

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Sponsorship Identification Rules)	MB Docket No. 08-90
and Embedded Advertising)	

**COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (“NCTA”), by its attorneys, hereby submits its comments on the *Notice of Proposed Rulemaking* in the above-captioned proceeding. NCTA is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable systems serving more than ninety percent of the nation’s cable television households, and owners and operators of more than 200 cable program networks.

INTRODUCTION

In its *Notice*, the Commission asks whether it should “take additional steps with respect to sponsorship identification required of cable programmers,”¹ specifically, by imposing disclosure requirements regarding product placement in the programming carried by cable networks. The question seems to presume that the current sponsorship identification requirements can be extended to programmers – but they cannot. The Commission has no statutory authority to impose such requirements, much less to broaden them to include product placement disclosures. Imposing such extensive content regulation on cable operators and programmers would also raise serious First Amendment issues. Moreover, such regulation

¹ *Notice* at ¶ 17.

would constrain the ability of cable programmers to adapt to significant changes that are occurring in the marketplace for video advertising, and could therefore have adverse effects on the price, quality and diversity of programming available to consumers. While we appreciate the Commission's efforts to address changes in television brought on by new technologies and their impact on advertising, we think this proposal takes policy in the wrong direction.

I. THE COMMUNICATIONS ACT DOES NOT AUTHORIZE THE COMMISSION TO IMPOSE SPONSORSHIP IDENTIFICATION REQUIREMENTS ON CABLE PROGRAMMERS OR THEIR PROGRAMMING.

Nothing in the Communications Act specifically directs or even authorizes the Commission to impose new sponsorship identification requirements of any sort on origination cablecasting by cable operators *or* on programming provided by cable networks. In fact, the source of the FCC's sponsorship identification rules – Section 317 – does not mention cable television at all. It instead applies to “all matter broadcast by any radio station” and to “licensees” of such stations.

When the Commission applied the current rules to cable operators providing origination programming in 1969,² it had no specific regulatory authority over cable but relied on its jurisdiction to adopt cable regulations “reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting.”³ But when Congress enacted the Cable Communications Policy Act of 1984, which for the first time gave

² CATV, 20 FCC 2d 201 (1969). At the time, cable operators did not challenge application of the broadcaster sponsorship identification rules to their local origination, *id.* at 219, and thus the Commission's reliance on ancillary jurisdiction to adopt even those rules has never been tested. However, Comcast has recently questioned the viability of the FCC's rules that extend these sponsorship identification rules to even cable origination channels. See Letter to Marlene H. Dortch, File No, EB-06-IH-3723, Notices of Apparent Liability for Forfeiture (Oct. 22, 2007) (seeking cancellation of Notices of Apparent Liability for alleged cable operator violation of Section 76.1615).

³ 20 FCC 2d at 219 (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968)).

the Commission explicit regulatory jurisdiction over cable television, it also effectively removed any “ancillary-to-broadcasting” jurisdiction to regulate cable programming.

That Act adopted a comprehensive framework for the regulation of cable by Federal, State and local governments – codified as Title VI of the Communications Act – and provided, in Section 624(f)(1), that “[a]ny Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as *expressly* provided in this title.”⁴ In other words, if authority to regulate cable content is not found within the square corners, and in the express language, of Title VI, it does not exist.

A rule compelling programmers to include particular content, *i.e.*, sponsorship identification, would clearly be a “requirement regarding the provision or content of cable services....” Under the current rule, programmers would be forced to include messages at the end of their programs. They might also be compelled, should the FCC adopt the more intrusive proposals of certain advocates, to include messages within the programs themselves.⁵ In addition, proposals to regulate the size or duration of those messages not only would impose impermissible content requirements on the messages⁶ but also could force changes in the underlying content of the program network itself. Programmers could be forced to modify program endings, to change how end credits are displayed, to alter the flow from one program into the other, and to restrict common creative practices if these types of regulations were adopted. This would directly contravene Section 624(f)(1).

⁴ 47 U.S.C. § 544(f) (emphasis added).

⁵ See *Notice* at ¶ 12 (seeking comment on whether to mandate “concurrent disclosures” of sponsored messages integrated into entertainment programming).

⁶ *Id.* at ¶ 15 (proposing to “make the current disclosure requirement more obvious to the consumer by requiring that sponsorship identification announcements 1) have lettering of a particular size and 2) air for a particular amount of time”).

Section 624(f)(2) provides only two exceptions to the prohibition on such content regulation. First, the Commission is not barred by Section 624(f)(1) from enforcing “any rule, regulation, or order issued under any Federal law, as such rule, regulation, or order (i) was in effect on September 21, 1983, or (ii) may be amended after such date if the rule, regulation, or order as amended is not inconsistent with the express provisions of this title.” Second, the prohibition does not apply to “any rule, regulation, or order under title 17, United States Code” – *i.e.*, federal copyright law.

The sponsorship identification rule applicable to cable origination programming was in effect on September 21, 1983, but even if, *arguendo*, the Commission had ancillary jurisdiction to apply those rules to cable origination programming, that rule plainly does not apply to cable program networks or to the programming on such networks. Section 76.1615 provides, in relevant part, that “when a cable television system operator engaged in *origination cablecasting* presents any matter for which money, service or other valuable consideration is either directly or indirectly *paid or promised to, or charged or accepted by such cable television system operator*, the cable television system operator, at the time of the cablecast” shall provide a sponsorship identification.⁷ As the Commission has elsewhere made clear, “origination cablecasting,” which is defined as “programming subject to the exclusive control of the cable operator,” does not

⁷ 47 C.F.R. § 76.1615(a) (emphasis supplied). Subsection (b) also applies to “each cable television system operator engaged in origination cablecasting,” as do subsections (d) and (e). When the FCC originally adopted its definition of origination, it anticipated that cable operators themselves would be originating the programming locally, complete with their own “origination facilities” (*e.g.*, origination equipment and studio). *See* CATV, 20 FCC 2d at 209; CATV, 15 FCC 2d 417, 422 (1968) (describing plan for “required origination”). Indeed, in eliminating its mandatory origination rule, the FCC explained that it had been adopted to advance “localism,” *Cable Television Service*, 49 FCC 2d 1090, 1091 (1974), and that this experimental rule dealt with “the field of *local* cablecasting.” *Id.* at 1104.

extend to programming provided by program networks; it is meant to apply only to programming originated by the operator.⁸

In any event, even if the term “origination cablecasting” were to be construed more broadly, the sponsorship identification rule still could not be construed to extend to the programming carried on cable program networks. That rule, *by its terms*, has no applicability to payments or other consideration that may be received by a cable *network programmer* in connection with programming that appears on that network. It applies only to consideration received by the cable operator.

Adopting new rules that apply not only to a whole new area of “sponsorship” – *i.e.*, product placement – but also to entities and programming that were never the subject of the existing rules cannot reasonably be deemed an “amendment” of the existing rules, for purposes of Section 642(f)(2).

Such an “amendment” would vastly alter and enlarge the scope and burden of the rules.⁹ Expanding coverage of even the existing sponsorship identification requirements to the hundreds of cable networks carried by cable systems, and to the thousands of hours of programming that such networks provide weekly, would result in a fundamentally different rule from one that

⁸ Just a few years ago, in determining how to apply equal opportunity requirements to DBS comparable to the cable rules (which apply to “origination cablecasts by legally qualified candidates for public office”), the FCC noted that “DBS providers primarily carry programming, including advertising, provided by programmers that are not controlled by the DBS provider.” Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992: Direct Broadcast Satellite Public Obligations, 19 FCC Rcd. 5647, 5659 (2004) (describing applicability of equal opportunity rules to DBS). And it contrasted that type of programming with programming “originated by DBS providers,” analogizing the latter to “programming originated by the cable operator, ‘origination cablecasting.’” *Id.* at 5659.

⁹ The rules require not only that the sponsorship announcement be made, but also that “each cable television system operator engaged in origination cablecasting shall exercise reasonable diligence to obtain from employees, and from other persons with whom the system operator deals directly in connection with any matter for cablecasting, information to enable such system operator to make the announcement required by this section.” 47 C.F.R. § 76.1615. Assuming *arguendo* the validity of Section 76.1615, it is one thing to require that effort of any operator creating a local origination cable channel, but it is quite another – and enormously burdensome – to impose this type of obligation with respect to every program network carried.

requires sponsorship identification of programming originated by local cable operators. And adopting a rule that also requires identification of all product placements for which programmers are compensated bears no resemblance whatsoever to the rule that currently exists, either in scope *or* substance.

II. REGULATING PRODUCT PLACEMENT IN CABLE PROGRAMMING WOULD RAISE SERIOUS FIRST AMENDMENT ISSUES.

Because of their effect on content, proposals to regulate product placement would raise significant First Amendment issues. Cable operators and programmers, unlike broadcasters, do not use the public airwaves and the Supreme Court has recognized that “the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation.”¹⁰ The FCC would have to “do more than simply ‘posit the existence of the disease sought to be cured.... It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.’”¹¹ The record is devoid of such a showing.

To the contrary, much of the *Notice* raises concerns about children’s programming, and the effects of product placement in such programming.¹² But the FCC already has rules implementing the Children’s Television Act of 1990, which are targeted at protecting children against excessive commercialization of programs directed toward their age group without also restricting and burdening the large majority of cable program networks and programming that is

¹⁰ *Turner Broadcasting System v. FCC*, 512 U.S. 622, 637 (1994).

¹¹ *Id.*, 512 U.S. at 664.

¹² *Notice* at ¶ 16 (inviting comment on “whether the Commission’s existing rule and policies governing commercials in children’s programming adequately vindicate the policy goals underlying the Children’s Television Act and Section 317 and 507 with respect to embedded advertising in children’s programming”).

not aimed at children.¹³ That rule is more than adequate to deal with concerns the FCC has articulated and no further action is needed.

In addition, the Federal Trade Commission, which has authority under Section 5 to regulate unfair and deceptive advertising practices, has examined a similar complaint filed by Commercial Alert regarding product placement and found no evidence of consumer injury.¹⁴ Moreover, many cable programmers already identify sponsors of material used in a program, as sponsors likely will want that credit to be given, but the programmers do it in a way that is editorially appropriate as well as informative. Thus, it is highly dubious that the FCC would have sufficiently compelling evidence of a problem needing to be remedied that could overcome the constitutional hurdles here.

III. EVEN IF THE COMMISSION HAD AUTHORITY TO EXTEND SPONSORSHIP IDENTIFICATION AND PRODUCT PLACEMENT RULES TO THE PROGRAMMING ON CABLE NETWORKS, IT SHOULD AVOID ANY SUCH INTERFERENCE IN THE EVOLVING PROGRAMMING MARKETPLACE.

Wholly apart from these statutory and Constitutional impediments, there are strong public policy reasons to tread lightly in this area. The use of sponsorship to support television programming is not a new phenomenon. And advertising support is a fact of life for the hundreds of basic cable networks that exist today. Those networks rely on a combination of advertising and subscription fees to support the wide variety of news and entertainment programming that cable television brings. Last year alone, cable networks generated more than \$16 billion from the sale of advertising, comprising almost half of cable networks' total revenues. These ad revenues enable programmers to make substantial investments in high-

¹³ See *Policies and Rules Concerning Children's Television Programming*, 6 FCC Rcd 5093 (1991). Congress specifically intended that the rules adopted pursuant to the Children's Television Act apply to cable operators and program networks, *see id.* at 5094 – in contrast to the sponsorship identification requirements of Section 317, which apply only to broadcasters.

¹⁴ Letter from Mary K. Engle, Associate Director for Advertising Practices, Federal Trade Commission, to Gary Ruskin, Executive Director, Commercial Alert (dated Feb. 10, 2005).

quality content, resulting in more choice for consumers and more diverse programming targeted to underserved audiences.

To the extent that regulating sponsorship and product placement affects the underpinnings of advertiser support, it will necessarily have adverse collateral effects. It will either require countervailing increases on the subscription fee side of the equation – resulting in increases in costs to consumers. Or, where such price increases are unsustainable, it will adversely affect the quality, quantity and diversity of available programming.

The *Notice* itself recognizes that advertising on video programming is changing as “advertisers respond to a changing industry.”¹⁵ It points out that the growth of digital recording devices (DVRs), which enable viewers to skip commercials, has given rise to an interest in means other than the traditional 30- or 60- second advertisement to reach audiences.¹⁶ To respond and adapt to this rapidly evolving marketplace, cable programmers need maximum flexibility – not a new layer of regulatory requirements and constraints.

¹⁵ *Notice* at ¶ 2.

¹⁶ *Id.*

CONCLUSION

For the foregoing reasons, the Commission has no basis in law or in sound policy for adopting new rules regulating product placement in cable programming.

Respectfully submitted,

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