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ALERT

Children's Programming Commercial Limits Violations Result in $3M Fine for Broadcasters

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For one of our authors, their kids' current favorite treat is a chocolate bar sold by a popular YouTube personality (and philanthropist!). The kids know about this particular chocolate bar because the personality promotes it during his videos. On YouTube, this practice of "host selling" likely results in a bigger payday for the personality (and smaller bank accounts for parents). On broadcast television, it would result in a fine.

On September 6, 2024, the Federal Communications Commission (FCC or Commission) released a Forfeiture Order imposing a $3,334,000 total fine against licensees of over 100 TV stations (collectively, the "Broadcasters") for willfully and repeatedly violating section 73.670 of the Commission's Rules, which limits the commercial time in programming directed to children ages 12 or under. The Forfeiture Order, adopted by a 3-2 vote down party lines and over strong dissents from Commissioners Carr and Simington, also evidences how two recent U.S. Supreme Court decisions could impact future FCC enforcement actions.

Background: Children's Programming Rules

Section 73.670 of the Commission's Rules limits the amount of commercial material that can be aired during children's television programming. Specifically, the Commercial Limits Rule restricts commercial material to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays. Stations are also forbidden to air a commercial in a children's program that features goods, services, or characters associated with that program. Violating this restriction transforms the program into a "program-length commercial" – meaning that the FCC will count the entire program as commercial

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time, regardless of whether the minutes devoted to advertisements are actually below the time cap for the program.

The Violation: Hot Wheels Commercials

In their license renewal applications, the Broadcasters disclosed multiple instances in which commercials for a "Hot Wheels Super Ultimate Garage" toy aired during episodes of the children's program *Team Hot Wheels*. After investigating the matter, the Commission concluded that the Broadcasters "willfully and repeatedly violated section 73.670 of the Rules by airing a commercial for a Hot Wheels-themed toy during a Hot Wheels-themed show multiple times." In so finding, the FCC found unavailing the claim by one of the Broadcasters that "a single miscommunication" "not received by the Traffic department" had led to the "inadvertent" airing of the commercials. Additionally, the FCC concluded that certain of the Broadcasters that received the problematic program and commercial material through programming agreements were "not less accountable" because "legal responsibility for rule violations always rests with the licensee, not any upstream network or syndicator."

Dissenting Views

Commissioners Carr and Simington issued separate dissents to the Forfeiture Order, citing recent Supreme Court cases *Loper Bright Enterprises v. Raimondo* and *SEC v. Jarkesy*. In *Loper Bright*, the Supreme Court overturned the decades-old *Chevron* doctrine under which courts gave deference to statutory interpretations by federal agencies. In *Jarkesy*, meanwhile, the Supreme Court held that a party was entitled to a jury trial before it could face a monetary penalty.

In his dissent, Commissioner Carr noted that FCC "enforcement practices are at a fork in the road" and that the "FCC is on thinning ice when it decides the legality of its own enforcement actions involving forfeitures." Commissioner Carr was particularly critical of the methodology the agency used to calculate the forfeiture. Commissioner Simington went even further, taking the position that "[u]ntil the Commission formally determines the bounds of its enforcement authority," he is "obligated to dissent from any decision purporting to impose a monetary forfeiture."

The three Democratic Commissioners responded to these arguments in a footnote within the Forfeiture Order, arguing that the authority under which the Commission issues fines is distinct from that of the U.S. Securities and Exchange Commission, which the Court found problematic in *Jarkesy*.