Stealth Marketing and Editorial Integrity

Ellen P. Goodman[†]

Draft 3/01/06
(to be published 85 TEX. L. REV. __ (2007))

TABLE OF CONTENTS

I. INTRODUCTION

Advertisers use the media to encourage consumption, propagandists to urge belief.[1] When they press products and positions on audiences while masking their

---

[†]Associate Professor, Rutgers University School of Law–Camden. I am grateful for comments from C. Edwin Baker, Michael Carroll, Julie Cohen, Wendy Gordon, Frank Goodman, Stuart Green, Marjorie Hein, Gregory Lastowka, Gregory Magarian, Molly Van Howelling, Niva Elkin-Koren, Dennis Patterson, Alan Stein, Joseph Turow, Polk Wagner, and Phil Weiser, and participants of the Penn-Temple-Wharton Intellectual Property Colloquium.

[1] Since the 1920's, the word "propaganda" has connoted the spread of half-truths, often of a political nature. *See* Mark Crispin Miller, *Introduction* to EDWARD BERNAYS, PROPAGANDA 9-15 (Ig Publishing 2005)(1928). The actual definition of propaganda is value and subject neutral. It is, according to one representative definition, "the spreading of ideas, information, or rumor for the purpose of helping or injuring an institution, a cause, or a person." Merriam-Webster Dictionary Online, available at http://www.m-w.com/dictionary. *See also* Meese v. Keene, 481 U.S. 465, 477

identities and promotional intent, they market by stealth.[2] American mass media law has long been hostile to stealth marketing, at least when broadcast by radio and television. It is illegal, for example, for a record company to make secret payments to radio stations to play music – the practice of payola[3] – or for an advertiser or organization to pay broadcasters to feature products or story lines without identifying the sponsor. Sponsorship disclosure law requires broadcasters to identify those who pay for program material[4] and imposes criminal sanctions on both broadcast employees and sponsors for concealing sponsorship.[5]

Although this law is well-established, no one has yet offered a satisfying account of why it exists or how it should operate in a digital world. At the same time, recent controversies over stealth marketing practices reveal continued popular and political support for the law and more vigorous enforcement. These controversies have involved local television stations' covert use of government propaganda in their news[6] and government payments to media pundits to endorse positions on social issues like education and marriage.[7] We have seen a resurgence in enforcement actions against old fashioned radio payola, like New York state's recent settlement

---

(1987) (the term propaganda can refer to "advocacy materials that are completely accurate and merit the closest attention and the highest respect.").

[2] The term "marketing" describes the application of consumer research and advertising techniques to further the sale of consumer products or ideas and values. *See* WILLIAM LEISS ET AL, SOCIAL COMMUNICATION IN ADVERTISING 389, 404 (2d ed. 1997) (describing "political marketing" and "social marketing"). *See also* Siva K. Balasubramanian, *Beyond Advertising and Publicity: Hybrid Messages and Public Policy Issues*, 23 JOURNAL OF ADVERTISING 29, 31-35 (1994) (identifying types of hidden persuasion, including payola, paid product placements, and program length commercials).

[3] Payola is technically "the unreported payment … to achieve airplay for any programming." Commission Warns Licensees About Payola and Undisclosed Promotion, Public Notice, 4 F.C.C.R. 7708 (1988) (such payment may be made to "employees of broadcast stations, program producers or program suppliers" and may consist "of any money, service or valuable consideration."). The related offense of "plugola" is "the use or promotion on the air of goods or services in which the person responsible for including the promotional material in the broadcast … has a financial interest." Broadcast Announcement of Financial Interests of Broadcast Stations and Networks, 76 F.C.C.2d 221 (1980).

[4] 47 U.S.C. § 317(a)(1) (2005) ("All matter broadcast …for which any money, service or valuable consideration is directly or indirectly paid, … from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished … by such person"); 47 C.F.R. § 73.1212(a) (2005).

[5] 47 U.S.C. §508(a) (2005).

[6] *See* Commission Reminds Broadcast Licensees, Cable Operators and Others of Requirements Applicable to Video News Releases and Seeks Comment on the Use of Video News Releases by Broadcast Licensees and Cable Operators, 20 F.C.C.R. 8593 (2005) [hereinafter Sponsorship ID Public Notice](acknowledging thousands of emails, a petition on behalf of 40,000 people, and letters from Senators John F. Kerry and Daniel Inouye to the FCC urging an investigation of broadcasters who distributed government-sponsored news reports without identifying the source).

[7] *See generally*, Letter from Ben Scott, Free Press to Chairman Kevin Martin, FCC (June 15, 2005) (requesting an expanded investigation of "payola punditry" and citing incidents of undisclosed political and commercial influence over broadcast content); Clay Calvert, *Payola, Pundits, and the Press: Weighing the Pros and Cons of FCC Regulation*, 13 COMMLAW CONSPECTUS 245, 246-251 (2005).

with Sony BMG and the Warner Music Group for secretly paying radio stations to spin records.[8] Complaints about the integration of product promotions into entertainment programming now sit before federal regulators.[9] And in Hollywood, these marketing practices have become a source of labor unrest as screenwriters are asked to write promotional copy into scripts.[10] Concerns over stealth marketing are resonant enough that Congress has been moved to act[11] and reluctant regulators at the Federal Communications Commission have threatened more energetic enforcement of the sponsorship disclosure rules.[12]

Against this background, the legal literature on stealth marketing is remarkably thin. Among all stealth marketing techniques, payola is the only one to have received significant analysis, most notably in a little-cited article by Ronald Coase defending the practice.[13] Sponsorship disclosure seems to be one of those

---

[8] *See* Jeff Leeds & Louise Story, *Radio Payoffs Are Described as Sony Settles*, N.Y.TIMES, July 26, 2005 at A1 (describing Sony BMG Music Entertainment's agreement to pay a $10 million fine to end a New York state investigation of payola); Jeff Leeds, *2nd Music Settlement by Spitzer*, N.Y. TIMES, Nov. 22, 2005 at C1 (describing Warner Music Group's $5 million settlement). *See also* Warner Music Group Corp., Assurance of Discontinuance Pursuant to Executive law § 63(15) at 16 (Nov.22, 2005), *available at* http://www.oag.state.ny.us/press/2005/nov/nov22a_05.html; Sony BMG Music Entertainment, Assurance of Discontinuance Pursuant to Executive Law §63(15), *available at* http:///www.oag.state.ny.us/press/2005/jul/payola.pdf.

[9] *See, e.g.,* Letter from Gary Rushkin, Executive Director, Commercial Alert, to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 30, 2003), *available at* www.commercialalert.org/index.php/category_id/1/subcategory_id/79/article_id/191. A similar petition to the Federal Trade Commission was dismissed. Letter from Gary Ruskin, Commercial Alert to Donald Clark, Federal Trade Commission (Sept. 30, 2003), *available at* www.commercialalert.org/index.php/category_id/1/subcategory_id/79/article_id/191, was dismissed. Letter of Mary K. Engle, Federal Trade Commission to Gary Ruskin, Commercial Alert (Feb. 10, 2005).

[10] *See* Writers Guild of America, Are You Selling to Me?: Stealth Advertising in the Entertainment Industry (2005) (proposing code of conduct for product integration and demanding more control over the inclusion of promotional segments into scripts).

[11] *See* S. 967, Prepackaged News Story Announcement Act of 2005, 109 Cong. 1st Sess. (Oct. 20, 2005) (providing that any "prepackaged news story produced by or on behalf of a Federal agency and intended for broadcast over the air or distribution by a multichannel video programming distributor" shall include "a clear notification within the text or audio of the …news story" that it was prepared by the United States Government).

[12] *See* Sponsorship ID Public Notice, *supra* note xx. *See also* Amy Schatz &Sarah McBride, *FCC Launches Bribery Probe Over Payouts for Radio Airplay*, WALL ST. J., Aug. 9, 2005 at B3. The last time the FCC levied a payola fine was in 2000. AMFM Texas Licenses Limited Partnership, Licensee of Station KHKS(FM) Denton, Texas, 15 F.C.C.R. 19,705 (2000) (notice of apparent liability for $4,000 forfeiture).

[13] R.H. Coase, *Payola in Radio and Television Broadcasting*, 22 J. L. & ECON. 269 (1979). Others have extended Coase's central argument that payola improves the market for radio air play. *See* J. Gregory Sidak & David E. Kronemyer, *The "New Payola" and the American Record Industry: Transactions Costs and Precautionary Ignorance in Contracts for Illicit Services*, 10 HARV. J. LAW & POLICY 521, 525 (1987) (arguing that payola improves market efficiency where there are regulatory

obligations imposed on broadcasters simply because it is in the public interest.[14] But what interest? It is not obvious why the public is harmed when Sony Records secretly sponsors air play of a Celine Dion track that audiences enjoy, or when an advertiser or propagandist injects into programming a storyline that stands or falls on its merits. Nor is it clear why, if stealth marketing harms radio and television broadcast audiences, it does not similarly harm cable, satellite, podcast, cell phone, or Internet audiences.[15]

This Article tests candidate theories of harm that might justify sponsorship disclosure. Drawing on Coase's economic analysis of payola, as well as Jürgen Habermas' social theory, I conclude that stealth marketing is a problem for mediated communications, but not for the reasons most widely suggested by policymakers and commentators. Stealth marketing harms by damaging the quality of public discourse and the integrity of media institutions that support and shape this discourse. Sponsorship disclosure requirements mitigate this harm by correcting failures of the market to inform audiences of marketing activities. The role of sponsorship disclosure law in enhancing discourse and generating valuable consumer information neutralizes the two strongest lines of attack against it: First Amendment and free market absolutism. In fact, disclosure requirements advance the First Amendment value of robust debate without burdening speech and further the market goal of informed consumers without imposing undue costs.

If disclosure law is to produce these benefits in the new media environment, it must undergo radical surgery. Existing sponsorship disclosure law focuses on yesterday's technology and fails to operate in the electronic media that claim most of the public's attention. Here as elsewhere, age old broadcast regulations reflect ageless aspirations for mediated communications, leaving us to ponder whether these aspirations remain relevant and achievable in a post-broadcast media marketplace. Stealth marketing is growing apace with digital media for both the technological and business reasons discussed below. Indeed, the all out reliance of Google, Inc. and its

---

restraints on vertical integration between record producers and radio stations); Lauren J. Katunich, *Time To Quit Paying the Payola Piper: Why Music Industry Abuse Demands a Complete System Overhaul*, 22 LOY. L. A. ENT. L. REV. 643, 671-678 (2002) (arguing that pay-for-play is healthy for the music industry so long as music publishers make payments directly to radio stations without the use of independent promoters). Other contributions to the payola literature have been largely historical accounts. S*ee, e.g.*, KERRY SEGRAVE, PAYOLA IN THE MUSIC INDUSTRY: A HISTORY, 1880-1991 (1994); Douglas Abell, *Pay for Play*, 2 VAND. J. ENT. L. & PRAC. 53 (2000).

[14] *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 394 (1969) (broadcasters are public trustees "given the privilege of using scarce radio frequencies as proxies for the entire community"); LEE BOLLINGER, IMAGES OF A FREE PRESS 66-72 (1991) (tracing the public trustee model of broadcasting through leading cases).

[15] The sponsorship disclosure rules do not apply to cable programming unless such programming is "subject to the exclusive control of the cable operator" such as local cable news channels and other forms of "origination cablecasting." 47 C.F.R. § 76.5(p) (2005).

competitors on advertising for the production and circulation of information raises important questions about the impact of stealth marketing techniques on audiences.[16]

Part II begins probing these questions with a description of the most common stealth marketing practices in media. The marketers may be government or private entities, their marketing messages carried in news stories, dramas, games, or play lists. The undisclosed promotion may itself constitute the communication or it may be but a small part of the whole. What these varied practices have in common is their undisclosed use of the editorial voice to conceal the propagandist's or advertiser's appeal.

Part III analyzes three possible theories of harm in connection with these practices: that they reduce media competition, that they over-commercialize media content, or that they deceive audiences. None of these theories fully accounts for the harm of stealth marketing or justifies sponsorship disclosure law. A theory of deception comes closest, but audiences that are highly skeptical that editorial content is what it seems are not deceived. And yet, it is in producing such skepticism that stealth marketing does its greatest damage. Stealth marketing harms, I argue, by degrading public discourse and undermining the public's trust in mediated communication.[17] Doubt that an editor has an authentic voice leads to an overgeneralization of distrust as audiences come to believe that mediated speech is inauthentic or untrue even when it is not. The law of bribery as well as public discourse theory helps to show how such distrust corrupts the kind of communicative public sphere that a democracy needs.

Mandated sponsorship disclosure raises questions about free speech and the possibility of market-based incentives as an alternative to government interventions. Part IV shows how sponsorship disclosure promotes, rather than retards, First Amendment interests by enhancing public discourse and audience autonomy. As for market incentives, media entities may indeed choose to compete on their level of disclosure (or abstinence from stealth marketing). But in an unregulated market, there is a significant risk that media entities will participate in a race to the bottom of undisclosed promotions especially since incentives to engage in stealth marketing are strong and growing. As ad-skipping techniques and the sheer abundance of media options render audience attention a scarce commodity,[18] stealth techniques enable

---

[16] Google will use advertising not only to support its search engine and additional Internet services, but also its telecommunications services like wireless Internet access and voice communications. *See* Jesse Drucker, Kevin J. Delaney, et al, *Google's Wireless Plan Underscores Threat to Telecom*, WALL ST. J. at A1, Oct. 3, 2005 (describing Google's proposal to introduce advertising supported Wi-Fi service in San Francisco).

[17] On public discourse in American free speech traditions, *see generally* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603 (1990).

[18] Digital devices empower consumers to skip traditional advertisements and digital media fracture audiences across thousands of outlets. *See* Ellen P. Goodman, *Media Policy Out of the Box: Content*

sponsors to capture attention across media platforms without triggering audience resistance.

Part V argues that as stealth marketing expands beyond broadcasting, the law should follow. Any regulatory strategy pinned to the physical infrastructure of broadcast spectrum is both indefensible and ineffective – indefensible because the technology of broadcasting bears no relationship to the harm that stealth marketing causes and ineffective because all media technologies are converging on the same functions of video and data. Recognizing that any expansion of sponsorship disclosure law presents definitional and enforcement challenges, the Article concludes with a proposal for the evolution of sponsorship disclosure law in the new media context.

II. STEALTH MARKETING

Existing law conceives of media-based stealth marketing as a single set of practices, and for the most part, so will I. This is not to deny that distinct forms of stealth marketing may have different impacts. Propagandists and advertisers have different aims. Sponsorship of entertainment programming and news will often affect audiences very differently. Government sponsorship of media content raises peculiar issues of political accountability and democratic process that may not arise for corporate sponsors.[19] Specialized sponsorship disclosure laws that are imposed on government[20] and candidates[21] recognize these differences. At the same time, there is

---

Abundance, Attention Scarcity, and the Failures of Digital Markets, 19 BERKELEY TECH. L. J. 1389, 1420-21 (2004) (presenting evidence of audience and attention fragmentation).

[19] *See generally* MARK YUDOF, WHEN GOVERNMENT SPEAKS 159 (1983) (discussing the dangers of indoctrination from government speech); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 992-97 (2005) (arguing for the development of a limited disclosure requirement for government speech within First Amendment doctrine).

[20] Since 1951, annual appropriations laws have prohibited the use of federal funds "for publicity or propaganda purposes within the United States" without Congressional authorization. *See, e.g.*, Consolidated Appropriations Act, 2005, Pub.L.No. 108-477, div. G, title II, § 624, 118 Stat. 2809, 3278 (Dec. 8, 2004). For a history of this appropriations provision, see U.S. Gov. Accountability Office, *Medicare Prescription Drug Improvement and Modernization Act of 2003*, B-302504, Mar. 10, 2004. *See generally* Kevin R. Kosar, *Public Relations and Propaganda: Restrictions on Executive Agency Activities*, CONG. RES. SERV., Mar. 21, 2005. In addition, since 1913, it has been illegal for federal agencies to use appropriated funds "to pay a publicity expert unless [such funds are] specifically appropriated for that purpose." 5 U.S.C. § 3107 (2005). This appropriations law "has been difficult to enforce, rarely applied and interpreted in such a way that many agency public relations efforts are considered acceptable." Christopher Lee, *Law Cautions Against Outside PR Spending*, WASH. POST, Jan. 31, 2005 at A19.

[21] Federal Election Commission regulations require political advertisers to disclose who paid for the ad and whether it was authorized by the candidate. 2 U.S.C.§441d (2005); 11 C.F.R. § 110.11 (2005)(disclaimer must identify the payor and disclose the name of the candidate's committee that authorized the communication or the fact that no candidate or candidate's committee authorized the communication). *See generally* Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter*

much that sponsorship of media content, whatever its form or purpose, has in common. Whatever the message or the messenger, sponsorship changes the composition of media content. Whether the sponsorship promotes a sale or an idea, it seeks to align audience response with the sponsor's interests, as we can see in the following practices.

A. Emerging Practices

Stealth marketing takes two basic forms in media programming. The first is conventional payola, where the sponsor promotes a media experience, such as a musical work, by purchasing audience exposure to the experience as a form of advertisement.[22] Pay for play in broadcasting is similar to the use of slotting fees in the retail industries to obtain preferential shelf space in supermarkets[23] and book stores.[24] Online retail outlets also use slotting fees of a sort when portals like Amazon and Google accept payments for exposure of a particular product or service.[25]

A different form of stealth marketing is what has come to be known variously in the advertising industry as branded entertainment, branded journalism, or integrated marketing.[26] Here, the promotional messages are embedded into what is,

---

Competence Through Heuristic Cues and "Disclosure Plus," 50 U.C.L.A. L. REV. 1141, 1170 (2003). In addition, broadcasters are subject to special disclosure rules for candidate advertising. 47 C.F.R. § 73.4190 (2005).

[22] Airplay is a form of advertising. *See* Bonneville Intern. Corp. v. Peters, 347 F.3d 485, 487 (3rd Cir. 2003) (the "recording industry and broadcasters [have] existed in a sort of symbiotic relationship wherein the recording industry recognized that radio airplay was free advertising that lured consumers to retail stores where they would purchase recordings.").

[23] Supermarket slotting practices have received the most analysis. *See, e.g.*, Mary Sullivan, *Slotting Allowances and the Market for New Products*, 40 J. L. & ECON. 461 (1997); Benjamin Klein & Joshua Write, The Economics of Slotting Arrangements, draft of Aug. 10, 2005, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=773464. *See also* Federal Trade Commission, Slotting Allowances in the Retail Grocery Industry: Selected Case Studies in Five Product Categories, 2003, *available at* http://www.ftc.gov/os/2003/11/slottingallowancerpt031114.pdf.

[24] *See* Randall Kennedy, *Cash Up Front*, N.Y. TIMES, June 5, 2005 (describing the arrangements between publishers and Barnes & Noble and other large booksellers to feature the publishers' books prominently on prime shelf space); American Booksellers Ass'n, Inc. v. Barnes & Noble, Inc., 135 F. Supp. 2d 1031 (N.D. Cal. 2001) (describing slotting fee practices and holding them benign under antitrust law).

[25] *See* Letter from Heather Hippsley, Acting Assoc. Dir., FTC Division of Advertising Practices to Gary Ruskin, Executive Director, Commercial Alert (June 27, 2002) at 6, available at http://www.commercialalert.org/PDFs/ftcresponse.pdf (recommending that sponsored search engine results be clearly marked as paid rankings).

[26] The movement toward integrated marketing began in the 1990's when critics of traditional advertising lambasted "the practice of thinking of advertising as the distribution of discrete commercial messages to target audiences through paid media" rather than as a form of communication like "public relations, sponsored events, the telephone and the mail, even gossip." JOSEPH TUROW, BREAKING UP AMERICA 166 (1997).

or appears to be, independent editorial content. These emersive marketing techniques import practices originally developed for publicity purposes into the realm of advertising.[27] Publicity is the circulation of messages in the hopes of further dissemination, for free, without attribution of source. Advertising, by contrast, involves the paid circulation of messages, with attribution.[28] Stealth marketing blurs the line between publicity and advertising by concealing sponsorship for a price.[29]

Emersive marketing takes many forms. In news programming, a sponsor may supply editors with prepackaged video, called "video news releases," as a way to infiltrate coverage with promotional content.[30] For decades, local television stations have included in their newscasts unattributed video news releases produced by public relations firms.[31] Although most of these releases are supplied by corporations,[32] it was the disclosure that local television stations were broadcasting video promotions made by the Departments of Agriculture and Health and Human Services that brought renewed attention to the practice in 2005.[33]

Video news releases usually are provided free of charge to the producer,[34] but sponsors sometimes pay for "secured placement" of their footage to achieve a kind of

---

[27] *See* Anne R. Owen & James A. Karrh, *Video News Releases: Effects on Viewer Recall and Attitudes*, 22 PUB. REL. REV. 369, 371 (1996) (distinguishing between publicity and advertising).

[28] *See* MICHAEL SCHUDSON, ADVERTISING: THE UNEASY PERSUASION 100 (1984) ("Advertising is publicity that a firm pays for; public relations seeks publicity that does not require payment to the media for time or space.").

[29] *See* Balasubramanian, *supra* note xx at 29-30 (defining the category of "hybrid messages" which "creatively combine key elements from the definitions of advertising and publicity").

[30] A video news release typically includes video clips, or "B-roll footage," as well as a news story and soudbites. A journalist can use all or any of these elements. *See* Testimony of Susan A. Poling, Managing Associate General Counsel, Office of General Counsel, Before the Committee on Commerce, Science, and Transportation, May 12, 2005.

[31] David Lieberman, *Fake News*, TV GUIDE, Feb. 22, 1992 at 9-10.

[32] See KATHLEEN HALL JAMIESON & KARLYN KOHRS CAMPBELL, THE INTERPLAY OF INFLUENCE: NEWS, ADVERTISING, POLITICS, AND THE MASS MEDIA 141 (5th ed. 2001).

[33] *See* David Barstow & Robin Stein, *Under Bush, a New Age of Prepackaged TV News*, N.Y. TIMES, Mar. 13, 2005 at A1. *See also* Ceci Connolly, *Drug Control Office Faulted for Issuing Fake News Tapes*, WASH. POST, Jan. 7, 2005 at A7 (300 news programs aired portions of a government-issued video news release (VNR) that was distributed to 770 local news stations without identifying the source). VNR producers claim that most television newscasts include VNRs. *See* Comments of Center for Media and Democracy & Free Press in Use of Video News Releases by Broadcast Licensees and Cable Operators, MB Docket No. 05-171 at 2-3 (FCC filed June 22, 2005) (citing to surveys conducted by DS Simon Productions and Medialink Worldwide finding 80-100% penetration for some genres of VNR); Comments of PR Newswire Association LLC in Use of Video News Releases by Broadcast Licensees and Cable Operators, MB Docket No. 05-171 (FCC filed June 22, 2005) at 5 (citing various studies showing high frequency of VNR use among broadcasters). *But see* Comments of Radio and Television News Directors Association in Use of Video News Releases by Broadcast Licensees and Cable Operators, MB Docket No. 05-171 (FCC filed June 22, 2005) at 7-10 (claiming news directors rarely use VNRs in full) [hereinafter *RTNDA Comments*].

[34] RTNDA Comments, *supra* note xx at 6-7.

"branded journalism."[35] Advertisers and propagandists may also pay journalists to themselves speak the promotional messages. Advertisers routinely pay consumer experts[36] and celebrity spokespeople[37] to plug commercial interests without attribution. Propagandists have engaged in similar practices. The Department of Education, for example, paid syndicated radio commentator Armstrong Williams to promote the No Child Left Behind Act[38] and other federal agencies paid print journalists to tout Administration programs.[39] These activities are not confined to old media. In the 2004 elections, the committees of at least one presidential candidate and one Senate candidate paid bloggers for unattributed campaign promotions.[40] Video news releases are also making their way onto the Internet and other new media outlets.[41]

Entertainment programming provides a more hospitable and customary environment for the placement of sponsored messages. Even propagandists seek to influence entertainment programming with stealth appeals. For example, the Clinton White House Office of National Drug Control Policy paid broadcast networks to

---

[35] *See* Joe Mandese, *The Art of Manufactured News*, BROADCASTING & CABLE, Mar. 28, 2005; Craig McGuire, *'Narrowcasting' Reaps Rewards for VNRs*, PR WEEK USA, Oct. 17, 2005 (reporting on the growing practice of "secured placement."), *available at* http://www.prweek.com/us/sectors/crisis/article/521853.

[36] James Bandler, *Advice for Sale: Believe It: How Companies Pay Experts for On-Air Product Mentions*, WALL ST. J., Apr. 29, 2005, at A1; Howard Kurtz, *Firms Paid TV's Tech Gurus To Promote Their Products*, WASH. POST, Apr. 20, 2005, at C1. *See generally* Remarks of FCC Commissioner Jonathan S. Adelstein, *"Fresh is Not as Fresh as Frozen": A Response to the Commercialization of American Media*, Washington D.C. (May 25, 2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-258962A1.pdf.

[37] *See Commercial Alert FTC Letter* at 4-5, 16 (citing examples of Lauren Bacall and Rob Lowe appearing on talk shows and touting pharmaceuticals without disclosing their financial ties to the manufacturers).

[38] Howard Kurtz, *Administration Paid Commentator; Education Dept. Used Williams to Promote 'No Child' Law*, WASH. POST, Jan. 8, 2005 at A1. The FCC opened an investigation into the Armstrong Williams case. *See* Statement of FCC Chairman Michael K. Powell, News Release (Jan. 14, 2005). The General Accountability Office concluded that these payments constituted illegal covert propaganda. U.S. Govt. Accountability Off., Department of Education – Contract to Obtain Services of Armstrong Williams, B-305368 (Sept. 30, 2005).

[39] *See* Howard Kurtz, *Writer Backing Bush Plan Had Gotten Federal Contract*, WASH. POST, Jan. 26, 2005, at C1 (Department of Health and Human Services paid columnist Maggie Gallagher to promote the Administration's marriage initiative in newspaper columns); Christopher Lee, *USDA Paid Freelance Writer $7,500 For Articles*, WASH. POST, May 11, 2005 at A15 (Department of Agriculture paid freelance writer to write articles promoting federal conservation programs).

[40] *See* William M. Bulkely & James Bandler, D*ean Campaign Made Payments to Two Bloggers*, WALL ST. J., Jan. 14, 2005 at B2; Charles Babington & Brian Faler, *A Committee Post and a Pledge Drive – Bloggers on the Payroll*, WASH. POST, Dec. 17, 2004 at A16. Political committees must disclose these disbursements in reports filed with the Federal Elections Commission. 2 U.S.C. §434 (2005).

[41] *See* McGuire, *supra* note xx (quoting a marketing executive to say that video news releases "are being targeted to a variety of audiences through web syndication, strategic placements in broadcast, cable, and site-based media in retail outlets and hospitals.").

include anti-drug messages in their sitcoms and dramas.[42] The government reviewed scripts in about fifty cases and placed promotional messages in more than 100 episodes of shows like *ER* and *The Practice*[43]– a sacrifice of editorial control worth about $21 million to the networks.[44]

By far the most common form of stealth marketing in entertainment programming is product placement. In many cases, audience members will be aware that the editor is using the product for promotional purposes, in which case the marketing is not by stealth. At their best, however, product placements will be disguised.[45] The promotional message will melt into non-promotional plot lines, props, and dialog,[46] enabling advertisers to build brand equity without interrupting the narrative flow of programming.[47]

Ten years ago, product placements were infrequent and limited to the appearance of a brand name, like Snapple in the television program *Seinfeld*[48] and

---

[42] Congress passed a law in 1998 authorizing the federal government to purchase anti-drug public service announcements from networks that would donate as much time as the government purchased. *See* National Youth Anti-Drug Media Campaign, 21 U.S.C. §§ 1801-1804 (2004). The White House then promised to excuse participating networks from donating time if they incorporated anti-drug storylines and dialogue into programming. *See generally* Ariel Berschadsky, *White House Anti-Drug Policy: Statutory and Constitutional Implications*, 19 CARDOZO ARTS & ENT. L. J. 183 (2001). Another part of the government's anti-drug media campaign was the production of video news releases. *See* Letter from Anthony H. Gamboa, General Counsel, Government Accountability Office to The Honorable Henry A. Waxman and the Honorable John W. Olver (Jan. 4, 2005) (finding that this practice constituted illegal "covert propaganda.").

[43] Howard Kurtz & Sharon Waxman, *White House Cut Anti-Drug Deal with TV*, WASH. POST, Jan 14, 2000, at A1. Some networks agreed only to submit plot summaries, but not scripts. *See, e.g.*, Anti-Drug Media Campaign: Hearing Before the Subcomm. On Telecomm., Trade, and Consumer Protection of the House Comm. On Commerce. 106th Cong. (2000) (Statement of Alex Wallau, President, ABC Television Network).

[44] Anti-Drug Media Campaign: Hearing Before the Subcomm. On Telecomm., Trade, and Consumer Protection of the House Comm. On Commerce. 106th Cong. (2000) (Statement of Donald R. Vereen, Dep. Dir., Office of the National Drug Control Policy). The compensation came in the form of relief from having to broadcast public service announcements. *See* Letter from David H. Solomon, Chief, Enforcement Bureau, Federal Communications Commission, to Thomas W. Dean, Esq., Litigation Director, NORML Foundation, 16 F.C.C.R. 1421, 1424 (2000) (holding that because the networks "were obligated to donate a matching amount of media time for every advertising spot purchased by ONDCP… any credit toward that obligation … received for the broadcast of programming with anti-drug … themes constitutes consideration.").

[45] The coding of media content with product placements and slogans is designed to reach the audience surreptitiously. As Steven J. Heyer, a Coca-Cola marketing executive has suggested, if the brand is obvious, it's not working. *See* DONATON, *supra* note xx at 25-34.

[46] C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097, 2205, 2207 (1992) (paid product placements "implicitly suggest to the public that media professionals, journalists or program creators and directors, formulated the communication for their own professional or artistic reasons.").

[47] *See* SEGRAVE, *supra* note xx at 42-50.

[48] June Deery, *Reality TV as Advertainment*, 2 POPULAR COMMUNICATION 1, 11 (2004).

Reese's Pieces in the film *E.T.*[49] For business and technological reasons, discussed in Part V, nearly every major content producer and every major advertiser is now engaged in the practice of product placement.[50] Between 1999 and 2004, the share of total television advertising dollars attributable to product placement jumped by an average of 21% a year.[51] Les Moonves, CEO of the CBS Corp., predicts a "quantum leap" in the incidence of product placement in the next several years.[52] Moreover, the salience of the sponsored message in the editorial content is growing[53] as sponsors come to be involved earlier in the editorial process.[54] By working directly with producers,[55] instead of with the network distributor, advertisers are able to knit their

---

[49] Interestingly, Hershey Co. did not place Reese's Pieces in *E.T.* The producer substituted the Hershey candy for M&M's when the Mars candy company turned down a proposal to include M&Ms in the film. Hershey was unaware until after production closed that its candy had been used, but agreed to help promote the film. *See* SEGRAVE, *supra* note xx at 165; Michael Schudson, Advertising: The Uneasy Persuasion 102 (1984) ("[W]hat eventually became a promotion in a fairly conventional sense began as the largely accidental placement of a product in a nonadvertising communication setting.").

[50] Although intellectual property rights have not had a major impact on the growth of product placement, it is worth noting that the rise of product placement corresponded with the decision in Ringgold v. Black Entertainment Network, 126 F.3d 70 (2nd Cir. 1997), which held that the incidental use of copyrighted items in programming could not be decided on summary judgment. The result of this case was increased rights clearance practices in the production of content. Ironically for the content owners, the necessity to clear rights to certain items may have given producers the impetus to charge for including the item.

[51] The Commission Proposal for a Modernisation of the Television without Frontiers Directive, Memo/05/475 at 2, available at europa.eu.int/information-society/services/doc_temp/M05_475en.pdf.

[52] Jon Fine, *An Onslaught of Hidden Ads: Media, Marketing and Advertising in the 21st Century*, BUSINESS WEEK at 24, June 27, 2005. *See also* Marc Grasser, *Product-Placement Spending Poised to Hit $4.25 Billion in '05*, ADVERTISING AGE, Apr. 4, 2005, at 16; John Consoli, *The Word On Placement: It's Following The Script*, ADWEEK, July 26, 2004 (predicting that 75% of all prime time scripted programming will include product placements in several years).

[53] *See, e.g.*, Lorne Manly, *When the Ad Turns Into The Story Line*, N.Y. TIMES at 3-1, Oct. 2, 2005 (reporting on new forms of "branded entertainment" in which the advertised product is more central to the program).

[54] *See* Lawrence A. Wenner, *On the Ethics of Product Placement in Media Entertainment* in HANDBOOK OF PRODUCT PLACEMENT IN THE MASS MEDIA 114 (Mary-Lou Galician, ed. 2004) (brand owners intervene "in the 'integration planning' at various stages from the ground level concept of a series to plot twists and themes that put their product hand-in-glove with the show."); DONATON, *supra* note xx at 92-93 (describing how producers share content with advertisers when it is still in development to better effect true integration); Evelyn Nussenbaum, *Products Slide into More TV Shows*, N.Y. TIMES at C2, Sept. 6, 2004 (quoting president of integrated advertising production company as saying "[t]he best way to bridge these two worlds [of advertising and entertainment] is to come in at the very beginning of the creative process.").

[55] For example, audio systems manufacturer SLS International Inc. paid the producer of a reality program in stock for product placements. Brian Steinberg, *A New Wave of 'Advertising' Pays Producer, Not Network*, WALL ST. J. at B1, June 20, 2005. *See also* DONATON, *supra* note xx at 70 (citing Viacom's Les Moonves' opinion that product placement deals will be sold jointly by the network and the producer).

messages into the narrative to shape "the pop culture dialogue."[56] These trends affect both scripted[57] and unscripted reality programming, where stealth marketing is especially common.[58]

Product placements are expanding into new media. Placements on blogs are now beginning to appear, with and without attribution.[59] CBS, for example, is considering product placement opportunities for electronics manufacturers that would begin with a television reality program and then transition into a sponsored blog.[60] Video games provide another attractive vehicle for product placements.[61] Indeed, for many advertisers, games are ideal because of their popularity with the desirable young male demographic and their worldwide distribution.[62]

In new media, as in television and film, sponsors are participating in the editorial process at an earlier stage. Studio One Networks, for example, develops Internet magazines like *Driving Today* and *Your Baby Today*. These magazines are sponsored by companies like Bridgestone Firestone and Nestlé, respectively.[63] Using

---

[56] Stuart Elliot, *Burger King Moves Quickly to take a Product from TV to the Table*, N.Y. TIMES, Jan. 21, 2005 at C1 (reporting on partnerships between advertisers and NBC's The Apprentice whereby sponsors pay over $2 million each for incorporation of brands into the plot).

[57] Revlon, for example, paid for advertising spots in return for a three month "story arc" or "plot placement" featuring them in the ABC soap opera as a rival to the character Erica Kane's cosmetics company. Wenner, *supra* note xx at 116. *See* Joe Flint & Emily Nelson, *"All My Children" Gets Revlon Twist – First Came Product Placement; Now TV "Plot Placement" Yields ABC a Big Ad Buy*, WALL ST. J, Mar. 15, 2002. *See also Subway Buys Role on Will & Grace*, WALL ST. J., Sept. 30, 2005, at B4 (Subway Restaurants introduced new sandwich by working it into sitcom plot).

[58] The break-out reality program Survivor garnered about a million dollars in product placement revenue in its first season. By the second season, the show's executive producer said the products were the adventure's "17th character." Lawrence A. Wenner, *On the Ethics of Product Placement in Media Entertainment* in HANDBOOK OF PRODUCT PLACEMENT IN THE MASS MEDIA 115 (Mary-Lou Galician, ed. 2004).

[59] For example, a marketing company called Marqui, which itself helps companies place brands in blogs and monitor their impact, has contracted with bloggers to place *its* brand. *See generally* http://www.marqui.com. For the bloggers' product placement agreements, see http://www.marqui.com/files/PDF/Marqui_Bloggers_Agreement__Current_Bloggers.pdf.

[60] *See* Brian Steinberg, *Networks Rush to Keep Advertisers*, WALL ST. J., June 27, 2005 (reporting on interview with Larry Kramer, president of digital media at CBS).

[61] Michelle R. et al, *Advertainment or Adcreep? Game Players' Attitudes Toward Advertising and Product Placements in Computer Games*, 5 JOURNAL OF INTERACTIVE ADVERTISING 1 (2004). *See also* T.L. Stanley, *Where the Boys Are: Marketers Flock to Gaming Gathering*, ADVERTISING AGE, May 17, 2004 at 3.

[62] *Id.*

[63] *See* StudioOne Networks, Press Release, "Nestlé USA and Bridgestone Renew Studio One's *Your Baby Today* and *Driving Today*," Dec. 17, 2004, *available at* http://www.studioone.net/in_the_news/releases/perss_release_son121704.htm. *See also*, Jupiterresearch, Online Sponsorships: Blending Branding and Direct Marketing (2003) ("On behalf of Bridgestone, Studio One handles production and content maintenance, and manages relationships with 16 distribution partners that carry the sponsorship, including AOL, Autobytel, and Drivers.com,

what is called a "barter syndication" model, Studio One develops the content on behalf of the sponsors and arranges for distribution on the Internet and through television and radio. According to Studio One's CEO, "materials developed exclusively for one advertiser, [have] much greater lift in terms of persuasion and awareness consideration and purchase intent."[64]

Promotions are most fully integrated into entertainment programming when the advertiser itself produces the programming, as is the case with "brandvertising" or "advertainment."[65] Nike took this path when it produced a boxing film to market its shoes.[66] Nike then exchanged this film, valued by television networks as video content, for distribution to viewers. Another distribution model is that of ESPN Shorts, where advertisers like Miller Brewing and Sears paid the cable network for distribution of six-minute short films that market the advertiser's products in the context of a sports story.[67] A marketer, quoted in Joseph Turow's prescient book *Breaking up America*, predicts that "commercial messages, in and of themselves, will be bought and sold like entertainment programming."[68]

B. The Law of Sponsorship Disclosure

Many of the practices discussed above would be illegal if broadcast without identifying the sponsor. Section 317 of the Communications Act requires broadcasters to disclose the identity of sponsors[69] while Section 508 imposes criminal penalties on broadcast employees, program suppliers, and sponsors for failure to disclose sponsorship.[70] The language of Section 317 is broad, requiring disclosure when "any type of valuable consideration is directly or indirectly paid or promised, charged or accepted" for the inclusion of a sponsored message in a broadcast.[71] This

---

through a single point of contact, [and]…on the companion radio show, America on the Road, which reaches 300 million people weekly on 300 stations via CBS/Westwood One."

[64] Nestle Rings the Dinner Bell, Madison & Vine, Sept. 10, 2003, *available at* http://www.studioone.net/in_the_news/articles/madandvine.html.

[65] Susan B. Krechmer, *Advertainment: The Evolution of Product Placement as a Mass Media Marketing Strategy* in HANDBOOK OF PRODUCT PLACEMENT IN THE MASS MEDIA 39 (Mary-Lou Galician, ed. 2004) (defining "advertainment" as "entertainment content that mimics traditional media forms but is created solely as a vehicle to promote specific advertisers").

[66] *See* Suzanne Vranica, *Hollywood Goes Madison Avenue*, WALL ST. J., Dec. 15, 2003, at B5.

[67] *See* Nat Ives, *Commercials Have Expanded Into Short Films with the Story as the Focus Rather than the Product*, N.Y. TIMES, Apr. 21, 2004 at C1.

[68] TUROW, *supra* note xx at 176.

[69] 47 U.S.C. § 317 (2005).

[70] 47 U.S.C. § 508 (2005).

[71] Letter from David H. Solomon, Chief, Enforcement Bureau, Federal Communications Commission, to Thomas W. Dean, Esq., Litigation Director, NORML Foundation, 16 F.C.C.R. 1421, 1423 (2000). Sponsorship disclosures must be contemporaneous with the broadcast, 47 U.S.C. § 317(a)(1) (2005), and comprehensible to the audience. *See, e.g.*, National Broadcasting Co., 27 F.C.C. 2d 75 (1970) (the announcement should "state in language understandable to the majority of viewers that suppliers of goods or services have paid…to display or promote the products…and each supplier should be

obligation applies whether the message constitutes propaganda or advertising, and it applies regardless of who in the chain of production receives payment. Thus, for example, payments from an advertiser to a studio producer for transmission of a promotional message have to be disclosed.[72] Broadcast station personnel must use due diligence to discover whether there has been any exchange of consideration for programming[73] and, to facilitate these efforts, program producers, station employees, and sponsors must report such exchanges to station personnel.[74]

As broad as they are, the disclosure requirements have fairly clear limits. They do not apply to overt marketing, such as traditional 15 or 30 second spot advertisements, where both the presence and source of sponsorship are obvious. In the case of product placement, no disclosure is necessary to the extent that "it is clear that the mention of the name of the product constitutes a sponsorship identification."[75] Moreover, the sponsorship disclosure rules generally do not apply unless the sponsor has paid for its promotion. Thus, the use of traditional print publicity materials, circulated for free, is permissible without disclosure of source.[76] The use of free products or services falls into the same category, so long as the value of the gifts is minimal.[77] The one exception to this general requirement of

---

properly identified."). *See also* Midwest Radio-Television, Inc., 49 F.C.C. 2d 512, 515 (1974); National Broadcasting Company, 27 F.C.C. 2d 75 (1970); United Broadcasting Co. of New York, Inc., 45 F.C.C. 1921 (1965).

[72] *See, e.g.*, Letter to Mr. Earl Glickman, President, General Media Associates, Inc., 3 F.C.C. 2d 326 (1966) (production company required to disclose paid sponsorships for programming that it seeks to sell to broadcast stations).

[73] 47 U.S.C. §§ 317(2)(c) (2005) ("The licensee of each radio station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section.").

[74] Payment or promised payment for program material must be disclosed to responsible parties, and ultimately to the broadcast station and the public, when it involves transactions with a station employee, 47 U.S.C. § 507(a) (2005), with a program producer, 47 U.S.C. § 507(b), or with a program supplier, 47 U.S.C. § 507(c). *See also* 47 U.S.C. § 508(b) (requiring producers and suppliers of programs to report the receipt of any consideration to the licensee that broadcasts the program).

[75] 47 C.F.R. § 73.1212(f) (2005) (applying this standard with respect to "broadcast matter advertising commercial products or services"). If the product placement falls somewhere between an obvious advertisement and a background prop, broadcasters must disclose sponsorship. *Id.* (requiring sponsorship identification for products "furnished in consideration for an identification of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the same broadcast.").

[76] H.R. Rep. No. 1800, 86th Cong., 2d Sess. 19 (1960) (no disclosure required for "news releases [that] are furnished to a station by government, business, labor and civic organizations, and private persons, with respect to their activities, and editorial comment therefrom is used on a program.").

[77] 47 U.S.C. § 317(a)(1) (2005) (no disclosure is needed for "any service or property furnished without charge or at nominal charge for use on, or in connection with, a broadcast" subject to certain exceptions). *See also* Wenner, *supra* note xx at 104 (discussing the absence of disclosure requirements for free products used on air).

consideration is for promotional messages that could be considered controversial or political. As to these, Congress has given the FCC authority to require sponsorship disclosure absent payment and the agency has done so.[78]

The history of sponsorship disclosure law tracks the history of broadcasting. Section 317 is rooted in a 1912 law requiring newspaper and magazine publishers to provide "reading notices" identifying paid advertisements as a condition of receiving second-class mail privileges.[79] Congress then imported this requirement into the Radio Act of 1927[80] and from there unchanged into the Communications Act of 1934.[81] Until the middle of the twentieth century, the sponsorship identification requirements "occupied a humble position in the regulatory design and went virtually unnoticed."[82] This quiescence undoubtedly had something to do with the nature of broadcast sponsorship before World War II. In the first decades of radio, sponsors owned radio programming like the *Maxwell House Hour*, the *General Motors Family Party*, and the *Palmolive Hour*.[83] Rather than hide their promotional messages in editorial content, sponsors heralded their role. And what a role it was. Sponsors had the power to bring programs to life and to bury them. And although they sometimes exercised this power to advance an editorial agenda, they usually exercised it boldly for all to see.[84]

---

[78] 47 C.F.R. § 73.1212(d) (2005). The FCC had long interpreted Section 317 to require disclosure in such cases and, to give the FCC with statutory cover, Congress added subsection (a)(2) to Section 317, authorizing the FCC to require "an appropriate announcement" of source for all political or controversial material. 47 U.S.C. §§317(a)(2) (2005). *See* H.R. Rep. No. 1800, 86th Cong., 2d Sess. 24-25 (1960) (a sponsorship identification announcement may be required for political programs or discussions of controversial issues even if "the matter broadcast is not 'paid' matter").

[79] Act of Aug. 24, 1912, ch. 389, 37 Stat. 539, 553, codified at 18 U.S.C. § 1734 (2005) ("Whoever, being an editor or publisher, prints in a publication entered as second class mail, editorial or other reading matter for which he has been paid or promised a valuable consideration without plainly marking the same 'advertisement' shall be fined"). *See also* Publishing Co. v. Morgan, 229 U.S. 288, 312 (1913) (upholding law); LINDA LAWSON, TRUTH IN PUBLISHING: FEDERAL REGULATION OF THE PRESS'S BUSINESS PRACTICES, 1880-1920 (1993) (discussing legislation).

[80] Radio Act of 1927 §19, 44 Stat. 1162, 1170 ("All matter broadcast…for which service, money, or any other valuable consideration is … paid, or promised … shall, at the time the same is so broadcast, be announced as paid for or furnished … by [the sponsoring] person, firm, company, or corporation."). *See generally* Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations*, 1927-1963, 56 FED. COMM. L. J. 329, 334 (2004).

[81] *See* S. Rep. No. 781, 73d Cong., 2d Sess. 8 (1934); H.R. Rep. No. 1850, 73d Cong., 2d Sess. 2, 7 (1934); H.R. Conf. Rep. No. 1918, 73d Cong., 2d Sess. 47 (1934) (indicating that Section 317 of the Communications Act adopted Section 19 of the 1927 Act virtually verbatim and without debate).

[82] Loveday v. FCC, 707 F.2d 1443 (D.C. Cir. 1983).

[83] Susan B. Krechmer, *Advertainment: The Evolution of Product Placement as a Mass Media Marketing Strategy* in HANDBOOK OF PRODUCT PLACEMENT IN THE MASS MEDIA 41 (Mary-Lou Galician, ed. 2004).

[84] *2 Erik Barnouw, A History of Broadcasting in the United States: The Golden Web 1933-1953 (1968).*

During and after the War, the relationship between sponsors and programming changed. Advertising shifted from the sponsorship of entire programs to the less expensive practice of spot advertising during program breaks.[85] In this new context, the demarcation between promotional and editorial voices was not always clear and the FCC worried that a listener might not "know when the program ends and the advertisement begins."[86] More than a decade after the enactment of the Communications Act, the FCC finally felt it necessary to issue rules implementing Section 317.[87]

It was not until the late 1950's, however, in the wake of two highly publicized media scandals that the sponsorship disclosure rules became important.[88] One scandal had to do with revelations that radio station disc jockeys were secretly taking payola from record promoters to air singles, particularly rhythm and blues and rock and roll tracks.[89] The other centered on evidence that producers of popular television quiz shows, like *Twenty One*, had rigged the game at their sponsors' request to favor certain contestants[90] and had selected others to plug their employers' businesses.[91] After holding a number of very public hearings in which the practices were condemned,[92] Congress strengthened Section 317 by extending the sponsorship disclosure requirement to broadcast station employees, and made the failure to disclose such sponsorship a crime.[93]

---

[85] *See id. See also* DONATON at 45-46 (linking the rise of spot advertising to the migration of programming to Hollywood studios and increased production costs which no single advertiser wanted to bear).

[86] *See* FCC, Public Service Responsibility of Broadcast Licensees 47 (1946). At around the same time, the influential Hutchins Commission on the Freedom of the Press recommended that the media clearly distinguish advertising from editorial content. *See* COMM'N ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS [pincite] (1947).

[87] *See* Kielbowicz & Lawson, *supra* note xx at 343.

[88] *Id.* [Kielbowicz] at 347-52.

[89] *See* Coase, *supra* note xx at 286-88.

[90] ERIK BARNOUW, THE IMAGE EMPIRE 122-25 (1970) (discussing Revlon's involvement in the quiz show scandals).

[91] Kielbowicz & Lawson, *supra* note xx at 347.

[92] *See* Investigation of Television Quiz Shows: Hearings Before the Legislative Oversight Subcommittee of the House Comm. On Interstate and Foreign Commerce, 86th Cong. 1st Sess. (1959); Investigation of Regulatory Commissions and Agencies, Interim Report of the Subcommittee on Legislative Oversight, H.R. Rep. No. 1258, 86th Cong., 2d Sess. (1960). A history of the payola scandals and Congressional response is set forth in Kielbowicz & Lawson, *supra* note xx at 333-369; Coase, *supra* note xx at 270; Douglas Abell, *Pay for Play*, 2 VAND. J. ENT. L. & PRAC. 53, 57-8 (2000).

[93] 47 U.S.C. § 508 (2005). Congress also made it a crime to rig any broadcast contest. 47 U.S.C. § 509 (2005).

III. THEORIES OF HARM

Let us now turn from the structure of sponsorship disclosure law to its purpose. The law itself, its legislative history, and FCC decisions interpreting it provide scant justification for government involvement in this area. Examination of these sources, as well as the opposition to stealth marketing practices, yields three basic critiques of one or more of these practices: that undisclosed sponsorship harms media competition, that it over commercializes media content, and that it deceives audiences. To these, I would add a fourth, more fully satisfying, theory that locates the harm of stealth marketing not in media markets or individual consumers, but in the public sphere and the integrity of public discourse.

A. Reduced Competition

Some stealth marketing critics, using payola as their example, argue that sponsors lower media quality by reducing competition in media products.[94] A representative passage from the legislative history of the 1960 amendments to Section 317, for example, expresses concern that payola works "to drive out of business small firms who lack the means to survive this unfair competition."[95]

This theory continues to have some currency today. It assumes a model of editorial choice in which disc jockeys and program directors select programming to appeal to their audiences.[96] Stealth marketing then coopts these editors into serving the interests of sponsors instead of the public. FCC Commissioner Adelstein, for example, excoriates payola for its tendency to benefit the recording industry at the expense of listeners.[97] On this theory, media outlets that have been compromised by sponsors will exclude under-capitalized content from competing for the audience's attention because the content producers cannot pay the payola toll for access.

There are two threshold problems with this competition theory of harm. First, to take the case of radio station payola, it assumes that broadcast radio air play is essential to spur record sales, which is the relevant competitive arena. This is today a

---

[94] *See, e.g.*, Abell, *supra* note xx at 55 ("Critics of payment for broadcast contend that the practice would infect the relationship between record labels and radio stations, resulting in mediocre radio, declining listenership, and falling advertising revenues."); Eric Boehlert, *Pay for Play*, SALON, Mar. 14, 2001 (arguing that "radio suck[s]" because it costs record companies between $100,000 and $250,000 in payments to independent radio promoters to launch a new single on rock radio, foreclosing entry for artists that cannot pay those slotting fees), *available at* http://www.salon.com/ent/feature/2001/03/14/payola; Broadcast Localism, Notice of Inquiry, 19 F.C.C.R. 12425, 12437-38 (2004) (describing the Future of Music Coalition's claims that payola forecloses entry for many producers desiring airplay).

[95] *See* Coase, *supra* note xx at 316 (quoting Congressman Oren Harris).

[96] Whether or not editors actually are, or should be, driven by consumer tastes is a subject of considerable debate. *See infra* notes xx.

[97] FCC News Release, Commissioner Adelstein Calls for FCC Investigation Based on Spitzer Payola Settlement, July 25, 2005 ("It's unfair to listeners if they hear songs on the radio because someone was paid off, not because it's good music.")

dubious assumption. Although broadcast radio continues to be very important to the marketing of music, competing platforms like satellite radio and the Internet now have the power to make musical hits and drive sales.[98] More fundamentally, the competition theory conflates the harm of marketing with the harm of marketing by stealth. It is entirely legal for record companies to pay radio stations for air play so long as they disclose the transactions. If these transactions suppress competition and alter media output, they presumably do so regardless of disclosure.

We can overcome these problems simply by assuming that radio airplay continues to perform a gatekeeping function for popular music and that net marketing activity increases with opportunities for stealth appeals, thereby exacerbating the effects of "pay for play" on competition. What then are these effects? Radio music competes on quality, not price, for audience allegiance. Radio stations and record company sponsors are united in their hunt for this allegiance as they try to attract as large a segment of the target audience as possible.[99] Where there is payola, the sponsor's selections presumably will displace some of the editors' selections. This displacement, however, will only harm competition if it reduces the variety and quality of the public's listening options. Assuming that listeners want quality and choice, in a competitive market, they will turn away from stations that do not deliver. A radio station will participate in this downward spiral only if it derives more revenue from payola than it loses from advertising dollars that follow the audience elsewhere[100] The sponsor will then be faced with increasing payola payments

---

[98] Independent bands like Bright Eyes and Hawthorne Heights showed it was possible to achieve market success in the absence of substantial airplay by selling hundreds of thousands of albums marketing primarily through Internet sites like MySpace. *See* Brian Hiatt and Evan Serpick, *Music Biz Laments 'Worst Year Ever'*, ROLLING STONE (Jan. 13, 2006).

[99] In addition to seeking an audience, the sponsor may engage in payola to boost the rankings of their products on Billboard's hit charts. *See* Warner Music Group Corp., Assurance of Discontinuance Pursuant to Executive law § 63(15) at 16 (Nov. 22, 2005), available at http://www.oag.state.ny.us/press/2005/nov/nov22a_05.html (describing Warner Music "purchases [of] radio time to increase airplay and deceptively boost chart position for its artists."). Because Billboard ranks music based on a combined metric of radio air play and record sales, and because music tends to become more popular once it climbs to the top of Billboard's lists, Billboard converts air play from a method of reaching people to a credential that in itself increases sales. *See* Lee Ann Obringer, *How Top 40 Radio Works*, at http://entertainment.howstuffworks.com/top-40.htm (describing formula for Billboard's Top 40 hit list); James Surowiecki, *Paying to Play*, THE NEW YORKER, Jul. 7, 2004 (describing the role of payola in launching Avil Lavigne into the Top 10).

[100] Payola paid to employees without the employer's acquiescence raises other issues of agency costs. Under these conditions, the sponsorship constitutes a kind of commercial bribery that can induce the employee to act contrary to the interests of employer. *See* Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 U.C.L.A. 784, 796-805(1985) (discussing the moral and legal wrong of bribery). But here too, as with payments to the station itself, the sponsor only gains the exposure it wants if the employee's self-interest is consistent with his ability to draw an audience. The employee himself, in the case of a disc jockey or station programmer, has strong incentives to build an audience since his job will usually depend upon it. A decision to enrich himself by playing music that

(necessary to compensate the radio station for reduced advertising) for a shrinking audience – a situation it is unlikely to tolerate unless it can generate a striking per capita return on record sales. There is no evidence that the economics of payola have ever supported this result.

Ronald Coase has argued that payola, far from reducing market efficiency, might enhance it. Coase's economic defense of payola, which goes unrefuted, is that payola payments serve an important signaling function for program directors, indicating which new tracks record labels believe will be hits.[101] Correct predictions attract listeners and spur record sales. Incorrect predictions, as suggested above, drive away listeners and will rapidly diminish the influence of payola on programming decisions.

Economists following Coase have shown that in addition to its signaling function, payola can provide an efficiency-enhancing profit-sharing mechanism. By offering payola, record companies share the incremental value of repeated air play with stations and ensure that this value is factored into radio station play lists.[102] By partnering with sponsors, then, radio editors have incentives to give consumers more of what they want.

Economic research in the analogous area of supermarket slotting fees supports the basic position that Coase and others advance, which is that payola at least does not harm consumer welfare. The radio play list is much like shelf-space in a supermarket and payola like the slotting fees that manufacturers pay to retailers in order to obtain preferred display space for their wares. There appears to be general agreement that slotting fees do not create barriers to entry or raise prices so long as the downstream retail markets are competitive.[103] Media markets, especially the market for popular radio music, are competitive according to standard measures of concentration.[104]

To say that payola may be efficient is not to say that it takes no toll on the diversity of media content. As Professor Edwin Baker has powerfully argued, a

---

the listeners do not want, if repeated, would almost certainly lead to termination or more careful supervision from the employer.

[101] *See* Coase, *supra* note xx at 316-19.

[102] *See* Sidak & Kronemyer, *supra* note xx at 525.

[103] Benjamin Klein & Joshua Write, The Economics of Slotting Arrangements, *supra* note xx. *See also*, Federal Trade Commission, Report on the Commission Workshop on Slotting Allowances and Other Marketing Practices in the Grocery Industry, 2001, *available at* http://www.ftc.gov/os/2001/02/slottingallowancesreportfinal.pdf (reporting on divergence of views about whether or not slotting and pay-to-stay fees in the supermarket retail industry are anti-competitive, but arriving at no conclusions).

[104] *See* 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202, Report and Order and Notice of Proposed Rulemaking, 18 F.C.C.R. 13,620, [pincite] (2003), *remanded in part sub nom.* Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004).

competitive media market may not be one that fosters a diversity of voices.[105] In theory, payola is neutral with respect to diversity. Payola can be, and currently probably is, diversity reducing. Let us suppose that Sony BMG induces stations to play Sony artists at the expense of lesser-promoted independent artists station program directors would otherwise be inclined to feature. Even if ratings spike, suggesting that consumers approve Sony's selections, station listeners have lost some exposure to diverse voices. Sony has come to play a larger role in selecting the content the audience hears. Thus, by increasing the prevalence of a particular sponsor's products, payola would reduce the diversity of artists or viewpoints to which audiences are exposed.[106]

It is also possible that payola could *increase* diversity if, instead of Sony BMG, it is the independent or non-dominant label that pays for play. This is the kind of diversity-enhancing payola that existed in the 1950's. Then, it was the alternative rhythm and blues and rock and roll record companies that were paying to market music that disc jockeys, happy with popular big band music, were reluctant to play.[107] According to Coase, these small "companies lacked the name-stars and the strong marketing organization of the major companies, and payola enabled them to launch their new records in a local market and, if success there was achieved, to expand their sales by making similar efforts in other markets."[108] Today, among independent labels, there is a certain wistfulness for the practice of payola that might be counted on to increase independents' radio play.[109]

In the end, neither competition nor diversity rationales justify sponsorship disclosure law, particularly because disclosure itself does nothing to limit the flow of money which is at the core of the competition critique. For an alternative theory, we turn now to cultural critiques of stealth promotions.

B. Over Commercialism

If the reaction to the payola and quiz show scandals revealed anxiety about the effect of sponsorship on competition, it also revealed a concern over excessive

---

[105] *See* C. Edwin Baker, *Media Structure, Ownership Policy, and the First Amendment*, 78 S. CAL. L. REV. 733, 742 (2005) (arguing against "reductionist commodification" of media value that focuses only on quantity and quality of media products at the expense of other indicia of diversity like media source).

[106] *See generally*, Goodman, *supra* note xx at 1400-1413 (discussing the relationship between media diversity and media competition).

[107] *See* Coase, *supra* note xx at 292, 306, 315-16.

[108] *See id.* at 316. *See also* Tyler Cowen, *The Economics of the Critic* in CONFLICT OF INTEREST IN THE PROFESSIONS (Michael Davis & Andrew Stark, ed. 2001) at 246 (payola "gives individuals a chance to buy their way into markets that they otherwise might find difficult to crack….[P]ayola has been used most intensely by outsiders and minorities….").

[109] *See* Abell, *supra* note xx at 56 (quoting president of the independent label Rykodisc as commenting "'if I had an opportunity to actually put the money on the table and let [the music] get out there and let the consumer decide, to me that's more attractive than allowing the system to decide.'").

commercialism in broadcast media.[110] According to one commentator, the payola and quiz show "scandals … merged in the public's mind to form one image of commercialism's corrupting influence on broadcasting."[111] Other media regulations, since abandoned, sought to address this concern by limiting the total amount of broadcaster advertising and banning program-length commercials.[112]

This anti-commercial sentiment in general is most highly developed by theorists like Naomi Klein, whose book *No Logo* is a call to arms to reduce corporate control over the content of public communications.[113] For the *No Logoist*, third-party (usually commercial) voices have overwhelmed noncommercial communications with brands and corporate messages. Whether covert or overt, this advertiser influence hijacks authentic culture and turns "America's marketplace of ideas [into] … a junkyard of commodity ideology."[114] Again, FCC Commissioner Jonathan Adelstein has captured this critique, lamenting "a bottomless pit of commercialism in today's media into which even icons we hold sacred are sinking and becoming sullied."[115]

This cultural critique of marketing draws on various economic critiques.[116] Especially influential has been John Kenneth Galbraith's observation that advertising

---

[110] *See supra* note xx. *See also* SUSAN SMULYAN, THE COMMERCIALIZATION OF AMERICAN BROADCASTING, 1920-1935 [pincite] (1994) (describing a 1932 Senate resolution expressing "growing dissatisfaction with the present use of radio facilities for the purposes of commercial advertising.").

[111] *See* Kielbowicz & Lawson *supra* note xx at 347.

[112] *See* Revision of Programming and Commercialization Policies, 98 F.C.C.2d 1076, 1102 (1984) (eliminating use of 16 minute guideline for advertising content in the license reviews and eliminating ban on program length commercials); Report and Statement of Policy Re: Commission En Banc Programming Inquiry, 44 F.C.C. 2303 (1960) (identifying policy interests in limiting total amount of time devoted to advertising and frequency of program interruptions). *See also* Program-Length Commercials, 39 F.C.C.2d 1062 (1973) (expressing concern that program-length commercials "may exhibit a pattern of subordinating programming in the public interest to programming in the interest of salability."). Limits on advertising survive with respect to children's television programming. 47 U.S.C. § 303a-b (2005) (licensees of commercial television stations must limit the amount of "commercial matter" on children's programs to not more than 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays).

[113] *See* NAOMI KLEIN, NO LOGO (2000). *See also* KALLE LASN, CULTURE JAM (2000). For the associated social movements, see www.commercialalert.org and www.adbusters.org.

[114] Ronald K. L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697, 707 (1993). *See generally id*. at 707-728.

[115] FCC Commissioner Jonathan S. Adelstein, "Fresh is Not as Fresh as Frozen:" A Response to the Commercialization of American Media, Address Before the Media Institute, Washington, D.C., May 25, 2005.

[116] These critiques were both neoliberal, s*ee, e.g.*, JOHN KENNETH GALBRAITH, THE AFFLUENT SOCIETY (1958), and Marxist, *see, e.g.*, STUART EWEN, CAPTAINS OF CONSCIOUSNESS 37 (1976) ("The functional goal of national advertising was the creation of desires and habits" that satisfied the needs of a capitalist system for new markets and soaked up overproduction); HERBERT MARCUSE, ONE-DIMENSIONAL MAN 19 (1964) (discussing the creation of "false needs").

itself creates consumer wants and needs that would not otherwise exist.[117] The legal literature on advertising has welcomed this perspective, starting with Ralph Brown's landmark 1948 article on trademark protection in which he questioned the legal fiction that rational consumers sift through commercial cues without succumbing to their influence.[118] Recent scholarship on the complexity of consumer decisionmaking[119] and the interaction between brand promotion and consumer demand[120] have added psychological weight to the economic critiques of the rational and sovereign consumer.

Anti-commercialism, whether grounded in economic or political theory, is a powerful force in information law today, including both First Amendment and intellectual property law. Take, for example, the commercial speech debate.[121] Those who would exempt commercial speech from full, or maybe even any, First Amendment protection characterize commercial pitches as low value speech far from the "exposition of ideas,"[122] divorced from the pursuit of "truth, science, morality and [the] arts,"[123] irrelevant to democratic self governance,[124] and unrelated to individual liberty.[125]

---

[117] GALBRAITH, *supra* note xx at 141 (Advertising and marketing cannot be "reconciled with the notion of independently determined desires, for their central function is to create desires – to bring into being wants that previously did not exist").

[118] Ralph S. Brown, *Advertising and the Public Interest*, 57 YALE L. J. 1165, 1165069, 1180-84 (1948).

[119] *See, e.g.*, Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700 (2003); Jon D. Hansen & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999).

[120] *See, e.g.*, Graeme W. Austin, *Trademarks and the Burdened Imagination*, 69 BROOK. L. REV. 827, 854-861 (2004) (reviewing the trademark-related literature).

[121] Commercial speech was once thought to fall entirely outside the protection of the First Amendment because of its "low value." *See* Valentine v. Chrestensen, 316 U.S. 52, 54-55 (1942). Commercial speech later came to be treated as protected speech because of the informational value it provides for consumers, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 763-65 (1976) (striking down ban on advertising of pharmaceutical prices); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (striking down ban on lawyer advertisements). With some fluctuations, *see, e.g.*, Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) (upholding ban on casino advertisements), the trend has been towards greater protection for commercial speech. *See* 535 U.S. 357 (2002); Greater New Orleans Broadcasting v. United States, 527 U.S. 173 (1999); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

[122] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[123] Roth v. United States, 354 U.S. 476, 484 (1957).

[124] *See, e.g.*, Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM L. REV. 449 (1985) (proposing this instrumentalist theory in support of reduced protection for commercial speech). *See also* Daniel Hays Lowenstine, *Too Much Puff: Persuasion, Paternalism and Commercial Speech*, 56 U. CIN. L. REV. 1205 (1988).

[125] *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 196 (1989) (commercial speech lacks "crucial connections with individual liberty and self-realization"); Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735, 739 (1995) (corporate speech, as "institutional speech,"

Among intellectual property theorists, there is a strong strain of anti-commercialism as well. Particularly in the trademark area, scholars criticize the salience of corporate brands in culture and commerce.[126] Copyright commentary too bristles over the commercial domination of culture.[127] Of course it is the control that corporations exercise over communication by virtue of their property rights in expression that disturbs intellectual property theorists,[128] but the desire for a less commercial culture is also palpable and influential in the works of many.[129]

Since there has been so little scholarship in the area of sponsorship disclosure law, it is unclear how thoroughly the anti-commercialism in other areas of information law might permeate legal arguments, although it is clear that these sentiments run strong in the objections to product placements and payola. Ironically, the doctrinal shifts that have been proposed to reduce the rights of commercial

---

lacks a speaker); Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 14 (1979) ("a first amendment right of personal autonomy in matters of belief and expression stops short of a seller hawking his wares"). *See also* Virginia Board of Pharmacy, 425 U.S. 748 at 781 (Rehnquist, J., dissenting) (commercial speaker is not entitled to First Amendment protection for merely for "hawking his wares"). *But see* Martin H. Redish, *The First Amendment in the Marketplace*, 39 GEO. WASH. L. REV. 429, 445-47 (1971); Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 752 (1993); Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 780 (1993); Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO.WASH. L. REV. 235 (1998).

[126] *See* Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2056-57 (2005) (discussing the anti-advertising strain in trademark scholarship); Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1863 (1991) (discussing the commodification of cultural symbols). *But see* DANIEL BOORSTIN, DEMOCRACY AND ITS DISCONTENTS 40-42 (1971) (arguing that advertising should be celebrated as America's folk culture).

[127] This negative view of corporate culture is often expressed in appreciation for the role of non-corporate, individual or noncommercial collectives, in producing culture using the tools of digital communications. *See* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U.L. REV. 1, 10-14 (2004) (digital technologies enable consumers to produce culture); Yochai Benkler, *Freedom in the Commons: Toward a Political Economy of Information*, 52 DUKE L. J. 1245 (2003); Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L. J. 215 (1996).

[128] Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 132-33 (1999) (discussing trademarked symbols in cultural expression); Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 418-24 (1990) (proposing that brands incorporated into cultural expression be deemed "expressively generic" and available for public use); Stacey L. Dogan, *An Exclusive Right to Invoke*, 44 B.C. L. REV. 291 (2003); [SONIA KATYAL, ANTI-BRANDING (forthcoming 2006)].

[129] *See, e.g.*, Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1863-66 (1991) (showing how brands commodify cultural expression).

speakers and intellectual property owners would likely increase, not decrease, the prevalence of marketing in media products.

If commercial speech is afforded less protection from regulation, speakers will find it more attractive to mingle commercial and noncommercial speech – the very hybrid messages that are so common in stealth marketing – because hybrid messages resist classification as commercial speech.[130]

Reduced intellectual property protection could also increase marketing activities. It stands to reason that content producers *qua* advertisers will advertise less if intellectual property protection dwindles because they will have a smaller stake in the sale of those goods.[131] Universal's marketing budget for its films, for example, will fall with copyright royalties. However, content producers *qua* sellers of advertising time could well seek to host more advertising as copyright royalties decline. Much of such additional advertising is likely to take the form of promotional messages that are embedded within editorial content. The result would be more sponsored messages both within and around informational goods.

Whatever the actual relationship between proposed information law reforms and commercialism, the commercialism critique cannot justify sponsorship disclosure law. Uncovering covert marketing does not necessarily reduce the prevalence of brands in, nor advertiser control over, communications. As a practical matter, it may be that sponsorship disclosure is the only weapon *No Logoists* have against sponsorship. Commercial speech doctrine is unmistakably hostile to the suppression of advertising,[132] but permits source disclosure requirements.[133] As a second best legal response to promotional speech, however, sponsorship disclosure merely substitutes for, rather than accomplishes, reductions in commercial communications.

C. Deception

The potential of stealth marketing to deceive audiences is another, and thus far best, justification for sponsorship disclosure law. Deception is possible regardless of whether audience members believe that program material is selected on the basis of public appeal or on the basis of independent editorial judgment or artistic vision. I

---

[130] Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 795-96 (1988) ("we do not believe that … speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech."

[131] *See* Mark S. Nadel, *Why Copyright Law May Have a Net Negative Effect on New Creations: The Overlooked Impact of Marketing*, 19 BERKELEY TECH. L. J. 785, 800 (2004) (suggesting positive correlation between intellectual property protection and marketing expenditures).

[132] *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).

[133] *See* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771-72 n.24 (1976) ("[I]t …[may be] appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.")

will say more about these distinct visions of the editorial function in the next section, noting here only that actual audience perceptions about the program selection process are irrelevant to a theory of deception so long as audiences do *not* think that hidden sponsors are responsible for these choices. When in fact sponsors induce the selection of a song, an interview subject, or a product-related story line, audiences may be deceived.

At first blush, this theory of deception would seem to bring stealth marketing squarely within the ambit of federal and state trade law, which regulates false and deceptive advertising.[134] Consumer advocates have tried to persuade the Federal Trade Commission of just this, urging the FTC to deem product placement in film and television a deceptive trade practice.[135]

In fact, however, trade law is concerned with only a very small set of potentially deceptive practices. The Federal Trade Commission Act, for example, covers only advertising that makes *material* misrepresentations likely to mislead reasonable consumers with respect to "a consumer's choice or conduct regarding a product."[136] Stealth marketing dressed up to look like an "independent television program[]"[137] will be considered deceptive only if its stealth nature tends to make product claims more believable to consumers and induce purchases under false pretenses.[138] The Lanham Act too requires that advertising be demonstrably false and

---

[134] *See* the Federal Trade Commission Act, 15 U.S.C. § 45(n) (2005) (giving the Federal Trade Commission the authority to sanction false advertising), and the Lanham Act, 43 U.S.C. §1125(a) (2005) (providing a civil right of action for persons injured by "false designation of origin, false or misleading description of fact, or false or misleading representation of fact" with respect to "goods, services, or commercial activities" in "commercial advertising or promotion").

[135] *See, e.g.,* Petition of Center for the Study of Commercialism, et al, Unfair and Deceptive Acts and Practices in the Placement of Product Advertisements in Motion Pictures, Docket No. P914518, 209-59, Federal Trade Commission (May 30, 1991).

[136] Federal Trade Commission, Policy Statement on Deception, appended to FTC v. Cliffdale Associates, Inc. et al., 103 FTC 110, 693-94 (1984). *See generally* Gary T. Ford & John E. Calfee, *Recent Developments in FTC Policy on Deception*, 50 JOUR. OF MARKETING 82, 89-91 (1986).

[137] Michael S. Levey, et al., Consent Order, 116 F.T.C. 885, ¶¶25-26 (1993). *See also* JS&A Group, Inc., Consent Order, 111 F.T.C. 522, ¶1 (1989) (30 minute commercial fashioned to look like a news program violated Section 5 of the Federal Trade Commission Act by falsely representing that the program's favorable evaluation of the product was based on objective product testing); National Media Corp., 116 F.T.C. 549 (1993) (requiring disclosure that infomercial is paid programming); Georgetown Publishing House Limited Partnership, 122 F.T.C. 392 (1996) (requiring disclosure when promotional material is advertising). For a detailed discussion of the advertising practices at issue in the JS&A case, see Jeffrey Chester & Kathryn Montgomery, *Counterfeiting the News*, 27 COLUM. JOURNALISM REV. 38-41 (May/June 1988).

[138] In the FTC's view, the "principal reason for identifying an advertisement as such is that consumers may give more credence to objective representations about a product[]" if made by a third party than by the advertiser itself." Letter of Mary K. Engle, Federal Trade Commission to Gary Ruskin, Commercial Alert (Feb. 10, 2005). For this reason, FTC regulations also require that when there is a material connection between a third party endorser of a product that the audience might not expect – that is beyond payment to the endorser – the connection must be disclosed. 15 C.F.R. §255.5 (2005).

the plaintiff materially harmed by the falsity.[139] Common law fraud and state trade law statutes will require similar showings.[140]

Stealth marketers rarely make explicit or even implied misstatements of fact. If such marketing deceives, it does so with impressions. Take, for example, the recent experience of a producer on the reality program *American Dream Derby*. As time was running out on the day's shooting, the director reportedly screamed at the crew, "'[G]o get my fucking Diet Dr. Pepper moment and get out of here.'" According to the producer, "contestants [were] saying on mike – 'I hate Dr. Pepper.' … I told them to just hold it in their hand. But then we were told we had to make sure they drank it too."[141] Assuming the product placement in this case was done skillfully enough to constitute stealth marketing, the marketing message may leave a false impression, but does not materially misrepresent any fact. The purpose of stealth marketing is not, after all, to defraud. The purpose is to bypass audience resistance to promotional messages[142] by giving an erroneous impression of source.[143] Of course, to the extent that sponsors are propagandists, not advertisers, stealth marketing moves even further out of the reach of trade law.

It is thus to sponsorship disclosure law that one would have to turn for relief from deception in stealth marketing, and a theory of deception goes a long way towards explaining this law. The FCC's incantation of the public's "right to know whether the broadcast material has been paid for and by whom"[144] and audience

---

[139] *See* Skil Corp v Rockwell International Corp, 375 F. Supp. 777, 783 (N.D. Ill. 1974) (setting forth elements typically required in a Lanham Act false advertising claim).

[140] *See* 37 Am. Jur. 3d *Proof of Facts* §259 (2004) (false advertising claim requires proof of detrimental reliance on materially misleading statement); 37 Am. Jur. 2d *Fraud and Deceit* §242 (2004) (fraud claim requires proof that plaintiff's reasonable reliance on a successful deception induced action that he would not have otherwise taken). *See, e.g.* McDonald v. North Shore Yacht Sales, Inc., 513 N.Y.S.2d 590, 593 (N.Y. Sup. 1987) (for false advertising claim, plaintiff must "demonstrate that the advertisement was misleading in a material respect and he was injured"); Asermely v. Allstate Ins. Co., 728 A.2d 461, 464 (R.I. 1999) (for fraud claim, plaintiff must show detrimental reliance on fraudulent representation).

[141] Writers Guild of America, *supra* note xx at 5.

[142] *See* M. Friestad & P. Wright, *The Persuasion knowledge Model: How People Cope with Persuasion Attempts*, 21 J. OF CONSUMER RESEARCH 1, 62-74 (1994) (showing the tendency of audiences to counter-argue with persuasive attempts); John E. Calfee & Debra Jones Ringold, *Consumer Skepticism and Advertising Regulation: What do the Polls Show?*, 15 ADVANCES IN CONSUMER RESEARCH 244, 247 (1988) ("Poll data show that consumers have been deeply skeptical of advertising claims for at least two decades.").

[143] *See, e.g.*, Bhatnagar, *supra* note xx at 109 ("The lack of consumer awareness [of marketing] is considered central to the effectiveness of [product] placements.").

[144] United States Postal Service, 41 RR 2d 877, 878 (1977), citing Sponsorship Identification, 40 FCC 2 (1950). *See also* Broadcast Material Sponsorship Identification, 25 Fed. Reg. 2406 (Fed. Commc'n Comm'n, Mar. 16, 1960) (concealment of the fact that program material was broadcast because consideration was paid constitutes "deception.").

members' "entitle[ment] to know by whom they are being persuaded"[145] seems directly related to a fear of deception. The FCC first articulated this audience "right to know" in the wreck of the payola and quiz show scandals, years before citizen right to know laws in other contexts became common. The command that sponsors reveal themselves echoed the concerns of Vance Packard's late 1950's best seller, *The Hidden Persuaders*. In this screed against stealth marketing, Packard criticized political and commercial pitches that seek to persuade us "beneath our level of awareness."[146]

In the same period, there was widespread concern over subliminal advertising,[147] following news reports of an advertiser's supposedly effective use of the technique to flash the words "Eat Popcorn" and "Drink Coke" onto movie screens.[148] The Cold War incubated related fears about subliminal communist propaganda.[149] Responding to this public mood, the FCC banned the broadcast of "functional music" – commonly known as Musak – for fear that it would subliminally seduce the public into a buying mood.[150]

For all its explanatory power, however, deception is not fully satisfying as a justification for sponsorship disclosure law. Whether or not an audience member is

---

[145] Applicability of Sponsorship Identification Rules, 40 F.C.C. 141 (1963), as modified, 40 Fed Reg. 41936 (Sept. 9, 1975). *See also* Advertising Council Request for Declaratory Ruling or Waiver Concerning Sponsorship Identification Rules, 17 F.C.C.R. 22616, 22620 (2002) ("[T]the public has the right to know whether the broadcast material has been paid for and by whom."); Sponsorship Idnetiifcation Rules, 34 F.C.C. 829, 894 (1963) ("[p]aramount to an informed opinion and wisdom of choice … is the public's need to know the identity of those persons or groups who elicit the public's support.").

[146] VANCE PACKARD, THE HIDDEN PERSUADERS 11 (1957). Another influential book published around the same time was DANIEL BOORSTIN, THE IMAGE (1962) (discussing the use of photo opportunities and staged events to create reality).

[147] Subliminal messages have been defined as "the projection of messages by light or sound so quickly and faintly that they are received below the level of consciousness." *See* Nicole Grattan Pearson, *Subliminal Speech: Is it Worthy of First Amendment Protection?*, 4 S. CAL. INTERDISC. L. J. 775 (1995) (citing Alan F. Westin, Privacy and Freedom 279 (1967)).

[148] ANTHONY PRATKANIS & ELLIOT ARONSON, AGE OF PROPAGANDA: THE EVERYDAY USE AND ABUSE OF PERSUASION 286-290 (2002) (reporting that this experiment, later judged to be a hoax, was publicized in a 1957 *Saturday Review* article by Norman Cousins called "Smudging the Subconscious.")

[149] *See id.* (Norman Cousins asked if subliminal communication "is successful for putting over popcorn, why not politicians or anything else?").

[150] Functional Music v. FCC, 274 F.2d 543 (D.C. Cir. 1958). Years later, the FCC also declared, without so ordering, subliminal advertising unsuitable for broadcast. Public Notice Concerning the Broadcast of Information by Means of "Subliminal Perception" Techniques, 44 F.C.C.2d 1016, 1017 (1974) (attempts "to convey information to the viewer by transmitting messages below the threshold level of normal awareness," are "contrary to the public interest" because such advertisements are "intended to be deceptive.").

deceived by a communication will depend on what she expects from the speaker.[151] Viewers of the Wal-Mart Network, which plays exclusively for Wal-Mart shoppers, can be expected to understand that the programming, such as a cooking show, is purely promotional even if it mimics an independent media production.[152] A stealth appeal in the evening news, where the audience may expect greater independence, is a different matter. Here, the placement of stealth promotions is more likely to deceive the audiences. Indeed, it is *because* such placements are likely to deceive that stealth marketers find them valuable. Persuasion is easiest where the audience is most credulous and least defended against promotional messages.[153]

Audience beliefs as to source, even where the news is concerned, are dynamic and will change with changing practice. Just as we can expect reasonable care in consumer purchasing decisions, so we can expect a degree of *caveat auditor* in audience comprehension.[154] An audience exercising such care is less likely to be deceived as stealth marketing proliferates. The relationship between audience deception and stealth appeals is not unlike the relationship between consumer deception and false advertising. In a world without puffery, a puffed up statement like "we make the very best" might well deceive the reasonably prudent purchaser. But in a world rife with puffery, courts will deem purchasers to be immune to such blandishments.[155] Similarly, if an audience comes to know that a news outlet has

---

[151] *See* LEISS, *supra* note xx at 365 ("[A]ll mediated communication subsumes a relationship between a designer of messages and their interpretation by audiences.").

[152] Emily Nelson & Sarah Ellision, *In a Shift, Marketers Beef Up Ad Spending Inside Stores*, WALL ST. J., Sept. 21, 2005 at A1 (Wal-Mart's in-store television network is seen by 130 million shoppers a month).

[153] These are the communications most attractive to stealth advertisers and propagandists because they can exploit the credibility the audience has vested in the ostensible source of the communication *See* Balasubramanian, *supra* note xx at 37-38 (the persuasiveness and credence of messages are influenced by the identity of the perceived source); Letter of Mary K. Engle, Federal Trade Commission to Gary Ruskin, Commercial Alert (Feb. 10, 2005) at 2 (federal trade law recognizes that "consumers may give more credence" to a persuasive message if the persuader's identity is concealed); U.S. Govt. Accountability Off., *supra* note xx [B-305368] at 7 (government payments to a commentator to promote a government program was designed to "'win the battle for media space [through] favorable commentaries [that] will amount to passive endorsements from the media outlets that carry them.'") (quoting from Inspector General's investigation into payments).

[154] Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157, 165 (2001) ("in certain circumstances, a listener is responsible for ascertaining that a statement is true before believing it."). *See also* Smolla, *supra* note xx at 785-6 ("Let the buyer beware! This is a market filled with hucksters, hustlers, hype, and hyperbole.").

[155] *See, e.g.*, U.S. Healthcare, Inc. v. Blue Cross of Greater Phila., 898 F.2d 914, 922 (3d Cir. 1990) *cert. denied*, 498 U.S. 816 (1990) ("[m]ere puffing, advertising that is not deceptive for no one would rely on its exaggerated claims," is not actionable under Lanham Act) (quotations omitted); United States v. An Article... Consisting of 216 Individually Cartoned Bottles, 409 F.2d 734, 741 (2d Cir. 1969) (claims containing "familiar exaggerations" cannot be sanctioned because "virtually everyone can be presumed to be capable of discounting them as puffery.").

become more like the Wal-Mart network, it is less likely to be deceived. Consumer savvy reduces deception by unmasking what was once hidden.

In a media environment of pervasive skepticism, audiences will still be deceived sometimes. Stealth marketing will continue to create false negatives – the belief that messages are not promotional when they are. Even where audiences suspect sponsorship, they may not know exactly who the sponsor is or how thoroughly sponsorship pervades editorial content. But pervasive skepticism as to the presence of sponsorship will reduce the incidence of deception and, therefore, the deception-based rationale for sponsorship disclosure law. A robust defense of sponsorship disclosure needs, therefore, to consider harm to audience members not deceived by stealth appeals and perhaps not even exposed to them.

D. Damage to Discourse

The very skepticism that rescues the public from deception is what ultimately justifies sponsorship disclosure regulation. On this theory, stealth marketing harms by sowing skepticism as to the authenticity and truth of mediated communications. The result is damage to public discourse, which the media play such a large part in shaping. Of concern here are not only the false negatives, but the false positives – the widespread belief that messages are promotional when they are not. Of concern is the suspicion that falls on the editor who makes an expressive choice of a commercial symbol or political position, but whose communication is systematically misunderstood.[156] Caveat auditor helps to inoculate against deception, but too much caveat auditor degrades a communications environment in which participants are unnecessarily disbelieving.[157]

In this section, I examine the relationship between stealth marketing and public discourse from two perspectives: the effect of undisclosed sponsorship on discourse and the related impact on the integrity of media institutions. For the first perspective, I draw on the First Amendment theory of Robert Post and the social theory of Jürgen Habermas to show how stealth marketing degrades public discourse by undermining the contributions of the editor – a collective term for those who make speech selection judgments in media (*e.g.*, writers, producers, and directors). The law

---

[156] Editors may well choose to highlight brands for expressive reasons. In a 1993 episode of Seinfeld, for example, Jerry and Kramer are responsible for a Junior Mint candy falling into the body of a surgery patient. It was the producer's decision to use the brand and there was no sponsorship. Lorne Manly, *When the Ad Turns Into The Story Line*, N.Y. TIMES at 3-1, 6, Oct. 2, 2005. An audience accustomed to stealth marketing, however, might think otherwise. According to a recent study 66% of magazine readers assume, mistakenly, that most mentions of brands in consumer magazines are paid advertisements. Joe Mandese, *When Product Placement Goes Too Far*, BROADCASTING & CABLE, Jan. 2, 2006.

[157] Patrick D. Healy, *Believe It: The Media's Credibility Headache Gets Worse*, N.Y. TIMES, May 22 2005, at C4 ("opinion polls for at least two decades have shown declining faith in print and television news.").

of bribery provides an analytical structure for the second perspective. Positive contributions of the media to public discourse require a degree of institutional integrity. The receipt of sponsorship payments without disclosure corrupts media institutions much like bribes corrupt governmental ones.

1. Public Discourse

a) Stealth marketing and communicative action

Jürgen Habermas theorized the "public sphere" as a discursive space separate from the market and the state in which citizens develop and communicate opinions.[158] Ideally, what takes place in the public sphere is "discourse" [159] among speakers who exert no force "except the force of the better argument" and have no motives "except a cooperative search for the truth."[160] Robert Post's First Amendment theory relies on a similar concept of "public discourse" that takes place in a "public communicative sphere."[161] For both theorists, public discourse plays a critical role in democratic legitimacy. It is the mechanism by which a heterogeneous population forms public opinion and comes to be invested in democratic government. For Habermas, a healthy public discourse fosters "a common will, communicatively shaped and discursively clarified."[162] For Post, such discourse is the means by which the public develops opinions and comes to "identify a government as their own."[163]

Only certain kinds of speech are conducive to public discourse. Post puzzles over the tension in American free speech jurisprudence between faith in "an

---

158. JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (Thomas Burger trans. 1989) (1962). For a theoretical examination of the impact of Habermas' work on media policy, see generally PETER DAHLGREN, TELEVISION AND THE PUBLIC SPHERE (1995); Nicholas Garnham, *The Media and the Public Sphere*, *in* COMMUNICATING POLITICS: MASS COMMUNICATIONS AND THE POLITICAL PROCESS 41 (Peter Golding et al. eds., 1986).

159 JÜRGEN HABERMAS, 1 THEORY OF COMMUNICATIVE ACTION 23, 41-42 (T. McCarthy trans. 1984).

160 *Id.* at 25.

161 Post, *supra* note xx [Commercial Speech] at 22. *See also* Lawrence B. Solum, *Freedom of Communicative Action: A Theory of The First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 118-135 (1989) (deriving First Amendment theory from Habermas' discourse theory).

162 JÜRGEN HABERMAS, 2 THE THEORY OF COMMUNICATIVE ACTION 81-82 (T. McCarthy trans. 1987); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: A DISCOURSE THEORY OF LAW AND DEMOCRACY 170 (William Rehg Trans., 1996) (legitimate "political power derives from the communicative power of citizens").

163 *Id.* at 2368. [Reconciling]. *See also* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 639 (1990) (the purpose of public "discourse is to enable the formation of a genuine and uncoerced public opnion in a culturally heterogeneous society."). *See also* Post, *supra* note xx [Reconciling] at 2371 (addressing "the legitimation-producing effects of speech understood as a vehicle of participation.").

uninhibited marketplace of ideas in which truth will ultimately prevail"[164] and a belief that some kinds of speech should be inhibited. On the one hand, "[t]he First Amendment recognizes no such thing as a "false idea,"[165] and yet the regulation of false ideas in the context of professional malpractice[166] and misleading commercial speech[167] is commonplace. The theory of public discourse resolves this tension. The speech that matters under the First Amendment is speech "that is embedded in the kinds of social practices that produce truth."[168] Such practices reflect "a commitment to the conventions of reason, which in turn entail aspirations toward objectivity, disinterest, civility, and mutual respect."[169] One is participating in public discourse, and therefore entitled to full First Amendment protection, when one is "participating in the public life of the nation" or "inviting reciprocal dialogue or discussion," but not one is trying "simply to sell products."[170]

Habermas has developed a complex theory of speech as it relates to public discourse. In broad outline, his formal system distinguishes between the "communicative action" and "strategic action" that language performs in social interaction.[171] Public discourse depends upon the existence of communicative action, which is communication that seeks to "reach understanding" or "communicatively achieved agreement."[172] The purpose of communicative action is to persuade by using a set of "validity claims." Descriptions of the world as it is, in news for example, are what Habermas calls "constative" utterances whose claim to validity is truth.[173] "Expressive" utterances in stories and such assert the validity claim of sincerity.[174] Participants to communicative action either accept these validity claims

---

[164] Turner Broad. Sys., Inc. v. FCC, 507 U.S. 1301, 1304 (1994) (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

[165] Hustler Magazine, Inc. v. Falwell, , 485 U.S. 46, 51 (1988)

[166] *See* Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. LAW REV. 2353, 2364 (2000) (citing cases).

[167] *See, e.g.*, Rubin v. Coors Brewing Col, 514 U.S. 476, 482 (1995).

[168] *See* Post, *supra* note xx [Reconciling] at 2366.

[169] See Post, *supra* note xx at 2365 [Reconciling]. *See also* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 37, 38 (2000) (inferring from commercial speech cases that what is necessary for public discourse is rational reflection and uncoerced choice).

[170] Post, *supra* note [Commercial Speech] at 12, 18. *See also* Solum, *supra* note xx at 125-126 (explaining why commercial speech is not public discourse).

[171] Habermas seeks to not describe the way that speech actually functions in everyday life, but instead to construct an idealized system of how speech might operate to maintain and transform social relationships. *See* HABERMAS, *supra* note x [1TCA] at 328. *See generally*, Hugh Baxter, SYSTEM AND LIFEWORLD IN HABERMAS'S THEORY OF LAW, 23 *Cardozo L. Rev.* 473, 496 (2002) (discussing Habermas' "formal pragmatics").

[172] HABERMAS, *supra* note xx [1CA] at 305.

[173] *Id*. at 75, 99.

[174] *Id*. at 325-6. In addition, there are "regulative" utterances whose claim to validity is rightness. *Id.* at 75. Such speech, taking the form, for example, of imperatives, are less relevant to editorial functions.

or subject them to criticism and demand justification.[175] It is "the mutual acceptance of the validity claims, or further discussion between speaker and hearer aimed at consensus concerning those claims" that is the "'mechanism of understanding' that coordinates communicative action."[176]

The object of strategic action is not understanding, but influence.[177] Communicative action too seeks to influence, but only by using argument on the basis of shared belief about the validity claims that are being asserted. By contrast, strategic action operates outside the validity claims and cannot be justified through them. More precisely, at least in the case of concealed strategic action, the speaker cannot truthfully avow the validity claim on which he depends for effective strategic action.[178] Suppose, for example, I share a list of my favorite music with co-workers. If this is communicative action, my colleagues may challenge my sincere preference for the music or disagree with my taste. I will try to convince them that in fact this is my authentic choice and I have chosen well. In a sense, I have promised to defend my validity claims if asked. Now suppose I have been paid to promote particular music in my workplace with my endorsement. What appears to be an effort to reach understanding with my co-workers is actually an attempt to influence their choices through an implicit claim of sincerity I cannot justify. If asked, I cannot redeem my validity claims.

Habermas' theory provides an anatomy of deception,[179] but it does much more. It shows how, as Hugh Baxter puts it, strategic action is "parasitic on communicative action."[180] If one does not assume that the preconditions for communicative action have been met, strategic action will not work. By the same token, if one assumes away the preconditions for communicative action, discourse is impossible. Even knowing that Habermas' "ideal speech situation" is an impossible ideal, discourse participants "have to start from the (often counterfactual) presupposition" that the situation is "satisfied to a sufficient degree of approximation."[181] The migration of strategic action into public discourse reduces the confidence with which communicators can make that supposition.

---

[175] *Id.* at 99.

[176] Baxter, *supra* note xx [Buffalo] at 213.

[177] HABERMAS, *supra* note xx [1CA] at 286. In defining these terms, Habermas associates the philosophy of language terms "illocutionary" and "perlocutionary" respectively with communicative action and strategic action. Illocutionary acts are expressive only. Perlocutionary acts use expression instrumentally in order to bring about certain ends.

[178] *See* Baxter, *supra* note xx [Buffalo] at 214 ("In concealed strategic interaction, at least one participant pursues aims that he knows could not be avowed without jeopardizing that participant's success, while at least one participant assumes that all are acting communicatively.").

[179] HABERMAS, supra note xx [1CA] at 332-3.

[180] *See* Baxter, *supra* note xx [Buffalo] at 215.

[181] HABERMAS, *supra* note xx at 25. The ideal speech situation is one in which there is universal participation, equality of communicative opportunity and no compulsion. *Id.*

Sponsorship disclosure law directly advances the public discourse that Post and Habermas idealize. The media provides what Post calls a "structural skeleton" for public discourse.[182] If communicative action is compromised in the media, public discourse necessarily suffers. Undisclosed sponsorship in the media is in essence strategic action masquerading as communicative action. Whether the speech urges consumption, as in advertising, or urges belief, as in propaganda, it aims to effect audience action through cognitive manipulation, rather than through persuasion (or not only through persuasion). Disclosure of sponsorship may or may not reduce strategic action. Unmasking sponsorship simply denies sponsors access to the validity claims on which communicative action depends. So preserved, however, these validity claims are stronger for unsponsored material and an audience member's belief in the "approximation" of ideal speech more supportable.

b) Speech hierarchies

Different types of sponsorship will have differential effects on public discourse. Undisclosed propaganda concerning a pressing public policy issue in the news and undisclosed advertising in a situation comedy both convert communicative action to strategic action, but the propaganda will generally be more significant for public discourse. This conclusion flows directly from the place that both Habermas and Post give to public discourse in legitimizing democratic government. Without developing the point, Coase too asserts that sponsorship disclosure is most important for "news programs and commentaries, [where] knowledge of the source of finance and the political and religious doctrines and affiliations of the speaker is likely to influence the degree of confidence one has in the accuracy of the news and the responsibility of the comment."[183]

Existing source disclosure requirements reflect the special place of communication on issues of public concern. Government propaganda is subject to special disclosure rules imposed on the governmental sponsor.[184] Broadcasters and candidates are both subject to heightened disclosure rules for campaign advertising.[185] And Section 317 itself imposes more rigorous disclosure requirements on the sponsorship of speech on controversial topics.[186]

Although discourse theory naturally favors speech about matters of public concern, speech-based distinctions cannot be drawn with precision and are not central to the works of either Habermas or Post. For Habermas, the claim to sincerity in artistic expression is as basic to communicative action as is the claim to truth in factual expression. An authentic cultural life has its place alongside robust political

---

[182] Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1276 (1995).
[183] Coase, *supra* note xx at 313.
[184] *See supra* notes xx.
[185] *See supra* notes xx.
[186] *See supra* note xx.

discourse. For Post the "conflicting visions of national identity" which "continuously collide and reconcile" in the public sphere may have nothing to do with debates on specific policy proposals.[187]

Purely as a practical matter, courts have long recognized the impossibility of separating art from politics from commerce. As the Supreme Court has noted time and again in its First Amendment jurisprudence, speech-based classifications are unstable because "[o]ne man's vulgarity is another's lyric"[188] and "[w]hat is one man's amusement, teaches another's doctrine."[189]

Beyond practicality, there is in media law a substantive recognition that mediated communications of all kinds can come to influence the conduct of public life and are therefore part of public discourse. Consider, for example, the famous D.C. Circuit case of Banzhaf v. FCC, in which Judge David Bazelon had to assess the influence of advertising on the formation of public opinion.[190] When the case was decided, broadcasters were required to provide airtime to both sides of any "controversial issue of public importance" under the erstwhile fairness doctrine.[191] It was not clear, however, whether the promotion of a consumer habit, like cigarette smoking, counted as a controversial issue, nor was it clear whether an advertisement counted as an expression covered by the fairness doctrine. In 1967, a George Washington University law professor convinced the FCC to answer both questions in the affirmative and to find that a television station had violated the fairness doctrine by broadcasting commercials "which by their portrayals of youthful or virile-looking or sophisticated persons enjoying cigarettes in interesting and exciting situations deliberately seek to create the impression …that smoking is … a necessary part of a

---

[187] Post, *supra* note [Commercial Speech] at 11 (rejecting even the categorical exclusion of advertising, much less art or sport, from the domain of public discourse because "advertising deeply influences our sense of ourselves as a nation."). *See also* Stuart Ewen, *Advertising and the Development of Consumer Society*, in CULTURAL POLITICS IN CONTEMPORARY AMERICA 82 (Ian Angus & Sut Jhally eds., 1989) (discussing the fusion of advertising images and culture); RONALD K. L. COLLINS AND DAVID M. SKOVER, THE DEATH OF DISCOURSE 114 (2d ed. 2005) (why "...America's self-identity is bound up with commercialism.").

[188] Cohen v. California, 403 U.S. 15, 25 (1971). *See also* Hustler Magazine v. Falwell, 485 U.S. 46, 53-55 (1988) (describing the contribution political cartoons make to political discourse).

[189] Winters v. New York, 333 U.S. 507, 510 (1948); *see also* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (the "importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.").

[190] Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. den.*, 396 U.S. 842 (1969).

[191] *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-82 (1969). The FCC later decided to exclude advertising from the reach of the fairness doctrine. The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C.2d 1, 23 (1974) (commercials excluded unless they made a "meaningful statement which obviously addresses, and advocates a point of view on, a controversial issue of public importance."). Later, the FCC did away with the fairness doctrine entirely, *In re* Syracuse Peace Council, 2 F.C.C.R. 5043 (1987), *aff'd sub nom*. Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989).

rich full life."[192] The D.C. Circuit affirmed, concluding that cigarette smoking was a controversial issue and that advertisements so profoundly affect consumer consciousness that they must count as expression.[193]

Indeed, it is because of the continuous cross-pollination between the promotional and the editorial, the political and the entertaining, that flagging sponsorship can be so important to the integrity of discourse. Commercial and rhetorical symbols can have very different meanings depending on who uses and them and why.[194] Consider Mattel's Barbie doll. In a series of lawsuits at the beginning of this century, various artists defended their satiric use of the Barbie doll's image[195] and name[196] against Mattel's claims that such uses infringed the company's copyrights and trademarks.[197] The courts ruled in favor of the artists in large part because they had transformed an image carefully maintained and marketed by Mattel into social commentary on the values Barbie supposedly projects.[198] One case involved photographs the artist said "'critique[d] the objectification of women'" by posing Barbie with vintage kitchen appliances.[199] Another featured a pop song about an empty-headed "Barbie girl in her Barbie world."[200] The commentary was both art and political narrative, both an amplification of corporate symbols and a revolt against them. How different this commentary would have been had Mattel actually sponsored the art, unbeknownst to the audience.

2. Corruption of Media Integrity

Given the symbiosis between commerce and culture, we might question whether commercial media entities can ever engage in authentic communicative action. Is there in the Fox news editor or the Viacom producer an editorial voice worth protecting through sponsorship disclosure requirements? A theory of discourse

---

[192] Banzhaf v. FCC, 405 F.2d 1082, 1086 (D.C. Cir. 1968), *cert. den.*, 396 U.S. 842 (1969).
[193] *Id.* at 1098-99.
[194] It is for this very reason that intellectual property scholars have argued for the public's right to use logos and copyrighted material in new contexts. *See, e.g.*, Rebecca Tushnet, [Copyright as a Model for Free Speech Law], *supra* note xx at 16; Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L. J. 1 (2002) (arguing that the First Amendment trumps copyright law when the latter would interfere with a "freedom of imagination"); Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879, 1881 (2000) (the recoding of marketing material adds to the creation of "diverse and antagonistic" communications) (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945).
[195] Mattel v. Walking Mountain Productions, 353 F.3rd 792 (9th Cir. 2003);
[196] Mattel v. MCA Records, 296 F.3rd 894 (9th Cir. 2002).
[197] For an excellent discussion of this kind of cultural recoding of intellectual property see Justin Hughes, *Recoding Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923 (1999).
[198] *See* Walking Mountain Productions, 296 F.3rd at 802 (noting Mattel's "impressive marketing" of Barbie); MCA Records, 296 F.3rd at 898 (noting that Barbie is a "symbol of American girlhood").
[199] Walking Mountain Productions, 353 F.3rd at 796.
[200] MCA Records, 296 F.3rd at 901.

harm suggests that the answer is yes by distinguishing between commercial motivation and express sponsorship. The agenda of the commercial media, assuming nothing but a profit motive, is to attract audience attention. In offering content on this basis, the editor makes a validity claim combining truth and sincerity. She says, in effect, "you like this communication" or "I think you will like it." The same cannot be said for the sponsor. The sponsor seeks not to please the audience with its communication, but to use communication to induce action. An editor speaking a sponsor's promotional message and advancing the sponsor's agenda cannot redeem a claim to either sincerity or truth.

This distinction between ordinary commercial motivation and sponsored motivation helps to make sense of the powerful intuition that undisclosed sponsorship is a form of bribery. On this view, stealth marketing corrupts media institutions, and their function in democratic discourse, much as bribery corrupts governmental institutions, and their function in democratic governance. The word integrity, from the Latin root integer, means wholeness. A person with integrity, Stephen Carter writes, is "a person somehow undivided."[201] The effect of covert sponsorship is to divide the editor, enlisting her into the service of a marketing message without the knowledge of the audience.

a) Undisclosed sponsorship as bribery

Commentators often characterize sponsorship disclosure law – particularly as it relates to payola – as a form of bribery law.[202] Indeed, the American Law Institute revised the commercial bribery provisions of its 1962 *Model Penal Code* specifically to reach payola[203] and the recent New York state payola prosecutions of Sony BMG and Warner Music were brought under the state's commercial bribery laws.[204]

---

[201] STEPHEN L. CARTER, INTEGRITY 7 (1996).

[202] *See, e.g.*, Stuart Green, *Bribery*, in DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW 195 (Stuart Green & Antony Duff, ed. 2005); Lindgren, *supra* note [Bribery-Extortion] xx at 1707 (analogizing bribery and payola to the extent that they may both involve personal gain at the expense of professional function); Statement of Commissioner Jonathan Adelstein, 2005 WL 1876366 (Aug. 8, 2005) ("The vitality of radio is sapped when music is selected based on bribes rather than merit.").

[203] *See* NOONAN, *supra* note xx at 578. The revision characterized payola as the "breach of the duty to act disinterestedly."). *Id.* at 790, n. 46. In today's Model Penal Code, the applicable section of the commercial bribery provision reads: "A person who holds himself out to the public as being engaged in the business of making disinterested selection, appraisal, or criticism of commodities or services commits a misdemeanor if he solicits, accepts or agrees to accept any benefit to influence his selection, appraisal or criticism." Model Penal Code, §224.8(2).

[204] *See, e.g.*, Sony BMG Music Entertainment, Assurance of Discontinuance Pursuant to Executive Law §63(15), available at http:///www.oag.state.ny.us/press/2005/jul/payola.pdf. Commercial bribery and payola may actually be quite distinct, since commercial bribery, unlike payola, posits harm to competitors and employee gain at employer expense. *See, e.g.*, American Distilling Co. v. Wisconsin Liquor Co., 104 F.2d 582, 585 (7th Cir. 1939) ("The vice of conduct labeled 'commercial bribery' ... is

The linguistic structure, and required elements, of the federal bribery and sponsorship disclosure laws support the comparison. The Communications Act requires disclosure when "any money, service or valuable consideration is directly or indirectly paid" for the transmission of "broadcast matter".[205] Federal bribery law covers the receipt by a "public official" of "anything of value … in return for …being influenced in the performance of any official act".[206] In both cases, the regulated activity requires intent to influence, usually evidenced by a quid pro quo agreement between the sponsor/briber and the broadcaster/official.

Beyond these similarities, bribery and sponsorship disclosure law are quite different, and not merely because one law proscribes activity that the other merely requires be disclosed. Bribes induce the bribee to renege on what Stuart Green calls her "positional duties."[207] In the case of the public official, the bribee has a fiduciary duty to her constitutents which she betrays. The positional duty of an editor is not nearly as clear. Editorial integrity lacks the pedigree and place of public integrity as the object of anti-bribery laws. On one view, editorial integrity requires editors to operate in the public interest, selecting music, words or images in accordance with the editor's views of what will serve the public. While this is a virtuous aspiration, a discourse theory of editorial function does not require so much. Market-oriented editors can also act with integrity so long as they engage in communicative action. The sense in which stealth marketing functions like a bribe, corrupting the positional duties of editors, accommodates the two principal normative conceptions of editorial function.

b) The editorial function

Conceptions of editorial function echo the two principal conceptions of official function. According to Edmund Burke, the official has a duty to exercise his own best judgment as to the public interest, acting as a fiduciary for his constituents, but not necessarily bending to their will.[208] The more democratic perspective that the official is nothing more than the public's representative and should carry out the will of his constituents.[209]

---

the advantage which one competitor secures over his fellow competitors by his secret and corrupt dealings with employees or agents of prospective purchasers.").

[205] 47 U.S.C. § 317(a) (2005).

[206] 18 U.S.C. § 201(b) (2005).

[207] Green, *supra* note xx at 193, 202-208. NOONAN, *supra* note xx at 704 (bribery is a betrayal of "[t]rust, that is, the expectation that one will do what one is relied on to do."). *See also* McConnell v. FEC, 540 U.S. 93, 136 (2003) (noting the "interest in preventing... the eroding of public confidence in the electoral process through the appearance of corruption").

[208] *See* Edmund Burke, Speech to the Electors of Bristol (1774) ("Your representative owes you not his industry only, but his judgment; and he betrays instead of serving you if he sacrifices it to your opinion."). *See generally* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 174-175-76 (1969); CARL COHEN, DEMOCRACY 90 (1971).

[209] *See* Cohen, *supra* note xx at 90.

The public interest conception of editorial function makes the editor a fiduciary for the public. He plays the music he thinks the public should hear, or reports what the public should know.[210] It is this view of the journalist's duty that animates the conception of the press as the "fourth estate" and the extension of an institutional privilege to the press in the First Amendment.[211] Historically, the view that the press should function as fiduciaries of the public interest helped drive late 19th century journalism from a partisan to objective model.[212] Later, this view of the press, combined with the special physical features of broadcasting, led to the codification of the public interest obligations of the broadcast media in the Communications Act.[213]

As Lee Bollinger points out in his important book, *Images of a Free Press*, the ideal of the editor as public fiduciary has figured large in the Court's press-related First Amendment cases.[214] These cases imagine journalists as public regarding, serving as a "watchdog" over the government.[215] Drawing on these cases, Professor Randall Bezanson has characterized the journalistic voice as "reasoned, public-

---

[210] C. Edwin Baker, *Giving the Audience What it Wants*, 58 OHIO ST. L.J. 311, 316 (1997) (distinguishing media products from "typical" products like cars and can openers); Cass Sunstein, *Television and the Public Interest*, 88 CALIF. L. REV. 499, 514 (2000) (television programming "is not an ordinary product" to be sold based solely on demand); Randall P. Bezanson, *Atomization of the Newspaper: Technology, Economics & the Coming Transformation of Editorial Judgments about News*, 3 COMM. L. & POL'Y 175, 230 (1988) (journalists should give the public what it needs, not what it wants); Ken Auletta, Fault Line, THE NEW YORKER, Oct. 10, 2005 (quoting Los Angeles Times managing editor Dean Baquet: "It's not always our job to give readers what they want…Southern newspapers are still hanging their heads because generations ago they gave readers what they wanted – no coverage of segregation and the civil rights movement…If we don't do that, who will?").

[211] See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR FOUND. RES. J. 521, 593 (1977); Potter Stewart, "Or of the Press," 26 HASTINGS L. J. 631, 634 (1975) ("The primary purpose of the constitutional guarantee of a free press was…to create a fourth institution outside the government as an additional check on the three official branches…The relevant metaphor… is of the Fourth Estate."). The term "fourth estate" was coined by Thomas Carlyle in 1841 to refer to reporters in the British House of Commons who exhibited autonomy from the government and assumed a duty to the public to speak the truth. *See* Denis McQuail, MEDIA ACCOUNTABILITY AND FREEDOM OF PUBLICATION 52 (2003).

[212] See DAVID T.Z. MINDICH, JUST THE FACTS: HOW "OBJECTIVITY" CAME TO DEFINE AMERICAN JOURNALISM 114-116 (1998) (describing the appeal to progressives of public service and "facticity"); DARRELL M. WEST, THE RISE AND FALL OF THE MEDIA ESTABLISHMENT 51-54 (2001) (same).

[213] 47 U.S.C. § 301 (2005). *See generally* Henry Geller, *The Fiduciary Model: Regulating Accountability*, in MEDIA FREEDOM AND ACCOUNTABILITY 81-98 (Everette E. Dennis et al ed. 1989); LEE BOLLINGER, IMAGES OF A FREE PRESS 62-73 (1991) (describing the public interest rationale for broadcast regulation).

[214] *See* BOLLINGER, *supra* note xx at 1-23.

[215] Leathers v. Medlock, 499 U.S. 439, 447 (1991). *See also* Times-Picayune v. United States, 345 U.S. 594, 602 (1953) (central to American democracy is a "vigorous and dauntless press" that "vigilantly scrutinize[es]" official conduct and functions as "a potent check on arbitrary action or abuse.").

regarding, [and] independent."[216] In other areas of the law, courts have assumed editorial integrity and acted to protect consumers from its absence.[217]

Journalists themselves have assumed the obligation to act in the public interest. The Code of Ethics of the Society of Professional Journalists, for example, provides that journalists "should be free of obligation to any interest other than the public's right to know" and should avoid "conflicts of interest, real or perceived" and "[r]efuse gifts, favors, fees, free travel and special treatment."[218]

The public fiduciary, opinion-shaping conception of editorial function is not the only legitimate one, even for journalists.[219] The market-oriented norm requires nothing more of an editor than that she, like the public official, heed the public's command.[220] Under this conception of editorial function, the editor should satisfy consumer appetites as expressed in the market, not serve the public interest as filtered through editorial judgment.[221] According to this view, editorial choices to privilege crass over elevating programming or biased over objective reporting will be consistent with editorial integrity so long as they satisfy demand. Judge Richard Posner, for example, has recently defended biased news reporting as consistent with editorial duty because it produces market differentiation, ensuring that more consumers will be presented with the views they want.[222]

This market model of editorial function, if heretical for news programming, is less controversial when applied to entertainment programming. There is, as one

---

[216] Randall Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 855 (1999). *See also id*. at 760-61 (identifying features of editorial judgment that are important for press freedom cases).

[217] *See, e.g.*, S.E.C. v. Wall Street Pub. Institute, Inc., 851 F.2d 365, 371 (1988) (if articles touting securities in a particular company "are paid for by the company featured, …[it] would be inherently misleading" under the securities law given the usual assumptions about editorial integrity in magazine reporting.). *See also* Zweig v. Hearst Corp., 594 F.2d 1261, 1266-67 (9th Cir. 1979) (financial columnist violated securities laws by failing to reveal to investor-readers that he expected to gain personally if they followed his stock advice).

[218] Society of Professional Journalists, Code of Ethics, at http://www.spj.org/ethics.asp.

[219] *See* David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 478-79 (2002) (rejecting the public interest model of the press).

[220] *See* Alex Kozinski, *How I Stopped Worrying and Learned to Love the Press*, 3 COM. L. & POL'Y 163, 174 (1988) ("The media provide a commodity like any other."); Mark Fowler & Daniel Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 202, 210-11 (1982) ("[T]he public's interest . . . defines the public interest."); Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 Geo. L.J. 245, 266-92 (2003).

[221] The choices of a market-oriented editor may not be so simple where consumer and shareholder value diverge, such as when advertiser and audience preferences are not the same. *See* BRUCE M. OWEN & STEVEN S. WILDMAN, VIDEO ECONOMICS 91-92 (1992); ROBERT G. PICARD, THE ECONOMICS AND FINANCING OF MEDIA COMPANIES 135 (2002).

[222] Richard A. Posner, *Bad News*, N.Y.TIMES BOOK REVIEW, Jul. 31, 2005. *See* John C. Merrill, *The Marketplace: A Court of First Resort* in MEDIA FREEDOM AND ACCOUNTABILITY 12-14 (Everette E. Dennis, et al. ed. 1989) (outlining a marketplace model for journalistic practice).

commentator has put it, "no unwritten covenant between producers of entertainment and their audiences comparable to the one that leads the public to expect journalists to present the news without fear or favor."[223] Nor are there strong traditions in entertainment programming, as there are in journalism, of a "wall of separation" between business and editorial departments.[224] It would, however, be a mistake to segregate norms of editorial duty by genre. As noted above, entertainment media contribute to public discourse and the formation of public opinion. The choice "between being an arbiter and a tribune of public taste" presents for entertainment editors a quandary similar to the news editor's choice between the public interest and the public appetite.[225] The FCC itself seems to embrace the fiduciary model of editorial function in its enforcement of Section 317 for entertainment programming. Selections of music for broadcast, it has said, "must be guided by intrinsic merit rather than undisclosed consideration."[226]

Bribery and sponsorship disclosure law bolster public and editorial integrity, respectively, under either of the competing conceptions of positional duty. In the case of bribery, it is not hard to see how a bribe corrupts public integrity on either a fiduciary or representative theory of duty. Congressman Bob's vote to construct a power plant his constituents oppose, but that Bob believes is good for them, would fulfill Bob's obligation as a fiduciary and frustrate it as a representative. But under either theory, Bob's acceptance of a bribe for his vote would be a breach of duty. Bob has sold to the briber the loyalty owed either to his own judgment or to his constitutents' will.[227] Bribery law imposes minimal constraints on behavior to ensure that an official fulfills baseline obligations either to do what's best or to do what's wanted.

Sponsorship disclosure works in the same way in that it advances editorial integrity under either of the competing normative views of editorial function. Take an editor that receives payment to spin a story on the health insurance crisis, or to promote a product or service related to the story. Whether the story should have served the public interest or satisfied market demand for more information on the topic, the stealth marketing has distorted the editor's performance. The sponsor has

---

[223] LEO BOGART, COMMERCIAL CULTURE 73 (1995).

[224] The entertainment industry does, to some extent, police stealth marketing. MTV, for example, has a policy against product placement in the music videos it transmits. The concern is not audience deception, but audience alienation. Kaikati & Kaikati, *supra* note xx at 20.

[225] Andrew Stark, *Comparing Conflict of Interest Across the Professions*, in CONFLICT OF INTEREST IN THE PROFESSIONS 337 (Michael Davis & Andrew Stark 3d. 2001).

[226] Southeast Florida Broadcasting Limited Partnership, 1989 WL 512629 (F.C.C.) at *9 (1989) (emphasis added). *See also* Broadcast Localism, Notice of Inquiry, 19 F.C.C.R. 12425, 12438 (2004) ("payola-type practices are inconsistent with [broadcaster responsibilities] when they cause radio stations to air programming based on their financial stakes at the expense of their communities' needs and interests.").

[227] *See* NOONAN, *supra* note xx at 704.

commandeered the editor's allegiance that rightfully belongs either to some abstract notion of the public interest or to the audience that has consumed the media content. Sponsorship disclosure law ensures that when this transference of allegiance takes place, it is apparent to the public. Empowering the public with this knowledge not only preserves the quality of public discourse, but preserves a base level of public trust in the institutional media. [228]

c) Sponsorship disclosure and the quid pro quo

If undisclosed sponsorship compromises editorial integrity, so must other forms of influence that distort editorial choices. These forms of influence are multiple and varied. The journalist is subject to the force of her own belief system, the interests of her company, and the tastes of the public. So too, the entertainment producer may answer to his own muse, to advertisers interested in certain content genres, corporate pressures, or public fads. Sources shape what is covered and how.[229] Advertisers influence the selection of television programming by favoring some demographics over others[230] and light moods over darker ones.[231] As Edwin Baker has put it, "[a]dvertiser influence is so built into the market context that … it often [cannot] be easily proven, [and] frequently … occurs without any act of the

---

[228] As with public officials, we might well demand more, and ethical commitments are important in delivering more. The Radio and Television News Directors' Association policy calls for complete disclosure of any outside material used in a news story or program. Code of Ethics and Professional Conduct, Radio-Television New Directors Association, *available at* http://www.rtnda.org/ethics/coe.shtml (the purpose of such disclosure is to "protect the editorial integrity of the audio and video aired, to avoid commercialization of news stories, and to otherwise guard against third party influence of news content."). *See also* USC Annenberg Online Journalism Review, Code of Ethics, at http://www.ojr.org/ojr/wiki/ethics. (requiring disclosure of funding sources and avoidance of conflicts of interest).

[229] *See, e.g.*, HERBERT J. GANS, DEMOCRACY AND THE NEWS 45-68 (2003) (discussing how the reliance on official sources skews news reporting); DAVID CROTEAU & WILLIAM HOYNES, BY INVITATION ONLY 105-37 (1994) (showing the effects of the limited pool of experts consulted on television public affairs programs like Nightline).

[230] *See, e.g.*, C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097, 2165 (1992) ("Advertisers 'pay' the media to obtain the audience they desire, providing a strong incentive for the media to shape content to appeal to this 'desired' audience."); Cass Sunstein, *Television and the Public Interest*, 88 CALIF. L. REV. 499, 501, 514-15 (2000) ("Advertisers like certain demographic groups and dislike others, even when the numbers are equal; they pay extra amounts in order to attract groups that are likely to purchase the relevant products, and this affects programming content.").

[231] Baker, *supra* note [xx] at 2153-64 (discussing advertisers' interests in programming that creates a "buying mood" and avoids controversy); Inger L. Stole, *Advertising, in* CULTURE WORKS: THE POLITICAL ECONOMY OF CULTURE 100 (Richard Maxwell ed., 2001) (stating that advertisers "want the overall media content to complement their commercial messages . . . ."); Stuart Ewen, CAPTAINS OF CONSCIOUSNESS: ADVERTISING AND ITS SOCIAL ROOTS [pincite] (1976); WILLIAM LEISS, ET AL, SOCIAL COMMUNICATION IN ADVERTISING: PERSONS, PRODUCTS & IMAGES OF WELL-BEING 263 (2nd ed. 1990).

advertiser inducing it".[232] No mass medium – not newspapers, television, or the Internet – operates outside of these currents of influence.

Sponsorship disclosure law ignores most of these influences, kicking in only when there is an exchange of "valuable consideration" for programming material.[233] Here again, there are parallels with bribery law. Like editors, public officials are buffeted by influences of all kinds. Legal campaign contributions can have as much impact as illegal bribes in advancing an agenda at odds with either the interests of constituents or the best judgment of the politician.[234] But contributions become bribes only when there is "a quid pro quo – a specific intent to give or receive something of value in exchange for an official act."[235] So with sponsorship disclosure law, the sponsor must intend to influence programming choices[236] and usually the exchange will have to be manifest in an explicit or tacit agreement before sponsorship disclosure rules apply.[237]

One reason to draw the line at the quid pro quo exchange, in sponsorship disclosure or bribery law, is if such exchanges are qualitatively different from other kinds of influence. We could, for example, assume a set of professional practices to which payola and the like are alien. By definition, then, they would encumber positional duties unlike influences that are internal to the position. However, since norms of professional behavior are fluid, it is possible for quid pro quo exchanges like payola to become common, as they have in the radio business. At that point, it is

---

[232] *See* Baker [Advertising], *supra* note xx at 2202

[233] *See* 47 U.S.C. § 317 (a)(1) (2005); 47 U.S.C. 508(f) (same). *See also* General Media Assocs., Inc., 3 F.C.C.2d 326, 327 (1966) (sponsorship disclosure required only when there is an agreement to exchange valuable consideration for the airing of broadcast material).

[234] Dennis F. Thompson, *Two Concepts of Corruption: Making Campaigns Safe for Democracy,* 73 GEO. WASH. L. REV. 1036, 1042-47 (2005) (noting the difficulty of distinguishing contributions from bribes); James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695, 1707 (1993) (arguing that it is difficult to separate bribery from campaign contributions); Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. Rev. 784, 808-09 (1985) (same).

[235] U.S. v. Sun-Diamond Growers of California, 526 U.S. 398, 404 (1999). *See also* ANDREW STARK, CONFLICT OF INTEREST IN AMERICAN PUBLIC LIFE 152-177 (2000) (discussing the distinction between contributions and bribes); JOHN T. NOONAN, JR., BRIBES 687-90 (1984) (discussing the quid pro quo exchange requirement in bribery law); SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 93 (1999) (same); James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction,* 141 U. OF PA. L. REV. 1695, 1707 (1993) (same).

[236] *See, e.g.*, Southeast Florida Broadcasting Limited Partnership, 1989 WL 512629 (F.C.C.) at *9 (1989) (scienter requirement was missing in the case of a "station employee [whose] acceptance of assorted gifts from record company promoters was not tied directly or indirectly to evidence of reciprocal musical selections at the [station]").

[237] Southeast Florida Broadcasting Limited Partnership, 1989 WL 512629 (F.C.C.) at *13 (1989) ("the demonstrative presence of an agreement or an unusual inducement" will be necessary to show "that the practice of accepting promotional copies of records …could in appropriate cases be regarded as consideration 'indirectly paid' to help secure the airing of [specific music selections]."

hard to say that the quid pro quo is external to the profession and one might need a normative theory of why such exchanges should be rendered uncommon.

The most likely such theory is that quid pro quo exchanges more powerfully undermine professional functions than do other kinds of influence. On this theory, the politician who exchanges a vote for money has reneged on his obligations more thoroughly than the politician who votes with a view to improving his prospects for future employment or to please campaign contributors. It may or may not be true that quid pro quo exchanges have a more dramatic impact on decisionmaking.[238] In the abstract, it is not at all clear that a quid pro quo exchange, especially if small, would be more coercive than other kinds of influence, or more likely to distort judgment. Consider the threat of a prominent news source, such as a high level government official or corporate executive, to deny an editor access unless the editor changes her editorial approach. In the absence of any exchange of value, the source will exert tremendous pressure on the editor to compromise her editorial judgment in a manner that would be considered by many external to the editorial process. The same can be said for an advertiser's threat to boycott a particular producer or network unless the storylines are more conducive to the advertiser's interests.[239]

A better justification for orienting the law around quid pro quo exchanges is prudential, not principled. Pay for play and like exchanges of valuable consideration are simply more easily policed than are other forms of influence. Compliance with either a legal prohibition or disclosure requirement can be monitored without excessive government intrusion into the rough and tumble of media and politics. In sponsorship disclosure law, as in bribery law, making mere gifts (consideration without exchange) or promises (exchange without consideration) the unit of regulation would impose unwarranted costs on desirable behavior.

Politicians enter into all sorts of agreements in furtherance of their duties, such as agreements to reciprocate votes on particular bills or trade election endorsements.[240] Enforcement of a law that treated these agreements as bribes would insert prosecutors into the complex give and take of the workaday political process. As bribery experts have noted, such an expanded definition of bribery would have the unfortunate effect of chilling political communication.[241] Courts have in fact been wary of expansive definitions of bribery for fear of inhibiting normal political functions.[242] Requiring a quid pro quo exchange of valuable consideration creates a

---

[238] For an argument that campaign contributions are very influential, see Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301 (1989).

[239] *See* Baker, *supra* note xx [Advertising] at 2202-03.

[240] *See* Thompson, *supra* note xx at 1043.

[241] Green, *supra* note xx at 199 (It would chill the legislative process if we characterized vote exchange agreements as bribes rather than "merely log rolling, legislative 'business as usual'".)

[242] McCormick v. United States, 500 U.S. 257, 272 (1991) (overturning bribery conviction on basis of campaign contribution made without any explicit quid pro quo of action by public official so as not to "open to prosecution . . . conduct that in a very real sense is unavoidable so long as election campaigns

bright line that lowers the cost of enforcing bribery law and reduces the risks of deterring desirable behavior such as campaign contributions and political agreements.

Similarly, enforcement of a sponsorship disclosure rule that covered less well-defined forms of influence over media content, like the influence of sources over editors, would risk interjecting government into the thousands of judgments that editors make every day. Publicists influence the news media with spin on corporate and political developments and corporate marketing departments ensure that the media portray their products in a positive light without payment.[243] Requiring these influences to be disclosed could result in excessive government intrusion into editorial decisions and associated chilling effects on speech – speech that is not simply desirable but constitutionally protected.[244]

The fear of chilling speech has guided courts in interpreting another disclosure law triggered by valuable consideration paid to editors. The Securities Act's "anti-touting" provision[245] seeks to "meet the evils of … [publications] that purport to give an unbiased opinion [of securities] but which opinions in reality are bought and paid for."[246] Under this provision, a publisher must disclose any consideration it receives from an issuer of securities in return for publicity.[247] According to the D.C. Circuit, the provision of substantial amounts of text describing a security could not constitute "consideration" sufficient to trigger disclosure because "[c]onditioning regulation on the extent to which text is used … would result in both SEC and court interference with the 'crucial process' of editorial control".[248]

---

are financed by private contributions or expenditures, as they have been from the beginning of the Nation.").

[243] *See* KATHLEEN HALL JAMIESON & KARLYN KOHRS CAMPBELL, THE INTERPLAY OF INFLUENCE: NEWS, ADVERTISING, POLITICS, AND THE MASS MEDIA 113-114, 137-43 (5th ed. 2001).

[244] Cf. Comments of PR Newswire, Assoc. LLC in Use of Video News Releases by Broadcast Licensees and Cable Operators, MB Docket No. 05-171 (FCC filed June 22, 2005) at 35-39 (discussing fears of excessive governmental scrutiny if too much disclosure is mandated).

[245] The provision, contained in a section called "Fraudulent Interstate Transactions," makes it "unlawful for any person…to publish, give publicity to, or circulate any …communication which…describes [a] security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt … of such consideration and the amount thereof." 5 U.S.C. §77q(b) (2005).

[246] H.R. Rep. No. 85, 73d Cong., 1st Sess. 24 (1933). *See also* United States v. Amick, 439 F.2d 351, 365 (7th Cir.), *cert. den.*, 403 U.S. 918 (1971) ("The substantial interest of the investing public in knowing whether an apparently objective statement in the press concerning a security is motivated by promise of payment is obvious.").

[247] 5 U.S.C. §77q(b) (2005).

[248] S.E.C. v. Wall Street Pub. Institute, Inc., 851 F.2d 365, 374 (D.C. Cir. 1988) (quoting Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 257-58 (1974)) (holding there was no unconstitutional prior restraint in enjoining publication without disclosure of "crisp transaction[s] sharply distinguished from normal journalistic editing or news gathering practices" including the use of sponsor-provided copy). *See also* SEC v. Omnigene Devs., Inc., 105 F. Supp. 2d 1316, 1320 (S.D. Fla. 2000) (finding an anti-touting violation).

We must be careful not to exaggerate the brightness of the line the law draws with the quid pro quo exchange. It remains to be determined on a case by case basis what counts as an exchange and as valuable consideration. The case of video news releases that are provided by publicity agents to news editors shows how difficult these determinations can be. Congress has made clear that an explicit agreement between sponsor and broadcaster is not necessary to trigger disclosure. An agreement may be inferred from a broadcaster's receipt of consideration so substantial that it is they are likely to distort editorial judgment.[249] Do video news releases constitute such consideration?[250] On the one hand, these videos are expensive to produce, unlike print press releases, and, when provided for free, function as subsidies to news organizations.[251] On the other hand, an editor's decision to quote from or use extensive portions of a video news release is not inconsistent with independent editorial judgment. The quid pro quo standard will not resolve such debates, but will reduce their frequency by narrowing the coverage of regulation.

IV. DISCLOSURE, FREE SPEECH, AND MARKETS

Thus far, we have seen how sponsorship disclosure law functions to protect public discourse and editorial integrity from the harm that stealth marketing can inflict. This section defends such a law against two possible lines of attack: that the First Amendment forbids government mandated disclosures of sponsorship and that such mandates are undesirable, even if permissible, because market forces will provide the optimal amount of disclosure.

A. First Amendment Vitality of Disclosure Rules

The existing sponsorship disclosure law applies only to broadcasting and, perhaps because of the reduced First Amendment protection afforded to the broadcast

---

[249] *See* H.R. Rep. 86-1800 at 19-20 (1960) (distinguishing hotel rooms, which support inference of agreement, from free records, which do not). Congress was seeking to tighten the FCC's previous requirement that broadcasters disclose *all* donated program material and other gifts on the theory that such gifts in fact "induced" broadcast of "particular program material." Public Notice, Sponsorship Identification of Broadcast Material, 40 F.C.C. 69, 70 (1960). The FCC believed that receipt of program materials for free had the "practical effect" of being an inducement to air the materials. *Id.*

[250] If these news releases concern controversial issues, they are subject to special sponsorship disclosure provisions even if they do not constitute valuable consideration. 47 U.S.C. §317(a)(2) (2005) (requiring sponsorship disclosure for inclusion of controversial promotional messages even in the absence of valuable consideration).

[251] *See* Mark D. Harmon & Candace White, *How Television News Programs Use Video News Releases*, 27 PUB. REL. REV. 213, 214-216 (2001) (reviewing the literature on video news releases as information subsidies to broadcasters). *See also* Baker, *supra* note xx at 2205 ("When the firm supplies the media with 'free' videos or press releases, it uses economic resources to influence media content."). The problem with the subsidy argument is that it could apply to all publicity efforts, including print releases and press conferences. *See, e.g.*, Cook, *supra* note xx at 44 (characterizing early 20th century government publicity efforts as a "subsidy" to the press).

medium, has never been challenged. Even under the most exacting First Amendment review, however, a carefully drawn sponsorship disclosure law survives constitutional scrutiny and, indeed, furthers First Amendment interests.

1. Disclosure as a First Amendment Value

The previous section argued that sponsorship disclosure promotes public discourse. Under contemporary free speech jurisprudence, it is the job of the First Amendment to promote "public discourse"[252] and to protect "public debate"[253] and "the public expression of ideas."[254] It is not a large leap, then, to conclude that sponsorship disclosure law, with its discourse-enhancing function, advances First Amendment interests. Such a leap entails a theory of the First Amendment that gives to government a role in sustaining and enhancing the quality of public discourse. Under this theory, the First Amendment is not only an instrument of negative liberty to protect private rights,[255] but confers positive obligations on the government to safeguard the "public rights" of discourse.[256]

A public rights view of the First Amendment emphasizes the audience's interest in information flow, in addition to the speaker's interest in expression.[257] This view is most famously associated with Alexander Meiklejohn, whose emphasis on free speech as necessary for democratic self government led him to privilege

---

[252] Rosenberger v. University of Virginia, 515 U.S. 819, 831 (1995); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988); Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 682-3 (1986); Cornelius v. NAACP legal Defense & Educ. Fund, 473 U.S. 788, 802 (1985). .

[253] Hustler Magazine, 485 U.S. 46, 53 (1988).

[254] Street v. New York, 394 U.S. 576, 592 (1969). *See also* Thornhill v. State of Alabama, 310 U.S. 88, 101-102 (1940) ("The freedom of speech and of the press …embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.").

[255] For commentary placing individual liberty interests at the center of the First Amendment's free speech protections, see C. Edwin Baker, HUMAN LIBERTY AND FREEDOM OF SPEECH 47-51 (1989); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233-37 (1992); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 353-71 (1991).

[256] *See* Gregory P. Magarian, *Regulating Political Parties Under a "Public Rights" First Amendment,* 44 WM. & MARY L. REV. 1939, 1972-91 (2003) (building on Meikeljohn's political theory to describe a "public rights" approach to the First Amendment which would allow greater regulation); Gregory P. Magarian, *The First Amendment, The Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 110-114 (2004) (arguing that courts should invoke the First Amendment to enjoin private action that undermines public debate on matters of national policy).

[257] *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 26 (1948) (the central concern of free speech protections are "not that everyone shall speak, but that everything worth saying shall be said."); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 75 N.Y.U.L.REV. 354, 377-386 (1999) (elaborating on positive liberty theories of the First Amendment.

political discourse over other forms of speech.[258] Students of Meiklejohn like Cass Sunstein[259] and Owen Fiss,[260] have built upon this democratic theory to argue for government intervention in speech markets in order to facilitate the circulation of ideas – political and other – among listeners. Justice Breyer's constitutional theory reflects a similar approach, leading him to balance the liberty interests of the speaker against speech interests on the other side.[261] The public rights perspective has been particularly powerful in media law, with both courts[262] and commentators[263] accentuating the role of the media in building a robust speech environment.

Mandated source disclosure is the kind of government intervention in speech markets that the public rights theory of the First Amendment supports. The discourse-enhancing role of government-mandated disclosure is most evident in election law.[264] The Supreme Court has recognized here that "[i]dentification of the source of [political] advertising may be required … so that people will be able to evaluate the arguments to which they are being subjected."[265] The "stand by your ad"

---

[258] *Id.* at 27.

[259] Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 275-77 (1992).

[260] Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 140, 1409-11 (1986).

[261] *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION [pincite] (2005); Turner Broad. Sys. v. FCC, 520 U.S. 180, 225- 295 (1997), (Breyer, J., concurring) (balancing viewers' interests in a diverse array of local broadcast channels with cable operators' interests in editorial control over their systems); Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 743-44 (1996) (balancing cable operators' interests in editorial control against cable programmers' interests in access); Bartnicki v. Vopper, 532 U.S. 514, 536-41 (2001) (Breyer J., concurring) (balancing the right of the media to publish and the individual's right of privacy in private speech).

[262] *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the right of the viewers and listeners, not the right of broadcasters, which is paramount.").

[263] *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 554-65 (central purpose of the First Amendment is to protect media's operation as a check on government); Neil Weinstock Netanel, *The Commercial Mass Media's Continuing Fourth Estate Role*, in THE COMMODIFICATION OF INFORMATION 317, 320-23 (Niva Elkin-Koren & Neil W. Netanel eds., 2002) (media plays an important role, supported by the First Amendment, in sustaining liberal democracy); Potter Stewart, "Or of the Press", 26 HASTINGS L. J. 631 (1975) (Press Clause of the First Amendment vests the media with special responsibilities and protections in order to safeguard the free flow of information to the public).

[264] Campaign finance restrictions, in addition to disclosure requirements, serve this discourse enhancing purpose. Individuals may make unlimited expenditures that tie them directly to the candidate's speech, but are limited in their contributions that function less expressively as general support for a candidacy. *See* Buckley v. Valeo, 424 U.S. 1, 20-21 (1976) (campaign contributions receive less protection than campaign expenditures because "the transformation of contributions into political debate involves speech by someone other than the contributor"). *See also* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 665-66 (1990) (state could regulate Chamber of Commerce's political speech because it was not necessarily reflective of the views of the Chamber's members).

[265] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 792 n.32 (1978). *See also* McConnell v. FEC, 540 U.S. 93, 196-97 (2003) (upholding campaign disclosure requirements that further the "First

provision of the Bipartisan Campaign Reform Act of 2002 is a particularly clear example. [266] This provision requires federal candidates to approve their television and radio commercials with their own voice and image: "I am Joe Smith and I approve this ad."[267] Such disclosure is unnecessary to prevent deception – the law already required sponsorship disclosure and, in any case, sponsorship is fairly evident on the face of the ads. Instead, the goal is to more directly associate in the public mind the ad and its sponsor, thereby highlighting its authenticity and increasing its value to public discourse.[268]

It will often be the case that government interventions in speech markets that might be justified on a public rights theory cannot survive objections from speaker autonomy. In Buckley v. Valeo, for example, the "concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others" was repudiated as a method to enhance public discourse.[269] A case upholding criminal sanctions on foreign propagandists for failure to comply with a federal registration requirement shows how the public rights theory can be misused. According to Justice Black, who dissented on unrelated grounds, the requirement "implements rather than detracts from the prized freedoms guaranteed by the First Amendment" by protecting readers from "the belief that the information comes from a disinterested source."[270] While the informational purpose of the regulation accords with the public rights theory, a statue that empowers the federal government to label speech as "foreign propaganda" reaches too far.

Sponsorship disclosure, by contrast to governmental labeling, is not censorious. Nor is it an intervention that impermissibly privileges listener interests

---

Amendment interests of individual citizens seeking to make informed choices in the political marketplace"); Buckley v. Valeo, 424 U.S. 1 (1976)(upholding disclosure requirements for campaign contributions); U.S. v. Harriss, 347 U.S. 612 (1954) (upholding disclosure requirements for lobbying activities related to federal legislation). *See also* Plante v. Gonzales, 575 F.2d 1119 (5th Cir. 1978) (upholding required disclosure of Florida state officials' financial interests).

[266] 2 U.S.C. § 441d(d) (2005); 11 C.F.R. § 110.11 (2005).

[267] 2 U.S.C. § 441d(d)(1)(B) (2005) (a television commercial must include either "an unobscured, full-screen view of the candidate making the statement [of approval]" or a voice-over by the candidate "accompanied by a clearly identifiable photographic or similar image of the candidate.").

[268] *See* Lee, *supra* note xx at 1037. A further purpose of these provisions, the constitutionality of which the Supreme Court did not consider, was to reduce negative advertising. *See* Nicholas Stephanopoulos, *Stand by Your First Amendment Values – Not your Ad: The Court's Wrong Turn in* McConnell v. FEC, YALE L. & POLICY REV. 370, 376 (2005) (arguing that the provision is unconstitutional).

[269] Buckley v. Valeo, 424 U.S. 1, 48-49 (1976).

[270] Viereck v. United States, 318 U.S. 236, 251 (1943) (Black J., dissenting on separate and unrelated grounds). *See also* Meese v. Keene, 481 U.S. 465, 480 (1987) (disclosure "enable[s] the public to evaluate" political propaganda coming from foreign sources). *See generally*, Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 74 (1991) ("To the extent First Amendment rights are rooted in the 'marketplace of ideas,' disclosure of information cannot but contribute to the functioning of that marketplace.")

over speaker autonomy. As discussed in the next section, the toll disclosure takes on speaker autonomy is simply not very high.

2. Anonymous and Compelled Speech

The First Amendment protects speakers' interests in concealing their identity in some contexts, particularly where a speaker chooses anonymity in order to express unpopular or dissenting ideas. The First Amendment also protects individuals against government actions that compel them to speak what they choose not to profess. These principles are well established in the anonymous speech and compelled speech doctrines. On the surface, sponsorship disclosure law would seem to raise problems under both doctrines. It requires speakers (sponsors) to disclose their identities and it compels speakers (sponsors and editors) to speak (the sponsors' identity). On closer examination, however, sponsorship disclosure does not trench on either the expressive freedom or the discourse values underlying the anonymous and compelled speech doctrines. Sponsorship disclosure does not deter anonymous speech nor does it compel the speaker to associate herself with speech in ways that are constitutionally problematic.

The leading anonymous speech cases deal with regulations requiring the authors of political leaflets to identify themselves. [271] The ostensible object of these regulations is, much like the object of sponsorship disclosure law, to increase transparency in public communications. In these cases, both sides have an interest in the integrity of public discourse. Prohibitions on anonymous speech can advance discourse values, or public rights, because anonymity tends to compromise the reliability of information and, naturally, the transparency of discourse.[272] This is why the use of anonymous sources is so frowned upon in journalistic practice.[273] On the other side, anonymity enriches public discourse by encouraging the reticent to speak. Particularly for dissenting, marginal, or outrageous voices, anonymity may be a necessary spur to participation in the public sphere of communication.[274]

---

[271] *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341-42 (1995) (striking down state law prohibiting the circulation of anonymous political leaflets); Talley v. California, 362 U.S. 60 (1960) (striking down ban on anonymous leaflets on First Amendment grounds); Justice For All v. Faulkner, 410 F.3d 760 (5th Cir. 2005) (striking down requirement that students identify organization on political leaflets distributed on state university campus). *See also* Abrams v. United States, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting) (urging protection for the political pamphlets of the "puny anonymities.").

[272] *See* Saul Levmore, *The Anonymity Tool*, 144 U. PA. L. REV. 2191, 2193 (1996) (symposium issue) (discussing optimal tradeoffs between reliability and communication in different settings).

[273] [cite to source literature]

[274] McIntyre, 514 U.S. at 357 (anonymity "protect[s] unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society"); Talley v. California, 362 U.S. 60, 64 (1960) (anonymity permits "[p]ersecuted groups and sects" to "criticize oppressive practices and laws"). *See also* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 640

When presented with the speech interests on both sides of the anonymity question, the Court has generally chosen to protect anonymity, but only in the context of individual political speech. In this context, not only is the contribution to public discourse especially important, but the individual has strong liberty interests in presenting her views as she wishes. Moreover, the public interest in transparent communications is less weighty where anonymous political pamphlets allow the public to factor anonymity into its evaluation of the message. "People are intelligent enough," the Court has observed, "to evaluate the source of an anonymous writing.... They can evaluate its anonymity along with its message.... [O]nce they have done so, it is for them to decide what is responsible, what is valuable, and what is truth."[275]

Stealth marketing presents a very different constitutional calculus. For starters, it is not anonymous. Undisclosed sponsorship is not designed to appear authorless so that people know it is "anonymous writing" but to assume false authorship – the authorial identity of the editor. Moreover, stealth advertising, if not propaganda, usually involves messages far from the core of First Amendment protection. The promotional messages either are, or are much closer to, commercial speech, which receives reduced First Amendment protection.[276] For this reason, the discourse interests in transparency are not counter-balanced by discourse interests in concealment. There is no First Amendment interest in generating more stealth marketing.

As to the interests of the speaker, the sponsor's liberty interest in concealing its association with promotions does not approach the magnitude of the political speaker's interest in concealing her authorship of political speech. Liberty theories of the First Amendment generally ground the speaker's free speech rights in self realization and personal expression.[277] Sponsors, whether advertisers or propagandists, have no liberty interest in concealing the fact that they paid for their expression. Moreover, under the commercial speech doctrine, advertisers have minimal cognizable liberty interests in concealing their identities especially when doing so constitutes misleading speech.[278] Propagandists may have some liberty interest in concealing their identities, but it is a very weak one. After all, sponsorship disclosure requirements would not prevent a propagandist (or media entity for that

---

(1990) (arguing that anonymity is discourse enhancing not only because it provides cover for reticent speakers, but because it allows speakers to "divorce their speech from the social contextualization which knowledge of their identities would necessarily create in the minds of their audience").

[275] McIntyre, 514 U.S. at 349.

[276] Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980).

[277] *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 47-51 (1989); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty,* 59 U. CHI. L. REV. 225, 233-37 (1992).

[278] Misleading speech is not even entitled to the reduced protection of truthful commercial speech. Central Hudson, 447 U.S. at [pincite].

matter) from communicating the exact same message anonymously in the absence of a quid pro quo payment.

First Amendment doctrine reflects this contextual assessment of the relative values of disclosure and nondisclosure. Where speakers are sponsors, the Supreme Court has upheld disclosure requirements, recognizing that "[i]dentification of the source of advertising may be required as a means of disclosure, so that people will be able to evaluate the arguments to which they are being subjected."[279] Even in the area of political advertising, where individual interests in anonymity are strongest and disclosure most likely to threaten political participation, sponsorship disclosure requirements have generally been upheld.[280] When disclosure is at issue, the balance between speaker liberty and discourse interests is made easier by the fact that listener autonomy is also at stake. Disclosure advances the liberty interests of audience members by reducing deception[281] and enhancing their freedom as consumers of expression.[282]

The compelled speech doctrine is no more serious a threat to sponsorship disclosure law than is the anonymous speech doctrine. The First Amendment bars the state from "[m]andating speech that a speaker would not otherwise make" because such compelled speech "necessarily alters the content of the speech."[283] Under the compelled speech doctrine, for example, the state cannot force the Boy Scouts to express tolerance for homosexuality through their hiring practices,[284] cannot require students to pledge allegiance to the flag,[285] cannot force motorists to display license

---

[279] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 792 n.32 (1978).

[280] *See* McConnell v. FEC, 540 U.S. 93, 196-97 (2003) (upholding campaign disclosure requirements that further the "First Amendment interests of individual citizens seeking to make informed choices in the political marketplace"); Buckley v. Valeo, 424 U.S. 1 (1976) (upholding disclosure requirements for campaign contributions); U.S. v. Harriss, 347 U.S. 612 (1954) (upholding disclosure requirements for lobbying activities related to federal legislation). *See also* Plante v. Gonzales, 575 F.2d 1119 (5th Cir. 1978) (upholding required disclosure of Florida state officials' financial interests).

[281] *See* David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 355 (1991) ("Lying forces the victim to pursue the speaker's objectives instead of the victim's own objectives…. lies that are designed to manipulate people are a uniquely severe offense against human autonomy.")

[282] *Cf.* Hahn v. Sterling Drug, Inc. 805 F.2d 1480, [pincite] (11th Cir. 1986) (parenthetical).

[283] Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 795 (1998) (striking down state law requiring professional fund raisers to disclose to potential donors the percentage of funds raised that go to the charities).

[284] *See also* Boy Scouts of America v. Dale, 530 U.S. 640, 653 (2000) (government cannot "force [an] organization to send a message" with which it disagrees); Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 573 (1995) ("[T]he fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message.").

[285] West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 633-634 (1943);

plate mottos with political content,[286] and cannot make individuals contribute to the expression of particular viewpoints.[287]

In all these cases, the Court is prohibiting the state from forcing individuals to espouse positions they do not hold, in violation of their liberty interests in free speech. These are not cases in which there are First Amendment interests on both sides. The state is not regulating speech to improve the quality of public discourse. It may have other valid goals, such as nondiscrimination in the Boy Scout case, or administrative efficiency in the license plate case, but these do not advance speech interests. On the other side, the plaintiffs who have won compelled speech cases all have substantial liberty interests in not speaking. All are being forced to associate themselves with particular viewpoints they do not share. If there is constant in First Amendment law[288] and theory, [289] it is that the state must remain neutral as to the viewpoints its citizens express.

Sponsorship disclosure law does not implicate particular viewpoints. Sponsors and editors choose what views to express without governmental interference. The law merely requires that the sponsors of these viewpoints disclose their payments. In a fairly recent compelled speech case, Justice Stevens has noted that compelling persons to engage in "political" or "ideological" speech involves constitutional concerns that simply are not present for other kinds of speech.[290] In this sense, it is not farfetched to believe that a reviewing court would find sponsorship

---

[286] Wooley v. Maynard, 430 U.S. 705, 713-17 (1977) (striking down requirement that New Hampshire motorists bear "live free or die" motto on license plates).

[287] *See, e.g.*, United States v. United Foods, Inc., 533 U.S. 405 (2001) (food growers do not have to pay for advertising they do not support); Keller v. State Bar of Cal., 496 U.S. 1 (1990) (lawyers do not have to pay for political speech through compulsory dues to bar associations); Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977) (same for teachers and union dues). *But c.f.*, Johanns v. Livestock Marketing Assn., 544 U.S. __ (2005) (compelled subsidies are permissible when they are used to fund government speech); Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) (shopping mall owner can be required to allow private speech because of low risk that owner will be associated with speech).

[288] *See, e.g.,* R.A.V. v City of St. Paul , 505 U.S. 377, 386 (1992) ("The government may not regulate (speech) based on hostility--or favoritism--towards the underlying message expressed."); Young v American Mini Theatres, Inc., 427 U.S. 50, 67 (1976) (communication regulations "may not be affected by sympathy or hostility for the point of view being expressed by the communicator."); City Council v Taxpayers for Vincent, 466 US 789, 804 (1984) (asking whether a law "was designed to suppress certain ideas that the City finds distasteful").

[289] See FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 80-86 (1982) Geoffrey Stone, Content Regulation and the First Amendment, 25 Wm & Mary L Rev 189, 227-33 (1983); CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 154-59 (1993).

[290] Glickman v. Wileman Brothers & Elliott, Inc., 521 U.S. 457, 469-72 (1997) (upholding constitutionality of program that required plaintiffs to engage in commercial speech). This is despite the fact that Justice Stevens believes that commercial speech generally deserves full First Amendment protection. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) (Stevens, J., plurality opinion).

disclosure to be the kind of speech that lacks the "constitutional significance" worthy of any First Amendment scrutiny.[291]

B. Markets and Sponsorship Disclosure

Even if constitutionally permissible, sponsorship disclosure law must stand up to criticism on policy grounds. As a general matter, government mandated disclosure will be desirable only when markets fail to produce information that would enhance public welfare.[292] Mandated environmental disclosure falls into this category because entities like power plants and incinerators lack market incentives to disclose information about the negative externalities that their activities impose on the public.[293] Mandatory disclosure regimes enable the public to force firms to internalize these costs.[294] This kind of regulation will be unnecessary where market forces themselves generate the desired information. The tort system, for example, provides consumer product manufacturers with market-based incentives to internalize the costs of failures to warn.[295]

There is vigorous disagreement about the capacity of any particular market to generate sufficient information. One sees this clearly in corporate law. Advocates of corporate disclosure rules assert that the market will never produce optimal information,[296] while their opponents argue that corporations will voluntarily disclose even bad news lest investors assume the worst.[297] Disclosure advocates have

---

[291] Post, *supra* note xx [commercial speech] at 10. *See also* Frederick Schauer, *Categories of the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 268-71 (1981) (the First Amendment is not triggered by all speech, but only speech that implicates constitutional values). [disclaimers and source identification in trademark cases mandated without any First Amendment review].

[292] *See generally*, ANTHONY I. OGUS, REGULATION: LEGAL FORM AND ECONOMIC THEORY 121-125 (1994) (discussing market failures to provide adequate supply of information).

[293] *See, e.g.*, Madhu Khanna et al, *Toxic Release Information: A Policy Tool for Environmental Protection*, 36 J. ENV. ECONOMICS AND MANAGEMENT 243 (1998) (discussing the effect of Emergency Planning and Community Right-to-Know Act, which requires polluters to report quantities of potentially hazardous chemicals they have stored or released, on stock prices); ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION; LAW, SCIENCE, AND POLICY 612-16 (2d ed. 1996)(discussing informational approaches to environmental regulation). *See also* 42 U.S.C. § 7412(r) (2005) (Clean Air Act requirement that companies disclose "risk management plans" for accidental release of hazardous chemicals); 42 U.S.C. § 300 g-3(c)(4) (2005) (Safe Drinking Water Act requirements that community water suppliers issue annual "consumer confidence reports.").

[294] *See* Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 618-29 (1999).

[295] [cite treatise]

[296] *See, e.g.*, Merrit B. Fox, *Retaining Mandatory Disclosure: Why Issuer Choice is not Investor Empowerment*, 85 VA. L. REV. 1334, 1369-95 (1999) (information produces positive externalities that the corporation cannot capture); John C. Coffe, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717, 728-729, 733-34 (1984) (mandatory disclosure reduces search costs and increases the activity of market analysts, enhancing market efficiency).

[297] Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 683 (1984). *See also* Roberta Romano, *Empowering Investors: A Market*

prevailed in this argument and the trend in corporate law is towards ever more disclosure.[298]

This debate over the capacity of markets to generate material information is arid in the abstract, since markets behave in such surprising ways. One might expect disclosure to be particularly robust where the public will not view the information as bad news. For example, it seems natural that food manufacturers with a relatively good nutritional story to tell would disclose nutritional information. Kraft and Nabisco could then compete on nutritional value or Kraft could use nutritional information to distinguish its premium brands like Progresso. So one might think, and yet the market did not produce widespread disclosure of nutritional information until federal regulation required it. [299] It was the regulation that created a market for nutritional information that now appears to be strong.[300]

The market correcting function of disclosure applies in the media context. Like the polluter, the editor that engages in stealth marketing imposes costs on the public under any of the theories of harm discussed above. If the harm is over-commercialism or a reduction in competition, then the costs of stealth marketing inhere in the underlying marketing activity. On this theory, sponsorship disclosure rules function much like mandatory environmental disclosure by giving consumers the tools to force sponsors and editors to internalize the costs of marketing activities, namely by reducing their quantity. Disclosure is a means to the ends of less marketing, just as it is to the ends of less pollution.

Sponsorship disclosure functions a little differently under the deception and public discourse theories of harm. The external cost stealth marketing imposes flows from stealth, not from marketing in general. Disclosure works not by mobilizing public opinion against the activity that is disclosed (although this might well happen), but by meliorating the effect of stealth marketing on media consumers and discourse more generally. Disclosure is itself the desired end.

Under any theory of harm, regulated sponsorship disclosure is unnecessary if there are market-based incentives to accomplish the same purpose. In the media industry as in others, conclusions about the effect of market pressure on disclosure are speculative. It bears repeating that there is no threat of tort liability for failure to

---

Approach to Securities Regulation, 107 YALE L. J. 2359 (1998) (state law should govern disclosure, allowing jurisdictional competition for optimal disclosure).

[298] *See, e.g.*, General Rule Regarding Selective Disclosure, 17 C.F.R. 243 (2005) (Regulation FD (full disclosure) mandates that any time a public company or key executives disclose material information to stock market professionals or shareholders, they must either file it with the SEC, or otherwise disclose it to the public).

[299] *See* MARY GRAHAM, DEMOCRACY BY DISCLOSURE: THE RISE OF TECHNOPOPULISM 77-84, 101-103 (2003).

[300] *See* Archon Fung et al, *The Political Economy of Transparency: What Makes Disclosure Policies Effective?* (John F. Kennedy School of Government, OP-03-04, December 2004).

disclose sponsorship unless it amounts to false advertising or fraud. That leaves two other scenarios under which the market might still promote disclosure.

First, if consumers value disclosure highly, editors might have incentives to compete on their level of disclosure. If ever there was going to be a market in disclosure, one would expect to see it first in journalism, where norms of editorial integrity are cherished and presumably highly valued by consumers.[301] It would take an empirical study of the difference in sponsorship practices in broadcasting, where sponsorship disclosure requirements apply, and other media, where they do not, to say for certain whether the market actually functions this way. In theory, however, the market incentives to conceal sponsorship would seem to be at least as strong as those to reveal it. The fact that an editorial choice was paid for will be viewed by many audiences as bad news. Media entities, no less than polluters, will prefer to conceal bad news unless there is a significant threat of involuntary disclosure. A painful scrabble to high levels of transparency is less likely than the easy slide to the bottom in which all players collect sponsorship without suffering any reputational harm.

The second way in which market pressures might reduce stealth marketing is by making the marketing practices themselves less attractive. If undisclosed marketing takes a toll on consumer satisfaction with the sponsored content, editors would have incentives to end these practices.[302] It might be the case, for example, that undisclosed product placement or sponsored news releases undermine consumer satisfaction with the editorial content. Assuming consumers act, the market itself would discipline stealth marketing whether or not consumers value editorial integrity as such. If stealth marketing does not impair the consumer experience, and consumers do not value editorial integrity or do not know that it is at risk, there will be no market response. And yet there will still be discourse harm. In such cases, the toll that stealth marketing takes on public discourse is external to the market exchange between speaker and listener because it lessens the authenticity and truth value of all communications for all media audiences.

As the chart below summarizes, market forces cannot be expected to encourage disclosure or otherwise reduce stealth marketing practices for major categories of editorial content: where consumers desire disclosure, but do not know about the marketing practices, and where consumers do not care about disclosure and the marketing practices do not degrade the consumer experience of the content.

---

[301] *See* Blake Morant, *The Endemic Reality of Media Ethics and Self-Restraint*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y. 595, 605-9 (2005) (discussing journalistic pursuit of quality as a market strategy). *Cf.* Newspaper Guild of Greater Philadelphia v. N.L.R.B., 636 F.2d 550, 560-61 (D.C. Cir. 1980) (discussion of the centrality of credibility and integrity in newspaper enterprise).

[302] Another possibility is that consumers who object to stealth marketing on principle will reject media products that they learn contain stealth marketing, even if they do not detect the influence of the marketing on the content.

	Consumer value	**Undisclosed sponsorship reduces content quality**	**Market forces will reduce undisclosed sponsorship**
1	Quality content plus disclosure	no	Not likely
2	Quality content plus disclosure	yes	yes
3	Quality content only	no	no
4	Quality content only	yes	yes

If we accept that the market will not produce the optimal amounts of disclosure, there is still the question of whether the costs of disclosure outweigh its benefits. It is of course impossible to quantify the benefits of robust public discourse and media institutions that have integrity in the minds of audience members. The costs of disclosure, however, can be quantified and have been for broadcasters. They prove to be relatively meager.[303] Enforcement costs have also been kept low both because enforcement has been lax[304] and regulators have relied on audience members to monitor compliance.[305] A sponsorship disclosure law with greater reach, of the kind advocated below, will be more expensive, but also more beneficial.

V. STEALTH MARKETING AND NEW MEDIA

As we progress more deeply into the world of digital communications, economic, technological, and cultural forces are combining to make stealth marketing increasingly attractive to both sponsors and editors. At the same time, the share of mass media content that is subject to sponsorship disclosure law is rapidly shrinking. What is needed in sponsorship disclosure law, as in so many areas of media law, are definitions that transcend obsolete distinctions among media platforms. A definition for mass media or public communications needs to work across many areas of the law, including federal election law, defamation and privacy law, and state and federal

---

[303] *See* FCC, Supporting Statement for Sponsorship Identification Rule Section 73.1212, OMB Control Number: 3060-0174, *available at* http://www.fcc.gov/omd/pra/docs/3060-0174/3060-0174-02.doc (FCC estimates that sponsorship disclosure costs broadcast stations cumulatively $2.8 million a year, not including political advertising disclosures).

[304] *See generally* Abell, *supra* note xx at 66.

[305] *See, e.g.*, Commissioner Adelstein Calls for FCC Investigation Based on Spitzer Payola Settlement, 2005 WL 1750446 (July 25, 2005) (FCC Commissioner calling on the "public to help the FCC in monitoring and enforcing the rules against airing undisclosed promotions), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-258962A1.pdf).

reporters' shield laws. This Part advances this definitional project in a world of converging new media technologies and functions.

A. The Business and Cultural Contexts

Payola, product placement, and aggressive publicity, though old practices,[306] are becoming more common as it becomes harder for sponsors to capture audience attention.[307] In an era of "synergistic marketing communication," persuaders follow audiences across media platforms[308] and deep into editorial content with concealed pitches.

Media producers are hungry for sponsorship dollars. The proliferation of cable and satellite television, satellite radio, gaming, and wireless broadband services has splintered the media audience across digital media platforms.[309] As the audience disperses, revenue from traditional advertising spots, which are sold on the basis of audience size, declines. Programming costs are not falling proportionately. Thus, as the audience for any particular program dwindles, the producer needs more per-capita sponsorship revenue (or an alternative revenue stream) to cover the costs of production.[310] This search for revenue makes embedded sponsorship opportunities increasingly attractive to producers.

Digital technology whets the media producer's appetite for stealth marketing through another means as well. By facilitating the unauthorized copying of media content through peer networks, technology threatens media content purchases at the very time when producers are fighting for market share. If instead of buying a CD or subscribing to cable services, audiences are able to copy media products for free, the producer loses revenue.[311] Sponsorship opportunities offer producers an opportunity to recoup.[312] Sponsorship is resilient to unauthorized copying. Indeed, because

---

[306] *See* KERRY SEGRAVE, PRODUCT PLACEMENT IN HOLLYWOOD FILMS 42-50 (2004) (tracing product placement in film back to the early 1930's when in-film promotions replaced advertising shorts).

[307] *See* Joe Flint and Brian Steinberg, *Ad Icon P&G Cuts Commitment to TV Commercials,* WALL ST. J., June 13, 2005 (reporting Procter & Gamble's decision to reduce its expenditures on traditional television advertising in favor of product placements and "show-mercials" – short television narratives about women using the company's products). In 2004, the top ten programs featuring product placements had 12,867 such occurrences. Coca-Cola Classic alone had 1,931 brand appearances. *Id.*

[308] Matthew P. McAllister & Joseph Turow, *New Media and the Commercial Sphere: Two Intersecting Trends, Five Categories of Concern*, 46 J. OF BROAD. & ELEC. MEDIA 505, 507 (2002).

[309] *See* Goodman, *supra* note xx at 1419-1421.

[310] BRUCE M. OWEN & STEVEN S. WILDMAN, VIDEO ECONOMICS 23-25 (1992) (discussing first copy costs for media products which create commercial need to aggregate the largest possible audiences).

[311] Although the content industry seems certain that unauthorized copying reduces revenues, the relationship between unauthorized copying and producer revenue remains contested with some claiming that at least in the music industry, unauthorized copying increases record sales. *See, e.g.*, Metro-Goldwyn-Mayer Studios Ltd v. Grokster, 127 S.Ct. 2764 (2005).

[312] *See* Matthew P. McAllister, *From Flick to Flack: The Increased Emphasis on Marketing by Media Entertainment Corporations* in ROBIN ANDERSEN & LANCE STRATE, CRITICAL STUDIES IN MEDIA COMMERCIALISM 101, 107-110 (2000). Even print media players, long resistant to integrated

sponsorship value is based on audience size, if unauthorized copying increases circulation then it adds value to media products embedded with promotional messages.[313]

Finally, producers may find stealth marketing practices increasingly attractive because they can provide a free or low cost *substitute* for programming, as well as support for programming. As discussed in Part II, freestanding "advertainment" can itself constitute entertainment programming and branded journalism can perform the same function for news. This subsidiary benefit becomes more important as media entities must program twenty-four hour news channels and networks in a highly competitive media environment.[314] There is simply not enough content to feed the new media outlets that clamor for it.[315] Thus, "TV news operations hungry for free content have intersected with brand brokers looking for product placement opportunities in a way that is now generating growing revenues for both."[316]

Sponsors as well as producers are likely to find stealth marketing more attractive in the new media environment. Audience fragmentation requires persuaders to circulate more messages to reach an audience that could once be had with a single promotion.[317] The problem for advertisers, at least, is that the resulting "cacophony of marketing messages aimed constantly toward the consuming public" repels the audience. Freestanding announcements may be "fading as means of hawking products and services" and cannot be any more successful as a tool of

---

marketing, are being seduced by the prospect of stealth marketing revenue. *See* Jon Fine, *An Onslaught of Hidden Ads: Media, Marketing, and Advertising in the 21st Century*, BUSINESS WEEK at 24, June 27, 2005 (discussing attempts by Toyota Motor Corp. to integrate products into magazine editorial content).

[313] Online file sharing of music has pushed record companies and musical artists to blend brands with music. Angie Stone, for example, performed her song "Remy Red" in concerts sponsored by Remy Martin and Jewel performed her song "Intuition" at a concert sponsored by Schick, which has a razor by the same name. MTV has banned product placements in the videos it carries, for fear of diluting the power of its advertisers. *See* Evelyn Nussenbaum, *Products Slide into More TV Shows*, N.Y. TIMES at C2, Sept. 6, 2004.

[314] *See, e.g.,* Marion Just & Tom Rosensteiel, *All the News That's Fed*, N.Y.TIMES, Mar. 26, 2005 ("Local broadcasters are being asked to do more with less, and they have been forced to rely more on prepackaged news to take up the slack."); Joe Mandese, *The Art of Manufactured News*, BROADCASTING AND CABLE, March 28, 2005, at 24; David Barstow & Robin Stein, *supra* note xx; *The Fake News Cycle*, PR Watch, Vo. 12 No.2, Second Qtr., 2005, at 2.

[315] *See* Michael Hiltzik, *There Isn't Enough Good Entertainment to Go Around*, L.A. TIMES, Jan. 26, 2006 (describing the dominance of a few broadcast and cable programs on new media platforms, including Internet downloads).

[316] Marc Graser, *Product Placement Brokers Succeed in Morning Shows*, ADAGE.COM, Jan. 30, 2006, http://www.adage.com/news.cms?newsID=47653 (discussing proliferation of four minute lifestyle segment dedicated to a brand).

[317] *See* JOSEPH TUROW, BREAKING UP AMERICA: ADVERTISERS AND THE NEW MEDIA WORLD 157-183 (1997) (discussing the relationship between information clutter and new advertising techniques).

propaganda.[318] "[B]lurred communications" at the crossroads of "commercial persuasion and entertainment media" provides a way out of this conundrum.[319] With such blurring, promotional messages can become more pervasive, while also receding from audience consciousness. The integration of persuasive messages with editorial content has another benefit in the new media environment. It resists digital tools, like digital video recorders, that enable audiences to skip past spot advertising.[320]

In addition to these economic and technological forces, cultural trends may support the blurring of the line between editorial and promotional content. Even in the old-media bastion of broadcast news, sources are pieced together without meticulous concern for authorship.[321] New media practices place the collaboration between persuaders and producers in the context of wide scale "open source" collaboration among multiple authors.[322] Smaller scale collaborations like the digital sampling of music and photography also partake of an emerging "remix" approach to cultural creation.[323] The wiki-enabled webpage, for example, provides for the creation of content by many authors who add, delete, and edit without attribution.[324] In this information environment, the joint creation of persuaders and producers is less an anomaly than a typical manifestation of fused voices.

B. Out With the Old and In With the New

Against this strong wind at the back of stealth marketing stands nothing but an early 20th century broadcast law. Sponsorship disclosure requirements naturally took root in broadcasting, which has from the start been a pervasively regulated medium

---

[318] Brian Steinberg & Suzanne Vranica, *As 30-Second Spot Fades, What Advertisers Will Do Next*, WALL ST. J., January 3, 2006 at A15.

[319] Namita Bhatnagar, et al, *Embedding Brands Within Media Content: The Impact of Message, Media, and Consumer Characteristics on Placement Efficacy* in THE PSYCHOLOGY OF MEDIA ENTERTAINMENT 99 (L.J. Shrum, ed. 2004).

[320] *See* Randal C. Picker, *The Digital Video Recorder: Unbundling Advertising and Content*, 71 U. CHI. L. REV. 205, 207-08, 220 (2004) (discussing impact of digital video recorders on media consumption habits); Andrew M. Kaikati & Jack G. Kaikati, *Stealth Marketing: How to Reach Consumers Surreptitiously*, 46 CAL. MANAGEMENT REV. 6, 21 (2004) ("As traditional media channels fragment and consumers zap commercials faster than they can say 'TiVo,' stealth marketing will inevitably grow more common.").

[321] *See RTNDA Comments*, *supra* note xx at 3 (blaming the unattributed use of video news releases in part to "technological changes that have made the distribution of audio and video materials more complicated, and led to difficulties in ascertaining points of origin."); Comments of Center for Media and Democracy in Use of Video News Releases by Broadcast Licensees and Cable Operators, MB Docket No. 05-171 (FCC filed June 22, 2005) at 4-5 (citing examples).

[322] *See* Yochai Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm*, 112 YALE L.J. 369 (2002).

[323] *See* Dan Hunter & F. Gregory Lastowka, *Amateur-To-Amateur*, 46 WM. & MARY L. REV. 951, 984-989 (2004) (providing examples of "mash" albums which mix old and new music).

[324] Cunningham & Cunningham, Inc., Wiki Philosophy Faq, at http://c2.com/cgi/wiki?WikiPhilosophyFaq.

and was for most of a century the dominant medium of mass communication. And yet, no features intrinsic to broadcasting make undisclosed sponsorship particularly baneful when transmitted over the air. Like many other provisions of media and telecommunications law, sponsorship disclosure requirements incorporate now meaningless distinctions between legacy technologies like cable and broadcasting. As all these transmission technologies come to deliver the same digital bits and perform the same communications function, the justification for distinct regulatory treatment evaporates.[325]

Technological neutrality is one goal for the reform of sponsorship disclosure law. There are two others I briefly address below. A reformed law should include a definition of public communications or mass media that will work for other media-related statutes. We must recognize the necessarily limited reach of any such law, especially any merely national law, in a distributed medium of digital communications like the Internet. At the same time, the law can harness the capabilities of digital communications to advance the information dissemination goal at the heart of sponsorship disclosure law.

1. Technology-Neutral Regulation

Sponsorship disclosure law is an example of broadcast-specific regulation, of which there are many other examples. Broadcast-specific regulation is generally defended on the grounds that broadcasting has unique attributes justifying regulation.[326] These attributes, having to do with physical scarcity and pervasiveness, do not have substantial bearing on sponsorship disclosure law.

The first and most widely used rationale for broadcast regulation is that there is "a finite number of frequencies [that] can be used productively [and] this number is far exceeded by the number of persons wishing to broadcast to the public."[327] Because broadcast spectrum is scarce, broadcasters have been required to allow

---

[325] *See, e.g.*, John Markoff, *Coming Soon to TV Land: The Internet Actually*, N.Y. TIMES at C1, Jan. 7, 2006 (reporting on the migration of television programming to new distribution media such as Internet Protocol television provided by telephone companies).

[326] Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969); FCC v. Pacifica Foundation, 438 U.S. 726 (1978). Many scholars have attacked these justifications on First Amendment and technological grounds. *See* Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245 (2003); Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1103, 1106 (1993); Thomas G. Krattenmaker & L.A. Powe, Jr., *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L. J. 151, 151-52; Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 221-26 (1982).

[327] FCC v. National Citizens Comm. for Broad., 436 U.S. 775, 798 (1978), citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375-77 (1969).

access for responses to controversial broadcasts,[328] to allow access to candidates for political advertising,[329] and to comply with limits on media consolidation.[330]

The second rationale used to justify broadcast-specific regulation also derives from inherent characteristics of the medium – its pervasiveness and invasiveness. Until recently, broadcasting was not amenable to any access controls such once a broadcast receiver was turned on, there was no way to control what programming came across the airwaves. Because parents could not control broadcast content the way they could other media,[331] the Court upheld regulation of broadcasters to protect children from indecent speech.[332]

Under any theory of harm, disclosure rules do not address access problems related to scarcity or exposure problems related to pervasiveness. Rather, disclosure addresses the impact of communications on audience members. It is true that stealth marketing might be more concentrated and therefore more likely to skew editorial content if channels of communication are scarce. And the impact of marketing is greater the more pervasive the medium in which it is carried. But these are merely intensifying factors. Under the discourse theory, undisclosed sponsorship harms by distorting communicative action, not because there is insufficient speaker access to broadcast frequencies or excessive audience exposure to broadcast content.

When it enacted sponsorship disclosure rules, the FCC itself acknowledged that there was no relevant difference between broadcast and cable for these purposes.[333] The rules almost entirely exempt cable only because, when the rules were adopted and revised, cable operators had very little control over programming

---

[328] This was the requirement contained in the Fairness Doctrine which the FCC largely eliminated in 1987. Syracuse Peace Council, 2 F.C.C.R. 5043 (1987), recon. den., 3 F.C.C.R. 2035 (1988), aff'd, Syracuse Peace Council, 867 F.2d 654 (D.C. Cir. 1989). The rest of the Fairness Doctrine was later eliminated because it "chilled speech on controversial subjects" and was not required given "new media technologies and outlets [that] ensure[] dissemination of diverse viewpoints." Radio-Television News Directors Ass'n v. FCC, 184 F.2d 872, 876 (D.C. Cir. 1999).

[329] *See* 47 U.S.C. §§ 312; 315 (2005).

[330] *See* Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004); Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148, 168-69 (D.C.Cir.2002); Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1045-46 (D.C.Cir.2002).

[331] *See* Reno v. ACLU, 521 U.S. 844, 870 (1997).

[332] FCC v. Pacifica Foundation, 438 U.S. 726, 749 (1978) ("broadcasting is uniquely accessible to children").

[333] *See* Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, 20 F.C.C. 2d 201, 220 (1969) (cable "compliance with the legislative policy reflected in section 317" is in the public interest); Amendment of the Commission's Sponsorship Identification Rules, 52 F.C.C. 2d 701, 712 (1975) ("We see no reason why the rules for such cablecasting should be different from those for broadcasting, for the consideration of keeping the public informed about those who try to persuade it would appear to be the same in both cases.").

decisions.[334] Neither the FCC nor Congress has had occasion to revisit the rules since. [335]

In other contexts, scholars have convincingly demonstrated the need to regulate communications in a functional, technology-neutral manner.[336] The thrust of these arguments is that regulation should follow the structure of communications technologies, which consists of the transport layer (e.g., cables or broadcast frequencies), the logical layer (e.g., software systems and communications protocols), and the application layer (e.g., media content, data, and voice). To the extent that applications, like spam, are regulated, they should be regulated without regard to the physical infrastructure on which they travel, unless there is some important reason to tailor the approach. The same can be said for a regulation like sponsorship disclosure which is directed at the application of media content.

A technologically neutral approach to sponsorship disclosure law would mean repeal of the law altogether or extension to non-broadcast media, appropriately defined. The discourse harm that stealth marketing causes argues in favor of extension rather than repeal.[337] Such extension would be hardly radical, since sponsorship disclosure started with newspapers.[338] Once we leave the cloistered regulatory regime of broadcasting, we see that many communications media, both print and electronic, have long been subject to structural regulation designed to support public discourse.[339]

---

[334] Cable operators did not originally produce any sizeable amount of programming. *See* Home Box Office, Inc. v. FCC, 567 F.2d 9, 21-22 (1977) (describing early history of cable television).

[335] That may now be changing as groups like the Writers Guild of America seek disclosure of stealth marketing on cable programming where it is widespread. *See* Writers Guild of America, *supra* note xx at 8 (seeking an "[e]xtension of all regulation of product integration to cable television, where some of the most egregious abuse is found.").

[336] *See, e.g.*, Rob Frieden, *Adjusting the Horizontal and Vertical in Telecommunications Regulation: A Comparison of the Traditional and a New Layered Approach*, 55 FED. COMM. L. J. 207, 215 (2003) ("The horizontal orientation…makes better sense in a convergent, increasingly Internet-dominated marketplace and also provides a more intelligent model than the existing vertical orientation that creates unsustainable service and regulatory distinctions."); Philip J. Weiser, *Toward a Next Generation Regulatory Strategy*, 35 LOY. U. CHIC. L. J. 41 (2003); Kevin Werbach, *A Layered Model for Internet Policy*, 1 J. ON TELECOMM. & HIGH TECH. L. 37, 38-40 (2002). *See generally*, JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 210-12 (2005).

[337] Under its current authority, the FCC would probably have the authority to require sponsorship disclosure in cable and satellite programming, but has limited jurisdiction to regulate stealth marketing transmitted on other platforms, like the Internet. *See generally*, Susan Crawford, *Shortness of Vision: Regulatory Ambition in the Digital Age*, 74 FORDHAM L. REV. 695 (2005) (discussing the limits to FCC jurisdiction).

[338] *See supra* note xx.

[339] *See* C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 S.CT. REV. 57, 94-99, 105-11 (providing examples of structural "media" regulation of mail, telephone, and newspapers).

2. A New Media Law

A technology-neutral, functional approach to sponsorship disclosure raises difficult definitional problems about what constitutes the media and who are the editors of public communications. Do blogs and bloggers count? What about video games and amateur podcasts? A medium-specific law – whether limited to broadcasters or expanded to include cable, satellite, and like providers – avoids the worst of these problems by placing disclosure obligations on the platform providers, who also happen to be large institutional intermediaries. Regulating at the content layer, as opposed to the platform layer, would require a functional definition of editors and public communications subject to disclosure. As Randall Bezanson observed presciently over a decade ago, "technology will force us to reexamine many of the most basic assumptions we hold about the role and, indeed, the meaning of the press."[340]

A gradual approach to expanding the scope of sponsorship disclosure would avoid the worst of the definitional problems, but they must ultimately be confronted. As mass mediated communications become ubiquitous and travel across many distinct platforms, we need a consistent definition of such communications wherever they are the subject of legal obligations or privilege. Lawmakers are currently undertaking this definitional project piecemeal, law by law. Federal election law shows what can happen when old rules confront new communications technologies.[341] The Federal Election Campaign Act requires that candidates disclose certain "public communications."[342] The Federal Election Commission at first attempted to freeze the definition of "public communications" in the broadcast era by excluding all Internet communications from the definition. In Shays v. Federal Election Commission, the D.C. Circuit properly sent the rules back to the FEC, instructing it to consider the functional characteristics of various media in its definitions.[343] The FEC is now engaged in this project,[344] asking, among other things,

---

[340] RANDALL P. BEZANSON, TAXES ON KNOWLEDGE IN AMERICA 2-3 (1994).

[341] Food and drug law and securities law are other domains in which media definitions are important. The Food and Drug Administration is charged with regulating food and drug "advertisements and other descriptive printed matter." 21 U.S.C.A. § 352(n) (2005). The Food and Drug Act does not define advertisements, but the FDA has given the term an explicitly media-oriented definition, regulating "advertisements in published journals, magazines, and other periodicals, newspapers, and advertisements broadcast through media such as radio, television, and telephone communication systems." 21 C.F.R. § 202.1(l)(1) (2005). Securities law incorporation of media concepts is discussed at *supra* note xx.

[342] 2 U.S.C. §431(22) (2005) and 2 U.S.C. §431(9)(B)(i) respectively.

[343] 337 F.Supp.2d 28 (D.D.C. 2004), appeal filed, No. 04-5352 (D.C. Cir. Sept. 28, 2004). The rules reviewed in Shays implemented parts of the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-55, 116 Stat. 81, codified at 2 U.S.C. 431 (2005) et seq.

[344] Internet Communications, Proposed Rules 70 FR 16967, 16969 (Apr. 4, 2005) (proposing "to retain a general exclusion of Internet communications from the definition of 'public communication,' except

whether "on-line blogs [can] be treated as 'periodical publication[s]'" subject to higher spending limits and whether "bloggers' activity [is] commentary or … news story activity?" [345]

It is not only the regulation of media activities that requires new definitions, but government granted editorial privileges as well. State anti-SLAPP laws protect media entities from having to defend frivolous defamation actions and, in doing so, adopt a definition of public or mediated communications.[346] The most significant privilege enjoyed by members of the media is the reporter's privilege that protects reporters in most states from having to disclose their sources. These laws typically define a "covered person" as an editor or reporter for a print or electronic periodical publication.[347] A statutory reporter's privilege is now being considered at the federal level.[348] Definitional questions about who is a reporter and what counts as a periodical publication have bedeviled the proceedings.[349]

---

for those advertisements where another person or entity has been paid to carry the advertisement on its Web site"). [follow up on S. 678].

[345] 70 FR 16967, 16975 (Apr. 4, 2005) (proposing to amend 11 C.F.R. §§ 100.73 and 100.132 to characterize certain Internet activities as media, subject to a special media exemption from spending limits). *Cf*., 2 U.S.C. § 431(9)(B)(i) (2005) (providing an exemption for campaign expenditures for a "news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication."); H.R. Rep. No. 93-1239, 93d Congress, 2d Session at 4 (1974) (exemption assures "the unfettered right of the newspapers, television networks, and other media to cover and comment on political campaigns.").

[346] *See*, *e.g.*, Or. Rev. Stat. § 31.150(2)(c) (defendants must show that defamation and related claims they seek to strike fall into certain categories, including that the statement was made in a "place open to the public or a public forum").

[347] *See*, *e.g.*, California Evidence Code §§ 1080(a) and (b) (giving a "publisher, editor, reporter, or other person connected with… a newspaper, magazine, or other periodical publication…[or] a radio or television news reporter" immunity from being adjudged in contempt); Okla. Stat. tit. 12, § 2506(7) (covered person is one "regularly engaged in obtaining, writing, reviewing, editing, or otherwise preparing news for any newspaper, periodical, press association, newspaper syndicate, wire service, radio or television station, or other news service.").

[348] *See* S. 1419, Free Flow of Information Act of 2005, 109th Cong. 1st Sess. (Oct. 20, 2005). Federal courts have long recognized a qualified constitutional privilege against revealing sources in some cases, relying on federal common law definitions. *See*, *e.g.*, A. von Bulow ex rel. Auersperg v. von Bulow, 811 F.2d 136, 142 (2d Cir. 1987) (adopting a rule that one claiming journalist's testimonial privilege "must demonstrate an intent to use the material . . . to disseminate information to the public and that such intent existed as the inception of the newsgathering process."); In re Madden, 151 F.3d 125, 126, 131 (3d Cir. 1998) (holding that eligibility for journalist's privilege requires that one have been engaged in investigative reporting and newsgathering, and possessed intent to disseminate news to the public at the inception of the newsgathering process).

[349] There have always been questions about who qualifies for the state statutory and federal common law privileges, with the courts providing little guidance. *See* Kraig L. Baker, *Are Oliver Stone and Tom Clancy Journalists? Determining Who Has Standing to Claim the Journalist's Privilege*, 69 Wash. L. Rev. 739, 740 (1994) ("There is little case law that discusses who, beyond the traditional media, is covered by journalists's privilege.").

In sponsorship disclosure law as in other areas of media law, the definition of mediated communications must be narrow enough to exclude both personal and targeted communications.[350] Yet it must be broad enough to prevent the strategic use of particular transmission technologies to get out from under regulatory obligations or to secure privileges. Thus, a candidate who advertises on television should not be relieved of federal election disclosure requirements simply because she moves to the Internet, especially as video over the Internet and over cable and broadcast come to be viewed in the same way over the same devices. Similarly, if ABC has to disclose sponsorship over the air, there is no reason it should not have to disclose sponsorship over the Internet.

Currently unregulated speakers, like bloggers, pose a more difficult problem. The strongest claims individual speakers have to be free from sponsorship disclosure obligations is that they are not part of the institutional media and therefore do not have the influence on mediated communications and public discourse that the media do. Once bloggers become the conduits for paid promotions, the extent to which they truly function outside the commercial media is questionable. For now, however, it may well be fitting to exempt these speakers from sponsorship and other disclosure requirements at least until their role in public discourse and the Internet regulatory apparatus become clearer.

VI. CONCLUSION

A technology neutral sponsorship disclosure law – even one that exempted many genres of digital communications from a definition of media – would cover such a large volume of communications that governmental enforcement of sponsorship disclosure would be spotty.[351] The threat of enforcement would function something like the threat of a speed ticket or a tax audit, permitting significant non-compliance while at the same time fostering norms of behavior that produce socially valuable outcomes. Major newspapers and magazines show how this works. Although there has been no recent enforcement of the "reading notice" law which requires the identification of advertising material, the print press generally observes the norm of printing "advertisement" across such material. The norm developed in the shadow of the law.

In a pervasively networked digital environment, we might consider alternative regulatory mechanisms for encouraging sponsorship disclosure, like disclosure at the

---

[350] Defamation law relies on just such a distinction. *See, e.g.*, Greenmoss Builders, Inc., v. Dun & Bradstreet, Inc., 461 A.2d 414, 417 (1983), aff'd 472 U.S. 749 (1985) ("There is a clear distinction between a publisher which disseminates news for public consumption and one which provides specialized information to a selective, finite audience.").

[351] *See, e.g.*, Stefaan G. Verhulst, *About Scarcities and Intermediaries: the Regulatory Paradigm Shift of Digital Content Reviewed* in HANDBOOK OF NEW MEDIA 432, 434-35 (Leah A. Lievrouw & Sonia Livingstone ed. 2002) (arguing that disintermediation makes the enforcement of regulations difficult).

source. If, for example, publicly traded companies had to disclose stealth marketing payments in their corporate disclosures, third party information brokers would be able to publicize sponsors' contributions to seemingly independent editorial content. As securities literature shows, disclosure of this sort can efficiently further public policy goals.[352] Disclosure puts private intermediaries in a position to fortify official enforcement regimes, creating a form of "distributed enforcement" that exploits the very digital information processing technologies that have transformed the electronic media. [353]

Whatever the precise regulatory tool used to disseminate information about sponsorship, pressure to disclose sponsorship should be brought to bear in the digital age across media platforms. Stealth advertising and propaganda reduce the possibilities for, and force of, authentic mediated communications in the discursive public sphere. Even for commercially driven music and entertainment, and especially for news and information, stealth marketing transforms what Habermas calls communicative action into strategic action. An editor engaging in communicative action seeks audience attention. It is attention that drives ratings and attention that advances the artistic or rhetorical ambitions, if any, of the editor. Marketing converts this communicative agenda into a strategic one. The sponsor uses the editorial voice covertly, not merely to attract attention, but to call for action of a political or commercial nature. Over time, in a media environment saturated with stealth appeals, all genuinely communicative action is thrown into question, editorial agendas are upended, and authentic discourse made more difficult.

Current law and public opinion grasp the problem of stealth marketing intuitively. The outrage over payola and hidden promotional materials in news reports and television dramas is an inarticulate expression of concern about public discourse. I have articulated this discourse concern and shown it to be the best justification for sponsorship disclosure requirements and superior to arguments rooted in competition, anti-commercialism and deception theories.

---

[352] *See, e.g.*, Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV., 1197 (1999) [cite Stephen Choi].

[353] *Cf.* GRAHAM, *supra* note xx at 137-46 (discussing intermediary use of information technology in conjunction with disclosure regimes).