

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 CHILDREN'S MEDIA POLICY COALITION

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SUMMARY

The Children's Media Policy Coalition respectfully submits these comments in response to the Federal Communication Commission's request for comment on the practice of "embedded advertising." Children's trusting nature and cognitive vulnerabilities make them the ideal target for advertisers. Accordingly, Congress and the FCC have consistently adopted policies to prevent both manipulative advertising and over-commercialism in children's programming. Embedded advertising and the use of interactive links to commercial advertising on children's programs violate these longstanding policies, thus, CMPC urges the FCC to expressly prohibit these practices in all children's programming.

As the FCC acknowledges in the Notice, embedded advertising violates the FCC's longstanding separation policy, which requires children's programming to be clearly separated from commercial content. Because embedded advertising directly merges commercials into programming, it exacerbates children's inability to distinguish commercials from programming, and makes it more difficult for them to discern persuasive content. Embedded advertising also contravenes Congress' goal to limit commercial content included in, and adjacent to, children's programming. In passing the Children's Television Act of 1990, Congress instructed the FCC to restrict commercial matter in children's programming to 10.5 minutes per hour during the week and 12 minutes per hour during the weekend, and to limit the use of program-length commercials. Under existing FCC rules, the inclusion of commercial matter, such as embedded advertising, in a children's program converts the program into a program-length commercial. Because children's programs generally range from a half hour to an hour in length, any inclusion of embedded advertising would in most cases result in a *per se* violation of the commercial limits applied to broadcast licensees and cable and satellite operators.

CMPC also urges the FCC to codify its 2004 tentative ban on interactive links to commercial websites during children's programming. As CMPC has pointed out in previous comments, the use of interactive commercial links would result in product placement, host selling, and program-length commercials in violation of the separation principle and the Commission's commercial time limits. Accordingly, the FCC should revisit its tentative ban and codify its tentative prohibition on the use of interactive commercial links in children's programming provided via broadcast, cable, or satellite channels.

TABLE OF CONTENTS

SUMMARY i

I. Congress And The Commission Have A Tradition of Protecting Children
From Exploitative Advertising 2

II. The Commission Should Strictly Prohibit The Use of Embedded
Advertising In Children’s Programming Provided Via Broadcast, Cable, Or
Satellite Television..... 5

 A. Embedded Advertising Violates The Separation Policy..... 6

 B. The Commission Should Treat Any Children’s Program
Containing Embedded Advertising As A Program-Length Commercial
That Counts Towards The Commercial Time Limits 7

III. The Commission Should Codify Its Tentative Prohibition On The Use of
Interactive Links To Commercial Websites During Children’s Programming 9

Conclusion 12

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The Children’s Media Policy Coalition, including the American Academy of Pediatrics, American Psychological Association, Benton Foundation, Children Now, the Parent Teacher Association, and the Office of Communication of the United Church of Christ, (“CMPC” or “Coalition”), by their attorneys, the Institute for Public Representation, respectfully submit these comments in response to the Federal Communication Commission’s (“FCC” or “Commission”) Public Notice requesting comment on the practice of “embedded advertising” and the adequacy of the Commission’s existing policies and regulations regarding sponsorship identification and children’s advertising rules.¹ CMPC shares the Commission’s concerns regarding the practice of “embedded advertising” and welcomes the opportunity to provide its perspective as to the efficacy and application of Commission rules and policies as they pertain to promoting a healthy media environment for children.

¹ *Sponsorship Identification Rules and Embedded Advertising*, MB Docket No. 08-90 (rel. June 26, 2008) (“Notice”)

I. Congress And The Commission Have A Tradition of Protecting Children From Exploitative Advertising

For eighty years Congress and the FCC have sought to protect the public from unfair manipulation resulting from commercial content disguised as programming. As early as 1928, the FCC's predecessor, the Federal Radio Commission warned that "advertising must not be of a nature such as to destroy or harm the benefit to which the public is entitled from the proper use of broadcasting."² Similarly, Congress has recognized that "an advertiser would have an unfair advantage over listeners if they could not differentiate between the program and the commercial message and were, therefore, unable to take its paid status into consideration in assessing the message."³ Furthermore, the Communications Act of 1934 required television and radio stations to make on-air disclosures of product placements to ensure that the "audience would be clearly informed that it is hearing or viewing matter which has been paid for."⁴

While disclosure may be an appropriate tool to help adults guard against commercial manipulation, such measures are clearly insufficient where children are concerned. In 1974 the FCC articulated its growing concern over manipulative advertising methods and recognized the need for policies to prevent broadcasters from allowing advertisers to "prey upon or exploit the peculiar vulnerabilities of immature judgment or unsophistication."⁵ There the FCC noted that, due to the inability of children to discern persuasive intent, "special safeguards may be required to ensure that the advertising privilege is not abused,"⁶ and that "basic fairness requires that at

² 2 FRC Ann. Rep. 20 (1928).

³ *Petition of Action for Children's Television (ACT) For Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children's Programming and the Establishment of a Weekly 14-Hour Quota of Children's Television Programs, Children's Television Report and Policy Statement*, 50 FCC 32d 1, at ¶46 (1974) ("1974 Policy Statement").

⁴ *National Broadcasting Co.*, 27 FCC 2d 75 (1970).

⁵ *1974 Policy Statement*, 50 FCC 2d 1, Separate Statement of Commissioner Glen. O. Robinson.

⁶ *Id.* at ¶34.

least a clear separation be maintained between the program content and the commercial message so as to aid the child in developing an ability to distinguish between the two.”⁷ In particular, the Commission found that interweaving brand names into the program itself exacerbated children’s inability to discern advertising and that, therefore, “any material which constitutes advertising should be confined to identifiable commercial segments which are set off in some clear manner from the entertainment portion of the program.”⁸

Subsequently, in the Children’s Television Act of 1990 (“CTA”) Congress sought to remedy the failure of television stations to provide an adequate amount of educational programming specifically designed for children,⁹ and to ensure that the benefits of programming designed for children would not be undercut by the deleterious effects of over-commercialism and deceptive advertising.¹⁰ Noting children’s inability to comprehend the nature and purpose of television advertising and their “unique vulnerability to commercial persuasion,”¹¹ the CTA directed the FCC to adopt rules limiting commercials in children’s programming to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays,¹² and to initiate proceedings to define and limit program-length children’s commercials.¹³ Subsequently, the FCC adopted a mandate that commercials be clearly separated from regular programming, in addition to limitations on program-length commercials during children’s programming.¹⁴

⁷ *Id.* at ¶ 48.

⁸ *Id.* at ¶ 55.

⁹ S. REP. No. 227, 101st Cong., 1st Sess. 1, 8-10 (1989) (“Senate Report”).

¹⁰ *See* H.R. REP. No. 101-385, at 5-6 (1989) (“House Report”).

¹¹ *Id.* at 6.

¹² Children’s Television Act of 1990 (“CTA”) § 102, 47 U.S.C.A. § 303a.

¹³ 47 U.S.C.A. § 303a(b).

¹⁴ 47 C.F.R. § 76.225 (2007).

In enacting the CTA, Congress responded to the failure of market forces to adequately self regulate advertising directed at children,¹⁵ noting that reliance on those forces had resulted in “tangible expansion in the level of commercialization in children’s programming.”¹⁶ However, in today’s media environment market forces and technological developments over-expose children to even more commercialization and new predatory advertising practices. Children are now estimated to view tens of thousands of television advertisements every year – over one hundred per day.¹⁷ The concentration of advertising directed towards children is unsurprising considering that experts estimate that two- to fourteen-year-olds have influence over \$500 billion dollars a year in household purchasing,¹⁸ more than twice the estimated amount in 1997 (\$188 billion).¹⁹ Not only are children an increasingly attractive audience, but new technologies in the media marketplace now enable advertisers to target children more effectively and often surreptitiously. Realizing the huge potential to use television programming to influence consumers, advertisers have capitalized on product placement and integrated advertising techniques, which studies indicate are more persuasive than traditional commercial spots.²⁰

FCC rules must keep pace with these developments and ensure that children are adequately protected from marketing techniques that capitalize on children’s unique cognitive vulnerabilities. Accordingly, the FCC now asks whether its “existing rules and policies governing commercials in children’s programming adequately vindicate the policy goals

¹⁵ *House Report*, at 6-7.

¹⁶ *Id.* at 8.

¹⁷ FEDERAL TRADE COMMISSION, BUREAU OF ECONOMICS STAFF REPORT, CHILDREN’S EXPOSURE TO TV ADVERTISING IN 1977 AND 2004, at 9 (2007).

¹⁸ INST. OF MED. FOOD MARKETING TO CHILDREN AND YOUTH: THREAT OR OPPORTUNITY? 155 (J. Michael McGinnis, *et al.* eds., National Academies Press (2006))

¹⁹ James U. McNeal, *Tapping the Three Kids’ Markets*, AM. DEMOGRAPHICS, Apr. 1998, 36.

²⁰ Sharmistha Law & Kathryn Braun, *I’ll Have What She’s Having: Gauging the Impact of Product Placement on Viewers*, 17 PSYCHOL. & MARKETING 1059, 1071 (2000).

underlying the Children’s Television Act,” and specifically, whether it should explicitly prohibit the use of embedded advertising in children’s programming.²¹ CPMC urges the FCC to promptly adopt a ban on embedded advertising in children’s programming, regardless of the platform on which it is distributed. Additionally, CMPC urges the Commission to revisit its proceeding on the use of interactive commercial links in children’s programming, and codify its tentative ban on the use of commercial links, which are a more advanced, and potentially more dangerous, form of embedded advertising.

II. The Commission Should Strictly Prohibit The Use of Embedded Advertising In Children’s Programming Provided Via Broadcast, Cable, Or Satellite Television

As the Commission correctly observes in the Notice, “embedded advertising in children’s programming would run afoul of [its] separation policy because there would be no bumper between programming content and advertising.”²² Nevertheless the FCC asks whether that prohibition should be made explicit. CMPC agrees with the FCC that its rules forbid the use of embedded advertising in children’s programming, not only because it would violate the separation policy, but also because it would contravene Congressional intent to limit children’s exposure to commercial content during children’s programming. Accordingly, the FCC should clarify that embedded advertising is prohibited in all children’s programming, regardless of whether it is distributed via a free or pay-channel.

²¹ *Notice*, at ¶16.

²² *Id.* at ¶16.

A. Embedded Advertising Violates The Separation Policy

For over three decades the FCC has recognized that “children are far more trusting of and vulnerable to commercial ‘pitches’ than adults,”²³ and that certain advertising practices could be deemed “unfair or deceptive when directed at children.”²⁴ Accordingly, the FCC has determined that “basic fairness requires that *at least* a clear separation be maintained between the program content and the commercial message,”²⁵ and that special measures should be taken to guarantee that “an adequate separation is maintained on programs designed for children.”²⁶ Embedded advertising exacerbates the cognitive difficulties children already face in distinguishing programs from commercials by eradicating the boundaries between ads and children’s programming. This practice presents the product in such a way that it is not perceived as an advertisement. By its very definition “embedded” advertising is not separate from program content. Consequently, and as the FCC acknowledges, the use of embedded advertising explicitly contradicts the separation policy. Therefore, codifying such a prohibition would not only comport with existing regulations, but also ensure that children have effective protection against manipulative advertising practices in programming designed specifically for them.

The separation policy was conceived in the 1970s, prior to the rise of cable and satellite providers as major distributors of content. Today, however, cable and satellite television provide significant amounts of children’s programming. As a practical matter, however, children are equally susceptible to confusion and manipulation whether they are watching children’s programs on broadcast, cable, or satellite television. It is well documented that most children cannot distinguish between commercials and program content, and cannot recognize persuasive

²³ *1974 Policy Statement* at ¶34.

²⁴ *Id.* at ¶46.

²⁵ *Id.* at ¶48 (emphasis added).

²⁶ *Id.* at ¶49.

intent²⁷ -- this cognitive vulnerability exists regardless of the channel on which children are viewing advertisements. Thus, to fully comply with the principles and goals of the separation policy, and to update the policy in light of today's media marketplace the FCC should clarify that the use of embedded advertising is prohibited in children's programming provided on cable and satellite, as well as broadcast television.

B. The Commission Should Treat Any Children's Program Containing Embedded Advertising As A Program-Length Commercial That Counts Towards The Commercial Time Limits

In addition to violating the separation principle, the use of embedded advertising in children's programming offered via broadcast, cable, or satellite television would contravene Congress' goal of protecting children from over-commercialism during children's programming. Additionally, under the FCC's existing rules, the inclusion of such ads in the body of a children's program would necessarily convert the program into a program-length commercial, and in most cases would violate the CTA's advertising limits as applied to broadcast licensees, and cable and satellite operators.

In passing the CTA, Congress sought to limit commercial matter included in, and adjacent to, children's programming. Accordingly, the CTA directed the FCC to limit the advertising in children's programming aired on cable and broadcast television to not more than 10.5 minutes per hour and 12 minutes per hour on weekends and weekdays, respectively.²⁸ The CTA also instructed the Commission to adopt an appropriate definition of, and restrictions on, program-length commercials in children's television programming.²⁹

²⁷ See, e.g., *House Report*, at 6 (1991).

²⁸ 47 U.S.C. § 303a; 47 C.F.R. § 73.670.

²⁹ *CTA Implementation Order*, 6 FCC Rcd 2111, at ¶1.

Recognizing the “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,”³⁰ the FCC subsequently adopted two definitions of program-length commercials: “a program in which a product associated with the program appears in commercial spots not separated from the start or close of the program;” and, “a program in which a product or service is advertised within the body of the program.”³¹ The Commission affirmed that any children’s program deemed to be a program-length commercial would count toward the statutory commercial limits applied to broadcast licensees and cable operators.³² These limits were extended to satellite television operators in 2004.³³

With regard to children’s programming “commercial matter” is defined by the FCC as “time sold for the purpose of selling a product.”³⁴ Embedded advertising is a form of commercial matter incorporated into the body of a program either through product placement or integration in exchange for consideration, and, as a result, falls within the second definition promulgated by the Commission. Accordingly, the Commission should treat any children’s programming on cable, satellite or broadcast television that incorporates product placements or product integration as a program-length commercial under the Commission’s rules. The FCC has recognized that “a program-length commercial of a duration under the commercial limits

³⁰ *Id.*

³¹ *Id.* at ¶44.

³² *Id.* at ¶46 and n. 127.

³³ *Direct Broadcast Satellite Public Interest Obligations Sua Sponte Reconsideration*, 19 FCC Rcd. 5647, at ¶44 (2004); 47 C.F.R. § 25.701(e).

³⁴ *CTA Implementation Order*, 6 FCC Rcd 2111, at ¶4.

would not by definition violate the limits.”³⁵ However, because most children’s programs are thirty minutes to an hour in duration, any conversion to a program-length commercial through the incorporation of embedded advertising would almost always result in a violation of the commercial time limits.³⁶

Embedded advertising cannot be integrated in children’s programming without violating the Commission’s separation policy and, in most cases, the CTA’s commercial time limits. Accordingly, the FCC should clarify that any embedded advertising is expressly prohibited in any children’s programming provided via broadcast, cable, or satellite television.

III. The Commission Should Codify Its Tentative Prohibition On The Use of Interactive Links To Commercial Websites During Children’s Programming

In 2004, as part of its proceeding on *Children’s Television Obligations of Digital Broadcasters* (MM Docket 00-167), the FCC tentatively concluded that it “should prohibit interactivity during children’s programming that connects viewers to commercial matter unless parents “opt-in” to such services.”³⁷ However, four years later it has yet to rule conclusively on this issue. As CMPC has pointed out in comments filed in that proceeding, the use of interactive commercial links would result in product placement, host selling, and program length commercials in violation of the separation principle and the Commission’s commercial time

³⁵ *Id.* at ¶46.

³⁶ However, we note that the Commission’s rules do not protect the children from a more insidious form of product placement. Through character licensing agreements, advertisers employ characters that already appear on television, and in movies and videogames to market their products. This use of so-called “celebrity spokes-characters” in effect converts entire shows into commercials for the products the character has been licensed to promote. See 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. 1, 447, 464 (2006).

³⁷ *Children’s Television Obligations of Digital Television Broadcasters*, 19 FCC Rcd 22943, at ¶72 (2004) (“2004 FNPRM”).

limits.³⁸ Interactive commercial content is itself a form of embedded advertising. As such, the implications for use of commercial interactive links in children's programming have direct bearing on the questions the FCC poses in this Notice. Failing to promptly address the commercial interactivity ban could create complexities and inconsistencies in any decision reached here or in the DTV proceeding. Thus, CMPC urges the FCC to expressly and conclusively prohibit the use of interactive commercial matter in children's programming, regardless of the free or pay status of the channel on which it is offered.

In the four years since the FCC tentatively concluded it would prohibit interactive ads in children's programs, many companies have embarked upon extensive interactive advertising initiatives. Cable television providers such as Comcast, Time Warner, Cox, Charter Communications, and Cablevision Systems are already offering TV spots and "on-demand" features that employ commercial interactivity to allow advertisers to further target advertisements "based on consumers' personal data."³⁹ Satellite TV providers are also offering advertisers the opportunity to target subscribers via interactive elements. The Dish Network and NBC Universal recently struck a deal in which ads on NBC networks (NBC, USA, Oxygen, etc.) will display an icon that takes a viewer to a web page featuring that product or service.⁴⁰

³⁸ See *Comments of Children's Media Policy Coalition*, MM Docket 00-167 (filed April 1, 2005); *Reply Comments of the Children's Media Policy Coalition*, MM Docket 00-167 (filed May 2, 2005).

³⁹ Laura Petrecca, *Interactive TV ads are clicking with viewers*, USA TODAY, June 11, 2008 available at http://www.usatoday.com/money/advertising/2008-07-06-interactive-tv_N.htm; see also Glen Dickson, *Microsoft Bets on Interactive Ads*, BROADCASTING & CABLE, June 18, 2008 available at <http://www.broadcastingcable.com/article/CA6571197.html>; Yinka Adegoke, *Cable interactive ad venture taps new head*, REUTERS, Jun 10, 2008, available at <http://www.reuters.com/article/televisionNews/idUSN1037573920080611>.

⁴⁰ Press Release, *Dish Network Corporation, NBC Universal Partners With DISH Network to Expand Interactive Advertising Footprint*, May 20, 2008, available at <http://www.globenewswire.com/newsroom/news.html?d=143147>.

Currently, CMPC is not aware of any interactive commercial links directly targeting children in children's programs – no doubt as a direct result of the FCC's tentative ban in 2004. However, we urge the Commission to codify its prohibition on commercial interactivity in children's programming, thereby providing certainty to the industry and ensuring that such practices do not occur in the future.

Cable and satellite providers' foray into interactive advertising further evinces the need to make clear that the FCC's commercial interactivity ban applies across *all* television platforms. It is well established that many children cannot distinguish between programming and commercial content.⁴¹ This cognitive vulnerability is implicit regardless of whether children are viewing ads on cable, satellite, or broadcast television. As with the more traditional forms of embedded advertising already discussed in these comments,⁴² commercial interactivity has no place in children's programming; rather its use would only exacerbate Congress' and the Commission's concerns about overexposing children to commercial content.⁴³ Indeed, not only would such practices violate the FCC's ad limits and longstanding separation policies, they also raise ethical and privacy concerns about targeting ads to children based on their personal information. Commercial interactive links will confuse and take advantage of children by directly connecting them to advertising and removing the barrier between advertising and direct purchase. Such practices also allow for information collection on children's habits and preferences which could be exploited to advance additional marketing opportunities.

⁴¹ *House Report*, at 6; *see also* Dale Kunkel, *Children and Television Advertising*, HANDBOOK OF CHILDREN AND THE MEDIA (Dorothy Singer & Jerome Singer, eds. 2001) (providing a comprehensive review of existing research and findings concerning children's limitations in understanding commercial messages).

⁴² *See supra* section II.

⁴³ *See, e.g., CTA Implementation Order*, 6 FCC Rcd 2111, at ¶¶ 44-45.

Because of the dangers to children inherent in these advertising practices, CMPC does not support the FCC’s tentative parental “opt-in” provision.⁴⁴ For over 30 years the Commission has limited the amount of commercials and insisted on clear separation between program content and commercial matter to protect children from unfair and deceptive practices.⁴⁵ Allowing “opt-in” will inevitably result in some children being exposed to more commercial matter than is permitted under the CTA. Additionally, CMPC knows of no effective or reliable means for parents to opt-in – but, even if such means did exist, the opt-in proviso would contravene Commission and Congressional intent to limit children’s exposure to commercial matter. Thus, use of interactive links to commercial content in children’s programming should be banned outright.

Conclusion

Embedded advertising clearly has no place in children’s programming. Because of their inherent cognitive vulnerabilities, children are equally harmed whether they view embedded ads on broadcast, cable, or satellite television.⁴⁶ Subjecting children to embedded advertising takes unfair advantage of their naiveté and directly conflicts the fundamental principle that viewers deserve to know when they are being advertised to.⁴⁷ An explicit prohibition of embedded and interactive advertising in children’s programming represents the bare minimum of regulation necessary to ensure that increasingly subtle and sophisticated advertising practices do not outrun

⁴⁴ *2004 FNPRM*, at ¶72.

⁴⁵ *1974 Policy Statement*, at ¶56.

⁴⁶ The CTA and FCC rules define children’s programming as programs originally produced for children 12 years old and under. *CTA Implementation Order*, 6 FCC Rcd 2111, at ¶3; *See also House Report*, at 16.

⁴⁷ *National Broadcasting Co.*, 27 F.C.C.2d 75 (1970).

the purpose of the Communications Act of 1934 and the Children’s Television Act of 1990. As such, CMPC strongly urges the FCC to codify a prohibition against embedded advertising.

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