

COMMENT

Grand Theft Ore: The Constitutionality of Advergame Regulation

In recent years, companies have increasingly embraced alternative forms of marketing that deviate from the conventional advertising model. One new type of marketing that has received particular attention is “advergames.” The term—a combination of “advertisement” and “video games”—refers to video games created by companies to promote their products or brand. The use of advergames reflects a broader trend in marketing practices away from segmented advertisements and toward advertising messages that are integrated into what have traditionally been viewed as forms of highly protected noncommercial speech.¹ As the media landscape becomes increasingly filled with advertising hybrids—types of media that are essentially advertisements but are presented as, for example, movies, books, or songs—courts will have to decide how regulations of these hybrids should be evaluated.²

This Comment explores that issue by analyzing advergames used to promote unhealthy food to children. Because the use of these advergames has

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1. Another manifestation of the growing use of advertising hybrids is what could be termed “adverfilms.” The most prominent examples have been produced by BMW, which hired high-profile movie directors to create a series of short films to promote its products. These films feature BMW cars, along with famous actors, and are distributed via BMW’s website. See Phil Patton, *Lights, Camera, Traction: The Car as Film Star*, N.Y. TIMES, Feb. 15, 2002, at F1 (“A new strategy is for automakers to make their own films. . . . [T]he advantage for car companies rolling their own films: they can get rid of those last vestiges of plot and character that distract from the car.”).
 2. Advertising hybrids differ from product placement in a fundamental way. With product placement, the creation of the central creative work is initiated and controlled by someone other than the advertiser—such as a filmmaker or author—and the advertiser pays to have its product featured in that work. By contrast, with advertising hybrids, the central work is commissioned and controlled by the advertiser.

already prompted calls for government regulation,³ this context provides an ideal vehicle for analyzing a vital but unexplored legal question: What First Amendment standard should apply to regulations of advergames? To address this question, this Comment will examine two highly unsettled areas of First Amendment law: the appropriate level of scrutiny for evaluating regulations of video games, on the one hand, and commercial speech, on the other. Applying these aspects of First Amendment doctrine to restrictions on advergames, this Comment proposes a general framework for how courts should review First Amendment challenges to regulations of advertising hybrids.

Part I explains the nature of advergames, why they have become central to advertising and marketing practices (including those for unhealthy food aimed at children), and what types of regulation may soon be applied to them. Part II examines a potentially major obstacle to the regulation of advergames: the line of recent federal cases that apply heightened First Amendment protection to video games. This Comment argues that these cases do not present an insurmountable barrier to the regulation of advergames because they do not hold that video games are a per se category of highly protected speech. Rather, properly read, these cases hold that video games are considered highly protected speech for the purposes of First Amendment analysis only if they have certain characteristics such as narratives, themes, and sophisticated visual and auditory elements. Because most, if not all, existing advergames do not possess these characteristics, this Comment concludes that they do not qualify for the heightened First Amendment protection given to movies, books, and some video games. As a result, Part III asserts that regulations of advergames should be assessed using the less restrictive standards for evaluating limitations on commercial speech, under which it would be possible for the government to regulate the use of advergames that promote unhealthy food to children. The Conclusion then discusses the broader implications of this argument for other types of advertising hybrids.

I. THE NATURE OF ADVERGAMES

Unlike traditional video games such as *Grand Theft Auto*—which now rival movies in the level of sophistication of their narratives, artwork, musical components, and production values⁴—advergames are typically rudimentary, involving relatively simplistic animation and music as well as minimal plot or

3. See Melanie Warner, *Guidelines Are Urged in Food Ads for Children*, N.Y. TIMES, Mar. 17, 2005, at C7.

4. See, e.g., Ben Rayner, *Between Games and Movies, the Line Is Blurred*, TORONTO STAR, Jan. 11, 2002, at H3.

character development. They feature the product in a prominent role and are often made available on the company's website or on general online gaming websites.⁵ While advergames have become increasingly popular in a range of industries,⁶ food companies have seized upon them with particular zeal to market unhealthy food—including candy, cookies, cereal, fast food, and soda—to children. Nabiscoworld.com, for instance, offers a range of advergames that incorporate its products, including *Oreo Dunking*, which challenges the player to catch as many Oreos as possible in her glass of milk.⁷ On candy company Lifesavers's website, a child can play *Boardwalk Bowling*, an electronic version of Skee-Ball in which the player bowls a ball into holes that resemble Lifesavers candies.⁸

Food companies, like those in other industries, have embraced advergames as a marketing tool in recent years for four major reasons. First, advergames are a more cost-effective means of marketing than traditional types of advertising. They are cheaper to develop and the expense of hosting them on websites is minimal, especially in comparison to commercial airtime.⁹ Second, because children are spending more time on the Internet and playing video games, advergames are a particularly effective way for marketers to reach young people¹⁰ and hold their attention.¹¹ Third, according to some experts, as a result of the games' interactivity, players are more likely to retain the advertising

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5. For an example of an advergame on a general gaming website, see M&M's advergame *Flip the Mix*, <http://mms.kewlbox.com> (last visited Sept. 3, 2005).
 6. For examples of other industries that use advergames to market their products, see Michael McCarthy, *Disney Plans To Mix Ads, Video Games To Target Kids, Teens*, USA TODAY, Jan. 18, 2005, at 6B.
 7. The Nabisco advergames can be accessed at <http://www.nabiscoworld.com/Games>. The *Oreo Dunking* advergame, in particular, received a great deal of media attention. See *Morning Edition: Kraft Food Says It Will Stop Advertising Unhealthy Food to Children, but Stealth Advertising Is Increasing* (NPR radio broadcast Feb. 3, 2005) (transcript on file with author).
 8. *Boardwalk Bowling*, <http://www.candystand.com/games/gamepage.aspx?gameid=141> (last visited Sept. 3, 2005).
 9. See Sarah Sennott, *Customer Placement*, NEWSWEEK, Nov. 29, 2004, at 59 (Int'l Ed.) ("After the initial cost of production (anywhere from \$30,000 to \$500,000), advergames can run virtually free for years.").
 10. See Chris Seper, *Online Games Play Up to Advertisers: 'Advergaming' Takes Soft-Pedal Tack in Reaching Young Audiences*, PLAIN DEALER (Cleveland), May 24, 2002, at C1.
 11. See Hiawatha Bray, *And Now, Kids, a Web Game from Our Sponsor*, BOSTON GLOBE, July 30, 2004, at D1 ("While a typical TV commercial lasts 30 seconds, a typical [player of certain advergames] plays for seven to 10 minutes, ample time for the sponsor's message to sink in.").

messages of advergames than those of traditional commercials.¹² Fourth, unlike traditional commercials, advergames are conducive to viral marketing: If players enjoy a game, they can forward it to friends through e-mail and encourage them to play.¹³

As food companies' use of advergames has grown exponentially, various individuals and groups concerned about the role of the media in fueling the rising childhood obesity rate have called on the government to more aggressively regulate advergames and other forms of marketing. In particular, they have pushed Congress to give the Federal Trade Commission (FTC) authority to regulate advergames and other marketing practices¹⁴—authority that Congress denied the agency in the early 1980s.¹⁵ Senator Tom Harkin has proposed legislation—the Healthy Lifestyles and Prevention (HeLP) America Act—that would do just that. The Act would empower the FTC to issue regulations that restrict the advertising or marketing of food or beverages to children if the FTC found evidence that the consumption of those products was detrimental to their health. The proposed legislation would authorize the FTC to regulate advertising in traditional media, such as on television and in magazines, as well as in nontraditional media, such as the Internet, thus giving the agency the power to regulate advergames.¹⁶ Because advergames designed to promote unhealthy food to children already face potential regulation, they provide a useful means to examine the legal issues implicated by the regulation of advergames generally.

12. See Ellen Edwards, *Plug (the Product) and Play: Advertisers Use Online Games To Find, Entice Customers*, WASH. POST, Jan. 26, 2003, at A1 (quoting one expert as saying, “[y]ou can engage people in your brand for 15 to 20 minutes [with advergames]. . . . And there’s greater retention when it’s interactive”).

13. See Shelley Emling, *The Ad Game: Online Marketers Race To Reach Consumers Through Interactive Games*, AUSTIN AM.-STATSMAN, Sept. 9, 2001, at K1.

14. See Warner, *supra* note 3.

15. After the FTC proposed a controversial rule that would have greatly restricted television advertisements of unhealthy food products directed at children, Congress revoked the agency’s authority to regulate children’s advertising. See Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 11(a)(1), (3), 94 Stat. 374, 378-79 (1980) (codified as amended at 15 U.S.C. § 57a(h), 57a(b)(1) (2000)).

16. Healthy Lifestyles and Prevention (HeLP) America Act, S. 1074, 109th Cong. § 302 (2005). Section 302 of the Act would rescind the existing law on the FTC’s authority, 15 U.S.C. § 57a(h) (2000), which prevents the agency from regulating advertising or marketing aimed at children.

II. THE VIDEO GAME CASES: OBSTACLES TO REGULATION?

Due to the increasingly important role that advergames play in food companies' marketing practices, these companies are likely to strongly oppose any effort, such as the HeLP America Act, to regulate advergames. One avenue of resistance they are almost certain to pursue is challenging the constitutionality of advergame regulations in the wake of a series of recent federal court cases that have held that video games are highly protected speech, akin to books and movies, and thus can be regulated only if the restrictions survive heightened First Amendment scrutiny.

If these cases had indeed created a categorical protection for video games¹⁷—as food manufacturers will surely argue and other commentators have asserted¹⁸—then regulations of advergames would be highly vulnerable to constitutional challenge. However, while the outcomes of these cases may suggest that video games enjoy full First Amendment protection, their reasoning indicates otherwise. Under the logic employed by these cases, video games are considered fully protected speech only if they possess certain characteristics: book- or movie-like qualities such as narratives, themes, and dialogue, or well-developed visual and musical components resembling those found in other forms of protected speech.

A review of cases representative of federal courts' treatment of video games highlights the centrality of this characteristic-based analysis to determinations of whether a particular video game is fully protected speech. In *Interactive Digital Software Association v. St. Louis County*, for instance, the Eighth Circuit struck down as unconstitutional an ordinance that banned selling or renting violent video games to minors without parental consent.¹⁹ In its discussion of the constitutional status of video games, the court indicated that it was the book- and movie-like characteristics of *DOOM* and the other video games at

17. While the Supreme Court has yet to rule on whether video games are fully protected speech under the First Amendment, various lower federal courts have addressed this issue. Some early cases found that video games are not protected speech. *See, e.g., Rothner v. City of Chicago*, 929 F.2d 297 (7th Cir. 1991); *Am.'s Best Family Showplace Corp. v. City of New York*, 536 F. Supp. 170 (E.D.N.Y. 1982). However, these cases largely have been overruled or distinguished by the more recent cases discussed in this Section. *See infra* notes 19–25 and accompanying text.

18. For instance, one article characterizes *Video Software Dealers Association v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004), as “an opinion solidifying the First Amendment protection of the computer and video game industry.” Clay Calvert & Robert D. Richards, *The 2003 Legislative Assault on Violent Video Games: Judicial Realities and Regulatory Rhetoric*, 11 VILL. SPORTS & ENT. L.J. 203, 229 (2004).

19. *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 959–60 (8th Cir. 2003).

issue in that case—including their storylines, character development, and dialogue—that rendered them fully protected speech.²⁰ Similarly, the Seventh Circuit, in finding that *Mortal Kombat 3*, *House of the Dead*, and the other video games at issue in a case before it were protected speech, highlighted the numerous parallels between those video games, on the one hand, and literature and movies on the other, including that they all contained stories, messages, and age-old themes.²¹

In finding that modern video games are entitled to full First Amendment protection, many courts have noted how far such games have evolved from their forerunners, which had been found to be outside the ambit of First Amendment protection in earlier cases. These initial generations of video games, often simply rudimentary digital versions of popular games such as chess and pinball, were limited in scope and lacked any auditory or visual sophistication—much like the advergames of today. For example, in *Video Software Dealers Association v. Maleng*, the District Court for the Western District of Washington stated, “[t]he early generations of video games may have lacked the requisite expressive element, being little more than electronic board games or computerized races.”²² By contrast, the court explained, “[t]he games at issue in this litigation . . . frequently involve intricate, if obnoxious, story lines, detailed artwork, original scores, and a complex narrative which evolves as the player makes choices and gains experience.”²³ Similarly, in finding that tort claims against a video manufacturer were precluded by the First Amendment, the District Court of Connecticut stated, “the label ‘video game’ is not talismanic, automatically making the object to which it is applied either speech or not speech.”²⁴ The court then explained that “[w]hile video games that are merely digitized pinball machines are not protected speech, those that are analytically indistinguishable from other protected media, such

20. *Id.* at 957.

21. *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577-78 (7th Cir. 2001) (characterizing the video games at issue as “stories” and as having “a message, even an ‘ideology,’ just as books and movies do”).

22. *Maleng*, 325 F. Supp. 2d at 1184. One of the games before the court in this case was *Resident Evil II*. See Plaintiff’s Motion for Summary Judgment at 3, *Maleng*, 325 F. Supp. 2d 1180 (No. C03-1245L). In reviewing this game, the *Los Angeles Times* noted its “story,” “cast of characters who advance the story in different ways,” and “cinematic feel.” Aaron Curtiss, *Resident Evil 2 Exercises Players’ Trigger Fingers and Brains*, L.A. TIMES, Mar. 12, 1998 (Weekend ed.), at F41.

23. *Maleng*, 325 F. Supp. 2d at 1184.

24. *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 181 (D. Conn. 2002). The court took notice of the “plot,” “characters,” and sophisticated visual and auditory components of the game at issue in this case, *Mortal Kombat*.

as motion pictures or books, which convey information or evoke emotions by imagery, are protected under the First Amendment.”²⁵

The analysis in these cases shows that despite the trend in recent years to recognize video games as protected speech, most existing advergames would not receive such protection. Unlike the video games at issue in these cases, many, if not all, advergames do not possess complex narratives, themes, and characters, or the highly sophisticated visual or auditory elements that courts have indicated must be present for a video game to qualify for full First Amendment protection. As long as advergames lack these characteristics, the First Amendment, as interpreted in the video game cases, imposes no barrier to their regulation.

III. THE PROPER FIRST AMENDMENT STANDARD

Though most existing advergames are not fully protected speech under the reasoning of the video game cases, the government cannot regulate them with impunity. As advertisements, advergames are commercial speech and, consequently, any restrictions on them must survive the reduced First Amendment scrutiny applied to limitations on such speech. This Part argues that it is possible to develop regulations of advergames that pass constitutional muster, provided that the government has a sufficiently strong interest in regulating the products promoted by a particular type of advergame. To support this argument, this Part examines how restrictions on the use of advergames that promote unhealthy food to children would fare under the commercial speech doctrine.

The constitutionality of regulations of commercial speech is analyzed using a four-part test developed by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.²⁶ Under this test, a court first establishes whether the speech is within the purview of the First Amendment by determining if it “concern[s] lawful activity and [is not] misleading.”²⁷ It then assesses whether the interest asserted by the government is “substantial.”²⁸ If the answers to both those inquiries are affirmative, the court then ascertains “whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is

25. *Id.*

26. 447 U.S. 557 (1980).

27. *Id.* at 566.

28. *Id.*

necessary to serve that interest.”²⁹ As various commentators have noted, the Court has recently applied the test with increasing severity.³⁰ In 2001’s *Lorillard Tobacco Co. v. Reilly*, for instance, the Court invalidated Massachusetts’s tobacco advertising regulations—which had been justified based on the government’s interest in preventing the use of tobacco by children—under the fourth prong of *Central Hudson*.³¹

The key to developing constitutional regulations of advergaming that promote unhealthy food to children lies in the third and fourth prongs of the *Central Hudson* test.³² In order to satisfy the third prong, the *Lorillard* Court emphasized that the government must base its regulations on more than “mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”³³ In *Lorillard*, the Court found that Massachusetts had met this burden, and the FTC should be able to do so as well for regulations of advergaming promoting unhealthy food to children. Numerous studies link the advertising of unhealthy food to children to the growing rate of childhood obesity.³⁴ More specifically, the Kaiser Foundation is currently conducting a study on the effects of advergaming on children’s health.³⁵ Provided that the FTC carefully and thoroughly compiles such evidence of the link between advergaming and the health of children, it should be able to satisfy the third prong with little difficulty.

The more challenging, but still surmountable, obstacle is prong four of the *Central Hudson* test. While the Court has “made it clear that ‘the least restrictive means’ is not the standard” under this prong, and that case law instead requires merely “a reasonable ‘fit between the legislature’s ends and the

29. *Id.*

30. See, e.g., *Developments in the Law—Corporations and Society*, 117 HARV. L. REV. 2169, 2275-82 (2004).

31. 533 U.S. 525, 561 (2001).

32. It is highly unlikely anyone would dispute that regulations of advergaming satisfy the first two prongs of the *Central Hudson* test.

33. *Lorillard*, 533 U.S. at 555 (quoting *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 188 (1999)).

34. See, e.g., THE HENRY J. KAISER FAMILY FOUND., THE ROLE OF MEDIA IN CHILDHOOD OBESITY (2004), available at <http://www.kff.org/entmedia/upload/The-Role-of-Media-in-Childhood-Obesity.pdf>; INST. OF MED., PREVENTING CHILDHOOD OBESITY: HEALTH IN THE BALANCE (2005), available at <http://www.nap.edu/books/0309091969/html>.

35. See Pat Leonard, *Marketing May Fatten More Than Profits*, S. BEND TRIB. (Ind.), May 25, 2005, at C8.

means chosen to accomplish those ends,”³⁶ the Court has invalidated regulations in two recent commercial speech cases because they were overly broad.³⁷ In *Lorillard*, these overly broad restrictions included advertising regulations that would have “constitute[d] nearly a complete ban on the communication of truthful information” about tobacco products to adults in some geographic areas and would have prevented tobacco retailers from orally promoting their products.³⁸ Nonetheless, it is still possible for the FTC to promulgate rules regulating advergames that promote unhealthy food to children, as long as the FTC, in doing so, resists the temptation to regulate all advergames. Moreover, in the process of drafting the rules, the FTC must engage in a deliberate process that demonstrates sensitivity to the speech interests involved.³⁹ Thus, instead of banning advergames aimed at children that promote unhealthy food, the FTC could draft rules that require the operators of websites containing such advergames to obtain parental permission before children under the age of eighteen are allowed to play them.⁴⁰ Unlike the tobacco regulations at issue in *Lorillard*, this narrower regulatory scheme would not “unduly impinge on the speaker’s ability to propose a commercial transaction and the adult listener’s opportunity to obtain information about products.”⁴¹

Therefore, while the law on commercial speech imposes some limitations on the type of rules the FTC could develop, it does not prevent the agency from regulating advergames that promote unhealthy food to children. Similarly, the FTC could also restrict the use of advergames that promote other types of products, such as toys, provided that the government has a substantial interest

36. *Lorillard*, 533 U.S. at 556 (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995)).

37. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371-72 (2002); *Lorillard*, 533 U.S. at 565.

38. *Lorillard*, 533 U.S. at 562-63.

39. The *Lorillard* Court criticized “the process by which the Attorney General adopted the regulations,” stating that the process did “not demonstrate a careful calculation of the speech interests involved.” *Id.* at 562.

40. In doing so, the FTC could draw on the regulations it promulgated pursuant to the Children’s Online Privacy Protection Act (COPPA) of 1998, 15 U.S.C. §§ 6501-6505 (2000). Among other provisions, these regulations require that operators of websites or online services directed at children, and website operators who knowingly collect or maintain personal information from children, obtain parental permission before they collect, use, or disclose that personal information. Children’s Online Privacy Protection Rule, 16 C.F.R. § 312.3 (2005).

41. *Lorillard*, 533 U.S. at 565. Similarly, such a scheme is less likely to be found “more extensive than is necessary” to serve the government’s interest, which proved fatal to the regulations of drug advertising at issue in *Thompson*. *Thompson*, 535 U.S. at 371 (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980)).

in doing so, offers significant evidence supporting its claim that the regulations directly advance that interest, and enacts regulations that are not overly broad.

CONCLUSION

This Comment's analysis of advergaming regulation suggests that courts should refrain from treating advergaming and other advertising hybrids as highly protected noncommercial speech. Nor should the growth of advertising hybrids serve as the catalyst for abolishing the distinction presently drawn between commercial and noncommercial speech, resulting in a regime in which restrictions on all types of protected speech, including commercial speech, would be evaluated under strict scrutiny. Instead, courts should evaluate each advertising hybrid to determine whether it possesses the requisite characteristics—such as narratives, themes, dialogue, and other creative elements—to be considered the equivalent of highly protected noncommercial speech. If the advertising hybrid does possess these characteristics, any restriction of it should be evaluated using strict scrutiny; if not, the reduced scrutiny currently applied to regulations of commercial speech should apply. This approach ensures that communication deserving of heightened protection receives it, but communication not entitled to that level of protection does not.

SETH GROSSMAN