THE KIDS DON’T STAND A CHANCE:
UNFAIR AND DECEPTIVE ADVERTISING IN
CHILDREN’S APPS

I. INTRODUCTION

The University of Michigan released a startling study (“the
Michigan Study”) in October 2018 which unveiled that “manipula-
tive and disruptive” advertisements are deceptively built into
phone applications (“apps”) designed for children. The results of
this study led members of the United States Senate and several
public interest groups to petition the Federal Trade Commission
(“FTC”) to investigate apps marketed specifically to children. The

1. Marisa Meyer et al., Advertising in Young Children’s Apps: A Content Analysis,

2. See Letter from Sens. Edward J. Markey et al. to Joseph Simons et al., Chair-
man, Fed. Trade Comm’n, (Nov. 13, 2018) (on file with author); Letter from James T.
Graves & Angela J. Campbell, Inst. for Pub. Representation, Georgetown Univ. Law
Ctr., to Donald S. Clark, Sec’y of the Comm’n, Fed. Trade Comm’n, & Andrew Smith,
current federal administrative regime for regulating deceptive advertising targeted at children, however, falls far short of what is necessary to enable the FTC or any other federal agency to respond to the revelations in the Michigan Study with meaningful protections for children.

Although the FTC has regulated children’s advertising on television for decades and the Children’s Online Privacy Protection Act (“COPPA”) of 1998 regulates the collection of children’s data online, no app-focused advertising legislation exists. Additionally, the Michigan Study is the first to assess advertising within children’s apps. Until now, research has been confined to investigating the educational quality of children’s apps. Moreover, the research that was used to draft the 1970s and 1990s legislation on children’s advertising was based on passive television ads. This is problematic because the Internet has largely replaced television as children’s preferred source of information and entertainment. The app industry contributed $92.1 billion to the world economy in 2018. Not only are app developers and advertisers using marketing tactics that have been prohibited in television advertising for decades, they have also come up with much more manipulative ways to market their products that were unfathomable when the current laws were drafted. Children today battle a completely different beast. App advertisements, unlike television commercials, are personally curated, covert, and relentless.


8. Marisa Meyer et al., Advertising in Young Children’s Apps: A Content Analysis, 40 J. DEVELOPMENTAL & BEHAV. PEDIATRICS 32, 37 (2019) (“W]e also documented advertising practices that used persuasive methods not typically found in TV advertising. By embedding ad videos within gamified features, such as coin/token collection or ability to advance to the next level, children might be persuaded to consume more advertising, and interrupt their play, more than expected.”).
The Kids Don’t Stand a Chance

As mentioned above, the Michigan Study is the first to look at advertising practices in children’s apps, and its results raise a plethora of concerns. Foremost, children’s developmental health and well-being are at risk. Also, the FTC in its regulatory role is failing to keep up with the rapidly evolving app technology. App developers are violating basic advertising principles that the FTC has applied to other media for nearly a century. Additionally, with the advent of behavioral advertising, privacy and data collection are at issue.

Even worse is the fact that most adults do not realize that many children’s apps and games, as well as the ads within apps, are created by psychologists and other cognition experts who use advanced “behavior change” techniques to make these technologies as addictive and as influential as possible. The American Psychological Association’s (“APA”) Ethics Code recognizes that children’s developmental “vulnerabilities impair autonomous decision making.” In other words, children do not have the ability to make cognizant choices when viewing ads. Thus, behavioral advertising techniques are particularly unethical when their subjects are children.

Children should be afforded special protection. This Comment echoes the recent calls for the FTC to make sure that children’s app developers are complying with existing federal advertising laws, as well as address the gap in federal law on in-app advertising. In light of rapidly developing and readily accessible technology, a human-centered reevaluation of advertising regulation is needed.

This Comment will proceed as follows. Section II will present

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9. There have been other studies on the educational quality of apps, but none on “extraneous design features,” i.e., advertisements. See Marisa Meyer et al., Advertising in Young Children’s Apps: A Content Analysis, 40 J. DEVELOPMENTAL & BEHAV. PEDIATRICS 32, 36 (2019).

10. Behavioral advertising is the practice of collecting consumers’ information to create targeted ads based on their browsing behavior. Advertisers may use “the pages browsed on a website, time spent on the site, clicks made, recency of the visit and overall interaction with the site” to create a user profile. Advertisers can then use this profile to divide users into categories by browsing type. Each type of browser is shown ads based on their interest and type. See George Mathew, Behind the Scenes of Behavioral Advertising, NELPATEL (2014), https://neilpatel.com/blog/behavioral-advertising.


12. Id.
the scope of the children's federal advertising regulations currently in place. Section III evaluates two 2018 studies on unfair and deceptive advertising and false advertising in children’s apps and the adverse effects of these marketing tactics on America’s youth. Section IV will propose a solution to this problem.

II. CHILDREN'S ADVERTISING REGULATION IN AMERICA

Two federal agencies, the Federal Trade Commission (“FTC”) and the Federal Communications Commission (“FCC”), are chiefly responsible for regulating advertising to children. Both of these agencies have the power to enforce different laws and enforces those laws in different ways. The purpose of this Section is to highlight advertising practices that have been restricted on television and the internet to make it more clearly evident that the implementation of these same practices within apps is unethical and requires federal regulation.

An advertisement will be unlawful if it contains “unfair or deceptive acts or practices in or affecting commerce” in violation of Section 5(a) of the Federal Trade Communications Act (“FTCA”), the FTC’s central consumer protection statute. Unfair” practices are those that “cause or [are] likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”

A practice will be considered unfair if it is “immoral or unethical or offends public policy as established by statute, common law, industry practice or otherwise.” A practice is deceptive if: “(1) there is a representation, omission, or practice, that (2) is likely to mislead consumers acting reasonably under the circumstances,

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13. Regulations are “a set of rules set out by an agency of either a state or federal government, that is a department, at the direction of the legislative body in the form of a statute.” DEAN K. FUEROGHNE, LAW AND ADVERTISING: A GUIDE TO CURRENT LEGAL ISSUES 369 (Rowman & Littlefield 4th ed. 2017).
15. Substantial injury may be found where monetary harm, coercion into buying unwanted products, or health and safety risks have occurred. DEAN K. FUEROGHNE, LAW AND ADVERTISING: A GUIDE TO CURRENT LEGAL ISSUES 55 (Rowman & Littlefield 4th ed. 2017).
and (3) the representation, omission, or practice is material.”18 A representation is material when it affects the consumer’s decision in making her purchase.19 In other words, the consumer would have chosen differently without the deceptive information. A practice that is not deceptive can still be considered unfair for FTCA purposes.20 The FTC uses the “reasonable man” standard in evaluating an ad’s message.21 This flexible standard depends on the susceptibility of the audience to whom the ad is directed.22 Thus, an adjustment will be made when evaluating a child’s interpretation.23

The FTC also regulates ads that are blatantly false.24 False advertising is a specific claim under the theory of deceptive advertising.25 The use of the word “free” in an ad is heavily scrutinized. An ad that claims to offer a thing for free must require no consideration.26 To avoid scrutiny, “free” must mean that the consumer is required to pay and do nothing.27 This Section will outline the relevant regulatory schemes, beginning in the 1970s, as they pertain to child consumer protection over advertising on television and the internet based on these FTC principles.

A. TELEVISION

Currently, television is the only medium where advertising to children is directly regulated. In 1970, a children’s advocacy group, Action for Children’s Television, petitioned the FCC to ban advertising on children’s television programs.28 In response, the FCC conducted a rulemaking proceeding and issued the Children’s

19. Id. at 42.
20. Id. at 8.
21. Id. at 45-47.
22. Id. at 48.
24. See id. at 62.
25. See id. at 61.
26. Consideration is defined as “some right, interest, or responsibility, given, suffered, or undertaken by the other.” Consideration, BLACK’S LAW DICTIONARY (9th ed. 2009).

The 1974 Policy Statement set out several new regulations for television advertisements to children based on research that showed that children are cognitively incapable of distinguishing commercials from programming. These new requirements also stemmed from Section 317 of the Communications Act, which states that broadcast stations must identify what content is aired in exchange for payment and who funded the paid content. The reasoning behind these new regulations was 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.” This idea is referred to as the “separations principle.”

The FCC concluded that omitting this separation or “bumper” between programming and commercials would be contrary to “basic fairness” because studies in support of the Policy Statement showed that children do not have the cognitive ability to distinguish commercials from other content. Children cannot deduce that the fundamental purpose behind an advertisement is to encourage them to purchase the thing advertised. Stations began inserting bumpers between children’s programs and commercials. Bumpers refer to messages such as “We’ll be right back after this commercial break,” to explicitly separate programming and commercials.

The FCC additionally prohibited “host-selling,” based on the separations principle. Under the FCC’s definition, host-selling is
“the use of program talent or other identifiable program characters to deliver commercials during or adjacent to children’s programming featuring that character.”\textsuperscript{38} Host-selling takes “unfair advantage of the trust which children place in program characters.”\textsuperscript{39} Despite a decades-old implementation of the separations principle on television, many children’s apps violate the separations principle because they employ host-selling and provide no separation between ads and app content, as discussed in Section III \textit{infra}.

However, the 1980s, brought a shift in social and political attitudes toward federal regulation. In 1984, the FCC deregulated television and lifted all limits on advertisements, including those running during children’s programs.\textsuperscript{40} As a result, from 1983 to 1987, the number of programs designed to promote licensed characters, such as Strawberry Shortcake or Transformers, grew from thirteen to over seventy.\textsuperscript{41} Revenues from these products went from $26.7 billion to $64.6 billion.\textsuperscript{42} In response, Congress passed the Children’s Television Act of 1990 (“CTA”), which limited the number of advertisements per hour of programming.\textsuperscript{43} Advertising limits were subsequently added to children’s programs shown on cable television and satellite services.\textsuperscript{44} Notably, no such restrictions exist for in-app advertising.\textsuperscript{45}

The FCC’s children’s advertising policies have hardly changed since 1974. While these policies may have limited children’s exposure to harmful or manipulative advertising on television, the FCC has not updated its rules to account for technological developments

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\item \textsuperscript{38} Angela J. Campbell, \textit{Rethinking Children’s Advertising Policies for the Digital Age}, 29 LOY. CONSUMER L. REV 1, 17-18 (2016).
\item \textsuperscript{40} Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076, 1102 (1984), overruled by Action for Children’s Television v. F.C.C., 821 F.2d 741, 750 (D.C. Cir. 1987); see also Angela J. Campbell, \textit{Rethinking Children’s Advertising Policies for the Digital Age}, 29 LOY. CONSUMER L. REV 1, 18 (2016).
\item \textsuperscript{42} Id.
\item \textsuperscript{43} 47 U.S.C. § 303a (2019).
\item \textsuperscript{45} See Marisa Meyer et al., \textit{Advertising in Young Children’s Apps: A Content Analysis}, 40 J. DEVELOPMENTAL & BEHAV. PEDIATRICS 32, 37 (2019).
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since 2006.\textsuperscript{46} Considering the rapid technological developments that seem to occur with each passing year, thirteen years is a significant gap in technology and regulation. Importantly, the FCC only has the authority to regulate broadcast, cable, and satellite television. Its rules do not apply to video games or, most importantly for the purposes of this Comment, online videos or apps. However, it is crucial that the principles underlying the regulation of children’s advertising on television be applied to digital media.

The FTC similarly made its own attempt to police advertising to kids on television via its “unfair or deceptive practice” authority under Section 5 of the FTCA, but the agency was derailed as a result of industry lobbying and the deregulation agenda of the political branches of the 1980s. In 1975, Congress passed the Federal Trade Commission Improvement Act, which gave the FTC limited rule making power to enforce Section 5.\textsuperscript{47} Two advocacy groups, Action for Children’s Television and the Center for Science in the Public Interest, filed petitions in an attempt to take advantage of the FTC’s new rule making authority.\textsuperscript{48} The petitions claimed that the majority of advertising to children for sugary foods was unfair and deceptive under Section 5.\textsuperscript{49} This spurred the FTC to launch a major investigation into children’s advertising on television.\textsuperscript{50}

The Agency issued a report in 1978, which recommended a rule that would “(1) prohibit all television advertising 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; and (2) ban televised advertising of sugary products to older children, due to health risks.”\textsuperscript{51} As a result of these recommendations, a hearing was held before an administrative law judge.\textsuperscript{52} This hearing produced 60,000 pages of expert testimony and 6,000 pages of

\begin{thebibliography}{9}
\bibitem{petition} Angela J. Campbell, \textit{Rethinking Children’s Advertising Policies for the Digital Age}, 29 \textit{LOY. CONSUMER L. REV.} 1, 22 (2016).
\bibitem{ftc_report} \textit{Id.} (citing FTC, \textit{REPORT ON TELEVISION ADVERTISING TO CHILDREN 2-4} (1978)).
\bibitem{ftc_rules} \textit{Id.}
\bibitem{ftc_final} \textit{Id.} at 22-23.
\bibitem{ftc_hearing} \textit{Id.} at 23 (citing FTC, \textit{FINAL STAFF REPORT AND RECOMMENDATION 13} (Mar. 31, 1981)).
\end{thebibliography}
testimony from some of the world’s top health, child psychology, and nutrition experts.53

However, the proceeding eventually ended without producing any changes.54 The advertising industry laid siege to the proposal.55 The advertising lobby successfully convinced Congress to revoke the FTC’s authority to conduct rulemaking proceedings.56 This revocation was also likely due to a shifting political climate which favored deregulation, developments in corporate lobbying, and the election of President Reagan.57 In an editorial written in opposition to the proposal, the Washington Post referred to the FTC as a “National Nanny.”58 The Agency was briefly shut down after Congress allowed its funding to lapse.59 The FTC has all but ignored the issue of advertising to children ever since.

B. THE INTERNET

The FTC enforces numerous consumer protection statutes, including the Children’s Online Privacy Protection Act (COPPA). COPPA addresses the online data collection part of the problem identified in the Michigan Study, but it does not address advertising. Since the advent of the Internet in the 1990s, online consumer privacy protection has become a growing concern. After the FTC


56. Id.

57. Id. at 84.

58. Id.

So the proposal, in reality, is designed to protect children from the weakness of their parents—and the parents from the wailing insistence of their children. That, traditionally, is one of the roles of a governess—if you can afford one. It is not a proper role of government. The government has enough problems with television’s emphasis on violence and sex and its shortages of local programming, without getting into this business, too.


investigated the website kidscom.com for collecting children’s data in 1996, FTC staff issued a press release stating that:

[I]t is a deceptive practice to represent that a Web site is collecting personally identifiable information from a child for a particular purpose, when the information also will be used for another purpose that parents would find material, in the absence of a clear and prominent notice to a parent regarding the practice. Additionally, the FTC staff letter concludes that a Web site that has collected identifiable information about children must obtain parental consent prior to releasing that identifiable information to third parties.\(^{60}\)

The FTC proposed that Congress address the problem.\(^{61}\) Congress later passed COPPA. This Act requires operators of commercial websites and online services directed at children under thirteen to notify parents of website information collection and obtain “verifiable parental consent” for the collection.\(^{62}\) COPPA prohibits the collection of “identifiers for the purpose of behaviorally targeting advertising to a specific child.”\(^{63}\) Operators\(^{64}\) are forbidden from “amass[ing] a profile on the individual child user based on the collection of such identifiers . . . in order to make decisions or draw insights about that child.”\(^{65}\)

Also prohibited is the “conditioning a child’s participation in a game, the offering of a prize, or another activity on the child


\(^{63}\) Children’s Online Privacy Protection Rule, 16 C.F.R. § 312 (2013); see also Jon Leibowitz, Chairman, FTC, Statement on Updated COPPA Rule, (Dec. 19, 2012), https://www.ftc.gov/sites/default/files/documents/public_statements/remarks-ftc-chairman-jon-leibowitz-prepared-delivery/121219coppastmt.pdf (explaining that “[w]e also extend the Rule to cover persistent identifiers like IP addresses and mobile device IDs, which could be used to build massive profiles of children by behavioral marketers”).


The term “operator” means any person who operates a website located on the Internet or an online service and who collects or maintains personal information from or about the users of or visitors to such website or online service, or on whose behalf such information is collected or maintained, where such website or online service is operated for commercial purposes, including any person offering products or services for sale through that website or online service, involving commerce among the several States or with 1 or more foreign nations.

disclosing more personal information than is reasonably necessary to participate in such activity.” COPPA is only applicable to online matter knowingly targeted at children under the age of thirteen. It is not always clear whether a service is child-directed, and, regardless, many websites have privacy policies stating that they do not knowingly collect information from children under age thirteen.

The FTC has limited rule making power, so it usually enforces its protective measures by filing complaints in either administrative or federal court. The main drawback of these enforcement actions is that they only apply to the parties to the suit. In other words, a finding against a company in an enforcement action will not prevent other non-party companies from engaging in the same unfair or deceptive behavior that led the FTC to file a complaint. With the 1994 amendments to the FTCA, however, the Commission is allowed to create rules under the unfairness definition when there is evidence that indicates a widespread pattern of unfair or deceptive practices. Recently, the FTC has brought several significant enforcement actions for COPPA violations involving unauthorized in-app purchases, but not data collection.

In sum, the existing regulatory legislation for children and advertising exists only in the Children’s Television Act. As evidenced in the next Section, some of the marketing methods currently being employed in children’s apps would have been unfathomable when the CTA was drafted in 1990. App ads are “personalized, on-demand, and embedded within interactive digital play experiences,” making them more deceptive than television commercials.

69. Id. at 57.
Alternatively, other in-app marketing tactics directly violate the separation principles upon which the CTA was drafted. The rapidity with which apps can be taken down or changed also makes them harder to regulate than television. Thus, most in-app advertising methods go “virtually” unregulated.

COPPA, however, protects kids from being tracked and their data from being collected. This includes data collection for the purpose of creating targeted ads. Therefore, apps that use behavioral marketing to create targeted ads for users under thirteen years of age violate COPPA. Although the FTC has brought a handful of enforcement actions for in-app charges, it has not yet taken any steps to regulate in-app advertising to children. When the FTC becomes aware of industry-wide violations, it has the discretion to create rules. Current laws for policing advertising to kids are ill-suited for providing a meaningful check on the deceptive tactics being used in the online media that today are kids’ primary source of electronic entertainment. This problem requires legislation specific to in-app ad to incorporate changes in technology and marketing.

III. UNIVERSITY OF MICHIGAN STUDY & CCFC’S COMPLAINT

Two studies published in late 2018 present serious ethical concerns regarding content and marketing tactics used in children’s apps promoted by Google. The first study, performed by researchers at the University of Michigan, was conducted “to address gaps in research and policy by evaluating the prevalence of different advertising approaches in popular apps played by young children.” The study looked at the 135 most commonly installed apps (free and paid) from the Google Play store that are marketed as appropriate for children under five years of age.

73. Id. at 33.
74. Id. It is worth noting that the Michigan Study did not look at apps from the Apple App Store. The Apple App Store Review Guidelines say that “apps must not include links out of the app, purchasing opportunities, or other distractions to kids unless reserved for a designated area behind a parental gate.” App Store Review Guidelines, APP STORE (Sept. 12, 2019), https://developer.apple.com/app-store/review/guidelines/. Whether these guidelines are adhered to is unknown. The study notes that it chose to look at Android downloads because Android is the most common operating system among United States families, and thus, would provide a general experience. Marisa Meyer et al., Advertising in Young Children’s Apps: A Content Analysis, 40 J. DEVELOPMENTAL & BEHAV. PEDIATRICS 32, 39 (2019) (citing Smartphone Owners Are
After the Michigan Study was published, the Campaign for a Commercial Free Childhood (CCFC) and several nonprofits and children’s interest groups\(^\text{75}\) banded together to gather data in support of a written complaint (“the Complaint”) to the FTC.\(^\text{76}\) The Complaint examined seventy-five apps found in the Family Section of the Google Play Store.\(^\text{77}\) Family Section apps include only apps that have been accepted into Google's Designed for Families program.\(^\text{78}\) Apps in this program must adhere to special criteria, including complying with legal obligations, presenting appropriate content, and following format requirements.\(^\text{79}\) Apps that are geared toward children must join the program.\(^\text{80}\) Participation in the program benefits developers because Designed for Families program apps are featured in Google’s browsing experience.\(^\text{81}\) The Complaint alleges that Google makes false representations because it is aware that many of these apps do not comply with Designed for Families program guidelines and also violate COPPA.\(^\text{82}\)

The following section presents a compilation of the results of


\(^\text{76}\) See CCFC Complaint, supra note 75.

\(^\text{77}\) CCFC Complaint, supra note 75, at 6.

\(^\text{78}\) CCFC Complaint, supra note 75, at 12. “Google’s Safety Center purports to recommend appropriate content for children. The Safety Center directs parents to ‘look for the family star badge on apps and games. The star badge signifies that the content has been more carefully reviewed and it was developed with kids in mind. It also includes a suggested age range for the content.’ These advisory statements are clearly intended to communicate to parents that the apps in the Family section of the Play Store, as well as apps marked with the family-friendly star, are not just suitable for children but are appropriate for children to play without parental supervision.” CCFC Complaint, supra note 75, at 19.


\(^\text{80}\) Id.


\(^\text{82}\) See CCFC Complaint, supra note75, at 17.
the Michigan Study and CCFC’s investigation. The results are organized into the following categories: (1) apps that contain manipulative and deceptive marketing practices because they violate the separations principle underlying the CTA; and (2) apps that constitute false advertising by either claiming to be educational or free when, in fact, they are not.

A. UNFAIR AND DECEPTIVE ADVERTISING IN CHILDREN’S APPS

1. APPS EMPLOY HOST-SELLING

As stated in the previous section, the FCC defines host-selling as “the use of ‘program talent or other identifiable program characteristics to deliver commercials’ during or adjacent to children’s programming featuring that character.” 83 Host-selling is problematic (and banned on television) because research shows that children trust and pay more attention to familiar characters. 84 Children are more easily influenced when these characters encourage them to make purchases. 85 This advertising practice, illegal during children’s television programming, is fundamentally unfair to child consumers. Yet, multiple apps designed for children heavily employ host-selling.

For example, in PAW Patrol: Air and Sea Adventures, the commercial characters are not only the object of gameplay but also have interactions with the user. 86 Characters make faces indicating feelings of disappointment when the user does not click on locked items that require payment. 87 App characters also show disapproval when the player is unable to accomplish a certain mission because he did not make a required purchase. 88 The Michigan Study stated that such tactics “could be characterized as social pressure or validation” and “may also lead children to feel an emotionally charged need to make purchases.” 89 In Doctor Kids, the main character bursts into tears if the player does not make an in-

85. Id.
86. Id. at 34.
87. Id.
88. Id.
app purchase. In *Barbie Magical Fashion*, Barbie narrates and specifically encourages users to use “locked” items that require making a purchase.

Most problematic of the host-selling examples was *Strawberry Shortcake Puppy Palace*. In this app, Strawberry Shortcake instructs users to choose a puppy to play with, but only one out of eight puppies can be played with for free. Every other puppy is locked. If the child selects a locked puppy, Strawberry Shortcake says, “Oops. To play with [name of puppy], you’ll need to get the puppy pack. Or you can unlock everything and get the best deal.”

Throughout the game, Strawberry Shortcake has thought bubbles. Some tell the user that the puppy is sad, and the user should give the puppy what it wants. But oftentimes the item that the puppy “wants” is locked, and when the child selects it, Strawberry Shortcake tells the child to buy “the activities pack to keep the puppy happy.”

Host-selling is blatantly obvious when a well-known character encouraging children to make a purchase so that a puppy will not be sad. Host-selling is an overly aggressive commercial tactic, and its prohibition was one of the FTC’s first children’s television regulations. Thus, this practice should similarly be regulated in apps.

2. THE SEPARATION BETWEEN APP CONTENT AND ADS IS INADEQUATE

Television advertisers are required to clearly distinguish between ads and programming because “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.” However, in-app ads are subject to no such requirement and are thus often formatted in problematic ways. This includes ads that are hidden and indistinguishable from game content, ads that incentivize children to watch video advertisements.

90. CCFC Complaint, supra note 75, at 38.
92. CCFC Complaint, supra note 75, at 40.
93. CCFC Complaint, supra note 75, at 40.
94. CCFC Complaint, supra note 75, at 40.
95. CCFC Complaint, supra note 75, at 41.
In its recent Policy Statement on Deceptively Formatted Advertisements, the FTC remarked, “Advertising and promotional messages that are not identifiable as advertising to consumers are deceptive if they mislead consumers into believing they are independent, impartial, or not from the sponsoring advertiser itself.” Moreover, ads that are indiscernible from the app’s game directly violate the separations principle discussed in Section II(B). Some apps, however, displayed icons with misleading or camouflaged symbols such as “$” or a teddy bear, which if clicked, would bring up a video for other apps, toys, or food. For example, in Talking Tom, a floating present drops into the background of the game. If the user assumes the present is a part of the game clicks on it, the user is instead prompted to “watch videos and win.” Ads that appear as symbols, logos, or pictures are inherently deceptive in that they are indecipherable from gameplay.

Researchers in both studies witnessed many ads that prompted or even incentivized players to watch videos. The Michigan Study also noted “video” icons that often appeared in gameplay items, which prompted users to watch video ads to get coins or other tools that would make playing the app easier. For example, in Masha and The Bear Vet Clinic, the player can obtain faster or more effective medical tools by watching a video ad. Similarly in My First High School Crush, the object of which is to get the character’s high school crush to “like her”, the player must click on an ad before using the materials required to play the game. In ColorMinis Kids- Color & Create Real 3D art, before the child can use the app, she must “Press Here To Get” crystals. If the child presses the button, another image pops up and tells the child to “watch the Ad” for one crystal. Each ad is 30 seconds long, and the child needs eight crystals to play. A child would have to

99. See id.
100. Id.
101. Id. at 35.
102. Id.
103. CCFC Complaint, supra note 75, at 35-36.
104. CCFC Complaint, supra note 75, at 34.
105. CCFC Complaint, supra note 75, at 34.
106. See CCFC Complaint, supra note 75, at 34.
watch 4 full minutes of ads to begin playing the game. These video ads include banner ads, whole video ads, and ads that make it physically difficult for children with developing motor skills to click out of. The Michigan Study stated that 35% of all apps and 54% of free apps featured ads that suddenly interrupted play or appeared between levels in a game.

3. HYBRID MONETIZATION VIOLATES COPPA

Major app sellers such as Google have implemented a particularly manipulative marketing tactic known as “hybrid monetization.” Hybrid monetization directly violates the provision in COPPA prohibiting operators from “amassing a profile on an individual child user based on the collection of identifiers . . . in order to make decisions or draw insights about that child.” AdMob, a mobile advertising company, published a study in 2015 outlining effective monetization models for app building. AdMob looked at over 10,000 top Android apps, arguing that adding advertisements to games with in-app purchases can bolster monetary income by 117%. “Hybrid” references a mixing of revenue sources within an app, including advertising and in-app purchases. AdMob’s study categorizes app users by their behavior types so that the app developer can maximize profitability based on users’ tracked behavior models. AdMob proposes cajoling users with how-to videos and “free gifts” to familiarize them and induce loyalty.

107. CCFC Complaint, supra note 75, at 34.
109. See id. at 34-35.
113. See id.
114. See CCFC Complaint, supra note 75, at 15.
115. See CCFC Complaint, supra note 75, at 15 n.52 (citing Sean Meng, GOOGLE AdMob, Charge your game monetization with a winning combination of in-app purchases and ads (Dec. 1, 2015), https://www.blog.google/products/admob/charge-your-game-monetization-with-admob/) (“distinguishing ‘earners, burners, learners, and turners’ and suggesting different monetization strategies for each”).
The use of this hybrid monetization model in children’s apps is crafted to spur engagement and purchases. It is highly problematic for children because the AdMob study deliberately advises developers to target, track, and manipulate particular types of users into making purchases based on the collection of their data. AdMob’s study points to the success of multiple companies who use the hybrid monetization model, many of which are in the Family section of the Play Store.\textsuperscript{117}

**B. FALSE ADVERTISING IN CHILDREN’S APPS**

As mentioned earlier, under the FTC’s definition of “free”, an ad that claims to offer a thing for free must require no consideration.\textsuperscript{118} However, researchers noted that many free apps were significantly more difficult to play until a purchase was made.\textsuperscript{119} Therefore, the “free” product cannot be fully used unless the user spends money. 30% of all apps and 41% of all free apps offered tools or lives available for purchase to make playing the app easier.\textsuperscript{120} Thus, this Comment argues that apps that claim to be free but cannot be fully used unless in-app purchases are made constitute false advertising.

For example, in *Clawbert*, users could purchase coins and jewels to hatch eggs more quickly or to refill the game machine.\textsuperscript{121} If these items were not purchased, the user had to wait one to two hours for the machine to refill itself.\textsuperscript{122} In *Rescue Bots*, only two free bots are available, but the user cannot win the game without buying the other bots.\textsuperscript{123} Similarly, in *Strawberry Shortcake Bake Shop*, the user has the option between a free wooden tool and a for-purchase modern tool to cut a cake.\textsuperscript{124} Strawberry Shortcake always tells the user that the locked tool is superior.\textsuperscript{125} Researchers from the Michigan Study noted that it was difficult to cut the cake

\begin{footnotes}
\item[118] See supra Section II.A.
\item[120] Id.
\item[121] Id.
\item[122] Id.
\item[123] Id.
\item[125] Id.
\end{footnotes}
with the free wooden knife, but with the purchased metal knife, the cake was cut in a single motion. The object of the game is to fill dessert order for Strawberry Shortcake’s friends. When the player fills an order, she gets a star. After a few levels, however, the player cannot continue without making an in-app purchase. If the player chooses not to make the purchase, the wrong dessert is made, and Strawberry Shortcake tells the player, “we didn’t fill this order, so this dessert can be just for you.”

Many apps featured “full-app teasers.” In 46% of apps played and 67% of free apps, users were encouraged to upgrade to the full version of the app. In the full app, the user was able to unlock levels and gameplay items. In My Caterpillar, for example, toys that were whited out in the free app were accessible in the full app. In Balloon Pop, the player is shown fancy balloons but then a sound effect and text tell him that those balloons are only available in the full app. Therefore, apps are marketed as free but cannot be fully or successfully used without making a purchase.

Additionally, research has shown that apps marketed as “educational” are actually not at all conducive to ways in which children are known to learn and have no evidentiary basis to suggest otherwise. Poor content, distracting visuals, and sound effects take away from the learning experience. Other research has shown that of 183 apps marketed as educational, games meant to teach children reading skills really only taught memorization and were created with no input from developmental experts. No

127. Id.
128. Id. at 35-36.
129. Id. at 36.
130. Id.
132. Id.
133. Id.
134. Id.
135. Id.
138. Id. (citing Lisa GUERNSEY & MICHAEL H. LEVINE, TAP, CLICK, READ: GROWING READERS IN A WORLD OF SCREENS (2015)).
studies have looked at the adverse effects of commercial content on the educational value of apps, however it is very likely that ads detract from educational objectives by drawing children’s attention to unconnected stimuli.139

C. EFFECTS—THE NEW DIGITAL DIVIDE

When personal technology became increasingly available, there was widespread concern that children of privileged communities would become far advanced, leaving their less financially fortunate peers technologically illiterate and without opportunity. Now, however, as more research develops on the disparaging effects of excessive screen time, this concern has reversed. The initial anxiety was that there would be a digital divide in access to technology. Now, everyone has access, and the divide lies in the ability to limit that access.140

Recently, a number of well known Silicon Valley expatriates have been speaking out in urgency regarding the effects technology has on the human brain.141 As those at the center of the tech world renounce their own creations in the name of protecting their children, disenfranchised communities are relying more on technology out of necessity. Lower income families are also told by community leaders and educators that technology is the key to their children’s success.142 In contrast, more affluent communities are shielding children from technology all together and returning to a more traditional, natural education model.143 For example, the Waldorf


141. Matthew Field, Former Facebook president Sean Parker: ‘God only knows what it’s doing to our children’s brains’, TELEGRAPH (Nov. 10, 2017), https://www.telegraph.co.uk/technology/2017/11/10/ex-facebook-president-sean-parker-god-knows-childrens-brains/ (quoting Sean Parker, former Facebook President, on the site’s effect on children: “It literally changes your relationship with society, with each other. It probably interferes with productivity in weird ways. God only knows what it’s doing to our children’s brains. The inventors, creators . . . understood this consciously. And we did it anyway.”).


School, an elite private school popular with Silicon Valley executives, heavily limits screen exposure, while the nearby public Hillview Middle School flaunts its 1:1 iPad program.\(^\text{144}\) Thus, as privileged communities shield their children from screen time, and in turn, harmful or targeted ads, disadvantaged populations have a greater likelihood to engage with these technologies and be targeted by manipulative ads.

Free apps, which are downloaded more often by lower income families, and particularly, communities of color, showed more disruptive and problematic ads.\(^\text{145}\) Lack of education, information, outdated literature on children and screen time, and technological illiteracy plays a part in lower income communities’ dependence on technology. The typical U.S. teen now spends 6 hours, 40 minutes a day using screens for entertainment. Less advantaged kids are even more immersed in screens, as African American teens spend 8 hours, 7 minutes a day using screens for entertainment, compared with white teens who spend 5 hours, 42 minutes.\(^\text{146}\) Similarly, African-American teenagers are more likely to own a smartphone than any other group of teenagers in America.\(^\text{147}\) Thus, these statistics mean that lower income families and communities of color will be disparately effected by harmful advertising.

The Michigan Study is significant because it evidences the necessity for a broad and harmonized protection of child consumers. Its results show that children are vulnerable to developing

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marketing practices that should be considered unfair and deceptive from the perspective of child consumers.

**IV. PROPOSAL**

Just as Congress responded to manipulative advertising on children’s television with the CTA, it should respond to the flagrant violations of unfair and deceptive advertising in children’s apps. As apps and digital media have largely replaced television as children’s source of entertainment, new protections are needed for new technologies. In drafting these regulations, Congress should distinguish and define the educational and developmental needs of children. Regulators should seek input from parents and public interest groups. Psychological, scientific, and educational expert testimony should be of paramount consideration. The legislation should focus on apps that are frequented by children 8 years of age and younger. The age of child users should be based on reliable data so that apps cannot issue disclaimers that their users are not known to be 8 years of age or younger for the purpose of circumventing new legislation. The following proposed stipulations broadly use the long-standing requirements of the CTA as a guide for new app-specific legislation.

First, the regulations should require a strict separation of ads and app content—to go without this separation or “bumper” between programming and commercials would be contrary to “basic fairness” because studies show that children do not have the cognitive ability to distinguish commercials from other content.148 Children cannot deduce that the fundamental purpose behind an advertisement is to encourage them to purchase the thing advertised.149 This is particularly problematic within apps because children do not understand that when they are encouraged to make in-app purchases they are being sold a product. This regulation would prohibit the use of symbols, icons, or other images imbedded and indistinguishable from the contents of the app. In other words, children should not be tricked into clicking on a link to an ad because the link looks like it is part of the game. Links to ads should be clearly and objectively distinguishable from game content.

Second, new legislation should implement a ban on in-app host-selling similar to that in the CTA. No app should employ characters to encourage child users to make in-app purchases or any

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149. Id.
other purchase of any other product. As stated earlier, this practice is inherently unfair because research shows that children give more credence and pay close attention to familiar characters.\textsuperscript{150} Thus, children are more easily influenced when these characters encourage them to make purchases.\textsuperscript{151} The new regulations should prohibit host-selling in apps, just as the FCC has done in other forms of children’s media.

Third, new labeling of apps in marketplaces such as the Google Play Store and the Apple App Store is needed to eradicate false advertising of apps. Apps that market themselves as “free” but cannot be fully used without in-app purchases constitute false advertising. Congress should demand clear labeling of apps that require in-app purchases. Developers and marketplaces such as the Google Play Store and the Apple App Store should be required to use distinguishable symbols for apps that require or even include in-app purchases. Additionally, apps that purport to be educational should be required to make available the verifiable sources on which their educational qualities are based. These sources should be peer-reviewed and scientific.

Fourth, time limits on ad duration and frequency of pop ups should be imposed. The CTA limits commercials to 10.5 minutes to one hour of programming. Apps should similarly limit ad material to 10 minutes per hour of app usage. This requirement coincides with the requirement that banner ads and video ads must be clearly distinguishable from gameplay and should not be ever-present while a child uses an app.

In the meantime, the FTC should use its authority under Section 5 of the FTCA to bring enforcement actions against app developers who are known to be engaging in problematic marketing. The implementation of these regulations may produce a decline in apps marketed to preschoolers and young children. This effect, however, may be a positive one, as research shows that exposure to screen time may be detrimental for children who are still developing mental, physical, and social skills.

V. CONCLUSION

Current legislation pertaining to children’s advertising is antiquated and anachronistic. The Michigan Study provides ample

\textsuperscript{150} Marissa Meyer et al., \textit{Advertising in Young Children’s Apps: A Content Analysis}, 40 J. DEVELOPMENTAL & BEHAV. PEDIATRICS 32, 39 (2019).

\textsuperscript{151} \textit{Id.}
evidence that app developers are violating basic advertising principles that the FTC has applied to other media for decades to prevent advertisers from taking unfair advantage of child consumers. COPPA has been insufficient in regulating online advertising. Thus, at this time, no meaningful protection exists for children on apps. Congress and the FTC need to address the problem of in-app ads to afford current and future generations the same protections that have been given to generations of children before through advertising regulation.

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