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# Embedded Advertising and the Venture Consumer

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## EMBEDDED ADVERTISING AND THE VENTURE CONSUMER\*

ZAHR SAID \*\*

*Embedded advertising—marketing that promotes brands from within entertainment content—is a thriving, rapidly changing practice. Analysts estimate that embedded advertising expenditures will exceed \$10 billion in 2010. The market continues to grow even as traditional advertising revenues contract. The relatively few legal scholars who have studied embedded advertising believe that it is under-regulated. Ineffective regulation, they claim, is deeply troubling because corporations may, with legal impunity, deceptively pitch products to trusting viewers. Critics charge that embedded advertising creates “hyper-commercialism,” distorts consumers’ tastes, taints the artistic process, and erodes faith in public discourse. This Article argues that the critics are wrong. Sponsorship disclosure law under the Communications Act of 1934 and related regulations is indeed largely ineffective, in part because the media industry has consolidated considerably and in part because the drafters could not imagine the diverse ways we create and consume media content in the twenty-first century. Congress conceived the law not only for yesterday’s marketplace, but also for yesterday’s consumer. The media consumer today is a “venture consumer.” Often, she knows what she wants, knows where to get it, and is aware of the risks and costs involved. The*

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*mismatch between regulators' imagined consumer and the contemporary consumer means that expanded regulation of embedded advertising according to current reform proposals could end up harming consumers more than helping them. Moreover, embedded advertising is not especially amenable to effective regulation, given the incentives for artists and advertisers to collaborate in the production of entertainment content. In light of both the difficulty of correcting the regime's flaws and the consumer interests threatened by expanded regulation, this Article concludes that maintaining the law as-is—rather than expanding it through the proposed reforms—better serves the consumer.*

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## INTRODUCTION

You are watching *Chuck* on network television. A character trying to curry favor with his boss makes a delivery he knows his boss cannot refuse: a chicken teriyaki sandwich, wrapped in paper emblazoned with bright yellow Subway logos.<sup>1</sup> His boss takes an ecstatic, slow-motion bite and sighs: "Mmmm . . . a taste of the Orient in Burbank. Flavors melt together in perfect harmony."<sup>2</sup> Both characters murmur the phrase "\$5 foot-long," which is at the heart of the sandwich chain's national advertising campaign.<sup>3</sup> Curious, you wait for the final credits and study the rapidly scrolling fine print. You see an unambiguous disclosure that Subway paid for the reference.

Or so the relevant legal regime imagines<sup>4</sup>: hypothetically, the law catches instances of sponsorship effectively; anecdotally, consumers notice brand references, care about whether they were sponsored, and pay close attention to clearly communicated disclosure information that the Federal Communications Commission ("FCC") mandates. Yet the reality is quite different on almost all points. The law suffers from substantial failures of reach; consumers often do not notice embedded advertising or disclosure information; disclosure language may be ambiguous even if it is perceptible; and—as this Article argues below—consumers may not value sponsorship disclosure information if disclosure threatens other consumer interests.<sup>5</sup>

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1. *Chuck: Chuck Versus the First Kill* (NBC television broadcast Apr. 13, 2009).

2. *Id.*

3. Brian Steinberg, *Subway Places More Than Just Product in NBC's 'Chuck,'* ADVERTISING AGE (Apr. 16, 2009), [http://www.adage.com/madisonandvine/article?article\\_id=136036](http://www.adage.com/madisonandvine/article?article_id=136036).

4. Subway did in fact provide disclosure in this instance. *Id.*

5. See *infra* Parts III.B, III.C, III.D.

The Communications Act of 1934 regulates embedded advertising, like “payola,”<sup>6</sup> through a sponsorship disclosure regime.<sup>7</sup> *Chuck*’s Subway reference triggers disclosure obligations: broadcasters must make sponsorship and sponsors’ identities clear to consumers at the time of airing. But the *Chuck* episode has become the exception to the rule due to the law’s failure to reach much, if not most, embedded advertising today. Most content airing on cable television is exempt from the Communications Act’s sponsorship disclosure provisions, as are films released in theaters.<sup>8</sup> Some disclosures are subject to an “obviousness exception.”<sup>9</sup> If no consideration has changed hands, disclosure is not required, even if financial or strategic incentives clearly motivated brand references.<sup>10</sup> In short, the regulation of sponsorship has not kept up with the many significant changes in media production and sponsorship practices. In light of evolving modes of television programming and advertising, the Communications Act is a dinosaur. However, even where the law does trigger disclosures, as in the *Chuck* episode, few people notice them; those that do may not care about their content. If they do care about disclosures and study the screen’s brief disclosures, they may still have to go look for further information because disclosures are fleeting, small, and sometimes unclear.<sup>11</sup> In other words, they may need to turn to self-help to find out whether brand references are embedded advertising, even if the broadcaster uses disclosure language.

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6. “Payola” is the term invented to describe the practice of paying for airtime on radio and television. The word is thought to be a portmanteau deriving from the words “pay” and “Victrola.” ROBERT HENDRICKSON, *ENCYCLOPEDIA OF WORD AND PHRASE ORIGINS* 514 (1997); *Sony BMG Music Settles Spitzer’s Payola Probe*, MSNBC, <http://www.msnbc.msn.com/id/8700936> (last updated July 27, 2005).

7. Communications Act of 1934, 47 U.S.C. §§ 317(a), 508 (2006); *see also* 47 C.F.R. § 73.1212 (2010) (outlining the broadcasters’ responsibilities concerning sponsorship identification).

8. *See infra* notes 168–69 and accompanying text (discussing origination cablecasting).

9. *See infra* note 131 and accompanying text.

10. 47 U.S.C. § 317(a)(1).

11. For example, it is not clear what precisely is meant by one of the most commonly used phrases in disclosure, “promotional consideration furnished by [a sponsor].” Douglas N. Masters, *Negotiating Sports-Related Brand Integration Deals in a New Media Environment*, SPORTS LITIG. ALERT (Oct. 27, 2006), <http://www.hackneypublications.com/sla/archive/000367.php> (“The FCC rules do not specify the actual language that must be used [and] state that reference must be made to the sponsor or his product in such a manner as to indicate clearly not only that the program is paid for, but also the identity of the sponsor. Many television shows have complied with this requirement by providing notice at the end of a broadcast that promotional consideration was provided by XYZ Company.”) (internal quotation marks omitted).

The Communications Act is also outdated in terms of modes of media consumption and consumer habits and preferences. This Article will argue that the law skews heavily toward a single interest: a consumer's interest in receiving disclosure. In prioritizing the consumer's disclosure interest, however, the law overlooks other interests that may be equally or more important to the consumer, such as her "immersion interest" and her interest in media content availability.<sup>12</sup>

Aware that the law is out-of-date in a number of respects, the FCC issued a Notice of Inquiry and Proposed Rulemaking ("NOI/NPRM") in June 2008.<sup>13</sup> The NOI/NPRM sought comments to help the Commission determine what changes, if any, the sponsorship disclosure regime should undergo.<sup>14</sup> Consumer advocates and creative guilds pressed for expanded disclosure requirements.<sup>15</sup> The various reform proposals under consideration reflect the fear that embedded advertising deceives consumers and has a net negative impact on consumers and society at large. Reform proponents believe that

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12. The consumer's "immersion interest" is her interest in remaining connected to and uninterrupted during her consumption of entertainment products. In this era of hyperconnectivity and constant interruptions from advertisements on television, in web browsers, and on social marketing platforms—to name just a few sites for advertisement-supported media consumption—consumers' attention is harder for marketers to attract. The consumer may experience this as an increasing obstacle to losing herself in content as advertisements and other interruptions such as constant email updates and news alerts in her hyperconnected universe reach her continually. She may choose to interrupt a program mid-episode to tackle some other activity or engage more fully in another form of media usage (such as writing an email or participating in a text message exchange), but the decision will be hers if so. This Article defines the immersion interest normatively then, as the desire to be in control of one's attention so as to be able to engage more fully—to lose oneself or immerse oneself—in content consumption. See Bob Garfield, *The Chaos Scenario 2.0: The Post-Advertising Age*, ADVERTISING AGE, Mar. 26, 2007, at 1, 14.

13. Sponsorship Identification Rules & Embedded Advertising, 73 Fed. Reg. 43,194, 43,194 (proposed July 24, 2008).

14. *Id.* at 43,196. ("We undertake this proceeding in order to consider the complex questions involved with the practice of embedded advertising, and to examine ways the Commission can advance the statutory goal entrusted to us of ensuring that . . . the public is informed of the sources of program sponsorship while concurrently balancing the First Amendment and artistic rights of programmers. We seek comment on current trends in embedded advertising and the efficacy of the Commission's existing sponsorship identification rules in protecting the public's right to be informed in light of these trends.").

15. Diane Farsetta, *Stealth Marketers Gone Wild: Will the FCC Act?*, CTR. FOR MEDIA & DEMOCRACY: PR WATCH, <http://www.prwatch.org/node/7772> (last visited Nov. 19, 2010) (describing calls for reform by Commercial Alert, the Writers Guild of America, West (WGAW), the Children's Media Policy Coalition, Marin Institute, and the Center for Science in the Public Interest); see also Sponsorship Identification Rules & Embedded Advertising, 73 Fed. Reg. at 43,196 (describing Commercial Alert's call for the expansion of the sponsorship disclosure regime).

augmented disclosures help diminish the harms that embedded advertising produces.<sup>16</sup>

The FCC's proposed reforms do nothing to expand the scope of the law, the expansion of which is theoretically necessary if sponsorship disclosure law is to operate meaningfully. Nor do the reforms address the lopsided nature of the law's imagined consumer, who is presumed to value her disclosure interest over her immersion and media availability interests.

This Article argues that sponsorship disclosure law needs a new way of thinking about consumers and their interests in sponsorship disclosure regulation. It joins the chorus of scholarly voices in related legal fields of trademark, copyright, and First Amendment law asserting the need for a more fully articulated theory of the consumer.<sup>17</sup> Taken as a whole, this research suggests that the consumer has been overlooked systematically in many areas of legal scholarship, which has tended to focus instead on the rights of owners and competitors.<sup>18</sup> The digital revolution, among other factors, has

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16. Farsetta, *supra* note 15. Among the consumer advocacy groups' proposals were "clear and concurrent disclosure" and "simultaneous disclosure." *Id.* Some groups, such as the Children's Media Policy Coalition, sought an outright ban on embedded advertising. *Id.*; see Rita Cain, *Embedded Advertising on Television: Classic Legal Environment and Business Law Content "Brought to You by . . ."*, 27 J. LEGAL STUD. EDUC. 209, 220–223 (2010) (summarizing the reform proposals of the three most significant advocacy groups in the discussion: Commercial Alert; Writers Guild of America, West (WGAW); and the Screen Actors Guild (SAG)).

17. See, e.g., Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2021, 2025 (2005) (critiquing the binary, internally contradictory theory of the consumer in trademark law and illustrating this theory's jurisprudential importance by stating that "[t]he consumer, we are led to believe, is the measure of all things in trademark law"); Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 349 (2005) (taking aim at copyright theory's lack of attention to consumers and describing the "situated user" consumer model as a more sophisticated alternative to existing models, such as the economic consumer and the romantic consumer); Alan L. Durham, *Consumer Modification of Copyrighted Works*, 81 IND. L.J. 851, 851 (2006) ("New technologies assign consumers a more active role in shaping their experience of copyrighted works."); Laura A. Heymann, *The Public's Domain in Trademark Law: A First Amendment Theory of the Consumer*, 43 GA. L. REV. 651, 654 (2009) ("[T]rademarks require, at least to some extent, an active consumer to negotiate with these dual messages—one who not only perceives the trademark as a source identifier but who also can call to mind (and then accept or reject) the various associations the mark comprises."); Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1747–61 (2003) (discussing the concept of consumer sovereignty in the context of consumer expectations doctrine in tort law); Joseph Liu, *Copyright's Theory of the Consumer*, 44 B.C. L. REV. 397, 398–401 (2003) (laying the foundation for a normative theory of the consumer in copyright analysis, based on shifts in technology and new ideas about consumption and creativity).

18. Trademark might seem at first to present an exception, given that it has historically used a consumer's likelihood of confusion as the benchmark for whether a

radically altered the artistic landscape. Consumers are often active authors in their own right, using copyrighted content in a variety of ways—consuming it, playing with it, and using it as a means of expression and self-actualization.<sup>19</sup> Understanding the consumer helps articulate the proper scope and “entitlement structure” for copyright<sup>20</sup> and trademark law.<sup>21</sup> Likewise, understanding how consumers experience media consumption helps inform a more accurate model for embedded advertising law. This informed model is important because it highlights the anachronistic nature of the consumer that the FCC and Congress imagine.

This Article proposes that the law take into account the evolution of the “venture consumer,” who knows what she wants out of her media, knows where to get it, and is aware of the risks and costs involved. The venture consumer skips (or “zips”) through advertisements when watching television shows she has recorded using a digital video recorder (“DVR”); she watches several shows at once,<sup>22</sup> using a remote control to “flip” through them; she uses several platforms (for example, TVs, computers, smart phones, iPods, and

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mark infringes on another. However, important scholarship in the field has shown how the concept of the consumer has been central, but undertheorized, in trademark law. See Beebe, *supra* note 17, at 2025. Consumers as an abstract concept played whatever role was necessary for the strategic purposes of a given case under litigation. See *id.* at 2036. Furthermore, recent scholarship has questioned whether trademark law really was intended to be as consumer-dependent in the first place. See, e.g., Deborah R. Gerhardt, *Consumer Investment in Trademarks*, 88 N.C. L. REV. 427, 430–31 (2010); Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1843, 1915–16 (2007).

19. Cohen, *supra* note 17, at 349, 372; see also Michael Allyn Pote, Comment, *Mashed-Up in Between: The Delicate Balance of Artists’ Interests Lost Amidst the War on Copyright*, 88 N.C. L. REV. 639, 653–56 (2010) (examining the recent phenomenon of “mash-ups,” which use previously copyrighted works to create new artistic works).

20. Cohen, *supra* note 17, at 374.

21. See Beebe, *supra* note 17, at 2025 (concluding that trademark law is incoherent because of the underdevelopment of the idea of the consumer).

22. In the research on media consumption, this behavior is known as simultaneous media usage. Joseph J. Pilotta et al., “*Simultaneous Media Usage*”: *A Critical Consumer Orientation to Media Planning*, 3 J. CONSUMER BEHAV. 285, 285 (2004) (defining simultaneous media usage as “multiple exposures to various media forms at a single point in time for the same media consumer”). In a recent study, the Nielsen Company found that nearly two-thirds of Americans engaged in simultaneous media usage at least once in the last month. About ten percent of media consumption per week consists of using the internet and the television at the same time. THE NIELSEN CO., *THREE SCREEN REPORT: TELEVISION, INTERNET, AND MOBILE USAGE IN THE US* (2010) [hereinafter “THREE SCREEN REPORT”], available at [http://en-us.nielsen.com/content/nielsen/en\\_us/insights/nielsen\\_a2m2\\_three.html](http://en-us.nielsen.com/content/nielsen/en_us/insights/nielsen_a2m2_three.html) (follow “Download the Q1 2010 and previous reports now” hyperlink and complete the personal information requested; then follow the link to “A2/M2: Three Screen Report - Q1-2010” hyperlink).



iPads), perhaps at one time,<sup>23</sup> to watch content originally produced with a different platform in mind; and she has a sophisticated and perhaps even cynical view of the relationship between content producers and advertisers. The venture consumer has less need for, and—one might speculate—comparatively less interest in, what sponsorship disclosure law can offer. She, and consumers at large, may be better off in a world with extensive embedded advertising, in which they receive free or lower-cost, uninterrupted, advertisement-supported content with potentially better quality and better variety than they otherwise would receive.

Part I of the Article introduces the terminology and functions of embedded advertising, framing them with changes in the contemporary media landscape. It identifies the emergence of the venture consumer as one of the most important shifts. Part II describes sponsorship disclosure law and contrasts the venture consumer with the “old-fashioned consumer” the law imagines. It enumerates the ways in which sponsorship disclosure law is ineffective given contemporary market conditions. Part III discusses consumer interests in regulation and argues that the law fails to balance consumer interests adequately because of its overemphasis on disclosure. Part IV questions the amenability of embedded advertising to meaningful and consumer-valued regulation and describes some of the difficulties inherent in regulating the practice. Part V concludes that regulators should take the emerging venture consumer model into account in further consideration of sponsorship disclosure law. Sponsorship disclosure law is ineffective, but reforms to the law would impose significant costs on consumers. Allowing the law to remain in its current state better serves the venture consumer’s various interests.

## I. EMBEDDED ADVERTISING AND THE CONTEMPORARY MEDIA LANDSCAPE

This Part introduces a new kind of viewer—the venture consumer—who exhibits a very high degree of engagement with her media consumption practices and is more heavily invested in them. It

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23. CHRISTOPHER VOLLMER WITH GEOFFREY PRECOURT, ALWAYS ON: ADVERTISING, MARKETING AND MEDIA IN AN ERA OF CONSUMER CONTROL 33 (2008) (referring to “an always-on age of digital recorders, online video, and mobile devices, [in which] most young consumers [are] accustomed to playing video games, instant messaging (IMing), and watching television all at the same time” and stating that “[m]edia multitasking is so prevalent that it has provoked a round of academic studies to gauge its impact on education”).

argues that the venture consumer model clarifies the ways in which today's viewer differs materially from the viewer that sponsorship disclosure law contemplates. Given that the modern sponsorship disclosure regime purports to serve consumers, it should have a realistic picture of consumers in mind. Part I concludes that both the entrenchment and the continued growth of embedded advertising in the entertainment industry present significant challenges for sponsorship disclosure law as it is currently configured.

### A. *Defining Embedded Advertising*

To understand embedded advertising's currency in the law and in public discourse, it is helpful to first set out what embedded advertising is not. Embedded advertising necessarily consists of the insertion of immaterial promotional messages in entertainment content.<sup>24</sup> In other words, embedded advertising does *not* consist of promotional messages embedded in entertainment content which make material, false claims about brands.<sup>25</sup> If it were, false advertising law could intervene to buttress sponsorship disclosure law.<sup>26</sup> Unlike false advertisements, embedded advertisements are lawful. False advertising law reaches claims if they are deceptive and material—which is to say, capable of inducing reliance by a reasonable consumer.<sup>27</sup> Sponsorship disclosure law simply cares about the *fact* of

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24. See, e.g., Ross D. Petty & J. Craig Andrews, *Covert Marketing Unmasked: A Legal and Regulatory Guide for Practices That Mask Marketing Messages*, 27 J. PUB. POL'Y & MARKETING 7, 11 (2008); Letter from Mary K. Engle, Assoc. Dir. for Adver. Practices, FTC, to Gary Ruskin, Exec. Dir., Commercial Alert (Feb. 10, 2005), <http://www.ftc.gov/os/closings/staff/050210productplacemen.pdf> (differentiating between product placements and false advertising, on the grounds that so long as the former does not make claims that are material, deceptive or injurious, it is distinguishable from the latter).

25. See, e.g., Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 109 (2006); Ian Ayres, *The Lanham Act Goes to the Movies*, FREAKONOMICS BLOG (Apr. 21, 2010, 10:30 AM), <http://freakonomics.blogs.nytimes.com/2010/04/21/the-lanham-act-goes-to-the-movies/?scp=1&sq=lanham%20act%20goes%20to%20the%20movies&st=cse> (“Merely wrapping an ad inside a work of art should not empower advertisers to misrepresent the attributes of their products.”); Eriq Gardner, *When Does Embedded Advertising Become False Advertising?*, THR, ESQ. (Apr. 23, 2010, 3:17 PM), <http://thresq.hollywoodreporter.com/2010/04/misleading-product-placement.html>.

26. Direct false advertising is regulated under the Lanham Act, the FTC Act, and state unfair trade and deceptive practice statutes (the “little FTC Acts”). See, e.g., Federal Trade Commission Act § 5, 15 U.S.C. § 45(a) (2006); Lanham Trademark Act § 43(a), 15 U.S.C. § 1125(a)(1)(B) (2006); CAL. BUS. & PROF. CODE. § 17535 (West 2008); Cliffdale Assocs., Inc., 103 F.T.C. 110 app. at 174–76 (1984).

27. *Cliffdale Assocs.*, 103 F.T.C. app. at 174; see 15 U.S.C. § 45(n) (allowing the FTC to act if an advertiser makes a material representation or omission that is likely to mislead a reasonable consumer); 15 U.S.C. § 1125(a) (providing a private cause of action based on use of a word or mark likely to cause confusion or to deceive as to affiliation); Ivan L.

sponsorship and the sponsor's identity.<sup>28</sup> Both false advertising and sponsorship disclosure law seek to promote the circulation of truthful information in the public sphere.<sup>29</sup>

Before providing some examples of embedded advertising in Part II, it is worth emphasizing a rhetorical choice this Article makes that has implications for framing embedded advertising's impact on society. This Article adopts the FCC's phrase "embedded advertising" deliberately instead of "stealth marketing," which is the preferred term for many advocates and scholars.<sup>30</sup> Empirically, however, not all product placements are stealthy.<sup>31</sup> Granted, not all

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Preston & Jef I. Richards, *A Role for Consumer Belief in FTC and Lanham Act Deceptive Advertising Cases*, 31 AM. BUS. L.J. 1, 2–3 (1993) (examining the elements of deceptiveness under the FTC and Lanham Acts and proposing additional criteria that an advertising claim must fulfill for the law to consider it deceptive).

28. 47 U.S.C. §§ 317(a), 508 (2006).

29. *Cliffdale Assocs.*, 103 F.T.C. app. at 175–76. A striking difference between them lies in their efficacy. False advertising law has procedural thresholds (such as materiality and harm requirements) that permit it to weed out trivial claims while providing effective redress for meritorious claims. 15 U.S.C. §§ 45(n), 1125(a).

30. Sponsorship Identification Rules & Embedded Advertising, 73 Fed. Reg. 43,194, 43,195 (proposed July 24, 2008); see, e.g., Goodman, *supra* note 25, at 86; Robert Sprague & Mary Ellen Wells, *Regulating Online Buzz Marketing: Untangling a Web of Deceit*, 47 AM. BUS. L.J. 415, 415–16 (2010); Eric Goldman, *Stealth Risks of Regulating Stealth Marketing: A Comment on Ellen Goodman's Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. SEE ALSO 11, 15 (2007), <http://www.texasrev.com/sites/default/files/seealso/vol85/pdf/85TexasLRevSeeAlso11.pdf>; Letter from Gary Ruskin, Exec. Dir., Commercial Alert, to Marlene H. Dortch, Sec'y, FCC (Sept. 30, 2003), <http://www.commercialalert.org/fcc.pdf>; Writers Guild of Am., W., *Are You Selling to Me?* 7–8 (2005), [http://www.wga.org/uploadedFiles/news\\_and\\_events/press\\_release/2005/white\\_paper.pdf](http://www.wga.org/uploadedFiles/news_and_events/press_release/2005/white_paper.pdf) [hereinafter WGAW White Paper].

31. Sponsors often take pride in their marketing efforts in press releases and corporate blogs. They may release details concerning the success of their sponsorship efforts. See, e.g., Press Release, Cisco, Cisco WebEx Collaboration Stars on Next Episode of 24 (Mar. 27, 2009), [http://newsroom.cisco.com/dlls/2009/ts\\_032709.html](http://newsroom.cisco.com/dlls/2009/ts_032709.html); *Ford Cars Cast in Fall Television Shows*, FORD (Sept. 3, 2008), [http://media.ford.com/article\\_display.cfm?article\\_id=28981](http://media.ford.com/article_display.cfm?article_id=28981) ("In what may be one of the most highly anticipated product integrations this fall, the 2008 Ford Shelby GT500KR will star as KITT, the super intelligent, computerized talking car in the new television series 'Knight Rider' . . ."). For an example of corporate pride in product placements, see Marilyn Mersereau, *Grey's Anatomy*, 24, *The Office and Cisco's Human Network*, CISCO BLOG (Oct. 18, 2007, 3:37 PM), [http://blogs.cisco.com/news/greys\\_anatomy\\_24\\_the\\_office\\_and\\_ciscos\\_human\\_network/](http://blogs.cisco.com/news/greys_anatomy_24_the_office_and_ciscos_human_network/) ("[T]ake a closer look at Grey's Anatomy and CSI the next time you're in watching the tube. In addition to catching the doctors in their hospital scrubs and the yellow crime scene tape, you may just notice some strategically placed Cisco products in the shows."). In order to stretch their marketing dollars further, sponsors often update their websites the day after their products' placements have aired, to make the fact of sponsorship plain for those who are curious. See Mary Vuong, *Home Is Where the Product Placement Is*, HOUS. CHRON., Oct. 24, 2009, at E2 (describing how a sponsor capitalizes on the show's publicity to promote the brand the next day).

viewers recognize embedded advertising as advertising when they see it. Nonetheless, the word “stealth” has rhetorical and historical connotations that stack the deck against these marketing practices.<sup>32</sup> The term “embedded,” by contrast, is neutral;<sup>33</sup> it merely indicates that the advertisements have been placed into content (or developed with it), thus removing the stigma associated with the fear of deceiving consumers. Given evidence that reveals more and more consumers are aware of embedded advertising’s existence, it makes sense to evaluate the practice neutrally, decoupling it from the quasi-legal conclusion that it has deceived or will deceive consumers.<sup>34</sup> The terms used in policy discourse have the potential to slant proposals in one direction or the other when such words are freighted with connotations. This concern emphasizes the need for value-neutral rhetoric.

Sponsorship of entertainment content typically divides into outright sponsorships, product placements, and product integrations.<sup>35</sup> Outright sponsorship differs from embedded advertising, which includes product placements and integrations.<sup>36</sup> Product placement

32. Rhetorically, “stealth” suggests deception, dispossession, or theft. “Stealth” is defined as “[t]he action or practice of stealing or taking secretly and wrongfully.” 16 OXFORD ENGLISH DICTIONARY 597 (2d ed. 1989). Historically, it links to a discourse lamenting “sneaky commercials” that, according to the FCC, sought to deceive consumers. H.R. REP. NO. 86-1800 app. c, at 39 (1960), *reprinted in* 1960 U.S.C.A.N. 3516, 3545.

33. Matter is embedded when it is “fix[ed] firmly in a surrounding mass of some solid material.” 5 OXFORD ENGLISH DICTIONARY, *supra* note 32, at 160.

34. Laurence A. Wenner, *On the Ethics of Product Placement in Media Entertainment*, in HANDBOOK OF PRODUCT PLACEMENT IN THE MASS MEDIA: NEW STRATEGIES IN MARKETING THEORY, PRACTICE, TRENDS, AND ETHICS 101, 124 (Mary-Lou Galician ed., 2004) [hereinafter PRODUCT PLACEMENT HANDBOOK] (“[S]ocial science surveys confirm that many consumers are both readily aware of product placement as a technique and have no strong objection to seeing brands in film and television programming, as long as it isn’t ‘overdone’ or ‘inappropriate’ . . . .”); *see also* Chris Hackley et al., *An Ethical Evaluation of Product Placement: A Deceptive Practice?*, 17 BUS. ETHICS: EUR. REV. 109, 110 (2008) (outlining product placement practices and evaluating those practices using several strands of moral philosophy in the context of regulation).

35. James L. Johnston, *Branded Entertainment: The Old Is New Again and More Complicated than Ever*, 2 J. SPONSORSHIP 170, 170 (2009).

36. Outright sponsorship (e.g., “This episode brought to you by Tropicana: enjoy a glass with every meal”) consists of underwriting the production costs of the sponsored programming and was more common in the early days of television. Nate Anderson, *Buying 30 Minutes of Primetime: Modern Family Becomes an iPad Ad*, ARSTECHNICA, <http://arstechnica.com/tech-policy/news/2010/04/buying-30-min-of-primetime-modern-family-becomes-ipad-ad.ars> (last visited Nov. 19, 2010) (“Shows used to be completely underwritten by sponsors in a way we don’t see so obviously anymore.”). Outright sponsorship may also accompany an embedded advertisement (a product placement or integration), but it does not always. The cable television program *Damages* on the FX network was largely sponsored by Cadillac—and in the second season, Cadillac was glad

consists of visual or aural reference to a product in entertainment content in exchange for consideration or other anticipated benefit. Viewers may or may not notice the placements; if they do, it may be that the product's presence in a work seems stilted, hyperbolic, or, increasingly, ironic.<sup>37</sup>

Product integration consists of even more prominent positioning of the product than a mere glimpse or reference, usually consisting of substantial integration of the product into the storyline in exchange for consideration or other anticipated benefit.<sup>38</sup> Viewers cannot miss these brand references the way they might in a product placement, though viewers may not always recognize them as having been inserted by sponsors.<sup>39</sup> The integrated brands might provide fodder

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to provide an SUV central to the plot, while also airing advertisements during the broadcast. See *Damages: New York Sucks* (FX television broadcast Feb. 17, 2009); Evgenia Peretz, *Q&A: The Creators of Damages Talk About Bernie Madoff, Glenn Close, and Women in Power*, VANITY FAIR (Jan. 28, 2010), <http://www.vanityfair.com/online/oscars/2010/01/qa-the-creators-of-damages-talk-about-bernie-madoff-women-in-power-and-glenn-close.html>.

37. In context, a hypothetical placement might look like this: an episode of an imagined program that depicts the mafia features the gangsters drinking liquor heavily. Perhaps the brand is mentioned in dialogue, or the logo is visible, or both. The popular football drama *Friday Night Lights* features embedded advertising on many different levels as is evident to anyone who watches the program through the running credits. See Gary Levin, *The Newest Characters on TV Shows: Product Plugs*, USA TODAY, Sept. 20, 2006, at A1. Visual references to the Gatorade and Under Armour brands recur onscreen during the show as a natural part of depicting football players in uniform, drinking sports drinks. See *id.*; *Under the "Lights": Applebee's Happy with Product Placement*, STREET & SMITH, SPORTSBUSINESS DAILY (Feb. 7, 2007), <http://www.sportsbusinessdaily.com/index.cfm?fuseaction=archive.printArticle&articleId=109392>. According to running credits, brands such as Under Armour and Gatorade are sponsors of the show, but they are never mentioned in dialogue. *Friday Night Lights: Tami Knows Best* (NBC television broadcast Jan. 23, 2009). However, the show frequently shows and mentions Applebee's Restaurant. See *Under the "Lights," supra*; Marnie Hanel, *Did Applebee's Eat Friday Night Lights?*, VANITY FAIR (Jan. 30, 2009), <http://www.vanityfair.com/online/daily/2009/01/did-applebees-eat-friday-night-lights.html>. Indeed, a prominent character works there after school, and a major plotline from the first season involves a secondary character she met at Applebee's, while in uniform. Hanel, *supra*. Applebee's is also a sponsor of the program, according to disclosure credits. See *Under the "Lights," supra*. See generally Emily Nussbaum, *What Would Tina Fey Do for a SoyJoy?*, N.Y. MAG., Oct. 13 2008, at 32 (discussing many placements and the (sometimes negative) ways in which they affect the creative process).

38. Neda Ulaby, *Taking Product Placement Another Step*, NPR (Sept. 22, 2008), <http://www.npr.org/templates/story/story.php?storyId=94851729> ("When you see giant Coke cups sitting at the fingertips of *American Idol* judges, that's not just product placement. That's full-fledged product *integration*—when a brand becomes inextricably identified with the content of a show.").

39. In the television comedy *It's Always Sunny in Philadelphia*, an episode revolved around a video-arcade dinner chain, Dave & Buster's ("D&B's"). *It's Always Sunny in Philadelphia: The Great Recession* (FX television broadcast Oct. 1, 2009) (singing the

for extended riffs or entire conversations; functional uses of the product might evolve into extended, arbitrary plot contrivances.<sup>40</sup> The brands themselves sometimes take on central roles: an Oreo cookie hid an engagement ring in one episode of the television show *Seventh Heaven*.<sup>41</sup>

Note that all of these references to brands differ in an important way from traditional advertising. Unlike direct advertising, there is no “action step” in embedded advertising to induce action on the part of the viewer, such as “look in the frozen food aisle,” “talk to your doctor,”<sup>42</sup> “try us risk-free for ninety days,” or “collect all five in the series.” Complicating this distinction, however, is that much modern advertising relies more on narrative art or suggestion than on overt pitches.<sup>43</sup> High-quality advertisements look more and more like television, and television looks more and more like extended advertisements. Indeed, the boundaries between the two have perhaps never been so porous.<sup>44</sup> This blurring poses difficult questions for sponsorship disclosure law, which historically has treated advertisements and content as distinct, separable elements.<sup>45</sup>

This assumption that advertising and content can be easily distinguished from each other has ceased to be accurate as embedded advertising now provides a substantial part of the television industry’s revenues. Embedded advertising is big business and continues to grow rapidly.<sup>46</sup> The practice is firmly entrenched in the industry and

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praises of Dave & Buster’s, and featuring the line “Frank, if you’re looking for a better steak in an arcade setting, you are shit outta luck”). The premise in this episode was that in the difficult economic times, the protagonists’ bar was suffering, while D&B’s had been able to continuously run a significant business. *Id.* The protagonists try to adopt D&B’s business model to turn their business around—producing a plausible integration, though aesthetically obnoxious. *Id.*

40. One thinks of the episode “The Junior Mint” in the comedy program *Seinfeld*, in which Kramer and Jerry dropped the candy into the open cavity of a patient undergoing surgery. The candy was first thought likely to kill, then cure, the patient. *Seinfeld: The Junior Mint* (NBC television broadcast Mar. 18, 1993).

41. *Seventh Heaven: And More Secrets* (The WB television broadcast Apr. 24, 2006).

42. Paul Siegel, *Product Placement and the Law*, in *PRODUCT PLACEMENT HANDBOOK*, *supra* note 34, at 89, 89.

43. See Richard Craswell, “Compared to What?” *The Use of Control Ads in Deceptive Advertising Litigation*, 65 *ANTITRUST L.J.* 757, 757–59 (1997).

44. Brian Steinberg, *Desperate Spokeswives: A New Marriage with Ads*, *ADVERTISING AGE*, Sept. 28, 2009, at 4, 4 (describing a series of advertisements airing during the television program *Desperate Housewives* about a fictional couple whose story centers on their Sprint telephones; the advertisements aired during the commercial blocks, but later in the season, the couple was slated to appear on the program itself).

45. See *infra* Parts II.A.1, II.B.

46. See, e.g., TERENCE A. SHIMP, *ADVERTISING, PROMOTION AND OTHER ASPECTS OF INTEGRATED MARKETING* 476 (7th ed. 2007); Angela Campbell, *Restricting the*

has displayed continued growth over the past decade.<sup>47</sup> On *American Idol*, a program with several sponsors, a single sponsor is onscreen sixty percent of the time or more.<sup>48</sup> From late 2006 to 2008, the average television show went from having ten brand references in it to having fifty; outliers may have as many as 1,000 references per show.<sup>49</sup> These figures might seem to exaggerate the phenomenon because a single placement deal can lead to dozens of references to the same product in one episode, simply because it appears in numerous shots. Nonetheless, the volume of money changing hands tells a similar story. Product placements for the domestic television market exceeded \$4 billion in 2005, and accounted for approximately \$2 billion in the film industry.<sup>50</sup> Further, these dollar amounts are misleadingly low because many no-fee product placement deals exist that would increase the tally significantly, possibly by several billion dollars annually if these studies took the value of the bartered goods into account.<sup>51</sup> In 2008, sponsors spent an estimated \$4 billion on product placements for television,<sup>52</sup> a substantial increase over the reported \$2.9 billion spent in 2007<sup>53</sup> and the less-than \$10 million spent in 1999.<sup>54</sup> In the economically turbulent second quarter of 2009,

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*Marketing of Junk Food to Children by Product Placement and Character Selling*, 39 LOY. L.A. L. REV. 447, 449 (2006); Brian Steinberg, *Product Ads Gain More Screen Time*, BOSTON GLOBE, July 28, 2009, at B5.

47. From 1999–2005, product placement, commonly called “ad-spend,” grew annually by sixteen percent. Marc Graser, *Product-Placement Spending Poised to Hit \$4.25 Billion in '05*, ADVERTISING AGE, Apr. 4, 2005, at 16, 16.

48. MARTIN LINDSTROM, *BUY-ODOLOGY: TRUTH AND LIES ABOUT WHY WE BUY* 41–42 (2008).

49. Alana Semuels, *Tracking Embedded Ads: Research Firm Nielsen Seeks to Gauge Product Placement on TV*, L.A. TIMES, July 21, 2008, at C1.

50. Graser, *supra* note 47, at 16.

51. See Gail Schiller, *Brands Take Buzz to Bank Through Free Integration*, HOLLYWOOD REP., Apr. 13, 2006, at 1. Many of these unpaid deals call for sponsors to provide luxury goods or essential services such as hospitality and transportation. See *id.* For instance, an industry report states that the total value of product placements in 2005 was \$5.9 billion. On this basis, after netting out global paid product placement (\$2.21 billion) and U.S. paid product placements (\$1.42 billion), the estimated value of unpaid product placements stands at \$2.36 billion. Press Release, PQ Media, *Exclusive PQ Media Research: Global Paid Product Placement Spending Surged 42.2% to \$2.21 Billion in 2005; Double-Digit Pace to Continue in 2006 and Beyond* (Aug. 16, 2006), <http://www.pqmedia.com/about-press-20060816-gppf2006.html>.

52. See Rachel Browne, *Ads' 30 Seconds of Fame Under Threat*, SYDNEY MORNING HERALD, Aug. 24, 2008, at 28.

53. Comments of Commercial Alert at 2, Sponsorship Identification Rules & Embedded Advertising, 73 Fed. Reg. 43,194 (proposed July 24, 2008) (MB No. 08-90).

54. Rebecca Brown, *Genetically Enhanced Arachnids and Digitally Altered Advertisements: The Making of Spider-Man*, 8 VA. J.L. & TECH. 1, 4 n.14 (2003), [http://www.vjolt.net/vol8/issue1/v8i1\\_a01-Brown.pdf](http://www.vjolt.net/vol8/issue1/v8i1_a01-Brown.pdf).

embedded advertising spending grew nineteen percent.<sup>55</sup> Embedded advertising will likely continue to grow as traditional models of advertising keep contracting.<sup>56</sup> Alternatives to embedded advertising have been discussed and attempted but have not caught on in anywhere near the same scale. For instance, sponsors have been experimenting with banner advertisements and pop-up advertisements that are activated when a viewer uses her DVR to skip the traditional advertisements.<sup>57</sup>

The media landscape has evolved over the past three decades as a function of numerous changes, including the advent of time-shifting technologies, like the VCR and the DVR, and the rise of web platforms for television viewing.<sup>58</sup> The DVR is thought to have transformed singlehandedly the advertising industry.<sup>59</sup> The DVR facilitates consumers' evasion of advertisements by enabling them to "zip" past commercials in pre-recorded material. In so doing, the DVR exacerbates the problems advertisers face in getting their promotional messages to consumers.<sup>60</sup> However, the DVR is not

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55. Ira Teinowitz, *Consumer Groups to FCC: Fix Product Placement*, THE WRAP: COVERING HOLLYWOOD (Sept. 24, 2009), [http://www.thewrap.com/article/consumer-groups-fcc-fix-product-placement\\_7718](http://www.thewrap.com/article/consumer-groups-fcc-fix-product-placement_7718).

56. Suzanne Vranica, *WPP Chief Tempers Hopes for Ad Upturn*, WALL ST. J., Sept. 21, 2009, at B1; see also David Kaplan, *Product Placement Outpaces Ad Spending*, MEDIA POST (Mar. 30, 2005), [http://www.mediapost.com/publications/?fa=Articles.showArticle&art\\_aid=28681](http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=28681) ("[P]roduct placement growth has not been hampered as severely as [traditional] advertising by economic downturns . . .") (internal quotation marks omitted).

57. Gina Piccalo, *TiVo Will No Longer Skip Past Advertisers: The Tool That Lets Viewers Control the TV Will Soon Sport 'Billboards' and Track Viewing Habits*, L.A. TIMES, Nov. 17, 2004, at A1.

58. See Ethan Notkin, *Television Remixed: The Controversy over Commercial-Skipping*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 899, 900 (2006). Time-shifting is "[t]he action of viewing a recording of an earlier television broadcast." *Time-shifting*, OXFORD ENGLISH DICTIONARY, [http://dictionary.oed.com/cgi/entry/50295430?single=1&query\\_type=word&queryword=time-shifting&first=1&max\\_to\\_show=10](http://dictionary.oed.com/cgi/entry/50295430?single=1&query_type=word&queryword=time-shifting&first=1&max_to_show=10) (last visited Nov. 17, 2010).

59. See Kenneth Wilbur, *How the Digital Video Recorder (DVR) Changes Traditional Television*, J. ADVERTISING, Spring 2008, at 143, 143.

60. Advertisers had to face some methods of advertisement avoidance prior to the introduction of the DVR. *Id.* (describing older modes of "ad-avoidance," stating that consumers "change channels with remote controls ('zapping'), divert their attention to companions or other media ('multi-tasking'), leave the room (sometimes called 'physical zapping'), mute or turn off the TV, or fast-forward through commercials in recorded programming ('zipping)'). In a 2001 study Wilbur cites, researchers who interviewed viewers directly after the commercial block "found that 81% reported engaging in some form of advertisement avoidance." *Id.* at 144 (citing Alan Ching Biu Tse & Ruby P. W. Lee, *Zapping Behavior During Commercial Breaks*, J. ADVERTISING RES., May-June 2001, at 25, 27).



solely responsible for the explosion of embedded advertising.<sup>61</sup> The proliferation of content and its availability through an increasing number of media and channels has made it less appealing to sit through advertisements than to surf for more entertainment content playing elsewhere. The growth of the Internet also stimulated new behaviors in media generation and consumption, helping to create a viewership that knows where to find alternative content and does not sit still for long.<sup>62</sup> In 2009, the theme song for the television broadcast of the Emmy Awards was an original song sung by Neil Patrick Harris (formerly of *Doogie Howser, MD* fame),<sup>63</sup> entitled “Put down the Remote.”<sup>64</sup> The song captures the frustration of entertainment producers in the face of the contemporary consumer’s peripatetic nature.

Another factor strongly correlated with the expansion of embedded advertising is the rise of “reality television.”<sup>65</sup> Much

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61. See Amit Schejter, “Jacob’s Voice, Esau’s Hands”: Transparency as a First Amendment Right in an Age of Deceit and Impersonation, 35 HOFSTRA L. REV. 1489, 1494–95 (2007) (describing advances in digital imaging which have facilitated product placement in print and broadcast media).

62. VOLLMER WITH PRECOURT, *supra* note 23, at 31, 33 (“Consumers have been freed; they no longer have to sit through commercials to get the content they want . . . . In addition, it is unusual for a marketer to be able to capture the full attention of a consumer today through just one medium.”); see also Jonathan Handel, *Uneasy Lies the Head that Wears the Crown: Why Content’s Kingdom is Slipping Away*, 11 VAND. J. ENT. & TECH. L. 597, 609–10 (“People do still consume media the old-fashioned way—but fewer and fewer do so every day . . . . The handwriting is on the wall—or rather, on the laptop and mobile phone screens.”); Study: *Two-Thirds of Households Watch Online TV*, MEDIA BUYER PLANNER (Sept. 8, 2009), <http://www.mediabuyerplanner.com/entry/45030/study-two-thirds-of-households-watch-online-tv> (“Nearly 80% of consumers log on for daily entertainment. . . . Consumers are moving away from ‘appointment’ TV, preferring to watch programs whenever they choose. Being able to view favorite shows at any time, along with personal convenience, are the two major reasons cited by more than half of consumers for turning to online TV. Consumers also cite portability as another benefit.”).

63. TIM BROOKS & EARLE MARSH, *THE COMPLETE DICTIONARY TO PRIME TIME NETWORK AND CABLE TV SHOWS 1946–PRESENT* 276 (7th ed. 1999).

64. *The Primetime Emmy Awards* (CBS television broadcast Sept. 21, 2009). The song lyrics instruct viewers “[don’t] touch that dial,” “[don’t] jump online,” “turn off that phone,” “don’t flip that switch,” “don’t hit that fridge,” “don’t hit the loo,” “don’t let your fingertips roam,” and lists nearly two dozen stations available to viewers as a symbol of the difficulty of attracting and retaining viewers. *Id.* The song mixes old-fashioned diversions (such as food or a trip to the restroom) with the temptations of the contemporary media landscape, such as simultaneous media usage, the proliferation of content, and the multitude of devices available for content consumption. See *id.*

65. See, e.g., KEMBREW MCLEOD, *FREEDOM OF EXPRESSION: RESISTANCE AND REPRESSION IN THE AGE OF INTELLECTUAL PROPERTY* 189 (2007) (“Reality television turned out to be an incredibly important vehicle for placement; indeed, *Survivor* producer Mark Burnett described his show as being ‘as much a marketing vehicle as it is a television show. . . . My shows create an interest, and people will look at [the brands], but the

cheaper to produce, this form of television has grown to over a quarter of the primetime programming that the five major networks air.<sup>66</sup> Unscripted programming often seems to exist primarily to serve the marketing goals of sponsors. Take for instance *Extreme Makeover: Home Edition*, which features families needing substantial home repairs in the wake of a natural disaster or other traumatic event. The program can easily integrate brands like Sears, Kohler, and Home Depot without annoying consumers and polish the brands' corporate image at the same time. Without sponsors' involvement, this program and the many others like it would not exist.<sup>67</sup> Unscripted programming may comprise a larger proportion of viewers' consumption than ever before, exposing viewers to much more embedded advertising than consumers of the past.<sup>68</sup>

Consumers today experience more advertising messages than they have likely ever experienced at any other time in history (even accounting for the advertisement-saturated, under-regulated commodity culture of the late nineteenth and early twentieth centuries).<sup>69</sup> The phenomenon is known as "ad creep."<sup>70</sup>

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endgame here is selling products in stores—a car, deodorant, running shoes. It's the future of television.'"). One journalist noted that "[u]nscripted shows, sometimes incorrectly called 'reality shows,' like the *Apprentice* and *Survivor* have been willing canvases for marketers to sledgehammer their brands into programming." David Kiley, *Product Placement Appearing in More Scripted Venues*, BLOOMBERG BUSINESSWEEK NEXT (Sept. 29, 2005), [http://www.businessweek.com/innovate/next/blog/the\\_thread/brandnewday/archives/2005/09/product\\_placeme.html](http://www.businessweek.com/innovate/next/blog/the_thread/brandnewday/archives/2005/09/product_placeme.html); see also Laurie Ouellette & Susan Murray, *Introduction to REALITY TV: REMAKING TELEVISION CULTURE* 1, 5 (2004) (deconstructing "reality shows" and describing the ways in which the editing and scripting of such programs counter any claims that they offer unvarnished views of "reality"); Michael Ventre, *Just How Real Are Reality TV Shows*, MSNBC (Apr. 14, 2009), <http://today.msnbc.msn.com/id/30092600> ("Perhaps only cockeyed optimists believe reality shows are completely on the up-and-up . . ."). In some such programs, the logos and brand references appear blurred, suggesting that no formal affiliation exists in many cases between brands and the programs in which they might otherwise appear.

66. Edward Wyatt, *Television Fledgling Keeps It Real*, N.Y. TIMES, July 23, 2009, at A1.

67. Reply Comments of the Walt Disney Co. at 9, Sponsorship Identification Rules & Embedded Advertising, 73 Fed. Reg. 43,194 (proposed July 24, 2008) (MB No. 08-90). The existence of an entire network called the "Do It Yourself" Network speaks to the success programmers have had with this model. See *DIY NETWORK*, <http://www.diynetwork.com> (last visited Nov. 19, 2010).

68. Tim Arango, *Broadcast TV Faces Struggle to Stay Viable*, N.Y. TIMES, Feb. 28, 2009, at A1 (explaining why the industry-wide crisis has meant, and will mean, more reality television shows for viewers).

69. INGER L. STOLE, *ADVERTISING ON TRIAL: CONSUMER ACTIVISM AND CORPORATE PUBLIC RELATIONS IN THE 1930s*, at vii (2006) ("[T]oday some scholars conclude that each day the average American is exposed to several thousand advertisements.").

Advertisements are everywhere. They colonize every dimension of our physical world.<sup>71</sup> Recently, eggshells began to feature advertisements for upcoming television programs.<sup>72</sup> The physical world is clogged with advertisements, and the marketplace is increasingly cluttered with products. Brands struggle to pierce through the fog to reach a consumer's consciousness, and once there, struggle to remain. The glut worsens when consumers "voluntarily expose themselves to advertising to obtain free entertainment, information, or services financed by advertising revenues."<sup>73</sup>

All these factors require advertisers to think in aggressive and innovative ways about old problems like audience access and consumer recall of brands. Indeed, "in the digital era, it is attention that is scarce and content that is abundant."<sup>74</sup> The media sales paradigm has shifted away from a concept of consumers as "soulless aggregations of demographic data" who represented their segment and could be treated as a single group.<sup>75</sup> Instead, marketers have reconceived the consumer king.<sup>76</sup> Traditional industry-talk revolved around networks "delivering eyeballs" that advertisers "purchased,"

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70. The term "ad creep" has circulated in accounts of advertising's spread to seemingly every possible domain of life. *See, e.g.*, Rodney Ho, *Several Start-Ups Are Wrapping Cars in Advertisements*, WALL ST. J., June 6, 2000, at B2 (quoting Commercial Alert director Gary Ruskin: "It's part of ad creep . . . . As ad budgets go up and clutter increases, ad firms are trying to find any innovative way to stick ads in front of our noses.").

71. News Release, Commercial Alert, Commercial Alert Queries Ad Agencies About "Ad Creep" (Apr. 12, 2000), <http://www.commercialalert.org/PDFs/AdCreep.pdf> ("Americans feel assaulted by ads. There are ads in schools, airport lounges, doctors offices, movie theaters, hospitals, gas stations, elevators, convenience stores, on the Internet, on fruit, on ATM's, on garbage cans and countless other places. There are ads on beach sand and restroom walls.").

72. Stuart Elliott, *A Deluge by NBC to Promote Jay Leno's New Show*, N.Y. TIMES, Sept. 14, 2009, at B7.

73. Lisa P. Ramsey, *Intellectual Property Rights in Advertising*, 12 MICH. TELECOMM. & TECH. L. REV. 189, 193 (2006).

74. Ellen P. Goodman, *Media Policy out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389, 1389 (2004).

75. VOLLMER WITH PRECOURT, *supra* note 23, at 30.

76. *Id.* at 31 ("[T]he media environment has changed in ways that place consumers irrevocably and permanently in control. That's the natural consequence of having myriad outbound communication channels, on the Web and elsewhere; a multitude of technologies that enable either ad skipping or outright ad blocking; an immense number of low-cost and amateur content providers; and a rich variety of on-demand and portable media available on devices ranging from a wall-sized flat screen to a pocket-sized iPhone.").

but it turns out that the modern consumer's eyeballs present a moving target.<sup>77</sup>

### B. *The Emergence of the Venture Consumer*

Consumers have grown accustomed to experiencing their entertainment content in an autonomous and self-tailoring fashion, often watching programs on nontraditional devices or accessing them online.<sup>78</sup> Their undivided attention and loyalty are ever more elusive.<sup>79</sup> All content producers feel the effects of this attention shortage, but the networks feel it most acutely.<sup>80</sup> It is the networks that must scramble to draw viewers in, chasing them across a number of media platforms. Exacerbating the problem is that viewers have become seasoned ignorers of advertisements.<sup>81</sup> The rise of embedded advertising, in other words, is interrelated with the evolution of the traditional consumer into the venture consumer. The venture consumer is a concept with some empirical contours, rather than an empirically defined entity. Yet the concept helps frame the problem behind sponsorship disclosure law—as the venture consumer emerges, disclosures are less necessary and less valuable to consumers.

The venture consumer is an empowered consumer: technological advances and cultural shifts accustom consumers to a higher level of engagement with, and in some cases control over, their entertainment content.<sup>82</sup> Viewers no longer need to passively wait for content from a single source or channel (or even a small number of such sources).

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77. See Claire Atkinson, *How Commercial Ratings Changed a \$70B TV Market*, ADVERTISING AGE, 2008 Supp., at 1, 2.

78. See, e.g., THREE SCREEN REPORT, *supra* note 22 (demonstrating that American consumers of content are watching more content, accessed from more venues, than ever before); *New Study Shows TV Internet Viewers Have Doubled Since Last Year*, BUSINESS WIRE, Aug. 23, 2010, available at <http://www.businesswire.com/news/home/20100823005441/en/study-shows-TV-Internet-viewers-doubled-year>; Kevin Downey, *In DVR's, Networks Have an Ally After All*, MEDIA LIFE (May 4, 2009), [http://www.medialifemagazine.com/artman2/publish/Research\\_25/In\\_DVRs\\_networks\\_have\\_an\\_ally\\_after\\_all.asp](http://www.medialifemagazine.com/artman2/publish/Research_25/In_DVRs_networks_have_an_ally_after_all.asp) (outlining study results on DVR usage and ad-skipping).

79. Jim Krause, *Enhanced TV*, in 1 THE INTERNET ENCYCLOPEDIA 695, 703 (Hossein Bidgoli ed., 2004) (describing traditional broadcasting's challenge attracting consumers' attention given the proliferation of options that face them).

80. MARISSA GLUCK & MERITXELL ROCA SALES, THE FUTURE OF TELEVISION?: ADVERTISING, TECHNOLOGY, AND THE PURSUIT OF AUDIENCES 5, 33 (2008), available at <http://www.learcenter.org/pdf/FutureofTV.pdf>.

81. WAYNE D. HOYER & DEBORAH J. MACINNIS, CONSUMER BEHAVIOR 76 (4th ed. 2007).

82. SCOTT DONATON, MADISON & VINE: WHY THE ENTERTAINMENT AND ADVERTISING INDUSTRIES MUST CONVERGE TO SURVIVE 8-9 (2004).

Instead, the viewer has become a venture consumer, taking higher risks on new content and new channels for delivery of that content. I derive the term “venture consumer” from the phrase “venture capitalist” and its application outside its original context to describe the new “venture philanthropy” (characterized by, among other factors, a higher level of donor engagement and risk-taking).<sup>83</sup>

Venture consumers, like venture philanthropists, will pursue the return on their investment actively and aggressively. They consume media the way many end-users now use the Internet, in a Web 2.0 world: that is, interactively, collaboratively, and subversively.<sup>84</sup> The venture consumer is idiosyncratic. She searches out content from numerous media and sites (including user-generated content sites like YouTube) and tailors her consumption to her shifting and perhaps unpredictable interests.<sup>85</sup> She is armed with what one journalist has called the “inalienable right to channel-surf during commercials or fast-forward through ads in programs [she has] taped.”<sup>86</sup>

Along with greater autonomy over what she watches, the venture consumer has a range of media platforms from which to view content. She micro-manages her media consumption, plotting an individualistic trajectory in terms of where, when, what, and how she consumes. An increasing number of à la carte pricing options means that consumers have numerous small decisions to make about how to invest their capital in the form of their attention. All these choices are associated with a surge, not just in viewing content on portable devices and online, but also in television viewing itself. The average

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83. “Philanthro-capitalist. Philanthro-preneur. Venture Philanthropist. These are just some of the new labels being coined to describe one of the most important shifts in philanthropy today: the transformation of the traditional charitable donor into a philanthropic investor.” Elizabeth Snyder, *Venture Philanthropy*, PRIVATE WEALTH, Aug. 4, 2008, available at <http://www.fa-mag.com/component/content/article/4766.html?issue=130&magazineID=3&Itemid=226>.

84. William McGeeveran, *Disclosure, Endorsement and Identity in Social Marketing*, 2009 U. ILL. L. REV. 1105, 1112 (2009). Computer book publishing mogul and technology entrepreneur Tim O’Reilly coined the term “Web 2.0.” See Tim O’Reilly, *What is Web 2.0*, O’REILLY (Sept. 30, 2005), <http://oreilly.com/web2/archive/what-is-web-20.html>.

85. Mike Carlton, *A Funny Thing Happened on the Way to the Internet: How the New Consumer Foiled the Web Gurus*, CARLTON ASSOCS. INC., <http://www.carltonassociatesinc.com/wp1.cfm?id=18> (last visited Nov. 19, 2010) (detailing the failure of consumers to behave as marketing experts had predicted they would in terms of buying patterns on the Internet, and describing capricious patterns of consumption that mimic the venture consumer’s viewing habits).

86. Randall Stross, *Someone Has to Pay for TV. But Who? And How?*, N.Y. TIMES, May 7, 2006, at C3.

American watches 151 hours of television per month.<sup>87</sup> Such viewing is distinct from other forms of screentime.<sup>88</sup>

Not every consumer watches over a hundred hours of television per month. Nor do all venture consumers. Those who do watch heavily, it should be noted, still differ from their predecessors: the venture consumer is not a couch potato.<sup>89</sup> The venture consumer's viewing—whether fifteen hours per month or ten times that amount—is characterized by its mobility and dynamism. Whereas at one time television viewing might always have occurred in a dedicated room at a dedicated time, those boundaries now have eroded for many viewers. The venture consumer may watch television in a living room on a central set, perhaps connected to a cable box and DVR. Or she may view it on a laptop or handheld device that migrates as circumstances dictate, from desk to bed to couch to train or plane or subway.<sup>90</sup> The hours she chooses for her viewing follow her own needs and wishes.<sup>91</sup> She can watch a show when it begins, a couple of minutes after it begins so that she can “zip” through

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87. Nate Anderson, “TV Everywhere”: Pay Your Cable Bill, Watch Entourage Online, ARS TECHNICA (Mar. 3, 2009), <http://arstechnica.com/media/news/2009/03/tv-everywhere-pay-your-cable-bill-watch-entourage-online.ars>; see also THREE SCREEN REPORT, *supra* note 22 (breaking that amount down weekly as follows: the average American in 2010 spent “35 hours, 34 minutes watching television; approximately 2 hours timeshifting; 3 hours, 52 minutes using the Internet; 20 minutes watching online video; and 4 minutes watching mobile video”). Viewers record content using a VCR or DVR, or they may watch content online or via on-demand television options. See David Bauder, *Survey Shows Extent of TV Time Shifting*, MSNBC (Aug. 17, 2010), <http://today.msnbc.msn.com/id/38737094/ns/today-entertainment>.

88. THREE SCREEN REPORT, *supra* note 22. From 2001 to 2006, consumers reduced their consumption of music, broadcast television, and newspapers but increased their Internet surfing fourfold and their mobile device usage tenfold. VOLLMER WITH PRECOURT, *supra* note 23, at 31.

89. I thank Glen Robinson for prompting me to make this distinction.

90. See Mark Penn with E. Kinney Zalesne, *Smartphoniacs: Addicts of the Information Age*, WALL ST. J. (July 7, 2009), [http://online.wsj.com/article/NA\\_WSJ\\_PUB:SB124690953879601851.html](http://online.wsj.com/article/NA_WSJ_PUB:SB124690953879601851.html). By 2012, Samsung predicts that half a billion people globally will be using smartphones, as well as iPods equipped with video capacity, iPads, and other mobile devices capable of wireless connectivity and video streaming. See *id.*; see also Press Release, Knowledge Networks, Use of Video-Enabled Mobile Technology Doubles in Three Years Among 13- to 54-Year-Olds with Home Broadband Access (Sept. 2, 2009), [http://www.knowledgenetworks.com/news/releases/2009/090209\\_htm.html](http://www.knowledgenetworks.com/news/releases/2009/090209_htm.html) (“Since 2006, ownership of video iPods has grown by a factor of nearly five, and cell phones with video service have nearly doubled in ownership . . . . Net ownership of these two devices and/or laptops has increased almost 50%, from 45% in 2006 to 66% this year—contributing to a doubling (21% to 43%) in net use of these mobile technologies to view video during the same timeframe.”).

91. See Bauder, *supra* note 87.

advertisements, or anytime thereafter.<sup>92</sup> She may spend hours at a time watching back-to-back episodes of a program on DVDs from Netflix, which allows people who dislike cliffhangers to avoid the weeklong wait to find out what happens.<sup>93</sup> Many consumers opt for a combination of these modes as their schedules and circumstances permit.

The venture consumer customizes her viewing habits to suit her precise schedule and tastes, and they become an expression of her social identity. If she is eager to be involved actively with her entertainment content, the venture consumer has many arenas in which to engage in “fandom” of diverse levels of depth.<sup>94</sup> Two-thirds of web surfers access social networking sites.<sup>95</sup> It is easier than ever to “share” clips from beloved content (*pace* the possible copyright infringement implications), making personal endorsements of content part of the currency of one’s social networking profile. Content producers are taking advantage of that engagement. Some viewers state that clues in mystery programs appear so rapidly that the DVR is a necessity for viewers who must slow and replay the relevant content simply to stay abreast of the plot developments.<sup>96</sup>

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92. DVR data reveals that most consumers who use the DVR watch programs that air at 10:00 p.m. or later on the following day, whereas they view earlier or time-sensitive material such as “reality TV” the same day. Bill Gorman, *When Do DVR’d Shows Get Watched? Same Night or After?*, TV BY THE NUMBERS (Jan. 9, 2009), <http://tvbythenumbers.com/2009/01/09/when-do-dvrd-shows-get-watched-same-night-or-after/10483>.

93. Netflix is a rental system that allows subscribers to rent a fixed number of DVDs indefinitely. Viewers create a “queue” online and receive the next DVD in their queue by mail after returning the previous DVD also by mail. See *Help*, NETFLIX, [http://www.netflix.com/Help?action=1&p\\_search\\_text=queue](http://www.netflix.com/Help?action=1&p_search_text=queue) (last visited Nov. 19, 2010).

94. Fans now have message boards, social networking sites, fan-fiction sites, and many other modes of engaging with their favorite content. Many popular programs offer online content, webisodes, blogs, and other interactive media to satisfy fans’ demand for content and engagement outside of the program’s allotted airtime. See, e.g., *Friday Night Lights*, NBC, <http://www.nbc.com/friday-night-lights> (last visited Nov. 19, 2010); *Heroes*, NBC, <http://www.nbc.com/heroes> (last visited Nov. 19, 2010); *Lost*, ABC, <http://www.abc.go.com/shows/lost> (last visited Nov. 19, 2010); *Top Chef*, BRAVO TV, <http://www.bravotv.com/top-chef> (last visited Nov. 19, 2010).

95. THE NIELSEN CO., GLOBAL FACES AND NETWORKED PLACES: A NIELSEN REPORT ON SOCIAL NETWORKING’S NEW GLOBAL FOOTPRINT 1 (2009), [http://blog.nielsen.com/nielsenwire/wp-content/uploads/2009/03/nielsen\\_globalfaces\\_mar09.pdf](http://blog.nielsen.com/nielsenwire/wp-content/uploads/2009/03/nielsen_globalfaces_mar09.pdf).

96. See, e.g., Zaphod, *Post to Fringe’s DVR Viewing Stands out in Week 2*, TV BY THE NUMBERS (Oct. 20, 2009, 11:18 AM), [http://tvbythenumbers.com/2009/10/19/fringes-dvr-viewing-stands-out-in-week-2/30849#disqus\\_thread](http://tvbythenumbers.com/2009/10/19/fringes-dvr-viewing-stands-out-in-week-2/30849#disqus_thread) (“[O]n shows like ‘Fringe’ and ‘Lost’ DVRing is almost essential for seeing the video clues . . . . Sometimes it’s almost impossible to catch the Observer [an enigmatic character on ‘Fringe’] without ‘rewinding.’”).

More than ever, content producers behave like frenetic start-ups and chase the venture consumer's capital. This may not be surprising, given the increasing recognition of the consumer's importance in shaping the media landscape. *Time* named "You" as Person of the Year in 2006.<sup>97</sup> The cover's headline reads: "Yes, you. You control the Information Age. Welcome to your world."<sup>98</sup> Although the behaviors described in the article applied to online content generation and consumption, they have begun to apply to television consumption as well.<sup>99</sup>

Not every consumer is a venture consumer. However, the average household is ever more likely to own a DVR and is thus more likely to participate in one of the behaviors that characterize the venture consumer.<sup>100</sup> The expansion of DVR ownership may also

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97. *Person of the Year*, TIME, Dec. 25, 2006, at 38, 38. Contemporary responses to this article were skeptical of its claims, but whether or not it is descriptively accurate with respect to a consumer's power in the creative and business market, it speaks to the shift in consumer engagement and highlights the active consumption model which underlies the venture consumer concept. See, e.g., Editorial, *Person of the Year Uninspired Choice*, TORONTO STAR, Dec. 27, 2007, at A26; Dan Gillmor, *Us, Not You*, CTR. FOR CITIZEN MEDIA BLOG (Dec. 17, 2006), <http://citmedia.org/blog/2006/12/17/us-not-you>.

98. *Person of the Year*, *supra* note 97, at cover page.

99. See, e.g., Darren Murph, *DVR Owners Do Indeed Skip Ads, Study Affirms*, SWITCHED (Aug. 7, 2008, 9:01 AM), <http://www.switched.com/2008/08/07/dvr-owners-do-indeed-skip-ads-study-affirms> ("In the coming years, consumers will have unprecedented power to choose how they view content."); Brian Williams, *Enough About You*, TIME (Dec. 16, 2006), <http://www.time.com/time/magazine/article/0,9171,1570707,00.html#ixzz11y0N0EPZ> ("It is now possible—even common—to go about your day in America and consume only what you wish to see and hear. There are television networks that already agree with your views, iPods that play only music you already know you like, Internet programs ready to filter out all but the news you want to hear.").

New technologies allow consumers to offer responses or make purchases as they watch television. What is more, consumer feedback may count more than it ever has before; in some instances, actors' careers are made or broken based on whether or not consumers liked them in their breakout "reality TV" roles. Stephanie Clifford, *We'll Make You a Star (if the Web Agrees)*, N.Y. TIMES, June 6, 2010, at BU1 ("Viewers' opinions, carefully observed and culled on the Web and pinpointed through more traditional market research, tend to dictate which Bravo stars graduate from ensemble reality shows to their own programs."). Though market research has long been used in developing concepts for shows, this method has become far more precise and targeted. *Id.* ("Over the last year, Bravo has also begun relying heavily on social media to fine-tune story lines in its programs, so that each episode is even more efficiently tailored to its audience's taste.").

100. Atkinson, *supra* note 77, at 2 ("Now [the DVR-owning proportion of households] is 25% of the Nielsen sample and continues to rise."). More recent research suggests that sixty percent of people that Comcast surveyed nationally own DVRs. Surveys have shown that the longer an individual owns a DVR, the more he skips advertisements. Bauder, *supra* note 87 ("The survey found that 60 percent of viewers report time-shifting more than they did a year ago. Going back three years, 84 percent said they are doing it more often—more than half of the people saying they use it 'significantly more.'"). See generally S. Adam Brasel & James Gips, *Breaking Through Fast-Forwarding: Brand*



accelerate now that the U.S. Court of Appeals for the Second Circuit has reversed a copyright infringement case that “big content” brought against cable companies; the Second Circuit held that remote DVR services do not violate copyright laws.<sup>101</sup> One media analyst suggested that as a consequence of the decision, DVR ownership could spike to over sixty percent of “all digital cable subscribers,”<sup>102</sup> or forty-one million potential new households.<sup>103</sup>

The characteristics, practices, and devices of the venture consumer are of course not limited to the DVR. Alternatives are cropping up to unseat the DVR. For example, Disney has made headlines by promoting its forthcoming “Keychest,” an Internet-based system that would allow subscribers access to all Disney content, irrespective of the media platform chosen for viewing.<sup>104</sup> Disney is betting on the consumer’s desire to use multiple platforms for viewing content and the consumer’s sense of entitlement—consumers want to be able to watch what they want, whenever they want.<sup>105</sup>

The platforms for viewing are different from those available to the traditional consumer, but the mode of engagement is also arguably different. Because of the changes in the consumer’s viewing landscape and habits, the consumer has what we might call an immersion interest<sup>106</sup>—a desire to be able to engage with content in uninterrupted fashion, given the advertising saturation of her media

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*Information and Visual Attention*, J. MARKETING, Nov. 2008, at 31 (exploring data on DVR usage and marketing agencies’ attempts to circumvent ad-skipping).

101. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 123 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2890 (2009); *see also* Stephanie Clifford, *Supreme Court Allows Wider DVR Use*, N.Y. TIMES, June 30, 2009, at B6 (addressing the Supreme Court’s subsequent refusal to consider the plaintiffs’ appeal); Brian Stelter, *A Ruling May Pave the Way for Broader Use of DVR*, N.Y. TIMES, Aug. 5, 2008, at C8 (“Recording TV shows—and skipping the commercials that come with them—may become more pervasive in the wake of a new court ruling that blesses a new networked form of digital video recorder.”).

102. Stelter, *supra* note 101.

103. David Lieberman, *Court Sides with Operators in DVR Case*, TECH. LIVE (Jun. 30, 2009, 1:35 PM), <http://content.usatoday.com/communities/technologylive/post/2009/06/68493073/1>.

104. Ethan Smith, *Disney Touts a Way to Ditch the DVD: Purchase of a “Keychest” Movie Would Allow On-Demand Viewing from Multiple Devices*, WALL ST. J., Oct. 21, 2009, at B1 (“The technology would allow consumers to pay a single price for permanent access to a movie or TV show across multiple digital platforms and devices—from the Web, to mobile gadgets like iPhones and cable services that allow on-demand viewing.”).

105. Piccalo, *supra* note 57 (summarizing a consumer’s appreciation for the TiVo brand DVR: “To be able to see things when I want to see them is the real advantage.”).

106. For further discussion of this immersion interest, *see infra* Part III.C.

and advertising's ability to reach her almost anywhere. Consumers want to control the interruptions of their viewing. This self-imposed consumer interruption is one of the costs of content's new portability and on-demand access functionality. The interruption in that case simply prioritizes the consumer's media-access interest over her immersion interest.

### C. *Consumer-Oriented Scholarship and the Venture Consumer*

One of the most important correlates of the changes in the media landscape described above has been the change in consumer habits, and scholars' theorizations of consumers have taken note of this paradigm shift. Significant changes to older models of understanding the viewer have occurred in the past three or four decades.<sup>107</sup> It is essential to update our understanding of the consumer whom sponsorship disclosure law seeks to protect, because disclosures are only valuable if consumers notice them, need them, and want them. The venture consumer concept helps us see that disclosures may fail on all three counts with respect to today's consumers.

When sponsorship disclosure law originated, the average consumer had few resources to discover whether programming was sponsored. Early FCC opinions describe records kept at station headquarters so curious citizens could make their way to these physical locations and discover information about commercial times logged, sponsor-broadcaster relationships, and the like.<sup>108</sup> Today, the case is manifestly different. In this author's experience over eighteen

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107. David Morley, *Summary of Theories of Consumption in Media Studies*, in THE CONSUMER SOCIETY 262, 263–64 (Neva R. Goodwin et al. eds., 1997). Media studies, in particular, is a field whose conceptualization of the consumer has undergone radical changes in the past three decades. Instead of a passive viewer (the proverbial couch potato), the reigning theory of the viewer today is that of the active viewer. See Heymann, *supra* note 17, at 654 (asserting that “trademark law relies on the consumer’s ability to engage in [active] associational dexterity”); Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1728–30 (1999) (arguing that at least some of the goodwill accumulating around a brand is built by active consumers and audiences); see also JOHN FISKE, TELEVISION CULTURE 62, 65–66 (1987) (describing the way television viewers’ identities are social constructs that are actively created, in contrast with older understandings of “audiences . . . as textual subjects . . . relatively powerless and inactive”). Instead, viewers are actively making meaning as they watch (read) television. *Id.* (“Reading the television text is a process of negotiation between [the consumer’s] existing subject position and the one proposed by the text itself, and in this negotiation the balance of power lies with the reader.”); Brian Steinberg, *The Future of TV*, ADVERTISING AGE, Nov. 30, 2009, at 1, 1 (describing the myriad new forms of accessing content and speculating about the impact of media fragmentation on advertiser revenues).

108. Public Notice, *Applicability of Sponsorship Identification Rules*, 53 F.C.C.2d 368, 368 (1975).

months of researching the question, the day after a program airs, there is a great deal of discussion on websites, blogs, and social networking sites; some of it typically centers on the appearance of brands.<sup>109</sup>

The contrasts between these models of consumption are material to the law's function and utility. Where the law turns on consumer understandings—as it does in trademark and false advertising law—it can be helpful to draw on both empirical and theoretical models of how consumers behave.<sup>110</sup> Recent intellectual property law has emphasized the importance of understanding the consumer's role in the world of copyright<sup>111</sup> and with respect to First Amendment law.<sup>112</sup> Scholarship has also sought to reframe trademark law in terms of a more conceptually consistent account of consumers.<sup>113</sup> This turn to consumer-oriented analysis is especially fitting in communications law, and sponsorship disclosure law specifically, because the FCC purports in its actions to be substantiating the principle that “listeners are entitled to know by whom they are being persuaded.”<sup>114</sup>

Moreover, it also makes sense to develop a theory of the consumer fully when dealing with entertainment content because of the hermeneutic implications of working in an arena replete with texts. As Wolfgang Iser, Stanley Fish, and Hans Robert Jauss have variously argued, readers (or viewers) must understand texts—such as films and television programs—in terms of their own interpretation, construction, and reception through an active process of decoding and encoding.<sup>115</sup> Theories of the consumer that are grounded in

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109. Within a week after the *It's Always Sunny in Philadelphia* episode aired, discussed *supra* note 39 and accompanying text, a Google search of the program's name with “product placement” retrieved over two dozen relevant hits.

110. See Laura A. Heymann, *The Reasonable Person in Trademark Law*, 52 ST. LOUIS U. L.J. 781, 786 (2009) (drawing on literary theory and, by analogy, torts' “reasonable person” standard to argue that trademark law's reasonable consumer “is a judicial construct—one purportedly based on empirical evidence, but a construct nonetheless”).

111. See, e.g., Cohen, *supra* note 17, at 349; Liu, *supra* note 17, at 398–401.

112. Heymann, *supra* note 17, at 653–54.

113. Beebe, *supra* note 17, at 2025.

114. Public Notice, *Applicability of Sponsorship Identification Rules*, 40 F.C.C. 141, 141 (1963); see also *Sponsorship Identification Rules & Embedded Advertising*, 73 Fed. Reg. 43,194, 43,195 (proposed July 24, 2008) (referring to the public's “right to know”).

115. See generally STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980) (extending Iser's reader-response model to embrace “interpretive communities” to help explain why individual readers in the same “communities” may derive similar meanings from texts); WOLFGANG ISER, *THE IMPLIED READER: PATTERNS OF COMMUNICATION IN PROSE FICTION FROM BUNYAN TO BECKETT* (1974) (conceptualizing the reader as an active, engaged maker of meaning);

contemporary scholarship offer a more accurate perspective of consumers than what the FCC and Congress imagined.

## II. SPONSORSHIP DISCLOSURE LAW THEN AND NOW

This Part fills in the background on sponsorship disclosure law and shows how the law has not kept pace with today's modes of media programming, production, and consumption. Together with the law's traditional exceptions, changes in the media landscape have shrunk the amount of material that remains subject to sponsorship disclosure law. Embedded advertising's growth thus appears in tension with the increasing contraction of the law's reach.

### A. *The Scope and Purpose of Sponsorship Disclosure Law*

#### 1. Radio and Newspaper Acts

The purpose of the sponsorship disclosure regime was originally to bring to light transactions between advertisers and broadcasters that might otherwise have remained hidden from view. The animating purpose was not consumer protection so much as fear that broadcasters might, in the future, benefit from advertiser revenues while capturing the benefits of governmental subsidies, thus earning a kind of windfall.<sup>116</sup> Sponsorship disclosure law is premised on the idea that sponsors and broadcasters are separate entities who might collude to embed promotional messages in entertainment content for their mutual benefit. The law's legislative antecedents are the Newspaper Publicity Act of 1912 and section 19 of the Radio Act of 1927.<sup>117</sup> The concerns motivating the Newspaper Act were fears that nineteenth-century postal subsidies intended to encourage the circulation of magazines were providing advertisement-supported twentieth-century publishers with a windfall.<sup>118</sup> The law required that publishers clearly denote materials containing advertising as such.<sup>119</sup>

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HANS ROBERT JAUSS, TOWARD AN AESTHETIC OF RECEPTION (Timothy Bahti trans., 1982) (discussing the relationship between a text and a receptive reader).

116. See R.H. Coase, *Payola in Radio and Television Broadcasting*, 22 J.L. & ECON. 269, 274–76 (1979) (arguing that those lobbying for sponsorship disclosure laws at their inception were motivated by anticompetitive concerns); Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927–1963*, 56 FED. COMM. L.J. 329, 334–35 (2004).

117. Newspaper Publicity Act of 1912, ch. 389, § 2, 37 Stat. 539, 554 (codified as amended at 18 U.S.C. § 1734 (2006)); Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (repealed 1934); see Kielbowicz & Lawson, *supra* note 116, at 333–35.

118. Kielbowicz & Lawson, *supra* note 116, at 334–35.

119. See Newspaper Publicity Act of 1912, ch. 389, § 2; *Lewis Publ'g Co. v. Morgan*, 229

The Radio Act represented legislators' fears that broadcasters might similarly exploit the opportunity for mass dissemination of advertisement-supported information, even though such practices were not in evidence at the time of the law's passage.<sup>120</sup> Specifically, broadcasters and sponsors might disguise promotional messages as broadcasting content. To prevent this deception, legislators mandated disclosure.<sup>121</sup> Congress rejected one of its representative's suggestions that all broadcasting content with embedded advertisements be labeled "advertising," however, showing that the payola laws did depart from the postal regulations.<sup>122</sup> Instead, disclosure of sponsorship and the sponsor's identity would satisfy the payola regime. The Communications Act adopted the Radio Act's disclosure requirement without further congressional discussion.<sup>123</sup>

This quick glimpse of the legislative prehistory of the Communications Act suggests that payola regulation focused on preventing anticompetitive and fraudulent behavior. But it also points to an era when media communications were very different from their contemporary counterparts. Numerous technological, social, and economic factors have redrawn the contours of the entertainment industry and threaten to make sponsorship disclosure law increasingly ineffective, if not irrelevant.

## 2. The Communications Act of 1934

Contemporary sponsorship disclosure law exists under provisions of the Communications Act of 1934, as amended ("the Act"),<sup>124</sup> related regulations, and FCC rulings. Two main provisions of the Act authorize the FCC to issue rules and regulations with respect to

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U.S. 288, 313–16 (1912) (upholding the Act's constitutionality).

120. Kielbowicz & Lawson, *supra* note 116, at 333–34.

121. *Id.* at 332 ("Nothing is prohibited; the rules simply require public disclosure.").

122. *Id.* at 334. The Radio Act's legislative record attests to Congressman Emanuel Cellar's attempt to cast the congressional intent behind the Act as "prohibit[ing] stations from disguising advertising as program content." *Id.* Cellar sought an amendment to require labeling embedded advertising content as "advertising." *Id.* This would have increased the disclosure requirements from what was then the status quo (disclosure language had to state that embedded advertising had been "paid for" or "furnished by" sponsors). *See id.* Congress rejected Cellar's amendment, suggesting both that the legislature did not intend the disclosures to be as intrusive as his proposal would have made them and that the Act's legislative intent did not extend very far into the realm of consumer protection. *See id.*

123. *Id.* at 336 n.31.

124. 47 U.S.C. §§ 151–615b (2006). The FTC regulates direct advertising and has indicated that it may in the future take action with respect to embedded advertising, but it has thus far refused requests for action. Letter from Mary K. Engle to Gary Ruskin, *supra* note 24, at 6.

sponsorship disclosure law: sections 317 and 507 of the Act. Section 317(a)(1) of the Act requires disclosure of qualifying payments for airtime at the time of airing.<sup>125</sup> In theory, direct advertising is subject to section 317, but the Commission's rules exempt direct advertising on the grounds that it is clear to consumers that such matter contains sponsors' pitches.<sup>126</sup> Section 317(c) requires broadcasters to "exercise reasonable diligence" in obtaining sponsorship information from any person with whom the licensee deals directly.<sup>127</sup> Section 507 of the Act extends the duty to disclose from broadcast licensees to their employees, sponsors, program suppliers, and any other parties who provide consideration in exchange for airtime.<sup>128</sup> The Commission has exercised its authority by issuing a series of regulations collectively known as the Sponsorship Identification Rules.<sup>129</sup>

### 3. Exceptions (or Safe Harbors)

The sponsorship disclosure regime contains two important exemptions: the "obviousness" and "reasonably related" exceptions. The promulgation of several dozen illustrations in a House Committee Report clarified the applicability of these exceptions. These illustrations offer fact-specific examples to which the reasonably related exception would or would not attach, and they

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125. Section 317(a)(1) states that

[a]ll matter broadcast by any radio [or television] 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.

47 U.S.C. § 317(a) (2006). The statute's definition of "radio station" extends to television broadcast stations and some cable stations. *See* 47 U.S.C. § 153(5), (6), (33), (35) (2006) (defining "broadcast station," "broadcasting," "radio communication" (including pictures broadcast through radio waves, or television signals), and "radio station"); *see also* Amendment of the Comm'n's "Sponsorship Identification" Rules, 52 F.C.C.2d 701, 701 n.2 (1975) ("Section 317 applies, by its terms, only to broadcast stations. However, sponsorship identification rules have also been adopted for cable television systems insofar as they engage in origination cablecasting.").

126. 47 C.F.R. § 73.1212(f) (2010) (exempting direct advertising).

127. 47 U.S.C. § 317(c); *see also* 47 C.F.R. §§ 73.1212(b), 76.1615(b) (2010) (requiring cable television system operators and the licensees of broadcast stations to exercise reasonable diligence in obtaining sponsorship information).

128. 47 U.S.C. § 508(a)–(c) (2006) (broadening the duty to report so that station employees are covered). In what can otherwise seem confusing, the provision is codified at 47 U.S.C. § 508 but titled 507 in the Act itself. *See* 47 U.S.C.S. § 317(b) (LexisNexis 2010) (referring to "section 507 of this Act [47 U.S.C. § 508]").

129. *See* 47 C.F.R. §§ 73.1212, 73.4242 (2010).

have served as an important source of guidance for sponsors and broadcasters.<sup>130</sup>

The obviousness exception exempts from disclosure requirements any “broadcast matter advertising commercial products or services” that states “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.*”<sup>131</sup> The rules count such a mention as an “announcement” and find that a single announcement is sufficient.<sup>132</sup>

The reasonably related exception arose from a proviso added as part of the 1960 amendments. This proviso created a *de facto* safe harbor for property furnished to broadcasters without a charge or at a nominal charge in exchange for airtime.<sup>133</sup> A limitation on that safe harbor is that any reference to or use of the furnished property must be “*reasonably related* to the use of such service or property on the broadcast.”<sup>134</sup> Thus, once the brand’s use on air goes “beyond reasonably related,” or once the consideration paid in exchange for the airing goes beyond the “nominal” threshold, the broadcast triggers sponsorship disclosure requirements.<sup>135</sup> Congress recognized that these distinctions would involve difficult line-drawing and provided the FCC with clarification of what counted as “reasonably

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130. H.R. REP. NO. 86-1800, at 20–24 (1960), *reprinted in* 1960 U.S.C.C.A.N. 3516, 3528–32; *see also* Public Notice, Applicability of Sponsorship Identification, 40 F.C.C. 141, 141 (1963) (stating that the Commission viewed these illustrations as guidance for the application of its rules).

131. § 73.1212(f) (emphasis added).

132. *Id.* *But cf.* 47 U.S.C. § 317(a)(2) (potentially requiring advertisements for political programs or controversial issues to make disclosures even where consideration was nominal or absent). Additional regulations cover political advertising but lie outside the scope of this Article. *See, e.g.*, 47 U.S.C. § 315 (2006); Political Candidate Authorization Notice & Sponsorship Identification, 47 C.F.R. § 73.4190 (2010).

133. *See* Communications Act Amendments of 1960, Pub. L. No. 86-752, § 8, 74 Stat. 889, 895–96 (codified at 47 U.S.C. § 317(a)(1) (2006)).

134. 47 U.S.C. § 317(a)(1). More fully, section 317(a)(1) provides:

That ‘service or other valuable consideration’ shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is *reasonably related* to the use of such service or property on the broadcast.

*Id.* (emphasis added).

135. *Id.* For the proviso to apply, consideration cannot consist of money. *See* Letter from FCC to Earl Glickman, President, Gen. Media Assocs., Inc. (Apr. 13, 1966), *in* 3 F.C.C.2d 326, 326–27 (1966).

related” in the form of several dozen examples.<sup>136</sup> In collaboration with industry representatives, the House Committee on Interstate and Foreign Commerce produced twenty-seven illustrations (which the FCC later expanded to thirty-six).<sup>137</sup> For example, if a bus company’s travel video features the tour bus visually, there is no need to disclose sponsorship, so long as there has been no payment and the bus “is shown fleetingly in highway views in such a manner reasonably related to that travel program.”<sup>138</sup> The illustrations demonstrate that the law requires disclosure if the video shows the bus “to an extent disproportionate to the subject matter of the film.”<sup>139</sup> If an airline pays a radio station to mention its name on air, the law also demands sponsorship identification.<sup>140</sup> If a piano concert is broadcast and the piano shows an insignia of normal size, the Act does not mandate disclosure.<sup>141</sup> However, if the producer enlarges the piano’s logo for the purpose of enabling the television viewer to see it better, the Act requires disclosure.<sup>142</sup>

The scope of these two exceptions has never been fully understood. Few judicial or administrative rulings have broached section 317(a), let alone the reasonably related safe harbor and its illustrations. Overall, there is not a rich, internally consistent body of rulings on which to draw. Only one opinion has construed the central provision of sponsorship disclosure law (section 317),<sup>143</sup> though a number of opinions cite to sponsorship disclosure law’s terms in the context of resolving a procedural issue or a different substantive

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136. See H.R. REP. NO. 86-1800, at 20–24, *reprinted in* 1960 U.S.C.C.A.N. at 3528–32; see also Kielbowicz & Lawson, *supra* note 116, at 356 (discussing the importance of the examples).

137. Public Notice, Applicability of Sponsorship Identification Rules, 40 F.C.C. 141, 149–51 (1963) (providing additional illustrations 28–36); see also 4 THE ECONOMIC REGULATION OF BUSINESS AND INDUSTRY: A LEGISLATIVE HISTORY OF U.S. REGULATORY AGENCIES 2373–2546 (Bernard Schwartz ed., 1973) (surveying the history and development of the Communications Act of 1934).

138. *Nat’l Ass’n for Better Broad. v. FCC*, 830 F.2d 270, 277 (D.C. Cir. 1987) (quoting H.R. REP. NO. 86-1800, at 24, *reprinted in* 1960 U.S.C.C.A.N. at 3532).

139. *Id.*

140. Public Notice, Applicability of Sponsorship Identification Rules, 40 F.C.C. at 145.

141. *Id.* at 148.

142. *Id.* Even here, however, the rules contemplate removing the logo’s appearance from the reasonably related exception if “undue attention” is paid to the logo instead of, say, the pianist’s hands. *Id.* (“Conversely, if the piano furnished has normal insignia and during the course of the televised concert the broadcast includes occasional closeups of the pianist’s hands, no announcement is required even though all or part of the insignia appears in these closeups. Here the identification of the brand name is reasonably related to the use of the piano by the pianist on the program. However, if undue attention is given the insignia rather than the pianist’s hands, an announcement would be required.”).

143. *Nat’l Ass’n for Better Broad.*, 830 F.2d at 276–77.



matter.<sup>144</sup> Plenty of administrative rulings exist, but those tend to focus on the obviousness exception, to be analytically peremptory, or both.<sup>145</sup> The obviousness exception appears to have developed some guidelines: a sponsor must have a “logical connection” to the identified product and both the identity of the sponsor and the fact of sponsorship must be obvious.<sup>146</sup> If the sponsor is a commercial entity, the identification is more likely to count as “obvious” for the purposes of the exception.<sup>147</sup> The reasonably related proviso, on the other hand, has received no judicial or administrative elucidation. For this reason, the illustrations provided by the House Committee on Interstate and Foreign Commerce take on disproportionate importance because of the dearth of case law. The thirty-six illustrations provide the foundation upon which the FCC and courts determine what is “reasonably related.”

These thirty-six illustrations offer some clarification, but overall, they have raised more questions than they have answered. Certainly, they have imported into contemporary sponsorship disclosure law a view of the consumer that seems frozen in time, dating to the 1960s when Congress and the FCC created the illustrations.<sup>148</sup> An examination of these illustrations elucidates the proviso’s purpose but

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144. Very few cases and rulings exist in this area; those that do tend to focus on the obviousness section rather than the reasonably related exception. *See, e.g., id.* at 275 (clarifying that sponsorship disclosure law extends to “all broadcast matter” whether or not it is commercial, and regardless of whether it is intended for children).

145. Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Classical Acquisition Ltd. P’ship (Sept. 28, 1995), *in* 10 FCC Rcd. 11004, 11004 (1995) (clarifying that the obviousness exception requires a clear brand name or identifying factor); Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Leland M. Larson, Vice-President/Gen. Manager, Jacor Broad. of Colo., Inc. (Oct. 25, 1993), *in* 8 FCC Rcd. 7892, 7892 (1993) (noting that, under the obviousness exception, “product” and “sponsor” must be “obviously intertwined”).

146. Public Notice, Commission Reminds Broadcast Licensees & Cable Operators of Sponsorship Identification Requirements Applicable to Paid-For “Public Service” Messages, 6 FCC Rcd. 5861, 5861 (1991) (clarifying that the obviousness exception only applied where both the identity of the sponsor *and* the fact of sponsorship were obvious, and adding that public service announcements are not, without more, exempt).

147. *See, e.g.,* Letter from Donna R. Searcy, Sec’y, FCC, to Edward G. Astinger III, President, Salem Media Corp. (Feb. 3, 1992), *in* 7 FCC Rcd. 927, 927 (1992) (clarifying that the mere mention of a physician’s name was insufficient sponsor identification because the sponsoring physician was not a commercial entity or brand name clearly linked to the advertisement). *But cf.* Application of Dontron, Inc., 6 FCC Rcd. 2560, 2563 (1991) (finding no liability for a broadcaster who might have received free Jenny Craig meals in return for airtime because “in some circumstances, the mere mention of the Jenny Craig name may have constituted” adequate disclosure under the obviousness exception).

148. *See infra* notes 150–55 and accompanying text.

also reveals an exception that is outdated and manipulable. So long as content producers can plausibly find a way to make showing a brand “reasonably related” to the program’s purpose, the proviso will exempt the program from disclosure requirements with respect to that brand. Thus, to the example of the pianist,<sup>149</sup> if a program’s producer was choosing between camera angles focusing on the piano player’s face or fingers, he might opt to choose whichever one gave a better view of the sponsoring brand. Choosing this focus on the brand would be a natural decision to please the sponsor; the exception allows this choice and does not require any disclosure, regardless of whether this shot is the best one, artistically speaking.

As further illustration, no announcement is required if “[a] Coca-Cola distributor furnishes a Coca-Cola dispenser for use as a prop in a drugstore scene.”<sup>150</sup> Nor is disclosure required if a refrigerator is provided for free (or at nominal, non-cash charge), for use as a background prop, and the advertiser does not require the broadcaster to make aural reference to it.<sup>151</sup> Once a character refers to that refrigerator, however, disclosure is required.<sup>152</sup> If the manufacturer furnishes the refrigerator for use as a prize on a giveaway show and the show mentions the name and product details, no disclosure is required.<sup>153</sup> But note that once the refrigerator receives a special mention, disclosure is again necessary.<sup>154</sup>

If “[i]n addition to the identification [of the refrigerator] . . . the master of ceremonies says: ‘All you ladies sitting there at home should have one of these refrigerators in your kitchen’ or ‘Ladies, you ought to go out and get one of these refrigerators,’ ” a disclosure will be required, “because each of these statements is a sales ‘pitch’ not reasonably related to the giving away of the refrigerator on this type of program.”<sup>155</sup>

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149. See *supra* note 142 and accompanying text.

150. Public Notice, Applicability of Sponsorship Identification Rules, 40 F.C.C. 141, 146 illus. 16 (1963).

151. *Id.* illus. 15.

152. *Id.* at 147 illus. 22 (“During the course of the program the actress says: ‘Donald, go get the meat from my new X refrigerator.’ An announcement is required because the identification by brand name is not reasonably related to the particular use of such refrigerator in this dramatic program.”).

153. *Id.* illus. 23(a).

154. *Id.* illus. 23(b).

155. *Id.* Plainly, these illustrations make presuppositions about consumption that are gendered, in addition to being dated in other respects. That the target of these advertisements is presumptively women raises an inference about the paternalistic nature of the protections offered through sponsorship disclosure law. Many of the examples center on game shows for housewives, or on programming that depicts domestic life and

In the immediately previous example, the phrase “reasonably related” seems to mean “necessary.” But it also attempts to get at the distinction between entertaining and pitching—the rules aim to create a safe harbor for embedded advertising that facilitates the production of entertainment content. They do so by allowing free subsidies through the provision of props and giveaway prizes.<sup>156</sup> The rules draw the line, however, once the entertainment crosses over into the “action step” mode of direct advertising, in which a sponsor urges consumers to take particular action or makes recommendations for consumers.

In its illustrations, the House Committee on Interstate and Foreign Commerce also sought to distinguish between advertising and entertainment by regulating a show’s use of close-ups. If an aircraft manufacturer provides free travel to participants in a show that depicts the cast’s arrival in such a way that the manufacturer’s brand is visible, the law would not require disclosure unless the show features a *close-up* of the brand.<sup>157</sup> Based on the language it used, the committee appears to have applied that same logic to what might be considered *aural close-ups*, such as the references above, drawing viewers’ attention explicitly to brands that are heard whether or not they are seen.

The regulation of close-ups may be viewed as an attempt to prevent the aesthetic diminishment of entertainment content—its dissolution into overt advertising. Yet legal line-drawing that turns on questions of shot composition and length seems a perilous undertaking: it can be gamed by recurring quick glimpses of a product. Conversely, a focus on a branded product might be necessary and aesthetically justified but receive disfavored, disincentivizing treatment under the law.

The thirty-six illustrations that flesh out the “reasonably related” safe harbor naturalize certain kinds of brand references that may have been normative at the time of the amendments in 1960 but are no longer so. They presume that domestic life will look a certain way

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embeds products germane to the domestic sphere. Where a man appears, it is as an agent for the domestic chief, as in the example cited *supra* note 152. Congress presumed that women do both the bulk of the television consumption and the shopping inspired through such consumption. See Public Notice, Applicability of Sponsorship Identification Rules, 40 F.C.C. at 147 illus. 22.

156. Kielbowicz & Lawson, *supra* note 116, at 359–60, 365, 367 (“Congress barred the FCC from requiring disclosure for the routine use of records or props provided free for commercial broadcasts . . .”).

157. Public Notice, Applicability of Sponsorship Identification Rules, 40 F.C.C. at 147–48 illus. 24.

and incorporate stale notions about marketing and consumer behavior.

### B. Sponsorship Disclosure Law's Failures of Reach

Sponsorship disclosure law has not kept pace with the twenty-first century explosion of new media and the expansion of embedded advertising. Media industry consolidation means, for instance, that conglomerates may now be both sponsors and broadcasters. Further, programming, marketing, and merchandising practices have evolved so that entertainment content in some cases may function as one long commercial. Finally, modes of embedding advertising have rapidly grown more self-conscious. Embedded advertisements frequently point themselves out in ironic or cartoonish fashion.<sup>158</sup> These hyperbolic or metanarratological references may fall uncomfortably in a doctrinal no-man's land, beyond "reasonably related" yet not "obvious" enough for the obviousness exception. Taken together with changed consumption practices, these shifts suggest that old ways of thinking about embedded advertising's relationship to law no longer hold.

#### 1. Illustrations of Sponsorship Disclosure Law's Outdated Logic

Consider the hypothetical situation below, which imagines a consumer who encounters a number of embedded advertisements in succession.<sup>159</sup>

You are watching network television. You head over to cable, where a favorite show is now in reruns. On *Frasier*, a curmudgeonly father takes an ice-fishing trip with his affection-starved sons. He agrees to tell them he loves them, but only after stating that he "needs to do it right" and taking a big swig of Jim Beam whiskey to fortify himself.<sup>160</sup> You change the channel, finding the film *Cast Away*, starring Tom Hanks as a FedEx employee stranded on an island with only a branded volleyball for a friend.<sup>161</sup> Clinging to life on his wave-battered raft, Hanks howls when he finally loses his white leather

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158. Paul Tassi, *The Rights and Wrongs of Product Placement on Television*, UNREALITY MAG. (Apr. 20, 2009), <http://unrealitymag.com/index.php/2009/04/20/the-rights-and-wrongs-of-television-product-placement/> (praising the program *30 Rock* for making the product placement "so loud and obnoxious that the ad is a joke in itself").

159. All of these references have actually occurred, just not all at once as the hypothetical posits.

160. *Frasier: Breaking the Ice* (NBC television broadcast Apr. 18, 1995) (John Mahoney's character to Kelsey Grammer's character).

161. *CAST AWAY* (Twentieth Century Fox & DreamWorks 2000).

companion: “WILSON!”<sup>162</sup> You turn off the film and watch *30 Rock*, recorded earlier this week on your DVR. This episode features GE’s Trivection Oven: a fictional network executive made his name by dreaming up a device that can cook a turkey in twenty-two minutes.<sup>163</sup> At the advertisement break, GE informs viewers that the product is real. During the commercial block, you check your email on your smartphone, ignoring the remaining advertisements. A friend has shared a link to a funny video; you click to watch a pirated copy of a Pepsi commercial commissioned to parody a *Saturday Night Live* sketch.<sup>164</sup> Nothing appealing left on your DVR, you open your laptop and watch another episode of *30 Rock* online. Tina Fey and Alec Baldwin share a stagey exchange about their enthusiasm for Verizon Wireless phones. Fey turns to the camera as though directing herself to sponsors and asks, “Can we have our money now?”<sup>165</sup>

The examples above are all some form of embedded advertising under this Article’s broad definition (which catches exchanges *in anticipation* of benefit).<sup>166</sup> Yet none is likely to trigger disclosure obligations under the current law.

If Subway paid or provided consideration for the branded placement mentioned at the start of the Article and no exception applies, then a disclosure must appear when the placement airs.<sup>167</sup> But contrast the Subway placement with the ones above. Neither sponsors nor broadcasters need to make any disclosure. *Frasier* is airing on cable television, which the sponsorship disclosure regime effectively does not reach since it only includes programming that is original to cable.<sup>168</sup> *Cast Away* is subject to an exemption for films produced for

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162. *Id.*

163. *30 Rock: Pilot* (NBC television broadcast Oct. 11, 2006).

164. *See, e.g., MacGruber Pepsi Ad*, YOUTUBE, <http://www.youtube.com/watch?v=XhKdrbRW5vY> (last visited Nov. 19, 2010). During the 2008–2009 season, the NBC television show *Saturday Night Live* (“SNL”) did a recurring parody of an older television show, *MacGyver*, called *MacGruber*. Pepsi commissioned the SNL writers to produce a Pepsi-themed series of *MacGruber* commercials (ultimately called “Pepsuber”). *See* Suzanne Vranica, *MacGyver to MacGruber to PepSuber*, WALL ST. J. BLOG (Feb. 1, 2009, 5:06 PM), <http://blogs.wsj.com/superbowl/2009/02/01/macgyver-to-macgruber-to-pepsuber>.

165. *30 Rock: Somebody to Love* (NBC television broadcast Nov. 15, 2007).

166. *See supra* Part I.A.

167. *See* 47 U.S.C. § 317(a) (2006). And, indeed, Subway does in the *Chuck* episode in question. *See supra* notes 1–4 and accompanying text.

168. *See* Goodman, *supra* note 25, at 147 (“When it enacted sponsorship disclosure rules, the FCC itself acknowledged that there was no relevant difference between broadcast and cable for these purposes. The rules almost entirely exempt cable only because, when the rules were adopted and revised, cable operators had very little control over programming decisions. Neither the FCC nor Congress has had occasion to revisit the rules since.”) (internal citations omitted). At present, sponsorship identification

theatrical release, and even if it were not exempt, the reasonably related exception covers the free volleyballs Wilson reportedly provided.<sup>169</sup> A plain reading of the Act's proviso shows that *30 Rock*

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requirements under section 317 apply to broadcasters and origination cablecasters, but the FCC has not issued rules extending section 507 to original cablecasters; only broadcasters are covered. 47 C.F.R. §§ 73.1212, 76.1615 (2010). Origination cablecasting is subject to sponsorship disclosure law, but all second-run programming on cable is exempt; given that there is a great deal more origination cablecasting, this distinction may cease to make as big of a difference but it is worth noting. See Goodman, *supra* note 25, at 147 n.363. Origination cablecasting is "programming (exclusive of broadcast signals) carried on a cable television system over one or more channels and subject to the exclusive control of the cable operator." 47 C.F.R. § 76.5(p) (2010). Practically speaking, if *Frasier* were to air on cable television with the same product placements as it had carried on network television, it is unlikely that its producers would alter any disclosure language they might have included for the broadcast version. However, it is not inconceivable that the after-market syndication for the program would result in additional product placements being digitally superimposed on a program, in which case these new placements would fall outside the express jurisdiction of sponsorship disclosure laws because such programming counts as second-run programming, not as origination cablecasting. See Goodman, *supra* note 25, at 147.

169. See, e.g., Report and Order, Amendment of Sections 3.119, 3.289, 3.654 & 3.789 of the Comm'n's Rules, 34 F.C.C. 829 app. at 849-53 (1963); Notice of Proposed Amendments, 28 Fed. Reg. 4707, 4709, 4715-17 (May 10, 1963); *Sponsor Rules Amended*, BROADCASTING, May 13, 1963, at 50, 50. The announcements required by section 317(b) of the Communications Act of 1934, as amended, are waived with respect to "motion picture films produced initially and primarily for theatre exhibition." Kielbowicz & Lawson, *supra* note 116, at 366 (quoting Notice of Proposed Amendments, 28 Fed. Reg. at 4717). Ultimately, the waiver for theatrically released works would still apply to the entire film because it was a film produced and released for theatrical exhibition. Notice of Proposed Amendments, 28 Fed. Reg. at 4709, 4715-17. As an exercise in understanding the reasonably related exception, however, this case provides useful points of clarification because it has two important product integrations: the Wilson volleyball and the FedEx branded airplane, uniforms, and place of work. The sixty or so volleyballs Wilson provided for filming would qualify for the reasonably related exception for two reasons. First, the volleyballs' use appears to be "reasonably related" to the scene in which Tom Hanks confides in the Wilson volleyball as his only friend, because it is used as a prop and woven into the storyline. Second, as mere props provided without additional consideration, the volleyballs fall into the de minimis reasoning of section 317(a)(1) (which exempts props of "nominal" value so long as they remain "reasonably related" to their use on a given program). In contrast to the Wilson product integration, the FedEx product integration would not qualify for the reasonably related exception, because though there were no direct placement fees paid, FedEx reportedly paid a number of the production costs. Ted Friedman, *Cast Away and the Contradictions of Product Placement*, in *PRODUCT PLACEMENT HANDBOOK*, *supra* note 34, at 171, 173. The safe harbor at 47 U.S.C. § 317(a)(1) would not apply because the consideration is no longer "nominal," even if the prop's use in the creative work was "reasonably related." A further argument might be made that the FedEx brand's presence went "beyond reasonably related" to its use in the work; indeed, one critic referred to the film as "one big commercial for Federal Express," but this product integration probably falls outside the reasonably related exception even before that inquiry because of the substantial value it represents. See Friedman, *supra*, at 173 ("While no product placement fee was paid, FedEx supplied extensive resources to the filmmakers, including airplanes, trucks, packages and uniforms . . . . In addition, FedEx

is not required to make any disclosure because GE did not provide promotional consideration for the reference.<sup>170</sup> The Verizon plug in the second *30 Rock* example probably falls within an “obviousness exception” that exempts embedded advertising when it is obvious to viewers that they are seeing sponsored content.<sup>171</sup> Though the reasons for their exemption from sponsorship disclosure law differ, these examples reveal some of the failures in the current sponsorship disclosure regime’s effective reach.

From the FCC’s traditional perspective, consumers have a “right to know who is pitching to them.”<sup>172</sup> Yet in all of these examples, the hidden pitches fall outside sponsorship disclosure law’s effective reach. There is no good policy reason for the distinction; the differences are a function of changing technologies, modes of rhetoric, and marketplace conditions. To focus on one example, recall *30 Rock*’s unpaid reference to the Trivection Oven.<sup>173</sup> Tina Fey, the show’s producer, said she just liked the oven.<sup>174</sup> At the time of airing, GE owned NBC,<sup>175</sup> and we may thus presume—in spite of Fey’s protesting-too-much to the contrary—that incentives exist to choose a product for which the free publicity would do her “home team” (or bosses at NBC) some good. Practically speaking, however, no good policy distinction exists between the advertising practices that sponsorship disclosure law currently includes and excludes.

In a related vein, this GE oven “plugola”<sup>176</sup> resulted in an additional benefit that speaks to the particularities of the modern

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CEO Fred Smith was an investor in the film’s production company.”) (internal citations omitted).

170. Nonetheless, the program may have had other strong incentives for making the plug: *30 Rock* stood to benefit from providing GE with a free product plug, as the following makes clear. First, GE owns NBC, *30 Rock*’s home network, so the benefits that reach GE may be imputed to have some effect on NBC and *30 Rock*. Second, the plug induced an adbuy by GE, suggesting that plugging products is in a program’s self-interest. The sponsorship disclosure regime, if it were internally consistent, would care about these factors even if they are unconnected to a formal transfer of consideration between sponsors and broadcasters.

171. See 47 C.F.R § 73.1212(f) (2010).

172. NOI/NPRM, Sponsorship Identification Rules & Embedded Advertising, 23 FCC Rcd. 10682, 10702–03 (2008) (Statement of Jonathan S. Adelstein, Comm’r, FCC).

173. See *supra* note 163–65 and accompanying text.

174. Colleen Bohan, *GE’s Trivection Oven Gets Ready for Its Close-up*, TWICE (Dec. 4, 2006), [http://www.twice.com/article/257932-GE\\_s\\_Trivection\\_Oven\\_Gets\\_Ready\\_For\\_Its\\_Close\\_Up.php?rssid=20328](http://www.twice.com/article/257932-GE_s_Trivection_Oven_Gets_Ready_For_Its_Close_Up.php?rssid=20328).

175. See *id.* (calling NBC a “subsidiary” of GE).

176. Kielbowicz & Lawson, *supra* note 116, at 331 n.2; William Randle, *Payola*, 36 AM. SPEECH 104, 105 (1961). Plugola is commonly understood as a “promotional remark [or] a plug.” Kielbowicz & Lawson, *supra* note 116, at 329 n.2.

marketplace. GE decided to buy airtime once it learned of the product's placement, "to let viewers know the product is, in fact, real."<sup>177</sup> This example crystallizes the difference in marketplace conditions that stymies the sponsorship disclosure provisions today. The free plug benefited the program's parent company by providing free publicity and benefited the program itself by generating an adbuy during the commercial block.<sup>178</sup> Yet it lay outside sponsorship disclosure law, which is equipped only to track direct transfers, not potential conflicts of interest based on market incentives.

Rather than try to retrofit the law to disclose all the possible conflicts of interest that could generate such "plugola," the law should be allowed to remain on the books, imperfect as it is. Repeal would cost great political capital and expend tremendous amounts of legislative resources.<sup>179</sup> Currently, sponsorship disclosure law imposes few costs on consumers' immersion and media abundance interests, even if it arguably does not serve their disclosure interests as fully as one would wish. Instead, consumers who desire additional or specific information about sponsorship, and those who do not, will not be hounded with it.<sup>180</sup> In turn, the FCC should recognize that consumers'

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177. Bohlen, *supra* note 174 (" 'We at GE Consumer & Industrial had nothing to do with the inclusion of the product on the show,' said Allison Eckelkamp, a spokesperson for the division. 'We did however choose to run Trivection ads during the show to let viewers know the product is, in fact, real.' ").

178. Adbuys during a show contribute to the program's long-term viability. See SHIMP, *supra* note 46, at 431; see also Brian Steinberg, 'Modern Family' Featured an iPad, but ABC Didn't Collect, ADVERTISING AGE (Apr. 1, 2010), [http://adage.com/mediaworks/article?article\\_id=143105](http://adage.com/mediaworks/article?article_id=143105) ("Many product-placement deals include the purchase of traditional advertising along with the appearance or mention of a good or service.").

179. See Katie Connolly, *The Politics of Repealing Health-Care Reform*, NEWSWEEK BLOG (Mar. 22, 2010), <http://www.newsweek.com/blogs/the-gaggle/2010/03/22/the-politics-of-repealing-health-care-reform.html> (describing the various legislative difficulties and political costs associated with recent legislation that has provoked controversy).

180. As R. Polk Wagner explains:

A sponsorship disclosure requirement (SDR)—at most—enhances the perception of editorial integrity, but it does not ensure editorial integrity. . . . In essence, the theory undergirding an SDR is that consumers will, by knowing the sponsoring sources of media products, gain confidence in the authenticity of their editors' voices. But . . . implicit in any SDR is the assumption (or at least the hope) that consumers will choose more independent editorial voices . . . . But if the theory of an SDR relies on the marketplace—specifically, an assumption that consumers will, on the margin, choose independent rather than corrupt editorial voices, then it is unclear whether an SDR is needed at all: if the marketplace values editorial integrity, then we should expect such an approach to gain marketshare independent of the regulatory regime.



awareness of embedded advertising is unlikely to increase through disclosures because of the difficulty of perceiving them, the speed with which they scroll by, the lack of clarity in the messages they deliver, and the significant problems of scope from which the law ails. Consumers, one might speculate, are far more likely to learn of product placements through corporate press releases, co-branding efforts, or the mainstream media.

## 2. The Failure of the Traditional Exceptions

The growing convergence between advertisers and content producers leads to the potential undoing of the reasonably related and obviousness exceptions: they threaten to eviscerate the rule. The reasonably related exception provides strategic opportunities to evade the sponsorship disclosure regime. For example, in an era of widespread product integration, a show's producers can strategize the content of the show so as to make excessive references to a product "reasonably related." Indeed, some viewers might argue this is the norm in much unscripted programming today.

Similarly, the "obviousness" exception is outdated. What is "obvious" to consumers is a function of media sophistication and changing modes of expression in entertainment content. It would be ahistorical to claim that self-referential embedded advertisements are a product of our era alone,<sup>181</sup> but they have proliferated in recent years, perhaps after *Wayne's World 2*, a popular Mike Myers film, used them in a hyperbolic manner.<sup>182</sup> If ironically embedded advertisements continue to grow in popularity, and if convergence between advertising and entertainment content continues, it may be clearer than ever to consumers that sponsors have embedded advertisements. In theory at least, the obviousness exception could exclude more embedded advertisements from disclosure law than it includes.

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R. Polk Wagner, *Comments on Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. SEE ALSO 17, 17-18 (2006), <http://www.texasrev.com/sites/default/files/seealso/vol85/pdf/85TexasLRevSeeAlso17.pdf>.

181. One article from the late 1950s mentions many self-referential embedded advertisements, such as when "Jack Benny mentioned Schwinn bikes . . . , then wheeled toward the screen and said, 'Send three.'" *Block That Schlock*, TIME, Nov. 23, 1959, at 63, 63.

182. See, e.g., MCLEOD, *supra* note 65, at 193 ("Wayne's World made product placement (or at least 'ironic product placement') cool."); Steve Johnson, *Creeping Commercials: Ads Worming Way into TV Scripts*, CHI. TRIB., Mar. 24, 1996, § 1, at 1 ("[M]aking a joke out of ad creep is the technique's favored form of camouflage.").

Congress based the law on “yesterday’s technology” and yesterday’s consumer, too.<sup>183</sup> When sponsorship disclosure law originated, the consumer was comparatively powerless. He turned on the radio, tuned it to one of a few stations, and settled in to listen with relatively few other distractions competing for his attention.<sup>184</sup> Listening to the radio then was more like going to see a movie today—the consumption became the focus of one’s experience for a brief window of time.<sup>185</sup> Indeed, in the early days of television, a household and perhaps even neighbors clustered around a single television set, sitting close because of the small screens.<sup>186</sup> Watching television now is, instead, a process without a set time, without a fixed beginning and end, subject to multiple distractions.<sup>187</sup> This atomization began, in part, when households began to own multiple television sets in the late 1950s and continued when remote controls caught on in the 1970s.<sup>188</sup> The individualization of content consumption is still more pronounced in the era of the smartphone, the DVR, the migration of content to Internet platforms, and the proliferation of user-generated content. Sponsorship disclosure law originated in a different era, in order to govern a media industry whose modes of production and consumption differed materially from modern practices.

Law need not aspire to be cutting-edge, but it should at least reflect a realistic understanding of the industry it seeks to regulate.<sup>189</sup> The anachronisms in the legal regime as described above show how market players and practices have outpaced sponsorship disclosure law. This should not come as a tremendous surprise: the rules were

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183. Goodman, *supra* note 25, at 86.

184. John Carey, *New Media and TV Viewing Behavior: Implications for Public Broadcasting*, 2 *NHK BROADCASTING STUD.* 45, 46 (2003) (“During these early years, there was little channel changing . . .”).

185. See MILLY BUONANNO, *THE AGE OF TELEVISION: EXPERIENCES AND THEORIES 15* (Jennifer Radice trans., 2007).

186. *Id.*; Carey, *supra* note 184, at 46.

187. FISKE, *supra* note 107, at 73–74; see also Nicholas Carr, *The Price of Free*, *N.Y. TIMES*, Nov. 15, 2009, § 6 (Magazine), at 26, 26 (noting how television viewing through computers and laptops encourages “private consumption” and can lead to consumers feeling that “[e]ven when we’re together today, we’re often apart, peering into our own screens”).

188. Carey, *supra* note 184, at 47 (“With multiple sets, remote controls, and a larger number of channels available, [by 1990] television viewing became more personalized and people were by now routinely changing channels more frequently.”).

189. Ivan L. Preston, *Puffery and Other “Loophole” Claims: How the Law’s “Don’t Ask, Don’t Tell” Policy Condone Fraudulent Falsity in Advertising*, 18 *J.L. & COM.* 49, 95 (1998) (“The law of the marketplace cannot be the law of the marketplace unless it is based on what actually happens there.”).

crafted in 1927 and have not been substantially updated in half a century.<sup>190</sup>

### C. Currently Proposed Reforms

The proposed reforms, if adopted, would expand the scope and form of the required disclosures substantially.<sup>191</sup> Instead of simply announcing the sponsorship and sponsors' identities at the end of a program, for example, one proposal would require broadcasters to use superimposed messages ("pop-up disclosures") during the product's appearance onscreen that would have to move at a reasonable speed and remain on the screen for a specified duration.<sup>192</sup> This would be in addition to announcements before and after the program aired.<sup>193</sup> Another proposal would require horizontal text across the bottom of the screen (a "crawl") when the product airs, and disclosures would have to be a "reasonable degree of color contrast."<sup>194</sup> The FCC sought comment on a proposal that would require disclosure lettering to be a specific size and remain onscreen for a specific length of time.<sup>195</sup> Under this proposal, producers would

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190. Glen O. Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, in THE LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 3, 24 (Max D. Paglin ed., 1989) ("[W]ith each passing era [the Act] is beginning to look more like a 'living constitution' than a fixed statutory mandate."). Robinson wrote about communications law from a historical perspective, at a time predating a period of rapid legal change in the area generally. But his comments remain surprisingly true for sponsorship disclosure law, which has remained static precisely at a time when communications laws around it have evolved radically and continually.

191. See WGAW White Paper, *supra* note 30, at 2. If the program is a news program, the disclosure would also be made aurally. Farsetta, *supra* note 15.

192. See Comments of Commercial Alert, *supra* note 53, at 12–13. The "pop-up would only be required for a limited period (perhaps five seconds) in each scene or segment in which the placement occurs." *Id.*

193. See *id.* at 13.

194. Comments of the Writers Guild of Am., W. Regarding the Rampant Use of Embedded Advertising in Television and Film and the Need for Adequate Disclosure to Viewers at 2, Sponsorship Identification Rules & Embedded Advertising, 73 Fed. Reg. 43,194 (proposed July 24, 2008) (MB No. 08-90).

195. NOI/NPRM, Sponsorship Identification Rules & Embedded Advertising, 23 FCC Rcd. 10682, 10691 (2008) ("In this Notice of Inquiry and Notice of Proposed Rulemaking ("NOI/NPRM"), we seek comment on a proposed rule change to make the current disclosure requirement more obvious to the consumer by requiring that sponsorship identification announcements 1) have lettering of a particular size and 2) air for a particular amount of time. Currently, the sponsoring announcement for any television political advertising concerning candidates for public office must have lettering equal to or greater than four percent of the vertical picture height and air for not less than four seconds. Also, any political broadcast matter or broadcast matter involving the discussion of a controversial issue of public importance longer than five minutes "for which any film, record, transcription, talent, script, or other material or service of any kind is

need to disclose corporate relationships and fully articulated corporate identities.<sup>196</sup> A third proposal would mandate a statement that the writers and actors of the program did not endorse the promotional messages contained in the program.<sup>197</sup> In some cases, a producer might have to modify his content as well, even though this seems to contravene the plain language of other provisions of the Act.<sup>198</sup> Given how expressly expansive they are, these disclosure requirements appear intended to “regulate[] [embedded advertising] out of existence.”<sup>199</sup> Yet the proposed reforms do not correct many of the inconsistencies that frustrate the current law. Indeed, as the next Part details, the challenges involved with creating a meaningful sponsorship disclosure regime in the current media economy are considerable. The costs such a regime would impose on consumers’ interests in media consumption outweigh the benefits in the form of increased disclosures.<sup>200</sup>

### III. CONSUMER INTERESTS IN MEDIA CONSUMPTION AND THE REGULATION OF SPONSORSHIP

Embedded advertising is increasingly hard to regulate, as a function of the changed media landscape and market conditions outlined in Part II. This regulatory challenge breaks down into two factors: scope, addressed above in Part II.B, and remedy. What tools could help regulators curb embedded advertising or mitigate its alleged harms? An important obstacle for regulators lies in the

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furnished. . . to a station as inducement for the broadcasting of such matter” requires a sponsorship identification announcement both at the beginning and the conclusion of the broadcast programming containing the announcement. We seek comment on whether the Commission should apply similar standards to all sponsorship identification announcements and, if so, we seek comment on the size of the lettering for these announcements and the amount of time they should air.”) (internal citations omitted).

196. See Comments of Commercial Alert, *supra* note 53, at 13.

197. See Reply Comments of Screen Actors Guild at 1–2 & n.2, Sponsorship Identification Rules & Embedded Advertising, 73 Fed. Reg. 43,194.

198. Comments of Nat’l Cable & Telecomms. Ass’n at 3, Sponsorship Identification Rules & Embedded Advertising, 73 Fed. Reg. 43,194 (“[P]roposals to regulate the size or duration of those messages not only would impose impermissible content requirements on the messages but also could force changes in the underlying content of the program network itself. Programmers could be forced to modify program endings, to change how end credits are displayed, to alter the flow from one program into the other, and to restrict common creative practices if these types of regulations were adopted.”). *Cf.* 47 U.S.C. § 544(f)(1) (2006) (prohibiting any entity from “impos[ing] requirements regarding the provision or content of cable services, except as expressly provided in this subchapter”) (emphasis added).

199. Reply Comments of the Walt Disney Co., *supra* note 67, at 10.

200. *Cf.* Goodman, *supra* note 25, at 141.

difficulty of making effective and consumer-valued disclosures. Disclosure may threaten other consumer interests that regulators have overlooked, such as the consumer's immersion interest and the consumer's interest in media abundance.

These problems of scope and remedy may not be insurmountable challenges, but if more effective regulation of embedded advertising serves only some consumer interests while threatening others, these challenges may not be worth undertaking. This Part describes various consumer interests in the regulation of sponsorship practices and argues that the proposed changes to sponsorship disclosure law would not serve those consumer interests. Moreover, embedded advertising is not especially amenable to effective regulation, due to the incentives for artists and advertisers to collaborate in the production of entertainment content. Given the difficulty of correcting the regime's flaws and the threat expanded regulation poses to consumer interests, maintaining the law as-is, rather than expanding it through the proposed reforms, will better serve the consumer.

#### A. *Embedded Advertising's Harms*

One way to arrive at a consumer's interests in sponsorship and its regulation is to ask what harms may flow from embedded advertising. To the extent that regulation can mitigate harms emanating from the practice, consumers may have an interest in strengthening or expanding such regulation. It is necessary to explore these purported harms in order to frame the question of whether and how regulation might cure embedded advertising's harms in a manner that protects consumers' various interests in the regulation of sponsorship. The three harms that have animated scholarship and advocacy in this area are: (1) overcommercialization, (2) competitive harm, and (3) consumer deception. Most proponents of sponsorship disclosure reform believe that sponsorship disclosure law is good for society and that embedded advertising is not. From the perspective of its critics, advertising in general creates barriers to entry,<sup>201</sup> artificially creates or

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201. Cf. Lillian R. BeVier, *Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception*, 78 VA. L. REV. 1, 5 (1992) (reviewing and rejecting the collected arguments of critics of advertising on the grounds that it creates barriers to entry, distorts taste, and manipulates demand); Harold Demsetz, *Barriers to Entry*, 72 AM. ECON. REV. 47, 50 (1982) (arguing that a collection of factors, rather than advertising itself, does in fact create obstacles for market entrants). See generally Yale Brozen, *Is Advertising a Barrier to Entry?*, in ADVERTISING AND SOCIETY 79 (Yale Brozen ed., 1974) (reviewing arguments for and against the view that advertising creates barriers to entry).

distorts tastes,<sup>202</sup> solidifies negative depictions of disempowered or subordinate figures in society,<sup>203</sup> and unnaturally stimulates demand.<sup>204</sup>

### 1. Critics of Embedded Advertising

In the eyes of its critics, embedded advertising is even worse than standard advertising because of its potential to take place covertly.<sup>205</sup> Further, embedded advertising threatens the integrity of art and its creators because the author is not solely responsible for his creative decisions—“someone is trying to affect the stories [he is] telling.”<sup>206</sup> Critics argue that advertising possesses the ability to persuade consumers to adopt products or behaviors against their will or for reasons beyond their conscious knowledge.<sup>207</sup>

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202. See generally Sherwin Rosen, *Advertising, Information, and Product Differentiation*, in *ISSUES IN ADVERTISING: THE ECONOMICS OF PERSUASION* 161 (David G. Tuerck ed., 1978) (considering but rejecting the argument that advertising distorts taste; so long as product differentiation exists, advertising is an efficient way to communicate differences in products so as to empower consumers to select according to their preferences).

203. Deseriee A. Kennedy, *Marketing Goods, Marketing Images: The Impact of Advertising on Race*, 32 *ARIZ. ST. L.J.* 615, 620 (2000) (“Advertising plays an important role in weaving cultural messages about race into the consciousness of consumers. . . . Although advertisements do not contain a unified message about race, a startling continuity of race-based images over time have reinforced messages about race and racism and have played a critical role in shaping and maintaining racial identities.”).

204. JOHN KENNETH GALBRAITH, *THE NEW INDUSTRIAL STATE* 272–73 (1967). Under this view, advertising encourages consumers to buy products they otherwise would not buy and to develop brand loyalty for things they do not need. *Id.* But see BeVier, *supra* note 200, at 7 (“In my view, the most plausible assumption is that when consumers spend their own money to make a repeat purchase of a particular brand, they do so because they believe themselves to be satisfied with it: their incentives to maximize their own satisfactions are certainly most powerfully in play when their own resources are being expended.”).

205. Goldman, *supra* note 30, at 15; see also NOI/NPRM, *Sponsorship Identification Rules & Embedded Advertising*, 23 *FCC Rcd.* 10682, 10701 (2008) (Statement of Michael Copps, Comm’r, FCC) (“These kinds of stealth advertising may be particularly insidious because viewers often are unaware that someone is trying to influence, persuade, or market to them.”).

206. Stuart Elliott, *In ‘Trust Me,’ a Fake Agency Really Promotes*, *N.Y. TIMES*, Jan. 22, 2009, at B3 (quoting John Coveny, co-executive producer of the cable original series *The Closer* on the TNT network) (internal quotations omitted). This is of course not the first or last time “someone” will exert an external influence on the artistic process, yet the practice of embedded advertising mobilizes its critics with particular—and ahistorical—intensity. Cf. Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, *LAW & CONTEMP. PROBS.*, Spring 2007, at 135, 148 (“Moreover, creators of movies and, especially, television shows, rarely have complete creative control in any event. Alterations by network or studio officials are familiar territory to them.”).

207. BeVier, *supra* note 201, at 7 (reporting the unflattering ways false advertising scholarship often conceptualizes the consumer). For example, BeVier summarizes one

However, sponsorship disclosure law is not a good fit for addressing many of the harms that putatively flow from embedded advertising. For instance, many believe that advertising in general introduces undesirable commercial elements into televisual programming.<sup>208</sup> Embedded advertising is especially harmful, according to this perspective.<sup>209</sup> Consumer advocates and scholars build from this assumption, evoking fears of over-commercialism and consumer deception without systematically developing theories of harm that might flow from embedded advertising.<sup>210</sup> Critics vociferously presented these complaints to legislators and the FCC, and they became part of the public dialogue on embedded advertising's role in society.<sup>211</sup> However, sponsorship disclosure law does not seek to minimize embedded advertising; it seeks only to make its practice more visible to competitors and consumers. It is not tailored to minimize overcommercialism.<sup>212</sup> From the perspective of a consumer's interests, it is true that excessive embedded advertising could create distractions, thus minimizing their immersion interests. Yet this is not the kind of harm Congress contemplated when passing sponsorship disclosure legislation. Indeed, the "reasonably related" threshold is rather low, suggesting that Congress gave embedded advertising its blessing to annoy consumers as much as sponsors wished to, so long as consideration exchanged never rose above a "nominal" amount.<sup>213</sup>

Similarly, disclosure does nothing to stem the payments at the heart of the fears of competitive harm, which is another charge that critics levy against embedded advertising; it merely makes those

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such possibility thusly: "Advertising can persuade consumers to do what they otherwise would not do, what they do not 'really' want to do, and implicitly what is not in their own best interest to do." *Id.*

208. See Campbell, *supra* note 46, at 447; Kennedy, *supra* note 203, at 622–23.

209. NOI/NPRM, Sponsorship Identification Rules & Embedded Advertising, 23 FCC Rcd. at 10702–03 (Statement of Jonathan S. Adelstein, Comm'r, FCC) ("[N]ews and entertainment alike are practically being turned into undisclosed commercials. Many current practices fly in the face of viewers' legal right to know who is pitching to them. . . . [I]nadequate disclosure is bad for content, democracy, and our children's health. When viewers cannot distinguish content from advertising, the market check on content quality fails, and we see a race to the bottom where television shows become program-length infomercials.").

210. Cf. Goodman, *supra* note 25, at 99–129 (evaluating and rejecting three theories of harm before concluding that harm to public discourse provides a sufficient justification for sponsorship disclosure law).

211. Sponsorship Identification Rules & Embedded Advertising, 73 Fed. Reg. 43,194, 43,195–96 (proposed July 24, 2008).

212. See Goodman, *supra* note 25, at 107–08.

213. 47 U.S.C. § 317(a)(1) (2006); see *supra* Part II.A.

payments perceptible to third parties.<sup>214</sup> In fact, building on Coase's work on payola, one might argue that embedded advertising stimulates competition.<sup>215</sup> Some economists have shown its ability to bolster brand values and contribute to raising stock prices, suggesting that it is like any other investment in developing a brand's goodwill.<sup>216</sup>

## 2. The Harm of Consumer Deception

Arguments for consumer deception as a theory of harm from embedded advertising have some merit. Two kinds of deception could conceivably occur. First, consumers might not notice brands embedded in content but nonetheless be influenced by them. Second, consumers might notice brands in content but not know that they were sponsored.

As for the first harm, that of brands' potential secretly to influence viewers, cognitive psychology research has confirmed "the mere exposure effect"—repeated exposure to brands, even when consumers are not aware of their exposure, can under certain circumstances result in the formation of preferences for the viewed brands.<sup>217</sup> Consumers are in some sense deceived as to what is before their eyes. More empirical work on embedded advertising's cognitive effects would be valuable here, and as neuromarketing studies increase, more data may be available for legal scholars to consider. Intellectual property scholarship has begun to explore the

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214. See, e.g., Goodman, *supra* note 25, at 100 n.105.

215. See generally Coase, *supra* note 116 (arguing, inter alia, that payola served an important signaling function regarding which songs record companies believed were likely to be hits and also provided an efficient profit-sharing mechanism).

216. See Michael A. Wiles & Anna Danielova, *The Worth of Product Placement in Successful Films: An Event Study Analysis*, J. MARKETING, July 2009, at 44, 53 (describing an increase in stock price after product "placement in a successful film" and "suggesting that the market value boost is not short lived").

217. See Fred Bronner & Peter Neijens, *Audience Experiences of Media Context and Embedded Advertising: A Comparison of Eight Media*, 48 INT'L. J. MARKET RES. 81, 94 (2006) ("If the program[] stimulated a TV viewer (exciting or fascinating), the advertising within or around this program[] was also experienced as stimulating."); Xiang Fang et al., *An Examination of Different Explanations for the Mere Exposure Effect*, 34 J. CONSUMER RES. 97, 102 (2007) (finding that mere exposure effect "was replicated in the domain of banner ads: repeated incidental exposures to banner ads, just under the level of perception, increased perceptual fluency and resulted in more positive evaluation"); Yoav Hammer, *Expressions Which Preclude Rational Processing: The Case for Regulating Non-Informational Advertisements*, 27 WHITTIER L. REV. 435, 459 (2005) (describing the suggestiveness of a message "which is conveyed in a covert, implied manner"); *Effects of Unconscious Exposure to Advertisements*, SCI. DAILY (Dec. 15, 2008), <http://www.sciencedaily.com/releases/2008/12/081209125828.htm> ("A small number of visual exposures to an object typically raises the probability of acquiring the object, which enhances preference . . .").



ramifications of cognitive research in productive ways, and this methodology would be rewarding here as well.<sup>218</sup>

At present, however, there is little to suggest that consumer deception of the sort that may occur with embedded advertising could produce legally cognizable harms under the law of deception. First, deceptive advertising law cares only about propositional beliefs—that is, advertising claims that are verifiable.<sup>219</sup> It does not attempt to police advertising that merely tries to stimulate “vaguely pleasurable associations with” a brand.<sup>220</sup> This is so even though advertising scholars have long known that advertising does not persuade only by changing consumers’ factual beliefs; it works also on their suggestibility.<sup>221</sup> FTC deception law requires materiality and consumers acting reasonably. Embedded advertisements that consumers do not notice can hardly be considered material to their purchasing decisions because to be material, by definition, they must be capable of inducing the consumer’s reliance.<sup>222</sup> At bottom, such advertisements are no more material than all other subtle external cues in a potential purchaser’s life, such as what perfume her office co-worker wears, what stores she passes on her daily commute, or what car her neighbor drives. These real-world experiences may influence her: perhaps repeated exposure to these brands may cause her to favor them under well-settled principles of evaluative conditioning, whether or not she is conscious of how this repetition affects her. Thus, to affect a consumer is not to induce reliance; the law has traditionally held deception claims to a higher standard than merely being influencing.<sup>223</sup> Under a deception theory, then, this exposure theory seems unsatisfactory to address the particular context of embedded advertising.

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218. See generally Laura Bradford, *Parody and Perception: Using Cognitive Research to Expand Fair Use in Copyright*, 46 B.C. L. REV. 705 (2005) (examining the use of cognitive research in the formulation of copyright law); Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507 (2008) (arguing against the application of cognitive theory to trademark dilution law).

219. See Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657, 660–61 (1985).

220. *Id.*

221. *Id.* at 662 (citing J. BETTMAN, AN INFORMATION PROCESSING THEORY OF CONSUMER CHOICE 173–228 (1979) (analyzing consumers’ processes of selection); Michael L. Ray & Rajeev Battra, *Emotion and Persuasion in Advertising: What We Do and Don’t Know About Affect*, 10 ADVANCES CONSUMER RES. 543, 544 (1983) (surveying empirical research into consumer motivation and advertising’s effects)).

222. See *Cliffdale Assocs., Inc.*, 103 F.T.C. 110 app. at 175–76 (1984).

223. See Letter from Mary K. Engle to Gary Ruskin, *supra* note 24, at 3, 5.

Under sponsorship disclosure law itself, the “mere exposure effect” harm would appear even more of a non-starter. The 1960 proviso Congress added to protect “property furnished” for use on a program (so long as its appearance was “reasonably related” to its function onscreen) explicitly protects background uses of products that help tell the story without becoming intrusive.<sup>224</sup> As a policy matter, sponsors and broadcasters may collaborate in such a way that brands are constantly onscreen, and these brand references will frequently require no disclosure.<sup>225</sup> Congress gave this collaboration its blessing; whether Congress might revisit this proviso in light of contemporary cognitive psychology research may present a separate question, but there has been no indication of any such legislative review at present. This form of deception is unlikely to fall under the scope of sponsorship disclosure law, or deception law more generally.

Turning to our second theory of deception, under which consumers notice brands and do not know they were sponsored, shifts in the patterns of contemporary consumption and content mean that an increasing number of consumers are aware of embedded advertising generally.<sup>226</sup> The widespread use of metanarrative techniques in embedded advertising provides evidence that such advertisements have become common knowledge. When Tina Fey turns to the camera and asks Verizon for “our money now,”<sup>227</sup> that reference makes no sense unless consumers are aware of the practice of embedded advertising. Producers and programmers rely on consumers’ familiarity with the practice when they air ironic or hyperbolic references like this one.<sup>228</sup> Otherwise, such jokes would be incomprehensible.

### 3. The Harm of “Suppression” of Counterargument

Consumer advocates in their reply comments to the NOI/NPRM offered as a potential harm the “suppression” of counterargument that embedded advertising might induce because of its place in

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224. Communications Act Amendments of 1960, Pub. L. No. 86-752, § 317(a)(1), 74 Stat. 889, 895 (codified as amended at 47 U.S.C. § 317(a)(1) (2006)).

225. This assertion rests on a reading of the statute’s plain meaning.

226. Linda A. Goldstein & Kim S. Brown, *We Interrupt This Program . . . Is FCC’s Product Placement & Integration Proposal Necessary and Legal?*, LEGAL BACKGROUNDER, 3 (Sept. 19, 2008), <http://www.wlf.org/upload/09-19-08goldstien.pdf> (“[G]iven the robust use and increasing popularity of embedded advertising, it is likely that the vast majority of consumers are well aware of the fact that such placements have been secured on a pay-to-play basis.”).

227. See the hypothetical discussed above in Part II.B.1.

228. Ironic product placements point themselves out.

emotionally engaging content.<sup>229</sup> Besides lacking legally cognizable grounds, this theory of harm seems at odds with what embedded advertisements often do in the real world: draw viewers' attention and provoke discussion about whether the advertisements were sponsored. If advertisements are not pronounced enough to be noticed, it is not clear what "false premises" they raise that viewers should normatively be trying to suppress.<sup>230</sup>

Thus these purported harms—overcommercialization, competitive harm, consumer deception and suppression of consumers' counterarguments—without more, do not justify expanded sponsorship disclosure law. Sponsorship disclosure law in its current form fails to reach many instances of embedded advertising, thus failing to live up to its central purpose: to mandate disclosure of certain sorts of transactions that might otherwise work fraud on the public.<sup>231</sup>

### B. *Disclosure Interest*

The harms that embedded advertising ostensibly produce may not give rise to independent causes of action in false advertising or consumer deception. Yet in adopting section 317 of the Communications Act, Congress did act to create *sui generis* sponsorship disclosure regulation. Thus, while the origins of the legislation may have been less consumer protective than have been recognized, we may begin by presuming that consumers receive some benefit from the disclosure of information.<sup>232</sup> Indeed, in certain communicative contexts, the disclosure interest is strong. For instance, many viewers likely would want the evening news to provide

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229. Comments of Fairness & Integrity in Telecomms. Media at 6, Sponsorship Identification Rules & Embedded Advertising, 73 Fed. Reg. 43,194 (proposed July 24, 2008) (MB No. 08-90) ("The appropriate response to persuasive messages is healthy suspicion and counterarguing. . . . When the viewer is 'lost' in a story, critical thinking is reduced, and false premises may be accepted as true.") (internal citations omitted).

230. *But see id.* (asserting that the acceptance of false premises is associated with persuasive messaging contained in "narrative dramas and comedies").

231. Kielbowicz & Lawson, *supra* note 116, at 347.

232. Goodman, *supra* note 25, at 86–87 ("Sponsorship disclosure seems to be one of those obligations imposed on broadcasters simply because it is in the public interest. But what interest? It is not obvious why the public is harmed when Sony Records secretly sponsors airplay of a Celine Dion track that audiences enjoy, or when an advertiser or propagandist injects into programming a storyline that stands or falls on its merits. . . . [However,] sponsorship disclosure advances First Amendment interests by enhancing public discourse and audience autonomy.") (citation omitted).

ample disclosure of its material interests in a news story.<sup>233</sup> The question is whether that benefit is great enough to justify imposing the costs of disclosure on the consumer if disclosure threatens other consumer interests.

Consumers display conflicted preferences with respect to disclosures that information is marketing. On the one hand, consumers do not like marketing; sometimes it even moves them to rage.<sup>234</sup> Seventy percent of poll respondents found that marketing is untruthful and exists to persuade consumers to buy things they may not want. Yet on the other hand, somewhat paradoxically, seventy percent of consumers conclude that marketing contains useful information, thus producing something of a conundrum for consumer-oriented policymakers.<sup>235</sup> Consumers want to know when content contains marketing, but once they do know, they discount the value of the information contained in that content, even if it would otherwise be valuable to them.

Consumers display preferences to know when content is marketing, but it is not clear how consumers would order their preferences if disclosures became more intrusive. Indeed, consumers may not know what they want (and may not disclose it accurately even when they do know).<sup>236</sup> No research has yet tested whether consumers prefer frequent intrusions in the form of disclosures, or intrusions in the form of embedded advertisements themselves.

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233. See NOI/NPRM, Sponsorship Identification Rules & Embedded Advertising, 23 FCC Rcd. 10682, 10703 (2008) (Statement of Jonathan S. Adelstein, Comm'r, FCC) (“[W]hen audiences are fooled into believing they are watching real news by video ‘news releases’ and so-called news analysts who are paid off, their trust in the discourse shapers—the news broadcasters, TV writers, and DJs—suffers and so does the marketplace of ideas.”).

234. See Eric Goldman, *A Coasean Analysis of Marketing*, 2006 WIS. L. REV. 1151, 1152–53 (“Pick any marketing method, and consumers probably say they hate it. In extreme cases, unwanted marketing can cause consumers to experience ‘spam rage.’”).

235. See John E. Calfee & Debra Jones Ringold, *The 70% Majority: Enduring Consumer Beliefs About Advertising*, 13 J. PUB. POL’Y & MARKETING 228, 228 (1994) (“Six decades of survey data consistently indicate that about 70% of consumers think that advertising is often untruthful, it seeks to persuade people to buy things they do not want, it should be more strictly regulated, and *it nonetheless provides valuable information*. Consumers also tend to find that advertising’s benefits outweigh its deficits.”) (emphasis added).

236. See VANCE PACKARD, *THE HIDDEN PERSUADERS* 14 (1957). Vance Packard describes how marketers started to doubt their own polling when, among other results, they found that a survey of male beer drinkers overwhelmingly stated that they would prefer “a nice dry beer” but could not, upon further questioning, identify what “dry” would mean in relation to beer. Their answers offered differing interpretations of the term. *Id.*

Intuitively, however, it seems likely that consumers would prefer to watch their programs uninterrupted if the choices were as clear-cut as this analysis describes.<sup>237</sup> In many “reality” shows, for instance, the contemporaneous disclosure that would be required under many reform proposals would make the content “unwatchable.”<sup>238</sup> As one industry advocate put it, discussing a home makeover program that relies on free and sponsored provision of construction supplies for its funding: “imagine the number of disclosures on the screen as the camera pans over a newly-decorated room (including the lumber, nails, paint, carpet, furniture, fixtures, electrical and plumbing supplies, window treatments, and more).”<sup>239</sup>

Indeed, if reformed to the extent to which proponents demand, such disclosures would likely overshadow the consumer’s immersion interest.

### C. *Immersion Interest*

This part describes a consumer’s interest in remaining engaged in entertainment content without intrusions or involuntary interruptions—that is, her immersion interest. Consumers’ enjoyment of free entertainment content has almost always been interrupted, either by sponsorship announcements at the start (or end) of a program, or by advertisements that punctuate the programming. Consumers’ ability to escape distractions and focus on—become immersed in—content has grown ever more fragile in a media landscape filled with multiple choices, instant responses, and other distractions. The shift from a “push” model of media to a “pull” model has been part of the shift toward greater consumer engagement.<sup>240</sup> If it is true, as one marketing visionary has put it, that

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237. The Article presumes that the FCC would adopt the most extreme form of the reform proposals. However, this is not merely a convenient rhetorical device: the FCC took seriously proponents’ various reform proposals, describing even the most potentially onerous among them in the NOI/NPRM. See NOI/NPRM, Sponsorship Identification Rules & Embedded Advertising, 23 FCC Rcd. at 10703 (Statement of Jonathan S. Adelstein, Comm’r, FCC).

238. Reply Comments of the Walt Disney Co., *supra* note 67, at 11–12.

239. *Id.*

240. DONATON, *supra* note 82, at 8–9 (“For more than 50 years, TV was a passive medium—viewers sat in front of the TV while programming and advertising messages were pushed at them. The networks, local stations, and advertisers scheduled what consumers were going to see and when—decided, effectively, how viewers would consume their messages. This model is dependent on consumers’ being willing to cede control to others, to sit back and accept what comes their way. . . . But this is the age of the empowered consumer . . . . The consumer is now in control of how and when messages reach him or her, and if the consumer doesn’t want your message, it’s gone. . . . Consumers

the “age of empowerment is about convenience and choice” for consumers,<sup>241</sup> then the corollary of that is the need for the consumer to make frequent decisions about when and on what to focus. The venture consumer protects her immersion interest by tailoring her media consumption to her schedule’s needs and her own whims.

This immersion interest suffers when advertisements interrupt a consumer’s content but is vindicated when the consumer watches programs with embedded advertisements that provide more content with fewer advertising interruptions.<sup>242</sup> Interruptions of free programming by advertising spots disserve a consumer’s immersion interest but serve a consumer’s interest in media abundance by providing programmers with a means of revenue. Interruptions of free programming by disclosure language may disserve a consumer’s immersion interest but also disserve a consumer’s interest in media abundance. The immersion interest suffers when disclosure language draws attention to the business terms on which aesthetic decisions may have been premised, essentially by interrupting the consumer’s suspension of disbelief. If disclosures have a negative impact on the consumer’s immersion interest and media abundance interests, the value of disclosures as a remedy may be in question. The law assumes consumers would protect their disclosure interests above their immersion and media abundance interests, when in fact this is far from certain.

#### *D. Media Abundance Interest*

Many consumers are now aware that embedded advertising exists in many forms, but it is unlikely that consumers know how heavily media production relies on such marketing.<sup>243</sup> Whatever its costs to consumers, embedded advertising delivers an important benefit in the form of media abundance. Advertisers and content producers alike value embedded marketing strategies, which are more efficient than traditional advertising at getting and retaining consumers’ attention.<sup>244</sup> They are also more economically efficient because they enable cross-marketing synergies.<sup>245</sup> Advertisers find

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now ‘pull’ media toward them and have the ability to screen out those things they don’t want . . .”).

241. *Id.* at 10.

242. Of course, when done badly, embedded advertising can serve as its own annoying distraction.

243. See *supra* notes 49–55 and accompanying text.

244. See DONATON, *supra* note 82, at 21.

245. *Id.* at 22.

that embedded advertising gives brands credibility with viewers; advertising dollars spent during the commercial “pod” go further when paired with embedded advertisements than without; and purchasing airtime can be cheaper when buying embedded advertisements than when buying traditional commercial “slots.”<sup>246</sup>

Embedded advertising delivers substantial benefits for viewers as well. It lowers the cost of production, thus contributing to keeping viewers’ costs down.<sup>247</sup> This is true to some extent of advertising, but embedded advertising has additional benefits beyond direct advertising: it aligns the incentives of broadcasters and sponsors.<sup>248</sup> Embedded advertising also helps improve the range of programming options because it transfers risks to advertisers. This often means the difference between whether a new show will make it on the air, or whether a critically acclaimed but under-watched show will remain on the air long enough to widen its following; in some cases, advertiser resources will enable the very existence of the content in question.<sup>249</sup> Embedded advertising in this respect works as a risk-transfer mechanism: broadcasters rely on sponsors’ early investments to share some of the startup costs and risks of program development. Embedded advertising thus serves venture consumers’ media abundance interests well.

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246. See *FAQ*, ROSS GROUP, <http://thereelrossgroup.com/faq.html> (last visited Nov. 19, 2010) (“Product placement is one of the most cost effective forms of advertising, especially since a product has the ability to reach millions of consumers through films and television programs. This massive, worldwide audience makes product placement a highly influential advertising medium. Product placement also has one of the longest lasting effects, seeing as many films and television programs continue to affect consumers through syndication, home movies, and cable. The average cost for a 30 second spot on television can cost anywhere from \$50,000 to \$400,000. Product placement however, costs only a fraction of that, and gets products into high-impact situations.”). This language should be discounted because it is, itself, selling something: product placement. Nonetheless, it is helpful in that it provides an inside-industry view of the economic benefits of marketing through entertainment content.

247. DONATON, *supra* note 82, at 22 (“By providing free products to movies, marketers can lower the cost of producing the film. They also extend the film’s marketing budget with their own advertising and promotional dollars. By linking to TV shows, they can offset those shows’ production costs as well and continue to provide the revenue stream that keeps stations and networks on the air.”). Some television remains free-to-air, thus only requiring a television. Cable subscription costs, of course, raise costs for consumers, as do subscriptions to Netflix and downloads of paid on-demand content.

248. See Sharmistha Law & Kathryn A. Braun-LaTour, *Product Placements: How to Measure Their Impact*, in *THE PSYCHOLOGY OF ENTERTAINMENT MEDIA* 63, 64 (L.J. Shrum ed., 2004).

249. Bill Carter, *Upfronts: ‘Chuck’ Saved by Subway*, *MEDIA DECODER BLOG* (May 19, 2009, 10:12 AM), <http://mediadecoder.blogs.nytimes.com/2009/05/19/upfronts-chuck-takes-the-subway>.

Advertising also subsidizes the exchange of ideas and information; in so doing, advertising contributes to higher production values artistically. Competition for production resources and dollars characterizes the entertainment industry. When sponsors barter “free” products that producers would usually expend resources to acquire or provide other forms of consideration (guarantees of adbuys, or cash payments), they lower the production costs and potentially improve the entertainment content. If advertisers pour resources into a film or television program, these resources will have multiple effects: Producers will likely allocate advertiser resources to secure higher-cost materials and higher-paid talent than they otherwise would have absent sponsorship.<sup>250</sup> Depending on how early a producer secures an advertiser’s subsidy, he might funnel the resources into developing a script, hiring talent, securing a location, enhancing visual effects, and ensuring good post-production values, from editing to marketing and distribution. Additionally, advertiser resources may free up existing funds for other purposes. In the case of luxury brands that are submitted for use (such as expensive wardrobes, cars, planes, and the like), advertisers liberate producers to commit their existing resources to other elements that will contribute to higher production values. The end product stands a good chance of being of higher aesthetic quality.

An example is AMC’s *Mad Men*, a program about the advertising profession in the 1960s.<sup>251</sup> Because of its focus on advertising, product integration is a natural part of its plotlines.<sup>252</sup>

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250. The classic example is the Aston-Martin used in early James Bond films. The franchise then used BMW in its films; recently, movie-goers have seen Bond back in his Aston-Martin. *Product Placement on 007’s Bond with Aston Martin, Omega, Sony and Ocean Sky*, TOFFSWORLD, <http://www.toffsworld.com/business/business-marketing/product-placement-on-007-s-bond-with-aston-martin-omega-sony-and-ocean-sky/> (last visited Nov. 19, 2010). In a recent installment, the filmmakers were loaned luxury jets for a week, thus getting gratis a reported value of £600,000. *Id.* The jets themselves cost £100M. *Id.*

251. Rick McGinnis, *Mad Men’s Product Placement Museum*, METRO (Toronto) (Sept. 16, 2008), <http://www.metronews.ca/toronto/scene/article/112671>.

252. *Id.*; see also Abe Sauer, “*Mad Men*” is Branding Gold, BRANDCHANNEL (July 28, 2010, 1:30 PM), <http://www.brandchannel.com/home/post/2010/07/28/Mad-Men-Is-Branding-Gold.aspx> (“Each episode focuses on a single client’s brand and features outright exposition from the characters about that brand’s character.”). At the same time, it should be noted that *Mad Men* may be an outlier at present: its profile may make it uniquely suited to this form of television production. Yet its successes may induce copycat programs and inspire imitation; it could be that much more television programming in the future tries to emulate *Mad Men*. That it may be an outlier does not, however, make it entirely unique. Programs such as *Friday Night Lights*, *Gossip Girl*, *Chuck*, *Modern*



Consequently, sponsors have been happy to pour resources into the program, from outright payments to bartered product or assistance with historical detail, as is evidenced by the number of different sponsors who have worked with *Mad Men*, including Lucky Strike, Xerox, Heineken, BMW, Hilton, London Fog, Stolichnaya, Utz, Kodak, and A.T. Cross, the maker of luxury pens.<sup>253</sup> Not unrelatedly, the design values are higher than most other television programming.<sup>254</sup> The program's show-runner, Matthew Weiner, had the luxury of hiring superlative talent in all the areas that translate into greater aesthetic quality. *Mad Men* staffers are notorious for their attention to detail. For example, staffers may check the weather of a given week in 1960s New York to ensure historical accuracy.<sup>255</sup> Where content producers' attention to detail meets indefatigable resources on the part of sponsors willing to share the burden of research and design challenges, a program stands to deliver much higher quality programming.<sup>256</sup> Sponsors can greatly assist programs by picking up production costs even when they do not pay any placement fees.

This claim might face arguments that advertising revenues or benefits from partnerships with sponsors could merely enhance profit margins without substantively changing production values, thus undercutting the aesthetic upside. However, there is reason to believe that advertisers would want to see their money channeled into raising production quality rather than simply lining producers' pockets. The joint venture between advertisers and entertainment producers creates significant synergy for the parties. Optimum benefits for advertisers will arise if they associate their brand with a high-quality entertainment vehicle. Tangible metrics often attach to high-quality content in the form of awards and accolades that can increase distribution and global reach. In other words, the better the content, the more goodwill redounds to its producers and sponsors.

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*Family*, and *The Office* have all accepted help from sponsorship. See Anderson, *supra* note 36; Mersereau, *supra* note 31; Steinberg, *supra* note 46; *supra* notes 4, 37.

253. Sauer, *supra* note 252; see Alex Konrad, *Mad Men Is Back, and So Is Product Placement*, CNN MONEY, [http://money.cnn.com/galleries/2010/fortune/1007/gallery.mad\\_men\\_products.fortune/index.html](http://money.cnn.com/galleries/2010/fortune/1007/gallery.mad_men_products.fortune/index.html) (last updated July 27, 2010).

254. Bruce Handy, *Don and Betty Draper's Paradise Lost*, VANITY FAIR, Sept. 2009, at 268, 268, 274 ("AMC's *Mad Men* is the most stylish—and perhaps best—show on television. . . . There's really nothing else like it on television.")

255. *Id.* at 275.

256. See, e.g., Beth Snyder Bulik, *Xerox 914 Comes out of Retirement for 'Mad Men' Star Turn*, ADVERTISING AGE (Oct. 9, 2008), [http://adage.com/madisonandvine/article?article\\_id=131587](http://adage.com/madisonandvine/article?article_id=131587).

Further, the production team, if it is a repeat player, possesses an incentive to reach a high level of quality—it will signal to future advertisers the capacity of their advertising dollars to travel a long way in producing a satisfactory return on investment.<sup>257</sup>

Embedded advertising has the capacity to not just transfer costs but also to transfer risks because networks can afford to take chances when they spread the risk of failure across multiple parties. Sponsors assume risks in connection with their absorption of production costs. Such financial arrangements go beyond mere prop supply or even financial support. Producers, writers, and show creators often invite advertisers into the show's development stages, and these creative minds may tailor the show in connection with particular brands and their marketing goals.<sup>258</sup> Despite a few high-profile failures, the trend is not going away.<sup>259</sup> In the words of one network executive, “the network is not backing away from the model; if anything, it is doubling down.”<sup>260</sup> If advertisers are not interested in a newly proposed program, this disinterest may sound its death knell. But where advertisers are interested, a show may have a greater chance of making it to air and, once there, may stand a better chance of staying on the air.<sup>261</sup> If this content serves only advertisers' interests, consumers will be worse off. But if networks can induce advertisers to help them take risks on valuable content that has less mass appeal—and thus risks low ratings—then embedded advertising again serves consumers' media abundance interests well.

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257. See *Movie Product Placements: The Wave of Future Advertising*, PROD. PLACEMENT NEWS (June 29, 2009), <http://www.productplacement.biz/20090626932/product-placement-research/movie-product-placements-the-wave-of-future-advertising.html> (“[P]lacements in higher-grossing films tended to be worth more.”). The better the content is projected to be, the higher the quality of likely advertisers. See *id.*

258. Cf. Sheetal Patel, *In-Film Placement: Films Becoming Brands by Themselves*, TELEVISIONPOINT.COM (May 6, 2009), <http://www.televisionpoint.com/news2009/features.php?id=1241631327> (“[An] issue with films is the high-risk-high-return factor in terms of cost and the impact. Whether a film will do well or otherwise is unpredictable. There aren't any established norms to judge the success [ahead of time].”). Although this source discusses film, the risks involved with television are also substantial. Brian Stelter, *Integrated in a TV Letdown*, N.Y. TIMES, Nov. 14, 2008, at B10. A film may cost more than a television pilot, but once a program has been given the green light, substantial resources are shifted to launch it, and occasionally, it fails extremely early despite its promise. *My Own Worst Enemy*, for example, was canceled after fewer than five airings. Stelter, *supra*.

259. See, e.g., Stelter, *supra* note 258.

260. *Id.*

261. A widely publicized example in 2009 was Subway's unilateral decision to save NBC's *Chuck* from the programming chopping block despite low ratings. Carter, *supra* note 249. Consumers on various message boards and blogs expressed gratitude for Subway's role even if it meant more embedded advertisements. See, e.g., Richard Velez, Comment to Carter, *supra* note 249 (May 19, 2009, 8:52 PM).

Embedded advertising provides another unexpected benefit: it offers brand owners a way to recoup losses from online piracy.<sup>262</sup> The more illegal copies are made of content with embedded advertisements, the more airtime those messages receive. Some of the benefits embedded advertising delivers may generalize beyond network television. Indeed, a number of them apply to film production. However, the narrowest form of this claim is its strongest: embedded advertising stands to benefit consumers of free-to-air television most, because of its ability to subsidize programming that need not rely on other sources of revenue, such as cable subscription volume or advertising sales.

All of these factors contribute to the media abundance that consumers may now take for granted. Many, if not most, programs on broadcast television contain embedded advertising.<sup>263</sup> If the FCC adopts reforms that impose significant disclosure costs,<sup>264</sup> that revenue stream may evaporate, leaving consumers wondering whether their disclosure interest (vindicated through noisier disclosures) was worth the sacrifice of their media abundance interest.

#### IV. CHALLENGES TO EFFECTIVE REGULATION OF EMBEDDED ADVERTISING

In order to support this Article's argument that the FCC should maintain disclosure laws in their current state rather than expanding them, this Part revisits sponsorship disclosure law's current failures of reach and lays out the difficulties inherent in regulating embedded advertising meaningfully. As its name implies, sponsorship disclosure law has built itself on the notion that disclosure is valuable.<sup>265</sup> However, little evidence exists to inform policymakers as to whether disclosure works in practice.<sup>266</sup> The emergence of the venture consumer may cut against heightening disclosure requirements if

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262. Goodman, *supra* note 25, at 143 ("Sponsorship is resilient to unauthorized copying. Indeed, because sponsorship value is based on audience size, if unauthorized copying increases circulation then it adds value to media products embedded with promotional messages. The record companies, after vigorously fighting to stop listeners from 'pirating' music online, seem at last to understand that this piracy presents them with an excellent marketing opportunity and are making songs available on the Internet for free in files embedded with advertising messages.") (internal citations omitted).

263. See Paul Gough, *CBS Rewrites Product Script, Allows Product Placements in Scripted Series*, MEDIAPOST (Apr. 18, 2004), [http://www.mediapost.com/publications/index.cfm?fa=Articles.showArticle&art\\_aid=5423](http://www.mediapost.com/publications/index.cfm?fa=Articles.showArticle&art_aid=5423).

264. See *supra* Part II.C.

265. Goodman, *supra* note 25, at 140 ("Disclosure is itself the desired end.").

266. Goldman, *supra* note 30, at 12-13.

legislators are aware that consumers may miss, evade, or find disclosures duplicative or annoying. Policymakers should evaluate sponsorship disclosure law's reliance on disclosure in light of the venture consumer's capacity and likely preference for self-help over paternalistic disclosures. If an optimal means of disseminating disclosure information were available and presumed valuable to consumers, numerous factors would still pose significant challenges for the regulation of embedded advertising. This Part questions the value of disclosures and concludes that the government cannot effectively regulate embedded advertising without imposing undue burdens on sponsors, broadcasters, and consumers. Rather than trying to augment the sponsorship disclosure regime through expanded disclosures, the solution to the problems that embedded advertising purportedly poses should focus less on disclosure to consumers and more on consumer skepticism and informational empowerment.

#### A. *The Value of Disclosures*

The reform proposals before the FCC focus on fears of consumer deception, content overcommercialism, and corporate co-option of the artistic process. They do little to address the systematic anachronisms that make the current law ineffective. Beyond that, they display misguided faith in the value of disclosures.

Professor Eric Goldman has argued that basing any regulatory scheme on what consumers want may not make sense as a policy matter without more information about the reasons for their preferences.<sup>267</sup> He identifies certain externalities flowing from disclosure requirements,<sup>268</sup> such as the "risk of consumer overresponse to marketing labels," where consumers take action based on the fact that something has been sponsored even when that action does not serve their interests.<sup>269</sup> Further, Goldman discusses the primacy effect problem that leads to the ineffectiveness of disclosures, because the order in which consumers receive information can affect the extent to which it is persuasive to them.<sup>270</sup> Consumers miss or might discount disclosure information that comes

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267. *Id.* at 12.

268. *Id.* at 13 ("The 'advertising' label is a powerful disclosure; it can single-handedly cause consumers to overlook content they would have otherwise found meritorious.").

269. *Id.*

270. *Id.* at 14; *see also* JONATHAN BARON, THINKING AND DECIDING 205 (4th ed. 2008) (describing the primacy effect as a cognitive bias that leads individuals to value or count earlier-occurring events more than later occurring ones).

late in the content experience.<sup>271</sup> Goldman also explains the problems associated with noisy disclosures that consumers do notice, but choose to tune out because they suffer from “information overload.”<sup>272</sup> Even though these disclosures are meant to benefit consumers, in many scenarios their intended benefits will not reach consumers for the foregoing reasons.<sup>273</sup>

Proponents assert that disclosures help prevent fraud, but their utility is a function of consumers’ expectations and interests. The utility of disclosures decreases in proportion to consumers’ skepticism. That is, when consumers are aware that embedded advertisements are advertisements, no fraud ensues. Thus, if consumers already *know* that embedded advertisements are or may be sponsored, disclosures become duplicative, less useful, or possibly intrusive.<sup>274</sup> If consumers need and value disclosures sufficiently to warrant their imposition at all, a second-order question is whether disclosures must be concurrent—that is, appear onscreen along with branded references, either as “pop-ups” or as a horizontal crawl.<sup>275</sup>

Consumers are unlikely to appreciate concurrent disclosures because such disclosures impede consumers’ immersion interest; non-concurrent disclosures, however, are subject to numerous problems. The first is a timing problem. When disclosures are at the beginning or end of the show (or both), consumers may miss them and/or discount them because they have already formed their impressions. Contemporary viewing patterns may mean that consumers miss the end of a show because they have shut off the television, changed the channel, closed the browser window or changed browser tabs, switched from a viewing function of an iPod to a messaging function, or watched the show through a DVR (which often cuts off the credits). The second is a misinformation problem: disclosures may signal that some sponsorship has occurred but may not make clear the extent of the influence purchased through such sponsorship. Concurrent disclosures more directly tie brand appearances to sponsor influence. The third problem is the possibility that non-

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271. *See generally* Hillary Morgan & Kurt Rothoff, *Bias in Sequential Order Judging: Primacy, Recency, Sequential Bias, and Difficulty Bias* (Mar. 2010) (unpublished working paper), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1555094](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1555094) (testing for the effects of various biases, including the “primacy” bias, which suggests that encountering information first rather than last might give it an advantage).

272. Goldman, *supra* note 30, at 14.

273. *Id.* at 13.

274. *See supra* Part II.C.

275. *See Wagner, supra* note 180, at 17–18.

concurrent disclosures function as free publicity for sponsors. If consumers have missed brand references throughout the show but notice non-concurrent disclosures, the disclosure language exposes consumers to the brand for the first time. Sponsors may prefer access to consumers on a subconscious level, but failing that, they can still profit through the publicity disclosure language provides because of the goodwill associated with the content consumers have been watching. These factors all suggest that for disclosures to function meaningfully, they should occur concurrently. Concurrent disclosures, of course, represent the greatest threat to consumers' immersion interest.

Addressing the problem of disclosures' visibility and viability, however, leaves the problem of the law's failures of scope. Whether concurrent or non-concurrent, disclosures can backfire. Because sponsorship disclosure law currently fails to reach a great deal of embedded advertisements, disclosures predicated on the current regulatory scope will create false negatives if consumers rely on them. Overemphasizing sponsorship disclosure on television may create the misperception that covert sponsorship does not pervade other forms of communication. But advertising has long since broken through "the fourth wall that used to separate the theater of commerce, persuasion and salesmanship from our actual day-to-day life."<sup>276</sup> The greatest threat from covert sponsorship to consumers is probably no longer on their television screens. Advertisers certainly are thinking about consumers in terms of their changed behavior in a "hyperconnected world," and so should regulators.<sup>277</sup> For their part, consumers must be prepared to look beyond messages that by their nature endorse or feature brands, and to question the material interests of speakers whose advice they contemplate taking. The absence of disclosures keeps consumers on their guard and wondering about the source and motives behind the brand's placement.

In the absence of evidence that consumers welcome disclosures even when they come with a significant impact on consumers' immersion interest, the FCC should not adopt reform proposals, and sponsorship disclosure regulators should rethink the utility of disclosures currently under consideration by the FCC. It is not clear

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276. Rob Walker, *The Hidden (in Plain Sight) Persuaders*, N.Y. TIMES, Dec. 5, 2004, § 6 (Magazine) at 69, 70.

277. Rita Chang, *Mobile Marketing Beyond the Mobile Phone*, ADVERTISING AGE, Nov. 30, 2009, at 10, 10 (describing four categories of digital devices that advertisers should—and do—consider in their overall campaign strategies because of their potential to shape consumer behavior).

that the benefits of disclosures outweigh the economic and aesthetic costs. However socially valuable sponsorship disclosure laws could be in theory, they will not achieve their aims if we do not know “consumers’ motivations for wanting to know [when content is marketing]” or “what they will do with the disclosure.”<sup>278</sup> A distorting, “self-reinforcing feedback loop” can occur around disclosures.<sup>279</sup> The government mandates disclosures, believing that consumers care about them, and consumers, seeing that the government expends resources to require disclosures, assume that disclosures are indeed important.<sup>280</sup> Disclosed information is only as valuable as consumers deem it. To the extent that consumers value disclosure, the law’s failures of scope make disclosures untrustworthy. If a consumer actually put faith in such disclosures and studied them carefully as the hypothetical viewer does on the first page of this Article, then seeing disclosures linked only to a fraction of the sorts of embedded advertisements that *ought* to trigger disclosure could create a false negative. Under the current legal regime, a viewer might conclude from seeing a program with no disclosure language in it that no embedded advertising had taken place in it, when in fact that conclusion might be mistaken. Yet that would still potentially be true under various proposed reforms, so long as the problems of scope were not addressed. As long as sponsorship disclosure law does not trigger many instances of embedded advertising, it disserves consumers who would rely on it as accurate and full communication of sponsorship information. This difficulty presents a problem for sponsorship disclosure more generally. If in fact it poses a great challenge to develop feasible sponsorship disclosure, the question remains whether overcoming such challenges is worthwhile.<sup>281</sup>

### B. Challenges for Regulation’s Scope

This Article has highlighted the problems of scope running through the current regime (the viewing medium, the relationship between the sponsor and the broadcaster, and the nature of the placement), and it has shown how these problems were based on differences that should be trivial for sponsorship disclosure law rather than determinative.<sup>282</sup> Without correcting these problems, the law does not function meaningfully. But perhaps the fact that it does not

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278. Goldman, *supra* note 30, at 12.

279. *Id.* at 14.

280. *Id.*

281. Wagner, *supra* note 180, at 17–18.

282. *See supra* Part II.B.

work is not a bad thing. The following discussion works through the difficulties of making such corrections and questions embedded advertising's amenability to meaningful regulation. It concludes that it would be difficult to create sponsorship disclosure that catches embedded advertising proportionately and meaningfully.

### 1. The Viewing Medium

Reforms theoretically could neutralize differences between viewing media by extending payola regulation to new media such as online content, video content for mobile devices, and other emerging forms of electronic content not subject to sponsorship disclosure law at present.<sup>283</sup> In another context, Congress has authorized the FCC to investigate ways to regulate non-broadcast content to protect children.<sup>284</sup> But any actual extension of authority to regulate—not simply to *investigate* means of regulating—content on the Internet would go well beyond the FCC's congressional authorization, absent a legislative amendment.<sup>285</sup> Without a narrowly-tailored interest such as children's welfare, the FCC likely would lack the authority to compel speech in this arena.<sup>286</sup> It might simply seize this authority, as it did when it extended its reach to cable television in the early 1960s.<sup>287</sup> Nevertheless, the Internet is bigger than cable television, and more First Amendment interests are at stake. The “radical surgery” necessary to update sponsorship disclosure law to tackle the new media environment may constitute an insurmountable challenge to expanding regulation to new media.<sup>288</sup>

### 2. A “Material Interest” Test and the Problem of Incentives the Law Cannot Reach

The FCC historically has lacked the political support to make some sort of “material interest” disclosure feasible. Financial disclosure obligations were considered and rejected in the 1960s, at

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283. See Goodman, *supra* note 25, at 86 (“[S]ponsorship disclosure law focuses on yesterday’s technology and fails to operate in the electronic media that claim most of the public’s attention.”).

284. See Report, Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming, 24 FCC Rcd. 11413, 11414–15 (2009).

285. Susan P. Crawford, *Shortness of Vision: Regulatory Ambition in the Digital Age*, 74 *FORDHAM L. REV.* 695, 697–98, 728–36 (2005).

286. *Action for Children’s Television v. FCC*, 58 F.3d 654, 656 (D.C. Cir. 1995).

287. Robinson, *supra* note 190, at 18 (describing the FCC’s autonomy in expanding—and then retracting—its jurisdiction over cable television).

288. See Goodman, *supra* note 25, at 86–87.



the high-water mark of the Commission's authority over payola.<sup>289</sup> These would have required broadcasters to disclose when they had a material interest in the programming, even when no external payment was necessary to derive benefits from plugging a product.<sup>290</sup> Broadcasters and industry lobbyists aligned to stop the proposal from gaining currency.<sup>291</sup>

As this Article has demonstrated, the law exempts a substantial subset of all references.<sup>292</sup> Sponsorship law purports to care about the sorts of incentives that lead to branded references in content, but it fails to capture them nonetheless because of its failures of scope. Even if it were politically feasible to mandate disclosure of the material interests between broadcasters and sponsors, it is not clear that any legal regime could track, let alone regulate, all the ulterior motives behind brand references in content. Where there are economic incentives, the motives will continue to exist along with aesthetic motives behind artistic production.

The contemporary mass media are impossible to imagine without economic incentives: think of newspaper features and television programs that conspicuously create sponsor-friendly environments to attract advertisers. For example, an extended feature on fast food franchises in a respectable newspaper or in Internet publication venues may coincide with the sale of space to brand or franchise owners elsewhere in the paper or journalistic forum. If this sale is valuable to the publication, and if certain extended features like this one tend more frequently to inspire sponsors to purchase advertising space, its topic selection may be skewed ab initio. The publication in question has a strong incentive to look for newsworthy features that will attract sponsors. Disclosure law cannot regulate all such incentives out of existence. All advertiser-supported communications are subject to the same incentives, and this is not necessarily a failure of sponsorship disclosure law as much as it is a reality of the marketplace of which sponsorship disclosure law has not taken sufficient note. Nonetheless, this reality implicates sponsorship disclosure law and makes its emphasis on exposing only formal exchanges into something of a relic.

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289. Kielbowicz & Lawson, *supra* note 116, at 366–72 (describing the proposed extension of financial disclosure requirements to broadcasters).

290. *Id.* at 370–72.

291. *Id.* at 371–72 (discussing the complex political interplay between legislative, administrative, and industry actors that led to the proposal's failure).

292. See the hypothetical discussed *infra* Part II.B.1.

Finally, if legislators wish to close the gap between sponsorship disclosure law's ideal and actual forms, they should consider the other ways in which business incentives shape entertainment content materially but—from a consumer's perspective—invisibly. For example, screenplays may change drastically based on fluctuations in currency valuation and the creation of tax incentives for content producers. A setting might change from Texas to Spain to Germany to Montreal for purely financial reasons.<sup>293</sup> If consumers sustain harm when embedded advertising's inclusion of brand references does not make disclosures, consumers just as surely suffer harm when a film script relocates to Des Moines for similarly "invisible" reasons: the local government is pitching its midwestern idyll as fervently as Sony pitches its phones in the Bond franchise.<sup>294</sup> The comparison might at first seem inapt, yet practically speaking, the scenarios are analogous. A consumer who notices a brand in entertainment content and finds it pleasing may decide to buy it. A consumer who watches a film set in a particular location and enjoys it could conceivably add the location to her list of places to visit. In both situations, consumers are allowing pleasing experiences based on their consumption of entertainment content to affect their decisions.<sup>295</sup>

### 3. Convergence and the Nature of the Placement

Advertisers and sponsors are increasingly collaborating to produce content that contains embedded advertisements and to produce branded entertainment.<sup>296</sup> It is difficult for a legal regime to

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293. Lauren A. E. Schuker, *Local Incentives Play Bigger Role in Decisions for Movies*, WALL ST. J., Oct. 27, 2009, at B1. The tax incentive is simply for the film to be located—not necessarily set—in a particular locale, but in many instances the location's choice will dictate or influence its setting. *See id.*

294. Joe Barrett, *Build It with Tax Incentives and Hollywood Will Come*, WALL ST. J., Oct. 19, 2009, at A1.

295. Recall the distinction made *supra* notes 25–27 and accompanying text, between false advertising and sponsorship disclosure law. If a consumer selects a brand based on viewing it in content that has made misleading material claims about it, she should have recourse under false advertising law. In other words, that situation moves her out of the realm of sponsorship disclosure law and into the realm of false advertising.

296. *See, e.g.*, DONATON, *supra* note 82, at 3 (describing the rise of branded entertainment as “nothing short of a reinvention of the business of marketing communications, a fundamental transformation from an intrusion-based marketing economy to an invitation-based model”); JEAN-MARC LEHU, *BRANDED ENTERTAINMENT: PRODUCT PLACEMENT & BRAND STRATEGY IN THE ENTERTAINMENT BUSINESS 1–2* (2007) (describing branded entertainment as creating “a world in which a brand is able to get closer to its target audience via a film, a television program[] or series, a play, a novel, song, or show, indeed even a video game” and stating that it is a global phenomenon).

determine when disclosure requirements should be triggered if a team is producing sponsored content together. The greater the interdependence between sponsors and content producers, the greater the challenge will be for sponsorship disclosure law. Quite reasonably, some have argued that this convergence cuts in favor of heightening, not lowering, disclosure standards.<sup>297</sup> But it is difficult to imagine a system of disclosure that would catch sponsor-embedded plugs without subjecting a majority of television programming to the disclosure rules.<sup>298</sup> If this were the case, the externalities Goldman describes in relation to disclosure—consumers under- and over-reacting to them—would be correspondingly more harmful.<sup>299</sup>

### C. *Undue Burdens*

The current law is under-inclusive, but updating the law to correct for that problem in scope would be difficult, if not impossible.<sup>300</sup> If the scope problem were addressed and reforms focused on improving the visibility and substance of disclosures through the kinds of noisy disclosures that reform proponents envision,<sup>301</sup> these measures would impose numerous burdens on all the relevant players. Sponsors would be the least directly burdened as they would lose only the ability to create promotional messages that might go unnoticed as such. Broadcasters stand to lose huge amounts of revenue if sponsors pull their embedded advertisement funding because they do not wish to be associated with intrusive, noisy disclosures that move the embedded product from background to foreground.<sup>302</sup> Moreover, compliance costs would be substantial and

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297. See WGAW White Paper, *supra* note 30, at 8 (lamenting the “egregious abuse” found in some television programs and calling for the establishment of an industry code of conduct that would include, among other factors, “[f]ull and clear disclosure[:] . . . both the visual and aural disclosure of product integration deals at the beginning of each program, so the program’s audience knows ahead of time that it will be subject to hidden or stealth advertising”).

298. See *supra* Part II.C.

299. See Goldman, *supra* note 30, at 13–15.

300. Expanding the law as the reforms discussed above contemplate is certainly feasible, see *supra* Part II.C., but correcting the law effectively is another, much more difficult matter.

301. See *supra* Part II.C.

302. There is no guarantee that revenues from embedded advertising would be redirected to traditional advertising if embedded advertising were regulated out of existence. Advertisers have increasingly shifted to producing segments of branded content, or long-form advertisements that could well become the standard model if embedded advertisements in entertainment content ceased to function. Clearly, such speculation remains just that, speculation. But reports from the advertising industry and in the popular press reveal a continuing and increasing commitment to the use of the branded series or

would hit some broadcasters harder than others: public broadcasters have objected vociferously to the expansion of these requirements.<sup>303</sup> The Commission traditionally inquires whether its rules will impose on producers' abilities to create content.<sup>304</sup> For the foregoing reasons—loss of revenues and increased compliance costs—expanded disclosure requirements would intrude on broadcasters' programming significantly. Perhaps more importantly, the already-stretched Commission will find itself with burdensome monitoring and enforcement costs if it takes any expansion of scope seriously.

Consumers stand to lose the most. There will be a threat to their immersion interest if consumers experience disclosures that interrupt their viewing and that do not interest them. Such disclosures may be duplicating information consumers already have or could get if they wanted it.<sup>305</sup> This interference might take the form of concurrent disclosures or might consist of decreased variety and quality of entertainment offerings.

If an embedded advertisement plays a very minor but frequently seen role in the entertainment content, concurrent disclosures will emphasize the brand to the detriment of the consumer's enjoyment and immersion. This seems disproportionate: proponents of reform will concede that only a tiny portion of the entertainment content is potentially deceptive, yet the effect is to ruin the entire surrounding content with disproportionately noticeable disclosures that may benefit brand owners more than consumers.<sup>306</sup> Mandatory disclosures impose potentially substantial burdens on the relevant parties and diminish the many benefits associated with embedded advertising. Lastly, if the venture consumer cares whether a sponsorship occurred

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online episode. See, e.g., Jacquie Corbelli, *Branded Content Needs Digital: Click, Text and Press*, ADWEEK (Sept. 7, 2010), [http://www.adweek.com/aw/content\\_display/community/columns/other-columns/e3ic89e89e7caab6358e1b4a0da8f878cd1](http://www.adweek.com/aw/content_display/community/columns/other-columns/e3ic89e89e7caab6358e1b4a0da8f878cd1); Michael O'Neill, *All About Webisodes and Branded Content*, MEDIA, July 29, 2010, at 7, 7, available at <http://www.campaignasia.com/Article/223825,all-about-webisodes-and-branded-content.aspx>.

303. Comments of Nat'l Pub. Radio, Inc. at 2–3, Sponsorship Identification Rules & Embedded Advertising, 73 Fed. Reg. 43,194 (proposed July 24, 2008) (MB No. 08-90).

304. See Notice of Proposed Amendments, 28 Fed. Reg. 4707, 4712 (May 10, 1963) (stating that “inhibit[ing] program production” militated against imposing disclosure obligations on film producers).

305. See *supra* notes 227–28 and accompanying text; *infra* Part IV.D.

306. BeVier, *supra* note 201, at 38 (describing the problems inherent in banning false advertising altogether when in some instances the allegedly false message constitutes “but a trivial proportion of the ad's total information content”). The statute and the case law for false advertising claims require materiality to a reasonable consumer, as discussed *supra* notes 25–27 and accompanying text.

within a program, he can resort to self-help, unlike the consumer traditionally imagined under early sponsorship disclosure law.<sup>307</sup> In what follows, this Article builds on the possibility of using self-help to argue for its necessity, especially since self-help has become inexpensive, fairly easy (so long as one has access to the Internet), and quite reliable.

#### D. *Self-Help and Protecting the Venture Consumer*

There is a final reason for questioning the efficacy of regulating embedded advertising. No disclosure regulation will be as effective as self-help can be for consumers. Marketing practices evolve rapidly. Indeed, marketing grows ever more sophisticated, and consumers need to hone their skepticism in order to avoid becoming compliant targets of the sorts of ambush marketing that regulators find it difficult to regulate or do not regulate at all.<sup>308</sup> Self-help can take the form of skepticism, Internet research, and other inquiries into the claims and endorsements consumers encounter. For example, “guerilla” or “buzz” marketing puts advertisers’ agents out in the public sphere, wearing, using, drinking, and praising their “favorite” products.<sup>309</sup> These agents may be actors paid to stand in line at a local courthouse and talk up a furniture store’s sale;<sup>310</sup> actors asking strangers to take their picture while extolling the virtues of their new

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307. See *supra* Part I.C.

308. See, e.g., Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 *BUFF. L. REV.* 721, 721–23, 763 n.117 (2010); Salvator Parise et al., *The Secrets of Marketing in a Web 2.0 World*, *WALL ST. J.*, Dec. 15, 2008, at R4 (describing the changed media environment and the way marketers should understand new consumer behavior); Laura Petrecca, *Product Placement—You Can’t Escape It*, *USA TODAY*, Oct. 10, 2006, at 1B.

The FTC updated its endorsement guidelines in 2009 for the first time in thirty years. Jack Shafer, *The FTC’s Mad Power Grab*, *SLATE* (Oct. 7, 2009), <http://www.slate.com/id/2231808>. However, the guidelines mainly target sponsored blogging and endorsements, which may not reach all forms of “buzz marketing.” See *id.* The scope of the guidelines’ authority and purpose is unclear, and the new rules are both broad and vague. *Id.*; see also Natalie Zmuda, *Ann Taylor Case Shows FTC Keeping a Close Eye on Blogging*, *ADVERTISING AGE*, May 3, 2010, at 4, 4 (discussing the first action brought under the new FTC blogging regulations).

309. Walker, *supra* note 276, at 70 (describing how “a growing number of marketers [have been] organizing veritable armies of hired ‘trendsetters’ or ‘influencers’ or ‘street teams’ to execute ‘seeding programs,’ ‘viral marketing,’ [or] ‘guerrilla marketing,’ ” and citing to a company that paid (in the form of discounts or coupons, not cash) 2,000 people to promote the company’s sausages at family dinner parties, at formal parties, in comment boxes at grocery stores, and in conversation with perfect strangers).

310. Letter from Gary Ruskin, Exec. Dir., Commercial Alert, to Donald Clark, Sec’y, FTC (Oct. 18, 2005), <http://www.commercialalert.org/buzzmarketing.pdf>.

Sony camera-phone;<sup>311</sup> college students hired for their good looks and charisma pitching JetBlue and Microsoft products to their on-campus peers;<sup>312</sup> teenagers who have “volunteered” to help marketers plug “everything from toothbrushes to TV shows” in return for discounts or other non-cash benefits;<sup>313</sup> and even an MIT-bound high school valedictorian covertly paid \$1,800 to plug a Hollywood movie in her graduation speech.<sup>314</sup> The same hidden payments and conflicts of interest often pertain to the Internet and online searches, and research shows many consumers are unaware of how business incentives drive search results.<sup>315</sup> Consequently, consumers must learn to interrogate the sources they encounter, to double-check claims made against information available from outside and uninterested sources.

It may be that regulation should and will arise to suppress such marketing practices, although the FTC has thus far refused to step in and end this so-called buzz marketing.<sup>316</sup> Yet regulation merely inspires new marketing practices designed to evade legal restrictions and lead the consumer ever further into domains of potential persuasion. As consumers’ modes of media consumption continue to evolve, so do the modes of marketing that target those consumers.<sup>317</sup> Instead of—or in addition to—lamenting the ubiquity of promotional messages, consumers should embrace the subversive possibilities of resistance to branding.<sup>318</sup> At a minimum, they should maintain a healthy level of skepticism. Skepticism is a valuable form of consumer

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311. Suzanne Vranica, *That Guy Showing off His Hot New Phone May Be a Shill; New Campaign for SonyEricsson Puts Actors in Real-Life Settings; Women Play Battleship at the Bar*, WALL ST. J., July 31, 2002, at B1. Sony reportedly spent \$5 million on the two-month campaign to promote its new mobile phone with camera capabilities. *Id.*

312. Sarah Schweitzer, *Building a Buzz on Campus: Companies Enlist Students to Pitch Products to Their Peers*, BOSTON GLOBE, Oct. 24, 2005, at A1.

313. Walker, *supra* note 276, at 69–70; Melanie Wells, *Kid Nabbing*, FORBES, Feb. 2, 2004, at 84, 85.

314. Ethan Smith & Sabrina Shankman, *Fellow Graduates, Before We Greet the Future, a Word from My Sponsor*, WALL ST. J., July 28, 2009, at A1.

315. Brian Morrissey, *Can Online Video Cure DVR Commercial Skipping?*, ADWEEK (May 8, 2008), [http://www.adweek.com/aw/content\\_display/news/media/e31fb6fce0a2cc79c4067960449ad460399](http://www.adweek.com/aw/content_display/news/media/e31fb6fce0a2cc79c4067960449ad460399) (“[M]ost consumers still don’t know up to half of the links among search-results pages are advertisements.”).

316. *Id.*

317. Ian Schafer, *We Better Start Monetizing Social Media Before It’s Too Late*, ADVERTISING AGE, May 2, 2008, at 18, 18.

318. See Sonia Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489, 491–92 (2006) (offering the concept of “semiotic disobedience” to underline the need for a new way to conceptualize appropriation and reclamation of symbols that intellectual property law protects).

self-protection—one thinks of the FTC’s modern requirement that consumers have acted “reasonably”—and a sign of intelligent engagement with information in the world.<sup>319</sup> The venture consumer, unlike the novice researcher once tempted to rely on information merely because it existed online, has learned to interrogate her sources.<sup>320</sup> If she has not yet learned this lesson, she must. If the costs of verification are too high, she does well to remain guarded. Advertising regulation has shifted away from the common law rule of *caveat emptor* for reasons that make good sense.<sup>321</sup> But *caveat spectator*, *auditor*, and *lector* are still effectively the rules of the media landscape, because disclosure regulation does not and arguably cannot reach all the instances of sponsorship about which the government believes consumers should receive disclosure information.<sup>322</sup>

#### CONCLUSION

Sponsorship disclosure law’s effective reach misaligns with its goals. It fails to catch a great deal of today’s embedded advertising. However, embedded advertising has never been more prevalent nor so likely to continue to grow so much, so rapidly. Current uses of embedded advertising resist the plodding logic of the sponsorship disclosure regime. Worse still, the sponsorship disclosure regime is out of touch with the consumer it seeks to protect, a consumer who is closer to this Article’s venture consumer model than to the old-fashioned consumer imagined by the FCC.<sup>323</sup> To the extent that consumers value immersion over disclosures, the FCC will miss its mark in mandating noisy disclosures if its aim is indeed to protect consumers.

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319. BeVier, *supra* note 201, at 8 (“Consumers are wary whenever they discern that the self-interest of the advertiser would be served by their own uncritical belief in what the advertiser asserts.”).

320. DAVID M. BOUSH ET AL., *DECEPTION IN THE MARKETPLACE: THE PSYCHOLOGY OF DECEPTIVE PERSUASION AND CONSUMER SELF-PROTECTION 1* (2009) (“Practicing deceptive persuasion and coping with other people’s attempts to deceive you are fundamental social activities in every domain of daily life. . . . Deception protection skill is a critical life skill.”).

321. See JOHN GOLDRING ET AL., *CONSUMER PROTECTION LAW 6* (5th ed. 1998); see also Earl W. Kintner, *Federal Trade Commission Regulation of Advertising*, 64 MICH. L. REV. 1269, 1272 n.7 (1966) (summarizing ways common law remedies are inadequate for false advertising).

322. *Caveat emptor* is Latin for “buyer beware”; here the phrase warns the viewer, listener, and reader to beware.

323. See *supra* notes 183–86 and accompanying text.

The venture consumer of today is the average consumer of tomorrow. Sponsorship disclosure law should adopt a more up-to-date understanding of the consumer it seeks to protect. FTC consumer protection jurisprudence reveals a shift in the conceptualization of the consumer: where the gullible was once protected, he must now show he was acting reasonably to fall within the scope of FTC protection.<sup>324</sup> Here too, the FCC and Congress should bear in mind the radically changing profile of contemporary consumers. If sponsorship disclosure law seeks to achieve the proper balance between consumer interests in disclosure, immersion, and media abundance, it needs to take these paradigm shifts into consideration.

Policymakers historically have focused on consumers' presumed rights—or even desires—to know when they are being marketed to, whatever the costs to consumers of disclosing that information. Yet this overemphasis on consumers' disclosure interests ignores the sea-change in consumption patterns that has taken place in the eighty years since Congress passed the Communications Act and the fifty years since the amendments substantially updated it. Consumers exist today in a different relationship to their media sources than they have at any other time.<sup>325</sup> While the law need not—and should not—necessarily try to be up-to-the-minute, it fails to reflect an accurate conception of the contemporary media landscape. The viewing environment has undergone substantial transformation since Congress first conceived sponsorship disclosure legislation for radio (1927) and subsequently implemented and amended it for radio and television (1934, 1960, and 1980).<sup>326</sup> Going forward, policymakers could adopt some of the reform proposals, they could propose alternative amendments, or they could choose to let the law continue its slide into irrelevance. This last course of action is best: allowing the law to become all but obsolete. There is no evidence to suggest that

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324. As of 1984, when the FTC changed course in this respect, an act or practice is considered deceptive under FTC law only if it involves a representation, omission, or practice that is likely to mislead consumers *acting reasonably* under the circumstances, and the representation, omission, or practice is material. *Cliffdale Assocs., Inc.*, 103 F.T.C. 110 app. at 164–65, 174 (1984); *see also* *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994) (discussing standard for determining whether an advertisement is misleading and deceptive and adopting the *Cliffdale* standard of the reasonable consumer); *FTC v. Minuteman Press*, 53 F. Supp. 2d 248, 258 (E.D.N.Y. 1998) (applying *Pantron I's* reasonable consumer standard).

325. VOLLMER WITH PRECOURT, *supra* note 23, at 33 (“Consumers have more media at their disposal than ever before.”).

326. *See, e.g.*, DONATON, *supra* note 82, at 8–9; Carey, *supra* note 184, at 45–49.



consumers value their disclosure interest above their immersion and media abundance interests, both of which are threatened by legislators' overvaluation of consumers' disclosure interests.