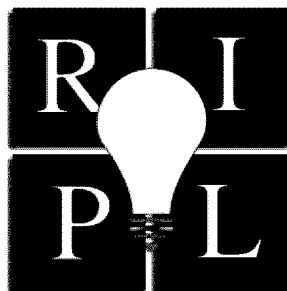


THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



EMBEDDED ADVERTISING: YOUR RIGHTS IN THE TiVo ERA

ANN K. HAGERTY

ABSTRACT

As DVR usage rapidly increases, embedded advertising is evolving and blurring the line for the viewing public between advertising and content. The FCC responded by seeking public commentary and guidance on the regulations governing embedded advertising. The comments the FCC received revealed a heated debate between media industry advocates and those who seek to protect consumer interests. The recent increase in the practice of embedded advertising has only intensified this debate. A balance must be struck between the interests of the media industry and the viewing public. To do so, the FCC must adopt a regulatory scheme that commands viewers' attention while avoiding repetition and not placing an undue burden on the media industry.

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EMBEDDED ADVERTISING: YOUR RIGHTS IN THE TiVO ERA

ANN K. HAGERTY *

INTRODUCTION

“Product placement . . . is a wacky business.”¹ Although the characterization of product placement as “wacky” may be debatable, this “business” is increasingly prevalent in television culture.² Advertising and commercials have always been a main character in television, but more innovative techniques are developing and blurring the line for viewers.³ One technique, known as embedded advertising or product placement, has flourished in response to the growing use of Digital Video Recorders (“DVRs”).⁴

TiVo and ReplayTV introduced the first consumer-focused DVRs in 1999.⁵ DVR ownership continues to grow rapidly, with a likely increase from 7% in 2004 to more than 50% by 2010.⁶ In parallel, spending for and use of embedded advertising are steadily increasing.⁷ For example, between 1999 and 2004, the amount of money spent on embedded advertising increased an average of 21.5% per year.⁸ This trend continues with embedded advertising growth rising to nearly 40% in the first quarter of 2008, with certain shows embedding over three thousand advertisements.⁹

* J.D. Candidate, May 2010, The John Marshall Law School. B.A. Political Science, DePaul University, June 2007. I would like to specifically thank Scott Barnett and Andrew Cook for their assistance while I was writing this comment. I would also like to thank the staff of THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW for all of their editorial guidance. Finally, I would like to thank my family, especially my husband Ray Hagerty, for supporting me throughout this process.

¹ Posting of Oli Warner to ThePCSPY.com Blog, http://www.thepcspsy.com/read/product_placement_gone_wild (June 17, 2008).

² See Mishawn Nolan, *FCC Investigates Embedded Advertising in TV*, VALLEY LAWYER, Feb. 2009, at 20.

³ *Id.* at 22.

⁴ Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. 43,194, 43,195 (proposed July 24, 2008) (to be codified at 47 C.F.R. pts. 73, 76) (using the terms “embedded advertising” and “product placement” interchangeably); see Letter from Robert Weissman, Managing Dir., Commercial Alert, to Marlene H. Dortch, Office of the Sec’y, Fed. Comm’n Comm’n (Sept. 22, 2008) (on file with author), available at <http://www.commercialalert.org/CA%20comments%20text%20only.pdf> [hereinafter Weissman Letter] (describing the increase in the occurrence of embedded advertising as a response to the increase in consumer DVR usage).

⁵ Press Release, Digeo, Inc., The Future of TV Indus. Background (Jan. 2007) (on file with author), available at http://www.digeo.com/downloads/Industry_background.doc (describing a DVR as a device that records and stores broadcast programs on a hard-drive, giving the viewer the option to pause and rewind live TV).

⁶ *Id.*

⁷ Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. at 43,195.

⁸ *Id.* In 2005, the net value of the paid product placement market in the United States was estimated to be \$1.5 billion, a 48.7% increase. *Id.*

⁹ *In re* Sponsorship Identification Rules and Embedded Advertising, Notice of Inquiry and Notice of Proposed Rule Making, 23 F.C.C.R. 10,682, 10,701 (June 26, 2008) (statement of Federal Communications Commissioner Michael J. Copps).

These statistics illustrate that embedded advertising is a rapidly growing phenomenon that demands attention. While television advertising is currently regulated by the Sponsorship Identification Rules,¹⁰ the Federal Communications Commission's ("FCC") response to the marked increase in embedded advertising was to issue a Notice of Inquiry and Notice of Proposed Rule Making ("Embedded Advertising Notices").¹¹ The Notices invited public commentary to guide any future revisions to the Sponsorship Identification Rules.¹² This comment explores and analyzes the heightened tension between the media industry and consumer advocate groups.

Part I of this comment discusses the relationship between the FCC's Sponsorship Identification Rules and increasing media industry reliance on embedded advertising. Part II analyzes the legal implications of this relationship. Finally, Part III proposes a plan that balances media industry and consumer advocate groups' interests.

I. BACKGROUND

The FCC's Embedded Advertising Notices attempt to directly address the growth and implications of embedded advertising.¹³ In order to completely understand embedded advertising, this section defines it, traces its history, and examines the current debate and the FCC's recent actions.

A. What is Embedded Advertising and Where Did it Come From?

Embedded advertising is the inclusion of sponsored brands in television programming.¹⁴ The growth of DVRs, allowing consumers to bypass commercials, forces the media industry to turn to more discreet methods of integrating advertising into television.¹⁵ As DVR use increases, embedded advertising techniques will become more prevalent.¹⁶ Although it is clear that embedded advertising is a growing practice, its historical roots have been debated.¹⁷

¹⁰ 47 C.F.R. § 73.4242 (2009); Sponsorship Identification Rules, 40 Fed. Reg. 41,936, 41,937–38 (Sept. 3, 1975).

¹¹ Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. at 43,194–95. The FCC's notices were adopted on June 13, 2008 and released on June 26, 2008. *Id.* A Notice of Inquiry is used for the purpose of gathering information about a certain subject or as a means of generating ideas on a specific issue. *See* 47 C.F.R. §§ 1.415, 1.430 (providing interested persons the opportunity to submit data, views, or arguments on a specific issue). Notices of Inquiry are initiated either by the Commission or on the basis of a petition by any interested person. *Id.* §§ 1.411, 1.430.

¹² Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. at 43,194.

¹³ Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. at 43,195.

¹⁴ *Id.* at 43,195. The FCC uses the term "embedded advertising" in its notice generally to describe both product integration and product placement. *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Joanne Weintraub, *Product Placement is a Super Tradition in Hollywood*, MILWAUKEE J. SENTINEL, Mar. 1, 2005, at 1E, available at <http://www.jsonline.com/story/index.aspx?id=305598> [hereinafter Weintraub] (claiming that embedded advertising is as old as movies and television); *see*

While embedded advertising may be as old as movies, television and film have very different histories with the practice.¹⁸ Television followed the lead of radio by placing product brand names in the titles of the programs.¹⁹ The "Philco TV Playhouse," "Texaco Star Theater," and "Kraft Television Theatre" were some of the most popular television programs of the 1950s.²⁰ By the 1980s, product placement was a regular practice.²¹ Modern examples of embedded advertising include episodes of "Extreme Home Makeover" featuring various products from Sears and "American Idol" where celebrity judges routinely drink Coca-Cola.²² The FCC responded to the growth of embedded advertising by issuing regulations to govern this activity.²³

The FCC's regulations date back to policies from the 1970s that addressed "teaser" announcements.²⁴ The Sponsorship Identification Rules are based on sections 317 and 508 of the Communications Act of 1934 and are designed to handle embedded advertising.²⁵ These rules set out to protect the public's right to know who is paying for television programming.²⁶ Section 317 requires broadcasters to make sponsorship identification announcements in any paid-for programming.²⁷ Section 508 of the Communications Act requires broadcasters to report when any "money, service, or other valuable consideration" is provided for the inclusion of advertising in a television program.²⁸

also Weissman Letter, *supra* note 4 (claiming that "product placement has taken off in recent years," with very high concentrations of embedded advertising in cable television, especially reality shows).

¹⁸ See Weintraub, *supra* note 17, at 1E, 3E.

¹⁹ *Id.* at 3E.

²⁰ *Id.* at 3E.

²¹ 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, 1492 (2007).

²² Scott Shagin and Matthew Savare, *Lawyering at the Intersection of Madison and Vine: It's About Brand Integration*, 23 ENT. & SPORTS L. 1, 33 (2005); *In re* Sponsorship Identification Rules and Embedded Advertising, Notice of Inquiry and Notice of Proposed Rule Making, 23 F.C.C.R. 10,682, 10,684 (June 26, 2008).

²³ 47 U.S.C. §§ 317, 508 (2006); 47 C.F.R. § 73.1212 (2009).

²⁴ *In re* Sponsorship Identification Rules and Embedded Advertising, 23 F.C.C.R. at 10,686 n.30. The FCC previously declared that "teaser" announcements that lasted only a few seconds were prohibited if the sponsor was not clear from the teaser itself, even if the sponsor became clear in a later announcement in the same program. *In re* Broadcasters Warned Against "Teaser" or "Come-On" Spots Where Neither Sponsor nor Sponsor's Product is Announced, Public Notice, 40 F.C.C. 135 (June 1, 1962).

²⁵ Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. 43,194, 43,195 (proposed July 24, 2008) (to be codified at 47 C.F.R. pts. 73, 76). The FCC writes that the Commission's sponsorship identification rules are based on sections 317 and 507 of the Communications Act of 1934; however, section 508 is in reality the applicable section for the Commission's sponsorship identification rules. *Id.* at 43,199; see 47 U.S.C. § 508 (2006) (requiring the reporting of any consideration that was provided in exchange for the inclusion of matter in a program).

²⁶ *In re* Sponsorship Identification Rules and Embedded Advertising, 23 F.C.C.R. at 10,684.

²⁷ 47 U.S.C. § 317(a)(1).

²⁸ 47 U.S.C. § 508. Section 508(c) of the Communications Act provides:

Subject to subsection (d) of this section, any person who supplies to any other person any program or program matter which is intended for broadcasting over any radio station shall, in advance of such broadcast, disclose to such other person any information of which he has knowledge, or which has been disclosed to him, as to any money, service or other valuable consideration which any person has

Section 73.1212 of the FCC's rules parallels section 317.²⁹ Under this rule, a sponsorship announcement is not required when there is an obvious connection between a commercial product and the sponsor.³⁰ Where there is no obvious connection, this rule requires the sponsorship announcement to occur once during the programming and stay on the television screen long enough to be read or heard by the average viewer.³¹

The FCC has historically passed various regulations with respect to advertising and sponsorship identification.³² The current debate between the media industry and consumer advocates centers on whether the current regulations adequately address embedded advertising.³³

B. The Current Debate: to I.D. or not to I.D.

One side of the current debate is composed of consumer advocate groups. These groups urge the FCC to adopt rules protecting the public's right to know who pays for their television programs.³⁴ Possibly one of the staunchest advocates of strict and clear sponsorship identification is Commercial Alert.³⁵ Commercial Alert argues that the FCC should issue a rule requiring the disclosure of embedded advertising the moment it occurs, a method known as "simultaneous" disclosure.³⁶ Commercial Alert also urges the FCC to require explanatory disclosures about the nature of embedded

paid or accepted, or has agreed to pay or accept, for the inclusion of any matter as a part of such program or program matter.

Id.

²⁹ Compare 47 C.F.R. § 73.1212 (2009) (requiring broadcast licensees to identify sponsors in programs when the identity of the sponsor and the existence of sponsorship of commercial material is not obvious) with 47 U.S.C. § 317 (requiring broadcast licensees to identify sponsors in any program for which consideration was received). See also Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. at 43,195.

³⁰ Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. at 43,195.

³¹ *Id.*

³² 47 U.S.C. §§ 317, 508; 47 C.F.R. § 73.1212.

³³ Compare Weissman Letter, *supra* note 4 (arguing that the FCC must pass more strict Sponsorship Identification Rules to protect the public), with PROGRESS & FREEDOM FOUND., COMMENTS, *IN RE* SPONSORSHIP IDENTIFICATION RULES AND EMBEDDED ADVERTISING 2-3, 6 (MB Docket No. 08-90, 2008) [hereinafter COMMENTS OF THE PROGRESS & FREEDOM FOUNDATION] (asserting that any further regulation would be a violation of the media industry).

³⁴ CAMPAIGN FOR A COMMERCIAL-FREE CHILDHOOD, COMMENTS OF CAMPAIGN FOR A COMMERCIAL-FREE CHILDHOOD, *IN RE* OF SPONSORSHIP IDENTIFICATION RULES AND EMBEDDED ADVERTISING i (MB Docket No. 08-90, 2008) [hereinafter COMMENTS OF CAMPAIGN FOR A COMMERCIAL FREE CHILDHOOD]; SCREEN ACTORS GUILD, COMMENTS OF SCREEN ACTORS GUILD, *IN RE* SPONSORSHIP IDENTIFICATION RULES AND EMBEDDED ADVERTISING at 6 (MB Docket No. 08-90, 2008) [hereinafter COMMENTS OF SCREEN ACTORS GUILD]; see generally Weissman Letter, *supra* note 4 (urging the F.C.C. to adopt simultaneous disclosures of embedded advertisements).

³⁵ Weissman Letter, *supra* note 4. Commercial Alert is a non-profit organization whose mission is "to keep the commercial culture within its proper sphere, and to prevent it from exploiting children and subverting the higher values of family, community, environmental integrity and democracy." *Id.*

³⁶ *Id.* "Simultaneous" disclosures are described as sponsorship identification at the time the product is mentioned or showed. *Id.* Such a disclosure would appear as a pop-up window or text "crawl" at the bottom of the television screen. *Id.*

advertisements at the beginning of a television program.³⁷ Commercial Alert asserts that embedded advertising exposes viewers to hidden advertisements, rendering them unable to use the filters they normally employ while watching commercials.³⁸ Commercial Alert and other consumer advocates claim that embedded advertising is a massive deception to the American public.³⁹

Located on the other side of this debate are the media industry and proponents of media independence who disfavor the regulation of embedded advertising.⁴⁰ One such organization is the Progress and Freedom Foundation (“PFF”).⁴¹ The PFF argues that FCC regulation of embedded advertising is unnecessary and burdensome.⁴² In its three-pronged argument, the PFF asserts that further regulation: (1) could have a harmful economic impact on the health of the struggling media sector; (2) unfairly singles out the already over-regulated broadcast media sector; and (3) is a violation of the First Amendment.⁴³

The PFF argues that regulation as urged by organizations like Commercial Alert would ultimately have a harmful economic impact on the health of the struggling media sector.⁴⁴ They posit that at a time when DVRs and video on demand are making commercials obsolete, embedded advertisements may become the only method of providing free, public broadcasting.⁴⁵ Additionally, the PFF contends that further regulation will stifle the media industry.⁴⁶

First Amendment concerns are guided by the framework set forth in *Central Hudson Gas & Electric Corp. v. Public Service Communication*.⁴⁷ *Central Hudson* established a four-step analysis for regulation of commercial speech.⁴⁸ First, there must be a determination as to whether the expression is protected by the First Amendment.⁴⁹ For commercial speech to come within that provision, it must concern lawful activity and cannot be misleading.⁵⁰ Second, there must be a substantial government interest asserted in regulating hidden advertisements.⁵¹ Third, the regulation must directly advance the governmental interest asserted.⁵² Fourth and finally, the regulation must not be more extensive than necessary to serve the asserted governmental interest.⁵³ For the purposes of this comment, the analysis will focus on the first and fourth elements of *Central Hudson*.

As discussed above, the heated debate between these organizations illustrates the uncertain future of embedded advertising. The FCC further intensified this

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *See, e.g.*, COMMENTS OF THE PROGRESS & FREEDOM FOUNDATION, *supra* note 33, at 6.

⁴¹ *See Id.* at 1.

⁴² COMMENTS OF THE PROGRESS & FREEDOM FOUNDATION, *supra* note 33, at 2, 6.

⁴³ *Id.* at 2, 5–7.

⁴⁴ *See id.* at 6.

⁴⁵ *Id.* at 7.

⁴⁶ *See id.*

⁴⁷ 447 U.S. 557 (1980).

⁴⁸ *Id.* at 566.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

debate by seeking comment and embarking on the path to possible future rulemaking.⁵⁴

C. FCC Rule-Making Process

The FCC's rulemaking process is a multistep and multifaceted journey. The process begins with the FCC releasing a Notice of Inquiry to gather information about a broad subject or to generate ideas on a specific issue.⁵⁵ After reviewing comments from the public, the FCC may then issue a Notice of Proposed Rulemaking, which seeks further public comment.⁵⁶ After reviewing these comments, the FCC may then issue a Further Notice of Proposed Rulemaking concerning specific issues or disputes raised in the comments.⁵⁷ Finally, after considering all comments submitted, the FCC issues a Report and Order.⁵⁸ The Report and Order may develop new rules, amend existing rules, or make a decision to do neither.⁵⁹

The FCC released a notice concerning embedded advertising on June 26, 2008.⁶⁰ The notice contained two parts: (1) the Notice of Inquiry, which sought comments on the current relationship between sponsorship identification and embedded advertising and (2) the Notice of Proposed Rulemaking, which sought comment on a proposed rule change concerning sponsorship identification.⁶¹ The FCC will also consider whether to extend disclosure requirements to cable television.⁶² The FCC will consider new rules regarding the size and content of sponsorship notices and the feasibility of "simultaneous" disclosures.⁶³

Concerning the notices at issue here, comments from interested parties were due on September 22, 2008, with replies due on October 22, 2008.⁶⁴ After most of the initial comments to the FCC's notice concerning the Sponsorship Identification Rules

⁵⁴ See Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. 43,194 (proposed July 24, 2008) (to be codified at 47 C.F.R. pts. 73, 76).

⁵⁵ 47 C.F.R. §§ 1.415, 1.430.

⁵⁶ *Id.* §§ 1.412, 1.415. An NPRM contains a full summary of the proposed rule changes adopted by the commission. *Id.* § 1.412(a)(1). Rule changes include adoption, amendment, or repeal of a rule. *Id.* § 1.412(b). Proposed changes to the Commission's rules again invite public comment on these proposals. *Id.* § 1.415.

⁵⁷ *Id.* § 1.421. The FNPRM provides an opportunity for further comment on a related or specific proposal. *Id.*

⁵⁸ *Id.* § 1.425.

⁵⁹ *Id.* §§ 1.412(b), 1.425. Report and Order summaries are published in the *Federal Register*, and the rule change becomes effective not less than 30 days from its publication unless otherwise specified under 47 C.F.R. 1.427(b)–(c). *Id.* § 1.427(a).

⁶⁰ *In re* Sponsorship Identification Rules and Embedded Advertising, Notice of Inquiry and Notice of Proposed Rule Making, 23 F.C.C.R. 10,682 (June 26, 2008).

⁶¹ *Id.*

⁶² Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. 43,194, 43,197 (proposed July 24, 2008) (to be codified at 47 C.F.R. pts. 73, 76).

⁶³ *Id.* at 43,196–97 (referring to "simultaneous" disclosures as "concurrent" disclosures).

⁶⁴ *Id.* at 43,194.

and embedded advertising were filed, it became clear that the FCC would have to decide the outcome of a media war.⁶⁵

II. ANALYSIS

This section provides a focused discussion and analysis of the legal and economic implications of the FCC's options to resolve the current debate. The first option available to the FCC, maintaining the current Sponsorship Identification Rules, is unresponsive to consumer concerns. In contrast, the second option, expanding FCC regulations to specifically confront the embedded advertising phenomenon arguably jeopardizes the media industry's survival.

A. Inadequacy of Maintaining the Status Quo

As noted by the previously cited statistics, embedded advertising has flourished under the current Sponsorship Identification Rules.⁶⁶ Leaving the Sponsorship Identification Rules unmodified risks potential deception and harm to the public.⁶⁷ Unlike traditional advertisements, embedded advertisements appear unexpectedly, sometimes without a disclosure of whom, if anyone, is paying for the advertisement.⁶⁸ Non-obvious sponsorship may deceive the public into thinking they are viewing purely content-based television programming.⁶⁹

The deceptive aspects of embedded advertising can lead to harmful effects on the public.⁷⁰ Studies show that viewers respond to embedded products without consciously acknowledging any response.⁷¹ For instance, viewing a brand or product during television programming "can result in consumers having a more favorable

⁶⁵ See Mishawn Nolan, *FCC Investigates Embedded Advertising in TV*, VALLEY LAWYER, Feb. 2009, at 21. As of July 15, 2009, over 200 comments were submitted on behalf of concerned citizens, parents, organizations, and law firms. F.C.C., *E.C.F.S. Comment Search*, http://fjallfoss.fcc.gov/cgi-bin/websql/prod/ecfs/comsrch_v2.hts?ws_mode=retrieve_list&id_proceeding=08-90 (last visited July 15, 2009) (listing in reverse chronological order records found for searching FCC proceeding 08-90, the proceeding that concerns sponsorship identification rules and embedded advertising).

⁶⁶ See Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. at 43,195 (estimating that between 1999 and 2004, the amount of money spent on embedded advertising increased an average of 21.5% each year).

⁶⁷ Weissman Letter, *supra* note 4 (explaining that the commercial nature of embedded advertisements are not obvious, and thus the public doesn't know who is trying to persuade them or even if they are actually persuaded to buy a product).

⁶⁸ *Id.*

⁶⁹ *Id.* The test for obviousness concerning embedded advertising focuses on whether the viewers can identify the advertisements each time they see them; it is not a matter of whether the viewer knows that such advertisements exist. *Id.*

⁷⁰ *Id.* (arguing the harm caused by embedded advertising is the deception itself).

⁷¹ Robert F. Bornstein et al., *The Generalizability of Subliminal Mere Exposure Effects: Influence of Stimuli Perceived Without Awareness on Social Behavior*, 53 J. PERSONALITY & SOC. PSYCHOL. 1070, 1072-73 (1987) (noting that "stimuli perceived without awareness may have significant effects on subsequent cognitions, affects, and behaviors.").

attitude towards it even if the consumer does not actually recall the exposure.”⁷² Therefore, these embedded advertisements can be more effective and potentially harmful when consumers are unaware that they have seen them.⁷³

The abundance of embedded advertisements and their effects are in sharp contrast to the policies behind the Sponsorship Identification Rules.⁷⁴ The FCC upholds the notion that viewers have a right to know by whom they are being persuaded.⁷⁵ Many embedded advertisements are designed so that the advertisement goes undetected by the average viewer.⁷⁶ As a result, viewers may be unable to determine when they are the targets of advertising.⁷⁷

Some observers contend that the current FCC rules are “facially ineffective” when it comes to regulating today’s species of embedded advertising.⁷⁸ Under the current rules, most sponsorship identification disclosures appear in fine print that quickly appear in the closing credits of a television program, rendering them nearly undetectable to even the most observant viewer.⁷⁹ This lack of an effective disclosure mechanism for embedded advertisements demanded the attention of the FCC and opened the door for the expansion of its rules and regulations.

B. The Consequences of Further Regulation

The possible expansion of the Sponsorship Identification Rules for embedded advertising raises various media concerns, including: (1) jeopardizing the media industry’s future; (2) impairing the industry’s ability to function; and (3) First Amendment encroachments.⁸⁰

⁷² COMMENTS OF CAMPAIGN FOR A COMMERCIAL FREE CHILDHOOD, *supra* note 34, at 6; *see also* Chris Janiszewski, *Preattentive Mere Exposure Effects*, 20 J. CONSUMER RES. 376, 376 (1993) (providing evidence that the effects of exposure to brand names and products persist even when such exposure is merely incidental).

⁷³ COMMENTS OF CAMPAIGN FOR A COMMERCIAL FREE CHILDHOOD, *supra* note 34, at 6–7; Janiszewski, *supra* note 72, at 376; Robert F. Bornstein et al., *supra* note 71, at 1072–73.

⁷⁴ Sponsorship Identification Rules, 40 Fed. Reg. 41,936, 41,936 (Sept. 3, 1975). *Cf.* Weissman Letter, *supra* note 4 (noting that the goal of embedded advertisements is to intertwine the product in the programming so that the viewer is unaware of an advertisement or persuasion tactic; while the policy of sponsorship identification regulations set forth by the FCC is to ensure the public’s right to know when they are being persuaded and who is trying to persuade them).

⁷⁵ Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. 43,194, 43,195 (proposed July 24, 2008) (to be codified at 47 C.F.R. pts. 73, 76).

⁷⁶ Weissman Letter, *supra* note 4 (noting that hidden advertisements are not meant to be obvious, “and it is widely understood within the industry that product placements or integrations that are obvious are poorly executed.”); *see also* SCREEN ACTORS GUILD, REPLY COMMENTS OF SCREEN ACTORS GUILD, *IN RE* SPONSORSHIP IDENTIFICATION RULES AND EMBEDDED ADVERTISING 5 (MB Docket No. 08-90, 2008) [hereinafter REPLY COMMENTS OF SCREEN ACTORS GUILD] (claiming that embedded advertising is based on the manipulation of viewers).

⁷⁷ *See* Weissman Letter, *supra* note 4.

⁷⁸ REPLY COMMENTS OF SCREEN ACTORS GUILD, *supra* note 76, at 3–4.

⁷⁹ *Id.* at 4.

⁸⁰ COMMENTS OF THE PROGRESS & FREEDOM FOUNDATION, *supra* note 33, at 2; NAT’L ASS’N OF BROADCASTERS, COMMENTS OF THE NAT’L ASS’N OF BROADCASTERS, *IN RE* IDENTIFICATION RULES AND EMBEDDED ADVERTISING at 2-3 (MB Docket No. 08-90, 2008) [hereinafter COMMENTS OF THE NAT’L ASS’N OF BROADCASTERS].

1. *Media Industry's Future in Jeopardy?*

The media industry asserts that an expansion of the Sponsorship Identification Rules jeopardizes the future stability of advertising.⁸¹ It is well known that television broadcasting remains primarily an advertiser-supported industry.⁸² Advertisers are concerned further regulation will lead to the eventual extinction of embedded advertising.⁸³ The media industry suggests that a drop in advertising will jeopardize the free broadcasting model, given the ultra-competitive media marketplace.⁸⁴ Finally, the media industry argues that the proposed rules unduly burden broadcasters by inhibiting their ability to experiment with new and different forms of advertising to ensure the continued free broadcast television programming.⁸⁵

Consumer advocates counter this argument by stating that the financial burden of expanded Sponsorship Identification Rules on broadcasters would be minimal.⁸⁶ Moreover, opponents note that more stringent rules would not limit the ability of broadcasters and advertisers to develop new sources of income; they only require disclosure of advertising arrangements to the public.⁸⁷

2. *Overregulation, Impaired Functionality?*

The media industry argues that a regulatory expansion would stifle future creativity and growth.⁸⁸ The media industry asserts that embedded advertising allows them to creatively provide value to advertisers while maintaining the integrity of popular television programs.⁸⁹ Moreover, the industry asserts that an expansion of the Sponsorship Identification Rules would be disruptive to television programs to the point where embedded advertisements and industry creativity would be diminished.⁹⁰ Nevertheless, consumer advocates emphasize that the "infringement on artistic integrity is the alteration of script, dialogue, program concept, attire, and scene to include hidden advertisements."⁹¹ Following this logic, it is the embedded

⁸¹ COMMENTS OF THE NAT'L ASS'N OF BROADCASTERS, *supra* note 80, at 3 (arguing that the media sector is already over-regulated and struggling and that further expansion of sponsorship identification laws will exacerbate the problem).

⁸² *Id.* at 3.

⁸³ See COMMENTS BY THE PRESS & FREEDOM FOUNDATION, *supra* note 33, at 7.

⁸⁴ COMMENTS OF THE NAT'L ASS'N OF BROADCASTERS, *supra* note 80, at 19. The National Association of Broadcasters declares that there is a strong public interest in maintaining free television broadcasting, and an expansion of the Sponsorship Identification Rules runs contrary to this public interest. *Id.*

⁸⁵ *Id.* at 19.

⁸⁶ REPLY COMMENTS OF SCREEN ACTORS GUILD, *supra* note 76, at 8 (arguing that any burden on broadcasters would be "*de minimus*").

⁸⁷ *Id.* at 8.

⁸⁸ COMMENTS OF THE NAT'L ASS'N OF BROADCASTERS, *supra* note 80, at 19; COMMENTS OF THE PRESS & FREEDOM FOUNDATION, *supra* note 33, at 2, 6–7 (claiming that extending disclosure requirements would impair creative freedom and "sap the very lifeblood of free, traditional media . . .").

⁸⁹ COMMENTS OF THE NAT'L ASS'N OF BROADCASTERS, *supra* note 80, at 19–20.

⁹⁰ *Id.* at 27–28; COMMENTS OF THE PRESS & FREEDOM FOUNDATION, *supra* note 33, at 2, 7.

⁹¹ Weissman Letter, *supra* note 4 (conceding simultaneously that a mandatory pop-up window stating "advertisement" would be a marginal addition to the distraction on television).

advertisements themselves that are the disruptive factor, not the proposed regulations.

3. *First Amendment Encroachments?*

During the debate over possible expansion of the current rules, the FCC recognized that such an expansion could raise First Amendment issues that may need to be balanced.⁹² These First Amendment concerns are guided by *Central Hudson Gas & Electric Corp. v. Public Service Communication*, which provides a framework for government regulation of commercial speech.⁹³ As previously discussed, the main focus of this analysis will be on the first and fourth elements of the *Central Hudson* framework: (1) that the speech must fall under the protection of the First Amendment and not be misleading; and (2) that a proposed regulation of commercial speech “is not more extensive than necessary to serve [the government’s] interest.”⁹⁴

Relying on the *Central Hudson* framework, the media industry asserts that: (1) embedded advertising has never been found to be misleading or unlawful; and (2) because there is no proof of real harm to consumers, the FCC could not expand its Sponsorship Identification Rules without violating the First Amendment.⁹⁵ Conversely, consumer advocates argue that embedded advertising should not be afforded First Amendment protection because it is per se misleading speech.⁹⁶ Furthermore, they urge that even if the FCC finds that embedded advertisements are not misleading, the expansion of the current Sponsorship Identification Rules satisfies the remaining elements of the *Central Hudson* test.⁹⁷

Despite this contentious debate, whether further regulations violate the First Amendment hinges on the final element of the *Central Hudson* analysis. This step demands that the proposed regulation is no more extensive than necessary to serve the government’s interest.⁹⁸ The FCC’s notice reveals that it is considering expanding the current Sponsorship Identification Rules regarding the size and content of sponsorship notices and the practicality of “simultaneous” disclosures.⁹⁹ By banning embedded advertising, the FCC’s contemplated expansion of the current rules is not a complete suppression of commercial speech and thus allowable under

⁹² Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. 43,194, 43,196 (proposed July 24, 2008) (to be codified at 47 C.F.R. pts. 73, 76).

⁹³ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 577, 566 (1980).

⁹⁴ *Id.*

⁹⁵ COMMENTS OF THE PRESS & FREEDOM FOUNDATION, *supra* note 33, at 2, 4.

⁹⁶ See Weissman Letter, *supra* note 4 (analogizing misleading as equivalent to inaccurate under the *Central Hudson* framework).

⁹⁷ *Id.* Commercial Alert emphasizes that the FCC has a very strong interest in protecting the public from deception. *Id.* Commercial Alert continues its argument by declaring that embedded “hidden” advertisements are “inherently deceptive” because their primary purpose is to be hidden in regular television programming. *Id.*

⁹⁸ *Central Hudson*, 447 U.S. at 569–70.

⁹⁹ Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. 43,194, 43,196–97 (proposed July 24, 2008) (to be codified at 47 C.F.R. pts. 73, 76); see also Weissman Letter, *supra* note 4 (discussing the FCC’s intent behind the Notices).

Central Hudson.¹⁰⁰ The FCC's proposal to regulate the lettering size and content of the disclosures while banning embedded advertisements¹⁰¹ is a limited regulation that falls within the First Amendment protections of commercial speech.¹⁰² The FCC's proposed expansion of the Sponsorship Identification Rules would likely pass scrutiny under *Central Hudson*.

After balancing the policy and constitutional implications, the FCC will likely expand the current Sponsorship Identification Rules in response to the intensifying debate over embedded advertising. The rules the FCC must implement to confront embedded advertising must strike a balance between protecting the public and ensuring the well-being of the media industry.

III. PROPOSAL

In response to the FCC's Notice of Proposed Rulemaking, organizations and interest groups urged for the adoption of several different regulatory schemes.¹⁰³ Each scheme asserted presents new issues of practicality and consequences.¹⁰⁴ Despite the shortcomings of each proposal, a compromise must be made to ensure the well-being of both the public and the media industry.¹⁰⁵

A. *Maintaining the Status Quo*

The first option, asserted by the media industry, is to simply leave the Sponsorship Identification Rules unmodified.¹⁰⁶ Although this option requires no implementation, it ignores the need for change to keep up with the continuously

¹⁰⁰ See Weissman Letter, *supra* note 4. As noted in *Central Hudson*, a government acts constitutionally where it furthers its policy by restricting the format and content of advertising, as opposed to completely banning advertising all together. *Central Hudson*, 447 U.S. at 570–71. In *Central Hudson*, the court held that a complete ban on an energy company's advertising was unconstitutional under the First Amendment. *Id.* The Commission was free to restrict the format and content of *Central Hudson*'s advertising, for instance, it could require that the advertisements include information about the relative efficiency and expense of the offered service. *Id.*

¹⁰¹ Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. at 43,197.

¹⁰² REPLY COMMENTS OF SCREEN ACTORS GUILD, *supra* note 76 at 7.

¹⁰³ See COMMENTS OF THE NAT'L ASS'N OF BROADCASTERS, *supra* note 80, at 1 (asserting that no change should be made to the current FCC regulations); see also COMMENTS OF SCREEN ACTORS GUILD, *supra* note 34, at 8 (proposing revision of the regulations in a way that would require disclosure before and after a television program that featured embedded advertisements); Weissman Letter, *supra* note 4 (calling for the requirement that all sponsorship disclosures are made simultaneously).

¹⁰⁴ COMMENTS OF THE NAT'L ASS'N OF BROADCASTERS, *supra* note 80, at 3 (stating that any change to the current rules would result in more financial burdens to the media sector). REPLY COMMENTS OF SCREEN ACTORS GUILD, *supra* note 76, at 1–2 (claiming, among other things, that not changing the current regulations would contribute to an uninformed public).

¹⁰⁵ REPLY COMMENTS OF SCREEN ACTORS GUILD, *supra* note 76, at 6 (acknowledging that no revisions to the current regulation scheme would undoubtedly harm the public, while employing tactics like simultaneous disclosure would be disruptive).

¹⁰⁶ COMMENTS OF THE NAT'L ASS'N OF BROADCASTERS, *supra* note 80, at 1 (claiming that the current rules already address embedded advertisements).

evolving media industry.¹⁰⁷ The current embedded advertising disclosures employed by the media industry feature crawls of rapidly-moving, tiny-font text at the end of programs that are illegible to most viewers.¹⁰⁸ Moreover, the language currently employed by broadcasters during such disclosures is often confusing and has no meaning to the average viewer.¹⁰⁹ Therefore, the current FCC regulations do not encourage broadcasters to make a clear and affirmative disclosure of embedded advertisements.¹¹⁰

B. Giving Disclosures a Face-Lift

The most modest proposed change to the Sponsorship Identification Rules comes from the FCC itself.¹¹¹ In its Notice of Proposed Rulemaking, the FCC sought comments on a proposed rule change requiring sponsorship identification announcements to have certain lettering and airtime requirements.¹¹² Although this modification would make the disclosures slightly more obvious, it - like the media industry's proposal - fails to address the habits of the viewing public.¹¹³ Very few viewers watch the credits at the end of a television program, where the embedded advertisement disclosures are featured.¹¹⁴ Thus, the modifications outlined by the FCC's Notice of Proposed Rulemaking would have, at best, minimal substantive effect on the public's awareness of embedded advertisements.¹¹⁵

The Screen Actors Guild ("SAG") expands on the FCC's proposal by providing a scheme in which detailed disclosures are made both before and after a program containing embedded advertisements.¹¹⁶ SAG calls for visual and aural disclosures that are in legible text on a full screen for an adequate period of time.¹¹⁷ Furthermore, SAG's proposal requires that each disclosure before and after the programming contain "specific language explaining that the program contains [e]mbedded content [and] that its inclusion is a paid advertisement."¹¹⁸ The disclosure at the end of the program would also announce, in text and aurally, the

¹⁰⁷ COMMENTS OF SCREEN ACTORS GUILD, *supra* note 34, at 2, 5.

¹⁰⁸ Weissman Letter, *supra* note 4 (reporting that broadcasters consistently use split screens to preview upcoming programs, making the already small fonts even harder to read).

¹⁰⁹ *Id.* (describing the phrases "promotional consideration furnished by . . ." or "special thanks to . . ." as language commonly used to meet FCC standards, falsely suggesting that advertisers featured their products pro-bono).

¹¹⁰ See Weissman Letter, *supra* note 4.

¹¹¹ Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. 43,194, 43,197 (proposed July 24, 2008) (to be codified at 47 C.F.R. pts. 73, 76).

¹¹² *Id.* (recognizing that such a change would make the disclosures more obvious to the consumer/viewer).

¹¹³ See Weissman Letter, *supra* note 4.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ COMMENTS OF SCREEN ACTORS GUILD, *supra* note 34, at 8.

¹¹⁷ *Id.* at 8. SAG defines a significant amount of time as "at least five seconds or long enough for the narrator to read the announcement aloud, whichever time is longer." *Id.* at 8.

¹¹⁸ *Id.* at 8.

brands of products embedded in the program, along with the name of the product's parent company.¹¹⁹

SAG's proposed disclosures accomplish the competing goals of informing the public while simultaneously not harming the media industry.¹²⁰ The pre-airing disclosure announcement is especially important because it warns the public of embedded advertisements before the program commences.¹²¹ The disclosures suggested by SAG would also reduce the likelihood of the public being misled by embedded advertising. Furthermore, the disclosure at the conclusion of the program lists the products embedded in the program and their respective parent companies, ensuring that the public knows *who* is trying to sell them something.¹²²

Although SAG's proposal is very appealing, it is not without a shortcoming. The proposed dual disclosure scheme presents the problem of repetition.¹²³ The announcement warning viewers of embedded advertisements occurs twice, once before the show, and once after the show.¹²⁴ This repetition may cause viewers to think that they are hearing or seeing the same disclosure, for a second time, and may ignore it. As a result, many viewers may not pay attention to the naming of products embedded in the program or they may simply switch the channel.¹²⁵ Overall, this dual disclosure model is comprehensive, yet repetitive to the viewer.

The final distinct proposal is the heavily debated "simultaneous" disclosure advocated by Commercial Alert.¹²⁶ Commercial Alert posits that in addition to having an initial disclosure at the beginning of a television program, embedded advertisements should be disclosed at the time they occur.¹²⁷ This disclosure would have the word "advertisement" appear on the television screen during the airing of an embedded advertisement.¹²⁸ Commercial Alert suggests that the standards for "simultaneous" disclosures would require the text to be large enough and last long enough to be read and understood by the viewer.¹²⁹ The purpose behind Commercial Alert's proposal is to create a meaningful disclosure of embedded advertisements by informing viewers at the moment they are subjected to an advertisement.¹³⁰

The obvious problem with Commercial Alert's "simultaneous" disclosure proposal is that it could be very disruptive and irritating to the viewing public.¹³¹

¹¹⁹ *Id.* at 8.

¹²⁰ *Id.* at 7.

¹²¹ *Id.* at 8 (suggesting that by alerting the viewer before the program, the viewer is keenly aware of embedded advertising as the program develops).

¹²² *Id.* at 8.

¹²³ *Contra* COMMENTS OF SCREEN ACTORS GUILD, *supra* note 34, at 8 (arguing that the disclosure announcements would not be duplicative because the disclosure at the end of the program identifies the products placed in the program in addition to repeating the announcement warning of embedded advertisements).

¹²⁴ *Id.* at 8.

¹²⁵ *Contra id.* at 8 (claiming that dual disclosure is not repetitive).

¹²⁶ Weissman Letter, *supra* note 4 (referring to "simultaneous disclosure").

¹²⁷ *Id.*

¹²⁸ *Id.* (noting that this disclosure could be done in a variety of ways, such as through the use of a pop-up window).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ COMMENTS OF THE NAT'L ASS'N OF BROADCASTERS, *supra* note 80, at 27 (contending that simultaneous disclosures would undoubtedly disrupt quality programs with unbearable amounts of

The media industry claims that this disruption will ultimately lead to the extinction of all embedded advertisements, causing a severe financial burden on the media industry.¹³² Because the risk of disrupting and annoying the public is great, the “simultaneous” disclosure scheme would be impractical and difficult to implement.¹³³

C. *The Great Compromise*

There is a need to achieve a proper balance between the public’s right to know who is trying to sell them something and the public’s demand for access to free broadcasting.¹³⁴ SAG’s dual disclosure model comes close to striking this balance and could do so with a few modifications.¹³⁵ In order to avoid repetition problems, the initial and concluding disclosures should be markedly different from each other.¹³⁶ The initial disclosure should be a visual and aural announcement alerting viewers that the program they are about to watch includes embedded advertisements.¹³⁷ This disclosure should have explicit language that the writers, producers, or actors in the program do not endorse any products included in the program.¹³⁸ The visual component of the initial disclosure should expand across the entire screen and be in a large enough font size for the average viewer to read.¹³⁹ Likewise, the audio component needs to be at the same volume level as the television program and be read slow enough for the average viewer to understand.¹⁴⁰ Finally, this initial disclosure announcement should remain on the television screen for at least fifteen seconds or longer if necessary.¹⁴¹

At the end of a program, before the closing credits, a full screen should display a legible and comprehensible statement listing all of the embedded products and their respective parent companies.¹⁴² Near the top of the screen, the phrase “Sponsored Products Placed in Program Include” should be in bold and underlined. Under this title would be a list of the products placed in the program along with their corresponding sponsors.¹⁴³ As soon as this closing disclosure appears, a brief aural announcement that recites the title of the disclosure should be aired.¹⁴⁴ Moreover,

commercial interruption); *see also* COMMENTS OF SCREEN ACTORS GUILD, *supra* note 34, at 9 (recognizing that simultaneous disclosures may be distracting).

¹³² COMMENTS OF THE NAT’L ASS’N OF BROADCASTERS, *supra* note 80, at 27–28.

¹³³ *See* COMMENTS OF THE NAT’L ASS’N OF BROADCASTERS, *supra* note 80, at 29; *see also* COMMENTS OF SCREEN ACTORS GUILD, *supra* note 34, at 9 (acknowledging that simultaneous disclosure would be detrimental to the television viewing experience).

¹³⁴ REPLY COMMENTS OF SCREEN ACTORS GUILD, *supra* note 76, at 6.

¹³⁵ *See* COMMENTS OF SCREEN ACTORS GUILD, *supra* note 34, at 8.

¹³⁶ *Contra id.* at 8.

¹³⁷ *Id.* at 8.

¹³⁸ *See id.* at 8.

¹³⁹ *Id.* at 8 (suggesting that the disclosure announcement should last long enough and feature text large enough for the average viewer to fully understand).

¹⁴⁰ *Id.* (proposing that text of the disclosure should remain on the screen long enough for the narrator to read the announcement aloud).

¹⁴¹ *Cf. id.* (recommending that the initial announcement remain on the screen for at least five seconds or long enough for the narrator to read the announcement aloud, whichever is longer).

¹⁴² *Id.*

¹⁴³ *See id.*

¹⁴⁴ *Id.*

the closing disclosure should remain on the television screen for fifteen to thirty seconds, depending on the number of products placed in the program.¹⁴⁵ If there are too many embedded advertisements to legibly fit on a still screen, then the list should *slowly* scroll up the screen, similar to the closing credits after a film.¹⁴⁶

Unlike SAG's proposal, the concluding disclosure announcement would be primarily visual and would not repeat the general statement concerning the inclusion of embedded advertisements.¹⁴⁷ By alerting the public to the presence of embedded advertisements while avoiding program disruptions, a modified version of SAG's proposal strikes the necessary balance between the public's rights and the media industry's demands.¹⁴⁸

CONCLUSION

The Sponsorship Identification Rules are currently in limbo.¹⁴⁹ After recognizing the vast expansion of embedded advertisements in programming, the FCC sought a community consensus on the issue.¹⁵⁰ Unfortunately, there is no consensus on what, if anything, should be done to confront the TiVo era. Nevertheless, the FCC must renew its commitment to protect the public by providing meaningful disclosures of embedded advertisements in television programs. Knowledge is power and the power of knowing who is trying to sell them something must rest with the people.

¹⁴⁵ See *id.* at 8 (asserting that an appropriate amount of time needs to be allotted to disclose the presence of embedded advertising).

¹⁴⁶ Cf. *id.* (claiming that a sufficient time needs to be spent when disclosing the existence of embedded advertising).

¹⁴⁷ *Id.* at 8. SAG also proposed that both of the disclosures be accompanied by an audio component that is at the volume commensurate with the level of the program itself. *Id.*

¹⁴⁸ *Id.* at 7 (suggesting that a narrowly tailored modification of the Sponsorship Identification Rules would achieve a balance between informing the public and ensuring the media sector's well-being).

¹⁴⁹ Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. 43,194, 43,195–96 (proposed July 24, 2008) (to be codified at 47 C.F.R. pts. 73, 76).

¹⁵⁰ *Id.* at 43,195.