Remarks of
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"Fresh is Not as Fresh as Frozen:"
A Response to the Commercialization of American Media

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[As prepared for delivery]

This weekend, I was following my Sunday ritual of trying to get through the *New York Times* while my son and daughter are crawling all over me. The reason I even try is I still believe what I read in the paper. That makes me part of an increasingly smaller number of Americans, if we believe a story in last Sunday's *Times*.

Here is what it reported. Headline: "The Media's Credibility Headache Gets Worse," in the wake of Newsweek's retracted Koran story. The piece explains how "opinion polls for at least two decades have shown declining faith in print and television news."[1] Occasional errant stories are not the only reason. According to Tom Rosenstiel, Director of the Project for Excellence in Journalism, one of the main reasons is that "More people think media companies are motivated by profit."[2]

Bit by bit, confidence in the press is eroding. Here is a little example of why.
As reported in the *Wall Street Journal*, one celebrity TV gourmet recently waxed eloquently about his favorite shrimp: the frozen kind. Here is how he put it: "Fresh is not as fresh as frozen, I think."[3]

What could possibly motivate someone to say such a thing? You guessed it, and I sure hope his unsuspecting viewers did, too. Money. Lots of it. Five hundred and fifty thousand dollars a year, to be exact, from, you guessed it again, a frozen shrimp company.

The *Wall Street Journal* detailed an increasing trend by TV chefs that undercuts their impartiality and will undercut public trust in their media shows.

The article also mentions how Julia Child refused scores of companies seeking her paid endorsement. Sadly, that era of integrity seems like a quaint throwback.

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[1] Patrick D. Healy, *Believe It: The Media's Credibility Headache Gets Worse*, N.Y. TIMES, May 22, 2005 (Week in Review), at C 4.

[2] *Id.*

[3] Kelly Crow, *The Sponsored Chef*, WALL ST. J., Apr. 22, 2005, at W1.

What explains the change? From the outset, American broadcasting has been based on a commercial model, unlike some of its European counterparts. That model has fueled the unprecedented success of the American media—the most dynamic and creative in the world.

But careful regulations to ensure that American broadcasters also serve the public interest have been wiped off the books over the last couple of decades. And media consolidation has worsened the problem.

Fortunately, one aspect of federal regulation designed to counter the excesses of commercialism still remains in place. Since 1927, before the FCC was even created, Congress has maintained an unwavering requirement that broadcasters must announce who gave them valuable consideration to air anything.[4]

The FCC has, perhaps, become lax in enforcing those rules. But last month, we issued a bipartisan, unanimous Public Notice on video news releases signaling that we are planning to enforce the rules vigorously.[5] And I am here to reinforce that point directly to you, as representatives of the media industry.

The last time I spoke with you here at the Media Institute was two years ago almost to the day, on May 20th, 2003—just two weeks before the June 2nd meeting where a divided Commission voted to approve the now discredited media ownership rules.[6] In front of many of you here today, I predicted a huge public outcry that would produce a backlash against loosening the rules. I said that the FCC had in our "hands a lit match, and we were moving closer to a powder keg of public anger that may be about to explode."[7]

I remember hearing a murmur that I was an "alarmist." Now, after the FCC received protests from more than 3 million Americans from the left to the right and everybody in between, nobody is saying that anymore. And we saw the backlash both in Congress, which voted to repeal all or part of our rules,[8] and in the federal courts, which overturned almost the entire decision.[9]

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[4] Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162, *repealed and amended by* the Communications Act of 1934, 47 U.S.C. § 317.

[5] *Commission Reminds Broadcast Licensees, Cable Operators and Other of Requirements Applicable to Video News Releases and Seeks Comment on the Use of Video News Releases by Broadcast Licensees and Cable Operators*, FCC 05-84, MB Docket No. 05-171, Public Notice, Apr. 13, 2005 [hereinafter FCC Public Notice 05-84].

[6] *In re 2002 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets; Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area*, Report and Order and Notice of Proposed Rulemaking, 18 F.C.C.R. 13,620 (2003).

[7] Jonathan S. Adelstein, Remarks before the Media Institute, *Big Macs and Big Media: the Decision to Supersize* (May 20, 2003), <http://www.fcc.gov/commissioners/adelstein/speeches2003.html>.

[8] *See e.g.*, Consolidated Appropriations Act of 2004, Pub L. No. 108-199 § 629, 118 Stat. 3, 99 (2004) (reversing the FCC's decision to increase the national television ownership rule's audience reach cap to 45 percent).

[9] *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3rd Cir. 2004).

Today, my focus is not on media consolidation, but on one of its most pernicious symptoms -- the increasing commercialization of American media. We see reports of video news releases masquerading as independent, legitimate news; PR agents pushing political and commercial agendas that squeeze out real news coverage and local community concerns; product placements turning news and entertainment shows alike into undisclosed commercials; and well-trained marketers preying on the unsuspecting minds of our young children.

I am here with a warning once again. People out there are frustrated by what they see as fake news and relentless marketing. They are angry when they do not get real news and accurate information that empowers them to make informed decisions. It is no wonder trust in the media is at an all-time low – something needs to be done.

And, like media concentration, lack of disclosure alarms Republicans and Democrats alike. That is why Congress just approved an appropriations bill that requires disclosure by the government when it is the source of VNRs.[10] When I testified before the Senate Commerce Committee on this issue earlier this month, there was a bipartisan commitment to make that requirement permanent.

But the problem goes far beyond the issue of government VNRs. The use of covert commercial pitches is penetrating deeper and deeper into our media.

Earlier this month, I spoke before 2,500 engaged citizens at the National Conference on Media Reform. I asked them to hit their record button when they saw what appeared to be an undisclosed product placement, a video news release or a news segment that looks like an advertisement. I promised to insist on an investigation of any serious problems they raised. I will continue to call on all viewers and listeners in this country to act as watchdogs for the FCC.

My preferred outcome is that this scrutiny results in compliance with the rules, not in us catching violations. That is why I am here today to sound the alarm to you, as well.

Together, we can shut down any deceptive or evasive practices being perpetrated on the American people. We can all agree that the failure to disclose who is behind sponsored programming violates the law and FCC rules, and must stop immediately. As a unanimous FCC reaffirmed in its April 13th Public Notice, "listeners and viewers are entitled to know who seeks to persuade them with the programming over broadcast stations and cable systems."[11]

My interest in this issue dates back to when I first joined the Commission and heard concerns about how underground payola in radio was corrupting the music industry. Local artists complained they could not be heard unless they had a major label backing them with a

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[10] Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act of 2005, Pub. L. No. 109-13 (2005).

[11] FCC Public Notice 05-84, *supra* note 5.

willingness to pay, directly or indirectly, for radio airplay. Our culture suffers when new, vibrant artists cannot break through not because they lack talent, but because they lack big money backing them. This so concerned me that I focused on the payola issue in a major speech over a year and a half ago.[12]

Since then, I have looked further into the issue, and I have discovered a bottomless pit of commercialism in today's media into which even icons we hold sacred are sinking and becoming sullied.

Not only are celebrity chefs and celebrity fashion up for sale but, most ominously, news shows are increasingly up for bid.[13]

Some will tell you that if broadcasters and cable companies insist on further commercializing news and other shows alike, that is their business. But if they do so without disclosing it to the viewing public, that is payola, and that is the FCC's business.

The FCC's Public Notice was intended to serve as a reminder to the media and communications industries. Broadcast licensees, cable operators, and any entity or individual involved in the production and provision of VNRs have disclosure responsibilities under the Commission's sponsorship ID rules. The same requirements apply to any paid programming and promotions, including product placements.

Section 317 of the Communications Act requires broadcast stations to make an announcement whenever they air material for which they have received payment or other consideration.[14] The only exception is when the consideration involves a product or service the station received free or at a nominal charge, like a record – so long as the product or service was not provided for identification in the broadcast.[15]

Significantly, the disclosure requirement also applies, whether or not something of value has changed hands, when a broadcaster airs controversial issue or political programming that has been furnished to them by an outsider. In those cases, they also must identify the sponsor.[16]

The FCC extended all of these requirements to cable operators when they air programming that is within their exclusive control.[17]

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[12] Jonathan S. Adelstein, Statement before the Federal Communications Bar Association (Nov. 5, 2003), <http://www.fcc.gov/commissioners/adelstein/speeches2003.html>.

[13] James Bandler, *Advice for Sale: Believe It: How Companies Pay Experts for On-Air Product Mentions*, WALL ST. J., Apr. 29, 2005, at A1.

[14] Communications Act of 1934, 47 U.S.C. § 317(a)(1); 47 C.F.R. § 73.1212(a).

[15] C.F.R. § 73.1212(a)(2).

[16] 47 U.S.C. 317(a)(2); 47 C.F.R. § 73.1212(d).

[17] 47 C.F.R. § 76.1615(c).

Section 507 of the Act also imposes disclosure obligations on those involved in producing, preparing, or supplying material intended for broadcast. If any such person receives or provides consideration for the inclusion of program matter, the law requires disclosure up the chain of production and distribution.[18] That includes the originating government agency or private business, media consultants, reporters, satellite services, network news feed operators, local news producers, and broadcast licensees where the exchange of valuable consideration is involved.

A broadcast licensee that receives such a disclosure must announce the sponsor even if the licensee itself did not receive payment.[19]

Violations of these laws and rules can bring a number of different penalties. A station's or operator's failure to make a sponsorship disclosure required by section 317 subjects it to fines - and perhaps license revocation.[20] An individual's failure to disclose as required by section 507 is a crime, and carries a penalty of a fine of up to $10,000, and as much as one year imprisonment.[21]

I understand governmental entities, private corporations and the PR agents they hire have a right to try to turn their policies, messages and products into items that purport to be newsworthy. But a simple disclosure of the source or sponsor of the information does not amount to government-compelled speech, nor does it infringe First Amendment rights of broadcasters. To the contrary, the law protects the rights of the American people to know the source of what is presented to them.

The problem with many video news releases is that they lead viewers to believe they are watching an investigative news report when they could be getting a subtle dose of government or corporate propaganda.[22] The issue with VNRs is not the content. My fellow Commissioners and I are not interested in content regulation. The concern arises when deception replaces disclosure—and when there is a failure to identify the source of the broadcast material. That is a betrayal of the public trust.

There has been a lot of attention given to VNRs. I am here today to tell you the same concerns apply to any undisclosed promotions.

Recent articles in the *Wall Street Journal* and *Washington Post* explained how product promos parade as independent and unbiased reviews by experts on everything from the latest electronics

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[18] 47 U.S.C. § 507.

[19] *Id.* at § 317(b); 47 C.F.R. § 73.1212(c).

[20] 47 U.S.C. § 501.

[21] *Id.*

[22] *The Fake News Cycle*, PR WATCH, Vol. 12 No. 2, Second Qtr., 2005, at 2.

gadgets to children's toys.[23] It works like this: consumer product experts pitch themselves to manufacturers to mention their products on television – for a fee of course – and then they pitch themselves to local TV stations for interviews. The media appearances often coincide with holidays or trade shows. The experts may conduct dozens of interviews with different stations over the course of a day in what is called a "satellite tour." Reports say that a mention on a local news show ranges in value from a few hundred to a few thousand dollars – and if a mention makes it on to network shows like *Good Morning America* or the *Today Show*, the publicity value skyrockets to a quarter of a million dollars.

These so-called experts do not always disclose their financial interest in the products they promote – and as a result stations do not always disclose that to viewers. What is surprising about these press reports was a shocking lack of awareness about our rules by broadcasters and on-air personalities alike. Both are required to disclose. Undisclosed promotions are not just wrong – they are payola, and they are illegal. That applies to product placements, paid VNRs, or anything for which payment is made but not disclosed. It is high time to employ some lessons about the law so this does not continue happening.

Another source of great annoyance to many listeners, potentially in violation of the law, is when radio disc jockeys casually mention their enthusiasm for some product or another in the course of their banter. Listeners are left wondering if the on-air personalities really liked the product, or whether the station was paid to promote it. If there was payment of any kind, they better disclose it or they should face the scrutiny of the FCC.

Our recent Public Notice was a good first step toward cleaning up these problems, but the Commission must do more. In fall 2003, a group called Commercial Alert asked us to take a number of different actions regarding product placement,[24] and its filing, and the recent press reports I mentioned, clearly indicate that the time has come for us to step up our enforcement in this area.

For the record, I have not determined anyone, as the *Washington Post* story this morning suggests, has violated the law.[25] But we have ample grounds to investigate and find out. On the surface, these reports raise serious question as to whether they reflect behavior that appears at odds with our rules. We should immediately open investigations into these possible violations of our rules and prosecute them to the full extent of the law. We need to see the contracts, find out what the broadcasters were told, and determine what questions were asked. If we uncover evidence of potential criminal violations, we should refer them to the Justice Department. And we should undertake an investigation regardless of whether we receive outside complaints. The simple fact of nondisclosure means that listeners and viewers are not always aware that companies are impermissibly blurring the line between advertising and content.

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[23] James Bandler, *Advice for Sale: How Companies Pay TV Experts For On-Air Product Mentions*, WALL ST. J., Apr. 19, 2005, at A1; Howard Kurtz, *Firms Paid TV's Tech Gurus To Promote Their Products*, WASH. POST, Apr. 20, 2005, at C1.

[24] Letter from Gary Rushkin, Executive Director, Commercial Alert, to Marlene H. Dortch, Secretary, FCC (Sept. 30, 2003) [hereinafter Commercial Alert Letter].

[25] Howard Kurtz, *FCC Panelist Wants Probe of Product 'Payola,'* WASH. POST, May 25, 2005, at C4.

On-air "experts" and PR agents sometimes say it is the broadcasters' responsibility to disclose. Broadcasters sometimes say they are not aware of money changing hands. But the law does not allow this blame game. On-air "experts" must disclose to stations that they have been paid for promoting a product on the air, and broadcasters must then disclose to their audience that someone was paid for it.

And if the journalist or on-air personality fails to disclose, broadcasters cannot simply turn a blind eye. Broadcasters have an affirmative legal duty to engage in "reasonable diligence" to find out whether anything of value has changed hands.[26] As every first-year law student learns, "ignorance of the law is no defense." And given the "reasonable diligence" requirement, ignorance may actually reflect a violation of the law in itself. We will need to investigate what "reasonable diligence" was undertaken by those accused of breaking our rules.

Outside of newscasts, product placement is even more rampant. Again, everything from Coke to soap is subliminally hawked in TV programs. In today's media environment, product placement has moved beyond Coke tumblers prominently displayed at the judges' table of *American Idol.* Now, products have even seeped into plot lines: soap operas have woven cosmetic lines into their tales of who-did-what-with-who, while the Apprentice sounds more and more like an hour long infomercial for the latest corporate sponsors. And all of this is on the rise: in 2003, an executive of one network reported that the network had used product placements in 10 shows, and predicted that it would use them in more than 20 in 2004.[27] In 2005, advertisers are expected to spend over $2.4 billion on product placements on TV alone.[28]

I understand that it is difficult for advertisers to capture and keep consumers' attention these days. Viewers can flip between hundreds of channels and skip commercials entirely. There is nothing inherently wrong with product placement – so long as it is disclosed as required by law.

Disclosures should also be meaningful. A disclosure that appears on screen for a split second during the credits in small type that no one could possibly read without pausing their DVR-- and pulling out a magnifying glass—could not possibly qualify. Except in the case of political or controversial material, though, our rules do not clearly spell out the prominence of the disclosure required[29] – but I believe they should. The FCC would do well to borrow from the work of its sister agency, the FTC, in requiring "clear and prominent" disclosures where needed, and defining what is meant by those terms.

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[26] 47 U.S.C. § 317(c); 47 C.F.R. §§ 73.1212(b), 76.1615(b).

[27] Commercial Alert Letter, *supra* note 24, at 9.

[28] Marc Grasser, *Product-Placement Spending Poised to Hit $4.25 Billion in '05*, ADVERTISING AGE, Apr. 4, 2005, at 16. Product placement on TV accounts for 57.5% of the total figure; film accounts for 33.4%; other media accounts for 9.1%.

[29] *See, e.g.,* 47 C.F.R. § 73.1212(a)(2)(ii). ("In the case of any television political advertisement concerning candidates for public office, the sponsor shall be identified with letters equal to or greater than four percent of the vertical picture height that air for not less than four seconds.")

Basic disclosure is generally all that the law requires – then the listening and viewing public understands the nature and source of the material they are hearing and seeing and can place it in its proper context. But where disclosure itself is not adequate for the audience to form such an understanding, stricter measures are needed. Studies have shown that very young children do not distinguish between programming and advertising, and even older children do not necessarily understand the purpose behind ads and accept claims as true and unbiased.[30] That is why the FCC has taken steps to draw especially bright lines between advertising and programming in children's shows. Last fall, we held that broadcasters could not display website addresses during children's programming unless certain requirements, designed to draw clear distinctions between commercial and other content, were satisfied.[31]

But I believe we need to do more. We need to move forward with an outright ban on interactive advertising to children through TV. Already, there is "t-commerce" abroad, where digital cable and satellite subscribers can buy products they see on television through a simple click of their remote control. Given that children do not always understand a division between advertising and programming – let alone product placement that seamlessly weaves the two together – I believe that now is the time to stop the development of "t-commerce" directed to children dead in its tracks. Digital TV – and new interactive technologies – can provide a wealth of opportunities to children and their parents – but should not provide wealth to advertisers at the expense of children and their parents.

There is a lot at stake here.

It is a cardinal right of every American to assume that radio and TV programs that appear to be based on authentic editorial judgments of the stations are in fact just that, unless the public is told otherwise. After all, the most fundamental responsibility of broadcast stations is to serve the public interest, and broadcasters are accountable to their communities. We have a right to know that people who present themselves to be independent, unbiased experts and reporters are not shills hired to promote a corporate - or governmental - agenda.

And, it is a cardinal right for Americans to have the commercial elements of radio and TV broadcasting clearly marked and made explicit to even undiscerning viewers and listeners.

But there is a larger context for concern that is shared by Americans across the political spectrum. We are in the midst of a tremendous wave of commercialism in our media and in our culture. The scholarly analysis of this phenomenon, especially for how it is affecting our children, is deeply troubling. At a minimum, basic disclosures will give the public a better chance to sort this out for themselves. Nobody suggests anything good comes from marinating children's brains in advertising.

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[30] *See, e.g.,* Dale Kunkel, *Children and Television Advertising*, *in* HANDBOOK OF CHILDREN AND THE MEDIA (Dorothy G. Singer & Jerome L. Singer eds., 2001); DALE KUNKEL ET AL, AM. PSYCHOL. ASS'N., REPORT OF THE APA TASK FORCE ON ADVERTISING AND CHILDREN (2004) <http://www.apa.org/releases/childrenads.pdf >.

[31] *See Children's Television Obligations of Digital Television Broadcasters*, 19 FCC Rcd 22943 (2004).

This is about protecting a bedrock principle of American media law. That is why I am going to make it my priority to wipe out these unlawful practices. Unless we act now, the problem will only grow worse. We must get control of it now.

Thank you for your willingness to hear me out, and for working together with me to help resolve these issues.