

An Embedded Solution: Improving the Advertising Disclosure Rules in Television

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I. INTRODUCTION	115
II. BACKGROUND	120
A. <i>The “Payola” Scandals</i>	120
B. <i>Current Embedded Advertising Trends in the Television Industry</i>	122
III. CURRENT DISCLOSURE RULES	124
A. <i>The Origins of and Rationale for Disclosure in Broadcasting</i>	125
B. <i>Current Disclosure Rules for Commercial Advertising</i>	127
IV. SUMMARIES AND CRITIQUES OF THE RESPONSES TO THE NOTICES.....	128
A. <i>Maintaining the Status Quo</i>	128
B. <i>Amending the Status Quo</i>	132
1. Modest Changes: Federal Communications Commission.....	132
2. Expanding on the Modest Changes: Screen Actors Guild.....	133
3. Extensive Changes: Commercial Alert	134
V. PROPOSAL	135
A. <i>The Disclosure Rules for Political Advertising</i>	136
B. <i>The Proposal</i>	138
1. Historical Limits: When has the Commission Adopted Amendments?	139
2. Legal Limits: Is the Proposed Amendment	

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Constitutional?	140
3. Practical Limits: How does the Proposal Impact the Industry?.....	142
C. <i>Test Suite: Applying the Proposal to Disclosures Made by Broadcasters in Practice</i>	144
1. Fast-Moving Disclosures: The Airtime Requirement ..	144
2. Compressed Disclosures: The Letter Size & Airtime Requirements.....	145
3. Not Showing End Credit Disclosures: The List Retention Requirement.....	146
VI. CONCLUSION.....	147

“There is a lot at stake here. . .”

- Former FCC Commissioner Jonathan S. Adelstein¹

I. INTRODUCTION

The American broadcast system is largely commercial, relying on advertising revenues to subsist.² Despite then-Secretary of Commerce Herbert Hoover’s insistence on an associative state broadcast system in the 1920s where broadcasters would cooperate with each other and the government to adequately support the dissemination of desirable news, entertainment, and educational programs without “advertising chatter,” the American broadcast system passively drifted towards being an advertiser-supported medium.³ Subsequently, more than 80 years after the invention of television, advertising in television continues to exist and has become increasingly popular in various forms.⁴ However, the

¹ Former FCC Commissioner Jonathan S. Adelstein, *Fresh is Not as Fresh as Frozen: A Response to the Commercialization of American Media*, (May 25, 2005), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-258962A1.pdf.

² See John Mark Dempsey & Eric Gruver, “*The American System*”: *Herbert Hoover, the Associative State, and Broadcast Commercialism*, 39 *PRESIDENTIAL STUDIES QUARTERLY* 22, 242 (2009) (chronicling the American broadcasting system’s movement away from Herbert Hoover’s vision of significant government support towards a commercially supported system of broadcasting). While some forms of television do not rely on any advertising revenues to subsist (i.e., pay television networks such as HBO) or rely on some advertising revenues to subsist (i.e., cable television networks such as FX), this Article will only focus on free broadcast television (e.g., ABC) because it relies solely on advertising revenues to subsist.

³ *Id.*

⁴ See Carrie La Ferle & Steven M. Edwards, *Product Placement: How Brands Appear on Television*, 35 *JOURNAL OF ADVERTISING* 65, 65-86 (2006), (proposing that, beyond the traditional 30-second commercial spot, there are 11 distinct categories of advertising embedded

increasing trend of using branded products as props or writing branded products into the actual content of television shows has become a real concern to some viewers, nonprofit advocacy groups and even actors that fear the adverse consequences that exist as the result of these practices.⁵

“Embedded advertising” describes situations in which commercial products and services are included in television programming rather than appearing separately as commercial messages in traditional 30-second advertising spots.⁶ The practice of embedded advertising primarily serves to promote brand names by drawing on the popularity of a broadcast program.⁷ For example, embedded advertising may manifest itself as the placement of red Coca-Cola cups in front of a panel of judges on a competitive reality television show.⁸ Conversely, embedded advertising may appear as a family’s desperate attempt to get a new Apple iPad throughout an entire episode of a scripted television show.⁹ These examples illustrate specific embedded advertising techniques known as product placement and product integration, respectively.¹⁰ Each technique intends to seamlessly weave advertisements into television shows to target a desired consumer demographic.¹¹ In exchange for these embedded advertising spots, advertisers pay television broadcasters some monetary fee or

in the content of television programs).

⁵ Associated Press, *FCC to Look into Embedded Advertising on TV*, MSNBC (June 26, 2008), <http://www.msnbc.msn.com/id/25401193>.

⁶ Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. 43,194 (proposed July 24, 2008) (to be codified at 47 C.F.R. pts. 73, 76) (defining and discussing embedded advertising).

⁷ *Id.* (discussing the purpose of embedded advertising).

⁸ This example is based on the show format of Fox’s *American Idol*. See Theresa Howard, *Real Winner of ‘American Idol’*, USA TODAY (Sept. 8, 2002), http://www.usatoday.com/money/advertising/2002-09-08-idol_x.htm.

⁹ This example is based on ABC’s *Modern Family*. In season 1, episode 19, Claire Dunphy tries to get her husband, Phil, a new Apple iPad for his birthday. The episode, scenes were set in Apple Store lines and various characters praised the iPad’s features. *Modern Family: Game Changer* (ABC television broadcast Mar. 31, 2010). See also *FCC’s Rules on Product Placement Disclosure, in Case You’re Wondering*, L.A. TIMES (Apr. 1, 2010), <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/04/product-placement-fcc-modern-family.html>.

¹⁰ Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. at 43,194, 43,195. The Federal Communications Commission defines “product placement” as the mere use of products as props in television programming and “product integration” as the integration of products into the dialogue and/or plot of a program.

¹¹ *Id.*; See also Alana Semuels, *Tracking embedded ads*, L.A. TIMES (July 21, 2008), <http://articles.latimes.com/2008/jul/21/business/fi-nielsen21> (describing embedded advertising techniques used by advertisers as a sophisticated methodology that attempts to “[seed] products into programming” without disrupting the viewing experience).

provide some form of consideration.¹²

After the payola scandals in the music industry were exposed in the late 1950s,¹³ the Federal Communications Commission (“Commission”) has more rigorously regulated embedded advertising in television and radio broadcasts by enforcing disclosure rules mandated by Sections 317 and 507 of the Communications Act of 1934 (“Communications Act”).¹⁴ Currently, embedded advertising is specifically regulated by Sections 73.1212¹⁵ and 76.1615¹⁶ of the Commission’s rules, closely tracking the language of Section 317.¹⁷ For television broadcasts, these regulations impose a “fair and full disclosure” standard.¹⁸ Broadcasters properly disclose so long as “one announcement [is made] at any time of the broadcast” if the embedded advertising relates to commercial products or services, and “it is clear that the mention of the name of the product constitutes a sponsorship notification.”¹⁹ Thus, identifying the use of embedded advertising in a show’s end credits satisfies the current disclosure rules. However, due to the admittedly ambiguous nature of the disclosure rules,²⁰ many

¹² Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. at 43,195. For instance, Coca Cola has paid \$10 million at one point to be featured on American Idol. *Supra* note 8. In contrast, Apple did not pay to have its iPad featured on Modern Family and instead provided the show with the product. See Brian Steinberg, “Modern Family” Featured an iPad, but Apple Didn’t Collect, *ADVERTISING AGE* (Apr. 1, 2010), http://adage.com/mediaworks/article?article_id=143105.

¹³ See Richard Kielbowicz & Linda Lawson, *Unmaking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963*, 56 *FED. COMM. LAW J.* 329 (2004) (describing “payola” as an illegal practice in the music industry where record companies pay or induce radio broadcasters to broadcast music recordings as a part of the normal day’s broadcast).

¹⁴ 47 U.S.C. §§ 317, 507 (2006). Section 317(a)(1) provides:

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.

¹⁵ 47 C.F.R. § 73.1212.

¹⁶ 47 C.F.R. § 76.1615.

¹⁷ Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. at 43,195 (acknowledging that Sections 73.1212 and 76.1615 of the Commission’s rules closely track the language of Section 317 of the Communications Act).

¹⁸ See 47 C.F.R. § 73.1212(e).

¹⁹ See 47 C.F.R. § 73.1212(f).

²⁰ Amy Schatz, *FCC’s Adelstein Talks Product Placement*, *THE WALL STREET JOURNAL* (June 8, 2005), http://www.aef.com/industry/news/data/2005/3119:pf_printable (quoting former Commissioner Adelstein as saying, “Currently, our rules require that they disclose [embedded advertising] sometime during the course of the broadcast. [The FCC doesn’t] spell

disclosures are made fairly quickly with small-sized, fast-moving end credits that are unreadable and incomprehensible to the viewing audience,²¹ especially when compressed.²²

Though the practice of embedded advertising is not unique or novel,²³ the increasing use of the practice has some groups concerned that the current disclosure rules are not adequately protecting the viewer's right to know when he or she is being advertised to in television programs.²⁴ In response to these concerns, the Commission issued a Notice of Inquiry and Notice of Proposed Rule Making ("Notices") in 2008 to solicit comments on the relationship between current disclosure rules and increasing industry reliance on embedded advertising in television.²⁵ Comments were submitted by broadcasters,²⁶ consumer groups,²⁷ and other interested parties²⁸ that

out how that's done . . .").

²¹ See Letter from Robert Weissman, Managing Dir., *Commercial Alert*, to Marlene H. Dortch, Office of the Sec'y, Fed. Comm'n's Comm'n, COMMERCIAL ALERT (Sept. 22, 2008), <http://www.commercialalert.org/CAcommentstextonly%20comments%20text%20only.pdf>. For example, in Season 2, Episode 11 of NBC's *Heroes*, disclosure for the show was flashed on the screen for less than two seconds, and for some re-run programs on A&E Network, the already fast-moving credits are compressed to about one fifth of the screen and thus resulting in distorted lettering. *Heroes: Powerless* (NBC television broadcast Dec. 3, 2007); See e.g., a post added to a Los Angeles Times article about embedded advertising on ABC's *Modern Family*. The comment posted by John De Salvo states: "Of course, it's SO obvious to each viewer that such-and-such company has something-or-other to do with product placement in the preceding program – especially when the close credits race by in about 10 seconds on that narrow side-screen that's making room for the tease about the next program. Even speed readers will have difficulty reading 300 lines of credits that are reduced to ultra-condensed micro type." Posting of John De Salvo, <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/04/product-placement-fcc-modern-family.html>, (Apr. 2, 2010, 07:19 PST).

²² *Id.*

²³ See Joanne Weintraub, *Product Placement is a Super Tradition in Hollywood*, MILWAUKEE J. SENTINEL (Mar. 1, 2005), <http://www.jsonline.com/story/index.aspx?id=305598> (proclaiming that embedded advertising in television took its cue from radio broadcasting and began around the 1920s); see also Cindy Tsai, *Starring Brand X: When the Product Becomes More Important than the Plot*, 19 LOYOLA CONSUMER L.J. 289 (2007) (discussing product placement in film).

²⁴ See Weissman, *supra* note 21.

²⁵ Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. at 43,194-98. The Notices were adopted on June 13, 2008 and released on June 26, 2008; see also 47 C.F.R. §§ 1.415, 1.430 (2011). The Notices are the first stage of the rulemaking process. After comments are submitted and reviewed, the Commission issues a Report and Order that may develop new rules, amend existing rules, or do neither.

²⁶ See NAT'L ASS'N OF BROADCASTERS, COMMENTS OF THE NAT'L ASS'N OF BROADCASTERS, IN RE SPONSORSHIP IDENTIFICATION RULES AND EMBEDDED ADVERTISING (MB Docket No. 08-90, 2008) [hereinafter COMMENTS OF THE NAT'L ASS'N OF BROADCASTERS] (arguing that current disclosure rules are sufficient and changes are unwarranted); See also NAT'L CABLE & TELECOMMUNICATIONS ASS'N, COMMENTS OF THE NAT'L CABLE & TELECOMMUNICATIONS

either supported or proposed amendments to the current rules. Despite these submissions, the Commission has not yet determined whether current disclosure rules are sufficiently protecting the viewer's right to know when he or she is being advertised to in light of an alleged increasing trend of embedded advertising in television.²⁹

Since this issue is still unresolved, this note is intended to be its own comment to the Notices. It is becoming evident that embedded advertising in television is more pervasive than ever. As a result, the need to assess the efficacy of current disclosure rules is greater. After balancing the consumers' right to know the sources of embedded advertising against the broadcasters' First Amendment rights and business needs, I propose that the Commission amend the current disclosure rules to incorporate, by analogy, the more stringent disclosure requirements imposed on political advertising. This proposal both improves the efficacy of the disclosure rules and legitimately takes into consideration all of the concerns of the interested parties that submitted comments to the Notices.

Part I of this paper discusses advertising generally in the historical context and specifically in light of current trends in television. This context provides the proper framework for understanding the prevalence of embedded advertising and why disclosure rules are necessary. Part II explores the disclosure rules related to commercial

ASS'N, IN RE SPONSORSHIP IDENTIFICATION RULES AND EMBEDDED ADVERTISING (MB Docket No. 08-90, 2008) [hereinafter COMMENTS OF THE NAT'L CABLE & TELECOMMUNICATIONS ASS'N] (suggesting that changes to current disclosure rules would be unconstitutional), NAT'L MEDIA PROVIDERS, COMMENTS OF THE NAT'L MEDIA PROVIDERS, IN RE SPONSORSHIP IDENTIFICATION RULES AND EMBEDDED ADVERTISING (MB Docket No. 08-90, 2008) [hereinafter COMMENTS OF THE NAT'L MEDIA PROVIDERS] (urging the FCC to take into account the necessity of embedded advertising in a rapidly changing media environment).

²⁷ See Weissman, *supra* note 21 (arguing that current disclosure rules are inadequate and specifically recommending that disclosures be made at the moment embedded advertising occurs).

²⁸ Compare SCREEN ACTORS GUILD, COMMENTS OF SCREEN ACTORS GUILD, IN RE SPONSORSHIP IDENTIFICATION RULES AND EMBEDDED ADVERTISING (MB Docket No. 08-90, 2008) [hereinafter COMMENTS OF SCREEN ACTORS GUILD] (urging the FCC to protect the public's right to know who pays for their television programs and submitting changes to the current disclosure rules), with PROGRESS & FREEDOM FOUND, COMMENTS OF THE PROGRESS & FREEDOM FOUNDATION, IN RE SPONSORSHIP IDENTIFICATION RULES AND EMBEDDED ADVERTISING 2-3, 6 (MB Docket No. 08-90, 2008) [hereinafter COMMENTS OF THE PROGRESS & FREEDOM FOUNDATION] (claiming that further regulation would be unwise, overreaching, and unconstitutional).

²⁹ *Id.*; see also Weissman, *supra* note 21 and James Rainey, *On the Media: Fake news flourishes under the feds' noses*, L.A. TIMES (Sept. 18, 2010), <http://articles.latimes.com/2010/sep/18/entertainment/la-et-onthemedata-20100918> (describing the Commission's attempt to update embedded advertising disclosure rules as "stalled").

broadcast advertising by looking at the origin of commercial broadcast advertising and the current requirements imposed. Part III summarizes and critiques the responses of interested parties to the Notices. Finally, Part IV presents my proposal for more comprehensive embedded advertising disclosure by drawing from the requirements imposed on political advertisements. By applying the amended disclosure rules to a variety of instances involving actual disclosures made by broadcasters, I hope to illustrate how the current disclosure rule can be modified to properly address the historical, legal, and practical limitations that exist while simultaneously serving the interests of all concerned parties.

II. BACKGROUND

Concerns about the commercialization of broadcast television existed as early as the 1920s.³⁰ However, to better understand current concerns,³¹ as well as the context in which the Commission's disclosure rules and the Notices arose, this section traces the history of embedded advertising by looking at "payola" scandals and examining the current trends occurring specifically in television broadcasting.

A. *The "Payola" Scandals*

Enacted in 1934, the Communications Act's disclosure rules were not seriously enforced and articulated until the late 1950s amidst the public's exposure to "payola" scandals.³² Payola refers to the practice of playing music on broadcast radio programs in exchange for monetary or other consideration from the sponsor,³³ typically a band's record label.³⁴ Though this practice of maximizing radio exposure

³⁰ Dempsey & Gruver, *supra* note 2. Hoover's primary concern about advertising was that the public interest in free broadcast radio and television would be threatened. Specifically, Hoover feared that too much advertising would crowd out "the genius of the American boy," the amateur broadcaster, and thereby decrease the quantity and quality of programs available to the public.

³¹ See Weissman, *supra* note 21 (describing Commercial Alert's concern with embedded advertising to be founded on the core principle of U.S. communications and fair advertising law that people have a right to know when they are being advertised to).

³² Kielbowicz & Lawson, *supra* note 13 at 345. It should be noted that around the same time, the Commission's disclosure rules were more rigorously enforced due in part to the quiz show scandals that were uncovered as well.

³³ *Id.* at 331. Similarly, "plugola" is the practice of making a promotional remark in exchange for some form of consideration.

³⁴ *Id.* at 349-50.

existed as early as the 1930s,³⁵ it was not until the practice's pervasive nature was uncovered in the late 1950s by a large amount of public exposure that a congressional investigation was ordered.³⁶

Described as a form of "commercial bribery," the payola scandals presented commercialism's "corrupting influence on broadcasting."³⁷ In particular, because the audience could not identify the sponsor's influence on the radio broadcast's content, payola was characterized as a deceptive practice.³⁸ The public soon learned that "sponsors influenced content in ways not readily apparent [to them]" and that "sponsors now included any party maneuvering to influence broadcast content to promote [their] goods or services."³⁹ As a result of this exposure and the expanded concept of deceptive advertising, the reach of Section 317 and its enforcement was seriously questioned.⁴⁰

Consequently, both Congress and the Commission worked closely to craft a response.⁴¹ Between 1960 and 1963, the Commission released a series of rulings on its disclosure rules.⁴² In an attempt to better enforce the existing disclosure requirements, the rulings updated the rules to focus more on sponsorship consideration and identification.⁴³ Moreover, the Commission articulated concrete examples of embedded advertising in which the disclosure rules would apply.⁴⁴ By making these changes, the Commission did not seek to

³⁵ *Id.*

³⁶ *Id.* at 348-49. A congressional committee was initially appointed to investigate rigged television game shows, typically named after a single sponsor or advertiser, because it was alleged that they deceptively attracted viewers by coaching contestants to make the contests seem exciting and fair. The committee subsequently became interested in payola when it received a letter charging that "commercial bribery [had] become a prime factor in determining what music was played on many broadcast programs and what musical records the public [was] surreptitiously induced to buy." Public curiosity grew when exposes were published in newspapers (e.g., *The New York Times*), magazines (e.g., *Look* and *Life*), and trade journals (e.g., *Broadcasting*, *Billboard*, and *Variety*).

³⁷ *Id.* at 347-48.

³⁸ *Id.*

³⁹ *Id.* at 349.

⁴⁰ *Id.*

⁴¹ *Id.* at 355.

⁴² See COMMENTS OF THE NAT'L ASS'N OF BROADCASTERS, *supra* note 26 at 4-5 (describing the series of rules as the most comprehensive analysis of Section 317 to date).

⁴³ Kielbowicz & Lawson, *supra* note 13 at 360-62 (describing the heightened scrutiny of Section 317 on two dimensions: the amount of consideration involved and the extent of on-air promotional identification).

⁴⁴ See *In re Applicability of Sponsorship Identification Rules*, Public Notice, 40 F.C.C. 141, 146-149 (1963) (containing 36 examples of situations that may or may not require disclosure, including several product integration examples covered by the disclosure rules).

limit content or to keep broadcasting from engaging in commercial promotion.⁴⁵ Instead, the disclosure rules—which currently apply to both radio and television broadcasting—were modified with a more modest purpose in mind: to inform the audience of when and by whom it was being persuaded.⁴⁶

B. *Current Embedded Advertising Trends in the Television Industry*

Since the changes to the requirements were made in the early 1960s, the Commission's disclosure rules have been left largely undisturbed;⁴⁷ embedded advertising, however, has evolved with the times.⁴⁸ Often, the increasing use and popularity of embedded advertising is described as the response of advertisers and broadcasters to a rapidly-changing television broadcast industry.⁴⁹

Embedded advertising in television is nothing new.⁵⁰ Though early examples of embedded advertising may date back to the 1950s,⁵¹ the practice started to really blossom in the 1980s.⁵² Recently, however, the use of embedded advertising has dramatically escalated. Between 1999 and 2004, it has been estimated that the amount of money spent on embedded advertising in television increased an average of 21.5 percent per year.⁵³ In 2005, while \$1.5 billion was spent in the United States on embedded advertising in television, that amount nearly doubled to \$2.9 billion in 2007.⁵⁴ During that year, 25,950 embedded advertisements occurred in the top 10 broadcast programs and 163,737

⁴⁵ Kielbowicz & Lawson, *supra* note 13 at 372.

⁴⁶ *Id.*

⁴⁷ See COMMENTS OF THE NAT'L ASS'N OF BROADCASTERS, *supra* note 26 at 4-5.

⁴⁸ Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. at 43,195.

⁴⁹ *Id.*

⁵⁰ Weissman, *Supra* note 21 (suggesting that embedded advertising in television is as old as movie and film and that it actually took its cue from embedded advertising in radio).

⁵¹ *Id.* (discussing how embedded advertising in television in the 1950s included the placement of product brand names in the titles of popular programs such as "Philco TV Playhouse," "Texaco Star Theatre," and "Kraft Television Theatre").

⁵² See Amit Schejter, *Jacob's Voice, Esau's Hands: Transparency as a First Amendment Right in an Age of Deceit and Impersonation*, 35 HOFTSRA L. REV. 1489, 1492 (2007).

⁵³ See David Kaplan, *Product Placement Outpaces Ad Spending*, MEDIA POST (Mar. 30, 2005), <http://publications.mediapost.com/index.cfm?fuseaction=Articles.san&s=28681&Nid=12778&p=276816>; Statistics provided by PQ Media, the "leading provider of alternative media econometrics for media stakeholders" and a "trusted resource for executives at major financial institutions and management consulting firms." PQ Media Home Page, www.pqmedia.com.

⁵⁴ See Alana Semuels, *Tracking embedded ads*, L.A. TIMES (July 21, 2008), <http://articles.latimes.com/2008/jul/21/business/fi-nielsen21>.

embedded advertisements occurred in the top 10 cable programs according to the Nielsen Company.⁵⁵ Notably, in 2008, *American Idol* alone included 3,291 embedded advertisements.⁵⁶ With one academic study estimating that one brand appears as often as every three minutes of programming,⁵⁷ embedded advertising is often being described as pervasive and omnipresent in television.⁵⁸

The ubiquity of embedded advertising can be attributed to the responses of advertisers and broadcasters to two major changes in television.⁵⁹ First, the advent of new technologies such as digital recording devices (“DVRs”) that allow viewers to record their favorite shows and skip or speed through traditional commercials has forced advertisers to try to promote their products and services inside programs where they are harder to ignore.⁶⁰ Although DVR was introduced more than ten years ago, DVR ownership continues to grow and was projected to increase by more than 50% between 2004 and 2010.⁶¹ Some observers claim that this will shift the industry away from traditional 30-second commercial spots and towards more embedded advertising.⁶² Second, the rapid expansion of cable channels

⁵⁵ See Weissman, *supra* note 21. The Nielsen Company is considered the world’s leading marketing and media information company that measures and analyzes how people interact with various media platforms.

⁵⁶ *In re* Sponsorship Identification Rules and Embedded Advertising, Notice of Inquiry and Notice of Proposed Rule Making, 23 F.C.C.R. 10,682, 10,701 (June 26, 2008) (statement of Federal Communications Commissioner Michael J. Copps).

⁵⁷ See Carrie La Ferle & Steven M. Edwards, *Product Placement: How Brands Appear on Television*, 35 J. OF ADVERTISING 65, 86 (2006).

⁵⁸ See Weissman, *supra* note 21 (stating “it is fair to say that product placement is now pervasive on television programming” and that “product placement” is omnipresent).

⁵⁹ Dempsey & Eric Gruver, *supra* note 2 (describing the “American system” as a commercial television broadcast system); see also Comments of the Nat’l Media Providers, *supra* note 26 (suggesting that “it is long-settled and well-accepted that ‘broadcast television in the United States is financed by the sale of advertising time”).

⁶⁰ See Wayne Friedman, *NBC’s Graboff: Mo’ Better Branding*, MEDIA POST (Jun. 11, 2007), http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticleHomePage&art_aid=62104 (stating that as a result of viewers’ increasing habit of fast-forwarding through commercials, NBC will continue to engage in embedded advertising to make the marketing messages inside programs).

⁶¹ Press Release, *The Future of TV Indus. Background*, DIGEO, INC. (Jan. 2007), http://www.digeo.com/downloads/Industry_background.doc.

⁶² See Stuart Elliot, *Ads That are Too Fast for a Fast-Forward Button*, N.Y. TIMES (May 18, 2007), <http://www.nytimes.com/2007/05/18/business/media/18adco.html?ex=1337140800&en=726593664a9d4d95&ei=5088&partner=rssnyt&emc=rss> (suggesting that the increasing prevalence of DVRs will move the industry away from traditional commercial breaks).

has led to increased competition among broadcasters for audience share, advertising revenue, and quality programming.⁶³ This “further heightened the need for both broadcasters and cable programmers to find additional means of economic support” beyond the traditional sale of commercial spots.⁶⁴ Embedded advertising has accordingly been used to support the viability of television broadcasting.

Ultimately, it has been recognized that the goal of embedded advertising is to integrate products and services seamlessly into traditional television broadcasts.⁶⁵ To do this, major networks have “[created] client-facing divisions specifically focused on how best to embed advertisers’ messages and products into programming.”⁶⁶ Thus, the effectiveness of embedded advertising heavily relies on advertising being subtle and trying to make sure that viewers do not recognize advertising as what it is.⁶⁷ Consequently, the concern is that the “line between promotional and editorial voices [is being] blurred”⁶⁸ by the increasingly pervasive practice in a way that does not allow viewers to identify the advertising to which they are exposed.⁶⁹

III. CURRENT DISCLOSURE RULES

Current administrative disclosure rules are generally premised on Sections 317 and 507 of the Communications Act.⁷⁰ In particular,

⁶³ See COMMENTS OF THE NAT’L MEDIA PROVIDERS, *supra* note 26, at 11.

⁶⁴ *Id.*

⁶⁵ Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. at 43,195.

⁶⁶ *In re* Sponsorship Identification Rules and Embedded Advertising, Notice of Inquiry and Notice of Proposed Rule Making, 23 F.C.C.R. 10,682, 10,702 (June 26, 2008) (statement of Federal Communications Commissioner Jonathan S. Adelstein).

⁶⁷ See Weissman, *supra* note 21.

⁶⁸ *Id.* (citing a published 2003 survey of product placement professionals that found a strong belief that product placements can be “considered a form of subliminal advertising,” with this belief receiving a mean score of 5.61 on a 7-point scale).

⁶⁹ See, Namita Bhatnagar, Lerzon M. AksoyAskoy & 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 RES. 170, 172 (2003) (stating 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)”); see also 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 J. CONSUMER RES. 306, 307 (2002) (stating that “in today’s oversaturated and fragmented advertising landscape, such [embedded advertising]...may prove more powerful than traditional advertisements if they are not perceived as persuasive messages”).

⁷⁰ 47 U.S.C. §§ 317, 507 (2006).

Sections 73.1212 and 76.1615 represent the Commission's disclosure rules and closely track the language of Section 317.⁷¹ The purpose of these rules is to ensure that audiences are informed of the sources of embedded advertising in broadcasts they hear or view.⁷² Disclosure is therefore required regardless of whether the program is primarily commercial or noncommercial and regardless of the duration of the broadcast.⁷³ This section explores the origins of disclosure and the Commission's current rules applying to embedded advertising in the commercial context.

A. *The Origins of and Rationale for Disclosure in Broadcasting*

The disclosure requirement is the oldest statutory provision that deals directly with broadcast advertising.⁷⁴ Originally encapsulated in Section 19 of the Radio Act of 1927,⁷⁵ disclosure using sponsorship identification requirements was intended to prohibit radio stations from disguising advertising in program content.⁷⁶ Relying on lessons from well-established postal law, the disclosure rules were primarily fashioned to ensure that the private and public interests of broadcasting were properly balanced.⁷⁷

In the late 1800s, Congress encouraged the circulation of magazines to better facilitate the dissemination of ideas for the public interest by offering highly subsidized postage rates to for-profit publishers.⁷⁸ However, because the cheap postal rates were unduly enriching private publishers that began to underwrite the low cost of circulation with advertising revenues, Congress adopted the Newspaper

⁷¹ Sponsorship Identification Rules and Embedded Advertising, *supra* note 17.

⁷² 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) (articulating the purpose of Section 317).

⁷³ Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. at 43,195.

⁷⁴ Kielbowicz & Lawson, *supra* note 13, at 331.

⁷⁵ *Id.* at 334. Section 19 of the Radio Act of 1927 provides:

All matter broadcast by any radio station for which service, money, or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, firm, company, corporation, shall, at the time of the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person, firm, company, or corporation.

Radio Act of 1927, 47 U.S.C. § 19 (repealed 1934).

⁷⁶ Kielbowicz & Lawson, *supra* note 13, at 332.

⁷⁷ *Id.* at 333.

⁷⁸ *Id.* at 332; see also Richard B. Kielbowicz, *Postal Subsidies for the Press and the Business of Mass Culture, 1880-1920*, 64 BUS. HIST. REV. 451 (1990).

Publicity Act of 1912 (“Newspaper Publicity Act”) to properly balance the private and public benefits of this policy.⁷⁹ In particular, the Newspaper Publicity Act required publishers to clearly label advertisements to prevent readers from mistaking them for editorial content.⁸⁰ This theoretically allowed the market to ensure that the public’s interest in having quality editorial content was being served. Congress reasoned that magazines incorporating excessive advertising would drive their readers away and in the direction of competing magazines more attuned to the public’s interest.⁸¹ Thus, disclosures gave readers the important “contextual information . . . to evaluate the messages they [were consuming]” and to informatively support only those for-profit magazines that were still making valuable contributions to the public’s interest in having quality content.⁸²

Similarly, disclosure requirements for broadcast advertising were deemed important under the same rationale. Though broadcasting passively drifted towards being a commercial system, Congress still intended to ensure that the private uses of *public* airwaves were serving the public’s interest in having quality news, entertainment, and educational programs.⁸³ To do this, compulsory broadcast advertising disclosure requirements were adopted to give viewers the contextual information to decide when for-profit broadcasters were disseminating too much advertising and too little quality programming.⁸⁴ Thus, disclosure relies on the market to weed out broadcasters that are not broadcasting enough content attuned to the public’s interest. In order to effectively balance the private and public interests, the viewer’s “right to know” must be adequately protected by informative disclosures.⁸⁵

⁷⁹ *Id.* at 332-333. Notably, the constitutionality of the Newspaper Publicity Act of 1912’s disclosure requirement was upheld in 1913 in *Lewis Publ’g Co. v. Morgan*, 229 U.S. 288 (1913), because the requirements were merely conditions on a privilege – the use of a highly subsidized postage rate. Moreover, the Court rejected the publisher’s argument that the requirements unconstitutionally limited freedom of the press since magazines that did not comply with the requirements could still circulate their publications by mail, just not at the subsidized rates.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 330-332.

⁸³ *Id.* at 331.

⁸⁴ *Id.*

⁸⁵ *Id.* at 330. Related to Part I, subsection (a), the viewer’s “right to know” is not adequately protected when advertising techniques are deceptive. When advertising is deceptive, the viewer cannot distinguish between broadcasters that include too much advertising and those that do not. As a result, viewers will not be able to make informed decisions about which broadcasters are still significantly serving the public’s interest in having

B. *Current Disclosure Rules for Commercial Advertising*

Currently, with respect to embedded commercial advertising, Section 73.1212 generally imposes a “full and fair” disclosure standard.⁸⁶ When “it is clear that the mention of the name of the product [or service] constitutes a sponsorship identification,” Section 73.1212 deems the use of only one announcement “made at any time during the course of the broadcast” sufficient disclosure.⁸⁷

To ensure compliant application of this standard, the Commission has issued numerous public notices elaborating on broadcasters’ obligations to disclose.⁸⁸ In these public notices, the Commission has reminded broadcasters that the size of the letters in the disclosure needs to be “sufficient . . . to be readily legible to an average viewer.”⁸⁹ Moreover, the disclosure should remain on the screen long enough to be read or heard by an average viewer.⁹⁰ Due to a variety of factors, however, the Commission has not dictated a specific letter size or airtime for embedded commercial advertising.⁹¹ Instead, the

quality programming. Thus, the goal of properly balancing the private and public interests in the public airwaves is threatened.

⁸⁶ See 47 C.F.R. § 73.1212(e). Section 73.1212(e) provides:

The announcement required by this section shall, in addition to stating the fact that the broadcast matter was sponsored, paid for or furnished, fully and fairly disclose the true identity of the person or persons, or corporation, committee, association or other unincorporated group, or other entity by whom or on whose behalf such payment is made or promised, or from whom or on whose behalf such services or other valuable consideration is received, or by whom the material or services referred to in paragraph (d) of this section are furnished.

Id.

⁸⁷ 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.

Id.

⁸⁸ Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. at 43194-02.

⁸⁹ See Codification of the Commission’s Political Programming Policies, Report and Order, 7 FCC Rcd 678, 686 (1991).

⁹⁰ *Id.*

⁹¹ Application of Sponsorship Identification Rules to Political Broadcasts, Teaser Announcements, Governmental Entities and Other Organizations, Public Notice, 66 F.C.C. 2d 302 (1977) (stating that “the Commission did not believe it practical, and therefore has never attempted, to designate a specific size of letter or specific period of time to be utilized in making such identifications since a combination of factors must be considered in determining

Commission plainly favors flexibility and continues to rely upon the broadcasters' "reasonable, good faith judgment" to determine how to disclose the sources of embedded advertising.⁹² This position has resulted in an industry-wide practice of disclosing in a television show's end credits, using "crawls of fast-moving, small font text" that sometimes even appear on small split screens.⁹³

IV. SUMMARIES AND CRITIQUES OF THE RESPONSES TO THE NOTICES

In response to the Notices, a number of comments were submitted by interested parties.⁹⁴ This section briefly presents the comments by categorically summarizing the responses into the two general options that the Commission now has before it with regard to current disclosure rules for embedded advertising. The Commission can either maintain the current disclosure rules, or amend the status quo. While amending the status quo is likely necessary, the amendments that have been proposed in response to the Notices are arguably inadequate.⁹⁵

A. *Maintaining the Status Quo*

Though separately submitted, the comments submitted by The National Association of Broadcasters,⁹⁶ The National Media Providers,⁹⁷ and The Progress & Freedom Foundation⁹⁸ suggest that the status quo should be maintained. As discussed below, these parties

the appropriateness of any particular announcement, i.e., length of sponsor's name, relationship of time shown to size of letters, difficulty in comprehending the words contained in the identification.").

⁹² Codification of the Commission's Political Programming Policies, Report and Order, *supra* note 89, at 687.

⁹³ See Weissman, *supra* note 21 (describing these types of disclosures to be "widely acknowledged [as] standard").

⁹⁴ See, COMMENTS *supra* notes 26, 28.

⁹⁵ See e.g., Ann K. Hagerty, *Embedded Advertising: Your Rights in the TiVo Era*, 9 J. MARSHALL REV. INTELL. PROP. L. 146 (2009) (analyzing the shortcomings of each proposal to amend the current disclosure rules).

⁹⁶ See COMMENTS OF THE NAT'L ASS'N OF BROADCASTERS, *supra* note 26. The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the FCC, the Courts, and other federal agencies.

⁹⁷ See COMMENTS OF THE NAT'L MEDIA PROVIDERS, *supra* note 26. The National Media Providers includes broadcast companies such as CBS Corporation, Fox Entertainment Group, and NBC Universal.

⁹⁸ COMMENTS OF THE PROGRESS & FREEDOM FOUNDATION, *supra* note 28. The Progress and Freedom Foundation is a market-oriented think tank that studies the digital revolution and its implications for public policy.

generally argue that the current disclosure rules are sufficient⁹⁹ and caution that adopting the heightened rules proposed by the other comments would be unconstitutional and an extensive burden on the industry as it tries to adapt to an evolving environment.¹⁰⁰

These interested parties initially argue that the current disclosure rules sufficiently protect the viewer's right to know when embedded advertising occurs.¹⁰¹ Any attempt at further regulating broadcasters would be "the Commission's latest effort to micromanage . . . the media" without any concrete evidence of false, misleading, or unlawful practices of embedded advertising.¹⁰² Specifically, it is claimed that the Notices do not provide any evidence that viewers are being misled or deceived by the embedded advertisements in television.¹⁰³ It is argued that "when brand names are used in program material, the public generally understands that some form of commercial sponsorship is involved" and that it would be "hard even to imagine that the American public could be as ignorant or naïve" as the Commission suggests in the Notices.¹⁰⁴ In fact, embedded brands may actually be desirable and may add value to the viewer's experience.¹⁰⁵ Without a real showing that viewers are being harmed, the current disclosure rules are arguably sufficient and the Commission has purportedly fallen victim to a "third-person effect" where they merely "tend to think that other people are fooled by what they themselves

⁹⁹ Compare COMMENTS OF THE NAT'L ASS'N OF BROADCASTERS, *supra* note 26, with COMMENTS OF THE NAT'L MEDIA PROVIDERS, *supra* note 26, and COMMENTS OF THE PROGRESS & FREEDOM FOUNDATION, *supra* note 28.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See COMMENTS OF THE PROGRESS & FREEDOM FOUNDATION, *supra* note 28, at 1; see also COMMENTS OF THE NAT'L MEDIA PROVIDERS, *supra* note 26, at 17 (urging the FCC to avoid "micromanagement because of the strong policy, statutory, and constitutional presumptions against government intervention in editorial decisions of broadcasters").

¹⁰³ *Id.* at 2.

¹⁰⁴ *Id.* at 3-4; see also COMMENTS OF THE NAT'L ASS'N OF BROADCASTERS, *supra* note 26, at 6 (claiming that current embedded advertisements are directed at rational free-thinking adults); see also *Starcom Study Yields Rules for Print Product Placement*, STARCOM MEDIAVEST GROUP (Oct. 15, 2005), <http://www.smggroup.com/news.asp?pi=1388> (citing a study that suggests that consumers are predisposed to think that brand advertisers pay for brand mentions and that "'prevailing opinion' of consumers is that 'advertisers pay to have products featured' . . .").

¹⁰⁵ See SCOTT DONATION, MADISON & VINE: WHY THE ENTERTAINMENT AND ADVERTISING INDUSTRIES MUST CONVERGE TO SURVIVE 3 (McGraw-Hill 2005) (suggesting that viewers' entertainment experiences are enhanced with subtly-laced, brand name products and that viewers will often reject poorly executed, transparent product placements).

understand perfectly.”¹⁰⁶

Moreover, without evidence showing that viewers are actually being harmed by embedded advertising, the parties argue that adopting any of the proposed amendments to the current rules would be unconstitutional.¹⁰⁷ When the government seeks to regulate protected commercial speech,¹⁰⁸ the Supreme Court makes it clear in *Central Hudson and Electric Co. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980), that the government must show that: (1) the asserted interest is substantial; (2) the regulation directly advances that interest; and (3) the regulation is no more extensive than necessary to serve that interest.¹⁰⁹ As discussed, there is no real harm associated with embedded advertising and so the parties claim that the government fails to establish a substantial interest in further heightening the current rules.¹¹⁰ Consequently, “without an actual harm to be remedied, more restrictive and burdensome rules will [also] be more extensive than necessary” and disrupt the presentation of the programming.¹¹¹ Thus, amending the current rules would arguably fail the *Central Hudson* test and unconstitutionally regulate protected commercial speech.¹¹²

Finally, from a policy standpoint, the parties assert that further regulation would actually threaten the public’s interest in having access to free, advertiser-supported television broadcasting.¹¹³ Embedded advertising is proclaimed to be a necessary response to a changing media environment.¹¹⁴ Broadcasters are currently facing particular challenges to the traditional advertiser-supported business model due to the advent of new technologies like DVRs and the rapid expansion of

¹⁰⁶ See COMMENTS OF THE PROGRESS & FREEDOM FOUNDATION, *supra* note 28, at 5; see also W. Phillips Davison, *The Third-Person Effect in Communication*, 47 PUB. OP. QUARTERLY 1, 3 (1983) (pioneering the “third-person effect” which would lead to other studies showing that the effect is the primary explanation for why many people fear or want to ban various types of speech or expression, including: news, misogynistic rap lyrics, television violence, video games, and pornography”).

¹⁰⁷ In particular, the proposed changes discussed in Part III, subsection (b) are: 1) disclosure requirements should be of a particular size and duration, 2) disclosures should occur at the beginning and the end of programming, or 3) disclosures should occur at the beginning and the end of programming *and* simultaneous, on-screen disclosure must be made at the moment the embedded advertising happens. See *infra* Part III.B.

¹⁰⁸ See Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. at 43194-02, *supra* note 6 (recognizing that embedded advertising as “a form of commercial speech”)

¹⁰⁹ *Central Hudson & Electric Co. v. Pub. Serv. Comm’n*, 447 U.S. 557, 565-66 (1980).

¹¹⁰ *Supra* note 99.

¹¹¹ See COMMENTS OF THE NAT’L ASS’N OF BROADCASTERS, *supra* note 26, at 25.

¹¹² COMMENTS OF THE NAT’L MEDIA PROVIDERS, *supra* note 97.

¹¹³ *Id.*

¹¹⁴ See COMMENTS OF THE NAT’L MEDIA PROVIDERS, *supra* note 26, at 12.

cable channels.¹¹⁵ To ensure that advertising revenues remain high enough to finance high-quality and free programming, the parties argue that broadcasters must be able to use embedded advertising in order to survive.¹¹⁶ Adopting new heightened requirements would ignore the fundamental commercial nature of the television industry and impose increased compliance costs.¹¹⁷ These consequences would therefore threaten the viability of the free, commercial-system of television broadcasting to the public's detriment.¹¹⁸

Despite these arguments for maintaining the status quo, these parties simply disregard the realities of the situation. First, as discussed, recent trends suggest that embedded advertising in television is becoming more pervasive.¹¹⁹ While viewers may be aware that the practice exists, "it is implausible to suggest [that] the average viewer is aware of most or all of the hidden advertisements to which he or she is subjected."¹²⁰ Second, the prevalence of the practice means that more disclosures are needed in the end credits. Unfortunately, however, industry practice already puts many viewers in a situation where current disclosures are unreadable and fast-moving.¹²¹ Third, since fewer viewers are likely to see the end credits,¹²² the current disclosures are not effective.¹²³ Thus, taken together, it is not surprising that the Commission received requests to amend the current requirements nearly seven years ago.¹²⁴ Due to the fact that the

¹¹⁵ *Supra* notes 58-62.

¹¹⁶ See COMMENTS OF THE NAT'L MEDIA PROVIDERS, *supra* note 26, at 14-15.

¹¹⁷ *Id.* at 15.

¹¹⁸ *Id.* at 15-16; see also COMMENTS OF THE NAT'L ASS'N OF BROADCASTERS, *supra* note 26, at 18 (arguing that making heightened changes to the current disclosure rules will stifle broadcaster growth and harm the public interest), COMMENTS OF THE PROGRESS & FREEDOM FOUNDATION, *supra* note 28, at 7 (recommending that the Commission specifically keep in mind the financial health and well-being of the free broadcast medium).

¹¹⁹ See *infra* Part I.B.

¹²⁰ See Weismann, *supra* note 21.

¹²¹ *Id.*

¹²² *Id.* (suggesting that many viewers are not watching credit scrolls as the result of the prevalence of remote controls and the increasing numbers of households with DVRs with fast-forwarding abilities).

¹²³ *Id.*

¹²⁴ See Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. at 43194-02. In 2003, Commercial Alert filed a petition for rulemaking arguing that the disclosure rules were inadequate to address embedded advertising techniques and thus requested a revision to the rules to require disclosure at the beginning of programs in clear and conspicuous language and also concurrently with any embedded advertising. Later, in 2005, the Writer's Guild of America (West and East), the Screen Actors Guild, and the associate dean of the U.S.C. Annenberg School for Communication formulated another set of recommendations. More

changes were not made when initially introduced, the Notices present the most viable opportunity to amend the current disclosure rules.

B. *Amending the Status Quo*

Amendments to the current disclosure rules have been proposed by the Commission,¹²⁵ the Screen Actors Guild (“SAG”),¹²⁶ and Commercial Alert.¹²⁷ Underlying these proposals is the principle that viewers have a right to know when they are being subjected to embedded advertisements.¹²⁸ Generally, the parties argue that the right is not adequately protected in light of the pervasiveness of embedded advertising and current disclosure practices.¹²⁹ As a result, each party has articulated its own amendment to the status quo. These amendments are presented and scrutinized below along a spectrum ranging from modest to extensive changes.¹³⁰

1. Modest Changes: Federal Communications Commission

In the Notices, the Commission makes what is regarded as the

recently, in 2007, Philip Rosenthal testified on behalf of the Writers Guild of America (West) and the Screen Actors Guild before the Subcommittee on Telecommunications and the Internet of the House Committee on Energy and Commerce regarding the need for greater disclosure requirements because of embedded advertising. Similarly, in 2007, Patric Verrone testified on behalf of the Writers Guild of America (West), during the Commission’s Public Hearing on Media Ownership in Chicago, Illinois regarding the need for greater disclosure requirements for embedded advertising.

¹²⁵ *Id.* at 43,196.

¹²⁶ See COMMENTS OF SCREEN ACTORS GUILD, *supra* note 28. SAG is the nation’s largest labor union representing working actors to enhance working conditions, compensation and benefits Screen Actors Guild Awards. SCREEN ACTORS GUILD, www.sag.org/content/about-us (last visited Apr. 22, 2011).

¹²⁷ See Weissman, *supra* note 21. Commercial Alert is a nonprofit organization with a mission to “keep the commercial culture within its proper sphere...” COMMERCIAL ALERT, www.commercialalert.org/about/ (last visited Apr. 22, 2011). Please note that because Commercial Alert initially ran a campaign to require more disclosure as early as 2003, its response to the Notices contains extensive research on and numerous examples of the inadequacies of the current disclosure rules. Consequently, Commercial Alert’s position will be cited on numerous occasions throughout the remainder of this paper to support amending the current requirements.

¹²⁸ *Id.*

¹²⁹ Compare Sponsorship Identification Rules and Embedded Advertising, *supra* note 6, COMMENTS OF SCREEN ACTORS GUILD, *supra* note 28, and Weissman, *supra* note 21.

¹³⁰ See Ann K. Hagerty, *Embedded Advertising: Your Rights in the TiVo Era*, 9 J. MARSHALL REV. INTELL. PROP. L. MARSHALL REV. INTELL. PROP. 146, 157-159 (2009) (describing the Commission’s proposal as a “modest proposed change,” the SAG proposal as an expansion of the Commission’s modest proposal, and Commercial Alert’s proposal as a “distinct proposal” that is “heavily debated”).

“most modest proposed change” to the current disclosure rules.¹³¹ To make disclosure more obvious to the viewer, the Commission proposes an amendment that would require sponsorship identifying announcements to “(1) have lettering of a particular size and (2) air for a particular amount of time.”¹³² No exact letter size or air time, however, is specified in the proposal. Instead, the Commission seeks suggestions on the size of lettering and the amount of time disclosures should air while noting that specific requirements are required in the political broadcast matter context.¹³³

Despite making disclosures only “slightly more obvious,” this proposal still “fails to address the habits of the viewing public.”¹³⁴ As mentioned, only a few viewers watch the end credits where disclosures are made.¹³⁵ Thus, the Commission’s proposal would only have, “at best, minimal substantive effect on the public’s awareness of [all of the] embedded advertisements” that exist in the programs they watch.¹³⁶

2. Expanding on the Modest Changes: Screen Actors Guild

In response to the Notices, SAG presents its own proposal. Characterized as an expansion on the Commission’s proposal and an attempt to protect union actors from being inadvertently associated with brands that they are not paid to help sell,¹³⁷ SAG seeks to amend the current rules by requiring visual and audible disclosures before and after programming that contain embedded advertisements.¹³⁸ The initial disclosures would include “specific language explaining that the program contains [embedded advertising]” and the concluding disclosures would actually announce the brands embedded and the

¹³¹ *Id.* at 157.

¹³² See Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. at 43,197 (proposed July 24, 2008) (to be codified at 47 C.F.R. pts. 73, 76).

¹³³ *Id.* (explaining that the Commission seeks comment on whether it should “apply similar [political broadcasting matter] standards to all sponsorship identification announcements,” including embedded commercial advertising).

¹³⁴ See Hagerty, *supra* note 130, at 157.

¹³⁵ *Id.*; see also Weissman, *supra* note 21.

¹³⁶ See Hagerty, *supra* note 130, at 157.

¹³⁷ *Id.*

¹³⁸ See COMMENTS OF SCREEN ACTORS GUILD, *supra* note 28, at 8 (recommending that an adequate amount of time as “at least five seconds or long enough for the narrator to read the announcement aloud, whichever time is longer”).

name of the brands' parent companies.¹³⁹

SAG's proposal is arguably more appealing than the Commission's proposal because it does a better job of informing the public of embedded advertising.¹⁴⁰ The pre-airing disclosures would warn viewers of embedded advertisements before the program commences so they are aware of and can anticipate them.¹⁴¹ Moreover, the disclosures at the end of a program ensure that viewers know who paid for the embedded advertisements.¹⁴² Together, these disclosures could better "reduce the likelihood of the public being misled by embedded advertising."¹⁴³

However, this proposal can also be criticized as repetitive.¹⁴⁴ The dual disclosure scheme may cause "viewers to think that they are hearing or seeing the same disclosure, for a second time, and [viewers] may ignore it" and, as a result, "many viewers may not pay attention to the naming of products embedded in the program or they may simply switch the channel."¹⁴⁵ More importantly, requiring dual disclosures may seriously "cut into the time available for entertainment or informational programming."¹⁴⁶ Thus, this proposal creates a "redundant layer of administrative burdens for the industry."¹⁴⁷ Therefore, this proposal is arguably more extensive than necessary under the *Central Hudson* test and not aligned with the public's interest in maximizing the amount of quality broadcast content.

3. Extensive Changes: Commercial Alert

Perhaps the most extensive changes are advocated by Commercial Alert. In addition to the dual disclosure scheme proposed by SAG, Commercial Alert advocates for simultaneous disclosure at the time

¹³⁹ See Hagerty, *supra* note 130, at 157.; *see also* COMMENTS OF SCREEN ACTORS GUILD, *supra* note 28, at 12.

¹⁴⁰ See Hagerty, *supra* note 130, at 157.

¹⁴¹ *Id.*; *see also* COMMENTS OF SCREEN ACTORS GUILD, *supra* note 28, at 8.

¹⁴² See Hagerty, *supra* note 130, at 157; *see also* COMMENTS OF SCREEN ACTORS GUILD, *supra* note 28, at 12.

¹⁴³ See Hagerty, *supra* note 130, at 158.

¹⁴⁴ *Id.* (arguing that the SAG's dual disclosure model comes close to striking the proper balance between the public's right to know and the public's demand for access to free broadcasting but recognizing that modifications are necessary, i.e., initial and concluding disclosures should be markedly different).

¹⁴⁵ *Id.*

¹⁴⁶ See COMMENTS OF THE NAT'L MEDIA PROVIDERS, *supra* note 26, at 61.

¹⁴⁷ *Id.* at 62.

embedded advertisements occur.¹⁴⁸ Specifically, the word “advertisement” would appear on the television screen when the embedded advertisement is aired.¹⁴⁹ This simultaneous disclosure would appear in text large enough to be read and long enough to be understood by the viewer.¹⁵⁰ This, Commercial Alert argues, will alert viewers that are unaware of the covert nature of embedded advertising precisely when embedded products and services are actually advertisements.¹⁵¹

Unfortunately, Commercial Alert’s proposal for simultaneous disclosures is also not perfect. In particular, the problem lies in the disruptive and potentially irritating nature of simultaneous disclosures to viewers.¹⁵² Moreover, this disruption will arguably deter advertisers from investing in embedded advertisements because they will be less effective and this will thereby threaten the advertising-based revenue stream upon which the television broadcasting industry relies.¹⁵³ Thus, this proposed amendment is not just detrimental to the viewer’s television viewing experience,¹⁵⁴ but may also impose a severe financial burden on the industry.¹⁵⁵ Therefore, like SAG’s proposal, Commercial Alert’s amendment is arguably an excessive burden and too far-reaching under the *Central Hudson* test.

V. PROPOSAL

In light of the need to amend the current disclosure rules and the inadequacy of the changes proposed thus far, this section presents my

¹⁴⁸ See Weissman, *supra* note 21.

¹⁴⁹ *Id.* (proposing that the word “advertisement” could appear in many ways including through the use of a pop-up window).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See COMMENTS OF THE NAT’L MEDIA PROVIDERS, *supra* note 26, at 61; see also, COMMENTS OF THE NAT’L ASS’N OF BROADCASTERS, *supra* note 26, at 27 (arguing that simultaneous disclosures would disrupt the quality of programs with this type of commercial interruption), and COMMENTS OF SCREEN ACTORS GUILD, *supra* note 28, at 9 (claiming that simultaneous disclosure would be distracting).

¹⁵³ See COMMENTS OF THE NAT’L MEDIA PROVIDERS, *supra* note 26, at 61-62; see also COMMENTS OF THE NAT’L ASS’N OF BROADCASTERS, *supra* note 26, at 27-28 (discussing how simultaneous disclosures would have the unintended consequence of “diminishing broadcasters’ ability to earn vital advertising revenue in an increasingly competitive marketplace” and inhibit “the ability of broadcasters to experiment with new forms of advertising to support the continued offering of free, over-the-air broadcast programming”).

¹⁵⁴ See COMMENTS OF SCREEN ACTORS GUILD, *supra* note 28, at 9.

¹⁵⁵ See COMMENTS, *supra* note 152.

proposal to amend the current rules by incorporating the heightened requirements imposed for political advertising. I will first introduce the current disclosure rules for political advertising. Then I will discuss the rationale behind the proposal and apply it to various examples of disclosures made in programs to show that my proposal is superior to the current disclosure rules required by the Commission.

A. *The Disclosure Rules for Political Advertising*

In 1992, the Commission adopted an amendment to Section 73.1212 with respect to disclosure rules related to political advertising.¹⁵⁶ That section now requires that when “the material broadcast is political matter or matter involving the discussion of a controversial issue of public importance,” the letters must be “equal to or greater than four percent of the vertical picture height [and] air for not less than four seconds.”¹⁵⁷ Moreover, for broadcasts exceeding five minutes in length, disclosures must be made at the beginning and end of the broadcast.¹⁵⁸ An audio announcement, however, is no longer required for political advertising since it was considered “unduly burdensome” to political candidates delivering messages in shorter spots since a substantial amount of time would have to be devoted to making the voice-over identification in order to comply with the disclosure rules.¹⁵⁹

Despite such changes, the disclosure rules for political advertising still continue to require broadcasters to retain a list of the sources of the

¹⁵⁶ See Codification of the Commission’s Political Programming Policies, Opinion and Order, 7 FCC.C.C. 1616 (1992). An NOI/NPRM was initiated in 1991 in response to numerous complaints that the sources for various political advertisements could not be adequately identified during their broadcasts.

¹⁵⁷ See 47 C.F.R. §73.1212(a)(2)(ii); see also *supra* note 156 (emphasizing that the adoption of a four percent letter size requirement, instead of a twenty percent requirement, and a four second airtime requirement, instead of a six second requirement, was intended to minimize interference with the content and the design of political messages).

¹⁵⁸ See 47 C.F.R. §73.1212(d). Section 73.1212(d) provides:

In the case of any political broadcast matter or any broadcast matter involving the discussion of a controversial issue of public importance for which any film, record, transcription, talent, script, or other material or service of any kind is furnished, either directly or indirectly, to a station as an inducement for broadcasting such matter, an announcement shall be made both at the beginning and conclusion of such broadcast...Provided, however, That in the case of any broadcast of 5 minutes’ duration or less, only one such announcement need to be made either at the beginning or conclusion of the broadcast.

Id.

¹⁵⁹ See COMMENTS, *supra* note 156, at 1616.

advertisements at their headquarter offices.¹⁶⁰ These lists must be made available for public inspection for a period of at least two years.¹⁶¹ The Commission reasoned that because, in the context of political advertising, many candidates are “all vying for support” when “attention is focused on controversial issues,” the “public may be confused as to the identity of the persuader.”¹⁶² Thus, to ensure that the sources of the advertisements are made reasonably available and to minimize the amount of announcement time required during a broadcast, the list retention requirement remains intact.¹⁶³

Overall, the disclosure rules pertaining to political advertising are motivated by several objectives.¹⁶⁴ First, the Commission seeks to “more accurately and closely reflect the language, intent, and requirements” of the Communications Act to ensure that viewers are informed during intense periods of political campaigning.¹⁶⁵ Second, the Commission seeks to issue “detailed and practical advice” to broadcasters obligated to make disclosures.¹⁶⁶ Finally, the Commission seeks to make amendments that would promote the Communication Act’s purpose of informing viewers while carefully being “responsive

¹⁶⁰ See 47 C.F.R. 73.1212(e). Section 73.1212(e) provides:

Where the material broadcast is political matter or matter involving the discussion of a controversial issue of public importance and a corporation, committee, association or other unincorporated group, or other entity is paying for or furnishing the broadcast matter, the station shall, in addition to making the announcement required by this section, require that a list of the chief executive officers or members of the executive committee or of the board of directors of the corporation, committee, association or other unincorporated group, or other entity shall be made available for public inspection [...] Such lists shall be kept and made available for a period of two years.

Id.

¹⁶¹ *Id.*

¹⁶² See Amendment of the Commissioner’s Sponsorship Identification Rules, 52 FCC 2d 701, 711 (1975).

¹⁶³ *Id.* Notably, the list retention requirement for political advertising has existed since 1944 when the disclosure rules were first adopted. However, the debate about the necessity of imposing such a requirement first arose in 1968 when the two-year retention period was specified by the Commission.

¹⁶⁴ Codification of the Commission’s Political Programming Policies, Report and Order, *supra* note 89, at 678.

¹⁶⁵ *Id.*; See also Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. at 43,196 (stating that the Commission is “entrusted with the statutory goal of ensuring that the public is informed of the sources of program sponsorship”).

¹⁶⁶ *Id.*; See also Codification of the Commission’s Political Programming Policies, Opinion and Order, *supra* note 156, at 1616 (reaffirming the belief that the Commission’s adoption of specific disclosure standards related to letter size and time period will “significantly assist stations by providing clear standards for compliance with the statutory requirement”).

to the evolving [commercial] sales practice of broadcast stations.”¹⁶⁷ Accordingly, the disclosure rules for political advertising reflect the Commission’s commitment to “ensuring that the public can reasonably identify who is using broadcast facilities to promote or oppose particular political candidacies” without unnecessarily “imposing undue burdens on broadcasters.”¹⁶⁸

B. *The Proposal*

Since disclosure rules for both political and commercial advertising are concerned with an announcement’s ability to inform an *average viewer*,¹⁶⁹ I propose that the Commission should clarify the current disclosure rules by specifically drawing from the heightened disclosure requirements imposed on political advertising. That is, the disclosure rules for embedded advertising should explicitly incorporate the letter size, airtime, and list retention requirements imposed on political advertising. To satisfy the Commission’s disclosure rule under this proposed amendment, broadcasters may continue to make one announcement during the programming but they would also have to make sure that:

- (1) The letter size is “equal to or greater than four percent of the vertical picture height,”¹⁷⁰ and
- (2) The disclosure is on the “air for not less than four seconds,”¹⁷¹ and
- (3) A list of the sources of the advertisements is accessible to the public (i.e., online) for a period of two years.¹⁷²

By incorporating these specific requirements into the current embedded advertising disclosure rules, the public’s right to know is

¹⁶⁷ Codification of the Commission’s Political Programming Policies, Report and Order, *supra* note 89, at 678-79 (defining the evolving sales practice of broadcasters as the introduction of a “‘yield maximization’ system, under which spots are in essence auctioned off to the highest bidder, and the price of a given class of time changes constantly to respond to the broadcasters’ need and advertisers’ fluctuating demand”).

¹⁶⁸ Codification of the Commission’s Political Programming Policies, Opinion and Order, *supra* note 156, at 1616-17.

¹⁶⁹ Codification of the Commission’s Political Programming Policies, Report and Order, *supra* note 89, at 686 (noting that the Commission has applied the criteria for sponsorship identifications involving both political broadcasts and commercial matter with the average viewer in mind).

¹⁷⁰ 47 C.F.R. §73.1212(a)(2)(ii); *see also* Codification of the Commission’s Political Programming Policies, Opinion and Order, *supra* note 156.

¹⁷¹ *Id.*

¹⁷² 47 C.F.R. §73.1212(e). For instance, ABC’s *Extreme Makeover: Home Edition* provides a good example of how an accessible list may be retained by broadcasters on its website. *As Featured On*, ABC, <http://abc.go.com/shows/extreme-makeover-home-edition/as-featured-on> (last visited Apr. 22, 2011).

more adequately protected while still preserving the well-being of the evolving television broadcast industry and its various media platforms. To support this proposal, I consider the historical, legal, and practical limitations associated with amending the disclosure rules.

1. Historical Limits: When has the Commission Adopted Amendments?

Though the disclosure rules were first created in 1927, the initial disclosure rules did not adequately anticipate the advertising practices that would materialize as the broadcast system evolved.¹⁷³ Rather than ignoring the inadequacy of the initial disclosure rules, it has not been uncommon for the Commission to develop and modify the disclosure requirements in order to deal with broadcast advertising techniques that were not initially anticipated but have become common practices.¹⁷⁴ I have already noted, for example, that the Commission adopted changes to the disclosure rules in response to the “payola” scandals of the late 1950s and the prevalence of political advertisements by unidentified sponsors in 1991.¹⁷⁵

In adopting changes, however, the Commission has been compelled by the importance of “informing the audience when and by whom it was being persuaded” in every case.¹⁷⁶ That is, when there is a “public interest objective” in protecting the viewer’s right to know and his or her subsequent interest in having quality broadcast content, change has been justified.¹⁷⁷ The Commission, when adopting heightened requirements for political advertising disclosure rules, emphasized that: “broadcasters are licensed to act as trustees for a valuable public resource and, in view of the public’s paramount right to be informed, some administrative burdens must be imposed on the [broadcaster] in this area. These burdens simply ‘run with the territory.’”¹⁷⁸

Like the “payola” scandals and the prevalence of unidentified sponsored political advertisements in the past, the frequency of embedded advertising in television today was not anticipated by the

¹⁷³ Kielbowicz & Lawson, *supra* note 13, at 333-34.

¹⁷⁴ *Id.* at 333.

¹⁷⁵ See *supra* Part I.A

¹⁷⁶ Kielbowicz & Lawson, *supra* note 13, at 374.

¹⁷⁷ Amendment of the Commissioner’s Sponsorship Identification Rules, *supra* note 162, at ¶ 24 (1975).

¹⁷⁸ *Id.*

Commission.¹⁷⁹ As a result, the current disclosure rules and practices with regard to embedded advertising are largely insufficient.¹⁸⁰ Thus, since the viewer's right to know is not adequately being protected by current industry disclosure practices related to embedded advertising, the "public interest objective" is threatened once again.¹⁸¹ Therefore, Commission practice and policy suggest that changes to the current disclosure rules, drawn by analogy from the heightened requirements imposed on political advertising, are appropriate.

2. Legal Limits: Is the Proposed Amendment Constitutional?

Any changes adopted by the Commission must also be constitutional. Since embedded advertising is commercial speech,¹⁸² the proposed amendment must satisfy the *Central Hudson* test.¹⁸³ Under this test, amending the current disclosure rules by imposing the heightened requirements of political advertising is constitutional if: (1) the asserted interest is substantial; (2) the regulation directly advances that interest; and (3) the regulation is no more extensive than is necessary to serve that interest.¹⁸⁴

First, as discussed, the viewer's right to know is threatened and inadequately protected by current disclosure rules and practices.¹⁸⁵ Under fair advertising principles, when viewers are not informed, there is a greater risk that viewers may be confused or deceived by the relevant embedded advertising.¹⁸⁶ Moreover, because the right to know is vital to ensuring that the public's interest in quality content is sustained, inadequate disclosures may deceive viewers "into not realizing [that] they are watching ads."¹⁸⁷ As a result, the market will not be able to discern which broadcasters are attuned to the public

¹⁷⁹ Kielbowicz & Lawson, *supra* note 13, at 333 (suggesting that changes to the disclosure rules occurred because the original rules were written with advertising practices in mind that did not end up dominating the broadcast system and instead had given way to unanticipated advertising practices).

¹⁸⁰ See *supra* Part III.A for a discussion about why maintaining the status quo is not justified due to the inadequacy of the current disclosure rules in protecting the viewer's right to know.

¹⁸¹ *Id.*

¹⁸² Sponsorship Identification Rules and Embedded Advertising, *supra* note 108.

¹⁸³ *Central Hudson & Electric Co. v. Pub. Serv. Comm'n*, 447 U.S. 557, 565-66 (1980).

¹⁸⁴ *Id.*

¹⁸⁵ *Supra* Part III.A.

¹⁸⁶ See Weissman, *supra* note 21 (explaining that U.S. communications and fair advertising principles are premised on preventing deceiving advertisements such as embedded advertising).

¹⁸⁷ *Id.*

interest. This resulting harm suggests that a substantial interest in protecting the viewer's right to know exists.¹⁸⁸

Second, this substantial interest is directly advanced by the specific letter size, airtime, and list retention requirements proposed. As a central principle of the Commission's rules, "disclosure is a standard cure for deception."¹⁸⁹ The specific letter size and airtime requirements will make disclosures more comprehensible. Moreover, the list retention requirement will make announcements accessible even for viewers that do not watch the end credits. Thus, the specific requirements imposed by this proposal would improve on current disclosures in a way that directly protects the viewer's right to know.¹⁹⁰

Third, and finally, the letter size, airtime, and list retention requirements proposed are no more extensive than are necessary to serve the interest in protecting the viewer's right to know. As the Commission has recognized, "it is obvious that some form of governmental regulation will impose certain costs or burdens of administration on the industry affected."¹⁹¹ However, in this case, the burdens imposed by my proposal are marginal and no more extensive than they are necessary, compared with the other amendments that have been proposed.

One concern raised regarding SAG's proposal was that the changes it proposed might severely cut into the airtime available for quality content.¹⁹² My proposal would retain the requirement of one announcement. As a result, the imposition of letter size and airtime requirements for the existing practice of end credit disclosures will only marginally affect the amount of airtime that must be dedicated to disclosing embedded advertising. In addition, the list retention requirement is also designed to make disclosures more available "while at the same time minimizing the amount of time that need be used for

¹⁸⁸ Weissman, *supra* note 21 (arguing that the government has "a substantial interest in ensuring [that embedded advertising does] not exert their persuasive effect because they are able to deceive viewers into not realizing they are watching ads").

¹⁸⁹ *Id.* (suggesting that disclosure is an especially efficacious cure in cases where, as here, "a hidden commercial relationship" is the "essence of the deception").

¹⁹⁰ In re Matter of National Broadcasting Co. Concerning Sponsorship, 20 Rad. Reg. 2d 901 (1970) (suggesting that the purpose of Section 317 and the Commission's rules can be achieved if disclosures are given in "letters of sufficient size to be readily legible to an average viewer . . . remain on the screen long enough to be read in full by an average viewer").

¹⁹¹ Amendment of the Commissioner's Sponsorship Identification Rules, *supra* note 162, at ¶ 24 (1975).

¹⁹² See *supra* discussion of SAG proposal, Part III.B.2. Generally, the SAG proposes to change the disclosure rules by requiring disclosure before and after the program airs.

identification.”¹⁹³ Taken together, since these heightened requirements minimize interference with the content and design of the broadcast, they make the disclosure rules more efficient without being too excessive.

Moreover, unlike the Commercial Alert proposal,¹⁹⁴ this proposal does not require simultaneous disclosures. By only imposing marginal changes to current end credit disclosures, there is no clutter or distraction created that may infringe on “artistic integrity” or viewer experience during the broadcast itself. This supports the assertion that the heightened requirements imposed by my proposal are only marginal and no more extensive than necessary. Therefore, under the *Central Hudson* test, amending the current disclosure rules with the heightened requirements that are traditionally imposed on political advertising is constitutional.

3. Practical Limits: How does the Proposal Impact the Industry?

While my proposed amendment to the current disclosure rules is supported by historical precedent and survives constitutional analysis, changes to the current disclosure regime need to also consider their impact on the television broadcast industry. Changes that are too expansive run the risk of jeopardizing the viability of an advertiser-supported medium.¹⁹⁵ Consequently, it is important to recognize that as the industry and its financial base continue to evolve, an adequate proposal will still give broadcasters the flexibility to experiment with new types of advertising in today’s “highly competitive media marketplace.”¹⁹⁶

One concern that broadcasters may have with my proposal is that the specific letter size and airtime requirements are too difficult to implement precisely and, as a result, they will be penalized for failing to comply with the heightened rules.¹⁹⁷ In response, it is important to

¹⁹³ Amendment of the Commissioner’s Sponsorship Identification Rules, *supra* note 162, at ¶ 30 (1975).

¹⁹⁴ See *supra* Part III, B.2 discussion of the Commercial Alert proposal. Generally, Commercial Alert proposes that the disclosure rules should be changed by requiring disclosure before and after the program airs as well as simultaneous disclosure when the embedded advertising takes place on screen.

¹⁹⁵ See COMMENTS OF THE NAT’L ASS’N OF BROADCASTERS, *supra* note 26, at 19.

¹⁹⁶ *Id.*

¹⁹⁷ Because this was a concern that arose when the disclosure rules for political advertising were amended, I believe the same concern may arise in this context due to the fact that the same stringent, specified requirements are proposed to apply to current disclosure rules related to embedded advertising.

note that when the same concern arose in the context of political advertising, the Commission took the position that “the reasonableness standard traditionally employed . . . in evaluating compliance with [its] regulations will apply to enforcement” of these precise letter size and airtime requirements.¹⁹⁸ Moreover, the Commission reemphasized that “rather than imposing undue burdens upon broadcasters, adoption of these standards [are intended to] significantly assist [broadcasters] by providing clear standards for compliance with the statutory requirement.”¹⁹⁹ This position suggests that, in evaluating compliance with the requirements, the Commission will give deference to broadcasters so long as they employ a reasonable basis for determining the letter size and airtime of their disclosures. Thus, applying the reasonableness standard would ensure that broadcasters who attempt to comply with the requirements in good faith will not be unduly sanctioned by the Commission.

Another potential concern for broadcasters may be that these requirements, taken together, impose significant costs. First, it may be argued that the list retention requirement creates an undue burden on broadcasters.²⁰⁰ However, as the Commission articulated when it amended the political advertising disclosure rules, “the point is not whether some burden is involved, but rather whether that burden is justified by the public interest objective embodied in the regulation.”²⁰¹ In the embedded advertising context, when viewers are increasingly skipping the end credits of programs, the fact that a list retention requirement could be “fundamental to the object of preserving the audience’s right to know”²⁰² is even more vital. Thus, the benefits of a retained list requirement clearly outweigh the costs imposed on broadcasters.

Second, broadcasters may argue that heightened letter size and airtime requirements will increase the amount of broadcast time needed for disclosures in the end credits and consequently decrease the amount of time available for quality content.²⁰³ This concern, however, fails to take into consideration a natural limit on the amount of embedded

¹⁹⁸ Codification of the Commission’s Political Programming Policies, Opinion and Order, *supra* note 156, at 1616.

¹⁹⁹ *Id.*

²⁰⁰ *Supra* note 197.

²⁰¹ Amendment of the Commissioner’s Sponsorship Identification Rules, *supra* note 162, at ¶ 24 (1975).

²⁰² *Id.* at ¶ 30 (1975).

²⁰³ *Supra* note 197.

advertising that can be interjected into programming because “at the end of the day, broadcasting’s principle business objective is simple: draw eyes and ears to the medium.”²⁰⁴ Market forces dictate that too much embedded advertising will leave broadcasters without an audience.²⁰⁵ Thus, the market for embedded advertising in programming will naturally limit end credit disclosures to a reasonable amount of time. Therefore, after giving due consideration to all these concerns associated with my proposed amendment, it becomes clear that the proposal’s impact on the television broadcast industry would only be marginal while the disclosures to the public would be very meaningful.

C. *Test Suite: Applying the Proposal to Disclosures Made by Broadcasters in Practice*

To demonstrate how heightened disclosure requirements improve the efficacy of embedded advertising announcements, the following illustrative applications demonstrate my proposal’s superiority to the current disclosure rules applied by the Commission.²⁰⁶

1. Fast-Moving Disclosures: The Airtime Requirement

In an episode of *Heroes* on NBC, the show included embedded advertising from four companies.²⁰⁷ During the end credits of the episode, the following announcement was made and remained on the screen for less than two seconds: “Promotional consideration furnished by: Sprint, Dell, Apple, and Cisco Systems.”²⁰⁸

Under the current disclosure rules, this end credit announcement satisfies the Commission’s “full and fair disclosure” standard since there are no specific letter size or airtime requirements established by

²⁰⁴ See COMMENTS OF THE NAT’L ASS’N OF BROADCASTERS, *supra* note 26, at 20.

²⁰⁵ *Id.*

²⁰⁶ Superiority should be considered in light of the origins of disclosure, *see infra* Part II.A: When viewers are informed, and not deceived, about instances of embedded advertising that occur in the programs they watch, they are better able to make decisions about which broadcasters are providing too much advertising and too little content. By protecting the viewer’s “right to know” with mandatory disclosure, only broadcasters in the market that are most attuned to the public’s interest in obtaining quality programming from the private uses of the public airwaves will survive.

²⁰⁷ *Heroes: Powerless* (NBC television broadcast Dec. 3, 2007); *see also* Weissman, *supra* note 21. This particular example shows that, “for the average viewer, there is effectively no affirmative disclosure of hidden advertisements” because disclosures appear in “unreadable, fast-moving type.” The size of the letters used in the disclosure was not specified.

²⁰⁸ *Id.*

the current rules. However, though satisfactory to the Commission, this disclosure may not necessarily be satisfactory for the viewer. Even though the letter size is unknown, it clearly would be difficult for a viewer to read and comprehend the announcement in less than two seconds. Thus, the viewer is not adequately informed about who was trying to persuade him or her during the program and this vitiates the purpose of the disclosure rules.

The proposed amendment to the current disclosure rules would give the viewer a fair opportunity to comprehend the announcement during the end credits by requiring the disclosure to remain on air for at least four seconds. Moreover, even if the viewer is not a fast reader or does not watch the end credits, the proposal still provides for the opportunity to access the announcements through a list retained by the broadcasters for at least two years. Thus, there are ample opportunities for the viewer be informed about who is trying to advertise to him or her during a particular broadcast, and the audience's right to know more is adequately protected.

2. Compressed Disclosures: The Letter Size & Airtime Requirements

For many re-run and original television programs, disclosures are made in the end credits. However, these credits may be compressed into fast-moving credits that are a fraction of the screen to allow broadcasters to quickly transition to the next program or promote other shows.²⁰⁹ Consequently, the “resulting distorted lettering [of compressed credits becomes] unreadable.”²¹⁰

Like the previous *Heroes* illustration, these compressed, end credit announcements would also satisfy the Commission's requirements. However, here, one can make an even stronger case that the viewer's right to know is not adequately protected. The compressed end credits and the speed at which those credits are presented significantly distort the announcement and make the announcement “unreadable.” When a viewer cannot read the disclosure, he or she consequently cannot be informed about who is trying to persuade him or her during the program and the viewer's right

²⁰⁹ See Weissman, *supra* note 21 (pointing out that some A&E Network re-runs made disclosures in end credits that were compressed into fast-moving credits that were about one-fifth of the screen). This example was footnoted to show that “even for a viewer intent on learning about [embedded advertising], it commonly requires enormous concentration to read the scrolls, and they are sometimes unreadable even for the most focused of viewers.”

²¹⁰ *Id.*

to know is not protected.

By applying my proposal to this case, the letter size requirement would force broadcasters to show the end credits, not in a compressed form but, at minimum, at least four percent of the *entire* vertical picture height. The airtime requirement would also slow down the currently fast-moving credits. Together, these specified requirements would make the end credits more comprehensible. Additionally, there would also be the opportunity to access the announcements through a list retained by the broadcasters. Thus, either by way of the end credits or a retained list, viewers will be better informed about who is trying to advertise to them during the program. Therefore, the viewer's right to know is better protected.

3. Not Showing End Credit Disclosures: The List Retention Requirement

In an episode of ABC's *Modern Family*, the entire plot was centered on a wife's desperate attempt to get Apple's new iPad tablet.²¹¹ Although a disclosure identifying Apple's role in providing the product was included in the end credits during the initial broadcast and is currently included when the episode is viewed on ABC.com, the disclosure and end credits are not shown when the episode is seen on Hulu.²¹²

Assuming *arguendo* that the end credit disclosures made during the initial broadcast and later on ABC.com would satisfy the current disclosure rules and the letter size and airtime requirements proposed in my amendment, viewers that watch the episode on Hulu will still not be informed about the embedded advertisement since the end credits are not shown. Due to the high volume of viewers that Hulu attracts,²¹³ a substantial number of viewers will not have their right to know adequately protected under current disclosure rules. However, the list retention requirement set forth in my proposal will preserve the viewer's right to know by making the disclosures accessible to viewers even if the broadcasted program is later viewed online.²¹⁴ Thus, viewers are still provided with the opportunity to stay informed about

²¹¹ *Supra* note 9; see also Steinberg, *supra* note 12.

²¹² Hulu is a "free [streaming] online video service that offers hit TV shows" typically after they have aired on television. HULU, www.hulu.com (last visited Apr. 22, 2011).

²¹³ See MG Siegler, *Hulu Now the Number Three U.S. Web Video Site. Soon to be Number Two*, TECH CRUNCH (Apr. 28, 2009), <http://techcrunch.com/2009/04/28/as-youtube-passes-a-billion-unique-us-viewers-hulu-rushes-into-third-place/> (pointing out that Hulu had gained more than 10 million viewers in Mar. 2009).

²¹⁴ 47 C.F.R. § 73.1212(e); see also *As Featured On*, *supra* note 172.

specific instances of embedded advertising regardless of the viewing platform. Therefore, the list retention requirement further ensures that the viewer's right to know is protected even when programs are watched in non-traditional ways such as on the Internet.

VI. CONCLUSION

“There is nothing inherently wrong about [embedded advertising]—so long as it is disclosed as required by law.”²¹⁵ Unfortunately, as even some members of the Commission have recognized, the current rules are simply not requiring disclosure to be made in a meaningful way.²¹⁶ This makes it imperative that the Commission reconsider the efficacy of its current disclosure rules.

In light of the current trend suggesting that embedded advertising is becoming more prevalent, changes are necessary to protect the viewer's paramount right to know when he or she is being advertised to in broadcast programming. However, any amendment to the current disclosure rules must consider the historical, legal, and practical limitations associated with embedded advertising and the American broadcasting system. By borrowing from its own heightened disclosure requirements imposed on political advertising, the Commission can make the current disclosures more clear, prominent, and accessible. Ultimately, this may prove to be the Commission's embedded solution to the inadequacy of the current disclosure rules imposed on commercial advertising.

²¹⁵ Adelstein, *supra* note 1, at 7.

²¹⁶ *Id.* In particular, former FCC Commissioner Jonathan S. Adelstein explains that: “Disclosures should also be meaningful. A disclosure that appears on screen for a split second during the credits in small type that no one could possibly read without pausing their DVR – and pulling out a magnifying glass – could not possibly qualify.” *Id.*