Comments of the Writers Guild of America, West Regarding the Rampant Use of Embedded Advertising in Television and Film and the Need for Adequate Disclosure to Viewers

Relating to:

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

Filed by John Kosinski, September 22, 2008

On behalf of

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"You're going to see some shows doing [product integration] extremely well, where you're hardly aware that you've been sold something."
Les Moonves, Chairman, CBS[1]

[1] S. Donatan, Madison and Vine: Why the Entertainment and Advertising Industries Must Converge to Survive, (New York: McGraw-Hill, 2004), p. 154.

Embedded Advertising in Television and Film Without Adequate Disclosure is Harmful and Deceptive to the American Viewing Public

The Commission Must Protect the Viewers' Right to Know when They Are Being Advertised to by Requiring Simultaneous Disclosure When Commercial Products Are Embedded Into Television Programming

The Writers Guild of America, West (WGAW) is pleased that the Federal Communications Commission has undertaken an examination of the rampant use of embedded advertising in television, and an analysis as to whether the current sponsorship identification rules are sufficient. For too long, networks have been able to blur the lines between entertainment content and advertising, often without adequate disclosure to the viewer. As the representative for thousands of writers in television and film, the WGAW has a detailed understanding of the practice, its growing use and its deceptive intentions. We sincerely hope that the FCC will do everything within its power to protect the American viewing public by requiring the most failsafe disclosure mechanisms whenever products are embedded into television programming.

Section I: The WGAW Supports Simultaneous Disclosure of Embedded Advertising on Broadcast Television

The WGAW supports simultaneous disclosure, such as a "crawl" along the bottom of the screen, any time a product is mentioned, referenced, or exhibited during television programming, when producers or distributors receive payment or any other form of consideration for embedding products into the programming.

The disclosure requirement should apply to all programming on broadcast television and origination cablecasting, including the reuse of feature films on broadcast television.

The disclosure should meet the following criteria:

- The disclosure should appear as text along the bottom of the screen, also known as a 'crawl,' anytime a product that is integrated into the program is mentioned, referenced or exhibited.
- The disclosure should appear on the bottom of the screen for no less than five seconds.
- The text should move at a reasonable speed and should be 'clearly readable' by the viewer.
- The disclosure should consist of a 'reasonable degree of color contrast' between the background and the text. No logos or other product-related graphics should be used in the disclosure.
- The brand of the product integrated or placed in the program as well as the parent corporation of the product must be included in the crawl.

The WGAW believes that a real time or simultaneous crawl would best serve the purpose of ensuring that consumers know when they are being advertised to within a program. It is widely understood that viewers now watch programming with the use of digital video recorders (DVRs) and can skip commercials with the click of a button. They also can speed through opening or closing credits with the same alacrity. Requiring greater disclosure either during the opening or closing credits, and/or before or after commercial breaks simply fails to provide adequate safeguards that the viewer will actually see the disclosure. Just because viewers use a DVR component to watch programming does not mean that they must waive their right to know when they are watching advertising.

The WGAW believes that the government interest in protecting the public is sufficient to warrant a real time crawl during programming. As demonstrated in this filing, embedded advertising is rampant in broadcast television and all signs indicate the practice will continue to grow. Moreover, while the use of embedded advertising has grown substantially in recent years, the major networks have made a mockery of the current sponsorship identification rules. Disclosures are often tucked into closing credits, appear on the screen for a few seconds or even less, and are barely readable by the viewer. Such “fleeting disclosures” fail to comply with either the letter or the spirit of current sponsorship identification rules.

The WGAW is startled by the reaction of certain networks and advertising agencies to this sensible proposal. Some have claimed a crawl will destroy the TV viewing experience. However, as shown in Section VII, the current television visual field is full of symbols, signs and promotions. A crawl would be no more disruptive of the visual experience than the profusion of advertisements and messages that currently crowd the screen.

Recent reports from advertising industry trade papers confirm that networks and advertisers are discussing the option of selling advertisers the bottom third of the screen during programming to promote products (see Section VIII). Broadcasters have also agreed to have crawls along the bottom of the screen to educate viewers about the upcoming transition to digital television (see Section VII). Obviously, it is not the medium broadcasters object to, it is the message.

The WGAW believes that the disclosure requirement should apply to all broadcast programming, including feature films shown on broadcast networks. The exemption from sponsorship identification requirements created for feature films in 1963 is arbitrary and outdated. Much like the rampant use of product integration in television, feature films have also become popular vehicles for product placement and integration (see Section V). There is no basis in policy for maintaining the exemption.

The WGAW does not make these proposals lightly, or with any intent to limit the commercial viability of television programming. WGAW members write much of the content that millions of Americans watch each day, and stand to benefit from the success of their shows. Artistic integrity, however, requires that viewers be apprised of the commercial influence on the programs that WGAW members write. A real time crawl achieves this goal.

Section II: The WGAW's Interest

The WGAW represents over 8,000 professional writers of literary material for theatrical and television motion pictures and interactive technologies. The WGAW is the collective bargaining agent for writers residing west of the Mississippi River employed by the major media companies and dozens of independent producers. Its membership is comprised of television writers,(including "showrunners" and executive producers), feature film writers, and news and new media writers. In its representative capacity, the WGAW protects and advocates for the rights, benefits and working conditions of writers. The WGAW also conducts programs, seminars and events throughout the world on issues of interest to writers.

In recent years, embedded advertising has become a major concern for writers, particularly television writers and writer-producers.

In the spring of 2005, the research firm Fairbank, Maslin, Maullin and Associates conducted a survey of WGAW members. The results of the survey illustrate the overwhelming opposition of writers to the growing use of embedded advertising:

- 73% of respondents stated that "the practice of product integration is unacceptable."
- 74% of respondents stated that "the line between content and advertising needs to be more firmly drawn."

As the practice of embedded advertising has grown, so has writers' resistance to it. As WGAW President Patric Verrone wrote in his letter to FCC Chair Kevin Martin on June 24, 2008: "When writers are told we must incorporate a commercial product into the story lines we have written, we cease to be creators. Instead, we run the risk of alienating an audience that expects compelling television, not commercials."

In May of 2007, Philip Rosenthal, the creator and the executive producer of the hit sitcom *Everybody Loves Raymond,* testified before the U.S House of Representatives, Subcommittee on Telecommunications and the Internet:

> "The problem began when production entities started making product placement deals for items that were not initially intended to be part of a scene. Writers tried to find ways to incorporate the product after the fact, but in certain instances the actors ultimately were required to use props that made them appear awkward. . . As with all principles that are not vehemently protected the slope has begun to disintegrate from beneath our feet. . . Thanks to somewhat specious concerns that the DVR has resulted in no one watching commercials, the studios and the production companies have concluded its best just to turn the television and motion pictures themselves into commercials. . . Product integration is a level of corporate pressure that impinges upon First Amendment free expression over the airwaves and long-established protection of viewers against stealth advertising."

The lack of adequate disclosure to the viewing public exacerbates the dilemma of embedded advertising for the creator. As Patric Verrone testified on behalf of the WGAW at the FCC's Media Ownership hearing in Chicago on September 20, 2007: "The idea behind 'branded entertainment' is to integrate commercials into the storyline so as to create 'stealth advertising.' Most Americans, like the proverbial frogs in the

slowly boiling water, may not notice how prevalent it has become. . . . Consumers are required to watch commercial messages that are no longer identified as commercial messages. And in our experience people want (and deserve to be) told when they are being sold."

The WGAW has expressed these concerns in a variety of forums. It worked with leaders in the European Union in order to forestall the relaxation of existing rules prohibiting product integration and placement in television. Additionally, in its recent round of collective bargaining with the major media companies, the WGAW was able to secure language requiring employers to consult writers when products are integrated into programming.

The WGAW has made significant strides in protecting the interests of creative talent in the face of the proliferation of embedded advertising. The FCC must now act to fulfill its statutory mandate of safeguarding the interests of the American viewer.

Section III: Definitions of Product Placement and Product Integration

The purpose of embedded advertising is to exploit the emotional connection between a character or a program and the viewer for the purpose of selling a product. This connection is so coveted by certain television and advertising executives that ad agencies sometimes become intimately involved in the creative process by which television shows are written. As a result, the lines between entertainment content and advertising have at times become blurred beyond distinction. As Congressmen Markey and Waxman described in a September 26, 2007 letter to FCC Chair Kevin Martin: "In our view the blurring of the line between advertising and content represented by product placement and integration is unfair and deceptive without adequate disclosures to the viewing public."

In its past communications to the FCC and to Congress, the WGAW has made a distinction between "product placement" and "product integration."

- Product placement, a practice that has existed for decades, is the use of real commercial products as props on programs.
- Product integration, a newer and rapidly developing advertising technique, inserts products into the story line of a program. This may involve multiple visual and verbal cues to the product during a single episode.

Product integration can take many forms. A product may not be mentioned by name, but characters will extol its virtues in dialogue. For example, in an episode of *Desperate Housewives* shown on the ABC network, the characters talk about the "cool" features of a Nissan Xterra. The young neighbor checks out the car much like a prospective buyer would, and even asks the question, "Is this set up for MP3?" Below is a frame from one scene of this episode. While the characters never mention the name of the car, the nearly minute-long scene has several shots of the product and the logo of the car is present throughout.

Screen Shot I: ABC's *Desperate Housewives*

The term product integration developed, as distinct from product placement, to define the more recent, and intrusive, practice described above. As the marketplace has evolved, however, it has become apparent that the two practices are points on a continuum, not discrete categories. Products may consciously be written into a story line even though they are never mentioned by name.

The blurring of the line between product placement and integration has convinced the Guild that there is no rationale for treating them differently. The WGAW applauds the FCC for framing its inquiry broadly. The WGAW believes that disclosure requirements should apply to all forms of embedded advertising, in any circumstance where a producer or distributor receives compensation or consideration for the promotion of a product.

Whether a particular use of a product is deemed integration or mere promotion, the interest of the audience is the same. As the Commission has long held, viewers have the right to know when they are watching advertising, whether it is a Coca-Cola cup on a judge's table, or Paula Abdul turning to Simon Cowell to extol the refreshing qualities of the product in the cup. Both are advertising and both warrant adequate disclosure.

Section IV: Current Trends in Television Advertising and the Growth of Embedded Advertising

While television has been an advertiser-supported medium since its inception, the past few years have seen a dramatic rise in the use of product placement and product integration on network television.

According to media research firm PQ Media, advertisers spent $2.9 billion in 2007 to place their products in TV shows and movies, up 33.7% from the previous year. Nielsen Media Research found that network television featured more than 85,000 placements in 2007.[2] Nielsen Media Research began tracking product placement in 2003 and has noted that placements have risen 30 percent since that time.

Product integration also continues to grow dramatically. In 2007 there were 5,190 integrations on network television, according to Nielsen Media Research, a 13% increase from the previous year. Nielsen tracks combined audio-visual placements, which the WGAW interprets as instances of product integration. The chart below lists the number of integrations and placements for the past three years.[3]

Embedded Advertising Occurrences in Network Television	**2005**	**2006**	**2007**
Product Integration	3938*	4,608	5,190
Product Placement	106,808	73,830	85,846

*Estimate based on reported percentage increase in 2006

Nielsen also reports product placement figures throughout the year. On September 15, 2008, the company released figures for product placement on network primetime for the first half of 2008. The chart below lists the top 10 programs featuring product placement on broadcast television. Combined, these programs featured 21,427 occurrences, a 12% increase from the first half of 2007.[4]

[2] Schiller, Gail, "Big Business: Placements up in '07," *The Hollywood Reporter*, January 9, 2008.
[3] We should note that Nielsen's attributes much of the decline in 2006 product placements to the absence of the reality show *The Contender*.
[4] The Nielsen Company, "Product Placement Declines By 15% In First Half, Nielsen Reports," http://www.nielsen.com/media/2008/pr_080915_download.pdf. Downloaded September 16, 2008.

Top 10 Programs for The First Six Months of 2008:
Product Placement on Broadcast TV

Program	Network	Total Occurrences
American Idol	FOX	4,636
The Biggest Loser	NBC	4,364
Deal or No Deal	NBC	2,122
Extreme Makeover Home Edition	ABC	1,776
The Apprentice	NBC	1,646
Hell's Kitchen	FOX	1,596
Big Brother 9	CBS	1,514
One Tree Hill	CW	1,308
America's Next Top Model	CW	1,259
Last Comic Standing	NBC	1,206

Source: Nielsen Media Research

Many of the shows that have the most instances of product placement also happen to be the most watched programs on television. For example, *American Idol* was the 1st and 2nd most watched television program for the 2007-2008 television season. The Tuesday night broadcast of the show was the most watched, with an average of more than 28 million viewers. *Extreme Makeover Home Edition* and *Deal or No Deal* were also among the top 30 most watched programs of last season.

TNS Media Intelligence also tracks brand appearances on broadcast television. For the first quarter of 2008, the firm found that brand appearances averaged 12 minutes and 8 seconds per hour for primetime network television, with unscripted programs featuring brands an average of 17 minutes and 19 seconds per hour.[5] Overall, brand appearances on network prime time increased 91% from the first quarter of 2007 to the first quarter of 2008.

[5] TNS Media Intelligence, "**TNS Media Intelligence Reports U.S. Advertising Expenditures Increased 0.6 Percent in First Quarter 2008**," http://www.tns-mi.com/news/06112008.htm , Downloaded September 15, 2008.

Brand Appearances Q1:2007 vs Q1:2008
(minutes:seconds per hour)

	Q1: 2007	Q1: 2008	Change
PRIME TIME NETWORK	6:22	12:08	91%
Unscripted Programs	10:50	17:19	60%
Scripted Programs	4:26	5:29	24%
LATE NITE NETWORK (Kimmel, Leno, Letterman)	12:32	12:17	-2%

Source: TNS Media Intelligence

It is important to note that the figures for brand appearances listed above are in addition to the regular commercial breaks that occur during programming. According to TNS Media Intelligence, one hour of television contains an average of approximately 14 minutes of commercial time.[6] This figure does not include local station advertising time. Since brand appearances constitute advertising, combining together commercial time and brand appearances produces alarming numbers: one hour of network prime time now averages 26 minutes of advertising. The WGAW hopes the Commission is as alarmed by these numbers as we are.

Placements and integrations manifest themselves through the ubiquitous display of Coca-Cola logos and music videos featuring Ford cars on *American Idol,* or the party on *Gossip Girl* where characters ask to be served Vitamin Water. On NBC's Emmy-winning *The Office*, a character spent an entire episode working at Staples while a Staples product was integrated into another character's work. On CBS's highly rated *CSI,* characters rhapsodize about the features of a General Motors Denali. Oreo cookies were a major part of the plot in two episodes of the CW family drama S*eventh Heaven*. On *Smallville*, contact lenses prompted a crime fighter to say, "Acuvue to the rescue." These are just a few of the many examples of embedded advertising that have occurred on major broadcast shows.

Most notable about the figures above is the sharp rise in product placements and integrations. All signs point to the further growth of these practices. These trends have created an urgent need for the Commission to act.

[6] Ibid.

Section V: Growing Use of Embedded Advertising in Feature Films

Much like the current trends in television, the use of product placement and integration has grown in feature films.

PQ Media reported that the market for embedded advertising in feature films reached nearly $500 million in 2005 and has undoubtedly grown since.[7] Several recent feature films have been noted to prominently display and integrate products into the story. When *Sex and the City* was released many news articles noted that dizzying array of designer brands featured in the program. A Mercedes Benz SUV, driven by one of the four main characters, was also prominently featured. Another notable product-laden film was 2007's *Transformers*, a sequel to which is set for release in 2009. Four General Motors vehicles, a Hummer H2, a Chevrolet Camaro, a GMC Topkick and a Pontiac Solstice convertible served as the "good guy" Transformers in the movie.

These are just two examples of the many integrations and placements that are taking place in feature films.

Integrations in film should trigger a disclosure requirement when the movies reach the small screen. Viewers should be made aware of the sponsorship of these movies when they are shown on broadcast television. Whereas the FCC created an exemption for such programs in broadcast over four decades ago, the WGAW believes there is no compelling need to continue the exemption of feature films from the sponsorship identification rules. Much like television programming, the recent rise in embedded advertising is deceptive without disclosure and the sponsorship identification rules of the Commission should apply.

Section VI: Current Sponsorship Rules Are Inadequate and Antiquated

From the inception of broadcast television, both the Congress and the FCC have protected the American viewer from stealth advertising.

In Section 317 of the Communications Act of 1934, Congress was explicit in requiring broadcasters to disclose when they air material for which they have received payment or other consideration. 47 U.S.C. § 317(a)(1). The Congress and the FCC upheld these obligations by extending the disclosures to original cable programming that is within the control of the distributor, while also applying the laws of disclosure to anyone involved in a television production that may receive payment. See 47 C.F.R. § 76.1615(c) and 47 U.S.C. § 317(b).

Despite the clarity of these laws, the major broadcast networks have flaunted current sponsorship identification rules. The WGAW has found that the general industry practice is to disclose sponsorship during the closing credits of programs. Often, the disclosure appears on the screen for seconds or less, and is illegible to the viewer. In addition, the disclosure is, in some instances, unclear about the connection between the product embedded in the program and the sponsor's name. Such fleeting disclosures comply with neither the letter nor the spirit of the law.

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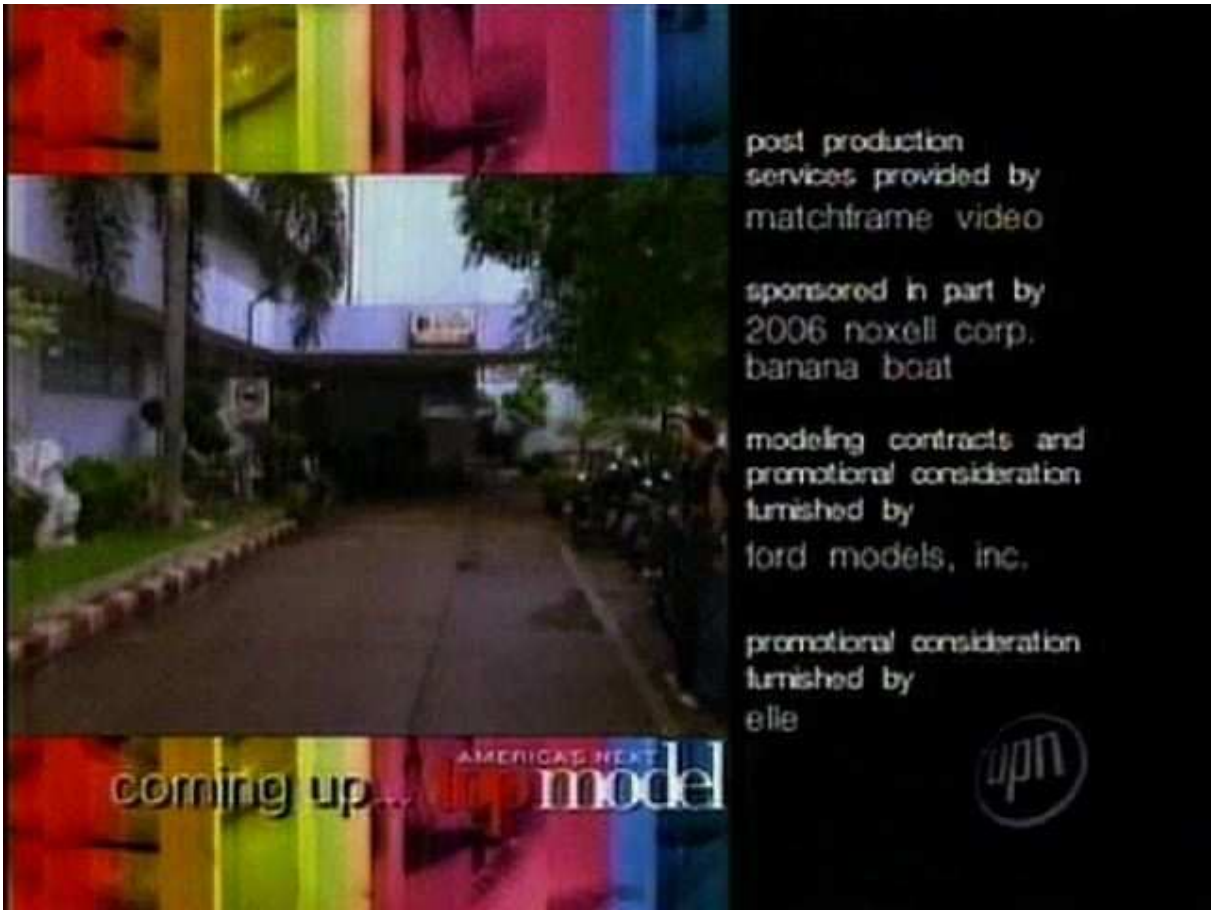
[7] PQ Media, "Global Product Placement Forecast 2006: Executive Summary," http://www.pqmedia.com/global-product-placement-2006.html, Downloaded August 16, 2006.

Below is a screen shot taken from an episode of the CW's *Gossip Girl* from the 2007-2008 season. This was broadcast on KTLA Channel 5 in Los Angeles. The disclosure shown here is barely legible. In addition, during the original broadcast **this information was held on the screen for less than one second**, making it impossible for the average viewer to be informed that the program contained embedded advertising.

Screen Shot II: The CW's *Gossip Girl*

Another example of inadequate disclosure is from the show *Americas Next Top Model.* The screen shot below is taken from a 2006 episode of the program, which aired on the former UPN Channel 13 in Los Angeles. Reality television is notorious for the amount of embedded advertising contained in the programs, and *America's Next Top Model* is no exception.

Screen Shot III: UPN's *America's Next Top Model*



There are two problems with the disclosure. First, **the above shot appeared on the screen for less than one second**, insufficient time for the viewer to read the 37 words that appear in the frame.

Second, the show lists one of its sponsors as the "2006 noxell corp." Most viewers will not know that the Noxell Corporation manufactures and markets Cover Girl and Noxzema products.[8] Even if viewers had sufficient time to read the words, they would have no idea what was being disclosed.

Another example of inadequate disclosure is from a 2007 episode of NBC's hit show, *The Office*. This particular frame is taken from an episode that was aired on KNBC in Los Angeles. The disclosure occurs during the closing credits, and appears on the screen for approximately two seconds – an improvement over other disclosures but still easy for a viewer to miss. In this example, the sponsor is listed simply as "HP" – an apparent abbreviation for the computer company Hewlett Packard.

[8] Cover Girl is a main sponsor of *America's Next Top Model*.

Screen Shot IV: NBC's *The Office*

What is interesting about this example is that the disclosure appears during a final scene, while the characters are talking. The WGAW struggles to understand the reluctance of advertisers and networks to implement a simultaneous crawl since they are already disclosing embedded advertising, however inadequately, during the final scenes of programs. We believe a crawl will be no more intrusive than the type of disclosure pictured above.

It is clear from these examples that network and station interpretations of the sponsorship identification rules lack standardization. What is equally clear is that networks and stations disclose as little as possible and make it as unlikely as possible for a viewer to actually be made aware that they are being advertised to and by whom.

The emergence of new technology in the form of DVRs and their popularity also raise questions about the adequacy of current sponsorship identification rules generally. The broadcast networks have cited the growing use of this technology as a key reason for the need for product placements and integrations. But use of DVRs creates the potential for skipping the end credits, including the disclosures. The FCC must take this factor into account when devising sponsorship rules that serve the purpose of protecting a consumer's right to know they are being advertised to.

Section VII: Precedents for Crawls

Currently, the broadcast networks regularly use the bottom portion of the screen to promote other programs. They do not seem to show any concern for the artistic integrity of the program when they announce the time and day of the next episode of *The Biggest Loser or America's Toughest Jobs*. The four screen shots below demonstrate how networks promote future shows during programs. In all instances, the networks included the promotion while the program was running and the story was taking place. Surely, if the bottom of the screen can be used for advertising and not disrupt the audience from the story, a crawl would be no more intrusive.

Screen Shot V: NBC Promotion During Programming

Screen Shot VI: Another NBC Promotion During Programming

During a recent rebroadcast of the CW show *Gossip Girl*, the network used the bottom portion of the screen to advertise for its new show, *90210*. In addition to the CW logo on the bottom right of the screen, the network used the bottom left portion of the screen to include graphics of palm trees, sunshine and clouds to promote *90210*. The advertising took place during the show.

Screen Shot VII: CW Promotion During Programming

Yet another example comes from FOX. During a broadcast on September 17th of the show *Til Death*, the network used the entire bottom portion of the screen to advertise for the next program, *Do Not Disturb*.

Screen Shot VIII: FOX Promotion During Programming

Finally, there is recent precedent for using a crawl to notify viewers. As part of the DTV Consumer Education Initiative, the FCC provided local stations with the option of running a crawl to inform consumers of the upcoming transition to digital TV. The example below is taken from the local FOX affiliate in Los Angeles. The frame shows a crawl taking place during an episode of *The Simpsons.* This example demonstrates that crawls can be used to serve the public interest without harming the integrity of the program.

Screen Shot IX: DTV Crawl on FOX During *The Simpsons*

Section VIII: Advertising on the Bottom Third

In addition to current promotional use of the bottom of the screen, news reports have noted that there may be an effort to rent the bottom third of the screen to advertisers. In an August 2008 article in *Broadcasting & Cable*, both advertisers and network executives expressed a growing interest in the practice of placing advertising and promotional materials along the bottom third of the screen. In fact, NBC has already experimented with this tactic by rolling out lower third graphics during the Olympics for the Universal Pictures movie *The Mummy: Tomb of the Emperor Dragon.* In another instance, on Thanksgiving night, NBC allowed for a Target shopping cart to zip around the bottom of the screen during a showing of the movie *The Incredibles*.

As the article notes: "Such sights are becoming familiar by the day. The lower third of the viewing screen, once part of the wide-open prairie for programming, is turning into the latest land of opportunity for Madison Avenue. Advertisers more and more are claiming this real estate for themselves in the ongoing fight for viewer attention."[9] Jack Severson, a partner in a prominent Los Angeles advertising firm, warns that this next step in branded entertainment is approaching quickly: "Severson expects the lower-third ad business to metastasize within the next 24 months, adding that viewers should brace themselves for an onslaught of corporate logos and advertising icons."[10]

[9] Atkinson, Claire, "The Battle for the Lower Third," *Broadcasting & Cable*, August 11, 2008
[10] *Ibid.*

Clearly, if the networks are willing to sell the bottom third of the TV visual field as advertising space, arguments about artistic integrity ring hollow. While advertisers and networks may complain about the burden of a crawl that discloses embedded advertising, they are already running advertising and other informational crawls during programming. The Commission should pay heed to the conduct of the advertisers and networks, not their rhetoric.

Section IX: Embedded Advertising is Subject to Regulation as Commercial Speech

Opponents of FCC action may argue that any regulation of product integration runs afoul of First Amendment protections. The arguments lack merit.

The First Amendment analysis begins, as always, with a characterization of the speech to be regulated. The Supreme Court has held that the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression. *See Bolger v. Youngs Prods. Corp*., 463 U.S. 60 (1983); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc*., 425 U.S. 748, 771-72 (1976). "And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *FCC v. Pacifica Foundation,* 438 U.S. 726, 748 (1978).

Because product integration is a relatively new phenomenon, the precise treatment of product integration as commercial speech is still evolving. The FCC recognized long ago that commercial content inserted into films and television programming may convert them into program-length commercials. The FCC test to determine whether a program can be characterized as a program-length commercial is "whether the purportedly non-commercial segment is so interwoven with, and in essence auxiliary to the sponsor's advertising, to the point that the entire program constitutes a single commercial promotion for the sponsor's products or services." Recent cases have held that speech in traditionally non-commercial contexts may be deemed commercial if the speaker has a commercial purpose and the audience includes actual or potential customers. *See Kasky v. Nike, Inc.*, 27 Cal. 4th 939 (2002), *cert. granted and dismissed*, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (finding statements made in press releases regarding Nike's labor practices were commercial speech).

Product integration is "entitled to the qualified but nonetheless substantial protection accorded to commercial speech." *Bolger*, 463 U.S. at 68. *See Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980) ("protection available for particular commercial expression turns on nature both of the expression and of the governmental interests served by its regulation"). The Supreme Court articulated a four-prong test to determine whether commercial speech is protected by the First Amendment. *Central Hudson*, 447 U.S. 563-67: (1) the communication must be related to lawful activity and must not be misleading; (2) the governmental interest served in regulating that speech must be substantial; (3) the regulation must directly advance the governmental interest asserted; and (4) the regulation may not be more extensive than necessary to serve that interest.

While absolute bans on commercial speech are usually struck down as unconstitutional, *see Central Hudson*, 447 U.S. at 557, that is not what is being proposed here. It is beyond question that the accurate disclosure of a concealed commercial purpose is a

legitimate government interest. The FCC has a long history of requiring such disclosures in an assortment of contexts. A simultaneous disclosure requirement proposed by the WGAW is a narrowly tailored form of regulation that focuses on the advertising content and leaves intact the non-commercial elements of the programming. As such, it passes muster under the constitutional standards articulated in *Central Hudson*.

Section X: Conclusion

As demonstrated above, embedded advertising on broadcast television is rampant and its use is growing. The Writers Guild of America, West believes an urgent need exists for the FCC to take action to ensure the audience knows when they are viewing advertising. Current sponsorship identification practices are woefully inadequate and do not achieve their stated purpose. In an age of DVRs, the WGAW respectfully submits that simultaneous disclosure is the only effective way to inform the viewer. We hope the Commission will protect the public interest by requiring adequate disclosure, in the form of a simultaneous crawl, whenever advertising is embedded into programming on broadcast television.