Legal Backgrounder

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WE INTERRUPT THIS PROGRAM . . .
IS FCC'S PRODUCT PLACEMENT & INTEGRATION PROPOSAL NECESSARY AND LEGAL?

by

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In June, the Federal Communications Commission ("FCC" or the "Commission") issued a Notice of Inquiry and Proposed Rule Making to solicit public comment as to whether its current sponsorship identification rules sufficiently address the escalating use of commercial messages in traditional television programming.[1] The FCC is primarily concerned with "embedded advertising,"[2] and has proposed rule changes designed to make the disclosures more obvious to the viewer.[3] It also proposes to extend the sponsorship identification rules to cable networks, whose programming was heretofore excluded from FCC oversight.[4]

The Commission has also opened an inquiry regarding the current state of advertising on both broadcast and cable television outlets, and whether the FCC should further amend its existing sponsorship identification rules to reflect changing advertising techniques.

These proposed changes, if adopted, will dramatically, and in the authors' view, negatively impact how producers of goods and services will advertise their wares, and will restrict the creative integration of these products and services within television programming itself. This LEGAL BACKGROUNDER discusses the Commission's concerns and proposed changes, and sets forth reasons why it should refrain from modifying the

[1] *See Notice of Inquiry and Notice of Proposed Rule Making*, MB Docket No. 08-90, adopted June 13, 2008, and released June 26, 2008 (hereinafter referred to as the "NOI/NPRM").

[2] The FCC defines the term "embedded advertising" as "situations where sponsored brands are included in entertainment programming." *See id.* at 1, n.1. The FCC uses the term "embedded advertising" to refer to both product placement and product integration.

[3] The FCC has proposed to modify the current disclosure rules to require sponsorship identification announcements to have lettering of a particular size, and to air for a particular amount of time, akin to the current disclosure requirements for political advertising. *Id.* at 10.

[4] Current FCC sponsorship identification requirements apply to broadcasters and to "origination cablecasting" by cable operators. 47 C.F.R. §§ 73.1212, 76.1615 (2008). The rules do not, however, apply to cable networks. "Origination cablecasting" is defined as "programming (exclusive of broadcast signals) carried on a cable television system over one or more channels and subject to the exclusive control of the cable operator." 47 C.F.R § 76.5(p).

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existing sponsorship identification rules. The changes proposed by the FCC neither address a clear public need nor provide the consumer with any protection not already adequately provided in the current rules. But first some background is necessary to provide context for our discussion.

The Current Rules. Current sponsorship identification rules require that broadcast licensees and cable system operators disclose any actual or promised payments they have received to include products or services in their programming. They must also identify at the time of airing the specific product advertised, and the entity making the payment, unless the mention of the product or services clearly serves to indicate sponsor identification.[5] The FCC has ruled that these sponsorship identification requirements apply to origination programming (or "cablecasting") by cable operators,[6] but to date, has not applied these rules to cable networks.

The FCC Notice of Inquiry and Proposed Rule Making. The Commission has expressed its concern that existing disclosure requirements may not sufficiently address "current trends in embedded advertising and the efficacy of the Commission's existing sponsorship identification rules in protecting the public's rights to be informed in light of these trends."[7] This concern was initially raised in a 2003 petition by Commercial Alert, in which it argued that a one-time sponsor identification mention during an entire program does not overcome the "subtle and complex efforts" on behalf of the advertiser to influence viewer perception.[8] The Commission's concerns were further prompted by the increased use of digital recording devices (DVRs) that permit viewers to skip traditional commercials, but not product "messages" integrated into the programming itself. Space constraints preclude a full enumeration of the various inquiries and proposals posed by the Commission. For our purposes, they can be summarized as attempts to ascertain (1) the frequency of embedded ads, (2) the extent to which broadcasters are placed on notice by producers that consideration has been paid, (3) whether there is a need for concurrent disclosures whenever a product is integrated into a program or placed onscreen, (4) whether such disclaimers would be unnecessarily disruptive of program content, (5) whether specific language, type size and onscreen disclosure time should be required and, (6) most important from a legal standpoint, whether the government's interest in protecting the public's need to know is sufficient to overcome the First Amendment guarantees enjoyed by advertisers, artists and producers of entertainment shows.[9] Finally, the Commission has requested comment as to whether it should extend its jurisdiction to cable networks with respect to matters of product placement and integration.[10]

Concurrent Disclosures. The possibility of a rule that would require concurrent disclosures whenever a program contains an embedded advertisement is of particular concern. In response to the FCC's inquiry, the Writers Guild of America, West, has urged the FCC to require concurrent disclosures "whenever a product is being mentioned, referred to and/or exhibited."[11] This would entail virtually constant disclosures on a reality

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[5]Additionally, the current rules require broadcasters to use reasonable diligence to obtain the information necessary from their employees and others they deal with for program material to make the required sponsorship identification announcements. 47 C.F.R. § 73.1212(b).

[6]*See Amendment of the Commission's Sponsorship Identification Rules* (Sections 73.119, 73.289, 73.654, 73.789 and 76.221), Report and Order, 52 F.C.C.2d 701 (1975), ¶ 37.

[7]NOI/NPRM at 8.

[8]Letter from Gary Ruskin, Executive Director, Commercial Alert, Re: Complaint, Request for Investigation, and Petition for Rulemaking to Establish Adequate Disclosure of Product Placement on Television, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 4 (Sept. 30, 2003). Posted at www.commercialalert.org.

[9]NOI/NPRM at 8-11.

[10]*Id*.

[11]Press Release, Writers Guild of America, West (the "Guild"), WGAW Responds to FCC's NPRM on Product Integration, Calls for Real-Time Disclosure (June 26, 2008). The Guild's president, Patric M. Verrone, has also written FCC chairman Kevin Martin to ask for real-time labeling in the form of a crawl across the bottom of the screen. Letter from Patric M. Verrone, President, Writers Guild of America, West, to Kevin Martin, Chairman, Federal Communications Commission (June 24, 2008).

show like *American Idol*, and frequent disclosure interruptions of any scripted entertainment that mentions, refers to, or exhibits a product. Such a requirement would violate the First Amendment, is unnecessary because the current rules sufficiently protect consumers, and would be difficult, if not impossible, to monitor.

First Amendment Concerns. It is well settled that a balance must be drawn between the government's legitimate need to protect its citizenry and the rights of free speech enjoyed by advertisers, creative artists and commercial entities alike.[12]

Clearly, the rights of advertisers to display their products within entertainment programming and the rights of producers to include branded products in a seamless and creative manner within a show must be balanced against the consumer's right to know whether the products and services being displayed onscreen have been bought and paid for by the advertiser. The Commission will not likely withstand a constitutional challenge if it adopts a disruptive concurrent notice requirement. This requirement is not narrowly tailored to fit the government's stated purpose of protecting the consumer's right to know and less restrictive means are available to achieve the desired goal.

A requirement that mandates flagging products each and every time they appear onscreen would unnecessarily impede editorial discretion and would almost certainly disrupt programming with little appreciable viewer gain in return.

A concurrent disclosure requirement would grossly interfere with the editorial discretion of programmers who may seek to include branded products in their programming as the natural part of a plot element, or where the inclusion of a branded product is nothing more than a random occurrence where a director may choose to use a branded product as opposed to a fake "generic" one. Such references would be impossible to distinguish from paid product integrations in which scenes are rewritten or otherwise altered with a particular brand in mind. By requiring concurrent disclosures each and every time a brand is mentioned or displayed, the Commission could create a cause of action in instances where the exposure of a product is actually a plot element or a random occurrence, as opposed to a brand-initiated integration, irrespective of whether or not consideration was received.

The FCC suggests that the fact that some programmers currently run crawls unrelated to the main programming on the bottom of the television screen belies the First Amendment argument.[13] The FCC's suggestion is disingenuous. There is a clear distinction between crawls and other promotional devices that are inserted into programs at junctures where the producers have deemed such insertions appropriate and nondisruptive, and mandated disclosures that must be made each and every time a product is onscreen.

The government interest in protecting the viewer is sufficiently addressed by the current sponsorship identification rules. If a viewer would like information regarding the embedded advertisements in a given program, this information is made available during the program credits. Moreover, the viewer's interests are protected as broadcasters and cable networks must ensure that product integrations and product placements comply with Section 5 of the Federal Trade Commission Act's prohibition on unfair or deceptive advertising.[14] It is doubtful that viewers will be harmed if additional "protective" rulemaking by the FCC is abandoned. No clear evidence has been presented that product placement or integration, whether evident or not, has adversely affected viewer program enjoyment or buying habits. Nor is there any empirical evidence indicating that consumers are unaware that product placements and integrations are paid for by the advertiser. Indeed, given the robust use and increasing popularity of embedded advertising, it is likely that the vast majority of consumers are well aware of the fact that such placements have been secured on a pay-to-play basis. An overly intrusive concurrent identification requirement will serve only to disrupt viewing enjoyment with information of dubious

[12]*See, e.g., Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980). ("If the communication is neither misleading nor related to unlawful activity . . . [t]he State must assert a substantial interest to be achieved by restrictions on commercial speech.").

[13]NOI/NPRM at 9.

[14]15 U.S.C. § 45.

value.

Many of the other changes proposed by the Commission would likewise constitute an unjustified expansion of the FCC's domain into the realm of protected commercial speech. The Commission's proposal to modify the current disclosure rules to require sponsorship identification announcements to have lettering of a particular size, and to air for a particular amount of time, is unwarranted and unnecessary, if for no other reason than it will further limit producers' time for the already shrinking creative and entertaining elements of their shows. American programming is already overburdened with numerous and prolonged commercial breaks. To further exacerbate these time constrictions is unwarranted – and not in the public interest. Moreover, there is preliminary research to indicate that consumers are highly cynical about government regulation of advertising, indeed, even more cynical than they are about the ability of advertisers to self-regulate.[15] This same research also indicates that consumers believe they possess the "marketing savvy" skills necessary to counter any possible influences of embedded advertising.[16] Further, the proposed extension of the sponsorship identification rules to cable networks would signify an appreciable shift in the FCC's jurisdiction, a shift that could extend past the sponsorship identification rules and into other areas, such as indecency regulation. A shift in the FCC's jurisdiction over content aired by cable networks requires far more consideration than what is presented in the NOI/NPRM. Finally, the FCC's proposed changes may, as a practical matter, be impossible to comply with, particularly during programs in which there are numerous sponsors to disclose.

Self-Regulation. Sufficient disclosure of embedded advertising can be achieved under the current regulatory framework. We encourage the industry to address the FCC's concerns by continuing to self-regulate. Many cable networks already voluntarily comply with the sponsorship identification rules as applied to broadcasters. Broadcasters and cable networks could work together to promulgate self-regulatory guidelines, which could improve upon the current practice of providing sponsorship identification during a program's closing credits. For instance, these credits could be restored to the full screen size, and slowed down to assist the viewer with identifying a program's sponsors.

Conclusion. Many of the Commission's concerns seem to stem from a perspective that viewers are not sophisticated enough to appreciate that advertisers often pay to have their products embedded in televised entertainment. Even if viewers somehow fail to grasp this arrangement, there is no indication that the current rules have failed to protect viewers from harm or that their buying habits have been affected in any way. The Commission must recognize that embedded advertisements provide advertisers with a legitimate forum to demonstrate their wares and are a valuable source of income to producers. Consumers also reap the rewards in the quality entertainment that embedded ads help to fund.

[15]Research currently being performed at Iowa State University for an upcoming, yet unpublished, article.

[16]*Id.*

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