

Comments on *Stealth Marketing and Editorial Integrity*

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In *Stealth Marketing and Editorial Integrity*, Professor Ellen Goodman has produced an important update of the legal and policy environment surrounding sponsorship disclosure, bringing this field into the digital era. Noting that the standard justifications for regulations compelling disclosure of sponsorship relationship for media products are woefully inadequate on their own terms—and hopelessly outdated in the new digital media environment—Goodman argues powerfully that sponsorship disclosure regulations, properly theorized and implemented, should continue to have vitality in this brave new world.

There is much to recommend in this fine article, and I applaud Professor Goodman for shining a light on what has—surprisingly—been a relatively obscure topic for legal scholars. I also share her views that the current system of regulations, with its early twentieth century roots, is seriously flawed. But I wonder whether the effort to save a system of sponsorship regulation is either worthwhile or even wise, given the radical changes in the nature of the media markets. In my brief remarks that follow, I suggest a few reasons why we might want to be skeptical of any effort to bring renewed vitality to a sponsorship disclosure regime.

1. A sponsorship disclosure requirement (SDR)—at most—enhances the perception of editorial integrity, but it does not ensure editorial integrity. The goal of enhancing editorial integrity is, of course, laudable. But I have serious reservations as to whether a regulatory system that merely requires disclosure of sponsor relationships will have any real effect in this regard.

In essence, the theory undergirding an SDR is that consumers will, by knowing the sponsoring sources of media products, gain confidence in the authenticity of their editors' voices. But of course, merely knowing the authenticity (or lack thereof) of the voice is of little use if all available editorial voices are corrupt. So implicit in any SDR is the assumption (or at least the hope) that consumers will choose more independent editorial voices, thus altering the marketplace for media goods in a way that will generate greater integrity.

But if the theory of an SDR relies on the marketplace—specifically, an assumption that consumers will, on the margin, choose independent rather than corrupt editorial voices, then it is unclear whether an SDR is needed at all: if the marketplace values editorial integrity, then we should expect such

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an approach to gain marketshare independent of the regulatory regime. And if the marketplace does not value editorial integrity, then the SDR will likely decrease, rather than enhance, overall social utility (by limiting the ability of profitable stealth marketing techniques).

2. The relevance of an SDR diminishes in proportion to the rise of new communications technologies. While it may well be that government intervention into the speech market was justified at the dawn of broadcast media products—where a select few editorial voices had an enormous share of consumer attention—this premise appears quaint in a world where the ability to communicate with millions is within a mouse click of mainstream consumers. Broadcast is being replaced by the “long tail” of media consumption, where even very narrowly-tailored media products can find an audience, and (more to the point) where consumers have an unprecedented array of choices available to them. That some (or even many) editorial voices will be “corrupted” by sponsorship dollars, whether explicitly disclosed or not, seems to me to be less important, as long as an array of editorial voices exist. (And, as I suggested above, if consumers value editorial integrity, then we can expect an array of media products advertising such values.) By most accounts, we are at the dawn of a new era in communications technologies, marked by an explosion of access (both on the supply and demand sides of the equation). This then, would seem to be a particularly inauspicious time to implement a modern SDR.

3. Finally, any SDR scheme must necessarily make some potentially questionable assumptions about consumer behavior—for example, their perception of editorial integrity, their propensity to be misled by stealth marketing tactics, or their desire for authenticity in their media products. Some of these assumptions appear paternalistic in nature—why don’t consumers understand the conflicts of commercially supported media products. Some appear fleeting or unstable—as communications change, one might expect norms and understandings to change as well. And if these assumptions are either incorrect or dynamic, then the foundations of an SDR scheme is, in my view, greatly weakened.

As I noted at the outset, I very much enjoyed reading Professor Goodman’s fine article on this important topic. And while I disagree with her proposals, that does not diminish in any way my admiration for the quality and originality of this project.