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The Regulation of Children's Advertising in the US

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Each new communications medium has been the target of regulation. This regulation has in many instances been requested in the name of children. Children are often cited as being the group most harmed by inappropriate or exploitive messages transmitted by this new medium. These calls for regulatory action are led by advocacy groups convinced of the dangers that these new medium pose. The calls for regulation of free speech in the name of children has led to a debate of what type of regulation of each medium is appropriate. The Internet is no exception to this rule. In the United States the courts now must write another interpretation of the First Amendment. We will begin by examining some of the milestones in past US regulation of media and look toward current and future trends in regulation.

ACT AND THE FIRST CRUSADE

In 1968, a group of suburban Massachusetts parents joined together in Peggy Charren's living room and formed an organisation called Action for Children's Television (ACT). The group was concerned with programming in terms of both content and amount of air time devoted to children's television (often referred to as 'KIDVID') [21] ACT's main mission became 'to increase the number of children's programs designed to enlighten and entertain young audiences' (p. 282.) However, besides programming, ACT also was extremely active in the area of children's television advertising.

During the 1970's, according to Peggy Charren the founder and executive director, ACT was the only group advocating that stations adhere to the Communications Act of 1934, that requires broadcasters responsibly serve the public. ACT's position was based on its interpretation of the Act: broadcasters are the trustees of a public resource and therefore are required to provide 'programming for children that enlivens and entertains… and maintain advertising practices that do not exploit viewers' (ibid. p. 283) With this fundamental belief, in 1970 ACT began petitioning the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC) to investigate television programming and advertising to children. [see, e.g., In the Matter of ACT, 28 F.C.C.2d 368 (1971)]

In those petitions, ACT pointed to areas that were especially troublesome to the organisation. These included:

- advertisements for nutrient vacant foods
- advertisements for over–the–counter drugs
- host selling (the practice of having one of the characters or the host of the programme stepping out of the programme to promote a product)

- violence in advertisements, and
- disruption of the parent/child relationship caused by children's demands for advertised products.

To ACT, advertising during children's programs was inappropriate and had the potential of leading to mental and physical harm to the child. Therefore, the group felt advertising should be banned from children's programming.

In 1978, the FTC Staff Report on Children's Television Advertising came to that very same conclusion. Based on ACT's petition, the FTC commissioned a staff report to investigate whether or not ACT's claims about the harms of advertising were valid. The Staff Report concluded that:

> The problem is that television exerts a uniquely powerful influence over children, that its influence is being used to persuade them to take substantial health risks that they are ill–equipped to access…This is accomplished by using sophisticated psychological insights into how best to shape children's behaviour…(and) seems to come…from exploitation of children's inherent inclination to watch and imitate adult behaviour and follow the lead of even such unlikely adult or companion surrogates as animated cartoon figures, wizards or talking animals (7)
>
> Federal Trade Commission 1978, p. 332.

Thus Commission Staff concluded such advertising should be banned, because children are unable to defend themselves from advertisers' exploitations, and was therefore unfair and in violation of the FTC Act. The test for unfairness employed by the Staff in reaching its conclusion was a three prong test delineated in the 1964 Cigarette Rule. The three prongs were:

- Does the challenged practice offend public policy?
- Is it immoral, unethical, oppressive or unscrupulous?
- Can it cause substantial injury?

The FTC ruled that advertising to children failed these criteria of unfairness (Federal Trade Commission 1978) and should be banned.

This action by the FTC staff raised a hue and cry from advertisers, broadcasters, and legislators. These groups felt that the Commission had overstepped its boundaries. As a result of this displeasure, in 1980 the use of the Cigarette Rule, most notably the second prong, was banned as a basis for 'describing the Commission's injury and public policy criteria (20) . As of 1980, the Commission was prohibited from using unfairness as a basis for rules designed to protect kids. This prohibition ended in 1994, when the FTC act was amended to provide a statutory definition of unfairness (20)

The National Science Foundation (NSF) commissioned its own study of television advertising to children in 1975. The NSF study was a review of the extant literature on television advertising to children, conducted by a team of Academic experts in the area of children and the media, led by Richard Adler of Harvard University. The report was divided into nine sections based on identified research issues. That list of issues, which follows, closely tracks the list submitted in the ACT request for the FTC investigation:

- Children's inability to distinguish TV ads from Programmes
- Influence of format and audiovisual techniques on children's perceptions of TV ads.
- Source effect and self–concept appeals in TV ads targeted at children.
- Effect of premium offers in TV ads targeted at children.

- Effect on children of TV ads for ethical drugs.
- Effect on children on TV ads for food products.
- Effect on children of the volume and repetition of TV ads.
- Effect of TV ads on consumer socialisation.
- Effect of TV ads on the relations between parents and their children (17)

The NSF report essentially concluded that we needed to know more before calling for a ban on advertising during children's programming. While Congress was mulling over the issue, self–regulation guidelines were being developed by the National Association of Broadcasters (NAB) and the Children's Advertising Review Unit (CARU) of the Better Business Bureau. Subsequently, Congress concluded that these self–regulatory efforts addressed the issues raised in the NSF report.
Through the 1970's – 1980's ACT grew in size, and at one point it had a membership of 25,000. Over its existence, 1968 – 1992, ACT was influential in a host of other investigations that eventually led to the promulgation of regulations, culminating in the fulfilment of Peggy Charren's original goal: the passage of the Children's Television Act of 1990 (CTA).

CTA AND THE CRUSADE'S END

The CTA was predicated on the notion that 'growing, evolving children are more impression–able and susceptible. Children may be taken advantage of by a profit–oriented system which lures them through shallow, escapist programming into being targets for manipulative advertising content' (6) (p. 30). Joining ACT, in advocating that children's television programming should be regulated, were the Council on Children, Media and Merchandising, the National Association for Better Broadcasting, the Media Action Research Centre, the Coalition for Better TV, and the Centre for Media Education. These groups were extremely effective in focusing public attention on the issue of children's programming and the .advertising contained therein (6) In spite of this concerted effort, the original CTA was vetoed by President Ronald Reagan in 1988, on the ground that it violated the broadcasters' First Amendment rights. President Bush, allowed the CTA to become law (without his signature) in 1990. The intent of the CTA, according to Peggy Charren of ACT, 'is to offer a First Amendment sensitive approach to television programs, calling for alternatives to violent, merchandise based children's series while working within the framework of the commercial television marketplace' (21). The Congressional findings (see Appendix II) validated the position that ACT had been advocating since 1968, and finally required broadcasters to consider the special needs of their child audience. The FCC was careful to address the broadcasters' main concern that without advertising revenue they would not be able to offer any children's programming; educational or otherwise.

Though the CTA did not ban advertising to children during children's programming, it did for limit the amount of advertising time. Specifically, the actions taken by the CTA are:

1. There are commercial limits of no more than 10.5 minutes per hour on weekends for programming targeted to viewers under twelve years old.
2. There are commercial limits of no more than 12 minutes per hour on weekdays for programming targeted to viewers under twelve years old.
3. Broadcast stations must air programming specifically designed to serve the educational and information needs of children sixteen years old and under. [Children's Television Act of 1990, Pub. L. No. 101–437, 104 Stat. 996 (codified at 47 U.S.C. 303a–303b, 393a, 394)]

The CTA has had a difficult teething–in process as both broadcasters and the FCC have tried to define what is and what is not educational programming. Initially broadcasters tried to say that cartoon programs were educational. One net–work presented cartoons as educational program

because they taught about life in other times. While broadcasters have tried to determine how to meet the educational programming requirements of the CTA, the FCC has carefully monitored compliance with the advertising time limitations.

Though broadcasters have complied with the time limits on advertising during children's programs, this does not necessarily mean that children have been exposed to less advertising. Perhaps the most telling finding of the CTA's worth is that, even though the vast majority of stations are in compliance with the time limitations, the amount of advertising to which children are exposed has not declined. Snyder (1995) found that on average the effect of the CTA was that children were exposed to one less thirty–second commercial per hour after the initial adoption of the CTA, but by 1994 the number of commercial minutes was back up to pre–CTA numbers. The number of ads placed within the allotted time span per hour may actually have increased, given the growing popularity of 15–second spots. In 1991 there were 21 commercials per hour, on average, and in 1992 after the CTA went into effect there were an average 21 commercials per hour. Not only was the number of ads the same, but the same product mix was found in the advertising: 31% were toy ads, 20% ads for pre–sweetened cereal, and 16% fast–food advertising (Snyder 1995).

Though ACT declared victory after the passage of the CTA, Snyder's findings indicate that the CTA had questionable success in reducing children's exposure to advertising. The CTA represents another chapter in the history of the regulation of advertising in the name of protecting children. Like other previous attempts at regulation of advertising, the CTA required the government to balance the competing rights of advertisers, broadcasters, regulators and advocates. Once again focusing the courts attention on defining the limits or extent of First Amendment protection of advertising.

THE NEXT CRUSADE

Each attempt to regulate advertising to children also has led another chapter in the interpretation of the First Amendment. The central question in this debate is in fact a two–part question. First, how much protection the sender of the information has to speak the information? Second, how much protection the receiver has from exposure to the information? Children always have been classified as needing special protection from speech that might harm their mental and physical development. The special needs of children have, in numerous instances, been the basis for call for limitations on the speech rights of others. The delicate balance between the First Amendment rights of the broadcasters and others versus the government interest in protecting children has been established in case law for radio, telephone, movie theatres, television and is now being adjudicated for the Internet. Historically, the Supreme Court has considered each new broadcast medium as a unique entity and regulated each independently. However, each First Amendment controversy does bear some resemblance to others. Aufdeiheide [(1)] states that:

> In most free speech controversies the question is about trade–offs. How much free speech should we be willing to sacrifice in order to shield children, or to achieve any other government interest? Conversely, how much shielding of children – or how much of any other important value – must we sacrifice in order to protect free speech? Behind every framework for scrutiny of speech regulations lurks a judgment about the trade–offs that must be paid.

Advertising is a form of commercial speech, and as such is a special class of speech. Traditionally the speech rights of individuals are far greater than those of commercial enterprises, like advertisers. Indeed, until 1976 commercial speech received no protection at all under the First Amendment, and since then the Supreme Court has treated it as the ugly stepchild of free speech,

providing only a limited form of freedom [14]

In order to determine whether or not commercial speech falls within First Amendment protec–tion, the Court relies on the standard set in Central Hudson Gas and Electric Corp. v. Public Service Commission of New York (1980). The Central Hudson criteria permit government regulation if (1) the speech concerns an unlawful activity or is misleading, or if the regulation satisfies all three of the following: (2) there is a substantial government interest, and (3) the regulation directly advances that interest, and (4) that regulation is no more extensive than necessary. (Id. at 566)

In the past the government's interest in protecting children has led to regulation of each form of broadcast medium. In seeking to keep the First Amendment current with technology, the Supreme Court uses a medium–specific approach, and considers the relevant factors specific to each type of media and balances competing government interests against each. Thus, the court examines the 'underlying technology and unique characteristics of each new form of communications before determining if a governmental interest exists which outweighs the First Amendment interest in protecting the speech within that particular medium' [12]

Traditionally the medium afforded the highest level of protection is print [15] , and lowest level goes to broadcasting (7) . Thus, certain types of activities may be restricted in one medium and permissible in others, depending on the level of First Amendment protection afforded to the medium. For example, 'cigarette advertising is allowed in print medium but statutorily prohibited on television by the Public Health Cigarette Smoking Act of 1969 ....' [4]

When faced with a new medium, the Courts have been very cognizant of their role in creating barriers that might inhibit the medium from developing its fullest potential. The Internet is the latest medium to be targeted for regulation. Yet, the Internet is unlike any previous medium. It is 'owned by no one, operated by no one, and regulated by no one..(it is) the mode of communications for the twenty–first century' (12) . The Internet is the first truly global medium and it allows print, broadcast telephony, and whole new combinations of these modes of communication unlike any prior medium.

The Courts in looking at new technology have often relied on the use of analogy. By seeking to find the medium that this new medium most closely resembles and using that as using that as a grounding (13) . If the Net is like print or telephone it receives much higher levels of protection, but if it is more like broadcast then it receives less. Yet the Net is all of those: print, telephone, broadcast, in one The Net also poses unique problems for regulators, as jurisdictional issues will play a major role in the promulgation of any laws. With much of the Web's content being initiated outside of the US, who regulates and who enforces will be important questions in the near future.

THE INTERNET AND THE FIRST AMENDMENT

In 1996 the federal government was faced with the question of whether – and how – to regulate the Internet, to protect children from the perils of cyberspace. The perils most often raised by advocacy groups and legislators are the harm from (1) children's ability to access indecent pornographic material and other sexually inappropriate speech (2) advertising that is targeted at children, and (3) the collection of private information from children without parental consent.

One argument being put forth by those opposing Internet regulation is that 'existing laws are sufficient to control any illegal activity occurring on the Internet…even the department of Justice agreed that the laws already in place (are) adequate' [12] . But those advocating regulation argue the Internet is dramatically different from other media, that children are especially vulnerable to

harm from this unique medium, and existing laws are not sufficient to protect children from those harms. Kathryn Montgomery, et al., from the Centre for Media Education stated that:

> Unlike television, which the entire family may watch together, many children use their computers alone. Children also tend to have greater computer skills than their parents, which makes periodic monitoring essentially useless…(many parents) are unaware that children's web sites can be more intrusive and manipulative than the worst children's television. (http://www.ftc.gov/bcp/privacy/wkshp97/com–ments3/cme030.htm)

The advocates' position is that this disparity between parents and children, in their knowledge about computers, makes it difficult for parents to exercise control over what their children access on the Net. Even if computer literate parents keep track of what their children receive from the Net at home, if a child accesses indecent information outside the parents' presence, the parents often have no way of later detecting the child's access. In the case of print or telephone, although the parents may not be present when the child is accessing indecent material, they are informed of the child's access by finding a magazine or receiving a phone bill. With the Net, once the computer is turned off, there is no record of what the child was accessing, and therefore no mechanism for parental notification. Parental control is lost, and parents need the assistance of regulators to know what their children are doing online.

The government decided to provide that assistance via Title V of the Telecommunications Act of 1996, titled the Communications Decency Act (CDA). On the same day President Clinton signed the Act, twenty plaintiffs (see Appendix II) brought suit against the United States Attorney General and the Justice Department, challenging the constitutionality of two provisions in the CDA. Additionally, another 27 plaintiffs filed a separate suit that challenged the constitutionality of the statute on its face (5)

The two cases were consolidated into a single case, Reno v. ACLU (18) . The Reno case was the first U.S. Supreme Court case involving the Internet, so it was our first opportunity to see how the Court would apply First Amendment principles to this new medium (4)

The main issue in Reno was 'whether the Court should uphold the constitutionality of two statutory provisions enacted to protect minors from indecent and patently offensive communications on the Internet' (5) . The Court found that two provisions of the CDA were unconstitutional. Further, the Court held that indecent speech on the Internet, unlike obscene speech, is protected by the First Amendment. In doing so, the Court stated that speech on the Internet was equal in importance to that of print, thereby affording this new medium the highest level of First Amendment protection.

This decision is extremely important for numerous reasons:

First, the Court has provided the Internet with the broadest possible First Amendment protection. This opinion sends a message to the legislature that broad, content–based[1] regulations on the Internet will be struck down. Second, the Court was presented with the opportunity to establish First Amendment guidelines with respect to the Internet. These guidelines create a new application of the traditional legal standards of the First Amendment. Finally this case is significant because the Internet is creating a new jurisprudence (5)

The primary findings against the CDA were that this law was overly broad and was more restrictive than necessary to achieve the government's interest in protecting children. The CDA restricted the flow of speech from and to adults, by banning the 'indecent' speech that has been

afforded First Amendment protection. Citing Sable Communications of California, Inc. v. FCC (19) , the Court found it was inappropriate to limit adult speech to only that which is appropriate for children.

The use of the terms 'indecent' and 'patently offensive' also were troublesome to the Court. The Justices felt that since the CDA carried criminal penalties a reasonable person would have to be able to avoid the penalties, and with terms so vague that would be difficult to do.

The Reno case established the Internet as a medium distinct from all other communication media. The Internet, unlike radio, is not 'invasive…. Internet communications do not have the ability to invade a person's computer or home' (5) . For this and other reasons, the Court determined that the findings in Federal Communications Commission v. Pacifica Foundation (7) did not apply to the Internet. (That case also is known as the 'George Carlin's Seven Dirty Words' case.) The government had argued in Reno that Internet content was for mature audiences, like the seven dirty words in Pacifica, and so like Pacifica this content should not be so easily available to children. This was deemed necessary in Pacifica because radio is an invasive medium, and all those within earshot of a radio – including children – are subject to hearing what is being said. There is no escape from listening, and even if warnings are played, informing the listener that potentially inappropriate content is going to be aired soon, those warnings do not protect the listener. In ACLU v. Reno the Court found that the Internet is not an invasive medium, that warnings are seen and can protect the person online from being exposed to inappropriate material. The Internet also must be invited into the home; it does not invade the home.

The Internet is like the telephone in that it requires a person to take 'a series of affirmative steps' to access the desired information. Yet the Internet was different from the telephone in that 'more deliberate and directed (action is required) than merely turning a dial.' The Sable case dealt with Dial–a–Porn numbers and the Court examined the similarity between the intentionality of a telephone call and the intentionality of seeking out a website. The sites do not find you, you have to go find them. Therefore, the Court found that the actions required to access inappropriate material are greater than those of dialling a telephone.

Although the CDA was struck down by the Supreme Court, there were some doors left open by the decision for the Court to re–examine the issue of regulation of the Web in future cases, especially in the opinions rendered by Justice O'Connor and Justice Rehnquist. Both of these opinions stated a reluctance to disallow regulation, but pointed to the numerous problems in the CDA that made it impossible for the Court to let it stand. The two opinions pointed to some corrections that, if made to a law similar to the CDA, the Court would view more favourably. While Free Speech advocates were celebrating their victory and declaring the end of Internet censorship, others were busy drafting the reincarnation of the CDA.

THE CHILD ONLINE PROTECTION ACT, OR CDA 2: THE SEQUEL

Free Speech advocates did not have long to celebrate before the next challenge to Free Speech on the Internet emerged. Once again the calls for regulation were being made in the name of protecting children from harm. This time the danger was defined as the potential harm that may come not only from children's accessing of adult material, but also from the disclosure of personal information to website operators. These calls for regulation were led by the Centre for Media Education (CME) (see http://www.ftc.gov/os/ 1997/9707/cenmed.htm for the initial letter to the .FTC). As influential as Action for Children's Television was at focusing public and regulatory interest to the issue of children's television, CME is striving to be in focusing public and regulatory interest to issues surrounding the Web and children. CME has been very vocal in its opposition to marketers' use of the Web as a means of reaching children.

CME's self–published report 'Web of Deception: Threats to Children from Online Marketing' (http://tap.epn.org/cme/cmwdecov. html) outlines CME's stance against the new levels of manipulation and deception being used on children by website owners. CME claims that the Internet is an even more dangerous tool for marketers than the television, and therefore should be highly regulated. One of the first attacks CME made against the Internet was on websites that collect personal information from children. According to 'Web of Deception' marketers 'have devised a variety of techniques to collect detailed data and to compile individual profiles on children… this ultimate goal is to create personalised interactive ads designed to microtarget the individual child.' In its request to the FTC for an investigation of children's websites, CME cited examples of all types of information being collected from children without parental consent or disclosure of the purpose for the collection of the information. Very few sites had privacy disclosure statements on them, and few offered parents a chance to review the information for accuracy and a chance to make corrections.

The FTC, following up on CME's petition, conducted its own investigation of children's websites and found that, in fact, CME's claims were justified in that many sites did not disclose either the use of the information, or who was collecting the information. The FTC began a series of discussion sessions in which advocates, site owners, and other interested parties were asked to come and voice their concerns on the issue of privacy on the Web.

Industry groups, realising that regulation was forthcoming, based on the level of interest shown by the FTC, promulgated self–regulatory guidelines for the collection of personal information. Two sets of guidelines for protection of children's privacy, identified by the FTC, were those of the Children's Advertising Review Unit of the Better Business Bureau and those of the Direct Marketing Association. In its report to Congress, the FTC reviewed these guidelines and stated that they were primarily directed at younger children (http://www.ftc.gov/reports/privacy3/ industry.htm). Though lauding the industry groups for attempting self–regulation, the FTC was concerned that none of the guidelines provided any penalty for non–compliance. This, according to the FTC, is crucial if self–regulation is to be effective. When the FTC conducted an investigation of children's websites it found a striking lack of compliance with any of the self–regulation guidelines. This left the door open for formal regulation of websites that collected information from children.

Congress agreed that this was an area ripe for regulation, and in October 1998 passed the Child Online Protection Act (COPA). First Amendment advocates joined with Internet groups in opposing this new law, which was seen as another attempt by the government to regulate the content of the Internet. The COPA was given the nickname CDA2, or Son of CDA, by those wishing to show their displeasure with this new law. As with the CDA, almost as soon as the law was signed, legal challenges to the COPA were filed. Led by the American Civil Liberties Union, the COPA once again brought a diverse group together to voice opposition to this law. The ACLU sought to declare the main provision of the COPA unconstitutional. But unlike the CDA, which was guaranteed a speedy adjudication by a provision in that Act, the COPA may take years to wind its way through the court system (Hailperin 1999).

The COPA (see Appendix II) has two titles that comprise the Act. The first title is a second attempt at regulating children's access to pornographic or other adult material on the Web. The second title is Child Online Privacy Protection. Title One tries to accommodate the criticisms levelled against the CDA especially the criticism that the CDA was overly broad. However, in its attempt to tailor the bill to the findings in ACLU vs. Reno, Congress only regulated those sites using HTTP or more advanced programming. Sites using FTP or older programming were not covered by the COPA. The COPA, according to the plaintiffs in the civil case, still does not satisfactorily delineate the difference between indecent and obscene. And once again the terms

remain vague.

What the Title One does contain, that CDA did not, is a provision that online providers separate adult content and use some mechanism for validating that minors are not gaining access to the site. Site owners claim this provision will cost large sums of money, as sites will have to be reconfigured and software purchased to validate age. The COPA also requires Internet providers to inform parents of the availability of blocking soft–ware and how to use it. Providers, however, feel that this is not their place, and that blocking soft–ware is still flawed, blocking many sites that are of educational value while allowing access to many others of questionable value.

While Title One is generating the most interest among free speech advocates, site owners, and internet service providers, Title Two (Children's Online Privacy Protection Act (COPPA)) is of great concern to marketers. The FTC published its guidelines for the COPPA in October of 1999 and are being implemented throughout 2000.). 'The main goal of the COPPA and the rule is to protect the privacy of children using the Internet. Publication of the rule means that, as of April 21, 2000, certain commercial Web sites must obtain parental consent before collecting, using, or disclosing personal information from children under
13' (http://www.ftc.gov.opa/1999/9910/childfinal. htm).

One of the main sticking points of this rule was the issue of 'verifiable consent.' The FTC wanted to ensure that parental consent was valid and not just rely on the child's word that they had parental consent. Cite owners and advocacy groups like the Direct Marketing Association fought to have email verification, instead of the fax or regular mail verification originally sought by the FTC. The DMA claimed that digital signature technology would soon be commonplace and render any verification procedure unnecessary, in the interim email would suffice and be least burdensome on parents. The FTC agreed that email would be acceptable, however the rule does make a distinction between types of information collected from children and the purpose of the collection. Sites that are collecting personally identifiable information, for purposes other than their own internal marketing, must have a more stringent mechanism for verification. The rule also allows for schools or other similar parties to give consent in lieu of parents.

Without the benefit of speedy judicial review it will be years before there is a final court decision on the COPA.. In the meantime, Congress is busy drafting other bills dealing with Internet selling and advertising, many of which are seeking to protect children. And the CME is now actively campaigning against advertising on Interactive Television. This is the new digital technology that is beginning to allow a blending of traditional television broadcasting with the Web. In addition, the European Union has taken up the cause of children's privacy online, as well as the issue of marketing to children online. This is becoming an interesting time for marketers who are looking at the Internet as a potential new channel, yet the rules of the road have yet to be established.

SO WHAT DOES THIS MEAN?

The adage 'those who do not learn from their history are doomed to repeat it' certainly applies to the regulation of media in the name of children. We have examined the role of advocacy groups that initially were very small, yet highly influential in shaping the regulatory agenda for children's issues. Starting with a group of suburban Newton Massachusetts in a living room, that became Action for Children's Television and set the agenda for the FCC and the FTC on the issues of television programming and advertising to children through the 1970's and 1980's, to their successor organisation: the Centre for Media Education. The Centre for Media Education is another very small group; a husband and wife team with a staff of twelve in suburban Washington DC. CME is now setting the agenda for the FTC and the FCC on children's issues in the US.

What is interesting to note is that these groups were and are seeking the same things. They both

possess a zealous belief that children need protection from harmful speech and from the manipulative and exploitative nature of advertising. Traditionally, calls for regulation have been made either in the name of Democracy or in the name of children. Democracy and children elicit strong reactions from people, when either is threatened. The image of a child being exploited is one that nearly everyone finds abhorrent. These groups, using these images of children, have been able to garner support and funding from major corporations and foundations. With this money they have been able to lobby legislators and petition regulators to get their message out.

For marketers wondering what the next step will be in the regulation of any medium, in the name of children, all one has to do is go to any of the websites run by these advocacy groups. CME already has declared itself against some of the newest technologies, arguing these new methods will be able to carry marketers' messages in even more insidious ways, thereby harming children. In many cases, the only research on which regulators rely to prove the veracity of the advocates claims is the advocates own research. Unfortunately, woefully little scholarly research is being conducted on questions like how children use the Internet, whether the Internet more persuasive to children, whether children can evaluate claims made in Web based advertising, and whether they can separate the information or entertainment content from the advertising content of a website.

In order to stem the tide of regulation, website owners and marketers must become more proactive. They must encourage and support research that offers regulators unbiased facts, and they must enforce self–regulatory guidelines that protect the legitimate interests of parents and prevent exploitation of children. Perhaps by answering the advocates' questions about children's understanding of marketing and advertising, rather than letting regulators hear only one perspective, marketers can have regulation that is balanced.

APPENDIX I

Initial Plaintiffs in the Suit Against the Communications Decency Act

1. American Civil Liberties Union
2. Human Rights Watch
3. Electronic Privacy Information Centre
4. Electronic Frontier Foundation
5. Journalism Education Association
6. Computer Professionals for Social Responsibility
7. National Writers Union
8. Clarinet Communications Corp.
9. Institute for Global Communications
10. Stop Prisoner Rape
11. AIDS Education Global Information
12. Bibilbytes
13. Queer Resources Directory
14. Critical Path AIDS Project, Inc.
15. Wildcat Press, Inc.
16. Declan McCullagh dba Justice on Campus
17. Brock Meeks dba Cyberwire Dispatch
18. John Typer dba The Safer Sex Page
19. Jonathan Wallace dba The Ethical Spectacle
20. Planned Parent Federation of America, Inc.

Plaintiffs in the Second Suit Against the Communications Decency Act

1. American Library Association
2. America Online, Inc.
3. American Booksellers Association, Inc.
4. American Society of Newspaper Editors
5. Apple Computer Inc.
6. Association of American Publisher, Inc.
7. Association of Publishers, Editors and Writers
8. Citizens Internet Empowerment Coalition
9. Commercial Internet Exchange Association
10. Compuserve, Inc.
11. Families Against Internet Censorship
12. Freedom to Read Foundation, Inc.
13. Health Sciences Libraries Consortium
14. Hotwired Ventures, LLC
15. Interactive Digital Software Association
16. Magazine Publishers of America
17. Microsoft Corp.
18. The Microsoft Network, LLC
19. National Press Photographers Association
20. Netcom On–Line Communication Services, Inc.
21. Newspaper Association of America
22. Opnet, Inc.
23. Prodigy Services Company
24. Society of Professional Journalists
25. Wired Ventures, Ltd.

APPENDIX II: TITLE ONE OF THE CHILDRENS TELEVISION ACT

Findings:

It has been clearly demonstrated that television can assist children to learn important information, skills, values, and behaviour, while entertaining them and exciting their curiosity to learn about the world around them;

1. as part of their obligation to serve the public interest, television station operators and licensees should provide programming that serves the special needs of children;
2. the financial support of advertisers assists in the provision of programming to children;
3. special safeguards are appropriate to protect children from over commercialization on television;
4. television station operators and licensees should follow practices in connection with children's television programming and advertising that take into consideration the characteristics of this child audience; and
5. it is therefore necessary that the Federal Communications Commission take the actions required by this title (Craig and Brown 1996)..

APPENDIX III: CHILD ONLINE PROTECTION ACT (COPA)

Summary

(Revised as of 10/07/98 – Passed House, amended)

Title I: Protection From Material That Is Harmful to Minors

Title II: Children's Online Privacy Protection

Child Online Protection Act – Title I: Protection From Material That Is Harmful to Minors – Amends the Communications Act of 1934 to make it unlawful for anyone who, with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to minors (persons under age 17) and that includes any material that is harmful to minors. Provides additional penalties for each violation. Makes such prohibition inapplicable to telecommunications carriers and other Internet service providers. Makes it an affirmative defense that such person: (1) requires the use of a credit card, debit account, adult access code, or adult personal identification number; (2) accepts a digital certificate that verifies age; or (3) uses other reasonable age verification measures.

Prohibits a person making such a communication from disclosing any information collected for purposes of restricting access to such communication to individuals 17 years of age or older without the prior written consent of: (1) the individual concerned if such individual is an adult; or (2) the individual's parent or guardian, if such individual is under 17 years old. Requires the person making such communication to take necessary actions to prevent unauthorized access to such information. Provides exceptions with respect to disclosure that is: (1) necessary to make the communication or to conduct a legitimate business activity related to making the communication; or (2) made pursuant to a court order authorizing such disclosure.

Requires a provider of interactive computer service, at the time of entering into an agreement with a customer, to notify such customer that parental control protections are commercially available that may assist the customer in limiting access to material that is harmful to minors.

Establishes the Commission on Online Child Protection to study and report to the Congress on methods to help reduce access by minors to Internet material that is harmful to such minors. Terminates the Commission 30 days after its report.

Title II: Children's Online Privacy Protection – Makes it unlawful for an operator of a website or online service directed to children under age 13, or any operator that has actual knowledge that it is collecting personal information from a child, to collect personal information from a child in a manner that violates regulations prescribed under this title. Protects such operator from liability for disclosures of such information to the child’s parent. Directs the Federal Trade Commission (FTC) to promulgate regulations implementing such requirements. Outlines conditions under which verifiable parental consent shall not be required.

Allows an operator to satisfy such regulatory requirements by following a set of self–regulatory guidelines issued by representatives of marketing or online industries or other approved individuals. Directs the FTC to provide incentives for such self regulation. Requires expedited FTC response to requests from operators as to whether their self–regulatory guidelines are sufficient to satisfy the regulatory requirements.

Authorizes the States to enforce such regulations by bringing actions on behalf of residents. Requires the appropriate State attorney general to first notify the FTC of such action. Authorizes the FTC to intervene in any such action.

Provides for enforcement of this Act through the Federal Trade Commission Act.

Directs the FTC to review and report to the Congress on the implementation of this title. (http://thomas.loc.gov/cgi–bin/ bdquery/z?d105:HR03783:@@@L)

NOTE

[1] Content based regulations 'restrict expression because of its message, its ideas, its subject matter or its content' (Cox 1998).

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NOTES & EXHIBITS

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