

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Sponsorship Identification Rules and Embedded Advertising)	MB Docket No. 08-90
)	
Children's Television Obligations of Digital Broadcasters)	MM Docket No. 00-167
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COMMENTS OF CAMPAIGN FOR A COMMERCIAL-FREE CHILDHOOD

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SUMMARY

Campaign for a Commercial-Free Childhood (“CCFC”) respectfully submits these comments in response to the Federal Communications Commission’s request for comment on the practice of “embedded advertising.” CCFC is a national coalition of healthcare professionals, educators, advocacy groups, parents and individuals concerned with the effects of commercialism on children. CCFC urges the Commission to promptly adopt new regulations on embedded advertisements in order to protect children from an advertising practice they are cognitively unable to understand. Specifically, CCFC requests that the FCC explicitly ban embedded advertisements in all children’s programming as well as in all primetime broadcast programming when children are likely to be in the audience.

Embedded advertisements are pervasive in today’s media marketplace. Research shows that embedded advertisements have been found to be much more effective and persuasive than traditional commercial spots. As a result, companies have increasingly focused on both placing and integrating products into popular programs. Embedded advertising has potentially harmful effects on all television viewers, but children are most at risk. Children are especially vulnerable to embedded advertising techniques because they are cognitively unable to distinguish advertising content from programming and cannot discern persuasive intent. Safeguards such as sponsorship identification and other types of disclosure are ineffective for children, who often cannot read or understand them. Consequently, CCFC recommends that the FCC adopt additional safeguards to protect children from the harms of embedded advertising.

Regulators have long recognized that children should be protected from the harmful effects of advertising. Over the years the FCC has created special safeguards for children, including requiring clear separation between children’s programming and advertising, imposing

commercial time limits and prohibiting host-selling during children's programs. The FCC should make clear that these existing policies explicitly prohibit the inclusion of embedded advertising in all children's programming regardless of whether it is provided via broadcast, cable or satellite service.

In addition to making clear that its existing policies preclude embedded advertising from children's programming, CCFC remains concerned that children are highly vulnerable to the harms of embedded advertising during primetime broadcast programming. Many programs aired during this time are extremely popular with children between the ages of two and eleven and have become "must-see" family viewing. These programs are also among those that include the most embedded advertising. In order to more fully protect young viewers, CCFC urges the FCC to also ban embedded advertisements in primetime broadcast programming when children are likely to be in the audience.

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The Campaign for a Commercial-Free Childhood by its attorneys, the Institute for Public Representation, respectfully submits these comments in response to the Federal Communication Commission’s (“FCC” or “Commission”) request for comment on the practice of “embedded advertising.”¹ Campaign for a Commercial-Free Childhood (CCFC) is a national coalition of healthcare professionals, educators, advocacy groups, parents and individuals concerned with the effects of commercialism on children. CCFC works with legislators and regulators to promote the rights of children to grow up – and the freedom for parents to raise them – without being undermined by commercial interests. CCFC welcomes this opportunity to offer its perspective on the adequacy of the Commission’s existing policies and rules in protecting children from commercialism and deceptive advertising practices.

I. Embedded Advertising Practices Are Pervasive Across Media

The new media marketplace has generated unprecedented growth in embedded advertising practices. These practices have become big business and are rapidly becoming one

¹ *Sponsorship Identification Rules and Embedded Advertising*, Notice of Inquiry and Notice of Proposed Rulemaking, MB Docket 08-90 (rel. June 26, 2008) (“Notice”).

of the primary marketing vehicles for media, particularly primetime television. The FCC recognizes this sea change and now requests public comment as it reevaluates its sponsorship identification and children's advertising rules. The Notice acknowledges that content providers have turned increasingly to "more subtle and sophisticated means of incorporating commercial messages into traditional programming."² One reason cited for this shift is the rise of technologies that allow consumers to more readily skip commercial content. However, research also shows that embedded techniques have become popular with advertisers due to their greater effectiveness and persuasiveness. Unlike a stand-alone commercial spot, an embedded advertisement catches viewers when they are least aware and least able to think critically. Indeed, one prominent observer of the phenomenon has written "a good product placement may be one that fits with the story in such a way as to make us forget that it is there to persuade us."³

In addition, marketers benefit in many other ways from the practice of embedding advertisements into content. For example, these placements often cost less than traditional advertising spots. They appear in a low clutter environment where consumers are arguably more captive. They can be used to imply a celebrity endorser at a lower cost. In addition, the embedded marketing message gets recycled with the program when it is re-run or moves to other platforms.⁴ There is no question that in today's vast media marketplace, "there is a conscious and coordinated effort on the part of content creators, production companies, studios, marketers, and manufacturers to integrate products into entertainment programming in a systematic,

² *Notice*, (Comm'r Martin Statement).

³ John A. McCarty, *Product Placement: The Nature of the Practice and Potential Avenues of Inquiry*, in *THE PSYCHOLOGY OF ENTERTAINMENT MEDIA: BLURRING THE LINES BETWEEN ENTERTAINMENT AND PERSUASION* 45, 49-50 (L.J. Shrum ed., 2004).

⁴ Sharmistha Law & Kathryn A. Braun-LaTour, *Product Placements: How to Measure their Impact*, in *THE PSYCHOLOGY OF ENTERTAINMENT MEDIA: BLURRING THE LINES BETWEEN ENTERTAINMENT AND PERSUASION*, *supra* note 3, at 63, 64.

efficient and persuasive manner.”⁵ Indeed, more than one hundred specialized advertising agencies are devoted to embedded advertising placements and most film and television studios have specialized placement departments.⁶ Complex commercial research, as well as measurement and tracking services have been developed and are now flourishing with the sole goal of measuring the impact of these placement techniques.⁷

This subtle and sophisticated advertising technique is thought to have taken off when Steven Spielberg’s 1982 film *E.T.* showcased the adorable alien eating Reese’s Pieces.⁸ The placement was a huge success and the candy company saw sales in the new product surge 65% in three months.⁹ Since *E.T.*, placing and integrating products has become increasingly common in countless other children's movies.¹⁰

⁵ Matthew Savare, *Where Madison Avenue Meets Hollywood and Vine: The Business, Legal, and Creative Ramifications of Product Placements*, 11 UCLA ENT. L. REV. 331, 334 (2004).

⁶ JULIET B. SCHOR, *BORN TO BUY: THE COMMERCIALIZED CHILD AND THE NEW CONSUMER CULTURE* 78 (2004).

⁷ Nielsen Product Placement Service catalogs and counts all visual and audio references to products during prime time entertainment programming on the six major TV networks and reports how many viewers were watching the program at the time of the product mention or appearance. Anna Heinemann, *TNS Launches Product-Placement Measuring Service*, AdAge.com, June 21, 2005, <http://www.adage.com/search.cms> (search "heinemann") (subscription required). In June 2005, TNS Media Intelligence launched its Branded Entertainment Reporting Service. *Id.* IAG Research offers In-Program Performance, yet another service for measuring the impact of product placement. *Id.* CinemaScore is used to calculate placement fees for product placements in movies. *See* Law & Braun-LaTour, *supra* note 4, at 66 (cited in Angela Campbell, *Food Marketing to Children and the Law: Restricting The Marketing of Junk Food To Children By Product Placement and Host Selling*, 39 LOY. L. REV. 447 (2006).

⁸ Nate Anderson, *Product Placement in the DVR Era*, ARS TECHNICA, March 19, 2006, <http://arstechnica.com/articles/culture/productplacement.ars>.

⁹ Dale Buss, *A Product-Placement Hall of Fame*, BUSINESS WEEK, June 11, 1998, <http://www.businessweek.com/1998/25/b3583062.htm>.

¹⁰ For example, recent examples of “product-placement movie[s] gone wild” are *Herbie: Fully Loaded*, *Madagascar*, *Scooby-Doo 2*, *Fantastic Four*, and *Spiderman 2*. Spiderman uses his web-spinning power to retrieve a Dr. Pepper. *See, e.g.* Ross Johnson, *Product Placement for the Whole Family*, N.Y. TIMES, July 6, 2005, at E5; Center for Science in the Public Interest,

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Not surprisingly, embedded advertising has migrated from movies to television and the practice has become standard marketing practice today. Indeed, primetime product placement occurrences on broadcast networks increased by 39% overall during the first quarter of 2008.¹¹ A recent Nielsen report documented a 12% increase across all broadcast programming during the first half of 2008.¹² The top ten programs featured 21,427 occurrences between January and June of this year – compared to 17,370 occurrences in the same time period in 2007.¹³ One public relations executive specializing in media placement of ads opined, “this is no fad – this is where the industry is going.”¹⁴

Today’s immensely popular primetime reality shows have become obvious and lucrative targets for the technique. These shows have large audiences and have increasingly become “must-see” family viewing. After several networks passed on *Survivor*, its producer approached CBS, which at the time was suffering in the primetime ratings. The *Survivor* producers convinced CBS that embedding advertisements could help off-set production costs. As a result, in the first episode the initial winner received a bag of Doritos and a six-pack of Mountain Dew. One analyst noted, “it played so well that that’s really where the upswing in television product

(footnote continued)

Pestering Parents: How Food Companies Market Obesity to Children (2003), http://www.cspinet.org/new/pdf/pages_from_pestering_parents_final_pt_1.pdf.

¹¹ *Product Placements Rose 6% in First Quarter, Nielsen Reports*, REUTERS, May 5, 2008, <http://www.reuters.com/article/pressRelease/idUS82123+05-May-2008+PRN20080505>.

¹² Wayne Friedman, *Nielsen: Networks Hit By Big Product Placement Drops*, MEDIA DAILY NEWS, Sept. 16, 2008, <http://www.mediapost.com/publications/?fa=Articles.san&s=90631&Nid=47302&p=368626>.

¹³ NAB365, *Product Placements for Broadcast TV Grow in First Half of '08*, Sept. 16, 2008, http://nab365.bdmetrics.com/NST-2-50104511/story.aspx?utm_source=nab365&utm_medium=email&utm_campaign=newsletter&ocuid=NDEyMDAyOQ==zbpO/YD8dFQ=&r=t.

¹⁴ Beth Gillin, *Product Placement Turns TV Programs into Commercials*, KNIGHT-RIDDER, Jan. 24, 2005, <http://www.commondreams.org/headlines05/0124-02.htm>.

placement began.”¹⁵ The hit show *American Idol* claims the top spot for product placements, with approximately 4,636 occurrences to date.¹⁶ In the spring of 2007, each episode of *American Idol* exposed roughly two million two- to eleven-year-old children to Coca Cola’s product placement through the prominent display and sipping of Coke at the judging table.¹⁷ In addition, the car maker Ford sponsors “Ford Music Videos” which air during the program, featuring the contestants singing and dancing while driving the latest Ford models. In the first thirty-eight episodes of *American Idol* in 2008, fourteen minutes per hour-long episode were taken up not by the talent competition, but by embedded advertising alone.¹⁸ This was in addition to the traditional interstitial commercial spots.

In addition to placements in the popular reality shows, many products are also embedded in primetime sitcoms and dramas.¹⁹ In these programs, the products are not only visible, but are often integrated into program storylines. In effect, the products are written in as characters in the story. As a result of a lucrative endorsement deal with Kraft Foods, five different storylines in

¹⁵ Anderson, *supra* note 8.

¹⁶ Friedman, *supra* note 12.

¹⁷ Susan Linn and Courtney L. Novosat, *Calories for Sale: Food Marketing to Children in the Twenty-First Century* 615 ANNALS AM. ACAD. POL. & SOC. SCI. 133, 139 (2008).

¹⁸ Ronald Grover, *American Idol’s Ads Infinitum*, BUSINESS WEEK, available at http://www.businessweek.com/magazine/content/08_22/b4086038607130.htm?chan=top+news+index_news+%2B+analysis

¹⁹ In an episode of NBC’s “The Office,” Steve Carell orders a Chili’s “awesome blossom” in a scene that was partially shot in Chili’s. Chili’s also paid the star to sing the Chiles ribs jingle in the show. Anderson, *supra* note 8. Additionally, a recent episode of the popular CW show “Gossip Girl,” revolved around popular Vitamin Water product. Roger Catlin, *Gossip Girl: Powered by Vitamin Water*, TV EYE, September 1, 2008. Even more disconcerting is the emergence of product placement in news programming “There are more local news stations that are incorporating brands into news in innovative, cutting-edge ways,” said Aaron Gordon, president of entertainment marketing firm Set Resources Inc. “The line, which has always been black and white in terms of what’s news and what’s commercials, is now being blurred.” Gail Schiller, *The Wall is Crumbling: Local TV Stations Adopt Product Placements In Newscasts to Increase Ad Support*, BULLDOG REPORTER’S DAILY DOG, March 17, 2006.

two installments of 7th *Heaven* included Oreo cookies.²⁰ In one episode, characters took part in a lengthy debate about whether Oreos should be dunked in milk, or twisted apart. In another, one character proposed to another by concealing an engagement ring in the cookie's filling.²¹ Like characters, the cookies themselves became associated with the emotional highs and lows of the episode's storyline.²²

II. Children Require Special Safeguards To Protect Them From The Harms Of Embedded Advertising

The above illustrations only begin to scratch the surface of the overwhelming amount of embedded advertising pervasive in today's television programming. Research confirms that embedded advertising can have harmful and deceptive effects on all television viewers, regardless of age. Among other things, studies show that viewers respond to embedded products without consciously knowing that they are doing so. For example, mere exposure to a brand by just seeing it can result in consumers having a more favorable attitude towards it even if the consumer does not actually recall the exposure.²³ Indeed, these placements are significantly more effective when consumers are not aware that they have seen them.²⁴ When products are embedded into television storylines, surveys suggest that even adult viewers tend to be less critical of the marketing message. By embedding brands in stories, integration techniques

²⁰ *TV scribes mount well-placed protest*, VARIETY, May 22, 2006, <http://www.variety.com/article/VR1117943888.html?categoryid=1979&cs=1>.

²¹ *Id.*

²² *Id.*

²³ C. Janiszewski, *Pre Attentive Mere Exposure Effects*, 20 J. CONSUMER RES. 376-92 (1993); See also R.F. Bornstein, D.R. Leone & D.J. Galley, *The Generalizability of Subliminal Exposure Effects: Influence of Stimuli Perceived Without Awareness of Social Behavior*, 53 J. PERSONALITY & SOC. PSYCHOL. 1070 (1987) (Research suggests that young adults exposed to objects presented for a very short duration show a preference for those items, even when they are not aware that they have seen them).

²⁴ S. Law & K.A. Braun, *I'll have what she's having: Gauging the impact of product placements on viewers*, 17 PSYCHOL. & MARKETING 1059 (2000).

present products in the context of emotion. Even a brief exposure in an emotional context is likely to affect how the product is perceived. There is no doubt that “stories can be a powerful tool for shaping attitudes and opinions” and “they are especially influential when we become drawn into them.”²⁵

While research demonstrates that the practice of embedding advertisements into television content is harmful to viewers of all ages, CCFC is especially concerned about the effect such advertising has on children. Marketing to children is big business. Advertisers are keenly aware of both the growing purchasing power of children and their influence on family spending.²⁶ About \$17 billion is spent annually marketing to children.²⁷ Twenty-five years ago this figure was only \$100 million.²⁸ On television alone, children between two and eleven see over 25,000 ads every year, not including product placements.²⁹ Children are constantly bombarded with advertising in every other content medium including the Internet, cell phones, mp3 players, video games, and sadly, even when they are in school. In addition, almost every major media program designed for children is associated with a line of licensed merchandise

²⁵ M. Green, J. Garst, & T.C. Brock, *The Power of Determinants*, in *THE PSYCHOLOGY OF MEDIA ENTERTAINMENT: BLURRING THE LINES BETWEEN ENTERTAINMENT AND PERSUASION* *supra* note 3, 174.

²⁶ Children under 14 personally spend \$40 billion annually, and teens spend over \$159 billion. *BuyBabies: Marketing to Kids*, *THE ECONOMIST*, December 9, 2006; TRU, *TRU Projects Teens Will Spend \$159 Billion in 2005*, December 15, 2005. Further, experts estimate that two- to fourteen-year-olds have sway over \$500 billion a year in household purchasing. *INSTITUTE OF MEDICINE, FOOD MARKETING TO CHILDREN AND YOUTH: THREAT OR OPPORTUNITY?* (J.M. McGinnis, J.A. Gootman & V.I. Kraak eds., National Academies Press 2006). This is up from estimates in 1997, where it was believed children influenced \$188 billion in family purchases. James McNeal, *Tapping the Three Kids' Markets*, 20 *AMERICAN DEMOGRAPHICS*, 37-41 (1998).

²⁷ B. Horovitz, *Six Strategies Marketers use to Make Kids Want Things Bad*, *USA TODAY*, Nov. 22, 2006, at 1B (quoting James McNeal).

²⁸ SCHOR, *supra* note 6, at 21.

²⁹ FEDERAL TRADE COMMISSION, *BUREAU OF ECONOMICS STAFF REPORT, CHILDREN'S EXPOSURE TO TV ADVERTISING IN 1977 AND 2004* 9 (2007).

including toys, snack foods, clothing, and accessories. These tie-in products and services accounted for \$22.3 billion in sales in 2006.³⁰

As a result of the constant commercial bombardment, this generation of children is more brand conscious than ever. Toddlers as young as two have been found to have attachments to brands.³¹ Children as young as three are capable of recognizing trademarked brand logos.³² One study found that 81% of three- to six-year-olds after having seen just the logo for Coca-Cola can describe the soft-drink product.³³ On average, teens between thirteen and seventeen have 145 conversations about brands per week, more than twice as many as adults.³⁴

The staggering increase in marketing to children has been linked to many of the serious problems facing children today. For example, marketing directly to children is a proven factor in the childhood obesity epidemic.³⁵ Marketing also encourages eating disorders, precocious sexuality, youth violence and family stress and can contribute to children's diminished capability to play creatively.³⁶ Moreover, as young children are developing their gender identities, they are flooded with ads for products promoting sexualized stereotypes. For example, there are 40,000

³⁰ D. Hayes, *Invasion of the Techie Tots*, VARIETY, Feb. 19, 2007, at 1.

³¹ JAMES MCNEAL, *KIDS AS CUSTOMERS* (Lexington Books 1992).

³² Paul M. Fischer, Meyer P. Schwartz, John W. Richards, Jr., & Adam O. Goldstein, *Brand logo recognition by children aged 3 to 6 years: Mickey Mouse and Old Joe the Camel*, 266 JAMA 3145 (1991).

³³ A. Dammler, & A.V. Middleman-Motz, *I Want the One with Harry Potter On It*, 3 INT'L J. ADVERTISING & MARKETING TO CHILDREN 3 (2002).

³⁴ M. Corcoran, *These Days, Some Teens Covet Expensive Brand Names in Purses, Accessories*, LOS ANGELES TIMES, September 25, 2007; *See also* G. Bachmann Achenreiner & John D. Roedder, *The Meaning of Brand Names to Children: A Developmental Investigation*, 13 J. CONSUMER PSYCHOL. 205 (2003).

³⁵ INSTITUTE OF MEDICINE, *FOOD MARKETING TO CHILDREN AND YOUTH* 8 (The National Academies Press 2006).

³⁶ SUSAN LINN, *CONSUMING KIDS: THE HOSTILE TAKEOVER OF CHILDHOOD* (New Press 2005); SCHOR, *supra* note 6.

Disney Princess items on the market today,³⁷ and violent PG-13 movies, like *Spiderman* and *Transformers*, market toys that promote violence to preschool children.³⁸

A. Children Are Especially Vulnerable To Embedded Advertising Techniques

In the Notice the Commission recognizes the “special safeguards”³⁹ already in place for children,⁴⁰ and asks whether “existing rules and policies governing commercials in children’s programming adequately vindicate [existing] policy goals.”⁴¹ CCFC strongly believes that more stringent regulations on embedded advertisements are necessary to protect children who are faced with particular vulnerabilities while watching television.

1. Children Cannot Distinguish Advertising Content From Programming

In order to recognize the persuasive intent of commercials, research suggests that one must make five cognitive distinctions:

- (1) discriminate between programming and commercials;
- (2) recognize an external source (*i.e.* a sponsor);
- (3) perceive that they are the intended audience as the target of the advertiser’s message;
- (4) be aware of the symbolic, not realistic, nature of commercials,
- (5) recall personal experiences in which discrepancies had been discovered between products as advertised and products in actuality.⁴²

³⁷ SUSAN LINN, *THE CASE FOR MAKE BELIEVE: SAVING PLAY IN A COMMERCIALIZED WORLD* 175 (New Press 2008).

³⁸ Letter from Alvin F. Poussaint and Susan Linn, Campaign for a Commercial-Free Childhood, to Deborah Platt Majoras, Chairman, Federal Trade Commission (June 28, 2007) (on file with author).

³⁹ Children’s Television Act of 1990, Pub. L. No. 101-437 (1990).

⁴⁰ Notice, at ¶6.

⁴¹ Notice, at ¶16.

⁴² Thomas S. Robertson and John R. Rossiter, *Children and Commercial Persuasion: An Attribution Theory Analysis*, 1 J. CONSUMER RES. 13 (1974). Even a general audience has difficulty processing these cognitive steps when confronted with embedded advertising because,

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Research suggests that a child’s ability to complete the first cognitive step – to discriminate programming from advertising – develops between the ages of four and seven years old.⁴³ Before children turn eight, most believe that commercials are designed solely to help them with their purchasing decisions and do not comprehend that commercials intend to persuade them or that advertisements are primarily motivated by monetary interests.⁴⁴ However, even children over the age of eight (who are more likely to understand that advertising is meant to be persuasive) tend not to employ these defenses against traditional commercial spots on their own or without external cues.⁴⁵ Indeed, studies have shown that children can be more persuaded by program-length commercials than by conventional television advertising promoting the same products.⁴⁶ For all these reasons, children are particularly vulnerable to the embedded advertising in their favorite programs.

2. Advertising Influences Children’s Decisions Even If They Are Unaware That They Are Being Advertised To

Even though children may be cognitively unaware that they are being targeted by advertisers, their decisions and preferences are nonetheless influenced by marketing. Product placement has a clear effect on children’s choices and preferences. In a 2004 study, two groups

(footnote continued)

due to the underlying goal of the technique, adults are “likely to be unaware of the commercial influence attempt [in embedded advertisements].” S.K. Balsubramanian, *Beyond Advertising and Publicity: Hybrid Messages and Public Policy Issues*, 23 J. ADVERTISING 30 (1994).

⁴³ GERARD HASTINGS ET AL., FOOD STANDARDS AGENCY, REVIEW OF RESEARCH ON THE EFFECTS OF FOOD PROMOTION TO CHILDREN (2003).

⁴⁴ Sandra L. Calvert, *Children as Consumers: Advertising and Marketing*, 18 THE FUTURE OF CHILDREN 205 (2008).

⁴⁵ M. Brucks, G.M. Armstrong & M.E. Goldberg, *Children’s Use of Cognitive Defenses Against Television Advertising: A Cognitive Response Approach*, 14 J. CONSUMER RES. 471 (1988).

⁴⁶ *Children’s Television Programming: Hearing Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the H. Comm. on Energy and Commerce*, 98th Cong. 99-66 (1985) (statement of J. Bryant).

of children (ages six to seven and eleven to twelve) were shown a clip from the movie *Home Alone*. One group was shown a clip in which a family sits around a table eating pizza and drinking Pepsi. In the clip, one character also explicitly refers to Pepsi. The control group was shown a similar clip from the same movie, but without the inclusion of the branded product. Afterwards, children who had seen the film and control groups of both ages were given a choice between Coke and Pepsi. Those who had seen the clip featuring Pepsi – even those who did not recall seeing Pepsi in the clip – chose Pepsi at a much higher rate than those that did not view the Pepsi-branded clip. Commenting on the confirmed link between product placement and children’s choices, researchers noted, “[w]ithout being aware of their exposure to commercial messages, [children] have been affected by the exposure in some preconscious way.”⁴⁷ The link between product placement and children’s choices indicate that children’s decisions are deeply influenced by marketing, rather than being based on rational logic.

Another study evaluating children’s vulnerability to advertising asked children to choose between receiving a chocolate bar or a head of broccoli. Common sense would indicate that most children would choose a chocolate bar over broccoli. Indeed, research shows that 78% of children would choose the chocolate.⁴⁸ But when branded with a favorite Sesame Street character, 50% of children instead chose the Elmo broccoli, and broccoli consumption more than doubled among children participating in the study.⁴⁹ Though in this particular study, neither

⁴⁷ Auty & Lewis, *Exploring Children’s Choice: The Reminder Effect of Product Placement*, 21 PSYCHOL. & MARKETING 697, 710 (2004).

⁴⁸ Press Release, Sesame Workshop, “If Elmo eats broccoli, will kids eat it too?” Atkins Foundation Grant to fund further research (Sept. 20, 2005), *available at* http://archive.sesameworkshop.org/aboutus/inside_press.php?contentId=15092302.

⁴⁹ *Id.*

Elmo nor broccoli were “embedded” in content, the influence and power of character marketing is clear.

Older children are just as likely to be affected by product placement. Market research on the viewing behavior of children eight to twelve indicated that “tweens” are influenced by product placement in the popular broadcast television program *American Idol*.⁵⁰ As described above, this show is rife with product placement of brands like Coca-Cola, Ford, and many others.⁵¹ Tweens studied were almost twice as likely to watch promotional videos starring performers from the show (92%) than they were to watch regular television commercials (48%), and almost half of tweens believed the performers really did use the products.⁵² The marketing survey also asked tweens if “seeing a favorite character or star using a certain brand [made them] also want to use that brand” – and 72% answered yes.⁵³

3. Sponsorship Identification And Disclaimers Are Ineffective Safeguards For Children

While this Notice is primarily concerned with the adequacy of existing sponsorship identification notices associated with advertising, these requirements will not alleviate the harmful effects of embedded advertisements on children. It is well documented that children do not comprehend disclosures or disclaimers.⁵⁴ Studies have shown that even simplistic statements such as “batteries not included,” and “each part sold separately” are misunderstood by at least three-quarters of children.⁵⁵ Because children are so engrossed in the product, they are apt to

⁵⁰ BUZZBACK MARKET RESEARCH, TWEENS EXPLORATORY (Aug. 2003) (“Tween Buzzback”).

⁵¹ Gail Shiller, *Big Business: Placements up in 2007*, HOLLYWOOD REPORTER, Jan. 10, 2008.

⁵² Tween Buzzback, *supra* note 50, at 22-23.

⁵³ *Id.*, at 10.

⁵⁴ See Dale Kunkel, *Children and Television Advertising*, in HANDBOOK OF CHILDREN AND THE MEDIA at 377-78 (Dorothy G. Singer & Jerome L. Singer eds., 2001) (citing various studies).

⁵⁵ *Id.*

ignore or misunderstand the warning. Surely then, a brief “this message sponsored by...,” which has greater implications, would be equally ineffective. Additionally, such sponsorship identification and disclosure may ultimately amount to an additional advertisement since children will first see the product, and then see or hear it mentioned once again. For children who have not yet learned to read, disclaimers are particularly ineffective in the form of “crawls” or any non-auditory disclosures. In such respects, sponsorship identification and disclosure requirements are inadequate and arguably irrelevant safeguards for protecting children.

B. Congress And The FCC Have Consistently Provided Appropriate Safeguards For Children From The Harmful Effects Of Advertising

While television has the power to enrich the lives of our children, Congress and the FCC have been vigilant in recognizing and protecting children from its many potential harms. As part of the “duty to serve all substantial and important groups in their communities” provided for in the 1934 Communications Act, decision-makers have always had a heightened recognition that children represent one such very important group.⁵⁶ Over the years, regulators have attempted to protect children from the harmful effects of certain content, including advertising.

One of the first of these attempts was to protect children from unfair advertising practices and commercialization in the burgeoning television industry. At the request of children’s advocates in 1971, the FCC initiated a wide-ranging inquiry into the state of children’s programming and advertising practices. In the resulting 1974 Policy Statement, the FCC declined to eliminate all commercials on children’s programming but adopted important restrictions based on a finding that “special safeguards may be required to ensure that the

⁵⁶ *1974 Children’s Television Report and Policy Statement*, 50 FCC 2d 1, ¶16 (1974) (“*1974 Policy Statement*”).

advertising privilege is not abused.”⁵⁷ It found that “most young children do not understand that there is a ‘commercial’ incentive for the use of these products and that it is, in fact, a form of merchandising.”⁵⁸ Specifically, the Commission adopted a policy requiring a clear separation between children’s programming and advertising, limiting the amount of commercials, and restricting host-selling or the use of program characters to promote products.⁵⁹

In passing the Children’s Television Act of 1990, Congress revisited the harms associated with unfair advertising directed at children.⁶⁰ Finding that “total reliance on marketplace forces is neither sufficient nor justified to protect children from potential exploitation by advertising or commercial practices,”⁶¹ Congress expressed concern with advertising practices that might take unfair advantage of children’s “unique vulnerability to commercial persuasion.”⁶² Accordingly, Congress directed the FCC to adopt rules limiting commercials in children’s programming to ten and a half minutes per hour on weekends and twelve minutes per hour on weekdays,⁶³ and to initiate proceedings to define and limit program-length children’s commercials.⁶⁴ Subsequently, the FCC also adopted a mandate that commercials be clearly separated from regular programming and a prohibition on program-length commercials.⁶⁵

The Commission must act again to address the dangers inherent in newly developed methods of targeting children with commercial messages. Because of the demonstrated harms

⁵⁷ *Id.*, at ¶34.

⁵⁸ *Id.*, at ¶55.

⁵⁹ *Id.*, at ¶¶39, 52, 53.

⁶⁰ Children’s Television Act of 1990, Pub. L. No. 101-437 (1990).

⁶¹ H.R. REP. NO. 101-385, at 6. (1989), *as reprinted in* 1990 U.S.C.C.A.N. 1605 (“House Report”).

⁶² *Id.*

⁶³ Children’s Television Act of 1990, 47 USC § 303a (2000); 47 C.F.R. § 76.225 (2007).

⁶⁴ Children’s Television Act of 1990, 47 USC § 303b (2000).

⁶⁵ 47 C.F.R. § 76.225 (2007).

associated with embedded advertising and its effect on children, and the increasing use of these practices, CCFC calls on the Commission to take prompt action in the following ways.

III. The Commission Should Explicitly Ban The Use Of Embedded Ads In All Children’s Programming

CCFC strongly supports the adoption of an explicit prohibition on the use of embedded advertising in all children’s programming. In the NPRM portion of the Notice, the Commission requests comment on whether its existing policies adequately protect children from embedded advertising practices, and if not, what additional steps the Commission should take to further regulate such practices.⁶⁶

In particular, it asks whether it should make explicit that the use of embedded advertising in children’s television programming violates the FCC separation policy.⁶⁷ As the FCC acknowledges, “embedded advertising would run afoul of our separation policy because there would be no bumper between programming content and advertising.”⁶⁸ For over thirty years the FCC has recognized that “children are far more trusting of and vulnerable to commercial ‘pitches’ than adults,”⁶⁹ and that certain advertising practices could be deemed “unfair or deceptive when directed at children.”⁷⁰ Accordingly, it determined that special measures should be taken to guarantee that “a clear separation be maintained on programs designed for

⁶⁶ *Notice*, at ¶16.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *1974 Policy Statement*, 50 FCC 2d 1, at ¶34.

⁷⁰ *Id.*, at ¶46.

children,”⁷¹ which FCC rules define as “programs primarily produced and broadcast for an audience of children twelve years old and under.”⁷²

While the separation principle was originally conceived in the 1970s when the FCC was focused largely on children’s programming aired on broadcast television, the concept should logically extend to all television platforms on which children’s programming is offered. It is well-documented that most children cannot distinguish between ads and program content, and cannot recognize persuasive intent.⁷³ These cognitive disadvantages and potential harms exist in spite of the medium on which children view advertising. As a result, it is clear that children are just as susceptible to confusion and commercial manipulation on programming provided over cable or satellite television as they are on programming provided over broadcast television. The FCC should clarify in any new rule that the use of embedded advertisements is expressly prohibited in all children’s programming whether distributed via broadcast, cable, or satellite television.

The use of embedded advertising in children’s programming also runs contrary to the CTA’s longstanding goal of protecting children from commercialism across all television media. Congress has noted that, “[y]oung children who cannot recognize the difference between a program and a commercial certainly cannot be expected to react adversely to an excessive amount of advertising by changing the channel or turning off the television.”⁷⁴ Accordingly, in the CTA, Congress instructed the Commission to limit the duration of advertising in children’s programming on cable and broadcast television to ten and a half minutes per hour on weekends

⁷¹ *Id.*, at ¶49.

⁷² *Policies and Rules Concerning Children's Television Programming, Report and Order*, 6 F.C.C.R. 2111 at ¶3 (1991) (“*CTA Implementation Order*”).

⁷³ *See, e.g.*, H.R. REP. 101-385, at 6.

⁷⁴ *Id.*

and twelve minutes per hour on weekdays,”⁷⁵ and to adopt an appropriate definition of, and restrictions on, program-length children’s commercials.⁷⁶

The FCC subsequently adopted rules defining a program-length children’s commercial as follows: (1) a program in which a product associated with the program appears in commercial spots not separated from the start or close of the program;⁷⁷ and (2) a program in which a product or service is advertised within the body of the program.⁷⁸ In doing so, the Commission affirmed its “fundamental regulatory concern, that children who have difficulty enough distinguishing program content from unrelated commercial matter [should] not be all the more confused by a show that interweaves program content and commercial matter. Removal of commercial matter should help alleviate this confusion.”⁷⁹

Embedded advertising clearly falls within the FCC’s second definition of a program-length commercial. Embedded advertising contains commercial matter, usually in the form of branded products, which are integrated into programming in exchange for consideration.⁸⁰ The Commission further found that any children’s program deemed to be a program-length commercial would count toward the statutory advertising limits,⁸¹ and stated that “[i]n light of the Act’s imposition of commercial limits on both television broadcasters and cable operators, we

⁷⁵ 47 U.S.C. § 303a; 47 C.F.R. § 73.670. These limits were subsequently extended to satellite television. *See Direct broadcast Satellite Public Interest Obligations Sua Sponte Reconsideration*, 19 FCC Rcd. 5647, at ¶44 (2004).

⁷⁶ 47 U.S.C. §303b.

⁷⁷ *CTA Implementation Order*, 6 FCC Rcd 2111, at ¶44, 45.

⁷⁸ *Id.*, at ¶44.

⁷⁹ *Id.*

⁸⁰ With regard to children’s programming, “commercial matter” is defined by the FCC as “time sold for the purpose of selling a product.” *CTA Implementation Order*, 6 FCC Rcd 2111, at ¶4.

⁸¹ *Id.*, at ¶44.

will apply our definition of program-length children's commercials to both television broadcast and cable programs for children."⁸²

Some of the most watched programming by children under 12 is shown during primetime on kid's cable networks such as Nickelodeon and Disney.⁸³ Given the popularity of such programs, CCFC believes that they may provide attractive venues for marketers seeking to target younger audiences via embedded advertising techniques. Therefore, any children's programming on cable, satellite or broadcast television that incorporates product placements or product integration in exchange for consideration should be considered a program-length children's commercial under the Commission's rules.

IV. The Commission Should Prohibit Embedded Advertisements In The Hours Of Primetime Broadcast Programming When Children Are Likely To Be In The Audience

While prohibiting the use of embedded ads in all children's programming is a necessary and welcome step in protecting children from commercial manipulation, CCFC is also concerned that children are not adequately protected from potentially deceptive ads and commercialism in the shows they are watching that fall outside the strict definition of children's programming. Consequently, CCFC urges the FCC to also adopt rules that protect children from the harmful effects of embedded advertising by prohibiting such practices during primetime broadcast programming during those hours when children are likely to be in the audience.

While the CTA and attendant FCC rules have taken fundamental steps to protect children from advertising and commercialism during children's programming, a significant number of

⁸² *CTA Implementation Order*, 6 FCC Rcd 2111, at n.127.

⁸³ Cynopsis Media, *Cynopsis: Kids!* (May 23, 2008), <http://www.cynopsis.com/content/view/3523/53/> (ranking Disney's *High School Musical*, and Nickelodeon's *iCarly* and *H2O* as some of the most popular evening programs for children under 11).

children remain vulnerable to manipulative product placement and integration during non-children's programming. In adopting advertising limits under the CTA, Congress exempted from the ad limits programming "originally produced for a general or adult audience which may nevertheless be significantly viewed by children."⁸⁴ However, in the early 1990s neither Congress nor the FCC could have contemplated how rampant the practice of embedded advertising in broadcast programming would become. Indeed product placement in broadcast programming surged by 39% in the first quarter of 2008 alone.⁸⁵

Children are attracted to primetime broadcast viewing, particularly when they watch with their families. Trade press reports indicate that reality shows such as Fox's *American Idol* and ABC's *Extreme Makeover: Home Edition*, which all air during primetime, are among the most popular broadcast programs for children.⁸⁶ Unfortunately, children remain unprotected from the inherently exploitive and harmful nature of product placements and integrated ads inserted in primetime programming – a time when families should feel safe watching programs free of objectionable or exploitive content.

One way to protect children from manipulation by stealth ads is to prohibit the use of embedded advertising in programs aired during times of the day when children are likely to be in the audience. As a possible solution, CCFC proposes that the FCC prohibit the use of embedded advertising in primetime broadcast programming during those hours when children are likely to

⁸⁴ H.R. REP. 101-385, at 16. As a result, the FCC's CTA Implementation Order similarly excuses "general audience programming" from the ad limits applied to programming directed towards children 12 and under. *CTA Implementation Order*, 6 FCC Rcd 2111, at ¶3.

⁸⁵ *Product Placements Rose 6% in First Quarter*, Nielsen Reports, *supra* note 11.

⁸⁶ Rick Kissel, *Reality rates high with families: Nonfiction programming big with all age groups*, VARIETY (Feb. 28, 2007).

be in the audience.⁸⁷ While CCFC understands that the creation and provision of programming requires financial support in the form of commercial sponsorship, such requirements do not justify the use of advertising techniques that are unfair and manipulative, particularly when viewed by children. Use of these techniques during times when children are likely to be watching should be restricted as it clearly is inconsistent with the public interest.

CONCLUSION

For the reasons stated above, CCFC urges the Commission to protect children, who are uniquely vulnerable to commercial manipulation, from embedded advertising practices. Accordingly, the FCC should adopt an explicit ban on the use of embedded advertising in all children's programs. Moreover, CCFC urges the FCC to explore ways to protect children from embedded advertising outside of the strict definition of children's programming and suggests that the FCC prohibit embedded advertising in primetime broadcast programming during those hours when children are likely to be in the audience.

⁸⁷ This would also include any feature films aired on broadcast television prior to 10 p.m. For forty-five years the FCC has waived the sponsorship identification requirements for feature films "produced initially and primarily for theatre exhibition." *Amendment of Sections 3.119, 3.289, 3.654, and 3.789 of the Rules*, 34 FCC 829, 835 (1963). However, the factual and policy underpinnings for this exemption have changed drastically since then and it no longer makes sense to exempt feature films – which are often rife with embedded ads – from the sponsorship identification rules otherwise applied to television programming. Thus, CCFC urges the Commission to revoke its waiver and instead apply its rules consistently to all programming.

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