

Ann O'Leary's Files

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Today's debate: Kids and electronic violence

Callous video game industry invites would-be regulators

Our view:

Resisting critics, it denies evidence of possible effects on kids.

If the video game industry has its way, an Indianapolis law designed to keep kids away from violent coin-operated video games won't go into effect as scheduled next Friday.

In a suit filed Monday, the American Amusement Machine Association, which seeks to restrict those under 18 from playing extremely violent games, violate the First Amendment.

In this specific case, the industry's claim might have merit. But it is in keeping with an unfortunate habit in the entertainment community broadly when it comes to violence aimed at children: The industry denies any claims of harm to kids, while enticing them to buy their products.

In doing so, the industry ends up sounding much like the tobacco industry, which for decades fought efforts to restrict sales of tobacco to minors and dismissed the mountain of evidence that smoking is unhealthy.

Last month, for instance, four prestigious medical groups, including the American Academy of Pediatrics and the American Medical Association, issued a powerful joint statement proclaiming that violent video games, TV shows and movies are directly linked to aggressive behavior in children.

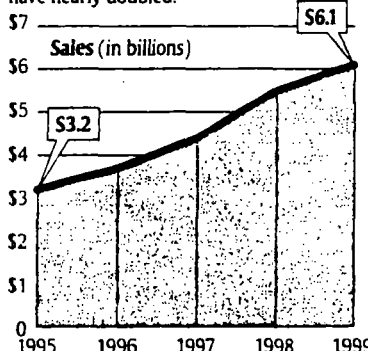
Many parents, of course, have perfectly healthy kids who spend hours with eyeballs glued to triple-digit-body-count movies, rough-and-tumble TV shows and increasingly realistic and gruesome video games.

But the industry's response to the medical organizations' findings was alarming. Rather than acknowledge that a risk might exist, industry officials insist that the games have no real impact whatever. It's a stance the industry takes whenever the subject comes up. Shortly after the Columbine High School massacre, for instance, Doug Lowenstein, president of the Interactive Digital Software Association, told a Senate committee that making any such link is "at best overstated and at worst at odds with prevailing academic literature." If there are any effects, he said, they quickly go away.

But there's an enormous body of research saying the opposite. As the medical groups

Video game sales take off

More than 215 million computer and video games were sold last year, or more than two per household. Sales during the past four years have nearly doubled.



By Genevieve Lynn, USA TODAY

pointed out, well over 1,000 studies on children's exposure to violent material, dating back to a 1972 surgeon general's report, "point overwhelmingly to a causal connection between media violence and aggressive behavior in children." More worrisome, they said the research suggests that, in some kids at least, the effects can be long lasting.

When it comes to marketing games to kids, the industry is in similar denial. Under pressure from Congress, the video game industry developed a labeling system. Games with an "M" rating are typically the most graphic and are designed for those age 17 and older. That, the industry says, is where its responsibility ends. But there's evidence that some game makers market graphic games to much younger sets. Next month the Federal Trade Commission is expected to issue a report looking into such practices.

Industry reassurances on these fronts may calm parental concerns, encouraging them to go on spending \$6 billion a year on video games. But by denying any link between its violent products and potentially harmful effects, the industry isn't helping parents where it counts: in steeling their resolve to keep the worst of the games out of reach. And it practically invites the very sort of regulation the industry is fighting in Indiana.

Better for all involved if the entertainment world decides to help spread the public-health message rather than blow it up.

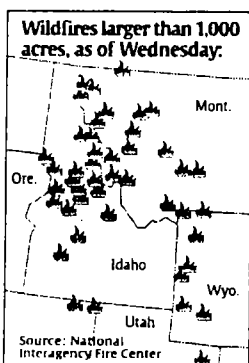
Tinder dry: The old West

By Mary Stange

EKALAKA, Mont. — We had dry lightning again last night. It's a phenomenon that occurs in various places, but nowhere so dramatically as in Big Sky country during fire season.

Turgid storm clouds crowd the evening sky. Rumbling ominously, they wait until dark to unleash volleys of blue-white energy. Then the rainless lightning comes, fast and ferocious, in several forms: Some strikes streak across the sky from one cloud to another; some explode within the clouds, suggesting enormous Chinese lanterns; and some — too many — slice jagged paths down from sky to ground. The snapping sound these vertical strikes make has roughly the same effect on the nerves as the buzz of a rattlesnake. These are the strikes that spawn wildfires.

We ranch in southeastern Montana. It's not the part of the state that the river runs through, or where the nationally reported blazes currently are raging. Those fires, along the Bitterroot Valley and elsewhere in the



Rocky Mountain end of this vast state, are hundreds of miles away from here. Nevertheless, we've been smelling their smoke for weeks now, and seeing it in the form of a yellow-brown haze. This haze has an interesting side effect: spectacular sunrises and sunsets. In ranch country, every cloud seems to have an ironic lining. And this is ranch country. We have few paved roads, no subdivisions. The population is shrinking steadily. Those ranchers managing to hang onto their livelihoods are mostly just about making it. The economy generally has been as kind to us as the harsh high-plains weather. We joke, ruefully, about becoming an endangered species. There are so few of us left that this Census dispensed with our occupational category. It doesn't take dry lightning to make a rancher feel vulnerable these days.

A part of Montana life

We've had our share of fires in this part of the state, too; we always do this time of year. But this has been an especially rough summer, with unremitting high temperatures and tinder-dry vegetation. Our neighbors had a lightning-caused grass fire this past week; fortunately, they got on it quickly before it could take out more than a piece of one pasture. They were lucky. Thousands of national-forest acres burned earlier this month near Ashland, about 60 miles west of us.

Although August is the cruelest month in these parts, there are weeks to go before the fire season ends. We pray for rain — and that our luck won't run out.

But ranchers know that our luck has been running out for a while now; we don't need the lightning to remind us. Demographers have explained our imminent demise to us already. Developers have plotted it. Economists have graphed it. We are the remnants of a West that isn't really there anymore, except on dude ranches and in theme parks.

Selling souls, counting on politicians

The majority of ranchers who survive do so by selling their souls to corporate agribusiness or by maintaining a separate, non-agricultural source of steady income. Some count on federal disaster relief to keep them afloat. Others, whose children want to carry on the family tradition, count on a repeal of the death tax in time to make that possible. Few can say they're thriving. Things can't go on this way forever.

But neither can fire season. The next strike might hit our place; the next wildfire might be a big one. Or maybe not: We, and our neighbors, may luck out. The weather forecasters are predicting continued heat with the threat of severe weather every day for the foreseeable future. But eventually, we just have to believe, autumn will get here. Eventually, if we just hold on, things will turn around. They always do. This is every rancher's credo.

There'll probably be more dry lightning tonight. It will be preceded by a brilliant sunset. We'll still be smelling smoke. And the question murmuring in the gathering storm clouds will be on just what, and how much, is the Western sun setting?

Mary Stange, who teaches at Skidmore College, operates the Crazy Woman Bison Ranch with her husband.

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MITCH GLAZIER
SENIOR VICE PRESIDENT
GOVERNMENT RELATIONS AND LEGISLATIVE COUNSEL



August 28, 2000

Bruce N. Reed
Assistant to the President for Domestic Policy
White House Office
Washington, DC 20500

Dear Mr. Reed:

For your information, the attached is an analysis written by David Kendall regarding mandatory labeling initiative.

I hope this is helpful.

Warm Regards,

A handwritten signature in black ink, appearing to read "Mitch Glazier". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Mitch Glazier
Senior Vice President, Government Relations
and Legislative Counsel

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August 28, 2000

To: Recording Industry Association of America
From: David E. Kendall
Thomas E. Shakow
Re: MANDATORY LABELING FOR VIOLENCE CONTENT

I. SUMMARY

Question: Could a law that mandated labeling of recordings for “violent” content be constitutional?

Conclusions: The Supreme Court recognized the problems inherent in burdening free speech as recently as late May, in its opinion in United States v. Playboy Entertainment Group, 120 S.Ct. 1878 (2000). Under Playboy, as well as numerous earlier cases, any mandatory labeling law would be unconstitutional on multiple grounds. A mandatory labeling law would regulate protected speech, and therefore would have to be narrowly tailored and advance a compelling governmental interest. Such a law could not avoid failing this test in at least two fundamental ways:

- First, mandatory labeling laws for “violent” content would be unable to define “violence” in such a way to avoid unconstitutionality for vagueness or overbreadth.
- Second, mandatory labeling laws are not the least restrictive means of dealing with violence in society.

These problems are particularly apparent in the proposed Media Violence and Labeling Act now being considered by the Senate Committee on Commerce, Science, and Transportation. Moreover, that bill would also be unconstitutional if passed in its current form because it improperly delegates legislative activities to nonlegislative bodies.

II. ISSUES

Any mandatory violence labeling system would suffer from fundamental constitutional flaws. Specifically: (1) it is impossible to define “violence” in such a way to avoid

unconstitutionality for vagueness or overbreadth; (2) such a regime would unduly infringe on free speech rights without advancing a compelling government interest.

A. VAGUENESS AND OVERBREADTH

At the heart of the proposals for a universal labeling system lie a set of related assumptions. First, the proposals assume that an acceptable and limited definition of violence can be created. Second, they assume that a definition of violence can be used as the basis for distinguishing “harmful” works from other, beneficial recorded works. And third, they assume that the standard can be applied in a rational manner to recordings and other artistic media all of which demonstrate considerable capacity for nuance and multiple meanings. Each of these assumptions is flawed.

First, an acceptable definition of “violence” is impossible to envision. The applicable standard here is that a law is unconstitutionally vague if persons “of common intelligence must necessarily guess at its meaning.” *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973). Vague statutes are unconstitutional typically because they fail to give fair warning to those potentially subject to them, or because they lend themselves to arbitrary and discriminatory enforcement. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). In the First Amendment context, statutes have been found void for vagueness for slightly different reasons, mainly due to their “obvious chilling effect on free speech.” *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997).

Courts have on multiple occasions held statutes addressing “violent” speech to be impermissibly vague for each of these reasons. In *Video Software Dealers Association v. Webster*, 968 F.2d 684, 690 (8th Cir. 1992), a Missouri statute barred the rental or sale to minors of videos depicting violence. The statute was held unconstitutional on its face, in part because the statute failed to define “violence,” and was therefore too vague. *See id.* at 690. The Eighth

Circuit held that it had no reason to assume Missouri's courts could rehabilitate the statute by applying their own definition of violence:

[w]e believe the Missouri courts could only define the prohibited expression on a video-by-video basis. Video dealers are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal.

Id. (internal quotation marks omitted).

Likewise, in Allied Artists Pictures Corp. v. Alford, a district court in Tennessee invalidated an ordinance that barred the dissemination to juveniles of material containing "excessive violence." 410 F. Supp. 1348, 1357 (M.D. Tenn. 1976). The court held "excess violence" to be too vague a description of the prohibited material: "[a]s necessarily applied by Board members, the section constituted an excessively subjective judgment" ¹ Id.

Similarly, in Interstate Circuit v. City of Dallas, 390 U.S. 676 (1968), the Supreme Court struck down a legally-mandated classification system as void for vagueness. There, an official municipal Motion Picture Classification Board was deputized to rate films as "not suitable" for children – with "not suitable" defined as "[d]escribing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency." 390 U.S. at 681. The Court held that these terms were so vague that it would be difficult for film producers to predict in advance what movies would be considered "not suitable." Id. at 684. It also noted that the stigma of classification

¹ See also Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 532 (Tenn. 1993) (invalidating for vagueness law regulating "excessive violence" that defined term in "entirely subjective" way).

would tend to provoke producers to self-censor to the point where they might produce only “inane” and “innocuous” films suitable for children, to the detriment of adult audiences. Id.

The same problems of vagueness, subjective definition, and chilling have occurred in other free speech contexts² and with other labeling laws,³ and would clearly occur with any bill mandating labeling for violence content in this context.

A more specific approach, listing particular violent acts, would be no more successful in passing constitutional muster. Not only would the listed definitions of particular acts of violence themselves potentially suffer from vagueness problems, but the second problem would arise: such definitions would inevitably reach large categories of valuable speech protected by the First Amendment, and therefore the definitions would be grossly overbroad.⁴

² See also Reno v. ACLU, 521 U.S. 844, 870-71 (1997) (invalidating as vague provisions of the Communications Decency Act that affected “patently offensive” and “indecent” materials); Butler v. Michigan, 352 U.S. 380, 381-3 (U.S. 1957) (invalidating ban on books “manifestly tending to the corruption of the morals of youth”).

³ Several times, the Supreme Court has held unconstitutionally vague classification and labeling laws that affected speech. See Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 681-82 (1968); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 67 (1963). In Bantam Books, the Court invalidated a statute that created a commission to label and circulate lists of “objectionable” books. See id. at 67. The term “objectionable” was not defined; instead, the Commission was vested with the authority to label any publication that contained “obscene, indecent or impure language, or manifestly tend[ed] to . . . corrupt[] . . . youth.” Id. at 59-60 (quotation omitted). In striking down the statute as void for vagueness, the Court noted that, among other things, the government-sponsored list had a chilling effect, in that it made retailers reluctant to sell the listed books. See id. at 68-69.

⁴ See, e.g., Simon & Schuster, Inc. v. Members of the N. Y. State Crime Victims Bd., 502 U.S. 105, 121 (1991) (invalidating law prohibiting criminal from profiting from writing about crime because law would have reached *Autobiography of Malcolm X*, Thoreau’s *Civil Disobedience*, and Augustine’s *Confessions*); and McCullum v. CBS, Inc., 202 Cal. App. 3d 989, 995 n.4 (1988) (in holding Ozzy Osbourne song “Suicide Solution” protected by First Amendment, listing various valuable discussions of suicide including “To be or not to be” soliloquy in *Hamlet*, *Anna Karenina*, *The Bell Jar*, *Death of A Salesman*, and operas of Puccini, Menotti and Verdi).

A federal district court in Florida noted this problem in Zamora v. Columbia Broadcasting Co., 480 F. Supp. 199 (S.D. Fla. 1979). In that case, the plaintiff had killed an elderly woman, and was suing the three major television networks for having allegedly desensitized him to violence. See id. The court dismissed the claim, holding that

the liability sought for . . . would place broadcasters in jeopardy for televising Hamlet, Julius Caesar, Grimm's Fairy Tales, more contemporary offerings such as All Quiet on the Western Front, and even The Holocaust, and indeed would render John Wayne a risk not acceptable to any but the boldest broadcasters.

Id. at 206. See also Eclipse Enterprises, Inc. v. Gulotta, 134 F.3d 63, 71 (2d Cir. 1997) (invalidating as overbroad ban on crime trading cards).

Great works of music, art and literature almost by their nature address socially important topics such as violence; other examples not cited by the Zamora court include such as *The Star-Spangled Banner*, Picasso's *Guernica*, and much of the Old Testament. For this reason, a labeling system which sought to avoid vagueness problems by listing "classifiable" violent acts would inevitably lead to hopeless overbreadth issues, by sweeping in many valuable works with no demonstrable relationship to the violence the government would seek to prevent. See Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (law is overbroad and therefore void if it "does not aim specifically at evils within the allowable area of [government] control but, on the contrary, sweeps within its ambit other activities that . . . constitute an exercise of freedom of speech"). Accordingly, any government action that sought to regulate music on the theory that it somehow induced violence, subliminally or through desensitization to violence, would be hard-pressed to define with specificity what subset of recordings it sought to reach.

Finally, musical recording is an art, not a science, and it cannot be scientifically parsed. Music coupled with lyrics has unique qualities that make interpretation especially

subjective, and thus may aggravate vagueness issues. It is unlikely that any definition of violence could be uniformly applied to such varied works as operas, techno music, and Balinese *gamelan* recordings, much less to films and video games.

In the words of the Supreme Court's Playboy opinion, issued on May 22,

'[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn.' Error in marking that line exacts an extraordinary cost. It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control. . . .

The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.

Playboy, at 1888-89 (citation omitted).

B. NARROW TAILORING TO SERVE A COMPELLING INTEREST

It is now well-established that "[m]usic, as a form of expression and communication, is protected under the First Amendment." Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989); see also Schad v. Mount Ephraim, 452 U.S. 61, 65 (1981). Regulation of music for its depictions of violence is therefore subject to the same standards as content-based regulation of speech, and should be distinguished from the more permissible regulation of time, place, and manner of speech. See Ward, at 798-99 (upholding time, place, and manner restriction); Reno v. ACLU, 521 U.S. at 879 (invalidating content regulation).

If a statute regulates speech based upon its content, the statute must survive "strict scrutiny." In other words, it must be both "necessary to serve a compelling state interest" and

“narrowly drawn to achieve that end.” Arkansas Writers’ Project v. Ragland, 481 U.S. 221, 231 (1987); see also Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989).

The Supreme Court has recognized that there is a compelling governmental interest in protecting the physical and psychological well being of minors. See Interstate Circuit, 390 U.S. 676, 690 (1968). Nevertheless, the existence of this interest is not enough to make any applicable law constitutional; only in relatively narrow and well-defined circumstances may government limit minors’ First Amendment rights. See Tinker v. Des Moines School District, 393 U.S. 503, 514 (1969) (invalidating regulation that barred children from wearing armbands to school in protest of Vietnam War); Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 (1975) (finding government does not have roving commission to “protect the young from ideas and images that [it] thinks unsuitable for them.”).

Under strict scrutiny analysis, the existence of less restrictive alternatives will defeat content-based regulations. The Supreme Court has recognized the “vital necessity” that tests be fashioned and applied carefully, so that protected speech is not threatened. See Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 67 (1963). “[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated is finely drawn. The separation of legitimate from illegitimate speech calls for sensitive tools.” Id. at 66 (ellipses omitted); see also Interstate Circuit, 390 U.S. at 689 (1968). If tools are insufficiently sensitive – if they are vague, or overbroad – courts will strike them down.

For purposes of First Amendment analysis, labeling requirements would be addressed by the same standards as a complete ban on “violent” speech.⁵ As the Court noted

⁵ See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) (holding government could not compel newspaper to speak against its will); West Virginia State Bd. of

only weeks ago in Playboy, “[i]t is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. The Government’s content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.” Playboy, at 1886.

1. The Government Has Yet to Draw a Convincing Connection between Violent Music and Child Violence

“To say that millions of children are subject to a risk . . . is one thing; to avoid articulating the true nature and extent of the risk is quite another.” Playboy, at 1889. In order to uphold a violence labeling law, the government would have to do more than just claim a link between “violent” music and violent children; it would have to prove a direct and broad connection between the two. We are aware of no case in which this demonstration has been made. It is simply not the purpose of recorded music to incite listeners to particular behavior.⁶ It is highly questionable whether any recording has ever had any empirically demonstrative relationship to particular acts of youth violence, and the speculative nature of the link is itself constitutionally problematic. See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994) (to defend content-based speech regulation, government must demonstrate that anticipated harms “are real, not merely conjectural,” and that regulation “will in fact alleviate these harms in a

Educ. v. Barnette, 319 U.S. 624, 642 (1943) (equally protecting the right to speak and the right to remain silent).

⁶ By contrast, broadcast speech has occasionally been held to constitute incitement. See, e.g., Weirum v. RKO General, Inc., 539 P.2d 36 (Cal. 1975). Weirum arose out of a “dash for cash” promotion by a radio station, in which listeners were encouraged to catch up with a disc jockey carrying a cash prize, whose movements were broadcast. See id. at 38-39. Two teens were speeding in the chase and caused a fatal accident. See id. at 39. The radio station was held liable, but the California Supreme Court carefully limited its holding to the facts of the case, which it described as “a competitive scramble in which the thrill of the chase to be the one and only victor was intensified by the live broadcasts which accompanied the pursuit.” Id. at 41. These facts are quite incomparable to those associated with any recording.

direct and material way.”); Gulotta, 134 F.3d at 68 (invalidating law where government introduced no studies linking prohibited material to violence).

At the very least, in order to justify a labeling regime, the government would need to provide considerable specific factual data to support its contentions that music and youth violence are related. Evidence suggests, however, that while consciousness of violence in America has gone up over the last decade, rates of violence have actually gone down. According to data from the Federal Bureau of Investigation, serious crime levels fell in 1999 for the eighth consecutive time nationwide. “The data collected show a 7-percent decline in reported serious crime from the 1998 totals. Preliminary figures indicate that the downward trend is the result of a 7-percent decrease in both violent and property crimes when compared with figures for the previous year.” Federal Bureau of Investigation Press Release, May 7, 2000. The rates for youth violence have similarly declined:

From 1991 to 1997, a significant linear decrease in the likelihood that students carried a weapon, engaged in a physical fight, or were injured in a physical fight was identified From 1993 to 1997, the likelihood that students carried a weapon on school property and engaged in a physical fight on school property showed a significant linear decrease. In addition, from 1993 to 1997, the likelihood that students carried a gun and the likelihood that students carried any weapon showed a significant linear decrease.

Nancy D. Brener et al., *Recent Trends in Violence-Related Behaviors Among High School Students in the United States*, 5 J.A.M.A. 440, 443 (1999).

In short, mere assertions that a connection exists between violence and music are insufficient to sustain a labeling statute. “Without some sort of field survey, it is impossible to know how widespread the problem in fact is,” the Court wrote in Playboy. Playboy, at 1891. By contrast, the Supreme Court upheld the “must carry” requirement for local broadcast stations’ signals only after it had reviewed “a record of tens of thousands of pages of evidence developed

through 'three years of pre-enactment hearings, ... as well as additional expert submissions, sworn declarations and testimony, and industry documents.'" Turner Broadcasting System, Inc. v. FCC, 520 U. S. 180, 187 (1997). "The First Amendment requires a more careful assessment and characterization of an evil in order to justify a regulation as sweeping as this." Playboy, at 1889.

2. Even if a Connection Were Drawn, Less Restrictive Alternatives Exist

The government must not only support its claim that a problem exists; it must also support with data its claim that it is pursuing the least restrictive alternative for dealing with that problem. In Playboy, the Court rejected the government's unsupported contention that other alternatives were impractical. "This is not to suggest that a 10,000 page record must be compiled in every case or that the Government must delay in acting to address a real problem," the Court held, "but the Government must present more than anecdote and supposition." Playboy, at 1891 (citations omitted).

Violence in society is an important problem to which there are no certain solutions. However, there are surely less restrictive alternatives to a mandatory labeling system. One such alternative involves implementing educational campaigns aimed at disseminating information to and providing forums for minors to discuss the nature, content and topics raised in materials depicting violent conduct. Other programs may focus on informing parents of various methods of monitoring the content of the material to which their children are exposed. Perhaps the most obvious alternative involves augmenting collaborative efforts among the media industries to expand currently existing voluntary labeling endeavors.

RIAA, in concert with other media associations, has undertaken – voluntarily – to do all these things. Since 1985, the RIAA's member companies have placed an advisory label on recordings that contain strong language or expressions of violence, sex, or substance abuse. The

logo is widely used not only by RIAA members, but also by non-member companies. RIAA, in concert with the Motion Picture Association of America, the Entertainment Software Rating Board, the National Association of Broadcasters, and the National Cable Television Association, has created an internet site called *parentalguide.org*, to give parents a central clearinghouse of ratings information.⁷ RIAA has supported and is supporting dialogue on violence issues through programs created by MTV, the Kaiser Family Foundation, The Advertising Council, and Children Now. RIAA is also sponsoring online discussions concerning teen violence. Numerous individual artists and recording companies are participating in the education effort as well.

III. THE MEDIA VIOLENCE AND LABELING ACT, SUMMARIZED

One mandatory labeling proposal currently under review is the Media Violence Labeling Act (MVLA) introduced by Senators John McCain and Joseph Lieberman. The MVLA would mandate the use of warning labels for “violence” in motion pictures and on interactive video games, video programs, and sound recordings. See S. 2497, 106th Cong. (2000), at 3, lines 18-21.⁸ Notably, the MVLA would not cover television programming. See id., lines 22-

⁷ At the White House’s *Conference on Teenagers: Raising Responsible And Resourceful Youth* (May 2, 2000), the First Lady called for just such a site: “There are several media rating systems in place to help parents determine the appropriateness of the shows their children watch. But with so many different systems, parents must hunt for the information needed to decode these various ratings. That’s why we will ask the task force to work with the entertainment and media industries to create a single web site to help parents make sense of all the various rating systems, and use them to monitor their children’s interactions with the media.” The RIAA and other industry associations have already made this proposed site a reality.

⁸ “In the case of a product or service sold in a box, carton, sleeve, or other container, the label shall appear on the box, carton, sleeve, or container in a conspicuous manner.” MVLA at 6, lines 1-4.

24.⁹ The labels envisioned by the MVLA would contain a “plain English” description of the “nature, context, and intensity of the depictions of violence” in the product. Id. at 5, lines 5-9. The labels would also specify “a minimum age in years” for potential customers of the product. Id., lines 10-15. Beyond these requirements, the MVLA is short on specifics; it provides for virtually all the particulars of the labeling system to be determined by the Federal Trade Commission.

The MVLA provides for standards to be set by the following process after enactment. First, the manufacturers and producers of the affected products have 180 days to develop a labeling system and submit a joint proposal to the FTC. See id. at 4, lines 7-26. Next, the FTC will review the proposal and, within 180 days, adopt it or issue its own modified version of the labeling system. See id. at 7, lines 4-12. If the manufacturers have not submitted a proposed system, the FTC will create one out of whole cloth. See id., lines 13-19.

One year after enactment, the MVLA bars all manufacturing, production, packaging, sales, and distribution of unlabeled or improperly labeled products. See id. at 7-8. The MVLA also bars sales of products to children if those children are under the label’s prescribed minimum age. See id. at 8, lines 10-19.

Penalties under the MVLA are potentially quite severe. Each violation subjects the violator to a \$10,000 fine. See id. at 10, lines 2-6. For purposes of the MVLA, each day – from the date the distribution or sale of the product begins, until a court rules – constitutes a new violation. See id., lines 7-17.

⁹ It is unclear why McCain and Lieberman have elected not to address television programming here. The government has already for a number of years been engaged in a prolonged struggle to achieve a general consensus with broadcasters on labeling issues. See

IV. CONSTITUTIONAL PROBLEMS WITH THE MVLA

The MVLA, as currently drafted, suffers from three fundamental constitutional flaws. Specifically, it suffers from the general problems all mandatory labeling laws face, as noted above: the Act is impermissibly vague and overbroad, and the Act is not narrowly tailored to serve a compelling government interest. Moreover, the Act as drafted suffers from a third constitutional flaw: it impermissibly delegates legislative power to nonlegislative bodies.

A. VAGUENESS AND OVERBREADTH

The MVLA, as drafted, contains no definition of the word “violence.” It defers the establishment of definitions entirely to the FTC, allowing for input from the industry. See MVLA at 4- 7. Prior experiences with similar statutes, as cited above, show the flaw in this proposal. The failure to define violence at this stage only puts off the inevitable difficulty in finding a constitutionally acceptable definition of violence. Whoever is ultimately responsible for defining violence in this setting will encounter the same vagueness and overbreadth problems, and will be forced into creating a system that chills protected speech. Such a system will be unacceptable under the First Amendment.

The difficulty of defining violence in music is closely tied to music’s subjective quality; music means different things to different listeners. It is just this quality that makes the interpretation of music such a difficult endeavor. In their drafting of the MVLA, the Senators seek to compare music to tobacco. See MVLA, at 10, lines 20-21 (“this act may be cited as the ‘Federal Cigarette and Media Violence Labeling Act.’”). Because of its subjective nature, efforts to treat music like a harmful physical substance are futile and, some might say, disingenuous.

Michael J. Fucci, Facing the Future: An Analysis of the Television Ratings System, 6 U.C.L.A. Ent. L. Rev. 1 (1998).

The threat each cigarette poses can be measured scientifically, and set out in numbers. This makes tobacco a fit material for mandated warning labels, like other scientifically quantifiable substances directly affecting health, such as alcohol, prescription drugs, pesticides, and raw milk.¹⁰ Because the interpretation of music, however, is one of the most highly subjective – and unscientific – pursuits known to humanity, application of any “universal” violence-labeling standard to music would be an inherently rough, risky, and unconstitutional endeavor.

B. NARROW TAILORING TO SERVE A COMPELLING INTEREST

The MVLA suffers from the same constitutional difficulties any mandatory labeling system would encounter. First, no direct tie has been shown between media violence and youth violence on a significant scale. Second, numerous other methods exist for approaching the problem of violence among young people. Moreover, because it imposes a ban on sales of some recordings to minors, the MVLA is especially burdensome to speech, and is not narrowly tailored.

C. UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER

Under the current draft of the MVLA, Congress delegates an extraordinary amount of rulemaking power to the FTC and to private industry. Such a delegation runs afoul of the “nondelegation doctrine,” and is unconstitutional.

The nondelegation doctrine “ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will.” Industrial Union Dept., AFL-

¹⁰ Moreover, tobacco use is illegal for minors, and universally regarded as hazardous to health. Music, by contrast, is (not to put too fine a point on it) not a natural enemy of one’s health; indeed it is “one of the oldest forms of human expression,” with a “capacity to appeal to the intellect and to the emotions.” Ward, 491 U.S. at 790.

CIO v. American Petroleum Institute, 448 U.S. 607, 685 (1980). The nondelegation doctrine springs largely from two 1935 cases, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, and Panama Refining Co. v. Ryan, 293 U.S. 388.

In Schechter Poultry, the Court invalidated a statute which allowed the executive branch to approve codes of business conduct, and make them into binding law. Schechter Poultry, at 521-22. The Court first addressed the argument that such a law might be created by the trade associations:

But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And could an effort of that sort be made valid by such a preface of generalities as to permissible aims . . . ? The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress.

295 U.S. at 537.

The Court then turned to whether the executive could legitimately exercise the power allocated to it. It held that the statute “supplies no standards.”

It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, [the statute] sets up no standards, aside from the statement of . . . general aims [T]he discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.

295 U.S. 495, 541-42.

Panama Refining dealt with a portion of the same law that delegated power over petroleum sales. See 293 U.S. at 407-11. In Panama Refining, the Court wrote that as to the targeted activity, “the Congress has declared no policy, has established no standard, has laid down no rule” in the statute. Id. at 430. “There is no requirement, no definition of circumstances and conditions in which the [activity] is to be allowed or prohibited.” Id. Because “Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested,” the Court invalidated the statute.

The United States Court of Appeals for the District of Columbia, in the 1999 case American Trucking Ass'ns v. EPA, invalidated part of the Clean Air Act on the grounds that it impermissibly delegated legislative powers to the EPA, thereby reminding us of the doctrine’s continued vitality. See 175 F.3d 1027, modified in part and reh'g en banc denied, 195 F.3d 4 (D.C. Cir. 1999); cert. granted, Browner v. American Trucking Ass'ns., 2000 WL 175256 (U.S. May 22, 2000); see also Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 Yale L.J. 1399, 1400 (2000).

In the MVLA, the delegation of the power to define violence – both to the industry as a whole and to the FTC – tracks the delegation the Court invalidated in Schechter Poultry sixty-five years ago. The statute delegates an initial quasi-advisory power to private industry, and then defers to the executive branch to arrive at a final rule. For all the same reasons the Schechter statute was unconstitutional then, the MVLA would be unconstitutional now.

Furthermore, the delegation of power at issue here is especially questionable because free speech is involved. The Court already demands strict scrutiny of Congress’s infringements on speech; the emphasis the Court places on “sensitive tools” in this area should

virtually compel a court to examine – and invalidate – any delegation of Congress’s highly restricted power in this very sensitive area. See Video Software Dealers Ass’n v. Webster, 968 F.2d 684 (8th Cir. 1992).

V. CONCLUSION

Just weeks ago, the Court noted that “[i]t is rare that a regulation restricting speech because of its content will ever be permissible.” Playboy, at 1889 (citation omitted). Certainly, here, mandatory labeling of speech for “violence” content raises a set of insurmountable constitutional problems. Foremost among these are vagueness and overbreadth, and insufficient tailoring to solve a specific social problem. The Media Violence Labeling Act, which would bar sales to minors, and delegate the power to limit speech to the FTC, is still more deeply flawed, and would likely be impossible to redeem through amendment or refinement in the legislative process.

MITCH GLAZIER
SENIOR VICE PRESIDENT
GOVERNMENT RELATIONS AND LEGISLATIVE COUNSEL



Handwritten: Helen Verneer
Handwritten: Jo Ann O'Heary

August 29, 2000

Melanne Verveer
Assistant to the President and
Chief of Staff to the First Lady
The White House Office
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Ms. Verveer:

The enclosed paper by David Kendall is an analysis regarding mandatory labeling of content.

I hope this is helpful.

Warm Regards,

A handwritten signature in black ink, appearing to read "Mitch Glazier". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Mitch Glazier
Senior Vice President, Government Relations
and Legislative Counsel

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August 28, 2000

To: Recording Industry Association of America
From: David E. Kendall
Thomas E. Shakow
Re: MANDATORY LABELING FOR VIOLENCE CONTENT

I. SUMMARY

Question: Could a law that mandated labeling of recordings for “violent” content be constitutional?

Conclusions: The Supreme Court recognized the problems inherent in burdening free speech as recently as late May, in its opinion in United States v. Playboy Entertainment Group, 120 S.Ct. 1878 (2000). Under Playboy, as well as numerous earlier cases, any mandatory labeling law would be unconstitutional on multiple grounds. A mandatory labeling law would regulate protected speech, and therefore would have to be narrowly tailored and advance a compelling governmental interest. Such a law could not avoid failing this test in at least two fundamental ways:

- First, mandatory labeling laws for “violent” content would be unable to define “violence” in such a way to avoid unconstitutionality for vagueness or overbreadth.
- Second, mandatory labeling laws are not the least restrictive means of dealing with violence in society.

These problems are particularly apparent in the proposed Media Violence and Labeling Act now being considered by the Senate Committee on Commerce, Science, and Transportation. Moreover, that bill would also be unconstitutional if passed in its current form because it improperly delegates legislative activities to nonlegislative bodies.

II. ISSUES

Any mandatory violence labeling system would suffer from fundamental constitutional flaws. Specifically: (1) it is impossible to define “violence” in such a way to avoid

unconstitutionality for vagueness or overbreadth; (2) such a regime would unduly infringe on free speech rights without advancing a compelling government interest.

A. VAGUENESS AND OVERBREADTH

At the heart of the proposals for a universal labeling system lie a set of related assumptions. First, the proposals assume that an acceptable and limited definition of violence can be created. Second, they assume that a definition of violence can be used as the basis for distinguishing “harmful” works from other, beneficial recorded works. And third, they assume that the standard can be applied in a rational manner to recordings and other artistic media all of which demonstrate considerable capacity for nuance and multiple meanings. Each of these assumptions is flawed.

First, an acceptable definition of “violence” is impossible to envision. The applicable standard here is that a law is unconstitutionally vague if persons “of common intelligence must necessarily guess at its meaning.” *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973). Vague statutes are unconstitutional typically because they fail to give fair warning to those potentially subject to them, or because they lend themselves to arbitrary and discriminatory enforcement. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). In the First Amendment context, statutes have been found void for vagueness for slightly different reasons, mainly due to their “obvious chilling effect on free speech.” *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997).

Courts have on multiple occasions held statutes addressing “violent” speech to be impermissibly vague for each of these reasons. In *Video Software Dealers Association v. Webster*, 968 F.2d 684, 690 (8th Cir. 1992), a Missouri statute barred the rental or sale to minors of videos depicting violence. The statute was held unconstitutional on its face, in part because the statute failed to define “violence,” and was therefore too vague. *See id.* at 690. The Eighth

Circuit held that it had no reason to assume Missouri's courts could rehabilitate the statute by applying their own definition of violence:

[w]e believe the Missouri courts could only define the prohibited expression on a video-by-video basis. Video dealers are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal.

Id. (internal quotation marks omitted).

Likewise, in Allied Artists Pictures Corp. v. Alford, a district court in Tennessee invalidated an ordinance that barred the dissemination to juveniles of material containing "excessive violence." 410 F. Supp. 1348, 1357 (M.D. Tenn. 1976). The court held "excess violence" to be too vague a description of the prohibited material: "[a]s necessarily applied by Board members, the section constituted an excessively subjective judgment" Id.

Similarly, in Interstate Circuit v. City of Dallas, 390 U.S. 676 (1968), the Supreme Court struck down a legally-mandated classification system as void for vagueness. There, an official municipal Motion Picture Classification Board was deputized to rate films as "not suitable" for children – with "not suitable" defined as "[d]escribing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency." 390 U.S. at 681. The Court held that these terms were so vague that it would be difficult for film producers to predict in advance what movies would be considered "not suitable." Id. at 684. It also noted that the stigma of classification

¹ See also Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 532 (Tenn. 1993) (invalidating for vagueness law regulating "excessive violence" that defined term in "entirely subjective" way).

would tend to provoke producers to self-censor to the point where they might produce only “inane” and “innocuous” films suitable for children, to the detriment of adult audiences. Id.

The same problems of vagueness, subjective definition, and chilling have occurred in other free speech contexts² and with other labeling laws,³ and would clearly occur with any bill mandating labeling for violence content in this context.

A more specific approach, listing particular violent acts, would be no more successful in passing constitutional muster. Not only would the listed definitions of particular acts of violence themselves potentially suffer from vagueness problems, but the second problem would arise: such definitions would inevitably reach large categories of valuable speech protected by the First Amendment, and therefore the definitions would be grossly overbroad.⁴

² See also Reno v. ACLU, 521 U.S. 844, 870-71 (1997) (invalidating as vague provisions of the Communications Decency Act that affected “patently offensive” and “indecent” materials); Butler v. Michigan, 352 U.S. 380, 381-3 (U.S. 1957) (invalidating ban on books “manifestly tending to the corruption of the morals of youth”).

³ Several times, the Supreme Court has held unconstitutionally vague classification and labeling laws that affected speech. See Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 681-82 (1968); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 67 (1963). In Bantam Books, the Court invalidated a statute that created a commission to label and circulate lists of “objectionable” books. See id. at 67. The term “objectionable” was not defined; instead, the Commission was vested with the authority to label any publication that contained “obscene, indecent or impure language, or manifestly tend[ed] to . . . corrupt[] . . . youth.” Id. at 59-60 (quotation omitted). In striking down the statute as void for vagueness, the Court noted that, among other things, the government-sponsored list had a chilling effect, in that it made retailers reluctant to sell the listed books. See id. at 68-69.

⁴ See, e.g., Simon & Schuster, Inc. v. Members of the N. Y. State Crime Victims Bd., 502 U.S. 105, 121 (1991) (invalidating law prohibiting criminal from profiting from writing about crime because law would have reached *Autobiography of Malcolm X*, Thoreau’s *Civil Disobedience*, and Augustine’s *Confessions*); and McCollum v. CBS, Inc., 202 Cal. App. 3d 989, 995 n.4 (1988) (in holding Ozzy Osbourne song “Suicide Solution” protected by First Amendment, listing various valuable discussions of suicide including “To be or not to be” soliloquy in *Hamlet*, *Anna Karenina*, *The Bell Jar*, *Death of A Salesman*, and operas of Puccini, Menotti and Verdi).

A federal district court in Florida noted this problem in Zamora v. Columbia Broadcasting Co., 480 F. Supp. 199 (S.D. Fla. 1979). In that case, the plaintiff had killed an elderly woman, and was suing the three major television networks for having allegedly desensitized him to violence. See id. The court dismissed the claim, holding that

the liability sought for . . . would place broadcasters in jeopardy for televising Hamlet, Julius Caesar, Grimm's Fairy Tales, more contemporary offerings such as All Quiet on the Western Front, and even The Holocaust, and indeed would render John Wayne a risk not acceptable to any but the boldest broadcasters.

Id. at 206. See also Eclipse Enterprises, Inc. v. Gulotta, 134 F.3d 63, 71 (2d Cir. 1997) (invalidating as overbroad ban on crime trading cards).

Great works of music, art and literature almost by their nature address socially important topics such as violence; other examples not cited by the Zamora court include such as *The Star-Spangled Banner*, Picasso's *Guernica*, and much of the Old Testament. For this reason, a labeling system which sought to avoid vagueness problems by listing "classifiable" violent acts would inevitably lead to hopeless overbreadth issues, by sweeping in many valuable works with no demonstrable relationship to the violence the government would seek to prevent. See Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (law is overbroad and therefore void if it "does not aim specifically at evils within the allowable area of [government] control but, on the contrary, sweeps within its ambit other activities that . . . constitute an exercise of freedom of speech"). Accordingly, any government action that sought to regulate music on the theory that it somehow induced violence, subliminally or through desensitization to violence, would be hard-pressed to define with specificity what subset of recordings it sought to reach.

Finally, musical recording is an art, not a science, and it cannot be scientifically parsed. Music coupled with lyrics has unique qualities that make interpretation especially

subjective, and thus may aggravate vagueness issues. It is unlikely that any definition of violence could be uniformly applied to such varied works as operas, techno music, and Balinese *gamelan* recordings, much less to films and video games.

In the words of the Supreme Court's Playboy opinion, issued on May 22,

'[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn.' Error in marking that line exacts an extraordinary cost. It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control. . . .

The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.

Playboy, at 1888-89 (citation omitted).

B. NARROW TAILORING TO SERVE A COMPELLING INTEREST

It is now well-established that "[m]usic, as a form of expression and communication, is protected under the First Amendment." Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989); see also Schad v. Mount Ephraim, 452 U.S. 61, 65 (1981). Regulation of music for its depictions of violence is therefore subject to the same standards as content-based regulation of speech, and should be distinguished from the more permissible regulation of time, place, and manner of speech. See Ward, at 798-99 (upholding time, place, and manner restriction); Reno v. ACLU, 521 U.S. at 879 (invalidating content regulation).

If a statute regulates speech based upon its content, the statute must survive "strict scrutiny." In other words, it must be both "necessary to serve a compelling state interest" and

“narrowly drawn to achieve that end.” Arkansas Writers’ Project v. Ragland, 481 U.S. 221, 231 (1987); see also Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989).

The Supreme Court has recognized that there is a compelling governmental interest in protecting the physical and psychological well being of minors. See Interstate Circuit, 390 U.S. 676, 690 (1968). Nevertheless, the existence of this interest is not enough to make any applicable law constitutional; only in relatively narrow and well-defined circumstances may government limit minors’ First Amendment rights. See Tinker v. Des Moines School District, 393 U.S. 503, 514 (1969) (invalidating regulation that barred children from wearing armbands to school in protest of Vietnam War); Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 (1975) (finding government does not have roving commission to “protect the young from ideas and images that [it] thinks unsuitable for them.”).

Under strict scrutiny analysis, the existence of less restrictive alternatives will defeat content-based regulations. The Supreme Court has recognized the “vital necessity” that tests be fashioned and applied carefully, so that protected speech is not threatened. See Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 67 (1963). “[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated is finely drawn. The separation of legitimate from illegitimate speech calls for sensitive tools.” Id. at 66 (ellipses omitted); see also Interstate Circuit, 390 U.S. at 689 (1968). If tools are insufficiently sensitive – if they are vague, or overbroad – courts will strike them down.

For purposes of First Amendment analysis, labeling requirements would be addressed by the same standards as a complete ban on “violent” speech.⁵ As the Court noted

⁵ See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) (holding government could not compel newspaper to speak against its will); West Virginia State Bd. of

only weeks ago in Playboy, “[i]t is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. The Government’s content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.” Playboy, at 1886.

1. The Government Has Yet to Draw a Convincing Connection between Violent Music and Child Violence

“To say that millions of children are subject to a risk . . . is one thing; to avoid articulating the true nature and extent of the risk is quite another.” Playboy, at 1889. In order to uphold a violence labeling law, the government would have to do more than just claim a link between “violent” music and violent children; it would have to prove a direct and broad connection between the two. We are aware of no case in which this demonstration has been made. It is simply not the purpose of recorded music to incite listeners to particular behavior.⁶ It is highly questionable whether any recording has ever had any empirically demonstrative relationship to particular acts of youth violence, and the speculative nature of the link is itself constitutionally problematic. See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994) (to defend content-based speech regulation, government must demonstrate that anticipated harms “are real, not merely conjectural,” and that regulation “will in fact alleviate these harms in a

Educ. v. Barnette, 319 U.S. 624, 642 (1943) (equally protecting the right to speak and the right to remain silent).

⁶ By contrast, broadcast speech has occasionally been held to constitute incitement. See, e.g., Weirum v. RKO General, Inc., 539 P.2d 36 (Cal. 1975). Weirum arose out of a “dash for cash” promotion by a radio station, in which listeners were encouraged to catch up with a disc jockey carrying a cash prize, whose movements were broadcast. See id. at 38-39. Two teens were speeding in the chase and caused a fatal accident. See id. at 39. The radio station was held liable, but the California Supreme Court carefully limited its holding to the facts of the case, which it described as “a competitive scramble in which the thrill of the chase to be the one and only victor was intensified by the live broadcasts which accompanied the pursuit.” Id. at 41. These facts are quite incomparable to those associated with any recording.

direct and material way.”); Gulotta, 134 F.3d at 68 (invalidating law where government introduced no studies linking prohibited material to violence).

At the very least, in order to justify a labeling regime, the government would need to provide considerable specific factual data to support its contentions that music and youth violence are related. Evidence suggests, however, that while consciousness of violence in America has gone up over the last decade, rates of violence have actually gone down. According to data from the Federal Bureau of Investigation, serious crime levels fell in 1999 for the eighth consecutive time nationwide. “The data collected show a 7-percent decline in reported serious crime from the 1998 totals. Preliminary figures indicate that the downward trend is the result of a 7-percent decrease in both violent and property crimes when compared with figures for the previous year.” Federal Bureau of Investigation Press Release, May 7, 2000. The rates for youth violence have similarly declined:

From 1991 to 1997, a significant linear decrease in the likelihood that students carried a weapon, engaged in a physical fight, or were injured in a physical fight was identified From 1993 to 1997, the likelihood that students carried a weapon on school property and engaged in a physical fight on school property showed a significant linear decrease. In addition, from 1993 to 1997, the likelihood that students carried a gun and the likelihood that students carried any weapon showed a significant linear decrease.

Nancy D. Brener et al., *Recent Trends in Violence-Related Behaviors Among High School Students in the United States*, 5 J.A.M.A. 440, 443 (1999).

In short, mere assertions that a connection exists between violence and music are insufficient to sustain a labeling statute. “Without some sort of field survey, it is impossible to know how widespread the problem in fact is,” the Court wrote in Playboy. Playboy, at 1891. By contrast, the Supreme Court upheld the “must carry” requirement for local broadcast stations’ signals only after it had reviewed “a record of tens of thousands of pages of evidence developed

through 'three years of pre-enactment hearings, ... as well as additional expert submissions, sworn declarations and testimony, and industry documents.'” Turner Broadcasting System, Inc. v. FCC, 520 U. S. 180, 187 (1997). “The First Amendment requires a more careful assessment and characterization of an evil in order to justify a regulation as sweeping as this.” Playboy, at 1889.

2. Even if a Connection Were Drawn, Less Restrictive Alternatives Exist

The government must not only support its claim that a problem exists; it must also support with data its claim that it is pursuing the least restrictive alternative for dealing with that problem. In Playboy, the Court rejected the government’s unsupported contention that other alternatives were impractical. “This is not to suggest that a 10,000 page record must be compiled in every case or that the Government must delay in acting to address a real problem,” the Court held, “but the Government must present more than anecdote and supposition.” Playboy, at 1891 (citations omitted).

Violence in society is an important problem to which there are no certain solutions. However, there are surely less restrictive alternatives to a mandatory labeling system. One such alternative involves implementing educational campaigns aimed at disseminating information to and providing forums for minors to discuss the nature, content and topics raised in materials depicting violent conduct. Other programs may focus on informing parents of various methods of monitoring the content of the material to which their children are exposed. Perhaps the most obvious alternative involves augmenting collaborative efforts among the media industries to expand currently existing voluntary labeling endeavors.

RIAA, in concert with other media associations, has undertaken – voluntarily – to do all these things. Since 1985, the RIAA’s member companies have placed an advisory label on recordings that contain strong language or expressions of violence, sex, or substance abuse. The

logo is widely used not only by RIAA members, but also by non-member companies. RIAA, in concert with the Motion Picture Association of America, the Entertainment Software Rating Board, the National Association of Broadcasters, and the National Cable Television Association, has created an internet site called *parentalguide.org*, to give parents a central clearinghouse of ratings information.⁷ RIAA has supported and is supporting dialogue on violence issues through programs created by MTV, the Kaiser Family Foundation, The Advertising Council, and Children Now. RIAA is also sponsoring online discussions concerning teen violence. Numerous individual artists and recording companies are participating in the education effort as well.

III. THE MEDIA VIOLENCE AND LABELING ACT, SUMMARIZED

One mandatory labeling proposal currently under review is the Media Violence Labeling Act (MVLA) introduced by Senators John McCain and Joseph Lieberman. The MVLA would mandate the use of warning labels for “violence” in motion pictures and on interactive video games, video programs, and sound recordings. See S. 2497, 106th Cong. (2000), at 3, lines 18-21.⁸ Notably, the MVLA would not cover television programming. See id., lines 22-

⁷ At the White House’s *Conference on Teenagers: Raising Responsible And Resourceful Youth* (May 2, 2000), the First Lady called for just such a site: “There are several media rating systems in place to help parents determine the appropriateness of the shows their children watch. But with so many different systems, parents must hunt for the information needed to decode these various ratings. That’s why we will ask the task force to work with the entertainment and media industries to create a single web site to help parents make sense of all the various rating systems, and use them to monitor their children’s interactions with the media.” The RIAA and other industry associations have already made this proposed site a reality.

⁸ “In the case of a product or service sold in a box, carton, sleeve, or other container, the label shall appear on the box, carton, sleeve, or container in a conspicuous manner.” MVLA at 6, lines 1-4.

24.⁹ The labels envisioned by the MVLA would contain a “plain English” description of the “nature, context, and intensity of the depictions of violence” in the product. Id. at 5, lines 5-9. The labels would also specify “a minimum age in years” for potential customers of the product. Id., lines 10-15. Beyond these requirements, the MVLA is short on specifics; it provides for virtually all the particulars of the labeling system to be determined by the Federal Trade Commission.

The MVLA provides for standards to be set by the following process after enactment. First, the manufacturers and producers of the affected products have 180 days to develop a labeling system and submit a joint proposal to the FTC. See id. at 4, lines 7-26. Next, the FTC will review the proposal and, within 180 days, adopt it or issue its own modified version of the labeling system. See id. at 7, lines 4-12. If the manufacturers have not submitted a proposed system, the FTC will create one out of whole cloth. See id., lines 13-19.

One year after enactment, the MVLA bars all manufacturing, production, packaging, sales, and distribution of unlabeled or improperly labeled products. See id. at 7-8. The MVLA also bars sales of products to children if those children are under the label’s prescribed minimum age. See id. at 8, lines 10-19.

Penalties under the MVLA are potentially quite severe. Each violation subjects the violator to a \$10,000 fine. See id. at 10, lines 2-6. For purposes of the MVLA, each day – from the date the distribution or sale of the product begins, until a court rules – constitutes a new violation. See id., lines 7-17.

⁹ It is unclear why McCain and Lieberman have elected not to address television programming here. The government has already for a number of years been engaged in a prolonged struggle to achieve a general consensus with broadcasters on labeling issues. See

IV. CONSTITUTIONAL PROBLEMS WITH THE MVLA

The MVLA, as currently drafted, suffers from three fundamental constitutional flaws. Specifically, it suffers from the general problems all mandatory labeling laws face, as noted above: the Act is impermissibly vague and overbroad, and the Act is not narrowly tailored to serve a compelling government interest. Moreover, the Act as drafted suffers from a third constitutional flaw: it impermissibly delegates legislative power to nonlegislative bodies.

A. VAGUENESS AND OVERBREADTH

The MVLA, as drafted, contains no definition of the word “violence.” It defers the establishment of definitions entirely to the FTC, allowing for input from the industry. See MVLA at 4- 7. Prior experiences with similar statutes, as cited above, show the flaw in this proposal. The failure to define violence at this stage only puts off the inevitable difficulty in finding a constitutionally acceptable definition of violence. Whoever is ultimately responsible for defining violence in this setting will encounter the same vagueness and overbreadth problems, and will be forced into creating a system that chills protected speech. Such a system will be unacceptable under the First Amendment.

The difficulty of defining violence in music is closely tied to music’s subjective quality; music means different things to different listeners. It is just this quality that makes the interpretation of music such a difficult endeavor. In their drafting of the MVLA, the Senators seek to compare music to tobacco. See MVLA, at 10, lines 20-21 (“this act may be cited as the ‘Federal Cigarette and Media Violence Labeling Act.’”). Because of its subjective nature, efforts to treat music like a harmful physical substance are futile and, some might say, disingenuous.

Michael J. Fucci, Facing the Future: An Analysis of the Television Ratings System, 6 U.C.L.A. Ent. L. Rev. 1 (1998).

The threat each cigarette poses can be measured scientifically, and set out in numbers. This makes tobacco a fit material for mandated warning labels, like other scientifically quantifiable substances directly affecting health, such as alcohol, prescription drugs, pesticides, and raw milk.¹⁰ Because the interpretation of music, however, is one of the most highly subjective – and unscientific – pursuits known to humanity, application of any “universal” violence-labeling standard to music would be an inherently rough, risky, and unconstitutional endeavor.

B. NARROW TAILORING TO SERVE A COMPELLING INTEREST

The MVLA suffers from the same constitutional difficulties any mandatory labeling system would encounter. First, no direct tie has been shown between media violence and youth violence on a significant scale. Second, numerous other methods exist for approaching the problem of violence among young people. Moreover, because it imposes a ban on sales of some recordings to minors, the MVLA is especially burdensome to speech, and is not narrowly tailored.

C. UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER

Under the current draft of the MVLA, Congress delegates an extraordinary amount of rulemaking power to the FTC and to private industry. Such a delegation runs afoul of the “nondelegation doctrine,” and is unconstitutional.

The nondelegation doctrine “ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will.” Industrial Union Dept., AFL-

¹⁰ Moreover, tobacco use is illegal for minors, and universally regarded as hazardous to health. Music, by contrast, is (not to put too fine a point on it) not a natural enemy of one’s health; indeed it is “one of the oldest forms of human expression,” with a “capacity to appeal to the intellect and to the emotions.” Ward, 491 U.S. at 790.

CIO v. American Petroleum Institute, 448 U.S. 607, 685 (1980). The nondelegation doctrine springs largely from two 1935 cases, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, and Panama Refining Co. v. Ryan, 293 U.S. 388.

In Schechter Poultry, the Court invalidated a statute which allowed the executive branch to approve codes of business conduct, and make them into binding law. Schechter Poultry, at 521-22. The Court first addressed the argument that such a law might be created by the trade associations:

But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And could an effort of that sort be made valid by such a preface of generalities as to permissible aims . . . ? The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress.

295 U.S. at 537.

The Court then turned to whether the executive could legitimately exercise the power allocated to it. It held that the statute “supplies no standards.”

It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, [the statute] sets up no standards, aside from the statement of . . . general aims [T]he discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.

295 U.S. 495, 541-42.

Panama Refining dealt with a portion of the same law that delegated power over petroleum sales. See 293 U.S. at 407-11. In Panama Refining, the Court wrote that as to the targeted activity, “the Congress has declared no policy, has established no standard, has laid down no rule” in the statute. Id. at 430. “There is no requirement, no definition of circumstances and conditions in which the [activity] is to be allowed or prohibited.” Id. Because “Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested,” the Court invalidated the statute.

The United States Court of Appeals for the District of Columbia, in the 1999 case American Trucking Ass'ns v. EPA, invalidated part of the Clean Air Act on the grounds that it impermissibly delegated legislative powers to the EPA, thereby reminding us of the doctrine’s continued vitality. See 175 F.3d 1027, modified in part and reh'g en banc denied, 195 F.3d 4 (D.C. Cir. 1999); cert. granted, Browner v. American Trucking Ass'ns., 2000 WL 175256 (U.S. May 22, 2000); see also Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 Yale L.J. 1399, 1400 (2000).

In the MVLA, the delegation of the power to define violence – both to the industry as a whole and to the FTC – tracks the delegation the Court invalidated in Schechter Poultry sixty-five years ago. The statute delegates an initial quasi-advisory power to private industry, and then defers to the executive branch to arrive at a final rule. For all the same reasons the Schechter statute was unconstitutional then, the MVLA would be unconstitutional now.

Furthermore, the delegation of power at issue here is especially questionable because free speech is involved. The Court already demands strict scrutiny of Congress’s infringements on speech; the emphasis the Court places on “sensitive tools” in this area should

virtually compel a court to examine – and invalidate – any delegation of Congress’s highly restricted power in this very sensitive area. See Video Software Dealers Ass’n v. Webster, 968 F.2d 684 (8th Cir. 1992).

V. CONCLUSION

Just weeks ago, the Court noted that “[i]t is rare that a regulation restricting speech because of its content will ever be permissible.” Playboy, at 1889 (citation omitted). Certainly, here, mandatory labeling of speech for “violence” content raises a set of insurmountable constitutional problems. Foremost among these are vagueness and overbreadth, and insufficient tailoring to solve a specific social problem. The Media Violence Labeling Act, which would bar sales to minors, and delegate the power to limit speech to the FTC, is still more deeply flawed, and would likely be impossible to redeem through amendment or refinement in the legislative process.

File: media

July 18, 2000

Ms. Hilary Rosen
President and Chief Executive Officer
Recording Industry Association of America
Suite 300
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dear Hilary:

I want to thank you for answering my Administration's call to develop a one-stop Web site for parents to learn more about how to monitor and understand their children's interactions with the media. By establishing a site that offers clear information about the various media ratings systems and parental advisory guidelines, you are helping parents make educated decisions regarding what their children will see and hear.

Hillary joins me in applauding your efforts, and we send you our best.

Sincerely, **BILL**

BC/RMS/DC/DWB/ddj-pfs-lynn-ws (Corres. #7238763)
(6.rosen.doc)

cc: John Wertman, 97 EEOB
cc: DWB/LL, 94 EEOB
cc: Ann O'Leary, 2FL/WW

Xeroxed copy of personally signed original to NH
through Lisel Loy

CLEAR THRU LISEL LOY

PRESIDENT TO SIGN

July 18, 2000

Mr. Douglas Lowenstein
President
Interactive Digital Software Association
Suite 210
919 18th Street, N.W.
Washington, D.C. 20006

Dear Doug:

I want to thank you for answering my Administration's call to develop a one-stop Web site for parents to learn more about how to monitor and understand their children's interactions with the media. By establishing a site that offers clear information about the various media ratings systems and parental advisory guidelines, you are helping parents make educated decisions regarding what their children will see and hear.

Hillary joins me in applauding your efforts, and we send you our best.

Sincerely, **BILL CLINTON**

BC/RMS/SH/DC/DWB/ddj-pfs-ckb-ws-ws
(Corres. #7238804)
(6.lowenstein.doc)

cc: John Wertman, 97 EEOB
cc: DWB/LL, 94 EEOB
cc: Ann O'Leary, 2FL/WW

Xeroxed copy of personally signed original to NH
through Lisel Loy

CLEAR THRU LISEL LOY

PRESIDENT TO SIGN

July 18, 2000

Mr. Robert Sachs
President and Chief Executive Officer
National Cable Television Association
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Dear Robert:

I want to thank you for answering my Administration's call to develop a one-stop Web site for parents to learn more about how to monitor and understand their children's interactions with the media. By establishing a site that offers clear information about the various media ratings systems and parental advisory guidelines, you are helping parents make educated decisions regarding what their children see and hear.

Hillary joins me in applauding your efforts, and we send you our best.

Sincerely, **BILL CLINTON**

BC/RMS/DC/DWB/ddj-pfs-lynn-ws (Corres. #7238794)
(6.sachs.doc)

cc: John Wertman, 97 EEOB

cc: DWB/LL, 94 EEOB

cc: Ann O'Leary, 2FL/WW

Xeroxed copy of personally signed original to NH
through Lisel Loy

CLEAR THRU LISEL LOY

PRESIDENT TO SIGN

July 18, 2000

Mr. Edward O. Fritts
President and Chief Executive Officer
National Association of Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036

Dear Eddie:

I want to thank you for answering my Administration's call to develop a one-stop Web site for parents to learn more about how to monitor and understand their children's interactions with the media. By establishing a site that offers clear information about the various media ratings systems and parental advisory guidelines, you are helping parents make educated decisions regarding what their children will see and hear.

Hillary joins me in applauding your efforts, and we send you our best.

Sincerely, **BILL CLINTON**

BC/RMS/SH/DC/DWB/ddj-pfs-lynn-ws (Corres. #7238773)
(6.fritts.doc)

cc: John Wertman, 97 EEOB
cc: DWB/LL, 94 EEOB
cc: Ann O'Leary, 2FL/WW

Xeroxed copy of personally signed original to NH
through Lisel Loy

CLEAR THRU LISEL LOY

PRESIDENT TO

July 18, 2000

Mr. Jack Valenti
President and Chief Executive Officer
Motion Picture Association of America, Inc.
1600 Eye Street, N.W.
Washington, D.C. 20006

Dear Jack:

I want to thank you for answering my Administration's call to develop a one-stop Web site for parents to learn more about how to monitor and understand their children's interactions with the media. By establishing a site that offers clear information about the various media ratings systems and parental advisory guidelines, you are helping parents make educated decisions regarding what their children will see and hear.

Hillary joins me in applauding your efforts, and we send you our best.

Sincerely,

BILL

BC/RMS/SH/DC/DWB/ddj-pfs-lynn-ws (Corres. #7238297)
(6.valenti.doc)

cc: John Wertman, 97 EEOB

cc: DWB/LL, 94 EEOB

cc: Ann O'Leary, 2FL/WW

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through Lisel Loy

CLEAR THRU LISEL LOY

PRESIDENT TO SIGN

To: ANN O

FROM: DM

16 15 pages

FTC staff report
Feb.

I. A lot of marketing to kids.

From Boston Globe 12/14/99 citing McNeal, Texas A&M professor and researcher

Advertising aimed at children has increased about 15-20% each year for the past six years.

By age 10, the typical child has memorized 400 brand names.

When children ask their parents for some kind of product, they identify it by brand name 92% of the time.

Parent News summarizing Selling Out America's Children by Dr. David Walsh, Nov/Dec 1998

In 1992, advertisers spend \$6.8 billion aimed at 4 to 12 year olds (a Dallas Morning News article from July reports this figure to be around \$2 billion).

Advertisers consider a child to be a consumer around age 3.

The typical child spends about 35 hours each week watching TV or playing video games.

Other points

There is an award called the Golden Marbles for the best ads to kids

In the past 4 or 5 years, one expert says the amount of ad campaigns targeted to kids has increased by 50%.

II. It works

From Mothering Magazine, 2/10/00, citing McNeal

Children directly spend about \$24.4 billion each year in the commercial market, and influence an additional \$300 billion in expenditures.

Some marketing execs call it the "Nag Factor" they want the child to pester the parent.

Kids are an easy target, they are easy to take advantage of.

The President of Kids-R-Us says "If you own a child at an early age, you can own this child for years to come."

III. It is hurtful to kids and all of us

One ad agency exec said, "Advertising at its best is making people feel without their product, you're a loser.... Kids are very sensitive to that."

Schools used to be a refuge from exploitive commercial influences.

In addition to the examples of the latest FTC study, we know that Joe Camel was no accident, it is instantly recognizable by our children. 3,000 kids a day start smoking.

The average child has seen 200,000 acts of violence on television by the time they are 18.

Selfishness. 60% of ads emphasize individual happiness.

There are real consequences to the huge amount of snack food adversity: obesity is skyrocketing to around 24-30% of our children, one doctor says the childhood diabetes problem "could be the beginning of an epidemic." One study says 1 million of our children are pathological gamblers."

9 out of 10 parents said it is harder to raise their children to be good people than 20 years ago according to USA TODAY.

Mothering Magazine 2/10/00

1999 UCLA national survey of incoming freshmen on what issues they valued: 75% to be well off financially; (an all time high since 1966); 40% develop a meaningful philosophy of life; all time low: "keeping up with political events";

1999 USA Today survey of parents: harder to raise children to "be good people"; today than it was twenty years ago: nearly 90%. 75% believed materialism and negative media influences were a "serious problem";

Sacramento Bee 9/14/00

Nielsen/NetRatings: 2-11 year olds click on Internet advertising banners more than any other age group.

Transforms wants into needs

V. We need to let kids be kids and give parents tools

We need to shape to shape a new politics that protects kids.

20 years ago the FTC staff proposed a ban on advertising aimed at children because they were too young to understand the concept of selling, but Congress prohibited the agency from issuing such rules.



Monitoring of Children's TV Urged; Parents Urged to Monitor Advertising for Children

By Carole Shifrin, Washington Post Staff Writer
Wednesday, November 15, 1978 ; Page F1

A coalition of 46 health, education, labor and public activist groups announced a one-week nationwide campaign yesterday designed to elicit public participation in the controversial Federal Trade Commission inquiry into television advertising aimed at children.

The coalition, headed by Action for Children's Television, urged citizens to spend an hour watching children's programming during the next seven days and write the FTC about their opinions of the advertising they see.

"Never before . . . has there been a better opportunity to help change a system that permits children to be manipulated for private gain," ACT President Peggy Charren said at a press conference yesterday. The letters will make a difference."

Nov. 24 is the closing date for comment from the public.

The FTC began the formal proceeding in the spring to look into problems posed by television advertising aimed at children and to decide whether the agency should take any action.

The FTC staff had recommended to the five-member agency that it propose a ban of TV commercials aimed at children "too young to understand the selling purpose" of advertising, a ban on the advertising of highly sugared products to children under the age of 12 and a requirement that advertisers of other sugared products aimed at youngsters contribute to a fund that would balance the ads with separate dental and nutritional messages.

The Proposals sparked a concerted lobbying effort on Capitol Hill by representatives of sugar and food companies and the broadcasting industry to try to head off the FTC, as well as several legal challenges designed to thwart the effort.

Although attempts to get Congress to limit FTC spending on the project failed during the last Congress one legal challenge affecting the proceeding was successful. Early this month, U.S. District Court Judge Gerhard A. Gesell ruled that FTC Chairman Michael Pertschuk could not participate in the proceeding because of his "emotional use of derogatory terms and characterizations" about children's advertising.

The three remaining members of the commission who are participating in the case will be deciding whether to appeal Judge Gesell's decision.

Newest member Robert Pitofsky is not participating because, when a professor at Georgetown Law School, he had served as chairman of the board of directors of a public activist law group that represented one of the two parties that petitioned the FTC to initiate the proceeding.)

Among the groups backing the watch-and-write campaign and whose representatives attended yesterday's press conference are the American Academy of Pediatrics, American Dental Association, American Public Health Association, Consumer Union, International Association of Machinists, NAACP, National Urban League, United Auto Workers and United Steel Workers.

Tipper Gore, the wife of Rep. Albert Gore Jr. (D-Tenn.), said the Congressional Wives Task Force, which she was representing, fully supported the FTC inquiry and hopes it can help heighten public awareness about children's advertising issues.

Dr. Philip L. Calcagno of the 15,000-member American Academy of Pediatrics said the academy believes "television advertising to children is inherently unfair since children lack the capacity to understand and evaluate the meaning or intent of television commercials."

Ideally, broadcasters and advertisers would display responsibility and restraint and refuse to exploit children, but "unfortunately this doesn't seem to be happening," Dr. Calcagno said. Although banning children's TV ads would be the most effective remedy, he said he knew political and economic realities may not permit that.

"Whatever happens, we believe that the issue must be addressed in a responsible way," he said. He added that parents also have the ultimate responsibility of monitoring television's influence on children.

Rev. Loring Chase of the United Church of Christ said the FTC proceeding was a "heaven-sent opportunity" to influence what children eat and see.

Ken Kovack of the United States Workers said the American people believe that government should act where the private sector has failed or has performed in an unsatisfactory way. Children's TV advertising falls into that category, he said.

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In the Public Interest

Making Parents Irrelevant

By Ralph Nader

October 27, 1999

STEP BACK FOR a moment and contemplate what corporate hucksters are doing to American childhood. Bypassing the parents, these companies brazenly market directly to children, starting at age two. These marketeers (with the advice of the child psychologists on their payroll) wrap these youngsters in a commercial cocoon for an average of 30 hours a week.

Companies use three steps to avoid or neutralize parental authority over the children's spending.

First, they urge the child to nag the parents.

Second, the sellers take conscious advantage of the absence of parents who are commuting and working long hours away from home.

Third, the marketers know that if they can undermine the authority, dignity, and judgment of parents in the eyes of their children, the little ones will purchase or demand items, regardless of their parents' opinions.

Most people, until the disclosures about tobacco and alcohol companies court kids, had little knowledge about just how premeditated and calculated the efforts are. Children under 12 are increasingly being raised by these companies. Those kids spend far more time with corporate television, video games, toys, arcades, and now Internet games than they do with their parents and other adults. All this is fine with the companies -- these boys and girls spent more than \$25 billion last year, and what they got in return is violent, addictive, and tawdry sensuality.

These electronic child molesters have little sense of restraint or boundaries. Their odious fare is becoming more coarse, more violent, and more interactive to



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In the Public Interest

Corporations and Violence
By Ralph Nader
May 5, 1999

Following last week's tragic homicides at Columbine High School and the mourning over the loss of life there, House Speaker Dennis Hastert and Senate majority leader Trent Lott announced they would convene a national conference on youth and culture.

That's good. Such a conference is sorely needed.

But it must not be an empty dialogue. Our country needs better. Throughout the last week, politicians and the media have searched for the causes behind the disaster in Littleton, Colo., and have been quick to ascribe it, in part, to the violence in video games, music, the Internet, pop culture, Hollywood, movies, and television.

Such comments, though understandable, do not go far enough. They stop at the symptoms, fall short of the cause. They fail to grasp the central fact of our commercial corporate culture: it is produced by corporations that are getting rich by promoting products to teenagers, corporations governed by profiteering that impels them to respect no boundaries in their exploitation of teenagers' vulnerable minds.

Every day hundreds of companies work in pursuit of one goal: manipulating children and teenagers to purchase video games and music and watch movies and television endlessly and mindlessly.

In their quest for larger audiences and greater profits the commercial media predictably races to the lowest and basest standards, with ever more blatant displays of violence, sex, crassness, and nihilism on television, cable, movies, radio, video games, and music. Our society, even 10 or 20 years ago, would not have tolerated such youth-beamed depravity. These are the motivations that relentlessly drive the creation, production, and marketing of ever more Doom, Quake, Basketball Diaries, Marilyn Mansons, Mortal Kombat I and

II and III and IV, Jerry Springers, Howard Sterns, South Parks, and the rest of it.

This poison has got to stop. Enough is enough.

There is a crying need in this country to redraw the lines, establish the boundaries, declare to the media industry in no uncertain terms: "Thus far and no farther." It is time to say that our children matter more than this brutalizing entertainment. There are few critiques that Congress or President Clinton could start that would have such a salutary effect upon our children and, therefore, on our nation's future.

After all, the people own the public airwaves and should be given the time to challenge such video muck. It is easy to point the finger at the Marilyn Mansons. But they are merely instruments. Speaker Hastert and Senate majority leader Lott ought to focus on the deeper problems. Behind every Marilyn Manson are corporations and corporate executives who cynically draw their large compensation packages from the fruits of such work.

The Hastert-Lott national conference on youth and culture will be a charade unless they discuss the corporations and the powerful, moneyed interests that produce this dominating corporate culture and vigorously insinuate it into the minds and pockets of American youth.

Will Speaker Hastert and Senator Lott have the courage to trace the problem to its source, to focus their national conference on youth and culture upon the commercial rewards that give rise to this destructive culture, and on how we might alter these dynamics? Can they enable corporations and civic institutions to produce a culture that nourishes and doesn't harm its teenagers? If so, they will provide an important service for this country, its parents, and their children, who are surrounded by debasement and conscripted into violence by methodical, calculating corporate huckstering that our teenagers may not understand.

There is nothing Congress could do that is more important than making America's children safe again from the interests that would rob them of their childhood. Many teenagers and children are powerless to defend themselves against the clever media magnates, their advertising and marketing firms, and their hostility or total disregard for teenagers' health, happiness, and well being. Families and children need help. The question is, will Speaker Hastert and Senator Lott help them?

seduce these youngsters into an addiction of direct video game involvement in the mayhem. The euphemism is "interactive." It has gotten so bad that Lt. Colonel Dave Grossman and Gloria DeGaetano have authored a new book, *Stop Teaching Our Kids to Kill* -- a call to Action Against TV, Movie and Video Game Violence.

It took a while and some terrible school tragedies before President Bill Clinton told the entertainment industry that "thirty years of studies" about this "daily dose of violence" demonstrate that it does "desensitize our children to violence, and its consequences."

Instead of our popular culture embracing children in a wholesome array of values, activities, and learning experiences with family, neighbors, and teachers, concerned adults have to focus on warding off this depraved corporate commercial saturation of the lives of millions of American youths. A saturation that is goading, exploiting, addicting, and harming children in order to sell, sell, sell.

Privately, more than a few business executives are holding their noses at what is being transmitted to these little customers. I've spoken to some of them. Their excuse: if we don't do this, someone worse will do it. In reality, they just don't have the courage to speak out as citizens.

But a new coalition of parents and friends -- the Center for a New American Dream -- is moving to organize public opinion and offer stiffer resistance. In a poll of parents commissioned by the center, 70 percent of parents, with children age 2 to 17, say that marketing to kids is bad for their kids' values and world view, makes them too materialistic, and puts pressure on kids to buy things that are bad for them.

More telling, more than half of all parents polled admitted to buying things for their child that they disapproved of just because the youngster wanted the products to fit in with their friends.

The center is offering a free pamphlet called "Tips for Parenting in a Commercial Culture" to anyone who writes to Suite 900, 6930 Carroll Avenue, Takoma Park, Maryland 20912. Their Web site is www.newdream.org. The struggle continues.



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In the Public Interest

Why is the Government Protecting Corporations That Prey on Kids?

By Ralph Nader

September 22, 1999

In 1980, the U.S. Congress passed a law to protect adults who prey on children.

You read that correctly. Public Law 96-252 prohibits the Federal Trade Commission from enacting rules that would protect the nation's children from commercial advertising that exploits their vulnerable and trusting natures.

This law is corporate power incarnate. It should be the role of Congress to protect children, not those who would prey upon them. Congress ought to repeal it.

Back then, the FTC was trying to respond to an increase in aggressive marketing aimed at children. Now, two decades later, that increase has become a deluge. Kids are literally assaulted from morning to night. Advertisers target them at home, school, and virtually all points in between.

According to Professor James U. McNeal, an expert on marketing to children, "Virtually every consumer-goods industry, from airlines to zinnia-seed sellers, targets kids."

Because of this, it has become nearly impossible for parents to control advertisers' access to their kids.

Some advertisers exploit children's weaknesses in order to get them to want products. For example, Nancy Shalek, president of the Shalek Agency, told the Los Angeles Times that "Advertising at its best is making people feel that without their product, you're a loser. Kids are very sensitive to that ... You open up emotional vulnerabilities and it's very easy to do with kids because they're the most emotionally vulnerable."

Some advertisers admit that they want to control

children's minds. For example, Julie Halpin, CEO of Gepetto Group, which specializes in marketing to kids, explains that "Kids marketing in general is becoming more sophisticated" in competing for what she calls "share of mind."

Mike Searles, former president of Kids-R-Us, a major children's clothing store, said that "[I]f you own this child at an early age, you can own this child for years to come. Companies are saying, 'Hey, I want to own the kid younger and younger.'"

Marketers believe they are succeeding. Professor McNeal says that "Advertising targeted at elementary school children, on programs just for them, works very effectively in the sense of implanting brand names in their minds and creating desires for the products."

That's great for advertisers but bad for parents. The problem is that children appear to be developing health problems because they do precisely what the ads are urging. For example:

Alcohol

Alcohol is a major cause of death among teenagers. It contributes significantly to motor vehicle crashes, injuries, suicide, date rape, and problems with school and family. It makes no sense to encourage children to drink beer or hard liquor. Nevertheless, the Federal Trade Commission recently found that the alcohol industry often advertises to audiences that include large numbers of children including placing their products in PG and PG-13 films with significant appeal to teens and children, such as films featuring animals or coming-of-age stories. The industry also advertises on 8 of the 15 television shows most popular with teens.

Tobacco

The deadly effects of tobacco advertising on American children are well-documented by the FTC and the Journal of the American Medical Association. RJR Nabisco's Joe Camel helped seduce hundreds of thousands of children into a lifetime of smoking. Each day, another 3,000 children start to smoke. About a third of them will have their lives cut short by smoking-related illnesses. Almost two-thirds of 12th graders who smoke choose Marlboro. That is no accident. The Marlboro Man plays to the desires of young people for independence.

Violent entertainment

Following the school shootings in Jonesboro, Pearl, Springfield, Paducah, and Littleton, some media experts, psychologists, and elected officials have suggested that

violent entertainment including violent video games, movies, and television may be contributing to the occurrence of such events. For example, Lieutenant Colonel Dave Grossman, coauthor of the new book Stop Teaching Our Kids to Kill, argues that first-person shooter video games such as Duke Nukem, Time Crisis, and Quake "teach children the motor skills to kill, like military training devices do. And then they turn around and teach them to like it like the military would never do."

Junk food and fast food

Children are subjected to a barrage of ads for Whoppers, Happy Meals, Coke, Pepsi, Snickers bars, M&M's, and other junk foods and fast foods. They are urged by these ads to buy these products directly themselves or, if they are too young, to nag their parents. These ads may contribute to skyrocketing levels of childhood obesity. About 25 to 30 percent of American children are now clinically obese. Severe obesity among young children has almost doubled since the 1960s. Similarly, childhood diabetes is also on the rise.

As a minimum response, Congress should now take the initiative to restore the full authority of the FTC to rule on marketing to children, to cure these fundamentally unfair and deceptive practices.

Furthermore, Congress should now tell the FTC to make such rules, and give the FTC enough money to enable the FTC to move quickly to protect children from this part of the advertising industry and its commercial molestations.

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Washington Post NEWS STYLE SPORTS CLASSIFIEDS MARKETPLACE

II. SUMMARY

A. The Facts

In 1977, the average American child aged two through 11 was exposed to more than 20,000 television commercials. This came as a result of watching an average of 3-2/3 hours of television per day throughout the year. Those children who attended school spent, on the average, more time watching television over the course of the year than they did in the classroom. Moreover, the amount of time which children spend watching television has apparently increased by a full hour per day over the last 22 years, and is now almost double the amount of time that children spent listening to radio immediately before the advent of television.

Infants are attracted to television almost from the moment they first become aware of the world. ^{18/} Not only are they attracted to television, but they are more attracted to commercials than to programs. This is not surprising, given the resources and the accumulated experience of advertisers, and given the financial incentives they have to make

^{18/} See note 96, infra , describing a study in which six-month old infants became so absorbed in watching television that they cried when the picture was left on but the sound turned off.

every second count for the purpose of gaining and holding children's attention. By the early 1970's, \$400 million was spent annually on TV advertising to children, 19/ and approximately \$80 million was spent annually by the processed cereal industry alone. 20/

Joan Ganz Cooney, president of the Children's Television Workshop, and producer of Sesame Street and The Electric Company, has explained that those educational programs were designed to resemble commercials because this allowed them to employ the same attention-getting devices that advertisers had perfected. 21/ Those devices, according to Dr. Kenneth O'Bryan, a child psychologist, are so potent that they make the 30-second commercial the most effective teaching

19/ Charles Kuralt, CBS news commentator, quoted in Ross Hume Hall, Food for Naught: The Decline in Nutrition 183 (1974).

20/ M. Gerzon, A Childhood for Every Child: Politics of Childhood 114 (1973).

21/ Quoted in Helitzer and Heyel, The Youth Market, Its Dimensions, Influence and Opportunities for You 107 (1970). As the title of this book suggests, it is basically a "how-to-do-it" manual for persons interested in advertising to children. The senior author, Melvin Helitzer, is president of an advertising agency which specializes in that market. (Hereinafter cited as "Helitzer and Heyel".)

device yet invented for implanting any relatively simple idea in a child's mind--including the idea that a product is desirable. 22/

The effectiveness of television advertising in "teaching" children is especially great among those who are still too young to understand the selling purpose of that advertising. This category takes in an apparent majority of children under the age of eight. Even when children in this category understand that there is some difference between commercials and programming, they tend to explain that the difference is that commercials are "shorter," or "more funny," or to point to some other superficial distinction.

Among pre-school children, moreover, confusion about the nature and purpose of television advertising tends to be even greater than among elementary school children up to the age of eight. As we noted in the Introduction and Recommendations, the youngest children may think that there are actual people inside the television set; and even when they outgrow that illusion they may think that a person speaking from the set

22/ Dr. O'Bryan is a professor of psychology at the University of Toronto in Toronto, Canada, and director of the Child Research Laboratory at the Ontario Institute for Studies in Education and the Ontario Educational Communications Authority. He made this statement in a presentation to the Commission on December 1, 1977.

is specifically addressing them. Cartoon fantasy figures, such as elves, wizards and the like, tend to be perceived by such children as in some sense real and as appropriate figures to be imitated and learned from.

Very young children have trouble grasping what advertising is because they "believe that everything has a purpose and that such a purpose is built around them. Unlike the egocentric adult, who can take another person's point of view but doesn't, the child does not take another person's viewpoint because he simply cannot." 23/ In other words, the purpose of televised advertising is inherently beyond the child's comprehension. Thus, according to Dr. Richard Feinbloom, then acting medical director of the Family Health Care Program, Harvard Medical School, "an advertisement to a child has the quality of an order, not a suggestion." 24/ Dr. Feinbloom's point is illustrated, even as to children old enough to read and write, by the Soupy Sales case. On New Year's Day, 1965, the performer of that name suggested to his early morning audience of children that they go find the wallets of their sleeping fathers, take

23/ Helitzer and Heyel at 107, citing the work of Dr. Jean Piaget.

24/ See text at note 99 infra.

out "some of those funny green pieces of paper with all those nice pictures of George Washington, Abraham Lincoln and Alexander Hamilton, and send them along to your old pal, Soupy, care of WNEW, New York." According to Helitzer and Heyel, who tell the story for the purpose of showing prospective advertisers to children "how easy it can be," enough money poured in to constitute "the biggest heist since the Boston Brink's robbery." 25/

The ordinary purpose of addressing advertising to children is not to turn them into pickpockets, but rather to capitalize on their ability to be "very successful naggers." 26/ One advertising executive has put it as follows:

"When you sell a woman on a product and she goes into the store and finds your brand isn't in stock, she'll probably forget about it. But when you sell a kid on your product, if he can't get it he will throw himself on the floor, stamp his feet and cry. You can't get a reaction like that out of an adult." 27/

Thus, in the words of Dr. Frances Horwich, a psychologist and director of children's television programming, the

25/ Helitzer and Heyel at 21-22.

26/ Id. at 32.

27/ Quoted in Advertising Age, July 19, 1965.

child is unwittingly turned into an "assistant salesman. He sells, he nags, until he breaks down the sales resistance of his parent." 28/

This takes a toll on the parent-child relationship. Dr. Sidney Berman, former president of the American Academy of Child psychiatry, has stated that the Academy is "deeply concerned with the exploitation of children" for advertising purposes because it "encourage[s] confrontation and alienation on the part of children toward their parents and undermine[s] the parents' child rearing responsibilities." 29/

Joan Ganz Cooney has described television advertising to young children as being "like shooting fish in a barrel... grotesquely unfair." 30/ As we shall demonstrate below, such advertising is not only unfair in the ordinary sense of the word; it is also inherently unfair and deceptive within the meaning of the FTC Act.

In addition to the advertising by which children are induced to demand products, the petitions consider the foods promoted to children--specifically those containing large

28/ See note 124 infra.

29/ See note 146 infra.

30/ See note 332 infra.

amounts of added sugar, and especially those that lend themselves to between-meal consumption.

The principal reasons for this concern are that sugar causes tooth decay 31/, that tooth decay is pandemic in the United States, being so serious and widespread that only one American adult in 160 has a full set of undecayed teeth, and that, as of the last comprehensive federal survey in 1960-62, twenty million American adults were missing all of their natural teeth, with almost ten million more missing all 16 teeth from one jaw or the other. 32/ Tooth decay commonly starts in early childhood and attacks most severely in adolescence. As Dr. Donald Kennedy, the Commissioner of Food and Drugs, recently advised Chairman Pertschuk:

"[I]t seems clear that children are more vulnerable [than adults] to dental caries [tooth decay] and that the damage to the teeth resulting from tooth decay in childhood can have a substantial detrimental effect on dental health in later life." 33/

31/ See Section III-C(3) infra.

32/ See text accompanying note 165 infra.

33/ Appendix "A".

Dr. Kennedy also pointed out that there is a "substantial likelihood that children will be unable to appreciate the long term risks to dental health that consumption of [the sugared products advertised to them on television] will create." 34/

Tooth decay seems to be a function more of the manner in which sugar is consumed than of the absolute amount ingested--with repeated between-meal snacking on candies, pastries and other foods that stick to the teeth or are retained in the mouth evidently being the most dangerous pattern (although even between-meal consumption of sugared soft drinks appears to contribute to tooth decay). Notwithstanding the special hazards of snacking on such sugared foods, much of the advertising in question specifically promotes stickiness, chewiness, the length of time that a candy lasts in the mouth, or the suitability of a candy for frequent between-meal consumption as being particularly desirable qualities. 35/

Other reasons for concern with the amount of sugar promoted to children on television include evidence which suggests

34/ Id.

35/ See Section III A(2) infra.

that at the present United States levels of consumption (more than a third of a pound of sugar per day for every man, woman, child, and infant) some persons are probably consuming so much sugar as to exclude from their diet essential nutrients, 36/ and that heavy consumption of sugar probably contributes to obesity and may contribute to heart disease and diabetes. 37/

Staff's investigation of the amount of television advertising being addressed to children for sugared products has yielded results similar to those obtained by others who have investigated this issue. We have found, for example, that on Saturday morning network television--a time of the week when children actually constitute a majority of the national audience --sugared cereals, candies, snacks and drinks account for half or more of all the products advertised (except during the pre-Christmas season, when toy advertising is especially heavy). 38/ Further, these sugared products are advertised to children almost to the exclusion of any other foods--the principal apparent exception being fast-food restaurants whose products include such sugared items as deserts, "thick shakes,"

36/ See Section III C(6) infra.

37/ See Sections III C(7) and (8) infra.

38/ See Section II A infra.

and carbonated soft drinks. On Saturday, September 24, 1977, when staff monitored all three networks from 8 a.m. until 1:30 p.m., sugar was promoted as many as four times per half hour on each network, and as many as seven times per half hour if fast-food advertising is taken into account. On ABC, 45 of the 59 food commercials (76%) were specifically for sugared products. On CBS, the corresponding figure was 41 out of 54 food commercials (76%), and on NBC, it was 43 out of 59 food commercials (73%).

A large proportion of the foods advertised to children on Saturday (or Sunday) daytime television are ready-to-eat cereals. Many of these are between 40 and 60% sugar. In the most extreme case, the sugar content exceeds 70%.

Sugar advertising to children is so intensive because it encounters little or no resistance. General Mills, speaking to parents as an advisor on nutrition (rather than to children as an advertiser of cereals like Count Chocula, which is 47.9% sugar) has pointed out that children need "no coaxing" to consume sugar, and has advised that "teaching a preference for other foods must begin early in the high-chair stage." General Mills explains that sugar "encourage[s] tooth decay" and that it provides "only calories," as opposed to nutrients

such as vitamins, minerals or protein. 39/ The economics of selling food directly to children being what it is, however, General Mills and its competitors are obliged to broadcast a great volume of child-directed television advertising whose effect is to undermine the ability of parents to teach a "preference for other foods", lest those companies lose their market shares to other companies less willing to be "out-sugared."

Another reason that food advertising addressed to children is so heavily biased in favor of sugar is, as Dr. Jean Mayer 40/ has pointed out, that food advertising cannot increase overall food consumption (except insofar as it encourages obesity). Therefore, it attempts to divert consumption from non-brand-name foods (which happen to include most of the best nutritionally) to brand-name foods (which happen to include many of the worst nutritionally). Thus, Dr. Mayer has said, a rough rule of thumb is that the nutritional value of a food varies inversely with the amount spent to advertise it. 41/ The more naive the audience, the more accurate this rule of thumb appears to be. Children, of course, are the ultimate

39/ Section IV-B(2)(a)(iii) infra.

40/ Dr. Mayer was formerly professor of nutrition at the Harvard School of Public Health and is now president of Tufts University. He was Chairman of the White House Conference on Food, Nutrition and Health (1969).

41/ See Section III-C(6) infra.

naive audience. Thus meats, fish, poultry, cheese, vegetables, milk, butter, eggs and vegetable juices may be promoted (in some cases even heavily) to adults on television during hours when advertisers are not focusing on the child market. Yet a survey of network weekend daytime television (when children are an especially high proportion of the audience) for the first nine months of 1975 revealed that there were only four commercials for any of those foods, as compared with 3,832 for cereals (few of which were unsugared), 1,627 for candy and gum, 841 for cookies and crackers, 582 for non-carbonated fruit drinks, 80 for deserts, and 104 for cakes, pies and pastries. 42/

There is evidence not only that these food advertisers get the results they pay for, but also that, in the aggregate, their advertisements skew children's notions of "appropriate" things to eat toward highly sugared, relatively non-nutritious foods. Thus, in one study in which children were asked to specify "the kinds of foods you call snacks," 78% responded by naming the sugared products they saw advertised on television. 43/

42/ See note 69 infra.

43/ See note 137 infra.

For this reason, among others, a number of prominent nutritionists, educators, other public health professionals, and parents have expressed concern that televised food advertising addressed to children is distorting nutritional habits, negating what little nutrition education takes place in the schools, and undermining the authority of parents in their own homes on matters of nutrition. 44/

In Part III, infra, we shall explore the themes in children's advertising for sugared products. The examples we have collected include a commercial in which children are taught that breakfast is "no fun" without a particular heavily sugared brand of cereal, and another in which the message is that a certain brand of heavily sugared fruit-flavored cookies is actually preferable to fresh fruit--as is shown by a fruit peddler's abandoning his entire stock of fruit after being introduced to the cookies. 45/ We have also collected a great number of commercials in which the message is that eating sugar is desirable and fun, that this is the normal, accepted way to satisfy hunger, either at breakfast or between meals, and that boys and girls who do this are healthy and happy, with no signs of tooth decay, obesity or any other problem.

44/ See Section IIB(2)(c) infra.

45/ See Section IIIA(2) infra.

One might ask why parents do not shield their children from these and similar themes presented in televised food advertising. It has been argued by one of the principal advertisers of sugared products to children that the very fact that so many children are permitted to watch television without parental intervention shows (a) that parents see nothing seriously wrong with the programming or the commercials that go with it, and, by inference (b) that to the extent that there is anything wrong, the blame should be assigned to the parents, not the advertisers.

But the matter is not so simple. Dr. Sherryl Graves, of New York University, has said that the unwillingness of parents to intervene often stems from "profound feelings of helplessness," and from the fear that if they deny their children so pervasive a childhood experience as children's programming, the children will become "social outcasts or social isolates." Dr. Graves points out that television is now such an integral part of American culture, for children as well as adults, that the New York Times considered it newsworthy when one group of children in only one school abstained from television for only one week. 46/

46/ See text accompanying note 302 infra. Dr. Graves is a psychologist who has also done research on the effects of children's television advertising under the auspices of the Harvard Graduate School of Education.

Whatever the dynamics of the matter may be, it does appear that there are substantial numbers of parents who object to the advertising being addressed to children on television, but who are unwilling or unable to take the drastic step of shutting that advertising out of the home by forbidding their children to watch.

Perhaps the last word on this subject, as we indicated above, belongs to Kenneth Mason, president of the Quaker Oats Co. No reasonable person could sit through a typical Saturday morning of children's television, Mr. Mason observed, without recognizing the need for "fundamental change."

B. The Law

It is both unfair and deceptive, within the meaning of Section 5 of the FTC Act, to address televised advertising for any product to young children who are still too young to understand the selling purpose of, or otherwise comprehend or evaluate, the advertising. This conclusion rests, in part, on legal precedents which hold that even adults--a group much less vulnerable than children--are not to be exposed to "disguised" or "hidden" advertising. The policy of those precedents is to proscribe efforts to bypass the defenses which adults are presumed to have when they understand that advertising is being addressed to them.

For example, Section 317 of the Federal Communications Act, 47 U.S.C. § 317, prohibits the broadcasting of paid advertising which is not clearly identified as such. The FCC has explained that Congress determined it to be "unfair" to broadcast advertising whose selling intent was not made plain to listeners or viewers. ^{47/} The legislative history characterizes such a practice as "a deception." ^{48/} To give another example, the FCC has characterized as "deceptive" the practice of subliminal advertising, which also seeks to influence viewers while bypassing the defenses they would have if they were aware that paid advertising was being addressed to them. ^{49/}

If it is unfair and deceptive to seek to bypass the defenses which adults are presumed to have when they are aware that advertising is being directed at them, then a fortiori it is unfair and deceptive to advertise to children in whom these defenses do not yet even exist.

Unfairness also arises out of the striking imbalance of sophistication and power between well-financed adult advertisers, on the one hand, and children on the other, many of whom are too young even to appreciate what advertising is. Such children are at the opposite pole, psychologically, intellectually

^{47/} See note 238 infra.

^{48/} Id.

^{49/} See FCC, Public Notice, 74-78 08055 (January 24, 1974).

and economically, from the traditionally assumed "rational consumer" for whom advertising provides a service, by offering him or her information relevant to logical market behavior. Children too young to understand even the concept of a market in which products compete are also too young to understand that a decision to consume any product may imply a decision not to consume some other product, or to forgo some other benefit. The classical justification for a free market, and for the advertising that goes with it, assumes at least a rough balance of information, sophistication and power between buyer and seller. In contract law the courts step in to redress that balance when it has been "unconscionably" skewed. The Commission also has a long tradition of seeking to preserve such a balance. It is the subversion of that balance that makes practices such as subliminal advertising, or advertising that is not identified as such, repugnant to public policy. In the present situation, it is ludicrous to suggest that any such balance exists between an advertiser who is willing to spend many thousands of dollars for a single 30-second spot, and a child who is incapable of understanding that the spot has a selling intent, and instead trustingly believes that the spot merely provides advice about one of the good things in life.

Further, it is unfair to address television advertising to children who may be aware of the selling purpose, when that advertising has the capacity to induce them to take health risks

that they are incapable of evaluating for the purposes of deciding whether, on balance, the products that pose those risks are desirable.

Robert Choate, president of the Council on Children, Media and Merchandising, has succinctly expressed the point as follows:

"Advertising to children much resembles a tug of war between 200-pound men and 60-pound youngsters. Whether called an unfair practice or thought subject to fairness doctrine interpretation, the fact remains that any communication that has a \$1,000-per-commercial scriptwriter, actors, lighting technicians, sound effects specialists, electronic editors, psychological analysts, focus groups and motivational researchers with a \$50,000 budget on one end and the 8-year-old mind (curious, spongelike, eager, gullible) with 50 cents on the other inherently represents an unfair contest." [see note 326, infra].

Unfairness in the Section 5 sense is a term which Congress deliberately made broad, leaving it to the Commission to supply the term with specific content in the light of changing market practices and public values. The Supreme Court has characterized the Commission's powers in interpreting and enforcing the unfairness provision of Section 5 as those of a "court of equity," FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972), 50/ and has recognized that an especially broad definition of unfairness is in order where children are concerned because of

50/ Hereinafter cited as "S & H."

their special naivete and vulnerability. FTC v. R.F. Keppel & Bro., 291 U.S. 304 (1934). Further, the Commission has recognized that the concept of unfairness should be defined most broadly of all where advertising induces consumers--especially children--to risk injury to their health, not just to their pocketbooks. 51/

The most elaborate test stated by the Commission for determining unfairness--and one cited approvingly by the Supreme Court in S & H, supra, 405 U.S. at 244-45 n. 5--appears in the Cigarette Rule issued by the Commission in 1964. 52/ That test looks to three factors: first, whether the challenged practice, even if it has not previously been considered unlawful, "offends public policy" in the sense of being "within at least the penumbra of some common-law, statutory, or other established concept of unfairness;" second, "whether it is immoral, unethical, oppressive or unscrupulous;" and third, "whether it causes substantial

51/ See Sections IV B(1) and (2)(b)(ii) infra.

52/ Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, and Accompanying Statement of Basis and Purpose of Rule, 29 Fed. Reg. 8355 (July 2, 1964). (Hereinafter cited as "Cigarette Rule").

injury to consumers (or competitors or other businessmen)."

As the Court recognized in S & H, it is not necessary for a practice to be offensive under each of the three parts of the test in order for it to be unfair. Indeed, there have been instances since the Cigarette Rule where the Commission has found a practice to be unfair without specifically measuring it against any of the three parts. Moreover, the Commission itself has recognized that the Cigarette Rule test is not the exclusive test for Section 5 unfairness.

Notwithstanding, we will demonstrate that televised advertising of sugared foods to children is offensive under all three parts of the Cigarette Rule test. First, such advertising offends public policy in the sense of being within the penumbra of a well-established common-law or other concept of unfairness. The law supplies many examples of a strong policy (a) to protect children from the serious or lasting consequences of their own mistakes and (b) to protect them from adults who would profit from the disparity between their own sophistication and the naivete of children. For instance, the attractive nuisance doctrine in tort law protects children from alluring yet hazardous premises by giving owners a stiff financial incentive to "child-proof" them. Likewise, the voidability doctrine in contract law allows a minor to

withdraw from contractual obligations even if they were entered into with the specific approval of his or her parents.

The law also recognizes that where a child is confronted with a situation which is immediately attractive, but which has long-run dangers, it does not suffice to inform the child of the dangers and then leave the child to fend for himself or herself. The law recognizes that a child's capacity for adequate self-protection has not yet developed. In the present case, as the Commissioner of Food and Drugs has pointed out, children are "substantial[ly] like[ly]" to be "unable to appreciate the long term risks" which consumption of sugared products poses, and thus are unable adequately to protect themselves against the allure of advertising for such products.

Second, such advertising is "immoral, unethical, oppressive and unscrupulous," within the meaning of the Cigarette Rule test. Two instances in which the Commission or a court has applied such adjectives are Keppel, supra, which involved a selling device which induced children to gamble with small amounts of money, and the Cigarette Rule itself, which addressed a situation where consumers were induced to gamble with their health. Advertisements for sugared products, like those for cigarettes, involve inducements to children to gamble with their health, not money. But they involve a target audience

younger, and thus even more defenseless, than the adolescents who were one of the targets of broadcast cigarette advertising. Further, the second S & H test is closely related to another concept that has a well-established legal content--"unconscionable." The latter word is applied by the courts to contracts which are the product of an excessive disparity of power between the parties, and which excessively favor the more powerful one. The present situation involves an encounter between extremes of sophistication and naivete, and of power and defenselessness. The advantage in this encounter lies so heavily with the more sophisticated and powerful advertiser as to warrant use of the word "unconscionable."^{53/}

Third, such advertising causes "substantial injury" to children to the extent that it induces them to consume products which pose health risks and interferes with their education on matters of nutrition. It injures the parent-child relationship in that it puts parents to the hard choice of allowing their children to take those health risks or of enduring the strife that can accompany denial of requests induced by television advertising. Likewise, it injures

^{53/} See text accompanying note 325 infra.

competitors, which are forced to engage in a kind of "sugar derby," in which no single participant can afford to be "out-sugared," even if it recognizes, like General Mills, that children need "no coaxing" to eat sugar. 54/

Present televised advertising for sugared products to children is also "false," "misleading," and "deceptive" within the meaning of Sections 5, 12 and 15 of the FTC Act. These terms, like "unfairness," are to be construed especially broadly where children constitute the target audience and where personal health, as distinct from mere pecuniary interest, is at stake. The advertising at issue is deceptive in that it fails to state facts which are material, either in light of the claims made in the advertising, or in light of the customary or recommended use of the advertised products. All advertising for sugared products makes at least the implicit claim that consumption of the advertised products is desirable. The material but unrevealed fact is that the products can also pose health risks. Some candy advertising urges that the products are desirable because they last a long time in the mouth, or because they are suitable for between-meal consumption, or because a child can "eat some now, save some for later"--all without disclosing that frequent or sustained between-meal snacking on sugared products is the

54/ See Section IV-B(2)(a)(iii) infra.

pattern best calculated to cause tooth decay. Additionally, such advertising has a cumulative deceptiveness greater than that of any single commercial in that it erects what the Commission in the Cigarette Rule called a "barrier to adequate public knowledge and appreciation of the health hazards" of consuming the advertised products, and is deceptive for that reason. 55/

C. The Lack of any Jurisdictional or Constitutional Impediments to Effective Relief

There are no jurisdictional or constitutional impediments to the Commission's adoption of the proposed remedies.

This Commission and the Federal Communications Commission possess concurrent jurisdiction to regulate television advertising to children. The FCC has traditionally deferred to this Commission's primary authority to regulate unlawful advertising, and has announced that its licensees should be alert to rulings of this Commission, and that a licensee's compliance with those rulings will be reviewed in determining whether it has operated in the public interest.

55/ Cigarette Rule at 8357.

Courts recognize concurrent jurisdiction wherever possible, failing to do so only where the statutory provisions of one agency are irreconcilably in conflict with those of another, when one agency administers a pervasive regulatory scheme which could be undermined by giving effect to the regulations of another agency, or when concurrent regulation would subject regulated entities to contradictory requirements. None of those factors obtain here.

A Liaison Agreement between the two agencies supports the exercise of concurrent jurisdiction. Further, the Supreme Court has declined to hold that the authority exercised by the FCC over its licensees constitutes a pervasive regulatory scheme (United States v. Radio Corporation of America, 358 U.S. 334, 351 (1957)), and the likelihood that exercise of jurisdiction by this Commission would subject advertisers or broadcasters to conflicting requirements is slight.

In constitutional terms, the present situation is a special case within a special case. First, it involves children, who have always been recognized as a special class of persons under the law. Second, it involves commercial speech, which has also been recognized as a special class of speech under the law--distinct from political speech.

The specialness of children in constitutional terms has been well stated by Professor Thomas I. Emerson, a leading

First Amendment scholar:

"[The] system cannot and does not treat children on the same basis as adults. The world of children is not the same as the world of adults, so far as a guarantee of untrammelled freedom of the mind is concerned. The reason for this is, as Justice Stewart said in Ginsberg, that a child 'is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.'

He is not permitted that measure of independence, or able to exercise that maturity of judgment, which a system of free expression rests upon. This does not mean that the First Amendment extends no protection to children; it does mean that children are governed by different rules." Emerson, The System of Freedom of Expression, 496-97 (1970).

Thus minors have consistently been treated differently from adults in cases involving their exposure to sexually-oriented materials. Ginsberg v. New York, 390 U.S. 629 (1968); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57 (1973); Miller v. California, 413 U.S. 15, 18-19 (1973); Interstate Circuit v. Dallas, 390 U.S. 676, 690 (1968); Jacobellis v. Ohio, 378 U.S. 184, 195 (1964); Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977).

Likewise, age-based limitations on other constitutionally protected rights have been upheld. Indeed, some are written directly into the Constitution itself. See Turner v. Fouche, 396 U.S. 346, 362-63 (1970) (right to seek and hold office); U.S. Const. art I, Sections 2, 3; art II, Section 1 (same); Reynolds v. Sims, 377 U.S. 533, 562 (1964) (right to vote); U.S. Const. 26th amend. (same); Skinner v. Oklahoma 316 U.S. 535, 541 (1942) (right to marry); Carey v. Population Services,

International, 431 U.S. 678, 706 (1977) (Powell, J., concurring) (recognition of legitimacy of state's concern that "its juvenile citizens generally lack the maturity and understanding needed to make decisions concerning marriage and sexual relations"); Traux v. Raich, 239 U.S. 33, 41 (1915) (right to work for living).

Numerous other examples can be cited, including limitations on issuance to children of drivers' licenses, despite the constitutional guarantee of right to travel; and voidability of minors' contracts, despite the constitutional guarantee of right of private contract. Further, the Supreme Court has recognized the validity of certain restrictions on speech to minors which may interfere with parents' ability to raise their children as they see fit, Ginsberg, supra, provided that the restrictions are not so broad as unreasonably to impair speech to adults, Butler v. Michigan, 352 U.S. 380 (1957).

The special nature of commercial speech is such that only recently has it been acknowledged to be within the scope of the First Amendment. Compare Valentine v. Chrestensen, 316 U.S. 52, 54 (1942), with Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Linmark Associates, Inc., v. Township Of Willingboro, 431 U.S. 85 (1977); Carey v. Population Services, supra; and Bates v. State Bar of Arizona, 45 U.S.L.W. 4895 (U.S., June 27, 1977). All of these cases

involved essentially factual advertising addressed to adults which--in line with the classical economic rationale for advertising--provided them with information essential to rational market behavior. Indeed, in those cases, individuals denied access to such information might undergo serious personal hardship due to their inability to act rationally in the market. All of those cases involved advertising which was essentially concerned with the factual "hard attributes" of the products promoted--size, price, quality, health consequences of use, and the like. Even so, the Court took pains to note that commercial and non-commercial speech warrant "different degree[s] of protection," Virginia Board, supra, 425 U.S. at 771, n. 24.

Television advertising to children is distinguishable from these commercial speech cases in several respects. First, children lack the maturity to make difficult consumer decisions based on assessments of factual information and subjective needs. Second, the regulations proposed by staff do not prohibit advertising altogether, as in Virginia Board and other cases; they merely propose partial restrictions on advertisements aimed at certain audiences, or at certain times of day. Third, the staff proposals involve television, and not print advertising.

As the Supreme Court has noted, "the special problems of the broadcast media...warrant special consideration,"

Bates, supra, 45 U.S.L.W. at 4904; see Virginia Board, supra, 425 U.S. at 773. Finally, unlike the instant proposals, none of the commercial speech cases involved advertising found to be "misleading," deceptive or unfair. As the Court in Bates recognized:

"The determination whether an advertisement is misleading requires consideration of the... sophistication of its audience. Cf. Feil v. FTC, 285 F.2d 879, 897 (CA9 1960). Thus different degrees of regulation may be appropriate in different areas." 45 U.S.L.W. at 4904, n. 37.

It is particularly relevant that in Keppel the Court expressly recognized the Commission's right to proscribe a certain form of promotion addressed to children as unfair even though it was not necessarily deceptive.

The courts have also recognized that special limitations on advertising are permissible where the advertising is addressed to a "captive audience," Packer Corp v. Utah, 285 U.S. 105 (1932), and have characterized even the adult television audience as being, for some purposes, captive. Columbia Broadcasting System v. Democratic Nat'l Committee, 412 U.S. 94, 127 (1973). See also, Banzhaf v. FCC, 405 F.2d 1082, 1100-01 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969).

Finally, "time, place and manner" doctrines have recently been construed by individual Justices of the Supreme Court to suggest that certain forms of speech might be "zoned" or

otherwise regulated as to the manner in which they can be addressed to various segments of the public. See e.g., Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976).

These doctrines might allow the Commission to "zone" certain advertisements into television viewing times when adults, and not children, constitute the principal audience.

D. Remedies--Advantages and Disadvantages

In this Report, we explore five possible remedies for the unfairness and deceptiveness previously discussed:

- (a) Affirmative nutritional and/or health disclosures, presented within the body of the advertisements;
- (b) Affirmative nutritional and/or health disclosures presented in other contexts and/or under other auspices than those of the advertisers;
- (c) Limitations on the amount of television advertising which can be permissibly directed to children for sugared products;
- (d) Limitations on particular techniques used or statements made in television advertising directed to children for sugared products; and
- (e) Bans on televised advertising which is:
 - (i) directed to children too young to understand the selling purpose of, or otherwise comprehend or evaluate, the advertising for any product, or

(ii) directed to older children for those products which pose the most severe risks to dental health.

These remedies are discussed in detail in Section VI,

infra. Our conclusions are as follows.

First, to the extent that the unfairness or deceptiveness to be remedied is inherent in any television advertising addressed to children too young to appreciate its selling purpose or otherwise comprehend or evaluate it, it is difficult to see how any remedy short of a ban would suffice.

Second, to the extent that the unfairness or deceptiveness is associated with the products being advertised, the various possible remedies short of a ban have their positive and negative attributes. Specifically:

(a) Affirmative disclosures presented within the body of the advertisements might deal with dental or perhaps other health risks, with the importance of brushing the teeth after consuming sugar, with the inadvisability of excessive sugar consumption, or with nutritional information. Affirmative disclosures have ample precedent in the Commission's decisions and have been frequently employed where deceptiveness has resulted from a failure to reveal material facts.

However, this type of affirmative disclosure might not be effective. Young children have trouble understanding (and sometimes even perceiving) such disclosures.

Further, the incentive to which some advertisers might yield would be to make the disclosures as inconspicuous and ineffective as possible--which is something that can be done by techniques as subtle and difficult to monitor as presenting the disclosures in a flat tone of voice. Other, less subtle techniques include presenting the disclosure while distracting music is on the sound track or while something visually exciting, and unrelated, is on the screen, or using verbal formulations whose significance is likely to escape even a child who can understand each of the individual words used.

(b) Affirmative disclosures presented outside the context of the advertisements could serve as vehicles for the presentation of the information described in paragraph (a). These disclosures, even if prepared by advertisers, would probably be more readily perceived by children than disclosures presented in the body of the advertising. But there is a risk that advertisers might present the disclosures in a bland or unpersuasive manner. Disclosures of this sort might have some of the qualities of present public service announcements, which, according to Dr. Kenneth O'Bryan, in his presentation to the Commission on December 1, 1977, are so bland as to "send the kids to the john." One partial solution is that the Commission could mandate the text of such disclosures.

Affirmative disclosures outside the context of the advertisements and under auspices other than those of the advertisers, however, might be more effective. These would, in essence, provide supplementary nutritional and health information. The disclosures could be funded by advertisers who would devote a specified percentage of monies spent on the advertising of regulated products for the preparation of appropriate dental or nutritional messages. This remedy would also ensure that the particular dental or nutritional messages were chosen and fashioned with the assistance of independent experts in relevant fields. The authority of the Commission to impose this remedy seems clear and is discussed in Section VI-C, infra. Issues raised by this proposal concern its mechanics (e.g., how a funding system would work and who would control it) and would have to be explored in the context of rulemaking proceedings.

(c) To the extent that the unfairness and deceptive-ness of televised advertising of sugared products to children arises out of the cumulative impact of that advertising, an appropriate means of reducing that impact might be a rule which restricted the amount of television advertising for sugared products which could be broadcast per time unit of children's programming. This proposal might diminish the barriers to public understanding of

the health hazards of sugar consumption and might also diminish the power which television advertisers of sugared products appear to command over the eating habits of children. One shortcoming of this approach, however, is that it might raise the price of time available for such advertising, or impose barriers to new entrants to the market, or otherwise produce anti-competitive effects.

(d) We have considered imposing restrictions on the techniques used or the representations made in televised advertising of sugared products to children. Techniques that might be banned in order to reduce the unfair and deceptive impact of that advertising include the use of authoritative voice-overs, the use of "super-heroes" to promote products, selling by characters who also appear in programming and the use of animated cartoon figures. Representations that might be banned include statements that chewiness and stickiness are desirable qualities of candies or other confections, that sugared products are desirable in proportion to the the length of time in which they can be retained in the mouth and that characteristics like "sweetness," "chocolateyness," and "marshmallow" taste are desirable qualities in a breakfast food. The authority of the Commission to prohibit techniques or specific statements which contribute to unfairness or deceptiveness is also clear. However, this solution is not likely to prove effective. First,

it would be most difficult to identify and describe with any precision categories of statements or techniques which are unfair or deceptive for children. Second, any proposed limitations could easily be "invented around" by professionals skilled in the art of communicating to children. Third, any list of forbidden techniques or statements would invite endless debate as to whether a particular commercial really did make use of techniques or statements subject to the ban.

(e) As we have noted, television advertising for any product directed to children who are too young to appreciate the selling purpose of, or otherwise comprehend or evaluate, the advertising is inherently unfair and deceptive. It is hard to envision any remedy short of a ban adequate to cure this inherent unfairness and deceptiveness. Further, ACT and CSPI have urged that television advertising directed to children for the most cariogenic products be banned.

Bans, of course, are remedies of last resort and are not to be imposed where less stringent remedies would suffice. But there are several factors which suggest the appropriateness of a ban here. And there is ample precedent establishing the Commission's authority to impose bans.

The argument in favor of a ban on televised advertising of the most cariogenic sugared products to children is that products which pose the most severe dangers to health ought not to be presented via television advertising to children, a uniquely credulous and trusting audience. This is particularly so because children are much less able than adults to temper easily-aroused impulses with considerations of long-run harm or to understand the magnitude and nature of the specific risks which arise from the consumption of particularly cariogenic sugared products.

The Commission in the past has not hesitated to ban advertising or marketing practices which pose risks of harm to children. Thus, for example, the practice found to be unfair in Keppel--inducing children to gamble with relatively trivial sums of money, rather than with their health--was banned outright; it was not permitted to continue on condition that the children be given affirmative disclosures about the risks involved. Additionally, the Commission has on several recent occasions recognized the need for bans on broadcast advertising that induces children to take health risks. In both 1968 and 1969, the Commission recommended to Congress that all broadcast cigarette advertising be banned (not, again, that it be permitted to continue subject to affirmative disclosure requirements, or other conditions). Most

recently, in Hudson Pharmaceutical Co., ^{56/} the Commission obtained a consent order whose effect was to ban from children's programming any advertising for children's vitamins. This was the very form of relief which the National Association of Broadcasters had earlier determined to be appropriate as to such advertising. The Hudson case is similar to the present one in that consumption of the advertised product poses health risks which children may not be able to evaluate.

Another pertinent line of cases supporting the Commission's authority to impose a ban concerns prohibitions on the use of deceptive trade names. See, e.g., FTC v. Algoma Lumber Co., 291 U.S. 67 (1934). These cases have generally involved protecting adults against economic injuries, not children against risks to their health. Accordingly, the Commission's discretion in formulating an adequate remedy is, if anything, broader in the present case. ^{57/}

The foregoing remedies, of course, do not have to be considered in isolation from one another; some appropriate combination might be devised. On that point, the present practice in the Netherlands is instructive. There, advertisements for sugared foods are banned before 7:55 p.m.

^{56/} 89 F.T.C. 82 (1977).

^{57/} See Section VI-F(3) infra.

After 7:55 p.m., they can be broadcast, but they cannot be "clearly directed towards influencing children in favour of the recommended product," and during a portion of the commercial the advertiser must show a stylized toothbrush on the screen as a reminder of the health hazards of the product. 58/

E. Conclusion

Our views as to the proper course to be followed by the Commission are stated on pages 10 through 12 of the Introduction and Recommendations.

58/ See note 415 infra.

Bill Summary & Status for the 96th Congress**Item 1 of 1207****PREVIOUS | NEXT****PREVIOUS:ALL | NEXT:ALL****NEW SEARCH | HOME | HELP****H.R.2313**

Public Law: 96-252 (05/28/80)

SPONSOR: Rep Scheuer (introduced 02/21/79)Jump to: [Titles](#), [Status](#), [Abstracts](#), [Committees](#), [Amendments](#), [Cosponsors](#), [Summary](#)**TITLE(S):**

- **SHORT TITLE(S) AS INTRODUCED:**
Federal Trade Commission Improvements Act of 1979
- **SHORT TITLE(S) AS PASSED HOUSE:**
Federal Trade Commission Improvements Act of 1979
- **OFFICIAL TITLE AS INTRODUCED:**
A bill to amend the Federal Trade Commission Act to extend the authorization of appropriations contained in such Act.

STATUS: Floor Actions

05/28/80 Public Law 96-252

05/23/80 Measure presented to President

05/22/80 Measure enrolled in Senate

05/22/80 Measure enrolled in House

05/21/80 Senate agreed to conference report, roll call #152 (74-15)

05/20/80 House agreed to conference report, roll call #245 (272-127)

05/01/80 Conference report filed in House, H. Rept. 96-917

02/28/80 Motion to instruct House conferees passed House, roll call #107 (257-115)

02/28/80 Conference scheduled in House

02/07/80 Conference scheduled in Senate

02/07/80 Inserted similar provisions of S. 102002/07/80 Measure passed Senate, amended, in lieu of S. 1991, roll call #40 (77-13)

02/07/80 Measure considered in Senate

02/07/80 Measure called up by unanimous consent in Senate

11/27/79 Measure passed House, amended, roll call #683 (321-63)

11/27/79 Measure considered in House

11/14/79 Measure considered in House

11/14/79 Measure called up by special rule in House

05/15/79 Reported to House from the Committee on Interstate and Foreign Commerce with amendment, H. Rept. 96-181

STATUS: Detailed Legislative Status**House Actions****May 13, 80:**

Committee on Rules Granted Rule Providing for Immediate Consideration Waiving Clause 3 and 4 of Rule XXVIII Against the Conference Report.

Feb 21, 79:

TO: Mark Penn +

Tom Friedman

289-0916

From: Ann OL

Re: FTC speech on history
of marketing/advertising to children

Referred to House Committee on Interstate and Foreign Commerce.

Feb 23, 79:

Referred to Subcommittee on Consumer Protection and Finance.

Feb 28, 79:

Subcommittee Hearings Held.

Mar 7, 79:

Subcommittee Consideration and Mark-up Session Held.

May 8, 79:

Forwarded by Subcommittee to Full Committee (Amended).

May 14, 79:

Committee Consideration and Mark-up Session Held.

May 14, 79:

Ordered to be Reported (Amended).

May 15, 79:

Reported to House (Amended) by House Committee on Interstate and Foreign Commerce.

Report No: 96-181.

May 15, 79:

Placed on Union Calendar No: 104.

Oct 17, 79:

Hearings Held by Committee on Rules.

Oct 18, 79:

Rule Granted Providing an Open Rule with 1 Hour of Debate. Partial Waiver of Points of Order.

Rules Committee Resolution H.Res.456 Reported to House.

Oct 26, 79:

Rule Passed House.

Nov 14, 79:

Called up by House by Rule.

Considered by House.

Amendment HA 1202 Offered by Representative Russo.

Amendment HA 1202 Passed in Committee of the Whole by Recorded Vote: 223 - 147 (Record Vote No: 660).

Amendment HA 1202 Agreed to by House (en gros).

Nov 27, 79:

House Agreed to Amendments Adopted by the Committee of the Whole.

Amendment HA 1220 Offered by Representative Andrews, of ND.

Amendment HA 1221 Offered by Representative Glickman.

Amendment HA 1220 Passed (Amended) in Committee of the Whole by Recorded Vote: 245 - 139.

Amendment HA 1221 Passed in Committee of the Whole by Unanimous Vote.

Passed House (Amended) by Yea-Nay Vote: 321 - 63 (Record Vote No: 683).

May 13, 80:

Rules Committee Resolution H.Res.664 Reported to House.

Senate Actions

Nov 29, 79:

Received in the Senate.

Placed on Senate Legislative Calendar under Regular Orders. Calendar No. 460.

Feb 7, 80:

Senate struck all after the Enacting Clause and substituted the language of S. 1991 amended.

Passed Senate with an amendment and an amendment to the Title by Yea-Nay Vote: 77-13.

Record Vote No: 40.

Mar 3, 80:

Message on House action received in Senate.

May 21, 80:

Message on House action received in Senate.

Conference Actions

Feb 7, 80:

Senate insists on its amendments by Voice Vote.

Request conference with the House; will appoint conferees no later than 2/20/80.

Feb 20, 80:

Senate appointed conferees: Ford; Cannon; Magnuson; Heflin; Danforth; Packwood; Warner.

Feb 28, 80:

House Disagreed to Senate Amendments by Unanimous Vote.

House Agreed to Request for Conference and Speaker Appointed Conferees: Staggers, Scheuer, Preyer, Ottinger, Satterfield, Luken, Broyhill, Rinaldo, Devine.

Russo appointed as conferee solely for consideration of section 305 and modifications committed to conference.

House Conferees Instructed House insist on language contained in Sec. 302 by Yea-Nay Vote: 257 - 115 (Record Vote No: 107).

Mar 13, 80:

Conference held.

Apr 30, 80:

Conferees agreed to file conference report.

May 1, 80:

Conference Report 96-917 Filed in House.

May 20, 80:

House Agreed to Conference Report by Yea-Nay Vote: 272 - 127 (Record Vote No: 245).

May 21, 80:

Senate agreed to conference report by Yea-Nay Vote. 74-15. Record Vote No: 152.

Executive Actions

May 21, 80:

Cleared for White House.

May 22, 80:

Measure Signed in Senate.

May 23, 80:

Presented to President.

May 28, 80:

Signed by President.

Became Public Law No: 96-252.

ABSTRACT(S):

- ABSTRACT AS INTRODUCED:

Amends the Federal Trade Commission Act to authorize appropriations for the Federal Trade Commission for fiscal years 1980 and 1981.

COMMITTEE(S):

- COMMITTEE(S) OF REFERRAL:
House Interstate and Foreign Commerce
 - COMMITTEE(S) REPORTING:
House Interstate and Foreign Commerce
-

AMENDMENT(S):

NONE

COSPONSORS(5):

Rep Hyde - 05/30/79 Rep Lagomarsino - 05/30/79

Rep Lott - 05/30/79 Rep Dorman - 05/30/79

Rep Whitehurst - 05/30/79

SUMMARY AS OF:

(REVISED AS OF 05/01/80 -- Conference report filed in House, H. Rept. 96-917)

Jump to Search Words

Federal Trade Commission Improvements Act of 1980 - Amends the Federal Trade Commission Act to authorize appropriations through fiscal year 1982 for the functions of the Federal Trade Commission (FTC) at the following levels: \$70,000,000 for fiscal year 1980, \$75,000,000 for fiscal year 1981, and \$80,000,000 for fiscal year 1982.

Directs the FTC to reopen any cease and desist order if the person subject to the order files a request which makes a satisfactory showing of the changed conditions warranting the modification or setting aside of such order.

Directs the FTC to publish a preliminary regulatory analysis for each proposed rule, and a final regulatory analysis for each final rule. Requires these analyses to include the objectives of the regulation, alternatives to the rule, and the projected benefits and adverse economic effects.

Requires the FTC to publish an advance notice of proposed rulemaking, prior to the notice of proposed rulemaking currently required, to describe the regulatory objectives and to solicit public comment.

Requires publication of a semiannual regulatory agenda listing the rules that the FTC expects to propose or promulgate in the upcoming year.

Limits the FTC's current authority to compensate interests which would otherwise not be adequately represented for the costs of participating in rulemaking proceedings. Reduces the aggregate compensation level per fiscal year from \$1,000,000 to \$750,000. Sets a \$75,000 ceiling on the amount of compensation paid to any person per rulemaking proceeding, and limits to \$50,000 per fiscal year the amount of public participation funds which may be received.

Requires that 25 percent of the total compensation per fiscal year be set aside for persons who would be regulated by the proposed rule. Directs the FTC to establish a small business outreach program to solicit comment from small businesses which would not be adequately represented at such proceedings.

Includes a provision designed to insure the independence of presiding officers in rulemaking proceedings. Prohibits a presiding officer from consulting any party or person with respect to any fact in issue unless notice and opportunity for participation is given.

Directs the FTC to promulgate rules providing that ex parte contracts with the Commissioners be on-the-record.

Requires the Commission to establish a plan for reducing the reporting burdens on small businesses with respect to the Quarterly Financial Report (QFR) Program. Directs the FTC to submit such plan to

Congress by December 31, 1980.

Specifies and clarifies procedures with respect to the disclosure of materials obtained by compulsory process for law enforcement purposes, the disclosure of confidential commercial and financial information and trade secrets, and the confidentiality of line-of-business reports.

Eliminates the current criminal penalties for failure to comply with a subpoena or lawful requirement of the Commission, but retains such penalties for noncompliance with judicial orders.

Includes a new civil investigative demand (CID) procedure to be used by the **FTC** in precomplaint actions.

Gives a party which has relied in good faith on Federal Reserve Board regulations, a defense based on such reliance in any **FTC** enforcement action.

Prohibits the **FTC** from exercising its current authority under the Lanham Trademark Act for cancellation of a trademark, on the ground that such trademark has become the generic name for the product.

✱ Eliminates the authority of the **FTC** to promulgate any rule in the pending children's advertising proceeding, or in any substantially similar proceeding, on the basis that such advertising constitutes an **unfair** act or practice in or affecting commerce. (Leaves unaffected other authority of the **FTC** to regulate such area.) Suspends through fiscal year 1982 the **FTC's** authority to regulate commercial advertising on the basis of such **unfairness standard**.

└ Suspends the children's advertising proceeding until the Commission complies with a new rulemaking provision, which requires the **FTC** to include in the proposed rulemaking notice the text of the rule and alternatives.

└ Authorizes the **FTC** to use funds authorized by this Act to promulgate the current or similar trade regulation rule concerning funeral industry practices (Federal Register, August 29, 1975, p. 39901) only to the extent that such rule: (1) requires fee or price disclosure; and (2) prohibits persons furnishing goods and services relating to funerals from engaging in specified practices, such as misrepresentation.

Provides that a State requirement which affords to consumers as great a level of protection as the funeral industry requirement of this Act shall not be pre-empted as long as the State effectively enforces its requirement.

Authorizes the **FTC** to use funds authorized by this Act to investigate or prosecute agricultural cooperatives only to the extent that the conduct at issue violates the antitrust laws or the Federal Trade Commission Act, in excess of the immunity afforded such cooperatives by the Capper-Volstead Act. Prohibits the use of authorized funds for the investigation of agricultural marketing orders.

Exempts the business of insurance from the investigative and reporting powers of the **FTC**, except for investigations relating to antitrust violations. Permits the Commission to conduct studies and prepare reports on the business of insurance only when requested by a majority of the members of the Senate Committee on Commerce, Science, and Transportation or the House Committee on Interstate and Foreign Commerce. Stipulates that the authority created by any such request terminates at the end of the particular Congress.

Permits the **FTC** to participate in a Department of Health and Human Services study of health insurance policies sold to Medicare-eligible persons.

Prohibits the **FTC** from promulgating any trade rule or regulation with respect to the development and utilization of **standards** or certification activities on the basis of **unfair** or deceptive acts or practices in or affecting commerce. (Leaves unaffected other authority of the Commission to regulate such area.)

Sets forth no provisions with respect to used motor vehicles or savings and loan institutions.

Directs the [FTC](#) to submit any final rule it promulgates to Congress for review. Permits both Houses of Congress to disapprove by concurrent resolution a proposed rule within 90 calendar days of continuous session of its submission. Requires such resolution to be referred to the House Committee on Interstate and Foreign Commerce or the Senate Committee on Commerce, Science, and Transportation. Makes it in order to move to discharge such Committees from further consideration if the resolution is not reported out within 75 calendar days of continuous session after referral. Makes it in order at any time after either Committee has reported, or been discharged from consideration of, such resolution, to move to proceed to its consideration. Makes such motion privileged in the Senate and highly privileged in the House, and non-debatable. Limits debate on the resolution to ten hours.

Directs the Comptroller General to examine this review procedure for [FTC](#) [Top](#) rules and report to Congress by the end of fiscal year 1982.

Provides for an expedited judicial review of the constitutionality of such review procedure.

Requires the Consumer Subcommittee of the Senate Committee on Commerce, Science, and Transportation to hold oversight hearings on the Commission at least once every six months through fiscal year 1982.

46 FR 48710

FEDERAL TRADE COMMISSION

AGENCY: Federal Trade Commission.

16 CFR 461

Children's Advertising

46 FR 48710

October 2, 1981

ACTION: Termination of Rulemaking Proceeding.

SUMMARY: The Federal Trade Commission (FTC) has terminated its rulemaking concerning children's television advertising (TRR No. 215-60). 43 FR 17967 (April 27, 1978).

FOR FURTHER INFORMATION CONTACT:

Wallace S. Snyder, Assistant Director or Judith P. Wilkenfeld, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580 [Telephone (202) 724-1499 and (202) 724-1467 respectively].

TEXT:

SUPPLEMENTARY INFORMATION: This rulemaking proceeding was initiated in response to petitions filed in 1977

by Action for Children's Television (ACT) and Center for Science in the Public Interest (CSPI), and a third

petition filed in 1978 by Consumers Union of the United States, Inc. (CU) and Committee on Children's

Television, Inc. (CCT). The ACT and CSPI petitions requested rulemaking to regulate television advertising for

candy and sugared food products directed to children. The CU and CCT petition sought rulemaking to regulate

all television advertising oriented to young children.

In response to the petitions, staff conducted an investigation and, in February 1978, submitted a report to the

Commission. That report concluded there was sufficient evidence to suggest that both (1) the televised

advertising of any product directed to children too young to understand the selling purpose of, or otherwise

comprehend or evaluate commercials and (2) the televised advertising of sugared products to children of all

ages may be unfair and deceptive within the meaning of section 5 of the FTC Act, thus requiring an

appropriate remedy.

On April 27, 1978, the Commission issued a Notice of Proposed Rulemaking (NPRM) declaring its intent to hold a

comprehensive rulemaking proceeding addressing the problems posed by television advertising directed to

children. The Notice did not propose a specific text of a rule. Instead, the Commission sought "comment on

the advisability and manner of implementation of a rule which would include the following three elements"

recommended at that point by the staff:

* * * (a) Ban all televised advertising for any product which is directed to, or seen by, audiences composed of

a significant proportion of children who are too young to understand the selling purpose of or otherwise

comprehend or evaluate the advertising;

(b) Ban televised advertising for sugared food products directed to, or seen by, audiences composed of a

significant proportion of older children, the consumption of which products poses the most serious dental

health risks;

(c) Require televised advertising for sugared food products not included in Paragraph (b), which is directed to,

or seen by, audiences composed of a significant proportion of older children, to be balanced by nutritional

and/or health disclosures funded by advertisers. * * *

In addition, the Commission sought comment on all of the remedial possibilities enumerated in the Staff Report.

In the request for these comments, the Commission made specific reference to the following four possibilities:

* * * 1. Affirmative disclosures located in the body of advertisements for highly cariogenic products directed to children.

2. Affirmative disclosures and nutritional information contained in separate advertisements, funded by advertisers of highly cariogenic products advertised to children.

3. Limitations upon particular advertising messages used and/or techniques used to advertise to very young children, or to advertise highly cariogenic products to all children.

4. Limitations upon the number and frequency of advertisements directed at very young children; limitations upon the number and frequency of all advertisements of highly cariogenic products directed at all children. * *

Finally, the Commission posed 16 general questions on issues of law and policy, summarized as follows:

(1) Is there a specific age group of affected children who do not understand the selling intent of, or otherwise adequately comprehend television advertisements?

(2) Is advertising directed to young children, unable to comprehend television advertising, unfair or deceptive and, if so, is it remediable?

(3) How should the Commission define advertising "directed to" or "seen by" children in order to identify the unfair or deceptive advertisement?

(4) Will a ban on television advertisements directed to young children affect the quality or quantity of children's television programming? What is the harm to young children of television advertising directed to them?

(5) Are there remedies other than a ban for the problems associated with child-oriented television advertising?

(6) Is there evidence that advertisements for highly sugared products lead children to consume such products

and get tooth decay? Is a ban or some other form of restriction necessary to remedy this problem?

(7) What factors affect the cariogenicity of food and what is their relative magnitude? (E.g., form and frequency of consumption.)

(8) Does between meal consumption of sugared products (snacking) have a greater negative effect on dental health than mealtime consumption, so as to warrant differentiation in any proposed rule?

(9) What evidence is there on the question of sugared consumption and nutrition related health problems?

(10) Do children know about the health, nutrition and dental consequences of the consumption of sugared products? Does advertising affect this awareness?

(11) How should the terms "directed to" or "seen by" be defined as regards advertising to older children?

(12) How could one best communicate to older children information about the risks of sugar consumption?

(13) Who should devise the measures for conveying such information to older children (e.g., advertisers, outside organizations)? What is the Commission's role?

(14) Will the proposed remedies adversely affect the quality and quantity of children's programming?

(15) Are there specific claims regarding sugar which should be banned from children's advertisements?

(16) What are the constitutional implications of a ban remedy for either advertising directed to young children or advertising of highly sugared products?

In the Notice of Proposed Rulemaking, the Commission proposed that hearings be held in two stages, the first

a public, legislative-type hearing, and the second an adjudicative-type hearing on certain disputed issues of

specific fact. The Commission also proposed that issues for the adjudicative-type hearings be suggested by

the parties and then designated by the Commission after completion of the legislative-type hearings.



OFFICE OF
THE CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

September 12, 2000

The Honorable John McCain
Chairman
Commerce Committee
United States Senate
508 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Joseph I. Lieberman
Ranking Member
Governmental Affairs Committee
United States Senate
706 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Robert C. Byrd
Ranking Member
Appropriations Committee
United States Senate
311 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Sam Brownback
Member
Commerce Committee
United States Senate
303 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators:

Thank you for your letter regarding the impact of television programming on America's children and for your participation in the Commission's proceeding on the public interest obligations of broadcasters.

As you are aware, in December 1999, the Commission issued a *Notice of Inquiry* (NOI) seeking comment on the public interest obligations of television licensees. Your letter and attached materials have been entered into the record of that proceeding.

Since the Commission initiated its proceeding on the public interest obligations of television licensees, I have received comments and e-mails from the public about the effect of the increasing amount of sexually explicit and violent programming on America's children and the need for new tools for parents to protect their children from such programming. Yesterday's Federal Trade Commission report puts a needed spotlight on the marketing of violence to children and the effect of exposure to media violence. In addition, as documented in the exhibits you submitted with your letter, recent studies indicate that television may influence children's sexual attitudes as well.

On Thursday, this Commission will consider a proceeding to extend to the digital era broadcasters' affirmative obligation to provide three hours each week of educational programming for children. The proceeding will also consider important questions about broadcasters' advertising practices during children's programming, and their promotion of

The Honorable John McCain
The Honorable Joseph I. Lieberman
The Honorable Robert C. Byrd
The Honorable Sam Brownback
September 12, 2000
Page 2

programming that may not be appropriate for children during times when children are likely to be watching television. We believe that the obligation of broadcasters is not only to protect children from objectionable programming but also to offer positive and educational programming.

In addition, the Commission will hold hearings in October to further supplement our record. The hearings will address broadcasters' obligations to children, including the effect of sexually explicit and violent programming on America's children, as well as their broader public interest obligations.

As we look at the public interest obligations of television licensees in this proceeding, we will continue to encourage the public to comment to us on these issues. Once the record has been fully developed, we will examine the steps the Commission may take to protect children and to ensure that television licensees continue to serve their communities in the digital television era. We will then issue a Report based upon the record, including the Commission's findings and recommendations going forward in this area.

You further suggested in your letter that the broadcast industry develop a voluntary code of conduct setting standards for broadcast programming. I take this recommendation very seriously, and join you, even during the pendency of this proceeding, in urging broadcasters to develop and enforce a voluntary code to help ensure that the programming carried when children are likely to be watching is programming that parents would find appropriate for their children.

In addition, you specifically asked about broadcast programming standards, including the Commission's approach to enforcing the prohibition against broadcasting indecent material and the development of an industry standard for self-regulation of program content, especially sexually explicit and violent programming. As you know, the Commission's authority to enforce the prohibition on the broadcast of indecent programming stems from 18 U.S.C. § 1464, which specifies that anyone who utters obscene, indecent or profane language over radio frequencies is subject to fine or imprisonment. Under section 503(b)(1)(D) of the Communications Act of 1934, as amended, the Commission has authority to issue civil fines for broadcast indecency.

Let me assure you that the Commission takes its indecency enforcement responsibilities very seriously, as reflected in recent indecency actions. This year we have imposed forfeitures of as much as \$35,000 on stations airing indecent material. In so doing, however, we are mindful of the First Amendment to the Constitution, and Section 326 of the Communications

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Act, which prohibit the Commission from censoring broadcast material and from making any regulation that would interfere with freedom of expression by broadcasters. We articulate the standard we are applying in each case and through our case law provide broadcasters with guidance on the meaning of the standard.

Finally, as Chairman of the Commission, as well as a parent, I very much appreciate and share your concerns about the effect of television on our children. I want to assure you that I will work with my fellow Commissioners to see what we can do to strengthen our efforts to encourage quality television. I look forward to continuing our mutual dialogue on these important matters.

Sincerely,

A handwritten signature in black ink, appearing to read "William E. Kennard". The signature is fluid and cursive, with the first name "William" and last name "Kennard" clearly distinguishable.

William E. Kennard
Chairman

FCC to Examine TV Sex, Violence

Hearings to Focus on Harm to Children

By CHRISTOPHER STERN
Washington Post Staff Writer

Just one day after a federal report charged that the movie, music and video-game industries are aggressively marketing violent images to children, the Federal Communications Commission announced yesterday that it will examine the effects of "sexually explicit and violent" television programming on children.

In a letter to members of Congress who had expressed concern about the amount of sex and violence on television, the FCC said it will hold hearings on the issue next month. The agency also said it will look into broadcasters' advertising practices, including "the promotion of programming that may not be appropriate for children" at times when children are most likely to be watching television.

The FCC's announcement comes as the portrayal and marketing of violence in the media has become a hot campaign issue. Vice President Gore said yesterday that he would favor additional regulations if the entertainment industry did not come up with a plan to reform its marketing practices within six months. Today, Gore running mate Sen. Joseph I. Lieberman (D-Conn.) will testify at a Senate Commerce Committee hearing on the Federal Trade Commission report released Monday. Lieberman, a longtime critic of the entertainment industry, is expected to use his testimony to call on the industry to tone down the levels of sexual and violent imagery in all forms of media.

Also testifying will be Lynne V. Cheney, the former chairman of the National Endowment for the Humanities and wife of Republican vice presidential nominee Richard B. Cheney. In an interview with *The Washington Post*, Cheney said yesterday that she plans to single out Universal Music Group's Interscope Records for criticism. Among Interscope's stars is the rapper Eminem, whose lyrics Cheney said promoted violence against women. Homosexual groups have also criticized Eminem for anti-gay lyrics.

Entertainment industry executives are expecting to face vigorous questioning at the hearing today. The 15-month FTC investigation found "pervasive and aggressive marketing of vi-

olent movies, music and electronic games to children."

Walt Disney Co. was the first to react to the FTC report, saying yesterday that it will modify its marketing practices.

The Burbank, Calif.-based studio said it will not allow theaters to show previews for R-rated movies to audiences attending Disney-branded movies. The policy will not apply to the other film companies owned by Disney such as Hollywood Pictures, Touchstone and Miramax Films.

In addition, Disney said its ABC Television Network will not accept advertisements for R-rated movies in prime-time entertainment programming before 9 p.m. But R-rated movies could be advertised in non-prime-time entertainment programming such as sports, a Disney spokesman said.

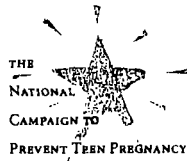
When it comes to R-rated movies, Disney said it will not conduct market research that targets children under 17. Among the FTC's findings was that movie studios regularly used children under 17 in market research for R-rated movies.

Despite invitations from the Commerce Committee, no movie industry executives were planning to attend today's hearing. Executives at every major movie studio declined invitations. The one executive who did accept, Universal Pictures chief executive Stacey Snider, backed out after learning that she would be the lone representative.

But the studios will be represented by lobbyist Jack Valenti, president of the Motion Picture Association of America. According to a draft copy of his testimony, Valenti will attack the FTC's report and say it overestimated the number of children watching certain television shows. "[W]ith only one exception, not any of the cited TV programs, from which flows the FTC's charges, can by any stretch be labeled for 'for under-17s.'"

The FTC said in its report that the movie studios regularly advertised violent R-rated movies during times when children are most likely to watch TV, including after school, and on shows with predominantly teen audiences.

Kle: m. d. + redm



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Study 11/99

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EMBARGOED UNTIL:

Wednesday, November 17, 1999, 9:00 a.m. EST

NEW STUDY FINDS KIDS SPEND EQUIVALENT OF FULL WORK WEEK USING MEDIA

Many Kids Have Multi-Media Bedrooms, TV on During Dinner, and No Rules

Time Spent With Computers Lags Far Behind TV and Music

New York, NY – The typical American child spends an average of more than 38 hours a week – nearly five and a half hours a day (5:29) – consuming media outside of school, according to a major national study released today by the Kaiser Family Foundation. That amount is even higher – nearly six and three-quarter hours a day (6:43) – for kids eight and older. The study – *Kids & Media @ The New Millennium* – examined media use among a nationally representative sample of more than 3,000 children ages 2-18, including more than 600 who completed detailed media use diaries. The study included children's use of television, computers, video games, movies, music and print media.

"Watching TV, playing video games, listening to music and surfing the Internet have become a full-time job for the typical American child," said Drew Altman, Ph.D., president of the Kaiser Family Foundation. "This study really underscores the importance of paying attention to the messages and the information kids are getting from the media, both good and bad."

The study also found that many parents are not exercising much control over their children's media use: among kids eight and older, two-thirds (65%) have a TV in their bedroom and say the TV is usually on during meals in their home, and nearly that many (61%) say their parents have set no rules about TV watching. Parents watch TV with their kids in this age range just 5% of the time. Nearly one out of every four kids in this age group (24%) spends more than five hours a day watching TV.

Even the youngest kids are dedicating a big chunk of their day to media use. According to their parents, kids in the 2-7 year-old age range spend an average of three and a half hours a day using media. Even among these younger kids, one in three (32%) has a TV in their bedroom. More than a third (35%) of parents of 2-7 year-olds say the TV is on in their homes "most of the time" and almost half (47%) say it is usually on during meals. Parents watch TV with their young kids just 19% of the time.

(more)

Computers. Nearly seven in ten kids (69%) have a computer at home and nearly half (45%) have Internet access from home. Among kids eight and older, one in five (21%) has a computer in their bedroom. But despite this widespread access to computers, kids still spend a comparatively small amount of time with computers, averaging less than half an hour a day (:21) using a computer for fun, compared to two and three quarters hours a day (2:46) watching TV. "Computers may be the wave of the future, but TV still dominates kids' time and attention today," said Vicky Rideout, director of the Foundation's *Program on the Entertainment Media and Public Health*.

There are significant disparities in computer use among children from different economic circumstances: in a typical day, half (50%) of all kids who live in or go to school in higher income communities use a computer, while only 29% of those from lower income areas do. Schools are helping bridge that gap: students are equally likely to use a computer in class whether they go to school in a low (32%) or a higher income (30%) community.

Contrary to popular perception, the study did not find evidence of large numbers of children spending hours a day playing computer games or surfing the Internet. Less than one in ten kids (9%) spends more than an hour a day using a computer for fun, including 3% who spend more than an hour online and 2% who spend more than an hour playing computer games. By contrast, nearly two-thirds of kids (64%) spend more than an hour a day -- and 17% spend more than *five* hours a day -- watching TV.

"Heavy" media users. The study identified a subset of children in the 8-18 year-old range who are classified as "heavy" media users -- those who spend more than ten and a half hours a day using media. About one in six kids (16%) falls into this category.

Most kids in this age group report that they have lots of friends, are happy at school, get along well with their parents, don't get into trouble a lot, and are not often bored, sad or unhappy. On a "contentedness index" summarizing self-reports on these issues, most children appear well-adjusted. However, those children identified by the study as "heavy" media users score lower on the index than those children who use less media. The study cannot determine whether heavy use of media causes kids to be less content, whether discontent contributes to children spending more time with media, or whether some other factors cause both effects. However, even when controlling for factors such as race, age, family composition and income of the community in which the child attends school, indicators of discontent are associated with high media use.

Other media. According to the study, music is a dominant force in kids' lives. Young people spend an average of almost an hour and a half a day (1:27) listening to CDs, tapes or the radio. "After TV, music is the medium of choice for most kids, especially older teens," said Donald F. Roberts, Jr., Ph.D., professor of communication at Stanford University and an author of the study.

While the study confirms that electronic media dominate young people's time, it also indicates that reading for pleasure is still a staple in most kids' lives. More than eight in 10 kids (82%) will read for fun each day, averaging nearly three quarters of an hour (:44) a day (excluding time spent reading in school or for homework). But kids still spend more than five times as much time in front of a TV, computer or video game screen each day than they do reading (4:06 v. :44).

(more)

Methodology: The study is based on a nationally representative sample of 3,155 children ages 2-18, including more than 2,000 written questionnaires completed by children 8 and older, more than 1,000 in-home interviews with parents of 2-7 year-olds, and more than 600 week-long media use diaries maintained by parents (for 2-7 year olds) or kids (for 8-18 year-olds). The surveys and diaries were completed between November 10, 1998 and April 20, 1999. The study was designed by Kaiser Family Foundation staff in consultation with Stanford University Professor Donald F. Roberts, Jr. and Harris Interactive, Inc. (formerly Louis Harris & Associates). The data were collected by Harris Interactive, and the results were analyzed by Foundation staff and Professor Roberts. The margin of error for the combined sample of children 2-18 is +/- 3%; for children 8 and older it is +/- 3%; and for children 2-7 it is +/- 5%. The study examines children's non-school use of television, videos, movies, video games, CDs and tapes, radio, books, magazines, newspapers and computers. Children or parents completed detailed questionnaires regarding the child's use of these media the previous day.

The Kaiser Family Foundation, based in Menlo Park, California, is an independent national health care philanthropy, and is not affiliated with Kaiser Permanente or Kaiser Industries. This study is a project of the Foundation's *Program on the Entertainment Media & Public Health*, which was established to examine the impact of entertainment media on society, and to work with the entertainment industry on important public health issues.

To order a copy of the full study (publication #1536), executive summary (#1535), or appendices (#1537) on which this release is based, call the Kaiser Family Foundation's publication request line at 800-656-4533, or review them online at www.kff.org.

###

Note: A summary of selected key data is attached to this news release.

Kids & Media @ the New Millennium: A Kaiser Family Foundation Report

Key Data

Amount of time children spend using media each day, on average:¹

All kids 2-18	5:29
2-7 year-olds	3:34
8 and older	6:43

Amount of time kids spend each day, on average:²

Watching TV	2:46
Listening to music	1:27
Reading for fun	:44
Watching videos	:39
Using a computer for fun	:21
Playing video games	:20
Online	:08

Percent of kids who spend more than an hour a day:

Watching TV	64%
Reading for pleasure	20%
Listening to CDs or tapes	19%
Listening to the radio	17%
Using a computer for fun	9%
Playing video games	8%
Online	3%
Playing computer games	2%

Amount of time kids spend each week, on average:³

Watching TV	19:19
Listening to music	10:04
Reading	5:15
Using a computer for fun	2:29
Playing video games	2:17

Percent of kids who have a TV in their bedroom:

All kids 2-18	53%
2-7 year-olds	32%
8 and older	65%

Percent of kids who use a computer in a day:

All kids 2-18	42%
2-7 year-olds	26%
8 and older	51%

Percent of kids who have a computer in the home:

All kids 2-18	69%
2-7 year-olds	62%
8 and older	73%
Lower income ⁴	49%
Upper income	81%

Percent of kids who have a computer in their bedroom:

All kids 2-18	16%
2-7 year-olds	6%
8 and older	21%

Percent of school-aged children who use a computer in a typical day, by income:⁴

In school:	
Lower income	32%
Upper income	30%

Out of school:	
Lower income	23%
Upper income	48%

Parental oversight:

Percent of kids...

With no rules about TV: 49%

In homes where TV is usually on during meals: 58%

Percent of time parents watch TV with their kids:⁵

2-7 year-olds:	19%
8-18 year-olds:	5%

¹ Time is presented in hours:minutes.

² Times cannot be summed, due to use of more than one medium at a time.

³ Week-long averages are based on mean times with each medium, separating out weekday and weekend reports. Times cannot be summed due use of more than one medium at a time.

⁴ Income categories are based on the median income of the zip code in which the child lives (for 2-7 year-olds) or goes to school (for 8-18 year-olds), and represents the following ranges: "low income" is less than \$25,000, and "high income" is \$40,000 or more.

⁵ Based on media-use diaries.

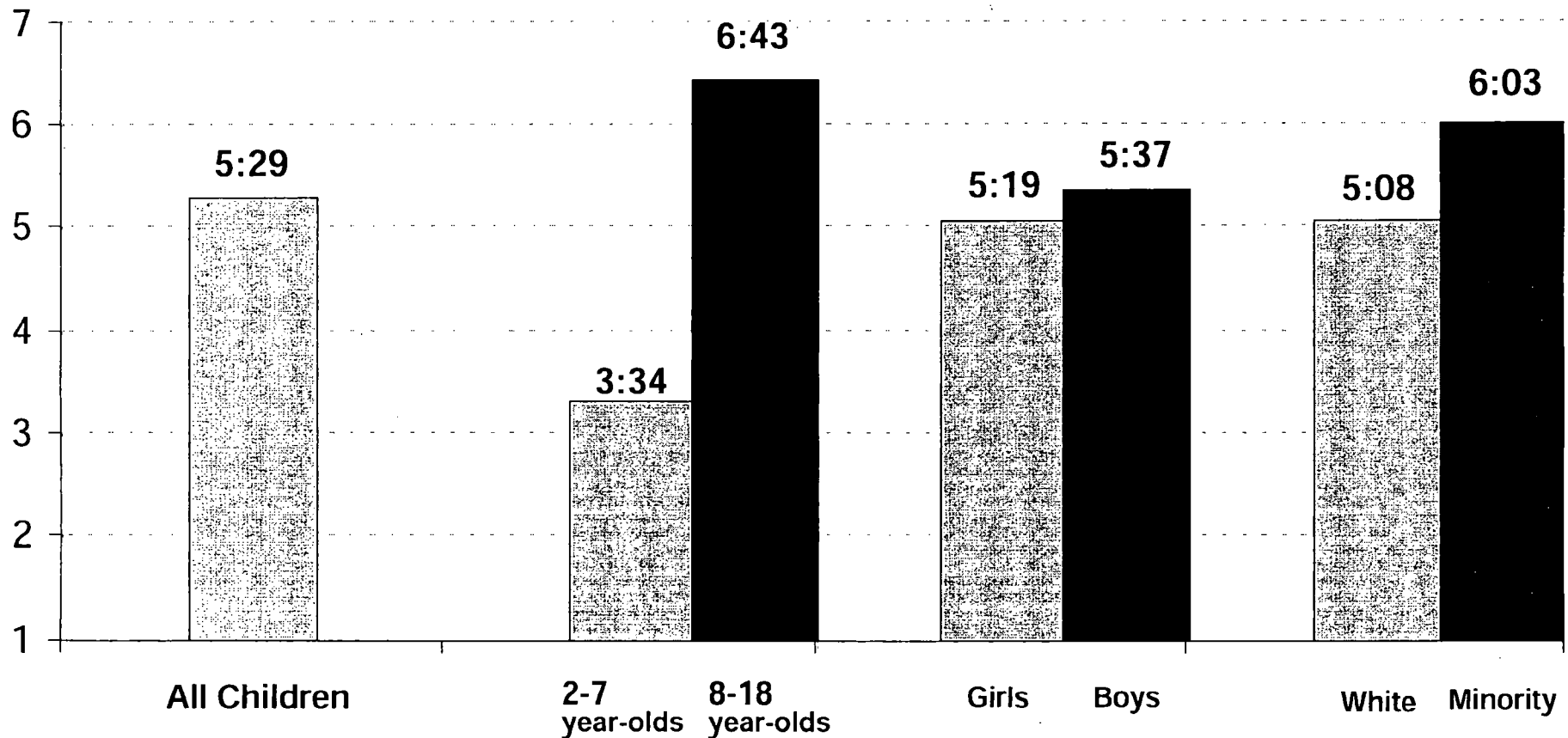
Kids and Media at the New Millennium: A Comprehensive National Analysis of Children's Media Use

A Report of the Kaiser Family Foundation
Chart Pack

Chart 1

Media Use

On a typical day, the total amount of time spent using media by...



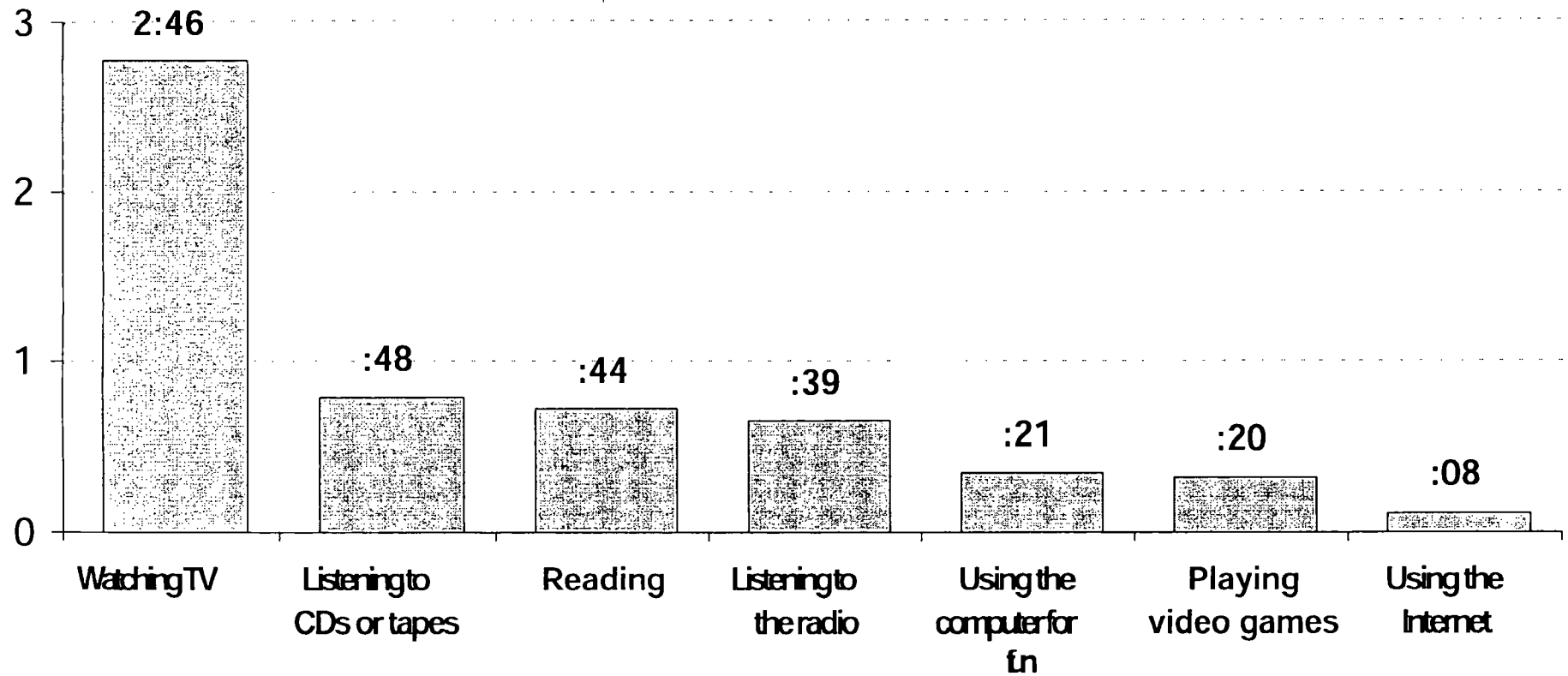
* Times are presented in hours: minutes.

Source: Kids & Media at the New Millennium, Kaiser Family Foundation, November 1999

Chart 2

Media Use

In a typical day, the average amount of time children spend...



* Times are presented in hours: minutes. Numbers cannot be summed to calculate children's total media use time because they may have used more than one medium at a time. Reading includes amount of time children are read to.

Source: Kids & Media at the New Millennium, Kaiser Family Foundation, November 1999

Chart 3

Media in the Bedroom

Percent of 2-7 year-olds who have the following media in their bedrooms...

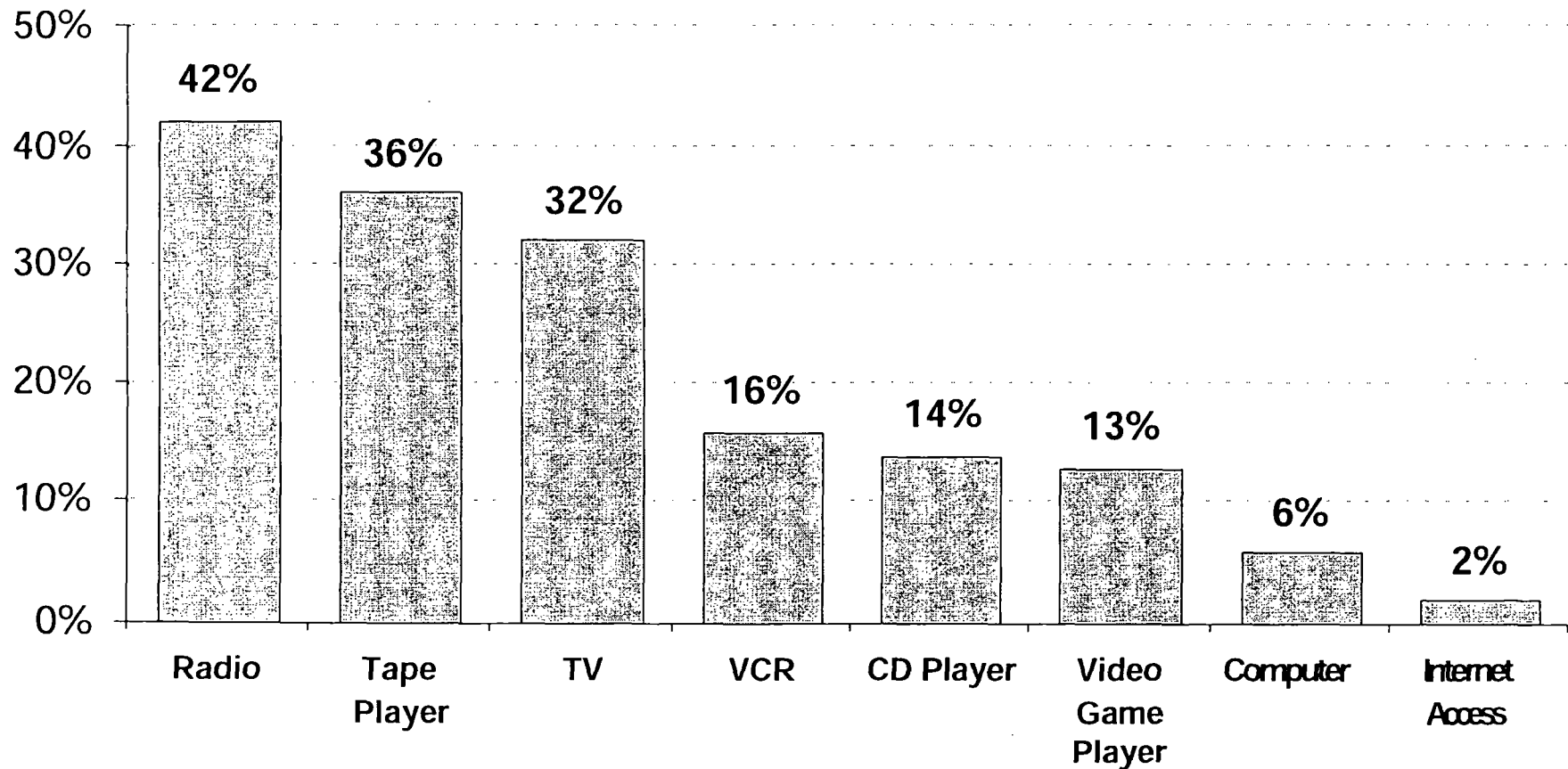


Chart 4

Media in the Home

Percent of children who live in homes with...

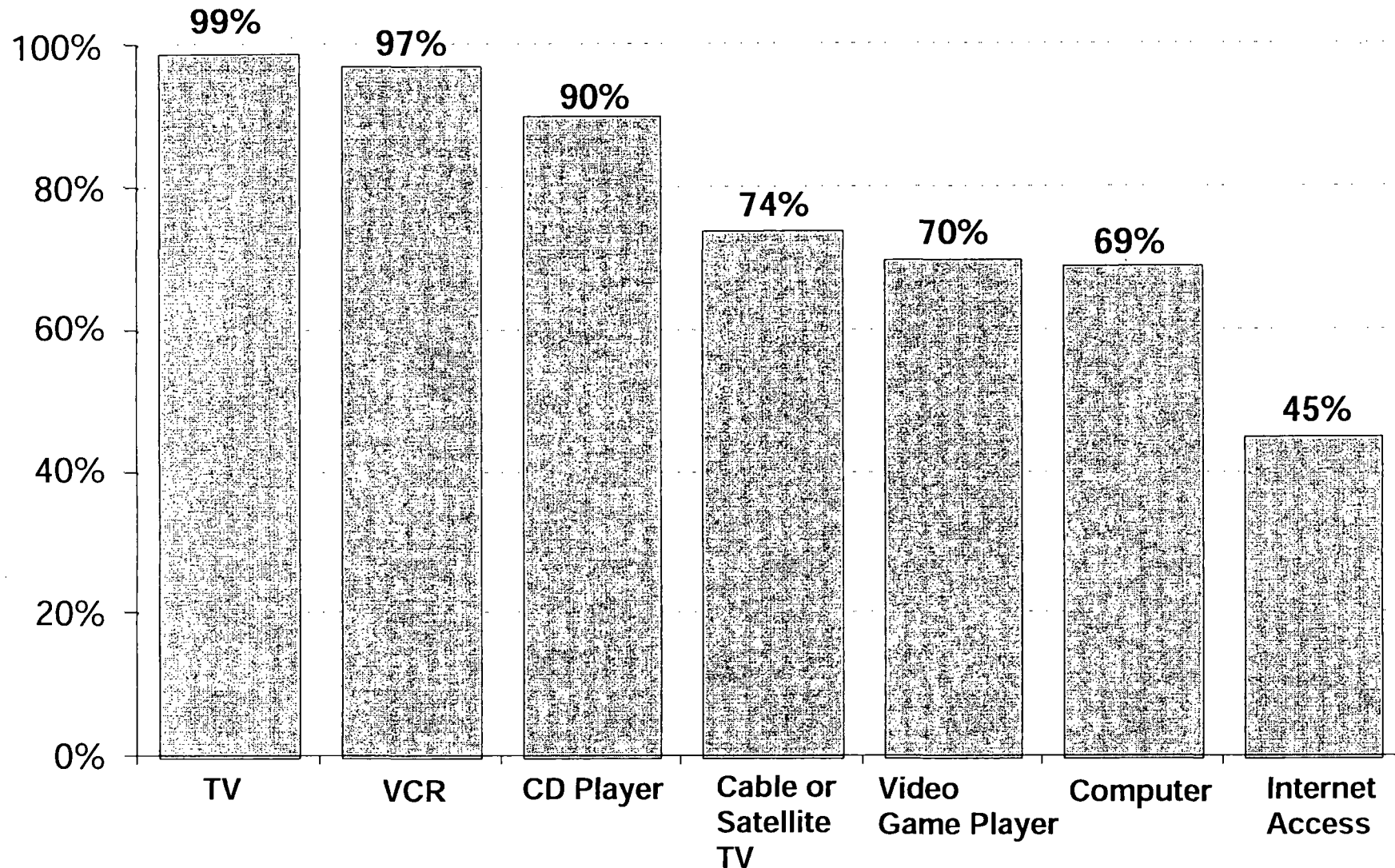
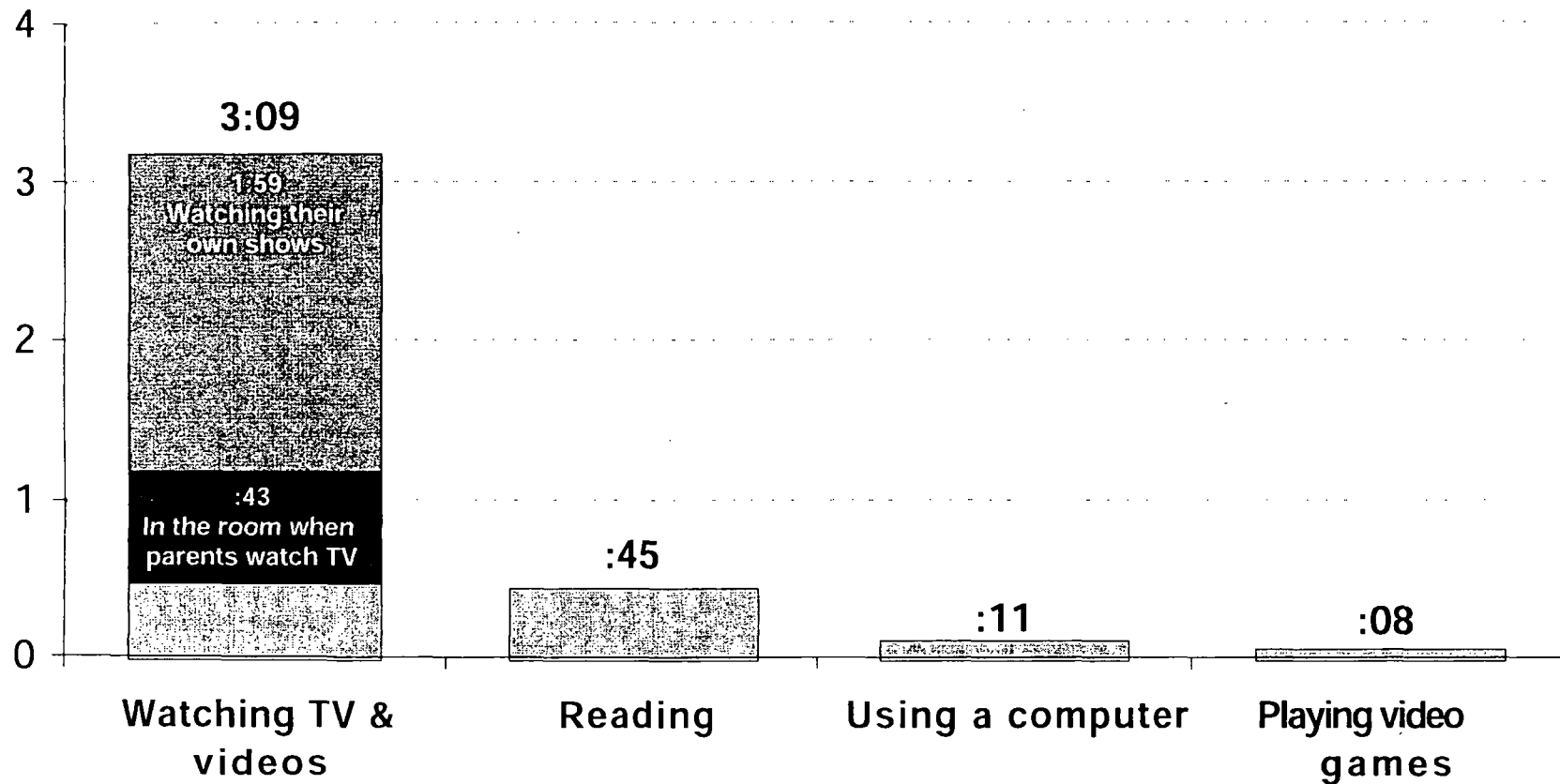


Chart 5

Media Use

On a typical day, the amount of time 2-7 year-olds spend...



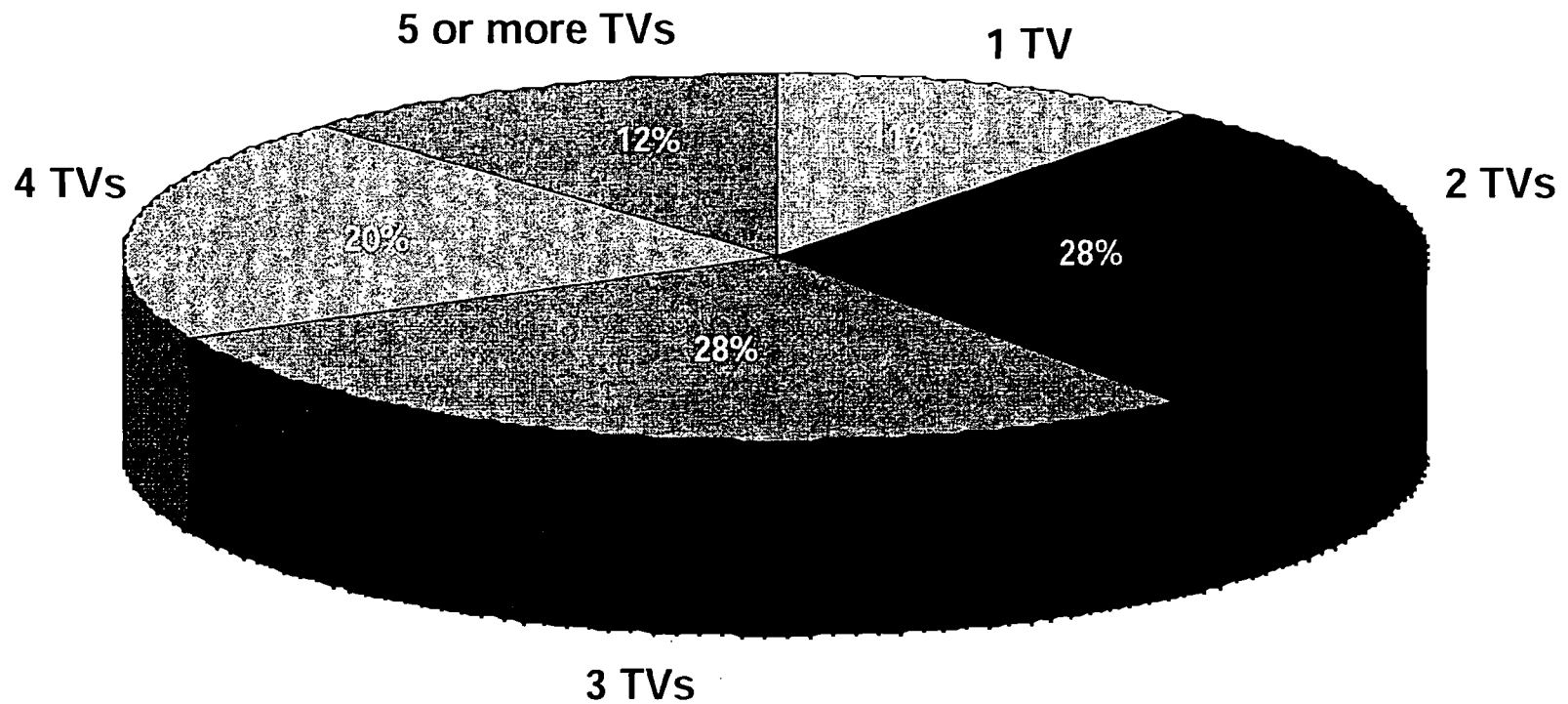
* Times are presented in hours: minutes. Numbers cannot be summed to calculate children's total media use time because they may have used more than one media at a time. Reading time includes amount of time children are read to.

Source: Kids & Media at the New Millennium, Kaiser Family Foundation, November 1999

Chart 6

Media in the Home

Percent of children who live in homes with...



* "No answer" responses not shown.

Source: Kids & Media at the New Millennium, Kaiser Family Foundation, November 1999

Chart 7

Media Use in the Home

Percent of children who live in homes where...

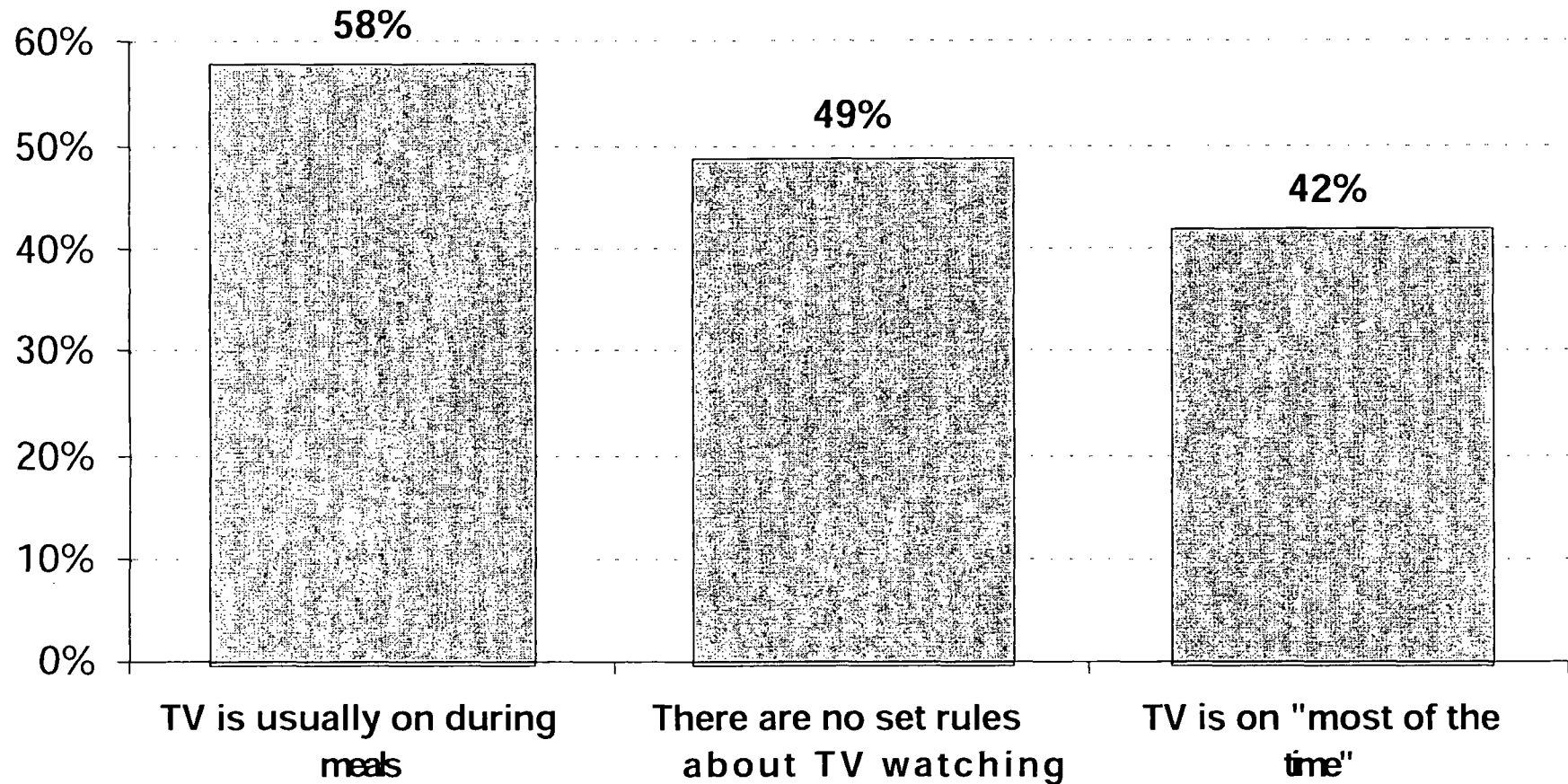


Chart 8

Daily TV Viewing

On a typical day, the percent of children who watch TV for...

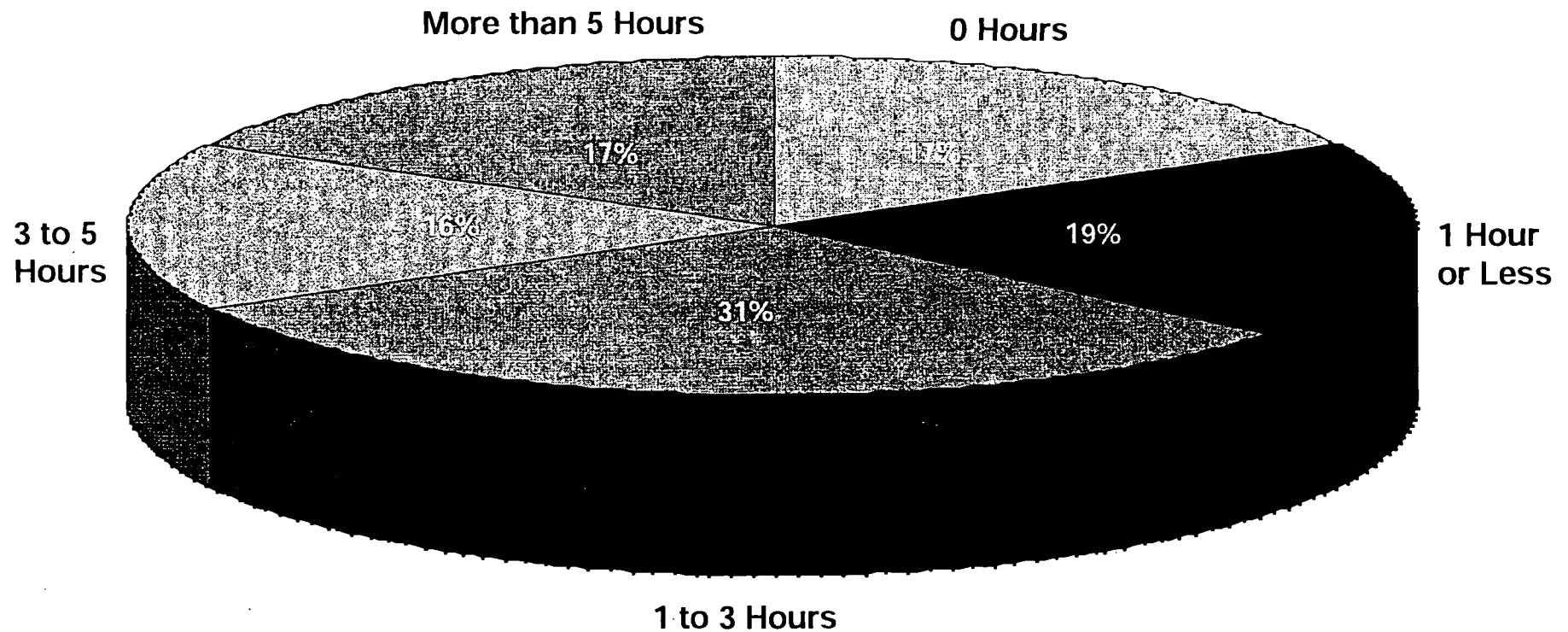
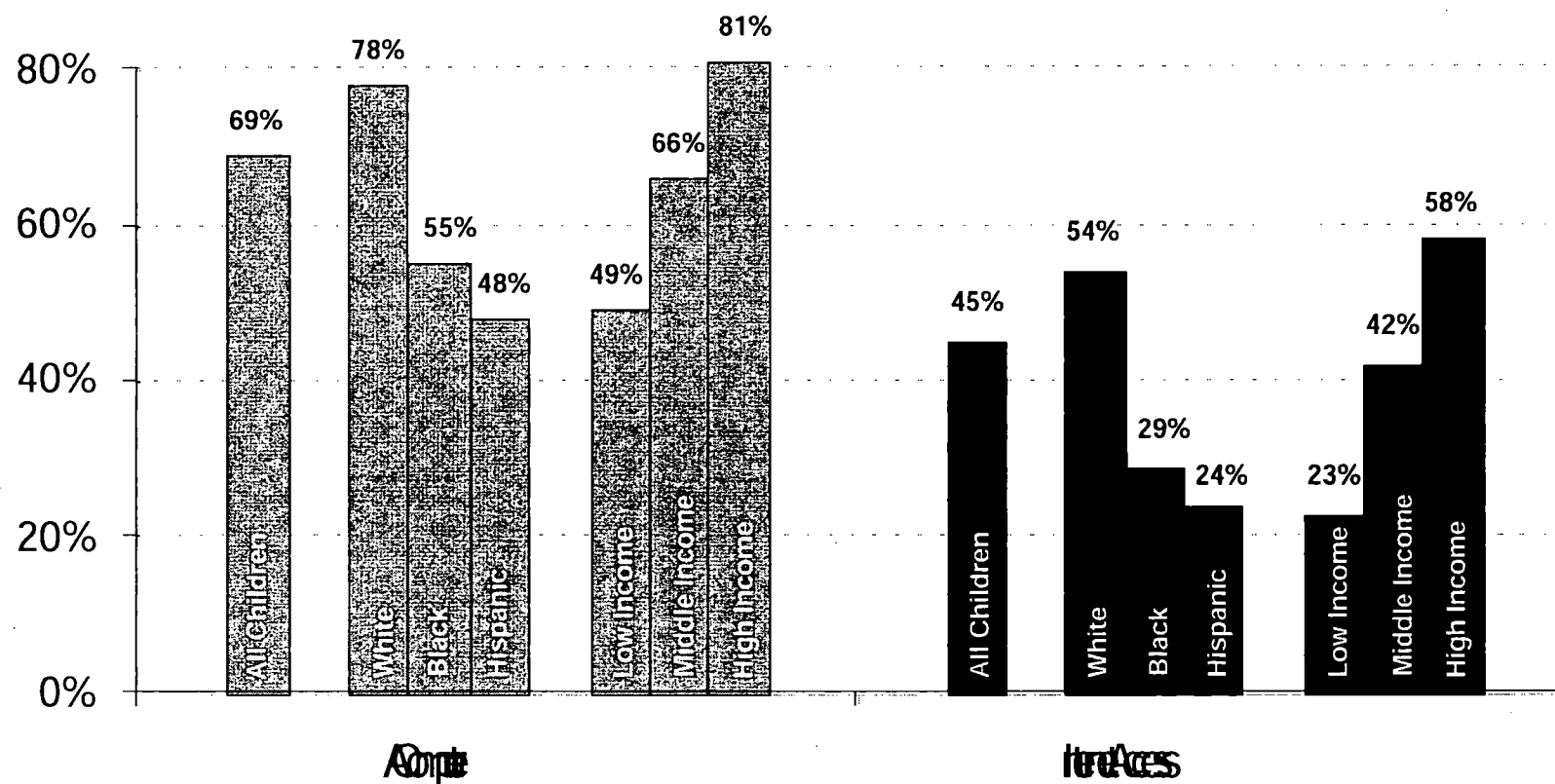


Chart 9

Computers in the Home

Percent of children who live in homes with...



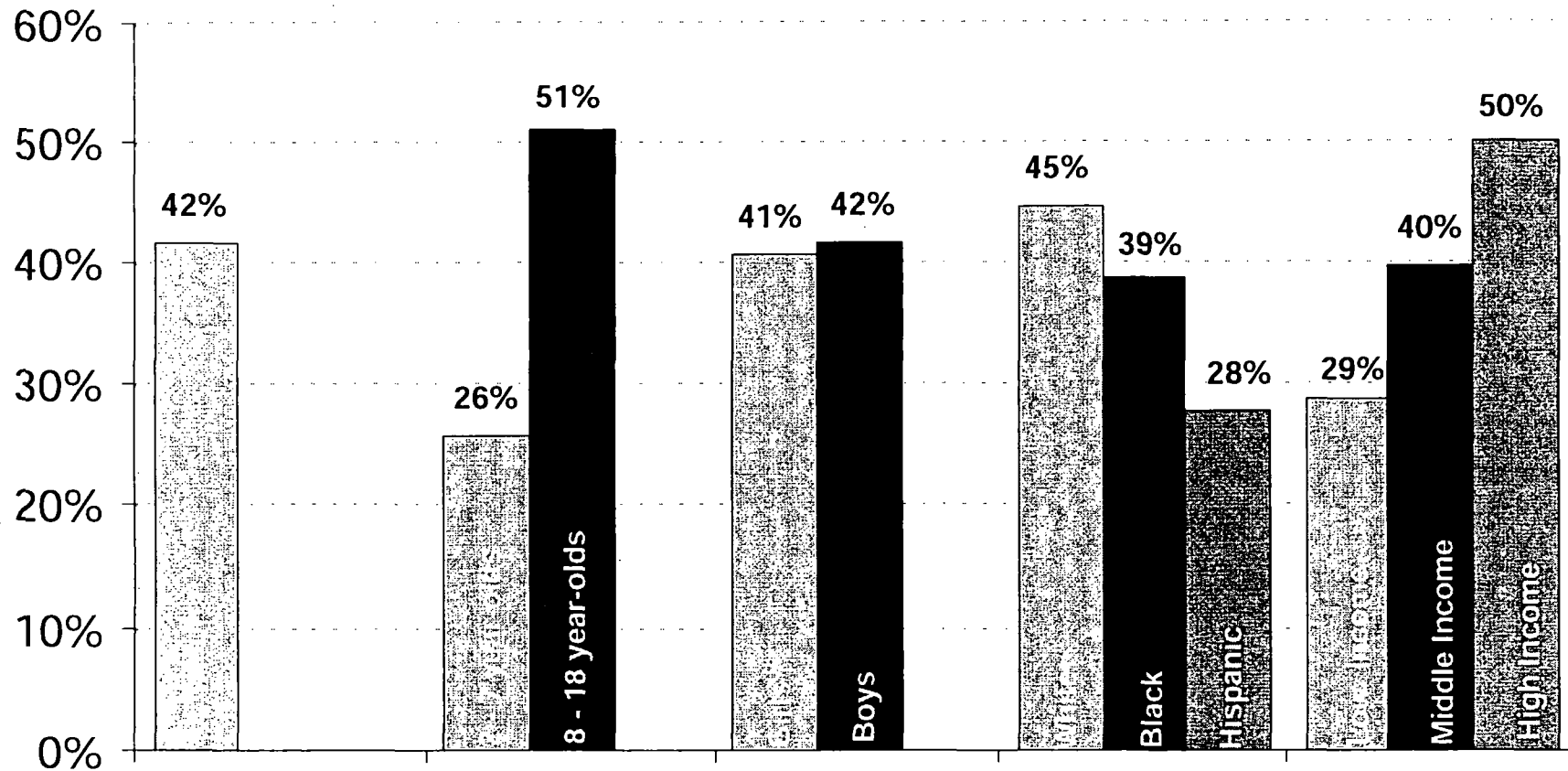
*Income categories are based on the median income of the zip code in which a child lives (among 2-7 year-olds) or attends school (among 8-18 year-olds), and represent the following ranges: "Low Income," less than \$25,000; "Middle Income," \$25,000 to \$39,999; "High Income," \$40,000 or more.

Source: Kids & Media at the New Millennium, Kaiser Family Foundation, November 1999

Chart 10

Computer Use

In a typical day, the percent of children who use a computer.



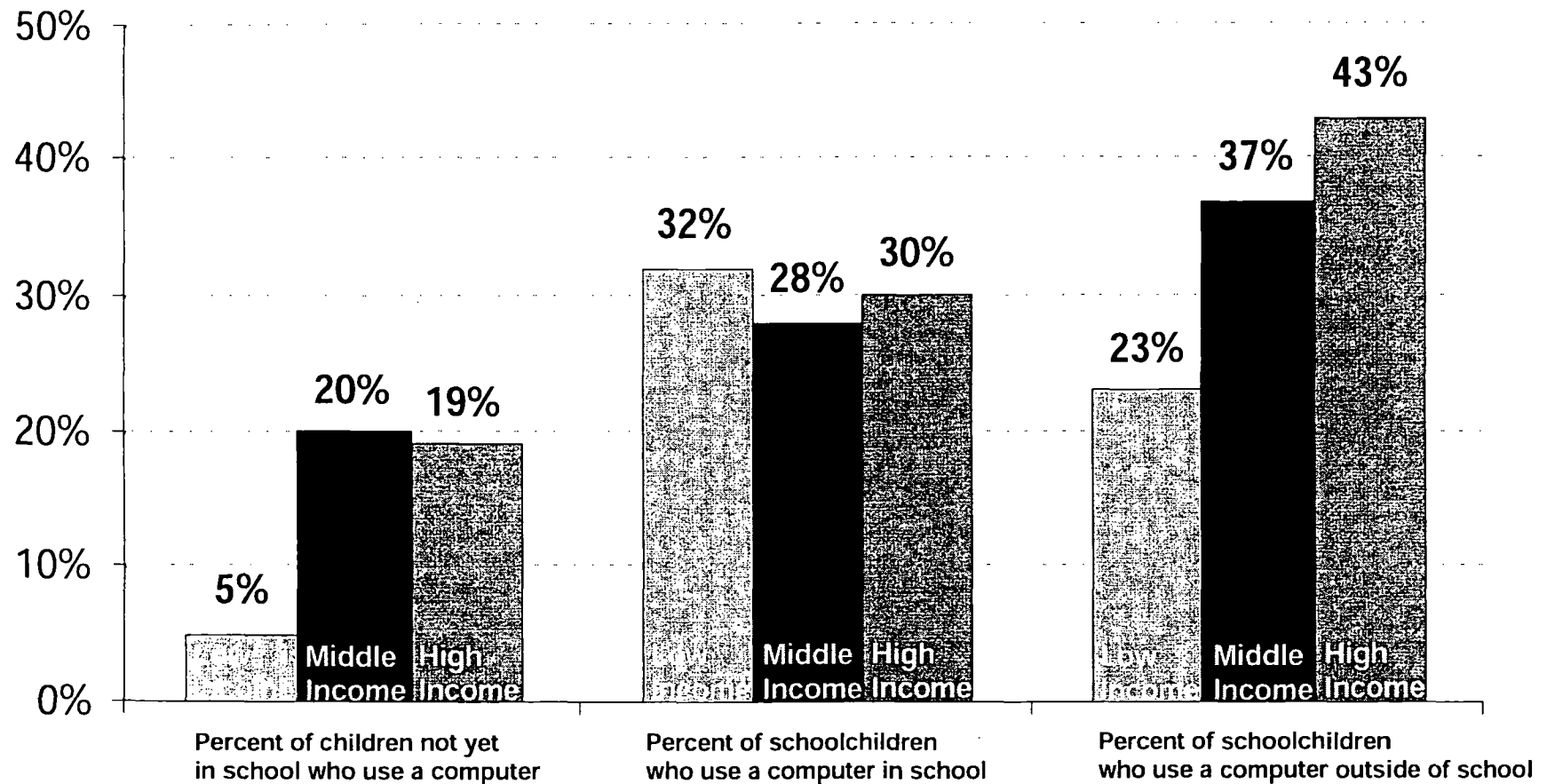
*Income categories are based on the median income of the zip code in which a child lives (among 2-7 year-olds) or attends school (among 8-18 year-olds), and represent the following ranges: "Low Income," less than \$25,000; "Middle Income," \$25,000 to \$39,999; "High Income," \$40,000 or more.

Source: Kids & Media at the New Millennium, Kaiser Family Foundation, November 1999

Chart 11

Computer Use

The impact of school on income differentials in computer use. In a typical day...



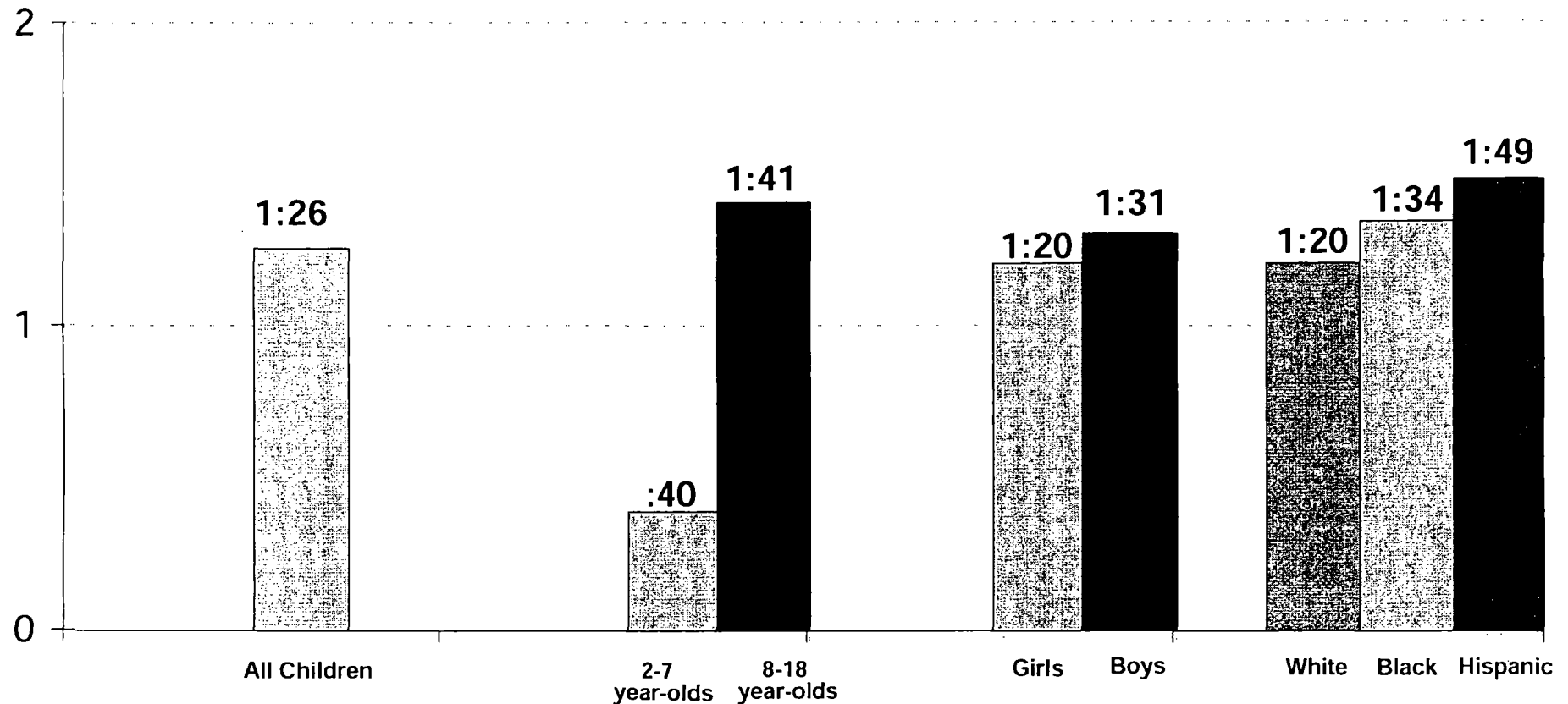
*Income categories are based on the median income of the zip code in which a child lives (among 2-7 year-olds) or attends school (among 8-18 year-olds), and represent the following ranges: "Low Income," less than \$25,000; "Middle Income," \$25,000 to \$39,999; "High Income," \$40,000 or more.

Source: Kids & Media at the New Millennium, Kaiser Family Foundation, November 1999

Chart 12

Computer Use

Among children who use a computer, the average amount of time spent at the keyboard per day by...



* Times are presented in hours: minutes.

Source: Kids & Media at the New Millennium, Kaiser Family Foundation, November 1999

Chart 13

Computer Use

Of children who use a computer on a typical day, the proportion of time spent on...

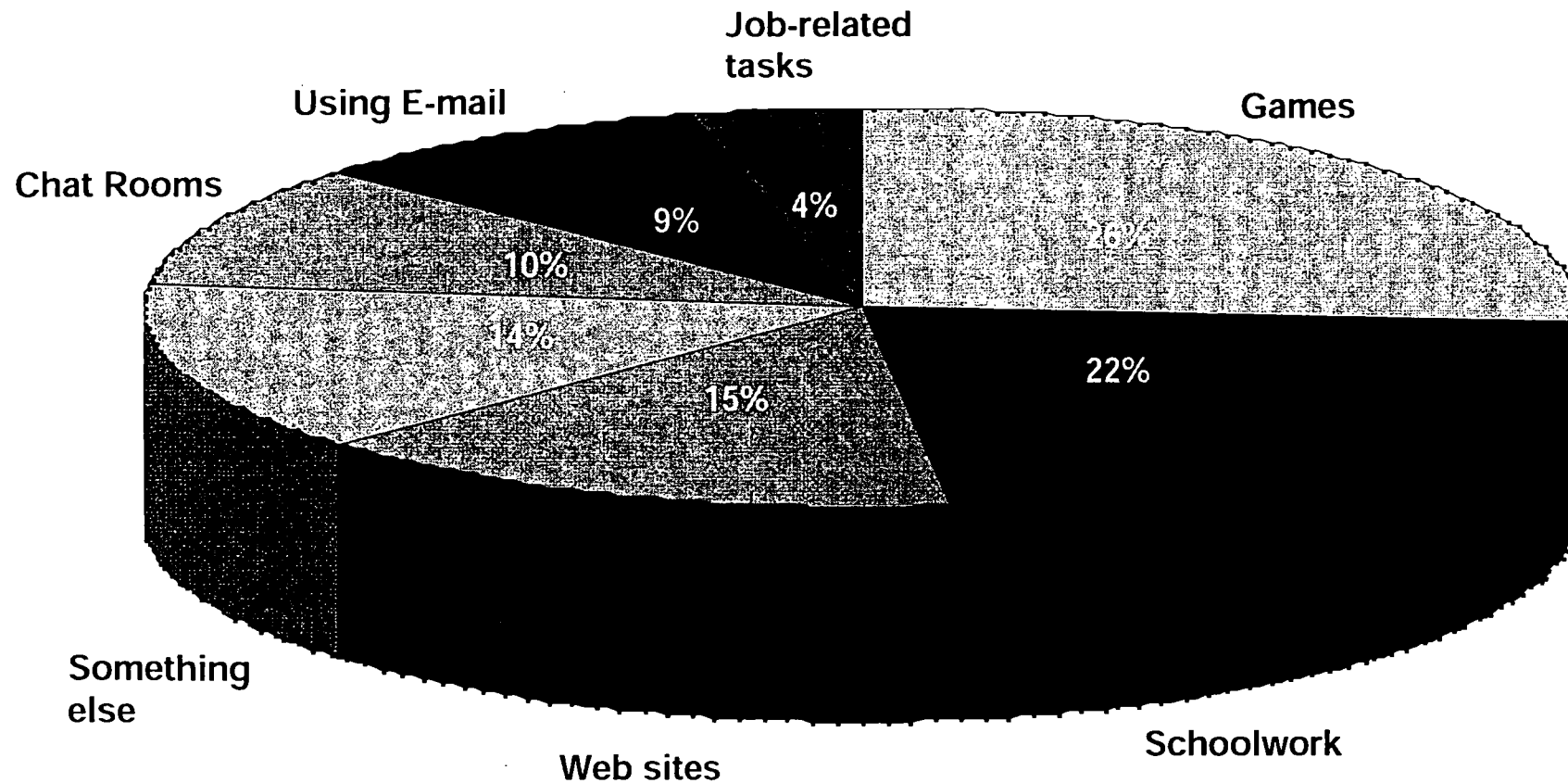


Chart 14

Media in the Bedroom

Percent of children who have the following media in their bedrooms...

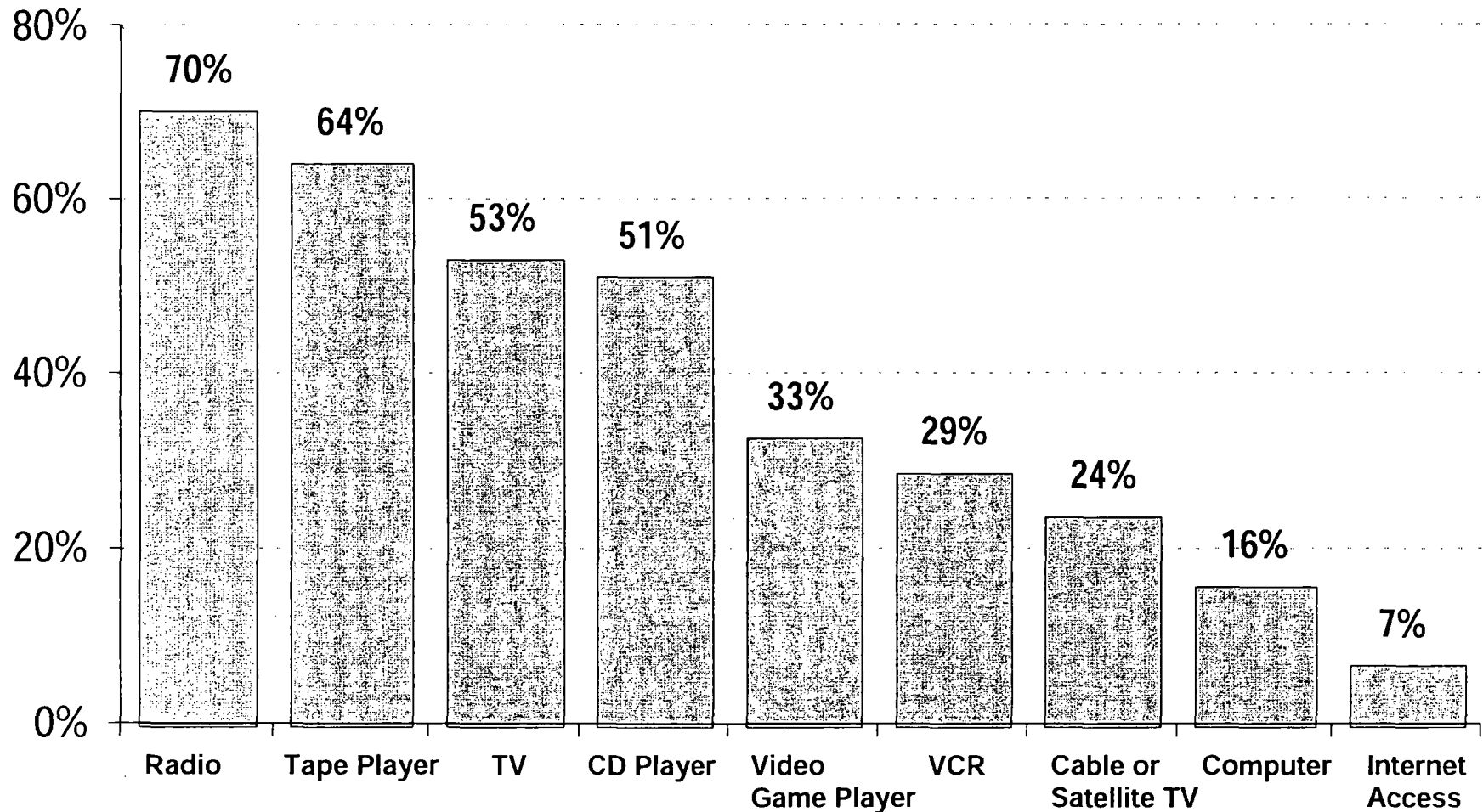


Chart 15

Media Use

Of all time with media, the proportion children spend...

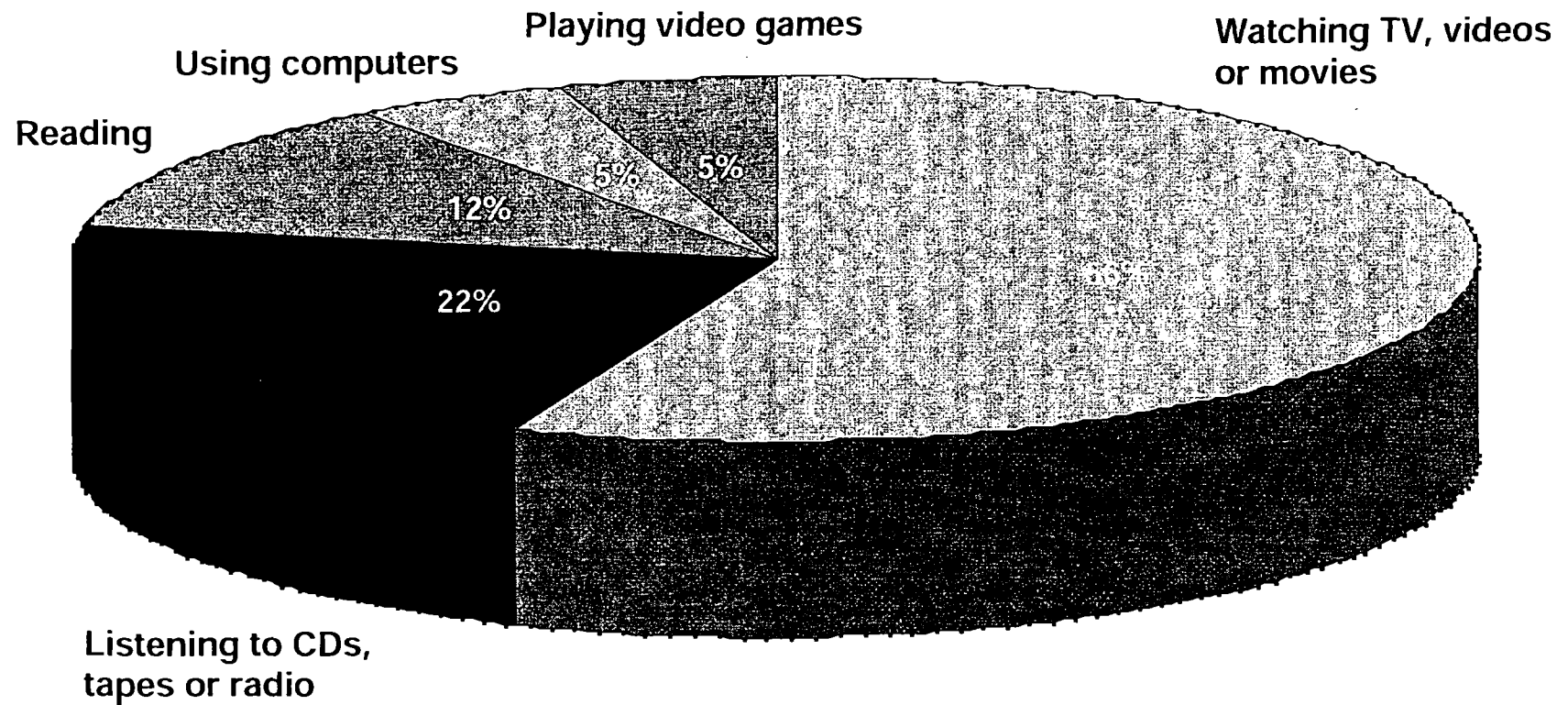


Chart 16

Media Use

Percent of children who spend more than one hour per day...

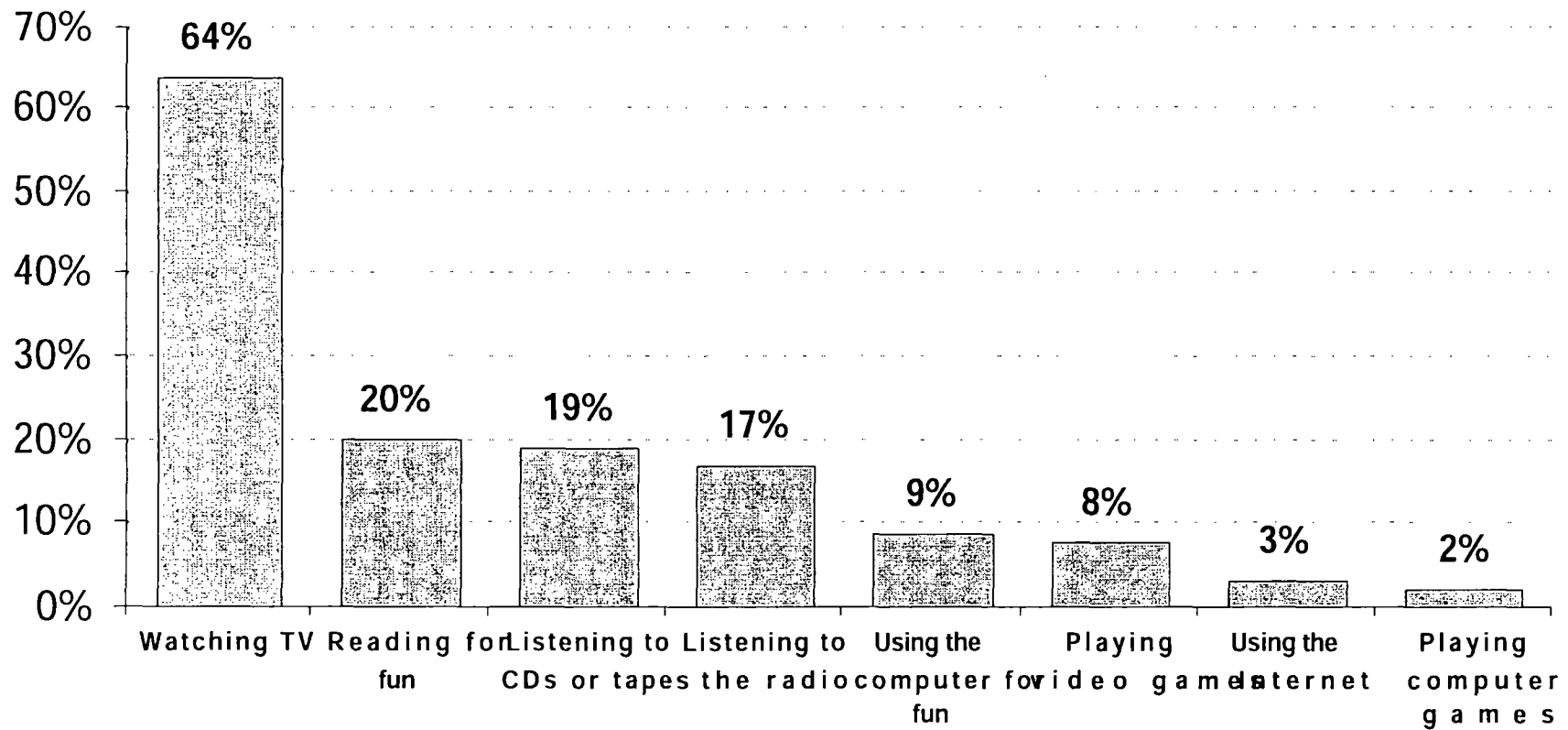
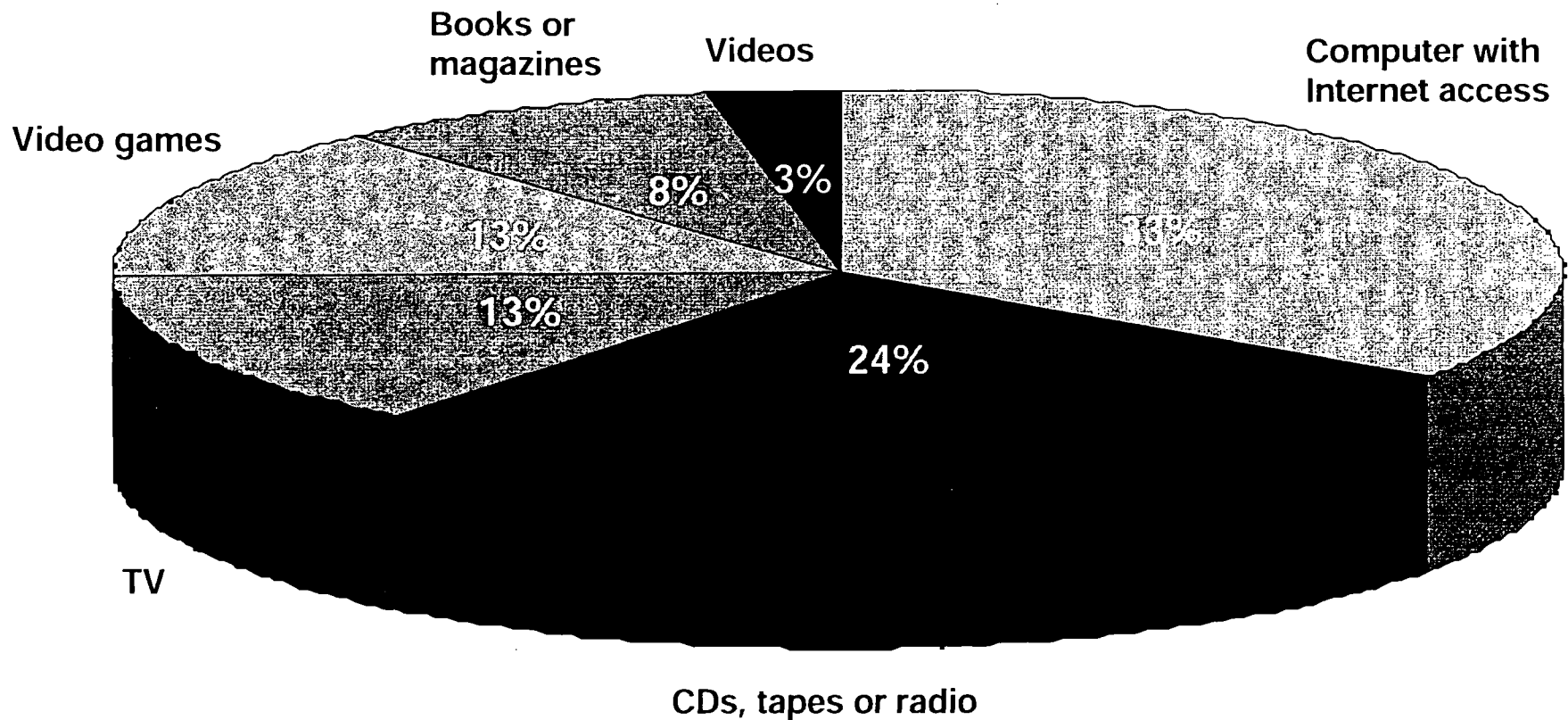


Chart 17

Favorite Media

When asked to choose which media to bring to a desert island, the percent of children aged 8-18 who picked...



* "No Answer"/ "Nothing" responses not shown.

Source: Kids & Media at the New Millennium, Kaiser Family Foundation, November 1999

Chart 18

Attitudes Toward Media

When asked how they feel when they use computers or watch TV, the percent of children aged 8-18 who say they...

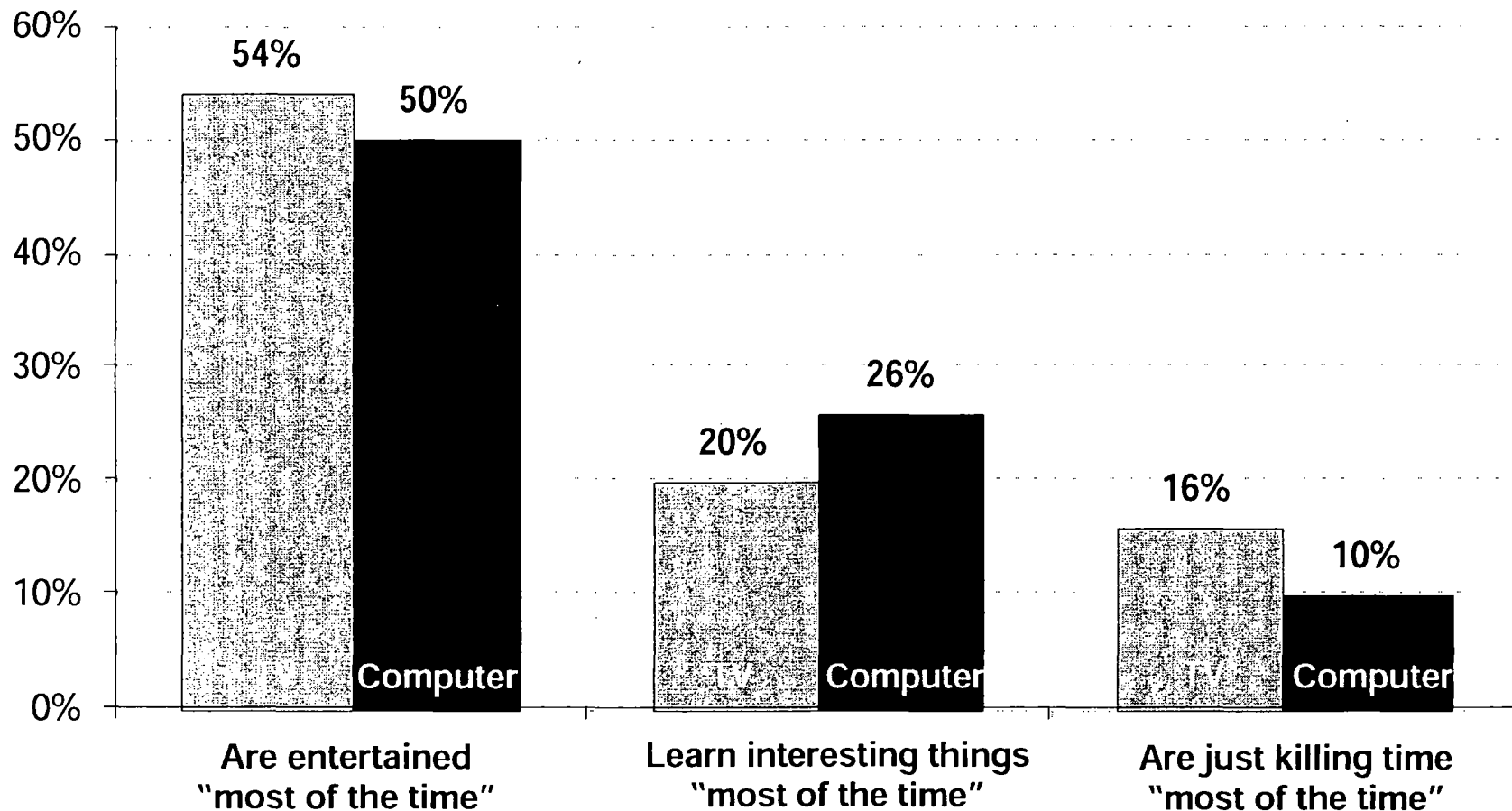
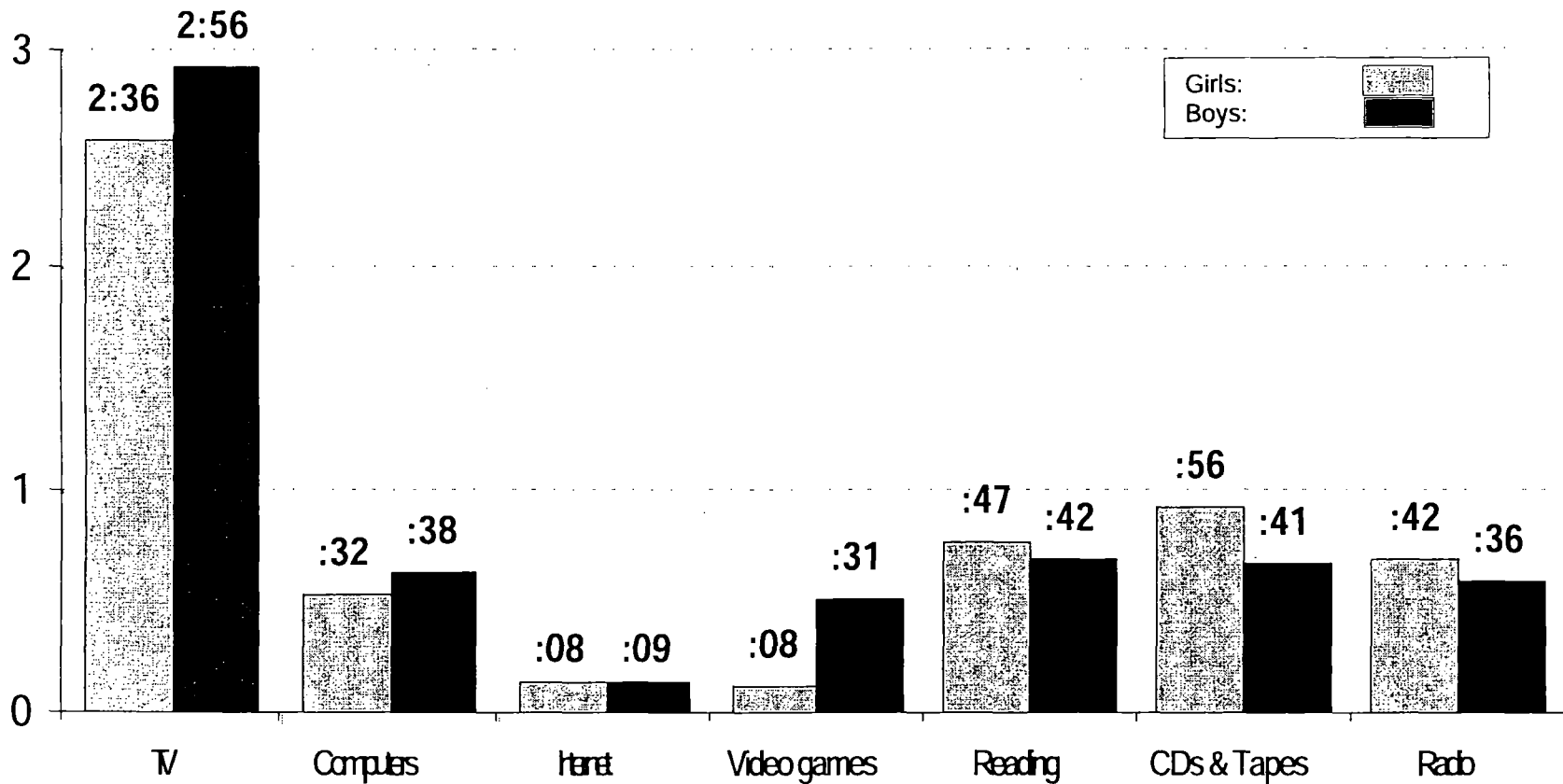


Chart 19

Media Use

Average amount of time boys and girls spend with the following media...



* Times are presented in hours: minutes. Numbers cannot be summed to calculate children's total media use time because they may have used more than one medium at a time. Reading includes amount of time children are read to.

Source: Kids & Media at the New Millennium, Kaiser Family Foundation, November 1999

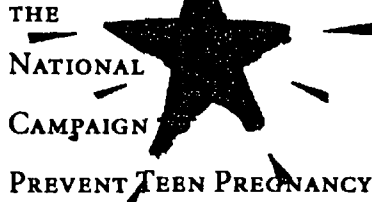
METHODOLOGY

This study is based on a nationally representative sample of 3,155 children ages 2-18, including oversamples of African American and Hispanic children. The media included in the study are television, computers, movies, videos, video games, books, magazines, newspapers, radio, and CDs and tapes.

The sample includes 2,065 students in grades 3-12 (who completed self-administered written questionnaires in the classroom about their media use the previous day) and 1,090 children ages 2-7 (whose parents or caregivers participated in an hour-long in-home survey about the child's media use the previous day). In addition, week-long media use diaries were collected for 621 of these children (487 completed by 3rd-12th graders, and 134 completed by parents of 2-7 year-olds).

The margin of error for the combined sample of children 2-18 is $\pm 3\%$; for the in-school sample of 3rd-12th graders it is $\pm 3\%$; and for the in-home sample of 2-7 year-olds it is $\pm 5\%$.

For a full explanation of the methods used in this study, please refer to the full report (publication #1536), or the appendices (publication #1537), which are available for free online at www.kff.org, or by calling 1-800-656-4KFF.



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Sexual Risk-Taking Decreases Among Teens

*"Trends in Sexual Risk Behaviors Among High School Students -- United States, 1991 - 1997."
A report from the Centers for Disease Control and Prevention*

Key Findings

- **For the first time this decade, fewer than half of the nation's high school students report having had sex.** The number of high school students who have had sexual intercourse has fallen 11 percent during the 1990's. This represents a reversal of the increasing trend in sexual intercourse rates among adolescents that occurred during the 1970s and 1980s.
- **The greatest decline was among boys.** In 1991, more than 57 percent of young males reported that they were sexually experienced -- in 1997 this dropped to less than 49 percent of young males. Females decreased slightly from more than 50 percent to less than 48 percent in 1997.
- **Young people are more likely to use condoms.** Among sexually active students, condom use increased 23 percent.
- **Teens have fewer sexual partners.** The number of students reporting that they had had four or more sexual partners over their lifetime decreased from nearly 19 percent to 16 percent.
- **Messages about risks seem to be taking hold.** Researchers say this change in teens' sexual behavior is due at least in part to the increasing array of messages that urge teens to delay sex and to protect themselves against STDs and unwanted pregnancies.
- **Teens are less likely to engage in behaviors that put them at risk for HIV infection, other STDs, and pregnancy.** Improvement in both delaying first intercourse and increasing condom use among adolescents who are sexually active has succeeded in reducing the overall risk.

Source: Centers for Disease Control and Prevention. (1998). "Trends in Sexual Risk Behaviors Among High School Students -- United States, 1991-1997." Morbidity and Mortality Weekly Report. Volume 47. September 18, 1998.

The Washington Post

FRIDAY, SEPTEMBER 18, 1998

Study: More Teens Refrain From Sex *Behavior Trends Shifted During '90s, Reflecting AIDS Threat*

By BARBARA VOBEJDA
Washington Post Staff Writer

After two decades of climbing steadily, the proportion of American high school students who have had sexual intercourse has fallen 11 percent during the 1990s, according to a new federal study released yesterday. Young people are also more likely to use condoms and less likely to have multiple sex partners.

The steep drops mean that for the first time this decade, fewer than half of the nation's high school students say they have had sex, with the most dramatic decline among boys. The new survey data show that just under 49 percent of young males reported that they were sexually experienced, down from more than 57 percent in 1991. For girls, the figure was just under 48 percent, down from about 51 percent.

The findings, combined with other recent studies showing fewer teenage pregnancies and a decline in teenage births in every state, point to a remarkable change in behavior among the nation's young people that researchers attribute to the growing barrage of messages from schools, community groups, churches and families urging them to delay sex and protect themselves against AIDS.

"It is truly good news for all of us involved in the lives of America's teenagers," said Health and Human Services Secretary Donna E. Shalala.

The study, known as the Youth Risk Behavior Survey, is designed to measure the extent to which high

school students are in danger of contracting AIDS and other sexually transmitted diseases or becoming pregnant. The most recent results indicate that because they are delaying sex, using condoms and having fewer partners, teenagers are at less risk than they would have been if the patterns of the '70s and '80s had continued.

The biennial study was conducted last year among more than 16,000 high school students of all ages, who completed written questionnaires about a range of sexual activity.

It also found that, among those who were sexually active, nearly 57 percent had used a condom the last time they had intercourse, compared with about 46 percent in 1991.

Over the same period, the number reporting that they had had four or more sexual partners over their lifetime decreased from nearly 19 percent to 16 percent.

Janet Collins, a study author and a psychologist at the Centers for Disease Control, which produced the study, said the figures "certainly reinforce that something important is turning around here, and it's heading in the right direction."

But Collins and other researchers cautioned that teenage pregnancy remains much more common in this country than in other industrialized nations, with 1 million teenagers becoming pregnant each year. Also, 3 million cases of sexually transmitted diseases are reported in that age group annually.

"Here's the good news. The bad

news is we shouldn't think our work is done," said Susan Tew, a spokeswoman for the Alan Guttmacher Institute, a research organization based in New York.

She cited the fact that many American teenagers become sexually active at relatively young ages, and many don't use contraceptives consistently or carefully.

The study found that, among ninth graders, for example, 38 percent had had sexual intercourse, a figure that rises to 61 percent among 12th graders.

Also, while teenagers are changing their behavior in ways that make them less likely to contract AIDS, the disease is nevertheless more of a risk to them than it was a decade ago because the pool of infected partners has increased. Despite the decline in sexual activity, half of HIV infections in this country occur among people under 25.

Douglas Kirby, senior research scientist at California-based ETR Associates, said programs common in schools and communities promote the notion that children should abstain from having sex altogether. The second message in many programs, he said, is "if you do have sex, you have to use condoms."

Ten years ago, many programs talked only about contraceptives, but that is rare today. And, he said, some of the changing behavior among teenagers may stem from the influence of a generally more conservative society that emphasizes personal responsibility in many areas of life.

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United States Senate
WASHINGTON, DC 20510

May 25, 2000

William Kennard
Chairman
Federal Communications Commission
445 12th Street SW
Room 8-B201
Washington, DC 20554

Dear Chairman Kennard:

We are writing to express our serious concern about the rapidly declining standards of broadcast television, the impact this decline is having on our children and our country, and the meaning of the pledge that broadcasters take to serve the public interest.

As you well know, frustration and anger about falling standards have been voiced for some time by millions of American parents, who are fed up with the rising tide of glorified violence and increasingly explicit sexual content flooding into their homes through their televisions. In response to this outcry, the broadcast industry has taken modest steps to diminish the threat of television violence, reducing the amount of gratuitous murder and mayhem aired during primetime, as well as implementing a content rating system to work in concert with the V-chip and help parents block out the excessive displays of violence that can be seen at all times of the day. However, the enclosed study by the Center on Media and Public Affairs documents just how excessive the violence still is, particularly in first-run syndicated programs, which averaged 37 violent acts per episode during the 1998-99 season.

At the same time, there has been a gross inflation of sex and vulgarity on free, over-the-air television, particularly in the early hours of primetime. This trend is readily apparent to even the most casual viewer, and has been confirmed in detail by a number of analyses. In its study "Sex on TV," the most extensive survey of sexual messages on television ever conducted, the Kaiser Family Foundation found that: 1) 67 percent of all network primetime shows aired during the 1997-98 season contained talk about sex or sexual behavior, with those shows averaging 5.3 scenes with sex per hour, and nearly one in 10 shows depicted or strongly implied copulation; 2) 77 percent of all primetime sitcoms contained sexual content, with those shows averaging nearly 6.7 scenes with sex per hour; and 3) 85 percent of all soap opera episodes contained sexual content, with an average of 4.4 scenes with sex per hour. Looking more narrowly at the first hour of primetime, the traditional "family hour," the Parents Television Council (PTC)

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found an average of 3.69 sexual references an hour in network programming reviewed over a two week period during the May 1999 sweeps -- a 77 percent increase in just the past year and a half. The Fox Network topped all of its competitors, averaging 6.8 sexual references an hour. Copies of both reports are enclosed for your reference.

To put this trend in historical perspective, the PTC issued another study earlier this year comparing four weeks of primetime network programming from the fall of 1989 to four weeks in 1999. The PTC found that the sheer amount of vulgar and sexual content had grown almost exponentially -- the amount of sexual material increased by more than 300 percent, while the use of crude language increased by more than 500 percent, to nearly five instances for every hour of programming. The study also showed that the quality of these messages had changed just as dramatically as the quantity, with the dialogue and sexual depictions becoming far more explicit. A copy of this report, "What a Difference a Decade Makes," is enclosed.

Much of this content is clearly unsuitable for children, millions of whom are watching during the hours these programs are regularly broadcast. In fact, a case could be made that portions of some programs are so offensive that they meet the Commission's legal standard for indecency -- "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities."

Regardless of whether these programs crossed that line, their boundary-pushing content should remind us why that line was drawn in the first place. Congress passed a law limiting the broadcast of indecent programming to certain hours to advance a compelling public policy interest -- protecting children from sexual messages that we as a society agree may be harmful to their moral, emotional, and physical development, the same reason we prohibit the sale of pornographic magazines to minors. Several major court rulings upholding the indecency standard have cited this compelling interest, *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988), *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) ("*ACT III*"), along with another compelling interest of "supporting parental supervision of what children see and hear on the public airwaves." *ACT III*, at 661.

Since then, as sexual content on television has grown more and more graphic and prurient, a number of leading child development experts have voiced concern about the way in which television, in conjunction with the rest of the sex-saturated electronic media, is contributing to the sexualization of children at a younger and younger age. The research community is particularly concerned about the context of the sexual messages many children are receiving from television, in which sex is often treated as a recreational activity with little if any consideration of consequences or connection to love or marriage. The Kaiser Family Foundation's "Sex on TV" study found that only 1 in 9 primetime network shows with sexual content include any reference to risk or responsibility, and that only *three percent* of the primetime sitcoms, which have the heaviest concentration of sexual content, include a risk/responsibility reference.

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Scientific research regarding the influence of television's sexual messages on children is more limited than the research regarding the effects of violent programming. But as far back as 1982, the National Institutes of Health declared television to be an "important sex educator," and since then, the studies that have been done, according to University of North Carolina Professor Jane Brown, a leading expert in this field, confirm the NIH's determination. After performing a survey of the available research, Dr. Brown testified at a Senate hearing that these studies "consistently point to a relationship between exposure to sexual content and sexual beliefs, attitudes and behaviors." And last fall, the University of Michigan released a study showing that young women who watch as little as 22 hours of prime time television a month are more likely to endorse a "recreational view of sex" than those who watch less. The lead researcher, Professor L. Monique Ward, concluded from this finding that TV's countless verbal and visual references to sexual relationships clearly influence sexual attitudes, expectations, and therefore behavior.

These findings were reinforced by an eye-opening article published by *The New York Times* on April 2nd under the headline "The Face of Teenage Sex Grows Younger." The Times cited several studies, leading experts, and interviews with children themselves to show that a disturbingly high number of pre-adolescents are engaging in sexual activity today. According to one study published in the Journal of the American Medical Association, 17 percent of a national sample of thousands of seventh and eighth graders reported having had sexual relations; other smaller studies put the percentage even higher. In explaining this phenomenon, the experts quoted in the article most frequently pointed to the alluring sexual messages the culture is raining down on children. Just as revealing were the comments from a 13-year-old Manhattan boy, who traced his desire to have sex to watching Fox's "Beverly Hills 90210" on television as a third-grader. "I was interested," he said. "The people were cool. I wanted to try what they were doing on the show." A copy of the Times article is enclosed for your reference.

The connection demonstrated in the research is intuitively apparent. The Supreme Court, as noted in *Bethel School District v. Fraser*, has long recognized "the obvious concern on the part of parents" [emphasis added] to protect children from exposure to "sexually explicit, indecent, or lewd speech." *Bethel School District 403 v. Fraser*, 478 U.S. 675, 684 (1986). That concern is especially obvious as it relates to the medium of television, which, as the Court declared in the *Pacifica* ruling, is "uniquely pervasive" in American society and "uniquely accessible" to young children. *Pacifica*, 438 U.S. at 748, 749. We cite these cases not to argue for more government restrictions on television content, but simply to point out that our highest court, not to mention most parents and child development experts, have long concluded that hypersexual messages can be harmful to young children.

The only people who seem to question this are broadcast industry executives. Critics have repeatedly asked the networks to recognize the enormous influence they wield and tone down the sexual content of the programming they air when large numbers of children are in the audience. The industry has for the most part responded by denying there is any problem. In fact, some network officials have admitted that their programming strategy is to increase the sex and vulgarity quotient in order to compete with the racier fare on HBO and other cable networks and to attract their desired younger and ideally male audience -- a strategy that is often euphemistically referred to as "pushing the envelope." One network leader explained it this way:

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"We're trying to be relevant and entertaining to our audience, young adults, 18 to 49." The problem is, of course, that these shows are being broadcast when millions of children well below the age of 18 are watching.

This "anything-goes" attitude is a far cry from the profession of responsibility made by broadcasters through the old National Association of Broadcasters TV Code, which, as you know, was the industry's vehicle for self-regulation for three decades. The NAB Code acknowledged that television requires "exceptional awareness of considerations peculiar to the medium. . . [I]n selecting program subjects and themes, great care must be exercised to be sure that the treatment and presentation are made in good faith and not for the purpose of sensationalism or to shock or exploit the audience or appeal to prurient interests or morbid curiosity." The Code went on to state that broadcasters have a "special responsibility" to children. "In the course of a child's development, numerous social factors and forces, *including television*, [emphasis added] affect the ability of the child to make the transition to adult society . . . Because children are allowed to watch programs designed primarily for adults, broadcasters should take this practice into account in the presentation of material in such programs when children may constitute a substantial segment of the audience."

The denials and excuses we routinely hear today from the industry raise serious questions about the commitment of many broadcasters to serving the public interest, as they are obligated to do by law. We must remember that broadcasters are trustees of a public resource worth billions of dollars, which they get access to for free, in return for a pledge to act as responsible stewards of the airwaves. The license they receive is a legally-binding contract, an especially important one given television's immense influence on our children and our culture. And much to our dismay, the evidence presented in this letter strongly suggests that many licensees, along with their network parents, are breaching this public trust, and harming rather than serving the public interest.

Consequently, we feel that the time has come for the Commission to engage in a broad reexamination of the public interest standard and the license renewal process, to determine if in fact the broadcasters are serving "the public interest, convenience and necessity," and whether the standard of service we expect of broadcasters needs to be clarified. The Commission recently took the first step toward such a reexamination in December by issuing a notice of inquiry regarding the public interest obligations of broadcasters during and after the transition to digital transmission. We applaud your initiative, and strongly urge the Commission to use this inquiry to study the issues we have raised in this letter. The apportionment of the digital spectrum, which the Commission estimated to be worth as much as \$70 billion, will enable licensees to transmit as many as six channels in the near future where there was previously only one. We believe it is more than appropriate to ask them how they plan to utilize this new capability to serve the public interest.

As part of this review, we would ask you to comment on the advisability of resurrecting an industry-adopted code of conduct to protect against the further erosion of broadcasting standards and to provide a broader platform for self-regulation. This idea, beyond having a longstanding and practical precedent, enjoys broad bipartisan support. The President's Advisory

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Committee on Public Interest Obligations of Digital Television Broadcasters, as part of its final report, unanimously called for a re-adoption of a voluntary common code, and last year both the House and Senate overwhelmingly approved legislation strongly encouraging the industry to do the same. The Advisory Committee also recommended requiring licensees to make "enhanced disclosures" of their public interest programming and activities and thereby strengthen their accountability to the communities they serve. We believe this requirement would be a worthy complement to a new code and we would encourage the Commission to consider adopting it.

In addition, we would ask you to review and rearticulate the Commission's indecency standard. In light of the increasingly salacious content now being aired, and the fact that the Commission has not to our knowledge issued an indecency ruling related to television in more than a decade, we think it would be constructive for the Commission to clarify the meaning of this standard at this time and thus help the public and the industry understand just where that line is drawn under the law. If the law is to have any meaning, it must be enforced, and if it is to be enforced, it must first be clearly understood.

In making these requests, we do not want to paint with too broad a brush. Many broadcasters ably and dutifully serve their communities. And there is some brilliant programming on television today. Series such as "ER," "NYPD Blue," "Law & Order," "The Practice," and the recently-canceled "Homicide," are among the finest written and acted shows in television history. Even when they touch on difficult or disturbing issues, they usually manage to put them into a responsible context, and in the end enlighten us. They have proven that broadcasters can air sophisticated, adult-oriented programming without violating the old NAB code's admonition against appealing to "prurient interests or morbid curiosity." And they have shown that they can do so while being sensitive to concerns about audience makeup - the networks have typically broadcast all five of the dramas mentioned above at 10 p.m., when fewer children are watching. The networks also deserve praise for broadcasting some new family-friendly programming in recent years, such as the much-heralded and much-watched "Touched By An Angel" on CBS and "Who Wants To Be A Millionaire" on ABC.

Sadly, those select programs, along with much of what broadcasters honorably do in their communities, are being overshadowed and overwhelmed by the on-air abundance of gratuitous sex and violence. The threat posed by the accumulated impact of these messages would be consequential at any moment, but they are especially so now, when children are gunning down their classmates and teachers, and our country is plagued by an epidemic of teen pregnancy and sexually-transmitted diseases. These are extremely complicated problems of public policy we in Congress and families and communities across America are grappling with, and we are convinced that we have little hope of solving them if the most powerful force in our culture continues to encourage the very behaviors that we are trying to deter.

The evidence is so compelling, and the risks to our children so serious, that we are obliged to ask whether the broadcasters are fulfilling their public trust. Ultimately it is the responsibility of the Congress to make such an important decision and to implement any significant change in the public interest obligations of broadcasters in this area by statute. But we hope the Commission's inquiry will help begin that process, by gathering information and

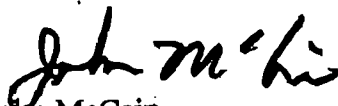
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providing recommendations, and ideally engage the television industry in an honest dialogue about its legal and societal responsibilities. Thank you for your consideration on this critical matter; we look forward to your response.

Sincerely,



John McCain
Chairman
Senate Commerce Committee



Joe Lieberman
Ranking Minority Member
Senate Governmental Affairs Committee



Robert C. Byrd
Ranking Minority Member
Senate Appropriations Committee



Sam Brownback
Member
Senate Commerce Committee

cc: Commissioner Harold Furchtgott-Roth
Commissioner Susan Ness
Commissioner Michael Powell
Commissioner Gloria Tristani

COURT OVERRULES LAW RESTRICTING CABLE SEX SHOWS

FREE SPEECH PROTECTION

Justices Agree on the Worth of
Shielding Children, but Not
on Government's Power

By LINDA GREENHOUSE

WASHINGTON, May 22 — Declaring for the first time that programming on cable television is entitled to the highest level of First Amendment protection, the Supreme Court today struck down a federal law that required many cable systems to limit sexually explicit channels to late-night hours.

The vote was 5 to 4, with an unusual lineup of justices, in a decision that, beyond the context of cable television, could pose obstacles to government efforts to regulate content in new media. Both sides agreed that shielding children from sexually explicit material, the purpose of the 1996 law, was a legitimate goal, but differed on the degree of constitutional "flexibility" the court should give the government in its effort to protect children.

Justice Anthony M. Kennedy wrote the majority opinion, joined by Justices John Paul Stevens, David H. Souter, Clarence Thomas and Ruth Bader Ginsburg. Justice Kennedy's opinion discussed the "basic speech principles" he said were at stake in the case, a challenge brought by Playboy Magazine's sexually oriented cable operations, which include Spice, AdultTVision, Adam & Eve and the Playboy channel.

"The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive or even ugly," Justice Kennedy said. He added, "The citizen is entitled to seek out or reject certain ideas or influences without government interference or control."

Tony Lynn, president of the Playboy Entertainment Group, said he expected his channels' distribution to grow because of the ruling.

Playboy's largest cable channel, Playboy TV, is available in 24 million of the nation's 81 million homes that receive either satellite, cable or digital television, Mr. Lynn said. The network was not in 1996, he said, because many cable companies did not want to use channel space for programming that was only available during part of the day.

"Now that we've got the shackles off, we're going to have an ability to do business with our consumers when they want to see us," he said.

The dissenters were Justices Stephen G. Breyer and Antonin Scalia, who wrote dissenting opinions, and

Chief Justice William H. Rehnquist and Justice Sandra Day O'Connor, who signed the dissent. "Our prior cases recognize that where the protection of children is at issue, the First Amendment poses a barrier that properly is high, but not insurmountable," Justice Breyer said.

At issue in the case, *United States v. Playboy Entertainment Group*, No. 98-1682, was the validity of Section 505 of the Telecommunications Act of 1996. The section was intended to address the problem of "signal bleed," caused by a cable system's failure to scramble a signal well enough to avoid a fuzzy image or some sound from coming through to those subscribers who have not paid for a channel and do not want it.

Section 505 required that for a channel "primarily dedicated to sexually-oriented programming," a cable system that lacked the technology to block the signal completely had to limit the channel to hours when children were unlikely to be watching. A Federal Communications Commission regulation set the time as between 10 p.m. and 6 a.m., and many cable systems chose that "safe harbor" option rather than investing in the technology needed for complete blocking.

At the same time, the law contained another approach in a separate section, Section 504, under which cable operators had to provide an effective blocking device for any subscriber who wanted one.

A Federal District Court in Wilmington, Del., ruling in 1998 in *Playboy's* challenge to the law, held that Section 504 could protect customers just as well without being as intrusive as the systemwide time segregation required by Section 505.

Therefore, the court said, Section 505 was not the "least restrictive means" to achieve the government's goal, and was unconstitutional.

In his opinion affirming that decision, Justice Kennedy made several points that could limit the government's ability to regulate content in new communications technologies.

In applying "strict scrutiny," the highest level of First Amendment protection, to cable programming, Justice Kennedy identified what he called a "key difference" between cable and broadcast television and radio, for which the court has applied a lower level of scrutiny and permitted more regulatory leeway.

Unlike the broadcast media, cable systems have the capacity for "target blocking," he said, adding: "Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the government is best positioned to make these choices for us."

Robert Corn-Revere, a lawyer who represented Playboy, said today that this analysis would also apply to the Internet and could prove important

in turning back efforts to regulate speech in cyberspace.

The majority of judges today also rejected the Clinton administration's defense of Section 505 as necessary because parents could not be counted on to request individual blocking devices from their cable company. That was an unwarranted assumption, Justice Kennedy said, adding, "Even upon the assumption that the government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify this widespread restriction on speech."

There were also these other developments on a busy day at the court.

Airbag Suits

Dividing 5 to 4, the court ruled that manufacturers of cars made before federal law required airbags cannot be sued under state negligence laws for failing to have the safety devices.

The case, *Geier v. American Honda Motor Co.*, No. 98-1811, was the latest in a particularly contentious and unpredictable area of the court's docket, federal preemption of various state court lawsuits.

Justice Breyer wrote the majority decision, which upheld a ruling last year by the federal appeals court here that a suit against Honda for failing to include an airbag in a 1987 Accord was pre-empted by the federal regulation in effect at that time that permitted a gradual phase-in of passive restraints.

In the dissenting opinion, Justice Stevens charged the majority with an "unprecedented extension of the doctrine of pre-emption that failed to treat state court systems with proper respect."

The majority opinion was joined by Chief Justice Rehnquist and by Justices O'Connor, Scalia, and Kennedy. Justices Souter, Thomas and Ginsburg joined the dissent.

Employment Disputes

Stepping into an issue of growing importance in labor-management relations, the court agreed to decide whether employers can enforce binding arbitration agreements that employees are increasingly required to sign as a condition of being hired.

The question in *Circuit City Stores v. Adams*, No. 99-1379, is whether the Federal Arbitration Act, a 1925 law that excludes certain employment contracts from its coverage, applies to ordinary labor agreements of this type. The United States Court of Appeals for the Ninth Circuit, in San Francisco, held in this case that arbitration as part of an ordinary employment contract could not be enforced. All other federal courts to address the issue have found such agreements enforceable. Nearly 10 percent of the American work force is covered by mandatory arbitration agreements, according to the National Academy of Arbitrators.

The New York Times

TUESDAY, MAY 23, 2000

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Cartoons That Aren't for Kids

Harvard Researchers Recommend Ratings Warn Parents of Violent Content

By PAUL FARHI
Washington Post Staff Writer

G-rated, animated movies like "Aladdin" and "The Lion King" have grown more violent during the 1990s, exposing young children to "significant" amounts of mayhem, according to a new study in the *Journal of the American Medical Association*.

The amount of cinematic violence—ranging from body blows to swordplay to gunshots—so alarmed researchers at the Harvard School of Public Health that they

recommended that the Motion Picture Association of America consider changing its age-based rating system to one that provides specific warnings about a movie's content.

"A G rating does not automatically signify a level of violence acceptable for very young viewers," wrote the study's authors, Fumie Yokota and Kimberly M. Thompson, both of Harvard, in today's issue of *JAMA*.

Social researchers have studied violence in movies and on TV for decades, but the Harvard study was the first systematic attempt to document violent acts in animated films over more than 60 years. The Harvard

study team reviewed 74 animated movies released since 1937 that had received a G rating—meaning a movie is suitable for general audiences. These movies are widely viewed by young children, particularly on videotape.

The authors defined violence as "intentional acts . . . where the aggressor makes some physical contact that has potential to inflict injury or harm." This includes everything from premeditated murder—the villain Scar killing Simba's father in "The Lion King"—to acts of slapstick comedy, such as

VIOLENCE. From *G*

Tigger playfully bowling over his friends in "The Many Adventures of Winnie the Pooh" (1977).

Every movie in the survey contained at least one instance of violence, and 46 featured injuries or depictions of death, such as the scene in "Bambi" in which a hunter kills the fawn's mother.

The study also found that the amount of violence and its duration onscreen has steadily increased since the first animated feature film, Disney's "Snow White and the Seven Dwarfs," was released in 1937.

By far, the greatest amount of violence in G-rated films was found in those released during the 1990s, which suggests that the standards for the movie ratings have become more lax over time. Of the 10 most violent G-rated features made since 1937, nine were released in 1990 or thereafter.

"Quest for Camelot," a knights-and-dragons epic released by Warner Bros. in 1998, contained the most violent scenes, with a little more than 24 minutes total. This was about 30 percent more than the second-ranking movie, Disney's "A Bug's Life," which had 18.3 minutes of imagery classified as violent. The average for all 74 films was 9.5 minutes.

Recent Disney summer releases such as "Aladdin," "Mulan," "Hercules" and "The Hunchback of Notre Dame" all ranked among the most violent films. Disney spokesman John Dreyer declined to comment after reviewing the *JAMA* article.

The authors declined to speculate about what effect watching G-rated animated movies might have on children. Decades of research into this question have raised the possibility that heavy doses of media violence can lead to violent or aggressive behavior in young viewers, although the precise link is unknown and the effects vary widely. "Unfortunately, it depends on how a child interprets images," Yokota said in an interview. "It's not clear how a child incorporates a video into his thinking."

Children aged 3 to 6 are more likely to be frightened by the kind of violence depicted in G-rated films than to imitate it, said Joanne Cantor, an emeritus professor of com-

munication arts at the University of Wisconsin, who has researched media influence on children.

"If it were transitory, it wouldn't be a problem," she said, "but the research I've done shows that the nightmares can last for weeks and months and years." She added, "I've yet to see one of these features be for 'all audiences.' I'd urge caution for any child under 6 for any movie that has violence in it."

The Harvard findings indicate that the G rating encompasses a wide range of onscreen images and behaviors. In contrast to "Quest for Camelot," for example, the animated "My Neighbor Totoro," released in 1993, contained only six seconds of noninjurious violence and "The Many Adventures of Winnie the Pooh" had just over one minute of slapstick play.

"Not all animated G films are created equal," said Thompson. "That puts the burden on parents to get information about a movie. Unfortunately, the rating system doesn't provide enough information" about a film's content.

The MPAA's movie-rating system has come under attack from many different directions since it was introduced 31 years ago, but it has endured with only occasional modifications. In his State of the Union speech in January, President Clinton called the current ratings for movies, TV shows and video games "too numerous, diverse and confusing to be really useful to parents." He championed a suggestion by first lady Hillary Rodham Clinton that a single system be developed to replace it.

MPAA president Jack Valenti, who instituted the movie ratings in 1968, declined to comment directly on the study's findings, saying he hadn't had a chance to review them. But he did say, "It's worth noting for the last 31 years the parents of America have given the voluntary rating system high approval marks." He pointed out that 76 percent of parents said in a recent MPAA-commissioned poll that the ratings were "useful to fairly useful" in determining their children's movie choices.

A movie's rating is determined by an MPAA reviewing panel consisting of about a dozen parents.

The Washington Post

WEDNESDAY, MAY 24, 2000

Going After the Global Investor

Trading Across Borders, Time Zones Becoming Easier, but Barriers Persist

by SANDRA SUGAWARA
Washington Post Staff Writer

Brokerages and stock markets are drawing up big plans to go after the Tsutomu Tagas of the world.

Taga, a 67-year-old retired Japanese construction executive, trades stock online, including U.S. stocks. "I want to diversify my portfolio to mitigate risks. ... Earthquakes may hit Japan," said Taga, who has used his DLJdirect online account in Tokyo to buy Microsoft, Cisco Systems, Sun Microsystems and Oracle shares in recent months.

Taga is part of the Internet revolution that is swiftly breaking down the national boundaries in stock trading. As electronic trading networks replace stock exchange floors, it is becoming easier and cheaper for

stock trading to creep across international borders.

The Internet is also allowing investors anywhere to find out about foreign stocks with the click of a mouse. For instance, Taga frequently visits the Web sites of Bloomberg and CNN to research his U.S. stock picks. And online technology means he can pay for his U.S. stock purchases in yen.

"Technology is making it easier and cheaper for somebody in one place and time zone to reach out and buy stocks in another time zone," said Erik R. Sirri, finance professor at Babson College and former SEC chief economist.

Technology also means that stock markets are no longer isolated islands of activity in a specific physical location, but rather far-flung electronic networks of buyers and sellers. That has made it easier for exchanges—

which make money from the amount of trading activity on their markets—to merge and create global operations that can attract massive numbers of investors and listed companies from around the world.

But the integration of foreign stock markets into a seamless global exchange is expected to be a slow, tedious process because of conflicting national stock trading regulations, investor protection laws, accounting standards and politics. Indeed, because stock markets decide who can raise money on their exchanges, national regulators may be wary of turning over the reins to foreign owners.

One fear is that if stock markets become truly mobile, with headquarters moving from city to city depending on the deal, na-

tions might start competing with each other to lure the prestigious financial markets. Regulators are trying to work cooperatively to prevent a situation where countries vie for stock exchanges by lowering their standards.

So far, trans-border trades still account for a small share of stock transactions, but online brokerages feel that there is potential demand. They say that American investors appear to have little demand for foreign stocks. But the brokerage firms hope to tap into strong interest overseas for U.S. equities.

This week, for example, E-Trade Group Inc. launched a service that will allow customers in Sweden to buy and sell U.S. stocks online, using the local Swedish currency.

Until this week, E-Trade customers in Sweden could buy only Swedish stocks. "We've been in operation [in Sweden] for a year and the most common question we used to get was: When are you going to offer trading in U.S. stocks?" said Viveka Blom, director of marketing for E-Trade's Swedish operations. After E-Trade announced that Swedes could buy U.S. stocks online, customers "started asking us: 'What is the next market you are going to be offering and when will that be happening?'"

Jarrett Lilien, chief brokerage officer of E-Trade, said E-Trade plans to eventually create a cross-border network linking the world's major equity markets to give its customers access 24 hours a day, seven days a week to international investing that is "similar in cost, convenience and control" to domestic online investing.

DLJdirect, an online brokerage owned by Donaldson, Lufkin & Jenrette Co., has similar plans. In addition to its operations in Japan and the United Kingdom, which were launched last year, DLJdirect is planning to offer service in Hong Kong, Taiwan, Singapore, China, Philippines, Thailand, Indonesia and Malaysia.

Currently Japanese customers can buy only Japanese and American stocks. But DLJdirect is developing software so that any of its customers can easily buy and sell stocks in any country where it has operations. Charles Schwab & Co. has also been quickly expanding overseas, offering online brokerage services in Australia, Japan, Canada, Hong Kong, Europe and Latin America. Investors in all those markets, except for Australia, can buy U.S. securities, but the foreign operations are not linked to allow trading of each others' stocks. Schwab, however, is developing an online foreign exchange service, as a first step, to make it easier for its customers to buy a variety of foreign stocks.

Likewise, stock markets are racing to change their models to grab new business in the electronic trading era. The Deutsche Boerse, the Frankfurt-based stock exchange, yesterday approved a merger with the London Stock Exchange. In addition, Euronext was formed recently with the merger of the Amsterdam, Brussels and Paris exchanges.

The New York Stock Exchange is in talks about possible alliances with Euronext, the Tokyo Stock Exchange, and other exchanges in the Asia Pacific region. Canada and Mexico are also part of the picture.

Nasdaq plans to create a global stock market by linking Nasdaq operations in Japan and Europe. Nasdaq Japan is scheduled to begin operations on June 19, with trading in about eight Japanese companies. Its Nasdaq Europe operation is expected to combine

Germany's Neuer Markt and London's Techmark, both of which specialize in high-growth technology stocks.

These mergers and alliances, however, face substantial regulatory and political hurdles.

"Everybody has a vision of a global stock market, but everybody wants to run it. Nobody wants to give up their own listings," said James J. Angel, a finance professor at Georgetown University.

E-Trade and DLJdirect said they will eventually allow Americans to trade foreign stocks online. Currently Americans can buy shares of the best-known foreign companies, such as British Telecom, Sony or Nokia, by purchasing American Depository Receipts, ADRs, which represent shares of foreign companies, are traded on U.S. exchanges and can be purchased online.

"Foreign countries are educated with the idea of cross-border trading and dealing with foreign exchange ... while the average U.S. citizen has never invested anything overseas and probably never even done a foreign exchange transaction," said Lilien.

In addition, Lilien said information on U.S. companies is easier to find than data on foreign corporations. "There is far more information circulating about U.S. securities than foreign securities. You can travel around the globe, pick up a newspaper anywhere and get

a quote on Microsoft or Oracle," he said.

Another reason few Americans buy and sell stocks traded on overseas exchanges is that it is generally "a pain in the neck," said Angel. "If I want to buy U.S. stock from Schwab, I go click click with my computer and it's done. But to buy international stocks, I have to call up the international trading desk and place the order over the telephone. It's less convenient and more expensive."

Americans may grow enamored of foreign stocks as online brokerages offer easier service. But that will raise a new set of issues for U.S. investors. "One thing we've got to worry about: Will U.S. investors understand the risks they are taking when they step outside the U.S. system?" Sirri said. He pointed out that SEC regulations will not apply to stock bought from overseas markets.

Some economists also worry about even sharper volatility if foreign money follows the momentum traders here. Of course, it's unclear whether a Japanese investor, for instance, would evaluate a U.S. stock the same way an American might.

For instance Akira Mizutani, 25, of Tokyo, wants to buy U.S. stocks, and in fact is searching for another online brokerage firm because his Japanese E-Trade account does not yet permit him to do that. Mizutani thinks the plunge in U.S. Internet stocks makes this "a good time" to buy them. That's because he finds U.S. technology stocks cheap, especially compared with Japanese equities.

Akiho Kashiwagi contributed to this report from Tokyo.

The Washington Post

WEDNESDAY, MAY 24, 2000

No Big Surge in Sex Programs Is Expected From Cable Ruling

By JIM RUTENBERG

The Supreme Court's decision on Monday striking down a law that required many cable systems to limit sexually explicit channels to late-night hours will most likely reap a modest increase in profits for programmers but is not expected to hasten a vast explosion of sexually oriented material on cable.

Under the old law, cable systems that did not have the sufficient technology to fully scramble the signals of sexually explicit channels for non-subscribers were allowed to make those channels available only when children were unlikely to be watching — from 10 p.m. to 6 a.m., the Federal Communications Commission had decided in a regulation applying the law.

Now the cable systems that the court's ruling affects, which in all reach about 18 million homes, are deciding how to respond. None seemed eager yesterday to announce an expansion in the hours of sexually explicit programming, notice that could offend their subscribers.

But analysts said they did not expect sexually explicit cable offerings to increase significantly in any case. They also said the law would have been obsolete in a few years anyway, because of technological advances that are expected to make scrambling universally effective.

"I view this primarily as a technical ruling that is more important for its First Amendment implications," said Chris Dixon, a media analyst for PaineWebber.

The Playboy Entertainment Group, which owns four sexually explicit channels and brought the challenge upheld by the Supreme Court, said its growth had been stunted by the law because cable carriers were loath to give up channel space for programming that was available only a relatively few hours a day. And executives of the company said that even with the systems that carried the Playboy channels, the limitation in hours had cost Playboy about \$4 million a year in revenue.

But Mr. Dixon said that despite the Supreme Court's decision, many cable companies that had refrained from carrying sexually oriented programming would probably remain hesitant, because of limited channel capacities. "The problem is not whether or not programming is appropriate, it's whether or not there is space available on the dial or on the

set-top box," he said.

Those systems that do carry the explicit channels have until now taken up the other 16 hours of the day on them with "filler" programming, which draws few viewers.

It is not as if demand for the sex channels is extremely high. While explicit programming, available predominantly on pay per view, is somewhat popular, it does not draw blockbuster ratings. Larry Gerbrandt, senior analyst at Paul Kagan Associates, said the cable companies brought in revenue of \$954 million from pay-per-view programming last year. Of that total, sexually explicit programming accounted for \$177 million, he said.

Still, Mr. Gerbrandt said he ex-

**Cable systems
hesitate to announce
expanded hours for
explicit shows.**

pected many of the cable companies affected by the ruling to expand the channels' hours, primarily because there is easy money to be made for all parties: the cable companies receive half the revenue from the pay-per-view sales.

And while the viewers of sexual content are relatively small in number, Mr. Gerbrandt said he expected them to take advantage of the expanded hours where available.

"I think it provides a boost to the category," he said of the ruling. "I don't think it causes it to explode."

Tony Lynn, president of the Playboy Entertainment Group, who on Monday expressed great enthusiasm about the justices' ruling, was more temperate yesterday. Mr. Lynn said he expected the expansion of his channels' hours to take time, because there were hundreds of cable systems that had to decide individually whether they wanted to take advantage of the change in law.

One cable executive, who spoke on the condition that he not be identified, said his company would most likely expand the hours of the Playboy channels, but quietly, so as not to stir community opposition.

"There are customers out there that want this kind of programming," he said. "It might not be the majority, but you cannot be cynical."

COOL BREEZES, MOUNTAIN STREAMS:
SUPPORT THE FRESH AIR FUND

The New York Times

WEDNESDAY, MAY 24, 2000

THE REACTION

Bush's Missile Defenses Could Limit Warhead Cuts, Experts Warn

By STEVEN LEE MYERS

WASHINGTON, May 23 — It lacked details and raised, but failed to answer, tantalizing questions. But Gov. George W. Bush's call today for "a new approach" to the nation's nuclear arsenal represented what could be, in the view of experts, a significant shift in arms control and post-cold-war relations with Russia.

In his remarks at the National Press Club, Mr. Bush embraced concepts that arms controllers have long advocated, including deeper reductions in warheads and steps to ease the highest levels of alert at which those weapons can be launched on a moment's notice.

He even left open the possibility of dramatic, unilateral steps, evoking his father's decision in 1991 to remove American bombers from alert and withdraw short-range nuclear weapons from Europe and Asia, a move quickly matched by the last Soviet leader, Mikhail S. Gorbachev.

But in calling for missile defenses not only for the United States but also for its allies, Mr. Bush challenged the longtime orthodoxy of arms control: that prohibiting defenses allowed limits in offenses.

That assumption, embodied in the Anti-Ballistic Missile Treaty of 1972, stipulated that the ability of either side to destroy the other — mutually assured destruction — created a safer world by making the temptation to use nuclear weapons simply too

risky to consider.

"Our mutual security need no longer depend on a nuclear balance of terror," Mr. Bush declared, surrounded by members of Republican administrations who once defended some of the very assumptions that he challenged today.

Many of the proposals outlined by Mr. Bush, the presumptive Republican presidential nominee, were greeted with striking praise from arms-control experts. In particular, they welcomed his pledge to ask the Pentagon to review its targeting strategies and rethink the number of warheads, which Mr. Bush called "expensive relics of dead conflicts."

But they warned about the risks in other parts of Mr. Bush's vision. Mr. Bush's seemingly open-ended view of missile defenses, they said, could undercut the benefits of his proposals to reduce the number of weapons and take "as many weapons as possible" off "hair-trigger status."

"It's very encouraging from the prospect of unilateral reductions," said George R. Perkovich, director of the W. Alton Jones Foundation, a private organization in Charlottesville, Va. "But I don't think that kind of gesture is going to change any of the problems with our relationship with Russia. Even if we're willing to get to lower levels, the Russians aren't, because of the kind of national missile defense he's proposing."

Bruce G. Blair, president of the Center for Defense Information here and a strong advocate for reducing the alert status of American and Russian forces, welcomed Mr. Bush's remarks. But he said they contained inherent contradictions.

Mr. Blair said that if the United States proceeded with a significant missile defense system, Russia would feel compelled to keep its forces on alert to preserve their ability to launch an overwhelming counterattack. A heightened Russian posture, he added, would convince the Pentagon that the steps Mr. Bush said he would pursue — even unilaterally — would not be possible.

"They're working at cross-purposes," Mr. Blair said.

Neither Mr. Bush nor his aides would discuss his proposals in detail, leaving many questions about how — and whether — he could bring about a new era of arms control in a Bush presidency. He did not rule out creating a missile defense based at sea or in space, which would prove even more unsettling to the Russians than the limited system the Clinton administration is considering and would certainly require abrogation of the A.B.M. treaty.

And while he said he favored reducing arsenals below the 3,000 to 3,500 warheads negotiated under the second strategic arms reduction treaty, or Start II, he did not say whether he would go as low as the

proposed Start III levels of 2,000 or 2,500.

Mr. Bush emphasized that he would never make any reductions that the Pentagon did not endorse, but it has long been the Pentagon that has resisted deeper reductions in warheads.

Today, the Joint Chiefs of Staff, along with Adm. Richard W. Mies, the commander of the strategic force, appeared before the Senate's Armed Services Committee and testified that they would oppose any further reductions in warheads beyond Start III, something that Russia has proposed.

"There is a cushion in larger numbers," Admiral Mies said. "And there is a tyranny in smaller numbers that reduces stability in certain situations."

Michael Krepon, president of the Henry L. Stimson Center, a research group here, said it was possible to move past the "cold-war logic" of mutually assured destruction and allow for a defensive system. The key, he said, was to manage a "cooperative transition" with the Russians that would reassure them that they would not lose their strategic leverage when the United States builds a defensive shield.

"What George W. did not tell us was the kind of defenses and the architecture he is envisioning," Mr. Krepon said. "Those particulars will clarify whether or not this cooperative transition is likely to succeed."

High court sides with Playboy

Ruling lifts constraint on sex-oriented shows

By Richard Willing
USA TODAY

AI

WASHINGTON — A busy Supreme Court on Monday threw out a federal law designed to shield children from sex-oriented programs on cable television, opening the door for cable companies to show such features around the clock rather than just at night.

By a 5-4 vote, the court ruled that a provision of the Telecommunications Act of 1996 requiring cable operators to show adult programming only between 10 p.m. and 6 a.m. violated the free-speech rights of channels whose business was limited by the restriction.

The provision, supported by parents' groups, was designed to counter "signal bleed," in which the sound and picture from a scrambled cable signal can appear clearly on the sets of those who do not subscribe to the channel.

Christie Hefner, chairman of Playboy Enterprises Inc., whose cable subsidiary sued to overturn the law, called it an "intrusion upon individual choice by the federal government. We have maintained all along that the law was unconstitutional."

Sen. Dianne Feinstein, a California Democrat who helped draft the law, said the ruling "ignores the reality of parenting in the 21st century. I don't think it's too much to ask that sexually explicit programmers either limit their broadcasts to evening hours or fully scramble those broadcasts to non-subscribing households."

Some cable operators say that while they now have more latitude in showing adult features, their own policies and improving technology will limit the decision's impact.

Lynn Yeager of Time Warner Cable, the nation's largest operator, says most cable firms voluntarily limit adult programming to overnight hours in areas where poorly scrambled signals can reach those not subscribing to such shows. She adds that new digital technology will stop "bleed through" problems.

For now, households without digital cable may order free blocking devices from cable companies to ensure they do not receive adult programming.

Besides a clash of speech rights and parents' desires to protect kids, the case produced unusual alliances.

Conservative Justice Clarence Thomas joined liberals John Paul Stevens, David Souter and Ruth Bader Ginsburg and centrist Anthony Kennedy in rejecting the law.

"The government has failed to show that (the law) is the least restrictive means for addressing a real problem," Kennedy wrote for the majority.

Those backing the law also were rare allies: conservatives Antonin Scalia and Chief Justice William Rehnquist, centrist Sandra Day O'Connor and liberal Stephen Breyer.

Contributing: Peter Johnson in New York.

► Justices issue five opinions in flurry of action Monday. Story, 3A

Not tonight, honey, I took the placebo

By Marilyn Elias
USA TODAY

Viagra doesn't help women, study says

Viagra does not improve women's sexual response, shows the first major scientific test of the drug in females. It worked no better than placebos in a 12-week study of 577 Europeans and Canadians.

Details from the study, funded by Viagra maker Pfizer, will be reported today at the American College of Obstetricians and Gynecologists meeting in San Francisco.

In men, the impotence drug increases blood flow to the penis, promoting erections. Studies have shown that Viagra also improves blood flow to women's genitalia and can enhance arousal in postmenopausal women.

But the first major test of the drug against placebos included women 18 to 55 years old, and their problems weren't limited to trouble becoming aroused. Some also had low desire, difficulties reaching orgasm and pain during intercourse.

The tests found that Viagra and placebos had statistically the same effect, with no perceived sexual benefit from the drug.

The findings "aren't surprising," Kinsey Institute director John Bancroft says. Blood flow is central to men's sexual performance. "We

don't know how relevant it is for women. (The drug) might help a minority of women, but most need other things — more sleep, a better relationship or feeling better about themselves."

Adds Boston University urologist Jennifer Berman: "Before we jump to the conclusion this doesn't work, we need to limit our tests to women it could help — those with adequate hormones who have trouble becoming sexually excited."

Pfizer has begun another test of postmenopausal women; findings should be available next year, medical director Michael Sweeney says.

Disbar Clinton, panel urges

President vows he'll fight recommendation

By Judy Keen and Kathy Kiely
USA TODAY

WASHINGTON — President Clinton vowed Monday to fight a recommendation by an Arkansas Supreme Court committee that he be disbarred for "serious misconduct" in his testimony in the sexual harassment case that involved Paula Jones.

"This recommendation is wrong and clearly contradicted by precedent," David Kendall, Clinton's personal lawyer, said in a statement. "We will vigorously dispute it in a court of law."

Former president Richard Nixon was disbarred in New York after he resigned in 1974 over the Watergate scandal. Clinton would be the first sitting president to be stripped of his law license.

If he's disbarred in Arkansas, Clinton might not be able to get a law license in other states. "Disbarment is like capital punishment for an attorney," said Diane Karpman, president of the Association of Professional Responsibility Lawyers.

The recommendation by the court's Committee on Professional Conduct was made by a majority vote among five lawyers and a teacher. The action makes it clear that the Monica Lewinsky scandal still dogs Clinton, 15 months after

his acquittal at his impeachment trial.

The disbarment action stems from complaints by U.S. District Judge Susan Webber Wright, who presided over the Jones case, and the conservative Southeastern Legal Foundation.

The complaints focus on the president's deposition in the Jones case in January 1998, during which Clinton denied having sexual relations with Lewinsky. In April 1999, Wright found Clinton in contempt for lying and fined him \$90,000. Clinton insists that his testimony was misleading but not false.

A Pulaski County Circuit Court judge in Little Rock will preside over the disbarment hearing, which could include testimony from witnesses.

Clinton told NBC that he does not plan to participate, even though it will put him at "a severe disadvantage." He said he does not want to interfere with his presidential duties.

Matt Glavin, president of the Southeastern Legal Foundation, hailed the ruling. However, W. Christopher Barrier, a Democrat who chairs the Arkansas Bar Association executive council, said it was unusually harsh.

"I haven't heard of anyone being disbarred for grounds such as those levied against the president," Barrier said.

Restraints On TV Sex Struck Down

High Court Says Law Overstepped Bounds

By EDWARD WALSH
and AMY GOLDSTEIN
Washington Post Staff Writers

A1

A closely divided Supreme Court yesterday struck down a provision of a 1996 law that was designed to protect children from exposure to sexually explicit programming on cable television, marking the second time in three years that the court has ruled Congress overstepped its bounds in regulating information technology.

In a 5-4 decision, the court ruled that the provision of the Telecommunications Act—which required cable providers of sexually explicit material to “fully scramble” their signals or show such programming only when children are unlikely to be watching—violated the First Amendment’s free speech guarantees.

The court said another section of the same law, which requires cable operators to block any cable channel at the request of a subscriber, offered an equally effective and “less restrictive” means to achieve the same goal.

In First Amendment matters, “if a less restrictive means is available for the government to achieve its goals, the government must use it,” Justice Anthony M. Kennedy wrote for the court majority.

Yesterday’s high court decision re-

COURT, From A1

presented a victory for Playboy Entertainment Group Inc., which operates the Playboy TV Network and the Spice Network, the dominant adult entertainment cable channels. It was also another sign that a slim court majority is more willing than Congress to apply strict First Amendment protections to evolving information technology.

In 1997, the justices invalidated another section of the same federal law that restricted the transmission of sexually explicit material over the Internet. The ruling delighted civil libertarians and the cable television industry, but dismayed a variety of conservative organizations that are working to restrict children’s exposure to sexually oriented material.

Christie Hefner, chairman and chief executive of Playboy Enterprises, Inc., said “the beauty of the decision was to endorse the rights of parents to control what comes into their home without limiting the rights of adults to see constitutionally protected programming.”

But Janet LaRue, senior director of legal studies at the Family Research Council, said “it’s a sad day when the protection of children and unconsenting adults takes a back seat to the profit of cable pornographers.” She said the court’s decision “places the burden on cable subscribers rather than the sexually explicit cable providers” to keep the material out of homes.

The case, *U.S. v. Playboy Entertainment Group Inc.*, arose from the problem of “signal

bleed”—cable TV signals sometimes becoming available to nonsubscribers. Congress responded in the 1996 Telecommunications Act by requiring cable providers of sexually explicit material to scramble those signals or confine the programming to times when children are unlikely to be watching. The Federal Communications Commission later set the acceptable time as between 10 p.m. and 6 a.m.

According to Playboy, most cable operators chose to restrict the time they would show adult programming rather than risk lawsuits stemming from signal bleed or incurring the expense of creating a foolproof scrambling system.

Playboy challenged the restrictions, and in 1998 a special federal district court in Delaware ruled that the rules violated the First Amendment by targeting a certain kind of speech—sexually explicit material—based on its content, and banning that type of programming for most of the day. Unlike obscene material, sexually explicit programming is protected under the First Amendment.

Kennedy, who was joined by Justices John Paul Stevens, David H. Souter, Clarence Thomas and Ruth Bader Ginsburg, agreed with that decision, saying that the only “reasonable way” for many cable operators to comply with the law was to restrict adult programming to a few hours a day.

That, Kennedy wrote, “silences the protected speech for two-thirds of the day in every home in a cable service area, regardless of the presence or likely presence of children or of the wishes of the viewers. . . . To prohibit this

much speech is a significant restriction of communication between speakers and willing adult listeners, communication which enjoys First Amendment protection.”

Kennedy also emphasized that because the case involved free speech guarantees, it was up to the government to prove that the proposed alternative method of protecting children from sexually explicit material would be ineffective. He said the government had failed to do so.

It was on this point that Justice Stephen G. Breyer based the main dissent in the case. He argued there was no evidence that allowing cable subscribers to request complete blocking of certain programming would be equally effective in shielding children.

Citing the millions of children left alone at home after school, Breyer said that the restrictions struck down yesterday offered more certain protections for “a large number of families.”

“By finding ‘adequate alternatives’ where there are none, the court reduces Congress’s protective power to the vanishing point,” Breyer wrote. Other dissenters were Chief Justice William H. Rehnquist and Justices Sandra Day O’Connor and Antonin Scalia.

There is little agreement on the pervasiveness of signal bleed. The Justice Department estimated that 39 million homes with 29.5 million children could potentially be affected. But Robert Corn-Revere, a lawyer for Playboy, said that in 16 years of transmitting adult entertainment, the company had heard only a handful of complaints and did not believe it

was a significant problem.

Hefner said about 25 million households view Playboy TV and 14 million receive the Spice Network, which Playboy acquired last year. Playboy projected that the federal law would cost it \$25 million in lost revenue over a decade.

In another closely watched case decided yesterday, the court upheld a key part of a Civil War-era law that authorizes individuals to file suit on behalf of the federal government alleging fraud and to keep a portion of any settlement or court award.

But in the 7-2 decision, the justices also said that states and state agencies cannot be sued under the 1863 False Claims Act because they are not “persons” as defined by the law. Amended and revived in the 1980s, the law is considered an important element in “whistleblower” attempts to curb fraud against the government.

In another case yesterday, the court ruled unanimously that a federal anti arson law does not apply to fires set in private homes but only to commercial buildings or other structures more closely linked to Congress’s authority to regulate interstate commerce. The decision invalidated the federal conviction of an Indiana man who set fire to his cousin’s house.

And in yet another decision, the court ruled 5-4 that criminal defendants who voluntarily tell jurors about previous convictions, rather than allowing that information to become known through cross-examination by prosecutors, cannot appeal a judge’s decision to allow questioning about their criminal backgrounds.

Aristide's Party Leading in Haitian Vote

Monitors Say Elections Generally Credible

By MICHAEL DOBBS
Washington Post Foreign Service

A1

PORT-AU-PRINCE, Haiti, May 22—The ruling Lavalas party of former president Jean-Bertrand Aristide appeared today to be headed for a significant victory in parliamentary and local elections that could put an end to a protracted constitutional crisis in Haiti.

International observers described Sunday's elections for the parliament and hundreds of local councils as generally credible despite numerous irregularities in voting and counting. While opposition politicians sought to draw attention to noteworthy cases of fraud and voter intimidation, they stopped short of describing the entire election as invalid.

The apparent Lavalas victory,

which has yet to be officially confirmed, could pave the way for Aristide's return to power in presidential election later this year and, if he is elected again, give him a free hand to run the country without interference from an opposition-controlled legislature.

A former Roman Catholic priest who as president antagonized many among Haiti's establishment, Aristide was overthrown by a military coup in 1991 and restored to office three years later by a U.S. military intervention—only to be forced to step down in 1996 because of a constitutional requirement barring Haitian presidents from succeeding themselves.

But the elections—and a higher than expected 60 percent turnout—

suggested that Aristide retains the support of a large section of the Haitian population, particularly among the poor whom he has championed, at the same time that he is loathed by many members of the country's commercial elite. His likely return to power is also being viewed with trepidation by U.S. officials, who are alarmed by his sometimes radical liberation theology and ambiguous record on condemning political violence.

International observers who monitored the vote count said Lavalas candidates appeared to have taken a clear lead in a number of crucial races, particularly the Port-au-Prince region, but also in some other parts of the country. If the results are confirmed, Aristide supporters could gain an absolute majority in both the Senate and the Chamber of Deputies. Official results are not expected until later in the week.

While voting proceeded peacefully in most of the country, opposition politicians cited cases of intimidation by Lavalas activists and an incident in the central Hinche region, where armed gunmen stole several ballot boxes. After votes were counted in one electoral district of downtown Port-au-Prince, the capital, ballots were seen strewn in the street.

This afternoon, violent clashes erupted in Port-au-Prince between Lavalas supporters and activists from a rival political party. During the disturbances, an opposition candidate for mayor was struck over the head with a rock and died of his injuries, witnesses said. Several opposition activists were injured and others sought refuge in the nearby offices of the U.S. Agency for International Development.

On the whole, however, international observers pronounced themselves satisfied. According to the head of the international observer mission, Orlando Marville of Barbados, violent incidents were limited to 10 polling stations out of more than 11,000.

The leader of a two-man U.S. congressional delegation, Rep. John Conyers Jr. (D-Mich.), described himself as "totally pleased and happy"

with the way the election was conducted.

In addition to concentrating political power in the hands of Aristide's Lavalas movement—Lavalas means "avalanche" in Creole—Sunday's election could also lead to the unblocking of more than \$500 million in international assistance to Haiti. The aid had been frozen because of the absence of a constitutionally formed government and parliament and repeated delays by President Rene Preval in setting a date for new elections.

The seemingly impressive nature of the Lavalas victory took U.S. officials and many international observers here by surprise. Opinion polls, including one funded by USAID, had predicted that Lavalas would get no more than 30 to 35 per cent of the vote. Many had predicted a low turnout.

But other analysts pointed out that the U.S. Embassy has consistently underestimated Aristide's popular appeal, beginning in 1990 when he was elected president with more than 80 per cent of the vote.

Ironically, the Clinton administration may have contributed to the Aristide myth by putting heavy pressure on him to step aside in 1996 in favor of Preval. Aristide wanted to serve an additional three years as president to make up for the three years of military rule. By withdrawing from the limelight for the last five years, he has avoided blame for the country's economic and political problems and is still seen as a figure of hope.

Among the Lavalas candidates who seem likely to win office are several close associates of Aristide who have been accused by the Clinton administration of involvement in political murders and drug dealing. Aristide's former security chief, Dany Toussaint, appeared headed for a convincing first-round victory in a closely watched Senate race in a huge district of Western Haiti that includes Port-au-Prince.

"We are not the first state," said Patrick Brutus, an opposition candidate for mayor of Port-au-Prince. "It is not up to the Americans to decide who will or won't be elected in this country."

The Washington Post

TUESDAY, MAY 23, 2000

289-09116

The ABCs at the FTC: Marketing and Advertising to Children

Summary of Prepared Remarks

of

Commissioner Roscoe B. Starek, III
Federal Trade CommissionAdvertising and Promotion Law 1997
Minnesota Institute of Legal Education

July 25, 1997

Good morning. Thank you for the opportunity to discuss marketing and advertising to children.⁽¹⁾ The Commission places a high priority on combating deceptive and unfair practices that harm children. Yet, our enforcement efforts in this area often raise difficult questions about the appropriate role of government and the nature of the relief that we can impose. Marketing and advertising to children touch on several different FTC issues. I'll try to walk you through these with a brief introduction to the Commission's deception and unfairness enforcement authority and then highlight some of the hot topics in children's advertising at the FTC.

Deception and Unfairness Authority

Section 5 of the Federal Trade Commission Act ("FTC Act") prohibits both unfair and deceptive acts or practices in or affecting commerce.⁽²⁾ The FTC's deception standard is set forth in the Commission's Deception Policy Statement.⁽³⁾ It asks whether the challenged representation or practice is one that would likely deceive a consumer acting reasonably under the circumstances in a material way -- that is, in a way that affects the consumer's conduct or choice regarding a product or service. In assessing advertising or other marketing practices that affect or are directed primarily to a particular audience, the Commission considers the effect of the ad or practice on that audience.⁽⁴⁾ Thus, our examination of children's advertising takes into account the limited ability of children to detect exaggerated or untrue statements.⁽⁵⁾ An interpretation that might not be reasonable for an adult may well be reasonable from the perspective of a child. Claims tend to be taken literally by young children. Depictions of a toy ballerina standing alone and twirling may reasonably be understood by children to mean that the ballerina can really dance by herself.⁽⁶⁾ A child who sees an ad showing a fully assembled toy helicopter reasonably may believe that it comes that way right out of the box, so the Commission requires a disclosure if significant assembly is needed.⁽⁷⁾

We can also challenge unfair acts and practices under the FTC Act -- those that cause or are likely to cause substantial injury to consumers when that injury is not reasonably avoidable by the consumers themselves and is not outweighed by countervailing benefits to consumers or competition.⁽⁸⁾ Although injury must be both substantial and likely, unwarranted health or safety risks can suffice. For example, the distribution of free sample razor blades without protective packaging in home-delivered newspapers poses a direct risk of injury to young children and others who might handle the papers.⁽⁹⁾

In assessing whether injury is reasonably avoidable, the Commission looks at how susceptible the affected audience may be to the act or practice in question. Children tend to imitate other children and they often lack the ability to foresee and avoid dangers. Thus, ads that show young children engaging in potentially hazardous activities, such as cooking hot foods or using a blowdryer next to a bathroom sink filled with water, are

unfair even though adults might reasonably avoid injury when engaging in similar activities.⁽¹⁰⁾

Remedies

The Commission has a variety of tools available to it to attempt to prevent future harm to consumers, including law enforcement actions in federal court or before an administrative law judge, issuing rules or guidelines, and consumer education. Court or administrative orders sought by the Commission prohibit deceptive or unfair claims and almost always impose "fencing-in" relief that covers claims or products beyond those that were the subject of the complaint. In appropriate cases, disclosures may be required to correct or prevent deception. Corrective advertising is warranted in the rare case in which the challenged ads substantially contributed to the development and maintenance of a false belief that lingers in the minds of a substantial portion of consumers.⁽¹¹⁾

The Commission also may seek redress for consumers or disgorgement in cases involving dishonest and fraudulent conduct. For instance, a Commission consent order issued last year required a toy manufacturer to refund to consumers the purchase price of toy vehicles deceptively shown in television ads performing such feats as driving and flying under their own power.⁽¹²⁾ In fact, the toys did not have these capabilities and were manipulated off-screen with wires and other hidden devices to make them appear to be moving. As fencing-in relief, the Commission also required the company to send a letter to every television station that aired the commercials, advising them of the settlement and of the availability of self-regulatory guidelines used by many industry members to screen advertising directed to children.

Once a Commission order is in effect, violations of the order may result in the imposition of civil penalties. Last year, a major toy manufacturer agreed to pay \$280,000 in civil penalties to settle charges that it violated a Commission consent order by misrepresenting that children could use a "Colorblaster" paint sprayer toy with little or no effort.⁽¹³⁾

In assessing appropriate remedies for unfair or deceptive practices in advertising to children, we cannot overlook the First Amendment. We've all heard the phrase from our parents or told our own children: "If you can't say something nice, don't say anything at all." While this is a good standard for raising polite children, it is not the standard for speech in a free society.

As the Supreme Court recently reaffirmed in *44 Liquormart*,⁽¹⁴⁾ *Central Hudson* remains the standard for assessing whether restrictions on commercial speech are permissible under the First Amendment.⁽¹⁵⁾ Under the *Central Hudson* standard for commercial speech, neither deceptive speech nor speech that proposes an illegal transaction is protected by the First Amendment.⁽¹⁶⁾ A restriction on commercial speech that is not misleading and concerns lawful activity must pass three additional tests: the asserted governmental interest in the speech restriction must be substantial; the restriction must directly advance the governmental interest asserted; and the restriction must not be more extensive than necessary to serve that interest.⁽¹⁷⁾

Commission orders that require marketers to stop making false or unsubstantiated statements do not tread on First Amendment rights. When the Commission compels speech as part of a remedy for deception, however, the analysis becomes more complicated. Disclosures that remedy deceptive omissions of material information are correctly viewed as restraints on deceptive speech. Affirmative disclosures or corrective advertising that prevent future deception or correct past deception do not raise First Amendment concerns, unless they in fact go beyond the prevention or correction of deception.⁽¹⁸⁾ Broad fencing-in remedies, for example, that compel general consumer

education or other speech not directly related to the prevention of deception are unlikely to survive First Amendment scrutiny.

Restrictions on unfair advertising also are subject to First Amendment scrutiny under the *Central Hudson* standard. In *44 Liquormart*, a plurality opinion written by Justice Stevens confirmed that, in the absence of evidence, courts cannot assume that an advertising restraint will significantly reduce consumption.⁽¹⁹⁾ Instead, the government must establish a causal relationship between its speech restriction and the asserted state interest that the restriction is intended to directly advance.⁽²⁰⁾

A restriction on unfair advertising also has to satisfy the *Central Hudson* requirement that a speech restriction not be more extensive than necessary to advance the asserted government interest. Both the plurality opinion and Justice O'Connor's concurring opinion in *44 Liquormart* agreed that a total ban on price advertising of alcohol did not satisfy this requirement when there were other effective ways for government to achieve its goal.

The ABCs of Children's Advertising at the FTC

Now that I've given you an overview of our authority and enforcement powers, I'll turn to some of children's advertising issues causing the most concern at the Commission. As a primer, you can think of this as the "ABCs" at the FTC: A and B are for alcoholic beverages, while C covers both Camel and cyberspace.

A Controversial History

Not surprisingly, the most controversial children's advertising issues involve possible unfairness violations. The Commission's reliance on its unfairness authority to police children's advertising has a long, and some would say checkered, history. During the 1970s efforts to use unfairness as a basis for restricting children's advertising prompted considerable opposition from the advertising industry and members of Congress. In 1980, the FTC promulgated an Unfairness Policy Statement that set the parameters for the Commission's use of its unfairness doctrine by describing the Commission's injury and public policy criteria and disavowing any independent reliance on whether the challenged conduct was unethical or unscrupulous.⁽²¹⁾

Nonetheless, reaction to the Commission's expansive attempts at rulemaking based on theories of unfairness in the 1970s deprived the agency of a Congressional authorization for 14 years. Amendments to the FTC Act in 1980 specifically denied the Commission authority to issue any rule regarding children's advertising on the basis that the advertising constitutes an unfair act or practice.⁽²²⁾ These amendments also prevented the Commission for a period of three years from initiating any new rulemaking proceeding restricting commercial advertising based on unfairness,⁽²³⁾ and this prohibition was continued through the Commission's appropriations legislation until 1994. ←

During this period, the Commission very cautiously exercised its unfairness jurisdiction in law enforcement actions. Shortly after I arrived at the Commission, we accepted several consent agreements alleging that advertisements for 900-number calls unfairly induced children to make calls to cartoon characters, resulting in expensive phone bills that their parents had no reasonable way to avoid.⁽²⁴⁾ The Commission required easy-to-understand disclosures about the need to obtain parental permission and the cost of the call. We also required the call to include a preamble stating, "This telephone call costs money. If you do not have your mom or dad's permission, hang up now," during a grace period in which the call could be terminated without charge. The orders required that parents be provided with a reasonable means to avoid unauthorized calls or one-time refunds upon request for unauthorized calls by children.

Congress later expanded this relief with a broader statute, the Telephone Disclosure and Dispute Resolution Act of 1992, that directed the Commission to issue pay-per-call regulations. Among other things, the 900-Number Rule prohibits ads for non-educational, pay-per-call services directed to children under 12, requires clear and conspicuous disclosures about the need to obtain prior parental permission in ads directed to children under 18, and sets forth criteria for determining when a call is directed to a particular age group.⁽²⁵⁾ Ads are directed to a particular age group if competent and reliable evidence shows that more than 50% of the audience is composed of that age group. If such evidence is not available, other criteria include placement of the ad on a program directed to that age group, the nature of the programming in which the ad appears, and whether the ad, regardless of its location, is directed primarily at the relevant age group in terms of its subject matter, content, tone or the like. This Rule is currently under review by the Commission, and the Commission will seek public comment on any changes it proposes later this year.

After the 900-number cases, the Commission next publicly addressed its unfairness jurisdiction in 1994, when a majority of the Commission -- including me -- decided to close an investigation of whether the R.J. Reynolds Tobacco Company had engaged in unfair practices through its use of the "Joe Camel" campaign to promote Camel cigarettes. We said then that "[a]lthough it may seem intuitive to some that the Joe Camel advertising campaign would lead more children to smoke or lead children to smoke more, the evidence to support that intuition is not there."⁽²⁶⁾ As the statement said, the record did not show a link between the Joe Camel advertising campaign and increased smoking among children sufficient to justify a charge of unfairness in violation of the FTC Act.

Congress amended the FTC Act later that year to specify that an unfair act or practice is one that causes or is likely to cause substantial injury to consumers that is not reasonably avoidable and is not outweighed by countervailing benefits to consumers or competition.⁽²⁷⁾ Essentially, Congress codified the Commission's injury test for unfairness as set forth in the Unfairness Policy Statement. At the same time, Congress expressly barred the Commission from relying on public policy considerations as the primary basis for an unfairness determination.⁽²⁸⁾

The Commission still alleges deception far more frequently than unfairness. Despite the controversial history of unfairness enforcement, it remains an important part of the Commission's consumer protection arsenal. We recently pursued unfairness allegations in several cases,⁽²⁹⁾ and it would be a mistake to underestimate the possibility of additional unfairness enforcement actions. I want to emphasize that the Commission is giving scrupulous care to applying the codified injury requirement, although in any particular case individual Commissioners may disagree as to the level of evidence needed to satisfy the requirement that an alleged unfair act or practice be "likely to cause substantial injury."

A (and B) are for Alcoholic Beverages

Last year, the Distilled Spirits Council of the United States ended its forty-year voluntary ban on liquor advertising on radio and television, precipitating a public debate about the effect of alcohol advertising on children. In response, the Chairman of the Federal Communications Commission has sought to hold hearings to inquire into whether the broadcast of distilled liquor advertising is in the public interest. The inquiry was scuttled when two of the four members of the Commission refused to support the Chairman's initiative because they believe that a memorandum of understanding between the two agencies places this issue within the FTC's jurisdiction.

→ *Wagner to Call substance policy - to make the level*
Policy Statement - 1994 program - David Brown

→ Assume price

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- Probably would not then

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put a

inguz caused

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only to be seen
A pretty

one down - Chiller along

As a Commissioner of the FTC, I would not presume to opine on the FCC's jurisdiction. I am confident, however, that the Federal Trade Commission has jurisdiction over deceptive or unfair advertising for alcoholic beverages and that it will exercise that jurisdiction in appropriate cases.⁽³⁰⁾ For example, in 1991 the Commission issued a consent order against the Canandaigua Wine Company for alleged deceptive marketing of Cisco, a fortified, flavored wine product.⁽³¹⁾ The Commission charged that Cisco's packaging and advertising misrepresented that it was a low-alcohol wine cooler, despite a high alcohol content. The alleged misrepresentation resulted in alcohol poisoning of several consumers who believed the product to be low in alcohol. The order prohibited representations that Cisco is a low-alcohol, single-serving product and required other changes in marketing and packaging to distinguish the product more clearly from wine coolers.

Use of the Commission's unfairness jurisdiction to address alcoholic beverage advertising that may appear to be targeted to children requires showing that the advertising causes or is likely to cause substantial injury. The Commission testified to Congress in 1990 that the evidence of a link between advertising and alcohol consumption in general was inconclusive and failed to show a causal relationship.⁽³²⁾ The Commission suggested that these studies and their underlying research methodology were perhaps incapable of accurately measuring any relationship that might exist. At that time, we called for further research. Two years ago, the National Institute of Alcohol Abuse and Alcoholism issued a similar call based on a review of existing studies of the effects of alcohol advertising, promotion activities, and mass media presentations on attitudes toward drinking, actual consumption, and alcohol-related problems. According to this government agency, existing studies were inconclusive for methodological reasons and the lack of sufficient data.⁽³³⁾

In my view, methodologically sound studies are the best way to determine whether and how advertising affects consumption. But the absence of reliable scientific evidence on the effect of a particular advertising campaign on consumption is not dispositive of every unfairness inquiry. The unfairness standard permits us to find that substantial injury is likely, not that it has actually occurred. We look at the entire record and consider the flaws or limitations of every piece of evidence in assessing how much weight it deserves. Direct or circumstantial evidence of an intent to target children with advertising for a product they cannot legally consume is particularly relevant to this inquiry. Alcohol advertising also poses difficult First Amendment issues because this advertising concerns behavior that is legal when directed to adults. Without evidence that a restriction on alcohol advertising will significantly reduce consumption by minors, the speech restriction may not survive First Amendment scrutiny.⁽³⁴⁾

Self-regulation may prove an alternative way to address advertising of beer, wine, and spirits that may be especially appealing to or directed to minors. In light of the governmental interest in the effect of alcoholic beverage advertising on children, industry might wish to forestall possible "fix-it-for-you" solutions by coming up with its own fix through industry codes and self-regulatory enforcement mechanisms.

C is for Camel . . .

You might have noticed a few headlines over the past several months about the Federal Trade Commission's administrative complaint against R.J. Reynolds Tobacco Company. The complaint charges that the Joe Camel advertising campaign is an unfair practice that violates Section 5 of the FTC Act. Since the case is in litigation, over my objection, I will not answer any questions about it here. But I can describe what is already on the public record about the majority's decision to bring the case and the opposing views expressed by me and the other dissenting Commissioner.

The complaint alleges that the Joe Camel campaign was intended to make the brand attractive to younger smokers and that one of its targets was "first usual brand" smokers.⁽³⁵⁾ It also alleges that the campaign successfully appealed to children and adolescents under 18, and induced many of them to smoke or increased the risk that they would do so.⁽³⁶⁾ Additionally, it charges that, for many children and underage adolescents, the Joe Camel campaign caused or was likely to have caused them to begin smoking or to continue smoking.⁽³⁷⁾ Shortly after the campaign began, the percentage of children who smoked Camel cigarettes allegedly became larger than the percentage of adults who smoked Camels.⁽³⁸⁾ In addition, Reynolds allegedly knew or should have known that because of the themes and techniques used in the campaign it would have a substantial appeal to children and adolescents below the age of 18, not just to smokers over the age of 18.⁽³⁹⁾ Moreover, Reynolds allegedly knew or should have known that many smokers begin smoking and become regular smokers before age 18, and that by targeting first usual brand smokers the Joe Camel campaign would cause many minors to smoke Camel cigarettes.⁽⁴⁰⁾ The complaint alleges that consumers who smoke risk addiction and serious adverse health effects, and that many children do not comprehend the nature of the risk or seriousness of nicotine addiction or the other dangerous health effects of smoking.⁽⁴¹⁾

If the complaint allegations are proved, then the Commission seeks an order that would prevent Reynolds from advertising Camel brand cigarettes to children through the use of images or themes related or referring to Joe Camel.⁽⁴²⁾ The order also would require a ten-year public education campaign to discourage minors from smoking.⁽⁴³⁾ Other relief would include a requirement that Reynolds collect and make available to the Commission data about sales of each brand of its cigarettes to persons under the age of 18, including brand share in the underage market.⁽⁴⁴⁾ Additionally, corrective advertising or affirmative disclosures might be ordered if necessary or appropriate, and, if the facts are found as alleged in the complaint, the Commission might seek restitution, refunds, and other types of relief under Section 19 of the FTC Act.⁽⁴⁵⁾

Commissioner Azcuenaga and I dissented from issuance of the Joe Camel complaint, because we concluded that the evidence, including evidence not before the Commission in 1994, was not sufficient to find reason to believe that the law had been violated.⁽⁴⁶⁾ Despite our concern for children's health and a strong intuitive link between the Joe Camel campaign and children's smoking, the information we looked at did not give us reason to believe there is a likely causal connection between the campaign and smoking by children. I also stated that it is not in the public interest for the Commission to expend its scarce resources on this litigation while other developments -- including the settlement discussions between tobacco companies and numerous states -- might largely duplicate any remedies the Commission might obtain. Indeed, the settlement reached in June between tobacco companies and state attorneys general would eliminate Joe Camel and the Marlboro Man.

Since I cannot say more about Joe Camel at this juncture, I'll take advantage of the fact that the letter C also stands for Cyberspace and I'll talk with you about advertising and marketing to children online.

... C is also for Cyberspace

Section 5 applies to online marketing and advertising, and the Commission has brought a number of cases involving pyramid schemes, credit repair scams, and the sale of business opportunities. None of these were directed at children, but Commission staff are actively monitoring children's advertising on the Internet and online services. I would not be surprised to see some cases involving children's online advertising down the road.

In June 1996, the Commission conducted a public workshop about Consumer Privacy -- including children's privacy -- on the Global Information Infrastructure. Technological tools for limiting children's access to sites and their ability to divulge personal information were discussed, as were various proposals for protecting children's privacy online. There was broad agreement that the elements of effective online consumer privacy protection included notice, choice, security, and access.

When it came to specific ways to accomplish these goals, however, opinions varied considerably. The Center for Media Education ("CME") and the Consumer Federation of America asked the Commission to issue guidelines for permissible industry practices for the collection and tracking of information from children online. Others urged the Commission not to take any action pending self-regulatory efforts by online marketers. The staff report on that workshop contains more detailed information, including a summary of a Commission staff survey of information practices on children's Web sites. You can find that report, and other materials about Commission activities, at our Web site (www.ftc.gov).

In June 1997, we held four additional days of hearings on Consumer Information Privacy, including the collection and use of information in computerized databases, the use of unsolicited commercial e-mail, and children's privacy online. The purpose of the second workshop was to gather new information, including surveys and other empirical data. Commission staff will consider the workshop record and the comments filed to help determine what, if any, further action to recommend in the area of online privacy protections.

Information gathered at our workshops confirms that many children's Web sites collect personal information. Online technology allows marketers to track children's behavior -- to see what sites a child visits and how long the child lingers at a site. By the use of surveys -- sometimes in the form of registration screens that must be completed to access a site or be eligible for a prize -- the site owner can collect other valuable marketing information. All of this information helps marketers identify new consumers at little additional cost, and may allow companies to target consumers very narrowly according to their individual interests.

Most children's Web sites seem to use children's information only for internal purposes, but some disseminate the information more broadly. Only a few provide notice to parents or a way for parents to limit disclosure of the information that is collected. Survey research submitted at the workshop revealed that parents care deeply about the collection and use of their children's information. According to a survey conducted by Louis Harris & Associates, 97% of parents whose children are online believe that Web sites should not collect children's real names and addresses and sell or rent that information to others. Even if children's personal information is used only within the company collecting it, 72% of the parents surveyed oppose its collection. Other attitude surveys presented at the workshop show that parents want to be empowered to be parents on the Net: to have some degree of control over what information their children may provide to others.

Workshop participants were divided over how to accomplish this. Some stressed technological solutions that may help protect children from data collection not authorized by their parents, and provide a means for obtaining consent from parents or others responsible for supervising children. A number of software blocking and filtering products are available now. Testing by an independent consumers' organization, however, shows that many of these can be circumvented and other testimony indicates that parents -- whose computer skills may lag behind those of their children -- need further education and experience to use these tools effectively.

Many workshop participants argued that self-regulation could resolve concerns about children's privacy online, combined with government enforcement against practices that

violate current laws. Several industry guidelines for the collection and use of children's information have recently been announced, and efforts to educate businesses and seek compliance are underway. For example, the Children's Advertising Review Unit ("CARU") of the Council of Better Business Bureaus recently updated its voluntary Guidelines on Children's Advertising to cover marketing to children through interactive electronic media. CARU was established in 1974 by the advertising industry to promote responsible children's advertising. Its self-regulatory guidelines cover a host of concerns, including deception, taking into account children's limited capacity to evaluate the credibility of information they receive.

CARU is in the process of contacting several advertisers that U.S. consumer groups have identified as using possibly deceptive or unfair practices relating to the collection and use of information from children. According to CARU's testimony at the Commission's recent hearings, the advertisers it has contacted so far uniformly have expressed willingness to change their practices to conform with the guidelines. Failure to comply will result in enforcement through self-regulatory review, publication of decisions, and, if necessary, referral to the Federal Trade Commission.

A few participants echoed CME's call for government guidelines on children's privacy. Generally, however, workshop participants favored self-regulation, the development of technological tools to protect privacy, and limitation of government action to narrow circumstances, such as failure to comply with a stated privacy policy.

In my view, it is important to keep in mind exactly what the FTC can and cannot do in the privacy area. We can pursue deceptive practices, such as a false representation that a site will collect information only for one purpose when in fact the site is using it in other ways. We cannot enforce against violations of an industry code unless they also are violations of the FTC Act or another statute we enforce. For example, an explicit claim that a marketer complies with a particular industry code, when in fact it does not, would violate the FTC Act.⁽⁴⁷⁾

We also can pursue unfair practices as defined by the FTC Act. Testimony at the workshop shows that the collection and dissemination of personally identifiable information from children can expose them to being targeted by predators. There are safety risks involved in online activities that encourage children to provide their full names, street addresses, or E-mail addresses in a way that is accessible to other persons. Some forms of collection and dissemination of children's personal information, without adequate safeguards, might be challenged successfully under the FTC Act as unfair practices based on a likelihood of serious harm to children.

For a more detailed discussion of how the FTC Act applies to online collection and use of information from children, I suggest you take a look at the letter our staff released last week in response to a petition filed by CME. CME asked the Commission to investigate alleged deceptive and unfair practices of "KidsCom," a children's Web site that uses an online survey and an e-mail pen pal program. The staff response outlines several principles that the staff believes should generally apply to the online collection of personally identifiable information from children. The staff concludes that it is a deceptive practice to represent that information is being collected for one purpose when it will also be used for another purpose that parents would find material, unless there is a clear and prominent notice to a parent. The letter also states that it likely is an unfair practice to collect personally identifiable information from children and sell or disclose that information without providing parents with notice and an opportunity to control its collection and use. According to FTC staff, an adequate notice should include: who is collecting the personally identifiable information, its intended use or uses, to whom and in what form it will be disclosed to third parties, and how parents may prevent the retention, use, or disclosure of the information. Parental consent must be obtained *before* children's personally identifiable information is released to a third party. Staff's letter is

available on the Commission's Web site.

Conclusion

While I will not make predictions about particular investigations or cases, I can assure you that protecting children from unfair and deceptive practices is likely to remain a priority at the FTC. Self-regulation and consumer education can go a long way toward accomplishing this goal, and I can predict that the Commission will continue to encourage private efforts to empower parents and protect children. We cannot and should not dictate the form of self-regulation, however, or attempt to regulate by threat of Commission action in areas where we lack authority. To do so needlessly risks stifling the burgeoning innovative efforts of the private sector.

1. The views that I express here today are my own, and do not necessarily reflect those of the Commission or any other Commissioners.

2. ² 15 U.S.C. § 45(a).

3. Letter from the Federal Trade Commission to Hon. John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (Oct. 14, 1983), reprinted in *Cliffdale Assoc., Inc.*, 103 F.T.C. 110, 174 (1984).

4. Deception Statement at 178-79.

5. See *Ideal Toy*, 64 F.T.C. 297, 310 (1964).

6. See *Lewis Galoob Toys, Inc.*, 114 F.T.C. 187 (1991).

7. *Id.*

8. 15 U.S.C. § 45(n).

9. See *Philip Morris, Inc.*, 82 F.T.C. 16 (1973).

10. See *Uncle Ben's Inc.*, 89 F.T.C. 131 (1977); *Mego International*, 92 F.T.C. 186 (1978).

11. See *Warner Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

12. *Azrak-Hamway International, Inc.*, Docket No. C-3653 (1996).

13. *U.S. v. Hasbro, Inc.*, No. 96-451P (D.R.I. Aug. 6, 1996).

14. *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996).

15. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

16. See *Central Hudson*, 447 U.S. at 563; *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72 (1976).

17. *Central Hudson*, 447 U.S. at 566.

18. See *Warner Lambert*, 562 F.2d at 758; *Beneficial Corp. v. FTC*, 542 F.2d 611, 620 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

19. ¹⁹ The Court stated that "[w]ithout any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance. Although the record suggests that the price advertising ban may have some impact on the purchasing patterns of temperate drinkers of modest means, the State has presented no evidence to suggest that its speech prohibition will *significantly* reduce market-wide consumption." *44 Liquormart*, 116 S. Ct. at 1509 (emphasis in original) (citations omitted).

20. ²⁰ "[A]ny conclusion that elimination of the ban would significantly increase alcohol consumption would require us to engage in the sort of 'speculation or conjecture' that is an unacceptable means of

demonstrating that a restriction on commercial speech directly advances the State's asserted interest. Such speculation certainly does not suffice when the State takes aim at accurate commercial information for paternalistic ends." *Id.* at 1510 (citations omitted).

21. ²¹ See Letter from the Federal Trade Commission to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate (Dec. 17, 1980) ("Unfairness Policy Statement"), *appended to International Harvester Co.*, 104 F.T.C. 949, 1070 (1984).

22. 15 U.S.C. § 57a(i).

23. 15 U.S.C. § 57a note.

24. *Phone Programs, Inc.*, 115 F.T.C. 977 (1992); *Teleline, Inc.*, 114 F.T.C. 399 (1991); *Audio Communications, Inc.*, 114 F.T.C. 414 (1991). See also *Fone Telecommunications, Inc.*, 116 F.T.C. 426 (1993).

25. 16 C.F.R. §§ 308.3(e), (f).

26. ²⁶ *R.J. Reynolds Tobacco Co.*, File No. 932-3162 (Joint Statement of Commissioners Mary L. Azcuenaga, Deborah K. Owen, and Roscoe B. Starek, III) (June 6, 1994).

27. ²⁷ 15 U.S.C. § 45(n).

28. *Id.*

29. ²⁹ *Sears, Roebuck and Co.*, File No. 972-3187 (consent agreement accepted for public comment) (June 3, 1997) (unlawful collection of debts that were legally discharged in bankruptcy proceedings); *FTC v. David L. Amkraut*, Civ. 97-054-RSWL(BQRx) (C.D. Cal. 1997) (submitting disqualifying, multiple entries on behalf of his clients in State Department's green card lottery; failing timely to forward to lottery winners the materials necessary for them to apply for visas); *FTC v. Diversified Marketing Service Corp.*, Civ. 96-0388M (W.D. Okla. 1996) (unauthorized bank debits and credit card charges); *FTC v. Windward Marketing, Ltd.*, 1:96-CV-615-FMH (N.D. Ga. 1996) (same). See also *R.J. Reynolds Tobacco Co.*, Docket No. 9285 (complaint issued May 28, 1997) (allegedly inducing children to smoke or continue smoking through advertising campaign).

30. The Commission shares jurisdiction with the Bureau of Alcohol, Tobacco and Firearms ("BATF") over deceptive alcohol advertising. The Federal Alcohol Administration Act authorizes the BATF to prevent false, misleading, obscene, or indecent statements in advertisements of distilled spirits, wine, or malt beverages. 27 U.S.C. § 205(f). BATF also has authority over alcohol product labeling and pre-approves package labels. 27 U.S.C. § 205(e).

An agreement between the FTC and the FCC recognizes that the FTC has primary responsibility with respect to unfair or deceptive advertising in all media, including the broadcast media. Liaison Agreement Between Federal Communications Commission and Federal Trade Commission (Apr. 27, 1972), 4 Trade Reg. Rep. (CCH) ¶ 9852.

31. *Canandaigua Wine Co.*, 114 F.T.C. 349 (1991).

32. ³² *Health Warnings on Alcoholic Beverage Advertisements: Hearings on H.R. 4493 Before the Subcomm. on Transportation and Hazardous Materials of the Committee on Energy and Commerce, United States House of Representatives*, 101st Cong., 2d Sess. 35-41 (1990)(statement of Janet D. Steiger, Chairman, FTC).

33. ³³ U.S. Dept. of Health and Human Services, Public Health Service, National Institutes of Health, National Institute of Alcohol Abuse and Alcoholism, The Effects of the Mass Media on the Use and Abuse of Alcohol, at v (1995).

34. ³⁴ *But see Anheuser-Busch v. Schmoke*, 101 F.3d 325 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997); *Penn Advertising v. Mayor of Baltimore*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997).

35. *R.J. Reynolds Tobacco Co.*, Docket No. 9285 (complaint issued May 28, 1997), Complaint ¶ 6.

36. *Id.*, Complaint ¶¶ 7-8.

37. *Id.*, Complaint ¶ 8.

38. *Id.*, Complaint ¶ 9.

39. *Id.*, Complaint ¶ 10.a.

40. *Id.*, Complaint ¶ 10.b.

41. *Id.*, Complaint ¶¶ 11-12.

42. *Id.*, Notice Order ¶ I.

43. *Id.*, Notice Order ¶ III.

44. *Id.*, Notice Order ¶ II.

45. *Id.*, Notice Order at 1-2.

46. Dissenting Statement of Commissioner Roscoe B. Starek, III in *R.J. Reynolds Tobacco Co.*, Docket No. 9285 (May 28, 1997); Statement of Commissioner Mary L. Azcuenaga in *R.J. Reynolds Tobacco Co.*, Docket No. 9285 (May 28, 1997).

47. See *American Body Armor and Equipment, Inc.*, Docket No. C-3539 (Oct. 21, 1994) (consent order addressing alleged false representation that bullet-resistant vests complied with government agency's voluntary performance standard).

Re: FIC report

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

Office of Congressional Relations

David Thomas
DirectorDirect Dial
(202) 326-2195

FAX

To: Anne O'Leary

Office: _____

Fax No: 456.2878Page 1 of: 6Date: 10/05/00From: David Thomas

Subject: _____

To: Karin Kullman
Cathy Mays

FYI

From: Ann OZ.

JOHN ASHCROFT
MISSOURI

e-mail:john_ashcroft@ashcroft.senate.gov

United States Senate

WASHINGTON, DC 20510-2504

September 15, 2000

Mr. Robert Pitofsky
Chairman, Federal Trade Commission
Sixth Street, and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Chairman Pitofsky:

As the Chairman of the Senate Commerce Committee's Subcommittee on Consumer Affairs, Foreign Trade and Tourism, I commend the Federal Trade Commission's (FTC) work on the issue of marketing violent materials to our children. I was deeply concerned to learn that the FTC found that the entertainment industry deliberately and routinely targets very violent material to children.

The FTC's work has contributed significantly to our understanding of how - and why -- our children are exposed to so much violent material. I compliment you for your efforts.

As you are aware, at the hearing, I voiced concern that elected officials would try to deal with the FTC's findings by publicly claiming to be outraged by Hollywood's marketing tactics, while giving private assurances to this industry that nothing meaningful would be done to change business as usual. As you must know, media reports have said that the Vice President was in possession of the key study findings prior to its official release on September 11, and that he was in touch with people in the entertainment industry over the weekend. If the report findings were conveyed to the industry you investigated due to advance knowledge you had provided to an elected official or a candidate, this clearly would undermine confidence in the FTC as a tough and unbiased investigative agency. In order to get to the facts about any advance release of your findings, I ask that you provide my office with the dates, prior to its official release, on which copies of the report, executive summaries or staff briefings were provided by the agency to elected or appointed officials or their staffs; members of Congress, in either party; or private individuals.

The Honorable Robert Pitofsky
September 15, 2000
Page 2

Thank you for your attention to this matter. I look forward to your response as quickly as possible. If you have any questions or need more information, please call Lori Sharpe of Senator Ashcroft's staff at 224-6154 with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a stylized flourish at the end.

John Ashcroft

JDA/las

cc: The Honorable John McCain, Chairman of the Senate Committee on
Commerce, Science and Transportation



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

October 5, 2000

The Honorable John Ashcroft
United States Senate
316 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Ashcroft:

Thank you for your recent letter regarding the report of the Federal Trade Commission ("FTC") on the marketing to children of violent entertainment products labeled or rated by industry with parental warnings. As you know, President Clinton asked the FTC and the Department of Justice ("DOJ") to conduct a study of the marketing practices of the movie, music recording, and computer and video game industries. You have asked that we provide the dates of any advance release of the report or executive summaries as well as the dates of staff briefings of elected or appointed officials or their staffs, members of Congress, or private individuals. I am providing the information you requested in the following brief summary of staff activities relating to release of the report. As indicated below, we provided staff briefings in response to requests from appropriate Congressional Committees and the White House.

On August 3, 2000, in response to a request from Senator John McCain, Chairman of the Senate Committee on Commerce, Science, and Transportation, FTC staff provided a comprehensive briefing to Committee staff on the status of the report, the scope of the Commission's study of the issues and staff's findings to date, including methodology of the study, findings with respect to target marketing and sales practices of each industry studied, and proposed staff recommendations. On August 22, 2000, in response to a White House request, the White House Domestic Policy staff for the President and Vice President received a briefing on the status and scope of the report, including tentative views and the likely timing for release. On August 28, 2000, FTC staff forwarded a redacted draft copy of the report and appendices to DOJ's Office of Juvenile Justice and Delinquency Prevention ("OJJDP") for its review and comments. DOJ provided funding and technical assistance to the FTC for this study.

On August 30, 2000, in response to a request from Senators Mike DeWine and Herb Kohl, Chairman and Ranking Member, respectively, of the Senate Judiciary Committee's Subcommittee on Antitrust, Business Rights and Competition, FTC staff provided a comprehensive briefing to Subcommittee staff on the status of the report, the scope of the Commission's study, and staff's findings to date, including methodology of the study, findings with respect to target marketing and sales practices of each industry studied, and proposed staff

Senator Ashcroft -- Page 2

recommendations. Committee staff for Senator Hatch also attended this briefing. On the same day, in response to a request from Congressman Henry Hyde, Chairman of the House Committee on the Judiciary, FTC staff also provided a similar briefing for House Judiciary Committee staff. Staff for Senator Brownback also attended this briefing.

On September 1, 2000, FTC staff forwarded a draft copy of the executive summary of the report to OJJDP for review. On that same date, in response to a request from Senators John McCain and Ernest F. Hollings, Chairman and Ranking Member, respectively, of the Senate Commerce Committee, FTC staff provided a comprehensive briefing to Commerce Committee minority staff on the status of the report, the scope of the Commission's study of the issues, and staff's findings to date, including methodology of the study, findings with respect to target marketing and sales practices of each industry studied, and proposed staff recommendations. The briefing for minority staff continued on September 6, 2000, and staff for Senator Lieberman attended this session.

On September 8, 2000, the Commission voted to issue the report. On that same date, Commission staff provided an embargoed copy of the executive summary of the report to *Advertising Age*, with the understanding that there would be no public release of information in the report until September 11, 2000. On September 8, 2000, Commission staff also responded by telephone to a request from White House Domestic Policy staff for the Vice President for information as a follow up to the August 22, 2000 briefing. This conversation dealt with questions on the timing of issuance of the report, along with an overview of the methodology of the study.

On September 9, 2000, Commission staff provided copies of the final report to Senators John McCain and Ernest F. Hollings and to the White House Domestic Policy staff for the President and the Vice President. On September 11, 2000, at 8:30 a.m., Commission staff made copies of the final report available for pick-up by the entertainment industry trade associations. At 9:00 a.m., with the assistance of Senate Commerce Committee staff, FTC staff provided an open briefing on the report to all interested Congressional staff. At 10:00 a.m., the Commission held a press conference at which time the agency presented the report to the American public.

I hope that this information is helpful. If you have any questions, please contact David Thomas, the Commission's Director of Congressional Relations, at 326-2468.

Sincerely,



Robert Pitofsky

Senator Ashcroft -- Page 3

cc: The Honorable John McCain
Chairman, Senate Committee on Commerce,
Science and Transportation

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September 14, 2000, Thursday, Late Edition - Final

SECTION: Section C; Page 1; Column 5; Business/Financial Desk

LENGTH: 1497 words

HEADLINE: Commercialism In U.S. Schools Is Examined In New Report

BYLINE: By CONSTANCE L. HAYS

BODY:

From exclusive soft-drink contracts to computers displaying continuous advertising, corporate marketing in public schools is rising sharply. But few states have laws in place to address the phenomenon, and most decisions on commercial arrangements in schools are made piecemeal by local officials, according to a report from the General Accounting Office scheduled to be released today.

"In-school marketing has become a growing industry," the report stated. "Some marketing professionals are increasingly targeting children in schools, companies are becoming known for their success in negotiating contracts between school districts and beverage companies, and both educators and corporate managers are attending conferences to learn how to increase revenue from in-school marketing for their schools and companies."

Until now, there has been no comprehensive effort to measure the number of commercial contracts with schools. But school board officials, consultants and nonprofit organizations that follow education issues say it is clear that such contracts are far more common now than they were even two years ago.

About 25 percent of the nation's middle schools and high schools now show Channel One, a broadcast of news features and commercials, in their classrooms, and about 200 school districts have signed exclusive contracts with soft-drink companies to sell their beverages in schools. And in at least one case, students using computers in classrooms were offered incentives to enter personal data -- names, addresses, information on personal habits -- which would then be sold to advertisers.

Recognizing that the nation's 47.2 million students are an increasingly lucrative target market for consumer product companies, school districts are often willing to join with corporations. They see the money as one way to supplement tight budgets without having to raise taxes. But at the same time, few school officials are an even match for experienced corporate marketers. "They're trained in the three R's, and the R's don't include retail," one North Carolina school official noted last year.

Over the last three years, many school districts have signed contracts with soft-drink giants like Coca-Cola and Pepsico, in which vending machines in hallways function as glowing billboards for their brands. A math textbook published in 1995 by McGraw-Hill and approved for use in about 15 states names many consumer products, including Gatorade, Sega and Sony video games and Nike sneakers, in its problems. McGraw-Hill said it received no compensation for the use of the corporate names.

Companies like Zap Me, which is based in San Ramon, Calif., offer schools free computers with screens that include continuously flashing ads. Zap Me also collects information that students provide and makes it available to its advertisers -- including Microsoft and Toshiba,

which also supply the computers -- said Bob Stern, a spokesman for the company.

The G.A.O. report cites textbook covers distributed by Clairol, Ralph Lauren, Reebok and Philip Morris with company names and logos fully displayed. In New York City, the Board of Education is considering a plan that would provide computers for all of its students, starting in the fourth grade. The computers might carry ads and possibly encourage shopping on a particular Web site.

A spokesman for the National Soft Drink Association said local bottlers signed contracts with the schools in part to support the schools and in part to promote their products. "The brand loyalty that is gained by having these products available to kids when they get thirsty during the day is valuable to these companies," said Sean McBride, the spokesman.

All the activity has aroused concern in communities from Montclair, N.J., to Madison, Wis., to Birmingham, Ala., where companies have made deals with schools that let them promote their products to students. The demand for product placement in schools has even created a separate consulting niche.

School districts are expected to make decisions about commercial agreements using their own discretion, said Renee Williams Hockaday, a spokeswoman for the National School Boards Association in Alexandria, Va. "It is obviously a growing issue," she said, adding that the agreements "could be something positive, as long as the students don't turn into walking advertisements for these companies with no benefit to their learning environment."

The report, prepared over the last year, is the first government study to address **commercialism in schools**. It stops short of pinpointing the effects of in-school advertising, noting that "because advertising is ubiquitous in America, it is difficult -- if not impossible -- to distinguish between the effects of advertising to which students are exposed inside and outside of school." The G.A.O. will study the issue again in the next year or so and quantify the spread of commercial activity in schools.

The report, which includes color photographs of ads atop school bus stops, over computer carrels and on soda vending machines, was ordered by Representative George Miller, a Democrat of California, and Senator Christopher J. Dodd, a Democrat of Connecticut. In an interview, Mr. Miller said he was prompted by concern over data being collected about students through computers given to their schools by Zap Me.

"Not a lot of attention is being paid to whether parents agree with this or want their children to participate or not participate," he said. "Sometimes parents have a different opinion from that of the superintendent or the school board."

Senator Dodd said he planned to send letters to parent-teacher groups around the country to urge them to read the report. There is still time, he said, for lawmakers and others to resolve the issues. "This hasn't gotten totally out of hand yet," he said. "Most schools are still doing a pretty good job." He added, however, that he was shocked that many schools said they were unaware that the "free" computers they received from companies could be used to collect, and sell, marketing data from their students.

"There is a tremendous amount of information being solicited and used to market back to kids without administrative consent or parental consent," he said. "If you had an 8-year-old or a 10-year-old, would you allow someone to come into your house to do a survey on your child without your consent?"

The report is being hailed by some as proof that commercial activity in schools is a growing threat. "This is the first official government confirmation that **commercialism in schools** is a problematic issue," said Andrew Hagelshaw, director of the Center for Commercial-Free Public Education in Oakland, Calif., which has waged many grass-roots battles against soft-drink

contracts and Channel One. "Public schools are publicly funded and are supposed to be the one place where kids don't get advertised to. It's completely inappropriate to turn that venue into a place where companies get to promote brand-name products."

Mr. Hagelshaw said he had seen something of a backlash against **commercialism in schools** recently. Last year, the 15-million-member Southern Baptist Convention passed a resolution against Channel One, because it advertises to schoolchildren. In Madison, Wis., one of the first school districts to sign an exclusive contract with Coca-Cola, the school board recently voted not to renew the arrangement. San Francisco earlier this year turned down an exclusive contract with Pepsi, Mr. Hagelshaw said.

Another longtime critic of commercial activity in schools predicted that the report would encourage state legislatures to act. "This is going to raise the visibility of this issue enormously," said Alex Molnar, a professor of education at the University of Wisconsin-Milwaukee, who directs the university's three-year-old Center for the Analysis of Commercialism in Education.

Mr. Miller and Mr. Dodd have sponsored a bill, now part of the Elementary and Secondary Education Act, that is pending before the House and would require parental consent for market-research activities in schools.

"Let's not pretend this is child's play," Mr. Miller said. "This is not some benevolent effort to give away computers. This is a cold, calculating effort to make customers out of children."

Mr. Molnar says students could be harmed by the promotion of products through schools. "One could argue that a person comes to the marketplace skeptical, as a consumer," he said, "but in a school, everything that's going on is supposed to be good for you. When you take that venue and you exploit it for a particular special interest, you do a lot of damage to children." For example, he added, soft drinks, candy, snack food and fast food are all advertised in schools in many places, lending them a credibility they may not deserve nutritionally.

"Ultimately, this is the kind of thing that promotes cynicism in children," he said.

<http://www.nytimes.com>

GRAPHIC: Photo: A Coca-Cola vending machine sits near the gym entrance at Rodgers High School in Toledo, Ohio. The soft-drink company has signed a \$4.5 million deal with the school system to be its exclusive soda seller. (Associated Press)(pg. C25)

LANGUAGE: ENGLISH

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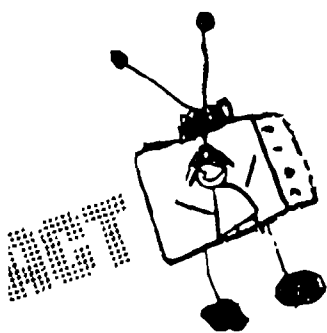
This cover sheet is page 1 of _____ pages.

Special Instruction

PARTIAL LIST OF GROUPS AND INDIVIDUALS OPPOSING
COMMERCIALS IN THE CLASSROOM

January 1990

Alabama State Department of Education
California State Department of Education
Massachusetts Department of Education
New York State Board of Regents
Rhode Island State Department of Education
Wyoming State Department of Education
Action for Children's Television
American Association of Colleges for Teacher Education
American Association of School Administrators
American Montessori Society
American Public Health Association
American Youth Work Center
Association for Childhood Education International
Association for Supervision and Curriculum Development
The Center for Collaborative Education
Cincinnati Federation of Teachers
National Council for the Social Studies
National Association of Elementary School Principals
National Association of Secondary School Principals
National Association of State Boards of Education
National Consumers League
National Council of Catholic Women
National Education Association
National PTA
North American Federation of Temple Youth
Office of Communication, United Church of Christ
Strategies for Media Literacy
Professor John Condry, Cornell University
Professor Neil Postman, New York University
Professor Bruce Watkins, University of Michigan
Patricia Albjerg Graham, Dean, Harvard Graduate School of Education
Jean Mayer, President, Tufts University
American Federation of Teachers



ACTION FOR CHILDREN'S TELEVISION
20 UNIVERSITY ROAD
CAMBRIDGE, MA 02138 617-876-6620

Dear Friends:

Action for Children's Television (ACT) is leading a nationwide campaign to block the attempt by Whittle Communications to introduce TV commercials into schools. We are sending the enclosed information to organizations and individuals concerned with children and education in the hope that it will fuel efforts to assure that public education in the United States remains free of commercialization.

Whittle Communications is an agency in the business of putting advertisers together with new audiences. Its clients are companies that want to sell directly to young people. Whittle's plan is to provide free TV monitors, VCRs and a satellite connection to enable schools to receive two minutes of advertising per day. As a framework for the ads, Whittle will supply, at no cost, "Channel One," a ten-minute TV news program to be broadcast to students each day.

Pilot tests begin in six schools on March 6, 1989. Whittle's goal is to beam "Channel One" into 8,000 middle and high schools across the country by 1990, reaching 6.5 million students. This audience size is achieved on broadcast television only by events such as the Super Bowl.

The important thing to remember is that Whittle's primary deal is with advertisers. Giving schools a news show is secondary. Whittle has designed a clever way to assure that the school will deliver to the show's sponsors, on a "cost per thousand" basis, **students who are mandated by law to attend school.**

Schools find Whittle's proposition seductive because they get TV equipment and programming without spending a cent. However, such largesse carries a price: every day schools must serve up their children to satisfy advertisers' expectations. School officials who focus on the short-range advantages may forever regret the long-term consequences.

ACT urges you to join our coalition of educators, parents, advocacy and public policy groups to fight this shocking misuse of America's schools. Your immediate help is needed to promote awareness of the Trojan Horse aspect of this issue and to rally support.

Cordially,

Peggy Churnen

Peggy Churnen
President

ELLEN GOODMAN

An overdue slap at entertainment industry

TALK ABOUT your ingrates.

On Sunday night the entertainment industry virtually passes over the Mafia in the "The Sopranos" to give nine Emmys to the politicians in "The West Wing," a show that treats pols better even than Oprah Winfrey does.

Then Monday morning, what happens? The government kneecaps the industry for marketing violence to kids.

As if that weren't bad enough, Hollywood antes up more than 13 million bucks for the Democrats, much of it to enable Al and Joe to k their wares on TV. In return, the duo lambastes them for false and deceptive advertising.

What would Tony Soprano have to say about all that?

This is the gist of the Federal Trade Commission report: After combing the industry's own incriminating papers, they conclude that the entertainment folks are violating their own ratings systems.

The people who market music, movies, video games, and TV shows put together an assortment of guidelines to help parents monitor the level of violence the kids are exposed to. And then they deliberately execute an end run around parents to market no-nos to kids.

Eighty percent of the violent movies, 70 percent of the violent electronic games, and nearly all of the music with explicit lyrics were in one way or another marketed and/or targeted to the under-17 market.

One infamous memo stated its goal for an R-rated movie: "to find the elusive teen target audience and make sure everyone between the ages of 12-18 was exposed to the film." Another memo positioned its M-rated video game at "males 12-17."

None of this should be a surprise to parents who have heard Eminem emanating from a child's bedroom or discovered that "all the kids" went to the R-rated movie at the Cineplex.

But now we know that the industry is actually marketing against, over, and around its own alleged "standards." To use everyone's favorite analogy, it's like the tobacco companies pitching forbidden underage customers. Ride 'em Joe Camel.

Of course, at their best, ratings are a lousy defense system against incoming entertainment missiles anyway. A label on the cigarette package is nowhere nearly as effective as the ad showing the lifestyles of the thin, glamorous, and nicotine addicted.

And similarly the ratings on movies, CDs, or video games — why do they call the worst stuff Adult and Mature? —



them out.

So the FTC's suggestion for a unified rating system is fine, but not very helpful to parents who have become nothing but roadkill on the way to the box office. The major point is that the entertainment industry is deliberately, knowingly, undermining the culture and values that parents want for kids.

In his generic sound bite answer to concerns about violence, Jack Valenti, the head of the Motion Picture Association of America, said "If movies are causing moral decay, then crime ought to be going up, but crime is going down." But nobody claims a direct correlation between a murder movie and a murder rate. The effect of violence is far more subtle and far more pervasive.

It makes the world seem a more dangerous place. It makes kids less sensitive to hurt. It makes aggression seem "cool." It promotes the bizarre notion that violence is entertaining. It not only heightens but exports a thoroughly warped view of American culture to the entire world.

This is not just a children's issue or a mother's issue, though women may be more appalled at the "entertainment" that portrays us as victims of rap and rape. More appalled when our sons and daughters are fed these visions and roles.

It's still an issue, however, that has touched deep feelings of impotence among parents, even those who don't believe in censorship and do watch "The Sopranos."

The entertainment industry has been caught. Caught making a mockery of self-regulation. Caught in an end run around parents. Caught in a power grab for kids. At the very, very least the industry has to be held to the standards they set for children and be forced to keep the no-nos they

"Frankly, if I were running for office, I'd be trashing the movie industry myself," says a cynical Valenti. But even when Hollywood is smarting from ungrateful pols, it doesn't make a very convincing whipping boy.

This season, whoever finds a way to empower parents may find himself with more than a cameo role in the West Wing.

Ellen Goodman's e-mail address is ellengoodman@globe.com.

Sunday, Sept. 24
Boston Globe



Peggy Charren
975 Memorial Drive #504
Cambridge, MA 02138
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FAX TRANSMISSION

FROM: Peggy Charren

TO: Anne O'Leary

COMPANY: Whitehouse

CESAR FAX

September 25, 2000

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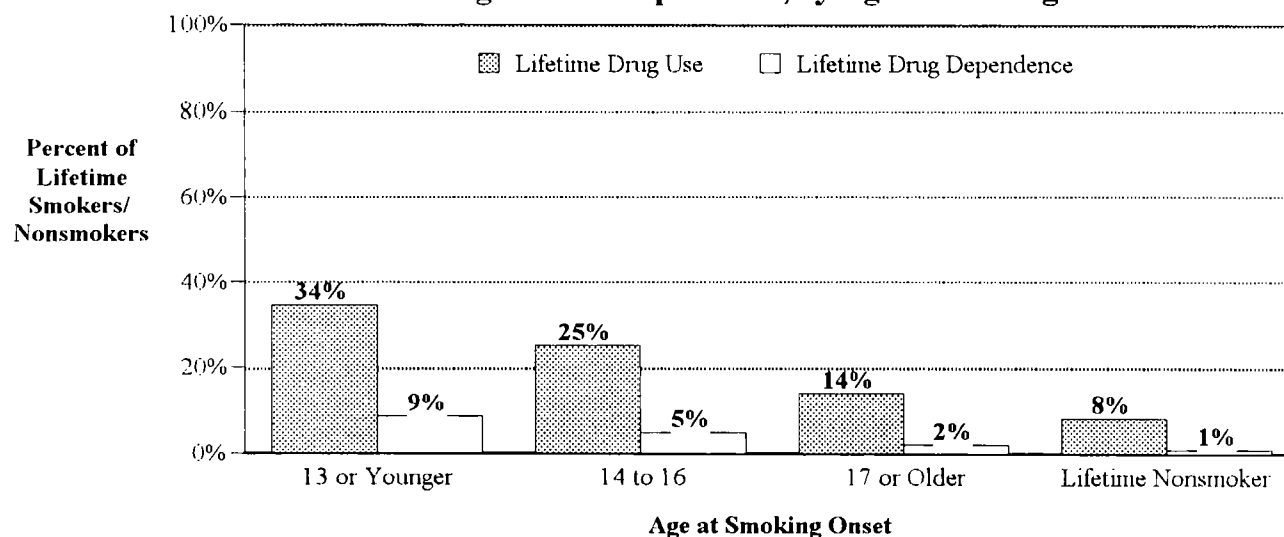
A Weekly FAX from the Center for Substance Abuse Research

University of Maryland, College Park

Early Onset of Smoking Related to Increased Risk of Drug Use and Dependence

Smokers who began smoking at a younger age were significantly more likely than those who began smoking at a later age to report lifetime drug use and dependence. According to an analysis of data from the 1992 National Longitudinal Alcohol Epidemiologic Survey (NLAES), lifetime smokers who reported first smoking regularly at age 13 or younger were nearly 2.5 times more likely to report lifetime drug use than were those who began smoking at age 17 or older (34% vs. 14%, respectively). Furthermore, those who began smoking at age 17 or older were nearly twice as likely as nonsmokers to report lifetime drug use (14% vs. 8%, respectively). Similar findings were found for lifetime drug dependence. According to the 1999 National Household Survey on Drug Abuse, the mean age of first cigarette use is currently 15.4 years old.

Percentage of Lifetime Smokers and Nonsmokers Reporting Lifetime Drug Use and Dependence, by Age at Smoking Onset



NOTES: Lifetime smokers were defined as those who had ever smoked 100 cigarettes, 50 cigars, or a pipe at least 50 times. Lifetime drug users were defined as those who had used any illicit drug at least once in their lifetime. Lifetime drug dependence was defined using DSM-IV criteria.

SOURCE: Hanna E.Z., Grant B.F., "Parallels to Early Onset Alcohol Use in the Relationship of Early Onset Smoking with Drug Use and DSM-IV Drug and Depressive Disorders: Findings From the National Longitudinal Epidemiologic Survey," *Alcoholism: Clinical and Experimental Research* 23(3):513-522, March 1999. For more information, contact Dr. Eleanor Hanna at ehanna@willco.niaaa.nih.gov.

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