

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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

**NOTICE OF INQUIRY AND  
NOTICE OF PROPOSED RULE MAKING**

**Adopted: June 13, 2008**

**Released: June 26, 2008**

**Comment Date: (60 days after date of publication in the Federal Register)**

**Reply Comment Date: (90 days after date of publication in the Federal Register)**

By the Commission: Chairman Martin, Commissioners Copps and Adelstein issuing separate statements.

**I. INTRODUCTION**

1. We solicit comment on the relationship between the Commission's sponsorship identification rules and increasing industry reliance on embedded advertising techniques.<sup>1</sup> Due, in part, to recent technological changes that allow consumers to more readily bypass commercial content, content providers may be turning to more subtle and sophisticated means of incorporating commercial messages into traditional programming. As these techniques become increasingly prevalent, it is important that the sponsorship identification rules protect the public's right to know who is paying to air commercials or other program matter on broadcast television and radio and cable. Accordingly, we seek comment on current trends in embedded advertising and potential changes to the current sponsorship identification regulations with regard to embedded advertising.

**II. NOTICE OF INQUIRY**

**A. BACKGROUND**

2. The purpose of embedded advertising, such as product placement and product integration,<sup>2</sup> is to draw on a program's credibility in order to promote a commercial product by weaving

<sup>1</sup> Embedded advertising describes situations where sponsored brands are included in entertainment programming. Embedded advertising is used here generally to describe both product integration and product placement, defined below. *See infra*, note 2.

<sup>2</sup> Product placement is the practice of inserting "branded products into programming in exchange for fees or other consideration." *See* Letter from Mary K. Engle, Associate Director for Advertising Practices, Federal Trade Commission, to Gary Ruskin, Executive Director, Commercial Alert, 6 (Feb. 10, 2005), *available at* <http://www.ftc.gov/os/closings/staff/050210productplacement.pdf>. The Writers Guild and others have made a distinction between the mere use of products as props in television programming and the integration of the product into the plot of the story. Product placement is the placement of commercial products as props in television programming, whereas product integration integrates the product into the dialogue and/or plot of a program. *See e.g.*, Writers Guild of America, West and Writers Guild of America, East, White Paper, *Are You Selling to Me?*,

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the product into the program.<sup>3</sup> The use of embedded advertising is escalating as advertisers respond to a changing industry. Digital recording devices (DVRs) allow consumers to skip traditional commercials, giving rise to interest in other means of promoting products and services.<sup>4</sup> In addition, concerns have been raised that the availability of more programming options may translate into lower audience retention during commercial breaks.<sup>5</sup> The industry appears to be turning increasingly to embedded advertising techniques.<sup>6</sup> PQ Media estimates that between 1999 and 2004, the amount of money spent on television product placement increased an average of 21.5 percent per year.<sup>7</sup> For 2005, PQ Media estimates that the net value of the overall paid product placement market in the United States increased 48.7 percent to \$1.50 billion.<sup>8</sup> Product placements for primetime network programming, according to Nielsen's Product Placement Services, decreased in 2006,<sup>9</sup> but the first quarter of 2007 shows an increase in product placements in Nielsen's Top 10 shows.<sup>10</sup>

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November 14, 2005, at 2, available at [http://www.wga.org/subpage\\_newsevents.aspx?id=1422](http://www.wga.org/subpage_newsevents.aspx?id=1422) ("Writer's Guild White Paper"); Wayne Freidman and Jean Haliday, *Product Integrators Tackle Learning Curve*, 73 ADVERTISING AGE 18 (2002). Commercial Alert in its Petition for Rulemaking (September 30, 2003) also identifies "title placement," the practice of placing brand names in the title of television programs, such as the WB's *Pepsi Smash*. See *infra*, note 15.

<sup>3</sup> See, e.g., Namati Bhatnagar, Lerzon M. Askoy, and Selin A. Malkoc, *Efficacy of Brand Placements, the Impact of Consumer Awareness and Message Salience* in L.J. Shurm, Special Session Summary, *Where Art and Commerce Collide: A Funnel Approach to Embedding Messages in Non-Traditional Media*, 30 ADVANCES IN CONSUMER RESEARCH 170, 172 (2003) (noting that "there appears to be a general consensus that consumers are more skeptical of advertised claims (where persuasion is overt and easily perceived) than placed claims (where persuasion is harder to discern)" (citations omitted)); 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*, 29 JOURNAL OF CONSUMER RESEARCH 306, 307 (2002) (noting that "[i]n today's oversaturated and fragmented advertising landscape, such hybrid advertisements ... may prove more powerful than traditional advertisements if they are not perceived as persuasive messages." (citations omitted)).

<sup>4</sup> See Wayne Friedman, *NBC's Graboff: Mo' Better Branding*, MEDIA POST, June 11, 2007, available at [http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticleHomePage&art\\_aid=62104](http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticleHomePage&art_aid=62104) (noting that "[d]ue to increased time-shifting—and as a consequence, viewers' increasing habit of fast-forwarding through commercials—NBC will continue to try to get marketing messages inside programs"); Stuart Elliott, *The Media Business: Advertising; Ads That Are Too Fast for a Fast-Forward Button*, NEW YORK TIMES, May 18, 2007, available at <http://www.nytimes.com/2007/05/18/business/media/18adco.html?ex=1337140800&en=726593664a9d4d95&ei=5088&partner=rssnyt&emc=rss> (emphasizing that the industry may be moving away from traditional commercial breaks because of increasing prevalence of DVR owners, and because of Nielsen Media Research's decision to measure viewership of commercials).

<sup>5</sup> See Gail Schiller, *Report: Product Placements on the Rise*, THE HOLLYWOOD REPORTER, July 28, 2005 (quoting PQ Media president Patrick Quinn: "Advertisers and marketers are scrambling like never before to compete for consumers' time and money in this era of increasing audience fragmentation, advertising clutter, media multi-tasking and ad-skipping technology....").

<sup>6</sup> See Stuart Elliott, *The Media Business: Advertising; Ads That Are Too Fast for a Fast-Forward Button*, *supra* note 5; Gail Schiller, *Out of their place; Integration Dips*, THE HOLLYWOOD REPORTER, December 29, 2006, available at [http://www.hollywoodreporter.com/hr/content\\_display/film/marketing/e3i73449c66171eef17b0a390b6391dfc05](http://www.hollywoodreporter.com/hr/content_display/film/marketing/e3i73449c66171eef17b0a390b6391dfc05).

<sup>7</sup> See David Kaplan, *Product Placement Outpaces Ad Spending*, March 30, 2005, MEDIA POST, available at <http://publications.mediapost.com/index.cfm?fuseaction=Articles.san&s=28681&Nid=12778&p=276816>.

<sup>8</sup> See *Exclusive PQ Media Research: Global Paid Product Placement Spending Surged 42.2% to \$2.21 Billion in 2005; Double-Digit Pace to Continue in 2006 and Beyond*, available at <http://www.pqmedia.com/about-press-20060816-gppf2006.html>. Based on these figures, the United States has the largest and fastest growing market in the world.

<sup>9</sup> See *U.S. Advertising Spending Rose 4.6% in 2006, Nielsen Monitor-Plus Reports*, available at <http://www.nielsenmedia.com/nc/portal/site/Public/menuitem.55dc65b4a7d5adff3f65936147a062a0/?vgnextoid=23> (continued...)

3. These trends are also reflected in the new types of advertising offered by certain networks and radio stations. The CW network, for example, offers “content wraps,” serialized stories within a group of commercials that include product integration,<sup>11</sup> and “cwickies,” five second advertising slots interspersed in regular programming.<sup>12</sup> Fox Sports Network claims a specialty in “product immersion,” the practice of “immersing products into programs ... so that they really feel like it is part of the show.”<sup>13</sup> NBC has instituted a policy of bringing in advertisers during programming development.<sup>14</sup> In 2004, Universal Television Networks sold to OMD Worldwide the exclusive rights to product placement position in a miniseries.<sup>15</sup> The goal of many of these new marketing techniques is to integrate products and services seamlessly into traditional programming.

4. The Commission’s sponsorship identification rules are based on Sections 317 and 507 of the Communications Act of 1934, as amended (“Communications Act”), and are designed to protect the public’s right to know the identity of the sponsor when consideration has been provided in exchange for airing programming.<sup>16</sup> Section 317 generally requires broadcast licensees to make sponsorship identification announcements in any programming for which consideration has been received.<sup>17</sup> Section

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922dafb3b61110VgnVCM10000ac0a260aRCRD. There were 102,793 occurrences of product placements during primetime in 2005; 79,701 occurrences in 2006.

<sup>10</sup> See *U.S. Advertising Spending Declined 0.6% in First Quarter 2007, Nielsen Monitor-Plus Reports*, available at <http://www.nielsenmedia.com/nc/portal/site/Public/menuitem.55dc65b4a7d5adff3f65936147a062a0/?vgnnextoid=764d40cf14023110VgnVCM10000ac0a260aRCRD>. During the first quarter of 2007, product placements occurred 8,893 times on Neilson’s Top 10 programs compared to 8,793 times in the first quarter of 2006. Many of these top 10 shows are reality shows—such as American Idol (ranked #1) and the Apprentice (ranked #4). See *id.* See also *Writer’s Guild White Paper* at 4-6 (emphasizing that reality shows spurred the development of wide-spread product placement and integration because of the lower risks associated with the short-run, open ended formats of these shows).

<sup>11</sup> See John Consoli, *CW Creates Content Wraps within Commercial Pods*, 16 MEDIAWEEK 4 (2006).

<sup>12</sup> See Jon Lafayette, *CW Tries to Break Away from Commercials*, TV WEEK, May 17, 2007, available at [http://www.tvweek.com/news/2007/05/cw\\_tries\\_to\\_break\\_away\\_from\\_co.php](http://www.tvweek.com/news/2007/05/cw_tries_to_break_away_from_co.php) (quoting Bill Morningstar, head of ad sales for CW: “[t]he idea is to surprise viewers by using nontraditional commercial forms. An individual advertiser such as a movie studio would air three of the “cwickies,” either in a show or over the night .... After they air, the sponsor could have a longer-form payoff, such as a trailer”). We note that in 1962, the Commission issued a warning to broadcast stations that sponsorship identification requirements applied to “teaser announcements,” a series of short, promotional messages which did not identify the product until a final announcement. See *In re Broadcasters Warned Against “Teaser” or “Come-On” Spots Where Neither Sponsor nor Sponsor’s Product Is Announced*, Public Notice, 40 F.C.C. 135 (1962). There appears to be similarity between these “teaser announcements” and “cwickies,” although “cwickies” may or may not identify the product.

<sup>13</sup> See Richard Linnett, *Fox Sports Specialty: Product ‘Immersion’: Net Inks Tie-Ins with Snapple, Labatt, Lincoln*, ADVERTISING AGE, January 20, 2003.

<sup>14</sup> Wayne Friedman, *NBC’s Graboff: Mo’ Better Branding*, MEDIA POST, June 11, 2007, available at [http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticleHomePage&art\\_aid=62104](http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticleHomePage&art_aid=62104) (quoting Marc Graboff, co-chairman of NBC Entertainment and NBC Universal Television Studio: “Creative has been typically in its silo here in Los Angeles, and advertising sales in its silo in New York. Why not have someone from the sales group in the room during those development meetings?”).

<sup>15</sup> See Gary Ruskin, Executive Director, Commercial Alert, Complaint, Request for Investigation, and Petition for Rulemaking to Establish Adequate Disclosure of Product Placement on Television (September 30, 2003) at 7 (“Commercial Alert Petition”).

<sup>16</sup> See *In re Applicability of Sponsorship Identification Rules*, Public Notice, 40 F.C.C. 141 (1963) (“*Sponsorship Identification*”) (emphasizing that “listeners are entitled to know by whom they are being persuaded”).

<sup>17</sup> Section 317(a) (1) of the Communications Act of 1934, as amended (“Communications Act”) provides:

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317(c) requires broadcasters to “exercise reasonable diligence” in obtaining sponsorship information from any person with whom the licensee “deals directly.”<sup>18</sup> Section 507 of the Communications Act establishes a reporting scheme designed to ensure that broadcast licensees receive notice of consideration that may have been provided or promised in exchange for the inclusion of matter in a program regardless of where in the production chain the exchange takes place.<sup>19</sup>

5. Sections 73.1212<sup>20</sup> and 76.1615<sup>21</sup> of the Commission’s rules closely track the language of Section 317 of the Communications Act.<sup>22</sup> The rules apply regardless of whether the program is primarily commercial or noncommercial<sup>23</sup> and regardless of the duration of the programming.<sup>24</sup> The

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all matter broadcast by any radio station for which 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 be, by such person.

Congress also inserted a proviso in Section 317(a)(1) to clarify that “service or other valuable consideration” does

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.

Therefore, whenever a service or property is provided without charge or at a nominal charge to a station in connection with a broadcast, sponsorship identification is not required unless it is furnished in consideration for an identification that is “beyond an identification which is reasonably related to the use of such service or property on the broadcast.” *Id.* The House Committee on Interstate and Foreign Commerce provided several illustrations of when an identification is beyond that “reasonably related to the use of such service or property on the broadcast.” For example, a scenic travel video provided without charge by a bus company does not trigger sponsorship identification requirements if the bus “is shown fleetingly in highway views in such a manner reasonably related to that travel program,” but does trigger these requirements if the bus is “shown to an extent disproportionate to the subject matter of the film....” *National Association for Better Broadcasting v. FCC*, 830 F.2d 270, 277 (1987) (citing H.R. Rep. No. 1800, 86<sup>th</sup> Cong., 2d Sess. (1960), reprinted in [1960] U.S. Code Cong. & Admin. News 3516, 3532). By way of public notice, the Commission stated that it would use these illustrations as guidance in applying the Commission’s rules. *See Sponsorship Identification*, Public Notice, 40 F.C.C. 141 (1963). Where consideration is in the form of money, the proviso does not apply and a sponsorship announcement is required. *See Earl Glickman*, 3 F.C.C. 2d 326 (1996).

<sup>18</sup> 47 U.S.C. § 317(c); *see also* 47 C.F.R. §§ 73.1212(b), 76.1615(b). Section 317(c) of the Communications Act provides that a licensee must:

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 [Section 317].

<sup>19</sup> 47 U.S.C. § 508.

<sup>20</sup> 47 C.F.R. § 73.1212.

<sup>21</sup> 47 C.F.R. § 76.1615.

<sup>22</sup> Section 76.1615 of the Commission’s rules applies the broadcast provisions of Section 317 of the Communications Act to origination cablecasting. Section 507 of the Communications Act, however, is not reflected in a rule applicable to cable programming, and its provisions do not apply to cable programming. *See Amendment of the Commission’s Sponsorship Identification Rules (Sections 73.119, 73.289, 73.654, 73.789 and 76.221)*, Report and Order, 52 F.C.C. 2d 701 at n.10 (1975).

<sup>23</sup> *National Ass’n for Better Broadcasting v. FCC*, 830 F.2d 270 (1987). In 2002, the Commission denied the Advertising Council’s request for declaratory ruling or waiver concerning certain public service announcements as interpreted under the Commission’s sponsorship identification requirements, concluding among other things that “[i]t is not the nature of the message conveyed in broadcast material that determines whether an identification is required but whether or not a station receives valuable consideration for broadcasting it.” *Advertising Council*

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rules do not require sponsorship identification, however, when both the identity of the sponsor and the fact of sponsorship of a commercial product or service is obvious.<sup>25</sup> Thus, a sponsorship announcement would not be required when there is a clear connection between an obviously commercial product and sponsor.<sup>26</sup> Furthermore, with the exception of sponsored political advertising and certain issue advertising,<sup>27</sup> the Commission only requires that the announcement occur once during the programming and remain on the screen long enough to be read or heard by an average viewer.<sup>28</sup> Other decisions are left to the “reasonable, good faith judgment” of the licensee.<sup>29</sup> The Commission has issued numerous public notices over the years reminding industry participants of their sponsorship identification obligations.<sup>30</sup> In the past, the Commission has specifically reminded the industry that such obligations extend to “hidden” commercials embedded in interview programs.<sup>31</sup>

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*Request For Declaratory Ruling or Waiver Concerning Sponsorship Identification Rules*, 17 FCC Rcd 22616, 22621 (2002), recon. pending.

<sup>24</sup> See *In re “Teaser” Announcements*, 40 F.C.C. 60 (1959).

<sup>25</sup> See 47 C.F.R. § 73.1212(f). Section 73.1212(f) provides:

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.

An equivalent provision applies to origination cablecasting. See 47 C.F.R. §76.1615(e).

<sup>26</sup> See Letter to Edward G. Atsinger III, President of Salem Media Corporation, Radio Station WMCA(AM), 7 FCC Rcd 927 n.1 (1992). See also, e.g., *Classical Acquisition Limited Partnership Licensee, Radio Station WTEM(AM)*, 10 FCC Rcd 11004 (1995) (emphasizing that this exception applies when the product name and the sponsor are “obviously intertwined in the public mind.”).

<sup>27</sup> See *In the matter of Codification of the Commission's Political Programming Policies*, Opinion and Order, 7 FCC Rcd 1616 (1992).

<sup>28</sup> See *Application of Sponsorship Identification Rules to Political Broadcasts, Teaser Announcements, Governmental Entities and Other Organizations*, Public Notice, 66 F.C.C. 2d 302 (1977).

<sup>29</sup> See *Codification of the Commission's Political Programming Policies*, Opinion and Order, 7 FCC Rcd 678, 687 (1991).

<sup>30</sup> In 1970, for example, the Commission issued a public notice making clear that under Section 317 and 507, a producer receiving compensation or other valuable consideration for inclusion of matter in a program must report its receipt to the licensee, who in turn must make an appropriate disclosure. *Application of Sections 317 and 507 of the Communications Act to “Kickbacks” of Fees Paid to Performers*, Public Notice, 23 FCC 2d 588 (1970). In 1977, the Commission issued a public notice addressing the “widespread” failure of licensees to disclose sponsorship with respect to a nationwide “teaser” campaign sponsored by a religious organization, as well as for a commercial message paid for by governmental entities, local public service organizations, and trade associations. The Commission also directed attention to “numerous complaints” filed by the public claiming that the sponsorship identifications associated with certain election ads were illegible. See *Application of Sponsorship Identification Rules to Political Broadcasts, Teaser Announcements, Governmental Entities and Other Organizations*, Public Notice, 66 FCC 2d 302 (1977). See also *In re Broadcasters Warned Against “Teaser” or “Come-On” Spots Where Neither Sponsor nor Sponsor's Product Is Announced*, Public Notice, 40 F.C.C. 135 (1962); *In the Matter of Amendment of Section 3.119(e) of the Commission's Rules and Regulations so as to Permit Utilization of “Teaser” Announcements Without Sponsorship Identification of Each Such Announcement*, Opinion and Order, 40 F.C.C. 60 (1959). In 1988, the Commission warned licensees about the failure to disclose sponsored promotions and payola. See *Commission Warns Licensees About Payola and Undisclosed Promotion*, Public Notice, 4 FCC Rcd 7708 (1988). In 1991, the Commission issued a public notice reminding cable operators and broadcast licensees that the sponsorship identification requirements applied to public service announcements paid for by governmental, non-profit, and other entities. See *Commission Reminds Broadcast Licensees and Cable Operators of Sponsorship*

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6. Providing “special safeguards” against the effects of overcommercialization on children, the Children’s Television Act imposes time limitations on the amount of commercial matter in children’s programming.<sup>32</sup> The Commission also has several longstanding policies that are designed to protect children from confusion that may result from the intermixture of program and commercial material in children’s television programming.<sup>33</sup> The Commission requires broadcasters to use separations or “bumpers” between programming and commercials during children’s programming to help children distinguish between advertisements and program content.<sup>34</sup> The Commission also considers any children’s programming associated with a product, in which commercials for that product are aired, to be a “program-length commercial.”<sup>35</sup> Such program length commercials may exceed the Commission’s time limits on commercial matter in children’s programming and expose the station to enforcement action.<sup>36</sup> The Commission has also stated that this program-length commercial policy applies to “programs in which a product or service is advertised within the body of the program and not separated from program content as children’s commercials are required to be.”<sup>37</sup>

7. In a petition for rulemaking filed with the Commission in 2003, Commercial Alert argues that the Commission’s sponsorship identification rules are inadequate to address embedded advertising techniques, and thus, these rules fail to fulfill the Commission’s mandate under Section 317 of the Communications Act.<sup>38</sup> For example, Commercial Alert asserts that “[t]here was a statement at the end of

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*Identification Requirements Applicable to Paid-For “Public Service” Messages*, Public Notice, 6 FCC Rcd 5861 (1991). In 2005, the Commission issued a public notice reminding licensees, cable operators and others of their disclosure obligation with respect to video news releases (VNR). *See Commission Reminds Broadcast Licensees, Cable Operators and Others of Requirements Applicable to Video News Releases and Seeks Comment on the Use of Video News Releases by Broadcast Licensees and Cable Operators*, Public Notice, 20 FCC Rcd 8593 (2005).

<sup>31</sup> *See Inquiry Into Hidden Commercials In Recorded “Interview” Programs*, Public Notice, 40 F.C.C. 81 (1960). This public notice inquired into the prevalence of “hidden commercials” in “interview programs,” describing situations where during the course of the interview, one party may “casually mention one or more commercial products.” Because these deals were often orchestrated by parties other than the broadcaster, the Commission requested licensees to “use more than ordinary diligence” in monitoring sponsorship activity in these shows. *Id.* *See also In re Sponsorship Identification of Broadcast Material*, Public Notice, 40 F.C.C. 69, 74 (1960) (addressing plugs and “sneaky” commercials, including product placement).

<sup>32</sup> Specifically, commercial television broadcast licensees and cable operators must limit the amount of commercial matter that airs during programs directed to children ages 12 and under to not more than 10.5 minutes per hour on weekends and not more than 12 minutes per hour on weekdays. *See Children’s Television Act of 1990*, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. §§ 303b; 47 C.F.R. § 73.670; 47 C.F.R. § 76.255.

<sup>33</sup> These policies “directly addresses a fundamental regulatory concern, that children who have difficulty enough distinguishing program content from unrelated commercial matter, not be all the more confused by a show that interweaves program content and commercial matter.” *See Policies and Rules Concerning Children’s Television Programming*, Report and Order, 6 FCC Rcd 2111, 2118 (1991), *recon. granted in part*, 6 FCC Rcd 5093 (1991) (“*Children’s Television Programming*”).

<sup>34</sup> *See, e.g., Children’s Television Programming*, 6 FCC Rcd at 2117-8.

<sup>35</sup> *See id.* at 2118.

<sup>36</sup> *See* 47 C.F.R. § 73.670 (a).

<sup>37</sup> *See Children’s Television Programming*, 6 FCC Rcd at 2118 (citing *Weigel Broadcasting Company*, 41 F.C.C. 2d 370 (1973) (eight-minute segment inviting viewers to contact sponsor about entering chinchilla ranching business in half-hour program on chinchilla ranching). In addition, the host-selling rule prohibits “program talent or other identifiable program [characters]” from delivering any commercial pitches during a program. *See Policies and Rules Concerning Children’s Television Programming*, Order on Reconsideration, 6 FCC Rcd at 5097.

<sup>38</sup> *See* Commercial Alert Petition at 3-4. Commercial Alert also filed this petition with the Federal Trade Commission (FTC), alleging that product placement without full disclosure constitutes an unfair and deceptive practice in violation of Section 5 of the Federal Trade Commission Act. In its response, the FTC stated that the

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a segment featuring the product placement that [the television program] 'Big Brother 4 is sponsored by McDonald's.' But there was not a hint that embedded plugs within the show were in fact paid ads."<sup>39</sup> Commercial Alert requests revision to these rules to require disclosure of product placement and integration in entertainment programming at the beginnings of programs in clear and conspicuous language.<sup>40</sup> Commercial Alert also requests that disclosure be made concurrently with any product placement and/or integration, asserting that requiring disclosure only at the beginning or the end of the program disadvantages viewers who might miss the announcement.<sup>41</sup>

8. In opposition, the Washington Legal Foundation (WLF) and Freedom to Advertise Coalition (FAC) both argue that embedded advertising techniques are a longstanding fixture of broadcast advertising that cause no substantial harm to consumers, that the Commission's existing sponsorship identification rules are adequate to regulate them, and that a concurrent disclosure requirement would violate the First Amendment.<sup>42</sup> WLF argues that the proposed concurrent disclosure would so greatly interfere with programming that it would be paramount to a governmental ban on product placement.<sup>43</sup> By interfering with both the "commercial and dramatic reality of television production," asserts WLF, a concurrent disclosure requirement would be unconstitutionally overbroad.<sup>44</sup> Similarly, FAC argues that a concurrent disclosure requirement would so greatly interfere with the "artistic integrity" of a program that it would "censor or ban this long standing means of commercial speech."<sup>45</sup> FAC also asserts that a concurrent disclosure requirement lacks a "strong enough governmental interest" to justify the infringement on commercial speech.<sup>46</sup> Accordingly, applying the four-part test developed by the U.S.

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complaint "does not suggest that product placement results in consumers giving more credence to objective claims about the product's attributes," or sufficiently show that the product placement involves "false or misleading objective, material claims about the product's attributes. . . ." See Letter from Mary K. Engle, Associate Director for Advertising Practices, Federal Trade Commission, to Gary Ruskin, Executive Director, Commercial Alert (February 10, 2005). Similarly, in 1991, the Center for the Study of Commercialism filed a complaint and a request for investigation and rulemaking with the FTC regarding product placements in motion pictures, alleging that product placement was an unfair and deceptive trade practice in violation of Section 5 of the Federal Trade Commission Act as amended, 15 U.S.C. § 45. See *In the Matter of Unfair and Deceptive Acts and Practices in the Placement of Product Advertisements in Motion Pictures*, Docket No. P914518, 209-59, 1991 WL 640030 (May 30, 1991). The FTC denied the petition by letter, stating that because of an "apparent lack of a pervasive pattern of deception and substantial consumer injury attributable to product placements," a rulemaking was not warranted. See Press Release, FTC, FTC Denies Center for the Study of Commercialism's Petition to Promulgate Rule on Product Placement in Movies, (Dec. 11, 1992), available at <http://www.ftc.gov/opa/2002/12/predawn/F93/csc-petit5.htm>.

<sup>39</sup> *Id.* at 11.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> See Comments of the Washington Legal Foundation to the Federal Communications Commission Concerning Television Product Placement (April 6, 2004) at 6-7 ("Comments of Washington Legal Foundation"); Opposition to Petition for Rulemaking related to Disclosure of Product Placement on Television filed by Freedom to Advertise Coalition (November 12, 2003) at 5 ("Comments of Freedom to Advertise Coalition").

<sup>43</sup> See Comments of Washington Legal Foundation at 6. Because product placements add to the realism of programming, asserts WLF, a concurrent disclosure requirement would "destroy the artistic integrity of any programming containing such speech, and would be a nuisance to the viewer." *Id.* at 3. WLF also argues that product placement and/or integration is harmless, and that the petition fails to distinguish the current embedded advertising practices from those occurring in the 1950s and 1960s. *Id.* at 3 & 5.

<sup>44</sup> See Comments of Washington Legal Foundation at 7.

<sup>45</sup> *Id.*

<sup>46</sup> See Comments of Freedom to Advertise Coalition at 5.





























