

BEFORE THE FEDERAL TRADE COMMISSION

In re: National Geographic Kids)
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_____)

Docket No. _____

PETITION TO PROHIBIT DECEPTIVE PRACTICES

* * *

Submitted by the

Center for Science in the Public Interest

December 1, 2004

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Pursuant to Section 4(d) of the Administrative Procedure Act, 5 U.S.C. § 553(e) and 16 C.F.R. § 2.1, the Center for Science in the Public Interest (CSPI)¹ requests that the Federal Trade Commission (FTC) halt deceptive direct mail solicitations by National Geographic Kids magazine (NGK). These solicitations constitute “deceptive acts and practices” as defined by Sections 12 and 15 of the Federal Trade Commission Act (FTCA), 15 U.S.C. §§ 52, 55, and hence are “unfair or deceptive” under Section 5 of the FTCA, 15 U.S.C. § 45, as interpreted by the Commission in its “FTC Policy Statement on Deception.”

I. Factual Background

NGK, National Geographic Society’s children’s magazine, uses direct mail solicitations to build its subscription base by sending a sample “special issue” to potential subscribers, along with an accompanying order form and envelope. In September 2004, it sent a sample magazine containing 32 pages of articles about animals and the environment, with two order-form inserts attached inside. The cover featured a sea otter, and the words “Special Issue: Awesome Animals” were printed on the top right-hand corner. [See Attachment A] In all, the magazine resembled the typical monthly NGK in all respects except for one significant fact: it did not contain any advertisements. The

¹ CSPI is a non-profit consumer advocacy and education organization that focuses primarily on food safety and nutrition issues and is supported principally by the 850,000 subscribers to its *Nutrition Action HealthLetter*.

magazine and attached order form failed to mention the presence of advertisements in the typical monthly NGK.

In stark contrast to the sample magazine, the monthly NGK is jam-packed with advertisements. NGK's 60-page November 2004 issue includes 19 full-page and four third-of-a-page advertisements. [See Attachment B] Its 48-page October 2004 issue included 15 full-page (including a fold-out ad) and one third-of-a-page advertisements. [See Attachment C] The 52-page September 2004 issue contained 10 full-page advertisements, 3 half-page advertisements, and 3 third-of-a-page advertisements. [See Attachment D] Thus, approximately one-third of the pages of a typical NGK issue contain advertisements.

CSPI is especially concerned about NGK's advertising for foods loaded with calories, saturated and trans fats, and sodium. From October 2002 to the present, all issues of NGK have bombarded readers with a total of 62 advertisements for candy (16 ads), sugary cereal (13 ads), snack cakes and foods (14 ads), pizza (8 ads), fast food (7 ads), and bubble gum (4 ads). American children (as well as adults) consume such foods in excess. Diets rich in such foods are linked to high rates of childhood obesity, the onset of adult "Type 2" diabetes in children, and high rates of heart disease, stroke, cancer, and diabetes later in life.²

NGK is also filled with advertisements for DVDs, television shows, and video games, which are associated with a sedentary lifestyle. It is well recognized, that a lack of physical activity, coupled with a diet rich in the kinds of foods advertised in NGK, is

² National Center for Chronic Disease Prevention and Health Promotion, Preventing Obesity and Chronic Diseases Through Good Nutrition and Physical Activity, http://www.cdc.gov/nccdphp/pe_factsheets/pe_pa.htm (accessed November 8, 2004).

responsible for the major increases in childhood obesity and the consequential health effects.³

NGK deceives children and adult recipients of its solicitations by implicitly representing that its monthly magazines do not contain advertisements. A family that receives the sample magazine in the mail, and on that basis decides to subscribe, expects to receive a periodical devoted solely to articles and photographs about nature and science instead of a magazine that devotes about one-third of its pages to advertising, let alone advertising for less healthful foods and products associated with a sedentary lifestyle.⁴

II. NGK's Solicitation is Deceptive Because It Misleads Reasonable Consumers Into Believing That Its Magazine Is Free Of Advertisements

Section 5 of the Federal Trade Commission Act prohibits “unfair or deceptive acts or practices.” There are three elements necessary for a finding of deception: (1) there must be a representation, omission, or practice that is likely to mislead the consumer; (2) the act or practice must be considered from the viewpoint of a consumer acting reasonably under the circumstances; and (3) the representation, omission, or practice must materially mislead consumers to their detriment.⁵

³ Testimony of Richard H. Carmona, Surgeon General, Hearing on the Growing Epidemic of Childhood Obesity before the Subcommittee on Competition, Infrastructure and Foreign Commerce, Science, and Transportation, March 2, 2004, <http://www.hhs.gov/asl/testify/t040302.html> (accessed November 8, 2004).

⁴ The Commission may also find that NGK's direct mail solicitation was unfair, since reasonable readers who subscribe to NGK based on the sample magazine will suffer substantial injury when their children are inundated by advertisements for junk food and sedentary toys in the monthly magazine.

⁵ FTC Policy Statement on Deception [hereinafter “FTC Policy Statement”], appended to *In the Matter of Cliffdale Associates, Inc.*, 103 F.T.C. 110, 170 (1984).

NGK's direct mail solicitation is deceptive because its advertising-free sample magazine is likely to mislead reasonable consumers into believing that its monthly issues are similarly free of advertising. That representation materially misleads consumers to their detriment. Consumers who attempt to shield their children from advertising for unhealthy foods and sedentary products would be less likely to subscribe to the magazine if they realized the enormous volume of advertisements for junk food, DVDs, television shows, and video games that a typical issue contains.

A. The Lack of Advertising in NGK's Sample Magazine is Likely to Mislead Consumers

Deception may occur through express misinterpretations, implied claims, or through omission of material information. "In cases of implied claims, the Commission will often be able to determine meaning through an examination of the representation itself, including an evaluation of such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the nature of the transactions."⁶ The representation must be "likely to mislead," and does not need to cause actual deception.⁷ An examination of NGK's solicitation reveals that the mailing is deceptive because it does not include ads. Individuals, such as parents or grandparents, who receive the sample magazine and solicitation to subscribe, will likely be misled into thinking that the monthly NGK similarly does not contain advertisements. There is no disclosure in the sample magazine or order form materials to correct a consumer's false impression that the monthly periodical is similarly free of advertising.

⁶ *Id.*

⁷ *Id.*

In *New American Library of World Literature, Inc. v. FTC*,⁸ the court affirmed the Commission's finding that offering an abridged book for sale without disclosing that it is abridged is deceptive. The Commission found:

The offering of a book for sale constitutes an implicit representation that the book contains the entire original text and that the title under which it is offered is the original title. In the absence of a clear and conspicuous disclosure of the fact of abridgment or change of title, the offering of an abridged book or of an old book under a new title unquestionably has the capacity and tendency to deceive and mislead prospective purchasers.⁹

Just as offering a book for sale implicitly represents that the book accurately reflects the text of the original, sending a sample magazine to potential subscribers is an implicit representation that the magazine accurately reflects the content of the monthly edition.¹⁰ This implied representation misleads consumers.

In this case, the inclusion of a simple disclosure on NGK's sample magazine stating that its monthly issues contain advertisements, would not negate the impression left by seeing the phony magazine. Consumers would still be misled since they would not realize the volume and extent of advertisements for junk food, DVDs, and video games that a typical issue contains. Thus, while disclosure is often the preferred remedy, in this case it would not provide adequate relief for consumers since they would not comprehend from a simple disclosure that a full one-third of the NGK monthly magazine consists of advertising, chiefly for junk food and sedentary products.

⁸ 213 F.2d 143 (2d Cir. 1954).

⁹ *Id.* at 145.

¹⁰ The inclusion of the term "Special Issue" in the top right-hand corner of the sample magazine does not constitute adequate disclosure that the magazine is departing from its usual advertising policy. NGK appears to use the term "special issue" freely. Both the September and October 2004 issues of NGK feature covers that boast "Special Issue!" and are full of advertisements.

B. NGK is Deceiving Consumers Acting Reasonably Under the Circumstances

The FTC's Policy Statement on Deception requires consideration of the representation in question from the viewpoint of the reasonable consumer. "To be considered reasonable, the interpretation or reaction does not have to be the only one. When a seller's representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation."¹¹ The Commission looks at the "net impression" that the representation is likely to make on the general populace.¹²

A reasonable consumer who receives the NGK solicitation in the mail is likely to be misled into thinking that NGK is free of advertising. Unlike magazines geared to adults, that generally contain advertisements, many children's magazines do not carry advertising.¹³ For example, the magazines on the market most similar to NGK, the World Wildlife Fund's Ranger Rick and Your Big Backyard, do not contain advertising. Other children's magazines that do not run advertisements include Kids Discover, Cricket, Muse, Highlights, and New Moon. Consumers who are familiar with those publications and read NGK's sample magazine would thus have a reasonable expectation that NGK similarly does not contain ads.¹⁴

¹¹ FTC Policy Statement.

¹² *Id.*

¹³ The direct mail solicitation and advertisement-free sample magazine distributed by National Geographic, the National Geographic Society's magazine for adult readers, is not deceptive, since reasonable consumers do not expect a magazine geared toward adults to be free of advertising.

¹⁴ For example, an Amazon.com reviewer of NGK (who did not even receive a sample magazine as part of a solicitation) expected that NGK would not contain advertisements based on her subscriptions to Ranger Rick and Your Big Backyard. The reviewer wrote:

Some consumers might also reasonably believe that there is no advertising in NGK based on their memories of reading NGK's predecessor, National Geographic World (NGW). NGW did not contain advertising from its first publication date in 1975 until approximately May 2002, when a few advertisements started to appear. It was only after the magazine changed its name to National Geographic Kids in October 2002 that the barrage of advertising began. Thus, consumers familiar with NGW likely would have expected the current National Geographic publication for children to be free of advertisements.¹⁵ Receiving in the mail a sample NGK that is totally free of advertising would validate that mistaken, but reasonable, assumption.

I was so excited for my son to get a subscription to this magazine for his birthday last year. After the first glance at the magazine I was so disappointed. It was filled with advertisements! We had had a subscription to My Big Backyard and then Ranger Rick, both of which my son couldn't wait to get each month, both of which have no advertisements, so I was appalled that this KIDS magazine from National Geographic would be like this. We will not be renewing our subscription. We will renew Ranger Rick and Discover Kids!

¹⁵ Several online reviewers of NGK on Amazon and Epinions were appalled to discover that the magazine they adored as children was turned into a magazine that is now full of advertisements. One Amazon reviewer wrote:

I had a subscription to National Geographic's original kids magazine, World, when I was a child. In fact, I still have a couple dozen issues from about 25 years ago, which my 5 years old son has enjoyed looking through. A few months ago, I looked on the web to see if World still existed. Happily, it did, now renamed National Geographic Kids. I ordered a two-year subscription for my son. I wanted so much to like it. But the damn thing is chock full of advertising for candy, video games and movies, and in a way that makes it hard to separate the selling from the educating. It is a little repulsive, actually, the level to which the advertising is carried. As I sit here in front of my computer, I am looking wistfully at a May 1982 issue of World magazine. Within which, there is not one stich [sic] of advertising. What happened?

C. The Presence of Advertising in NGK Materially Misleads Consumers to Their Detriment

According to the FTC Policy Statement, “A 'material' misrepresentation or practice is one likely to affect a consumer's choice of, or conduct regarding, a product. In other words, it is information that is important to consumers. If inaccurate or omitted information is material, injury is likely.” NGK’s representation that its typical magazine is free of advertising is material since many parents and other adults are concerned about the effects of marketing on children, and might not purchase a subscription to NGK if they were aware that it is heavily larded with advertising.

Furthermore, the Commission “considers claims or omissions material if they significantly involve health, safety, or other areas with which the reasonable consumer would be concerned.”¹⁶ NGK’s advertisements significantly impact children’s health by encouraging junk food consumption and a sedentary lifestyle, which have been shown to lead to childhood obesity and early onset of “Type 2” diabetes in some children.¹⁷ These devastating health consequences are clearly detrimental to consumers.

1. Studies demonstrate that food advertising can materially mislead children and their families to their detriment.

The food industry believes that food marketing is effective, and invests heavily in promoting its products. In 2000, it spent \$26 billion on advertising and promoting food products and brands, some of which is directed to children.¹⁸ Several major studies and

¹⁶ FTC Policy Statement. *See also Kraft, Inc. v. F.T.C.*, 970 F.2d 311, 322 (7th Cir. 1992).

¹⁷ *See supra* note 3.

¹⁸ Elitzak, H. “Food Marketing Costs at a Glance.” *FoodReview* 2001, vol. 24, no.3, pp. 47-48.

reviews have confirmed that advertising significantly impacts children, who lack the faculties to view advertising critically and understand advertisers' motives.

The American Psychological Association (APA) task force on advertising and children has concluded that younger children are highly susceptible to advertising, since they do not realize that the advertisements are biased messages that are intended to sell products.¹⁹ The task force found significant evidence that commercials for candy, snacks, and fast food are typically effective in persuading children to like and request the product. Based on its findings, the APA task force declared that advertising to younger children is unfair. It stated:

[Y]ounger children are more strongly influenced to request advertised products after watching commercials, which seems indicative of younger children's weaker cognitive defenses against advertising claims and appeals. It appears quite clear that children's understanding of advertising's persuasive intent plays an important role in helping them to defend against commercial persuasion. This evidence raises fundamental issues of fairness in terms of allowing advertising to target audiences of young children.²⁰

NGK's readership consists of 6- to 14-year-old boys and girls.²¹ Much of NGK's readership, then, is vulnerable to advertising, and is likely to be misled by the advertisements for junk food and video games that pervade the magazine.

The Institute of Medicine of the National Academy of Sciences recently found that advertising to children influences children's commercial recall and product

¹⁹ *Report of the APA Task Force on Advertising and Children, Psychological Issues in the Increasing Commercialization of Childhood*, released February 20, 2004, available at <http://www.apa.org/releases/childrenads.pdf> (accessed November 22, 2004).

²⁰ *Id.* at 18.

²¹ NGK Media Kit, http://www.ngklubhouse.com/natgeo_kids/demographics.html (accessed November 8, 2004).

preferences.²² In addition, it determined that the volume and nature of advertisements to which children are constantly subjected “appear to contribute to food, beverage and sedentary-pursuit choices that can adversely affect energy balance.”²³

A systematic review of research literature on the effects of food promotion to children, prepared for the UK Food Standards Agency, found that food promotion has an effect on children’s preferences, purchase behavior, and consumption.²⁴ The effect is independent of other factors and operates at both a brand and category level.²⁵ Studies have also found that children need less exposure to advertising to produce an effect. According to the Millward Brown research company, children are three times more likely to remember advertised brands than adults.²⁶

The World Health Organization Global Strategy on Diet, Physical Activity, and Health has recognized the link between food advertising and diet choices, and calls for member states to protect children from advertising. It states, “Food advertising affects food choices and influences dietary habits. Food and beverage advertisements should not exploit children’s inexperience or credulity. Messages that encourage unhealthy dietary

²² Institute of Medicine of the National Academies, National Academy of Sciences, *Preventing Childhood Obesity: Health in the Balance*, unpublished version, at 199.

²³ *Id.*

²⁴ Hastings, G, et al, *Review of Research on the Effects of Food Promotion to Children*, 2003 (www.food.gov.uk/multimedia/pdfs/foodpromotiontochildren1.pdf).

²⁵ *Id.*

²⁶ Lindstrom M. Seybold PB. *Brand Child: Remarkable Insights into the Minds of Today’s Global Kids and their Relationships with Brands*. London and Sterling, VA: Kogan Page Limited, 2003, quoted in *Pestering Parents.: How Food Companies Market Obesity to Children*, Center for Science in the Public Interest, 2003.

practices or physical inactivity should be discouraged, and positive, healthy messages encouraged.”²⁷

The U.S. government, led by the Department of Health and Human Services, supported adoption of the WHO Global Strategy at the World Health Assembly in May 2004.

2. Studies show that many consumers wish to shield their children from advertisements.

Consumers are disgusted by the barrage of advertising to which they, and especially their children, are subjected.²⁸ Parents are concerned that excessive advertising and consumerism can cause significant harm to children’s mental and physical well-being. The Center for a New American Dream, a group that encourages a less materialistic society, has found that 70% of parents think that children’s attention is too focused on buying things.²⁹ Children who are highly involved in consumer culture are more likely than other children to suffer from depression, anxiety, low self-esteem, stomachaches and headaches, boredom, psychosomatic complaints, and fighting with parents.³⁰

²⁷ *Global strategy on diet, physical activity and health*. Geneva, World Health Organization, 2004 (World Health Assembly Resolution WHA57.17, 2004).

²⁸ According to a survey by the marketing services consultancy firm Yankelovich Partners, 61% of consumers feel the amount of marketing and advertising is out of control, 65% feel constantly bombarded with too much marketing and advertising, 64% are concerned about practices and motives of marketers and advertisers, and 61% feel that marketers and advertisers don’t treat consumers with respect. Yankelovich Partners, “Consumer Resistance to Marketing Reaches All-Time High Marketing Productivity Plummets, According to Yankelovich Study,” Press Release, April 15, 2004.

²⁹ Katy Kelly and Linda Kulman, “Kid power,” *U.S. News & World Report*, September 13, 2004, <http://www.newdream.org/about/medioclips/usnewssept1304.php> (accessed November 3, 2004).

³⁰ Corrie Pikul, “New and Improved Ways to Rot Your Kid’s Brain,” *Salon*, September 8, 2004, http://www.salon.com/mwt/feature/2004/09/08/born_buy/ (accessed November 3, 2004), citing Boston college sociologist Juliet Schor, author of *Born to Buy: The Commercialized Child and the New Consumer Culture*.

Because of the significant harm that advertising poses to children, many parents would like to protect their children from being targeted as consumers. A July 2001 Time/CNN/Harris Interactive Poll found that 71% of parents believe that children are exposed to too much advertising when it comes to the toys and games they might buy.³¹ 85% of parents surveyed by Center for a New American Dream believe that there should be more restrictions on advertising to children.³²

3. Readers have complained that the presence of advertisements in NGK has ruined the magazine.

NGK's decision to saturate its magazine with advertisements for junk food, toys, and video games and other toys associated with sedentary activity has raised the ire of many parents. They have decried NGK's acceptance of advertisements as a lowering of its standards and an abandonment of its responsibility to its readers. Reader reviews of NGK on the Amazon³³ and Epinions³⁴ websites feature a recurring complaint: parents resent their children being bombarded with advertisements every time they open the

³¹ According to the survey, 3% of parents believe that their children are exposed to too little advertising, 25% believe they are exposed to just the right amount of advertising, and 1% are not sure. Survey by Time, Cable News Network. Conducted by Harris Interactive, July 17-July 18, 2001 and based on telephone interviews with a national adult sample of 1,015. (E-mail correspondence from Carl W. Brown, Jr., Research Assistant, Roper Center for Public Opinion Research to Aliza Sperling, September 22, 2004.)

³² Katy Kelly and Linda Kulman, "Kid power." Some parents have banded together to take action against the advances of advertisers. The Motherhood Project at the Institute for American Values has issued a manifesto, *Watch Out for Children: A Mothers' Statement to Advertisers*, that decries the way that advertisers target vulnerable children. *Watch Out for Children: A Mothers' Statement to Advertisers*, The Motherhood Project, Institute for American Values, 2001, http://www.watchoutforchildren.org/html/wo_page_1.html (accessed November 24, 2004). The Project commits "[t]o make our homes and families commerce-free zones. To the degree that we are able, we will limit our children's exposure to advertising and marketing." *Watch Out for Children*, at 4.

³³ http://www.amazon.com/gp/product/customer-reviews/B000063XJL/ref=cm_cr_dp_2_1/002-3127503-6704068?%5Fencoding=UTF8&me=ATVPDKIKX0DER (accessed October 20, 2004).

³⁴ http://www.epinions.com/pr-Magazines-National_Geographic_Kids_Magazine/display_~reviews (accessed October 26, 2004).

magazine. [See Attachment E] To those readers, the presence of advertisements in the magazine is highly material. As described below, several of those adults explicitly state that they would not have purchased a subscription to NGK had they known it was full of advertisements.

Twenty-one reviews about NGK are on Amazon.com; twelve blast the magazine for having too many advertisements. One reviewer fumed, “This magazine is one huge ad,”³⁵ while another wrote, “[M]aybe I’m all confused about what National Geographic was about, because I hadn’t realized it was about bringing in the advertising dollars . . .”³⁶

Two reviewers on Amazon wrote that they will not renew their subscriptions to NGK because of the advertising in the magazine. One of these reviewers declared:

I bought a single copy of National Geographic Kids at a bookstore thinking I would give my grandson a subscription. I will not. I couldn't believe the number of ads and, worse yet, how much they were made to look like articles. Even many of the actual articles are about ‘product placement.’ What other purpose than advertising is there in a 3-page article on The Lord of the Rings? A child's movie? I think not, not for the 8-12 year old set. How could National Geographic have gone so wrong, treating children like nothing more than little consumers? Truly ugly!³⁷

Reviewers also commented on the harm to children that the advertising in NGK could inflict. One reviewer stated, “The advertising is shameful and irresponsible. In an age when we are preoccupied by the health of our children, particularly their diet, the latest issue advertises a major fast food chain right on the cover.”³⁸ Another reviewer

³⁵ See *supra* note 33.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

seethed, “Kids are bombarded enough with advertising via television, movies, and fast food restaurants. Do we really need to target their developing minds during a simple pleasure such as reading? I should think the goal of a decent children's magazine is to get the child to sit calmly, relax, and read; this magazine simply adds to the culture of hype and cross-promotion.”³⁹

The reviewers at Epinions were also disappointed by the advertisements in NGK; all four reviewers gave the magazine negative ratings.⁴⁰ One reviewer wrote, “The magazine is now full of ads for junk food and tv [sic] shows. The magazine used to be interesting and informative, now it seems like another vehicle attempting to get my son to buy products. It is awful and I will be canceling [sic] my subscription as soon as I can. They took a good product and are RUINING it.”⁴¹

As these reviews attest, the presence of advertising in NGK is a material issue to many consumers.

III. Conclusion

NGK’s current promotional program deceives families who want to shield their children from marketing and consumerism. Its sample magazine does not contain advertisements and creates the false impression that its monthly issues are similarly free of advertisements. It does not include a prominent disclosure in its solicitation materials to overcome readers’ mistaken impressions.

For the foregoing reasons, we request that the Commission:

³⁹ *Id.*

⁴⁰ One of the Epinions reviewers appears to have written the same critique in Amazon’s reviews as well.

⁴¹ *See supra* note 34.

- (1) Bring an action pursuant to Section 13 of the FTCA, 15 U.S.C. § 53, to enjoin further direct mail solicitation by NGK that includes an advertising-free sample magazine pending issuance of a complaint under Section 5 of the FTCA, 15 U.S.C. § 45;
- (2) Initiate action under Section 5 of the Act, 15 U.S.C. § 45, to permanently prohibit dissemination of the mailing; and
- (3) Require the National Geographic Society to offer refunds to current subscribers of NGK.

Respectfully submitted,

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