RESTRICTING THE MARKETING OF JUNK FOOD TO CHILDREN BY PRODUCT PLACEMENT AND CHARACTER SELLING

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I. INTRODUCTION

This Article argues that certain marketing practices—specifically product placements and the use of popular characters to promote products—are deceptive when used to market to children. It argues that such practices should therefore be prohibited by federal law and further, that such a law is consistent with the First Amendment.

Parts II and III describe the practices of product placement and spokes-character marketing and the limited extent to which these practices have been regulated. Because these forms of marketing are increasingly being used to market junk foods to children, and because the federal regulatory agencies have done little to stop these practices, Part IV concludes that legislation restricting product placement and character marketing to children is needed. To determine whether such legislation would be constitutional, Part V summarizes and applies the leading Supreme Court commercial speech cases. After reviewing research on whether product placement and character marketing are deceptive, it concludes that the Supreme Court will likely find the proposed legislation constitutional under the first prong of the *Central Hudson* test, which permits the prohibition of misleading or deceptive commercial speech.[1] Part V further argues that legislation prohibiting product

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1. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557,

placement and character marketing to children would be consistent with the concerns underlying the commercial speech doctrine, because its effects would be limited primarily to children and because it would limit only certain forms of advertising that lack significant informational value. Part VI addresses how such legislation would contribute to the reduction of childhood obesity, and Part VII examines whether such legislation would be workable.

II. PRODUCT PLACEMENTS

"Product placement is a form of promotion in which advertisers insert branded products into programming in exchange for fees or other consideration."[2] Product placement takes three basic forms: (1) visual, i.e., where a product, logo, or sign is shown; (2) auditory, i.e., where the product is mentioned; or (3) where the product is used or plays a role in the program.[3] Although product placement has been used for decades, it has become much more prevalent in the past few years.[4]

563 (1980).

2. Letter from Mary K. Engle, Assoc. Dir. for Adver. Practices, Fed. Trade Comm'n [FTC], to Gary Ruskin, Exec. Dir., Commercial Alert (Feb. 10, 2005), http://www.ftc.gov/os/closings/staff/050210productplacemen.pdf.

3. *See* Matthew Savare, *Where Madison Avenue Meets Hollywood and Vine: The Business, Legal, and Creative Ramifications of Product Placements*, 11 UCLA ENT. L. REV. 331, 356 (2004). The placement of AOL in the movie *You've Got Mail* is an example of the third category. *See* John A. McCarty, *Product Placement: The Nature of the Practice and Potential Avenues of Inquiry*, *in* THE PSYCHOLOGY OF ENTERTAINMENT MEDIA: BLURRING THE LINES BETWEEN ENTERTAINMENT AND PERSUASION 45, 47 (L.J. Shrum ed., 2004). Reality television shows, in particular, have been able to incorporate products into the storyline. For example, "entire episodes [of *The Apprentice*] have been built around Procter & Gamble Co.'s Crest Refreshing Vanilla Mint toothpaste, Levi Strauss & Co. denim jeans and Pepsi-Cola North America's Pepsi Edge." Meg James, *Products Are Stars in New Ad Strategy*, L.A. TIMES, Dec. 2, 2004, at C1. A recent example is the starring role to be played by Levi jeans in the Warner Brothers film based on the book, *The Sisterhood of the Traveling Pants*. *See* Matthew Creamer, Sisterhood of the Traveling Pants *a Good Fit for Levi's*, MADISON & VINE, June 15, 2005, http://www.adage.com/MadisonandVine (subscription required).

4. The practice of product placement in the movies began in the 1940s. McCarty, *supra* note 3, at 46. However, it was the phenomenal success of the 1982 placement of Reese's Pieces in the film *E.T.* that is credited for increasing advertisers' interest in product placement. *See, e.g.*, Savare, *supra* note 3, at 333. The increased use of product placement in television was fueled by the success of Junior Mints' placement in *Seinfeld*. Sharmistha Law

A. The Practice of Product Placement

Product placement has become big business. The amount of money spent on product placement increased from $190 million in 1974 to $3.458 billion in 2004.[5] From 1999 to 2004, the overall product placement market grew at a compound annual rate of 16.3%.[6] Product placement spending in 2005 is expected to increase 22.7%, to a total of $4.24 billion.[7]

Today, "there is a conscious and coordinated effort on the part of content creators, production companies, studios, marketers, and manufacturers to integrate products into entertainment programming in a systematic, efficient and persuasive manner."[8] Over one hundred specialized advertising agencies are devoted to product placement.[9] Several different services have been developed to measure product placement impact.[10] Most movie and TV studios have product placement departments.[11] One study found that as many as fifteen branded products appear in every half hour of network programming and that 40% of these are product placements.[12]

& Kathryn A. Braun-LaTour, *Product Placements: How to Measure their Impact*, *in* THE PSYCHOLOGY OF ENTERTAINMENT MEDIA: BLURRING THE LINES BETWEEN ENTERTAINMENT AND PERSUASION, *supra* note 3, at 63, 63.

5. PQ MEDIA LLC, PRODUCT PLACEMENT SPENDING IN MEDIA 2005: EXECUTIVE SUMMARY 6 (2005).

6. *Id.*

7. *Id.* at 8.

8. Savare, *supra* note 3, at 334.

9. JULIET B. SCHOR, BORN TO BUY: THE COMMERCIALIZED CHILD AND THE NEW CONSUMER CULTURE 78 (2004).

10. Nielsen Product Placement Service catalogs and counts all visual and audio references to products during prime time entertainment programming on the six major TV networks and reports how many viewers were watching the program at the time of the product mention or appearance. Anna Heinemann, *TNS Launches Product-Placement Measuring Service*, ADAGE.COM, June 21, 2005, http://www.adage.com/search.cms (search "heinemann") (subscription required). In June 2005, TNS Media Intelligence launched its Branded Entertainment Reporting Service. *Id.* IAG Research offers In-Program Performance, yet another service for measuring the impact of product placement. *Id.* CinemaScore is used to calculate placement fees for product placements in movies. *See* Law & Braun-LaTour, *supra* note 4, at 66.

11. Law & Braun-LaTour, *supra* note 4, at 64.

12. *Id.* (citing R.J. Avery & R. Ferraro, *Verisimilitude or Advertising? Brand Appearances on Prime-Time Television*, 34 J. CONSUMER AFF. 217, 217 (2000)).

Analysts have posited many reasons for the increase in product placement. Sharmistha Law and Kathryn Braun-LaTour summarize the advantages of product placement:

> Practically, placements appear to be a good deal for manufacturers: They often cost less than traditional advertising, appear in a low clutter environment, appeal to a worldwide audience, get recycled with the program, imply a celebrity endorser, and are in an optimal environment where consumers are captive to the product's placement (no remotes!).[13]

Moonhee Yang and Beverly and David Roskos-Ewoldsen note that placing products in movies or television programs allows advertisers to target very specific audiences.[14] Furthermore, product placements have a longer life than traditional commercials since movies can remain popular for many years, are often shown on television and are available for sale or rental on tape or DVD.[15] Likewise, television programs are often rerun and increasingly may be available on DVD.

Namita Bhatnagar, Lerzan Aksoy and Selin Malkoc note the advantages of product placement over both unpaid publicity and traditional advertising: product placement is superior to free publicity because it gives the sponsor control over the message, while, at the same time, it is also superior to traditional advertising in that "[p]laced messages, which are paid for but do not identify the message sponsor, have the potential to overcome consumers' skepticism toward advertisements."[16] Yang and Roskos-Esoldsen note that audiences are less skeptical and more receptive because product placement is not perceived as an advertisement.[17] John McCarty also notes that traditional advertising messages are interpreted in the context of the awareness that advertising is

13. Law & Braun-LaTour, *supra* note 4, at 64.

14. *See* Moonhee Yang et al., *Mental Models for Brand Placement*, *in* THE PSYCHOLOGY OF ENTERTAINMENT MEDIA: BLURRING THE LINES BETWEEN ENTERTAINMENT AND PERSUASION, *supra* note 3, at 79, 80–81.

15. *See id.* at 81.

16. Namita Bhatnagar et al., *Embedding Brands within Media Content: The Impact of Message, Media and Consumer Characteristics on Placement Efficacy*, *in* THE PSYCHOLOGY OF ENTERTAINMENT MEDIA: BLURRING THE LINES BETWEEN ENTERTAINMENT AND PERSUASION, *supra* note 3, at 99, 104.

17. *See* Yang et al., *supra* note 14, at 81.

persuasive communication, and that normal skepticism is reduced when viewers see a product in the context of a story.[18] He concludes that "a good product placement may be one that fits with the story in such a way as to make us forget that it is there to persuade us."[19]

Product placement is also seen as a response to new technologies that allows consumers to avoid watching traditional advertisements on television. An article in the *New York Times* describes the goal of product placement as "regain[ing] the attention of consumers who can avoid advertising by using digital video recorders, satellite radio and digital juke boxes."[20] Digital video recorders (DVRs) such as TiVo, and remote controls allow viewers to skip over traditional advertisements. A study by Media Planning Group "found that 90% of people with DVRs skip commercials in recorded programming—and just 16% watch the ads when viewing live TV, rather than doing something else or channel hopping."[21]

We can expect to see even more product placement in the future. CBS Chairman Les Moonves recently told investors to expect "a quantum leap in the number of products integrated into your television shows this year."[22] AdAge reports that "a growing number of marketers want to persuade the nation's print magazines to open the text of their editorial pages to product placements."[23] And a PQ Media Special Report notes that "[t]o compensate for [advertisers'] perception of diminished advertising returns" from traditional television spot advertising, "marketers have substantially ratcheted up the role of product placement in their buying strategies. . . . And this is a trend we expect to continue in the

18. *See* McCarty, *supra* note 3, at 49–50.

19. *Id.* at 50–51. *See also* Letter from Gary Ruskin, Exec. Dir., Commercial Alert, to Donald Clark, Sec'y, FTC, (Sept. 30, 2003) (on file with Commercial Alert) ("advertisers have found embedded ads to be effective, precisely because viewers are off guard").

20. Stuart Elliot, *More Products Get Roles in Shows, and Marketers Wonder if They're Getting Their Money's Worth*, N.Y. TIMES, Mar. 29, 2005, at C3.

21. Theresa Howard, *Product Placement in TV Shows Moves Out of Background*, USA TODAY, Oct. 14, 2004, at B3.

22. John M. Higgins, *Moonves: Prepare for Plugs Aplenty*, BROADCASTING & CABLE, June 13, 2005, at 4.

23. Jon Fine, *Marketers Press for Product Placement in Magazine Text: Call for End of Strict Separation Between Advertising and Editorial Content*, ADAGE.COM, Apr. 12, 2004, http://www.adage.com (subscription required).

foreseeable future."[24]

Product placement is common in children's movies. For example, Walt Disney Pictures' *Herbie: Fully Loaded* has been described as "a product-placement movie gone wild."[25] In *Spider-Man*, Spider-Man uses his web-spinning power to retrieve a Dr. Pepper.[26] Other recent examples of children's movies with paid product placement include *Madagascar* (Coca-Cola, Denny's), *Scooby-Doo 2* (Burger King, Gatorade), *Fantastic Four* (Burger King, Pepsi, Kool-Aid, Mountain Dew, Oscar Meyer), and *Spider-Man 2* (Dr. Pepper, Fritos, Pop-Tarts).[27]

Product placements are also common in television programs that children watch.[28] *American Idol*, in which the judges sip Coca-Cola, is one of the most commonly cited examples.[29] Another example is the appearance of Canada Dry vending machines (which do not actually exist) on *Buffy the Vampire Slayer*.[30] NBC's *American Dreams*, another top show among child viewers, featured Campbell's

24. PQ MEDIA LLC, *supra* note 5, at 5.

25. Ross Johnson, *Product Placement for the Whole Family*, N.Y. TIMES, July 6, 2005, at E5 (describing one of many product placements: "The only time Ms. Lohan/Peyton touches food or drink is when she pulls a prominently displayed bottle of Tropicana orange juice from a kitchen refrigerator. In a scene 20 minutes later, Maggie enters the kitchen growling at another character, 'If you touched that orange juice, I'll kill you.'").

26. CTR. FOR SCI. IN THE PUB. INTEREST, PESTERING PARENTS: HOW FOOD COMPANIES MARKET OBESITY TO CHILDREN (2003), *available at* http://cspinet.org/new/pdf/pages_from_pestering_parents_final_pt_1.pdf.

27. *See* Brand Channel Films, http://www.brandchannel.com/brandcameo_films.asp (last visited Oct. 22, 2005). This Web site notes that some children's movies also feature brands as a joke. *See id.* For example, the site describes *Shrek 2:* "While free of 'real' brands, this land of make believe does make fun. From Olde Knavery and Versarchery to Farbucks coffee, Baskin Robinhood and Burger Prince, many jokes require knowledge of non-fairytale brands." *Id.* (follow "2004" hyperlink). "*See also* Kokogiak, http://www.kokogiak.com (last visited Oct. 22, 2005) (documenting product tie-ins with the movies *The Cat in the Hat*, *The Incredibles*, and *The Hulk*).

28. Teens are also targeted by product placements. *See*, e.g., Abbey Klaassen, *MTV Changes Strategy to Embrace Product Integration*, MADISON & VINE, July 11, 2005, http://www.adage.com/MadisonandVine/ (describing how Domino's Pizza, Burger King, Coca-Cola and others are integrating brands into MTV programming) (subscription required).

29. *See, e.g.*, Katherine Neer, *How Product Placement Works*, http://money.howstuffworks.com/product-placement.htm (last visited Oct. 22, 2005).

30. CTR. FOR SCI. IN THE PUB. INTEREST, *supra* note 26, at 21.

tomato soup in nine episodes during the 2004-05 season.[31] The daughter on the 1960s era drama entered a Campbell's-sponsored essay contest and the family ate a large quantity of tomato soup.[32] Cans of Campbell's tomato soup are also seen "in the kitchen, in commercials on a black-and-white TV, and in the hands of a young artist visiting a college campus."[33] *Meet Mister Mom*, a reality show that began airing on NBC in the summer of 2005, in which dads compete to run the most efficient household, was actually produced by an advertising agency specifically for the purpose of promoting products.[34]

Product placement is not limited to movies and television. Some Web sites targeting children and teens also carry product placements. For example, the Neopets Web site, which claims to have twenty-five million mostly "tween-aged" visitors,[35] allows children to create and care for a pet by purchasing food, toys, and medicines using "Neopoints," which are obtained by playing games, visiting stores on the site, and completing surveys.[36] A child may visit the McDonald's shop or the Disney Theater on the Neopets site.[37] Once at the McDonald's shop, children can play games and win McDonald's French fries for their neopet.[38] The Habbo Hotel site, "a teen-targeted animated Web world where users can play games, chat and customize characters and rooms," has integrated a number of brands into its site, including Pepsi and Mountain Dew.[39]

31. Beth Gillin, *Product Placement Turns TV Programs into Commercials*, PHILA. INQUIRER, Jan. 23, 2005, at A1.

32. *Id.*

33. *Id.*

34. *See* Tara Weiss, *Advertiser's Television*, J. NEWS, Aug. 19, 2005, *available at* http://www.thejournalnews.com/apps/pbcs.dll/article?AID=/2050816/BUSINESS/508160367/1066 (log-in required).

35. *See* Hilary Potekewitz, *Big Media Paying Big to Find Kids*, L.A. BUS. J., Aug. 1, 2005, at 1.

36. *See* Welcome to Neopets!, http://www.neopets.com (last visited Oct. 22, 2005) (log-in required). Neopets is an interesting example of both product placement and character marketing, as the Neopets characters have also been included in McDonald's Happy Meals.

37. *See* Neopets McDonald's Page, http://www.neopets.com (follow "shops" hyperlink; then follow "McDonald's shop" hyperlink (last visited Oct. 24, 2005); Neopets Disney Theatre, http://www.neopets.com (follow "shops" hyperlink; then follow "Disney Theatre" hyperlink (last visited Oct. 24, 2005).

38. *See* Neopets McDonald's Page, *supra* note 37.'

39. T.L. Stanley, *Online Habbo Hotel Targets U.S. High-Schoolers*,

Video games are likely to become another important venue for product placement targeting children and teens. Samsung, which has prominent product placement in the movie *The Fantastic Four*, has also entered into an agreement with video game maker Activision to integrate its brand and products into the video game for the movie.[40] Massive, an advertising agency, is placing products in computer and video games for such advertisers as Dunkin' Donuts and Coca-Cola.[41] According to Massive's CEO, "[a]dvertising is seamlessly integrated into games [and] takes many forms: billboards, posters, branded messages on delivery trucks and computer and TV screens."[42] Massive uses technology that allows different advertisements to be inserted depending on time of day, geography, or other factors.[43]

Product placement is also turning up in other, less-expected places. In recent years, a number of counting and activity books for very young children have featured branded snack foods and cereals.[44] McDonalds recently hired a marketing firm to encourage hip-hop artists to integrate the Big Mac into their songs.[45]

MADISON & VINE, Feb. 2, 2005, http://www.adage.com/MadisonandVine (subscription required).

40. Beth Synder Bulik, *Samsung Reloaded is Back in the Movie Game*, MADISON & VINE, June 28, 2005, http://www.adage.com/MadisonandVine (subscription required).

41. *See* Matt Richtel, *A New Reality in Video Games: Advertisements*, N.Y. TIMES, Apr. 11, 2005, at C1.

42. T.L. Stanley, *Making a Game of Marketing*, MADISON & VINE, May 18, 2005, http://www.adage.com/MadisonandVine (subscription required). Massive reaches the core gamer population, which consists of over seventy percent of males ages eighteen to thirty-four. *Id.* Children in the U.S. spend an average of forty-nine minutes per day playing video games. DONALD F. ROBERTS ET AL., THE HENRY J. KAISER FAMILY FOUND., GENERATION M: MEDIA IN THE LIVES OF 8–18 YEAR OLDS 31 (2005).

43. Stanley, *supra* note 42. This technology also allows advertisers to monitor the behavior of the gamers. *Id.* For a discussion of the deal between Nike and Take-Two Interactive Software to cross-promote Nike shoes and the basketball videogame NBA 2K6, see also Marc Graser, *Nike Ramps Up Video-Game Product Placements*, ADAGE.COM, Sept. 28, 2005, *available at* http://www.adage.com (subscription required). The game will also feature Nestle's energy bars and Gatorade signage on the sidelines. *Id.*

44. *See* SCHOR, *supra* note 9, at 78–79.

45. Marc Graser, *McDonald's Buying Way into Hip-Hop Song Lyrics*, MADISON & VINE, Mar. 28, 2005, http://www.adage.com/MadisonandVine (subscription required). McDonald's will pay a certain amount for each time a

A substantial number of the products placed in children's media are foods of low nutritional value.[46] PQ Media found that "marketers in the food & beverage, house & home, and health & beauty categories account for more than half of all physical product placements [in 2004]."[47] Food or beverage products frequently appear in the top-ten lists of product placements.[48] Additionally, the recent report by the Institute of Medicine titled "Food Marketing to Children and Youth: Threat or Opportunity?" found that marketers increasingly employed product placement, across multiple forms of media, to market food and beverages to children and youth.[49]

B. The Regulation of Product Placement

Product placements have been largely unregulated except for those that appear on broadcast television or radio, which is regulated to a limited extent by the Federal Communications Commission (FCC). Section 317 of the Communications Act requires that television and radio stations make on air disclosures of product placements.[50] The FCC has explained the rationale underlying

song is played on the radio. *Id.* This article notes that radio airplay not only extends the reach of the brand, but "[i]f a song is getting a lot of airplay, there's a strong likelihood it will be played in clubs, be downloaded, be turned into a ringtone and sell more CDs." *Id.* (quoting Tony Rome, President-CEO, of Maven Strategies).

46. *See* CTR. FOR SCI. IN THE PUB. INTEREST, *supra* note 26, at 10.

47. PQ MEDIA LLC, *supra* note 5, at 7.

48. *See, e.g.*, *IAG Top 10 Most-Recalled Product Placements in Network Sitcoms, Feb. 14–Mar. 13, 2005*, MADISON & VINE, Mar. 16, 2005, http://www.adage.com/MadisonandVine (subscription required) (Hostess's Twinkie in NBC's Scrubs ranked second); *Nielsen Product Placement Report: Coke Classic Tops List for Week of May 9–15, 2005*, MADISON & VINE, June 1, 2005, http://www.adage.com/MadisonandVine (subscription required) (Coca-Cola Classic appeared 111 times; PepsiCo's Gatorade ranked second with 92 appearances, and Sierra Mist ranked seventh with 54 appearances).

49. COMM. ON FOOD MKTG. & THE DIETS OF CHILDREN & YOUTH, INST. OF MED., FOOD MARKETING TO CHILDREN AND YOUTH: THREAT OR OPPORTUNITY? 162–67 (J. Michael McGinnis et al. eds., The National Academies Press 2006), *available at* http://www.nap.edu/books/0309097134/html/R1.html.

50. 47 U.S.C. § 317 (2000). Disclosure is generally required whenever a station broadcasts matter in exchange for "any money, service or other valuable consideration." *Id.* § 317(a)(1). Section 508 requires that any person who supplies a program to a broadcast station shall disclose whether payment has been made for the inclusion of any program matter. *Id.* § 508. In cases of

Section 317 is that "an advertiser would have an unfair advantage over listeners if they could not differentiate between the program and the commercial message and were, therefore, unable to take its paid status into consideration in assessing the message."[51] The non-profit group, Commercial Alert, has alleged that television networks have not complied with Section 317's disclosure requirements for product placement.[52] Commercial Alert calls on the FCC to investigate current product placement practices and to update its rules to address these practices.[53] Although Commercial Alert's request for investigation has been pending for over two years, the FCC has taken no action in response.[54]

The FCC also prohibits product placement in programs originally produced and broadcast primarily for children ages twelve and under.[55] In 1971, the FCC initiated a wide-ranging inquiry into children's programming and advertising practices at the request of Action for Children's Television (ACT).[56] This inquiry resulted in the issuance of the 1974 Children's Television Report and Policy Statement.[57] While the FCC declined ACT's request to eliminate all commercials on programs designed for children and to prohibit any other use or mention of any product by brand name, it nonetheless

such disclosure, Section 317(b) requires stations to make an announcement regarding the payment. *Id*. § 317(b). In addition, station licensees are required to "exercise reasonable diligence" to obtain the information they need to make an appropriate announcement. *Id.* at § 317(c). The FCC rules implementing this statute may be found at 47 C.F.R. § 73.1212 (2004).

51. Children's Television Report and Policy Statement, 50 F.C.C.2d 1, 15 (1974) [hereinafter Children's Television Report] (citing *Hearing on H.R. 5589 Before the H. Comm. on the Merchant Marine and Fisheries*, 69th Cong. 83 (1926)).

52. Letter from Gary Ruskin, Exec. Dir., Commercial Alert, to Marlene H. Hortch, Sec'y, FCC (Sept. 30, 2003) (on file with Commercial Alert). Commercial Alert is a non-profit organization whose "mission is to keep the commercial culture within its proper sphere, and to prevent it from exploiting children." CommercialAlert, http://www.commercialalert.org (last visited Nov. 12, 2005).

53. Letter from Gary Ruskin, *supra* note 52, at 1.

54. FCC Commissioner Jonathan Adelstein has urged the FCC to act on this and other related matters. *See, e.g.*, Jonathan S. Adelstein, Comm'r, FCC, Remarks at the Media Institute 6 (May 25, 2005) (transcript available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/doc-258962A1.pdf).

55. *See* Children's Television Report, *supra* note 51, at 1.

56. *Id*.

57. *Id.*

adopted some important restrictions in implementing its statutory responsibility to "insure that broadcasters do not engage in excessive or abusive advertising practices."[58]

The *1974 Policy Statement* did not explicitly address the practice of product placement, but it did express concern that many broadcasters were not maintaining adequate separation between programming and advertising on programs designed for children.[59] Thus, the FCC adopted a policy requiring a clear separation between program and commercial content, the effect of which is to prohibit product placement in programs originally designed and aired for children aged twelve and under.[60] However, the FCC policies do not apply to "programs originally produced for a general audience that might nevertheless be significantly viewed by children."[61] This explains why television programs that large numbers of children watch, such as *American Idol*, are allowed to contain product placements (although they should be disclosed). Moreover, FCC rules exempt motion pictures that are shown on television from its disclosure requirements.[62] While the FCC has extended children's advertising policies to cover children's programming on cable television and direct broadcast satellites,[63] it lacks the jurisdiction to regulate product placement in motion pictures, video games, magazines, songs, and books.[64]

In contrast to the FCC, the Federal Trade Commission (FTC) has broad jurisdiction over advertising practices regardless of the medium.[65] However, in 1992, the FTC declined to take any action against product placement in movies.[66] More recently, the FTC staff

58. *Id.* at 8–9.
59. *Id.* at 14.
60. *Id.* at 15.
61. Policies and Rules Concerning Children's Television, 6 F.C.C.R. 2111, 2112 (1991).
62. 47 C.F.R. § 73.1212(h) (2004).
63. 47 U.S.C. § 303a(d) (2000) (applying advertising limits to cable television operators); *In re* Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, 19 F.C.C.R. 5647, 5668 (2004) (MM Docket No. 93-25) (applying advertising limits to direct broadcasting satellites).
64. *See infra* note 149 and accompanying text.
65. *See* Federal Trade Commission Act § 5, 15 U.S.C. § 45(a)(1) (2000).
66. *See* Press Release, FTC, FTC Denies CSC's Petition to Promulgate Rule on Product Placement in Movies (Dec. 11, 1992), *available at* http://www

denied a request by Commercial Alert to investigate product placement practices on television.[67]

Commercial Alert documented that product placement has grown in scope, sophistication and intensity, and argued that use of product placement is "deceptive because it flies under the viewer's skeptical radar. It is unfair because it is advertising that purports to be something else."[68] Commercial Alert alleged the failure to disclose embedded advertising was deceptive or unfair under the meaning of the Federal Trade Commission Act.[69] To support this argument, Commercial Alert cited numerous cases in which the FTC had required marketers to disclose that advertising appearing to be something else, such as a television program, newspaper article, or Internet search result, was really a paid advertisement.[70] While the bulk of Commercial Alert's request focused on product placement in general, it expressed concern that embedded advertisements could get "past the guard" of watchful parents and "trigger cravings" for products that parents might oppose, such as junk food.[71] Commercial Alert cited several examples of product placements for soda, fast food, and even beer in programs watched by large numbers of children.[72]

In February 2005, the FTC's Associate Director for Advertising Practices denied Commercial Alert's request to require greater disclosure of product placement.[73] As to adult viewers, the letter

.ftc.gov/opa/predawn/F93/CSC-petit5.htm. In 1991, the Center for the Study of Commercialism and others asked the FTC to prevent the use of product placement in movies unless otherwise disclosed at the beginning of such films containing them. *Id.* The FTC denied the petition, concluding that "[d]ue to the apparent lack of a pervasive pattern of deception and substantial consumer injury attributable to product placements . . . an industry-wide rulemaking is inappropriate at this time." *Id.*

67. *See* Engle, *supra* note 2.

68. Letter from Gary Ruskin, *supra* note 19, at 2.

69. *Id.*

70. *See id.* at 2–3.

71. *Id.* at 12.

72. *See id.* at 12–13. Commercial Alert also noted that the fast food company Taco Bell had entered into a brand integration deal with Discovery Networks, which operates several cable networks with a substantial child audience. *Id.* at 13. (citing Hank Kim, *Madison & Vine: Discovery, Taco Bell Sign Ad Pact*, ADVERTISINGAGE, Sept. 16, 2002, at <START PAGE>, or *available at* http://www.adage.com (subscription required)).

73. Engle, *supra* note 2.

stated that the FTC's staff was not aware of any empirical data about whether consumers distinguish between paid and non-paid product appearances.[74] Even assuming, however, that consumers are not aware of paid appearances, the letter concluded without a formal determination as to whether the failure to identify paid product placements as advertising violated Section 5 of the Federal Trade Commission Act.[75] It explained that the principal reason to identify something as an advertisement is that consumers may give more credence to representations about a product's performance or other attributes if they are made by an independent third party, rather than an advertiser.[76] It cites as an example, *JS&A Group, Inc.*,[77] which concerned an infomercial for BluBlocker sunglasses that appeared to be an independent news program.[78] In contrast,

> in product placement, few objective claims appear to be made about the product's performance or attributes. That is, in most instances the product appears on-screen (e.g., American Idol hosts are seen drinking from cups with the Coca Cola logo), or is mentioned, but the product's performance is not discussed.[79]

Thus, the FTC staff letter concluded that the rationale for disclosure was absent.[80]

The FTC staff applied the same reasoning to Commercial Alert's request for investigation of product placement seen by children.[81] The FTC noted that because of children's special vulnerabilities, it examined whether an advertisement was deceptive from the standpoint of an "ordinary child."[82] Nonetheless, "[i]f no objective claims are made for the product, then there is no claim as to which greater credence could be given; therefore, even from an ordinary child's standpoint, consumer injury from an undisclosed

74. *See id.* at 2.
75. *Id.* at 5–6.
76. *Id.* at 2.
77. *See In re* UJS&A Group, Inc., 111 F.T.C. 522 (1989) (discussing consent order).
78. Letter from Mary K. Engle, *supra* note 2, at 2–3.
79. *Id.* at 3.
80. *Id.*
81. *Id.* at 4–5.
82. *Id.* at 4.

paid product placement seems unlikely."[83]

In sum, although advertisers have used product placement for many years and have increased their usage substantially in recent years, federal agencies have failed to restrict it or ensure it is not deceptive or misleading.

III. CHARACTER MARKETING

Characters have been used to market products for over a hundred years.[84] Some characters associated with certain products or brands have been developed by the advertiser specifically to promote their products.[85] Examples of this type include Chester Cheetah, Tony the Tiger, and Ronald McDonald. Advertisers have also employed other characters that appeared first in children's books, movies, television shows, and video games to market unrelated products, which are often food products.[86] Researchers refer to this type of character marketing as "celebrity spokes-characters."[87] An example of a celebrity spokes-character is SpongeBob Square Pants, a character from a popular children's program on Nickelodeon, who appears on the packaging for a wide variety of food products

83. *Id.* While denying Commercial Alert's request, the FTC staff noted the FTC would continue its policy of evaluating whether an advertising format is deceptive on a case-by-case basis, and to the extent that specific uses of product placement could be demonstrated to likely cause consumer injury, the FTC could bring enforcement actions. *Id.* at 5.

84. Judith A. Garretson & Ronald W. Niedrich, *Spokes-Characters: Creating Character Trust and Positive Brand Attitudes*, 33 J. ADVERTISING 25, 25 (2004).

85. *Id.*

86. Margaret F. Callcott & Wei-Na Lee, *A Content Analysis of Animation and Animated Spokes-Characters in Television Commercial*, 23 J. ADVERTISING 1, 11 (1994).

87. *See* Garretson & Niedrich, *supra* note 84, at 25–36. This article defines "spokes-characters" as "nonhuman characters used to promote a product or a brand." *Id.* Non-celebrity characters "aren't cartoons originally created for animated movies, cartoon programs, and/or comic strips and then licensed by brands to appear in promotions. Rather, they are created for the sole purpose of promoting a product or brand." *Id.* at 25. Another article uses the term "celebrity spokes-characters" to refer to spokes-characters of a non-advertising origin that can be licensed to endorse products. Callcott & Lee, *supra* note 86, at 2. Similarly, the Institute of Medicine uses the term "character merchandising" to refer to the licensing of popular fictional characters to promote the sale of products. COMM. ON FOOD MKTG. & THE DIETS OF CHILDREN & YOUTH, *supra* note 49, at 147.

including Kellogg's cereal, Cheez-it snack crackers, and Pop-Tarts.[88] Another example is the common practice of fast food restaurants putting toy characters from popular children's movies into their children's meals. This Article proposes limits on the use of such celebrity spokes-characters.[89]

A. The Practice of Celebrity Spokes-Character Marketing

In most cases, advertisers pay a license fee for the right to use a popular character as a toy or in an advertisement. Licensing has become big business. In 2004, licensing fees in the entertainment/character category in the United States amounted to $2.57 billion, a $63 million (2.5 percent) increase over the year 2003 "due in large part to the successful licensing programs for 2004 mega-hits such as *Spider-Man 2* and *Shrek 2*."[90]

A related practice is cross-selling, in which two or more companies combine promotion efforts. For example, in 1990, Burger King promoted the movie *Teenage Mutant Ninja Turtles* before it opened and was prominently featured in the movie.[91] Cross-licensing has become a common practice for children's movies.

88. *See* SpongeBob SquarePants Offers from Kellogg's, http://www.kelloggs.com/promotions/spongebobsquarepants/limitededitions.html (last visited Nov. 4, 2005).

89. The proposal is limited to celebrity spokes-characters because spokes-characters developed for advertising campaigns generally do not take advantage of children or pose the same risk of confusion as characters developed in a book, movie, or television program that are used to market an unrelated product. *See* Callcott & Lee, *supra* note 86. However, even characters developed for a marketing campaign may be used in an unfair or deceptive manner. For example, it has been argued that the use of the character Joe Camel was unfair because it promoted a product to children that was illegal for them to purchase. *See* Joel B. Cohen, *Playing to Win: Marketing and Public Policy at Odds over Joe Camel*, 19 J. PUB. POL'Y & MARKETING 155 (2000). Moreover, in 1992, Fox Television network considered broadcasting a cartoon program based on Chester Cheetah. *Groups Rap Chester Cheetah Show Idea*, ADVERTISINGAGE, Mar. 9, 1992, http://www.adage.com (subscription required). After Action for Children's Television and others asked the FCC to declare that the program would violate its separations policy, Fox decided not to pursue the program. *Id.*

90. Patricia Odell, *Live from the Licensing Show: Royalties Flat, Entertainment and Character Licensing Booming*, PROMO XTRA, June 22, 2005, *available at* http://promomagazine.com/news/licensing0622/.

91. EDUC. SERVS. DIV., CONSUMERS UNION, SELLING AMERICA'S KIDS: COMMERCIAL PRESSURES ON KIDS OF THE 90'S (1998), http://www.consumersunion.org/other/sellingkids/license.htm.

Dreamworks, which produced the *Shrek* movies, recently entered into a two-year global marketing and promotional relationship with McDonald's that will enable McDonald's to integrate the characters from *Shrek 3* into its year-round marketing.[92] For the last nine years, McDonald's has had an exclusive relationship with Disney, "doing a series of commercials and Happy Meal promotions with Disney properties like *101 Dalmatians*, *Finding Nemo* and *Inspector Gadget*."[93] According to McDonald's President and Chief Operating Officer, the tie-ins with Disney movies had been some of the company's most successful Happy Meal promotions.[94]

Spokes-character marketing has also become a common practice on children's Web sites. The Center for Media Education first identified the problem of spokes-character marketing to children in its 1996 report, *Web of Deception*.[95] This report notes that "[i]n the online world, the [FCC's] no-host [selling] principle is not only being violated, but hosts are also being used to interact with children in exploitative new ways."[96] It describes how many children's Web sites encourage children to interact with spokes-characters and use spokes-characters to promote and even sell products online.[97] Today, many children's television Web sites have online shops where one can buy product merchandise associated with the programs or program characters.[98] Moreover, on many children's

92. *See* T.L. Stanley & Kate MacArthur, *McDonald's Signs Two-Year Deal with Dreamworks*, MADISON & VINE, July 27, 2005, http://www.adage.com/MadisonandVine (subscription required).

93. Melanie Warner, *McDonald's Reaches Deal with Studio*, N.Y. TIMES, July 28, 2005, at C7.

94. *Id.*

95. CTR. FOR MEDIA EDUC., WEB OF DECEPTION: THREATS TO CHILDREN FROM ONLINE MARKETING (1996).

96. *Id.* at 16.

97. *See id.* at 17.

98. For example, clicking the "shop" button on http://www.nick.com will take a child to an area selling hundreds of items—games, toys, clothing, home furnishings—associated with Nickelodeon characters that can be viewed by program, age, or type of merchandise. *See* Nick.com Shop, http://shop.nickjr.com/home/index.jsp (last visited Oct. 13, 2005). Disney, Cartoon Network, and Sesame Workshop have similar shopping areas on their Web sites. Disney, http://www.disney.go.com/shop/today/index.html (last visited Oct. 13, 2005); Cartoon Network, http://www.cartoonnetwork.com /shop/index.html (last visited Oct. 13, 2005); Sesame Workshop, http://www.sesameworkshop.org/newshop (last visited Oct. 13, 2005).

media Web sites, program characters promote unrelated products using a variety of techniques including banners advertisements,[99] contests,[100] and advergames.[101] Further, some children's media Web sites provide children with a direct link to product Web sites. For example, on the Cartoon Network's Web site,[102] a child may click on a banner advertisement for Pop-tarts and immediately be sent to a Pop-tarts Web site, where characters from the movies *Robots* and *Star Wars* are featured on Pop-tarts boxes.[103]

Character marketing remains a popular marketing technique in television commercials as well. As one study notes, "[a]lthough celebrity characters from Buster Brown to Mickey Mouse to the Flintstones have endorsed a variety of products throughout advertising history, they have been especially visible in recent years."[104] This study analyzed the content of commercials on broadcast and cable networks.[105] It found that animated advertisements appeared most frequently during children's programming and cartoons, more

99. *See, e.g.*, Oppositions to Petitions for Reconsideration of the Children's Media Policy Coalition at 24 n.104, *In re* Children's Television Obligations of Digital Television Broadcasters, 19 F.C.C.R. 22943 (2004) (MM Docket No. 00-167).

100. For example, the FoxKids Web site invited kids to enter a Teenage Mutant Ninja Turtle Monster Candy contest co-sponsored by Pez candies. FoxKids, http://foxkids.com/promotions/tmntmonstercandy/ (last visited Sept. 1, 2005).

101. For example, the Nickelodeon Web site has an advergame promoting both the *SpongeBob SquarePants Movie* and several Kellogg's products—SpongeBob Cereal, Cheez-it Crackers, Pop-tarts, and Eggo Waffles. *See* Kellogg's Spongebob Games, http://www.nick.com/ads/kelloggs/spongebob/ (last visited Oct. 13, 2005). The site offers two interactive games. In "The Diner," children have to serve food to hungry customers. Of course, every customer wants the SpongeBob cereal or other Kellogg's brand featuring SpongeBob on the package. In the "Kellogg's Supermarket Challenge," the object is to beat the clock by picking up the Kellogg's products that have been "dropped" in the Supermarket and put them back where they belong. In addition, children can win a screen saver by naming one of the four things represented by the marshmallow pieces in the SpongeBob cereal.

102. Cartoon Network, http://www.cartoonnetwork.com/tv_shows/index.html (last visited Oct. 13, 2005).

103. Kellogg's Pop-Tarts Toaster Pastries, http://www.poptarts.com/promotions/poptarts/hotnews.html (last visited Oct. 13, 2005).

104. Callcott & Lee, *supra* note 86, at 2–3.

105. *See id.* at 3. Of the seven networks studied, i.e., Nickelodeon, Fox, NBC, MTV, CBS, CNN, and ABC, Nickelodeon had the highest percentage of animated advertisements. *See id.* at 5 tbl.1.

than half of the animated commercials featured animated characters, and 27.9 percent of spokes-characters were classified as "celebrity characters."[106] The study found that the "majority of animated characters appeared for products in the cereal/fruit/vegetable, candy/snacks, food/beverage and games/toys categories."[107]

Susan Linn has also noted the extensive use of characters to market food to children:

> Most of the movies and many of the TV programs children watch are marketed with off-screen food promotions. Once a program is associated with a particular brand, the program itself becomes an ad for that food. Visit any supermarket and you'll find shelves filled with examples of these links between the media and food manufacturers. . . . Tie-ins like these are designed to lure children into selecting foods associated with favorite movie or TV characters.[108]

Even characters from children's programs shown on public broadcasting stations, such as *Sesame Street* and *Arthur*, which are supposed to provide a non-commercial alternative for children, are frequently used to promote food products to children.[109] The Institute of Medicine found that "[t]he use of child-oriented licensed

106. *Id.* at 9 tbl.3. The characters appearing most often were Fred Flintstone and Barney Rubble. *Id.* at 10 tbl.4. Interestingly, this study found that animated spokes-characters were also used to promote products to adults. *Id.* at 6.

107. *Id.* at 11.

108. SUSAN LINN, CONSUMING KIDS: THE HOSTILE TAKEOVER OF CHILDHOOD 97 (2004); *see also* CTR. FOR SCI. IN THE PUB. INTEREST, *supra* note 26, at 25–26.

109. *See* LINN, *supra* note 108, at 97 (describing juice boxes adorned with characters from *Sesame Street*); *see also* SARAH SAMUELS ET AL., THE CAL. ENDOWMENT, FOOD AND BEVERAGE INDUSTRY MARKETING PRACTICES AIMED AT CHILDREN: DEVELOPING STRATEGIES FOR PREVENTING OBESITY AND DIABETES 11 (2003), *available at* http://www.calendow.org/reference/publications/pdf/disparities/TCE1101-2003_Food_and_Bever.pdf (picturing characters from PBS program *Arthur* on package of Brach's fruit snacks). The practice of licensing characters from PBS shows has increased substantially in the last decade. *See* Susan E. Linn & Alvin F. Poussaint, *The Trouble with Teletubbies*, AM. PROSPECT, May 1, 1999, at 18. This may be attributed to the fact that at the 1995 congressional hearings, "Republicans chided PBS for not benefiting from the huge amount of money Barney, the popular purple dinosaur, was making for its parent company. Nor did PBS initially get money from licensing of *Sesame Street* merchandise." *Id.* at 21. Subsequently, PBS renegotiated its deals with the producers of children's programs to share in the profits from the licensing of these characters. *Id.*

cartoon and other fictional or real-life spokes-characters has been a prevalent practice used to promote low-nutrient and high-calorie food and beverage products."[110]

B. The Regulation of Spokes-Character Marketing

Like product placements, spokes-character marketing has been largely unregulated. Only one form of character marketing to children, known as "host-selling," has been restricted by the FCC since the mid-1970s.[111] At that time, the two primary methods of advertising to children were broadcast television and print.[112] The FCC adopted a policy against host-selling, which limited character marketing on television programs in which the character appeared.[113] The Children's Advertising Review Unit (CARU) of the Bureau for Better Businesses adopted guidelines restricting character based marketing in print media.[114] The FTC found the use of a celebrity spokes-character to be unfair or deceptive in one case in 1977, but has not brought any actions against character marketing to children since that time.[115]

1. FCC Regulation of Host-Selling

In its *1974 Policy Statement*, the FCC defined "host selling" as "the use of program characters to promote products."[116] The FCC found that host-selling took unfair advantage of children in two ways. First, the interweaving of program and commercial content exacerbated the difficulty children have distinguishing between the two.[117] Second, host-selling took "unfair advantage of the trust which children place in program characters. Even performers themselves recognize that, since a special relationship tends to develop between hosts and young children in the audience,

110. COMM. ON FOOD MKTG. & THE DIETS OF CHILDREN & YOUTH, *supra* note 49, at 149.
111. *See* Children's Television Report, *supra* note 51, at 16.
112. *See id.*
113. *Id.* at 16.
114. CHILDREN'S ADVER. REVIEW UNIT, SELF-REGULATORY GUIDELINES FOR CHILDREN'S ADVERTISING 7 (7th ed. 2003), *available at* http://www.caru.org/guidelines/guidelines.pdf (last visited Oct. 24, 2005).
115. *See* Hudson Pharm. Corp., 89 F.T.C. 82 (1977).
116. Children's Television Report, *supra* note 51, at 16.
117. *Id*.

commercial messages are likely to be viewed as advice from a friend."[118]

The Commission limited its prohibition against host-selling to programs in which the host or character appeared, and to advertisements during or adjacent to that program.[119] It did not prohibit children's program hosts from promoting products in commercials shown at other times.[120] The FCC noted that "[p]ublic interest questions may also be raised when program personalities or characters deliver commercial messages on programs other than the ones on which they appear" because it takes advantage of the "trust relationship which has been developed between the child and the performer."[121] However, the FCC was concerned that it "may not be feasible, as a practical matter, for small stations with limited staffs to avoid using children's show personnel in commercial messages on other programs." [122] This reasoning is no longer valid today as stations rarely produce their own children's programs or commercial messages using station staff.[123]

Moreover, most host-selling problems today arise in the context of animated characters, rather than human hosts.[124] Although the FCC initially conceived of host-selling as the pitching of products by human hosts of children's programs, subsequent FCC cases make it clear that host-selling encompasses promotion of products by nonhuman and animated characters as well as by human hosts.[125] In recent years, the FCC has admonished several television stations for

118. *Id*.
119. *Id.* at n.20.
120. *Id.*
121. *Id*.
122. *Id.*
123. *See* Museum of Broad. Commc'ns, Children and Television, http://www.museum.tv/archives/etv/C/htmlC/childrenand/childrenand.htm (last visited Nov. 12, 2005) (stating that "[t]he production of children's programming is big business").
124. *See, e.g.*, Sandra L. Calvert, *Future Faces of Selling to Children*, *in* THE FACES OF TELEVISUAL MEDIA: TEACHING, VIOLENCE, SELLING TO CHILDREN 347, 356 (Edward L. Palmer et al. eds., 2003).
125. *See, e.g.*, Policies and Rules Concerning Children's Television Programming, 6 F.C.C.R. 5093, 5097 (1991); Dr. Frederick Breitenfeld, Jr., President, WHYY, Inc., 7 F.C.C.R. 7123, 7123 (1992) (noting that in an earlier case it established that "advertisements featuring the same type of animation that is regularly featured in the accompanying program constitutes host-selling").

violating the policy against host-selling.[126]

In the fall of 2004, the FCC updated its children's' advertising policies.[127] Among other things, it extended its host-selling policy to prohibit the display of Web site addresses on children's television programs (or advertisements during children's programs) when the Web site uses characters from the program to sell products or services.[128] The major children's networks and advertisers have strongly opposed this change, and have asked the FCC to reconsider this decision.[129]

2. CARU Guidelines

The Children's Advertising Review Unit (CARU) is a self-regulatory arm of the National Advertising Review Council, an organization formed by the Association of National Advertisers, American Association of Advertising Agencies, American Advertising Federation, and Council of Better Business Bureaus.[130] It is a private organization funded by the advertising industry, with no enforcement powers.[131]

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126. *See, e.g.*, *In re* Gary M. Cocola, 15 F.C.C.R. 9192, 9193 (2000) (noting that KXVO (TV) was admonished for airing commercials for Post Cereal Golden Crisp featuring Looney Toon characters during the Warner Brothers Kids' Block); Paramount Stations Group of Houston, Inc., 13 F.C.C.R. 21816, 21820 (MMB 1998) (finding that broadcasting a commercial for Honey Nut Cheerios featuring Sonic the Hedgehog during the *Sonic the Hedgehog* program violated policy against host-selling).

127. *In re* Children's Television Obligations of Digital Television Broadcasters, 19 F.C.C.R. 22,943 (2004).

128. *Id.* at 22,961.

129. In November 2005, Disney and Viacom asked the Court of Appeals to overturn the FCC's decision. *In re* Walt Disney Co., No. 05-4498 (6th Cir. Nov. 29, 2005); Viacom v. FCC, No. 05-4497 (6th Cir. Nov. 29, 2005); *see also* Petition for Reconsideration of Nickelodeon, *Children's Television Obligations of Digital Television Broadcasters*, MM Docket No. 00-167, at 18–25 (Feb. 2, 2005). In December 2005, the children's networks and advertisers reached an agreement with children's advocates to jointly propose changes in the Web site display rules and other children's television rules, which if ultimately adopted by the FCC on reconsideration, would result in the withdrawal of the court challenges. John Eggerton, *FCC Will Open Kids Deal for Comment*, BROADCASTING & CABLE, MAR. 14, 2006 http://www.broadcastingcable.com/article/CA6315951?display=Breaking+News&referra1=SUPP (last visited Apr. 9 2006).

130. *See* Children's Advertising Review Unit, http://www.caru.org/about/index.asp (last visited Oct. 26, 2005).

131. *Id.*

The CARU Guidelines address host-selling in a section entitled "Endorsement and Promotion by Program or Editorial Characters."[132] The Guidelines note that "[s]tudies have shown that the mere appearance of a character with a product can significantly alter a child's perception of the product. Advertising presentations by program/editorial characters may hamper a young child's ability to distinguish between program/editorial content and advertising." The Guidelines prohibit the use of "[p]rogram personalities, live or animated" to sell products "in or adjacent to programs primarily directed to children in which the same personality or character appears" and also prohibit the advertising of products related to a children's program during or adjacent to the program.[133] The Guidelines further advise that "[i]n print media primarily designed for children, a character or personality associated with the editorial content of a publication should not be used to sell products, premiums or services in the same publication."[134] CARU explains that this section incorporates the FCC's proscription against host selling and extends it to print media.[135]

The CARU Guidelines, however, do not prohibit character selling on children's Web sites.[136] Moreover, they contain an exception for "character-driven" or "product-driven" magazines.[137] This exemption has been interpreted broadly to cover the popular children's magazine, *Nickelodeon*.[138] Even where the Guidelines

132. CHILDREN'S ADVER. REVIEW UNIT, *supra* note 114.

133. *Id.* at 8.

134. *Id.* However, in "character driven" or "product driven" magazines or Web sites, the prohibition against advertising related products does not apply. *Id*.

135. MTV Networks Nickelodeon Magazine (Zoey 101) Children's Advertising Review Unit, No. 4293, at 2 (Mar. 9, 2005) (on file with Children's Advertising Review Unit, http://www.caru.org).

136. CHILDREN'S ADVER. REVIEW UNIT, *supra* note 114, at 8.

137. *Id.*

138. MTV Networks Nickelodeon Magazine (Zoey 101), No. 4293, at 3. This exception was intended to exempt magazines such as *Barbie*, *American Girl* and *G.I. Joe*, which contain material related solely to those characters, on the theory that children subscribing to those magazines would expect to see advertising for those characters' products. *Id.* CARU acknowledges that *Nickelodeon Magazine* is not "technically" a product or character-driven magazine because it contains editorial content that is not solely related to Nickelodeon characters. *Id.* Nonetheless, CARU decided to include it within the exemption. *Id.*

advise against a particular practice, compliance with its rulings is purely voluntary.[139]

3. Federal Trade Commission

In one instance, the FTC found that the use of a popular children's character to market to children is unfair or deceptive.[140] In *Hudson Pharmaceutical Corp.*,[141] the FTC alleged that the company had "utilize[d] the endorsements of a hero figure, Spider-Man, who is known for his super-human strength and abilities and has a special appeal to children" in marketing "Spider-Man Vitamins."[142] The FTC explained that Spider-Man had appeared on a popular children's television program and using a program character in television advertising that children view has the "capacity to blur for children the distinction between program content and advertising and to take advantage of the trust relationship developed between children and the program character."[143] Thus, the FTC entered into a consent decree prohibiting the company from advertising the vitamins to children.[144] Since entering into this consent decree in 1977, the FTC has taken no further actions involving character marketing to children.

IV. THE NEED FOR LEGISLATION TO RESTRICT PRODUCT PLACEMENT AND CHARACTER MARKETING TO CHILDREN

As discussed, advertising agencies increasingly use product placement and character marketing to target children.[145] Moreover, in many cases, the advertised products are unhealthy foods.[146] For this reason, further restrictions on these types of advertising to children could help to solve the problem of childhood obesity and public health problems associated with obesity.

Legislation is needed to restrict these marketing practices. As discussed above, neither the federal regulatory agencies nor the self-

139. Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711, 737 (1999).
140. *See* Hudson Pharm. Corp., 89 F.T.C. 82, 86 (1977).
141. *Id.*
142. *Id.*
143. *Id*.
144. *Id.* at 87–88.
145. *See supra* Parts I., II.A.
146. *See supra* notes 46–48 and accompanying text.

regulatory CARU are effectively addressing these problems.[147] While the FCC should be commended for its recent decision to extend its host selling prohibition to Web sites advertised on children's television programs,[148] it appears to lack jurisdiction to address the bigger problem of character selling on Web sites generally.[149] Nor does it have jurisdiction over commercial activity unrelated to broadcasting such as food packaging, or putting characters in children's meals at fast food restaurants.[150]

Although the FTC has jurisdiction to address "unfair or deceptive" marketing and advertising practices in interstate commerce,[151] it lacks jurisdiction to adopt rules regarding children's advertising.[152] Moreover, the current FTC Chairman, Deborah Majoras, has indicated that the FTC does not intend to regulate children's advertising.[153] And, as discussed above, a recent FTC staff letter rejected a request to even investigate the increasingly prevalent practice of product placements.[154]

V. WOULD LEGISLATION PROHIBITING PRODUCT PLACEMENT AND CHARACTER MARKETING TO CHILDREN BE CONSTITUTIONAL?

Although legislation could prohibit product placements in children's media and character marketing to children, critics will

147. *See supra* Parts I, II.B.

148. Children's Television Obligations of Digital Television Broadcasters, 19 F.C.C.R. 22,943, 22,943 (2004).

149. *See* 47 U.S.C. § 151 (2001) (stating that the FCC's jurisdiction is limited to interstate and foreign communications by means of wire or radio); *see generally* Am. Library Ass'n v. FCC, 406 F.3d 689 (D.C. Cir. 2005) (discussing the scope of the FCC's statutory authority).

150. *Id.*

151. 15 U.S.C. § 45(a)(1) (2000).

152. *Id.* § 57a(h). Congress eliminated the FTC's authority to make rules regarding children's advertising when it enacted the FTC Improvements Act of 1980. *Id.* *See* Tracy Westen, *Government Regulation of Food Marketing to Children: The Federal Trade Commission and the Kid-Vid Controversy, Remarks at the Loyola of Los Angeles Law Review Symposium: Food Marketing to Children and the Law*, 39 LOY. L.A. L. REV. ____ (2006).

153. *See* Deborah Platt Majoras, Chairman, FTC, Remarks at the Obesity Liability Conference 9–10 (May 11, 2005) (transcript available at http://www.ftc.gov/speeches/majoras/050511obesityliability.pdf); *see also Childhood Obesity Workshop to Focus on Self-regulation*, FTC: WATCH (D.C.), July 11, 2005, at 6 (discussing the FTC's focus on self-regulation).

154. *See supra* notes 81–83 and accompanying text (discussing Commercial Alert's FTC Complaint).

undoubtedly object that such legislation would be unconstitutional. Since a prohibition on product placement and character marketing would be a restriction on commercial speech, the legislation would be analyzed under the commercial speech doctrine.

A. The Commercial Speech Doctrine

Until the Supreme Court's 1976 decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[155] courts generally did not accord advertising protection under the First Amendment.[156] In deciding to provide some protection to commercial speech, the Court emphasized the informational value of advertising for consumers.[157] The Court was troubled by the paternalistic assumption of a regulation that deprived the public of accurate and useful information under the guise of protection. Instead, courts should assume that well informed people will act in their own best interests.[158]

At the same time, the Court did not hold that commercial speech could never be regulated.[159] For example, false commercial speech could be prohibited even though other forms of speech are subject to a higher degree of protection.[160] The Court noted that: "Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem."[161] It suggested that states could "require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive."[162] The Court concluded that the First Amendment "does not prohibit the State from insuring that the stream of commercial information flow

155. 425 U.S. 748 (1976).

156. *See, e.g.*, Valentine v. Chrestensen, 316 U.S. 52, 54 (1942), *overruled by* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

157. *Va. State Bd. of Pharmacy*, 425 U.S. at 765 ("Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price.").

158. *See id.* at 770.

159. *See id.*

160. *Id.* at 771–772.

161. *Id*. at 771.

162. *Id.* at 771 n.24.

cleanly as well as freely."[163]

The following year, the Court applied the reasoning of *Virginia Pharmacy* to advertising by attorneys. In *Bates v. State Bar of Arizona*,[164] the Court found that an Arizona state bar's prohibition on attorney advertising violated the First Amendment.[165] As in *Virginia Pharmacy*, the Court was concerned with protecting the public's interest in obtaining information needed to make informed decisions.[166] While the Court rejected the claim that all advertising by attorneys was inherently misleading, it emphasized that the advertising here pertained only to routine services and did not make claims about the quality of the service.[167] The Court stressed that it would uphold regulations of false, deceptive, or misleading advertising.[168] Further, "because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising."[169] The Court gave two examples of possible deceptive advertising: claims as to quality of service, because they are "not susceptible of measurement or verification," and in-person solicitation.[170]

In *Ohralik v. Ohio State Bar Ass'n*,[171] the Court took up the question of in-person solicitation, upholding sanctions against an Ohio lawyer for soliciting young accident victims immediately after the accident.[172] While noting the holding in *Bates* that the First Amendment protects truthful, restrained advertising regarding routine legal services, the Court found that in-person solicitation presented a different kind of advertising than in *Bates*.[173] The Court was concerned that in-person solicitation would exert pressure and

163. *Id.* at 771–72. Justice Stewart concurred, writing separately to explain why the Court's decision did not preclude government regulation of false or deceptive advertising. *See id.* at 776–81 (Stewart, J., concurring).
164. 433 U.S. 350 (1977).
165. *Id.* at 384.
166. *See, e.g.*, *id.* at 374–75.
167. *See id.* at 372–73, 383–84.
168. *Id.* at 383.
169. *Id.* at 383–84.
170. *Id.*
171. 436 U.S. 447 (1978).
172. *Id.* at 449–50 (upholding sanctions where in-person solicitation occurred while one victim was still in the hospital).
173. *Id*. at 454–55.

demand an immediate response without time for reflection.[174]

In *Friedman v. Rogers*,[175] the Court upheld a Texas law prohibiting the practice of optometry under a trade name.[176] While acknowledging that a trade name was a form of commercial speech, the Court found that it differed significantly from the commercial speech at issue in *Virginia Pharmacy* and *Bates* because those cases involved statements about the product or services offered and their prices.[177] In contrast:

> A trade name conveys no information about the price and nature of the services offered by [a professional] until it acquires meaning over a period of time by associations formed in the minds of the public . . . [T]hese ill-defined associations of trade names with price and quality information can be manipulated . . . .[178]

Thus, the Court concluded that there was a significant possibility that professionals would use trade names to mislead the public.[179] Since optometrists could communicate factual information about the businesses directly to the public, Texas had done no more than require that information about optometry services appear in a form necessary to prevent deception.[180]

In its 1980 decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[181] the Court articulated the four-prong test for analyzing the constitutionality of restrictions on commercial speech that has been applied in all subsequent commercial speech cases:

> For commercial speech to come within [First Amendment Protection], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and

174. *See id.* at 457.
175. 440 U.S. 1 (1979).
176. *Id.* at 19.
177. *Id.* at 11–12.
178. *Id*. at 12–13.
179. *Id.* at 13.
180. *Id.* at 16.
181. 447 U.S. 557 (1980).

> whether it is not more extensive than is necessary to serve that interest.[182]

Noting that the First Amendment concern for commercial speech was based on the informational function of advertising, the Court observed that "[c]onsequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it."[183] In *Central Hudson*, however, the Court held that the advertising by electric utilities at issue was not misleading, and found that the prohibition on truthful, non-misleading advertising was unconstitutional because it failed the fourth prong of the test.[184]

Although many have criticized the commercial speech doctrine generally and the *Central Hudson* test in particular,[185] the Court continues to apply it.[186] Most Supreme Court decisions finding restrictions unconstitutional under the *Central Hudson* test have involved truthful, nonmisleading speech.[187] Only three cases decided

182. *Id.* at 566.

183. *Id*. at 563.

184. *See id.* at 569–71.

185. *See, e.g.*, 44 Liquormart Inc. v. Rhode Island, 517 U.S. 484, 522–23 (1996) (Thomas, J., concurring) (arguing that commercial speech should be afforded the highest level of protection under the First Amendment); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 631 (1990) (discussing how subsequent cases shed little light on the *Central Hudson* test aside from "standing as ad hoc subject-specific examples of what is permissible and what is not").

186. *See, e.g.*, Thompson v. W. States Med. Ctr., 535 U.S. 357, 367–68 (2002) (noting that although some members of the Court had expressed doubts about *Central Hudson*, there was "no need in this case to break new ground"); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 184 (1999) (noting that while "certain judges, scholars, and *amici curiae* have advocated repudiation of the *Central Hudson* standard," *Central Hudson* provided an "adequate basis" for decision).

187. *See, e.g.*, *Thompson*, 535 U.S. at 374–77 (finding unconstitutional a law prohibiting pharmacists from truthfully advertising that they could compound drugs); Lorrilard Tobacco Co. v. Reilly, 533 U.S. 525, 564–66 (2001) (finding unconstitutional various state restrictions on truthful advertising of tobacco products); *Greater New Orleans Broad. Ass'n*, 527 U.S. at 194–96 (finding unconstitutional restrictions on broadcast of truthful advertising for legal gambling casinos); *44 Liquormart, Inc.*, 517 U.S. at 489 (finding unconstitutional a prohibition on truthful advertising of liquor prices); Rubin v. Coors

after *Central Hudson* involved speech that was alleged to have been misleading.

First, in *Zauderer v. Office of Disciplinary Counsel*,[188] an Ohio attorney was disciplined for running an advertisement offering to represent clients who were injured by the Dalkon Shield, an intrauterine contraceptive device.[189] The Ohio Supreme Court had found the advertisement misleading in several respects.[190] The United States Supreme Court overturned the sanction for running an advertisement that contained an illustration of the Dalkon Shield.[191] It found that none of the statements in the advertisement were false or deceptive.[192] Moreover, it rejected the state's contention that illustrations posed an unacceptable risk that the public would be misled, manipulated or confused because the state cited no evidence to support this claim.[193]

However, the Court upheld the sanction for omission of information regarding the lawyer's contingent-fee arrangements, noting that "[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, . . . [the attorney's] constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal."[194] It held that disclosure need only be "reasonably related to the State's

Brewing Co., 514 U.S. 476, 493 (1995) (finding unconstitutional a prohibition on nonmisleading display of alcohol content on beer labels); Edenfield v. Fane, 507 U.S. 761, 765 (1993) (finding unconstitutional solicitation bans placed on direct, uninvited solicitations from certified public accountants where no evidence existed that such solicitations were likely to lead to false or misleading claims); Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 473 (1988) (finding unconstitutional a categorical prohibition of lawyers soliciting business by sending truthful and non-deceptive letters to potential clients); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 69 (1983) (finding unconstitutional a statute prohibiting unsolicited mailing of truthful and non-misleading contraceptive ads); *In re* R.M.J., 455 U.S. 191, 203 (1982) (finding that the First Amendment protected lawyer advertising that included truthful and non-misleading information about practice areas).

188. 471 U.S. 626 (1985).
189. *Id.* at 635.
190. *Id.*
191. *Id.* at 655–56.
192. *Id.* at 645.
193. *Id*. at 648.
194. *Id*. at 651, 655.

interest in preventing deception of consumers" and that here, the advertisement was likely to mislead members of the public because they were unlikely to be aware of the technical distinction between fees and costs.[195] The Court concluded that "[w]hen the possibility of deception is as self-evident as it is in this case, we need not require the State to 'conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead.'"[196]

Second, in *Peel v. Attorney Registration & Disciplinary Commission*,[197] the Court held that an attorney had a First Amendment right to include the fact that he was certified as a trial specialist on his letterhead.[198] Although the Illinois Commission had found the inclusion of this information misleading, a closely divided Court disagreed.[199] Five Justices thought the letterhead was potentially misleading, but disagreed as to whether they should allow the state to ban it or only require additional information.[200] Justice Stevens' decision for the Court emphasized that the facts stated on the letterhead were true and verifiable and that no one contended that any person had actually been misled.[201] He "reject[ed] the paternalistic assumption that the recipients of petitioner's letterhead are no more discriminating than the audience for children's

195. *Id*. at 651–52.

196. *Id.* at 652–53 (quoting F.T.C. v. Colgate-Palmolive Co., 380 U.S. 374, 391–392 (1965)).

197. 496 U.S. 91 (1990).

198. *Id.* at 93, 110–111.

199. *Id.* at 106, 110.

200. Justice Marshall, joined by Justice Brennan, concurred, noting that although the letterhead was not actually misleading, it was potentially misleading, and that the state may enact measures other than a total ban such as requiring a disclaimer. *Id.* at 111 (Marshall, J., concurring). Justice White dissented based on his belief that the speech was potentially misleading and that the state should be allowed to ban the letterhead in present form. *Id.* at 118 (White, J., dissenting). Justice O'Connor, joined by Justices Rehnquist and Scalia, also dissented. She thought the letterhead was likely to mislead the public, and that additional disclosures would be unlikely to alleviate the problems. *Id.* at 125 (O'Connor, J., dissenting). She argued that "[i]f the information cannot be presented in a way that is not deceptive, even statements that are merely potentially misleading may be regulated with an absolute prohibition." *Id.*

201. *Id.* at 100–01.

television."[202] He concluded that while the state may take action against sham certifications or require disclaimers, it could not completely ban information about certification that was useful to consumers.[203]

Finally, in *Ibanez v. Florida Dept. of Business*,[204] the Court overturned a sanction against an attorney who had accurately identified herself as a Certified Public Accountant and a Certified Financial Planner.[205] The Florida CPA Board argued that her use of these designations was either inherently or potentially misleading.[206] While the two dissenters agreed that the designations were misleading,[207] the majority stressed that the information was true and that the Board had failed to point to any harm not "purely hypothetical."[208] Thus, the Court continues to apply the *Central*

202. *Id.* at 105 (comparing Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74 (1983)).
203. *Id.* at 110.
204. 512 U.S. 136 (1994).
205. *Id.* at 138–39, 143.
206. *Id.* at 144, 146.
207. *Id.* at 149 (O'Connor, J., concurring in part and dissenting in part).
208. *Id.* at 146. *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), did not involve commercial speech that was claimed to be deceptive or misleading. Nonetheless, the Court upheld a Florida bar rule prohibiting personal injury lawyers from sending targeted direct mail solicitations to victims and their relatives for 30 days following an accident or disaster. *Id.* at 635. The Court reasoned that the state has a substantial interest in protecting the privacy of personal injury victims against intrusive, unsolicited contact by lawyers and in protecting the reputation of the legal profession. *Id.* It emphasized that here, in contrast to its 1993 decision in *Edenfield v. Fane*, 507 U.S. 761 (1993), which held unconstitutional a complete ban against in-person solicitation by CPAs, the record contained "data—both statistical and anecdotal—supporting the Bar's contentions that the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession." *Id.* at 626. The Court found a reasonable fit between the ends and means because the prohibition was limited to a brief period, and many alternative ways remained for lawyers to advertise and people to learn about availability of legal representation. *See id.* at 633–34. Two other Supreme Court decisions also upheld restrictions on truthful and non-misleading advertising. The restrictions at issue in *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 330–31 (1986), which upheld prohibitions against advertising of casinos to residents of Puerto Rico, and *United States v. Edge Broad. Co.*, 509 U.S. 418, 421–25 (1993), which upheld a restriction on the broadcast of lottery advertisements by a radio station licensed to a state where lotteries were illegal. Both were found to meet the *Central Hudson* test because they served the state's interest in protecting

Hudson test in analyzing restrictions on commercial speech and will allow regulation of speech found to be misleading or deceptive.

B. Are Product Placement and Character Marketing Commercial Speech?

When the commercial speech doctrine is applied to the proposed legislation prohibiting the use of product placements and character marketing to children, the threshold question is whether these forms of marketing are commercial speech. One critique of the Supreme Court's commercial speech doctrine is that it is sometimes difficult to tell what constitutes commercial speech.[209] However, in the case of product placements and character marketing, it seems clear that the speech at issue is commercial speech.

In *Bolger v. Youngs Drug Products Corp.*,[210] the Supreme Court examined three factors which, taken together, supported the conclusion that the speech at issue was properly classified as commercial speech: (1) whether the speech was advertising; (2) whether it referred to a specific product; and (3) whether the speech served the economic interest of the speaker.[211] Each of these factors applies to paid product placement. Product placement is undoubtedly a type of advertising. As discussed above, advertising agencies find placement opportunities in films, television programs, and other media, and advertisers pay for the right to have their product placed.[212] Product placement involves showing or mentioning a specific product or brand. Last, product placement clearly serves the economic interests of the advertisers.[213]

citizens from the ills associated with gambling.

209. *See, e.g.*, David Vladeck, *Lessons from a Story Untold:* Nike v. Kasky *Reconsidered*, 54 CASE W. RES. L. REV. 1049, 1060 (2004) (discussing criticism of Court's test for commercial speech due to difficulty differentiating between commercial and non-commercial speech).

210. 463 U.S. 60 (1983).

211. *See id.* at 66–67.

212. *See supra* notes 2–12 and accompanying text.

213. I am not claiming that the existence of product placement converts the entire movie, television program, or video game into commercial speech. Rather, the product placement itself is the commercial speech.

Advertisements and packaging featuring celebrity spokes-characters also easily fit within commercial speech as defined by the three *Bolger* factors: they are a form of advertising, they refer to specific products, and they serve the economic interests of the speaker.[214] Some types of character marketing, however, may not be considered speech at all. For example, when a fast food restaurant enters into a licensing agreement with a movie producer that allows it to use the characters as toys in children's meals, this could arguably be viewed as pure economic activity subject to rational basis review rather than speech. Invariably in such deals, however, the characters also appear in television, print and Web site advertisements. This type of advertising would constitute commercial speech as well as economic activity. Moreover, given that the Supreme Court has found letterhead and beer labels are commercial speech,[215] it would likely find that the depiction of characters on packaging is commercial speech.

C. Are Product Placement and Character Marketing Misleading?

Because the Court will likely consider product placement and character marketing as commercial speech, the four-part *Central Hudson* test applies. Under the *Central Hudson* test, the Court asks "as a threshold matter whether the commercial speech concerns unlawful activity or is misleading. If so, then the speech is not protected by the First Amendment."[216]

To address this question, Congress could point to a substantial body of academic research to support a finding that these forms of advertising are misleading to children. A great deal of research has been done on how children understand traditional television advertising.[217] As noted above, this research formed the basis for the FCC's restrictions on children's advertising in the *1974 Policy*

214. *See Bolger*, 463 U.S. at 67.

215. Rubin v. Coors Brewing Co., 514 U.S. 476, 481 (1995) (treating beer labels as commercial speech); Peel v. Attorney Registration and Disciplinary Comm'n, 496 U.S. 91, 99–100 (1990) (determining that a letterhead was commercial speech).

216. Thompson v. W. States Med. Ctr., 535 U.S. 357, 367 (2002).

217. For a more detailed summary of research about children's understanding of advertisements see BARRIE GUNTER ET AL., ADVERTISING TO CHILDREN ON TV: CONTENT, IMPACT AND REGULATION (2005) and Calvert, *supra* note 124, at 351–54.

Statement and for the CARU Guidelines.[218] Research conducted since the 1970s has confirmed that children do not fully understand advertising until approximately age eight.[219]

As Dale Kunkel explains, for children to fully comprehend advertising messages:

> First, they must be able to discriminate at a perceptual level commercial from noncommercial content, and, second, they must be able to attribute persuasive intent to advertising and to adjust their interpretation of commercial messages consistent with that knowledge. Each of these capabilities develops over time, largely as a function of cognitive growth and development rather than the accumulation of any particular amount of experience with media content.[220]

Children below the age of four or five have difficulty distinguishing between television programs and commercials.[221] Until they are seven or eight, even if they can distinguish commercials from other content, children are generally unable to recognize the persuasive intent of television advertising because of their limited cognitive development.[222] Until children develop this capability, they are thought to be "uniquely vulnerable to commercial persuasion" because they cannot effectively evaluate commercial claims.[223] Even then, children's "general understanding and skeptical attitude may not be sufficient. Children between the ages of eight and twelve tend not to invoke their knowledge of persuasive influence attempts when viewing a television commercial, unless

218. *See supra* notes 55–58, 132–133 and accompanying text.

219. *See, e.g.*, BRIAN WILCOX ET AL., REPORT OF THE APA TASK FORCE ON ADVERTISING AND CHILDREN 5–9 (2004) (summarizing research) (refer to the section entitled, "Psychological Issues in the Increasing Commercialization of Childhood"); GUNTER ET AL., *supra* note 217, at 30–47.

220. Dale Kunkel, *Children and Television Advertising*, *in* HANDBOOK OF CHILDREN AND THE MEDIA 375, 378 (Dorothy G. Singer & Jerome L. Singer eds., 2001).

221. *Id.* at 378–79 (summarizing research conducted since the 1970s).

222. *Id.* at 380–81 (summarizing research conducted since the 1970s).

223. BRIAN WILCOX ET AL., *supra* note 219, at 1 (refer to section entitled, "Recommendations"). Indeed, the American Psychological Association has recommended "that television advertising be restricted during programming directed to or seen by audiences primarily composed of children 8 years of age and under." *Id.*

explicitly reminded to do so."[224]

1. Research on Product Placement

Because children under the age of eight generally do not understand the persuasive intent of traditional advertising, it is virtually inconceivable that, even if they recognize product placements as a type of advertising, they would understand that product placement is a form of advertisement intended to promote a product or brand. Indeed, in her 1995 dissertation, Stacy Vollmers found that "the majority of second and fourth grade subjects do not recognize the promotional intent of placements while a large majority of sixth grade subjects do."[225]

As to whether product placement affects children's attitudes toward products, her findings were less conclusive. Vollmers found that children recognized and recalled product categories placed in motion pictures and that children viewing the film with product placement were more likely to recall the product categories, but not necessarily the product brands.[226] Contrary to her expectations, she

224. Elizabeth S. Moore, *Children and the Changing World of Advertising*, 52 J. BUS. ETHICS 161, 163 (2004). Moore cites research suggesting "that older children (11–12 year olds) may actually be more attentive to the entertainment provided by advertising than younger children (7–8 year olds), and are more likely to allow it to shape their interpretations of product usage." *Id.* at 164.

225. Stacy M. Vollmers, The Impact on Children of Brand and Product Placements in Films 90 (Aug. 31, 1995) (unpublished Ph.D. dissertation, Florida State University) (on file with University Microfilms, http://www.umi.com). Vollmers reports on an experiment she conducted in which children in grades two, four and six viewed edited versions of the movie *Lassie*. *See id.* One version of the film had product placements for eight products, while the second version had most of the product placements removed or obscured so that the brand name or logo was not visible. *Id.* at 38–39. The brands and products featured were Pepsi soda, Quaker Oats cereal, American gas, Casio walkman, John Deere tractor, U-Haul moving trailer, Pop-Tarts toaster treats, and Pennzoil oil. *Id.* at 40. The placements were also of different type and frequency, e.g. obscured placements, single placements, multiple placements, and multiple placements with character use and mention. *Id.* at 81 tbl.6.1. The children completed questionnaires both before and after viewing the film that asked questions regarding "brand and product recognition, brand and product affect [i.e., whether they liked a product], brand choice, and affect toward the movie and toward the characters in the movie." *Id.* at 45–46.

226. *Id.* at 76.

found that the brand placement had no effect on preferences for the brand.[227] However, she noted several limitations with the study. First, all of the placements were for established brands. She suggested that a new brand or product featured in a movie may have a greater impact.[228] Second, the placements were not necessarily targeted to young audiences. She pointed out that the fact that "although no change in affect as a result of brand and product placements was found in this study this does not mean the phenomena does not occur."[229] Vollmers suggested that "[t]argeting placements of new products to a young market may be more effective because it may shape initial perceptions associated with the brand."[230] Finally, she noted that while the study found no immediate influence on brand preference, the impact of product placement on brand preferences might be more long term.[231] Vollmers explained:

> Only differences in measures of memory are found with a placement. However, altering memory may impact future interactions with the brand. Memory is important to marketers because consumers often make product decisions without any external information search. Consumers simply search internally for information and choose among recalled brands. If the placement of brands and products in a motion picture creates more top-of-the-mind awareness or moves the brand into the child's evoked set, marketers have succeeded in their promotional effort.[232]

In a recent published work, authors Susan Auty and Charlie Lewis found that product placement does affect children's brand choices.[233] They conducted an experiment in the United Kingdom in which 105 children in two age groups (six to seven-year olds and eleven to twelve-year olds) viewed clips of the movie *Home*

227. *Id.* at 77.
228. *Id.* at 79–80. She notes, for example, that Reese's Pieces peanut butter candy was a relatively new brand when it appeared in E.T. *Id.*at 87.
229. *Id.* at 87–88.
230. *Id.* at 79.
231. *Id.* at 89.
232. *Id.* at 91 (citations omitted).
233. *See* Susan Auty & Charlie Lewis, *Exploring Children's Choice: The Reminder Effect of Product Placement*, 21 PSYCHOL. & MARKETING. 697, 708 (2004).

Alone.[234] One clip contained a product placement for Pepsi and the other did not.[235] After viewing the clips, the children were offered a choice of Pepsi or Coke.[236] The control group that had not seen the product placement preferred Coke over Pepsi (58:42), while the group that had viewed the product placement preferred Pepsi (38:62).[237] This difference was striking because Coke has a significantly greater market share than Pepsi in the UK (75:25).[238] The authors concluded that "this study appears to show a clear effect of product placement upon children's incidental choice of a drink."[239] Further, they found "[n]o difference in choice . . . between those who correctly recalled the brand and those who did not, regardless of age, suggesting that explicit memory does not play a significant role in choice."[240] Thus, this experiment supports other research showing that failure to remember the exposure does not mean that it has no effect.[241]

Auty and Lewis also found the hypothesis that "mere exposure may make the individual's attitude toward the objects more positive is supported by the findings only to the extent that a reminder of the object is provided."[242] They suggested that "implicit memory reactivated by a current exposure provides an explanation for the findings."[243] They observed that:

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234. *Id.* at 704.
235. *Id.*
236. *Id.* at 705.
237. *Id.* at 706.
238. *Id.*
239. *Id*. at 708.
240. *Id.* at 709. They found no statistically significant difference in the ability of each age group to recall the Pepsi placement after prompting, but that younger children required more prompts than the older children, "in keeping with an expected increase in cognitive ability." *Id.* at 706.
241. *Id.* at 710.
242. *Id.* at 709.
243. *Id.* at 710.

> Explicit memories are both conscious, in the sense that the person is aware of remembering prior events, and intentional, in the sense that the person in some sense wants, or voluntarily intends, to retrieve them. In contrast, implicit memories are unconscious, in the sense that the person is unaware of retrieving or otherwise being influenced by prior events, and their retrieval is thought to occur involuntarily or without intent.

Law & Braun-LaTour, *supra* note 4, at 67.

> Given the tendency of young children to watch videos of their favorite films over and over again, the findings have ethical implications for the use of product placement in films targeted at young children who have not yet acquired strategic processing skills. Without being aware of their exposure to commercial messages, they have been affected by the exposure in some preconscious way.[244]

In another article, Auty and Lewis further explored the implications of their experiment.[245] They noted that "the surprising dissociation between the children's ability to recall having seen Pepsi and their choice of this brand over its more successful competitor in the market is, of course, the very effect—increased interest, sales—that advertisers strive for."[246] They suggested that this result may be explained by psychological research over the last fifteen years that distinguishes between explicit and implicit (nonconscious) memory.[247]

Research shows that "implicit memory does not appear to be affected by increasing maturity," but explicit memory "improves substantially from early childhood to adolescence."[248] Because memory performance is a function of one's knowledge base and children have a smaller knowledge base than adults, Auty and Lewis theorized that more product perceptions will be at a preconscious level and lead to implicit rather than explicit memories.[249] These implicit memories may influence their feelings toward the product by, for example, creating familiarity that will affect future brand choice.[250] Auty and Lewis noted that while

> [a]dults may be able to guard against preconscious perceptions simply by noting the appearance of a product as a placement with a commercial origin[,] . . . [researchers]

244. Auty & Lewis, *supra* note 233, at 710.

245. *See* Susan Auty & Charlie Lewis, *The "Delicious Paradox": Preconscious Processing of Product Placements by Children*, *in* THE PSYCHOLOGY OF ENTERTAINMENT MEDIA: BLURRING THE LINES BETWEEN ENTERTAINMENT AND PERSUASION, *supra*, note 3, at 117 (L.J. Shrum ed., Lawrence Erlbaum Assoc. 2004).

246. *Id.* at 119.

247. *Id.*

248. *See id.* at 124–25.

249. *Id.* at 125–26.

250. *See id*. at 126.

> found that children 8-12 years of age need cues to produce counterarguments and suggest that cues would not be effective for children younger than 8 years. Hence, one could argue that product placement is likely to be most effective in young children, precisely because it is almost always preconscious, allowing affect without (conscious) cognition: a delicious paradox with potentially insidious and powerful effects.[251]

They noted that product placement "is not strictly subliminal communication . . . because products usually have exposure times measured in seconds rather than milliseconds, often with some verbal labeling."[252] Nonetheless, product placement may be considered subliminal in that it influences choice on an unconscious basis.[253]

The FCC has held that "that use of subliminal perception is inconsistent with the obligations of a [broadcast] licensee, and . . . that broadcasts employing such techniques are contrary to the public interest. Whether effective or not, such broadcasts clearly are intended to be deceptive."[254] Similarly, product placement that

251. *Id.* at 128.

252. *Id.* at 117–18.

253. *Id.* at 118. Some recent research on the impact of product placement on adults also suggests that the measures typically used to assess effectiveness of traditional advertising do not account for the effects of product placement. Law and Braun-LaTour argue that "the recall and recognition measures are not capable of detecting the more subtle effects of product placements." Law & Braun-LaTour, *supra* note 4, at 64. They conducted an experiment in which adults viewed six excerpts from *Seinfeld* containing at least six product placements (some central to the plot while others simply seen or mentioned) under the guise of collecting their evaluations of the show. *Id.* at 72. After viewing the clips, participants completed an "implicit choice task" in which they were asked to choose a brand from a set of two brand names where one brand was present in the episode and the other was not. *Id.* Participants performed this task without reference to the viewing. *Id.* They also completed a similar "explicit recognition test" in which they were instructed to think back to the viewed episode and identify the brands present in the video. *Id.* The study found that "placements that were central to the program were best recalled and recognized though least likely to be chosen. In contrast, . . . seen-only placements showed lower recall and recognition compared with heard-only placements but were chosen most frequently." *Id.* at 73. The researchers who conducted this experiment suggest it shows that product placements that viewers are not aware of may nonetheless influence them. *See id.*

254. Public Notice Concerning the Broadcast of Information by means of "Subliminal Perception" Techniques, 44 F.C.C.2d 1016, 1017 (1974). The

operates at a subconscious level is deceptive.

2. The Federal Trade Commission Staff Ruling on Product Placement

It is true the FTC staff recently found that product placements generally, including those seen by children, are not deceptive.[255] However, the staff based its ruling on a very limited record. For example, the FTC staff indicates no awareness of the recent research on product placement.[256]

Even given the limited record, the staff analysis glosses over the problem that product placement itself is deceptive because the audience does not know the product's inclusion is promotional and that the program producer has been paid to include it.[257] Instead, the FTC staff takes the position that a product placement can only be deceptive if it presents false or misleading information about a product.[258] Under this view, since a product placement generally provides little or no factual information, it cannot be deceptive.[259]

This position seems inconsistent with the FTC's guidelines on endorsements. FTC guidelines define endorsements broadly to include "any advertising message . . . consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser."[260] The guidelines cite as an example of an endorsement a television advertisement for golf balls showing a prominent professional golfer hitting the golf balls even though he says nothing about the golf balls.[261] It is hard to see a distinction between a golfer hitting a golf ball and a judge on *American Idol* sipping a Coke. If anything, the *American Idol* example has a greater potential for deception because the use of the product occurs in a program rather than a commercial. Yet, the FTC requires clear and

FCC's prohibition on subliminally perceptive advertising appears to apply only to television, and not to movie theater commercials or print media. *See* Jef I. Richards & Richard Zakia, *Pictures: An Advertiser's Expressway Through FTC Regulation*, 16 GA. L. REV. 77, 123 (1981).

255. *See* Letter from Mary K. Engle, *supra* note 2, at 3–5.

256. *See id.* at 2.

257. *See id.* at 5.

258. *See id.* at 3.

259. *Id.*

260. Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0(b) (2005).

261. *Id.* § 255.0(b) ex.5.

conspicuous disclosure of any payment in the case of endorsements,[262] but does not require any disclosure when it comes to product placement.

Furthermore, the case on which the staff relies does not directly support its interpretation. In *JS&A Group, Inc.*, the FCC alleged as a completely separate count that it was deceptive for a paid program to be held out to the public as an independent program.[263] The same is true in many other cases involving deceptive formats.[264] The deceptive format claim does not seem to depend on whether the information presented about the product is factual.

Taken to its logical end, the staff's claim that only advertisements presenting objective information about a product's performance or attributes can be deceptive would immunize a large number of advertisements from being found deceptive. Much of modern advertising does not communicate information about a product's attributes, price, or availability, but rather is concerned with creating a certain image or associating a certain emotion with a product.[265] Moreover, immunizing from regulation commercial speech that lacks informational content would have the effect of turning the commercial speech doctrine on its head. As discussed earlier, the reason that commercial speech is protected under the First Amendment at all is that it provides useful information to

262. *Id.* § 255.5. The FTC Guidelines also require that endorsements be true, in the sense that they reflect the "honest opinions, findings, beliefs, or experience of the endorser." *Id.* § 255.1(a).

263. JS&A Group, Inc., 111 F.T.C. 522, 524 (1989).

264. For example, in *In re Vital Basics, Inc.*, No. C-4107, 2004 FTC LEXIS 52, at 28 (F.T.C. Apr. 26, 2004), the FTC alleged that representing, directly or by implication, that these advertisements were independent radio programs and not paid commercial advertising constituted unfair or deceptive acts or practices under the Federal Trade Commission Act. *See also* Mega Sys. Int'l, Inc., 125 F.T.C. 973, 986 (1998) (finding representations false and misleading where respondents portrayed paid commercial advertising as independent television and radio programs); Synchronal Corp., 116 F.T.C. 1189, 1202 (1993) (finding representations false and misleading where respondents portrayed paid commercial advertising as independent television programs); Michael S. Levey, 116 F.T.C. 885, 900 (1993) (finding representations false and misleading where respondents portrayed paid commercial advertising as independent television programs).

265. *See* Ronald K.L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697, 702–07 (1993).

consumers.[266] In fact, in *Friedman v. Rogers*,[267] the Court found that the very fact that a trade name conveys no information about the price or nature of the services offered created the potential for misleading the public.[268]

Even assuming, however, that the FTC staff letter correctly interprets its own precedent, Congress, of course, remains free to make its own determination as to whether certain marketing practices are deceptive.

3. Research on Character Marketing to Children

Congress could certainly find that using characters popular with children to market unrelated products is deceptive. As the CARU Guidelines state: "Studies have shown that the mere appearance of a character with a product can significantly alter a child's perception of the product. Advertising presentations by program/editorial characters may hamper a young child's ability to distinguish between program/editorial content and advertising."[269]

Or, as the Center for Science in the Public Interest summarizes the problem: "Younger children may not understand that spokespeople are paid to promote products, and small children may not even understand that cartoon characters do not really exist. Using characters from movies and television shows also blurs the line between programs and advertising."[270]

Dr. Jennifer Kotler, Director for Knowledge Management, Department of Education and Research at Sesame Workshop, presented a very dramatic demonstration of the effectiveness of character marketing at the recent FTC workshop on Marketing, Self-Regulation, and Childhood Obesity. She described research on whether the *Sesame Street* characters influenced food choices.[271]

266. *See supra* notes 157–158 and accompanying text; *see also* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 55 (2000) (arguing commercial speech is protected under the First Amendment because of its informational function).

267. 440 U.S. 1 (1979).

268. *Id.* at 12–13.

269. CHILDREN'S ADVER. REVIEW UNIT, *supra* note 114, at 7.

270. CTR. FOR SCI. IN THE PUB. INTEREST, *supra* note 26, at 25.

271. *See* Jennifer Kotler, SESAME WORKSHOP, THE HEALTHY HABITS FOR LIFE INITIATIVE AT SESAME WORKSHOP 6 (2005), *available at* http://www.ftc.gov/bcp/workshops/foodmarketingtokids/presentations/jkotler.pdf [hereinafter KOTLER, HEALTHY HABITS]; *see also* Jennifer Kotler,

Children were asked whether they wanted to eat broccoli or a Hershey bar.[272] Twenty-two percent chose broccoli.[273] Next, a sticker showing Elmo, a well known character from *Sesame Street*, was attached to the broccoli.[274] A sticker showing a different *Sesame Street* character, who had not yet been on the air, was attached to the Hershey Bar.[275] This time, 50% of the children said they wanted the broccoli.[276] Then, the stickers were reversed so that the Elmo sticker was on the Hershey Bar.[277] Under these conditions, only 11% wanted the broccoli and 89% preferred the Hershey Bar.[278]

Most research on the effect of character marketing on children concerns host-selling on television because, as discussed above, the FCC has a policy against host-selling on children's television programs.[279] Charles Atkin, whose study was published in 1975, was the first to investigate host-selling.[280] Atkin showed children aged three to seven a commercial for Flintstone's cereal that was embedded within either a *Flintstones* or *Bugs Bunny* cartoon.[281] He found that one fourth of the children who recalled seeing the Flintstones eating cereal thought this activity occurred during the cartoon rather than the commercial.[282] He further found that children who saw the commercial during the *Flintstones* were more likely to desire the cereal than those who saw it during *Bugs Bunny*.[283]

Perspectives on Marketing, Self-Regulation and Childhood Obesity, Remarks at Federal Trade Commission and the Department of Health and Human Services 287–289 (July 14, 2005) (transcript available at http://www.ftc.gov/bcp/workshops/foodmarketingtokids/transcript_050714.pdf) (describing research conducted to determine whether the Sesame Street characters influenced food choices).

272. *See* KOTLER, HEALTHY HABITS, *supra* note 271, at 15.
273. *See id.*
274. *Id.* at 16.
275. *See id.*
276. *Id.*
277. *See id.* at 17.
278. *Id.*
279. *See supra* Part III.B.1.
280. Mariea Grubbs Hoy et al., *Animated Host-Selling Advertisements: Their Impact on Young Children's Recognition, Attitudes, and Behavior*, 5 J. PUB. POL'Y & MARKETING. 171, 173 (1986).
281. *Id.*
282. *Id.*
283. *Id.*

In the 1980s, Kunkel conducted further research in which children viewed programming (*Flintstones* and *The Smurfs*) and commercials (for either Fruity Pebbles Flintstone cereal or Smurfberry Crunch cereal) taped off-the-air on Saturday mornings.[284] He found clear evidence of a "confusion effect related to the host-selling format,"[285] and that both younger (aged four to five) and older (aged seven to eight) children were confused. He also found that the older children were "more favorably influenced toward the advertised product by host-selling than by viewing the same commercial in a non-host-selling format."[286] Kunkel suggested that older children are more skeptical towards commercials generally and that their skepticism

> may . . . be minimized in the host-selling scenario. By definition, host-selling commercials feature figures who are well-known and trusted program heroes. Reactions to the products endorsed by such figures may be enhanced by an increase in children's positive affect toward the characters generated through their viewing of the adjacent program content.[287]

In a 2001 study, Mariea Grubbs Hoy, Clifford Young, and John Mowen conducted experiments using *Flintstones* and *Bugs Bunny* cartoons and cereal commercials comparable to those Atkin used.[288] While they found that children had no more difficulty distinguishing the commercial from the program when seen in a host-selling context, they did confirm that children were less likely to recognize the commercial's selling intent in the host-selling context than in the non-host condition.[289]

This study also "unexpectedly" found that children viewing the Pebble's cereal advertisement in the *Bugs Bunny* cartoon had a larger positive attitude change toward the cereal than those viewing it

284. Dale Kunkel, *Children and Host-Selling Television Commercials*, 15 COMM. RES. 71, 78–79 (1988).
285. *Id.* at 81–83.
286. *Id.* at 84.
287. *Id.* at 88.
288. *See* Hoy et al., *supra* note 280, at 179–80.
289. *Id.* at 177–80. Within the host-selling context, however, children had greater difficulty distinguishing commercials that were imbedded within the program as opposed to those adjacent to the program. *Id.* at 180.

within the *Flintstones* cartoon.[290] They speculated that the introduction of different characters may serve as an attention-getter, or that children viewing the *Flintstones* cartoon may be overexposed and bored with the character.[291] While Hoy, Young, and Mowen's findings differ from those of Kunkel and Atkin as to the impact of host-selling (as that term is defined by the FCC), for purposes of this Article, it is irrelevant whether the *Flintstones* characters sell cereals better when the advertisement is embedded in a *Flintstones* cartoon or another cartoon. Both studies agree, as do most other researchers, that associating a product with popular characters can cause children to desire the product.[292]

A recent study by Judith Garretson and Ronald Niedrich examined how different spokes-character qualities affect brand attitudes across market segments.[293] This study is not directly on point since it was limited to "noncelebrity" spokes-characters," that is, those that were created for the sole purpose of promoting a product or brand, and the subjects of the experiment were undergraduate students, not children.[294] Nonetheless, several of their findings are relevant here. First, they found that trusted spokes-characters were effective in engendering positive brand evaluations.[295] Second, they found that the use of spokes-characters results in more favorable brand attitudes for consumers with less

290. *Id.*

291. *Id.* at 180–81.

292. Hoy et al., *supra* note 280, at 180; Kunkel, *supra* note 284, at 81. *But see* Sabrina M. Neeley & David W. Schumann, *Using Animated Spokes-Characters in Advertising to Young Children*, 33 J. ADVERTISING 7, 8 (2004) (concluding "although character action and voice may influence a young child's attention to an ad, recognition of the character and product, and even a positive attitude toward the product, the relation between spokes-characters and a child's preference, intention, and choice of product is uncertain"). However, their experiment, which involved pre-school aged children, used animated characters that were created for the purpose of study and were not recognized by children. *Id.* The authors note that "it is possible that strong experience with a spokes-character, often derived from massive media exposure and popularity of the characters, motivates the leap from liking to preference, intention, and choice." *Id.* at 20.

293. Judith A. Garretson & Ronald W. Niedrich, *Spokes-Characters: Creating Character Trust and Positive Brand Attitudes*, 33 J. ADVERTISING 25 (2004).

294. *See id.* at 25, 29.

295. *Id.* at 33.

brand experience.[296] Because children generally are more trusting and have less brand experience than adults, they are even more likely than adults to be susceptible to spokes-character marketing. Finally, Garretson and Niedrich noted that because consumers are exposed to characters at an early age through character endorsement of children's products, these same characters may be used years later to "prime personal memories, including those of earlier times and felt trust with the character."[297] Thus, exposure to character marketing as a child may even affect product choices later in life.

In sum, there is an ample evidentiary basis for Congress to find that the use of product placement in children's media, and the use of characters from children's media to market unrelated products, is deceptive and misleading.

D. The Court Would Likely Uphold Legislation Prohibiting Deceptive Commercial Speech Aimed at Children

If Congress were to pass the proposed legislation based on its conclusion that product placement and celebrity spokes-character marketing in children's media were misleading or deceptive, the Supreme Court would likely uphold the restrictions under the first prong of the *Central Hudson* test. Not only is the commercial speech at issue misleading and unfair, but restricting it is consistent with the concerns underlying the commercial speech doctrine. Specifically, the restriction does not have any significant effect on the speech available to adults. Moreover, while restrictions on advertising to adults are disfavored because they are paternalistic, paternalism is appropriate in regulations designed to protect children. In addition, the proposed legislation limits only certain forms of advertising to children, and these forms of advertising provide little if any information to children.

1. The Legislation is Limited to Advertising to Children

In *Lorillard Tobacco Co. v. Reilly*,[298] the Supreme Court considered restrictions intended to primarily affect children. There, the Court found Massachusetts' regulations unconstitutional because

296. *Id.*
297. *Id.* at 28 (citation omitted). Their experiment confirmed that nostalgia was an important factor in engendering character trust. *Id.* at 32.
298. 533 U.S. 525 (2001).

they substantially restricted the flow of information to adults.[299] Specifically, the Court found that the prohibition on outdoor advertising of smokeless tobacco and cigars within a one-thousand foot radius of a school playground was a poor fit with the stated goal of preventing minors from using tobacco products because "[i]n some geographical areas, these regulations would constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to *adult* consumers."[300] While recognizing that Massachusetts had a substantial interest in preventing underage tobacco use, the Court stated that tobacco companies had an interest in conveying truthful information to adults and adults had an interest in receiving truthful information about tobacco products.[301]

In *Bolger*, the government argued, among other things, that a statute prohibiting unsolicited mailing of contraceptive advertising was necessary to protect children.[302] It claimed that that statute aided "parents' efforts to control the manner in which their children become informed about sensitive and important subjects such as birth control."[303] The Court agreed this interest was substantial, but found the means did not fit the end.[304] It found it reasonable to assume parents would exercise control over what enters their mailboxes.[305] Further, any marginal protection for children would be at the expense of suppressing the availability of this information to adults: "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."[306]

299. *Id.* at 564–65.
300. *Id.* at 562 (emphasis added).
301. *Id.* at 564. The point of sale limitation to ads below five feet failed both prongs three and four. *Id.* at 566–67. The Court found that the five-foot rule failed to advance the state's goal of preventing underage tobacco use since many minors are taller than five feet, and thus, the rule was not a good fit. *Id.*
302. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 71 (1983).
303. *Id.*
304. *See id.* at 73–75.
305. *Id.* at 73.
306. *Id.* at 74. In *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 749 (1978), the Court recognized the government's interest in protecting children justified limits on broadcasts heard by adults. However, it distinguished mail from broadcasting because it was less intrusive and could be better controlled by parents. *Bolger*, 463 U.S. at 74.

Unlike outdoor advertising or certain mailed advertisements, prohibiting product placement and character marketing in children's media or children's products has only minimal, if any, impact on adults' access to information. Nor are program producers' First Amendment rights limited. Producers would be free to use brands so long as they were not paid (in money or other valuable consideration) to do so. Thus, for example, the legislation would not prevent a scene from being shot in Times Square, or preclude the use of brand name products integral to a story.

Moreover, in the case of product placement and character marketing, unlike the mail, it is impossible for parents to protect their children. There are no ratings, filters or blocking devices available for product placement or character marketing as there are for violent or sexually explicit programming. Indeed, as discussed earlier, advertisers' increased interest in product placement is driven in large part by the desire to find a way to prevent the public from skipping over commercials.[307]

Throughout the Supreme Court's decisions on commercial speech, the Court objected to the paternalism underlying the restrictions. In *Virginia Pharmacy*, for example, the Court observed that it was hard to see how the law protected consumers by keeping them ignorant and referred to the restriction as a "highly paternalistic approach."[308] Similarly, in *Peel*, Justice Stevens wrote, "[w]e reject the paternalistic assumption that the recipients of petitioner's letterhead are no more discriminating than the audience for children's television."[309]

Moreover, the cases in which restrictions were upheld involved advertising directed at populations viewed as more vulnerable. In *Bates*, the Court found that advertising by attorneys posed special risks of deception because of the public's lack of sophistication concerning legal services.[310] Similarly, in *Edenfield v. Fane*, the Court distinguished between in-person solicitation by lawyers and in-person solicitation by certified public accountants (CPAs) on the

307. *See supra* notes 20–21 and accompanying text.

308. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 770 (1976).

309. Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 105 (1990).

310. Bates v. State Bar, 433 U.S. 350, 383 (1977).

ground that a typical CPA client was an experienced business person who would be less susceptible to manipulation than the "young accident victim" involved in *Ohralik*.[311]

Children clearly lack sophistication and are susceptible to manipulation by product placement and character marketing. Additionally, although product placement and character marketing generally do not involve in-person solicitation, this trend is changing. Kathryn Montgomery describes how new technologies and data collection techniques can allow interactive product placement and other forms of one-on-one marketing to children.[312] Sandra Calvert also predicts that "[i]n the future, host selling will take on a new form. Intelligent, humanlike characters will be developed to create personal relationships with individual children and adolescents, thereby cultivating familiarity, affection, and trust."[313]

Thus, in considering the constitutionality of restrictions on product placement and character marketing to children, the Court should not be concerned that the legislation is paternalistic. Paternalism is appropriate when children are involved, especially here, where parents are not able to effectively protect their children without the state's assistance. Indeed, in other recent cases involving restrictions on noncommercial speech, the Court has been willing to protect children from speech considered harmful to them so long as it did not infringe significantly on the rights of adults. For example, in *United States v. American Library Ass'n*,[314] the Court rejected a First Amendment challenge to the Children's Internet Protection Act which required public libraries that receive grants from the federal government to install software designed to protect minors from accessing material harmful to them.[315] The Court found that the measure had little impact on adults because adults could request the software be disabled.[316] In contrast, the legislation proposed here

311. Edenfield v. Fane, 507 U.S. 761, 775 (1993) (citing Ohralik v. Ohio State Bar Assoc., 436 U.S. 447 (1978)).

312. Kathryn C. Montgomery, *Digital Kids: The New On-Line Children's Consumer Culture*, *in* HANDBOOK OF CHILDREN'S MEDIA, *supra* note 220, at 639–40, 643.

313. Calvert, *supra* note 124, at 355.

314. 539 U.S. 194 (2003).

315. *Id.*

316. *Id.* at 209. In contrast, in *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 701–02 (2004), the Court upheld a preliminary injunction against

imposes absolutely no restriction on media intended for adults or primarily viewed by adults.

2. The Proposed Legislation Only Limits Certain Forms of Advertising

On several occasions, the Court has noted that regulation of the *form* of commercial speech is permitted. For example, the *Virginia Pharmacy* Court observed that it may be appropriate to require commercial messages to appear in such a form as is necessary to prevent its being deceptive.[317] Moreover, in other cases, the Court has emphasized its special concern with complete bans.[318]

The proposed legislation would not prohibit all forms of advertising to children. Rather, it would only prohibit certain forms that are particularly deceptive and unfair. In other words, Kelloggs remains free to advertise Pop-Tarts to children. It merely may not market them to children through paid product placement or by using SpongeBob or other popular children's characters to promote them.

3. Product Placement and Character Marketing Lack Informational Value

The commercial speech cases make clear that the main purpose of affording constitutional protection to commercial speech at all is to ensure that the public has access to information.[319] In contrast, product placement and character marketing generally provide no real information about the product, its characteristics, availability or price. Thus, the case for protecting these forms of commercial

enforcement of the Children's Online Protection Act. The Court found that the law would have a significant chilling effect on the speech available to adults, and that filtering software was less of a speech restriction and a more effective alternative for protecting minors. *Id.*

317. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771 n.24 (1976).

318. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 562 (2001) (expressing concern that regulations would constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 502 (1996) (discussing "dangers that attend complete bans on truthful, nonmisleading commercial speech cannot be explained away").

319. *See, e.g.*, *44 Liquormart*, 517 U.S. at 489 (discussing prices of liquor); Rubin v. Coors Brewing Co., 514 U.S. 476, 484 (1995) (discussing alcohol content of beer); *Va. State Bd. of Pharmacy*, 453 U.S. at 754 (discussing prices of prescription drugs).

speech is weak.

Moreover, there is no effective way to make product placement or character marketing nonmisleading by requiring disclosures. In its FTC Complaint, Commercial Alert asked the FTC to require product placements be identified when they occur, as well as at the beginning of a program, and that such disclosure be clear and conspicuous.[320] While this may be an appropriate way to reduce the deceptiveness of product placements for adults, it will not be effective for children. Since, as discussed above, children under the age of seven generally do not understand the persuasive intent of advertising, merely telling them that the product placement is an advertisement will not eliminate the unfairness.[321] Further, research shows that the FCC's analogous requirement of separation devices between children's programs and commercials has largely been ineffective.[322]

VI. WOULD THE LEGISLATION HELP REDUCE THE PROBLEM OF JUNK-FOOD ADVERTISING?

Even if Congress were to pass such legislation, and the Court were to uphold it, it would be fair to ask whether this legislation would help solve the problem of childhood obesity, a matter that has received so much attention lately and is the subject of this symposium. In a report issued just as this Article was going to press, the Institute of Medicine found that "[t]he commercial advertising and marketing of foods and beverages influences the diets and health of children and youth."[323] The report estimates that more than $10 billion per year is expended to market food, beverage and restaurant products to children and youth.[324] While "[t]elevision remains the primary promotional vehicle for measured media marketing, . . . a shift is occurring toward unmeasured sales promotion, such as marketing through product placement, character licensing, special events, in-school activities, and advergames."[325] These findings lend support to the claim that limiting product placements and character

320. Letter from Gary Ruskin, Executive Dir., Commercial Alert, to Marlene H. Hortch, Sec'y, FCC (Sept. 30, 2003) (on file with Commercial Alert).

321. *See supra* note 222 and accompanying text.

322. WILCOX ET AL., *supra* note 219, at 6.

323. COMM. ON FOOD MKTG. & THE DIETS OF CHILDREN & YOUTH, *supra* note 49, at 3.

324. *Id.* at 145.

325. *Id.* at 3.

marketing will address the problem of childhood obesity.

Nonetheless, at the FTC Workshop, Dr. Margo Wootan, Director of Nutrition Policy at the Center for Science in the Public Interest, argued that the problem is not so much that advertisements are deceptive, but that the products advertised are most often for food of poor nutritional quality.[326] She also pointed out that advertising could be used to promote healthy food.[327]

The legislation proposed here would prohibit product placement and character marketing to children regardless of the type of product being marketed. Thus, for example, it would prohibit product placements for Hot Wheels toys, Corvettes, and Victoria's Secret clothing, as well as for Coca-Cola and Burger King products, because the deceptiveness of the product placement does not depend on the product being promoted. Deceptively promoting products that are good for children is still deceptive.[328]

The key reason for identifying deception as the harm caused by product placement and character marketing, rather than as their contribution to the obesity epidemic, is that legislation prohibiting deceptive commercial speech is likely to survive constitutional challenge.[329] Legislation prohibiting advertising of unhealthy food products to children would not necessarily be found unconstitutional, but would be a much harder case to make.

If the purpose of legislation is to suppress truthful non-misleading speech to improve the health of children, the courts would have to apply the last three prongs of the *Central Hudson*

326. *See* Margo Wootan, Dir. of Nutrition Policy, Ctr. for Sci. in the Pub. Interest, Remarks at the FTC and Department of Health and Human Services Workshop; Perspectives on Marketing: Self-Regulation and Childhood Obesity 78 (July 15, 2005) (transcript available at http://www.ftc.gov/bcp/workshops/foodmarketingtokids/transcript_050715.pdf).

327. *See id.* at 52. In fact, one of the recommendations of the Institute of Medicine is that licensed characters be used only for the promotion of foods and beverages that support healthful diets for children. COMM. ON FOOD MKTG. & THE DIETS OF CHILDREN & YOUTH, *supra* note 49, at 10.

328. *Cf.* Advertising Council Request for Declaratory Ruling or Waiver Concerning Sponsorship Identification Rules, 17 F.C.C.R. 22,616, 22,621–22 (2002) (holding public disclosure required where the Office of National Drug Control Policy pays for stations to run anti-drug public service announcements).

329. *See supra* Part V.

test.[330] It should not, however, be difficult to show that the asserted governmental interest is substantial. It is less clear whether the courts would find that the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

In fact, the Chairman of the FTC emphasized that "[a]ny form of government limitation on truthful commercial speech faces significant constitutional hurdles."[331] She asserted that establishing restrictions on food advertising to children to directly advance their health would be "at best, a difficult undertaking."[332] Moreover, in her view, it would be even more "difficult "to show that there are no options to protect children's health that would not involve limiting speech."[333] Commentators have generally noted that the Court's review of nonmisleading commercial speech has moved closer to strict scrutiny.[334] Some Justices would like to see truthful commercial speech afforded the same level of protection as other forms of speech. For example, in his concurrence in *Lorillard*, Justice Thomas argued for applying strict scrutiny.[335] He also pointed out "that to uphold the Massachusetts tobacco regulations would be to accept a line of reasoning that would permit restrictions on advertising for a host of other products," citing as an example, fast food advertisements targeting children.[336] Thus, legislation prohibiting food advertising to children would require a substantial amount of empirical support to be upheld.

330. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).

331. Majoras, *supra* note 153, at 9.

332. *Id.* at 10.

333. *Id.* Others have made similar arguments. *See, e.g.*, Todd J. Zywicki et. al., *Obesity and Advertising Policy*, 12 GEO. MASON L. REV. 979, 991–1003 (2004) (questioning whether food advertising substantially contributes to obesity in children).

334. *See, e.g.*, John M. Olin, Note, *Making Sense of Hybrid Speech: A New Model for Commercial Speech and Expressive Conduct*, 118 HARV. L. REV. 2836, 2855 (2005) (discussing trend of the Court in applying strict scrutiny for commercial speech regulations); Vladeck, *supra* note 209, at 1059 (discussing the transformation of *Central Hudson* test).

335. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 575 (1980) (Thomas, J., concurring).

336. *Id.* at 587–88.

Because so many of the examples of product placement and spokes-character marketing involve unhealthy foods, more limited legislation restricting these deceptive forms of advertising could significantly improve children's health. Moreover, the benefits from prohibiting deceptive advertising far outweigh any benefits that might result from using product placement or characters to market healthy foods. In response to public pressure, Nickelodeon's SpongeBob SquarePants will soon star on spinach, carrot and fruit bags in supermarkets.[337] While this will likely attract children to these products, using the same character to promote both healthy and unhealthy foods could be very confusing to children.[338]

VII. CAN THE PROPOSED LEGISLATION BE IMPLEMENTED EFFECTIVELY?

Even if the legislation is constitutional and would contribute to solving the problem of childhood obesity, it would likely give rise to practical objections. For example, how can one tell whether a program, Web site, movie, or video game is targeted to or viewed/used by significant numbers of children?

A. Line Drawing Problems

Determinations of whether a particular program, movie, Web site or video game is intended for children or watched/visited/played by substantial numbers of children are routinely made in a variety of contexts. For example, most movies, television shows, and video games have ratings for age appropriateness. These ratings are likely to provide a good indication as to whether a substantial number of children will view the film, program or game. Demographic data regarding viewers of television programs and magazine readers is routinely collected and made available to advertisers. Moreover, food companies design certain food products to specifically appeal to children.[339]

337. Therese Howard, *Food Marketers Hope Veggies Look Fun to Kids*, USA TODAY, July 15, 2005, at 5B, *available at* http://www.usatoday.com/money/industries/food/2005-07-14-obesity-usat_x.htm.

338. Of course, program producers will be free to feature health foods in programming so long as they are not paid to do so.

339. An example is Pepperidge Farm's co-branded Nickelodeon slime goldfish that, when eaten, color one's tongue green. Jennifer Brizzi, *Hued Food*, ULSTER PUBL'G, May 6, 2005, http://www.ulsterpublishing.com/

Certain cable networks, such as Nickelodeon and Cartoon Network, target younger viewers. Additionally, major broadcast networks devote certain time periods, primarily Saturday mornings, to children's programming. For purposes of its advertising restrictions, the FCC defines children's programs as "programs originally produced and broadcast primarily for an audience of children 12 years old and younger."[340] Neither the FCC nor the entities covered by its regulations appear to have difficulty determining which programs are included within this definition.[341]

CARU also seems to be able to determine what constitutes children's advertising without much difficulty. CARU Guidelines "apply to advertising addressed to children under twelve years of age in all media, including print, broadcast and cable television, radio, video, point-of-sale and online advertising and packaging."[342] CARU takes the position that it "should scrutinize children's advertising wherever it appears . . . without reference to program content, form or day-part."[343] It considers any commercial that is directed toward children or for a children's product to come within its purview, but allows advertisers to provide demographics to verify that children do not constitute a significant part of the audience.[344]

index.cfm?fuseaction=article&articleID=343373. Moreover, the Institute of Medicine found that new food and beverage products targeting children, as well as children's versions of classic products, have proliferated in recent years. COMM. ON FOOD MKTG. & THE DIETS OF CHILDREN & YOUTH, *supra* note 49, at 132–40.

340. 47 C.F.R. § 73.670 n.2 (2004).

341. *See* Policies and Rules Concerning Children's Television Programming, 6 F.C.C.R. 2111, 2112 (1991) (finding FCC definition of children's programs well-established and supported by the majority of commenting parties).

342. CHILDREN'S ADVER. REVIEW UNIT, *supra* note 114, at 4.

343. CHILDREN'S ADVER. REVIEW UNIT, CHILDREN'S ADVERTISING IN TODAY'S MEDIA MARKET (2005), http://www.caru.org/news/todaymkt.asp.

344. *Id.* At the FTC Workshop, CARU Director Elizabeth Lascoutx explained that CARU had an "internal working rule that—which we've borrowed from other industry codes, that if there is a 35 percent under 12 demographic in programming before 9:00 at night, we will look at it and consider it within our purview." Elizabeth Lascoutx, Dir., Children's Adver. Review Unit, Remarks at the FTC and Department of Health and Human Services Workshop: Perspectives on Marketing: Self-Regulation and Childhood Obesity 68 (July 15, 2005) (transcript available at http://www.ftc.gov/bcp/workshops/foodmarketingtokids/transcript_050715.pdf).

Similarly, the FTC has had no significant problems determining whether Web sites are directed to children in its implementation of the Children's Online Privacy Protection Act (COPPA). This Act restricts the collection and use of personal information on Web sites or online services directed towards children.[345] A "website or online service directed to children" is a commercial Web site or online service, or portion thereof, "that is targeted to children."[346] In determining whether a Web site is targeted to children, the Commission considers

> its subject matter, visual or audio content, age of models, language or other characteristics of the website or online service, as well as whether advertising promoting or appearing on the website or online service is directed to children. The Commission will also consider competent and reliable empirical evidence regarding audience composition; evidence regarding the intended audience; and whether a site uses animated characters and/or child-oriented activities and incentives.[347]

The FTC recently requested comment on the adequacy of this definition,[348] and Nickelodeon and other companies responded that the factors used by the FTC were clear and appropriate.[349] These examples suggest that the line drawing problems inherent in legislation of this type are surmountable.

345. Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501–6506 (2000).

346. *Id.* § 6501(10).

347. 16 C.F.R. § 312.2 (2004).

348. As required by COPPA, the FTC recently began a review of the effectiveness of the law and its rules. Among other things, it sought comment on whether its definitions were clear and appropriate. Children's Online Privacy Protection Rule: Request for Comments, 70 Fed. Reg. 21,107, 21,109 (Apr. 22, 2005) (to be codified at 16 C.F.R. pt. 312).

349. *See* Comments of Nickelodeon to FTC on Children's Online Privacy Protection Rule at 9, FTC File No. P054505 (June 27, 2005), *available at* http://www.ftc.gov/os/comments/COPPArulereview/516296-00018.pdf; Comments of Time Warner Inc. to FTC Children's Online Privacy Protection Rule at 4–5, FTC File No. P054505 (June 27, 2005), *available at* http://www.ftc.gov/os/comments/COPPArulereview/516296-00019.pdf.

B. Experience in Other Countries

Further support for the feasibility of the proposed legislation may be found in the fact that many other countries limit advertising to children, prohibit product placement, and/or restrict character marketing to children.

A survey conducted by the World Health Organization (WHO) found that sixty-two of seventy-three countries reviewed had some form of regulation (defined broadly to include self-regulation) of television advertising that specifically referred to children.[350] Some, such as Sweden, Norway, and Quebec, Canada, ban all television advertising targeted at children.[351] Many other countries do not allow children's programs to be interrupted by advertising or have other types of restrictions.[352]

In addition, the survey found that twenty-three countries had "some form of statutory regulation on product placement."[353] It found that, "[r]egulations on product placement typically take one of several forms, including outright bans on product placement and on 'surreptitious advertising' (i.e., hidden advertising that might mislead the public); strong discouragement of product placement, 'indirect advertising' or 'non-regular' advertising; time restrictions; and guidelines on the use of placed products."[354] Austria, Belgium (Flemish community), Ireland, Norway and the United Kingdom explicitly ban product placement, while the Czech Republic, Denmark, Germany, Italy, Switzerland and others interpret the ban on surreptitious advertising to restrict product placement.[355]

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350. CORINNA HAWKES, WHO MARKETING FOOD TO CHILDREN: THE GLOBAL REGULATORY ENVIRONMENT 14 (WHO 2004), *available at* http://whqlibdoc.who.int/publications/2004/9241591579.pdf.

351. *Id.* at 15–16 tbl.3, 19.

352. *See, e.g.*, *id.* at 19 tbl.4 (summarizing timing and content restriction in selected European countries), 22–23 (noting that Australia "prohibit[s] advertising during program[s] aimed at pre-school age children, restrict[s] the amount of advertising during programming for primary school-age children, and limit[s] the repetition of advertisements"). For a summary of the regulations in the eighteen members of the EU, see EUROPEAN COMM'N, STUDY ON THE IMPACT OF ADVERTISING AND TELESHOPPING ON MINORS: SUMMARIES, *available at* http://www.europa.eu.int/comm/avpolicy/stat/studpdf/pubsum_en.pdf (last visited Nov. 1, 2005).

353. HAWKES, *supra* note 350, at 45.

354. *Id.*

355. *Id.* at 46 tbl.10. Hawkes notes that regulations regarding product place-

Likewise, several countries limit character selling to children. The United Kingdom prohibits children's television personalities from appearing in any advertisements before 9:00 p.m., and prohibits advertisements for merchandise based on children's programs during the two hours before and after broadcast of the relevant program.[356] In addition, the British Broadcasting Corporation recently decided to stop licensing the use of its popular children's television characters such as the Teletubbies in connection with fatty or sugary snack foods.[357]

Several Scandinavian countries also restrict character marketing. Finland prohibits advertisements in which sales pitches are delivered by familiar cartoon characters or children.[358] In Denmark, an executive order implementing the Television Without Frontiers Directive prohibits characters and puppets from children's programs from appearing in advertisements for products of particular interest to children.[359] Norway also prohibits advertisements that star people or characters from children's programs.[360] The fact that so many countries restrict product placement and character marketing suggests that legislation in the United States would be workable.

VIII. CONCLUSION

At a time when product placement and popular children's characters are increasingly being used to market unhealthy food products to children, limiting these techniques with regard to children could significantly prevent childhood obesity. Legislation restricting product placement in children's media, and prohibiting the use of popular children's characters from being used to market unrelated products to children, is workable and would likely be found constitutional by the Supreme Court. There is ample evidence

ment are "especially open to the vagaries of interpretation." *Id.* box 16. She cites, as an example, Austria which prohibits product placement in all children's programs and on public broadcasting programs, but not in television series. *Id.*

356. *Id.* at 19, tbl.4.

357. Emma Ross, *BBC to Phase Out Cartoon Character Licenses for Junk Food*, SAN DIEGO UNION-TRIBUNE, Apr. 5, 2004, *available at* http://www.signonsandiego.com/news/health/20040405-0907-cartoonjunkfood.html.

358. HAWKES, *supra* note 350, at 19 tbl.4.

359. EUROPEAN COMM'N, *supra* note 352, at 12.

360. *Id.* at 50.

to show under the first prong of the *Central Hudson* test that these forms of advertising, when directed at children, are deceptive and unfair, while having minimal impact on the speech available to adults.