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KidVid in Context

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Forty years ago the Federal Trade Commission did something so shocking and terrible that we continue to hear about it in federal court cases. What was that unforgivable sin? Something called "KidVid."

KidVid was the Federal Trade Commission's campaign to rein in advertising to children in the late 1970s. It is a centerpiece in narrative about out of control Washington regulators. But the narrative is more complex than commonly understood. My essay on KidVid, as part of Federal Trade Commission Privacy Law & Policy, elucidates several of KidVid's important, elided elements. Here are some of the highlights—

Although KidVid was poorly conceived and unlikely to be effective, it was the product of a bipartisan and years-long, incremental campaign to address problematic advertising to children. How problematic? Imagine if you came home to find your children asking for (or taking) vitamins on the advice of a cartoon.

KidVid didn't just come out of the blue in 1978. Its predicate was a republican-initiated campaign to address ads to children. Spearheaded by Nixon-appointed Chairman Lewis Engman the FTC convened working groups to come to a self-regulatory solution. Engman eventually left the Commission to run for Congress on an anti-regulatory platform, but he saw no conflict between his clichéd campaign themes and interventions on children's advertising. In fact, he left the Commission saying that he wished more had been done on children's advertising.

Proof of agency overreach reaches its apogee in a Washington Post institutional editorial, which argued that: "the [KidVid] proposal, in reality, is designed to protect children from the weakness of their parents - and the parents from the wailing insistence of their children. That, traditionally, is one of the roles of a governess - if you can afford one." Even the left-wing Post hated KidVid! Yet the editorial was conservative; strongly in favor of a parental responsibility narrative. In its simplicity, the Post overlooked the problem's structural causes. FTC critics never quote the end of the editorial, which suggests a case for sugar warning labels and mandated dental health ads during kids programming.


Volumes of Children's Advertising Transcripts

Finally, to get an idea about why the FTC pursued KidVid, it is useful to examine the record. It is rife with what might be called predation against children. The industry explains its strategy to manipulate children and it reinforces gender stereotypes. My favorite quote: "When you sell a woman on a product and she goes into the store and finds your brand isn't in stock she'll probably forget about it. But when you sell a kid on your product, if he can't get it he will throw himself on the floor, stamp his feet, and cry. You can't get a reaction like that out of an adult."

Viewed in larger context, KidVid can be understood as a mask for the anti-regulatory efforts of less charismatic actors, such as used car salesmen and funeral directors that were targeted by other FTC interventions. KidVid offered FTC opponents a topic that fit a "nanny state" narrative about the federal government, one that the news media embraced and helped fan, because the news media itself was concerned about the freedom to advertise.

In some ways, the FTC could be seen as decades ahead with KidVid. Think of just how much modern parents—especially those who, unlike the Washington Post's Katherine Graham, lack a governess—try to limit sugar intake among children. But here is where KidVid really fails and the Post was right. Limiting national advertising of sugary foods would do nothing to stem the more basic problem that junk food makers can signal to children in the store, or simply displace healthy food so that the only options are junk.

Harari observed in *Homo Deus* that, "…Marie Antoinette allegedly advised the starving masses that if they ran out of bread, they should just eat cake instead. Today, the poor are following this advice to the letter." Our regulators stand silently in the face of this despite doubling obesity rates, in part because of the great sin that was KidVid.

advertising.[90] The Agency had always experienced some Congressional meddling, but at some point in the 1970s, it misread changing political signals and became too aggressive for the politics of the era. Although several commission proceedings contributed to a reaction against the FTC (including the used-car rule and the funeral rule), the children's advertising proceeding symbolized a regulatory agency out of control.

THE KIDVID CONTROVERSY

The KidVid controversy refers to the late 1970s attempt of the Commission to regulate children's advertising. KidVid was a catalyzing force in the 1980 shutdowns of the FTC, and it still has a powerful psychological effect on the Agency. When KidVid is mentioned, it often is as a kind of threat that Congress will neuter the Agency if it takes the wrong action.

Throughout the 1970s, public interest groups and Congress urged some kind of policy intervention to address television advertising to children. Televisions were proliferating, and the Saturday morning cartoon-watching "marathon" was very popular. During this period, children were shown dozens of ads, almost all of which were for foods with added sugar.[91] Others directly advertised vitamins to children, raising concerns about poisoning and whether children could judge the need for vitamins. Liberal and conservative thinkers were concerned, and the FTC began to take action on the issue in the early 1970s, under Republican leadership. A 1970 staff report characterized children's advertising as more aggressive than adult advertising, as employing more special effects, and faulted it for masking "product placement" (the intentional presence of a product in the program) in even the tamest shows.[92] Staff recommended that the commissioners devote two hours of their time to the "unfortunate" task of watching Saturday morning cartoons to get the feel of the situation.

In 1972, the Agency held five weeks of hearings, featuring ninety witnesses to learn about television advertising and advertising's power in the medium.[93] During this time, the FTC's scrutiny of television as a medium increased, with the Agency

[90] In addition to appropriations bills passed, Congress during this period held many hearings and considered various measures that would have deeply affected the Commission's power. These are detailed in Charles Louis Mitchell, Federal Trade Commission Policy Making and Congress 1970–1983 (1984) (Ph.D. dissertation, University of Tennessee).

[91] A University of Texas undergraduate who focused her thesis on children's advertising monitored a Saturday morning's worth of food commercials in 1978. In the first half-hour, Alpha Bits (two times), Dairy Queen, Lifesavers, Reese's, Burger King (two times), Snickers, and Foot Loops were advertised. Andrea E. Eisenkraft, Nutrition Advertising and Children: The Decisions and Events Leading Up to the 1978 Federal Trade Commission Proposal (1978) (B.A. thesis, University of Texas).

[92] FTC, Staff Memorandum on Television Advertising to Children, November 23, 1970.

[93] Peter Braton Turk, The Federal Trade Commission Hearings on Modern Advertising Practices: A Continuing Inquiry into Television Advertising (1977)(Ph.D. dissertation, University of Wisconsin, Madison).

recommending to the FCC at one point that controversial advertisements should be subject to the fairness doctrine, thus requiring networks to carry countercommercials.[94]

In a move that still reflects FTC style, the Agency tried to get the industry to self-regulate before enforcing cases or proposing a rule. Concerned that "people on both sides of the issue appeared to be talking at each other rather than with each other,"[95] in 1973, Nixon-appointed FTC Chairman Lewis A. Engman convened advertising groups, consumer advocates, and FTC staff to develop a voluntary code that could be enforced by the Agency.[96] Engman also created a Children's Television Advertising Project (CTAP) at the FTC to encourage development of a voluntary code.[97]

In a matter concerning the advertising of Wonder Bread, Engman argued that advertising to children was unfair under Section 5, and that, "In my opinion, advertising directed to or seen by children which is calculated to, or in effect does, exploit their known anxieties or capitalize upon their propensity to confuse reality and fantasy is unfair within the meaning of Section 5 . . ."[98]

Engman left the Commission in 1975 to run for a US Senate seat in Michigan on a "too much regulation in Washington" platform. At the same time, he expressed disappointment that he had not made more progress on the children's advertising issue. He lost the election.

By 1978, the FTC felt that self-regulatory and enforcement actions were ineffective in addressing the children's advertising controversy. The Commission thus invited comment on a new trade regulation rule-making, which proved to be a disaster for the Agency.

Petitions filed with the FTC had urged it to investigate whether televised advertising of products to "children who are too young to understand the selling purpose of, or otherwise comprehend or evaluate, commercials may be unfair and deceptive within the meaning of Section 5 . . ."[99] The FTC sought to address several harms, the most prominent of which was tooth decay.[100] It also invoked the risk of

[94] *Id*; Advertising Age, FTC Tells FCC It Supports 'Counter' Ads, January 10, 1972.

[95] *Interview of Lewis A. Engman*, 43 Antitrust L. J. 443 1973–1974.

[96] Association Management Magazine, The Aggressive New Chairman at FTC (November 1973).

[97] Gerald J. Thain, Television Advertising to Children & the Federal Trade Commission: A Review of the History & Some Personal Observations, University of Illinois Advertising Working Paper No. 9, July 1981.

[98] *In re ITT Continental Baking Co.*, 83 F.T.C. 865, 942 (1973–1974).

[99] Children's Advertising, Proposed Trade Regulation Rulemaking and Public Hearing, 43 Fed. Reg. 17,967 (April 27, 1978).

[100] This seems esoteric, given the modern obesity problem, but Tracy Westen explains: "We knew that by the age of two, half the children in this country had gum disease and one decayed tooth; by the age of eighteen, the average child had fourteen decayed teeth; yet half of all fifteen year-olds never saw a dentist. Pediatricians told us tooth decay was the number one childhood illness at that time." Tracy Westen, *Government Regulation of Food Marketing to Children: The Federal Trade Commission and the Kid-Vid Controversy*, 39 Loy. L. A. L. Rev. 79 (2006).

obesity, but the prevalence of that condition accelerated after the 1970s – childhood obesity more than doubled among children and quadrupled among adolescents between 1980 and 2012. Some believed that advertising of sugary cereal did not grow the economy but rather just shifted investments in food away from healthier, less-advertised alternatives and, in the process, created unwarranted public health costs.

The FTC quoted advertising executives discussing how they could manipulate children and, in so doing, their parents. For instance, quoting *Advertising Age*'s coverage of a conference devoted to kids' advertising, the FTC relayed one executive's comment: "When you sell a woman on a product and she goes into the store and finds your brand isn't in stock she'll probably forget about it. But when you sell a kid on your product, if he can't get it he will throw himself on the floor, stamp his feet, and cry. You can't get a reaction like that out of an adult."[101] Even in advertising textbooks, one can find insensitive and even offensive advice about selling to children. In the 1975 textbook *Advertising Management*, the authors quote a memo from a San Francisco advertising firm that advised: "With children, the problem is to reach the head through the emotions ... Girls are less effective in communicating with both girls and boys ... [A]nimation is ... credible. Animation tends to be trusted even by most of the more critical children."[102]

Yet, the FTC's proposals for addressing the problem caused a major controversy because of their breadth.[103] The Agency asked for comment on "the advisability and manner of implementation of a rule" with the following elements: first, a ban on all television advertising "for any product which is 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." The FTC thought that children under the age of eight years could not comprehend advertising. Second, a ban on television advertising for "sugared food products directed to, or seen by, audiences composed of a significant proportion of older children ..." Third, whether there should be counteradvertising for older children that included "nutritional and/or health disclosures funded by advertisers."[104]

Critiques rained down on the FTC. Bernice Hasin called this proposal "[c]omplicated and confusing, to say nothing of ill conceived and unworkable ..."[105] The

[101] FTC, Federal Trade Commission Staff Report on Television Advertising to Children 17, quoting *Reach Kids on Adult TV Shows: Wilk; It's Cheaper on Kids' Shows: Halock*, 36 Advertising Age 40–41, July 19, 1965 (quoting Jerry Ringlein of Oscar Mayer & Co.); for an overview of psychological research on children's understanding of ads, *see* Dale Kunkel & Donald Roberts, *Young Minds and Marketplace Values: Issues in Children's Television Advertising*, 47(1) J. Soc. Issues 57 (1991).

[102] This advice is attributed to Hoefer, Dietrick, and Brown *in* David A. Aaker & John G. Myers, Advertising Management 43–44 (1975).

[103] Teresa Moran Schwartz & Alice Saker Hrdy, *FTC Rulemaking: Three Bold Initiatives & Their Legal Impact*, 90th Anniversary Symposium of the Federal Trade Commission (2004).

[104] Children's Advertising, Proposed Trade Regulation, Rulemaking, & Public Hearing, 43(82) Fed. Reg. 17967 (April 27, 1978).

[105] Bernice Rothman Hasin, Consumers, Commissions, & Congress: Law, Theory, & the Federal Trade Commission, 1968–1985 (1987).

proposal would require some definition of "children's television," with an important division between programming for those under eight and those under twelve. Compliance could have been very tricky, and spread to programming other than (then popular) after-school and Saturday morning cartoons. This is because many adults watch children's shows,[106] perhaps in role as caretaker.

Critics also pointed to a logical disconnect in the FTC's reasoning: children cannot buy anything, and so advertising to them is filtered through the parent as decision-maker.[107] Thus, there is no deception or unfairness to the actual consumer – the parent. But, all parents can recognize the trick in this reasoning. One point of advertising is to trigger cues. The cues manifest themselves in desires that children do not even understand – they recognize a product from a television show while in a store, but often do not even understand what the product is. Demands for the unknown product create conflict and sometimes compromise from parents.[108]

On a more abstract level, opponents of the rule saw a battle over values. Supporters of the rule were concerned about the values that advertising taught kids. Others saw it as an attack on conservative power structures.

Advertisers went full tilt against the FTC, and even obtained an order disqualifying Chairman Michael Pertschuk from the proceeding based on bias.[109] The *Washington Post* labeled the Agency a "national nanny" and sneered that "the proposal, in reality, is designed to protect children from the weakness of their parents (who cannot say no to sugary treats) – and the parents from the wailing insistence of their children. That, traditionally, is one of the roles of a governess – if you can afford one."[110]

The *Washington Post*'s criticism is often invoked as evidence that "the left" agreed that the FTC had gone too far. But there is another way to look at this: the institutional editorial board was concerned about its parent company eventually becoming a regulated entity under children's advertising rules. It had an interest in attacking the proceeding. Throughout the century, publishers have opposed consumer protection in situations where it threatens advertising dollars (see box titled "Publishers' hair shirt on consumer protection" in Chapter 3). The *Post* developed a liberal reputation for its courageous service in exposing the Watergate affair. Characterizing it as "the left" signals a narrow understanding of the range of political thought of this newspaper, however, as it has often followed the establishment line.

[106] J. Howard Beales, III, Advertising to Kids & the FTC: A Regulatory Retrospective That Advises the Present (2004).

[107] Susan Bartlett Foote & Robert H. Mnookin, *The "Kid Vid" Crusade*, 61 The Public Interest 90 (Fall 1980).

[108] Molly Pauker, *The Case for FTC Regulation of Television Advertising Directed Toward Children*, 46 Brook. L. Rev. 513 (1979).

[109] *Ass'n of Nat. Advertisers, Inc.* v. *FTC.*, 627 F.2d 1151 (D.C. Cir. 1979)(the disqualification was reversed on appeal).

[110] The Washington Post, The FTC as National Nanny (March 1, 1978).

Current histories of KidVid rarely, if at all, discuss the bipartisan nature of the genesis of KidVid. Concern about children's health spans the left and right, to this day in the form of the Agency's working group on children's advertising and nutrition. Today, we better understand sugar's role in the problem of obesity and diabetes, and that the problem of childhood obesity is practically irreversible and causes misery. If these regulations caused cereals to be more expensive, perhaps healthier alternatives would take their place, with attendant cost savings in public health.[111]

Existing histories also elide how KidVid was an appealing front in the business community's struggle with the FTC. KidVid occurred against a backdrop of other regulations, including the FTC's funeral rule and used-car rule. These other rulemakings angered many politically powerful small business leaders. Yet, the public was unlikely to rally in favor of funeral directors and used-car salesmen. KidVid offered FTC opponents a topic that fit a "nanny state" narrative about the federal government, one that the news media embraced and helped fan, because the news media was concerned about losing advertising revenue. A broad range of FTC opponents could march under the banner of KidVid and, in so doing, slow down the FTC's other rules that many consumers may have supported.

The FTC was ahead of its time on KidVid, in being concerned about the risks to children's health from pervasive availability of junk food masquerading as a healthy breakfast. The fundamental problem was not that it was an unmeritorious or partisan idea to improve children's health, but that solutions to the problem are complex and could result in deeply perverse results. Limiting advertising of these products would likely not ameliorate the problem, as children love sugar and will learn one way or the other about it.[112] We learned from the regulation of tobacco that deep structural changes (e.g., bans on indoor smoking) had to be put in place to reduce smoking. Even with restrictions on advertising and the increasing inconvenience and expense of tobacco, about seventeen percent of Americans still smoke. Turning back to sugar, our society still faces expensive and complex structural challenges, such as how to provide more healthful alternatives to sugar-frosted sugar cereals.

[111] In recent years, there have been increasingly strenuous calls for control over advertising to children as a result of obesity and diabetes rates: "We believe that the accumulation of evidence on this topic [advertising to children] is now compelling enough to warrant regulatory action by the government to protect the interests of children, and therefore offer a recommendation that restrictions be placed on advertising to children too young to recognize advertising's persuasive intent." American Psychological Association, Report of the APA Task Force on Advertising and Children, February 20, 2004; *see also* Susan Linn, Consuming Kids: The Hostile Takeover of Childhood (2004); The Lancet, Selling to – and selling out – children, September 28, 2002. *See also*, Paul M. Schwartz & Daniel J. Solove, *The PII Problem: Privacy and a New Concept of Personally Identifiable Information*, 86 N.Y.U. L. Q. Rev. 1814 (2011).

[112] There is also the question of what advertising would replace marketing for highly sugared food. A look back report at KidVid determined that much of the modern advertising to children focused on sedentary entertainment. Debra J. Holt, Pauline M. Ippolito, Debra M. Desrochers, Christopher R. Kelley, FTC, Children's Exposure to TV Advertising in 1977 and 2004 Information for the Obesity Debate (2007).

THE KIDVID REACTION

Forces opposed to KidVid and the Agency's other activities made strong appeals to Congress, which reacted with the Federal Trade Commission Improvement Act of 1980.[113] Much of the FTC's powers were left unchanged, yet the substance and procedure of the act's passage did much political and psychological damage to the Agency. The act included the ability of Congress to exercise a legislative veto of FTC action, a feature President Carter thought unconstitutional, but Carter nevertheless signed the bill to keep the Agency going.[114] The indeterminacy surrounding passage of the bill caused the FTC to close its doors on May 1, 1980, probably the first time an agency has been shut down over a policy matter.[115] Still in need of permanent operating funds, it asked employees to come to work at the next shutdown a month later, but apparently the staff did not work on matters that day.[116]

The 1980 act limited the Agency's use of administrative subpoenas, reflecting concerns that the Agency could demand too much information before a complaint had been filed. It created detailed procedures for the protection of information furnished to the Agency in response to a leak that showed that smoking bans in public places would harm cigarette sales.[117]

The 1980 act placed procedural limitations on the Agency's rule-making authority, requiring the Commission to announce in advance to the public and to Congressional committees when it intends to propose new rules.[118] It also required regular congressional oversight of the Agency.[119] Congress flatly prohibited the Agency from initiating rule-makings to determine that children's advertising was unfair or deceptive.[120] Congress also punished the Agency by prohibiting the Commission from using its funds for 3 years "for the purpose of initiating any new rulemaking proceeding . . . which prohibits or otherwise regulates any commercial advertising . . ."[121]

The FTC is still reeling from the 1980 act. The worst fears of business interests were awakened by the Agency's interpretation of its unfairness power. Former FTC Chairman and staffer to Senator Magnuson, Michael Pertschuk, attributed the backlash against the Agency to a number of factors.[122] Among them, business interests had become much more disciplined in organizing against federal

[113] Pub. L. No. 96–252, 94 Stat. 374 (1980).
[114] N.Y. Times, F.T.C. Funds Bill Is Signed, May 29, 1980 at D3.
[115] J. Howard Beales, III, Advertising to Kids and the FTC: A Regulatory Retrospective That Advises the Present (2004).
[116] Jeffrey Mills, *FTC Again Is Marking Time*, Washington Post, June 3, 1980.
[117] Pub. L. No. 96–252, 94 Stat. 374 (1980).
[118] *Id.* at §8.
[119] *Id.* at §22.
[120] *Id.* at §11.
[121] *Id.*
[122] Michael Pertschuk, Revolt against Regulation: The Rise and Pause of the Consumer Movement (1982).

regulation and regulators. Organizations such as the Business Roundtable were formed, and once-sleepy groups such as the Chamber of Commerce were reinvigorated. Chairman Pertschuk angered the business community by taking up an old Brandeisian notion: that antitrust policy should factor in the social dangers of bigness.[123] Pertschuk overestimated the political capital he possessed in an era where the consumer movement peaked and then quickly went into decline and where Americans – and even Carter administration officials – were becoming more skeptical of government regulation.

Adding to these problems, apparently, the FTC did not use its economists to study its overall consumer protection mission. Funds were finally budgeted in 1978 for economic analysis of consumer protection policy.[124] The FTC had issued a number of trade regulation rules that affected a variety of small business interests, which in turned complained loudly to Congress. These rules dug into the profits of small businesses such as funeral homes, which, prior to the funeral practices rule, did not have to disclose a price list.

CONCLUSION

The FTC formally entered the consumer protection sphere in the 1930s, and had massive gains in power and sophistication as a result of changes brought on by the courts, Congress, and commissioners themselves in the 1970s. But by the end of the 1970s, the commissioners' ambition got ahead of existing political support. The FTC was active on a number of fronts where consumers probably supported more intervention, such as the regulation of used-car sales and of funeral parlor practices. Business frustration with those interventions probably did not have popular appeal with consumers. But KidVid implicated the news media and the myriad businesses that advertised to children. KidVid thus became the banner under which a wide range of businesses, in partnership with news media that were dependent on advertising dollars, could vent their anti-FTC frustration. The KidVid reaction resulted in the Agency being shut down twice and threatened its very existence. KidVid still has a psychological effect on the modern commission. KidVid is routinely invoked by commission critics who oppose the Agency's privacy efforts. KidVid also offers a cautionary lesson, as regulation of online advertising too has broad effects on businesses, advertisers, and the news media itself. These factions could unite and develop an anti-FTC narrative and political campaign if they feel threatened by the Agency's privacy actions.

[123] American Enterprise Institute, A Conversation with Michael Pertschuk (1979). ("The issue is fundamental Jeffersonian democracy. It is an essential distrust of substantial concentrations of power.")

[124] Paul A. Pautler, *A Brief History of the FTC's Bureau of Economics: Reports, Mergers, and Information Regulation*, 46 Rev. Ind. Org. 59 (2015); William C. MacLeod & Robert A. Rogowsky, *Consumer Protection at the FTC during the Reagan Administration*, in Regulation and the Reagan Era: Politics, Bureaucracy and the Public Interest (Roger E. Meiners & Bruce Yandle, eds., 1989).