

**Remarks of**

**J. Howard Beales, III**

**Before**

**George Mason Law Review 2004 Symposium on Antitrust  
and Consumer Protection  
Competition, Advertising, and Health Claims:  
Legal and Practical Limits on Advertising Regulation**

**March 2, 2004**

The views I express today are my own, and do not necessarily represent the views of the Commission or any individual Commissioner.

---

<sup>1</sup>Centers for Disease Control and Prevention (CDC), National Center for Health Statistics, National Health and Nutrition Examination Survey (NHANES): NHANES 1999-2000, Prevalence of overweight among U.S. children and adolescents.

<sup>2</sup>See

purchase or use decision.<sup>5</sup> Ads are interpreted from the standpoint of the reasonable consumer. If an ad is directed to children, the FTC will consider it from the standpoint of an ordinary child.<sup>6</sup>

The FTC's cases challenging deceptive performances in toy ads aptly illustrate the ordinary child standard. For example, the FTC has challenged advertisements showing a dancing ballerina doll spinning on her toes unassisted, and ads depicting toy helicopters hovering in mid air. A child would expect the toys to perform as shown in the ads, but these toys could not achieve these feats in real life.<sup>7</sup>

The Commission also has brought cases challenging claims regarding foods' nutritional content. For example, the FTC challenged ads claiming that Wonder Bread, as a good source of calcium, helps kids' minds work better and helps their memory.<sup>8</sup> The Commission challenged that claim as unsubstantiated; although calcium does affect brain function, there is no evidence that adding calcium to the diet will improve brain function.

The Commission has also challenged deceptive fat and calories claims made in food advertising. For example, an ad claimed that the Klondike Lite Ice Cream Bar was 93% fat free. The FTC alleged that claim was false because the bar actually had 14% fat when you included the bar's chocolate coating – and who's going to eat the bar without the coating? The Commission also challenged the implied claim that the bar was low in fat. The bar actually had 10 grams of fat per serving, well in excess of any reasonable level to support that claim.<sup>9</sup>

Similarly, an ad for Carnation Liquid Coffeemate showed the product being poured over fruit and cereal while claiming it was low in fat. The FTC challenged that claim because, while the express low fat claim was true for the one tablespoon serving appropriate for use in coffee, it was not true for the half cup consumers would use on cereal or fruit.<sup>10</sup>

Some of the cases we've brought under Section 5 of the FTC Act involving ads to kids have involved unfair practices. An act or practice is "unfair" if it causes or is likely to cause

---

<sup>5</sup>Deception Policy Statement, appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 168-170 (1984).

<sup>6</sup>Id. at 180.

<sup>7</sup>Hasbro, Inc., 116 F.T.C. 657 (1993) (consent order); Lewis Galoob Toys, Inc., 114 F.T.C. 187 (1991) (consent order).

<sup>8</sup>Interstate Bakeries Corp., 2002 F.T.C. LEXIS 20 (2002) (consent order).

<sup>9</sup>The Isaly Klondike Co., 116 F.T.C. 74 (1993) (consent order).

<sup>10</sup>Nestle Food Co., 115 F.T.C. 67 (1992) (consent order).

---

<sup>11</sup>15 U.S.C. § 45(n) (“The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”); Unfairness Policy Statement, appended to International Harvester Co., 104 F.T.C. 949, 1070 (1984).

<sup>12</sup>E.g., Phone Programs, Inc., 115 F.T.C. 977 (1992) (consent order).

<sup>13</sup>The Commission also used its unfairness authority to challenge R.J. Reynolds’ Joe Camel advertising campaign. Although widely misperceived as an action based on the cartoonish nature of the advertising, the Commission’s allegations were based on an extensive investigation, including extensive empirical studies of the effect of the advertising in the under-age market. However, the case was never resolved on the merits. Before Reynolds presented its defense, the FTC dismissed the case as moot in light of the 1998 State Attorneys General Master Settlement Agreement prohibiting the use of Joe Camel and all other cartoon characters in tobacco advertising. Federal Trade Commission News Release (Jan. 27, 1999), available at [www.ftc.gov/opa/1999/01/joeorder.htm](http://www.ftc.gov/opa/1999/01/joeorder.htm).

<sup>14</sup>Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992, 16 C.F.R. Part 308.

<sup>15</sup>Children’s Online Privacy Protection Rule, 16 C.F.R. Part 312.

---

<sup>16</sup>Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

<sup>17</sup>Id. at 566.

the Internet that “the governmental interest in protecting children from harmful materials does not justify an unnecessarily broad suppression of speech addressed to adults.”<sup>21</sup>

In contrast to government regulations, industry self-regulatory approaches do not have to satisfy First Amendment standards, and often are more flexible and adept at addressing concerns about advertising to kids than governmental regulation. For example, the Children’s Advertising Review Unit of the Better Business Bureaus, known as CARU, has voluntary guidelines for advertising to children under 12.<sup>22</sup> The guidelines emphasize that advertisers should not exploit children’s credulity; should not advertise inappropriate products or content; should recognize that children may learn practices affecting health or well-being from advertising; and should “contribute to the parent-child relationship in a constructive manner” and “support positive and beneficial social behavior.”<sup>23</sup> CARU has an active enforcement program, handling over 100 inquiries a year, with about 10% of those involving food ads.

The Commission has conducted studies and issued reports showing that self-regulation can be effective. For example, in response to Congressional requests, in 1999 and 2003 the FTC issued reports regarding alcohol marketing.<sup>24</sup> The alcoholic beverage industry has voluntary codes of conduct restricting where alcoholic beverage ads may appear. In its 1999 Report, the Commission found that only one-half of the alcohol companies were in compliance with the codes’ standard that alcohol ads should not be placed in media with a 50% or more under-21 audience.<sup>25</sup> To address this finding, the Commission recommended enhanced self-regulatory efforts and highlighted industry best practices that other industry members should follow. When

---

<sup>21</sup>Id. at 564 (citing Reno v. American Civil Liberties Union, 521 U.S. 844, 875 (1997) (striking down portions of the Communications Decency Act prohibiting transmission of obscene or indecent telecommunications to persons under 18)).

<sup>22</sup>Children’s Advertising Review Unit of the Better Business Bureaus, Self-Regulatory Guidelines for Children’s Advertising, available at <http://www.caru.org/guidelines/index.asp>.

<sup>23</sup>Id.

<sup>24</sup>Federal Trade Commission, Alcohol Marketing and Advertising: A Report to Congress (Sept. 2003) (“2003 FTC Alcohol Report”); Federal Trade Commission, Self-Regulation in the Alcohol Industry: A Report to Congress from the Federal Trade Commission (1999) (“1999 FTC Alcohol Report”).

<sup>25</sup>See generally 1999 FTC Alcohol Report.

<sup>26</sup>See generally 2003 FTC Alcohol Report.

---

<sup>27</sup>Federal Trade Commission, Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording and Electronic

After several years of consideration, in 1978 the FTC issued a Notice of Proposed Rulemaking seeking comment to explore the issues, including a staff proposal to consider three major alternative actions:

- Ban all television advertising to kids ages 8 and under, on the theory that these children are too young to understand advertising's selling purpose;<sup>32</sup>
- Ban television ads for the most cariogenic foods (*i.e.*, those foods most likely to cause tooth decay and cavities) to kids 12 and under; or
- Require television advertising for sugared food products to older children to be

---

<sup>32</sup>The staff ultimately concluded that the appropriate cut-off was 6 and under. FTC Final Staff Report and Recommendation, In the Matter of Children's Advertising, TRR No. 215-60 (Mar. 31, 1981) ("Final Staff Report re Children's Advertising"), at 18.

<sup>33</sup> 46 Fed. Reg. 43,710 (1981). Although the White House had changed hands in 1980, the determination to close the rulemaking was made by three of the four Commissioners who had initiated it, with the fourth, then-FTC Chairman Michael Pertschuk, recusing himself.



[T]he proposal, in reality, is designed to protect children from the weaknesses of their parents – and the parents from the wailing insistence of their children. That, traditionally, is one of the roles of a governess – if you can afford one. It is not a proper role of government.<sup>34</sup>

This is an important lesson that the FTC learned and it is even more true today. Parents in the year 2004 have many more options than did parents in the 1970s. Commercial-free television is readily available to any parent who thinks his or her child should be protected from Ronald McDonald or Cap'n Crunch, along with thousands of hours of commercial-free programming on videotape or DVD, as well as the technology to record programming and play it back without the advertising.<sup>35</sup> FTC law enforcement and rulemakings since kidvid, such as those I described earlier, have involved practices that parents themselves cannot control (for

---

<sup>34</sup>Editorial, The Washington Post (March 1, 1978), reprinted in Michael Pertschuk, Revolt Against Regulation, at 69-70 (1982). Former FTC Chairman Pertschuk characterizes the Post editorial as a turning point in the Federal Trade Commission's fortunes.

<sup>35</sup>In 1980, only 1% of U.S. households had VCRs and only 20% had cable TV. Last year, 91.5% had VCRs and 70% had cable. See Media Info Center, available at [www.mediainfocenter.org/compare/penetration](http://www.mediainfocenter.org/compare/penetration). In 1980, DVDs and Blockbuster did not exist.

<sup>36</sup>Final Staff Report re Children's Advertising at 3-4, 84-85.

<sup>37</sup>Id. at 73-77.

food labeling rule requiring foods to have a minimum amount of certain nutrients in order to make health claims (the so-called jelly bean rule) prevents health claims for many fruits and vegetables.<sup>38</sup> Good nutrition is about good diets, not “good” versus “bad” foods. That should be

---

<sup>38</sup>See 21 C.F.R. § 101.14(e)(6). But see 60 Fed. Reg. 66206 (discussing proposals to change the 10% nutrient contribution requirement for health claims and stating that although FDA has not been persuaded to amend the requirement, it agrees that the rule had the unintended consequence of precluding health claims for certain fruits and vegetables and therefore health claims should be allowed for such foods).

<sup>39</sup>Final Staff Report re Children’s Advertising, at 39.

<sup>40</sup>Id.

<sup>41</sup>Id. at 40-41.

small reduction in exposure to advertising would directly advance the government's interest is difficult.

Why is this different from alcohol advertising, where, as I noted earlier, the alcohol industry voluntarily limited under-age exposure to its ads by lowering the audience composition standard from 50% to 30% under-age? It's because the legal drinking age is 21, and far more programs are affected under the 30% standard than would be the case when younger age groups, such as under ages 8 or 12, are considered.

Thus, in the kidvid proceeding, the staff concluded that it was not feasible to impleo ime

---

<sup>42</sup>FTC Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980).

<sup>43</sup>See 139 Cong. Rec. S8253 (daily ed. June 22, 1993) (statement of Sen. Bryan); *id.* (statement of Sen. Gorton).

<sup>44</sup>See, e.g., 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Cincinnati v. Discovery Network, 507 U.S. 410 (1993); Board of Trustees of SUNY v. Fox, 492 U.S. 469

So let's consider how a proposed ban on children's advertising would fare under the Central Hudson test. The first prong is relatively easy to meet – I think we can assume there is a substantial government interest in protecting children's health. It would be much more difficult to meet the last two prongs of the test, however. I'm unaware of any compelling evidence that restricting junk food advertising to kids would directly advance kids' health. To reach that conclusion, one would need evidence on the link between such advertising and kids' health, that is, that the advertising itself (as opposed to just time in front of the TV) leads to increased caloric consumption leading to being overweight. The evidence suggests that kids today actually spend less time watching television than they did 20 years ago, but increasingly more time in front of largely food advertising-free computer screens.<sup>45</sup> Thus, it's far from clear that restricting television advertising would directly advance kids' health.

It may seem obvious that food advertising directed to children will cause children to eat more food (or more junk foods), and therefore to gain weight. However, this is surprisingly difficult to demonstrate. We know that advertising increases the demand for individual brands of food; otherwise, companies would not pay for the advertising. But if ads for one brand of candy merely steal market share from other brands of candy, they do not increase children's consumption of candy in general. Certainly in most markets, the great bulk of advertising's effect is to shift demand across brands, rather than to expand the demand for the entire product category.<sup>46</sup> Whether there is any market expansion at all remains highly controversial. In the markets for tobacco and alcohol products that have been studied extensively, some studies find

---

(1989); Riley v. National Fed'n of Blind, Inc., 487 U.S. 781 (1988); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983).

<sup>45</sup>The average amount of time children spent watching television actually declined from over 4 hours per day in the late 1970s to about 2 3/4 hours per day in 1999. See Federal Communications Commission, Television Programming for Children: A Report of the Children's Television Task Force (Oct. 1979) (the average preschooler watched television 33 1/2 hours per week (over 4 1/2 hours per day); the average school-aged child watched over 29 hours per week (over 4 hours per day), citing 1978 A.C. Nielsen Co. data); Kaiser Family Foundation, Kids and Media @ the New Millennium (Nov. 1999) (average child aged 2-18 spends 2 hours 46 minutes per day watching television). A 2000 survey found that children aged 2-17 spend an average of about 33 minutes per day playing video games. Kaiser Family Foundation, Children and Video Games (Fall 2002).

<sup>46</sup>See generally the line of research starting with J.J. Lambin, Advertising, Competition & Market Conduct in Oligopoly Over Time (1976) (finding that the bulk of advertising efforts serve to influence brand shares, but not overall demand for the industry); K. Bagwell, The Economic Analysis of Advertising, Handbook of Industrial Economics (2003) (forthcoming), available at [www.columbia.edu/~kwb8/](http://www.columbia.edu/~kwb8/) (provides a survey of Lambin and more recent research on the sales-advertising relationship).

---

<sup>47</sup>For opposing views with extensive references to the research literature, see H. Saffer, Economic Issues in Cigarette & Alcohol Advertising, 28/3 J. Drug Issues 781-93 (1998), and Advertising & Markets

We will also continue to take action against deceptive weight-loss, health-benefit, and nutrient-content claims.<sup>52</sup> Another useful step clearly is to encourage more positive ads on these issues such as truthful, non-misleading, low-calorie claims.

We will also look closely to make sure government is not inadvertently inhibiting useful advertising claims. An FTC

---

<sup>52</sup>See, e.g., Prepared Statement of the Federal Trade Commission Before the Subcommittee on Competition, Foreign Commerce, and Infrastructure of the Committee on Commerce, Science, and Transportation, U.S. Senate (June 11, 2003), Section II.D.; Prepared Statement of the Federal Trade Commission Before the Subcommittee on Commerce, Trade and Consumer Protection of the Committee on Energy and Commerce, U.S. House of Representatives (June 11, 2003), Section II.D.

<sup>53</sup>P. Ippolito & J. Pappalardo, Advertising Nutrition & Health: Evidence from Food Advertising 1977-1997 (2002).

<sup>54</sup>Comments of the Staff of the Bureau of Consumer Protection, the Bureau of Economics, and the Office of Policy Planning of the Federal Trade Commission, before the Food and Drug Administration in Docket No. 2003N-0338, In the Matter of Obesity Working Group, Public Workshop: Exploring the Link Between Weight Management and Food Labels and Packaging (Dec. 12, 2003) (“Obesity Working Group Comment”).

<sup>55</sup>U.S. Surgeon General, The Surgeon General’s Call to Action to Prevent and Decrease Overweight and Obesity 2001, available at [www.surgeongeneral.gov/topics/obesity/calltoaction/fact\\_whatyoucando.htm](http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact_whatyoucando.htm).

<sup>56</sup>Obesity Working Group Comment, at 13-19.

government to consider whether food labeling rule changes would help consumers better control their calorie intake by allowing useful information. We will continue to work with the FDA as they consider those issues.

Finally, I think there is much more the industry should be encouraged to do on a self-regulatory basis. Kraft, for example, has announced several initiatives to address the growing problem of obesity.<sup>57</sup> Kraft plans to eliminate all in-school marketing, to determine appropriate criteria to select products sold through in-school vending machines, and to develop guidelines for all advertising and marketing practices, including those targeting kids, to encourage healthier

---

<sup>57</sup>Kraft Foods News Release, Kraft Foods Announces Global Initiatives to Help Address Rise in Obesity (July 1, 2003), available at <http://164.109.16.145/obesity/pressrelease.html>.

<sup>58</sup>Id.

<sup>59</sup>George Santayana, The Life of Reason, Vol. I (1905).