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Return to Hot Wheels: The FCC, Program-Length Commercials, and the Children's Television Act of 1990

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Introduction

The Children's Television Act of 1990[1] was Congress' response to a decade during which children's television programming became, in effect, a remarkably profitable toy catalog. The Act limited the amount of advertising time permitted during children's programs and required the Federal Communications Commission ("FCC") to consider broadcasters' service of children's educational and informational needs. Years of controversy over how best to achieve the Act's objectives followed its passage. A recent White House summit meeting—attended by regulators, broadcasters, and public interest advocates—resulted in an accord requiring each station to air three hours of educational programming for children per week.[2]

One element of the Children's Television Act, however, has been forgotten entirely in the flurry of activity regarding its enforcement. The new law directed the FCC to address the most serious problem with children's television in the 1980's—"program-length commercials," that is, programs principally designed to sell toys or other products associated with the programs. To illustrate, the television specials offered to children during the 1993 holiday season included a program called *Nick and Noel*. Toys 'R' Us toy stores created the show, which featured two cuddly characters—a dog, Nick, and a cat, Noel—available only at Toys 'R' Us stores. On the day before the program aired, Toys 'R' Us placed large newspaper ads alerting children to the show and reminding them where Nick and Noel dolls could be purchased.[3]

Surprisingly, the FCC did not quickly condemn *Nick and Noel*, although it was a particularly clear example of the kind of program-length commercials that concerned Congress. In fact, *Nick and Noel* did not violate FCC rules because, despite the Children's Television Act, the FCC never adopted an adequate policy against program-length commercials aimed at children. To the contrary, in its rule-making proceeding on program-length commercials, the FCC: (1) ignored Congress' concerns; (2) misconstrued the issue presented; (3) adopted rules placing virtually no new restrictions on broadcasters; and (4) misleadingly characterized the approach taken as consistent with long-standing policy.

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1. Pub. L. No. 101-437, 104 Stat. 996 (1990)(codified at 47 U.S.C. §§ 303(a), 303(b), 394 (1994)).

2. *See infra* notes 68-79 and accompanying text.

3. *Consumer Groups Assail Kidfomercials*, THE RECORD, Dec. 30, 1993, at B1.

This article examines the FCC's treatment of the program-length commercial issue in the aftermath of the Children's Television Act. It describes how the FCC's rule-making proceeding resulted in an ineffective policy. Further, it suggests how the FCC may better respond to the problem of program-length commercials by reviewing a broadcaster's overall handling of commercialization and children's television before granting a renewal of that broadcaster's license. Such a policy would represent a return to the approach taken by the FCC in the past, would be flexible enough to be effective, and would be constitutional within the boundaries established for regulation of broadcast and commercial speech.

I
The *Hot Wheels* Era

Advertising in children's television presents unique concerns that do not apply to advertising directed at adults. Children are born unable to appraise commercial messages critically and realistically. Until approximately six years of age, a child cannot distinguish television commercials from programs, and a child generally does not begin to recognize the persuasive intent of commercials for several more years.[4] Thus, children are uniquely vulnerable to exploitation by advertising because they cannot adequately recognize and evaluate it. That is particularly true of program-length commercials—television programs with commercial content.[5]

The FCC first faced the problem of program-length commercials aimed at children in the late 1960's. Eddie Smarden, vice president of the advertising agency for toy manufacturer Mattel, developed an idea for a show which combined the virtues of *Archie* comics with Mattel's

4. The FCC first recognized those facts in 1974. *See In re* Petition of Action for Children's Television (ACT) for Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children's Programing, *Children's Television Report and Policy Statement*, 50 F.C.C.2d 1, 15 (1974)[hereinafter *Children's Television Report and Policy Statement*]. The Federal Trade Commission has reached the same conclusion. *See* Children's Advertising, *Termination of Rulemaking Proceeding*, 46 Fed. Reg. 48,710 (1981)[hereinafter *Termination of Rulemaking Proceeding*].

5. As discussed below, it is important to distinguish program-length commercials from other concerns regarding children's television and advertising. A typical half hour of children's television consists of a 24 to 25 minute program interrupted by a number of shorter spot advertisements. One concern is the amount of time devoted to these spot ads. A second concern is the relationship between the program and the spot ads. If *Mighty Morphin Power Rangers* is interrupted by a *Power Rangers* toy commercial, will children confuse the two? Program-length commercials present a third concern, that is, the commercial nature of the programs themselves.

hugely popular *Hot Wheels* line of toy racing cars.[6] The *Hot Wheels* program debuted on ABC in 1969. Mattel purchased advertising time during the show. Commercials for the *Hot Wheels* cars aired during other Saturday morning programs on ABC, but not during the *Hot Wheels* program itself. A rival toy manufacturer complained to the FCC that the cartoon was "in reality a 30-minute commercial for Mattel's miniature racing cars."[7] The FCC concluded that the body of the *Hot Wheels* program contained commercial material and required ABC to log various parts of the show as commercial matter, including the opening theme song and all audio or video references to the words "Hot Wheels."[8] The FCC's central concern was that the "pattern subordinates programing in the interest of the public to programing in the interest of its saleability."[9] ABC soon canceled the *Hot Wheels* series.

The FCC maintained that attitude toward children's television throughout the 1970's. In 1971, for example, a newly-formed interest group, Action for Children's Television, asked the FCC to implement a radical three-part policy: elimination of all spot advertising during children's television, prohibition of all product references during children's programs, and imposition of a mandatory minimum of fourteen hours per week of children's programming per broadcaster.[10] In its landmark 1974 report on children's television, the FCC chose not to adopt such *per se* rules, but promised to "closely examine commercial activities in programs designed for children on a case-by-case basis."[11] Thus, while the FCC did not establish any specific definition of a program-length commercial, it exercised scrutiny over the commercial content of children's television programming. However, extreme cases like *Hot Wheels* were rare.

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6. *In re* ABC Concerning Logging of Hot Wheels Program, 23 F.C.C.2d 132, 132 (1970).

7. *In re* Complaint of Topper Corp. Concerning ABC and Mattel, Inc., 21 F.C.C.2d 148, 148 (1969).

8. *In re ABC*, *supra* note 6, at 132.

9. *Complaint of Topper*, *supra* note 7, at 149.

10. *In re* Petition of Action for Children's Television (ACT) for Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children's Programing, *Notice of Inquiry and Notice of Propose Rulemaking*, 28 F.C.C.2d 368, 368 (1971).

11. *Children's Television Report and Policy Statement*, *supra* note 4, at 14.

II
Deregulation in the 1980's

The tide turned in the early 1980's. American Greeting Cards was the first to strike gold, when it introduced *Strawberry Shortcake* and quickly realized more than one billion dollars in sales from the character.[12] Other manufacturers realized the potential profits of the marketing strategy—the creation and heavy marketing of a licensed character through television. A flood of imitators followed. Meanwhile, the National Association of Broadcasters, threatened with an antitrust action, agreed to abandon its code of self-regulation.[13] That code had imposed some restrictions on advertising during children's programming.

Not to be outdone by the toy and broadcast industries, the FCC contributed to the proliferation of program-length commercials aimed at children by its near complete deregulation of children's television in 1984. The Commission declined to adopt any specific advertising or programming standards to replace those of the abandoned National Association of Broadcasters' code.[14] In children's television, as in all programming, broadcasters were no longer required to ascertain the needs of the community and were no longer subject to any maximum limits on advertising time per hour.[15] Action for Children's Television challenged the removal of the children's television advertising guidelines and won a ruling that the FCC's decision lacked a "reasoned basis," forcing the FCC to reopen its proceeding.[16]

In the meantime, *He-Man, Pac-Man, The Care Bears, My Little Pony*, and *The Transformers* dominated children's television. Between 1983 and 1988, the number of toy-based programs on the air jumped from thirteen to more than seventy, and revenue from sales of related products rose from $26.7 billion to $64.6 billion.[17] Despite the efforts

12. Tom Engelhardt, *The Shortcake Strategy, in* TODD GITLIN, WATCHING TELEVISION 73 (1986).

13. United States v. National Ass'n of Broadcasters, 536 F. Supp. 149 (D.D.C. 1982).

14. *In re* Children's Television Programming and Advertising Practices, *Report and Order*, 96 F.C.C.2d 634, 655 (1984).

15. *See In re* Revision of Programming and Commercialization Policies, *Report and Order*, 98 F.C.C.2d 1076, 1077 (1984); *In re* Revision of Programming and Commercialization Policies, *Memorandum Opinion and Order*, 104 F.C.C.2d 358, 359 (1986).

16. Action for Children's Television v. FCC, 821 F.2d 741, 745 (D.C. Cir. 1987).

17. Joint Comments of Action for Children's Television, *et al.*, MM Dkt. No. 90-570, at 38-39 (Jan. 30, 1991). The Comments, Reply Comments, Petitions for Reconsideration, Oppositions, and Joint Replies to Oppositions from MM Dkt. No. 90-570 cited herein are on file with the FCC.

of Action for Children's Television and the National Association for Better Broadcasting, the FCC declined to regulate these new shows. In addition, the FCC refused to prohibit a variety of profit-sharing arrangements such as the one used to market the *Thunder Cats* program and toys. Under that scheme, if a station aired the cartoon and reached, for example, 4% of U.S. homes, the station would receive 2% of the national profits from the toy line. The FCC felt that the arrangement was "an innovative technique" which did not contravene broadcasters' duty to serve the public interest.[18] The FCC also refused to restrict barter sales at below-market prices. For example, the producers of *He-Man and the Masters of the Universe* sold each episode to stations in exchange for two minutes of commercial time on that station. The FCC concluded that such barter arrangements presented no problem unless the producer gave the programming to the station for no charge or a nominal charge.[19] In sum, the FCC closed its eyes to a wave of program-length commercials that dominated children's television in the 1980's, programs that Rupert Murdoch justly called a "prostitution of the broadcaster's function."[20]

III
The Children's Television Act of 1990

Congress originally passed a measure on children's television in 1988, but President Reagan pocket vetoed the bill.[21] A very similar bill emerged from Congress in 1990 and became law after President Bush neither signed nor vetoed it. The Act had four components. First, it placed quantitative limits on the amount of commercials permitted during children's television: 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays.[22] Second, it required the FCC to consider whether a station seeking renewal of its broadcast license has

18. *In re* Petition for Rule Making to Prohibit Profit-Sharing Arrangements in the Broadcasting of Children's Programming, *Memorandum Opinion and Order*, 100 F.C.C.2d 709, 713 (1985)[hereinafter *Memorandum Opinion and Order*].

19. *In re* Complaint of National Association for Better Broad. Against Television Station KCOP, *Memorandum Opinion and Order*, 4 FCC Rcd. 4988 (June 2, 1989), *on remand*, National Ass'n for Better Broad. v. FCC, 830 F.2d 270 (D.C. Cir. 1987).

20. *The Thinking Man's Media Baron*, BROADCASTING, Apr. 13, 1987, at 70.

21. *See* Memorandum of Disapproval for the Children's Television Act of 1988, 24 WEEKLY COMP. PRES. DOC. 1456 (Nov. 5, 1988).

22. 47 U.S.C. § 303a(b) (1994).

served the educational and informational needs of its young viewers.[23] Third, it directed the FCC to consider the program-length commercial issue and to resolve its ongoing proceeding on children's television and advertising.[24] Fourth, it established the National Endowment for Children's Educational Television to award grants for the production of educational children's television.[25]

In their remarks on the Children's Television Act of 1990 and its unsuccessful precursor in 1988, members of both the Senate and the House made clear that the legislation was a response to the FCC's abdication of responsibility in the area.[26] Driven by "pure ideology,"[27] the FCC had embarked on a "deregulatory rampage"[28] and had "completely fallen down on the job" with respect to protection of children.[29] While the Children's Television Act did not contain specific directions to the FCC on how to resolve the program-length commercial question, Congress clearly expected an aggressive policy. Senator Wirth emphasized that "[b]y no means, however, does this measure abandon the issue of children's product-related programming."[30] Virtually all of the legislators who spoke on the bill mentioned the problem of program-length commercials.[31] They decried how children's television had become "the video equivalent of a Toys-R-Us catalog."[32] Representative Swift gave the issue central importance:

> The interest here is whether or not, and this was central to the hearings we held, children and virtually children alone in our society are going to be subject to program-length commercials, commercials which begin at the beginning of the program and run all the way to

23. 47 U.S.C. § 303b(a)(2).

24. Pub. L. No. 101-437, 104 Stat. 996, § 104 (not codified).

25. 47 U.S.C. § 394(b) (1994).

26. *See, e.g.*, 134 CONG. REC. S16,857 (daily ed. Oct. 19, 1988)(statements of Sen. Inouye and Sen. Metzenbaum); 134 CONG. REC. H3984 (daily ed. June 7, 1988)(statement of Rep. Eckart).

27. 134 CONG. REC. H3984 (daily ed. June 7, 1988)(statement of Rep. Miller).

28. 135 CONG. REC. S7437 (daily ed. June 23, 1989)(statement of Sen. Wirth).

29. 134 CONG. REC. S16,857 (daily ed. Oct. 19, 1988)(statement of Sen. Hollings).

30. 136 CONG. REC. S16,341 (daily ed. Oct. 22, 1990)(statement of Sen. Wirth).

31. *See, e.g.*, 136 CONG. REC. H5245 (daily ed. July 23, 1990)(statement of Rep. Markey); *id.* at H5246 (statement of Rep. Rinaldo); *id.* at H5248 (statement of Rep. Bryant); 136 CONG. REC. S10,124 (daily ed. July 19, 1990)(statement of Sen. Lautenberg); *id.* at S10,127 (statement of Sen. Wirth); 136 CONG. REC. S184 (daily ed. Jan. 23, 1990)(statement of Sen. Inouye); 135 CONG. REC. S7437 (daily ed. June 23, 1989)(statement of Sen. Wirth); 135 CONG. REC. E275 (daily ed. Feb. 2, 1989)(statement of Rep. Tauke); 134 CONG. REC. S16,858 (daily ed. Oct. 19, 1988)(statement of Sen. Metzenbaum); 134 CONG. REC. E1889 (daily ed. June 8, 1988)(statement of Rep. Downey).

32. 136 CONG. REC. H5245 (daily ed. July 23, 1990)(statement of Rep. Markey).

> the credits, commercials which act as programs because what they have done is taken the product they are selling and turned it into the central character of the program itself. That is the governmental interest.[33]

The Act's proponents made clear that they expected the FCC to take notice of Congress' concern. Representative Bruce stated that "we are putting the FCC on notice that we are serious about protecting our children from advertising disguised as programming."[34] The legislators indicated that they would revisit the issue if the FCC failed to adequately resolve the problem.[35]

IV
The FCC's Answer to Program-Length Commercials

Despite Congress' expressions of concern, the FCC did not take an aggressive position against program-length commercials in the rule-making that followed passage of the Children's Television Act. The FCC proposed to define a program-length commercial as one where (1) the program's content relates to a product and (2) spot advertisements for that product air during the program.[36] In short, a broadcaster cannot run spot advertisements for *GoBots* toys during the half hour when the *GoBots* program airs. During ensuing proceedings, the FCC agreed to alter its proposed definition in one minor respect. The FCC's initial definition did not address advertisements that appear after the end of one show and before the beginning of the next. Initially, the FCC felt that sixty seconds provided sufficient separation between a program and related ads, given "the short attention spans of children."[37] After child psychology experts disputed the validity of that reasoning, the FCC modified the rule, requiring that a program and related advertisements be separated by intervening and unrelated program material.[38] In other words, the

33. 134 CONG. REC. H3982 (daily ed. June 7, 1988)(statement of Rep. Swift).

34. *Id.* at H3981 (daily ed. June 7, 1988)(statement of Rep. Bruce).

35. 136 CONG. REC. S16,845 (daily ed. Oct. 23, 1990)(statement of Sen. Lautenberg); 136 CONG. REC. H8537 (daily ed. Oct. 1, 1990)(statement of Rep. Markey); 136 CONG. REC. S10,124 (daily ed. July 19, 1990)(statement of Sen. Wirth); *id.* at S10,127 (statement of Sen. Inouye).

36. *In re* Policies and Rules Concerning Children's Television Programming, *Notice of Proposed Rule Making*, 5 FCC Rcd. 7199, 7201 (Nov. 8, 1990)[hereinafter *Notice of Proposed Rulemaking*].

37. *In re* Policies and Rules Concerning Children's Television Programming, *Report and Order*, 6 FCC Rcd. 2111, 2118 (Apr. 9, 1991)[hereinafter *April 1991 Order*].

38. Memorandum Opinion and Order, 6 FCC Rcd. 5093, 5099 (Aug. 1, 1991)[hereinafter *August 1991 Order*].

GoBots advertisement may not air until after the opening credits of the next program. With that modification, the FCC's definition became its final rule on the subject.

In so defining program-length commercials, the FCC misconstrued the issue before it. The FCC treated the problem solely as one concerning the relationship between children's programs and spot advertisements, boldly claiming that its definition directly addressed the "fundamental regulatory concern" of interweaving "program content and commercial matter."[39] The FCC refused to acknowledge that such interweaving is possible within a program itself, even without spot ads. "This request," the FCC revealingly wrote, "begs the basic dilemma: how to distinguish a program from a promotion."[40] The FCC mistakenly looked to determine whether a show is a program-length commercial based not on the program's content, but on the advertising environment which surrounds it.[41] By doing so, the FCC failed to address the regulatory concern which Congress had in mind.[42]

Not only did the FCC's rule on program-length commercials fail to accomplish what Congress intended, it essentially failed to accomplish anything at all. The FCC admitted that its definition "harmonizes with, and codifies to some degree, existing policies with respect to host-selling and adequate separation of commercial from program material."[43] In fact, the FCC's definition was quite similar to existing policies. The host-selling rule prohibits "program talent or other identifiable program characteristics" from delivering any sort of commercial pitches during a program.[44] That rule alone would prevent a broadcaster from airing spot ads featuring the *GoBots* characters during the *GoBots* program. Thus, the FCC's rule-making had little net practical effect. As one court recognized, "[a] regulation perfectly reasonable and appropriate in the face of a given problem may be

39. *April 1991 Order*, *supra* note 37, at 2118.

40. *Id.* at 2126 n.135.

41. *See* Joint Comments of Action for Children's Television, *et al.*, *supra* note 17, at 46; Comments of American Academy of Pediatrics, MM Dkt. No. 90-570, at 2 (Jan. 30, 1991); Comments of American Psychological Association, MM Dkt. No. 90-570, at 9-10 (Jan. 30, 1991); Comments of Donald McGannon Communication Research Ctr., MM Dkt. No. 90-570, at 26 (Jan. 30, 1991).

42. *See* Petition for Reconsideration of Nat'l Ass'n for Better Broad., *et al.*, MM Dkt. No. 90-570, at 2 (May 29, 1991).

43. *April 1991 Order*, *supra* note 37, at 2118.

44. *August 1991 Order*, *supra* note 38, at 5097.

highly capricious if that problem does not exist."[45] The FCC's rule was such a response to a nonexistent problem.

Inevitably, the FCC's rule-making proceeding on program-length commercials came to nothing, given the impossible requirements that the FCC, along with representatives of the toy, broadcasting, and advertising industries, demanded of alternative proposals. First, the FCC questioned any proposal that raised even a potential First Amendment issue.[46] Second, the FCC suggested that any alternative proposal establish a bright-line rule ensuring "certainty in application."[47] Finally, the FCC required that such a proposal be neither under nor overinclusive. Out of the endless variety of possible programs and marketing arrangements, the FCC demanded that an alternative proposal allow mechanical identification of those that deserve to be labeled program-length commercials. The FCC emphasized the product ties of such acclaimed programs as *Sesame Street* and *Wonderful World of Walt Disney*.[48] Industry representatives sounded the same chord, noting that *Sesame Street* generates millions of dollars of licensed product sales every year, and claiming that it would be difficult to adopt a policy that would vanquish *He-Man* without also razing *Sesame Street*.[49] In other words, the FCC's requirements could only be met by a perfect rule, but there is no perfect abstract rule for defining a program-length commercial.

45. Chicago v. Federal Power Comm'n, 458 F.2d 731, 742 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972); *see also* Home Box Office, Inc. v. FCC, 567 F.2d 9, 36 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977)(holding programming limits on pay cable television might be appropriate if problem is how cable can best "supplement" broadcasting, but capricious if question is really how cable can become broadcast television's equal).

46. *See August 1991 Order*, *supra* note 38, at 5099; *April 1991 Order*, *supra* note 37, at 2118; *see also* Reply Comments of American Association of Advertising Agencies, MM Dkt. No. 90-570, at 4-7 (Feb. 25, 1991); Comments of Radio-Television News Dirs. Ass'n, *et al.*, MM Dkt. No. 90-570, at 2-10 (Jan. 22, 1991).

47. *Notice of Proposed Rule Making*, *supra* note 36, at 7201.

48. *April 1991 Order*, *supra* note 37, at 2117; *Notice of Proposed Rule Making*, *supra* note 36, at 7201.

49. *See* Reply Comments of Motion Picture Ass'n of Am., MM Dkt. No. 90-570, at 2-6 (Feb. 20, 1991); Comments of Disney, MM Dkt. No. 90-570, at 17-18 (Jan. 30, 1991); Comments of Fisher Broad., MM Dkt. No. 90-570, at 11 (Jan. 30, 1991); Comments of HSN Communications, MM Dkt. No. 90-570, at 26 (Jan. 30, 1991); Comments of Joint Broadcast Parties, MM Dkt. No. 90-570, at 27 (Jan. 30, 1991); Comments of Nat'l Ass'n of Broadcasters, MM Dkt. No. 90-570, at 16 (Jan. 30, 1991); Comments of Toy Mfrs. of Am., MM Dkt. No. 90-570, at 5-6 (Jan. 30, 1991).

Further, the FCC claimed that it was not, in fact, relying on the difficulty of line-drawing in rejecting proposed alternative policies.[50]

Most misleadingly, the FCC claimed that the program-length commercial rule it adopted was consistent with FCC policy dating back to the early 1970's. To support that assertion, the FCC repeatedly quoted from its 1974 decision on program-length commercials aimed at adults: "The primary test is whether the purportedly non-commercial segment is so interwoven with, and in essence auxiliary to, the sponsor's advertising . . . that the entire program constitutes a single commercial promotion for the sponsor's products or services."[51]

The FCC, however, made careful use of an ellipsis in harking back to the 1974 policy. The original definition read: "The primary test is whether the purportedly non-commercial segment is so interwoven with, and in essence auxiliary to the sponsor's advertising *(if in fact there is any formal advertising)* to the point that the entire program constitutes a single commercial promotion for the sponsor's products or services."[52] Thus, the FCC's 1974 decision recognized that a program-length commercial might not have any spot advertisements, and that a program may be properly categorized as a program-length commercial because of the commercial content of the program itself.[53]

The FCC's pretense of consistency is further undermined by comparison of its definition of a program-length commercial with FCC decisions from the early 1970's. For example, the *Hot Wheels* program would not be a program-length commercial under the FCC's current rule because the program did not contain spot ads for *Hot Wheels* toys. By contrast, the FCC's current rule reaches some programs that were not defined as program-length commercials by the FCC in the 1970's. For example, in 1971, NBC requested an FCC advisory opinion regarding its plan to begin airing a "well-known and respected educational children's program which has been in existence for 15 or 20 years."[54] During every episode, NBC planned to run one or two

50. *August 1991 Order*, *supra* note 38, at 5099 (quoting Joint Reply of Action for Children's Television and Nat'l Ass'n for Better Broad., MM Dkt. No. 90-570, at 5 (July 10, 1991)).

51. *See April 1991 Order*, *supra* note 37, at 2127 n.144; *Notice of Proposed Rule Making*, *supra* note 36, at 7201.

52. *In re* Public Notice Concerning the Applicability of Comm'n Policies on Program-Length Commercials, 44 F.C.C.2d 985, 986 (1974)(emphasis added)(footnote omitted).

53. *Id.* at 986 n.5 ("Some program-length commercials contain no separate or formal advertisements as such.").

54. *In re* Request by NBC for Ruling on Commercial Announcements, 29 F.C.C.2d 67, 67 (1971).

spot ads for a product bearing the name and likeness of the program's principal performer. The FCC advised NBC that the program would not be considered a program-length commercial.[55] It would be under the FCC's current rule. Thus, compared to the approach taken in the 1970's, the FCC's new rule on program-length commercials goes further in some respects but less far in others.

The FCC's rule-making on program-length commercials ultimately failed to address the problem at issue. In the process of adopting its policy, the FCC disregarded the intentions of Congress and misused FCC precedents. It is therefore little wonder that Senators Inouye and Wirth chided FCC Chairman Alfred Sikes for failing to arrive at a "satisfactory solution" to the program-length commercial problem.[56]

V
Counterproposals

The FCC's program-length commercial rule pleased toy makers and broadcasters. It displeased interest groups that hoped the Children's Television Act would improve children's television. Although those groups suggested alternatives to the FCC's proposed rule, none of the suggestions won the FCC's favor.

Two groups, Action for Children's Television and the National Association for Better Broadcasting, suggested an alternative rule focusing on intent.[57] Did the producer and licensee aim to educate and entertain viewers, or was the primary purpose to promote products?[58] The two groups supplemented their intent test with a "two-year rule." If a program debuted within two years before or after the introduction of a related product, there would be a rebuttable presumption that it is a program-length commercial.[59] The groups recommended the two-

55. *Id.* at 68.

56. Letter of Sen. Daniel K. Inouye and Sen. Timothy E. Wirth to Chairman Alfred C. Sikes, at 2 (Mar. 27, 1991), *available in* MM Dkt. No. 90-570.

57. Joint Comments for Action for Children's Television, *et al.*, *supra* note 17, at 45; Comments of Nat'l Ass'n for Better Broad., MM Dkt. No. 90-570, at 33-34 (Jan. 31, 1995).

58. Joint Comments of Action for Children's Television, *et al.*, *supra* note 17, at 44; Comments of Nat'l Ass'n for Better Broad., *supra* note 57, at 30.

59. Joint Comments of Action for Children's Television, *et al.*, *supra* note 17, at 45; Comments of Nat'l Ass'n for Better Broad., *supra* note 57, at 34. When it became clear the FCC was not well-disposed to their suggestion, the two groups cut back their suggestion to a one-year rule. *See* Petition for Reconsideration of Action for Children's Television, MM Dkt. No. 90-570, at 6 (May 13, 1991); Petition for Reconsideration of Nat'l Ass'n for Better Broad., *supra* note 42, at 7.

year rule because it presented a bright line—an administrable way of discerning intent. It would ensnare what the groups believed to be the most flagrant offenders: programs introduced simultaneously with related toys.

The FCC and broadcast industry commenters balked at the proposed intent test, describing it as too vague in application and as leading to inconsistent results.[60] In many cases, the timing of the products and program's respective debuts are not reliable indicators of the programs' merit.[61] For example, the Children's Television Workshop, creator of acclaimed programs like *Sesame Street*, pointed out that the two-year rule would inhibit it from introducing new shows with accompanying toys, games, magazines, or computer software.[62] By contrast, the two-year rule would not touch programs like *Hot Wheels* and *G.I. Joe: A Real American Hero* based on products already existing for more than two years.

The Children's Television Workshop and the Donald McGannon Communication Research Center offered a second alternative definition of a program-length commercial. Like the FCC's rule, their approach focused on the placement of spot advertisements. Under the McGannon proposal, a program is a program-length commercial if related "products appear in paid commercial advertising presented in the context of any children's programs broadcast by the same licensee."[63] In other words, a station which airs *GoBots* could not run ads for *GoBots* toys during any of its children's programming. The Children's Television Workshop put forward essentially the same proposal, although it suggested that perhaps the *GoBots* ads might be blocked out of only a portion of the station's children's programming, such as only during programs aimed at preschoolers, during certain

60. *See August 1991 Order*, *supra* note 38, at 5098; Opposition of Disney, MM Dkt. No. 90-570, at ii (June 26, 1991); Opposition of Nat'l Ass'n of Broadcasters, MM Dkt. No. 90-570, at 4 (June 26, 1991); Reply Comments of Capital Cities/ABC, MM Dkt. No. 90-570, at 14 (Feb. 20, 1991).

61. *See* Informal Reply Comments of American Family Ass'n Law Ctr., MM Dkt. No. 90-570, at 8 (Feb. 26, 1991); *see also, e.g.*, Opposition of Association of Nat'l Advertisers, MM Dkt. No. 90-570, at 3 (June 26, 1991); Opposition of Disney, *supra* note 60, at 3-4; Reply Comments of Capital Cities/ABC, *supra* note 60, at 15; Reply Comments of Motion Picture Ass'n of Am., *supra* note 49, at 4-5; Reply Comments of NBC, MM Dkt. No. 90-570, at 14, 18-19 (Feb. 20, 1991); Comments of Capital Cities, MM Dkt. No. 90-570, at 17 (Jan. 30, 1991); Comments of CBS, MM Dkt. No. 90-570, at 9 (Jan. 30, 1991); Comments of Disney, *supra* note 49, at 20.

62. Reply Comments of Children's Television Workshop, MM Dkt. No. 90-570, at 11 (Feb. 20, 1991).

63. Comments of Donald McGannon Communication Research Ctr., *supra* note 41, at 20.

prime children's viewing hours, or during programs which the licensee claimed as informative or educational for purposes of license renewal.[64]

The Children's Television Workshop and Donald McGannon Center proposals suffer several defects. First, like the FCC's rule, the proposals misstate the nature of the program-length commercial problem. They address only the placement of spot advertisements and not the commercial nature of the program itself. Second, the proposals would not necessarily accomplish their limited aims. If a child changes the television channel, he could go straight from the *Super Mario Brothers* show to a *Super Mario Brothers* commercial.[65] The attempted separation would be frustrated. Finally, the proposals would not touch the barter, profit-sharing, and similar arrangements used in connection with program-length commercials. Toy manufacturers can and do produce products related to more than one show. A toy company could offer the *Rainbow Brite* program and *Pound Puppies* advertisements to one broadcaster, and the *Pound Puppies* program and *Rainbow Brite* ads to another. The proposals therefore would merely modify, rather than deter, such transactions. In sum, none of the proposed alternatives to the FCC's definition of a program-length commercial was flexible enough to effectively address the problem.

VI
The Continuing Need for an Effective Policy

The FCC's failure to adopt a stronger rule on program-length commercials perpetuated disturbing patterns of commercialization of children's television programming. New programs with substantial product ties continued to appear—such as *Teenage Mutant Ninja Turtles* and *Mighty Morphin Power Rangers*—and to generate billions of dollars in sales.[66] The merchandising and licensing aspects of new programs remain a dominant concern in their creation. Toy manufacturers provide creative input and financial underwriting of programming. Further, the business practices developed during the 1980's—such as producers and broadcasters enjoying a percentage of

64. Comment of Children's Television Workshop, MM Dkt. No. 90-570, at 21-22 (Jan. 30, 1991).

65. Reply Comments of NBC, *supra* note 61, at 14-15.

66. Alan Bunce, *Old Foes Rekindle Battle Over Children's Television*, CHRISTIAN SCIENCE MONITOR, June 6, 1995, at 10; *Children's Television: Hearing Before the Subcomm. on Telecomm. and Finance of the House of Representatives Comm. on Energy and Commerce*, 103d Cong., 12-14 (1994)(statement of Kathryn C. Montgomery, President, Center for Media Education).

product revenue, or programs being offered to stations on a "barter" basis in return for advertising time—decrease opportunities for educational and informational programming. Stations have little incentive to pay for educational programs when they can receive heavily merchandised programs for free.[67]

The need for revision of the FCC's policy on program-length commercials is further demonstrated by the agreement reached in 1996 to require a minimum of three hours of educational children's programming per week. That accord followed years of sharp disagreement between the television industry and public interest advocates,[68] as well as a bitter division within the FCC itself,[69] over how to implement the educational and informal programming segment of the Children's Television Act. The FCC's commissioners remained deadlocked on the issue for months. In May 1996, Commissioner James Quello, the staunchest opponent of the three-hour rule, finally budged. Quello announced that he would go along with a rule requiring broadcasters to meet an "industry norm" with respect to educational programming for children.[70] Likewise, representatives of the various industries interested in the matter grew increasingly willing to compromise as they realized a Clinton re-election in 1996 would mean the appointment of two new FCC commissioners and possibly the imposition of a rule far stricter than the three-hour proposal.[71] After Quello rejected the initial draft of a compromise rule in mid-

67. Patricia Aufderheide & Kathryn Montgomery, *The Impact of the Children's Television Act on the Broadcast Market, appended to* Statement of Kathryn C. Montgomery, *supra* note 66, at 30-32.

68. The FCC issued a notice proposing the three-hour per week rule in April 1995. *See In re* Policies and Rules Concerning Children's Television Programming and Revision of Programming Policies for Television Broadcast Stations, *Notice of Proposed Rulemaking*, 10 FCC Rcd. 6308, 6311 (1995)[hereinafter *Notice of Proposed Rulemaking*]. FCC Chairman Reed Hundt was the driving force behind the proposal, which children's television advocates uniformly applauded. By contrast, broadcasters adamantly opposed any "qualification" of their obligations with respect to children's educational programming under the 1990 Act.

69. Broadcasters found vocal allies at the FCC in Commissioners James Quello and Andrew Barrett, who believed that a programming quota like the three-hour proposal violated broadcasters' freedom of expression. *See* Edmund L. Andrews, *A Bitter Feud Fouls Lines at the FCC*, N.Y. TIMES, Nov. 20 1995, at D1. Angered by Hundt's terming their opposition to the proposal a "campaign against kids," Barrett responded by publicly denouncing Hundt as a "gutless, leaderless liar." *Id.*

70. *See* Paul Farhi, *FCC's Quello Softens Opposition to Children's Educational TV Rule*, WASH. POST, May 29, 1996, at D1; Lawrie Mifflin, *A Three-Hour Rule*, N.Y. TIMES, May 29, 1996, at C16.

71. *See* Lawrie Mifflin, *TV Broadcasters Agree to 3 Hours of Children's Educational Programs a Week*, N.Y. TIMES, July 30, 1996, at A8.

July because he found it "overly intrusive" on broadcasters' discretion, the White House scheduled the late July summit meeting in an effort to break the impasse.[72]

The National Association of Broadcasters represented the industry interests at the bargaining table. Although the broadcasters conceded the three-hour minimum as a general rule, they won several points that made that rule more flexible than FCC Chairman Reed Hundt and the children's television watchdog organizations preferred. Most important, the three-hour rule became a "processing guideline" or "safe harbor," rather than an absolute requirement, meaning that a broadcaster that does not air three hours of educational programming weekly may still pass muster through efforts like occasional specials, short-form programming, and public service announcements.[73] In addition, the compromise granted each broadcaster the option of paying another station in its market (such as a public broadcasting station) to air educational programming on its behalf.[74] The FCC was not a party to the White House accord, but it voted promptly and unanimously to accept and formalize the compromise.[75]

Advertisers were well-represented at the White House summit meeting that produced the new three-hour rule.[76] They saw it as creating new, high-minded opportunities to market products to children, and opening the door to even greater advertiser participation in the creation of children's programs.[77] The American Center for

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72. *Id.*

73. *See id.*; *see also Notice of Proposed Rulemaking*, *supra* note 68, at 6311, 6337-39 (describing "processing guidelines" versus "programming standard" distinction).

74. *See* Elizabeth Jensen & Albert R. Karr, *Summit on Kids' TV Yields Compromise*, WALL ST. J., July 30, 1996, at B14. In addition, although the broadcasters unsuccessfully opposed a requirement that educational programs counted toward the three-hour standard air between 7 a.m. and 10 p.m., they won the right to preempt their educational fare for special events or programs. *See* Mifflin, *supra* note 71, at A8.

75. *See In re* Policies and Rules Concerning Children's Television Programming and Revision of Programming Policies for Television Broadcast Stations, *Report and Order*, 11 FCC Rcd. 10, 660 (Aug. 8, 1996); *FCC Sets Regulation for Minimum Level of Educational TV*, WALL ST. J., Aug. 9, 1996, at B3; Christopher Stern, *Crusade Wears 'Em Down*, VARIETY, Aug. 12-18, 1996, at 19.

76. Sally G. Beatty, *White House Pact on TV for Kids May Prove a Marketing Bonanza*, WALL ST. J., Aug. 2, 1996, at B10.

77. Advertisers' expectations have begun to be fulfilled by the introduction of programs like *PE TV*, a physical fitness program for children and teens which debut in the fall of 1996. *PE TV* aims to qualify as "FCC-friendly," while providing a showcase for the shoes and sportswear of its creator, Reebok International. *See* Matthew Grimm, *And Now a Show from Our Sponsor*, BRANDWEEK, July 1, 1996, at 20; Zack Martin, *Intersport Shops Kids Fitness Show*, ELECTRONIC MEDIA, Jan. 8, 1996, at 6.

Children's Television, an industry-sponsored research organization, promptly suggested amending the Children's Television Act to permit an extra minute of spot advertisement time during educational programs.[78] White House officials welcomed advertisers' interest, noting that "[t]he one period in American broadcast television in which the advertisers played a larger role in programming"—the 1950's—"most people remember fondly."[79] The remark overlooks a more recent period—the 1980's—when advertisers played their greatest role in children's television and a glut of program-length commercials filled the airways. In short, the need continues for a more effective policy to check the commercialization of children's programming.[80]

VII
How the FCC Should Regulate Program-Length Commercials

Although the FCC's rule-making proceeding over program-length commercials was hotly disputed, there was surprisingly little disagreement expressed about what sort of programs were in issue. Public interest advocates and toy, advertising, and broadcast industry representatives alike recognized what sort of programs were essentially 30-minute commercials. Yet, the FCC and industry spokespeople repeatedly contended that any definition of a program-length commercial more far-reaching than the FCC's proposal would threaten *Sesame Street* or some other valuable program. As one of the parties indicated, "While the question [of *Sesame Street*] may have some merit at a hypothetical level in helping to determine the scope and applicability of the program-length commercial restriction, it can hardly be taken seriously."[81] While everyone knew what kind of children's programs were essentially advertisements, no one could produce a single, abstract definition that perfectly separated them

78. *See* Grimm, *supra* note 77, at 20.

79. *Id.* (quoting senior aide Bill Curry).

80. The significance of rules governing commercialization of children's television is heightened to the extent the rules serve as models for regulation of advertising directed at children through new media technologies. *See, e.g.*, Lawrie Mifflin, *Advertisers Chase Young People in Cyberspace*, N.Y. TIMES, Mar. 29, 1996, at A16.

81. Comments of Donald McGannon Communication Research Ctr., *supra* note 41, at 13.

from other programs. To paraphrase Justice Stewart, we cannot define a program-length commercial, but we know it when we see it.[82]

Because of the difficulty of formulating an ideal, abstract definition of a program-length commercial, the FCC should deal with excessive commerciality in children's programming through its primary means of enforcing the public interest obligations of broadcasters: reviewing the licensee's performance at renewal time.[83] Under such an approach, a broadcaster would have full discretion in the first instance to air what it feels will entertain and serve its audience. At the second stage—renewal—the FCC would have discretion to evaluate the licensee's overall handling of commerciality in its children's programming. The FCC would achieve its stated goal of affording ample discretion to broadcasters.[84] As the broadcast industry demanded, the FCC would "respect[] the rights of broadcasters to make good faith judgments."[85] The FCC's analysis could take account of all relevant factors, including the licensee's and program producers' intent, the placement and quantity of spot advertisements, the use of barter or profit-sharing arrangements, and the nature of the programs aired. The primary question, though, must be whether the station is "serving the needs and interests of children rather than exploiting them."[86] As the Association of National Advertisers recognized, "[t]o protect the public and in particular children from so-called 'program-length' commercials requires a careful, objective analysis of each specific program in question."[87] Such an approach to the program-length commercial problem would "address the root concerns of children's TV advocates—improving the programming watched by the children of our Nation," rather than "only nibbl[ing] around the edges."[88]

A flexible approach to this problem is the only kind that can be effective. Abstract rules simply cannot account for the infinite adaptability and ingenuity of the toy, television, and advertising industries. In the 1970's, the FCC approached program-length

82. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964)(Stewart, J., concurring)("I shall not attempt further to define [hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.").

83. 47 U.S.C. § 309 (1994).

84. *April 1991 Order*, *supra* note 37, at 2114-15.

85. Reply Comments of Capital Cities/ABC, *supra* note 60, at 12.

86. Comment of Capital Cities, *supra* note 61, at 18.

87. Opposition of Ass'n of Nat'l Advertisers, *supra* note 61, at 4.

88. H.R. Rep. No. 101-385, 101st Cong., 1st Sess. 22 (1989).

commercials this way. It sought "flexibility and an opportunity for adjustment which is not possible with per se rules."[89] In *Hot Wheels* and similar situations, the Commission considered the entire pattern of facts, rather than relying on any single piece of evidence.[90] Even during the deregulatory 1980's, the FCC emphasized that this sort of flexibility was essential. In evaluating the profit-sharing arrangement behind *Thunder Cats*, the FCC explained that it was not willing to either approve or condemn a particular practice as a general matter.[91] During the rule-making proceeding on program-length commercials, industry representatives also suggested that a flexible scheme was necessary. The Motion Picture Association of America recommended that the FCC consider the "totality of circumstances" in evaluating programming.[92] The National Association of Broadcasters similarly warned that "hard and fast assumptions" were inappropriate.[93]

As broadcasters pointed out during the program-length commercial proceeding, the FCC has no special expertise in answering questions about what is best for children.[94] Accordingly, the FCC should turn to experts for assistance in making its determinations. A panel with two sorts of experts, those with knowledge of children and those with knowledge of television, should be created to share this decision-making responsibility. FCC Commissioner Dennis suggested something similar in the early stages of the program-length commercial proceeding.[95] She felt that advisory boards on advertising could help to "elevate the consciousness of broadcasters."[96] Congress created a similar panel in the National Endowment for Children's Educational Television section of the Children's Television Act. This Advisory Council consults in establishing the criteria for grants and in selecting recipients, and consists of ten members serving without compensation for two year terms with a maximum of three

89. *Children's Television Report and Policy Statement*, *supra* note 4, at 18.

90. *See* Comments of Donald McGannon Communication Research Ctr., *supra* note 41, at 17.

91. *See Memorandum Opinion and Order*, *supra* note 18, at 714.

92. Comments of Motion Picture Ass'n of Am., MM Dkt. No. 90-570, at 4 n.5 (Jan. 30, 1991).

93. Comments of Nat'l Ass'n of Broadcasters, *supra* note 49, at 16..

94. Comments of Radio-Television News Directors Ass'n, *et al.*, *supra* note 46, at 6.

95. *In re* Commercial Television Stations, *Further Notice of Proposed Rule Making, Notice of Inquiry*, 2 FCC Rcd. 6822, 6829 (1987)(separate statement of Commissioner Patricia Diaz Dennis).

96. *Id.*

consecutive terms.[97] Each possesses expertise in "education, psychology, child development, or television programming, or related disciplines."[98]

A flexible approach to regulation of the commercial content of children's television programming would also mirror the approach taken by Congress and the FCC with respect to the educational and informational requirements of the Children's Television Act. Congress did not give the FCC specific guidelines as to how to evaluate a broadcaster's compliance with this requirement. The Act gave the FCC "broad discretion" in reviewing licensees' performance,[99] and gave the licensees the "greatest possible flexibility" in deciding how to fulfill their obligation.[100] The FCC chose to maximize flexibility in its rule-making as well. It left initial programming decisions entirely to licensees and defined educational and informational television as including any programming which "furthers the positive development of children 16 years of age and under in any respect."[101]

Enforcement of the Act's educational and informational programming requirements has generated significant controversy, but has demonstrated that flexible requirements are effective if taken seriously by the FCC. In response to the Act, many broadcasters initially claimed credit for airing programs like *Leave It to Beaver*, *Hard Copy*, and *The Flinstones*.[102] The FCC's early study of license renewals found little progress in the number of hours and time slots devoted to children's programming.[103] Determined to enhance enforcement, the FCC announced it had delayed license renewals of seven stations and requested additional information on their compliance with the Act's requirements.[104] The market responded well

97. 47 U.S.C. § 394(b)(1)(B), (c)(1) (1994).

98. 47 U.S.C. § 394(e).

99. 134 CONG. REC. H3984 (daily ed. June 7, 1988)(statement of Rep. Markey).

100. 136 CONG. REC. S10,121 (daily ed. July 19, 1990)(statement of Sen. Inouye); *see also id.* at S10,127 (statement of Sen. Wirth).

101. 47 C.F.R. § 73.671 (1995).

102. Richard Zoglin, *If Not the Jetsons, What? Educational Shows Will Work Only if Everyone Stops Treating Them Like Spinach*, TIME, Mar. 22, 1993, at 64.

103. *In re* Policies and Rules Concerning Children's Television Programming, *Notice of Inquiry*, 58 Fed. Reg. 14,367-69 (1993).

104. *See* Doug Halonen, *FCC Stalls Renewal of 7 Stations*, ELECTRONIC MEDIA, Feb. 1, 1993, at 3. The FCC also handed down a significant number of fines and other sanctions on stations exceeding the Act's commercial time limits or violating the FCC's program-length commercial definition. *See, e.g.*, Notice of Apparent Liability, Clear Channel Television, Inc., Licensee, KTTU, 10 FCC Rcd. 3773 (1995)(fined $125,000 and renewal period limited to two years); Northstar Television of Erie, Inc., Licensee, WSEE, 10 FCC Rcd. 3779 (1995)(fined $100,000 and

to the FCC's demonstration of commitment to the Act. Broadcasters demanded and television producers created new "FCC-friendly" programs, like *Nick News*, *Beakman's World*, and *Bill Nye the Science Guy*.[105]

In sum, with a sufficiently flexible approach and expert assistance, the FCC is capable of adequately policing the program-length commercial problem and reducing the level of commercialization of children's television programming.

VIII
Broadcast and Commercial Speech Under the First Amendment

The FCC and its supporters alleged that the FCC's resolution of the program-length commercial question was as far as the government could go without violating rights guaranteed by the First Amendment. When contemplating bureaucratic regulation of any speech, attention to constitutional boundaries is obviously important. However, the courts have recognized that certain types of speech merit less First Amendment protection than others. Advertising through children's television lies at the intersection of two of these less sacred areas of expression: commercial speech and broadcast speech.[106]

As recently as twenty years ago, the First Amendment did not apply at all to purely commercial speech. In 1976, the Supreme Court

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renewal period limited to two years); *see generally* Diane A. Hayes, *The Children's Hour Revisited: The Children's Television Act of 1990*, 46 FED. COMM. L.J. 293 (1994).

105. Bunce, *supra* note 66, at 8; Richard Mahler, *Fear is a Great Motivator: With Government Pressure On, Stations Scramble to Come up with Educational Shows that Both Kids and Advertisers Will Buy*, L.A. TIMES, May 30, 1993, at 7; Aufderheide & Montgomery, *supra* note 67, *appended to* statement of Kathryn C. Montgomery, *supra* note 66 (study found "threats of renewed enforcement of the law had a positive effect on the market, and thus regulation can be a countervailing force to the powerful economic and institutional forces that govern the business").

106. Various courts have upheld regulations which restrict or even prohibit commercial, broadcast speech against First Amendment attacks. *See* Posadas de P.R. Ass'n v. Tourism Co. of P.R., 478 U.S. 328 (1986)(sustaining Puerto Rico's ban on advertising of casino gambling aimed at residents of Puerto Rico); Dunagin v. City of Oxford, 718 F.2d 738 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984)(sustaining Mississippi's ban on liquor advertising by in-state media); Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490 (10th Cir. 1983)(sustaining Oklahoma prohibition of broadcast ads for alcohol), *rev'd on other grounds sub nom.* Capital Cities Cable v. Crisp, 467 U.S. 691 (1984); Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969)(sustaining FCC order requiring stations carrying cigarette ads to devote significant time to anti-smoking viewpoint); Capital Broad. Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1991), *aff'd without opinion*, 405 U.S. 1000 (1972)(sustaining federal statute prohibiting cigarette advertising on broadcast media).

finally held that the Constitution did limit government regulation of commercial speech.[107] However, commercial speech is still at the bottom of the First Amendment ladder. Even content-based restrictions may be permissible, given the "greater potential for deception or confusion" inherent in commercial expression.[108] The Supreme Court has emphasized that it is essential not to allow commercial speech to be equated with more protected forms. First Amendment law may be diluted if it is developed and applied without distinction in cases involving mere commercial speech.[109]

The distinction between "speech proposing a commercial transaction"[110] and other speech is to be made on a "common sense" basis.[111] Programs like *Hot Wheels*, *He-Man*, or *Mighty Morphin Power Rangers* fall within the Court's broad definition of commercial expression. Such programs, however, are not purely commercial speech. That is precisely the problem with a program-length commercial: it combines commercial with noncommercial content. Pure commercial speech in essence says merely "I will sell you the X [product] at the Y price."[112] The Court has said that if the purely commercial speech is "inextricably intertwined" with normal speech, then the whole message will be protected by the fullest application of the First Amendment.[113] However, the intertwining of the two must be truly "inextricable." For example, the Court upheld a university regulation which prohibited product demonstrations in dormitories, even though the presentations were a hybrid of commercial and other speech.[114] There was no reason why the Tupperware salespeople could not separate their sales pitch from their home economics discourse. Similarly, the television industry is capable of disentwining the

107. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976)(striking down Virginia ban on ads listing prescription drug prices).

108. Bolger v. Young Drug Prod., Inc., 463 U.S. 61, 65 (1983)(striking down statute against unsolicited mailing of contraceptive ads).

109. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456-66 (1978)(sustaining punishment of attorney for personally soliciting accident victims).

110. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 562 (1980)(striking down New York's restriction on advertising by public utility).

111. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985)(striking down punishment of lawyer for advertising).

112. *Virginia State Bd. of Pharmacy*, 425 U.S. at 760-61.

113. Riley v. National Fed'n of the Blind, 487 U.S. 781, 796 (1982)(striking down law requiring charitable solicitors to disclose what percentage of donations represents solicitor's commission).

114. Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 474 (1989).

commercial content from the other messages presented in children's programming.

The Supreme Court fixed upon a standard test for commercial speech in *Central Hudson Gas & Electric v. Public Service Commission of New York.*[115] The regulation must (1) serve a substantial government interest, (2) directly advance that interest, and (3) be no more excessive than is required to serve that interest.[116] The test does not apply and the First Amendment has no application, however, if the commercial expression is deceptive or unlawful.[117] The Supreme Court has recognized that whether advertising is deceptive may depend on the audience. In *Bates v. State Bar of Arizona*, the Court found advertising by attorneys to be within the realm of the First Amendment.[118] At the same time, the Court noted that because of the public's unfamiliarity with sophisticated legal matters, "misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate" in the context of legal advertising.[119]

Similarly, practices that might be deemed unimportant in adult television may be quite inappropriate for children's programming. In 1978, the staff of the Federal Trade Commission ("FTC") concluded that advertising directed at children under the age of six may be unfair and deceptive within the meaning of section 5 of the Federal Trade Commission Act.[120] The FTC's staff recommended a ban on such ads.[121] The FTC considered such a ban, but dropped the matter because "as a practical matter, [it] cannot be implemented."[122] Thus, while child-oriented television advertising does not currently rise to the legal definition of deceptive advertising, it is a questionable practice. As the Supreme Court explained, the rationale for protecting advertising under the First Amendment is society's interest in information that allows consumers to make "intelligent and well-

115. 447 U.S. 557 (1980).

116. *Id.* at 564.

117. *Id.* at 563-64.

118. 433 U.S. 350 (1977).

119. *Id.* at 383.

120. *See Termination of Rulemaking Proceeding, supra* note 4.

121. *Proposed Termination of Proceeding and Request for Comment*, 46 Fed. Reg. 21,019, 21,020 (1981).

122. *Id.*

informed" decisions.[123] As a result, the government has far greater room to regulate advertising that is "more likely to deceive the public than to inform it."[124]

The Constitution also tolerates far greater restriction of the right to broadcast than to communicate through other means.[125] Broadcast frequencies are a scarce commodity. More speakers would like to have channels than there are channels available.[126] While it is true that all resources are scarce, including newsprint and soapboxes, the federal government does not control allocation of those resources. However, the government continues to run a monopoly in the distribution of broadcast licenses. The Supreme Court and Congress remain committed to the scarcity argument.[127] Senator Inouye expressed a point frequently made in the House and Senate about the Children's Television Act when he said that "broadcast licenses are not like other commodities: they are given exclusive use of a limited public resource and they are not subject to full competition."[128]

The scarcity rationale has come under some attack,[129] but the critiques are especially inapposite in regard to children's television.[130] While a free market of ideas is the ideal for adults, the market alone cannot sufficiently regulate children's television. While adults might tune out overcommercialized programs, children do not have the

123. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765, 771 n.24 (1976).

124. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980).

125. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388 (1969)(upholding fairness doctrine).

126. *See* FCC v. National Citizens Comm. for Broad., 436 U.S. 775, 794 (1978)(sustaining rules on newspaper and television cross-ownership).

127. Metro Broad. v. FCC, 497 U.S. 547, 566-67 (1990)(sustaining enhancement for minority ownership in new licensing and distress sales); FCC v. League of Women Voters, 468 U.S. 364, 377 (1984)(striking down prohibition of editorializing by federally supported public broadcasters).

128. 134 CONG. REC. S16,857 (daily ed. Oct. 19, 1988)(statement of Sen. Inouye).

129. *See, e.g.*, Telecommunications Research & Action Ctr. v. FCC, 801 F.2d 501, 507-08 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987)(sustaining FCC's decision not to apply requirements demanded of broadcasters to teletext); *In re* Complaint of Syracuse Peace Council, 2 FCC Rcd. 5043, 5048-52 (Aug. 4, 1987), *aff'd sub nom.* Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990)(sustaining FCC's decision to abandon fairness doctrine).

130. Even under a "unitary" approach to the First Amendment giving equal treatment to broadcasters and, for example, newspapers, an effective FCC policy on program-length commercials would not violate the First Amendment because of the commercial nature of the regulated speech. *See* Ronald J. Krotoszynski, Jr., *Into the Woods: Broadcasters, Bureaucrats, and Children's Television*, 45 DUKE L.J. 1193, 1201-36 (1996).

cognitive ability to perform the same limiting function.[131] According to one Congressman, "Relying on a marketplace of children to determine the course of children's programming is about as wise as allowing a marketplace of children to determine their courses in school."[132] Increases in the number of media outlets also does not eliminate the problem.[133] Young children with limited or no ability to read cannot turn to non-television alternatives available to adults, such as newspapers or the Internet. Moreover, broadcast television is free, unlike alternative media such as cable television and videocassettes. Children in lower income families watch more than fifty percent more television than those in middle and upper income households.[134] As one court put it, the FCC must regulate broadcasting because the public cannot do so, even "through a million stifled yawns."[135] Young audiences are even less capable of such regulation than adults, even through a million glassy-eyed stares.

Broadcasters are therefore required to serve the public interest,[136] to act as "proxies for the entire community"[137] and not as mere "traffic officer[s]."[138] The Supreme Court has specifically emphasized the FCC's power to regulate broadcasting in the interests of children. In upholding the FCC's power to restrict indecent broadcasts, the Court noted that broadcasting deserves low First Amendment protection because of its unique pervasiveness and the fact that it is "uniquely accessible to children, even those too young to read."[139]

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131. In their consideration of the 1988 and 1990 acts, members of Congress repeatedly emphasized their belief that market forces alone are inadequate here. *See, e.g.*, H.R. Rep. No. 101-385, *supra* note 88, at 6; 136 CONG. REC. H5247 (daily ed. July 23, 1990)(statement of Rep. Walgren); 136 CONG. REC. S10,122 (daily ed. July 19, 1990)(statement of Sen. Hollings); 134 CONG. REC. S16,858 (daily ed. Oct. 19, 1988)(statement of Sen. Wirth)("If children were sophisticated enough to recognize the commercial hucksterism that underlies such programs, they would quickly change the channel or shut the television set off.").

132. 133 CONG. REC. E3585 (daily ed. Sept. 16, 1987)(statement of Rep. Bruce).

133. *See Syracuse Peace Council*, 2 FCC Rcd. at 5044.

134. Michael J. Palumbo, *Broadcast Regulation, Has the Marketplace Failed the Children: The Children's Television Act of 1990*, 15 SETON HALL LEGIS. J. 345, 375 (1991).

135. National Ass'n of Indep. Television Producers and Distribs. v. FCC, 516 F.2d 526, 536 (2d Cir. 1975)(upholding prime time access rule).

136. *See* 47 U.S.C. § 303 (1994).

137. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 394 (1969).

138. NBC v. United States, 319 U.S. 190, 215 (1943)(sustaining chain broadcasting regulations).

139. FCC v. Pacifica Found., 438 U.S. 726, 749-50 (1978); *see also* Banzhaf v. FCC, 405 F. 2d 1082, 1100-01 (D.C. Cir. 1968)("It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word.").

The First Amendment test for regulation of broadcast speech is essentially the same as that for commercial speech. The restriction must be narrowly tailored to serve a substantial government interest.[140] The government's interest in protecting children is clearly a substantial one.[141] Government regulation of speech may be "paternalistic,"[142] but paternalism seems especially fitting in regard to children. Children are not, as the American Association of Advertising Agencies described them, "merely young consumers."[143] According to the Supreme Court, "[i]t is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."[144] During debate on the Children's Television Act, Congress made clear that it regarded children's needs as a substantial interest.[145] The legislators agreed that broadcasters who air program-length commercials for children contravene the public interest obligations they assume in return for a license "to graze on the public airwaves."[146] As Senator Inouye stated, "If the licensee cannot be required to render public service—to children as in this legislation—because that interferes with the editorial discretion of the licensee, that means that the entire [Communications] act is a farce."[147] The Children's Television Act's statement of findings reiterated that broadcasters' public interest obligations require them

140. *See* FCC v. League of Women Voters, 468 U.S. 364, 380 (1984).

141. Far less weighty interests have been deemed to be substantial for purposes of broadcast speech regulation. *See, e.g.*, Guschke v. City of Oklahoma City, 763 F. 2d 379, 385 (10th Cir. 1985)(upholding height zoning regulations against owner of amateur radio tower based on aesthetic interests); Johnson v. City of Pleasanton, 781 F. Supp. 632, 637 (N.D. Cal. 1991)(upholding city restriction on home satellite dishes based on neighborhood aesthetic interests).

142. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976).

143. Reply Comments of Am. Ass'n of Advertising Agencies, *supra* note 46, at 12.

144. Prince v. Commonwealth of Mass., 321 U.S. 158, 165 (1944)(rejecting free exercise challenge to child labor law by Jehovah's Witness parent convicted for allowing child to sell church magazines).

145. 136 CONG. REC. S9662 (daily ed. July 12, 1990)(statement of Sen. Burns)("Children are our nation's most precious resource.").

146. 136 CONG. REC. S16,340 (daily ed. Oct. 22, 1990)(statement of Sen. Wirth); *see also, e.g.*, 136 CONG. REC. H8540 (daily ed. Oct. 1, 1990)(statement of Rep. Cooper); 136 CONG. REC. H5246 (daily ed. July 23, 1990)(statement of Rep. Rinaldo); *id.* at H5247 (statement of Rep. Lent); *id.* at H5248 (statement of Rep. Bryant); 136 CONG. REC. S10,274 (daily ed. July 23, 1990)(statement of Sen. Burns); *id.* at S10,125 (daily ed. July 19, 1990)(statement of Sen. Lautenberg).

147. 136 CONG. REC. S10,122 (daily ed. July 19, 1990)(statement of Sen. Inouye).

to follow advertising practices which take into account the unique vulnerability of the child audience.[148]

Given that the welfare of American children is a substantial interest, the question becomes whether a flexible approach to regulating program-length commercials—as illustrated by *Hot Wheels*—is a constitutionally permissible means of serving that interest.[149] The courts have endorsed that sort of regulatory scheme. For example, in the 1980's, the Court of Appeals for the D.C. Circuit declined to find that the FCC's deregulation of children's television was an abuse of discretion. While the FCC had chosen to defer to broadcasters' judgments, the court believed that the FCC would continue to review the adequacy of a licensee's commitment to children at renewal and the court approved that approach.[150] Similarly, the same court earlier explained that the best way for the FCC to implement broadcast speech regulation is to impose general affirmative duties. As a result: "The licensee has broad discretion in giving specific content to these duties, and on application for renewal of a license it is understood the Commission will focus on his overall performance and good faith rather than on specific errors it may find him to have made."[151] In sum, when the government must examine program content, a flexible approach involving license renewal review minimizes the First Amendment dangers.

The Supreme Court expressed the same idea in *CBS v. Democratic National Committee*.[152] The Court held that the public interest obligations of broadcasters do not require them to accept editorial advertisements. A plurality of the Court explained that a broadcaster should be afforded the "initial and primary responsibility" as to how it will operate and meet its responsibilities to the public. At the same time, the FCC functions as the "overseer" or "ultimate arbiter and guardian of the public's interest."[153] In other words, deference to the broadcaster's judgment is backed up by the threat of a lost license.

Renewal review of the licensee's overall handling of commercialization and children's television also avoids the difficulties

148. Pub. L. No. 101-437, § 101(4)-(5), 104 Stat. 996 (1990).

149. Action for Children's Television v. FCC, 756 F.2d 899 (D.C. Cir. 1985).

150. *Id.* at 902.

151. Banzhaf v. FCC, 405 F.2d 1082, 1095 (D.C. Cir. 1968).

152. 412 U.S. 94 (1973).

153. *Id.* at 117-18.

presented by evaluating programs in advance to determine whether or not they are program-length commercials. Section 326 of the Communications Act specifically forbids censorship by the FCC.[154] The Supreme Court in *Pacifica Foundation* warned that the FCC may not exercise prior restraint by editing inappropriate material before it reaches the airwaves. However, the FCC is empowered to "review the content of completed broadcasts in the performance of its regulatory duties."[155]

Many of the industry representatives who participated in the FCC's rule-making proceeding on program-length commercials voiced fear that a flexible regulatory approach would force endless, unproductive litigation of every new show with product tie-ins.[156] That danger would be avoided if the FCC waited until each licensee came up for renewal. In fact, the FCC would never have to condemn any one program. If a producer created an extremely commercial program, the FCC would not have to be a Draconian censor and keep the program off the air. The producer's multi-million dollar investment in the program would not be entirely wasted. Some broadcasters might choose to air the program. While it would weigh against them at renewal time, they might offset the program with other extensive efforts to serve their young audience. The frightening image painted by the toy and television industry—of an *in terrorem* FCC standing ready to "swoop down on any broadcaster" to challenge any program at any time—would not exist.[157] Yet, the FCC would still be able to do an effective job of deterring excessive commercialization. The FCC would be able to act powerfully without wielding a "regulatory meat ax."[158]

Thus, the FCC's oversight of commercialization in children's television through license renewal review would meet the Supreme Court's tests for restricting commercial and broadcast speech under the First Amendment. Such regulation by the FCC would help solve

154. 47 U.S.C. § 326 (1994). The Supreme Court has repeatedly warned against prior restraint in a variety of First Amendment areas. *E.g.*, Hague v. CIO, 307 U.S. 496 (1939)(invalidating Jersey City requirement of permit for assembly in streets or parks).

155. FCC v. Pacifica Found., 438 U.S. 726, 735-36 (1978).

156. Opposition to Reconsideration of Kellogg's, MM Dkt. No. 90-570, at 2 (June 26, 1991); Reply Comments of USA Network, MM Dkt. No. 90-570, at 3 (Feb. 26, 1991); Reply Comments of Children's Television Workshop, *supra* note 62, at 11; Reply Comments of Cohn and Marks on Behalf of Various Broadcasters, MM Dkt. No. 90-570, at 27 (Feb. 20, 1991).

157. *See* Reply Comments of Motion Picture Association of America, *supra* note 49, at 3-4.

158. *Id.* at 6.

the problem of program-length commercials and would constitute a reasonable and narrowly tailored means of advancing the government's interest. A burden on commercial, broadcast speech does not invoke the strictest First Amendment test, which would require that the government use the absolute narrowest means to achieve its goals. The Supreme Court has been extremely reluctant to entertain overbreadth challenges to the regulation of advertising because commercial speech is such a "hardy breed of expression."[159] In *Central Hudson*, the Court struck down an absolute ban on advertising by a power company, suggesting that the state instead might restrict the format or content of the utility's advertising.[160] In *Metromedia v. City of San Diego*, the Court upheld restrictions on commercial billboards as a narrow approach compared to the more drastic step of completely banning billboards.[161] Similarly, the First Amendment allows the FCC to curtail the most exploitative methods of advertising rather than, for example, banning entirely advertising during children's television.

While the courts are somewhat more sensitive to overbroad restrictions on broadcast speech, the proposed method of regulation is well within the acceptable boundaries. The *Pacifica Foundation* plurality, for example, recognized that a ban on indecent broadcasts might have some chilling effect, but only on expression that was already "at the periphery of First Amendment concern."[162] The same applies to program-length commercials aimed at children.

In sum, contrary to the FCC's suggestion, a flexible approach to regulation of program-length commercials and children's television would be both constitutional and effective. Indeed, from *Hot Wheels* through the 1970's, that approach proved its merit.

IX
Conclusion

The FCC's rule-making response to the Children's Television Act purported to address the problem of program-length commercials, but effectively avoided facing the issue. The rule adopted placed no limits

159. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 564 n.6 (1980). In other words, manufacturers interested in selling their products are unlikely to be chilled by speech restrictions. *See* Banzhaf v. FCC, 405 F.2d 1082, 1102 (D.C. Cir. 1968).

160. *Central Hudson*, 447 U.S. at 570-72.

161. 453 U.S. 490, 508 (1981).

162. *Pacifica Found.*, 438 U.S. at 743-44.

on the commercial nature of children's television programming. After completion of the FCC's rule-making, attention focused on other aspects of the Act's implementation, such as the Act's educational and informational programming requirements. Meanwhile, no effective policy exists to limit the use of children's television programs as marketing instruments.

As FCC Commissioner Robinson said in 1974, "there is a difference between salesmanship and exploitation."[163] Program-length commercials directed at children are the latter. In the early 1970's, the FCC's *Hot Wheels* style of regulation proved to be an effective way to combat the problem. The FCC remains capable of effectively and constitutionally addressing the program-length commercial problem, as it did in the past.

163. *Children's Television Report and Policy Statement*, *supra* note 4, at 40.