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ABSTRACT

This report addresses the problems created by the large volume of current television advertising being directed to children, many of whom naively accept the messages and cannot perceive the selling purpose of television advertising or otherwise comprehend or evaluate it; and recommends that law-making proceedings begin to (1) ban all television advertising for any product which is directed to very young children, (2) ban advertising directed to older children for sugared products which pose serious dental health risks, and (3) require that advertisements directed to older children for other sugared products be balanced by nutritional and/or health disclosures funded by advertisers. Various sections of the report deal with the factual background of televised advertising to children, including children's exposure to television commercials concerned with sugared foods and commercial impact; legal implications of advertising to children in light of the Federal Trades Commission Act; the absense of jurisdictional or constitutional impediments to the regulation of advertising to children; and remedies available to cure the deceptiveness and unfairness of current advertising to children. (CMV)

IR req

FTC Staff Report On Television Advertising To Children

TO: Federal Trade Commission

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SUBJECT: Petitions From

Action For Children's Television
and
Center For Science In The Public Interest

Requesting

The Promulgation Of A Trade Rule
Regulating Television Advertising
Of Candy And Other Sugared Products
To Children

RECOMMENDATION: That the Commission Commence Rulemaking under Applicable Provisions of the Magnuson–Moss Federal Trade Commission Improvements Act to Eliminate Harms Arising out of Television Advertising to Children.

APPROVED:

Wallace S. Snyder
Assistant Director for Advertising Practices

February, 1978

CONCUR:

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Deputy Director, Bureau of Consumer Protection

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SUMMARY OF TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

COURT CASES:

A. United States Supreme Court

B. Federal Courts

C. State Courts

ADMINISTRATIVE CASES, REPORTS, PUBLICATIONS AND PROCEEDINGS:

A. Cases

B. Reports

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I. INTRODUCTION AND RECOMMENDATIONS

This Report addresses the large volume of current television advertising which is directed to children. 1/ Many young children--including an apparent majority of those under the age of eight--are so naive that, as this Commission 2/ and the Federal Communications Commission (FCC) have previously recognized, they cannot perceive the selling purpose of television advertising or otherwise comprehend or evaluate it and tend, as the FCC has observed, to view commercials simply as a form of "informational programming." 3/ The youngest children tend to be even more naive and thus even less capable of comprehending the influence which television advertising exerts over them. For example, it appears that a large proportion of pre-schoolers think that the persons or animated figures on television are addressing them personally,

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1/ As used throughout this Report, the word "children" refers to those under the age of 12, as distinct from adolescents of 12 or above.

2/ See, Federal Trade Commission, Statement of Reasons for Rejecting the Proposed Guide on Television Advertising of Premiums to Children, 42 Fed. Reg. 15069, 15070 (March 18, 1977). The Commission noted, citing pertinent studies, that "young children (1) fail to understand the nature and profit making purpose of the television commercials [and] (2) tend to trust and believe television advertising indiscriminately...."

3/ Federal Communications Commission, Children's Television Programs: Report and Policy Statement, 39 Fed. Reg. 39396, 39401; 50 F.C.C. 2d 1, 11 (1974).

and that the animated figures are "real" and in some sense appropriate objects for emulation. Apparently the youngest pre-schoolers think that there are "real little people" inside the set. 4/

The largest single part of the television advertising addressed specifically to children is for sugared foods, 5/ consumption of which poses a threat to the children's dental health, and possibly to other aspects of their health as well.

The Commission now has pending before it two petitions on this subject, both of which urge that a major portion of the advertising to children for such sugared products is unfair and deceptive within the meaning of the FTC Act. Both petitions request that the Commission promulgate a trade regulation rule (1) banning what they describe as the worst of that advertising during hours when children are an especially large proportion of the audience, and (2) granting certain related relief.

4/ See text accompanying note 106, infra.

5/ In the text accompanying notes 197 and 202, infra, we list the percentages of sugar contained in a sampling of these products. Many of these products, including cereals that are not overtly classified as candy by the manufacturers, are well over 50% added sugar. It is with these high percentages in mind that we use such terms as "sugared," "heavily sugared," and "highly sugared" in this Report. For the definitional problems that may be raised by products on the fringe of such categories, see the discussion in Section VI-A, infra.

The petitioners are Action for Children's Television ("ACT"), a non-profit Massachusetts corporation with 10,000 members which works to eliminate commercial abuses from television advertising addressed to children, and the Center for Science in the Public Interest ("CSPI"), a non-profit District of Columbia corporation with 4,000 members which works to improve domestic food policies. The petitions point out that sugar consumption, especially between meals, is commonly understood by experts to be a principal cause of tooth decay; that tooth decay is a disease that afflicts virtually every person (and more than half of all adult teeth) in the United States; that it is so widespread that at any given moment there are an estimated 1,000,000,000 unfilled cavities in American mouths; and that there is some medical evidence that excessive consumption of sugar probably contributes to obesity, and possibly contributes to heart disease. The petitions also point out that the great volume of televised advertising which urges children to eat sugar is not balanced by any remotely comparable volume of advertising which urges them to consume other foods--or impresses on them the risks they take by eating the advertised products.

The petitions contend that the special naivete, suggestibility and vulnerability of children have long been recognized by the Commission, so that advertising practices which might be neither unfair nor deceptive as to adults can be both unfair and deceptive to children.

ACT's Petition, received on April 16, 1977, seeks a ban on televised "candy" advertising addressed to children. Specifically, ACT asks that such advertising be prohibited (a) before 9:05 p.m.; or (b) where the dominant appeal of the advertising is to children; or (c) during any periods when children make up at least half of the audience. ACT does not define the word "candy," but proposes that the Commission obtain the aid of an expert body such as the American Dental Association in arriving at an appropriate definition for regulatory purposes.

CSPI's Petition, received on April 26, 1977, seeks a ban, during any periods when children make up at least half of the audience, on televised advertising for between-meal snacks which derive more than 10% of their calories from added sugar. CSPI also seeks mandatory affirmative disclosure of the added sugar content of foods permitted to be advertised, as well as of the dental health risks posed by eating sugared products, during periods when children make up at least half of the audience. 6/

6/ CSPI defines between-meal snacks to include products commonly eaten between meals or depicted in advertising as being so eaten. CSPI's 10% test is designed to exclude products with minor amounts of sugar, such as bread. Its added sugar test is designed to exclude foods such as fresh fruit, which naturally contain more than 10% sugar.

Regulation of televised advertising of sugared products to children has obtained broad expert and public support. On December 19, 1977, Dr. Donald Kennedy, Commissioner of Food and Drugs, wrote to Chairman Pertschuk of this Commission that:

> "In view of the large amounts of advertising--particularly television advertising--that are directed to children urging them to consume a seemingly endless variety of sugared products and the substantial likelihood that children will be unable to appreciate the long-term risks to dental health that consumption of these products will create, I strongly support action by the Federal Trade Commission to regulate the advertising of these products directed to children." 7/

Likewise, the Council on Dental Health of the American Dental Association has endorsed "the elimination of advertising of sugar-rich products on children's television." 8/ Similarly, the Council of Foods and Nutrition of the American Medical Association has characterized present televised food advertising to children as "most distressing," and as "counter-productive to the encouragement of sound [nutritional] habits." 9/

7/ See Appendix "A".

8/ See Appendix "B".

9/ See Section III-B(2)(c), infra.

On July 20, 1977, representatives of the following organizations met with Chairman Pertschuk to express their endorsement of the petitions: The American Academy of Pediatrics, the American Parents Committee, The Dental Health Section of the American Public Health Association, the Association for Childhood Educational International, the Black Child Welfare League of America, the East Coast Migrant Head-Start Program, the Latino Media Task Force, the National Association for the Education of Young Children, the National Association of Elementary School Principals, the National Council of Negro Women, and the National Women's Political Caucus.

Significantly, too, the U.S. Department of Agriculture (USDA) has been exploring ways to curb the overpromotion to children of heavily sugared and otherwise nutritionally poor foods. USDA has proposed that the use of "formulated grain/fruit products" 10/ such as specially formulated doughnuts, cream-filled cakes, coffee cakes, oatmeal bars, and peanut butter cookies be prohibited in school breakfast programs. In explaining this proposal, USDA noted that "questions have been raised over the sugar and fat content of the products...

10/ U.S. Dep't. Agr., Formulated Grain Fruit-Products, 42 Fed. Reg. 40911 (Aug. 12, 1977). See also, No More Super Donuts? USDA wants to Ban Kids' 'Breakfast Bars', Washington Post, Feb. 2, 1978, at E-1.

and their value in teaching good eating habits to children." 11/ USDA has also recently issued guidelines for that program "encourag[ing] the service of foods with relatively low sugar content." 12/

Similarly, the Assistant Secretary for Health of the Department of Health, Education and Welfare, Julius Richmond, M.D., recently told the Senate Select Committee on Nutrition and Human Needs that "there is a need to change current [food] advertising directed to children." He commended this Commission for what he described as its present efforts "to bring a reasonable degree of regulatory control to bear on nutrition-related advertising, particularly on television." 13/

These experts and others believe that reform of children's television advertising is needed in part because that advertising induces children to take health risks which they are not equipped to assess. But the potential for health-related risks is not the only reason for such views. Many believe it is unfair to advertise any product on television, specifically to children who are so young (evidently below the age of 8) that

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11/ U.S. Dept. Agr., Press Release 2912-88 (Oct. 7, 1977).

12/ U.S. Dept. Agr., National School Lunch Program: Nutritional Requirements, 42 Fed. Red. 45328, 45329 (Sept. 9, 1977).

13/ Statement by Julius B. Richmond, M.D., before the Senate Select Committee on Nutrition and Human Needs, 95th Cong. 1st Sess. (Oct. 19, 1977).

they cannot understand the selling purpose of, or otherwise comprehend or evaluate, commercials and thus cannot discount them, if they so choose, as adults or older children can. That unfairness is exacerbated when television advertising is directed to the very youngest children who are even more naive. The abuse inherent in advertising directly to such an audience via a medium as powerful and pervasive as television is such that a committee established by the British Parliament has just recommended that "no advertisements should be shown within children's programmes." (Emphasis added.) The committee explained that:

> "Children are inclined to believe that what they are told in a television programme is not only true, but the whole truth. How are they to distinguish between what they are told in a children's programme and what they are told in an advertisement? Yet in singing the praises, and the jingles, of a particular product, a child cannot be expected to know that other, less advertised products may be equally good....That is why the majority of us believe that children should not be exposed during their own programmes to the blandishments and subtle persuasiveness of advertisements." Lord Annan, Report of the Committee on the Future of Broadcasting 166 (1977).

That view has widespread support throughout the world. Of the major industrialized nations, the United States and Britain are part of only a handful that have ever allowed

television advertising--for any product--to be directed specifically to pre-school children. 14/ The other members of that handful are Australia, Canada and Japan. And experience in those first two countries has led to authoritative proposals now pending to ban such advertising. 15/

At least one advertiser of sugared products recognizes the need for fundamental change in televised advertising directed to children. On November 22, 1977, Kenneth Mason, President of the Quaker Oats Co., appeared as part of a panel of cereal industry representatives to discuss the televised advertising of that industry's products to children. Mr. Mason vigorously defended his company's products, but he conceded that:

> "We do not believe any reasonable person can view a typical eight to twelve noon Saturday morning period on any of the major television networks and fail to recognize

14/ See Fleiss and Ambrosio, An International Comparison of Children's Television Programming (1971); Powell, Protection of Children in Broadcast Advertising: the Regulatory Guidelines of Nine Nations, 26 Fed. Comm. Bar J. 61 (1974).

15/ In Canada, the Province of Quebec is considering a proposal to ban all television advertising addressed to children, even those beyond the pre-school age. The Provincial Minister of Consumer Affairs has explained that:

> "We are convinced that it is imperative to ban advertising intended for children, because a child lacks the ability to make valid judgments in the face of persuasive communication." Quoted in Advertising Age, Nov. 14, 1977 at 3.

Likewise, the Australian Broadcasting Tribunal has just recommended that no advertising be permitted during programs designed for pre-school children. Australian Broadcasting Tribunal, Self-Regulation for Broadcasters? 139 (1977).

> the need for fundamental change in the way our society is using its most powerful and pervasive medium of communication to entertain and enlighten the very young."

Mr. Mason accordingly urged the Commission to hold thorough hearings on the present petitions.

In view of the breadth and importance of the issues raised in these petitions, staff has conducted its own extensive investigation of those and related issues. This is the report of that investigation.

As we describe in the Summary and as we explore in far greater detail in the ensuing sections, we have concluded that the petitions are generally meritorious, that rulemaking proceedings should be commenced under the Magnuson-Moss FTC Improvements Act and that the Commission should proceed to rulemaking to determine whether it should:

(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 16/;

16/ For purposes of this Report, "young children" refers to children below age of eight. Comments and testimony in the rulemaking proceedings we recommend should address the appropriateness of this age definition.

(b) Ban televised advertising directed to, or seen by, audiences composed of a significant proportion of older children 17/ for sugared products, the consumption of which poses the most serious dental health risks;

(c) Require that televised advertising directed to, or seen by, audiences composed of a significant proportion of older children for sugared food products not included in paragraph (b) be balanced by nutritional and/or health disclosures funded by advertisers.

The remedy described in paragraph (a) follows from the conclusion that televised advertising directed to children too young to understand the selling purpose of, or otherwise comprehend or evaluate, commercials is inherently unfair and deceptive. The remedy described in paragraph (b) reflects the conclusion that the most cariogenic sugared products should not be advertised to children on television. The remedy described in (c) reflects the view that those products of lesser cariogenicity should be advertised to children only if balanced by nutritional and/or health disclosures addressed to that group.

17/ For purposes of this Report, "older children" refers to a group as old as 11 and as young as eight years of age. Comments and testimony in the rulemaking proceedings should address the appropriateness of this age definition.

The remedy in paragraph (a) must be implemented in a way that protects child audiences without unreasonably foreclosing the right of adults to receive otherwise protected commercial speech. Remedies (b) and (c) must be implemented in a manner which fairly differentiates among sugared products in terms of their relative cariogenicity, capturing the worst for remedy (b) and leaving the rest for remedy (c).

The reasons why these particular remedies have been proposed are set forth in Part VI of this Report, particularly at Sections B, C and F therein.

We further recommend that the Commission adopt for this proceeding a modified form of the procedures used by the Environmental Protection Agency in promulgating rules under certain of the statutes which it administers. The EPA procedure involves a two-stage hearing process--the first legislative, and the second adjudicative. The proposed Rule seems well suited to this procedural course. Disputed legislative issues may be identified and considered at the first stage. The second stage can be limited to consideration of those disputed adjudicative issues which the Commission determines are material to its deliberations.

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

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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 betwen 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

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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 LII 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 competitiors 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

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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 televison, 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 <u>any</u> 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

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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 untrammeled 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 the latter 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. Democractic 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 deceptiveness 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.

III. TELEVISION ADVERTISING TO CHILDREN--THE FACTUAL BACKGROUND

A. Children's Exposure to Television Commercials, Especially Those Addressed Directly to Them Which Concern Sugared Foods

In 1977, the average American child aged 2 through 5 watched 25 hours and 36 minutes of television per week, or just under 3 2/3 hours per day. Older children, aged 6 through 11, watched slightly more, 25 hours and 41 minutes per week, or more than 3 2/3 hours per day. 59/ This works out to well over 1,300 hours per year, or more time than the older group spent in the classroom, taking into account that schools close down for weekends and vacations, whereas television does not.

The time which children under 12 spend watching television has increased by a full hour per day over the last

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59/ A.C. Nielsen Company, Inc., The Television Audience 17 (1977). The Nielsen Company provides market-by-market data on television viewing audiences. It divides the "child" audience into two groups, ages 2-5 and 6-11. For purposes of this Report, a "child" is someone less than 12. This definition is consistent with existing usage within the broadcasting and advertising industries, and specifically with the codes, promulgated by the National Association of Broadcasters (NAB) and National Advertising Division (NAD) of the Council of Better Business Bureaus. For purposes of this Report, we are defining "young children" as those who are too young to understand the selling purpose of, or otherwise comprehend or evaluate, the advertising. We believe an appropriate age definition is those children below the age of eight years. Comments and testimony in the rulemaking proceedings should address the appropriateness of this definition. See notes 16 and 17 supra.

22 years. 60/ This reflects an increase in the amount of programming addressed specifically to children, a rise between 1961 and 1975 in the number of homes that have television (from 90% to 97%) and a much larger rise in the number of homes that have two or more sets (from 15% to 43%). 61/

In 1961, the following percentages of children were found to "use" television at various ages: 62/

Age	Percent Using Television
2	14
3	37
4	65
5	82
6	91
7	94
8	95
9	96

60/ National Science Foundation, Research on the Effects of Television Advertising on Children 12 (1977) (citing A.C. Nielsen data, November 1975). This report, which summarizes the current literature on the effects of television advertising on children, is cited hereinafter as the "NSF Report." The present figure for time spent watching television also appears to be almost double the amount of time spent listening to radio immediately before the advent of television. See Goulden, The Best Years; 1945-1950 149 (1976).

61/ NSF Report at 12 (citing 1976 Nielsen data).

62/ Id. The 1977 figures may be higher for the reasons just stated.

The NSF Report (p. 12) states that "we can conclude that a majority of children are watching television regularly before age 4." (Emphasis added.)

The NSF Report (p. 13) tells us that:

> "Schramm, Lyle and Parker's description in 1961 of the pervasive role of the medium in children's lives is still appropriate today:
>
> 'Throughout the preschool years, television time far exceeds other media time; in fact it usually exceeds the total of all other media time...Two-thirds of all children are already television viewers before they have much experience with movies. Even at the end of 10 years, when they are making some use of all media, television is the only one they are using day after day. At age 10, three-fourths of all children as we discovered, will be likely to be watching television on any given day. This is more than twice the percentage for any other medium at that age.'"

Children are exposed to enormous numbers of commercials. The NSF Report estimates (p. 14) that children 2 through 5 view an average of 20,476 commercials per year and that children 6 through 11 view an average of 19,236. These estimates are slightly lower than estimates made by others. For example, former Chairman Lewis Engman of this Commission put the figure at 21,875 per year from early childhood through high school 63/ and Robert Choate, Chairman of the Council on

63/ NSF Report at 13.

Children, Media and Merchandising, has put the figure at about 22,000 per year for "the average child." 64/ This amounts to about 3 hours of television advertising every week, the year around, year after year. 65/

The range of products which sellers promote directly to children over television is, as the NSF Report notes (p. 34), "fairly limited." According to the NSF Report, 25% of this advertising is for "candy/sweets--e.g., cakes, cookies, fruit drinks"; another 25% is for "cereals," many of which contain even more sugar than most candies sold in this country; 66/ and another 10% is for "eating places," principally fast-food restaurants which feature, in addition to hamburgers or fried chicken, sugared products such as "thick shakes," carbonated soft drinks, and assorted desserts. The remaining major category is toys, whose commercials are concentrated most heavily just prior to Christmas.

Much of the television advertising addressed to children is broadcast during weekend daytime hours--especially during the Saturday morning animated cartoon programs. This is not to say that children do most of their viewing during those

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64/ Id.

65/ Id.

66/ See text accompanying note 198 infra.

hours; that is far from being the case. Rather, the point is that the demographic purity of the Saturday and Sunday morning audience allows advertisers to concentrate on children. According to one source:

> "Very few adults ever see the unusual beings that hop, fly, or slither across the TV screen every Saturday and Sunday morning. The grownups gratefully let the cartoons glue their youngsters in front of the electronic baby-sitter while they grab a bit more shuteye. But the three networks don't kid around about kid attractions.
>
> In [an] average minute on a Saturday morning after eight o'clock regardless of program, there are 10 million pairs of children's eyes glued to the set, and before the day is over, 75 percent of all children in all TV households will have watched some program. 67/ "
>
> * * *
>
> "[T]he 2 to 5 year olds control the dial starting at 8 or 9 a.m.; after 9 a.m. the 6 to 11 year olds come in and stay all morning; the 12-year-olds come in around 10 a.m." 68/

The following table shows what foods (exclusive of fast-food restaurants) were advertised on the three major television

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67/ Helitzer and Heyel at 216.

68/ Id. at 221.

networks during weekend daytime hours for the first 9 months of 1975: 69/

Saturday/Sunday Daytime Food Advertising, 1st 9 months, 1975

	3 network commercial totals
Cereals	3,832
Candy and gum	1,627
Cookies and crackers	841
Non-carbonated fruit drinks	582
Macaroni and spaghetti	208
Cakes, pies, pastry	104
Desserts	80
Citrus	78
Carbonated soft drinks	63
Ice Cream	53
Soups	43
Meats and poultry	2
Vegetables	1
Cheese	1
Milk, butter, eggs	0
Vegetable juices	0

According to a report by the Program and Committee Staff of the New York State Assembly, which discusses this same survey for the first 9 months of 1975, "the sugar content of the most advertised cereal was 40.7%, and very few low sugar

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69/ Source: Testimony of Robert B. Choate, President, Council on Children, Media & Merchandising, Before the FTC, Fall, 1976, synopsized at 61-64 of Edible Television, Your Child and Food Commercials, prepared by Council on Children, Media & Merchandising for the Senate Select Committee on Nutrition and Human Needs, 95th Congress, 1st Session. (U.S. Government Printing Office 1977). These compilations are for the first 9 months of the year in order to avoid the distorting factor of advertising on football broadcasts. They are based on "Barcumes," a standard industry source.

cereals were advertised to children at all." 70/ Counting the cereals as sugared products, and assuming that "candy and gum," "cookies and crackers," "fruit drinks," "cakes, pies [and] pastry," "desserts," "carbonated soft drinks," and "ice cream" are all sugared products (a safe assumption except as to diet soft drinks 71/ and crackers) we arrive at the rough estimate that of the total of 7,515 commercials in this sample, only 4.3% (333) were not for sugared products.

Kids, Food and Television reports (p. 11) that:

> "On the weekend of February 21 and 22, 1976, approximately one thousand volunteers provided by the New York State Nutrition Council, the State Parent-Teachers Association, and the State Association of Child Care Councils assisted the [New York State Assembly's] Task Force on Farm and Food Policy in a statewide television monitoring project. The volunteers monitored every hour of children's television programming that appeared on 28 of the State's commercial television stations during that weekend."

70/ Program and Committee Staff, New York State Assembly, "Kids, Food and Television, The Compelling Case for State Action," at 5 (March, 1977). (Hereinafter cited as Kids, Food and Television.) This report followed legislative hearings at which expert testimony was adduced on the effects of televised food advertising on children's nutritional habits.

71/ Carbonated soft drinks (especially the diet variety) do not appear to be heavily advertised on television to children under 12. A possible reason is that a major market for these products is among adolescents, who would be less likely to use them if they perceived them as being "for children."

This survey found (p. 16) that in the Syracuse market, 66.49% of all commercials for edibles on that Saturday were for sugared products. In the Albany-Schenectady-Troy market on the same Saturday (p. 18) "more than 50% of all. . . advertising was composed of cereal and candy/sweet ads." (emphasis added.) In that market, on that day, advertisements for "sugared cereals had a ratio of 6.2 [to] 1 over unsugared." Id. The report says (p. 13) that the data from these two markets for that day are "an accurate but not perfect proxy for television advertising practices elsewhere in the State" for the same day.

The staff's monitoring of commercials presented on the three major networks in the course of a Saturday morning children's programming yielded similar findings. 72/

On that Saturday, from 8 a.m. to 1:30 p.m., 45 of the 59 food commercials on ABC (76%) were for heavily sugared products, as were 41 of the 54 food commercials on CBS (76%), and 43 of the 59 food commercials on NBC (73%).

The following chart shows those advertisements broadcast that day from 11:00 a.m. to 11:30 a.m. on the three

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72/ Televised advertisements were video-taped by Radio & TV Reports Company in New York City under contract with the Commission. All commercials shown on Saturday, September 24, 1977 between 8:30 a.m. to 1:30 p.m. were obtained as well as a report of the sequence of commercials shown during that period. A listing of all commercials and the times they were shown on the three major networks appears as Appendix "C".

major television networks. Products high in sugar are identified by asterisks (*). Double asterisks (**) identify fast-food chains which feature, among other products, foods and drinks which are high in sugar.

NBC	CBS	ABC
Hershey's Chocolate Instant Mix*	Hershey's Chocolate Instant Mix*	Kool Aid Drink*
Corn Pops*	SSP Toy	Pay-Day Candy Bar*
Movie	Cracker Jacks*	Cocoa Puffs* (pre-sweetened cereal)
Cookie Crisp* (pre-sweetened cereal)	McDonald's Shops**	Cheerios (cereal)
Camp Fire promo	Wrapples (A taffy* candy product)	Happy Birthday Tender Love
Charlie's Angels House	Power Shifter Toys	Bubble Yum* Bubble Gum
Forever Yours (candy bar)*	TV Promo	McDonald's Shops**
Sugar Babies Candy*	Forever Yours* (candy bar)	Corny Snaps* (pre-sweetened cereal)
Spaghetti O's	McDonald's Shops**	Burger King Shops**
Burger King Shops**		

In sum, sugared products were advertised as many as four to seven times per half hour on each of the major networks, depending on whether the fast-food chains are counted.

1. The Preparation of the Television Commercials Directed to Children and the Selling Techniques Which They Employ

(a) The Preparation of Commercials

Television advertising for children is developed from direct testing and observation of the child audience. Children are subjected to research techniques developed from the study of child psychology, to determine the most efficient ways of inducing their counterparts in the nationwide audience to demand advertised products.

> "With the help of firms specializing in child market and product research, manufacturers are now able, by play acting, simulated shopping situations, picture questionnaires, and special interviewing and observational techniques, to bridge the verbal gap and obtain . . . . information directly from moppets. These advanced techniques draw upon new insights into child behavior furnished by a growing body of psychological research." 73/

This commercialization of child psychology is a relatively new phenomenon:

73/ Helitzer and Heyel at 142.

> "Only in relatively recent years--from small beginnings less than a decade ago [as of 1970]--have these techniques been systematically applied to problems of the advertising media and messages for the children's market." 74/

The commercials which emerge from this process are usually 30-second spots. Helitzer and Heyel have explained why advertisers prefer short messages. A young child:

> "cannot absorb many ideas at one sitting. Therefore, an advertising campaign on TV directed to him will be partially wasted if it covers numerous product points and benefits. If he is being offered too many ideas at one time he will remember none of them well." 75/

Dr. Kenneth O'Bryan, professor of psychology at the University of Toronto, and director of the Child Research Laboratories at the Ontario Institute for Studies in Education and the Ontario Educational Communications Authority, told the Commission in an open meeting on December 1, 1977 that the 30-second television commercial is the most effective device yet invented for implanting any relatively simple idea in a child's mind.

74/ Id.

75/ Helitzer and Heyel at 105. This point will come up again in Section VI-B, infra, where we discuss the possible effectiveness of requiring disclaimers or warnings in the commercials for sugared products which are addressed to children.

(b) The Selling Techniques Employed

Dr. William Wells, now of the Chicago office of Needham, Harper & Steers, an advertising agency, 76/ has described some of the typical techniques used in children's commercials. They include the following:

(i) Magical promises that a product will build muscles or improve athletic performance

> "Certain commercials--like the commercials for some kinds of cereal, some kinds of candy, and some kinds of bread--imply that using the product will build muscles or increase athletic abilities. When asked directly about these claims, most children deny that they believe them; but when the question is asked what commercials make them want the product--and why--some of them say, 'because it makes strong muscles' or 'because it makes you run fast.' The best hypothesis seems to be that on a rational level children know these claims are not literally true, but the commercials have succeeded in creating an aura about the brand that gives the brand a special and highly desirable significance. The image is there even though strictly speaking, the substance is not." 77/

76/ Dr. Wells has been a professor of child psychology at Rutgers University and the University of Chicago, and has also conducted studies in child psychology for Benton & Bowles, an advertising agency in New York.

77/ Wells, "Communicating with Children," 5 Journal of Advertising Research No. 2 (1965) at 13.

(ii) The Chase or Tug-of-War Sequence in Which One Character Tries to Take a Product Away from Another.

> "Another type of 'motivating scene' [is] the scene in which one character shows he wants the product by trying to get it--usually, but not always, trying to get it from another character. As with the 'magic power' commercials, the motivation seems to be on a fantasy level. Even though children know perfectly well the commercial characters are not real, seeing the characters strive for something produces a powerful inference that something must be worth having." 78/

Helitzer and Heyel have identified several additional techniques:

(iii) The Use of Music, Singing and Dancing

> "[Children] will sing the words to a commercial, clap hands to the rhythm, mimic sound effects, and even dance to the commercial music." 79/

78/ Id.

79/ Helitzer and Heyel at 185.

(iv) The Use of Super Heroes to Entice Children

"If you watch children's Saturday television programs, you will have noticed the predominance of cartoon serials. Many of these involve super heroes who leave even the granddaddy of them all--Superman--far behind in imaginative feats . . . . [I]f you want to create your own hard-hitting spokesman to children, the most effective route is the super hero--the miracle worker." 80/

(v) The Voice of Authority

"[T]he [adult] male voice is far superior in reaching the child. It is authoritative. ('Wait till your father gets home. He'll talk to you about that!') The [child's] associations with the male voice are usually less frequent, and hence command more attention and respect. Female voices are all too reminiscent of the don't and do of mother and teacher. Tests conducted with children have indicated preference for and response to the adult male voice." 81/

80/ Id. at 179-180.

81/ Id. at 179-80.

(vi) The Voices of Children Agreeing with the Announcer

"A limited use of children's voices saying 'great!' 'wow!' 'terrific!' can be highly effective. But these approving voices should be recorded off camera, so that they can be taken as those of other viewers rather than of participants in the commercial." 82/

(vii) Depictions of Children Outperforming Adults

"For the under-12-year olds . . . a surefire episode is the one in which an adult tries something, can't do it, and a youngster does. A typical example is where the strong man can't lift the bar bells, but after one mouthful of the product, a young child handles them like feathers." 83/

(viii) Animation

"[A]nimation in one style or another [is] a sure bet to turn children on. . . . To kids born in the TV age, an animated Green Giant could, in their imagination, be a real green giant. . . ." 84/

82/ Id. at 180.

83/ Id. at 201. Compare the discussion of "magical promises," at text accompanying note 77, supra.

84/ Id. at 182-3.

The NSF Report adds two more techniques to the list:

(ix) Peer Group Acceptance Appeals

> "[C]ommercials may utilize . . . subtle allusions to social status. For example, commercials which simply show children of the target group's age using the product may border on social status or peer status appeals." 85/

(x) Selling by Characters Who Also Appear in Programming

> "[T]he nearby presence, rather than direct adjacency, of [a] program [featuring characters, such as Fred Flintstone, et al., who are used in a commercial] to the commercial may be sufficient both to increase the effectiveness of a commercial featuring the program characters and to create confusion between the two, especially for younger children . . . [C]urrent NAB code restrictions prohibit only direct adjacency." 86/

The NSF Report (p. 35) also identifies one technique that is not used in advertising addressed to children:

85/ NSF Report at 55. Children learn by imitation and dislike feeling "left out." Helitzer and Heyel (p. 201) bluntly advise advertisers to "suggest that the use of your product will make the child more popular with his friends." But suggestions that a product will lead to increased social status or that lack of a product will have the opposite effect are proscribed by the National Association of Broadcasters (NAB) and National Advertising Division, Council of Better Business Bureaus (NAD) codes.

86/ NSF Report at 29; See also NSF Report at 46-49.

"Children's commercials . . . tend to provide little information about the 'hard qualities' of products, such as price, size, materials, quantity, durability, etc. * * * [T]he infrequency of such descriptions seems inconsistent with the NAB's general guideline stating that 'the disclosure of information on the characteristics and functional aspects of a product/service is strongly recommended.'"

2. Themes Which Appear in Specific Commercials for Sugared Products

Specific commercials for sugared products are summarized below. They illustrate the techniques and themes employed. These commercials were identified in the course of normal advertising monitoring functions of the Division of National Advertising. They have been seen by large numbers of children and appear to be representative samples.

(a) Nestle's $100,000 Bar

Manufacturer: Nestle's Company
Length : 30 seconds
Airdate : Saturday, September 6, 1975

The commercial features a chorus and stresses that the product contains "chewy, chewy caramel" and has been "double-dumped in more Nestle's rich chocolate than ever."

(b) Charleston Chews

Manufacturer: Fox-Cross Candy Company
Length : 30 seconds
Airdate : 5:24 p.m. on Saturday, February 16, 1977

The commercial employs children singing and stresses the "chewiness" of the product. The commercial informs children that they will "like to chew it," and that it is a "real chewy chew."

(c) Marathon Candy Bar

Manufacturer: Mars, Inc.
Length : 30 seconds
Airdate : 10:04 a.m. on Saturday, January 29, 1977

This commercial features a pilot (hero-figure) who tells the young audience that he does everything fast. The child learns, however, that the pilot can't eat a Marathon bar fast. The commercial stresses that "you can't eat a Marathon Candy Bar fast--it lasts a good long time--delicious caramel and chewy--Nobody eats a Marathon bar quick."

(d) Snickers Bar

Manufacturer: Mars, Inc.
Length : 30 seconds
Airdate : Saturday morning, February 28, 1977

This commercial depicts adolescents singing and playing together in a picnic scene. They are shown enjoying the

taste of Snickers bars. The commercial stresses that the product is "all covered in delicious milk chocolate."

(e) Hershey Bar

Manufacturer	:	Hershey Food Corp.
Length	:	30 seconds
Airdate	:	Saturday morning, January 8, 1977

This commercial features children riding on a roller coaster. Music plays throughout the commercial. A voice-over tells children that:

> "There's nothing like the face . . . of a kid eatin' a Hershey bar . . . . It's the chocolate, Hershey's real milk chocolate."

(f) Big Pops

Manufacturer	:	Charms, Inc.
Length	:	30 seconds
Airdate	:	Saturday morning, February 25, 1975

This commercial takes children to a fantasy place called "Candyland," where confections abound. There, they are told, "there's chocolate, coconut, caramel, crunchy, marshmallow, fruits, gooey, corny, crispy, crackly, chewy."

The children are told three times in this commercial that:

> "there's only one Charms Big Pop, and they last so long."

(g) Life Savers

Manufacturer: Squibb Corporation
Length : 30 seconds
Airdate : 1:40 p.m. on Saturday, May 29, 1976

This commercial features animated cartoon characters as well as singing. The message which it presents to children is that they should: "Suck 'em slow, or suck 'em fast; they're fun on your tongue and made to last."

(h) Count Chocula and Frankenberry Cereals

Manufacturer: General Mills
Length : 30 seconds
Airdate : 12:30 p.m. on Saturday, April 30, 1977

This commercial features the animated characters Count Chocula and Frankenberry, who are investigating an attempted theft of the cereals of the same names. ("Someone's after my delicious chocolate cereal, Count Chocula." "He's after my delicious strawberry flavored Frankenberry.") According to the "monsters," the cereals are being sought because of "my chocolate marshmallows" and "my strawberry flavored marshmallows." After the animated characters confront the culprit, children are told to "enjoy a complete breakfast" with Frankenberry or Count Chocula cereals, which are 46.6 and 47.9% sugar, respectively. 87/

87/ See text accompanying note 202 infra.

(i) Lucky Charms Cereal

Manufacturer: General Mills
Length : 30 seconds
Airdate : 9:00 a.m. on Saturday, May 3, 1977

Lucky, an elf and spokesman for the product, is pursued by children through a forest. Lucky states that the reason for the chase is that the pursuers are "always after my Lucky Charms with sweet surprises." Lucky Charms is 58% sugar. 88/

(j) Cookie Crisp Cereal

Manufacturer: Ralston-Purina
Length : 60 seconds
Airdate : 11:09 a.m. on Saturday, July 30, 1977

This commercial features a dialogue between "Cookie Jarvis"--a cartoon fantasy spokesman for the cereal--and two small children, a boy and a girl. To the young girl's question, "Cookies for breakfast?" Cookie Jarvis responds, "Oh heavens no--unless they are my cereal you know." One of the children states, "they look like little chocolate chip cookies." The commercial closes with the words, "part of a complete breakfast, I hope you'll favor chocolate chip and vanilla wafer flavor."

88/ Id.

(k) Crazy Cow Cereal

Manufacturer: General Mills
Length : 30 seconds
Airdate : 8:30 a.m. on Saturday, July 30, 1977

The commercial features the animated character, "Crazy Cow," whose cereal "makes chocolate milk." The directions are "just pour milk, stir, and the milk turns chocolatey--and the cereal makes chocolate milk--wow!" Children are told to eat "Crazy Cow, part of your complete breakfast, new chocolate Crazy Cow."

(l) Post Pebbles (Fruity and Cocoa)

Manufacturer: General Foods
Length : 30 seconds
Airdate : 9:00 a.m. on Saturday, May 21, 1977

Popular cartoon fantasy characters, Fred Flintstone and Barney, are featured. (Both of them also appear in programming addressed to children. "Pebbles" is the name of Fred Flintstone's daughter, who also appears in the programming.) The cereals are Fruity Pebbles (56.2% sugar) and Cocoa Pebbles (54.1% sugar). 89/ When Fred Flintstone and Barney approach Cocoa and Fruity Pebbles, they turn into a "chocolatey monster" and a "fruity monster," respectively. A young girl reverses

89/ Id.

these metamorphoses by proffering the cereals: "Quick! Eat some." Fred and Barney return to normal. The voice-over states that "New Fruity Pebbles and Cocoa Pebbles are part of a balanced breakfast."

(m) Cocoa Puffs

Manufacturer: General Mills
Length : 30 seconds
Airdate : 8:45 a.m. on Saturday, April 12, 1977

An animated cuckoo bird named Sonny announces, "I'm not gonna go cuckoo for Cocoa Puffs. I'm gonna pack myself in a piano." A child announces that the product is "part of a complete breakfast" and describes the product as "munchy, crunchy, chocolatey." Cocoa Puffs is 46.5% sugar. 90/

(n) Corny Snaps

Manufacturer: Kellogg Company
Length : 30 seconds
Airdate : 9:30 a.m. on Friday, July 15, 1977

This animated commercial features a turtle on horseback ("Shelly") who liberates the "town of Durango" from a posted decree that "breakfast must not be fun." Shelly obliterates the decree with "the shape of the 'S'" (also the shape of the cereal). Shelly exclaims, "Bring fun back to breakfast

90/ Id.

with Kellogg's Corny Snaps cereal!" Shelly then tells the audience that the cereal has the "taste of sweet, crunchy corn." An old lady exclaims, "Bless you, masked turtle!" This commercial uses a special technique, not listed above, which was identified by Dr. Kenneth O'Bryan in his presentation before the Commission, on December 1, 1977. It sets up a "negative hypothesis," which might not otherwise occur to a child, that breakfast without Corny Snaps is not fun. It also encourages a child to identify a parent who refuses to provide Corny Snaps with the "bad guy" who posted the "no fun" decree. (In another version of the commercial, the decree is issued by an "evil doctor named Blum" who resembles Dr. Frankenstein.) This commercial casts some doubt on the arguments of the cereal manufacturers before the Commission on November 22, 1977, that one of their principal goals in advertising to children is to promote breakfast-eating in general, as opposed to breakfast-skipping.

(o) Super Sugar Crisp

Manufacturer: General Foods
Length : 30 seconds
Airdate : 8:45 a.m., on Monday, March 14, 1977

This commercial features the animated "Sugar Bear" who has a "golden sugar coat." Sugar Bear is approached by two friendly animated gangster characters who are told by Sugar

Bear that Super Sugar Crisp has a "golden sugar coating just like Sugar Bear's." One of the gangsters eats some Super Sugar Crisp (which is 45.2% sugar), 91/ then exclaims "sweet, sweet, sweet." The next frame shows Sugar Bear telling the audience that "Super Sugar Crisp is part of a balanced breakfast."

(p) Honeycomb

Manufacturer: General Foods
Length : 30 seconds
Airdate : Saturday morning, April 2, 1977

This commercial depicts three young children eating Honeycomb cereal in front of a television. One child says "tastes sweeter than ever" and offers some cereal to another who tastes it and replies "it does taste sweeter." Honeycomb is 51.6% sugar. 92/

(q) Keebler Fruit Cremes

Manufacturer: Keebler Co.
Length : 30 seconds
Airdate : 10:45 a.m. on Saturday September 24, 1977

This commercial depicts a fruit peddler selling "fresh fruit" from a wagon. He asks some elves living in a hollow

91/ Id.

92/ Id.

tree if they want any. The elves respond that they have just been baking Keebler Fruit Cremes (a brand of cookies). The peddler tastes the cookies, then discards his stock of fresh fruit and commences selling the cookies from his wagon. The apparent moral is that actual fresh fruit is to be rejected in favor of the cookies.

(r). Sugar Babies

Manufacturer	:	Nabisco
Length	:	30 seconds
Airdate	:	Saturday, September 24, 1977

This commercial shows a group of children, running, jumping, smiling, and making happy faces and gestures for the camera as a children's chorus sings "we love Sugar Babies" to the tune of "Yes, Sir, That's My Baby." Like the commercials for Charleston Chews, Snickers Bars, Hershey Bars, and Honeycomb cereal, described above, the Sugar Babies commercial provides an example of what the NSF Report refers to as commercials which "border on social status or peer status appeals." 93/

93/ NSF Report at 55.

In the aggregate, the message for all sugared products appears to be that:

(i) Eating sugared products is the normal, pervasively accepted thing to do, either at breakfast (pre-sweetened cereals) or between meals (candy and sweets); and that

(ii) Children who eat these products are active, healthy and happy, and that eating the products is fully consistent with good health.

Commercials for candies and other confections stress that:

(i) The products are desirable in proportion to the length of time they will last in the mouth; and that

(ii) Chewiness and stickiness are desirable qualities.

Commercials for the pre-sweetened cereals suggest that:

(i) Characteristics such as "sweetness," "chocolateyness," "crunchiness," "honey-taste," and "marshmallow" taste or texture are desirable qualities in a breakfast food; and that

(ii) Foods which have those qualities are appropriate--perhaps even essential--components of a balanced breakfast.

B. Impact of Television Advertising For Sugared Foods and Other Products on Children

Television advertising exerts a strong influence over children. 94/ The strongest determinant of that influence is the child's age. The younger viewer, particularly the pre-schooler, seems to be the "most vulnerable." 95/

Although not everything is understood about the impact of television advertising on children, certain facts seem clear.

94/ The Commission has previously acknowledged this influence. In discussing the proposed premium guide, the Commission noted, citing pertinent studies:

> "[t]he literature tends to support the conclusion that young children (1) fail to understand the nature and profitmaking purpose of television commercials, (2) tend to trust and believe television advertising indiscriminately, (3) tend to recall only simple, concrete elements of commercials, (4) have difficulty distinguishing commercials from programs, and (5) tend to want whatever products are advertised on television." FTC; Statement of Reasons for Rejecting the Proposed Guide on Television Advertising of Premiums to Children. 42 Fed. Reg. 15069, 15070 (March 18, 1977).

95/ NSF Report at i.

First, as Joan Ganz Cooney has observed:

> "Children watch and enjoy commercials long before they are interested in programs, because commercials are often the best produced and most imaginatively conceived moments on TV." 96/

Second, children tend to prefer, and ask their parents to buy, the products promoted to them.

Third, children are frequently successful in these purchase requests; were it otherwise, television advertising would not be addressed to them. 97/

Fourth, television commercials are frequently misunderstood by the child audience. Studies show that many children (1) have difficulty in differentiating television commercials from programming; (2) show little understanding that the purpose of commercials is to create product demand; and (3)

96/ Quoted in Helitzer and Heyel at 107. Mrs. Cooney is the president of the Children's Television Workshop, and producer of Sesame Street and The Electric Company. The observation above was made in the context of explaining why those programs are designed to resemble commercials. Just how young children behave when they are first attracted to television is shown by a recent study in which six-month-old infants were shown a set with the sound and picture on, with the sound on but not the picture, and with the picture but not the sound. These infants watched it when the picture and sound were both on; they paid little attention to it when the sound was on but not the picture, and when the picture was on without the sound they sat and cried. Slaby, R.C., and Hollenbeck, Television's Influence on Visual and Vocal Behavior of Infants, paper presented at the biannual meeting of the Society for Research in Child Development (New Orleans, 1977).

97/ See Section II-B(2)(a)(ii).

repose indiscriminate trust in commercial messages, particularly if they are among the group that fails to recognize the selling purpose of, or otherwise understand or evaluate, the commercial.

Specifically with respect to food, it appears that children are attracted to, and demand, nationally advertised brand-name sugared products. Childrens' efforts to influence their parents' purchases can be tenacious and are often successful. According to some experts, television advertising to children thus undermines the parent-child relationship by provoking unnecessary conflict. Televised advertising of sugared products also appears to have an effect on children's nutritional beliefs and attitudes. Several nutritionists and nutrition educators have expressed concern that the current high level of such advertising competes with what little nutrition education takes place in schools, and that such advertising skews children's preferences away from foods that provide essential nutrients and toward sugared, relatively non-nutritious products.

We emphasize one statistic because it merits the Commission's special attention. In 1976, advertisers spent roughly one-half billion dollars on advertising directed to children. 98/

98/ Pearce, "Television Advertising and Children: An Assessment of the Impact on Network Revenues of Two Reductions in Advertising" (paper presented at ACT Symposium, No. 6, Cambridge, Massachusetts, November 20-23, 1976) at 17.

As observed by Dr. Richard Feinbloom, then Acting Medical Director of the Family Health Care Program, Harvard Medical School, and Acting Chief, Child and Family Health Division, Children's Hospital Medical Center, Boston:

> "To children, normally impulsive, advertisements for appealing things demand immediate gratification. An advertisement to a child has the quality of an order, not a suggestion. The child lacks the ability to set priorities, to determine relative importance, and to reject some directives as inappropriate. . . .
>
> "The child responds to the setting as to the object advertised, unlike an adult, and is unable to separate the two." 99/

Helitzer and Heyel illustrate that point with the following story: 100/

> "Perhaps the example for all times of how easy it can be [to manipulate children via television] is the incident that took place on New Year's day of 1965.
>
> "Soupy Sales, then a popular children's TV entertainer with an early morning program for moppets, looked his fans right in the eye and in a low and conspiratorial voice asked: 'Is Daddy asleep? He is? Good! Find his wallet and slip out some of those funny green pieces of paper with all those nice pictures of George Washington,

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99/ Quoted in Hearings on Broadcast Advertising and Children Before House Comm. on Interstate and Foreign Commerce, 94th Congress, 1st Session (July 1975) at 29 (statement of Peggy Charren). (Emphasis added.)

100/ Helitzer and Heyel at 21-22.

> Abraham Lincoln, and Alexander Hamilton, and send them along to your old pal, Soupy, care of WNEW, New York.'
>
> "The next day the mail began to pour in. But before Soupy could retire to a life of wealth and ease after the biggest heist since the Boston Brink's robbery, the long arm of a humorless station management descended on him and his producer, suspending them both.
>
> "Soupy's heist was, of course an unexpected result of what had been intended as a harmless gag."

The Soupy Sales case involved children who were old enough and literate enough to address an envelope. Pre-school children, as we are about to see, are even more suggestible.

1. Children's Confusion Regarding Television Advertising

(a) Television Advertising and the Pre-Schooler

The pre-schooler has limited capacity for reasoning. 101/ Although he speaks, he frequently does not understand what

101/ Reese and Lipsett, Experimental Child Psychology 479-99 (1970).

he is saying. 102/ He is unable to put himself in the place of another person to see that his viewpoint is only one of many possible points of view. 103/ His thinking focuses only on one feature at a time, "impressionistically and sporadically on this or that momentary condition." 104/ The pre-schooler's impressionistic and extremely limited reasoning processes are nicely demonstrated by Jean Piaget's famous experiment in which a child who has been shown two identical tall thin vases filled to the same level will deny that they contained equal amounts of liquid once the contents of one have been poured, before his eyes, into a short broad jar, which to him looks smaller than a tall, thin vase of equivalent volume. 105/

These characteristics of pre-schoolers may account for their perceptions of television. For example, Schramm, Lyle, and Parker have noted that television appears "real" to young

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102/ Id. at 499. Helitzer and Heyel (p. 107) add on this point that "[C]hildren, [Piaget] says, believe that everything has a purpose, and that such a purpose is built around them. . . . [T]he child does not take another person's viewpoint because he simply cannot."

103/ Mussen, Kongen and Kagan, Child Development and Personality 305 (1969).

104/ Flavell, J.H., The Developmental Psychology of Jean Piaget 157 (1963).

105/ Piaget, J., Judgment and Reasoning in the Child (1951).

children, who may believe for a time that there are "real little people" inside the box. 106/ Children who have progressed beyond that early illusion may think that a person speaking from the box is addressing them personally. 107/ Further, small children perceive even the animated fantasy character (elves, wizards, etc.) in commercials as being (a) in some sense real and (b) in some sense adult, so that they are to be listened to, learned from and imitated, just as any adult is. 108/ Dr. William Wells has noted that young children have difficulty in perceiving the difference between an advertisement and the product being advertised. 109/

Young children also have difficulty in assimilating the messages presented in television advertisements. They can "parrot" the messages and perhaps recall an element or an image from a commercial, but they rarely understand what the message means or what the elements recalled have to do with

106/ Schramm, Lyle, and Parker, Television in the Lives of Our Children quoted in Blatt, Spencer and Ward, A Cognitive Developmental Study of Children's Reactions to Television Advertising (working paper, Marketing Science Institute, Cambridge, Mass. 1971) at 2.

107/ O'Bryan, Kenneth, Presentation Before the Federal Trade Commission, December 1, 1977.

108/ Id.

109/ Wells, supra note 77, at 4-5.

the product. 110/ More mature viewers, on the other hand, tend to recall an advertisement's "content" and "purpose." 111/ Small children also have difficulty distinguishing between the fantasy and the realistic elements of commercials as well as between the advertisements and the products which they promote. 112/

These cognitive and perceptual limitations have led the Program and Committee Staff of the New York State Assembly to question seriously the propriety of advertising at all to preschoolers--or even grade school children.

The Program and Committee Staff stated:

> "We have very serious concerns about the appropriateness of directing any advertising to children, 2-11 years old. We are particularly concerned about the directing of advertising to the very young child 2-5 or 6 years old. It is difficult to understand how a child of that age can be considered a discriminating judge of products presented to him in any context, let alone the non-informational context within which advertising is presented. The argument of many advertisers, advertising agencies, and broadcasters that such advertising really helps to prepare the child for his future role as a consumer, seems like, at best, grasping at straws." 113/

110/ Blatt, Spencer, and Ward, supra note 106, at 21. The researchers caution us, however, that the study was done with very small samples and is intended to explore, most tentatively, possible implications of television advertising for cognitive development.

111/ Id. at 22.

112/ Id.

113/ Kids, Food and Television at 86.

The argument "seems like. . . grasping at straws" because it reflects a different view of child psychology from the one on which the advertising itself is based. Advertisers find it useful, in defending advertising to children, to portray their audience as one that is capable, or nearly capable, of adult reasoning. But in preparing advertising for the child audience, they take a different view--a view which recognizes, and takes full advantage of, the actual limitations and tendencies of children's minds.

Notwithstanding their inability to grapple with commercial messages, pre-schoolers are exposed to significant quantities of television advertising. 114/ It may be their very vulnerability which makes them so attractive to advertisers.

Helitzer and Heyel counsel prospective advertisers that:

> "TV can be highly effective for the pre-school group. With a good program and a good commercial, you can command 60 seconds of total interest--the child's eyes will remain riveted on the screen." 115/

114/ See Section II-A, supra. On Saturday mornings (8:00 a.m. to 12:00 p.m.) the 2-5 year old group accounts for 20% of the total viewing audience. On Monday through Friday mornings, children aged 2-5 account for at least 10% of the total viewing audience. They constitute between 5 and 10% of the total viewing populations at most other times.

115/ Helitzer and Heyel at 218. (Emphasis added)

And these authors provide specific advice on how best to reach pre-schoolers, as well as on what products to promote:

> "Manufacturers of toys, games, and other products for this group can capitalize on new insights into child psychology. In addition, this age group's receptivity to special versions of general-utility, and health and food products, redesigned or packaged with a special small-child appeal, can open up hitherto untapped marketing opportunities. With the direct visual medium provided by television, manufacturers of such products as food, drug, and toiletry items and clothing can advertise and sell as effectively to these youngsters as can the makers of candies, gum, toys, and games. The biggest mistake being made in basic advertising strategy today is aiming exclusively at the parents of this market segment, with adult appeals that sail completely over the youngsters' heads.
>
> The secret in successful selling communication here is that small children enjoy, and better remember, ads in which they may participate--for example, sing-along commercials and print ads that allow them to color pictures." 116/

Pre-schoolers are not the only children who are readily confused and manipulated by television advertising. Even older children show significant difficulty in understanding matters essential to comprehension of television commercials. The following section explores the research related

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116/ Id. at 50-51. (Emphases added)

to children 6 through 11 years old, and the effect which television advertising has on them.

(b) Television Advertising and the School-Age Child

(i) The Inability of Many Children to Differentiate Between Television Programs and Commercials

Studies confirm that many children age eight or younger are unable to distinguish between television programming and commercials. The aforementioned pilot study undertaken by Blatt, Spencer, and Ward, 117/ exposed 20 children ranging in age from 5-12 years to video-tapes of typical Saturday and Sunday morning commercials. The youngsters were interviewed the next day about what they had seen. The younger children (those in kindergarten) focused basically on coincidental differences between commercials and programs ("commercials are more funny").

117/ Blatt, Spencer, and Ward, supra note 106.

Subsequent studies undertaken by Ward, Reale, and Levinson in 1971 118/ and by Ward and Wackman in 1973 119/ support these findings. In each study, personal in-house interviews were administered to a sample of 67 children, ranging in ages from 5 to 12 years. Children were asked directly, "What is the difference between a TV program and a TV commercial?" Children between the ages of 9 and 12 readily distinguished between the two on the basis of the essential underlying difference (e.g., that "programs are supposed to entertain," while "commercials try to sell things"). Children between the ages of 5 and 8 evidenced the same confusion demonstrated in the earlier Blatt, Spencer, and Ward pilot study. They tended to focus on

118/ Ward, Reale, and Levinson, Children's Perceptions, Explanation, and Judgments of Television Advertising: A Further Exploration (working paper, Marketing Science Institute, Cambridge, Mass., 1971).

119/ Ward and Wackman, Effects of Television Advertising on Consumer Socialization (Marketing Science Institute, Cambridge, Mass. 1973).

superficial differences (e.g., that "commercials are short and programs are long"). 120/

The inability of many children to differentiate between television programs and commercials suggests that they do not understand that the purpose of the commercial is to create product demand. In the Ward and Wackman study, the 5-12 year

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120/ The inability to distinguish commercials from programming has been recognized by both the Federal Communications Commission and this Commission. See note 2, supra. The FCC has acknowledged the inability on two specific occasions. In the context of rejecting ACT's petition seeking to "Prohibit Commercials on Television Programming Directed to Children," the FCC noted that:

> "There is...evidence that very young children cannot distinguish between programming and advertising; they do not understand that the purpose of a commercial is to sell a product". FCC Policy Statement, supra note 2, 39 Fed. Reg. at 39399; 50 F.C.C. 2d. at 11. (Emphasis added).

The FCC also found:

> "Psychological and . . . behavioral questions can seldom be resolved to the point of mathematical certainty. . . . The evidence confirms, however, what our accumulated knowledge, experience and common sense tell us: that children do not have the sophistication or experience needed to understand that advertising is not just another form of informational programming". Id. at 39401; 50 F.C.C. 2d. at 15 (Emphasis added).

olds were specifically asked the question, "Why are commercials shown on TV?" Nearly one-half (47%) showed low levels of understanding of the selling intent of the commercial. The least aware children were those between the ages of 5 and 8.

(ii) The Trust Reposed in Television Commercials by Children Who Do Not Perceive Their Selling Purpose or Cannot Otherwise Comprehend or Evaluate Them

Three studies demonstrate that young children who do not understand the persuasive intent of commercials are more likely to perceive them as truthful messages than older children who do understand that intent. 121/ The NSF Report has characterized these studies as "consistent evidence" for this proposition. 122/

A study performed by Ward, Reale, and Levinson in 1972 demonstrates that younger children who did not understand the persuasive purpose of commercials showed more willingness to believe them than did older children who tended to regard them

121/ Robertson and Rossiter, Children and Commercial Persuasion: An Attribution Theory Analysis, Journal of Consumer Research, (June 1974) at 13-20. Ward, Reale, and Levinson, supra note 118; and Ward and Wackman, supra note 119.

122/ NSF Report at 30.

with more skepticism. 123/ Similarly, Robertson and Rossiter found that awareness of the persuasive purpose of commercials is directly related to age and that younger children, in this case first graders, showed more trusting attitudes toward commercials than did older children.

2. The Influence of Televised Advertising of Food and Other Products on Children and Their Parents

The central feature of televised advertising of sugared food products to children is that it is successful. It is successful principally because children are willing and able to act as "surrogate salesmen" for advertisers and because they are increasingly buying foods for themselves.

(a) Children's Purchase Requests of Parents

Helitzer and Heyel explain the profitability of advertising to children as a function of the tenacity with which they will insist on advertised products:

> "Children can be very successful naggers. By and large parents quite readily purchase products urged upon them by their

123/ Id.

127

> youngsters. In Helitzer Advertising's research it was found that a parent will pay 25% more for an advertised product with child appeal--even when a less expensive, nonadvertised product is no different." 124/

One advertising executive has observed even more baldly that:

> "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." 125/

Dr. Frances Horwich, a director of children's television programming and a psychologist whom Helitzer and Heyel have described as the "articulate private conscience and public scold of TV," has said that;

> "If you truly want big sales, you can use the child as your assistant salesman. He sells, he nags, until he breaks down the sales resistance of his parent. We are exploiting them, and we are confusing and bewildering them as to whom they should believe--the exciting-voiced

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124/ Helitzer and Heyel at 32.

125/ Kids, Food and Television at 38.

TV announcer, their favorite hero who will endorse anything short of leprosy, or their negatively replying mother or father." 126/

(i) The Incidence of Requests

The New York State Assembly staff reports that "parents from around the country indicate that children who cannot yet walk or read will recognize a product by its package and reach for it from the shopping cart." 127/ Studies suggest that even those who do not reach ask.

One study, undertaken by Dr. Charles Atkin of Michigan State University, unobtrusively observed parent-child interactions in selecting cereals in supermarkets. 128/ He found that in two-thirds of the 516 families observed, children initiated the selection, either by demanding (46%) or requesting (20%) a specific brand.

126/ Quoted in Helitzer and Heyel at 176. Although the National Association of Broadcasters' Code proscribes the use of a program's host or hero in commercials shown during that program (or an adjacent one), the same host or hero may appear in advertising shown on other programs.

127/ Kids, Food and Television at 38.

128/ Atkin, Effect of Television Advertising on Children - Parent-Child Communication in Supermarket Breakfast Cereal Selection, Report No. 7, Michigan State University (June 1975).

(ii) The Success of These Requests

An earlier study performed by the Gene Reilly Group yielded similar results. 129/ A sample of 1,053 children were individually interviewed in houses; 591 of the mothers completed questionnaires. For the 20 product categories examined (including presweetened cereals, cookies, fruit drinks, peanut butter, gum, and candy), at least 75% of the mothers who purchased these products acknowledged that they were influenced by their children's requests.

Dr. Joan Gussow, Professor of Nutrition at Teachers College, Columbia University, cites a study which shows the percentage of success for children's food requests for various types of food:

Breakfast cereals	88%
Snack foods	52%
Candy	40%
Soft drinks	38% 130/

Other research confirms that parents frequently yield to their children's requests for cereals and snack foods. For example, Ward and Wackman 131/ report acquiescence 85% of the time for cereals, 63% for snack foods, and 42% for

129/ Gene Reilly Group, Inc., Meals and Snacking: The Child and What He Eats, The Child, Volume 2, December 1973.

130/ Gussow, Counternutritional Messages of TV Ads Aimed at Children, Journal of Nutrition Education, Spring 1972 at p. 52.

131/ Ward and Wackman, Children's Purchase Influence Attempts and Parental Yielding, 9 Journal of Marketing Research 316-19 (1972).

candy--all based on reports by mothers from middle class families. The earlier referenced Atkin Study concluded that parents were twice as likely to comply with children's purchase requests as to deny them. 132/

Esther Peterson, when she was consumer affairs adviser to President Johnson, suggested parents avoid taking their small children when they shop for food because of the irrational distorting effect of children's demands on buying decisions. 133/ Not surprisingly, given the cost and inconvenience of arranging for baby sitters, that advice has not been widely followed. An American Broadcasting Company study shows that 65% of all mothers take their small children with them to the supermarket, and that 34% take them along every time they shop for food. Over half the mothers told ABC that their children actually select items to be bought. 134/

(iii) The Positive Relationship Between Children's Exposure to Advertising and Purchase Requests Made of Parents

A study by Galst and White measured pre-school children's attempts to influence purchases while accompanying their

132/ Atkin, supra note 128.

133/ Helitzer and Heyel at 18.

134/ Id.

mothers at the supermarket. The results show that the number of requests they made was positively related to the amount of television they watched. Cereals and candy were the most frequently requested items. 135/ Another study undertaken by Atkin shows a positive relationship between children's exposure to television advertising for cereal and candy and their consumption of those products. 136/

A third study by the Gene Reilly group 137/ shows that 85% of regular breakfast cereal consumers and 84% of regular candy consumers identified a specific brand as either their favorite or the one they usually asked for. When questioned about more general information (e.g., "the kinds of things you call snacks"), the children most often (78% of the time) cited such products as cookies, candy, cake, and ice cream. These responses indicate that the children's concepts of what constituted an "acceptable" snack included those products heavily advertised to them. 138/

135/ Galst and White, The Unhealthy Persuader: The Reinforcing Value of Television on Children Purchase Influencing Attempts at the Supermarket (working paper, Department of Psychology of Schooling, Teachers College, Columbia University, April 1976).

136/ Atkin, The Effects of Television Advertising on Children - A Survey of Pre-Adolescents' Response to Television Commercials, Report No. 6, Michigan State University (June 1975).

137/ Gene Reilly Group, Inc., "Meals and Snacking: The Child and What He Eats", The Child, Vol. 2 (December 1973).

138/ NSF Report at 104.

The manufacturers of these products have acknowledged that television advertising positively and significantly influences children's consumption.

A memorandum of the Kellogg Company entitled "Ready-To-Eat Cereals: Nutrition and Advertising," submitted to the Commission on August 3, 1977, states (p. 45):

> "Television advertising of ready-to-eat cereals to children increases children's consumption of these products."

Broadcasters, of course, are not reticent about the effectiveness of television in influencing children to demand products, including food. The August 29, 1977, issue of Broadcasting magazine contained an advertisement headlined "KID POWER IS COMING TO BOSTON," which advises prospective advertisers that:

> "If you're selling, Charlie's Mom is buying. But you've got to sell Charlie first. His allowance is only 50¢ a week, but his buying power is an American phenomenon. He's not only tight with his Mom, but he has a way with his Dad, his Grandma and Aunt Harriet, too.
>
> "When Charlie sees something he likes, he usually gets it. Just ask General Mills [or] McDonalds....
>
> "Of course, if you want to sell Charlie, you have to catch him when he's sitting down. Or at least standing still. And that's not easy. Lucky for you, Charlie's into TV.

* * *

"And, of course, Charlie won't be watching alone! You'll also be reaching Jeff and Timmy, Chris and Susie, Mark and his little brother John. Not to mention Mom when she's serving the cookies.

"That's what we mean by Kid Power."

(b) Children's Personal Food Purchases

Children seem to be buying more food for themselves now than in previous generations. This appears to be related to a significant shift in American eating habits over the last 20 years--a shift to snacking and nibbling instead of eating at meals. For instance, from 1962 to 1968 U.S. consumption of cake as a dessert decreased by 32%, while consumption of cake as a snack rose 70%. Snacking on cookies was up 40% and snacking on chocolate candy up 46.5% 139/

Today children, especially those in cities, are able to purchase snack foods in supermarkets, fast-food restaurants, and even in schools. According to a supermarket manager in a large eastern city, a survey in his store showed that 12% of his customers were under 12. 140/ Another survey showed that low-cost items on which children spend most of their money

139/ Kids, Food and Television at 51.

140/ Id. at 37.

are purchased alone or with a friend--not parents. The same survey showed that the children studied (aged 8-12) spent about half of their allowance on snacks--72% of which were sugared. These snacks were purchased repeatedly and were sometimes substituted for meals. 141/

(c) The Impact of Advertising for Sugared Products on Children's Nutritional Attitudes and Beliefs

We have discussed above the evidence that there is a relationship between children's exposure to television advertising and (i) their ability to recognize nationally advertised brands of sugared products; (ii) their tendency to believe that the heavily sugared products advertised to them are the most appropriate snack foods; and (iii) the frequency of children's requests for and purchases of those products.

These effects, taken together with the enormous quantity of television advertising for such products, have alarmed a number of experts in public health and nutrition who fear that televised food advertising undermines nutrition education and biases food preferences toward non-nutritious products.

141/ Id.

The Senate Select Committee on Nutrition and Human Needs describes the negative impact of televised food advertising on the efforts of parents and teachers to instill good nutritional habits in children:

> "In a world of human beings, progress is bound to be slow, but instruction in sound food choices and eating habits is at present hardly more than episodic, while persuasive commercial forces work unremittingly to encourage unwise eating habits and to nullify sound education. Some of these forces promote diet supplements, but most promote over-sugared, over-salted snack foods that distort diets." 142/

The Council on Food and Nutrition of the American Medical Association expressed similar sentiments in 1974 when it presented a resolution to Chairman Engman of this Commission, entitled "Television Advertising to Children." That resolution stated that:

> "The nature of the advertising and the emphasis on food items of high caloric density (mainly from sugar) that characterize the commercial promotion on children's television programming is most distressing. There clearly is need for more responsible advertising that helps to keep the concepts of good health and good nutrition. At the present time, advertising to children is counterproductive to the encouragement of sound habits." (Emphasis added.)

142/ Senate Select Committee on Nutrition and Human Needs, 93d Cong., 2d Sess., National Nutrition Policy Study, Report and Recommendation V-9 (1974). (Emphases Added)

Writing on this same subject of television and childhood nutrition, Helen D. Ullrich, Executive Director, Society for Nutrition Education, expressed the concern that current high levels of televised advertising of sugared products would lead children to consume a nutritionally inadequate diet:

> "Unfortunately, the nutritional message which is delivered to the child day after day in many TV ads promotes a completely unbalanced diet. When almost all the choices advertised on programs aimed at children are pre-sweetened cereals, candy and soft drinks with a message that these are the only foods needed for a good life, it is not difficult to realize that the result would be a totally inadequate diet." 143/

The White House Conference on Food, Nutrition and Health, convened by then President Nixon to assess the state of the nation's nutrition and make recommendations for improving it, concluded that:

> "One of the major goals of nutrition education is to develop an informed public capable of making wise food choices. However, when advertisements of private industry are contradictory or at cross-purposes with school nutrition efforts, nutrition education is seriously handicapped." 144/

143/ Ullrich, H., A View of Educational Goals of Childhood Nutrition, with Particular Reference to Television Advertising (Mar. 11, 1976).

144/ White House Conference on Food, Nutrition and Health, Final Report 163 (1974). (Emphasis added)

3. Additional Impacts of Television Advertising on Children and Their Parents

Research demonstrates that parent-child conflicts frequently ensue as a consequence of parental refusal of a child's purchase requests. As we have shown above, the requests that lead to these results are stimulated by televised advertising. Probably for that reason many parents believe that some sort of regulation of advertising to children is needed. 145/

Sidney Berman, M.D., former president of the American Academy of Child Psychiatry, has stated that:

> "The American Academy of Child Psychiatry, as an organization primarily devoted to the mental health needs of all children, is deeply concerned with the exploitation of children, by many advertisers on the television media. Many of these advertisements are directed to the attention of children in order to bring pressure to bear upon the parents to purchase these products . . . .Furthermore, the advertisements encourage confrontation

145/ When the FCC opened its docket in 1971 for comments on a proposal to ban all advertising on television to children, it got over 100,000 letters, 90% of them hostile to such advertising. This was the largest volume of mail the FCC had received to that date on any subject. See, NSF Report at 134.

and alienation on the part of children toward their parents and undermine the parents' child rearing responsibilities." 146/ (Emphasis added)

Frederick C. Green, of the Department of Health, Education and Welfare's Office of Child Development, has expressed a similar view:

> "The child...is put in the position of an inexperienced solicitor; and the parent, an experienced though unsolicited buyer. When the parent denies the child's request for an advertised product he may feel guilty or resentful at being repeatedly placed in the position of having to say 'no.'" 147/

146/ Quoted in Hearings Before Senate Select Committee on Nutrition and Human Needs, 93d Cong., 1st Sess. (March 6, 1973) (Statement of Peggy Charren and Evelyn Sarson).

147/ Testimony Before the FTC, Hearings on Modern Advertising Practices (November 12, 1971).

C. Sugar, Tooth Decay, and Other Health Problems

1. The Historical Rise in American Sugar Consumption

The consumption of sugar at anything like the present American level is an historically new phenomenon. In 1821, Americans ate 10 pounds of sugar per capita. 148/ In the 156 years since, annual per capita consumption has risen almost 13-fold, reaching 126 pounds in 1976, the last full year for which data are available. 149/ The 1976 figure, in fact, was up by 13% just since 1960, when the corresponding figure was 111.2 pounds. 150/ And the Department of Agriculture's preliminary estimate for 1977 is that annual per capita consumption has risen by another 2 pounds since 1976, to a new high of 128.1 pounds. 151/

148/ American Medical Ass'n, Council on Foods and Nutrition, Some Nutritional Aspects of Sugar, Candy, and Sweetened Carbonated Beverages, 20 J. Am. Med. Ass'n 763 (1942).

149/ U.S. Department of Agriculture, Economic Research Service, Sugar and Sweetener Report (Dec. 1977) at 31.

150/ U.S. Department of Agriculture, Economic Research Service, Sugar and Sweetener Report (May 1977) at 31.

151/ Sugar and Sweetener Report (Dec. 1977) at 31.

About 95 pounds per capita of the 1976 and 1977 sugar consumption was in the form of sucrose, the kind found in white or brown table sugar. 152/ This works out to about 28 level teaspoons of sucrose per day for every man, woman, child and infant in the United States. This figure does not take account of other forms of sugar, of which Americans eat almost 32 pounds per capita per year. According to Dr. James H. Shaw, professor of nutrition at the Harvard School of Dental Medicine:

> "If evenly distributed throughout the population this level of consumption [of sucrose] would provide about 500 calories per day per capita or one sixth to one fourth of our total caloric needs." 153/

These figures may sound implausible to anyone who is still accustomed to thinking of sugar as a commodity to be bought in

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152/ Sucrose is a disaccharide, meaning that it is composed of two molecules, one of glucose and one of fructose. Glucose and fructose, themselves forms of sugar, are monosaccharides, meaning that they are single molecules. Glucose is a principal component of dextrose and corn syrup, and along with sucrose and fructose occurs naturally in significant amounts in fruits and honey. The use in manufactured foods of 100% fructose is rare, because of its expense, but high-fructose corn syrups (10-50% fructose) are currently enjoying a vogue in food manufacturing.

153/ Hearings on Nutrition Education, Part 3, TV Advertising of Food to Children, Sen. Select Comm. on Nutrition, 93d Cong., 1st Sess. (Mar. 5, 1973) at 289. (These hearings are cited hereinafter as the "Senate Hearings.") Among adult North Americans, an additional 10 to 20% of the caloric intake comes from alcohol. Mayer, A Diet for Living 89-90 (1976), citing White House Conference on Food, Nutrition and Health, Final Report 57 (1969). Further, according to the Senate Select Committee on Nutrition and Human Needs, "fat and sugar consumption [together] have risen to the point where these two dietary elements alone now comprise at least 60 percent of the total caloric intake, an increase of 20 percent since the early 1900s." Edible TV, Your Child and Food Commercials (1977) at v. (Foreword by Sens. McGovern and Percy).

bags at the store and added to foods in one's own home. As recently as 1920, 65% of the sugar used in this country was sold in that fashion. 154/ But by 1976, only 24% of the sugar consumed in this country was sold for home use. 155/ By contrast, over 70% of it went into manufactured or processed foods and beverages. 156/ Added sugar now appears in a wide range of foods not commonly thought of as being sweet or sweetened.

According to the Washington Post (Dec. 21, 1974):

> "It usually shocks people to find that sugar is in canned soups, including bullion cubes; in some cheese spreads, even refrigerated crescent dinner rolls; in many luncheon meats such as bologna and pastrami; in canned welsh rarebit; artifically flavored and colored peanut spread, mayonnaise, canned and most frozen vegetables.
>
> "The list is virtually endless: seasoned rice mixes, most add-the-main-ingredient packages, stuffing mixes...hamburger, sloppy joes and chili....
>
> "Checking these packaged foods against recipes for the dishes they are made to resemble, it is surprising how many of the original recipes do not call for sugar. Only Americans, for example, put sugar in their mayonnaise. Certainly few home cooks would think of adding sugar to garlic butter or even welsh rarebit."

154/ Personal communication, Fred Gray, Agricultural Economist, U.S. Department of Agriculture with Katherine Clancy, Ph.D., FTC consultant on nutrition (January 10, 1978).

155/ Sugar and Sweetener Report (Dec. 1977) at 26.

156/ Id.

Some experts have suggested that sugar consumption among small children may be rising even faster than among the population as a whole. The suggestion is based on the fact that sugar consumption has risen almost 13% since 1960 at the same time that consumption of non-caloric sweeteners (principally saccharin) has gone from the sweetening equivalent of 2.5 pounds of sucrose per capita in 1960 to the estimated equivalent of 9 pounds of sucrose per capita in 1977. 157/ The inference is that saccharin is most popular among those concerned about their weight, usually adolescents and adults, and that if they are shifting their consumption from sugar, but sugar consumption is still rising, then someone is taking up the slack, most likely small children for whom obesity is not a concern--yet. 158/

The amount of sugar in the American diet has, for the past several years, exceeded the amount of flour. Dr. Jean Mayer, formerly professor of nutrition at the Harvard School of Public Health and now president of Tufts University, 159/ has called this a "sobering statistic...almost incredible" 160/:

> "No nutritionist can really enjoy watching this mounting proportion of the calories

157/ Sugar and Sweetener Report (Dec. 1977) at 31. Compare Sugar and Sweetener Report (May 1977) at 31.

158/ See, e.g., the remarks of Dr. Joan Gussow, professor of nutrition, Teachers College, Columbia University, at the Georgetown University Seminar on Children and TV Advertising (Oct. 19, 1977).

159/ Dr. Mayer was also the chairman of the White House Conference on Food, Nutrition and Health (1969), which was convened by President Nixon to examine the state of American nutrition and make recommendations for its improvement.

160/ Senate Hearings at 271.

> in the diet--not necessarily mounting amounts, because people are tending to eat less, but the proportion represented by sugar is going up and up. I don't think that any nutritionist can look at that with equanimity." 161/

Dr. Mayer gave a number of reasons for his distress. "[B]y far the best established" 162/ of these, he said, is the current pandemic level of tooth decay in the United States which is causally related to sugar consumption.

2. Tooth Decay as a Public Health Problem

Tooth decay afflicts "almost everyone in the United States... mostly before adulthood." 163/ Tooth decay and other dental diseases 164/ are such a severe problem that as of 1960-62, the last time such a comprehensive survey was made, this country had "20 million men and women whose only teeth were artificial," 165/ in addition to "almost 10 million who had lost all 16 teeth from

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161/ Id. at 273.

162/ Id.

163/ Nat'l Caries Program, Dep't of Health, Education and Welfare, Status Report at 1 (NIH Pub. No. 73-394, 1972).

164/ Nat'l Inst. of Health, Dep't of Health, Education and Welfare, Prevention and Oral Health at 9 (NIH Pub. No. 74-707, 1973).

165/ Nat'l Center for Health Statistics, Dep't of Health, Education and Welfare, Decayed, Missing and Filled Teeth in Adults, 1960-62, Ser. 11, No. 23 at 1 (1967) (Emphasis added).

one jaw or the other." 166/ At that time "more than half" of all American adults had "more than 18 decayed, missing [or] filled teeth; and a quarter had as many as 24 or more. In sharp contrast, it was the exceptional person (about 1 in 160) who possessed a full complement of 32 teeth, none of which was either filled or decayed." 167/ According to the National Institute of Dental Research:

> "[W]e spend about $2 billion annually [in 1972 dollars] to repair the...damage [of tooth decay]. Even so, we obviously meet only a minor fraction of the need. Since caries [tooth decay] is principally a disease of young people, recent experience of the U.S. Army gives a representative picture of the problem. Army surveys indicate that every 100 inductees require 600 fillings, 112 extractions, 40 bridges, 21 crowns, 18 partial dentures, and one full denture. To repair completely the damage caused by caries nationwide would cost an estimated $8 billion more annually [in 1972 dollars] than we now spend." 168/

Among American six-year-olds as of 1965, the last time such a comprehensive survey was made, about four of every

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166/ Id.

167/ Id. at 3-4.

168/ Status Report, supra note 163, at 1.

hundred permanent teeth had already been attacked by decay, and among 11-year-olds "about 12 of every hundred teeth were decayed, missing [or] filled." 169/ A "greater frequency of tooth decay...is typical of adolescence and early adulthood." 170/ Thus, as of 1960-62, "men and women 18-24 years of age averaged about 14 DMF [decayed, missing, or filled] teeth per person." 171/ It has been estimated that at any given time there are about a billion unfilled cavities in American mouths. 172/ According to Dr. Abraham Nizel, of the School of Dental Medicine, Tufts University:

> "It is said that this disease develops so rapidly that if all of the 100,000 dentists in the United States restored decayed teeth day and night, 365 days a year, as many new cavities would have formed at the end of the year as were just restored during the previous year." 173/

169/ Nat'l Center for Health Statistics, Dep't of Health Education and Welfare, Decayed, Missing, and Filled Teeth Among Children, Ser. 11, No. 106 at 3 (August, 1971).

170/ Id.

171/ Id.

172/ Nat'l Inst. of Dental Research, Dental Decay, Pub. Health Serv. Pub. No. 1483, Health Info. Ser. No. 134 at 1 (1966).

173/ Senate Hearings at 277.

Dr. Nizel added that tooth decay:

> "is not a life endangering disease, but it can be extremely troublesome, incapacitating and expensive. It can cause pain, infection, chewing impairment and malnutrition." 174/

Decay of permanent adult teeth is irreversible and progressive. The only remedies are to drill out the decay and fill the teeth or, if the decay has progressed too far, to extract the teeth. Decay of deciduous, or "baby", teeth is likewise a serious problem. If these are lost too early, the spacing of the permanent teeth will be affected. Also, decay of these teeth can affect the permanent teeth that are forming within the jaws. And as with the adult teeth, decay of deciduous teeth can interfere with the chewing of foods that are essential to health, thus contributing to malnutrition. 175/

It is difficult to determine whether the incidence of tooth decay has increased or decreased among various elements of the American population because surveys cited above were completed in the 1960s and thus do not assess the effect of subsequent water flouridation, on the one hand, and changing eating habits, on the other. But Dr. Basil Bibby, of the Eastman Dental Center, Rochester, has recently written that "some diverse information indicates that the caries attack rate is increasingly active where there is no flourine in

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174/ Id. at 276.

175/ Nat'l Inst. of Dental Research, Research Explores Tooth Decay 1-2 (1966).

the drinking water," and that a 1972 finding "of no change in caries prevalence over 25 years, in spite of the use of flourine in dental offices, by prescription, or in dentifrices, ...can be interpreted as evidence of an increase in the strength of the caries attack." 176/ He says that this apparently stronger caries attack may be attributable to increased consumption of sugared snack foods, particularly those combining sugar with flour, such as cakes, cookies and pastries. 177/

One reason why it is difficult to get accurate year-by-year figures for the incidence of tooth decay is that in any given year somewhat less than half of the population visits a dentist. 178/ One might expect that those persons who do not regularly see a dentist would have worse dental problems, on the whole, than those who do. But the available data point in the other direction; dental disease seems to be an affliction of affluence, rather than poverty. According to the 1960-62 survey reported by the National Center for Health

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176/ Bibby, The Cariogenicity of Snack Foods and Confections, 90 J. Am. Dental Ass'n 121, 122 (1975). (Emphasis added.)

177/ Id.

178/ See e.g., Decayed, Missing and Filled Teeth in Adults, supra note 165, at 1; Dep't of Health, Education and Welfare, Vital and Health Statistics, Selected Dental Findings by Age, Race and Sex: United States 1960-61 at 6 (1965).

Statistics:

> "[H]igher counts of DMF [decayed, missing or filled] teeth were more frequent among people with greater income or education and among residents of more densely inhabited places. In addition, men and women living in the Northeast had significantly high counts, and those living in the South had significantly low ones." 179/

3. The Historical Correlation Between Sugar Consumption and Tooth Decay

Like sugar consumption at its present American level, tooth decay at its present American level is an historically new phenomenon.

According to Prevention and Oral Health (pp. 7-8), a volume published in 1973 under the auspices of the National Institute of Dental Research: 180/

> "Abundant epidemiological and experimental evidence implicates sugars, especially sucrose, as the major cariogenic [decay-causing] culprit in the modern diet. Though human remains from pre-sucrose cultures show some evidence of dental caries, the prevalence was much lower, and the lesions were confined

179/ Decayed, Missing and Filled Teeth in Adults, supra note 165, at 1.

180/ This volume is the report of a conference sponsored by the John E. Fogarty International Center for Advanced Study in the Health Sciences and the National Institute of Dental Research, National Institutes of Health (James P. Carlos, D.D.S., editor).

largely to root surfaces. 180a/ The modern high prevalence and severity of caries [tooth decay] dates from around the middle of the 19th century when the consumption of sugar began to rise rapidly." (Emphasis added.)

This volume adds that "time after time" since the mid-19th century: 181/

> "the disease has appeared among a previously caries free population as it changed from its traditional diet of starchy foods and other vegetables or animal flesh to more and more sugar. This can be observed today in parts of Africa and the Far East. Little or no caries is seen in persons hereditarily unable to metabolize fructose 182/ and who therefore consume starchy foods devoid of sweetstuffs."

Dr. Abraham Nizel, of the School of Dental Medicine, Tufts University, has explained that tooth decay can be seen to begin when various theretofore unaffected populations start to eat sugar:

> "There have been several surveys showing significantly increased dental caries experience in Eskimos and African tribesmen who were originally

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180a/ See e.g., Hardwick, The Incidence and Distribution of Caries Throughout the Ages in Relation to the Englishman's Diet, 108 Br. Dent. J. 9 (1960) (some tooth decay found in Pleistocene era hominids); Sedwick, Observations on Pre-Columbian Indian Skulls Unearthed in New York State, 23 J. Amer. Dental Ass'n 764 (1963) (over half of skulls examined showed some tooth decay). But compare the modern American figures cited above which show, inter alia, that over half of all adult teeth in this country are decayed, missing, or filled, and that tooth decay afflicts such a large proportion of the population that only one adult in 160 has a full set of undecayed teeth.

181/ Id. at 9.

182/ Since fructose is one of the components of sucrose, persons who cannot metabolize fructose are obliged to avoid sucrose.

exposed to primitive foods and dietary practices and subsequently changed to modern types of refined foods, particularly sugars. Another example of the dental health penalties of the so-called civilized diets was seen in natives living on an island, Tristan de Cunha. In 1938, the diet of the natives of this island consisted of two staples, potatoes and fish, but no sugar. Not a single carious [decayed] molar was found in any of the young people under the age of 20. In 1962, Dr. Holloway went back and found that they were consuming an average of one pound of sugar per week, per person, with the result that a comparable age group showed 50 percent of their molars to be carious." 183/

Dr. Nizel added that:

"In Norway during World War II, there was food rationing which included a reduction in consumption of sugar and refined carbohyrates 184/ with a concurrent increased consumption of potatoes, vegetables, milk and bread.

"A progressive decrease in occurrence of caries was associated with these forced dietary changes from 1942 to 1946. However, the caries incidence began to rise in 1947 and 1948 as the restrictions [on] sweets were lifted." 185/

183/ Senate Hearings at 278, citing Holloway, et al., Dental Disease in Tristan da Cunha, 115 Brit. Dent. J. 19 (1963). (Emphasis added.)

184/ A refined carbohydrate is one which has been separated from its component parts, the separation having decreased the complexity of the substance and removed other nutrients. A common example is white flour.

185/ Senate Hearings at 278, citing Toverud, et al., Influence of War and Postwar Conditions on the Teeth of Norwegian School Children, 39 Milbank Mem. Fund Quarterly 489 (1961). Dr. Basil Bibby, Research Associate, Eastman Dental Center, Rochester, has pointed out that although, in this study, "caries figures fell pretty much in parallel with sugar consumption, a clear case cannot be made because...between meal eating was virtually eliminated, and, in addition, refined flour was removed from the diet. Either of these alone might have reduced the strength of the caries attack." Bibby, The Cariogenicity of Snack Foods and Confections, 90 J. Am. Dental Ass'n 121, 122 (1975).

4. How Sugar Causes Tooth Decay

There is no serious doubt that the historical relationship between rising sugar consumption and a rising incidence of tooth decay is a causal one. There is a solid expert consensus that sugar is cariogenic. That is, it causes dental caries, or tooth decay. It does this by "contribut[ing] to the development of acid-producing bacteria (dental plaque) that stick to the teeth." 186/ Sugar and plaque are also factors in periodontal disease, 187/ which can cause the loss of even undecayed teeth. "[S]ucrose-induced plaque will cause gingivitis in humans." 188/ According to the American Dental Association's Bureau of Dental Health Education:

> "Every time you eat sweets, acids are formed in your mouth. When the acids become sufficiently concentrated, they attack your teeth." 189/

Moreover, according to Dr. William H. Bowen, Chief of the Caries Prevention and Research Bureau, National Caries

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186/ Council on Dental Health, American Dental Ass'n, Public Message on Sugar and Dental Health. This message accordingly endorses "the elimination of advertising of sugar-rich products on children's television programs." See Appendix B.

187/ "Periodontal disease is a disease of the tissues which support the teeth and hold them firm in the jaws. When only the gingivae or gums are involved, the condition is called gingivitis. If the underlying bone is involved in the inflammatory process, the condition is known as periodontitis." Prevention and Oral Health, supra note 180 at 9.

188/ Id.

189/ Bureau of Dental Health Education, American Dental Ass'n, The Chain of Tooth Decay (1974).

Program, National Institute of Dental Research, National Institutes of Health:

> "Carbohydrates and sugar in particular apparently can also affect the maturation of [tooth] enamel... It was observed that the teeth of rats exposed to high sugar diets showed delayed maturation and were therefore presumably more susceptible to decay." 190/

The cariogenicity of sugar seems to be less a function of the absolute amount consumed than of the form and manner in which it is consumed. The most dangerous pattern is frequent between-meal snacking on sugar-rich foods, especially those that stick to the teeth (e.g., viscous candies), are sucked on for long periods of time (e.g., hard candies) or otherwise remain in the mouth (e.g., pastries, cakes, cookies, and other products that combine sugar with flour). 191/

Such snacking leads to a sustained buildup of the acids that attack the teeth. According to Dr. W. H. Bowen "each ingestion of sugar is followed by a rapid fall in pH value [i.e., an increase in acidity] on the tooth surface. The

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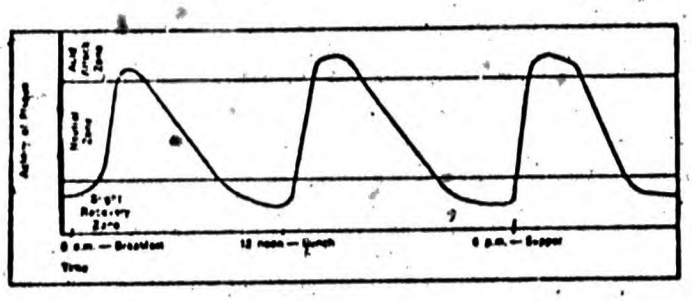
190/ Bowen, Role of Carbohydrates in Dental Caries, American Chemical Soc'y Symposium Series, No. 15 at 150 (1976). (Citations omitted.)

191/ While stickiness and chewiness are thought to contribute to cariogenicity of sugared products, those properties are not essential to make them cariogenic. According to Dr. Nizel, "[s]ugar sweetened liquids as well as solid sweets will stimulate the formation and growth of sticky dental plaque as well as the multiplication of caries-producing bacteria. A recent controlled experiment with children who consumed 12 ounces of soft drink a day for 3 years showed that they suffered in certain teeth as much as 50-150 percent more decay than another group who drank water. On the whole, the decay rate tended to be higher in the soft drink consuming group, compared with the water drinking group." Senate Hearings at 280.

pH returns to neutrality over a 20-30 minute period." 192/

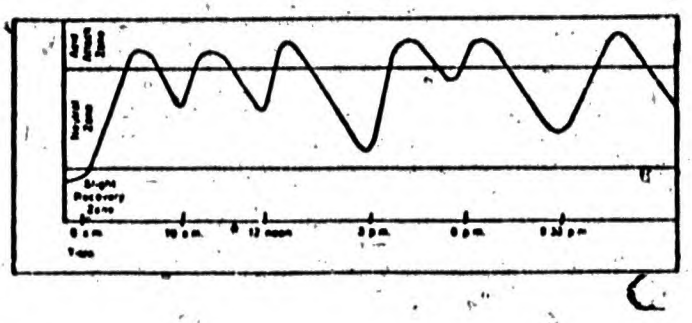
Thus if sugar is eaten only at meals, the teeth will be subjected to much less exposure to sugar-produced acid than if the supply of sugar in the mouth is periodically replenished through between-meal snacking. Dr. M. Truuvert, of the Faculty of Dentistry, University of Toronto, has shown in graphic form what happens to acid production when sugared snacks are eaten. The first diagram shows the pattern of acid production when three daily meals are eaten without snacks: 193/



192/ Bowen, supra note 190, at 152.

193/ Truuvert, How to Avoid the High Cost of Dental Work, 39 J. Canad. Dent. Assn. 779, 780 (Nov. 1973).

The second diagram shows what happens if "we add three very minor snacks, i.e., a Lifesaver candy at 10:00 a.m., a cookie and a soft drink at 3:00 p.m. and a cup of hot chocolate at bedtime":



Dr. Truuvert says that with the second eating pattern, "the acidity would hardly have a chance to fall enough for the enamel to reach the remineralization zone," and that "if this eating pattern is followed constantly, the result could easily be rampant caries (decay almost out of control)." 194/

The LSRO Report (Dextrose) 195/ makes a similar point (p. 14):

194/ Id. at 780.

195/ We shall be referring frequently in the following pages to the LSRO Report (Dextrose) and the LSRO Report (Sucrose). These were commissioned by the Food and Drug Administration and submitted within the past two years by the Life Sciences Research Office (LSRO) of the Federation of American Societies for Experimental Biology. The LSRO Reports constitute literature searches as to the health effects (including dental effects) of consuming these forms of sugar. These searches were both recent and wide ranging, as the reports themselves explain. The full titles are Evaluation of the Health Aspects of Sucrose as a Food Ingredient (1976) and Evaluation of the Health Aspects of Corn Sugar (Dextrose), Corn Syrup and Invert Sugar as Food Ingredients (1976).

"The most common factors associated with caries development in a study of 80 patients with rampant dental caries were a history of frequent or excessive eating of sweets during and between meals, extensive bacterial plaque formation and lower pH levels [increased acidity] in plaque than in mucuous membranes or saliva. Studies of eating habits of preschool and school children have indicated a correlation between the number of caries and the number of confections or quantity of sugar consumed between meals, but not between dental caries experience and total sugar consumed." (Citations omitted; emphasis added.)

The same report adds (p. 16):

"Between-meal eating has been demonstrated to be significantly correlated with frequency and severity of caries in both children and adults. Thus protection is facilitated by limitation of the frequency of consumption of sugar and sugared foods." (Citation omitted.)

Prevention and Oral Health 196/ adds (p. 36) that "to give an idea of the results which can be achieved" if between-meal sugar consumption is eliminated:

"[I]n the Vipeholm Study conducted in Sweden, caries activity was reduced up to 90 to 95 percent when the frequent intake of sticky sweets between meals was discontinued. In a well-controlled study at Hopewood [H]ouse in Australia, children aged 5 to 13 had an average caries prevalence which was about 90 percent lower than the general population in the same age group after sugar and other refined carbohydrates were excluded from their diet. These two examples illustrate the effect of a strict sugar-reducing regimen in institutional groups, though it would be observed that the figures might not be valid for other situations." (Emphasis added.)

196/ See note 180.

5. The Heavily Sugared Products Promoted to Children on Television and Tooth Decay

(a) Sugared Snacks

Thus far we have seen that frequent consumption of sugared food products between meals is the dietary pattern best calculated to cause tooth decay. Below we shall see that if one does eat between meals, it is significantly safer to eat alternative foods, which are readily available.

The overwhelming message of televised food advertising to children is that the best way to satisfy between meal hunger is with something sugary. The sugared snacks sold to children on television include a wide range of candies, cakes, cookies, other snacks, sweet drinks (e.g., Kool-Aid), milk sweeteners (e.g., Nestle's Quick) and other products. Dr. Ira Shannon, Director of the Oral Physiology Research Laboratory, Veterans Administration Hospital, Houston, Texas, has calculated the sucrose content of a number of these products: 197/

197/ Shannon and Edmonds, High Sucrose Snacks: Are They Doubly Dangerous?, 91 Texas Dental J. 8,9 (August, 1973).

Candies

Product	% Sucrose
Hershey Bar (plain)	46.8
Hershey Bar (almond)	44.3
Hershey Kisses	48.8
3 Musketeers	41.1
Mars	40.3
Mars Almond	48.8
Mounds	21.9
Almond Joy	25.6
Nestle's Crunch	47.4
Nestle's Krackel	43.6
Nestle's Almond Bar	48.5
Peter Paul Cluster	35.6
Peanut Butter Bar	51.3
Reese Peanut Butter Cup	36.3
Milk Duds	30.7
Mars Sprint	42.1
Mr. Goodbar	42.5
Baby Ruth	35.3
Butterfinger	33.5
Planter's Jumbo Block	23.9
Kraft Caramel	34.6
Big Time	41.2
Hollywood	47.4
5th Avenue	36.6
Tootsie Roll	36.1
Rally	36.6
Pay Day	29.3
Butternut	28.3
Boston Baked Beans	60.0
Snickers	33.8
Milky Way	36.5
Pom Poms	23.4
Hollywood Swinger	32.6
Caravelle	33.2
Bit-O-Honey	36.2
Sugar Daddy	43.3
Peanut Butter Oompas	60.9
Malted Milk Balls	44.5
M&M Chocolate Peanuts	44.8
Candy Corn	57.5
Double Coated Peanuts	27.2
Lance's Peanut Bar	20.0
Lemon Drops (hard)	47.0

Product	% Sucrose
Gum Drops (soft) yellow	41.3
" " " orange	39.4
" " " red	34.6
" " " green	39.6
" " " white	34.0
" " " black	38.4
" " " purple	35.8
Mints	
Life Savers	
Mint-O-Green	39.7
Cryst-O-Mint	77.8
Spear-O-Mint	98.4
Pep-O-Mint	98.6
Stik-O-Pep	72.4
Tropical Fruit	75.4
Fancy Fruit	75.2
Butterscotch	70.8
Five Flavors	77.3
Assort-O-Mint	77.2
Wild Cherry	72.5
Reed's	
Cinnamon	54.9
Spearmint	53.8
Butter Scotch	47.0
Root Beer	54.7
Peppermint	51.3
Cookies	
Oreo	40.2
Butter Cookies	21.7
Oatmeal Cookies	18.8
Yum Yums	28.5
Chip-A-Roos	28.5
Vanilla Wafers	32.6
Zu Zu Ginger Snaps	29.4
Lemon Snaps	31.7
Vanilla Snaps	31.7
Fig Newton	11.6
Peanut Butter Cookies	16.4

Dr. Shannon has calculated the mean sucrose concentration for the 50 candies he sampled as 38.8%, for the 16 mints he sampled as 72.2%, and for the 11 cookies he sampled as 26.9%. 198/ The LSRO Report (Sucrose) says (p. 4) that for all soft candy sold in the U.S., the weighted mean sucrose concentration is 44.74%, and that for all hard candy it is 48.98%.

Notwithstanding that between-meal consumption, a sticky or chewy texture, and a long retention time in the mouth add to the cariogenicity of sugared products, some of the advertising now in question promotes exactly those attributes as especially desirable. Examples are the "Marathon Bar" and "Life Savers" commercials reproduced at pp. 41 and 37, respectively, of the ACT Petition. Marathon bars are promoted on the basis that "You can't eat a Marathon Candy Bar fast.... It lasts a good long time...chewy." Life Savers are promoted as being "made to last." Both are obviously intended for between-meal consumption. Although repeated between-meal consumption of sugared products is an especially dangerous practice, that practice too is specifically promoted in some advertising. An example is the advertisement for

198/ Id. at 10.

"Now and Later" candy ("eat some now, save some for later").

Cookies, cakes, and pastries, which combine large amounts of sugar with flour, are also thought to be especially cariogenic. Dr. Basil Bibby of the Eastman Dental Center, Rochester, explains that:

> "Although the strength of the caries attack seems to have increased during the past half century, there has been no corresponding increase in sucrose consumption. 199/ This suggests that some other changes may relate more closely to the caries picture. Since the greatest change in eating habits in recent decades has been the increased use of manufactured, ready-to-eat snack foods, particularly baked goods, it seems logical to suspect them of being important in caries causation. This is particularly true since the increased variety and availability of such foods as well as other factors have led to an increase in the frequency of eating, which, of itself, is conducive to caries.
>
> "Support for the belief that snack food consumption is as important as the amount of sucrose used was found in a comparison of snack food and sugar use in the northeastern

199/ Emphasis added. Although consumption of sucrose has remained relatively stable for the past 50 years (after taking an enormous jump following World War I), consumption of all forms of sugar combined has increased by almost 15% just since 1960, and sugar consumption among small children may have increased even more markedly. See text accompanying notes 157-58 supra.

and southern states. Persons in the northeastern region, who have higher caries incidence eat more snacks but use less sugar than persons, in the southern states, who have less caries." 200/

Dr. Bibby adds that:

"In this connection, attention should be directed to foods made of mixtures of flour and sugar. Laboratory tests and some animal studies indicate that these may be particularly destructive to the teeth. Also, this type of baked-goods snack food is showing the greatest increase in use in this country. Further, since these items are designed for between-meal use, they can be counted on to exert their maximum destructive effect on the teeth." 201/

(b) "Pre-Sweetened" or "Ready-Sweetened" Cereals

"Pre-sweetened" or "ready-sweetened" cereals constitute the largest single category of heavily sugared foods being

200/ Bibby, The Cariogenicity of Snack Foods and Confections, 90 J. Am. Dental Ass'n 121 (1975).

201/ Id. at 130. Dr. Bibby cites figures which show that from 1963 to 1968 the use of cakes as desserts declined by 32.8%, while the use of cakes as snacks increased by 70%. Over the same period the use of cookies as desserts declined 42.6%, while the use of cookies as snacks increased by 39.9%. Id. at 124. See U.S. Department of Commerce, An Economic and Marketing Report on Frozen Desserts (October, 1969).

promoted to children on televison. The heavy sugar content of a sampling of these cereals is set forth below. 202/

Product	% Sucrose	% Glucose	% Total Sugar
Alpha Bits	40.3	0.6	40.9
Sir Grapefellow	40.7	3.1	43.8
Super Sugar Crisp	40.7	4.5	45.2
Cocoa Puffs	43.0	3.5	46.5
Cap'n Crunch	43.3	0.8	44.1
Crunch Berries	43.4	1.0	44.4
Kaboom	43.8	3.0	46.8
Frankenberry	44.0	2.6	46.6
Frosted Flakes	44.0	2.9	46.9
Count Chocula	44.2	3.7	47.9
Orange Quangaroos	44.7	0.6	45.3
Quisp	44.9	0.6	45.3
Boo Berry	45.7	2.8	48.5
Vanilly Crunch	45.8	0.7	46.5
Baron von Redberry	45.8	1.5	47.3
Cocoa Crispies	45.9	0.8	46.7
Trix	46.6	4.1	50.5
Froot Loops	47.4	0.5	48.9
Honeycomb	48.8	2.8	51.6
Pink Panther	49.2	1.3	50.5
Cinnamon Crunch	50.3	3.2	53.5
Lucky Charms	50.4	7.6	58.0
Cocoa Pebbles	53.5	0.6	54.1
Apple Jacks	55.0	0.5	55.5
Fruity Pebbles	55.1	1.1	56.6
King Vitaman [sic]	58.5	3.1	61.6
Sugar Smacks	61.3	2.4	63.7
Super Orange Crisp	68.0	2.8	70.8

202/ Shannon, Sucrose and Glucose in Dry Breakfast Cereals, 18 J. Dent. for Children 347, 348 (1977).

The manufacturers of these cereals contend that the fact that they contain large -- even preponderant -- amounts of sugar does not mean that they cause tooth decay. Thus, the Kellogg Co. has argued to the Commission that:

> "Sticky" cohesive types of foods which get between the teeth and remain there in fissures are the cariogenic types. The food that stays is the food that decays. Cereal and milk combinations have a fluid consistency and do not stay in the month for long periods of time after eating. Katz has suggested that cereals have a buffering effect due to their mineral and protein content. The importance of this is the neutralization (inactivation) of the acid which causes caries. Currently 95% of all ready-to-eat cereals are consumed with milk (which also has a buffering potential) and is readily cleared from the mouth. Therefore, it is not logical to conclude that simply because ready-to-eat cereals contain sugar they cause dental caries. In fact, there exists considerable evidence [three experiments with children, which Kellogg discusses] to the contrary." 203/

203/ Kellogg Co., Ready to Eat Cereals: Nutrition and Advertising 27 (Aug. 3, 1977). (Citations omitted; emphasis added.) When Kellogg made a similar argument in a two-page advertisement which appeared in eight major newspapers on Nov. 15, 1977, the argument was criticized by the American Dental Association. Kellogg responded by threatening to sue the American Dental Association for defamation of its products. See Washington Post, Dec. 2, 1977 at D-10. For an extensive, and generally critical, discussion of the claims made in Kellogg's advertisement, see Sugary Cereals: A Taste of Controversy, Washington Post, Dec. 1, 1977 at E-1.

On the other hand, Dr. James H. Shaw, professor of nutrition at the Harvard School of Dental Medicine, has done animal studies which show, according to him, that:

> "It is very clear...that the sugar coated cereals are much more cariogenic [in animals] even when milk is added than is the case with regard to the traditional cereals.
>
> * * *
>
> "[I]t is certainly correct that there [are] no published data specifically on humans [showing greater cariogenicity for sugared cereals]. It is very difficult and expensive to do clinical studies where a single food like this is tested. And when I speak of making tests, it is with animals where we fed the sugar-coated breakfast cereals as a specific meal or several meals during the day in well-controlled experiments." 204/

According to Dr. W.H. Bowen, Chief of the Caries Prevention and Research Bureau, National Caries Program, National Institute of Dental Research, neither the studies that Kellogg cites nor Dr. Shaw's studies deserves to be given much weight. Dr. Bowen believes that there are methodological deficiencies in both sets of studies which prevent them from establishing the points for which they have been cited. 205/

204/ Senate Hearings at 283-4.

205/ Interview with FTC staff, at National Inst. for Dental Research, Bethesda, Md., October 31, 1977.

The studies that Kellogg cites have been severely criticized. After one of these studies was published in the Journal of the American Dental Association, 206/ Dr. Herschel S. Horowitz, of the National Institute of Dental Research, observed that:

> "There are...major weaknesses in the study's design that may lead to misinterpretation of the findings by readers.
>
> "A mother [in the study] apparently ordered cereal for her entire family, and her family's total preferences were reflected in those orders. Annual quantities of ordered cereals were divided by the number of family members (excluding children under age one) to estimate cereal consumption for each subject. In other words, the authors have little notion of what type or amount of cereals the subjects themselves consumed; they know merely what all family members ordered (and ostensibly consumed).
>
> "Yet, the authors repeatedly refer to the subjects' cereal orders, their consumption of cereals, and whether they ate small amounts of cereals. With the methods used, these statements are not justified." 207/

Another comment was that:

> "I found the article to be unacceptable on any reasonable scientific or epidemiological grounds.

* * *

206/ Glass and Fleisch, Diet and Dental Caries: Dental Caries and the Consumption of Ready-To-Eat Cereals, 88 J. Amer. Dental Ass'n 807 (1974).

207/ Letter from Herschel S. Horowitz, D.D.S., 89 J. Amer. Dental Ass'n 30-31 (1974).

> While these results and inferences [published in the study] may have pleased the Kellogg Co., which, incidentally, supplied all the cereal, presumably free of charge, my training in epidemiology and simple common sense caused me to recoil." 208/

On the other side of the dispute, Dr. Shaw himself has admitted that his animal studies have weaknesses that prevent them from being proof that sugared cereals, whether or not eaten with milk, cause tooth decay in human beings. 209/

The fact that we do not understand all the reasons for the relative non-cariogenicity of most foods that were in the human diet prior to the introduction of large amounts of added sugar has to be borne in mind in assessing the arguments of Kellogg and other cereal manufacturers on this issue. The point is that however logical Kellogg's arguments may sound, they are not backed by the same historical assurances that are available as to these other foods with which we have generations of experience.

Much of the Kellogg argument that sugared breakfast cereals are non-cariogenic rests on the proposition that they are eaten only at breakfast and only with milk. This is asserted to distinguish them from sugared snack foods,

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208/ Letter from Howard J. Green, D.D.S. Id. at 31.

209/ Letter from Dr. James H. Shaw to Dr. Sanford Miller, Oct. 6, 1976.

eaten between meals, which Kellogg impliedly concedes to be highly cariogenic. Kellogg, at various times, has asserted that either 92% 210/ or 94% 211/ of all "pre-sweetened" or "ready-sweetened" cereals are eaten with milk.

There are several reasons to regard such claims cautiously. First, the data on which Kellogg bases the claims are not publicly available. Second, we do not know how Kellogg defines the terms "pre-sweetened" and "ready-sweetened". Therefore, we do not know what the category is of which 92 or 94% is supposedly eaten with milk. Third, assuming that 92 or 94% of all "pre-sweetened" or "ready-sweetened" cereal is eaten with milk, that figure may conceal very substantial differences among particular brands, or among particular children. It might be, for example, that some of these products are more attractive than others, in terms of taste and texture, when eaten without milk. It might also be that younger children are more inclined than older ones to put pieces of sugared cereal in their mouths and suck on them. Such sucking might account for relatively little consumption of cereal,

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210/ Kellogg, Breakfast and Nutrition (undated pamphlet).

211/ Kellogg, advertisement, Washington Post, Nov. 15, 1977 at A12-A13.

at the same time that it exposed the children to a serious cariogenic risk. 212/ But these things cannot be known unless we have access to Kellogg's underlying data -- and may be unknowable even then. 213/

Certainly Kellogg's claim that these cereals are rarely eaten without milk is contrary to some of the anecdotal evidence. Dr. M. Truuvert, of the Faculty of Dentistry, University of Toronto, has written that:

> "Pre-sweetened cereals can be placed in the same category as dry cookies. Only if they are thoroughly soggy with milk 214/ do they lose some of their ability to stick in the deep pits and fissures abundant on young teeth -- and most children prefer them crisp. From

212/ See Dr. Truuvert's diagram, and the accompanying discussion at notes 193-94 supra. Similarly, Dr. Nizel has said that the "most important" factor in tooth decay is "the frequent eating of even minute amounts of sugar confections or sugar sweetened drinks between meals." Senate Hearings at 280. (Emphasis added.)

213/ In other words, Kellogg may simply be making broad claims on the basis of inadequate data, as it appears to be doing when it claims that sugared cereals have been demonstrated not to be cariogenic in human beings.

214/ The claim that a cereal is eaten "with milk" does not, of course, establish that the cereal has reached this "thoroughly soggy" state. In fact, advertising for sugared cereals tends to stress their crispness, as opposed to their sogginess. Note the use of the words "crisp" and "crunch" in the names of some of the cereals listed in the text accompanying note 202 supra, and the emphasis on crispness in the commercial quoted in the text accompanying note 219 infra.

> daily contact with many Canadian diets (mostly in the urban, Toronto area) our experience has been that children like and eat pre-sweetened cereals, both as breakfast food and as snacks... Take, for instance, the relatively new Count Chocula (General Mills) which is intended as a cereal but, according to many children, quickly becomes soggy in milk, and tastes better as a snack. Let us look at the main ingredients: chocolate, marshmallows, sugar, oat flour and corn syrup, 215/ fortified with iron. The dental profession considers this a dangerous way of supplying iron, practically the only worthwhile nutrient in the product.
>
> "Both General Foods (Post) and Kellogg's produce a variety of unsweetened enriched cereals, but their presweetened products, to our knowledge, are also enriched, encouraging parents to buy... In all these the sugar is incorporated directly into the cereal and thereby not easily dissolved making them more cariogenic (decay causing) than those not pre-sweetened. Sugar sprinkled on plain cereals is a separate entity and thereby more easily dissolved." 216/

Similarly, Dr. Jean Mayer has said that "according to the testimony of many young mothers, these [cereals] are often eaten like candy, without milk." 217/ He has also observed that "I think they perhaps might more properly be called candy." 218/

215/ Corn syrup consists largely of sugar. See note 152 supra.

216/ Truuvert, supra note 193, at 780-81.

217/ Senate Hearings at 260.

218/ Id. at 259. (Emphasis added.)

Some of the advertising for these products, moreover, may be making a subtle pitch for the between-meal snack market. An example is the advertising for a cereal called "Cookie Crisp." Cookie Crisp is promoted by a fantasy figure named "Cookie Jarvis." Cookie Jarvis has a magic wand that he uses to conjure up the product. He also participates in such dialogue as the following:

> Child: "Cookies for breakfast?"
>
> Voice: "Cookies are not for breakfast. Oh heavens no. Unless they are my cereal, you know. Cookie Crisp is cereal. Crunchy through and through. 219/ And I'm Cookie Jarvis to bring it to you."
>
> * * *
>
> Child: "They look like little chocolate chip cookies."
>
> Voice: "Cookie Crisp Cereal, that's what they are. Shaped like little cookies from a cookie jar...[they] taste like sweet crunchy cookies. Haroo, Haree."

While this commercial does say that cookies (other than Cookie Crisp) "are not for breakfast," it does nothing to caution that these "sweet crunchy" "little cookies from a cookie jar" should not be eaten the way cookies from a cookie jar ordinarily are -- as snacks. In fact, it rather suggests that they can be.

219/ Compare, Dr. Truuvert's observation about "thorough[] sogg[iness]." See text accompanying note 216 supra.

There is one other point that has to be considered in determining whether sugared cereals can be put to one side as non-cariogenic, as Kellogg and the other manufacturers have argued. That point is that a very high proportion of the calories in these cereals come from sugar. It has been suggested that sugar tends to produce a quick feeling of energy -- which also wears off quickly -- and that children who get a high proportion of their breakfast calories from sugar will be the ones who feel hungry in mid-morning, and thus be most likely to indulge in a mid-morning snack on another sugared product. Dr. Michael C. Wolf, of the Dental School, Fairleigh Dickinson University, has written that:

> "If a relatively sugarfree breakfast is eaten, a person will not only reduce his frequency of exposure to sugar but will avoid an initial high blood sugar level followed by a sharp decrease. This avoids a craving for a mid-morning sugary snack, further reducing the frequency of exposure to sucrose." 220/

(c) The Availability of Relatively Non-Cariogenic Alternative Snacks, Which Are Not Advertised to Children on Television

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220/ Letter from Michael C. Wolf, D.D.S. in 88 J. Am. Dent. Ass'n 1224 (June, 1974).

While between-meal eating itself contributes to tooth decay, it can be made considerably less dangerous by the substitution of other foods for candies, cookies, cakes, and pastries. The Bureau of Dental Health Education, American Dental Association, recommends the following as being relatively safe:

> "Fruits (fresh and/or packed in water or juice [as opposed to syrup]) oranges, grapefruits, tangerines, apricots, plums, apples, peaches, nectarines, cherries, strawberries, grapes, melons, avocados, pineapples, olives."

Likewise, the Bureau endorses unsweetened fruit and vegetable juices as being comparatively safe in relation to "soft drinks with added sugar," and also endorses "popcorn, soda crackers, toast, hard rolls, pretzels, potato chips, corn chips [and] pizza" in preference to heavily sugared products like "cookies, sweet rolls, pie, cakes (especially with frosting). . . candy, fudge, caramels, honey, sugars and syrups".

In a recent article, Drs. Ira Shannon and E.J. Edmonds have written that:

> "Among suitable snack selections are most fresh or frozen fruits, vegetables and their juices to which no sugar has been added, and fruits and vegetable which have been water packed in processing. In raw form, fibrous fruits and vegetables can act as cleansing agents for removing oral debris. Chewing them has the added advantage of stimulating copious salivary flow. With higher flow, salivary biocarbonate

> concentration increases, with consequent rises in pH [i.e., decreasing acidity] and buffer capacity." 221/

While some of these safer products are advertised to adults on television, they are not advertised to children at any level that remotely compares with the level of advertising for sugared products.

Just as we do not fully understand all of the reasons why natural foods contribute to human nutrition (as we shall show below), so too we do not understand all of the reasons why fresh fruits and vegetables are non-cariogenic, despite their natural sugar content. We do know, however, that human beings have eaten these foods since time immemorial, but that the present epidemic of tooth decay dates only from the introduction of large amounts of refined sugar into the diet. Drs. Shannon and Edmonds have written that:

221/ Shannon and Edmonds, Selection of Less Hazardous Between-Meal Snacks, 94 Texas Dent. J. 14, 16 (No. 10 October, 1976). Compare Research Explores Dental Decay, supra note 175, at 8. ("Foods that require thorough chewing are called detergent foods because they are forced over the teeth and gums, helping to clean them. Firm, crisp raw vegetables or fruits may have this cleansing effect. However, they should not be considered as a substitute for brushing after eating.")

> "Although natural sugars occur in fresh fruits and vegetables in limited amounts, they are not fermented by oral bacteria as easily as are the more readily solublized refined sugars that sweeten many processed foods." 222/

Other possible reasons why fresh fruits and vegetables are not significantly cariogenic are (a) that the fructose which occurs naturally in fruits may be marginally less cariogenic than the sucrose used in most foods to which sugar is added, 223/ (b) that these foods may have other substances

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222/ Shannon and Edmonds, Selection of Less Hazardous Between-Meal Snacks, supra note 221, at 16.

223/ This is a matter of dispute, or at least uncertainty. The National Institute of Dental Research's Status Report, supra note 163 at 4 states that in experiments with hamsters and rats, "glucose or fructose, or an equimolar mixture of the two have induced considerably less caries than sucrose... The reductions in caries activity have been most pronoun on smooth surfaces of teeth..." Dr. W.H. Bowen, however, has written that:

> "Sucrose has probably been blamed as the main dietary culprit in caries causation simply because it is the sugar which is most frequently ingested. But there is no evidence that its substitution by glucose or fructose would lead to a significant reduction in dental decay in humans. Results of many experiments carried [on] in animals clearly indicate that glucose and fructose can induce significant levels of decay." Bowen, Role of Carbohydrates supra note 190, at 153.

in them which protect the teeth from their sugar; 223a/ and/or (c) that the smooth juicy texture of most fresh fruits carries them rapidly through the mouth. 224/ But the explanation, in whole or in part, may also lie elsewhere. 225/ The important point is that no one knows with certainty.

223a/ By analogy, whole grains--as opposed to refined flour--appear to contain such substances. The National Institute of Dental Research reports that ". . . studies have shown that certain South American Indians, who live mostly on an unrefined . . . cereal, are particularly free from caries, whereas people using large quantities of white refined wheat flour in their diet have considerable decay. . . . It would thus appear that protective substances in the coats of most grains are removed in cleaning, refining, and cooking processes." U.S. Department of Health, Education and Welfare, National Institutes of Health, Research Explores Nutrition and Dental Health (1970) at 5. (Emphasis added.)

224/ An exception on this score is dried fruits, such as raisins and figs, which have a sugar concentration as high as that of most candies, and which have a chewy texture. These are not heavily advertised directly to children, but raisins have recently been advertised to parents on daytime television with such slogans as "Nature's Candy" and "Give Your Child a Natural Snack." Another possible exception is bananas. See Shannon and Edmonds, supra note 197, at 16. But see note 191, supra, to the effect that even sucrose-sweetened soft drinks, which pass quickly through the mouth, are cariogenic, showing that this characteristic is no guarantee against cariogenicity, at least in manufactured or fabricated foods.

225/ It has been suggested, for example, that "sucrose could be considered a sensitizing agent for teaching other simple sugars to become caries-producing far beyond their original capacity" and that a "banana when fed to a dental plaque which was originally formed on a sucrose background diet becomes, in a matter of six hours, three to five times more cariogenic than it was originally." Masters, The Sour Side of Sugar, J. Amer. Soc'y of Preventive Dentistry 23-24, (Jan.-Feb. 1975).

6. Sugar, Nutrition and Malnutrition

Dr. Juan Navia, a nutritional biochemist who is senior scientist at the Institute of Dental Research, University of Alabama at Birmingham, has observed that:

> "Foods compete for space in the stomachs of mankind. Every time a person selects a sugar rich food, he does it at the expense of other foods, and these other foods are always better as a source of vitamins and minerals than the sugar that replaces them." 226/

These other foods are "always better" because sugar contributes calories to the human diet, but is not otherwise nutritious. 227/ This is the point of the phrase, "empty calories". The energy content of a calorie of sugar is, by definition, exactly the same as the energy content of a calorie of any other food.

While children assuredly need calories, they have no need to get them in a form devoid of other nutrients. Ivalee McCord, Chairman of the Child Developmental and Family Relations Section of the American Economics Association has put the matter as follows:

226/ Senate Hearings at 297. (Emphasis added.)

227/ U.S. Dept. Agr., Nutritional Value of Foods, Home and Garden Bull. No. 72 at 24 (April 1977).

> "At a time when a body is growing at a more rapid rate and body structures are developing, the need for quality food is crucial. There is no room in the diet for 'empty calories' --those represented by most sugar-coated and snack foods. At this time children need balanced diets providing the nutrients needed for growth." 228/

The Life Sciences Research Office (LSRO) of the Federation of American Societies for Experimental Biology has warned, in a report to the Food and Drug Administration, that at the present level of sugar consumption:

> "It is likely that some individuals may eat enough to exclude adequate amounts of other foods that furnish required nutrients." 229/

That warning has to be read in conjunction with the theory that sugar consumption may be proportionately highest and rising fastest among children. As Dr. Jean Mayer has observed:

> ". . . particularly when you consider that a large part of the population eats relatively small amounts of sugar, it means we have a lot of children where sugar becomes a gigantic proportion [of the diet]." 230/

228/ Letter to ACT, Feb. 23, 1972. To similar effect, see Arlen, The Science of Nutrition 253 (2d ed. 1977).

229/ LSRO Report (Sucrose) at 13.

230/ Senate Hearings at 271.

With a few fortified exceptions (e.g., Hostess Twinkies), it is not claimed that the sugared snack foods and candies promoted to children on television have any nutritional value apart from calories. But claims are made that pre-sweetened cereals are "highly nutritious." 231/ These claims are a matter of dispute. On the one hand, the manufacturers point out that most, if not all, of these cereals have been fortified by adding vitamins and minerals. This was not always the case; this fortification was added, for the most part, starting in the early 1970's, following congressional hearings in which it was pointed out that the nutritional value of the unfortified cereals was essentially nil. 232/ The manufacturers, having added this fortification, now contend that some children are reluctant to

231/ This phrase was used by the president of the Kellogg Co. in threatening to sue the American Dental Association for defamation of these products. See Washington Post, December 2, 1971 at D-10.

232/ See Hearings on Dry Cereals, Sen. Commerce Comm., Consumers Subcomm., 91st Cong., 2d Sess. (1970); Choate, The Sugar Coated Children's Hour, The Nation at 146 (Jan. 31, 1972). There was even one academic study whose reported conclusion was that animals fed the boxes in which the cereals were packaged, with milk and raisins, were better nourished than animals fed the cereals alone, without milk or raisins. Id. at 147.

eat breakfast at all, and that the sugar in these cereals is a necessary attraction in order to get them to swallow the now-added vitamins and minerals. 233/

Thus, for example, Kellogg in an effort to counter criticism of these products, has recently published advertisements in adult print media which argue that "no breakfast is nutritious until somebody eats it," and that "it's that sparkle of sugar frosting 234/ we add that does the hard work...getting the cereal out of the bowl and into the boy or girl." 235/

In contrast to the manufacturers' position, Dr. Jean Mayer has argued that "in spite of their being enriched with some vitamins and iron, the total effect [of these cereals] is one of inadequate nutrition (deficient, in particular, in trace minerals...)." 236/

233/ Kellogg's data, however, show that fewer children (5%) than adults (9%) skip breakfast, and that fewer consumers of non-sugared cereals (5%) than of sugared cereals (7%) skip breakfast. See Kellogg, Breakfast and Nutrition (undated pamphlet); and the presentation of Dr. Gary Costley, Kellogg's Director of Nutrition, before the Commission on Nov. 22, 1977.

234/ See text accompanying note 202 supra for the extent of this "sparkle of sugar frosting" as a percentage of the cereal itself. Ironically, 17 of the cereals listed there exceed the mean sucrose concentration reported by LSRO for soft candy, and nine exceed the mean sucrose concentration for hard candy. See text accompanying note 198 supra.

235/ See, e.g., Washington Post, Oct 17, 1977.

236/ Senate Hearings at 260.

Dr. Mayer added to this assessment that:

> "Cereals, some of which are extremely highly processed so that their intrinsic nutrient content is very low, particularly when combined with sugar, which is the prototype of 'empty calories,' are not a complete food even if fortified with eight or 10 vitamins." 237/

As an example of what can happen when a child's diet is deficient in trace minerals, Dr. Mayer cited cases of zinc deficiency in middle class American children. The symptoms of this deficiency are that growth stops and that sexual maturation stops with it. In Dr. Mayer's words:

> "This seems like an extradordinary occurrence... Zinc is a widespread metal in nature and it seems almost impossible that American children of well-off families would be deficient in zinc. However, it becomes possible when you think of children feeding themselves a cereal containing more than 50-percent sugar, enormous amounts of soft drinks, enormous amounts of snacks and, generally speaking, empty calories." 238/

At least some of the cereals in question have very recently been fortified with zinc. 239/ But it is not known what other elements remain to be added. Dr. Walter Mertz, Chairman, Nutrition Institute, Agricultural Research Service, U.S. Department of Agriculture, has recently pointed out that:

237/ Id. at 262-63 (Emphasis added).

238/ Id. at 263.

239/ Presentation of Dr. Gary Costley, Kellogg Co., before the Commission, November 22, 1977.

> "[F]abricated foods... all have in common that they replace products for which mankind has had thousands of years of experience. Some of these products are as good as modern nutritional science and food technology can make them, but the question remains whether they are good enough. Regardless of how one evaluates the present nutritional status of people in highly developed societies, it can be stated with certainty that a continuation of the present trend toward consumption of more partitioned, refined and fabricated food must lead eventually to the point where the rest of the diet cannot meet the requirements for all essential nutrients any more." 240/

Dr. Mertz added that "the present knowledge of essential trace elements and of their requirement by man is grossly insufficient to undertake [the] task" of "exact definition of human requirements of all essential nutrients, followed by measures to assure that the food supply contains these nutrients within the recommended ranges." He said that:

> This is convincingly demonstrated by the experiments of Klaus Schwartz, who raised experimental animals on chemically pure diets containing optimal amounts of all nutrients known or suspected to be essential, and protected them carefully from all environmental

240/ Walter Mertz, M.D., State of Knowledge of Nutrient Data: Trace Minerals, unpublished paper, 1977. (Emphases added.)

contamination. These animals were sick and failed to grow indicating that there exist essential factors, organic or inorganic, that we have not yet recognized. 241/

7. Sugar and Obesity

The other side of the malnutrition coin is obesity. If an individual is eating both "adequate amounts of other foods that furnish required nutrients" and a large amount of sugar, the result may be excessive caloric intake and thus obesity. Thus the LSRO Report (Sucrose) concludes (p.13) that "over-consumption of sucrose probably contributes to obesity."

Obesity is a serious problem among Americans. The National Center for Health Statistics has recently released a report 242/ which shows that the average adult male in this

241/ Id. (Emphasis added.) Dr. Schwartz's work is reported in Hoekstra, Trace Element Metabolism in Animals-2, University Park Press, Baltimore, (1974) at 355. Trace elements appear to be related to dental health as well as to other aspects of health. Thus, the National Institute of Dental Research's Status Report, supra note 163, at 5-6 states that "one study indicates a correlation between low caries experience and increased concentrations of boron, lithium, molybdenum, strontium, and vanadium in the drinking water. Except for flouride, however, available data indicate that from 80 to 90% of our trace element intake comes from foodstuffs."

242/ Nat'l Center for Health Statistics, Dept. of Health, Education and Welfare, Advance Data No. 14 (Nov. 30, 1977).

country weighs 20 to 30 pounds more than he should, and four pounds more than the average adult male did ten years ago. The average adult female, the report shows, weighs 15 to 30 pounds more than she should, and a pound more than her counterpart of a decade ago. 242a/ The New York Times reports that:

> "Both sexes measured a fraction of an inch taller in the latest survey than in the previous one, but Sidney Abraham, chief of nutrition statistics for the center, attributed the additional poundage not to increased stature but to putting on more fat. The problem, he believes, is the rise of the fast-food industry and the growing popularity of junk food." 243/

Obesity is thought to be a serious aggravating factor in the other (possibly sugar-related) health problems which we shall discuss below. 243a/

242a/ Compare id. with Society of Actuaries, Build and Blood Pressure Study (1959).

243/ New York Times, Dec. 25, 1977 (News of the Week in Review).

243a/ See, e.g., Bray, "The Obese Patient," in volume 9 of Major Problems in Internal Medicine (1976).

8. Sugar and Coronary Heart Disease

The LSRO Report (Sucrose) states (p. 7) that "a firm association between sugar consumption and coronary artery disease has not been established." There are, however, sound epidemiological data on which to base a conclusion that sucrose is related to coronary heart disease. 244/ There is also metabolic evidence, discussed below, relating to the effect of sucrose on serum lipid levels.

9. Sugar and Serum Lipid Levels

Increased levels of cholesterol and/or triglycerides are considered risk factors in the development of heart disease. Studies of the effect of sugar consumption on these levels show that:

(i) Dietary sucrose produces a small increase in serum cholesterol under certain specific conditions. 245/ Under ordinary conditions, this effect is moderated by the

244/ Masironi, R., 42 Bull. World Health Organization 103 (1970); Reiser, S., Metabolic Effects of Dietary Carbohydrates - A Review. ACS Symposium Series, No. 15 (1975).

245/ McGandy, R.B., Hegsted, D.M., Myers, M.L., and State, F.J., 18 J. Clin. Nutr. 237 (1966).

other elements of the diet, and it is difficult to tell whether the increase is due to sucrose or to the removal of starch and fiber from the diet. 246/

(ii) The major effect of dietary sucrose on blood lipids appears to be an increase in serum triglyceride. 247/ Sucrose produces a much greater effect in this regard than glucose (sucrose being composed of one molecule of fructose and one molecule of glucose), suggesting that fructose is the culprit in increasing lipid levels. The effect in many cases is transitory; lipid levels return to normal after an extended period of time, because of an adaptation of enzyme levels. 248/ However, there is a segment of the population estimated at 10%

246/ Reiser, S., Effect of Nutrient Excess in Animals and Man: Carbohydrate (in press).

247/ Mann, J. I., Watermeyer, G.S., Manning, E.B., Randles, J., and Truswell, A.S., 44 Clin. Sci. 601 (1973).

248/ Antonis, A. and Bersohn, I., 1 Lancet, 3 (1966).

that can be described as carbohydrate sensitive. In these persons a large and permanent increase in blood triglycerides occurs when sucrose contributes 20-25% of their total caloric intake--which is about the average sucrose contribution in the present American diet. 248a/ It is also the case that a large percentage of the American population has elevated blood triglyceride levels. The presumed major reason for this is that the level of fat in their diet is so high. In these persons, sucrose is not the primary risk factor, but it is nonetheless an important one, because sucrose acts synergistically with dietary cholesterol and triglyceride to increase serum lipid levels. This is one of the facts that have led the Senate Select Committee on Nutrition and Human Needs to suggest that people reduce their consumption of both fat and sucrose. 249/

248a/ U.S. Department of Agriculture, ESCS, National Food Review (Jan. 1978) at 15.

249/ Senate Select Committee on Nutrition, Dietary Goals for the United States 5 (Jan., 1977). (Hereinafter cited as Dietary Goals).

10. Sugar and Hypertension

Data from some animal work, and one or two human studies, suggest that sugar might contribute to increasing blood pressure levels 249a/ -- but the findings in the human studies may also be related to dietary sodium levels.

11. Sugar, Insulin Response and Diabetes

There are some findings from human research which suggest that eating sucrose produces undesirable metabolic effects (e.g., an increase in serum insulin and a decrease in glucose tolerance). 250/ The human experimental research on insulin response presents conflicting findings and interacting variables. Epidemiologic data have been published by Dr. Aaron Cohen of the University of Jerusalem on the incidence of diabetes among Yemenite Jews living in Yemen or Israel. The data suggest that increased sucrose consumption was the major dietary factor involved in the increased incidence of diabetes that affected Yemenites after they moved from Yemem to Israel. 251/

249a/ R. Ahrens, in Sweeteners: Issues and Uncertainties (Nat'l Academy of Sciences, 1975) at 96-99.

250/ Szanto, S. and Yudkin, J., 45 Postgrad Med. J. 602 (1969)

251/ The incidence of diabetes was 0.3% in Yemen, and 2.9% among Yemenites who had lived in Israel more than 25 years. Cohen, A.M., Teitelbaum, A. and Saliternik, R., 21 Metabolism 235 (1975).

12. Experts Who Have Recommended Decreased Sugar Consumption

A number of expert bodies and individuals have concluded that sugar should be consumed only in limited quantities.

For example, the final report from the White House Conference on Food, Nutrition and Health (1969) recommended (p. 48) that:

> "Candies, confections and beverages containing sucrose should not be ingested by children between meals. Food manufacturers should limit sucrose in foods primarily intended for consumption by children. Education of the consumer on this point is essential."

Dr. Jean Mayer has written that:

> "The best advice I can give about sugar in any form is: eat less." 252/

The Senate Select Committee on Nutrition and Human Needs, in its recently published report advocates a 40% reduction in the nation's per capita sugar consumption. 253/ The report expresses concern that sugar may displace complex carbohydrates

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252/ This statement was made in Dr. Mayer's nationally-syndicated newspaper column on nutrition. See Boston Globe, Nov. 8, 1972. See also Mayer, Scale Down Your Sugar, Family Health, April 1975 at 24.

253/ Dietary Goals at 46.

in the diet without offering equivalent nutritional value, cause tooth decay and possibly precipitate diabetes in those who are genetically predisposed. 254/ The report also lists the following bodies as having recommended reduced sugar consumption:

American Health Foundation (1972)

American Heart Association (1973)

DHSS Coma Report (Great Britian) (1974)

Royal College of Physicians and British Cardiac Society (1975)

National Heart Foundation-Australia

Academy of Science-Australia (1975) 255/

13. Conclusions as to the Non-Dental Health Consequences of Sugar Consumption

As the LSRO Report (Suerose) points out (p. 13), there is a growing mass of scientific literature that attests to an increasing controversy over the health effects, apart

254/ Id. at 48-51.

255/ Id. at Appendix A.

from dental health effects (which are established), of sugar consumption. That report has refrained from drawing conclusions except on matters as to which there is a virtually unanimous expert consensus. But the lack of such unanimity as to the possible health effects just discussed is not the same thing as a clear consensus that sugar can be consumed, in whatever quantities an individual may desire, without risk to health. Indeed, there is clear evidence that some portions of the population are at health risk from consumption of moderate to high amounts of sugar.

Given the controversy over the non-dental health risks of sugar consumption, a person familiar with the data could very reasonably conclude that sugar should be consumed in strictly limited quantities, not only by him or herself, but also by such of his or her children as are "too young to be capable of exercising an intelligent judgment" of their own.

IV. THE PRESENT TELEVISED ADVERTISING OF SUGARED PRODUCTS TO CHILDREN, AND THE TELEVISED ADVERTISING OF ANY PRODUCT TO CHILDREN TOO YOUNG TO UNDERSTAND THE SELLING PURPOSE OF, OR OTHERWISE UNDERSTAND OR EVALUATE, THE ADVERTISING VIOLATE THE FEDERAL TRADE COMMISSION ACT

In the preceding section we saw that televised advertising, even more than televised programming, appeals to children virtually from the moment they first become aware of the world around them, and that this advertising has the capacity to induce children to take dental and possibly other health risks which they are incapable of appreciating in such a manner as to protect themselves.

In this section, we shall apply the Federal Trade Commission Act to that advertising. Specifically, we shall see that the present televised advertising for sugared products to children is deceptive within the meaning of Sections 5, 12 and 15 of the Act, and unfair within the meaning of Section 5. And we will also demonstrate that the televised advertising of any product to children too young to understand the selling purpose of, or otherwise understand or evaluate, the advertising is inherently both deceptive and unfair within the meaning of Section 5.

In reading both the present section and the section on remedies, it should be borne in mind that the Commission has long recognized the special disabilities and incapacities of children, and has accordingly fashioned especially stringent

legal standards pertaining to deceptive and unfair advertising for their protection. Nowhere are those standards more stringent than where advertising addressed to children threatens their personal health. In fashioning these stringent standards, the Commission has simply reflected a well-established tradition that runs through many aspects of American law, that children are to be treated differently from adults so that they can be protected from the serious and lasting consequences of their own mistakes and from the designs of adults who would commercially exploit the disparity between their own experience and sophistication and the naivete of children.

A. The Present Televised Advertising of Sugared Products to Children is False, Misleading and Deceptive Within the Meaning of Sections 5, 12 and 15 of the FTC Act

Children are exposed to a steady stream of televised advertising whose purpose and effect are to induce them to consume a wide variety of sugared products, both at breakfast and between meals. These products entail health risks, most especially to dental health, which children are ill-equipped to understand by reason of their lack of experience and sophistication. And these products are advertised by communications techniques which young children also cannot understand.

Advertising for such sugared products, particularly when taken as a whole, is "false", "misleading", and "deceptive" within the meaning of Sections 5, 12 and 15 of the FTC Act. 256/ This is especially true in light of two factors: first, the Commission's traditional treatment of children as a special, uniquely vulnerable and easily misled class for purposes of these sections; and second, the special stringency with which the Commission measures deceptiveness in cases where consumers are threatened not only in their pocketbooks, but in their persons.

Section 5 of the FTC Act, 15 U.S.C. § 45, declares unlawful "unfair or deceptive acts or practices in or affecting commerce." Section 12 of the Act, 15 U.S.C. § 52, makes unlawful the dissemination of a "false advertisement" which is intended or "likely to induce, directly or indirectly, the purchase of food," 257/ and declares it a violation of Section 5. Section 15, 15 U.S.C. § 55, defines a false advertisement" for purposes of § 12 as one "which is misleading in a material respect," and adds that:

256/ 15 U.S.C. §§ 45, 52, 55 (1970).

257/ Emphasis added. The Commission's specific statutory mandate as to "food" advertising requires it to reject the argument made by Dr. Gary Costley of the Kellogg Co. that all questions involving the health risks posed by sugared cereals -- and perhaps other sugared products as well -- should be left exclusively to the Food and Drug Administration. See Dr. Costley's remarks at the Georgetown University Seminar on Children and Advertising, October 19, 1977. In this connection, it is also relevant that the Commissioner of Food and Drugs has said that he "strongly support[s] action by the Federal Trade Commission to regulate the advertising of these [sugared] products directed to children." Letter, Donald Kennedy, Commissioner of Food and Drugs, to Chairman Pertschuk, December 19, 1977 (Appendix A).

> "[i]n determining whether any advertisement is misleading, there shall be taken into account (among other things)...the extent to which the advertisement fails to reveal facts material in the light of [its] representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisements, or under such conditions as are customary or usual."

It is well-established that in applying these sections, actual deception of a specific consumer need not be shown. The test is whether the advertising in question has a substantial capacity or tendency to deceive. See, e.g., FTC v. Algoma Lumber Co., 291 U.S. 67, 81 (1934); FTC v. Winsted Hosiery Co., 258 U.S. 483, 494 (1922). The existence of such a capacity or tendency may be inferred by the Commission, in the exercise of its accumulated administrative knowledge and expertise, on the basis of the challenged advertising itself, taking account of the "net impression" which the advertising is "likely" to make. See, e.g., E. F. Drew & Co. v. FTC, 235 F. 2d 735 (2d Cir. 1956); Degorter v. FTC, 244 F. 2d 270, 283 (9th Cir. 1957); and, as to the "net impression" test, Charles of the Ritz Dist. Corp. v. FTC, 143 F. 2d 676, 679 (2d Cir. 1944); Aronberg v. FTC, 132 F. 2d 165, 167 (7th Cir. 1942).

Nor is it necessary to establish that the advertising has a capacity or tendency to deceive the general population if it is addressed to some more easily misled minority of the

population. Feil v. FTC, 285 F. 2d 879, 892, n. 19 (9th Cir. 1960). Children are the classic example of such an easily misled minority. "Thus", the Commission has said, "throughout the law in general and under Section 5 of the Federal Trade Commission Act in particular, it has been recognized that minors constitute an especially vulnerable and susceptible class requiring special protection from business practices that would not be unlawful if they only involved adults." 258/ The Commission's precedents provide numerous examples of an especially stringent standard being applied to measure deceptiveness in advertising addressed to children, taking due account of what the Commission has called "the [low] level of knowledge, sophistication, maturity, and experience" of children. Topper Corp., 79 F.T.C. 681, 686-87 (1971); Mattel, Inc., 79 F.T.C. 667, 671-72 (1971). 259/

258/ FTC, 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. 8324, 8358 (July 2, 1964) (Hereinafter cited as the Cigarette Rule).

259/ See, e.g., Wilson Chem. Co., Inc., 64 F.T.C. 168 (1964) (recruitment of children through comic book ads to sell salve, without adequate disclosure of obligations assumed by mailing in coupon to get "absolutely free" gifts; misleading letters later threatened children with legal action if they did not remit sales proceeds for required amount of salve); Ideal Toy Co., 64 F.T.C. 297 (1964) (misrepresentation of toy in ads); Stupell Enterprises, 67 F.T.C. 173 (1965) (ads failed to make plain to children that toy could break, posing danger to eyes); ITT Continental Baking Co., 83 F.T.C. 865 (1973) (representation that "Wonder Bread" has extraordinary property to produce growth in children).

It is likewise settled that deceptiveness is to be measured by an especially stringent standard in cases involving hazards to human health. 260/ The Commission has explained:

> "There are two reasons for such special treatment. First the stakes are so much greater. It is one thing to permit an occasional borderline misrepresentation where it appears that only a few consumers are likely to be misled and suffer economic loss thereby. It is altogether more serious to permit the misleading of even the few, where those who are misled may, in consequence, be injured in their persons as well as in their pocketbooks. Second, while consumers may perhaps discount a certain amount of exaggerated and distorted advertising in the case of ordinary products, they are not likely to expect and be prepared to cope with loose advertising practices in the area of health and safety. People have a right to, and by and large do, expect that advertising will be completely truthful in circumstances where the consequence of an untruth, half-truth or ambiguity may be personal injury. Because they expect fair dealing in the advertising of such products, their guard is down." (Emphases added.) 261/

260/ This is, if anything, even truer where the health of children is at stake. See, e.g., Stupell Enterprises, supra (toy posed unrevealed threat to eyes); General Foods, Inc., 86 F.T.C. 381 (1975) (ads falsely implied to young children that wild berries and plants are generally edible); Uncle Ben's Inc., 89 F.T.C. 131 (1977) (ad depicting small child cooking on stove without adult supervision falsely implied that this is safe, acceptable behavior); Hudson Pharmaceuticals, 89 F.T.C. 82 (1977) (use of hero figure to advertise vitamin pills directly to children, notwithstanding children's inability to determine whether they need such pills and to understand risks of excessive consumption); Philip Morris, 82 F.T.C. 16, 17 (1973) (advertising of razor blades by distributing samples inserted in home-delivered newspapers; hazard to persons handling newspapers, "particularly young children").

261/ Cigarette Rule at 8353-54.

An adult's guard is lowered by an expectation of "completely truthful...fair dealing" where health and safety are at stake. 262/ But children already have their guard down to such an extent that below the age of eight a substantial proportion are unable to understand that a television commercial has a selling purpose, i.e., that is not merely disinterested instruction or they may be otherwise unable to understand or evaluate the commercial.

Finally, the Commission has recognized that -- at least where a product is being advertised that poses health hazards, and at least where children are exposed to that advertising -- the advertising for that product may as a whole be deceptive if its "cumulative effect...has been to establish a barrier to adequate public knowledge and appreciation of the health hazards." 263/

Section 15 establishes two non-exclusive criteria for determining whether advertising is misleading, other than by explicit misstatements of fact.

262/ Thus, the very prevalence of child-directed advertising for sugared products lowers the guard of parents who could understandably assume that any class of products so intensively advertised to so vulnerable and uncritical an audience must be essentially safe.

263/ Cigarette Rule at 8357.

First, advertising may be misleading if it "fails to reveal facts...material in light of its representations." Second, it may be misleading if it "fails to reveal facts... material with respect to consequences which may result from the use of the [advertised] commodity...under the conditions prescribed in said advertisement, or under such conditions as are customary or usual."

Staff believes that current advertising of sugared foods directed to children is misleading, and therefore false and deceptive, under both of these criteria.

1. Failure to Reveal Facts Material in Light of Representations.

a. The Representations Made

First, the broad representation common to all advertising for sugared foods is that the foods are desirable. Typically, the desirability is expressed in terms of fun. Representations of fun, however, are not the only way of conveying that a product is desirable. Dr. William Wells, Helitzer and Heyel, and the NSF Report (See III-A(1)(b) 1 supra) describe others. Dr. Wells' examples include implied magical claims which motivate children to demand the product even though they know the claims are not literally true, and scenes in which a character is shown trying to wrest the product away from someone else, thus producing what Dr. Wells calls a "powerful inference that [the product] must be worth having." Helitzer and

Heyel's examples include identification of the product with a super-hero, and the NSF Report's examples include implied peer-acceptance appeals.

Second, the totality of this advertising conveys the representation that eating sugared foods is the normal, pervasively accepted thing to do, either at breakfast (sugared cereals) or between meals (sugared snacks). Acceptability is likely to be important to small children, who learn by imitation and dislike having to feel "different" or "left out." The NSF Report (pp. 104-05) describes a study in which children, questioned about "the kind of things you call snacks," gave responses which:

> "indicate that the children's concept of what constitutes an acceptable snack usually included those products heavily advertised to them." (Emphasis added.)

Thus 78% of the children responded to the question by citing "sweets...such as cookies, candy and cake, and ice cream."

Third, this advertising conveys the representation that, at least at breakfast and between meals, sugared foods are fully consistent with good health. The advertising invariably shows active, healthy persons enjoying sugared products. No suggestion is ever made that using such products might lead to dental or other health problems.

Fourth, a representation which appears frequently in candy advertising is that candy is desirable in proportion to the amount of time it lasts in the mouth.

Fifth, another common representation is that chewiness and viscosity are desirable qualities in candy.

Sixth, a representation sometimes made is that frequent or repeated snacking on sugared products is a desirable pattern of consumption.

Seventh, a representation common to much of the cereal advertising is that products which are "chocolatey", "marshmallowy", or otherwise sweet are -- by reason of those characteristics -- desirable, wholesome foods for breakfast. This representation occurs, for example, in phrases like "it's the chocolatey part of a good breakfast," which implies that a good breakfast should have a "chocolatey part," without which something important is missing.

b. The Unrevealed Facts

The unrevealed facts which are material in light of any of these claims -- even a simple representation of desirability -- are:

i. That sugared foods are highly cariogenic, especially when eaten between meals.

ii. That there is a body of responsible scientific opinion which holds, in the words of the LSRO Report (Sucrose) that the "over-consumption of sucrose probably contributes to obesity," and that there is a scientific controversy as to whether heavy sugar consumption can lead to such

other long-term health problems as heart disease and diabetes. 264/

iii. That, in short, there are ample grounds for concluding, on health grounds, that the advertised sugared products are on balance not desirable and that it is best to limit one's sugar consumption, both in terms of the amount eaten and the occasions on which it is eaten.

Where sugared products are promoted in terms of the length of time they can be kept in the mouth, in terms of their chewy or viscous texture, or in terms of the desirability of frequent or repeated snacking, an additional unrevealed material fact is that such attributes or patterns of consumption increase the products' cariogenicity.

The Commission's established policy is not to assume that the public is already aware of the health or safety hazards of advertised products. In Firestone Tire & Rubber Co., 81 F.T.C. 398 (1972), aff'd, 481 F. 2d 246 (6th Cir. 1973), the Commission said that "too much is at stake" where health and safety are involved to permit such an assumption. 81 F.T.C. at 459. Likewise, in the Cigarette Rule, the Commission said that 265/:

264/ LSRO Report (Sucrose) at 13.

265/ Cigarette Rule at 8360

> "The Commission cannot rely on the public's vague, unspecific and...merely transient awareness of advertising falsehoods as an excuse for not proceeding against them."

A refusal to assume general awareness of the health hazards involved here is especially appropriate because the target audience consists of pre-school and grade school children. The "vague, unspecific and...merely transient" nature of their awareness of threats to their health and safety is well recognized by the law. (See Section IV-B(2)(b), infra for a discussion of the law's traditional special protections for children.)

Specifically with respect to tooth decay, it appears that children do not in fact understand the unrevealed facts at issue here so as to obviate the need for their disclosure. For example, it appears that children as a class are not generally aware that between-meal snacking at frequent intervals or over a long period of time -- as with long-lasting candy bars or hard candies -- is the pattern of sugar consumption most hazardous to dental health. The NSF Report (p. 105) cites a study in which children were asked to evaluate the nutritional value of foods eaten at meals and snacks. The study concluded:

> "[S]weets (notably candy and soft drinks) were consistently described as being 'not so good for you' in the context of meal-time foods. However, this evaluative distinction broke down somewhat for afterschool snacks, in that one out of four of the children mentioned sweet foods as 'especially good for you or healthy.'" (Emphases added.)

It is ironic that these children were most aware that sugar consumption at meals is "not so good for you" -- yet so little aware that sugar consumption between meals is hazardous that fully a fourth thought it to be "especially... healthy."

The Commission has the authority to act against claims which mislead even an "appreciable or measurable segment of the public," Feil v. FTC, 285 F. 2d 879, 892 n. 19 (9th Cir. 1960). And anything even approaching a fourth of the child television audience would surely qualify as an "appreciable or measurable segment of the public." In Benrus Watch Co., 64 F.T.C. 1018 (1964), aff'd, 352 F. 2d 313 (8th Cir. 1965), cert. denied 384 U.S. 939 (1966), an advertiser argued that its claim could not be barred as deceptive because a poll showed that 86% of the public was not in fact deceived. The Commission rejected that defense on the ground that even if the poll were accurate "this still leaves 14%...who may be deceived, and of course, these are entitled to protection. Helbros Watch Company, Inc. v. Federal Trade Commission, 310 F. 2d 868, 869 (D.C. Cir. 1962)." Benrus Watch Company, 64 F.T.C. at 1045.

2. Failure to Reveal Facts Material With Respect to Consequences of Use

The second non-exclusive criterion in Section 15, is that advertising may be deceptive if it fails to reveal facts

material to consequences which may result from the use of the advertised commodity (a) under the "conditions prescribed" in the advertising, or (b) "under such conditions as are customary or usual."

a. Use Under Conditions Prescribed in the Advertising

There are two categories of commercials now being addressed to children which might be construed as prescribing conditions for the use of sugared products.

The first category encompasses commercials which emphasize that the product is a between-meal snack, rather than something meant to be eaten as part of a meal. A clear example is the advertising for "Milky Way" candy bars, which features a chorus singing:

> "A Milky Way Bar
> Wherever you are...
> Wherever you're going
> You're never outgrowing
> Your love for the taste of a Milky Way
> At work, rest or play
> Milky Way, Milky Way."

The second category encompasses commercials which emphasize the length of time a candy lasts in the mouth, or the desirability of frequent or repeated snacking on the product. Clear examples are the advertising for the "Marathon Bar," emphasizing that "you can't eat [it] fast," and for "Now and Later" candy ("eat some now, save some for later").

In these two categories, use of the products under the "conditions prescribed" actually increases their cariogenicity, since between-meal or frequent snacking on sugared products, or long retention in the mouth, is a more dangerous pattern of consumption than eating the products only at meals. Thus in these categories, the cariogenicity of the products, and their increased cariogenicity when eaten between-meals, are material unrevealed facts.

b. Use Under Customary or Usual Conditions

The customary or usual use of candy and of sugared products sold as snacks is to be consumed between meals. As to a certain part of the child market, this also seems to be a customary or usual use of sugared cereals. As noted above, such use appears to account for 6 or 8% of the consumption of all sugared cereals and may account for a good deal more of the consumption of some such cereals, i.e., those whose appearance, texture and other qualities make them attractive when eaten directly from the box.

To the extent that a customary or usual use of any sugared product is to be eaten between meals, material unrevealed facts are that the products are more cariogenic than non-sugared alternatives, that between-meal consumption of sugared products increases their cariogenicity, and that a scientific controversy exists as to the non-dental health consequences of sugar consumption.

3. The Deception Inherent in the Advertising for Sugared Foods Taken as a Class

The aggregate message of the advertising addressed to children for sugared products is that their consumption is desirable, enjoyable, healthy, pervasive and normal, and that they are to be preferred to non-sugared alternatives which, not being advertised, are made to seem less desirable.

Dr. Jean Mayer has said of the totality of food advertising to which children are exposed that:

> "If you placed foods in decreasing order of nutritional usefulness, you would have something like this:
>
> "Group 1: Fruits and vegetables; milk, fish, eggs, meat and cheese.
>
> "Group 2: Bread, potatoes, macaroni products, some of the better breakfast cereals, soups.
>
> "Group 3: Sugar-coated breakfast cereals, most 'snack foods,' cake mixes.
>
> "Group 4: Candy and soft drinks....
>
> "It is fairly obvious to any habitual television viewer that national advertising expenditures are in reverse order to nutritional usefulness.
>
> * * *
>
> "The reason for this is plain: Foods in group 1 are not branded and are produced by an enormous number of farmers with no advertising resources (except through local supermarket advertising). Foods in group 3 and particularly 4 are produced by a few companies with strong brands to introduce or protect and with large advertising budgets. The structure of the industry, in spite of the undeniable goodwill and excellent intentions of many industry leaders, dictates the results.

> "It may be observed that unlike the situation in other consumer areas advertising...cannot increase overall food consumption. This is regulated by the physiological mechanism of the individuals who comprise our population. What advertising does is to shift consumption from one category of foods to another; at present all too often from better foods to less nutritious foods." 266/

In explaining its Cigarette Rule, the Commission observed, in language highly apposite to the present situation:

> "The cumulative effect of at least a decade of massive cigarette advertising has been to establish a barrier to adequate public knowledge and appreciation of the health hazards. Modern mass-media advertising on [this] scale is a form of power in the market place -- power over the buying choices of consumers. It is a lawful power. But just as the possession of lawfully-acquired market or monopoly power in the antitrust sense may nevertheless place a firm under a special duty of fair dealing towards its competitors [citing cases] an advertiser's possession of great power vis-a-vis consumers may place him under a special duty of fair dealing toward them, especially where the advertised product is dangerous to life and health." 267/

In the present case, sugared products are dangerous at least to children's dental health. In addition, heavy sugar consumption may be hazardous to other aspects of health as well, and even to life, if it has a role in causing heart disease, as the LSRO Report (Sucrose) says it "possibly" may. 268/

Also in the present case, the relevant audience has been inundated, literally over its entire lifetime, with entreaties to consume sugared products. As Drs. Mayer

266/ Senate Hearings at 260. (Emphases added.)

267/ Cigarette Rule at 8357. (Emphasis added.)

268/ Also, of course, to the extent that heavy sugar consumption contributes to obesity, it can aggravate diseases like heart disease and diabetes, whether or not it causes them directly.

and Navia 269/ point out, to the extent that children consume the advertised products, they are unable to consume alternative products which would not pose these hazards. In light of the unique suggestibility and lack of sophistication which characterize children, and especially young children, this plethora of advertising forms "a barrier to [their] adequate...knowlege and appreciation of the health hazards". This barrier to understanding makes the advertising, taken as a whole, "misleading in a material respect" under Section 15 and thus "false" under Section 12 and "deceptive" under Section 5.

The Commission noted in the Cigarette Rule that: 270/

> "In the conventional false and misleading advertising case, it is not unusual to consider the challenged advertisement apart from the respondent's -- and the industry's -- total advertising. . . . [This] is less satisfactory where the cumulative effect of massive and long-continued advertising throughout an entire industry, in contrast to the effect of a single advertisement or particular advertisements, is itself a source of substantial and unjustifiable injury to the consuming public."

To be sure, the Commission, in the Cigarette Rule, distinguished "candy" and "rich foods" from cigarettes as a health hazard, on the ground that such foods can arguably be safely consumed in small amounts or at infrequent intervals, whereas even the slightest cigarette consumption is dangerous. 271/ But this was in 1964, before the most recent great rise

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269/ See text accompanying notes 226-230 supra.

270/ Cigarette Rule at 8357.

271/ Id. at 8362.

in per capita sugar consumption in the U.S. Per capita consumption in 1964 was 113.4 pounds of sugar (plus the sweetening equivalent in saccharin and cyclamate of another 4.8 pounds). 272/ Per capita consumption in 1977 was 128.1 pounds of sugar (plus the sweetening equivalent in saccharin of another 9 pounds). 273/ As described above, there is reason to think that per capita sugar consumption among children may be rising faster than consumption among the population as a whole, and that sugar accounts for an especially high proportion of the diet among children, to the detriment of their teeth, their nutrition, and possibly other aspects of their health. Further, the Commission did not then have before it a factual showing, as it does here, that sugar consumption at existing levels was posing a threat to the dental, and possibly non-dental, health of children, true as that undoubtedly was even in 1964.

B. The Present Televised Advertising of Sugared Products to Children is Unfair Within the Meaning of Section 5 of the FTC Act

In addition to being false, misleading and deceptive, the present televised advertisements to children for sugared products also constitute "unfair...acts or practices in or affecting commerce," and an "unfair method of competition in or affecting commerce."

272/ U.S. Dept. Agr., Sugar and Sweetener Report, (Dec. 1977) at 31.

273/ Id.

Unfairness in the Section 5 sense is a concept deliberately left flexible by Congress, and one about which the Commission has recognized that it is "difficult to generalize," without reference to specific factual situations. 274/ Judge Learned Hand wrote of Section 5 unfairness:

> "The Commission has wide latitude in such matters; its powers are not confined to such practices as would be unlawful before it acted; they are more than procedural; its duty in part at any rate is to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop." FTC v. Standard Education Soc'y, 86 F.2d 692, 696 (2d Cir. 1936), rev'd on other grounds, 302 U.S. 112 (1937).

As we shall show, this is only one of a number of statements from the courts or from the Commission about the breadth and flexibility of the Section 5 unfairness concept.

In the present situation one method--although by no means the only one--for measuring unfairness is to look at the following three factors:

First, the unique naivete and defenselessness of the target audience;

Second, the purely manipulative--as opposed to informative--nature of the advertising; and

Third, the potential for harm, both in the advertising itself, and in the products advertised.

274/ Cigarette Rule at 8348.

The more naive and defenseless the audience, the more manipulative the advertising, and the more potential for harm, both in the advertising itself and in the products, the greater the justification for a finding of Section 5 unfairness. The televised advertising of highly sugared foods to children achieves a high level of offensiveness in relation to each of these three criteria.

This three-part formulation arises specifically out of the present set of facts. However, there are two other, previously articulated tests: one focuses on disparities in knowledge and power between the buyer and seller, and the other sets forth the three-factors described by the Commission in its Cigarette Rule. These tests are analogous, although not identical, to the three factors just enumerated.

A brief review of the law of Section 5 unfairness is useful in demonstrating the context in which the Commission developed its previous definitions and tests of unfairness. We will then show that the present advertising is clearly unfair under those definitions and tests.

1. The Relevant Legal Framework

In granting the Commission power to proceed against

"unfair methods of competition," Congress recognized that:

> "It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task." 275/

In 1972, the Supreme Court reviewed the Commission's power to proceed under the "unfairness" provisions of Section 5 and concluded that:

> "[T]he FTC does not arrogate excessive power to itself if, in measuring a practice against the elusive but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws. 276/

The Court also noted:

> "[a]s we recently unanimously observed: '... it is now recognized . . . that the Commission has broad powers to declare trade practices unfair. FTC v. Brown Shoe Co., 384 U.S. 316, 320-321 (1966)." 277/

275/ H.R. Rep. No. 1142, 63d Cong., 2d Sess. 18-19 (1914). To the same effect, see S. Rep. No. 597, 63d Cong., 2d Sess. 13 (1914), and the discussion of the relevant legislative history in FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239-44 (1972). (Hereinafter cited as "S & H".)

276/ S & H, 405 U.S. at 244. (Emphasis added).

277/ Id. at 242.

Further, the Court said that the case which "sets the standard by which the range of FTC jurisdiction is to be measured today" is FTC v. R. F. Keppel & Bros., Inc., 291 U.S. 304 (1934). 278/

Keppel, very much like the present case, involved an inducement to children to take risks as to which they were "too young to be capable of exercising an intelligent judgment," 291 U.S. at 309. The principal difference is that the children in Keppel were induced to take the risks with relatively small amounts of money, whereas here the risks involve personal health. Keppel specifically concerned the marketing of penny candy by a device which amounted to gambling. The candy was sold in:

> "'break and take' packs, a form of merchandising that induced children to buy lesser amounts of concededly inferior candy in the hope of by luck hitting on bonus packs containing extra candy and prizes." 279/

278/ Id.
279/ This account of the device is given in S & H, 405 U.S. at 242.

The Keppel Court observed (291 U.S. at 309) that:

> "although [this] method of competition . . . induces children, too young to be capable of exercising an intelligent judgment of the transaction, to purchase an article less desirable in point of quality or quantity than that offered at a comparable price in the straight goods package, we may take it that it does not involve any fraud or deception." (Emphasis added.)

Thus, said the Court, "the decisive question [is] whether the practice . . . is one over which the Commission is given jurisdiction because it is unfair." Id. The Court answered that question affirmatively, noting that "the practice is shown to exploit consumers, children, who are unable to protect themselves" and that it would "seem a gross perversion of the normal meaning of the word, which is the first criterion of statutory construction, to hold that the method is not 'unfair.'" Id. at 313.

Keppel was followed in 1938 by the Wheeler-Lea Amendments to the FTC Act 280/, which, inter alia, added the provision of Section 5 which forbids "unfair acts or practices." The Commission has written that:

280/ 52 Stat. 111 (1938).

> "the amendments . . . approved and codified the principle of Keppel--that certain merchandising practices are forbidden by Section 5 even though they are neither deceptive nor anticompetitive." 281/

Thirty years after Keppel, the Commission undertook a systematic review of its precedents involving Section 5 unfairness and concluded that while "it is not possible to give an exact and comprehensive definition of the unfair acts or practices proscribed by Section 5 as amended, " 282/ an "idea of the broad scope of the concept of unfair acts or practices may be gathered from a consideration of the marketing methods which the Commission has in the past forbidden as unfair but which involve neither false-advertising nor restraint-of-trade principles." 283/ The Commission concluded, after reviewing some 40 such unfairness cases, that:

> "No enumeration of examples can define the outer limits of the Commission's authority to proscribe unfair acts or practices, but the examples should help to indicate the breadth and flexibility of the concept of unfair acts and practices and to suggest the factors that determine whether a particular act or practice should be forbidden on this ground. These factors are as follows: (1) whether the practice, without

281/ Cigarette Rule at 8354
282/ Id.
283/ Id.

> necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise--whether, in other words, it is within at least the penumbra of some common-law, statutory, or other concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen). If all three factors are present, the challenged conduct will surely violate Section 5 even if there is no specific precedent for proscribing it. The wide variety of decisions interpreting the elusive concept of unfairness at least makes clear that a method of selling violates Section 5 if it is exploitive or inequitable and if, in addition to being morally objectionable it is seriously detrimental to consumers or others. Beyond this, it is difficult to generalize." 284/

In S & H, the Supreme Court approvingly cited these three criteria, rejecting an argument that the Commission had committed itself to the view that "misconduct in respect of the third of these criteria is not . . . 'unfair' absent . . . misconduct as to the first or second of these criteria." 405 U.S. at 244-45, n. 5. The Court drew special attention to the words, "at least," which are scored in the above quotation. Id.

The context in which the Commission set forth these three criteria makes plain that unfairness, like deceptiveness, is to be judged by an especially stringent standard

284/ Cigarette Rule at 8355. (Emphasis added.)

where threats to the health of children are involved. Thus a practice may be "unfair . . . [as to children] even if it is not especially pernicious as to adults" 285/ because "everyone knows that very young people have a far less acute appreciation of mortality, and danger generally, than adults . . . . The analogy of the 'attractive nuisance' of tort law is . . . relevant." 286/

In 1969, the Commission wrote that:

> "[T]he responsibility of the Commission in this respect [Section 5 unfairness] is a dynamic one: it is charged not only with preventing well-understood, clearly defined, unlawful conduct but with utilizing its broad powers of investigation and its accumulated knowledge and experience in the field of trade regulation to investigate, identify, and define those practices which should be forbidden as unfair because contrary to the public policy declared in the Act. The Commission, in short, is expected to proceed not only against practices forbidden by the statute or common law, but also against practices not previously considered unlawful, and thus to create a new body of law--a law of unfair trade practices adapted to the diverse and changing needs of a complex and evolving competitive system." All-State Industries, 75 F.T.C. 465, 491 (1969).

285/ Id. at 8358.
286/ Id. at 8359.

Similarly, in Beneficial Corp., 86 F.T.C. 119 (1975), aff'd in part, 542 F.2d 611 (3d Cir. 1976), cert. denied, 430 U.S. 983 (1977), the Commission stated that:

> "[t]here is no doubt at this point that the Commission may adapt the substance of Section 5 to changing forms of commercial unfairness, and is not limited to vicariously enforcing other law. Therefore, in this case, as in others, those who engage in commercial conduct which is contrary to a generally recognized public value are violating the Federal Trade Commission Act, notwithstanding that no other specific statutory strictures apply." 86 F.T.C. at 171. 287/

Interestingly, we know of no case since the issuance of the Cigarette Rule in 1964 (including the Cigarette Rule itself) in which the Commission has demonstrated the unfairness of a practice by measuring it rigorously against each of the Cigarette Rule's three criteria. There have, however, been cases since the Cigarette Rule in which the Commission has determined a practice to be unfair without going through that exercise. Thus, for example in Pfizer & Co., Inc., 81 F.T.C. 23 (1972), the Commission, while citing the Cigarette Rule's three criteria, made a finding of unfairness without specifically addressing the applicability of any of those criteria to the practice in question. Pfizer thus underscores the point made by the Supreme Court in S & H, that

287/ In Spiegel, Inc., 86 F.T.C. 425 (1975), aff'd, 540 F.2d 287 (7th Cir. 1976), the Commission extended the concept of Section 5 unfairness even to conduct which conformed to applicable state law.

the Commission has not committed itself to the proposition that all three criteria need be met in order to support a finding of unfairness. 405 U.S. at 245, n.5.

Pfizer is also important because it confirms that the Commission will pay particular attention to disparities of knowledge and resources between an advertiser and its target audience. Such disparities, of course, could hardly be greater than they are in the situation at issue here. In Pfizer, the Commission held that it is unfair under Section 5 for an advertiser to make affirmative claims about the performance of its product for which it has no reasonable basis--even though the claims might ultimately prove to be true. The Commission's explanation, 81 F.T.C. at 62, was that "given the imbalance of knowledge and resources between a business enterprise and each of its customers," it is unfair for the enterprise to impose on its customers the burden of finding out whether a performance claim is true or not. Pfizer did not involve, as the present situation does, the possibility that customers might discover belatedly that advertised products could actually harm their health. The present situation involves unfairness arising from the disparity of knowledge and resources between the authors of the present highly sophisticated and well-financed "hard sell" for sugared products, and children who,

as the Commissioner of Food and Drugs has pointed out, are "likel[y]" to be "unable to appreciate the long-term risks" of consuming the advertised products.

All-State Industries, is another post-Cigarette Rule Section 5 unfairness case in which the Commission laid particular emphasis on disparities of knowledge and resources, without specifically measuring the challenged practice against each of the Cigarette Rule's criteria. All-State involved a seller's routine practice, not disclosed to buyers, of assigning to a third party "the debt contracted by the buyer in making a credit purchase." 75 F.T.C. at 480. The Commission noted that "when a seller knows, but the buyer does not know [of this practice] the buyer may be entering into a transaction quite different in its characteristics from the one buyer imagines he is entering." 75 F.T.C. at 492. In the present situation, of course, highly knowledgeable sellers are leading children who have very little knowledge into transactions which "may . . . be quite different" in long-term results from what the children imagine, and which may, indeed, exact a price in personal health.

Finally, the concept of Section 5 unfairness has recently been invoked in several cases which specifically involved televised advertising to children. The cases which are most squarely analogous to the present one involved the televised

advertising to children of vitamins. 288/ In those cases, staff advised the Commission in an extensive memorandum 289/ that such advertising was both unfair and deceptive. However, before the recommended complaints were voted on, the prospective respondents "voluntarily" ceased to advertise their vitamins to predominantly child audiences. 290/

Thereafter, the National Association of Broadcasters Code was amended so that it specifically prohibited direct televised advertising of vitamins to children. 291/ On

288/ File Nos. 722-3047 (Hoffman-LaRoche, Inc., et. al.); 722-3048 (Bristol-Myers Co., et. al.); and 722-3049 (Miles Laboratories, Inc., et.al.); and Hudson Pharmaceutical Corp., 89 F.T.C. 82 (1977).

289/ Memorandum to the Commission, Subject: Television Vitamin Advertising Addressed to Children (Feb. 22, 1972).

290/ The account given by Gerald Thain, who was then the Director of the Commission's Division of National Advertising, is that:

> "[p]rior to the FTC's determination whether the proposed complaints should issue, the staff's position became known. [See N.Y. Times, July 21, 1972, at 63, col. 4] Thereafter, the three companies involved 'voluntarily' removed all advertising of children's vitamins from those time periods in which rating services indicated that children formed the majority audience. The FTC [thereafter] rejected the proposed complaints by a 3-2 vote." Thain, Suffer the Hucksters to Come Unto the Little Children? 56 B.U.L. Rev. 651, 662 (1977).

291/ Advertising Age, July 21, 1975, at 54.

January 13, 1977, the Commission issued a consent order against Hudson Pharmaceutical Co. prohibiting the advertising of any vitamin supplement designed primarily for use by children where such advertising was directed to children. 292/ The complaint approved by the Commission made an observation that applies equally to the ability of children to understand the health issues involved here, namely that they were unable to reach informed judgments about the advisability of consuming vitamins in general or the advertised brand in particular. 293/

In ITT Continental Baking Co., 83 F.T.C. 865 (1973), the Commission approved a complaint which charged that it was both deceptive and unfair to address televised advertising to children which implied that Wonder Bread had magical growth-inducing properties. In deciding the case, the Commission did not reach the unfairness issue, because it found that the advertising was deceptive. Chairman Engman, however, would have reached the unfairness issue, and would have held that the advertising was both deceptive and unfair. 83 F.T.C. at 941-42.

There have also been recent consent orders in two cases involving allegedly unfair television commercials addressed

292/ 89 F.T.C. 82 (1977).

293/ Id. at 86.

to children, General Foods Corp., 86 F.T.C. 831 (1975) (commercials implied that wild plants are generally edible); Uncle Ben's, Inc., 89 F.T.C. 131 (1977) (commercials implied that children may safely use a hot stove without supervision).

2. The Unfairness of the Present Advertising Under the Test Set Forth in the Cigarette Rule

Thus far, we have seen that the Commission's powers in applying the concept of Section 5 unfairness in particular cases are broad, flexible, and analogous to those of "a court of equity." S & H, supra, 405 U.S. at 244. We have also seen that there are at least three different, albeit overlapping, tests for determining unfairness in the present situation:

First, the test which we have proposed which is based specifically on the present facts, rather than on prior formulations;

Second, the test suggested by the Pfizer and All-State cases, which focuses on the exploitation of disparities in knowledge and power between buyer and seller; and

Third, the three-part test which the Commission set forth in the Cigarette Rule.

The most elaborate of these is the test set forth in the Cigarette Rule, which looks to such matters as (1)

whether a challenged practice "offend[s] public policy," (2) whether it is "immoral, unethical, oppressive or unscrupulous, and (3) whether it can cause "substantial injury."

In the following pages we shall apply the Cigarette Rule's three criteria to the present facts. This analysis will demonstrate that the televised advertising of sugared foods to children violates not only the three criteria but also the test we propose and the test suggested by Pfizer and All-State.

For ease of exposition, we shall start with the substantial injury criterion before discussing the other two.

a. Substantial Injury

i. To Children Themselves

As Dr. Jean Mayer has observed, "advertising cannot increase overall food consumption. 294/ Instead, it attempts to shift consumption toward advertised branded products, and, by necessary implication, away from unadvertised, non-branded products. The advertising in question here attempts to persuade children to consume sugared products, both at breakfast and between meals. Where this advertising

294/ See text accompaning note 266 supra.

succeeds, children are being induced to take risks with their health, both dental and non-dental. 295/

By and large children are not equipped, when they take these risks, to make an intelligent assessment of either the stakes or the odds. See Keppel, 291 U.S. at 309. The younger the children, the less capable they will be in this respect. It will be a rare and precocious young child who, wanting a candy bar in mid-afternoon, is able or inclined to make a calculation that balances the strength of the desire against the possibility of future harm, taking into account such matters as the particular cariogenicity of sugar eaten between meals; the probability that overconsumption of sugar contributes to obesity; the unsettled, albeit suggestive, evidence as to the link between sugar, heart disease, and diabetes; and the availability of safer snacks like fruits and nuts.

And even to the degree that a child has begun to calculate long-run consequences, the purpose and likely effect of the present advertising is to overwhelm that calculation, by

295/ To the extent that it fails, of course, the advertisers would appear to be wasting enormous budgets. But Kellogg frankly acknowledges that its advertising to children increases sales of the advertised products. See Kellogg statement to the F.T.C., Nov. 22, 1977. And there is no reason to suppose that Kellogg alone has found the secret of effective advertising.

appealing to a kind of thinking that is well-developed in small children, namely a simple desire for immediate oral gratification.

This advertising also overwhelms any calculation of long-term consequences by showing the child, over and over again, that the way normal, healthy boys and girls in the real world resolve any doubts is in favor of eating the advertised products. The lesson, even for the most thoughtful child, is that while his or her parents or teachers might have warned him or her about sugar, those warnings obviously cannot be entitled to much weight. The authority figures on television certainly seem to have no similar reservations. The children shown in the advertising are not only healthy and vigorous, without any symptoms of tooth decay or obesity, they are also in most cases visibly happy, and made so by having the advertised products. The sum of this endlessly repeated lesson is that only people who are excessively preoccupied with self-denial (parents and teachers, for example) are going to let the possibility of harm in the seemingly distant future interfere with pleasure that is available right here and now.

The ability of this advertising to overwhelm whatever rudimentary rationalism a child might have developed is a product of several factors, among them the following:

First, the enormous sophistication of the advertisers in devising effective (and usually emotional, or at least non-rational) appeals to induce children to demand products.

Second, the budgets which allow the advertisers to apply that sophistication to particular commercials.

Third, the unique power of television in reaching and appealing to children--who are attracted to the medium in great numbers, long before they can even begin to weigh the long-term effects of consuming advertised products; who spend great amounts of time watching television; who think, at least at the earlier ages, that authority figures in the commercials are specifically addressing them; and who do not learn until the later ages that television advertising should be viewed with at least some skepticism because the advertiser has a motive beyond that of simply "educating" them.

There are two elements of injury in all this. The first is the immediate injury done to the child's health, dental and otherwise, by consuming the advertised sugared products. The second is that done to the child's ability to safeguard his or her long-term health by learning and cultivating sound nutritional habits. As the Commission recognized in the Cigarette Rule, the cumulative effect of all this advertising is to create a "barrier to adequate public knowledge and appreciation of the health hazards" posed by

consuming the advertised products. 296/ Dr. Jean Mayer has testified before the Senate Select Committee on Nutrition that:

> "[a]s you know, Mr. Chairman, I have appeared before this committee about the importance of having better nutrition education programs in schools . . . . However, I am very much concerned that, even with a vigorous nutrition education program, we might be locking the barn after the horse has been stolen."
>
> "Before the first 5 years of their lives children have been exposed to very striking lessons. I think television is a very striking phenomenon for small children, equating goodness with sweetness, selling food on the basis of anything except nutrition . . . . It becomes very difficult, all of a sudden at the age of 6, to rever[se] the whole process and explain to them that the first reason we eat is to get the necessary nutrients." 297/

For this reason, among others, Dr. Mayer observed that "unfortunately, on the whole, food advertising as presently practiced in our country seems to work against the nutritional health of the American people; many children's food advertisements are nothing short of national disaster. " 298/

296/ Cigarette Rule at 8359.

297/ Senate Hearings at 261.

298/ Senate Hearings at 259.

(ii) To Parents and to the Parent-Child Relationship

Whenever a parent accepts the responsibility of guiding a child's dietary habits, the extent to which the child will be permitted to indulge a taste for foods the parent disfavors will be resolved by some sort of negotiation between the parent and child, which is often a continuing source of tension in the parent-child relationship.

The degree of this tension can be seen by examining the General Mills American Family Report, 1976-77: Raising Children in a Changing Society. The Family Report is based on data obtained by Yankelovich, Skelly and White, Inc., a well-known polling firm. According to the Family Report:

The number one "major nagging problem" identified by parents in "raising children who are 12 years old or under" is "children filling up with snacks between meals" (p. 96).

The number three "major nagging problem" is "children not eating what they should."

The number two "major nagging problem"--which may bear some relationship to numbers one and three--is "children crying and whining."

The number four "major nagging problem"--which may bear some relationship to numbers one, two and three--is "children always asking for things they see advertised."

Similarly, the Family Report (p. 93) lists "Ten Major Personal Concerns About Raising Children." The top-ranked concern on this list is "giving in to children more often than [parents feel they] should." In third place, only one percentage point behind televised violence, is "children eating too much non-nutritious food."

From the children's point of view, the Family Report lists "The Children's Complaints About Their Parents" (p. 133).

The number one complaint is that "parents make children eat food they don't like."

The number two complaint is that "parents make them turn off television."

Complaints number six and seven are that "parents don't let them eat snacks" and that "parents don't buy children what they see advertised."

Looking at the matter from still another perspective, the Family Report (p. 132) lists the major sources of arguments between children and parents. The number two item on this list is "things [children] want parents to buy for them." 299/

These findings suggest that the present advertising of sugared products, for several reasons, concerns matters that are of particular sensitivity between the parent and child.

299/ The number one item is "doing chores around the house"--which is more typically a problem with older children than with younger.

First, it concerns food. Second, much of it concerns snack food. Third, it encourages children to demand things they see advertised. Fourth, it concerns television; if a parent tries to escape pressure as to the first three points by turning off the set, he or she will run into yet another area of conflict.

The injury here is that while a child may be incapable of balancing the short-term attractions of sugar consumption against the possible long-term harms, a parent not only is capable of striking such a balance on the child's behalf, but also may well feel obligated to strike it, as an element of responsible parenthood. A parent, on reviewing the evidence on the dental and non-dental health consequences, might very well conclude that sugar should be consumed in a significantly lesser amount than the child might prefer. The advertising at issue, however, taken cumulatively, will force such a parent to defend that conclusion against the teaching of the television set that all sugared foods are desirable, and that their unfettered consumption is the normal, healthy way to satisfy hunger. The advertising undermines the authority of the parent in his or her own home on a matter which is intimately related to health, and thus central to legitimate parental concern.

It does this at a time when, it has been argued:

> "[T]he dangers posed by television advertising are increased by changes in technology which

> have broken down the extended family, weakened family life, and led to mobility which destroys the sense of community and reduces schools to shambles. These societal changes have lessened the role of parents, and increased the role of peers and television in socialization [of children]." 300/

This is no small injury. As the Supreme Court wrote in Ginsberg v. New York, 390 U.S. 629, 639 (1968):

> "[T]he parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents ...,' Prince v. Massachusets [321 U.S.] at 166."

It will undoubtedly be argued that a parent can always "pull the plug" on the television set, or banish it from the home. But this too involves a matter of great delicacy in the parent-child relationship. It may also be a remedy which the parent legitimately believes to be undesirable.

Dr. Sherryl Graves, a clinical psychologist on the faculty of New York University, who has been involved in a three-year project with the Center for Research in Children's Television

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300/ Howard and Hulbert, Advertising and the Public Interest, a Staff Report to the Federal Trade Commission, at VI-26 (1973) (describing the views of Dr. John Condry, professor of psychology, Cornell University). The degree to which traditional discipline has broken down is suggested by the fact that on an average weeknight there are 1.4 million children under the age of 12 still watching television from midnight to 12:30 a.m. From 12:30 to 1 a.m. the number is 1.1 million; from 1 to 1:30 a.m. it is 743,000; from 1:30 to 2 a.m. it is 435,000. See Hearings on Broadcast Advertising and Children, House Comm. on Interstate and Foreign Commerce, Subcomm. on Communications, 94th Cong., 1st Sess., 183-84, July 15, 1975 (testimony of John A. Schneider, President, CBS Broadcast Group).

at the Harvard Graduate School of Education, recently made these observations:

> "Parents responded that they made few efforts to control their children's viewing because of some intense feelings of helplessness.
>
> "They had concerns about enforcing rules on their children that they thought might help to make their children social outcasts or social isolates.
>
> "Further, many parents were at a total loss for what they would do with their children if they didn't have television there to keep them quiet and off the streets." 301/

The fear that children denied television will become "social outcasts or social isolates" comes from the fact that, as Dr. Graves says, ours is:

> "an environment in which the New York Times considers it newsworthy when a portion of an Upper West Side school population abstains from television viewing for a week .... [I]t's an environment in which the network news transports us to the hinterlands of California, where people live without receiving television. We'd want to know how people survive under such primitive conditions. What can they possibly do for amusement? It is not surprising that such stories are considered to be newsworthy, when Americans are more likely to own a television set than they are to have [the] advantages of indoor plumbing." 302/

301/ Remarks to the Children and Advertising Seminar, Georgetown University Law Center, Session III, April 19, 1977.

302/ Id. Compare Hirshey, What Happens When Kids Don't Watch TV? Family Circle (Sept. 20, 1977) at 22.

The Kellogg Company has argued that the very fact that "the clear majority of mothers don't appear to be doing much about it" demonstrates that children's television, and the food advertising that goes with it, is not a significant problem. 303/ But parental inaction, as Dr. Graves suggests, may be more the result of "intense feelings of helplessness" than of any judgment that the status quo is tolerable. Moreover, it is not clear that even if parents did try to forbid television viewing, this effort would be effective to screen out the commercials they found offensive. It has been argued that:

> "Given the advertising saturation techniques now employed, it is virtually impossible for parents to monitor every product promotion their children see. Working parents are especially handicapped in the effort to censor children's viewing, and, as of March, 1975, over fifty percent of all women with children in the United States worked outside the home. Also, merely limiting a child's exposure to the media has proven to be an ineffective remedy. Studies have shown that even when children's television viewing hours were restricted, purchases influenced by television were not proportionately reduced. Inevitably, many of the seller's persuasive advertisements will reach children, even if only through friends, and will rival parental influence." Wolinsky and Econome, Seduction in Wonderland: The Need for a Seller's Fiduciary Duty Toward Children, 4 Hastings Const. L. Q. 249, 257 (1977). (Citations omitted.)

303/ Kellogg Company, Ready-to-Eat Cereals: Nutrition and Advertising (Aug. 3, 1977) at 39.

Significantly, the courts have recognized that even the adult segment of the national television audience is for some purposes "captive." See, e.g., Columbia Broadcasting System v. Democratic Nat'l Committee, 412 U.S. 94, 127-28 (1973), where the Supreme Court wrote that:

> "[t]he [Federal Communications] Commission is ...entitled to take into account the reality that in a very real sense listeners and viewers constitute a 'captive audience.' Cf. Public Utilities Comm'n v. Pollack, 343 U.S. at 463; Kovacs v. Cooper, 336 U.S. 77 (1949). The 'captive' nature of the broadcast audience was recognized as early as 1924, when Commerce Secretary Hoover remarked at the Fourth National Radio Conference that 'the radio listener does not have the same option that the reader of publications has--to ignore advertising in which he is not interested--and he may resent its invasion of his set.' As the broadcast media become more pervasive in our society, the problem has become more acute.". (Citation omitted.)

To similar effect, see, e.g., Banzhaf v. FCC, 495 F. 2d 1082, 1100-01 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969); cf. Lehman v. Shaker Heights, 418 U.S. 298 (1974) and Packer Corp. v. Utah, 285 U.S. 105 (1932).

If even adults in the television audience are in some sense the "captives" of advertisers, then a fortiori this is true of children, especially the youngest of them, who lack the ability which adults have to discount or even understand or evaluate advertising.

Notably, too, the chief executive officer of one of Kellogg's competitors, the Quaker Oats Company, advised

the Commission in a public session held last November 22, 1977 that:

> "[w]e do not believe any reasonable person can view a typical eight to twelve noon Saturday morning period on any of the major television networks and fail to recognize the need for fundamental change in the way our society is using its most powerful and pervasive medium of communication to entertain and enlighten the very young."

The unfairness of putting parents to a choice between the rock and the hard place--between purchasing products advertised to children on television and enduring the conflict that goes with a refusal to buy the products (or, a fortiori, with a refusal to allow television watching)--has been recognized in previous Commission cases. For example, in Ideal Toy Corp., 64 F.T.C. 297, 310 (1964), the Hearing Examiner concluded that toy advertising which was deceptive to children was also unfair to "adults not deceived" because:

> "[T]he use of such advertising plays unfairly upon the affection of adults for children, especially parents and other close relatives. By subjecting such persons to importuning and demands on the part of children who have been entranced by the imaginative and deceptive properties claimed for such toys, which importuning and demands can be resisted even by adults not deceived only upon pain of having dissatisfied, unhappy, hating or rebellious children, respondent tends to create disturbed home and family relationships." (Emphasis added.)

This conclusion was adopted by the Commission. Id. at 315. To similar effect, see Mattel Corp., 79 F.T.C. 653, 670 (1971); Topper Corp., 79 F.T.C. 674, 684 (1971).

In those cases, the advertising merely promoted parent-child conflict over toys. Here the advertising promotes such conflict over nutrition and health.

(iii) To Competitors

The inadvisability of urging sugar on small children is well known, even among the companies that sponsor the present advertising. General Mills, for example, has published a booklet for parents entitled "Meal Planning for Young Children." This booklet advises:

> "Watch the teeth. Use sparingly foods high in sugar. They take away the appetite for more basic foods, provide only calories and quick energy and encourage tooth decay. No coaxing is necessary to get children to eat candy, cookies, cake, or drink carbonated beverages. Teaching a preference for other types of foods must begin early in the high-chair stage. Offer sweets only at the end of a meal."

General Mills is one of a number of companies whose televised advertising to children makes it difficult for parents to follow that advice. One of its products, for example, is "Count Chocula" (47.9% sugar 304/), which

304/ See text accompanying note 202 supra.

Dr. Truuvert reports children consume both as a cereal and as a between-meal snack. 305/ Count Chocula has been promoted with such commercials as the following:

> "Mirror, mirror on the wall, whose cereal is the supersweetest of them all? Is it my Count Chocula? My supersweet cereal, chocolate sweet is for monster chocolate flavor." 306/

Dr. Jean Mayer has suggested a reason for this discrepancy between General Mills' advice to parents and its own advertising. Food advertising, to be profitable, has to shift consumption away from unbranded, generic foods (which, he says, include most of the best nutritionally) and toward branded, highly processed or fabricated foods (which he says include many of the worst nutritionally). This imperative, he says, exists "in spite of the undeniable good will and excellent intentions of many industry leaders." 307/

Another part of the explanation is given by the General Mills booklet just quoted. It says that "no coaxing is necessary to get children to eat candy, cookies, cake, or drink carbonated beverages." The conclusion drawn for parents in the booklet is that "teaching a preference for other types of foods must begin early in the high-chair stage." But the

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305/ See text accompanying note 216 supra.

306/ Senate Hearings at 389.

307/ Senate Hearings at 260.

conclusion drawn by the industry for marketing purposes is that since these are the foods for which "no coaxing" is needed, they are also foods which are most easily and effectively urged on children when repeated and highly sophisticated coaxing is employed.

The result is a kind of competitive "sugar derby," in which no single competitor can afford to be "out-sugared," lest it lose its market position.

This situation closely resembles the one in Keppel. In that case the Supreme Court observed, 291 U.S. at 313, that:

> "A method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulstion not to adopt, even though it is not criminal, was thought [in FTC v. Winsted Hosiery Co., 258 U.S. 483 (1922)] to involve the kind of unfairness at which the statute was aimed.
>
> "The practice in this case presents the same dilemma to competitors .... * * * [H]ere the competitive method is shown to exploit children who cannot protect themselves." (Emphasis added.)

The practice in Keppel which competitors were "under a powerful moral compulsion not to adopt" involved leading children to gamble relatively insignificant amounts of money. Here, the advertising in question leads them to gamble with their health.

b. Offensiveness to Public Policy

Against this background of substantial injury to children, to parents and the parent-child relationship, and to competitors, we turn now to the Cigarette Rule's first criterion for determining unfairness:

> "[W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise--whether, in other words, it is within at least the penumbra of some common-law, statutory, or other concept of unfairness." 308/

(i) Public Policy of Protecting Children

Among the public policies most deeply rooted in American law are (a) that children are to be protected from the serious or lasting consequences of their own mistakes, and (b) that adults are to be prevented from exploiting, for their own financial advantage, the disparity between their own sophistication and the naivete of children. 309/

308/ Cigarette Rule at 8355.

309/ The relevance of these policies to the Pfizer and All-State approach to unfairness, which focuses on disparities in market power even between adult and adult, should need no elaboration.

As one commentator has expressed it:

> "The infant has always been a favorite of the law. From early times the common law has made exceptions to the ordinary rules of law to compensate for the mental immaturity of persons in the adolescent period of life. The infant has been given certain special rights and privileges, and at the same time has had imposed upon him certain disabilities, all intended to afford him special protection." 5 Vernier, American Family Law at 3 (1938).

Some examples of this "special protection" are set forth below:

1. The Attractive Nuisance Doctrine

A particularly relevant example is the "attractive nuisance" doctrine, which governs liability when children trespass on premises which are both attractive and dangerous to them. 310/ This doctrine is based on the recognition that the power of an adult to prevent children from entering such premises is a far surer protection for the children than their own highly limited ability to understand the danger

310/ See, e.g., Sioux City & Pac. R. Co. v. Stout, 17 Wall. 657 (U.S. 1873); Keffe v. Milwaukee & St. Paul R. Co., 21 Minn. 207 (1875); Ekdahl v. Minnesota Utilities Co., 203 Minn. 374, 281 N.W. 517 (1938); Mckiddy v. Des Moines Elec. Co., 202 Iowa 225, 206 N.W. 815 (1926); Bartleson v. Glen Alden Coal Co., 361 Pa. 519, 64 A. 2d 846 (1949). See generally Restatement of Torts § 339 (1934); Prosser, Law of Torts § 27.5 (1965).

and act--or refrain from acting--on the basis of that understanding. Thus the law gives an adult who maintains attractive but dangerous premises a stiff financial incentive to make them "child-proof." A 19th century commentator expressed the policy as follows:

> "Now, boys are just as God made them, and as God has not seen fit to make them careful, cautious, reasonable and reflective, most courts have deemed it wise and humane, in order to protect the breed and guarantee it against extermination and save it from unsightly disfigurements and inconvenient maimings, to make certain allowances for them and their notorious proclivities, and exact from adults a certain extraordinary degree of foresight and care in view of them." Note, The Allurement of Infants, 31 Amer. L. Rev. 891, 892 (1897).

Mr. Justice Holmes once described the doctrine as being for the protection of "children of an age when they follow a bait as mechanically as a fish," United Zinc & Chem. Co. v. Britt, 258 U.S. 268, 275 (1921). 311/

The present case is like that of an attractive nuisance whose owner, instead of trying to exclude children, is making every possible effort to lure them on. As with entering an attractive nuisance, children need "no coaxing"

311/ That, however, seems to be an excessively narrow statement of the class protected by the doctrine. See, e.g., Prosser, supra note 310, at § 59.

to consume sugar. As with an attractive nuisance, children, even if they "understand" those risks in some abstract sense, lack the capacity for translating their "understanding" into appropriate conduct.

The attractive nuisance doctrine provides guidance for dealing with the argument sometimes made that advertisers should be allowed to make whatever appeals they want to children, and that the burden should be placed on the parents, if they object, to resist the appeals or turn off the television set. 312/ In the attractive nuisance situation, Prosser has noted:

> "While it is true that [the child's] parents or guardians are charged with the duty of looking out for him, it is obviously neither customary nor practicable for them to follow him around with a key, or chain him to the bedpost. If he is to be protected at all, the person who can do it with the least inconvenience is the one upon whose land he strays. Added to this is the traditional societal interest in the safety and welfare of children." Prosser, Law of Torts § 59 (1971).

2. Provision of Dangerous Chattel to Minors

In language of obvious relevance here, the Restatement of Torts § 390 (1934) states the principle that:

312/ See, e.g., Kellogg Co., Ready-to-Eat Cereals: Nutrition and Advertising (Aug. 2, 1977) at 39.

> "One who supplies . . . a chattel for the use of another whom the supplier knows or from facts known to him should know to be likely because of his youth, inexperience or otherwise, to use it in a manner involving unreasonable risk of bodily harm to himself . . . is subject to liability for bodily harm caused thereby . . ." (Emphasis added.)

Here the products being promoted have a well-established tendency to cause tooth decay. The children who are encouraged to consume these products are likely "because of youth, inexperience or otherwise" to adopt the very consumption pattern most likely to cause this harm -- between-meal snacking on sugared products. Consumed in this pattern, sugared products are especially cariogenic.

3. Voidability of Minors' Contracts

It is hornbook law that the contracts of a minor are not enforceable against the minor, and are thus voidable at his or her option. 313/ "The endeavor of the courts has

313/ 43 C.J.S. Infants § 71 (1945). See generally 2 Williston, Contracts § 222, et seq. (3d ed., 1959). The idea that children should be protected against commercial exploitation is of considerable antiquity, although the sanctions used to enforce the policy have been mitigated somewhat. Under the Code of Hammurabi (c. 2250 B.C.), for example, buying or receiving on deposit anything from a minor without power of attorney or consent of elders was a crime punishable by death. See Woodbridge, Physical and Mental Infancy in the Criminal Law, 87 U. of Pa. L. Rev. 428 (1939).

been to prevent designing adults from overreaching infants by taking advantage of their lack of experience and judgment and inducing them to enter into contracts clearly to their disadvantage." Worman Motor Co. v. Hill, 54 Ariz. 227, 94 P. 2d 867, 871 (1939). "The policy of the law is to protect [children] from their own mistakes, even though this may sometimes result in hardship to others," Wharen v. Funk, 152 Pa. Super. 133, 31 A.2d 450, 452 (1943). The child's right to avoid his or her contracts has been described as "an absolute and paramount right, superior to all equities of all other persons." Ware v. Mobley, 190 Ga. 249, 9 S.E. 2d 67, 69 (1940).

Like the attractive nuisance doctrine, the voidability doctrine rejects the alternative of imposing on parents the burden of protecting children from the consequences of their own immaturity, and from the designs of predatory adults. It does not matter that a child's parents may have approved a contract; even then he or she may void it. See, e.g., Bombardier v. Goodrich, 94 Vt. 208, 11 A. 11 (1920); Hines v. Cheshire, 36 Wash. 2d. 467, 219 P. 2d 100 (1950); Kaufman v. American Youth Hostels, 13 Misc. 2d 8, 174 N.Y.S. 2d 580 (1957).

4. Minors' Disabilities or Immunities in Criminal and Tort Law

Among the protections which the law has traditionally extended to children are certain disabilities or immunities in criminal and tort law. The younger the child, the more stringent the protections. Thus, for example, a child under the age of seven has been conclusively presumed to be incapable of "negligent" behavior for purposes of tort law, Jorgenson v. Nadleman, 25 Ill. App. 2d 350, 195 N.E. 2d 422 (1960); and a child under ten has been held incapable of committing a felony murder, People v. Rooks, 40 Misc. 2d 359, 243 N.Y.S. 2d. 359 (1963). Blackstone's expression of the general principle was that:

> "Infancy is a defect of the understanding, and infants under the age of discretion ought not to be punished by any criminal prosecution whatever." 314/

The common law conclusively presumed that a child under the age of seven was absolutely incapable of committing a crime, having neither the ability to form a criminal intent nor the ability to be deterred by punishment. 315/ Between

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314/ Blackstone, IV Blk. Comm. 20, 22 quoted in 1 Burdick, The Law of Crime 202 (1946).

315/ LaFave and Scott, Criminal Law 352 (1972). See also 43 C.J.S. Infants § 96 (1945); Bassiouni, Criminal Law and its Processes 86-87 (1969).

the ages of seven and 14, the child was given the benefit of the presumption of incapacity, rebuttable only by "the strongest and most positive evidence." 316/ Above the age of 14, the common law presumed the child to be just as capable of a crime as an adult. 317/ About one-third of American jurisdictions have enacted statutes which have the effect of increasing the age below which criminal incapacity is conclusively presumed. In New York and New Jersey, for example, the age of absolute incapacity was raised to 16. 318/ While the practical significance of the law relating to criminal incapacity has been greatly reduced by the creation of statutory juvenile courts, these in turn represent yet another recognition of the need for special treatment, in most cases withdrawing children from the ordinary criminal process until the age of 18. 319/

These incapacities or immunities are relevant as expressions of the law's policy of protecting children from the serious or lasting consequences of their own mistakes.

316/ 1 Burdick, The Law of Crime at 205-506.

317/ 43 C.J.S., Infants § 96 (1945); 21 Am. Jur. 2d, Criminal Law 27 (1965).

318/ N.Y. Penal Law § 530.00; N. J. Rev. Stat. § 2A:85-4.

319/ LaFave and Scott, Criminal Law 354 (1972).

5. Prohibitions Against Minors' Purchase of Dangerous Products

This policy of protecting children extends specifically into the area of safeguarding their health and safety. Some products freely available to adults are considered so dangerous to children that children may not buy them at all. The most obvious examples are liquor and cigarettes. Another product which arguably belongs in this category is sexually oriented reading or pictorial matter which would be constitutionally protected if sold to adults, but which can be withheld from children on the ground, among others, that it poses a threat to their emotional well-being and development. See, e.g., Ginsberg v. New York, 390 U.S. 629 (1968). Other products which adults can buy, but children cannot, include firearms and ammunition; there the policy is to protect both children themselves and others whom they might injure.

6. Fiduciary Duties Owed to Minors and Other Weak and Reliant Parties

It has been recently and persuasively argued that those who advertise to children via television are in a position vis-a-vis their audience that is very close to those in which the courts have declared fiduciary relationships between

stronger and weaker parties, and have imposed obligations on the stronger for the benefit of the weaker. See Wolinsky and Econome, Seduction in Wonderland: The Need for a Seller's Fiduciary Duty Toward Children, 4 Hastings Const. L. Q. 249 (1977).

Fiduciary relationships, according to these authors, have been declared in a broad range of relationships, usually in cases having the following elements:

1. A dominant party (whom they call an "advisor") who has power over a weak and reliant party; and

2. An ability on the part of the advisor to "reach out and knowingly exploit this power for his own financial advantage and the reliant party's corresponding financial loss." 320/

They state that:

> "When the advisor does in fact abuse this power in favor of himself, equity will intervene. The greater the advisor's power to control the reliant party, the more urgent is the need for the law to insure that the power is used fairly. Hence, the scope of the advisor's fiduciary duty is to a great extent correlative with the amount of control he can impose on the reliant party. The advisor's power can consist of one or a combination of the following

320/ 4 Hastings Const. L.Q. at 266.

> factors: superior knowledge, experience, resources, control, or psychological power over the more vulnerable party. The weakness of the reliant party can include limited access to knowledge, limited experience and underdeveloped intellect, or infirmity because of advanced age." 321/

They then conclude that "the relationship between a seller and a child meets every characteristic typically ascribed to the advisor's fiduciary relationship with a reliant party. Indeed, trusting, undiscriminating children are the classic reliant parties." 322/

The relationship between a television advertiser and a child audience that is led by the advertiser to take health risks by consuming the advertiser's product is "within at least the penumbra" 323/ of equitable notions of unfairness employed in fiduciary relationship cases. Thus, under the Cigarette Rule, those equitable notions support a finding of Section 5 unfairness here.

7. Other Protections Extended to Children

Other protections extended to children include compulsory school attendance laws, prohibitions on marriage below a certain

321/ Id. at 266-67. (Citations omitted.)

322/ Id. at 268.

323/ Cigarette Rule at 8355.

age, prohibitions on driving a motor vehicle below a certain age, prohibitions against child labor, and the law governing statutory (as distinct from forcible) rape. These examples involve conduct whose long-run consequences may be serious, but which a child is not equipped to evaluate. Significantly, below certain ages these prohibitions are effective even where there might be parental consent.

The protections enumerated do not form an exhaustive list, but they do illustrate a point. That point has been articulated as follows:

> "In the case of infants, or persons under the natural and legal disability of nonage the government exercises functions of guardianship, the superintendence flowing from its general power and duty as parens patriae or sovereign guardian. No doctrine has ever been asserted more broadly in principle than the power of government in this regard and none has received more extensive and varied practical application. The numerous regulations to be found on the statute books of the states, for the protection of the morals and health of minors [and the] security of their person, have been sustained as valid enactments in the exercise of this sovereign power." Hockeimer, The Law in its Relation to Children, 67 Cent. L. J. 395 (1908).

(ii) Public Policy of Protecting Parental Authority

In addition to protecting the welfare of children, the law also has a policy of protecting the authority of parents.

This is the point of the Supreme Court's observation in Ginsberg v. New York, that:

> "[t]he parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. * * * The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsiblity . . . ." 390 U.S. at 639.

(iii) The Commission's Recognition of These Public Policies

The Commission has a long history of recognizing and implementing these public policies, particularly in applying Section 5 to situations involving children as a naive and vulnerable audience. It is clear, therefore, that these policies support protection of children "too young to be capable of exercising an intelligent judgment" , Keppel, 291 U.S. at 309, from advertising whose tendency and capacity is to persuade such children to consume foods which pose immediate risks to their teeth and which may also be bad for other aspects of their long-term health. 324/

324/ These policies also support protection of parental authority on matters of nutrition since parents have "primary responsibility for children's well being." Ginsberg, supra, 390 U.S. at 639.

c. Immorality, Unethicality, Oppressiveness, Unscrupulousness

The Cigarette Rule's remaining criterion for determining unfairness is "whether [the practice in question] is immoral, unethical, oppressive, or unscrupulous."

Two Section 5 unfairness cases in which the Commission or a court employed such adjectives are Keppel (involving inducements to children to gamble with small amounts of money) and the Cigarette Rule itself (involving inducements to both adults and children to gamble with health). The present case, of course, is of the latter sort, but involves substantially younger, and thus even more defenseless, children than those likely to have been enticed by broadcast cigarette advertising.

Further, these adjectives are close in meaning to yet another adjective, "unconscionable," which has well established legal content of its own. "Unconscionable" is a word which the courts apply to certain contracts, arrived at by parties of highly disparate bargaining power, which excessively favor the more powerful side, and injure the weaker. 325/

325/ See, e.g. Williams v. Walker-Thomas Furniture Co., 350 F. 2d 445, 449 (D.C. Cir. 1965); Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960). See also, UNIFORM COMMERCIAL CODE § 2-302. Cf. 1 Corbin, Contracts § 128 (1963).

The relationship between the present advertisers and the child audience is "unconscionable" in just that sense. Sophisticated, well-financed adults are advertising potentially harmful products, via the most powerful medium ever devised for reaching young children, to an audience which has little understanding either of the means by which it is being manipulated or of the potential harms in the products. The advantage in this encounter of extremes lies overwhelmingly--if not, indeed, wholly--with the more powerful side.

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." 326/

326/ Quoted in Heighton and Cunningham, Advertising in the Broadcast Media 314 (1976). (Emphasis added.) Similarly, see K. Keniston, et al., All Our Children: The American Family Under Pressure 53-54 (1977).

C. It Is Inherently Unfair and Deceptive to Address Any Television Advertisement to Children Too Young to Understand the Selling Purpose of, or Otherwise Comprehend or Evaluate, the Advertisement.

Section 317(a)(1) of the Federal Communications Act, 47 U.S.C. § 317(a)(1), provides in pertinent part that:

> "All matter broadcast by any radio station 327/ for which any money . . . is paid . . . to . . . the station so broadcasting from any person shall, at the time the same is so broadcast, be announced as paid for . . . by such person."

The FCC has explained that:

> "The rationale behind this provision is, in part, that an advertiser would have an unfair advantage over listeners if they could not differentiate between the program and the commercial message, and were, therefore, unable to take its paid status into consideration in assessing the message. Hearings on H.R. 5589 before the House Committee on Merchant Marine and Fisheries, 69th Cong., 1st Sess. at p. 83 (1926)." 328/

327/ For purposes of the Act, a "radio station" is defined to include any "station equipped to engage in radio communication." "Radio communication," in turn, is defined to include the transmission of "pictures." 47 U.S.C. Section 153(b) and (k). Thus Section 317(a)(1) applies to television.

328/ FCC, Report of Policy Statement: Children's Television Programs, 39 Fed. Reg. at 39401, 50 F.C.C. 2d at 14. (Emphasis added.) See also H. Rep. No. 1800, House Comm. on Interstate and Foreign Commerce (June 13, 1960) concerning amendments to Section 317 to deal with such previously uncovered problems as undisclosed payments to station employees for mention of company or product in programming or for playing of designated records. In the hearings on H.R. 5589 cited by the FCC, a failure to identify broadcast advertising as such was characterized as "a deception" which exploits the fact that "many" broadcasters "doubtless stand high, and have the confidence of their listeners." Hearings at 83 (remarks of Rep. Davis). Section 317 of the Communications Act was patterned after a parallel provision of the postal laws (now codified as 39 U.S.C. § 4367) which requires print media which enjoy second class mailing privileges to identify paid advertising as such.

The NSF Report observes (p. 25) that:

> "For adult viewers, we can generally assume that perception of a television advertisement is accompanied by an understanding of the promotional purpose. The same assumption cannot be made when the viewers are children. That is, some children may be able to correctly identify a television message as a commercial and still not comprehend its purpose."

The NSF Report adds (p. 27) that research findings

> "[c]onsistently demonstrate a positive relationship between children's age and their ability to describe the difference between commercial and program material. More specifically, the younger children (ages 5-8 years) either expressed confusion about the difference or used superficial perceptual or affective cues as the basis for the distinction." (Emphasis added.)

We have discussed this point in detail above. The sum of the matter is that in advertising any product via television to an audience which, in the FCC's words, (a) cannot "differentiate between the program and the commercial message," and (b) cannot "take [an advertisement's] paid status into consideration in assessing the message," an advertiser is engaging in a practice which Congress, according to the FCC, determined in Section 317(a)(1) to be "unfair." 329/

The FCC's use of the word "unfair" did not occur in the specific context of Section 5 of the FTC Act. But

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329/ The FCC's interpretation of Section 317(a)(1), and other provisions of the Federal Communications Act, is, of course, entitled to great weight. Cf. Udall v. Tallman, 380 U.S. 1, 16 (1965).

unfairness in a practical sense and unfairness in the Section 5 sense are intimately related concepts. As the Supreme Court held in Keppel, 219 U.S. at 313, "the first criterion of statutory construction" to be used in defining the word "unfair" as it appears in Section 5 is "the normal meaning of the word."

Section 317(a)(1) of the Communications Act is only one of several recognitions that it is wrong--in a sense that can be characterized either as "unfairness" or as "deceptiveness"--to address television advertising to an audience which cannot recognize that a financially self-serving message is being presented. Another example concerns subliminal advertising. On January 24, 1975, the FCC issued a Public Notice on that subject (FCC 74-78 08055) which stated that:

> "We believe that use of subliminal perception . . . is inconsistent with the obligations of a licensee and therefore we take this occasion to make clear that broadcasts employing such techniques are contrary to the public interest. Whether effective or not, such broadcasts clearly are intended to be deceptive." (Emphasis added.) 330/

330/ Compare note 328, supra. (Congressional characterization of failure to identify broadcast advertising as such as "a deception"). The word "deceptive," like the word "unfair," has to be defined for purposes of Section 5 of the FTC Act in terms which accord due weight to the "normal meaning of the word," taking into account the susceptibilities and incapacities of particular audiences. Thus, it is appropriate to define it with special stringency where advertising to children is concerned.

If it is unfair or deceptive to bypass defenses which adults are presumed to have, then a fortiori it is unfair or deceptive to address television advertising to children in whom those defenses do not even exist. In the case of adults, the unfairness or deceptiveness can usually be cured by some suitable disclosure, reasonably calculated to let the audience employ its defenses. But in the case of young children below a certain age (evidently about eight), the very nonexistence of these defenses in a substantial part of the audience makes disclosure an inadequate remedy. Some analogies to other areas of the law may be instructive on this point. The law as to the voidability of a minor's contract, for example, is that a minor may not be held to a contractual bargain--not that the child may be held to the bargain if he or she was given certain disclosures when the bargain was made. The law as to statutory rape is that it is unlawful to seduce a child below a certain age, not that such seduction is lawful if the child was given certain disclosures in advance. The law as to attractive nuisance is that a property owner is liable for injury to a child who strays onto property that is both attractive to the child and dangerous--not that the property owner is exonerated from liability if the child was given certain disclosures about the danger. In none of these situations

is the law willing to entrust the protection of children to defenses of their own which the law recognizes do not exist. There is no reason why the Commission should entrust the protection of children in the present situation to defenses of their own which do not exist.

Another relevant point is that few, if any, of the classical justifications for advertising can be straightfacedly applied to children who are still too young to understand the selling purpose of, or otherwise comprehend or evaluate, a commercial. Those children are at the opposite pole, psychologically, intellectually, and economically, from the traditionally assumed "rational consumer" who derives a benefit from advertising, in that it enables him or her to make intelligent choices among alternate products and services competing in the marketplace. A child too young to understand the selling purpose of advertising is likely also to be unaware even that such a marketplace exists, and is still more likely to be unaware that a decision to consume one product may imply a decision not to consume another, 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. It is the subversion of that balance that makes such practices as subliminal or unlabeled advertising offensive to public policy.

In the area of contract law, the courts step in to redress the balance when it has been "unconscionably" skewed. Likewise, this Commission has recognized an obligation to act against practices which destroy that balance. 331/

It can hardly be argued that any such balance exists between an advertiser who is prepared to spend many thousands of dollars just to produce a single 30-second commercial, and a 3-year-old child who has no idea what the purpose of a commercial is, and looks up to even an animated cartoon elf in such a commercial as an appropriate figure to trust, heed, and imitate.

If the classical justifications for advertising do not explain why children who cannot appreciate the selling purpose of, or otherwise comprehend or evaluate, the advertising should nonetheless be considered "fair game," then it is reasonable to ask what, if any, justifications do explain it. We believe that the correct answer--none--was supplied in the following words by Joan Ganz Cooney, president of the Children's Television Workshop, and producer of Sesame Street and The Electric Company:

331/ See, e.g., Trade Regulation Rule: Cooling-Off Period for Door to Door Sales, 16 C.F.R. § 429 (1977); Trade Regulation Rule: Preservation of Consumers' Claims and Defenses, 16 C.F.R. § 433 (1977).

> "[If] we, as a total society, put the interest of children first, then we are led to the inescapable conclusion that it is terribly wrong to be pitching products--even high-quality, worthwhile products--at the young.
>
> "It is like shooting fish in a barrel. It is grotesquely unfair. The target audience is, after all, illiterate, uneducated, unemployed and hopelessly dependent on welfare from others."
>
> "Thus, even if the program content that is sandwiched in between the commercial pitches were of positive value--and that, at best, is debatable--those who put children first would still have to take the position that trying to sell them anything is dead wrong. The hard sell to children should be stopped." 332/

There are, of course, certain problems that will have to be solved in tailoring protections specifically for that part of the audience that is still too young to appreciate the selling purpose of, or otherwise comprehend or evaluate, commercials. The most obvious problem is that children below the age of eight seldom form anything approaching a majority of the audience for television programming. Thus the remedy may have to be some form of limitation on advertising at times when such children form more than a certain percentage of the audience, and/or a ban on advertising which is reasonably calculated to appeal to them rather than exclusively to older children. Helitzer and

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332/ Senate Hearings at 415.

Heyel have shown that such advertising does exist. And Dr. Kenneth O'Bryan, when he appeared before the Commission on December 1, 1977, offered some expert advice on how it can be identified. For example, he said, when children appear in commercials, it is a fair inference that the children to whom the commercials are addressed are a year or two younger than those shown on the screen. Line-drawing in this area may also be facilitated by detailed scrutiny of audience data for particular hours or programs. 333/ Ultimately, however, the Commission will have to exercise its sound discretion in drawing such lines, recognizing that it can never be done perfectly.

333/ A principal difficulty with the data we have now is that audiences are broken down in terms of the 2-5 and 6-11 age groups, not in terms at the distinction at age 8 which is suggested by the consideration we have been discussing.

V. THERE ARE NO JURISDICTIONAL OR CONSTITUTIONAL IMPEDIMENTS TO COMMISSION REGULATION OF TELEVISION ADVERTISING TO CHILDREN

The ACT and CSPI petitions request, and we are proposing, that the Commission regulate certain aspects of television advertising to children. One concern is whether this Commission has the authority to impose the remedies suggested in light of concurrent jurisdiction exercised by this Commission and the Federal Communications Commission (FCC). We have concluded that the Commission does possess the jurisdiction necessary to undertake any of the remedies here proposed. We have also analyzed the various constitutional issues which are raised by our regulation of commercial speech, and have concluded that no constitutional impediments exist to imposition of the proposed remedies.

The following jurisdictional and constitutional analyses are general in tone. Jurisdictional and constitutional questions with respect to the application of the proposed remedies are discussed more specifically where appropriate in Section VI.

A. The Federal Trade Commission and The Federal Communications Commission Possess Concurrent Jurisdiction to Regulate Television Advertising to Children

The FCC is authorized to license broadcasters if the grant would serve the public convenience, interest or necessity, 47 U.S.C. §307(a), and to deny an application where the licensee has failed to meet this standard. 47 U.S.C. §§ 309(a), 310(b). The FCC may also suspend or revoke licenses, or issue cease and desist orders. 47 U.S.C. §§ 303(m), 312(a) and (b). Except for the inclusion of the knowing transmission of "false and deceptive signals or communications," 47 U.S.C. § 303(m)(1)(D)(1), nothing in the provisions of the Communications Act of 1934 relative to broadcasting refers specifically to unfair or deceptive acts or practices.

In considering the public interest, the FCC may inquire into the possibly deceptive nature of particular advertisements carried by licensees. However, the FCC has generally considered the jurisdiction of this Commission to be primary in this area and has announced that it would refer to the Commission any complaints concerning specific advertisements. At the same time, the FCC has emphasized that licensees have an obligation to use reasonable diligence to avoid broadcasting deceptive advertisements, that they should be alert to the rulings and activities of this Commission and

that a licensee's compliance with this mandate will be reviewed in determining whether the licensee has operated in the "public interest." See Alan F. Neckritz, 29 F.C.C.2d 807, 810, 812 (1971). In reviewing allegations that a licensee failed to exercise due care in assuring that deceptive advertisements are not broadcast, the FCC has discussed the reasons underlying its policy of deferring to this Commission's primary jurisdiction to regulate deceptive advertising. It has emphasized in particular its limited resources and lack of necessary expertise to determine the merits of claims regarding particular advertisements. Consumers Association of District of Columbia (Columbia Broadcasting System, Inc. and WTOP-TV), 32 F.C.C.2d 400, 404, 405 (1971). These same reasons, and "primarily the recent activity of the FTC" were cited as the basis for the FCC's refusal to initiate rulemaking proceedings to establish guidelines relating to deceptive advertising. Adoption of Standards Designed to Eliminate Deceptive Advertising from Television (Petition of TUBE), 32 F.C.C.2d 360, 361 (1971).

This FCC policy is embodied in a Liaison Agreement between the Commission and the FCC adopted on April 27, 1972, which recognizes that except for advertising related to prescription drugs and those areas specified in Section 5(a)(2)

of the FTC Act, 15 U.S.C. §45(a)(2), this Commission has primary responsibility to regulate unfair or deceptive commercial advertising and the FCC has primary responsibility to assure that the overall operation of broadcast licensees is consistent with the Communications Act's standard of "public interest, convenience and necessity." The Agreement concludes that this Commission will exercise primary jurisdiction over "all matters regulating unfair or deceptive advertising in all media, including the broadcast media" and the FCC will continue to "take into account pertinent considerations in this area" in reviewing applications for licenses or for renewals of licenses. CCH Trade Reg. Rep. ¶ 9852 (1972). Recently, the FCC acknowledged the appropriateness of Commission remedies to regulate certain broadcast advertising practices. Thus, the FCC stated that its fairness doctrine was not an appropriate remedy for false, misleading or deceptive advertising because a "Congressionally-mandated remedy for deceptive advertising already exists in the form of various FTC sanctions." Handling of Public Interest Under the Fairness Doctrine and the Public Interest Standard, 48 F.C.C.2d 1, 27-28 (1974), reconsideration denied, 58 F.C.C.2d 691 (1976), aff'd sub nom. NCCB v. FCC, Civ. No. 74-1700 (D.C. Cir. November 11, 1977) ("Fairness Report"). The FCC stated:

> "[W]e believe that the public interest can be best served through the existing, Congressionally mandated scheme of regulation, and by a conscientious effort on the part of broadcasters to meet their obligations in this area [citing Licensee Responsibility with Respect to the Broadcast of False, Misleading or Deceptive Advertising, 32 F.C.C.2d 396 (1971) and Consumer Association of District of Columbia, 32 F.C.C.2d 400 (1971).]" Fairness Report, 48 F.C.C.2d at 28.

The FCC also stated that "[i]f an advertisement is found to be false or misleading, we believe that the proper course is to ban it altogether rather than to make its claims a subject of broadcast debate" under the fairness doctrine. Fairness Report, 48 F.C.C.2d at 28.

Presently, the FCC reviews a broadcaster's advertising practices as to overcommercialization 334/ and children's advertising. Subsequent to its hearings on the latter subject, the FCC issued a policy statement limiting the use of so-called "selling hosts" in children's commercials and requiring a clear separation of commercials from program content. It addressed as well the question whether it should ban all commercials on children's television programming. It declined to do so, reasoning that the ban would not be in

334/ In terminating an inquiry into overcommercialization, the FCC declined to issue regulations governing the amount of time licensees could devote to commercials, although it concluded that such regulations would be within its authority. Amendment of Part 3 of the Commission's Rules and Regulations with Respect to Advertising, 36 F.C.C. 45, 46 (1964). See also WMOZ, Inc., 36 F.C.C. 201 (1964).

the public interest because of its possible impact on the quality of children's programming. But the policy statement tacitly endorsed the limits on the amount of children's advertising established by industry codes and warned that the FCC would be prepared to issue more stringent standards if industry self-regulation were shown to be insufficient. The FCC declined to address several issues raised during the hearings, including the impact of advertising of products claimed to be harmful to children, such as snack foods, vitamins and drugs. It did so because many of these issues were the subject of then current investigations by this Commission into advertising practices on children's programs and food advertising. Children's Television Report and Policy Statement, 50 F.C.C.2d 1, 9 (1974), aff'd sub nom. Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977).

The foregoing pronouncements of the FCC and the Liaison Agreement between the agency and this Commission indicate that the agencies have concurrent jurisdiction to regulate

television advertising to children -- as it affects advertisers and broadcasters. 335/

When agencies have concurrent jurisdiction, the basic principle is that "[w]here there are two acts upon the same subject, [the courts will attempt to] give effect to them both if possible." United States v. Borden Co., 308 U.S. 188,198 (1939). The only occasions when concurrence is not given effect are when the statutory provisions of the agency are irreconcilably in conflict with that of another, or when one agency administers a pervasive regulatory scheme which would be undermined by giving effect to the regulations of another agency, 336/ or when concurrent regulations would

335/ The Commission, of course, exercises jurisiction to reach unlawful practices concurrent with that of other agencies. This concurrence has been upheld by the courts. See FTC v. Cement Institute, 333 U.S. 683, 690-95 (1948) wherein the Court held that both the Department of Justice and the FTC, under Section 1 of the Sherman Act and Section 5 of the FTC Act, respectively, have jurisdiction to reach conduct alleged to constitute an illegal restraint of trade; and in Warner-Lambert Co. v. FTC 361 F.Supp. 948 (D.D.C. 1973), where the court ruled that with respect to proper labeling of drugs, statutory remedies of the FTC and the FDA were cumulative and not mutually exclusive and both agencies could therefore proceed simultaneously against the same party.

336/ See, e.g., Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) and United States v. Radio Corporation of America, 358 U.S. 334 (1959).

subject regulated entities to contradictory requirements. 337/

The exercise of concurrent jurisdiction by this Commission and the FCC over television advertising to children -- as it affects advertisers and broadcasters -- is in no way undermined by any of these factors. The Liaison Agreement entered into by the agencies supports -- not undermines -- the exercise of concurrent jurisdiction. The Supreme Court has explicitly declined to determine that the authority exercised by the FCC over broadcasters constitutes a pervasive regulatory scheme, United States v. Radio Corporation of America, 358 U.S. at 350-51. And the likelihood that exercise of concurrent jurisdiction by this Commission and the FCC would subject advertisers or broadcasters to irreconcilable holdings or regulations is slight. Irreconcilability would occur only if the FCC were to hold that the public interest requires the broadcast of advertisements determined by this Commission to be unfair or deceptive. This is most unlikely in view of two factors: the FCC's determination that this Commission has primary responsibility over unfair or deceptive advertising, and its policy of reviewing compliance of licensees with the Commission's findings in determining whether they have operated in the "public interest."

337/ See FTC v. Cement Institute, 333 U.S. at 694-95 and FTC v. Texaco Inc., 555 F.2d 862, 880-81 (D.C. Cir. 1977).

We conclude that the Commission's jurisdiction to regulate television advertising to children does not interfere with that of the FCC.

B. The Proposed Regulations of Advertising to Children Do Not Violate the First Amendment.

This section considers First Amendment questions posed by the prospect of Commission regulation of sugared food advertising to children. Although commercial speech, as distinguished from political speech, has traditionally been considered a constitutionally unprotected form of speech, recent Supreme Court cases 338/ have held that commercial speech enjoys some First Amendment protection (although the parameters of such protection are not as yet fully defined). The question arises, therefore, whether Commission regulatory action in this area would be proscribed or severely curtailed by the holdings in those cases. Our conclusion is that it would not. For the reasons set forth herein, narrowly tailored and carefully drafted Commission regulation of televised advertising of sugared foods to

338/ Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976), is the most significant of these cases. Its successor cases include Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977); Carey v. Population Services International, 431 U.S. 678 (1977); and Bates v. State Bar of Arizona, 45 U.S.L.W. 4895 (U.S. June 27, 1977).

children would be consistent with the First Amendment.

This section will first examine some of the special qualities of children that have been recognized by courts in tailoring the applicability of First Amendment requirements to the needs of minors. The differential treatment of minors in other areas of Constitutional import will also be discussed, highlighting the broad application of the principle that children are a special class of persons under the law. The recent "commercial speech" cases will be examined, including an analysis of their underlying premises and rationale. The "special problems" of advertising disseminated via the electronic broadcast media will be considered. The governmental interest in curtailing advertising that substantially interferes with the paramount parental interest in the child-rearing process will be analyzed. Finally, the need for maximizing the protection of children consistent with the rights of adults will be discussed, as well as the application to the matter at hand of theoretical frameworks which have been articulated in prior cases as a basis for lawfully curtailing speech because of its effect upon minors. The concluding subsection will highlight those factors which tilt any balancing test required by the First Amendment in favor of Commission regulatory action in this area.

1. Children are a Special Class of Persons Under the Law

a. Children are Different from Other Audiences in the Context of the First Amendment

Children occupy a special and different status from other persons for First Amendment purposes. This is a principle that has long been recognized and applied in our system of jurisprudence. Its rationale has been explained by Professor Thomas I. Emerson, a leading authority on the First Amendment. In his book, The System of Freedem of Expression, Emerson described "the place of children in a system of freedom of expression" as follows:

> "[T]hat 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 untrammeled 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 invididual choice which is the presupposition of the 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, 496-497 (1970). 339/

339/ See Section III-B supra for discussion of pyschological research data bearing out the limited cognitive abilities of children.

In Ginsberg v. New York, 340/ the case referred to by Emerson, the U.S. Supreme Court upheld a state ban on the sale to minors of materials which depicted or explicitly described, among other things, "sexual conduct or sado-masochistic abuse . . ", even though a ban on the sale of the same materials to adults would have been constitutionally invalid. Concurring in that case, Justice Stewart observed:

> "[T]he Constitution protects more than just a man's freedom to say or write or publish what he wants. It secures as well the liberty for each man to decide for himself what he will read and to what he will listen. The Constitution guarantees, in short, a society of free choice. Such a society presupposes the capacity of its members to choose.
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> "When expression occurs in a setting where the capacity to make choice is absent, government regulation of that expression may co-exist with and even implement First Amendment guarantees . . . .
>
> "I think a State may permissibly determine that, at least in some precisely delineated areas, a child -- like someone in a captive audience -- is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a state may deprive children of other rights -- the right to marry, for example, or the right to vote -- deprivations that would be constitutionally intolerable for adults." Ginsberg v. New York, 390 U.S. at 649-650 (1968) (Emphases added; footnotes omitted).

340/ Ginsberg v. New York, 390 U.S. 629 (1968).

As the above statements indicate, the assumptions which underlie First Amendment guarantees do not apply to children. Children lack the "maturity of judgment," "the full capacity for individual choice," and the perspective that comes from time and experience that the law presumes on the part of adults. It is for these reasons that children have been shielded from certain types of speech and other activities that could not be lawfully denied to adults.

The Supreme Court has also long recognized that First Amendment limitations on state action may differ depending upon whether the interests of children or of adults are at issue. In Prince v. Massachusetts, 321 U.S. 158 (1944), a nine-year-old child had been distributing religious literature on the street while accompanied by her legal guardian. The guardian was convicted of violating a state child labor law which prohibited children within specified age limits from selling or offering to sell "any newspapers, magazines...or any other...merchandise...in any street or public place." 321 U.S. at 160-161. The Supreme Court considered a First Amendment challenge to the conviction based not upon freedom of speech or of the press, but rather upon a First Amendment claim of freedom of religion by

the child's guardian for herself and the child. 341/ In its opinion, the Supreme Court noted that a similar statute of general applicability to adults would certainly be unconstitutional. However, the Court observed:

> "It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men [sic] and citizens....[T]he mere fact [that] a state could not wholly prohibit this form of adult activity...does not mean it cannot do so for children.,..
> The state's authority over children's activities is broader than over like actions of adults. This is particularly true of public activities and in matters of employment." 321 U.S. at 165, 168. (Emphasis added).

Among other things, Prince stands for the proposition that the rights of a minor may not only be curtailed more severely than the similar rights of an adult, but also that the state has a strong interest in protecting a minor from activities having potentially harmful consequences.

341/ The Court noted that "two claimed liberties are at stake", one being the parental right "to bring up the child in the way he [sic] should go....The other freedom is the child's, to observe [the tenets and practices of her faith by preaching the gospel and distributing religious literature]." 321 U.S. at 164. Referring to the fact that appellant's claim was based specifically on freedom of religion as opposed to freedom of expression, the Court observed that "it may be doubted" that the former occupied any higher place than the latter. In regard to the "great liberties insured by the First Article....", the Court stated, "All have preferred position in our basic scheme." Id. (Emphasis added).

In Ginsberg v. New York, 390 U.S. 629 (1968), the Supreme Court reaffirmed this proposition, upholding the State's right to deprive minors of access to sexually explicit materials -- a First Amendment right fully protected as to adults. The Court in Ginsberg upheld the conviction of a luncheonette proprietor who sold two "girlie" magazines to a sixteen-year-old boy, in violation of a New York obscenity statute. That statute prohibited the sale to minors under 17 years of age of material defined to be obscene on the basis of its appeal to them, whether or not it would be obscene as to adults. The Supreme Court in Ginsberg upheld the legislature's power to employ variable concepts of obscenity and to restrict the distribution to minors of otherwise protected speech. With obvious approval, the Court quoted as follows from a New York Court of Appeals opinion which had addressed the same issue:

> "Material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined..." 342/ (Emphasis added).

342/ 390 U.S. at 636, citing Bookcase, Inc. v. Broderick, 18 N.Y.2d 71, 75, 218 N.E.2d 668, 671 (1966).

The clear thrust of the Ginsberg decision, therefore, is that whatever the quantum of First Amendment protection afforded to the speech in question, when that speech is directed to a child audience, the protection afforded may be lawfully diminished or even eliminated if such limitation is justified by valid state interests. Citing Prince, the Supreme Court in Ginsberg identified two state interests that supported the New York statutory restriction in question:

> "First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society....The legislature could properly conclude that parents and others, teachers for example, who have...[the] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." 343/ 390 U.S. at 639.
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> "[Second, the] State also has an independent interest in the well-being of its youth." 344/ Id. at 640.

343/ This interest is also present in the proceeding at hand. Parents and teachers amongst the Petitioners and supporting groups and individuals have asserted that because of the cumulative impact and persuasiveness of televised advertising for sugared food products, their nutritional educational efforts, and teachings of caution and restraint, go largely unheeded by their children and/or pupils. See Section III-B (2)(c) supra.

344/ The Commission has its own statutory mandate to protect television viewers, and especially vulnerable audiences like children, from unfair or deceptive advertising in or affecting commerce. This interest may be analogized to the second state interest recognized and upheld in Ginsberg.

Having thus cited two substantial interests (i.e., that of parents and teachers as well as the State) in protecting children's welfare and "safeguard[ing them] from abuses", 345/ the Court was left to consider one remaining question: whether it was reasonable for the New York legislature to find that exposure to the sex materials proscribed by the statute was "harmful to minors". The Court observed that "the growing consensus of commentators is that 'while...a causal link has not been demonstrated [between exposure to sex materials and an impairment of the ethical and moral development of youth], ...a causal link has not been disproved either.'" 346/ The Court concluded that "We therefore cannot say that...[the statute] has no rational relation to the objective of safeguarding minors from harm." 347/

The principle upheld in Ginsberg -- i.e., that the State may lawfully restrict the dissemination of obscene or otherwise objectionable materials to minors based on their lack of "that full capacity for individual choice which is the presupposition of First Amendment guarantees" 348/ --has been

345/ 390 U.S. at 640.

346/ Id. at 642.

347/ Id. at 643.

348/ Id. at 649-650.

recently reaffirmed by the Supreme Court in Erznoznik v. City of Jacksonville, 422 U.S. 205, 214 n. 11 (1974). Indeed, the Court in Erznoznik expressly noted that "[t]he First Amendment rights of minors are not 'co-extensive with those of adults.'" Id. (emphasis added) (citing Tinker v. Des Moines School Dist., 393 U.S. 503, 515 (1969) (Stewart, J., concurring)). The Court suggested, moreover, that significant constitutional distinctions can be made based on the age of the minor:

> "In assessing whether a minor has the requisite capacity for individual choice the age of the minor is a significant factor. See Rowan v. Post Office Dept., 397 U.S. at 741 (Brennan, J., concurring)." 349/

Clearly, then, the First Amendment would not preclude Commission regulation which provides for differential treatment of pre-school and early school-aged children vis-a-vis older

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349/ Erznoznik v. City of Jacksonville, 422 U.S. 205, 214 n. 11 (1974). The Court of Appeals for the District of Columbia Circuit has also noted the importance of the minor's age: "Need a nineteen year old and a seven year old be protected from the same...language?" Pacifica Foundation v. FCC, 556 F.2d 9, 17 (D.C. Cir. 1977), cert. granted, 46 U.S.L.W. 3436 (U.S. Jan. 10, 1978) (No. 77-528).

child viewers 350/ in terms of their access to television advertising.

That obscene materials or materials otherwise deemed harmful to minors may be lawfully restricted from children is a principle which has been consistently upheld by the Supreme Court. In Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57 (1973), the Court observed that it had "...often pointedly recognized the high importance of the state interest in regulating the exposure of obscene materials to juveniles and unconsenting adults." In Miller v. California, the Court noted that "the States have a legitimate interest in prohibiting dissemination...of obscene material when the mode of dissemination carries with it a significant danger of...exposure to juveniles." 413 U.S. 15, 18-19 (1973). In Interstate Circuit v. City of Dallas, 390 U.S. 676 (1968), the Court indicated that "...[b]ecause of its strong and

350/ A recent case which considered First Amendment requirements in regard to high school-aged child speakers and listeners is Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977). In that case, the court upheld the authority of school officials to prohibit the distribution of a sex questionnaire to students in the ninth through twelfth grades based on evidence which gave authorities reason to believe that harmful psychological consequences could result. The court opinion referred to the rights of listeners (vis-a-vis speakers) "to be protected against the importunities of those who seek answers to questions." Id. at 520, n. 9. The instant rulemaking proposals concern the right of young child viewer/listeners to be protected from advertising which seeks to stimulate harmful responses by them - i.e., that they demand and consume highly sugared foods.

abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults." Id. at 690. And in Jacobellis v. Ohio, the Court "recognize[d] the legitimate and indeed exigent interest...in preventing the dissemination of material deemed harmful to children." 378 U.S. 184, 195 (1964).

A consideration of the reasons for curtailing the dissemination of obscenity to children yields several parallels to sugared food advertising. If children are considered particularly susceptible to the effects of sexual materials because of their intellectual and emotional immaturity, then it follows that they would be comparably susceptible to highly sophisticated television advertisements expressly designed to induce their acceptance of certain commercial ideas. State curtailment of both types of speech is predicated upon preventing

a harmful impact 351/ upon children's attitudes and behavior. Governmental restrictions on the dissemination of both obscenity and advertising to children also support the right of parents to deal as they see fit with their offspring's morals, and nutritional views and habits, respectively. Finally, the state's interest in protecting children from speech which can manipulate or exploit them emotionally outweighs the limited interest that children may have in obtaining access to both forms of expression -- either erotic materials or highly sophisticated and persuasive advertising which is appropriate for adult audiences.

351/ See the discussion by Emerson of the reasons behind societal restrictions on the dissemination of erotic materials to children:

> "Generally speaking, ...the effects of erotic material on the recipient are presently unknown. But the available evidence does seem to establish that exposure to such material is for some persons an intense emotional experience....
>
> [Upon] appraisal of the...various social interests that obscenity laws are thought to foster....the issues resolve into the protection of society against (1) immediate harmful actions resulting from exposure to erotic materials; (2) longer-range, more remote, harmful actions;... (3) internal reactions of the individual, not necessarily reflected in overt action.... [and] (4) the possible harmful results, of any of the types mentioned, from the exposure of children to erotic materials." The System of Freedom of Expression, at 496-497.

If anything, the data on the harms resulting from children's exposure to sophisticated televised advertising, particularly for heavily sugared products, is more concrete than that resulting from youthful exposure to sexual materials. See Section III supra.

b. Age-Based Limitations on Otherwise Protected Rights Have Been Widely Upheld

Just as the courts have recognized that otherwise-protected speech rights may be curtailed when children are the audience, so legislatures and courts have also recognized that other rights of major import may be curtailed as to children in order to further legitimate state interests. Perhaps the most dramatic demonstration of the link between age and the enjoyment of basic rights is to be found in the very fabric of the Constitution itself.

(i) The right to seek and hold public office is a constitutionally protected right. Turner v. Fouche, 396 U.S. 346, 362-363 (1970); Stapleton v. Clerk for City of Inkster, 311 F. Supp. 1187, 1190 (E.D. Mich. 1970). Yet the Constitution itself "abridges" that right unless the office-seeker has reached a certain age. Membership in the U.S. House of Representatives and the Senate is limited on the basis of age, and age is specifically listed as a qualification for the Presidency. U.S. Const. art. I, §§ 2, 3; art. II, § 1. Presumably, the framers of the Constitution recognized that a certain level of maturity and ability to deal with problems and situations usually comes with chronological age, and accordingly set these limitations.

(ii) The right to vote is fundamental because it is "preservative of other basic civil and political rights...." Reynolds v. Sims, 377 U.S. 533, 562 (1964). Yet even the liberalizing Twenty-Sixth Amendment extended the right of suffrage only to those eighteen years of age and older. This and prior age limitations on voting rights have generally been based upon the conclusion that citizens under eighteen lack the capacity to make intelligent and responsible use of the franchise. Oregon v. Mitchell, 400 U.S. 112, 142, 240-242 (1970)(opinions of Justice Douglas, and Justices Brennan, White and Marshall, respectively).

(iii) The right to marry has been called one of the "basic civil rights of man... fundamental to the very existence and survival of the race." Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). Yet the minor's right to marry has been curtailed in most states. Maynard v. Hill, 125 U.S. 190, 205 (1888); Sweigart v. State, 213 Ind. 157, 12 N.E.2d 134, 138 (1938)("There can be no doubt that the Legislature may prescribe who may marry, [and] the age at which they may marry...."). Earlier this year Justice Powell, concurring in Carey v. Population Services, International, 431 U.S. 678, 706 (1977) endorsed such restrictions noting that the statutory

> "...provisions highlight the State's concern that its juvenile citizens generally lack the maturity and understanding necessary to make decisions concerning marriage and sexual relations."

(iv) "The right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure." Truax v. Raich, 239 U.S. 33, 41 (1915)(emphasis added). Yet long-standing federal and state laws have restricted or prohibited the employment of children in certain occupations or establishments. 352/

(v) The right to travel, the "right of persons to move freely from State to State occupies a...protected position in our constitutional system." Edwards v. California, 314 U.S. 160, 177 (1941) (concurring opinion of Mr. Justice Douglas); Twining v. New Jersey, 211 U.S. 78, 97 (1908); Crandall v. Nevada, 6 Wall. 35, 47 (1867) (an implied right "guaranteed" by the Constitution). Yet the issuance of a driver's license, one important means of travel both within a state and between states, is generally restricted by state law to persons who

352/ The Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 et seq. (1970), prohibits the shipment or delivery for shipment in commerce of goods produced in an establishment in which "oppressive child labor" has been employed. 29 U.S.C. § 212. Cases upholding and applying state child labor laws are numerous. See, e.g., Whitney-Fidalgo Seafoods, Inc. v. Beukers, 554 P.2d 250, 253 (Alaska 1976) ("child labor laws...are premised in part on the notion that a child is not competent to assess the risks of personal injury and exploitation attendant in the performance of hazardous activities"); Gabin v. Skyline Cabana Club, 54 N.J. 550, 258 A.2d 6 (1969) (broad policy behind the child labor law -- to prevent the economic exploitation of minors and also to protect children -- held to apply even where child was injured while engaged in non-commercial activity, i.e., engaged in an activity to benefit a charity); see also Prince v. Massachusetts, 321 U.S. 158, 167-170 (1944); Chesapeake & Ohio Ry. Co. v. Stapleton, 279 U.S. 587, 593 (1929).

have attained a specified age. 7 Am.Jur.2d, Automobiles and Highway Traffic, § 107; 60 C.J.S., Motor Vehicles, § 146. Such age limitations have been upheld as justified by reason of having "some fair relationship in dividing the mature individuals from the immature individuals." People v. Joy, 271 N.Y.S.2d 15, 19 (1966).

(vi) Similarly, "the right of private contract is no small part of the liberty of the citizen." Baltimore & Ohio Southwestern Ry. Co. v. Voight, 176 U.S. 498, 505 (1899) (Emphasis added). Indeed, it has been held that "[t]he privilege of contracting is both a liberty and a property right... [said] right to contract [being] recognized as within the protection of the Fifth and Fourteenth Amendments." Morris v. Holshouser, 220 N.C. 293, 17 S.E.2d 115, 117 (1941) (citations omitted). Yet it has been recognized in most jurisdictions that subject to some qualifications, an infant cannot bind himself absolutely by a contract. 43 C.J.S., Infants, § 71; 42 Am.Jur.2d, Infants, § 58. The prevailing rule of law is that an infant's contracts or conveyances are voidable at his option -- a right conferred upon the infant for his/her protection against his/her own improvidence and the designs of others. Hurwitz v. Barr, 193 A.2d 360 (D.C. App. 1963); Burnand v. Irigoyen, 30 Cal.2d 861, 186 P.2d 417, 420

(1947) ("One deals with infants at his peril"); O'Leary's Estate, 352 Pa. 254, 42 A.2d 624 (1945).

As the foregoing examples indicate, the extensive power of the State to protect its children by means involving some curtailment of their rights and freedoms has been widely recognized and applied. Recently, in Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 102 (1976), Mr. Justice Stevens (concurring in part and dissenting in part) summarized this power as follows:

> "The State's interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent. Indeed such consent is essential even when the young woman is pregnant. The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible." (Emphasis added).

In sum, if protective governmental action may lawfully abridge children's exercise of basic rights of constitutional import, so too may government limit children's access to highly sophisticated and persuasive television advertising which they cannot comprehend or evaluate. The commercial speech cases discussed in the following subsections are entirely consistent with this position because the thrust of those cases is that mature adults need access to commercial

information in order to make rational, intelligent, and informed economic decisions.

2. Recent Commercial Speech Cases were Designed to Protect the Information Rights of Adults, not Immature Child Audiences

a. Commercial Speech Now Enjoys Some First Amendment Protection

Traditionally, "purely commercial advertising" was considered to be a category of expression outside the scope of First Amendment protection. 353/ In 1976, however, in the landmark case of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (hereinafter referred to as "Virginia Pharmacy"), the Supreme Court held that commercial speech does not lack all First Amendment protection, 354/ and that a State may not "completely suppress" advertising about a lawful activity. 425 U.S. at 773.

353/ Valentine v. Chrestensen, 316 U.S. 52, 54 (1942); Schneider v. State, 308 U.S. 147 (1938).

354/ 425 U.S. at 762. Some cases subsequent to Valentine v. Chrestensen, presaged an end to the traditional dichotomy between unprotected commercial speech and protected political speech. See, e.g., New York Times v. Sullivan, 376 U.S. 254 (1964), wherein a newspaper ad having the purpose of raising funds for civil rights workers was held to be protected by the First Amendment as a political statement despite its commercial setting; and Bigelow v. Virginia, 421 U.S. 809 (1975), wherein an advertisement for a New York abortion referral service published in a Virginia newspaper was held entitled to First Amendment protection since even though it sought customers for a commercial service, "[i]t contained factual material of clear 'public interest.'" 421 U.S. at 882.

In its opinion in Virginia Pharmacy, the Court described the role of advertising in a free enterprise economy as follows:

> "Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable." 425 U.S. at 765. (Emphasis added).
>
> "[P]eople will perceive their own best interests if only they are well enough informed, and...the best means to that end is to open the channels of communication rather than to close them." Id. at 770. (Emphasis added).

In holding that commercial speech is not wholly outside the protection of the First Amendment, and thus not "subject to complete suppression by the State," 355/ the Court in Virginia Pharmacy took pains to stress that there are differences between commercial speech and non-commercial speech. 356/ The Court observed that these differences warrant "different degree[s] of protection" 357/ as between the two types, and that "some forms of commercial speech regulation are surely permissible." 425 U.S. at 770.

355/ 425 U.S. at 771, n. 24 (emphasis added).

356/ The Court in Virginia Pharmacy pinpointed two specific differences between commercial speech and other forms of expression; viz., "the greater objectivity and hardiness of commercial speech" when compared to other kinds of speech. Id.

357/ Id.

To date, the Supreme Court has cited and followed the principles laid down in Virginia Pharmacy in three other major commercial speech cases. See Linmark Associates, Inc. v. Township of Willingboro; 358/ Carey v. Population Services International; 359/ and Bates v. State Bar of Arizona. 360/

358/ 431 U.S. 85 (1977). In Linmark, the Supreme Court considered the constitutionality of a town ordinance which prohibited the posting of real estate "For Sale" and "Sold" signs for the admittedly beneficial purpose of maintaining a racially integrated community by stemming the flight of white homeowners. Citing Virginia Pharmacy, the Court in Linmark found the ordinance unconstitutional, holding that the First Amendment prohibited the township from restricting the free flow of this truthful commercial information.

359/ 431 U.S. 678 (1977). In Carey, the Supreme Court held unconstitutional a New York statute which prohibited the distribution of contraceptives to anyone under the age of 16, prohibited distribution to anyone over 16 by anyone other than a licensed pharmacist, and completely banned the advertising and display of contraceptives.

360/ 45 U.S.L.W. 4895 (U.S. June 27, 1977). In Bates, the Court invalidated as violative of the First Amendment an Arizona State Supreme Court disciplinary rule which prohibited attorneys from advertising in newspapers or other media.

b. The Premises Underlying the Recent Commercial Speech Cases are Inapplicable to Immature Child Audiences

Consideration of the factors involved 361/ in the Virginia Pharmacy line of cases indicates that the Commission's current inquiry into televised sugared food advertising directed to young children is in no way precluded by those decisions. Indeed, the rationale underlying the recent commercial speech cases is entirely consistent with the proposition articulated by Mr. Justice Stewart in Ginsberg v. New York, that "[w]hen expression occurs in a setting where the [full] capacity... [for individual] choice is absent, government regulation of that expression may co-exist with and even implement First Amendment guarantees." 390 U.S. at 649. (Emphasis added).

Among the significant premises underlying the Supreme Court's decisions in the commercial speech cases are the following: that commercial speech warrants some degree of First Amendment protection because it serves individual and

361/ Among the factors which significantly distinguish the commercial speech cases from the current inquiry are the following elements (which will be discussed individually at different points throughout this First Amendment section of the Report): the character and capabilities of the audience to whom the advertising would be addressed; the information needs of the consumer and the alternative channels for obtaining the information; the "total suppression" factor present in the commercial speech cases; and the media through which the advertising was sought to be disseminated in those cases.

societal interests in assuring informed and reliable decision-making; 362/ that under our system of government, it is preferable for citizens rather than government to make commercial no less than political choices (i.e., that the allocation of societal resources is best made through numerous private economic decisions); that commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in our free enterprise system; 363/ that most importantly, adults are presumed to possess maturity, judgment, rationality, evaluative capacity, and "that full capacity for individual choice which is the presupposition of First Amendment guarantees"; 364/ and that a potent alternative to the 'highly paternalistic' approach of protecting the state's citizens by keeping them in total ignorance of product information is "to assume that this information is not in itself harmful, that people will perceive their own best interests

362/ 425 U.S. at 761-765. In his concurring opinion in Virginia Pharmacy, Mr. Justice Stewart stated that "...the one facet of commercial price and product advertising that warrants First Amendment protection...[is] its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking." Id. at 781.

363/ Bates v. State Bar of Arizona, 45 U.S.L.W. at 4899.

364/ Ginsberg v. New York, 390 U.S. at 649-650. (Emphasis added).

if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." 425 U.S. at 770.

Consideration of these premises indicates their inapplicability to an audience of children, especially young children. Current evidence indicates, and legal precedents presume, that young children in particular are extremely impressionable, and lack the perceptual ability, experience, maturity of judgment, evaluative capacity, and rational decisionmaking processes that are ordinarily presumed as to adults. Unlike the presumption applicable to adults, it is unreasonable to assume that very young children are able rationally to understand and evaluate conflicting or potentially harmful commercial messages, or that when exposed to a free flow of competing ideas and product choices they will ultimately make "informed and reliable decisions", and perceive their own best interests.

Accordingly, because the premises underlying the commercial speech cases are not applicable to a young and highly immature child audience, they do not restrain the proposed Commission actions involved here.

c. The Rationale Underlying the Recent Commercial Speech Cases was to Protect the Interests of the Audience and Facilitate Informed and Reliable Decisionmaking, and Not to Establish or Vindicate any "Right to Speak" on the Part of the Advertiser

Although some may argue that Virginia Pharmacy and its progeny vindicated a "right to speak" on the part of an advertiser, careful analysis of those cases does not support such

an argument. Any such right established or vindicated is merely incidental to the primary rationale underlying those decisions: i.e., protection of a mature audience's right to receive important commercial information.

There are two places in the Virginia Pharmacy opinion where the Court made mention of the speaker's right to speak. The first instance appears at pages 756-757 of the opinion, 365/ where in citing several "decided cases", the Supreme Court referenced pages in earlier opinions which dealt specifically with a First Amendment right to receive information, ideas, publications and communications. The second instance appears

365/ The pertinent language at pp. 756-757 of Virginia Pharmacy reads as follows (emphasis added):

> "The question...arises whether, even assuming that First Amendment protection attaches to the flow of drug price information, it is a protection enjoyed by the...recipients of the information, and not solely, if at all, by the advertisers themselves who seek to disseminate that information.
>
> Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases...." (citing Lamont v. Postmaster General, 381 U.S. 301 (1965), Kleindienst v. Mandel, 408 U.S. 753, 762-763 (1972), and Procunier v. Martinez, 416 U.S. 396, 408-409 (1974)).

at page 762 of the opinion, 366/ where the Court refers to labor relations cases. Examination of those specific cases and pages referenced reveals that each concerned speech, discussion, or other forms of self-expression (e.g., peaceful picketing) that had implications as much social and political as economic.

The Court's refefences in Virginia Pharmacy to a right of the speaker to speak in an economic setting do not detract from the position advanced here. The Court did not at all refer specifically to the effect on Virginia pharmacists of the state's denial to them of a right to advertise. 367/ The Court's emphasis throughout was on the individual and societal

366/ The pertinent language on p. 762 of the opinion reads as follows:

> "Focusing first on the individual parties to the transaction that is proposed in the commercial advertisement, we may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him for protection under the First Amendment. The interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome. See, e.g., NLRB v. Gissell Packing Co., 395 U.S. 575, 617-618 (1969); NLRB v. Virginia Electric & Power Co., 314 U.S. 469, 477 (1941); AFL v. Swing, 312 U.S. 321, 325-326 (1941); Thornhill v. Alabama, 310 U.S. at 102."

367/ It is noteworthy that the pharmacists were not even plaintiffs in the case. The plaintiffs, an individual Virginia resident and two non-profit organizations, based their claim for relief on the assertion that "...the First Amendment entitles the user of prescription drugs to receive information...concerning the prices of such drugs." 425 U.S. at 754. (Emphasis added).

interest in receiving 368/ the factual information which was being totally suppressed by the state-imposed ban on prescription drug advertising.

Moreover, even if one were to acknowledge some right in the advertiser "to speak", it does not necessarily follow that he can "speak" to any audience of his choosing. Ginsberg, supra, clearly established the principle that even where a speaker has a contitutional right to disseminate certain speech to adults, that speaker may have no constitutional right to disseminate the identical speech to minors. Where

368/ Support for the proposition that the primary right being vindicated in Virginia Pharmacy and its progeny is the right of the public to receive important commercial information, may also be found in Bates v. State Bar of Arizona. In that case, the Supreme Court referred as follows to the opinion which had been rendered below by the Supreme Court of Arizona:

> "Of particular interest here is the opinion of Mr. Justice Holohan in dissent. In his view, the case should have been framed in terms of 'the right of the public as consumers and citizens to know about the activities of the legal profession'....Observed in this light, he felt that the rule performed a substantial disservice to the public.... [by preventing] 'access to such information'...." 45 U.S.L.W. at 4897 (citing Matter of Bates, 555 P. 2d 640, 648-649 (1976)).

This quotation underscores the primary focus of the U.S. Supreme Court in Bates.

"informed and reliable decisionmaking" 369/ would not be furthered by dissemination of the advertising in question, the rationale underlying the recent commercial speech cases would not preclude Commission restraints on an advertiser's right to address an immature and highly impressionable audience via the most persuasive communications medium known to man.

d. The Role of Advertising in Contributing to the Intelligent and Efficient Allocation of Societal Resources Is not Furthered by Advertising Directed to Immature Child Audiences

In the course of its opinion in Virginia Pharmacy, the Supreme Court indicated that one category of commercial speech clearly subject to governmental regulation is advertising which is "false, ...deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem." 425 U.S. at 771. Subsequently, in Bates v. State Bar of Arizona, the Supreme Court expressly noted:

369/ Virginia Pharmacy, 425 U.S. at 761-765; Bates v. State Bar of Arizona, 45 U.S.L.W. at 4899.

> "The determination whether an advertisement is misleading requires consideration of the legal 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.

To the extent that the the televised advertising of sugared foods to children is deceptive or misleading, Commission regulation or proscription of such advertising is clearly supportable. 370/

370/ To the extent that the record developed in response to the subject petitions establishes the "unfairness" of televised advertising of sugared foods to children, Commission regulation of such advertising is equally supportable. That an advertisement may or may not be defined as "unfair," depending upon the nature of the message, the medium of communication and the maturity of the audience, may be analogized to the variable obscenity standard upheld in Ginsberg v. New York, supra. There, the Court held that the State could constitutionally "adjust... the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interest...' of minors." 390 U.S. at 638.

Deceptive and misleading advertising is prohibited under Section 5 of the FTC Act 371/ (and was expressly exempted from First Amendment protection in Virginia Pharmacy) because it contributes to misallocation of goods and services and thereby diminishes the efficiency of the marketplace. Televised advertising of sugared foods to children is vulnerable to the same charge. It does not advance the beneficial flow of commercial information (and therefore does not serve the goals sought to be furthered by extension of First Amendment protection to commercial speech).

The basic role of advertising in a free enterprise system is to contribute to the efficiency of the marketplace by providing "accurate and reliable information relevant to public and private decisionmaking." 372/ Advertising which functions properly presumes economic rationality on the part

371/ 15 U.S.C. § 45 (1970).

372/ Virginia Pharmacy, 425 U.S. at 781 (Stewart, J., concurring opinion).

of consumers. 373/ When advertising is directed to audiences having an inherent deficiency in evaluative capacity, such advertising encourages misallocation of resources and resulting diminished market efficiency. Given the FTC's expertise in market behavior (both consumers' and competitors'), advertising narrowly defined to be deceptive or unfair when aimed at young children, and which leads to disutility or net social loss, is not the kind of commercial speech intended to enjoy First Amendment protection under the Virginia Pharmacy rationale.

3. The "Special Problems of the Electronic Broadcast Media" Emphasize the Need for Protection of Children in Regard to Advertising Disseminated Via This Mode of Communication

373/ Among the assumptions underlying the function of advertising in a predominantly free enterprise economy are the following: that a consumer will know his own needs, that he will know what he can afford, that he will seek out the advantages and disadvantages of different products and services, and will have the maturity to make intelligent choices. As described above, current evidence indicates that young children lack the maturity and evaluative capacity necessary to make these decisions and choices. Accordingly, advertising directed to them may encumber the rational allocation of societal resources.

Although the Supreme Court was careful to distinguish the "special problems" of the electronic broadcast media in each of its recent commercial speech cases, the Court has not to date identified or described those "special problems." Presumably, they include the unprecedented power of broadcast communication, the fact that children are often present in the audience, and the fact that broadcast advertising via the electronic media to particularly vulnerable child viewers presents "captive audience" issues.

a. Among the "Special Problems" of the Electronic Broadcast Media are its Unprecedented Power as a Mode of Communication and the Fact That Child Viewers are in the Audience at Most Times

Although Virginia Pharmacy, Linmark, Carey and Bates did not involve advertising disseminated via the electronic broadcast media, each of them expressly recognized the special status of the electronic broadcast media. 374/ Virginia Pharmacy, Linmark, and Bates also expressly referenced

374/ Virginia Pharmacy, 425 U.S. at 773; Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. at 94; Carey v. Population Services International, 431 U.S. at 712 n. 6 (Powell, concurring); and Bates v. State Bar of Arizona, 45 U.S.L.W. at 4904.

Capital Broadcasting Co. v. Mitchell, which upheld a sweeping prohibition against broadcast cigarette advertising. 375/

In Linmark, for example, the Court struck down a town ordinance which prohibited the posting of real estate "For Sale" and "Sold" signs. In doing so, the Court observed:

> "Nor has...[the town] acted to restrict a mode of communication that...reaches a group the township has a right to protect." Id. at 94 (emphasis added), citing Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 585-586.

375/ 333 F. Supp. 582 (D.D.C. 1971), aff'd sub nom. Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972). Capital Broadcasting involved a challenge by broadcasters to the constitutionality of the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §§ 1331 et seq., which prohibited the advertising of cigarettes on any electronic communication media subject to the jurisdiction of the Federal Communications Commission. In Capital Broadcasting, the District Court upheld the statute, holding that the unique characteristics of electronic communication make it especially subject to regulation in the public interest. 333 F. Supp. at 584. The court held, moreover, that there exists a rational basis for imposing a ban on cigarette advertising on broadcast facilities while allowing such advertisements in print. Id. at 585. The court in Capital did not specifically address the issue of the First Amendment rights of advertisers or of those to whom the ads were directed.

The portion of Capital Broadcasting cited by the Linmark Court discussed the effect on children, particularly pre-school and early elementary school age children, of radio and television cigarette advertising, and the ability of Congress to take this effect into account in prohibiting such advertising while allowing advertising to continue in other media. Thus, Capital Broadcasting concluded:

> "Substantial evidence showed that the most persuasive advertising was being conducted on radio and television, and that these broadcasts were particularly effective in reaching a very large audience of young people. Thus, Congress knew of the close relationship between cigarette commercials broadcast on the electronic media and their potential influence on young people, and was no doubt aware that the younger the individual, the greater the reliance on the broadcast message rather than the written word. A pre-school or early elementary school age child can hear and understand a radio commercial, while at the same time be substantially unaffected by an advertisement printed in a newspaper, magazine or appearing on a billboard." 333 F. Supp. at 585-586.

Finding that there existed a rational basis for the Congressional ban on cigarette advertising on the broadcast media while allowing such advertisements to continue in the print media, Capital Broadcasting upheld the validity of

the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §§ 1331 et seq. 376/

The implication that can be fairly drawn from the Linmark language coupled with the reference to Capital Broadcasting is that the nature of the medium employed, the age of the audience, and the subject of the advertising message are all significant factors in assessing the extent of permissible commercial speech regulation.

b. The State Interest in Curtailing Speech is Enhanced When the Advertising is Directed to a "Captive Audience"

Among the factors the State may weigh in the decision to regulate commercial speech is whether that speech is

376/ The dissent in Capital Broadcasting (per J. Skelly Wright) was premised on the view that cigarette advertising implicitly states a position on a matter of public controversy. For that reason, the dissent argued that ventilation of this issue on the electronic media by both cigarette advertising and anti-smoking messages was required by the First Amendment and was further the best means of carrying out the beneficial purposes of the latter. The dissent stated:

> "At the very core of the First Amendment is the notion that people are capable of making up their own minds about what is good for them....I think that when people are given both sides of the cigarette controversy, they will make the correct decision." 333 F. Supp. at 593-594.

As indicated above, these premises are questionable as to young children.

directed to a "captive audience" -- particularly when the advertiser employs sophisticated techniques to reach the child captive auditor.

The earliest judicial expression of concern for the child as a captive auditor is found in Packer Corp. v. Utah, 285 U.S. 105 (1932), where the Supreme Court upheld a state law banning the billboard advertisement of cigarettes. The Court noted:

> "Advertisements of this sort are constantly before the eyes of observers...without the exercise of choice or volition on their part.... The young people as well as adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce." 285 U.S. at 110.

The captive audience concerns expressed in Packer have particular relevance here. In upholding the constitutionality of a State restriction on commercial speech, the Court evidenced a concern over sophisticated advertising techniques designed and used to sell potentially harmful products to children -- the very concerns that are currently posed by the advertisement of heavily-sugared products on television.

The Supreme Court has in recent years reaffirmed its position that the State has an interest in limiting private speech directed to a captive audience. In Lehman v. Shaker Heights, 418 U.S. 298 (1974), the Court sustained a city-

imposed prohibition on the dissemination of political advertisements in the city-operated transit system. Finding that the riders on the transit system were a "captive audience," the Court concluded that there is a "reasonable legislative objective" in restricting advertising "in order to minimize... the risk of imposing upon a captive audience." 418 U.S. at 304.

The concurring opinion of Mr. Justice Douglas in Lehman, supra, noted that the State interest in regulating the captive forum stems from the fact that the "audience [is] incapable of declining to receive [the message]." 418 U.S. at 307. Certainly this interest must then apply with particular force to television advertisements directed to young children. Such children cannot resist the impact of commercial messages; oftentimes, they are even unaware that the televised commercial constitutes an attempt at persuasion. 377/

The Supreme Court has also recently held that one permissible consideration in an administrative agency's decision to restrict speech on television is the captive nature of the television audience. In Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94

377/ See Section III-B(1).

(1973), the Court upheld the discretion of the Federal Communications Commission to permit licensee restrictions on access to paid political announcements on television. The Court noted that in its consideration of the need for such restrictions,

> "[t]he Commission is also entitled to take into account the reality that in a very real sense listeners and viewers constitute a 'captive audience.'" 412 U.S. at 127. (Emphasis added).

In its current consideration of the need for regulation of advertisements directed to children, the Commission may consider that children are captives of the television medium. It is notworthy that in Columbia Broadcasting System, supra, the Supreme Court assumed that even adult viewers of television were members of a captive audience. The Court remarked that:

> "The 'captive' nature of the broadcast audience was recognized as early as 1924, when Commerce Secretary Hoover remarked...that 'the radio listener does not have the same option that the reader of publications has -- to ignore advertising in which he is not interested -- and he may resent its invasion of his set.'" (citation omitted) 412 U.S. at 127-128.

The Columbia Court further quoted with approval the opinion of Judge Bazelon in Banzhaf v. Federal Communications Commission, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969), which also recognized that all habitual users of television are captives of the medium:

> "Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are 'in the air.' In the age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinary habitual television user can avoid these commercials only by frequently leaving the room, changing the channel, or doing some other affirmative act. It is difficult to calculate the subliminal impact of the persuasive propaganda, which may be heard even if not listened to...." 405 F.2d at 1100-1101. (Emphasis added).

The foregoing cases demonstrate that the state interest in regulating messages directed to a captive audience is not limited to those contexts where there is actual physical captivity. Rather, the State interest extends as well to those contexts where there is psychological captivity or social compulsion to expose oneself to the forum where the message is being disseminated. Certainly in many instances the child may be viewed as a psychological captive of the television medium. 378/

378/ At least one commentator has so concluded. See, Comment, The FCC as Fairy Godmother: Improving Children's Television, 21 U.C.L.A. L. Rev. 1290, 1320 n. 150 (1974). Another expert on children's television has observed that television places on children the peer group pressure either to watch television, or feel left out:

> "If you can't talk about the new programs or the new stars, you simply aren't up to date with your peer group; thus television [for children] has a direct social utility."

W. Schramm, J. Lyle & E. Parker, Television in the Lives of Our Children 59 (1961).

Indeed, the State interest in regulating speech is undoubtedly stronger in the case of psychological captivity because the physical captive may simply tune the message out. In contrast, psychological captives, like children watching television, 379/ demonstrate heightened attention to the message and hence are more susceptible to effective inculcation of the advertiser's message. As Professor Charles Black has observed:

> "[the advertisers] have marshalled every resource of societal pressure, technology, and applied psychology to the precise end of making the withdrawal of attention as difficult as possible...." 380/

Where, as discussed in the next subsection, the effectiveness and cumulative impact of the advertisers' messages

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379/ In his concurring opinion in Ginsberg v. New York, Mr. Justice Stewart observed that "...[a] State may permissibly determine that, at least in some precisely delineated areas, a child -- like someone in a captive audience -- is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." 390 U.S. at 649-650. In the matter at hand, since the audience is both a child audience and a captive audience, it is doubly deserving of the Commission's regard and protection!

380/ Black, He Cannot Choose But Hear: The Plight of the Captive Auditor, 53 Colum. L. Rev. 960, 969 (1953).

seriously encumber the paramount parental interest in the child-rearing process, the case for governmental regulation is strengthened.

4. The State Has a Legitimate Interest in Curtailing Speech that Interferes with the Paramount Parental Interest in the Child-Rearing Process

The Supreme Court has recognized a state interest in curtailing speech that interferes with parents' ability to raise their children as they see fit. In Ginsberg v. New York, the Court sustained a state restriction on the dissemination of sexually-explicit materials to minors, noting that such dissemination interfered with the primary parental responsibility to control the sexual upbringing of the child. The Court held that:

> "[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' [citing Prince v. Massachusetts, 321 U.S. at 166]. The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the

> support of laws designed to aid discharge of that responsibility....Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing... [sex-related material] for their children." 381/ 390 U.S. at 639. (Emphasis added).

Although Mr. Justice Fortas dissented in Ginsberg, he nevertheless agreed with the proposition that parental authority in child-rearing is of paramount importance. Indeed he stressed "our traditions and...our conception of family responsibility" and expressly recognized a state interest in protecting parents and children from outside interference:

> "The State's police power may, within very broad limits, protect...parents and their children from public aggression of panderers and pushers [of vulgar literature]. This is defensible on the theory that they cannot protect themselves from such assaults." 382/

381/ This last sentence indicates recognition by the Court that a parent's decision to provide such material to his or her child could properly supersede a state's finding that exposure to such material is harmful to minors.

382/ 390 U.S. at 674. The Fortas dissent was premised on the arguments that the Court had an obligation to conduct its own inquiry into whether the material was obscene, and that the defendant, Ginsberg, had not sought out the minor who made the purchase. Referring to Ginsberg as a "passive luncheonette operator," Fortas argued that "Bookselling should not be a hazardous profession." Id. at 674-675.

It can hardly be argued that food advertisers are "passive". On the contrary, their vigorous efforts to "push" their products to child viewers have prompted the petitions presently being considered.

In Ginsberg, the majority opinion upheld the statute in question based upon its similar observation that the parent cannot always be present to counter adverse outside influences:

> "While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided...justif[ies] reasonable regulation of the sale of material to them." 390 U.S. at 640 (quoting People v. Kahan, 15 N.Y.2d 311, 312, 206 N.E.2d 333, 334 (1965) (Emphasis added).

More recently, in Wisconsin v. Yoder, the Supreme Court again emphasized the fundamental interest and primary role of parents in the education and nurture of their children (in Yoder, children of high school age were involved):

> "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." 406 U.S. 205, 233 (1972).

It is beyond dispute that parents, along with teachers, have the "primary responsibility" for controlling the dietary habits of children. Indeed, the fostering of sound nutritional habits in the child is basic to the "care and nurture

of the child." 383/ Yet as detailed in earlier sections of this Report, there is increasing evidence that through continuous and massive food advertising directed to children, the advertising industry has successfully engineered itself into a position where it commands substantial power over the eating habits of young children. 384/ Parents and teachers have asserted that the cumulative impact of such advertising has seriously encumbered both the ability of parents to control their children's eating habits, and the discharge of the responsibility by parents and teachers to foster sound nutritional sense in children. Moreover, given the importance of television to children and the pervasiveness of their viewing habits, parents cannot be continually present to provide balance and guidance to offset the influence of massive food advertising to children.

383/ Ginsberg v. New York, 390 U.S. at 639; Prince v. Massachusetts, 321 U.S. at 166.

384/ Parents, educators, and nutritionists have asserted that televised food commercials "nullify sound education", are "counter-productive to the encouragement of sound habits" and are "contradictory with school nutritional efforts." See discussion at Section III-B(2)(c).

If, as appears, the cumulative impact of televised food advertising directed to young children undermines or seriously encumbers the discharge of the respective responsiblities of parents and teachers, this fact may properly be considered in any balancing process required by the First Amendment. 385/ In any balancing of the respective interests at stake in the regulation of advertising directed to children, the Commission may properly include in its weighing process the societal and individual 386/ parental interest in preventing any undermining of the parental claim to authority and responsibility in the rearing of his or her child.

The next subsection sets out the principles applicable to any Commission effort to maximize the protection of children consistent with the rights of adults.

385/ See the discussion of this point at text accompanying note 399 infra.

386/ In Prince v. Massachusetts, the Supreme Court termed the "parent's claim to authority...in the rearing of her children...[a] sacred private interest...basic in a democracy...." 321 U.S. at 165.

5. Regulation of Speech for the Purpose of Protecting Children is Consistent with the First Amendment Unless the Restriction Unduly Infringes Upon Adult Rights, or Unless the Standard Adopted is Vague, or Overly Broad Even as to Children

Courts have suggested that children can be protected from certain forms of speech as long as two conditions are met: first, that legitimate rights of adults are not unduly infringed in the process; and second, that the prohibitions are drawn narrowly and precisely.

In Butler v. Michigan, 352 U.S. 380 (1957), the Supreme Court considered the validity of a Michigan law that made it a misdemeanor to distribute to the general public material "containing obscene, immoral, lewd or lascivious language, or prints, pictures...tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth." Butler had been convicted of selling a book to a police officer in violation of the statute. In a unanimous opinion, the Court overturned the conviction. Speaking for the Court, Mr. Justice Frankfurter wrote that:

> "The State insists that, by a law quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely this is to burn the house to roast the pig.

* * *

> "We have before us legislation not reasonably restricted to the evil with which it is said to deal. The...[effect] of this enactment is to reduce the adult population of Michigan to reading what is fit for children." 352 U.S. at 383.

In Butler, therefore, the Court held that the State of Michigan could not totally prohibit the sale of materials constitutionally protected as to adults, in order to protect minors. The clear implication of the case is that a properly drawn regulation which prohibits minors from purchasing such materials, but allows adults to do so, would pass constitutional muster.

In regard to written materials or movies deemed harmful to children, relatively precise enforcement mechanisms exist (e.g., prohibiting minors' access to "adult" theaters or their purchase of materials in "adult" bookstores). The more difficult problem of how to allow the dissemination of broadcast materials to adults while withholding them from children was considered by the Court of Appeals for the District of Columbia in the case of Pacifica Foundation v. FCC, 556 F.2d 9 (D.C. Cir. 1977), cert. granted, 46 U.S.L.W. 3436 (U.S. Jan. 10, 1978) (No. 77-528). In that case, the court struck down an FCC Order which barred licensees from broadcasting seven specific four-letter words which described "sexual or excretory activities and organs" in a patently offensive manner during "times of the day when

there is a reasonable risk that children may be in the audience." 556 F.2d at 11. One of the reasons for reversal expressed by the court was that "in its effort to shield children from language which is not too rugged for many adults, the Commission has taken a step toward reducing the adult population to hearing or viewing only that which is fit for children." Id. at 17. Moreover, the court held that the FCC's ruling suffered from both overbreadth and vagueness. In regard to overbreadth, the court observed that the FCC Order forbade the broadcast of the seven cited words irrespective of context or however innocent or educational they might be. 387/ "Clearly," held the court, "every use of these seven words cannot be deemed offensive even as to minors. In this regard the Order is overbroad." Id. The court held the Order to be vague in that it failed to define "children":

> "The Order does not even consider [the] age [of child members of the audience] as a factor, much less a significant one." 388/

In sum, the Pacifica court applied the principle previously articulated by the Supreme Court in Erznoznik that in the

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387/ The court observed that under the FCC ruling, at least two Shakespearian works, certain passages from the Bible, the Nixon tapes, and numerous serious literary and artistic works would not be allowed to air. 556 F.2d at 17.

388/ Id.

context of the First Amendment, "precision of drafting and clarity of purpose are essential." 556 F.2d at 16.

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), was another case in which governmental restraint was found to be overbroad and unsupportable. That case involved a Jacksonville, Fla. ordinance which made it a public nuisance and a punishable offense for a drive-in movie theater to exhibit films containing nudity, when the screen was visible from a public street or place. The Supreme Court first found that the ordinance could not be justified on the basis of the limited privacy interest of persons on the public streets who, if offended by viewing the movies, could readily avert their eyes. 389/ Id. at 212. The Court then considered a second argument advanced in support of the ordinance: namely, that it protected children. Addressing this point, the Court, citing Ginsberg v. New York, supra, acknowledged that it was well settled that a governmental entity could adopt more stringent controls on communicative materials available to youths than on those available to adults. The Court found, however, that:

389/ The Court in Erznoznik recognized that when faced with a stimulus that adults feel is not in their best interest to be exposed to, they will avert their eyes. Children exposed to offensive or harmful stimuli will not necessarily do likewise.

> "In this case,...the restriction is broader than permissible. The ordinance is not directed against sexually explicit nudity, nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing any uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. The ordinance also might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach. Clearly all nudity cannot be deemed obscene even as to minors.... [I]f Jacksonville's ordinance is intended to regulate expression accessible to minors, it is overbroad in its proscription." 422 U.S. at 213-214. (Emphasis added).

Analysis of the foregoing cases indicates that where governmental regulation totally deprives adults of access to "adult" materials, 390/ or to modes of expression that are not necessarily injurious or unsuitable for children, 391/ such restraints are not constitutionally permissible. On the other hand, they suggest that more narrowly drawn regulations which allow the dissemination of materials to adults, but prohibit their dissemination to children, will be upheld.

390/ Butler v. Michigan, supra.

391/ The Court in Erznoznik observed that movies containing nudity might be "innocent or even educational." 422 U.S. at 211.

A recent Court of Appeals decision, for example, upheld the right of the FCC to prohibit use of the public airwaves to disseminate sex-related material in a titillating manner during time periods when it was probable that children were in the radio audience. In that case, Illinois Citizens Committee for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1975), 392/ the court sustained an FCC-imposed forfeiture, in effect a fine, upon a station which broadcast a day-time talk show called "Femme Forum". In the course of its opinion the court observed that:

> "The [broadcast] excerpts cited by the Commission contain repeated and explicit descriptions of the techniques of oral sex. And these are presented, not for educational and scientific purposes, but in a context that was fairly described by the FCC as 'titillating and pandering'....Moreover, and significantly, 'Femme Forum' is broadcast from 10 a.m. to 3 p.m. during daytime hours when the radio audience may include children--perhaps home from school for lunch, or because of staggered school hours, or illness. Given this combination of factors, we do not think that the F.C.C.'s evaluation of this material [as obscene] infringes upon rights protected by the First Amendment." 515 F.2d at 404.

392/ The Illinois Citizens and Pacifica cases may be distinguished by the fact that the FCC ruling in Pacifica was overbroad, banning material that would not be obscene or offensive even to children. Moreover, the titillation factor found significant in Illinois Citizens was absent in Pacifica. 556 F.2d at 16.

Commission regulatory action which is neither vague nor overbroad, and which is carefully framed so as not to infringe unduly upon adult rights of access to commercial speech, would be compatible with the principles established in the foregoing cases. Drawing lines where the broadcast media are involved, as opposed to print materials or motion pictures, may necessarily involve consideration of such factors as "time of day" restraints and/or restrictions triggered by the existence of significant numbers of young children in the audience. 393/ In discharging its statutory mandate, the Commission must seek to accomodate the rights of adult viewers and listeners with the interests of young children who need protection. If in so doing the Commission carefully, narrowly, and as precisely as possible employs the least drastic means necessary to accomplish its legitimate objectives, such regulatory action would be consistent with First Amendment requirements.

393/ Such line-drawing and measuring (e.g., of the composition of the broadcast audience) of necessity cannot be precise, but it seems possible to do so in a way that will protect most children most of the time.

6. Limited Time Restraints and/or Audience Composition Restraints on Commercial Speech as Possible Commission Remedies are Supportable Under Two Theories

a. "Variably Unprotected Advertising" (Analogous to "Variable Obscenity")

In attempting to fashion a remedy accommodating the rights of adults to see and hear advertising protected as to them, with the public interest in shielding young children from certain advertising which is "unfair" and/or "deceptive" as to that segment of the broadcast audience, the "variable obscenity" standards approved by the Supreme Court in Ginsberg v. New York, is a useful analytical tool. In Ginsberg, the Court noted that the concept of variable obscenity was developed in Lockhart & McClure, "Censorship of Obscenity: The Developing Constitutional Standards", 45 Min. L. Rev. 5 (1960). In its opinion, the Ginsberg Court quoted from that article as follows:

> "Variable obscenity...furnishes a useful analytical tool for dealing with the problem of denying...[children] access to material aimed at a primary audience of sexually mature adults. For variable obscenity focuses attention upon the make-up of primary and peripheral audiences in varying circumstances, and provides a reasonably satisfactory means for delineating the obscene in each circumstance." 390 U.S. at 635, n. 4.

The proposed regulations at hand may similarly invoke the concept of "variably unprotected advertising" as a useful analytical tool.

b. Emerging Recognition of Time, Place and Manner Restrictions Tied to Content

Traditionally, "time, place and manner" restrictions have been content-neutral. 394/ In recent years, however, there have been increasing judicial indications that at least in regard to advertising, time, place and manner restrictions tied to content may be constitutionally permissible. As argued supra, the implication of the Linmark Court's 395/ specific reference to Capital Broadcasting is that at least

394/ In Virginia Pharmacy, the Court held as follows:

> "There is no claim...that the prohibition on prescription drug price advertising is a mere time, place and manner restriction. We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information...Whatever may be the proper bounds of time, place and manner restrictions on commercial speech, they are plainly exceeded by this Virginia statute..." 425 U.S. at 770-771.

In Bates, the Court observed that "[a]s with other varieties of speech,... there may be reasonable restrictions on the time, place and manner of advertising." 45 U.S.L.W. at 4904. And, Mr. Justice Powell and Mr. Justice Stewart (concurring in part, and dissenting in part) in Bates emphasized that "...[Q]uestions remain open as to time, place and manner restrictions affecting...radio and television." Id. at 4909, n. 12.

395/ All members of the Court joined in the Linmark opinion except for Mr. Justice Rehnquist who took no part in the consideration or decision of the case.

where a protectable group (i.e., children) is involved, content-based restrictions on the time, place or manner of advertising may be constitutionally permissible and would allow the channeling of such messages into specific times of day.

In Carey v. Population Services International, several Justices discussed the relationship between advertising content and time, place and manner restrictions. Speaking for the majority, Mr. Justice Brennan held that the statutory total suppression of contraceptive advertising or displays could not be justified on the dual grounds that such advertising would be offensive and embarrassing to those exposed to it, and that such advertising would serve to legitimize sexual activity by young people. But, Mr. Justice Brennan observed:

> "We do not have before us, and therefore express no views on state regulation of the time, place or manner of such commercial advertising based on these [grounds] or other state interests." 431 U.S. at 702, n. 29.

Several of the other Justices were moved to express their views on this issue. Thus Mr. Justice Stevens (concurring in part and concurring in the judgment) stated:

> "The Court properly does not decide whether the State may impose any regulation on the content of contraceptive advertising in order to minimize its offensive character.

> "I have joined Part V of the opinion on the understanding that it does not foreclose such regulation simply because an advertisement is within the zone protected by the First Amendment. The fact that a type of communication is entitled to some constitutional protection does not require the conclusion that it is totally immune from regulation....
>
> "In the area of commercial speech...the offensive character of the communication is a factor which may affect the time, place or manner in which it may be expressed." 431 U.S. at 714-715. (Justice White expressed his agreement with these views. Id. at 703).

Mr. Justice Powell addressed the same issue of time, place or manner restrictions in his opinion (concurring in part, and concurring in the judgment):

> "The Court does leave open the question whether...state interests [of minimizing advertising's offensiveness, or its encouragement of promiscuity, or otherwise] would justify regulation of the time, place or manner of such commercial advertising.... In my view, such carefully tailored restrictions may be especially appropriate when advertising is accomplished by means of the electronic media. As Judge Leventhal recently observed in that context, 'there is a distinction between the all-out prohibition of a censor and regulation of time and place of speaking out, which still leaves access to a substantial part of the mature audience. What is entitled to First Amendment protection is not necessarily entitled to First Amendment protection in all places. Young v. American Mini Theatres, Inc., 427 U.S. 50....Nor is it necessarily entitled to such protection at all times.' Pacifica Foundation v. FCC,...556 F.2d 9 (D.C. Cir. 1977) (dissenting opinion)." 431 U.S. at 712 n, 6. (Emphases added).

These most recent views 396/ of Court members lend support to the argument that time, place or manner

396/ In the earlier case of Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), "place" restrictions based on content were upheld. Specifically, in Young, the Court upheld two Detroit zoning ordinances that required the dispersion of "adult" motion picture theaters for the purpose of preserving the city's neighborhoods. Theaters were classified as "adult" on the basis of the content of the motion pictures they exhibited. In the course of the plurality opinion, the Court stated as follows:

> "Even within the area of protected speech, a difference in content may require a different governmental response....
>
> We have recently held that the First Amendment affords some protection to commercial speech. We have also made it clear however, that the content of a particular advertisement may determine the extent of its protection. A public rapid transit system may accept some advertisements and reject others. [citing Lehman v. City of Shaker Heights, 418 U.S. 298]....The measure of constitutional protection to be afforded commercial speech will surely be governed largely by the content of the communication....
>
> [W]e hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures." Id. at 66, 68-69, 70-71.

The dissenting opinion in Young by Mr. Justice Stewart (in which Justices Brennan, Marshall, and Blackmun joined) stated as follows:

> "By refusing to invalidate Detroit's ordinance the Court rides roughshod over cardinal principles of First Amendment law, which require that time, place and manner regulations that affect protected expression be content neutral except in the limited context of a captive or juvenile audience." Id. at 85-86. (Emphasis added).

In effect, then, eight of the nine Justices would have upheld the content based "place" restriction had the interests of "juveniles" been involved.

restrictions related to the content of the advertising are supportable, particularly (1) where they "serve a significant governmental interest"; 397/ (2) where they involve the broadcast media; and (3) where access to a substantial part of the mature audience is permitted 398/. If, as argued by

397/ Virginia Pharmacy, 425 U.S. at 771.

398/ This would satisfy the requirement of traditional time, place and manner restrictions that they "leave open ample alternative channels for communication of the information." Id. The State legislation or regulation struck down by the Court in Virginia Pharmacy, Carey and Bates totally suppressed information pertinent to the health and legal needs of the public--matters of vital concern. Virginia Pharmacy, 425 U.S. at 771; Carey, 431 U.S. at 700-701; and Bates, 45 U.S.L.W. at 4903-4904. In Linmark, while the ordinance in question restricted only one mode of communication (the posting of "For Sale" or "Sold" signs on front lawns), the Court found that the alternative channels of communication (newspaper ads and real estate listings) were more costly and less effective--in short, "far from satisfactory." 431 U.S. at 93.

In the recent case of Trachtman v. Anker, supra, note 350, the Linmark opinion was cited for the proposition that a content-based restriction on one mode of communication is permissible (particularly where the interests of juveniles are involved). In Trachtman, the majority opinion noted that the school authorities had not tried to supress all forms of student expression on sex-related matters (e.g., the school curriculum included formal courses on sex education as well as peer group discussion sessions). "Thus," noted the court,

> "this case involved restriction of only one among many methods of communication between students on sex-related matters, which the Supreme Court has noted, 'is not without significance to First Amendment analysis, since laws regulating the time, place or manner of speech stand on a different footing from laws prohibiting speech altogether.'" 563 F.2d 512, 517 n. 3 (citing Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 93).

Mr. Justice Powell in Carey, the offensiveness of commercial advertising for contraceptives vis-a-vis adults (or at least minors old enough to recognize the product in order to be offended) supports time, place or manner restrictions, then a fortiori legitimate governmental concern as to the effects of young children's exposure to televised advertising for highly sugared foods should support similar restrictions based on the content of the advertising in question.

In regard to the matter of adequate access to mature audiences, here, unlike the situation presented in Capital Broadcasting where a total ban on broadcast cigarette advertising was upheld, complete suppression of all televised sugared food advertising is not being considered. Interested adults will still have access to such product advertising during adult programming, and via print advertising, in-store promotions, direct mailings, etc.

In sum, employment of the concept of content-based time, place or manner restrictions upon advertising in order to protect child audiences, while at the same time safeguarding adult rights of adequate access to commercial information, would constitute accommodation of the traditional doctrine of time, place and manner restrictions to emerging needs.

7. Even Under the First Amendment Balancing Test, Commission Regulation of Televised Advertising Directed to Children is Permissible

To the extent that the record developed in response to the subject petitions establishes the "unfairness" of televised advertising of sugared foods to children, the Commission may legitimately "weigh" 399/ a series of factors previously discussed in the context of this First Amendment section. Among those factors are the following:

(1) The premises and rationale underlying the recent commercial speech cases (i.e., the information needs and right of a mature audience to receive important commercial information so as to facilitate informed and reliable decision-making);

(2) The character of the child audience (i.e., especially susceptible to persuasion; lacking the judgment, maturity, evaluative and decisionmaking capacity of the adult consumers envisioned by the Court in Virginia Pharmacy);

399/ In Bigelow v. Virginia, 421 U.S. 809 (1975), the Supreme Court had previously held that the degree of protection to be accorded commercial speech is determined by "assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." Id. at 826.

(3) The fact that the advertising in question is being disseminated via the electronic broadcast media with its "special problems" of uprecedented impact and unrestricted access by child viewers;

(4) The fact that the child audience sought to be protected is a "captive audience" of the television medium, a status which has traditionally warranted special regard and protection; and

(5) The fact that in seeking to curtail advertising to child viewers, the Commission would be seeking to end a serious encumbering of the paramount parental interest in the child-rearing process.

As indicated earlier in this First Amendment discussion, the Commission's mandate to regulate advertising broadcast via the television medium which is "unfair" and/or "deceptive" to child viewers (but that adults may have a constitutional right to view) presents difficult problems of accommodation. The Commission can constitutionally discharge this mandate, however, by fashioning the least restrictive remedy or remedies necessary to accomplish its legitimate objectives. So long as the remedy or remedies adopted are carefully tailored, precisely drafted, and allow the mature audience to have continued access to such product information (by leaving open ample alternative information channels, e.g., televised advertising

during adult programming, print advertising, in-store displays, etc.), the First Amendment would not preclude Commission regulatory action with respect to commercial speech of this nature.

VI. THE COMMISSION HAS REMEDIES AVAILABLE TO CURE THE DECEPTIVENESS AND UNFAIRNESS OF THE CURRENT TELEVISED ADVERTISING TO CHILDREN.

A. Introduction

Historically, the Commission has been afforded "wide discretion" in framing remedies that bear some rational relationship to the cure or prevention of a commercial practice found to be in violation of the FTC Act. 400/ The breadth of this discretion is demonstrated by the diversity of remedies which the Commission has employed in the past, which range from assurances of voluntary compliance, to cease and desist orders, to affirmative disclosures to corrective advertising. However, the Commission may impose no greater restriction on advertising than is reasonably necessary to cure the underlying violation of the Act. 401/

As we have noted above, young children are generally unable to comprehend the selling purpose of, or otherwise understand or evaluate, television commercials. As to these

400/ See FTC v. National Lead Co., 352 U.S. 419 (1957); Jacob Siegel Co, v. FTC, 327 U.S. 608 (1946).

401/ Beneficial Corporation v. FTC, 542 F.2d 611 (3rd Cir. 1976), cert. denied, 430 U.S. 983 (1977).

children, television advertising addressed to them for any product is inherently unfair and deceptive, in a way that cannot be cured by any remedy short of a ban.

And as we have seen, the unfairness and deceptiveness of televised advertising addressed to older children arises out of its heavy concentration on sugared products. The problem as to advertising for those products is to cure the unfairness and deceptiveness it has for children, without unreasonably infringing the rights of adults to receive protected commercial speech for those products.

The petitions on this matter focus predominantly on the dental, rather than the non-dental, health risks posed by sugared products. Those dental risks do indeed seem to be, as Dr. Jean Mayer has put it, "by far the best established." 402/ They also are the risks that seem to be most clearly posed even by moderate consumption of sugared products. 403/

402/ Senate Hearings at 273.

403/ Taking into account that typical U.S. consumption of sugar appears to some experts to be far more than moderate. See Section III-C (1) supra.

But not all sugared products pose the same degree of dental health harms. As we have seen, it is abundantly clear that sugar consumption in general is causally related to tooth decay, but less clear exactly how true this is of each specific sugared product, consumed in each specific mode. The most dangerous sugared products, from a dental health standpoint, appear to be those that are sticky, viscous or combine large amounts of sugar with flour, and are eaten between meals. 404/ Outside of this class, cariogenicity appears to decline by degrees that cannot readily be measured. This presents a problem of drawing lines for purposes of subjecting television advertising for the most cariogenic products to more stringent regulation than those which pose lesser risks. Below are some of the factors that might be considered in determining when, and for which products, a remedy might be applied to product advertisements on the basis of cariogenicity.

(i) Presence of Sugar

A remedy could be directed at advertising for all products which contain any sugar. Such an approach would recog-

404/ See Section III-C (4), supra.

nize that any sugar in the mouth in any form and on any occasion may present at least some danger to the teeth. However, because of the routine addition of sugar to most fabricated or processed foods, the presence of any sugar as the criterion might put the advertising for virtually every such food into the regulated class. Products with relatively small amounts of sugar (e.g., bread) are not claimed to pose substantial risks to children's dental health. Also, many products that are considered "good" or "nutritious" for children (e.g., apples, oranges, grapes) contain naturally occurring sugar and would therefore be subject to any regulation that employed the presence of sugar as the test.

(ii) Percentage of Sugar

To avoid inclusion of those products with an insubstantial amount of sugar, the rule could cover only those products with some specified percentage of sugar. The CSPI Petition suggests added sugar amounting to 10% of caloric content. However, the 10% figure (or any other figure) does not appear to be founded upon any notion of tolerance that is accepted by the scientific community. Cariogenicity appears not to be a function solely of the amount of sugar in a product, but to be related as well to other factors including

(a) the amount of time the product is in the mouth, (b) its viscosity, (c) whether it is eaten with a meal or between meals, and (d) how often it is eaten between meals. 405/ Consequently, it might be difficult to support a regulation based solely upon a percentage of sugar. But we will seek comment on this issue.

(iii) Natural Versus Added Sugar

The CSPI Petition would exclude from regulation advertising for products such as fresh fruit which contain naturally occurring sugar. CSPI suggests that it is "unnecessary and unwise from a policy standpoint" to restrict the advertising of fresh fruit to children, although there seems to be very little of such advertising. As we have noted above, the historic evidence suggests that fresh fruit, for whatever reason, is not a significant cause of tooth decay.

Dried fruits may be a different matter in terms of cariogenicity, 406/ but they, like fresh fruit, do not seem

405/ Id.

406/ See note 224, supra.

to be the subject of significant amounts of television advertising directed to children.

(iv) Suitability for Between-Meal Eating

The remedy could affect only sugared foods that lend themselves to between-meal consumption, reflecting the view that between-meal consumption appears to be especially cariogenic. A particular problem as to this test concerns sugared cereals, which are supposedly sold to be eaten only with milk and only at breakfast, but which appear to be consumed to some degree as snacks without milk. The test might have to be combined with one or more other tests.

Rulemaking proceedings should elicit comments on all factors which influence cariogenicity as well as on the effectiveness and feasibility of the remedies discussed in the balance of this section. These comments as well as the evidence obtained at hearings should inform the Commission's ultimate decision on the optimum remedy or remedies.

The balance of this section describes alternative remedies available to the Commission, their positive and negative features, and the First Amendment questions, if any, which they raise.

B. Affirmative Disclosures in the Body of the Advertising

To the extent that televised advertising for sugared products addressed to children is deceptive or unfair solely because of its failure to disclose material facts, it might seem that an appropriate remedy would be to require disclosure of those facts in the body of the advertising.

Such a remedy is commonly employed by the Commission in cases involving advertising addressed to adults. 407/ The question is to what extent it would also be appropriate and effective here -- where television advertising is directed to an audience which, up to the age of eight, largely fails to understand the selling purpose of, or otherwise comprehend or evaluate television commercials.

The first problem raised by this form of affirmative disclosure resembles the problem presented by the attractive nuisance doctrine, discussed above, namely whether simply informing a small child that a danger exists is sufficient to provide the child with adequate protection against the danger.

407/ See e.g., Ward Laboratories v. FTC, 276 F.2d 452 (2d Cir.), cert. denied, 364 U.S. 827 (1960); P. Lorillard v. FTC, 267 F.2d 952 (4th Cir. 1950); and Firestone Tire & Rubber Co. v. FTC, 481 F.2d 246 (6th Cir. 1973).

The answer for purposes of the attractive nuisance doctrine is no. That negative answer is probably even more appropriate here, if the information is to be presented in the context of messages whose overall purpose and effect are to impress on the child the desirability of the product which poses the risk.

Another problem concerns the ability of children to understand disclaimers made in televised advertising. The evidence on this subject is mixed. The relevant variables seem to include the age of the children and the form in which the disclaimer is presented. For example, the words "you have to put it together," spoken of toys, may be more effective than the words, "some assembly required." 408/

Dr. Thomas R. Donohue, Chairman of the Department of Communication, University of Hartford, has testified that:

408/ See e.g., R. Liebert, D. Liebert, Sprafkin and Rubinstein, Effects of Television Commercial Disclaimers on the Product Expectations of Children (1976). (Occasional Paper 76-8, Brookdale International Institute).

> "[0]ur research indicated that when asked to describe those patent [medicine] ads that have disclaimers at the end, 'use only as directed' by and large the message went undetected by children." 409/

Other researchers have found that the ability of children to see and hear disclosures depends in large measure on the simplicity and force with which they are delivered. 410/

Unfortunately, the natural incentive of some advertisers may be to minimize the effectiveness of any disclosure. This can be done by delivering the disclaimer quickly, or in a tone of voice that seems unrelated to the rest of the commercial, or while distracting music is playing in the background, or while striking visual effects are on the screen. 411/ Some of the possible techniques for minimizing effectiveness could doubtless be proscribed in a regulation requiring affirmative disclosures, but it would be hard to identify, and effectively proscribe, all of the techniques by which the impact of disclosures could be minimized or even negated.

409/ FTC Hearings on Proposed Food Advertising Trade Reg. Rule, Tr. 3508, (Nov. 15, 1976.) (Emphasis added.)

410/ Liebert, supra, note 408.

411/ Id.

For instance, the National Association of Broadcasters' Code directs that television advertising for ready-to-eat cereals identify the role of the product in the context of a balanced regimen--requiring, in effect, an affirmative disclosure that the product is not an adequate meal by itself. In practice, that requirement is "met" by the simple addition of statements such as "there's fun in your good breakfast with Corny Snaps..." and, for the cereal Cap'n Crunch, that it is "part of a peanutty good breakfast."

There is also evidence that, as Helitzer and Heyel explain (p. 105), a pre-school child "cannot absorb many ideas at one sitting...If he is being offered too many ideas at one time he will remember none of them well." The same problem exists even for adults. Paul C. Harper, Jr., Chairman of Needham, Harper and Steers, Inc., a New York advertising agency, has testified as to advertising addressed to adults:

> "What we find is that with addition of each additional sales point, the impact and memorability of the commercial tends to be reduced, and this has been shown time and again in tests that we have done where we have run commercials for the same product with one, two or three sales points and the margins of effectiveness can run anywhere from 70 percent down to 35... That is an order of magnitude of difference in effectiveness when you begin adding secondary and tertiary sales points." 412/

412/. FTC Hearings on Proposed Food Advertising Trade Reg. Rule, Tr. 6732-33 (Dec. 13, 1976). But see the findings of Dr. Charles Atkin, reported in the NSF Report at 37-40, that children can learn as many as three discrete messages from a given television commercial.

And, in the words of Dr. Samuel Ball, of the Educational Testing Service, "...I think it is possible we may get to the point where you are trying to say too much in 30 seconds." 413/

The fundamental assumption on which a remedy like affirmative disclosure rests is that the consumer is, if not always rational and logical in his behavior, at least capable of being so where his interests require it. While that fundamental assumption is appropriate as to adults, there is some question as to how much validity it has for children. Thus, Helitzer and Heyel (p. 110) have advised prospective advertisers to children that:

> [i]t is Piaget's discovery that, even after the child attains the 'age of reason' at about 6 to 7, his mode of reasoning is still different from that of adults, that [Dr. David] Elkind considers to be one of his most important contributions. 414/ Children of elementary school age reason in terms of things, and in general cannot deal in verbal propositions and abstractions, which they are actually not able to handle until about age 12. Thus they may be able to tell that of three blocks, A is greater than B, and B is greater than C. But they are lost if you pose a purely verbal question: 'Helen is taller than Mary and Mary is taller than Jane. Who is the tallest of the three?'

413/ FTC Hearings on Proposed Food Advertising Trade Reg. Rule, Tr. 4603-4 (Nov. 19, 1976).

414/ Dr. Elkind is professor of Psychology at the University of Rochester, and as Helitzer and Heyel observe (p. 197), "has published authoritative interpretations of Piaget."

> "This discovery, says Elkind, is only now beginning to be applied in education. He quotes educational authorities to the effect that some traditional elementary school teaching, where teachers use verbal propositions, inevitably goes over the heads of the pupils." (Emphases added.)

Helitzer and Heyel add that "the implications for advertisers are obvious." So too are the implications for the Commission, as it considers possible remedies for the present deceptiveness and unfairness. If the Commission ultimately adopts affirmative disclosures presented in the advertising itself as an appropriate remedy, it will have to assure that those disclosures do not merely present "verbal propositions" that "inevitably go over the heads" of children. It must also assure that the effectiveness of disclosures is not subtly -- or even overtly -- undermined by advertisers who may be tempted to minimize their impact.

Affirmative disclosures in the context of the advertisements do not have to be considered as an exclusive remedy. They could be required in combination with one or more of the other remedies discussed below. For example, the Netherlands currently imposes an outright prohibition on the televised advertising of sugared products at any time of day

prior to 7:55 p.m., or at any time thereafter if the advertising is "clearly directed toward influencing children in favor of the recommended product." 415/ And those advertisements for sugared products that are permitted are required to display a stylized toothbrush as a reminder of the product's dental hazards. 416/

Adoption of affirmative disclosures in the context of the advertisements themselves would not pose First Amendment problems. Affirmative disclosures are a traditional remedy and have been upheld repeatedly by the courts. 417/ And the recently-decided Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976), left the state free to impose remedies necessary to eliminate harms arising out of deceptive advertising. Id. at 771. The affirmative disclosures discussed have traditionally been that sort of remedy.

415/ Reclameraad, Radio and Television Advertising Regulations (January, 1976) Article 17.

416/ Id.

417/ See, e.g., Ward Laboratories v. FTC, 276 F.2d 952 (2d Cir.), cert. denied, 364 U.S. 827 (1960); P. Lorillard v. FTC, 267 F.2d 952 (4th Cir. 1950).

C. Affirmative Disclosures in Formats Other Than the the Advertising Itself, Or Under Auspices Other Than Those of the Advertisers.

The drawbacks to the affirmative disclosure remedy just discussed could be reduced by requiring that the disclosures be presented in some context other than that of the product advertising itself. For example, an advertiser might be required, for every "X" number of commercials addressed to children for sugared products, to present "Y" number of disclosures containing nutritional and health information. Separating the disclosures from the commercials would make the disclosures more visible to children, and probably more intelligible as well, taking into account the difficulties which children have in extracting multiple or contradictory messages from single 30 - second announcements.

Requiring advertisers to present messages of this sort would have much in common with corrective advertising, whereby advertisers are required to present information to undo harms caused by previous deceptive or unfair advertising. The only real difference would be that corrective advertising has been imposed to dispel lingering misimpressions caused by advertisements which are no longer running, whereas the affirmative disclosures proposed here would remedy harms

arising out of existing advertising to children. Thus, affirmative disclosures could be required so long as the triggering advertisements are broadcast. 418/

It would thus be harder--although by no means impossible--for an advertiser to undercut the effectiveness of an announcement devoted exclusively to the disclosure, than for advertiser to undercut the effectiveness of a disclosure presented in an advertisement which promotes the virtues of the product. Still, it is hard to assure that announcements prepared by advertisers would have the full force and attention-getting effectiveness of the commercials now being addressed to children. Commercial advertisements are designed, as Joan Ganz Cooney puts it, "to reach the head through the emotions, rather than the other way around." 419/ On the other hand, many current public service announcements have a bland, gray, overly didactic quality which, as Dr. Kenneth O'Bryan told the Commission in his presentation on December 1, 1977, tends to "send the kids to the john." The Commission

418/ See, e.g., Ward Laboratories v. FTC, 276 F.2d 952 (2d Cir.), cert. denied, 364 U.S. 827 (1960); P. Lorillard v. FTC, 267 F.2d 952 (4th Cir. 1950); Firestone Tire & Rubber Co. v. FTC, 471 F.2d 246 (6th Cir. 1973); Stuppel Enterprises, Inc., 67 F.T.C. 173 (1965).

419/ Quoted in Helitzer and Heyel at 107.

could mandate certain word usage, and proscribe the more obvious means of undercutting the disclosures, but it could hardly mandate enthusiasm in their presentation, or mandate the full use of the skills at the advertiser's command in putting the disclosures across.

One solution to the problems inherent in advertiser control might be to require advertisers to devote a certain percentage of their normal advertising budget to the preparation and broadcasting of affirmative disclosures. For every "X" dollars spent on advertising sugared products to children, an advertiser would contribute "Y" dollars for affirmative disclosures on dental or nutritional topics. The advertiser would also be required to devise a procedure which would allow independent experts and other representatives of the public to control the content and preparation of the affirmative disclosures. The disclosures themselves might therefore be prepared under the auspices of health professionals or organizations such as the American Dental Association or American Medical Association. Subject to sensible restrictions, the advertiser might be permitted to influence the membership of the group and participate in--but not control--the decisions as to content, presentation and dissemination of the disclosures. The group under whose auspices the disclosures were developed would be free to draw upon the assistance of advertising professionals to devise the most effective means of

communicating those disclosures to the child audience. The only Commission role in this procedure would be to require advertisers to dedicate a certain percentage of their advertising budget to the preparation of affirmative disclosures, and to review the composition of the group to safeguard its balance. 420/ Affirmative disclosures presented in this fashion contain many positive features.

First, the disclosures could have considerable power. The messages presented during 1968 and 1969 in response to cigarette advertising were no less powerful and imaginative than the selling messages of the cigarette companies. They were written and produced by some of the most skilled members of the advertising profession -- some of whom donated

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420/ The federal courts have a comparable role in reviewing the composition of analogous membership bodies under analogous statutes. Compare 47 U.S.C. § 396(c)(2)(Supp. 1977) which sets forth a concept of balanced public interest representation for the Corporation for Public Broadcasting ("members...shall be selected from among citizens...who are eminent in such fields as education, cultural and civic affairs, or the arts, including radio and television...[and] shall be selected ...to provide... a broad representation of various regions of the country, various professions and occupations, and various kinds of talent and experience..."); and 15 U.S.C. § 41 (1970), which balances membership on this Commission ("Not more than three of the Commissioners shall be members of the same political party").

their talents, as indeed some might here. Those messages are credited with having reduced per capita consumption of cigarettes in this country during the period when they were broadcast. 421/

Second, the remedy is not new to the Commission. The Commission has already acknowledged its usefulness in an earlier proceeding. In 1972, it submitted a statement to the Federal Communications Commission which suggested several situations where this type of affirmative disclosure might be the most suitable remedy for unfair and deceptive acts or practices. 422/

421/ Judge Wright's dissent in Capital Broadcasting v. Mitchell, 333 F. Supp. 582 (D.D.C. 1972), aff'd. 405 U.S. 1000 (1972) notes that:

> "The figures on total U.S. cigarette consumption from 1967 to the present are quite striking. U.S. consumption reached a peak of 549.2 billion cigarettes in 1967, the year before the Banzhaf ruling. As the Banzhaf messages began to appear on the air in late 1968, consumption began to drop for the first time in two years. It slipped to 545.7 billion in 1968 and 528.9 billion in 1969. Cigarette commercials and most Banzhaf messages left the air on January 1, 1970, and their departure was accompanied by an immediate resumption of the upward trend in consumption. 536.4 billion cigarettes were consumed in the United States in 1970 and the projected figure for 1971 is 546.0 billion." 333 F. Supp. at 589, n. 18.

422/ Statement of the FTC, In the Matter of the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, Part III, FCC Dkt. No. 19260.

Although the Commission has not in the past required affirmative disclosures to be presented in contexts other than regulated advertising, this does not mean the Commission lacks authority to impose the remedy. 423/ The remedies available to it now suggest otherwise. The Commission, for example, can seek to deprive respondents of illegally acquired gains. 424/ The Commission also has broad power to require advertisers to expend funds in furtherance of its orders, as in corrective advertising, where the Commission has ordered a specific portion of an advertiser's budget to be allocated

423/ The mere fact that the Commission has yet to exercise its authority in this fashion does not indicate that the Commission lacks the requisite power. See, Warner-Lambert v. FTC, where the District of Columbia Circuit rejected the petitioner's argument that the "late emergence of this "newly discovered' remedy [corrective advertising]" was evidence that the FTC lacked authority to impose the remedy. 562 F.2d at 759. Accord, National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 693-94 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974).

424/ 15 U.S.C. § 57(b) (1970), as amended (Supp. V. 1977).

to the required correction. 425/ The Commission has also, in the corrective advertising cases, dictated the form of the particular disclosure and mechanics by which the disclosure is to be disseminated. If the Commission can require expenditure of funds for corrective advertising to eliminate harms from unlawful advertising, it follows that it can require expenditures for affirmative disclosures which will serve that same purpose.

This remedy may, however, have some drawbacks. First, it may raise mechanical problems of implementation. It would require the cooperation of public health professionals ready to take the responsibility for development of disclosures. Second, the remedy may be inadequate for very young children who fail to understand what commercials are. Third, the remedy may be inadequate for even those older children who lack the maturity to fully comprehend the dangers of especially cariogenic products, or that a decision to consume one product may imply a decision to forgo another, or that current pleasure may bring

425/ Warner-Lambert Co., 86 F.T.C. 1398 (1975), aff'd, Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977).

future discomfort, or who otherwise lack the capacity to assure their own protection once they have been advised of the existence of a health danger. Such disclosures may not suffice any more than they do in the context of attractive nuisances or commercial contracts. For those children, disclosures may still leave a residue of unfairness or deceptiveness.

Should the Commission desire to adopt this remedy, it would face few, if any, First Amendment inhibitions. In fact, this remedy would advance the First Amendment's underlying goals--assuming they are fully applicable to children--by ensuring a greater diversity of information in the marketplace. Children (and adults) are currently exposed only to one-sided selling messages for sugared products. The proposed remedy would impose no limit on amounts or content of commercial speech; it would permit advertisers to place as much advertising on the airwaves as they were able, subject only to the concerns of the FCC and the broadcasters to avoid overcommercialization on children's programming. Moreover, regulations of this sort have been explicitly sanctioned by the Supreme Court. In Virginia Board, the Supreme Court affirmed the State's capacity to ensure the "stream of commercial information flow[s] cleanly as well as freely." 425 U.S. at 772. The Court elaborated in a footnote that it might be

appropriate to require that a commercial message appear in a particular form or include additional information so as to eliminate deceptiveness. 425 U.S. at 771-72 n. 24. The affirmative disclosures proposed here would help to assure that commercial information flows "cleanly as well as freely" and might significantly reduce the harm of televised advertising for sugared products.

D. Limitations on the Amount of Advertising Permitted for Sugared Products

To the extent that the unfairness and deceptiveness of televised advertising for sugared products result from its cumulative impact on children's eating habits and nutritional beliefs, it might be appropriate to reduce the amount of television advertising for such products which can be directed to children. For instance, an overall limit could be imposed on the number of advertisements for such products which could be run per hour, day and/or week during children's programming. The advertiser could be held responsible for assuring that advertisements placed with broadcasters were not shown in violation of this rule. 426/

426/ This requirement would impose little burden on the advertiser. Currently, advertisers take steps to assure that advertisements for their products do not run "back-to-back" with the advertisements of direct competitors.

One threshold question is whether this Commission has jurisdiction to impose a remedy which would limit the number of television advertisements for sugared products, a remedy which might appear to tread on the traditional concerns of the Federal Communications Commission. We have concluded that this Commission has that jurisdiction. First, this Commission clearly possesses jurisdiction concurrent with that of the FCC to regulate broadcast advertising. The FCC traditionally has left to this Commission questions as to whether any particular advertisement or class of advertisements is unfair or deceptive. Second, although the FCC has traditionally exercised jurisdiction over the maximum amount of advertising permissible in a given period of time, the remedy under discussion would not affect the <u>total</u> number or duration of commercials which might be shown in any given period. The limitation would be imposed only on commercials for sugared products addressed to children to remedy the cumulative harms arising out of their massive number and the lack of any information directed to children for other foods. And advertisers for other products could fill the available spots left by a reduction in the amount of sugared products advertising.

While we believe that this Commission has jurisdiction to impose this remedy, we still recognize that as a matter of comity, it would be appropriate to solicit the FCC's

views on this subject. We propose to invite the FCC to submit those views in the context of the public hearings we recommend.

There would be a number of practical advantages to this remedy.

First, a diminution in the amount of sugar advertising viewed by children might reduce the influence which manufacturers of sugared foods command over the eating habits of children. The harm of sugared food advertising to children is more the result of the cumulative impact of all the commercials in the category than of any one particular message. A significant concern is that the continuous and massive nature of this advertising message overwhelms nutritional instruction or warnings from parents and other sources. 427/ A trade regulation rule limiting the amount of televised sugar advertising permitted to children would address this concern and might enhance the ability of parents, educators and nutritionists to impress upon children the risks of sugar consumption.

Second, this approach would be relatively simple to implement. It would relieve the Commission of having to

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427/ Among the concerns we discussed above are that sugar commercials "nullify sound education," are "counterproductive to the encouragement of sound habits," and are "contradictory with school nutritional efforts." See Section III-B(2)(c), supra.

supervise advertisements in order to ascertain whether they employed proscribed techniques or failed to disclose material facts. Detection of violations would involve only simple arithmetic -- i.e., counting up how much sugared food advertising was broadcast during a given unit of time. Violations could be called to the Commission's attention by any parent or organization which monitors children's television.

Third, this remedy would pose relatively few First Amendment problems. Commercial speech for highly sugared products would still be permitted--but only in smaller amounts.

There are, however, some disadvantages to this remedy. First, it might be difficult to select the number of advertisements which could be broadcast. That number might have to be set at a level significantly lower than present. Research also suggests that exposure to even moderate amounts of advertising can influence children's attitudes toward and desires for advertised products. The NSF Report (p. 125) has summarized the pertinent findings:

> "A considerable amount of secondary research in learning theory and the available primary research indicates that neither the rate at which children encounter a commercial (i.e., frequency per program or per week) nor the total number of times they encounter it, beyond the first one or two exposures, has any incremental effect on either their liking of the brand or their intention to request or buy it."

Second, a mere reduction in the number of televised sugar messages addressed to children might not adequately balance the information they convey. Unlike the various forms of affirmative disclosures discussed above, this remedy provides children with no information about the product.

Third, this remedy might have adverse competitive effects. Restrictions on the amount of sugar advertising permitted on children's programs might raise the price of the remaining time available for such advertising, since there would be the same number of sugared food advertisers bidding for fewer slots. This leads to the possibility that only the largest advertisers of sugared foods, which could afford the increased advertising costs, would be able to advertise their products during children's programming. Further, a diminution in the time available would necessarily limit the amount a new entrant could advertise, even assuming the new entrant had the funds.

E. Limitations on the Techniques Employed or Representations Made in Television Advertising for Sugared Foods

As we described in Section III-A(1)(b), supra, the techniques employed in televised advertising addressed to children include veiled suggestions that a particular product

will build strength or improve athletic performance; "motivating scenes" including the familiar tug-of-war or chase sequence in which one character demonstrates the product's desirability by wresting it from another; the use of super heroes; peer group acceptance appeals; and selling by characters who also appear in programming.

Television commercials for candy or other confections often stress that chewiness and stickiness are desirable qualities and that such products are desirable in proportion to the time they can be retained in the mouth. Television advertising for pre-sweetened cereals touts "sweetness", "chocolateyness", "honey taste", and "cookie flavor", etc., as desirable qualities for breakfast foods.

To the extent that unfairness or deceptiveness arise out of any of these techniques or representations, the question is whether a prohibition on these or other techniques or representations would be feasible and effective.

The first observation is that it would do little to redress the unfairness and deception inherent in addressing any television advertising to children who are too young to understand the selling purpose of, or otherwise comprehend or evaluate a commercial. Apart from this shortcoming, this solution has some positive features, but mostly negative ones. On the positive side, proscription of techniques and representations which are unfair or deceptive in advertising to

children has substantial precedent in Commission law. Techniques identified as deceptive were proscribed in Ideal Toy Co., 64 F.T.C. 297 (1964), Mattel, Inc., 79 F.T.C. 667 (1971) and Topper Corp., 79 F.T.C. 681 (1971) 428/ as they had the capacity to convey specific misimpressions regarding toys. More recently, the Commission prohibited the use of a "superhero", in Hudson Pharmaceutical Co., 89 F.T.C. 82 (1971), on the theory, as stated in the Complaint, that the use of that figure could convey misimpressions concerning the product, to the possible health detriment of the child viewer. 429/

But there are indications that proscriptions on representations or techniques might not be effective here. As we have shown, the claims and representations made in advertising addressed to children for sugared products tend to be so broad and unspecific that it would be hard to define the

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428/ The techniques proscribed in each of those cases included visual demonstrations which misrepresented the authentic qualities of the toys, for example, in Ideal, that a "Robot Commando" toy could be voice-controlled (Id. at 312-313); in Mattel that a "Ballerina" doll could dance without assistance (Id. at 668-669); and in Topper, that the "Johnny Lightning" car has doors and a hood which can open and close (Id. at 683-684).

429/ Paragraph 12 of the Complaint issued in Hudson alleges that the use of the hero figure can "lead children to believe that the endorsed product has qualities and characteristics it does not have". Id. at 86. Paragraph 13 alleges that advertising which features "Spiderman" can induce children to take excessive amounts of the advertised product which can cause substantial injury to them. Id.

representations to be prohibited. The association of characteristics such as "chocolate" or "marshmallow" flavor with concepts of good nutrition might be appropriate for prohibition. So too might various representations in commercials for candy and other confections, which promote those patterns of consumption that pose the greatest menace to dental health.

Proscribing certain techniques in commercials addressed to children--for example, animation, "host selling", authoritative voice-overs, user acceptance appeals, etc., also has its shortcomings. First, any list of proscribed techniques could be "invented around". Second, proscription of any technique would quickly invite almost insoluble arguments over whether a particular commercial really did employ that technique. Third, the unfairness and deceptiveness of current advertising for sugared products stems not so much from the use of any specific technique as from such factors as (a) the power of television as an advertising medium, (b) the well-financed expertise and sophistication of the advertisers, (c) the naivete of the audience, and (d) the harms that can be done both by the products themselves and by the advertising. Limitations on techniques are not likely to reach those factors.

The problems posed here are different from those posed in cases like Ideal Toy, Mattel, and Hudson, where a specific identifiable technique produced a specific deception.

Accordingly, limitations of the sort just discussed are not likely to be the optimum solution.

Should the Commission opt for limitations on techniques employed or representations made in television advertising for sugared food, it would face no greater First Amendment impediments than those previously discussed in the affirmative disclosures sections. Proscriptions on deceptive statements and techniques have been imposed for many years by the Commission and Virginia Pharmacy indicates that the First Amendment is no bar to such regulation. 425 U.S. at 771. Restrictions on particular representations or techniques leave open "ample alternative channels for communication of information" and would thus be permissible restriction. Id.

F. Bans on Television Advertising to Children

1. Bans on Television Advertising Directed to Audiences Composed of Substantial Numbers of Children Too Young to Understand the Selling Purpose of, or Otherwise Comprehend or Evaluate Commercials

We have shown that televised advertising addressed to young children, who do not yet understand the selling purpose of commercials, or who lack the ability to comprehend or evaluate such commercials, or a fortiori to pre-school

children who have even greater perceptual difficulties as to advertising, is inherently unfair and deceptive. The inherent unfairness and deceptiveness are so great that only a ban can effectively remedy them.

There are practical problems in declaring young children "off limits" to advertisers. First, it is difficult to identify precisely the age group that is too young to understand the selling purpose of, or otherwise comprehend or evaluate commercials. There is some indication that children eight and under fall into this group. Available audience surveys divide the child audience into 2-5 and 6-11 age groups, but do not specifically state the proportion of children in the audience who are under eight. Thus it may be impossible to know that proportion exactly, although supportable interpolations could be done for regulatory purposes from the available data 430/.

The next problem is that children under eight probably are almost never a majority of the audience. A. C. Nielsen data show that pre-schoolers constitute only some 20% of the

430/ Currently available demographic data and Nielsen data would provide sufficient information for making rather precise interpolations.

total viewing audience on Saturday mornings and on portions of Sunday mornings. 431/ Older children (ages 6 to 11) constitute some 30% of the viewing audience during the same periods. 432/ On weekday mornings and at other times pre-schoolers make up a lesser portion of the total viewing audience, ranging from a high of 10% on weekday mornings and diminishing at other times. 433/ Thus a ban designed to protect children below the age of eight would have to take effect when they constituted far less than a majority of the audience. One possible solution would be to have the ban take effect when younger children constituted more than "X" percent of the audience and adults constituted less than "Y" percent. This would have the effect, if appropriate values were given to "X" and "Y", of avoiding a ban when advertisers might be

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431/ A.C. Nielsen, Inc., Viewers in Profile, September 29, 1977 to October 26, 1977.

432/ Id. Data set forth in the NSF Report (p. 19, Table ii-5) confirms that Saturday morning and portions of Sunday morning are those periods when the largest percentage of the audience is children. Of those programs most heavily viewed by children, only those which appear on Saturday and on certain hours on Sunday morning are composed of audiences which are predominantly children.

433/ Id.

trying to reach the adult audience. If the Commission prohibited television advertising in programs 20% or more of whose audience is pre-schoolers, large amounts of television advertising on so-called children's programming--at least the Saturday morning hours--would be eliminated. This would confer a significant degree of protection on younger children, since the television advertising broadcast during those periods is prepared with the child audience in mind.

As an alternative, the Commission might adopt a scheme which eliminated television advertising whose "dominant appeal" was to younger children or which featured products which appealed primarily to, or were purchased primarily for, younger children.

We believe that these and related issues should be raised and thoroughly explored at the hearings that we recommend.

2. Bans on Television Advertising Directed to Children For Those Sugared Products Which Pose Serious Dental Health Risks

Both the ACT and CSPI petitions request the Commission to ban television advertising addressed to children for those sugared products which they believe pose the greatest harm to dental health. Bans are not imposed lightly and are appropriate only upon conclusion that less stringent

remedies are insufficient to cure the deceptiveness or unfairness. A case can be made, however, that the harms arising out of television advertising directed to children for the most cariogenic products are so great that they can not be remedied by any measure short of a ban.

The facts supporting a ban have been explored above. Briefly, the problem is that television exerts a uniquely powerful influence over children, that its influence is being used to persuade them to take substantial health risks that they are ill equipped to access, and that such advertisements skew their nutritional habits toward sugared products and away from more nutritious foods.

This is accomplished by using sophisticated psychological insights into how best to shape children's behavior. The success of the advertising in question seems to come in no small measure from exploitation of children's inherent inclination to watch and imitate adult behavior, and follow the lead of even such unlikely adult or cpmpanion surrogates as animated cartoon figures, wizards, and talking animals.

We submit that only a ban on advertising to children will suffice in the case of the advertising of those products which can most severely harm children's teeth. Affirmative disclosures of whatever variety, proscriptions on certain

techniques or representations, or limits on the numbers of television advertisements for sugared products which can be directed to children will have their deficiencies, as we have pointed out.

We have discussed above the elements which appear to distinguish the most cariogenic sugared foods, including, suitability for between-meal consumption. The ban we propose would apply only to television advertising for the most cariogenic products. And it would apply only to television advertising "directed to children."

3. The Authority of the Commission to Impose Bans on Television Advertising Addressed to Children, and the Precedents Which Show the Appropriateness of that Remedy in the Present Case

The Supreme Court has explicitly affirmed the Commission's broad powers to ban unfair or deceptive acts or practices. In Jacob Siegel Co. v. FTC, 327 U.S. 608, 612-13 (1946), the Supreme Court wrote that:

> "The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed.

> It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." (Emphasis added.) 434/

It was clear at the time of the Court's writing that the Commission's authority to fashion effective remedies extended to bans on practices found to be unfair, even where such practices were not, in addition, deceptive. Twelve year earlier, in Keppel, the Court had expressly sustained that sort of ban. 435/ That case involved selling to children by a method amounting to gambling which the Commission banned outright, choosing not, for example, to permit it to continue subject to some lesser restriction, such as disclosure of the risks involved.

In addition, the Supreme Court has recently analogized the Commission's power in enforcing Section 5 of the FTC Act to those of a "court of equity, " S&H, supra, 405 U.S. at 244.

434/ More recent expressions of the same point are FTC v. Ruberoid Co., 343 U.S. 470 (1952) and Moog Industries, Inc. v. FTC, 355 U.S. 411, rehearing denied, 355 U.S. 968 (1958).

435/ 291 U.S. 304 (1934).

The Commission itself, in construing these equitable powers, has said that they extend to "defin[ing] those practices which should be forbidden as unfair because contrary to the public policy declared in the [FTC] Act." All-State Industries of North Carolina, 75 F.T.C. at 491. (Emphasis added.)

More specifically, the Commission has on several recent occasions recognized that bans on broadcast advertising for products that pose health risks to children may be the only way to cure the unfairness and deceptiveness of such advertising. In both 1968 and 1969, the Commission expressed its concern about the unfair and deceptive impact on children of cigarette advertising on radio and television, and recommended to Congress that such advertising be banned. 436/ The Commission did not attempt to ban that advertising because Section 5 of the Federal Cigarette Labeling and Advertising Act 437/ revoked the Commission's authority to do so--in the context of that one particular situation, while leaving the Commission's authority to order that remedy otherwise intact.

436/ FTC, Report to Congress (June 30, 1969).

437/ Act of July 27, 1965, Pub. L. No. 89-92, Section 5, 79 Stat. 283 (The restriction on FTC action expired on July 1, 1971).

Little more than a year ago, the Commission considered the appropriateness of a ban on televised advertising directed to children for another product that posed health risks, children's vitamins. The complaint issued in Hudson Pharmaceutical Company 438/ raised issues analogous to those involved here. It alleged that child-directed television advertising for vitamins was unfair because children, by virtue of their youth and inexperience, lacked the capacity to determine whether taking vitamins was on balance, advisable and because such advertising had the tendency to induce overconsumption. 439/ The remedy imposed by the consent order was a ban on child-directed commercials--the very remedy previously determined by the National Association of Broadcasters to be appropriate with respect to such advertising. 440/

438/ 89 F.T.C. 82 (1977).

439/ By comparison, sugared products can pose serious dental health risks even when consumed in amounts which, by current American standards, are quite common. See Section III-C(4), supra.

440/ National Association of Broadcasters, "Advertising Guidelines: Non-Prescription Drugs," (Sept. 1, 1973) Guide I.F. (non-prescription drug commercials shall avoid approaches tending to capture the attention of children).

Another pertinent line of authority involves bans which the Commission has imposed on the use of deceptive trade names. There are many such cases, starting with FTC v. Algoma Lumber Co., 291 U.S. 67 (1934), and the rule that emerges is that the Commission has the power to impose such bans, provided that it has considered and rejected less stringent remedies as inadequate. A sampling of these cases is set forth below. 441/ It should be noted that these cases have generally involved protecting adults against economic injuries--and not always economic injuries that are serious to individual consumers. The present case involves protecting children against risks to their health. Accordingly, the Commission's discretion in formulating an adequate remedy is, if anything, broader, and the appropriateness of a ban greater.

441/ Continental Wax Corp. v. FTC, 330 F.2d 475 (2d Cir. 1964) ("Six Month" excised from name of floor wax); Waltham Watch Co. v. FTC, 318 F.2d 28 (7th Cir. 1963) (excision of "Waltham" from name of imported clocks required unless qualifying words added); Bakers Franchise Corp. v. FTC, 302 F.2d 258 (3d Cir. 1962) ("Lite Diet" excised from bread name); Carter Prods., Inc. v. FTC, 268 F.2d 461 (9th Cir. 1958) ("Liver" excised from name of pills); Arrow Metal Prods. Corp. v. FTC, 249 F.2d 83 (3d Cir. 1957) ("Porcenamel" excised from name of awning products); Gold Tone Studios, Inc. v. FTC, 183 F.2d 257 (2d Cir. 1950) ("Gold Tone" excised from studio name); Deer v. FTC, 152 F.2d 65 (2d Cir. 1945) (FTC has discretion to determine whether "Manufacturing" must be excised from trade name); Charles of Ritz Distribs. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944) ("Rejuvenescence" excised from name of skin cream); Herzfeld v. FTC, 140 F.2d 207 (2d Cir. 1944) ("Mills" excised from trade name). The Third Circuit's recent holding in Beneficial Corp. v. FTC, 542 F.2d 611 (3d Cir. 1976), cert. denied, 430 U.S. 983 (1977) is not to the contrary. The Commission was reversed there only because it had failed first to consider affirmative disclosure as a less stringent remedy.

The principal question raised by a prohibition on advertising to the youngest children is the extent to which it would undercut the financial support for children's programming and ultimately reduce or eliminate it. Staff believes this question is most appropriately addressed in rulemaking proceedings where relevant financial and related information in the possession of the television networks, advertisers and others can be analyzed. For this reason, we propose that the Notice of Proposed Rulemaking call for comment on this question.

However, there are several factors which should be taken into consideration in weighing the possibility that prohibitions on television advertising directed to young children would undermine children's programming.

First, unfair or deceptive advertising in any other context would not be tolerated by the Commission merely because of a claim that its elimination would undermine the programming it currently sustains.

Broadcast licensees are required by the 1934 Communications Act to operate in the "public interest, convenience, and necessity." See, e.g., 47 U.S.C. §309(a) (1970). The Federal Communications Commission has interpreted the "public interest" standard to require broadcasters to serve all

significant segments of its listening audience, and has expressly included children in this definition. Broadcast licensees are therefore required, as a condition of their license, to provide programming for young children. As the Commission concluded in its 1974 Report and Order, Children's Television Programs, supra note 3, at 39397:

> "One of the questions to be decided here is whether broadcasters have a special obligation to serve children. We believe that they clearly do have such a responsibility.
>
> As we have long recognized, broadcasters have a duty to serve all substantial and important groups in their communities and children obviously represent such a group. Futher, because of their immaturity and their special needs, children require programming designed specifically for them. Accordingly, we expect television broadcasters as trustees of a valuable public resource, to develop and present programs which will serve the unique needs of the child audience.
>
> As noted above, the Federal Radio Commission and the Federal Communications Commission have consistently maintained the position that broadcasters have a responsibility to provide a wide range of different types of programs to serve their communities. Children, like adults, have a variety of different needs and interests. Most children, however, lack the experience and intellectual sophistication to enjoy or benefit from much of the non-entertainment material broadcast for the general public. We believe, therefore, that the broadcaster's public service obligation includes a responsibility to provide diversified programming designed to meet the varied needs and interests of the child audience."

* * *

"Even though we are not adopting rules specifying a set number of hours to be presented, we wish to emphasize that we do expect stations to make a meaningful effort in this area. During the course of this inquiry, we have found that a few stations present no programs at all for children. We trust that this Report will make it clear that such performance will not be acceptable for commercial television stations which are expected to provide diversified program service to their communities." Id.

* * *

"While we agree that a detailed breakdown of programming into three or more specific age groups is unnecessary, we do believe that some effort should be made for both pre-school and school aged children. Age specificity is particularly important in the area of informational programming because pre-school children generally cannot read and otherwise differ markedly from older children in their level of intellectual development. A recent schedule indicated that, although one network presented a commendable five hours a week for the pre-school audience, the others did not appear to present any programs for these younger children. In the future, however, we will expect all licensees to make a meaningful effort in this area." Id. at 39398.

Elimination of commercial support would not relieve licensees of their obligation to provide children with programming. See, e.g., FCC, Report on Public Service Responsibility of Broadcast Licensees (the so-called "Blue Book", 1946). But because the FCC has itself raised the question

whether advertising prohibitions would adversely impact on programming, see Children's Television Programming, supra, at 39397-98, we shall elicit comment from the FCC in the course of rulemaking proceedings.

Finally, as a practical matter, the elimination of some advertisements in programming addressed to young children would not likely cause broadcasters to abandon that group altogether. What is far more likely is that licensees would continue to serve this portion of their audience as they do other portions. In any case, we believe that issues posed by prohibitions should be addressed in rulemaking proceedings where the consequences of the proposed remedies can be examined in open forum.

4. The Definition of the Term "Advertising Directed to Children"

Obviously, the rule which ultimately emerges in this case must give content to the concept of television advertising "directed to children." One possiblity is to define that term to include television advertisements shown on programming whose audiences are composed of a majority--or a significant proportion, short of a majority--of children.

Such a definition should appropriately cover most of the Saturday and Sunday morning programs, children's after school programs as well as children's "specials." That definition should also include television advertising shown on other programs designed primarily for children. Additionally, it should cover television advertising whose "dominant appeal" is to children. Deciding when an advertisement has its "dominant appeal" to children might present problems, but presumptions could be created when a particular commercial employs devices or techniques common to children's advertising but which are not commonly seen in advertising addressed to adults.

Current industry regulations on children's television advertising promulgated by the National Association of

Broadcasters and the Children's Unit of the National Advertising Division are made applicable by criteria not very different than these. 442/ If those definitions are workable in the self-regulatory context, they ought to be workable in the context of trade regulation rules.

Another criterion for regulation is possible. Federal Communications Commission Broadcast License Renewal Form 303 requires each broadcaster to list and describe those programs "broadcast during the license period which were designed for children twelve years old and under" (Question 7). The Commission, therefore, could simply

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442/ The Children's Television Guidelines of the National Association of Broadcasters apply to:

> "[a]dvertising of products designed primarily for children, or to advertising designed primarily for children, or to advertising which is telecast during programs designed primarily for children, or within station breaks between such consecutive programs designed primarily for children." (Preamble, October, 1975)

The Children's Review Unit of the National Advertising Division of the Council of Better Business Bureaus extends its guidelines, inter alia, to:

> "[a]dvertising designed to appeal to children 11 years of age and under. This includes children's advertising which is broadcast in children's programs and programs in which audience patterns typically contain more than 50% children." (Principles, Paragraph [B])

prohibit commercials for those sugared products most dangerous to dental health in programs which the broadcast license defined as "designed for" such children. Comment should be elicited and testimony adduced during the hearings as to the appropriate coverage of these regulations.

VII. CONCLUSION

This Report has identified and discussed a broad range of remedies calculated to undo harms arising out of television advertising to children. The advantages and disadvantages of each of those remedies has been discussed and, as stated in the Introduction and Recommendations, the following represents the staff's judgment as to the appropriate action for the Commission to take.

The Commission should commence rulemaking proceedings under the Magnuson-Moss Federal Trade Commission Improvements Act to determine whether it should:

(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 directed to, or seen by, audiences composed of a significant proportion of older children for sugared food products, the consumption of which poses the most serious dental health risks;

(c) Require that televised advertising directed to, or seen by, audiences composed of a significant proportion of older children for sugared food products

not included in paragraph (b) be balanced by nutritional and/or health disclosures funded by advertisers.

We urge that rulemaking commence immediately.

APPENDIX A

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
PUBLIC HEALTH SERVICE
FOOD AND DRUG ADMINISTRATION
ROCKVILLE, MARYLAND 20857

DEC 19 1977

Honorable Michael Pertschuk
Chairman
Federal Trade Commission
Room 440
6th and Pennsylvania Avenue, N.W.
Washington, D. C. 20580

Dear Mr. Chairman:

I am writing to you to comment on the prospect of Federal Trade Commission action to regulate the advertising of food products to children, including but not limited to foods which contain large amounts of sugars.

As you are aware, the FDA recently received a report from the Life Sciences Research Office of the Federation of American Societies for Experimental Biology entitled "Evaluation of the Health Aspects of Sucrose as a Food Ingredient" (1976) (hereafter the LSRO Report). This is part of a more general review of food substances currently "Generally Recognized as Safe." On the basis of this comprehensive review of the evidence with respect to the potential health hazards posed by the current patterns of use of sucrose in the American diet, the report concluded that:

> "Reasonable evidence exists that sucrose is a contributor to the formation of dental caries when used at the levels that are now current and in the manner now practiced." (LSRO Report, p. 14.)

We have no reason to believe that the cariogenic qualities of other nutritive sweeteners in the diet are substantially different than sucrose, with the possible exception of xylitol, one of the sugar alcohols. However, xylitol is currently under question as to its possible carcinogenicity.

Little doubt exists that excess sugar in the diet contributes to dental caries. Although the degree of potential harm is controlled by many variables including the amount of sugar, the form of the food, and the manner in which the product is consumed in the diet, the introduction of large amounts of sugar into the diet at any time enhances the risk of tooth decay. Moreover, it seems clear that children are more vulnerable to dental caries 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.

In view of the large amounts of advertising--particularly television advertising--that are directed to children urging them to consume a seemingly endless variety of sugared products and the substantial likelihood that children will be unable to appreciate the long-term risks to dental health that consumption of these products will create, I strongly support action by the Federal Trade Commission to regulate the advertising of these products directed to children.

Sincerely yours,

Donald Kennedy
Commissioner of Food and Drugs

APPENDIX B

Public Message on Sugar and Dental Health
Council on Dental Health
American Dental Association

Sugar plays a pervasive role in American life. For too many people, it has, unfortunately, become associated with treats and comfort, with holidays and other good times as well as with quick energy pickups. The result is a society dependent on sugar and with little expectation in the near future of the development of an all purpose replacement for sugar.

The dental profession is concerned about the heavy consumption of sugar as a cause of tooth decay, but is fully aware that it is unrealistic to expect many patients to eliminate all sugar from their diets. To minimize the dental health hazards of sugar, dentists should inform their patients and the public on how to reduce sugar intake reasonably. This is the view of the American Dental Association Council on Dental Health and its committee on preventive dentistry, in consultation with experts on nutrition as related to dental health.

A sugar-rich diet contributes to the development of acid-producing bacteria (dental plaque) that stick to the teeth and cause cavities. Avoiding sugary foods could eliminate this cause of tooth decay.

Research studies show that the total amount of sugar eaten is not the only factor in decay. The frequency of eating sugary foods, the length of time they remain in the mouth and the physical form of the food (sticky sweets) are equally important. Most hazardous to dental health are sweet sticky snacks, hard candies, sugar-containing breath mints and cough drops, and sticky dried fruit such as raisins

The American Dental Association recommends the following to protect dental health:

1. maintain a balanced diet;
2. reduce the number of times sugar is eaten;
3. restrict sweets to meals, for instance, as dessert;
4. avoid between-meal snacks;
5. do not give sugared drinks to babies at bedtime;
6. watch for hidden sugars in prepared foods and buy low-sugar or sugar-free foods if possible;
7. use artificial sweeteners whenever possible;
8. brush and floss daily to remove disease-causing plaque from the teeth;
9. consult your dentist.

In an effort to reduce society's exposure to sweet snacks and to discourage children from becoming dependent on sweets, the ADA recommends the removal of sugar-containing products from school vending machines and school lunch programs and also has called for the elimination of advertising of sugar-rich products on children's television time.

APPENDIX C

COMMERCIAL PROGRAMMING

ABC-TV CHANNEL 7 NEW YORK

SATURDAY, SEPTEMBER 24, 1977 8:00AM - 1:30PM

8:00AM	SUPERFRIENDS	
8:01	BABY HEART BEAT	KENNER
	FRUIT CREMES	KEEBLER
8:14	COCOA PUFFS	GENERAL MILLS
	AERIAL ACES	KENNER
8:15	MAX MACHINE	SHAPPER
8:26	MR. CLOBBER GAME	GABRIEL
	LIFE SAVERS	
8:27	BABY THIS & THAT	REMCO
	STATION ID	
	VISITING NURSE SERVICE	
8:28	PSA NEW YORK AQUARIUM	
	STATION ID	
8:41	CHEERIOS	GENERAL MILLS
	LUCKY CHARMS	GENERAL MILLS
8:42	SPAGHETTI-O'S	FRANCO AMERICAN
8:46	ALPHA BITS	POST
	BUBBLE YUM BUBBLE GUM	
8:47	HOT WHEELS	MATTEL
8:52	PSA HEALTH	
8:53	COOKIE CRISP	
	MARCHING MICKEY	
8:54	TV PROMO	
8:56	SCHOOL HOUSE ROCK	
8:58	STRETCH MONSTER	KENNER
	STATION ID	
	McDONALD'S	
	STATION ID	
9:00AM	SCOOBY'S LAFF-A-LYMPICS	
	CORNY SNAPS	
	PAY DAY GAME	PARKER BROS
9:13	SUGAR BABY	NABISCO
	SUNTAN TUESDAY TAYLOR	IDEAL

9:14	MAX MACHINE	SHAPPER
	CAP'N CRUNCH	QUAKER OATS
9:24	CHEF BOY-AR-DEE ROLLERCOASTERS	AMERICAN HOME
	REESE'S PEANUT BUTTER CUP	
9:25	DONNY'N'MARIE DOLLS	MATTEL
9:26	PSA (SALVATION ARMY)	
	STATION	
9:27	FRUIT CREMES	KEEBLER
9:38	FARRAH DOLL	MEGO
	LIFE SAVERS	
9:39	WIZ WHEEL	MARX
	COOKIE CRISP	
9:47	McDONALD'S	
9:48	TRACER TRIGGER	
	STATION ID	
	McDONALD'S	
9:49	STATION ID	
	HERSHEY'S INSTANT	
10:07	SUPERSTAR BARBIE	MATTEL
	HONEY COMB CEREAL	
10:08	ALMOND JOY	PETER PAUL
	NERF FOOTBALL	PARKER BROS
10:20	MINI-WHEATS	KELLOGG'S
	CHEF BOY-AR-DEE RAVIOLI	AMERICAN HOME
10:21	PLAY-DOH	KENNER
	SCHOOL HOUSE ROCK	
10:25	SUPER SUGAR CRISP	
	AMERICAN HEART ASSOCIATION	
10:26	MUSEUM OF AMERICAN INDUSTRY	
	TV PROMO	
10:27	PLAY-N-MAKE	HASBRO
10:39	SUGAR BABIES CANDY	NABISCO
	RIGG IT ON	PARKER BROS
10:40	BUBBLE YUM BUBBLE GUM	
	SUGAR POPS	KELLOGG'S

10:52	WRAPPLES	KRAFT
	SLIME	MATTEL
10:53	PSA (ABC NUTRITION)	
	SCHOOL HOUSE ROCK	
10:58	SIT-N-SPIN	KENNER
	STATION ID	
	BURGER KING	
11:00AM	KROFFT SUPER SHOW	
11:01	KOOL-AID SOFT DRINK	
	PAY DAY	PARKER BROX
11:08	COCOA PUFFS	
	CHEERIOS	GENERAL MILLS
11:09	HAPPY BIRTHDAY TENDER LOVE	MATTEL
	BUBBLE YUM BUBBLE GUM	
11:26	McDONALD'S	
11:27	CORNY SNAPS	KELLOGG'S
	STATION ID	
	BURGER KING	
	STATION ID	
11:36	MAX MACHINE	SHAPPER
	FRUIT CREMES	KEEBLERS
11:37	CAP'N CRUNCH	QUAKER OATS
11:44	HERSHEY'S CHOCOLATE BAR	
	TENDER LOVIN' KISSES DOLL	MATTEL
11:45	APPLE JACKS	KELLOGG'S
11:53	BIG WHEELS	MARX
	SCHOOL HOUSE ROCK	
11:58	HONEY COMB CEREAL	
	STATION ID	
	CHICLETS GUM	
	STATION ID	

12:00N	WEEKEND SPECIAL: CHILDREN'S NOVEL FOR TELEVISION	
12:02	FARRAH FAWCETT DOLL	MEGO
	MAX MACHINE	SHAPPER
12:12	CAMPBELL'S SOUP.	
	6 MILL DOLLAR MAN DUAL SET	KENNER.
12:13	RIVERTON RIVET JET	PARKER BROS
	COWBOY DOLLS	GABRIEL
12:26	TV PROMO	
	JAWS GAME	TOCAL
12:27	SPACE FLIGHT	MEGO
	STATION ID	
12:28	BURGER KING.	
	STATION ID	
12:30PM	AMERICAN BANDSTAND	
	TRIDENT GUM	
	SEARS JEANS	
12:37	THREE MUSKETEERS BAR.	
	CLOSE UP TOOTHPASTE	
12:38	BRECK CLEAN RINSE	
	MAYBELLINE NAIL POLISH	
12:48	SURE DEODORANT	
	FRESHEN UP GUM	
12:49	TV PROMO	
12:57	ULTRA BRITE TOOTHPASTE	
	STATION ID	
	TV PROMO	
12:58	BURGER KING	
	STATION ID	
1:07	COVER GIRL MASCARA	
	COVER GIRL MAKEUP	
1:08	PEARL DROPS TOOTHPASTE	
	NESTLE'S QUIK	
1:18	DENTYNE GUM	
	CLAIROL SKIN MACHINE	

1:19	PSA (NAVY)
	SNICKERS CANDY BAR
1:24	CARESS SOAP
	TV PROMO
1:25	DYNAMINTS
	TV PROMO
	STATION ID
1:28	GETTY GASOLINE
	SANYA AUTO STEREO
	STATION ID

COMMERCIAL PROGRAMMING

CBS-TV CHANNEL 2 NEW YORK

SATURDAY, SEPTEMBER 24, 1977 8:00AM - 2:00PM

8:00AM	BUGS BUNNY/ROAD RUNNER	
8:01	SUNTAN TUESDAY TAYLOR	IDEAL
	CB McCALL RIG	MEGO
8:02	BIG WHEELS	MARX
8:17	HOT WHEELS	MATTEL
	SUPERSTAR BARBIE	MATTEL
8:18	POST SUGAR CRISP	POST
	MAX MACHINE	SHAPPER
8:20	IN THE NEWS	
	KICK & GO CYCLE	HONDA
8:22	TV PROMO	
	STATION ID	
8:23	ADVENTURE BUGGY	TONKA
8:37	TENDER LOVIN' KISSES	MATTEL
	SLIME	MATTEL
8:38	LUCKY CHARMS	GENERAL MILLS
8:53	BABY HEART BEAT	KENNER
	GIRDER PANEL SET	KENNER
8:54	SPAGHETTI-O'S	FRANCO AMERICAN
	CAP'N CRUNCH	QUAKER OATS
8:56	PSA (UNICEF)	
	IN THE NEWS	
8:57	FOREVER YOURS	MARS
	TV PROMO	
	STATION ID	
8:58	McDONALD'S	
9:00AM	MR. MAGOO	
	CAMPBELL'S SOUP	
	HONEY COMB	POST
9:12	HERSHEY BAR	
	NERF ROCKETS	PARKER BROS
9:13	CAP'N CRUNCH	QUAKER OATS
9:24	MR. GOODBAR	HERSHEY
	PUTT PUTT	MATTEL

	IN THE NEWS	
:26	RICE KRISPIES	KELLOGG'S
	TV PROMO	
	STATION ID	
9:29	CUSTOM VAN	TONKA
9:30AM	SKATEBIRDS	
9:33	HOT WHEELS	MATTEL
	KOOL-AID SOFT DRINK	GENERAL FOODS
9:34	HONEY COMB	POST
9:46	WRAPPLES	KRAFT
	STRETCH ARMSTRONG	KENNER
9:47	BIONIC CAR	KENNER
9:54	CHEERIOS	GENERAL MILLS
	LUCKY CHARMS	GENERAL MILLS
9:55	TV PROMO	
	BURGER KING	
9:56	STATION ID	
10:06	TUESDAY TAYLOR	IDEAL
	HERSHEY'S INSTANT	HERSHEY
10:07	McDONALD'S	
10:24	TENDER LOVIN' KISSES	MATTEL
	POWER SHIFTERS	MATTEL
10:25	TURN ON GAME	KENNER
10:26	IN THE NEWS	
	WEEBLES CIRCUS	ROMPER ROOM
	TV PROMO	
	STATION ID	
10:29	MIGHTY ADVENTURE BUGGY	TONKA
10:30AM	SPACE ACADEMY	
10:32	PULSAR MAN	MATTEL
	DONNY'N'MARIE	MATTEL
10:40	RIGG IT ON	PARKER BROS
	CAMPBELL'S VEG. SOUP	
10:41	BLIP GAME	TOMY
10:54	ALPHA BITS	GENERAL FOODS
	MAX MACHINE	SHAPPER

10:56	IN THE NEWS	
	KELLOGG'S BB	
10:57	MINI-WHEATS	KELLOGG'S
	TV PROMO	
	STATION ID	
10:58	$100,000 BAR	NESTLE'S
11:00AM	BATMAN	
11:01	HERSHEY'S INSTANT MIX	
	SSP TOY	KENNER
11:12	CRACKER JACK	
	McDONALD'S	
11:24	WRAPPLES	KRAFT
	POWER SHIFTERS	MATTEL
11:25	TV PROMO	
11:26	IN THE NEWS	
	FOREVER YOURS	MARS
	TV PROMO	
	STATION ID	
11:28	McDONALD'S	
11:30	TARZAN	
11:30	MAX MACHINE	SHAPPER
	HAMILTON BEECH PRODUCTS	
11:41	BIONIC CAR	KENNER
	MILKY TOY	KENNER
11:42	SLIME	MATTEL
11:54	MONSTER MANIA	MARX
	SUPER SUGAR CRISP	GENERAL FOODS
11:56	IN THE NEWS	
	KELLOGG'S BB	
	CORNY SNAPS	KELLOGG'S
	TV PROMO	
	STATION ID	
11:58	CUSTOM VAN	TONKA

12:00N	WACKO	
12:00	SPIROGRAPH	KENNER
	CHEERIOS	GENERAL MILLS
12:15	CAP'N CRUNCH	QUAKER OATS
	PULSAR MAN	MATTEL
12:16	BABY COME BACK	MATTEL
12:24	SUGAR CRISP	POST
	KOOL-AID	GENERAL FOODS
12:26	SUPER JOE	HASBRO
12:27	IN THE NEWS	
	TV PROMO	
	STATION ID	
12:28	McDONALD'S	
12:30PM	FAT ALBERT	
12:36	JAWS GAME	IDEAL
	MR. GOODBAR	HERSHEY
12:45	HOT WHEELS	MATTEL
	DONNY'N'MARIE DOLLS	MATTEL
12:46	ALPHA BITS	POST
12:54	NERFMAN	PARKER BROS
	WRAPPLES CARAMEL APPLES	KRAFT
12:56	IN THE NEWS	
	SUGAR CORN POPS	KELLOGG'S
	TV PROMO	
	STATION ID	
12:58	GREAT ADVENTURE	
1:00PM	SECRETS OF ISIS	
1:00	REESE'S PEANUT BUTTER CUP	
	FROSTED MINI-WHEATS	KELLOGG'S
1:09	PLAY-DOH FUZZY PUMPER	KENNER
	TREE HOUSE FAMILY	KENNER
1:10	SUGAR BABY	NABISCO
1:23	KOOL-AID	GENERAL FOODS
	SUGAR CRISP	POST
1:24	IN THE NEWS	

1:26	MARCHING MICKEY	
	TV PROMO	
	STATION ID	
1:28	BURGER KING	
1:30PM	CHILDREN'S FILM FESTIVAL	
1:30	BABY ALIVE STROLLER	KENNER
	MICRONAUTS	MEGO
1:39	ALPHA BITS	POST
	KOOL-AID MIX	GENERAL FOODS
1:40	BLIP GAME	TOMY
1:53	SUPERSTAR BARBIE	MATTEL
	CRACKER JACKS	
1:56	CORNY SNAPS	
	TV PROMO	
	STATION ID	
1:58	MAGIC COW	

COMMERCIAL PROGRAMMING

NBC-TV CHANNEL 4 NEW YORK

SATURDAY, SEPTEMBER 24, 1977 8:00AM - 1:00PM

8:00AM	C.B. BEARS	
8:00	APPLE JACKS	KELLOGG'S
	BIG WHEELS	MARX
8:08	FRUIT CREMES	KEEBLER
	BABY COME BACK	MATTEL
8:09	PSA (BETTER BUSINESS BUREAU)	
8:16	BABY HEART BEAT	KENNER
	CHEERIOS	GENERAL MILLS
8:27	SPIDERMAN VIEWER	GAF
	PROF. ROD & TURTLE RACE	GABRIEL
8:28	BURGER KING	
	STATION ID	
8:29	MERRY SCHOOL BUS	TOMY
	FROSTED MINI-WHEATS	KELLOGG'S
8:36	COCOA PUFFS	GENERAL MILLS
	BIONIC WOMAN CAR	KENNER
8:37	REESE'S PEANUT BUTTER CUP	
8:48	PULSAR MAN	MATTEL
	CRACKER JACKS	
8:56	CORNY SNAPS	KELLOGG'S
	CHARLIE'S ANGELS HOUSE	
	JR HALL OF FAME	
	McDONALD'S	
9:00AM	YOUNG SENTINALS	
	AERIAL ACES	KENNER
	B.C. EASY BAKE OVEN	
9:01	COCOA PUFFS	GENERAL MILLS
9:11	DONNY & MARIE DOLLS	MATTEL
	SUGAR BABY'S	NABISCO
9:12	CORNY SNAPS	KELLOGG'S
9:24	COOKY CRISP	
	NESTLE'S QUIK	
9:25	MARCHING MICKEY	
9:27	JR HALL OF FAME	
	BURGER KING	
9:30AM	ARCHIE/SABRINA	
	TV PROMO	
	CORNY SNAPS	KELLOGG'S

9:44	SUGAR FROSTED FLAKES	KELLOGG'S
	NESTLE'S QUIK	
9:45	JR CONSUMERS TIP	
9:53	McDONALD'S	
10:00	PLAY'N'MAKE	HASBRO
	SPAGHETTO-O'S	FRANCO AMERICAN
10:01	NOW-N-LATER CANDY	
	RICE KRISPIES	KELLOGG'S
10:02	MINI-WHEATS	KELLOGG'S
	MONSTER MANIA	MARX
10:13	HERSHEY'S INSTANT	
	BABY COME BACK	MATTEL
10:14	LUCKY CHARMS	GENERAL MILLS
10:25	COOKIE CRISP	
10:26	NERF FOOTBALL	PARKER BROS
	SUGAR BABIES CANDY	NABISCO
10:28	GREAT ADVENTURE	
10:30	MUHAMMAD ALI	
	McDONALD'S	
10:38	CORNY SNAPS	KELLOGG'S
	SUPERSTAR BARBIE	MATTEL
10:39	AMERICAN HEART ASSOCIATION	
10:47	SUPER JOE COMMANDER	HASBRO
	CRACKER JACKS	
10:56	CAPN CRUNCH	QUAKER OATS
	NERF MAN	PARKER BROS
	PHYSICAL FITNESS PROMO	
10:58	McDONALD'S	
	STATION ID	
11:00AM	THUNDER	
	HERSHEY'S INSTANT MIX	
	CORN POPS	KELLOGG'S
11:06	MOVIE PROMO	
	COOKIE CRISP	
11:07	CAMP FIRE	
11:17	CHARLIE'S ANGELS HOUSE	
	FOREVER YOURS	MARS
11:25	SUGAR BABIES CANDY	NABISCO
	SPAGHETTI-O'S	FRANCO AMERICAN
11:27	JR HALL OF FAME	
	BURGER KING	
11:27	STATION ID	

11:30AM	SEARCH AND RESCUE	
	LUCKY CHARMS	GENERAL MILLS
	FRUIT CREMES	KEEBLER
11:39	CORNY SNAPS	KELLOGG'S
	FOREVER YOURS	MARS
11:40	HOT WHEELS	MATTEL
11:49	MR. GOODBAR	HERSHEY'S
	MONSTER MANIA	MARX
11:56	SUGAR BABIES CANDY	NABISCO
	BLIP GAME	TOMY
11:58	McDONALD'S	
	STATION ID	
12:00N	BAGGY PANTS	
	POP TARTS	
	CHEF BOY-AR-DEE	AMERICAN HOME
12:08	SPECTOGRAPH	KENNER
	COOKIE CRISP	
12:09	NESTLE'S QUIK	
12:19	CAP'N CRUNCH	QUAKER OATS
	PETER PAUL CANDY BAR	
12:26	CHEERIOS	GENERAL MILLS
	STRETCH ARMSTRONG	KENNER
12:28	SHOP RITE MARKET	
	STATION ID	
12:30PM	RED HAND GANG	
	FROSTED MINI-WHEATS	KELLOGG'S
	6 MILL DOLLAR MAN MISSION CYCLE	KENNER
12:41	CHEERIOS	GENERAL MILLS
	TREE TOPS FAMILY LIGHTHOUSE	KENNER
12:42	PSA (HEW)	
12:49	TENDER LOVIN' KISSES	MATTEL
	FRUIT CREMES	KEEBLER
12:57	BLIP GAME	TOMY
	CRACKER JACKS	
12:58	BURGER KING	
	STATION ID	

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