

Stealth Marketing and Editorial Integrity

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Stealth Marketing and Editorial Integrity is the first article in the legal literature to address the normative implications of covert marketing in mass media. For business, technological, and cultural reasons, advertisers and propagandists are increasingly using editors to pass off promotional messages as editorial content. This integration of sponsorship allows marketers to cut through communications clutter and audience resistance to marketing. In this way, the practices of payola, product placement, and sponsored journalism are proliferating and spreading into newer media forms like blogs and video games. A federal sponsorship disclosure law has proscribed these practices in broadcasting for nearly a century. Despite high-profile recent controversies about the practices, the legal literature is devoid of any systematic analysis of the problem that stealth marketing presents or the values that sponsorship disclosure might serve, whether in broadcasting or other media.

This Article fills that void by providing a normative theory of sponsorship disclosure law informed by the First Amendment, bribery law, and information theory more generally. Drawing on the economic theory of Ronald Coase and the social theory of Jürgen Habermas, I identify the harm of undisclosed sponsorship in media as a degradation of the robust public discourse that is necessary to a democracy and is possible even in a highly commercialized media sphere. The Article concludes with a proposal for revamping and extending sponsorship disclosure law beyond broadcasting in a manner that is technology-neutral and sensitive to the evolution of digital technologies.

I. Introduction

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

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1. Since the 1920s, 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, 9–15 (Ig Publishing 2005) (1928). The actual definition of propaganda is value- and subject-neutral. It is, according to one representative definition, the “dissemination of ideas, information, or rumor for the purpose of helping or injuring an institution, a cause, or a person.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1817 (1986); see also *Meese v. Keene*, 481 U.S. 465, 477 (1987) (noting that propaganda can refer to “advocacy materials that are completely accurate and merit the closest attention and the highest respect”).

masking their 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 payola³—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 material⁴ 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 for more vigorous enforcement. These controversies have involved local television stations' covert use of government propaganda in their news⁶ 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

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* 8 (3d ed. 2005) (describing the marketing concept as one based on the assessment of customer needs and wants and the attempt to serve those needs and wants); see also Siva K. Balasubramanian, *Beyond Advertising and Publicity: Hybrid Messages and Public Policy Issues*, *J. ADVERTISING*, Dec. 1994, at 29, 31–35 (identifying types of hidden persuasion such as paid product placements, paid but undisclosed celebrity spokespersons, and program-length commercials).

3. Payola is technically “the unreported payment . . . to achieve airplay for any programming.” FCC Public Notice, *Comm’n Warns Licensees About Payola and Undisclosed Promotion*, 4 F.C.C.R. 7708, 7708 (May 18, 1988) (stating that 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.” FCC Public Notice, *Broad. Announcement of Fin. Interests of Broad. Stations and Networks*, 76 F.C.C.2d 221, 221 (1980).

4. 47 U.S.C. § 317(a)(1) (2000); see also 47 C.F.R. § 73.1212(a) (2005).

5. 47 U.S.C. § 508(g) (2000).

6. See FCC Public Notice, *Comm’n Reminds Broad. Licensees, Cable Operators and Others of Requirements Applicable to Video News Releases and Seeks Comment on the Use of Video News Releases by Broad. Licensees and Cable Operators*, 20 F.C.C.R. 8593, 8593 (Apr. 13, 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 Clay Calvert, *Payola, Pundits, and the Press: Weighing the Pros and Cons of FCC Regulation*, 13 *COMMLAW CONSPECTUS* 245, 246–51 (2005) (chronicling the \$240,000 paid by the Department of Education to television personality Armstrong Williams to tout the No Child Left Behind Act during his broadcast appearances and the payments received by columnists Maggie Gallagher and Michael McManus from the Department of Health and Human Services to tout the President’s marriage policies); Letter from Ben Scott, Policy Dir., Free Press, to Kevin J. Martin, Chairman, FCC (June 15, 2005), available at http://freepress.net/docs/final_payola_complaint_pdf.pdf (requesting an expanded investigation of “payola punditry” and citing incidents of undisclosed political and commercial influence over broadcast content). Companies too have been

old-fashioned radio payola, like the state of New York's recent settlement 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 to move Congress to action¹¹ and prompt reluctant regulators at the Federal Communications Commission to threaten 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

caught up in paid punditry scandals. See Philip Shenon, *G.M. Entangled in Pay-for-Publicity Dispute*, N.Y. TIMES, Apr. 28, 2006, at A21 (reporting on public relations firm's alleged offers on behalf of General Motors to pay former Labor Secretary Robert B. Reich to comment favorably on G.M.'s employee buyout plan).

8. See Jeff Leeds & Louise Story, *Radio Payoffs Are Described as Sony Settles*, N.Y. TIMES, July 26, 2005, at A1 (reporting on 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. 23, 2005, at C1 (reporting on Warner Music Group's \$5 million settlement). For the actual agreements referenced in the above *New York Times* articles, see Eliot Spitzer, Att'y Gen. of the State of N.Y., Assurance of Discontinuance Pursuant to Executive Law § 63(15), *In re Sony BMG Music Entertainment* 22–24 (July 22, 2005) [hereinafter Spitzer, *In re Sony*], available at <http://www.oag.state.ny.us/press/2005/jul/payola.pdf> and Eliot Spitzer, Att'y Gen. of the State of N.Y., Assurance of Discontinuance Pursuant to Executive Law § 63(15), *In re Warner Music Group Corp.* 16–17 (Nov. 22, 2005) [hereinafter Spitzer, *In re Warner*], available at <http://www.oag.state.ny.us/press/2005/nov/Warner%20Music%20Group%20Corp.pdf>.

9. See, e.g., Letter from Gary Ruskin, Executive Dir., Commercial Alert, to Marlene H. Dorte, Sec'y, FCC (Sept. 30, 2003), available at <http://www.commercialalert.org/fcc.pdf> (requesting that the FCC investigate alleged failures by all the major broadcast networks to comply with sponsorship disclosure laws). A similar petition to the Federal Trade Commission was dismissed. Letter from Mary K. Engle, Assoc. Dir. for Adver. Practices, FTC, to Gary Ruskin, Executive Dir., Commercial Alert (Feb. 10, 2005), available at <http://www.ftc.gov/os/losures/staff/050210ftccommercialalert.pdf>; Letter from Gary Ruskin, Executive Dir., Commercial Alert, to Donald Clark, Sec'y, FTC (Sept. 30, 2003), available at <http://commercialalert.org/ftc.pdf>.

10. See Press Release, Writers Guild of Am., "Are You Selling to Me?": Stealth Advertising in the Entertainment Industry 7–8 (Nov. 14, 2005), available at http://www.wga.org/uploadedFiles/news_and_events/press_release/2005/white_paper.pdf (proposing a code of conduct for product integration and demanding more control over the inclusion of promotional segments into scripts).

11. See S. REP. NO. 109-210, at 5 (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 Charles Duhigg, *FCC Launches Payola Probes of 4 Radio Giants*, L.A. TIMES, Apr. 20, 2006, at A1 (reporting on letters of inquiry FCC sent to Clear Channel, CBS, Entercom, and Citadel broadcasting companies); see also Sponsorship ID Public Notice, *supra* note 6, at 8593–95 (reminding broadcast licensees and cable operators of the sponsorship identification rules and the sanctions for violating the rules); 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 Ltd. P'ship*, 15 F.C.C.R. 19,705, 19,705 (2000) (giving notice of apparent liability for a \$4,000 forfeiture).

by Ronald Coase defending the practice.¹³ Sponsorship disclosure seems to be one of those 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 airplay 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's 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

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 airplay. See 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, 678-84 (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); 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.L. & PUB. POL'Y 521, 566 (1987) (arguing that payola improves market efficiency where there are regulatory restraints on vertical integration between record producers and radio stations). Other contributions to the payola literature have been largely historical accounts. See, 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. 52 (2000).

14. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 394 (1969) (declaring that broadcasters are public trustees "given the privilege of using scarce radio frequencies as proxies for the entire community"); LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 66-73 (1991) (tracing the public trustee model of broadcasting through leading cases).

15. The sponsorship disclosure rules do not apply to any nonbroadcast media, except to cable programming that 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), 76.1615 (2005).

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 and its 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 playlists. 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 advances 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

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 et al., *Google's Wireless Plan Underscores Threat to Telecom*, WALL ST. J., Oct. 3, 2005, at A1 (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).

scarce commodity,¹⁸ stealth techniques enable 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 government²⁰ and candidates²¹ recognize these differences. At the same time, there is much

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 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 G. 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) (discussing a variety of commentary on the propriety of government speech and its ability to influence the public).

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. GEN. ACCOUNTING OFFICE, REPORT NO. B-302504, *MEDICARE PRESCRIPTION DRUG, IMPROVEMENT, AND MODERNIZATION ACT OF 2003: USE OF APPROPRIATED FUNDS FOR FLYER AND PRINT AND TELEVISION ADVERTISEMENTS* 6 (2004); see also Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. H, title VI, § 624, 118 Stat. 2809, 3278 (2004). See generally KEVIN R. KOSAR, CONG. RESEARCH SERV., REP. NO. RL32750, *PUBLIC RELATIONS AND PROPAGANDA: RESTRICTIONS ON EXECUTIVE AGENCY ACTIVITIES* 1–4 (2005), available at <http://www.fas.org/sgp/crs/RL32750.pdf> (discussing recent controversies regarding the legality of executive agency spending on informational campaigns). 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.” KOSAR, *supra*, at 5 (quoting 5 U.S.C. § 3107 (2000)). 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—Sort Of*, WASH. POST, Jan. 31, 2005, at A19.

21. Both federal election law and 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.

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 supermarkets²³ 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, or appears to be, independent editorial content.

§ 441d (2000); 11 C.F.R. § 110.11 (2006). See generally Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. REV. 1141 (2003) (advocating a "disclosure plus" framework whereby the government attempts not only to increase campaign finance disclosures, but also broadcasts such disclosures to the public in highly visible ways). 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 Int'l Corp. v. Peters*, 347 F.3d 485, 487 (3d 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., FTC, *SLOTING ALLOWANCES IN THE RETAIL GROCERY INDUSTRY: SELECTED CASE STUDIES IN FIVE PRODUCT CATEGORIES* (2003), available at <http://www.ftc.gov/os/2003/11/slottingallowancercpt031114.pdf>; Benjamin Klein & Joshua D. Wright, *The Economics of Slotting Contracts*, 50 J.L. & ECON. (forthcoming 2007), available at <http://ssrn.com/abstract=773464>; Mary W. Sullivan, *Slotting Allowances and the Market for New Products*, 40 J.L. & ECON. 461 (1997).

24. See *Am. Booksellers Ass'n v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1068 (N.D. Cal. 2001) (describing the practice of publishers securing in-store displays by giving bookstores promotional allowances substantially in excess of actual promotional costs); Randy Kennedy, *Cash Up Front*, N.Y. TIMES, June 5, 2005, § 7, at 14 (describing arrangements between publishers and large booksellers, including Barnes & Noble, to feature the publishers' books prominently on prime shelf space).

25. See Letter from Heather Hipsley, Acting Assoc. Dir. of Adver. Practices, FTC, to Gary Ruskin, Executive Dir., Commercial Alert (June 27, 2002), 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 late 1980s 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).

These immersive marketing techniques import practices originally developed for publicity purposes into the realm of advertising.²⁷ Publicity is the circulation of messages for free in the hopes of further dissemination 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

Immersive 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

27. See Anne R. Owen & James A. Karrh, *Video News Releases: Effects on Viewer Recall and Attitudes*, 22 PUB. REL. REV. 369, 371–72 (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 2, 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 sound bites. A journalist can use all or any of these elements. See U.S. GEN. ACCOUNTING OFFICE, GAO-05-643T, *VIDEO NEWS RELEASES: UNATTRIBUTED PREPACKAGED NEWS STORIES VIOLATE PUBLICITY OR PROPAGANDA PROHIBITION*, at ii (2005) (statement of Susan A. Poling, Managing Assoc. Gen. Counsel, Government Accountability Office, Before the S. Comm. on Commerce, Science, and Transportation), available at <http://www.gao.gov/new.items/d05643t.pdf#searchl=%22prepackaged%20news%20stories%22> (explaining that video news releases “are intended to be indistinguishable from news segments broadcast to the public by independent television news organizations”).

31. David Lieberman, *Fake News*, TV GUIDE, Feb. 22, 1992, at 10, 10.

32. See KATHLEEN HALL JAMIESON & KARLYN KOHRS CAMPBELL, *THE INTERPLAY OF INFLUENCE: NEWS, ADVERTISING, POLITICS, AND THE MASS MEDIA* 141 (5th ed. 2001) (discussing the increased use of video news releases by businesses).

33. 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 A17 (reporting that 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 Ken Dowell, PR Newswire Ass’n & Multivu, Inc., Comments for FCC *In re* Requirements Applicable to Video News Releases 5 (June 22, 2005), http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6517887889 (citing various studies showing high frequency of video news release use among broadcasters); Diane Farsetta, Ctr. for Media and Democracy & Free Press, Comments for FCC *In re* Use of Video News Releases by Broad. Licensees and Cable Operators 2 (June 22, 2005), http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6517887890 (citing claims by VNR producers D S Simon Productions and Medialink Worldwide that VNR usage is widespread and increasing). *But see* Radio-Television News Dirs. Ass’n, Comments for FCC *In re* Use of Video News Releases by Broad. Licensees and Cable Operators, at 7–10 (June 22, 2005), <http://gullfoss2.fcc.gov/prod/ecfs/>

Video news releases are usually provided free of charge to the producer,³⁴ but sponsors sometimes pay for “secured placement” of their footage to achieve a kind of “branded journalism.”³⁵ A public interest group study recently documented more than seventy-five instances in which local news operations were paid to pass off video news releases as news.³⁶ These disclosures have spurred an ongoing FCC investigation.³⁷

Advertisers and propagandists may also pay journalists themselves to speak the promotional messages. Advertisers routinely pay consumer experts³⁸ and celebrity spokespeople³⁹ 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 controversial No Child Left Behind Act,⁴⁰ and other federal agencies paid print journalists to tout Administration programs.⁴¹ These activities are not confined to old media. In the 2004

retrieve.cgi?native_or_pdf=pdf&id_document=6517887910 (claiming that news directors rarely use video news releases in full).

34. Radio-Television News Dirs. Ass’n, *supra* note 33, at 6–7.

35. See Joe Mandese, *The Art of Manufactured News*, BROADCASTING & CABLE, Mar. 28, 2005, at 24, 24–25 (discussing the expanding practice of “secured placement” to create “branded journalism”); Craig McGuire, *‘Narrowcasting’ Reaps Rewards for VNRs*, PR WEEK USA, Oct. 17, 2005, at 18, 18 (reporting on the growing practice of “secured placement”).

36. DIANE FARSETTA & DANIEL PRICE, CTR. FOR MEDIA AND DEMOCRACY, FAKE TV NEWS: WIDESPREAD AND UNDISCLOSED 1, 4 (2006), available at <http://www.prwatch.org/pdfs/NFNPDFExt6.pdf>.

37. Press Release, FCC, FCC Launches Unprecedented Video News Release Probe (Aug. 14, 2006), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267048A1.pdf (reporting that the FCC issued forty-two Letters of Inquiry to seventy-seven broadcast licenses to determine whether the source of video news releases was properly disclosed).

38. James Bandler, *Advice for Sale: How Companies Pay TV Experts for On-Air Product Mentions*, WALL ST. J., Apr. 19, 2005, at A1; Howard Kurtz, *Firms Paid TV’s Tech Gurus to Promote Their Products*, WASH. POST, Apr. 20, 2005, at C1; see also Jonathan S. Adelstein, Comm’r, FCC, “Fresh Is Not as Fresh as Frozen:” A Response to the Commercialization of American Media, Remarks Before the Media Institute (May 25, 2005), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-258962A1.pdf (commenting on the increasing use of paid consumer experts by advertisers).

39. Letter from Gary Ruskin to Donald Clark, *supra* note 9, at 4–5, 16 (citing examples of Lauren Bacall and Rob Lowe appearing on talk shows to tout pharmaceuticals without disclosing their financial ties to the manufacturers).

40. 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. Press Release, FCC, Statement of FCC Chairman Michael K. Powell (Jan. 14, 2005), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-256115A1.pdf. The Government Accountability Office concluded that these payments constituted illegal covert propaganda. Letter from Anthony H. Gamboa, Gen. Counsel, U.S. Gov’t Accountability Office, to Senators Frank R. Lautenberg and Edward M. Kennedy (Sept. 30, 2005), available at <http://www.gao.gov/decisions/appro/305368.pdf>.

41. See Howard Kurtz, *Writer Backing Bush Plan Had Gotten Federal Contract*, WASH. POST, Jan. 26, 2005, at C1 (asserting that the 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

elections, the committees of at least one presidential candidate and one Senate candidate paid bloggers for unattributed campaign promotions.⁴² Video news releases are also making their way onto the Internet and other news media outlets.⁴³

Entertainment programming provides a more hospitable 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 include antidrug messages in their sitcoms and dramas.⁴⁴ The government reviewed scripts in about fifty cases and placed promotional messages in more than one hundred episodes of popular shows like *ER* and *The Practice*⁴⁵—a sacrifice of editorial control worth about \$21 million to the networks.⁴⁶

A15 (detailing how the Department of Agriculture paid a freelance writer to write articles promoting federal conservation programs).

42. See Charles Babington & Brian Faler, *A Committee Post and a Pledge Drive*, WASH. POST, Dec. 18, 2004, at A16 (noting payments by John Thune's Senate campaign to two bloggers who attacked his opponents online); William M. Bulkely & James Bandler, *Dean Campaign Made Payments to Two Bloggers*, WALL ST. J., Jan. 14, 2005, at B2 (detailing payments made by Howard Dean's presidential campaign to two bloggers in order to receive positive campaign promotions online). Political committees must disclose these disbursements in reports filed with the Federal Election Commission. 2 U.S.C. § 434 (2000 & Supp. IV 2004).

43. See McGuire, *supra* note 35, at 18 (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").

44. Congress passed a law in 1998 authorizing the federal government to purchase antidrug public service announcements from networks that would donate as much time as the government purchased. National Youth Anti-Drug Media Campaign, 21 U.S.C. §§ 1801–1804 (2000). The White House then promised to excuse participating networks from donating time if they incorporated antidrug storylines and dialogue into their programming. Ariel Berschadsky, *White House Anti-Drug Policy: Statutory and Constitutional Implications*, 19 CARDOZO ARTS & ENT. L.J. 183, 185 (2001). Another part of the government's antidrug media campaign was the production of video news releases. See Letter from Anthony H. Gamboa, Gen. Counsel, U.S. Gov't Accountability Office, to Congressmen Henry A. Waxman and John W. Olver (Jan. 4, 2005), available at <http://www.gao.gov/decisions/appro/303495.pdf> (finding that this practice constituted illegal "covert propaganda").

45. 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 Telecommunications, Trade, and Consumer Protection of the H. Comm. on Commerce*, 106th Cong. 54–55 (2000) (statement of Alex Wallau, President, ABC Television Network) (describing ABC's involvement in the campaign).

46. *Anti-Drug Media Campaign: Hearing Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the H. Comm. on Commerce*, 106th Cong. 39–40 (2000) (statement of Donald R. Vereen, Dep. Dir., Office of the Nat'l 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, FCC, to Thomas W. Dean, Litig. Dir., NORML Found., 16 F.C.C.R. 1421, 1424 (Dec. 22, 2000) (finding that because the networks "were obligated to donate a matching amount of media time for every advertising spot purchased by the ONDCP . . . [,] any credit toward that obligation . . . received for the broadcast of programming with anti-drug . . . themes constitutes consideration").

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.⁴⁷ The promotional message will melt into non-promotional plot lines, props, and dialogue,⁴⁸ enabling advertisers to build brand equity without interrupting the narrative flow of programming.⁴⁹ So bullish are producers on the potential for seamless product integration that even the “auteurs” of the Sundance Film Channel have reconsidered their noncommercial stance.⁵⁰

Ten years ago, product placements were infrequent and limited to the appearance of a brand name, like Kellogg’s cereal in the television program *Seinfeld*⁵¹ and Reese’s Pieces in the film *E.T.*⁵² 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.⁵³ Between 1999 and 2004, the share of total television advertising dollars attributable to product placement jumped by an average of twenty-one percent a year.⁵⁴ Les Moonves, CEO of the CBS Corporation, predicted a

47. 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 SCOTT DONATON, MADISON & VINE: WHY THE ENTERTAINMENT AND ADVERTISING INDUSTRIES MUST CONVERGE TO SURVIVE 25–34 (2004).

48. See C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097, 2207 (1992) (arguing that 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”).

49. See KERRY SEGRAVE, *PRODUCT PLACEMENT IN HOLLYWOOD FILMS* 206 (2004) (noting the key for corporations to expand into independent (non-major) films is “not only to find opportunities to seamlessly place products, but more importantly to associate brand to the entire film relevance” (quoting Paul Speaker, the director of marketing for The Shooting Gallery, the company producing *Slingblade*)).

50. *Sundance Channel to Push Sponsorship Next Year*, COMM. DAILY, June 23, 2006, at 10, 10 (reporting on the Sundance Channel’s decision to adopt a branded entertainment model).

51. June Deery, *Reality TV as Advertainment*, 2 POPULAR COMM. 1, 11 (2004).

52. Interestingly, Hershey Company 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&M’s in the film. SEGRAVE, *supra* note 49, at 165. Hershey was unaware until after production closed that its candy had been used but agreed to help promote the film. *Id.*; see also SCHUDSON, *supra* note 28, at 102 (“[W]hat eventually became promotion in a fairly conventional sense began as the largely accidental placement of a product in a nonadvertising communication setting.”).

53. 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 Television, Inc.*, 126 F.3d 70 (2d Cir. 1997), which held that the legality of using copyrighted items in programming without permission 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.

54. European Comm’n, *The Commission Proposal for a Modernisation of the Television Without Frontiers Directive: Frequently Asked Questions* 1 (Dec. 13, 2005), <http://europa.eu.int/>

“quantum leap” in the incidence of product placements in television programming.⁵⁵ Moreover, the salience of the sponsored message in the editorial content is growing⁵⁶ as sponsors become involved earlier in the editorial process.⁵⁷ By working directly with producers,⁵⁸ instead of with the network distributor, advertisers are able to knit their messages into the narrative to shape “the pop culture dialogue.”⁵⁹ These trends affect both scripted⁶⁰ and unscripted reality programming, where stealth marketing is especially common.⁶¹

rapid/pressReleasesAction.do?reference=MEMO/05/475&format=PDF&aged=1&language=EN&guiLanguage=fr (citing Carat Belgium & Koan Law Firm, Comparative Study on the Impact of Control Measures on the Television Advertising Markets in European Union Member States and Certain Other Countries 60–61 (July 2005), <http://ec.europa.eu/comm/avpolicy/docs/library/studies/2003/44-03-finalreport-fr.pdf>).

55. Jon Fine, *An Onslaught of Hidden Ads*, BUS. WEEK, June 27, 2005, at 24, 24; see also John Consoli, *The Word on Placement: It's Following the Script*, ADWEEK, July 26, 2004, at 8, 18 (reporting Moonves's prediction that 75% of all primetime scripted programming will include product placements in several years); Marc Graser, *Product-Placement Spending Poised to Hit \$4.25 Billion in '05*, ADVERTISING AGE, Apr. 4, 2005, at 16, 16 (discussing a research study estimating a 23% increase in product placement spending in 2005 over the previous year).

56. See, e.g., Lorne Manly, *When the Ad Turns into the Story Line*, N.Y. TIMES, Oct. 2, 2005, § 3, at 1 (reporting on new forms of “branded entertainment” in which the advertised product is more central to the program).

57. See DONATON, *supra* note 47, at 92–93 (describing how producers share content with advertisers when it is still in development to better effect true integration); Lawrence A. Wenner, *On the Ethics of Product Placement in Media Entertainment*, in HANDBOOK OF PRODUCT PLACEMENT IN THE MASS MEDIA 101, 114 (Mary-Lou Galician ed., 2004) (noting that 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”); Evelyn Nussenbaum, *Products Slide into More TV Shows, with Help from New Middlemen*, N.Y. TIMES, Sept. 6, 2004, at C7 (quoting the president of an integrated advertising production company as saying that “[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”).

58. 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., June 20, 2005, at B1; see also DONATON, *supra* note 47, at 70 (citing Viacom’s Les Moonves’s opinion that product placement deals will be sold jointly by the network and the producer).

59. Stuart Elliot, *Burger King Moves Quickly to Take a Product from TV to the Table*, N.Y. TIMES, Jan. 21, 2005, at C4 (quoting an advertising agency president and reporting on partnerships between advertisers and NBC’s *The Apprentice* whereby sponsors paid over \$2 million each for incorporation of brands into the plot).

60. Revlon, for example, paid for advertising spots in return for a three-month “story arc” or “plot placement” featuring them in an ABC soap opera as a rival to the character Erica Kane’s cosmetics company. Wenner, *supra* note 57, at 116; 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, at B1; see also Geoffrey A. Fowler, *Ad Notes: Subway Buys a Role on “Will & Grace,”* WALL ST. J., Sept. 30, 2005, at B4 (reporting that Subway Restaurants introduced a new sandwich by working it into a sitcom plot).

61. The break-out reality program *Survivor* garnered about one million dollars in product placement revenue in its first season. Wenner, *supra* note 57, at 115. By the second season, the show’s executive producer said the products were the adventure’s “17th character.” *Id.*

Product placements are expanding into new media. Placements on blogs now appear, with and without attribution.⁶² 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.⁶³ Video games provide another attractive vehicle for product placements.⁶⁴ Indeed, for many advertisers, games are ideal because of their popularity with the desirable young male demographic and their worldwide distribution.⁶⁵ Most attractive of all perhaps is the sponsorship of viral videos distributed on sites such as YouTube.⁶⁶ Many such videos contain no attribution and are as likely to be authored by sponsors as individuals. There was recent speculation, for example, that a popular video spoofing former Vice President Al Gore's global warming film, *An Inconvenient Truth*, originated in a public relations firm hired by Exxon and other companies with an interest in refuting global warming theories.⁶⁷

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*.⁶⁸ These magazines are sponsored by companies like Bridgestone Firestone and Nestlé, respectively.⁶⁹ Using what is called a "barter syndication" model,

62. For example, a marketing company called Marqui, which itself helps companies place brands in blogs and monitors their impact, has contracted with bloggers to place its brand. See *Blogging for Business—Marqui's Revolutionary Paybloggers Program*, http://www.marqui.com/Paybloggers/Paybloggers_Program.aspx (outlining a company's program to pay bloggers to mention it and link to its website). For the bloggers' product placement agreements, see Marqui's Paybloggers Contract, http://www.marqui.com/Paybloggers/Paybloggers_Contract.aspx.

63. See Brian Steimberg, *TV Networks Find New Ways to Attract Ads*, WALL ST. J., June 27, 2005, at B1 (reporting on interview with Larry Kramer, president of digital media at CBS).

64. Michelle R. Nelson et al., *Advertainment or Adcreep? Game Players' Attitudes Toward Advertising and Product Placements in Computer Games*, J. INTERACTIVE ADVERTISING, Sept. 2004, at 3, 5; see also T.L. Stanley, *Where the Boys Are: Marketers Flock to Gaming Gathering*, ADVERTISING AGE, May 17, 2004, at 3, 3, 157 (reporting on major corporations' efforts to embed their products into video games).

65. See Stanley, *supra* note 64, at 3 (noting that advertisers targeted males age eighteen to thirty-four at a video game conference and that the video game industry amassed \$16 billion in business worldwide).

66. See Antonio Regalado & Dionne Searcey, *Where Did That Video Spoofing Gore's Film Come From?*, WALL ST. J., Aug. 3, 2006, at B1 (noting that YouTube has attracted various sponsors trying to access the site's numerous visitors).

67. *Id.*

68. See Press Release, Studio One Networks, Nestle USA and Bridgestone Renew Studio One's "Your Baby Today" and "Driving Today" (Dec. 17, 2004), http://www.studioone.net/in_the_news/releases/press_release_son121704.htm (announcing sponsorship renewal for the two Internet magazines).

69. *Id.*; see also JUPITERRESEARCH, ONLINE SPONSORSHIPS: BLENDING BRANDING AND DIRECT MARKETING 2 (2003), available at http://www.studioone.net/news/articles/jupiter_article.pdf ("On behalf of Bridgestone, Studio One handles production and content maintenance, and manages relationships with 16 distribution partners that carry the sponsorship, including AOL, Autobyte, and Drivers.com, 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.").

Studio One develops the content on behalf of the sponsors and arranges for distribution on the Internet and through television and radio.⁷⁰ 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 than shared sponsorships."⁷¹

Promotions are most fully integrated into entertainment programming when the advertiser itself produces the programming, as is the case with "brandvertising" or "advertainment."⁷² Nike took this path when it produced a boxing film to market its shoes.⁷³ 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.⁷⁴ 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."⁷⁵

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,⁷⁶ while § 508 imposes criminal penalties on broadcast employees, program suppliers, and sponsors for failure to disclose sponsorship.⁷⁷ The language of § 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.⁷⁸ This obligation applies whether the

70. Press Release, Studio One Networks, Nestle Rings the Dinner Bell (Sept. 10, 2003), http://www.studioone.net/in_the_news/articles/madandvine.html.

71. *Id.*

72. See Susan B. Krechmer, *Advertainment: The Evolution of Product Placement as a Mass Media Marketing Strategy*, in HANDBOOK OF PRODUCT PLACEMENT IN THE MASS MEDIA 37, 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"); see also Elliot, *supra* note 59 (defining "brandvertising" and "advertainment" as "branded or sponsored entertainment").

73. Suzanne Vranica, *Hollywood Goes Madison Avenue*, WALL ST. J., Dec. 15, 2003, at B5.

74. 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 C8.

75. TUROW, *supra* note 26, at 176.

76. 47 U.S.C. § 317 (2000).

77. 47 U.S.C. § 508 (2000).

78. Letter from David H. Solomon, Chief, Enforcement Bureau, FCC, to Thomas W. Dean, Litig. Dir., NORML Found., 16 F.C.C.R. 1421, 1423 (Dec. 22, 2000). Sponsorship disclosures must be contemporaneous with the broadcast, 47 U.S.C. § 317(a)(1), and comprehensible to the audience. See, e.g., *Midwest Radio-Television, Inc.*, 49 F.C.C.2d 512, 515 (1974) (requiring a disclosure to clearly announce that the program was "sponsored or paid for"); *NBC*, 27 F.C.C.2d 75, 75 (1970) ("[T]he announcement should at least state in language understandable to the majority

message constitutes propaganda or advertising, and it applies regardless of who in the chain of production receives payment.⁷⁹ Thus, for example, payments from an advertiser to a studio producer for transmission of a promotional message have to be disclosed.⁸⁰ Broadcast station personnel must use due diligence to discover whether there has been any exchange of consideration for programming,⁸¹ and to facilitate these efforts, station employees, program producers, and program suppliers must report such exchanges to station personnel.⁸²

As broad as they are, the disclosure requirements have fairly clear limits. They do not apply to overt marketing, such as traditional fifteen- or thirty-second spot advertisements, where both the presence and source of sponsorship are obvious.⁸³ 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.”⁸⁴ Moreover, the sponsorship disclosure rules generally do not apply unless the sponsor has paid for its promotion.⁸⁵ Thus, the use of traditional print publicity materials, circulated for free, is permissible without disclosure of source.⁸⁶ The use of free products or services falls into the same category, so long as the gifts have minimal value.⁸⁷ The one exception to this general requirement of

of viewers that suppliers of goods or services have paid . . . to display or promote the products . . . and each supplier should be properly identified.”); *United Broad. Co. of N.Y., Inc.*, 45 F.C.C. 1921, 1924 (1965) (finding insufficient a disclosure that a sponsor produced a broadcast because the disclosure did not specifically indicate that the broadcast was paid for by the sponsor).

79. See 47 U.S.C. § 317(a) (requiring sponsorship disclosures for “[a]ll matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting”).

80. See, e.g., *Letter to Earl Glickman, President, Gen. Media Assocs., Inc.*, 3 F.C.C.2d 326, 326–27 (Apr. 13, 1966) (requiring a production company to disclose paid sponsorships for programming that it seeks to sell to broadcast stations).

81. See 47 U.S.C. § 317(c) (“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.”).

82. 47 U.S.C. § 508(a)–(c).

83. See 47 C.F.R. § 73(f) (2005) (deeming that advertisements for commercial products or services satisfy § 317 so long as they name the sponsor or the sponsor’s product).

84. See 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. See *id.* § 73.1212(a)(2) (requiring sponsorship identification for products “furnished in consideration for an identification of any person, product, service, trademark, or brand name beyond an identification reasonably related to the use of such service or property on the broadcast”).

85. *Id.* § 73.1212(a).

86. See H.R. REP. NO. 86-1800, at 22 (1960) (clarifying that no disclosure is required for the use of “[n]ews releases . . . furnished to a station by Government, business, labor and civic organizations, and private persons, with respect to their activities, and editorial comment therefrom”).

87. 47 U.S.C. § 317(a)(1) (2000) (stating that, subject to certain exceptions, no disclosure is necessary for “any service or property furnished without charge or at nominal charge for use on, or in connection with, a broadcast”).

consideration is for promotional messages that could be considered controversial or political.⁸⁸ As to these, Congress has given the FCC authority to require sponsorship disclosure absent payment, and the agency has done so.⁸⁹

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.⁹⁰ Congress then imported this requirement into the Radio Act of 1927⁹¹ and from there unchanged into the Communications Act of 1934.⁹² Until the middle of the twentieth century, the sponsorship identification requirements “occupied a humble position in the regulatory design and went virtually unnoticed.”⁹³ 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*.⁹⁴ 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. Whether or not sponsors used this power to advance an editorial agenda, they almost always exercised it boldly for all to see.⁹⁵ There was nothing stealthy about the arrangement.

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

88. 47 C.F.R. § 73.1212(d) (2005).

89. *Id.* The FCC had long interpreted § 317 to require disclosure in such cases, and, to provide the FCC with statutory cover, Congress added subsection (a)(2) to § 317, authorizing the FCC to require “an appropriate announcement” of source for all political or controversial material. 47 U.S.C. § 317(a)(2); *see also* H.R. REP. NO. 86-1800, at 24-25 (1960) (stating that a sponsorship identification announcement may be required for political programs or discussions of controversial issues even if “the matter broadcast is not ‘paid’ matter”).

90. Act of Aug. 24, 1912, ch. 389, 37 Stat. 539, 554 (codified at 18 U.S.C. § 1734 (2000)); *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, at 106-23 (1993) (discussing legislation).

91. Radio Act of 1927, ch. 169, 44 Stat. 1162, 1170 (repealed 1934). *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) (elaborating on the Act’s legislative origins).

92. *See* H.R. REP. NO. 73-1918, at 47 (1934) (Conf. Rep.) (indicating that § 317 of the Communications Act adopted § 19 of the Radio Act of 1927 virtually verbatim and without debate); H.R. REP. NO. 73-1850, at 2, 7 (1934) (same); S. REP. NO. 73-781, at 8 (1934) (same).

93. *Loveday v. FCC*, 707 F.2d 1443, 1450 (D.C. Cir. 1983).

94. Kreehmer, *supra* note 72, at 41.

95. 2 ERIK BARNOUW, A HISTORY OF BROADCASTING IN THE UNITED STATES: THE GOLDEN WEB 1933 TO 1953, at 35 (1968) (“In the industry [by 1935] it had become an assumption that the company paying the bill could control content.”).

breaks.⁹⁶ 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.”⁹⁷ More than a decade after the enactment of the Communications Act, the FCC finally felt it necessary to issue rules implementing § 317.⁹⁸

It was not until the late 1950s, however, in the wake of two highly publicized media scandals, that the sponsorship disclosure rules became important.⁹⁹ 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.¹⁰⁰ 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 contestants¹⁰¹ and had selected others to plug their employers’ businesses.¹⁰² After holding a number of very public hearings in which the practices were condemned,¹⁰³ Congress strengthened § 317 by extending the sponsorship disclosure requirement to broadcast station employees, and criminalizing the failure to disclose.¹⁰⁴

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

96. *Id.*; see also DONATON, *supra* note 47, 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).

97. 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 65 (1947) (“[S]ales talk should be plainly labeled as such . . .”).

98. Kielbowicz & Lawson, *supra* note 91, at 341–42.

99. See *id.* at 347–52 (describing the television quiz show and payola radio scandals as well as the government investigations and media reports targeting them).

100. Coase, *supra* note 13, at 286–88.

101. 3 ERIK BARNOUW, A HISTORY OF BROADCASTING IN THE UNITED STATES: THE IMAGE EMPIRE FROM 1953, at 122–25 (1970) (discussing Revlon’s involvement in the quiz show scandals).

102. See Kielbowicz & Lawson, *supra* note 91, at 352 (noting that a department store had paid the producers of *The \$64,000 Question* for an employee to appear as a contestant and mention the store on air).

103. *Investigation of Television Quiz Shows: Hearings Before a Subcomm. of the H. Comm. on Interstate and Foreign Commerce*, 86th Cong. (1959); H.R. REP. NO. 86-1258 (1960). For a history of the payola scandals and the congressional response, see Abell, *supra* note 13, at 57–58; Coase, *supra* note 13, at 270; and Kielbowicz & Lawson, *supra* note 91, at 333–69.

104. 47 U.S.C. § 508 (2000). Congress also made it a crime to rig any broadcast contest. *Id.* § 509.

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.¹⁰⁵ A representative passage from the legislative history of the 1960 amendments to § 317, for example, expresses concern that payola works “to drive out of business small firms who lack the means to survive this unfair competition.”¹⁰⁶

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.¹⁰⁷ Stealth marketing then co-opts 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.¹⁰⁸ On this theory, media outlets that have been compromised by sponsors will exclude undercapitalized 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 airplay is essential to spur record sales, which is the relevant competitive arena. Today, this is a 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.¹⁰⁹ More fundamentally, the competition theory conflates the

105. See, e.g., FCC Notice of Inquiry, Broad. Localism, 19 F.C.C.R. 12,425, 12,437–38 (July 1, 2004) (describing the Future of Music Coalition’s claims that payola forecloses entry for many producers desiring airplay); Abell, *supra* note 13, 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, <http://www.salon.com/ent/feature/2001/03/14/payola> (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).

106. See Coase, *supra* note 13, at 316 (quoting Congressman Oren Harris).

107. Whether or not editors actually are, or should be, driven by consumer tastes is a subject of considerable debate. See *infra* note 230 and accompanying text.

108. Press Release, FCC, Commissioner Adelstein Calls for FCC Investigation Based on Spitzer Payola Settlement (July 25, 2005), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260158A1.pdf (“It’s unfair to listeners if they hear songs on the radio because someone was paid off, not because it’s good music.” (emphasis omitted)).

109. See Brian Hiatt & Evan Serpick, *Music Biz Laments ‘Worst Year Ever,’* ROLLING STONE, Jan. 13, 2006, at 3, available at <http://www.rollingstone.com/news/story/9147118/>

harm of marketing with the harm of marketing by stealth. It is entirely legal for record companies to pay radio stations for airplay 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.¹¹⁰ 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. In a competitive market, listeners who want quality and choice 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.¹¹¹ The sponsor will then be faced with increasing payola payments (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.

music_biz_laments_worst_year_ever/1 (noting that independent bands like Bright Eyes and Hawthorne Heights have achieved market success in the absence of substantial airplay by selling hundreds of thousands of albums marketed primarily through Internet sites like MySpace).

110. 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 Spitzer, *In re Warner*, *supra* note 8, at 16 (describing Warner Music’s “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 airplay and record sales and because music tends to become more popular once it climbs to the top of *Billboard*’s lists, *Billboard* converts airplay from a method of reaching people to a credential that in itself increases sales. See James Surowiecki, *Paying to Play*, *NEW YORKER*, July 7, 2004, at 42, 42 (describing the role of “spot buys” in launching Avril Lavigne into the Top 10); Lee Ann Obringer, *How Top 40 Radio Works*, <http://entertainment.howstuffworks.com/top-401.htm> (describing the formula for *Billboard*’s Top 40 hit list).

111. 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 H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 *UCLA L. REV.* 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 the listeners do not want, if repeated, would almost certainly lead to termination or more careful supervision from the employer.

Ronald Coase has argued that payola, far from reducing market efficiency, might enhance it.¹¹² 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 recording companies believe will be hits.¹¹³ 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.¹¹⁴ By offering payola, record companies share the incremental value of repeated airplay with stations and ensure that this value is factored into radio station playlists.¹¹⁵ 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 playlist 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.¹¹⁶ Media markets, especially the market for popular radio music, are competitive according to standard measures of concentration.¹¹⁷

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

112. See Coase, *supra* note 13, at 316–19.

113. *Id.*

114. See Katunich, *supra* note 13, at 670–71, 678–79 (explaining that deregulation allowing contracts for airplay between record companies and radio stations “would improve the efficiency of radio programming”); Sidak & Kronemyer, *supra* note 13, at 569 (discussing how increased efficiency could result if payments by record companies to radio stations in return for airplay are allowed).

115. See Sidak & Kronemyer, *supra* note 13, at 566 (arguing that payola “renders th[e] market [in hit singles] more efficient in its evaluation and dissemination of information that is valuable to both record companies and radio stations”).

116. See Klein & Wright, *supra* note 23, at 5–6 (“[C]ompetition between incumbents and entrants for retail distribution generally occurs on a ‘level playing field,’ in the sense that all manufacturers can openly compete for shelf space and it is the manufacturer willing to pay the most for a particular space that obtains it.”); see also FTC, 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 anticompetitive but arriving at no conclusions).

117. See FCC Report and Order and Notice of Proposed Rulemaking, 2002 Biennial Regulatory Review—Review of the Comm’n’s Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202, 18 F.C.C.R. 13,620, 13,666 (2003), *aff’d in part and remanded in part sub nom.* Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004) (remanding to the Commission to justify certain parts of its order, including the numerical limits placed on television and radio station ownership).

competitive media market may not be one that fosters a diversity of voices.¹¹⁸ In theory, payola is neutral with respect to diversity. Payola can, and currently probably does, reduce diversity. 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.¹¹⁹

It is also possible that payola could *increase* diversity if, instead of Sony BMG, it is the independent or nondominant label that pays for play. This is the kind of diversity-enhancing payola that existed in the 1950s. 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.¹²⁰ 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."¹²¹ Today, among independent labels, there is a certain wistfulness for the practice of payola that might be counted on to increase independents' radio play.¹²²

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.

118. See C. Edwin Baker, *Media Structure, Ownership Policy, and the First Amendment*, 78 S. CAL. L. REV. 733, 742-47 (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).

119. See generally Goodman, *supra* note 18, at 1400-13 (discussing the relationship between media diversity and media competition).

120. See Coase, *supra* note 13, at 292-93, 306, 315-16 (presenting testimony that in 1959 rock and roll would not have been played without payola and noting that small independent companies relied on payola).

121. *Id.* at 316; see also Tyler Cowen, *The Economics of the Critic*, in CONFLICT OF INTEREST IN THE PROFESSIONS 237, 246 (Michael Davis & Andrew Stark eds., 2001) (noting that payola "gives individuals a chance to buy their way into markets that they otherwise might find difficult to crack" and "has been used most intensely by outsiders and minorities").

122. See Abell, *supra* note 13, at 56 (quoting the president of the independent label Rykodisc as saying that "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").

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 commercialism in broadcast media.¹²³ 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.”¹²⁴ Other media regulations, since abandoned, sought to address this concern by limiting the total amount of broadcaster advertising and banning program-length commercials.¹²⁵

This anticommmercial 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.¹²⁶ For the *No Logoist*, third party (usually commercial) voices have overwhelmed non-commercial communications with brands and corporate messages.¹²⁷ Whether covert or overt, this advertiser influence hijacks authentic culture and turns “America’s marketplace of ideas [into] . . . a junkyard of commodity ideology.”¹²⁸ 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.”¹²⁹

This cultural critique of marketing draws on various economic critiques.¹³⁰ Especially influential has been John Kenneth Galbraith’s

123. Kielbowicz & Lawson, *supra* note 91, at 347; see also SUSAN SMULYAN, *SELLING RADIO: THE COMMERCIALIZATION OF AMERICAN BROADCASTING, 1920–1935*, at 145 (1994) (describing a 1932 Senate resolution expressing “growing dissatisfaction with the present use of radio facilities for the purposes of commercial advertising”).

124. Kielbowicz & Lawson, *supra* note 91, at 347.

125. Revision of Programming and Commercialization Policies, 98 F.C.C.2d 1076, 1102 (1984) (eliminating use of sixteen-minute guideline for advertising content in the license reviews and eliminating ban on program length commercials); FCC Public Notice, Report and Statement of Policy Re: Comm’n En Banc Programming Inquiry, 44 F.C.C. 2303, 2314 (July 29, 1960) (identifying policy interests in limiting total amount of time devoted to advertising and frequency of program interruptions); see also FCC Public Notice, Program-Length Commercials, 39 F.C.C.2d 1062, 1062–63 (Feb. 22, 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 (2000) (requiring licensees of commercial television stations to 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).

126. NAOMI KLEIN, *NO LOGO* (Picador USA 2002) (2000). See generally KALLE LASN, *CULTURE JAM: HOW TO REVERSE AMERICA’S SUICIDAL CONSUMER BINGE—AND WHY WE MUST* (1999). For the associated social movements, see Commercial Alert, Protecting Communities from Commercialism, <http://www.commercialalert.org> and Adbusters, <http://www.adbusters.org>.

127. See KLEIN, *supra* note 126, at 3–124 (chronicling the expansion of corporate speech into fields once traditionally reserved for noncorporate actors).

128. Ronald K.L. Collins & David M. Skover, *Commerce & Communication*, 71 TEXAS L. REV. 697, 707–28 (1993).

129. Adelstein, *supra* note 38, at 4.

130. These critiques were both neoliberal and Marxist. See, e.g., STUART EWEN, *CAPTAINS OF CONSCIOUSNESS: ADVERTISING AND THE SOCIAL ROOTS OF THE CONSUMER CULTURE* 37 (1976)

observation that advertising itself creates consumer wants and needs that would not otherwise exist.¹³¹ 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.¹³² Recent scholarship on the complexity of consumer decisionmaking¹³³ and the interaction between brand promotion and consumer demand¹³⁴ has added psychological weight to the economic critiques of the rational and sovereign consumer.

Anticommercialism, 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.¹³⁵ 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,"¹³⁶

(asserting that "[t]he 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); JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* 155 (1958) (arguing that the production of goods creates wants that are the product of advertising); HERBERT MARCUSE, *ONE-DIMENSIONAL MAN* 19 (1964) (discussing the creation of "false needs").

131. GALBRAITH, *supra* note 130, at 155 (arguing that 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").

132. Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 *YALE L.J.* 1165, 1165–69, 1180–84 (1948).

133. See, e.g., Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 *N.Y.U. L. REV.* 630 (1999) (noting the influence of unyielding cognitive biases on decisionmakers); Douglas A. Kysar, *The Expectations of Consumers*, 103 *COLUM. L. REV.* 1700 (2003) (proposing the incorporation of recently uncovered cognitive and behavioral phenomena into the consumer expectations test).

134. See, e.g., Graeene W. Austin, *Trademarks and the Burdened Imagination*, 69 *BROOK. L. REV.* 827, 854–61 (2004) (reviewing the trademark-related literature).

135. 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) (distinguishing between communication in the public interest and communication for private profit). Commercial speech later came to be treated as protected speech because of the informational value it provides for consumers. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383–84 (1977) (striking down ban on lawyer advertisements); *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). With some fluctuations, the trend has been towards greater protection for commercial speech. See, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002) (striking down ban on advertising compounded drugs); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (striking down regulations governing tobacco advertising); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999) (striking down ban on casino advertisements); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (striking down ban on advertisement of retail liquor prices). *But see Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986) (upholding ban on casino advertisements).

136. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

divorced from the pursuit of “truth, science, morality and [the] arts,”¹³⁷ irrelevant to democratic self-governance,¹³⁸ and unrelated to individual liberty.¹³⁹

Among intellectual property theorists, there is a strong strain of anticommmercialism as well. Particularly in the trademark area, scholars criticize the salience of corporate brands in culture and commerce.¹⁴⁰ Copyright commentary, too, bristles over the commercial domination of culture.¹⁴¹ Of course it is the control that corporations exercise over communication by virtue of their property rights in expression that disturbs

137. *Roth v. United States*, 354 U.S. 476, 484 (1957) (quoting CONT’L CONG., LETTER TO THE INHABITANTS OF THE PROVINCE OF QUEBEC (1774), reprinted in 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–79, at 108 (Worthington Chauncey Ford ed., 1904) (discussing general rationales for freedom of speech)).

138. 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 Lowenstein, “Too Much Puff”: *Persuasion, Paternalism and Commercial Speech*, 56 U. CIN. L. REV. 1205 (1988) (noting that the purpose of commercial speech protection is to benefit consumers).

139. See C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 196 (1989) (asserting that commercial speech lacks “crucial connections with individual liberty and self-realization”); Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735, 739 (1995) (noting that corporate speech, as “institutional speech,” 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 *Va. State Bd. of Pharmacy*, 425 U.S. at 781 (Rehnquist, J., dissenting) (arguing that a commercial speaker is not entitled to First Amendment protection merely for “hawking his wares”). But see Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEXAS L. REV. 747, 752 (1993) (arguing that the protection of speech perceived to be of little value is the essence of the First Amendment); Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 445–47 (1971) (relating commercial speech to private self-governance); 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, 237 (1998) (arguing that corporate speech may be important for individual self-realization); Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEXAS L. REV. 777, 780–82 (1993) (noting that commercial speech regularly involves “selling” a lifestyle, fantasy, or identity).

140. 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); see also Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEXAS 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).

141. This negative view of corporate culture is often expressed in appreciation for the role of noncorporate, 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) (suggesting that digital technologies enable consumers to produce culture); Yochai Benkler, *Freedom in the Commons: Toward a Political Economy of Information*, 52 DUKE L.J. 1245, 1247 (2003) (discussing decentralized methods of digital production); Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 243 (1996) (celebrating the transformation of passive readers into potential participants in the creative process).

intellectual property theorists,¹⁴² but the desire for a less commercial culture is also palpable and influential in the works of many.¹⁴³

Since there has been so little scholarship in the area of sponsorship disclosure law, it is unclear how thoroughly the anticommmercialism 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 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.¹⁴⁴

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.¹⁴⁵ 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, or advertiser control over,

142. See, e.g., Stacey L. Dogan, *An Exclusive Right to Evoke*, 44 B.C. L. REV. 291, 316–17 (2003) (suggesting that preventing the evocation of protected intellectual property threatens to chill free speech); 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); Sonia Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. (forthcoming 2006) (manuscript at 41, on file with the Texas Law Review) (explaining that copyright law’s “increasingly robust right to exclude others from access” coupled with today’s corporation’s “vast inventories of expressive works” has resulted in individuals’ disproportionate burden to obtain permission to use these protected works); Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1732–33 (1999) (noting the use of trade symbols in everyday language).

143. See, e.g., Coombe, *supra* note 140, at 1863–66 (showing how brands commodify cultural expression).

144. *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 795–96 (1988) (“[W]e do not believe that . . . speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech.”).

145. See Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKELEY TECH. L.J. 785, 801–02 (2004) (suggesting positive correlation between intellectual property protection and marketing expenditures).

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,¹⁴⁶ but permits source disclosure requirements.¹⁴⁷ 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 the 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 will say more about these distinct visions of the editorial function in the next subpart, 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, it is the sponsor who controls the selection of songs, interview subjects, or a product-related story lines 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.¹⁴⁸ 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.¹⁴⁹

146. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001) (explaining that even though states may protect children from tobacco advertisements, tobacco manufacturers and retailers have a protected interest in communicating with their adult customers); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490–91 (1995) (holding that a federal provision prohibiting beer labels from displaying alcohol content violated the First Amendment’s protection of commercial speech despite the government’s substantial interest in protecting health, safety, and welfare of citizens by preventing brewers from competing on the basis of alcohol strength).

147. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 772 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.”).

148. See Federal Trade Commission Act, 15 U.S.C. § 45(a)(2) (2000) (giving the Federal Trade Commission the authority to sanction false advertising); Lanham Act, 15 U.S.C. § 1125(a) (2000) (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”).

149. See *supra* note 9. The first such petition the author was able to find was 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 (FTC May 30, 1991), 1991 WL 640030. That petition was denied. Press Release, FTC, *FTC Denies Center for the Study of Commercialism’s Petition to Promulgate Rule on Product Placement in Movies*, (Dec. 11, 1992), available at <http://www.ftc.gov/opa/peadawn/F93/csc-petit5.htm>.

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 of or conduct regarding a product.”¹⁵⁰ Stealth marketing dressed up to look like an “independent television program[]”¹⁵¹ will be considered deceptive only if its stealth nature tends to make product claims more believable to consumers and induce purchases under false pretenses.¹⁵² The Lanham Act also requires that advertising be demonstrably false and the plaintiff materially harmed by the falsity.¹⁵³ Common law fraud and state trade law statutes require similar showings.¹⁵⁴

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

150. FTC, Policy Statement on Deception, appended to *FTC v. Cliffdale Associates, Inc.*, 103 F.T.C. 110, 182–83 (1984). See generally Gary T. Ford & John E. Calfee, *Recent Developments in FTC Policy on Deception*, J. MARKETING, July 1986, at 82, 89–91.

151. See Michael S. Levy, Consent Order, 116 F.T.C. 885, paras. 25–26, at 900–01 (1993) (disguising a paid commercial advertisement as an independent television program constitutes a false and misleading representation); see also *Georgetown Publ’g House Ltd. P’ship*, 122 F.T.C. 392, 398 (1996) (requiring disclosure when promotional material is advertising); *Nat’l Media Corp.*, Consent Order, 116 F.T.C. 549, 582–83 (1993) (requiring disclosure that infomercial is paid programming); *JS&A Group, Inc.*, Consent Order, 111 F.T.C. 522, paras. 7–8, at 524 (1989) (determining that a thirty-minute commercial fashioned to look like a news program violated § 5 of the Federal Trade Commission Act by falsely representing that the program’s favorable evaluation of the product was based on objective testing). For a detailed discussion of the advertising practices at issue in the JS&A case, see Jeffrey Chester & Kathryn Montgomery, *Counterfeiting the News*, COLUM. JOURNALISM REV., May–June 1988, at 38.

152. 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 from Mary K. Engle to Gary Ruskin, *supra* note 9. 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. 16 C.F.R. § 255.5 (2006).

153. See *Skil Corp. v. Rockwell Int’l Corp.*, 375 F. Supp. 777, 783 (N.D. Ill. 1974) (setting forth elements typically required in a Lanham Act false advertising claim).

154. See, e.g., *McDonald v. N. Shore Yacht Sales, Inc.*, 513 N.Y.S.2d 590, 593 (N.Y. Sup. Ct. 1987) (asserting that for a 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) (indicating that for a fraud claim, plaintiff must show detrimental reliance on fraudulent representation); see also 37 AM. JUR. 3D *Proof of Facts* § 259 (2004) (noting that a false advertising claim requires proof of detrimental reliance on a materially misleading statement); 37 AM. JUR. 2D *Fraud and Deceit* § 242 (2004) (requiring, for fraud claims, proof that plaintiff’s reasonable reliance on a successful deception-induced action that he would not have otherwise taken).

drank it too.”¹⁵⁵ 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 messages¹⁵⁶ by giving an erroneous impression of source.¹⁵⁷ 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”¹⁵⁸ and audience members’ “entitle[ment] to know by whom they are being persuaded”¹⁵⁹ 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 1950s best seller, *The Hidden Persuaders*.¹⁶⁰ In this screed against stealth marketing, Packard criticized political and commercial pitches that seek to persuade us “beneath our level of awareness.”¹⁶¹

155. Press Release, Writers Guild of Am., *supra* note 10, at 5.

156. See John E. Calfee & Debra Jones Ringold, *Consumer Skepticism and Advertising Regulation: What Do the Polls Show?*, 15 ADVANCES CONSUMER RES. 244, 247 (1988) (“Poll data show that consumers have been deeply skeptical of advertising claims for at least two decades.”); Marian Friestad & Peter Wright, *The Persuasion Knowledge Model: How People Cope with Persuasion Attempts*, 21 J. CONSUMER RES. 1, 62–74 (1994) (showing the tendency of audiences to counterargue with persuasive attempts).

157. See, e.g., Namita Bhatnagar et al., *Embedding Brands Within Media Content: The Impact of Message, Media, and Consumer Characteristics on Placement Efficacy*, in THE PSYCHOLOGY OF ENTERTAINMENT MEDIA: BLURRING THE LINES BETWEEN ENTERTAINMENT AND PERSUASION 99, 109 (L.J. Shrum ed., 2004) (“The lack of consumer awareness that placements (i.e., payments in exchange for brand inclusion) occur is considered central to the effectiveness of placements.”).

158. United States Postal Service, 41 R.R.2d 877, 878 (1977) (citing Sponsorship Identification, 40 F.C.C. 2 (1950)); Adver. Council Request for Declaratory Ruling or Waiver Concerning Sponsorship Identification Rules, 17 F.C.C.R. 22,616, 22,620 (2002) (“[T]he public has the right to know whether the broadcast material has been paid for and by whom.”); see also Broad. Material Sponsorship Identification, 25 Fed. Reg. 2406 (Mar. 16, 1960) (concluding that concealment of the fact that program material was broadcast because consideration was paid constitutes “deception”).

159. FCC Public Notice, Applicability of Sponsorship Identification Rules, 40 F.C.C. 141, 141 (May 6, 1963), as modified, 40 Fed. Reg. 41936 (Sept. 9, 1975); see also Sponsorship Identification Rules, 34 F.C.C. 829, 849 (1963) (“Paramount 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.”).

160. VANCE PACKARD, *THE HIDDEN PERSUADERS* (1957). For another influential book published around the same time that focused on the use of photo opportunities and staged events to create the impression of reality, see DANIEL J. BOORSTIN, *THE IMAGE* (1962).

161. PACKARD, *supra* note 160, at 3.

In the same period, there was widespread concern over subliminal advertising,¹⁶² 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.¹⁶³ The Cold War incubated related fears about subliminal communist propaganda.¹⁶⁴ 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.¹⁶⁵

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 deceived by a communication will depend on what she expects from the speaker.¹⁶⁶ 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.¹⁶⁷ 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.¹⁶⁸

162. 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." Nicole Grattan Pearson, *Subliminal Speech: Is It Worthy of First Amendment Protection?*, 4 S. CAL. INTERDISC. L.J. 775, 776 (1995) (quoting ALAN F. WESTIN, *PRIVACY AND FREEDOM* 279 (1967)).

163. ANTHONY R. PRATKANIS & ELLIOT ARONSON, *AGE OF PROPAGANDA: THE EVERYDAY USE AND ABUSE OF PERSUASION* 199 (1992) (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*).

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

165. *See* *Functional Music v. FCC*, 274 F.2d 543 (D.C. Cir. 1958) (considering a challenge to the FCC regulation of Musak). Years later, the FCC also declared, without so ordering, subliminal advertising unsuitable for broadcast. FCC Public Notice, *Broad. of Info. by Means of "Subliminal Perception" Techniques*, 44 F.C.C.2d 1016, 1017 (Jan. 24, 1974) (declaring that 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").

166. *See* WILLIAM LEISS ET AL., *SOCIAL COMMUNICATION IN ADVERTISING: PERSONS, PRODUCTS & IMAGES OF WELL-BEING* 365 (2d ed. 1990).

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

168. 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 2, at 37–38 (arguing that the persuasiveness and credence of messages are influenced by the identity of the perceived source); Letter from Mary K. Engle to Gary Ruskin, *supra* note 9 (noting that federal trade law recognizes that "consumers may give more credence" to a persuasive message if the persuader's identity is concealed); Letter from Anthony H. Gamboa to Senators Frank R. Lautenberg and Edward M. Kennedy, *supra* note 40, at 7 (concluding that government payments to a commentator to promote a government program were

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.¹⁶⁹ 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.¹⁷⁰ Similarly, if an audience comes to know that a news outlet has 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 sometimes still be deceived. 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 and gravity 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 also the false positives—the widespread belief that messages are promotional when they are not. Of concern is the suspicion that

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)).

169. 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 139, at 785–86 (“Let the buyer beware! This is a market filled with hucksters, hustlers, hype, and hyperbole.”).

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

falls on the editor who makes an expressive choice of a commercial symbol or political position, but whose communication is systematically misunderstood.¹⁷¹ *Caveat auditor* helps to inoculate against deception, but too much *caveat auditor* degrades a communications environment in which participants are unnecessarily disbelieving.¹⁷²

In this subpart, 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 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.¹⁷³ Ideally, what takes place in the public sphere is “discourse”¹⁷⁴ among speakers who exert no force “except the force of the better argument” and have no motives “except that of a cooperative search for the truth.”¹⁷⁵ Robert Post’s First Amendment theory relies on a similar concept of “public

171. Editors may well choose to highlight brands for expressive reasons. In a 1993 episode of *Seinfeld*, for example, main characters Jerry and Kramer were 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. Manly, *supra* note 56, at 6. 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, at 12, 12, available at <http://www.broadcastingcable.com/article/CA6295746.html?display=Advertising>.

172. Patrick D. Healy, *Believe It: The Media’s Credibility Headache Gets Worse*, N.Y. TIMES, May 22, 2005, § 4, at 4 (“Opinion polls for at least two decades have shown declining faith in print and television news.”).

173. JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE 141 (Thomas Burger trans., MIT Press 1989) (1962). For a theoretical examination of the impact of Habermas’s work on media policy, see generally PETER DAHLGREN, TELEVISION AND THE PUBLIC SPHERE 12–13 (1995) and Nicholas Garnham, *The Media and the Public Sphere*, in COMMUNICATING POLITICS: MASS COMMUNICATIONS AND THE POLITICAL PROCESS 37, 40–46 (Peter Golding et al. eds., 1986).

174. JÜRGEN HABERMAS, I THE THEORY OF COMMUNICATIVE ACTION 42 (Thomas McCarthy trans., Beacon Press 1984) (1981).

175. *Id.* at 25.

discourse” that takes place in a “public communicative sphere.”¹⁷⁶ 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.”¹⁷⁷ For Post, such discourse is the means by which the public develops opinions and comes to “identify a government as [its] own.”¹⁷⁸

Only certain kinds of speech are conducive to public discourse. Post puzzles over the tension in American free speech jurisprudence between faith in “an uninhibited marketplace of ideas in which truth will ultimately prevail”¹⁷⁹ and a belief that some kinds of speech should be inhibited.¹⁸⁰ On the one hand, “[t]he First Amendment recognizes no such thing as a ‘false’ idea,”¹⁸¹ and yet the regulation of false ideas in the context of professional malpractice¹⁸² and misleading commercial speech¹⁸³ 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.”¹⁸⁴ Such practices reflect “a commitment to the conventions of reason, which in turn entail aspirations toward objectivity, disinterest, civility, and mutual respect.”¹⁸⁵ 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

176. Robert C. Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 22 (2000); see also Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 118–35 (1989) (deriving First Amendment theory from Habermas’s discourse theory).

177. JÜRGEN HABERMAS, 2 THE THEORY OF COMMUNICATIVE ACTION 81–82 (Thomas McCarthy trans., Beacon Press 1987) (1981); see also JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 170 (William Rehg trans., MIT Press 1996) (1992) (arguing that legitimate “political power derives from the communicative power of citizens”).

178. Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2355, 2367 (2000) [hereinafter Post, *Reconciling Theory*]; see also Post, *supra* note 17, at 639 (contending that the purpose of public “discourse is to enable the formation of a genuine and uncoerced public opinion in a culturally heterogeneous society”); Post, *Reconciling Theory*, *supra*, at 2371 (addressing “the legitimation-producing effects of speech understood as a vehicle of participation”).

179. *Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301, 1304 (1993) (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969)).

180. Post, *Reconciling Theory*, *supra* note 178, at 2363–66.

181. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988).

182. See Post, *Reconciling Theory*, *supra* note 178, at 2364 & n.39 (citing cases).

183. See, e.g., *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 (1995) (applying a multifactor test that “courts should consider in determining whether a regulation of commercial speech survives First Amendment scrutiny”).

184. Post, *Reconciling Theory*, *supra* note 178, at 2366.

185. *Id.* at 2365; see also Post, *supra* note 176, at 37–38 (inferring from commercial speech cases that what is necessary for public discourse is rational reflection and uncoerced choice).

dialogue or discussion,”¹⁸⁶ but not when one is trying “simply to sell products.”¹⁸⁷

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.¹⁸⁸ Public discourse depends upon the existence of communicative action, which is communication that seeks to “reach understanding” or “communicatively achieved agreement.”¹⁸⁹ The purpose of communicative action is to persuade by using a set of “validity claims.”¹⁹⁰ Descriptions of the world as it is, in news for example, are what Habermas calls “constative” utterances whose claim to validity is truth.¹⁹¹ “Expressive” utterances, such as one might find in fictional narratives, have a very different claim to validity which is rooted in nothing more than sincerity.¹⁹² Participants to communicative action can either accept these validity claims or subject them to criticism and demand justification.¹⁹³ 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.”¹⁹⁴

Strategic action is something altogether different. Its object is not understanding, but influence.¹⁹⁵ Communicative action also 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, an effective

186. Post, *supra* note 176, at 12.

187. *Id.* at 18; see Solum, *supra* note 176, at 125–26 (discussing the confusion about the status of commercial speech in First Amendment jurisprudence).

188. Habermas seeks not to 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. HABERMAS, *supra* note 174, at 328–29. See generally Hugh Baxter, *System and Lifeworld in Habermas’s Theory of Law*, 23 CARDOZO L. REV. 473, 496–99 (2002) (discussing Habermas’s “formal pragmatics”).

189. HABERMAS, *supra* note 174, at 286–87, 305.

190. *Id.* at 75, 308.

191. *Id.* at 309, 323.

192. *Id.* at 174, 325–26. In addition, there are “regulative” utterances whose claim to validity is rightness. *Id.* Speech taking the form, for example, of imperatives is less relevant to editorial functions. *Id.*

193. *Id.* at 99.

194. Hugh Baxter, *Habermas’s Discourse Theory of Law and Democracy*, 50 BUFF. L. REV. 205, 213 (2002).

195. HABERMAS, *supra* note 174, at 286–95. Habermas associates communicative and strategic action with the philosophy of language terms “illocutionary” and “perlocutionary.” Illocutionary acts are purely expressive and constitute communicative action. Perlocutionary acts use expression instrumentally in order to bring about certain ends, which is the essence of strategic action. *Id.* at 295.

speaker cannot truthfully avow the validity claim on which he depends.¹⁹⁶ Suppose, for example, that I share a list of my favorite music with coworkers. 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 that I have been paid to endorse particular music in my workplace. What appears to be an effort to reach understanding with my coworkers is actually an attempt to influence their choices through an implicit claim of sincerity that I cannot justify. If asked, I cannot redeem my validity claims.

Habermas's theory provides an anatomy of deception,¹⁹⁷ but it does much more. It shows how, as Hugh Baxter puts it, strategic action is "parasitic on communicative action."¹⁹⁸ 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's "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."¹⁹⁹ The migration of strategic action into public discourse reduces the confidence with which communicators can make that supposition.

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.²⁰⁰ 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 provide a stronger foundation for unsponsored material and for an audience member's belief in the "approximation" of ideal speech.

196. See Baxter, *supra* note 194, 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.").

197. HABERMAS, *supra* note 174, at 332–33.

198. Baxter, *supra* note 194, at 215.

199. HABERMAS, *supra* note 174, at 42. The ideal speech situation is one in which there is universal participation, equality of communicative opportunity, and no compulsion. *Id.* at 25.

200. Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1276 (1995).

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 have more significance for public discourse. This conclusion flows directly from the value that both Habermas and Post place on 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.”²⁰¹

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, and both broadcasters and candidates are subject to heightened disclosure rules for campaign advertising.²⁰² Furthermore, § 317 imposes more rigorous disclosure requirements on the sponsorship of speech on controversial topics.²⁰³

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.²⁰⁴ An authentic cultural life has its place alongside robust political 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.²⁰⁵

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 “one man’s

201. Coase, *supra* note 13, at 313.

202. *See supra* notes 20–21 and accompanying text.

203. *See supra* notes 88–89 and accompanying text.

204. HABERMAS, *supra* note 174, at 303–06.

205. Post, *supra* note 176, at 11 (rejecting even the categorical exclusion of advertising from the domain of public discourse because “advertising deeply influences our sense of ourselves as a nation”); *see also* RONALD K. L. COLLINS & DAVID M. SKOVER, *THE DEATH OF DISCOURSE* 114 (2d ed. 2005) (“America’s self-identity is bound up with commercialism.”); Stuart Ewen, *Advertising and the Development of Consumer Society*, in *CULTURAL POLITICS IN CONTEMPORARY AMERICA* 82, 82 (Ian Angus & Sut Jhally eds., 1989) (discussing the fusion of advertising images and culture).

vulgarity is another's lyric"²⁰⁶ and "[w]hat is one man's amusement, teaches another's doctrine."²⁰⁷

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*,²⁰⁸ in which Judge David Bazelon had to assess the influence of advertising on the formation of public opinion.²⁰⁹ 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.²¹⁰ 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 rich full life."²¹¹ The D.C. Circuit affirmed, concluding that advertisements must count as expression covered by the fairness doctrine because of their profound effect on consumer consciousness.²¹²

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 them and why.²¹³ Consider Mattel's Barbie doll. In a series of lawsuits

206. *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).

207. *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.").

208. 405 F.2d 1082 (D.C. Cir. 1968).

209. *Id.* at 1100–03.

210. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380–82 (1969). The FCC later decided to exclude advertising from the reach of the fairness doctrine. *Handling of Pub. Issues Under the Fairness Doctrine and the Pub. Interest Standards of the Commc'ns Act*, 48 F.C.C.2d 1, 23 (1974) (noting that commercials are excluded unless they make a "meaningful statement which obviously addresses, and advocates a point of view on, a controversial issue of public importance"), *aff'd in part, remanded in part sub nom. Nat'l Citizens Comm. for Broad. v. FCC*, 567 F.2d 1095 (D.C. Cir. 1977). Later, the FCC did away with the fairness doctrine entirely. *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).

211. *Banzhaf*, 405 F.2d at 1086.

212. *Id.* at 1098–99.

213. 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., Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879, 1881 (2000) (asserting that the recoding of marketing material adds to the creation of "diverse and

at the beginning of this century, various artists defended their satiric use of the Barbie doll's image²¹⁴ and name²¹⁵ against Mattel's claims that such uses infringed the company's copyrights and trademarks.²¹⁶ The courts ruled in favor of the artists in large part because they had transformed an image carefully maintained and marketed by Mattel into a social commentary on the values Barbie supposedly projects.²¹⁷ One case involved photographs that the artist said "critique[d] the objectification of women" by posing Barbie with vintage kitchen appliances.²¹⁸ Another featured a pop song about an empty-headed "Barbie girl in her Barbie world."²¹⁹ 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 Editorial 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 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

antagonistic" communications (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 48–49 (2002) (arguing that the First Amendment trumps copyright law when the latter would interfere with a "freedom of imagination"); Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 16 (2000) (asserting expressive "autonomy interests" in support of the freedom to copy someone else's work).

214. *Mattel v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003).

215. *Mattel v. MCA Records*, 296 F.3d 894 (9th Cir. 2002).

216. For an excellent discussion of this kind of cultural recoding of intellectual property, see Justin Hughes, *Recoding Intellectual Property and Overlooked Audience Interests*, 77 TEXAS L. REV. 923 (1999).

217. See *Walking Mountain Prods.*, 353 F.3d at 802 (noting Mattel's "impressive marketing" of Barbie); *MCA Records*, 296 F.3d at 898 (describing Barbie as a "symbol of American girlhood").

218. *Walking Mountain Prods.*, 353 F.3d at 796.

219. *MCA Records*, 296 F.3d at 901.

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.”²²⁰ 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.²²¹ Indeed, the American Law Institute revised the commercial bribery provisions of its 1962 *Model Penal Code* specifically to reach payola,²²² and the recent New York state payola prosecutions of Sony BMG and Warner Music were brought under the state’s commercial bribery laws.²²³

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 other valuable consideration is directly or indirectly paid” for the transmission of broadcast matter.²²⁴ 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.”²²⁵ In both cases, the regulated activity

220. STEPHEN L. CARTER, *INTEGRITY* 7 (1996).

221. See, e.g., Stuart P. Green, *What’s Wrong with Bribery*, in *DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW* 143, 159 (R.A. Duff & Stuart P. Green eds., 2005) (comparing the bribery of a public official to the exchange of payment for acting in a manner contrary to the ideals of one’s position); James Lindgren, *The Theory, History, and Practice of the Bribery–Extortion Distinction*, 141 U. PA. L. REV. 1695, 1707 (1993) (analogizing bribery and payola to the extent that they may both involve personal gain at the expense of professional function); Press Release, FCC, Statement of FCC Commissioner Jonathan Adelstein (Aug. 8, 2005), available at http://hraunfoss.fcc.gov/edoes_public/attachmatch/DOC-260453A1.pdf (“The vitality of radio is sapped when music is selected based on bribes rather than merit.”).

222. See MODEL PENAL CODE § 224.8(2) (Proposed Official Draft 1962) (“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.”); JOHN T. NOONAN, JR., *BRIBES* 578 (1984) (recounting how the American Law Institute sought to reach payola by revising the *Model Penal Code* to include as bribery the giving of gifts to “anyone professionally a disinterested expert”).

223. See, e.g., Spitzer, *In re Sony*, *supra* note 8, at 22–24 (outlining the bribery allegations against Sony BMG). 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., *Am. Distilling Co. v. Wis. Liquor Co.*, 104 F.2d 582, 585 (7th Cir. 1939) (“The vice of conduct labeled ‘commercial bribery,’ . . . is the advantage which one competitor secures over his fellow competitors by his secret and corrupt dealing with employees or agents of prospective purchasers.”).

224. 47 U.S.C. § 317(a) (2000).

225. 18 U.S.C. § 201(b) (2000).

requires intent to influence, usually evidenced by a *quid pro quo* agreement between the sponsor/briber and the broadcaster/official.²²⁶

Beyond these superficial similarities, bribery and sponsorship disclosure law share a substantive goal. Both seek to bolster integrity—public integrity in one case and editorial integrity in the other—without specifying or requiring a singular conception of integrity. The problem with bribes is that they induce the bribee to renege on what Stuart Green calls her “positional duties.”²²⁷ Exactly what these duties are may be contested, but the public official has at a minimum the duty to serve her constituents. The premise of anti-bribery law is that public integrity suffers when officials privilege service to bribers over service to the public.

What of the positional duty of an editor, and the associated concept of editorial integrity? Here too, conceptions of editorial duty differ. One position might be that editors have a duty to operate in the public interest, selecting music, words, or images in accordance with the editor’s views of what will serve the public. It should be clear from the discussion above that a discourse theory of mediated communications does not require such high aspirations. According to another view of editorial duty, market-driven editors act with integrity when fulfilling a duty no higher than the satisfaction of audience demand, so long as they engage in communicative action. The following explores how, under either a maximalist or minimalist conception of editorial integrity, stealth marketing can function like a bribe, corrupting the positional duties of editors.

b. The Editorial Duty.—The maximalist and minimalist conceptions of editorial duty echo the two principal conceptions of official duty. 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.²²⁸ The more

226. *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404–05 (1999) (stating that federal bribery law requires “a *quid pro quo*—a specific intent to give . . . something of value *in exchange* for an official act”).

227. Green, *supra* note 221, at 160; *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” (internal quotations omitted)); NOONAN, *supra* note 222, at 704 (characterizing bribery as a betrayal of “[t]rust, that is, the expectation that one will do what one is relied on to do”).

228. Edmund Burke, *Speech to the Electors of Bristol* (Nov. 3, 1774), *in* 2 *THE WORKS OF EDMUND BURKE* 7, 12 (1839) (“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* CARL COHEN, *DEMOCRACY* 90 (1971) (discussing how an accumulation of superior information may lead a representative to conclude that it is in his duty to follow a course that his constituents disagree with); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 174–76 (1969) (discussing that many English commentators at the time of the Revolution saw representatives as servants of the whole people not to be bound by the advice of particular constituents).

democratic perspective is that the official is nothing more than the public's representative and should carry out the will of his constituents.²²⁹

The public interest conception of editorial duty 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.²³⁰ 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.²³¹ Historically, the view that the press should function as fiduciaries of the public interest helped drive late-nineteenth-century journalism from a partisan to objective model.²³² 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.²³³

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.²³⁴ These cases imagine journalists as public-regarding, serving as a "watchdog" over the government.²³⁵ Drawing on these cases, Professor Randall Bezanson has

229. See COHEN, *supra* note 228, at 90.

230. Randall P. Bezanson, *The Atomization of the Newspaper: Technology, Economics and the Coming Transformation of Editorial Judgments About News*, 3 COMM. L. & POL'Y 175, 229 (1998) (arguing that journalists should give the public what it needs, not what it wants); Ken Auletta, *Fault Line*, NEW YORKER, Oct. 10, 2005, at 51, 61 (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?"); see also 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 R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 514 (2000) (contending that television programming "is not an ordinary product" sold based solely on demand).

231. See 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. DENIS MCQUAIL, *MEDIA ACCOUNTABILITY AND FREEDOM OF PUBLICATION* 52 (2003).

232. See DAVID T.Z. MINDICH, *JUST THE FACTS: HOW "OBJECTIVITY" CAME TO DEFINE AMERICAN JOURNALISM* 114–16 (1998) (chronicling the rise of objectivity and progressivism in American journalism); DARRELL M. WEST, *THE RISE AND FALL OF THE MEDIA ESTABLISHMENT* 51–54 (2001) (same).

233. 47 U.S.C. § 301 (2000). See generally BOLLINGER, *supra* note 14, at 62–73 (describing the public interest rationale for broadcast regulation); Henry Geller, *The Fiduciary Model: Regulating Accountability*, in *MEDIA FREEDOM AND ACCOUNTABILITY* 81, 81–98 (Everette E. Dennis et al. eds., 1989) (discussing the public interest obligations in the fiduciary model of broadcast regulation).

234. BOLLINGER, *supra* note 14, at 1–23.

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

characterized the journalistic voice as “reasoned, public-regarding, [and] independent.”²³⁶ In other areas of the law, courts have assumed this kind of editorial integrity and acted to protect consumers from its absence.²³⁷

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.”²³⁸

The public-fiduciary, opinion-shaping conception of editorial duty is not the only legitimate one, even for journalists.²³⁹ The market-oriented norm requires nothing more of an editor than that she, like the public official, heed the public’s command.²⁴⁰ Under this conception of editorial duty, the editor should satisfy consumer appetites as expressed in the market, not serve the public interest as filtered through editorial judgment.²⁴¹ 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 integrity

236. Randall P. 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).

237. See, e.g., *SEC v. Wall St. Publ’g Inst., Inc.*, 851 F.2d 365, 371 (D.C. Cir. 1988) (stating that 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) (holding that a financial columnist violated securities laws by failing to reveal to investor–readers that he expected to gain personally if they followed his stock advice).

238. SOC’Y OF PROF’L JOURNALISTS, CODE OF ETHICS (1996), available at <http://www.spj.org/pdf/ethicscode.pdf>.

239. See David A. Anderson, *Freedom of the Press*, 80 TEXAS L. REV. 429, 478–79 (2002) (rejecting the public interest model of the press).

240. See Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEXAS L. REV. 207, 210 (1982) (“The public’s interest . . . defines the public interest.”); Alex Kozinski, *How I Stopped Worrying and Learned to Love the Press*, 3 COMM. L. & POL’Y 163, 174 (1998) (“The media provide a commodity like any other.”); Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 268 (2003) (“[T]he market can allocate the [broadcasting] spectrum through a price mechanism . . .”).

241. The choices of a market-oriented editor may not be so simple where audience 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) (discussing a broadcasters’ dual consideration of viewers’ values of available programs and advertisers’ values of exposure to viewers); ROBERT G. PICARD, THE ECONOMICS AND FINANCING OF MEDIA COMPANIES 135–36 (2002) (“[A]dvertisers are willing to pay a higher cost . . . [where] the media are able to deliver audiences with specific characteristics that the advertising may be targeting.”).

because it produces market differentiation, ensuring that more consumers will be presented with the views they want.²⁴²

This market model of editorial duty, if heretical for news programming, is less controversial when applied to entertainment programming. There is, as one 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.”²⁴³ Nor are there strong traditions in entertainment programming, as there are in journalism, of a “wall of separation” between business and editorial departments.²⁴⁴ 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”²⁴⁵ presents for entertainment editors a quandary similar to the news editor’s choice between the public interest and the public appetite. The FCC itself seems to embrace the fiduciary model of editorial duty in its enforcement of § 317 for entertainment programming. Selections of music for broadcast, it has said, “must be guided by intrinsic merit rather than undisclosed consideration.”²⁴⁶

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 constituents’ will.²⁴⁷ Bribery law imposes minimal constraints on behavior to ensure that

242. Richard A. Posner, *Bad News*, N.Y. TIMES BOOK REVIEW, Jul. 31, 2005, at 1; see also John C. Merrill, *The Marketplace: A Court of First Resort*, in MEDIA FREEDOM AND ACCOUNTABILITY, *supra* note 233, at 11, 12–14 (outlining a marketplace model for journalistic practice).

243. LEO BOGART, *COMMERCIAL CULTURE* 73 (Transaction Publishers 2000) (1995).

244. 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. Andrew M. Kaikati & Jack G. Kaikati, *Stealth Marketing: How to Reach Consumers Surreptitiously*, CAL. MGMT. REV., Summer 2004, at 6, 20. The concern is not audience deception, but audience alienation. *Id.*

245. Andrew Stark, *Comparing Conflict of Interest Across the Professions*, in CONFLICT OF INTEREST IN THE PROFESSIONS, *supra* note 121, at 335, 337.

246. Application of Metroplex Commc’ns, Inc., 4 F.C.C.R. 8149, 8153 (1989); see also FCC Notice of Inquiry, Broad. Localism, 19 F.C.C.R. 12,425, 12,438 (July 1, 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.”).

247. See NOONAN, *supra* note 222, at 704 (“When [government officials] take bribes they divide their loyalty. Whether or not they consciously act against the public interest, they have

an official fulfills baseline obligations either to do what is best or to do what is wanted.

Sponsorship disclosure works the same way in that it advances editorial integrity under either of the competing normative views of editorial duty. 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 editor 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 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.²⁴⁸

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.²⁴⁹ Advertisers influence the selection of television programming by favoring some demographics over others²⁵⁰ and light moods

adopted a second criterion of action, the proper reciprocation of the bribe. Their resultant conflict of interest is always a dilution of loyalty, always a betrayal of trust.”).

248. 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. Radio-Television News Dirs. Ass'n, Code of Ethics and Professional Conduct (Sept. 14, 2000), <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.” Radio-Television News Dirs. Ass'n, *supra* note 33, at 5; *see also* USC Annenberg Online Journalism Review, What Are the Ethics of Online Journalism?, <http://www.ojr.org/ojr/wiki/ethics> (requiring disclosure of funding sources and avoidance of conflicts of interest).

249. *See, e.g.*, DAVID CROTEAU & WILLIAM HOYNES, *BY INVITATION ONLY* 105–30 (1994) (showing the effects of the limited pool of experts consulted on television public affairs programs like *Nightline*); HERBERT J. GANS, *DEMOCRACY AND THE NEWS* 45–55 (2003) (discussing how the reliance on high officials as sources skews news reporting).

250. *See, e.g.*, Baker, *supra* note 48, at 2165 (“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.”); Sunstein, *supra* note 230, at 501, 514–15 (“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.”).

over darker ones.²⁵¹ In Professor Ed Baker's words, "[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 advertiser inducing it."²⁵² 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.²⁵³ 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.²⁵⁴ 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."²⁵⁵ So with sponsorship disclosure law, the sponsor must intend to influence programming choices²⁵⁶ and usually the exchange will have to be manifest in an explicit or tacit agreement before sponsorship disclosure rules apply.²⁵⁷

251. See Baker, *supra* note 48, at 2153–64 (discussing advertisers' interests in programming that creates a "buying mood" and avoids controversy); see also EWEN, *supra* note 130, at 62 (noting national advertisers' role in making newspapers "increasingly commercialized and centralized"); LEISS ET AL., *supra* note 166, at 263 (illustrating advertisers' use of the "Lifestyle Format" to promote the consumption style to audiences); Inger L. Stole, *Advertising, in CULTURE WORKS: THE POLITICAL ECONOMY OF CULTURE* 83, 100 (Richard Maxwell ed., 2001) (stating that advertisers "want the overall media content to complement their commercial messages").

252. Baker, *supra* note 48, at 2202.

253. See 47 U.S.C. § 317(a)(1) (2000) (requiring disclosure by radio stations that valuable consideration was received in exchange for broadcasting); 47 U.S.C. § 508(f) (2000) (defining "service or other valuable consideration"); see also Letter to Earl Glickman, President, Gen. Media Assocs., Inc., 3 F.C.C.2d 326, 327 (Apr. 13, 1966) (requiring sponsorship disclosure only when there is an agreement to exchange valuable consideration for the airing of broadcast material).

254. Lindgren, *supra* note 221, at 1707 (arguing that it is difficult to separate bribery from campaign contributions); Lowenstein, *supra* note 111, at 808–09 (noting the difficulty in discerning between bribery and campaign contributions); Dennis F. Thompson, *Two Concepts of Corruption: Making Campaigns Safe for Democracy*, 73 GEO. WASH. L. REV. 1036, 1042–47 (2005) (same).

255. United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 404 (1999) (emphasis omitted); see also NOONAN, *supra* note 222, at 687–90 (discussing the quid pro quo exchange requirement in bribery law); SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM* 93 (1999) (discussing the distinction between contributions and bribes); ANDREW STARK, *CONFLICT OF INTEREST IN AMERICAN PUBLIC LIFE* 152–77 (2000) (same); Lindgren, *supra* note 221, at 1707 (discussing bribery as an exploitation of other people's interests for personal gain).

256. See, e.g., *Metroplex Commc'ns, Inc.*, 4 F.C.C.R. 8149, 8153 (1989) (stating that the 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]").

257. See *id.* at 8155 (recognizing "that the practice of accepting promotional copies of records or cassettes could in appropriate cases be regarded as consideration," but that "proving a causal relationship between the two is a difficult task in the absence of the demonstrative presence of an agreement or an unusual inducement").

One reason to draw the line at the quid pro quo exchange, in sponsorship disclosure or bribery law, would be if such exchanges more powerfully undermined 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.²⁵⁸ 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 by 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.²⁵⁹

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.²⁶⁰ 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.²⁶¹ Courts have in fact been wary of expansive definitions of

258. 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).

259. See Baker, *supra* note 48, at 2202–03 (providing examples of when advertiser influence on editorial content cannot be easily proven or where such influence occurs without any act of the advertiser, such as when media outlets make decisions influenced by the hope of attracting or retaining advertisers).

260. See Thompson, *supra* note 254, at 1043 (characterizing these “quid pro quo” practices as common in politics).

261. STUART P. GREEN, LYING, CHEATING AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME 199 (2006) (arguing that it would chill the legislative process if we characterized vote exchange agreements as bribes rather than “merely log rolling, legislative ‘business as usual’”);

bribery for fear of inhibiting normal political functions.²⁶² Requiring a quid pro quo exchange of valuable consideration creates a 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.²⁶³ 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.²⁶⁴

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" provision²⁶⁵ 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."²⁶⁶ Under this provision, a publisher must disclose any consideration it receives from an issuer of securities in return for publicity.²⁶⁷ 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

see also Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323, 1340 (2000) (noting that several state statutes explicitly exempt legislative log rolling from the definition of bribery and arguing that vote exchanges should not be illegal).

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

263. *See* JAMIESON & CAMPBELL, *supra* note 32, at 113–14, 137–43 (discussing how journalists have at times become direct participants in news stories and that "strategic use of the media's needs and constraints . . . help determine what is covered and how news stories are presented").

264. Dowell, *supra* note 33, at 35–39 (discussing fears of excessive governmental scrutiny if too much disclosure is mandated).

265. 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." 15 U.S.C. § 77q(b) (2000).

266. H.R. REP. NO. 73-85, at 24 (1933); *see also* *United States v. Amick*, 439 F.2d 351, 365 (7th Cir. 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.").

267. 15 U.S.C. § 77q(b).

in both SEC and court interference with the 'crucial process' of editorial control.²⁶⁸

We must be careful not to exaggerate the brightness of the line sponsorship disclosure 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 likely to distort editorial judgment.²⁶⁹ Do video news releases constitute such consideration?²⁷⁰ 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.²⁷¹ 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 Part defends sponsorship disclosure law against two possible lines of attack: that the First Amendment forbids government mandated disclosures of sponsorship and that such mandates are undesirable,

268. SEC v. Wall St. Publ'g Inst., 851 F.2d 365, 374, 376 (D.C. Cir. 1988) (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) (citing Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257-58 (1974)); see also SEC v. Omnigene Devs., Inc., 105 F. Supp. 2d 1316, 1320 (S.D. Fla. 2000) (depublished) (finding an antitouting violation).

269. See H.R. REP. NO. 86-1800, at 19-20 (1960) (distinguishing hotel room distribution, which supports 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." FCC Public Notice, Sponsorship Identification of Broad. Material, 40 F.C.C. 69, 71 (Mar. 16, 1960). The FCC believed that the receipt of program materials for free had the "practical effect" of being an inducement to air the materials. *Id.*

270. 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) (2000).

271. See Mark D. Harmon & Candace White, *How Television News Programs Use Video News Releases*, 27 PUB. REL. REV. 213, 214-16 (2001) (reviewing the literature on video news releases as information subsidies to broadcasters); see also Baker, *supra* note 48, at 2205 ("When the firm supplies the media with 'free' videos or press releases, it uses economic resources to influence media content.").

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 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 subpart argued that sponsorship disclosure promotes public discourse. Under contemporary free speech jurisprudence, it is the job of the First Amendment to promote “public discourse”²⁷² and to protect “public debate”²⁷³ and “the public expression of ideas.”²⁷⁴ 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,²⁷⁵ but confers positive obligations on the government to safeguard the “public rights” of discourse.²⁷⁶

272. Compare *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (declining to set an “outrageousness” standard vis-à-vis *Hustler*’s lurid depiction of Jerry Falwell, as doing so could subjectively impose liability on participants in “political and social discourse”), with *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682–83 (1986) (permitting the sanction of schoolchildren for the use of offensive language because teaching them to abstain from its wanton use promotes “a civilized social order”).

273. See *Hustler*, 485 U.S. at 53 (1988) (noting that in public debate, many things that are “less than admirable” are protected by the First Amendment).

274. *Street v. New York*, 394 U.S. 576, 592 (1969); see also *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (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.”).

275. For commentary placing individual liberty interests at the center of the First Amendment’s free speech protections, see BAKER, *supra* note 139, at 47–51; Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233–37 (1992); and David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 353–71 (1991).

276. See Gregory P. Magarian, *The First Amendment, the Public–Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 150–72 (2004) (arguing that courts should invoke the First Amendment to enjoin private action that undermines public debate on matters of national policy and apply that argument to nongovernmental suppression of wartime speech); Gregory P. Magarian, *Regulating Political Parties Under a “Public Rights” First Amendment*, 44 WM. & MARY L. REV. 1939, 1972–91 (2003) (building on Meiklejohn’s political theory to describe a “public rights” approach to the First Amendment that would allow greater regulation).

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.²⁷⁷ This view is most famously associated with Alexander Meiklejohn, whose emphasis on free speech as necessary for democratic self government led him to privilege political discourse over other forms of speech.²⁷⁸ Students of Meiklejohn like Cass Sunstein²⁷⁹ and Owen Fiss²⁸⁰ 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.²⁸¹ The public rights perspective has been particularly powerful in media law, with both courts²⁸² and commentators²⁸³ 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

277. See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 26 (1948) (“What is essential is 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*, 74 N.Y.U. L. REV. 354, 377–84 (1999) (describing the negative consequences for “democratic systems such as ours” of concentrated—or, nondecentralized—information sources).

278. *E.g.*, MEIKLEJOHN, *supra* note 277, at 42, 79–80, 117–18.

279. Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 263–300 (1992).

280. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1413–21 (1986).

281. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 54–55 (2005) (arguing that by applying First Amendment presumptions in accordance with basic constitutional purposes, such as active liberty, we can preserve speech essential to democratic government but also deal with “modern regulatory problems”); see also *Bartnicki v. Vopper*, 532 U.S. 514, 536–41 (2001) (Breyer, J., concurring) (balancing the right of the media to publish against the individual's right of privacy in private speech); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 225–29 (1997) (Breyer, J., concurring in part) (balancing viewers' interests in a diverse array of local broadcast channels against cable operators' interests in choosing their own programming, to determine if the statute “strikes a reasonable balance between . . . speech-restricting and speech-enhancing consequences”); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 743–44 (1996) (balancing cable programmers' interests in access against the need to protect children from offensive material and cable operators' interests in editorial control).

282. 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 the broadcasters, which is paramount.”).

283. See Neil Weinstock Netanel, *The Commercial Mass Media's Continuing Fourth Estate Role*, in *THE COMMERCIALIZATION OF INFORMATION* 317, 320–23 (Niva Elkin-Koren & Neil W. Netanel eds., 2002) (asserting that the media plays an important role, supported by the First Amendment, in sustaining liberal democracy); Blasi, *supra* note 138, at 455–56, 460 (asserting that a core commitment of the First Amendment is to protect the press and individual expression as a check on government); Stewart, *supra* note 231, at 634 (positing that the 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).

is most evident in election law.²⁸⁴ The Supreme Court has recognized here that “[i]dentification of the source of [political] advertising may be required . . . so that the people will be able to evaluate the arguments to which they are being subjected.”²⁸⁵ The “stand by your ad” provision of the Bipartisan Campaign Reform Act of 2002 is a particularly clear example.²⁸⁶ 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.”²⁸⁷ 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 the ad and its sponsor in the public mind, thereby highlighting the ad’s authenticity and increasing its value to public discourse.²⁸⁸

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.²⁸⁹ 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.²⁹⁰ According to Justice

284. 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) (giving campaign contributions 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, 669 (1990) (holding that the state could regulate the Chamber of Commerce’s political speech in part because it was not necessarily reflective of the views of the Chamber’s members).

285. See *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978) (discussing corporate advertising); see also *McConnell v. FEC*, 540 U.S. 93, 196–97 (2003) (explaining that campaign disclosure requirements further the “First Amendment interests of individual citizens seeking to make informed choices in the political marketplace”); *Buckley*, 424 U.S. at 82–84 (upholding disclosure requirements for campaign contributions); *U.S. v. Harriss*, 347 U.S. 612, 625–26 (1954) (upholding disclosure requirements for lobbying activities related to federal legislation).

286. 2 U.S.C. § 441d(d) (Supp. IV 2004); 11 C.F.R. § 110.11 (2006).

287. 2 U.S.C. § 441d(d)(1)(B)(i)(I)–(II) (providing that 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”).

288. See *Lee*, *supra* note 19, at 1037–38 (explaining that the specific requirements of disclosure are to “ensure that the disclosures are meaningful” and enhance accountability). A further effect 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*, 23 YALE L. & POL’Y REV. 370, 376 (2005) (arguing that the provision is unconstitutional).

289. *Buckley*, 424 U.S. at 48–49.

290. *Viereck v. United States*, 318 U.S. 236 (1943).

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.”²⁹¹ While the informational purpose of the regulation accords with the public rights theory, a statute 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 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.²⁹² The First Amendment also protects individuals against government actions that compel them to speak what they choose not to profess.²⁹³ These principles are well established as 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.²⁹⁴ The ostensible object of

291. *Id.* at 251 (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.”).

292. See, e.g., *Buckely v. Am. Constitutional Law Found.*, 525 U.S. 182, 199–200 (1999) (holding a Colorado statute requiring persons to wear name badges when circulating petitions to be an infringement of First Amendment rights); *Talley v. California*, 362 U.S. 60, 65 (1960) (“States may not compel members of groups engaged in the dissemination of ideas to be publicly identified.”).

293. See *Wooley v. Maynard*, 430 U.S. 705, 714–15 (1977) (observing that the First Amendment protects the “right to refrain from speaking at all” and holding that a state cannot compel a citizen to be “an instrument for fostering public adherence to an ideological point of view”).

294. See, e.g., *Melntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995) (striking down a state law prohibiting the circulation of anonymous political leaflets); *Talley*, 362 U.S. at 65 (holding a ban on anonymous leaflets facially invalid on First Amendment grounds); *Justice For All v.*

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.²⁹⁵ This is why the use of anonymous sources is so frowned upon in journalistic practice.²⁹⁶ 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.²⁹⁷

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.²⁹⁸ 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.”²⁹⁹

Faulkner, 410 F.3d 760, 763 (5th Cir. 2005) (striking down a requirement that students identify their organization on political leaflets distributed on the 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”).

295. *See* Saul Levmore, *The Anonymity Tool*, 144 U. PA. L. REV. 2191, 2192–95 (1996) (discussing optimal tradeoffs between reliability and communication in different settings).

296. *See, e.g.*, SOC’Y OF PROF’L JOURNALISTS, *supra* note 238 (“Identify sources whenever feasible. The public is entitled to as much information as possible on sources’ reliability.”); Associated Press Managing Editors, *Statement of Ethical Principles* (1994), <http://www.apme.com/ethics> (“News sources should be disclosed unless there is a clear reason not to do so. When it is necessary to protect the confidentiality of a source, the reason should be explained.”).

297. *See 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*, 362 U.S. at 64 (suggesting that anonymity permits “[p]ersecuted groups and sects” to “criticize oppressive practices and laws”); Post, *supra* note 17, at 640 (arguing that anonymity is discourse-enhancing not only because it provides cover for reticent speakers, but also 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”).

298. An allied area in which the Court has protected anonymity is where the state seeks disclosure of minor political group membership and support. *See, e.g.*, *Brown v. Socialist Workers ’74 Campaign Comm.*, 459 U.S. 87, 101–02 (1982) (holding unconstitutional as applied to the Socialist Workers Party an Ohio statute requiring disclosure of campaign contributions because of risk that contributors would be subject to harassment).

299. *McIntyre*, 514 U.S. at 348 n.11 (quoting *People v. Duryea*, 351 N.Y.S.2d 978, 996 (N.Y. Sup. Ct. 1974)).

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.³⁰⁰ For this reason, the discourse interests in transparency are not counterbalanced by discourse interests in concealment. There is no First Amendment interest in the generation of 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.³⁰¹ 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.³⁰² 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 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 the people will be able to evaluate the arguments to which they are being subjected.”³⁰³ 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.³⁰⁴ In these cases, it is the interest

300. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562–63 (1980).

301. *See, e.g.*, *BAKER*, *supra* note 139, at 47–51.

302. Misleading speech is not even entitled to the reduced protection of truthful commercial speech. *See Cent. Hudson*, 447 U.S. at 563 (“[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.”).

303. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 793 n.32 (1978).

304. *See McConnell v. FEC*, 540 U.S. 93, 196–97, 201 (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, 143 (1976) (upholding disclosure requirements for campaign contributions); *United States v. Harriss*, 347 U.S.

in listener autonomy as well as public discourse that supports disclosure. Disclosure advances the liberty interests of audience members by reducing deception³⁰⁵ and enhancing their freedom as consumers of expression.³⁰⁶

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.”³⁰⁷ Under the compelled speech doctrine, for example, the state cannot force the Boy Scouts to express tolerance for homosexuality through their hiring practices,³⁰⁸ cannot require students to pledge allegiance to the flag,³⁰⁹ cannot force motorists to display license plate mottos with political content,³¹⁰ and cannot make individuals contribute to the expression of particular viewpoints.³¹¹

In all of 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

612, 625–26 (1954) (upholding disclosure requirements for lobbying activities related to federal legislation); *see also* *Plante v. Gonzalez*, 575 F.2d 1119, 1122 (5th Cir. 1978) (upholding required disclosure of Florida state officials’ financial interests).

305. *See* *Strauss*, *supra* note 275, at 355 (“Lying forces the victim to pursue the speaker’s objectives instead of the victim’s own objectives. . . . [L]ies that are designed to manipulate people are a uniquely severe offense against human autonomy.”).

306. *Cf. McConnell*, 540 U.S. at 201 (noting that in the political arena, not only do disclosure requirements not hinder communication, they also serve the important function of allowing the public to be informed of a politician’s views prior to election day); *Hahn v. Sterling Drug, Inc.*, 805 F.2d 1480, 1483 (11th Cir. 1986) (considering, in relation to a tort claim, the adequacy of the warning on a medicine bottle given the unsafe nature of the product).

307. *See Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 795 (1988) (striking down state law requiring professional fundraisers to disclose to potential donors the percentage of funds raised that go to the charities).

308. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653, 661 (2000) (explaining that government cannot “force [an] organization to send a message” with which it disagrees); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 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.”).

309. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

310. *Wooley v. Maynard*, 430 U.S. 705, 713–17 (1977) (striking down requirement that New Hampshire motorists bear “Live Free or Die” motto on their license plates).

311. *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (holding that food handlers do not have to pay for advertising that they do not support); *Keller v. State Bar*, 496 U.S. 1 (1990) (holding that lawyers do not have to pay for political speech through compulsory dues to bar associations); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (same for teachers and union dues); *cf. Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005) (holding that compelled subsidies are permissible when they are used to fund government speech); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (holding that a shopping mall owner can be required to allow private speech because of the low risk that the owner will be associated with the speech).

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 that they do not share.³¹² If there is a constant in First Amendment law³¹³ and theory,³¹⁴ 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.³¹⁵ Indeed, so attenuated are the First Amendment interests in the concealment of sponsorship that a reviewing court might well find such disclosures to be the kind of speech that lacks constitutional significance.³¹⁶

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

312. See *Johanns*, 544 U.S. at 557 (noting that in compelled speech cases, “an individual is obliged personally to express a message he disagrees with, imposed by the government”). That compelled speech exists only when the state requires an individual to express a particular viewpoint was reaffirmed in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 126 S. Ct. 1297 (2006).

313. 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.”); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (asking whether a law “was designed to suppress certain ideas that the City finds distasteful”); *Young v. Am. Mini Theatres*, 427 U.S. 50, 67 (1976) (stating that communication regulations “may not be affected by sympathy or hostility for the point of view being expressed by the communicator”).

314. See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 80–86 (1982) (arguing that distrust of the government forms the basis of freedom of speech); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 154–59 (1993) (discussing impermissible government justifications for the regulation of free speech); Geoffrey Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 227–33 (1983) (explaining the Court’s concern with governmental motivation in regulating free speech).

315. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469–72 (1997) (upholding constitutionality of a 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).

316. See Post, *Reconciling Theory*, *supra* note 178, at 2373–74 (explaining that many areas of speech receive no First Amendment protection at all); see also Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 268–71 (1981) (arguing that the First Amendment is not triggered by all speech, but only by speech that implicates constitutional values).

information that would enhance public welfare.³¹⁷ 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.³¹⁸ Mandatory disclosure regimes enable the public to force firms to internalize these costs.³¹⁹ 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.³²⁰

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,³²¹ while their opponents argue that corporations will voluntarily disclose even bad news lest investors assume the worst.³²² Disclosure advocates have prevailed in this argument and the trend in corporate law is towards ever more disclosure.³²³

317. See generally ANTHONY OGUS, *REGULATION: LEGAL FORM AND ECONOMIC THEORY* 121–25 (1994) (discussing market failures to provide adequate supply of information).

318. See, e.g., ROBERT V. PERCIVAL ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 612–16 (2d ed. 1996) (discussing the effectiveness of informational approaches to environmental regulation); Madhu Khanna et al., *Toxic Release Information: A Policy Tool for Environmental Protection*, 36 J. ENVTL. ECON. & MGMT. 243 (1998) (discussing the effect on stock prices of certain provisions of the Emergency Planning and Community Right-to-Know Act, which requires polluters to report quantities of potentially hazardous chemicals they have stored or released); see also 42 U.S.C. § 7412(r)(7) (2000) (requiring that companies disclose “risk management plans” for accidental release of hazardous chemicals); 42 U.S.C. § 300g-3(c)(4) (2000) (requiring that community water suppliers issue annual “consumer confidence reports”).

319. See Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 618–29 (1998) (discussing the way in which informational regulation corrects for market failures to provide information to customers).

320. See Linda J. Rusch, *Products Liability Trapped by History: Our Choice of Rules Rules Our Choice*, 76 TEMP. L. REV. 739, 770–75 (2003) (explaining that imposing liability for product malfunction onto product manufacturers creates incentive for manufacturers to take care in producing products).

321. See, e.g., John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717, 728–29, 733–34 (1984) (asserting that mandatory disclosure reduces search costs and increases the activity of market analysts, enhancing market efficiency); Merritt B. Fox, *Retaining Mandatory Securities Disclosure: Why Issuer Choice Is Not Investor Empowerment*, 85 VA. L. REV. 1335, 1369–95 (1999) (arguing that information produces positive externalities that the corporation cannot capture).

322. 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 Approach to Securities Regulation*, 107 YALE L.J. 2359, 2419–22 (1998) (proposing that state law should govern disclosure, allowing jurisdictional competition for optimal disclosure).

323. See, e.g., Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 15 U.S.C.) (imposing extensive disclosure requirements on public corporations); General Rule Regarding Selective Disclosure, 17 C.F.R. § 243.100 (2006) (mandating 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).

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.³²⁴ It was the regulation that created a market for nutritional information that now appears to be strong.³²⁵ The same story could be told about federal regulations that require sellers to disclose “the durability of light bulbs, octane ratings for gasoline, tar and nicotine content of cigarettes, mileage per gallon for automobiles, or care labeling of textile wearing apparel.”³²⁶ In all these cases, the purpose of disclosure is to reduce consumer information costs so as to improve market efficiency.³²⁷

The market-correcting function of disclosure applies in the media context. Like the polluter, the editor who 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 end of less marketing, just as it is to the end of less pollution.

324. See MARY GRAHAM, *DEMOCRACY BY DISCLOSURE* 77–84, 101–03 (2002) (describing the evolution of the federal nutrition labeling requirement).

325. See ARCHON FUNG ET AL., *THE POLITICAL ECONOMY OF TRANSPARENCY* 16–17 (2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=766287 (noting emergence of market for nutritional information following enactment of government regulation in 1994); Marian Burros, *Read Any Good Nutrition Labels Lately?*, N.Y. TIMES, Dec. 1, 2004, at F1 (reporting that 85% of survey respondents “read the label closely some or all of the time,” and 66% “had used [the] information to decide whether or not to buy something”).

326. Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 664 (1977); see also 15 U.S.C. §§ 1451–1461 (2000) (requiring that covered consumer commodities be labeled to disclose the contents of the product and the identity and address of the manufacturer); 15 U.S.C. §§ 68, 68a, 68b (2000) (requiring that wool products be labeled to indicate, among other things, the country in which the item was processed or manufactured); 15 U.S.C. §§ 70–70k (2000) (requiring that fur products be labeled to specify, among other things, the name of animal that supplied the fur).

327. See, e.g., *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001) (upholding mercury disclosure rule not in order “to prevent ‘consumer confusion or deception’ per se, but rather to better inform consumers about the products they purchase” (citation omitted)); *CFTC v. Vartuli*, 228 F.3d 94, 108 (2d Cir. 2000) (upholding disclosure rules of the Commodity Exchange Act because they are “reasonably related to the state’s interest in preventing . . . inefficiencies in the commodities markets that are contrary to the public interest”).

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 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.³²⁸ 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 with distaste. 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 editors would have incentives to end these practices.³²⁹ 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

328. See Blake D. Morant, *The Endemic Reality of Media Ethics and Self-Restraint*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 595, 605–09 (2005) (discussing the journalistic pursuit of quality as a market strategy); cf. *Newspaper Guild v. NLRB*, 636 F.2d 550, 560–61 (D.C. Cir. 1980) (discussing the centrality of credibility and integrity in the newspaper enterprise).

329. 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.

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 significant categories of editorial content: where consumers desire disclosure, but do not know they are being marketed to, and where consumers do not care about disclosure and the marketing practices do not degrade the consumer experience of 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.³³⁰ Enforcement costs have also been kept low both because enforcement has been lax³³¹ and regulators have utilized audience members to monitor compliance.³³² A sponsorship disclosure law with greater reach, of the kind advocated below, will be more expensive, but also more beneficial.

330. FCC, OMB CONTROL NO. 3060-0174, SUPPORTING STATEMENT FOR SECTION 73.1212, SPONSORSHIP IDENTIFICATION (2005), available at <http://www.fcc.gov/omd/prd/docs/3060-0174/3060-0174-02.doc> (estimating that sponsorship disclosure costs broadcast stations cumulatively \$2.8 million a year, not including political advertising disclosures).

331. See Abell, *supra* note 13, at 65 (describing the FCC's enforcement of "payment for broadcast" laws within the music industry as "lax").

332. See, e.g., Press Release, FCC, *supra* note 108 ("[Commissioner Adelstein] openly called for the American public to help the FCC in monitoring and enforcing the rules against airing undisclosed promotions . . .").

V. Stealth Marketing and New Media

As we progress more deeply into the world of digital eommunications, 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 between 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 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,³³³ are becoming more common as it becomes harder for sponsors to capture audience attention.³³⁴ In an era of "synergistic marketing communication," persuaders follow audiences across media platforms³³⁵ and deep into editorial content with concealed pitches.

Media producers more willingly welcome sponsors into their products when economically pressed. Pressure on media companies increases with the proliferation of cable and satellite television, satellite radio, gaming, and broadband services that splinter the media audience across digital media platforms.³³⁶ 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.³³⁷ Media abundance thus drives the supply of embedded sponsorship opportunities.

333. See SEGRAVE, *supra* note 49, at 42–50 (tracing product placement in film back to the early 1930s when in-film promotions replaced advertising shorts).

334. See Joe Flint & Brian Steinberg, *Ad Icon P&G Cuts Commitment to TV Commercials*, WALL ST. J., June 13, 2005, at A1 (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. *Id.* Coca-Cola Classic alone had 1,931 brand appearances. *Id.*

335. See Matthew P. McAllister & Joseph Turow, *New Media and the Commercial Sphere: Two Intersecting Trends, Five Categories of Concern*, 46 J. BROADCAST & ELECTRONIC MEDIA 505, 507 (2002) (describing the evolution of marketing strategies in response to the development of new media platforms).

336. See Goodman, *supra* note 18, at 1419–21 (describing how digital technologies increase both the quantity of content available to consumers and consumer control over that content, thereby rendering viewer attention an increasingly scarce resource).

337. See OWEN & WILDMAN, *supra* note 241, at 23–25 (discussing the first copy costs for media products, which create a commercial need to aggregate the largest possible audiences).

It is not only by scattering audiences that digital technology promotes stealth marketing. By facilitating the unauthorized copying of media content through peer networks, technology may reduce the amount of money audiences pay to access media at the same time that producers fight for audience 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.³³⁸ Sponsorship opportunities offer producers an opportunity to recoup.³³⁹ Sponsorship is resilient to unauthorized copying. Indeed, because sponsorship value is based on audience size, if unauthorized copying increases circulation then it adds value to media products embedded with promotional messages.³⁴⁰ The record companies, after vigorously fighting to stop listeners from “pirating” music online, seem at last to understand that this piracy presents them with an excellent marketing opportunity and are making songs available on the Internet for free in files embedded with advertising messages.³⁴¹

Yet another reason that producers may find stealth marketing practices increasingly attractive is that they sometimes provide a free or low cost substitute for expensive 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.³⁴² There is simply not enough content to feed the new media

338. 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*, 125 S. Ct. 2764, 2794 (2005) (Breyer, J., concurring) (stating that unauthorized copying likely reduces industry revenue to some extent but presenting “mixed evidence”).

339. See Matthew P. McAllister, *From Flick to Flack: The Increased Emphasis on Marketing by Media Entertainment Corporations*, in *CRITICAL STUDIES OF MEDIA COMMERCIALISM* 101, 107–10 (Robin Anderson & Lance Strate eds., 2000) (explaining how companies advertise by cross-promotion with sister companies). Even print media players, long resistant to integrated marketing, are being seduced by the prospect of stealth marketing revenue. See Fine, *supra* note 55, at 24 (discussing attempts by Toyota to integrate products into magazine editorial content).

340. 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 cognac Remy Martin, and Jewel performed her song *Intuition* at a concert sponsored by Schick, which has a razor by the same name. Evelyn Nussenbaum, *This Song Is Brought to You by . . .*, *N.Y. TIMES*, Sept. 6, 2004, at C2. MTV, however, has banned product placements in the videos it carries for fear of diluting the power of its advertisers. *Id.*

341. Julia Anguin et al., *Record Labels Turn Piracy Into a Marketing Opportunity*, *WALL ST. J.*, Oct. 18, 2006, at B1. (“[T]here’s a growing recognition among some record executives and performers that the people who are downloading illegally are frequently huge music fans and that marketing to them may be more desirable in the long run than suing or otherwise harassing them.”).

342. See, e.g., Barstow & Stein, *supra* note 33 (documenting TV news programs that air news clips created by the government); Marion Just & Tom Rosenstiel, *All the News That’s Fed*, *N.Y. TIMES*, Mar. 26, 2005, at A13 (“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.”); Mandese, *supra* note 35,

outlets that clamor for it.³⁴³ 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.”³⁴⁴

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.³⁴⁵ The problem for advertisers, at least, is that the resulting “cacophony of marketing messages aimed constantly toward the consuming public” repels the audience.³⁴⁶ Freestanding announcements may be “fading as a means of hawking products and services” and cannot be any more successful as a tool of propaganda.³⁴⁷ “[B]lurred communications” at the crossroads of “commercial persuasion and entertainment media” provide a way out of this conundrum.³⁴⁸ 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.³⁴⁹

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.³⁵⁰ New media practices place the collaboration between persuaders and producers in the context of

at 24 (describing the increasingly common practice of corporations selling advertisements that appear to be journalism to news organizations); Daniel Price, *The Fake News Cycle*, PR WATCH, Second Quarter 2005, at 1, 2, available at <http://www.prwatch.org/files/PRW12Q2.pdf> (summarizing how video news releases make it onto local evening news broadcasts).

343. See Michael Hiltzik, *There Isn't Enough Good Entertainment to Go Around*, L.A. TIMES, Jan. 26, 2006, at A1 (describing the dominance of a few broadcast and cable programs on new media platforms, including Internet downloads).

344. Marc Graser, *Product Placement Brokers Succeed in Morning Shows*, ADVERTISING AGE, Jan. 30, 2006, available at http://adage.com/article?article_id=48278 (discussing the proliferation of four-minute lifestyle segments dedicated to a brand).

345. See TUROW, *supra* note 26, at 157–83 (discussing the relationship between information clutter and new advertising techniques).

346. Bhatnagar et al., *supra* note 157, at 99.

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

348. Bhatnagar et al., *supra* note 157, at 99.

349. See Kaikati & Kaikati, *supra* note 244, at 21 (“As traditional media channels fragment and consumers zap commercials faster than they can say ‘TiVo,’ stealth marketing will inevitably grow more common.”); 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).

350. See Radio-Television News Dirs. Ass’n, *supra* note 33, 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”); see also Farsetta, *supra* note 33, at 4–5 (citing cases).

wide scale “open source” collaboration among multiple authors.³⁵¹ Smaller scale collaborations like the digital sampling of music and photography also partake of an emerging “remix” approach to cultural creation.³⁵² The wiki-enabled webpage, for example, provides for the creation of content by many authors who add, delete, and edit without attribution.³⁵³ 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-twentieth-century broadcast law. Sponsorship disclosure requirements naturally took root in broadcasting, which has from the start been a pervasively regulated medium 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.³⁵⁴

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 ground

351. See Yochai Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm*, 112 YALE L.J. 369, 382–83 (2002) (describing how groups of users work to create open-source software).

352. See Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951, 984–89 (2004) (providing examples of “mash” albums which mix old and new music).

353. Cunningham & Cunningham, Inc., Wiki Philosophy Faq, <http://c2.com/cgi/wiki?WikiPhilosophyFaq>.

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

that broadcasting has unique attributes justifying regulation.³⁵⁵ 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.”³⁵⁶ Because broadcast spectrum is scarce, broadcasters have been required to allow access for responses to controversial broadcasts,³⁵⁷ to allow access to candidates for political advertising,³⁵⁸ and to comply with limits on media consolidation.³⁵⁹

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 since once a broadcast receiver was turned on, there was no way to control what programming came across the airwaves. Because parents could

355. *FCC v. Pacifica Found.*, 438 U.S. 726, 748–50 (1978); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375–77 (1969). Many scholars have attacked these justifications on First Amendment and technological grounds. See Fowler & Brenner, *supra* note 240, at 221–26 (arguing that broadcast spectrum is not uniquely scarce and does not justify broadcast-specific regulation); 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 (attacking the fairness doctrine as a rationale for broadcast-specific regulation); Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1103, 1106 (1993) (arguing that the danger of competing broadcasting interference is a “nonsensical” justification for broadcast-specific regulation); Yoo, *supra* note 240, at 267 (arguing that the limited nature of the spectrum resource is insufficient to justify broadcast-specific regulation).

356. *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 799 (1978) (citing *Red Lion*, 395 U.S. at 375–77).

357. This was the requirement contained in the fairness doctrine which the FCC essentially eliminated in 1987. *Syracuse Peace Council*, 2 F.C.C.R. 5043, 5047 (1987), *aff’d sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989). *Syracuse Peace Council* was the FCC’s formal rejection of the fairness doctrine after the FCC reported in 1985 that the doctrine “chilled speech on controversial subjects” and was not required given “new media technologies and outlets [that] ensur[e] dissemination of diverse viewpoints.” *Radio-Television News Dirs. Ass’n v. FCC*, 184 F.3d 872, 876 (D.C. Cir. 1999).

358. See 47 U.S.C. § 312 (2000); 47 U.S.C.A. § 315 (Supp. 2006) (requiring broadcasters to allow equal access to political candidates at nondiscriminatory rates and without right of censorship, under penalty of revocation of broadcasting license for violation).

359. See *Prometheus Radio Project v. FCC*, 373 F.3d 372, 395–96 (3d Cir. 2004) (discussing the national television ownership cap, which prohibited common ownership of stations reaching 39% of the national market); *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 168–69 (D.C. Cir. 2002) (upholding FCC prohibition of dual cable–broadcast ownership); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1045–46 (D.C. Cir. 2002) (citing Supreme Court decisions upholding FCC regulations of dual radio–broadcast and dual newspaper–broadcast ownership).

not control broadcast content the way they could other media,³⁶⁰ the Court upheld regulation of broadcasters to protect children from indecent speech.³⁶¹

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 because it distorts 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.³⁶² The rules almost entirely exempt cable only because, when the rules were adopted and revised, cable operators had very little control over programming decisions.³⁶³ Neither the FCC nor Congress has had occasion to revisit the rules since.³⁶⁴

In other contexts, scholars have convincingly demonstrated the need to regulate communications in a functional, technology-neutral manner.³⁶⁵ The

360. See *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (implying that with broadcast communication, there is a danger of being “taken by surprise” by indecent communication (quoting *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989))).

361. *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978) (“[B]roadcasting is uniquely accessible to children . . .”).

362. See Amendment of the Comm’n’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.”); Amendment of Part 74, Subpart K, of the Comm’n’s Rules and Regulations Relative to Cmty. Antenna Television Sys., 20 F.C.C.2d 201, 220 (1969) (inquiring into developments in communications technology and concluding that cable “compliance with the legislative policy reflected in section 317” is in the public interest).

363. Cable operators did not originally produce any sizeable amount of programming. See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 21–22 (D.C. Cir. 1977) (describing the early history of cable television).

364. 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 Press Release, Writers Guild of Am., *supra* note 10, at 8 (seeking an “[c]xtension of all regulation of product integration to cable television, where some of the most egregious abuse is found”).

365. 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. CHI. L.J. 41, 41 (2003) (“[T]he FCC will . . . need to shift its focus from specific regulatory approaches based on the particular technology platform . . . to a ‘layered model’ of telecommunications regulation that regulates functionally similar services in the same way regardless of the underlying platform.”); Kevin

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 technology-neutral approach to sponsorship disclosure law would mean repeal of the law altogether or extension to nonbroadcast media, appropriately defined. The discourse harm that stealth marketing causes argues in favor of extension rather than repeal.³⁶⁶ Such extension would be hardly radical, since sponsorship disclosure started with newspapers.³⁶⁷ 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.³⁶⁸

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

Werbach, *A Layered Model for Internet Policy*, 1 J. TELECOMM. & HIGH TECH. L. 37, 38–40 (2002) (arguing that “horizontal service and geographic classifications . . . should be reconceived in terms of vertical layers,” with “[d]ifferent policy approaches . . . for each layer”). See generally JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, *DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE* 210–12 (2005) (noting that the Internet presents new regulatory problems because there are multiple ways to access the Internet, and the Internet can “in turn serve as a platform for any communications service imaginable”).

366. Under its current authority, the FCC would probably have the power 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, 728–36 (2005) (discussing the limits of FCC jurisdiction).

367. See *supra* note 90 and accompanying text.

368. See C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 *SUP. CT. REV.* 57, 94–99, 105–11 (providing examples of structural “media” regulation of mail, telephone, and newspapers).

many of the most basic assumptions we hold about the role and, indeed, the *meaning* of the press.”³⁶⁹

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, with federal election law at the vanguard.³⁷⁰ The Federal Election Campaign Act requires that candidates disclose certain “public communications,”³⁷¹ and exempts certain kinds of media activities from otherwise applicable campaign spending limits.³⁷² The Federal Election Commission (“FEC”) at first attempted to freeze the definition of “public communications” in the broadcast era by excluding all Internet communications from the definition.³⁷³ In *Shays v. Federal Election Commission*,³⁷⁴ the D.C. District Court properly sent the rules back to the FEC, instructing it to consider the functional characteristics of various media in its definitions.³⁷⁵ Recently, the FEC adopted a functional approach to the Internet, treating communications on websites, blogs, and other Internet fora as “public communications” when they have been sponsored by an advertiser³⁷⁶ and as news media when they serve the same function as conventional news media.³⁷⁷

369. RANDALL P. BEZANSON, *TAXES ON KNOWLEDGE IN AMERICA* 2–3 (1994).

370. 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. § 352(n) (2000). 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, other periodicals, and newspapers, and advertisements broadcast through media such as radio, television, and telephone communication systems.” 21 C.F.R. § 202.1(l)(1) (2006). Securities law incorporation of media concepts is discussed at *supra* note 237.

371. 2 U.S.C. § 431(22) (2000 & Supp. IV 2004); *id.* § 431(9)(B)(i).

372. 2 U.S.C. § 431(9)(B)(i) (2000 & Supp. IV 2004) (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, at 4 (1974) (stating that the exemption of media activity from the definition of campaign expenditures assures “the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns”).

373. Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,072 (July 29, 2002) (codified at 11 C.F.R. § 100.26 (2006)).

374. 337 F. Supp. 2d 28 (D.D.C. 2004), *aff’d*, 414 F.3d 76 (D.C. Cir. 2005).

375. *Id.* at 130. The rules reviewed in *Shays* implemented parts of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-55, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C.).

376. 11 C.F.R. § 100.26 (2006) (excluding Internet communications from the definition of “public communication” except when such communications are “placed for a fee on another person’s Web site”).

377. *Id.* §§ 100.73, 100.132.

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.³⁷⁸ 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.³⁷⁹ A statutory reporter's privilege is now being considered at the federal level.³⁸⁰ Definitional questions about who is a reporter and what counts as a periodical publication have bedeviled the proceedings.³⁸¹

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.³⁸² Yet it must be broad enough to prevent the strategic use of particular transmission technologies to avoid 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.

378. See, e.g., OR. REV. STAT. § 31.150(2)(c) (2005) (requiring defendants to show that the 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").

379. See, e.g., CAL. EVID. CODE § 1070(a)-(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) (2001) (providing that a covered person is one who is "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").

380. Free Flow of Information Act, S. 1419, 109th Cong. (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., *In re Madden*, 151 F.3d 125, 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); *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987) (adopting a rule that one claiming journalist's testimonial privilege "must demonstrate . . . the intent to use material . . . to disseminate information to the public and that such intent existed at the inception of the newsgathering process").

381. There have always been questions about who qualifies for the state statutory and federal common law privileges, with the courts providing little guidance. See Craig 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 journalist's privilege.").

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

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 becomes 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.³⁸³ The threat of enforcement would function something like the threat of a speeding ticket or a tax audit, permitting significant noncompliance 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 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.³⁸⁴ Disclosure puts private intermediaries in a position to fortify official enforcement regimes, creating a form of “distributed enforcement” that exploits the very

383. 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 eds., 2002) (arguing that disintermediation makes the enforcement of regulations difficult).

384. See, e.g., Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1295 (1999) (“Required disclosure might also serve as an impetus for companies to do more expensive things . . . such as increased investment in education in the community or in employee training and development; enhanced employee flexibility in work hours and scheduling; or provision of on-site child care or elder care.”).

digital information processing technologies that have transformed the electronic media.³⁸⁵

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—one that is superior to arguments rooted in competition, anticommercialism, and deception theories.

385. See GRAHAM, *supra* note 324, at 137–46 (discussing intermediary use of information technology in conjunction with disclosure regimes).