

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Children’s Television Programming Rules)	MB Docket No. 18-202
)	
Modernization of Media Regulation Initiative)	MB Docket No. 17-105

COMMENTS OF NCTA-- THE INTERNET & TELEVISION ASSOCIATION

NCTA – The Internet & Television Association (“NCTA”) submits these comments in response to the *Notice of Proposed Rulemaking* (“Notice”) in the above-captioned proceeding. We agree with the *Notice* that the Commission should take steps to “modify outdated requirements” regarding children’s television.¹

INTRODUCTION AND SUMMARY

Program networks that provide thousands of hours of high-quality children’s programming annually are proud of their record in serving parents and children and are committed to providing a safe space to entertain and educate children twelve years old and younger. They have spent decades building trusted brands and have invested billions of dollars in quality children’s programming. They are committed to protecting children in all media. Providing these non-broadcast program networks greater flexibility will help strengthen their ability to continue to serve parents and children in the face of a rapidly changing environment for children’s television.

¹ *In re Children’s Television Programming Rules*, MB Docket No. 18-202 (rel. July 13, 2018) (“Notice”).

Congress and the Commission adopted restrictions on children’s television decades ago when linear television was the principal means for viewing children’s programming. This year will be the first in which online video streaming displaces traditional broadcast and cable programming as the number one source of traditional television programming for children and families.² Technological and behavioral changes like these justify revisiting some of the rules that were fashioned for a very different programming marketplace.³ In particular, the Commission should modify its rules governing the treatment of the display of website addresses during children’s programming – rules that now serve to unfairly inhibit programmers’ ability to promote their services or to fully utilize new platforms to reach child audiences.⁴ Furthermore, the Commission should clarify certain rules that are vestiges of a different time, including the definition of “commercial matter,” and which impose unnecessary paperwork obligations and costs. These measures will not adversely impact the child audiences but will instead enable programmers to better direct their efforts and resources to continuing to provide high quality children’s programming.

² Source: *KidSay TrendTracker - Moms 2018 Report*.

³ See Children’s Television Act of 1990 (“CTA”) § 102(c), *codified at* 47 U.S.C. § 303a (providing continuing authority to the Commission to review the children’s advertising limits).

⁴ The Commission should clarify that the current definition of “children’s programming” is not intended to include programming originally produced for children 12 years and younger but that is subsequently (or contemporaneously) aired for older audiences primarily 13 years old and older, and in dayparts or on networks not traditionally directed or available to children.

DISCUSSION

I. THE COMMISSION SHOULD MODERNIZE THE WEBSITE DISPLAY RULE

A. The Marketplace for Children’s Television Has Undergone Dramatic Changes

As the *Notice* describes, “in the more than two decades since the Commission adopted the children’s programming rules, there have been dramatic changes in the way television viewers, including younger viewers, consume video programming. Appointment viewing – watching the same program on the same channel at the same time every week – has significantly declined, while time-shifted viewing has risen.”⁵ And while the *Notice* focuses on the effect of these fast-moving developments on broadcasters, the impact is no less true for non-broadcast children’s networks that compete for viewership against a range of new alternatives.

Recent technological and marketplace developments have ushered in significant changes in how families and children access and view video programming content. The widespread availability of high-speed broadband services and interconnected mobile devices, such as smartphones, tablets, and laptop computers, empower families and children to view their favorite video content almost anywhere—inside or outside the home. In fact, usage of Internet-connected devices to view television programming by children between the ages of 5 to 7 increased 122 percent between the second quarter 2016 to the second quarter of 2018.⁶ Nearly 80 percent of these children view content on their devices from just three sources: YouTube (35 percent), YouTube Kids (23 percent) or Netflix (20 percent).⁷

⁵ *Notice* ¶ 1.

⁶ *Source: KidSay TrendTracker - Moms 2018 Report.*

⁷ *Source: Nielsen Research.*

This shift in content consumption is typical among children of all ages and has led to a significant migration in children’s viewing habits, from “traditional” linear television to unregulated online programming. Indeed, the average audiences on children’s linear programming networks are half what they were even six years ago,⁸ and have declined an additional 20 percent in just the last two years.⁹ At the same time, viewership of unregulated children’s programming found on YouTube or Netflix is growing exponentially. According to KidSay, a leader in youth market research, 31 percent of households with children between the ages of 5 to 7 now receive their favorite television shows through online streaming services—up 99 percent from 2016.¹⁰ Nielsen recently reported that Netflix became the top viewing destination for children under the age of 11 in June 2018, comprising 11 percent of total television “glass time” for children—a nearly 40 percent increase from the prior six months.¹¹

The type of video programming children access has also changed dramatically in recent years. Households with children between the ages of 5 to 7 report that 49 percent of the online video programming that parents watch with their children are non-traditional, short videos on YouTube.¹² In fact, 72 percent of children between the ages of 8 to 11 prefer YouTube videos over traditional linear television.¹³ According to Tubular Insights, about 25 percent of the top 100 YouTube channels in June 2018 were creating and distributing children’s programming

⁸ AB Bernstein, *Oh, by the way, in case you hadn’t noticed, kids’ TV viewing has fallen in half since 2011* (Sept. 15, 2017), www.bernsteinresearch.com; David Kirkpatrick, *Study: Kids’ TV viewing falls 50% over 6 years* (Sept. 18, 2017), www.marketingdive.com/news/study-kids-tv-viewing-falls-50-over-6-years/505096.

⁹ See “‘Everything Is Netflix.’ This Could Be the Worst Year for Kids TV.” *Fortune*, April 28, 2018, available at <http://fortune.com/2018/04/25/netflix-kids-cable-tv/> (last visited September 18, 2018).

¹⁰ Source: KidSay TrendTracker - Moms 2018 Report.

¹¹ Source: Nielsen, time period data

¹² Source: KidSay TrendTracker - Moms 2018 Report.

¹³ *Id.*

content.¹⁴ KidSay also reports that children between the ages of 5 to 7 are 60 percent more likely to subscribe to a YouTube channel than their parents.¹⁵ Overall, 90 percent of children ages 7 to 11 watch YouTube according to Nickelodeon research.¹⁶

Advertisers are following children's viewership to new online platforms. Online ads directed to children are forecast to represent 28 percent of the total children's advertising spend by next year.¹⁷ Social media platforms such as Snapchat have "emerged as a holy grail for retailers in search of young consumers."¹⁸ Network programmers seeking to compete on these platforms, however, are hampered by the Commission's regulations, simply by virtue of their participation in other, traditional distribution platforms.

Together, these trends and disparate regulatory treatment undermine the ability of traditional networks to attract investment necessary to produce the quality children's television programming that their viewers expect and enjoy. These networks have strict processes in place to ensure they offer age-appropriate television content in a safe space environment. They aim to compete based on the continuing appeal of their quality programming, rather than engage in a

¹⁴ World Cup and Kids' Content Drive Millions of Channel Views: Top YouTube Channels June 2018, Tubular Insights (July 17, 2018), available at < <http://tubularinsights.com/top-youtube-channels-june-2018/>).

¹⁵ Source: KidSay TrendTracker - Moms 2018 Report

¹⁶ Nickelodeon Consumer Insights, "YouTube," among K7-11. Spring 2017.

¹⁷ David Kirkpatrick, *Study: Kids' TV viewing falls 50% over 6 years* (Sept. 18, 2017), www.marketingdive.com/news/study-kids-tv-viewing-falls-50-over-6-years/505096 (based on PricewaterhouseCooper's report). As just two examples, last year, Mattel made its first "upfront" advertising spending commitment to YouTube Kids and Hasbro has launched a new program online. Mike Shields, *YouTube is making a play for Nickelodeon's lunch money*, Business Insider (Aug. 2, 2017), <https://www.businessinsider.com/youtube-is-making-a-play-for-nickelodeons-lunch-money-2017-8>. See also David Kirkpatrick, *PwC: Kids digital ad market to hit \$1.2B by 2019* (Sept. 11, 2017), www.marketingdive.com/news/pwc-kids-digital-ad-market-to-hit-12b-by-2019/504619.

¹⁸ Michael Katz, *Marketing's new frontier: Pint-sized shoppers on smartphone*, WASHINGTON POST, at G1, Aug. 12, 2018.

race to the bottom. But they need to be able to adapt to the ways in which their audiences are enjoying programming today without being subject to one-sided, outdated regulatory obligations.

As the Content Companies’ described in their Comments in the Media Modernization proceeding, “[t]he programming marketplace is more competitive and diverse today than at any time in history, providing consumers access to an ever-increasing variety of content.”¹⁹ Given the fast-moving developments in this arena, the Commission should act quickly to lift rules that unfairly hamper traditional networks’ ability to compete and should modernize the children’s television rules and policies while continuing to protect child audiences.

B. The Website Display Rules Should Be Modernized

The Children’s Television Act of 1990 (“CTA”) imposed limits on the “duration of advertising in children’s television programming”²⁰ It found that “special safeguards are appropriate to protect children from over-commercialization on television.”²¹ In 2004, the Commission was concerned that programmers might be able to use websites in a manner that would undermine protections against over-commercialization of television programming directed at children 12 and younger. In particular, the agency worried that programmers would display a website address during a program that a child viewer could interactively reach, thus potentially circumventing the limits on the duration of commercial content during children’s television programming.²² The Commission also was concerned that a website address would merely act

¹⁹ Comments of the Content Companies, at 5.

²⁰ Children’s Television Act of 1990, § 102(b); 47 U.S.C. § 303a.

²¹ *Id.* § 101(4).

²² *In re Children’s Television Obligations of Digital Television Broadcasters*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 22943, ¶ 54 (2004) (cautioning broadcasters and cable operators during pendency of Further Notice to “not circumvent our rules on commercial limits through technological developments in interactivity”) (“2004 R&O”).

as a disguised commercial that would run across the screen during non-commercial content.²³ It explained that children might be directed to websites that simply were a site for e-commerce: “we are concerned that the display of such addresses for websites established *solely* for commercial purposes in children’s programs is inconsistent with our mandate under the CTA to protect children, who are particularly vulnerable to commercial messages and incapable of distinguishing advertising from program material.”²⁴ As the FCC’s *Reconsideration Order* put it, “the display of the address of a website that sells a product is the equivalent of a commercial encouraging children to go to the store and buy the product.”²⁵

To address these concerns, the Commission adopted a four-prong test. The display of a website address during program (i.e., non-commercial) material is permitted as within the CTA limits only if the website:

- (1) offers a substantial amount of bona fide program-related or other noncommercial content;
- (2) is not primarily intended for commercial purposes;
- (3) the website’s homepage and other menu pages are clearly labeled to distinguish the commercial from the noncommercial sections; and
- (4) the page of the website to which viewers are directed by the website address is not used for e-commerce, advertising, or other commercial purposes (e.g., contains no links labeled ‘store’ and no links to another page with commercial material.)²⁶

The Commission considered these prescriptive website display rules to be “narrowly tailored”²⁷ at the time. But that twelve-year-old assessment, if ever true, is no longer the case.

²³ See, e.g., *In re Children’s Television Obligations of Digital Television Broadcasters*, Second Order on Reconsideration and Second Report and Order, 21 FCC Rcd 11065, ¶ 33 (2006) (“Televised references to commercial websites are no different from other forms of advertising.”) (“Second Reconsideration Order”).

²⁴ 2004 R&O ¶ 50 (emphasis added).

²⁵ Second Reconsideration Order ¶ 32.

²⁶ 2004 R&O ¶ 50.

²⁷ Second Reconsideration Order ¶ 33.

Instead, what was intended to affect only “a tiny fraction of a broadcaster’s programming” and to do “nothing to prevent broadcasters and cable programmers from publicizing their websites as often as they wish during their many hours of other programming or during properly buffered commercial portions of children’s programming”²⁸ has had a significant impact on those very programmers that provide the most child-friendly programming. The website display rules no longer serve the purpose for which they were intended – preventing the circumvention of the advertising time limits in linear children’s programming – but instead heavily regulate the look and feel of children’s programmer websites or the ability to promote to those websites, which often contain material intended to deepen the narrative with little monetary value to advertisers. The rules diminish program networks’ ability to use the web in creative ways to enhance the appeal to children of their child-friendly linear programming. As Viacom explains, “the unforeseen consequences of the application of these rules in our current environment are exacerbated by the unlevel playing field they have created.”²⁹

Nothing in the Children’s Television Act of 1990 supports this regulatory overreach. But even if the website display rules could be found to have some– albeit tangential – relationship to the Commission’s mandate,³⁰ the four-pronged test has imposed unnecessary burdens and regulatory uncertainties that have disincentivized and chilled investment on the range of websites and digital content related to programs by responsible creators of children’s programming. This encourages investment to move toward the least regulated platforms and negatively impacts

²⁸ *Id.*

²⁹ Viacom Reply Comments at 4.

³⁰ The Commission previously disagreed with a challenge to its authority to regulate in this area “because [the rules] do not regulate Internet content, but rather the advertising of commercial websites in children’s programming, a subject clearly within the scope of the Commission’s jurisdiction.” Second Reconsideration Order ¶30. Whether that rationale can withstand scrutiny in the face of the significant impact the rule today has on the look and feel of programmer online material is, at the very least, questionable.

companies with proven records in quality children’s programming. At the very least, the rule is in need of updating and streamlining.

First, the test is confusing and internally inconsistent as applied to websites provided by non-broadcast children’s programmers. For example, the first prong requires a website to offer a “substantial amount of *bona fide* program-related or other non-commercial content.” If a website has such content, *by definition* it should be considered *not* to fall within the second prong -- “primarily intended for commercial purposes.” Thus, the overlapping elements of the test are unnecessary, and the Commission should eliminate the ill-defined and unwarranted second prong of its test.

In addition, the test’s third prong – which allows “clearly labeled” commercial material on a website’s homepage – and its fourth prong – which says that the website address to which children are directed cannot be used for “commercial” purposes – are at odds with each other. The fourth prong has the effect of prohibiting programmers from promoting to the home page of their website over their children’s programming (which often is the easiest for a child to remember) if they also include advertising on the home page. If “clearly labeling” commercial content is sufficient to help children differentiate advertising from other content – and it is³¹ – there is no legitimate reason to prohibit programmers from including such content on the site’s “landing page,” the page of the website to which viewers are directed.

³¹ See, e.g., Self-Regulatory Program for Children’s Advertising, Children’s Advertising Review Unit (“CARU”) (adopting restrictions on advertising to children on websites and online, including a requirement to “prominently identify the name of the sponsoring company and/or brand in that area” as well as requiring “on Websites directed to children, if an advertiser integrates an advertisement into the content of a game or activity, then the advertiser should make clear, in a manner that will be easily understood by the intended audience, that it is an advertisement.”)

Finally, the fourth prong – which, because of its restrictions, requires “two-clicks” before a user can reach certain content such as a store or a separate website that might include certain commercial content – is unduly restrictive. It forces programmers to artificially create a landing page “cul-de-sac” that intentionally interferes with the usability of its site and, if that landing page is the front page of a flagship brand’s website, government oversight and second-guessing make it inherently less competitive.

As Viacom’s Media Modernization Reply Comments explain, the website display rule has acted to disrupt Nickelodeon’s ability to direct children to a “free coding tutorial game, and other games and resources available in mobile app stores.”³² It also “can diminish its ability to promote corporate social responsibility campaigns to parents and children,”³³ by preventing the network from displaying the web address of its partners that promote its “WorldWide Day of Play” because their websites may contain commercial content. And it can skew investment by directing creative efforts away from child-focused content subject to stringent oversight, to unregulated online material.³⁴ Moreover, mere mention of the Apple App Store or Google Play in a promotion during children’s programming can turn that promotion into an ad under the Commission’s rules. That means promotions directing children to the App Store to download enriching or high quality content can fall under the restrictions.

For these reasons, the fourth prong of the test causes real damage to child-friendly programmers. If it ever was the case, requiring children’s television programmers to wrap their website in an artificial landing page is not necessary today to protect children online. Since the

³² Viacom Reply Comments at 3.

³³ *Id.* (describing impact on Nickelodeon’s “Worldwide Day of Play”).

³⁴ *See* Viacom Reply Comments at 4-5.

Commission adopted its four-part test, various measures have been introduced that enable parents to monitor and control their children's internet usage.³⁵ Therefore, the fourth prong of the website address display rule can be safely eliminated without harming children.

II. THE COMMISSION SHOULD UPDATE IMPLEMENTATION OF ITS RULES

Several other children's television rules and policies are vestiges of a different time and should be updated to better reflect the way that children and their parents watch television today. The Commission should clarify that these rules are narrow in scope to avoid unnecessarily burdening non-broadcast television programmers without helping children.

Uncertainty about the reach of certain rules and policies can put those non-broadcast networks that provide the lion's share of children's programming at an additional unfair competitive disadvantage. For example, the definition of "commercial matter" includes "promotions of television programs or video programming services other than children's or other age appropriate programming appearing on the same channel or promotions for children's education and informational programming on any channel."³⁶ While broadcasters are required to provide a minimum amount of "core" educational and informational programming, non-broadcast program networks are not subject to any such requirement. Thus, unlike broadcasters, they have no separate reason to distinguish "educational and informational" programming from the other children's programming they provide on related channels. The Commission should clarify that it will not treat cross-network promotions of children's or other age-appropriate

³⁵ See, e.g., https://www.common sense media.org/blog/everything-you-need-to-know-about-parental-controls?utm_source=twitter&utm_medium=social; <https://www.webwise.ie/parents/parental-controls-2/>

³⁶ 47 C.F.R. § 76.225, n.1.

programming as advertising, regardless of whether that programming is designated “educational and informational.”³⁷

In addition, we agree with the *Notice* that there are ways to “streamline the children’s television reporting requirements to eliminate unnecessary burdens and redundancies.”³⁸ Those rules currently require programmers and cable operators to engage in quarterly recordkeeping that is unduly burdensome and unnecessary.³⁹

Each quarter, cable operators must upload to each cable system public file “sufficient records to verify compliance with [the commercial limits in children’s programming].”⁴⁰ In practice, each cable operator (and other MVPD) collects and uploads to system public files the same documents from dozens – if not hundreds – of programming networks certifying that the networks comply with the Commission’s rules. This process is unnecessarily burdensome for both cable operators and programming networks.

Instead of the current requirement, as NCTA’s Comments in the Media Modernization proceeding propose,⁴¹ the Commission should permit cable operators to provide relevant documentation from program networks regarding compliance only in the event of a complaint. This type of approach would greatly simplify the process without doing damage to the intent of

³⁷ The Commission should also liberalize networks’ ability to use same channel promotions. Promotions of upcoming shows are an important way of making children and parents aware of programming of interest, especially in networks devoted to children. The rules should allow these networks to use promotional material for unrelated programming as a way of separating program content from commercial matter.

³⁸ *Notice* ¶ 29.

³⁹ *Id.* ¶ 30.

⁴⁰ 47 C.F.R. § 76.1703.

⁴¹ Comments of NCTA – The Internet & Television Association, MB Docket No. 17-105 et al. (filed July 5, 2017) at 27-28.

the rules. At a minimum, the recordkeeping obligation should be reduced from a quarterly to an annual certification requirement.⁴²

CONCLUSION

For the reasons described above, the Commission should modernize its children's television rules to better reflect the current marketplace and the changing expectations and behaviors of parents and children as well as to remove unnecessary restrictions on non-broadcast networks. Such revisions will allow these networks to compete with the myriad alternative viewing options children have today and can be undertaken without lessening the important protections the Children's Television Act was designed to provide.

Respectfully submitted,

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⁴² The Commission should also take steps to reduce other unnecessary reporting requirements. For example, it should eliminate the need to report *de minimis* overages through establishing a "safe harbor." This will help preserve scarce company resources, while protecting companies against enforcement actions for inadvertent, slight mistakes in calculating commercial time for these purposes.