Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Sponsorship Identification Rules and Embedded Advertising	)	MB Docket No. 08-90
	)	
	)	

COMMENTS OF THE NATIONAL MEDIA PROVIDERS

American Advertising Federation
American Association of Advertising Agencies
Association of National Advertisers, Inc.
Beasley Broadcast Group, Inc.
CBS Corporation
Citadel Broadcasting Corporation
Debmar-Mercury
Discovery Communications, Inc.
Entercom Communications Corp.
Fox Entertainment Group
Greater Media, Inc.
Journal Broadcast Corporation
LIN Television Corporation
Motion Picture Association of America
NBC Universal, Inc.
Promotion Marketing Association
Viacom Inc.
The Walt Disney Company

Robert Corn-Revere
Ronald G. London
Amber L. Husbands
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, N.W., Suite 200
Washington, D.C. 20006-3402
(202) 973-4200

Counsel

September 22, 2008

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Sponsorship Identification Rules and Embedded Advertising	)	MB Docket No. 08-90
	)	
	)	

COMMENTS OF THE NATIONAL MEDIA PROVIDERS

The National Media Providers hereby submit comments in response to the Notice of Inquiry and Notice of Proposed Rulemaking in the captioned matter. [1]

INTRODUCTION AND SUMMARY

The American system of broadcasting has been predicated, since its inception, on the support of commercial advertisers. More than 60 years ago, the Commission recognized the direct connection between the quality of program service and the availability of economic support for broadcasters: "A prosperous broadcasting industry is obviously in a position to render a better program service to the public than an industry that must pinch and scrape to make ends meet." [2] The Commission also recognized that because the revenues of American broadcasters come primarily from advertisers, "the terms and conditions of program service must not be such as to block the flow of advertising revenues into broadcasting." *Id*. Therefore, to fulfill its statutory obligation to make a "nation-wide radio communication service" available "to all the people

---

[1] *Sponsorship Identification Rules and Embedded Advertising*, 23 FCC Rcd. 10682 (2008) ("*NOI/NPRM*" or "Notice"). Descriptions of the corporations and associations that make up the National Media Providers reflecting their interests in this proceeding are provided in the Attachment to these Comments.

[2] Federal Communications Commission, *Public Service Responsibility of Broadcast Licensees* (1946), *reprinted in Documents of American Broadcasting* 151, 224 (Frank J. Kahn ed., 2d ed. 1973).

of the United States," 47 U.S.C. § 151, the Commission historically has avoided rules and policies that would undermine the economic foundation of advertiser-supported broadcasting.

Another well-established principle of the American system of commercial broadcasting is that broadcasters must provide reasonable identification of their commercial sponsors. This is not a new concept. Beginning with the Radio Act of 1927 and continuing with Section 317 of the Communications Act of 1934, as amended (the "Act"), "there has been an unvarying requirement that all matter broadcast by any station *for a valuable consideration* is to be announced as paid for or furnished, and by whom." [3] The corollary of this statement is equally unvarying: in the absence of valuable consideration received by a broadcast station or program producer in exchange for placing particular material on the air, no sponsorship identification announcement is required. The key distinction contained in Section 317 – whether valuable consideration (in the form of money, services or products) has been received in exchange for broadcasting program material – establishes the boundaries of the Commission's authority to regulate the sponsorship identification requirements.

The requirements of Section 317 are not difficult to comprehend, and program producers, advertisers and broadcasters fully understand them. If a broadcaster airs particular material because it or a program producer received valuable consideration to do so, an appropriate sponsorship identification must be provided. If a service or product is furnished to a broadcaster for no or nominal consideration for use on or in connection with a broadcast, no sponsorship identification is required *unless* the service or product was furnished *in consideration for* a specific mention of the product or service (or its trademark or brand name) in the broadcast. If the

[3] *Applicability of Sponsorship Identification Rules*, 40 FCC 141, 141 (1963) ("*Sponsor ID Rules*") (emphasis added).

identification of the product or service on the air is reasonably related to the use of the product or service in the program, however, no sponsorship identification is required. [4]

The requirements of Section 317 apply to all forms of program material, including all forms of commercial advertising and the subset of advertising known as product placement and product integration, which the Commission refers to as "embedded advertising." [5] Although this label may be new, commercial practices involving product placement and product integration have existed since the earliest days of broadcasting, [6] and nothing has changed to alter the way the basic requirements of Section 317 apply to this form of advertising. Thus, if a broadcaster purchases a prop, such as a personal computer, for set dressing, no announcement is required. If the computer is furnished to the broadcaster by a third party for free or for nominal consideration with no agreement, express or implied, that it is being provided in exchange for a mention on the program beyond that reasonably related to its use, no announcement is required. If, however, a broadcaster (or program producer) is paid to use the computer in the broadcast or accepts the computer in exchange for agreeing to provide a specific mention of the computer beyond that reasonably related to its use on the broadcast, a sponsorship identification announcement would be required. Thus, the first two examples are outside the scope of Section 317, while the second two are subject to Section 317's sponsorship identification requirements. In these Comments,

---

[4] 47 U.S.C. § 317(a)(1).

[5] The *NOI/NPRM* defines "product placement" as "the practice of inserting branded products into programming in exchange for fees or other consideration." *NOI/NPRM* ¶ 2 n.2 (internal quotation and citation omitted). The *NOI/NPRM* adopted a distinction proffered by the Writer's Guild between product placement and product integration: "Product placement is the placement of commercial products as props in television programming, whereas product integration integrates the product into the dialogue and/or plot of a program." *Id*.

[6] Jay Newell, *The hidden history of product placement*, J. OF BROAD. & ELEC. MEDIA, Dec. 1, 2006; Andrea K. Walker, *Under Armour in Public Eye; Product Placement Key Part of Sales Strategy*, BALT. SUN, July 25, 2008, at 1D.

we use the terms "product placement" and "product integration" to refer only to the advertising practices subject to the sponsorship identification requirements, *i.e.*, those described in the last two examples.

Also well-established are the Commission's longstanding rules regarding *how* a required sponsorship identification must be presented – that is, it "must state in language understandable to a majority of the audience that the station has received consideration for the matter broadcast and from whom that consideration was received." *Application of Sponsorship Identification Rules to Political Broadcasts, Teaser Announcements, Governmental Entities and Other Organizations*, 66 FCC.2d 302 (1977). Broadcasters have editorial discretion about precisely where, with what particular language, and in what form the sponsor identification is presented, subject to the basic obligation that they reasonably identify the commercial sponsor. Notably, the Commission has always agreed that any required sponsorship identification for "product placement" or "product integration" should occur at the end of the program, among closing credits. *See*, *e.g.*, *Elimination of Unnecessary Broadcast Regulation*, 59 R.R.2d (P&F) 1500 ¶¶ 7, 17 (1986). In this way, the Commission rules, as applied for decades, have served the basic purpose of identifying a program's commercial sponsors while avoiding undue interference with broadcasters' editorial and artistic programming choices, and with the viewing experience. These balanced interests would be disrupted if more intrusive identification requirements were imposed.

The sponsor identification examples presented above use a modern product – the personal computer – to illustrate application of Section 317's requirements. These computer examples, however, do not differ *one iota* in substance from the detailed examples offered by Congress and the FCC *forty-five years ago* in connection with amendments to Section 317 and the adoption of

Section 507 of the Act.[7] The examples from 1963, which are as relevant today as they were 45 years ago, have provided ample guidance to, and are understood by, those who are subject to the sponsorship identification requirements.

What *has* changed in the intervening years, however, is the extent to which advertiser-supported media face greater economic challenges in light of increasing competition and rapid technological change. Listeners and viewers may now choose programming from an unprecedented range of platforms and content options, including both subscription- and advertiser-supported choices that provide users substantially greater control over how, where, and when they view or hear their selections. As a result, the traditional 15- or 30-second advertising spot is in jeopardy, which in turn threatens the economic viability of ad-supported media, including radio, television and cable programming networks. Accordingly, in this emerging "on demand" world, product placement will assume even greater importance in the preservation of free or advertiser-supported media among the rapidly expanding choices available to the American public.

The *NOI/NPRM* expressly acknowledges that the growing use of product placement is due, "in part, to recent technological changes that allow consumers to more readily bypass commercial content." *NOI/NPRM* ¶ 1. Regrettably, however, it disregards the Commission's long-standing recognition of the key role that advertising plays in maintaining the most vibrant and diverse electronic media environment in the world. Instead, and much like the advocates of this rulemaking proceeding who would like to drastically reduce or eliminate entirely the practice of product placement,[8] the Commission evinces in the *NOI/NPRM* a generally hostile

---

[7] *See Sponsor ID Rules*, 40 FCC 141 (1963). Section 507 of the Act, codified at 47 U.S.C. § 508, establishes a reporting scheme designed to ensure that broadcast licensees receive notice of consideration that may have been provided or promised in exchange for inclusion of matter in a program regardless where in the production chain such exchange takes place.

[8] *See* Gary Ruskin, Executive Director, Commercial Alert, Complaint, Request for Investigation, and Petition for Rulemaking to Establish Adequate Disclosure of Product Placement on

stance toward the very concept of commercial advertising. The increasing use of product placement is characterized as a "problem" to be "solved," rather than as an essential adjustment in the form of commercial support needed to preserve ad-supported media in the face of increasing competition and technological change. Moreover, the inclusion of an *NPRM* in this proceeding suggests the Commission already has reached a tentative conclusion that current practices necessitate new rules dictating specific requirements for sponsorship identification.[9] But the practices are not new, and the existing statute and rules fully address the Commission's concerns. Accordingly, there is no justification for imposing new and more burdensome regulations on advertiser-supported media.

Adopting new rules as the *NOI/NPRM* suggests would create significant jurisdictional and constitutional problems. The FCC lacks the authority to adopt rules that exceed the specific terms of Section 317, and any attempt to do so would violate both the Communications Act and the First Amendment. The Commission cannot extend broadcast regulations to the cable medium, and more expansive rules would also highlight the fact that broadcast regulations themselves rest on a threadbare legal fiction of spectrum scarcity. More burdensome sponsorship requirements would raise additional constitutional problems that are not limited to the category

---

Television, Sept. 30, 2003 ("Commercial Alert Petition"); Writers Guild of America, West and Writers Guild of America, East, White Paper, *Are You Selling to Me?*, Nov. 14, 2005, at 2, *available at* www.wga.org/subpage_newsevents.aspx?id=1422 ("*WGA White Paper*").

[9] This is somewhat astonishing considering the Commission's recent approach to similar disclosure requirements that, one would think, carry far graver implications. In implementing the Warning, Alert and Response Network ("WARN") Act, under which Commercial Mobile Service (CMS) providers may elect to transmit emergency alerts to the public, the Commission required CMS providers electing to not transmit such alerts to provide notice of that fact at the point of sale, but left specific requirements regarding the mechanics of such disclosures to the wireless providers. *Commercial Mobile Alert System*, 23 FCC Rcd. 12561, 12568-69 (2008) ("wireless service providers are in the best position to determine the proper method of providing this notice and [we] leave it to the discretion of providers to provide clear and conspicuous notice at the point-of-sale"). *See also infra* at 16-17, 56.

of "commercial speech." And even if such rules were analyzed purely as a question of commercial speech, they would fail to survive judicial scrutiny.

Rather than presuming that new rules should be adopted, therefore, the Commission should approach this proceeding with full awareness of and appreciation for the well-established public interest value of preserving advertiser-supported media as one of the most universally available and affordable options presented to consumers in an expanding media universe.

<u>The Parties</u>. The National Media Providers are comprised of the American Advertising Federation ("AAF"), the American Association of Advertising Agencies ("AAAA"), the Association of National Advertisers, Inc. ("ANA"), Beasley Broadcast Group, Inc., CBS Corporation, Citadel Broadcasting Corporation, Debmar-Mercury, Discovery Communications, Inc., Entercom Communications Corp., Fox Entertainment Group, Greater Media, Inc., Journal Broadcast Corporation, LIN Television Corporation, the Motion Picture Association of America, Inc. ("MPAA"), NBC Universal, Inc., the Promotion Marketing Association, Viacom Inc., and The Walt Disney Company. Members of this coalition broadly represent all aspects of the national media businesses potentially affected by this proceeding – including advertisers and advertising agencies; television and radio broadcasters, including the four major broadcast networks; and cable networks and program producers – and, consequently, are uniquely positioned to provide a cohesive analysis of the issues raised in the *NOI/NPRM*.

I. ANY POLICY GOVERNING SPONSORSHIP IDENTIFICATION MUST TAKE INTO ACCOUNT THE PUBLIC INTEREST IN PRESERVING ADVERTISER-SUPPORTED MEDIA

The Commission explains that it initiated this proceeding "to examine ways the Commission can advance the statutory goal … of ensuring that that the public is informed of the sources of program sponsorship while concurrently balancing the First Amendment and artistic rights of programmers." *See NOI/NPRM* ¶10. Under the relevant provisions of the Communications Act and Commission precedent governing this proceeding, however, this public-interest calculus is incomplete. The Commission must take into account the importance to consumers of advertiser-supported media. As the Commission itself has recognized, to "ignor[e] the fundamentally commercial nature of the commercial broadcasting system is done at great risk." [10]

A. The Communications Act Was Designed to Promote the Public Interest Via Commercially-Supported Media

The FCC is charged with making available "so far as possible, to all the people of the United States … Nation-wide … radio communication service." 47 U.S.C. § 151. It also is "the policy of the United States to encourage the provision of new technologies and services to the public." *Id.* § 157(a). These statutory objectives are set forth in the preamble to the Telecommunications Act of 1996, which describes the Act's purpose as "promot[ing] competition and reduc[ing] regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. No. 104-104, Preamble, 110 Stat. 56 (1996). These twin statutory goals – making broadcast television widely available to consumers and encouraging new technologies – require a regulatory environment that accommodates both subscription and advertiser-supported media.

It is long-settled and well-accepted that "[b]roadcast television in the United States is financed by the sale of advertising time." Jonathan Levy, Marcelino Ford-Livene & Anne Levine, *Broadcast Television: Survivor in a Sea of Competition*, OPP Working Paper No. 37 at 7 (Sept. 2002). *See also Revision of Programming & Commercialization Policies*, 98 FCC.2d 1076 ¶ 66 (1984) (acknowledging the "fundamental, advertiser supported nature of commercial

[10] *Petition for Rulemaking Pertaining to a Children's Advertising Detector Signal*, 100 FCC.2d 163, ¶ 9 (1985). *See also Children's Television Programming and Advertising Practices*, 96 FCC.2d 634, 654 n.9 (1984).

television"). Because of this, the FCC has acknowledged repeatedly that advertising support is essential for the preservation of a healthy system of broadcasting. As the Commission recognized more than 60 years ago, "[a]dvertising represents the only source of revenue for most American broadcast stations and therefore is an indispensable part of our system of broadcasting." *Public Service Responsibility of Broadcast Licensees* at 208-09. The Commission found that:

> The problem of program service is intimately related to economic factors. A prosperous broadcasting industry is obviously in a position to render a better program service to the public than an industry which must pinch and scrape to make ends meet. Since the revenues of American broadcasting come primarily from advertisers, the terms and conditions of program service must not be such as to block the flow of advertising revenues into broadcasting.

Id. at 224.

An FCC Office of Plans and Policy Working Paper made a similar point: "Sale of advertising time and payments from advertiser-supported networks comprise, for practical purposes, the sole sources of revenue for broadcast stations. Consequently the state of the overall advertising market, and competition from other advertising media, crucially affect the health of broadcast television." Florence Setzer and Jonathan Levy, *Broadcast Television in a Multichannel Marketplace*, OPP Working Paper No. 26, 6 FCC Rcd. 3996, 4069 (1991). It added that "[a]llowing networks and stations to apply their expertise in acquiring and distributing programming in ways they find advantageous, both within broadcasting and in other media, will improve broadcasters' ability to provide service the public values. * * * * Commission rules that restrict stations' and networks' ability to deliver service should be reconsidered." *Id*. at 4102-03.

The Commission likewise has recognized the importance of ad revenues to cable networks. [11] In the early 1980s, broadcast channels enjoyed a 90 percent share of the television audience; since then, cable channels have "slowly and steadily expanded their share of the audience, to more than 55 percent now." [12] Advertiser-supported cable represents most of cable's share, with about 48 percent of the television audience. [13] The FCC's annual Video Competition Reports have tracked this phenomenon. In the First Annual Report, issued in 1995, the four broadcast networks (ABC, CBS, NBC and Fox) had 72 percent of the prime time audience during the 1993-94 season, [14] but "broadcast television stations' audience shares have continued to fall as cable and DBS penetration, the number of cable channels, and the number of

[11] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 21 FCC Rcd. 2503, 2551 (2006) ("*Twelfth Annual Video Competition Report*") (cable programming experienced 17.7% increase in advertising revenue in 2004); *id*. at 2583 (broadcast and cable "compete for audience, advertising, and programming"). *See also*, *e.g.*, OPP Working Paper No. 37 at 23 ("cable is likely to make further inroads into [ ] broadcast advertising share").

[12] Brian Stelter, *Cable Networks Trying to Build on Their Gains in Ratings*, N.Y. TIMES, May 26, 2008, at C5. In the 1984-85 season, broadcast networks had an 86.7% share, down to 67.4% by the 1989-90 season. George Winslow, *No Slacking for Cable*, MULTICHANNEL NEWS, May 19, 2008, at 53. By the 1999-2000 season, broadcast's share was down to 53.4%, and cable had increased its share to 46.6%. *Id.* Advertiser-supported basic cable networks garnered a larger audience share over the broadcast networks for the first time in 2002 – 48 percent of prime time compared to 45 percent. Allison Romano, *Cable's Big Piece of the Pie*, BROAD. & CABLE, Dec. 30, 2002 (citing Nielsen Media Research).

[13] Stelter, *supra* note 13, at C5 (by April 2008, ad-supported cable channels averaged a 48 percent share of the total television audience). *See also* James Hibberd, *DVRs Blamed for Ratings Slump, Nielsen Says Number of Viewers Unchanged*, ELEC. MEDIA, June 11, 2007, at 3 (citing "erosion in viewership for broadcast prime time and pay cable," including that "[b]roadcast prime is down 3 percent … and pay cable is down a steep 12 percent" while "[a]d-supported cable is up 3 percent," which "suggest[s] … viewers migrating to basic cable").

[14] *See Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 9 FCC Rcd. 7442 (1994).

nonbroadcast networks continue to grow."[15] By the FCC's *Twelfth Annual Video Competition Report*, all broadcast stations had a combined prime time audience share of 47 percent (2004-05 season). *Id*. A prime reason for the competitive growth of cable networks is their exhibition of original programming.[16] The increased competition for audience share, advertising revenue, and quality programming has further heightened the need for both broadcasters and cable programmers to find additional means of economic support.

The Commission has stressed at various times that "ignoring the fundamentally commercial nature of the commercial broadcasting system is done at great risk." *Children's Advertising Detector Signal*, 100 FCC.2d 163, ¶ 9. In proceeding after proceeding, the Commission has recognized the importance of these economic considerations as a fundamental component of its public interest determinations. *See*, *e.g.*, *Newspaper-Broadcast Cross-Ownership Order*, 23 FCC Rcd. 2010 (2008) ("*Newspaper-Broadcast Cross-Ownership Order*") (relaxing cross-ownership rules in light of adverse financial conditions at newspapers). *Cf. Application for Consent to the Transfer of Control of Licenses of XM Satellite Radio Holdings*, 23 FCC Rcd. 12348, 12365 (2008) (in public interest analyses, the FCC may "consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry"). The FCC should avoid regulations that undermine commercial

---

[15] *Twelfth Annual Video Competition Report*, 21 FCC Rcd. at 2550. More recent data is not available from the FCC in that, after it released the *Twelfth Annual Video Competition Report*, it did not release, though it adopted in late 2007, a *Thirteenth Annual Report* (which would contain data current only as of mid-2006, in any event), *see*, *e.g.*, Barbara Esbin & Adam Thierer, *Where is the FCC's Annual Video Competition Report?*, Progress Snapshot, May 11, 2008, *available at* www.pff.org/issues-pubs/ps/2008/ps4.11whereisFCCvidcompreport.html, and the FCC's press release announcing adoption of the *Thirteenth Report* did not provide audience share statistics. *FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report*, FCC, Nov. 27, 2007.

[16] *See, e.g.,* Ted Cox, *The best TV summer ever*, CHI. DAILY HERALD, Aug. 31, 2007, at 35.

support for the medium, particularly now, at a time when the business model is in flux and the economy is undergoing seismic changes that adversely impact ad spending.

B. Product Placement is a Necessary Response to a Changing Media Environment

When the FCC was created almost 75 years ago, only radio existed. Now, terrestrial radio competes with subscription satellite radio, cable television digital music channels, webcasts and podcasts. Video delivery platforms now include broadcast television, cable and satellite television (which provides video-on-demand, subscription, and advertiser-supported channels), broadband Internet video, home video (*e.g.*, DVD) options, and others, which combined offer viewers literally millions of choices in video content. *E.g.*, *Twelfth Annual Video Competition Report*, 21 FCC Rcd. at 2506-2510 (describing competing technologies); *Newspaper-Broadcast Cross-Ownership Order*, 23 FCC Rcd. at 2024 (citing "dramatic changes … over several decades with respect to the number and types of media 'voices' competing for the public's attention").

These media alternatives provide the public with an array and variety of content options beyond anything that has existed previously or was even imagined when the FCC was established. In this new environment, advertiser-supported media continue to play an important role in providing greater choice to the American public. *E.g.*, OPP Working Paper No. 26, 6 FCC Rcd. at 4006-07. The ever-expanding media landscape provides consumers with unprecedented choice, but it also presents challenges for traditional advertiser-supported media.

First, the proliferation and splintering of media platforms present particular challenges to advertiser-supported media such as broadcast and cable television networks, which are competing with more media for the same pool of advertising dollars.[17] Second, technologies that

---

[17] *See, e.g.,* Suzanne Vranica, *At MTV, a new show that pushes deodorant*, Associated Press (Sept. 13, 2007) ("Facing intensifying competition for ad dollars from the Web, television

increase user control, such as digital video recorders ("DVRs"), also decrease the incentive of companies to utilize traditional methods of television advertising. *See, e.g.*, Peter S. Menell, Symposium, 46 N.Y.L. Sch. L. Rev 63, 125 (2002) ("The introduction of [DVRs] has raised concerns across the television and advertising industries about the future of advertiser-supported programming."). Penetration of DVRs is increasing, as is the phenomenon of ad skipping facilitated by the DVR. [18] Ever since DVRs were first introduced in the market, the FCC has recognized that preservation of advertiser-supported media requires adjustments in the business model. *E.g.*, OPP Working Paper No. 37 (describing necessary movement to strategies such as product placement to cope with the emergence of DVRs). The *NOI/NPRM* begins with the recognition that a movement toward product placement has resulted, at least in part, from "technological changes that allow consumers to more readily bypass commercial content." *NOI/NPRM* ¶ 1. Third, program producers and networks have had to cope with skyrocketing production costs. Gene DeWitt, *Network TV Scheduling: A New Prime-Time Paradigm*, TELEVISION WEEK, Apr. 14, 2008 ("TV production costs have increased at a rapid rate"). This has occurred, at least in part, because the growing number of competitors vying for programming have bid up the cost.

---

executives need to please advertisers."). At the same time, advertising revenue has been declining. *See*, *e.g.*, Michael Malone, *TVB: Broadcast Ad Revenue Down 4% in Q2*, BROAD. & CABLE, Aug. 18, 2008, at 45.

[18] *See, e.g., Revving Replays: DVR Use Continues Upward Trending*, CABLEFAX DAILY (Aug. 22, 2008) ("DVR penetration now sits at one-quarter of US homes"). *Accord*, Larry Burnett, *One in Four Homes Has At Least One DVR: Study*, MULTICHANNEL NEWS, Sept. 15, 2008 (reporting that DVRs "are now found in more than 27% of U.S. households," that "more than 30% of [those] homes have at least two DVRs," and that the number of "households with DVRs has essentially doubled in the past two years, and – with a continued push from cable, DBS, and Telco TV providers – will likely double again in the next four years"). *See also id.* ("68% of DVR owners watch recorded content instead of live programming"); Andrea K. Walker, *Under Armour in Public Eye; Product Placement Key Part of Sales Strategy*, BALT. SUN (July 25, 2008) at 1D ("traditional means of advertising, such as television commercials that technology allows people to skip, have become less effective").

Given these challenges to advertiser-supported content, it is critical that these media be allowed to adjust to new technologies and changing market conditions in order to continue to offer high quality content and to stay viable. Media that have not evolved to the same degree, such as newspapers, have fallen on hard times. As Chairman Martin testified before Congress, "according to almost every measure newspapers are struggling. At least 300 daily papers have stopped publishing over the past thirty years. Their circulation is down and their advertising revenue is shrinking." Written Statement of the Hon. Kevin J. Martin, 2007 FCC LEXIS 9317 (Dec. 13, 2007). When circulation decreases, so do advertising revenues, and newspapers continue to struggle with the increased competition for advertising dollars. *See, e.g., Newspaper-Broadcast Cross-Ownership Order*, 23 FCC Rcd. at 2028 ("The decline in newspapers' print circulation has, predictably, affected the advertising dollars that keep newspapers alive. * * * * SNL Kagan, for example, predicts declines in the number of daily newspapers, declines in circulation, and declines in all categories of newspaper advertising revenue, including online ad revenue, through 2011."). This sharp decline in advertiser support for print media has had a significant adverse impact not only on newspapers but on the media industry as a whole. *See e.g.*, *id.* at 2027 ("The steep reduction in newspaper circulation in recent years has triggered a cascade of negative impacts on the media industry.").

Product placement is one established means through which television can respond to the shifting media landscape. [19] Measures such as product placement on television are necessary to

[19] *See id*. at 2025 ("As new digital technologies are [ ] introduced, audiences continue to splinter, and advertising dollars continue to shift with the changing structure of the market-place."); Gail Schiller, *Report: Product Placements on the Rise*, HOLLYWOOD REP., July 28, 2005 (noting expansion of product placement is due to "increasing audience fragmentation, advertising clutter, media multi-tasking and ad-skipping technology").

keep advertising revenue robust [20] – and advertising revenue is how commercial television is funded. *See, e.g.*, Stephanie Clifford, *Product Placements Acquire a Life of Their Own on Shows*, N.Y. TIMES, July 14, 2008 ("these shows have always been funded by advertising, and if advertising is changing, … the mechanics of how we deliver advertising must change, or advertisers will walk away"). As Chairman Martin recognized, skipping advertisements may be "awesome, but I recognize that I want to continue having high-quality programming." David Lazarus, *What's between the ads? More ads*, L.A. TIMES, June 29, 2008, at C1. If commercial television is to survive in this dramatically changed media environment, it must adapt. Product placement is one way to provide the necessary financial support for the production of the "high-quality programming" all consumers want. *See id*. Indeed, to the extent increased use of product placement is a necessary response to new competitive pressures on advertiser-supported media, the Commission should be even more reluctant to impose new regulatory burdens and increased compliance costs on these programming sources.

C. Proposed Regulations Would Undermine Advertiser-Supported Media

The Commission initiated this proceeding "to examine ways the Commission can advance the statutory goal … of ensuring that the public is informed of the sources of program sponsorship while concurrently balancing the First Amendment and artistic rights of programmers." *NOI/NPRM* ¶ 10. As the Commission has recognized, however, "ignoring the fundamentally commercial nature of the commercial broadcasting system is done at great risk." *Children's*

[20] Industry experts predicted that spending for product placement in the United States in 2007 would be $2.90 billion, and would grow to $5.48 billion by 2010. PQ Media LLC, *PQ Media Market Analysis Finds Global Product Placement Spending Grew 37% in 2006*, *available at* www.pqmedia.com/about-press-20070314-gppf.html; PQ Media LLC, Global Placement Forecast 2006 Executive Summary (Aug. 2006), *available at* www.pqmedia.com /execsummary/GlobalProductPlacementForecast2006-ExecutiveSummary.pdf.

Advertising Detector Signal, 100 FCC.2d 163, ¶ 9. Public interest regulation is predicated on a viable commercial system.

The *NOI* portion of the *NOI/NPRM* asks broad questions about restricting product placement. *NOI/NPRM* ¶¶ 10-14. Even more specifically, the *NPRM* portion asks about imposing the following rules:

- Should current disclosure requirements be more obvious to consumers by requiring that sponsorship identification announcements 1) have lettering of a particular size and 2) air for a particular amount of time? In particular, should the FCC adopt rules comparable to its political broadcasting requirements in which 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, should the rules require a sponsorship identification announcement both at the beginning and the conclusion of the broadcast programming containing the announcement? *Id.* ¶ 15.

- Should the Commission accept the WGA proposal to extend regulation of product integration to cable television programmers? *Id.* ¶ 17.

- What additional steps should the Commission take to regulate embedded advertising in programming directed to children? *Id.* ¶ 16.

- Should the Commission adopt rules to restrict radio hosts' personal, on-air endorsements of products or services they may have been provided at little or no cost to them? *Id.* ¶ 18.

Apart from these fairly general questions, the *NOI/NPRM* does not present, or seek comment on, any specifically proposed rules.

As described more fully in Section II, *infra*, sufficient, well-established rules already exist to deal with all of the issues raised in the *NOI/NPRM*. Any attempt to adopt more restrictive rules would contradict the careful balancing of interests in the existing rules and would constitute regulatory overkill. A good benchmark for this assessment is the Commission's implementation of rules under the Warning, Alert and Response Network ("WARN") Act. The FCC declined to impose specific notification requirements on wireless providers that elect to not transmit emergency alerts to the public. Although such alerts may relate to life-threatening situations including natural disasters and terrorist attacks, the Commission agreed "that wireless service providers are in the best position to determine the proper method of providing this notice and leave it to the discretion of providers to provide clear and conspicuous notice at the point-of-sale." *Commercial Mobile Alert System*, 23 FCC Rcd. at 12568-69. If the FCC permits such licensee discretion in matters of life and death, it should likewise do so when the entire downside risk is possible exposure to programming with product placements identified by their sponsors in end credits.

The FCC must avoid micromanagement because of the strong policy, statutory, and constitutional presumptions against government intervention in editorial decisions of broadcasters. The Commission has held repeatedly that licensees "have broad discretion – based on their right to free speech – to choose, in good faith, the programming it believes serves the needs and interests of their communities." [21] The FCC historically intervenes in programming matters only if a licensee abuses that discretion. *Philadelphia Station License Renewals*, 8 FCC Rcd. at 6401. In this context, the FCC should follow its long tradition of deferring to editorial discretion and should not dictate specific terms of any required disclosures here.

In the case of sponsorship identification, adding specific requirements of a sponsorship identification before a program and/or when a product appears, as some have proposed, would be excessive. *See WGA White Paper* at 8. As the Commission's rules have long recognized, such a step is unnecessary and would be highly disruptive for viewers. In other contexts, the FCC has

---

[21] *Saga Commc'ns of New England, LLC*, 23 FCC Rcd. 11008, 11010 (2008). *See also License Renewal Applications of Certain Commercial Radio Stations Serving Philadelphia, Pa.*, 8 FCC Rcd. 6400, 6401 (MMB 1993) ("*Philadelphia Station License Renewals*") ("licensees have broad discretion to choose, in good faith, the issues the licensee believes to be of concern to the community and the best way to address those issues"); *Time Life Broad., Inc.*, 33 FCC.2d 1081, 1092 (1972) ("the Commission has consistently called upon broadcasters to exercise their prudent judgment in determining the problems of the communities they are licensed to serve"). *See also Office of Communications of United Church of Christ v. FCC*, 707 F.2d 1413, 1431 (D.C. Cir. 1983) (subsequent history omitted) (programming has always been left to the editorial discretion of licensees).

eliminated duplicative sponsorship requirements that it found to be excessively burdensome.[22] Various proposals to restrict advertising have been rejected over the years because they would be too burdensome or would reduce advertiser support. *See Children's Advertising Detector Signal*, 100 FCC.2d 163 ¶ 7 ("petitioners' proposal, while not a total prohibition, would nonetheless cause broadcasters to suffer substantial revenue losses"). The Commission should apply the same principles in this proceeding.

II. THE INCREASED USE OF PRODUCT PLACEMENT DOES NOT REQUIRE ANY CHANGE IN FCC SPONSORSHIP IDENTIFICATION RULES

Proponents of expanded and more intrusive sponsorship identification requirements present nothing new that the FCC had not already anticipated when it set forth interpretive examples to guide compliance with Section 317 in 1963. Existing rules and FCC interpretations fully address the issues raised in the *NOI/NPRM*. As a consequence, none of the policy interests asserted in the *NOI/NPRM* provides a legitimate ground for adopting "potential changes to the current sponsorship identification regulations." *NOI/NPRM* ¶ 1. The asserted interests include "the public's right to know who is paying to air … program matter" or "when consideration has been provided in exchange for [ ] programming," *id.* ¶¶ 1, 4, protecting children from over-commercialization and from confusing program and commercial matter, *id.* ¶ 6, and preventing deceptive advertising, *id.* ¶ 7 n.38. But all of these interests are more than adequately addressed by existing laws and regulations.

[22] *See, e.g.*, *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd. 1616 (1992) (eliminating on reconsideration redundant audio announcement requirement for political sponsorship identification). Although the FCC imposed specific notice requirements for political advertisements, it did so because of the different governmental interest at issue in that particular context (*i.e.*, the need to deal with negative campaign ads). *See infra* at 27.

A. Section 317 Establishes the Limit of the Commission's Authority and Fully Addresses the Issues Raised in the Notice

Section 317 and the body of rules, policies, and precedent arising from it address all the concerns raised in the *NOI/NPRM*. Consistent with other carefully circumscribed grants of authority to the Commission to regulate broadcast content, [23] Section 317 establishes clear limits on the Commission's authority to regulate product placement. Section 317 does not bar sponsored programming or product placement. Rather, as noted above, Section 317 generally requires sponsorship identification announcements for broadcast programming or program elements for which consideration has been received. It requires that:

> All matter … for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted … shall, at the time … broadcast, be announced as paid for or furnished, [p]rovided, that "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge … unless it is so furnished in consideration for an identification … of any [ ] product, service, trademark, or brand name beyond an identification … reasonably related to the use of such service or property" on the program.

47 U.S.C. § 317(a)(1). Moreover, Section 317(d) allows the Commission to waive the announcement requirement in any case or class of cases where it determines that the public interest, convenience, or necessity does not warrant broadcasting such announcement. *Id.* § 317(d). But nothing in Section 317 allows the Commission to *expand* its own authority over sponsorship identification.

When Congress amended Section 317 in 1960 to clarify the situations in which broadcasters must make sponsorship identification announcements, the Committee Report illustrated the limited application of the sponsorship identification requirements with specific examples. *See* H.R. Rep. 86-1800, *as reprinted in* 1960 U.S.C.C.A.N. 3516, 3528-32. In fact, a primary

[23] *See, e.g.*, 47 U.S.C. § 613; 47 C.F.R. §§ 79.1, 79.2; *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, and Accessibility of Emergency Programming*, 15 FCC Rcd. 6615 (2000).

reason that Congress amended the law was to "avoid some of the hardships" resulting from the Commission's overly expansive approach to enforcing Section 317. *Complaint of National Ass'n for Better Broadcasting Against Television Station KCOP(TV)*, 4 FCC Rcd. 4988, 4989 (1989). *See also* H.R. Rep. No. 86-1800. In particular:

> Congress was concerned that the Commission had required such an identification in cases where Congress did not believe that this was necessary. More specifically, Congress did not believe sponsorship identifications were necessary when broadcasters received broadcast programming or services for free or at nominal rates except when the circumstances fell within the terms of the proviso. Congress thus sought to limit the Commission's authority by exempting from the identification requirement some of the situations for which an announcement would have been required under the Commission's earlier interpretation of Section 317.

National Ass'n for Better Broadcasting, 4 FCC Rcd. at 4990. Moreover, to ensure the Commission understood where the lines were to be drawn, the Committee Report provided numerous detailed examples of the application of the law. The FCC articulated additional examples shortly thereafter. *Sponsor ID Rules*, 40 FCC 141.

These illustrative examples, which cover the waterfront of product/service uses in TV and radio programming to which Section 317 can apply, continue to provide sufficient guidance for the product placement concerns voiced in the *NOI/NPRM*. For instance, Example 6 appended to *Sponsor ID Rules* presents a straightforward case of a company paying for insertion of a specific product mention into a broadcast, and makes clear that a sponsorship identification announcement is required.[24] Examples 5 and 8, as well as others on the list, address situations in which radio announcers make references to businesses or products.[25] Examples 14 and 29(b)

[24] *Id.* at 145 ("An airline pays a station to insert in a program a mention of the airline. An announcement is required.").

[25] *Id.* (announcements required where "department store owner pays an employee of a producer to … mention[ ] on a program the name of the department store," or where an "automobile [company] furnishes a station with a new car, not for broadcast use, in return for broadcast mentions[, …] the car constituting payment for the mentions").

explain circumstances in which sponsorship identification announcements may be required when a commercial location is made available as the setting for a show.[26] Examples 15, 16, and 17 provide common instances in which products are supplied for use as props or set-dressing and explain when sponsorship identification announcements are and are not required.[27] Examples 22 through 29 incorporate the basic truism that, where Section 317 applies, "if there is a payment … in consideration for the exposure, an announcement is required." *See id*. at 147 n.3.

The examples in the legislative history and *Sponsor ID Rules* are equally up to the task with respect to "radio host[s'] on-air banter" and other mentions on radio of specific goods or services. *NOI/NPRM* ¶ 8. For example, the above-cited "note 3" to the *Sponsor ID Rules* makes clear that the applicable paid-for exposure necessitates a sponsorship identification announcement, and this is not limited to television. *See* 40 FCC at 147 n.3. For the Commission to "presume" consideration in all circumstances would be factually wrong and an unacceptable (and unlawful) extension of the rules into areas in which they are simply inapplicable – that is,

[26] *Id*. at 146 (no announcement required if a "hotel permits a program to originate on its premises," but if, "however, in return for the use of the premises, the producer agrees to mention the hotel in a manner not reasonably related to the use made of the hotel on that particular program, an announcement would be required"); *id*. at 149 ("If the hotel pays money or furnishes free or at a nominal charge any services or items which are not for use on or in connection with the program (*e.g.*, furnishing free or at a nominal charge room and board … for any period of time not related to [ ] production of the program at the hotel [ ]), an announcement is required.").

[27] *Id*. at 146 (no announcement required where "refrigerator is furnished … as part of the backdrop in a kitchen scene," where "Coca-Cola distributor furnishes a Coca-Cola dispenser for use as a prop in a drugstore scene," or where "automobile manufacturer furnishes his identifiable current model car for use," but announcement is required in last case if "it is understood … that the producer may keep the car for personal use" or program incorporates language touting the vehicle). Examples 24(a) and (b) are similar compare-and-contrast cases. *Id*. at 147-48 (no announcement required where "airplane manufacturer furnishes free transportation to a cast on its new jet model … , and the arrival of the cast … is shown as part of the program" compared to announcement required in "same situation … except that after the cameraman has made the foregoing shots he takes an extra closeup of the identification insignia").

situations in which a host, of his or her own accord, simply chooses to provide favorable mention to a product or a provider of service.

Together, these examples and the generally applicable statement regarding consideration are sufficient to illustrate the application of the existing rules to all of the cases of product placement cited in the *NOI/NPRM*. The *Sponsor ID Rules* examples thus address such mundane product appearances as, for example, a refrigerator appearing as set-dressing in the background of a broadcast, by explaining the circumstances in which sponsorship identifications are required and, just as importantly, that such announcements are not always required simply because a product appears on-air. Not only do these examples fully explain how Section 317 should be applied, they also define its limits. Because Congress has not seen the need to further address sponsorship identification or expand the Commission's authority to act in this area, the Commission lacks the authority to expand the law beyond what the statute will allow.

1. The Commission's Existing Rules and Policies Sufficiently Protect the Public

Consistent with the established statutory framework, the sponsorship identification rules closely track Section 317. Section 73.1212 applies to broadcast stations, and Section 76.1615 governs cable television systems engaged in "origination cablecasting." *See* 47 C.F.R. §§ 73.1212; 76.1615. The rules do not require sponsorship identification when both the identity of the sponsor and the fact of sponsorship are obvious, the most prominent example of which are advertisements that run in commercial breaks from the program material. [28]

Where sponsorship identification is required, announcements must appear at least once during the program containing the product or service reference that triggered the sponsorship identification requirement, in a manner so that the average audience member can see and/or hear

[28] *See id.* §§ 73.1212(f); 76.1615(e).

the announcement. *See*, *e.g.*, *Application of Sponsorship Identification Rules to Political Broadcasts, et al.*, 66 FCC.2d 302. In such circumstances, the Commission has considered a single identification of the sponsor – typically at the end of a show – to be sufficient. This has been the basic rule in each of the scenarios requiring sponsorship announcements. As discussed above, these well-established rules have long been deemed sufficient to serve the public interest in disclosure of commercial sponsors, and no compelling reason has been provided to demonstrate that they are suddenly inadequate to the task.

2. Adequate Safeguards Exist to Address False and Deceptive Advertising

In addition to Section 317 and the FCC's existing rules, there also is a robust regulatory framework for protecting consumers from false or deceptive advertising. Although FCC enforcement of Section 317 at times touches on related issues, *see*, *e.g.*, *CBS, Inc.*, 67 FCC.2d 969 (1978), the primary federal authority regulating deceptive practices is the Federal Trade Commission ("FTC") acting pursuant to the Federal Trade Commission Act, 15 U.S.C. §§ 41-58, as amended. The FTC is empowered to (a) prevent unfair or deceptive acts or practices; (b) seek monetary redress and other relief for conduct injurious to consumers; and (c) prescribe trade regulation rules that define with specificity acts or practices that are unfair or deceptive. *See id.* § 45 & *FTC Deception Policy Statement*, *appended to Cliffdale Associates, Inc.*, 103 FTC 110, 175 (1984) ("*Deception Policy Statement*").

With respect to deceptive advertising in particular, the FTC may take action if advertisers make material representations or omissions likely to mislead consumers acting reasonably under the circumstances. *Id*. As the *Deception Policy Statement* makes clear, the FTC has developed a framework for identifying and dealing with unfair and deceptive advertising practices. Importantly for consumers, the FTC considers the entire advertisement, transaction, or course of dealing between a business and its customers, with all practices being viewed from the perspective of the consumer. *Deception Policy Statement* at 1, 3-6. Separately, the FTC has identified principles regarding unfair trade practices, which explain how it may take action against immoral, unethical, oppressive, or unscrupulous practices that cause substantial consumer injury by violating established public policy. *See FTC Policy Statement on Unfairness*, *appended to International Harvester Co.*, 104 FTC 949, 1070 (1984).

The FCC has long recognized that, when it comes to allegedly "deceptive advertising," the FTC "has primary responsibility in this area." *See Complaint Concerning KCOP-TV, Inc.*, 24 FCC.2d 149 n.1 (1970). Accordingly, "primary responsibility for determining whether specific advertising is … misleading" lies with the FTC. *Loren Rivers et al.*, 45 FCC.2d 790 ¶ 4 (1974) (citing *Licensee Responsibility with Respect to the Broadcast of False, Misleading or Deceptive Advertising*, 32 FCC.2d 396 (1961)). As made clear by the FCC in its July 2008 update of the guidance manual *The Public and Broadcasting*, this remains the division of authority. *See* www.fcc.gov/mb/audio/decdoc/public_and_broadcasting.html#_Toc202587565 at 23 (FTC has "primary responsibility for determining whether an advertisement is false or deceptive and for taking action against the sponsor").

In addition to regulatory approaches, there are private enforcement mechanisms such as the *NAD/CARU/NARB Procedures for the Voluntary Self-Regulation of National Advertising*. The National Advertising Review Council ("NARC") formed by the ANA, AAAA and AAF provides a forum for individuals and companies to seek review of potentially misleading claims in national advertising. *See* www.nadreview.org/AboutNAD.aspx. NARC adopted policies and procedures for National Advertising Division ("NAD") and the Children's Advertising Review Unit ("CARU") of the Council of Better Business Bureaus' ("CBBB"), the program's investigative arms, and for a National Advertising Review Board ("NARB"), a peer-group appeals body from which *ad hoc* panels are selected to adjudicate cases not resolved at the NAD/CARU level. This framework offers a hybrid form of alternative dispute resolution that can result in fully "litigated" decisions to which advertisers are encouraged to – and generally do – voluntarily adhere. When a party refuses to comply with an NAD decision, a referral may be made to the FTC, where agency staff review the challenged advertising on a priority basis to determine if it violates the FTC Act. This often is successful in halting the challenged conduct and/or convincing the party to return to the NARB process.

Existing laws and regulations, along with private sector initiatives, thus fully address the asserted governmental interests raised in the *NOI/NPRM*. Nevertheless, the Commission asks whether and how it should amend Sections 73.1212 and 76.1615 of its rules in order to fulfill the purposes of Section 317 and 507 with regard to product placement. *NOI/NPRM* ¶ 10. As demonstrated below, there is nothing novel or different about "embedded advertising" to warrant such rule revisions.

B. There is No Need for New Regulations Governing Product Placement Practices

1. There Has Been No Showing that Existing Rules are Inadequate, or that the Public is Adversely Affected by Product Placement

The Commission does not need to adopt new rules, or amend existing regulations, to ensure that product placement conforms to the requirements of Sections 317 and 507 of the Act. There has been no showing that existing sponsorship identification requirements are inadequate to inform the public about product placement, or that the public currently lacks awareness of product placement.

As WGA notes, members of the public "have all likely spotted commercial products in … television shows or movies," and the practice "is certainly nothing new." *WGA White Paper* at 2. And, WGA claims, product integration is even less subtle, to the point that, as WGA describes it, it is easily noticeable in programming in which it appears. *See id*. In addition, if content producers mention name brand products or services without consent and/or cooperation of the brand owner, costly trademark infringement or product disparagement suits are a distinct possibility, [29] and this historically led to use of genericized products (*e.g.*, cans of soda labeled simply "cola") in programming. This in turn helped build viewer expectations that, if a brand name is discernible, its inclusion likely was purposeful and for the benefit of the brand owner. As social scientists note in this context, "[a]cademic research as well as anecdotal evidence suggests that, at least within the United States, consumers' awareness of commercial content in entertainment media is on the upswing." [30]

In fact, comments the Commission receives in this proceeding and/or other data it might obtain may reveal that the "increasingly prevalent" incidence of product placement cited as the motivation for this proceeding, *NOI/NPRM* ¶ 1, has raised consumer awareness to the point that the sponsored nature of product placement is sufficiently "obvious" that the rules allow forgoing sponsorship identification. For example, a recent, first-ever study to gauge consumer attitudes towards product placements in magazines found the "prevailing opinion" of consumers is that "advertisers pay to have products featured in editorial matter," that "consumers have print product placement on their radar, and … are willing to accept it when it adds value to their reading experience," and that, if anything, consumers are predisposed to think that brand advertisers pay for brand mentions. *Starcom Study Yields Rules for Print Product Placement*, STARCOM

[29] *See*, *e.g.*, *Caterpillar, Inc. v. The Walt Disney Co.*, 287 F.Supp.2d 913 (C.D. Ill. 2003); *WHAM-O, Inc. v. Paramount Pictures Corp.*, 296 F.Supp.2d 1254 (N.D. Cal. 2003); *Films of Distinction, Inc. v. Allegro Film Prods., Inc.*, 12 F.Supp.2d 1068 (C.D. Cal. 1998). *See also, e.g.*, Kai Falkenberg & Elizabeth McNamara, *Using Trademarked Products in Entertainment Programming*, COMMS. LAWYER, Vol. 24, Number 4 (Winter 2007) (citing cases).

[30] Namita Bhatnagar *et al.*, *Embedding Brands Within Media Content: The Impact of Message, Media, and Consumer Characteristics on Placement Efficacy*, THE PSYCHOLOGY OF ENTERTAINMENT MEDIA: BLURRING THE LINES BETWEEN ENTERTAINMENT AND PERSUASION 99, 110 (L.J. Shrum ed. 2004).

MEDIAVEST, Oct. 10, 2005. At the same time, product placement "is increasingly spanning into other popular media, such as books, magazines, newspapers, and even video games and music," Bhatnagar, *Embedding Brands* at 100, and, as noted above, the social science reflects that consumers' awareness of these practices is growing. *See id*. at 110.

In any event, none of the potential rule changes raised in the *NOI/NPRM* is necessary. In particular, there is no need to adopt new rules that would incorporate for all sponsorship identification announcements mandates regarding letter size and duration, or front-and-back disclosure, that currently apply only to political ads. *See NOI/NPRM* ¶ 15 (citing 47 C.F.R. §§ 73.1212(a)(2)(ii) & (d)). Given the existing requirement that all sponsorship identification announcements be legible or audible for the average audience member, *see NOI/NPRM* ¶ 5, extending the political advertising requirements to all sponsorship identifications would be both redundant and inappropriate. Disclosure of political sponsorship has been regulated differently for good reason. It involves government interests that are distinct from the issues relevant to commercial advertising.[31] The fact that there are more specific requirements for political ads is thus not a basis for applying similar rules to commercial products.

Moreover, requirements regarding the size and duration of sponsorship announcements for political advertising, which generally involves a single candidate or issue and a single sponsor, are not well suited to television and radio programs that typically may include product

[31] When it adopted specific guidelines for political sponsorship identification, the FCC noted the "additional requirements for political announcements [ ] are designed to make information about their sponsors available to the public" for several reasons. *Codification of the Commission's Political Programming Polices*, 7 FCC Rcd. 678, 686 (1991). Proponents of specific guidelines for political ads claimed the rules were needed to permit opposing candidates to identify the source of negative political attack ads. *Codification of the Commission's Political Programming Policies*, 6 FCC Rcd. 5707, 5718 (1991). Further, certain political sponsorship requirements, such as the "stand by your ad" provision (requiring federal candidates to state "I approve this message"), were adopted to discourage negative campaigning. *See* Bipartisan Campaign Reform Act, Pub. L. No. 107-155, 116 Stat. 81 (2002).

placements for multiple advertisers. A broadcast might include numerous items of set dressing, props, wardrobe, etc., that are included as a result of some form of consideration sufficient to trigger sponsor identification. Requiring each such announcement to appear at both the beginning and end of the program, in lettering equal to or greater than four percent of the vertical picture height, and that appears on-air for not less than four seconds each, has the potential to encroach significantly on program material. It also is unlikely to be welcomed by a vast majority of the audience who would find such repeated interruptions highly intrusive on the programming they have selected to enjoy. For this reason, broadcasters typically include sponsorship identifications for product placements at the end of the program as part of the closing credits so that viewers who want more information about the production of the program can choose to watch them, while those who are not interested are not compelled to watch.

2. Labeling Product Placement "Deceptive" Does Not Allow This Commission to Usurp FTC Authority or Override its Finding that Disclosure Rules Are Unwarranted

There is no basis for imposing new requirements for sponsorship identification based on assertions that current product placement practices result in "deceptive" or "misleading" advertising. *NOI/NPRM* ¶ 7 n.38 (citing, *inter alia*, Commercial Alert Petition at 3-4). As the *NOI/NPRM* recognizes, Commercial Alert already has made this pitch to the FTC, *id.*, which the Commission concedes has primary responsibility over claims of deceptive advertising. *See supra* at 23-24. In response, the FTC held the product placement practices Commercial Alert described do not violate the prohibition in Section 5 of the FTC Act against unfair or deceptive acts or practices.[32] Significantly, the FTC reached this conclusion in responding to a "Request for Investigation of Product Placement on Television and for Guidelines to Require Adequate

[32] *See* Letter from Mary K. Engle, Associate Director for Advertising Practices, FTC, to Gary Ruskin, Commercial Alert (Feb. 10, 2005) ("*FTC Product Placement Letter Ruling*").

Disclosure of TV Product Placement" by Commercial Alert that is virtually identical to the Commercial Alert petition here. *See NOI/NPRM* ¶ 7 n.38 ("Commercial Alert also filed this petition with the … FTC").

In denying the Commercial Alert petition, the FTC staff concluded that "a rule or guide requiring an 'advertisement' disclosure is not warranted under Section 5." *FTC Product Placement Letter Ruling* at 3. It reasoned that "[d]espite the variety and frequency of product placement and brand integration into programming, your complaint does not suggest that [it] results in consumers giving more credence to objective claims about the product's attributes. Indeed, in product placement, few objective claims appear to be made about the product's attributes." *Id*. The FTC further noted that "given the fact-specific nature" of claims of unfair or deceptive acts or practices, "a one-size-fits-all rule or guide *would not be the most effective approach*" to addressing Commercial Alert's concerns. *Id*. (emphasis added).

The FTC ruling added that, if problems relating to deception arose with respect to product placement in the future, it had sufficient authority under existing law to take action, and that "the existing statutory and regulatory framework provides sufficient tools for challenging any [ ] deceptive acts or practices" involving product placement. *Id*. at 3, 5. The FTC's denial of Commercial Alert's petition echoed a prior 1992 ruling denying a complaint and request for investigation and rulemaking by the Center for the Study of Commercialism on grounds that product placements in motion pictures constituted unfair and deceptive trade practices. *See NOI/NPRM* ¶ 7 n.38 (citing www.ftc.gov/opa/predawn/F93/csc-petit5.htm (Press Release, *FTC Denies Center for the Study of Commercialism's Petition to Promulgate Rule on Product Placement in Movies* (Dec. 11, 1992)).

Traditionally, when it comes to unfair trade practice concerns such as those it seems the Commission believes are implicated here, it generally defers to the FTC. For example, that was the path followed with respect to "ratings hypoing," as to which it was FCC policy to refer complaints to the FTC and to incorporate FTC findings or cease-and-desist orders involving uses of ratings in determining whether broadcast licensees operated in the public interest. *Amendment of Part 73 of the Commission's Rules and Regulations to Prohibit Distortion of Audience Ratings*, 58 FCC.2d 513 (1976). The Commission followed a similar course in *Petition to Promulgate a Rule Restricting the Advertising of Over-the-Counter Drugs*, 62 FCC.2d 465 (1976), which implicated not only the FTC's authority, but that of the Food and Drug Administration and the Consumer Product Safety Commission as well. And the FCC followed the same approach in adjudications involving licensee advertising practices, as in *Complaint by Consumers Association of District of Columbia*, 32 FCC.2d 400 (1971), which recited, among other things, that:

> [T]he main thrust in the field of deceptive advertising must continue to come from the [FTC], the agency specifically created … to deal with that problem. That agency, *unlike this Commission*, has the capacity to formulate standards of deceptive advertising … applicable to the various media. It thus has the scientific and related expertise *which we lack* in this area.

Id. at 404-05 (emphases added). The FCC went on to note that, even to the extent it had a "role to play in this important area" vis-à-vis each broadcaster's duty to protect the public from false, misleading or deceptive ads, its actions were dependent upon FTC assessments of the advertising in question. *See id*. As in the past, the Commission should defer here to the expertise of the FTC, which has already held that product placement concerns identical to those before this Commission do not warrant further rules or agency action.

3. Existing FCC Rules Preclude Product Placements In Children's Programming

Proponents of new rules raise concerns over "hidden tactics" in "[c]hildren's programming" and allege that programmers are "dealing with children" by trying to "insert product placements" in a manner that is "particularly manipulative," but these assertions are all red herrings. *WGA White Paper* at 6 (quoting Amy Schatz, *Questions for ... Jonathan Adelstein*, WALL ST. J., June 8, 2005). Product placement practices are completely irrelevant to children's programming. The Children's Television Act, 47 U.S.C. §§ 303a-303c, and the FCC's rules strictly regulate the amount and the positioning of commercial matter within "children's programming," defined as programming "originally produced … primarily for … children 12 years old and younger." 47 C.F.R. §§ 73.670 note 2, 76.225, note 2. In addition to imposing limits on the amount of commercial matter in children's programs, [33] the FCC's rules and policies require separation devices – bumpers – to distinguish commercial matter from the start or close of the program or segments of it (*i.e.*, those between commercial "breaks"). *See Children's Television Programming*, 6 FCC Rcd. at 2112, 2117-18. The children's programming rules also prohibit "host selling" by program talent or characters on a show, as well as program-length commercials or "PLCs," which include not only entire shows dedicated to a selling message, but also situations in which a product or character associated with a program appears in ads within any commercial breaks inside or on either end of the program. [34]

The minutes-per-hour, host-selling and PLC limits apply to all commercial matter aired during children's programming, not just ads for products aimed at children. *Oregon Television Inc.*, 14 FCC Rcd. 17064, ¶ 7 n.10 (1999). The Commission enforces the no-PLC policy strictly

[33] The rules define "commercial matter" as "[a]ir time sold for purposes of selling a product (or service)," with "sold" meaning the advertiser provides some consideration either directly or indirectly as an inducement for airing the material. *See Policies and Rules Concerning Children's Television Programming*, 6 FCC Rcd. 2111, 2112 (1991). The Commission has explained that material is commercial matter if the entity airing it "received consideration directly or indirectly" for doing so and it was used to sell a product or service, and that this is not restricted to material of any particular length. *Mass Media Bureau Advises Commercial Television Licensees Regarding Children's Television Commercial Limits*, 13 FCC Rcd. 10265, 10266 (MMB 1998).

[34] *Children's Television Commercial Limits*, 13 FCC Rcd. at 10266. Under these rules, advertisements involving any products or characters associated with program content must be placed in advertising time, clearly separated from the program content with bumpers on either end, and must be separated the program's start and close by at least 60 seconds of intervening and unrelated program material.

and vigorously. Examples of programs turned into PLCs by insertion of ads for related products include (i) an ad for Honey Nut Cheerios featuring the Sega Genesis game "Sonic the Hedgehog" and Sega Genesis in general that aired during a *Sonic the Hedgehog* program, [35] (ii) a Frosted Flakes ad containing an offer for a free character from the show *Ducktales* that aired during the *Ducktales* program, [36] (iii) an ad for toys based on the movie *Hook* airing during *Peter Pan and the Pirates*, *id*., and (iv) an ad for Gameboy Advance E-Reader that included fleeting partial images of three Pokemon game cards aired during the *Pokemon* program. [37] In each of these cases, the violations were disclosed to the Commission by the broadcast licensees themselves, and in each case it levied fines for the children's advertising violation disclosed.

In short, the FCC's rules are robust and effective in addressing advertising during children's programming. Product placement is a non-issue for children's programming because it would create violations and problems under the "host selling," commercial separation, PLC, commercial minutes limit, and other rules, as the Commission acknowledges here. *NOI/NPRM* ¶ 16. Claims about product placement and its alleged effects on children cannot justify new rules, since the FCC has proven itself fully willing and able to enforce its existing regulations, which prohibit product placement in programming produced for children, [38] and broadcasters have proven themselves fully capable of and willing to comply with those regulations, and to apprise the Commission when violations so occur.

---

[35] *Paramount Stations Group of Houston, Inc.*, 13 FCC Rcd. 21816 (MMB 1998).

[36] *Scripps Howard Broad. Co.*, 12 FCC Rcd. 19504 (MMB 1997).

[37] *See*, *e.g.*, *Acme Television Licensees of Wis., LLC*, 23 FCC Rcd. 8187 (2008).

[38] *See*, *e.g.*, *supra* notes 35-37. *See also KSBY Commc'ns, Inc.*, 23 FCC Rcd. 11192 (MB 2008); *Raleigh (WRDC-TV) Licensee, Inc.*, 22 FCC Rcd. 6688 (MB 2007); *North Carolina Broad. Partners*, 16 FCC Rcd. 5627 (2001); *WDBD License Corp.*, 15 FCC Rcd. 1151 (2000); *Telemundo of Puerto Rico License Corp.*, 15 FCC Rcd. 24494 (EB 2000); *KTBY, Inc.*, 11 FCC Rcd. 13870 (MMB 1996).

The FCC's prohibition is reinforced by private initiatives as well. The *Self-Regulatory Program for Children's Advertising* maintained by CARU also forbids product placement in children's programming.[39] On a related note, an FTC Report to Congress issued just this summer on *Marketing Food to Children and Adolescents* confirmed that members of the Children's Food and Beverage Advertising Initiative established by the CBBB and NARC agreed not to seek product placement of food and beverage items in editorial and entertainment content directed at children under twelve. *Id*. at 2, 62.

C. Rationales for Protecting Children from Product Placement are Insufficient to Justify Extending those Protections to Adults

Though embedded advertising thus does not implicate children's programming in any manner warranting further inquiry or new or amended regulations, the proposals animating the *NOI/NPRM* suggest the general audience needs to be "protected" from possible exposure to advertising in the same manner as children. Proponents of new rules, restrictions, and prohibitions claim that product placement "sneaks by our critical faculties and plants messages in our brains when we are paying less attention,"[40] results in "tens of millions of viewers … being sold products without their knowledge," *id*. at 1, and plays on asserted "emotional connections viewers have with shows and their characters" that "can be used to motivate viewers to buy [ ] merchandise." *Id*. at 2. Commercial Alert claims that advertisers "have an unfair advantage" on grounds that audiences cannot "differentiate between the program and [ ] commercial messages." Commercial Alert Petition at 1, 4 (quoting *Children's Television Report and Policy Statement*, 50 FCC.2d 1, 15 (1974)). But this is a standard applicable to programs produced for *children, who are already protected under the FCC's rules*. *See Children's Television Report*, 50 FCC.2d

[39] *See* www.caru.org/guidelines/guidelines.pdf at 6.

[40] *WGA White Paper* at 6 (citing M. James, *Probe of Stealth TV Ads Sought*, L.A. TIMES, May 26, 2005, at C1 (quoting Gary Ruskin, executive director of Commercial Alert)).

at 15 (citing "evidence that *very young children* cannot distinguish conceptually between programming and advertising") (emphases added).

There is no comparable regulatory interest that is relevant to adults. Advocates of new rules offer no empirical evidence showing that adult consumers are unaware that consideration may be provided when brand-names are featured in programming. Nor do they attempt to show that adults are any more driven to make purchases as a result of product placements than as a result of exposure to traditional advertisements.

Claims that American consumers should be treated as if they were children run contrary to this Commission's historic practice of recognizing that children *differ* from adults. Just recently, the FCC reaffirmed in *Children's Television Obligations of Digital Broadcasters* its belief that "children are more 'trusting and vulnerable to commercial "pitches" than adults.'" 19 FCC Rcd. 22943, 22945 (2004) (quoting *Children's Television Report*, 50 FCC.2d at 11), *recon. granted on other grounds*, 21 FCC Rcd. 11065 (2006). This conclusion followed from the Commission's original observation that it is a matter of "common understanding" that, due to "youth and inexperience," children are "*far more* trusting [ ] and vulnerable … than adults." *Children's Television Report*, 50 FCC.2d at 11.

There is no plausible argument for treating adults as if they were children vis-à-vis product placement. As the Supreme Court made clear in, *e.g.*, *Butler v. Michigan*, governmental interests in shielding children from certain materials "does not justify [ ] unnecessarily broad suppression of speech addressed to adults." 352 U.S. 380, 383 (1957). Since then, the Court has repeatedly warned against "reducing the adult population to only what is fit for children." [41] The

[41] *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 759 (1996) (quoting *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989) (quoting *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 73 (1983), in turn quoting *Butler v. Michigan,* 352 U.S. at 383) (internal quotes and editing omitted).

Commission itself cautioned against allowing "the need to protect children" to "freeze present standards and … discourage creative developments in" television. *Complaint of The Polite Society, Inc. Against Station WLS-TV, Chicago, IL*, 55 FCC.2d 810 ¶ 9 (1975). It also has expressed its expectation that "children will grow into adults capable of fully participating in [ ] deliberative" thought. *Policies And Rules Concerning Children's Television Programming*, 11 FCC Rcd. 10660, 10731 (1996). This application is inconsistent with a regulatory approach that would treat everyone as if they were children

Imposition of such obligations is inconsistent with Commission observations in the past regarding whether such changes make any difference to how effectively audiences receive the information imparted. For example, the Commission has held that the impact of an "identification of the person paying for exposure of a product or service" is the same regardless whether it is "contained in a 'crawl' positioned at the end of a program [or] positioned in or in proximity to" the ad. *ABC*, 30 FCC.2d 827 (1971). "The fact that the sponsor's identity is announced at the end of the program, rather than at the time the product or service is advertised, *does not change the essential nature of the announcement*." *Id*. Accordingly, there is little to be gained by supplanting rules that allow sponsorship identifications necessitated by product placement to be placed in a show's end credits, where audiences are accustomed to seeing such information, with rules requiring a simultaneous "crawl," "pop up," or other sponsorship identifications.

D. The Commission Should Not Attempt to Expand its Authority

The Commission should decline to pursue the inquiries in the *NOI/NPRM* that appear to contemplate *any* FCC action that would increase regulation. Any further regulation would substantially expand the Commission's authority into areas where it previously declined to regulate and/or in which it lacks statutory authority. For example, the *NOI/NPRM* asks whether the Commission should consider imposing sponsorship identification obligations on cable programmers.

NOI/NPRM ¶ 17. It also asks "whether Section 317 disclosure requirements should apply to feature films containing embedded advertising when re-broadcast by a licensee or … by a cable operator." *Id.* ¶ 18. Since in each case there is no cause to depart from the status quo, and doing so would result in FCC action in excess of its statutory authority, the Commission should decline to impose new or additional mandates.

1. The Commission Lacks Statutory Authority to Expand its Jurisdiction to Cable Networks

The Commission does not have the authority to extend sponsorship identification rules to cable networks. The *NOI/NPRM* asks for analysis of what "additional steps with respect to sponsorship identification announcements [for] cable programmers" might be taken to "extend regulation of product integration" to them, *NOI/NPRM* ¶ 17, but the Commission lacks both statutory and constitutional authority to adopt such changes. By its clear terms, Section 317 does not apply to cable television *at all*, and prior FCC rules were limited to "origination cablecasting," which is programming under the exclusive control of the cable operator. *See* 47 C.F.R. § 76.1615. The existing rules thus apply only to programming originated by cable operators and not to networks they license and make available to subscribers. But as the discussion below makes clear, the Commission not only lacks any authority to impose sponsorship identification regulations on cable networks, it exceeded its authority when it first adopted the cable origination rules in 1969.

Section 317 of the Communications Act requires sponsorship identification for "[a]ll matter *broadcast by any radio station* for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the *station so broadcasting*." 47 U.S.C. § 317(a)(1) (emphases added). And, although Section 317(e) empowers the Commission to "prescribe appropriate rules and regulations to carry out the provisions of this section," *id.*, § 317(e), the law says *nothing whatsoever* about cable television. Because "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000), the plain statutory language deprives the FCC of the authority to regulate cable television as if it were "radio broadcasting." [42] To be sure, the Commission adopted rules long ago in which it asserted authority to regulate certain aspects of origination cablecasting as if it were broadcasting, and that assertion of authority has not yet been challenged. But the analysis herein makes clear that: (a) the assertion of jurisdiction over origination cablecasting was in error, and (b) there is no basis at all for the Commission to extend its authority to include cable networks.

Section 317 rules were first applied to cable television origination programming in 1969 by FCC rulemaking, not by Congressional action. *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, 20 FCC.2d 201 (1969). At that time, the Commission simply asserted it could naturally extend its rules as an exercise in ancillary jurisdiction, and by reference to general "public interest" considerations set forth in *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969). 220 FCC.2d at 220. Indeed, it acknowledged at the time that its assertion of authority was based on a generalized notion of the public interest and was "not pursuant to any explicit direction from Congress." *Id.*

However, case law development over the last four decades has undermined the FCC's facile assumptions made in 1969 regarding its ancillary jurisdiction. For example, the Supreme Court in *Midwest Video Corp. v. FCC* rejected the assertion of ancillary authority to adopt public

[42] *Compare* 47 U.S.C. §§ 151(5)-(6), *with id.* §§ 522(5), (7). *See also*, *e.g.*, *Office of Communication, Inc. of the United Church of Christ v. FCC*, 327 F.3d 1222 (D.C. Cir. 2003) (it was reasonable interpretation of Act to prohibit only "broadcast" and not other transmissions of ads by noncommercial public television stations that FCC allowed to offer subscription services on their excess digital capacity – including ad-supported services – in that "the 'broadcast/non-broadcast' distinction relied upon" was sound) (discussing, *inter alia*, *National Ass'n for Better Broad. v. FCC*, 849 F.2d 665 (D.C. Cir. 1988) (affirming FCC *Subscription Video* order that held subscription television services that could be viewed only by customers who purchased special equipment and paid subscription fee are not "broadcasting" under relevant statutory definitions)).

access channel requirements for cable operators. 440 U.S. 689, 706-07 (1979) ("the Commission was not delegated unrestrained authority," but rather "Congress … restricted [its] ability to advance objectives associated with public access at the expense of journalistic freedom"). *See also Home Box Office, Inc. v. FCC*, 567 F.2d 9, 28 (D.C. Cir. 1977) (rejecting ancillary authority to impose cable television content controls); *MPAA v. FCC*, 309 F.3d 796, 804-806 (D.C. Cir. 2002) (FCC cannot assert jurisdiction over programming based solely on ancillary jurisdiction).

This conclusion similarly is compelled by basic principles of statutory interpretation. To begin with, the plain language of the statute provides the primary guide to Congressional intent, *Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997), and it is a "cardinal canon" of statutory construction "that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). In this regard, Section 317's sole focus on "radio broadcasting" should be the beginning – and the end – of the inquiry. After all, "[t]he powers of the commission were defined, and definition is limitation." *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 276 (1933).

Additionally, although Congress amended Section 315 of the Communications Act in 1971 to extend its political broadcasting rules to include cable origination programming, [43] it never did so with Section 317 or with Section 507. [44] Since then, Congress adopted both the Cable Communications Policy Act of 1984 and the Cable Television Consumer Protection and Competition Act of 1992 without making any changes in Section 317. In neither instance did

[43] *See* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (amending Section 315 to cover community antenna television systems). Section 315(c)(1) of the Act was amended so that "the term 'broadcasting station' includes a community antenna television system," for purposes of implementing political broadcasting rules. 47 U.S.C. § 315(c)(1).

[44] The requirements of Section 507, the other overarching statutory provision referenced in the *NOI/NPRM*, apply only to broadcasters, as the FCC recognizes. *See id*. ¶ 5 n.22 (citing *Amendment of the Commission's Sponsorship Identification Rules (Sections 73.119, 73.289, 73.654, 73.789 and 76.221)*, 52 FCC.2d 701, 712 n.10 (1975)).

Congress incorporate into the Act statutory authority for the FCC to regulate sponsorship identification on cable television. This failure to amend the law speaks volumes. Where, as here, "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely." *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991). When that statute provides authority for an action, and is silent as to a similar, related action, the law therefore must be interpreted as authorizing only the former, and not the latter. [45]

Moreover, this interpretation of Congressional intent is not based solely on inaction by Congress. The 1984 Cable Act included Section 624(f)(1), which states that "[a]ny Federal agency, State, or franchising authority may not impose requirements regarding the … content of cable services, *except as expressly provided in this subchapter*." 47 U.S.C. § 544(f)(1) (emphasis added). As the House Committee explained, this provision "limits the authority of the FCC … to regulate the provision or content of cable services *other than as provided in this new title of the Communications Act*." H.R. Rep. No. 98-934, at 70 (emphasis added). Given this express statutory limitation, both the plain language and legislative history of the Act make clear that any effort to apply Section 317 to cable networks would be invalid.

Even if the Commission had legitimately asserted Section 317 jurisdiction over cable (which it did not), its reach would extend only to *origination programming*, not cable networks. *See Sponsorship Identification Rules*, 52 FCC.2d at 712. This much is apparent from the text of the rules, which state that sponsorship identification rules for cable operators apply only to "origination cablecasting," as defined above. *See NOI/NPRM* ¶ 17 (quoting 47 C.F.R. § 76.1615). *See also* 47 C.F.R. § 76.5(p). In the 1969 rulemaking in which the Commission extended vari-

[45] *E.g.*, *MPAA v. FCC*, 309 F.3d at 802-06; *Nextwave Personal Commc'ns, Inc. v. FCC*, 254 F.3d 130, 152-153 (D.C. Cir.), *aff'd*, 537 U.S. 293 (2003). *See also TVA v. Hill*, 437 U.S. 153 (1978); *Original Honey Baked Ham Co. v. Glickman*, 172 F.3d 885, 887 (D.C. Cir. 1999).

ous rules to cable operators, including sponsorship identification requirements, it chose only to impose "requirements on CATV *origination*" as part of its decision to permit cable operators to originate programming in the first instance. *Amendment of Part 74,* 20 FCC.2d at 219 (emphasis added). Thus, the Commission never previously sought to assert jurisdiction over cable programming networks, and there is no conceivable basis for doing so now.

Finally, the law must be interpreted to avoid constitutional conflicts, and in this regard, there is nothing to support applying Section 317 either to cable operators or cable networks.[46] As explained in more detail below, the FCC has never had the constitutional authority to regulate cable or satellite content in the same way as broadcasting. In *Turner Broadcasting System v. FCC*, after noting the Commission's "minimal" authority over broadcast content, the Supreme Court held that "the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation." 512 U.S. 622, 637 (1994) ("*Turner I*"). Noting the "fundamental technological differences between broadcast and cable transmission," the Court found that application of "the more relaxed standard of scrutiny adopted in *Red Lion* and [ ] other broadcast cases is inapt when determining the First Amendment validity of cable regulation." *Id*. *See also United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 815 (2000) (citing "key difference" between cable and broadcasting in striking down indecency regulations imposed on cable operators); *Time Warner Entm't Co., L.P. v. FCC*, 56 F.3d 151, 181 (D.C. Cir. 1995). Given the extent to which the regulation of product placement cuts directly at the content of programming

[46] *See Jones v. United States*, 526 U.S. 227, 239 (1999). This basic rule of statutory construction has special relevance to the FCC, since "the 'public interest' standard necessarily invites reference to First Amendment principles." *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 122 (1973).

and the revenues needed to produce it, the FCC in this proceeding cannot extend its jurisdiction over product placement, to whatever extent it may be valid, to cable television programmers.

2. The Commission Should Not Seek to Extend its Statutory Authority Over Product Placement in Feature Films

The Commission should forgo consideration of whether Section 317 disclosure requirements may apply when broadcasters or cable operators re-air feature films that contain product placement. Bottom line, it should not disturb the long-standing exemption from sponsorship identification requirements for feature films.[47] Consistent with the discussion above, whatever the Commission may be considering with respect to feature films generally, *see NOI/NPRM* ¶ 14, it lacks any authority to impose sponsorship identification requirements on movies appearing on cable.[48] We also note the law has evolved since enactment of Sections 317 and 507, and since the exemption was created for feature films. Under current law, the Commission cannot legitimately assert authority to impose sponsorship identification obligations on theatrical releases simply by stating – as it did in 1963 – that "nothing in section 317 … excludes films not produced exclusively for television from the requirements of section 317." *Feature Film Exemption Order,* 34 FCC at 836. *See also id.* at 835 ("Neither section 317 … nor section [507] … exclude by their terms, 'feature' films'"). However, it is now settled law that it is "entirely untenable" that the FCC may adopt rules in a particular area simply "because Congress did not expressly foreclose the possibility." *MPAA v. FCC*, 309 F.3d at 805. *See also*, *e.g.*, *Ethyl Corp.*

---

[47] *NOI/NPRM* ¶ 14 (citing *Amendment of Sections 3.119, 3.289, 3.654 and 3.789 of the Commission's Rules,* 34 FCC 829, 837 (1963) ("*Feature Film Exemption Order*")); 47 C.F.R. §§ 73.1212(h); 76.1615(g).

[48] *See supra* Section II.D.1. It also is worth noting that the Commission's analysis of its jurisdiction over feature films under Section 317 leaned quite heavily on related authority in Section 507, *see*, *e.g.*, *Feature Film Exemption Order,* 34 FCC at 837, which, as noted, does not apply outside the broadcast context. *See supra* note 44 (citing *NOI/NPRM* ¶ 5 n.22).

v. EPA, 51 F.3d 1053, 1060 (D.C. Cir. 1995) ("We refuse … to presume a delegation of power merely because Congress has not expressly withheld such power.").

To the extent the Commission reviews the issue at all in this proceeding, it should, if anything, reconsider its 1963 conclusion that it "clearly" had authority to impose sponsorship identification obligations on feature films. *Feature Film Exemption Order*, 34 FCC at 841-42. As noted, the FCC, like other agencies, "literally has no power to act … unless and until Congress confers power upon it." *Louisiana PSC v. FCC,* 476 U.S. 355, 374 (1986). Accordingly, the Commission cannot regulate feature films produced wholly outside the ambit of its statutory charge. *American Library Ass'n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005).

In any event, just as the FCC concluded in 1963 there was no good reason to extend the rules to feature films, the Commission should reach the same conclusion here. There still is a substantial "timelag between production of 'feature' film and its exhibition on television." *Feature Film Exemption Order*, 34 FCC at 841, which the Commission found helps diminish any extent to which feature films might incorporate practices that could "improperly affect broadcasting" vis-à-vis sponsorship identification. Subjecting motion pictures produced for theatrical release to sponsorship identification rules also would still have "disruptive and dislocating economic effects that might inhibit … production." *Id*. And, perhaps most importantly, there still is an absence of "evidence indicative of a need for such a rule." *Id*. at 842. With respect to the latter point in particular, it is important to note that this remains true even with the rise of product placement. As the FTC noted in its letter ruling declining to regulate precisely the practice at issue here – product placement in motion pictures – there is a "lack of a pervasive pattern of deception and substantial consumer injury." *See supra* at 29 (citing www.ftc.gov/opa/predawn/F93/csc-petit5.htm).

Indeed, if anything has changed, it is that the "economic facts of life in the motion picture industry today" make televised exhibition of films no longer "one of the principal purposes of film production," which was one of the FCC's lynchpin findings back in 1963. *Feature Film Exemption Order*, 34 FCC at 838. In 1963, there was no videotape, DVD or other home-video market. There were no video-on-demand platforms, and especially none that existed solely outside the broadcast-and-cable framework, such as in-room hotel viewing, TiVo, and similar services. And, of course, there was no Internet, no iTunes or iPod, or any of the other various ways of enjoying feature films that have since evolved.[49] Accordingly, it is not plausible for the Commission to simply assume "that 'feature' film is 'program matter which is intended for broadcasting'" to which Sections 317 and 507 apply absent an exemption, *Feature Film Exemption Order*, 34 FCC at 841, and there is accordingly even less basis for including feature films in the sponsorship identification rules than there was at the time the Commission exempted them from the rules.

III. EXCESSIVE REGULATION OF PRODUCT PLACEMENT WOULD VIOLATE THE FIRST AMENDMENT

The *NOI/NPRM* seeks comment on the First Amendment implications of possible modifications to the sponsorship identification rules. *NOI/NPRM* ¶ 13. In particular, it asks whether concurrent disclosure requirements as proposed by some advocacy groups would be tantamount to a ban on embedded advertising, or whether such a requirement would infringe on

[49] In fact, that there are now home-video releases, online services, airline exhibition, and other secondary markets for theatrically released films, none of which are subject to FCC regulation, presents a serious risk that an FCC attempt to regulate product placement in feature films will be so "riddled with exemptions and inconsistencies" it could not withstand First Amendment scrutiny. *See*, *e.g.*, *Bellsouth Telecomms., Inc. v. Farris*, __ F.3d ___, 2008 WL 4133382 (6th Cir. Sept. 9, 2008); *Rubin v. Coors Brewing Co.,* 514 U.S. 476, 488-89 (1995); *Western States Med. Ctr. v. Shalala*, 238 F.3d 1090, 1095 (9th Cir. 2001), *aff'd sub nom.*, 535 U.S. 357 (2002).

artistic integrity of programmers. [50] It also asks commenters to address whether the government interests at stake here are substantial enough to justify such requirements and how the Commission can ensure that any modified regulations are no more extensive than necessary to serve these interests. *NOI/NPRM* ¶ 13. As explained below, any attempt by the FCC to expand existing requirements governing sponsorship identification or to extend its jurisdiction to new media not previously subject to the rules necessarily raises significant First Amendment issues. [51]

A. The First Amendment Questions Raised in the Notice Are Unduly Limited

The questions articulated in the *NOI/NPRM* do not cover all the First Amendment issues raised by this proceeding. Because the *NOI/NPRM* did not put forward specific proposals, it is not possible to definitively list all the constitutional issues that may be implicated, or to pinpoint what First Amendment doctrine should be applied. However, the issues raised in the *NOI/NPRM*

---

[50] *NOI/NPRM* ¶ 13. *See* Comments of the Washington Legal Foundation Concerning Television Product Placement (April 6, 2004) at 7. In this connection, the *NOI/NPRM* asks whether the practice of "superimposing unrelated promotional material at the bottom of the screen during a running program belie[s] the contention that concurrent identification would effectively preclude product integration as a form of commercial speech because it would 'infringe on artistic integrity'?" *NOI/NPRM* ¶ 13. However, whether or not this issue is framed as one of "artistic integrity," the most important question is whether there is sufficient justification for the government to override editorial choices of program producers and the affected networks. As discussed in this section, this constitutional analysis is unaffected by the fact that unrelated promotional material may be superimposed at the bottom of the screen. For First Amendment purposes, the critical issue is whether the government can justify inserting itself into that editorial process.

[51] In order to avoid any confusion about the relevant constitutional issues, it is important to be clear about whose First Amendment rights are at issue in this proceeding. The *WGA White Paper* cited frequently in the *NOI/NPRM* complains that writers' "creative rights are affected" by product placement. *WGA White Paper* at 1. *See NOI/NPRM* ¶ 1 n.2; ¶¶ 8-9. But in this regard, the law is quite clear the First Amendment rights at issue are those of the program producers and networks. *E.g.*, *CBS v. DNC*, 412 U.S. at 139 ("To hold that broadcaster action is governmental action would thus simply strip broadcasters of their own First Amendment rights."); *Kuczo v. Western Conn. Broad. Co.*, 566 F.2d 384, 388 (2d Cir. 1977); *Massachusetts Universalist Convention v. Hildreth and Rogers Co.*, 183 F.2d 497 (1st Cir. 1950); *McIntire v. William Penn Broad. Co.*, 151 F.2d 597 (3d Cir. 1946); *Smothers v. CBS, Inc.*, 351 F.Supp. 622, 626-27 (C.D. Cal. 1972); *Post v. Payton*, 323 F.Supp. 799 (E.D.N.Y. 1971).

and the questions it presents make clear that the Commission has overlooked some major constitutional issues involving the applicable standard of First Amendment scrutiny.

1. The Notice Incorrectly Assumes That Product Placement is Commercial Speech

The fact that the Commission refers to product placement as "embedded advertising" and describes "product integration as a form of commercial speech," *NOI/NPRM* ¶ 13, begs an important threshold question regarding the applicable constitutional standard that would apply to regulations in this area. Just because product placement may involve sponsored programming and increasingly provides an alternative to traditional advertising, it does not follow that product placement regulations are appropriately analyzed under the commercial speech doctrine. To the extent product placement and program content are intertwined, any proposed rules must be analyzed as restrictions on speech that is fully protected by the First Amendment.

The Supreme Court has stressed that the "core notion of commercial speech" is "speech which does '*no more* than propose a commercial transaction.'" *Bolger v. Youngs Drug Products,* 463 U.S. at 66 (emphasis added). However, product placement does not propose a commercial transaction at all. As the FTC noted in rejecting the Commercial Alert petition, "in product placement, few objective claims appear to be made about the product's attributes." *FTC Product Placement Letter Ruling* at 3. The fact that product placement is a form of commercial sponsorship of certain program material does not mean that it is "advertising" and thereby subject to the commercial speech doctrine for purposes of First Amendment analysis. FCC rules governing noncommercial broadcasting specifically distinguish paid program sponsorship, including the display of trademarks and corporate logos, from "advertising" that uses comparative language and/or "calls to action." [52] Although enhanced underwriting in the noncommercial broadcasting

[52] In the Public Broadcasting Amendments Act of 1981, Congress amended the Communications Act to permit public broadcasters to generate much-needed economic support through the

context and paid product placement in the case of commercial broadcasting require sponsorship identification pursuant to Section 317, that does not mean they constitute commercial speech for purposes of First Amendment analysis.

Even if the underlying purpose of product placement is considered to be commercial, it does not alter the constitutional analysis. In *Riley v. National Federation of the Blind of North Carolina,* 487 U.S. 781, 796 (1988), the Supreme Court found that where the commercial and expressive parts of speech are "inextricably intertwined," a court could not parcel out the fully protected and less protected parts of the speech. Here, proponents of regulation urge the Commission to adopt rules precisely because product placements are "intertwined" with programming. Commercial Alert Petition at 2, 4 (citing "interweaving" of programming and product placement). Contrary to assumptions underlying the submissions of Commercial Alert and others, the fact that the messages are intermingled gives the FCC less constitutional latitude to impose regulations, not more. [53]

---

practice of "enhanced underwriting." *See* Section 12341 of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35 (1981); 47 U.S.C. §§ 399A, 399B. While it is clear such paid sponsorships require broadcasters to provide a sponsorship identification as set forth in Section 317, it is equally certain that the appearance of brand names and corporate logos do not constitute "advertising" as defined in the Act. *See* 47 U.S.C. § 399B(a). *See also Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations*, 7 FCC Rcd. 827 (1992) (enhanced underwriting represents "another step in our ongoing effort to strike a reasonable balance between the financial needs of public broadcasting and their obligation to provide an essentially noncommercial service"); *Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations*, 97 FCC.2d 255 ¶ 3 (1984) (agreeing with commenters that "specific reference to a donor's product or service" does not constitute advertising "in the absence of comparative or qualitative language").

[53] *See*, *e.g.*, *Hays County Guardian v. Supple,* 969 F.2d 111, 120 (5th Cir. 1992) (holding that university regulation prohibiting on-campus solicitation unconstitutionally restricted distribution of newspapers containing advertisements); *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1144 (9th Cir. 1997) (holding plaintiffs likely to succeed on First Amendment challenge to canvassing restriction because it applied to "fully protected expression that contains some form of advertising"); *Perry v. Los Angeles Police Dep't*, 121 F.3d 1365, 1368 (9th Cir. 1997) (full First Amendment protection applies where commercial products are inextricably intertwined with

2. Content-Based Regulations That Impose an Economic Burden on Programming Are Invalid

As a general rule, content-based restrictions of speech are presumed to be invalid unless the government can demonstrate that such measures are the least restrictive means of serving a compelling governmental interest. *Playboy Entm't Group*, 529 U.S. at 813 ("If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."). This heightened constitutional scrutiny is all the more appropriate in this proceeding because the Commission is asking about regulations that would adversely affect the programming supported by product placement. In particular, it asks about the First Amendment impact of "concurrent disclosure requirements," which would require transmission of a government-approved disclosure during the program itself. *NOI/NPRM* ¶ 13. Such mandatory disclosure inherently would alter the nature of the programming. The Supreme Court has clearly established that "[m]andating speech that a speaker would not otherwise make *necessarily alters the content of the speech*," and is therefore "a content based regulation." [54] Even requiring additional disclosures beyond those already required by the rules, such as mandatory disclosures at the beginning of a program, or specifying that particular language must be used or that it remain onscreen for a designated duration, would alter the nature of the program presented. [55]

---

noncommercial messages); *Gaudiya Vaishnava Soc'y v. City and County of San Francisco*, 952 F.2d 1059, 1065 (9th Cir. 1990) (same).

[54] *Riley*, 487 U.S. at 795 (emphasis added). The Commission's reference to "the apparently common existing practice of superimposing unrelated promotional material at the bottom of the screen," *NOI/NPRM* ¶ 13, does not alter this conclusion. For purposes of constitutional analysis, such promotional material that a network may include on its own is not comparable to messages that the government requires it to transmit. *See supra* note 50.

[55] Such a requirement would be disruptive and conflict with the overall presentation of programming. Among other things, a requirement for notices of a particular size or duration could significantly increase the time devoted to program credits to the exclusion of program material. In addition, such requirements could necessitate changes to program endings, modification of the flow from one program to the next, and restrict other programming and creative practices.

Courts have recognized that in evaluating such restrictions, attention must be paid to the degree to which they may adversely affect the economic viability of the medium. For example, in *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004), the court held that application of a Pennsylvania law banning advertisers from paying for dissemination of "alcoholic beverage advertising" by media affiliated with educational institutions imposed an impermissible economic burden in violation of the First Amendment. As then Judge, and now Justice, Alito explained for the court, "[i]mposing a financial burden on a speaker based on the content of the speaker's expressions is a content-based restriction of expression and must be analyzed as such." *Id*. at 106. This conclusion followed from the Supreme Court's opinion in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105 (1991), where the Court struck down a so-called "Son of Sam" law because it "impose[d] a financial disincentive" on "speech of a particular content." *Id.* at 116. In this case, the proposals to expand regulation of product placement to "curb the excesses of commercialism," as one rule proponent put it, certainly raise the same constitutional concerns.

3. The Commission Cannot Constitutionally Extend Broadcast Regulation to Other Media

The constitutional questions raised in the *NOI/NPRM* understate the First Amendment problems implicated by the proposed rules for another reason: the FCC has never had the same constitutional authority to regulate other media as it does broadcasting. Although the *NOI/NPRM* asks whether the Commission "should" extend its regulation of cable to include networks, this misses entirely the larger question – whether the FCC has the constitutional ability to regulate cable programming *at all*. There is no judicial support for the Commission's assertion of such authority. As the Supreme Court and other appellate courts have made clear, "the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation … does not apply in the context of cable regulation." *Turner I*, 512 U.S. at 637. *See* *also Playboy Entm't Group*, 529 U.S. at 815; *Denver Area Educational Telecom. Consortium*, 518 U.S. 727; *Home Box Office*, 567 F.2d at 28.

The Supreme Court explained in *Turner I* why the assumptions regarding "spectrum scarcity" that have underlay content regulation of broadcasting do not apply to the cable medium:

> The broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium. Indeed, given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium. Nor is there any danger of physical interference between two cable speakers attempting to share the same channel. In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation.

512 U.S. at 638-39. As explained in the next section, the assumptions about spectrum scarcity with respect to broadcasting are no longer true either, and courts have begun to be more skeptical of the Commission's authority in this area. *See infra* at Section III.A.4. But when it comes to the question of the FCC's ability to regulate non-broadcast media, there is no room for doubt about the conclusion – the FCC does not have the constitutional authority to impose content regulations based on the assumption that cable is "like" broadcasting. *See Playboy Entm't Group*, 529 U.S. at 815 (citing "key difference" between cable and broadcasting in striking down indecency regulations imposed on cable operators); *Time Warner Entm't*, 56 F.3d at 181.

4. The Commission Can No Longer Justify Reduced First Amendment Protection for Broadcasting Based on the Legal Fiction of Spectrum Scarcity

The Commission may assume that a lower level of First Amendment scrutiny (akin to the commercial speech doctrine) would apply to expanded sponsorship identification requirements because of the wider latitude accorded broadcasting regulation in the past. *Red Lion v. FCC*, 395 U.S. 367. However, such an assumption would be incorrect because it overestimates the degree of latitude the FCC is given in regulating programming content, which is diminishing as the media landscape evolves. To whatever extent a general reference to the "public interest" standard might have permitted certain types of content regulation in the past, courts have begun to reduce the latitude given the FCC with passage of time and changing conditions. [56] Any new regulations imposed on product placement would receive intense constitutional scrutiny.

It has been thirty-nine years since the Supreme Court decided *Red Lion*, a case based on "'the present state of commercially acceptable technology' as of 1969." [57] Since then, both Congress and the FCC have found that the media marketplace has undergone vast changes. For example, the legislative history to the Telecommunications Act of 1996 suggested that the traditional justifications for the FCC's regulation of broadcasting require reconsideration. The Senate Report noted that "[c]hanges in technology and consumer preferences have made the 1934 [Communications] Act a historical anachronism." It explained that "the [Communications] Act was not prepared to handle the growth of cable television" and that "[t]he growth of cable

---

[56] *See*, *e.g.*, *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999) (restrictions on casino advertising struck down without reference to *Red Lion*); *Radio-Television News Directors' Ass'n v. FCC*, 229 F.3d 269 (D.C. Cir. 2000) (*per curium*) (personal attack and political editorial rules struck down because of tension with First Amendment). Reviewing courts have noted that the "power to specify material the public interest requires or forbids to be broadcast … carries the seeds of the general authority to censor denied by the Communications Act and the First Amendment alike." *Anti-Defamation League of B'nai B'rith v. FCC,* 403 F.2d 169, 172 (D.C. Cir. 1968) ("the First Amendment demands that [the FCC] proceed cautiously [in reviewing programming content] and Congress … limited the Commission's powers in this area"). *See also Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1443 (8th Cir. 1993) (*en banc*) (Arnold, C.J., concurring) ("There is something about a government order compelling someone to utter or repeat speech that rings legal alarm bells.").

[57] *News America Publ'g, Inc. v. FCC*, 844 F.2d 800, 811 (D.C. Cir. 1988) (quoting *Red Lion*, 395 U.S. at 388). *See Meredith Corp. v. FCC*, 809 F.2d 863, 867 (D.C. Cir. 1987) ("the Court reemphasized that the rationale of *Red Lion* is not immutable"). *See also Banzhaf v. FCC*, 405 F.2d 1082, 1100 (D.C. Cir. 1968) ("some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets").

programming has raised questions about the rules that govern broadcasters" among others.[58] The House of Representatives' legislative findings were even more direct. The House Commerce Committee pointed out that the audio and video marketplace has undergone significant changes over the past 50 years "and the scarcity rationale for government regulation no longer applies." Communications Act of 1995, H. Rep. No. 104-204, at 54 (1995).

The FCC has reached similar conclusions over the years. In the mid-1980s, for example, the Commission "found that the 'scarcity rationale,' which historically justified content regulation of broadcasting … is no longer valid."[59] More recently, in complying with the congressional mandate to conduct a biennial review of broadcast regulations, the FCC again found that the media landscape has been transformed.[60] It concluded that "the modern media marketplace is far different than just a decade ago," finding that traditional media "have greatly evolved" and "new modes of media have transformed the landscape, providing more choice, greater flexibility, and more control than at any other time in history." *Id*. at 13647-48.

Since then, an FCC staff report picked up where the 1987 Fairness Doctrine decision left off and concluded that the spectrum scarcity rationale "no longer serves as a valid justification for the government's intrusive regulation of traditional broadcasting."[61] It criticized the logic of

---

[58] Telecommunications Competition and Deregulation Act of 1995, S. Rep. No. 104-23, at 2-3 (1995).

[59] *Meredith Corp.*, 809 F.2d at 867 (citing *Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees*, 102 FCC.2d 143 (1985) ("*1985 Fairness Doctrine Report*")). *See Syracuse Peace Council v. FCC*, 867 F.2d 654, 660-66 (D.C. Cir. 1989) (discussing *1985 Fairness Doctrine Report* and upholding FCC's decision to repeal the fairness doctrine).

[60] *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd. 13620, 13623 (2003) ("*Biennial Regulatory Review*").

[61] John W. Berresford, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed* (Media Bureau Staff Research Paper, March 2005) at 8. FCC staff

the scarcity rationale for content regulation and added that "[p]erhaps most damaging to The Scarcity Rationale is the recent accessibility of all the content on the Internet, including eight million blogs, via licensed spectrum and WiFi and WiMax devices." Content regulation "based on the scarcity of channels, has been severely undermined by plentiful channels." [62]

People coming of age in this environment enjoy an "extraordinary level of abundance in today's media marketplace" and thus "have come to expect immediate and continuous access to news, information, and entertainment." *Biennial Regulatory Review*, 18 FCC Rcd. at 13648. To the extent the Commission must justify any heightened sponsorship identification requirements, it will be exceedingly difficult in the current media marketplace to fashion credible findings that the broadcast medium operates in a condition of scarcity. In this connection, reviewing courts would not be required to defer to the policymakers' findings. [63]

In this context, it is far from a foregone conclusion that the Supreme Court (or, for that matter, other reviewing courts) would accept the technological assumptions upon which *Red Lion* is based. Recent cases suggest that reviewing courts will closely scrutinize any new regulation of broadcast content. In *MPAA v. FCC*, the D.C. Circuit vacated the Commission's video description rules. 309 F.3d 796. Although the court analyzed only the question of whether the FCC had been given statutory authority to adopt the rules, it explained that it interpreted the Commission's powers narrowly because any regulation of programming content "invariably

---

research papers are unofficial studies and do not necessarily reflect the position of the Media Bureau or the Commission.

[62] *Id*. at 11. The report also concludes that alternative rationales for broadcast content regulations are similarly flawed. *Id*. at 18-28. For a more comprehensive discussion of various justifications for broadcast content regulation, *see* Robert Corn-Revere, ed., RATIONALES AND RATIONALIZATIONS (Media Inst. 1997).

[63] *Playboy Entm't Group*, 529 U.S. at 817-818; *Sable Commc'ns*, 492 U.S. at 129 ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.") (citation omitted).

raise[s] First Amendment issues." *Id*. at 805. The same conclusion follows from the D.C. Circuit's decision in *RTNDA v. FCC*, where the court ordered the Commission to repeal the personal attack and political editorial rules. 229 F.3d 269. There, the court held that the FCC had the burden to justify rules that "interfere with editorial judgment of professional journalists and entangle the government in day-to-day operations of the media." *Id*. at 270 (it is "incumbent upon the Commission to 'explain why the public interest would benefit from rules that raise these policy and constitutional doubts'") (citation omitted). Because of constitutional concerns, the court was unwilling to allow the FCC to continue to enforce the content restrictions (that already had been subject to protracted review) while the Commission assessed their validity.

Other circuit court opinions have raised similar questions. In *Lutheran Church-Missouri Synod v. FCC*, the D.C. Circuit invalidated FCC equal employment opportunity rules that were predicated on promoting diverse programming. 141 F.3d 344 (D.C. Cir. 1998). Although the court did not analyze program content regulation based on spectrum scarcity, it noted the dilemma the FCC faces if it is either too general or too specific when it attempts to regulate programming. It observed that the notion of "diverse programming" may be "too abstract to be meaningful," but that "[a]ny real content-based definition of the term may well give rise to enormous tensions with the First Amendment." *Id*. at 354. Accordingly, the court struck down the FCC regulations as a violation of equal protection. The D.C. Circuit reached a similar conclusion in *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13 (D.C. Cir. 2001).

In short, the FCC must walk a First Amendment tightrope, and the line it must tread has been steadily narrowing. New disclosure requirements that would intrude on the editorial judgment of broadcasters and would undermine financial support for programming would face significant First Amendment scrutiny. As part of this process, it is difficult to believe that courts would defer to the FCC based on technological assumptions that are four decades old and that describe a media environment that is unrecognizable today.

B. Expanded Disclosure Requirements Would Not Survive First Amendment Scrutiny Under the Commercial Speech Doctrine

Even if the commercial speech doctrine were the applicable test in this proceeding, product placement regulations would be unlikely to survive judicial review. Any regulation of commercial speech must survive intermediate scrutiny as articulated by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 565-66 (1980). Assuming the speech in question is not misleading or deceptive, the government must show (1) there is a substantial government interest in regulating the speech, (2) the regulation directly and materially advances the government's interest, and (3) the regulation is no more extensive than necessary. *E.g.*, *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 176 (1999). In the case of product placement, the FTC already concluded that the practice is not deceptive, and the FCC does not seek to justify the proposed rules by suggesting otherwise. *NOI/NPRM* ¶ 7 n.38 (citing *FTC Product Placement Letter Ruling*). Here, the Commission has not specified what remedy it might adopt. But review of the proposed options strongly suggests they would not likely survive First Amendment review.

1. No Substantial Interest Justifies Increased Regulation of Product Placement

a. Generally

Although the *NOI/NPRM* and the petitions that prompted it contain much harsh language about the practice of product placement, there is little effort to delineate or identify an important governmental interest requiring the adoption of new rules. Shorn of the inflammatory rhetoric, the asserted interest to be served by expanded and intrusive sponsorship identification requirements boils down to protecting children and "the public's right to know who is paying to air commercial or other program matter on broadcast television and radio and cable." *NOI/NPRM* ¶ 1. Accordingly, the FCC has the burden to show there is a substantial need for more extensive disclosure requirements for product placement than already exist under the Commission's commercial prohibitions in children's television programming and under Section 317 and the Commission's rules and policies.

The government must go beyond "mere speculation or conjecture" and "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). In numerous cases, the Supreme Court has made clear it will not uphold restrictions on commercial speech backed only by "unsupported assertions," *Ibanez v. Florida Dept. of Bus. & Prof. Reg.*, 512 U.S. 136, 143 (1994), or even "anecdotal evidence and educated guesses." *Rubin v. Coors Brewing*, 514 U.S. at 490. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996). In this proceeding, therefore, simply expressing distaste for the practice of product placement is insufficient.

Courts have declined to accept the argument that new rules are required simply because a given practice has the *potential* to be misleading. As the Supreme Court has put it, "[w]ere we to accept [this] argument … we would have little basis for preventing the government from suppressing other forms of truthful and nondeceptive advertising simply to spare itself the trouble of distinguishing such advertising from false and deceptive advertising." *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626, 646 (1985). The Court is particularly suspicious of broad, prophylactic rules in this area, noting that "[t]he First Amendment protections afforded commercial speech would mean little indeed if such arguments were allowed to prevail." It is the burden of "would-be regulators," therefore, to distinguish "the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Id.*

The Commission has provided no basis for concluding that the alleged potential for product placement to be misleading is a sufficiently weighty interest for it to mandate more specific sponsorship identification requirements, dictate how and when an announcement must appear in a program, or require more frequent announcements. To put this into perspective, the Commission recently adopted rules to implement the WARN Act as indicated above, under which CMS providers may elect to transmit emergency alerts to the public. *See Commercial Mobile Alert System*, 23 FCC Rcd. 12561; WARN Act, *supra* at n.9 & 16. The Commission outlined the compelling governmental interest, noting that, "[a]s we have learned from recent disasters, including Hurricane Katrina in 2005 and the recent floods that have impacted our Midwestern and Southern states, it is essential to enable Americans to take appropriate action to protect their families and themselves from loss of life or serious injury." *Commercial Mobile Alert System*, 23 FCC Rcd. at 12562. Nevertheless, in adopting rules requiring CMS providers that elect not to transmit emergency alerts to provide "clear and conspicuous" notice at the point of sale of any CMS devices, the FCC found that specific requirements were unnecessary.

In other words, where the governmental interests involved include "situations of war, terrorist attack, natural disaster, or other hazards to public safety and well-being," it is not necessary for the government to dictate the form of the notice to consumers. Instead, the Commission declined "to adopt specific requirements, such as those put forth by [commenters] (*e.g.*, certain sized posters, type-size, brochures) for displaying the notification, preferring instead to allow carriers to create and position notifications that are consistent with the marketing and service notification methodologies in use at any given time by the service provider." *Id*. at 12568. By comparison, it strains credulity to believe that a sufficient governmental interest exists to rewrite sponsorship identification rules (and to expand their jurisdiction) over claims that viewers may miss notices that are already provided under current rules.

b. The FCC Cannot Justify Expanded Regulation of Product Placement Based on Paternalism

Much of the FCC's support for expanding regulation of product placement is misplaced because it stems from an overly paternalistic approach to broadcast regulation. For example, the *NOI/NPRM* cites the "policy goals underlying the Children's Television Act," and asks "what additional steps the Commission should take to regulate embedded advertising in programming directed at children." *NOI/NPRM* ¶ 16. Additionally, much of the rhetoric supporting expanded rules, both by advocates and Commissioners alike, stems from an interest in protecting children. As discussed above, the Act and the rules fully protect children. Therefore, the only result of adopting the rules sought by these proponents would be to treat adults as if they were children in protecting them from possible exposure to commercial matter.

Generally, the government may not assert a substantial or compelling interest in protecting children in order to sweep away adults' First Amendment rights, as "[a] speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001). For this reason, the Court struck down a federal ban on mailing unsolicited advertisements that promoted birth control. *See Bolger v. Youngs Drug*, 463 U.S. at 73-75. The Court reasoned that the restriction was more extensive than necessary, because the government may not "reduce the adult population … to reading only what is fit for children … and the level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." *Id*. at 73-74 (quoting *Butler*, 352 U.S. at 383 ("The incidence of this enactment is to reduce the adult population … to reading only what is fit for children")).

Arguments based on paternalism are insufficient to justify broad new regulations of commercial messages. In *44 Liquormart*, for example, the Supreme Court stressed that the government "does not [have] broad discretion to suppress truthful, non-misleading information for paternalistic purposes." 517 U.S. at 510. *See also Lorillard*, 533 U.S. at 563-64. Similarly, in *Thompson*, the Court addressed paternalism as a justification for commercial speech restrictions, stating, "[w]e have previously rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information." 535 U.S. at 375.

Such arguments cannot support regulation of all product placement on the theory that adults – like children – require something of a "separations policy" between programming and all sponsored matter. Commercial Alert's petition, for example, suggests that the FCC failed to enforce its Section 317 mandate in the case of a program like Big Brother 4 because the sponsorship identification said only that "'Big Brother 4 is sponsored by McDonald's'" but did not "hint that the embedded plugs within the show were in fact paid ads." Commercial Alert Petition at 16. Citing such arguments, the Commission asks whether the current practice of airing sponsorship identification announcements at the end of a program is sufficient, and whether such disclosures should be made before, after, and even during a program. However, the possibility that some audience members might sporadically miss an announcement, does not justify a constant barrage of disclosures to adult viewers. In the case of sponsorship identification, it simply is illegitimate to propose new regulations governing all product placement based on a policy adopted in a children's advertising rulemaking that "very young children" may not distinguish between program and commercial matter. *See supra* at 33-35.

2. Expanded Rules Would Not Serve the Asserted Interest

Once the Commission decides which of the proposed sponsorship identification rules to promote, it must prove it would be substantially more effective than the existing rules. As with other elements of the *Central Hudson* test, the government has the burden to prove that any proposed regulation would serve its asserted interest in a "direct and material way." This requires findings of fact and "evidentiary support" that the regulation "will significantly advance" the government's interest. *44 Liquormart*, 517 U.S. at 505-06. Thus, "a regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Greater New Orleans Broad.*, 527 U.S. at 188. This requirement is critical; otherwise the government "could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Id*. It cannot just point to "common sense," but must gather solid evidence to support its conclusions. *Coors Brewing*, 514 U.S. at 480; *Edenfield*, 507 U.S. at 770.

Under this standard, the government cannot simply assume a proposed regulation will be sufficient. In *Lorillard*, for example, the government failed to satisfy its burden to demonstrate that indoor point-of-sale advertising regulations would directly and materially advance its asserted goal of reducing underage use of tobacco products. 533 U.S. at 566. The Court found that banning such ads below five feet did not advance the government's goal because not all children are less than five feet tall, and those who are five feet tall can look up and see their surroundings. *Id*. If the Commission were to adopt new product placement notice requirements on the assumption that not all viewers may see existing notices, it cannot simply assume viewers will observe any "enhanced" notices. This is particularly true with technologies such as DVRs. If audience members skip material, they may skip the notices as well. In short, the Commission cannot base expanded sponsorship identification requirements upon mere unsupported speculation that they will solve a presumed problem.

Similarly, the Commission would not be able to demonstrate the effectiveness of proposed product placement regulations to the extent its jurisdiction is limited (as the law requires) just to broadcasting. Generally, courts will not sustain a restriction on commercial speech that provides "only ineffective or remote support for the government's purpose." *Greater New*

Orleans Broad., 527 U.S. at 188. Where, as here, the regulations would be riddled with jurisdictional waivers and exclusions, the rules would be unlikely to survive judicial review. In *Coors Brewing*, for example, the Supreme Court struck down a federal restriction on disclosing alcohol content on beer labels after finding that "exemptions and inconsistencies" regarding wine and distilled spirits "bring into question the purpose of the labeling ban." The Court concluded that the restriction could not directly and materially achieve its purpose. 514 U.S. at 489. *See Greater New Orleans Broad.*, 527 U.S. at 189 (holding ban on advertising casino gambling cannot achieve purpose where government policy simultaneously promotes tribal casino gambling and permits advertising state-run lotteries). The same conclusions would apply to regulations of product placement given the FCC's lack of jurisdiction generally.

3. Expanded Rules Would Be More Extensive Than Necessary

The First Amendment precludes the government from adopting regulations that are more extensive than necessary to serve the asserted interest. This is because "[i]f the First Amendment means anything, it means that regulating speech must be a last – not first – resort." *Thompson*, 535 U.S. at 373. Thus, the Supreme Court has "made clear that if the Government could achieve its interest in a manner that does not restrict speech, or that restricts less speech, the government must do so." *Id*. at 371. In applying this rule, the Court does not require a showing that the less restrictive means were in fact available or that they would work. It is sufficient if non-speech related means "might be possible here." *Id*. at 372. Significantly, *Thompson* confirmed that the government must consider obvious alternatives less burdensome to speech. *Id*. at 371.

This proceeding violates this principle from the very outset because it was initiated upon the assumption that new and redundant rules are necessary. Both the *NOI/NPRM* and statements by Commissioners begin with a presumption in favor of adopting new rules. Additionally, narrow tailoring requires the government to "carefully calculat[e] the cost and benefits associated with the burden on speech imposed by the regulations." *Lorillard*, 533 U.S. at 561-563. In *Lorillard*, for example, the Court held that a Massachusetts regulation prohibiting cigar and smokeless tobacco advertising within 1,000 feet of a school or playground was not a reasonable fit, as the government did not carefully calculate the costs and benefits of the regulation on speech. *Id*. at 562. The Court noted the state had failed to consider sufficiently the burdens imposed on advertisers, particularly retailers who may have limited alternative means to communicate with potential customers. *Id*. at 565. In this case, advertiser supported networks are facing fundamental shifts in technology that may threaten their future viability. Regulations imposed by this Commission that may undermine their ability to adapt to this highly competitive environment are particularly threatening. *See*, *e.g*., *Pitt News*, 379 F.3d at 106.

Expanded notice requirements as set forth in the *NOI/NPRM* would disrupt the delicate balance that FCC rules have attempted to strike for decades. As the Commission explained when it rejected a proposal for an advertising "detector signal," "ignoring the fundamentally commercial nature of the commercial broadcasting system is done at great risk." *Children's Advertising Detector Signal*, 100 FCC.2d ¶ 9. Just as the proposal in that proceeding would not have banned advertising, the potential regulations identified in the *NOI/NPRM* would not prohibit product placement (although some advocates seem to suggest such an outcome would be desirable). However, the regulations could hamper product placement and make it far less viable in the marketplace. In particular, contemporaneous notices would fill the screen with clutter and would be bothersome to the audience. Expanded notice requirements at the beginning and/or the end of programs, or notices of a specified size or duration, would cut into the time available for entertainment or informational programming. The Commission would risk such disruptions based on speculation that such requirements would get more audience members to notice sponsorship identification announcements than under current rules. The proposed regulations are more extensive than necessary to the extent they would create a redundant layer of administrative burdens for the industry. Moreover, the Commission has recognized in the past that duplicative notice requirements are burdensome and thus more extensive than necessary. *See*, *e.g.*, *Codification of Political Programming Policies*, 7 FCC Rcd. 1616 (eliminating audio notices for political ads). The same considerations apply here.

New regulations also would be more extensive than necessary because other means are readily available to serve the asserted interests. Just as new technologies such as DVRs (and older technologies such as VCRs) make it possible for members of the audience to skip advertisements, they also make it possible for those who wish to read notices to "freeze" them and read them at their leisure. Additionally, the courts have made clear that consumer education is constitutionally preferable to limits on speech. *44 Liquormart*, 517 U.S. at 507. If it is determined to take action, the Commission could undertake consumer education to bolster the public's growing awareness of product placement and integration practices. As the social science notes, "[i]ncreased familiarity will likely influence the individuals' ability to recognize a placement and manage" the effect it has on the audience. Bhatnagar, *Embedding Brands*, at 110. If the Commission believes that so momentous a policy change as the transition to digital television can be facilitated through consumer education, *see DTV Consumer Education Initiative*, 23 FCC Rcd. 4134 (2008), certainly such a less speech restrictive approach should be good enough to inform the public about product placement practices.

4. Contemporaneous Sponsorship ID Requirements Would be Unconstitutional as Compelled Speech

Although certain disclosure requirements are permissible under the commercial speech doctrine, they are limited to circumstances in which a commercial message is *actually* misleading or deceptive. *E.g.*, *Zauderer*, 471 U.S. at 651. That is not the situation with product placement, as the FTC recognized. *See FTC Product Placement Letter Order*. Accordingly, there is no permissible basis for the Commission to increase sponsorship identification requirements by mandating specific language for, the timing of, or the redundant placement of notices for product placements.

Such specific and/or repeated sponsorship identification requirements would exceed constitutional limits. As the Supreme Court recently observed, some of its "leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 61 (2006). Where a government requirement compels a disclosure that is overly burdensome, or that adversely affects a speaker's message, the measure is unconstitutional. *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006) ("Certainly we would not condone a health department's requirement that half of the space on a restaurant menu be consumed by the raw shellfish warning. Nor will we condone the State's unjustified requirement of the four square-inch '18' sticker."). *See Video Software Dealers Ass'n v. Schwarzenegger*, 401 F.Supp.2d 1034 (N.D. Cal. 2004) (likelihood of success on claim that labeling requirement is unconstitutional).

The same legal concerns apply to the potential FCC rules here, particularly if they mandate contemporaneous disclosures during programming. Such a requirement would be disruptive and conflict with the overall presentation of the programming. Similarly, a requirement for notices of a particular size or duration could significantly increase the time devoted to program credits to the exclusion of program material. Such regulations would be particularly disruptive for radio, since it is not possible for an announcer to "talk over" other programming material as is the case with visual material. As a consequence, a compelled labeling requirement in all such contexts would certainly run afoul of constitutional limits.

CONCLUSION

For the foregoing reasons, the Commission should decline to adopt the rules proposed in the *NOI/NPRM* as unnecessary, counterproductive, disruptive and in many instances potentially unconstitutional. The Commission should reject imposition of new requirements on sponsorship identification announcements, and should terminate the present inquiry by doing no more than clarifying how existing FCC rules, policies and examples apply to product placement.

Respectfully submitted,

American Advertising Federation
American Association of Advertising Agencies
Association of National Advertisers, Inc.
Beasley Broadcast Group, Inc.
CBS Corporation
Citadel Broadcasting Corporation
Debmar-Mercury
Discovery Communications, Inc.
Entercom Communications Corp.
Fox Entertainment Group
Greater Media, Inc.
Journal Broadcast Corporation
LIN Television Corporation
Motion Picture Association of America
NBC Universal, Inc.
Promotion Marketing Association
Viacom Inc.
The Walt Disney Company

By /s/ Robert Corn-Revere

Robert Corn-Revere
Ronald G. London
Amber L. Husbands
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Ave., N.W. Suite 200
Washington, D.C. 20006-3402
(202) 973-4200
Counsel

September 22, 2008

ATTACHMENT

National Media Providers

American Advertising Federation. Headquartered in Washington, D.C., the American Advertising Association ("AAF") is the trade association that represents 50,000 professionals in the advertising industry. AAF's 130 corporate members are advertisers, agencies and media companies that comprise the nation's leading brands and corporations.

American Association of Advertising Agencies. Founded in 1917, the American Association of Advertising Agencies ("AAAA") is the national trade association representing the advertising business in the United States. AAAA's nearly 450 members represent virtually all the large, multi-national advertising agencies, as well as hundreds of small and mid-sized agencies, which together maintain 13,000 offices throughout the country. Its membership produces approximately 75 percent of the total advertising volume placed by agencies nationwide.

Association of National Advertisers, Inc. The Association of National Advertisers, Inc. ("ANA") leads the marketing community by providing its members insights, collaboration and advocacy. ANA's membership includes over 350 companies with 9,000 brands that collectively spend over $100 billion in marketing communications and advertising annually in the U.S. The ANA strives to communicate marketing best practices, lead industry initiatives, influence industry practices, manage industry affairs and advance, promote and protect all advertisers and marketers. For more information, visit www.ana.net.

Beasley Broadcasting Group, Inc. Beasley Broadcast Group, Inc. owns 44 radio stations in 11 U.S. markets.

CBS Corporation. CBS Corporation ("CBS") is a media company with constituent parts that reach back to the beginnings of the broadcast industry, as well as newer businesses that operate on the leading edge of the media industry. It has operations in virtually every field of media and entertainment, including broadcast television (CBS and The CW – a joint venture between CBS Corporation and Warner Bros. Entertainment), cable television (Showtime Networks, CBS College Sports Network, and Smithsonian Networks), local television (CBS Television Stations), television production and syndication (CBS Paramount Network Television and CBS Television Distribution), radio (CBS Radio), video/DVD (CBS Home Entertainment), and motion pictures (CBS Films), as well as outdoor advertising and online operations.

Citadel Broadcasting Corporation. Citadel Broadcasting Corporation owns and/or operates 229 radio stations in more than 50 U.S. markets.

Debmar-Mercury. Debmar-Mercury is a worldwide production and distribution media company. It specializes in syndication, cable, network, video-on-demand/pay-per-view, and pay TV. Debmar-Mercury distributes movies featuring titles from Revolution Studios and Lionsgate.

Discovery Communications, Inc. Discovery Communications, Inc. ("Discovery") is the world's number one nonfiction media company reaching more than 1.5 billion cumulative subscribers in over 170 countries. Discovery empowers people to explore their world and satisfy their curiosity through 100-plus worldwide networks, led by Discovery Channel, TLC, Animal Planet, Science Channel, Planet Green, Investigation Discovery and HD Theater, as well as leading consumer and educational products and services, and a diversified portfolio of digital media services including HowStuffWorks.com.

Entercom Communications Corp. Entercom owns 110 radio stations in 23 U.S. markets.

Fox Entertainment Group. Fox Entertainment Group ("Fox") owns and operates businesses in all segments of broadcast, cable and film entertainment, including broadcast networks

(FOX and MyNetworkTV); 27 local television stations; an extensive collection of entertainment, news and entertainment cable programming networks (including Fox News, Fox Business Network, Fox Sports Net, Fuel, FX and National Geographic, among others); film and television studios (including Twentieth Century Fox Film and Twentieth Century Fox Television); and syndication (Twentieth Television).

Greater Media, Inc. Greater Media, Inc. owns 23 radio stations in 5 U.S. markets.

Journal Broadcast Corporation. Journal Broadcast Corporation owns and/or operates 11 television stations and 35 radio stations in 13 U.S. markets.

LIN Television Corporation. LIN Television Corporation owns and/or operates 28 television stations in 17 U.S. markets.

Motion Picture Association of America. The Motion Picture Association of America ("MPAA") is a trade association representing some of the world's largest producers and distributors of theatrical motion pictures, home entertainment, and television programming. MPAA members produce and distribute some of the world's most popular movies and television shows, including wide-release motion pictures; art, classics, and foreign language motion pictures; documentaries; and children's and educational programming. MPAA members include Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLLP; Walt Disney Studios Motion Pictures; and Warner Bros. Entertainment Inc.

NBC Universal, Inc. NBC Universal, Inc. (including its commonly controlled affiliates, such as NBC Telemundo License Co.) owns and operates multiple businesses in the broadcast, cable and film industries, including the NBC and Telemundo (Spanish-language) broadcast networks; 26 local television stations; a number of news and entertainment nonbroadcast channels (including MSNBC, CNBC, USA, Bravo, and Sci Fi, among others) exhibited by cable systems, direct broadcast satellite systems and other multichannel video programming distributors; film and television studios (including Universal Pictures, Focus Features, Rogue Pictures, and Universal Media Studios); and television syndication (NBC Universal Television Distribution).

Promotion Marketing Association. Established in 1911, the Promotion Marketing Association, Inc ("PMA") is the premier not-for-profit organization and resource for research, education and collaboration for marketing professionals. Representing the over $1 trillion integrated marketing industry, the organization is comprised of Fortune 500 companies, top marketing agencies, law firms, retailers, service suppliers and academia, representing thousands of brands worldwide. Championing the highest standards of excellence and recognition in the promotion and integrated marketing industry globally, PMA's objective is to foster a better understanding of promotion and integrated marketing and its role in the overall marketing process. The PMA is headquartered in New York City with its affiliate, the PMA Educational Foundation, Inc. Our founding principles are: Resources. Education. Networking. Community.

Viacom Inc. The Viacom Inc. family includes the multiplatform properties of MTV Networks, BET Networks, Paramount Pictures, Paramount Home Entertainment and DreamWorks. MTV Networks includes favorites like MTV, VH1, Nickelodeon, Nick at Nite, COMEDY CENTRAL, CMT: Country Music Television, Spike TV, TV Land, Logo and approximately 150 networks around the world. The BET Networks include BET, BET J, BET Gospel, BET Hip Hop, and BET International. Paramount Pictures Corporation provides audiences access to a huge library of films through Paramount Pictures, Paramount Vantage, MTV Films, Nickelodeon Movies, DreamWorks, and Paramount Home Entertainment.

The Walt Disney Company. The Walt Disney Company ("Disney"), together with its subsidiaries and affiliates, is a leading diversified international family entertainment and media enterprise. Disney's enterprises implicated by this rulemaking include the ABC Television Network, the ABC Owned Television Station Group, ESPN (80% owned by Disney), the Disney ABC Cable Networks Group (including Disney Channel, ABC Family, Toon Disney, and SOAPnet), Walt Disney Studios, and Miramax.