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Regulating Television Advertising in the European Community and United States: Preventing Harm to Children

Daniel E. Frank†

Both the United States and the European Community ("EC") regulate broadcasting and broadcast advertising. The Federal Communications Commission ("FCC") is charged with the duty of regulating broadcasters in the United States.¹ In the EC, the Council Directive of October 3, 1989 on television broadcast activities provides the regulatory framework for freedom of broadcasting, but also contains provisions to limit the potentially harmful effects of unregulated broadcasting.² In particular, Article 16 of this Directive seeks to protect children from "moral or physical detriment" and provides a number of criteria that television advertising must meet.

The issue of regulating television advertising bears exploration, especially in light of Congress' recent enactment of the Children's Television Act of 1990 ("CTA").³ This measure seeks to protect children from harm by limiting the amount of advertising that may be presented during children's television programming.⁴ Other

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² Council Dir 89/552, 1989 OJ L298:23 (On the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities) ("Directive").

³ Articles 10 through 21 of the Directive govern television advertising and sponsorship. More specifically, Article 12 provides that

Television advertising shall not:
(a) prejudice respect for human dignity;
(b) include any discrimination on grounds of race, sex or nationality;
(c) be offensive to religious or political beliefs;
(d) encourage behaviour prejudicial to health or to safety;
(e) encourage behaviour prejudicial to the protection of the environment.

Article 13 prohibits the advertising of tobacco products, Article 14 prohibits the advertising of certain medicinal products, and Article 15 regulates the advertising of alcohol on television.

⁴ Pub L No 101-437, 104 Stat 996 (1990), to be codified at 47 USC §§ 303a-303b, 394.

⁵ Id, § 102, 104 Stat at 996-97. The Act directs the FCC to "prescribe standards applicable to commercial television broadcast licensees with respect to the time devoted to commercial matter in conjunction with children's television programming." Id, § 102(a), 104
measures designed to protect young viewers, such as the FCC's total ban on the broadcast of "indecent" material, have not withstood legal challenge.\(^6\) In comparison, the European Community's Article 16 represents an alternative, superior approach to protecting children from the harmful effects of television advertising.

This Comment argues that no constitutional impediment bars the United States from enacting its own version of Article 16. Part I of the Comment sets forth the particulars of Article 16 and examines its underlying policies. Part II explores the regulation of children's television in the United States, focusing on the CTA and recent FCC actions. Part III describes the constitutional limits placed on the regulation of television advertising. Finally, Part IV argues that despite these limits, the United States could constitutionally enact its own version of Article 16.

I. ARTICLE 16 OF THE "TELEVISION WITHOUT FRONTIERS" DIRECTIVE

The EC adopted the "Television without Frontiers" Directive on October 3, 1989. Article 16 of this Directive provides that

Television advertising shall not cause moral or physical detriment to minors, and shall therefore comply with the following criteria for their protection:

(a) it shall not directly exhort minors to buy a product or a service by exploiting their inexperience or credulity;

(b) it shall not directly encourage minors to persuade their parents or others to purchase the goods or services being advertised;

(c) it shall not exploit the special trust minors place in parents, teachers or other persons;

(d) it shall not unreasonably show minors in dangerous situations.\(^6\)

Thus, Article 16 protects children by regulating the content of television advertising.

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Stat at 996. Under the Act, advertising in children's television programming is limited to no more than ten and one-half minutes per hour on weekends and no more than twelve minutes per hour on weekdays. Id, § 102(b), 104 Stat at 996-97.

\(^6\) Action for Children's Television v FCC, 932 F2d 1504, 1510 (DC Cir 1991) (remanding the regulation to the FCC for reconsideration).

The Directive promotes the objectives of the Treaty of Rome ("EEC Treaty"), including establishing closer relations between the peoples and states of the European Economic Community, guaranteeing economic and social progress by eliminating divisive trade barriers, and improving the living conditions of the peoples of the European Economic Community. The Directive also seeks to ensure "cultural diversity" and "pluralism." Guaranteeing freedom of broadcast is one means of securing these objectives and, more generally, of protecting freedom of expression.

The Directive does not allow unhindered broadcasting, though. It also articulates a commitment to the interests of consumers as television viewers. Rules for television programs and television advertising are necessary to protect the physical, mental, and moral development of children.

In the proposal stage, the Commission sought to limit broadcast advertising in order to prevent advertisers from displacing the informational, educational, cultural, and entertainment functions of radio and television. The Commission found that "advertisements can unduly influence younger people if special standards are not laid down to prevent it" and that the "general interest" warrants protecting children's physical, mental, and moral development. The Economic and Social Committee, while expressing some concerns over a number of the Directive's provisions, highlighted the same four basic functions of broadcasting. The Com-

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7 Id, 1st recital, 1989 OJ at L298:23.
11 Id, 8th recital, 1989 OJ at L298:23.
12 Id, 27th recital, 1989 OJ at L298:25, "[i]n order to ensure that the interests of consumers as television viewers are fully and properly protected, it is essential for television advertising to be subject to a certain number of minimum rules and standards." This recital also highlights the need for Member States to be able to enact more detailed or stricter rules.
14 Amended Prop for a Council Dir on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of broadcasting activities, 36th recital, 1988 OJ C110:3, 9.
16 Id, 44th recital, 1988 OJ at C110:10.
17 Opinion of the Economic & Social Committee on the Prop for a Council Dir on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of broadcasting activities, 1987 OJ C232:29. The Committee "endor[se]d the rules of conduct on broadcast advertising directed at children and young persons," but had "doubts about the practical application of vaguely worded provisions and effective monitoring of their observance." Id, ¶ 2.16, 1987 OJ at C232:32.
mittee also suggested "systematic consumer education" by Member States as an additional means of teaching children to view television advertising critically.\textsuperscript{18}

Thus, Article 16’s four primary objectives are as follows: (1) to ensure diversity of information and opinion through freedom of broadcast; (2) to prevent retardation of the physical, mental, and moral development of children; (3) to ensure that broadcasters continue to provide informational, educational, cultural, and entertainment programming; and (4) to preserve program quality.

II. THE CHILDREN’S TELEVISION ACT OF 1990 AND THE FCC

In the United States, concerns similar to those of the EC have also informed federal regulation of television broadcasting. The FCC has adopted regulations\textsuperscript{19} implementing the provisions of the CTA,\textsuperscript{20} and it has attempted, unsuccessfully, to ban the broadcast of "indecent" material. Examining both the legislative history of the CTA and the FCC’s attempted ban of "indecent" material reveals the policies driving regulation of television advertising in the United States.

A. The Children’s Television Act of 1990

On October 18, 1990, the CTA became law without the President’s signature.\textsuperscript{21} The Act sets standards for children’s television programming,\textsuperscript{22} requires the FCC to consider a license renewal applicant’s compliance with those standards,\textsuperscript{23} and establishes an endowment for educational television.\textsuperscript{24}

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\textsuperscript{18} Id, ¶ 2.25, 1987 OJ at C232:33.
\textsuperscript{20} Children’s Television Act of 1990, Pub L No 101-437, 104 Stat 996 (1990), to be codified at 47 USC §§ 303a, 303b, 394.
\textsuperscript{22} These standards consist of limits on the amount of broadcast time available to advertisers. See note 4.
\textsuperscript{23} Children’s Television Act, § 103, 104 Stat at 997. In reviewing broadcast license renewal applications, the FCC must consider the extent to which the licensee has complied with the standards and has "served the educational and informational needs of children through the licensee’s overall programming," Id, § 103(a), 104 Stat at 997.
\textsuperscript{24} Id, Title II, §§ 201-203, 104 Stat at 997-1000.
These measures were based on congressional findings\textsuperscript{26} that "television can assist children to learn important information, skills, values, and behavior,"\textsuperscript{26} that "as part of their obligation to serve the public interest" television broadcasters should "provide programming that serves the special needs of children,"\textsuperscript{27} that "the financial support of advertisers assists in the provision of programming to children,"\textsuperscript{28} and that "special safeguards are appropriate to protect children from overcommercialization on television."\textsuperscript{29}

Congress also found that "total reliance on marketplace forces is neither sufficient nor justified to protect children from potential exploitation by advertising or commercial practices."\textsuperscript{30} Indeed, much "scientific evidence" demonstrates that "children are uniquely susceptible to the persuasive messages contained in television advertising," due to their lack of "perceptual capabilities to consistently discriminate program from commercial content" and lack of "ability to recognize the persuasive intent that necessarily underlies all television advertising."\textsuperscript{31} Since children cannot distinguish programming from advertising, they cannot turn the channel when confronted with excessive advertising.}\textsuperscript{32}
Moreover, Congress found that because children watch many hours of television, broadcasters have the capability to "provid[e] unique and positive education opportunities." Thus, children's television should do more than sell products; it should educate and inform. An unregulated television marketplace will not ensure this.

Opponents of the Act criticized these findings. They noted the lack of "evidence to indicate precisely if or how excessive commercialization causes harm to children." They also questioned the need for legally imposed limits on advertising, noting that some studies showed that broadcasters already follow voluntary limits. Finally, these opponents suggested that instead of imposing restrictions on broadcasters, encouraging more programming for children would adequately address the "root concerns of children's TV advocates—improving the programming watched by the children of our Nation."

Despite this opposition and without contributing its views to this policy analysis, the FCC issued regulations implementing the Act. The four main objectives underlying enactment the Children's Television Act of 1990 may thus be summarized as follows: (1) television should first serve the educational and informational
needs of children; (2) advertising revenue should help finance children’s programming; (3) the FCC should promulgate measures to protect children from overcommercialization; and (4) regulations should discipline the market, since children are not capable of distinguishing advertising from programming.

B. The FCC’s Attempted Ban of “Indecent” Broadcasts

Prior to enactment of the CTA, the FCC demonstrated its commitment to protecting children viewers in a different way; it attempted to ban the broadcast of “indecent” programs. The policy analysis that drove the FCC to adopt such a ban—although not directly aimed at advertising—nonetheless seems to have informed (and continues to inform) much of the debate regarding the regulation of television advertising in the United States. Thus, a brief examination of the policies behind the FCC’s attempted ban should help develop a deeper understanding of the concerns motivating regulators in this context.

The United States has a long history of regulating “indecent” speech. Federal law prohibits the broadcast of “any obscene, indecent, or profane language.” Although the courts have never authoritatively defined the term “indecent,” the FCC has ruled that it means “language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs.” The FCC’s primary goal in restricting the broadcast of indecent material has been to protect children from “language which most parents regard as inappropriate for them to hear.”

Initially, it sought to accomplish this by permitting the broadcast of indecent material only in the late evening hours.

The FCC altered course in 1987. Based on its findings that children might be in viewing audiences even late at night, the FCC instituted a complete ban on the broadcast of “indecent” mate-

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43 Id.
This ban did not withstand legal challenge, however, and the D.C. Circuit directed the FCC to revise its policy. 46

Congress responded by enacting a law that directed the FCC to issue regulations banning "indecent" broadcasts on a 24-hour basis. 47 The FCC complied, 48 and to avoid further judicial interference, it compiled a record that attempted to show that the government's interest was "compelling" and that the regulation was a "narrowly tailored" means of realizing this interest. 49

The FCC relied on three findings to conclude that the government's interest was "compelling." 50 First, it found that facilitating or assisting parental supervision of children is a compelling governmental interest. 51 Second, it found that the government had an independent, compelling interest in protecting the physical and psychological welfare and development of children. 52 Third, the FCC found that "preserving the privacy of the home provides an alter-

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46 New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees, 2 FCC Rec 2726 (1987) (summary of new FCC policies). See also, In re Infinity Broadcasting, 3 FCC Rec at 937 n 47.

47 Action for Children's Television v FCC, 852 F2d 1332, 1344 (DC Cir 1988).


51 Id at 5299-5300.


The FCC has recognized for many years that the basis for protecting children is their inexperience and youth:

It is a matter of common understanding that, because of their youth and inexperience, 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 that the purpose of a commercial is to sell a product.

native basis for upholding the constitutionality of the 24-hour prohibition” on indecent broadcasts.53

The FCC also determined that the blanket prohibition was a “narrowly tailored” means of protecting children. After examining children’s listening and viewing habits,64 the FCC found that television and radio broadcasts reach unsupervised children at all times of day and night.65 It, therefore, concluded that the unique pervasiveness and accessibility to children of broadcasting justified banning indecent programming.66

After exploring the various alternatives to a blanket prohibition, the FCC ruled that none of these would effectively protect children from indecency.57 The FCC also found that a flat prohibition on the broadcast of indecent material would not impose children’s programming on adults, as indecent material could be obtained elsewhere.68 Thus, the FCC concluded that a flat

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53 Enforcement of Prohibitions Against Broadcast Indecency, 5 FCC Rec at 5300 (cited in note 49).
54 Id at 5301-06.
55 Id at 5304. The FCC ruled, however, that broadcasters could rebut, on a case-by-case basis, the finding that children were present in viewing audiences at all times. Id at 5309.
The FCC also rejected the argument that since parents were often “present” when children were viewing television broadcasts, the children were therefore supervised since their parent(s) had the “opportunity to supervise.” Enforcement of Prohibitions Against Broadcast Indecency, 5 FCC Rec at 5304 (cited in note 49). The “mere ‘presence’ in the same house as a child does not necessarily translate into supervision.” Id at 5305. Furthermore, “the pervasiveness and accessibility of television and radio, coupled with the lack of effective parental control mechanisms . . . make effective parental supervision exceedingly difficult if not impossible for the average parent.” Id. The number of televisions in a household, the use of VCRs for time-delayed viewing, and lack of “readily available” technical devices to block television broadcasts supported the FCC’s position. Id. Only by “co-viewing” or “at a minimum, by remaining actively aware of what their children are watching at all times” can parents effectively supervise children’s television viewing. Id.
56 Enforcement of Prohibitions Against Broadcast Indecency, 5 FCC Rec at 5301 (cited in note 49). Broadcasting also reaches children who do not read. Id at 5302.
57 Enforcement of Prohibitions Against Broadcast Indecency, 5 FCC Rec at 5306-08 (cited in note 49). The FCC discussed various options. First, it rejected time channeling—which would establish a specific time period during which indecent broadcasts could be shown—because children are in broadcast audiences at all times and have access to VCRs. Id at 5306-07. Second, the FCC also rejected ratings and warnings that would air prior to broadcast and would also appear in television guides. Id at 5307. It found these ineffective because children “graze,” or randomly scan the available television channels; because prior warnings can be missed, they would not serve their purpose. Id. Further, although the FCC offered no explanation for this, it suggested that indecency ratings might actually attract children despite warnings. Third and finally, the FCC rejected scrambling and decoding devices, because it found that “no such technologies are currently available to the public for this purpose.” Id at 5308.
58 Enforcement of Prohibitions Against Broadcast Indecency, 5 FCC Rec at 5308 (cited in note 49), citing Butler v Michigan, 352 US 380, 383 (1957). The FCC found that “indecent material is available on media that are largely indistinguishable, from the viewer’s per-
prohibition, applied exclusively to television, would withstand First Amendment challenge.\textsuperscript{58}

An “amalgam of broadcasters, industry associations, and public interest groups” challenged the new ban,\textsuperscript{60} and the D.C. Circuit again invalidated it.\textsuperscript{61} While recognizing the government’s interest in protecting children from physical and psychological harm, the court interpreted its prior ruling to mean that the FCC could not ban indecent broadcasts entirely.\textsuperscript{62} An absolute prohibition, whether enacted by Congress or promulgated by the FCC, “cannot withstand constitutional scrutiny.”\textsuperscript{63}

III. CONSTITUTIONAL RESTRICTIONS ON COMMERCIAL SPEECH

The First Amendment does not prohibit all restrictions placed on the freedom of speech. For example, the First Amendment affords less protection to speech likely to reach and harm children than to some other types of speech.\textsuperscript{64} Commercial speech, defined as “expression related solely to the economic interests of the speaker and its audience” or speech that proposes an economic transaction, can also be regulated constitutionally.\textsuperscript{65}

The controlling commercial speech case is \textit{Central Hudson Gas and Electric Corporation v Public Service Commission of New York}.\textsuperscript{66} While noting that commercial speech provides consumers with useful information, the Court in this case concluded that the First Amendment

accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. . . . The

\textsuperscript{58} Broadcasting, unlike other media, has “specific characteristics” that render it most suitable to regulation. Id at 5302. The FCC also cited \textit{FCC v Pacifica Foundation}, 438 US 726, 748 (1978), and \textit{Sable Communications of California v FCC}, 492 US 115, 127 (1989), for the proposition that broadcasting’s “pervasive presence” and its unique ability to intrude in the privacy of the home subjected it to legitimate constitutional regulation.

\textsuperscript{59} \textit{Action for Children’s Television v FCC}, 932 F2d 1504, 1507 (DC Cir 1991).

\textsuperscript{60} Id at 1509.

\textsuperscript{61} Id.

\textsuperscript{62} Id at 1509-10. The court directed the FCC to resume proceedings to determine during what times indecent material may be broadcast. Id. The FCC has not taken any subsequent action, although the Supreme Court has denied certiorari. 1992 US Lexis 1420 (Mar 2, 1992).

\textsuperscript{63} \textit{FCC v Pacifica Foundation}, 438 US 726 (1978).


\textsuperscript{65} 447 US 557.
protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.\textsuperscript{67}

Relying on the "informational function of advertising,"\textsuperscript{68} the Court articulated a four-prong test to determine the validity of commercial speech restrictions.\textsuperscript{69} First, to warrant constitutional protection, commercial speech must be "neither misleading nor related to unlawful activity."\textsuperscript{70} Second, the government's interest in regulating the speech must be "substantial."\textsuperscript{71} Third, the restriction "must directly advance the state interest involved."\textsuperscript{72} Finally, there must be a fairly tight fit between the means employed and the ends sought.\textsuperscript{73} The government bears the burden of proving that it has satisfied the substantial interest, direct advancement, and means-ends fit prongs of the Central Hudson test.\textsuperscript{74}

Recent cases suggest that the Supreme Court has become more trusting of legislative judgment with respect to the means-ends fit requirement. In Posadas de Puerto Rico Associates \textit{v} Tourism Co. of Puerto Rico,\textsuperscript{75} the Court upheld restrictions on the advertising of gambling in Puerto Rico. Advertisers challenging the restrictions argued that the government should "reduce demand for casino gambling among the residents of Puerto Rico not by suppressing commercial speech that might encourage such gambling, but by promulgating additional speech designed to discourage it."\textsuperscript{76} The Court, however, stated that "it is up to the legislature to decide whether or not such a 'counterspeech' policy would be as effective in reducing the demand for casino gambling as a restriction on advertising."\textsuperscript{77} Thus, the legislature is not limited to

\textsuperscript{67} Id at 562-63.
\textsuperscript{68} Id at 563.
\textsuperscript{69} Id at 563-66.
\textsuperscript{70} \textit{Central Hudson}, 447 US at 564. If the speech is misleading or related to unlawful activity, the government may regulate it without "constitutional objection." Id at 563.
\textsuperscript{71} Id at 564.
\textsuperscript{72} Id at 564. In applying the test, the Court held that this prong was met when it found a "direct link" between the state interest and the restriction. Id at 569.
\textsuperscript{73} \textit{Central Hudson}, 447 US at 564 ("[I]f the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive."). Thus, the restriction must be "no more extensive than necessary to further the State's interest." Id at 569-70.
\textsuperscript{74} Id, 447 US at 564.
\textsuperscript{75} 478 US 328 (1986).
\textsuperscript{76} Id at 344 (emphasis in original).
\textsuperscript{77} Id.
countering potentially harmful commercial speech with its own speech; it may also prohibit harmful speech entirely.  

Moreover, in Board of Trustees of the State University of New York v Fox, the Court declared the fourth prong of the Central Hudson test to be a reasonable fit test, "something short of a least-restrictive-means standard." Thus, the Court appears to be moving in the direction of Justice Rehnquist's dissent in Central Hudson, in which he argues that requiring too tight a fit between means and ends would "unduly impair a state legislature's ability to adopt legislation reasonably designed to promote interests that have always been rightly thought to be of great importance to the State."

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78 Justice Rehnquist, writing for the Court in Posadas, also noted that:
[1] It is precisely because the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising.
Id at 346 (emphasis in original).
80 Id at 477. Of the fourth prong's requirement, the Court said
[O]ur decisions require . . . a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.
Id at 480 (citations omitted).
81 Central Hudson, 447 US at 584-85 (Rehnquist dissenting). Justice Rehnquist also gave three other reasons in support of his position. First, because broadcast licenses are state-created monopolies, the government may place limits on the use of such licenses. Id at 585, 587-88. Second, the First Amendment fully protects only political speech, not commercial speech. Id at 595-99. Third, the "final part of the Court's test leaves room for so many hypothetical 'better' ways that any ingenious lawyer will surely seize on one of them to secure the invalidation of what the state agency actually did." Id at 599-600.

However, other recent cases suggest that the Court is not entirely willing to defer to legislative judgment in applying the Central Hudson test. For example, in Peel v Attorney Registration and Disciplinary Commission of Illinois, the Court invalidated a state statute prohibiting lawyers from advertising themselves as being "certified" as "specialists." 496 US 91 (1990). The Court said that the "particular State rule restricting lawyers' advertising is 'broader than reasonably necessary to prevent the perceived evil.'" Id at 107 (quoting Shapero v Kentucky Bar Ass'n., 486 US 466, 472 (1988) (quoting In re R. M. J., 455 US 191, 203 (1982))). However, Peel, and the cases that it cites, deal with statutes that prohibit potentially misleading advertising. They were not invalidated because this kind of interest is insubstantial. Rather, they were invalidated because the asserted interests lacked evidentiary support and thus were not substantiated.
REGULATING TELEVISION ADVERTISING

Protecting children from harm is one such interest, as the Court has repeatedly held. Nevertheless, under Central Hudson, the policies and facts involved in each case must be examined to determine the constitutionality of a restriction on commercial speech.

IV. Article 16 in the United States

No constitutional impediment bars the United States from enacting its own version of Article 16. As this Part demonstrates, Article 16 restrictions on commercial speech would likely satisfy all four prongs of the Central Hudson test.

A. Non-Misleading Advertising

This Comment assumes that, in general, advertising is neither misleading nor related to unlawful activities, and thus it qualifies as commercial speech entitled to some measure of constitutional protection. If this assumption is incorrect, then such advertising can claim no constitutional protection and the state may freely regulate it.

Some children's television advocates, however, have asserted that program- and traditional-length advertisements are "inherently deceptive" and misleading. Such advertisements are deceptive because children "cannot distinguish advertisements from program content," because they "place unwarranted trust in the salesperson," and because they lack the ability "to make informed judgments about the truthfulness of the advertisements." Not all restrictions that seek to protect children are upheld under the Central Hudson test. For example, in Sable, the Court invalidated a federal statute prohibiting indecent language in prerecorded, commercial telephone messages on the ground that the record did not show that the restriction was not the least restrictive means to further the government's articulated compelling interest of "protecting the physical and psychological well-being of minors." Sable, 492 US at 126.

Program length commercials are "programs that interweave 'noncommercial' program content so closely with the commercial message that the entire program must be considered commercial." Charren, 56 U Cin L Rev at 1252-53, citing Applicability of Commission Policies on Program-Length Commercials, 44 FCC2d 985 (1974).


83 Not all restrictions that seek to protect children are upheld under the Central Hudson test. For example, in Sable, the Court invalidated a federal statute prohibiting indecent language in prerecorded, commercial telephone messages on the ground that the record did not show that the restriction was not the least restrictive means to further the government's articulated compelling interest of "protecting the physical and psychological well-being of minors." Sable, 492 US at 126.

84 Central Hudson, 447 US at 563. Article 16 itself does not directly address this issue, but one assumes that the EC would not deem such advertising worthy of protection.

choices even if presented with all the relevant information.” Thus, both program- and traditional-length commercials would fail Central Hudson’s first prong and would not be entitled to any constitutional protection.

Whether television advertising is “inherently deceptive” remains unclear. At the least, many program-length commercials can conceivably stand on their own as valid children’s programs. Thus, in general, one may reasonably assume that advertising is neither misleading nor related to unlawful activity.

B. Substantial State Interest

The Supreme Court has repeatedly held that concern for the welfare and development of children qualifies as a substantial state interest. The interests that underlie FCC regulation of indecent broadcasts and children’s television include facilitating parental supervision of children, protecting children’s physical and mental welfare, and preserving the privacy of the home from intrusive and pervasive television broadcasting. Congress has also regulated television advertising in order to prevent harm to children from the overcommercialization of television.

Similarly, the EC has also recognized its substantial interest in protecting children. The Commission specifically found that “the protection of the physical, mental and moral development of children and young persons is in the general interest.” Indeed, that is the very objective cited in the preamble to Article 16. Hence, similar interests underlie United States regulations and Article 16 of the EEC Treaty. Article 16 satisfies the second prong of Central Hudson.

C. Directly Advances the Substantial State Interest

1. Article 16(a).

Article 16(a) states that television advertisers may “not directly exhort minors to buy a product or a service by exploiting

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*Comment, 12 Hastings Comm & Ent L J at 499-500 (cited in note 85).


*Amended Prop for a Council Dir on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of broadcasting activities, 44th recital, 1988 OJ at C110:10 (cited in note 14).
their inexperience or credulity. This provision directly facilitates parental supervision of children. Arguably, parents teach children the ways of the world, to eliminate “inexperience or credulity” and turn them into savvy consumers. By preventing advertising that plays upon children’s naivete, government obviates the need for repeated explanations of why advertised products should not be purchased, thus reducing competition for children’s allegiance.

Article 16(a) also prohibits harmful advertising that parents might, if given the chance, screen from their children. Thus, Article 16(a) assists parents in the task of shielding their children from unwelcome television advertising. The legislators backing the CTA and the FCC also seemed keen to facilitate parental screening of program material, because they found that children do not have the cognitive ability to distinguish between programming and advertising and that they do not possess the intellectual capacity to evaluate the persuasive intent of advertising.

Article 16(a) addresses this concern quite effectively: if television advertising directed at children is harmful, then remedial measures should be addressed to the source of the harm. By comparison, the time limits enacted by the CTA seem a much cruder means of addressing these concerns.

2. Article 16(b).

Advertising can be both educational and informative: it may alert consumers to the availability and quality of products and services. Yet, strongly urging young consumers to buy or have bought for them these products and services may well go beyond educating and informing consumers. Thus, Article 16(b) directs advertisers to “not directly encourage minors to persuade their parents or others to purchase the goods or services being advertised.”

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91 See Comment, 12 Hastings Comm & Ent L J at 500 (cited in note 85) (children’s advertising provides exciting and fun-filled role models that children readily accept).
92 Indeed, the European Economic and Social Committee has expressed a similar concern about the “levelling down” of program quality if broadcasters are permitted to pursue policies of maximizing advertising revenue. In other words, absent regulation, broadcasters might shirk their informational and educational missions in the headlong pursuit of advertising revenue. See Economic & Social Committee Opinion on the Green Paper on the establishment of the common market for broadcasting, especially by satellite and cable, ¶ 5.6.1, 1985 OJ C303:13, 17.
United States, by placing a similar restraint on advertisers, would at least remind broadcasters of their duty to inform and educate.\footnote{This also comports well with the Children's Television Act of 1990, which stresses that television should serve the needs of children by providing information and education. See Children's Television Act of 1990, § 101, Pub L No 101-437, 104 Stat 996 (1990).}

Further, Article 16(b), by regulating the content of advertisements, protects children from the subtle and not-so-subtle appeal of television advertisers. It assists parents in supervising their children, especially when parents cannot be present to guide their children's viewing. This relieves parents of some of the burden of continuously monitoring their children's viewing habits and of denying their children's requests for advertised products. In so doing, such regulation also serves several other salutary purposes: it prevents children from acquiring a distorted understanding of the proper way to interact with parents and others; it prevents them from viewing their parents as merely a source for procuring advertised products, and it prevents them from perceiving their parents as a "repressive authority," denying them things television "has characterized as accessible and desirable."\footnote{Comment, 12 Hastings Comm & Ent L J at 500-01 (cited in note 85).}

Moreover, if it is the content of television advertising that harms children, then limiting the amount of time available to advertisers (the CTA solution) seems a crude way to redress this harm. Content regulation of the type proposed by Article 16(b) presents the superior solution. Such regulation may not even harm advertisers if it produces more informative advertising. Because informative advertising conveys facts regarding the availability and quality of an advertised good, it may sell more of that good than mere emotive appeals.\footnote{See id at 500.} Such advertising would at least make consumer decisions more rational.\footnote{Comment, 12 Hastings Comm & Ent L J at 503 (cited in note 85).} Thus, Article 16(b)'s prohibition on advertisers—that they may not directly encourage a child to ask his parents or others to buy an advertised product—may actually increase the informative content of advertisements.

However, some United States broadcasters have expressed concern that stringent regulation of advertisement content, such as that undertaken by Article 16(b), might discourage advertisers, which in turn might reduce the funding available for children's programming.\footnote{However, children may be especially susceptible to emotive appeals. See notes 32, 52.} Yet, stringent content regulation need not drive
advertisers away.\textsuperscript{99} It might instead lead to a different kind of advertising, one that is more informative and less emotive. At the least, regulating advertisement content would continue to accomplish the advertisers' primary objective—to convey information about the availability and quality of goods and services.\textsuperscript{100}

3. Article 16(c).

Article 16(c) prohibits television advertising from "exploit[ing] the special trust minors place in parents, teachers or other persons."\textsuperscript{101} The influence that advertising has on children may create friction between children and their parents.\textsuperscript{102} Preserving the "special trust" children have in their parents assists parents in supervising their children. Without such trust, parents may find it difficult to effectively guide their children to adulthood.\textsuperscript{103}

4. Article 16(d).

Finally, Article 16(d) forbids television advertising from "unreasonably show[ing] minors in dangerous situations."\textsuperscript{104} Showing children involved in dangerous activities may induce other children to engage in similar activities.\textsuperscript{105} Therefore, prohibiting the depic-
tion of such situations in advertising directly advances the state's interest in protecting the health of children.

Therefore, Article 16 directly advances substantial state interests satisfying the third prong of the *Central Hudson* test.

D. "Reasonable Fit" Analysis

Finally, *Central Hudson* requires a reasonable fit between restrictions placed on commercial speech and the purposes those restrictions are intended to serve. While proponents of content regulation admit that other means may exist to assist parental supervision of children, to protect the welfare of children, and to curb the intrusiveness of television advertising, Article 16 seems to satisfy the reasonable fit requirement. The analysis "turns on the nature both of the expression and of the governmental interests" involved.

Even though the invalidation of some state commercial speech restrictions in recent cases may herald a more searching inquiry into the fit between means and ends, the substantial state interest here—protecting the mental and physical development of children—has repeatedly been recognized by the Court and the EC. Congress, the FCC, and commentators have also recognized this interest, as well as the interest in assisting parental supervision of children. Since Article 16 directly advances these substantial state interests and directly addresses the source of potential harm, its means seem adequately fitted to its ends. Further, the FCC's experience in regulating "indecent" programming strongly suggests that alternatives to content regulation are simply infeasible. Thus, Article 16 would satisfy the fourth prong of the *Central Hudson* test and thus be upheld as a constitutional restriction on commercial speech.

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persuasive influence on young children, though, it seems reasonable to conclude that legislation like Article 16 would guard against any potential risk.

106 Curiously, Article 16 forbids only "unreasonably" showing children in dangerous situations. Presumably, this gives advertisers some flexibility in advertising their products or services.

107 *Board of Trustees of the State Univ. of New York v Fox*, 492 US 469, 477 (1989).

108 *Central Hudson Gas & Elec. Corp. v Public Service Comm'n. of New York*, 447 US 557, 563 (1980). See also, *Board of Trustees of the State University of New York v Fox*, 492 US 469, 480 (1989) (noting that the restriction should be "in proportion to the interest served").

CONCLUSION

The United States and the European Community share a concern for the health and development of children. Both have identified television advertising as a source of potential harm. To minimize this risk, the EC has adopted Article 16. No constitutional impediment prevents the enactment of a similar measure in the United States. Thus, Congress may wish to follow the European example as it attempts to devise a constitutional and adequate means of protecting children from the risks of television advertising.