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Zahr K. Said
University of Washington School of Law

MANDATED DISCLOSURE IN LITERARY HYBRID SPEECH

Zahr K. Said*

Abstract: This Article, written for the Washington Law Review's 2013 Symposium, *The Disclosure Crisis*, argues that hidden sponsorship creates a form of non-actionable influence rather than causing legally cognizable deception that mandatory disclosure can and should cure. The Article identifies and calls into question three widely held assumptions underpinning much of the regulation of embedded advertising, or hidden sponsorship, in artistic communications. The first assumption is that advertising can be meaningfully discerned and separated from communicative content for the purposes of mandating disclosure, even when such advertising occurs in "hybrid speech." The second assumption is that the hidden promotional aspects of hybrid speech create a form of legally cognizable deception. The final assumption holds that disclosure is normatively desirable, to inform audiences of hybrid speech of its hybridity, and in so doing, to remedy the perceived harms that flow from hidden sponsorship. The Article challenges these three assumptions by using as an example the little-remarked phenomenon of sponsored literature, literary texts in and around which advertising is inserted, as well as literary texts that owe their existence to commissioning advertisers. The standard disclosure literature does not consider contexts such as these, in which the decision-making process does not involve crucial questions of life or death, shelter or homelessness, solvency or bankruptcy. Thus the entertainment context of hybrid speech demands different regulatory treatment. The Article concludes that mandatory disclosure is the wrong regulatory response to hidden sponsorship because the harms that it ostensibly creates are rooted in influence, rather than deception.

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INTRODUCTION

This Article, written for the Washington Law Review's 2013 Symposium, *The Disclosure Crisis*, argues that hidden sponsorship creates a form of non-actionable *influence* rather than causing legally cognizable *deception* that mandatory disclosure can and should cure. The Article identifies and calls into question three widely held assumptions underpinning much regulation of embedded advertising. In particular, it takes aim at the central mechanism by which such regulation seeks to remedy any harms perceived to emanate from hidden sponsorship: disclosure. It challenges these three assumptions by using a previously unexamined terrain for sponsorship: literature. Sponsored literature consists of literary texts in and around which advertising is inserted, as well as literary texts that owe their existence to commissioning advertisers.

The Article applies these three central assumptions to sponsored literature and concludes that collectively, these assumptions should be revisited and either abandoned, or more thoroughly theorized and justified. At present, these assumptions are naïve, mistaken, or otherwise indefensible. In turn, undermining these assumptions weakens the case on behalf of mandated disclosure for the influence ostensibly exerted by embedded advertising, or the insertion of promotional products or

messages in artistic content.[1]

The first assumption is that advertising can be meaningfully discerned and separated from communicative content for the purposes of mandating disclosure, even when advertising occurs in expressive or artistic content; that is, even when it occurs in what we could call "hybrid speech."[2] Hybrid speech refers to collaboration between advertisers and content producers in the creation of content that is functionally a hybrid of promotional and artistic messages.[3] The second assumption, which builds on the first, is that the hidden promotional aspects of hybrid speech create a form of legally cognizable deception. The final assumption also builds on the first, and it reflects a long history of regulatory and legislative action. It relies on the notion that disclosure is normatively desirable in that it informs audiences of hybrid speech of its hybridity and it delineates the respective contributions from both content creators and sponsors. In so doing, disclosure is thought to remedy the perceived harms that flow from hidden sponsorship.

Accordingly, the Article proceeds in four parts. Part I provides a background in sponsored forms of communicative content, arguing that hybrid speech is common, and likely to continue to increase, in film, television, internet content, and even literature. It emphasizes literature as a special case because currently there is no disclosure regime applicable to most forms of literature. Furthermore, no scholarship has focused on sponsored literature yet. Finally, this scholarship is timely because sponsored literature, in one form or another, is likely to become

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1. *See* Zahr Said, *Embedded Advertising and the Venture Consumer*, 89 N.C. L. REV. 99, 107 (2010).

2. Other terms include "embedded advertising" (the FCC); "stealth marketing" (Ellen Goodman); "camouflaged promotion" (Nat Stern); and "advertainment" (numerous others). *See, e.g.*, Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. 43,194 (July 24, 2008); Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 109 (2006); Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 125 (1999); Benjamin R. Mulcahy, *That's Advertainment!*, 29 L.A. LAW. 44, 44 (2006), *available at* http://www.sheppardmullin.com/assets/attachments/310.PDF; John P. Feldman & Gonzalo E. Mon, *"Advertainment" and "Advergaming": Legal Considerations Concerning a New Trend in Online Advertising*, 3 No. 11 E-COMMERCE L. REP. 2 (Sept. 2001) ("Advertainment is any mode of entertainment (film, music, dramatics) that purports to be presented for entertainment value but is produced by a company primarily to feature its products or services.").

3. *See* Mulcahy, *supra* note 2 (describing the emergence of branded entertainment and the reasons for its growth); *see also* Siva K. Balasubramanian, *Beyond Advertising and Publicity: Hybrid Messages and Public Policy Issues*, 23 J. OF ADVERTISING 29, 30 (1994); Note, *Making Sense of Hybrid Speech: A New Model for Commercial Speech and Expressive Conduct*, 118 HARV. L. REV. 2836, 2837 (2005) (defining hybrid speech as speech or expressive conduct that contains "a different mixture of protected elements that merit a heightened level of First Amendment scrutiny and of regulable elements that deserve only rational basis review").

more and more common.[4] Part II tackles the question of whether advertising content can truly be parsed and differentiated from creative content such that one can satisfactorily be called "art" and the other "commerce" for the purposes of mandating disclosure as to art's origins. Discerning who contributed what to a work of art, and why, is a notoriously difficult endeavor. However, sponsorship endorsement law seems to presume its feasibility. Part II then suggests, through reference to sponsored literary texts, that such a division is often unrealistic and potentially unreliable.

Part III argues that, to the extent that hidden forms of sponsorship permeate expressive content, their presence constitutes a form of *influence* over audiences rather than a form of deception. Because influence is different from deception, the law should not treat it the way it treats traditional forms of deception. This Part draws on Gregory Klass's taxonomy of regulatory approaches to deception to conclude that a causal-predictive model of deception might encompass the harm of "influence" through hidden sponsorship. Part IV queries whether disclosure is a tool that effectively addresses the concerns that hybrid speech raises for consumers, focusing on the question of sponsored literature. It relies upon the groundbreaking work of Carl Schneider and Omri Ben-Shahar to conclude that disclosure is not effective in this manner because it is incapable of providing readers with the information they would—or perhaps should—desire in order to make decisions about their entertainment content. On the contrary, disclosures in literary hybrid speech would likely only impose on readers by diminishing their immersion in the entertainment content and by burdening them with intrusive and potentially voluminous information that does not materially affect their decisions.

To some extent, consumer preferences in this context are unknown. Consumers might indicate that they would welcome more information in the form of disclosures, but their preferences might change if such information were presented in an interruptive fashion. If consumers had to make choices between more information (and less immersion), or less information (and more immersion), it is unknown which they would choose. Put another way, it is unclear whether consumers would prefer to sacrifice immersion or information provided by disclosure if they were unable to have what they considered an optimal balance of both. It is also unknown whether, if regulatory limitations on sponsor

4. *See* Ron Adner & William Vincent, *Get Ready for Ads in E-Books*, WALL ST. J., Aug. 19, 2012, at A17.

participation decreased the available amounts or forms of content, consumers would believe themselves better or worse off.

Yet there is also a normative question apart from the empirical ones: does embedded advertising produce the sort of harm that *justifies* mandating disclosure, even if it intrudes on artistic creation and audience consumption? Assuming arguendo that it does, the Article examines whether disclosure is the proper remedy for embedded advertising's perceived harms, and concludes that it is not. Disclosing sponsor involvement does not disclose the information that consumers really do—or, more normatively, should—care about: creative autonomy with respect to issues and products featured in an artistic text and capable of influencing consumers. In light of the foregoing, the Article concludes that the three main assumptions underpinning the traditional view of disclosure's role in curbing hidden influences require revision and, possibly, concomitant regulatory reaction. Reviewing these assumptions helps make the case that mandatory disclosure is the wrong regulatory response to hidden sponsorship because disclosure is a remedy designed to provide information and prevent deception. Yet the harms that sponsorship ostensibly creates are rooted in influence, rather than deception. Most sponsorship falls well below the threshold required for deception claims, and although some *sui generis* sponsorship laws exist, they often do not reach all forms of sponsorship. Accordingly, a theory of some alternative sort of harm created by sponsorship could free regulators to rethink the goals and mechanisms of their regulation of these marketing practices.

I. BACKGROUND: THE EXISTENCE OF HYBRID SPEECH IS WIDESPREAD

Hybrid speech, or expressive content that integrates both editorial and commercial messages, is everywhere. This section provides the reader with a background in sponsored forms of communicative content. It shows that hybrid speech is common, familiar, and likely to continue to increase across many media: film, television, internet content, and literature. Hybrid speech plays a new and evolving role in social media as well, where its status changes constantly as a function of technological developments, advertiser pressures, consumer responses, and regulatory and legal challenges.[5]

This Part places special emphasis on literature as a uniquely

5. *See* Said, *supra* note 1, at 109–16.

compelling arena to investigate because no disclosure regime yet applies to literature (unless literary texts take the form of sponsored blogs, at which point they would fall into a clearly enumerated category targeted by the Federal Trade Commission (FTC)). Moreover, knowledge of literary sponsorship is not widespread in the way that it is with respect to audiovisual sponsorship, where its prevalence is by now familiar to many.[6] Accordingly, Section A lays out the entertainment landscape and shows how hybrid speech predominates in entertainment content produced in many different media. Section B emphasizes that advertising has made inroads in literature, where popular consensus is unaware of advertisers' presence.

A. Sponsorship Plays an Important Role in the Economy

Commercially sponsored entertainment and information represent a large and rapidly growing market.[7] Branded entertainment alone accounts for billions of dollars spent annually around the world. In 2009, companies spent $6.25 billion globally on product placements, $3.61 billion of which was traceable to the United States.[8]

Embedded advertising has developed into a sophisticated aspect of the artistic and business dimensions of entertainment content. As one television executive put it: "'It's not just about sticking a Coke can on a desk anymore,' . . . . 'It's an evolving form.'"[9] From the earliest days of radio and television sponsorship—characterized by programming like *The Palmolive Hour*—underwriting has grown into a reliable source of revenue for programmers that serves as an ever-evolving, flexible marketing tool for sponsors.[10] Cooking shows such as *Top Chef* and talent competition shows such as *American Idol* and *The Apprentice* require contestants to interact with branded products for their challenges and rewards. *The Biggest Loser* admonished weight-loss candidates to

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6. *See* Sonia K. Katyal, *Stealth Marketing and Antibranding: The Love That Dare Not Speak Its Name*, 58 BUFF. L. REV. 795, 796–98 (2010).

7. Said, *supra* note 1, at 111.

8. Global Branded Entertainment Marketing Forecast 2010-2014, PQ MEDIA 11, 48 (June 29, 2010). An executive summary of the report is available at http://www.pqmedia.com/execsummary/GBEM10-Executive-Summary.pdf. *See also* Said, *supra* note 1, at 113 ("Embedded advertising will likely continue to grow as traditional models of advertising keep contracting.") (citations omitted).

9. Brian Stelter, *Low Ratings End Show and a Product Placement*, N.Y. TIMES, Nov. 14, 2008, http://www.nytimes.com/2008/11/14/business/media/14adco.html.

10. *See* Ann K. Hagerty, Comment, *Embedded Advertising: Your Rights in the Tivo Era*, J. MARSHALL REV. INTELL. PROP. L. 146, 148 (2009).

remain well-hydrated using a Brita water filter.[11]

The form is not limited to entertainment on television, of course: embedded advertising exists in all audiovisual content, including films and videogames (or so-called "advergames");[12] it exists in literature;[13] and forms of embedded advertising arguably exist in many different forms of editorial content, including broadcast news, online journalism and blogging, government lobbying, and academic research.[14] Embedded advertising has even permeated elementary schools.[15] While its existence in traditional media is commonplace, embedded advertising especially thrives online, partly because one can efface or disguise the origins of any given communication, and sources of influence may be multiple, overlapping, and hidden.[16]

Indeed, for some time, hidden payments and secret provision of goods to bloggers, for the purposes of securing favorable reviews, seemed to fly under the regulatory radar. Marketers saw this period as a time during which a great deal of experimentation could occur with regulatory impunity.[17] In that vein, online product reviews such as those frequently posted and relied upon by visitors of Amazon.com, were once susceptible to outright fraud. In one instance, a company was caught paying people to write reviews of products, whether or not those

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11. Alessandra Stanley, *Commercials That You Can't Zap*, N.Y. TIMES, June 2, 2009, http://www.nytimes.com/2009/06/07/arts/television/07stan.html.

12. *See* Seth Grossman, Comment, *Grand Theft Oreo: The Constitutionality of Advergame Regulation*, 115 YALE L.J. 227, 228 (2005) (describing advergames as having "become central to advertising and marketing practices," especially for food companies targeting young children).

13. *See generally* Zahr K. Said, Novels for Hire (Jan. 17, 2013) (unpublished manuscript) (on file with the Washington Law Review).

14. *See, e.g.*, Amit Schejter, *"Jacob's Voice, Esau's Hands": Transparency as a First Amendment Right in an Age of Deceit and Impersonation*, 35 HOFSTRA L. REV. 1489, 1496 (2007); Brian Blackstone, *FCC to Probe Williams's Deal*, WALL ST. J., Jan. 17, 2005, at B3; Gardiner Harris, *Doctors' Ties to Drug Makers Are Put on Close View*, N.Y. TIMES, Mar. 21, 2007, http://www.nytimes.com/2007/03/21/us/21drug.html?_r=2&th&emc=th&oref=slogin&; Duff Wilson, *Harvard Medical School in Ethics Quandary*, N.Y. TIMES, Mar. 2, 2009, http://www.nytimes.com/2009/03/03/business/03medschool.html?pagewanted=all.

15. *See* ALEX MOLNAR ET AL., NAT'L EDUC. POLICY CTR, EFFECTIVELY EMBEDDED: SCHOOLS AND THE MACHINERY OF MODERN MARKETING—THE THIRTEENTH ANNUAL REPORT ON SCHOOLHOUSE COMMERCIALIZING TRENDS 2–3 (2009–2010), *available at* http://nepc.colorado.edu/files/CommTrends2010.pdf (enumerating seven categories of sponsor involvement in the academic ecosystem).

16. *See* Robert Sprague & Mary Ellen Wells, *Regulating Online Buzz Marketing: Untangling A Web of Deceit*, 47 AM. BUS. L.J. 415, 415 (2010) ("Marketers have discovered that the Internet is an excellent interactive medium to promote goods and services. Some marketers have begun to engage in the flourishing business of 'stealth marketing,' a method of communicating with potential customers in a way that disguises the originator of the communication.").

17. *Id.* at 422–24.

reviewers had used them.[18] These paid reviewers were also instructed to mark independent, negative reviews of the same product as "unhelpful."[19] The FTC has since updated its Guides on Endorsements to close the loophole that previously failed to address these types of fraudulent or hidden practices.[20] But the scope of the FTC guidelines is not unlimited, and many forms of hidden influence may still be permissible or actionable only if another, independent cause of action exists. For example, users of the social media site Facebook recently brought a class action lawsuit against that company for its secret and unauthorized use of user profiles and activity in order to generate profits for third-party advertisers.[21]

Taken together, these developments underscore that embedded advertising, in one form or another, is still alive and well despite the range of regulatory attempts to contain it.[22] It offers a powerful means of partnership between content creators and advertisers. Financial assistance and the provision of props and services from sponsors can greatly defray production costs for creators, while giving sponsors valuable publicity in creative works, which offer advertisers access to a context likely to be full of pleasurable or exciting associations for consumers.[23]

Creators benefit from embedded advertising because it provides financial assistance, often in the form of props and services that defray production costs.[24] Sponsors benefit because of the publicity it provides in a cutting edge forum.[25] Increasing use of celebrity endorsements, and the rise of "brand ambassadors," illustrate a shift in the approach to marketing big brands. Sponsors, content creators, and even the stars themselves are increasingly collaborating to put together a branded

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18. *See id*. at 423 (discussing how Belkin, a computer product company, "was discovered to have paid individuals to post reviews of Belkin products on Amazon.com." The company instructed individuals to post about the product as if they were using it.).

19. *Id.* at 423.

20. *Id*. at 431; *see also* Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53, 124–25 (Oct. 15, 2009).

21. *See* Fraley v. Facebook, Inc., 830 F. Supp. 2d 785 (N.D. Cal. 2011). The parties in this case have now settled. *See* Fraley *ex rel.* Duval v. Facebook, No. CV–11–01726 RS, 2012 WL 6013427 (N.D. Cal. 2012) (order approving settlement agreement); *see also* GCG, Inc., *Fraley v. Facebook, Inc.: Overview of the Proposed Settlement*, FRALEYFACEBOOKSETTLEMENT.COM, http://www.fraleyfacebooksettlement.com/ (last visited Apr. 13, 2013).

22. *See* Said, *supra* note 1, at 134–40 (providing examples).

23. *See* Mark Litwak, *When Products Become Stars*, DEL. L., Winter 2005–2006, at 8, 10, *available at* http://www.marklitwak.com/downloads/ProductsAsStars.pdf.

24. *See id*. at 9.

25. *See id.*

message that highlights the stars' creative vision for the brand.[26] Rather than simply endorsing a brand—say, by appearing on the cover of a cereal box—these celebrity brand ambassadors may take on creative and executive positions in advertising campaigns. These collaborations draw on the "borrowed equity" of the celebrities, while allowing them to shape the brand's promotional strategy.[27] As scholars and industry experts have shown, branded entertainment is a vital practice with a recent history of growth and projections of continued growth.[28]

B. Sponsorship Exists in Literature

Knowledge that embedded advertising exists in audiovisual content is widespread. Yet that common knowledge does not extend to the embedded advertising that exists in literary texts. Nonetheless, sponsored literature does exist,[29] and it is likely to increase.[30] This increase deserves attention because responses to sponsored literature have been almost uniformly negative.[31] To summarize the gist of the

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26. *See* Rupal Parekh & Natalie Zmuda, *More Than a Pitchman: Stars Get Marketing Titles*, ADVERTISING AGE, Feb. 11, 2013, at 8 ("Gone are the days when celebrities were simply paid to endorse. Today they're creative directors, music curators and 'ambassadors.'") (quoted from magazine cover).

27. *Id.* (describing the "marketing-related roles" played by celebrities with respect to certain brands, including Marc Jacobs (Diet Coke); Justin Timberlake (Bud Light Platinum); "Alicia Keys (BlackBerry); Beyonce (Pepsi); Taylor Swift (Diet Coke); Lady Gaga (Polaroid); Gwen Stefani (HP); Victoria Beckham (Land Rover); and Will.i.am (Intel)").

28. Marc Graser, *Product-Placement Spending Poised to Hit $4.25 Billion in '05*, ADVERTISING AGE, Apr. 4, 2005 (describing a nearly twenty percent rise in product placement spending each year from 1999 to 2005).

29. Steven L. Snyder, Note, *Movies and Product Placement: Is Hollywood Turning Films into Commercial Speech?*, 1992 U. ILL. L. REV. 301, 308 (1992).

30. Said, *supra* note 13, at 5, 15–22.

31. *See, e.g.*, Richard Alan Nelson, *The Bulgari Connection: A Novel Form of Product Placement*, *in* HANDBOOK OF PRODUCT PLACEMENT IN THE MASS MEDIA: NEW STRATEGIES IN MARKETING THEORY, PRACTICE, TRENDS, AND ETHICS 203–12 (Mary-Lou Galician ed., 2004); Paul Collins, *Smoke This Book*, N.Y. TIMES, Dec. 2, 2007, http://www.nytimes.com/2007/12/02/books/review/Collins-t.html (stating that "[t]he practice had its critics."); Motoko Rich, *In Books for Young, Two Views of Product Placement*, N.Y. TIMES, Feb. 19, 2008, http://www.nytimes.com/2008/02/19/books/19cathy.html?_r=0 (referring to product placement generally as a "widespread practice" and providing a specific example of literary product placement that was subject to a firestorm of criticism for this marketing strategy); Gitangeli Sapra, *Ford Pays the Author to Make Its Car the Star*, THE TELEGRAPH, Feb. 29, 2004, http://www.telegraph.co.uk/news/uknews/1455597/Ford-pays-the-author-to-make-its-car-the-star.html (discussing the head of a British writers' union's "serious reservations about the practice"); David Usborne, *Strange Tale of The Author, a Jeweler and Some Novel Product Placement*, THE INDEPENDENT, Sept. 4, 2001 (characterizing one view of Fay Weldon's collaboration with the Italian jeweler, Bulgari, as follows: "Ms [sic] Weldon has committed a sin so terrible, so crass, so commercial, that she may be remembered now for betraying her art and

critique, readers and commentators alike perceive such efforts as unprecedented insertions by third-party commercial interests into artistic works, where they do not belong. Such efforts are decried for their sullying of the artistic purity of literature.[32] Whether it is inaccurate or naïve as a description, there is some intuitive heft to the notion that literature is a realm in which embedded advertising is unworthy to tread. The sanctity of the literary text—again, as an intuitive notion—commands a certain power in the popular imagination. The power of the act of reading, when imagined as a private, uniquely immersive and autonomous action, generates a strong urge to protect the privacy and dignity interests of the reader.

However, historically, literature has always been subject to commercial constraints imposed from the outside by publishers, distributors, and booksellers. Collaborations between sponsors and authors are, therefore, not a completely new phenomenon or simply a product of the current era of hyper-commercialism. Indeed, even the late-nineteenth and early-twentieth centuries featured many instances of serialized literature in which texts by advertisers and authors were visually interwoven or juxtaposed. The late nineteenth century was a time in which advertising techniques were increasing moving beyond pamphlets or other traditional media to outdoor spaces, cultural texts, and anywhere deemed likely to reach potential consumers. In this sense, advertising broke new barriers and seemed, at least in the eyes of some, to be newly ubiquitous. In her study of London and Paris in that era, Sara Thornton describes what she believes to have been no less than "the beginning of the commercial sponsorship of high culture," even as she documents the way that sponsorship was also jostling for consumers' cognitive space by seeming to assault them from every possible location in the urban landscape.[33] Charles Dickens, for instance, serialized much of his fiction in connection with sponsorship from advertisers, whose texts were interspersed with those of Dickens.[34]

In the twentieth century, collaborations between sponsors and authors were more episodic than constant. They may have taken the form of ad-

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sullying the literary tradition forever.").

32. *See* Bill Fitzhugh, *To Sell Out Takes a Lot of Bottle*, THE GUARDIAN, Nov. 6, 2000, http://www.guardian.co.uk/media/2000/nov/06/books.pressandpublishing (describing the critiques the author received for placing a brand of liquor in his novel, in exchange for publicity and product samples, which declared that he "had cheapened either literature in general, or the novel form in particular").

33. SARA THORNTON, ADVERTISING, SUBJECTIVITY AND THE NINETEENTH-CENTURY NOVEL: DICKENS, BALZAC AND THE LANGUAGE OF THE WALLS 26 (2009).

34. *Id*. at 65–67.

inserts into literary works,[35] or they may have been works created at a sponsor's behest.[36] A more familiar form of such work can be found in the long-form review piece. Authors such as Hunter S. Thompson (*Song of The Sausage Creature*),[37] David Foster Wallace (*A Supposedly Fun Thing I'll Never Do Again*),[38] Stephen King (*Ur*),[39] and Alain de Botton (*A Week at The Airport: A Heathrow Diary*)[40] have accepted free trips or products in exchange for writing about them.

Whatever the intermittent nature of such sponsor-author collaborations in the past, however, different forms of advertising in (and around) literature are likely to increase in the future.[41] In the aggregate, publishing industry changes, including the increasing dominance of the e-book, and newly patented modes of inserting ads

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35. It was not uncommon in the 1970s and 1980s for books to feature advertisements in their final pages or in the middle of their bindings. For example, a popular romance series featured ads for Clairol Hair coloring products (which referred to the novel's characters), *see* FAYRENE PRESTON, THE DELANEYS OF KILLAROO: SYDNEY, THE TEMPTRESS (1987), and Tony Morrison's *The Bluest Eye* (1970) featured tobacco advertisements that were inserted without Morrison's knowledge, after the text's initial publication. *See* Collins, *supra* note 31.

36. For example, works of fiction are known to have been commissioned by many prominent brands: BMW, Lexus, Heathrow Airport, Mini Cooper, Amazon, Electrolux, and Nescafé. BMW commissioned four works of fiction to star its automobiles. *See* Jesse Willis, *BMW Audiobooks Releases A Twilight Zone-ish Product Placement Podcast*, SFFAUDIO (May 26, 2006), http://www.sffaudio.com/?p=447. The works and their authors are Don Winslow (*Beautiful Ride*), James Flint (*Master of the Storm*), Simon Kernick (*The Debt*), and Karin Slaughter (*Cold Cold Heart*). *See* Guardian Unlimited, *BMW Audiobooks*, CULTURE VENTURE BLOG (Mar. 9, 2006), http://blogs.guardian.co.uk/culturevulture/archives/2006/03/09/bmw_audiobooks.html. Lexus commissioned *In the Belly of the Beast*. VARIOUS AUTHORS, IN THE BELLY OF THE BEAST (2008) (on file with the Washington Law Review). Heathrow Airport commissioned *A Week at the Airport: A Heathrow Diary*. *See* Paul Barker, *Air Spray*, TIMES LITERARY SUPPLEMENT, Dec. 4, 2009, http://www.the-tls.co.uk/tls/reviews/politics_and_social_studies/article714913.ece (reviewing *A Week at the Airport: A Heathrow Diary* by Alain de Botton). Mini Cooper commissioned *Mission Mini*. *See* VAL MCDERMID, MISSION MINI (2002). Amazon, Inc. commissioned Stephen King to write a story featuring the Amazon Kindle. *See* David Kaplan, *Interview: Stephen King on Kindle: 'This Device Will Not Replace Books,'* PAIDCONTENT (Feb. 9, 2009), *available at* http://paidcontent.org/2009/02/09/419-interview-stephen-king-on-kindle-this-device-will-not-replace-books/ (describing in general terms the agreement formed with Amazon to write a story featuring the Kindle). Eloctrolux commissioned author Alex Mattis to write a novel, in the hopes of reaching young men. *See* ALEX MATTIS, MEN IN APRONS (2006). Nescafé commissioned *Love Over Gold*. *See* SUSANNAH JAMES, LOVE OVER GOLD: THE UNTOLD STORY OF TV'S GREATEST ROMANCE (2003).

37. Hunter S. Thompson, *Song of the Sausage Creature*, CYCLE WORLD 70 (Mar. 1995).

38. DAVID FOSTER WALLACE, A SUPPOSEDLY FUN THING I'LL NEVER DO AGAIN: ESSAYS AND ARGUMENTS 256 (1997).

39. In 2009, Amazon commissioned Stephen King to produce a download-only novella to feature the release of Amazon's Kindle electronic reading device. *See* Kaplan, *supra* note 36.

40. ALAIN DE BOTTON, A WEEK AT THE AIRPORT: A HEATHROW DIARY (2009).

41. Adner & Vincent, *supra* note 4.

into e-books, indicate an increasing use of advertising in selling both books and devices.[42]

Little has been written about sponsored literature. As a result, the practice scarcely has been chronicled, let alone systematically analyzed. My research in this area has begun to create a record by presenting texts drawn from an increasing number of works that feature literary sponsorship, which we might call "literary branded entertainment." Such sponsored brand references are difficult to discover, but growing in number, especially as publishers shift to digital or other multiplatform models. Through my original research, I have found sponsorships in women's fiction, young girls' fiction, children's counting books, cookbooks, travel literature, comic books, spy fiction, romance, award-winning literature, and—rather bizarrely—in a book of economic/political scholarship.[43] Because of the likely continuation of collaborations between sponsors and content producers, and the continued exploitation of programming that benefits from sponsor investment, the line between artistic and sponsored content is often, and may remain, difficult to pinpoint.

Literature thus offers a viable realm within which to explore questions about hidden sponsorship. In addition, sponsored literature is perhaps more troubling than sponsorship in the audiovisual context because consumer awareness is not as high and because the legislative and executive branches have done nothing yet to regulate it. No disclosure scheme reaches most instances of sponsored literature.[44] Scholars have debated whether product placement transforms expressive content into commercial speech for the purposes of more easily regulating it, and

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42. *See id.*; *see also Amazon to Embed "Smart Ads" in Kindle E-Books*, BOOK CHASE (July 25, 2009), *available at* http://bookchase.blogspot.com/2009/07/amazon-to-embed-smart-ads-in-kindle-e.html; *Yahoo Files E-Book Advert System Patent Applications*, BBC.COM (Apr. 9, 2012), *available at* http://www.bbc.co.uk/news/technology-17657859; Jon Fingas, *Microsoft Patents Contextual Ads in E-Books, Whether We Like it or Not*, ENGADGET (Aug. 12, 2012), *available at* http://www.engadget.com/2012/08/07/microsoft-patents-contextual-ads-in-e-books/.

43. WILLIAM GREIDER, THE TROUBLE WITH MONEY: A PRESCRIPTION FOR AMERICA'S FINANCIAL FEVER 1 (1989).

44. The exceptions are: (1) literature encountered in magazines and (2) literature published as a blog. Magazines are subject to an antiquated statute that requires disclosure of advertising funds for reasons that are not consumer-protection oriented, but have to do with preventing fraud on the government. *See, e.g.*, Newspaper Publicity Act of 1912, ch. 389, § 2, 37 Stat. 539, 554 (1912) (codified as amended at 18 U.S.C. § 1734 (2006)); Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963*, 56 FED. COMM. L.J. 329, 334–35 (2004). In theory, if literature were sponsored and published as a blog, such texts would be subject to the FTC's Endorsement Guidelines. *See supra* note 20 and accompanying text (discussing FTC Endorsement Guidelines).

they have reached different conclusions.[45] Some scholars have debated whether regulating product placements can be authorized, and concluded that it is unclear and will remain unclear until courts weigh in on whether embedded advertising is commercial and whether, if so, it is deceptive.[46] I suspect that the absence of any legislative or regulatory scheme at present is due to a lack of awareness. In other words, few are aware of the growing volume of sponsored literature and the increasing number of intersections between advertising and literature.[47]

As electronic publishing occupies a growing percentage of the overall publishing market, it will become increasingly important to understand the role advertisers play in supporting and sponsoring literature. They have an impact on both the creation and the dissemination of expressive content. A romantic, or simply undertheorized, conceptualization of literary texts predominates, which imagines that such works arise free from commercial constraints or collaboration. Nonetheless, it must take into account the growing amount of traffic at the intersection of advertising and literature in order to reflect reality.

For the purposes of this analysis, I break advertising into two categories: that which readers can easily identify as advertising, and that which is not easily identifiable. The first type consists of traditional advertising and exists around text, like literary banner ads or inserts into physical books. These inserts are somewhat notorious because they are sometimes placed in books without authors' knowledge, and have prompted complaints when this has happened.[48] Literary banner ads appear in periodicals in print and online, in comic books, in serialized versions of print literary texts, and most pertinently, in digital publications. This form of promotional speech is recognizable to readers as advertising that exists outside of and independently of the principal text. Standard federal advertising law and state unfair and deceptive trade practices laws apply to these advertisements just as they would if the ads were in standard broadcast or periodical venues. The second type, advertising that is not easily recognized as traditional advertising,

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45. *See* Robert Adler, *Here's Smoking at You Kid: Has Tobacco Product Placement in the Movies Really Stopped?*, 60 MONT. L. REV. 243, 276–77 (1999) (summarizing the arguments for and against treating product placements as commercial speech); Snyder, *supra* note 29, at 303 (concluding it is likely not commercial speech).

46. *See, e.g.*, Rita Marie Cain, *Embedded Advertising on Television: Disclosure, Deception, and Free Speech Rights*, 30 J. OF PUB. POL'Y & MKTG. 226, 232–33 (2011).

47. *See* Rich, *supra* note 31.

48. *See, e.g.*, Nat'l Bank of Commerce v. Shaklee Corp., 503 F. Supp. 533, 535 (W.D. Tex. 1980); Spock v. Pocket Books, Inc., 48 N.Y.S.2d 77, 77 (N.Y. Sup. Ct. 1965); *Collins*, *supra* note 31.

intermingles with the principal text in some fashion. It is either embedded after the fact in a pre-existing text, like a "literary product placement," or it consists of a commissioned text whose very existence is due to a sponsor who wishes to showcase his brand in long-form creative "advertising prose."[49] I call this "sponsor-generated content."[50]

This Article focuses on the second type, the kind of advertising that is not necessarily recognized as such, like product placements and sponsor-generated content. Finding that it is not deceptive under the FTC's usual standards, the Article asks whether it nonetheless harms consumers in a way that, while not amounting to full-fledged deception, still deserves attention from scholars and regulators. Consequently, the Article suggests that "influence" is a form of harm that lies below deception's threshold, and inquires into whether and how the law might regulate it.

II. "WRITTEN LIKE AN ADVERTISEMENT": ART IS NOT NEUTRAL

This Part rebuts the dominant presumption in sponsorship and endorsement law that advertising content can meaningfully be parsed and differentiated from creative content. The presumption underlies disclosure requirement regimes, which are designed as though artistic content is neutral and treat any commercial influences on art as suspect or non-neutral, and thus require disclosure. Put in its most reductive form, such a presumption casts art as *a priori* reliable, trustworthy, and uninterested in exerting directed influence over consumers. Conversely, commerce is thought to be unreliable, untrustworthy, and tainted by a desire to influence consumers for the purpose of directing their purchasing decisions or otherwise affecting their behavior. When the two intertwine, to whatever extent, in the creation of hybrid speech, there are two questions of concern to consumer advocates and members of creative guilds, who have been the most outspoken opponents of embedded advertising and other forms of hybrid speech.[51] First, do artists *freely choose* to include sponsors' brands and messages, or do they do so based on coercion—as the Writers' Guild represents about its

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49. *See* David D. Kirkpatrick, *Words From Our Sponsor*: *A Jeweler Commissions a Novel*, N.Y. TIMES, Sept. 3, 2001, http://www.nytimes.com/2001/09/03/business/media/03BOOK.html.

50. Said, *supra* note 13, at 29.

51. Their intense opposition led to their submission of the three main reform proposals offered to the FCC in response to its Notice of Inquiry and Notice of Proposed Rulemaking. *See* Rita Marie Cain, *Embedded Advertising on Television: Classic Legal Environment and Business Law Content "Brought to You by . . . "*, 27 J.L. STUD. EDUC. 209, 220–23 (2010).

members—or perhaps financial incentive?[52] Second, *how much* influence did sponsors exert over the artwork in question? Current disclosure regimes do not pose these questions directly. Instead, in their formulation of the inquiry into sponsor involvement, regulators display fidelity to the troubling presumption that art and commerce can be meaningfully separated. This presumption frames art and commerce in distinct and discrete terms that cast one as the good party and the other as the corrupting party. Focusing on sponsored literature, this Part concludes that hybrid speech cannot be neatly divided in that way, and it questions the basis for such a semiotic division of labor. Section A provides an example of the view that advertising can and must be differentiated from non-advertising content because advertising is not neutral, and non-advertising content is, or can be, neutral. This logic underpins the flawed regulation of hybrid speech, and thus it is helpful to identify it and revisit it. Section B provides examples of literary hybrid speech and illustrates that in many instances, art and commerce are inextricable.

A. Advertising Is Considered Non-Neutral, Whereas Other Content Is Neutral

In 2010, an internet search led me to a Wikipedia page with the following warning: "This section appears to be written like an advertisement. Please improve it by rewriting promotional content from a neutral point of view . . . ."[53] Wikipedia's disclosure policy is reflective of the general view that advertising should be disentangled from other forms of content, treated as its own genre—having nothing to do with art or editorial content—and labeled accordingly. Further investigation revealed that one of Wikipedia's three core content policies requires a "neutral point of view" (NPOV), which, along with "verifiability" and a policy of allowing "no original research," are meant to ensure reliability

52. Press Release, Writers Guild of America, East and West, Are You SELLING to Me? 1 (Nov. 14, 2005) [hereinafter Writers Guild of America], *available at* http://www.wga.org/uploadedFiles/news_and_events/press_release/2005/white_paper.pdf. For the writers represented in this complaint, the sense is that they are bound by a contract to produce content for a program, but they were not aware they would also have to write advertising copy as part of that artistic employment. Many feel that adding promotional messages becomes an after-the-fact and objectionable condition of continued employment.

53. *Baker Street Irregulars*, WIKIPEDIA, http://en.wikipedia.org/wiki/Baker_Street_Irregulars (last visited Apr. 2, 2013) ("This section appears to be written like an advertisement. Please help improve it by rewriting promotional content from a neutral point of view and removing any inappropriate external links. (*January 2010*)").

and legitimacy.[54] Yet it seems an odd idea that these characteristics—neutrality, verifiability, non-originality—would purportedly exist on one side of a sociolinguistic, epistemological, or generic divide, on the other side of which stand advertisements. For instance, in the legal realm, advertising is held to particular standards only at the point at which it *starts* making verifiable claims, suggesting that in some cases the two (advertising and verifiability) can, and must, coexist.[55] Still, Wikipedia intended something specific through this disclosure language: it wanted to put readers on notice that the kind of speech they will encounter therein requires extra vigilance. It also implies that Wikipedia readers cannot discover this epistemological uncertainty on their own. The potentially suspect content was interwoven with the putatively reliable or trustworthy content, thus requiring rewriting to conform to Wikipedia's neutrality policy.

So it goes with regulatory assumptions about hybrid speech. Hidden influences—such as sponsors who embed advertising in expressive content—are thought to shape expressive content in ways that remain out of view to ordinary audiences and readers and that make that content "non-neutral." Regardless of which Wikipedia protocols might have prompted one reader to flag this section—and other readers or editors to leave it flagged for a year or more—what is perhaps most interesting about this disclosure is the idea that epistemologically, some language might be thought to communicate its non-neutrality, thus suggesting inversely the possibility that "neutral" language exists elsewhere, in some semiotic Shangri-La. This is one of the governing assumptions underlying sponsorship disclosure law, which is challenged by hybrid speech that resists neat categorization.

This Article's focus is on exactly this kind of literary "hybrid speech," or "advertising prose."[56] The law struggles to reach, and then to regulate, this kind of content. The regulation that does exist operates by mandating disclosure of sponsorship or material connections in certain contexts and under certain circumstances.

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54. *Wikipedia: Neutral Point of View*, WIKIPEDIA, http://en.wikipedia.org/wiki/Wikipedia:Neutral_point_of_view (last visited Apr. 14, 2013).

55. An aside to the reader: this Wikipedia entry has not been rewritten yet as of February 2013, and best as I can tell, that is because it does not differ appreciably in tone or content from the rest of the allegedly non-offending sections of the wiki-entry.

56. I am adapting a term here that Fay Weldon used, perhaps half-jokingly, to describe her own sponsored novel, *The Bulgari Connection*. *See* Kirkpatrick, *supra* note 49.

B. Art Intermingles with Advertising

Consider the following few brief snippets of text. All but one are drawn from literary works known to have been sponsored by the owners of the mentioned brands.[57] Beyond that structural similarity, they are thematically linked in at least one way: they all display an uneasy piety towards the pleasures of materialism, and they yoke some aspect of character development or scene-setting to the aura of meanings surrounding a brand. These passages exist because sponsors made deals with authors to provide them with some benefit—goods, services, publicity, or other financial reward—in exchange for featuring the sponsors' products.

> Adam played with the stick shift, reflecting on the power at his fingertips. The car's V6 engine had two turbo chargers, 185 horsepower, and got up to sixty in under seven seconds. It was by far his biggest toy, and he couldn't get enough of it. His Maserati Biturbo I made life bearable in L.A., even when the crush of cars clogged the streets and avenues and freeways, making any kind of travel a test of sheer determination and strong nerves.[58]

> "Got any scotch?" "Only the best." Dan pulled out a handcrafted wooden box with an etching of the Glenlivet Distillery and its founding year prominently displayed on the inside lid. He held it up as if it were a holy relic. "This is a limited-edition collection of five vintage-dated single-malt Scotch whiskies produced by the world-renowned Glenlivet Distillery." Carefully, almost religiously, Dan pulled the 1968 vintage from the box. "This is as good as it gets," he said as he uncorked the bottle . . . . Dan held the glass up to the light. "Say Seagram's and be sure."[59]

> I plod out after Alice and she hands me the brown carrier bag while she shimmies into her shiny new Ford Fiesta, which I'm dead jealous of. I slide in next to her and look at all the bells and whistles and gadgets and I want a nice car again.[60]

> I couldn't find my favorite pair of black pants. They weren't at the cleaners and they weren't in my apartment. It is so hard to find a really good pair of black pants, and this pair made by

57. *See* Nelson, *supra* note 31, at 204; Fitzhugh, *supra* note 32; Sapra, *supra* note 31.

58. BETH ANN HERMAN, POWER CITY 11–12 (1998).

59. BILL FITZHUGH, CROSS DRESSING 38 (2000).

60. CAROLE MATTHEWS, THE SWEETEST TABOO 27 (2000).

Theory was the best I ever had. I wore them all the time.[61]

All of these literary references to brands differ in an important way from traditional advertising. Hybrid literary speech does not contain within itself the obvious markers of its own commercial origins. Whereas direct advertising historically has urged consumers to take an action step, such as when it urges viewers to "talk to your doctor," "collect all three," or "compare results,"[62] embedded advertising simply sets the stage for would-be consumers to develop positive feelings about the brand in question. The appeal to consumers is often much more subtle, sometimes barely noticeable. Because of this greater subtlety, consumers are not on notice in the way that the marketing scholarship assumes that they are when they encounter direct advertising. Their guard is down. Indeed, this is perhaps the defining characteristic of hybrid speech.

Hybrid speech, by definition, threads sponsors' brands or promotional messages through its artistic or expressive fabric. Because the sponsors are not explicitly labeled as such, their influence is harder to identify, and thus to resist. Indeed, the brands draw on their appealing entertainment contexts for legitimacy and positive associations.[63] It is the hybrid, camouflaging nature of the speech that makes it at once so appealing to sponsors and so potentially deceptive for audiences and readers. As Siva K. Balasubramanian has written, hybrid speech "creatively combine[s] key elements from the definitions of advertising and publicity (i.e. they are paid for and do not identify the sponsor) such that their respective advantages are consolidated, and their shortcomings are avoided."[64] Professor Balasubramanian's work is grounded in marketing and businesses practices, and his approach reveals why sponsors often view such marketing practices as a good strategy for their brands.

Literary hybrid speech is no exception: per Professor

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61. ALISON PACE, IF ANDY WARHOL HAD A GIRLFRIEND 5 (2005).

62. Paul Siegel, *Product Placement and the Law*, *in* HANDBOOK OF PRODUCT PLACEMENT IN THE MASS MEDIA: NEW STRATEGIES IN MARKETING THEORY, PRACTICE, TRENDS, AND ETHICS 89 (Mary-Lou Galician ed., 2004); Letter from Robert Weissman, Managing Dir., Commercial Alert, to Marlene H. Dortch, Office of the Sec'y, FCC (Sept. 22, 2008) (Response to Request for Comments, Sponsorship Identification Rules) [hereinafter Commercial Alert Comments], http://www.commercialalert.org/CA%20comments%20text%20only.pdf.

63. *See* Sponsorship Identification Rules & Embedded Advertising, 23 F.C.C.R. 10682, 10682–83 (June 26, 2008) ("The purpose of embedded advertising, such as product placement and product integration, is to draw on a program's credibility in order to promote a commercial product by weaving the product into the program.").

64. *See* Balasubramanian, *supra* note 3, at 29–30.

Balasubramanian's definition, hybrid speech often is paid for and does not identify its sponsor.[65] Consequently, readers will be exposed to brands in an artistic work that readers have sought out for pleasure, and that readers will approach with their guard down, not mobilizing the defensiveness and resistance that consumers use to minimize the efficacy of advertising. Thus literary speech has the power to convey *sub rosa* advertising messages to readers, in precisely the way that Congress has deemed necessary to regulate in the broadcast arena.[66] Yet because literature is not broadcast, it does not trigger sponsorship disclosure law under the Communications Act of 1934.[67] Indeed, literary hybrid speech does not fit into either of the regulatory schemes contemplated to remedy deception as to the source of communicative content. FCC sponsorship disclosure laws reach *all content* that is broadcast, whether or not that content contains truth claims or advertising. Conversely, FTC Endorsement Guidelines reach only advertising, not all content, but apply in a broader range of contexts than sponsorship disclosure.[68] Both legal realms do not fit sponsored literature, which is neither broadcast on television nor cable, nor clearly "advertising" in the sense contemplated by the FTC's endorsement guides.[69] The FTC's Guidelines target commercial speech, and in general its jurisdiction is limited to regulating advertising or other potentially unfair or deceptive trade practices.[70] Because sponsored literature consists of hybrid speech that is at least partly, if not primarily, expressive speech, it does not easily fall within the FTC's jurisdiction. The closest the FTC gets to regulating expressive content that is not purely advertising is through its regulation of infomercials, sponsored reviews, sponsored testimonials (for instance,

65. *Id.* at 30.

66. 47 U.S.C. § 317 (2006); *see also infra* notes 119–122 and accompanying text.

67. 47 U.S.C. § 317.

68. FTC Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0–255.5 (2009) [hereinafter FTC Endorsement Guides]. The Guidelines offer numerous examples to assist in interpreting the new rules, but most of them cover traditional advertising. A few of them reach beyond traditional advertising to create liability for hidden endorsements made on blogs (16 C.F.R.§ 255.1, Example 5, at 184); talk shows (16 C.F.R.§ 255.5, at 188); social media websites (16 C.F.R. § 255.5, at 188).

69. *See* Cain, *supra* note 46, at 235 ("The FCC is only empowered by law to protect consumers' needs for sponsorship disclosure. Similarly, the FTC is delegated the authority to regulate deceptive advertising. Neither agency is authorized to address other social needs regarding commercialism in the arts or the labor/management relationship among producers, actors, and writers.").

70. Jon M. Garon, *Beyond the First Amendment: Shaping the Contours of Commercial Speech in Video Games, Virtual Worlds, and Social Media*, 2012 UTAH L. REV. 607, 615 (2012) ("By their express terms, the FTC Endorsement Guidelines apply only to commercial speech.").

on talk shows), and sponsored blog posts.[71] But none of these are primarily expressive, even if interwoven with some commercial elements, in the same way as literary hybrid speech. The FTC could not likely exercise authority to compel speech or otherwise regulate speech that is non-commercial. Some have even suggested that the FTC's Endorsement Guidelines could be challenged on the basis that they *do* regulate noncommercial speech.[72]

Thus literary hybrid speech falls outside the extant regulatory schemes for controlling forms of hidden sponsorship. Yet both systems contain an additional flaw in design beyond the aforementioned limitations on medium and content. The two regulatory strategies at work in the FCC and FTC arenas are arguably based on tracking payments or transfers between sponsors and content creators, which I call the "transfer model" view. This view presupposes that separate parties exist and imagines artistic conditions that keep the parties separate. In some cases, this transfer model view of sponsorship may be accurate, but in many other cases, such a presumption fails to capture the spectrum of possible forms and amounts of sponsor-artist collaboration.

Consider the cases in which a content creator added a brand into an already-created work. For instance, the authors of *Cathy's Book*, a novel for young adults, changed the name of a mascara they featured in their book from an unbranded name to Cover Girl. This occurred after Cover Girl's owner, Procter and Gamble, approached the authors and offered their marketing support in exchange for the authors' promotion of Procter and Gamble's mascara.[73] This exchange exemplifies the transfer model view of the way embedded advertising works. An artistic work is created, and after its creation has occurred with little, if any, direct interference from a sponsor, the sponsor offers, or the artist requests, some form of consideration in exchange for the creator including the sponsor's brand or promotional message. Such a process makes disclosure of sponsor involvement easy to identify, and thus, in theory, to disclose. Similar examples exist, in which authors created a work, and then agreed—or volunteered—to superimpose brand references onto the work in exchange for some benefit, such as financial support, free product, a venue for a book launch party, or a combination thereof. Indeed, the examples discussed in the text at page 437 all represent such

71. *See* 16 C.F.R. § 255.

72. *See* Note, *Internet Law—Advertising and Consumer Protection—FTC Extends Endorsement and Testimonial Guides to Cover Bloggers—74 Fed. Reg. 53,124 (Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255)*, 123 HARV. L. REV. 1540, 1542, 1547 (2010).

73. *See* Rich, *supra* note 31.

an exchange.[74]

The traditional transfer model, however, does not capture a, host of other agreements that are becoming much more common. For example, it fails to capture placements made in anticipation of benefit. It is conceivable that for some artists, references to brands may be induced by the knowledge that advertisers are likely to buy space in or around a literary work if they like what they see and their brand is mentioned. Of course, these incentives exist in any publishing context in which advertiser support is desirable, from newspapers and magazines to works of fiction, especially as e-readers transform the publishing landscape and offer more viable opportunities for advertising alongside fiction.[75] Formal sponsorship agreements need not motivate the placement of brands in fiction because such authors may embed brands in order to make it easy to convert their literary works into viable screenplays or television scripts for which it then becomes easy to secure sponsors' involvement.[76] Alternatively, authors may seek sponsor involvement so that sponsors will underwrite the costs of a launch party or publication itself. In another instance, Bill Fitzhugh sought a publisher for his novel, and finding none, inserted brand references to a popular brand of

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74. In exchange for their references to the respective brands, Beth Ann Hermann received $10,000 and a launch party at the Maserati dealership in Los Angeles; Allison Pace received a launch party thrown at the Theory store in New York City; Bill Fitzhugh received marketing support and free liquor from Seagram's; and Carole Matthews received an undisclosed sum from Ford for featuring its Fiesta in a prominent position in her novel. In all these cases, however, the brand was not integral to the work, but added in after the fact and could have been removed with no resulting loss in artistic meaning or depth. *See* Nelson, *supra* note 31, at 204–05; Jo Piazza, *Prada Placement*, N.Y. DAILY NEWS, June 23, 2005, at 52, *available at* 2005 WLNR 25292883; Fitzhugh, *supra* note 32 (claiming [though erroneously] that he "became the first novelist to use product placement in a work of fiction"); Richard Simpson, *Of Course I'm a Lifelong Ford Fan . . . It Runs in the Family*, THE TELEGRAPH, Mar. 13, 2004, http://www.telegraph.co.uk/motoring/2727242/Of-course-Im-a-lifelong-Ford-fan-. . .-it-runs-in-the-family.html.

75. Said, *supra* note 13, at 20–21 (describing how the shift to digital publishing changes most of the factors that made in-book advertising not viable for most advertisers, such as the former inability to measure advertisement efficacy, which click-through data now corrects; the inability to update ads once they were printed, which the e-book platform now offers; the long period between the time of an ad campaign to the time of print publication, which the shift to digital publishing now shortens; the inability to rotate ads, which allows different advertisers to "share" advertising space, thus offering different pricing levels, which the e-book now enables, and so on).

76. For example, the novel *Gossip Girl* was filled with brand references that were unsponsored, but became sponsored when the work was converted into a television program. *See* Rich, *supra* note 31 (noting the brand references that proliferate in *Gossip Girl*, unsponsored); Brian Steinberg, *Product Ads Gain More Screen Time:*

Economics Spur TV Networks to Ease Placement Rules, BOS. GLOBE, July 28, 2009, http://www.boston.com/business/articles/2009/07/28/product_ads_gain_more_screen_time/ (describing heavily integrated and sponsored Vitamin Water brand references in the television version).

liquor.[77] Armed with these product placements, which he inserted of his own volition, Fitzhugh approached Seagram's Liquors, and that brand owner agreed to help him publish the novel by providing publicity and financial support.[78]

Finally, the transfer-model of embedded advertising—which imagines discrete, arms-length parties that converge after a work of art has been conceived to consider promotional possibilities within it—excludes the important category of sponsor-generated content. Sponsors increasingly use long-form advertising, hiring artists to produce highly expressive advertisements containing little in the way of direct factual statements. Brand owners such as BMW, Lexus, Hilton, Bulgari, Diageo, and Chanel, to name some of the most prominent brands, have all participated in the sponsor-generated genre.[79] London's Heathrow Airport commissioned a novella by well-known author Alain De Botton.[80] The popular brand of liquor, Captain Morgan's Spiced Rum, created a thirty-minute film that was shown at the Sundance Film Festival and that purported to be a documentary about the real-life exploits of the actual Henry Morgan, a swashbuckling privateer whose identity lends the brand its name.[81] In conjunction with the film, alcoholic beverages company Diageo also commissioned a graphic novel by the well-known artists Ben Templesmith and Michael Bendis, which was to be released alongside the film.[82] These brand owners have all released some form of artwork—from novellas, short stories, and novels, to short films.[83]

These examples suggest that art and commerce—or artists and sponsors—are working in a range of ways that sponsorship disclosure law did not, and still does not entirely, anticipate. When sponsor-artist collaboration exists from the beginning, it is unclear whether commercial control can be separated from artistic autonomy. Incentives may align for both parties: artists want their work to be published or broadcast; sponsors want their products to receive good publicity. Yet these aligned incentives may obviate the need for the sorts of transfers between parties on which the "transfer model" is premised. In turn, it

77. *See* Fitzhugh, *supra* note 32.

78. *Id.*

79. *See* Said, *supra* note 13, at 11–15.

80. Barker, *supra* note 36.

81. Marc Graser, *Captain Morgan Seeks Sundance Spotlight*, VARIETY, Jan. 16, 2013, http://variety.com/2013/film/news/captain-morgan-seeks-sundance-spotlight-1118064705/.

82. *Id.*

83. *See supra* notes 31–40 and accompanying text.

becomes harder for the law to track commercial control over art in the way that the disclosure regime envisions. Art and commerce could be said to be "commingling," rather than remaining separate entities that transfer goods, services, benefits, or airtime between them as part of sponsorship deals. These collaborations raise a number of issues, which will be explored in Parts IV and V, with respect to whether sponsorship disclosure remains meaningful. They also demonstrate that art and commerce commingle sufficiently that the categories "art" and "commerce" are, at a minimum, destabilized, if not rendered useless.

These collaborations invite discussion as to whether certain sorts of collaborations should be permitted to elude regulation. The FCC's regulation of hidden sponsorship, for example, exempts from mandatory disclosure any instances in which props or services were exchanged for airtime, so long as no payment occurred, and the use of the props in the broadcast programming was "reasonably related" to the content of the program.[84] Any use of a sponsor's goods or services that is considered "beyond reasonably related" triggers disclosure requirements. Recognizing that determining what is "reasonably related" would present difficulties, the House Committee offered twenty-seven illustrations to clarify the "reasonably related" proviso, and included these in its Committee Report.[85] The FCC then memorialized these illustrations in its own rules, and added six more illustrations.[86] Congress provided several dozen illustrations designed to convey what it meant by "reasonably related."[87]

These illustrations reveal that Congress sought to facilitate collaboration between sponsors and content creators because it recognized that television shows that featured cars, refrigerators, and

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84. The reasonably related exception was created by proviso when Congress in 1960 amended the Communications Act of 1934. This proviso created a safe harbor for goods or services furnished to broadcasters without a charge or at a nominal charge, in exchange for airtime. The statute provides: "That 'service or other valuable consideration' shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast *unless* it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name *beyond* an identification which is *reasonably related* to the use of such service or property on the broadcast." Amendments to the Communications Act of 1934, Pub. L. No. 86-752, § 8, 317(a)(1), 74 Stat. 889, 895 (codified at 47 U.S.C. § 317(a)(1) (2000)) (emphasis added).

85. *See* Said, *supra* note 1, at 128–29; Kielbowicz & Lawson, *supra* note 44, at 359.

86. Applicability of Sponsorship Identification Rules, 28 Fed. Reg. 4732, 4734–35 (May 6, 1963) (examples 28–36); Kielbowicz & Lawson, *supra* note 44, at 359; *see also* 4 THE ECONOMIC REGULATION OF BUSINESS AND INDUSTRY: A LEGISLATIVE HISTORY OF U.S. REGULATORY AGENCIES 2373–546 (Bernard Schwartz ed., 1973).

87. *See* Kielbowicz & Lawson, *supra* note 44, at 356–65.

travel services were often very costly to produce, and sponsors were more than willing to underwrite these expenses.[88] Thus Congress explicitly wanted to exempt certain sorts of collaboration but only up to a point: after a use was no longer "reasonably related" to the underlying content, mandatory disclosure requirements were triggered. The amount of sponsorship is one way a program can go "beyond reasonably related," but the mode of such sponsorship matters, too: for instance, an "unnecessary" close-up of a branded product can trigger disclosure requirements.[89] Some amount and some modes of sponsorship, subject to the terms of the "reasonably related" exception, are acceptable and not deemed, on balance, harmful enough to viewers to justify mandating disclosure.

One might reasonably characterize this Congressional distinction between "reasonably related" and "beyond reasonably related" as an idealistic line-drawing exercise. It seeks to capture the point at which sponsors exert so much control or influence over the content creation that the content itself is no longer neutral, and becomes, in some sense, harmful. On the other end of the spectrum, Congress also included another important exemption from mandatory disclosure of hidden sponsorship: the obviousness exception, which permits sponsorship to remain undisclosed when its existence would be apparent ("obvious") to viewers.[90] Traditional advertising, for instance, is obviously advertising goods or services directly to viewers, even when it does so through association and narrative suggestion rather than through direct solicitation or direct factual statements. If the presentation of the sponsorship is so clear that it is patently obvious to consumers, then the obviousness exception waives the disclosure requirement.

These exceptions prove that Congress believed that consumers only needed disclosures under certain circumstances. Thus Congress sought to strike a balance through the use of substantive exceptions to their rule. The attempt to carefully craft a limited scope for mandatory disclosure is laudable. However, as others have argued, the effort is almost always in vain.[91] The balance Congress struck in this context imports numerous

88. *See id.* at 360–65.

89. Applicability of Sponsorship Identification Rules, 28 Fed. Reg. 4732, 4734 (May 10, 1963) (Illustration 24).

90. 47 C.F.R. § 73.1212(f) (2006). The obviousness exception exempts from disclosure requirements any "broadcast matter advertising commercial products or services" that states "the sponsor's corporate or trade name, or the name of the sponsor's product, *when it is clear that the mention of the name of the product constitutes a sponsorship identification.*" *Id.* (emphasis added).

91. *See* Carl Schneider & Omri Ben-Shahar, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 679, 684 (2011).

assumptions about sponsor-creator collaboration and about consumer aptitude and preferences. Yet sponsors and creators often collaborate from the outset, including in the creation of sponsor-generated content.[92] This type of ongoing collaboration allows sponsors and creators together to infuse as many brand mentions into the plot as they like. This makes such references "reasonably related" to the content and eviscerates the sponsorship disclosure rule.

Indeed, the case of sponsor-generated content aligns the interests of sponsors and creators to the point that the terminology ceases to be fully accurate. Calling them partners in branded entertainment, though a much more unwieldy phrase, would be more accurate than conceiving them as separate entities that engage in mutual transfers for various benefits. This type of collaboration, in fact, has been the case in "reality television," which routinely features activities, contests, and rewards built around emphasizing brands.[93] Under these artistic conditions, the brands' centrality easily complies with the "reasonably related" standard, and the producers thus evade disclosure requirements. In this type of programming, highlighting the brands is a central objective.

Regularly scripted programming has also seen an increase in the use of "product integration," or heavy integration of brands into television programming content.[94] Several recent episodes of programs that have aired, including *Modern Family* and *The Middle*, appear to center on a character's desire to receive an iPad, for example, thus spawning discussion by a television critic and other fans as to whether these subplots were the result of sponsor-creator collaborations.[95] Current

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92. *See supra* note 36 and accompanying text.

93. *See* Said, *supra* note 1, at 114–15; *see also supra* note 11 and accompanying text; KEMBREW MCLEOD, FREEDOM OF EXPRESSION: RESISTANCE AND REPRESSION IN THE AGE OF INTELLECTUAL PROPERTY 189 (2007) ("Reality television turned out to be an incredibly important vehicle for placement; indeed, *Survivor* producer Mark Burnett described his show as being 'as much a marketing vehicle as it is a television show. . . . My shows create an interest, and people will look at [the brands], but the endgame here is selling products in stores—a car, deodorant, running shoes. It's the future of television.'").

94. *See generally* Emily Nussbaum, *What Would Tina Fey Do for a SoyJoy?*, N.Y. MAG., Oct. 5, 2008, at 32 (offering examples of numerous product integrations); Neda Ulaby, *Taking Product Placement Another Step*, NPR.COM, Sept. 22, 2008, *available at* http://www.npr.org/templates/story/story.php?storyId=94851729 ("When you see giant Coke cups sitting at the fingertips of *American Idol* judges, that's not just product placement. That's full-fledged product integration—when a brand becomes inextricably identified with the content of a show.").

95. *See* Emily Nussbaum's "tweet" on February 7: "Is this Ipad integration on The Middle? I love this show, but this Brick-wants-an-Ipad plot is making me unbelievably uncomfortable." Emily Nussbaum, TWITTER (Feb. 7, 2013), https://twitter.com/emilynussbaum/statuses/299649562384166912; *see also* Dale Buss, *ABC, NBC and IFC Push Boundaries of In-Show Brand*

content creation practices defy the logic of the sponsorship disclosure regime, which rests on outdated assumptions about both content creation and consumption.

Meanwhile, the obviousness exception also seems outdated. On one hand, its purpose was to exempt traditional advertising. When advertisers speak directly to consumers, the FCC assumes consumers are aware that they are being pitched. Yet the obviousness exception's application is unclear when advertisers speak indirectly to consumers, such as through product placements or integrations that occur in entertainment content but that identify themselves as pitches. For example, in the film *Wayne's World 2*, the characters engage in such protracted and hyperbolic praise for brands that the consumer quickly catches on to the irony and realizes that the characters are mocking product placement.[96] Similarly, on *30 Rock*, Tina Fey praises a Verizon cell phone in a deadpan voice and then turns directly to the camera and says, "Can we have our money now?" thus both mocking these marketing practices and participating in them.[97]

The obviousness exception clearly implies some awareness of consumer aptitude: how able are consumers to determine when sponsorship is obvious? In the case of traditional advertising, the answer is clear. In the case of embedded advertising, the answers are murkier. On one hand, consumer knowledge generally reflects widespread awareness of embedded advertising as a practice. On the other hand, many consumers do not seem to know about individual instances of hidden sponsorship. Complicating this issue, then, is the increased use of satire or hyperbole to gesture, from within the content, to instances of embedded advertising.[98] Such gestures, like those of *Wayne's World 2* and *30 Rock*, mock embedded advertising while benefiting from it.[99] They raise the question: are they reasonably related to the underlying content, and if not, do they go far enough beyond reasonably related to become "obvious"?

If sponsorship disclosure law conceptualized both the consumer, and the creative process, differently, it might regulate embedded advertising

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Integration, BRANDCHANNEL (Feb. 8, 2013), *available at* http://www.brandchannel.com/home/post/2013/02/08/Television-Placement-020813.aspx; Brian Steinberg, *Why Apple Didn't Have to Pay to Play—Again*, ADVERTISING AGE (Apr. 1, 2010), http://adage.com/article/media/modern-family-ipad-abc-collect/143105.

96. *See* Katyal, *supra* note 6, at 795–96.

97. *30 Rock: Somebody to Love* (NBC television broadcast Nov. 15, 2007).

98. *See* Said, *supra* note 1, at 110, 133.

99. *See* Katyal, *supra* note 6, at 795.

in a different, perhaps more effective, fashion. It is thus imperative to correct some of the misperceptions at the heart of the discussion of these promotional practices. There is a key misperception concerning the independence of art and commerce: that is, the persistent notion that art, on its own, is neutral and reliable, and becomes worthy of suspicion only once it becomes tainted by commerce—an outside influence. More work is needed to unsettle these old ideas within legal scholarship and regulation, as they have been thoroughly unsettled in critical theory outside the legal world. As literary scholar Gail McDonald has argued in the context of literary modernism, scholarship that has sought to rehabilitate the clearly interconnected forces of art and commerce "has been a persuasive corrective to the notion of the art object as autonomous, transcendent, extraordinary."[100]

Let me offer a closing image showing how branding literally seeps into the body of a literary text and exemplifies McDonald's claims of the work of art as an object or sign embedded in—and embodied through—a materialist system. The work is a comic book created in collaboration with Coca Cola's branded sports drink, Powerade. The work features a celebrity endorsement from the then-sports star of the moment. A message from LeBron James on the inside cover of the comic book advises: "And while you read *The King of Basketball*, know too that Powerade has been mixed into the very ink used to print this book. Yeah, that's right. I'm not kidding you. That's how committed Powerade is to making *The King of Basketball* a one-of-a-kind entertainment experience. Read on!"[101] In a very real sense, this comic book is made up of branding: the commerce and the art are literally inextricable.

III. SPONSORSHIP LAW SHOULD MOVE ITS FOCUS FROM DECEPTION TO INFLUENCE

Part III reviews the regulation of deception and explores why hybrid speech fails to satisfy the legal threshold required for standard misrepresentation claims that lies at the heart of deceptive advertising law. This Part argues that, in fact, hidden sponsorship is not the same sort of deception as are the misrepresentations targeted by deception law more generally. Instead, embedded advertising's potentially deceptive effects can be divided into three different types of putative harm:

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100. Gail McDonald, *Product Placement: Literary Modernism and* Crisco, 2(1) MODERNIST CULTURES 21 (2006).

101. Gary Phillips, Damion Scott & Udon, KING JAMES: THE KING OF BASKETBALL 2 (D.C. Comics 2004).

deception as to the *fact* of sponsorship; deception as to the *truth* of the sponsor's claims, if any; and deception as to the *influence* of such sponsorship. Different legal treatment attaches to the first two of the three, and the third should be accurately characterized in its own class, for legitimate consideration of whether it should remain out of regulatory reach.

Thus this Part tackles the presumption that hidden sponsorship's concealment necessarily constitutes deception, and offers harm by influence as a competing framework for the kind of impact experienced by consumers exposed to such sponsorship. Consumers may be influenced, even when they are not necessarily deceived, in legal terms. Building off legal scholar Gregory Klass's taxonomy of legal regulation of deception, this Part concludes with a recommendation that an influence-based framework be adopted in future discussions of regulating hidden sponsorship.[102] Section A provides the background on the FTC's deception law. Section B compares the principles undergirding sponsorship regulation generally and discusses key differences between the FCC and the FTC's regulation of hidden sponsorship. Section C shifts focus to an area that current sponsorship laws do not reach: mere influence on consumers.

A. Several Areas of Law Regulate Sponsorship and Deception

Section 5 of the Federal Trade Commission Act (FTC Act) empowers the FTC to take action against deceptive or unfair actions or practices.[103] Its emphasis on regulating deception means that the FTC plays an important role in regulating false advertising.[104] Historically, the FTC has very rarely exercised its authority to pursue those engaged in unfair methods of competition and instead has focused almost exclusively on deceptive actions, statements, or practices.[105] As a result, in order to prompt FTC action, an advertisement must be deceptive.[106] In addition

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102. Gregory Klass, *Meaning, Purpose, and Cause in the Law of Deception*, 100 GEO. L.J. 449 (2012).

103. 15 U.S.C. § 45 (2006).

104. Other sources of false advertising laws include the Lanham Act, state unfair trade statutes (sometimes known informally as the "little FTC" acts), and other industry-specific statutes such as, for instance, those that govern the manufacture, marketing, and sale of pharmaceutical products. *See e.g.*, Federal Trade Commission Act § 5, 15 U.S.C. § 45(a) (2006); Lanham Trademark Act § 43(a), 15 U.S.C. § 1125(a)(1)(B) (2006); Cal. Bus. & Prof. Code § 1735 (West 2008).

105. *See* Matthew A. Edwards, *The FTC and New Paternalism*, 60 ADMIN. L. REV. 323, 349–50 (2008) (describing an ongoing era of regulatory restraint and reluctance to use the FTC's unfairness rulemaking authority).

to being deceptive, the advertisement must concern a material fact.[107]

Finally, for the FTC to act, it must be able to show that it considers its actions in the public interest, and the public interest must be "specific and substantial."[108] The FTC does not require actual deception, which would heighten the burden of proof by complainants—or impose a higher threshold on the FTC itself. Instead, it requires deceptiveness: the capacity to deceive whether or not deception actually occurs.[109] This difference can be traced to the FTC's mission, which is prophylactic, rather than punitive: by embracing the broader standard (deceptiveness), the FTC can deter more future actions. In recent decades, the FTC has moved away from a standard that protects the gullible, and implemented a reasonableness requirement for consumer behavior.[110] False advertising is a strict liability violation, but it does have some negligence-like concepts in the sense that it asks consumers to behave reasonably in order to benefit from FTC protection.[111]

The FTC has also developed a more particularized line of consumer protection law in the form of its Endorsement Guidelines, first promulgated in 1980.[112] Since that time, advertisers have had to disclose material interests in connection with any endorsements they used in promoting their brands.[113] However, since 2008, when the Guidelines

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106. Cliffdale Assocs., Inc., 103 F.T.C. 110 (1984) ("Rather the concept [of deceptiveness] provides the Commission with a flexible sliding scale upon which it can typically infer whether or not a significant number of consumers could be deceived from its own examination of the conduct at hand and surrounding circumstances.").

107. *See* FTC v. Colgate-Palmolive Co., 380 U.S. 374, 386 (1965) (discussing that courts have developed the general concept that action against deceptive advertising presupposes that the untruth or deception is capable of affecting purchasing decisions); *see also Am. Home Prods. Corp.*, 98 F.T.C. 136 (1981), aff'd, 695 F.2d 681 (3d Cir. 1982).

108. FTC v. Klesner, 280 U.S. 19, 28 (1929) ("To justify filing a complaint the public interest must be specific and substantial.").

109. *See generally Colgate-Palmolive Co.*, 380 U.S. at 391, 392; *Am. Home Prods.*, 695 F.2d at 687; Montgomery Ward & Co. v. FTC, 379 F.2d 666, 670 (7th Cir. 1967); Regina Corp. v. FTC, 322 F.2d 765, 768 (3d Cir. 1963); Feil v. FTC, 285 F.2d 879, 896 (9th Cir. 1960); Goodman v. FTC, 244 F.2d 584, 604 (9th Cir. 1957).

110. *See, e.g.*, Ivan L. Preston, *Reasonable Consumer or Ignorant Consumer? How The FTC Decides*, 8 J. CONSUMER AFF. 131 (1974) (describing the evolution of the standard for the deceived consumer's behavior); FTC Policy Statement on Deception, *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, app. 174 (1984) (requiring for a finding of deceptiveness an act or omission that misled or was likely to mislead a consumer, behaving reasonably).

111. Good faith is not a defense to an advertiser's misrepresentations; intent to deceive is not required. *See* Chrysler Corp. v. FTC, 561 F.2d 357, 363 (D.C. Cir. 1977); Beneficial Corp. v. FTC, 542 F.2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

112. FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,124 (proposed Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255)

113. *See* 16 C.F.R. § 255.5 (2006).

were revised for the first time, the policy has been extended to new media and social networking, and the FTC has created new sources of liability.[114]

In spite of the revised Guidelines, which represent the FTC's attempt to address new, potentially deceptive forms of marketing, the FTC remains wary with respect to taking action on hidden sponsorship.[115] Just because sponsorship is hidden, which may feel intuitively deceptive to consumers, does not mean that the deception is material for consumers in terms of affecting purchasing or viewing decisions. Indeed, this was the FTC's position as recently as 2005.[116] In this fundamental way, then, hidden sponsorship falls below the threshold required for regulation under the FTC's standard rules governing deception.[117] So while it may provoke outrage on an intuitive basis, the practice of embedded advertising, in many cases, does not give rise to any cognizable legal claims.[118]

Nonetheless, in a different context, Congress believed that certain forms of hidden sponsorship were sufficiently deceptive that they merited legislative correction. In the late 1950s, a series of radio and television scandals involving "payola," or secret payments by sponsors in exchange for airtime or control over broadcast programming, prompted legislative and regulatory review of the communications laws then in force.[119] Consequently, Congress enacted new, more finely tailored sponsorship disclosure requirements with its 1960 Amendments to the Communications Act of 1934.[120] That disclosure scheme, however, is limited in reach[121] and flawed in design because it is based on broadcast technology.[122] This mandatory disclosure scheme does

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114. *Cf.* FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,124, 53,125 ("The Guides merely elucidate the Commission's interpretation but *do not expand (or limit)* its application to various forms of marketing.") (emphasis added)).

115. *See* Letter from Mary K. Engle, Assoc. Dir. for Adver. Practices, FTC, to Gary Ruskin, Exec. Dir., Commercial Alert (Feb. 10, 2005), *available at* http://www.ftc.gov/os/closings/staff/050210productplacemen.pdf (differentiating between embedded advertising and false advertising on the grounds that embedded advertising does not usually make claims that are material, deceptive or injurious, and clarifying that the FTC would revisit the issue if embedded advertisements were making material claims).

116. *Id.* at 3.

117. *See* Goodman, *supra* note 2, at 109.

118. *Id.*

119. *Id.* at 99.

120. *See* Kielbowicz & Lawson, *supra* note 44, at 369–70. These are discussed more fully *supra* Part II.

121. *See* Said, *supra* note 1, at 133.

122. *See* Goodman, *supra* note 2, at 86.

govern some television programming, but this legislation is out of date, not medium-neutral, and poorly suited to today's rapidly changing consumer viewing habits.[123] The relevant legislation excludes some cable programming, does not apply to all feature films that are not primarily destined for broadcast in theaters—due to politics rather than policy or doctrine[124]—and contains great substantive exemptions that threaten to eviscerate the rule given the way sponsors now participate in program development.[125]

The FCC recognizes many of the law's limitations, and announced an intention to revise its regulations in the form of a Notice of Inquiry and a Notice of Proposed Rulemaking in 2008.[126] Despite the acknowledged flaws in today's sponsorship disclosure regime, the FCC has taken no action to follow through with reforms in the years since its 2008 calls for reform proposals.[127]

B. Regulatory Principles Vary by Agency

Two of the three major forms of deception that potentially emanate from hidden sponsorship are thus already covered by distinct legal regimes. First, if consumers could be deceived as to the fact of sponsorship collaboration, FCC sponsorship disclosure law and FTC endorsement guidelines may apply. These two agencies' rules do not reach all possible instances of sponsorship, and the FTC guidelines are merely recommendations, thus lacking the full force of self-executing law.[128] Yet they are complemented by an array of state consumer protection laws, or "little FTC" acts, that might, at least in theory,

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123. *See id.*; *see also* Jennifer Fujawa, *The FTC's Sponsorship Identification Rules: Ineffective Regulation of Embedded Advertising in Today's Media Marketplace*, 64 FED. COMM. L.J. 549, 557–59 n.128 (2012); Said, *supra* note 1, at 103, 118–22.

124. Amendment of Sections 3.119, 3.289, 3.654 and 3.789 of the Commission's Rules, 34 F.C.C. 829, 841 (May 1, 1963) ("Feature Film Exemption Order"). The FCC waived sponsorship disclosure requirements for feature films in 1963, but did so in response to lobbying from the film industry. Kielbowicz & Lawson, *supra* note 44, at 366; *cf.* Cain, *supra* note 46, at 229. At least one scholar has noted that the FCC's jurisdiction over films that are not broadcast is questionable, given that its authority is limited to broadcast media. *See* Jacob Strain, *Finding a Place for Embedded Advertising Without Eroding the First Amendment: An Analysis of the Blurring Line Between Verisimilar Programming and Commercial Speech*, 24 BYU J. PUB. LAW 167, 176 (2009).

125. Said, *supra* note 1, at 138.

126. Sponsorship Identification Rules and Embedded Advertising, 23 F.C.C.R. 10,682, 10,692 (2008).

127. Cain, *supra* note 46, at 226, 235.

128. FTC Endorsement Guides, *supra* note 68, at § 255.0(a) ("The Guides provide the basis for voluntary compliance with the law by advertisers and endorsers.").

provide some protection for consumers who could satisfy the laws' fairly low thresholds for recovery. The key to recovery under this theory of deception is that some sponsorship must have taken place but has either been concealed from consumers or improperly disclosed.

Second, if consumers might plausibly be deceived by statements or claims about brands featured by sponsors as embedded advertising in artistic content, they will often be able to make out a false advertising claim under state law—even if they lack standing under the Lanham Act's federal false advertising provisions.[129] In other words, if a work of art embeds promotional messages that make verifiable claims, then false advertising law will cover those claims. After all, false advertising law will apply to any *advertising claims* that are made in the context of expressive speech, and its reach will be limited only insofar as advertising cannot be recognized as such—that is, perhaps, when it is embedded and not disclosed. Difficulties arise when the format is unusual and the advertising unexpected: it is there that the concern becomes something different from the standard false advertising concern.[130] Instead, then, what becomes a concern is independence as to source of influence.[131]

Yet neither general realm of law—neither sponsorship and endorsement law, which concerns the *source* of content, nor false advertising law, which cares about the *substance* of the content—reaches putative deception. This third kind of deception is deception as to the extent of *influence* exerted on a consumer as a consequence of embedded advertising.

By contrast, false advertising focuses on propositional claims: statements that induce consumers to believe a factual claim of some kind.[132] At the core of the regulatory concern here is that statements that can induce reliance by providing valuable information to consumers must not be misrepresentations. The Restatement (Second) of Torts sets out the first principle at a very high level of generality from which

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129. Gerald P. Meyer, *Standing Out: A Commonsense Approach to Standing for False Advertising Suits Under Lanham Act Section 43(a)*, 2009 U. ILL. L. REV. 295, 297–98 (2009) (explaining the uncertainty behind the standing requirement for consumers wishing to sue under the Lanham Act's Section 43(a)).

130. Rebecca Tushnet, *Attention Must be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 BUFF. L. REV. 721, 721 (2010) ("Conventional false advertising law will attempt to follow ads wherever they go, no matter how unusual the format. But where ads don't necessarily look like ads, a different kind of consumer deception can be at issue: deception about the independence of a source. . . .").

131. *Id.*

132. Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657, 661 (1985).

particularized advertising and consumer protection laws emerged. If a speaker makes a fraudulent misrepresentation of fact or opinion so as to induce another to act, or not to act, the speaker will face liability in the common law of deception.[133]

As a practical matter, deception law's inability to reach hidden sponsorship at common law probably partially accounts for why Congress implemented sponsorship disclosure law through the Communications Act of 1934. It also helps explain why the FTC felt pressured to revise, after nearly three decades, its endorsement law guidelines—because the many new and controversial stealth marketing practices being implemented in the social media marketplace were not reachable through some clear alternative legal regime.[134] Nonetheless, the grounds and the means for targeting hidden sponsorship in a meaningful way remain difficult to locate in deception law, especially once applied to literary speech.

Indeed, the FTC does not think product placement is deceptive in a legally cognizable sense, as is evidenced by its continued refusal to treat it as a form of deception when it falls outside the parameters described in the FTC's Endorsement Guidelines.[135] In 2005, the FTC reiterated its decision to decline to regulate product placement, citing the lack of evidence of any consumer injury. In short, the FTC has declined to do anything at all about product placement, for now.[136] The FTC left room for regulating it, in the event embedded ads begin to make material claims. For instance, if on the television program *30 Rock*, the GE-branded Trivection Oven—featured as part of an episode's product integration—had falsely claimed to cook a turkey in eleven minutes instead of twenty-two, it could trigger FTC suspicion.[137] But this is only

133. RESTATEMENT (SECOND) OF TORTS § 525 (1977) ("One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.").

134. Fujawa, *supra* note 123, at 560–61 ("[I]n 2010 the FTC evidently believed that embedded advertising online posed enough of a threat of unfair and deceptive practices to require new regulatory control. . . .").

135. *See* Letter from Mary K. Engle, Assoc. Dir. for Adver. Practices, FTC, to Gary Ruskin, Exec. Dir., Commercial Alert (Feb. 10, 2005), *available at* http://www.ftc.gov/os/closings/staff/050210productplacemen.pdf (differentiating between product placements and false advertising, on the grounds that so long as the former does not make claims that are material, deceptive or injurious, it is distinguishable from the latter); *see also* FTC Endorsement Guides, *supra* note 68.

136. Sandra Lee, *Product Placement in the United States: A Revolution in Need of Regulation*, 26 CARDOZO ARTS & ENT. L.J. 203, 213 (2008).

137. For background discussion of this instance of product integration, see Said, *supra* note 1, at 134, 136–37.

so long as it was the sort of false statement that reasonably induced or could induce consumer reliance.

The FTC's rejection of sponsorship as deception rests in large part on the materiality requirement, which is built in to common law principles of deception as well as federal false advertising law.[138] At common law, both with respect to contracts and torts actions, materiality played an important gatekeeping function[139]: recovery for breach of contract under the nondisclosure doctrine similarly requires that an undisclosed fact be "material."[140] Thus to count influence through hidden sponsorship as a form of deception is to eviscerate or circumscribe the requirement that deception occur with respect to withholding the kind of information that is material to consumers. The failure to satisfy deception's materiality requirement need not mean that consumers experience *nothing* that could be legally cognizable when they encounter, without their knowledge, hidden sponsorship. Hidden sponsorship simply raises issues of a different sort.

C. Sponsorship Disclosure Laws Target Concealed Influence

At its most successful, embedded advertising exerts influence over audiences. Sometimes consumers do not notice embedded ads, but they may be affected by them nonetheless. Psychological research bears this out: a phenomenon known as the "mere exposure effect" has long been known to exist.[141] As it happens, the more consumers see brands, as a general rule, the more they like them.[142] Marketers are well aware of the power of portraying brands in an entertaining panorama. They have long known, and tracked, the way consumer behavior can be altered when sponsors and content creators collaborate.[143] The fact is that product

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138. Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. 1305, 1344–45 (2012). Insofar as any of the so-called "little FTC acts," or state unfair competition and deceptive trade practices statutes do not require materiality, they might reach such forms of sponsorship, but they reflect the exception rather than the rule.

139. Klass, *supra note* 102, at 463.

140. Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, 92 VA. L. REV. 565, 574–75 (2006).

141. Matthew Hugh Erdelyi & Diane M. Zizak, *Beyond Gizmo Subliminality*, *in* THE PSYCHOLOGY OF ENTERTAINMENT MEDIA: BLURRING THE LINES BETWEEN ENTERTAINMENT AND PERSUASION 39 (L.J. Shrum ed., 2004) ("When some neutral (often meaningless) stimulus is repeatedly exposed to the subject, there is a tendency for this repeated stimulus to be preferred by the subject and to be judged more emotionally pleasing.").

142. *Id.*

143. *See generally* MARTIN LINDSTROM, BUY-OLOGY: TRUTH AND LIES ABOUT WHY WE BUY

placement works. A famous example from the marketing literature is the film *E.T.* Its producers' collaboration with the makers of Reese's Pieces was a very significant one because it worked so well.[144] The film catapulted Reese's Pieces from an obscure peanut-butter candy few had sampled to a bestselling staple of the supermarket aisle in the twelve months that followed the film's release.[145] The question for legal regulators is how to conceptualize the influence the film exerted over consumer behavior. Is it deception if, after being charmed by the alien's enjoyment of the little colored candies, audience members decide to try the candy, and like it? Multiple other factors—price, context, marketing, and so on—affect purchasing decisions. Thus, if some influence is a factor, is it the material factor deception law cares about?

Gregory Klass has created a helpful taxonomy of regulatory responses to different forms of deception in terms of three frameworks. His organization of the multifaceted laws of deception is helpful in rethinking how to classify—and remedy—the quasi-deception that hidden sponsorship can create.

The first of Klass's categories consists of interpretive laws, designed to prevent speakers from making misrepresentations, and involving interpretation of statements to test veracity, once statements are made.[146] Klass thinks of this area of law as properly targeting what he refers to as deceit. The second of these categories consists of purpose-based laws, designed to target acts done with the wrong intent.[147] Klass designates these laws as targeting "concealment," which he distinguishes from misrepresentation deceit on the basis of proof of culpability, irrespective of any statements made. In the first category, a speaker may accidentally make a misrepresentation: the liability will hinge on interpreting the statements made, not the state of mind of the speaker. In the second category, regardless of how the statements or representations appear when tested for veracity, the inquiry will focus on the speaker's intent. His statements may appear non-deceitful, either because they are literally true (even if false by implication), or because he is careful not to speak at all on subjects about which he knows he would have to make outright misrepresentations. Yet in the second category, the speaker *purposefully* wishes to withhold, or conceal, material information. The

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(2010).

144. *See* Snyder, *supra* note 29, at 302, 304.

145. *Id.* at 302 n.5.

146. Klass, *supra* note 102, at 450.

147. *Id.*

inquiry into falsity or truth would fail to capture what is wrong about the bad actor's behavior. Hence regulators turn to culpability to home in on and remedy the proper wrong. Finally, Klass describes causal-predictive laws, which he envisions as consumer protection laws that draw on behavioral psychology and knowledge of consumer behavior to predict the potentially deceptive impact of conduct or statements.[148] These last laws need not focus on interpreting the meaning or testing the truth of the acts or statements made in the course of a purported deception, nor do they need to investigate the purpose and intent of the actor or speaker.[149]

Each of the three types has its regulatory strengths and weaknesses. The first type, for instance, can be mobilized against statements that are not explicitly false or suggest wrongful intent by speakers, but that nonetheless are misleading in context or in terms of how consumers will interpret them based on conversational norms.[150] The second type requires no falsity, nor any interpretive expertise by adjudicators, but instead concerns itself with intent. If wrongful intent can be proven, this type of law reaches concealment and nondisclosure more broadly.[151] The third type does not require wrongful intent or falsity (and the concomitant interpretation to determine veracity or falsity). In that sense, this third type is more flexible and capacious. This category of laws target conduct and statements by focusing on their predicted impact on consumers. It draws on folk psychology, empirical research, and insights from cognitive psychology to make predictions about consumer behavior, and to justify regulating conduct not necessarily reachable under the interpretive or purpose-based standards.[152] This category's drawbacks lie in its cost (empirical studies are expensive) and its lower predictability.[153] This relative unpredictability exists because empirical

148. *Id.*

149. *Id.*

150. *Id.* at 459, 472.

151. *Id.* at 478.

152. Folk psychology refers to two distinct forms of psychology inquiry. The first is also known as "commonsense psychology," which "explains human behavior in terms of beliefs, desires, intentions, expectations, preferences, hopes, fears, and so on. . . ." The second interprets these "everyday explanations" and tries to fit these explanations into larger cultural frameworks and belief systems. *See* Lynne Rudder Baker, *Folk Psychology*, *in* THE MIT ENCYCLOPEDIA OF THE COGNITIVE SCIENCES (MITECS) 319, 319 (Robert A. Wilson & Frank C. Keil eds., 2001). Klass's article draws on the first understanding of folk psychology, namely, the "commonsense psychology" view of human behavior.

153. Klass, *supra* note 102, at 480 ("Causal-predictive laws are different. They require an intermediate legislative step in which cognitive theories or empirical results are applied to repeat transaction elements . . . .").

and cognitive psychological studies sometimes deliver surprising results.[154] Folk psychology, too, can sometimes predict counterintuitive human behavior.[155] The first two types have the great benefit of being simple and thus easier for parties to anticipate and abide by. The third is more flexible but may be harder for parties to use to predict liability in order to comport with the applicable laws.

As applied to the problem of embedded advertising's capacity to influence, if not to deceive, the three categories offer a helpful intervention. The first two do not align sufficiently with hidden sponsorship to make them candidates for adoption. The interpretive regulatory approach to deception is already at work in standard advertising law, and, as aforementioned, embedded advertising does not usually make direct factual claims about brands.[156] The purpose-based model seems unlikely to extend to hidden sponsorship because it covers behaviors that have a higher degree of intention and scienter. Sponsors may be negligent in failing to disclose collaborations, but the purpose-based laws require something more in the way of culpability.[157] Sponsors rarely conspire to deceive: they merely wish to exert influence, and can effectively do so by not trumpeting their involvement. Thus the first two types do not help rethink hidden sponsorship's impact. However, the causal-predictive category of deception laws may offer some guidance.

The use of a causal-predictive approach to the problem of hidden sponsorship could mobilize empirical research and insights into human behavior to test the extent to which such covert promotions actually exert influence. If these practices truly exert no influence, then regulators will be right to leave them alone. Regulators will effectively be allowing sponsors to throw good money after bad, because to spend money on sponsorship that does not yield a return on sponsors' investment is wasteful. Regulators would thus be safe in the knowledge that consumers may be irritated, but uninfluenced in terms of their actions. This seems intuitively unlikely, however. The agencies that regulate deception may have few existing resources in place to conduct extensive research on these practices' efficacy, but that is almost certainly untrue for many if not most sponsors. Large corporate entities that can afford systematic efforts at embedded advertising possess

154. *Id.* at 475–78.

155. *Id.*

156. Goodman, *supra* note 2, at 109.

157. *Id.*

sophisticated marketing departments, often with in-house psychologists who test the impact of the sponsor's marketing claims and strategies.[158] Data on sponsorship efficacy do exist because without information on their return on investment, sponsors cannot usually justify continuing to pursue a particular marketing strategy. But often that data, especially when collected by in-house marketing teams, will not be made public because it is not always in sponsors' interests to make such information available to either competitors or consumers. Recall that the consensus in the psychological literature is that embedded advertising *does* in many cases exert influence. Known as the "mere-exposure effect," this phenomenon proves that consumers are affected by visually observed stimulae even when they don't report noticing them, and they develop a preference for the things to which they have been exposed.[159]

However, assuming that regulators can demonstrate that hidden sponsorship does have an effect on consumers does not necessarily mean that deception's legal threshold has been cleared. Because of the materiality requirement, deception may remain out of reach. Yet the causal-predictive model might allow regulators to reframe hidden sponsorship as a practice that nonetheless does have some impact on consumers.

This legal category is expensive to design because it requires collecting data, which could require commissioning studies or soliciting the advice of experts. Yet the effort may be worth it if its costs can be amortized across many similar transactions.[160] Sponsorship already affects many, many instances of broadcast programming and film, and it is likely to make more and more incursions into literary texts as well. If regulators could frame the issue of hidden sponsorship more precisely, they could tailor a better-fitting remedy than disclosure. As discussed in Part IV, disclosure does not necessarily work well when the harm in question is influence rather than deception.

Ultimately, this Part has argued that that the presence of forms of embedded advertising in expressive content constitutes a form of influence over audiences, instead of being a form of legally cognizable deception that ought to be classified and handled the same way that the law treats traditional forms of deception. To the extent that it tracks extant theories of deception, it fits into Klass's causal-predictive model of deception regulation, with the disclaimer that, again, what is

158. *See* KENNETH E. CLOW & KAREN E. JAMES, ESSENTIALS OF MARKETING RESEARCH: PUTTING RESEARCH INTO PRACTICE 464 (2013).

159. Erdelyi & Zizak, *supra* note 141, at 39.

160. Klass, *supra* note 102, at 477.

occurring is more aptly characterized as influence rather than deception. Any mandatory disclosure regime that seeks to address hidden sponsorship should rethink its theory of harm and, accordingly, its capacity to cure that harm.

IV. DISCLOSURE IS A REGULATORY TOOL WITH SIGNIFICANT LIMITATIONS

This Part questions whether disclosure is warranted in the context of expressive content such as literary works, given that that the entertainment context in which hidden sponsorship arises is almost entirely free of information of the sort that would normally be deemed material to consumer decisions. What to watch, whether to continue to purchase sequels to a beloved first novel, and whether to subscribe to a full season of programming, are all decisions of a different order that do not affect life, limb, shelter, or financial security. This Part argues that the world of entertainment deserves consideration apart from the rest of the information-dense mandated disclosure areas, which are typically replete with difficult decisions that consumers must make based on that information. Where information is crucial to consumer decision-making, mandating disclosure makes a certain sense. Think of disclosures that are required when people buy a house, make certain investments, take a prescription medication, or vote. In all these "informational arenas," disclosures are mandatory because regulators assume that the information disclosed will be *useful*. Yet even in informational arenas like these, consumers are bombarded with disclosures and information that—empirically—they are unlikely to read, process, or appreciate.

In the entertainment arena, it is difficult to imagine that, as a behavioral matter, consumers would wish for disclosures interrupting their immersion in pleasurable content they have sought out in their leisure time. Consumers seek out entertainment content typically as a respite, to provide enjoyment and relief from the rest of their lives. Put another way, if consumers ignore disclosures in contexts where the disclosed information *really matters*, why should we expect them to wish for or pay more attention to disclosed information in arenas that do not clearly affect the material decisions they must make? Because disclosures in entertainment content are even likelier to be ignored, this Article argues that they are the wrong regulatory mechanism to use.

Beyond this important difference in the context for disclosure, doctrinal reasons militate against mandating disclosure for hidden sponsorship in the entertainment context, specifically for literary hybrid speech. Among the doctrinal difficulties are that consumers do not always notice all the embedded advertising they observe, which makes it

tricky to claim that it played a material role in deceiving them and inducing subsequent action.[161] Even when they do notice embedded advertising—perhaps especially when they notice it—it is unclear that they act in reliance upon what they have observed. This undermines the idea that the sponsorship (and its hidden origins) is, in any sense, material under the traditional doctrinal understanding of that term. Without satisfying the materiality threshold of deception, it is difficult—absent some alternative theory, such as influence—to justify mandated disclosure.[162] In turn, without a strong justification for mandating disclosure in the context of First Amendment protected speech, any such mandate likely would not pass constitutional muster because of the need for compelled speech to survive heightened review.[163] Consequently, due to the different context of the entertainment world and its pleasure-providing purpose for consumers, and due to doctrinal reasons having to do with the absence of materiality and the probable lack of constitutionality of any disclosure mandate, regulators should consider an alternative regulatory mechanism for addressing hidden sponsorship.

A. The World of Entertainment Is Unique for Regulatory Purposes

Disclosure has arisen as a flawed—perhaps failed—means of curing or preventing deception with respect to material information that consumers use in making choices.[164] The theory behind disclosure is that it provides valuable information to consumers so that they can make informed decisions.[165]

In spite of the notion that mandated disclosures provide useful information that cures information failures and assists in consumer decision-making, disclosures in practice rarely deliver their promised benefits. Carl Schneider and Omri Ben-Shahar have produced an encyclopedic and insightful survey of disclosure's multifaceted failures

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161. Said, *supra* note 1, at 146 ("Embedded advertisements that consumers do not notice can hardly be considered material to their purchasing decisions because to be material, by definition, they must be capable of inducing the consumer's reliance.").

162. *See supra* Part III.

163. Cain, *supra* note 46, at 233 ("Without clarity regarding what the public does or does not understand about the paid sponsorship of product placement and product integration, the *Central Hudson* commercial speech analysis stalls. If there is no public misunderstanding of the paid nature of these product appearances, the 'substantial government interest' in regulating sponsorship disclosure vanishes. The constitutional analysis would end, and increased regulation would fail.").

164. *See generally* Schneider & Ben-Shahar, *supra* note 91.

165. Sunita Sah, George Loewenstein & Daylian M. Cain, *The Burden of Disclosure: Increased Compliance with Distrusted Advice*, 104 J. PERSONALITY & SOC. PSYCH. 289, 289 (2013).

to accomplish its regulatory goals.[166] They have compiled a dizzying array of disclosure requirements that span all imaginable areas of law and realms of human conduct, and they have shown how these disclosures simply do not work.[167] The failures that plague disclosure are too varied and numerous to summarize here. However, key failures include that disclosers do not always know what their duties require them to disclose, nor how to make these disclosures. Furthermore, consumers may be faced with so many disclosures that they are simply overwhelmed. Schneider and Ben-Shahar term this the "accumulation problem": consumers are inundated by so many disclosures that they are unable to sift through all the relevant information even if they wanted to.[168]

These information-providing disclosures from the health, financial, and professional industries are primarily the sort tackled more generally by the disclosure efficacy literature.[169] But disclosure requirements are not as obviously justified when they attach to expressive content that is, at least in theory, not information-providing. The main benefit of disclosure, to provide valuable information for the purpose of improving decision-making, does not clearly transfer to the expressive works context. Two starkly different sorts of contexts exist: the informational context, in which consumers might plausibly need and desire disclosed information for the purposes of making their decisions, and the entertainment context, in which consumers retreat from their responsibilities to a large extent and seek pleasure and release from the informational world. Transferred to the world of entertainment, the original justifications for disclosure as to the source of hidden sponsorship simply fail to cohere.

The entertainment world exists to provide the consumer with enjoyment. Thus disclosures foisted on consumers, in however benevolent a fashion, seem likely to burden consumers, rather than assist them. The entertainment world is not about—or perhaps not supposed to be about—exercising autonomy by navigating a series of choices based

166. Schneider & Ben-Shahar, *supra* note 91, at 650.

167. *Id.*

168. *Id.* at 689–90. The authors draw on empirical literature to show that consumers do *not* want to sift through those volumes of disclosed information: chalk up another failure for mandated disclosure.

169. *Id. But cf.* Eric Goldman, *Stealth Risks of Regulating Stealth Marketing: A Comment on Ellen Goodman's* Stealth Marking and Editorial Integrity, 85 TEX. L. REV. SEE ALSO 11 (2006), http://www.texaslrev.com/wp-content/uploads/Goldman-85-TLRSA-11.pdf (raising concerns over disclosure's effectiveness in a broader realm); *see generally*, Craswell, *supra* note 140 (focusing on the problems that arise when parties do not disclose valuable, or material, or "basic," information).

on material information on which a crucial element of well-being depends, such as solvency, safety, health, and the like. To be sure, entertainment in the twenty-first century requires some decision-making, but it is a unique kind of decision-making. Consumers, more than ever, face choices about how, when, and where to watch their chosen content.[170] Viewing content no longer involves gathering around the family television set to watch the same program as the neighbors do, at the same time.[171] Reading literary texts, similarly, no longer just involves reading a hardbound book out of the family's collection of leather-bound classics but can involve a wide array of devices and modality. In other words, consumers already *do* make numerous choices about how to access their content.[172]

Their modes of selecting what content to consume may involve collecting recommendations, reading reviews, and responding to suggestions from service providers like Netflix or Hulu. Would disclosure of embedded advertising affect material decisions, such as how and whether to consume certain content at all once it was known to contain sponsorship? While this could be asked as an empirical question, the answer is in many cases likely to be negative as a matter of common sense. Mandated disclosure usually exists in areas where disclosed information is material to some subsequent decision.[173] In the entertainment context, it is a stretch to find any sort of materiality at all.

Assuming that decisions about what and how to consume content were deemed material, it is unclear whether disclosures would actually affect consumer behavior. Merely providing disclosed information appears to do little to induce disclosees to make better decisions in general. Yet the very concept of mandating disclosure "is to give people good information. If they do not take up the information and learn it accurately, mandated disclosure fails."[174] There is nothing to suggest that this would be less true in the entertainment context, where the accumulation problem identified by Carl Schneider and Omri Ben-

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170. Said, *supra* note 1, at 117–19.

171. *Id*. at 139.

172. *Id*. at 118 (describing the "venture consumer," a contemporary consumer who seeks content out dynamically and autonomously: "Along with greater autonomy over what she watches, the venture consumer has a range of media platforms from which to view content. She micro-manages her media consumption, plotting an individualistic trajectory in terms of where, when, what, and how she consumes. An increasing number of à la carte pricing options means that consumers have numerous small decisions to make about how to invest their capital in the form of their attention.").

173. Sah et al., *supra* note 165, at 289–90.

174. Schneider & Ben-Shahar, *supra* note 91, at 720.

Shahar would be even more acute.[175] Merely channel surfing (or browsing Netflix) would become an exercise in that "time-sapping and soul-sucking" exercise of control that Schneider and Ben-Shahar bemoan as disclosure's pyrrhic victory. For if the information mandatory disclosure conveys is theoretically valued, but becomes less valuable by being delivered in an intrusive, excessive fashion, the net benefit to the consumer may be greatly decreased, or nonexistent.[176]

In the entertainment context, it is not clear that consumers spend, or wish to spend, the same amounts of time weighing their decisions as they do in the informational contexts. Mandatory disclosure regimes assume consumers want information so as "to make decisions themselves and want to do so by gathering and evaluating information about their choices."[177] Yet these assumptions fly in the face of empirical evidence that shows that consumers often resist making important decisions, and do not deploy valuable information that has been disclosed to them, when they do broach decision-making.[178] With regards to the related area of trademark and false advertising claims, the law expects consumers to do some amount of work, but it seeks to calibrate that work to some extent by lowering "search costs," unburdening the imagination (to paraphrase Graeme Austin),[179] and filtering out false advertising from other marketing.[180] Any mandatory disclosure regime ought to be thinking about the extent to which it wishes to deploy the consumer's valuable cognitive resources further in an effort to protect herself.

Consumers do not always notice embedded advertising. When they do notice it, it may be a source of minor irritation. Its prominence may be the result of conscious efforts by the content creators, who draw attention to the embedded advertising so as to mock it gently even as they participate in it. If consumers do notice the hidden sponsorship, however, they will not necessarily always notice the disclosure that the FCC and Congress have mandated. Often, disclosure language scrolls across the screen rapidly, in small font, at the end of programming. Use of a digital video recorder or other means of prerecording content may

175. *Id*.

176. *Id*. at 729 ("Control means constant choices, time-sapping and soul-sucking.").

177. *Id*. at 727.

178. *Id*. at 727–28.

179. Graeme W. Austin, *Trademarks and the Burdened Imagination*, 69 BROOK. L. REV. 827, 890–95 (2004).

180. Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67, 120, 137 (2012).

mean end matter, such as disclosures and credits, is not included for consumers to view even if they wanted to see it.[181] The disclosure skepticism literature, as exemplified by Schneider and Ben-Shahar's article, discusses the problems with disclosures provided to disclosees. Yet it assumes that consumers, much of the time, receive disclosures, because much of the article is dedicated to describing how incomprehensible and onerous such disclosures are to most disclosees.[182] It does not contemplate the scenario in which disclosures are fleeting and scarcely noticeable, or, worse still from the regulator's perspective, the scenario in which disclosures are seen to be as annoying and intrusive as the barely-noticed hidden ads themselves.

Schneider and Ben-Shahar offer a dystopic vision of a hypothetical consumer burdened with disclosures, whom they name "Chris."[183] Chris is, as they tell us, a saint.[184] All day long, his everyday actions give rise to disclosure requirements by those who deal with him, and all day long, he dutifully reads the painfully abstruse and complex disclosure language, struggling in vain to understand it. When he actually seeks certain information, he is unable to find it. His imaginary day concludes after a brief session of watching television, too tired to pick up the novel on his bedside table.[185]

Now imagine, for present purposes that Chris, poor saintly soul that he is, decided, after watching his football game, to watch another hour or two of television, and then to retire to bed and read his novel, in spite of his fatigue. His programs on network television all include different forms of embedded advertising. If some of the proposed reforms under contemplation by the FCC are adopted, Chris will encounter additional disclosures tacked on to the end of his disclosure-filled day. That is, in addition to the disclosure currently required under Section 317(a) of the Communications Act of 1934, which requires disclosure but permits broadcasters to identify a sponsor just once in the credits that roll at the end of programming, Chris will see "concurrent disclosure" language that airs simultaneously with the sponsorship itself. When a character discusses the amazing value he gets from his Toyota, if that reference is sponsored, Chris will be notified at that very moment by a pop-up disclosure at the bottom of his screen or a "crawl" along the bottom of

181. Said, *supra* note 1, at 158.

182. Schneider & Ben-Shahar, *supra* note 91, at 711–24.

183. *Id*. at 705–09.

184. *Id.* at 709.

185. *Id.* at 708.

the screen.[186] Some of the sponsored programming may be preceded by a disclaimer—both aural and visual—notifying Chris that some of the content about to be viewed contains sponsorship.

Among the proposals the FCC received, collated, and considered seriously enough to include in its Notice of Inquiry, are suggestions that would require very detailed and specific compliance. For example, disclosure requirements might mandate the size and color of the font of disclosed language, the amount of time it should remain onscreen, and a full identification of the corporate identity of the sponsor as well as a statement of the conflicts of interest, if any, between sponsor and broadcaster.[187] The Writers' Guild, which protested what its members presented as the increasing amounts of advertising being demanded of them as writers in the form of product integration, elaborated on this conflicts-of-interest demand with an example.[188] "HP" for Hewlett-Packard would be insufficient to identify the electronics manufacturer, and if any corporate ties existed between Hewlett-Packard and the program's broadcaster, network parent, producer, or employees, those should be disclosed as well.[189] Thus Chris could also see fine print on his screen, identifying Toyota's role in sponsoring *Modern Family*, announcing Toyota's full corporate identity, and clarifying whether ABC—on which the program airs—has any material connections with Toyota's parent company.

Chris scratches his head and squints at the screen, trying to understand what import this new information holds, or should hold. Even his novel, which he picks up, wearily, after his exercise in televisual disclosure bombardment, bears a prominent disclosure on the front cover ("WARNING: THIS BOOK CONTAINS SPONSORSHIP") as well as footnotes peppered throughout the work to disclose every branded reference.[190] Chris sighs and puts down his novel. He opens his iPad and begins reading his favorite blog, which reviews automobiles. One of the cars receives extra attention and unusually high ratings. The review is marked with an asterisk. As a final exercise in self-flagellation

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186. *See* Notice of Inquiry and Notice of Proposed Rulemaking, Sponsorship Identification Rules and Embedded Advertising, 23 F.C.C.R. 10682 (adopted June 13, 2008); R. Polk Wagner, *Comments on* Stealth Marketing and Editorial Integrity, 85 TEX. L. REV. SEE ALSO 17 17–18 (2006), http://www.texaslrev.com/wp-content/uploads/Wagner-85-TLRSA-17.pdf.

187. Cain, *supra* note 46, at 229–30.

188. Writers Guild of America, *supra* note 52.

189. Commercial Alert Comments, *supra* note 62, at 2; Sponsorship Identification Rules & Embedded Advertising, 73 Fed. Reg. 43194-02, at 13 (proposed July 24, 2008).

190. These literary disclosures are hypothetical: no disclosure regime exists for literature.

by disclosure, Chris clicks on the asterisk, which takes him to disclosure language stating that this blog was indeed sponsored by the manufacturer of the car, which gave the blogger use of a free car for three months so that he could perform a more thorough review. Chris finally lets sleep claim him, knowing—though no one has disclosed this to him—that if he stays up too much later, he will be thoroughly exhausted the next day.

The FCC's intentions are to protect consumers from the harms of hidden sponsorship and to discipline broadcasters and sponsors to provide information that the FCC believes is in the public interest. The FTC's intentions are similarly unobjectionable in principle, laudable even. Perhaps the disclosures they mandate for sponsored blogs are not as overly intrusive as those the FCC has under consideration for television programming. Yet the information of the sort the FCC reform proposals have considered mandating seems to be a great deal more than most consumers would want, and seems as though it would be delivered in a way more intrusive than helpful. Moreover, both the FTC's and the FCC's attempts to protect the beleaguered Chris (and others like him) would seem to ignore basic information about consumer needs, abilities, and preferences.

These agencies' regulatory efforts call to mind Schneider and Ben-Shahar's insight that:

> [I]n many areas . . . knowledge is not intrinsically valued. People may want to know less, not more, and so they may find information a burden, not a privilege. They may begrudge the time and trouble it takes to learn and use the amount and kind of information disclosures provide. They may dislike reading contracts, manuals, warnings, notices, forms, charts, and instructions, or burrowing through endless data.[191]

The hypothetical Chris pays attention to the many disclosures that bombard him, but Schneider and Ben-Shahar's survey of the empirical research on consumer behavior shows that as a consequence of the constant bombardment of disclosed information, most people, unlike the heroic Chris, "strive to stem the waste of time and attention required to sort through that information."[192] Consider that after Chris's day of bombardment with information about decisions that really do matter, like those concerning his financial, emotional, and physical well-being, he will now be bombarded with information about—and, importantly,

191. Schneider & Ben-Shahar, *supra* note 91, at 729.

192. *Id.*

during—his source of respite from that world of responsibility and constant decision-bombardment. Schneider and Ben-Shahar make the observation that decision-making is a means, not an end: this is truer still with any decisions that must be made with respect to entertainment.[193]

B. Materiality and Constitutionality Present Doctrinal Hurdles

As described in Part II, a strong adherence to a belief in commercial separability from art characterizes sponsorship and endorsement law. Yet the distinction between the two categories seems tenuous at best: artistic and commercial parties often collaborate in the creation of content, suggesting that the categories are fluid and that it is difficult to distinguish meaningfully between their roles in the production of the final work of art. Nonetheless, the underlying idea here is one with a lot of cultural and political currency: it is the belief that listeners can, and should, know the sources and motives behind speech, in part to inoculate themselves against the full force of its persuasiveness.[194] Without being accompanied by disclosures, hybrid speech can seem tainted or corrupt because of its capacity to influence listeners. In some instances, the law frames this anxiety as an entitlement, a "right to know," or a corresponding "duty to disclose" information.[195] This principle is very easy to explain in any context in which information flows from the speech, and listeners will use that information as the basis to make decisions. It is less easy to explain when the information might make no difference, or little difference, in terms of consumer behavior.

Whatever the merits of disclosure in contexts in which information may be material or instrumental to consumers, it is unclear that these merits transfer to instances in which the information to be provided through disclosure is not clearly material to consumer decision-making under a traditional understanding of materiality.[196] For instance, if hidden sponsorship in a television program is disclosed, it may provide information that consumers find interesting (if they even notice it). But

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193. "[D]ecisions—especially the subsets of decisions that mandated disclosure seeks to improve—are generally a means, not an end; a distraction, not a pleasure." Schneider & Ben-Shahar, *supra* note 91, at 728.

194. *See* Namita Bhatnagar, Lerzan Aksoy & Selin A. Malkoc, *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 (L.J. Shrum ed., 2004).

195. *See, e.g.*, Applicability of Sponsorship Identification Rules, 40 Fed. Reg. 41,936 (Sept. 3, 1975); Cain, *supra* note 46, at 228; Kielbowicz & Lawson, *supra* note 44, at 333.

196. FTC v. Colgate-Palmolive Co., 380 U.S. 374, 386 (1965).

will it affect their viewing habits? Will they choose to abandon, say, *Friday Night Lights*, once they've spotted that Applebee's and Gatorade "furnished valuable consideration," and seek instead some other sports drama?[197] Will they enjoy the programming less, knowing of the sponsor collaboration? Will they choose not to buy the brands associated with the program—and if so, should it matter whether they originally purchased those brands knowing that their association with the program was the reason for doing so? All these questions are another way of asking whether hidden influences in hybrid speech can be deemed material to some subsequent decision, and if so, how? The question must be answered before an effective disclosure rule, if any, can be created.

Finally, the difference in the contexts of sponsorship matters in considering the proper remedy, to the extent that a legally cognizable harm arises. Where Congress compels disclosure of sponsorship over the air, it relies for its authority to so regulate on the well-settled proposition that allocation of broadcast licenses to licensees grants the government some control over licensees, allowing governmental enforcement of rules to safeguard the public interest.[198] Broadcast licensees comply with such disclosure requirements as part of their bargain in securing a license to broadcast.[199]

If Congress, or the FCC, wished to regulate authors of sponsored literature, these institutions would face substantial First Amendment hurdles.[200] If the FTC wished to regulate authors of sponsored literature, it would need to show that the practices it was targeting fell within its mandate. To do that, it would need to be able to show that the practices involved in creating and disseminating sponsored literature were unfair or deceptive.

More generally, because literary sponsorship typically occurs in First

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197. *Under the "Lights": Applebee's Happy with Product Placement*, STREET & SMITH'S SPORTSBUSINESS DAILY (Feb. 7, 2007), http://www.sportsbusinessdaily.com/Daily/Issues/2007/02/Issue-96/Sponsorships-Advertising-Marketing/Under-The-Lights-Applebees-Happy-With-Product-Placement.aspx.

198. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 376 (1969); Kielbowicz & Lawson, *supra* note 44, at 335 ("In assigning licenses, the [Federal Radio Commission] and FCC conferred on private broadcasters the right to exploit a valuable public resource—the electromagnetic spectrum—for commercial purposes. Just as the disclosure requirement in postal law conditioned access to privileged mail rates, its analogue in broadcast law conditioned private broadcasters' use of the public airwaves.").

199. *Red Lion Broad. Co.*, 395 U.S. at 394 (holding that regulation of broadcasters does not violate the First Amendment because licensees are not owners of spectrum allocations, but temporary trustees "given the privilege" of access to "scarce radio frequencies" for the benefit of the "entire community").

200. Cain, *supra* note 46, at 230–32.

Amendment-protected works of art, the burden of justifying disclosure (which entails compelling speech) is high. It must be clear that these practices are sufficiently harmful to justify compelling speech, and that doing so is sufficiently narrowly tailored to a legitimate end. If disclosures prove to be ineffective against sponsorship, they will fail to satisfy the First Amendment threshold. In sum, mandated disclosure, in the context of hybrid speech, is unlikely to satisfy either the materiality hurdle required for FTC and common law deception or the First Amendment threshold required to regulate literary hybrid speech.[201]

V. LITERARY HYBRID SPEECH MAY DEFY ALL THREE PRESUMPTIONS

A brief excursus into the work of one author demonstrates the logical strains placed on the three fundamental assumptions at the heart of sponsorship disclosure law. Consider the example of a bestselling author who was formerly the chief executive officer of a leading advertising agency: James Patterson.[202] A multimillion-dollar bestselling author, he routinely has multiple books simultaneously on the relevant lists of top-selling novels.[203] A professor at Harvard Business School referred to Patterson as a brand unto himself: "I'd never actually heard a product speak . . . . It was like listening to a can of Coca-Cola describe how it would like to be marketed."[204] Even Patterson's willingness to co-author, which he admits is how he manages to produce so many works so quickly, betrays more than a whiff of this awareness of his own brandedness: he charges his co-authors for the privilege of working with him, the way one would license any other trademark.[205]

Patterson's work provides ample evidence of literature that integrates brands heavily, though it is unknown whether Patterson enters into formal sponsorship arrangements. Assuming that his work is indeed unsponsored, it would fall outside the extant sponsorship regimes. Yet his constant brand integrations are worth looking at more closely. For example, Chapter 19 of James Patterson's bestselling novel *Cross*

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201. *Id.* at 233; *cf.* Goodman, *supra* note 2, at 130–32.

202. Gaby Wood, *The World's No 1 Bestseller*, THE GUARDIAN, Apr. 4, 2009, http://www.guardian.co.uk/books/2009/apr/05/james-patterson-author-bestseller.

203. Christian DuChateau, *James Patterson: The World's Busiest Best-Selling Writer*, CNN.COM, Mar. 23, 2012,

http://www.cnn.com/2012/03/23/living/james-patterson-author-interview.

204. Wood, *supra* note 202.

205. *Id.*

features a family excursion to the Mercedes dealership near protagonist Alex Cross's home:

> Jannie and Damon ogled a silver CLK 500 Cabriolet convertible, while Ali and I tested out the spacious front seat of an R350. I was thinking family car—safety, beauty, resale value. *Intellect and emotion*.[206]

Cross's son, Ali, loves the car, and he and the Mercedes salesman exchange words of praise:

> "You have excellent taste in automobiles, buddy. This is a six-seater, and *what* seats they are. Look up at that glass roof. Must be five feet or so."
>
> "Beautiful," Ali repeated.
>
> "Stretch out. Look at all this leg room, little man. This is an automobile."[207]

The car is not the only object of praise. Cross immediately tells us that the salesman "had been at our side the whole time without being pushy or unnecessarily obtrusive. I appreciated that. God bless Mercedes."[208] The moment is soon cut short, however. Cross's pager calls him to duty, and he "groan[s] loud enough to draw stares" while protesting to himself: "*Not on Saturday! And not during car shopping. Not while I was sitting in this beautiful Mercedes R350*."[209] Shopping for a Mercedes with his family provides Cross with respite from his stressful and dangerous life on the job and unites the family in the shared pleasures of fantasizing about consumption. Their collective fantasy is grounded in utilitarian concerns, including thoughts of "value," "resale value," "intellect," and measurable interior space, but it derives its force from the aesthetic realm, from the "beauty," "emotion," and even thoughts of "God" the brand inspires.

Again, Patterson has never divulged any formal sponsorship of the novel or his other works. However, he and his wife are known to own several Mercedes cars.[210] In fact, Patterson's works possess patterns of brand references that would suggest sponsorship or some form of benefit derived, or anticipated, from brand mentions. He mentions many brands

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206. JAMES PATTERSON, CROSS 62 (2006); *see also* Wood, *supra* note 202.

207. PATTERSON, *supra* note 206, at 62.

208. *Id*. at 62–63.

209. *Id*. at 63.

210. Jonathan Mahler, *James Patterson, Inc*., N.Y. TIMES, Jan. 24, 2010, http://www.nytimes.com/2010/01/24/magazine/24patterson-t.html?pagewanted=all (describing Patterson's and his wife's "matching Mercedes sedans").

often, but he returns to certain brands as triumphant symbols of heroism, loyalty, and success. The other brands merely serve as background props, or worse. A case in point: the Mercedes in the scene above is presented explicitly as a major improvement over the beat-up Toyota Corolla that the family has kept because of its sentimental value (it belonged to Cross's slain wife).[211] Cross is quick to state of the Toyota: "I didn't think much of the vehicle. Not in terms of form *or* function. . . ."[212] His children give him bumper stickers mocking the car, including one that reads: "ANSWER MY PRAYER, STEAL THIS CAR."[213]

While the reference above "bless[es]" Mercedes, this reference seems to transform Mercedes into the savior that will indirectly answer the prayer for a better vehicle. The Mercedes brand provides an emblem of Cross's yearning for upward mobility. But conveying that aspiration would not require Patterson to fill a chapter—one of the novel's longest at four pages—with fawning over the Mercedes brand. At least one reader is on record as having considered the Mercedes dealership excursion subplot to be a bizarre interruption.[214] The breathless descriptions of the car continue after Cross returns to buy the R350 and opines that he "liked the vehicle's zip and also the dual-dash zone climate control, which would keep everybody happy, even Nana Mama."[215]

Whether or not Patterson has a formal sponsorship relationship with Mercedes' parent company, it is clear his relationship to the brand is unique and over-determined. For example, he renamed one of his novels *Tick Tock*, but its working title was originally *Mercedes Blue*, after the "out-of-the-box midnight blue SL550 Mercedes convertible," the "sleek

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211. An objection to this point might be that a placement deal is unlikely to result in negative references to competing brands, due to sponsors' fears of ensuing litigation. But Cross's beloved wife *did* love her old Corolla, so arguably the text provides a kind of counterpoint to the brand's critique. PATTERSON, *supra* note 206, at 27. When Patterson's use of objects becomes very negative (as when a car is used to stash a corpse or run someone over, for instance), the brand is conspicuously absent. *Id.* at 366 ("Sullivan had a three-year-old Winchester in the trunk of the *car* . . . .") (emphasis added); *id.* at 377–78 ("Headlights shone suddenly—two blazing eyes aimed right at us. A *car* was coming fast . . . . [It] was a dark-colored sedan") (emphasis added). In fact eight separate references to the car used in a climactic shoot-out that almost kills our hero avoid branding the *car*, which is highly unusual given how freely car brands usually circulate in Patterson's work.

212. *Id*. at 61.

213. *Id*.

214. *See* David Thomas, *New Product Placement: Best-Selling Novels*, KICKINGTIRES: THE BLOG FOR CAR BUYERS (Nov. 20, 2006), http://blogs.cars.com/kickingtires/2006/11/patterson_merce.html.

215. PATTERSON, *supra* note 206, at 108.

Merc [sic]" that "stopped on a dime" on the very first page of that novel.[216] When criticizing those who would refer to his home office—and symbolically, therefore, his mode of artistic production—as a "factory," he replied: "If it is a factory, it's a factory where everything is hand-tooled. So it's kind of a *Mercedes* factory or something."[217] Somewhat remarkably, Patterson associates his own creative process with the German automaker manufacturing process, displaying a pronounced level of identification with the brand.

Though my assertions about sponsorship here remain mere speculations, it is worth noting that Patterson has become known for using aggressive and unusual marketing practices in promoting his works, which suggests some sort of sponsorship perhaps less arbitrary.[218] In other words, exploring possible sponsorship deals would not seem so out of character. Patterson was head of a major advertising agency prior to becoming an author, which speaks to his skill at and faith in marketing strategies.[219] Indeed, his authorial brand and the corpus of his works attest to his willingness to treat literature as a commodity that can market and be marketed like any other.

Patterson's brand integrations reveal the shaky foundations on which the three operational assumptions of sponsorship and endorsement law rest. Perhaps Patterson was paid for his integrations, perhaps he received goods or services in exchange for them, or in some other way benefited financially. Assuming any of the three of those occurred, then no division of art and commerce is tenable. If the artist knows any such

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216. JAMES PATTERSON, TICK TOCK 3 (2011). The next two pages feature discussion of the car's vanity plate ("SXY BST," clarified in context by the chapter's title, Sexy Beast), its "fine leather," "high-torque snarl," "iconic three-pronged steering wheel," and the "precise, symmetrical" motion of the hardtop roof's returning to cover the car, "a glorious harmony of moving parts." *Id.* at 4–5.

217. John Berman & Ted Gerstein, *James Patterson: Give Them What They Want*, ABC NEWS/NIGHTLINE (Mar. 13, 2008), http://abcnews.go.com/Nightline/story?id=4445592&page=1 (emphasis added).

218. *See* Mahler, *supra* note 210. Patterson pushed for aggressively advertising his novels on television even though it was thought at the time that such marketing would cheapen or detract from the work. He conceived of his audience in demographic terms, even going so far as to set a novel in San Francisco when he learned that John Grisham's legal thrillers outsold his works on the West Coast. He developed a system of co-authorship akin to franchising and has used it to keep up a frenetic publication schedule of as many as nine books per year. To remedy his sluggish sales in Scandinavia, he partnered with a bestselling author from Sweden. In short, he has been received as a kind of "marketing genius who has cynically maneuvered his way to best-sellerdom." *Id.* Whether that characterization is more uncharitable than accurate, it reflects Patterson's continued commitment to innovating the publishing industry's marketing strategies. Given the commitment to unprecedented marketing techniques, it hardly seems unlikely that sponsor collaborations could play a part in the mix. *Id.*

219. *Id.*

benefits will emanate from placing a brand in the artwork, the question of artistic intent can no longer be freely investigated. Art and commerce are, at a minimum, intertwined, and at most, interdependent.

Turning to the second assumption, we can reasonably query what precisely is deceptive about these brand references. (They may be annoying; they may or may not be influential, but recall that the standard the law has to meet is deceptiveness.)[220] Even if the brand references are unsponsored, they are omnipresent in Patterson's works. The reader simply cannot help wonder why the brand references are so frequent and so hyperbolic. One speculative reason might be anticipated future benefits—such as purchase of Patterson's literary properties to be transformed into audiovisual works: many of his books are indeed now films. Another reason, similarly speculative, might be the expectation that brand managers for Mercedes will learn of Patterson's positive emphasis on the brand and decide to reward him with free vehicles or other brand-related benefits.

But still another possibility exists. Perhaps Patterson is a genuine brand evangelist, who simply loves the Mercedes brand and wishes to draw on—even reinforce—its associations with luxury, quality, and elitism. As it happens, Patterson does have other brands play important roles in his fiction, and it would require more familiarity with Patterson's overall body of work than I have thus far been willing to acquire, to study the range and frequency of brands mentioned, and to track their qualitative use. But assume for the moment Patterson simply adores the Mercedes brand. At what point does his individual passion become something suspicion-raising for the purposes of sponsorship disclosure law, and what sort of disclosure would be desirable, if any? Should the determination of these brand references, for regulatory treatment, hinge on whether Patterson, who sets out merely to evangelize his brand, ends up receiving goods and services in exchange? Should Patterson have to disclose the fact of owning stock in the brands he praises? Should Patterson have to disclose his own brand evangelism if his goal is simply to see more owners drive Mercedes cars because he loves the brand? Or, more innocuous still, because he merely loves to write about the thing he loves?

James Patterson's work provides a rich example precisely because of its combination of (1) many brand references, (2) absence of acknowledged sponsorship, and (3) extrinsic evidence pointing toward a

220. Snyder, *supra* note 29, at 336–37 (calling product placements "downright obnoxious" but calling for "more speech, not less"); *see also supra* Part III.

high level of investment in the brand. Though it lacks formal indicia of sponsorship, such as any disclosure, an author interview, or a press release, there are reasons to consider this hybrid speech. The speech may look the same as speech that includes brands purposely placed in it for financial benefit or other consideration. Yet the motive behind placing brands in fiction can be artistic—such as to convey verisimilitude or to evoke a particular class or locale or era. The motive could also be purely personal. Perhaps an author simply loves a given brand and wants to sing its praises, for no other reason than the pleasure of evangelism. Hybrid speech may include speech with brand references in it placed there in anticipation of inducing financial benefits, such as free goods and services or movie deals.

In the absence of affirmative information confirming a sponsorship deal, perhaps concerns over sponsor influence should reach the cases in which authors seek to curry favor with sponsors for future benefits. If the goal is to bring to the surface all material influences, this strategy would be effective, but if the goal is crafted that broadly in scope, what limits its scrutiny in the case in which an author seeks to influence readers, not because of an external benefit she anticipates, but because of a preference for a particular brand or entity? If the influence is so subtle a consumer just barely recognizes it, is there a principled difference among the three cases described, namely:

(1) an author who receives an outright benefit for including brand references in her work, with the goal (the sponsor's goal) of influencing consumers;
(2) an author who anticipates an outright benefit for including brand references in her work, with the goal of appealing to sponsors for the author's own benefit, when the appeal to sponsors lies in the sponsor's goal of influencing consumers; and
(3) an author who receives no outright benefit for including brand references in her work, but places brands based on personal preferences unaffected by financial or professional considerations, but does so without disclosing to consumers a personal goal of influencing them?

Should the answer to this question depend on the status of the author? Namely, for those who would conceptualize art as separate from commerce, would the answer to the classification of the third possibility depend on whether the author was an independent author, writing in a fashion imagined to be free from external commercial constraints and with little hope of profit or success in influencing others? Put another way, would the answer change if the author, though purely personally motivated, were in and of himself a publishing megalith, a brand unto

himself?

The many questions this Part has raised seek to bring to light the unexamined role played by consumer expectations of artistic autonomy. Insofar as hidden sponsorship matters to consumers, perhaps it matters because consumers believe that sponsorship coerces authors to include brands or messages that they would otherwise exclude. Underpinning this idea is the assumption that artists are, in the absence of such sponsorship deals, autonomous creatures that make decisions of their own volition. If this free-will theory of artistic creation is what justifies consumer indignation at hidden sponsorship, then hidden sponsorship is only one proxy for determining artistic autonomy, and a flawed proxy at that. Sponsors might be more or less controlling of artists.[221] Artists might be more or less susceptible to influence, and they might consider external influence to be more or less welcome.[222] Whatever their susceptibility, communicating the fact and extent of that influence would be inherently problematic.[223]

Imagine if the status of hybrid speech, for purposes of mandating disclosure, was determined based on whether an artist had to soul-search to determine how much of the work originated from himself as opposed to emanating from a sponsor partner. Such a standard would be inherently unreliable in the ways that all such artistic statements are suspect: statements of authorial intention, generally, are correctly viewed with suspicion. Statements in a context like the hypothetical one would be even more so, subject to this consequentialist framework: declare this work a product of art, rather than commerce, evade disclosure or admit sponsors played a role in the artistic creation, submit to the disclosure mandate. Finally, any such statements would be problematic as a function of the difficulty in determining responsibility when partners jointly author a work. In the copyright context, the problem of joint authorship has a long history of disputes showing that even when parties agree to collaborate, it is all too easy to miscommunicate, misunderstand the scope of one's duties or influence, or behave strategically.[224]

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221. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989).

222. The writers and actors who championed extensive reform of embedded advertising, in their comments in response to the FCC's request for comments, did not welcome sponsor participation. *See* Writers Guild of America, *supra* note 52. But see Weldon, Fitzhugh, and the many other authors mentioned in this article, who acceded to sponsor invitations to collaborate, or who actively sought out such collaborations. *See supra* notes 31–32 and accompanying text.

223. Consider the intricate proposals demanded by the writers, indicating that mere disclosure of a sponsor's name during the end credits would be insufficient. *See* Writers Guild of America, *supra* note 52. The detailed reform proposals are discussed in Cain, *supra* note 46, at 229–30.

224. *See, e.g.*, Childress v. Taylor, 945 F.2d 500, 504 (2d Cir. 1991) ("[T]he determination of

The example offered by James Patterson's work has highlighted real-world circumstances around an author not known to have committed to formal sponsorship agreements, whose work nonetheless suggests patterns of sponsorship that raise questions for the author's readers. In turn, this combination of factors allows us to reexamine the flaws in the three central assumptions at which this Article has taken aim: the neutrality of unsponsored art, the deceptive—rather than influential—impact of hidden sponsorship, and the utility of disclosure in addressing hidden sponsorship's perceived harms. None of those assumptions works in the context of the James Patterson example, where the absence of known sponsorship does not end the inquiry, where the presence of brand does not clearly suggest deception but could be at work so as to exert influence, and where disclosure might not tell the whole story, or might not matter if it did.

CONCLUSION: SPONSORSHIP LAW'S FUNDAMENTAL ASSUMPTIONS SHOULD BE REVISITED

This Article has identified and questioned three fundamental presumptions that underpin sponsorship and endorsement disclosure law. On the basis of examples drawn from literary hybrid speech, the Article has shown that these assumptions do not map onto current realities of artistic production. It argues that these presumptions are unjustified and should be revisited and perhaps abandoned. Further, it advances the theory that sponsorship has the potential to *influence* consumers more than it *deceives* them. The distinction between influence and deception is descriptively and normatively valuable. Accordingly, the Article calls for further investigation into an influence-based framework for evaluating the regulation of sponsorship and endorsement. Finally, it proposes that disclosure, as a regulatory mechanism, be revisited in light of the influence-framework.

Disclosure cannot capture the range of reasons for which artists refer to brands. Moreover, because disclosure cannot undo the effects of influence consumers voluntarily seek out—thus assuming certain risks themselves—disclosure is not an effective solution to the perceived problem of influences exerted by hidden sponsorship.

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whether to recognize joint authorship in a particular case requires a sensitive accommodation of competing demands advanced by at least two persons, both of whom have normally contributed in some way to the creation of a work of value. Care must be taken to ensure that true collaborators in the creative process are accorded the perquisites of co-authorship and to guard against the risk that a sole author is denied exclusive authorship status simply because another person rendered some form of assistance.").