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GOVERNMENT REGULATION OF FOOD MARKETING TO CHILDREN: THE FEDERAL TRADE COMMISSION AND THE KID-VID CONTROVERSY

*Tracy Westen**

In a rulemaking proceeding subsequently called the most radical agency initiative ever conceived, in 1978 the Federal Trade Commission (FTC) proposed sweeping regulations to restrict television advertising to children.¹ I was put in charge of developing this rule-making proceeding.

The FTC first proposed to ban all television advertising to children who were too young to understand the selling intent of commercials, on the theory that such ads were unfair and deceptive.² Second, for older kids, roughly eight to eleven, we proposed to ban all television advertising for highly sugared products, such as candies that caused dental risks, on the theory that, although kids know they're being advertised to, they lack the ability to understand long-term serious health consequences—they can't balance the desire for immediate gratification versus the hazards of tooth decay. And third, for older kids—eight to eleven and older—with respect to sugared products like soft drinks that have long-term adverse nutritional consequences but not necessarily tooth decay, we proposed to require either in-ad disclosures warning purchasers' kids of the nutritional consequences, or full counter-ads—public service announcements

* CEO, Center for Governmental Studies, and former Deputy Director for Consumer Protection, Federal Trade Commission. This Article is adapted from oral remarks made at the Loyola of Los Angeles Law Review Symposium: Food Marketing to Children and the Law (Oct. 21, 2005) (video recording available at <http://av.lls.edu/ramgen/programs/foodmktg/rv-kp-keynote.rm>).

1. Children's Advertising, 43 Fed. Reg. 17,967 (Apr. 27, 1978) (codified at 14 C.F.R. pt. 369).

2. *Id.* at 17,969.

opposing consumption of those products paid for by the advertisers of those products.

We also made other proposals in the same rule-making proceeding—to limit selling techniques such as host selling, to limit certain messages like “sugar is fun,” to reduce the number of ads in children’s programming, to require in-ad disclosure such as “sugar can rot your teeth”—but those received less attention than the three major ones.

Three years later, in 1981, the FTC terminated this rule-making proceeding without taking any action.³ The proceeding had witnessed enormous controversy. Although the FTC ended the proceeding, the staff left behind a lengthy report summarizing what was learned, including 60,000 pages of expert testimony and 6,000 pages of oral testimony from some of the leading experts on health, children psychology and nutrition in the world.⁴

The staff’s 1981 report, which is part of the public record, concluded that the evidence received had established that very young children are cognitively unable to understand the selling intent of ads⁵. In my opinion, that inevitably led to the conclusion that very young children are deceived by advertising. The staff document left a factual predicate by summarizing everything that was learned, for future efforts at regulation, and it is sitting there today still waiting to be used. What I want to do today is briefly describe what happened, and what lessons might be learned from this rule-making proceeding.

In 1977, what the FTC knew about the problems posed by children’s television advertising is roughly as follows: We knew that children watched a lot of television—kids two to eleven watched about twenty-five hours a week, preschoolers thirty-three hours a week, or one-third of their waking hours. We also knew that adults watched four hours a day on average, or ten solid years of twenty-four-hour days watching television, by the age of sixty-five.⁶ Today,

3. Children’s Advertising, 46 Fed. Reg. 48,710, 48,712 (Oct. 2, 1981) (codified at 16 C.F.R. pt. 461).

4. FTC, FINAL STAFF REPORT AND RECOMMENDATION, IN THE MATTER OF CHILDREN’S ADVERTISING (1981).

5. See Children’s Advertising, 46 Fed. Reg. at 48,712 (noting that the Staff Report concluded that children six years and under place indiscriminate trust in television advertising messages and do not understand the persuasive bias inherent in advertising).

6. FTC, STAFF REPORT ON TELEVISION ADVERTISING TO CHILDREN 51

it's even more.

Kids saw at least 20,000 commercial television ads a year,⁷ and there was already evidence that they couldn't distinguish between commercials and programs.⁸ Psychologists, some of the leading ones, said that very young children, ages three, four, or five, thought that the characters were real, and that they lived inside the television set.⁹

One psychologist said it's very hard to capture how a young child views a commercial, but gave this example: To a very young child, a Tony the Tiger commercial came across as follows: "Hi, I'm Tony the Tiger, and I love you. I'm your friend, and I want you to eat Sugar Frosted Flakes because I want you to grow up to be big and strong like me." That was the message received by very young children.

The average commercial in those days cost about \$35,000 to produce. That's pretty cheap by today's standards, but we calculated that each exposure was a \$35,000 experience. On that basis, from the age of two to eleven, the average child received about \$7 billion in sophisticated educational TV ad experiences.

We also knew there were lots of ads for sugared products—kids saw 7000 ads for sugar a year—and that posed special problems.¹⁰ We knew that by the age of two, half the children in this country had gum disease and one decayed tooth; by the age of eighteen, the average child had fourteen decayed teeth;¹¹ yet half of all fifteen year-olds never saw a dentist.¹² Pediatricians told us tooth decay was the number one childhood illness at that time. We also knew that older children knew very little about nutrition, and we speculated that television ads were shaping their nutritional attitudes.

Of course, we also knew that western legal tradition has always given children special treatment. The Code of Hammurabi, written on stone tablets 2200 years before Christ,¹³ prohibited entering into

(1978).

7. *Id.* at 13, 53.

8. *Id.* at 15.

9. *Id.* at 15, 83–84.

10. *Id.* at 57.

11. *Id.* at 111.

12. *See id.* at 113 (indicating that less than half of the population visits a dentist in any given year).

13. *Id.* at 210 n.313 (citing F. Woodbridge, *Physical and Mental Infancy in*

contracts with children.¹⁴ Today the law of attractive nuisance requires you put a fence around your swimming pool so unsupervised kids won't be attracted to the water and drown.¹⁵ Contracts with minors are voidable.¹⁶ State laws limit the ages that minors can marry and work.¹⁷ Even the U.S. Constitution specifies that you can't run for federal office or vote in federal elections unless you're a certain age. So we knew that there were core legal traditions that gave children special protections because they have less maturity, less cognitive experience in the world.

We also knew that the FTC could only act if it first found actions that were either unfair or deceptive; only then could it devise a remedy.¹⁸ Under FTC precedents, deception is not only saying something that's untrue, but it's also omitting something that's very important—deception by omission.¹⁹ Some old FTC cases, for example, prohibited actors dressed in white coats with stethoscopes around their necks from selling products, because that created the assumption that doctors were recommending the product when in fact they weren't, paid actors were. So omitting an important fact, namely, that doctors don't necessarily recommend this product, was also considered to be deceptive.

In addition, there was a strong policy against so-called subliminal advertising. At the time these ads were thought to include implanted messages that would go by so quickly you wouldn't consciously be aware of them, but in fact they would affect you psychologically. (It turned out later that subliminal ads were a hoax.) The FTC and Congress were very concerned about subliminal ads and felt that they embodied a fundamental form of deception. Ads that bypassed your cognitive defenses were

the Criminal Law, 87 U. PA. L. REV. 428 (1939)) (explaining that under the Code of Hammurabi (c. 2250 B.C.), buying or receiving on deposit anything from a minor without power of attorney or consent of elders was a crime punishable by death).

14. *Id.*

15. *Id.* at 207–09 (summarizing the attractive nuisance doctrine and citing relevant cases and treatises).

16. *Id.* at 210–211 (summarizing case law and treatises on the voidability of contracts involving minors).

17. *Id.* at 216–17.

18. 15 U.S.C. § 45 (1975).

19. See FTC, *supra* note 6, at 158–64 (describing the FTC Act and relevant case law).

considered deceptive. We based the children's rule-making on that conclusion, starting with the assumption that if children could not understand the difference between an ad and a program, could not understand the selling intent of an ad, did not know they were being advertised to, then fundamentally they were being deceived. That was a key legal basis of the original proposal.²⁰

Three years later, the rulemaking proceeding was shut down for both political and substantive reasons. First, the political climate had changed. In the mid-1970s, when we were gearing up for this, the country was very pro-consumer. "Consumer protection" and "the public interest" were well-known watch words. Ralph Nader was in his heyday. Congress almost created an agency for consumer representation—a federal agency designed to represent consumers in all litigation across the federal government in consumer issues. The proposal was ultimately defeated.

But by the late 70s, that began to change. Inflation was rampant; stagnation in the economy began to spark opposition to consumer legislation; and corporations developed rhetorical rebuttals to "public interest" arguments, warning of "excessive governmental regulation." Lobbying innovations were created. The industries that opposed the children's television rulemaking raised \$16 million in contributions to oppose it. That may not seem like much right now, but that was an amount one-fourth the entire FTC's budget. No one had ever raised that much money to oppose an agency rule-making proceeding. And, of course, campaign contributions to Congressmen grew.

During the FTC's three-year rulemaking period, the FTC was called a "National Nanny" by the Washington Post.²¹ The rhetoric stuck. The FTC was ordered by Congress not to adopt any rules without first posting them in writing. The U.S. District found Chairman Pertschuk guilty of "bias" for delivering a candid speech about the problems of children's TV advertising and disqualified him from participating in the proceeding, but the U.S. Court of Appeals

20. *See id.* at 221–28 (arguing that it is inherently unfair and deceptive to address any television advertisement to children too young to understand the selling purpose of the advertisement).

21. Editorial, *Farewell to the National Nanny*, WASH. POST, Apr. 6, 1981, at A14; Merrill Brown, *New Head at FTC, New Era for Kid Ads*, WASH. POST, Oct. 1, 1981, at D11.

reversed, holding that Pertschuk had merely been informing the public about an important agency proceeding.²² Nevertheless, Pertschuk subsequently disqualified himself just to make sure the proceeding appeared fair.²³ That left only four votes. We were then told by Congress we could not adopt any rules based on the FTC's unfairness jurisdiction.²⁴ That took away half of our jurisdiction. Congress then passed legislation allowing both Houses of Congress to veto any act of a regulatory agency,²⁵ and it took several years of litigation to the U.S. Supreme Court to reverse that.²⁶

Finally, in 1980, President Regan was elected. He appointed a new FTC chairman,²⁷ and it was apparent that the new chairman was opposed to the proceeding. So by March of 1981 it was clear the proceeding was doomed, there were no longer sufficient votes for it. At that point the staff decided to write a document memorializing what had been learned, if you like a kind of a message in a bottle to future public interest advocates interested in doing something about children's advertising. That document summarized everything we learned, the pros and cons, all of the testimony. There are still today 60,000 pages of expert testimony sitting there to be mined for whatever projects you might be interested in using it for. So I suggest you take a look at it; we left it there deliberately.

As the staff report explains, we encountered difficult substantive problems in the proceeding. The first proposal was to ban all advertising to kids who were too young to understand what an ad was, who didn't know they were being advertised to. What did we conclude? The FTC staff report concludes that the problem did exist,

22. *Ass'n of Nat'l Adver. v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979).

23. Brown, *supra* note 22.

24. Federal Trade Commission Improvement Act of 1980, Pub. L. No. 96-252, 94 Stat. 374, 378 (codified in part at 15 U.S.C. § 57a(i)) ("The Commission shall not have any authority to promulgate any rule in children's advertising proceeding pending on the date of enactment of the Federal Trade Commission Improvements Act of 1980 or in any substantially similar proceeding on the basis of a determination by the commission that such advertising constitutes an unfair act or practice in or affecting commerce.").

25. 15 U.S.C. § 57a-1(a) (Supp. IV 1980).

26. *Process Gas Consumers Group v. Consumer Energy Council*, 463 U.S. 1216 (1983) (summarily affirming the Court of Appeals' striking down of the legislative veto as unconstitutional in *Consumers Union of U.S., Inc. v. FTC*, 691 F.2d 575 (D.C. Cir. 1982)).

27. Brown, *supra* note 22.

and that kids were being deceived.²⁸ That problem still exists today.

The difficulty was designing a solution to that problem. How do you craft a law that prohibits advertising to very young children, say six or seven years old, when those children are mixed in with older audiences? We considered a regulation that would say, "No ads in programs aimed at children when a certain percentage of very young kids are in the audience."²⁹ The problem was that there was only one program on television in those days in which fifty percent of the audience was about six or seven, and that was "Captain Kangaroo." It would seem ironic to go through three years of struggle and publish a regulation banning ads on "Captain Kangaroo." That wouldn't accomplish much.

To affect all advertising on Saturday morning television, we would have had to drop the percentage of young kids in audiences down to about nineteen percent. However, that would have banned ads in all programs in which over eighty percent of audiences would have been adults and older kids. That seemed overkill. In other words, we had trouble tailoring a regulation that would prohibit ads only in programs watched by young children, because it turns out there aren't any programs just watched by very young children; audiences are all intermixed together.³⁰

We were also concerned that if we banned ads to young children, we might undermine commercial support for those provisions. In theory, if you had programs (which you don't) which are only watched by children aged one to six, our remedy would prohibit sponsorship for those programs. The networks asked, "What incentive do we have to create such programs?" Now, privately, I thought the Federal Communications Commission (FCC) could require networks to carry children's programming without ads as a public service, but nonetheless it posed a difficult problem, particularly since the FTC couldn't speak for the FCC.

28. FTC, *supra* note 6, at 90 n.120.

29. Children's Advertising, 43 Fed. Reg. 17,967, 17,969 (Apr. 27, 1978) (codified at 14 C.F.R. pt. 369).

30. *See* Children's Advertising, 46 Fed. Reg. 49,710, 48,712 (Oct. 2, 1981) (codified at 16 C.F.R. pt. 461) (stating the staff found that the only effective remedy would be a ban on all advertisements oriented toward young children, which would be both over- and under-inclusive).

We also considered a regulation that would prohibit advertising “aimed at young children,”³¹ but we didn’t know how to define ads “aimed at young children.” How do you define an advertisement “aimed at” a young child? Intent? Impact?

We considered another concept: no ads in “programs aimed at young children.”ⁱ But it turned out that the most popular program among young children was *I Love Lucy*, so we would’ve ended up banning ads in *I Love Lucy* but not Saturday morning cartoon shows. That didn’t seem to work either. So we concluded there was a serious problem, that TV ads did deceive young kids, but we couldn’t draft a regulation that was narrowly tailored enough to address that particular problem without also affecting ads in programs seen by many older children and adults.

The second FTC proposal was to ban all ads for sugared products to older kids, say eight to eleven and up. We concluded, yes, tooth decay was a major serious health problem.³² The problem we encountered was defining sugared products. We had trouble writing a definition for candy. We tried defining products as having chocolate in them, but it turned out that chocolate had health benefits. A study from Sweden apparently showed that the more chocolate you ate, the less tooth decay you had. And remember, we had to base this regulation on the record, so we struggled with often counter-intuitive facts. It turned out that some of the most cariogenic products were not candies but things like dried fruits, because they stick to the teeth. One of the most cariogenic of all turned out to be potato chips; they stick to the teeth and are converted into acid incredibly quickly.

So we struggled. We tried to figure out how to restrict advertising for cariogenic-related products, yet we had trouble defining the products that would be covered by the bans. If you have ideas, that’s an issue that’s still open.

Third, in some respects the most sweeping remedy was this: we proposed that with respect to other products, like soft drinks—which don’t immediately cause tooth decay because they go through the mouth quickly but affect long-term nutrition—the remedy to older kids was counter-messages. In other words, don’t ban the ads but

31. Children’s Advertising, 43 Fed. Reg. at 17,969 (codified at 14 C.F.R. pt. 369).

32. See FTC, *supra* note 6, at 109–14.

require the advertiser to pay for nutritional messages—either a disclosure in the ad or, more importantly, a full counter commercial—like the anti-smoking messages in California today.

The problem was that for the FTC to show the necessary predicate for a rule, we had to show that soft drinks ads were affecting long-term nutritional attitudes that needed to be corrected by the counter-ads, and we were unable to demonstrate that those ads were linked to long-term deceptive nutritional attitudes. I personally think they were, and I think they are today. But at that point, some twenty-five years ago, we didn't have enough evidence to establish a link between, let's say, soft drink ads and long-term nutritional attitudes, and we therefore had to abandon that remedy. In sum, we terminated the proceeding primarily for political reasons, but there were also very difficult substantive problems to overcome, and we were not quite able to solve them.

What lessons can we draw from this? Well, first there are some political lessons. We probably should not have bundled all these remedies into one proceeding, because that flushed out and organized every potential opponent, who then banded together with other opponents, raised money, and fought the rulemaking. It would've been better if we had gone remedy by remedy instead of lumping them together into one document. As a result, we were opposed by the cereal industry, the sugar industry, the candy industry, the toy industry and the broadcast industry. The farmers were against us because they were raising wheat that was being used in sugared cereals. We even had the cigarette industry against us. Why? Although cigarettes weren't being advertised to children, the cigarette industry was convinced that if we were successful in this proceeding, they would be next. So they raised all this money to oppose this rule-making proceeding. They used tactics that really had never been seen before but now are pretty common.

Is there still a problem? Obviously you think there is, or you probably all wouldn't be here. I still believe very young children do not understand the difference between a commercial and a program. Experts told us, twenty-five years ago, that very young kids couldn't tell the difference, literally. As they got a little older, they would say, "Yeah, I can tell the difference." But when pressed, they would

say, "A commercial is funnier than a program"³³ That showed they still didn't understand the true difference.

Until kids were six, seven or eight years old, they didn't understand that they were being sold something for a "commercial motivation."³⁴ Kids are, I think, genetically programmed to trust adults. So, to a very young child, a commercial is an adult authority figure telling them what's good for them. In those days, the biggest adult figure to kids in TV ads was Tony the Tiger—deep voice, clearly an adult who loves children, and he's recommending the best possible action for kids. So I think this is still a problem.

So what? Some said then, and some say today, that kids don't buy products, their parents do. Therefore, it doesn't matter if ads deceive kids because parents make the purchasing and the consumption decisions. I still have a simple response to that. If parents are making the decisions, why is the industry spending \$15 billion a year advertising to children? Interesting paradox. More significantly, some argue that if kids are deceived, it's all part of life, it's part of growing up, advertising just toughens them up. All of us have learned by being deceived, and as you get older you learn how to handle deception. My problem with this is that it assumes it's okay to deceive a child as long as they have a parent. I've never accepted that. I think deception of children is still fundamentally wrong and should be illegal regardless whether the child has a parent or whether the child will grow up.

How about the First Amendment? The simple answer is that the First Amendment does not protect deceptive speech.³⁵

Would a ban on advertising in children's programming leave us with no children's programming? This is an interesting political and commercial question. One answer is yes, it would, because if nobody's going to pay for such programming, then nobody's going to put it on. But we do have other options. The FCC could require broadcasters to carry children's programming free of charge as part of their statutory "public interest" obligations.³⁶ Congress could give

33. *Id.* at 88–90 (citation omitted).

34. Children's Advertising, 46 Fed. Reg. at 46,712 (codified at 16 C.F.R. pt. 461).

³⁵ E.g., *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986).

³⁶ E.g., 47 U.S.C. 309.

broadcasters who carried such programming tax credits or tax subsidies. Or Congress could require free carriage of children's programming as a trade off for the broadcasters' free use of the publicly-owned broadcast spectrum. Broadcasters could freely make money on all their other programming, but with children's programming they could be required to put it on free. Or Congress could provide stronger funding for children's programming on public television. All of these seem to be reasonable alternatives to targeting children with billions of dollars of TV advertising, much of which is "deceptive" to them.

How about the ban on highly sugared ads? Well, I talked about the need for further research. And there are still other options. We could still say that it's deceptive and unfair to advertise sugared products to children because of the health consequences. We could then time zone the ads into late evening hours. There might also be a V-chip solution. For those of you familiar with the V-chip, all television sets today have the capacity to screen out programming that's coded as excessively sexual or violent. What if we added a code for sugar or for certain forms of nutritionally harmful advertising that would be blocked by the V-chip? Parents could simply program their V-chip and it would automatically black out every TV commercial selling a product that had more than a certain percentage of sugar or that was ranked as not nutritional. That's another possibility.

Finally, how about counter advertising? I still think that for older children affirmative messages on health and nutrition are very important, and there are very few places they will ever see such messages. The question is, who's going to pay for them? There are really only four options. Advertisers could pay for them—that was the FTC proposal, which was not adopted. Broadcasters could pay for them—that was the theory of the old fairness doctrine, requiring broadcasters to present both sides of controversial issues.³⁷ Consumers could pay for them—Congress could levy a fee on specified sugary products and use that money to pay for affirmative nutritional messages. That's the approach California takes with cigarette advertising. It levies a fee on cigarettes and spends the money on anti-smoking announcements. Finally, the government

³⁷ *E.g.*, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

could pay for nutritional messages for children out of its general revenues.

The FTC's children's television rulemaking proceeding raised some fundamental issues that are still confront us today and are posed by this conference. One of them is the extent to which children in our society should be treated as consumers. If we're going to treat very young children as consumers, then I suppose logic demands that we advertise to them. If we're not going to treat them as consumers, then we need to create ways of shielding them from advertising until they're mature enough to understand it.

Put another way, if we were to start all over and recreate our current system of television and other forms of marketing, say in creating a system of digital television, would we want to make sure that our children all see at least 20,000 to 40,000 ads a year? Would we consciously build that into our system of television? I think we would not, but that's the system we now in fact have. So, since we now have it, and we would not have designed it in the first place, what should we do to correct it? That's still a critically important question.

I thought about this when my son was in kindergarten—he's now in college, so that's a while ago. I spent some time sitting in his kindergarten class, watching the process, and I liked what the teacher was doing. Most of what the teacher was doing I thought was terrific. Occasionally I thought, "Well, I'm not sure I would teach kindergarten that way," but if you go and watch a kindergarten class, which deals with very young children, I think you will conclude that the institution of kindergarten is designed for the benefit of the child. That is its intentionality; that is its purpose; it's there for the benefit of the child. But if you watch most television aimed at children, I doubt you could conclude that the advertising and programming is there for the benefit of the child. It's clearly there for the benefit of the sponsors. So we have one set of institutions that are designed to nurture and help children as they grow older, and we have another completely different institution that's designed to sell them products and to inculcate them into lifetime purchasing habits. That's a fundamental problem in our consumer society, and one we still have to grapple with.

I believe there are solutions to the problems of children's television advertising, and that these solutions are both constitutional and legal. It is the purpose of this conference to try and propose, analyze and debate these solutions. I wish you the best of luck in doing so.

