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Finding a Place for Embedded Advertising Without Eroding the First Amendment: An Analysis of the Blurring Line Between Verisimilar Programming and Commercial Speech

I. INTRODUCTION

No one expects to turn on the television or go to the movies without enduring at least a few advertising pitches for useless and/or uninteresting products. But with the advent of new technologies that allow commercials to be bypassed, sponsor notices to be skipped, and previews to be passed over, advertisers have become increasingly aggressive in subjecting media consumers to advertisements *during* the entertainment experience.¹ Take, for instance, the television show *American Idol* where the infamous judges are depicted with large Coca-Cola drinks in almost every scene and winning contestants make Ford advertisements presented in a trendy video.² Products from Dairy Queen, Ford, and Sue Bee Honey have made their way onto *The Apprentice*.³ One episode from *The Office* has Dwight Schrute working at a Staples Office Supply store,⁴ and another episode features an Olympic bailer.⁵ An entire plot line on *7th Heaven* revolves around Oreo cookies.⁶

But television is not the only infected medium. Movie plots have likewise become an advertising platform. *I, Robot* “shamelessly” promotes a plethora of brands within its first 30 minutes, including: Converse shoes, FedEx, the Audi RSQ, JVC, Dos Equis, Ovaltine, and Prudential life insurance.⁷ The plotline of *You’ve Got Mail* centers on

1. See FCC, *Notice of Inquiry & Notice of Proposed Rule Making on Sponsorship Identification Rules and Embedded Advertising*, MB Doc. No. 08-90, FCC 08-155, at 1 (2008) [hereinafter *FCC Notice*].

2. *FCC to Look into Embedded Advertising on TV: Should Viewers be Better Informed About Paid-for Props?*, ASSOCIATED PRESS, June 26, 2008, <http://www.msnbc.msn.com/id/25401193> [hereinafter *FCC to Look*].

3. PATRICK LEE PLAISANCE, *MEDIA ETHICS: KEY PRINCIPLES FOR RESPONSIBLE PRACTICE* 62 (2008).

4. *FCC to Look*, *supra* note 2, at ¶ 11.

5. NBC’s “*The Office*” Warehouse Features Vertical Baler From Olympic Wire and Equipment in “*Safety Training*” Episode on April 12, MARKET WIRE, Apr. 2007, http://findarticles.com/p/articles/mi_pwwi/is_200704/ai_n18800065.

6. *FCC to Look*, *supra* note 2, at ¶ 11.

7. Tom Hatori, *Top Ten: Most Shameless Uses Of Product Placement In Film*, June 6, 2008, <http://www.movie-moron.com/?p=544>.

AOL with frequent plugs for Starbucks coffee.⁸ The list goes on: *Independence Day*—Coca-Cola and Apple; *Demolition Man*—Pizza Hut and Taco Bell; *Men in Black II*—Mountain Dew, Burger King, and Victoria's Secret; *Just My Luck*—T-mobile and Pepsi.⁹ The research confirms that these are not isolated instances. Over the past twenty years,¹⁰ “embedded advertising”¹¹ has grown into a four-billion-dollar industry.¹²

The Federal Communications Committee (FCC) drew attention to this new issue in a very old debate rooted in the virtues of advertising¹³ when it recently announced that it would be adopting a Notice of Inquiry and Notice of Proposed Rulemaking seeking comment on whether the current FCC rules effectively handle sponsorship identification.¹⁴ Contenders representing every corner of the debate have adamantly urged the FCC to proceed in almost every possible direction.¹⁵ More importantly, however, the FCC's announcement signals an abrupt end to its disregard of aggressive, “out-of-control”¹⁶ practices of an industry struggling to survive in an economy “shaken to its core”¹⁷ and

8. *Id.*

9. *Id.*

10. James Karrh, Kathy Brittain McKee & Carol Pardun, *Practitioners Evolving Views on Product Placement Effectiveness*, 43 J. OF ADVERTISING RES. 138 (2003).

11. For an explanation of this term, see *supra* note 3 and accompanying text.

12. PLAISANCE, *supra* note 3, at 61. For a detailed history of the growth in advertising expenditures among television networks see DONALD E. BIEDERMAN ET AL., LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES 612–16 (2d ed. 1993). For a background on advertising expenditures among movie producers see MELVIN SIMENSKY ET AL., ENTERTAINMENT LAW 34–36 (2d ed. 1997).

13. See MICHAEL J. PHILLIPS, ETHICS AND MANIPULATION IN ADVERTISING: ANSWERING A FLAWED INDICTMENT, vii (1997) (“Briefly put, the attack says that advertising manipulates consumers, and that this manipulation justifies corrective political action. This attack’s influence waxes and wanes, but it is never without adherents.”); RANDALL MARLIN, PROPAGANDA AND THE ETHICS OF PERSUASION 180 (2002); JENNIFER GUNNING & SOREN HOLM, ETHICS, LAW, AND SOCIETY 220 (2006); see also Robert Harris, *The Seven Deadly Sins and Seven Virtues in Advertising*, VIRTUAL SALT, July 21, 2000, <http://www.virtualsalt.com/think/xtrseven.htm> (“Advertisements present values and goals that are in conflict with traditional values.”); Jaiboy Joseph, *The Virtues of Advertising*, BUSINESS LINE, Jan. 06, 2000, <http://www.thehindubusinessline.com/2000/01/06/stories/190602ji.htm> (“We have come a long way since the days when H.G. Wells opined that ‘advertising is legalised lying.’”) (“Without advertising, the price of a jar of honey could really sting you.”).

14. *FCC Notice*, *supra* note 1, at 1.

15. See generally FCC comments for Proceeding 08-90, http://fjallfoss.fcc.gov/cgi-bin/websql/prod/ecfs/comsrch_v2.hts?ws_mode=retrieve_list&id_proceeding=08-90&start=1&end=208&first_time=N.

16. Stephanie Clifford, *Product Placements Acquire a Life of Their Own on Shows*, N.Y. TIMES, July 14, 2008, at C1 (quoting Robert Weissman, the managing director of Commercial Alert, a nonprofit group which attempts to restrict commercial marketing).

17. Carrick Mollenkamp et al., *Crisis on Wall Street as Lehman Totters, Merrill Is Sold, AIG Seeks to Raise Cash*, WALL ST. J., Sept. 15, 2008, at 1; see also Emily Steel, *Ad-Spending Forecasts Are Glum*, WALL ST. J., Dec. 8, 2008.

desperately trying to “remain competitive in a multiplatform universe.”¹⁸ Indeed, with the new presidential administration in power, and bearing in mind that the FCC commissioners are political appointees, more onerous regulation appears to be on the horizon.¹⁹ Regardless of the FCC’s ultimate decision, debate will continue over the proper regulation of embedded advertising.

Part II of this article provides a brief history of advertisement regulation and lays a foundation as to why embedded advertising has become such a popular and widespread practice in the entertainment industry.

Part III explores possible legal responses to five questions that must be answered by the FCC before it determines whether and how to regulate embedded advertising. The threshold question addressed in this section is whether the current FCC rules effectively address embedded advertising practices. Second, this section will explore whether FCC regulation is the best way to address embedded advertising. Third, this section will discuss whether the FCC has the vested congressional authority to promulgate rules governing embedded advertising. Special emphasis will be given to this question because of its critical nature and because it is so fiercely disputed. Fourth, this section will briefly review possible regulatory options the FCC may adopt. Finally, as this article determines that embedded advertising is a hybrid form of speech possessing attributes of both commercial and normal speech, this section will explore whether any such regulations might violate or erode First Amendment rights. This section has been structured to emphasize the preliminary questions because the FCC is in the preliminary stages of its decision making process and has not yet definitively resolved to regulate embedded advertising.

Part IV offers a brief conclusion.

18. John Eggerton, *CCFC Wants FCC To Ban Product Placement In Kids Shows, Limit In Primetime*, BROADCASTING & CABLE, Nov. 24, 2008, available at http://www.broadcastingcable.com/article/159827-CCFC_Wants_FCC_To_Ban_Product_Placement_In_Kids_Shows_Limit_In_Primetime.php?q; see also HAROLD ORENSTEIN & DAVID E. GUINN, ENTERTAINMENT LAW AND BUSINESS §7.6.2.2 (1996).

19. See Richard J. Wegener, Shareholder, Fredrikson & Byron, P.A., Speech at PMA’s 30th Annual Promotion Marketing Conference: Product Placement & Government Regulation: FCC vs. FTC: Why Government Regulation of Product Placement Will Likely Expand Despite Insufficient Evidence of Consumer Harm, (Nov. 20-21, 2008), http://www.fredlaw.com/bios/attorneys/wegenerrichard/RWegener_PMA_2008%20Law%20Conference.pdf; see also Louis E. Frenzel, *Expect Changes In Wireless Regulation This Year*, MOBILE DEV. & DESIGN, Feb. 9, 2009, available at <http://mobiledevdesign.com/tutorials/fcc-changes-wireless-regulation-2009-0209>.

II. BACKGROUND

This section is essential to the understanding of the current debate because the application of the FCC rules depends largely on the context which produced them.²⁰ This article will use the general term “embedded advertising” to describe circumstances where sponsored products or brands are included in media programming.²¹ This type of advertising is also referred to as “stealth advertising,” “covert sponsorship,” or “product placement.” The two former terms are used frequently by those opposed to such advertising,²² while the latter is a non-descriptive pejorative employed by those in favor of it.²³ This article’s definition of embedded advertising is formulated from the FCC’s description of the term and is arguably a compromise between the two camps. Embedded advertising includes both “product placement” (in the non-pejorative sense) and “product integration.” Product placement occurs when branded products are “[inserted] into programming in exchange for fees or other consideration.”²⁴ On the other hand, product integration involves integrating the sponsored product with the plot of the program and/or the dialogue.²⁵ This distinction may not always be crystal clear in practice and will be discussed in a later section of this article.²⁶

A. *Brief History of Advertising Regulation*

The Radio Act of 1927 represents Congress’s first efforts to require sponsorship identification for broadcasters.²⁷ This statute granted enforcement power to the Federal Radio Commission (FRC), the

20. Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927–63*, 56 FED. COMM. L.J. 329, 332 (2004).

21. *FCC Notice*, *supra* note 1, at 1.

22. Writers Guild of America, East and West, *Are You Selling to Me?*, Nov. 14, 2005, at 1, http://www.wga.org/uploadedFiles/news_and_events/press_release/2005/white_paper.pdf [hereinafter *Writers Guild of America*] (last visited Nov. 14, 2009).

23. See American Advertising Federation, Government Affairs, Product Placement, <http://www.aaf.org/default.asp?id=349> (last visited Mar. 14, 2009).

24. See Letter from Mary K. Engle, Associate Director for Advertising Practices, Federal Trade Commission, to Gary Ruskin, Executive Director, Commercial Alert, 6 (Feb. 10, 2005) [hereinafter *Letter from Engle*], available at http://www.ftc.gov/os/closings/staff/050210product_placement.pdf.

25. *Writers Guild of America*, *supra* note 22, at 2; Wayne Freidman & Jean Haliday, *Product Integrators Tackle Learning Curve*, 73 ADVERTISING AGE 18 (2002). There is also a term known as “title placement,” which describes the practice of inserting brand names into entertainment program titles.

26. See *infra* Part III, E.

27. Kielbowicz, *supra* note 20, at 330.

precursor to the FCC.²⁸ It provided in part:

All matter broadcast by any radio station for which service, money, or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, firm, company, or corporation, *shall, at the time the same is so broadcast*, be announced as paid for or furnished, as the case may be, by such person, firm, company, or corporation.²⁹

For the next 20 years, however, neither the FRC nor the FCC found this provision relevant in the supervision of radio broadcasting as sponsors of that era “almost always craved public recognition.”³⁰ Nevertheless, when adopting the provision, Representative Emanuel Celler argued that the statute was designed to disallow radio stations from camouflaging advertising as program content.³¹

The statute began to have more influence when political advertisements became a growing concern for the FCC during Franklin D. Roosevelt’s presidential campaign in 1944.³² Some stations began broadcasting prerecorded spot announcements labeling them only as “political announcements” with no further identifying information from the sponsor.³³ After the FCC deliberated for three months as to what kind of enforcement action to pursue, it espoused administrative guidelines that clarified the statutory language of the Radio Act. These rules have remained fundamentally unaltered.³⁴ The new administrative guidelines required “stations that received anything of value, including production assistance (records, transcriptions, talent, scripts, or other material or services) . . . to identify at the beginning and end of the program the nature of the support.”³⁵ Broadcasts under five minutes needed only to

28. The Supreme Court sustained the Federal Radio Commission’s power to delegate under the Radio Act in *Fed. Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 (1933).

The FCC was established by the Communications Act of 1934 as the successor to the Federal Radio Commission and is charged with regulating all non-federal government use of the radio spectrum (including radio and television broadcasting), and all interstate telecommunications (wire, satellite and cable) as well as all international communications that originate or terminate in the United States. is charged with regulating interstate and international communications by radio, television, wire, satellite and cable. The FCC’s jurisdiction covers the 50 states, the District of Columbia, and U.S. possessions. Federal Communications Committee, About Us, <http://www.fcc.gov/aboutus.html>.

29. RADIO ACT OF 1927, ch. 169, § 19, 44 Stat. 1162 (1927) (emphasis added).

30. Kielbowicz, *supra* note 20, at 334.

31. *Id.*; see 67 CONG. REC. 2309 (1926).

32. Kielbowicz, *supra* note 20, at 341.

33. *Id.*

34. See *Nat’l Ass’n for Better Broad. v. FCC*, 830 F.2d 270, 276 (D.C. Cir. 1987).

35. Kielbowicz, *supra* note 20, at 341–42.

make one announcement.³⁶ This sponsorship disclosure requirement was codified as an amendment in section 317 of the Communications Act of 1934.³⁷ After the adoption of the new guidelines, the FCC issued a report restating the purpose and intent of the rules.³⁸ In that report, the FCC expressed the now well-known axiom, “[a] listener is entitled to know when the program ends and the advertisement begins.”³⁹

Television sets became pervasive in the 1950s, making their way into millions of households across America.⁴⁰ Due to the “relatively lax enforcement of Section 317,” sponsors began to introduce advertisements with unidentified sponsors more frequently.⁴¹ Rather than naming the company or trade company advertising the product, broadcasters would merely describe the product. For example, “This program is sponsored by the Sink Man.”⁴² In response, the FCC issued the following statement: “In all cases, the public is entitled to know the name of the company it is being asked to deal with, or at least, the recognized brand name of his product.”⁴³ The FCC’s justification for this ruling was that it would “prevent . . . fraud being perpetrated on the listening public by letting the public know the people with whom they are dealing.”⁴⁴

The true regularity of the practice of failing to identify a sponsor was exposed in the late 1950s by the television quiz show scandals.⁴⁵ Though on the surface it appears that sponsorship identification and dishonesty about the rules of a quiz show are separate issues, they “merged in the public’s mind to form one image of commercialism’s corrupting influence on broadcasting.”⁴⁶ In one example, House investigators uncovered the fact that a department store paid a quiz show producer \$10,000 to allow one of the store’s employees to participate on the show as a contestant and bring up the store during the broadcast.⁴⁷ This

36. *Id.*

37. Now codified as 47 U.S.C. § 317 (1980).

38. FEDERAL COMMUNICATION COMMISSION, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 47 (1946).

39. *Id.*; Kielbowicz, *supra* note 20, at 344.

40. TVHistory.com, Television History – The First 75 Years, <http://www.tvhistory.tv/1950-1959.htm> (last visited Oct. 13, 2009).

41. Kielbowicz, *supra* note 20, at 347.

42. Identification on Broad. Station, Public Notice, 40 F.C.C. 2d (1950); *see also* Kielbowicz, *supra* note 20, at 346-47.

43. Identification on Broad. Station, 40 F.C.C. 2d, at 3; *see also* Re Cmty. Telecasting Serv., 10 F.C.C. 2d 727 (1967).

44. *Id.*

45. Kielbowicz, *supra* note 20, at 346.

46. *Id.* at 347.

47. *Id.* at 352; *see also* Investigation of Television Quiz Shows, Pts 1 & 2: Hearings Before the Spec. Subcomm. on Legislative Oversight of the House Comm. on Interstate and Foreign Commerce, 86th Cong. 1142 (1959).

occurrence, of course, not only involved the failure to disclose the sponsor adequately, but also a “payola”—a term used in the entertainment industry to describe clandestine payments to a producer to promote a product or brand name through a broadcast.⁴⁸

This time, Congress responded by amending and expanding the Communications Act. The amendments both increased and decreased the FCC’s regulatory authority. First, Congress prohibited the FCC “from requiring disclosure for broadcasters’ routine use of free records or props.”⁴⁹ Next, Congress broadened the legal requirement to divulge hidden sponsorships to include “parties involved in production.”⁵⁰ Lastly, these amendments provided the FCC with discretionary authority to “develop or suspend rules.”⁵¹

After these amendments were implemented, TV networks separated advertising from entertainment programming beginning in 1960.⁵² As former producer/screenwriter of *The Bill Cosby Show* and *Murphy Brown*, Korby Siamis explained the segregation of advertising and network programming after 1960: “During my career, there was a clear distinction between art and advertising. On occasions that we used a product name, we would receive notices from the network Standards and Practices department. If the reference were necessary for the joke, it would stay. Otherwise we would take it out.”⁵³ She continued by stating, “The concept that we would ever have been expected to include product names or usage in our writing would have been beyond ludicrous, and would have been strongly fought as the worst kind of assault on our creative process. . . .”⁵⁴ These circumstances and opinions provide the historical context for the largely unaltered standards that govern embedded advertising today.⁵⁵

48. Kielbowicz, *supra* note 20, at 376 n.2.

49. *Id.* at 356; *see also* Amendments to the Communications Act of 1934, Pub. L. No. 86-752, sec. 8, 317(a)(1), 74 Stat. 889, 895 (1960) (codified at 47 U.S.C. § 317(a)(1) (2000)).

50. Kielbowicz, *supra* note 20, at 356.

51. *Id.*

52. LAWRENCE R. SAMUEL, *BROUGHT TO YOU BY: POSTWAR ADVERTISING AND THE AMERICAN DREAM* 122–52 (University of Texas Press, 2001).

53. Letter from Korby Siamis to Kevin J. Martin, Chairman, FCC, MB Doc. No. 08-90, (Aug. 23, 2008), *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520170200.

54. *Id.*

55. Amendments to Communications Act of 1934, Pub. L. No. 86-752, sec. 8, 317, 508, 74 Stat. 889, 895–97; *see* Kielbowicz, *supra* note 20, at 376 n.2. For an in-depth look at the impacts of pay television *see* MICHAEL I. RUDELL, *BEHIND THE SCENES: PRACTICAL ENTERTAINMENT LAW* 195 (1984).

III. ANALYSIS

The debate raised by the FCC's Notice of Inquiry and Notice of Proposed Rulemaking centers on whether the current FCC rules effectively address embedded advertising practices. If the answer is yes, no further inquiry is required and the advertising industry can continue on its current course. If the answer is no, critical issues and questions arise: Is FCC regulation the best way to address this issue? Does the FCC have the vested congressional authority to promulgate rules governing embedded advertising? What rules should the FCC adopt? Finally, would any such rules violate First Amendment rights?

The analysis that follows will explore the gamut of possible answers to each of these questions. The questions will be addressed in the order presented above as each is influenced by its predecessor. Because the FCC is currently in the preliminary stages of its decision making process and has not yet definitively resolved to regulate embedded advertising, this research will focus on the threshold questions concerning the FCC and its authority to act. For example, whether embedded advertising actually causes harm is a more foundational question in the current legal climate than what kind of restrictive measures the FCC should adopt. Obviously, the time may come when the legal landscape is transformed, at which time the nuances and details of the latter questions will deserve additional attention.⁵⁶

A. Do Current FCC Rules Effectively Address Embedded Advertising Practices?

Today, section 317(a)(1) of the Communications Act reads nearly identically to the version adopted in 1927,⁵⁷ making the sponsorship identification requirements the oldest statutory provision dealing directly with broadcast advertising.⁵⁸ The FCC has adopted 47 C.F.R. §

56. On March 3, 2009 President Obama nominated Julius Genachowski as the new FCC Chairman. Genachowski was heavily involved in the Internet efforts of the Obama campaign and previously worked for Democratic FCC Chairman Reed Hundt. See Declan McCullagh, *Obama Picks Net Neutrality Backer as FCC Chief*, CNET NEWS, Mar. 3, 2009, available at http://news.cnet.com/8301-13578_3-10187067-38.html. Though there is wide speculation, writers on The Washington Post and The Wall Street Journal have indicated that they believe Genachowski will focus on Internet issues. See David Oxenford, *Julius Genachowski as New FCC Chair - What Will It Mean to Broadcasting's Future?*, DIGITAL MEDIA WIRE, Jan. 15, 2009, available at <http://www.dmwmedia.com/news/2009/01/15/julius-genachowski-new-fcc-chair-what-will-it-mean-broadcasting%2526%2523039%3Bs-future%3F>.

57. 47 U.S.C. § 317 (2008) ("All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person . . .").

58. Kielbowicz, *supra* note 20, at 331; see also John Eggerton, *Group to FCC: Lay Off*

73.1212(f), which more clearly elucidates requirements for sponsorship identification:

[A]n announcement stating the sponsor's corporate or trade name, or the name of the sponsor's product, when it is clear that the mention of the name of the product constitutes a sponsorship identification, shall be deemed sufficient for the purpose of this section and only one such announcement need be made at any time during the course of the broadcast.⁵⁹

After a run-in with the D.C. Circuit Court of Appeals regarding lax policies of enforcement influenced by the Reagan administration, the FCC defined "sponsorship" expansively, stretching the term to include all agreements involving consideration or promises of consideration.⁶⁰ Thus, if a broadcasting station airs an infomercial—i.e. content that is sponsored and could be erroneously identified by an audience as a show—such an agreement would require an identification announcement.⁶¹ Similarly, the utilization of a product in a television show for valuable consideration would require a sponsorship credit.⁶² The FCC considers a failure to reveal a sponsor who provides valuable consideration or services as a "payola" is punishable by a fine or imprisonment for not more than one year or both.⁶³ Such criminal penalties are enforced and prosecuted by the Department of Justice.⁶⁴ The current minimum fine for every discovered sponsorship identification violation is \$4,000 per occurrence.⁶⁵

Current broadcast industry practice appears incongruent with these regulations as "[m]ost television shows satisfy their legal disclosure obligations merely by including a credit to the effect that 'promotional considerations were provided by ABC Company.'"⁶⁶ While often the

Product Plugs: Broadcasters, Advertisers Fighting Disclosure Rules, BROADCASTING & CABLE, Oct. 13, 2008, available at http://www.broadcastingcable.com/article/115826-Group_to_FCC_Lay_Off_Product_Plugs.php.

59. 47 C.F.R. § 73.1212(f) (2008) (last visited Oct. 13, 2009).

60. See Nat'l Ass'n for Better Broad. v. FCC, 830 F.2d 270, 276 (D.C. Cir. 1987); see also Time Warner Entm't Co. v. FCC, 144 F.3d 75 (D.C. Cir. 1998); Kielbowicz, *supra* note 20, at 332.

61. Kielbowicz, *supra* note 20, at 332.

62. *Id.*; see also Christian McGrath, *Political Video News Releases: Broadcasters' Obligations Under the Equal-Opportunity Provision and FCC Sponsorship-Identification Regulations*, 1993 U. CHI. LEGAL. F. 313, 325–29 (1993).

63. *Id.*; see also McGrath, *supra* note 62.

64. *Id.*

65. In the Matter of The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, FCC 97-218, (1997), available at <http://www.fcc.gov/Bureaus/Compliance/Orders/1997/fcc97218.doc>.

66. Barry M. Benjamin, *The Call for a Code of Conduct*, MEDIAWEEK, Dec. 19, 2005, available at http://www.mediaweek.com/mw/eseach/article_display.jsp?vnu_content_id=1001

credits “fly by incredibly quickly, and often shrink to a small portion of the screen,”⁶⁷ it is commonly known that “[b]asic disclosure is generally all that the law requires.”⁶⁸ In other words, to satisfy its burden under the FCC disclosure rules, a producer must provide sponsorship identification to the extent that “the listening and viewing public understands the nature and source of the material they are hearing and seeing,” and “where disclosure itself is not adequate for the audience to form such an understanding, stricter measures are needed.”⁶⁹

Feature films are a different story completely. Since 1963, the FCC has exercised authority over feature films, but has allowed them exemption status under the sponsorship rules.⁷⁰ Thus, producers of film need not make any kind of sponsorship identification as long as the film was not produced with the main intent of broadcasting it.⁷¹ The FCC’s jurisdiction over feature films is questionable since section 317 arguably covers only “broadcasts.”⁷² But again, the FCC has defined the term broadly—holding that it has the authority to make such regulations outside the traditionally defined “broadcast” context.⁷³

As described by an FCC Chairman, the “ultimate goal” of these rules is “to ensure that the public is able to identify both the commercial nature of any programming, as well as its source.”⁷⁴ Yet, recent FCC enforcement actions appear nuanced and petty in comparison to the prevalent embedded advertising practices throughout the industry. Viewers of average intelligence of the *Wheaties Fit to Win Challenge* could not possibly think that General Mills was a disinterested party with the Wheaties brand plastered throughout the program. Nor would a viewer of average intelligence regard *The Right Side of Armstrong* and

700237; see also John Eggerton, *National Media Providers: FCC Lacks Jurisdiction; FCC Rules Already in Place to Prevent Most Abuses*, BROADCASTING & CABLE, Sept. 23, 2008, available at http://www.broadcastingcable.com/article/115561-Media_Cos_Plug_Product_Placement_at_FCC.php.

67. *Id.*

68. Jonathan S. Adelstein, Commissioner, FCC, “Fresh is Not as Fresh as Frozen”: A Response to the Commercialization of American Media, Address Before the Media Institute (May 25, 2004), available at 2004 FCC LEXIS 7458, at 18.

69. *Id.*

70. In the Matter of Amendment of Sections 3.119, 3.289, 3.654 and 3.789 of the Commission’s Rules, Report and Order, 34 FCC 829, 837 (1963).

71. *Id.*; see also 47 C.F.R. § 73.1212(h) (2008) (“Any announcement required by section 317(b) of the Communications Act of 1934, as amended, is waived with respect to feature motion picture film produced initially and primarily for theatre exhibition.”).

72. 47 U.S.C. § 317 (2008).

73. Comments of the National Media Providers to FCC, MB Doc. No. 08-90, (Sept. 22 2008), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520170175 [hereinafter *Comments of National Media Providers*].

74. Statement of FCC Chairman Kevin J. Martin, *Re: Sponsorship Identification Rules and Embedded Advertising*, MB Doc. No. 08-90, available at http://www.adlawbyrequestlegacy.com/_db/_documents/FCC-08-155A1.pdf [hereinafter *Statement of Kevin Martin*].

assume that Armstrong Williams, a conservative newspaper columnist and entertainer, was free from any monetary influence in his message supporting the No Child Left Behind Act. Had these violators provided the single credit at the conclusion of their respective programs, they could have avoided hefty FCC fines. Conceivably, the FCC has pursued these trivial violations as a warning to advertisers in an effort to thwart the flood of embedded advertisements.

In truth, the FCC has adopted a broad interpretation of a statute that appears to contemplate the requirement of sponsorship identification announcements “at the time [of]”⁷⁵ or during embedded advertisements. The FCC could easily construe the statute as requiring real-time announcements of sponsors during embedded advertisements. An administrative agency’s reasonable construction of an ambiguous statute which is administered by the agency may receive substantial deference under *Chevron*⁷⁶ unless such construction is procedurally defective, arbitrary or capricious in substance,⁷⁷ or manifestly contrary to the statute.⁷⁸ As long as “basic disclosure” is all that is required by the FCC interpretation, broadcasters will continue to provide only “basic disclosure.” As advertising techniques become more sophisticated, it is unlikely that a 70-year-old understanding of an ambiguous statute will continue to be adequate.

B. Is FCC Regulation the Best Way to Address Embedded Advertising?

The response of consumer advocates to this question is categorically “yes.” The group that initiated the turning of the FCC’s regulatory gears was Commercial Alert.⁷⁹ Commercial Alert lodged a complaint with the FCC arguing that this kind of “stealth advertising” reaches unsuspecting and unaware consumers in a way that is “an affront to basic honesty.”⁸⁰

75. 47 U.S.C. § 317 (2008) (reads “All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, *at the time* the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person”) (emphasis added).

76. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

77. Administrative Procedure Act, 5 U.S.C. § 706 (2008).

78. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

79. Commercial Alert’s mission is “to keep the commercial culture within its proper sphere, and to prevent it from exploiting children and subverting the higher values of family, community, environmental integrity and democracy.” Commercial Alert, Our Mission, <http://www.commercialalert.org> (last visited Oct. 23, 2009).

80. Letter from Gary Ruskin, Executive Dir., Commercial Alert, to Marlene H. Dortch, Sec’y, FCC (Sept. 30, 2003), available at <http://www.commercialalert.org/fcc.pdf> [hereinafter *Commercial Alert Complaint*].

Commercial Alert warned that if the FCC failed to act, the net effect would be that many viewers would not be aware of the influence embedded in their programming.⁸¹ It urged the FCC to “restore some honesty” to the industry by “strengthening the sponsorship identification rules.”⁸²

This was neither the first complaint lodged nor the first agency that Commercial Alert approached. Indeed, in 2003 it filed a complaint with the Federal Trade Commission (FTC) urging it to react against embedded advertising through its congressionally delegated authority under section five of the Federal Trade Commission Act, which gives the FTC the power to ban unfair or deceptive acts or practices.⁸³ Commercial Alert argued that embedded advertising is “deceptive because it flies under the viewer’s skeptical radar.”⁸⁴ It argued that embedded advertising is “unfair because it is advertising that purports to be something else.”⁸⁵

The FTC formally responded to Commercial Alert’s complaint in February 2005 by stating, “it does not appear that failure to identify the placement as advertising violates Section 5 of the FTC Act.”⁸⁶ The FTC went on to explain that regulation was not the wisest course because embedded advertising does not generally involve a “false or misleading objective, [or] material claims about a product’s attributes.”⁸⁷ In fact, the FTC held that “few objective claims appear to be made about the product’s performance or attributes. That is, in most instances the product appears on-screen . . . or is mentioned, but the product’s performance is not discussed.”⁸⁸

With regard to feature films, producers are adamant that the long-standing exemption from sponsorship identification requirements be left undisturbed.⁸⁹ They argue compellingly that the FCC could not find a “good reason to extend the rules to feature films [and] the Commission should reach the same conclusion” today.⁹⁰ Because there is a “substantial time lag between production of ‘feature’ film and its exhibition on television,” this diminishes the impact a feature film could

81. *Id.*

82. *Id.* at 12.

83. 15 U.S.C. § 45(a)(1) (2000).

84. Letter from Gary Ruskin, Executive Dir., Commercial Alert, to Donald Clark, Sec’y, FTC (Sept. 30, 2003), *available at* <http://www.ftc.gov/os/closings/staff/050210ftccommercialalert.pdf>.

85. *Id.*

86. *Letter from Engle, supra* note 24, at 2.

87. *Id.* at 3.

88. *Id.*

89. *Comments of National Media Providers, supra* note 74, at 41; *see also* In the Matter of Amendment of Sections 3.119, 3.289, 3.654, and 3.789 of the Commission’s Rules, Report and Order, 34 F.C.C. 829, 837 (1963).

90. *Comments of National Media Providers, supra* note 74, at 42.

have to “‘improperly affect broadcasting’ vis-à-vis sponsorship identification.”⁹¹

On the subject of television broadcasts, advertisers and producers argue that embedded advertising does not need to be regulated by the FCC because “shows that feature excessive or misplaced embedded advertising risk losing their audience.”⁹² Accordingly, this would produce a naturally limiting effect on the practice which would allow producers to determine how best to avoid “losing their audience.”⁹³

Perhaps one of the underlying motives of the FTC’s decision not to regulate embedded ads was the belief that a more favorable outcome might be achieved through independent intra-union negotiations and collective bargaining agreements. The Writers Guild of America pointed this out to the FCC.⁹⁴ Unsurprisingly, the writers have their own interests at the forefront of their strategy and have urged broadcasters to reimburse them not only for the work they do as writers, but as advertisers.⁹⁵ The Screen Actors Guild has publicly supported this request and urges broadcasters to better compensate writers for product placements.⁹⁶ They have threatened, “[w]e would naturally prefer to talk, knowing that to be the wisest course of action among partners. . . . This Code of Conduct can be established through negotiations with our business partners. Failing that, we will seek additional FCC regulation.”⁹⁷

The position of the Writers Guild will inevitably lead it to support FCC regulation.⁹⁸ Producers and advertisers came to a full realization of the effectiveness of embedded advertising when Hershey Foods allowed the feature film *E.T.* to incorporate Reese’s Pieces brand candy into its plot.⁹⁹ M&Ms declined to allow the film to feature its candy. Two weeks after the movie’s premier, the Reese’s Pieces brand sales went “through the roof” and this example is still known today as one of the “most successful instances of movie product placement.”¹⁰⁰ Since then the

91. *Id.* (quoting In the Matter of Amendment of Sections 3.119, 3.289, 3.654 and 3.789 of the Commission’s Rules, Report and Order, 34 FCC 829, 837 (1963)).

92. *See, e.g.*, Mary McNamara, *Fabulous Project Runway Tainted by Tsunami of Product Placement and Tacky Cross-Promotion*, MULTICHANNEL NEWS (Feb. 21, 2008), <http://www.multichannel.com/blog/130000330/post/410022241.html>.

93. *Id.*

94. *See* American Advertising Federation, *supra* note 23 at ¶ 5.

95. *See id.*

96. *See id.*

97. *Writers Guild of America, supra* note 22, at 8.

98. *See generally Id.*

99. Wegener, *supra* note 19.

100. JAMES G. SAMMATARO, *FILM AND MULTIMEDIA AND THE LAW* § 4:51 (2008); *see* tvSmarter, *Safe Sex and Product Placement*, Nov. 26, 2008, <http://tvsmarter.wordpress.com/2008/11/26/safe-sex-and-product-placement>. It is worth noting that Coors Beer was

practice of embedded advertising has shown no signs of slowing down. Last year there were 3,291 product placements on top-rated *American Idol* alone.¹⁰¹ NBC recently made an agreement with Ford Motor Company to feature its Lincoln automobiles on *The Tonight Show with Jay Leno* in exchange for \$9 million dollars of Ford advertising commitments across its network.¹⁰² ABC also recently made a deal with Sears for \$1 million to show Sears vehicles delivering and installing equipment on the popular show *Extreme Makeover: Home Edition*.¹⁰³ When reviewing these facts, it is impossible to say that the Writers Guild would be able to effectively limit or restrict sponsorship identification in broadcasting. In these circumstances, the Writers Guild simply does not possess enough clout to discourage producers and advertisers from engaging in such incredible economic opportunities.

There is no question that the practice of embedded advertising will continue to grow, and it is unlikely that even sweeping administrative regulation will slow the process.¹⁰⁴ What is more likely is that the fickle media market of consumers will determine what level of embedded advertising it will endure.¹⁰⁵ Websites criticizing filmmakers and television producers for flagrant advertising have already appeared and are widely popular.¹⁰⁶

C. Does the FCC Have Vested Congressional Authority to Regulate Embedded Advertising?

Whether harm arises from the proliferation of embedded advertisements is perhaps the most hotly contested issue with regard to embedded advertising, and one which will ultimately determine whether

also a product featured on *E.T.* but experienced no sales increase as a result. Reply Comment of American Advertising Federation et al. to FCC, MB Doc. No. 08-90, Nov. 21, 2008, available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520187449 [hereinafter *Comments of American Advertising Federation*]; see Cristel Antonia Russell & Michael Belch, *A Managerial Investigation into the Product Placement Industry*, J. OF ADVERTISING, RES. 74 (2005) (the study's small sample and main reliance on close-ended survey questions could not fully confront and address all the challenges and opportunities associated with product placement planning).

101. PLAISANCE, *supra* note 3, at 62.

102. Wegener, *supra* note 19 at 3.

103. *Id.*

104. See Karh, *supra* note 10, at 143–44.

105. Compare Kielbowicz, *supra* note 20, at 331 (“In this line of reasoning adopted by Congress and regulators, stations relying too heavily on advertising or ceding too much control to sponsors would drive their listeners to competing stations more attuned to the public interest. Such regulation by the marketplace, however, worked best when the audience could distinguish a sponsored message from the surrounding programming or recognize programming itself as sponsored content. To this end, broadcast law has always mandated that stations identify content sponsors.”).

106. See, e.g., Hatori, *supra* note 7.

the FCC has the power to act. Because of the critical nature of this issue, this section will explore its nuances in detail —first, with respect to harms arising in general and second, with respect to harms arising specifically to children.

One of the arguments asserted by producers and advertisers is that the FCC does not have the authority to promulgate additional rules governing sponsorship identification because no harm is involved in the current practices it is seeking to regulate.¹⁰⁷ To begin, “an administrative agency’s power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.”¹⁰⁸ At a minimum, the FCC is required to show that the harms it is attempting to rectify or prevent are not based on “mere speculation or conjecture.”¹⁰⁹ Thus, before the FCC is able to adopt new rules, it must satisfy its burden in showing a “substantial need for more extensive disclosure requirements for product placement than already exist under the Commission’s commercial prohibitions . . . under Section 317 and the Commission’s rules and policies.”¹¹⁰ The FCC must also “demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”¹¹¹

1. Are there really “harms” arising from embedded advertising?

Commercial Alert’s complaint argued that “[p]roduct placements are inherently deceptive, because many people do not realize that they are, in fact, advertisements.”¹¹² Because of this deception and because the current rules allow such deception, Commercial Alert alleged that the rules are inadequate to regulate the “new challenges posed by embedded advertising.”¹¹³

Commercial Alert’s conclusory arguments are both accurate and flawed. In a sense, it is dishonest to initiate advertisements without identifying their source if it is not clear that the entertainment program is ending and an advertisement is beginning. The fact that the advertising industry has become so reliant on such advertising suggests that it is an

107. See generally *Comments of National Media Providers*, *supra* note 73 at 18–41.

108. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

109. *Comments of National Media Providers*, *supra* note 73, at 55 (quoting *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993)).

110. *Id.* at 55.

111. *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993).

112. *Commercial Alert Complaint*, *supra* note 80, at 3; see generally *Commercial Alert, Product Placement*, <http://www.commercialalert.org/issues/culture/product-placement> (last visited Oct. 13, 2009).

113. *Id.*

effective endeavor.¹¹⁴ Such “dishonesty” might be curbed by requiring real time identification;¹¹⁵ however, in another sense, embedded advertising provides an additional component of “verisimilitude to fictional programming.”¹¹⁶ The Writers Guild commented, “As any historian of television knows well, advertising and the medium of television have been inseparable ever since Milton Berle first donned a dress.”¹¹⁷ America has increasingly become a service oriented, commercialistic, and materialistic society.¹¹⁸ Consequently, a fictional program based on reality would be quite unauthentic if it failed to include the realities of such a society.

Other consumer advocates have argued that embedded advertising is deceptive purely because it “‘mimics’ program content.”¹¹⁹ In this regard, it has been described as a “Trojan horse” as it is delivered to homes in an objective and neutral way only to unleash a belly full of commercial manipulation.¹²⁰ This camp points to research that suggests viewers assume that featured products or brands are a writer’s attempt at realism or simply understand them to be a result of an increasingly commercialist society.¹²¹ Proponents of this view claim that this perception is only exacerbated by embedded advertising which appears to be unpaid.¹²² They argue that “as long as trademarked brands are sometimes used for creative effects *without* payment or for a nominal fee, the audience cannot discern when content was ‘induced by consideration.’”¹²³ Thus, because it is deceptive, it is harmful.¹²⁴

114. See *Statement of Kevin Martin*, *supra* note 74.

115. See *infra* Part III, D.

116. American Advertising Federation, *supra* note 23 ¶ 2.

118. *Writers Guild of America*, *supra* note 22, at 1.

118. See CHARLES MERLIN UMPENHOUR, *FREEDOM, A FADING ILLUSION* 337 (2d ed. 2005).

119. Comments of N. E. Marsden to FCC, MB Doc. No. 08-90, (Nov. 24 2008), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520187733 [hereinafter *Comments of N. E. Marsden*] (“At least two product placement agencies have said as much on their websites: ‘The benefit to the marketer is the exposure to a large audience in an environment that is perceived to be objective . . . Often consumers do not even realize they are being marketed to.’” (quoting OnPoint Marketing & Promotions, *Product Placement Defined*, July 24, 2006, available at <http://www.onpointmarketing.com/product-placement.htm>) (“Products shown on screen within a film’s storyline have higher credibility than products in advertisements which the audience knows are paid announcements.” (quoting Vista Group, <http://vistagroupusa.com/serv02.htm>)).

120. *Id.*

121. Cristel Antonia Russell, *Investigating the Effects of Product Placements in Television Shows: The Role of Modality and Plot Connection Congruence on Brand Memory and Attitude*, 29 J. OF CONSUMER RES. 74 (2002).

122. Gail Schiller, *Brands Take Buzz to Bank Through Free Integration*, HOLLYWOOD REPORTER, Apr. 13, 2006, http://www.hollywoodreporter.com/hr/search/article_display.jsp?vnu_content_id=1002343793; see also Wayne Friedman, *Product Placement Dealing: Try to Keep Your Hands in Your Pockets*, MEDIA POST, Apr. 14, 2006, http://www.mediapost.com/publications/index.cfm?fa=Articles.showArticle&art_aid=42245.

123. *Comments of N. E. Marsden*, *supra* note 119 (“When content is induced by a payment,

Producers and advertisers have counter-argued that consumer advocates' accusations of harm are "anecdotal" and "not based on actual evidence."¹²⁵ In fact, this group argues that consumers benefit from embedded advertising because 1) it supports "quality programming in unobtrusive ways and . . . add[s] context and realism to programs,"¹²⁶ and 2) "provides viewers with additional information that they can use outside their viewing experience in their own daily lives."¹²⁷ As Discovery Communications, Inc. explained, its "creative team works extensively to ensure that product placement and in-program messaging blends into the creative content in ways that improve the viewer's knowledge and enjoyment of the program."¹²⁸ Indeed, this group argues that the only protest media consumers have is against "disproportionate or clumsy embedded advertising."¹²⁹

Technological advances support the advertisers' position. Advertisers must face the reality that file sharing and television and movie piracy are at an all-time high.¹³⁰ Only a few years ago the popularity of DVRs¹³¹ and VODs¹³² was predicted to "change the advertising culture."¹³³ These machines, such as TiVo, allow viewers to jump past commercials and watch broadcasts at times of their choosing. One could easily argue that a technological revolution has taken place.¹³⁴

two factors are of material interest to the consumer: 1) there is a promotional motive underlying the choice to pay for the placement, and 2) the content might NOT have been included without the payment.").

124. *Id.*

125. *Comments of American Advertising Federation, supra* note 100, at 9 ("Not only do the pro-regulation comments fail to offer any support for their claims that product placement is extraordinarily persuasive—and therefore inherently deceptive—the very articles cited by Commercial Alert conclude that *there is no consensus* on the impact of product placement."); see Sheri J. Broyles, *Subliminal Advertising and the Perpetual Popularity of Playing to People's Paranoia*, 40 J. OF CONSUMER AFF. 392, 404–05 (2006); see also HERBERT JACK ROTFELD, *ADVENTURES IN MISPLACED MARKETING* 152–53 (2001); Frank R. Kardes, *The Psychology of Advertising*, *PERSUASION: PSYCHOLOGICAL INSIGHTS AND PERSPECTIVES* 297 (Timothy C. Brock & Melanie C. Green eds., 2d ed. 2005).

126. Reply Comment of Discovery Communications, Inc. to FCC, MB Doc. No. 08-90, at 3 (Nov. 21, 2008), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520187454 [hereinafter *Comment of Discovery Communications*].

127. *Id.*

128. *Id.*

129. *Id.*

130. Karrh, *supra* note 10 at 138–40; see also FCC Notice, *supra* note 1.

131. Jonathan Stickland & James Bickers, *How DVR Works*, HOW STUFF WORKS, Oct. 30, 2008, <http://electronics.howstuffworks.com/dvr.htm>.

132. Mark Sweney, *Broadcasters to Launch Joint VOD Service*, GUARDIAN, Nov. 27, 2007, <http://www.guardian.co.uk/media/2007/nov/27/bbc.itv>.

133. Jonathan M. Gitlin, *Stealth Advertising: Marketing Creeps into the Evening News*, ARS TECHNICA, July 12, 2007, <http://arstechnica.com/old/content/2007/07/stealth-advertising-marketing-creeps-into-the-evening-news.ars> (last visited July 12, 2007).

134. *Id.*; *FCC to Look, supra* note 2, at 1.

Advertisers explain that embedded advertising is “simply a pragmatic response to audiences being increasingly difficult to reach with traditional mass media.”¹³⁵ In short, such efforts are a “public relations strategy.”¹³⁶

Advertisers and producers finally argue that such advertising is not deceitful—and thus not harmful—because “consumers ultimately are well aware of product placement practices.”¹³⁷ Producers argue that “[i]f anything, consumers tend to assume any appearance of a product is a paid placement, even when it is not (*e.g.*, use of Reese’s Pieces in *E.T.*).”¹³⁸ In fact, producers point to research that suggests “American respondents were more likely to believe that placements are usually a form of paid advertising and less likely to support government restrictions on the practice.”¹³⁹ Some have gone so far as to label such possible regulations as “demeaning and intrusive.”¹⁴⁰

The arguments of advertisers and producers emphasize only part of the truth. If media consumers are not “confused” and do in fact “assume” that embedded advertisements are paid for by the corporations representing the brand or product, such a system is inherently flawed and will taint the messages of those speaking without monetary reward. For example, the movie *Castaway* could be characterized as one long FedEx ad. “Portions of *Cast Away* were filmed in Memphis at the FedEx international headquarters,”¹⁴¹ and Gayle Christensen, managing director of FedEx’s global brand management admitted, “[w]e’re all over this film. We’re really a character central to the movie.”¹⁴² Surprisingly though, FedEx spokeswoman Darlene Faquin confirmed, “[W]e didn’t pay anything [for *Cast Away*]. It was the writer’s idea to focus on FedEx’s efficiency. They came to us.”¹⁴³ Consider also *E.T.*, which did not involve an agreement for consideration to feature the Reese’s Pieces brand. From the perspective of the media consumer, a writer’s opinion or

135. *Comments of American Advertising Federation, supra* note 100, at ii–iii.

136. *Id.*

137. *Id.* at 9; Reply Comments of CBS Corporation to FCC, MB Doc. No. 08-90 (Nov. 21, 2008), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520187521 (last visited Nov. 14, 2009).

138. *Comments of American Advertising Federation, supra* note 100, at 10.

139. Karrh, *supra* note 10, at 140.

140. *Comment of Discovery Communications, supra* note 126 at 4 (“[T]here is no evidence that adult viewers are confused or misled by embedded advertising, and suggestions that adults are unable to distinguish between programming and advertising, and thus need protections extended to them that were originally designed for children, are demeaning and intrusive.”).

141. *Stranded: Behind-the-Scenes of Cast Away: A comprehensive behind-the-scenes look at Cast Away*, STUMPED (2004), <http://stumpedmagazine.com/Articles/stranded.html>.

142. David Finnigan, *FedEx Won’t Go Postal on Cast Away; Pepsi Returns for Oscars, Sans Refill*, BRANDWEEK, Dec. 4, 2000, available at http://findarticles.com/p/articles/mi_m0BDW/is_47_41/ai_67716804.

143. *Stranded: Behind-the-Scenes of Cast Away, supra* note 141 (last visited Nov. 14, 2009).

artistic expression could easily be mistaken for an embedded advertisement.

While producers are correct in stating that “[m]uch of the support for more stringent rules reflects general hostility toward advertising and commercial activity,”¹⁴⁴ is it proper to accept such a dynamic which holds the views of writers hostage to the assumption that they are receiving compensation for their opinions? Under this theory of harm, artists who may wish to extol the virtues of a product without payment are assumed to be biased or paid off.

2. *Are there special harms to children?*

Many subtleties exist with regard to childhood harms from advertising, but much of that discussion is beyond the scope of this article. This complex issue will be given brief treatment in this section with an emphasis only on the potential harms arising from embedded advertising because the FCC faces special challenges when protecting children from embedded advertising. The FCC must respect the rights of adult media consumers and regulate in the narrowest technologically feasible fashion. Thus, it has implemented certain limits on advertisements during hours children are likely to consume media broadcasts. Unfortunately, children have become legal means of many consumer advocates who have wished to play the child card at every opportunity.

The FCC has always had a special interest in protecting children from manipulative advertising practices. Commissioner Jonathan S. Adelstein announced that the FCC “should move quickly . . . seeking comment on how to implement sensible restrictions on interactive ads targeting children.”¹⁴⁵ The FCC received a filing by a group called Campaign for a Commercial-Free Childhood (“CCFC”)¹⁴⁶ urging the FCC to limit embedded advertising in primetime broadcasts explaining that “2 million kids ages 2-11 watch *American Idol* each week, a show

144. See American Advertising Federation, *supra* note 23, at ii.

145. Jonathan S. Adelstein, Comm’r, FCC, *Stuck in the Mud: Time to Move an Agenda to Protect America’s Children*, Address Before the Media Institute (June 11, 2008), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-282885A1.pdf.

146. The group’s mission is as follows: “to reclaim childhood from corporate marketers. A marketing-driven media culture sells children on behaviors and values driven by the need to promote profit rather than the public good. The commercialization of childhood is the link between many of the most serious problems facing children, and society, today. Childhood obesity, eating disorders, youth violence, sexualization, family stress, underage alcohol and tobacco use, rampant materialism, and the erosion of children’s creative play, are all exacerbated by advertising and marketing.” Campaign For a Commercial-Free Childhood, About CCFC, <http://www.commercialexploitation.org/aboutus.htm> (last visited Oct. 23, 2009).

that is filled with plugs for Coke and Ford.”¹⁴⁷ This would mean restricting embedded advertising during the 8-10 PM programming hours in which children are likely to be watching.¹⁴⁸

The CCFC’s suggestion is not without merit. However, it should be noted that the entertainment industry is wholly reliant—and always has been—on revenues generated from advertisement sales. Normatively speaking, the power of the advertisement industry’s purse in influencing all media should be a default supposition by any and all media consumers. However, the universal access to broadcast entertainment merits additional measures of caution which must be exercised when considering the infirm, incapacitated, and/or youthful viewers. A “tough love” approach would be to expect such viewers to adjust to the realities of American society rather than to shield them from its negative effects.

Nevertheless, the CCFC’s position supporting the restriction of embedded advertising during primetime raises legitimate concerns about the logistics of enforcing such a rule. The logistics are complicated by the “hidden” nature of embedded advertising, which is the major concern of critics.¹⁴⁹ For instance, what would the FCC’s default investigative position be if a product made its way to a show on primetime television without following new regulatory requirements? A detailed and fact-intensive inquiry would be required to discover if the appearance of the product was done for consideration or simply a fortunate coincidence for the benefiting brand name. Such investigations would lead to more transparency; however, they might also damage industry trade secrets or fatally harm fragile or tentative relations between producers and advertisers in an industry known for its impulsiveness and unpredictability.

Conversely, the FTC reasons that there is no child harm involved with embedded advertisements because the advertisements are not deceptive. In its letter ruling in response to Commercial Alert’s complaint, the FTC stated that there is “lack of a pervasive pattern of deception and substantial consumer injury.”¹⁵⁰ As the producers are swift to point out, simply expressing distaste for child exposure to embedded advertising is insufficient.¹⁵¹ The FTC explained that “if no objective claims are made for the product, then there is no claim as to which greater credence could be given; therefore, even from an ordinary child’s

147. Eggerton, *supra* note 18 at 1.

148. *Id.*

149. *Commercial Alert Complaint*, *supra* note 80.

150. *Letter from Engle*, *supra* note 24. FTC Denies CsC’s Petition to Promulgate Rule on Product Placement in Movies, <http://www.ftc.gov/opa/predawn/F93/csc-petit5.htm> (last visited Oct. 23, 2009).

151. *Id.* at 4–5.

standpoint, consumer injury from an undisclosed paid product placement seems unlikely.”¹⁵²

If the FCC were to follow suit of the FTC, it would likely find that the current standards are sufficient to notify media consumers of embedded advertising.¹⁵³ In fact, the FCC faces a heavy burden in that it must support any change to its rules on embedded advertising with “substantial evidence”¹⁵⁴; thus, it is unlikely to act successfully in implementing an intrusive regulation on the current embedded advertising practice.

D. If Regulation is Warranted, What Rules Should the FCC Adopt?

Another thorny component of this issue is if regulations are needed to control embedded advertising, what rules should the FCC adopt? Again, because the FCC has not definitively resolved to regulate embedded advertising, this section will only highlight pieces of a complex puzzle. If the legal landscape does shift, the nuances of this question should be explored more fully. Though, in all reality the regulatory options available beyond those already provided by current FCC regulations are extremely limited. If advertisers and producers continue their efforts to slip advertisements past DVR and VoD technology, consumer advocates will not be satisfied unless some kind of alert takes place when such advertisements occur.

Consequently, Commercial Alert has offered a range of solutions centered on the idea that “product placements should be identified *when they occur*.”¹⁵⁵ One option would be for the words “[a]dvertisement’ [to appear] when the product placement is on the TV screen.”¹⁵⁶ Producers describe these suggestions as “distracting . . . ‘pop-up’ announcements or bottom-screen scrolls.”¹⁵⁷ Other more dramatic options include lengthy texts throughout the program, or total interruptions with “full screen oral and visual ‘warning’ each time a branded product is used.”¹⁵⁸ A final, more moderate suggested option would be “[d]isclosure at the outset of the program . . . in plain English, such as: ‘This program contains paid advertising for’”¹⁵⁹

152. *Id.* at 4.

153. *See id.*

154. *Comments of American Advertising Federation, supra* note 100, at ii; *see also Comments of National Media Providers, supra* note 73, at 55, 59 (quoting *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993)).

155. *Commercial Alert Complaint, supra* note 80, at 4.

156. *Id.*

157. *Comment of Discovery Communications, supra* note 126, at 9.

158. *Id.*

159. *Commercial Alert Complaint, supra* note 80 at 4.

How far would such rules extend? Adoption of regulations governing embedded advertising would undoubtedly embark the FCC on a very slippery slope. How would cross-promotional campaigns be handled—i.e. commercials within commercials? Suppose a celebrity wishes to accept valuable consideration to make an appearance at a charity event. How would such a celebrity promotion be handled under the rules? And what of record-company employees posing as teenagers on MySpace?¹⁶⁰ Often companies receive valuable consideration to promote the brands and products of other companies which do not fall into the same market.¹⁶¹

Advertising advocates have convincingly argued that if the adopted rules are “impracticable . . . no advertiser or programmer could ever agree to them, leading to the complete elimination of embedded advertising.”¹⁶² Such a result would not be congruent with the congressional intent of section 317, which was designed only to require sponsorship identification, not a complete elimination of certain forms of advertising.¹⁶³ This is a compelling argument because as notices and warnings become intrusive and distracting,¹⁶⁴ embedded advertising will lose its appeal to producers and advertisers alike.

E. Would FCC Rules Violate First Amendment Rights?

The First Amendment prohibits all governmental actors (including administrative agencies) from making laws that infringe on the freedom of speech.¹⁶⁵ A threshold question in this instance is whether FCC regulation would infringe on the freedom of speech and therefore whether a First Amendment analysis is applicable. A wide variety of government actions sufficiently burden speech so as to be considered an infringement and are thus subject to First Amendment scrutiny. Therefore, to determine whether the FCC’s potential regulations comply with the First Amendment, it must be determined whether embedded advertising involves “speech.” If so, it must also be determined whether the FCC’s potential regulations restrict speech in a manner which is consistent with the purpose of the First Amendment. This inquiry is dependent upon what level of protection embedded advertising warrants.

Commercial speech has been defined by the Supreme Court as an

160. *Id.* at 1.

161. Johnny Davis, *The Stealth Sell*, TIMES ONLINE, Aug. 5, 2007, http://women.timesonline.co.uk/tol/life_and_style/women/the_way_we_live/article2162542.ece (last visited Nov. 14, 2009).

162. *Comment of Discovery Communications*, *supra* note 126, at 9.

163. *Id.*

164. *Id.*

165. U.S. CONST. amend. I.

expression that “propose[s] a commercial transaction”¹⁶⁶ or an “expression related solely to the economic interests of the speaker and its audience.”¹⁶⁷ Commercial speech was not protected until 1975 when the Supreme Court decided *Bigelow v. Virginia*.¹⁶⁸ This decision was solidified by *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, where the Court again confirmed that commercial speech is protected under the First Amendment, though to a lesser degree than normal speech.¹⁶⁹ The definitions of commercial speech offered by the Court have been difficult to apply.¹⁷⁰ In practice, however, if the speech in question is an advertisement of some form and refers to a specific product, and the speaker has economic motive in speaking of the product, it is likely commercial speech.¹⁷¹ If speech is deemed to be commercial, it has less protection under the First Amendment—albeit some. Commercial speech restrictions must pass intermediate scrutiny to be upheld by the Court.¹⁷² Keeping audiences in ignorance cannot be the goal of the restriction of speech or such restriction is prohibited by the First Amendment.¹⁷³ However, if the government scheme focuses on secondary goals such as lowering consumption of something undesirable or limiting negative effects of some objectionable activity, the Court will require that the speech restriction significantly limit consumption of that evil and that no available method exists that is significantly less intrusive than the regulation.¹⁷⁴

In *Central Hudson Gas*,¹⁷⁵ the Court developed a four-part analysis to review the validity of a government’s regulation of commercial speech. Under this analysis, the government has the burden of proof.¹⁷⁶ In part one, the Court will determine whether the speech in question is protected commercial speech.¹⁷⁷ If the speech is not commercial speech, normal First Amendment protections apply. Commercial speech must be lawful and may not be misleading or have a high risk of becoming

166. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 760 (1976).

167. *Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561 (1980).

168. 421 U.S. 809 (1975).

169. 425 U.S. 748 (1976).

170. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 1088 (3d ed. 2006).

171. *See Va. State Bd. of Pharmacy*, 425 U.S. at 760.

172. *See id.*

173. *See id.* (declaring unconstitutional a Virginia Law restricting pharmacists from publishing prices of prescription drugs).

174. *Cent. Hudson Gas*, 447 U.S. at 557.

175. *Id.*

176. *Id.* at 561; *see also Comments of American Advertising Federation*, *supra* note 100.

177. *Cent. Hudson Gas*, 447 U.S. at 573 (Blackmun, J., concurring).

deceptive.¹⁷⁸ If the speech is deemed commercial and deceptive or misleading, no First Amendment protection is afforded the speech.¹⁷⁹ In part two of the *Central Hudson* test, the Court inquires whether there is a substantial government interest in regulating this kind of speech.¹⁸⁰ If there is no substantial governmental interest, then First Amendment protection will be afforded to the speech.¹⁸¹ In the third part of the test, the court will determine whether the governmental interest is directly advanced by the speech regulation.¹⁸² If it is not, the speech receives First Amendment protection and the regulation is invalidated.¹⁸³ Finally, the Court will determine whether the regulation is “not more extensive than is necessary” to serve the governmental interest.¹⁸⁴ In other words, the government must show that its interest “cannot be protected adequately by more limited regulation of . . . commercial expression.”¹⁸⁵ Otherwise stated, the regulation must be a reasonable fit.¹⁸⁶ If the fit is not reasonable, the commercial speech will receive First Amendment protection and the regulation will be invalidated.¹⁸⁷ Moreover, if the regulatory scheme is irrational, inconsistent, or not likely to achieve its means, the government fails part four of the *Central Hudson* test.¹⁸⁸

In the case of embedded advertising, the overarching question is whether it should be considered commercial speech. Obviously, critics of embedded advertising wish to label such advertising practices as commercial speech so as to allow heavier regulation. Conversely, those who promote embedded advertising wish to push it into the normal speech category to avoid such regulation. The only real distinctions between normal speech and commercial speech are the intent of the speaker and the understanding of the audience.¹⁸⁹ Is embedded advertising designed to sell products or is it designed to entertain? The truth is that it is designed to do both. Advertisers and companies like Discovery “work together to create an organic viewer experience so that the integrations enhance the storyline.”¹⁹⁰ Even critics of embedded advertising admit that “[t]he effectiveness of embedded advertising rests

178. *Id.* at 566.

179. *Id.*

180. *Id.* at 569.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 566.

185. *Id.* at 570.

186. *Id.*

187. *Id.*

188. *Id.*

189. See PAUL C. WEILER, ENTERTAINMENT, MEDIA, AND THE LAW: TEXT, CASES, PROBLEMS 952 (West 1997).

190. *Comment of Discovery Communications*, *supra* note 126, at 5.

on blurring the line between commercial and non-commercial speech.”¹⁹¹ Therefore, one commentator accurately labeled embedded advertising as a kind of “hybrid speech.”¹⁹²

Over the last few decades, courts have not interpreted hybrid speech consistently.¹⁹³ Generally, however, branded entertainment is considered by courts to be a form of entertainment or artistic expression, and thus entitled to First Amendment protection.¹⁹⁴ Likewise, the FCC’s own policy has afforded a greater degree of protection to producers and advertisers. In the 1970s, the FCC adopted a test to determine whether a broadcast is considered an advertisement. The test is as follows: “The primary test is whether the purportedly non-commercial segment is so interwoven with, and in essence auxiliary to the sponsor’s advertising (if in fact there is any formal advertising) to the point that the entire program constitutes a single commercial promotion for the sponsor’s products or services.”¹⁹⁵ Thus, under the current policy, a program replete with embedded advertisements would still likely not be considered commercial in nature.

The circumstance presenting the most intricate First Amendment concerns regarding potential FCC regulation would be if an embedded advertisement is broadcast and the advertisement is determined not to be misleading. The entire inquiry of whether the speech would be protected would revolve around whether the ad was commercial speech. Perhaps what is most alarming about the FCC’s potential regulation is that a court could easily define the speech as commercial, and afford it less protection, allowing the FCC to regulate it under a “reasonable” scheme. This is alarming because it is not true that embedded ads are purely commercial in nature. As such, an entire class of speech which would have traditionally found protection under the First Amendment could be found to be unprotected simply because of the taint of a commercial venture. Moreover, regulation could easily extend beyond embedded advertising and include many more kinds of speech likewise tainted with commercial intent. This should be incredibly disconcerting when considering the fact that America is becoming ever more commercialistic.¹⁹⁶ If such a regulation were promulgated, and ultimately

191. *Comments of N. E. Marsden, supra* note 119, at 14.

192. Note, *Making Sense of Hybrid Speech: A New Model for Commercial Speech and Expressive Conduct*, 118 HARV. L. REV. 2836, 2841 (2005).

193. *See Wegener, supra* note 19, at 986.

194. *See Bolger v. Youngs Drugs Prods. Corp.*, 463 U.S. 60, 66 (1983); *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1002–03 (9th Cir. 2001); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184–86 (9th Cir. 2001).

195. *In Re Public Notice Concerning the Applicability of Commission Policies on Program-Length Commercials*, 44 F.C.C.2d 985 (1974).

196. *See UMPENHOUR, supra* note 118, at 337.

upheld by a court, it would signal an erosion of First Amendment principals so vital to the functioning of a free democracy¹⁹⁷ and essential to the quest to seek truth.¹⁹⁸

IV. CONCLUSION

If the FCC has the initiative and an exceedingly strong interventional pull—and perhaps presidential encouragement—embedded advertising regulation is not out of the question. However, proponents of FCC regulation of embedded advertising face many hurdles: legal barriers, public policy concerns, limits on administrative agency power, etc. Nor does it appear that the broadcasters, producers, and advertisers will give up their new marketing technique without a bitter fight. And why should they? The outcome of this legal battle may leave open to regulation a valuable and traditionally protected class of speech. In the end, what's the harm in having cups of Coca-Cola in front of *American Idol* judges? Audiences don't seem to mind all that much. In fact, if given a choice, surely most would choose embedded advertisements over traditional ones—at least for now.

*Jacob J. Strain, J.D.**

197. Under this theory, freedom of speech is considered a predicate for democracy and consistent with democratic values. *See* CHEMERINKSY, *supra* note 170.

198. Under the search for truth theory, speech should be protected because it is essential to discovery of truth and truth is assumed to be a benefit to society. *See* CHEMERINKSY, *supra* note 170.

* Jacob J. Strain, graduated Magna Cum Laude from J. Reuben Clark Law School, Brigham Young University, April 2009. I wish to dedicate this article to my wife Elodia, without whom, this article would not have been written. Also, I wish to give special thanks to Professor Stephen Wood for his invaluable insights and guidance.