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**KIDS' AD PLAY: REGULATING CHILDREN'S
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KIDS' AD PLAY: REGULATING CHILDREN'S ADVERGAMES IN THE CONVERGING MEDIA CONTEXT

Sara M. Grimes*

This article explores possibilities for regulating emerging forms of advertising within children's online culture, focusing specifically on the rising phenomenon of advergames. An immensely popular form of entertainment among children and teens, advergames integrate advertising and market research strategies directly into the fabric of online games and environments. I begin by situating advergames within broader traditions of advertising to children. I then present and discuss four potential "points of entry" for the regulation of these new media advertising practices, which include media regulation, consumer protection law, industry self-regulation and contract law. As media regulation in Canada and the US share many similarities, and because children's digital media is most often transnational with a large proportion of content originating from the US, the discussion draws upon both Canadian and US legislation, providing comparisons where relevant. I discuss different courses of action that could potentially establish clearer restrictions on marketers' interactions with children online, as well as enforce regulation of the role of advertising in children's online games. The aim of this paper is to explore the Canadian government's position that existing regulatory frameworks can be effectively extended to digital media, as well as demonstrate the necessity of enhanced coordination and integration if these regulatory regimes are to remain relevant within the converging media context.

I. INTRODUCTION

A key facet of the digital culture is the way in which technological and corporate convergence has enabled an increasingly fluid integration of content and advertising. While the merger between advertising and content has a long and contentious history within the traditional media, their symbiosis has reached new heights within the digital context. A prime example of this can be found in "advergaming," an online phenomenon wherein advertising messages are embedded into the very fabric of a digital game. Advergames are not only potentially quite lucrative¹, but they also represent a highly effective tool for capturing the attention of "hard-to-reach" child and youth markets. Advergames and other forms of branded content are found on many of the most successful and popular online destinations for kids. Here, advergames have come to represent a new watermark for media coordination, integration and intertextuality—not only in terms of content, but also in terms of their seamless integration of market research strategies. Through data-mining technologies and other tools, marketers are now able to integrate the once distinct (though always compatible) activities of entertaining, advertising and market research.

Emerging business practices such as these elude outdated government regulation and most existing industry codes of conduct. In the absence of any concerted opposition, they are also quickly spreading throughout children's online culture. The lack of public attention to advergaming is surprising, however, since regulating children's advertising in order to prevent

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¹ PricewaterhouseCoopers has projected that the advergaming industry will reach \$3 billion by the year 2009. See Bertrim, B. (2005, May 2). It's how you play the games. *Marketing*, 110(16), 18.

commercial exploitation of children's credulity has traditionally been a high priority for North American regulatory bodies. Historically, public concern about the potential effects of advertising on children has appeared alongside similar concerns about violent and sexually explicit content—leading to the institutionalization of media regulation and certain forms of media censorship. Today, however, digital media convergence poses serious challenges to both existing policies and to established regulatory processes. In Canada, media regulation is specialized and fragmented—consisting of various, somewhat uncoordinated federal and provincial policies, alongside industry-generated guidelines, each dealing with different media forms and advertising approaches individually. Canadian policymakers have been reluctant to take on the daunting task of coordinating and updating regulatory frameworks to address issues raised by converging media forms. This reluctance was made explicit in 1999, when the Canadian Radio-television and Telecommunications Commission (CTRC) announced its decision not to create new regulation specific to the Internet.

This paper seeks to test the CRTC's underlying assumption that existing regulatory frameworks can be effectively extended to digital media, by examining their applicability to the issues that arise within children's advergaming. Since media regulation in Canada and the US often intersect, and since children's media is most often transnational and originating from the US, I will adopt a comparative approach that draws upon both Canadian and US examples. I will begin by situating advergaming within the broader tradition of advertising to children and then identify some of the dominant trends and characteristics of online advergaming. The ensuing discussion will be structured into four "points of entry" currently available within American and Canadian law, each representing an existing course of action that could potentially be used to establish clearer restrictions on advertising to children online.

II. BACKGROUND INFORMATION

From the beginning, children's media and marketing have shared a close relationship. The children's radio industry is credited with establishing the preliminary "norms of sponsorship and programming" for child-oriented content,² standards that were subsequently adopted and expanded upon by early children's television shows (such as *Howdy Doody* and *Winky Dink and You*). By the 1980s, many children's television shows had adopted the "Strawberry Shortcake Strategy"—product or character-driven programming aimed at promoting a particular brand and related merchandise.³ Similar strategies have since appeared throughout and across the children's industries, emerging most recently within children's digital culture. Through media convergence and the integration of digital technologies, children's culture can now be understood as a sort of media "supersystem." According to Kinder,⁴ this supersystem networks together various media texts and products constructed around a single popular character (or group of characters) or brand, enabling them to cross-reference and promote one another to a previously unimaginable extent. Today, the supersystem approach is adopted by the vast majority of popular children's

² Pecora, N.O. (1998). *The Business of Children's Entertainment*. New York, NY: The Guilford Press. Pg. 38.

³ Engelhardt, T. (1986). The Strawberry Shortcake strategy. In T. Gitlin (Ed.), *Watching television: A Pantheon guide to popular culture* (pp. 68-100). New York: Pantheon Books. According to Engelhardt, character-based programming increased from 2½ hours in 1981-82 to 6½ hours in 1984-85. He claims that while fourteen such shows existed in 1983, by 1985 the genre included over forty licensed-character cartoons.

⁴ Kinder, M. (1991). *Playing with power in movies, television, and video games: From Muppet Babies to Teenage Mutant Ninja Turtles*. Berkeley, University of California Press.

media-brands, as they expand across every available media form (including television series, motion pictures, touring ice shows, video games and websites) and merchandising opportunity.

Children's media is thus heavily characterised by both a continued homogenization of content across platforms on the one hand, and the integration of content and marketing on the other. The integration of content and marketing has reached unprecedented heights, however, with the advent of the Internet and other digital technologies. Children consistently identify promotional websites as among their favourite online destinations.⁵ Increasingly, these promotional sites include various types of advergimes, ranging from the explicitly product-centred (such as those featured on *Barbie.com*) to those that embed their product placements within a larger game narrative (as found in *Neopets.com*, *Habbo Hotel* and *Nickropolis*). Advergimes are both cheaper to produce than traditional forms of advertising, and potentially more effective at capturing children's prolonged attention (particularly if they demand several minutes or hours of playtime). As Pereira describes, while a 30-second television ad can cost up to \$29.90 (USD) per thousand viewers (particularly during prime time) in addition to initial production costs, "there are no costs to "air" advergimes. Spreading development costs across the typical number of players, advergaming can cost less than \$2 per thousand users."⁶

Advergimes can also enable direct links between marketing and market research, through on-the-spot measurement of impression rates, soliciting participation in accompanying polls and quizzes, as well as deeper analyses of players' in-game activities. This trend reflects the increasingly central role of market research in both the creation and manipulation of children's online culture. When children engage in online activities, Seiter notes, their "interests, habits, and abilities in the online environment [become] the subject of intense interest by marketers."⁷ Montgomery describes, the "intense focus on research within the new media industries has produced a wealth of information, much of it proprietary, which is guiding the development of digital content and services for children."⁸ Online research applications allow marketers to construct richly-detailed consumer profiles based on the aggregate data gathered from thousands of child subjects, a demographic group that is otherwise extremely difficult to gain access to.⁹

It is unlikely that children fully comprehend the commercial processes at work within some of their favourite sites. Despite children's well-noted aptitude with digital technologies, recent

⁵ For statistics on children's internet habits see: "Nearly 20 percent of the active online population are kids and teens, creating opportunities for marketers." (2002, August 13). *News Release*. New York, NY: Nielsen/Netratings. <http://phx.corporate-ir.net/phoenix.zhtml?c=82037&p=irol-newsArticle&ID=538963&highlight> (consulted October 18, 2004); "Kids account for one out of every five Internet surfers in the U.S." (2003, October 21). *News Release*. New York, NY: Nielsen/Netratings; "13 million kids using the Internet across Europe." (2003, September 30). *News Release*. Nielsen/Netratings, <http://www.nielsen-netratings.com> (consulted August 10, 2004); and Rodgers, Z. (2004, August 16). The stickiest site in the world. *Clickz.com*. <http://clickz.com/features/insight/article.php/3395581> (consulted May 10, 2005).

⁶ Pereira, J. (2004, May 3). Junk-food games; online arcades draw fire for immersing kids in ads; Ritz Bits wrestling, anyone? *The Wall Street Journal* (Eastern edition), B1.

⁷ Seiter, E. (2004). The Internet playground. In J. Goldstein, D. Buckingham & G. Brougère (Eds), *Toys, games, and media* (pp. 93-108). Mahwah, NJ: Lawrence Erlbaum Associates. Pg. 93.

⁸ Montgomery, K. C. (2000). Digital kids: The new on-line children's consumer culture. In D.G. Singer & J.L. Singer (Eds.), *Handbook of Children and the Media* (pp. 635-648). Thousand Oaks, CA: Sage Publications. Pg. 638

⁹ For analysis of these practices see: Chung, G. & Grimes, S.M. (2005). Data mining the kids: Surveillance and market research strategies in children's online games. *Canadian Journal of Communications*, 30(4), 527-48; and Grimes, S.M. & Shade, L.R. (2005). Neopian economics of play: Children's cyberpets and online communities as immersive advertising in *Neopets.com*. *International Journal of Media and Cultural Politics*, 1(2), 181-198.

studies reveal significant limitations in their understanding of Internet business practices,¹⁰ as well as an overall lack of critical literacy when it comes to new media content.¹¹ This supports longstanding research showing that younger children are not always able to differentiate advertising from programming content¹². Child development experts generally agree that children under eight years of age are “unable to critically comprehend televised advertising messages and are prone to accept advertiser messages as truthful, accurate and unbiased.”¹³ Children’s unique vulnerability to commercial exploitation has traditionally justified governmental regulation of advertising to children. It has also led to the establishment of widely supported codes of conduct and other self-regulatory policies adopted by the children’s industries. The question thus becomes, why hasn’t a similar level of consideration been given to children’s exposure to advertising online?

III. REGULATING ADVERTISING: FOUR POINTS OF ENTRY

The following section will explore existing possibilities for a more active regulation of children’s online advertising, through a critical consideration of four potential legal and regulatory “points of entry” that pertain to the issues raised above. As a case specifically relating to advertising has yet to reach the courts, the analysis will look to comparable cases that have addressed advertising practices within traditional media (most notably television), as well as cases involving children and “violent” video games. This overview will establish key challenges and opportunities presented by each point of entry, and highlight important political and legislative trends that could shape future efforts to regulate this new media form.

A. Point of Entry 1: Media Regulation

In response to mounting public concern around children’s television advertising during the 1960s and early-1970s, Canadian and American governments both included restrictions on advertising to children in their initiatives to enhance government regulation of the media in the mid-1970s. In 1974, both the FCC (US) and CRTC (Canada) adopted a more interventionist stance vis-à-vis children’s media, establishing new policy guidelines for children’s programmers and advertisers.¹⁴ Both governments also began pressuring the industry to “adopt codes regulating some of the worst excesses of children’s advertising” and “violence,” and introduce more educational programming.¹⁵ However, by the 1980s, trends toward de-regulation led to massive accommodations to media industry and advertiser priorities, many of which have not

¹⁰ Seiter, *supra* note 7; Shade, L., Porter, N., & Sanchez Santiago, W. K. (2004). Everyday domestic Internet experiences of Canadian children and youth. Presented at *Digital Generations—Children, Young People and New Media*, July 26-29: Center for the Study of Children, Youth and Media, Institute of Education, University of London: London, UK.

¹¹ For an overview of the research in this area, see Livingstone, S. (2003). The changing nature and uses of media literacy. In G. Rosalind, A. Pratt, T. Rantanen & N. Couldry (Series Eds.), *Media@LSE Electronic Working Papers* (4). London: London School of Economics and Political Science. See also Kline, S. (2001). Media use audit for B.C. teens. Burnaby, BC: SFU Media Lab. <http://www.sfu.ca/media-lab/research/report.html> (consulted August 18, 2004).

¹² (Verharen, 1991 cited in Preston, 2004)

¹³ (“Television Advertising,” 2004, online)

¹⁴ Engelhardt, *supra* note 3.

¹⁵ *Id.*, Pg. 75. In the US, for example, this included new restrictions on “host selling” or “the use of program talent to deliver commercials” aired during or adjacent to the program. See Shanahan, K.J. and Hyman, M.R. (2001). Program-length commercials and host selling by the WWF. *Business and Society Review*, 106(4), 379-393. Pg. 381.

since been recuperated. Furthermore, both systems have had ongoing problems with compliance and enforcement of advertising limitations. In the US, as Shanahan and Hyman describe, “Despite clear prohibitions on host selling (since 1974) and program-length commercials (since 1992) targeted at children”¹⁶ television stations continue to violate children’s television rules with very little repercussion.¹⁷ In Canada, Jeffery argues, “there is no evidence on record that the CRTC has ever considered violations of the Children’s Code [the industry-generated standards which determine Canadian restrictions on advertising to children] to determine whether a license should be renewed, revoked, or subjected to additional terms.”¹⁸

With the continued fusion of content and advertising within digital media culture, it is less and less likely that existing media policies can effectively regulate children’s advertising without a significant expansion in scope, as well as a restructuring of enforcement processes. Yet, in both Canada and the US, government bodies have been slow to expand and revise existing media regulation to account for the some of the more problematic realities of the digital age. Government response within the area of children’s media regulation in particular has tended to be delayed and highly narrow in focus. An example of this can be found in the FCC’s 2004 decision to finally recognize the widespread use of promotional websites by the children’s television industry, and implement new rules regulating the display of website addresses within children’s programs.¹⁹ The situation is even worse in Canada, with the CRTC’s continued failure to keep federal communication policies up-to-date with the latest media trends and technologies, after announcing in 1999 that the agency would not create new regulation for Internet content—including websites, online media programming and online games.²⁰

Thus, while children’s television and other traditional media continue to be regulated to varying degrees by the CRTC and FCC, newer media often do not fall under the authority of existing media policies. In the absence of a much-needed expansion of these policies to include a broader spectrum of converging digital media, new media forms have instead become subject to other forms of regulation. In Canada, the Competition Act of 1985 currently provides some of the only state regulation of children’s advertising outside of television available at the federal level.²¹ While the Act is relevant in that “is not limited by the nature of product promoted...or the media used,”²² and that it provides citizens with a democratic complaint-investigation

¹⁶ Id, Pg. 379.

¹⁷ Id. Shanahan and Hyman report 37 violations of the program-length commercial and host selling rules between 1998 and 2001 alone. It should be noted, however, that during the FCC’s recent and long overdue review of license renewal applications, the agency finally fined a large number of television stations for ad-related violations of the children’s television rules, some of which dated back to 1998.

¹⁸ Jeffery, B. (2006). The Supreme Court of Canada’s appraisal of the 1980 ban on advertising to children in Québec: Implications for “misleading” advertising elsewhere. *Loyola of Los Angeles Law Review*, 39, 237-276. Pg. 249.

¹⁹ See *Report and Order and Further Notice of Proposed Rule Making In the Matter of Children's Television Obligations of Digital Television Broadcasters* (“2004 Order”), MB Docket No. 00-167, FCC 04-221, released November 23, 2004; and *Second order on reconsideration and second report and order* (“Second Order”), MM Docket No. 00-167, FCC 06-143, released September 29, 2006.

²⁰ The CRTC recently upheld its decision not to regulate Internet content by declining to rule on a request for authorization for Canada’s telecommunications carriers to voluntarily block sites containing hate speech, which is otherwise illegal in Canada.

²¹ The Competition Act shares authority over children’s advertising with provincial legislation, both of which co-exist under constitutional law. Additional protection against specific kinds of promotional content, such as misleading and deceptive advertising, is found in a number of other Canadian statutes, including the Food and Drugs Act, R.S.C., ch. F-27, 5(1) (1985) (Can.).

²² Jeffery, supra note 18, Pg. 255.

process, very few arguments or pertinent case law seem to have been made under this legislation. In the US, advergaming and similar online media appear to fall primarily under the jurisdiction of the Federal Trade Commission Act, which prohibits deceptive or unfair advertising in any medium.²³

Recent campaigns by child advocacy groups and health care professionals may soon challenge the Canadian and US governments' unwillingness to expand existing regulatory frameworks. In 2004, special interest group Campaign for a Commercial-Free Childhood (CCFC)—an American coalition of health care professionals, academics, and other advocacy groups based out of Harvard University's Judge Baker Children's Centre—launched a national, US-wide campaign to ban unhealthy food advertisements directed at children and adolescents.²⁴ Among the CCFC's targets were the numerous food manufacturers (such as Nabisco, General Mills and Post) who have adopted advergaming as a key method of targeting children online. This campaign was initiated following the publication of a series of highly-publicized announcements by the American Psychological Association (APA) and the US Institute of Medicine (IOM), arguing a link between rises in childhood obesity rates and increases in children's exposure to unhealthy food advertising.²⁵

Since then, a number of national and international organizations have followed suit,²⁶ culminating in 2006 with the UK's sweeping media ban on advertising unhealthy food and beverages to children under 16 years of age, as well as the World Health Organization's (WHO) call for significant reductions in the commercial promotion of unhealthy foods to children worldwide. More recently, the US Federal Trade Commission (FTC) initiated an investigation into children's advertising practices, and the link between unhealthy food ads and childhood obesity.²⁷ Meanwhile, industry associations, such as the National Advertising Review Council (NARC) and the Children's Advertising Review Unit (CARU) have launched their own investigations into advergaming practices and published new guidelines for food advertisements targeting children. As a result of these developments, a number of companies have publicly committed to stop advertising unhealthy foods to younger children. In November 2006, ten high-

²³ Furthermore, Austin and Reed describe, "The act specifically reminds advertisers that children may be more easily misled than adults and that advertisers should take care not to misrepresent products advertised to children." See Austin, M.J. and Reed, M.L. (1999). Targeting children on-line: Internet advertising ethics issues. *The Journal of Consumer Marketing*, 16(6), 590-602. Pg. 591. This notion is also present in the Children's Television Act (1990) and more recent FCC reports, which support the argument that limitations on advertising targeted at children is necessary in order "to protect children, who are particularly vulnerable to commercial messages."

²⁴ A recent report issued by the US Institute of Medicine (IOM) revealed that the growth in new food products targeted directly at children and youth in the past decade has been enormous, "from 52 introduced in 1994 to nearly 500 introduced last year." Cited in Quaid, L. (2005, December 6). Panel doesn't want junk food aimed at kids. *Washington Post Online*. <http://www.washingtonpost.com/wpdyn/content/article/2005/12/06/AR2005120600606.html> (consulted December 9, 2005).

²⁵ Child advocacy group CFCC reports that rate of overweight children and teens in the United States "has nearly tripled from less than five percent in the 1980s to about 16 percent today." See "Harkin Secures Report to Look at Onslaught of Food Marketing Directed at Children" (2005, November 4). *Press Release*. Boston, MA: Campaign for a Commercial-Free Childhood. Furthermore, the group estimates that in 2004 alone, the food industry spent between \$10-12 billion on marketing to children.

²⁶ Jeffery, supra note 18. Including the Canadian Institutes for Health Information, the Chief Medical Officer of Health for Ontario, the Heart and Stroke Foundation of Canada, and the Centre for Science in the Public Interest of Canada, Commercial Alert, and the Center for Science in the Public Interest (U.S.).

²⁷ "Harkin Secures Report," supra note 25.

profile members of the Children's Food and Beverage Advertising Initiative²⁸ committed to cease advertising in elementary schools and to stop using advergames to promote unhealthy foods.

Although the full implications of children's advergames have not yet been adequately addressed, these developments could lead to an enhanced public awareness of emerging trends in children's advertising. This possibility was the focus at a recent conference of the US Association of National Advertisers' Advertising Law & Business Affairs, which brings together legal council and representatives from a variety of children's industries. The keynote speaker at the event, John Feldman, was quoted as saying: "Right now...the scrutiny is on food marketers' advertising to children, but a number of other self-regulated categories could be next on the docket. Politically, what gets traction better than kids?"²⁹ With both the FCC and CRTC currently conducting reviews of their respective rules and scope of operations, the timing does seem optimal for a comprehensive update of how (and where) children's advertising is regulated across North America.

While it is possible that the food advertising controversy could provide enough momentum to fuel a renewed movement toward regulation, concurrent developments around the regulation of video game content point to a much different conclusion. As Grossman argues, "a potentially major obstacle to the regulation of advergames...[is] the line of recent federal cases that apply heightened First Amendment protection to video games."³⁰ This particular debate, which started in the 1980s and escalated throughout the 1990s, has recently risen to the forefront of US politics with the initiation of a series of state laws. In response to the media frenzy that followed the discovery of the *Grand Theft Auto: San Andreas* "Hot Coffee" mod in 2005, a number of US states drafted bills aimed at regulating children's access to digital games,³¹ by making the Entertainment Software Ratings Board's (ESRB) game classification system mandatory. Since then, nearly half of all US states have attempted to pass legislation aimed at restricting violent content in video games. These developments follow on the heels of a comparable set of initiatives passed within Canada, which institutionalized the ESRB's ratings system, making it illegal to sell or rent age-inappropriate games to minors in four provinces (Ontario, Manitoba, New Brunswick and Nova Scotia), with another on its way (Saskatchewan).³² A sixth Canadian province (British Columbia) regulates video game content through its motion picture legislation.

²⁸ Mulvihill reports that together, these ten companies alone account for "two-thirds of child-targeted food and drink commercials on TV." See Mulvihill, G. (2006, 15 November). Food companies agree to new, voluntary, rules for selling to kids. *The Associated Press/The Journal News*. <http://www.thejournalnews.com/apps/pbcs.dll/article?AID=/20061115/BUSINESS01/611150328/1066> (consulted November 29, 2006).

²⁹ Cited in Thompson, S. (2007, January 17). Kids' Advertisers Bolster Defences at ANA Conference: Lawyers Warn Marketers to Prepare for a Litigious 2007. *AdAge.com*. http://adage.com/abstract.php?article_id=114376 (consulted January 18, 2007).

³⁰ Grossman, S. (2005). Comment: Grand Theft Oreo: The constitutionality of advergames regulation. *The Yale Law Journal*, 115, 227-236. Pg. 228.

³¹ Examples include Illinois's Safe Games Illinois Act (House Bill 4023), California's Assembly Bill (AB) 1179 and Michigan-State's Senate Bill (SB) 416. In 2005, New York junior Senator Hillary Rodham Clinton and Senator Joe Lieberman (D-Conn.) initiated similar legislation at the federal level through the Family Entertainment Protection Act. More recently, Senator Sam Brownback (D-Kans.) introduced the Truth in Video Game Ratings Act, which would require the ESRB to play games in their entirety before assigning a content rating.

³² See, for example, recent amendments to the Ontario Theatres Act and the Manitoba Amusement Act.

While at first glance it would seem that the ESRB has constructed a feasible framework for governmental regulation of video game content, the durability of these bills and initiatives has proven dubious, particularly in the US. In examining the video game violence debates, we begin to identify important characteristics of the current regulatory climate that are perhaps not as readily apparent within the example of the children's food advertising controversy. A major feature of these cases is that the vast majority of the US state bills introduced to regulate video game violence were subsequently deemed unconstitutional by the US Courts, while still others remain in limbo as their constitutionality is explored in further depth. The common thread in all of these cases is that the bills are seen as infringing upon constitutional rights to freedom of speech, which in the US is increasingly taking priority over the state's responsibility to regulate children's media.

When it comes to video game regulation, Festinger argues,³³ the current US political climate is exemplified in two landmark cases, *American Amusement Machines Association v. Kendrick*³⁴ and *Interactive Digital Software Association v. St. Louis County, Missouri*.³⁵ The rulings in these cases suggest two major issues that are likely to resurface in future regulatory initiatives including, potentially, those involving increased restrictions on advertising to children. The first is the aforementioned right to freedom of speech, which applies to both content producers and children who would otherwise be denied access to certain media content. The second, and perhaps most relevant to advergaming, involves the contentiousness of the evidence that is used to justify restrictions on children's exposure to certain types of content.

When it comes to freedom of speech, contemporary US courts are inclined to rule on the side of the constitution. In both *Interactive Digital Software Association v. St. Louis County* and *American Amusement Machines Association v. Kendrick* one of the leading arguments was that the legislation infringed upon minors', as well as parents', right to select their own media. Here, freedom of speech considerations are extended to the very children and adolescents that these bills are allegedly intended to "protect." For example, in *IDS v. St. Louis*, the Court concluded that:

[S]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas of images that a legislative body thinks unsuitable for them.³⁶

The second issue involves the arguably inconclusive nature of the evidence presented to prove that video game violence is harmful to children. In each case, the Courts have set the evidentiary bar quite high, ultimately demanding empirical and "substantial supporting evidence" of causality.³⁷ As a result, the evidence produced is commonly either deemed inconclusive or is highly contested by opposing experts. Because the nature and validity of the evidence remains under dispute, the Courts have been unwilling to uphold what they see as important restrictions on constitutional rights.³⁸ Despite widespread agreement among child

³³ Festinger, J. (2005). *Video game law*. Markham, ON: LexisNexis Canada.

³⁴ *American Amusement Machines Association v. Kendrick* [2001] U.S. App. LEXIS 4371, United States Court of Appeals for the Seventh Circuit.

³⁵ *Interactive Digital Software Association v. St. Louis County, Missouri* [2003] U.S. App. LEXIS 11069, United States Appeals for the Eight Circuit, No. 02-3010.

³⁶ Referring to *Erznoznik v. Jacksonville*, 422 U.S. 205, 213-14 (1975).

³⁷ Festinger, supra note 33.

³⁸ Recently, the FCC has attempted to re-open the debate by arguing that Congress could pass a law authorizing the agency to regulate violent content in the same way that it currently regulates sexual content and

development experts and numerous academics that exposure to certain kinds of media can impact upon children's behaviour and sense of well-being, new media regulation is likely to have to bear a burden of conclusive causal evidence that the early children's media policies did not. This increased emphasis on causality was also a key component of the massive de-regulation of children's television that occurred in the 1980s, when the FCC initially refused to ban "program-length commercials" directed at children because of insufficient proof of "actual harm."³⁹

While the "proof of actual harm" requirement continues to constrain American attempts to regulate media content, this may not ultimately be the case in Canada. Although Section 2(b) of the Canadian Charter is similar to the First Amendment in that it guarantees the right to freedom of expression, Section 1 of the Charter subjects this freedom to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." As Metcalfe and Bennett argue, "Section 1 jurisprudence in Canada has not required definitive proof of actual harm; potential harm has been sufficient in the past—especially when children are involved."⁴⁰ A recent example of this can be found in the Supreme Court ruling of *R. v. Sharpe*.⁴¹ In *R. v. Sharpe*, the Court decided, "Parliament is not required to adduce scientific proof based on concrete evidence that the possession of child pornography causes harm to children. Rather, a reasoned apprehension of harm will suffice." The Canadian Supreme Court thus "only requires a sufficiently rational link between the legislative impairment of expression and the legislative objective of the law."⁴² It might be concluded, therefore, that whereas new regulation may be destined to fail on freedom of speech grounds in the US, the recent revisions to provincial policies in Canada could yet manage to prevail if ever a similar challenge is brought to the Canadian courts.

On the other hand, although Canada might be more likely than the US to uphold new restrictions on video game violence and child pornography, there is nothing to indicate that this proclivity would extend to children's advertising within emerging media forms. Given the CRTC's refusal to create new national media regulation, the Canadian government may ultimately be just as unlikely to initiate new jurisprudence specific to digital media content as the US appears to be. A more feasible regulatory solution may instead be found in focusing attention on the enhanced coordination of existing rules and a more active expansion of established policies. This is particularly necessary in the context of advergames and other media forms that do not uphold traditional distinctions between content and advertising.

profanity. It is worth noting, however, that this same approach has been applied in a number of the thwarted video game bills, with little to no success.

³⁹ See *Action for Children's Television*, 58 R.R.2d 61(1985); *National Association for Better Broadcasting v. FCC*, 830 F.2d 270, (DC Cir., 1985); and *Action for Children's Television v. FCC*, 821 F.2d 741 (DC Cir., 1987). This decision was overturned in 1990, when the FCC included new restrictions on program-length commercials within the Children's Television Act.

⁴⁰ Metcalfe, C. & Bennett, C. (2007, March 9). Commentary: Anti-violence legislation on video games passes easily under Charter. *The Lawyers Weekly*, 26(41). http://davis.ca/community/blogs/video_games/files/video_game_violence_legislation.htm (consulted March 16, 2007).

⁴¹ *R. v. Sharpe*, [2001] S.C.J. No. 3, [2001] 1 S.C.R. 45.

⁴² Festinger, supra note 33, Pg.126, footnote 29.

B. Point of Entry 2: Consumer Protection Law

A second point of entry for instigating better regulation of children's advergaming can be found in consumer protection laws. As Balkin argues, "[T]o the extent that [these] spaces are designed for and encourage buying and selling of real and virtual goods,"⁴³ game designers can expect to be held accountable to consumer protection laws. One possibility in Canada can be found in the Quebec Consumer Protection Act (1971), which prohibits advertising aimed at children under the age of 13 years.⁴⁴ As the only provincial consumer protection act to specifically address children, the Quebec Act could easily be expanded on to include online advergaming, and otherwise provide a template for similar regulation in other regions. Moreover, the Act has already held up against charges of freedom of expression infringement at the Supreme Court level,⁴⁵ most notably in the case of *Irwin Toy Ltd. v. Quebec*.⁴⁶

In the 1980's, toy manufacturer Irwin Toy Ltd. attempted to overthrow sections 248 and 249 of the Quebec Consumer Protection Act on the grounds that they infringed upon their "freedom of expression" to advertise their products to children. The Supreme Court of Canada upheld the Act, stating: "The objective of regulating commercial advertising directed at children accords with a general goal of consumer protection legislation—to protect a group that is most vulnerable to commercial manipulation." The Court upheld a number of rulings that based their evaluation of the fairness of a particular advertisement from the vantage point of the intended recipient of "average" ability.⁴⁷ They also referred to the FTC's 1981 Final Staff Report and Recommendation which, the Court argued, established "a sound basis on which to conclude that television advertising directed at young children is *per se* manipulative."⁴⁸

As in the *R. v. Sharpe* case, the Supreme Court of Canada decided that conclusive proof of harm was not a mandatory requirement for media regulation and censorship in cases where children are involved. The *Irwin Toy* case, Festinger argues, offers "[T]he potential for Canadian courts to ignore the need for a specific proof of harm test even when the creative content of a game is a stake."⁴⁹ Furthermore, since the Supreme Court upheld a sweeping ban on advertising in *Irwin Toy*, it can be postulated that they may very well also "permit legislative prohibitions against video game advertising aimed at children."⁵⁰ In fact, the Court noted that it was "reasonable" to extend the FTC Report's conclusions on children's television advertising "to advertising in other media."⁵¹

In the US, consumer protection legislation enacted by the FTC has already been used to regulate children's privacy online. The FTC's implementation of Children's Online Privacy Protection Act (COPPA) in 1999, which requires that commercial websites obtain parental

⁴³ Balkin, J.M. (2004). Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds. *Virginia Law Review*, 90 (8), 2043-2098. Cited in Festinger, *supra* note 33, Pg.64.

⁴⁴ A series of exceptions, including ads announcing children's television programs or other entertainment events, or ads appearing in children's magazines for a maximum time interval of three months, have been designed to limit children's exposure to advertising whilst ensuring access to information.

⁴⁵ See also *Attorney General v. Kellogg's Co.*, [1978], 2 S.C.R. 211 (Can).

⁴⁶ In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No.36.

⁴⁷ See *R. v. Int'l Vacations Ltd.*, [1980] 56 C.P.R.2d 255-56 (Ont. Canada) and *R. v. Imperial Tobacco Prods. Ltd.*, [1971] 3 C.P.R.2d 178, 195 (Alta. C.A.) (Can.)

⁴⁸ Federal Trade Commission (1981). In the matter of children's advertising. *Final Staff Report and Recommendation*. Washington, DC: Federal Trade Commission. Cited in *Irwin Toy*, 1 S.C.R. at 988.

⁴⁹ Festinger, *supra* note 33, Pg. 128.

⁵⁰ *Id.*, Pg. 128.

⁵¹ *Irwin Toy*, 1 S.C.R. at 988-89.

consent before collecting personally identifiable information (such as name, address, postal code, etc.) from minors under the age of 13 years, has resulted in a number of important changes in the way commercial websites interact with child users. The FTC holds authority over various aspects of children's advertising, including host selling and deceptive commercial speech, and has "broad jurisdiction over advertising practices regardless of the medium."⁵² Although the FTC Improvements Act of 1980 greatly diminished the agency's authority to restrict advertisements targeted to children, the FTC continues to enforce rules against unfairness and deception in advertising to children, by fining ads that inaccurately represent toys' capabilities,⁵³ for example, or that portray children engaged in unsafe behaviours.⁵⁴ The FTC could expand its current mandate to address the integration of advertising and content found in advergimes and other online applications.

Advergimes can easily be understood as a form of commercial speech in the same vein as program-length commercials or host selling, which similarly blur content (or characters) and advertising to create an unacceptable level of ambiguity around the promotional aims of the program, particularly when young children are involved. As a result, the program (or advergime) in its entirety becomes classified as commercial speech under FTC and FCC definitions. While advergimes may not meet the exact criteria of a "program-length commercial," it is important to remember that these terms were originally defined for traditional media (namely television) and thus demand a more flexible interpretation if they are to be applied to new media formats. Furthermore, Campbell argues, the inclusion of product placements in children's programming is in itself often deemed as a form of misleading or deceptive commercial speech. This alone could justify restrictions on advergimes, which often feature interactive product placement.

Once advergimes are understood as a form of commercial speech, they become subject to greater regulation than other forms of speech, as determined by the *Central Hudson* test.⁵⁵ In *Central Hudson*, the Court outlined a "four-prong test for analyzing the constitutionality of restrictions on commercial speech that has been applied in all subsequent commercial speech cases."⁵⁶ The Court concluded that for commercial speech to come under the protection of the Constitution, it must "concern lawful activity and not be misleading." If it fails to meet either of these standards, it becomes vulnerable to prohibition, as long as the resulting restrictions reflect and advance substantial governmental interest, and are "not more extensive than is necessary to serve that interest."⁵⁷ Despite the lack of "conclusive" evidence of harm, child-directed advergimes could thus potentially be restricted as misleading or deceptive commercial speech in both countries.

⁵² Campbell, A.J. (2006). Restricting the marketing of junk food to children by product placement and character selling. *Loyola of Los Angeles Law Review*, 39, 447-505. Pg.457.

⁵³ See *Hasbro, Inc.*, 116 F.T.C. 657 (1993) (consent order); *Lewis Galoob Toys, Inc.*, 114 F.T.C. 187 (1991) (consent order); and *Mattel, Inc.*, 79 F.T.C. 667 (1971) (consent order).

⁵⁴ *Mego International, Inc.*, 92 F.T.C. 186 (1978) (consent order).

⁵⁵ *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), as argued by Campbell, supra note 52, and Grossman, supra note 30.

⁵⁶ Campbell, supra note 52, Pg. 473.

⁵⁷ *Central Hudson* at 566 (cited in Campbell, supra note 52, Pg. 474).

C. Point of Entry 3: Industry Self-Regulation

Many legislative initiatives to curb children's advertising rely to some extent on industry self-regulation. The media industries in both Canada and the US have a long history of successfully tempering state regulation through the implementation of voluntary standards of conduct and content classification systems (as exemplified by the Motion Picture Association of America (MPAA)). Furthermore, when consumer pressure is consistent and forceful enough, industry response can be implemented more rapidly and potentially more effectively than government initiatives, which must be channelled through legislative processes. It is therefore possible that many of the ethical and legal issues raised by advergaming could be resolved by industry-led self-regulation. In order for these systems to function in the interest of citizens, however, they must work in conjunction with an independent system of checks and balances, preferably one that is subject to a democratically accountable process. For as Jeffery argues, self-regulatory bodies "have both a vested financial interest in weak standards and a professionally honed skill for "selling" such weak standards as tough regulatory oversight."⁵⁸

In the context of children's advergaming, which integrate content with advertising and market research, the most important question becomes: which of the many industries involved should be responsible? The hybridized nature of advergaming highlights the need for comparable coordination when it comes to its regulation. Addressing the issues associated with advergaming would be greatly facilitated through a collaboration between relevant media, advertising and marketing industries, each of which has decades of experience navigating the contentious legal waters of children's advertising. For example, while in-game advertising is not currently part of the ESRB's mandate, it currently shares a number of monitoring duties with the Advertising Review Council (ARC). This relationship could easily be extended to include in-game advertising.

In fact, a number of industry organizations have recently announced their intention to revise existing guidelines to address emerging forms of digital advertising, including advergaming.⁵⁹ In 2006, the Children's Advertising Review Unit (CARU) revised their guidelines for advertisers to include a number of recommendations for advertising to children online.⁶⁰ For example, they propose "if an advertiser integrates an advertisement into the content of a game or activity, then the advertiser should make clear, in a manner that will be easily understood by the intended audience, that it is an advertisement."⁶¹ In addition, CARU now also requires that advertisers "disclose any passive means of collecting information from children (e.g., navigational tracking tools, browser files, etc.) and what information is being collected," as well as comply to

⁵⁸ Jeffery, *supra* note 18, Pg. 246.

⁵⁹ Teinowitz, I. (2005, September 16). CARU targets product placement and cartoon ads: Industry group raises public profile on obesity issue. AdAge.com. <http://www.commercialexploitation.org/news/carutargetstpp.htm> (consulted October 13, 3005).

⁶⁰ "New Food, Beverage Initiative to Focus Kids' Ads on Healthy Choices." (2006, November 14) *Press Release*. Council of Better Business Bureaus, Inc./National Advertising Review Council (NARC). <http://www.bbb.org/alerts/article.asp?ID=728> (consulted March 22, 2007).

⁶¹ Children's Advertising Review Unit (2006). *Self-Regulatory Program for Children's Advertising* (8th ed.). Washington, DC: Council of Better Business Bureaus, Inc./National Advertising Review Council (NARC), Pg. 7. Interestingly, however, for software and CD-ROMS (a category that would necessarily include computer games) CARU requires that any ads or other promotions must be both clearly identified as advertisements and separate from the program content. In the current environment of ongoing media and technological convergence, where games can be installed via CD-ROM to then be played online, this distinction between "online" and "offline" digital games is certain to cause confusion—both in terms of policy enforcement, as well as among child users.

COPPA's requirements around personally identifiable information.⁶² If properly enforced, these guidelines could conceivably lead to a much fairer treatment of children online.

In Canada, the Broadcast Code for Advertising to Children and a number of other self-regulatory frameworks could similarly be expanded to address advergaming. The Canadian Advertising Foundation (CAF)'s Canadian Code of Advertising Standards (ASC Code), the principle instrument of self-regulation within the Canadian advertising industry, includes two clauses that could easily be applied to advergaming.⁶³ In addition, the recently amended Canadian Marketing Association's (CMA) Code of Ethics and Standards of Practice also includes special standards of practice for marketing to children (under the age of 13 years) and teens online. In comparing these initiatives with the regulatory systems provided by the Canadian and US governments, it becomes clear that self-regulation has a distinct advantage when it comes to keeping its codes current and relevant vis-à-vis emerging trends and technologies.

Nonetheless, it is unlikely that self-regulation alone can provide adequate protection for children's special needs and vulnerabilities online. Within the advertising industry, self-regulatory codes are often ambiguous and restrict only the most extreme forms of manipulation. As Jeffery argues, the provisions set by the Children's Code are "too vague to set clear standards for enforcement, if an enforcement mechanism were actually available."⁶⁴ The APA has made similar claims against CARU's guidelines, which it deemed "too vague and general to be subject to empirical assessment."⁶⁵ The effectiveness of self-regulation is further weakened by lack of compliance, weak (or non-existent) enforcement strategies, and undemocratic consumer complaint processes. Within the Canadian context, Jeffery observes, "it is virtually impossible to know how [the] provisions of the ASC Code are routinely applied to complaints because ASC only publishes decisions in which it finds a violation of the Code."⁶⁶ In addition, the CRTC has been conspicuously inactive in enforcing licensing consequences for broadcasters known to have violated the Children's Code. Similar issues arise in the US, where FTC studies conducted over the past five years have consistently found widespread violations and non-compliance⁶⁷ of self-regulatory codes such as the ESRB ratings system, with little or no consequences.

While industry codes may provide an appealing framework for addressing emerging media forms, their utility is also severely limited by industry-bias and lack of accountability. In order to be more effective, industry self-regulation must operate in conjunction with an independent review process, as well as a democratic system for handling consumer complaints. One way to ensure this is through the institutionalization of regular monitoring and enforcement strategies involving the direct participation of government or other democratically-elected agencies. Co-regulation provides the necessary system of checks and balances that industry alone cannot

⁶² Id, Pg. 11.

⁶³ For example, Clause 13: Advertising to children, states: "Advertising which is directed to children must not exploit their credulity, lack of experience, or their sense of loyalty, and must not present information or illustrations which might result in their physical, emotional or moral harm."

⁶⁴ Jeffery, supra note 18, Pg. 248.

⁶⁵ Wilcox, B., Cantor, J., Dowrick, P., Kunkel, D., Linn, S. & E. Palmer (2004, February 20). *Report of the APA Task Force on Advertising and Children*. Washington, DC: American Psychological Association. <http://www.apa.org/pi/cyf/advertisingandchildren.pdf> (consulted March 29, 2007). Pg.38.

⁶⁶ Jeffery, supra note 18, Pg. 246.

⁶⁷ While CARU claims a high compliance rate (over 97% of the 253 ads or websites that received CARU calls for modification or removal between January 2003 and June 2005 reportedly complied to the agency's recommendations), compliance to its revised guidelines concerning online advertising has yet to be determined. See Lascoutx, E. (2005, June 29). *Letter to Donald S. Clark, Federal Trade Commission*. <http://www.caru.org/news/2005/P034519.pdf> (consulted March 22, 2007).

supply, while ensuring that guidelines are actually upheld and enforced. Based on the past successes of the Motion Picture Association of America (MPAA) film ratings (in the US), as well as current interest in the ESRB's rating system (particularly in Canada), it seems likely that industry will continue to play a large role in future regulatory regime. It remains crucial, however, that public interest is also adequately represented in this process—especially in terms of children's rights and their special legal status as minors—through ongoing public debate, more consistent government involvement, and increased cooperation between industry and special interest groups.

D. Point of Entry 4: Contract Law

Another problematic aspect of children's advergaming is their incorporation of market research, conducting youth trend studies (such as those produced by *Neopets.com*) and product preference surveys (such as those featured on *Barbie.com*) under the guise of advergaming. While commercial advergaming claims copyright over children's non-personally identifiable information and in-game contributions in their terms of service (TOS),⁶⁸ the fact remains that minors have a special status within contract law that make these online agreements unenforceable. A contract made with a child would be deemed void if ever challenged in a Canadian⁶⁹ or US⁷⁰ court. Furthermore, most websites that conduct market research fail to ensure that even the minimum standards for informed consent are met. Children are rarely encouraged to read TOS contracts, which are oftentimes inaccessible anyway, in terms of the language and terminology used. There also appears to be no standard framework for informing parents or obtaining parental consent for research conducted on young children online. While market research is just one facet of advergaming, tighter restrictions on these practices could lead to both a mitigation of the ongoing commercialization of children's online games, as well as a greater promotion of children's interests online.

The ethical implications of conducting research without first establishing the informed consent of participants are immense,⁷¹ particularly when the respondents are minors. Nonetheless, market researchers act as though TOS claims over children's online submissions are valid, packaging and selling children's information for profit, and using it to create more effective advertisements. Not only do TOS contracts employ sweeping intellectual property claims over children's submissions, but they claim to do so for eternity, throughout the universe,

⁶⁸ Grimes, S.M. (2007). Terms of service, terms of play in children's online gaming. In J.P. Williams & J. Heide Smith (Eds.), *The Player's Realm: Studies on the Culture of Video Games and Gaming* (pp. 33-55). Jefferson, NC: McFarland & Co.

⁶⁹ In Canada, contracts with children can be voided at their request if they are not beneficial to the child. The only exception, as established in *Miller v. Smith & Co.*, [1925] 2 W.W.R.360, 377 (Can.), is in instances where the child enters into a contract to obtain the "necessities of life" (food, clothing, shelter, etc.).

⁷⁰ See California Family Code 6710 (West 2004); *Sparks v. Sparks* [1950] 101 CA2d 129 (Cal.); *Burnand v. Irigoyen* [1947] 186 P.2d 417 (Cal.); *Scollan v. Gov't Employees Ins.* [1963] 35 Cal. Rptr. 40, 41 (Cal. Dist. Ct. App.); and *Mitchell v. Mitchell* [1998] 963 S.W.2d 222, 223 (Ky. Ct. App.) Cited in Hruby, H. (2006) Comment: That's show business kid: an overview of contract law in the entertainment industry. *Journal of Juvenile Law*, 27, 47-55.

⁷¹ A number of recent cases involving "spyware" may support this, including *RealNetworks Privacy Litigation*, No. 00 C 1366, 2000 U.S. Dist. LEXIS 6584 (N.D. Ill. May 11, 2000) and the recent class action settlement involving Sony BMG Music (Canada) Inc., SunnComm International Inc., and First 4 Internet, Ltd.; as well as Assembly Bill 1392, read to the California Congress on March 26, 2007, and the Consumer Protection Against Computer Spyware Act (2004).

and in any format now known or yet to be invented.⁷² Obviously, the scope of these claims is absurd, making these contracts highly vulnerable to charges of unconscionability.⁷³ Children's cognitive and emotional limitations, as well as lack of familiarity with key concepts involved in contractual agreements, also points to the possibility of copyright misuse within many TOS agreements.

While little research has been conducted on children's understanding of website policies, studies of adult Internet users reveal that only a small proportion even pay attention to the contents of TOS contracts and privacy policies, let alone understand their full legal implications. Recent studies suggest that children rarely, if ever, read privacy policies, have trouble understanding basic business practices (such as the use of "Cookies" to track users), and do not always fully comprehend why personal information should not be divulged online.⁷⁴ Studies of children's economic socialization have shown that while rights of use and control are relatively easy for children to grasp, the right of transfer is much more difficult for children to comprehend.⁷⁵ It is not until the age of 11 years that notions of private ownership and the right of transfer are fully understood by the majority of children. For very young children (under 6 years of age), Furnham argues, "most economic events are still simply observed and accepted as mere ritual."⁷⁶ It is easy to see how clicking "I Agree" to a TOS contract can become a ritualized part of children's online experience, even while the legal and economic nuances of this agreement likely remain beyond children's understanding.

Although it is unlikely that child players will ever become embroiled in a legal conflict involving TOS claims, consideration for children's potential intellectual property rights is nonetheless a crucial step towards ensuring that children receive fair treatment within the digital context. In this way, the issues raised by TOS contracts introduce a unique opportunity for establishing children's rights as producers of online content. For while the marketing strategies found in children's advergames are often unfair, they also privilege the child user in ways that most contemporary cultural venues do not. As it currently stands, however, it is more likely that marketer practices will continue unchallenged, supported by the semblance of authority provided by the TOS, since both children and parents generally lack sufficient knowledge of the issues

⁷² The Terms and Conditions for Neopets.com (<http://www.neopets.com/terms.phtml>), for example, requires that players agree to:

[A]utomatically grant...to Neopets a perpetual, royalty-free, irrevocable, nonexclusive right and license to use, reproduce, modify, adapt, publish, translate, create derivative works from, and distribute such materials or incorporate such materials into any form, medium, or technology (now known or hereafter developed or devised) throughout the universe.

⁷³ See *Davidson & Associates, Inc., v. Internet Gateway* [2004] US Distr. LEXIS 20369, where the Court ruled against the defendants' claims of contract unconscionability in part because of the defendants' specialized knowledge of computer software and EULA provisions. In this case, the Court concluded, "the defendants are not unwitting members of the general public as they claim. They are computer programmers and administrators familiar with the language used in the contract." Arguably, this is certainly *not* the case with children.

⁷⁴ Turow, J. (2001, March). *Privacy policies on children's websites: Do they play by the rules?* (Report Series). Philadelphia: Annenberg Public Policy Centre of the University of Pennsylvania; Also Shade et al., *supra* note 10.

⁷⁵ Cram, F, Ng, S.H. & Jhaveri, N. (1996). Young people's understanding of private and public ownership. In P.Lunt & A. Furnham (Eds.), *Economic socialization: The economic beliefs and behaviours of young people* (pp. 110-129). Cheltenham, UK: Edward Elgar Publishing Limited.

⁷⁶ Furnham, A. (1996). The economic socialization of children. In P.Lunt & A. Furnham (Eds.), *Economic socialization: The economic beliefs and behaviours of young people* (pp. 11-34). Cheltenham, UK: Edward Elgar Publishing Limited. Pg. 31.

involved—including intellectual property, contract law and research ethics—to challenge them at the judicial level. Ideally, these issues would be settled concurrently, in a case that dismissed the TOS contracts as invalid, while simultaneously recognizing children's rightful authorship rights over the content they produce online.

IV. AN INTEGRATED APPROACH TO REGULATION

Based on an examination of the four “points of entry” outlined above, we can begin to formulate a number of solutions to the regulatory problem raised by children's advergaming. Existing media regulation, whilst to some extent successful in curbing children's advertising in the past, now seems out of touch with cultural trends as well as the contemporary political climate. On the other hand, government reluctance to enact new regulation, as well as failed regulatory initiatives in comparable areas of children's media, both demonstrate tendencies toward deregulation among North American governments. While state and provincial governments may yet adopt a stronger stance on children's digital advertising, the focus of policymakers in both countries is currently dominated by hot button topics such as video game violence and unhealthy food advertising. Even if children's advergaming were to take centre-stage within policy debates, constitutional rights of freedom of speech seem likely to present a challenge to any regulation that aims to restrict media content. It therefore seems probable that no new “advergaming” regulation could successfully be put into place without considerable debate, as well as heavy-handed challenges by the relevant industries and lobby groups.

This does not mean, however, that government intervention is either unnecessary or unlikely. The CTRC's decision not to create new regulation for Internet content confirms the Canadian government's reliance on the ability of existing policies to address issues raised by new media technologies. A realistic solution will therefore need to work within these parameters. The first step will be to determine how children's advergaming will be classified under current definitions of media content—as programming, as commercial speech or as some combination thereof. Keeping in mind that much broader definitions of commercial speech are applicable when dealing with children's media (including, for example, the FCC's special categories of “program-length commercials” and “host selling”), it is likely that advergaming will be amenable to the same rules that regulate other forms of children's advertising, including consumer protection laws and state-enforced self-regulation. As such, current restrictions against misleading and deceptive advertising—as established by the Competition Act and the Québec Consumer Protection Act in Canada, for example, and by the FTC and FCC's co-regulation of advertising targeted to children in the US—could be used to assess the legality of children's advergaming. Similarly, existing laws around minors' contracts and contractual unconscionability offer an important venue for restricting market researchers' access to children through advergaming and other online applications.

Given that advergaming present an often seamless integration of commercial and non-commercial content, they are unlikely to meet the requirements currently demanded of other forms of advertising. It is at this point that industry self-regulation has the potential to transform newly formulated professional guidelines around the use of advergaming and other online applications into enforceable standards of practice. Self-regulation offers a number of advantages that are difficult to reproduce at the government level, foremost of which is the ability to draw on the expertise of the very industries that are most directly involved in the production of hybridized media forms (such as advergaming). Nonetheless, history shows that self-regulatory regimes

require governmental involvement (or other form of independent and democratic authority) in order to function properly. The voluntary and self-serving aspects of self-regulation remain highly problematic, and continue to threaten the effectiveness of such systems within most traditional media industries. Relevant government agencies have a significant and ongoing role to play in the monitoring and enforcement of industry codes—transforming guidelines into rules, and representing the interests of vulnerable citizens.

As content, advertising and related business practices continue to collide, effective regulation will need to construct a correspondingly integrated framework—one that includes both advertising and content concerns, and that adequately addresses children's special needs and vulnerabilities as both consumers *and* producers of online content. Such a framework would need to apply a coordinated approach that utilizes all four “points of entry” reviewed herein. Drawing upon existing media regulation and consumer protection laws, policymakers should aim to expand operational definitions of “content” and “advertising” to create a more inclusive regulatory regime, one that is able to address new media forms as they arise. In order to be effective, this approach will necessarily require greater coordination and consistency at three levels of governance: between and within relevant government departments; between relevant government agencies and self-regulatory bodies; and between the regulatory bodies of the various industries involved. In the specific case of advergimes, this would translate into a regulatory regime that is able to address the entirety of the issues involved, from misleading advertising, to underlying data-mining practices, to privacy issues and production rights.

V. CONCLUSION

Industry trends within digital culture show that today's children indeed experience “childhood as a cultural space constituted by consumerism.”⁷⁷ While these trends may be reflective of a more generalized commercialization that is gradually encompassing Western culture, children nonetheless present a very special case that requires heightened levels of caution and concern. Children's vulnerability to advertiser manipulation, their lack of knowledge of economic and legal processes, and the fragility of their still-burgeoning rights, all justify the need for a “double-standard” in how we address children's advergimes. Until minors are granted the same special status online as previously established in media policies, international conventions and national law, children's rights will remain largely unprotected within the digital environment.

It is clear that alone, no one of the four “points of entry” provides a satisfactory avenue for the construction of a sufficiently comprehensive framework for addressing the problem of advertising in children's digital culture. Just as media content, advertising and market research are now often combined within a single game or activity, regulatory regimes must now abandon outdated divisions and adopt a similarly integrated strategy. It is unreasonable to expect that treating these issues as distinct phenomena within legal and regulatory frameworks will result in anything other than ineffective policies that fail to take into account the full scope of issues involved. There is an obvious need for increased coordination, both between government bodies as well as between the private and public spheres. Adopting such an approach will be crucial in order for future regulatory efforts to successfully address the massive integration occurring at both the cultural and technological levels within children's digital culture.

⁷⁷ Langer, B. (2004). The business of branded enchantment: Ambivalence and disjuncture in the global children's culture industry. *Journal of Consumer Culture*, 4(2), 251-77. Pg. 260.