ASSESSING EFFECTIVENESS OF SELF-REGULATION: A CASE STUDY OF THE CHILDREN'S ADVERTISING REVIEW UNIT

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I. INTRODUCTION

While working as a legal consultant to the Center for Science in the Public Interest (CSPI) in 2004, I became aware that the children's magazine, *National Geographic Kids* (*NGK*),[1] was packed with advertisements for sugary cereals, snack cakes, candy, and other foods high in fats and added sugars and low in nutritional value. Soon thereafter, CSPI filed seven complaints with the self-regulatory body of the advertising industry, the Children's Advertising Review Unit (CARU),[2] challenging specific ads CSPI alleged were inconsistent with myriad CARU guidelines.[3] CARU agreed with CSPI's allegations in most instances,[4] and issued press releases and case reports detailing its findings.[5]

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1. *National Geographic Kids* is a magazine published by the National Geographic Society of Washington, D.C., with ten issues annually. Library of Congress Online Catalog, http://catalog.loc.gov (search for "National Geographic Kids" under "Basic Search" and view "Full Record") (last visited Oct. 6, 2005). NGK is geared toward children aged 6–12. National Geographic Kids, About Us, http://nationalgeographic.com/ngkids/about_us.html (last visited Oct. 6, 2005).

2. CARU was founded in 1974 as part of an alliance formed by the major advertising trade associations through the National Advertising Review Council. About the Children's Advertising Review Unit (CARU), http://www.caru.org/about/index.asp (last visited Oct. 3, 2005) [hereinafter About CARU]. It is the "children's arm of the advertising industry's self-regulation program." *Id.*

3. *See infra* notes 74–105 and accompanying text.

4. *Id.*

5. *Id.*

In order to assess whether CARU's actions had an impact or lasting effect on these or other advertisers' behavior, I reviewed subsequent advertisements for compliance with the guideline violations raised by CSPI. This Article details the results of that exercise. Part II gives a brief history of the regulation of children's advertising. Part III gives a brief history of the National Geographic Society's magazine for children, and its abrupt transformation from the original, advertisement-free *National Geographic World*, to the ad-laden *NGK* magazine. Part IV discusses the efforts of CSPI to monitor advertising in *NGK* and, through CARU's complaint process, to press for compliance with industry standards of self-regulation. Part V demonstrates that companies continue to publish advertisements that violate CARU guidelines despite CARU's admonitions to the advertisers, and the advertisers' own pledges to cease the offending practices. Part VI explains how *NGK* uses other techniques, such as an online "clubhouse," to expose children to additional advertising through attractions such as "advergaming." Finally, in view of the frequent, continued violation of CARU guidelines and the lack of meaningful consequences, Part VII concludes that industry self-regulation has not been as effective as CARU has claimed.

II. CARU AND REGULATION OF CHILDREN'S ADVERTISING

Concern over aggressive and deceptive advertising to children arose soon after television became firmly entrenched in homes, bringing with it a steady stream of virtually unrestricted marketing—primarily for toys and sugary breakfast cereals.[6] Throughout the 1970's, advocates concerned about the adverse effect of "host selling" on children's physical and psychological health,[7] began to press for greater government oversight.[8]

6. *See* Marian Burros, *Sugary Cereals: A Taste of Controversy*, WASH. POST, Dec. 1, 1977, at E1.

7. "Host selling" is the appearance by program characters in television commercials and sales promotions within the context of that same character's program. *See* Federal Trade Commission, Children's Educational Television: FCC Consumer Facts, http://www.fcc.gov/cgb/consumerfacts/childtv.html (last visited Oct. 4, 2005).

8. Henry John Uscinski, Comment, *Deregulating Commercial Television: Will the Marketplace Watch Out For Children?*, 34 AM. U. L. REV. 141, 147 (1984) (noting that a public interest group, Action for Children's Television

The first effort to ward off the threat of government regulation through industry self-regulation occurred in 1972 when the Association of National Advertisers (ANA) published the Children's Advertising Guidelines to "encourage advertising practices sensitive to the special nature of children."[9] Soon after, in 1974, the advertising industry, lead by the National Advertising Review Council (NARC),[10] established CARU to implement the guidelines.[11] Industry self-interest is evident in CARU's stated goals, which include increasing public trust in advertising, settling disputes among competing advertisers, and minimizing government involvement in the advertising business.[12]

Industry self-regulation did not diminish concerns about the advertisement of sugary foods on television. Advocacy groups filed several petitions with both the FCC and FTC,[13] essentially requesting

(ACT), petitioned the Federal Communications Commission (FCC) for commercial advertising regulations in 1970). Another advocacy group, the Committee on Children's Television, brought suit in California against General Foods and other businesses that advertised sugary breakfast cereals to children. Comm. on Children's Television, Inc. v. General Foods, Corp., 673 P.2d 660, 663–64 (Cal. 1983). The case settlement included the creation of a health program that still exists today. *See* Michael F. Jacobson, *Tipping the Scales: Recipe for Reducing American Obesity Lists Labels, Legislation, and Litigation*, LEGAL TIMES, Mar. 1, 2004, at 34 (stating that the settlement allotted $2 million to the creation of a children's health organization).

9. DANIEL L. JAFFE ET AL., ASS'N OF NAT'L ADVERTISERS, INC., COMMENTS ON CONSUMER INFORMATION PRIVACY ON THE GLOBAL INFORMATION INFRASTRUCTURE (April 15, 1997), http://www.ftc.gov/bcp/privacy/wkshp97/comments2/anai.htm.

10. The National Advertising Review Council (NARC), an independent self-regulatory body, was created in 1971 by an alliance of the Association of National Advertisers (ANA), the American Association of Advertising Agencies (AAAA), the American Advertising Federation (AAF), and the Council of Better Business Bureaus (CBBB). National Advertising Review Council, NARC Partners, http://www.narcpartners.org/about/partners.asp (last visited Oct. 6, 2005).

11. *See* About CARU, *supra* note 2.

12. BEN KELLEY, PUB. HEALTH ADVOCACY INST., INDUSTRY CONTROLS OVER FOOD MARKETING TO CHILDREN: ARE THEY EFFECTIVE? 8 (2005), http://www.phaionline.org/downloads/caru.analysis.pdf; Jeffery S. Edelstein, *Self-Regulation of Advertising: An Alternative to Litigation and Government Action*, 43 IDEA 509, 509–10 (2003).

13. *See* Uscinski, *supra* note 8, at 147 (discussing petitions filed with the FCC); Children's Advertising: Termination of Rulemaking Proceeding, 46 Fed. Reg. 48,710 (proposed Oct. 2, 1981) (stating that petitions to the FTC were filed in 1977 and 1978 by four public interest groups: Actions for

those agencies to limit the amount of television advertising directed at children, and imposing other restrictions intended to protect children's health. The FTC issued a Notice of Proposed Rulemaking,[14] and held hearings resulting in thousands of pages of testimony and an extensively researched staff report that strongly supported the need for agency regulations on children's advertising.[15] The attempt at government regulation not only failed, but was met with a backlash from Congress that threatened the FTC's continued existence.[16] Not surprisingly, the FTC has been reluctant to entertain the concept of increased government regulation of children's advertising ever since.[17] And while the FTC retains ultimate jurisdiction over all unfair or deceptive practices in advertising,[18] it

Children's Television (ACT), the Center for Science in the Public Interest (CSPI), Consumers Union (CU), and the Committee on Children's Television (CCT)). The ACT and CSPI petitions requested rulemaking to regulate television advertising for candy and sugared food products directed to children. *Id.* The CU and CCT petition sought rulemaking to regulate television advertising for candy and sugary food products directed at children. *Id.* It is important to remember the impact that sugar filled diets had on dental caries at that time. This predated many preventive dental treatments currently available to children, such as fluoridated water, tooth sealants, etc. *See* U.S. DEPT. OF HEALTH & HUMAN SERVS., HEALTHY PEOPLE 2010, at 21-6 to 21-8, 21–27 (2d ed. 2000). It also pre-dated the current obesity crisis affecting children and the myriad studies linking television viewing with increased likelihood of obesity. *E.*g., R.J. Hancox & R. Poulton, *Watching Television Is Associated with Childhood Obesity; But Is It Clinically Important?*, 29 J. INT'L OBESITY 1 (Sept. 2005).

14. Children's Advertising: Proposed Trade Regulation Rulemaking and Public Hearing, 43 Fed. Reg. 17,967 (proposed Apr. 27, 1978) (to be codified at 16 C.F.R. pt. 461).

15. Teresa Moran Schwartz & Alice Saker Hrdy, FTC Rulemaking: Three Bold Initiatives and Their Legal Impact, 11 n.58 (Sept. 22, 2004), *available at* http://www.ftc.gov/ftc/history/docs/040922schwartzhrdy.pdf (first article of three on legislative proceedings regarding advertising and telemarketing).

16. MICHAEL PERTSCHUK, REVOLT AGAINST REGULATIONS: THE RISE AND PAUSE OF THE CONSUMER MOVEMENT 69–81 (1982).

17. Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Remarks at the Obesity Liability Conference 9 (May 11, 2005), *available at* http://www.ftc.gov/speeches/majoras/050511obesityliability.pdf ("I want to be clear that, from the FTC's perspective, this is not the first step toward new government regulations to ban or restrict children's food advertising and marketing. The FTC tried that approach in the 1970s, and it failed for good reasons.").

18. Section 5 of the FTC Act gives the FTC jurisdiction over "unfair or deceptive acts and practices in or affecting commerce." 15 U.S.C. § 45(a)(1) (2005).

demurs to CARU on issues related to children's advertising.[19] That essentially leaves CARU as the watchdog over advertising to children. Until recently, CARU has had a total staff of five,[20] and an advisory board comprised of industry members and academics.[21] A bilingual staff member was added in late 2004 to assist in monitoring Spanish language advertisements.[22]

Self-regulation, as defined by CARU, results in the "review and evaluation of child-directed advertising in all media, and online privacy practices as they affect children." [23] When these practices "are found to be misleading, inaccurate, or inconsistent with CARU's Self-Regulatory Guidelines for Children's Advertising or relevant laws, CARU seeks change through the voluntary cooperation of advertisers."[24] Guidelines are revised in what CARU describes as its attempt to "ensure that they accurately reflect changes in the children's media landscape and current industry 'best practices.'"[25] Thus, CARU guidelines were expanded in 1996 to include provisions that "highlight issues, including children's privacy, that are unique to the Internet and online sites directed at children age 12 and under."[26]

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19. *See* Mary K. Engle, Assoc. Dir., Div. of Adver. Practices, Fed. Trade Comm'n, Regulating Food Advertising to Children: An Historical Perspective, Presentation at the IOM Meeting on Food Marketing and the Diets of Children and Youth (Oct. 14, 2004), http://www.iom.edu/Object.File/Master/23/031/0.pdf (providing an historical overview of the FTC's regulation of food advertising to children from the agency's current perspective).

20. *See* CARU, Staff Listing, http://www.caru.org/about/staff.ASP (last visited October 21, 2005) (listing current CARU staff members).

21. CARU, Academic Advisory Board, http://www.CARU.org/about/advisory.asp (last visited Oct. 21, 2005) (listing the current CARU Academic Advisory Board).

22. *See* Press Release, Children's Adver. Review Unit, CARU Launches New Program to Monitor Advertising to Children in Spanish-Language Media (Sept. 9, 2004), http://www.caru.org/news/2004/spanishlang.asp.

23. NAT'L ADVER. REVIEW COUNCIL, GUIDANCE FOR FOOD ADVERTISING SELF-REGULATION: AN HISTORICAL OVERVIEW OF THE INVESTIGATIONS OF FOOD, NUTRITION AND WEIGHT-LOSS ADVERTISING OF THE CHILDREN'S ADVERTISING REVIEW UNIT (CARU) AND THE NATIONAL ADVERTISING DIVISION (NAD) 10 (2004), *available at* http://www.narcpartners.org/reports/NARC_White_Paper_6-1-04.pdf.

24. *Id.* at 10–11.

25. Children's Adver. Review Unit, Latest Revisions to the Self Regulatory Guidelines for Children's Advertising, http://www.caru.org/guidelines/changes.asp (last visited Oct. 6, 2005).

26. About CARU, *supra* note 2.

CARU's director, Elizabeth Lascoutx, has described her agency's purpose as: "ensur[ing] that advertising directed to children is truthful, accurate and appropriate for its intended audience."[27] She recently emphasized that "[i]t was never intended that CARU be the arbiter of what products should or should not be manufactured or sold, or to decide what foods are 'healthy,' to tell parents or children what they should or shouldn't buy."[28] CARU's oversight extends to "all media" advertising directed at children twelve and under,[29] although researchers differ as to the age below which children need to be protected from specific advertising and marketing techniques.[30]

CARU guidelines also emphasize promotion of "responsible children's advertising,"[31] and the protection of children relative to cognitive development, that is, their ability to understand basic mechanisms of advertising such as sales pressure, program character endorsements, and product claims.[32] CARU guidelines do not address the nutritional content of advertised foods, although there are specific food-related guidelines.[33] They include:

- not misleading children about a product regarding its nutritional benefits, for example, that consuming the product would result in the acquisition of strength, growth, and intelligence;[34]
- representing food products to encourage their "sound use" with a view toward healthy development and good nutritional practices;[35]

27. Caroline E. Mayer, *Minding Nemo: Pitches to Kids Feed Debate About a Watchdog*, WASH. POST, Feb. 27, 2005, at F01.

28. *Id.*

29. CHILDREN'S ADVER. REVIEW UNIT, SELF-REGULATORY GUIDELINES FOR CHILDREN'S ADVERTISING 2 (2003), *available at* http://www.caru.org/guidelines/guidelines.pdf.

30. *See* Wally Snyder & Margo Wootan, Remarks at the Joint Workshop of the Federal Trade Commission and the Department of Health and Human Services on Perspectives on Marketing, Self-Regulation, and Childhood Obesity 69–71 (July 15, 2005), http://www.ftc.gov/bcp/workshops/foodmarketingtokids/transcript_050715.pdf (Wootan arguing that that established law defines children as those under the age of eighteen; Snyder arguing for an under-twelve standard).

31. CHIDREN'S ADVER. REVIEW UNIT, *supra* note 29.

32. *Id.* at 3.

33. *See id.* at 1–5.

34. *Id.* at 4.

35. *Id.* at 5.

- advertising products shown at mealtimes as part of a balanced diet and not presenting snack foods as a substitute for meals.[36]

Other guidelines do not specifically mention food, but are applicable to advertisements that promote food products such as foods and candies tied to movies, television programs, sweepstakes, contests, prize promotions, and kids' clubs.[37] They provide that:

- children should not be urged to ask parents or others to buy products and should not be pressured into purchases by words such as "now" and "only";[38]
- ads for premium offers should focus primarily on the product, rather than the prize, to avoid exploitation of children's immaturity;[39]
- program personalities should not be used to sell products within the context of, or adjacent to, the program in which they appear;[40]
- both the likelihood of winning a sweepstakes and alternate means of entry must be prominently disclosed in a manner that children can understand.[41]

Over the three decades since its creation,[42] the interpretation of CARU guidelines has resulted in familiar children's advertising techniques. For example, both print and television advertisements will most often depict breakfast cereals as part of a "balanced breakfast" meal that includes milk, toast, and fruit. Another familiar example is sweepstakes ads that contain the statement "No purchase necessary," although such statements often appear in "mice type,"[43] which is difficult, if not impossible, to read.[44] CARU's concern

36. *Id.* at 5.
37. *Id.* at 6–10.
38. *Id.* at 6.
39. *Id.* at 8.
40. *Id.*
41. *Id.* at 9.
42. *Id.* at 14.
43. *See generally* Roger P. Furey, *Of "Mice Type" And Men*, ADVANTAGE, Winter 2005, at 4, 7, http://www.kattenlaw.com/Practices (follow "Advertising" hyperlink; then follow "Advantage–Advertising Law Decisions And Trends" hyperlink) (defining "mice type" as a fine print advertisement disclaimer, and giving general information about regulation and usage of such fine print).
44. Children's Advertising Review Unit, Sweepstakes Directed to Children,

about advertisers' misleading and deceptive methods of marketing sweepstakes to children prompted publication of a commentary in 2003 that stressed the importance of adherence to CARU guidelines.[45] CARU reminded the advertising industry that children "are more credulous" than adults.[46] As a result, advertisers targeting children need to be particularly careful about disclosing the chances of winning, and that no purchase is necessary to enter a sweepstakes.[47] CARU emphasized this point with unequivocal language: "The necessity of having clear disclosure that no purchase is necessary cannot be overstated."[48]

In 2004, at the request of the Grocery Manufacturer's of America (GMA),[49] one of CARU's sponsors, the National Advertising Review Council (NARC), directed an assessment of CARU's thirty year involvement in food advertising.[50] The resulting White Paper detailed CARU's self-regulatory approach to food advertising directed at children for a twenty-eight year period, from its inception in 1974 until 2003.[51] The White Paper categorized CARU's deci-

http://www.caru.org/news/sweepstakes.asp (last visited Oct. 9, 2005) (noting that a child will not understand the phrase "no purchase is necessary" if the text is not clearly displayed and easy to read).

45. *Id.*

46. *Id.*; *see* Lynnea Mallalieu et al., *Understanding Children's Knowledge and Beliefs About Advertising: A Global Issue That Spans Generations*, 27 J. CURRENT ISSUES & RES. ADVER. 53, 62–63 (2005) ("Contests may not be an effective strategy with older children; however, younger children exhibited greater susceptibility to this strategy. Even though younger children expressed skepticism about winning competitions, they were still quite eager to try as evidenced by the 6 and 7 year olds who had repeatedly bought Bagel Bites in an attempt to win a competition.").

47. *See* Mallalieu, *supra* note 46, at 63.

48. Children's Adver. Review Unit, *supra* note 44.

49. The Grocery Manufacturers of America (GMA) is an industry advocacy and lobbying organization whose mission "advances the interests of the food, beverage and consumer products industry on key issues that affect the ability of brand manufacturers to market their products profitably and deliver superior value to the consumer." Grocery Manufacturer's Assoc., About GMA: Mission Statement, http://www.gmabrands.com/about/index.cfm (last visited Nov. 10, 2005).

50. Letter from C. Manly Molpus, President & CEO, Grocery Mfr. Assoc. ,to James Guthrie, President, Nat'l Adver. Review Council, and Elizabeth Lascoutx, Dir., Children's Adver. Review Unit (October 23, 2003), *available at* http://www.gmabrands.com/publicpolicy/docs/Correspondence.cfm.

51. *See* NAT'L ADVER REVIEW COUNCIL, *supra* note 23, at 31–33. The White Paper also reviewed National Advertising Division's (NAD) history

sions according to the decade in which they were rendered. The 1970's were described as a period of advertisements primarily for toys and food.[52] The 1980's saw the rise of competitive claim advertising.[53] The 1990's ushered in the use of expedited procedures, which made it possible for CARU to consider more complaints using a stream-lined process.[54] Unfortunately, the brevity of the informal decisions made it more difficult to determine, on review, whether the complaints involved nutrition or food issues.[55] In any event, CARU recently decided to abolish the informal case report procedure.[56]

CARU summarized that it had "reviewed and reported on over 1,100 child-directed advertisements,"[57] and that "[o]ver 150 cases and inquiries have involved food advertising."[58] As outlined in Table A, during the twenty-eight year period, there were fifty-seven formal case decisions related to food advertising directed at children, approximately two decisions a year.[59] Adding the food related informal decisions conducted under the expedited review process, the number of food or nutrition related decisions increases to 161.[60] Thus, more than half of CARU's decisions involving food or nutrition were informal decisions. Moreover, greater than half of the food related informal cases were initiated between 2000 and 2003.[61] CARU stated that for the first three years of the twenty-first century, it initially focused its attention on children's privacy issues related to the Internet, but "is now focusing more of its efforts on food advertising to children." [62]

with regard to adult food advertising. *See id.* at 45–67.

52. *See id.* at 33.

53. *See id.* at 35.

54. *See id.* at 38.

55. *Id.*

56. Press Release, Children's Adver. Review Unit, Changes to CARU's Expedited Procedure (Nov. 5, 2004), http://www.caru.org/news/2004/procedures.asp.

57. NAT'L ADVER. REVIEW COUNCIL, *supra* note 23, at 11.

58. *Id.*

59. *See id.* at 33, 36, 38, 40 (detailing the number of formal cases each decade).

60. *See id.* at 38, 40.

61. *See id.*

62. *See id.* at 40.

TABLE A: CARU CASES AND EXPEDITED REVIEWS SPANNING TWENTY-EIGHT YEARS

1975–2003	All Advertising	Food and Nutrition (includes vitamins)
Formal cases	423	57
Informal decisions	735	104
TOTAL	1196	161

Despite the relatively small number of food related cases (approximately 7 percent), the White Paper concluded that:

> [CARU's] current Guidelines, as illustrated by the cases cited above, adequately address the advertising of food to children. Education of the industry concerning CARU's interpretation of those Guidelines, as reflected in this paper, is an important step toward achieving better understanding of the role of self-regulation.[63]

Even assuming the guidelines are adequate on their face to address the special problems of advertising to children, the cases discussed in the White Paper indicate that neither the interpretation nor implementation of guidelines has been robust. Moreover, CARU's suggestion that industry education is important to the success of self-regulation[64] begs the question as to what role self-regulation played during the almost three decades of CARU's existence.

Since publication of the White Paper, both the GMA and NARC have announced proposed changes to CARU guidelines.[65] These changes are intended to address the increasing pressure on both the food industry and its advertisers to alter practices that are viewed as contributing to childhood obesity.

63. *See id.* at 41.

64. *Id.*

65. GROCERY MFRS. ASSOC., PROPOSALS TO STRENGTHEN ADVERTISING SELF-REGULATION AND TO ENCOURAGE PUBLIC-PRIVATE INITIATIVES PROMOTING HEALTHY LIFESTYLES (2005), http://www.ftc.gov/os/comments/FoodMarketingtoKids/516960-00058.pdf; Press Release, Nat'l Adver. Review Council, NARC Announces Key Initiatives to Strengthen Self-Regulation of Advertising to Children (Sept. 15, 2005), http://www.nadreview.org/start.asp?SessionID=0.

III. NATIONAL GEOGRAPHIC KIDS MAGAZINE AND ADVERTISING

The National Geographic Society generally enjoys a reputation for excellence in global exploration, photography, and education in multiple media.[66] The Society's magazine for children and predecessor to *NGK*, *National Geographic World* (*NGW*), was first published in 1975.[67] It did not contain advertisements.[68] The educational content of the magazine made it a natural choice for parents to welcome into their homes, primarily by mail subscription since the magazine was not widely available in retail outlets.[69]

In 2002, *NGK*'s editor announced that the children's magazine had decided to aggressively pursue advertising as part of its redesign for the magazine.[70] The decision to include advertising was not announced to subscribers, but rather to business and media outlets.[71]

According to Magazine Publishers of America, *NGK*'s advertising revenue increased from zero for January 2002, to $258,075 for

66. *See generally* Press Release, Ctr. for Sci. in the Pub. Interest, National Geographic Pushes Junk Food to Kids, Says CSPI (July 19, 2004), http://www.cspinet.org/new/200407191.html (noting National Geographic Society's "esteemed reputation and long standing educational mission for both adults and children").

67. NAT'L GEOGRAPHIC KIDS, FAST FACTS, http://www.ngkclubhouse.com/natgeo_kids/NGK_MediaKit_PDFs/NGK_FastFacts.pdf (last visited Apr. 3, 2006).

68. *See* Jeff Bercovici, *Nat Geo'll Play with the Big'uns*, MEDIA LIFE MAG., June 4, 2002, http://www.medialifemagazine.com/news2002/jun02/jun03/2_tues/news2tuesday.html (stating that the magazine was advertisement-free until the October 2002 issue when the magazine changed its name to National Geographic Kids). There was, however, one notable exception to the ad-free makeup of NGW. The May 2002 issue featured a simulated duplicate cover advertising Quiznos Subs. NAT'L GEOGRAPHIC KIDS, May 2002. Unlike the May 2004 issue, the Quiznos cover lacked any attempt to alert readers it was an advertisement. *Id.* Other small exceptions are not discussed here.

69. *See* Bercovici, *supra* note 68 (stating that the big change from National Geographic World to National Geographic Kids is that now all of the issues will be distributed to retailers).

70. *Id.*

71. The evolution of the increased presence of advertising in NGK can be traced in the masthead. An office of "Consumer and Member Marketing," NAT'L GEOGRAPHIC WORLD, Sept. 2002, at 35, gives way to a single "Advertising Office" in New York City, NAT'L GEOGRAPHIC KIDS, Oct. 2002, at 39, which grows to include two additional advertising offices that span the country, NAT'L GEOGRAPHIC KIDS, May 2003.

January 2003.[72] Advertising revenue has continued to increase, reaching $4,971,283 for the period from January to July 2004.[73]

Subscribers,[74] many of whom were familiar with the ad-free *NGW*, voiced disappointment and disgust with the rampant advertising in *NGK* in their posted comments on sites such as Amazon.com. One angry subscriber described *NGK* as "[s]hamefully rife with advertising."[75] Another subscriber noted that the magazine included advertisements "for candy, video games and movies . . . in a way that makes it hard to separate the selling from the educating."[76] Another called it "the worst kids' magazine you will ever see."[77] Yet another complained, "[t]he advertising is

72. Magazine Publishers of America, Advertising & PIB—PIB Revenue & Pages: January 2003 vs. 2002, http://www.magazine.org/content/files/restated04/Jan03monthly.xls.

73. Magazine Publishers of America, Advertising & PIB—PIB Revenue & Pages: Jan–July 2005 vs. 2004, http://www.magazine.org/Advertising_and_PIB/PIB_Revenue_and_Pages/Revenue___Pages_by_Magazine_Titles__YTD_/13067.cfm.

74. NAT'L GEOGRAPHIC KIDS, *supra* note 67. NGK's targeted audience is described as six to fourteen year-old girls and boys, *id.*, although it is listed elsewhere on the NGK web site as being for six to twelve–year olds. Nat'l Geographic Kids, About Us, http://nationalgeographic.com/ngkids/about_us.html (last visited Oct. 9, 2005). Further, a 2004 NGK readers' survey describes the average subscriber age as 9.5 years. NAT'L GEOGRAPHIC KIDS, DEMOGRAPHICS: SUBSCRIBERS, http://www.ngkclubhouse.com/natgeo_kids/NGK_MediaKit_PDFs/NGK_Subscribers.pdf (last visited October 9, 2005). Twenty percent of those are under eight years old; 76% are six to eleven-years old; 70% are eight to twelve-years old; 8% are thirteen to fourteen-years old; and 2% are fifteen-years old and above. *Id.* According to information provided on NGK's Web site, as of October 2005, average net-paid circulation was over 1.3 million; readership was reported as over 4.6 million. NAT'L GEOGRAPHIC KIDS, *supra* note 67.

75. Posting of A Magazine Reader, Shamefully Rife with Advertising, to http://www.amazon.com/gp/product/customer-reviews/B000063XJL/ref=cm_rev_next/002-4723877-4457608?%5Fencoding=UTF8&customer-reviews.sort%5Fby=-SubmissionDate&n=599858&s=magazines&customer-reviews.start=31 (Aug. 19, 2003).

76. Posting of Michael May, When Did This Magazine Head South?, to http://www.amazon.com/gp/product/customer-reviews/B000063XJL/ref=cm_rev_prev/002-4723877-4457608?%5Fencoding=UTF8&customer-reviews.sort%5Fby=-SubmissionDate&n=599858&s=magazines&customer-reviews.start=21 (Mar. 30, 2004).

77. Posting of Megan Crane, This Is the Worst Kid's Magazine You Will Ever See, to http://www.amazon.com/gp/product/customer-reviews/B000063XJL/ref=cm_rev_next/002-4723877-4457608?%5Fencoding=UTF8&customer

shameful and irresponsible. In an age when we are preoccupied by the health of our children, particularly their diet, the latest issue [May 2004] advertises a major fast-food chain right on the cover."[78]

Over one year later, the criticism continues. A mom in Minnesota considers *NGK* a "waste of money" with "a ridiculous amount of advertising."[79] Another subscriber describes *NGK* as "a thinly veiled excuse to sell ads for the worst possible products for kids. . . . The National Geographic Society should be deeply ashamed of itself."[80]

The May 2004 issue employs an advertising technique often used by adult magazines: special offers printed on a wrap, which serves as a mailer, over the front and back covers.[81] In this instance, the advertisement on the wrap simulates the actual *NGK* cover underneath. However, instead of the typical listing of the issue's stories and features, the wrap advertises Arby's Adventure Meals and urges kids to "[l]ook inside and start your adventure at Arby's today!"[82] The "fake" cover prominently displays the Arby's logo together in an oval with the words "Adventure Meal with *National Geographic Kids*."[83] Arby's partnered with *NGK* and was

-reviews.sort%5Fby=-SubmissionDate&n=599858&s=magazines&customer-reviews.start=31 (Nov. 3, 2003).

78. Posting of Nikmeiser, Terrible Disappointment, to *http://www.amazon.com/gp/product/customer-reviews/B000063XJL/ref=cm_rev_prev/002-4723877-4457608?%5Fencoding=UTF8&customer-reviews.sort%5Fby=-SubmissionDate&n=599858&s=magazines&customer-reviews.start=21* (May 24, 2004).

79. Posting of Mom in MN, Waste of Money, to *http://www.amazon.com/gp/product/customer-reviews/B000063XJL/ref=cm_rev_prev/002-4723877-4457608?%5Fencoding=UTF8&customer-reviews.sort%5Fby=-SubmissionDate&n=599858&s=magazines&customer-reviews.start=11* (June 23, 2005).

80. Posting of Book Maven, Awful—Full of the Worst Kind of Ads, to *http://www.amazon.com/gp/product/customer-reviews/B000063XJL/ref=cm_rev_prev/002-4723877-4457608?%5Fencoding=UTF8&customer-reviews.sort%5Fby=-SubmissionDate&n=599858&s=magazines&customer-reviews.start=1* (July 13, 2005).

81. NAT'L GEOGRAPHIC KIDS, May 2004, at mailing overwrap (Arby's Adventure Meal Advertisement).

82. *Id.*

83. *Id.* Although the duplicate cover advertisement may have been obvious to some readers, the same cannot be said of the nutritional content of the advertised Adventure Meal. The meal is purportedly "[t]rusted by mom," *id.*, and consists of two pieces of breaded and fried chicken, French fries par-cooked in partially hydrogenated oil, and a soft drink likely to be loaded with refined sugars. *Id.* A parent has to hunt for each item on Arby's Web site

advertising its children's meal selections with *NGK* toys and "educational" items on *NGK*'s false cover. Although the word "advertisement" appeared in small, red type at the top of the simulated cover, it is unlikely that many children were able to discern that the wrap was actually an advertisement, rather than the magazine cover.

The transition in September 2002 from the virtually ad free *NGW* to *NGK* also heralded the arrival of slick, commercialized content, numerous stories that had nothing to do with either geography or nature, and copious amounts of advertising.[84] Specifically, CSPI found that the seventeen post-transition issues—September 2002 through July/August 2004—contained fifty-one junk-food ads comprised of marketing for sugary cereal (thirteen ads), candy (twelve ads), snack cakes and foods (eleven ads), pizza (six ads), fast food (six ads), and bubble gum (three ads).[85]

There was only one substantive article about food for kids. Published in the December 2003 issue, the story focused on the efforts some fast food companies are making to reduce fat and serving sizes.[86] The featured illustration showed an Oreo-type cookie on a treadmill, and belittled children's interest in nutrition by

(neither Adventure Meals nor children's fare are separately categorized) to discover that the two-piece chicken fingers meal weighs in at 620 calories, 185 of which are from fat, and contains 1345 milligrams of sodium. ARBY'S 2005 NUTRITION, INGREDIENT, AND ALLERGEN INFORMATION (last visited Feb. 1 2006), http://www.arbys.com/nutrition/Arbys_US_Nutrition.pdf. The meal's thirty-two grams of fat provide almost half of an adult's recommended daily limit of sixty-five grams; the meal's sodium content is also more than half the recommended daily limit of 2,400 mg. *Id.* A small soda would add anywhere from 185 (cola) to 260 (orange drink) additional calories. *Id.*

84. *See* NAT'L GEOGRAPHIC KIDS, Sept. 2002.

85. Letter from Michael F. Jacobson, Executive Dir., Ctr. for Sci. in the Pub. Interest, & Ellen J. Fried, Legal Consultant, Ctr. for Sci. in the Pub. Interest, to John M. Fahey, Jr., President and CEO, Nat'l Geographic Soc'y, app. at 7 (July 19, 2004), http://cspinet.org/new/pdf/ngk_letter.pdf (detailing the fifty-one violations).

86. *Fighting Fat*, NAT'L GEOGRAPHIC KIDS, Dec. 2003, at 11. Food is mentioned in only a few short pieces: "*Chews to Win*" describes an adult hot-dog eating contest, NAT'L GEOGRAPHIC KIDS, Sept. 2003, at 14; candy and cake recipes for Halloween, NAT'L GEOGRAPHIC KIDS, Oct. 2003, at 18; recipes for Mother's Day and Father's Day presents featuring chocolate-dipped pretzel rods and BBQ Sauce, NAT'L GEOGRAPHIC KIDS, May 2004, at 40–41; and "*Crumbly Cookies*" purports to explain the "science" of why cookies crumble, NAT'L GEOGRAPHIC KIDS, June 2004, at 15.

stating, "[s]ome McDonald's restaurants are offering Happy Meals with fruit instead of fries. Fruit will make the meal more healthy, but will it make kids happy?"[87]

In addition to the Arby's Adventure Meal cover, food advertising appears to blend with editorial content inside the magazine as well. For example, an issue with a feature story on the movie *Shrek II* also ran a tie-in advertisement for M&M Minis candies that featured characters from the movie.[88] Further, a significant number of *NGK*'s advertisements for unhealthful food are sweepstakes and contests, a form of advertising to which young children are particularly susceptible.[89]

IV. CSPI COMPLAINS TO NATIONAL GEOGRAPHIC SOCIETY AND CARU

CSPI complained to National Geographic Society President and CEO John M. Fahey, Jr., by letter dated July 19, 2004 that "[a]t a time when obesity, diabetes, and other nutrition-related health crises plague our nation and especially our youth, it is unconscionable that the National Geographic Society . . . has chosen to cram *National Geographic Kids Magazine* (*NGK*) with ads for sugary cereals, candy, and snack foods."[90] CSPI also criticized *NGK*'s marketing of fast food on its simulated Arby's cover and pointed out that the majority of the foods hawked to children in *NGK* are "loaded with calories, saturated and trans fats, and sodium."[91] An appendix to the

87. *Fighting Fat*, note 86.

88. NAT'L GEOGRAPHIC KIDS, May 2004, at 5 (M&M's Minis in Shrek Colors Advertisement).

89. *See* Children's Adver. Review Unit, *supra* note 44 (discussing the susceptibility of young children to these types of advertising techniques). For example, NGK contained two advertisements for canned soup, both of which involved sweepstakes. NAT'L GEOGRAPHIC KIDS, Oct. 2003, at inside back cover (Campbell Soup Advertisement);NAT'L GEOGRAPHIC KIDS, March 2004, at 9 (Campbell Soup Advertisement). In each advertisement, the soup can is featured as bearing a code that can be used to enter the sweepstakes; there is no information about the soup as food.

90. Letter from Michael F. Jacobson & Ellen Fried to John M. Fahey, Jr., *supra* note 85, at 1.

91. *Id.* at 3. In addition to sending the letter to National Geographic, CSPI copied the letter complaining about the Arby's shark cover to the American Society of Magazine Editors (ASME). *Id.* The letter, which asserted that the cover violated ASME's guidelines, was never answered. *Id.* The ASME Guidelines (which have since been updated) provide, in pertinent part:

letter listed the 51 food advertisements in *NGK* and cited inconsistencies with CARU guidelines in almost every instance.[92] Mr. Fahey sent a polite response to the letter, thanking CSPI for bringing the issues to his attention. There was no further correspondence from Mr. Fahey regarding CSPI's complaints.

Simultaneous to stating its objections to *NGK*'s unhealthful food advertising, CSPI also filed seven complaints with CARU targeting specific advertisements in several *NGK* issues,[93] described in Table B below.

Guidelines For Editorial And Advertising Pages

1. Layout and Design

The layout, design and typeface of advertising pages should be distinctly different from the publication's normal layout, design and typefaces.

2. Use of The Magazine's Logo, Etc.

At no time should a magazine's name, logo or editorial staff be used in a way that suggests editorial endorsement of any advertiser. Specifically:

(a) *No advertisement or purely promotional contest may be promoted on the cover of the magazine* or included in the editorial table of contents. This includes cover stickers and other inserts.

AM. SOC'Y OF MAGAZINE EDITORS, GUIDELINES FOR EDITORIAL AND ADVERTISING PAGES (12th ed.), *archived at* http://66.102.7.104/search?q=cache:LjVFdixPZwUJ: www.magazine.org/Editorial/G (emphasis added). The current Guidelines are available at http://www.magazine.org/Editorial/Guidelines/ (last visited Feb. 18, 2006).

92. *See id.*, app. A, at 6–11.

93. Because CARU procedures require confidentiality, CSPI could not apprise Mr. Fahey of the seven complaints filed with CARU. NAT'L ADVER. REVIEW COUNCIL, THE ADVERTISING INDUSTRY'S PROCESS OF VOLUNTARY SELF-REGULATION 2 (2005), http://www.nadreview.org/05_Procedures.pdf ("To ensure the integrity and cooperative nature of the review process, parties to NAD/CARU proceedings must agree: 1) to keep the proceedings confidential throughout the review process . . . .").

TABLE B

COMPANY	AD	COMPLAINT	CARU DECISION AND DATE	VIOLATION REPEATED OR MODIFICATION
Arby's and *National Geographic Kids Magazine*	Mailing wrapper "fake" cover really an advertisement for joint promotion of Arby's Adventure meals for children with *NGK* toy.[94]	Ad designed to simulate editorial content; use of joint Arby's/*NGK* logo blurs distinction between editorial content and advertising.[95] No substantiation for Arby's claim "Trusted by Moms."[96]	Agreed mailing wrapper blurs distinction between editorial and advertising. However, CARU guideline loophole that focuses on program characters prevents CARU from acting.[97] Agreed no substantiation for "Trusted by Moms" claim.[98] January 2005	Use of combined logo continued in ads and contests.[99] To date, no revision of CARU rules to address issue of editorial endorsement.[100] Trusted by Moms claim discontinued.[101]

94. Nat'l Geographic Kids, *supra* note 81.

95. *See* Arby's, LLC, Adventure Meal Promotion, Children's Adver. Review Unit Case No. 4268, at 2–3 (Dec. 10, 2004) (case available on request by contacting: Linda Bean, Dir. Comm., Children's Adver. Review Unit, at 212-705-0129, or at lbean@narc.bbb.org) [hereinafter CARU Case No. 4268].

96. *Id.* at 3–4.

97. *Id.* at 8.

98. *Id.* at 5–8.

99. *E.g.*, NAT'L GEOGRAPHIC KIDS, July/Aug. 2004, at 17 (Adventure Meal Advertisement); NAT'L GEOGRAPHIC KIDS, Oct. 2004, at 19 (Adventure Meal Advertisement); NAT'L GEOGRAPHIC KIDS, Dec. 2004, at 21 (Adventure Meal Advertisement).

100. *See* CHILDREN'S ADVER. REVIEW UNIT, *supra* note 29.

101. CARU Case No. 4268, *supra* note 95, at 9.

TABLE B (CONTINUED)

COMPANY	AD	COMPLAINT	CARU DECISION AND DATE	VIOLATION REPEATED OR MODIFICATION
Hostess Twinkies Interstate Bakeries	Duck searching for snack cake filling gets hit by train. "Where's the Cream Filling?"[102]	Depiction of harm to animal that could frighten or cause anxiety in young children.[103]	Complaint denied. Ad deemed cartoonish, not frightening.[104] July 2004	Ad campaign continued.[105]
M&M's Masterfoods	Shrek II tie-in for mini M&M's available only for limited time [106]	Emphasis on limited time availability creates sales pressure and sense of urgency.[107]	CARU agreed with complainant.[108] November 2004	Print ad for Star Wars mini's modified; does not contain "Limited Time Only" language.[109] In store display does have "Limited Time Only" language.[110] Summer 2005

102. NAT'L GEOGRAPHIC KIDS, Oct. 2003, at inside front cover (Hostess Cupcake Advertisement).

103. *See* E-mail from Ellen J. Fried, Legal Consultant, Ctr. for Sci. in the Pub. Interest, to Jeffrey Cronin, Dir. of Comm., Ctr. for Sci. in the Pub. Interest (Dec. 21, 2004, 10:49:42) (on file with author).

104. *Id.*

105. *E.g.*, NAT'L GEOGRAPHIC KIDS, Sept. 2004, at inside front cover (Hostess Twinkies Advertisement).

106. NAT'L GEOGRAPHIC KIDS, *supra* note 88.

107. Masterfoods, Inc., M&M's Minis Promotion, Children's Adver. Review Unit Case No. 4249, at 2 (Nov. 2, 2004) (document available on request by contacting: Linda Bean, Dir. Comm., Children's Adver. Review Unit, at 212-705-0129, or at lbean@narc.bbb.org) [hereinafter CARU Case No. 4249].

108. *Id.* at 4–5.

109. *E.g.*, SPORTS ILLUSTRATED FOR KIDS, Apr. 2005, at 45 (Star Wars Minis Light Saber Advertisement).

110. Mega M&M's Store Display (Summer 2005) (on file with author).

TABLE B (CONTINUED)

COMPANY	AD	COMPLAINT	CARU DECISION AND DATE	VIOLATION REPEATED OR MODIFICATION
Kraft Post Cereals	Postopia Web site games and tokens to play them can be obtained in featured Post cereal boxes.[111]	Focus on premium, not product; explanation regarding necessary purchase misleading.[112]	CARU agreed with complainant.[113] Oct. 2004.	CARU brings case for violation of same guideline. June 2005.[114]
Big League Chew Bubble Gum	Children urged to chew bubble gum cut and packaged to resemble chewing tobacco used by baseball players.[115]	Encourages imitation of unhealthful and inappropriate behavior.	Complaint denied. Product looks like bubble gum. August 2004.[116]	Big League still marketed to resemble chewing tobacco used by sports figures in baseball.[117]

111. NAT'L GEOGRAPHIC KIDS, May 2004, at inside back cover (Post Cereal Advertisement).

112. Kraft Foods Global, Inc., "Want More Postokens?" Promotion, Children's Adver. Review Unit Case No. 4243, at 1 (Oct. 27, 2005) (document available on request by contacting: Linda Bean, Dir. Comm., Children's Adver. Review Unit, at 212-705-0129, or at lbean@narc.bbb.org) [hereinafter CARU Case No. 4243].

113. *Id.* at 2–3.

114. Kraft Foods Global, Inc., "The Fairly Odd Parents Bloopers," Children's Adver. Review Unit Case No. 0000, at 1 (June 29, 2005) (document available on request by contacting: Linda Bean, Dir. Comm., Children's Adver. Review Unit, at 212-705-0129, or at lbean@narc.bbb.org) [hereinafter CARU Case No. 0000].

115. NAT'L GEOGRAPHIC KIDS, June 2004, at inside front cover (Big League Chew Bubble Gum Advertisement).

116. *See* E-mail from Ellen J. Fried, *supra* note 103.

117. *E.g.*, Big League Chew, http://www.bubblegum.com/bigleaguechew/ (last visited Jan. 28, 2006).

TABLE B (CONTINUED)

COMPANY	AD	COMPLAINT	CARU DECISION AND DATE	VIOLATION REPEATED OR MODIFICATION
Hubba Bubba Bubble Gum Sweepstakes	Sweepstakes ad copy urges reader to "Look inside specially marked packages to see if you [instantly] win."[118]	Alternate means of entry into sweepstakes , i.e., "no purchase necessary" should be clearly disclosed.[119]	CARU initiated same complaint.[120] July 2004.	CARU resolves case for violation of same guideline. August 2005.[121] Skippy Peanut Butter ads violate same guideline.[122] August/September 2005.
Wonka Sweepstakes	Win sweepstakes when candy turns tongue purple; doesn't mention winning game piece is also necessary.[123]	Deceptive and misleading description of requirements to win prize; discrepancy between rules in print ad and on Web site.[124]	CARU agreed with complainant.[125] October 2004.	Subsequent sweepstakes ads modified regarding need for game piece; "no purchase necessary" still appears in small, difficult to read type.[126]

118. *See* Wm. Wrigley Jr. Co., Hubba Bubba Bubbletape Sweepstakes, Children's Adver. Review Unit Case No. 4204, at 1–2 (July 12, 2004) (case available on request by contacting: Linda Bean, Dir. Comm., Children's Adver. Review Unit, at 212-705-0129, or at lbean@narc.bbb.org) [hereinafter CARU Case No. 4204].

119. *Id.*

120. *Id.*

121. Press Release, Children's Adver. Review Unit, Wrigley Supports CARU by Agreeing to Prominently Disclose Free Means of Entry (Aug. 17, 2005).

122. SPORTS ILLUSTRATED FOR KIDS, Aug. 2005, at 51 (Skippy Peanut Butter Advertisement); SPORTS ILLUSTRATED FOR KIDS, Sept. 2005, at 19 (Skippy Peanut Butter Advertisement).

123. Letter from Michael F. Jacobson & Ellen Fried to John M. Fahey, Jr., *supra* note 85, app. at 11, (calling attention to the Nestlé USA "*Get Wonk'd" Advertisement*, NAT'L GEOGRAPHIC KIDS, July/Aug. 2004, at back cover).

124. Nestlé USA, "Get Wonk'd Promotion," Children's Adver. Review Unit Case No. 4233, at 1 (Oct. 4, 2004) (case available on request by contacting: Linda Bean, Dir. Comm., Children's Adver. Review Unit, at

212-705-0129, or at lbean@narc.bbb.org) [hereinafter CARU Case No. 4233].

125. *Id.* at 2–3.

126. *See, e.g.*, NAT'L GEOGRAPHIC KIDS, August 2005, at inside back cover (Nestlé Golden Ticket Sweepstakes Advertisement).

The primary limiting determinants on the number of complaints filed with CARU were the age of the individual advertisement and the subject matter's relation to food. Since most advertisements run for short time periods—especially those products associated with movie or other promotions—advertisements prior to the May 2004 issue were not cited. The absence of complaints about ads prior to that date was not an admission by CSPI that prior ads did not violate CARU guidelines. Also, CSPI limited its complaints to food advertisements, although ads in NGK for nonfood items also violated the guidelines of both CARU and other professional regulatory bodies.[127] The complaint process continued over several months, in accordance with CARU procedures.

In a typical procedure, once CARU determined that CSPI had raised issues CARU wished to pursue, a staff attorney would open a case, notify the advertiser of the complaint, and of CARU's independent concerns about the issue.[128] The advertiser would then be given the opportunity to respond in writing.[129] That response would be forwarded to CSPI, which, in turn, could comment on issues raised by the advertiser.[130] CARU would then issue its findings in a case report, which was provided to the participants.[131]

127. For example, NGK magazine, whose average reader is nine years old, ran at least three advertisements over the course of two years for T-rated video games, which violated NGK's own internal guidelines. Letter from John Q. Griffin, President, Mag. Group, Nat'l Geographic Soc'y, to Ellen J. Fried, Legal Consultant, Ctr. for Sci. in the Pub. Interest (Oct. 28, 2004) (on file with author) (stating that NGK's policy is to "only accept advertising for games rated "E"); *see* NAT'L GEOGRAPHIC KIDS, PRODUCTION, http://www.ngkclubhouse.com/natgeo_kids/NGK_MediaKit_PDFs/NGK_Production.pdf (last visited Feb. 18, 2006). The author complained directly to NGK editors regarding one of the instances. Letter from Ellen J. Fried, Legal Consultant, Ctr. for Sci. in the Pub. Interest to John Q. Griffin, President, Mag. Group, Nat'l Geographic Soc'y (Aug. 23, 2004) (on file with author). The author was informed that the inclusion was an oversight. Letter from John Q. Griffin, *supra*.

128. *See* NAT'L ADVER. REVIEW COUNCIL, *supra* note 93, § 2.2.

129. *Id.* § 2.5.

130. *Id.* § 2.6.

131. *Id.* § 2.9. Until recently, however, if one attempted to access case reports on CARU's Web site, a pop-up screen would inform the reader that a paid subscription was necessary. Nat'l Adver. Division, CARU Case Reports, http://www.nadreview.org/LatestCaru.asp?SessionID=672180 (type any advertiser's name, for example, "Wrigley," into the search field and click search; click on the PDF button for any file) (last visited Nov. 25, 2005). Members of

Finally, the case report would be followed by a press release.[132]

As can be gleaned from the press releases and the case reports, the advertisers:

- defended their advertisements as compliant with CARU guidelines;[133]
- disagreed with the issues raised both by the complainant and in CARU's findings;[134]
- argued that the advertisement had run its course or had only a few more appearances;[135]
- thanked CARU for the opportunity to participate in the process, reiterated its support for CARU and its regulatory authority;[136] and
- stated, in essence, that in the spirit of cooperation it would take CARU's advice into consideration for its next advertisements.[137]

CARU agreed with CSPI in five of the seven complaints raised.[138] In one of those five decisions, CARU noted that a loophole

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the press, however, were advised in press releases to contact CARU for a case report. *See, e.g.*, Press Release, Children's Adver. Review Unit, Masterfoods and CSPI Participate in CARU Process (Nov. 8, 2004), http://www.caru.org/news/2004/masterfoods_cspi.asp. Although reports may have been available to the public pursuant to CARU guidelines, nothing was done to promote that availability. Instead, every impression was given that access to the case reports was restricted. Finally, in an effort at consumer outreach, in July 2005, CARU added directions for requesting a case report by telephone or e-mail. *See, e.g.*, Press Release, Children's Adver. Review Unit, Wrigley Supports CARU by Agreeing to Prominently Disclose Free Means of Entry (Aug. 17, 2005), http://www.caru.org/news/2005/bubbletape.pdf ("Members of the press or general public who wish to view a copy of the decision, please contact Linda Bean, Director, Communication, at 212-705-0129, or at lbean@narc.bbb.org.").

132. *See, e.g.*, Press Release, Children's Adver. Review Unit, *supra* note 22 at 6.

133. *See, e.g.*, Arby's LLC, Arby's Adventure Meal, Children's Adver. Review Unit Case No. 4268, at 4–5 (December 10, 2004).

134. *See, e.g.*, Press Release, Children's Adver. Review Unit, Kraft and SPI Participate in CARU Process (Nov. 23, 2004), http://www.caru.org/news/2004/kraft.asp.

135. *See, e.g.*, *id.*

136. *See, e.g.*, CARU Case No. 4249, *supra* note 107, at 6.

137. *See also* Press Release, Children's Adver. Review Unit, *supra* note 22.

138. *Cf.* E-mail from Ellen J. Fried to Jeffrey Cronin, *supra* note 103 (noting CARU's reasons for rejecting the two complaints).

in the guidelines prevented it from complete agreement.[139] In another, CSPI's complaint was rejected apparently because CARU itself had already initiated a case based on the identical complaint.

Two of the seven complaints were rejected outright by CARU. In the first, a complaint about bubble gum that was being marketed to kids as "chewing tobacco" used by baseball players, CARU did not open a case because the product looked like gum.[140] CARU rejected CSPI's argument that children are being encouraged to imitate the unhealthful practice of chewing tobacco. In the second, CSPI had complained that images of animals being crushed when looking for the crème filling in a snack cake could be frightening to children. CARU rejected the claim, saying that the images were too cartoonish to be frightening, and unlikely to cause anxiety in children.[141]

CSPI issued a press release describing its letter to National Geographic as follows:

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139. Press Release, Children's Adver. Review Unit, Arby's Supports CARU by Agreeing to Use Affirmative Claims Only When Supported by Substantiation (Jan. 25, 2005), http://www.caru.org/news/2005/arbys.pdf. CARU agreed that the Arby's wrap cover blurred the distinction between editorial and advertising content, but stated that CARU guidelines refer only to advertising by program characters, and not the editorial content of the publication, such as in the Arby's case. *Id.* In an e-mail attachment dated August 10 , 2005, the author posed the following question to Elizabeth Lascoutx:

In Arby's, LLC, Arby's Adventure Meal (Case #4268 12/10/04) CARU stated that "it needs to revisit and reconsider the specific wording of the "Endorsement and Promotion" section of the guidelines." [sic] (p.8) in order to close a loophole encountered when a promotion that created the impression of endorsement did not specifically involve a program personality or educational character. Could you please describe the steps, if any, that CARU has taken to address this loophole in the guidelines?

E-mail from Ellen Fried, Research Assoc., Rudd Ctr. for Food Pol'y & Obesity, Yale Univ., to Elizabeth Lascoutx, Dir., Children's Adver. Review Unit (Aug. 10, 2005, 14:15:04 EST (on file with author). Lascoutx replied in an e-mail attachment dated August 15, 2005: "We are reviewing that section of the Guidelines with our academic advisors to come up with appropriate language." E-mail from Linda Bean, Dir. Comm., on behalf of Elizabeth Lascoutx, Dir., Children's Adver. Review Unit to Ellen Fried, Research Assoc., Rudd Ctr. for Food Policy & Obesity, Yale Univ. (Aug. 15, 2005, 10:42;00 EST (on file with author).

140. *See* E-mail from Ellen J. Fried to Jeffrey Cronin, *supra* note 103.

141. *Id.*

> CSPI today urged the Society to reject ads for low-nutrition, high-calorie foods which CSPI says put the magazine's young readers at greater risk for obesity, tooth decay, and other diet-related diseases. . . . *National Geographic Kids* (*NGK*), also runs very few articles about nutrition or healthy eating and shamelessly blends food advertising into its editorial content.[142]

As a result of CSPI's action, the New York Times published an article questioning food ads in *NGK*.[143] The article ran with a graphic that highlighted the extreme incongruity between the National Geographic Society's editorial policy and *NGK*'s advertising policy. It showed an image of the May 2004 issue of *NGK*, "wrapped in an ad for Arby's," juxtaposed with the *National Geographic*'s August 2004 cover story, "The Heavy Cost of Fat,"[144] that considered, inter alia, the impact of food advertising aimed at children.[145]

The Times article quoted Rainer Jenss, publisher of *NGK*, who stated that CSPI's criticisms would be reviewed "line by line."[146] He continued:

> We do accept advertising from these companies because, from a pure economic standpoint, they're the ones with the advertising budgets and the marketing dollars to reach kids this way. If this helps us to fulfill our mission to get information out to young people in a respectful way, and in a way that adheres to advertising and editorial guidelines, we will continue to do that.[147]

CSPI's exposure of junk-food advertising in *NGK* generated numerous articles and commentary around the world—an indication of both the heightened interest in the obesity epidemic facing children, and the global reputation of *National Geographic*. That interest continues; a Google search of the terms "*National*

142. Press Release, Ctr. for Sci. in the Pub. Interest, *supra* note 66.
143. Nat Ives, *Obesity and National Geographic*, N.Y. TIMES, July 21, 2004, at C6.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* (referring to ASME Guidelines, discussed in AM. SOC'Y OF MAGAZINE EDITORS, *supra* note 91).

Geographic Kids" and "obesity" returned 577 results in September 2005.[148]

V. HAVE ADVERTISERS ADHERED TO THEIR COMMITMENTS TO CARU?

At a recent workshop on children's advertising jointly sponsored by the Department of Health and Human Services (HHS) and the FTC, CARU's director stated: "We have a compliance rate of over 97 percent when we ask for modification."[149] She also stated: "We monitor over 1,000 commercials every month, along with print, online and radio [advertisements,] and we don't miss anything."[150] A review of recent CARU cases instigated by CSPI, and current advertising in children's magazines, demonstrates these statements are likely inaccurate.

The first issue is whether advertisers and food manufactures have, in fact, modified their advertising when CARU requested them to do so. In the case of Kraft and its advertisements for cereals that contain premiums for use on its Postopia advergaming Web site, the answer is no. As seen below in Table C, Kraft persisted for more than a year in running advertisements in which the premium, rather than the product, is the primary focus.[151] These ads continued to appear even after Kraft assured CARU that it would modify its advertising.[152]

148. Google, http://www.google.com (search "National Geographic Kids" and obesity") (last visited Nov. 12, 2005).

149. Elizabeth Lascoutx, Dir., Children's Adver. Review Unit, Remarks at the Joint Workshop of the Fed. Trade Comm'n and the Dep't of Health & Human Servs. on Perspectives on Mktg., Self-Regulation, and Childhood Obesity 39 (July 15, 2005), http://www.ftc.gov/bcp/workshops/foodmarketingtokids/transcript_050715.pdf.

150. *Id.*

151. *See* Press Release, Children's Adver. Review Unit, Kraft Supports CARU by Discontinuing Advertisement (Aug. 2, 2005), http://www.caru.org/news/2005/postokens.pdf.

152. *Compare* Press Release, Children's Adver. Review Unit, *supra* note 134 (noting that Kraft agreed to modify future advertisements by prominently featuring the product message over the premium), *with* Press Release, Children's Adver. Review Unit, *supra* note 151 (indicating Kraft advertisements again focused attention on the premium and not the product).

TABLE C: PERSISTENT VIOLATION OF CARU GUIDELINES BY KRAFT FOR POSTOPIA.COM

PUBLICATION AND DATE	AD COPY AND PROMOTION	COMPLAINT AND CITED GUIDELINE VIOLATION	GUIDELINE VIOLATION	CARU PRESS RELEASE	KRAFT RESPONSE TO CARU AND SOURCE
May 2004 NGK	Eat Cereal. Save the World. Create your own Justice League adventure at Postopia.com "With your Free powercard in marked boxes of Post Cereals, log on to postopia.com and unlock the adventure."[153]	None.	Yes.[154]	N/A	N/A

153. NAT'L GEOGRAPHIC KIDS, May 2004, at inside back cover (Post Cereal Justice League Advertisement).

154. *See* Letter from Michael F. Jacobson & Ellen J. Fried to John M. Fahey, Jr., *supra* note 85, app. at 9 (stating the advertisement is inconsistent with CARU guidelines because it focuses solely on the premium, and the Web site game is described as free, but requires review of a confusing explanation in order to play); CHILDREN'S ADVER. REVIEW UNIT, *supra* note 29, at 8.

TABLE C (CONTINUED)

PUBLICATION AND DATE	AD COPY AND PROMOTION	COMPLAINT AND CITED GUIDELINE VIOLATION	GUIDELINE VIOLATION	CARU PRESS RELEASE	KRAFT RESPONSE TO CARU AND SOURCE
March 2004 NGK	Get on the Fast Track to a Free* Racing Game. *Buy any marked box of Post Kids cereal and you can unlock the thrills of Speedway Challenge. Follow the track to your free game![155]	None.	Yes.[156]	N/A	N/A

155. NAT'L GEOGRAPHIC KIDS, Mar. 2004, at inside back cover (Post Cereal Speedway Challenge Advertisement).

156. *See* CHILDREN'S ADVER. REVIEW UNIT, *supra* note 29, at 8–9 (regarding premiums, promotions, and sweepstakes).

TABLE C (CONTINUED)

PUBLICATION AND DATE	AD COPY AND PROMOTION	COMPLAINT AND CITED GUIDELINE VIOLATION	GUIDELINE VIOLATION	CARU PRESS RELEASE	KRAFT RESPONSE TO CARU AND SOURCE
June 2004 NGK	"Want more Postokens? Just look inside these Post cereals for codes and log on to: Postopia.com"[157]	CSPI challenge. Focus on the premium rather than the product Need to purchase product to play games not clearly explained.[158]	Yes.[159]	"Kraft and CSPI Participate in CARU Process" CARU pleased to announce that Kraft agreed to modify future ads for products that offer premiums by prominently featuring product message over premium message.[160]	Does not agree with CARU findings, but will modify future ad. (press release).[161] Argued ad is discontinued, and is for Web site and not for product. (case report).[162]

157. NAT'L GEOGRAPHIC KIDS, June 2004, at inside back cover (Post Cereal "Want More Postokens?" Advertisement).

158. CARU Case No. 4243, *supra* note 112, at 2.

159. *See id.* at 2–3.

160. Press Release, Children's Adver. Review Unit, *supra* note 134.

161. *Id.*

162. CARU Case No. 4243, *supra* note 112, at 2.

TABLE C (CONTINUED)

PUBLICATION AND DATE	AD COPY AND PROMOTION	COMPLAINT AND CITED GUIDELINE VIOLATION	GUIDELINE VIOLATION	CARU PRESS RELEASE	KRAFT RESPONSE TO CARU AND SOURCE
February 2005 NGK	"Grab the Postoken code inside any box of these Post Kids cereals. Then log on to Postopia.com and catch the coolest Teen Titans episode you've never seen."[163]	None.	Yes.[164]	N/A	N/A

163. NAT'L GEOGRAPHIC KIDS, Feb. 2005, at 37 (Post Cereal Teen Titans Advertisement).

164. *See* CHILDREN'S ADVER. REVIEW UNIT, *supra* note 29, at 8–9 (CARU guidelines regarding premiums, promotions, and sweepstakes).

TABLE C (CONTINUED)

PUBLICATION AND DATE	AD COPY AND PROMOTION	COMPLAINT AND CITED GUIDELINE VIOLATION	GUIDELINE VIOLATION	CARU PRESS RELEASE	KRAFT RESPONSE TO CARU AND SOURCE
May 2005 NGK	"Now you can unlock the wackiest bloopers ever with a Postoken from one of your favorite cereals." "Use a code from one of your favorite Post cereals." Now showing at Postopia.com the fairly Odd Parents.[165]	None.	Yes.[166]	N/A	N/A

165. NAT'L GEOGRAPHIC KIDS, May 2005, at inside front cover (Post Cereal Bloopers Advertisement).

166. *See* CHILDREN'S ADVER. REVIEW UNIT, *supra* note 29, at 8–9 (CARU guidelines regarding premiums, promotions, and sweepstakes).

TABLE C (CONTINUED)

PUBLICATION AND DATE	AD COPY AND PROMOTION	COMPLAINT AND CITED GUIDELINE VIOLATION	GUIDELINE VIOLATION	CARU PRESS RELEASE	KRAFT RESPONSE TO CARU AND SOURCE
June 2005 SIK	Same advertisement as in the May 2005 NGK, directly above.[167]	CARU initiated challenge Focus on the premium rather than the product. Need to purchase product to play games not clearly explained.[168]	Yes.[169]	"Kraft Supports CARU by Discontinuing Advertisement" CARU pleased to announce Kraft has discontinued ad that might confuse children as to what is being advertised. Ads are for cereals since purchase is necessary to obtain Postokens.[170]	Intent to promote Web site, not the cereals. Ad has run course and will not run again.[171]

167. Nat'l Geographic Kids, *supra* note 165.
168. Press Release, Children's Adver. Review Unit, *supra* note 151.
169. CARU Case No. 0000 (June 29, 2005), *supra* note 114, at 2.
170. Press Release, Children's Adver. Review Unit, *supra* note 151.
171. *Id.*

Even though Kraft disagreed with CARU's finding in 2004, it nevertheless stated in the resolution of the 2004 complaint that it "appreciate[d] CARU's careful consideration of the issues raised here. While we do not agree with all aspects of its decision, we will modify our future children's advertising practices to conform to the CARU ruling.[172] CARU's press release trumpeted on November 23, 2004: "CARU . . . is pleased to announce that Kraft Foods Global, Inc. (Kraft) has agreed to modify future advertisements for its products that also offer premiums by prominently featuring the product message over the premium message."[173] Presumably, CARU counted this action as one of compliance with its request for modification, although this is not absolutely certain since CARU does not identify the cases included in the ninety-seven percent success figure quoted by its director.[174]

Then, in August, 2005, CARU issued a press release once again citing Kraft Postopia advertisements that violated CARU guidelines by focusing on the premium rather than the product.[175] The violation was the same as that complained about by CSPI in July 2004. This time the press release stated: "Kraft Supports CARU by Discontinuing Advertisement."[176] Neither the press release nor the case report mentions that Kraft had been previously cited for this same violation. Kraft's explanation was identical in both cases—it had intended to advertise the Web site rather than the cereals.[177] Moreover, CARU also complained about Kraft Cereal Postopia advertisements that ran in the June and July issues of various other children's magazines.[178] And, although not mentioned by CARU, the

172. CARU Case No. 4243, *supra* note 112, at 3.

173. Press Release, Children's Adver. Review Unit, *supra* note 134.

174. *See* Letter from Elizabeth Lascoutx, Dir., Children's Adver. Review Unit, to Donald S. Clark (Jun. 29, 2005), http://www.ftc.gov/os/comments/FoodMarketingtoKids/516960-00054.pdf.

175. Press Release, Children's Adver. Review Unit, *supra* note 151.

176. *Id.*

177. *Compare* CARU Case No. 4243, *supra* note 112, at 2, *with* CARU Case No. 0000, *supra* note 114, at 1.

178. CARU found that Kraft's advertisement for Post cereals, which appeared in the June edition of *Sports Illustrated for Kids*, SPORTS ILLUSTRATED FOR KIDS, June 2004, at 15 (Postopia Advertisement), focused on the premium rather than the product. Press Release, Children's Adver. Review Unit, *supra* note 151.

same advertisement also appeared in the May 2005 issue of *NGK*.[179]

Another advertiser, Kellogg's, has ignored CARU guidelines and the two CARU decisions condemning advertisements that promote premiums over product. Kellogg's placed an ad in the September 2005 issue of *NGK* that mimics the Kraft ads.[180] In this case, the premium—"pirate codes" found in specially marked boxes of Kellogg's cereals[181]—can be used to play games on both the Disney and Kellogg's Web sites.[182] The layout of the ad is almost identical to that used by Kraft. As in the Kraft Postopia cases, CARU held that the focus of the Kellogg's ad was on the premium found in the boxes of cereal, rather than on the cereal itself.[183] And, like Kraft in the Postopia cases, Kellogg's argued that the advertisement was intended to promote the Web sites, not the cereals.[184] Upon resolving the issue, CARU issued a press release dated November 1, 2005 with the headline "Kellogg Company Supports CARU by Discontinuing Advertisement."[185]

179. NAT'L GEOGRAPHIC KIDS, May 2005, at inside front cover (Postopia Advertisement).

180. NAT'L GEOGRAPHIC KIDS, Sept. 2005, at inside back cover (Kellogg's/Disney Virtual Magic Kingdom Advertisement).

181. The four cereals depicted in the advertisement are Cinnamon Krunchers, Rice Krispies, Apple Jacks, and Fruit Loops. *Id.*

182. *Id.* Readers are directed to look for "pirate-marked box[es] of Kellogg's cereal" for "secret pirate codes" that can enhance game play at a Disney's Virtual Kingdom online game site, vmk.com, or through Kelloggsfunktown.com. *Id.*

183. Kellogg Co., "You Can Get A Taste of Pirate Power," Children's Adver. Review Unit Case No. XXXX (July 28, 2005) (case available on request by contacting: Linda Bean, Dir. Comm., Children's Adver. Review Unit, at 212-705-0129, or at lbean@narc.bbb.org) [hereinafter CARU Case No. XXXX]. A pirate flag is prominently shown in the top center of the advertisement. NAT'L GEOGRAPHIC KIDS, Sept. 2005, at inside back cover (Kellogg's/Disney Virtual Magic Kingdom Advertisement). Below it is a banner stating "You Can Get a Taste of Pirate Power," followed by smaller text below containing instructions for using the games codes online. *Id.* The cereal products are depicted in a small section in the lower right-hand corner. *Id.* The pirate flag and instructions are all related to the premium of game codes that enhance online game play. *Id.* They have nothing to do with the actual cereal products themselves. *See id.*

184. CARU Case No. XXXX, *supra* note 183.

185. Press Release, Children's Adver. Review Unit, Kellogg Company Supports CARU by Discontinuing Advertisement (Nov. 1, 2005), http://www.caru.org/news/2005/kellogg.pdf.

For its part, Kellogg's stated that it would "modify [its] future children's advertising and promotional materials accordingly," and "remain committed to the self-regulatory process of CARU."[186] However, neither the press release nor the case decision makes any reference to identical infractions of the guidelines that had been the subject of two recent CARU formal inquiries.[187]

Any commitment to a regulatory process requires, at a minimum, that participants be familiar with both the guidelines themselves and the regulatory body's interpretation of those guidelines through case decisions. Advertisers such as Kellogg's and Kraft seem to be, innocently or willfully, ignorant of both.

Wrigley and its advertisements for Hubba Bubba Bubblegum Sweepstakes have also repeated guideline violations for which they were previously admonished by CARU.[188] CARU's press release for resolution of the complaint it initiated in July 2004 claimed "Wrigley Cooperates with CARU in Online Sweepstakes Advertising."[189] In reaching its decision, CARU stated that "[c]lear disclosure of the alternate means of entry is unequivocally necessary in advertising sweepstakes to children."[190] For its part, Wrigley stated:

> While we understand and acknowledge that communication of the Alternative Means of Entry should be legible and prominent, we believed that our advertising complied with this requirement. Nonetheless, in support of [CARU's] process, we have agreed to modify our Web site and to incorporate their concerns into our future print ads.[191]

This type of violation, however, has continued. CARU recently issued a press release dated August 17, 2005, with the headline: "Wrigley Supports CARU by Agreeing to Prominently Disclose Free

186. CARU Case No. XXXX, *supra* note 183.

187. *See* CARU Cases, *supra* notes 153–81 and accompanying text.

188. Wm. Wrigley Jr. Co., "The Big Score" Promotion, Children's Adver. Review Unit Case No. 4367 (July 28, 2005) (case available on request by contacting: Linda Bean, Dir. Comm., Children's Adver. Review Unit, at 212-705-0129, or at lbean@narc.bbb.org) [hereinafter CARU Case No. 4367].

189. Press Release, Children's Adver. Review Unit, Wrigley Cooperates with CARU in Online Sweepstakes Advertising (July 28, 2004), http://www.caru.org/news/2004/wrigley.asp.

190. *See* CARU Case No. 4204, *supra* note 118, at 2.

191. Press Release, Children's Adver. Review Unit, *supra* note 189.

Means of Entry."[192] In the related CARU decision, Wrigley stated that it "fully complied with the intention of the Guidelines, past CARU decisions and industry practices" but would nevertheless "take into account CARU's recommendations" to better comply with sweepstakes disclosures.[193] CARU had determined that the sweepstakes advertisement in question "did not explain how to enter without making a purchase clearly or prominently enough for a child to understand."[194] It added that "directions on entering the contest for free should be similar in size to statements such as 'Look Inside Specially Marked Packs . . . to See If You're A Winner.'"[195] CARU also found that "merely stating that 'no purchase is necessary,' even if the words were prominent, would not meet the requirement that 'the alternate means of entry' be disclosed in a prominent manner."[196] The press release did not mention that Wrigley had been admonished just one year earlier for the same guideline violation for a sweepstakes promotion involving the same product.[197]

Other companies routinely violate this guideline as well. For example, Skippy Peanut Butter ran an ad for a sweepstakes in the August 2005 issue of *Sports Illustrated for Kids* that directed children to "[l]ook for a code printed on inside specially marked Skippy Creamy or Super Chunk . . . labels."[198] The disclosure notice was printed in such tiny font that it was nearly impossible to read.[199] Although Skippy subsequently modified the advertisement for the September issue and increased the font size of the words "No purchase necessary,"[200] the disclosure notice remains similar to the notice CARU found unacceptable in the Wrigley sweepstakes cases.[201]

192. Press Release, Children's Adver. Review Unit, Wrigley Supports CARU by Agreeing to Prominently Disclose Free Means of Entry (Aug. 17, 2005), http://www.caru.org/news/2005/bubbletape.pdf.

193. CARU Case No. 4367, *supra* note 188, at 3.

194. Press Release, Children's Adver. Review Unit, *supra* note 192.

195. *Id.*

196. CARU Case No. 4367, *supra* note 188, at 3 n.2.

197. Press Release, Children's Adver. Review Unit, *supra* note 192.

198. *See* SPORTS ILLUSTRATED FOR KIDS, Aug. 2005, at 51 (Skippy Peanut Butter Advertisement).

199. *Id.*

200. SPORTS ILLUSTRATED FOR KIDS, Sept. 2005, at 19 (Skippy Peanut Butter Advertisement).

201. For example, the modified Skippy advertisement, like Wrigley's ads,

In October of 2004, CSPI again advocated for prominent disclosure notices in children's advertising in its complaint to CARU about a Wonka (Nestlé) sweepstakes campaign.[202] In CARU's press release about its decision, the manufacturer is quoted to have "understood CARU's findings and its requirement of more prominent and clear disclosure."[203] Subsequent ads for Wonka sweepstakes have been modified.[204] However, a visit to the Wonka Web site in September 2005 revealed a feature known as the "Second Chance" drawing in which entrants can win prizes unclaimed in the primary sweepstakes. A box on the Web site directs children to "[e]nter the password found inside non-winning specially marked Wonka 'Golden Ticket' candy packages" in a space provided for the password.[205] Directions on how to get a free game piece were on another page, buried in paragraph six,[206] in what CARU described in its sweepstakes commentary as "mice type."[207]

Masterfoods, Inc., manufacturers of M&M Mini's, did not agree with CARU's 2004 decision that the use of the term "for a limited time" created a sense of urgency to buy the product.[208] Masterfoods noted that while it "accept[s] CARU's decision on use of the phrase ‘limited time only’ in the context of this particular advertisement . . . The company noted that "[a]dvertisers . . . who must support grocery

still did not display the alternative method of entry in a prominent manner as required by CARU guidelines. *See supra* text accompanying notes 189–98.

202. The sweepstakes advertisement ran in the July/August 2004 issue of National Geographic Kids. CARU Case No. 4233, *supra* note 124, at 1. A PDF copy of the advertisement is available at http://cspinet.org/new/pdf/ngkad9.pdf.

203. Press Release, Children’s Adver. Review Unit, Nestlé and CSPI Participate in CARU Process (Oct. 12, 2004), http://www.caru.org/news/2004/nestle.asp.

204. *See, e.g.*, WONKA.com, Did you find the Golden Ticket?, http://www.wonka.com/goldenticket (last visited Oct. 18, 2005). “No Purchase Necessary” is the same size and style of font as “Look for specially-marked wrappers of Wonka candy for your chance to WIN.” *Id.*

205. *Id.* (“second chance” sweepstake entry box located at bottom right on webpage).

206. *Id*. The directions on how to get a free game piece can be accessed by selecting the button labeled “Click here for rules and how to get a free game piece.” *Id.*

207. CARU Case No. 4233, *supra* note 44, at 3; Children’s Adver. Review Unit, *supra* note 44.

208. CARU Case No. 4249, *supra* note 107, at 2.

store retailers, may have an obligation to note product availability limits in advertising."[209] To its credit, and in compliance with its pledge to modify its advertising, Masterfoods ran a children's promotion for M&M Mini's tied in to the *Star Wars* movie released in 2005 that did not include "limited time" language.[210] However, store displays for Mega M&M's, a product which is marketed to children on the M&M's Web site,[211] still contain the language "Limited Time Only" in bold letters in several prominent positions on the multi-tiered display.[212]

NGK continues its "adventure" with Arby's and continues to advertise its promotions using a combined logo for the two companies.[213] One joint promotion was an essay contest in which the Grand Prize was an "Arby's Adventure Party complete with a guest speaker from National Geographic."[214] Only in mice type at the very bottom of the page did the term "Arby's Adventure Meal Party complete with adventure speaker" appear, noting an approximate retail value of $3500.[215] No further information about the meal is provided.[216]

VI. MARKETING, *NGK*, AND THE FAILURE TO REGULATE.

NGK is a microcosm of the current state of integrated marketing. It is a world that is essentially uncontrolled, either in the traditional sphere of print ads and direct mail marketing, or in the burgeoning cyberworld. The foregoing discussion demonstrates that both CARU and *NGK* have failed to adequately review print advertisements before and after they appear in the magazine. The FTC has also failed to address an allegation of misleading marketing by *NGK* brought to its attention by CSPI in a petition filed in December

209. *Id.*
210. *See, e.g.*, Sports Illustrated for Kids, *supra* note 109.
211. M&Ms's.com, http://us.mms.com (last visited Oct. 15, 2005).
212. Mega M&Ms Store Display, *supra* note 110.
213. CARU Case No. 4268, *supra* note 110 (discussing the May 2004 issue of NGK with a wrap cover featuring a large oval with both Arby's and NGK's logos). A PDF copy of the advertisement is available at http://cspinet.org/new/pdf/ngkad9.pdf.
214. NAT'L GEOGRAPHIC KIDS, Jan. 2005, at 11 (Arby's Essay Contest Advertisement).
215. *Id.*
216. *Id.*

2004.[217] Specifically, CSPI complained in its petition that *NGK*:

> uses direct mail solicitations to build its subscription base by sending a sample "special issue" to potential subscribers, along with an accompanying order form and envelope. In September 2004, it sent a sample magazine containing 32 pages of articles about animals and the environment, with two order-form inserts attached inside. The cover featured a sea otter, and the words "Special Issue: Awesome Animals" were printed on the top right-hand corner. In all, the magazine resembled the typical monthly *NGK* in all respects except for one significant fact: it did not contain any advertisements.[218]

CSPI went on to note that neither the special magazine nor attached order form mentioned the presence of advertisements in every monthly issue of NGK.[219] The petition noted, for example, that the sixty-page November 2004 issue "include[d] 19 full-page and 4 third-of-a-page advertisements . . . the October 2004 issue included 15 full-page ads (including a fold-out ad), and one third-of-a-page advertisements, [and] the 52-page September 2004 issue contained 10 full-page advertisements, 3 half-page advertisements, and 3 third-of-a-page advertisements."[220] In other words, while the special edition was ad-free, approximately one-third of the pages of a typical *NGK* issue contain advertisements. This practice has continued in every *NGK* issue since.[221]

The ad-free special issue lures new subscribers and deceives them as well. One mother complained on a Web site message board:

> I am so annoyed over this. They [*NGK*] sent us a sample issue last year that we loved and our 6 [year old] loved. That issue contained no advertising. Based on that issue we decided to ask for a gift subscription from my parents, which they got for him. Since then, every issue has been

217. (Ctr. for Sci. in the Pub. Interest), Petition to Prohibit Deceptive Practices Before the Fed. Trade Comm'n (Dec. 1, 2004), *available at* http://cspinet.org/new/pdf/ngkpetition.pdf [hereinafter Petition to FTC].

218. *Id.* at 1.

219. *Id.* at 1–2.

220. *Id.* at 2.

221. *See id.* at 5 (observing that "a full one-third of the NGK monthly magazine consists of advertising, chiefly for junk food and sedentary products").

> loaded with glitzy advertising for junk food and media products, such as Game Boy with "Mild Fantasy Violence", cocoa puffs, and TV shows. Naturally our [son] is far more interested in the ads than the content of the magazine. We have asked them to cancel our subscription and issue a refund.[222]

CSPI petitioned the FTC "to block National Geographic from distributing ad-free sample issues of *National Geographic Kids* so long as the publication itself contains advertising."[223] It also requested the FTC to "[r]equire the National Geographic Society to offer refunds to current subscribers of *NGK*."[224] As of this writing, the FTC had not taken any action on CSPI's petition.

The Office of the Attorney General of the State of Michigan, however, did act. After receiving a copy of CSPI's petition,[225] the Assistant Attorney General (AAG) for the Consumer Protection Division wrote to *NGK* magazine.[226] The AAG requested a response to CSPI's allegations, because "the failure to disclose that regular issues will contain prominent food advertising, while providing an ad-free sample issue"[227] could constitute a deceptive practice under the Michigan Consumer Protection Act.[228]

Counsel for National Geographic defended the *NGK* mail solicitation on a plethora of grounds, ranging from high U.S. Postal Service rates for publications with advertising to the lack of parental

222. Posting of Mama Lori to MotheringDotCommune Forums, http://www.mothering.com/discussions/showthread.php?t=242792 (Jan. 28, 2005, 07:23 PST [hereinafter Posting of Mama Lori].

223. Press Release, Ctr. for Sci. in the Pub. Interest, National Geographic Deceives Parents, Says CSPI (Dec. 1, 2004), http://www.cspinet.org/new/200412011.html.

224. Ctr. for Sci. in the Pub. Interest, *supra* note 217, at 15.

225. Ctr. for Sci. in the Pub. Interest, *supra* note 217.

226. Letter from Tracy A. Sonneborn, Assistant Attorney Gen. for the State of Mich., Consumer Prot. Div., to National Geographic Kids Magazine (Dec. 29, 2004) (on file with author).

227. *See id.*

228. The Michigan Consumer Protection Act, in pertinent part, prohibits the following practices: "[f]ailing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer," MICH. COMP. LAWS § 445.903(s) (2005); and "[f]ailing to reveal facts that are material to the transaction in light of representations of fact made in a positive manner," MICH. COMP. LAWS § 445.903 (2005).

complaints.[229] Counsel argued that the failure to affirmatively disclose that the magazine contains advertising cannot be unlawful because it was not a material omission, that is, it made no difference to a potential subscriber.[230] In fact, counsel continued, if "the presence of advertising in our magazine were material to consumers, we would expect to see significant numbers of subscribers cancel their subscriptions."[231] She argued further that cancellations "are exceedingly rare for any reason, let alone objections over the presence of advertisements."[232] Counsel also asserted that *NGK*'s advertising is not a secret and would be "reasonably known" to any potential subscriber by perusing a magazine at the newsstand.[233]

Despite its insistence that the marketing campaign with an ad-free special issue of *NG Kids* was not unlawful, *NGK* informed the Michigan Attorney General that additional information had been added to the direct mail solicitation that "expressly states that the magazine contains advertising."[234] The new direct mail subscription form contains the following notification, in "mice type":

> The enclosed selection of stories and pictures from recent issues of *NG Kids* is intended to introduce you to the kinds of articles and photography that you can expect in every issue of our magazine. You won't find advertising in this special issue, but you'll find ads from leading companies in each issue of *NG Kids*. Support from our subscribers and leading advertisers helps underwrite National Geographic's initiatives in exploration, field science, conservation, and geography.[235]

While this statement may serve to satisfy the legal issues raised by CSPI, it hardly informs parents of the extent or nature of

229. Letter from Angela M. Moore, Vice President and Associate General Counsel, National Geographic Society, to Tracy A. Sonneborn, Assistant Attorney General for the State of Michigan, Consumer Protection Division (February 1, 2005). *But see* Posting of Mama Lori, *supra* note 222 and accompanying text.

230. Letter from Angela M. Moore to Tracy A. Sonneborn, *supra* note 229.

231. *Id.*

232. *Id.*

233. *Id.* (internal quotation marks omitted).

234. *Id.*

235. *Subscription form*, NAT'L GEOGRAPHIC KIDS (2004) (Promotional Issue).

advertising encountered in *NGK*.

Misuse of direct mail marketing is just one misleading advertising technique employed by *NGK*. The *NGK* Web site is used to augment the print advertisements in its magazine with a "clubhouse"[236] that is nothing of the sort. It is simply a marketing technique by which *NGK* entices its youthful readers to revisit advertising they have already been exposed to in the pages of its magazine.[237] The clubhouse is also used to promote advertisers' sweepstakes and contests that children might first see in the magazine.[238] The clubhouse ad urges children to visit the advertiser's site where they can enter those contests.[239]

Entry to the clubhouse is through a small door on the lower right hand corner of the *NGK* Web site.[240] Although the word "advertisement" does appear above the door, the disclosure must compete with the lure of the animated mountain climber scaling the doorway, the enticement of entering a clubhouse, and the croaking frog who appears when a computer mouse is placed over the doorway.[241] As a result, it is unlikely children even notice the disclosure. Children enter the door with a mouse click on the frog, and find themselves in a room with a combination of objects.[242] Some are advertisements and some are not. For example, if a child

236. National Geographic Kids Clubhouse, http://www.ngkclubhouse.com/index.htm (last visited Oct. 18, 2005).

237. The NGK clubhouse Web site presents a picture of a clubhouse with toys, animals, and other objects, some of which are clickable links to product advertisements or sweepstake entry forms. *Id.* CARU guidelines caution advertisers that "[i]n advertising to children, care should be taken not to mislead them into thinking they are joining a club when they are merely making a purchase or receiving a premium." CHILDREN'S ADVER REVIEW UNIT, *supra* note 29, at 8–9; KELLEY, *supra* note 12, at 23–24 (stating that before using the word club, the minimum requirements of interactivity, continuity (newsletters) and exclusivity should be met).

238. *See, e.g.*, Purell Contest, http://www.ngkclubhouse.com/PDFs/images/PurellContest.pdf (last visited Oct. 18, 2005) (the everyday Explorer challenge); Robots Contest, http://www.ngkclubhouse.com/PDFs/Robots_Contest.pdf (last visited Oct. 18, 2005) (a contest to win a free home entertainment center).

239. For example, clicking on the Gameboy picture in the clubhouse will bring up an entry form for a sweepstakes for Gameboy Advance games. *Id.*

240. Nat'l Geographic Kids, Home Page, http://www.nationalgeographic.com/ngkids/index.html (last visited Oct. 16, 2005).

241. *Id.*

242. National Geographic Kids Clubhouse, *supra* note 236.

clicks on a cat or a crab, those objects become animated but do not lead to other Web sites. However, when a child clicks on a colorful gum ball machine or television set representing one of the advertisers that appear in *NGK* magazine, he or she is transported to that advertiser's Web site.[243] Further, the objects themselves are not disclosed as links to sponsored advertisement Web sites. Rather, they are designated, somewhat generically, as "Web site link[s]."[244] Once the child is transferred to the advertiser's Web site, he or she is invited to play online games for children known as advergaming.[245] Thus, parents who allow their children to visit the *NGK* Web site might be unaware that they are exposed to advertising and advergaming on an ever-changing variety of commercial Web sites.[246]

CARU's director stated at the FTC workshop that it has been looking into advertising related to advergaming, and will be issuing a report on the subject in the fall of 2005.[247]

VII. CONCLUSION: CAN SELF-REGULATION EFFECTIVELY REGULATE ADVERTISING TO CHILDREN?

The question of whether self-regulation can effectively regulate advertising to children is too broad an issue to be definitively answered within the context of this case study. However, the cases considered here present a snapshot of the evolution of children's advertising and CARU's attempts to keep up with those changes. The advertising world continually evolves and adapts to changing pressures, as seen in the way it has embraced the internet and digital communications. CARU's guidelines, however, have remained relatively unchanged with the exception of internet privacy

243. For example, clicking on the Lego block on the floor of the clubhouse will bring up http://www.lego.com in a separate browser window. *Id.*

244. *Id*.

245. For example, clicking on the Frigo CheeseHeads logo on a table top in the clubhouse leads to the Frigo CheeseHeads Web site. *Id.* There, three prominent and colorful links tout “Game Zone,” “Print n’ Play,” and “Flavor-ites,” along with the product logo and the animated character. Frigo CheeseHeads Home Page, http://www.frigocheeseheads.com/FrigoCheeseHeads/client/en/home/home.asp (last visited Oct. 16, 2005).

246. *Id.*

247. Lascoutx, *supra* note 149 (“Similarly, this last May, CARU convened a task force to develop an appropriate approach to advergaming and we expect its recommendations later this fall.”).

provisions related to children. Similarly, CARU's enforcement of its guidelines has remained unchanged; the emphasis has been upon the method rather than the content of the message.

When focusing on food advertisements directed to children, CARU's lack of attention to nutritional issues becomes apparent. Advertisements for sugary breakfast cereals and candies have remained the core of advertising aimed at children (and the focus of nutritional advocates' ire) since the 1970's. Still, the White Paper concludes that the guidelines "adequately address" nutritional issues. Even assuming, for the sake of argument, that is true, the paltry number of food related cases investigated by CARU may be interpreted either as evidence of an industry extraordinarily compliant with self-regulation, or a self-regulatory body otherwise engaged. In addition, claims of a 97% compliance rate are likely overstated. In this article, for example, five of the advertisers that participated in the self-regulatory process promised to modify their advertising techniques. Of those five promises at least two were quickly broken on more than one subsequent occasion.

Advertisers continue to ignore CARU cases and commentaries about sweepstakes advertising despite CARU's repeated efforts to stop abuses throughout its thirty year history. Sweepstakes clearly increase product sales to children, and are popular with children. Since CARU has no power to fine or otherwise punish advertisers, it appears that many are quite willing to continue using misleading and deceptive techniques that increase sales. When called to task, these advertisers succeed in satisfying CARU's concerns with pacifying statements or minor, temporary adjustments to advertising techniques.[248]

One recent positive change toward enforcement is CARU's efforts to make all of its decisions more readily available to the public. This opens up a greater number of advertisements for review and provides consumers and the press increased opportunity to determine whether promises to modify offending advertising have been kept.[249]

But with no power to enjoin specific ads from running, and no ability to sanction advertisers that break the rules, CARU cannot

248. *See supra* text accompanying notes 149–216.
249. *See supra* text accompanying notes 153–88.

effectively regulate the industry. Several years ago, CARU's director described its enforcement dilemma as follows: "Some of our guidelines have no backup in law, so somebody can actually blow us off and all we do is publish the results and give them bad publicity . . . ."[250]

In the case of sweepstakes and contest advertisements aimed at children, that indeed seems to be the attitude many advertisers adopt. And, rather than suffering from bad publicity, advertisers that have repeatedly violated CARU guidelines are instead praised by CARU in press releases for participating in the self-regulatory process.[251]

Commentators who espouse the view that advertising industry self-regulation is alive and working well often point to the industry's acceptance of and voluntary cooperation in the process.[252] With regard to the industry's voluntary cooperation in the process, that view is accurate. However, there is a lack of adherence to the guidelines and case decisions issued by the industry's self-regulatory body. This study's review of advertisers' compliance with case reports demonstrates that the success rate claimed by CARU, and therefore the effectiveness of the process itself, cannot be substantiated.

250. Elizabeth L. Lascoutx, *Children's Advertising Review Unit*, 16 ST. JOHN'S J. LEGAL COMMENT., 649, 650 (2002).

251. *See, e.g.*, *supra* text accompanying notes of 90–148.

252. *See* Edelstein, *supra* note 12, at 509–10.