



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Chairman

November 20, 2000

The Honorable John McCain
Chairman
Committee on Commerce,
Science, and Transportation
United States Senate
508 Dirksen Senate Office Building
Washington, DC 20510-6125

Re: FTC Report on Marketing Violent Entertainment to Children

Dear Mr. Chairman:

This responds to your inquiry at the September 13, 2000 Senate Commerce Committee Hearing on Marketing Violence to Children as to whether it would violate the Federal Trade Commission Act to target market to children violent movies, music, or electronic games rated or labeled as inappropriate for children or with a parental advisory.¹

Your request followed the September 11, 2000 issuance of the FTC's report, "Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording and Electronic Game Industries." After a 15-month review, the Commission found that, although these industries have taken steps to identify products whose content may not be appropriate for children,² companies in those industries routinely market such

¹ See Statement of Senator John McCain, Chairman, Senate Committee on Commerce, Science, and Transportation, during Sept. 13, 2000 Hearing on Marketing Violence to Children.

² According to the electronic game industry, the M (Mature) rating means "content suitable for persons age 17 and over." The motion picture industry has stated that the R rating means "Restricted," and that "under 17 requires accompanying parent or adult guardian" and that "the rating board has concluded that the film rated may contain some adult material [and] parents are urged to learn more about the film before taking their kids to see it." Unlike the M-rating, the R-rating does not expressly designate material as unsuitable for those under 17; children can see an R-rated film with a parent or other accompanying adult.

Instead of ratings, the music recording industry uses a label that states "Parental Advisory -- Explicit Content." According to the music recording industry, "parents can use the [parental advisory] label to identify music that may not be appropriate for their children and make the choice about when – and whether – their children should be able to have that recording."

products to children under 17. The Commission also found that children under 17 are frequently able to buy tickets to R-rated movies and can easily purchase explicit content music recordings and M-rated electronic games without being accompanied by an adult. The report concluded that the practice of pervasive and aggressive marketing of violent movies, music, and electronic games to children undermines the credibility of the industries' ratings and labels and frustrates parents' attempts to make informed decisions about their children's exposure to violent content. The Commission recommended that all three industries enhance their self-regulatory efforts by: 1) establishing or expanding codes that prohibit target marketing to children and imposing sanctions for violations; 2) increasing compliance at the retail level; and 3) increasing parental understanding of the ratings and labels.

In response to your inquiry, the Commission staff initiated a review of whether the advertising and marketing practices documented in the Commission's report may violate the provisions of the Federal Trade Commission Act prohibiting the use of unfair or deceptive acts or practices in or affecting commerce. After a careful review of the entertainment industry's marketing practices and an analysis of the law, the Commission believes that there are a number of significant legal limitations, including substantial and unsettled constitutional questions, to effective law enforcement actions under the FTC Act. Instead, the most prompt and viable option might be for continued encouragement by Congress of further, needed reforms. If additional self-regulatory efforts are not forthcoming, then we believe that the Congress should consider whether there are narrowly tailored legislative actions that could encourage more robust self-regulatory initiatives.

Deception

Under Section 5 of the FTC Act, 15 U.S.C. § 45, a representation, omission, or practice is *deceptive* if it is likely to mislead consumers acting reasonably under the circumstances to their detriment.³ The advertising and marketing of violent entertainment products to children is a new area for which there is little applicable precedent under the FTC Act. The staff identified at least three legal theories under which some of the practices described in the report might be challenged as deceptive in violation of the FTC Act. These are:

1. Making claims in advertising or marketing that R-rated films, M-rated video games, or explicit-content labeled music ("rated or labeled entertainment

³ *Kraft, Inc.*, 114 F.T.C. 40, 120 (1991), *aff'd and enforced*, 970 F.2d 311 (7th Cir. 1992); *Cliffdale Assocs.*, 103 F.T.C. 110, 164-65 (1984); *see generally Federal Trade Commission Policy Statement on Deception, appended to Cliffdale Assocs.*, 103 F.T.C. at 174-83. Although deceptive claims are actionable only if they are material, that is, likely to affect consumers' conduct or decisions with respect to the product at issue, the Commission need not prove actual injury to consumers. A claim is material if it is likely to deceive; it is not rendered otherwise simply because the advertising does not increase sales. *Novartis Corp. v. FTC*, 223 F.3d 783, 787 (D.C. Cir. 2000).

products") are suitable for children;⁴

2. Advertising that the film is restricted, *i.e.*, that admission of children under 17 requires an accompanying adult, without having substantiation that children under 17 in fact are not permitted to gain access to R-rated films without an accompanying adult guardian;⁵ and
3. With respect to marketing electronic games, failing to comply with the electronic game industry's self-regulatory code provision prohibiting marketing games to children under the age for which the game is rated as suitable.

In addition to having to prove the underlying factual violation (for example, that the electronic game manufacturer did target children in its advertising), the viability of each of these approaches would depend on the Commission's ability to adduce evidence that the practices in question are, in fact, likely to mislead parents or children in a material respect. For example, under the first theory, the Commission would need evidence that a given advertisement or marketing practice conveyed to reasonable consumers that the rated or labeled entertainment product was suitable for children under 17,⁶ as well as evidence that the product was not, in fact, suitable for children under 17. Although most films rated R because of their violent content are likely to be unsuitable for young people, particularly if not accompanied by an adult, other R-rated films might not be so characterized. For example, people might have different views about the propriety of unaccompanied children under 17 seeing a film like *Saving Private Ryan*, versus

⁴ Such express or implied claims of suitability could include the failure to clearly and conspicuously disclose the rating in an ad directed to an audience with a substantial percentage of children.

⁵ The Commission has determined that it is an unfair and deceptive practice to make an objective claim in advertising for which the advertiser did not possess a reasonable basis at the time the claim was made. *See Federal Trade Commission Policy Statement on Advertising Substantiation, appended to Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984).

⁶ In determining the claims that an ad conveys, the FTC looks to the "net impression" conveyed to consumers. *FTC v. Sterling Drug*, 317 F.2d 669, 674 (2d Cir. 1963). Even if the wording of an ad may be literally truthful, the net impression conveyed to consumers may still be misleading. *Stouffer Foods Corp.*, 118 F.T.C. 746, 799 (1994). When an advertisement conveys more than one meaning to reasonable consumers, one of which is false, the advertiser may be liable for the misleading interpretation. *Jay Norris Corp.*, 91 F.T.C. 751, 836 (1978), *aff'd*, 598 F.2d 1244 (2d Cir. 1979). An interpretation may be reasonable even if it is not shared by a majority of consumers in the relevant class; a material practice that misleads a significant minority of reasonable consumers is deceptive. Deception Statement, 103 F.T.C. at 177 n.20. When representations are targeted to a specific audience, including vulnerable groups such as children or the elderly, the Commission looks to the effect of the representation or practice on a reasonable member of that group. *Id.* at 179 (citing *Bates v. Arizona*, 433 U.S. 350, 383 n.37 (1977)).

one like *I Know What You Did Last Summer*. Thus, proving a deception case might leave the FTC in the position of differentiating which R-rated films are, in fact, inappropriate for young people. This would place the agency in a position that raises serious questions under the First Amendment. The presence or absence of the rating or label in the advertisement also would affect the analysis. That is, if the ad makes clear that the product is rated R or M or bears a parental advisory, consumers may be less likely to interpret the ad to mean that the product is appropriate for minor children.⁷

Under the second scenario – advertising that an R rating means children will be restricted from the audience unless accompanied by their parent or other adult guardian – the Commission would need to determine whether an R rating conveys to parents acting reasonably under the circumstances that unaccompanied children under age 17 will not gain access to R-rated movies.⁸ If the evidence shows that unaccompanied children frequently do gain access to R-rated movies but that parents are aware of this, advertising statements to the contrary might not mislead them in a material way. Also, it may be problematic to hold the movie studios liable for deception when the problem is that the movie theaters do not carry out their public commitments not to admit unaccompanied children under 17.

Under the third scenario – failing to comply with the electronic game industry's self-regulatory code provision prohibiting marketing games to children under the age for which the game is rated as suitable – there are two ways that the practice might mislead consumers. The first possibility is that the anti-targeting provision in the industry's self-regulatory code creates a claim that misleads consumers when a company targets children in violation of the code.⁹ One difficulty with this theory is that, while many parents may generally be aware of the ratings, it does not appear that the industry has made claims about the anti-targeting code provision directly to parents. Therefore, it seems unlikely that the Commission could prove that this claim is communicated to at least a significant minority of parents. The second possibility is that the M rating applied by the industry rating board leads consumers to believe that children will not be targeted by a company using the rating. This approach would require the Commission to prove that at least a significant minority of parents interpreted the M rating in that manner. If it could be shown that parents are aware of anti-targeting claims or representations, from the code or from the M rating – and the Commission has no evidence that they are – it might be possible to

⁷ Disclosures of qualifying information must be clear and conspicuous. Written disclosures or fine print may be insufficient to correct a misleading representation. Deception Policy Statement, 103 F.T.C. at 180.

⁸ Claims made expressly in advertising are presumed to be material. *Id.* at 182. Moreover, an interpretation will be presumed to be reasonable if it is one the advertiser intended to convey. *Id.* at 178.

⁹ Currently, neither the movie studios nor the music recording companies have an industry code of conduct that prohibits them from targeting their products to children under the age for which the products are rated or labeled. Accordingly, this potential theory only applies to the electronic game companies.

challenge marketing practices inconsistent with such representations. Moreover, as discussed below, fashioning an effective remedy would raise significant constitutional and public policy issues.

Unfairness

The staff also reviewed the potential application of the Commission's *unfairness* authority to such practices. An act or practice is unfair if it causes or is likely to cause injury to consumers that is (1) substantial; (2) not outweighed by countervailing benefits to consumers or to competition; and (3) not reasonably avoidable by consumers themselves.¹⁰ In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered, but public policy considerations may not serve as a primary basis for a determination of unfairness.¹¹ A legal challenge on the basis of unfairness would pose even higher evidentiary barriers than a deception analysis would, as well as considerable public policy issues. The staff considered the application of an unfairness analysis to several practices described in the Commission's report:

1. Direct marketing (e.g., ticket give-aways and other street marketing tactics) of rated or labeled entertainment products to children in a school environment or through youth organizations;
2. Placement of advertisements for rated or labeled entertainment products in media outlets with a substantial youth audience; and
3. Advertising rated or labeled entertainment products without including content descriptor information (e.g., extreme violence, sexual violence, mutilation).¹²

The staff concluded that for each of the scenarios it would be extremely difficult to meet all three criteria for unfairness. As reflected in the Commission's report, there is considerable scholarly disagreement as to how to assess and quantify any such injury. Thus, on the central issue of injury, for example, it would be difficult for the Commission to prove in a legal

¹⁰ Section 5(n) of the FTC Act, 15 U.S.C. § 45(n), *added by The Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312*. The Commission previously relied on similar criteria to define the scope of its authority to prohibit unfair acts or practices pursuant to Section 5(a) of the FTC Act. *See, e.g., Orkin Exterminating Co.*, 108 F.T.C. 263, 362 (1986); *International Harvester Co.*, 104 F.T.C. 949, 1061 (1984); *see generally Federal Trade Commission Policy Statement on Unfairness, appended to International Harvester Co.*, 104 F.T.C. at 1070-76.

¹¹ 15 U.S.C. § 45(n).

¹² This practice also could be analyzed as a deceptive failure to disclose material information, particularly in the case of advertisements placed in media with a significant number of child viewers or readers.

proceeding that the marketing of a given R-rated film to children is likely to cause substantial injury to consumers. With respect to direct marketing (e.g., free ticket give-aways) it might be easier to meet the second and third criteria of the unfairness theory, but the Commission would still need to overcome the difficult initial step of proving that substantial consumer injury resulted from the practice. Further, under any unfairness inquiry, the Commission would be required to balance the competing public policies of protecting children from violent entertainment products and preserving variety of artistic expression, as well as First Amendment values.

Generally speaking, in other industries an association member's failure to follow the association's restrictions on marketing has raised unfairness concerns where marketing the product not only violates the self-regulatory code provision but some other provision of law as well. For example, marketing alcohol and tobacco to young people not only violates code provisions but also various state laws.¹³ In contrast, there are no corresponding laws restricting the marketing or sale of violent entertainment products to children. Accordingly, these issues might best be resolved legislatively, rather than through law enforcement actions under the Section 5 unfairness standard.

Conclusion

The staff's review concluded that significant issues exist regarding the effect of a Commission proceeding against the advertising and marketing practices at issue. Even if the Commission could overcome the considerable difficulties it would face in proving cases based on the legal theories described above, there are also questions about whether such actions would advance the goal of providing increased protection to children. Most of the staff's proposed legal theories are based, in whole or in part, on aspects of existing industry self-regulatory programs. But, to the extent any legal action could be premised upon possible non-compliance or inconsistency with a legitimate self-regulatory requirement, that prospect might create a disincentive for improved industry self-regulation. Additionally, significant and unsettled First Amendment issues exist that may affect the viability of an FTC action or remedy. Finally, whatever the outcome of FTC enforcement actions under these theories, it seems clear that because of the substantial First Amendment protections accorded these products, a comprehensive and effective self-regulatory response could have a more prompt and substantial impact on the problems described in the Commission's report than would FTC enforcement actions.

For these reasons, the Commission believes that the best course is for the Congress to

¹³ State laws prohibiting the sale of alcohol and tobacco to minors are an example of the kinds of established public policies the Commission could consider as a factor in an unfairness case. In challenging R.J. Reynolds' advertising for Camel cigarettes, the Commission's complaint alleged that the acts and practices were unfair, and stated that the sale of tobacco products to minors violated state laws. *R.J. Reynolds Tobacco Co. (Joe Camel)*, FTC Dkt. No. 9285 (complaint issued May 28, 1997; dismissed without prejudice Jan. 26, 1999).

continue efforts to promote substantially improved, voluntary, self-regulatory efforts. Each of the industries covered by the Commission's report has already taken some steps, although more needs to be done. Continued encouragement by Congress of further, needed reforms can more quickly accomplish many of the same goals that might otherwise be achieved by law enforcement initiatives. If additional self-regulatory efforts are not forthcoming, then we believe that the Congress should consider whether there are narrowly tailored legislative actions that could encourage more robust self-regulatory initiatives. We are ready to assist the Congress in this effort in any way we can.

By direction of the Commission.



Robert Pitofsky
Chairman