

November 18, 2022

*Via Electronic Submission: <https://www.regulations.gov>*

U.S. Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Ave. N.W.,  
Suite CC-5610 (Annex B)  
Washington, D.C. 20580

**Re: Advertising to Kids in Digital Media Workshop Comments; Docket ID FTC-2022-0054**

The Toy Association, Inc. (TTA), on behalf of its members, is pleased to submit these comments in response to the U.S. Federal Trade Commission's (FTC or Commission) request for comment on the issues addressed in the October 19, 2022, virtual workshop on "Protecting Kids from Stealth Advertising in Digital Media" (the workshop).

TTA and its members are committed to the safety and wellbeing of children and are proud of the steps that they have taken and continue to take to protect children, while also providing them with safe, fun, and educational games and toys, desired by parents and children alike. TTA and its members have been strong proponents of the Children's Online Privacy Protection Act (COPPA) and have participated in prior rulemaking proceedings to share our industry's perspective. TTA has developed tools to help its members comply with COPPA, and strongly supports privacy protections for children, teens, and adults. Furthermore, TTA strongly supports advertising self-regulation and was instrumental in helping form the Children's Advertising Review Unit (CARU) in the 1970's. Many of our members are CARU Supporters and our industry has actively participated in the development of and updates to the CARU Self-Regulatory Guidelines.

TTA recognizes that the evolving digital landscape presents new questions and challenges to regulators and industry alike, and TTA welcomes the FTC's collaborative exploration of the issues at the workshop. Researchers participating in the workshop referred to the historically recognized benchmarks for key child development stages that reflect the well-established physical, cognitive, emotional, and social developmental stages of children. This long-standing research has informed the suitability of toys for particular age groups and the safety-testing of toys and would inform the development of advertising policy and regulation for children.

TTA supports appropriate advertisement disclosures to identify advertising content in circumstances where the commercial nature of a communication is not clear. We were encouraged to hear about research in the EU on the use of icons as a means of such disclosure and look forward to hearing more details about that research. TTA was also encouraged to hear of support for media literacy

programs for children and their parents. Parents are stewards and role models for their children, including in the use of digital media, and TTA shares the goal of empowering children and parents to better understand digital media through greater training and education.

Advertising has a role and provides benefits to the digital marketplace. Advertising not only powers free content, but also helps to connect consumers to products and services that might be of interest to them. However, TTA and its members agree that young children in particular are still developing their abilities to perceive and critically evaluate advertising, so special attention must be paid to support that developing ability. Our industry has worked for decades through CARU to evaluate best practices and develop recommended guidelines. In a constantly evolving media landscape, the industry continues to advance ideas to ensure honest and transparent advertisement, including through appropriate advertisement disclosures and the development of best practices for age-appropriate messaging. Some panelists suggested that any representation of a brand constitutes “advertising,” and that all advertising to minors is harmful and should be banned without demonstrating that advertising is categorically harmful. There is a distinction between branding and advertising that should be taken into consideration, and new rules or updated rules should be evidence-based. We urge the Commission to work with stakeholders to focus on advancing media literacy programs and continuing to support strong and effective advertising and privacy self-regulation.

The comments below elaborate on the points above, namely: (1) existing legal definitions of “children” and “children’s products,” (2) take-aways from child development research, (3) the distinction between branding and advertising, (4) regulation of manipulative and deceptive practices, (5) the role and benefit of advertising, (6) the need for clear disclosures in advertising, and (7) the need for education, training and parental support in promoting advertising literacy.

### **(1) Defining “Children”**

The workshop discussion referred to children as “minors.” TTA strongly supports the goal of investigating additional privacy protections for teens and adults which is being evaluated by Congress. COPPA and its implementing Rule do not deal with advertising *per se*, but reflect Congress’s considered position that the privacy protections for “children” should apply to websites or online services directed to children under 13 or where the operator has actual knowledge that the child is under 13.<sup>1</sup> The Consumer Product Safety Improvements Act (CPSIA) similarly defines a “children’s product” as a product “designed or intended primarily for children 12 years of age or younger,”<sup>2</sup> a definition that was intended to align with COPPA. The CARU Children’s Advertising Guidelines also apply to advertising that is primarily directed to children under the age of 13.<sup>3</sup> Thus, for advertising, privacy and product safety purposes, “children” are generally defined under statutory and self-regulatory frameworks most important to our industry to include those under 13. These comments therefore distinguish between

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<sup>1</sup> 15 U.S.C. § 6502(a)(1); 16 C.F.R. § 312.3.

<sup>2</sup> Pub. L. 110-314, 122 Stat. 3016 (2008) (definition codified at 15 U.S.C. § 2052(a)(2)).

<sup>3</sup> CARU, *Self-Regulatory Guidelines for Children’s Advertising*, available at [caru\\_advertisingguidelines.pdf \(bbbnp-bbbp-stf-use1-01.s3.amazonaws.com\)](http://caru_advertisingguidelines.pdf(bbbnp-bbbp-stf-use1-01.s3.amazonaws.com)).

“children” under 13 and teens ages 13 – 17, although we again stress our industry’s support for privacy protections for children, teens, and all consumers.

## **(2) Child Development Research**

As noted above, the research discussed during the panel underscored that children’s understanding of advertising generally follows long-recognized developmental benchmarks that have guided work on advertising and product safety policy core to our industry for decades. The ability of a child to recognize, understand, and respond to advertising develops over time and reflects a child’s experiences and education on the subject. Several panelists affirmed that there is no single age that can be used as a benchmark for when a child fully understands advertising. TTA agrees. A flexible approach governed by basic benchmarks forms the underpinning of not only regulatory and self-regulatory advertising initiatives, but also product safety considerations for toys and children’s products. The latter guides assessments of both the suitability of toys for children in particular age groups, and how to conduct safety testing of toys.<sup>4</sup> Age-grading of toys and children’s products, which is based on much of the same child developmental research that guides what we know about children’s understanding of advertising, provides a tool by which industry can translate the research into practical guidance for parents. Parents can then use it to determine the toys and products that are appropriate for their household, and to monitor their use accordingly.

Both online and offline, TTA believes that parents are in the best position to choose the most suitable toys and play experiences for their children. As noted above, we are encouraged by the discussion about exploring additional tools for children and their parents, including media literacy training, to support the development of a child’s autonomy. Available self-regulatory initiatives<sup>5</sup> provide a flexible framework to explore standards and guidelines.

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<sup>4</sup> CSPC, *Age Determination Guidelines: Relating Consumer Product Characteristics to the Skills, Play Behaviors, and Interests of Children* (Jan. 2020), available at [Updating Age Determination Guidelines for Toys \(cpsc.gov\)](#).

<sup>5</sup> TTA notes that in addition to CARU, there are several other major national and international self-regulatory organizations that provide guidance to industry on advertising to children. For example, many major food companies have joined the Children’s Food and Beverage Advertising Initiative (CFBAI), also part of the BBB National Programs and agreed to self-restrict the types of foods they advertise to children 12 and younger. Furthermore, for over 80 years, the International Chamber of Commerce (ICC) Commission on Marketing and Advertising has published a Code of Advertising and Marketing Practice, which is viewed as the “gold standard” for many advertising self-regulatory programs around the globe. The ICC has offered many different materials on best advertising practices to children, many of which are compiled in the *ICC Toolkit: Marketing and Advertising to Children*, available at [ICC Toolkit: Marketing and Advertising to Children - ICC - International Chamber of Commerce \(iccwbo.org\)](#). Notably, the ICC also considers “children” to be those 12 and younger for global advertising purposes.

### **(3) Branding/Content vs. Advertising**

Another predicate question for this discussion is what constitutes “advertising.” As Mamie Kresses, vice president of CARU, discussed at the workshop, CARU’s Children’s Advertising Guidelines distinguish between advertising and branding or content. Specifically, Section 2(d) of the CARU Guidelines states that “[p]lacement or integration of a product, service, character, or brand in editorial, educational, entertainment, or other non-commercial content is not within the scope of these Guidelines unless such placement or integration constitutes an endorsement.”<sup>6</sup>

Sesame Street presents a straightforward example of why branding is distinct from advertising. The original PBS show has blossomed into a larger cultural phenomenon. There are Sesame Street toys, lunchboxes, t-shirts, and other products. The TV show is not an ad for these products any more than the branded products should be considered ads for the TV show. It is equally true that popular toy brands featured in online games, TV shows or movies merit full First Amendment protection as entertaining or educational content; they are not ads for toys and, conversely, the toys are not ads for the entertainment content. Advertising, instead, typically features some type of commercial call to action. That is why one of the seminal rules that guide children’s advertising is the concept that children should know when they are being targeted for a sale if, through context, the commercial nature of the message is not otherwise clear.

### **(4) Manipulative and Deceptive Practices**

TTA believes that transparency and honesty are important in all commercial dealings, with all consumers. Our industry shares the panelists’ concerns that because children may be more vulnerable to manipulation because they are still developing their cognitive and emotional capacities, special care must be taken when advertising to children 12 and younger. Examples of techniques such as telling children their digital pets will die unless the child spends real money to save them are entirely contrary to the self-regulatory principles of CARU, and the FTC already has the authority to prevent this type of manipulative and deceptive practice under Section 5 of the FTC Act.

Some panelists suggested that the FTC’s existing authority to prevent deceptive practices is insufficient and advocated for a rule banning advertising to minors on a theory of unfairness. There is legal precedent in the “KidVid” proceeding relative to FTC restrictions on children’s advertising that was not fully explored by the panel.<sup>7</sup>

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

<sup>7</sup> The FTC’s authority to prescribe rules and general statements of policy defining unfair or deceptive acts or practices stems from Section 18 of the FTC Act. In enacting the FTC Improvements Act of 1980 (Pub. L. No. 96-252, 94 Stat. 374 (May 28, 1980)), Congress amended Section 18 of the FTC Act to expressly bar the FTC from initiating a categorical ban on advertising to children. Section 18(h) (codified at 15 U.S.C. § 57a(h)) now states that “[t]he Commission shall not have any authority to promulgate any rule in the children’s advertising proceeding pending on May 28, 1980, or in any substantially similar proceeding on the basis of a determination by the Commission that such advertising constitutes an unfair act or practice in or affecting commerce (emphasis added). The reference to the pending proceeding is a reference to the “KidVid” proceeding in which the FTC considered various

Moreover, the FTC, in implementing the privacy protections mandated by Congress through enactment of COPPA, has recognized the importance of advertising in supporting free content.<sup>8</sup> While some of the harms articulated during the panel, like bullying, are distressing, they are neither directly related to advertising nor do they meet the FTC’s definition of “unfairness” in connection with advertising.<sup>9</sup> Broadly banning advertising to children and teens would need to take into account First Amendment<sup>10</sup> considerations and other legal issues such as the “major questions” doctrine.<sup>11</sup>

## **(5) The Benefits of Advertising**

As discussed during the workshop, much of the information in the marketplace, for children, teens, and adults alike, is available without charge only because content creators and the platforms that

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options to curb alleged “pandemic levels of tooth decay,” including one option which would have banned all televised advertising for any product which was directed to or seen by “audiences composed of a significant proportion of children who are too young to understand the selling purpose of or otherwise comprehend or evaluate the advertising.” 43 Fed. Reg. 17,967 (Apr. 27, 1978). A ban on advertising to minors based on a theory of unfairness would be a “substantially similar proceeding.”

<sup>8</sup> The amended COPPA Rule allows operators to collect persistent identifiers to provide “support for internal operations,” which is defined to include, among others, “activities necessary to . . . serve contextual advertising on the Web site or online service or cap the frequency of advertising.” 16 C.F.R. §§ 312.2, 312.5(c)(7).

<sup>9</sup> An unfair act or practice must (1) be likely to cause substantial injury, (2) not be reasonably avoidable, and (3) and not be outweighed by countervailing benefits to consumers or competition. 15 U.S.C. § 45(n). Some panelists suggested that harms to minors which might justify a ban on advertising included pestering parents, promoting materialism, and inappropriate advertisement placement. Pestered parents certainly did not pass the test in the “KidVid” proceeding, and assertions of excess consumption or materialism likewise do not reflect the sort of substantial government interest that could justify FTC action, much less result on any sort of constitutional rule. Furthermore, TTA members have internal standards and practices to guide ad placement in television and digital media which address the expressed concerns in a far more narrowly tailored (and Constitutionally permissible) manner. And, even if the first two prongs of the unfairness test were met with respect to any of these practices, they must be weighed against the countervailing benefits of advertising.

<sup>10</sup> An attempt to categorically ban advertising to children and teens would be subject to First Amendment scrutiny under the *Central Hudson* doctrine. *Central Hudson* requires that governmental restrictions on speech that is otherwise legal must (1) advance a substantial government interest, (2) directly advance that interest, and (3) not be more extensive than is necessary to serve that interest. 447 U.S. 557 (1980). “Harms” related to pestering parents, increased consumption or materialism hardly qualify as a substantial government interest under *Central Hudson*.

<sup>11</sup> Broad restrictions on advertising to any demographic segment would implicate major portions of the online economy and would therefore likely present the sort of “major question” that the Supreme Court in *West Virginia v. EPA* has stated requires “clear congressional authorization.” 142 S. Ct. 2587 (2022).

make the content available to the public are able to pay for the necessary infrastructure to support that viewership with advertising revenue. Restrictions on advertising will force business to impose subscription fees or exit the market, which will reduce the overall availability of digital content, including the free digital content that users have come to expect and rely on for many of their information needs.<sup>12</sup> Some streaming services are minimizing increases in service fees to consumers by adding lower-cost tiers that include advertising. Restrictions on advertising may limit access to paid content, particularly for lower income families.

Although much of the panel discussion focused on the potential harms of advertising, advertising provides a means for companies to provide consumers with information regarding products they want and has a role in the digital marketplace. The toys and games that TTA's members create provide play and educational value to enrich the lives of children and their families.

## **(6) Disclosures in Advertising**

TTA strongly believes that advertising should be transparent and in instances where the commercial nature of a message is not otherwise clear from context or other factors, disclosures that are easily understandable to children should be provided. TTA was encouraged to hear that simple icons are being evaluated in parts of Europe to aid in recognition of advertising, and that research in this area is ongoing, with stakeholder involvement. Business innovation also continues, as indicated by the representative from Google and YouTube. TTA believes that a uniform global standard for advertising disclosures could be extremely helpful, but also recognizes that different types of disclosures may be needed in different contexts,<sup>13</sup> and with different audiences of different ages. Disclosure options are worth additional exploration and discussion.

## **(7) Media Literacy**

As discussed during the workshop, children learn to recognize advertisements (*i.e.*, recognition that the content is commercial) and to understand the implications of an advertisement (*i.e.*, the persuasive intent of the advertiser) over time. Children also learn to tie their shoes, read, solve math problems, and modulate their own thoughts, emotions, and behaviors over time as well. One point on which there appeared to be alignment at the workshop is around the potential benefits of media literacy programs to all audiences – parents, children, and teens alike. The ability to distinguish content from advertising, identify online scams, and recognize facts versus misinformation is an essential 21<sup>st</sup> century skill set. As demonstrated by the YouTube training video shown at the workshop, such education materials need not be long or complicated. Parent-oriented resources could support parents as they guide

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<sup>12</sup> Under the unfairness test, if the FTC determined that advertising caused a substantial injury which is not reasonably avoidable by consumers, it must under the third step, weigh these considerations against countervailing benefits. The established benefits of advertising to our society in powering free content have been recognized for many decades.

<sup>13</sup> For example, the relationship between the content creator and the company selling the product can take many forms (e.g., payment, receipt of free goods, etc.). Whether a single type of disclosure would be appropriate for all these relationships merits further investigation, but use of a common icon of a type under investigation in the Netherlands could be extremely helpful to consumers.

their children on the journey to becoming autonomous adults able to understand and responsibly navigate the digital world.

TTA supports efforts to improve parents' media literacy and their understanding and awareness of their children's digital engagement. Children in all facets of life need support to grow and develop, and TTA believes that appropriate advertising disclosures where it is not clear that content is advertising, coupled with advertising literacy training, and parental support are the best way to mitigate the concerns articulated during the workshop.

We hope these comments will assist the FTC as it reviews the many important issues that were raised in the stealth advertising workshop. Please contact Ed Desmond at [edesmond@toyassociation.org](mailto:edesmond@toyassociation.org) or Jennifer Gibbons at [jgibbons@toyassociation.org](mailto:jgibbons@toyassociation.org) if you would like additional information on our industry's perspective.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Pasierb". The signature is fluid and cursive, with the first letter "S" being large and prominent.

Steve Pasierb  
President & CEO