

Fairness and Integrity in Telecommunications Media
Health, Media, and Child Advocates
Supporting FCC Regulation of Embedded Advertising

September 23, 2009

The Honorable Julius Genachowski
Chairman, Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

RE: *Notice of Inquiry and Notice of Proposed Rulemaking in the Matter of Sponsorship Identification Rules and Embedded Advertising*, Docket 08-90

Dear Mr. Chairman:

As public advocacy organizations and professionals, we congratulate you on your appointment to the chairmanship of the Federal Communications Commission. Visionary leadership at the FCC has never been more vital to the American people.

Regarding the above-referenced *Notice* (“NOI/NPRM”), we wish to call your attention to the importance of this proceeding, and to update the Commission on significant developments since the reply period ended in November, 2008.

Embedded advertising refers to commercial speech that is woven into program content in exchange for fees or other consideration.¹ Research suggests that adults may interpret paid-for branded content as artistic choices, or as signs of increasing commercialism in society, when in fact it is advertising.² Research further indicates that children are particularly vulnerable to covert marketing, and are heavily influenced by embedded messages, even though – or perhaps because – they don’t recognize the material as advertising.³

¹ Federal Communications Commission. *Notice of Inquiry and Notice of Proposed Rulemaking in the Matter of Sponsorship Identification Rules and Embedded Advertising*, MB Docket 08-90, at 1 and notes 1 & 2 (released 26 Jun 2008) (“Notice”).

² Cristel Antonia Russell, *Investigating the Effects of Product Placements in Television Shows: The Role of Modality and Plot Connection Congruence on Brand Memory and Attitude*, 29 JOURNAL OF CONSUMER RESEARCH 307, 314 (2002).

³ Sandra L. Calvert, *Children as Consumers: Advertising and Marketing*, 18 THE FUTURE OF CHILDREN 205 (2008); Auty & Lewis, *Exploring Children’s Choice: The Reminder Effect of Product Placement*, 21 PSYCHOL. & MARKETING 697, 710 (2004); M. Brucks, G.M. Armstrong & M.E. Goldberg, *Children’s Use of Cognitive Defenses Against Television Advertising: A Cognitive Response Approach*, 14 JOURNAL OF CONSUMER RES. 471 (1988).

The NOI/NPRM evokes a principle long recognized by Congress and the FCC: people have a right to know when, and by whom, they are being sold something. Under existing rules, Sponsorship Identification disclosures are difficult to read, confusingly worded, and buried in the end credits where they are ineffective.⁴ Non-origination cable and satellite networks are not subject to Sponsorship Identification rules.⁵ Therefore, it is necessary to amend/extend existing rules in order to *adequately inform* consumers when program content is induced by consideration.

Regarding youth, we applaud your stated interest in protecting children from inappropriate media content.⁶ In an era when content providers are turning to subtle and sophisticated product integration techniques,⁷ we encourage the Commission to codify existing policies that prohibit embedded advertising in children’s programming⁸ and to clarify that the rule(s) apply to broadcast, cable and satellite television. In addition, there is concern that millions of children and adolescents who do not (or cannot) read and/or grasp the significance of Sponsorship Identification disclosures are exploited by the inherently deceptive and harmful nature of embedded ads during primetime hours.

When the product *itself* is potentially unhealthful, harmful or addictive, such as junk food, alcohol, tobacco, pharmaceutical drugs, gambling or weapons, the deceptive nature of embedded advertising poses additional serious risks to public health. Similarly, embedded ads in newscasts and Video News Releases (VNR’s) represent conflicts of interest that can only be remedied by *effective* Sponsorship Identification disclosures – vital to ethical journalism.

The attached “Update” provides evidence of the increasing penetration and sophistication of embedded advertising since the NOI/NPRM ended in November. Advertisers are not only altering program content, they often *create it* without the audience’s awareness. Importantly, research indicates that *awareness of the intent to persuade* is a key factor in resistance to persuasion.⁹

Congressmen Edward J. Markey (D-MA) and Henry A. Waxman (D-CA) have warned that embedded advertising is “unfair and deceptive if it occurs without adequate

⁴ For a review of research on the ineffectiveness of warning someone after the fact that material lacks credibility or may be biased, see G.T. Kumkale & D. Albarracin, *The sleeper effect in persuasion: a meta-analytic review*. 130-1 PSYCHOLOGICAL BULLETIN 143-72 (2004).

⁵ Notice at 11.

⁶ Julius Genachowski, *Statement of Chairman Julius Genachowski Re: Implementation of the Child Safe Viewing Act: Examination of Parental Control Technologies for Video or Audio Programming*, Federal Communications Commission, MB Docket 09-26 (31 Aug 2009).

⁷ Notice at 1.

⁸ See Children’s Television Act of 1990, 47 USC § 303a (2000); 47 C.F.R. § 76.225 (2007); *Children’s Television Report and Policy Statement*, 50 FCC 2d 1 (1974).

⁹ See R. Petty. & J. Cacioppo, *Forewarning, cognitive responding, and resistance to persuasion*, 35 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 645-55 (1977); R. Petty & J. Cacioppo, *Effects of forewarning of persuasive intent and involvement on cognitive responses and persuasion*, 5 PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 173-6 (1979).

[Dr. Richard Petty is a signatory on this letter.]

disclosure to the viewing public.”¹⁰ Former FCC Chairman Kevin J. Martin (R) stated upon initiating the NOI/NPRM: “I believe it is important for consumers to know when someone is trying to sell them something and that it is appropriate for the Commission to examine these issues.”¹¹

The Federal Trade Commission (FTC) recently proposed rules requiring disclosure of embedded ads in online media under its truth-in-advertising guidelines.¹² In a public statement, Richard Cleland, an assistant director at the FTC’s Division of Advertising Practices, Bureau of Consumer Protection, said: “Consumers have a right to know when they’re being pitched a product.”¹³

We strongly urge the Commission to exercise its full authority to amend/extend existing rules governing embedded advertising practices, in order to ensure full transparency for the adult consumer and codified protection for youth. Your leadership in this matter will determine whether TV and radio programs become conduits for stealth and misleading commercial propaganda; or whether media integrity, vital in a democratic society, will be preserved.

Respectfully submitted,

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¹⁰ Edward Markey and Henry Waxman, Letter to FCC Chairman Kevin Martin (26 Sept 2007).

¹¹ Kevin Martin, Public Statement, Federal Communications Commission Hearing, Chicago, Illinois, (20 Sept 2007)

¹² Pradnya Joshi, *Approval by a Blogger May Please a Sponsor*, NEW YORK TIMES (12 Jul 2009).
See also Direct Agents, Inc., *Bloggers Beware: FTC to Monitor Paid Posts and Affiliate Links*, (23 Jun 2009).

¹³ Joshi.

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Concerned Educators Allied for a Safe Environment (CEASE)

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Women In Media & News (WIMN)

Jennifer Posner, Director

Online network with 80,000 to 120,000 unique visits per month

www.wimnonline.org

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Robert M. McDowell, Commissioner
Meredith Attwell Baker, Commissioner
Mignon Clyburn, Commissioner
Senator Byron L. Dorgan
Senator Frank R. Lautenberg
Senator Claire McCaskill
Senator Mark L. Pryor
Senator John D. Rockefeller IV
Representative Edward J. Markey
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ATTACHMENT FOLLOWS: Update on Data and Research Since the NOI/NPRM

UPDATE: RECENT DATA and RESEARCH on EMBEDDED ADVERTISING

- U.S. TV-watching hit record highs in 2008 and continues to rise in 2009 to 153.5 hours/month/person.¹⁴ Even teens watch more TV than ever – up 6% in five years.¹⁵
- Despite claims that DVR technology (ad-skipping) is destroying the TV advertising model: timeshifted viewing amounts to only 5.4% of TV-watching.¹⁶
- Marketing Management Analytics (MMA) reports that TV is still the most effective advertising medium, even for youth:

*If time shifting, ad skipping or clutter really were rendering TV less effective, then it should show up in marketing-mix analyses that have been done since the early 1990s as a lower average sales lift per gross rating point over time. It doesn't...In fact, MMA...has seen a slight uptick in effectiveness in recent years.*¹⁷

–Advertising Age, 2009

Increasing Proliferation of Embedded Ads

Per TNS Media Intelligence, in the second quarter of 2009, in-show branded content increased 19% over the same period a year ago. When added to the commercials, advertising represented 40% of an average hour of primetime network programming.¹⁸

Measured another way, the number of placements in the top ten shows on broadcast networks grew from **25,950** to **29,823** in 2008.¹⁹ The number of *unique brands* embedded in primetime shows on broadcast television (745) and cable networks (839)²⁰ increased 11% and 46% respectively year-to-year.

Teen dramas are magnets for product placement. Dramas are a preferred genre for teens worldwide.²¹ The teen drama *One Tree Hill* had 2,575 product placements in 2008²² -- nearly 50 per week on average.

¹⁴ Nielsen, *Three Screen Report: Media Consumption and Multi-tasking Continue to Increase Across TV, Internet and Mobile* (2 Sept 2009).

¹⁵ Gavin O'Malley, *Study: Online A Teenage Wasteland*, ONLINE MEDIA DAILY (26 Jun 2009).

¹⁶ Nielsen reports 8 hours, 13 minutes per month of timeshifted viewing, compared to 153 hours, 27 minutes of viewing at scheduled times. See Nielsen, *Three Screen Report*.

¹⁷ Jack Neff, *Guess Which Ad Medium Is As Effective As Ever: TV*, ADVERTISING AGE (3 Feb 2009).

¹⁸ TNS Media Intelligence, *TNS Media Intelligence Reports U.S. Advertising Expenditures Declined 14.3 Percent in First Half 2009* (16 September 2009).

¹⁹ Nielsen, *US Advertising Spending UP 0.6% in 2007, Internet Ad Spend UP 18.9%* (31 Mar 2008); Nielsen, *Tops in 2008: Top Advertisers, Most Popular Commercial*, (15 Dec 2008);

²⁰ Claire Atkinson, *Looking for Brand Equity*, BROADCASTING & CABLE (February 9, 2009).

²¹ O'Malley.

²² Nielsen, *Tops in 2008: Top Advertisers, Most Popular Commercial* (15 Dec 2008)

Deeper Integrations

In May, 2009 *Advertising Age* reported that sponsors are becoming “**more aggressive**” in their demands for “**deeper**” and “**more intrusive**” product integrations, and that providers are more willing to comply.²³ Said one insider: “**Things that might have been sacrosanct before are now negotiable.**”²⁴ Confirming this view, a marketing executive told *Broadcasting & Cable*: “**We’re seeing across the board that everybody has relaxed the rules.**”²⁵

*... due to a host of factors, media outlets have begun to abandon some of their previous, long-standing resistance to letting marketers burrow even more deeply into their properties.*²⁶

Failing shows are magnets for branded content. For example, Subway recently saved NBC’s *Chuck* from cancellation in return for deep integration in the plot next season.²⁷

Some advertisers gain in-show exposure by “wooing the talent.”²⁸ Dave & Buster’s, a sports bar chain, forged a marketing relationship with former Playboy playmate, Kendra Wilkinson. The result: deep integration in her 2009 cable reality show, *Kendra*.²⁹

I’m doing a poster shoot for Dave and Buster’s and I’m so excited...I’m obsessed with Dave and Buster’s and I don’t know how they’re going to get me to calm down and pose.
–Kendra, aired 6-14-09³⁰

High-level Barters and Partnerships

Embedded ads are increasingly negotiated at the network level as part of media buys.³¹ The deal may obligate screenwriters to doctor, or even invent content on behalf of sponsors.³² *This unfair and deceptive practice erodes broadcasting integrity and fosters sponsor-control and censorship of content reminiscent of TV in the 1950’s.*³³

²³ Brian Steinberg, *Series Let Advertisers 'Boldly Go' Where Few Have Gone Before*, ADVERTISING AGE (7 May 2009).

²⁴ *Id.*

²⁵ Atkinson.

²⁶ *Id.*

²⁷ Larry Dobrow, *Is It Time to Put an End to Brand Integration?* ADVERTISING AGE (21 May 2009)

²⁸ Andrew Hampp, *Want More TV Time? Woo the Talent*, ADVERTISING AGE (5 Jun 2009).

²⁹ *Id.*

³⁰ Prometheus Entertainment, Fox Television Studios and Alta Loma Entertainment, *Kendra: Basket Cases*, E! ENTERTAINMENT TELEVISION (aired 14 Jun 2009).

³¹ Atkinson. See also Andrew Hampp, *In This Year’s Upfront, It’s All About Branded Entertainment*, ADVERTISING AGE (26 May 2008).

³² See Writer’s Guild of America, *Are You Selling To Me? Stealth Advertising in the Entertainment Industry* (14 Nov 2005).

³³ For a discussion of sponsor-controlled TV in the 1950’s see: Lawrence Samuel, *BROUGHT TO YOU BY: POSTWAR TELEVISION ADVERTISING AND THE AMERICAN DREAM*, Austin: University of Texas Press, 122-180 (2002).

Partnerships are occurring earlier in the development process. For instance, Johnson & Johnson teamed with the BET Network to create the 2009 reality series, *Harlem Heights*. Producers reportedly “come on set with boxes” of Johnson & Johnson products and insert them in the scenes as seamlessly as possible. Said a BET executive, you get the sense that the products are part of the cast’s “daily process.”³⁴

Foreign language networks are courting deep integrations which may elude mainstream scrutiny. For example, the Spanish-language station Telemundo offers its partners [sponsors] seamless product integration and branded entertainment.³⁵

In the extreme, a toymaker has purchased 50% equity in a children’s cable network. Hasbro paid \$300 million for a half stake in the Discovery Kids Network, which will target children 14 and under. Discovery and Hasbro executives stressed that *merchandizing will be a priority*.³⁶

Subtle and Sophisticated Techniques³⁷

Coca-Cola reportedly pays \$26 million annually for the right to embed visual and verbal messaging in *American Idol*. Coke’s artfully-placed cups, couches evoking the shape of its bottles, Coke-red walls and verbal plugs permeate an estimated 60% of the show’s running time. Newly published brain research suggests that Coke’s subtle branding cues may be more effective than traditional commercials. They are perceived as part of the emotional content of the program, and thereby penetrate long-term memory.³⁸

We will use a diverse array of entertainment assets to break into people’s hearts and minds. In that order. For this is the way to their wallets...

--Steven J. Heyer, CEO, the Coca-Cola Company, 2003³⁹

Competitive Pressures

Product placement is escalating in the soft drink category – a dangerous trend in a nation where soda pop is the #1 source of sugar, diabetes is rising “at an alarming rate” and nearly 73% of Americans (59% of children) are overweight, obese or extremely obese.⁴⁰ Mountain Dew recently shifted 50% of its measured media budget to branded entertainment.⁴¹ Dr. Pepper bartered a season-long role in the teen drama *90210*, with

³⁴ Brian Stelter, *Product Placements, Deftly Woven into the Story Line*, NEW YORK TIMES (1 Mar 2009).

³⁵ Product Placement News, *Telemundo unveils new shows, focuses on branded entertainment*, www.productplacement.biz/News/Television/ (20 May 2009).

³⁶ Joe Flint, *Hasbro and Discovery partner to create kids’ TV channel*, LA TIMES (1 May 2009).

³⁷ Notice at 1.

³⁸ Martin Lindstrom, *BUYOLOGY: TRUTH AND LIES ABOUT WHY WE BUY*, New York: Doubleday at 40, 41, 49 (2008).

³⁹ Steven J. Heyer, *Keynote Address*, Madison & Vine Conference, Beverly Hills, 2003, quoted in Donaton, Scott, *MADISON & VINE*, New York: McGraw-Hill, 30 (2004).

⁴⁰ Associated Press, *Americans eat 22 teaspoons of sugar a day*, MSNBC.com (24 Aug 2009); Maggie Fox, *Obese Americans now* www.reuters.com (9 Jan 2009); Susan Landers, *Diabetes rates continue to climb*, American Medical Association News (10 Feb 2009).

⁴¹ Andrew Hampp, *Mnt Dew Banks on Branded Entertainment*, ADVERTISING AGE (4 Jun 2009).

plugs like “We’re on a road trip! Drinking Dr. Pepper is practically a requirement.”⁴² *Advertising Age* calls NBC’s *Saturday Night Live* an “ad agency for Pepsi” because TV writers script skits to sell soda.⁴³

Similarly, gambling casinos are waging a “product placement war” on primetime television. In 2008, travel and hospitality placements leaped 34% year-to-year on broadcast networks, led by Paris Hotel and Casino (474 incidents), MGM Grand (271), and New York New York (197).⁴⁴ There were *twice as many* such placements in the category on cable, including in the top ten: Luxor Hotel and Casino, Planet Hollywood, Palms Resort Casino and MGM Grand.

Product placement has even penetrated the news. McDonald’s coffee was placed in local newscasts in 2008.⁴⁵ Now Starbucks has paid an estimated \$10 million to place its coffee in the cable news magazine *Morning Joe* (MSNBC).⁴⁶ Blurring the line between advertising and objective reporting introduces conflicts of interest that erode ethical journalism, a trend which can only be remedied by *clear and timely disclosure*.

Marketing Harmful or Addictive Products Under the Radar

A study published in 2009 by the *Journal of Consumer Affairs* supports concern about increasing alcohol portrayals in primetime television.⁴⁷ Alcohol was present in all programs investigated – a 23% increase over 1998-9. Though overt alcohol portrayals were largely negative (drunk driving, addiction, death), *covert* portrayals shown visually in the background conveyed the opposite message (“drinking is fun”) and likely trumped the sober warnings. Although most TV alcohol portrayals were *unbranded*, they would seem to promote beer, wine or spirits as a category and drinking as a behavior.⁴⁸ The authors note that alcohol advertisers have an “active presence in the product placement industry” (*Russell and Belch, 2005*) and that background messages may be “less likely to raise suspicion.”

Similar concern surrounds embedded plugs for prescription drugs.⁴⁹ *Fortune* has touted product placement as a means to advertise pharmaceuticals without disclosing drug side

⁴² Steinberg, *Series Let Advertisers ‘Boldly Go’ Where Few Have Gone Before*, ADVERTISING AGE (7 May 2009)

⁴³ Brian Steinberg, *‘Saturday Night Live’ Acts as Ad Agency for Pepsi*, ADVERTISING AGE (5 Feb 2009).

⁴⁴ Nielsen, *Travel and Hospitality Advertising*, NIELSEN MONITOR-PLUS SPOTLIGHT (Jun, 2009).

⁴⁵ Wayne Friedman, *McDonald’s Coffee on Local News Show*, MEDIAPOST (22 Jul 2008).

⁴⁶ Brian Stelter, *Starbucks is Now the Official Joe of ‘Morning Joe’*, NEW YORK TIMES (1 Jun 2009).

⁴⁷ Cristobel Russell & Dale Russell, *Alcohol Messages in Prime-Time Television Series*, 43-1 JOURNAL OF CONSUMER AFFAIRS at 123-4 (2009).

⁴⁸ For an example of product placement by an industry trade group promoting consumption, not brands, see Alex Klein, *The Cigar Caper*; BALTIMORE SUN (11,12,13 Jan 1998).

⁴⁹ See *Comments of Michael H. Katz, MD, Director of Health, City of San Francisco*, NOI/NPRM, Docket 08-90 (22 Sept 2008); Gary Ruskin, Executive Director, Commercial Alert, *Complaint, Request for Investigation, and Petition for Rulemaking to Establish Adequate Disclosure of Product Placement on Television* at 5, 11 (30 Sept 2003); Melody Peterson, *Heartfelt Advice, Hefty Fees*, NEW YORK TIMES (11 Aug 2002); Enrique Rivera, *Does drug product placement on TV require new regulations?* UCLA NEWSROOM (17 May 2008).

effects.⁵⁰ In 2008, the preeminent product placement website, iTVX, posted this rare admission:

Does the average viewer take note of the marketing brilliance on display...when a pill-popping wunderkind doctor names a particular med to counter the mysterious ailment of the week? Probably not. But many of these seemingly casual references are anything but, and the practice may soon create some legal dust-ups of its own. —www.itvx.com⁵¹

There is also concern about verbal plugs and brand cameos promoting guns in TV programs. *Entertainment Weekly* has called it “one of Hollywood’s dirtiest little secrets – that, just like chips or beer, guns get product placement.”⁵² The recent influx of Hecker and Koch weapons on Fox Network’s action drama series *24* (for example, the Hecker & Koch UMP Submachine Gun used to kill a U.S. senator) provoked suspicion among gun enthusiasts that the company may be paying for the plugs.

Now you never hear the full make and model of firearms on TV...So I gotta wonder – is H’nK paying for placement on 24?
--www.shotinthedark.com⁵³

Embedded ads for potentially harmful or addictive products may bypass advertising regulations, industry codes of conduct, and parental guidance.

At a minimum, the FCC must set a standard for transparency and public accountability by enacting and vigorously enforcing effective Sponsorship Identification rules and protection for youth.

Public Harm

The risks inherent in embedded advertising are further illustrated by a 2009 study in the *Journal of Consumer Research*, which provides a blueprint for selling products by undermining self-esteem: evoke feelings of insecurity, then promote the product as a means to restore self-confidence.⁵⁴

*...subtle manipulations can temporarily “shake” one’s self-view confidence, resulting in an increased propensity of choosing self-view-bolstering products in a subsequent choice task...*⁵⁵

In traditional advertising, adults defend against such profit-driven ploys with skepticism or by ignoring the message.⁵⁶ But when marketers doctor a storyline, they may influence

⁵⁰ John Simmons, *Big Pharma’s ready for prime time*, FORTUNE (28 Sep 2007).

⁵¹ iTVX, *More Pharmaceutical Sales Relying on TV Product Placement*, itvx.com (11 May 2008).

⁵² Daniel Fierman, *Where Hollywood Gets Its Guns*, 488 ENTERTAINMENT WEEKLY (4 Jun 1999).

⁵³ Mitch Berg, *Product Placement We Can Use*, www.shotinthedark.info/wp/?p=4512 (2 Apr 2009).

⁵⁴ L. Gao, S. Wheeler & B. Shiv, *The “Shaken Self”: Product Choices as a Means of Restoring Self-View Confidence*, 36 JOURNAL OF CONSUMER RESEARCH 29-38 (Jun 2009).

⁵⁵ *Id* at 29.

⁵⁶ Petty et al.

the audience under the radar.⁵⁷ A 2006 market research study, *Audience Response to Product Placements*, suggests that a program's mood influences attitudes leading to purchase behaviors, and identifies television as a context for "how mood is manipulated."⁵⁸

Because advertising is profit-driven and persuasive in nature, the consumer must be fully informed when advertisers pay to doctor or invent program content. Parents in particular must be informed so that they can counsel and/or shield children from the effects of embedded commercial speech. Finally, because youths are highly vulnerable to covert marketing,⁵⁹ the FCC must enact codified rules to protect them from the harmful and deceptive nature of product placements and integrated ads.

⁵⁷ Bhatnagar N., Aksoy, L., and Malkoc, S., "Embedding Brands within Media Content: The Impact of Message, Media, and Consumer Characteristics on Placement Efficacy," in Shrum, L.J., *Psychology in Entertainment Media: Blurring the Lines Between Advertising and Entertainment*, Mahway, NJ: Erlbaum 99-116 (2004).

⁵⁸ S. Balasubramanian, J. Karrh & H. Patwardhan, *Audience Response to Product Placements: An Integrative Framework and Future Research Agenda*, 35.3 JOURNAL of ADVERTISING 123-5 (Fall 2006).

⁵⁹ See note 3.