



Comments of

TechFreedom

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In the Matter of

*Protecting Kids from Stealth Advertising in Digital
Media*

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I. Introduction

With these Comments, TechFreedom responds to the FTC's October 19, 2022, event entitled "Protecting Kids from Stealth Advertising in Digital Media" (the "Stealth Advertising Webinar").¹ The Commission invited further comments, to be filed by November 18, 2022, on the topics covered in the webinar.²

TechFreedom is a nonpartisan think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity.

TechFreedom has been engaged on issues related to children and advertising, including COPPA, for many years. In 2018 we hosted a panel discussion entitled "20 Years of Coping with COPPA,"³ and TechFreedom General Counsel James E. Dunstan participated as a speaker at the workshop hosted by the FTC on October 7, 2019.⁴ We filed Comments in Docket ID: FTC-2019-0054 (COPPA Rule Review), December 11, 2019,⁵ and Matter No. P194502 (Comments on Video Loot Boxes), October 11, 2019.⁶

¹ See Protecting Kids from Stealth Advertising in Digital Media, FTC (Oct. 19, 2022), <https://www.ftc.gov/news-events/events/2022/10/protecting-kids-stealth-advertising-digital-media>.

² *Id.* ("In conjunction with this event, the FTC is seeking additional public comment on how children are affected by digital advertising and marketing messages that may blur the line between ads and entertainment. The public will have until November 18, 2022 to submit comments to accommodate those who wish to provide input on the topics discussed at the event."). These comments are timely filed.

³ *TechFreedom Event: 20 Years of Coping with COPPA* (July 26, 2018), <https://techfreedom.org/techfreedom-event-20-years-coping-coppa/>.

⁴ *The Future of the COPPA Rule: An FTC Workshop*, Agenda, FTC (Oct. 7, 2019), <https://www.ftc.gov/news-events/events-calendar/future-coppa-rule-ftc-workshop>. TechFreedom also filed comments in the FTC's "Loot Box" proceeding which has implications for children's privacy as well. See Berin Szóka & Jim Dunstan, Comments of TechFreedom, *Video Game Loot Boxes*, FTC Matter No. P194502 (Oct. 11, 2019), <https://techfreedom.org/wp-content/uploads/2019/12/TechFreedom-FTC-Loot-Box-Comments-10-11-19.pdf>.

⁵ James Dunstan & Berin Szóka, Comments of TechFreedom, *COPPA Rule Review, 16 CFR Part 312*, FTC-2019-0054 (Dec. 11, 2019), <https://techfreedom.org/wp-content/uploads/2019/12/TechFreedom-Comments-COPPA-12-11-19.pdf>.

⁶ Comments of TechFreedom, *Video Game Loot Boxes*, *supra* note 4.

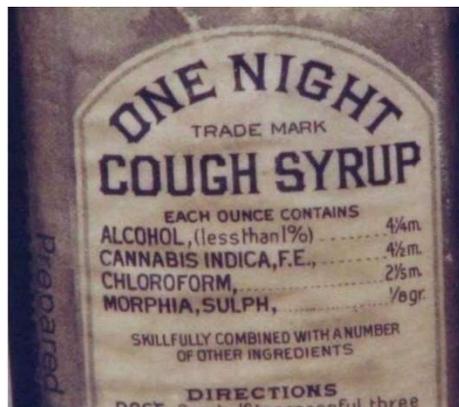
TechFreedom’s President Berin Szóka co-authored a paper in 2009 presaging some of the issues related to children, advertising, and the dangers of expanding COPPA beyond its original intent.⁷ We also filed comments in the last round of COPPA review, in 2012.⁸

II. Advertising to Children Has Been with Us Since the Dawn of Commerce

An undercurrent ran throughout the Stealth Advertising Webinar that what consumers are encountering on the Internet is wholly new—that advertising to children, including sponsored content and product placements within substantive content, is somehow a new phenomenon. Maybe the term “blurred advertising”⁹ is relatively new, but advertising, and advertising to children, has been with us for ages.

A. Earliest Forms of Advertising: Print

Archaeologists have uncovered over 6,000 advertising inscriptions on the walls of Pompeii.¹⁰ Colonial newspapers were full of advertisements, and the challenging economic conditions during the Civil War fostered a huge growth in print advertising.¹¹ Some of this advertising was for products we have made illegal, or at least highly regulated, today. Other such advertisements we would today find abhorrent from a cultural standpoint on many levels.



⁷ Berin Szóka & Adam Thierer, *COPPA 2.0: The New Battle Over Privacy, Age Verification, Online Safety & Free Speech* (Oct. 26, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1408204.

⁸ See TechFreedom, *TechFreedom Urges FTC Not to Expand COPPA by Changing Definitions* (Sept. 26, 2012), <https://techfreedom.org/techfreedom-urges-ftc-not-to-expand-coppa-by/>.

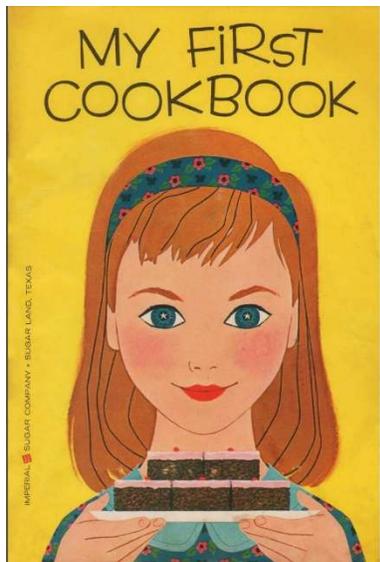
⁹ The origin of the term “blurred advertising” is unclear. The earliest reference we have been able to find is a 2009 article, Steve Dix & Ian Phau, *Spotting the Disguises and Masquerades: Revisiting the Boundary Between Editorial and Advertising*, MKTG. INTEL. & PLAN. (May 2009), https://www.researchgate.net/publication/240259892_Spotting_the_disguises_and_masquerades_Revisiting_the_boundary_between_editorial_and_advertising.

¹⁰ Tutorials, *The Entire History of Advertising*, SOFTCUBE BLOG (Aug. 4, 2020), <https://softcube.com/the-entire-history-of-advertising>.

¹¹ See University Libraries, *Early Advertising of the West, 1867–1918*, UNIV. OF WASH., <https://content.lib.washington.edu/advertweb/index.html> (last visited Nov. 14, 2022) (“The Civil War spurred the growth of print advertising for many reasons. The conflict created a need for hundreds of thousands of uniforms, underwear and shoes and ready-made food which triggered mass production of clothing and canned goods. In addition, when men went off to war, women went to work in the factories to earn money. With less time to make bread, soap and clothing for their families, women used their earnings to purchase goods from stores and bakeries. This rise in consumerism was accompanied by the invention of wood pulp newsprint, new publishing techniques (curved stereotype press), and innovations in techniques used to reproduce illustrations.”).

Advertising to children has long been a staple on the American scene as well, including for products that we today would conclude have no business being in the hands of children (or even being administered to children by their parents).

So, too, have sponsored content, product placements, and what now is being pejoratively labeled as “blurred advertising” been with us for many years. In 1959, for example, the Imperial Sugar Company



sponsored “My First Cookbook.”¹² In addition to 28 recipes (using Imperial Sugar), the book contained entries on “Cooking Terms for Beginners,” “Good Cooking Habits,” “How to Measure,” “Safety Tips,” and “Table of Measurements.”¹³

The book could be acquired by sending one label from an Imperial Sugar product to the company, which covered the cost of shipping.¹⁴ Thus, the cost of acquiring the book (a five pound bag of sugar cost \$0.59 in 1960—which a household would use, plus a \$0.04 stamp),¹⁵ was far less than the cost of a retail-priced cookbook.¹⁶ Somehow children, and society as a whole, survived the first wave of “blurred advertising.”



B. Advertising to Children on the New Medium of Television

The mass market introduction of television was soon followed by TV commercials directed at children. Mr. Potato Head is credited as the first television commercial directed at children, in 1952.¹⁷ The early days of television were marked with expansive corporate sponsorship

¹² The PDF of this book is available for free at https://www.imperialsugar.com/sites/default/files/2016-09/1959_My_First_Cookbook_imperial.pdf.

¹³ *Id.*

¹⁴ See Imperial Sugar, *1962 Imperial Sugar My First Cookbook TV Commercial*, YouTube (Dec. 2, 2010), <https://www.youtube.com/watch?v=Te9OPsPe7HU>.

¹⁵ *Retail Prices of Selected Foods in U.S. Cities, 1890–2015*, INFOPLEASE, <https://www.infoplease.com/business/economy/retail-prices-selected-foods-us-cities-1890-2015> (last visited Nov. 14, 2022).

¹⁶ The Betty Crocker Cookbook, for example cost \$2.95 in 1960 (equivalent to \$34.61 today). SUSAN MARKS, *FINDING BETTY CROCKER: THE SECRET LIFE OF AMERICA'S FIRST LADY OF FOOD* (2010).

¹⁷ Marketing, *What Was the First Toy Ever Advertised on Television*, SMALL BUS. MENTOR (Dec. 16, 2021), <https://www.smallbmentor.com/blog/what-was-the-first-toy-ever-advertised-on-television>.

of television shows, as a direct follow-on to the successful business model used in radio.¹⁸ Post Cereals and Skippy Peanut Butter sponsored “Captain Video and His Video Rangers” (1949–1955).¹⁹ Gordon Baking Company (makers of Silvercup Bread) sponsored the popular “Rocky Jones, Space Ranger” series (1954, 39 episodes).²⁰ Both of these shows had large audiences of children. Again, somehow children and society survived both the commercials and the sponsorships.

C. Advertising to Children on the Internet

It should have come as no surprise, therefore, that advertising and sponsorship would migrate onto the Internet. In a 1989 workshop convened by the “fathers” of the Internet to discuss the development of a commercial Internet (in which the undersigned author participated and wrote the summary report),²¹ a variety of means were discussed to fund the development, authentication, and delivery of content on the Internet. Although a variety of mechanisms were discussed (ranging from a public-television model to the development of micropayment systems), ultimately, the participants concluded that advertising would play a major role.

And it has. We walk through this history and evolution to show that the engine that drives the development of innovative content on the Internet is, and remains, advertising.²² The FTC should dismiss any notion that somehow advertising hasn’t or shouldn’t play a major role in content creation on the Internet, in the same way it has in every other communications medium in history. There is nothing new under the sun.

¹⁸ Ovaltine, for example, was the official sponsor of the “Captain Midnight” radio series beginning in 1940. Interestingly, when the show transitioned to television, Ovaltine dropped its sponsorship after its initial two-year network run. *Captain Midnight Trivia*, IMDB, <https://www.imdb.com/title/tt0046585/trivia/> (last visited Nov. 14, 2022). Children could join Captain Midnight’s “Secret Squadron” and receive the secret decoder ring by sending in the inner wax cover of an Ovaltine jar. See Tvdays, *Captain Midnight Ovaltine Secret Squadron Rare Premiums 1955*, YOUTUBE (July 2, 2021), <https://www.youtube.com/watch?v=5LyMeUrH20>.

¹⁹ Interviews, *Captain Video and His Video Rangers*, TELEVISION ACADEMY, <https://interviews.televisionacademy.com/shows/captain-video-and-his-video-rangers> (last visited Nov. 14, 2022).

²⁰ *Rocky Jones, Space Ranger*, MST3KTEMPLE, <http://www.mst3ktemple.net/rockyjones.html> (last visited Nov. 14, 2022). The syndicated (non-network) show was rolled out with a huge marketing campaign. “Wrist watches, wallets complete with space dollars, badges, buttons, records and clothing were produced to promote the show.” *Id.*

²¹ Workshop on the Protection of Intellectual Property Rights in a Digital Library System: Knowbots in the Real World (May 18–19, 1989), http://www.cnri.reston.va.us/wkshp_intel_prop_knowbots_may1989.pdf.

²² See Ophir Tanz, *How Ad Tech Fuels Innovation*, ENTREPRENEUR (June 7, 2016), <https://www.entrepreneur.com/science-technology/how-ad-tech-fuels-innovation/275646> (detailing how advertising technology “keeps the internet alive”).

III. Critics of Advertising to Children are as Old as the Commercials Themselves

As every new advertising—supported medium of communications has evolved, critics have emerged, arguing that we must protect children from advertisements. For example, one of the major groups involved is the “Campaign for a Commercial-Free Childhood” (CCFC).²³ The name says it all—this group (and others) simply believe that children should not be exposed to commercials, and they have held that belief for many decades.

The major push against children’s advertising began in the late 1960s. By the mid-1970s, in response to this criticism, the Better Business Bureau established the Children’s Advertising Review Unit (CARU),²⁴ which has served as an important industry group to monitor advertising practices, and where necessary, call out deceptive advertising to children. The anti-children’s advertising movement has taken its message to the FCC, the FTC, and Congress, where in 1979, Action for Children’s Television (ACT) founder Peggy Charren testified that “children’s advertising should be considered, per se, an unfair commercial practice.”²⁵

The message delivered by these advocacy groups and the response from the federal government and the public at large provide important lessons for the FTC today as it asks what it should do regarding advertising to children on the Internet.

IV. The Government’s Actions in the 1970s Provide Cautionary Tales

A. The FCC’s Investigation of Television Advertising to Children

Critics of advertising to children first took their message to the Federal Communications Commission. In response to a petition for rulemaking filed by ACT, the FCC opened Docket 19142 on January 26, 1971, as a “wide-ranging inquiry into children’s programming and advertising practices.”²⁶ The ACT Petition asked the FCC to adopt the following rules:

- a) There shall be no sponsorship and no commercials on children’s television;

²³ Interestingly, CCFC recently changed its name to “Fairplay.” David Monahan, *CCFC Becomes Fairplay and Launches Sweeping New Campaign to Protect Children Online*, FAIRPLAY (June 23, 2021) https://fairplayforkids.org/ccfc_becomes-fairplay/.

²⁴ *Children’s Advertising Review Unit*, BBB PROGRAMS, <https://bbbprograms.org/programs/all-programs/children-s-advertising-review-unit> (last visited Nov. 14, 2022).

²⁵ Exhibits, *Look Boys and Girls! Advertising to Children in the 20th Century*, DUKE UNIV. LIBR.’S, <https://exhibits.library.duke.edu/exhibits/show/childrenads/intro> (last visited Nov. 17, 2022).

²⁶ In the Matter of Petition of Action for Child’s Television (Act) for Rulemaking Looking Toward the Elimination of Sponsorship & Com. Content in Children’s Programming & the Establishment of A Wkly. 14-Hour Quota of Child’s Television Programs, 50 F.C.C.2d 1, 1 (1974) (“1974 Policy Statement”).

- b) No performer shall be permitted to use or mention products, services or stores by brand names during children's programs, nor shall such names be included in any way during children's programs; and
- c) Each station shall be required to air at least 14 hours of children's programming per week.²⁷

The ACT Petition set off a four-year journey for the FCC, which included accepting public comments (over 100,000 were filed, an amazing amount given that there was no way to file electronically in that era), holding panel discussions in 1972, and three days of oral argument before the full FCC in January 1973 (something unheard of at today's FCC). The end result was the 1974 Policy Statement, issued on November 6, 1974, which provided a clear roadmap for children and television advertising.²⁸

The FCC recognized both that broadcasters have a special responsibility to children, and that younger children may have difficulty separating program content from commercial material.

Broadcasters have a special responsibility to children. Many of the parties testified and we agree, that particular care should be taken to insure that they are not exposed to an excessive amount of advertising. It is a matter of common understanding that, because of their youth and inexperience, children are far more trusting of and vulnerable to commercial "pitches" than adults. There is, in addition, evidence that very young children cannot distinguish conceptually between programming and advertising; they do not understand that the purpose of a commercial is to sell a product. See Report to the Surgeon General, *Television and Growing Up: The Impact of Televised Violence*, Vol. IV at 469, 474 (1970). Since children watch television long before they can read, television provides advertisers access to a younger and more impressionable age group than can be reached through any other medium. [citation omitted]. For these reasons, special safeguards may be required to insure that the advertising privilege is not abused.²⁹

²⁷ *Id.*

²⁸ Although the 1990 Children's Television Act (CTA), Pub. L. No. 101-437, 105 Stat. 996 (1990), established new rules for the relationship between broadcasters and children, the underlying policies (such as the need for separation between programming and commercial matter, prohibitions on "host-selling," and the concept of "program-length commercials") all stem from the 1974 Policy Statement.

²⁹ 1974 Policy Statement, ¶ 34. If there is anything that is "blurred" at the FTC these days concerning children and advertising, it is the clear line the FCC drew both in 1974 and 1990 between young children (12 years and younger) and older children (13 and above), and their ability to distinguish between commercial and programming matter. See *In the Matter of Policies and Rules Concerning Child's Television Programming*, 6

But rather than concluding that the proposals set for in the ACT Petition should be adopted, prohibiting commercials, sponsorship, or any sort of product placement in children's programming (again, what the FTC is now calling "blurred advertising"), the FCC found the exact opposite.

Despite these concerns, we have chosen not to adopt ACT's proposal to eliminate all sponsorship on programs designed for children. The Commission believes that the question of abolishing advertising must be resolved by balancing the competing interests in light of the public Interest. *Banning the sponsorship of programs designed for children could have a very damaging effect on the amount and quality of such programming.* Advertising is the basis for the commercial broadcasting system, and revenues from the sale of commercial time provide the financing for program production. Eliminating the economic base and incentive for children's programs would inevitably result in some curtailment of broadcasters' efforts in this area. Moreover, it seems unrealistic, on the one hand, to expect licensees to improve significantly their program service to children and, on the other hand, to withdraw a major source of funding for this task.

Some suggestions were made during the proceeding that institutional advertising or underwriting would replace product advertising if the latter were prohibited. Although we would encourage broadcasters to explore alternative methods of financing, at this time there is little evidence that the millions of dollars necessary to produce children's programming would, in fact, be forthcoming from these sources. Since eliminating product advertising could have a serious impact on program service to children, we do not believe that the public interest would be served by adopting ACT's proposal.³⁰

The FCC could not have been clearer in either its analysis or legal conclusions.

FCC Rcd 2111, ¶ 3 (1991), *recon. granted in part*, 6 FCC Rcd 5093 (1991) ("The legislative history of the Act, however, reveals that Congress intended that we use a definition of 12 and under for children's programming. Moreover, there is some empirical evidence with respect to children's comprehension of commercial mater that supports an upper age limit as high as 12 years."). In contrast, there was discussion during the Stealth Advertising Webinar that all children must be protected from advertising on the Internet, not just younger children with less developed cognitive abilities, without the submission of substantial evidence to displace the 50 years of prior work on this subject. Video: Protecting Kids from Stealth Advertising in Digital Media, FTC (Oct. 19, 2022), <https://www.ftc.gov/news-events/events/2022/10/protecting-kids-stealth-advertising-digital-media>.

³⁰ 1974 Policy Statement, ¶¶ 35–36 (emphasis added, footnotes omitted).

B. The FTC's "KidVid" Proceeding

Having failed at the FCC, critics of advertising next took their arguments to the Federal Trade Commission in what became known as the "KidVid" proceeding. The arguments were similar, except this time they were couched not in "public interest" FCC jargon, but in FTC language, the critics arguing that commercials aimed at children are an "unfair business practice." But the regulatory demand remained the same: "Ban all television advertising for any product, which is directed to, or seen by, audiences with a significant proportion of children too young to understand the selling purpose of advertising."³¹ The FTC staff in 2004 characterized the proceeding, begun in 1978, as "by far the most exhaustive examination ever undertaken of the practical realities that would have to be addressed in any effort to restrict advertising to children."³²

Whereas it took the FCC almost four years to reach its conclusions, this time the reaction from all quarters was swift. The 2004 FTC Staff Report describes what ensued:

The children's advertising proceeding was toxic to the Commission as an institution. Congress allowed the agency's funding to lapse, and the agency was literally shut down for a brief time. The FTC's other important law enforcement functions were left in tatters. Newspapers ran stories showing FTC attorneys packing their active investigational files in boxes for storage, and entire industries sought restriction of, or even outright exemptions from, the agency's authority. Congress passed a law prohibiting the FTC from adopting any rule in the children's advertising rulemaking proceeding, or in any substantially similar proceeding, based on an unfairness theory. It was more than a decade after the FTC terminated the rulemaking before Congress was willing to reauthorize the agency. A congressional response of this magnitude was not simply the result of skilled lobbying by politically well connected industries, although they certainly did make their views known. Rather, it was the reaction to what was widely perceived as a grossly overreaching proposal. Even *The Washington Post*, normally a reliable friend of an activist FTC, editorialized that the proposal was "a preposterous intervention that would turn the FTC into a great national nanny." *The Washington Post* continued: [T]he proposal, in reality, is designed to protect children from the weaknesses of their parents—and the parents from the

³¹ FTC, Notice of Proposed Rulemaking, 43 Fed. Reg. 17,967, 17,969 (Apr. 27, 1978).

³² FTC STAFF REPORT, ADVERTISING TO KIDS AND THE FTC: A REGULATORY RETROSPECTIVE THAT ADVISES THE PRESENT (2004), https://www.ftc.gov/sites/default/files/documents/public_statements/advertising-kids-and-ftc-regulatory-retrospective-advises-present/040802adstokids.pdf ("2004 FTC Staff Report").

wailing insistence of their children. That, traditionally, is one of the roles of a governess—if you can afford one. It is not a proper role of government.³³

The conclusion of the 2004 FTC Staff Report puts those years in proper context.

Although the idea of banning certain kinds of advertisements may offer a superficial appeal in this context, it is neither a workable nor an efficacious solution to the health problem of childhood obesity. The Federal Trade Commission has traveled down this road before. It is not a journey that anyone at the Commission cares to repeat.³⁴

Yet this FTC apparently wishes to repeat this path regarding advertising to children on the Internet, not even tethered to any particular public health harm such as obesity, but rather an overall loathing of commercials to children that some believe can be shoehorned into some sense of “unfairness.”

C. Congress Stripped the FTC of Any Authority to Write Rules Declaring Advertising to Children as Unfair

Congress responded swiftly to the Sturm und Drang created by the FTC in its KidVid proceeding and passed the FTC Improvements Act of 1980.³⁵ Section 11(a)(1) states:

The Commission shall not have any authority to promulgate any rule in the 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.³⁶

The legislative history of the Act, and specifically the floor debate prior to defeating, by a vote of 30-67, an amendment that would have stripped this provision, shows two things: (1) Congress believed that advertising to children is not inherently unfair; and (2) Curtailment of advertising would adversely affect the quantity and quality of content for children.

³³ *Id.* at 7–8 (footnotes omitted).

³⁴ *Id.* at 23.

³⁵ Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96- 252, §§ 11(a)(1), (3), 94 Stat. 374, 378–79 (1980) (codified in part at 15 U.S.C. § 57a(i)).

³⁶ *Id.*

1. Deceptiveness v. Unfairness

Congress was quite clear in defining the FTC's authority in this area. The Senators' comments regarding the path the FTC was pursuing in 1979 ring eerily similar to the present FTC, which seems to find new regulatory authority at every turn. As Senator Howard Cannon put it,

No one would dispute that the FTC has the authority to regulate false or deceptive advertising but regulating truthful, nondeceptive advertising is a new exercise in overregulation—overregulation made more objectionable by the presence of the first amendment. And what is unfair? This term is ambiguous, broad, capable of being molded to fit the ideas of the one who is defining it. One need look no further than the current kidvid rulemaking. I quote from the FTC staff, report on children's advertising, "unfairness arises out of the striking imbalance of sophistication and power between well-financed adult advertisers, on one hand, and children on the other, many of whom are too young to even appreciate what advertising is." The problem with this concept of unfairness is that, taken to its logical conclusion, the money and sophistication of every advertiser could be considered unfair, especially compared with the sophistication and economic power of a hungry 10 year old.³⁷

Senator Wendell Ford used his floor time to "blow away the smoke of emotion," and rationally discuss the actual metes and bounds of FTC authority, as constrained by court precedent.³⁸ And Sen. John Danforth said,

In its children's advertising rulemaking, the FTC is considering an industry-wide rule which would ban advertising to young children and extensively regulate the content of advertising to older children even though such advertising may not be false or deceptive but because, in the Commission's view, its content is "unfair." This exemplifies a newly formulated theory of power to regulate "unfair" advertising that is a step beyond the Commission's long-recognized authority to prevent false or misleading advertising and one with such potentially far-reaching consequences and constitutional implications that the Committee believed it desirable to place a modest check on the Commission's activities in this area by expressly limiting its authority in industrywide rulemaking to advertising which is false or misleading. It

³⁷ 126 Cong. Rec. 2353 (1980) (statement of Sen. Cannon).

³⁸ *Id.* (statement of Sen. Ford).

should be remembered that the Commission's basic charter, section 5 of the Federal Trade Commission Act, makes no mention at all of advertising.

The agency's authority over advertising was very early established by court decision declaring that the publication of false or deceptive advertising was an unfair method of competition within the meaning of section 5. Sections 12 through 15 of the act, added in 1938, expressly prohibit false advertising of food, drugs, devices or cosmetics and define false advertising as that which is "misleading in a material respect." Nothing contained in the act is a warrant for the Commission to regulate the nondeceptive advertising of a lawful product or activity because the content of its advertising message is deemed to be "unfair" in the eyes of the Commission. Nor has any court ever ruled in an advertising case that the Commission has such broad power as it is now claiming over the content of truthful commercial speech.³⁹

In addition to *The Washington Post* chastising the FTC for its regulatory overreach, the ACLU also weighed in.

We do not question the Commission's power to regulate deceptive advertising. We recognize fraud, deception and misrepresentation as permissible grounds for the regulation of commercial speech. But what the FTC now proposes is in effect to label all advertising aimed at young children as inherently deceptive. This in our view is too sweeping a remedy that catches protected speech in its net.⁴⁰

Senator Danforth responded:

Mr. President, I think that that is exactly the point. The combination of the sweeping term "unfair" and the rulemaking authority under Magnuson-Moss have created a situation where the Federal Trade Commission can create a per-se rule that all advertising, regardless of what it is, directed toward children under the age of 8 years is, per se, unfair and, therefore, all advertising falling within this category can be banned.⁴¹

Finally, Senator Carl Levin put into sharp focus the problem of declaring advertising to children as per-se unfair:

³⁹ *Id.* at 2354 (statement of Sen. Ford).

⁴⁰ *Id.* at 2357 (statement of Sen. Danforth) (quoting the ACLU).

⁴¹ *Id.*

Mr. President, we cannot allow catchall and vague words like “unfair” to remain undefined in the statute that the FTC is applying to advertising practices. Such an untrammled and undefined hunting license in the area of opinion and speech, is dangerous because it is so subjective. The FTC has and should continue to have the power to take action against deceptive advertising and will continue to do so under the committee bill. The FTC will also continue to have the authority over “unfair” business acts or practices. The word “unfair” can more justifiably be enforced and interpreted in such latter instances because they do not involve speech or opinion and because the word “unfair” has been used by statutes and been interpreted by court opinions relative to such acts and practices with some frequency over the years. *To give the FTC the authority to move against advertising which, although not deceptive, is thought by some to be unfair is simply to give too much legislative power in a critical area of speech and opinion to an unaccountable, unelected agency.*⁴²

2. Banning Advertising Would Adversely Impact the Creation of Media Content for Children

In the same way that the FCC was concerned about the impact of the loss of advertising on the creation of television content for children in 1974, Senators were equally concerned with the state of the marketplace for children’s content in 1980.

One of the proposals in the kidvid proceeding is a total ban on children’s advertising. I cannot help but wonder (aside from my concerns about the regulation of free speech) what will happen to children’s programming if a ban is imposed. Is children’s television to be virtually eliminated as the FTC uses the unfairness doctrine as a broad charter to sweep away children’s advertising solely because it is contrary to the Commission’s concept of fairness?⁴³

In the end, Section 11(a)(1) of the FTC Improvement Act of 1980 barred the FTC from “promulgat[ing] any rule in the children’s advertising proceeding pending on May 28, 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.”⁴⁴ The question now arises whether any proceeding the FTC might

⁴² *Id.* at 2366 (statement of Sen. Levin) (emphasis added).

⁴³ *Id.* at 2353 (statement of Sen. Cannon).

⁴⁴ Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 11(a)(1), 94. Stat. 374, 378 (1980)(codified in part at 15 U.S.C. § 57a(h)).

undertake regarding advertising to children on the Internet is a “substantially similar proceeding,” thus limiting the FTC’s ability to craft rules based on a finding that “blurred advertising” is unfair. At the least, the FTC should be cognizant of these clear congressional findings and statutory limitations on the FTC’s ability to rule advertising to children to be unfair.

V. The FTC Cannot Ignore the First Amendment Implications of Limiting Advertising to Children

The congressional debate surrounding the 1980 FTC Improvement Act also pointed out that the FTC was on thin constitutional ice in trying to ban or heavily regulate advertising, even to children. Multiple Senators expressed their concerns that the First Amendment would preclude such regulations:

The Supreme Court has shown no small amount of determination to protect speech, commercial speech included. Indeed, in one recent case, the Supreme Court struck down a State statute regulating certain advertising saying that its effect was to suppress truthful information about entirely lawful activity and thus the statute violated the first amendment.⁴⁵

Indeed, the Supreme Court’s recent pronouncements on the first amendment protection given to commercial speech have recognized an exception only in the case of false, deceptive or misleading speech. In the *Virginia State Board of Pharmacy* case, the Court expressly denied the right of the State under the first amendment to prevent the dissemination of advertising which contained “concededly truthful information about entirely lawful activity” because it was “fearful of that information’s effect upon its disseminators and its recipients.”⁴⁶

[The need to pass Section 11(a)(1) is critical] in light of the 1976 Supreme Court decision in *Virginia State Board of Pharmacy* against Citizens Consumer Council, in which the Court held that truthful commercial speech had protection under the first amendment. The present authority of the FTC must be redrawn to insure that it does not run afoul of constitutional protected free speech. The language suggested by the committee in section 7 does this, while at the same time directing the FTC to continue its efforts to regulate

⁴⁵ *Id.* (statement of Sen. Cannon).

⁴⁶ *Id.* at 2354 (statement of Sen. Ford).

advertising so that no false or deceptive material will mislead the public. This is a proper and necessary role for the Commission, one I support.⁴⁷

These concerns were detailed in the 2004 FTC Staff Report. In discussing *Va. State Board of Pharmacy*,⁴⁸ the Report states:

The Court described the role of advertising in a free enterprise economy as follows: Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of information is indispensable.⁴⁹

The Report further articulated the three-part test of *Central Hudson*,⁵⁰ and concluded that in the context of broad bans on advertising to children, especially if such advertisements would also impact the ability of adults to receive the advertising message, the FTC was on shaky ground.⁵¹ The 2004 FTC Staff Report concluded, “one wonders how the wholesale ban on broadcast advertising would fare under the standards set forth in *Central Hudson* and *Lorillard*.”⁵²

VI. The FTC Has Ample Tools to Enforce Its Deceptiveness Authority

The most counterproductive part of the assault on children’s advertising on the Internet is that the FTC has all of the statutory authority it needs to combat abuses in the advertising

⁴⁷ *Id.* at 2355 (statement of Sen. Warner).

⁴⁸ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976).

⁴⁹ 2004 FTC STAFF REPORT, *supra* note 32 at 12.

⁵⁰ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557 (1980). “(1) ‘[t]he state must assert a substantial interest to be achieved by restrictions on commercial speech’; (2) ‘the restriction must directly advance the state interest involved’; and (3) ‘if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.’” 2004 FTC STAFF REPORT, *supra* note 32 at 12.

⁵¹ 2004 FTC STAFF REPORT, *supra* note 32 at 14–15, *quoting* *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001) (“In a case involving indecent speech on the Internet we explained that ‘the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults.’”).

⁵² *Id.* at 16. The 2004 FTC Staff Report also quotes *Thompson v. Western States Medical Center*, 535 U.S. 357, 373 (2002) “If the First Amendment means anything, it means that regulating speech must be a last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try.” *Id.* at 14.

market, authority it has used many times against deceptive advertising.⁵³ It may bring enforcement actions against deceptive advertising, has established influencer guidelines,⁵⁴ and in instances where children’s privacy rights are violated, the FTC has expansive authority under COPPA.⁵⁵ The FTC has shown no hesitancy in bringing such actions in the Internet Age.⁵⁶ Many of the alleged abuses highlighted in the Stealth Advertising Webinar can be addressed through enforcement actions, and TechFreedom encourages the FTC to aggressively move against content creators and advertisers who either seek to hide the fact that they are luring a child into a monetary transaction without making it clear,⁵⁷ or

⁵³ See *id.* at 2–5, citing more than a dozen enforcement cases. See also *FTC v. Match Grp., Inc.*, Civil Action No. 3:19-CV-2281-K, 2022 U.S. Dist. LEXIS 52960 (N.D. Tex. Mar. 24, 2022) (FTC sued Match Group for deceptive practices in their dating services by using fake love interest ads); *In the Matter of Health Research Laboratories et. al.*, FTC Docket No. 9397 (June 30, 2022) (FTC ordered supplement sellers to seize deceptive health claim marketing); *Complaint, United States v. Axis Led Group, LLC*, No. 3:22-cv-01389 (N.D. Ohio, Aug. 5, 2022) (FTC sued companies claiming that their COVID-19 products were made in America when they were not).

⁵⁴ *Disclosures 101 for Social Media Influencers*, FTC (Nov. 2019), https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf.

⁵⁵ Children's Online Privacy Protection Act of 1998 (COPPA), Pub. L. 105-277, 112 Stat. 2681–728 (codified at 15 U.S.C. 6501–06). TechFreedom would note that it believes that some aspects of the FTC’s implementation of COPPA exceed the statutory authority granted by Congress, especially as it relates to defining personally identifiable information (PII) to include device persistent identifiers that might be attached to devices used by multiple members of a family, including adults. See, e.g., Comments of Berin Szòka, President of TechFreedom on Proposed Modifications to the Children’s Online Privacy Protection Act (COPPA) (Sept. 24, 2012), <https://docs.google.com/file/d/0B2pNWHJ8ackuemZPeUs0Si1VRWM/edit?resourcekey=0-vWcXuUF9WWZXXy81m60ZnA> (discussing how the FTC may be over exceeding its statutory authority under COPPA and should instead have limited authority to “redefine the scope of personal information”); see also Remarks of Commissioner Noah Phillips, *The Future of the COPPA Rule: FTC Staff Workshop Washington, D.C.* (Oct. 7, 2019), https://www.ftc.gov/system/files/documents/public_statements/1547700/phillips_-_coppa_workshop_remarks_10-7-19.pdf (“Our children are indeed precious and technology can present risks; which makes it is easy to scare all of us who care about them. But not all risks are the same and not all harms are the same. The ability of a strange person to contact a child is not the same as an advertisement appearing when the child is watching a show. What is more, focusing entirely on the possibility of harm and discounting completely the potential promise of technologies seems the wrong course to me.”).

⁵⁶ See *In the Matter of CSGO Lotto, Inc. et. al.*, FTC Docket No. C-4632 (Nov. 28, 2017) (FTC ruled that two influencers violated the Endorsement Guides by misrepresenting their experiences using CSGO Lotto’s services and failed to disclose their paid influencers’ connections to CSGO Lotto); *In the Matter of Health Research Laboratories et. al.*, FTC Docket No. 9397 (June 30, 2022) (FTC ordered supplement sellers to seize online marketing for making false claims online about the effects of their products). Additionally, the FTC has sent more than ninety letters to influences and brands about disclosing material connections to brands when endorsing their products. Lesley Fair, *Three FTC Actions of Interest to Influencers*, FTC (Sept. 7, 2012), <https://www.ftc.gov/business-guidance/blog/2017/09/three-ftc-actions-interest-influencers>.

⁵⁷ See *Google, Inc.*, FTC File No. 122 3237 (Dec. 2, 2014) (FTC final order related to Google apps which allowed credit card charges to be made without any password requirement or other method to obtain account holder authorization); *Apple Inc.*, FTC File No. 112 3108 (Mar. 27, 2014) (FTC final order requiring Apple to refund at least \$32.5 million to consumers for app purchases made without parental knowledge or approval); *FTC v. Amazon.com, Inc.*, 71 F. Supp. 3d 1158 (W.D. Wash. 2014) (denied motion to dismiss allegations that apps allowed children to make purchases without the “express informed consent” of parents). The Washington

employing tactics that otherwise deceive children into taking actions based on their vulnerabilities. The FTC also has brought an action against a computer game company for “unfair or deceptive acts” in violation of Section 5(a) for failing to disclose the existence of full nudity and a “mini sex game,” which would have warranted an Adults Only (AO) rather than a “Mature” (M) rating from the Entertainment Software Rating Board (“ESRB”).⁵⁸ Enforcement of COPPA remains at the core of the FTC’s enforcement efforts.⁵⁹

Thus, there simply is no need to try and establish rules prohibiting broad types of advertising activities when the FTC has the ability to go after those who attempt to deceive on a case-by-case basis, especially given the First Amendment briar patch the FTC would soon find itself in, were it to embark on a rulemaking proceeding aiming to ban broad swaths of advertising it dislikes under the rubric of “blurred advertising.”

VII. Restrictions on Advertising to Children on the Internet Would Disproportionately Impact Poor and Minority Communities

The saddest part of the latest chapter of our drama—let’s call it “I Hate Commercials for Kids,”—is that if those public interest groups are finally successful, the children who would be most affected by broad bans on Internet advertising to children would be the poor and minority children with fewer resources. Take away the economic engine of advertising from content producers, and content will have to retreat behind paywalls, into curated gardens, where one must pay to enter, either through monthly subscriptions or pay-to-play

Western District Court later granted partial summary judgment for the FTC and found Amazon liable for Section 5 of 15 U.S.C. § 45(n) for their deceptive marketing. *FTC v. Amazon.com, Inc.*, No. C14-1038-JCC, 2016 U.S. Dist. LEXIS 55569 (W.D. Wash. Apr. 26, 2016).

⁵⁸ In the Matter of Take-Two Interactive Software, Inc., and Rockstar Games, Inc., FTC File No. 052 3158 (June 8, 2006) (consent order).

⁵⁹ See, e.g., *United States v. Kurbo, Inc. and WW International, Inc.*, No: 3:22-cv-00946-TSH (Mar. 3, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/wwkurbostipulatedorder.pdf (consent order and injunction against Weight Watchers for collecting PII from children without parental consent related to weight loss products marketed to children); *United States v. OpenX Technologies*, No. 2:21-cv-09693 (Dec. 15, 2021), https://www.ftc.gov/system/files/documents/cases/ecf_3-1_-_stipulated_order.pdf (consent order and agreement to pay \$2 million by online advertising platform for collecting PII from children without parental consent). See, generally, *The Children’s Online Privacy Protection Act (COPPA): What Parents Should Know*, FTC, <https://www.ftc.gov/news-events/topics/protecting-consumer-privacy-security/kids-privacy-coppa> (last visited Nov. 16, 2022) (FTC website listing eight cases brought and settled under COPPA in the past five years).

mechanisms.⁶⁰ Limit the ability of advertisers to target ads, and we risk turning “walled gardens” into “content fortresses” where only the biggest platforms can hope to survive.⁶¹

Harmed too will be smaller, newer, and less well-funded content producers, as those gardens are expensive to build and operate. Ban or highly restrict advertising to children, and we will be handing our children over to large media conglomerates, who can build those gardens, or whose name recognition is so high that they can afford to produce free content without advertising on the Internet because of their reach in other advertising markets.⁶²

Data-driven advertising is particularly important to small publishers—the “long tail” of niche websites that make browsing the internet such an interesting activity. Large publishers have a great deal of information about users based on what they do on the publisher’s own site and may have their own sales force. Small publishers cannot afford a sales force, have less data of their own, and are far more dependent on information from third parties. Indeed, the data advantages of large platforms and publishers are an important barrier to entry into advertising markets. Context is also likely to be a poor substitute for user data for niche sites, both because their audiences change over time and because the visitor to a site specializing in, say, quilting, has other interests that may be far more varied—and valuable—to advertisers other than sellers of quilting supplies.⁶³

⁶⁰ See, Adam Thierer, *Kids, Privacy, Free Speech & The Internet: Finding the Right Balance*, MERCATUS CTR. GEORGE MASON UNIV. 13, (Aug. 2012), https://www.mercatus.org/system/files/Kids_Privacy_Free_Speech_and_the_Internet_Thierer_WP32.pdf (“New Privacy rules could result in online pay walls, subscriptions, micropayment schemes, or tiered services. Web developers might have no choice but to raise prices to cover costs or cut back service. Regulation could also destroy opportunities for new or smaller website operators to break into the market and offer competing services and innovations, thus contributing to consolidation of online content and services by erecting barriers to entry.”); See also Comments of Lartease M. Tiffith, Executive Vice President, Public Policy, Interactive Advertising Bureau, Panel 3: Looking Forward and Considering Solutions, Protecting Kids from Stealth Advertising in Digital Media, FTC (Oct. 19, 2022) (transcript, p. 63), https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-Protecting-Kids-from-Stealth-Advertising-in-Digital-Media%E2%80%93October-19-2022.pdf.

⁶¹ Eric Seufert, *The Profound, Unintended Consequence of ATT: Content Fortresses*, MOBILE DEV MEMO (Feb.15, 2021), <https://mobiledevmemo.com/the-profound-unintended-consequence-of-att-content-fortresses/>.

⁶² *Id.* See also Avi Goldfarb and Catherine E. Tucker, *Privacy Regulation and Online Advertising*, 57 MGMT. SCI. 1, 6 (Aug. 5, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1600259 (following the 2002 EU Privacy Directive which restricted the ability to deliver targeted advertising, advertising effectiveness decreased on average by around 65 percent in Europe relative to the rest of the world).

⁶³ J. Howard Beales and Andrew Stiver, *An Information Economy Without Data*, 1, 3 (Nov. 2022), <https://www.privacyforamerica.com/wp-content/uploads/2022/11/Study-221115-Beales-and-Stivers-Information-Economy-Without-Data-Nov22-final.pdf>.

As a result of the YouTube settlement agreement, and the restrictions on advertising implemented thereafter, we've seen a marked decrease in new children's content on YouTube, and an exodus of many smaller creators from that market.⁶⁴ The FTC in the past has connected these dots and concluded that a reduction in advertising "would include the loss of advertising-funded online content."⁶⁵

What was true in 1974 and 1980 is still true today. Take away the money that pays for content creation through advertising and sponsorship, and the content will go away, at least for those that can't afford to subscribe to premium services. Going back to the FCC's 1974 Policy Statement, that same analysis applies to today's Internet:

Banning the sponsorship of programs designed for children could have a very damaging effect on the amount and quality of such programming. Advertising is the basis for the commercial broadcasting system, and revenues from the sale of commercial time provide the financing for program production. Eliminating the economic base and incentive for children's programs would inevitably result in some curtailment of broadcasters' efforts in this area.⁶⁶

VIII. Conclusion

The FTC should resist the temptation to cast aside more than 50 years of reasoned analysis in this area to embark on an entirely new regulatory system of per se prohibition for media production and delivery because of a different sense of what is "unfair." Instead, the Commission should continue to use the tools it has at its disposal to protect children from deceptive advertising using existing standards and norms which have served it well across generations of children, and generations of media outlets.

⁶⁴ Comments of James C. Cooper, Professor of Law and Director of the Program on Economics & Privacy at George Mason University, Panel 3: Looking Forward and Considering Solutions, Protecting Kids from Stealth Advertising in Digital Media, FTC (Oct. 19, 2022) (transcript, p. 46), https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-Protecting-Kids-from-Stealth-Advertising-in-Digital-Media%E2%80%93October-19-2022.pdf ("Things go behind paywalls. I actually have some work in progress with some other co-authors on the impact of the FTC's suit against YouTube, the COPPA suit, which turned off behavioral advertising for all kids channels. And you see a large exit empirically, this is not anecdotal; a lot of exits, reduction of videos, reduction of channels, channels moving to a more mixed or moving to a grownup, a plus 13 audience... And there's other evidence that when you turn off the spigot of advertising that you reduce content.")

⁶⁵ FTC Staff Comment to the NTIA: Developing the Administration's Approach to Consumer Privacy, Docket No. 18021780-8780-01 (Nov. 9, 2018), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-ntia-developingadministrations-approach-consumer-privacy/p195400_ftc_comment_to_ntia_112018.pdf.

⁶⁶ 1974 Policy Statement, ¶ 35.

Respectfully submitted,

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