The Children's Hour Revisited: The Children's Television Act of 1990

Diane Aden Hayes
Federal Communications Commission

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The Children's Hour Revisited: The Children's Television Act of 1990

Diane Aden Hayes*

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* B.A., with honors, Purdue University–Calumet, 1986; M.A. Indiana University,
INTRODUCTION

The Children's Television Act of 1990\(^1\) (Act) is an unusual piece of legislation. The Act is a rarity in an era in which the Federal Communications Commission (FCC or Commission) has given up many regulations\(^2\) and has had many others overturned in court.\(^3\) Not only does it provide for the setting of standards for broadcasting directed at children,\(^4\) it places limits on advertising,\(^5\) and forces broadcasters to explain their efforts in these areas when seeking license renewal.\(^6\)

Congress and the FCC regard children's television with special importance. Children's high susceptibility to advertising\(^7\) and lack of power in the marketplace have been the main justifications for regulating broadcasting aimed at them.\(^8\) However, the FCC has not always been amenable to strict guidelines.\(^9\) The Act of 1990 represented a dramatic turnaround in Commission

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action. Previously, the FCC had shown a desire to deregulate in the children's television area.\footnote{10}

The Act has displeased many, however, including both the staunchest supporters of protective legislation for children and broadcasters.\footnote{11} Parents' and children's advocacy groups disapprove of the way broadcasters are responding to the Act,\footnote{12} and broadcasters are uncertain how to respond to the Act's demand that they serve "the educational and informational needs of children."\footnote{13} The Act is vague, so vague that little positive action has occurred in children's television.

In the wake of this situation, many are calling for changes in children's television regulations, including limits on time and content of programs and a stricter definition of children's television.\footnote{14} But stronger regulations are bound to face challenges

\begin{thebibliography}{9}
\footnotesize
\item 10. See, e.g., id.
\item 11. Action for Children's Television (ACT), which is now defunct, has historically been the prime lobby group for stricter children's programming guidelines. For ACT's initial responses to the Act of 1990, see generally Peter D. Lambert, \textit{Battelines Drawn on Children's Rulemaking}, \textit{Broadcasting}, Feb. 4, 1991, at 22. See also Patrick J. Sheridan, \textit{FCC Sets Children's Ad Limits}, \textit{Broadcasting}, Nov. 12, 1990, at 33.
\end{thebibliography}
because of the difficulty in enforcing them, and because they may intrude on broadcasters' First Amendment rights.

I. THE ACT AS OF 1990

The Children's Television Act of 1990 has three basic features. It places time restrictions on advertising during children's programming, requires broadcasters to make an effort to air programming that benefits children, and informs broadcasters that, at license renewal time, compliance with these factors will be considered as part of their duty to program in the public interest. The Act gives the Commission the opportunity to modify these limits after January 1993. But with the rationale for the rule being to "protect children from overcommercialization," it seems unlikely the ad limits will be relaxed.

Section 303b of the Act emphasizes the importance of this legislation. It allows the FCC to consider broadcasters' efforts in complying with the Act when reviewing license renewal applications. The Commission may examine how well a licensee is following the advertising restrictions, and whether the licensee is meeting the "educational and informational needs of children." In a small victory for broadcasters, the Act does not require them to keep specific or detailed records of their compliance. They may even ask the Commission to consider their nonbroadcast efforts to educate children or their support of other licensees' child-oriented programming within the same market. There are no minimum amounts required for this type of programming, nor

are there any descriptions of what qualifies as educational or informational television.\textsuperscript{24}

The advertising restrictions are perhaps the clearest of the three rules. Section 303a commanded the Commission to follow rulemaking proceedings that resulted in limits on advertising of 10.5 minutes per hour on weekends and twelve minutes per hour on weekdays during child-oriented broadcasts.\textsuperscript{25} Children’s programming is generally defined by the FCC as that geared toward children under twelve.\textsuperscript{26} These rules apply to cable operators as well as over-the-air licensees.\textsuperscript{27} All types and lengths of programs for children must meet the requirements, including “short segment” programming (programs less than half an hour long).\textsuperscript{28} Some general, all-age programming may be used to fulfill the Act’s programming requirements if these shows are beneficial to children.\textsuperscript{29} Congress has made it clear, however, that a licensee does not meet its obligation to younger viewers if it does not show some programming made expressly for them.\textsuperscript{30}

When Congress passed the Act, it found that television could be an important tool in educating children;\textsuperscript{31} therefore, part of the broadcaster’s duty to serve the “public interest” requires it to provide programming for children.\textsuperscript{32} Also, broadcasters are asked

\textsuperscript{24} The FCC, however, has recently stated that entertainment programs, cartoons particularly, do not meet the “educational and informational” standard. \textit{Children’s TV Programming Notice of Inquiry}, supra note 14, para. 3 n.6.


\textsuperscript{26} Commercial Limits in Children’s Programs, 47 C.F.R. § 73.670 (1992).


\textsuperscript{28} \textit{In re Policies and Rules Concerning Children’s TV Programming, Memorandum Opinion and Order}, 7 FCC Rcd. 3197, para. 2 (1992) [hereinafter \textit{Children’s TV Programming MO & O}].

\textsuperscript{29} 47 C.F.R. § 73.671 (1992).

\textsuperscript{30} \textit{Children’s TV Programming Report and Order}, supra note 27, para. 23.


\textsuperscript{32} Id.
to consider "the characteristics of the child audience" in making programming and advertising decisions. 33

The FCC has articulated several reasons for regulating in this area. One is that broadcasting is to be made in the public interest, 34 and it is in the interest of children to protect them from the persuasions of advertising. 35 Also, it is in the public interest to promote the educational needs of children. 36 The immaturity of children is another factor the Commission has considered when creating regulations for children's television. 37

Regulation of children's broadcasting dates back to the 1970s. 38 The FCC submitted its first major statement on the issue in 1974 39 and it was affirmed by the United States Court of Appeals for the D.C. Circuit. 40 This policy statement avoided direct regulations, and instead required broadcasters to make a "meaningful effort" to provide more children's programming. 41 It also placed limits on advertising and asked that television stations make an effort to keep programs and commercials separate. 42

In the 1980s, the Commission paid little attention to how broadcasters programmed for children. In its 1984 Report and

33. Educational and Informational Programming for Children, 47 C.F.R. § 73.671 (1992), reads: "For purposes of this section, educational and informational television programming is any television programming which furthers the positive development of children 16 years of age and under in any respect, including the child's intellectual/cognitive or social/emotional needs."


42. Id. paras. 46-56.
Order, the FCC stated that television was adequately serving the needs of children, and that any greater regulation would overburden the broadcast industry, possibly reducing the quality of programming available for children. The diversity of television-type resources available with which to educate and entertain children was cited as a reason for this new direction. The massive deregulation efforts of the Reagan administration also presumably played a part in the FCC’s lack of regulatory effort.

Children’s interest groups quickly took the FCC to task for its deregulatory stance. The Court of Appeals for the D.C. Circuit held that it was within the FCC’s power to consider other forms of television, such as video and cable, in deciding to curtail its programming regulations. But two years later it found that the Commission had not adequately justified its reasons for dropping some regulations. Because of the Commission’s “long history of separate treatment of children’s television,” it could not drop all of its regulatory measures without some clear, precise reasoning.

Congress also became involved. Between 1985 and 1989, several bills were considered that proposed greater regulation of broadcasting for children. A popular bill passed by both the

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43. Advertising Practices Report and Order, supra note 9, para. 32.
44. Id. para. 35.
45. Id. paras. 26-31.
46. Palumbo, supra note 8, at 345.
47. Action for Children’s TV v. FCC, 756 F.2d 899, 901 (D.C. Cir. 1985) (holding that cable television and videocassettes reached enough of the television viewing market to be considered by the FCC and suggesting that in an individual market, with little cable available, broadcasters should have to bear a significant part of the programming of children’s television).
49. Id. at 747.
Senate and the House of Representatives51 (and endorsed by many in the broadcast industry)52 was pocket vetoed by President Reagan in 1988.53 By 1990, however, Congress had created a new law that was enough to force the FCC to act in the area of children's television.54 Various groups have asked the FCC to either clarify or strengthen the regulations contained in the Act.55 The Commission has thus far declined to extend the Act into the areas of program-length commercials, or to define further what kind of programming it considers the most educational for children. The FCC has recently requested comments on how the law is working,56 suggesting that it will be more active in enforcing the current rules.57

53. Under U.S. CONST. art. I, § 7, cl. 2, President Reagan had been advised to veto the bill by the Department of Justice and the National Telecommunications and Information Administration. The Office of Management and Budget and the FCC also expressed reservations about the Bill. Reagan Kills Children's TV Bill; Industry, Hill Stunned by Veto, supra note 52, at 69.
55. See, e.g., Harry A. Jessell & Kim McAvoy, FCC Comments Call for Constitutional Challenge to Children's Act, BROADCASTING, Jan. 28, 1991, at 48, 48 (Radio-Television News Directors Association arguing that Act should be interpreted in “least restrictive” manner because spectrum scarcity and public trustee rationales no longer justify content regulation); Peter D. Lambert, ACT Challenges Children’s TV Rules, BROADCASTING, May 20, 1991, at 62 (Action for Children's Television asks that "program-length commercials" be regulated under the Act's advertising mandates).
56. Children’s TV Programming Notice of Inquiry, supra note 14, para. 11.
II. ISSUES SINCE ENACTMENT

A. The Advertising Restrictions

Congress was very specific regarding the action the FCC should take against advertising shown during children’s programs. The Act commands the Commission to limit commercial broadcasting to 10.5 minutes per hour on weekends, and twelve minutes per hour on weekdays. These rules apply to all stations, broadcast and cable, and to all lengths of programs. The limits were likely set in response to several surveys that demonstrated that television stations in the 1980s, after the FCC’s repeal of its commercial guidelines, often broadcast far more than twelve advertising minutes per hour, especially in the larger markets. A study conducted by Action for Children’s Television found stations airing as much as fourteen minutes per hour of advertising during children’s programs. A 1990 study concluded that, overall, stations in a wide range of cities were within the time limits, but that cable and independent broadcast stations showed far fewer commercials than did broadcast network affiliate stations.

The Commission itself has conducted random reviews of ads being broadcast in order to check up on its licensees. An audit conducted in January 1992 came up with ten violations out of more than 160 television stations and cable systems inspected.

59. See Children's TV Programming Report and Order, supra note 27, para. 1.
60. Children's TV Programming MO & O, supra note 28, para. 2.
62. Id.
64. Sukow, supra note 13, at 24.
Fines of up to $20,000 were levied on three stations cited as violators, with three others receiving admonishments from the FCC. The latter punishment carries a higher fine for repeat offenders. A spokesperson for the FCC has indicated more audits are likely in the future.

More recently, several stations that had turned themselves in were fined. These stations and the one involved in the 1992 audit were cited for either violating advertising time limits or for airing commercials advertising a product connected with the show being aired. Although not specifically part of the Act, broadcasters have been asked to distinguish programming from commercials when children are the majority of the audience. This request arises from the perception that young children cannot separate ads from programming and are easily swayed by commercial matter.

Broadcasters remain unclear on what constitutes compliance. One recent violator, Superstation WTBS in Atlanta, was admonished for going over the weekday advertising time limits. The station challenged the FCC’s finding, because it believed that ads promoting programming on other stations owned by Turner

66. Id.
67. Id. at 96.
68. Id.
70. Jessell, supra note 65, at 95.
72. See Children’s TV Report and Policy Statement, supra note 7, para. 34; Palumbo, supra note 8, at 374-77.
Broadcasting should not be counted as "commercial matter." WTBS argued that these ads did not have to meet the FCC's standards because the ads were not sold for money to the broadcaster. The Commission, however, defined "sold" as any situation where the broadcaster receives "valuable consideration" from the advertiser, and it stated that in this case, WTBS received such consideration either directly or indirectly. For this violation, WTBS received only an admonishment because it agreed to monitor this practice more carefully in the future.

While proponents of the Act hope these fines and punishments will create more compliance with the ad limits, some broadcasters have stated that it takes too much time and money to comply with the Act. It has been suggested that some broadcasters may simply give up trying to program for children for fear of sanctions if they do not comply. The FCC's past relative leniency with most violators, and the fact that the Act places an affirmative duty on broadcasters to program for children, make it unlikely that stations will completely abandon children's programming.

One way broadcasters have dealt with both the ad limits and the duty to program for children is with "kids clubs." The clubs show informational or educational spots between children's programs, which are tied together by an on-air host. Most clubs send a newsletter containing ads to members, providing a way for the sponsoring station to sell more advertising without violating

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74. Id. at 490.
75. Id.
76. Id.
77. Id.
78. See Jessell, supra note 65, at 95.
79. Id. at 96.
80. Id. (Tony Boquer, general manager of KHWE in Honolulu, said, "You may end up with less [children's] programming.").
81. See, e.g., supra notes 64-67 and accompanying text.
82. See Jessell, supra note 65, at 95 (only three of the 10 violators in the January 1992 audit received monetary fines).
83. Alan Radding, Stations Tune In to Kids, ADVERTISING AGE, May 18, 1992, at 37, 37.
The Fox network Kids Club has some 4.5 million members across the country.

B. Center for Media Education Report

After the Act had been law for one year, the Center for Media Education (CME), a Washington-based consumer watchdog group, released a study analyzing broadcasters' compliance with the Act’s programming requirements and studying whether the Act was achieving Congress’s and the FCC’s goals for children’s programming. The CME (in conjunction with the Institute for Public Representation at the Georgetown University Law Center) reviewed the license renewal applications of stations in fifteen markets—five large, five midsize, and five small markets. These markets were in the eight states with the first stations that would have to follow the Act’s logging requirements for renewal. A total of fifty-eight stations’ applications were reviewed as part of the study.

The study’s findings were not positive. The information logged by the stations did not indicate their attempts to program for children. Few shows were being created to meet the Act’s goals, and those broadcast were aired sporadically or at odd hours (after midnight, for example). And stations’ “educational or informational programming” was often just the same old reruns or cartoons with new descriptions.

1. Information Provided on Compliance

The report found that more than 25 percent of the stations reviewed never logged the time, date, or length of the programs they cited as fulfilling their duty to program for children. The reason for this lack of specificity is that the Act does not say what licensees must submit at renewal time. With no set standards, the

84. Id.
85. Id.
87. Id.
88. Id. at 4.
89. Id. at 3.
renewal submissions reviewed by the CME ran from just one page to fifty pages.\textsuperscript{90}

Many stations that did file more than a few pages were less than helpful in explaining what they had done to program for children. Some just listed programs shown, with no explanation of how these shows were educational or informational (or if they were for children at all).\textsuperscript{91} But considering there are no guidelines from the FCC on what licensees should submit, it should come as no surprise that the actual submissions were inadequate.\textsuperscript{92}

Until 1993, the Commission seemed unconcerned with the quality of the submissions it was receiving from broadcasters. In 1993, however, the Commission delayed renewing the licenses of seven midwestern stations until more information was provided on the stations' compliance with the Act.\textsuperscript{93} Out of some 320 renewal applications reviewed by the Commission since the Act became law, these seven stations were the first to receive greater scrutiny from the Commission.\textsuperscript{94}

With President Clinton setting a more active, regulatory mode for the country and the government, the FCC may become more involved in enforcing the children's programming rules.\textsuperscript{95} It may take this sort of involvement to bring broadcasters into compliance; until now there has been little to no incentive for them to change the shows they provide for children.

\textsuperscript{90} Id. at 4.
\textsuperscript{91} Id.
\textsuperscript{92} The FCC states that acceptable documentation of compliance for checking advertising overages could consist of (1) lists of the number of commercial minutes per hour or (2) certified documentation of stations' children's programming that featured the advertising. Broadcast and Cable Servs.; Children's TV Programming, supra note 71, paras. 13, 21. Also, the FCC requires "summaries" of the ways stations are complying with their programming requirements. Id. No greater detail is given.
\textsuperscript{93} See Andrews, Flintstones and Programs Like It Aren't Educational, FCC Says, supra note 57, at A1; FCC Opens Discussion of Children's Television Act, DAILY VARIETY, Mar. 3, 1993, at 3; FCC Says Cartoons Can't Count as Educational Shows, CHI. TRIB., Mar. 4, 1993, at 3.
\textsuperscript{94} FCC Opens Discussion of Children's Television Act, supra note 93, at 3.
\textsuperscript{95} Andrews, Flintstones and Programs Like It Aren't Educational, FCC Says, supra note 57, at A20.
2. Timing of Children's Programs

The stations that did submit evidence of times and dates of children's programs did little better. It seems that when broadcasters do go to the trouble of showing an educational, informational, interesting children's show, they show it at a time when almost no child would be (or should be) watching television. Of those stations that provided program times, children's news shows were broadcast between 5:30 and 7:00 a.m. nearly 60 percent of the time. Other shows were broadcast after midnight. Programs shown at more acceptable hours, such as weekend afternoons, often were shifted from time slot to time slot or, worse, frequently preempted.

The Act sets no standards for when children's programming should run. Indeed, many in favor of the Act had hoped it would provide some variety beyond the usual Saturday morning fare. Instead, the lack of standards has made it harder for children to watch shows geared for them.

3. Is G.I. Joe Educational?

Some broadcasters would argue that cartoons such as G.I. Joe are educational. A New Orleans television station said G.I. Joe covered "[i]ssues of social consciousness and responsibility." Other shows used by broadcasters to meet children's programming needs included Chip 'n Dale Rescue Rangers, Super Mario Brothers, and Yo Yogi!, where in one episode a character catches a "bank-robbing cockroach" by "using his head, rather than his muscles." Santa Claus Is Coming to Town, a Christmas special, is even considered educational because it "answers some

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96. Center for Media Educ., supra note 12, at 5.
97. Id. at 5, 7.
98. One of the early bills in Congress suggested rules that set minimum hours and reasonable times children's programs could be shown. S. 1594, 99th Cong., 1st Sess. (1985).
100. Id.
of the mysteries, myths, and questions surrounding the legend of Santa Claus."\textsuperscript{101}

It is unlikely that most people would consider these shows educational, or even informational, but broadcasters contend they are.\textsuperscript{102} Plot summaries are twisted into moral lessons that supposedly teach good values. Worse, some stations are even willing to place all cartoons in the educational category.\textsuperscript{103}

Even if broadcasters are not willing to go so far as to label cartoons educational, they still call them "pro-social."\textsuperscript{104} Since the FCC has demanded broadcasters meet children's "cognitive/intellectual or emotional/social" needs,\textsuperscript{105} broadcasters have generally focused on the latter—not that this has meant a change in what they broadcast. Instead, a "pro-social" program is one that shows any kind of "message," no matter how far one has to stretch to find it.\textsuperscript{106} Even now, several years after enactment of these policies, children's programs still bear little resemblance to the FCC standards. For the fall 1993 children's TV lineup, ABC tried to push *Tales from the Cryptkeeper*—based on HBO's adult horror series—as a way to teach children "a wonder-filled morality lesson."\textsuperscript{107}

Broadcasters even try to place all-age programs into these categories. While the FCC allows stations to use some general programming to meet their Act requirements, such shows are not alone sufficient.\textsuperscript{108} Yet many stations in the CME report were found to have simply given lists of such programs without specific reference to how they filled the needs of children.\textsuperscript{109} The kinds of programs listed were not always what most people would

\textsuperscript{101} Id. at 7.

\textsuperscript{102} Halonen, supra note 12, at 41.

\textsuperscript{103} Center for Media Educ., supra note 12, at 5-6.

\textsuperscript{104} Id. at 8.

\textsuperscript{105} Children's TV Programming Report and Order, supra note 27, para. 21.

\textsuperscript{106} Center for Media Educ., supra note 12, at 8.


\textsuperscript{108} Children's TV Programming Report and Order, supra note 27, para. 25.

\textsuperscript{109} Center for Media Educ., supra note 12, at 9.
consider appropriate for children, either\textsuperscript{110}—how many parents of young children would want them to be educated by \textit{Hard Copy}?

It is easy to see, however, why the broadcasters sampled for this study acted this way. Nothing in the Act said cartoons could not be used as informational/educational/pro-social programming,\textsuperscript{111} and some cartoons probably do meet those standards.\textsuperscript{112} With so little to follow, most broadcasters assumed that they might as well list anything vaguely related to children.\textsuperscript{113}

Broadcasters have given four reasons why they cannot immediately comply with the Act, especially with the slow economy.\textsuperscript{114} Children's shows are often expensive to produce, yet they do not bring in much revenue. Broadcasters argue it takes time to create good children's programs, and two years is just not enough time to judge their efforts.\textsuperscript{115} Also, some stations \textit{had} to air cartoons because they had contractual obligations.\textsuperscript{116} Finally, new programs are being produced, the CME study found,\textsuperscript{117} but these programs are shown infrequently or at inappropriate hours for children to watch.\textsuperscript{118}

\section{C. The FCC Responds}

The FCC began to look into these issues concerning children's television after the CME report came out. Whether the Commission's actions were taken out of shame, in response to

\textsuperscript{110} Cf. id. (\textit{Hard Copy}, \textit{CNN Headline News}, and \textit{The Donahue Show} listed by a station as contributing to children's informational and educational needs).

\textsuperscript{111} The Act does state that children should be protected from overcommercialization on television, and many cartoons are little more than long commercials with a semblance of a plot. Pub. L. No. 101-437, § 101(4), 104 Stat. 996, 996 (1990). But the word "cartoon" never appears in the above Act.


\textsuperscript{113} Halonen, \textit{supra} note 12, at 41.

\textsuperscript{114} Markey Promises Greater Attention to Enforcement of Children's \textit{TV} Law, Daily Rep. for Executives (BNA) at 46 (Mar. 11, 1993).

\textsuperscript{115} \textit{Id.}; see also Joyce Price, \textit{TV Broadcasters Warned to Provide Educational Fare}, WASH. TIMES, Mar. 11, 1993, at A4; Constance Sommer, \textit{Educational TV Programs Lacking, Activists Charge}, L.A. TIMES, Mar. 11, 1993, at F5.

\textsuperscript{116} Sommer, \textit{supra} note 115, at F5.

\textsuperscript{117} Center for Media Educ., \textit{supra} note 12, at 5.

\textsuperscript{118} \textit{Id.}
public demand, or as part of a new, more activist FCC under President Clinton is not clear.\textsuperscript{119} But it does appear the Commission will take the Act more seriously in the future.\textsuperscript{120}

The first step the Commission took was to let broadcasters know they cannot count cartoons toward their educational programming requirement.\textsuperscript{121} Educational means educational, the FCC said, although for the moment it is declining to go much beyond that for an explanation. A program designed to be educational will be in compliance; one that merely happens to have a buried message or a social theme will not fit the standard.\textsuperscript{122}

The Commission also sought comments on the Act,\textsuperscript{123} perhaps unsure of how it should handle a more regulatory stance. The FCC can impose more clearly defined or stricter rules, and may well do so.\textsuperscript{124}

The Commission also signaled a renewed regulatory effort in holding up the license renewal applications of seven stations until they further explain their compliance with the Act.\textsuperscript{125} It would be unusual for the Commission to withhold a license for something other than felonious acts,\textsuperscript{126} but the threat of losing one's license will certainly have broadcasters thinking about how to better comply.

Broadcasters are concerned about the CME study and the recent FCC announcements, but they have little recourse. Congress

\textsuperscript{119} Concerning the Clinton administration's possible views, see generally Andrews, Flintstones and Programs Like It Aren't Educational, FCC Says, supra note 57; Sommer, supra note 115. See also Broadcasters May Feel the Heat in Kidvid Sesh, DAILY VARIETY, Mar. 10, 1993, at 24; FCC Opens Discussion of Children's Television Act, supra note 93, at 3.

\textsuperscript{120} Joseph P. Kahn, Yabba Dabba Don't; Regulators Rap Non-Educational TV for Children, BOSTON GLOBE, Mar. 5, 1993, at 1, 8.

\textsuperscript{121} Children's TV Programming Notice of Inquiry, supra note 14, paras. 6-8.

\textsuperscript{122} Id. para. 8.

\textsuperscript{123} Id. para. 7.

\textsuperscript{124} Andrews, Flintstones and Programs Like It Aren't Educational, FCC Says, supra note 57, at A1.

\textsuperscript{125} See id.

\textsuperscript{126} Andrews, Broadcasters, to Satisfy Law, Define Cartoons as Education, supra note 12, at A1, B8.
strongly backs the idea of greater FCC intrusion into broadcasters’ programming, especially where children are concerned. House telecommunications subcommittee Chairman Edward J. Markey (D-Mass.) stated, “Broadcasters, beware. The new era has begun.”

The broadcast industry may have to brace itself for the worst. At the time this Note was submitted for publication, a bill was to be introduced in the House by Representative Ron Wyden (D-Or.) that would require stations to broadcast an hour of preschool programming every week. Their arguments that new programming takes time will meet with little success, considering that members of Congress already feel stations are taking too long to comply. As one person testified at a 1993 hearing, it took the Public Broadcasting Service less than six months to produce quality children’s television. Broadcasters can only alienate their viewers—especially parents—by resisting governmental efforts to help America’s future—its children.

Commentators express doubts that commercial broadcasters are capable of policing themselves. Broadcasters gave in without much of a fight when the Act was passed in 1990, and they may have to do so again to avoid embarrassment and bad publicity. It appears that neither the government nor the public is on their side.

128. Price, supra note 115, at A4; Markey Promises Greater Attention to Enforcement of Children’s TV Law, supra note 114, at 46.
130. Id. Noted children’s performer Shari Lewis testified, “PBS commissioned their children’s [programming] initiative in May; in September, we were all before the cameras.” Id.
131. Id. In the FCC’s call for comments on the implementation of the Act, the Commission stated, “We continue to believe that licensees must, for the most part, themselves define the appropriate scope of their service to children in their communities.” Children’s TV Programming Notice of Inquiry, supra note 14, para. 5.
132. At recent hearings, Congress was far from friendly toward broadcasters. Children’s television was called everything from “disappointing” to “the video equivalent of a twinkie.” See Oversight Hearing on the Implementation of the Children’s Television Act of 1990 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 103d Cong., 1st Sess. (1993) [hereinafter Oversight
III. REDESIGNING THE ACT TO BETTER MEET ITS GOALS

The FCC recently asked for comments on the Children's Television Act. Specifically, it asked for opinions on how the Commission might better implement the Act, through new, revised rules and clearer explanations of what the rules require. Sometime in 1994 the Commission will announce what it wants from broadcasters concerning children's programming. But based on the problems with the Act already noted, it is likely the Commission will regulate in three main areas: penalties, content, and time.

A. Penalties Could Be Harsher

While the Act is noted for the wide latitude it gives broadcasters, it also gives the FCC great freedom. For example, the FCC may modify the advertising regulations at any time provided that proper notice is given, public comment is permitted, and there is "a demonstration of need." The FCC also may consider broadcasters' advertising and programming compliance when renewing licenses; when violations occur there are no restrictions on what type of penalties the Commission can impose. So far, the FCC has reacted to violations by handing out admonishments and fines, and by delaying the renewal applications of a few stations.

If the Commission is serious about its renewed efforts to enforce the Act, then it will take advantage of its freedom and levy harsher penalties on violators. An admonishment seems

Hearing].

133. *Children's TV Programming Notice of Inquiry*, supra note 14, para. 11.
134. *Id.* paras. 7, 9.
135. Andrews, Flintstones and Programs Like It Aren't Educational, FCC Says, supra note 57, at A20. At the time this Note was submitted for publication, the Commission had not indicated how far it would go in creating new rules or penalties.
appropriate in instances of small violations, as in the WTBS case.\textsuperscript{140} But a heavy fine or license removal for repeat offenders would please supporters of the Act.\textsuperscript{141}

The largest fine the FCC has handed down for a violation of the Act is $20,000.\textsuperscript{142} While this is a fairly substantial amount, it is not enough to get a broadcaster's attention automatically. A station may find a fine of this size is worth it if it recoups the loss by selling more ads per hour than allowed or by programming to audiences other than children. A series of fines, however, might have greater effect. The FCC should follow up on the progress of the stations it has found not in compliance.\textsuperscript{143} If it finds stations have not corrected their errors or are not programming for children, larger fines could be imposed.

When the Act first came into existence, the Commission stated it had the right to audit broadcasters randomly, but that it would not then do so.\textsuperscript{144} Since that time, it has chosen to audit stations without telling them.\textsuperscript{145} Until broadcasters show greater willingness to comply with the Act, the FCC could step up these audits, doing them more often and in greater detail. Everything Congress has said regarding the Act indicates it would support such efforts and any fines that result from them.\textsuperscript{146}

Beyond just fines and admonishments lies broadcasters' greatest fear—the license removal. Currently license renewal is essentially a perfunctory act, with no licenses denied, and very few applications delayed.\textsuperscript{147} If the FCC wants to force compliance with the Act, all it needs to do is introduce the specter of a

\textsuperscript{140} See supra notes 73-77 and accompanying text.
\textsuperscript{141} Lambert, Battelines Drawn on Children's Rulemaking, supra note 11, at 22.
\textsuperscript{142} See Jessell, supra note 65, at 95.
\textsuperscript{143} See Oversight Hearing, supra note 132 (testimony of Peggy Charren, founder of Action for Children's Television).
\textsuperscript{144} Broadcast and Cable Servs.; Children's TV Programming, supra note 71, para. 12.
\textsuperscript{145} See Sukow, supra note 13, at 24.
\textsuperscript{146} See generally Andrews, Flintstones and Programs Like It Aren't Educational, FCC Says, supra note 57; Price, supra note 115; Sommer, supra note 115.
\textsuperscript{147} See Andrews, Broadcasters, to Satisfy Law, Define Cartoons as Education, supra note 12, at B8; Sukow, supra note 13, at 24.
license not being renewed to bring broadcasters in line. This is a strong punishment, and one the Commission would not lightly impose. But for repeat offenders, it seems appropriate. A license to broadcast is granted so the broadcaster can program in the public interest. Congress has determined broadcasting for children is part of the public interest. If the broadcaster cannot meet these standards, license removal is an appropriate response.

Before the FCC takes a license away, it needs concrete evidence of the broadcaster's lack of compliance. The best way for the Commission to get this would be through the information provided by the station itself when it files for license renewal. To make sure it is getting the information it needs, the Commission will have to create more detailed guidelines. As previously discussed, there is no consistency in what broadcasters turn in to demonstrate their efforts to program for children. To remedy this, the FCC could create a sample format for broadcasters to follow, letting them know when lists of programs are appropriate and when more detailed explanations are required. The Commission could also require broadcasters to explain why the show was broadcast when it was, and what audience the broadcaster was targeting. Broadcasters could also be asked to keep separate lists of their efforts to program to children through all-age shows or how they complied by supporting other stations' programming. These areas could also be documented in detail.

148. See Oversight Hearing, supra note 132 (statement of the National Association of Broadcasters) (nearly 15-page statement demonstrating how much broadcasters are worried about possible sanctions).

149. This is exactly how the FCC caught three recent violators. If the stations thought the Commission would be lenient if they admitted their errors, they were mistaken; each station was fined $15,000. All kept their licenses, though. See supra note 69 and accompanying text.

150. Both broadcasters and activists for better children's television would like to see this happen. Oversight Hearing, supra note 132 (statement of National Association of Broadcasters); id. (testimony of Peggy Charren, founder of Action for Children's Television).


152. Cf. Oversight Hearing, supra note 132 (testimony of Peggy Charren, founder of Action for Children's Television) (proposing several requirements for airing children's programming).
with explanations of how they show an effort to reach the child audience.

Obviously, compliance will take a great deal of effort on the part of broadcasters. But when faced with the prospect of losing a license, most will comply.

B. Further Definition of "Educational" Children's Television Is Necessary

Before the Commission starts revoking licenses, it needs to further define informational and educational children's programming.153 It took a step in that direction when it announced that cartoons are not.154 The Commission stated that it wants stations to cite programs that are meant to be educational and informational, not just those that happen to contain a lesson or useful knowledge for children.155

One possible way to define educational would be to limit it to nonfiction programming.156 Of course, this leaves out a wide range of fiction programs that have the power to educate or inform. Others have suggested that no commercially oriented programs count toward the requirement,157 but that could remove shows like Sesame Street or Winnie-the-Pooh, shows that have been merchandised heavily due to their popularity, but that still have the power to educate.158 The Commission could base its decision on whether the show was made around an already-existing toy or game (like Super Mario Brothers or G.I. Joe),159 but that seems a rather arbitrary decision, sure to cut out some deserving programming while allowing in some overly commercial shows. Because of these problems, the Commission might best serve all interested parties by using the nonfiction definition of

153. Id. (opening remarks by the Committee).
154. Children's TV Programming Notice of Inquiry, supra note 14, paras. 6-8.
155. Id.
156. Lambert, Battlelines Drawn on Children's Rulemaking, supra note 11, at 22.
157. Id.
158. See Andrews, Flintstones and Programs Like It Aren't Educational, FCC Says, supra note 57, at A20.
CHILDREN'S TELEVISION ACT

Many supporters of the Act would like to see commercially oriented programs wiped out altogether.\textsuperscript{160} While it is unlikely the Commission would go that far, it does have the power to create more regulations for program-length commercials. The Commission was given authority to make rules about such shows, but declined to adopt a very strict definition of what they are. While most activists would define them as any show built around a game or toy,\textsuperscript{161} the Commission refers to them as "a program associated with a product in which commercials for that product are aired."\textsuperscript{162} To avoid being one of these shows, all a broadcaster must do is not show a commercial for the toy \textit{during} the program. But nothing stops a station from advertising the toy in the programs preceding and following the toy's show.\textsuperscript{163}

If the Commission adopted the less restrictive definition of program-length commercials, broadcasters would face the possibility of having too many ads per hour because the entire program would be an ad. If the Commission wants to force broadcasters into showing fewer commercials and more educational programs, this would be a quick way to do it.

The Commission could also refuse to allow stations to count adult or all-age programs toward their requirement to provide educational programming for children.\textsuperscript{164} The Center for Media Education report found broadcasters highlighting the news as well as all-age shows as being beneficial for children.\textsuperscript{165} While news programs, both local and national, are undoubtedly educational for children sometimes, news shows certainly are not broadcast just for children. It is likely that many news programs do not make sense to younger viewers. The FCC ought to make clear that these

\textsuperscript{160} Lambert, \textit{Battlelines Drawn on Children's Rulemaking}, supra note 11, at 22.
\textsuperscript{161} Lambert, \textit{ACT Challenges Children’s TV Rules}, supra note 55, at 62.
\textsuperscript{162} \textit{Children’s TV Programming Report and Order}, supra note 27, para. 40.
\textsuperscript{163} Lambert, \textit{ACT Challenges Children’s TV Rules}, supra note 55, at 62.
\textsuperscript{164} \textit{Oversight Hearing}, supra note 132 (testimony of Peggy Charren, founder of Action for Children’s Television).
\textsuperscript{165} Center for Media Educ., \textit{supra} note 12, at 9.
kinds of programs can only be used to round out a broadcaster's programming for children. In addition, the FCC could require that a station show how news programming specifically benefits children before such programming would fulfill a station's educational requirement. Such a rule would avoid the problem the Center for Media Education found in its study—stations listing shows such as *Hard Copy* or *The Jerry Springer Show* without saying which episode or broadcast was informational for children.

Categorizing children's programming would help broadcasters create a good mix of programming types. For example, educational programs could make up 30 percent of the children's programming requirement, with informational shows making up another 20 percent, entertainment programs filling up another 30 percent, and the rest left to the station's discretion. Placing limits such as these would prevent broadcasters from showing the same kind of programs over and over, and would perhaps force some creativity.

The FCC could also extend the Act to make age-group programming requirements. One congressman has suggested forcing broadcasters to program to preschoolers one hour a week. If Congress were willing to pass legislation for that age group, other age groups probably would not be far behind. It should be easy enough to divide children into age groups: preschool (2-4), early elementary (5-9), preteen (10-12), early teen (13-15), middle teen (16-18). Making such divisions might even make compliance easier for broadcasters, because it would give them a wider range of options for programming. These divisions would also further the Act's goal of promoting diversity of programming for children.

169. *Id.*
170. *Id.* (opening remarks by Rep. Ron Wyden (D-Or.)).
C. Showing Children’s Television When Children Are Watching

Content restrictions and regulations will not make a bit of difference for children if broadcasters continue to run educational children’s television at hours when children are not likely to be viewers. Therefore, the FCC needs to set guidelines for when children’s programming is broadcast. The Commission could be restrictive about this kind of regulation, perhaps setting up a “children’s viewing hour” every night of the week. Or it could be more general and simply say programs shown after a certain hour at night, say 10 p.m. on weeknights, would not be eligible for consideration at license renewal time. The same rule would be applied to shows shown very early in the morning; no programs before 7 a.m. could be used to show compliance.

If the FCC adopts regulations creating age-group programming categories, then times could be adopted to fit each category. This could allow more flexibility to broadcasters. Preschoolers could be targeted during the day, when they would more likely be at home; programs for older teens could be shown after school or even later at night on the weekends.

Rules like these could mean extra work for everyone involved. The FCC would have more difficulty monitoring stations, and stations would have more headaches trying to keep track of all the categories and times for each one. These rules certainly will not make compliance with the Act any simpler, but they might make children’s broadcasting a little better for children.

IV. Problems with Creating More Children’s Television Regulations

More rules and regulations may sound like the answer to the problems with the Children’s Television Act, but there is no guarantee the FCC will adopt such measures. First, the Commission might not agree these suggestions would work, and even if it

171. Id.
172. Id. (testimony of Peggy Charren, founder of Action for Children’s Television).
173. Id.
did, it may not want to expend the effort. Implementing more rules could require more supervision than the Commission could handle. In these days of budget and staff cuts, there might not be enough people or money to spend on monitoring broadcasters so closely. While the Act is undoubtedly important to the Commission, it is not the only regulation the agency has to administer. Perhaps newer technologies and other areas of the communication world will be of more pressing concern to the FCC.

Even if the Commission would like to implement a slew of new regulations, it might not be able to do so. Broadcasters are sure to rebel against strict rules, especially ones involving what kind of programming they show. While the public may not side with broadcasters on these issues, it is possible courts will. Good intentions aside, the regulation of content and program timing may not pass constitutional standards.

A. The First Amendment Could Prevent Stricter Regulations of Children’s Television

The Act in its present form is apparently constitutional. Broadcasters must air programming in the public interest, because there are not enough broadcast outlets for everyone to use. The rationale for this greater level of intrusion is “spectrum scarcity”—the lack of opportunity for the general public to be heard over the airwaves. Because not everyone can operate a broadcast station, those who do may only do so by acting as a public trustee. Congress and the FCC cannot tell a broadcaster what to program, but they can stop or modify certain kinds of programming where a substantial government interest exists.

174. The general counsel for the National Association of Broadcasters expressed surprise when the Commission announced it would consider strengthening the Act. He referred to the action as “turning back the clock to the 1970s,” when stricter regulations were more common. Andrews, Flintstones and Programs Like It Aren’t Educational, FCC Says, supra note 57, at A20.


176. Id.

177. Id.

178. For example, the FCC can regulate the broadcasting of lewd speech, FCC v. Pacifica Found., 438 U.S. 726 (1978), or the airing of commercial matter, such as
indicated that the protection of children from the evils of advertising and the importance of educating American youth were substantial enough reasons to create the Children's Television Act, and broadcasters apparently did not feel overly burdened by the Act.\textsuperscript{179} While broadcasters have complained about the restrictions imposed by the Act,\textsuperscript{180} there has been no litigation so far, probably due to the fact that the Act has not yet required much action from stations.

A stronger version of the Act could lead to litigation, especially if the FCC imposes more content-based regulations. Rules that will not let broadcasters use cartoons to satisfy the children's programming requirement could be viewed as forcing stations to air a certain kind of programming, something much more direct and specific than the Act now requires.

Similarly, time limitation regulations of that kind force a broadcaster to air a certain kind of programming at a certain time, removing the broadcaster's right to choose what he or she airs. Broadcasters would undoubtedly see such a regulation as infringing on their First Amendment right to speak free from government coercion.\textsuperscript{181}

Congress has not given the FCC the authority to interfere with what broadcasters say once they are licensed.\textsuperscript{182} Courts, too, have noted that once the license is granted, the Commission

\begin{footnotes}

\item[179] Many broadcasters, in fact, backed the Act, perhaps because of its leniency and vagueness. James Hedlund, president of the Association of Independent Television Stations (INTV), said of the Act, "[B]y and large, the commission, with the limited discretion they had, has done a good job that [broadcasters] can live with." Patrick J. Sheridan, \textit{FCC Endorses Children's TV Act}, \textit{Broadcasting}, Apr. 15, 1991, at 90, 90.

\item[180] \textit{See}, e.g., Jessell and McAvoय, \textit{supra} note 55, at 48 ("If children's educational and informational programming can be coerced, why not coerce the same special attention by television for the benefit of other societal groups (e.g., the elderly) . . . ?"); Price, \textit{supra} note 115, at A4 ("Don't shoot all of us for the questionable actions of a few.").

\item[181] \textit{See Oversight Hearing, supra} note 132 (statement of National Association of Broadcasters).


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must allow broadcasters their right to speak free from government control. The only way the Commission can impinge on that right is to have the restriction narrowly tailored to meet a substantial governmental interest.

Congress and the courts have found that the interest in protecting children is substantial. The Act, as currently written, is apparently tailored narrowly enough to be constitutional. But more regulation could easily be seen as too broad because more content restrictions may interfere with what a broadcaster airs, yet might not improve children's television any more than the current rules do.

If one balances the broadcasters' right to program what they want against the government's interest in children, it is not clear that the government should win. It is a question of how substantial the government's interest is, especially if the interest is defined as educating children. Congress cannot promulgate a law inhibiting the broadcasters' right to program what they choose unless there exists a strong reason for doing so. In addition, this power is only to be used when there is no other way to correct the problem.

The main question to be answered is whether television is the cause or the solution to the problem Congress has identified. It is all very well and good to say children are the country's future, and it is important that they catch up with the children of other nations, but as one broadcaster has pointed out, why should broadcasters be responsible for educating them? Congress cannot force broadcasters to become teachers. If education were the problem, then perhaps Congress should appropriate more money to the public school systems. There is no clear relationship

184. Id. at 378.
185. See supra notes 31-32, 36-37, 39 and accompanying text.
187. Id.
188. See Andrews, Broadcasters, to Satisfy Law, Define Cartoons as Education, supra note 12, at B8.
between the aims of the Act and children's programming, which makes it difficult for Congress to substantiate its proposals for more regulation.\(^{189}\)

The current rules of the Act place only an affirmative duty on the broadcast industry to program for children in some way.\(^{190}\) It could be argued, however, that better defining that duty would not be content regulation at all, and therefore would not make the Act susceptible to constitutional challenge. Regulation of children's television may not be a limit at all, as it does not require any certain programming to be broadcast.\(^{191}\) The FCC should not come under attack if it further clarifies the definition of educational and informational television. By proposing that cartoons, all-age shows, and adult news programs should not satisfy the children's programming requirements, no greater burden would be placed on the broadcasters than now exists under the Act. But if the FCC starts telling stations how many educational/informational shows they must program, and how often they may show entertainment for children, the law will be unenforceable. It is too great a restriction, and it will not clearly promote the government's interest in protecting children.

The same is true of time restrictions, other than the most basic ones. It is not too much to ask broadcasters to show programs for children at hours when they will be watching television. The *Pacifica* Court already decided that broadcasters may only air programs unsuitable for children when they will not be tuning in.\(^{192}\) To require the reverse is surely no greater burden for broadcasters. It is common sense that the goals of the

\(^{189}\) *Oversight Hearing, supra* note 132 (statement of Brooke Spector, Vice-President and General Manager WUAB-TV (Cleveland)) (discrediting the Center for Media Education study that indicated broadcasters were not making serious efforts to comply with the Act).


\(^{192}\) *See* FCC v. *Pacifica Found.*, 438 U.S. 726, 749-50 (1978) (taking into account time of day radio program aired).
Act can never be met if children are not exposed to the programming designed for them.

But a regulation imposing strict time restrictions could be going too far. Setting specific times every day when programs for children must be broadcast takes away all freedom of decision. The interest in providing quality television for children is not so great that the government has the right to intrude this deeply into a broadcaster’s decisionmaking process.

In no other area does the FCC tread so far into programming. The Commission has often told stations what they cannot show, but time restrictions go much further. Such rules keep a broadcaster from showing a different program—one that might also have high quality and be of interest to another group. The FCC does not have the power or the right to set tight restrictions on when stations can program for children.

Whether Congress or the Commission can classify children by age groups within the Act’s rules is a more interesting question. No substantial governmental interest for doing so has been put forward, but such an interest could exist if the FCC compiled data showing such regulation is important. However, the fact that different age groups have different needs would not be a sufficient governmental interest, unless it could be shown that the educational needs of certain age groups are currently not being met (which seems highly likely). More information would be required to prove such a theory.

The FCC could satisfy many viewers concerned with children’s television if it adopted regulations to rid television of the much despised program-length commercial. Commercial speech has less constitutional protection than other kinds of

193. See Oversight Hearing, supra note 132.
194. Especially happy would be members of the now-defunct Action for Children’s Television, who have referred to the Act as “a failure.” Flint, supra note 12, at 40. ACT had consistently petitioned the Commission to reconsider and revise its definition of “program-length commercials.” Lambert, ACT Challenges Children’s TV Rules, supra note 55, at 62.
speech, and therefore is more easily regulated. Adopting a tougher definition of the "program-length commercial" would certainly be within the government's interest, because the Act is designed to protect children from the dangers of commercials. While defining a "program-length commercial" as any show created around a toy is less narrow than the current definition, it is not overly restrictive. Even the toymakers admit such shows are just another way of marketing their products.

The problem with regulating this way is that it discriminates between commercial shows and shows that were not originally commercial, but which now have toys to go along with them, such as *Sesame Street*. It does not seem consistent that *Sesame Street* can continue to be "educational" just because it was an educational program before it produced a line of dolls and toys, while *G.I. Joe* must be considered purely "commercial" because the toy came before the cartoon series.

If the FCC were to institute a rule prohibiting programs created around established toys, marketers could easily subvert the rule by creating programs featuring a not-yet marketed toy. The toy company could then start selling the toy right after the show began to air. Of course, this action could be risky because the toy has not yet proven popular, but toymakers looking for more sales would probably do whatever they deem necessary to sell their products.

The potential failure of such a rule would likely keep the FCC from ever passing it. But the FCC could make other rules that perhaps limit the time and number of program-length commercials that could be shown. Such limitations would probably pass the "substantial governmental interest" test without placing too much of a burden on broadcasters. This type of rule would not

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196. Peggy Charren, Whose Hand Rocks the Cradle?, 56 U. CHI. L. REV. 1251, 1255 (1988) (quoting a marketing director from Tonka Toys as saying, "We believe that in order to keep kids buying GoBots, we needed to do a TV series.").

197. Steiner, supra note 159, at 1270.
stop broadcasters from showing commercially oriented cartoons; it would just limit the times they could be shown.

Many of the regulations suggested would likely survive constitutional challenge, but broadcasters might have one more valid argument. With the proliferation of media available—cable channels, videocassettes, and interactive television, to name a few—broadcasters could argue that not only is spectrum scarcity an obsolete idea, but so is the notion that children are not getting what they need from television. Cable channels are full of kids’ programs ranging from the Discovery Channel to the child-oriented Nickelodeon network. The FCC itself espoused such an idea back in 1985 when cable was available to an even smaller percentage of homes than it is now.

Still, the risk that some children would not receive cable or have access to other media exists. Supporters of the Act would not want to see the child audience divided into those who can afford educational television and those who cannot. Until cable and VCRs become as common as telephones, this argument will not be taken seriously. Broadcasters must program in the public interest no matter what their actual competition is doing.

B. Problems with Content Definition

If content-based regulations were constitutional, they might still be hard to enforce or, for that matter, write. Defining educational television too narrowly would not serve the purposes of the Act, because there would be no room for growth. Broadcasters are not risk takers, so they probably would find the least objectionable programming format and stick with it—forever. Diversity of programming is not served by setting narrow limits.

198. See Kahn, supra note 120, at 8.
200. Kahn, supra note 120, at 8 (roughly 60% of households have cable television, leaving many children without access to that medium).
201. Id.
202. See generally Andrews, FCC Flunks Fred Flintstone, supra note 112, at 2 (suggesting that the line between education and entertainment is blurry).
Of course, defining the Act broadly has not been successful either.203 Finding the middle ground will be a difficult task for the FCC, especially when one considers that most of those making suggestions on how to enforce the Act have a vested interest in the final outcome.

Requiring too much educational programming could even cause a backlash among the viewers; children do not want to watch the same kind of show all the time any more than adults do. Driving them away from children's television might be helpful for their education, but not necessarily. Children might just watch adult programs instead.

While the Act encourages educational programming, it cannot go so far as to wipe out entertainment programs for children.204 Television is not school, nor should it be. It has an incredible hold over people, especially children,205 but not so great a hold that it must be taken over by the government and used only for educational purposes. The FCC must keep in mind that no matter how great the urge to regulate, the regulation must accomplish something. Regulations will not protect children unless they are artfully crafted to do so.

C. How Much Can the Broadcaster Bear?

With any regulations come market concerns. If the FCC forces broadcasters to create new children's shows—shows without a built-in commercial sponsor—how will the broadcasters pay for them?206 The fact that stations will have to create new

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203. See generally Brooks Boliek, Study: Maryland B'casters Flunk Kids TV Standards, HOLLYWOOD REP., July 28, 1993, at 1; Wharton, supra note 127, at 1; Center for Media Educ., supra note 12.

204. Indeed, the FCC has stated, "The primary objective of qualifying 'core' children's programming should be educational and informational, with entertainment as a secondary goal." Children's TV Programming Notice of Inquiry, supra note 14, para. 8.

205. Children are said to spend as much time in front of the television as they do in the classroom. S. REP. NO. 227, supra note 191, at 5; see also Oversight Hearing, supra note 132 (statement of Rep. Edward J. Markey (D-Mass.)).

206. See Andrews, Flintstones and Programs Like It Aren't Educational, FCC Says, supra note 57, at A20 (broadcasters may have to produce more programming with limited commercial and profit potential).
shows—not rely on old reruns—will also be costly. Because of their limited potential audience, these new programs will not have the ability to generate profit as well as all-age shows.

Over-the-air stations could lose out to cable television systems, which do not receive licenses and therefore cannot be so sanctioned for not following the Act. If the audience did not watch the new educational programs, broadcast stations would lose advertising revenue. The advertisers may go to cable if cable's audience grows and stations' viewers diminish.

In the past, the FCC has almost gone out of its way to ensure that broadcast television survives against the onslaught of cable television. But broadcast television may be losing its favored position. A U.S. representative on the House telecommunications subcommittee stated that producing quality children's shows would be like a "payback" from broadcasters for all the benefits the industry has received in the past. The era of broadcast protectionism could be over, and broadcasters may have to learn how to compete with cable. If the market will not support over-the-air television as well as it did before cable, broadcasters will have to scale down their industry.

Broadcasters could help themselves by using another section of the Children's Television Act to help pay for the new programs.

207. Id.
208. Id.
209. Id.
210. Id.
211. For instance, the FCC has attempted to force cable systems to carry over-the-air stations as part of their programming (known as "must-carry"). See Century Comm. Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987) (less restrictive must-carry rules still unconstitutional because lack of demonstrated need for them), cert. denied, 486 U.S. 1032 (1988); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985) (FCC proposed must-carry rules violate the First Amendment because they are overbroad and unnecessary), cert. denied, 476 U.S. 1169 (1986). The FCC has tried to regulate in other ways as well. See Home Box Office v. FCC, 567 F.2d 9 (D.C. Cir.) (FCC cannot regulate the number and age of films and sporting events shown by a cable programmer), cert. denied, 434 U.S. 829 (1977); National Ass'n. of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601 (D.C. Cir. 1976) (FCC cannot regulate cable television system used for two-way communication because such a system is a common carrier). But see United Video, Inc. v. FCC, 890 F.2d 1173 (D.C. Cir. 1989) (FCC may enforce syndicated exclusivity regulation on cable television systems).
212. Wharton, supra note 127, at 1 (statement by Edward J. Markey (D-Mass.)).
they must produce. The Act also established the National Endowment for Children’s Educational Television, which provides grants to those wishing to produce educational programming for children. The catch is that grants are given only to programs that will be aired on public or noncommercial television for two years after the show’s creation. After that time, the programs may be aired on commercial stations (as long as the programming is not interrupted with commercial advertisements).

If Congress and the FCC decided to help broadcasters a little more, they could rewrite the endowment rules to provide some funding for commercial broadcasters. If Congress were serious about promoting educational television for children, all broadcasters should be able to receive funding to create such programming. Noncommercial stations may receive grants for children’s programs because they lack the money to produce quality shows. If commercial broadcasters could show they have the same problems, they should be able to receive some funding as well. Congress should help all broadcasters as long as the market cannot bear the costs of creating educational children’s programming. As a result, it is not just the broadcasters who could lose in this market situation, but the children as well.

CONCLUSION

The future of the Children’s Television Act remains uncertain. The FCC’s recent call for comments on how to implement the Act indicates that even the Commission is not sure what should be done to make television a more educational experience for young viewers. Congress appears to want to create more rules for promoting educational programs, but more rules will not

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216. See Pub. L. No. 101-437, § 201, 104 Stat. 996, 998 (1990) (“[E]ducational television programming for children is aired too infrequently either because public broadcast licensees and permittees lack funds or because commercial broadcast licensees or cable television system operators do not have the economic incentive . . . .”).
217. See supra notes 127-30 and accompanying text.
necessarily solve the problems of the overcommercialization of children’s television and the lack of quality shows for children.

Instead, better definitions of what broadcasters should be doing will help if the Commission can ever decide exactly what educational television includes. By refusing to count cartoons as educational programming, the Commission has made an important first step toward making television more than just entertainment. If the Commission makes broadcasters air educational programs at times when children will be watching, the FCC will have taken another step in the right direction.

The Commission may enforce its goals through the use of fines and the threat of license delay or removal. But if the Commission abuses its power and goes too far by creating rules no one can live with or implement, there will be litigation. Broadcasters will not tolerate having their freedom taken away, and courts will not allow restrictive rules to stand if the FCC cannot prove regulations are absolutely necessary.

Ultimately, a compromise between the Commission and broadcasters is likely. The Commission can gain concessions from broadcasters if they work together, and broadcasters can avoid court battles where they might win their right to free speech but lose respect from the public. Such an alliance led to the enactment of the law in 1990. The Commission must be careful, though, to make sure that a compromise has some meaning and use. If new regulations fail to help the cause of children’s television, another generation of children could be lost.