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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	MM Docket No. 93-254
Limitations on Commercial Time on	)	
Television Broadcast Stations	)	

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TO: The Commission

Reply Comments of the National Association of Broadcasters

NATIONAL ASSOCIATION
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Summary

The comments filed in response to the *Notice of Inquiry* overwhelmingly oppose the adoption of any new regulation of television stations' commercial practices. Only one set of comments — filed by the Center for the Study of Commercialization, *et al.* [CSC] — attempted to make a case for renewed regulation. Those arguments, however, are wholly inadequate.

The Commission could not impose new regulation on broadcast commercial speech without a record demonstrating specific harms that the regulation would alleviate. CSC, however, provided no evidence of any harm to the public interest which was caused by the Commission's 1984 *Television Deregulation* decision. Although CSC's comments are filled with sweeping generalizations about the impact of deregulation, not a shred of evidence was presented to support these claims, and the Commission must therefore disregard them. Indeed, while CSC asserts that the amount of news and public interest programming has decreased on broadcast stations, the resources which stations devote to news has instead *increased* since 1984.

CSC asks the Commission to restrict the number of commercials on television stations because, it claims, they promote "materialism." Such regulation of speech on the basis of a governmental determination of its value, however, is completely precluded by the First Amendment. The Supreme Court has made it clear that government cannot suppress truthful advertising messages in order to promote preferred societal values. Moreover, one of the values which the First Amendment does protect is the free flow of commercial information that is essential to operation of a free market. CSC's attack on

television advertising is clearly contrary to the public interest in maintaining a free enterprise system.

CSC asks that the Commission determine how much public interest programming should be aired on television stations and then restrict the amount of permitted advertising to the level needed to generate the revenues to support that programming. This complex scheme would convert broadcasters into regulated carriers in clear contravention of the Communications Act. It would change the system of broadcasting from one characterized by competition into one characterized by government control. The CSC proposal would eliminate incentives for broadcasters to provide innovative and attractive programming because their successful efforts would only lead to further reductions in the amount of advertising time they could sell.

CSC also makes no effort to explain how such intrusive regulations imposed only on broadcast television could be reconciled with Congress' expressed intent to eliminate regulations which impede broadcasters from competing in the video marketplace. The Commission should reject CSC's proposals and reaffirm its 1984 decision eliminating regulation of television stations' commercial practices.

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Reply Comments of the National Association of Broadcasters

The National Association of Broadcasters ("NAB")[1] submits this reply to the comments filed in response to the Commission's *Notice of Inquiry* in this proceeding. With only two exceptions, the comments received by the Commission opposed the reimposition of limits on television commercial practices. The comments demonstrated the benefits which have been brought about by the Commission's 1984 decision lifting regulation of television commercial time.[2] Deregulation has resulted in program innovations,[3]

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1 NAB is a nonprofit, incorporated association of radio and television stations and networks which serves and represents the American broadcasting industry.

2 *Television Deregulation*, 98 FCC 2d 1076 (1984), *recon. denied*, 100 FCC 2d 357 (1986), *aff'd in relevant part sub nom. Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987).

3 *See, e.g.*, Comments of Tribune Broadcasting Company at 6-7.

new industries which have created new jobs,[4] and new and valuable ways to provide information to the public.[5]

This reply will focus on the arguments raised in the one set of comments which argued in favor of renewed limits on commercial practices of television stations — the Comments of the Center for the Study of Commercialization, *et al.* [hereinafter CSC].[6]

I. There is No Evidence to Support CSC's Claims

NAB argued in its comments (pp. 2-4) that the Commission cannot undertake extensive new regulation of the commercial practices of television stations without a record demonstrating that the absence of regulation has lead to commercial practices which harm the public interest. NAB noted the striking absence in the *Notice of Inquiry* of any suggestion that the Commission possessed such evidence, and stressed that the First Amendment requires a particularly high level of certainty of any claimed harms from speech before that speech can be regulated.

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4 *See, e.g.*, Comments of WEST Telemarketing Corp.; Comments of Cassette Productions Limited.

5 *See, e.g.*, Comments of Silver King Communications, Inc. at 25-26; Comments of State Broadcaster Associations at 19-21; Comments of ValueVision International at 4-6.

6 While the U.S. Catholic Conference also supported renewed commercial limits, its comments simply recited a conclusion without any supporting facts or argument. A substantial portion of the CSC comments addressed several rulemaking petitions it filed with the Commission which have not been placed on public notice. Since the Commission rejected CSC's request that these issues be added to the instant proceeding, *Limitations on Commercial Time on Broadcast Television Stations*, MM Dkt. 93-254 (Mass Media Bureau, Dec. 29, 1994) at n. 2, NAB will not address those issues.

CSC does nothing to rectify this critical absence of evidence that the public has been adversely affected by the deregulation of commercial television advertising practices. Although CSC makes a number of factual assertions, *none* are accompanied by any data or citations to studies which support its claims.[7] That CSC has no evidence of any harmful consequences of deregulation is demonstrated by its request (Comments at 23-25) that the Commission conduct a study of the amount and type of commercial matter which television stations are carrying. The Commission, however, does not have unlimited resources, and it should only devote its efforts to conducting a study if there is a credible reason to believe that a problem exists. Clearly, one of the purposes of the *Notice of Inquiry* was to determine whether there is any basis for further analysis by the Commission. Since CSC has suggested none, the Commission should conclude this proceeding without further action.

CSC's specific claims are either entirely without support or contrary to fact. CSC asserts (Comments at 7) that the repeal of commercial time limits has resulted in "an increase in the time devoted to traditional spot commercials." No evidence whatever is cited for this proposition, although demonstrating that the market has not controlled the number of commercials appearing on television stations would appear to be an essential component of any argument that the Commission should reinstitute regulation. CSC may

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7 If CSC were to submit studies for the first time in its reply comments which it would claim demonstrated the existence of a problem, the Commission could not rely on such evidence without inviting further comments in which those studies could be examined. *See Aqua Slide 'N' Dive Corp. v. CPSC*, 569 F.2d 831, 842 (5th Cir. 1978)(rule cannot be upheld "when the only evidence on a crucial finding is alleged to be unreliable and the Commission has not exposed it to the full public scrutiny which would encourage confidence in its accuracy").

wish that evidence existed to support its claim; it may even believe, without evidence, that the number of spot commercials has increased; but the Commission cannot take regulatory action on the basis of CSC's wishes or beliefs. The total paucity of evidence supporting CSC's claims is fatal to its proposals.[8]

The only increase in commercials to which CSC even alludes (without citing even one example) is a claimed rise in *news stories* which "promote" other programs. These news programs, however, would not have been deemed commercial matter under the Commission's pre-1984 guidelines. Even if the number of such programs did go up, that would have no bearing on CSC's allegation that *commercial* loading has increased.

CSC (Comments at 6) also repeats its tired claim that non-shopping presentations on home shopping stations occupy only five minutes per hour. CSC made the same point in seeking reconsideration of the Commission's decision in *Implementation of Section 4(g) of the Cable Act (Home Shopping Issues)*, 8 FCC Rcd. 5321 (1993). NAB pointed out in response that the Commission found that Silver King Communications' 4½ minute hourly public affairs program was *not* its only public interest program, and that other operators of home shopping stations had identified other non-entertainment programming as well. Opposition of the National Association of Broadcasters to Petition for Reconsideration, MM Dkt. No. 93-8 (filed Sept. 30, 1993) at 3. That CSC continues to press this incorrect characterization of the facts found by the Commission almost three months after its error

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8 Moreover, the comments of broadcasters indicate that stations have *not* increased the level of commercial loading since 1984. *See* Comments of Meredith Corporation at 9-10; Comments of SCI Television, Inc. at 7-8; Comments of Tribune Broadcasting Company at 3-4.

was identified further demonstrates that its call for new regulations is based on supposition and not fact.

Because CSC believes (albeit without any support) that the amount of time devoted to commercial matter has increased, it concludes (Comments at 8) that "less air time is available for broadcasting programming" that meets its definition of the public interest. This broad assertion is again offered without any support. The evidence, however, is to the contrary. If CSC's allegation were true, one would expect that the amount of resources which stations devoted to news would have declined as the amount of such programming went down. An examination of television stations' finances, however, reveals that the resources devoted to news has *increased* since 1984 as a percentage of total station expenditures. In 1984, news department expenses accounted for 23.3% of the average affiliate's operating expenses, and 5.7% for the average independent.[9] Over the next eight years, the total amounts grew at significant rates — 72.3% for the average affiliate and 74.4% for the average independent.[10] As a result, the average affiliate now spends 25.3% of its operating expenses on news programming, and the average independent 7.4%.[11] CSC is simply wrong, therefore, in its conclusion that deregulation of television stations' commercial practices has lead to diminished service to the public.

CSC similarly makes the sweeping and unwarranted generalization that television advertising deceives viewers. Comments at 4. While it asserts that some "infomercials"

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9 *1985 NAB Television Financial Report*, National Association of Broadcasters, Washington, D.C., 1985, pp. 34, 64.

10 *1993 NAB Television Financial Report*, National Association of Broadcasters, Washington, D.C., 1993, pp. 33, 64.

11 *Id.*

might mislead some viewers, that claim, even if true, would hardly support a conclusion that television advertising as a class is deceptive. Further, even if some "infomercials" were produced in a misleading manner, CSC does not explain why this problem should be addressed by restricting television stations' ability to carry commercial matter, rather than through proceedings at state and Federal agencies whose responsibilities includes protecting the public from deceptive practices. Indeed, the Comments of the Direct Marketing Association (pp. 3-4) point out that these agencies already regulate many forms of the commercial presentations which CSC claims are deceptive.

CSC's comments rest on sweeping generalizations about television stations, but little or no evidence is provided to support its claims.[12] Established principles of First Amendment and administrative law hold that the Commission cannot embark on new regulatory initiatives to control speech without a substantial record demonstrating harm to the public interest from its current policies. Nothing in the comments on the *Notice of Inquiry* suggested that the Commission has, or could establish, such a record.

II. CSC's Comments Demonstrate Why the Regulations it Supports Would Violate the First Amendment

In its comments, NAB pointed out that a regulation which singles out commercial speech because of its content would violate the First Amendment. Comments of NAB at 5-10. The applicable constitutional limitations on Commission regulation of commercial

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12 Further, the relevance of many of CSC's arguments is unclear. It complains (Comments at 15-17) about alleged advertiser control over news and other programming. Even if these claims were true, they would have no relevance to the issue before the Commission — whether the *amount* of advertising on television stations should be regulated.

speech because of its content were further set out at length in the Statement submitted by Professor Rodney A. Smolla in support of the Comments of Silver King Communications, Inc.

Ignoring the First Amendment questions entirely, CSC (Comments at 13-15) asks the Commission to regulate the amount of advertising on television stations because it claims that advertising promotes societal values which CSC opposes. It asks the Commission to determine that speech proposing a commercial transaction or providing information about goods and services is of low value because it promotes "materialism." CSC argues that the Commission should restrict such speech in favor of programming which promotes "noncommercial values." The Supreme Court made clear in *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1516 (1993), however, that commercial speech cannot be relegated to a secondary status because of a governmental judgment that it is of "low value." As Professor Smolla concluded, "[d]islike for the content of speech that is lawful and not misleading or fraudulent is an improper interest as a matter of law." Statement of Professor Rodney A. Smolla at 18.

Moreover, the Supreme Court has rejected the notion that government can regulate speech in order to promote its conception of appropriate societal values. In *Carey v. Population Services International*, 431 U.S. 678 (1977), the Court struck down a New York statute which prohibited the advertising or display of contraceptives. The State contended that advertising contraceptives would "legitimize sexual activity of young people," which the State argued it could discourage. The Court disagreed, and held that advertisements for contraceptives "merely state the availability of products and services that are not only entirely legal, but constitutionally protected. These arguments therefore

do not justify the total suppression of advertising concerning contraceptives." *Id.* at 700-01 (citations and footnotes omitted).

Unlike *Carey*, where no one doubted the legitimacy of the State's underlying interest in promoting morality in its young, the values which CSC urges the Commission to promote are not legitimate governmental interests in our society and could not possibly form the basis for regulation of truthful speech. CSC in essence asks the Commission to conclude that the promotion of the sale of legal goods and services is contrary to the public interest. In *Edenfield v. Fane*, 113 S. Ct. 1792 (1993), the Court struck down a restriction on solicitation by accountants, holding that the

> "law threatens societal interests in broad access to complete and accurate commercial information that First Amendment coverage . . . is designed to safeguard. The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish."[13]

This followed from the Court's holding in *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977), that commercial speech "performs an indispensable role in the allocation of resources in a free enterprise system."

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980), the Court held that the government must demonstrate a substantial interest in regulating speech before such regulations can be upheld. The interest asserted by CSC — the reduction of materialism in society — is not a substantial one because it is contrary to values which are essential for the operation of our society and to our commit-

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[13] 113 S. Ct. at 1798 (citations omitted).

ment to free markets. Thus, the concerns advanced by CSC do not form a legitimate basis for regulation of television stations' commercial practices.

Further, CSC does not suggest that particular commercial messages have harmful effects. Instead, it argues that any commercial speech beyond that absolutely necessary to support station operations should be viewed as harmful, regardless of any benefits to the public that might accrue from one or more of those commercial messages. Even if CSC had demonstrated some harm from some television commercials which the government could properly address — and it has not — the First Amendment would require that any regulation distinguish the "harmful" speech from commercial messages generally. *See Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989).

While, as the Commission recognized (*Notice of Inquiry* ¶ 8), any proposed new regulation of television commercial speech would raise serious First Amendment questions, the regulatory program which CSC advocates is totally at odds with our national commitment to free speech and free markets. The Commission cannot entertain requests for regulations which would limit the kind or amount of speech which television stations can carry on the basis of a governmental determination that such speech is of lesser quality or value than other speech which the government would prefer.[14]

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[14] Moreover, the notion that commercial messages on television stations are somehow inimical to the public interest is directly contradicted by research into consumer attitudes towards advertising and the economic effects of advertising. A survey of consumer polls asking about attitudes towards advertising concluded that, while consumers are often skeptical about particular claims in advertising, they overwhelmingly agree that "advertising provides useful information about products and services." In four samples between 1974 and 1984, 77-79 percent of the respondents agreed with that statement. J. Calfee & D. Ringold, *Consumer Skepticism and Advertising Regulation: What do the Polls Show?* 15 ADVANCES

footnote continued . . .

III. CSC's Proposed Restriction of Commercial Messages on Television Stations Would be Contrary to the Communications Act

While CSC concedes (Comments at 6) that "some commercial matter is necessary to pay for programming," it asks the Commission to "impose limits so that licensees do not exceed that amount." Comments at 3. The extraordinary suggestion that the Commission should decide how much of particular types of programming is desirable, how much that programming should cost, and then restrict advertising on television to the minimum needed to generate that revenue, is absurd. It would entangle the Commission in a hopelessly complex regulatory task, and would fundamentally alter the system of free, competitive over-the-air broadcasting contrary to the express intent of Congress in the Communications Act.

First, the Commission has rejected the notion that the quality of broadcast programming can be assured through quantitative requirements. *Television Deregulation*, 98 FCC

. . . footnote continued

IN CONSUMER RESEARCH 244 (1988). Another survey of economic literature concerning advertising concluded that "[s]cholars have found that advertising tends to reduce, rather than increase, consumer prices. Similarly, advertising tends to increase consumer information, improve product quality, expand the scope of available choices, and encourage a better fit between consumer preferences and consumer purchases." J. Calfee, *Advertising and Market Performance: An Interpretative Survey of the Literature* (prepared for the National Association of Broadcasters 1988) at 29-30. A copy of the Calfee study is attached to these reply comments. Thus, rather than harming the public interest, as CSC asserts, advertising enhances the public interest by giving consumers useful information and improving the efficiency of our economy. Restricting the amount of truthful advertising would instead harm the public by reducing the efficiency of markets and would lead to increased consumer prices.

2d at 1090; *see Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1430 (D.C. Cir. 1983). A requirement that a station put on specified amounts of particular types of programming would do little to ensure that those programs would be of high quality. Instead, the notion on which our system of broadcasting is built is that the public interest is best served if station operators exercise their discretion in determining how to meet the needs of their communities. *See Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 105-110 (1973)("Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations"). A program under which the Commission would determine by regulation the appropriate amount of particular types of programming that a station should air and what revenues would be needed to produce those programs would be both ineffective and inconsistent with Congress' desire to promote licensee discretion.

Although CSC does not spell out the details of the scheme it asks the Commission to adopt, it would appear that CSC contemplates a rule which would place a cap on the advertising income a broadcaster could generate, based on the cost of providing the amount of public interest programming specified by the Commission and the other costs of operating the station. The consequences of adopting a proposal like this would be harmful to the very values which CSC professes to endorse. Stations on a public interest programming budget would face strong disincentives to provide any additional programming beyond that mandated by the Commission. If a disaster occurred in a station's community, and additional public service programming became needed, the Commission might even be

placed in the position of having to grant the station a waiver so that it could sell sufficient advertising to cover these unexpected costs.

The CSC proposal would in essence make broadcasters regulated carriers since, like common carriers, the amount of revenue they could raise would be restricted to the revenues which the government determines they need. Section 3(h) of the Act, however, specifically provides that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

In passing the Communications Act, Congress chose a competitive model for broadcasting, in which the public would be served by stations competing to provide the most attractive programming. *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940). The regulations CSC envisions would entirely change this competitive environment. As stations became more successful in developing attractive programs for which advertisers would pay increased amounts for commercial time, the amount of time that they could sell could be reduced since, following CSC's logic, they could afford to offer more public service programming and less advertising. Successful broadcasters could be penalized, either by having their individual "quota" of advertising reduced, or by reducing the amount of advertising the Commission would allow the entire industry. In either event, stations would have little incentive to develop attractive programming since they ultimately would receive little or no benefit from their success.

The Commission does not have the authority to contemplate such a fundamental change in the role of broadcasting under the Act. Even if it did, placing onerous restrictions on the commercial practices of broadcasters alone would, as NAB pointed out (Comments at 4-5) conflict with Congress' clearly expressed goal of eliminating regulatory

imbalances which prevent broadcasters from competing in the developing video marketplace. CSC does not attempt to explain how the regulations it seeks can be squared with the Act or with the goal of eliminating needless regulatory restrictions on broadcasters ability to compete. *See* Comments of INTV at 9-11; Comments of National Broadcasting Company at 7-8.

Conclusion

For the foregoing reasons, the Commission should conclude this proceeding without adopting any new rules or guidelines concerning the commercial practices of broadcast television stations.

Respectfully submitted,

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APPENDIX

ADVERTISING AND MARKET PERFORMANCE:
AN INTERPRETATIVE SURVEY OF THE LITERATURE

John E. Calfee

University of Maryland

January 12, 1988

prepared for the

National Association of Broadcasters

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Dr. Calfee received his Ph.D. in Economics from the University of California, Berkeley and his M.A. in International Relations from the University of Chicago. He has taught at the Georgetown Law Center and the University of Utah. Dr. Calfee is also the author of a number of scholarly articles in economic, marketing and law journals.

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SUMMARY

This is a survey of the scholarly literature on the economic effects of advertising. The past several decades have seen a major shift in the opinion of economists and other analysts. Advertising was once seen primarily as a threat to competition and a tool for distorting consumer choices. Now it is more commonly seen as a subtle but highly effective adjunct to competition, tending to bring more vigorous rivalry, lower prices, improved products and more informed consumer choices.

Early research: advertising thwarts competition

From the early twentieth century through the 1960s, prevailing opinion was that advertising was probably a cause of monopoly profits. The primary reason, in this view, was that advertising acted as a barrier to entry by new firms, which had to overcome economies of scale, brand loyalty, artificial product differentiation and other factors induced by heavy advertising. Thus advertising was thought to transform competitive firms into quasi-monopolists. Moreover, advertising was itself a costly activity and the cost was apparently passed on to consumers, which further increased retail prices.

The older analysis also discussed the content of advertising. Advertising was divided into two categories, "informative" and "competitive." Informative advertising provided consumers with simple, accurate information—mainly prices and product availability—and these aided consumer decision making. But informative advertising was deemed to be rare. The second type of advertising, variously referred to as "competitive," "combative," or "persuasive," was thought to be far more common. This kind of advertising, by seeking to persuade rather than to inform, allowed firms to "compete" in

a way that increased costs, increased retail prices and probably increased monopoly profits.

Newer research: advertising enhances competition

In the 1970s there emerged an alternative, more positive analysis of advertising and its effects. The statistical relation between advertising and profits was found to disappear under the impact of better data and more sophisticated methods. Moreover, theoretical reasoning suggested that advertising could easily facilitate rather than inhibit entry by new competitors, a conclusion that was supported by empirical analysis. These and other results cast doubt on the existence of most of the mechanisms by which, in the older view, advertising inhibited competition.

The "advertising as information" school: Much of the recent analysis has come from a new "advertising as information" school of thought in the economics profession, which has largely transformed scholarly views of how advertising affects consumer behavior. New theoretical insights have demonstrated that much advertising previously thought to be "persuasive" or wasteful can serve an important informational role. The incentives for advertisers to be truthful and complete are much more pervasive than once believed, and there are numerous and subtle ways by which consumers can assess advertised claims. These theoretical advances have been accompanied by a series of empirical studies on how markets change when advertising is introduced, removed, or restricted. The results have consistently supported the "advertising as information" school. For example, scholars have found that because of its pro-competitive effects, advertising tends to reduce, rather than increase, consumer prices. Similarly, advertising tends to increase consumer information, improve product quality, expand the scope of

available choices, and encourage a better fit between consumer preferences and consumer purchases.

A more positive governmental attitude toward advertising: The new, more positive analysis of advertising's effects has begun to exert influence beyond the university. Government regulators have increasingly recognized the informational benefits of advertising. The Federal Trade Commission now routinely opposes legal restrictions on advertising, and recently the National Cancer Institute welcomed the advent of health claims in food advertising as an important adjunct in the effort to prevent cancer.

Advertising effects are short-lived

Research has also cast light on other controversial topics such as the duration of advertising effects and the influence of advertising on overall market consumption. Attempts to measure the longevity of advertising effects have not dealt adequately with two central points: different kinds of advertising differ enormously in the immediacy of their effects, and the fact that advertising is largely informational in nature implies that longer term effects probably derive more from product quality itself than from advertising *per se*. These flaws usually result in an overestimate of the duration of advertising. Nonetheless, most studies find that most advertising effects last for a year or less.

Advertising and consumption: limited effects on entire markets

Some studies have sought to determine how the level of advertising affects total consumption in entire markets. Most of these studies have focussed on mature products such as cigarettes and alcohol. The findings almost always show at most a very small increase in consumption associated