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October 14, 2003

The Honorable J. Joseph Curran, Jr.
Attorney General of Maryland
200 St. Paul Place - 20th Floor
Baltimore, MD 21202

Re: Smoking in Youth-Oriented Motion Pictures

Dear Attorney General Curran:

I am an entertainment attorney in Los Angeles, California, in private practice for over twenty years. My area of practice is the representation of individuals and entities in the motion picture and television industries.

I congratulate you on joining the other state Attorneys General in your letter of August 26, 2003 to the Motion Picture Association of America regarding the depiction of tobacco in youth-oriented motion pictures.

Your letter and follow-up actions can have a critical influence on the MPAA and, more importantly, its motion picture studio members.

As a member of the motion picture industry and an active supporter of the positions stated in your letter, I would like to offer some thoughts on potential issues you may encounter in future interactions with the MPAA.

First, there is no credible "First Amendment" or other free-speech argument in favor of the depiction of tobacco in youth-rated films. Language itself as well as other substantive content is already subject to restrictions pursuant to the existing MPAA ratings system. As you know, the MPAA ratings system is purely voluntary – there is no federal, state or other governmental action of any kind implicated in its operation. Just as there has been no First Amendment problem with the existing ratings standards, there would be no First Amendment problem with including tobacco depiction in the ratings system and giving films that depict tobacco use an R rating.

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The notion that “cigarettes are legal so how could [smoking] affect the rating of a picture” (*Jack Valenti, “Hollywood on Tobacco” documentary film, American Nonsmokers’ Rights Foundation, 2000*) is thus specious in light of the speech (e.g., graphic language) and other lawful activity (e.g., non-obscene sex between consenting adults) routinely restricted by the current ratings system.

Second, the MPAA ratings standards are constantly reviewed and updated by the MPAA’s ratings entity (CARA, the Classification and Ratings Administration); there is no question that if the studios decided that smoking in a film requires an R rating, CARA could and would immediately implement this new criterion.

In fact, a film produced in 2003 for Showtime Networks entitled “The Incredible Mrs. Ritchie” has for the first time (I believe) been rated PG-13 by CARA for “thematic elements *including teen drinking and smoking*, language and some sensuality” (emphasis added) (*see internet URL <http://us.imdb.com/title/tt0296682>*).

The MPAA has thus acknowledged by its current practice that smoking is a legitimate consideration in rating films. The studios must now be convinced that R, not PG-13, is the proper rating for films depicting tobacco use. Ironically, CARA made the very worst decision here: by rating a film depicting “teen smoking” PG-13, it has virtually *endorsed* the film for teenage viewing rather than restricting it. The invidious inference is hard to escape: a PG-13 rating for smoking could be a “compromise” solution that would make the health problem worse.

Third, the argument that the MPAA must accede to individual filmmakers’ “creative rights” regarding smoking in films is simply not credible: on-screen smoking has enormous public-health consequences but very little impact on the actual content of motion pictures. As a former studio executive and a practicing attorney, I know that with few exceptions, the final creative and economic decisions concerning studio films rest in the absolute discretion of the studios that finance and release them, not in the hands of the creative community.

Of course it would be ideal if individual filmmakers made choices not to include tobacco in youth-rated films; but the final arbiters of what appear in films are the studios, through either their direct control or through the ratings system. Filmmakers routinely edit their films after negotiating content issues with the studios and with CARA – content far more important to the filmmakers than the presence or absence of tobacco.

Fourth, the various motion picture guilds (the Screen Actors Guild, the Directors Guild of America, the Writers Guild of America, etc.), while potentially helpful in communicating

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with their membership on this issue, cannot be the primary entities to address the issue. Only the MPAA and the studios can implement a collective solution as a matter of policy.

In this regard, one of the MPAA's primary real-world responsibilities is to shield its studio members from direct criticism of their policies and practices. The MPAA does only what its member studios want it to do. If the MPAA can act as a buffer between concerned public interests and the studios, it will ceaselessly do so. The studio heads must be at the table themselves if the smoking issue is to be resolved.

Finally, a ratings solution to the tobacco problem is literally cost-free to the studios and the MPAA. As distinguished from the putative commercial value of, for example, sex and violence in films, no film ever became a hit due to the depiction of tobacco. Absent corrupt activity on the part of the studios, restricting smoking in films will have zero adverse economic impact on them.

More bluntly, tobacco in youth-rated films doesn't sell the films, but it does sell tobacco – to youth.

The studios and the MPAA should understand that no one prefers regulation or legislation over voluntary, responsible and inexpensive ratings reform. Your and your colleagues' actions will hopefully go a long way toward realizing an appropriate solution.

If I can offer any assistance or further information, please do not hesitate to contact me.

Very truly yours,

Mark D. Bisgeier

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