

2016

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Angela J. Campbell

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Angela J. Campbell *Rethinking Children's Advertising Policies for the Digital Age*, 29 Loy. Consumer L. Rev. 1 (2017).

Available at: <https://lawcommons.luc.edu/lclr/vol29/iss1/2>

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RETHINKING CHILDREN'S ADVERTISING POLICIES FOR THE DIGITAL AGE

Angela J. Campbell¹

¹ Copyright (c) 2016 Angela J. Campbell. Professor Campbell directs the Communications and Technology Clinic at Georgetown Law's Institute for Public Representation (IPR) and also serves on the Board of Directors of the Campaign for a Commercial Free Childhood (CCFC). In April 2015, IPR filed, on behalf of CCFC, the Center for Digital Democracy (CDD) and other non-profit organizations, a request with the FTC to investigate whether Google was engaging in deceptive practices in connection with the YouTube Kids app (YTK). Request for Investigation into Google's Unfair and Deceptive Practices in Connection with its YouTube Kids App, filed by CDD et al. (Apr. 7, 2015), https://www.democraticmedia.org/sites/default/files/field/public-files/2015/4-7-15_youtube_kids_request_for_investigation_final.pdf ("YTK RFI"). In November 2015, IPR supplemented this request to respond to certain changes made by Google and to provide additional information. Supplement to Request for Investigation into Google's Unfair and Deceptive Practices in Connection with its YouTube Kids App, filed by CDD et al. (Nov. 24, 2015), https://www.democraticmedia.org/sites/default/files/field/public/2015/2015-11-23_final_supplement.pdf ("Supp. to YTK RFI"). At that time, they also asked the FTC to investigate whether members of the Children's Food and Beverage Initiative Advertising Initiative (CFBAI) were violating pledges to market only products meeting the nutritional guideline, when products not meeting the guidelines were promoted on YTK. Request for Investigation into Violations by Members of the Children's Food and Beverage Advertising Initiative of Pledges Not to Advertise Products to Children that Do Not Meet Uniform Nutrition Criteria, filed by CCFC and CDD (Nov. 24, 2015), https://www.democraticmedia.org/sites/default/files/field/public/2015/2015-11-23_final_cfbai_rfi.pdf ("CFBAI RFI"). Professor Campbell thanks Susan Linn for her comments and encouragement. She also thanks Aaron Mackey, Eric Null, Maggie Thomas, Samantha Rosa, and Nicholas Garcia for their work on the requests

I.	The Changed Media Environment	3
A.	The Rise of “Influencer Marketing”	5
B.	The Effect of the Digital Media Environment on Children.....	10
C.	The YouTube Kids App	13
II.	US Framework for Regulating Advertising to Children	15
A.	The FCC	16
1.	The 1974 Policy Statement.....	16
2.	The Children’s Television Act of 1990	18
B.	The FTC	21
1.	Children’s Online Privacy.....	24
2.	Recent FTC Enforcement Regarding Undisclosed Payments to Influencers	28
3.	FTC Guidelines on “Native Advertising”	31
C.	Industry Self-Regulation	33
III.	Rationales for Regulating Children’s Advertising.....	35
A.	Children’s Cognitive Capacity is Still Developing	35
1.	Discriminating Commercial from Non-Commercial Content.....	36
2.	Understanding Persuasive Intent and Activating Defenses	38
B.	Children Are More Susceptible than Adults.....	40
C.	Market Forces are Insufficient to Protect Children	42
D.	Increasing Stress on Families.....	43
E.	Impact On Children’s Content	45
F.	Effect On Children’s Health	47
G.	Impact on Values.....	48
IV.	The Prospects for New Regulation	50

for investigation. While this essay is informed by this and other work on behalf of public interest clients, the views expressed here are solely those of Professor Campbell and should not be attributed to any of IPR’s clients.

How Americans, especially children, consume media has changed dramatically in recent years. The regulatory framework for advertising to children, however, has not changed very much since the 1990s. This essay uses Google's recently introduced YouTube Kids app ("YTK") to illustrate a range of marketing practices to children that are deceptive or unfair. It argues that the existing regulatory framework must be reinvented to protect children in the digital age.

Part I describes how the internet, mobile, and other new technologies have vastly changed the manner in which consumers get access to and watch video and how companies market to them. Part II describes the existing framework for regulating advertising to children in the United States. Part III sets forth various rationales for regulating marketing to children and examines whether these concerns remain valid today. Part IV discusses the prospects for updating protections for children in the digital age.

I. THE CHANGED MEDIA ENVIRONMENT

Television viewing traditionally involved sitting down to watch a scheduled program on a television set. The signal was broadcast over-the-air by a local television station for free or delivered by a cable company over coaxial cable for a monthly subscription fee.

Today, consumers can generally watch what they want when they want to watch it. The expansion of broadband allows programming to be streamed or downloaded. Mobile devices such as smart phones, tablets, and laptop computers allow consumers to view screen content almost anywhere. As one company puts it, "[w]e're all living through a once-in-a-generation shift in video from linear TV to internet-enabled video."²

The number of sources providing content has expanded well beyond broadcast and cable networks to

² Alex Watt, *Tubular and YouTube's Measurement Program*, TUBULAR: BLOG (Aug. 11, 2016), <https://tubularlabs.com/blog/youtubes-new-measurement-program/>.

include Internet-based services such as Netflix, Amazon, Hulu, and YouTube. YouTube, launched in 2005 and purchased by Google the next year, has become one of the most important platforms for watching video. YouTube has more American viewers aged eighteen to forty-nine on mobile alone than any cable network.³ Increasingly, consumers are opting to “cut the cord,” meaning that they watch video programming without subscribing to cable or satellite service.⁴

Consumers can generally choose among free advertising-supported media, monthly subscriptions, and pay-per-view options. Much internet-delivered content, however, is advertiser-supported. The ability to target advertising based on the interests and characteristics of individuals, sometimes known as targeted marketing or online behavior advertising, allows advertisers to advertise more efficiently. Along with personalized marketing, however, comes concerns about the type and extent of data collected from consumers and the ability of advertisers to use this data to manipulate consumers.

Not only is marketing more personalized, but it is increasingly integrated into content. When DVRs allowed consumers to skip advertisements, advertisers responded by paying to have their products seen or mentioned within programs, a practice is referred to as “product placement” or “embedded advertising.”⁵ The distinction between content and marketing has become even more blurred on the Internet, where much of the advertising looks similar to news clips or independent product reviews, a practice referred to as “native advertising.”

³ Belinda Luscombe, *YouTube's View Master*, TIME, Sept. 7-14, 2015, at 70, 72.

⁴ Julia Boorstin, *TV industry on the brink of a cord-cutting storm*, CNBC (May 17, 2016), <http://www.cnbc.com/2016/05/17/tv-industry-on-the-brink-of-a-cord-cutting-storm-analyst.html>.

⁵ Angela J. Campbell, *Restricting the Marketing of Junk Food to Children by Product Placement and Character Selling*, 39 LOYOLA OF L.A. L. REV. 447, 448-55 (2006).

A. *The Rise of "Influencer Marketing"*

Much of the content initially available on YouTube consisted of "user-generated" videos produced by amateurs. Typical examples include videos of cats, cute babies, and people playing video games. Over time, many of these video creators built up a large following. They have come to be known as "YouTube celebrities" or "influencers."⁶ Young people especially tend to follow YouTube celebrities more than traditional celebrities.⁷

Advertisers have turned to influencers to market their products to younger audiences. Most influencer videos can be categorized into genres. For example:

Unboxing is a genre of videos on YouTube where people quite literally unbox a product to get a feel for it. . . . These videos not only document the experience of opening a product, but they also often dramatize it and, in

⁶ Tereza Litsa, *How can a brand benefit from influencer marketing?*, CLICKZ (Apr. 12, 2016), <https://www.clickz.com/2016/04/12/how-can-a-brand-benefit-from-influencer-marketing> (defining influencer marketing as "a process of identifying and activating individuals who have an influence over a specific target audience or medium, in order to be part of a brand's campaign towards increased reach, sales, or engagement.").

⁷ *Id.* See also Susanne Ault, *Digital Star Popularity Grows Versus Mainstream Celebrities*, VARIETY (July 23, 2015), <http://variety.com/2015/digital/news/youtubers-teen-survey-ksi-pewdiepie-1201544882/>. A recent survey of youth aged thirteen to seventeen found that eight of their top ten favorite celebrities were YouTube stars. Teens were asked to rank twenty celebrities from a list that included ten of the most popular YouTube stars and ten of the most popular entertainment stars. Only two traditional celebrities, musicians Taylor Swift and Bruno Mars, made it into the top ten. YouTube stars were rated well above other mainstream celebrities such as Will Smith, Johnny Depp and Jennifer Anderson. *Id.*

turn, take on a quirky, playful spirit, showcasing products in all of their freshly unopened glory.⁸

Other genres of influencer marketing include product reviews, tutorials and “how-to” videos. According to ClickZ, a digital marketing website, brands collaborate with influencers because “they certainly know how to grab the power of social media and use their credibility to affect their followers’ views (and even their purchasing decisions).”⁹ Influencer marketing works because “[p]eople value influencers for their *authenticity*, as their endorsement matters to them and this helps a brand increase its human element of the wider marketing strategy.”¹⁰

The word “authenticity” has become a marketing buzzword for advertising that does not appear to be advertising. For example, a Google blog promotes influencer advertising this way:

Advertising is becoming, well, less like advertising—in the traditional sense, at least. Brands have evolved beyond just talking at people and touting their benefits. In an age of *authenticity*, brands strive to tell stories and build genuine relationships with their consumers. It’s an approach that’s working. Re-

⁸ YouTube Insights, *The Magic Behind Unboxing on YouTube*, GOOGLE: THINKWITHGOOGLE (Nov. 2014), <https://www.thinkwithgoogle.com/features/youtube-insights-stats-data-trends-vol7.html>. See also Heather Kelly, *The bizarre, lucrative world of ‘unboxing’ videos*, CNN (Feb. 13, 2014), <http://www.cnn.com/2014/02/13/tech/web/youtube-unboxing-videos/>.

⁹ Litsa, *supra* note 6. See Research project by the kidsmedia-centre at Centennial College, #BRANDOFME, <http://www.hashtagbrandofme.com/>; *Top YouTube Influencers - a Quick Resource Guide 2015 (Part I)*, MEDIKIX (2015), <http://mediakix.com/2015/06/top-youtube-influencers-a-quick-resource-guide-2015-part-1/>, for a more detailed explanation of influencer market.

¹⁰ *E.g.*, Litsa, *supra* note 6 (emphasis in original).

search reveals that the videos consumers perceive as being “less like advertising”—regardless of whether they are video ads or branded video content—are seen as more informative, authentic, and original.¹¹

Google facilitates influencer marketing on YouTube in several ways. The YouTube Partners Program allows creators to monetize content on YouTube by letting Google stream advertisements in exchange for a portion of the advertising revenue.¹² Google also provides resources to help creators produce more professional videos, such as the YouTube Creator Academy.¹³

Google encourages brands to collaborate with influencers in its YouTube Creator Playbook for Brands,¹⁴ and its blog, ThinkwithGoogle.¹⁵ For example, a recent blog on ThinkwithGoogle presented research showing that “consumers don’t just love online video—they are influenced by it. It earns unprecedented lifts in consideration and favorability. It impacts purchase intent.

¹¹ *Blurred Lines Between Branded Video Content and Ads*, GOOGLE: THINKWITHGOOGLE (Dec. 2014), <https://www.thinkwithgoogle.com/articles/youtube-insights-stats-data-trends-vol8.html>.

¹² *About the YouTube Partners Program*, GOOGLE, https://support.google.com/youtube/topic/6029709?hl=en&ref_topic=14965. See also Kristen Schweizer, *YouTube Unboxing Goes from Family Fun to Big Business*, BLOOMBERG (Dec. 18, 2015), <http://www.bloomberg.com/news/articles/2015-12-18/youtube-unboxing-makes-stars-of-parents-and-children> (reporting that Google receives 45% of the revenue from its partners).

¹³ YOUTUBE: CREATOR ACADEMY, <https://youtube.com/creatoracademy/page/education>.

¹⁴ *The YouTube Creator Playbook For Brands*, GOOGLE, https://think.storage.googleapis.com/docs/creator-playbook-for-brands_research-studies.pdf (the playbook is intended to help brands understand influencer advertising and develop “strategies that will resonate with 21st-century consumers.”).

¹⁵ GOOGLE: THINKWITHGOOGLE, <https://www.thinkwithgoogle.com/> (last visited Nov. 9, 2016).

And the creators making it have never been more influential.”¹⁶ It goes on to claim that “YouTube creators are more trusted than traditional celebs on what to buy.”¹⁷

While some influencers work directly with YouTube, Multichannel Networks (“MCNs”) often serve as a middleman. MCNs match advertisers with influencers that can reach their desired audiences and find advertisers who are willing to pay influencers. MCNs may also handle the video production, which often results in more professional-looking videos. For example, EvanTube, the child star of EvanTubeHD¹⁸, one of YouTube’s most popular channels, is one of Maker Studios’¹⁹ influencers.²⁰

Maker Studios is the largest MCN.²¹ Founded in 2009, it was subsequently acquired by the Disney Company. Maker Studios’ videos alone had 6.2 billion views on YouTube over a thirty day period ending June 12, 2015.²² The next largest MCNs are Fullscreen, BroadbandTV, and Machinima.²³

¹⁶ Celie O’Neil-Hart & Howard Blumenstein, *How Online Video Influences Your Audience*, GOOGLE: THINKWITHGOOGLE (Apr. 2016), <https://www.thinkwithgoogle.com/infographics/online-video-youtube-influence.html>.

¹⁷ *Id.*

¹⁸ *EvanTubeHD*, YOUTUBE, <https://www.youtube.com/user/EvanTubeHD/videos> (kid entertainment channel with three million subscribers). Evan’s father started making and posting videos of Evan opening, playing with and talking about toys and other products when Evan was eight years old. Now he has four YouTube channels and reportedly makes millions of dollars. *See infra* note 20.

¹⁹ MAKER STUDIOS, <http://www.makerstudios.com/#creators> (last visited Nov. 9, 2016).

²⁰ Gary Rusak, *How YouTube Kids is Changing the Face of Toy Marketing*, KIDSCREEN (Feb. 9, 2015), <http://kid-screen.com/2015/02/09/how-youtube-is-changing-the-face-of-toy-marketing/>.

²¹ Paul Verna, *YouTube Advertising: Why Google’s Platform Will Stay on Top* EMARKETER (Aug. 2015), at 10 [hereinafter “eMarketer report”].

²² eMarketer report, *supra* note 21, at 10.

²³ eMarketer report, *supra* note 21, at 10. *See also* Tim Baysinger, *Fullscreen Has Evolved into a full-fledge Media Company in Just 5 Years*, ADWEEK (May 9, 2016),

Today, *more than half* of the content on YouTube is professionally produced by MCNs.²⁴ The vast majority of content from MCNs is supported by advertisements, or funded directly by marketers who insert brand messaging into the clips.²⁵

Other professionally produced content for YouTube comes from brands. Google encourages brands to have their own YouTube channels.²⁶ Brand channels generally include a collection of commercials for their products that were previously shown on television, as well as videos demonstrating how a product is made or used.

The growth in the number of brand channels and brand videos has been remarkable. According to video advertising technology company Pixability, by 2013, all but one of the top 100 global brands had a YouTube channel, and 56 had 10 or more.²⁷ By 2015, the top 100 brands collectively had 2,400 brand channels, 611,000 branded videos, and 40 billion channel views.²⁸ Pixability reported seeing a “significant shift from brands treating YouTube as a dumping ground for commercials to a destination site for a broad range of branded video

<http://www.adweek.com/news/technology/fullscreen-has-evolved-full-fledged-media-company-just-5-years-171353> (explaining how Fullscreen has recently expanded from being a conduit between YouTube stars who wanted to grow their own business and brands that wanted to reach younger consumers to a full-fledged content creator).

²⁴ eMarketer report, *supra* note 21, at 7.

²⁵ *Id.*

²⁶ *E.g.*, *YouTube Brand Channels*, YOUTUBE, <https://static.googleusercontent.com/media/www.youtube.com/en//yt/advertise/medias/pdfs/brand-channel-onesheet-en.pdf> (last visited Nov. 9, 2016).

²⁷ *The Top 100 Global Brands on YouTube*, PIXABILITY 5 (Aug. 2013), available at <http://offers.pixability.com/pixability-top-100-global-brands-keys-lessons-for-success-on-youtube>.

²⁸ *Top 100 Brands on YouTube—2015 Update*, PIXABILITY (July 20, 2015), <http://www.pixability.com/top-100-brands-2015/> (finding that viewership of brand channels increased by 85% from 2014-2015).

content.”²⁹ It found that subscribership to brand channels had increased 47% from the year before and that 10% of the branded videos were ten or more minutes in length.³⁰ In June 2016, Pixability reported that the top 100 brands had increased their presence on YouTube by 43% since 2015 and experienced a 10% increase in engagement, as measured by likes, dislikes, and comments.³¹

B. The Effect of the Digital Media Environment on Children

While the changed media environment affects everyone, it particularly affects children. Today’s media environment is “always on,” giving marketers many more opportunities to reach young people and to do so across more platforms than ever before.³² According to *Kidscreen* magazine, the “rapid shift in kids and family viewing habits from more traditional appointment television to [streaming video on demand] platforms and time shifted viewing is having an impact on all areas of kids programming from development, funding and production, to marketing, distribution and acquisitions.”³³ A recent study by the European Commission concluded that not only were children spending more time online, but that the Internet has to a great extent replaced television as a source of information and entertainment.³⁴ And in terms of advertising, eMarketer forecasts that

²⁹ *Id.*

³⁰ *Id.*

³¹ Eric Linder, *The Top 100 Brands are Maturing on YouTube*, PIXABILITY (June 23, 2016), <http://www.pixability.com/top-100-brands-2016-youtube-infographic/>.

³² Kathryn C. Montgomery, *Safeguards for Youth in the Digital Marketing Ecosystem*, HANDBOOK OF CHILDREN AND THE MEDIA 631, 633 (2011).

³³ Jeremy Dickson, *Windows of opportunity?*, KIDSCREEN, Oct. 2015, at 75, available at <http://kidscreen.com/content/pdf/51695.pdf?b29836>.

³⁴ Věra Jourová, *Fact Sheet on The impact of online marketing on children’s behavior*, EUROPEAN COMM’N (May 2016), available at http://ec.europa.eu/consumers/consumer_evidence/behavioural_research/docs/online_marketing_factsheet_2016_en.pdf.

spending on digital advertisements in the United States will surpass TV in 2017.³⁵

Mobile devices, such as smart phone and tablets, are a major platform for reaching young people because children tend to be avid users of these devices. A Nielsen survey found that if these devices are available in a household, 69% of children aged eight to ten use them.³⁶ Another study found that children prefer watching and spend more time viewing video on hand-held devices than on television.³⁷

When watching conventional broadcast or cable television, a viewer's activities are not constantly tracked and analyzed. But the internet and mobile device use cookies, web beacons and other technology to track a user's activities, including search terms used, websites visited, advertisements viewed, the user's location, and much more.

Companies known as ad networks connect advertisers to websites by aggregating ad space and matching it with advertiser demand, often in real time. Online ad networks use a central server to deliver advertisements to consumers, which enables targeting, tracking, and reporting consumers' impressions in ways not possible with analog media alternatives. Other companies such as Google DoubleClick and Adobe Analytics, use advanced data techniques to help brands market more efficiently by refining their messages based on audience response and using various targeting techniques. For example, Adobe Analytics claims that it allows companies to "enrich [their] customer profiles with online and offline information to better understand who they

³⁵ *Digital Ad Spending to Surpass TV Next Year*, EMARKETER (Mar. 8, 2016), <http://www.emarketer.com/Article/Digital-Ad-Spending-Surpass-TV-Next-Year/1013671>.

³⁶ *Kids' Audience Behavior Across Platforms*, NIELSEN (Aug. 6, 2015), <http://www.nielsen.com/us/en/insights/reports/2015/kids-audience-behavior-across-platforms.html>.

³⁷ Robert Miner, *TV is Now the 2nd Screen for Kids (Miner Study)*, DIGITALCONTENTNEXT (July 14, 2015), <https://digitalcontentnext.org/blog/2015/07/14/tv-is-now-the-2nd-screen-for-kids>.

are and how you can present each one with a more personalized experience.”³⁸ Thus, when children watch videos on YouTube, a great deal of information is collected from and about them.

Many children watch YouTube despite the fact that YouTube’s terms of service explicitly state it “is not intended for children under 13. If you are under 13 years of age, then please do not use the Service.”³⁹ A survey done in 2014 found that 66% of children aged six to twelve visit YouTube daily, including 72% of six to eight year olds. Or, as Time Magazine put it, “YouTube pretty much owns kids’ eyeballs at this point.”⁴⁰

Many of the most popular YouTube channels are intended for young children. In August 2016, for example, Tubular reported that Toy Freaks was the most watched YouTube channel, with over 661 million views.⁴¹ Ryan ToysReview, Webs and Tiaras – Toy Monster Compilations, Family Fun Pack, and Little Baby Bum were also in the top ten.⁴² Tubular describes these channels as “aimed squarely at pre-school children, and offer[ing] a range of cute unboxing videos and tutorials, and nursery rhyme singalongs.” The growth rate of these channels has been phenomenal. Ryan ToysReview, which launched in March 2015, had 3.9 million subscribers and generated over 6.2 billion views by August 2016.⁴³ Ryan ToysReview’s most successful video,

³⁸ ADOBE ANALYTICS, <http://www.adobe.com/marketing-cloud/web-analytics.html> (last visited Nov. 9, 2016) (defines adobe analytics as “the industry-leading solution for applying real-time analytics and detailed segmentation across all your marketing channels. Use it to discover high-value audiences and power customer intelligence for your business.”).

³⁹ *Terms of Service*, YOUTUBE ¶ 12, <https://www.youtube.com/t/terms> (last visited Nov. 9, 2016).

⁴⁰ Luscombe, *supra* note 3, at 72.

⁴¹ Carla Marshall, *YouTube Channel Rankings – Most Popular YouTube Creators August 2016*, TUBULARINSIGHTS (Sept. 20, 2016), <http://tubularinsights.com/top-youtube-channels/>.

⁴² *Id.*

⁴³ *Ryan ToysReview*, YOUTUBE, <https://www.youtube.com/channel/UChGJGhZ9SOOHvBB0Y4DOO> (last visited Nov. 12, 2016) (toys review channel with 5 million subscribers).

100+ Car Toys, has attracted a “staggering 474 million YouTube views.”⁴⁴ These types of toy review and unboxing videos have become so popular that they are now a primary method of marketing toys to children.⁴⁵

C. *The YouTube Kids App*

Aware of YouTube's popularity with children, as well as parents' concerns about their children being exposed to inappropriate content, Google launched the YouTube Kids app in February 2015. Google designed YTK specifically for children ages five and under. In Google Play and the App Store, Google describes the app as “designed for curious little minds. This is a delightfully simple (and free!) app, where kids can discover videos, channels and playlists they love.”⁴⁶ YTK quickly became “a major children's entertainment player in this digital- and mobile-first environment.”⁴⁷

YTK gives children easy access to many of the same videos available on YouTube. When a child opens the app, she can select videos from four categories – shows, music, learning, and explore – simply by touching an icon on the screen. Selecting an icon on an iPad, for example, will display six tiles, each representing a channel, video, or collection of videos known as a “playlist.”⁴⁸ The selection of videos displayed within

⁴⁴ Marshall, *supra* note 41.

⁴⁵ *E.g.*, Robert D. Hof, ‘Unboxing’ Videos as Gift to Marketers, N.Y. TIMES (Dec. 6, 2015), http://www.nytimes.com/2015/12/07/business/media/unboxing-videos-a-gift-to-marketers.html?_r=0.

⁴⁶ *Description of YouTube Kids App*, GOOGLEPLAY, <https://play.google.com/store/apps/details?id=com.google.android.apps.youtube.kids>; *iTunes Preview: YouTube Kids App*, APPLE, <https://itunes.apple.com/us/app/youtube-kids/id936971630?mt=8> (last visited Nov. 9, 2016).

⁴⁷ Patrick Callan, *Achieving retail royalty, the YouTube way*, KIDSCREEN (June 16, 2016), <http://kidscreen.com/2016/06/16/achieving-retail-royalty-the-youtube-way/>.

⁴⁸ YTK RFI, *supra* note 1, at Ex. 1, pp. 15-17.

each category is made by an algorithm and is supplemented by human review.⁴⁹

After a child plays a video, the next video starts automatically. After a child has watched several videos, a heart-shaped icon appears denoting “recommended.” The app recommends videos similar to those watched previously based on an algorithm without human review.⁵⁰ Children may also search for videos verbally or by typing a key word.

The same toy-based channels such as Ryan’s ToyReviews and EvanTubeHD described above are also available on YTK. Other channels feature cartoons that were previously shown on broadcast television such as *My Little Ponies* and *Transformers*, which also promote toys. Children can also watch “webisodes” that were created by brands to feature their toys.⁵¹

Many of the influencer videos feature candy and snack foods. For example, children can learn to make a Nutella milkshake, Play-Doh “Twizzlers,” and lip gloss from a Snickers bar. Entire channels are devoted to candy reviews, such as “babyteeth4-Kid Candy Review.” Children can also watch videos on brand’s channels, such as the Oreo channel or the Coca-Cola channel, which show television commercials for their products as well as longer promotional videos.⁵²

Sometimes children will see what Google now refers to as “paid ads.” These are “pre-roll” advertisements sold by Google. Paid ads occasionally appear before a selected video is shown. They are preceded by an “ad intro” and, during the video, the word “ad” appears on the screen.⁵³

⁴⁹ *YouTube Kids Parental Guide: Recommended Videos*, YOUTUBE, https://support.google.com/youtubekids/answer/6130531?hl=en&ref_topic=6130504 (last visited Nov. 9, 2016).

⁵⁰ *Id.*

⁵¹ YTK RFI, *supra* note 1, at Ex. 1, pp. 18-19; Suppl. To YTK RFI, *supra* note 1, at Ex. K.

⁵² CFBAI RFI, *supra* note 1, at 7-8, 10, 12-15, Ex. 1-2, 4-7.

⁵³ *YouTube Kids Parental Guide: Ads in YouTube Kids*, YOUTUBE, https://support.google.com/youtubekids/answer/6130541?hl=en&ref_topic=6130504 (last visited Nov. 9, 2016).

When Google first launched YTK, there were no ad intros. But the YTK Ad Policy did state that all advertisements must comply with the Ad Policy and that “[a]ll ads must be pre-approved by YouTube’s policy team prior to serving in the YouTube Kids app.”⁵⁴ The YTK Ad Policy explicitly prohibited advertising for products in categories such as food and beverages (regardless of nutrition content), beauty and fitness, and electronic video games rated for audiences over age seven.⁵⁵ Despite this policy, many of the influencer videos and brand channels on YTK promoted products that violated the Ad Policy.

In April 2015, children’s advocacy groups asked the Federal Trade Commission (“FTC”) to investigate YTK for deceptively claiming that it only allowed advertising consistent with its Ad Policy. Sometime in the summer 2015, Google changed the YTK Ad Policy description and added a Parental Guide.⁵⁶ The Parental Guide explains that YTK shows “paid ads” in order to provide YTK free of charge.⁵⁷ Any other content, it continues, including advertisements shown on television, sponsored videos, and content on brand channels, is considered content uploaded by “users.” In other words, Google does not consider these promotional videos to be “paid ads” subject to YTK’s Ad Policy.⁵⁸ This result, however, is that young children are exposed to a great deal of marketing at odds with longstanding policies regarding marketing to children.

II. US FRAMEWORK FOR REGULATING ADVERTISING TO CHILDREN

The Federal Communications Commission (“FCC”) and the FTC are the two government agencies

⁵⁴ YTK Ad Policy, YTK RFI, *supra* note 1, at 52, Ex. 7 (emphasis in original).

⁵⁵ *Id.*

⁵⁶ Supp. YTK RFI, *supra* note 1, at Ex. F and G.

⁵⁷ *Id.*

⁵⁸ *YouTube Kids Parental Guide: Ads in YouTube Kids*, YOUTUBE, https://support.google.com/youtubekids/answer/6130541?hl=en&ref_topic=6130504 (last visited Nov. 9, 2016).

primarily responsible for regulating advertising to children. However, each agency enforces different laws, has different means of developing policies and rules, and uses different enforcement methods. The regulatory efforts of the FCC and the FTC are supplemented, to a limited extent, by industry self-regulation.

A. The FCC

The Communications Act of 1934 directs the FCC to grant and renew broadcast licenses in the "public interest."⁵⁹ It also gives the FCC authority to adopt rules and regulations "necessary to carry out" its regulation of broadcasting in the public interest.⁶⁰ To adopt, change, or repeal a rule, the FCC must abide by the requirements set forth for "informal rulemaking" under the Administrative Procedure Act. The Act generally requires that an agency give the public notice of a proposed regulation by publishing it in the Federal Register, give members of the public an opportunity to comment on the proposal, and issue a written decision explaining its decision.⁶¹

The FCC has long considered providing programming for children to be part of a television station's public interest obligations. However, it was not until the late 1960s and early 1970s that the FCC specifically addressed advertising to children.

1. The 1974 Policy Statement

In 1970, the advocacy group, Action for Children's Television, filed a petition for rulemaking asking the FCC to prohibit advertising on children's programs.⁶² After an extensive rulemaking proceeding, the FCC issued its *Children's Television Report and Policy*

⁵⁹ 47 U.S.C. §309.

⁶⁰ 47 U.S.C. §303(r).

⁶¹ 5 U.S.C. §553.

⁶² Children's Television Report & Policy Statement, 50 F.C.C.2d 1, 5 (1974), *aff'd*, *Action for Children's Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977).

Statement in 1974 ("1974 Policy Statement").⁶³ By then, the National Association of Broadcasters ("NAB") had amended its self-regulatory Television Code to limit advertising on children's programs to 9.5 minutes on weekends and 12 minutes on weekdays.⁶⁴ While the FCC did not adopt specific advertising limits for children's programs, it made clear that television broadcasters were expected to comply with the NAB Code.⁶⁵

The 1974 Policy Statement also required a clear separation between programming and advertising on children's programs. The FCC's authority for this requirement came from Section 317 of the Communications Act, which requires broadcast stations to identify when they air content in exchange for payment and who paid for it. The rationale underlying Section 317 is 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."⁶⁶ Because studies showed that children, especially young children, had difficulty distinguishing commercial matter from program matter, the FCC concluded that "basic fairness" required a clear separation between program content and commercial messages.⁶⁷ As a result, television stations began airing "bumpers," such as "[W]e'll be right back after these commercial messages," to delineate when a children's program is interrupted by a commercial.

The separations principle also underlies FCC policies regarding "host-selling," and "program length commercials ("PLCs")."⁶⁸ The FCC defines host-selling as "the use of program talent or other identifiable program

⁶³ Children's Television Report & Policy Statement, 50 F.C.C.2d 1 (1974)[hereinafter 1974 Policy Statement].

⁶⁴ 1974 Policy Statement, *supra* note 63, at 12-13.

⁶⁵ *Id.* at 10-12. However, the NAB Code was subsequently abandoned in 1982. See *United States v. NAB*, 553 F Supp. 621, 626 (1982); Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L. J. 711, 724 (1990).

⁶⁶ 1974 Policy Statement, *supra* note 63, at 12.

⁶⁷ *Id.* at 13.

⁶⁸ *Id.*

characteristics [sic] to deliver commercials during or adjacent to children's programming featuring that character."⁶⁹ The FCC prohibits host-selling because it offends the concept of a clear separation between programming and commercials and takes "unfair advantage of the trust which children place in program characters."⁷⁰

The FCC first expressed concern about PLCs in what came to be called the 1969 "Hot Wheels" case.⁷¹ The "Hot Wheels" case arose when a competing toy company filed a complaint alleging that ABC's airing of *Hot Wheels*, a program that was developed with Mattel to promote its miniature toy cars, violated the advertising limits then in effect for all television programs. The FCC agreed. In the 1974 Policy Statement, the FCC cited *Hot Wheels* as one of "the clearest examples of incorporating promotional matter into a program" that broadcasters should not engage in.⁷²

2. The Children's Television Act of 1990

Ten years later, the FCC deregulated television by, among other things, eliminating all limits on television advertising, including those on children's programs.⁷³ Television stations began airing children's programs that were designed to promote sales of licensed

⁶⁹ FCC, Consumer Guide, *Children's Educational Television* (last updated Oct. 25, 2016), available at <http://transition.fcc.gov/cgb/consumerfacts/childtv.pdf> (internal quotations omitted).

⁷⁰ 1974 Policy Statement, *supra* note 63, at 16-17.

⁷¹ *Topper Corporation*, 21 F.C.C.2d 148 (1969), *aff'd* 23 F.C.C.2d 132 (1970), *reaffirmed sub nom. American Broad. Co.*, 23 F.C.C.2d 134 (1970) (the "Hot Wheels" cases).

⁷² 1974 Policy Statement, *supra* note 63, at 17.

⁷³ *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 F.C.C.2d 1076, 1101-05 (1984), *recon.*, 104 F.C.C.2d 357, 358 (1986). This aspect of the FCC's decision was overturned by the US Court of Appeals. *Action for Children's Television v. FCC*, 821 F.2d 741, 750 (D.C. Cir. 1987). The FCC reinstated the policy, but adopted a more limited definition of

characters such as *He-Man*, *Transformers*, and *Strawberry Shortcake*.⁷⁴

Congress responded by passing the Children's Television Act of 1990 ("CTA").⁷⁵ The CTA limited the number of minutes of advertising per hour to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays.⁷⁶ The CTA also applied advertising limits to children's programs shown on cable television.⁷⁷ Subsequently, the FCC applied the same advertising limits to children's programs shown on satellite services, such as DirecTV,⁷⁸ and on television stations' digital multicast channels.⁷⁹

The CTA also directed the FCC to complete a pending rulemaking proceeding to define PLCs.⁸⁰ The FCC changed the definition of a PLC to allow toy-based programs, so long as the toy was not explicitly advertised during or adjacent to the program.⁸¹ This change

PLCs that allowed television stations to continue showing programs promoting branded toys. *See infra* note 81.

⁷⁴ Allen Rostron, *Return to Hot Wheels: The FCC, Program-Length Commercials, and the Children's Television Act of 1990*, 19 HASTINGS COMM. & ENT. LAW J. 57, 61 (1996). This article reports that between 1983 and 1987, the number of toy-based programs on air increased from thirteen to over seventy, and the revenues from sales of related products grew from \$26.7 billion to \$64.6 billion.

⁷⁵ *Children's Television Act of 1990*, Pub. L. No. 101-437, 104 Stat. 996-1000., codified at 47 U.S.C. §§ 303a, 303b, 394.

⁷⁶ 47 U.S.C. §303a(b); 47 C.F.R. §73.670(a). When stations file their license renewal applications, they are required to certify whether they have complied with the advertising limits and may be fined if they do not.

⁷⁷ 47 U.S.C. §303a(d).

⁷⁸ *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Interest Obligations*, Order on Reconsideration, 19 FCC Rcd. 5647 (2004).

⁷⁹ *Children's Television Obligations of Digital Television Broadcasters*, 19 FCC Rcd. 22943, 22960-61 (2004). The transition from analog to digital television permitted television stations to broadcast multiple program streams using the same amount of spectrum.

⁸⁰ Pub. L. No. 101-437, §104, Stat. 996 (not codified).

⁸¹ *Policies and Rules Concerning Children's Television Programming*, Report and Order, 6 FCC Rcd. 2111, 2117 (1991), aff'd on

allowed even more children's programs to promote toys.⁸²

Apart from relaxing the definition of PLCs, the FCC's children's advertising policies have not changed much since 1974. While these policies have helped to limit children's exposure to advertising, the effectiveness of the FCC's policies has been limited by several factors.

First, the advertising limits apply only to programs that are originally produced for children ages twelve and under.⁸³ They do not apply to programs intended for teens or general audiences, even though many children watch these programs.⁸⁴

Second, the last time that the FCC updated its rules to take account of new technologies and marketing practices was in 2006. At that time, the FCC completed a rulemaking proceeding, begun in 2000, to clarify the public interest obligations of digital television stations with respect to children. The transition to digital television, which was completed in 2009, allows television stations to broadcast multiple streams of programming. The FCC determined that its children's advertising policies would apply to all programming designed for children ages twelve and under, regardless

recon., 6 FCC Rcd. 5093, 5098 (1991).

⁸² See Joe Flint et al., *Discovery to Take Control of Hub Children's Network*, WALL ST. J. (Sept. 17, 2014), <http://www.wsj.com/articles/discovery-to-take-control-of-the-hub-network-1410979842>. Some cable and satellite channels primarily carry programs promoting products to children. For example, Disney XD, a cable and satellite channel targeting boys aged six to eleven, began showing a block of programs based on Marvel comic books after Disney purchased Marvel. Toy seller Hasbro began the children's cable and satellite channel "The Hub" in 2010 to serve as "an outlet for some of Hasbro's best known toy brands, including G.I. Joe, Transformers, and My Little Pony." In 2014, this channel was taken over by Discovery Communications.

⁸³ 47 C.F.R. §73.670 (defining "children's tv").

⁸⁴ For example, programs hugely popular with children, such as *American Idol* and the *Simpsons*, which are produced for a general audience, are not subject to the advertising limits or policies.

of whether it was shown on a primary or multicast channel.⁸⁵ In addition, the FCC restricted the display of commercial website addresses during children's programming.⁸⁶ Since 2006, however, both the ways in which people watch video and the ways that products are marketed have changed dramatically.

Finally, the FCC rules apply only to television delivered by means of broadcast, cable, and satellite television. They do not apply to motion pictures (even if shown on television), video games, or online videos.

B. The FTC

The jurisdiction of the Federal Trade Commission (FTC), unlike the FCC, is not limited to specific communications media. Section 5 of the Federal Trade Commission Act gives the FTC the power to prevent deceptive and unfair marketing practices in interstate commerce, regardless of the medium employed.⁸⁷ But unlike the FCC, which has broad authority to adopt rules pursuant to the APA, the FTC's authority to adopt rules is limited. Consequently, the FTC enforces Section 5 by bringing actions against specific companies for specific practices it alleges are deceptive or unfair. The FTC can file complaints with either an FTC administrative law judge or in a federal district court.

Most enforcement proceedings are settled before the FTC even files its complaint. The FTC staff will attempt to negotiate a settlement, and if successful, will file a proposed consent decree along with the complaint. Companies often agree to a consent decree because it is less costly than litigation and they need not necessarily admit liability. Consent decrees typically become final after a period for public comment has ended.⁸⁸

⁸⁵ *Children's Television Obligations of Digital Television Broadcasters*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd. 22943, 22950 (2004).

⁸⁶ *Id.* at 22961.

⁸⁷ Federal Trade Commission Act, 15 U.S.C. §45(a)(1).

⁸⁸ DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW §11:17 (2015).

Bringing enforcement actions in this manner has certain disadvantages compared to rulemaking. First, they are time and resource intensive for the FTC. Second, they only apply to the parties named in the complaint. Enforcement actions do not prohibit other companies from engaging in the same sort of unfair or deceptive practices, although doing so could lead to the FTC filing a complaint. Finally, consent decrees only govern specific activities in the future.⁸⁹ For example, Kenner Toys entered into a consent decree in 1979 that prohibited it from airing television advertisements that depicted toys in any manner that could not be duplicated by children in normal use.⁹⁰

In 1975, Congress gave the FTC limited rulemaking authority to enforce Section 5, in legislation known as "Magnuson-Moss."⁹¹ Magnuson-Moss imposed a number of additional steps on the FTC beyond those required by the Administrative Procedure Act.

Two advocacy groups, Action for Children's Television and the Center for Science in the Public Interest were some of the first to try to take advantage of the FTC's new rulemaking authority. Each filed petitions for rulemaking alleging that a major portion of the advertising to children for sugared products was unfair and deceptive under Section 5.⁹² As a result, the FTC staff conducted an extensive investigation of advertising to children.

In a 1978 Report, the FTC staff recommended that the Agency adopt a rule that would 1) prohibit all television advertising directed to or seen by "audiences composed of a significant proportion of children who are too young to understand the selling purpose of, or otherwise comprehend or evaluate, the advertising"; and 2)

⁸⁹ *Id.* In some cases, consent decrees may require restitution or impose civil penalties for past actions.

⁹⁰ General Mills Fun Group, Inc., 93 F.T.C. 749 (1979).

⁹¹ Federal Trade Commission Improvement Act, Pub. L. No. 93-637, (1975). Because this law imposes procedural requirements on the FTC beyond those required for rulemaking under the Administrative Procedure Act, in practice, the FTC has not used this authority in over thirty years. Solove, *infra* note 113, at 620 & n.176.

⁹² FTC, REPORT ON TELEVISION ADVERTISING TO CHILDREN 2-4 (1978).

ban televised advertising of sugared products to older children, due to health risks.⁹³ The FTC issued a Notice of Proposed Rulemaking in April 1978.⁹⁴ Hundreds of written comments were filed. In addition, an administrative law judge held hearings which produced 60,000 pages of expert testimony and 6,000 pages of oral testimony from some of the world's leading experts on health, child psychology and nutrition.⁹⁵

Three years later, however, the FTC terminated this rulemaking proceeding without taking any action.⁹⁶ The advertising industry heavily lobbied against the proposal, and it succeeded in getting Congress to pass a law that revoked the FTC's authority to conduct rulemaking proceedings concerning unfair advertising to children.⁹⁷ Congress also allowed the FTC's funding to

⁹³ *Id.* at 10-11.

⁹⁴ Children's Advertising, 43 Fed. Reg. 17,967, 17,969 (Apr. 27, 1978).

⁹⁵ FTC, FINAL STAFF REPORT AND RECOMMENDATION 13 (Mar. 31, 1981).

⁹⁶ Children's Advertising, 46 Fed. Reg. 48,710, 48,712 (Oct. 2, 1981) (codified at 16 C.F.R. § 461). Compare Tracy Westen, *Government Regulation of Food Marketing to Children: The Federal Trade Commission and the Kid-Vid Controversy*, 39 LOYOLA L.A. L. REV. 79, 83-84 (2006) (illustrating an account by the FTC attorney in charge of the "kid-vid" rulemaking), with, Howard J. Beales III, Former FTC Director, Remarks before the George Mason Law Review Symposium, *Advertising to Kids and the FTC: A Regulatory Retrospective That Advises the Present*, (Mar. 2, 2004), available at https://www.ftc.gov/sites/default/files/documents/public_statements/advertising-kids-and-ftc-regulatory-retrospective-advises-present/040802adstokids.pdf (showing a differing account from the Director of the FTC's Bureau of Competition from 2001 to 2004).

⁹⁷ Federal Trade Commission Improvement Act of 1980, Pub. L. No. 96-252, 94 Stat. 374, 378 (codified in part at 15 U.S.C. § 57a(i)). Tracy Westen, the FTC staff attorney in charge of the rulemaking proceeding at the time, explains that the rulemaking proceeding was shut down for both political and substantive reasons. In particular, he notes changes in the political climate due to economic problems, innovations in corporate lobbying, a Washington Post editorial calling the FTC a "national nanny," a court decision prohibiting the participation of the FTC Chairman Pertschuk because of "bias," and the election of President Reagan. See Tracy Westen,

lapse, and it was briefly shut down.⁹⁸ This experience was so traumatic for the FTC staff that the FTC has largely ignored advertising to children ever since.

1. Children's Online Privacy

In the 1990s, however, the FTC became concerned about consumer protection and privacy issues raised by the growth and commercialization of the internet. In 1996, the Center for Media Education and other children's advocacy organizations asked the FTC to investigate the child-directed web site Kidscom.com, for violating Section 5. The FTC staff responded by issuing a letter and a press release stating that:

[I]t is a deceptive practice to represent that a Web site is collecting personally identifiable information from a child for a particular purpose, when the information also will be used for another purpose that parents would find material, in the absence of a clear and prominent notice to a parent regarding the practice. Additionally, the FTC staff letter concludes that a Web site that has collected identifiable information about children must obtain parental consent prior to releasing that identifiable information to third parties.⁹⁹

Government Regulation of Food Marketing to Children: The Federal Trade Commission and the Kid-Vid Controversy, 39 LOYOLA L.A. L. REV. 79, 83-84 (2006).

⁹⁸ Howard J. Beales III, Former FTC Director, Remarks before the George Mason Law Review Symposium, *Advertising to Kids and the FTC: A Regulatory Retrospective That Advises the Present*, (Mar. 2, 2004), available at https://www.ftc.gov/sites/default/files/documents/public_statements/advertising-kids-and-ftc-regulatory-retrospective-advises-present/040802adstokids.pdf.

⁹⁹ Press Release, FTC, *FTC Staff Sets Forth Principles For Online Information Collection From Children* (July 16, 1997), available at <https://www.ftc.gov/news-events/press-releases/1997/07/ftc-staff-sets-forth-principles-online-information-collection>.

The FTC subsequently held workshops to examine online advertising to children¹⁰⁰ and proposed that Congress adopt legislation to address the problem.¹⁰¹ As a result, Congress passed the Children's Online Privacy Protection Act of 1998 ("COPPA").¹⁰²

A major purpose of COPPA was to limit advertising targeted to children by prohibiting the collection, use, and dissemination of personal information from children without informed, advance parental consent.¹⁰³ In introducing the legislation, Senators Richard Bryan and John McCain explained that the legislation was necessary to prevent marketers from targeting and exploiting children:

Unfortunately, the same marvelous advances in computer and telecommunication technology that allow our children to reach out to new resources of knowledge and cultural experiences are also leaving them unwittingly vulnerable to exploitation and harm by deceptive marketers . . .

Web sites were using games, contests and offers of free merchandise to entice children to give them exceedingly personal and private information about themselves and their families. Some even used cartoon characters who asked children for personal information . . .

¹⁰⁰ *E.g.*, FTC, BUREAU OF CONSUMER PROTECTION, PUBLIC WORKSHOP ON CONSUMER PRIVACY ON THE GLOBAL INFORMATION INFRASTRUCTURE 30-50 (Dec. 1996), available at <https://www.ftc.gov/reports/staff-report-public-workshop-consumer-privacy-global-information-infrastructure>.

¹⁰¹ FTC, PRIVACY ONLINE: A REPORT TO CONGRESS i-ii (1998).

¹⁰² Children's Online Privacy Protection Act of 1998 ("COPPA"), 15 U.S.C. §§ 6501-09.

¹⁰³ 144 CONG. REC. S8482-83 (July 17, 1998).

The Internet gives marketers the capability of interacting with your children and developing a relationship without your knowledge.¹⁰⁴

Similarly, one of the reasons that the FTC revised its COPPA rules in 2013 was to ensure that marketers could not profile or send targeted advertising to children:

Without parental consent, operators may not gather persistent identifiers for the purpose of behaviorally targeting advertising to a specific child. They also may not use persistent identifiers to amass a profile on an individual child user based on the collection of such identifiers over time and across different Web sites in order to make decisions or draw insights about that child, whether that information is used at the time of collection or later.¹⁰⁵

While COPPA has undoubtedly helped protect children from abusive marketing, several factors have inhibited its success.¹⁰⁶ First, the FTC's enforcement efforts have been modest at best. In the fifteen years since the COPPA rules took effect, the FTC has brought only twenty eight enforcement actions, on average, less than two per year.¹⁰⁷

¹⁰⁴ *Id.*

¹⁰⁵ Children's Online Privacy Protection Rule, 78 Fed. Reg. 3972, 3981 (2013) (to be codified at 16 C.F.R. pt. 312). *See also* Jon Leibowitz, Former Chairman, FTC, Statement on Updated COPPA Rule, (Dec. 19, 2012), <https://www.ftc.gov/public-statements/2012/12/statement-ftc-chairman-jon-leibowitz-updated-coppa-rule-prepared-delivery> ("We also extend the Rule to cover persistent identifiers like IP addresses and mobile device IDs, which could be used to build massive profiles of children by behavioral marketers.").

¹⁰⁶ 15 U.S.C. §§ 6501(1) & (10), 60502(a).

¹⁰⁷ FTC, Legal Resources, https://www.ftc.gov/tips-advice/business-center/legal-resources?type=case&field_consumer_protect

Second, COPPA applies only to websites and online services that are directed to children under age thirteen or where the operator has actual knowledge that the person using the service is under age thirteen.¹⁰⁸ It can sometimes be difficult to tell whether a service is child-directed. The multifactor test employed by the FTC leaves room for subjective interpretation.¹⁰⁹ Many online services and websites, which parents might assume to be child-directed, have privacy policies claiming that they do not knowingly collect information from children under age thirteen.

In addition, children frequently use websites or online services that are intended for general audiences. It is difficult to tell whether these operators have "actual knowledge" of child users. In the few cases where the FTC brought enforcement actions under the actual knowledge standard, the operator had requested birthdates (a practice known as age-gating) but nonetheless collected personal information from children whose birthdates showed that they were under age thirteen.¹¹⁰ Children may also lie about their birthdate, and

tion_topics_tid=246 (search results of cases on "children's privacy").

¹⁰⁸ 16 C.F.R. § 312.2 (defining "child").

¹⁰⁹ 16 C.F.R. § 312.2 ("In determining whether a Web site or online service, or a portion thereof, is directed to children, the Commission will consider its subject matter, visual content, use of animated characters or child-oriented activities and incentives, music or other audio content, age of models, presence of child celebrities or celebrities who appeal to children, language or other characteristics of the Web site or online service, as well as whether advertising promoting or appearing on the Web site or online service is directed to children. The Commission will also consider competent and reliable empirical evidence regarding audience composition, and evidence regarding the intended audience.").

¹¹⁰ *E.g.*, United States v. UMG Recordings, Inc., Civ. Action No. CV-04-1050 JFW (filed Feb. 18, 2004), available at <https://www.ftc.gov/sites/default/files/documents/cases/2004/02/040217compumgrecording.pdf> (alleging that UMG violated the COPPA Rule when it collected birth dates in its online registration process but failed to obtain verifiable parental consent before collecting extensive personal information from visitors whose birthdate showed them to be under 13).

the FTC does not require operators to investigate the ages of their users.¹¹¹ Consequently, despite COPPA's intent, many children are profiled and targeted by marketers online.¹¹²

2. Recent FTC Enforcement Regarding Undisclosed Payments to Influencers

In addition to enforcing the COPPA rules, the FTC can bring enforcement actions to stop specific marketing practices it finds deceptive or unfair. Over time, consent decrees have collectively created a kind of common law of practices considered unfair or deceptive.¹¹³ A body of consent decrees provides some guidance to industry. Consent decrees also facilitate enforcement, since once they are final, the FTC need only show that a company violated the terms of the consent decree.

Rules, like consent decrees, facilitate enforcement because the agency need only show that a company violated the rule. But as discussed above, the FTC Act does not give the FTC general rulemaking authority. However, the FTC can, and sometimes does, issue non-binding guidance documents to alert the industry of its expectations. One example is the FTC's Guide Concerning the Use of Endorsements and Testimonials in Advertising ("Endorsement Guide").¹¹⁴

¹¹¹ FTC, *Complying with COPPA: Frequently Asked Questions*, G(1) (Mar. 20, 2015), <https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions#GeneralAudience>.

¹¹² Another problem is that the COPPA protections disappear when a child turns thirteen. Under the law, a teen is treated like an adult with few legally enforceable online privacy protections, even though teens lack experience and self-control of adults. *See* Center for Digital Democracy et al., *Request for Public Comment on the Federal Trade Commission's Implementation of the Children's Online Privacy Protection Rule*, 41-42 (June 30, 2010).

¹¹³ Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583 (2014).

¹¹⁴ *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 74 Fed. Reg. 53,124 (Oct. 15, 2009) (to be codified at 16 C.F.R. § 255).

The Endorsement Guide states that advertisers should generally disclose any “material connections” between advertisers and endorsers, such as payments or other incentives, that could affect the weight or credibility of the endorser. In 2009, the FTC amended the Endorsement Guide to specify that it applied to “new forms of marketing,” and gave several examples that involved blogging and social media where disclosures would be needed to prevent deception.¹¹⁵ In May 2015, the FTC issued additional guidance in the form of Frequently Asked Questions.¹¹⁶ The FAQs clarified that disclosure is required whenever a video creator is paid by an advertiser or reviews a product received from an advertiser and the relationship is not reasonably expected by the audience.

After giving the industry numerous warnings, the FTC began bringing actions against companies that failed to adequately disclose material connections with endorsers. In September 2015, the FTC filed a complaint alleging that the MCN Machinima had engaged in deceptive advertising when it failed to disclose that it paid influencers to post YouTube videos endorsing Microsoft's Xbox One gaming console and games.¹¹⁷ The proposed consent decree, which prohibited Machinima from misrepresenting that paid influencers are independent reviewers, became final in March 2016.¹¹⁸

¹¹⁵ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255 (Oct. 15, 2009), *available at* https://www.ftc.gov/sites/default/files/documents/federal_register_notices/guides-concerning-use-endorsements-and-testimonials-advertising-16-cfr-part-255/091015guidesconcerningtestimonials.pdf.

¹¹⁶ FTC, *The FTC's Endorsement Guides: What People are Asking*, (May 2015), *available at* https://www.ftc.gov/system/files/documents/plain-language/pdf-0205-endorsement-guides-faqs_0.pdf.

¹¹⁷ Press Release, FTC, *Xbox One Promoter Settles FTC Charges that it Deceived Consumers With Endorsement Videos Posted by Paid 'Influencers'* (Sept. 2, 2015), <https://www.ftc.gov/news-events/press-releases/2015/09/xbox-one-promoter-settles-ftc-charges-it-deceived-consumers>.

¹¹⁸ Press Release, FTC, *FTC Approves Final Order Prohibiting Machinima, Inc. from Misrepresenting that Paid Endorsers in Influencer Campaigns are Independent Reviewers* (Mar. 17, 2016),

In March 2016, the FTC also filed a complaint against Lord & Taylor for engaging in similar activities. The FTC alleged that the department store failed to disclose that it paid fashion influencers to post Instagram pictures of themselves wearing a dress from the company's new spring collection.¹¹⁹ Lord & Taylor agreed to a proposed consent decree that prohibits it from misrepresenting that a paid endorser is an independent user or ordinary consumer of the product.¹²⁰

In June 2016, the FTC filed yet another complaint and proposed settlement for inadequate disclosure of payments to online influencers. It alleged that Warner Bros. violated Section 5 by hiring influential gamers, such as PewDiePie, to post videos promoting the video game *Shadow of Mordor*. The FTC claimed that by not disclosing these payments, Warner Bros. had falsely represented that the *Shadow of Mordor* gameplay videos reflected the independent opinions or experiences of impartial gamers.¹²¹ The influencer videos were viewed more than 5.5 million times on YouTube.

By bringing these cases, the FTC hopes, according to Michael Ostheimer, a deputy in the FTC's Ad Practices Division, "that we not only stop the marketer and influencer who didn't have adequate disclosures previously, but also get the message out that other companies should have clear and conspicuous disclosures."¹²²

<https://www.ftc.gov/news-events/press-releases/2016/03/ftc-approves-final-order-prohibiting-machinima-inc>.

¹¹⁹ Press Release, FTC., *Lord & Taylor Settles FTC Charges It Deceived Consumers Through Paid Article in an Online Fashion Magazine and Paid Instagram Posts by 50 "Fashion Influencers,"* (Mar. 15, 2016), <https://www.ftc.gov/news-events/press-releases/2016/03/lord-taylor-settles-ftc-charges-it-deceived-consumers-through>.

¹²⁰ *Id.*

¹²¹ Press Release, FTC, *FTC challenges influencer campaign for Warner Bros.' Shadow of Mordor game* (July 11, 2016), <https://www.ftc.gov/news-events/blogs/business-blog/2016/07/ftc-challenges-influencer-campaign-warner-bros-shadow-mordor>.

¹²² Sara Frier & Matthew Townsend, *FTC to Crack Down on Paid Celebrity Posts That Aren't Clear Ads*, BLOOMBERG TECHNOLOGY (Aug. 5, 2016), <http://www.bloomberg.com/news/articles/2016-08->

While these enforcement actions are welcome, none of the FTC's complaints mention anything about children, despite the fact that many children undoubtedly saw the videos promoting Xbox and *Shadow of Mordor*. Nor has the FTC brought any similar complaints involving paid influencers that market directly to children.

3. FTC Guidelines on "Native Advertising"

Another area where the FTC has provided guidance concerns the practice known as "native advertising." Recently, the FTC posted on its website *Native Advertising: A Guide for Business* ("Native Advertising Guide").¹²³ The Native Advertising Guide defines native advertising as "content that bears a similarity to the news, feature articles, product reviews, entertainment, and other material that surrounds it online." Influencer videos, which often appear to be tutorials, product reviews, or entertainment, are a form of native advertising.

The Native Advertising Guide explains that an "advertisement or promotional message shouldn't suggest or imply to consumers that it's anything other than an ad." If disclosure is necessary to prevent deception, the disclosure must be clear and prominent. Disclosure is not required, however, when consumers are likely to understand that the content is an ad.

The Native Advertising Guide uses hypothetical examples to illustrate when disclosure is required. These examples, however, are more confusing than enlightening. For instance, Example 9 describes a video game set in a virtual world with billboards for actual

05/ftc-to-crack-down-on-paid-celebrity-posts-that-aren-t-clear-ads.

¹²³ FTC, *Native Advertising: A Guide For Businesses*, (Dec. 2015), <https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses> [hereinafter *Native Advertising Guide*]. This Guide links to and is intended to supplement the FTC's Enforcement Policy Statement on Deceptively Formatted Advertisements by offering informal guidance to help companies apply the Policy Statement in day-to-day contexts in digital media.

products. The Native Advertising Guide states that disclosure is *not* required because “consumers are likely to attribute the ads to the sponsoring advertisers.” But disclosure *is* required in Example 16, in which a vlogger posts a video promoting a snack food. The Native Advertising Guide explains that even though consumers watching the video are likely to identify it as an advertisement, they would not expect it to be an advertisement, given their experience with other (non-sponsored) videos posted by the vlogger. On the other hand, consumers playing the video game in Example 9 likewise may not expect advertising in a video game.¹²⁴ Given the FTC’s assumption that consumers in both examples recognize the content as advertising, requiring disclosure in one case and not the other makes no sense.

The FTC provides no evidentiary support for its assumptions about what consumers expect or recognize as advertising.¹²⁵ And even if adults might understand that certain content is actually advertising, children would not. The Native Advertising Guide makes no reference to children even though a large amount of native advertising is watched by and targeted to children.

Thus, the FTC has not effectively protected children from unfair and deceptive advertising practices online. Rather, it has only brought a modest number of enforcement actions under COPPA, and it has brought no enforcement actions under Section 5 concerning unfair or deceptive marketing to children.¹²⁶

¹²⁴ Native Advertising Guide, *supra* note 123, at Ex. 9, 16.

¹²⁵ *Id.* at ex. 16. The Policy Statement merely explains that consumers watching the video in Example 16, would not expect it to be advertising,

¹²⁶ The FTC’s reluctance to bring enforcement actions against advertisers to children stems from Congress’ threat to shut down the agency in the late 1970s after it found that it was unfair to advertise to very young children and to advertise sugary cereal to children aged 8 and under. *See supra* at 107. More recently, industry lobbying stopped the FTC from adopting even *voluntary nutritional guidelines* for children’s advertising in 2012. *E.g.*, Katy Bachman, *Does this Look Like Health Food?*, ADWEEK (Mar. 27, 2012); Lindsey Layton & Dan Eggen, *Industries lobby against voluntary nutrition guidelines for food marketed to kids*, WASH. POST (July 9,

C. Industry Self-Regulation

In addition to government regulation, advertising to children is subject to a variety of industry self-regulatory programs. The two most important self-regulatory bodies are the Children's Advertising Review Unit ("CARU") and the Children's Food and Beverage Advertising Initiative ("CFBAI"). The industry undertook both programs in an attempt to stave off threatened government regulation. CARU, for example, was founded the same year that the FCC released its 1974 Policy Statement warning television broadcasters to stop airing unfair and deceptive advertising to children. The CARU Guidelines, which largely track and to some extent exceed the principles set forth in the 1974 Policy Statement, purport to apply to advertising to children in all forms of media.¹²⁷ When concerns were expressed about children's online privacy in the 1990's, CARU revised its guidelines to require that child targeted websites give notice and obtain parental consent before collecting information.

In the early 2000s, public health advocates began calling for limiting the advertising of "junk" foods based on research showing that such marketing was contributing to the epidemic of childhood obesity. The advertising industry responded by creating CFBAI. According to its website, CFBAI "is a voluntary self-regulation program comprising 18 of the nation's leading food and beverage companies and quick-serve restaurants. The Initiative was created in 2006 to shift the mix of foods advertised to children under age 12 to encourage healthier dietary choices and healthy lifestyles."¹²⁸ As a condition of membership, the companies pledge to

2011). No doubt this recent experience has reinforced the FTC's reluctance to bring actions involving advertising to children.

¹²⁷ *About CARU*, ASRC, <http://www.asrcreviews.org/about-caru/> (emphasis added).

¹²⁸ Children's Food & Beverage Advertising Initiative, BETTER BUS. BUREAUS, <https://www.bbb.org/council/the-national-partner-program/national-advertising-review-services/childrens-food-and-beverage-advertising-initiative/> (last visited Nov. 30, 2016).

only advertise products to children that meet the CFBAI's nutrition standard.

In practice, self-regulatory codes tend to be weak and unenforceable.¹²⁹ For example, CARU's Guidelines state that advertising should focus primarily on the product and make premiums (such as toys that come with fast food children's meals) clearly secondary, to avoid taking unfair advantage of children.¹³⁰ Nonetheless, an analysis of nationally televised advertisements for children's meals found that they emphasized toy giveaways more than the product.¹³¹ Similarly, the food marketing guidelines have not been effective. A study comparing food advertisements on children's television before and after the CFBAI guidelines took effect found no significant improvement in the nutritional quality of foods marketed to children by CFBAI members, even though those companies had complied with the CFBAI guidelines.¹³² Even though the CFBAI guidelines apply to online marketing to children, YTK is full of promotions for candy, soda, fast food restaurants,

¹²⁹ See generally Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L. J. 711 (1999).

¹³⁰ CHILDREN'S ADVERTISING REVIEW UNIT, COUNCIL OF BETTER BUS. BUREAUS, SELF-REGULATORY PROGRAM FOR CHILDREN'S ADVERTISING 13 (2014), <http://www.asrcreviews.org/wp-content/uploads/2012/04/Guidelines-FINAL-FINAL-REVISED-20142.pdf>.

¹³¹ Amy M. Bernhardt et al., *How Television Fast Food Marketing Aimed at Children Compares with Adult Advertisements*, PLOS ONE 8(8): e72479 (2013).

¹³² Dale H. Kunkel, *Evaluating Industry Self-Regulation of Food Marketing to Children*, 49 AM. J. PREV. MED 181 (2015). A literature review of scientific, peer-reviewed studies of self-regulatory regimes in multiple countries and regions found that these initiatives have done little to reduce the high levels of advertising of less healthy foods. S. Galbraith-Emanmi & T. Lobstein, *The impact of initiatives to limit the advertising of food and beverage products to children: a systematic review*, 14 OBESITY REVIEWS 960 (2013); Francisco Lupiáñez-Villanueva et al., *Study on the impact of marketing through social media, online games and mobile applications on children's behaviour*, EUROPEAN COMM'N 151-56 (Mar. 2016), available at http://ec.europa.eu/consumers/consumer_evidence/behavioural_research/docs/final_report_impact_marketing_children_final_version_approved_en.pdf [hereinafter "EC Impact Study"].

and snack food.¹³³ In fact, in conducting research for the Request for Investigation, we found videos on YTK promoting products from all but one of the eighteen CFBAI members that did not meet CFBAI nutritional criteria.¹³⁴

In sum, the existing framework for regulating children's advertising is out of date and ineffective. Unless the regulatory framework is reinvented to take account of changes in technology and marketing, it will become even less effective in the future.

III. RATIONALES FOR REGULATING CHILDREN'S ADVERTISING

Before turning to the prospects for a new regulatory framework, it is useful to review the rationales underlying the regulation of children's advertising on television. This section discusses seven rationales, which I set forth in a previous article,¹³⁵ to see if they remain valid in the current media environment.

A. Children's Cognitive Capacity is Still Developing

The FCC's 1974 Policy Statement was grounded in child developmental and psychology research finding that "young children lacked the necessary sophistication to appreciate the nature and purpose of advertising."¹³⁶ Research over the last thirty years has confirmed and expanded upon these findings.¹³⁷

¹³³ See CFBAI RFI, *supra* note 1, at 3-15, Ex. 1-2, 4-7.

¹³⁴ *Id.*, *supra* note 1, at 5.

¹³⁵ Angela J. Campbell, *Ads2Kids.com: Should Government Regulate Advertising to Children on the World Wide Web?*, 33 GONZAGA L. REV. 311, 320-24 (1998).

¹³⁶ 1974 Policy Statement, *supra* note 63, at 15.

¹³⁷ See, e.g., EC Impact Study, *supra* note 132, at 67-68; Tim Kasser & Susan Linn, *Growing Up under Corporate Capitalism: The Problem of Marketing to Children, with Suggestions for Policy Solutions*, 10 SOC. ISSUES & POLICY REV. 122, 131-32 (2016).

1. Discriminating Commercial from Non-Commercial Content

Before children can comprehend advertising, they must be able to discriminate commercial content from non-commercial content at a perceptual level. Most children develop this ability by around age five for television. But in today's digital media environment, it is much more difficult for children to identify what is advertising. As the Editorial Director for *Kidscreen* magazine put it, "Everything in media is being disrupted. Content is heaving and morphing and if it's crazy difficult for adults to figure out what paid content is, imagine the challenge for kids."¹³⁸

Studies confirm that adults have difficulty identifying sponsored content online. For example, one study found that adults are more likely to recognize banner ads as commercial content than sponsored content.¹³⁹ Another study found that "parents were quite poor at identifying a children's advergaming even when given a definition and multiple examples."¹⁴⁰ The "most striking finding" from another study that examined how different locations and types of disclosures affected adults' understanding of sponsored advertising, was that "very few participants recognized the [online] article as advertising, irrespective of disclosure condition."¹⁴¹

¹³⁸ Kidsmediacentre, *The "Advertising" Tools & Techniques Marketers are Using to Influence Young Consumers Makes it Hard to Separate Advertising from Content*, #BRANDOFME, <http://www.hashtagbrandofme.com/the-new-advertising-toolbox/?rq=hard%20to%20separate%20advertising%20from%20content> (last visited Nov. 9, 2016).

¹³⁹ Karolina Tutaj & Eva A. van Reijmersdal, *Effects of online advertising format and persuasion knowledge on audience reactions*, 18 J. OF MKTG. COMM. 5, 16 (2012).

¹⁴⁰ Nathaniel J. Evans, *Pinpointing Persuasion in Children's Advergaming*, 14 J. OF INTERACTIVE ADVERTISING 73, 74-75 (2014).

¹⁴¹ Bartosz W. Wojdyskia & Nathaniel J. Evans, *Going Native: Effects of Disclosure Position and Language on the Recognition and Evaluation of Online Native Advertising*, 45 J. OF ADVERTISING 157 (2016).

Studies confirm that children are less able to identify online advertising compared to traditional television advertising.¹⁴² For example, one found that:

With advergimes, compared to traditional advertising where advertising and media content are shown sequentially, the advertising message is interwoven into an interactive game. Due to the embedded and subtle nature of these games, combined with children's underdeveloped persuasion knowledge and limited experience with this new advertising format, young children are unlikely to retrieve and apply their advertising knowledge as a critical defense while playing an advergime.¹⁴³

Like advergimes, the advertising messages in influencer videos are interwoven into the content. Because YTK's intended audience of ages five and under lacks the capacity to distinguish advertising from content in traditional television programming, it is inconceivable that they would be able to distinguish between sponsored and unsponsored videos on YTK.

Even if sponsored videos in YTK were identified as advertising, its audience is too young to comprehend what that means.¹⁴⁴ But Google makes no attempt to

¹⁴² Dale Kunkel & Jessica Castonguay, *Children and Advertising: Content, Comprehension, and Consequences*, HANDBOOK OF CHILDREN AND THE MEDIA 395, 405-06 (2011).

¹⁴³ Katarina Panic et al., *Comparing TV Ads and Advergimes Targeting Children: The Impact of Persuasion Knowledge on Behavioral Responses*, 42 J. OF ADVERTISING 264, 266 (2013) (citations omitted). Another study found that young children had more difficulty recognizing advertisements on a web page than on television. See Mark Blades et al., *Children's recognition of advertisements on television and on Web pages*, 62 APPETITE 190, 191 (2013) (finding that six-year-olds identified just over a quarter, eight-year-olds identified about half, and ten-year-olds identified about three-quarters of Web advertisements).

¹⁴⁴ An experiment designed to test the effect of "ad breaks," i.e., disclosing that an advergime is a commercial, on children aged eight to eleven, found that the inclusion of an ad break did

identify sponsored content as advertising or separate it from other content that is not advertising. Instead, it claims that sponsored videos on YTK are not advertisements.¹⁴⁵

2. Understanding Persuasive Intent and Activating Defenses

Not only are young children unable to identify sponsored videos as commercials, but they lack the ability “to attribute persuasive intent to advertising and to adjust their interpretation of commercial messages consistent with that knowledge.”¹⁴⁶ Studies conducted since the 1980s have corroborated the finding that children develop an understanding of persuasive intent at about age eight.¹⁴⁷ However, recent work suggests that

not increase children’s understanding that the purpose of the advergaming was to sell a product. Nor did ad breaks increase children’s ability to correctly identify who put the advergaming online; most thought that it had been put there by a pop star or celebrity. Soontae An & Susannah Stern, *Mitigating the Effects of Advergaming on Children*, 40 J. OF ADVERTISING 43, 50 (2011). See also Soontae An et al., *Children’s Advertising Literacy for Advergaming*, 43 J. OF ADVERTISING 63, 69 (2014) (finding that three-quarters of children playing an advergaming did not recognize it as advertising).

¹⁴⁵ See YouTube Kids Parental Guide, *supra* note 49. The Parental Guide explains that “[v]ideos uploaded by users to YouTube are not Paid Ads and therefore they are not marked as an Ad nor are they subject to our advertising policies. This may also include content about or from companies who may have also purchased Ads in the app. For example, a search for trains could result in train cartoons, songs and videos of real trains, as well as a TV commercial for toy trains uploaded by a user or a toy train company, none of which we consider as Paid Ads, as they are not part of the YouTube Kids advertising program. Likewise, a search for chocolate can show a user-uploaded video on making chocolate fudge even though we do not allow paid Ads for chocolatiers.”

¹⁴⁶ Kunkel, *supra* note 142, at 403. Many studies in the field of marketing utilize the persuasion knowledge model (PKM). For a good explanation of this model see Panic, *supra* note 143.

¹⁴⁷ Kunkel, *supra* note 142, at 405; Samantha Graff et al., *Government Can Regulate Food Advertising To Children Because Cognitive Research Shows That It Is Inherently Misleading*, 31 HEALTH AFFAIRS 392, 395-96 (2012).

merely understanding persuasive intent may be insufficient to moderate the effects of advertising. Rather, children also need to understand “source bias, that is, that ads tend to exaggerate. This capacity develops around age twelve.”¹⁴⁸ Research also suggests that that children often need a “cue” in order to activate their understanding of persuasive intent.¹⁴⁹

Marketing to children that lack the cognitive capacity to understand persuasive intent is fundamentally unfair. Yet, influencer marketing is more effective than more traditional advertisements because it is made to look like “authentic content” rather than advertising. As one study explains, “Overall, people have more positive attitudes toward sponsored content than toward banner ads. They think these formats are more informative, amusing, less irritating, and [are] less skeptical toward sponsored content.”¹⁵⁰ A recent survey suggests that children, too, prefer “brand integration” over other forms of online advertising.¹⁵¹ But the survey also found that many children did not recognize some online advertising formats as advertising at all.¹⁵² Using influencer videos that do not appear to be advertising

¹⁴⁸ Kunkel, *supra* note 142, at 407.

¹⁴⁹ *E.g.*, Panic, *supra* note 143, at 267.

¹⁵⁰ Karolina Tutaj & Eva A. van Reijmersdal, *Effects of online advertising format and persuasion knowledge on audience reactions*, 18 J. OF MKTG. COMM. 5, 16 (2012).

¹⁵¹ See Sophie, *We asked 1000 kids what they thought about online advertising*, SUPERAWESOME BLOG (June 13, 2016), <https://blog.superawesome.tv/2016/06/13/we-asked-1000-kids-what-they-thought-about-online-advertising/>. This survey of 1,000 children aged 6 to 14 in the US and the UK found that of six popular online advertising formats, children preferred “brand integration” because it was “the least disruptive and most engaging format.” The other formats, listed in order of most to least liked, were interactive mobile interstitials, interactive pre-roll, mobile game interstitials, skins, and expandable floor ads.

¹⁵² *Id.* For example, it noted that the “good thing about skins is that they are seen as unintrusive, and raise awareness of a brand at a subconscious level by remaining in the background while a kid browses their favourite content. The downside? Many kids, especially at a young age, don’t see this format as an ad at all, but simply as a new look for a site or app.”

takes unfair advantage of children's cognitive inability to appreciate the nature and purpose of advertising.

B.Children Are More Susceptible than Adults

Because they are just developing their cognitive capabilities, children are more trusting than adults and thus, more vulnerable to "commercial pitches" by program hosts, a practice known as "host selling." As described above, the FCC prohibits host-selling on children's television programs because it takes "unfair advantage" of children's trust in program characters. The FCC noted that "[e]ven performers themselves recognize that, since a special relationship tends to develop between hosts and young children in the audience, commercial messages are likely to be viewed as advice from a friend."¹⁵³

Character or "spokes-character" marketing is similar to host-selling. It uses brand mascots or media characters to market to children.¹⁵⁴ It has been found that "[y]ounger children are especially vulnerable to the marketing of unhealthy food and beverage products" that use character marketing. Character marketing is effective because "[c]hildren develop emotional bonds with brand mascots and media characters as if they were their personal friends."¹⁵⁵

The intended audience of YTK, children ages five and under, are thus the most vulnerable to host selling and character marketing. Rather than prohibiting marketing of this type, YTK has essentially become a plat-

¹⁵³ *Id.* at 320. Nonetheless, the use of licensing of popular characters to market to children has become a huge business. Angela J. Campbell, *Restricting the Marketing of Junk Food to Children by Product Placement and Character Selling*, 39 LOYOLA L.A. L. REV. 447, 460-65 (2006).

¹⁵⁴ Angela J. Campbell, *Restricting the Marketing of Junk Food to Children by Product Placement and Character Selling*, 39 LOYOLA L.A. L. REV. 447, 460-65 (2006).

¹⁵⁵ Vivica Kraak & Mary Story, *The Use of Brand Mascots and Media Characters: Opportunities for Responsible Food Marketing to Children*, Issue Brief, HEALTHY EATING RESEARCH (Mar. 2016), available at www.healthyeatingresearch.org

form for host-selling and character marketing on steroids. YTK has vastly increased opportunities for companies to popularize new characters and to use them (or license their use) to promote products.

A recent *Kidscreen* article explains how production companies worldwide are capitalizing on YouTube's "viral nature and its lightning-quick speed" to launch new programs and to obtain "a faster track to retail."¹⁵⁶ Unlike traditional television, YTK allows children to watch whenever and wherever they want. Therefore, "whether they're watching in the car, at home or in the grocery store, all that extra screen time spent with their favorite characters opens up a whole new realm of possibilities" for character merchandising.¹⁵⁷

Kidscreen calls Shopkins the "poster child for YouTube-driven programs." Shopkins are a line of collectible toy plastic figurines based on products, such as chocolate bars and lipsticks, with cute names, such as "Cheeky Chocolate" and "Lippy." Australia-based Moose Toys launched the toys along with Shopkins webisodes on YouTube in July 2014. As of June 2016, Moose Toys had sold more than 250 million units and made 55 licensing deals worldwide.¹⁵⁸ Moose Toys' Marketing Director attributes this success to its periodic release of short webisodes on YouTube:

The webisodes and the licensing program took off in tandem. As the toys were becoming more successful and the series more popular, Moose began pivoting Shopkins from being solely a toy brand to a lifestyle brand, working very closely with key partners to develop a blueprint for ancillary expansion. Additionally, the YouTube content helped Moose to determine which Shopkins characters were really striking a chord with

¹⁵⁶ Patrick Callen, *Achieving retail royalty, the YouTube way*, KIDSCREEN (June 16, 2016), <http://kidscreen.com/2016/06/16/achieving-retail-royalty-the-youtube-way/>.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

kids and would be more likely to drive sales of licensed products.¹⁵⁹

The Shopkins webisodes are available on YTK, along with a host of unboxing videos featuring Shopkins figures and licensed products. For example, the CookieSwirlC channel available on YTK describes itself as:

“a unique toy channel bursting with super happy, positive, family friendly videos inspired by sugary cute toys like Disney, Frozen, Princesses, mermaids, Littlest Pet Shop LPS, My Little Pony MLP, Lego, Barbie dolls, Play Doh, Monster High, Shopkins and much much more!!! Everything from stories, movies, playset toy reviews, hauls, blind bag openings, toy unboxing, and fun do it yourself crafts!”¹⁶⁰

By providing a platform that companies can use to create and promote characters that are popular with children as a means of promoting products, YTK enables marketers to take advantage of children’s vulnerabilities.

C. Market Forces Don’t Protect Children

Because children naturally love toys and characters, market forces cannot be relied on to protect children from excessive, deceptive, or unfair advertising.¹⁶¹ Just as it was recognized in passing the CTA, that young children cannot be expected to change the channel or turn off the television set because of excessive or deceptive advertising,¹⁶² they cannot be expected to stop watching an online video.

¹⁵⁹ *Id.*

¹⁶⁰ *CookiSwirlC*, YOUTUBE, <https://www.youtube.com/c/cookieswirlc/about> (last visited Nov. 12, 2016) (toy channel with over 3 million subscribers).

¹⁶¹ *Ads to Kids.Com*, *supra* note 135, at 322.

¹⁶² H.R. Rep. No. 100-675, at 8 (1988).

Thus, market forces have not limited excessive and unfair marketing on YTK. In fact, YTK has been so successful in the United States market that it has expanded to other countries.¹⁶³ Although parents may choose YTK because it limits children's exposure to inappropriate sexual and violent content on YouTube, they have no way to opt out of sponsored content on YTK. Even if they pay \$10/month for the "ad free version" of YTK that Google began offering in August 2016,¹⁶⁴ they will still see sponsored videos on YTK because they are not considered "paid ads."

D. Increasing Stress on Families

Another rationale for regulating marketing to children is that it undermines parental authority and contributes to family stress.¹⁶⁵ YTK bombards children with sponsored content, which can lead to children requesting products that parents may not want to purchase.¹⁶⁶ For example, many parents seek to limit their children's consumption of soda, sugary cereals, and

¹⁶³ Antika Mainkar, *YouTube's Child-Friendly App Now Available in Other Countries*, THEAPPLEGOOGLE (Nov. 19, 2015), <http://theapplegoogle.com/2015/11/youtubes-childfriendly-app-countries/> (stating it is available in Australia, Canada, Ireland, New Zealand, and the United Kingdom).

¹⁶⁴ Davey Alba, *Kids Can Now Watch YouTube Ad-Free—If Parents Pay*, WIRED (Aug. 3, 2016), <https://www.wired.com/2016/08/kids-can-now-watch-youtube-ad-free-parents-pay/>.

¹⁶⁵ *Ads to Kids.Com*, *supra* note 135, at 323.

¹⁶⁶ See Press Release, FTC, *Federal Court Finds Amazon Liable for Billing Parents for Children's Unauthorized in-App Charges*, (Apr. 27, 2016), <https://www.ftc.gov/news-events/press-releases/2016/04/federal-court-finds-amazon-liable-billing-parents-childrens>. Although YTKs does not allow children directly order the featured products, advertisers have found other ways to allow children to purchase products without parental consent. For example, in 2014, the FTC brought enforcement actions against Google, Apple, and Amazon for allowing children to make in-app purchases without parental consent. Google and Apple quickly settled, agreeing to stop this practice and to provide refunds totally over \$50 million. The FTC took Amazon to court, and in April 2016, the judge granted the FTC's motion for summary judgment.

candy that are frequently featured in YTK videos. Similarly, most parents would probably not want their four-year-old playing the T-rated video game *Xenoblade Chronicles*; yet trailers for this game were shown on YTK. Also, many families cannot afford to buy expensive toys featured in unboxing videos, such as Lego Star Wars sets costing over \$100, or to take vacations to places such as The World of Coca Cola and Hershey's Chocolate World.

While some argue that it is the job of parents to simply resist children's demands for advertised products, this is neither realistic nor fair. In "an ideal world, perhaps parents would ignore all of children's request for lavish toys and unhealthy snack foods, but in fact, research is clear that parents have a high rate of yielding to children's purchase-influence requests" observes Dale Kunkel, a leading scholar on children and media.¹⁶⁷

Research also shows that the parents' denials of children's requests is a significant source of parent-child conflict.¹⁶⁸ Because digital marketing is so pervasive, it is not easy for parents to limit their children's exposure to it. Studies show that children spend far more time online than parents realize.¹⁶⁹ It is not feasible for parents to monitor all of a child's activities online. Even parents who closely monitor their children's online activities may have difficulty identifying advertising. This problem is aggravated by the fact that some sponsored videos are designed to appear educational.¹⁷⁰

¹⁶⁷ Kunkel, *supra* note 142, at 408.

¹⁶⁸ *Id.* at 409. See also Paramaporn Thaichon & Thu Nguyen Quach, *Online marketing communications and childhood's intention to consume unhealthy food*, 24 AUSTRALASIAN MKTG. J. 79 (2016) (finding that even though parents tried to encourage their children to eat healthy food, they would sometimes give into children's requests for unhealthy food to make their children happy and avoid trouble).

¹⁶⁹ Nathaniel J. Evans, *Pinpointing Persuasion in Children's Advergaming*, 14 J. OF INTERACTIVE ADVERTISING 73, 74-75 (2014).

¹⁷⁰ For example, Dan Burdett, Snickers global brand director, explained how he extended the "phenomenally popular Snickers brand online [by] tapping into the global popularity of 'how to' videos. The 'off their game' vloggers are an innovative digital twist

E. Impact On the Content of Programming for Children

The integration of programming and marketing negatively affects the type and content of programming made for children. This concern was first articulated by the FCC in its 1969 *Hot Wheels* decision. There, the FCC found that interweaving toy cars with the program “subordinate[d] programming in the interest of the public to programming in the interest of its saleability.”¹⁷¹

Today, products are routinely integrated into digital content for children. Major children's media companies, such as Nickelodeon and Disney, use their child-directed websites, video games, and apps to promote their television programs, movies, and characters and vice-versa. They also license the use of their characters to market a wide variety of products to children.¹⁷² Entire YouTube channels are devoted to particular toys or brands, such as the Barbie Channel and the Star Wars Channel.¹⁷³ In this kind of environment, children's stories that do not lend themselves to character

on our hugely successful ‘You're Not You When You're Hungry' TV ads.” John McCarthy, *Snickers enlists YouTube vloggers for ‘You're Not You When You're Hungry' digital campaign*, THE DRUM (Apr. 8, 2015), <http://www.thedrum.com/news/2015/04/08/snickers-enlists-youtube-vloggers-you-re-not-you-when-you-re-hungry-digital-campaign>. Some of these “how-to videos” shown on YTK purported to teach drawing or to play an instrument. They did not reveal until the very end that they were ads for Snickers.

¹⁷¹ See Topper Corporation, *supra* note 71.

¹⁷² E.g., Beth Snyder Bulik, *How Disney Has Managed to Keep ‘Frozen’ Red Hot*, ADVERTISINGAGE (Sept. 3, 2014), <http://adage.com/article/cmo-strategy/disney-managed-frozen-red-hot/294757/>.

¹⁷³ *Barbie*, YOUTUBE, <https://www.youtube.com/user/barbie/featured> (last visited Nov. 12, 2016) (official Barbie content channel with 1.5 million subscribers); *StarWars*, YOUTUBE, <https://www.youtube.com/user/starwars/featured> (last visited Nov. 9, 2016) (official StarWars content channel with 1.5 million subscribers).

marketing are less likely to be made into videos or movies.¹⁷⁴

High-quality, noncommercial children's programs such as Mr. Roger's Neighborhood and Sesame Street typically carried by PBS stations, have trouble competing in the digital marketplace saturated with sponsored content. YTK's search and recommendation functions may exacerbate this problem by steering children away from actual programming to branded content. For example, a child looking for a TV program such as *Thomas the Tank Engine* ("Thomas") will find not only episodes of the program, but sponsored videos showing children unboxing *Thomas* play sets and videos of *Thomas* trains delivering chocolate eggs filled with branded toys and candy.¹⁷⁵ And once a child watches these promotional videos, the recommendation function will cue up more videos with similar content.

YouTube's partnership program with content creators provides another example of how content is subordinated to marketing.¹⁷⁶ To participate in this program, creators must agree to upload only "advertiser-friendly" content.¹⁷⁷ "Advertiser-friendly" content may not include "controversial or sensitive subjects and events, including subjects related to war, political conflicts, natural disasters and tragedies, even if graphic imagery is not shown."¹⁷⁸ At the same time, YouTube ex-

¹⁷⁴ The children's cable channel the Hub provides another example of how tie-ins with toy companies can distort programming decisions. Launched by Hasbro in partnership with the Discovery Channel, the Hub became a "source of tension between Discovery and Hasbro" because "Hasbro regarded the partnership with Discovery as a way to drive toy sales, and that often led the toy maker to balk at supporting shows that had good ratings but weren't moving product." See Joe Flint et al., *supra* note 82.

¹⁷⁵ See YTK RFI, *supra* note 1, at 34-35, Ex. 1(1).

¹⁷⁶ See *About the YouTube Partners Program*, *supra* note 12.

¹⁷⁷ *Understanding Monetization: Video monetization criteria*, YOUTUBE, <https://support.google.com/youtube/answer/97527?hl=en> (last visited Nov. 9, 2016).

¹⁷⁸ *Partner Program Policies & Security: Advertiser-friendly con-*

publicly permits creators to include paid product placements and endorsements.¹⁷⁹ This policy thus privileges sponsored programming on YouTube, and by extension, on YTK.

F. Effect On Children's Health

In the 1970s, public health advocates were primarily concerned about the effects of candy and sweetened cereal on children's dental health.¹⁸⁰ Over the last thirty years, however, attention has shifted to the health problems associated with childhood obesity.¹⁸¹ Numerous studies have found that children's attitudes and eating habits are affected by food and beverage advertising.¹⁸² As discussed above, the self-regulatory CFBAI was created in responses to these concerns. YTK provides a way for these advertisers to evade the CFBAI nutrition guidelines. Many videos on YTK promote candy, soda, sugary cereal, and other products of CFBAI

tent guidelines, YOUTUBE, <https://support.google.com/youtube/answer/6162278> (last visited Nov. 9, 2016).

¹⁷⁹ *Ad Policies: Paid product placements and endorsements*, YOUTUBE, <https://support.google.com/youtube/answer/154235> (last visited Nov. 9, 2016).

¹⁸⁰ FED. TRADE COMM'N, STAFF REPORT ON TELEVISION ADVERTISING TO CHILDREN 105-56 (1978).

¹⁸¹ *E.g.*, COMM. ON FOOD MKTG. AND THE DIETS OF CHILDREN AND YOUTH, INST. OF MED., FOOD MKTG. TO CHILDREN AND YOUTH: THREAT OR OPPORTUNITY? (2006); STANDING COMM. ON CHILDHOOD OBESITY PREVENTION, INST. OF MED., CHALLENGES AND OPPORTUNITIES FOR CHANGE IN FOOD MARKETING TO CHILDREN AND YOUTH: WORKSHOP SUMMARY (2013).

¹⁸² *E.g.*, *Id.* at ch. 5; Kunkel, *supra* note 142, at 409-10 (summarizing studies of the role that food marketing plays in shaping children's nutritional knowledge, eating habits, and weight); Jennifer L. Harris et al., *US Food Company Branded Advergimes on the Internet: Children's exposure and effects on snack consumption*, 6 CHILDREN & MEDIA 51 (2011) (study found that after children played unhealthy food advergimes, they consumed more nutrient-poor snack foods and fewer fruits and vegetables); Thaichon, *supra* note 168, at 83 (finding that fast food ads on social networking websites could manipulate children's likelihood of purchase and views on fast food and eating habits).

members that do not meet the CFBAI nutrition guidelines.¹⁸³

G. Impact on Values

Finally, marketing to children teaches values that many parents do not support or that are detrimental to society.¹⁸⁴ The Campaign for a Commercial Free Childhood (“CCFC”), for example, works to limit commercial access to children in part because “when children adopt the values that dominate commercial culture—materialism, self-indulgence, conformity, impulse buying, and unthinking brand loyalty—the health of democracy and sustainability of our planet are threatened.”¹⁸⁵

Much of the content on YTK promotes materialism, that is, the view that one’s personal worth is based on products.¹⁸⁶ The Shopkins webisodes discussed above, are a good example because they promote both collecting the Shopkins merchandise as well as shopping in general. Toy review and unboxing channels, such as Ryan ToysReview and Disney Car Toys, similarly promote the idea that the key to happiness is having lots of toys. Yet, studies show that having materialistic values is correlated with lower personal well-being and engagement in behaviors that pose risks to health.¹⁸⁷

Other content on YTK may contribute to the sexualization of girls. A Task Force of the American Psychological Association (“APA”) found that sexualization of girls is linked to a variety of harmful consequences,

¹⁸³ CCFC and CCD’s request to the FTC to investigate CFBAI members categorized promotional videos on YTK into three types: (1) brand channels, such as the Reese’s Channel and the Oreo Channel; (2) influencer videos, such as FoodMania reviews of Oreo and Nutella snack dippers by the child actress from Modern Family, and EvanTube and his sister taking the Oreo Cookies challenge; and (3) actual commercials for products such as Pop Tarts, M&Ms, and Chips Ahoy. CFBAI RFI, *supra* note 1, at 4.

¹⁸⁴ *Ads2Kids.com*, *supra* note 135, at 324-25.

¹⁸⁵ *About CCFC*, CAMPAIGN FOR A COMMERCIAL FREE CHILDHOOD, <http://www.commercialfreechildhood.org/about-ccfc> (last visited Nov 9, 2016).

¹⁸⁶ Kunkel, *supra* note 142, at 409.

¹⁸⁷ Kasser & Linn, *supra* note 137, at 132.

including impaired cognitive performance, eating disorders, low self-esteem, and depressive affect.¹⁸⁸ It identified media of all types, along with advertising, and products such as dolls, clothing, and cosmetics, as the primary drivers of girls' sexualization. The APA's Report cited Disney movies that featured female characters in "sexy" costumes, Bratz dolls "dressed in sexualized clothing such as miniskirts, fishnet stockings, and feather boas," and marketing to young girls by the cosmetics industry as examples.¹⁸⁹

Much of the content on YTK is similar to that cited in the APA Report. In addition to videos featuring scantily-clad Disney princesses and Bratz dolls, children can watch "webisodes" promoting Lego Friends, a line of Lego products marketed to girls. Although the Lego Friends playsets are targeted to young girls,¹⁹⁰ the webisodes portray the Lego Friends as teens engaging in teen activities such as partying at a café or getting their hair done at the beauty parlor. Children can also see tutorials in which children demonstrate how to apply makeup or how to make lip gloss. They can also watch videos of casual games such as "Elsa vs. Barbie Fashion Contest 2" and "Elsa Makeup School," where the game players select and apply different outfits and cosmetics.

Other videos on YTK have themes widely believed inappropriate for preschoolers. For example, there are trailers for video games that the Entertainment Software Rating Board ("ESRB") has rated T for teens, due to blood, mild language, partial nudity, use of alcohol and tobacco, and violence. Similarly, there are unboxing videos for T-rated video games such as *Monster Hunter: Generations*.

Because YTK provides young children with a subset of videos from YouTube, it is not surprising that they reflect the dominant commercial culture. Children are exposed to that culture in many ways. But YTK is particularly troubling because it is intended for very

¹⁸⁸ APA, TASK FORCE ON THE SEXUALIZATION OF GIRLS 23 (2007), <http://www.apa.org/pi/women/programs/girls/report,-full.pdf>.

¹⁸⁹ *Id.* at 13.

¹⁹⁰ See YTK RFI, *supra* note 1, at 5-6, and Ex. 1-E, 21-23.

young children. The impact of this early exposure on children's development remains to be seen.

In sum, the reasons for regulating television marketing to children apply as well to digital marketing. Indeed, given that children are spending more time in front of screens and viewing videos that seamlessly integrate marketing and programming, the need for regulation has taken on a new urgency to protect the well-being of children.

IV. THE PROSPECTS FOR NEW REGULATION

As discussed above, many of the videos on YTK could not be shown on broadcast, cable, or satellite television, because they would violate the FCC's commercial limits and separation policies. Content that is deceptive or unfair on television is just as deceptive or unfair if shown online. Thus, it makes no sense to protect children on some platforms but not others.

Although YTK is extremely popular, it is only one of many platforms that can be used to market to children in unfair or deceptive ways.¹⁹¹ For example, McDonald's has created a branded video game that takes advantage of virtual reality and sold Happy Meal Boxes that can be folded into virtual reality headsets.¹⁹² Some advertisers are using facial recognition to target specific messages to individuals as they walk through stores and airports.¹⁹³ Marketers are actively exploring

¹⁹¹ YTK itself is also frequently updated. Google recently added the ability to show 360 degree videos, a form of virtual reality, to YTK.

¹⁹² David Gianatasio, *McDonald's is Now Making Happy Meal Boxes That Turn Into Virtual Reality Headsets*, ADWEEK (Feb. 29, 2016), <http://www.adweek.com/adfreak/mcdonalds-now-making-happy-meal-boxes-turn-virtual-reality-headsets-169907>. At the South-by-Southwest festival in March 2016, McDonalds provided attendees with a virtual reality experience that allowed them to step into a giant Happy Meal Box and design the interior with virtual paint brushes, balloons, and lasers. Michal Lev-Ram, *Ever Wondered What it's Like Inside a McDonald's Happy Meal?* FORTUNE (Mar. 11, 2016), <http://fortune.com/2016/03/11/mcdonalds-happy-meal-virtual-reality-sxsw/>.

¹⁹³ Consumer Reports, *New technology is moving into the world*

marketing opportunities made possible by new technologies such as the Internet of Things and Advanced Television.

New legislation will be required to protect children from excessive and deceptive marketing practices in the digital environment. That legislation should provide ample legal authority, resources, and the political support for the FCC, FTC, or perhaps some other agency, to develop new rules and enforce them across all platforms. While proposing an actual bill is beyond the scope of this essay, I hope to spur discussion about what legislation might look like. With a new President and Congress starting in 2017, as well as the appointment of at least one new member of the Supreme Court, now is a good time to be thinking about this important issue.

Passing legislation of this type will be difficult, but several recent developments suggest that it is not impossible. First, academics who study marketing to children are finding that existing regulations are ineffective in a digital environment and have called on policy makers to take action. For example, one study concluded that the “nature of contemporary advertising demands a radical revision of our conceptualization of ‘fair’ marketing to children,” and urged policy makers “to reconsider policies and regulations concerning child-directed advertising.”¹⁹⁴

Second, many other countries have stricter limits on marketing to children (or marketing in general) than the United States. Some limit food advertising to children;¹⁹⁵ while others have taken action to make clear

of department stores, casinos, and cruise ships—and even churches, CONSUMER REPORTS (updated Dec. 30, 2015), <http://www.consumerreports.org/privacy/facial-recognition-who-is-tracking-you-in-public1/>; E.J. Schultz, *Facial-Recognition Lets Marketers Gauge Consumers' Real Responses to Ads*, ADVERTISINGAGE (May 18, 2015), <http://adage.com/article/digital/facial-recognition-lets-marketers-gauge-real-responses/298635/>.

¹⁹⁴ E.g., Panic, *supra* note 143, at 271.

¹⁹⁵ For a summary of restrictions by country see *NOURISHING framework*, Database, World Cancer Research Fund International (last updated Oct. 25, 2016), available at <http://www.wcrf.org/int/policy/nourishing-framework/restrict->

that sponsored videos are commercials.¹⁹⁶ A Report by the European Commission issued in March 2016 found that the current regulatory regime is not providing children with sufficient protection from the adverse effects of online marketing, there is likely to be more regulation.¹⁹⁷

The children's digital media marketplace is international. Not only are many of the videos on YTK produced in other countries, but companies such as Mondelez and Coca-Cola use influencer advertising to sell their products world-wide. It may be easier to get stronger safeguards for children in the United States if other countries have more protective regulations. Corporations may find it easier and less expensive to comply with uniform standards than to tailor their marketing to comply with the laws of many different countries. Also, when other countries have stronger restrictions, it is more difficult for corporations to credibly argue that similar restrictions are unnecessary or unworkable here.

Finally, changes in the composition of the Supreme Court may increase the odds that legislation limiting advertising to children will be found constitutional. Advertisers will undoubtedly challenge such legislation as violating the First Amendment's guarantee of free speech. I and others have argued, however, that narrowly-drawn legislation prohibiting specific types of deceptive advertising with respect to children would be found constitutional under the intermediate level commercial speech test set forth in 1980 in *Central Hudson*.¹⁹⁸ But in its 2011 decision in *Sorrell v. IMS*

food-marketing.

¹⁹⁶ See Mark Sweeney, *YouTubers ads for Oreos banned for not making clear purpose of videos*, THE GUARDIAN (Nov. 26, 2014), <https://www.theguardian.com/media/2014/nov/26/youtube-ad-oreo-banned-advertising-lick-race> (Britain's Advertising Standards Authority found Mondelez's advertising campaign, in which YouTube stars took part in an "Oreo Lick Race," violated the requirement that advertising be identified as commercial content.).

¹⁹⁷ EC Impact Study *supra* note 132, at 182. This study will inform the EU's ongoing review of consumer and marketing law.

¹⁹⁸ Angela J. Campbell, *Restricting the Marketing of Junk Food to Children by Product Placement and Character Selling*, 39 LOYOLA

Health, Inc., the Court applied heightened scrutiny to a state regulation of commercial speech.¹⁹⁹ Some have argued that this decision implicitly overruled the “commercial speech test” from *Central Hudson*, or if it did not, that the Court should have taken the opportunity to do so.²⁰⁰ Eliminating the commercial speech test would make it more difficult for government regulation of commercial speech to survive a constitutional challenge.

The decision for the Court in *Sorrell* was written by Justice Kennedy and joined by five other Justices, including Justice Scalia. The majority stated that it would reach the same outcome whether it applied heightened scrutiny or the *Central Hudson* test. Justice Breyer, whose dissent was joined by Justices Ginsberg and Kagan, thought that the First Amendment did not require heightened scrutiny, and the statute clearly met the test in *Central Hudson*. Since deciding *Sorrell*, the

OF L.A. L. REV. 492-97(2004). Samantha Graff et al., *Government Can Regulate Food Advertising To Children Because Cognitive Research Shows That It Is Inherently Misleading*, 31 HEALTH AFFAIRS 395-396 (2012). *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980) (articulating a four-prong test for analyzing the constitutionality of restrictions on commercial speech) (“For commercial speech to come within [First Amendment Protection], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.”).

¹⁹⁹ *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653 (2011). In this case, the Court found that a Vermont statute limiting the sale and use of prescribing information to drug companies without consent of the physician, violated the First Amendment. The majority found that statute was content-based, because it allowed the use of the information for educational purposes but not marketing purposes, and speaker-based, because it prevented drug marketers from communicating in an effective manner. Thus, the Court applied “heightened scrutiny,” similar to that used in other cases involving content-based restrictions on speech.

²⁰⁰ *E.g.*, Nat Stern & Mark Joseph Stern, *Advancing an Adaptive standard of Strict Scrutiny for Content-Based Commercial Speech Regulation*, 47 U. RICH. L. REV. 1171, 1186-88 (2013).

Court has not issued any decisions clarifying the appropriate First Amendment standard for commercial speech.

This uncertain state of the law makes it difficult to predict the outcome of a constitutional challenge.²⁰¹ The death of Justice Scalia, however, means that the next president will get to appoint at least one new Justice. The appointment of one or more new Justices could make the Court more receptive to upholding a law protecting children, or at the very least, clarify the applicable constitutional standard of review.

In conclusion, changes in the media environment have rendered ineffective the existing protections for children against excessive, deceptive, and unfair marketing practices, even as the need for such protections has increased. It is time to rethink how to protect children in the digital age, to develop a new regulatory framework, and to push Congress to adopt it.

²⁰¹ As one scholar put it: "Commercial speech has been one of the most controversial and unsettled areas of constitutional law in recent years. It is 'frequently considered an area in need of reform, and possibly even of demolition.' The Supreme Court's decisions have been 'unsteady and somewhat unpredictable.'" Allen Rostron, *Pragmatism, Paternalism, and the Constitutional Protection of Commercial Speech*, 37 VT. L. REV. 527, 532 (2013) (citations omitted).