

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

**REPLY COMMENTS OF
MOTION PICTURE ASSOCIATION OF AMERICA, INC.**

Motion Picture Association of America, Inc. (“MPAA”)¹ submits these reply comments in response to the above-captioned Notice of Inquiry (“NOI”) of the Federal Communications Commission (“FCC” or “Commission”).² As the record in this proceeding demonstrates, the Commission made the correct determination in 1963 when it exempted feature films subsequently exhibited on television from the sponsorship disclosure requirements of Section 317 of the Communications Act of 1934, as amended (the “Act”).³ No evidence has been

¹ MPAA represents six of the world’s largest producers and distributors of theatrical motion pictures, packaged home video material, and audiovisual programs for home reception via broadcast, cable, satellite, and the Internet. The MPAA members are: Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; The Twentieth Century Fox Film Corporation; Universal City Studios LLLP; Walt Disney Studios Motion Pictures; and Warner Bros. Entertainment Inc.

² *Sponsorship Identification Rules and Embedded Advertising*, Notice of Inquiry and Notice of Proposed Rulemaking, 23 FCC Rcd 10682 (2008) (“NOI”).

³ *See Amendment of Sections 3.119, 3.289, 3.654 and 3.789 of the Commission’s Rules*, Docket No. 14094, 34 F.C.C. 829 (1963) (“*Feature Film Exemption Order*” or the “Exemption”). *See also* 47 C.F.R. § 73.1212(h); 47 C.F.R. § 73.1615(g) (exempting feature motion films distributed by cable television systems from sponsorship identification requirements applicable to origination cablecasts). The requirements of Section 317 and the FCC’s implementing regulations are referred to collectively herein as the “Disclosure Requirements.”

presented that warrants initiation of a rulemaking and any departure from this settled precedent. Accordingly, the Commission should close its inquiry on this topic and retain the Exemption.

As a preliminary matter, MPAA continues to believe, as the record supports, that the Commission lacks authority under Section 317 to regulate feature films subsequently displayed on television.⁴ Even beyond the questionable exercise of jurisdiction in this area, however, it is clear that the Commission cannot depart from nearly a half-century of precedent by applying the Disclosure Requirements to feature films in the absence of a well-founded reason for change.⁵ Indeed, at the time the Exemption was established, the Commission explicitly stated that where there was “no evidence indicative of a need for such a rule,” the Commission would be unjustified in enacting a requirement that “might have some disruptive and dislocating economic effects” and could “inhibit program production.”⁶ Thus, under judicial precedent and the Commission’s own judgment at the time the Exemption was adopted, anything short of convincing evidence cannot serve as a basis for Commission action in this case.

Yet, there is no evidence – whether before the Commission or elsewhere – of substantially changed circumstances since the Exemption was established or of any harm caused by product placement in theatrical films shown on television. Specifically:

⁴ See, e.g., Comments of National Media Providers at 41-42 (“NMP Comments”) (“To the extent the Commission reviews the [feature film Exemption] issue at all in this proceeding, it should, if anything, reconsider its 1963 conclusion that it ‘clearly’ has authority to impose sponsorship identification requirements on feature films.”); Comments of Motion Picture Association of America, Inc. (“MPAA Comments”) at 6-7. See also *infra*. pp. 3-5.

⁵ See generally *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983) (“*State Farm*”) (“an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”). Rescission of an agency rule is subject “to the same standard of review as promulgation of a rule”, and the agency must articulate[] permissible reasons for the change.” See *Public Citizen and Ctr. For Auto Safety v. Nat’l Hwy. Traffic Safety Admin.*, 733 F.2d 93, 97-99 (D.C. Cir. 1984) (citing *State Farm*). The standard is not, as the Writers Guild of America West (“WGAW”) submits, whether there exists a “compelling need to continue the exemption.” Comments of WGAW (“WGAW Comments”) at 10.

⁶ *Feature Film Exemption Order*, para. 35.

No commenter has demonstrated any evidence that movie studios engage in “improper practices” with respect to product placements that would implicate broadcasters.⁷ Instead, the record shows that the public is not harmed or misled by the television distribution of feature films in which particular products are used or incorporated.⁸ And, as Starz and Ovation point out, existing laws and regulations would be sufficient to address any false or deceptive advertising in the form of product placements.⁹ In any event, the Federal Trade Commission (“FTC”) repeatedly has determined that there is *no* “pervasive pattern of deception and substantial consumer injury attributable to product placements.”¹⁰

No commenter has demonstrated that the nexus between the production of theatrical films and their subsequent display on television is sufficient to justify application of the Disclosure

⁷ *Feature Film Exemption Order*, para. 36. Commercial Alert argues that circumstances have changed since the Commission adopted the Exemption because feature films now include (but did not previously include) sponsored product placements. See Comments of Commercial Alert (“CA Comments”) at 26. However, both CA and the Commission, in the NOI, misinterpret the Commission’s 1963 findings. Specifically, the Commission never found previously that there was a “lack of evidence of sponsorship within ... films.” See CA Comments at 26; NOI at 10. Rather, the Commission determined, as continues to be the case, that sponsored placement of products in feature films did not constitute a harmful or impermissible practice. See *Feature Film Exemption Order*, para. 35 (“[T]here is no evidence before us which tends to establish that any practices in this regard prevail in this industry which *improperly affect* broadcasting.”) (emphasis added); para. 36 (“[W]e are aware of *no improper practices* in the motion picture industry with respect to undisclosed sponsorship in general.”) (emphasis added).

⁸ See Comments of Starz and Ovation (“Starz/Ovation Comments”) at 3 (“The use of product placements in the cable programming and theatrical film industries is not deceptive to viewers. Viewers of cable programming and movies containing product placements ‘know that they are simply watching fictional programming,’ not substantive discussions of the benefits of the products that appear in the programs. In fact, the typical ‘product placement’ consists of little more than the appearance of the product at some point during the program, devoid of any description, endorsement, or promotion of the positive aspects of the product.”) (internal citations omitted); MPAA Comments at 2-3. Commenters arguing for removal of the Exemption present evidence that product placement occurs in theatrical films. See, e.g., CA Comments at 26-27; WGAW Comments at 10. However, they have made no showing of any harm caused by such practices. See CA Comments at 26 (noting the percent of global spending directed toward product placement and providing examples of product placement); WGAW Comments at 10 (providing the same spending data and examples of product placement as CA, and simply stating that product placements are “deceptive without disclosure”).

⁹ Starz/Ovation Comments at 1. See also 15 U.S.C. § 45(n) (the FTC may act if an advertiser makes a material representation or omission that is likely to mislead a reasonable consumer).

¹⁰ See, e.g., FTC Denies CSC’s Petition to Promulgate Rule on Product Placement in Movies (rel. Dec. 11, 1992), <http://www.ftc.gov/opa/predawn/F93/csc-petit5.htm> (“If ... particular instances of product placement arise where there is significant evidence of consumer injury, the [FTC] said it would consider these matters on a case-by-case basis.”).

_____ . In 1963, the Commission exempted theatrical releases subsequently exhibited on television even though the Commission found as an “undeniable reality” that “the great majority of ‘feature’ films made today will be exhibited on television.”¹¹ In 2008, however, it is no longer reasonable to conclude that “‘feature’ film is ‘program matter which is intended for broadcasting.’”¹² As was the case at the time the Feature Film Exemption was established,¹³ there continues to be a substantial time lag between theatrical release and broadcast by licensees.¹⁴ And, due to the development of a complex distribution system that includes cable distribution, Blu-Ray, DVD, Internet distribution, and non-linear MVPD offerings (e.g., video-on-demand (“VOD”) and pay-per-view (“PPV”)), motion picture studios often derive substantial revenue from a film without ever showing that film on broadcast television. Thus, at the time of production, it may be difficult to predict with any certainty whether and when a particular film will ever end up being shown on broadcast television.¹⁵

Moreover, theatrical films that may appear on broadcast television differ significantly from programming produced specifically for television distribution. For example, in the latter case, a television production studio may work closely with a television network or local broadcaster in developing programming, while this is rarely the case in the former instance. And

¹¹ *Feature Film Exemption Order*, para. 32.

¹² *Id.*, para. 33. See NMP Comments at 43. The Commission noted in the *Feature Film Exemption Order* that its conclusion that films are produced with “the intent that they would at some time be broadcast by television stations” was based on the “facts of the industry’s economic life” and “reflected the most realistic approach” at “that time.” *Feature Film Exemption Order*, para. 13, n. 3. See also *id.*, para. 25 (“[T]he economic facts of life of the motion picture industry *today* dictate that one of the principal purposes of film production is for broadcast exhibition...”) (emphasis added). Thus, the Commission appears to have contemplated that the motion picture industry business model would adapt over time, perhaps moving away from the creation of content “intended for broadcasting.”

¹³ *Id.*, para. 35 (concluding that improper practices were unlikely to develop due to the time lag between production of theatrical films and broadcast distribution).

¹⁴ See, e.g., NMP Comments at 42.

¹⁵ See MPAA Comments at 4.

although Commercial Alert observes that movies, when exhibited on broadcast television, often lose the “unbroken story” feature that is essential to theatrical exhibition and distinct from most television programming,¹⁶ this is nothing new. The editing of feature films for television distribution, and the interspersing of commercial breaks throughout movies aired on television, were common practices at the time the Commission first determined that feature films should be exempt from the Disclosure Requirements. Thus, no commenter has demonstrated a nexus between production of theatrical films and their subsequent display on broadcast television that is sufficient to justify application of the Disclosure Requirements to feature films.

* * * * *

For the foregoing reasons, the Commission should terminate its inquiry with respect to application of the Disclosure Requirements to feature films distributed on television and retain the feature film Exemption.

Respectfully submitted,

**MOTION PICTURE ASSOCIATION OF
AMERICA, INC.**

By: /s/ Michael P. O’Leary

Michael P. O’Leary
Senior Vice President & Chief Counsel
Federal Affairs & Policy
Motion Picture Association of America, Inc.
1600 Eye Street, NW
Washington, DC 20006
202-293-1966

¹⁶ See CA Comments at 27.