

Open Letter by Robert M. Smith, SMPTE President, to Henry Cabell of the Federal Trade Commission Deploring an FTC Proposed Rule Regulating Voluntary Standards Activities

15 March 1979

Henry B. Cabell
Presiding Officer
Federal Trade Commission
Washington, DC 20580

Dear Sir:

These comments on the Federal Trade Commission Standards and Certification Proposed Rule published at 43 F.R. 57269 (7 December 1978, hereinafter called the "Proposed Rule") are submitted by the Society of Motion Picture and Television Engineers ("SMPTE"), a nonprofit professional organization engaged in the development of standards in the field of motion pictures, television, and related disciplines.

SMPTE is a membership corporation; at the present time SMPTE has slightly more than 7000 individual members who are scientists, engineers, and technicians involved in motion pictures, television, and the allied arts and sciences. SMPTE is organized and operated exclusively for scientific purposes and is exempt from federal income tax as an organization described in Section 501(c) (3) of the Internal Revenue Code, 1954.

SMPTE's individual members contribute their time and effort free of charge to their Society; without this contribution, SMPTE could not carry out the many activities in which it engages in furtherance of its scientific aims and purposes. In no activity sponsored by SMPTE is there a greater need for volunteer effort than in the development of standards related to the disciplines which SMPTE serves.

Conceding, as we do, the good motives of the proponents of the Proposed Rule, this Rule as proposed, besides representing poor implementation of those motives, provokes serious Constitutional questions and presents an unnecessary redundancy. At worst, it would directly thwart the very ideals the furtherance of which it purports to seek. SMPTE, accordingly, opposes adoption of the Proposed Rule.

In basic terms, the Proposed Rule would prevent even a private, voluntary, nonprofit, scientific, and professional organization such as SMPTE from promulgating its opinions regarding appropriate industry standards, standards for product certification, or the appropriate methodology for arriving at such standards, without first complying with an expensive and elaborate notice and review procedure strictly regulating the process by which such proposed opinions are determined. This proposed procedure is not unlike the procedure the FTC or other governmental agencies must follow before they adopt new rules or regulations. Of course, the FTC's rules have the force and effect of federal law while SMPTE's standards are only intended to serve as guidelines and as such are but expressions of private opinion. Notwithstanding this, under the Proposed Rule such similar burdensome procedures would be compelled, and the voluntary organization involved could, on the petition of a private party, be required to promulgate new guidelines within a tightly regulated time frame, even when the organization feels they should not then be set.

Indeed, the Proposed Rule provides for sanctions and even civil liability on the part of such an organization and conceivably those individuals affiliated with it if, after the fact, it is found that pursuant to the interpretation of the Proposed Rule the organization had a duty to publish standards but did not do so in the manner and in accordance with the regulatory scheme prescribed by the Proposed Rule. An organization like SMPTE, which functions in greatest part by the good-faith voluntary contributions of time and expertise of concerned professionals, rather than by dint of paid staff, could not possibly continue its functions were it and its committee members subject to such Draconian measures.

In order to understand why the SMPTE, a group supportive of the basic philosophy of open participation and accuracy in the development of standards which purportedly underlies the Proposed Rule, so strongly urges its rejection, it is necessary to step back a pace and examine exactly what activities and considerations are here involved.

Groups like SMPTE are not themselves in commerce per se. As an organization comprised of technical and professional people in the scientific and engineering field, we deal not in products or commodities but in ideas and opinions.

Participants in the SMPTE committees which actually prepare suggested standards for publication are volunteers acting in their individual capacities and do not act as representatives of any company or industry. Indeed, this committee work is open to anyone with knowledge of the discipline and a willingness to share it with others for no financial remuneration. There is no requirement that committee members belong to SMPTE; open participation by all concerned is encouraged, and the committees, which are assisted by a single staff engineer, not only develop and draft the recommended standard but they, and not SMPTE, have the primary responsibility for its technical content and finalization.

As a result, the standards published in the name of SMPTE reflect the intellectual labor of highly motivated, top professional people, and as such embody a quality and independence that could not be duplicated nor approached by trying to buy what these experts so willingly contribute.

The fundamental vice in the Proposed Rule is that it is premised on the supposition that the promulgation of standards and product certification by voluntary groups is a cover for commercial abuse, undertaken by calculating businessmen who corruptly use these standards to defraud consumers, exclude new products, and restrain competition, thus justifying massive before-the-fact regulation by the FTC. Ascribed to SMPTE, such a suggestion is, of course, plainly absurd.

But more pointedly, with respect to this basic premise, having reviewed the 600-page Staff Report and subsequent clarification publications by the FTC relating to the Proposed Rule, it seems clear that the FTC has not come to grips with, nor even clearly thought through, four basic issues which should properly be resolved before this expensive, burdensome, and potentially harmful regulatory scheme is undertaken. These four issues are:

1. The necessity for regulation in this area.
2. The propriety of such regulation.
3. The feasibility of such regulation by the FTC.
4. The probable result of such regulation.

Such considerations establish a compelling case for rejection of the Proposed Rule.

1. Necessity

Particularly where the United States Congress, after three years of hearings, took no action on legislation designed to regulate the very same voluntary standards system, it is to be expected that before the FTC would undertake to do so it would present a cogent, well-documented case showing a compelling necessity for this. Despite, however, its 600-page Staff Report, which claims to set forth the abuses giving rise to the Proposed Rule, the FTC cites a total of only some 20 cases of purported abuse over the last ten years. SMPTE in no way downplays the destructive tendencies of unjustified product exclusion or consumer deception to which the Staff Report contends the Proposed

Rule is directed, but the question remains whether these 20 alleged abuses over a period in which many tens of thousands, if not hundreds of thousands, of standards have been considered and/or promulgated by groups like SMPTE makes out any kind of a rational basis whatsoever for massive regulation.

Moreover, though the FTC fails to acknowledge it in its Staff Report, absence of FTC regulations in this area in no way deprives an injured party of a legal remedy. The abuses the FTC cites are fully remediable pursuant to federal legislation such as the Sherman Antitrust Act; the Consumer Product Safety Act; and a variety of state statutory and common law theories of fraud, product disparagement, and/or unfair competition. In addition, to the extent promulgated standards are misused or misrepresented with respect to marketed products, the FTC, under existing statutory and regulatory authority, has ample power to prevent or redress such abuses.

In light of this formidable array of existing legal recourse, and in light of the fact that even taking its "best shot," the Staff Report could find no more than a handful of alleged abuses over the course of a decade, any justification, much less necessity, for the cost and burden of this before-the-fact regulatory scheme is utterly lacking. There is no need to use dynamite to kill a mosquito, especially where it is shown that the mosquito appears at most once every six months. But that is precisely what the Proposed Rule would effect.

Finally, it appears to us that the Proposed Rule is a studied effort to create phantom issues for the FTC to knock down. On the one hand, the FTC suggests that because standards such as those recommended by SMPTE have received such widespread commercial acceptance they should be treated as if they were the law of the land, not mere private recommendations. The FTC says it fears that, were it otherwise, such standards as are set may be inaccurate or unreliable. But it is only because these SMPTE standards have withstood the test of time and have been shown to be accurate and reliable that they could have achieved such acceptance. If the FTC position is that only accurate and reliable standards need be regulated to assure accuracy and reliability while inaccurate and unreliable standards may be left alone, this Proposed Rule must then have been drafted by Lewis Carroll.

Similarly, the FTC says one problem with the voluntary standards system is that it thwarts development in the discipline involved because of unyielding adherence to those standards. Yet the FTC is also concerned about the problem of conflicting voluntary standards being set by different bodies. This self-contradiction, it is submitted, arises from a misplaced analogy. Were these proposed standards in fact mandatory "laws," then the FTC's concerns would be justifiable. But that which is a vice in a law is not always a vice in the voluntary recommendation context. Because no one is compelled to follow these standards, growth and development are not stifled. Because only the reliable standard will survive, problems of nonuniformity become self-correcting, as industry practice ultimately sorts out the best of the proposed recommendations and discards the rest. Such is the natural law of ideas in conflict; the FTC cannot change this by enacting rules nor should it try to do so.

2. Propriety

Although the Staff Report stresses at length that the voluntary standards, which the new Proposed Rule would regulate, "affect" commerce, from the standpoint of an organization such as SMPTE any such effect is merely an incidental and intermediate one. Simply put, with respect to its publication of recommended standards, the SMPTE has no concern with whether any consumer buys a specific product. Similarly, no consumer as such purchases the SMPTE standards. They are used by those who choose to use them, as a guideline, for they reflect but the opinion of the SMPTE committee involved as to what a particular commodity or service should be. Similarly, those who buy such products may take into consideration such opinions, if they choose, or reject them out of hand if they wish to.

As SMPTE understands it, under existing law civil liability can attach where one voices a purported opinion he does not in good faith hold, and this opinion is relied on by another to his detriment. Thus, SMPTE understands that were it to promulgate standards it knew to be erroneous,

and if someone was injured as a result, that person could well sue SMPTE and recover. SMPTE believes this is a sound law.

However, what the FTC by its Proposed Rule seeks to do is something far different, more drastic, and much more destructive than this.

By its notice, hearing, and other procedural requirements, the Proposed Rule would prohibit a private organization from expressing honestly held technical and scientific opinions, unrelated to products it offers for sale, unless those opinions were arrived at in a manner the FTC deems satisfactory. By its "duty to act" provisions, the Proposed Rule would require that private organizations prepare such standards under time constraints prescribed by the FTC and, if they fail to do so, be foreclosed from thereafter giving or holding themselves out as qualified to give such opinions. Indeed, such a private party could even be found civilly liable if it failed to set standards when the FTC feels that it should have done so in the manner prescribed by the Proposed Rule.

Neither the FTC nor any other governmental agency can properly arrogate unto itself this role of absolute arbiter of the propriety of intellectual thought moving in interstate channels. To extend the federal regulatory scheme to censorship of, and risk of civil liability for, statements of opinion, not because those opinions are falsely portrayed but because the FTC is not satisfied as to the method they are arrived at or as to the wisdom of such opinions, is a serious error. And to justify these restraints on speech by pointing out that someone may base a decision to buy or not to buy a product based thereon, even though the speaker does not benefit thereby, is not only to have an undesirable end justified by questionable means, but is to open a door into darkness beyond which who knows what lies.

For example, does the FTC seriously contend that it could require a newspaper to refrain from printing an investigatory story leading to a conclusion that General Motors' cars are safer than Ford's — a story that could certainly affect commerce — until all interested persons in the automotive field had a chance to make comments thereon at a hearing the newspaper was required to convene? Or, conversely, if it believes such a safety problem exists, does the FTC contend that the newspaper is required to undertake the investigation and print a story to that effect, even if it chooses not to? And if so, why not hold that if the newspaper refuses to print such a story within the time frame required by the FTC, it can be foreclosed from printing any stories with respect to safety in the automotive field, or ultimately that its editors and reporters can be held civilly liable for their failure to publish what the FTC thinks that they should, in the time and manner the FTC thinks that they should?

This is not raising an extreme example. SMPTE has previously published a book, "Control Techniques in Film Processing" (1960), which contains what it understands to be "standards" as defined and regulated by the Proposed Rule. Thus, tomorrow or the next day, the SMPTE would not be able to publish such a book without FTC approval. And just how far a step is it before such a book, which is only a collection of standards the SMPTE would otherwise promulgate separately, can be pulled off the library shelf because some government official dislikes its thesis, methodology, ideology, or for that matter, its author?

SMPTE, as a professional and technical organization which promulgates voluntary suggested standards, is neither a vendor nor a governmental agency. Its scientific, technical, and professional opinions are entitled to as much protection as are statements of opinion made by the media, or by any other speaker whose role is not to sell products but ideas. We do not question the right of the FTC to act where such a statement of opinion is utilized in the trade to mislead or deceive the public, or which is shown to be otherwise anti-competitive in purpose or effect, but that is not what the Proposed Rule is all about. For the FTC so to regulate opinion, prevent expression of opinion, and in some cases mandate the expression of opinion is to advocate a proposition too dangerous to be seriously maintained.

3. Feasibility

Even assuming that the flow of technical opinion could be regulated, and treating the recommendation of standards by engineers and other professionals as statements of fact in the manner the FTC is desirous of doing, the question remains as to whether the FTC is the proper agency to perform this regulatory role. SMPTE respectfully submits it is not.

The gist of the problem was well-displayed by the notice of Proposed Rule Making published by the FTC at 43 F.R. 57270 wherein the FTC asserts, "Standards should have logical and technical justification in light of their stated or implied policy goals. . . ." With this SMPTE agrees. Problematic, however, is by virtue of what background, experience, or expertise is the FTC supposed to administer this rule? For example, the FTC can, in the media field, regulate misleading advertising, but would it want to determine the allocation of broadcast channels? Presumably, the FTC is aware of its own limitations and leaves this technical regulation to the technical experts at the Federal Communications Commission.

Determination of the appropriate product standard within a discipline such as the motion-picture industry is, as the FTC acknowledges, no less a technical question and, insofar as SMPTE is aware, this is not an area in which the FTC has or can claim particular knowledge. From its own experience in this field, SMPTE knows that the determination of technical justification can often raise close questions and disputes even among those who, by professional training and experience, have the right to term themselves experts in a given field of inquiry. The FTC simply has no business holding itself as the arbiter between such conflicting expert opinions. If the matter is to be done at all, it should be done by a group or agency that has such expertise.

As a corollary to its inability to resolve technical disagreements, the FTC also appears unable to present regulations which technical men and women can follow. For example, perhaps the most onerous substantive provision in the Proposed Rule is the so-called "duty to act" requirement in Section 457.6. This duty, per the Proposed Rule, arises whenever a standards developer, as defined, "receives a request for action accompanied by substantial evidence. . . ."

While the term "substantial evidence" no doubt has meaning to lawyers, it is not a term easily comprehended by non-lawyers generally, or technical people in particular. When the FTC attempts to clarify the meaning of "substantial evidence" in Note 1 to this Section, that explanatory note is similarly written in pristine legalisms. The FTC fails to realize the communication difficulties when it tries to force the square peg of commercial regulation into the round hole of technical opinion. Not being at home in the field it now seeks to regulate, the FTC displays an inability to communicate to those whom it would be regulating.

If this improvident regulatory effort is not to be abandoned outright, then it should be remitted at least to those who understand intimately not only the problems arising from lack of regulation, but the problems of regulating those to whom the proposed rules are directed. Technical and professional standard developers are neither businessmen nor business lawyers, and quite clearly the FTC is not operating on their wavelength.

4. Effect of Regulation

The most serious omission in the FTC study is the likely effect of the Proposed Rule on voluntary standard setting groups.

Organizations like SMPTE set voluntary standards at no cost to the government and little cost to the ultimate consumer. SMPTE is proud of the fact that in over 63 years it has received no complaints of serious hardship caused by any act or omission on its part. The dedication and worth of the voluntary standard setters generally is well-evidenced by the FTC Staff Report, which over the course of the last 10 years could find only 20 alleged abuses arising from standards set by other such groups and organizations.

The core of SMPTE's success is its reliance on volunteers. With a lone staff engineer assisting, the hard work of developing and recommending appropriate standards is done by volunteer professionals who work through the medium of SMPTE committees. These committees do their own drafting work and make their own decisions as to appropriate recommendations for standards. By use of this volunteer system, the SMPTE is able to attract a diverse and varied pool of highly motivated, expert, and reliable professional opinion, and still have virtually no expenses for these services. This permits SMPTE, in turn, to make available to the public its proposed recommendations without having incorporated excessive cost factors that must ultimately be passed on to the consumer by those who choose to use the SMPTE standards.

The Proposed Rule, if adopted, would make it impossible for SMPTE to continue to function. Under the Proposed Rule, SMPTE would become responsible as an organization for the work product of its committees. As such, the entire structure of permitting volunteer experts on the committees themselves, rather than paid labor employed by SMPTE, to develop appropriate standards would be radically altered. To comply with the Proposed Rule, it would be necessary for SMPTE to retain a bloated full-time staff of professional researchers, editors, and other salaried employees acting as overseers of the committee function. The concomitant cost and burden would be passed on in the long run to the users of the standards, who would then have no choice but to charge this to the consumer.

Not only costs but functional considerations are involved. No volunteer organization could possibly survive under the Proposed Rule. For example, under certain circumstances a duty to commence action to promulgate a standard must be undertaken within 60 days pursuant to the Proposed Rule. How can the SMPTE require the volunteers on its committees to act within this mandatory time frame? SMPTE has no economic "control" over its volunteers, many of whom have other pressing professional responsibilities, and such a time constraint is completely unworkable.

However, the sanctions prescribed for failure to act are severe. Should the SMPTE fail to act when the Proposed Rule is construed to mean there is a duty so to act, the Proposed Rule would foreclose SMPTE from thereafter offering a standard in that entire product area or holding itself out as competent to do so. It is plainly absurd to say "if you don't start on Sunday, don't come in Monday" in this technical field, but that is what the Proposed Rule does.

Lest it be thought that too much emphasis is being placed on the cost savings of the volunteer system, over the last three years SMPTE completed some 125 items of work and engaged in approximately 170 others at a cost for internal organizational and administrative matters of \$291,000. Under the Proposed Rule, the same work would have cost at least three times as much. For a nonprofit group, the only source of such additional funds would have been dues, and as a matter of fiscal reality SMPTE could not raise that kind of money. In short, the price of SMPTE compliance with the Proposed Rule is bankruptcy or abandonment of its standards activities.

And even this does not tell the whole — nor even the major part — of the story.

That \$291,000 figure completely ignores the massive volunteer effort that is the heart blood and lifeline of SMPTE's standard setting process. Take 940 technical, scientific, and other professional men and women giving freely of their time and efforts, and place a price tag on that. Taken conservatively, SMPTE estimates the worth of this contribution to be more than three times that \$291,000 figure. Now, if the FTC will tell us how to require these volunteers to give threefold the time and efforts they have already given free of charge, maybe the SMPTE could stay in operation notwithstanding the Proposed Rule.

But even then, under certain of the provisions of the Proposed Rule, civil liability could attach to any person involved in the promulgation of a standard. Although the FTC now takes the position that such civil liability could not attach to an individual, this palliative finds no clear support on the face of the Proposed Rule, and by what stretch of the imagination should a volunteer professional take the risk that his good-faith effort to further public benefit and the state of his art may make him civilly liable if there is an after-the-fact determination that he failed to comply with an ambiguous rule of the FTC?

In short, then, the Proposed Rule means in substance that those who set standards by virtue of the volunteer efforts of highly trained professionals can no longer operate. The volunteer system, as exemplified by the 63-year record of SMPTE, is the best and most economical way of setting objective, reliable standards; and for no good reason at all the FTC would deny this benefit to the public.

For the foregoing reasons, the SMPTE strongly urges rejection of this ill-advised and ultimately counterproductive Proposed Rule.

Very truly yours,



Robert M. Smith
President, SMPTE