

Hidden Agendas

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You may have suspected long ago that movie makers get paid to show certain brands of cars or vodka or toys in their films, but you probably were surprised to learn recently that even some novelists accept payment for using brand names in their books. You should know that when you use a search engine to find information, the sites that come up at the top of the list may have paid to get there. If you were paying attention, you found out not long ago that television news reports about federal programs may in fact be videos furnished to the stations by the agencies, and the “reporters” touting the programs are actually employees or public relations agents for the agencies. The newspaper columnists you read may have been paid by the government to applaud the government activities they write about.

Not that these practices are entirely new. Many years ago, newspapers had special pages on which a business that bought an ad got a small story lauding the business and its owner. Most readers understood that these weren’t legitimate features, but the advertisers didn’t, or didn’t care—and that’s why these pages were known in the trade as “sucker pages.”

These are examples of the phenomenon Ellen Goodman exposes in her article, *Stealth Marketing and Editorial Integrity*. The article couldn’t be more timely. The conception of media we have held for at least a century takes for granted that media speech is their own unless it’s identified as someone else’s. We know, of course, that media outlets and the individuals who operate them have blind spots and sacred cows, and favored causes and pet peeves. But we assume they are expressing *their* views, not positions they’ve been paid to take. Professor Goodman draws an analogy to bribery, which I think is apt. We know politicians’ votes will be influenced by friendship, prejudice, ignorance, pressure, and campaign contributions, but we don’t expect them to exchange their votes for bribes. Likewise with journalists and filmmakers and novelists: we know they’re subject to influences other than the search for truth and beauty, but we don’t expect them to secretly sell their voices to advertisers.

We expect editorial independence, and generally we’ve been given that, despite some exceptions of the sort mentioned above. But that paradigm is on the cusp of dramatic change. In the world of commercial messages, advertisers are in an escalating contest with the audience. Television packs more commercials into each hour, and viewers respond by embracing technologies that filter them out, such as TiVo, or make it easy for viewers to

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bypass them, such as digital recording. Advertisers, tired of paying for newspaper and magazine ads that readers ignore, flee to Internet sites. But users ignore block ads on the Internet just as they do ads in the print media, so advertisers switch to pop-up ads—to which users respond by employing pop-up blockers.

In the political sphere, audience resistance is just as high. Political consultants realize that ads discussing issues and candidates' qualifications bore the audience, so they make ads that are increasingly shrill, uninformative, and even irresponsible. We should have seen all this coming a generation ago, when political consultants began to speak of "free media" and "paid media." They recognized that advertising and editorial material don't necessarily serve different purposes; they're just alternative ways of reaching the audience. The military branches, the Postal Service, and other governmental bodies used to rely on public service announcements furnished for free by broadcast stations, but when it became apparent that those couldn't compete effectively with the more enticing messages of commercial advertisers, the government became a commercial advertiser itself, only to face the same saturation problem as other advertisers.

The consequences of this struggle aren't all bad. One has seen improvement in the production values of the ads—magazine ads are more alluring, billboard messages are wittier, and television commercials are more clever and more glamorous, or at least sexier and more outrageous.

The problem with the old paradigm is that in a world suffering from a surfeit of images and sounds, editorial (or entertainment) content that attracts eyeballs and ears isn't enough to assure that the neighboring advertising content will be seen or heard. The solution is all too obvious: don't make the advertising ancillary, embed it. If it's inseparable from the content, the audience will have a hard time ignoring it. Better yet, make it impossible to tell what's paid and what's not. Not only will the audience be unable to ignore it, their defenses against hucksterism will be bypassed.

Those advantages have been obvious for a long time, of course, but two things have kept paid media and free media separate. One has been a commitment to independence: editors, filmmakers, novelists, liked to think of themselves as beholden only to their audience and their own journalistic or artistic muse. Newspapers maintained a metaphorical—and often physical—wall between the news and advertising departments, to prevent the latter from influencing the former. At the great television networks, the news divisions were autonomous enough to expose the misdeeds of such major advertisers as tobacco companies and auto makers. If an artist depicted a brand of soup in a painting, it was because his artistic muse suggested it, not because he was paid to do so.

The other bulwark was audience resistance. In part this was disdain for commercialism itself. Until the 1960s, self-respecting people wouldn't wear

clothing bearing advertising messages—at least nothing more conspicuous than the tiny “Levi’s” tag on the hip pocket of their jeans. When an entertainer began doing product endorsements, it was a sign his or her career was fading. Stadiums didn’t sell their names, corporate logos were not seen on public school or university premises, and college coaches didn’t make commercials. But that resistance to commercialism generally was mild compared to the disdain for clandestine commercialism. The public was outraged when it learned that radio disc jockeys were playing certain songs because record companies paid them to do so. When readers learned that the *Los Angeles Times* published a special section about the new Staples Center with undisclosed underwriting from the center itself, the paper’s credibility took a hit from which it has never fully recovered. Such scandals destroyed careers, thereby reinforcing the professional norms that kept advertising out of art and journalism.

Today, audience resistance has softened. In the stadium, we grumble when play is stopped to permit the television network to run a few commercials, but we don’t stop buying tickets. We don’t seem to mind that the venerable Peach Bowl is now the Chick-fil-A Bowl. Judging by the success of magazine “advertorials,” we apparently don’t care much whether our reading material reflects the sensibilities of the writer or the aspirations of an advertiser. We take our children to see a movie even though we know it was made primarily as a marketing tool for a line of toys. If the commercial incursions were rare, it would be easier for the audience to resist them; but they’re everywhere, so the audience has little choice but to accept them.

The professional norms that maintained artistic and journalistic independence are under duress. Owners of newspapers now insist that their editors meet regularly with the advertising staff, so they will know what kinds of coverage the advertisers want. Magazine editors are told to make the editorial layout look more like advertising so it won’t be too easy for readers to tell the difference. Play-by-play announcers of sporting events are required to tout the network’s upcoming entertainment programs.

The erosion of professional norms is difficult to resist because it is presented as a financial imperative. Newspapers, magazines, over-the-air television, and radio are all under enormous pressure to cut costs and raise revenues. Competition for advertising dollars has never been more intense. The media choices available to advertisers are multiplying rapidly, and that has two effects: it requires the advertiser to constantly re-evaluate its spending allocations lest its competitors find more effective media, and it gives advertisers a great deal of leverage over the media who seek those allocations.

Now add to this mix the Internet, which offers countless new ways to reach consumers and thousands of new competitors for advertising dollars. Most of the Internet options are unencumbered by professional norms or

established audience expectations of independence. Advertisers who are frustrated by “old media” insistence on identifying advertising as advertising now have vast new opportunities to avoid such constraints. Of course, advertising on an Internet site that doesn’t separate the commercial voice from the artistic or editorial voice isn’t optimal because the audience will realize that the information it’s getting may be commercial. The better solution for the advertiser is to use the new Internet opportunities to persuade the old media to accept clandestine advertising, thereby giving the advertiser the benefit of the old media credibility that the more compliant Internet sites lack. Never has the demand for stealth marketing been so strong, and never have the media been so ill-equipped to resist. An editor faced with massive newsroom layoffs isn’t in a strong position to resist demands to cozy up to advertisers.

The potential effects on the media and public discourse are enormous. The First Amendment implications may be enormous too, depending on one’s understanding of the purposes of that amendment. For those to whom the First Amendment is a guarantee of *laissez faire* capitalism in information, stealth marketing is not fundamentally objectionable. It just reinforces their belief that there is no viable distinction between commercial and other speech, and therefore bolsters their claim that commercial speech must be protected as fully as any other speech. In this view, if there is a market for editorial independence, it will survive, and if it doesn’t, we will adapt to a world in which we won’t know whose speech we’re hearing.

For those who see the First Amendment as a protector of a system of freedom of expression that the market may not provide, as Professor Goodman does (and as I do), the matter is more difficult. We must consider whether stealth marketing threatens First Amendment values, whether the First Amendment itself may limit stealth marketing, and whether the First Amendment may limit legislative options aimed at restricting stealth marketing.

Professor Goodman is clearly of the view that the First Amendment embodies a commitment to a public discourse that presupposes editorial independence. She does not trust the unregulated market to provide all the speech that a self-governing people need. Borrowing from Jurgen Habermas and Robert Post, she argues that what the First Amendment protects is speech that embraces reason, seeks understanding, and invites dialogue. Speech of this sort aspires to objectivity, disinterest, civility, and mutual respect. It seeks to persuade through claims of validity. Habermas calls this “communicative action,” and he contrasts it with “strategic action,” which aims to influence others through mechanisms that make no validity claims.

As Professor Goodman says, “Undisclosed sponsorship in the media is in essence strategic action masquerading as communicative action.”¹

Habermas’s terms do not commend themselves to the First Amendment scholar, because they label as “action” something we insist must be distinguished from, and treated differently than, action. But the idea that all speech is *not* equal, and that public discourse is the primary object of the First Amendment’s solicitude, has a great deal of support in history, in Supreme Court decisions, and in popular understandings of free speech.

Professor Goodman identifies several objections to stealth marketing. It adds to the sum total of commercialism in media and hence in life. It deceives audiences. It may distort competition (a possibility that she too readily rejects, in my opinion). But she is quite right in identifying damage to public discourse as the principal reason for concern: “[S]tealth marketing harms by sowing skepticism as to the authenticity and truth of mediated communications.”² This harm occurs not only when the audience fails to recognize an instance of stealth marketing, but also when it mistakenly assumes that a message is sponsored when it is not. “*Caveat auditor* helps to inoculate against deception, but too much *caveat auditor* degrades a communications environment in which participants are unnecessarily disbelieving.”³

She makes the additional point that a healthy media role in public discourse requires a degree of institutional integrity. If the public has no trust in the independence of the media, public discourse will suffer, just as it will if the public trusts the media blindly. If media accept undisclosed payments to present commercial or political messages as their own, there will be little reason to trust them with respect to anything else. If they’re willing to deceive us in that way, why should we believe them when they purport to tell us what happened today in the world?

Her antidote to stealth marketing is what she calls “sponsorship disclosure.” Up to now, the law has played only a modest role in preventing stealth marketing. Since 1912, newspapers and magazines have been required, as a condition of receiving second class mailing privileges, to identify paid advertising if the fact isn’t obvious. A similar requirement was included in the very first broadcast regulation, the Radio Act of 1927, and that became Section 317 of the Communication Act of 1934. Section 317 had little effect, however, until it was strengthened in the wake of the payola and quiz-show-fixing scandals of the 1950s. Section 317, which makes it a crime for a broadcaster to fail to disclose sponsorship, is now the most meaningful legal restraint on clandestine advertising. It exempts cable

1. Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEXAS L. REV. 83, 116 (2006).

2. *Id.* at 112.

3. *Id.* at 113.

television, however, and has no application to movies, novels, or the Internet, and therefore leaves open many opportunities for stealth marketing.

Professor Goodman provides little detail about the specifics of the sponsorship disclosure law she envisions. Apparently it would be similar to Section 317, requiring media to disclose at least the fact that they have been paid to present the material in question. She would attack only the most sharply defined forms of influence over media content, those in which consideration is paid to influence content selection. That is sensible, because policing less clearly defined sources of influence, such as trading access for favorable treatment or use of information provided by press agents, would require too much intervention in the editorial function.

Whether media would have to disclose not only the fact of payment, but also who paid them, is one of the details she doesn't address. Nor does she say how the disclosure requirements would be enforced—a question that may present some difficulties. Existing disclosure requirements have an established mechanism for enforcement. In the case of newspapers and magazines, the Postal Service is at least nominally the enforcement agency. It's doubtful that postal inspectors peruse publications trying to identify unacknowledged advertising, but it's possible that a competitor might spot the offending material and report it to the Postal Service. For most newspapers today, loss of second-class mailing privileges wouldn't be a serious blow, but those privileges are important to magazines. Professor Goodman says there has been no recent enforcement of this regulation, but she observes that it appears to have created a norm of disclosure which is widely followed despite the absence of active enforcement.

I'm not convinced that broader disclosure requirements could be expected to achieve similar results without more vigorous enforcement. The norm of disclosure in print media was established at a time when mailing privileges were important, and it's been in place for nearly a century. Relying on self-enforcement of a long-established norm is very different from expecting a newly minted requirement to be self-enforcing. In broadcasting, I suspect Section 317 works not because a federal prosecutor is likely to file charges against a station that fails to disclose sponsorship, but because the offending broadcaster is aware that the FCC could give the station a lot of grief and possibly even take away its license.

If disclosure requirements were extended to media for which there is no existing regulatory mechanism, enforcement would be a significant issue. I'm skeptical that criminal sanctions alone would suffice. If the stealth marketing is stealthy enough, no one will know the law requiring disclosure of sponsorship has been violated. If someone does find out, will he or she be outraged enough and persistent enough to complain to the U.S. Attorney? The U.S. Attorney and the grand jury are likely to be busy with crimes that seem more important than failure to disclose sponsorship. If an indictment *is*

returned, the offender will have available all the protections of the criminal law, and may not look like a crook to the jury.

Creating a new agency or agencies to enforce disclosure requirements through regulatory action seems politically unlikely. If the solution lies in a regulatory agency, probably the Federal Trade Commission is the best candidate. Its portfolio already includes deceptive advertising, so the addition of sponsorship disclosure isn't a long stretch. The FTC, however, isn't a very zealous cop with respect to deceptive advertising, and enforcement by an agency that doesn't enforce isn't much of a solution.

I'm not arguing that the enforcement obstacles are insuperable, but I do think they require more attention than Professor Goodman gives them.

She argues vigorously that any disclosure requirement must be technologically neutral, and that "[a] reformed [sponsorship disclosure] law should include a definition of public communications or mass media that will work for other media-related statutes,"⁴ such as shield statutes, campaign finance laws, and SLAPP statutes. I fail to see why either of those things is essential. Subjecting broadcasters to requirements that don't apply to newspapers may be galling to broadcasters and aesthetically displeasing to First Amendment scholars, but it has persisted for a long time without (so far as I can tell) dire consequences for the system of freedom of expression. Some even argue that we are the better served by having media that have different sets of rights and obligations.

The First Amendment is not an equal protection clause; as long as the public interest in free speech isn't disserved, all speakers need not be treated equally. With respect to stealth marketing specifically, it is not necessary to eradicate it from all media. As long as we have sufficient sources that are free from it, and we can tell which those are, free speech and public discourse will survive.

Professor Goodman argues that it would be a mistake to attack stealth marketing in entertainment any less vigorously than in news. It's true, as she says, that "entertainment media contribute to public discourse and the formation of public opinion."⁵ But I don't believe product placement in movies poses the same threat to public discourse as clandestine payments to newspaper columnists or fake television news videos. In a world of limited resources, political resistance, and enforcement difficulties, it seems to me that Congress might justifiably decide to attack surreptitious payments for news coverage without also taking on product placement in movies. And as she acknowledges, clandestine advertising in an anonymous or pseudonymous blog doesn't seem to pose the same risks to public discourse that it poses if published in a newspaper.

4. *Id.* at 145.

5. *Id.* at 124.

The argument for a universal definition of mass media is subject to an additional objection. In some contexts, it is easy to extend a particular right or privilege to all comers. There is no reason, for example, not to extend freedom from prior restraints to all media, or even to all speakers; there is no natural or practical limit on the number who can enjoy that right. Shield statutes, on the other hand, are a compromise between the needs of free speech and the legal system's need for testimony. A privilege to maintain confidences may be manageable if it extends only to a limited class of potential witnesses; if it extends to too many people, it isn't manageable. The same is true of rights of access to news conferences and press galleries. We live with that reality daily; only journalists who work for established media outlets such as broadcast stations or newspapers get the benefit of shield statutes and press passes. Those arrangements may exclude some people who serve the journalistic function just as fully, but they are preferable to arrangements that include no one to avoid excluding anyone.

In almost any area of media law today, the thorniest problems involve the Internet, and stealth marketing is no exception. As Professor Goodman recognizes, stealth marketing is particularly attractive to both producers and sponsors in the new media. Because the Internet audience is highly fragmented, advertisers must pay for many ads to reach an audience that in the mass media could be reached with one message, and that produces a blizzard of ads that users are eager to avoid. Embedding the ads in editorial content alleviates that problem and at the same time avoids pop-up blockers and other technology designed to help users avoid ads. Professional commitment to editorial independence isn't as strong in the digital world, either. Indeed, the Internet culture tilts in the opposite direction, toward widespread copying and collaboration among multiple authors without attribution. The pressure to engage in stealth marketing in new media is strong, and barriers to it are weak.

Moreover, enforcing restraints on stealth marketing is particularly problematic. The content producers who will accept payment to embed messages in their product may be anonymous, may be nimble characters who can disappear when the law is closing in and reappear quickly in a different incarnation, and will sometimes be beyond the jurisdiction of the regulators.

Wisely, Professor Goodman doesn't attempt to prescribe how stealth marketing in the new media should be attacked. She proposes to exempt bloggers and other currently unregulated speakers from sponsorship disclosure requirements "at least until their role in public discourse and the Internet regulatory apparatus becomes clearer."⁶ I suspect neither of those things will happen anytime soon, and stealth marketing in new media may prove to be uncontrollable for the foreseeable future. If it never becomes

6. *Id.* at 151.

amenable to control, that would trouble me less than it would trouble her: in my view, contamination of new media with stealth marketing is indeed unfortunate, but allowing it to grow unchecked in the old media because of inability to check it in the new media would be far worse.

She argues that the First Amendment does not preclude her proposed solution, which would extend to media generally something like the broad disclosure requirements that Section 317 currently imposes on broadcasting. In her view the First Amendment, properly interpreted, allows the government to act affirmatively to promote public discourse and protect public debate. This theory has always been anathema to the rather large subset of scholars and judges for whom the First Amendment is only a bar against government intervention in the marketplace for speech, and the Supreme Court has blown hot and cold on the theory, mostly cold.

Fortunately, to sustain her claim Professor Goodman doesn't need any grand version of the theory that government can regulate speech to promote discourse. Instead, she can rely on the well-established narrower principle that the state can affirmatively require disclosure to prevent advertising from being misleading. She doesn't want to rely on this theory because she wants to argue that what makes stealth marketing objectionable is the harm to public discourse, not its deceptiveness. While I think she's right to focus on the harm to public discourse, that doesn't require us to turn a blind eye to the deceptiveness issue. By definition, stealth marketing is designed to mislead; it is employed for the purpose of preventing the recipient from realizing that what he or she is getting is advertising. A newspaper restaurant critic who writes that Pascal's is the best French restaurant in town is representing that as an independent judgment. If it is not—if it is a judgment purchased by the restaurant—the implicit representation of independence is false. Perhaps speech that pollutes public discourse ought to be more generally condemnable, but for purposes of combating stealth marketing, it is enough to say that it is commercial speech that will be misleading unless its sponsorship is disclosed. That the First Amendment permits the state to require disclosure under those circumstances is clear to all except those who insist (unsuccessfully, so far) that commercial speech must be protected as fully as other speech even when it's false.

Stealth marketing can transform the media as profoundly as technological convergence and concentration of ownership—phenomena that have received far more attention. Professor Goodman's article is eye-opening as to the dimensions of the problem, and her focus on public discourse locates the debate about harm in stealth marketing exactly where it belongs: at the heart of our thinking about the role of mass media in the system of freedom of expression.