

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Children's Television Obligations of Digital	)	MM Docket No. 00-167
Television Broadcasters	)	
	)	

**COMMENTS OF  
CHILDREN'S MEDIA POLICY COALITION  
FREE PRESS  
THE CAMPAIGN FOR A COMMERCIAL-FREE CHILDHOOD  
DADS AND DAUGHTERS**

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## SUMMARY

The Children's Media Policy Coalition joined by Free Press, The Campaign for a Commercial-Free Childhood, and Dads and Daughters are pleased that the Federal Communications Commission is proposing to adopt rules governing interactive advertising to children at this time. The Coalition *et al.* support the Commission's tentative conclusion that it should prohibit interactivity with commercial matter during children's programming.

Prohibiting interactivity with commercial matter during children's programming on broadcast, cable and satellite television, as well as during advertisements aired during or adjacent to such programs, is consistent with the Commission's and Congress' goals of limiting the amount of commercial matter presented during children's programs to the minimum amount necessary. A prohibition is also necessary to ensure compliance with the commercial time limits. Limiting advertising would also help to reduce children's desires for advertised products that parents do not want or are unable to purchase, and contribute to reducing childhood obesity and related health problems caused by consuming heavily advertised food products of low nutritional value.

For purposes of this rule, commercial matter should be defined as interactivity designed with the purpose of selling or promoting a product or service. This definition would prohibit not only traditional advertisements that might be enhanced by interactivity, but also interactions with branded environments, direct selling to the viewer, and the collection or use of information to target advertisements to children.

The Coalition *et al.* do not support the Commission's proposal to allow parents to "opt in" to interactivity during children's programming that connects the viewer to commercial matter. We know of no effective means to reliably provide for parents to opt in. Even if such a

means existed, however, allowing “opt in” would contravene the Commission’s and Congress’ policy goals of limiting children’s exposure to commercial matter and requiring a clear separation where commercials are permitted.

Finally, the Coalition *et al.* support the Commission’s tentative conclusion that the “commercial matter” and “web crawl” definitions adopted in the *2004 Children’s Television Obligations of Digital Television Broadcasters Report & Order* should be applied to direct broadcast satellite service providers. Such a rule would be consistent with the Commission’s and Congress’ objectives of limiting children’s exposure to advertising and requiring clear separation of programming and commercial content by ensuring that all children are protected, regardless of the means by which they receive their television signal.

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Children Now, American Psychological Association, American Academy of Pediatrics, Action Coalition for Media Education, American Academy of Child and Adolescent Psychiatry, Benton Foundation, National Institute on the Media and the Family, National PTA, and Office of Communication of the United Church of Christ, Inc. (“Children’s Media Policy Coalition”) joined by Free Press, The Campaign for a Commercial-Free Childhood, and Dads and Daughters (“Coalition *et al.*”), by their attorneys the Institute for Public Representation, respectfully submit these comments in response to the Further Notice of Proposed Rule Making (“FNPRM”) in the above referenced proceeding.

**I. THE COMMISSION SHOULD PROHIBIT COMMERCIAL INTERACTIVITY DURING CHILDREN’S PROGRAMS AND DURING ADVERTISEMENTS AIRED DURING AND ADJACENT TO CHILDREN’S PROGRAMMING**

The Federal Communications Commission (“FCC” or “Commission”) has proposed prohibiting “interactivity during children’s programming that connects viewers to commercial

matter unless parents ‘opt in’ to such services.”<sup>1</sup> The Coalition *et al.* support a prohibition on interactivity, during children’s programming and during commercials aired during or adjacent to children’s programming, that connects the viewer to commercial matter, regardless of whether the viewer is receiving the television signal via broadcast, cable operator, or direct broadcast satellite service provider. The Coalition *et al.* believe this proposal would serve to limit children’s exposure to commercial matter and ensure a clear separation between commercial matter and program content, without impeding the development of interactive technologies and interactive content that will enhance the educational and entertainment value of the program. This proposal is consistent with the policies established by the FCC in its *1974 Policy Statement*<sup>2</sup> and with Congressional intent in passing the Children’s Television Act.<sup>3</sup> Moreover, recent research summarized in the Report of the American Psychological Association Task Force on Advertising and Children (“Task Force”)<sup>4</sup> reinforces the need to limit the amount of advertising directed at children and to require clear separation of programming and commercial matter.

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<sup>1</sup> *Children’s Television Obligation of Digital Television Broadcasters*, 19 FCC Rcd 22943, ¶ 72 (2004) (“*FNPRM*”).

<sup>2</sup> *Petition of Action for Children’s Television (ACT) for Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children’s Programming and the Establishment of a Weekly 14-Hour Quota of Children’s Television Programs*, 50 FCC 2d 1 (1974) (“*1974 Policy Statement*”).

<sup>3</sup> Children’s Television Act of 1990, P. Law 101-437 (Oct. 18, 1990) (“*CTA*”) (codified at 47 U.S.C. § 303a).

<sup>4</sup> Kunkel, Dale, et al., Report of the APA Task Force on Advertising and Children (Feb 21, 2004), available at <http://www.apa.org/releases/childrenads.html> (last visited March 30, 2005) (“*APA Report*”). The Report is divided into four sections: Psychological Issues in the Increasing Commercialization of Childhood, Summary of Findings and Conclusions, Recommendations, and Psychological Implications of Commercialism in Schools.

**A. Prohibiting Interactive Advertising is Consistent with the Commission’s and Congress’ Objectives of Limiting Children’s Exposure to Commercial Matter**

In the *1974 Policy Statement*, the Commission concluded that it was important to “limit advertising to children to the lowest level consistent with [broadcasters’] programming responsibilities.”<sup>5</sup> The Commission recognized that “children are far more trusting of and vulnerable to commercial ‘pitches’ than adults. There is, in addition, evidence that very young children cannot distinguish conceptually between programming and advertising; they do not understand the purpose of a commercial is to sell a product.”<sup>6</sup> As a result, the Commission reasoned that broadcasters have a “special responsibility to children,” and concluded that over-commercialization of children’s programs represents a breach of that “special responsibility.”<sup>7</sup>

Although the Commission in 1974 relied on industry self-regulation, Congress adopted specific limits on the amount of advertising in the 1990 Children’s Television Act (“CTA”).<sup>8</sup> Congress found that “special safeguards are appropriate to protect children from over-commercialization on television.”<sup>9</sup> Both the House and Senate Reports on the CTA relied on the Commission’s findings in the *1974 Policy Statement* as well as more recent studies to support limiting the amount of advertising.<sup>10</sup> They explained that because the youngest children lack the perceptual capabilities to discriminate program from commercial content and children “under the

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<sup>5</sup> *1974 Policy Statement*, 50 FCC 2d at 13.

<sup>6</sup> *Id.* at 11.

<sup>7</sup> *Id.*

<sup>8</sup> 47 U.S.C. § 303a. In the *1974 Policy Statement*, the Commission decided to rely on the self-regulatory efforts of the broadcasters to limit the amount of commercial material. While these efforts were generally successful for a time, in the early 1980s, the NAB abandoned the advertising code and the FCC eliminated all television ad limits. These actions, and the subsequent increase in children’s advertising, ultimately prompted Congress to set limits. H.R. REP. NO. 101-385, at 2-12 (1989) (“*House Report*”); S. REP. NO. 101-227, at 1-10 (1989) (“*Senate Report*”).

<sup>9</sup> CTA, P. Law 101-437 § 101(4).

<sup>10</sup> *House Report* at 6-7; *Senate Report* at 2-4, 9.

age of 7 or 8 lack the ability to recognize the persuasive intent that necessarily underlies all television advertising,” children cannot be expected to react to excessive advertising by “changing the channel or turning off the television.”<sup>11</sup> Thus, advertising limits were necessary to “protect the interest of children by limiting the amount of commercial matter presented during children’s programs to the greatest extent possible without negatively impacting the viability of children’s programming on commercial television.”<sup>12</sup>

The CTA’s advertising limits of 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays apply to cable operators as well as licensees for over the air television.<sup>13</sup> The Senate Report explains that “the same rationale for restricting commercial matter during children’s programming on over-the-air television applies to such programming on cable television—most young children are unable to distinguish commercial matter from program matter, and they are especially vulnerable to commercial matter.”<sup>14</sup>

A report adopted by the APA, authored by the APA Task Force on Advertising and Children (“Task Force”), and released in February 2004, provides additional support for and reasons for limiting advertising to children.<sup>15</sup> The Task Force, which consisted of experts in the fields of childhood development, social psychology, and developmental psychology, conducted “an extensive review of the research literature in the area of advertising media, and its effects on children,” documented increases in the commercialization of childhood, and made a number of recommendations based on its findings.<sup>16</sup>

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<sup>11</sup> *House Report* at 6. *See also, Senate Report* at 9.

<sup>12</sup> *House Report* at 8. *See also, Senate Report* at 10.

<sup>13</sup> 47 U.S.C § 303a(d).

<sup>14</sup> *Senate Report* at 10 (citing Testimony of Bruce Watkins, American Psychological Association, Oct. 18, 1989).

<sup>15</sup> *APA Report*.

<sup>16</sup> *Id.* APA Press Release.

The Task Force found “an unprecedented level of growth in both the amount and type of advertising directed at children.”<sup>17</sup> It explained:

When channel capacity was constrained, as in decades past, television programming targeted to children was limited in amount and relegated to time slots unpopular with adults, such as Saturday mornings [ ]. Yet in this new multi-channel era, there are numerous national program services primarily or exclusively devoted to children, including Nickelodeon, ABC Family, Disney Channel, Cartoon Network, and Noggin. Naturally, these channels deliver significant amounts of child-oriented marketing messages. This includes not only traditional commercial segments but also product sponsorships that are linked to programs and program characters, such as licensing agreements with food companies, toy companies, and fast food restaurants. For example, in recent years, Kraft Macaroni and Cheese products have used popular characters from such shows as “Rugrats,” “Pokemon,” “Blue’s Clues,” and “SpongeBob SquarePants” in their advertising aimed at children.<sup>18</sup>

The Task Force also found that advertisers were increasingly targeting children younger than 7 or 8 as “new developments in media technology have facilitated greater degrees of age-niche programming and related advertising.”<sup>19</sup> At the same time, the Task Force noted that “[t]he strength of the research documenting young children’s limited ability to recognize and defend against television advertising has improved substantially since the 1970s, when both the FCC and the FTC seriously considered, although ultimately eschewed, broad-based restrictions on advertising targeting audiences of young children.”<sup>20</sup>

The Task Force also identified several types of negative effects from children’s increased exposure to advertisements. One problem is the strain such advertising places on parent-child relationships. The Task Force cites studies finding that children often become angry or

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<sup>17</sup> *APA Report*, Psychological Issues in the Increasing Commercialization of Childhood at 2.

<sup>18</sup> *Id.* (citations omitted).

<sup>19</sup> *APA Report*, Summary of Findings and Conclusions at 7.

<sup>20</sup> *Id.* Consequently, the Task Force recommends restricting advertising to children too young to recognize advertising’s persuasive intent.

disappointed when parents refuse to buy advertised products.<sup>21</sup> Yet, according to a poll of marketing professionals, many companies employ as a marketing strategy putting “pressure on children to pester their parents to buy things.”<sup>22</sup>

Another problem the Task Force identified is that exposure to excessive advertising contributes to “unhealthy eating habits.”<sup>23</sup> As the Task Force noted, “commercials for candy, snacks, and fast food are mainstays of the advertising targeting children. It is well documented that such ads are typically effective in persuading children to like and request the product.”<sup>24</sup> Moreover, “the serious implications of advertising influence” on children are heightened because “eating habits formed during childhood often persist throughout life.”<sup>25</sup> Similarly, a recent report from the Institute of Medicine of the National Academies determined that one of the wider impacts of such advertising is “increased consumption of energy-dense foods and beverages and greater engagement in sedentary behaviors, both of which contribute to energy imbalance and obesity.”<sup>26</sup>

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<sup>21</sup> *Id.*, Psychological Issues in the Increasing Commercialization of Childhood at 11.

<sup>22</sup> Harris Interactive, *What Does the Youth Marketing Industry Think of Commercialism and Youth?*, Trends & Tudes, vol. 3, iss. 4, at 3, available at [http://www.harrisinteractive.com/news/newsletters/k12news/HI\\_Trends&TudesNews2004\\_v3\\_is\\_s04.pdf](http://www.harrisinteractive.com/news/newsletters/k12news/HI_Trends&TudesNews2004_v3_is_s04.pdf) (last visited March 4, 2005).

<sup>23</sup> *APA Report*, Psychological Issues in the Increasing Commercialization of Childhood at 12. The Task Force also noted evidence suggesting that increased commercialization also leads to positive attitudes toward tobacco and alcohol consumption, and an increase in marketing of violent media to children. *Id.* at 12-13.

<sup>24</sup> *Id.* at 12 (citations omitted).

<sup>25</sup> *Id.*

<sup>26</sup> PREVENTING CHILDHOOD OBESITY HEALTH IN THE BALANCE 174 (Jeffrey P. Koplan et al. eds., National Academic Press 2005), available at <http://www.nap.edu/catalog/11015.html> (last visited March 30, 2005). Obesity is a significant health problem. Demographers estimate that obesity will cause the average life expectancy of Americans to drop by approximately two years between now and 2050, the first time in centuries that life expectancy will decrease. Robyn Shelton, *Obesity epidemic could sharply reduce life expectancy for Americans*, ORLANDO SUN-SENTINEL, March 17, 2005, at <http://www.sun-sentinel.com/news/local/southflorida/sfl-aexpectancy17mar17,0,6049292.story> (last visited March 30, 2005).

If the Commission permits interactivity with commercial matter during children's programs on broadcast, cable or satellite television, children would be exposed to even greater amounts of advertising. Interactive advertising strategies are predicated on keeping the user within the branded environment as long as possible.<sup>27</sup> While traditional television commercials are limited to 30 seconds, interactive technologies allow for advertisements that keep the user engaged much longer. TiVo, for example, is introducing interactive advertising to engage viewers with interactive advertisements for extended periods of time.<sup>28</sup> Disney has made use of interactive technology to produce a 7-minute commercial for Disney World that allows viewers to interact with a free travel planner using the TiVo remote control.<sup>29</sup>

Moreover, interactive advertising is likely more powerful than the television advertising to which children have been exposed. For example, in reviewing the effect of violent video games, Dr. Craig Anderson concluded that "violent interactive media will have an even stronger effect on aggression and violence than traditional forms of media violence."<sup>30</sup> Dr. Anderson's conclusion was based on the differences "between television and video games that influence

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<sup>27</sup> See Kathryn C. Montgomery, *Digital Kids: The New On-line Children's Consumer Culture*, in HANDBOOK OF CHILDREN IN THE MEDIA 635, 641 (Dorothy G. Singer & Jerome L. Singer ed., 2000). Cf., Jane Chen & Matthew Ringel, *Can Advergaming be the Future of Interactive Advertising?*, <kpe> Fast Forward, at 2 (2002) (emphasis added), available at <http://www.locz.com.br/loczgames/advergaming.pdf> (last visited March 4, 2005) ("KPE Report"); Interactive Advertising Bureau, *IAB's 28 Reasons to use interactive Advertising*, at [http://www.iab.com/resources/pdf/reasons\\_to\\_use.pdf](http://www.iab.com/resources/pdf/reasons_to_use.pdf) (last visited March 4, 2005).

<sup>28</sup> Judy Artunian, *DVRs forcing ad agencies into changing their messages*, CHIC. TRIB., Jan. 10, 2005 at 1 (Business). Comcast, the largest cable provider in the United States, has recently entered into an agreement with TiVo to offer this functionality to all of Comcast's subscribers. Nick Wingfield and Peter Grant, *Comcast Users to Get TiVo Options That Go Beyond Generic DVR's*, WALL ST. J., March 16, 2005, at D5.

<sup>29</sup> Judy Artunian, *DVRs forcing ad agencies into changing their messages*, CHIC. TRIB., Jan. 10, 2005 at 1 (Business).

<sup>30</sup> *Impact of Interactive Violence on Children: Hearing Before the Commerce, Sci. and Transp. Comm.*, 106th Cong. (2000) (testimony of Craig A. Anderson, Ph.D., Professor of Psychology & Chair of Department of Psychology, Iowa State University of Science & Technology).

learning processes:” 1) video games allow the player to identify with a single character rather than an entire cast in a television program; 2) video games, unlike television, allow for active participation which increases learning; 3) video games have an addictive nature and are likely to be played repeatedly, which increases learning; 4) “[r]ehearsing an entire behavioral sequence is more effective than rehearsing part of it.”<sup>31</sup> Interactive advertisements are more like video games than traditional television commercials because they allow for active participation, allow the viewer to play games that have an addictive nature, and allow viewers to participate in selecting the information they receive and the character who delivers it to them. Thus, it is likely that interactive technologies are more powerful than traditional television advertising.

Interactive advertising is already being used to promote or even sell food products directly to consumers. For example, children in Hawaii can order Pizza Hut pizza from the television using a remote control.<sup>32</sup> Currently, companies such as Nabisco use the World Wide Web to promote cookies and other snack foods by creating branded interactive games, such as the “Oreo Dunking Game” on NabiscoWorld.com.<sup>33</sup> It is easy to imagine that advertisers would attempt to lure children away from programming by the use of similar games on interactive television.

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<sup>31</sup> *Id.*

<sup>32</sup> Steve Donahue, *Quiet, Nosy Navic Might Be Watching*, Multichannel News, May 3, 2004, at <https://extranet.hcp.com/stuff/contentmgr/files/f19361feb37edf2e2d12a3322ffa97dd/news/navic.htm> (last visited March 4, 2005).

<sup>33</sup> *Online Arcade Game – NabiscoWorld.com*, at [http://www.nabiscoworld.com/Games/game\\_large.aspx?gameid=10012](http://www.nabiscoworld.com/Games/game_large.aspx?gameid=10012) (last visited March 30, 2005). This game allows the child to use a virtual glass of milk to catch Oreo cookies that fall from the top of the game screen. The child gets more points for each Oreo he or she catches, and loses “glasses” every time one drops. Nabisco also has a Mah-jongg game using tiles decorated with the logos of various Nabisco products. See *Play Free Mahjongg at NabiscoWorld.com*, at [http://www.nabiscoworld.com/Games/game\\_large.aspx?gameid=10043](http://www.nabiscoworld.com/Games/game_large.aspx?gameid=10043) (last visited March 30, 2005).

Prohibiting commercial matter interactivity during children’s programming on broadcast, cable and satellite television, as well as during advertisements aired during or adjacent to such programs is necessary to ensure compliance with the commercial time limits.

**B. Prohibiting Interactive Advertising is Necessary to Ensure a Clear Separation Between Commercial Matter and Programming Content**

In addition to calling for limits on the amount of children’s advertising, the *1974 Policy Statement* required that broadcasters ensure adequate separation between program matter and commercial matter. The Commission noted that Section 317 of the Communications Act “specifically requires that all advertisements indicate clearly that they are paid for and by whom” based on the rationale that “an advertiser would have an unfair advantage over listeners if they could not differentiate between the program and the commercial message and were, therefore, unable to take its paid status into consideration in assessing the message.”<sup>34</sup> Because “children—especially young children—have greater difficulty distinguishing programming from advertising than adults,” the Commission concluded that “basic fairness requires that at least a clear separation be maintained between the program content and commercial message so as to aid the child in developing an ability to distinguish between the two.”<sup>35</sup>

In addition to warning that a “licensee who directs advertising to children has a responsibility to take action to insure that it is presented in as fair a manner as possible,” the *1974 Policy Statement* identified several specific practices which it deemed contrary to the public interest. First, the Commission cautioned licensees against product placements or the

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<sup>34</sup> *1974 Policy Statement*, 50 FCC 2d at 15.

<sup>35</sup> *Id.*

display of brand names and products in the body of the program itself in a way that constitutes advertising.<sup>36</sup>

Second, the Commission prohibited “host selling,” that is, the use of a program host or other program personality to promote products in the program in which the host appears.<sup>37</sup> This practice not only “interweave[s] the program and the commercial, exacerbating the difficulty children have distinguishing between the two,”<sup>38</sup> but “allows advertisers to take unfair advantage of the trust which children place in program characters.” The Task Force recently confirmed that “characters and celebrities are important in shaping children’s views of advertised products. Experiments presenting virtually identical versions of ads, one with and one without a celebrity endorser, show that popular figures significantly enhance children’s liking of the product.”<sup>39</sup>

Finally, the *1974 Policy Statement* identified a program-length commercial as an example of commercial matter than can easily confuse children viewers.<sup>40</sup> The Commission has defined “program-length commercial” as “a program associated with a product, in which commercials for that product are aired.”<sup>41</sup> As with host-selling, the problem with a program-length commercial is that it “interweaves program content and commercial matter.”<sup>42</sup>

Interactivity offers many opportunities for product placement, host-selling, and program-length commercials. Without prompt Commission action, advertisers will be able to utilize

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<sup>36</sup> *Id.* at 17.

<sup>37</sup> *Id.* at 16.

<sup>38</sup> *Id.*

<sup>39</sup> *APA Report, Psychological Issues in the Increasing Commercialization of Childhood* at 10.

<sup>40</sup> *1974 Policy Statement*, 50 FCC 2d at 17.

<sup>41</sup> *Policies and Rules Concerning Children's Television Programming; Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 6 FCC Rcd 2111, 2118 (1991) (“1991 Report”).

<sup>42</sup> *Id.*

interactive television technologies to subtly interweave advertising messages into program content. For example, in a recent episode of *Darcy's Wild Life*, Darcy makes-over a friend so that the friend can impress a boy. Darcy and her mother give Darcy's friend new make-up, new clothes, new jewelry, a new hair style and, when the friend is asked out on a date by the boy, Darcy lends her friend a purple Prada dress for the date.<sup>43</sup> With interactivity, the child might be able to press a button on the remote control and be presented with a screen allowing her to learn more about the Prada dress, the hair-care products, jewelry or makeup shown on the program. This hypothetical presents a clear violation of the host-selling prohibition because the character Darcy and her friend are effectively promoting the products by using and wearing them. It would also constitute a program-length commercial, and violate the product placement prohibition.

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<sup>43</sup> This program is produced by Discovery Kids as an "E/I" program for NBC affiliates. This particular episode, entitled "My Fair Lindsey," originally aired on December 18, 2004. NBC affiliates offer the following explanation of the show's educational and informational objectives:

"Darcy's Wild Life follows the life of 15-year-old Darcy Fields, the pampered daughter of a top Hollywood movie-star who was plucked out of a life of limousines, movie-premieres and world class restaurants to live a "no frills" life in rural Idaho. Darcy's initial resentment gives way to optimism as she makes new friends and becomes a part of the community. The overarching educational goal is for the audience to see how the main character, Darcy, is able to make a successful adjustment to a new environment that is the complete antithesis of her old life. Darcy comes to a deeper understanding of herself, the value of relationships, and the insignificance of material things. this [sic] occurs as she makes new friends who have totally different perspectives than hers. The viewer will also learn about the care and treatment of a variety of animals that live on farms or in the wild."

*See, e.g.*, Form 398 of WRC-TV, Washington, DC, for Quarter Ending December 31, 2004, available at [http://svartifoss2.fcc.gov/cgi-bin/ws.exe/prod/kidvid/prod/rep398.pl?Call\\_Sign=WRC-TV&Quarter\\_Date=12/31/2004](http://svartifoss2.fcc.gov/cgi-bin/ws.exe/prod/kidvid/prod/rep398.pl?Call_Sign=WRC-TV&Quarter_Date=12/31/2004) (last visited March 31, 2005).

Thus, prohibiting commercial matter interactivity during children’s programming on broadcast, cable and satellite television will help to ensure separation between program matter and commercial matter and avoid confusing or taking advantage of children.

**C. The Commission Should Apply This Prohibition to Broadcasters, Cable Operators, and Direct Broadcast Satellite Service Providers**

To effectively protect children, a prohibition against interactivity with commercial matter must be applied to all children’s programs, whether delivered by broadcast, cable, or direct broadcast satellite. Since 1991, broadcasters and cable operators have been subject to strict commercial matter time limits under the CTA.<sup>44</sup> In 2004, the Commission decided to apply these limits to Direct Broadcast Satellite (“DBS”) service providers because DBS had grown to such an extent that it was being used in a large number of households.<sup>45</sup> The Commission concluded that allowing DBS providers to function under less stringent rules than cable operators or broadcasters would contravene Congress’ intent in passing the CTA, because it would increase the risk of exposing children to over-commercialization.<sup>46</sup>

Broadcast, cable, and satellite are the three primary means which American households use to receive their television signal.<sup>47</sup> A report by the Government Accountability Office noted that cable is the primary means of receiving a television signal in 57 percent of American

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<sup>44</sup> *1991 Report*, 6 FCC Rcd at 2113. DBS was not a commercial service when Congress passed the CTA. *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992; Direct Broadcast Satellite Public Interest Obligations*, 19 FCC Rcd. 5647, 5668 (2004) (“*DBS Order*”).

<sup>45</sup> *DBS Order*, 19 FCC Rcd at 5668.

<sup>46</sup> *Id.*

<sup>47</sup> Government Accountability Office, *Digital Broadcast Television Transition: Estimated Cost of Supporting Set-Top Boxes to Help Advance the DTV Transition*, GAO-05-258T, at 7 (Feb. 17, 2005), available at <http://www.gao.gov/new.items/d05258t.pdf> (last visited March 31, 2005) (“*GAO Report*”).

households,<sup>48</sup> and satellite and broadcast are the primary means of receiving a television signal in about 19 percent of American households, each.<sup>49</sup> Failing to include any of these services would increase the number of children exposed to over-commercialization, a result which the Commission has already concluded would contravene the intent of the CTA.<sup>50</sup>

## **II. THE COMMISSION SHOULD MODIFY THE DEFINITION OF COMMERCIAL MATTER TO INCLUDE ANY INTERACTIVITY DESIGNED TO SELL OR PROMOTE A PRODUCT OR SERVICE**

The *FNPRM* seeks comment on how the Commission should define commercial matter in the interactive context.<sup>51</sup> For the rule against interactivity with commercial matter to be effective, the Commission must craft a definition of commercial matter that takes account of the specific attributes of interactivity. It must also be clear and understandable both by those who would seek to follow it and those who would seek to enforce it. To that end, the Coalition *et al.* propose that the Commission prohibit any interactivity designed for the purpose of selling or promoting a product or service during the course of a children's program or during any advertisement during or adjacent to a children's program. The Commission should clarify that this definition would prohibit not only traditional advertisements that might be enhanced by interactivity, but also interactions with branded environments, direct selling to the viewer, and the collection or use of information to target advertisements to children.

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<sup>48</sup> *Id.* at 8.

<sup>49</sup> *Id.* at 7, 9.

<sup>50</sup> *DBS Order*, 19 FCC Rcd at 5668.

<sup>51</sup> *FNPRM*, 19 FCC Rcd at 22968.

**A. The Prohibition of Commercial Interactivity Should Include Branded Promotions such as Advergames**

Brand promotion is an increasingly important marketing strategy.<sup>52</sup> Some advertisers are finding it more cost-effective to increase brand familiarity and positive associations via on-line and interactive advertising campaigns than to make direct pitches to customers via traditional television commercials and magazine advertisements.<sup>53</sup> One form of interactive brand promotions is “advergames.” This term is defined in one industry report as “the use of interactive gaming technology to deliver *embedded* advertising messages.”<sup>54</sup> Advergames do not pitch a particular product, but rather are designed to increase the user’s familiarity and positive associations with the brand. Advergames are touted for their ability to reinforce brand recognition and capture user information in a cost-effective manner.<sup>55</sup>

Currently, many companies target children by placing advergames on websites. Ford Motor Company, for example, is spending millions of dollars developing children’s games featuring the Mustang, to “introduce the brand to future Mustang buyers.”<sup>56</sup> Another website, neopets.com, uses advergames to market many different products to children in a seemingly

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<sup>52</sup> See, Sarah Lacy, *On the Web, Branding is Back*, Business Week Online, Aug. 20, 2004, at [http://www.businessweek.com/technology/content/aug2004/tc20040820\\_2029\\_tc024.htm](http://www.businessweek.com/technology/content/aug2004/tc20040820_2029_tc024.htm) (last visited March 30, 2005).

<sup>53</sup> The Interactive Advertising Bureau undertook several “Cross Media Optimization Studies” to determine the appropriate mix of media use in a marketing campaign. To review these studies, see Interactive Advertising Bureau, *IAB Resources & Research - XMOS Studies*, at <http://www.iab.com/xmos/index.asp> (last visited March 4, 2005). The Interactive Advertising Bureau touts more cost-effective branding as one of its 28 reasons to use interactive advertising. Interactive Advertising Bureau, *IAB’s 28 Reasons to Use Interactive Advertising*, at [http://www.iab.com/resources/pdf/reasons\\_to\\_use.pdf](http://www.iab.com/resources/pdf/reasons_to_use.pdf) (last visited March 4, 2005).

<sup>54</sup> *KPE Report* at 2 (emphasis added).

<sup>55</sup> *Id.* at 7. See also, Ellen Edwards, *Plug (the Product) and Play; Advertisers Use Online Games to Entice Customers*, WASH. POST, at A1 (Jan. 26, 2003).

<sup>56</sup> Karl Greenberg, *Licensing: Ford Ponies UP Perfume, Toys, Games for Mustang*, BRANDWEEK (Feb. 21, 2005).

innocuous environment.<sup>57</sup> The site allows users to create their own Neopet and care for the Neopet by purchasing food, toys, and medicines for the Neopet.<sup>58</sup> Users purchase these items using neopoints accrued by playing games and visiting stores throughout the site, many of which are branded, as well as by completing marketing surveys.<sup>59</sup> The central marketplace is called the Neopian Marketplace.<sup>60</sup> In the Neopian Marketplace, the user can go to the McDonald's shop to learn more about McDonald's and play McDonald's games,<sup>61</sup> or to the Disney Theater<sup>62</sup> to watch trailers for upcoming Disney movies<sup>63</sup> or play games with Disney characters.<sup>64</sup> The user could also go to Cereal Adventures to learn more about General Mills cereals and play games such as Trix Cereal: Adios Amigos<sup>65</sup> or the Lucky Charms: Mine Car Chase.<sup>66</sup> Additionally, Neopets sells its own products,<sup>67</sup> making the entire site an Internet version of a program-length commercial because it interweaves commercial matter with non-commercial content.

A site like Neopets exemplifies how interactive content combined with an innocuous environment can be used to introduce a brand to children and create positive associations with that brand. With companies like Ford, McDonald's, General Mills, Nabisco, and Disney using this strategy in one form or another on the Internet and other interactive environments, it is reasonable to think this strategy will soon find its way to children's television programs.

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<sup>57</sup> Daren Fonda, *Pitching It To Kids; On sites like Neopets.com, brands are embedded in the game. Is children's marketing going too far?*, TIME, at 52 (June 28, 2004).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See Appendix, Exhibit A.

<sup>61</sup> See Appendix, Exhibit B.

<sup>62</sup> See Appendix, Exhibit C.

<sup>63</sup> See Appendix, Exhibit D.

<sup>64</sup> See Appendix, Exhibit E.

<sup>65</sup> See Appendix, Exhibit F.

<sup>66</sup> See Appendix, Exhibit G.

<sup>67</sup> See Neopets Catalogue, at <http://www.neopets.com/shopping/newcatalogue.phtml> (last visited March 31, 2005).

## B. Direct Sales to Children Should be Prohibited

Interactive technologies can allow for the direct sale of goods and services to children. If not prohibited, direct sales to children could become a significant problem. Permitting direct sales would further undermine parental authority and increase the stresses in parent-child relationships.

The Children's Advertising Review Unit's voluntary guidelines for online commerce recommend that companies enable parents to cancel orders or return merchandise when the purchase was made without appropriate parental permission.<sup>68</sup> This is not an adequate remedy. Parents cannot monitor their children's activities 24 hours a day. Even when parents do become aware that an unauthorized purchase has been made, returning the item places a burden on already busy parents. Sometimes, as in the case of a pizza, the item cannot be returned.<sup>69</sup> In the United Kingdom and some European Union countries, regulations prohibit the direct sale of merchandise to children via interactive television.<sup>70</sup>

The FCC should provide similar protections to children in the United States by prohibiting the direct sale of products and services to children via interactive television.

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<sup>68</sup> Children's Advertising Review Unit, *Self-Regulatory Guidelines for Children's Advertising*, at <http://www.caru.org/guidelines/index.asp> (last visited March 31, 2005).

<sup>69</sup> See, Steve Donahue, *Quiet, Nosy Navic Might Be Watching*, Multichannel News, May 3, 2004, at <https://extranet.hcp.com/stuff/contentmgr/files/f19361feb37edf2e2d12a3322ffa97dd/news/navic.htm> (last visited March 4, 2005) (discussing the interactive features that allow viewers to order Pizza Hut pizza on their television).

<sup>70</sup> Committee of Advertising Practice, *Guidance to Broadcasters on the Regulation of Interactive Television Services*, at 9 (Nov. 2004) at [http://www.cap.org.uk/NR/rdonlyres/D41345A2-31B5-4149-879B-69A08A64879C/0/BCAP\\_Guidance\\_on\\_Interactive\\_TV.pdf](http://www.cap.org.uk/NR/rdonlyres/D41345A2-31B5-4149-879B-69A08A64879C/0/BCAP_Guidance_on_Interactive_TV.pdf) (last visited March 31, 2005); Broadcasting Commission of Ireland, *Advertising and Children*, at 36 (Dec. 2002), at <http://www.bci.ie/Advertising%20&%20Children.doc> (last visited March 31, 2005).

**C. Interactivity that Allows for the Collection of User Information for Commercial Purposes Should be Prohibited During Children’s Programs**

Another example of a capability that was not contemplated in the context of conventional television but presents significant problems now is the ability to collect and use vast quantities of data about viewers, their habits, tastes, and backgrounds. This capability can be used to enhance marketers’ ability to target children with advertisements and marketing campaigns. Many interactive television hardware and software developers actually tout this capability as one of the key benefits of interactive advertising.<sup>71</sup> The Interactive Advertising Bureau’s “28 Reasons to Use Interactive Advertising” includes such reasons as becoming more familiar with your audience, and the ability to more closely track trends and purchasing habits.<sup>72</sup>

Advertisers are already using information such as viewers’ addresses to tailor the commercial to appeal to specific geographic audiences. For example, Ted Airlines recently produced a commercial that would tailor itself to the viewer based on the viewer’s location, so that a viewer in Des Plaines, IL would see a slightly different commercial from a viewer in Crystal Lake, IL.<sup>73</sup> These capabilities may not raise significant concerns in the context of advertising to adults, but advertising to children, which is already unfair, would become even more unfair and lead to more harmful behavior if advertisers could specifically tailor their messages based on the age, gender, or interests of individual child viewers.

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<sup>71</sup> See, e.g., Ensequence, *Case Study: Disney Channel UK*, at <http://www.broadcastpapers.com/data/EnsequenceDisneyCaseStudy01.htm> (last visited March 4, 2005); NDS, *Value@TV Case Study: Nickelodeon*, available at [http://www.nds.com/pdfs/Nickelodeon\\_casestudy.pdf](http://www.nds.com/pdfs/Nickelodeon_casestudy.pdf) (last visited March 14, 2005).

<sup>72</sup> Interactive Advertising Bureau, *IAB’s 28 Reasons to Use Interactive Advertising*, at [http://www.iab.com/resources/pdf/reasons\\_to\\_use.pdf](http://www.iab.com/resources/pdf/reasons_to_use.pdf) (last visited March 4, 2005).

<sup>73</sup> Lorne Manly, *The Future of the 30-Second Spot*, N.Y. TIMES, March 27, 2005, § 3 (Sunday Business), at 1.

Applying the definition of “commercial matter” to the collection or use of viewer information, personally identifiable or otherwise, is a necessary and reasonable means of ensuring the effectiveness of a prohibition on commercial matter interactivity. The Child Online Privacy Protection Act of 1998 (COPPA), which requires web site operators to obtain verifiable parental consent before collecting personally identifiable information from a child,<sup>74</sup> provides similar protections. However, while COPPA would apply to any website that might be linked with a children’s program, it may not necessarily apply to other forms of interactivity on broadcast, cable and satellite platforms.<sup>75</sup> The Commission can address this problem by applying the definition of “commercial matter” to the collection or use of viewer information for commercial purposes.

Additionally, the Coalition *et al.*’s recommendation goes beyond the information that is protected by COPPA in that it includes all collection or use of information from children, whether or not such information is personally identifiable. Information need not be personally identifiable for advertisers to become even more sophisticated at targeting children with advertisements and marketing campaigns.<sup>76</sup> Moreover, almost all children, even those too young to read, have access to television and rely on television for entertainment and information.<sup>77</sup>

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<sup>74</sup> Children Online Privacy Protection Act of 1998, P. Law 105-277, 15 U.S.C. § 6501 *et seq* (2004).

<sup>75</sup> The FTC has adopted a broad interpretation of the term “Internet” to include “the Internet in its current form and any conceivable successor.” Children’s Online Privacy Protection Rule, 64 Fed. Reg. 59,888 (Nov. 3, 1999). However, it is unclear whether the interactive television platforms currently being sold by companies such as Navic Networks, OpenTV, Microsoft, etc. would fall under COPPA jurisdiction.

<sup>76</sup> Knowing information such as a viewer’s age, location, sex, etc. can help advertisers deliver an advertisement that is almost directly targeted at the viewer. *See* Lorne Manly, *The Future of the 30-Second Spot*, N.Y. TIMES, March 27, 2005, § 3 (Sunday Business), at 1.

<sup>77</sup> *APA Report*, Psychological Issues in the Increasing Commercialization of Childhood at 4.

The more precisely that advertisers can target children, the more they can take advantage of children's lack of sophistication and inability to understand persuasive intent. Prohibiting the collection and use of information for commercial purposes will limit the ability of marketers and advertisers to collect information about children and use that information against them.

### **III. THE COMMISSION SHOULD REJECT THE "OPT IN" PROPOSAL.**

The Coalition *et al.* do not support the Commission's proposal to allow parents to "opt in" to interactivity during children's programming that connects the viewer to commercial matter. The Coalition *et al.* know of no technology that would allow the "opt in" proposal to function as the Commission has described. Nor does it make sense to adopt a regulation premised on the development of such technology. In implementing COPPA, the Federal Trade Commission ("FTC") adopted a sliding scale mechanism under the assumption that some technology would be developed to permit parents to give permission for collection of personal information from their children.<sup>78</sup> Now, eight years later, no technology has developed.<sup>79</sup> We see no reason why the result would be different here.

Nevertheless, even if such technology exists or could be developed, the Coalition *et al.* does not support allowing "opt in." For over thirty years, the Commission has limited the amount of commercials and insisted on clear separation between program content and commercial matter to protect children from unfair and deceptive practices.<sup>80</sup> Allowing "opt in" will inevitably result in children who "opt in" being exposed to more commercial matter than allowed under the CTA. As the *FNPRM* notes, the time spent accessing interactive material is

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<sup>78</sup> Children's Online Privacy Protection Rule, 64 Fed. Reg. 59,888, 59,901-02 (Nov. 3, 1999). The Sliding Scale Mechanism timeline was extended in 2002. Children's Online Privacy Protection Rule, 67 Fed. Reg. 18,818, 18,819 (April 17, 2002).

<sup>79</sup> Children's Online Privacy Protection Rule, 70 Fed. Reg. 2580, 2581 (Jan. 14, 2005).

<sup>80</sup> *1974 Policy Statement*, 50 FCC 2d at 17.

not limited to the time the link is displayed on the screen and can cause the commercial time to vary.<sup>81</sup> Moreover, children do not receive any benefit from being exposed to interactive advertising. Thus, while the Coalition *et al.* support the prohibition against interactivity with commercial matter, the Coalition *et al.* do not support allowing “opt in” because it would result in violations of the commercial matter time limits.

#### **IV. CHILDREN’S TELEVISION OBLIGATIONS SHOULD BE EXTENDED TO DIRECT BROADCAST SATELLITE SERVICE PROVIDERS**

In the FNPRM, the Commission tentatively concluded that it should amend Part 25 of the Commission’s rules to apply the revised definition of “commercial matter” and the restriction on the display of web site addresses to DBS service providers.<sup>82</sup> The Commission reasoned “that children in DBS households [should] receive the same protection from excessive commercialism on television as children in cable or over-the-air households.”<sup>83</sup> The Commission noted that compliance on the part of DBS service providers would not be burdensome, because “many of the programming services carried by DBS providers are the same as are carried by cable systems around the country.”<sup>84</sup> The Coalition *et al.* agree with the Commission’s tentative conclusion.

As noted above, satellite is one of the three primary means by which American households receive their television signal.<sup>85</sup> More American households receive their television signal via satellite than via broadcast.<sup>86</sup> Not applying the newly revised “commercial matter”

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<sup>81</sup> FNPRM, 19 FCC Rcd at 22968.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> GAO Report at 7.

<sup>86</sup> While 20.8 million households receive their television signal via broadcast, 21.7 million households receive their television signal via satellite. *Id.* at 7-10. This number is increased from the 2002 report cited by the Commission, which said 20 million American households used satellite television. *DBS Order*, 19 FCC Rcd at 5668.

definition and the website address display rule to DBS service providers would expose children in nearly one-fifth of American households to a lesser level of protection than that intended by Congress. As the Commission correctly noted, applying these rules to DBS providers results in benefits to children which clearly outweigh the potential burdens to DBS providers.

## CONCLUSION

For the foregoing reasons, the Coalition *et al.* respectfully request that the Commission promptly adopt a prohibition, applicable to broadcasters, cable operators, and DBS service providers, on commercial interactivity during children’s programming and during commercials aired during or adjacent to children’s programming that connects the viewer to commercial matter. For the purposes of this rule, the Commission should define “commercial matter” as interactivity designed with the purpose of selling or promoting a product or service. The Commission should clarify that this definition would prohibit not only traditional advertisements that might be enhanced by interactivity, but also interactions with branded environments, direct selling to the viewer, and the collection or use of information to target advertisements to children. The Commission should reject the “opt in” proposal because it would result in violations of the commercial matter time limits. Lastly, the Coalition *et al.* urge the Commission to apply the newly revised “commercial matter” definition and the website address display rule to DBS service providers.

Respectfully Submitted,

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April 1, 2005

Counsel for Children’s Media Policy  
Coalition *et al.*

# APPENDIX

## EXHIBIT A



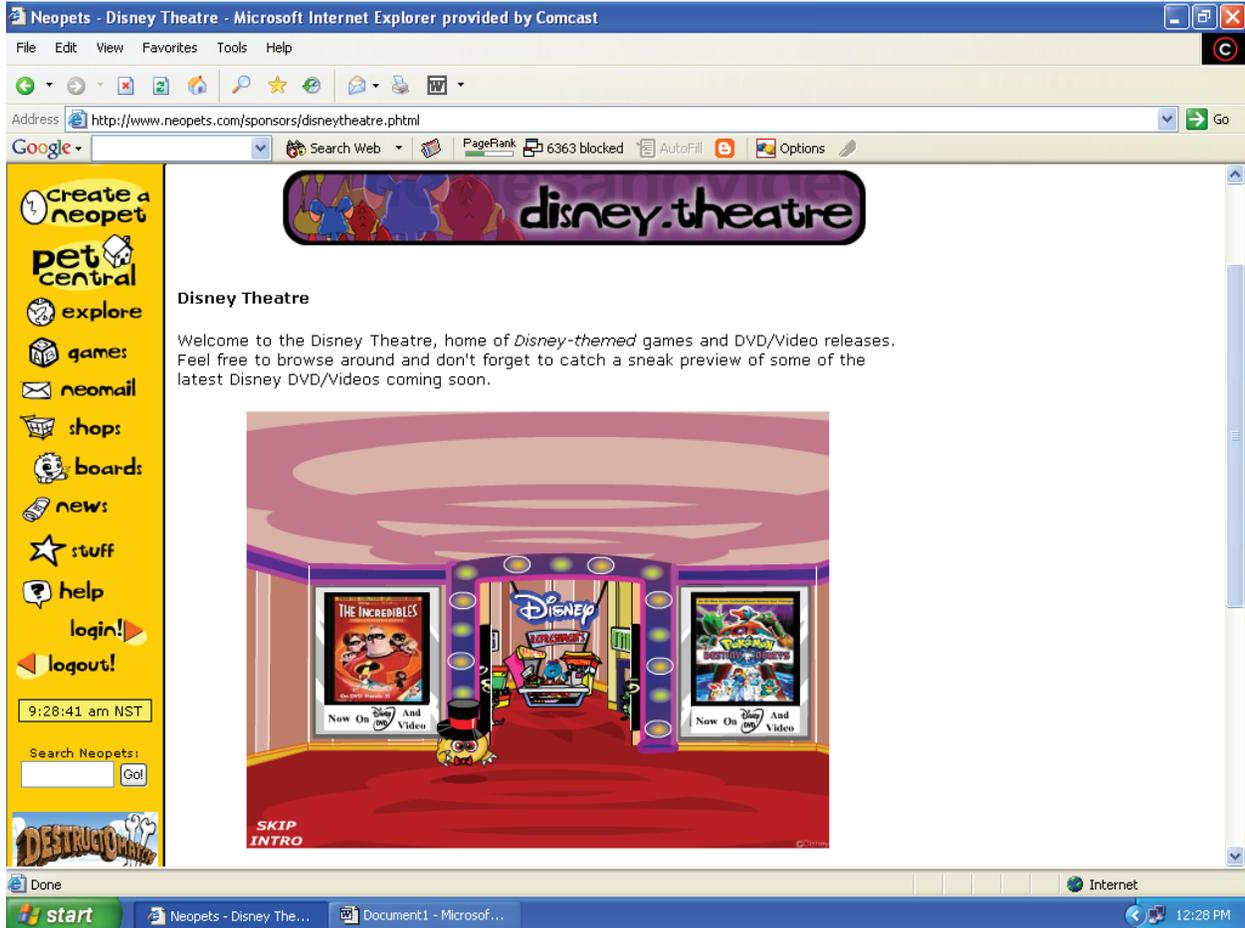
The Neopian Marketplace includes many stores where users can buy products for their Neopets. The McDonald's store is located on the left side of the Neopian Marketplace, Cereal Adventures is located in the top right corner, and the Disney Theater is located near the bottom-right corner.

## EXHIBIT B



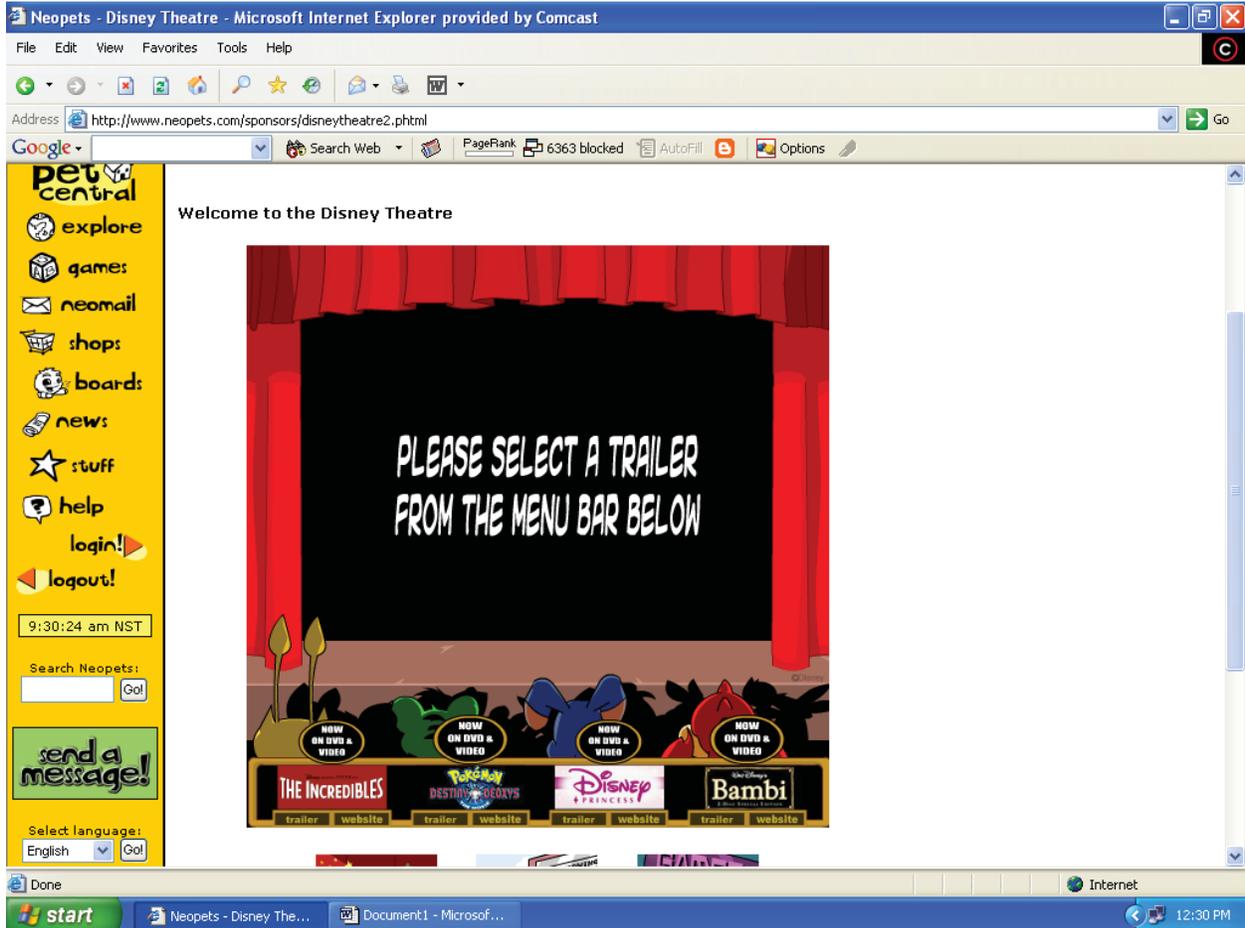
In the McDonald's store, the visitor is allowed to search throughout the store and visit with other Neopets who are enjoying their McDonald's food.

## EXHIBIT C



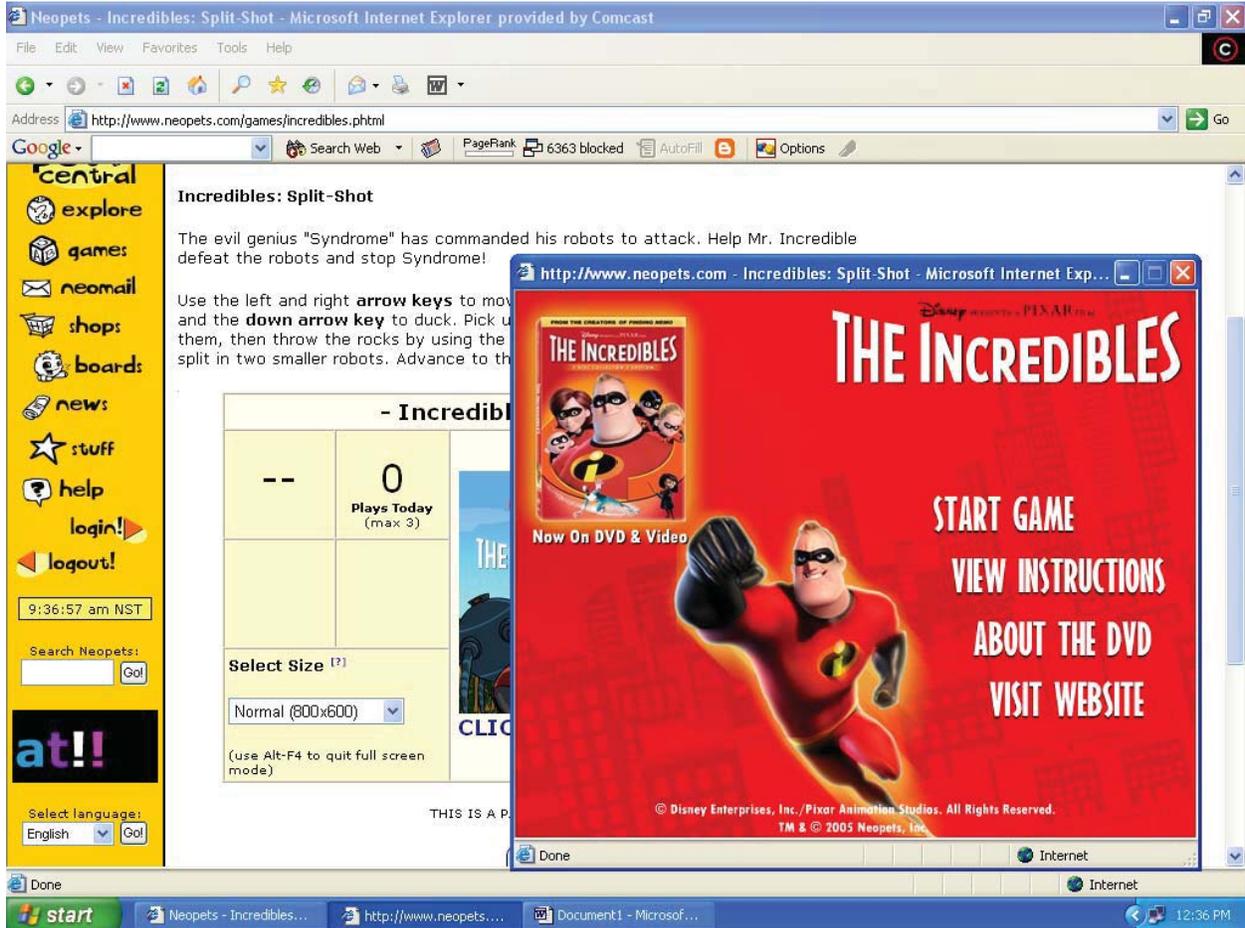
In the Disney Theater, the visitor is greeted with advertisements for Disney movies, and can elect to play Disney-branded games or watch trailers of Disney movies.

## EXHIBIT D



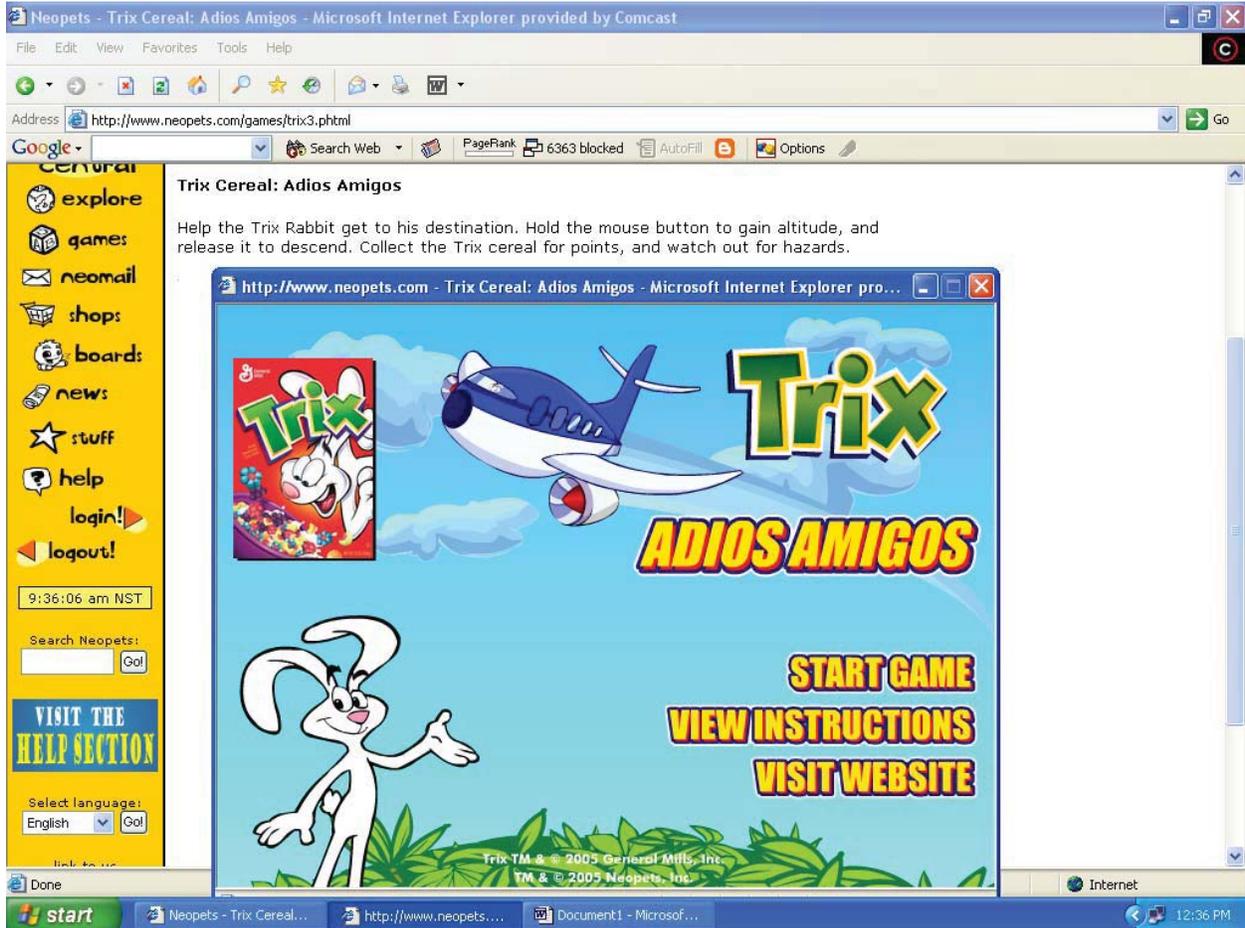
Once in the Disney Theater, a visitor can view the trailer of several Disney movies that are currently available on DVD or video.

## EXHIBIT E



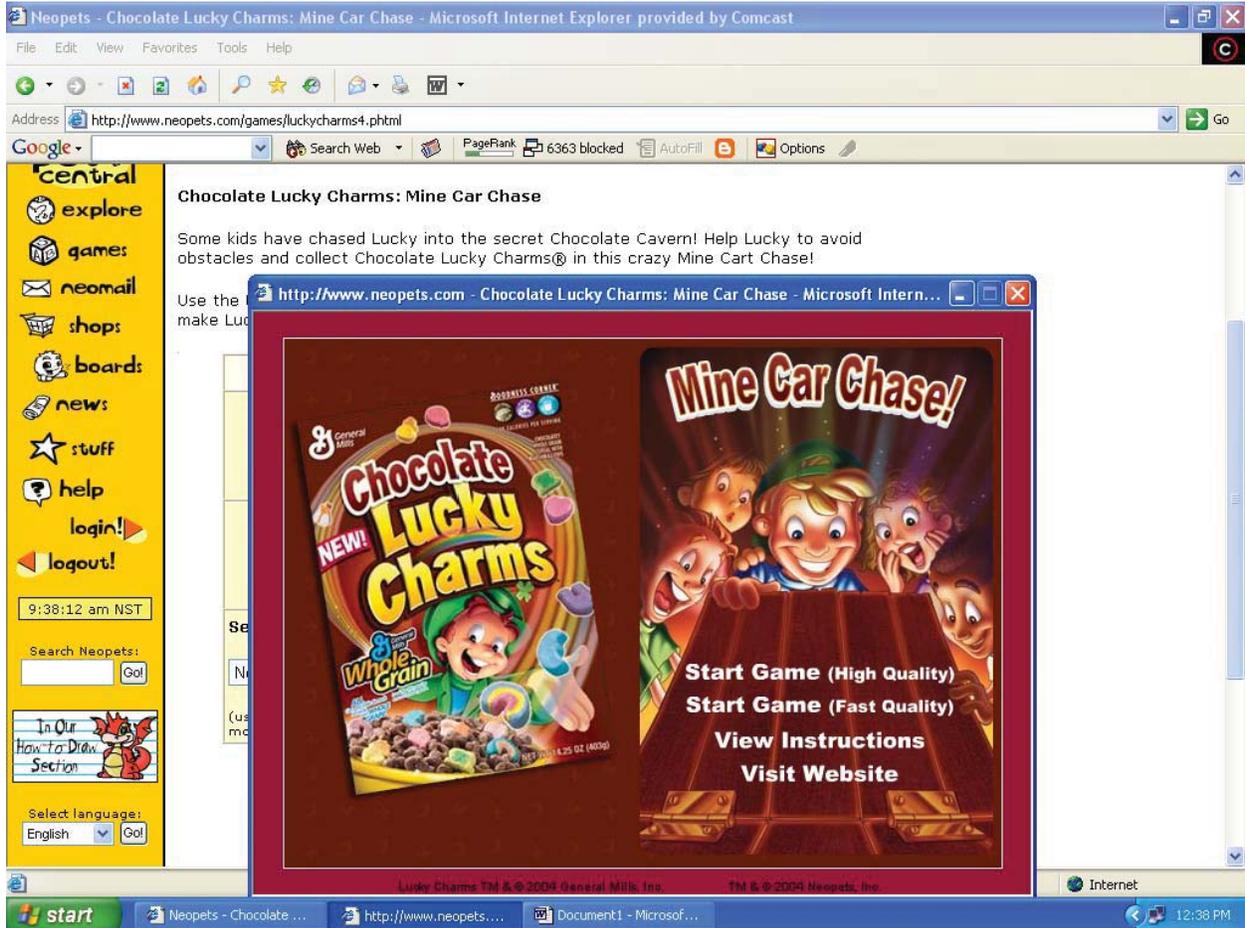
In the "Incredibles: Split Shot" game, users take control of Mr. Incredible to help defeat the villain, Syndrome.

## EXHIBIT F



In the “Trix Cereal: Adios Amigos” game, users are tasked with taking the Trix Rabbit to his “destination” by directing an airplane. The users can collect points by collecting Trix cereal pieces throughout the game.

## EXHIBIT G



In the “Chocolate Lucky Charms: Mine Car Chase” game, users are tasked with directing Lucky through the mineshaft. The users can collect points by collecting Lucky Charms cereal pieces throughout the game.