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INQUIRY INTO CHILDREN'S PROGRAMMING
—A CALL FOR ACTION?

Robert E. Lee*

I. Introduction

On February 5, 1970, Action for Children's Television (ACT), a non-profit corporation organized under the laws of Massachusetts, presented to the Federal Communications Commission proposals for the improvement of children's television. Almost immediately, many letters and petitions of support for the ACT proposals were received by the Commission indicating great public interest in the matter. On January 26, 1971, the Commission issued a Notice of Inquiry and Notice of Proposed Rule Making in which it requested information and specific data about children's programming from licensees and invited their comments particularly in regard to the specific ACT proposals which were used as a springboard for discussion.

The purpose of this paper is to investigate whether current children's programming practices are in the public interest; whether the specific ACT proposals are within the authority of the Commission to adopt; and whether any action should be taken by the Commission and, if so, what action.

One of the problems raised in both the comments filed in this action and in the Commission's Notice of Inquiry is defining children's programming. It is realized that some of the most popular shows among children were designed primarily for adult or family viewing, e.g., "Bewitched," "That Girl," and "Family Affair." Some shows designed for children have adult viewers. Whereas there are easily recognizable extremes ("The Tonight Show" is not a children's program, and "Romper Room" is not an adult's program), there are many shows that cannot be so quickly classified.

In any rule concerning itself with children's television, there must be some definition so as to avoid confusion in compliance. The Toy Manufacturers of America, in their comments filed July 2, 1971, suggest certain guidelines for definition: viewing hour, subject matter, show length, etc. Many of the licensees responding to the Commission's questions offer a definition which combines the elements of design and viewing hour. The Commission itself suggests in its Notice of Inquiry and Notice of Proposed Rule Making that for the purposes of its inquiry, children's television should include programs which are primarily designed for children from 2 to 12.

For purposes of classification and regulation, ACT assumes that "licensees

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* Commissioner, Federal Communications Commission.

The views contained herein are solely my own and do not necessarily reflect those of the Federal Communications Commission.

1 Children's Programs, 28 F.C.C.2d 368 (1971).

2 As of this date, the ACT proposals are still pending before the Commission and it is hoped that this article will encourage interested parties to submit their comments with respect to such proposals.
would have reasonable latitude to exercise their own good faith judgment in classifying programs and that the Commission would develop objective criteria for reviewing the judgment of the licensees.” ACT suggests only the broadest criteria. However, it is possible that objective standards could be devised, e.g., surveys of the actual viewing audience, should the Commission wish to undertake this task.

Nevertheless, it is necessary for the purposes of this paper to define the subject with some precision. Any single definition of a subject as broad as children’s programming will incur some criticism, however, the following will provide a touchstone for our discussion:

A children’s program is an identifiable unit of continuity, not commercial material, or public service announcement, specifically designed to appeal to those with an intelligence and experience level between 2 and 12 years.

This definition does not include within its ambit some of the most popular shows among children. Such programs may appeal to those under 12, but are not specifically designed for them and, hence, would not be considered children’s programming.

In addition, no determination has been made of children’s viewing hours. At this point, that seems unnecessary since practical considerations make it apparent that children’s programs will likely be shown at a time when children are watching.

II. The Importance of Programming for Children

“There can be no question of the importance of programming for children,” wrote Chairman Dean Burch in an article for Television Quarterly. And Dr. Gerald L. Looney of the Kennedy Memorial Hospital said, in a speech before The First National Symposium on Children and Television, “Lest anyone doubt its importance, perhaps a few statistics will convince all skeptics: According to the Neilsen Television Index, preschool children, ages 3-5, who are at home, watch television an average of 54 hours a week—nearly 64% of their waking time. By the time the child reaches 5 and enters kindergarten, in the previous two years he has spent more time in front of television than he will spend in the primary grades.”

Broadcasters and advertisers are well aware of the extent of children’s viewing. According to the August 31, 1970, issue of Advertising Age, “Each network averages at least 3,000,000 households on Saturdays with these shows geared chiefly at the 2-12-year-old market.” Kiddie shows produce good sales at bargain prices for sponsors.

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3 ACT Comments to the F.C.C. 25 (July 2, 1971).
6 Forkan, Toy, Cereal Makers Set Network TV Buys on Children’s Programs, Advertising Age, August 31, 1970.
7 Id.
Saturday morning children's TV may be revenue-producing for broadcasters, but it is a vacuum for the children. The 1970-71 season "contained a dash of informational programming, but was still dominated by 26 cartoon shows." The data filed by the broadcasters in their comments to this action supplied the Commission with much revealing information. The ABC Television Network, for example, offered one show which it classified as "educational" during the Composite Week, and thirteen shows classified as "entertainment," of which twelve were cartoons.

Our Nation's children are treated to Saturday mornings of chase features—the "good guys" are chased by the "bad guys" who are seeking the magic box, or key, or whatever. At the last moment, the "good guy" escapes, only to await next week's pursuit.

"Sesame Street" and the Children's Television Workshop have proven that we can do better and the American public is becoming concerned. Consumer organizations like ACT and the National Citizen's Committee for Broadcasting have served an important purpose in making the general public aware of their recourse to the Commission.

As of this date, In the Matter of Action for Children's Television, consists of 29 volumes. Naturally, many of these volumes contain nothing more than the lengthy comments filed by licensees on July 2, 1971. However, taking a volume at random, it should be noted that in March and April of 1970, the Commission received 122 handwritten letters in support of the ACT proposal, 17 postcards, six formal comments, and petitions containing 1,480 names. During this same period, one formal comment in opposition, and one letter, were received. Three Congressmen wrote, asking information and expressing their desire to see an improvement in the quality of children's programming. The estimates of the total number of letters and signatures received in this docket range from 60,000 to 80,000. In the past, "The Commission has always viewed its regulatory duties as guided, if not limited, by, our national tradition that the public response is the most reliable test of ideas and performance in broadcasting as in most areas of life."

It is easily apparent that this problem is one that evinces great public response. There is national concern about the quality of children's programming. Reforms are being sought and many suggestions and recommendations have been made.

However, the Commission, in its January 26, 1971, Notice of Inquiry used as a springboard for discussion, the guidelines for the improvement of children's television proposed by ACT:

1. There shall be no sponsorship and no commercials in children's programming.

8 Id.
9 ABC Television Network Comments to the F.C.C. (July 2, 1971).
11 F.C.C. Docket 19142, In the Matter of Action for Children's Television, Vol. 6. This is not a particularly lengthy volume and, in addition to the above material, contains extensive comments filed by ACT.
2. No performer shall be permitted to use or mention products, services, or stores by brand name during children’s programs.

3. Each station shall provide daily programming for children and in no case shall this be less than 14 hours per week, as part of its public service requirement. Provision shall be made for programming in each of the age groups specified below, and during the time periods specified below:

<table>
<thead>
<tr>
<th>Age Group</th>
<th>Time Range</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preschool</td>
<td>Ages 2 - 5 years</td>
</tr>
<tr>
<td></td>
<td>7 AM to 6 PM Daily</td>
</tr>
<tr>
<td></td>
<td>7 AM to 6 PM Weekends</td>
</tr>
<tr>
<td>Primary</td>
<td>6 - 9</td>
</tr>
<tr>
<td></td>
<td>4 PM to 8 PM Daily</td>
</tr>
<tr>
<td></td>
<td>8 AM to 8 PM Weekends</td>
</tr>
<tr>
<td>Elementary</td>
<td>10 - 12</td>
</tr>
<tr>
<td></td>
<td>5 PM to 9 PM Daily</td>
</tr>
<tr>
<td></td>
<td>9 AM to 9 PM Weekends</td>
</tr>
</tbody>
</table>

There is general agreement that there is room for improvement in children’s programming. Individual licensees and networks feel that self-regulation and self-improvement are the answer. ACT believes that self-regulation won’t work and that the FCC must initiate a rule to assure program quality. The guidelines they propose are, in their opinion, the foundation for the most effective rule.

It is evident that there are legal determinations which must be made prior to any discussion of the practicalities of the ACT proposals. The Communications Act of 1934, as amended,\(^{13}\) grant authority to the Commission to act in the “public interest, convenience or necessity” in the regulating of radio licensees. However, Section 326\(^{14}\) of the Act forbids censorship and the first amendment to the Constitution protects the freedom of speech and press. The ACT proposals may present a conflict between such sections of the Communications Act.

We shall herewith present the principal legal arguments both in favor of and in opposition to the ACT proposals.

A. Legal Arguments for the Adoption of the Act Proposals

Arguments in favor of the ACT proposals focus on two points—that the public interest requires that the Commission enact the proposals; and that there is no Constitutional or statutory barrier to the adoption of the ACT proposals.

1. Public Interest

Proponents contend that the trend of recent Supreme Court decisions defining the responsibility of the Commission under the public interest standard indicates a broadening spectrum of Commission authority to act under the public interest.

The case of National Broadcasting Co. (NBC) \textit{v. United States}\(^{15}\) made clear that the Commission’s authority to enforce the public interest is “not niggardly,

\(^{14}\) \textit{Infra}, note 60.
\(^{15}\) 319 U.S. 190 (1942).
but expansive"16 and that the "Commission's powers are not limited to the engineering and technical aspects of radio communication."17

In 1969, the landmark case of Red Lion Broadcasting Company v. F.C.C.18 was decided by the Supreme Court, granting to the FCC an affirmative duty to act because "it is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences which is crucial here."19 The Red Lion case was concerned with the "Fairness Doctrine" and its specific manifestations in the personal attack and political editorial rules. Deciding that the first amendment is relevant to broadcasters, the Court held, however, that "it is the right of the viewing and listening public, and not the right of the broadcasters which is paramount."20

Having determined that the Commission has broad authority to act in the public interest, even though, "this criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power"21 it is now necessary to consider whether the ACT proposals be adopted.

It is established that children have traditionally been given special protection by the law. The policy underlying this has been to protect children from their own improvident acts, or from the deceptive acts of others. Cases such as Bookcase, Inc. v. Broderick22 and Jacobellis v. Ohio23 point to this proposition of special protection, and Prince v. Massachusetts24 says quite clearly, "the state's authority over children's activities is broader than over adults'."

ACT contends that television is pressuring children, who cannot discriminate, into becoming salesmen for toys, cereal and candy by urging their parents to buy specific products. ACT submitted two studies to the Commission in May of 1970 to reinforce their view that current television practices are harmful to "kids."25

Mr. Ralph Jennings of New York submitted a report of the excessive commercialism on children's television programs and the profits from that advertising in a total of 54 markets including 39 network affiliates and 15 independents for the week of February 21-27, 1970. Mr. Jennings discovered that 33 of the stations carried less than 14 hours per week of programming for children, and what programming was available was, for the most part, cartoons. "No less than 2/3 of all time devoted to children's programs consisted of cartoons, in any market, with Washington, D.C., leading in this category with 84%."26

This study considered the problem of overcommercialization. All three networks follow their regular daytime standards of 12 commercial minutes an hour. However, a commercial minute may contain as many as four individual messages.

16 Id. at 216.
17 Id. at 215.
19 Id. at 390.
20 Id. at 389.
24 312 U.S. 158, 168 (1944).
26 R. Jennings, supra note 25, at 5.
Prime time evening maximum is 8-10 commercial minutes per hour. Therefore, it has been estimated that during the year more than 25% of all time children spend watching television is watching commercials.27

The second study filed by ACT found that among groups of mothers of children under 12 in St. Louis, Denver, and Omaha, "the mothers agreed that the whole thing would be better if there were no commercials at all" in one area, and in another, the mothers agreed that the sponsors are "not interested in providing good entertainment for children, they are just using a media for advertising."28

ACT contends that these studies prove that children's television is overcommercialized, and that people don't like it. The problem of overcommercialization is one to which I addressed myself in a speech before the Association of National Advertisers in April, 1970: "the overall time devoted to commercials, the number of commercials, and the frequency of program interruption are all matters which the Commission may, and should, take into account in determining whether a broadcaster is operating in the public interest."

Moreover, courts have recognized that opinion surveys may be the most practical way of ascertaining public opinion on a given topic.29

ACT contends that these two studies are objective and verifiable evidence that children's programming is harmful to children. In addition, a study recently completed under the auspices of the National Citizen's Committee for Broadcasting has been submitted to the FCC, comparing children's television in the United States with that of the countries of Western Europe, Canada, and Japan.30 Some conclusions are drawn from this study:

(1) There is twice as much advertising on children's programming in the United States.
(2) Most countries have no advertising on children's television.
(3) Only the United States allows more advertising on children's programs than on adult programs.
(4) The United States is the only major country lacking weekday afternoon programs for children.
(5) United States programs are much less age specific.
(6) The United States is just beginning to offer informational programming to compare with that of other countries.

The ACT proponents contend that these conclusions indicate that American television is inferior to that of other countries in the area of children's programs. Moreover, they suggest that American television programs for children are overly violent. "We refer here to violence as a conscious act that results in damage to a libidinally invested or valued object perceived in human terms."

27 Id. at 7.
28 D. Yankelevich, supra note 25, at 21.
29 Speech by Commissioner Robert E. Lee before the Association of National Advertisers, April 13, 1970.
All violence is not harmful, some "digestible" or "cathartic" violence is related to the realities of the environment and is associated with tension which is swiftly reduced, relieved, or resolved. However, noxious violence tends to be portrayed as "bizarre, sexually tinged or frankly sadistic and raises and maintains tension on a relatively high and slowly diminishing curve."

Noxious violence is portrayed, according to ACT, in shows for children which prey upon the immature mind. ACT proponents cite studies which have concluded that violence on television can be seriously harmful to children, including the Final Report of the National Commission on the Causes and Prevention of Violence:

We believe it is reasonable to conclude that a constant diet of violent behavior on television has an adverse effect on human character and attitudes. Violence on television encourages violent forms of behavior and fosters moral and social values about violence in daily life which are unacceptable in a civilized society.

According to ACT, children's television programming is likely to be violent, loud and crude because of sponsorship practices. "There can be no doubt that it is the commercialism of American children's television which is responsible for its marked inferiority." Present commercial practices make it necessary for broadcasters to attract the largest possible number of viewers, "which means a program which will retain the attention of all ages from 2 to 12." That program will probably resort to noise and violence to retain its audience. Programs with more limited appeal, e.g., "Hot Dog," are forced off the air by the sponsors. Therefore, present commercial practices of children's programming which cause its current inferior and violent state are not in the public interest.

2. Constitutional Problems

The second argument advanced by ACT proponents is that there is no Constitutional barrier to adopting the ACT proposals. Several strong points support this contention.

1. Commercial advertising carried out on public property with the intention of securing monetary return is not protected by the Constitution.

Valentine v. Chrestensen represents the most important case on this point. In that case the Supreme Court considered the question of whether a municipal ordinance prohibiting the distribution of handbills advertising services was Constitutional. The Court held that the first amendment protections do not attach to advertising which is commercial in nature and which is carried out on public property. Subsequent decisions have held to the same theory.

2. The Commission has the authority to regulate commercial advertising over the airwaves.

33 Id.
35 ACT Comments to the F.C.C. 12 (July 2, 1971).
36 Id. at 10.
37 316 U.S. 52 (1941).
It is well established that television licensees are the trustees of the public in the operation of television stations and that the television airwaves are public property subject to regulation in the public interest. This was confirmed in the Red Lion case.

In Banzhaf v. FCC the public interest was held to include the regulation of cigarette advertising over the air. In supporting the Commission's 1967 ruling that a "significant amount of time" must be granted to those wishing to reply to the "controversial issue" of cigarette smoking, the court rejected the first amendment and Section 326 arguments of the licensees. Citing NBC v. United States to affirm the doctrine that Section 326 of the Act is not violated if the Commission is acting under its public interest mandate, the court said, "Thus, in the context of the Communications Act as it has long been understood, we do not think that public interest rulings relating to specific program content invariably amount to censorship within the meaning of the Act." The court specifically held that the Commission was correct and that cigarette advertising was not protected speech under the first amendment. Thus, under Banzhaf, it seems fair to assert that ACT's proposal to rid the public airwaves of commercial advertising during the times when children's programs are scheduled is not inimical to Commission rule making for Constitutional reasons given a reasonable public interest basis.

3. The Commission has the authority to regulate licensee program requirements.

Both the NBC and the Red Lion cases deal with first amendment challenges to Commission authority. In NBC the Court held that the Commission's authority extended beyond technical and engineering aspects of radio traffic, but that the Act "puts upon the Commission the burden of determining the composition of that traffic." To do so would neither violate the first amendment nor Section 326.

The Red Lion case strengthened the Commission's mandate to act in the public interest, "No one has a First Amendment right to a license or to a monopoly of a radio station frequency; to deny a station license because the public interest requires it is not a denial of free speech." The Court held that the Commission does not violate its statutory responsibility under Section 326 when it acts to create new areas of service with which the licensee must provide his audience.

It can be seen from the above decisions that Section 326 of the Communications Act and the first amendment present no barriers to adopting ACT's proposals.

B. Legal Arguments Against the Adoption of the ACT Proposals

Those who oppose the adoption of the specific ACT proposals contend that the F.C.C. is without authority to adopt the proposals for three reasons:

38 405 F.2d 1082 (D.C. Cir. 1968).
39 319 U.S. 190 (1942).
40 405 F.2d at 1096.
41 319 U.S. at 216.
42 395 U.S. at 389.
1. The rules proposed by ACT are a direct form of censorship prohibited by Section 326 of the Communications Act.

2. The rules violate the First Amendment guarantee of free speech for the broadcaster.


1. Censorship

According to the opponents of the ACT proposals, the Commission is prohibited from regulating specific programs and program content by Section 326 of the Communications Act of 1934, except for special instances provided for by Congress and judicial decisions, i.e., forbidding the broadcast of lotteries fraud or obscenity. Such is not the case here where the licensee would not be violating any law, but merely selecting his own programs.

The rules proposed by ACT would give the selection of what is to be broadcast and how it is to be presented to the F.C.C. This is clearly a matter of censorship and prohibited by Section 326.

2. First Amendment

The free speech protection granted by the first amendment applies to radio and television. The ACT proposal to ban the mention of brand names, services or stores by performers is clearly contrary to freedom of speech. The proposal which dictates that a broadcaster must provide a certain amount of time for children's programming also violates the first amendment by prescribing what must be shown and by seriously restricting the broadcaster's ability to carry other programs.

ACT opponents contend that Commercial matter is entitled to first amendment protection. The Court said in New York Times v. Sullivan that:

If the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement.

Further, the right of free speech cannot be conditioned on what is said. The Supreme Court has refused to differentiate between speech concerning important issues and speech of no particular moment. Therefore the outright banning of commercials on children's television would be violative of the first amendment.

It must be noted that certain cases which do affect licensee's first amendment rights do not stand for the proposition that a broadcaster's right to speak may be outrageously banned. Rather, they stand for the general proposition that broadcasters have certain affirmative obligations to the public which cannot be avoided.

43 334 U.S. 131 (1948).
44 376 U.S. 254, 266 (1964).
45 333 U.S. 507 (1948).
by seeking refuge in the first amendment. *Red Lion*\(^{46}\) and *Banzhaf*\(^{47}\) involve a broadcaster's obligation to present opposing viewpoints once having spoken on a given topic. The *NBC case*\(^{48}\) is concerned with the Commission's chain broadcasting regulations and licensing powers. Opponents of ACT contend that these cases are not relative to the issue at hand: banning of specific types of statements and regulation of program selection and presentation.

3. The 1960 Commission Programming Study\(^{49}\)

The Commission in determining its policy on programming pointed out that "the protection against abridgement of freedom of speech and press flatly forbids governmental interference, benign or otherwise."\(^{50}\)

The Commission went on to acknowledge the limitations on its own power to regulate or influence programming as expressed by the Court in *Farmer's Educational and Cooperative Union of America v. WDAY*.\(^{51}\) The Court said:

... applying this country's tradition of free expression to the field of radio broadcasting, Congress has from the first, emphatically forbidden the Commission to exercise any power of censorship over radio communication.\(^{52}\)

The Commission's own conclusions have led to the present policy:

The ascertainment of the needed elements of the broadcast matter to be provided by a particular licensee for the audience he is obligated to serve remains primarily the function of the licensee. His honest and prudent judgments will be accorded great weight by the Commission. Any other course would tend to substitute the judgment of the Commission for that of the licensee.\(^{53}\)

ACT opponents suggest that the ACT proposals would, if enacted, be violative of Section 326 of the Communications Act of 1934, in that they would force the prior restraint of some material. In addition, they contend, the broadcaster's guarantee of freedom of speech would be abridged; and, finally, adoption of the ACT proposals would be contrary to long-standing Commission policy as outlined in its 1960 Programming Study.

III. Analysis

There are three separate questions which must be answered affirmatively in order for the Commission to adopt the ACT proposals:

(1) Does the Commission have the authority to regulate programming to allow for a specified amount of time to be devoted to children's programs?

\(^{46}\) *Supra* note 18.

\(^{47}\) *Supra* note 38.

\(^{48}\) *Supra* note 39.

\(^{49}\) 20 R.R. 1901, August, 1960.

\(^{50}\) *Id.* at 1907.

\(^{51}\) 360 U.S. 525 (1959).

\(^{52}\) *Id.* at 528.

\(^{53}\) 20 R.R. 1901, at 1913-14.
Does the Commission have the authority to regulate commercials? Does the Commission have the authority to ban endorsements during children's programs?

To answer the first of these questions, we turn to *Red Lion*, where it is clearly established that licensees are proxies for the community, "obligated to give suitable time and attention to matters of great public concern." Moreover, the Court in *Red Lion* was broad in its construction of the scope of previous cases, especially *NBC*, where "The Court upheld the regulations, unequivocally recognizing that the Commission was more than a traffic policeman concerned with the technical aspects of broadcasting and that it neither exceeded its powers under the statute nor transgressed the first amendment in interesting itself in general program format and the kinds of programs broadcast by licensees."

In a memorandum prepared at the request of the Commission, former F.C.C. General Counsel Henry Geller analyzes the Court's opinion in *Red Lion* with the specific intention of "setting at rest the long-continuing controversy as to the Commission's authority to interest itself in general program format." Mr. Geller concludes that the opinion in *Red Lion* "constitutes ample legal authority for the Commission, pursuant to Sections 303(b)(r), 304(i), 307 and 309, to specify minimum percentages of time to be devoted to various programming categories, provided a reasonable public interest basis is demonstrated for the specification."

Moreover, in Mr. Geller's analysis, "it would seem that the obligation of the licensees to give suitable time and attention to matters of general concern applies not just to the typical controversial issue of public importance, but to a wide range of program obligations." This would include children's programming, since "Requirements directed to other categories, if reasonably related to the public interest, could also be specified. . . . In light of *Red Lion* we believe that arguments against such a course based on First Amendment grounds would have little validity, provided there is a reasonable public interest basis for any requirement."

First amendment objections to program regulation aside, there is still the problem of Section 326 of the Communications Act of 1934, which reads:

> Nothing in this chapter shall be construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

The first provision of Section 326 forbids censorship and the second, interference with the right of free speech, which protection is also guaranteed by the

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54 395 U.S. at 394.
55 *Id.* at 395.
57 *Id.* at 384.
58 *Id.*
59 *Id.*
first amendment. Therefore, it is the former provision which concerns us here. Censorship has been interpreted as meaning the "deletion of specific items and dictation as to what should go into specific programs." Any broader interpretation would lead into a morass of difficulty beginning with the legislative history of the Act. "Although Congress had long been concerned with the possibility of constraints on free broadcasting, it is uncertain whether the examination of overall programming, or even the establishment of qualitative regulations was thought of as censorship." As long as there is uncertainty, it would seem unwise to attempt to construe censorship in any broader terms than the deletion of specific material or the addition of specific material, since to do so might be to invalidate 37 years of broadcast regulation.

It would appear then, from an analysis of the Court's decision in Red Lion and by construing Section 326 narrowly, that the Federal Communications Commission would have ample legal authority to adopt the ACT proposal regarding the amount of time devoted to children's programming, provided there was a strong public-interest basis for doing so. That important proviso will be considered below.

The second question before the Commission concerns the regulation of commercials. Some doubt exists as to the extent of first amendment protection for advertising. The leading case in this area, Valentine v. Chrestensen, is almost 30 years old and has been criticized. Yet, the cases cited by ACT's opponents are not squarely on point. In the Banzhaf case, the court comes nearest to solving the problem when it says that:

It is established that some utterances fall outside the pale of 1st Amendment concern. Many cases indicate that product advertising is at least less rigorously protected than other forms of speech. Promoting the sale of a product is not ordinarily associated with any of the interests that the 1st Amendment seeks to protect. . . . It is rather a form of merchandising subject to limitations for public purposes like other business practices.

As in Banzhaf, the Commission would not be undertaking to "ban" any forms of speech, protected or not, by adopting the first ACT proposal. Commercials could be aired at any time, except during the hours of children's programming. Therefore, again construing "censorship" narrowly, no Section 326 difficulties would arise.

The third question concerns the Commission's banning of endorsements by the performer during children's programs. Based on the above discussion, it might well be possible that the outright banning of endorsements would be violative of the first amendment and Section 326. However, the Commission has approached the problem in the past on a somewhat different tack.

61 2 CHAFFEE, GOVERNMENT & MASS COMMUNICATION 641 (1947).
63 Supra note 37.
65 Supra note 38, at 1101-02.
The Commission has found in a number of cases that there are certain "types of program which become program length commercials because there is no difference between program content and the sponsor's sales pitch."\(^6\) The Commission frowns upon this pattern that "subordinates programming in the interest of the public to programming in the interest of its saleability"\(^7\) and the Commission has recently concluded that "the entire content of the program is to be considered as commercial in nature,"\(^6\) unless only one product identified with the show is advertised.

The principal reason for this second ACT proposal is to prevent children's programs themselves from becoming commercials, once legitimate commercial advertising was prohibited from children's programs. This can be accomplished without adopting the Rule, as the Commission has already shown.

The important proviso underlying the above discussion is a demonstrable public interest basis. In the opinion of this author, the Commission is prohibited from adopting the ACT proposals because a reasonable public interest basis for doing so cannot be demonstrated. While there is general agreement that television is important as an instructional force among children, and that there is room for improvement, it is difficult to scientifically prove that the current program fare being offered to children is harmful.

The amount of research done in the field of television's effects upon children is staggering, and the lack of conclusive results is equally staggering. From the Kefauver Hearings in the early 1950's,\(^6\) through the Dodd Hearings in the early 1960's,\(^6\) to the present Surgeon General's Report,\(^7\) scientists have debated each other and have accused each other of "selling out" and have proved nothing.

For every researcher who "proves" that television is harmful, there is another who "proves" that it is not.\(^2\) Perhaps the research is best summarized by Dr. Wilbur Schramm:

> For some children, under some conditions, some television is harmful. For other children, under the same conditions, or for the same children under other conditions, it may be beneficial. For most children under most conditions, most television is probably neither particularly harmful nor particularly beneficial.\(^7\)

The first official reports of the Surgeon General's Advisory Committee on Television and Social Behavior should be available in the near future; however,

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69 U.S. Senate Committee on the Judiciary, Investigation of Juvenile Delinquency in the U.S., Television and Juvenile Delinquency (1956).
70 U.S. Senate Committee on the Judiciary, Effects on Young People of Violence and Crime Portrayed on Television (1964).
72 See Surgeon General's Advisory Committee on Television and Social Behavior, An Annotated Bibliography (June, 1971).
problems in methodology and semantics plague the researcher and the Surgeon General's Report may well be nothing more conclusive than a compilation of expert opinions.

Therefore, the Commission would be acting without authority in adopting the ACT proposals without strong and conclusive proof that the public interest would require it.

Individual broadcasters and networks have insisted that even if there were something wrong with children's television, self-regulatory actions would be taken which would solve the problem. In response to pressure from consumer groups and under the threat of Commission action in this area, many individual stations and networks have recently announced innovations to be made.

The ABC Television Network sponsored a two-day workshop in June of 1971 to investigate the problem. Attending were representatives of the toy and cereal manufacturing industries, their advertising agencies, independent broadcasters, educators and child psychologists and other interested parties. Few conclusions were reached; however, the problem was openly discussed, and there was an apparent willingness to sacrifice some revenue dollars if a compromise could be effected.

The Post-Newsweek stations announced, in July of 1971, that new policies regarding children's programming would go into effect for the 1971-1972 season. These include:

(1) Increasing the schedule of children's programs to include approximately 14 hours per week;

(2) Indicating the appropriate age groups to which children's programs are directed;

(3) Clustering commercials at the opening and close of children's programs and limiting the number of commercials to the number accepted for adult programming;

(4) Eliminating commercials which are coercive in nature or incompatible with program content.

NBC-TV will produce a new half-hour series to be shown Monday through Friday and designed for the three-to-six-year-old group. "A balanced educational-entertainment format, with the accent on learning," the new show will not carry network commercials but will provide two 2-minute spots for local commercials.

Moreover, the National Association of Broadcasters announced new and stricter guidelines for the broadcast of toy commercials, effective February 1, 1971. These new guidelines caused some consternation on the part of manufacturers and advertising agencies; however, they are designed to avoid misleading advertisements for toys, and it is expected that they will be generally adhered to.

These self-regulatory actions are indicative of a growing awareness on the part of broadcasters; but, while commendable, do not represent an industry-wide solution to a recognized problem. There is no guarantee that broadcasters would react so conscientiously if there were no consumer pressure and if Commission action were not threatening.
IV. Alternative Courses of Action

The Commission has a number of possible courses of action available to it and should choose a course of action which will satisfy not only statutory and constitutional requirements but which will begin the process of raising children’s television programming to the highest quality.

A. Adopt the ACT Proposals

The Commission may choose to adopt the ACT proposals, or similar proposals substantially the same in nature. However, this course of action may founder in the courts since without convincing evidence of a reasonable public interest basis for either the regulation of commercials or a specification of minimum time, the Commission would be acting without authority. To date, there is no uncontradicted evidence that current children’s programming is deficient or inferior, and it is unlikely that such evidence will emerge until scientists agree on the methodology to be utilized in determining the effects of such programming upon children.

Furthermore, even if the Commission should decide that the ACT proposals are within its authority to adopt, there remain practical considerations. Many broadcasters have expressed the concern that eliminating commercials may well serve to eliminate those high-quality children’s shows that presently are offered. They contend that these expensive shows would have to be replaced by inexpensive cartoon reruns in order to make up the 14-hour minimum proposed by ACT. Thus, according to the broadcasters, adoption of the ACT proposals would be self-defeating.

ACT contends that some form of underwriting, perhaps similar to that enjoyed by “Sesame Street” and “Misteroger’s Neighborhood,” could be found to subsidize quality children’s programs. The same people who presently sponsor children’s programs could exchange commercials for credits and underwrite children’s programs. Evelyn Sarson, President of ACT, suggested at the ABC-TV Children’s Programming Workshop that, from a public relations point of view, this might be extremely valuable to several major corporations.

As yet, however, no toy or cereal manufacturer has offered to underwrite, and not sponsor, a children’s program. The costs of producing a high-quality children’s show must be met, if not through commercials, then some other way. No solutions to this dilemma seem forthcoming. Therefore, to adopt the ACT proposals may open a Pandora’s box and still not raise the quality of children’s programming.

B. Take No Action

The Commission may, by taking no action, “bury” the proposals and hope the problem goes away. This approach by the Commission may have served it well in the past but it is unlikely that children’s television will improve absent some form of Commission persuasion. Admitting that there is a problem, the
Commission has a responsibility to do something to alleviate it. The American public has the right to demand that much; and it should be expected that they will continue the stream of letters and comments and exert pressure on the Commission.

C. Rely on Self-Regulation

The Commission may choose to suggest that broadcasters take it upon themselves to improve the quality of children's programs. Putting broadcasters on the honor system is likely to have little effect on the quality of programming. Self-regulation has no means of enforcement and so seldom works for more than one season. In the early 1960's the problems of children's television were examined informally by the Commission and then Chairman Newton Minow warned the industry that improvements should be forthcoming. They were, but witness our present issue, they did not last. Lacking any effective means of enforcement, self-regulation won't work.

D. Issue a Public Notice

The Commission may wish to issue a Public Notice to inform broadcasters and the general public that it is concerned with children's programming, that it considers quality children's programming to be in the public interest and that to insure an increase in quality children's programming, it will take certain steps. These may include amending the license renewal applications of broadcasters so that specific data concerning children's programming is filed; working closely with the Federal Trade Commission to eliminate false and misleading advertisements from the airwaves; and taking particular notice of community complaints about excessive violence and overcommercialization on children's programming during license renewal proceedings. Issuing a Public Notice will alert broadcasters to the Commission's hope that future children's programming practices will represent the best the industry has to offer. While it might be inappropriate for the Commission to specify the number of "educational" programs it would like to see offered, it can provide affirmative guidelines encouraging innovative and imaginative use of instructional techniques.

Once licensees have been put on notice, that the Commission intends to continue its surveillance of children's programs, it is expected that they will realize that serving the community needs includes presenting programs for children that stimulate rather than stifle the imagination.

E. Amend Renewal Forms

The Commission is currently undergoing an extensive study of its licensee renewal forms.\textsuperscript{74} It may choose to include, in an amended renewal form, specific questions designed to elicit information on current children's programming practices, future plans and ascertainment of community needs in this area. As a

\textsuperscript{74} F.C.C. Docket 19153 (1971).
result of this information, the Commission would be able to conclude which stations were not serving community needs regarding this issue. For example, a licensee who does not include an educator or child psychologist among those community leaders whom he relies upon for ascertainment of community needs, or who programs only a few hours a week of children’s shows, or who has no local children’s programming, or who presents a disproportionate amount of old cartoons, would be regarded with disfavor in renewal proceedings. To gain the information necessary to reach these conclusions, the Commission would have to amend license renewal applications.

V. Conclusion

In conclusion, let us be reminded that the Commission shares its primary responsibility, serving the needs and interests of the viewing and listening public, with those to whom it grants licenses. It is recognized that this responsibility is not always easy to meet. Ascertaining the public interest can be as difficult as serving it. In this case, however, there is general agreement that it would be in the public interest to improve children’s programming.

Chairman Dean Burch has called current children’s programming “chewing gum for the eyes.” Raising children’s programming from that level will require sincere effort on the part of broadcasters, producers, writers, advertisers, educators and child psychologists. Maintaining children’s programming on a level of high quality may require encouragement by the Commission.

Several broadcasters, recognizing their deficiency in this area, have taken steps to improve the quality of the children’s programs they present. The Commission applauds these actions and awaits further innovations. Every Saturday morning the broadcasting industry accepts the responsibility of “our most valuable and trusted resource—the minds and hearts of our young people.” The American people have the right to expect the finest children’s programming that the industry can produce.

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75 Burch, supra note 4, at 62.