

1988

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Recommended Citation

Weintraub, Jeffrey S. (1988) "The Protection of Commercial Speech and the Regulation of Children's Television: Throwing Out the Baby with the Bathwater," *NYLS Journal of Human Rights*: Vol. 6 : Iss. 1 , Article 3.

Available at: https://digitalcommons.nyls.edu/journal_of_human_rights/vol6/iss1/3

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NOTES

THE PROTECTION OF COMMERCIAL SPEECH AND THE REGULATION OF CHILDREN'S TELEVISION: THROWING OUT THE BABY WITH THE BATHWATER?

I. INTRODUCTION

Thirty-five years ago, there was a children's television program called Winky Dink and You.¹ Today, Winky Dink might be called an ancestor of "interactive" programming, that is, programming to enable a viewer to respond to the action on the screen and thereby participate in the outcome of the show.² In Winky Dink, this was done by means of a soft, clear plastic sheet that a child laid over the television screen, on which he or she would draw with crayons in response to visual and aural cues from Winky Dink and his friends. If Winky was chased to the edge of a cliff, he might turn to the audience and ask for a bridge to be drawn across the chasm on which he could make his escape. Once safely across the crayoned bridge, he would ask his viewers to erase it to forestall his big, bad pursuers. Or he might call for a disguise for himself or a house to rest in or for a moustache to be drawn across the face of a particularly evil villain. A Winky Dink kit, consisting of the plastic sheet, erasable crayons, eraser, and an instruction booklet, was on sale through the mail, but it was not essential. Similar objects around the house could suffice. Television was still a young

1. "Winky Dink and You" aired from October 10, 1953 through April 27, 1957. MCNEIL, TOTAL TELEVISION: A COMPREHENSIVE GUIDE TO PROGRAMMING FROM 1948 TO THE PRESENT 719 (1984).

2. The Federal Communications Commission defines an interactive device as "one intended for recreational or educational use, the operation of which can be controlled by signalling information contained in a television program." *In re* Revision of Programming & Commercialization Policies, 2 F.C.C. Rcd 6822 (1987).

medium.³ There was relatively little research to measure not only what a child chose to view, but how the experience of watching television generally, and of watching certain types of programming specifically, shaped children's perceptions of the "real" world beyond television and thus influenced behavior.⁴ Children's television has changed since Winky Dink. A new trend in children's television is programming that sends out inaudible signals, enabling viewers to interact with the program via a special toy capable of picking up the signal.⁵ Such a toy is used to "shoot" certain characters whose torsos are highlighted as targets. Aside from the obvious shift from crayons to laser beams and from drawing to shooting, it is claimed that such interactive programming takes advantage of children who are not capable of realizing that they are actually watching a program-length commercial for the interactive toy.⁶ Whether a kit costing several dollars in 1955 and a laser toy costing some thirty-five to forty-five dollars in 1988 are different enough to justify disparate regulatory treatment is an open question, and is, in part, the concern of this article. Though the essential form of the programming remains the same, one may wonder whether such

3. L. BOGART, *THE AGE OF TELEVISION*, 8-9 (3d. ed. 1972). Television was first developed during the 1920's and 1930's. *Id.* at 8. However, World War II interrupted its development since, during that period, no new televisions were sold. *Id.* By January of 1948 there were 102,000 television sets in the nation; that number doubled by the end of the year. *Id.* Expansion was interrupted by a freeze on new station permits which lasted from September 1948 until July 1952. *Id.* at 9. When the freeze was lifted a "boom" in the television industry quickly followed. *Id.*

4. Early studies were crisis-oriented, and thus were limited in their conceptualization of media usage and effects. Focusing on short-term stimulus and response behaviors, these studies ignored such processes as media selection and television's impact beyond the immediate viewing situation. These studies were primarily experimental in nature, and failed to recognize the myriad of variables that affect the use and effects of television. Only recently have researchers begun to recognize the complexity of the viewing process. See, e.g., M.A. WOLF, *NATURAL AUDIENCES: QUALITATIVE RESEARCH OF MEDIA USES AND EFFECTS* 58 (T. Lindlof ed. 1987).

5. N.Y. Times, Oct. 4, 1987, § 2 (Arts & Leisure), at 31, col. 1.

6. Responding to the D.C. Circuit Court of Appeals' ruling in National Ass'n. of Better Broadcasting v. F.C.C. (KCOP Television), 830 F.2d 270 (D.C. Cir. 1987), Peggy Charren, president of Action for Children's Television, remarked, "It's another nail in the coffin of program-length commercials." Davis, *FCC Ruling That Gives Toy Companies Anonymity on TV Shows Is Overturned*, Wall St. J., Sept. 30, 1987, at 28, col. 1.

technologically sophisticated forms of interactive programming may have entirely different effects on children.

The recent history of children's television regulation, however, has generally been marked by a retreat from the government's recognition of the profound effects of televised messages on children and the need for specific guidelines to reflect these "high public interest considerations."⁷ A series of decisions, including the suspension of the National Association of Broadcasters' (NAB) Code,⁸ the Federal Trade Commission's (FTC) claim that only commercials causing "substantial injury" should be prohibited,⁹ and the Federal Communications Commission's (FCC) advocacy of marketplace economics,¹⁰ have eroded a protective system of checks and balances.

Advances in technology and marketing have further complicated the controversy surrounding the effects of deregulation. A toy manufacturer was recently rebuffed in its attempts to circumvent sponsorship announcements by entering into a barter arrangement with a television station.¹¹ In exchange for programming produced by the manufacturer, the station gave commercial time to the manufacturer without requiring disclosure of its sponsorship of the program.¹² The case was remanded to the FCC for the development

7. *Action for Children's Television v. F.C.C.*, 821 F.2d 741, 742 (D.C. Cir. 1987).

8. *See infra* notes 48-66 and 84-101 and accompanying text.

9. *See infra* notes 67-83 and accompanying text.

10. *See infra* notes 106-14 and accompanying text.

11. *National Ass'n. for Better Broadcasting v. F.C.C. (KCOP Television)*, 830 F.2d 270 (D.C. Cir. 1987). At issue was the FCC's interpretation of a section of the Communications Act of 1934, 47 U.S.C. § 317(a)(1) (1962) which states: "All matter broadcast by any radio station for which any money, service, or valuable consideration is directly or indirectly paid . . . the station so broadcasting . . . shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person . . ." *Id.* A three-judge appeals court panel rejected the FCC's rationale that identifying the toy makers as sponsors wasn't necessary so long as the entire program wasn't commercial in nature. Judge Spottswood Robinson, writing for the unanimous panel, said, "[w]e are satisfied that the commission's construction of section 317 is inconsistent with the manifest intention of Congress." *National Assn. for Better Broadcasting*, 830 F.2d at 277. The provision, stemming from the broadcast payola scandals of the 1950's, is aimed at informing viewers about who is paying for the programming. Davis, *supra* note 4, at 28.

12. *National Ass'n for Better Broadcasting*, 830 F.2d at 271. *See also* Davis, *supra* note 4.

of workable and legally enforceable standards for such barter arrangements in light of their growing prevalence in children's programming.¹³

It is clear that deregulation has highlighted the struggle between those who advocate allowing the marketplace to determine the content of programming and advertising and those who advocate stricter controls over the airways. In *Action for Children's Advertising (ACT) v. F.C.C.*,¹⁴ a decision roundly hailed by advocates of federal regulation of children's television,¹⁵ a federal appeals court unanimously upheld ACT's challenge to the FCC's failure to evince a "reasoned basis" adequate to support its 1984 termination of its longstanding children's television commercialization guidelines.¹⁶ The Court remanded the case to the FCC, and observed that "the Commission has offered neither facts nor analysis to the effect that its earlier concerns over market failure were overemphasized, misguided, outdated, or just downright incorrect . . ."¹⁷ "Instead," the court said, "the FCC, without explanation, suddenly embraced what had theretofore been an unthinkable bureaucratic conclusion that the market did in fact operate to restrain the commercial

13. *National Ass'n for Better Broadcasting*, 830 F.2d at 270.

14. *Action for Children's Television v. F.C.C.*, 821 F.2d 741 (D.C. Cir. 1987).

15. *MIT Communications Forum: New Issues in Children's Television Policy*, (Dec. 3, 1987) (audiotaped statement of Peggy Charren).

16. *Action for Children's Television*, 821 F.2d at 741. The FCC had been, as early as 1971, concerned with the effect of what it termed "the most powerful communications medium ever devised, in relation to a large and important segment of the audience, the nation's children." *In re* Petition of Action for Children's Television, 28 F.C.C.2d 368, 369-70 (1971) (Notice of Inquiry and Notice of Proposed Rulemaking). In 1974, the FCC published an exhaustive report which concluded that children are "far more trusting of and vulnerable to commercial 'pitches' than are adults," and that "very young children cannot distinguish conceptually between programming and advertising." *In re* Petition of Action for Children's Television, 50 F.C.C.2d 1, 11 (1974) (Children's Television Report and Policy Statement). To address these concerns, the FCC adopted specific guidelines on the permissible level of commercialization in children's programming and strict requirements that broadcasters maintain adequate separation between program content and commercial messages. *Id.* at 15-16. In 1978, the FCC reaffirmed its commitment to specific advertising guidelines. *In re* Children's Programming and Advertising Practices, 68 F.C.C.2d 1344 (1978) (Second Notice of Inquiry).

17. *Action for Children's Television*, 821 F.2d at 746.

content of children's television."¹⁸ The FCC, faced with either establishing a factual basis for its decision to embrace marketplace forces as sufficient regulators of advertisers' activities, or, alternatively, reopening the public record on the issue with a Notice of Proposed Rulemaking¹⁹ opted for the latter choice, with comments due February 19, 1988 and reply comments April 4, 1988.²⁰

On another front, Congress has conducted hearings on the need for children's television commercialization guidelines, culminating in the passage of legislation in the House by a vote of 328 to 78²¹ and by voice vote in the Senate²² designed to reinstate the FCC's former commercialization guidelines.²³ President Reagan exercised his

18. *Id.*

19. *In re* Revision of Programming & Commercialization Policies, 2 F.C.C. Rcd 6822 (1987).

20. 53 Fed. Reg. 426 (1988) (to be codified at 47 C.F.R. pt. 73) (proposed Jan. 7, 1988).

21. 134 CONG. REC. H4010 (daily ed. June 8, 1988) (statement of Mr. Carr).

22. 134 CONG. REC. S16861 (daily ed. Oct. 19, 1988).

23. H.R. 3966, 100th Cong., 2d Sess., 134 CONG. REC. H3979 (1988). The bill provides, in pertinent part:

SEC. 3. RULEMAKING REQUIRED.

(a) RULEMAKING ON COMMERCIAL TIME REQUIRED.--The Federal Communications Commission shall, within 30 days after the date of enactment of this Act, initiate a rulemaking proceeding to prescribe standards applicable to commercial television broadcast licensees with respect to the time devoted to commercial matter in conjunction with children's television programming.

(b) REQUIREMENTS FOR STANDARDS.--The standards required by subsection (a) shall require commercial television broadcast licensees to limit the duration of advertising in children's programming, on and after January 1, 1990, to not more than 10.5 minutes per hour on weekends and not more than 12 minutes per hour on weekdays, except that, after January 1, 1993, the Commission shall have the authority--

(1) to review and evaluate the standards prescribed under this subparagraph; and

(2) after notice and public comment and a demonstration of the need for a modification of such standards, to modify such standards in accordance with the public interest.

(c) TIME FOR COMPLETION OF RULEMAKING.--The Commission shall, within 150 days after the date of enactment of this Act, prescribe final standards in accordance with the requirements of subsection (b).

SEC. 4. CONSIDERATION OF CHILDREN'S TELEVISION SERVICE IN BROADCAST LICENSE RENEWAL.

The Federal Communications Commission shall consider, among the elements in its review of an application for renewal of a television broadcast license:

(1) whether the licensee complied with the standards required to be

pocket veto which effectively killed the legislation.²⁴ Specifically, the bill sought to limit the duration of advertising in children's programming and to enforce the obligation of broadcasters to meet the educational and informational needs of the child audience.²⁵ The bill's co-sponsor, Representative Edward Markey (Democrat, Massachusetts), commented during the hearings that such legislation was necessary to combat the FCC's "pursuit of its own narrow, ideological agenda."²⁶ The FCC's decision to repeal its regulations, he said, was a "slapdash effort that failed to meet the Commission's statutory responsibilities as a regulatory agency."²⁷ The bill in its final form represented a substantial compromise with its original scope, failing to address, as it did in its original form,²⁸ such issues as program-length commercials and the way in which such practices blur the distinction between programming and commercial content.²⁹

As with any effort to regulate either access to or the content of speech, commentators have noted that enactment of the bill will face substantial opposition on first amendment grounds.³⁰ Indeed, as the

prescribed under section 3 of this Act; and
(2) whether the licensee has served the educational and informational needs of children in its overall programming.

24. N.Y. Times, Nov. 7, 1988 at A1, col. 1.

25. H.R. 3966, 100th Cong., 2d Sess., 134 CONG. REC. H3979, 3980 (1988).

26. COUNCIL OF BETTER BUSINESS BUREAUS, CHILDREN'S TELEVISION AND ADVERTISING PRACTICES, 2 (Oct. 1987).

27. *Id.* See also *infra* notes 33-35 and accompanying text.

28. H.R. 3966, 100th Cong., 2d Sess., 134 CONG. REC. H3979 (1988).

29. Such practices constitute a reversal of the traditional strategy of marketing toys based upon successful program characters. Children's shows like "Strawberry Shortcake," "Transformers," and "The Smurfs," to name but a few among the estimated seventy-five such programs, are shows inspired by and designed to market successful toys. Davis, *supra* note 4, at 28. Commenting on the bill's failure to address program-length commercials, Representative Markey noted, "Members of the Committee [Committee on Energy and Commerce] and children's advocates made a conscious determination not to address program length commercials in this legislation. There are difficult definitional determinations that must be made, and possibly are better left to the Commission and courts to resolve." 134 CONG. REC. H3980 (daily ed. June 7, 1988) (statement of Rep. Markey).

30. U.S. CONST. amend. XIV; see *In re* Revision of Programming & Commercialization Policies, 2 F.C.C. Rcd 6822 (1987). In the context of requesting information and comment on reinstating children's television guidelines, the FCC also requested comment about how any proposed restrictions would comport with existing commercial free speech doctrine: "We

court noted in *Action for Children's Television*,³¹ the FCC "has been sensitive to the limits imposed by the First Amendment on its regulatory efforts,"³² and has "carefully emphasized that '[a]lthough the unique nature of the broadcasting medium may justify some differences in the First Amendment standard applied to it, it is clear that any regulation of programming must be reconciled with free speech considerations."³³

Thus, the purpose of this article is to examine the regulation and deregulation of children's television from the standpoint of the commercial free speech doctrine, a doctrine that will undoubtedly be brandished in defense of advertisers' rights to promote lawful products in ways that are neither false nor deceptive. The development of the commercial free speech doctrine has forced the courts to make distinctions between types of speech,³⁴ relegating the first amendment protection of commercial speech to a lower standard of scrutiny.³⁵ This process of balancing the protection of free expression with the government's interest in regulation, its taking into account recent and ongoing efforts to deregulate industries as diverse as the airlines, commercial advertising, and broadcasting, presents an important distinction between the market for ideas and the market for goods and services.³⁶

This article will first review the development of the regulatory

note that Congress has also recognized that examination of children's advertising issues gives rise to First Amendment concerns." *Id.* at 6825.

31. *Action for Children's Television v. F.C.C.* 821 F.2d 741 (D.C. Cir. 1987).

32. *Id.* at 741 n.1.

33. *Id.* (quoting *In re* Petition of Action for Children's Television (ACT), 50 F.C.C.2d 1, 3 (1974) *aff'd sub nom.* *Action for Children's Television v. F.C.C.*, 564 F.2d 458 (D.C. Cir. 1977)).

34. See *infra* notes 115-24 and accompanying text.

35. See *infra* notes 134-48 and accompanying text.

36. Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979). The point of the authors' argument is that the first amendment guarantee of freedom of speech and press protects only certain identifiable values, chief among them being effective self-government and the opportunity for individual self-expression through free speech. Neither value, the authors claim, is implicated by governmental regulation of commercial speech. "In the realm of ideas, the first amendment erects stringent safeguards against governmental restraint. In the economic sphere, by contrast, the majoritarian political process controls." *Id.* at 2.

and self-regulatory scheme of children's television and the gradual movement towards deregulation, including the role of the FTC and other advertising review bodies. In addition, a sample of cases testing the limits of that regulation will be discussed. Finally, the development of the commercial free speech doctrine will be examined, and areas of controversy in its application to the regulation of advertising with respect to children's television will be suggested. This analysis will yield the conclusion that short of absolutely curtailing advertisers' activities, regulation is constitutionally permissible to serve a substantial government interest which is not adequately served by the marketplace alone.

II. THE REGULATION OF CHILDREN'S TELEVISION: THE FCC, THE FTC AND THE NAB CODE

The dynamic field of broadcasting is undergoing significant regulatory changes due, in part, to the proliferation of new forms of communication such as cable and satellite received television, and, in part, to federal efforts allowing the marketplace to determine the content and commercialization levels of programming.³⁷ Where the FCC once exercised some authority over broadcasters' conduct, either through its direct efforts or through such other regulatory mechanisms as the FTC and the NAB Code,³⁸ this area is now deregulated to the extent that, as one commentator noted, "difficult

37. When, in 1984, the FCC undertook to delete existing commercialization guidelines for television broadcasters, *see infra* notes 106-14 and accompanying text, its action was based on the general proposition that in a highly competitive market, such as television broadcasting, there were constraints external to the regulatory process that would properly control commercial levels. At that time, the FCC stated, "it seems clear to us that if stations exceed the tolerance level of viewers by adding 'too many' commercials the market will regulate itself, i.e., the viewers will not watch and the advertisers will not buy time." *In re* Revision of Programming & Commercialization Policies, 2 F.C.C. Rcd 6822, 6823 (1987) (quoting *In re* Revision of Programming and Commercialization Policies, 98 F.C.C.2d 1076, 1105 (1984)). *See infra* notes 103-11 and accompanying text.

38. In the wake of such manifestly widespread public support for ACT's proposed rules, and, perhaps, in apprehensive anticipation of possible agency adoption of those rules, the broadcast industry undertook limited self-regulation. In 1971 the self-regulatory Code of the NAB was reinterpreted to prohibit the use of certain possibly deceptive advertising techniques. *Action for Children's Television v. F.C.C.*, 564 F.2d 457, 463 (D.C. Cir. 1977).

questions arise concerning the obligation and proper role of government."³⁹

The authority of the FCC over electronic communications derives from the Communications Act of 1934,⁴⁰ which gives the FCC broad powers to regulate broadcasting as "public convenience, interest or necessity requires."⁴¹ The licensing of broadcasters has enabled the FCC to monitor compliance with the public interest standard.⁴² While the FCC is prohibited by law from censoring the content of broadcasting and from interfering with free speech,⁴³ there are limited exceptions to the no-censorship provisions of the Act.⁴⁴ The FCC is generally, however, not permitted to direct broadcasters in the selection and scheduling of programs and announcements, including commercial messages.⁴⁵

Typically, broadcasters have been regarded as public fiduciaries,

39. Silberstein, *Deregulation and Children's Advertising*, 2 ANN. SURV. AM. L. 603, 611 (1985).

40. Communications Act of 1934, 47 U.S.C. §§ 152-609 (1982 & Supp. II 1984).

41. *Id.* § 303.

42. *Id.* §§ 307(a), 309(a), 310(d).

43. FEDERAL COMMUNICATIONS COMM'N MASS MEDIA BUREAU PUBLICATION, FCC REGULATION OF BROADCAST ADVERTISING: BASIC LAWS AND POLICIES, No. 8310-100, § 5(a)(1985) 3-62.

44. *Id.* Exceptions include prohibitions on obscenity, indecency, and profanity, 18 U.S.C. § 1464 (1982 & Supp. IV 1986), on the pre-arrangement or pre-determination of broadcast contests, 47 U.S.C. § 508 (1982), and on subliminal advertising (deriving from the prohibitions of covert advertising in 47 U.S.C. § 317 (1982 & Supp. II 1984)).

45. The FCC, however, is not prohibited from developing broad guidelines to rationally direct licensees in their service of the public interest. Guidelines dictating no specific programs and allowing broadcasters wide discretion in satisfying the guidelines, *see, e.g.*, 47 C.F.R. § 0.283(a)(7)(i)(A) (1985), have been judicially approved. *See* Great Falls Community TV Cable v. F.C.C., 416 F.2d 238 (9th Cir. 1969) "[S]ection 405 [of the U.S.C.] . . . leaves room for the operation of sound judicial discretion to determine whether and to what extent judicial review of questions not raised before the agency should be denied." *Id.* at 239. However, in National Ass'n. of Independent Television Producers & Distributors v. F.C.C., 516 F.2d 526, 538 (2d Cir. 1975), a children's programming exception to the prime time access rule was upheld, demonstrating that the FCC can legitimately prefer certain categories of programming over others consistent with the first amendment. *Id.* at 538. *See In re Children' Television Programming & Advertising Practices*, 96 F.C.C.2d 634, 699-70 n.53 (1984) (dissenting Statement of Commissioner Henry M. Rivera). The prime time access rule defines the quantity of network programming which may be shown during prime time and deducts from the limitation "programs designed for public affairs programs" and news events, among other programming. 47 C.F.R. § 73.658(k) (1987).

who have been granted an exclusive license to use a limited resource, the broadcast spectrum.⁴⁶ The 'scarcity rationale'⁴⁷ has been criticized in recent years, owing to the development of new technologies which allegedly serve to broaden viewers' choices and place greater burdens on broadcasters to attract audiences.⁴⁸ Although the FCC recently abandoned the fairness doctrine on grounds that it 'chilled' speech by allowing the government to scrutinize program content and that the number of broadcast outlets available to the public had increased,⁴⁹ scarcity remains an important component of regulatory authority.

The public interest standard, codified by the FCC in 1946,⁵⁰ included noncommercial programming, local live programs, programs devoted to public issues, and the elimination of excess advertising, all of which were to be considered in both new and renewal broadcast license applications.⁵¹ In 1960, however, the FCC repealed its requirements for noncommercial programming,⁵² and added a provision ordering licensees to ascertain and serve diverse community programming needs.⁵³ Thus, the FCC sought to encourage self-regulation by placing the burden of compliance with the public

46. See *United States v. National Ass'n of Broadcasters*, 536 F. Supp. 149, 156 (D.D.C. 1982) (citing *Columbia Broadcasting Sys., v. Democratic Nat'l. Comm.*, 412 U.S. 94, 101 (1973)). See also *National Broadcasting Co. v. United States*, 319 U.S. 190, 213 (1943).

47. The "scarcity rationale" derives, in part, from FCC decisions defining the Commission's authority to impose content restrictions on broadcasters such as the Fairness Doctrine, which requires stations to present programming that addresses controversial public issues of public importance and that such stations afford a reasonable opportunity for the presentation of opposing views. See *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969). Since the government allocates to broadcasters a scarce public resource, broadcast frequencies, it is therefore empowered to require broadcasters to make such reply times available. *Id.* at 400-01.

48. Note, *Changing Channels in Broadcast Regulation: Leaving Television Advertising to Containment by Market Forces*, 34 CASE W. RES. L. REV. 465, 466 (1984).

49. *In re Complaint of Syracuse Peace Council Against Television Station WTVH*, 2 F.C.C. Rcd 5043 (1987).

50. See FEDERAL COMMUNICATIONS COMMISSION, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSES (1946).

51. *Id.* at 55.

52. *En Banc Programming Inquiry*, 44 F.C.C. 2303 (1960) (Report and Statement of Policy Res: Commission *en banc* Programming Inquiry).

53. *Id.* at 2314-16.

trustee standard on the licensee.⁵⁴

The history of the FCC's involvement with the FTC and the NAB provides a revealing view of how the FCC's regulatory posture has changed, particularly with regard to children's television. From its inception in 1952, the FCC has looked to the NAB Code for guidance in giving substance to the public interest standard.⁵⁵ Since broadcasters' compliance with the Code ensured fulfillment of the FCC's public interest requirement, the NAB grew in influence by providing definitive guidelines for program content and advertising time.⁵⁶ This method of industry self-regulation worked, for the most part, without controversy for many years. In 1971, however, the FCC instituted its First Notice of Inquiry to explore and define the fundamental issues of children's television.⁵⁷ This decision was based on reaction to widespread public support of a petition circulated by the lobbying group, Action for Children's Television, which called for increased scrutiny of advertising directed at

54. Note, *supra* note 41, at 474. The FCC noted fourteen major elements of program material in order to best guide the licensee towards satisfying the trustee standard, including children's programs. See also *Broadcast Advertisements: Hearings on H.R. 8316 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 88th Cong. 1st Sess. 162 (1963).

55. Note, *supra* note 41, at 477. The NAB Code is essentially a self-regulatory version of the Blue Book, which urges broadcasters to scrutinize the quality of advertising aired by their stations. The Code was adopted in 1952 by the NAB and consisted of guidelines to help broadcasters meet their statutory obligations to operate in the public interest. Subscription to the Code was voluntary, and subscribers were entitled to display a Seal of Good Practice indicating Code subscription. *Id.*

56. Silberstein, *supra* note 32, at 609, (citing Brosterhaus, *United States v. National Association of Broadcasting: The De-Regulation of Self-Regulation*, 35 FED. COMM. L.J. 313, 314 (1983)).

57. *In re* Petition of Action for Children's Television, 28 F.C.C.2d 368 (1971) (Notice of Inquiry and Notice of Proposed Rulemaking). Here the FCC noted:

It is apparent that there are high public interest considerations involved in the use of television . . . in relation to a large and important segment of the audience, the nation's children. The importance of this portion of the audience, and the character of material reaching it, are particularly great because its ideas and concepts are largely not yet crystallized and are therefore open to suggestion, and also because its members do not yet have the experience and judgment always to distinguish the real from the fanciful.

Id. at 369-70.

children.⁵⁸ In 1972, the NAB amended its code to reduce the allowable time for non-program material during children's programming from sixteen to twelve minutes per hour⁵⁹ and restrict the content of breakfast cereal and snack food advertising.⁶⁰

In 1974, encouraged by NAB's efforts, the FCC issued its comprehensive Children's Television Report and Policy Statement.⁶¹ The Policy Statement endorsed NAB's guidelines,⁶² including those "prime time" standards and methods of separating program content from advertising.⁶³ While the FCC explicitly refrained from establishing an independent policy, it did state that it expected broadcasters to limit the amount of advertising in children's programming,⁶⁴ separate commercials from program content, and eliminate host-selling and tie-in practices (the practice of displaying a sponsor's products on the set of a program).⁶⁵ The FCC emphasized the need for regulation since preschoolers were generally incapable of distinguishing program content from advertising and were unaware of the persuasive aims of advertisers.⁶⁶ Later in 1974, the FCC decided not to ban all advertising from children's programs.⁶⁷ This decision was made in response to a petition advanced by Productive Action for Children's Television asking the FCC to reconsider its Policy Statement. The FCC reasoned that efforts to clearly separate advertising and program content would be sufficient

58. Silberstein, *supra* note 32, at 609 n.56.

59. *Action for Children's Television v. F.C.C.*, 564 F.2d 458, 464 (D.C. Cir. 1977).

60. *Id.* The NAB began to require that advertisements for breakfast cereals emphasize the importance of a balanced diet, that no advertisement encourage children to ingest immoderate amounts of candy and snack foods, and that children not be directly encouraged to pressure their parents into buying advertised products.

61. *In re* Petition for Action For Children's Television (ACT), 50 F.C.C.2d 1 (1974), *aff'd sub nom.* *Action for Children's Television v. F.C.C.*, 564 F.2d 458 (D.C. Cir. 1977).

62. *In re* Petition for Action for Children's Television (ACT), 50 F.C.C. 2d 1, 11-14 (1974).

63. *Id.* "Prime time" is considered to be 7:00pm - 11:00pm. *Id.*

64. *Id.* at 14.

65. *Id.* at 13, 15-18.

66. NATIONAL SCIENCE FOUNDATION, RESEARCH ON THE EFFECTS OF TELEVISION ADVERTISING ON CHILDREN 25 (1977).

67. *In re* Petition of Action for Children's Television, 55 F.C.C.2d 691 (1975) (Memorandum Opinion and Order).

means to safeguard children.⁶⁸

In 1975, the FCC required its licensees to provide more information on advertising practices than the NAB had required for children's programming during the previous licensing term.⁶⁹ Although the FCC was providing some leadership on issues of children's television, groups such as Action for Children's Television (ACT) continued to challenge the efficacy of the NAB Code and NAB studies indicating widespread compliance among its member stations.⁷⁰ Three years later, the FCC issued its Second Notice of Inquiry to determine if self-regulation was effective and to reestablish the Children's Television Task Force.⁷¹ The Task Force report,⁷² released in October, 1979, concluded that advertising guidelines had been met, and therefore, further FCC rulemaking should concern itself only with policy options for children's programming and not for children's advertising.⁷³ There was, however, a storm brewing on the horizon of NAB's self-regulatory code, which would have far-reaching implications not only for the NAB, but for the FCC's view of its own regulatory role.

Along with the NAB, the Federal Trade Commission (FTC) has played an important role in the regulation of children's television. In 1957 the FCC formalized a relationship with the FTC regarding regulation of deceptive advertising⁷⁴ underscoring the FCC's reluctance to engage in content-based review of alleged deceptive advertising in favor of referring all such claims to the FTC for

68. *Id.*

69. *In re* Petition of Action for Children's Television, 53 F.C.C.2d 161 (1975) (Memorandum Opinion and Order).

70. Silberstein, *supra* note 32, at 611.

71. *In re* Children's Programming & Advertising Practices, 68 F.C.C.2d 1344, 1344 (1978).

72. FEDERAL COMMUNICATIONS COMMISSION, TELEVISION PROGRAMMING FOR CHILDREN: A REPORT OF THE CHILDREN'S TELEVISION TASK FORCE (1979) [hereinafter FCC STAFF REPORT].

73. Silberstein, *supra* note 32, at 612. The Task Force report stressed that broadcasters had not followed programming guidelines, thus narrowing the scope of further FCC studies concerning rulemaking options necessary to guide broadcasters' presentation of children's programming. *Id.*

74. Liaison Between FCC and FTC Relating to False Misleading Radio and Television Advertising, 22 F.C.C. 1572 (1957).

investigation and disposition. The FTC Staff Report issued in 1978,⁷⁵ examined a cross-section of possible remedies, concluding that children's advertising was possibly inherently unfair and deceptive.⁷⁶ These remedies included banning all televised advertising directed at audiences of young children too young to evaluate such advertising, banning advertising of sugared snacks aimed at audiences of young children, and requiring that advertisers fund nutritional and health disclosures to balance the advertising of certain sugared foods.⁷⁷ In April of 1978, the FTC issued a Notice of Proposed Rulemaking calling for comments on children's advertising, in response to petitions from three different public interest groups, Action for Children's Television, Consumer's Union of the United States, Inc., and Committee on Children's Television.⁷⁸

It was, however, to be a hollow exercise. Merely two years later, Congress passed the FTC Improvements Act,⁷⁹ which effectively forestalled further FTC proceedings on the subject. Section 11 of the Act reinterpreted the FTC's mission with respect to its regulation of advertising.⁸⁰ No longer could the FTC regulate advertising on the basis of fairness. The new "standard" in the advertising industry was deceptiveness,⁸¹ widely believed to be the result of concentrated and overwhelming big business lobbying.⁸²

75. Silberstein, *supra* note 32, at 605 n.19 (citing F.T.C. Final Staff Report and Recommendation in the Matter of Children's Advertising (TRR No. 215-60) (Mar. 31, 1981) citing F.T.C. Staff Report on Television Advertising to Children (1978)).

76. Silberstein, *supra* note 32, at 605 n.19 (citing F.T.C. Final Staff Report and Recommendation in the Matter of Children's Advertising (TRR No. 215-60) (Mar. 31, 1981) at 11).

77. Silberstein, *supra* note 32, at 605 n.19 (citing F.T.C. Final Staff Report and Recommendation in the Matter of Children's Advertising (TRR No. 215-60) (Mar. 31, 1981) at 11-12).

78. Silberstein, *supra* note 32, at 604 n.18.

79. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (codified as 15 U.S.C. §§ 45, 46, 50, 57a, 57b(1)-b(4), 7c (1982 & Supp. IV 1986)).

80. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374, § 11 (codified as 15 U.S.C. § 57a).

81. Silberstein, *supra* note 32, at 605.

82. *Id.* at 605 n.20.

The 1981 FTC Final Staff Report and Recommendations on the Matter of Children's Advertising⁸³ addressed three issues: whether children's cognitive abilities were sufficient to allow them to evaluate advertising; what remedies were sufficient to mitigate the effects of such advertising; and how was the impact of sugared food advertisements on children's dental health and nutritional attitudes to be measured.⁸⁴ Despite acknowledging that children are exposed to certain dangers in advertising, the Final Report recommended, in light of the recently passed FTC Improvements Act, that the FTC terminate its inquiry into possible rules for children's advertising.⁸⁵ Since the Final Report refused to consider whether advertising directed at children was deceptive per se,⁸⁶ further rulemaking was effectively rendered moot.

First, the Report conceded that children under the age of six are not capable of learning the cognitive skills necessary to evaluate television commercials.⁸⁷ Although young children may have the ability to distinguish between programs and commercials, it is most probable that they do not fully understand that the intent of the advertising is to persuade or sell a product.⁸⁸ However, even though such a conclusion seems to bear out the inherent deception argument advanced by children's lobbying groups, the Final Report was unwilling to commit the resources of the FTC to what it called "impractical solutions."⁸⁹ Fearing that banning advertising on

83. 47 Fed. Reg. 21,019 (1981).

84. *Id.* at 21,020 (1981).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. Silberstein, *supra* note 32, at 605-06. The Report alternatively considered a ban on advertising limited to all audiences of which young children constituted a substantial proportion, and to those audiences of which children constituted fifty, thirty, or twenty percent of the audience. The Report found, however, that a twenty percent threshold level, regardless of how many shows would be affected, would be overinclusive. FCC STAFF REPORT, *supra* note 72, at 39-40. Some alternatives advanced to avoid overinclusiveness were rejected. *Id.* at 45 n.131. Such alternatives included the classification of commercials by their marketing techniques (as either child oriented or not), *Id.* at 42-44, or clearly designating certain commercials as children's commercials (by their placement directly before or after children's programming). *Id.* at 44 n.126.

programs in which the audience was substantially composed of young children would be subject to charges of overinclusiveness, the Final Report concluded that alternatives such as classifying commercials which primarily used child-oriented techniques or predesignating certain shows as children's programs were not narrowly tailored enough to meet the presumed goal of protecting young children.⁹⁰

With respect to sugared foods advertisements, the Final Report concluded that evidence was inconclusive regarding the effect of such advertising on children's attitudes towards nutrition, and, further, that there were numerous factors which impacted on tooth decay.⁹¹ The Report thus recommended that the FTC cease its inquiries into that area.⁹² In sum, despite compelling evidence indicating that children were often unwitting victims of the considerable skills of professional advertisers, the FTC would not consider remedies which could not assure a measurable and precise result.

On the NAB front, the storm broke in 1979 when the Justice Department filed suit against the NAB Code Authority for violating the Sherman Antitrust Act.⁹³ The government claimed that three Code provisions violated antitrust laws: limits on the number of commercials per hour, limits on the number of consecutive announcements interrupting programs, and the prohibition of advertising of two or more products in a commercial of less than sixty seconds.⁹⁴ As a threshold matter, the court held, according to antitrust law, that it could only examine the Code in light of the particular characteristics of the broadcasting industry:⁹⁵ its finite number of broadcast frequencies, its absolute restrictions imposed by limited broadcast time, and its duty to operate in the public interest.⁹⁶ Since broadcasters would limit the amount of commercial time and

90. Silberstein, *supra* note 32, at 606-07.

91. *Id.* at 607-08.

92. *Id.* at 608.

93. *United States v. National Ass'n. of Broadcasters*, 536 F. Supp. 149, 153-4 (D.D.C. 1982). *Sherman Antitrust Act*, 15 U.S.C. §§ 1-11 (1982 & Supp. II 1986).

94. *National Ass'n of Broadcasters*, 536 F. Supp. at 149.

95. *Id.* at 156.

96. *Id.* at 156-57.

program interruptions even in the absence of government regulation or industry self-regulation, the court denied the government's motion for summary judgment on these issues.⁹⁷

With respect, however, to the standard prohibiting "piggybacking," that is, advertising two or more products in one commercial of less than sixty seconds, the court found that this ban further restricted the already limited supply of commercial time, which compelled advertisers to purchase more time than they otherwise might.⁹⁸ Therefore, the ban violated the antitrust laws.⁹⁹ Despite NAB's claim that the Code had been endorsed by various governmental bodies and was therefore exempt from antitrust restrictions,¹⁰⁰ the court found that this had not been clearly demonstrated, and, more importantly, only Congress had the authority to grant exemptions.¹⁰¹ Thus the court found that the Code standards constituted an illegal restraint of trade, granted summary judgment on the government's motion, and enjoined enforcement of the NAB Code.¹⁰²

Although only the "piggybacking" standard was held to be violative of the antitrust laws, a consent decree was entered into whereby the NAB agreed to cease disseminating and enforcing its Code in toto, in return for cessation of the prosecution of all antitrust claims against it.¹⁰³ The court also refused ACT's recommendation that the decree be modified to exclude enforcement of the Code's provisions with respect to children's advertising, noting that "there was no necessary conflict between competition and the goal of protecting children from excessive commercial advertising Competition . . . can be expected to continue to foster such *individual* restraint once the NAB's *collective* restraints are lifted."¹⁰⁴

Following the consent decree, only the FCC's promise to

97. *Id.* at 157.

98. *Id.* at 160.

99. *Id.*

100. *Id.* at 168.

101. *Id.*

102. *Id.* at 169-70.

103. *United States v. National Ass'n of Broadcasters*, 553 F. Supp. 621 (D.D.C. 1982).

104. *Id.* at 624 n.8 (emphasis in original).

intervene, where necessary to protect children against broadcasters' abuses, remained in the absence of FCC regulations and NAB Code protections.¹⁰⁵ ACT again brought an action to reinstate the NAB Code,¹⁰⁶ maintaining that the proper application of antitrust principles compelled consideration of the effects of an antitrust decision on other public policies.¹⁰⁷ ACT also argued that the considerable influence of television upon children should be closely scrutinized, particularly when viewed in the context of their inability to make informed decisions based upon the content of advertising.¹⁰⁸ The Justice Department responded that the settlement did not prevent broadcasters from unilaterally decreasing advertising,¹⁰⁹ and furthermore that public policy choices were properly for Congress, and not for the judiciary branch, to decide.¹¹⁰

With the dissolution of the NAB Code, the FCC reopened rulemaking procedures on children's television in March, 1983.¹¹¹ Those supporting stricter regulation advocated reinstatement of the 1974 Policy Statement Advertising Guidelines based on four specific grounds: broadcast industry recidivism, abolition of the NAB Code, FCC's adoption of the short form renewal (a postcard format consisting of five questions, none of which dealt with children's television),¹¹² and the general need for more specific advertising standards.¹¹³ In response, the reconvened Task Force found that licensees were in compliance with the 1974 Policy Statement Advertising Standards (a conclusion sharply at odds with ACT's interpretation of the relevant statistics). The FCC then terminated the proceedings.¹¹⁴

105. Silberstein, *supra* note 32, at 614.

106. 47 Fed. Reg. 49,108-09 (1982).

107. *Id.*

108. *Id.* at 49,110.

109. *Id.* at 49,113.

110. *Id.*

111. 48 Fed. Reg. 18,860 (1983).

112. 46 Fed. Reg. 26,236 (1981).

113. 49 Fed. Reg. 1,704-06 (1984).

114. *Id.* at 1,714.

III. THE DEREGULATION OF CHILDREN'S TELEVISION: THE 1984 REPORT

In 1983, the FCC began the process of deregulating the programming and commercial content of broadcast television with a Notice of Proposed Rulemaking.¹¹⁵ In its proposal, the FCC noted that television should follow the path of deregulation in order to successfully compete with the emerging popularity of cable and satellite transmissions, and that the growth of the industry, in terms of the numbers of television sets in use and stations broadcasting, showed a competitive market less worthy of governmental regulation.¹¹⁶

Following receipt of comments, the Commission's report¹¹⁷ eliminated all quantitative commercial guidelines for television broadcasting, finding that "commercial levels will be effectively regulated by marketplace forces . . . [and that] if stations exceed the tolerance level of viewers . . . the market will regulate itself . . ."¹¹⁸ Despite ACT's evidence that market forces do not play a role in regulating the commercial content of children's television,¹¹⁹ the

115. *In re* Revision of Programming & Commercialization Policies, 94 F.C.C.2d 678 (1983) (Notice of Proposed Rulemaking).

116. *Id.* at 680, 688-94.

117. Revision of Programming & Commercialization Policies, Ascertainment Requirements & Program Log Requirements For Commercial Television Stations, 98 F.C.C.2d 1076 (1984) (Report and Order).

118. *Id.* at 1105.

119. *See In re* Children's Television Programming & Advertising Practices, 96 F.C.C.2d 634 (1984) (Report and Order). With the abolition of the NAB Code and in the absence of what some commenters considered vague FCC guidelines, the FCC noted:

ACT argues that the responsibility for children's television programming rests squarely on the shoulders of each broadcast licensee. Therefore, relying on other sources of children's programming is contrary to the law and antithetical to the interests of children. Under the theory of "market" responsibility, maintains ACT, the fact that some stations serve children would act as a disincentive to any expansion of children's programming. Furthermore, this approach would destroy licensee accountability to the public and to the Commission. ACT further argues that shifting responsibility for children's programming to public broadcasting would have an adverse effect on the diversity of children's programming. Nor, in ACT's view, should this responsibility be shifted to the new technologies Consumers would incur substantial costs (installation and monthly charges) Because these new technologies are not subject to the public interest standard of the Communica-

report failed to address ACT's concerns, and indeed never mentioned the children's television commercialization policy. Not until a request for clarification of the scope of the report was made by the NAB¹²⁰ did the FCC indicate that the deregulation of television commercialization applied to children's television as well.¹²¹ Comment on this subject was limited to the observation that deregulation of children's television was "consistent with the general de-emphasis of qualitative guidelines," and that advertising provided the bulk of support for children's programming.¹²² It was this language, or the dearth of it, that one circuit court later found insufficient to support the FCC's abandonment of its children's television guidelines, especially in light of the FCC's 15-year recognition that children comprised a special audience.¹²³

IV. THE COMMERCIAL FREE SPEECH DOCTRINE

The commercial free speech doctrine is a relatively recent development, and has presented courts with the difficult task of balancing the guarantees of the first amendment with the government's interest in regulating the content of certain messages and/or the context in which they are delivered.¹²⁴ Generally, commercial speech is defined as "business advertising that does no more than solicit a commercial transaction or state information relevant thereto."¹²⁵ Commercial speech does not encompass editorial

tions Act, there is no guarantee that they will serve children. ACT argues that the question is not what kinds of children's programming are being offered, or how good such programs are, but rather how much time is allocated to children's programming, and when such programs are scheduled.

Id. at 642.

120. *Action for Children's Television v. F.C.C.*, 821 F.2d 741, 744 (D.C. Cir. 1987).

121. *Revision of Programming & Commercialization Policies*, 104 F.C.C.2d 358 (1986) (Memorandum Opinion and Order).

122. *Id.* at 370-71.

123. *Action for Children's Television*, 821 F.2d 741. "Far be it from us to demand long-winded tiresome explanations. But the Commission's barebones incantation of two abbreviated rationales cannot do service as the requisite 'reasoned basis' for altering its long-established policy." *Id.* at 746.

124. See Jackson & Jeffries, *supra* note 30, at 2-4.

125. *Id.* at 1.

advertising, nor does it cover discussions of goods and services in a news context or in a consumer guide.¹²⁶ As an exception to the protections of the first amendment, commercial speech is distinguished from political speech or speech designed to express ideas, and has therefore been subject to numerous restrictions that otherwise would not be upheld on first amendment grounds.¹²⁷

Application of this doctrine has resulted in banning advertisements which are offensive, although not obscene¹²⁸ and misleading, although not literally false.¹²⁹ Specific information may be required to accompany certain advertisements¹³⁰ to remedy alleged misconceptions created by previous advertising efforts,¹³¹ and warnings may be required to accompany the advertising of specific products.¹³² Certainly the government may ban advertising of illegal products¹³³ and even the advertising of legal products in certain media.¹³⁴

Extending the protections of the first amendment to commer-

126. *Id.*

127. *Id.* at 1-2.

128. *Id.* at 2.

129. *Id.* at 3 n.6 (citing Federal Trade Commission Act, §§ 5, 2, 15; 15 U.S.C. §§ 45, 52, 55 (1976) (as amended); *F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374, 384-92 (1965) (holding that a demonstration of shaving cream's ability to soften sandpaper so it could be shaved found deceptive where a plexiglass "mock-up" was used for visual clarity).

130. *Jackson & Jeffries, supra* note 30, at 3 n.8 (citing *J.B. Williams Co. v. F.T.C.*, 381 F.2d 884 (6th Cir. 1967)) (where "Makers of 'Geritol', an iron whpplement, who represented, directly or indirectly, that people with a tired feeling would find relief must also state that this is true only for people suffering from an iron deficiency anemia and that the vast majority of people experiencing tiredness do not have such a deficiency." *Id.*)

131. *Jackson & Jeffries, supra* note 30, at 3 n.7 (citing *Warner-Lambert Co. v. F.T.C.*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978)). To remedy misimpressions caused by Listerine advertisements claiming preventive and curative properties for sore throats, the FTC issued, in addition to a cease and desist order, an order that Warner-Lambert include in future Listerine ads the corrective statement: "Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity." *Warner-Lambert Co.*, 562 F.2d at 753.

132. *See, e.g.*, Federal Trade Commission Act 15 U.S.C. § 1333 (1982 & Supp. II 1984) (statutes requiring warning notices on packages of cigarettes and banning the broadcast advertising of same).

133. *Jackson & Jeffries, supra* note 30, at 4.

134. *Id.* *See, e.g.*, Federal Trade Commission Act, 15 U.S.C. § 1335 (1982) (" . . . it shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication . . ." *Id.*).

cial speech appears to stem from two core values in the American system: first, an abhorrence of information rationing (curtailing access to information and ideas which favor one viewpoint at the expense of another¹³⁵), and second, ensuring that free enterprise is bolstered by "informed and reliable decision making," the byproduct of a free flow of commercial information.¹³⁶ The extent to which these values override the government's intent to safeguard other values has carved out an area of first amendment protection of commercial speech.

In 1976, the Supreme Court first brought commercial speech within the protections of the first amendment in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*¹³⁷ A Virginia statute forbidding advertising by the regulated pharmacy profession was challenged not by the pharmacists, but rather by Virginia consumers asserting a first amendment right to receive the competitive benefits of price advertising of prescription drugs by Virginia's pharmacists.¹³⁸ The Court found the consumers had standing to sue recognizing that "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees."¹³⁹

The Court rejected what it called Virginia's "highly paternalistic approach"¹⁴⁰ in banning advertising, and found that a better alternative was to:

135. COVINGTON & BURLING, A CONSTITUTIONAL ANALYSIS OF PROPOSALS BAN OR RESTRICT TOBACCO PRODUCT ADVERTISING 9 (1986).

136. *Id.* at 10 (citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977)).

137. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 748 (1976).

138. *Id.* at 753.

139. *Id.* at 757.

140. *Id.* at 770.

assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them It is precisely this kind of choice, between the danger of suppressing information, and the dangers of misuse if it is freely available, that the First Amendment makes for us.¹⁴¹

The Court, however, was careful to avoid an absolute first amendment protection. Prior restraints and regulations of time, place, and manner of advertising, false and misleading advertising, advertising of illegal acts, and advertising in the broadcast media are permissible where like regulation of noncommercial speech is not.¹⁴² Such restraints could survive, the Court said, if they can be justified without reference to the content of the regulated speech, if they serve an important government interest, and finally, if they leave open an alternative method of expression.¹⁴³

Significantly, the Court noted that constitutional guarantees for commercial speech did not carry with them the need for the same measure of protection applicable to other forms of speech.¹⁴⁴ "There are commonsense differences between speech that does 'no more than propose a commercial transaction,' and other varieties."¹⁴⁵ An advertiser's greater ability to ascertain truthfulness of his own statements, as opposed to the news reporter's or the political commentator's, insures commercial speech a different degree of protection.¹⁴⁶ Furthermore, the Court noted that commercial speech is more durable: "[S]ince advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely."¹⁴⁷ These dual attributes of greater

141. *Id.*

142. *Id.* at 770-71.

143. *Id.* at 771-72.

144. *Id.* at 771-72 n.24.

145. *Id.* at 771 n.24 (citation omitted).

146. *Id.* at 772 n.24.

147. *Id.*

objectivity and hardiness, the Court concluded, "may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker."¹⁴⁸

However, an important issue remained unresolved, even after the decision in *Virginia Pharmacy Board*: under what circumstances could unsuppressible speech be regulated? In other words, although commercial speech promoting goods and services enjoys some first amendment protection, precisely how far could those constitutional rights extend? In the 1976 decision *Linmark Associates, Inc. v. Willingboro*¹⁴⁹ the Court struck down an anti-blockbusting ordinance enacted by a New Jersey town prohibiting the placement of "for sale" signs on homeowners' lawns to fight "white flight" and preserve an integrated community.¹⁵⁰ Appellees, relying on language in *Virginia Pharmacy Board*,¹⁵¹ claimed that the ordinance was merely a reasonable time, place, or manner restriction. However, the Court disagreed, although it acknowledged that the restriction served a laudable purpose.¹⁵² The constitutional defect, the Court found, was that the town did not have the right to withhold truthful and nondeceptive information from its citizenry, reiterating the first amendment choice (as stated in *Virginia Pharmacy Board*) between the dangers of suppressing information and the misuse to which that information might be put first.¹⁵³

It was not until 1980 that the definitive test of the constitutionality of commercial speech would be drawn. In *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*¹⁵⁴ the Court reviewed a total ban on promotional advertising by electric utilities, imposed, it was argued, to further the state's interest in energy conservation.¹⁵⁵ In order to balance the utility's First

148. *Id.* (citation omitted).

149. *Linmark Associates Inc. v. Willingboro*, 431 U.S. 85 (1977).

150. *Id.* at 94.

151. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

152. *Linmark*, 431 U.S. at 96-97.

153. *Id.* at 97.

154. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n.*, 447 U.S. 557 (1980).

155. *Id.* at 561-66.

Amendment rights with the state's legitimate interest, the Court developed a four-part test:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it must at least concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.¹⁵⁶

Although the Court found that the advertising at issue did concern a lawful activity and that the state's interest was indeed substantial, it struck down the ban because it was not the least restrictive alternative.¹⁵⁷ Writing for the Court, Justice Powell found that the state's energy conservation rationale did not outweigh the suppression of speech, because "a more limited restriction on the content of promotional advertising would not serve adequately the state's interests"¹⁵⁸ In his dissent, Justice Rehnquist admonished that the effect of this approach would be to invite chaos, that it "leaves room for so many hypothetical 'better' ways that any ingenious lawyer will surely seize on one of them to secure the invalidation of what the state agency actually did."¹⁵⁹

Cases following *Central Hudson* have appeared to affirm the thrust of its balancing doctrine, and have continued to carve out a measure of first amendment protection for commercial speech, albeit within limitations related to the character of the advertising and the substantiality and specific application of the state's interest in

156. *Id.* at 566.

157. *Id.* at 572.

158. *Id.* at 570.

159. *Id.* at 599-600. Justice Rehnquist, dissenting, also noted, "There is no reason for believing that the marketplace of ideas is free from marketplace imperfections any more than there is to believe that the invisible hand will always lead to optimum economic decisions in the marketplace." *Id.*

regulation. In *Metromedia v. City of San Diego*,¹⁶⁰ the Court confronted a local ordinance prohibiting all outdoor advertising signs, except for on-premises signs (signs identifying the owner/occupant or advertising goods or services rendered on such premises) and specific categories of off-premises signs (at bus stops, historical plaques, signs displaying time, temperature, or news).¹⁶¹ The stated purpose of the law was "to eliminate hazards to pedestrians and motorists brought about by distracting sign displays," and "to preserve and improve the appearance of the City."¹⁶² Justice White, writing for the plurality, concentrated his analysis on the third prong of the *Central Hudson* test, whether the ordinance directly advanced a substantial government interest. He concluded that although there was only sketchy evidence relating to the connection between traffic safety and the billboards, "a legislative judgment that billboards are traffic hazards is not manifestly unreasonable and should not be set aside."¹⁶³ Similarly, absent any hint of ulterior motive, the city could have properly determined that banning outdoor advertising advances the cause of urban esthetics.¹⁶⁴ The Court, however, struck down the ordinance, not because it suppressed commercial speech, but rather because, by permitting on-site signs, it favored commercial speech over non-commercial speech: "Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages."¹⁶⁵ In sum, the Court affirmed the *Central Hudson* test and seemed to indicate that San Diego could validly prohibit all commercial billboards within its municipality, noting that the city's esthetic and safety interests outweighed the asserted commercial interest.

160. *Metromedia v. City of San Diego*, 453 U.S. 490 (1981).

161. *Id.* at 493-95 (quoting SAN DIEGO, CAL. ORDINANCE 10,795, § 101.0700 (F) (New Series) (1972)).

162. *Id.* at 493.

163. *Id.* at 509.

164. *Id.* at 510.

165. *Id.* at 513. "Although the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of non-commercial speech to evaluate the strength of, or distinguish between, various communicative interests." *Id.* at 514.

Of great significance for the commercial speech doctrine is the Supreme Court's 1986 five to four decision in *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*,¹⁶⁶ which upheld regulations partially prohibiting legalized casino gambling advertising.¹⁶⁷ In upholding the partial ban, the Court rejected the first amendment claim of the appellant, a partnership franchised to operate a casino in Puerto Rico.¹⁶⁸ Puerto Rico's Gaming Regulations enacted pursuant to the Games of Chance Act¹⁶⁹ essentially allowed advertising outside Puerto Rico while prohibiting such advertising to the public of Puerto Rico.¹⁷⁰

The majority opinion was written by Justice Rehnquist, a consistent dissenter in commercial speech cases upholding the first amendment rights of advertisers.¹⁷¹ Conceding that the regulated advertising concerned a lawful activity and was neither fraudulent nor deceptive, thus passing the first prong of the *Central Hudson* test, Rehnquist pointed to the Puerto Rican legislature's interest in the health, safety, and welfare of its citizens as constituting a substantial government interest, noting that these same concerns prompted most states to ban casino gambling entirely.¹⁷² Rehnquist concluded that the regulation advanced this same interest: "The

166. *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986).

167. *Id.*

168. *Id.* at 340-47.

169. Games of Chance Act, P.R. Laws Ann., tit. 15 § 71 (1972).

170. 15 P.R. R. & Regs. tit. 15, § 76a-1(7) (1972), as amended in 1971, provides in pertinent part: No concessionaire, nor his agent or employee is authorized to advertise the gambling parlors to the public in Puerto Rico. The advertising of our games of chance is hereby authorized through newspapers, magazines, radio, television and other publicity media outside Puerto Rico subject to the prior editing and approval by the Tourism Development Company of the advertisement to be submitted in draft to the Company. *Id.*

171. See, e.g., *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, (the first amendment was designed to protect discussion of "political, social and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo." *Id.* at 787.). (Rehnquist, J. dissenting); *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) (the four-part test enumerated by the majority gave commercial speech falling within the first amendment protection that was "virtually indistinguishable" from that given to non-commercial speech. *Id.* at 583.).

172. *Posadas*, 478 U.S. at 341.

Puerto Rico legislature obviously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at residents of Puerto Rico would serve to increase the demand for the product advertised.¹⁷³ In addition, he rejected the argument that the challenged advertising restrictions were underinclusive since other types of gambling, namely the Puerto Rico lottery, were not affected, noting "that for Puerto Ricans the risk associated with casino gambling were significantly greater than those associated with the more traditional kinds of gambling in Puerto Rico."¹⁷⁴

Finally, the Court concluded that the last prong of the test, whether the regulation was no more extensive than necessary to advance the asserted state interest was also satisfied: "The narrowing constructions of the advertising restrictions announced by the Superior Court ensure that the restrictions will not affect advertising of casino gambling aimed at tourists, but will apply only to such advertising when aimed at the residents of Puerto Rico."¹⁷⁵

Justices Brennan's dissent criticized the majority's less than rigorous scrutiny of the Puerto Rico legislature's decision to legalize casino gambling in the first place. "In light of the legislature's determination that serious harm will not result if residents are permitted and encouraged to gamble," he wrote, "I do not see how Puerto Rico's interest in discouraging its residents from engaging in casino gambling can be characterized as 'substantial.'¹⁷⁶ Most importantly, Justice Brennan criticized the majority for leaving it to the legislature to determine whether the government's interest might be protected by less extensive measures: "Rather, it is

173. *Id.* at 341-42.

174. *Id.* at 343.

175. *Id.* "The legislature could conclude . . . that residents of Puerto Rico are already aware of the risks of casino gambling, yet would nevertheless be induced by widespread advertising to engage in such potentially harmful conduct." *Id.* at 344. Responding to appellant's claim that the ban was not narrowly drawn, Justice Rehnquist later added that "it is precisely because the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising." *Id.* at 346.

176. *Id.* at 354. (Brennan J., dissenting).

incumbent upon the government to prove that more limited means are not sufficient to protect its interests, and for a *court* to decide whether or not the government has sustained this burden."¹⁷⁷

While the Court, again, affirmed the four-part *Central Hudson* test, and did so in the context of upholding a ban on the advertising of a lawful product via truthful, nondeceptive means, its guidance to advertisers and regulatory bodies is not clear, and indeed the decision may be seen as being limited to its facts. Reaction among advertisers and the tobacco and alcohol industries has been, predictably, hostile. Wally Snyder, senior Vice President/Government Relations of the American Advertising Federation, remarked that "the *Posadas* case does not change the law with regard to what Congress has to do to ban truthful advertising," he added that *Posadas* "should be applied to a very narrow factual situation."¹⁷⁸ Other commentators have attempted to distinguish the *Posadas* holding since gambling has traditionally been an area of significant state interest and has only existed at the sufferance of the state.¹⁷⁹ At the root of the controversy, however, is the belief that the banning of truthful speech about lawful products or services is inconsistent with a national commitment to individual choice:

The question is, do we want to be a society where you try to manipulate people's behavior to get them to act in their own best interests by censoring the kind of information they get? . . . [I]s advertising somehow less important to the society than other kinds of information? I mean, after all, we do live in a free market society. We do live in a society in which the operation of the market is one of the most important things to us. And if you cut off and control the flow of information about lawful products, how can you possibly hope to run an efficient free market? . . . The most

177. *Id.* at 357.

178. COUNCIL OF BETTER BUSINESS BUREAUS, *Ban on Casino Ads Does Not Violate First Amendment: U.S. High Court Ruling*, 4 ADVERTISING COMPLIANCE SERVICE, Issue 15, at 7-8 (1986).

179. *Id.* at 8.

dangerous thing a free society can do is to permit the illusion of freedom, but to, but to give the government the power to control people's behavior by controlling the amount of information available to them.¹⁸⁰

The issue has also been framed as one which asks the underlying question whether the government may seek to manipulate people's behavior to get them to act in their own best interest by censoring the kind of information they get.¹⁸¹ Assuming that an advertising regulation seeks to influence consumption of a product or service by restricting one's exposure to information regarding that product or service, such as a cigarette advertising ban, should a policy change be sought through the curtailment of speech? On the other hand, does not common sense and constitutional precedent indicate that no speech is entirely beyond regulation, particularly where it is questionable whether the recipients of that speech are fully capable of mediating its message? As with any balancing between the state's interest in regulation and the protections of the first amendment, the quality of speech and the degree to which that speech has come to be relied upon are not immune from analysis.

V. COMMERCIAL FREE SPEECH AND THE REGULATION OF CHILDREN'S TELEVISION

In 1987 the FCC requested commenters "to examine any potential government interests in light of applicable constitutional principles."¹⁸² Recognizing that any "First Amendment analysis as applied to the regulation of children's television is necessarily different than in 1974¹⁸³ when the 1974 Policy Statement declared that commercial speech has little first amendment protection, the FCC asked whether the concerns identified by commenters rise to

180. Free Speech and Advertising -- Who Draws the Line? (quoting of Burt Neuborne in videotape of a forum sponsored by the Institute for Democratic Communication, Boston University College of Communication, Apr. 2, 1987) (statement of Burt Neuborne).

181. *Id.*

182. See *In re* Revision of Programming & Commercialization Policies, 2 F.C.C. Rcd 6822, 6825 (1987).

183. *Id.* at 6825.

the level of a "substantial" government interest.¹⁸⁴ And, if so, commenters were asked to discuss "whether and which methods of restricting commercial speech directed to children both advance any substantial interest that may be identified and are no more extensive than necessary to serve such interests."¹⁸⁵

The concerns about commercialization guidelines that the FCC asked commenters to address included such issues as whether young children were too young to understand the purpose and function of commercials (and were therefore insensitive to commercialization levels) and whether parents and older siblings played an advisory role such that an incentive for advertisers to limit their activities was created.¹⁸⁶ Additionally, comments were sought relating to the role of alternative sources of video as possibly serving as a limiting influence on commercialization levels as well as whether marketplace forces generally served to regulate advertising activity.¹⁸⁷ Finally, the FCC asked for conclusions regarding the effect of the number of commercial minutes on the welfare of each of several children's age groups, and for specific observations regarding any negative effects to be expected from increased exposure to advertising as a result of the withdrawal of the children's advertising guidelines.¹⁸⁸

At the outset, it is clear that any constitutional analysis must begin with the fact that courts have consistently recognized the special nature of children where speech issues are concerned and particularly with respect to broadcast speech.¹⁸⁹ In *F.C.C. v. Pacifica Foundation*,¹⁹⁰ the Supreme Court upheld an FCC order that comedian George Carlin's monologue "Filthy Words" was indecent,

184. *Id.*

185. *Id.*

186. *Id.* at 6823.

187. *Id.*

188. *Id.* at 6824.

189. *See, e.g., Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding a conviction for selling "girlie" magazines to a 16-year old boy, thus rendering permissible a state's determination that material that would not be obscene when read by an adult is nonetheless obscene when read by a minor); *Prince v. Massachusetts*, 321 U.S. 158 (1943) (upholding a statute making it a crime for a girl under the age of 18 to sell newspapers, periodicals, and merchandise in public places); *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978).

190. *Pacifica Foundation*, 438 U.S. at 726.

and recognized that the FCC action was premised on the presence of children in the listening audience.¹⁹¹ In April 1987, the FCC resurrected and broadened its regulation of indecent speech, and said that it no longer would use 10 p.m. as the point after which broadcasters could assume children were not in the audience. Furthermore, indecent broadcasts are actionable if broadcast when there is a reasonable risk that children are in the audience.¹⁹² Indeed, recently a federal appeals court noted that, "the FCC has repeatedly indicated that unique difficulties obtain in children's television regulation and has acted on those perceived difficulties in proceedings clearly distinct from general television policy proceedings. As the agency has seen it, kids are different"¹⁹³ It would seem that given both the FCC's long experience with grappling with children's television, and the Supreme Court's recognition that indecent speech on broadcast media may be regulated for the sake of children, there exists a substantial government interest in scrutinizing content directed at children.

The more difficult questions center around whether any regulation of children's television will directly advance that government interest. Testimony presented to the House Subcommittee on Telecommunications and Finance by Preston Padden, president of the Association of Independent Television Stations, noted that "limits on the commercial content of programming designed for kids establishes a 'strong market disincentive' against such programs relative to other programs that are likely to attract the same children's audience."¹⁹⁴ In other words, if a station was only permitted, for example, nine and one half minutes of advertising in a children's show but had no limit with respect to a sitcom, and both shows attracted children's audiences of similar size, there might be less children's programming.¹⁹⁵ In addition, Padden noted that

191. *Id.*

192. New Indecency Enforcement Standards, 62 Rad. Reg.2d (P & F) paras. 10:326, 53:24(R)(23), 62:119 (Apr. 29, 1987).

193. Action for Children's Television v. F.C.C., 821 F.2d 741, 750 (D.C. Cir. 1987).

194. COUNCIL OF BETTER BUSINESS BUREAUS, Children's Television & Advertising Practices (Supp. 460 Oct. 1987).

195. *Id.*

studies indicate that children and their parents are capable of using the marketplace to register approval or disapproval of television practices.¹⁹⁶

In light of sharp disagreement among concerned parties about the effects of television on children, one may wonder how courts will react to legislation based, in part, on a Congressional determination that children are indeed negatively affected by certain commercialization levels. Following *Posadas*, a decision which is widely disputed as to its general applicability to commercial speech doctrine (and which gave great deference to a legislature's determination that speech concerning a legal product, gambling, could be regulated), it is possible that regulation based upon extensive legislative factfinding would not be disturbed on constitutional grounds. A related difficulty, noted by FCC Commissioner Patricia Diaz Dennis in a separate statement concerns how products are being advertised to children in addition to what products are being marketed to children.

For example, if encyclopediae, books, or computers were the products advertised to children, I question whether the petitions we have received would have been filed. Nor does anyone appear to be complaining about sales of Sesame Street products from which Children's Television Workshop, the producers of Sesame Street, receives about \$30 million annually in royalties and other income Mindful of First Amendment interests, can our society do anything with regard to children's television to help insure the welfare of its children?¹⁹⁷

Returning once again to Winky Dink, is there something inherently different between that sort of interactive programming and advertising presently being scrutinized by the Congress and the FCC? Consider a recent Children's Advertising Review Unit (CARU) opinion on the Mattel, Inc. toy line and television program

196. *Id.*

197. *Id.*

called "Captain Power." This recent CARU investigation centered on a television commercial, which aired during children's cartoons on independent stations and on MTV. The commercial opened with what appeared to be a cake mix ad interrupted by static and voices: "I think we're getting through, Captain." "What year?" "19, uh, 87, I think. Try it." This interruption was revealed to be a 60-second introduction to a new toy line and associated television program. The voice continued:

Hello. To anybody watching, this is Captain Power. Jonathan Power. Do you read? We have a situation here. The year is 2147. Human life is threatened by Bio-Dreads I need your help. I have instructions, please pay attention. Weekly program transmissions on TV begin September If you have the Power Jet XT-7, the XT-7, you can fire invisible beams at enemy targets on these transmissions. Score or be hit. Warning: The TV show will fire back. It will fire back. Score or be hit. Warning: The TV show will fire back. Do you understand? The power of the future is in your hands. My next message is September¹⁹⁸

CARU questioned several aspects of this commercial, including "whether the commercial's sustained fantasy, featuring the dramatic interruption of a regular broadcast transmission, allowed children to distinguish sufficiently between real and make believe."¹⁹⁹ CARU also questioned "the clarity of product presentation exclusively within the fantastic format," the "program character, Captain Power, urging viewers to help him by using the XT-7," and the message's urgency, noting that children aren't "as prepared as adults to make judicious, independent purchase decisions."²⁰⁰ In response to CARU's admonition that each of these concerns were violative of CARU's voluntary Self-Regulatory Guidelines for Children's Advertising, "the

198. COUNCIL OF BETTER BUSINESS BUREAUS, *NAD Investigations: Latest Trends*, 21 ADVERTISING COMPLIANCE SERV., Issue 21, at 3 (1987).

199. *Id.* at 18-19.

200. *Id.* at 19.

advertiser noted that the challenged commercial had completed its scheduled run, and said future ads would give consideration to CARU's concerns.²⁰¹

It should be noted that a Petition for Rulemaking was filed by Action for Children's Television on February 9, 1987, requesting that such programs be prohibited as contrary to the public interest. The FCC expressed skepticism as to whether such type of programming could stand on its own without the toy and whether there was anything to indicate to a child viewer that he has to have the toy to enjoy watching the programming.²⁰² It is well beyond the scope of this article to come to any conclusions about the value of Captain Power or other such programs. An equal difficulty accrues to an analysis of parental supervision of children's viewing. Certainly, this sort of supervision can not be governmentally mandated, notwithstanding whatever preference one might give it over federal regulation. During the debate on the Children's Television Act of 1988, it was noted, however, that lacking FCC leadership and industry-wide self-regulation such as the NAB Code to ensure responsible broadcasting practices, Congress was reacting to parental failure in monitoring what their children watch or asking themselves questions as to what they *want* their children to watch, and to convey those concerns to the industry by either turning the dial to a different program or turning off the set entirely.²⁰³

Advocates of a hands-off policy to federal regulation of children's television may well be ignoring important societal changes which may impact on the ability of parents to monitor their children's viewing habits, such as the proliferation of two-parent wage-earner families and single-parent families. It is also significant that commercial broadcast television occupies a decreasing share of the viewing market, which suggests that such media as cable and videotape are offering viable alternatives. Additionally, in light of the difficulties in quantifying the effects of television on children,

201. *Id.*

202. *In re* Revision of Programming & Commercialization Policies, 2 F.C.C. Rcd 6822 (1987).

203. H.R. 3966, 100th Cong., 2d Sess., 134 CONG. REC. 3983 (1988).

that is, how behavior may be affected by watching particular programming and advertising, and at what viewing levels, regulation generally presents extraordinary problems beyond first amendment concerns. The present legislative initiative represents an effort to ensure that individual broadcasters discharge their public interest responsibility to the child audience, and further, to ensure that the FCC takes these efforts, or lack thereof, into account at renewal of license.

While it is understood that imposing limits on speech must withstand the most rigorous scrutiny, it is the economic motives of advertisers that will, on constitutional grounds, be balanced against their perceived effect on children. Leaving this job to the marketplace alone raises serious questions about whether in the interest of free speech, childhood itself is endangered by endowing children with an officially unaided responsibility to make adult viewing and purchasing decisions.

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