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I. INTRODUCTION

The advertising industry increasingly relies on embedded advertising in the contemporary media landscape to reach consumers. The scope of embedded advertising in today's marketplace raises significant concerns and complicated First Amendment questions regarding the type of regulation needed to best suit the interests of all parties concerned. While many critics argue that increased sponsorship identification regulations would inhibit First Amendment rights and harm the modern consumers' viewing experiences, this Note argues that the negative consequences stemming from embedded advertising are far more threatening than any potential negative consequences that the increased regulation might have on First Amendment rights and the interests of venture consumers. Thus, this Note contends that the FCC needs to revise its sponsorship identification rules to address the growth and implications of embedded advertising in the contemporary media landscape.

Part II of this Note defines embedded advertising, providing insight into exactly what this phenomenon is today. Part III describes the development of embedded advertising and its effect on the advertising mainstream. Part IV outlines the history of sponsorship disclosure law and its inability to regulate in the current media marketplace and discusses the FCC's 2008 Notice of Inquiry ("NOI") and Notice of Proposed Rule Making ("NPRM") regarding the potential revision of its sponsorship identification rules. Part V identifies criticism facing increased regulation of embedded advertising. Part VI concludes that the FCC needs to revise its rules to avoid the numerous undesirable consequences caused by embedded advertising today. Revising the law to more effectively regulate within the current media mainstream would better serve society's interests as a whole.

II. EMBEDDED ADVERTISING: DEFINING THE PHENOMENON

Carrie Bradshaw typed her weekly column on a Mac, while she dreamed of Manolo Blahnik Mary Janes in the hit series *Sex and the City*.[1] In the film *Demolition Man*, the character Lenina Huxley explained that the only restaurants in 2032 are Taco Bells, which won the franchise wars.[2] And on *30 Rock*, after discussing the virtues of Verizon Wireless, Liz Lemon looked straight into the camera and asked, "Can we have our money now?"[3] Embedded advertising can take many forms, but it is generally

1. *Sex and the City: A Vogue Idea* (HBO television broadcast Feb. 3, 2002).
2. DEMOLITION MAN (Warner Bros. 1993).
3. *30 Rock: Somebody to Love* (NBC television broadcast Nov. 15, 2007).

defined as the inclusion of sponsored brands into entertainment media content.[4]

"Product placement" and "product integration" are the two terms used most interchangeably with embedded advertising.[5] While both refer to embedded advertising, product placement and product integration are two distinct advertising practices. Broadly defined, product placement is the insertion of "branded products into programming in exchange for fees or other consideration."[6] Narrowly defined, product placement is the placement of a visual or aural reference to a commercial product, brand, or service in media content as a prop.[7] Product integration is the prominent positioning of a commercial product, brand, or service into media content.[8] Instead of a mere glimpse of or reference within the program, the product, brand, or service is substantially integrated into the storyline of the program in exchange for consideration or another anticipated benefit.[9] While product placements can often be overlooked by consumers, product integrations are rarely missed.[10] Frequently, media content contains both product placements and product integrations.

The purpose of all embedded advertising "is to draw on a program's credibility in order to promote a commercial product by weaving the product into the program."[11] Embedded advertising is not designed to be deceitful, false, or subliminal—the objective of advertisers who use

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4. Sponsorship Identification Rules & Embedded Advert., *Notice of Inquiry & Notice of Proposed Rule Making*, 23 F.C.C.R. 10682, at para. 2 (2008) [hereinafter *Sponsorship Identification Rules NOI/NPRM*].

5. The terms "stealth advertising" and "covert sponsorship" have negative connotations of being deceptive and are, therefore, used most commonly by critics of embedded advertising. The relatively few legal scholars who have studied embedded advertising believe that it is under-regulated. Ineffective regulation, they claim, is deeply troubling because corporations may, with legal impunity, deceptively pitch products to trusting viewers. Zahr Said, *Embedded Advertising and the Venture Consumer,* 89 N.C. L. REV. 99, 107–10 (2010).

6. *Sponsorship Identification Rules NOI/NPRM*, *supra* note 4, at para. 2 n.2. While "embedded advertising" is most often referred to as the inclusion of products, brands, and services into "programming" or a "program," it is important to recognize that embedded advertising can be included in media that does not necessarily have "programming." Therefore, the term "media content" is more appropriate. *See generally* Said, *supra* note 5, at 113–14.

7. *See* Said, *supra* note 5, at 110.

8. *See id.*

9. *See id.* at 110. In order to avoid falling within the scope of disclosure regulation of 47 U.S.C. § 317(a)(1), the consideration given to program producers in an embedded advertising deal is often not monetary. *See, e.g.*, *id*. at 153 (mentioning guarantees of adbuys as another form of consideration).

10. *Id.*

11. *Sponsorship Identification Rules NOI/NPRM*, *supra* note 4, at para. 2.

embedded advertising is to "ensure that the brand or product is seen, as much and overall as clearly as possible."[12] To achieve this, advertisers utilize numerous embedded advertising methods, including four types of product placements: classic, institutional, evocative, and stealth.[13]

Classic placement is the most traditional product placement technique, merely requiring a shot of the product at some point during the program.[14] Classic placement of products is expertly incorporated within the hit series *Mad Men*. For example, in the fourth season, Smirnoff becomes the characters' vodka of choice.[15]

Institutional, or corporate placement, is even easier to implement than classic placement because it "prioritizes the brand over the product;" thus, no products are required.[16] In the series *Heroes*, the character Hiro teleports himself into Times Square and stands looking at the advertisements flashing on the billboards—the brands of Bank of America, Virgin, and Marriott are all shown.[17] This scene exemplifies institutional placement, as none of the billboards show a specific product, but the consumer is exposed to the brands.

Evocative placement, on the other hand, is difficult to successfully employ and is impossible to use for certain products because it is so discreet.[18] Evocative placement occurs when the brand is never

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12. JEAN-MARC LEHU, BRANDED ENTERTAINMENT: PRODUCT PLACEMENT & BRAND STRATEGY IN THE ENTERTAINMENT BUSINESS 6 (2007).

13. *Id.* at 9.

14. *Id.* (This technique "has existed since the [product placement] technique was first originated.").

15. *Mad Men* (AMC television broadcast 2010). Classic placement is also easily utilized in other media. *See, e.g.*, LADY GAGA, *Telephone*, YouTube (Mar. 15, 2010) http://www.youtube.com/watch?v=EVBsypHzF3U (integrating products including Diet Coke, Virgin Mobile, Miracle Whip, and Wonder Bread); Constance L. Hays, *Math Book Salted with Brand Names Raises New Alarm*, N.Y. TIMES, Mar. 21, 1999, http://www.nytimes.com/1999/03/21/business/math-book-salted-with-brand-names-raises-new-alarm.html?pagewanted=all&src=pm (containing problem sets like the following: "Will is saving his allowance to buy a pair of Nike shoes that cost $68.25. If Will earns $3.25 per week, how many weeks will Will need to save?") (quoting KAY MCCLAIN, MATHEMATICS: APPLICATIONS AND CONNECTIONS (1999).

16. LEHU, *supra* note 12, at 10.

17. *Heroes: Genesis* (NBC television broadcast Sept. 25, 2006). Another example of institutional placement was a recent tweet by Michael Vick, "Looking at Thanksgiving recipes on @Chobani Kitchen site!" Darren Rovell, *Paid Tweets Are a Gray Area for Athletes and Celebrities*, CNBC (Oct. 26, 2011, 1:57 PM), http://www.cnbc.com/id/45046738. While both Vick and Chobani maintain that this was not an instance of product placement, this is an example of how advertisers can insert brand references into the content of Twitter posts by athletes and celebrities, thereby blurring the line between advertisement and content.

18. LEHU, *supra* note 12, at 11.

referenced—either aurally or visually.[19] Instead, only the product itself is shown, thus requiring the product to be sufficiently unique for the evocative placement to work.[20] For example, in *The Pursuit of Happyness*, Will Smith's character is seen playing with a Rubik's Cube; despite not having an obvious logo, a Rubik's Cube is a very distinct product.[21]

Finally, stealth placement is extremely discreet and frequently overlooked; however, it often causes a powerful impact when finally identified in credits.[22] Stealth placement often includes costumes, make-up, or hair-styling.[23]

These are just four representative examples of the versatility of embedded advertising in the media marketplace today, and the growing prevalence of its use in both traditional and nontraditional media.

III. DEVELOPMENT OF EMBEDDED ADVERTISING: A MAJOR SHIFT IN THE ADVERTISING MAINSTREAM

Embedded advertising is not a new phenomenon. While more intricately linked within the contemporary media marketplace, "[m]arketing and entertainment have always been allies, especially in the United States."[24] Although embedded advertising can be shown in other media prior to the radio,[25] the practice of including commercial products and brands in entertainment programming became more common after the first radio program broadcast in 1906.[26] By 1929, advertising agencies

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19. *Id.*

20. *Id.*

21. THE PURSUIT OF HAPPYNESS (Columbia Pictures 2006); *see also* LEHU, *supra* note 12, at 11.

22. LEHU, *supra* note 12, at 12.

23. *Id.* ("The same is true of Tom Cruise's blow-dried hair by Lyndell Guiyou in *The Firm* (Sydney Pollack, 1993), of Julia Roberts's make-up applied by Richard Dean in *America's Sweethearts* (Joe Roth, 2001), or even the Westmore cosmetics that brightened the faces of Hollywood stars in innumerable films and series."). *Id.*

24. *Id.* at 23.

25. For example, *The Pickwick Papers* by Charles Dickens contained embedded advertising. CHARLES DICKENS, THE POSTHUMOUS PAPERS OF THE PICKWICK CLUB (1837). *See also* Jay Newell, et al., *The Hidden History of Product Placement*, 50 J. OF BROAD. & ELEC. MEDIA. 575, 579 (2006) ("The Pickwick name was taken from a London-to-Bath carriage line of Dickens's time. The carriage line makes a cameo appearance in the story, and the coincidence of the title character riding in a carriage with his name painted on the outside is the center of one of the stories . . . [T]he illustrator, Phiz, included a partly seen logo for Guinness Dublin Stout in a pub scene.") (citations omitted).

26. *See History of Radio Information,* TELEPHONING.ORG, http://www.telephoning.org/radio/encyclopedia.htm (last visited Apr. 10, 2012) ("On Christmas Eve 1906, Reginald Fessenden used a synchronous rotary-spark transmitter for the first radio program broadcast, from Ocean Bluff-Brant Rock, Massachusetts. Ships at sea heard a broadcast that included Fessenden playing *O Holy Night* on the violin and reading a passage from the Bible.").

were financing or producing 55 percent of radio programs in the United States.[27]

As programming like the *Kraft Music Hall*, which was a variety program that featured top entertainers and was sponsored by Kraft, transitioned from radio to television, so did the focus of advertisers using embedded advertising.[28] Advertisers now spend much more of their advertising budget on embedded advertising in television programs.[29] Movies also became an integral medium for advertisers after the enormous success of Reese's Pieces in Steven Spielberg's *E.T.* in 1982.[30]

The practice of embedded advertising is now firmly entrenched in the entertainment industry and is growing in prevalence.[31] As consumers increasingly rely on alternative viewing platforms like DVRs, TiVo, Hulu, and illegal downloads, advertisers are escalating the number of embedded advertising deals made with media.[32] These technological advances allow viewers to skip traditional advertisements in prerecorded material.[33] Thus, current consumers are less likely to be persuaded by advertisements in the traditional thirty-second and sixty-second television programming formats.[34] In response, from late 2006 to 2008, the average television program went from "ten brand references in it to having fifty; [with] outliers [having] as many as 1,000 references per show."[35]

Embedded advertising is usually mutually beneficial for both advertisers and television program producers.[36] Advertisers are able to

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While the first, recognized public entertainment broadcast aired in 1947, there were radio programs broadcast prior, of which advertisers took advantage. *See, e.g.*, *Little Orphan Annie* (debuting on April 6, 1941). This children's show was sponsored by Ovaltine.

27. LEHU, *supra* note 12, at 23.

28. *See* Ann K. Hagerty, Note, *Embedded Advertising: Your Rights in the TiVo Era*, 9 J. MARSHALL REV. INTELL. PROP. L. 146, 148 (2009); *see generally* LEHU, *supra* note 12, at 23.

29. *See* Sandra Lee, Note, *Product Placement in the United States: A Revolution in Need of Regulation*, 26 CARDOZO ARTS & ENT. L.J. 203, 207–08 (2008).

30. *See, e.g.*, Scott Shagin & Matthew Savare, *Lawyering at the Intersection of Madison and Vine: It's About Brand Integration*, 23 ENT. & SPORTS LAW. 1, 32 (2005) ("Within several months of the movie's theatrical release, sales of the candy surged 65 percent.").

31. *See* Lee, *supra* note 29.

32. *See* Hagerty, *supra* note 28, at 146 (2009).

33. *Id.* at 147.

34. Joseph Lewczak & Anne DiGiovanni, *"Enhanced" FCC Regulation of Product Placement Would Breach Free Speech Rights*, 25 WLF LEGAL BACKGROUNDER 1, 1 (2010), *available at* http://www.wlf.org/publishing/publication_detail.asp.

35. Said, *supra* note 5, at 112 (citing Alana Semuels, *Tracking Embedded Ads: Research Firm Nielsen Seeks to Gauge Product Placement on TV*, L.A. TIMES, July 21, 2008, at C1).

36. *Id.* at 153.

carefully choose which television content should incorporate their brands or products, while program producers are able to maximize commercial value and profits by soliciting different companies to embed within their shows.[37] Controversially, embedded advertising is now even present in news programming, through television stations' use of video news releases ("VNRs"), which are prepackaged news stories produced by corporations, the government, and other entities.[38] VNRs are designed to be indiscernible from normal news stories, and television stations use them to fill empty time slots in their newscasts.[39]

Embedded advertising is growing more prevalent not only due to increased usage in television programs and movies, but also in other media. While embedded advertising generally describes the insertion of a product or brand into a film or televised series, it is now normal to find such commercial inclusions within other cultural vehicles, such as songs, blogs, novels, video games, and social media outlets like Twitter.[40] Even school textbooks are not immune to embedded advertising.[41]

Because of the increasing frequency of blurring between advertising and editorial and program content in different media through embedded advertising, it is essential that regulations affecting embedded advertisements are up-to-date and firmly established.

IV. SPONSORSHIP IDENTIFICATION REGULATION AND ITS CURRENT INABILITY TO REGULATE

A. Historical Background

Fears have motivated the development of embedded advertising regulation.[42] Embedded advertising is governed primarily by sponsorship disclosure law, which has been in effect in some form for nearly a century.[43] In 1912, the Newspaper Publicity Act was enacted by Congress. It required print media—newspapers and magazines—to provide reading notices that identified paid advertisements within their contents.[44] Fear that print media was "benefit[ing] from advertiser revenues while capturing the

37. *Id.*

38. Amit Schejter, *"Jacob's Voice, Esau's Hands": Transparency as a First Amendment Right in an Age of Deceit and Impersonation*, 35 HOFSTRA L. REV. 1489, 1495 (2007).

39. *Id.*

40. *See* Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 95 (2006).

41. Hays, *supra*, note 15.

42. *See* Said, *supra* note 5, at 125–26.

43. *Id.*

44. *Id.* at 125; *see also* Goodman, *supra* note 40, at 98.

benefits of governmental subsidies, thus earning a kind of windfall" was the chief motivation behind the legislature's decision to pass the narrowly-scoped Newspaper Publicity Act.[45]

Congress's first effort to require sponsorship identification from broadcasters was the Radio Act of 1927.[46] Legislators feared that the media would become a tool of advertisers—used for mass dissemination of advertisements for products and brands.[47] Thus, under Section 19 of the Radio Act, if any content of a broadcast by any radio station was "directly or indirectly paid, or promised to or charged or accepted by" a corporate sponsor, then the station was required to announce that sponsorship at the same time the broadcast aired.[48] However, the blatant nature of the sponsorship of the initial radio broadcasting era meant that the Radio Act's sponsorship identification provisions went largely unenforced.[49]

However, as broadcasting became more popular and sponsorship became less obvious, the Radio Act's regulations became more significant. The Communications Act of 1934 codified the Radio Act of 1927 without alteration to the Act's provisions.[50] But over the next two decades, Congress strengthened the regulations set out in the Communications Act to make it more effective in the changing media marketplace.[51] Initially, sponsorship of radio programming was blatant; as many sponsors' names appeared in the titles of the shows that they helped fund or produce.[52] But, the relationship between sponsors and radio programs changed during and after WWII.[53] Advertisers began purchasing smaller, cheaper spot advertising to play during the program, rather than sponsoring the entire program.[54] It was no longer transparent to listeners that the products, brands, and services mentioned in the program's content were paid for by advertisers.[55] Further concerns that the Communications Act's initial sponsorship identification rules were insufficient arose in the 1950s due to three issues: radio station disc jockeys were secretly taking payola to play

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45. Said, *supra* note 5, at 125.
46. *See, e.g.*, Goodman, *supra* note 40, at 98.
47. Said, *supra* note 5, at 126.
48. Radio Act of 1927, Pub. L. No. 69-632, § 19, 44 Stat. 1162 (repealed 1934).
49. Jacob J. Strain, Note, *Finding A Place for Embedded Advertising Without Eroding the First Amendment: An Analysis of the Blurring Line Between Verisimilar Programming and Commercial Speech*, 24 BYU J. Pub. L. 167, 171 (2009).
50. Said, *supra* note 5, at 126.
51. *See generally* Strain, *supra* note 49, at 173.
52. Goodman, *supra* note 40, at 98.
53. *Id.*
54. *Id.*
55. *Id.* at 99.

specific songs; the number of home televisions was skyrocketing; and game shows were rigging their games according to sponsors' requests.[56] The FCC amended and expanded the Communications Act of 1934 in an attempt to strengthen it against these issues.[57] Section 317 and Section 508 were designed specifically to govern the relationship between broadcasters and embedded advertising.[58]

Currently, Section 317 of the Communications Act requires broadcasters to make sponsorship identification announcements in any paid-for programming, while Section 508 requires broadcasters to report when any "money, service, or other valuable consideration" is provided for the inclusion of a product or brand in a television program.[59] The focus of this Note is on the FCC's sponsorship identification rules, which were enacted in the 1970s and primarily reiterate the disclosure requirements of the Communications Act.[60] These sponsorship identification rules, however, also require a sponsorship announcement once during a program in a manner that can be read or heard by an average consumer if there is no obvious connection between a commercial product appearing in the broadcast and its sponsor.[61] Together, the FCC's sponsorship identification rules and the Communications Act of 1934 act as the primary regulations currently governing embedded advertising and sponsorship disclosure in the contemporary media marketplace, although neither has been altered drastically since their inception.

B. *Current Regulation and Why It Fails*

The current sponsorship identification regulations are outdated and ineffective in governing the contemporary use of embedded advertising in broadcast television and are inapplicable to the other media also containing embedded advertisements. The FCC's sponsorship identification rules and the Communications Act of 1934 are ill-equipped to deal with current embedded advertising techniques, even though they are the primary regulations governing modern advertisers' use of embedded advertising.[62]

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56. *Id.*; *see* Strain, *supra* note 49, at 172–73 (defining payola as "a term used in the entertainment industry to describe clandestine payments to a producer to promote a product or brand name through a broadcast.").

57. Strain, *supra* note 49, at 173.

58. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 317, 508).

59. 47 U.S.C. §§ 317(a)(1), 508(a) (2006).

60. *See* 47 C.F.R. §§ 73.1212, 76.1615 (2010).

61. *Id.* § 73.1212(f). However, a sponsorship announcement is not required when there is an obvious connection between a commercial product and its sponsor. *See id.*

62. *See* Lee, *supra* note 29, at 214–19.

First, they are extremely limited in scope. Both emphasize the regulation of radio and television broadcasters even though Section 76.1615 of the FCC's sponsorship identification rules provides for the application of the disclosure requirements to origination cablecasting by a cable operator.[63] However, neither the FCC's sponsorship identification rules nor the Communications Act extends regulation to the growing markets beyond broadcast radio and broadcast and cable television.[64] The scope of disclosure law is limited not only in its application to embedded advertising in emerging media, but also in its application to a medium that has been popular with embedded advertisers since the 1970s: movies.[65] In 1963, the FCC adopted a Section 317 waiver for feature films "produced initially and primarily for theatre exhibition."[66] Only made-for-television movies are required to follow the sponsorship identification requirements of the FCC and the Communications Act even though around $2 billion was spent by advertisers to place embedded advertisements in movies in 2005 alone.[67]

The scope of the FCC's sponsorship identification rules is further limited by its language, which explicitly includes two exceptions to the

63. *See* 47 C.F.R. § 76.1615 (2010); s*ee also Sponsorship Identification Rules NOI/NPRM*, *supra* note 4, at para. 17. It is important to note, however, that the sponsorship identification rules do not apply to shows that were formerly on broadcast television that are now running in syndication on cable, because they are neither being shown on broadcast television, nor are they an original programming of cable. *See* Said, *supra* note 5, at 168.

64. *See, e.g.*, Applicability of Sponsorship Identification Rules, 40 F.C.C. 141 (1963) (providing examples of the types of situations in which the FCC's sponsorship identification rules apply—none of which include newer media, like video games or music videos). *See also* 47 C.F.R. §§ 73.1212, 76.1615 (2010); 47 U.S.C. §§ 317, 507 (limiting the scope of the sponsorship disclosure law to broadcast radio and broadcast and cable television). In 2010, the FTC adopted disclosure regulation for some social media, but there are still insufficient requirements to cover media like YouTube, where users can upload videos that have embedded advertising, whether the videos are television shows, movies, music videos, or another form of media, without regulation requiring disclosure. *See generally* Sonia K. Katyal, *Stealth Marketing and Antibranding: The Love That Dare Not Speak Its Name*, 58 BUFF. L. REV. 795, 847–48 (2010). While the users themselves may not be compensated for posting the videos, others can be. For example, if a clip of a television show is posted that contains product placements that would ordinarily require sponsorship identification during the program, that identification is probably not included in the posting on YouTube. Thus, advertisers get the benefit of their placement without having to compensate more than the original program producers. *See also* Press Release, Fed. Trade Comm'n, FTC Facts for Business, The FTC's Revised Endorsement Guides: What People Are Asking 2 (June 2010), http://business.ftc.gov/sites/default/files/pdf/bus71-ftcs-revised-endorsement-guideswhat-people-are-asking.pdf [hereinafter *FTC Facts for Business*].

65. *See* 47 C.F.R. § 73.1212(h). *See generally* Savare & Shagin, *supra* note 30.

66. *See* § 73.1212(h).

67. *See id. See also* Said, *supra* note 5, at 112.

disclosure requirements: obviousness and reasonably related.[68] The obviousness exception provides that "any 'broadcast matter advertising commercial products or services'" that states "the sponsor's corporate or trade name, or the name of the sponsor's product, *when it is clear that the mention of the name of the product constitutes a sponsorship identification*" does not have to provide the requisite sponsorship disclosure announcement.[69] The reasonably related exception creates a de facto safe harbor for property furnished to broadcasters without a charge or at a nominal charge in exchange for airtime.[70] It provides an exception unless the identification is beyond "an identification which is reasonably related to the use of such service or property on the broadcast."[71]

These exceptions are ambiguous and outdated.[72] In the contemporary marketplace, these exceptions fail to address the increasing number of media industry consolidations resulting in partnerships between advertisers and producers; the growing propensity for program content to act as a long commercial; and the new self-aware and ironic embedded advertisements.[73] The obviousness and reasonably related exceptions provide opportunities for modern advertisers to take full advantage of the system, so that more embedded advertisements are exempted from disclosure law than are covered by it.[74] By consolidating, advertisers and broadcasters are now capable of manipulating the content of programs in order to make frequent references to a product or brand reasonably related to the storylines.[75] The programs thus become the equivalent of long commercials, but because this extensive embedded advertising is still technically program content, it falls outside the scope of the FCC's sponsorship identification rules.[76] And if that same program uses those products, brands, or embedded advertising as a whole in an ironic, self-aware manner, then it would also fall under the obviousness exception, because in order to make fun of the embedded advertising, it would have to be apparent to viewers.[77]

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68. Said, *supra* note 5, at 127.

69. *Id.* at 128 (quoting 47 C.F.R. § 73.1212(f)).

70. *Id.*

71. 47 U.S.C. § 317(a)(1).

72. "Reasonably related" has had no "judicial or administrative elucidation," but rather has only been clarified by a set of thirty-six illustrations that the House Committee on Interstate and Foreign Commerce created. Obviousness has been explained only slightly better. Said, *supra* note 5, at 130.

73. *See id.* at 134, 138. Ironic embedded advertisements "point themselves out." *Id.* at 133.

74. *See generally id.* at 138.

75. *Id.*

76. *Id.* at 133.

77. Although exempted from the disclosure laws because it is a feature film produced

There are other, smaller scale influences on embedded advertising in today's media marketplace, but they are equally insufficient to effectively regulate embedded advertising. In June 2010, the Federal Trade Commission ("FTC") updated its endorsement regulations to address sponsored web content.[78] These new guidelines expand upon the preexisting law that deemed misleading an ad that "features an endorser who's a relative or employee of the marketer – or if an endorser has been paid or given something of value to tout the marketer's product . . . ."[79] The 2010 changes modernized the law to address the growing use of embedded advertising in online social media, where it is becoming commonplace for advertisers to compensate individuals—primarily celebrities—to post about their products or brands.[80] Today, the regulation requires clearer distinctions to be made by paid endorsers online, so that consumers can clearly delineate between sponsored advertisements and legitimate unpaid personal reactions.[81]

While this regulation provides up-to-date and effective guidelines that help balance advertisers' desire to use embedded advertising online with the need to protect consumers active in social media, the FTC has made it clear that it will not adopt laws to assist in the regulation of embedded advertising in television—broadcast or cable.[82] The FTC has jurisdiction over advertising only in cases where there is an unfair or deceptive act or practice that affects commerce and leads to substantial injury.[83] While in 2010 the FTC evidently believed that embedded advertising online posed enough of a threat of unfair and deceptive practices to require new

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for theatres, *Wayne's World* is a prime example of the use of self-conscious embedded advertising. WAYNE'S WORLD (Paramount Pictures 1992).

78. *See* Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.1–5 (2010).

79. *FTC Facts for Business*, *supra* note 64.

80. 16 CFR § 255.5. This expansion of regulation occurred because of controversies like the one about Kim Kardashian and her post about Carl's Jr. grilled chicken salads soon after filming a commercial for Carl's Jr. Kardashian tweeted "The Carl's Jr grilled chicken salads came out yesterday!! I'm on my way to Carl's Jr [sic] for lunch now . . . have you tried them yet?" TWITTER, @KimKardashian (Dec. 17, 2009). Despite rumors that she had received $10,000 for the tweet, both Kardashian and Carl's Jr. denied that she was paid; however, this example demonstrates the increasing blur between legitimate online social media posts and paid endorsements. *See, e.g.*, Elicia Dover, *Paid to Tweet? Rainn Wilson's Del Taco Promo Controversy*, ABC NEWS (Oct. 27, 2011, 1:43 PM), http://abcnews.go.com/ blogs/entertainment/2011/10/paid-to-tweet-rainn-wilsons-del-taco-promo-controversy/.

81. *See* 16 C.F.R. § 255.5.

82. *See* Letter from Mary K. Engle, Associate Director for Advertising Practices, FTC, to Gary Ruskin, Executive Director, Commercial Alert (Feb. 10, 2005), http://www.ftc.gov/os/closings/staff/050210productplacement.pdf.

83. 15 U.S.C. § 45 (2006).

regulatory control, the FTC has firmly declined to adopt new regulation to address the growing prevalence of embedded advertising in other media *unless* an advertisement is so embedded that its nature "tends to make product claims more believable to consumers and induce purchases under false pretenses."[84] Similarly, other federal and state trade laws, like Section 43(a) of the Lanham Act, are restricted because they also require a showing of false and deceptive advertising and harm to a consumer.[85]

The advertising industry has also set noncompulsory, self-regulatory guidelines concerning embedded advertising in certain contexts. For example, the Children's Advertising Review Unit ("CARU"), founded in 1974 and designed to promote responsible advertising practices when targeting children, has established discretionary guidelines, including those concerning the blurring of advertising and content in children's programs.[86] However, like the other regulations governing embedded advertising in today's media marketplace, the CARU guidelines are limited. They are not mandatory, and they are only applicable to children's programming on television and online.[87] Finally, even if advertisers and program producers strictly adhere to the guidelines, there is limiting language within the guidelines themselves: "This provision does not apply to the mere presence of a product or character in program/editorial content."[88]

C. *Call for Change—Potentially*

The FCC has recognized the shortcomings of its sponsorship identification rules and the failure of other regulations to fill in the gaps. On June 13, 2008, the FCC adopted a NOI that sought the public's comments on potential changes to the FCC's sponsorship identification

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84. Goodman, *supra* note 40, at 109; *see also* Engle, *supra* note 82.

85. Goodman, *supra* note 40, at 109.

86. These guidelines state:

> 1. Advertisers should recognize that children may have difficulty distinguishing between program/editorial content and advertising, e.g., when program/editorial characters make advertising presentations or when an advertisement appears to be content to the intended audience.
>
> 2. Advertising should not be presented in a manner that blurs the distinction between advertising and program/editorial content in ways that would be misleading to children.

CHILDREN'S ADVER. REVIEW UNIT, SELF-REGULATORY GUIDELINE FOR CHILDREN'S ADVERTISING 9 (2003), http://www.caru.org/guidelines/guidelines.pdf.

87. *Id.* at 3 ("[CARU] seeks changes through the voluntary cooperation of advertisers . . . .").

88. *Id.* at 9 n.2. Thus, the mere presence of a product within a television show or online does not require disclosure, even if it has been included because of an embedded advertising deal.

rules.[89] First, the FCC solicited comments on the embedded advertising trends in the modern media marketplace and the effectiveness of the current sponsorship identification rules to regulate.[90] Second, the NOI requested feedback on the application of the current sponsorship identification rules to the many different forms of embedded advertising.[91] Third, the NOI sought comments on whether changes need to be made to the current sponsorship identification rules to make them better suited for embedded advertising used today and in the future.[92] Fourth, the FCC asked for opinions on possible First Amendment issues raised by increased regulation of embedded advertising through stricter sponsorship identification rules.[93] Finally, the NOI requested comments on whether the sponsorship identification rules should be modified to eliminate feature films containing embedded advertising.[94]

The NOI was accompanied by an NPRM, which invited comment on its proposal that the current rules should be altered to make disclosure more obvious to viewers by firmly requiring: a specific size lettering to be used in the identification; a certain amount of time for the identification to remain on the air; and a repeat disclosure of the sponsorship identification at both the beginning and the end of the program.[95] The NPRM also recommended potential changes to the sponsorship identification rules to better protect children from embedded advertising.[96] Lastly, the NPRM requested comments from the public about the potential expansion of the scope of the sponsorship identification rules to cable television and other forms of media currently unregulated by the disclosure requirements.[97] Since the FCC's NOI/NPRM was adopted in 2008, 229 comments have been submitted, and only twenty-five commentators have expressed opposition to the full spectrum of changes proposed by the NOI/NPRM.[98]

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89. *Sponsorship Identification Rules NOI/NPRM*, *supra* note 4.

90. *Id.* at para. 10.

91. *Id.* at para. 11.

92. *Id.* at para. 12.

93. *Id.* at para. 13.

94. *Id.* at para. 14. The current rules "waive the sponsorship identification requirements for feature films 'produced initially and primarily for theatre exhibition.'" *Id.*

95. *Id.* at para. 15.

96. *Id.* at para. 16. These changes would be designed to help maintain the policies set forth in the Children's Television Act and Sections 317 and 507 of the Communications Act of 1934. *Id.*

97. *Id.* at para. 17.

98. *See Sponsorship Identification Rules NOI/NPRM*, *supra* note 4. Some of these critics of the proposed regulation included the following: Fairness and Integrity in Telecommunications Media Coalition, Motion Picture Association of America, Inc., National Cable & Telecommunications Association, and Discovery Communications, Inc. *Id.*

The remaining applicable commentators reacted much more favorably to the proposed modifications.[99]

The time period to submit comments on the NOI/NPRM ended on November 21, 2008.[100] But despite the number of comments procured from the public, the FCC has failed to respond—either by determining that increased regulation would be irreparably harmful and unnecessary or by taking steps to adapt its sponsorship identification rules to make them more effective. While arguments supporting both actions are strong, the FCC should move forward in modifying its sponsorship identification rules immediately to prevent continuing issues caused by embedded advertising.

V. CONFLICT AND THE NEED FOR CHANGE

A. *Conflict Overview*

In deciding whether or not to revamp its sponsorship identification rules, the FCC is facing a multitude of critics. Media producers and advertisers argue that the changes to sponsorship identification rules proposed in the NOI/NPRM are unnecessary and would unavoidably violate the First Amendment.[101] Meanwhile consumer advocates, teamed with professional guilds and trademark owners, argued that the changes are integral because too many negative consequences stem from the inadequate regulation in effect today.[102]

B. *Critics' Views of Increased Regulation*

The critics opposing the FCC's proposed rule changes consist mainly of advertising companies and program producers who use the compensation from embedded advertising to supplement their bottom

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99. *Id.* The comments that were supportive of the proposed regulation were filed by such entities as: Screen Actors Guild, Center for Media and Democracy, and Campaign for a Commercial-Free Childhood. *Id.*

100. Sponsorship Identification Rules & Embedded Advert., *Order*, 23 F.C.C.R. 15022 (2008) [hereinafter *Sponsorship Identification Rules Order*]. The original deadline for comments was September 22, 2008, while reply comments had to be turned in by October 22, 2008. However, both the Writers Guild of America, West, and Commercial Alert requested that the reply comment deadline be extended. The FCC granted those requests, extending the due date for reply comments to November 21, 2008. Although the FCC granted the extension, that extension has now run out as well. *Id.*

101. *See, e.g.*, *Sponsorship Identification Rules NOI/NPRM*, *supra* note 4, at para. 8; *see also* Comments of Nat'l Ass'n of Broad., Sponsorship Identification Rules and Embedded Advertising, FCC MB Docket No. 08-09 (rel. Nov. 24, 2008) [hereinafter *NAB Comments*] (example of comments by a critic of the proposed regulation citing First Amendment concerns).

102. *See, e.g.*, Goodman, *supra* note 40, at 99–129.

line.[103] Their argument is based on the theory that increased regulation would restrict First Amendment speech,[104] destroy the free media marketplace,[105] impede the development of programming that cannot be produced without the financial assistance of corporate sponsors,[106] and go against the interests of modern venture consumers.[107] This theory has multiple flaws.

Opponents of the FCC's proposed changes claim that further regulation of embedded advertising would violate the First Amendment by restricting the free speech of broadcasters and other media producers.[108] However, this First Amendment argument is faulty. While the First Amendment prohibits the government and its subsidiary agencies from infringing free speech, the United States Supreme Court has ruled that the First Amendment does not entitle commercial speech to the same level of protection afforded noncommercial speech.[109] The Supreme Court in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York* established a method to determine if a regulation affecting commercial speech is constitutional.[110] The main issue with applying the *Central Hudson* test to the proposed regulation is determining whether embedded advertising is commercial speech or noncommercial speech, due to the increasingly blurred line between the advertisement and the program's content.[111] Courts have not ruled consistently on this issue, and the FCC has also been lenient in calling branded entertainment noncommercial speech.[112] A bright line needs to be created to establish

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103. *See* Hagerty, *supra* note 28, at 154.

104. *See Sponsorship Identification Rules NOI/NPRM*, *supra* note 4, at para. 8.

105. *See* Hagerty, *supra* note 28, at 154.

106. *See* Said, *supra* note 5, at 151–56.

107. *See id.* at 166–67.

108. *See, e.g.*, *NAB Comments, supra* note 101, at 22.

109. *See* Hagerty, *supra* note 28, at 150; *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 563 (1980).

110. Cent. Hudson Gas & Elec. Corp., 447 U.S. at 566. First, a court must determine if the expression is within the scope of the First Amendment's protection, and for commercial speech to be constitutionally protected from regulation, "it at least must concern lawful activity and not be misleading." *Id.* Second, a substantial governmental interest must exist to support the proposed regulation. *Id.* Third, the regulation in question must directly advance that government interest. *Id.* And finally, the regulation must be not more extensive than necessary to promote that governmental interest. *Id.*

111. Strain, *supra* note 49, at 190.

112. *Id.* at 191 ("In the 1970s, the FCC adopted a test to determine whether a broadcast is considered an advertisement. The test is as follows: 'The primary test is whether the purportedly noncommercial segment is so interwoven with, and in essence auxiliary to the sponsor's advertising (if in fact there is any formal advertising) to the point that the entire program constitutes a single commercial promotion for the sponsor's products or services. Thus, under the current policy, a program replete with embedded advertisements would still

whether embedded advertising qualifies as commercial or noncommercial speech under the First Amendment.

While uncertainty regarding the nature of the embedded "speech" prevents the *Central Hudson* test from clearly supporting the theory that the regulation proposed by the FCC is constitutional, dicta in other Supreme Court decisions have weakened the First Amendment argument against stricter regulation by focusing the query more on the reasonableness of the regulation, rather than the status of the embedded advertisement.[113]

Under either the *Central Hudson* test or the dicta test, the "no more than necessary" advancement of the "substantial governmental interest" of preventing the deception of consumers through increased sponsorship identification rules will be constitutional, as embedded advertising causes a multitude of harms that are not in the government's best interest. More effective FCC regulation is the most efficient method of advancing the governmental interests of preventing overcommercialization, avoiding consumer deception, protecting the editorial integrity of programming, and preserving the rights of trademark owners against trademark dilution.

The argument that increased regulation will also destroy the free media marketplace is also weak in its reasoning. Embedded advertising:

> harms by damaging the quality of public discourse and the integrity of media institutions that support and shape this discourse. Sponsorship disclosure requirements mitigate this harm by correcting failures of the market to inform audiences of marketing activities. The role of sponsorship disclosure law in enhancing discourse and generating valuable consumer information neutralizes the two strongest lines of attack against it: First Amendment and free market absolutism. In fact, disclosure requirements advance the First Amendment value of robust debate without burdening speech and further the market goal of informed consumers without imposing undue costs.[114]

Thus, the FCC's proposed rulemaking would actually encourage the free media marketplace by promoting "the public's constitutional guarantee to a full and unfettered measure of information—quantitatively and qualitatively sufficient to promote rational decisionmaking in all matters, political, economic, and otherwise."[115]

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likely not be considered commercial in nature.'") (internal citations omitted).

113. *See e.g.*, Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985) ("We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.").

114. Goodman, *supra* note 40, at 86.

115. Ronald K.L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697, 740 (1993) (stating that this right was the main justification for First Amendment

The other two theories—impediment of program development due to insufficient financial backing from advertisers[116] and harm to the interests of venture consumers who prefer to be immersed in programs—do not warrant much discussion.[117] First, although embedded advertising deals can provide the financial backing needed to produce a program that otherwise would not be produced, that financing does not mean that the program will be successful or long-lasting.[118] Second, while some consumers in the contemporary marketplace are venture consumers, who are aware of what is going on and prefer to be immersed in programming without the distractions of sponsorship identifications and traditional advertising blocks, many other consumers are impressionable individuals who are unaware of how prevalent embedded advertisements are today.[119] Additionally, the FCC proposed modifications to its rules are designed not only to protect the interests of consumers, but also to protect the interests of others, like the creative talent in programs and trademark owners.[120] Thus, there are a multitude of existing governmental interests, besides protecting consumers, which need to be shielded from the harms caused by embedded advertising.

The negative consequences stemming from the growing prevalence of embedded advertising unrestricted by regulation cannot be ignored. No one expects to turn on the television without being exposed to at least a few advertising pitches. However, embedded advertisements in television programs are frequent in the contemporary media marketplace.[121] It is essential that the FCC take action and begin the process of strengthening its sponsorship identification rules to make them more effective. Additionally,

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freedom in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), which championed the informational function of commercial expression).

116. *See* Said, *supra* note 5, at 151–56.

117. *Id.* at 166–67.

118. *See* Said, *supra* note 5, at 155 n.258 (quoting Brian Stelter, *Integrated in a TV Letdown*, N.Y. TIMES, Nov. 14, 2008, at B10) ("A film may cost more than a television pilot, but once a program has been given the green light, substantial resources are shifted to launch it, and occasionally, it fails extremely early despite its promise. *My Own Worst Enemy*, for example, was canceled after fewer than five airings.").

119. *See, e.g.*, Letter from Commercial Alert to Donald Clark, Secretary, FTC, on Request for Investigation of Product Placement on Television and for Guidelines to Require Adequate Disclosure of TV Product Placement (Sept. 30, 2003), http://www.commercialalert.org/ftc.pdf [hereinafter *FTC Request for Investigation of Product Placement*].

120. *See, e.g.*, Cindy Tsai, Note, *Starring Brand X: When the Product Becomes More Important Than the Plot*, 19 LOY. CONSUMER L. REV. 289, 300–01 (2007); *see also* Elizabeth L. Rosenblatt, *Rethinking the Parameters of Trademark Use in Entertainment*, 61 FLA. L. REV. 1011 (2009).

121. *See supra* text accompanying note 23.

although the FCC solicited comments on a number of potential rule changes, nothing requires it to adopt all of them. Any small change would be positive. This Note does not argue that all of the changes should be implemented, but instead, it is only necessary for the FCC to begin taking steps necessary to control embedded advertising.

Arguments in favor of increased regulation of embedded advertising are advanced by consumer advocates, professional guilds, and trademark owners. Consumers, actors, screenwriters, and trademark owners are all affected by embedded advertising differently, but the result is the same: each group desires stronger regulation to rein in the advertising industry's undisclosed use of embedded advertising.

C. *Negative Consequences of Embedded Advertising*

Consumer advocates are the most prominent proponents of increased sponsorship identification rules. Consumer Alert's persistent campaign regarding consumer protection from embedded advertising influenced the FCC to release its NOI/NPRM.[122] The two main concerns voiced by consumer advocates are that embedded advertising (1) exposes viewers, including impressionable individuals, like children, who are less likely to understand that most products are "commercials," to overcommercialization; and (2) causes consumer deception because no clear distinction is made between advertising and content—thus, only a thin line exists between embedded advertising and the deceptive advertising banned by the FTC.[123] Consumers must be protected from the overcommercialization and deception that can occur when a program is saturated with embedded advertising and sponsorship identification is provided only minimally at the end credits.

Overcommercialization is defined as "an excessive amount of commercial advertising during television programming."[124] Media entities are growing increasingly dependent on the financial support that embedded advertising provides.[125] And in a nearly unregulated market, "there is a significant risk that media entities will participate in a race to the bottom of undisclosed promotions . . . ."[126] This "race to the bottom" often causes overcommercialization in programming, because media entities are

122. *See generally* FTC Request for Investigation of Product Placement, *supra* note 119.

123. *See, e.g.*, Said, *supra* note 5, at 147–48.

124. Henry John Uscinski, Comment, *Deregulating Commercial Television: Will the Marketplace Watch Out for Children?*, 34 AM. U. L. REV. 141, 149 n.47 (1984).

125. *See, e.g.*, Tsai, *supra* note 120, at 297 (citing Dr. Seuss' *The Cat in the Hat* (2003) as a prime example of embedded advertising deals making films possible and profitable, even if a box office flop).

126. Goodman, *supra* note 40, at 87.

primarily motivated by the desire to compete with other media entities in receiving the incentives from embedded advertising.[127] The result of this overcommercialization is vapid storylines designed to sell products and brands, rather than character and plot development—leading to a lack of substantive content.[128] The 1950s payola and quiz show scandal mentioned in Part IV of this Note also exemplifies how overcommercialization can corrupt broadcasting through commercialism and how that corruption needs to be prevented to protect broadcast legitimacy.[129]

Deception, however, is an even greater threat. There are two main types of deception caused by embedded advertising: consumers may be influenced by products or brands in a program without even noticing them, or consumers may notice the products or brands in the program, but not realize that the broadcasters were being paid to integrate them into the program's content.[130] The most susceptible to these forms of advertising are children; thus, many consumer advocates direct their attention to promoting stronger sponsorship identification rules to protect children from embedded advertising.[131] However, critics of the proposed rules argue that if the sponsorship identification rules are modified solely to protect children, then the rules will become overbroad and will unconstitutionally restrict the rights of advertisers, media producers, and venture consumers who wish to be immersed in programming.[132] Venture consumers often view all products and brands in television programs skeptically due to their knowledge of the frequency of embedded advertising, and critics argue that this skepticism is sufficient to protect them from being deceived.[133] The

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127. *See, e.g.*, Gary Levin, *The Newest Characters on TV Shows: Product Plugs*, USA TODAY (Sept. 20, 2006, 12:34 AM), http://www.usatoday.com/life/television/news/2006-09-19-product-integration_x.htm (referencing *Friday Night Lights* as an example of a television show with many product placements—Applebee's, Gatorade, AT&T, Toyotas, and *Eragon*, the movie).

128. S*ee* Tsai, *supra* note 120, at 304 (discussing the public's outrage when an episode of ABC's *The View* had Barbara Walters talking about eating the soup, while the other hosts hummed "M'm! M'm! Good!"). Sometimes, the ridiculousness of an embedded advertisement's integration into programming turns consumers off an episode. In a recent episode of *The Secret Life of the American Teenager*, a mother handed her daughter a Clean & Morning Burst face wash and tells her that it will change her entire life. This blatant embedded advertising detracted from the seriousness of the episode, which dealt with abortion issues. *See The Secret Life of the American Teenager: The Sounds of Silence* (ABC Family television broadcast July 26, 2010).

129. Goodman, *supra* note 40, at 104.

130. *Id.* at 108–12.

131. *See* Angela J. Campbell, *Restricting the Marketing of Junk Food to Children by Product Placement and Character Selling*, 39 Loy. L.A. L. Rev. 447, 480–81 (2006).

132. *See Sponsorship Identification Rules NOI/NPRM*, *supra* note 4, at para. 8.

133. *See, e.g.*, Said, *supra* note 5, at 166–67.

skepticism that protects the consumers from deception, however, is the ultimate justification for increased sponsorship disclosure regulation:

> [S]tealth marketing harms by sowing skepticism as to the authenticity and truth of mediated communications. The result is damage to public discourse, which the media play such a large part in shaping. Of concern here are not only the false negatives, but also the false positives—the widespread belief that messages are promotional when they are not. Of concern is the suspicion that falls on the editor who makes an expressive choice of a commercial symbol or political position, but whose communication is systematically misunderstood. *Caveat auditor* helps to inoculate against deception, but too much *caveat auditor* degrades a communications environment in which participants are unnecessarily disbelieving.[134]

Therefore, consumer deception concerns more to justify modifications to the FCC's sponsorship identification rules, because not only would strengthening the rules protect the vulnerable from basic consumer deception, but it would also help prevent the damage to public discourse that stems from contemporary, venture consumers' skepticism.[135]

Additionally, contemporary embedded advertising methods negatively affect the individuals involved in the development of the programs in which the advertisements are placed.[136] Creative decisions of screenwriters are heavily influenced by advertisers who wish to dictate the content to better suit their products.[137] Advertisers "may enforce private economic censorship with as heavy a hand as that of the government."[138] Because consumers are continuing to depend more on ad-skipping technologies, program producers are struggling to survive by bringing in revenue from sources other than traditional time slot advertising.[139] Embedded advertising provided almost $4 billion in revenue in 2008 alone.[140] The mass media's heavy reliance on this new source of revenue has caused the financial incentives to often have heavy strings attached, because "[c]ompetition for the marketing dollar is rife. With the multitude of media options and the tightening of recessionary advertising budgets, media managers elect increasingly to please advertisers *at almost any*

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134. Goodman, *supra* note 40, at 112–13.

135. *Id.* at 112.

136. *See, e.g.* Savare & Shagin, *supra* note 30, at 35.

137. *Id.*; *see also* Tsai, *supra* note 120, at 303–05.

138. Collins & Skover, *supra* note 115, at 720.

139. *See, e.g.*, Said, *supra* note 5, at 113; Rosenblatt, *supra* note 120, at 1031–32 ("For large-scale productions, the sums paid for conspicuous placement of a product may be at least as influential—and they are rising . . . . [P]roduct placement is symbiotic, giving marketholders a relatively inexpensive way of disseminating advertising to a large viewing audience, while providing content creators with an additional source of funding.").

140. Said, *supra* note 5, at 112 (on television).

cost."[141] The relationship between the media and advertisers today is similar to the relationship between early broadcasters and corporate sponsors, when sponsors had nearly absolute power over the content of the program.[142]

Embedded advertising also negatively dictates the creative decisions of actors, and consequently, the creative abilities of writers and producers as well. Some actors refuse to work with certain products or brands, while other actors absolutely refuse to work in projects funded by embedded advertising deals.[143] Thus, program producers involved in a product placement deal might have to rethink casting decisions—forfeiting part of their creative team's vision and control in their desire to satisfy advertisers.[144] The tension among writers, actors, and program producers is continuing to build.[145]

In response to this growing friction, the Writer's Guild of America, West; the Writer's Guild of America, East; the Screen Actors Guild; and the associate dean of the USC Annenberg School for Communication suggested two potential solutions: the creation of an industry code on embedded advertising or increased regulations to help control the pervasive effect of embedded advertising in today's marketplace.[146] Professional guilds are thus clearly advocates of increased regulation—of any sort—because of the negative effects embedded advertising is having on the creative decision-making abilities of the talent behind television programming.

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141. Collins & Skover, *supra* note 115, at 722 (emphasis added).

142. *See* Timothy McAllister, Book Review, *CONSUMER CULTURE & TV PROGRAMMING*, 74 WIS. LAW. 32, 32 (2001) (reviewing ROBIN K. ANDERSEN, CONSUMER CULTURE & TV PROGRAMMING (2000)).

143. *See* Kai Falkenberg & Elizabeth McNamara, *Using Trademarked Products in Entertainment Programming*, 24 J. MEDIA, INFO., & COMM. L. 13, 14 (2007) (noting Robin Williams as an example of an actor who refuses to participate in any product placement deals because he does not want to endorse any particular brand or product).

144. *Id.*

145. Lisa Lapan, Note, *Network Television and the Digital Threat*, 16 UCLA ENT. L. REV. 343, 376 (2009). Writers, represented by the WGA and SAG, are extremely frustrated with their role in including embedded advertising in scripts, "describing it as a form of 'forced endorsement' without compensation." *Id.*

146. *Sponsorship Identification Rules NOI/NPRM*, *supra* note 4, at para. 9. The proposed increased regulations by these groups included: "(1) [v]isual and aural disclosure of product integration at the beginning of each program; (2) strict limits on product integration in children's programming; (3) input by storytellers, actors, and directors, arrived at through collective bargaining, about how a product or brand is to be integrated into content; and (4) extension of all regulation of product integration to cable television." *Id.*

Trademark owners are another advocate of stricter sponsorship identification rules.[147] Trademarked products and brand names tell stories.[148] If a character is shown shopping at Wal-Mart, then a viewer likely infers that they are less wealthy than a character who would shop at Saks Fifth Avenue.[149] While many inferences are needed to provide context in programming, it is impractical to expect program producers, when creating content for their programs, to request approval for the use of all products and brands used to set the scene.[150] Thus, program producers are increasingly using trademarked products and brands without permission.[151] However, using trademarked products and brands without permission can lead to trademark dilution and trademark infringement claims under the Lanham Act because not all trademark owners believe all attention is good attention.[152]

Trademark dilution can occur in two different forms: blurring and tarnishment.[153] Trademark blurring is the creation of "an association that impairs the *distinctiveness* of the famous mark . . . ."[154] Blurring occurs when a trademarked brand or product is used generically. For example, in *Charlie's Angels*, Cameron Diaz picks up a PDA that she describes as a Palm Pilot; however, upon closer inspection, the PDA was actually a Windows Pocket PC user system—a competitor of the Palm Pilot.[155] Blurring can lead to genericide, which rids the mark of its value.[156]

Trademark tarnishment is the harming of the reputation of a trademark through unsavory or unflattering associations.[157] Trademark

147. *See generally* Rosenblatt, *supra* note 120.

148. *Id.* at 1012.

149. *See generally id.*

150. *See, e.g.*, Falkenberg & McNamara, *supra* note 143, at 14 (noting that the average American is surrounded by dozens of, if not more, brands and products daily, and to make a show realistic, it is often necessary to include those items in the background for authentication and contextual purposes).

151. *Id.*

152. *Id.* Other claims are possible as well, including unfair competition, product disparagement, and false endorsement; however, blurring and tarnishment are the most common. *Id.; see generally* Lanham Act, 15 U.S.C. §§ 1051, 1125 (2006).

153. 15 U.S.C. § 1125(c).

154. *See* Rosenblatt, *supra* note 120, at 1020 (emphasis added).

155. LEHU, *supra* note 12, at 145.

156. *See, e.g.*, Haughton Elevator Co. v. Seeberger, 85 U.S.P.Q. 80 (Apr. 3, 1950) (holding that the coined word "Escalator," originally fanciful, or at least suggestive, had become generic in part because even the trademark owner used the mark "Escalator" to refer to the product generally, rather than only to refer to the specific brand of the product). Many trademark owners have lost their trademark rights over the years due to genericide, including Cellophane, Linoleum, Kerosene, Pilates exercise system, Zipper, and Yellow Cab.

157. Rosenblatt, *supra* note 120, at 1020–21.

owners fear that because some viewers have become aware of—and even cynical toward—embedded advertising, they are more likely "to believe that all marks appearing in entertainment are placed or licensed," even in cases where the trademark owner did not authorize the use.[158] Thus, even where a trademark is negatively portrayed in a program, the consumer is likely to believe that the trademark owner agreed to that depiction.[159]

Despite Lanham Act protection, trademark owners are often defenseless to stop trademark blurring and tarnishment in television because courts are increasingly finding in favor of defendants—in both dilution and infringement cases.[160] However, even though the judiciary often sides with the defense, content creators fear litigation because of the substantial costs associated with it.[161] Therefore, program producers are often choosing to license unnecessarily, or are forgoing the use of trademarked products or brands entirely, which can be costly and delaying.[162] As more trademarked products and brands "are placed or licensed and fewer marks are used without authorization in favor of conspicuous blurring or generic designations" consumers will believe even more that all uses of marks are embedded advertisements.[163] More effective sponsorship identification rules would help clarify when it was necessary for content creators to ask permission to use a trademarked product, brand, or service. Additionally, it would help a trademark owner protect a trademark's integrity by requiring unambiguous sponsorship disclosure, making it obvious to consumers which products were paid for and which ones were placed in the content purely for context.[164]

VI. CONCLUSION

Both critics and supporters of the FCC's proposed rule changes agree that the current regulatory framework governing sponsorship disclosure is outdated.[165] Critics are wrong, however, in their argument that changes are unnecessary because the market has been adapting to the increasing prevalence of embedded advertising.[166] In support of their argument, critics of the proposed changes point to both the increasing number of mutually beneficial partnerships between advertisers and media producers, and the

158. *Id.* at 1033.
159. *Id.*; *see also* Falkenberg & McNamara, *supra* note 143, at 14.
160. *See* Rosenblatt, *supra* note 120, at 1035.
161. *Id.* at 1036.
162. *Id.* at 1036–44.
163. *Id.* at 1040.
164. *See id.* at 1081.
165. *See* Said, *supra* note 5, at 99–100.
166. *Id.*

modern venture consumer, who is aware of embedded advertising but prefers it to the traditional advertisement slots in programming, as examples of the positives stemming from embedded advertising.[167]

However, this reasoning insufficiently addresses the complete impact that embedded advertising has on contemporary society. While the market does reflect that some individuals have benefited from the modern practice of embedded advertising, there are many members of society that are threatened by possible negative consequences stemming from it. Updated and effective sponsorship identification rules are integral to controlling embedded advertising, so that it can be utilized by those it benefits while still protecting society as a whole.

The myriad of negative consequences stemming from weak regulation of embedded advertising far outweigh the modest negative consequences that could possibly result from the FCC's proposed changes to its sponsorship identification rules. The proposed regulation would help ensure that the payola scandals of the 1950s do not reoccur due to overcommercialization causing media entities to "race to the bottom."[168] Additionally, the regulation changes would prevent consumer deception.[169] Content creators and trademark owners, whom the critics argue benefit from the current status of the FCC's sponsorship identification rules, would actually benefit from the proposed changes because content creators would have more artistic freedom and trademark owners would not have to worry about potential trademark dilution.[170]

Critics of the proposed regulation argue that increased regulation would violate the First Amendment, destroy the free media marketplace, abolish the mutually beneficial relationship between program producers and corporate sponsors, and go against the interests of modern venture consumers.[171] As discussed in Part V of this Note, however, these concerns are unfounded, especially as the proposed changes by the FCC are extremely minor.

The current FCC sponsorship identification rules require only that a disclosure announcement be given "once during the programming and remain on the screen long enough to be read or heard by an average viewer."[172] The disclosure must include one of three phrases: "paid for," "sponsored by," or "furnished by" and the name of whom provided the

167. *See id.* at 117–55.
168. *See supra* text accompanying notes 125–29.
169. *See supra* text accompanying notes 130–35.
170. *See supra* text accompanying notes 147–64.
171. *See supra* text accompanying notes 104–21.
172. *Sponsorship Identification Rules NOI/NPRM*, *supra* note 4, at para. 5.

consideration for the program.[173] The requirements for sponsored political advertising and other certain issue advertising are stricter, requiring the lettering be "equal to or greater than four percent of the vertical picture height and air[ed] for not less than four seconds."[174] Additionally, if anything has been provided to a station in order to induce it to broadcast "any political broadcast matter or broadcast matter involving the discussion of a controversial issue of public importance longer than five minutes," the current FCC rules require a disclosure announcement both at the beginning and the end of the program in which the announcement was aired.[175]

The proposed changes the FCC suggests in its NPRM are slight changes to its current regulatory language. The FCC simply recommended that the required size of the sponsorship identification text for all embedded advertisements should be larger and that the sponsorship disclosure should be required to remain on the screen long enough for a reasonable viewer to notice and read.[176] These two changes are the main proposals of the NPRM and are the two that this Note suggests are the most plausible for the FCC to incorporate in the near future. The FCC also makes three additional proposals: increased regulation of advertising in children's programming; expansion of the sponsorship identification rules to cable; and increased regulation of on-air endorsements.[177] While these three additional proposed changes are also realistic and unlikely to cause First Amendment issues under the *Central Hudson* test, the FCC should initially focus its efforts on the first two proposed changes to create an effective foundation upon which to expand its regulatory scope further in the future.

These two changes are not drastic. The FCC's proposed changes are extremely reasonable in comparison to the recommendations proposed by the Writer's Guild of America, West; the Writer's Guild of America, East; the Screen Actors Guild; and the associate dean of the U.S.C. Annenberg School for Communication. Their recommendations included rules that expanded the FCC's regulatory scope to immediately encompass cable and required that input by content creators govern all uses of embedded advertising in programming—entirely eliminating advertiser's power over content.

Additionally, the regulatory changes recently undertaken by other countries that have faced similar problems with the growing prevalence of embedded advertising reflect the reasonableness of the FCC's proposed

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173. *Id.* at 15.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at paras. 16–18.

changes. In December 2007, the European Union ("EU") revised its "Television Without Frontiers" Directive to modernize the existing rules, and in doing so, the EU explicitly defined "product placement" and created a clear legal framework that authorized its use in all programming, except news programs, documentaries, and children's programs, as long as a clear identification is given at the beginning of the program.[178]

Similarly, the United Kingdom began permitting embedded advertising in television programs, as long as the advertisements comply with the regulations of Ofcom, the independent regulator and competition authority for the United Kingdom communications industries.[179] Ofcom's rules include limitations on the programs in which the advertisements can be placed, restrictions on the type of products that can be used as embedded advertisements, and the required inclusion of a special logo indicating embedded advertising at the beginning and end of the program, as well as after any commercial break.[180]

Thus, the FCC's proposed changes regarding the size of the lettering and length of the sponsorship disclosure seem well-supported by industry customs. While nothing in the proposed regulation suggests expanding regulation to address the growing issue of embedded advertising in new media, such as Twitter, blogs, and video games, these proposed changes seem like the most logical first step in expanding the scope of the FCC's regulatory power. As new technologies continue to develop and change the media marketplace by introducing more media in which embedded advertising could be utilized, further changes will need to be implemented. However, the FCC needs to start somewhere before another four years go by, and these proposed changes seem the most practical place to start. Doing nothing only protects the interests of advertisers, who are increasingly using embedded advertising to promote their brands and producers, who voluntarily exchange embedded advertising revenue for creative freedom.

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178. *See* "*Audiovisual Media Services Without Frontiers" Directive*, EUROPA, http://europa.eu/legislation_summaries/audiovisual_and_media/l24101a_en.htm#KEY (last visited Apr. 10, 2012).

179. *See Product placement on TV*, OFCOM, http://consumers.ofcom.org.uk/2011/02/product-placement-on-tv/ (last visited Apr. 10, 2012).

180. *See id.*