

September 22, 2008

Marlene H. Dortch,
Office of the Secretary
Federal Communications Commission
236 Massachusetts Avenue, NE, Suite 110
Washington, DC 20002

Re: Response to Request for Comments
In the Matter of Sponsorship Identification Rules
MB Docket No. 08-90

Dear Ms. Dortch,

Commercial Alert is a Washington, D.C.-based nonprofit organization that is concerned about excessive commercialism in society. Our mission is to keep the commercial culture within its proper sphere, and to prevent it from exploiting children and subverting the higher values of family, community, environmental integrity and democracy. In 2003, we petitioned the Federal Communications Commission to require TV networks and stations to clearly and conspicuously identify and disclose product placements and product integration.

Five years later, the Commission issued a Notice of Inquiry and Notice of Proposed Rule Making (NOI/NPRM) on the issue of sponsorship identification rules. These comments are in response to that notice.

Our position remains consistent with that we urged five years ago: The Commission should issue a rule requiring disclosure of product placements and product integrations at the moment they occur. In these comments, we refer to product placement and integration (as well as product immersion, plot placement, title placement, paid spokespersons, virtual advertisements and branded entertainment) collectively as "hidden advertisements" or sometimes by a term used by the Commission, "embedded advertisements." We refer to our disclosure recommendation as a proposal for "simultaneous disclosure." In addition to simultaneous disclosure, we also urge the Commission to require, at the outset of a program, direct and easy-to-understand explanatory disclosures about the nature of embedded advertisements in a program.

The rationale for our position is straightforward. The Communications Act requires disclosure of paid-for broadcast matter "at the time the same is so broadcast." The reality of present-day TV viewing and hidden advertisements make simultaneous disclosure necessary to uphold the core principle of U.S. communications and fair advertising law: People have a right to know when they are being advertised to. Hidden advertisements are thriving for two reasons: People are using digital video recording systems and other means to skip over traditional 30-second ads; and many hidden ads have uniquely persuasive effect precisely because they are hidden and because viewers are deceived into believing they are seeing authentic, non-commercial-driven

presentations of products and services. Both of these reasons speak directly to the need for simultaneous disclosure.

These comments are organized to respond to the questions posed by the Commission in its (NOI/NPRM). Part I is entitled "Hidden Advertisements are Pervasive on Television," and responds to the questions in paragraph 11 of the NOI/NPRM. Part II is titled, "Section 317 and Protecting Viewers Requires Mandatory Disclosure of Hidden Advertisements at the Time They Are Aired," and responds to paragraph 12. Part III addresses First Amendment issues related to a simultaneous disclosure regime, and responds to paragraph 13. Part IV addresses "Issues Involving Feature Films Re-Broadcast on Television," and responds to Paragraph 14. Part V responds to the Commission's questions in paragraph 15 about modifying the existing disclosure rules to be more prominent. Part VI responds to paragraph 16 questions about children and hidden advertisements. Part VII comments briefly on paragraph 17 questions about cable programmers and hidden advertisement rules. Part VIII responds to paragraph 18 questions about radio hosts' on-air endorsements. Finally, Part IX suggests areas for the Commission to explore as it conducts its inquiry into hidden advertisements and sponsorship identification rules.

I. HIDDEN ADVERTISEMENTS ARE PERVASIVE ON TELEVISION (Response to Paragraph 11)

A. Prevalence and Categorization

Television product placements have risen by roughly an order of magnitude since Commercial Alert petitioned the FCC on the issue in 2003. Nielsen reports that \$360 million was spent on product placement that year. In 2007, PQ Media reports \$2.9 billion was spent on product placement.¹ Nielsen reports that the top 10 broadcast programs in 2007 featured 25,950 product placement occurrences; the top 10 cable programs featured 163,737 product placement occurrences.²

It is fair to say that product placement is now pervasive on television programming. There are greater concentrations on cable than broadcast programs, and on reality programming than scripted shows -- but product placement is omnipresent. Even in 2002, one academic study found, placements are quite prevalent, with one brand appearing every three minutes of programming."³

As product placement has taken off in recent years, networks, television producers and advertisers have innovated new and much more elaborate forms of hidden advertisements. The Notice of Inquiry and Notice of Proposed Rule Making references a distinction between product placement and product integration. In this categorization, product placement is the paid-for

¹ "Exclusive PQ Media Research: Branded Entertainment Market Defies Slowing Economy, Expands 14.7% to \$22.3 bil. In 2007" (press release), PQ Media, February 12, 2008, available at: <<http://www.pqmedia.com/about-press-20080212-bemf.html>>.

² "U.S. Advertising Spending Rose 0.6% in 2007, Nielsen Reports," Nielsen, March 31 2008, available at: <http://nielsen.com/media/2008/pr_080331b.html>.

³ Carrie La Ferle and Steven M. Edwards, "Product Placement: How Brands Appear on Television," *Journal of Advertising*, vol. 35, no. 4 (Winter 2006), pp. 65-86.

branding of a prop. Product integration refers to instances where storylines or scripts are altered to feature a product. Even the notion of product integration, however, may not capture the increasing extent to which producers and advertisers are joint partners in developing programs, and the degree to which paid product appearances drive program content and presentation.

NBC has stated that it aims "to make advertisers into long-term partners," according to the New York Times.⁴ In such an arrangement, "you've got the media content closely aligned with our brand," said the senior vice president for communications at Liberty Mutual, an insurance company engaged in such a partnership with NBC. According to the Times, Liberty Mutual "will help develop" scripts.⁵ NBC aims to "have someone from the sales group in the room during ... development meetings," so advertisers can have a role in program development from the start.⁶

The CW network is exploring ways to eliminate traditional advertising, replacing it instead with diverse efforts to incorporate sponsors' products into each episode. "As an example of how CW Now advertising integrations would work, Mr. Morningstar [executive vice president for sales at CW] outlined a possible segment on popular fashions, music or restaurants, featuring the star of a film from a movie studio that was sponsoring the episode."⁷

Other networks are moving in similar directions, through, for example, what they call "branded entertainment."⁸ Examples include Univision,⁹ MTV,¹⁰ Mojo HD and the Game Show Network,¹¹ and AMC.¹²

In this context, it may make sense to consider hidden advertisements as occurring along a broad spectrum. Academic researchers and product placement firms have proposed various categories,

⁴ Stuart Elliott, "NBC to revive a Mainstay of Early TV," The New York Times, April 2, 2008, available at: <<http://www.nytimes.com/2008/04/02/business/media/02adco.html>>.

⁵ Stuart Elliott, "NBC to revive a Mainstay of Early TV," The New York Times, April 2, 2008, available at: <<http://www.nytimes.com/2008/04/02/business/media/02adco.html>>.

⁶ Wayne Friedman, "NBC's Graboff: Mo' Better branding," MediaPost Publications, June 11, 2007 (quoting Marc Graboff, co-chair of NBC Entertainment and NBC Universal Studio), available at <http://www.mediapost.com/publications/index.cfm?fuseaction=Articles.showArticleHomePage&art_aid=62104>.

⁷ Stuart Elliott, "Ads That are Too Fast for a Fast-Forward Button," May 18, 2007, The New York Times, available at: <http://www.nytimes.com/2007/05/18/business/media/18adco.html?_r=1&oref=slogin>.

⁸ We recognize that in some "branding cases," as in a hypothetical "Acme Machines Presents The Latest Gizmos," the sponsorship arrangement is clear. In some, but not all, cases, this may suggest no need for additional disclosures. However, in some cases, additional disclosures may be required. For example, it would not be obvious just from the branding that Acme helped write the script, nor would the sponsorship connection be obvious for product placements of an Acme product line known as Everyday Tools and not branded as "Acme."

⁹ Laurel Wentz, "Sprint, Nissan Make Big Branded-Entertainment Plays With Soccer Shows," Advertising Age, May 5, 2008, available at: <http://adage.com/abstract.php?article_id=126763>.

¹⁰ Stuart Elliott, "Coming Episodes of 'Control Freak' on MTV2 Don't Have Commercials But They Do Pitch Lee Jeans," The New York Times, October 29, 2004, available at:

<<http://query.nytimes.com/gst/fullpage.html?res=9502E1D6123DF93AA15753C1A9629C8B63>>; Suzanne Vranica, "2008 At MTV, a New Show That Pushes Deodorant," The Wall Street Journal, September 13, 2007, available at: <<http://online.wsj.com/public/article/SB118963983165125765.html>>.

¹¹ Stuart Elliott, "Up Next, a Show From Our Sponsor," The New York Times, June 12, 2008, available at: <<http://www.nytimes.com/2008/06/12/business/media/12adco.html>>.

¹² Stuart Elliott, "What Was Old Is New as TV Revisits Branding," The New York Times, June 13, 2007, available at: <<http://www.nytimes.com/2007/06/13/business/media/13adco.html>>.

and we offer our own list here. Researchers and product placement firms have developed their categorization system to analyze the effectiveness of different hidden advertisement strategies. Our interest is in developing a typology that facilitates an analysis of how hidden advertisements affect viewers. This analysis correlates in part with an industry-driven definition of effectiveness (do hidden ads lead to brand recall and identification? Positively affect or reinforce brand profile? Lead to increased sales?). But the primary concern of our typology is whether viewers may reasonably be expected to consciously note that an integrated product advertisement is in fact a paid-product commercial. A secondary concern is to examine how different kinds of hidden advertisements affect viewers, as distinct from traditional ads.

Cristel Antonia Russell categorizes product placements as to whether they are visual or not, auditory or not, and with a high or low relationship to the program's plot. Sub-categories for the visual dimension include number of appearance on screen and style of camera shot. Sub-categories for the auditory dimension include the context in which a brand is mentioned, the emphasis placed on the brand name, and which character uses the name. The plot dimension involves the role of the product in the program. A brief appearance or short mention constitutes a lower plot connection. A product identified with a character, or playing a more important role in a script, has a higher plot connection.¹³

Carrie La Ferle and Steven Edwards articulate a range of visual and verbal characteristics.¹⁴ The visual category is divided into primary (where the brand, product or company name is displayed on the product) and secondary brand placements (where the brand name could be seen on a different product; e.g. the brand name Coca-Cola on a character's t-shirt). They characterize brand placements as "traditional advertisements" if the brand name is presented in a traditional advertising context, such as on a billboard during a sporting event, or a logo flashed on screen. Other analyzed categories include: whether the brand name can be clearly seen; whether the brand is at the center of the screen; whether the brand was shown with other branded products; and the number of same-branded products visible. They also inquired into prominence of the brand, measured by whether the brand is at the center of on-screen action, the amount of character interaction, and the type of character interacting the product (leading character, supporting character, extra, celebrity playing him or herself, an expert). They noted as well the length of time a brand appeared on screen.

For the verbal category, they tracked the type of character verbally interacting with the brand, the number of other branded products mentioned, and the manner in which the product was referenced (use of the brand name, use of the category while showing the brand, using a pronoun while showing the brand). They also measured the length of time a brand was discussed.¹⁵

¹³ Cristel Antonia Russell, "Investigating the Effectiveness of Product Placements in Television Shows: The Role of Modality and Plot Connection Congruence on Brand Memory and Attitude," *Journal of Consumer Research*, vol. 29, December 2002, pp. 306-318.

¹⁴ Carrie La Ferle and Steven M. Edwards, "Product Placement: How Brands Appear on Television," *Journal of Advertising*, vol. 35, no. 4 (Winter 2006), pp. 65-86.

¹⁵ Carrie La Ferle and Steven M. Edwards, "Product Placement: How Brands Appear on Television," *Journal of Advertising*, vol. 35, no. 4 (Winter 2006), pp. 65-86.

These categories all suggest important features to consider in analyzing hidden advertisements. Drawing on these trait measures as background, our analytic focus leads us to suggest the following working typology of hidden advertisements:

1. *Brand-unidentifiable product placements.* This category would include the provision of a tailored suit to a news program anchor, where there is no way in the program for a viewer to identify the brand.

2. *Brand-name appearance in a traditional advertising setting, or a virtual-world analog, or the presentation of brand logos or brand names.* A billboard at a sports stadium would be a traditional advertisement. A virtual billboard imposed on the screen by the television network during a baseball game is an example of a virtual-world analog to a traditional advertisement.

3. *A product used in a program as a prop, with the brand identifiable, either because the brand name is visible, or because a defining feature of the brand is visible.* The brand-name is not mentioned. The appearance of Coke cups on the American Idol judges' table is the quintessential example of this. Other examples include McDonald's iced coffee cups appearing on the desks of news anchors on a local Las Vegas station;¹⁶ Packet 8 videophones featured on the set of *Alias*;¹⁷ a Nortel phone on the President's desk in the West Wing, which received close-ups;¹⁸ a character on *ER* wearing a digital stethoscope from ThinkLabs, distinguishable by its appearance.¹⁹

4. *A product used as a prop in a program, and the brand is verbally mentioned, or the product is discussed and the brand name is visible or otherwise identifiable.*

As of 2002, according to one academic study, the vast majority of product placements fell into the categories of visual or verbal display or mention of the brand, but no interaction with the characters.²⁰ This proportion may have changed, thanks to the proliferation of product integration strategies, but the relative simplicity of brand appearances versus interaction with characters means that brand appearances very likely remain predominant.

5. *A brand mentioned or visually identifiable, and a character uses or interacts with the product.* Examples are *CSI* detectives driving Hummers,²¹ characters in *The Office* using HP computers,²² or characters on *Desperate Housewives* driving Volvos.²³

¹⁶ Stephanie Clifford, "A Product's Place Is on the Set," *The New York Times*, July 22, 2008, available at: <<http://www.nytimes.com/2008/07/22/business/media/22adco.html>>.

¹⁷ <<http://www.eclipse-worldwide.com/index2.html>> (According to Eclipse Worldwide, a product placement firm, a subsequent press release led to multiple news articles about the placement.)

¹⁸ <<http://www.eclipse-worldwide.com/index2.html>>.

¹⁹ <<http://www.eclipse-worldwide.com/index2.html>>.

²⁰ Carrie La Ferle and Steven M. Edwards, "Product Placement: How Brands Appear on Television," *Journal of Advertising*, vol. 35, no. 4 (Winter 2006), pp. 65-86.

²¹ Beth Gillin, "Product Placement Turns TV Programs into Commercials," *Knight-Ridder*, January 24, 2005, available at: <<http://www.commondreams.org/headlines05/0124-02.htm>>.

²² Ravi Somaiya, "'Chloe, it's Jack. Who does our phones?'" *The Guardian*, June 16 2008, available at: <<http://www.guardian.co.uk/media/2008/jun/16/advertising.realitytv>>.

²³ Ken Bensinger, "Carmakers are kings of product placement deals," *Los Angeles Times*, June 14, 2008, available at: <<http://www.latimes.com/business/la-fi-garage14-2008jun14,1,5780889.story>>.

6. *A case where the product category otherwise would not have appeared, the script is altered to incorporate a product in a scene, or a reality show scene is altered to incorporate a product.* Examples include characters on *Scrubs* playing the game *Operation*, with new features of the game emphasized;²⁴ Tom Arnold on *Best Damn Sports Show, Period!* splashing a drink on an actor from a *Dockers'* commercial, and then talking about the benefits of *Dockers* pants' ability to resist stains;²⁵ a high school girl on *Heroes* given a new car by her father and saying, "Daddy, you're giving me the *Rogue!*" or something comparable;²⁶ the opening scene of an episode of *Two and a Half Men*, which featured the *Logitech Quickcam*, with actual product specs read off of the packaging.²⁷

7. *A case where the product category otherwise would not have appeared, script is altered so that a product appears in more than one scene of a show, or an episode is structured around a product.* Examples include an episode of *What I Like About You*, where characters compete for work in an *Herbal Essences* ad -- which then airs as an actual ad;²⁸ *America's Next Top Model*, with contestants modeling *Lee Jeans* for an episode;²⁹ an episode of *Kathy Griffin: My Life on the D-List*, where Kathy's assistants spend the whole episode talking about wanting new *Blackberries* and trying to sell enough merchandise to get them as a reward, with new *Blackberries* handed out at the end of the show;³⁰ in the 2008 season finale of *My Name is Earl*, a character spends the entire episode proving what he would do for a *Klondike* bar;³¹ an episode on *Smallville* that aired in March 2008 prominently featured *Stride* logos in and out of what was supposed to be an abandoned gum factory; later *Stride* gum gives a character superpowers -- being stretchy.³²

²⁴ Theresa Howard, "TV product placement moves out of background," *USA Today*, October 14, 2004, available at: <http://www.usatoday.com/money/media/2004-10-14-tv-product-placement_x.htm>.

²⁵ Michael Y. Park, "Product Placement Hits the Small Screen," *Fox News*, August 9, 2002, available at: <http://www.foxnews.com/printer_friendly_story/0,3566,59743,00.html>.

²⁶ Ravi Somaiya, "'Chloe, it's Jack. Who does our phones?'" *The Guardian*, June 16 2008, available at: <<http://www.guardian.co.uk/media/2008/jun/16/advertising.realitytv>>.

²⁷ <<http://www.eclipse-worldwide.com/index2.html>>.

²⁸ Theresa Howard, "TV product placement moves out of background," *USA Today*, October 14, 2004, available at: <http://www.usatoday.com/money/media/2004-10-14-tv-product-placement_x.htm>.

²⁹ Daniel R. Coleridge, "Top Model Says Farewell, Norelle," *TV Guide*, December 6, 2004, available at: <<http://www.tvguide.com/news/norelle-model-eliminated/041206-12>>; "America's Next Top Model, Cycle 3," *Wikipedia*, available at: <http://en.wikipedia.org/wiki/America's_Next_Top_Model,_Cycle_3>.

³⁰ Season 4, episode 2 (June 2008), <<http://www.itvx.com/MediaPost.aspx>>.

³¹ Karlene Lukovitz, "Klondike Mixes Placement, Ad Spots to Promote Contest," *Marketing Daily*, May 21, 2008, available at: <http://www.mediapost.com/publications/index.cfm?fuseaction=Articles.showArticleHomePage&art_aid=83040>.

³² Mark Wilson, "Smallville Product Placement Hits New Low," *About.com*, March 16, 2008, available at: <<http://scifi.about.com/b/2008/03/16/smallville-product-placement-hits-new-low.htm>>. (Along with the episode, *Stride* teamed up with the CW and Warner Television to give viewers the opportunity to create their own digital comic book based on the *Smallville* series. "The CW, Warner Bros. Television Group and *Stride* Gum Offer Fans the Opportunity to Create Their Own "Smallville" Digital Comic Book" (news release), *Time Warner*, March 12, 2008, available at: <<http://www.timewarner.com/corp/newsroom/pr/0,20812,1721812,00.html>>).

8. *Multiple episodes, a season or an entire series are adjusted to feature a brand.* Examples include Telemundo's featuring of Ford's Flex model in a 22-part novela,³³ America's Next Top Model, a contest show for which a contract with CoverGirl is the grand prize³⁴ and in which CoverGirl is commonly referenced;³⁵ Mad Men's "partnership" arrangement with BMW,³⁶ a deal which follows its controversial and perhaps altered deal with Jack Daniels; and Kyra Sedgwick's character's use of Revlon products on the Closer.³⁷

9. *A brand name is incorporated into the name of a program* ("Mutual of Omaha's Wild Kingdom,"³⁸ or the name of a program segment ("Halftime Brought to you By Hyundai").

10. *A celebrity or other individual endorses or promotes a product with which he or she is clearly commercially tied.* Examples of this category would include an actor appearing on a talk show to promote a movie, an author discussing a book she wrote, or a celebrity promoting a product for which he or she is identified as a paid endorser.

11. *A celebrity or other individual endorses or promotes a product with which he or she is commercially tied, in a case where the commercial tie is not disclosed or self-evident.* Earlier this decade, pharmaceutical companies hired celebrities in significant numbers to appear on

³³ John Consoli, "Novela Affair for Telemundo, Ford," Hollywood Reporter, July 1, 2008, available at: <http://www.insidebrandedentertainment.com/bep/article_display.jsp?JSESSIONID=vSrZL02G2Mg6M8GJB9dZL3phjQGYdcpFcGQJWYmlw82mt3t7RGv!571049150&vnu_content_id=1003823039>. ("The production and launch of "Amores de Luna" with Ford, featuring the Flex, is a prime example of the unique and innovative integrated solutions that only Telemundo can offer our valued clients and partners as a result of our Strategic Customized Solution Sales Strategy," said Jacqueline Hernandez, Telemundo chief operating officer. In addition to the product integration, a customized online microsite will feature a splash page with a 'Meet the Flex' section for users to get a look at the vehicle.")

³⁴ <<http://www.cwtv.com/shows/americas-next-top-model11/cast/cycle11-grandprize>>.

³⁵ See CoverGirl webpage for examples of how this is integrated on the advertiser side:

<<http://www.covergirl.com/antm/cycle11/index.jsp>>.

³⁶ Hollywood Reporter Staff, "BMW to Sponsor 'Mad Men,'" Adweek, April 8, 2008, available at:

<http://www.adweek.com/aw/content_display/news/media/e3i86d84cb514d0b969c7c8b3079a2a6b20>.

("Cable net AMC said it has signed BMW as an exclusive premiere sponsor and series partner for season two of Mad Men.

AMC said it would spotlight BMW through each of its multiplatform marketing initiatives, including on-air and online promotions, and within the network's off-channel marketing campaign through tagged exposure in advertising. AMC will also incorporate BMW into its so-called 'MAD-Vertising' campaign, in which the network creates custom content for Mad Men advertisers that airs as part of commercial breaks.

As the exclusive premiere sponsor, BMW will also receive 'enhanced exposure' throughout the first episode of Mad Men, as well as throughout AMC's promotional campaign leading up to the new season, which premieres this summer.

In addition, BMW will support a variety of network programming specials leading up to the new season, including a Mad Men season one marathon, and a special half-hour documentary. BMW will also sponsor two additional episodes during the show's second season.")

³⁷ "Kyra Sedgwick's Brutal Honesty," Parade, July 9, 2008, available at:

<http://www.parade.com/celebrity/celebrity-parade/archive/pc_0192.html>. ("I do product placement because they offer us a lot of money. I did the Revlon thing. Brenda changed her lipstick and it was a Revlon color.")

³⁸ <<http://www.wildkingdom.com/tv/>>.

television and discuss products or diseases (a kind of "disease placement," connected to an entreaty to "ask your doctor").³⁹ Stars pushing drugs on TV included Lauren Bacall, Kathleen Turner and Rob Lowe. So far as we know, neither the celebrities nor the drug makers disclosed to the broadcasters that the celebrities had been paid to discuss a disease or drug; and the broadcasters did not disclose the commercial arrangement to viewers. After publicity, this practice seemed to tail off in the pharmaceutical sector, but it does continue. Former New York Times reporter and author of *Our Daily Meds* Melody Petersen reports, for example, that Sally Field has in the last two years promoted the osteoporosis drug Boniva on at least one television program, without disclosing that the manufacturer pays her.⁴⁰

Outside of the pharmaceutical field, there is reason to suspect that undisclosed celebrity endorsements on television are not uncommon, but we are not aware of good data or reporting on the issue.

The examples used to illustrate the spectrum should demonstrate that no categorization system can capture the density, innovativeness and cross-platform components of hidden advertisements. Even the simple appearance of a product in a popular program can be quite consequential, and is often reinforced by an array of other promotional efforts.

B. Existing Rules and Practice: The Current Disclosure Regime Fails to Satisfy Section 317, or Protect Viewers from Hidden Advertisements

Under Section 508 of the Communications Act, all persons who accept payment or consideration for inclusion of any matter in a program must disclose this to the station.⁴¹ Under Section 317, broadcasters must disclose "at the time the same is so broadcast" that payment has been made or other consideration provided.⁴²

³⁹ Melody Petersen, "Heartfelt Advice, Hefty Fees," the New York Times, August 11, 2002, available at: <<http://query.nytimes.com/gst/fullpage.html?res=9506E0DD153AF932A2575BC0A9649C8B63>>; David P. Hamilton, "Celebrities Help 'Educate' Public On New Drugs," Wall Street Journal April 22, 2002.

⁴⁰ Melody Petersen, personal communication to author, September 18, 2008.

⁴¹ 47 U.S.C. § 508. The relevant section reads:

(a) Payments to station employees

Subject to subsection (d) of this section, any employee of a radio station who accepts or agrees to accept from any person (other than such station), or any person (other than such station) who pays or agrees to pay such employee, any money, service or other valuable consideration for the broadcast of any matter over such station shall, in advance of such broadcast, disclose the fact of such acceptance or agreement to such station.

(b) Production or preparation of programs

Subject to subsection (d) of this section, any person who, in connection with the production or preparation of any program or program matter which is intended for broadcasting over any radio station, accepts or agrees to accept, or pays or agrees to pay, any money, service or other valuable consideration for the inclusion of any matter as a part of such program or program matter, shall, in advance of such broadcast, disclose the fact of such acceptance or payment or agreement to the payee's employer, or to the person for whom such program or program matter is being produced, or to the licensee of such station over which such program is broadcast.

⁴² Section 317(a)(1) of the Communications Act requires that:

All 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, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may

These provisions reflect a fundamental principle of broadcast and fair advertising law that is simple, ethical and grounded in common sense: Viewers have a right and need to know when they are being advertised to. Or, as the Commission has stated: "Listeners are entitled to know by whom they are being persuaded."⁴³

As we noted in our initial petition on hidden advertisements, sponsorship identification has been central to broadcast law since its inception. The Commission has consistently upheld sponsorship identification requirements. "Paramount to an informed opinion and wisdom of choice," the Commission stated in one important case, "is the public's need to know the identity of those persons or groups who elicit the public's support."⁴⁴ And again, a broadcast audience must "be clearly informed that it is hearing or viewing matter which has been paid for, when such is the case, ... and the person paying for the broadcast of matter [must] be clearly identified."⁴⁵

As we argued in our initial petition, and as we elaborate further below, existing law and the principles behind existing law demand that hidden advertisements be disclosed "at the time the same is so broadcast" -- that is, simultaneously with the airing of the hidden commercial.

Under existing Commission regulations, however, broadcasters are able to discharge their duty under Section 317 simply by airing a single notice of the commercial placement during the course of a broadcast. 47 CFR § 73.1212(f) stipulates that:

In the case of broadcast matter advertising commercial products or services, an announcement stating 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, shall be deemed sufficient for the purpose of this section and only one such announcement need be made at any time during the course of the broadcast.

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

Section 317(c) further states:

(c) Acquiring information from station employees

The licensee of each radio station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section.

⁴³ Application of Sponsorship Identification Rules, 40 FCC 141 (1963), as modified, 40 Fed. Reg., 41936 (September 9, 1975).

⁴⁴ Liability of Universal Broadcasting Co. of Minneapolis-St. Paul, Inc., 51 FCC 2d 597, 602 (1975), forfeiture reduced, 58 FCC 2d 1367 (1976), citing Sponsorship Identification Rules, 34 FCC 829, 894 (1963).

⁴⁵ Midwest Radio-Television, Inc., 49 FCC 2d 512, 515 (1974), citing National Broadcasting Company 27 FCC 2d 75 (1970). ⁴⁶ This is the practice on at least some programs on the E! and Food networks, for example.

The Commission asks whether existing rules are effective at ensuring the public is aware of hidden advertisements. The obvious answer to that question is, "no," but it is important to delineate the multiple reasons that the public is not so aware.

Even if a disclosure at the end of a program were an adequate means of informing viewers about hidden advertisements, current broadcaster practice would fail.

First, although existing FCC rules require that the disclosure of embedded advertisements must appear on screen long enough (and in large enough type, if visual) to be heard or read by the average person, it is widely acknowledged that this standard is not met in practice. Crawls of fast-moving, small font text are unreadable to most persons, especially when the disclosure is likely to occur at the end of a program, when broadcasters routinely use small split screens to preview coming programs or transmit other messages. The split screens make small fonts even harder to read and draw viewer attention away from the credit scroll.

Second, the existing language commonly used to meet the 73.1212(f) obligation -- "promotional consideration furnished by ..." -- has no meaning to the average person. Many programs now use language such as "special thanks to ...",⁴⁶ which conveys the idea that advertisers have lent some pro bono assistance to the producers.

Third, it is not clear that all programs are fully disclosing product placements, including but not exclusively in the area of celebrity endorsers appearing on talk shows.

For the average viewer then, the current situation is this: The hidden advertisement disclosures at the end of programs appear in unreadable, fast-moving type, and convey information about product placements in coded language. In other words, for the average viewer, there is effectively no affirmative disclosure of hidden advertisements.⁴⁷ Even for a viewer intent on learning about product placements, it commonly requires enormous concentration to read the scrolls, and they are some times unreadable even for the most focused of viewers.⁴⁸ And, when information is readable, it may be incomplete.

Curing these three problems, however, would not satisfy the letter or purpose of Section 317. That is because end-of-program disclosures are inherently unable to make the public aware of hidden advertisements, for reasons elaborated below.

C. Embedded Advertising Is Not Obvious

The Commission asks whether embedded advertising should be exempt from disclosure requirements, because the commercial nature and identity of the sponsor is obvious.

⁴⁷ In Season 2, Episode 11 of NBC's *Heroes*, for example, disclosure for the show's sponsors was flashed on screen during the credits for less than two seconds. The disclosure read: "Promotional consideration furnished by: Sprint, Dell, Apple, Cisco Systems." Such a brief disclosure with puzzling and unspecific information does not inform viewers that certain companies paid to have their products placed within the show, and fails to meet the standards of Section 317.

⁴⁸ For at least some re-run programs, A&E Network, for example, compresses fast-moving credits to about one fifth of the screen. The resulting distorted lettering is unreadable.

We believe there are some cases of embedded advertisements that are obvious, and these can reasonably be excluded from a robustly defined duty to disclose. These cases primarily involve embedded advertisements that appear to be traditional advertisements inside of a program, as in the appearance of a billboard or the branding of a portion of a program.

In general, however, the commercial nature of hidden advertisements is not obvious, and it is widely understood in the industry that product placements or integrations that are obvious are poorly executed. We elaborate on this argument below.

Before turning to the case for simultaneous disclosures, however, one additional point should be made regarding obviousness. The test for obviousness around product placement and integration is not whether people are aware that product placement and integration exist, but whether they can identify these advertisements each time they are exposed to them. Just as people are aware that newspaper advertisements exist, but will be deceived by a newspaper advertisement they cannot identify as such, so too with product placements. Even the average viewer is attuned to product placement -- an assertion of awareness which we believe is not justified -- it is implausible to suggest the average viewer is aware of most or all of the hidden advertisements to which he or she is subjected.

II. SECTION 317 AND PROTECTING VIEWERS REQUIRES MANDATORY DISCLOSURE OF HIDDEN ADVERTISEMENTS AT THE TIME THEY ARE AIRED (Response to Paragraph 12)

A. Proposed Modification of Sponsorship Identification Rules

Our 2003 petition presented our basic position: Product placement advertisements should be disclosed at the time they occur, with the word "advertisement" appearing on screen during the airing of a product placement. This could be done through a pop-up window, or through any of the many technologies broadcasters now employ. The standards should be that the disclosure is large enough, and kept on screen long enough, to be read and understood. There should be additional disclosure at the outset of the program of product placements and integration, again in large enough font and on screen long enough to be comprehended. Disclosure must be in plain English. In our 2003 petition, we suggested "This program contains paid advertising for ..."

Given the evolution of hidden advertisement product integration since our petition, we now believe also that the disclosure at the outset should explain, simply, how a program has been altered to incorporate embedded advertisements. For example, "This program contains paid advertising for ... The script of a scene has been altered to include an in-program advertisement from this advertiser."

This approach is intended to realize the letter and purpose of Section 317. As a textual matter, Section 317 requires disclosure of "all matter" for which payment or consideration has been received. For this to have meaning, broadcasters must explain to viewers the fashion in which they are being advertised to -- disclosing the form of the hidden advertisement is necessary to communicate the "matter" for which payment has been provided. So also to fulfill the purpose

of Section 317. In the current elaborate system of hidden advertisements, viewers cannot just be told that they are being advertised to. To be meaningfully informed, they must be informed at the time they are being persuaded, and they must be told of the of the ways in which they are being advertised.

Here is how we would envision this arrangement working, as applied to the schematic spectrum of hidden advertising strategies presented above:

1. *Brand-unidentifiable product placements.* The advertising effect is de minimis and no disclosure is required. Note, however, that integration of such product placements with other advertising campaigns, including on-line sales sites of the program that tout the appearance of a product on the show, may change the character of such a product placement.

2. *Brand-name appearance in a traditional advertising setting, or a virtual-world analog, or the presentation of brand logos or brand names.* These advertisements generally meet the standard for obviousness, and no disclosure is required.

3. *A product used in a program as a prop, with the brand identifiable, either because the brand name is visible, or because a defining feature of the brand is visible.* The brand-name is not mentioned. The word "advertisement" appears on screen while the brand appears. For a brand that appears on screen for an extended period of time, the advertisement pop-up would only be required for a limited period (perhaps five seconds) in each scene or segment in which the placement occurs. The disclosure at the outsets explains: "This program contains paid advertising for ..."

It is worth noting that the mere presence of a placed product in the background of a television program has considerable persuasive power, according to academic studies.⁴⁹

4. *A product used as a prop in a program, and the brand is mentioned, or the product is discussed and the brand name is visible or otherwise identifiable.* The word "advertisement" appears on screen while the brand appears. For a brand that appears on screen for an extended period of time, the advertisement pop-up would only be required for a limited period (perhaps five seconds) in each scene or segment in which the placement occurs. The disclosure at the outsets explains: "This program contains paid advertising for ..."

5. *A brand mentioned or visually identifiable, and a character uses or interacts with the product.* The word "advertisement" appears on screen while the brand appears. For a brand that appears on screen for an extended period of time, the advertisement pop-up would only be required for a limited period (perhaps five seconds) in each scene or segment in which the placement occurs. The disclosure at the outsets explains: "This program contains paid advertising for ..." If the plot would have called for a character to have used that product

⁴⁹ Cristel Antonia Russell, "Investigating the Effectiveness of Product Placement in Television Shows: The Role of Modality and Plot Connection Congruence on Brand Memory and Attitude," *Journal of Consumer Research*, vol. 29, December 2002, pp. 306-318. ("Product placements that were merely placed in the visual background were as persuasive as audio placements that were highly connected to the plot," at page 314.)

generically in any case (e.g., the script called on a character to drive, now they are driving a brand-identifiable car), no further disclosure is required.

6. *A case where the product category otherwise would not have appeared, script is altered to incorporate a product in a scene, or a reality show scene is altered to incorporate a product.* The word "advertisement" appears on screen while the brand appears. For a brand that appears on screen for an extended period of time, the advertisement pop-up would only be required for a limited period (perhaps five seconds) in each scene or segment in which the placement occurs. The disclosure at the outset explains that the scene has been altered and how: "This program contains paid advertising for ... The script of a scene has been altered to include an in-program advertisement from this advertiser." Unscripted programs would need to employ comparable language that explained how a scene was affected. A disclosure is additionally required at the start of the segment in which the product placement scene occurs.

7. *A case where the product category otherwise would not have appeared, script is altered so that a product appears in more than one scene of a show, or an episode is structured around a product.* The word "advertisement" appears on screen when the brand appears. For a brand that appears on screen for an extended period of time or on multiple occasions, the advertisement pop-up would only be required for a limited period (perhaps five seconds) in each scene or segment in which the placement occurs. The disclosure at the outset explains plainly the commercial influence on the program's content. For example: "This program contains paid advertising for ... The story for this episode has been developed in conjunction with the advertiser, and the program contains in-program advertisements from this advertiser." Unscripted programs would require a comparable disclosure, explaining clearly how a program has been adjusted. Such a disclosure might state: "This program contains paid advertising for ... The episode features contestants modeling clothing from this advertiser. The choice about what clothing contestants will model in this episode has been altered to include an in-program advertisement from this advertiser." A disclosure is additionally required at the start of each segment in which a product placement scene occurs.

8. *Multiple episodes, a season or an entire series are adjusted to feature a brand.* The same standard as for an individual episode applies, thus, the word "advertisement" appears on screen when the brand appears. For a brand that appears on screen for an extended period of time or on multiple occasions, the advertisement pop-up would only be required for a limited period (perhaps five seconds) in each scene or segment in which the placement occurs. The disclosure at the outset of each program explains plainly the commercial influence on the series and the episodes' content. For example: "This program contains paid advertising for ... This show and this episode [assuming that to be the case] were developed in conjunction with the advertiser, and the program contains in-program advertisements from this advertiser." A disclosure is additionally required at the start of each segment in which a product placement scene occurs.

9. *A brand name is incorporated into the name of a program or the name of a program segment.* The advertisement is obvious, and no disclosure is required. Note, however, if the branding involves other non-obvious forms of product integration, those would need to be disclosed.

10. *A celebrity or other individual endorses or promotes a product with which he or she is clearly commercially tied.* The advertisement is obvious, and no disclosure is required.

11. *A celebrity or other individual endorses or promotes a product with which he or she is commercially tied, in a case where the commercial tie is not disclosed or self-evident.* The word "advertisement" appears on screen while the person discusses the product.⁵⁰ The disclosure at the outset explains plainly the commercial tie of the celebrity or other endorser. For example: "This program contains paid advertising for ... John Jones is a paid to endorse products from this advertiser, and discusses this advertiser's products on this program."

B. The Rationale for the Proposed Modification to Sponsorship Identification Rules

The simultaneous disclosure regime we urge is required for two distinct reasons. First, very few viewers watch credits, and so very few will be informed by hidden advertisement disclosures included at the end of a program.⁵¹ Second, meaningful disclosure of hidden advertisements must inform viewers at the moment they are being subjected to the persuasive impact of a product placement. Even in a world with no TiVo and where viewers were prohibited from getting up from their couches and going to the bathroom at the end of television programs, simultaneous disclosures would remain necessary.

1. Viewers Do Not Watch Credit Scrolls

Even before widespread use of TiVo and DVR services, advertisers recognized that viewers did not watch scrolling credits at the end of a program. Particularly once remote controls became prevalent, and cable introduced a wide selection of channels, viewers began switching channels while credits rolled. This recognition was inspiration for split screen presentations of program previews to be run simultaneous with credits.⁵²

Now, with increasing numbers of households using DVRs, as well as watching television programs on a wide array of nontraditional screens delivered from diverse services, even fewer viewers are likely to see end-credits.

Nielsen estimates that a quarter of U.S. homes own DVRs.⁵³ Analysts expect this figure to double by 2012.⁵⁴ TiVo users skip between one half and two thirds of all commercials.⁵⁵

⁵⁰ Note that a relevant discussion of a product may include conversation that does not mention the product's name. A paid endorser for a pharmaceutical product, for example, may discuss a particular medical condition treated by that product without mentioning the product's name. This kind of "ask-your-doctor" or disease awareness advertising should be covered by FCC rules.

⁵¹ Inclusion at the outset of a program offers some modest potential benefits over the end of a program (as we discuss below), but disclosures at the start of a program can also be segmented off from the main show.

⁵² Marketing Week, "ITV Plans End-Credits Overhaul," August 24, 2000. ("The channel is developing more creative ways of ending programmes than the standard name roll and music. Advertisers are keen to see the channel take measures to reduce channel switching before ads appear.")

⁵³ David Goetzl, "Nielsen: DVR Use Up, America Readies For Digital Switch," Media Daily News, July 17, 2008, available at: <http://www.mediapost.com/publications/?fa=Articles.showArticleHomePage&art_aid=86737>.

⁵⁴ Leichtman Research Group, "DVRs Now in One Quarter of U.S. Households" (news release), September 15, 2008. ("The number of US 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 over the next four years," said

Advertisers have acknowledged the danger DVRs pose to traditional commercial breaks, and 70 percent of advertisers believe that DVRs "will reduce or destroy the effectiveness of 30-second spot TV advertising" by allowing viewers to fast forward through ads.⁵⁶

Indeed, it is the spread of DVRs that is widely credited with the surge in product placement and product integration. "Marketers are obviously extremely wary of ad-stripping technologies and this is only going to, in our minds, increase the role of product placement in the overall media buying strategies to compensate for the perceived diminished effectiveness of the 30-second television spot," says Patrick Quinn, president of PQ Media. 'Product placement is right there. You are watching the show. You are going to see it. So why wouldn't you do more of that?'"⁵⁷

"Paying hundreds of thousands of dollars for a 30 second spot that users skip over on their TiVo is insane," asserts marketing firm Eclipse Worldwide. "With product placement your product is embedded into the body of the production, so skipping commercials is no longer a concern."⁵⁸

If viewers are not watching traditional advertisements, which are carefully designed and heavily tested to be engaging, what reason is there to believe they will watch credit scrolls, or even improved hidden advertisement disclosures?

There is none. If external forces are pushing advertisers to embed their advertisements in programs, then the relevant disclosures should be embedded as well.

2. Meaningful Disclosure of Hidden Ads Must Come at the Moment Viewers Are Advertised To

But the problem is not just that viewers will not see disclosures at the end or beginning of programs. The fundamental problem is that disclosures separated in time will fail even if viewers do watch them. The emotional and persuasive power of a product placement advertisement, like other advertisements, occurs at the moment it airs. It is at that moment when viewers are being marketed to; it is at that moment when they are seeing a product portrayed favorably and forming an opinion, without recognizing that they are being advertised to. Being told earlier or later that the portrayal is an ad will not cure the deception perpetrated at the moment it happens. This is especially so given that disclosures at the end or beginning of shows do not enable viewers to identify every hidden advertisement precisely.

The covert nature of the commercial underpinnings of product placement and integration is, in many cases, central to their effectiveness. To the extent this is true -- and it is considerable --

Bruce Leichtman, president and principal analyst for Leichtman Research Group, Inc.) available at: <<http://www.leichtmanresearch.com/press/091508release.html>>.

⁵⁵ Steve McClellan, "TiVo: Viewers Skip Fewer 'Relevant Ads,'" AdWeek, July 30, 2008, available at: <http://www.adweek.com/aw/content_display/news/media/e3ie8eec957b5ed578bd028b1966ccb7ab0>.

⁵⁶ ANA/Forrester, "Beyond the 30 Second Spot: Marketers Adding Alternatives to Television Advertising," Marketing Today, March 22, 2006, available at:

<http://www.marketingtoday.com/research/0306/tv_advertising_less_effective.htm>.

⁵⁷ Amy Johannes, "TV Placements Overtake Film," Promo Magazine, May 1, 2005, available at:

<http://promomagazine.com/entertainmentmarketing/marketing_tv_placements_overtake/index.html>.

⁵⁸ <<http://www.eclipse-worldwide.com/index2.html>>.

product placement and integration without simultaneous disclosure is inherently deceptive.

Those involved in the product placement business have acknowledged that hidden advertisements' effectiveness depends on viewers not recognizing them for what they are: commercials. A survey of product placement professionals, published in 2003, found a strong belief that product placements can be "considered a form of subliminal advertising," with this proposition receiving a mean score of 5.61 on a 7-point scale.⁵⁹ These remarkable results suggest that the stealth component is a key facet of product placements. The results suggest not just that viewers desire subtle product integrations that do not distract from the storyline, but that the hidden nature of product placements is central to how they work.

Similarly, drawing on interviews with managers in the product placement industry, Cristel Antonia Russell and Michael Belch write that "subtlety is the key strength of product placement."⁶⁰ The more obvious the placement -- that is, the more apparent that it is commercially driven -- the less effective it is. One product placement manager told Russell and Belch, "We don't like blatant placements, ... because all that is going on, the consumer is starting to see through it. *Starting to realize that all this is paid advertisement*" (emphasis added).⁶¹

Others in the product placement field worry that once viewers develop awareness of product integration strategies, they will tune it out.⁶² Advertisers, of course, reasonably want viewers to pay attention to their ads -- but they have no right to achieve this objective by hiding the fact that they are advertising.

The importance of secrecy for product placements is not a new discovery. The pioneers in product placement, Big Tobacco, have long understood that the value of a product placement comes from viewers not recognizing that they are watching paid ads. In 1972, a movie production company president wrote to RJ Reynolds Tobacco that all the characters in a movie his company was producing smoked. "Movies are better than any commercial that has been run on television or any magazine," he boasted, "because the audience is totally unaware of any sponsor involvement."

Unaware that they are being advertised to, viewers do not apply the same filters as they do when watching commercials. Explained an executive from a marketing firm long involved in integrated campaigns, product placement is "more subtle than advertising because your

⁵⁹ James Karrh, Kathy Brittain McKee, Carol Pardun, "Practitioners Evolving Views on Product Placement Effectiveness," *Journal of Advertising Research*, June 2003, pp. 138-149.

⁶⁰ Cristel Antonia Russell and Michael Belch, "A Managerial Investigation into the Product Placement Industry," *Journal of Advertising Research*, March 2005, pp. 73-92.

⁶¹ Cristel Antonia Russell and Michael Belch, "A Managerial Investigation into the Product Placement Industry," *Journal of Advertising Research*, March 2005, pp. 73-92.

⁶² Ed Erhardt, ESPN ABC Sports, interviewed in "Making the Deal," *Brandweek*, May 17, 2004, available at: <http://www.adweek.com/aw/esearch/article_display.jsp?vnu_content_id=1000511871>. ("And as fast as we figure out how to do product integration and all that stuff, is as fast as consumers will figure out how to tune it out.")

⁶³ Stanton Glantz, "Smoking in Teenagers and Watching Films Showing Smoking," *British Medical Journal*, December 15, 2001. 323:1378-1379. Available at: <<http://bmj.bmjournals.com/cgi/content/full/323/7326/1378>>.

(defensive) antenna is up a little less.”

Elizabeth Cowley and Chris Barron explain that one of the perceived benefits of product placement is that viewers do not activate their "persuasion knowledge" -- "knowledge about how, why, and when a message is intended to influence them, to help them 'cope' with persuasive episodes." That is, they write, citing other researchers, "the advantage that product placements have over traditional advertising is ascribed to the placement's hidden motive of persuasion." Cowley and Barron carry out an experiment that supports this hypothesis, showing that when viewers are more aware of product integration strategies, they react negatively to the integrated brand.⁶⁵

Another way to understand the deceptive element of hidden advertisements is that they deceptively appear to portray authentic uses of a product. Such authentic uses may be conveyed by actual persons, whether regular people or celebrities, in reality shows, talk shows, sports programs or news programs. "When somebody is jumping up and down because they have a beer as a reward," explained CBS President (and current CEO) Leslie Moonves a half dozen years ago, "and they make it seem like it's the greatest liquid that they ever drank in their lives and they're real people -- that probably is more effective than having some model saying, 'Hey, drink Budweiser.' It can be very effective."⁶⁶

Apparently authentic uses of a product may also be by fictional characters, presumed by viewers to wear clothes or consume food or otherwise use goods and services that match what they would "really" do. The effectiveness of many product placements depends significantly on the association with favorite characters, and the implied endorsement they confer. There is widespread acknowledgement of this in the field.

* "Most practitioners rely on the belief that a well-placed brand is 'more like an implied endorsement by that character,' and that the effect of placement is generating 'buzz,'" managers in the product placement industry told two academic researchers.⁶⁷

* "Product placement is the biggest thing to hit the advertising industry in years," Gisela Dawson, then-president of Entertainment Resources & Marketing Association, told *Promo Magazine* in 2005. "It will never go away. It's an implied endorsement. You are involved in a story and the story involves a product that you see or notice. [Product placement] moves and motivates people. It's an incredible medium."⁶⁸

⁶⁴ Steven Theobald, "Teen-Clothing Chain's 46 New Stores Buck Trend," *Toronto Star*, May 6, 2001. (quoting Lynn Fletcher, chief strategic officer of Vickers Benson & Arnold).

⁶⁵ Elizabeth Cowley and Chris Barron, "When Product Placement Goes Wrong: The Effects of Program Liking and Placement Prominence," *Journal of Advertising*, vol. 37, no. 1 (Spring 2008), pp. 89-98.

⁶⁶ Douglas Durden, "Not-So-Hidden Persuaders: A Word From Your Sponsor Is Now a Part of the Show Itself," *Richmond Times Dispatch*, August 17, 2002, available at: <http://www.commercialalert.org/persuaders.htm>.

⁶⁷ Cristel Antonia Russell and Michael Belch, "A Managerial Investigation into the Product Placement Industry," *Journal of Advertising Research*, March 2005, pp. 73-92.

⁶⁸ Amy Johannes, "TV Placements Overtake Film," *Promo Magazine*, May 1, 2005, available at: http://promomagazine.com/entertainmentmarketing/marketing_tv_placements_overtake/index.html.

* A product placement professional responding to an academic study explained that product placements help establish a brand's profile, and also conveys the benefit of the program or a character's credibility.⁶⁹

* Said a Labatts USA spokeswoman, "When a product is embedded in the content of a movie or show, it can carry increased credibility with our target audience."⁷⁰

* The benefits of product placement, asserts the marketing firm Eclipse Worldwide, include "Implied Endorsement: Forget About Those Huge Endorsement Fees." States the agency's promotional material: "Famous actors, who are key influencers in purchase decisions, use your products, without paying huge endorsement fees. This adds an incredible 'cool' factor to your product and brand."⁷¹

The mechanisms and emotional relationships through which these implied endorsements are transmitted are not a mystery. Viewers commonly have strong relationships with particular programs and characters. Surveying the academic literature, Cristel Antonia Russell, Andrew Norman and Susan Heckler explain that favored characters are a reference point, a source of social comparison and an inspiration for consumer goals. They model behavior for viewers, and viewers develop interpersonal relationships -- effectively a kind of admiring friendship -- with TV characters. "These behavioral modeling effects are especially powerful because the dramatic nature of TV programming elicits expressions of feeling and verisimilitude rather than the counterargumentation usually associated with advertising."⁷² In other words, viewers know to be suspicious and have their guard up when confronted with advertising. But they trust the authenticity of TV programs -- making them especially vulnerable to hidden advertisements.

Russell, Norman and Heckler show through a research study that viewers with tight connections to a program recall significantly more product placed brands than those with weaker connections, and they are better able to recollect the context in which the brand appears.

"Highly connected viewers are likely to consider the program content part of their world and to mold characteristics of their own life after the lives of the characters in the show. Because of the relationships they have with the characters, they are interested in the types of consumption displayed on the show, and, as a result, they pay more attention to these consumption portrayals and become more familiar with the premise and characters." They hypothesize and then show that "these effects should be particularly notable in the realm of product placements, when real brands are placed in the program to enhance the characters' realism even further."⁷³ However,

⁶⁹ James Karrh, Kathy Brittain McKee, Carol Pardun, "Practitioners Evolving Views on Product Placement Effectiveness," *Journal of Advertising Research*, June 2003, pp. 138-149. ("It delineates public acceptance,' one respondent wrote, 'a "third party endorsement" of product or service."')

⁷⁰ Mark R. Greer, "Going Hollywood: Beverage Companies Are Dealing with Advertising Overload with Less Traditional Tie-ins," *Beverage Industry*, May 1, 2003.

⁷¹ <<http://www.eclipse-worldwide.com/index2.html>>.

⁷² Cristel Antonia Russell, Andrew Norman and Susan Heckler, "The Consumption of Television Programming: Development and Validation of the Connectedness Scale," *Journal of Consumer Research*, vol. 31, June 2004, pp. 150-161.

⁷³ Cristel Antonia Russell, Andrew Norman and Susan Heckler, "The Consumption of Television Programming: Development and Validation of the Connectedness Scale," *Journal of Consumer Research*, vol. 31, June 2004, pp. 150-161.

the illusion of "realistic" characters depends on the characters making authentic choices within the context of the program. If viewers understand that characters' consumption choices are instead dictated by advertisers, then the appearance of real brands undermines rather than enhances the sense of realism. In this regard, in the cases where it may otherwise be most effective (with highly connected viewers), product placement effectiveness as an advertising technique depends especially on its stealth. That is, advertisers' ability to capitalize on highly connected viewers' relationship with characters depends in some part on the viewers not recognizing that they are being advertised to.

In the context of U.S. communications and fair advertising law and principles, there is typically (but with important exceptions) no problem in principle with implied endorsements by TV characters or real persons appearing on TV. But if those implied endorsements stem from payment, then they must be disclosed as the paid advertisements that they are. And, the disclosure must be done in such a manner as to alert the viewer at the moment they are being advertised to -- so that they are able to recognize product placement ads as ads.

C. The Case of Radio

Product placements and integration are widespread on commercial radio, as any listener to sports broadcasts knows.

Many of the product placements on radio broadcasts are similar to the television categories number two or number nine that we present above. These would include brand names attached to sports events (e.g., the Jones Company Seventh Inning Stretch) or sponsorships of studios (e.g., "we are broadcasting from the Smith Company Studios"). These product integrations meet the standard of obviousness, and do not require any disclosures.

But some number of hidden advertisements on radio raise more troubling issues. In some cases, radio hosts incorporate reference to products into their on-air banter, without revealing that they or broadcasters have been paid or otherwise compensated for such mentions. An example of hidden advertisements on radio is GM's practice of giving prominent radio personalities new cars for two weeks a month. In 2007, Automotive News reported on this practice, and how it has succeeded in getting the radio hosts to praise GM products on air.⁷⁴ These practices, apparently accompanied by no disclosure at all, appear to violate Sections 317 and 507.

We do not know how frequent are such practices, nor other kinds of hidden advertisements on radio.

However extensive they are, such practices clearly call for a new disclosure regime. Radio obviously differs from television in that it is aural only. Simultaneous disclosure does not seem feasible for radio. The appropriate rule, however, should aim to be as close to the television rule

⁷⁴ Mary Connelly, "General Motors Payola: GM Woos the Radio Stars - Rush, Whoopi and Others Plug Vehicles on the Air," *Automotive News*, August 6, 2007. A request for investigation of this matter from Ralph Nader has apparently gone unanswered. See Letter from Ralph Nader to Kris Monteith, Bureau Chief, Enforcement Bureau, Investigations and Hearings Division, Federal Communications Commission, August 17, 2007, available at: <<http://www.nader.org/index.php?archives/1214-Open-Letter-to-FCC-Regarding-GM-Payola.html>>.

we propose as possible. There should be a disclosure immediately before the hidden advertisement (within, say, 30 seconds), and it should state that an advertisement will follow or has just occurred, and explain in plain language that the host or broadcaster was paid or compensated for the comments to follow. The disclosure should be mandated to be presented at the same volume as the host's banter, and it should be presented at a normal speed of speech. Given that radio listeners listen so intermittently to radio programs, disclosures at the outset of a program are fine, but of even more limited value than is the case for television programming.

III. FIRST AMENDMENT CONSIDERATIONS (Response to Paragraph 13)

There is no First Amendment problem with a hidden advertisement rule that mandates simultaneous disclosure.

Central Hudson Gas & Elec. v. Public Serv. Comm'n 447 U.S. 557 (1980) continues to provide the guiding framework for assessing the constitutionality of limits on commercial speech. The case establishes a four-part test:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.⁷⁵

A. Hidden Advertisements are Inherently Deceptive and Misleading, and Thus Do Not Merit First Amendment Protection

A simultaneous disclosure rule passes the Central Hudson test based on the first prong. An undisclosed hidden advertisement is inherently deceptive and misleading. Our discussion above in favor of a simultaneous disclosure requirement shows why this is so. If viewers are not informed at the time they are being advertised to, they are unknowingly being subjected to persuasive advertising messaging. The very form of the hidden advertisement makes it misleading, irrespective of what is being communicated.

In a mistakenly reasoned decision to reject simultaneous disclosure in response to a petition we filed at the same time as our 2003 petition to the FCC, Federal Trade Commission staff argued that product placements are not misleading because they do not make objective claims about products.

"The principal reason for identifying an advertisement as such is that consumers may give more credence to objective representations about a product's performance or other attributes if made by an independent third party than if made by the advertiser itself. ...

Despite the variety and frequency of product placement and brand integration

⁷⁵ Central Hudson Gas & Elec. v. Public Serv. Comm'n 447 U.S. 557, 566 (1980).

into programming, your complaint does not suggest that product placement 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 performance or attributes."⁷⁶

This analysis fails completely to address the unique attributes of hidden advertisements, how they work, and why they differ from traditional advertisements. Additionally, although the FTC comments did not purport to address First Amendment issues, it is important to note that the FTC's analysis is not grounded in any constitutional jurisprudence.

The FTC analysis fails, first, because hidden advertisements not infrequently make objective claims. The clearest examples involve straight reading from brand partner promotional text. Such examples include the episode of *Two and a Half Men*, with a character reading the product description off of the Logitech Quickcam camera's packaging;⁷⁷ characters on *Scrubs* discussing new features of the game *Operation*;⁷⁸ and Tom Arnold on *Best Damn Sports Show, Period!* talking about the benefits of Dockers pants' ability to resist stains.⁷⁹

Second, in highlighting the example of the Coke cups on *American Idol*, the FTC failed to grapple with the reality of present-day hidden advertisements. While straight product placements very likely remain predominant, much more industry attention (and, presumably, advertiser dollars) is directed at product integration and much deeper kinds of advertiser-broadcaster partnerships. The Coke cups themselves, of course, are part of a much broader integration strategy.

These evolving partnerships involve extraordinarily careful presentation of products, and commonly include explicit and implicit claims about the products. For example, in a June 2008 episode of *My Boys*, a character compares himself to a "dependable" Honda. In an episode of *Heroes*, initially airing in February 2007, a Nissan Versa is used as a shield in a shootout. Afterward, a character notes that the car is scratch-free despite the gunfight. In an episode of *Gilmore Girls*, originally airing in October 2006, an entire scene revolves around a character talking about whether she actually likes Pop-Tarts or whether she just likes them because her parents did not want her to eat them as a child. The scene concludes with her stating, "I like Pop-Tarts."⁸⁰ On *Fear Factor*, a hidden advertisement for Orbitz had the show's host state, "Today you guys will be playing for a \$10,000.00 flight credit from Orbitz.com, where you can

⁷⁶ Letter from Mary K. Engle, associate director for advertising practices, Federal Trade Commission, to Gary Ruskin, executive director, Commercial Alert, February 10, 2005.

⁷⁷ <<http://www.eclipse-worldwide.com/index2.html>>.

⁷⁸ Theresa Howard, "TV product placement moves out of background," *USA Today*, October 14, 2004, available at: <http://www.usatoday.com/money/media/2004-10-14-tv-product-placement_x.htm>.

⁷⁹ Michael Y. Park, "Product Placement Hits the Small Screen," *Fox News*, August 9, 2002, available at: <http://www.foxnews.com/printer_friendly_story/0,3566,59743,00.html>.

⁸⁰ Creative Entertainment Services, "Kellogg's Pop-Tarts Receive Exposure in *Gilmore Girls*," available at <http://www.acreativegroup.com/ces/sample_placements.html>. According to Creative Entertainment Services, "Kellogg's Pop-Tarts receive excellent exposure in the October 10th episode of CW's *Gilmore Girls*, with 14 verbal mentions and both hands on and logo exposure."

travel anywhere around the world, Europe, Asia, South America, anywhere you want to go."⁸¹
The list of examples goes on and on.

Third, as discussed above, one of the key benefits of hidden advertisements is the associational value with fictional characters or real persons. There is, as industry insiders repeatedly state, an implied endorsement. Failure to disclose that an endorsement is paid is deceptive and misleading, because the viewer has no way to know of the underlying commercial arrangement (and, in the case of product placements, evidence suggests that disclosing this information reduces their persuasive impact). Indeed, the FTC has adopted exactly this principle in its regulations related to paid endorsements.⁸²

Fourth, there is no common sense rationale for the FTC position on product placement. There is surely no dispute that advertisements work as much through emotive response as rational information dissemination and argument. Why should viewers and consumers not be protected if they are covertly subjected to emotive persuasive techniques, rather than "objective" claims?

Finally, while again recognizing that the FTC was not making a First Amendment argument, it must be emphasized that there is basis in constitutional jurisprudence for the "objective claims" standard. The commercial speech jurisprudence explains that "the First Amendment's concern for commercial speech is based on the informational function of advertising."⁸³ In other words, if anything, the absence of objective claims reduces the strength of First Amendment protections.

B. Even if Hidden Ads Merit First Amendment Protection, a Simultaneous Disclosure Rule is Constitutional

Even if the Commission were to conclude that hidden advertisements merit First Amendment protection as non-misleading speech under *Central Hudson*, it should have no trouble finding that a simultaneous disclosure system for hidden advertisements satisfies the other components of the *Central Hudson* test.

We consider each element of *Central Hudson* in turn.

1. The Substantial Government Interest in Regulating Hidden Advertisements

First, is there a substantial government interest in regulating hidden advertisements?

The Washington Legal Foundation (WLF) comments mockingly ask, "where oh where" is the injury from hidden ads, asserting that our 2003 petition fails "to demonstrate any harm from

⁸¹ See Creative Entertainment Services, "Orbitz Receives Exposure in Fear Factor," available at: <http://www.acreativegroup.com/ces/sample_placements.html>. The verbal mention was part of a much more elaborate integration.

⁸² 16 C.F.R. § 255.5. ("When there exists a connection between the endorser and the seller of the advertised product which might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience) such connection must be fully disclosed.")

⁸³ *Central Hudson Gas & Elec. v. Public Serv. Comm'n* 447 U.S. 557, 563 (1980).

them."⁸⁴

The answer, as was plain from our petition, is the deception perpetrated on viewers, a deception that U.S. communications and fair advertising law is premised on preventing. As we have sought to demonstrate in these comments, under the current system, broadcasters and cable operators expose viewers to a torrent of advertisements without them being aware they are being advertised to, or when. Even if hidden advertisements are not found to constitute misleading speech under Central Hudson, it is implausible to argue there is no deceptive element to hidden advertisements -- even product placement professionals self-report product placements as "subliminal." Viewers are injured every time they are deceived by hidden advertisements.

Our petition did allude to particular areas of concern with hidden advertisements, among them advertising to children, and advertising of junk food, alcohol and pharmaceuticals. The WLF argues that in these respects, "petitioner's real objection appears to be the commercial promotion of those products at all, not their promotion through product placements."⁸⁵

The WLF argument, however, fails to acknowledge that, in each of these areas, the government and the industries themselves recognize the strong public interest in restricting no-holds-barred advertising. Each is subjected to industry self-regulation -- including significant if inadequate measures by the junk food industry not to advertise to children -- and all (with the partial exception of the junk food industry⁸⁶) are subject to governmental restrictions on advertising. The logic of those self-regulatory and regulatory systems is obvious: for children, they do not have the ability, or have only limited ability, to distinguish between ads and regular programming; for the particular industries, advertising may lead to inappropriate consumption practices by children and/or adults, with potentially severe public health consequences.

In this context, it makes sense to impose special rules on hidden advertisements. Or, stated more accurately, it makes sense to tailor fundamental fair-advertising rules to meet the newly emerged circumstance of widescale product placement and integration.

It is worth emphasizing in this regard that -- although they are driven in part by advertiser concern that traditional ads are of diminished effectiveness -- product placement and integration function differently than traditional ads. "Product placements and traditional advertising are not substitutes," note Russell and Belch.⁸⁷

Product placement can be more impactful with audiences than traditional advertising, because it taps into the values associated with a particular program. The placed products "come to signify

⁸⁴ Daniel J. Popeo and David Price, Washington Legal Foundation, Comments to the Federal Trade Commission, March 26, 2004.

⁸⁵ Daniel J. Popeo and David Price, Washington Legal Foundation, Comments to the Federal Trade Commission, March 26, 2004.

⁸⁶ Which is governed by children's advertising rules, but not otherwise subject to special regulations.

⁸⁷ Cristel Antonia Russell and Michael Belch, "A Managerial Investigation into the Product Placement Industry," *Journal of Advertising Research*, March 2005, pp. 73-92.

or perform social roles for audience members who use or avoid these products as means of gaining status or avoiding stigmatization."⁸⁸

"When integrating brands and celebrities correctly, you can create a meaningful connection between the brand, consumer and the property," Inside Branded Entertainment reports Laura Caraccioli-Davis, Senior Vice President and Director of Starcom Entertainment, explaining in an interview. "Good example: In *Sex and the City*, even though there were product placements that were not integrated into the story, there was a connection for Macintosh, TiVo, certain cosmopolitan Vodka brands and the whole restaurant scene in NYC."⁸⁹

Hidden advertisements take advantage of context, with program plots sometime revolving around products or building up to their use. Thus, "Product placement also provides a rich emotional context for brand building."⁹⁰ By contrast, only so much storytelling is possible in a 30-second commercial.

Above all, hidden advertisements benefit from implied endorsements and the authenticity of presentation. Not only are placed products seen used in a "natural" environment, but viewers do not apply the filters against puffery and exaggeration they use for traditional advertisements.

To be clear: We do not suggest there is anything in communications or advertising law that prohibits emotional appeals in advertising, or prevents advertisers from trying to associate their product with a program, character, celebrity or place. What we are arguing here is that hidden advertisements work differently than traditional ads. Concerns about hidden advertisements should not be mistaken with concerns about advertising in general, and the government has a substantial interest in ensuring these advertisements do not exert their persuasive effect because they are able to deceive viewers into not realizing they are watching ads.

2. Simultaneous Disclosures Directly Advance the Government Interest in Eliminating the Deceptive Element of Hidden Advertisements

Following the examination of whether a substantial government interest exists, the Central Hudson test directs an inquiry into whether the regulation under consideration "directly advances the governmental interest asserted."

Here, it is clear that meaningful, simultaneous disclosure, while imperfect, directly advances the government interest in preventing deception of viewers through hidden advertisements. Disclosure is a standard cure for deception -- a principle already central to the Communications Act and FCC rules, as well as U.S. fair advertising law -- and is especially efficacious in cases where, as here, it a hidden commercial relationship that is the essence of the deception.

⁸⁸ James Karrh, Kathy Brittain McKee, Carol Pardun, "Practitioners Evolving Views on Product Placement Effectiveness," *Journal of Advertising Research*, June 2003, pp. 138-149.

⁸⁹ Laura Caraccioli-Davis, Senior Vice President and Director of Starcom Entertainment, interview with Inside Branded Entertainment, available at: <<http://www.insidebrandedentertainment.com/bep/interviews/starcom.jsp>>.

⁹⁰ Cristel Antonia Russell and Michael Belch, "A Managerial Investigation into the Product Placement Industry," *Journal of Advertising Research*, March 2005, pp. 73-92.

3. A Simultaneous Disclosure Rule is No More Extensive than Necessary

Central Hudson finally instructs a query into whether the regulation is not more extensive than is necessary to serve that interest.

WLF contends that the "undoubtable effect" of a simultaneous disclosure rule "would be to act as a ban on the majority of television product placements."⁹¹ WLF offers no evidence whatsoever for this assertion.

As the FCC correctly implies in its Notice of Inquiry and Notice of Proposed Rulemaking, the claim of product placement apocalypse or unreasonable interference in the artistic integrity of entertainment programming is belied by the vast array of crawls, bugs and snipes that now routinely crowd television screens. Much of the information conveyed is unrelated to the program being aired, and much involves promotional material. Attached to these comments are three screen shots of snipes and crawls showing how much screen space broadcasters and cable operators feel comfortable devoting to unrelated promotional information. We are not suggesting anything as prominent as these. TV snipes now regularly include not just print but eye-drawing video presentations. "Promotional content on what the industry calls the 'lower third' of the television screen is 'the way of the world these days,'" an ABC executive told the New York Times.⁹²

It is somewhat disingenuous to claim a mandatory disclosure system would infringe on "artistic integrity," since the real infringement on artistic integrity is the alteration of script, dialogue, program concept, attire, and scene to include hidden advertisements.

We do concede that a mandatory pop-up window stating "advertisement" would be a marginal addition to the clutter and distraction on television, and this should be part of the calculation in making the policy decision about whether to adopt a simultaneous disclosure system.

It is not clear, however, whether this concern is properly part of a First Amendment analysis. The added clutter for viewers is arguably not a burden on the commercial speech itself.

We believe it is possible that a disclosure system may reduce the number of hidden advertisements on TV -- but that this will correlate primarily to the dependence of those hidden advertisements on the deceptive element of current practice. That is, to the extent that some product placements and integrations not only benefit from the failure to disclose their commercial basis, but are effective as persuasive advertising only because viewers do not understand they are watching paid ads, we would expect these ads to cease with a system of mandatory disclosure. But this poses no First Amendment concern, because such the viability of this category of ads, by definition, depends on deception.

⁹¹ Daniel J. Popeo and David Price, Washington Legal Foundation, Comments to the Federal Trade Commission, March 26, 2004.

⁹² Wendy A. Lee, "As the Fall Season Arrives, TV Screens Get More Cluttered," The New York Times, September 24, 2007, available at:

<http://www.nytimes.com/2007/09/24/business/media/24clutter.html?_r=2&ref=media&oref=slogin&oref=slogin>

If our argument that hidden advertisements do not merit First Amendment protection under the first prong of *Central Hudson* is rejected, then the First Amendment inquiry thus boils down to the central policy issue confronting the Commission: Should it require simultaneous disclosures, or only disclosures before and/or after a program. Or, in constitutional terms, is a system of simultaneous disclosure "not more extensive than is necessary" to serve the government interest in protecting viewers from being deceived by hidden ads.

Even if a judgment is made that pop-up notices of "advertisement" are more burdensome than we contend, the case remains overwhelming for such an approach. To reiterate: First, disclosures at the start and end of a program are certain to be missed by a very large portion of viewers. This contention is supported by advertisers' own perceptions, industry practice, data on the rising use of DVRs, and common sense. People do not watch credits, and they won't, no matter how prominent they are. Second, disclosures at the outset of a program, even if seen, cannot identify the actual situations in an episode when hidden advertisements will occur -- and so viewers remain unprotected. Third, the emotional and persuasive impact of hidden advertisements, like advertisements in general, occurs at the moment they are watched. Viewers need to be informed at that moment that they are being subjected to advertising. The academic data and industry statements about how hidden advertisements rely on emotion, and draw on viewers' deep engagement with plot and character, emphasize the need to insert the "advertising" disclosure at the moment the hidden advertisement occurs.

IV. ISSUES INVOLVING FEATURE FILMS RE-BROADCAST ON TELEVISION (Response to Paragraph 14)

Product placements in movies have exploded in numbers in recent years and continue to expand, which necessitates a revisiting of the FCC's decision to waive Section 317 disclosure requirements.

As the Commission's Notice of Inquiry and Notice of Proposed Rulemaking notes, the Commission's current rules waive Section 317 disclosure requirements for feature films containing embedded advertising when re-broadcast on television. The Commission notes that when this waiver was granted in 1963, "there was a lack of evidence of sponsorship within the films." This is no longer the case. PQ Media found that product placements in films comprised 26.4 percent of global spending on product placement in 2006, totaling \$885.1 million.⁹³ With product placements in movies rising so rapidly, there clearly is a public policy issue with hidden advertisements re-broadcast movies. And there is no policy rationale why re-broadcast movies should be treated differently than original TV programming.

As with television programming, product placement and integration are now routine in movies. For instance, in the 2008 release "Sex and the City," Mercedes-Benz played a starring role.⁹⁴ Other brands seen prominently in the movie included Vitamin Water and Skyy vodka.⁹⁵ In the

⁹³ <<http://www.pqmedia.com/about-press-20070314-gppf.html>>.

⁹⁴ Jean Halliday, "Mercedes Gets All Dolled Up," *Advertising Age*, March 20, 2008.

⁹⁵ Stuart Elliot, "'Sex and the City' and Its Lasting Female Appeal," March 17, 2008, available at: <http://www.nytimes.com/2008/03/17/business/media/17adco.html?_r=1&oref=slogin>.

2005 release "Herbie: Fully Loaded," marketed as a family film, there was "a commercial in nearly every frame," according to film critic Richard Roeper. The main character talked about her upcoming position with ESPN, wore a Goodyear baseball cap and only drank Tropicana orange juice. Nascar was a continuous presence in the movie as well.⁹⁶

"Herbie: Fully Loaded" -- a "family" movie directed at children -- is now frequently aired on television. This example emphasizes the importance of applying Section 317 to re-broadcast movies. It raises serious questions about whether re-broadcast movies for children's audiences that are replete with product placement can comply with the Children's Television Act and FCC rules requiring separation between advertising and program content.

"Sex and the City" will no doubt be aired on television as well. That it features product placements for distilled spirits highlights concerns about alcohol product placements and integration, and emphasizes the importance of applying Section 317 to re-broadcast movies.

Movies do differ from typical TV programs in that they present a single, unbroken story. But when they are broadcast on television, movies lose much of this distinguishing feature, and essentially become elongated television programs. Movies aired on television are typically broken up by commercials. Movies are consistently edited for length and content when aired on television. Broadcasters now routinely impose snipes and bugs on top of re-aired movies. The adoption of a simultaneous disclosure system for re-broadcast movies does not raise any important issues distinct from those related to regular television programming. And there is no apparent reason that mandatory disclosures at the outset or end of a program should not be required of re-broadcast movies.

V. MODIFYING THE CURRENT DISCLOSURE REQUIREMENT TO BE MORE OBVIOUS

(Response to Paragraph 15)

In its Notice of Proposed Rulemaking, the Commission raises various questions about possible revisions to the existing disclosure system. These relate primarily to the prominence of disclosures, and whether they should be before and/or after programming.

We view this rulemaking with trepidation. As these comments make clear, we believe that functional disclosures at the outset of a program are an important part a hidden advertisement disclosure system. But they are, by a large margin, the lesser part. Simultaneous disclosures are much more important.

In the best-case scenario, with the Commission pursuing the very inadequate remedy of disclosures at the outset of a program, while shunting off the consideration of much more meaningful simultaneous disclosures into an inquiry with no defined end and no assurance of subsequent action, viewers will be denied proper protection from hidden ads for a still-longer period. In the worst-case scenario, advertisers will succeed in arguing that the inadequate remedy proposed by the rule obviates the need for meaningful steps.

⁹⁶ Ross Johnson, " Product Placement for the Whole Family," The New York Times, July 6, 2005, <available at: <<http://www.nytimes.com/2005/07/06/movies/06herb.html>>.

In that context, we offer these responses to the questions posed in Paragraph 15:

1. The political broadcast standard of disclosure offers a good model for the length and size of needed disclosures. However, depending on the length of required disclosure -- and this should depend on the extent of hidden advertisements, as we suggest below, four seconds will in many cases be too short.
2. Disclosures should come at the beginning and end of programming, but disclosure at the outset is much more important than after-the-fact disclosures at the end. Fewer people will send an end-of-program disclosure. And an end-of-program disclosure will not enable viewers to prepare themselves for hidden advertisements -- in other words, to get their guard up, or their defensive "antenna," as one marketing firm executive called it.
3. As proposed above, we urge as well that the Commission mandate disclosures at the start of segments in which hidden advertisements appear.
4. Disclosures should be made both verbally and visually.
5. The Commission should mandate that disclosures appear on a full, plain screen. The standard now appears to be split screens, or very compressed screens for credits with action appearing on the main screen, or credits presented on top of programming. Only the most motivated and focused viewer can read credits and disclosure in this context.
6. The Commission should mandate that disclosures be made in everyday language. "Promotional considerations furnished by ..." is coded language that has no meaning to the average viewer.
7. The Commission should specify that disclosures at the outset and end of programming explain the nature of the hidden advertisements to which viewers will be and have been exposed. This proposal, explained above, would have broadcasters and cablecasters state, for example: "This program contains paid advertising for ... The story for this episode has been developed in conjunction with the advertiser, and the program contains in-program advertisements from this advertiser."

VI. PRODUCT PLACEMENT AND CHILDREN (Response to Paragraph 16)

Product placement and integration poses unique problems for children, which cannot be addressed by a disclosure regime.

As the comments submitted by the Campaign for Commercial-Free Childhood (CCFC) note, not only can children not distinguish between advertising and program content, they do not comprehend disclosures or disclaimers. There is thus sound basis for the FCC's bumper rule, and for interpreting it to mean that hidden advertisements must be prohibited from children's programming altogether. The Commission asks whether this should be made explicit in its

rules. Particularly because this constitutes a bright-line rule not in need of tailoring to individual circumstance, the answer is "yes." As CCFC notes, the Commission should also clarify that its rules apply to television programming originating on cable, or delivered through satellite or other delivery services.

The bigger challenge for the Commission is to address the problem that children watch programming that is not "children's programming," and indeed watch programs such as American Idol in greater numbers than all or almost all children's shows. CCFC proposes that hidden advertisements thus be prohibited from all programming airing before 10 PM, when children are likely to be watching in substantial numbers. We endorse this proposal. It is hard to see what other system will protect children from hidden ads.

VII. PRODUCT PLACEMENT AND CABLE PROGRAMMERS (Response to Paragraph 17)

Noting that Section 76.1615 of the FCC rules applies to original cablecasting, and imposes Section 317 disclosure requirements on cablecasters, the Commission asks whether it should take additional steps with respect to sponsorship identification announcements required of cable programmers.

We believe the same robust standards that should apply to broadcasters should apply as well to cable programmers, and that any incremental improvements adopted pursuant to this rulemaking should apply to cablecasters as well.

Additionally, Section 507 obligations should be extended to cablecasters; given the heightened abuse of the disclosure obligation on cable programming, this reform may be more consequential than immediately obvious.

Additionally, we offer two brief observations and recommendations regarding hidden advertisement disclosure for cable broadcasts:

First, even casual viewing of cable programming reveals that cable networks are doing an even worse job of meeting their Section 317 obligations than broadcasters. In the course of this rule-making and investigation, the Commission should respond to this rampant abuse by reiterating immediately and notifying cable programmers that they are obligated to meet Section 317, and by undertaking an investigation of cablecasters' existing disclosure practice.

Second, attention should be paid to cablecasters' airing of broadcaster-originated programming. Our observations suggest that disclosures on the original program are distorted when they are re-run on cable, due to compressed type and perhaps speeded-up running of credits. It is logical to put responsibility for disclosures in broadcaster-originated programming on broadcasters, but cablecasters should not be able to avoid responsibility for presenting the disclosures in at least as robust fashion as when they were originally aired.

VIII. RADIO HOSTS' ON-AIR ENDORSEMENTS (Response to Paragraph 18)

Our overall position on the appropriate application of Section 317 in the radio context is provided in II.C. of these comments.

The Commission queries whether the gift of products or services to radio hosts, followed by subsequent air time mention of the products or services, should presumptively be treated as an exchange of consideration triggering the obligation for a sponsorship announcement. We believe the reasonable exception to this rule illustrates the appropriate application of the presumption.

Reviewers in some but not all cases may reasonably accept free goods and services without disclosing the gift. The public may either presume the gift, or the free access may not taint the review process.⁹⁷

Most radio hosts are not reviewers, however. The public has no reason to expect that their on-air banter is influenced by gifts or payment. If there is one case where the obviousness requirement should *not* apply on radio, it is to undisclosed gifts that give rise to subsequent favorable commentary.

IX. SUGGESTED AREAS OF INQUIRY

As the Commission proceeds with its inquiry into hidden advertisement, we suggest looking at the following issues, among others.

1. Industry Metrics. Measuring product placements has proven challenging, in part because of the novelty and sudden proliferation of hidden advertisements and new forms of advertiser-producer/broadcaster partnerships. Many efforts are now underway. These include efforts to measure the number of product placements, but also to develop metrics to track different forms and their effectiveness. Key players in the branded entertainment field view the lack of metrics as viewed as an impediment to further expansion of branded entertainment, or effective operations in the field.⁹⁸ Numerous firms are involved in developing such metrics.⁹⁹

⁹⁷ This is not the case in all instances. A free meal provided to an identified restaurant critic may distort the underlying experience and lead to an illegitimately positive review. Whether this rises to the level of an FCC disclosure obligation can perhaps be left to another day. The relevant principle here is that reviewers generally, or in many cases, will be able to accept free gifts and services in order to perform their functions. They are going to mention the product or service on air -- that is the essence of their job -- but they should generally not be biased by the gift to offer a plug or positive review.

⁹⁸ Ed Erhardt, ESPN ABC Sports, interviewed in "Making the Deal," Brandweek, May 17, 2004. ("There should be some kind of standard that folks can measure against. I think every brand has a different place in the universe in terms of what they're trying to accomplish. Somebody's logo is seen on the screen. Did it sell anything, or is it just a logo on the screen?")

⁹⁹ Alana Semuels, "Research Firm Nielsen Tallying Product Placement Ads," Los Angeles Times July 21, 2008; Gail Schiller, "Giants, startups of placement valuation," the Hollywood Reporter, December 30, 2004.

But some product placement professionals have expressed fear that more precise metrics -- showing the impact of hidden advertisements, and revealing how they work -- will lead to federal regulatory action.¹⁰⁰

Understanding how the industry measures its success -- and how successful it believes hidden advertisements to be -- should help guide the Commission's work.

2. Industry Information on Viewer Attentiveness to Credit Scrolls. The industry has grappled with maintaining viewers at the end of programs, and likely has important insights into the extent to which viewers pay attention to scrolls at the end of programs, as well as the extent to which they might pay attention to a disclosure at the start of a program.

3. Industry Characterizations of Product Placement. Our argument emphasizes that viewers will not see disclosures at the start and end of programs because of DVRs, channel switching, and the lure of grabbing a snack. Do industry discussions of product placement suggest they have the same fear about 30-second advertisements? We also contend that a significant part of the value of hidden advertisements depends on their remaining covert. In its internal discussions, do industry players agree?

4. Celebrity Endorsements. Do celebrity endorsers disclose information about their commercial ties to producers and broadcasters? Do broadcasters inquire? Has the extent of non-obvious celebrity endorsements on television (or radio) been subject to any comprehensive study? Do industry players have any data, or are they able to shed light on the extent of the practice?

5. Hidden Advertisements on Radio. What can radio broadcasters report about the prevalence of hidden ads on radio? Do they require radio hosts to disclose gifts that they receive? If so, what do these disclosures show?

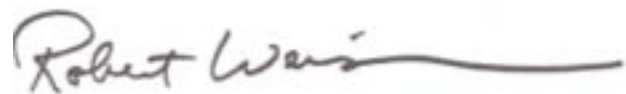
6. Hidden Advertisements in Re-Broadcast Movies. What data do movie studios collect on product placement? What does his data show about the extent of hidden ads in movies?

7. Pharmaceutical and Alcohol Hidden Advertisements. What, if any, information do TV broadcasters and cablecasters, and radio broadcasters, collect about pharmaceutical and alcohol hidden advertisements? What does this data show? What can the pharmaceutical and alcohol industries report about hidden advertisements?

Thank you for the opportunity to submit these comments. We look forward to working with the Commission on this matter.

¹⁰⁰ Linda Goldstein, advertising attorney, interviewed in "Making the Deal," Brandweek, May 17, 2004. ("When I see a presentation that begins to attach a very finite monetization to the value of the placement or the integration, and, obviously, there are very compelling reasons why the industry needs those measurement tools, we need to be careful about how that then plays into the regulatory framework. And the last thing I think any of us would want to see is an agency like the Federal Trade Commission beginning to exercise its jurisdiction over our entertainment content.")

Sincerely,

A handwritten signature in dark ink that reads "Robert Weissman" followed by a long, horizontal flourish.

Robert Weissman,
Managing Director

ATTACHMENTS

1. Screen shot of a snipe on the CW's Life Is Wild, July 12, 2002.
2. Screen shot of a snipe on CBS's Swingtown, August 6, 2005.
3. Screen shot of promotional crawl on CNN's The Situation Room, February 2007.



CROWNED

Series Premiere
Wednesday December 12





THURSDAYS THIS FALL AFTER CSI:

ELEVENTH HOUR





ANNA NICCOLE SMITH
1967-2007

BREAKING NEWS

CNN'S LARRY KING LIVE, 9PM ET, NAS 1.83
DEVOTES HOUR TO SMITH'S DEATH. THE SITUATION ROOM

IF AS THE PRESIDENT TOO GREAT AND THE WORLD WITH THE MANNING

