Stealth Risks of Regulating Stealth Marketing: A Comment on Ellen Goodman's *Stealth Marketing and Editorial Integrity*

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Professor Ellen Goodman's article, *Stealth Marketing and Editorial Integrity*, addresses the regulation of marketing that disguises itself as editorial content, which the article refers to as "stealth marketing." In an era of information overload and hypercommercialism, stealth marketing has become a common way for marketers to garner scarce consumer attention. With its growing ubiquity, stealth marketing has attracted considerable attention from academics, commentators, and consumers.

Sponsorship disclosure laws—requiring marketers/publishers to disclose when content is marketing—can be used to regulate stealth marketing, and they are in fact used in broadcasting media. Yet, despite their potentially important policy role, sponsorship disclosure laws get surprisingly little academic attention.

Professor Goodman tackles this deficiency in the literature by considering how sponsorship disclosure can be a useful policy tool. The article argues that the implicit deception in stealth marketing produces negative externalities by degrading consumer trust in all content they receive. The article then concludes that sponsorship disclosure laws can correct this negative externality and proposes that sponsorship disclosure laws (currently applicable only to a few media) be extended to more media.

These conclusions are intuitively attractive. It is human nature to want to know more rather than less, and in this situation it is very pragmatic to require publishers and marketers simply to tell us when they are engaged in marketing. Even a libertarian might favor this regulation because it increases transparency that helps consumers make smarter marketplace decisions.

Nevertheless, this Comment will explore some possible adverse consequences of sponsorship disclosure laws. If Goodman's article is premised on the need to correct negative externalities, these consequences also must be factored into the deliberations, which may suggest the need for further doctrinal and empirical research on the merits and disadvantages of sponsorship disclosure laws.

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I. Why Do Consumers Care if Content is Marketing?

Consumer attitudes toward marketing can be dichotomous and hard to reconcile. Calfee & Ringold[1] (in a study cited by Professor Goodman) highlighted this confusion in their review of many consumer surveys conducted between the 1920s and the 1980s. Synthesizing the consistent findings of these surveys, Calfee & Ringold paradoxically concluded that 70% of consumers think that marketing is often untruthful and seeks to persuade people to buy things they do not want,[2] but 70% of consumers also think that marketing is useful for information.[3]

Dichotomous findings like this raise some thorny issues for policy-makers. When can regulators rely on consumer opinions about marketing, and how should inconsistent opinions be accounted for?

With this in mind, we should reconsider the universally recognized fact that consumers say that they want to know when content is marketing. Given conflicting consumer attitudes toward marketing, it may not be prudent to base policy on this fact in isolation. More importantly, this fact masks an underlying issue of significant import. We know what consumers say they want, but we do not know *why* consumers want this—why do consumers care about distinguishing between marketing and editorial content, and how will consumers change their behavior in response to such disclosure? Without understanding consumers' motivations for wanting to know, or knowing what they will do with the disclosure, there is no way to tell if sponsorship disclosure laws actually achieve the desired outcome.

Thus, the article attempts to address the manifestations of a problem (consumers want to know the status of content) without addressing the source of that problem (why they want to know). Responding to manifestations of a problem, without correcting the root problem, may lead to unsatisfying results—and, as this Comment will explore, may create new and unexpected problems.

II. Does Disclosure Help—or Hurt—Consumers?

Clearly, consumers value marketing. In fact, in some cases consumers value marketing content as much or more than editorial content. For example, consumers regularly rate the utility of paid Internet search results (such as "sponsored links") as equal to or better than unpaid search results generated by the search engine's algorithms.[4] In one survey, 75% of consumers felt this way.[5]

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1. John E. Calfee & Debra J. Ringold, *The 70% Majority: Enduring Consumer Beliefs About Advertising*, 13 J. PUB. POL'Y & MARKETING 228 (1994).

2. *Id.* at 236.

3. *Id.* at 233.

4. *See, e.g.*, ICROSSING, HOW AMERICA SEARCHES 11 fig.17 (2005) (reporting that 49% either preferred sponsored search results or were indifferent between editorial search results and sponsored

Yet, consumer distrust toward marketing is so strong that consumers often disregard marketing without assessing its actual utility to them. The "advertising" label is a powerful disclosure; it can single-handedly cause consumers to overlook content they would have otherwise found meritorious.

A 2005 study by Jansen and Resnick[6] illustrates this risk. Consumers were shown multiple sets of Internet search results, some of which were labeled advertising. Although the search results substantively were the same, consumers rated the unlabeled search results as more relevant than the labeled results.[7] In other words, the advertising label single-handedly degraded the consumers' relevancy assessment even though the search results had the same level of relevancy.[8]

The risk of consumer overresponse to marketing labels poses an interesting policy conundrum. Superficially, the populist approach would be to give consumers what they want (to know when content is marketing). Yet, this approach has the risk of counterproductively and systematically increasing consumers' erroneous content assessments, which in turn may hurt consumers' ability to get content they would find useful. At minimum, any cost–benefit analysis of sponsorship disclosure laws should account for the costs of these errors.

III. Obscure Disclosures vs. Noisy Disclosures

Assuming that mandatory sponsorship disclosures are cost–benefit justified, the article does not address how the disclosures should be presented to consumers. Yet, the mechanical details are crucial to the efficacy of any proposed solution.

If forced to make unwanted disclosures, publishers can do so half-heartedly by burying sponsorship disclosure in such an obscure location that reasonable consumers probably will not see it. This may very well describe

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search results); IPROSPECT, SEARCH ENGINE USER ATTITUDES 18–20 (2004), *available at* http://www.iprospect.com/premiumPDFs/iProspectSurveyComplete.pdf (illustrating that users of the MSN search engine found paid search advertisements more useful than editorial search results and that users of the AOL search engine found paid search advertisements at least as useful as editorial search results)

5. *See* Stefanie Olsen, *Software Tool Smothers Sponsored Search*, NEWS.COM, Nov. 14, 2003, http://news.com.com/2102-1032_3-5107846.html (citing a survey finding that 24% found sponsored search results more useful than editorial search results and 51% found them just as useful).

6. *See* Bernard J. Jansen & Marc Resnick, Examining Searcher Perceptions of and Interactions with Sponsored Results (June 5, 2005), *available at* http://www.ist.psu.edu/faculty_pages/jjansen/academic/pubs/jansen_ecommerce_workshop.pdf.

7. *See* Press Release, Penn State University, Consumers Suspicious of Sponsored Links (June 10, 2005), http://live.psu.edu/story/12348 ("While study participants rated 52 percent of the organic results as 'relevant,' searchers described 42 percent of sponsored links as 'relevant' even though both sets of results were identical.").

8. *Id.* (stating that "[E]ven when the returned results are exactly the same, people still view what they thought of as the organic results as better [than the advertising results]." (quoting Professor Jim Jansen)).

the typical implementations by broadcasters today. For example, television broadcasts often disclose sponsorships in the end-of-show credits that are effectively invisible to most consumers. Consumers typically have little reason to read credits carefully, and even if they tried, it may be challenging to read the small type as it scrolls quickly and is obscured by the broadcaster's allocation of screen space to other promotions. If consumers do not notice obscure sponsorship disclosures, the disclosures cannot produce the positive benefits that the article seeks.

Further, sponsorship disclosures may be made after the consumer has formed an opinion about the content (such as in end-of-show credits, after the consumer has watched the entire show). I have not seen any empirical analysis of the consequences of after-the-fact sponsorship disclosures, but based on analogous psychological principles such as framing, ex post disclosures may not fully correct any misassessments of the content made by consumers.

Thus, to achieve the sought-after policy benefits, sponsorship disclosures may need to be noticed by consumers and disclosed early in consumers' content experience. I call these "noisy disclosures." Noisy disclosures solve the obscurity problem but create at least two new ones.

First, many consumers already suffer from information overload. Yet, noisy disclosures consume more of their already-strapped attention. Some consumers will feel that the disclosed information is valuable enough that they will not mind the "cost" of having their attention consumed, but others will resent the imposition. For the latter consumers, the mandated disclosure becomes another form of spam (unwanted content).

Ironically, mandated sponsorship disclosures could create a negative externality analogous to the one that the article attributes to stealth marketing. The article argues that stealth marketing degrades consumer trust in otherwise-trustworthy content. Similarly, to the extent that consumers do not find mandated sponsorship disclosures valuable to them, they will tune them out. Further, if consumers routinely find mandated disclosures unhelpful, they may be inclined to adopt an across-the-board heuristic to tune out mandated disclosures, even if those disclosures are socially valuable. Thus, as disclosures generally become noisier, consumers may increasingly become disinterested in all of them—a different negative externality than the one identified by the article, but problematic nonetheless.

Second, as discussed above, noisier disclosures should increase the number of consumers who see the disclosure and use it to make erroneous categorization judgments about the marketing. Indeed, this effect may support a self-reinforcing feedback loop. By mandating sponsorship disclosures, the government communicates to consumers that they should care about the distinctions between editorial and marketing content. Thus, consumers may care about the editorial–marketing divide because the government has mandated disclosure, while the government may mandate disclosure because consumers say they care about the divide. When the government makes disclosures louder, it may simply be ratcheting up the communicative import of the message, heightening consumer sensitivity to the sponsorship disclosure and magnifying the risk of erroneous consumer reactions to the disclosure.

IV. Conclusion

As the Calfee & Ringold study indicates, most consumers view marketing suspiciously. Among many possible reasons, consumers suspect that marketers are manipulating them to make unwanted choices for the marketer's profits. Stealth marketing represents the natural evolution of those fears about manipulation; the surreptitious nature of stealth marketing only heightens the perception that marketers are doing something improper. As Justice Brandeis has said, "Sunlight is . . . the best of disinfectants,"[9] so unmasking stealth marketing seems like an ideal way to curb such untoward behavior by marketers.

But marketing's bad reputation is partially undeserved. Marketing can educate consumers, help them make better decisions, and improve marketplace competition in a way that benefits all consumers (even those not exposed to the marketing). So the question remains: on balance, are we better off if marketing is transparent?

Professor Goodman's article posits an explanation why transparency is important. But as this Comment has explored, transparency creates new additional costs that need to be considered. The net effect of these theoretical considerations is indeterminate, making it hard to generate reliable policy recommendations.

Despite this, the article makes one point that I wholeheartedly agree with. Unless some empirical data indicate that consumers do, in fact, evaluate stealth marketing differently based on the medium used to deliver it, sponsorship disclosure rules should not differ by media. However, this insight may support an across-the-board rollback of the rules rather than an expansion of them.

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9. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY – AND HOW THE BANKERS USE IT 62 (Richard M. Abrams ed., Harper & Row 1967) (1914).