

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Empowering Parents and Protecting Children in an Evolving Media Landscape)	MB Docket No. 09-194
)	
)	
Children’s Television Obligations of Digital Television Broadcasters)	MB Docket No. 00-167

COMMENTS OF CHILDREN’S MEDIA POLICY COALITION

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SUMMARY

The Children’s Media Policy Coalition (“Coalition” or “CMPC”) urges the Federal Communications Commission (“FCC” or “Commission”) to move to adopt rules governing interactive advertising to children. The Coalition supports the Commission’s prohibiting interactivity with commercial matter during children’s programming. The CMPC values the benefits interactive television can provide children, and it believes that the current interactive technologies can be employed to engage and educate children while they are watching television. CMPC, however, agrees with the Commission that commercial interactivity during children’s programming is not in the public interest and should thus be prohibited.

CMPC submits this comment to provide the Commission with updated information about commercial interactivity currently on television. This comment first reviews (I) the Commission’s proposals for regulating commercial interactivity during children’s programming. Then it (II) presents scientific studies, statements by industry leaders, and statistics to demonstrate that the number of households equipped for interactive television is quickly increasing and that commercial interactivity on television will only become more prevalent. This comment then (III) updates the record on who is currently creating the technology needed for television interactivity and (IV) what types of interactivity are currently on television.

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Children Now, American Academy of Pediatrics, American Academy of Child and Adolescent Psychiatry, American Psychological Association, Benton Foundation, and Office of Communication of the United Church of Christ, Inc. (“Children’s Media Policy Coalition”), by their attorneys, the Institute for Public Representation, respectfully submit these comments in response to the Federal Communications Commission’s 2004 *Report and Order and Further Notice of Proposed Rule Making*¹ and 2009 notice of inquiry entitled *Empowering Parents and Protecting Children in an Evolving Media Landscape*.²

¹ Report and Order and Further Notice of Proposed Rule Making, *In the Matter of Children’s Television Obligations of Digital Broadcasters*, 19 FCC Rcd. 22,943 (Sept. 9, 2004) (“2004 R&O”).

² Notice of Inquiry, *Empowering Parents and Protecting Children in an Evolving Media Landscape*, 74 Fed. Reg. 61,308, ¶ 36 (Oct. 22, 2009) (“2009 NOI”).

The CMPC writes these comments to update the record on television interactivity. Interactivity is becoming more prevalent; several forms of interactivity are being developed and numerous companies and ventures have formed to deploy these technologies. The time has come for the Commission to act on its tentative conclusion to regulate commercial interactivity during children’s programming.

I. THE FCC’S TENTATIVE CONCLUSION TO REGULATE COMMERCIAL INTERACTIVITY DURING CHILDREN’S PROGRAMMING

Children are vulnerable to advertising regardless of the technology that is used to deliver it. Even worse, as these comments show, interactive advertising is likely to be even more influential with children, thus making the harms that have led to prior regulation of children’s advertising even more pressing. The CMPC has repeatedly articulated its support for prohibiting commercial interactivity during children’s programming, and it asks the Commission to act on its tentative conclusion to regulate commercial interactivity.

In 2004, the Commission released a *Report and Order and Further Notice of Proposed Rule Making* in which it tentatively concluded that it “should prohibit interactivity during children’s programming that connects viewers to commercial matter unless parents ‘opt in’ to such services.”³ The Commission recognized that because interactivity “can cause a commercial to last much longer than a 30-second or 15-second spot,” interactive advertising could allow for the circumvention of current rules and could create additional regulatory challenges.⁴

³ 2004 R&O at ¶ 72.

⁴ *Id.*

In response, the industry argued that regulating interactive television would be premature because it would stifle the development of beneficial interactive technologies⁵ and because there was no evidence that it was necessary.⁶ Some argued that regulating interactive technologies in 2004 might have inadvertently created “a disincentive for the development of interactive educational and information children’s programming,”⁷ and others argued that regulation would make development of interactivity more difficult because “television services and distributors” may have been less likely to work with programmers.⁸

In 2004, the Children’s Media Policy Coalition submitted comments in April and reply comments to the industry’s comments in May. In April, CMPC asserted its support for a prohibition on commercial interactivity during children’s programming because such regulation is consistent with the Commission’s and Congress’ goals of limiting the amount of commercial matter presented during children’s programs.⁹ CMPC argued that a prohibition is necessary to ensure compliance with the commercial time limits.¹⁰ It further argued that a ban would help reduce children’s desires for advertised products that parents do not want or are unable to purchase, and it could contribute to reducing childhood obesity and related health problems caused by consuming heavily advertised

⁵ Comments of The Walt Disney Company, MM Docket No. 00-167, April 1, 2005 at 8 (“Disney Comments”); Comment of Nickelodeon, MM Docket No. 00-167, April 1, 2005 at 2 (“Nickelodeon Comments”); Comments of the National Association of Broadcasters, MM Docket No. 00-167, April 1, 2005 at 3 (“NAB Comments”).

⁶ Disney Comments, *supra* note 5, at 4. *See also* NAB Comments, *supra* note 5, at 2; Nickelodeon Comments, *supra* note 5, at 4-5.

⁷ NAB Comments, *supra* note 5, at 3.

⁸ Disney Comments, *supra* note 5, at 8.

⁹ Comments of Children’s Media Policy Coalition, Free Press, The Campaign for a Commercial-Free Childhood, and Dads and Daughters, MM Docket 00-167, April 1, 2005 at 1-9.

¹⁰ *Id.*

food products of low nutritional value.¹¹ CMPC also asserted that it did not support the Commission's proposal to allow parents to "opt in" to commercial interactivity during children's programming because there is no effective means to provide reliably for parents to opt in and because allowing an opt in would contravene the Commission's and Congress' policy goals of limiting children's exposure to commercial matter.¹²

In May, the Coalition argued that the Commission should reject the commenters' argument that the Commission should abstain from or delay in adopting regulations to protect children from excessive commercials because interactive television is an established technology and regulation will not stifle the industry.¹³ CMPC reiterated its opposition to an opt in proposal and rejected commenters' opt out approach, arguing that there is currently no existing technology to allow parents to control interactivity and that it does not give parents any real choice in what information their children access because it does not distinguish between commercial and non-commercial content.¹⁴ The Coalition also argued that the Commission should reject Disney's request to exempt video on demand from children's programming regulations because television commercials should be regulated regardless of the way they are delivered to children.¹⁵ Lastly, CMPC argued that the Coalition's proposals do not violate the First Amendment and that the Commission has clear authority under its general public interest authority and the Children's Television Act to implement the Coalition's proposed regulation.¹⁶

¹¹ *Id.*

¹² *Id.* at 19-20.

¹³ Reply Comments of Children's Media Policy Coalition, Free Press, The Campaign for a Commercial-Free Childhood, and Dads and Daughters, MM Docket 00-167, May 2, 2005 at 1-9.

¹⁴ *Id.* at 12-13.

¹⁵ *Id.* at 13-15.

¹⁶ *Id.* at 15-20.

In the 2009 notice of inquiry, entitled *Empowering Parents and Protecting Children in an Evolving Media Landscape*, the Commission invited comments to update the record in the *2004 Children’s Television Obligations of Digital Television Broadcasters* proceeding. It asserted that new forms of advertising—such as interactive television commercials—“warrant scrutiny into how they impact children,” and it asked several questions about how interactive advertising can affect children.¹⁷ In a separate statement accompanying the notice of inquiry, Commissioner Copps advocated for the Commission to regulate interactive advertising:

[T]he Commission has pending two further proceedings on children’s media issues that address interactive and embedded advertising in television and in cable programming. The critical issues raised in those proceedings may be ripe for Commission action now, and need not await the filing of comments in this NOI. I urge prompt review of the record in those proceedings.”¹⁸

We thus write to update the record on interactivity and urge the Commission to act on its tentative conclusion.

II. CIRCUMSTANCES ARE RIPE FOR A RAPID EXPANSION OF INTERACTIVE TELEVISION

Every month, multichannel video programming distributors and set-top box and television manufactures bring television interactivity into more American homes. In March 2009, 32 million homes had interactive capabilities, and experts predicted that 25 million new cable-enabled homes would become interactive by the end of 2009.¹⁹

Comcast’s Senior Director of Interactive Television Product Development asserted that

¹⁷ 2009 NOI at ¶ 36.

¹⁸ *Id.* at Statement of Commissioner Copps.

¹⁹ Peter Low, *Why Interactive TV Is the New Reality*, ONLINE MEDIA DAILY, March 16, 2009, available at http://www.mediapost.com/publications/?fa=Articles.printFriendly&art_aid=102159 (last visited Feb. 22, 2010).

more than ten million Comcast customers will have interactive television capabilities by early 2010.²⁰ Canoe Ventures and Cable Television Laboratories, two cooperative entities formed by many cable companies, multichannel video programming distributors, and television and set-top box manufacturers are investing in research and development to create new technologies and products to bring interactivity into more American homes. Many are working to make interactive technologies compatible across different cable platforms and with all hardware so that programmers and marketers can create interactive television commercials that can be deployed quickly and to many American homes.²¹

Executives at multichannel video programming distributors are also publically promoting interactivity as the future of advertising, and they are voicing their commitment to interactive advertising. For example, Barry Frey, the executive vice president of advanced platform sales for Cablevision, explains, “While the effectiveness of the ‘traditional’ 30-second spot at times appears to be threatened by a plethora of technological advances, cable operators are now equipping advertising partners with innovations and creative solutions that enable interaction with viewers in ways previously unachievable.”²² Cable company executives are touting the beneficial effects of interactive advertising: it can provide advertisers with a much more valuable advertising platform because it can engage users to interact with the advertised product, it can prolong the amount of time users spend with the commercial matter, and it can shorten the length of time between consumer awareness and purchase. Comcast COO Steve

²⁰ Todd Spangler, *Comcast Hits 8 Million EBIF-Enables Homes*, MULTICHANNEL NEWS, December 2, 2009, available at http://www.multichannel.com/article/397739-Comcast_Hits_8_Million_EBIF_Enabled_Homes.php (last visited Feb. 22, 2010).

²¹ Low, *supra* note 19.

²² Barry Frey, *Power to the :30*, ADWEEK, February 2, 2009, available at http://www.adweek.com/aw/content_display/community/columns/other-columns/e3iae944bbce9080b6e94065f5ead440456 (last visited Feb. 22, 2010).

Burke announced in Fall 2009 at the Cable & Telecommunications Association for Marketing Summit that one of the two “big opportunities facing the cable industry [is] interactive TV technology.”²³ Burke also stated, “We are big believers that interactive television is coming.”²⁴ David Kline, president of Cablevisions’ advertising sales unit, said that hundreds of interactive campaigns are planned for 2010.²⁵

Market research indicates that viewers want interactive television technologies. Harris Interactive, a market research firm, gauged demand and interest for interactivity by conducting an online study between November 29 and December 3, 2007 which involved questioning 2,949 adults, of whom 2,877 watch television.²⁶ Of those polled, sixty-six percent asserted that they already use the interactive electric programming guides to search for shows, schedule movies, or access video-on-demand (“VOD”) services.²⁷ The study revealed that sixty-six percent responded that they would be “very interested in interacting with commercials that piqued their interest.”²⁸ Seventy-two percent of reality television viewers also said that they wanted to interact with those shows, and even those

²³ Claire Atkinson, *CTAM Wrap: Taking the Pulse of the Cable Biz*, BROAD. AND CABLE MAGAZINE, October 29, 2009, available at http://www.broadcastingcable.com/blog/ADverse_Atkinson_on_Advertising/24776-CTAM_Wrap_Taking_the_Pulse_of_the_Cable_Biz.php?rssid=20116&q=CTAM+Wrap%3A+Taking+the+Pulse+of+the+Cable+Biz (last visited Feb. 22, 2010).

²⁴ Marissa Guthrie and Alex Weprin, *Comcast-NBCU: Roberts Says Hulu, TV Everywhere Are Complementary*, BROAD. AND CABLE MAGAZINE, December 3, 2009, available at http://www.broadcastingcable.com/article/409187-Comcast-NBCU_Roberts_Says_Hulu_TV_Everywhere_Are_Complementary.php (last visited Feb. 22, 2010).

²⁵ Andrew Hampp, *Interactive Commercials Show Strong Early Results*, ADVERTISING AGE, January 14, 2010, available at http://adage.com/abstract.php?article_id=141501.

²⁶ Shahnaz Mahmud, *Survey: Viewers Crave TV Ad Fusion*, ADWEEK, January 25, 2008, available at http://www.adweek.com/aw/content_display/news/media/e3i9c26dcb46eda7449d1197b0419feb7a1 (last visited Feb. 22, 2010).

²⁷ *Id.*

²⁸ *Id.*

who watch dramas said they were interested in interacting with dramas.²⁹ Viewers spend twenty percent more time on a channel when there is interactive television programming.³⁰ The History Channel's ratings increased between fifteen and twenty percent during a trial of interactive applications.³¹ More than ten percent of Oceanic Time Warner's 200,000 digital subscribers participated in the interactive television initiative each week, prompting Fox Reality Channel President David Lyle to assert: "It's not a huge number, but any time you get a 10% opt-in, we feel very good about it."³²

Along with interactive programming, interactive commercials are becoming more prevalent on television. Several studies have found interactive commercials to be more persuasive than traditional thirty-second spots. On average, twenty percent of viewers engage with an interactive commercial,³³ and on average people spend six to twelve minutes with interactive advertisements.³⁴ An interactive commercial that enables a viewer to engage with content "can deliver the same levels of awareness as three exposures to a regular ad."³⁵ Cablevision recently claimed that the conversion rates of interactive advertisements—the percentage of viewers who requested the advertiser's product sample or coupon after initially clicking on the interactive television advertisement—ranged from forty percent to more than seventy percent.³⁶

²⁹ *Id.*

³⁰ Low, *supra* note 19.

³¹ Atkinson, *supra* note 23.

³² David Tanklefsky, *Fox Reality Goes Interactive*, BROAD. AND CABLE MAGAZINE, June 1, 2009, available at http://www.broadcastingcable.com/article/277496-Fox_Reality_Goes_Interactive.php (last visited Feb. 22, 2010).

³³ Low, *supra* note 19.

³⁴ Frey, *supra* note 22.

³⁵ Steven Bellman, Anika Schweda, and Duane Varan, *A Comparison of Three Interactive Television Ad Format*, J. OF INTERACTIVE ADVER., Fall 2009 at 14, 17.

³⁶ Todd Spangler, *Cablevision: Interactive TV Ads work Very Well*, MULTICHANNEL NEWS, January 12, 2010, available at <http://www.multichannel.com/article/443697->

One study reported that interactive television “increases brand awareness by up to 70%,” and viewers who engage with an interactive commercial “are twice as likely to make purchases.”³⁷ Another found that “the effect of interaction with iTV [interactive television] ads includes an 8% increase in purchase intentions compared with the level for viewers of regular ads, which represents a 36% increase in estimated sales.”³⁸ The study further noted that “interaction with iTV ads performs better than regular ads at generating brand awareness and is more persuasive for selling the benefits of the brand, so that interactors have many more positive than negative thoughts about the ad and therefore develop more favorable attitudes toward both the ad and the brand.”³⁹ The study also found that those who interacted with an advertisement that allows a viewer to watch an extended VOD commercial indicated that they were more likely to buy the advertised product than the top forty percent of the control group.⁴⁰ These results lead researchers to conclude that “iTV ads can generate leads and build purchase intentions.”⁴¹

Advertisers seem to be taking note of the trend to introduce interactive advertisements. Companies have diverted their advertising budgets from traditional media to digital media and advanced forms of advertising, such as interactive commercials and VOD.⁴² Advertising Week reported that of those advertising firms that

Cablevision_Interactive_TV_Ads_Work_Very_Well.php (last visited Feb. 22, 2010). Spangler also notes that these numbers have not yet been verified by an outside auditor.

³⁷ Low, *supra* note 19.

³⁸ Bellman, *supra* note 35, at 29.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Katy Bachman, *Shops Spend Less on Traditional Media*, ADWEEK, August 7, 2009, available at http://www.adweek.com/aw/content_display/news/e3i111888fc4afd5a6af66a0da7a57c992f (last visited Feb. 22, 2010).

responded to its poll, 62.5 percent predicted that their customers were either “very or somewhat likely to add cutting-edge media to their plans.”⁴³

III. SEVERAL VENTURES ARE PROMOTING INTERACTIVE TECHNOLOGIES

Multichannel video programming distributors and the manufacturers of both set-top boxes and television sets invented the technologies used in interactive television, and all continue to improve the technology in order to make interactivity available to more Americans.

A. Multichannel Video Programming Distributors

Cable television system operators have cooperatively formed two entities—Canoe Ventures and Cable Television Laboratories—that work to solve the challenges of implementing interactivity on televisions throughout America. Cable operators recognized that if each implemented its own platform for interactivity, advertisers would have to create separate content for each system, which would be an expensive and potentially a prohibitive financial undertaking.

Canoe Ventures was founded by six of the country’s largest cable operators: Comcast, Cablevision, Time Warner, Cox, Bright House, and Charter. Canoe Ventures seeks to make television “a more competitive and compelling marketing medium by developing advanced advertising products and services to help network partners and their clients reach and engage millions of viewers across cable’s national footprint.”⁴⁴ Last year, David Verklin, the CEO of Canoe Ventures, asserted that Canoe Ventures would

⁴³ *Id.*

⁴⁴ Canoe Ventures – About Canoe, *available at* <http://www.canoe-ventures.com/about.html> (last visited Feb. 22, 2010).

aggressively implement in the near future several interactive television technologies, including voting and polling, request for information, t-commerce, telescoping, and addressability.⁴⁵ Canoe Ventures uses the Enhanced Binary Interchange Format to achieve television interactivity, and it recently released its Canoe Advanced Advertising Platform, which “works across disparate technologies used by various cable operators, programmers, and advertisers.”⁴⁶ Canoe Ventures plans to launch nationwide its commercial interactive request for information services by spring 2010.⁴⁷

Cable Television Laboratories, or CableLabs, was founded in 1988 by cable operators as a “non-profit research and development consortium that is dedicated to pursuing new cable telecommunications technologies and to helping its cable operator members integrate those technical advancements into their business objectives.”⁴⁸ CableLabs has been responsible for developing many of the technologies that consumers use today, such as VOD. Every major cable operator is a member of CableLabs,⁴⁹ and cable operator CEOs make up CableLabs’ Board of Directors.⁵⁰ CableLabs is currently engaged in a number of projects designed to create a uniform interactivity standard and

⁴⁵ Stacey Higginbotham, *Canoe Venture Wants Your Data*, NEWTEEVEE.COM, November 13, 2008, available at <http://newteevee.com/2008/11/13/canoe-ventures-wants-your-data/> (last visited Feb. 22, 2010).

⁴⁶ Kent Gibbons, *Advanced Ads Already Pay Off*, MULTICHANNEL NEWS, November 2, 2009, available at http://www.multichannel.com/article/367043-Advanced_Ads_Already_Pay_Off.php (last visited Feb. 22, 2010).

⁴⁷ Spangler, *supra* note 36.

⁴⁸ About Cable Labs – Overview, available at <http://www.cablelabs.com/about/overview/> (last visited Feb. 22, 2010).

⁴⁹ About Cable Labs – Member Companies, available at <http://www.cablelabs.com/about/companies/> (last visited Feb. 22, 2010).

⁵⁰ CableLabs – Board of Directors, available at <http://www.cablelabs.com/about/board/> (last visited Feb. 22, 2010).

encourage content providers and device manufacturers to develop products using that standard.⁵¹

CableLabs' flagship interactivity product is called tru2way, which it promotes with the slogan: "The interactivity that consumers love so much on the Internet will soon become an everyday reality on TV sets, thanks to tru2way—an innovative national software platform that enables cable's interactive services to be deployed to many different devices."⁵² Tru2way provides an open-source industry standard for delivering interactive content to compatible devices.⁵³ Currently, a number of device manufacturers have signed on to include tru2way technology in their products, and Panasonic recently introduced its first tru2way television that will be able to access all of the features of cable programming without a set-top box.⁵⁴

Comcast Executive Vice-President David Cohen noted that the consumer electronics manufacturers' ardor for embedding tru2way technology in DVR's and expensive television sets has lessened because interactive technology is changing so rapidly that hardware can quickly become outdated.⁵⁵ Cohen suggested that a replaceable chip or downloadable updates might be a better means of delivering interactive television to operators in the face of such technological change.⁵⁶

⁵¹ About Cable Labs – Overview, *supra* note 48.

⁵² Tru2way Home Page, *available at* <http://www.tru2way.com/>; Tru2way Consumers, *available at* <http://www.tru2way.com/consumers/>.

⁵³ John Eggerton, *Cohen: Comcast's Plant tru2way-Capable By End of Year*, BROADCASTING AND CABLE MAG., October 26, 2009, *available at* http://www.broadcastingcable.com/article/366357Cohen_Comcast_s_Plant_tru2way_Capable_By_End_of_Year.php (last visited Feb. 22, 2010).

⁵⁴ Panasonic Televisions, *available at* <http://www2.panasonic.com/consumer-electronics/learn/televisions/whats-hot-viera-tru2way.jsp> (last visited Feb. 22, 2010).

⁵⁵ Eggerton, *supra* note 53.

⁵⁶ *Id.*

Multichannel video programming distributors have also developed their own products and formed partnerships with technology companies to bring interactive television to their subscribers. In March 2009, Dish Network announced that its subscribers would have access to interactive television applications.⁵⁷ One interactive application available is Fandango, which allows subscribers to purchase movie tickets with their remote controls.⁵⁸ Cablevision developed the Power :30SM, which “uses the 30-second unit as the entry point into video on demand and interactive television channels dedicated to a specific advertiser, and provides marketers and agencies with addressable advertising and telescoping functionality.”⁵⁹ In fall 2009, Cablevision became the first cable operator to provide interactive capabilities to all of its 3.1 million subscribers in the New York, Connecticut, and New Jersey area.⁶⁰ Backchannelmedia, which creates clickable television technology, partnered with Fisher Communications, which owns 13 full-power stations, and LIN and Gray station groups to bring interactive television to their subscribers.⁶¹

B. Device Manufacturers

Set-top box and television manufacturers are also providing Internet-based (rather than cable-based) interactive products and services. These services allow a viewer to use his television to access the Internet.

⁵⁷ Traci Patterson, *AT&T, Dish Intro New iTV Apps*, CES MAGAZINE, March 17, 2009, available at <http://www.cedmagazine.com/News-broadband-briefs-031709.aspx> (last visited Feb. 22, 2010).

⁵⁸ *Id.*

⁵⁹ Frey, *supra* note 22.

⁶⁰ Hampp, *supra* note 25.

⁶¹ Michael Malone, *Fisher, Backchannelmedia Reach Interactive TV Deal*, BROAD. AND CABLE MAGAZINE, April 20, 2009, available at http://www.broadcastingcable.com/article/209445-Fisher_Backchannelmedia_Reach_Interactive_TV_Deal.php (last visited Feb. 22, 2010).

1. Set-Top Boxes

There are currently several set-top boxes that can add interactive features to a user's television. For example, TiVo's set-top boxes allow users to record and manipulate television content and some newer boxes enable users to watch movies from popular online distribution sites, like Netflix, Amazon Video, and YouTube.⁶² TiVo even offers users the ability to order Domino's Pizza with a click of the remote.⁶³ Echostar plans to release a set-top box that can access a full Internet browser and will be able to play video from across the web.⁶⁴

2. Television Sets

Television manufacturers have also started to develop televisions with built-in technologies that can provide a user with an interactive experience. Manufacturers have added this functionality to televisions by harnessing widget engines and by adding WiFi and other computer technologies directly to the television sets.

Widgets, which are small software applications, are built into televisions and allow users to perform certain tasks or access information directly on their televisions via the Internet and thus independently of any cable or broadcast programming.⁶⁵ For example, Yahoo! Widgets, one of the industry's most popular widget engines, has many applications, including ones for Twitter, Facebook, sports scores, and the weather.

⁶² TiVo Products, *available at* <http://www.tivo.com/dvr-products/tivo-hd-dvr/index.html> (last visited Feb. 22, 2010).

⁶³ J.R. Raphael, *TiVo Debuts TV-Powered Pizza Ordering -- So What's Next?*, PC WORLD, November 17, 2008, *available at* http://www.pcworld.com/article/154029/tivo_debuts_tvpowered_pizza_ordering_so_whats_next.html (last visited Feb. 22, 2010).

⁶⁴ Saul Hansell, *Like Apple, TV Explores Must-Have Applications*, N. Y. TIMES, September 6, 2009, *available at* <http://www.nytimes.com/2009/09/07/business/07cable.html> (last visited Feb. 22, 2010).

⁶⁵ Some cable companies use widgets as well. Cable widgets are built into the operator's set-top boxes as an additional service for subscribers.

Yahoo! also recently released a developer kit to the public so that it can create widgets that will be compatible with devices that have Yahoo! Widget functionality.

Some manufacturers are selling televisions that have much more open-ended functionality. For example, Vizio is marketing a WiFi television that contains Adobe Flash support, and it asked companies to create interactive applications for its television.⁶⁶ The Vizio remote control (picture below) will have traditional buttons that enable viewers to change channels and volume, as well as additional buttons to navigate a screen and to type letters and punctuation.⁶⁷



IV. FORMS OF EXISTING COMMERCIAL INTERACTIVITY ON TELEVISION

Interactive television has been defined in many ways, but each highlights that the interactive component enables the traditional television viewer to become a television user. Some define interactive television as any television with a “return path” that allows

⁶⁶ Erica Ogg, *How Vizio Will Stand Out Among the Sea of Web TVs*, CNET NEWS, August 4, 2009, available at http://news.cnet.com/8301-17938_105-10302894-1.html (last visited Feb. 22, 2010).

⁶⁷ *Id.*

information to flow both from the broadcaster to the viewer and from the viewer to the broadcaster.⁶⁸ Several subscribe to the definition that interactive television “is a group of technologies that gives users the possibility to take control over their TV experience, enabling interactivity with content.”⁶⁹ Still others are even more descriptive: interactive television is “an on-demand, participatory, non-linear, infotainment, advertising targeted and broadband two-way communication platform.”⁷⁰

Some interactivity on television has existed for the past decade on many cable systems via set-top boxes and services that offer interactive program guides,⁷¹ VOD,⁷² and digital video recorders⁷³ (“DVRs”). More recently, however, multichannel video programming distributors and set-top box and television manufacturers have introduced technology that creates an opportunity for television commercial interactivity: advertisements that offer interactive elements—such as voting and polling, request for information services, t-commerce, telescoping, and addressability components—during the traditional 30-second television spot.

Interactive advertisements on television currently take one of three forms: superimposed, interactive icons; interactive sub-channels; and telescopic.⁷⁴ An interactive

⁶⁸ *Understanding Interactive TV*, Advanced TV Primer, distributed by the Cable Television Advertising Bureau, available at <http://www.thecab.tv/main/vod/index.shtml> (last visited Feb. 22, 2010).

⁶⁹ Verolien Cauberghe and Patrick De Pelsmacker, *Opportunities and Thresholds for Advertising on Interactive Digital TV: A View from Advertising Professionals*, J. OF INTERACTIVE ADVER., Fall 2006, at 12-13.

⁷⁰ *Id.*

⁷¹ Interactive program guides allow users to browse the content available on each channel without having to change the channel.

⁷² VOD allows users to order content when they want to view it, and the content may be offered free, paid, or tied to a particular subscription service.

⁷³ DVRs allow users to record content and access it at their convenience and enable users to pause, rewind, and fast-forward the content that they access.

⁷⁴ Bellman, *supra* note 35, at 14.

icon superimposed over the traditional commercial is frequently accompanied by a textual message that encourages viewers to press a button on their remote controls to avail themselves of the advertised offer, such as a free brochure, callback, or sweepstakes.⁷⁵ With this form of interactivity, if the offer requires viewers to enter personal details, such as their names or telephone numbers, the banners will remain superimposed until the interaction is complete, even if that entails that the adjacent advertising or programming is obscured by the interactive banner.⁷⁶ Interactive sub-channel advertisements allow much greater interactivity, and they “resemble miniature Web sites (‘microsites’).”⁷⁷ To view interactive advertisements located on sub-channels,⁷⁸ one must leave the live video content, but one can then navigate among different screens that resemble a PowerPoint presentation.⁷⁹ The third form is telescopic advertisements, which also take the viewer away from the live video content by inviting them to view extended or long-form audiovisual content that is downloaded on demand or stored in advance on the viewer’s DVR.⁸⁰ Viewers opting to watch telescopic advertisements can frequently pause the live video content so as not to miss any programming.⁸¹ With these three forms of interactivity, advertisers have come up with many types of commercial interactivity to market their products and engage viewers.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ The subchannels are “obtained by dividing the main channel’s allocated bandwidth, which limits the number of pages that can be used and the type of content displayed.” *Id.*

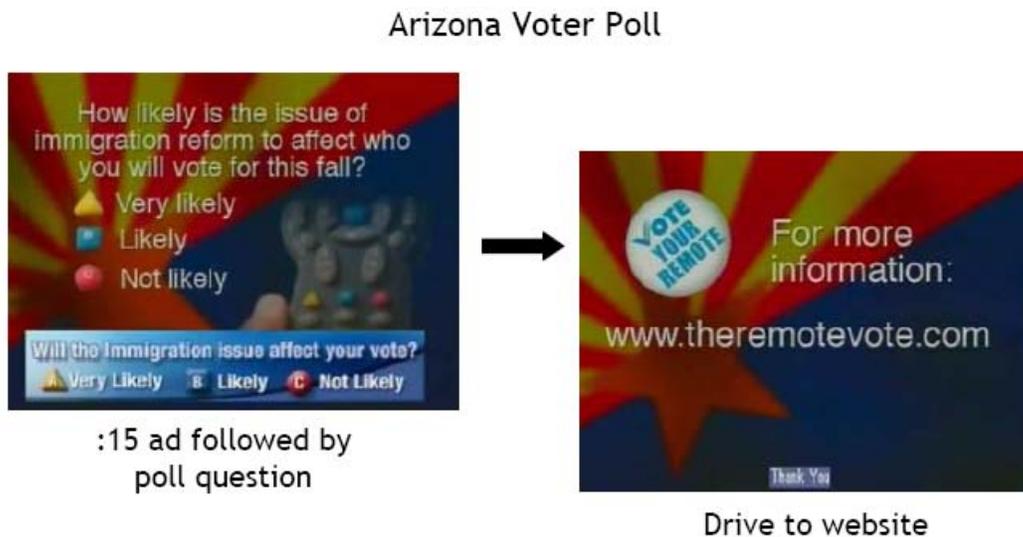
⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

A. Voting and Polling

Voting and polling allows viewers to participate in live votes using only their television remotes. Below is an example of how an Arizona cable channel used the voting and polling feature:⁸²



Voting and polling was developed to keep viewers engaged with their televisions during regular programming shows: for example, viewers would likely remain more engaged with their televisions during American Idol, which allows viewers to vote for their favorite contestants, if they could vote directly through their television rather than using text messages or phone calls to vote.⁸³ Bright House Networks Digital Cable currently has a subscription service that enables viewers to respond to questions that appear on the bottom of their television screen by pressing a button on their remote control.⁸⁴ One poll asked viewers, “Should police have to knock entering a home if a search warrant has been issued?” and instructed them to hit one button for “yes,” another for “no,” and a

⁸² Screenshot from *Understanding Interactive TV*, *supra* note 68.

⁸³ Higginbotham, *supra* note 45.

⁸⁴ Bright House Networks—Interactive Television, *available at* http://tampabay.brighthouse.com/products_and_pricing/digital_cable/interactive_televisions/default.aspx (last visited Feb. 22, 2010).

third for “depends on the crime.”⁸⁵ Bright House then provides the outcome of the television poll within minutes.⁸⁶

It is easy to imagine voting and polling being employed in an educational manner during children’s programming. However, commercial voting and polling could unfairly gather information about children’s preferences and could confuse children as to whether they are participating in children’s programming or commercial advertisements. For example, children could be asked to vote for their favorite television character, color, or game. These polls would be commercial in content, could lead to the collection of personal information, and most likely would be sought after by marketers.

B. Request For Information

Request for information is a feature that allows viewers to click an icon shown during programming to receive additional information about a product advertised. This information could be transmitted to the viewer in several forms, including an email message, the delivery of a physical catalogue, or even a free sample. Many companies, including Gillette, Benjamin Moore, Century 21, and Halls, have aired request for information advertisements.⁸⁷

In 2009, Gillette, Benjamin Moore, Century 21, Unilever, and Colgate-Palmolive each signed up with Cablevision to run for two weeks an interactive advertisement which prompted viewers to click their remote controls to receive more information, product samples, or gift certificates from advertisers.⁸⁸ Advertisers and Cablevision noted that the

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Mike Robuck, *Cablevision Bullish on Interactive TV Ads*, CES MAGAZINE, January 12, 2010, available at <http://www.cedmagazine.com/News-Cablevision-interactive-TV-ads-011210.aspx> (last visited Feb. 22, 2010).

⁸⁸ Hampp, *supra* note 25.

request for information feature was so popular that the interactive commercials were taken off the air on average after one week because marketers did not have enough promotional inventory.⁸⁹ The Benjamin Moore interactive campaign for paints yielded more than 25,000 requests for product samples, and because the product samples had to be redeemed in stores, the company was able to quantify the campaign's impact on store traffic.⁹⁰ Colgate Palmolive had similarly successful results: seventy percent of the consumers who requested more information became recipients of the product giveaway.⁹¹ Even local advertisers were impressed with the results of their request for information commercials. Mount Everest Ski and Snow Board Shop in Westwood, New Jersey offered viewers via an interactive commercial free lift tickets and tune-ups for ski and snowboard equipment, both of which could be redeemed in person. The store manager explained that "[t]his [interactive commercial] is something that holds the customer's attention, gives them the opportunity to get something for free and opens another door for return business because they're actually coming into the store."⁹² Cable companies envision this service being implemented for less product-specific uses, such as allowing a Food Network viewer to request a recipe be emailed to him.⁹³

Requests for information could certainly be a useful technology for children's programming, but they could also be used without parental permission or awareness and in a manner that allows children to request commercial products that their parents do not desire. For example, an interactive commercial aired during children's programming could offer to send a free sample of a new cereal to a child's home if the child hits a

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

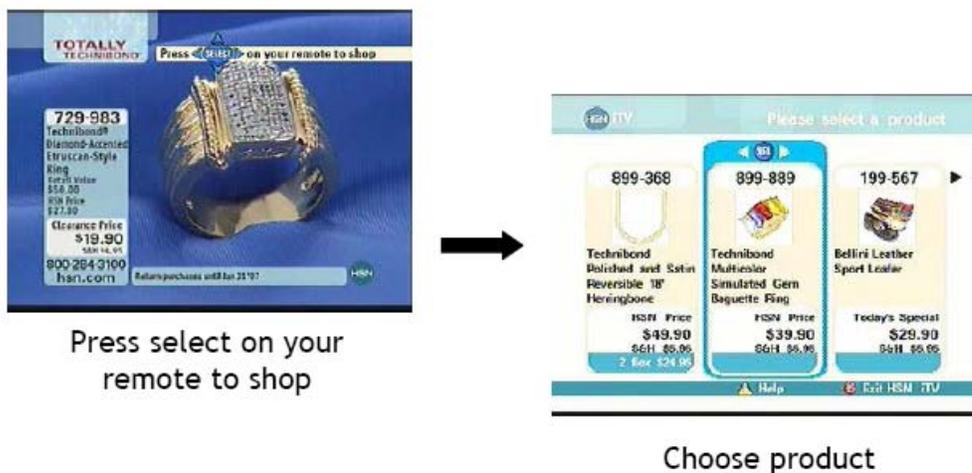
⁹³ Higginbotham, *supra* note 45.

button on his remote control. Because even very young children have the dexterity to hit one button on a remote control, a child could order a sample of a cereal that his parents would never purchase for him. Children could also order product samples that are otherwise inappropriate – too frightening or containing sexual content. Parents should be able to make their own decisions for their children, not be forced to fight with marketers who have sent material to their children without their consent.

C. T-commerce

T-commerce is a service that allows viewers to use their remote controls to purchase items that are billed to their cable bill or credit card.⁹⁴ Cable companies tout t-commerce as hugely beneficial to advertisers: it provides both a quicker conversion time from awareness to interest to sale and a faster, more streamlined checkout process.⁹⁵ Industry leaders view t-commerce as an extremely lucrative innovation for advertisers, and they envision that home shopping channels will be the first to harness this technology regularly, as demonstrated below:⁹⁶

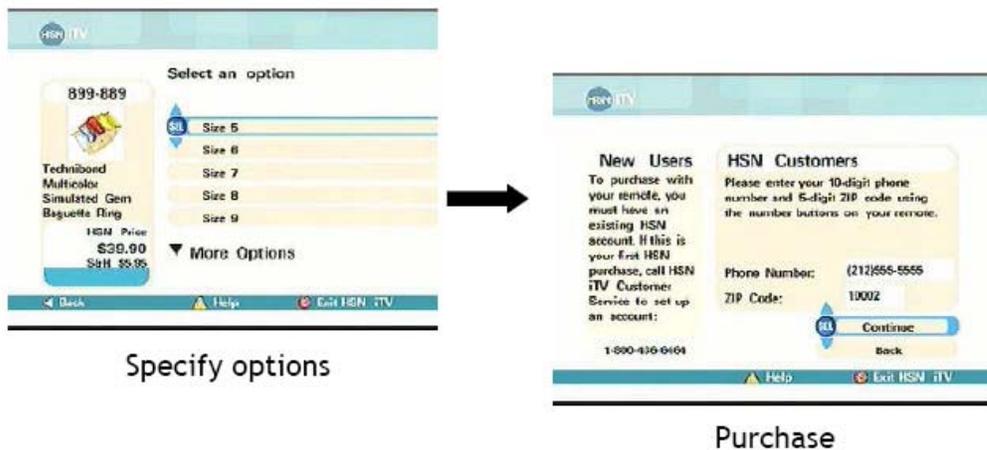
Home Shopping Network iTV



⁹⁴ *Id.*

⁹⁵ *Understanding Interactive TV, supra* note 68.

⁹⁶ *Id.*



In December 2009, Comcast introduced a service called Home Shopping Network Shop by Remote in eight million American homes.⁹⁷ With an average purchase time of less than sixty seconds, this system allows customers to select the quantity, color, features, and sizes of products with their remote controls.⁹⁸

T-commerce may be convenient for adults seeking to purchase products that they want, but there are severe consequences—some irreversible—that can occur if this technology appears during children’s programming when direct sales to children are likely. Direct sales to children are problematic because they could undermine parental authority and could increase the stresses in parent-child relationships. The ability to cancel or return products purchased by children is not a sufficient or adequate remedy because returning items places a burden on already busy parents, parents may not know

⁹⁷ Spangler, *supra* note 20. The eight million homes are approximately forty-four percent of Comcast’s eighteen million digital video customers nationwide, out of 24.3 million video customers total. *Id.*

⁹⁸ *Comcast Rolls Remote Shopping*, LIGHT READING’S CABLE DIGITAL NEWS, December 3, 2009, available at http://www.lightreading.com/document.asp?doc_id=185370&site=cdn (last visited Feb. 22, 2010).

that a product was delivered until already opened or used, and some items—such as food deliveries⁹⁹—can never be returned.

The Commission demonstrated its agreement that direct sales to children should be prohibited when it enacted the 900 Number Rule: “The provider of pay-per-call services shall not direct advertisements for such pay-per-call services to children under the age of 12.”¹⁰⁰ The Commission enacted this regulation to prevent companies from encouraging children viewing programming directed at those under twelve to call a number displayed on the television screen to talk to a cartoon character.¹⁰¹

D. Telescoping

Telescoping is a service that allows viewers to “click through” programmed content to access additional content. It is commonly implemented by having a banner displayed during programmed content link to VOD content. Telescoping can deliver additional information to customers instantly and can increase the amount of time that viewers are exposed to commercial content. Cable companies envision this product being used to “click through on a movie [advertisement] and see a whole trailer, or click through on a video game ad and see a demo.”¹⁰²

Some cable systems devote entire channels to telescoping or VOD services. For example, channel 651 on most Cablevision systems is the Barbie Channel, which runs

⁹⁹ In 2004, Pizza Hut ran an interactive commercial that enabled viewers to order pizza delivery with their remote controls. Steve Donohue, *Quiet Nosy Navic Might Be Watching*, MULTICHANNEL NEWS, May 2, 2004, available at http://www.multichannel.com/article/71941-Quiet_Nosy_Navic_Might_Be_Watching.php (last visited Feb. 22, 2010).

¹⁰⁰ 16 C.F.R. § 308.3 (2009).

¹⁰¹ See *Facts for Consumers: 900 Numbers: FTC Rule Helps Consumers*, available at <http://www.ftc.gov/bcp/edu/pubs/consumer/telemarketing/tel04.shtm> (last visited Feb. 22, 2010).

¹⁰² Higginbotham, *supra* note 45.

twenty-four hours a day and presents the viewer with the opportunity to watch many videos on demand. A menu appears on channel 651 that includes links to a variety of Barbie related content, including “Watch Commercials,” “Watch Trailers,” “For Parents” “Barbie of the Month,” and Poll/Trivia.” Clicking on “Watch Commercials” brings a viewer to another screen with links to “Cool Videos,” “Movie Trailers,” “Barbie Talk,” “Barbie Messages,” and “Parents.”¹⁰³ “Barbie Messages” contain three commercials for Barbie merchandise: “Cut & Style Rapunzel,” a doll whose hair you can cut; “World of Peek-a-Boo,” a collection of miniature Barbie dolls with oversized heads; and “Barbie Anthem,” in which mothers discuss the joy of sharing a Barbie with their daughters. The Parents section informs users that they can receive special offers on Barbie products by hitting the “Submit” button.

Channel 650 on Cablevision is the Disney Travel Channel, which also runs twenty-four hours a day.¹⁰⁴ After watching a VOD, viewers can click on the “Talk to Agent” feature on their television and request a telephone callback from a Disney travel representative to make their travel arrangements at Disney theme parks.¹⁰⁵ Cablevision Senior Vice-President Barry Frey recently boasted that channels like the Barbie Channel and Disney Travel Channel regularly engage viewers for an average of seven to ten minutes, as opposed to the typical fifteen to sixty seconds of a traditional commercial.¹⁰⁶

¹⁰³ *Television Barbie TV*, available at <http://www.schematic.com/#/OurWork/Television/BarbieTV/> (last visited Feb. 22, 2010).

¹⁰⁴ Press Release, Disney, Disney Parks Launches First-of-its-Kind Programming for Interactive Cable Networks; Introducing Disney Travel on Demand (May 15, 2007), available at http://corporate.disney.go.com/corporate/moreinfo/pdfs/2007_disney_parks_ondemand.pdf (last visited Feb. 22, 2010).

¹⁰⁵ *Id.*

¹⁰⁶ Brian Santo, *CES: Ad, cable industries out of synch on interactive ads*, CES MAGAZINE, January 9, 2009, available at <http://www.cedmagazine.com/CES-Ad-cable-industries-interactive-ads.aspx> (last visited Feb. 22, 2010).

The Commission has determined that commercial time limits apply “regardless of the free or pay status of the channel,”¹⁰⁷ and therefore VOD should not be exempted from its regulation of commercial interactivity during children’s programming. It is irrelevant that a child can request a VOD program at any time because the same concerns about over-commercialization apply when a child watches a VOD as when a child watches a traditional 30-second spot: commercial telescoping during children’s programming will expose children to more commercial material. Even very young children have the know-how to order VOD programming, and it is unrealistic to assume that parents will always watch television with their children or that children will ask permission before accessing VOD content.

E. Addressability

Addressability is a feature that allows advertisers to target individual viewers specifically. One industry leader described this technology as a way to ensure that viewers receive “no more dog food ads if [they] don’t own a dog.”¹⁰⁸ Cable systems usually target viewers with addressable advertisements by overlaying census and other demographic data onto their cable system subscription information. This allows, for example, “General Motors [to] send an ad for a Cadillac Escalade to high-income houses, a Chevrolet to low-income houses, and one in Spanish to Hispanic consumers.”¹⁰⁹ In September 2009, Cablevision launched an addressable-advertising service to

¹⁰⁷ 2004 R&O at ¶ 43.

¹⁰⁸ Higginbotham, *supra* note 45.

¹⁰⁹ Stephanie Clifford, *Cable Companies Target Commercials to Audience*, N. Y. TIMES, March 3, 2009, available at http://www.nytimes.com/2009/03/04/business/04cable.html?_r=1 (last visited Feb. 22, 2010).

approximately half a million subscribers.¹¹⁰ Addressability itself is not interactive, but because viewers are being specifically targeted with advertisements that demographic reports deem relevant to them, cable companies believe that viewers are more likely to engage interactively with the advertisement by watching a VOD or participating in a request for information. David Porter, vice president of marketing and new media at Cox Media, which is the ad-sales arm of Cox Communications, thinks Cox can exploit aggregated data culled from consumers to create interactive advertising opportunities such as allowing viewers to request more information about a product or service.¹¹¹

One example of addressability being used in conjunction with interactive television was a sweepstakes Hawaiian Airlines offered in conjunction with American Idol.¹¹² Viewers accessed the sweepstakes by selecting the Hawaiian Airlines logo on the television screen, and, after reviewing a rules and guidelines page, they hit another button on their remote controls and were automatically entered into a drawing because their personalized information had been culled from their digital set-top box.¹¹³ One multichannel video programming distributor also uses addressability in its interactive Fandango television application: when a viewer accesses Fandango, the application creates a list of nearby theatres based on the subscriber's zip code.¹¹⁴

Addressability may not raise significant concerns in the context of advertising to adults, but when advertisers design commercials that specifically target children based on their individual preferences there are many concerns. The more precisely advertisers can

¹¹⁰ Todd Spangler, *Cablevision Bows Interactive TV Ads*, MULTICHANNEL NEWS, January 25, 2009, available at http://www.multichannel.com/article/354000-Cablevision_Bows_Interactive_TV_Ads.php (last visited Feb. 22, 2010).

¹¹¹ Gibbons, *supra* note 46.

¹¹² Tanklefsky, *supra* note 32.

¹¹³ *Id.*

¹¹⁴ Patterson, *supra* note 57.

target children, the more they can take advantage of children's lack of sophistication and inability to understand persuasive intent. If advertisers are able to use addressability to target children and make their products more appealing to the child, children are even more likely to watch VOD, request more information, and engage in t-commerce.

V. CONCLUSION

We urge the Commission to act on its tentative conclusion to regulate commercial interactivity during children's programming. Interactive television is widespread throughout America and will only become more prevalent, thus making interactive television ripe for Commission regulation. The Commission should prohibit commercial interactivity during children's programming.

Respectfully Submitted,

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