

2014: Brand Totalitarianism

Peter S. Menell*

As the Cold War commenced, George Orwell famously warned of a dystopian future in which government authorities pervasively surveil their citizens as part of an insidious system of public mind control.¹ In *Nineteen Eighty-Four*, Big Brother, the leader of the ruling party, controls the thoughts, values, and actions of the population through technology and information. The Ministry of Truth – which dictates news, entertainment, education, and the arts – uses large, ubiquitous two-way telescreens to broadcast propaganda and monitor citizens’ activities. Orwell’s dystopian vision achieved iconic literary and political status, although its dire predictions proved exaggerated . . . or possibly premature.²

While leaks of the National Security Administration’s (NSA) clandestine PRISM mass electronic data mining program have dominated headlines and reignited sales of *Nineteen Eighty-Four*,³ a more gradual, but possibly comparably significant, shift in information control has unfolded without much fanfare: the growing integration of advertising into news, media, expressive creativity, and social activity.⁴ This story is far less dramatic than the NSA controversy, but it may have greater ramifications for public health, expressive freedom, journalistic independence, and other economic, social, and political concerns. This story revolves around markets, corporate data centers, and technological change as opposed to clandestine government institutions. It is more Adam Smith and Facebook than Benito Mussolini or Joseph Stalin; more Mad Men, Marshal McLuhan, and digital video recorders (DVRs) than J. Edgar Hoover or Edward Snowden.

The growing integration of advertising into mass media and Internet services in the digital age represents a subtle, but real and present threat to expressive freedom, free will, and public well-being. What began as a largely innocuous means of cross-subsidizing print media and a solution to funding broadcast media has increasingly distorted the integrity of news reporting and creative expression. Part I explores the development of the advertising industry as a branch of applied psychological research. Part II traces the relationship between advertising and the funding and dissemination of expressive creativity. Part III explores the policy

* Koret Professor of Law and Director, Berkeley Center for Law & Technology, University of California at Berkeley School of Law. I thank Tup Ingram and Jenna Stokes for excellent research assistance.

¹ GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (1949).

² See Lewis Beale, *We’re Living ‘1984’ Today*, CNN, Aug. 3, 2013, <http://www.cnn.com/2013/08/03/opinion/beale-1984-now>.

³ See Dominique Mosbergen, *George Orwell’s ‘1984’ Book Sales Skyrocket In Wake Of NSA Surveillance Scandal*, HUFFINGTON POST, June 11, 2013, http://www.huffingtonpost.com/2013/06/11/orwell-1984-sales_n_3423185.html.

⁴ See Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83 (2006) (“the first article in the legal literature to address the normative implications of covert marketing in mass media”); Andrew M. Kaikati & Jack G. Kaikati, *Stealth Marketing: How to Reach Consumers Surreptitiously*, CAL. MGMT. REV., Summer 2004, at 6.

challenges posed by the growing integration of advertising into mass media and the larger Internet-driven cultural landscape.

I. Advertising: Useful Information or Mind Control?

In the most charitable account, advertising provides consumers with useful information and reduces the costs of searching for goods and services. The informative model of advertising traces back to “Chicago School” economists writing in the early 1960s.⁵ This research typically assumes that consumer preferences are relatively fixed.⁶ Don Draper⁷ and most economic and psychological researchers would beg to differ. In the canonical view, advertising serves to persuade, manipulate, and condition consumers.⁸ And the more effective such persuasion, the higher the price that advertisers are willing to pay for the opportunity to bundle their advertisements with programming. This section traces and summarizes applied psychological research relating to advertising. It then focuses on psychological research on the effects of advertising on children.

A. The Psychology of Advertising

Advertisers have used insights from psychological research since the dawn of this social science.⁹ William James established the first American psychology laboratory in 1875¹⁰ and

⁵ See Kyle Bagwell, *The Economic Analysis of Advertising*, in 3 HANDBOOK OF INDUS. ORG. 1701, 1716–20 (M. Armstrong & R. Porter eds., 2007) (summarizing the formative work); George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961) (presenting an optimal search model in which advertising reduces price dispersion); S.A. Ogza, *Imperfect Markets Through Lack of Knowledge*, 74 QUARTERLY J. ECON. 29 (1960) (suggesting that advertising effort is less productive as more potential buyers become informed); L.G. Telser, *Advertising and Competition*, 72 J. POL. ECON. 537 (1964) (observing that advertising is frequently a means of entry and a sign of competition); see also Sherwin Rosen, *Advertising, Information, and Product Differentiation*, in ISSUES IN ADVERTISING: THE ECONOMICS OF PERSUASION 161 (David G. Tuerck ed., 1978) (rejecting the argument that advertising distorts taste and viewing advertising as an efficient way to communicate differences in products so as to empower consumers to select according to their preferences).

⁶ See George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 AM. ECON. REV. 76 (1977).

⁷ Don Draper is the lead character in the hit AMC cable network series, *Mad Men*, which traces the development of the modest Madison Avenue advertising firm in the 1960s. See *Mad Men*, WIKIPEDIA, http://en.wikipedia.org/wiki/Mad_Men (last visited Aug. 13, 2013).

⁸ See Bagwell, *supra* note 5, at 1708–16. Much of this section surveys psychological theories of advertising.

⁹ See David P. Kuna, *The Concept of Suggestion in the Early History of Advertising Psychology*, 12 J. HIST. BEHAV. SCI. 347, 347–53 (1976).

¹⁰ See William James, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Oct. 23, 2009), <http://plato.stanford.edu/entries/james/#3>.

published his seminal treatise, *The Principles of Psychology*, in 1890.¹¹ By 1895, Harlow Gale, a psychologist at the University of Minnesota, had conducted the first American experiments on the psychology of advertising.¹²

Gale tested the relative attention value in print advertising of relevant and irrelevant words, of different parts of magazine pages, and of colors.¹³ Using Gale's methodology and building upon a then prominent theory of hypnosis,¹⁴ William Dill Scott focused his advertising research on the concept of suggestion, a central concept in advertising psychology to this day.¹⁵ Scott studied the suggestion hypothesis, common to many theories of hypnosis, which held that the narrowing of attention could cause automatic expression of a suggested idea, in order to increase advertising's effectiveness.¹⁶

Subsequent research by advertisers and psychologists generally views advertising as a persuasive, as opposed to an informative, medium.¹⁷ A critical corollary of this "persuasive

¹¹ See WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* (1890).

¹² See HARLOW GALE, *On the Psychology of Advertising*, in *PSYCHOLOGICAL STUDIES* 36 (1900); see also John Eighmey & Sela Sar, *Harlow Gale and the Origins of the Psychology of Advertising*, 36 *J. ADVERTISING* 147–58 (2007).

¹³ See Gale, *supra* note 12, at 53, 57, 58.

¹⁴ *Id.* at 47, 50. See also, e.g., HENRI ELLENBERGER, *THE DISCOVERY OF THE UNCONSCIOUS: THE HISTORY AND EVOLUTION OF DYNAMIC PSYCHIATRY* 85–90 (1970).

¹⁵ See WALTER DILL SCOTT, *THE THEORY AND PRACTICE OF ADVERTISING*, 47, 53 (1916).

¹⁶ See Walter D. Scott, *The Psychology of Advertising*, *THE ATLANTIC*, January 1, 1904 <http://www.theatlantic.com/magazine/archive/1904/01/the-psychology-of-advertising/303465/>; see also SCOTT, *THE THEORY AND PRACTICE OF ADVERTISING*, *supra* note 15, at 47, 53.

¹⁷ See Ronald Faber, et al., *Coloring Outside the Lines: Suggestions for Making Advertising Theory More Meaningful*, in *ADVERTISING THEORY* 18–32 (Shelly Rodgers & Esther Thorson eds., 2012); Rajeev Batra & Michael L. Ray, *How Advertising Works at Contact*, in *PSYCHOLOGICAL PROCESSES AND ADVERTISING EFFECTS: THEORY, RESEARCH, AND APPLICATIONS* 13–44 (Linda Alwitt & Andrew Mitchell eds., 1985); Linda Alwitt & Andrew Mitchell, *Concluding Remarks*, in *PSYCHOLOGICAL PROCESSES AND ADVERTISING EFFECTS: THEORY, RESEARCH, AND APPLICATIONS* 13–44 (Linda Alwitt & Andrew Mitchell eds., 1985); VANCE PACKARD, *THE HIDDEN PERSUADERS: AN INTRODUCTION TO THE TECHNIQUES OF MASS-PERSUASION THROUGH THE UNCONSCIOUS* (1957). Note, however, that informative advertising plays a role in the introduction of new products to the market and in allowing consumers to differentiate among similar products. In a mature marketplace, however, the majority of advertising is persuasive in nature, and the persuasive aspects of advertising have been the primary source of psychological research during the age of mass media. See, e.g., JOHN CALFEE, *FEAR OF PERSUASION: A NEW PERSPECTIVE ON ADVERTISING* (1998); Gene M. Grossman and Carl Shapiro, *Informative Advertising with Differentiated Products*, 51 *Rev. Econ. Stud.* 63–81 (1984); Daniel A. Ackerman, *Empirically Distinguishing Informative and Prestige Effects of Advertising*, 32 *RAND J. ECON.* 316 (2001); Bagwell, *supra* note 5, at 1705–06. *The Economic Analysis of Advertising*, in M. Armstrong & R. Porter, *HANDBOOK OF INDUSTRIAL ORGANIZATION* 1708, Elsevier (2007).

intent” is that advertising, once recognized as such, results in the target’s developing psychological resistance, a natural consequence of any perceived threat to behavioral freedom.¹⁸ This resistance can manifest as skepticism toward a persuasive message,¹⁹ which can be particularly intensely directed toward advertising, since the message’s intent is likely to be seen as self-serving.²⁰ These innate psychological defense mechanisms (resistance and skepticism) therefore can be decreased if the target does not realize that she is being persuaded.²¹ “When consumers recognize a communication as a persuasion attempt, they will process the message differently than if no such recognition occurred. They may get distracted [and] . . . disengage” from the persuasive message.²² Advertisements work best when they are not recognized as such.²³

Numerous psychological models describe advertising’s persuasive ability. Among the most influential are Robert Heath’s Low Involvement Processing Model and Friestad and Wright’s Persuasion Knowledge Model.²⁴ Both models recognize advertising’s persuasive content and the target’s attempts to resist this persuasion. The Low Involvement Processing Model focuses on “the entire process of brand choice” and begins with a perception that “consumers rarely find themselves able to base brand choice on rational performance.”²⁵ It emphasizes that “we tend to process media passively” and through automatic or subconscious processes.²⁶ This passive learning creates subconscious associations with the advertised brand, even if the target cannot consciously recall either the association or even her exposure to the advertisement.²⁷ Low attention advertising “can be a strong motivator of brand choice, without consumers realising it . . . [because it] creates strong brand associations.”²⁸

The Persuasion Knowledge Model focuses on consumers’ reactions to advertisements’ persuasive content. It states that targets attempt to “cope” with persuasive messages, in order

¹⁸ See S.S. Brehm & J.W. Brehm, *PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL* (1981).

¹⁹ See Faber, *supra* note 17, at 20.

²⁰ See John E. Calfee & Debra Jones Ringold, *Consumer Skepticism and Advertising Regulation: What Do the Polls Show?*, 15 *ADVANCES IN CONSUMER RESEARCH* 244–48 (1988).

²¹ See John McCarty & Tina Lowrey, *Product Integration: Current Practices and New Directions*, in *THE PSYCHOLOGY OF ENTERTAINMENT MEDIA* Chapter 2 (L.J. Shrum ed., 2d ed. 2012).

²² See *id.*

²³ See, e.g., Marian Friestad & Peter Wright, *The Persuasion Knowledge Model: How People Cope with Persuasion Attempts*, 21 *J. CONSUMER RES.* 1–31 (1994).

²⁴ ROBERT HEATH, *THE HIDDEN POWER OF ADVERTISING: HOW LOW INVOLVEMENT PROCESSING INFLUENCES THE WAY WE CHOOSE BRANDS* (2001); Friestad & Wright, *supra* note 23.

²⁵ HEATH, *supra* note 24, at 76.

²⁶ *Id.* at 77.

²⁷ *Id.* at 78.

²⁸ *Id.* at 79.

“simply to maintain control over the outcome” of these interactions.²⁹ This model requires that the target recognizes advertising’s persuasive content in order to activate the coping mechanisms. Absent such recognition, the target will not develop the requisite skepticism to cope with the message’s persuasive intent.

Advertising best persuades its audience at low levels of cognitive involvement.³⁰ The low attention paid an advertisement allows it to evade the target’s natural psychological resistance to persuasion.³¹ Thereafter, repetition of the message influences the consumer to respond to the marketing stimulus and to act in accordance with the advertiser’s goals.³² “Perhaps the most important feature of advertising . . . is its highly repetitive nature.”³³ In a sense, the target’s natural defenses are worn down by two aspects of a persuasive commercial message: its stealth and its repetitiveness.

The above analysis refers to “traditional advertising,” advertisements which are clearly and obviously separate from the creative content which the viewer intends to watch. Approximately 25% of each hour watching commercial television in the United States consists of exposure to such commercials.³⁴ Despite the fact that traditional advertising is easily recognized as such,³⁵ it still works best when it can “exert an influence over our brand choices at

²⁹ Friestad & Wright, *supra* note 23, at 6.

³⁰ See, e.g., Anthony G. Greenwald & Clark Leavitt, *Cognitive Theory and Audience Involvement*, in *PSYCHOLOGICAL PROCESSES AND ADVERTISING EFFECTS* 221–26 (Linda F. Alwitt & Andrew A. Mitchell eds., 1985).

³¹ See, e.g., Peter Wright, *Factors Affecting Cognitive Resistance to Advertising*, 2 *J. CONSUMER RES.* 1–9 (1975); see also Margaret C. Campbell, *When Attention-Getting Advertising Tactics Elicit Consumer Inference of Manipulative Intent: The Importance of Balancing Benefits and Investments*, 4 *J. CONSUMER PSYCHOL.* 225–54 (1985) and Rohini Ahluwalia, *Examination of Psychological Processes Underlying Resistance to Persuasion*, 27 *J. CONSUMER RES.* 217–32 (2000).

³² See, e.g., Pamela Miles Homer, *Product Placements: The Impact of Placement Types and Repetition on Attitudes*, 38 *J. ADVERTISING* 21–32 (2009); see also Andrew A. Mitchell & Jerry C. Olson, *Are Product Attribute Beliefs the Only Mediator of Advertising Effects on Brand Attitude?* 18 *J. MARKETING RES.* 318–32 (1981); see also Margaret C. Campbell & Kevin Lane Keller, *Brand Familiarity and Advertising Repetition Effects*, 30 *J. CONSUMER RES.* 292–304 (2003); see also John T. Cacioppo & Richard E. Petty, *Effects of Message Repetition and Position on Cognitive Response, Recall and Persuasion*, 37 *J. PERSONALITY AND SOCIAL PSYCHOL.* 97–109 (1979).

³³ Xiaoli Nan & Ronald J. Faber, *Advertising Theory: Reconceptualizing the Building Blocks*, 4 *MARKETING THEORY* 7, 17 (2004), available at <http://www.uk.sagepub.com/hackley/SJO%20Articles%20for%20Website/Chapter%202%20-%20Nan%20&%20Faber.pdf>.

³⁴ Stuart Elliott, *And Now, a Commercial Break that Doesn’t Seem Like One*, *N.Y. TIMES*, March 21, 2007, http://www.nytimes.com/2007/03/21/business/media/21adco.html?_r=0.

³⁵ By adults only; see *infra*, pages __-__ <subsection B>, regarding children’s inability to recognize the persuasive intent of even traditional advertising.

a non-conscious level.”³⁶ “Ads are not meant for conscious consumption. They are intended as subliminal pills for the subconscious.”³⁷ Brand learning occurs through repetitive low attention exposure to branding messages.³⁸ Once a consumer is aware of a commercial's persuasive intent,³⁹ she can defend against the advertiser's goals through the unconscious and automatic defense mechanisms above and through conscious means, most obviously by avoiding the message completely.⁴⁰ People view advertising messages skeptically.⁴¹

Embedded advertising, encompassing both product placement and product integration,⁴² incorporates the advertised product into the program's storyline. Embedded advertising intends to “draw on the program's credibility” in order to promote the product.⁴³ In contrast to traditional advertising, embedded advertising cannot be avoided consciously since it is integrated into the plot. Furthermore, viewers “can have trouble recognizing product placement as advertising . . . while engrossed in a story.”⁴⁴ If an advertisement is not recognized as such, neither psychological defense mechanisms nor conscious avoidance allows the viewer to avoid its persuasive intent. “[P]roduct placement is less likely to activate these defense mechanisms, for several possible reasons. In situations in which information (the embedded ad) is secondary to the main message (the entertainment content), viewers may dedicate fewer cognitive resources to processing the embedded ad.”⁴⁵ Embedded advertising overcomes the target's natural

³⁶ HEATH, *supra* note 24.

³⁷ HEATH, *supra* note 24 at 76 (quoting MARSHALL McLuhan, *UNDERSTANDING MEDIA: EXTENSIONS OF MAN* (1964)).

³⁸ MAX SUTHERLAND & ALICE K. SYLVESTER, *ADVERTISING AND THE MIND OF THE CONSUMER: WHAT WORKS, WHAT DOESN'T AND WHY*. 8, 91, 95 (2d ed. 1993).

³⁹ This section refers only to advertisements directed at adults. As seen below, with children, both conscious and unconscious avoidance of commercials' persuasive intent is problematic.

⁴⁰ For example, consumers can skip the commercial content entirely through the use of a digital video recorder. *See, e.g., Fox Broad. Co. Inc. v. Dish Network, L.C.C.*, 905 F. Supp. 2d 1088 (C.D. Cal. 2012) *aff'd sub nom. Fox Broad. Co., Inc. v. Dish Network L.L.C.*, 12-57048, 2013 WL 3814917 (9th Cir. July 24, 2013).

⁴¹ *See* Farber, *supra* note 17, at 20..

⁴² *See* Federal Communications Commission, *Notice of Inquiry and Notice of Proposed Rulemaking In the Matter of Sponsorship Identification Rules and Embedded Advertising*, 73 Fed. Reg. 43195 (2008).

⁴³ *See Id.*

⁴⁴ *See* Campaign for a Commercial-Free Childhood, *Letter to The Honorable Kevin J. Martin, Chairman, Federal Communications Commission*, June 19, 2008 (citing Yang, Moonhee et al., *Mental Models for Brand Placement* and John A. McCarty, *Product Placement: The Nature of the Practice and Potential Avenues of Inquiry*, in *THE PSYCHOLOGY OF ENTERTAINMENT MEDIA: BLURRING THE LINES BETWEEN ENTERTAINMENT AND PERSUASION* 49–50, 79–81 (L.J. Shrum ed., 2004)).

⁴⁵ Rita Marie Cain, *Embedded Advertising on Television: Disclosure, Deception, and Free Speech Rights*, 30 J. PUBLIC POLICY & MARKETING 226, 232 (2011).

conscious skepticism, subverts her unconscious defense mechanisms, and approaches the level of subliminality, long considered the “holy grail” of advertising.⁴⁶

B. Advertising and Children

Since the Swiss developmental psychologist Jean Piaget pioneered the study of human cognitive development in the 1920s and 1930s, defining four stages of cognitive development corresponding to the child’s increasing ability to interact behaviorally, linguistically, and mentally with the world,⁴⁷ numerous investigators have focused on specific age-related abilities which relate specifically to children’s susceptibility to advertising’s persuasive message. These include younger children’s relative inabilities to pay attention to advertising, to discriminate between programs and commercials, to understand advertising’s persuasive intent, to question the truthfulness of advertising, and to recall commercial content.⁴⁸ Children’s ability to comprehend and thereby to resist the persuasive content of television commercials seems to be strongly correlated with the Piagetan neurodevelopmental stages. In fact, marketing theorists explicitly have coopted Piaget’s concepts in order to shape children’s “process of consumer socialization.”⁴⁹

A recent review supported by the National Science Foundation (NSF) examined the psychological and marketing literature to assess “children’s ability to appreciate and cope with advertising.”⁵⁰ It analyzed these abilities by looking at three distinct elements: (1) distinguishing

⁴⁶ See, e.g., Kenneth Lipartito, *Subliminal Seduction: The Politics of Consumer Research in Post-World War II America*, in *THE RISE OF MARKETING AND MARKETING RESEARCH* (Hartmut Berghoff, Uwe Spiekermann, & Philip Scranton eds. 2012). See also, e.g., GERARD J. TELLIS, *EFFECTIVE ADVERTISING: UNDERSTANDING WHEN, HOW, AND WHY ADVERTISING WORKS* 122 (2003).

⁴⁷ See, e.g., W. Huitt & J. Hummel, *Piaget's Theory of Cognitive Development*, EDUCATIONAL PSYCHOLOGY INTERACTIVE (2003), <http://www.edpsycinteractive.org/topics/cognition/piaget.html> (last visited July 27, 2013). These stages include: The Sensorimotor Stage, from birth to two years, when children’s knowledge is limited to sensory perceptions and behaviors are simple motor responses; the Preoperational Stage, from two to six years, when children learn to use language but cannot mentally manipulate information or assume others' points of view; the Concrete Operational Stage, from seven to eleven, when children begin to think logically but have difficulty understanding abstract or hypothetical concepts; and the Formal Operational Stage, after twelve years of age, when they begin to think about abstract concepts and learn deductive reasoning.

⁴⁸ Deborah L. Roedder, *Age Differences in Children's Responses to Television Advertising: An Information-Processing Approach*, 8 J. CONSUMER RES. 144–53 (1981).

⁴⁹ Valerie-Ines de la Ville & Valerie Tartas, *Developing as Consumers*, in David Marshall, ed., *Understanding Children as Consumers*, Sage, London, p. 26 (2010). See also D.T. Cook, *The Missing Child in Consumption Theory*, 8 J. Consumer Culture 219 (2008).

⁵⁰ Louis J. Moses & Dare A. Baldwin, *What Can the Study of Cognitive Development Reveal About Children's Ability to Appreciate and Cope with Advertising?*, 24 J. PUB. POL’Y & MARKETING 186 (2005). This study incorporates theories of developmental psychology which

between advertising and program content; (2) inferring the intentions underlying advertising,⁵¹ and (3) recognizing biases and promotional intent in advertising.⁵² This study concludes that children have well-formed conceptions of the intentions underlying advertising by seven or eight years of age but that they are not able to deploy these concepts effectively in their everyday lives until much later in development.⁵³ Immaturities in children's executive functioning render children unable to cope with advertisements prior to adolescence.⁵⁴

The NSF review concedes that the literature has focused primarily on "traditional television advertising"⁵⁵ and concludes that, "the executive challenges posed by increasingly subtle and/or sophisticated forms of advertising (e.g., merchandising, infomercials, Internet advertising) may be substantially greater [than children can overcome]. Although public policy research on children and advertising has focused heavily on the emergence of various advertising concepts, we urge that equal emphasis be placed on their ability to put these concepts to use in their everyday lives."⁵⁶

A British study similarly concluded that "[i]nvestigating the effects of unrecognized advertisements on web pages is an important issue for future research, because children's increasing use of new media means that they are more likely to be exposed to advertisements that they do not recognize as marketing messages."⁵⁷ This conclusion likely can be generalized to advertisements achieved through product integration into entertainment content.

The NSF and British findings are consistent with a subsequent Institute of Medicine (IOM) study which concluded that generally, children under the age of eight do not understand advertising's persuasive intent.⁵⁸ This report evaluated over 100 analyses of the effects of advertising on children and found that, "[e]stimates of the age at which children can consistently discriminate [television] advertisements as separate and distinct from adjacent programming

have evolved from Piaget's original work and which are consistent with both the Low Involvement Processing and Persuasion Knowledge Models, described above. Its bibliography contains approximately 140 original articles and monographs primarily from the child development, psychology, marketing, and public policy literature.

⁵¹ These inferences include recognizing the intent to sell, recognizing persuasive intent, and recognizing informative and deceptive intent.

⁵² *Id.* at 191-94.

⁵³ Moses & Baldwin, *supra* note 50.

⁵⁴ *Id.* at 195-96.

⁵⁵ *Id.* at 197.

⁵⁶ *Id.*

⁵⁷ Moondore Ali, Mark Blades, Caroline Oates & Fran Blumberg, *Young Children's Ability to Recognize Advertisements in Web Page Designs*, 27 BRIT. J. DEV. PSYCHOL. 71, 72 (2009).

⁵⁸ See J. Michael McGinnis, Jennifer Appleton Gootman, Vivica I. Kraak, eds., *Food Marketing to Children and Youth: Threat or Opportunity?*, NATIONAL ACADEMY OF SCIENCES, Committee on Food Marketing and the Diets of Children and Youth, 231 (2006). See also *infra*, more specifically regarding public health issues related to poor dietary choices.

range from as young as age 3 years to as old as age 6 years”⁵⁹ Another study recently found that, “[a]wareness of ‘persuasive’ intent emerged slowly as a function of age but even by our oldest age-group [(11 to 12 year olds)] was only 40%. Children are especially vulnerable to advertising at least into puberty. This finding has important implications regarding the debate surrounding the regulation of junk food (and other) advertising aimed at children.”⁶⁰

This consensus is underscored by the American Psychological Association’s (APA) Task Force on Advertising and Children, which studied “the impact of advertising on children, with particular attention given both to the implications of children’s cognitive development for understanding the potential effects of exposure to advertising and to specific harms that might result from exposure to advertising.”⁶¹ The task force found that children have been specifically targeted by advertisers to a degree that demanded government intervention for more than a century.⁶² Although commercials directed at children were not commonplace until television, their numbers have grown exponentially with cable television and the Internet. Children now frequently consume media without adult supervision.⁶³

The APA found that “[r]esearch on children’s commercial recall and product preferences confirms that advertising typically achieves its intended effect[]” of influencing product preferences and that “[a] variety of studies have found a substantial relationship between children’s viewing of tobacco and alcohol ads and positive attitudes toward consumption of such products.”⁶⁴ The APA study concluded that “advertising targeting children below the ages of 7–8 years is inherently unfair because it capitalizes on younger children’s inability to attribute persuasive intent to advertising.”⁶⁵ As a result of this limitation, children below this age comprehend the information contained in television commercials uncritically, accepting most advertising claims and appeals as truthful, accurate, and unbiased.⁶⁶ Until fairly recently, advertisers tended to view children in this age range as off limits as advertising targets, but

⁵⁹ *Id.* at 295-96.

⁶⁰ See Owen B.J. Carter et al., *Children’s Understanding of the Selling Versus Persuasive Intent of Junk Food Advertising: Implications for Regulation*, 72 SOC. SCI. AND MED. 962–68 (2011); Angela J. Campbell, *Restricting the Marketing of Junk Food to Children by Product Placement and Character Selling*, 39 Loy. L.A. L. Rev. 447 (2006).

⁶¹ Brian L. Wilcox et al., *Report of the Task Force on Advertising and Children*, AMERICAN PSYCHOLOGICAL ASSOCIATION 2 (2004). Note that, as in the NSF study, this review acknowledges that, “concerns about advertising that have emerged as a result of new and changing technological capabilities, such as interactive forms of advertising and commercial Web sites targeting children, have yet to attract almost any empirical study.” *Id.*

⁶² “The British Parliament passed legislation in 1874 intended to protect children from the efforts of merchants to induce them to buy products and assume debt.” *Id.* 3.

⁶³ *Id.* at 4.

⁶⁴ *Id.* at 6.

⁶⁵ *Id.* at 7.

⁶⁶ *Id.* at 11.

industry practices have changed as new developments in media technology have facilitated greater degrees of age-niche programming and related advertising.”⁶⁷

The APA recommended “that restrictions be placed on advertising to children too young to recognize advertising’s persuasive intent” and that “advertising disclaimers in children’s programming be stated in language children can understand and be aired in both audio and video for a time length conducive to reading, hearing, and comprehending.”⁶⁸ This warning is especially applicable regarding embedded advertising, since, as the IOM concluded, although “the age at which children understand persuasive intent in advertising has been well established for television, the issue has not yet been scrutinized on the Internet [or in embedded advertising]. Given the greater overall blurring of boundaries between commercial and noncommercial messages on the Internet, there is reason to expect that such ability may be delayed in surfacing as compared to the developmental patterns established as normative for television.”⁶⁹

The overwhelming weight of the available psychological evidence indicates that children are not mentally capable of distinguishing among the informative, entertainment, and commercial attributes of even traditional advertising until adolescence. Children do not understand that commercials are trying to sell them something. In this context, embedded advertising, which purposely blurs the distinctions among these attributes, likely will have an especially strong influence on younger consumers of commercial communication.

II. Advertising, Media, and Technological Change

Modern advertising industries developed symbiotically with print media in the nineteenth century.⁷⁰ Advertisements provided an additional revenue stream for newspapers and magazines; print media provided an effective vehicle for product manufacturers to build brand recognition and attract consumers. The resulting bundled media served commerce and entertainment. And the line between the content – news and art – and product advertising remained relatively clear.

With the advent of radio and later television broadcasting, advertising took on a more central role in supporting creative production by addressing a fundamental appropriability problem. For much of broadcasting history, broadcast signals were non-excludable (i.e., they were freely available to anyone with a receiving device regardless of whether the recipient paid for the programming) and non-rivalrous (consumption by one person does not diminish the quality of access by others). By bundling programming with advertisements, broadcasters

⁶⁷ *Id.* at 7–8

⁶⁸ *Id.* at 8, 12.

⁶⁹ *Food Marketing to Children and Youth: Threat or Opportunity?*, NATIONAL ACADEMY OF SCIENCES, COMMITTEE ON FOOD MARKETING AND THE DIETS OF CHILDREN AND YOUTH 297 (2006).

⁷⁰ See THOMAS O’GUINN, CHRIS ALLEN, & RICHARD J. SEMENIK, *ADVERTISING AND INTEGRATED BRAND PROMOTION* 81-82 (4th ed. 2006).

indirectly funded investments in producing and distributing content. Consumers did not have to pay directly for programming.

As with print media, consumers could readily recognize interruptions to programming. Television advertisements were typically breaks from the shows being broadcast, although some early variety shows included product pitches in the show format. Such pitches, however, were overt. As television programming evolved in the mid-twentieth century, programming and advertisement became discrete, overt, and separated. The producer and director of a television series or a motion picture would not ordinarily have any knowledge of what advertisements would be interspersed between program segments.

The development of home video recording technology brought about the most dramatic effects on the use of advertising in television content, although the changes did not manifest for several decades. Sony's introduction of the Betamax video cassette recorder (VCR) technology in the late 1970s enabled television consumers to record shows for later viewing. The VCR provided the means for consumers to not only shift when they watched a show but also, as remote control devices improved, to skip commercials. Nonetheless, relatively few consumers used their VCRs in this manner.

The advent of digital video recorders (DVRs) in the spring of 1999⁷¹ brought about a dramatic change in viewing habits. The ease of use, enhanced storage capacity, and widespread adoption of these devices substantially reduced the number of television commercials seen by consumers.⁷² In 2012, 46% of U.S. homes had DVRs, up 9% from 2011.⁷³ As a result, Hollywood and Madison Avenue increasingly turned their attention to an old, but limited, technique: product placement.

Product placement began with the earliest motion pictures and became a staple in the industry by the 1920s.⁷⁴ Studios, seeking to manage their production costs, bartered with companies to obtain props in exchange for showcasing the products on the big screen.⁷⁵

⁷¹ See Lawrence J. Magid, *Rewind, Replay and Unwind With These New High-Tech TV Devices*, L.A. TIMES, May 10, 1999, at C6.

⁷² See Benny Evangelista, *Fast Forward to VCR's Future: Digital Recording Devices Threaten Its Reign*, S.F. CHRON., Apr. 22, 2002, at E1, available at <http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2002/04/22/BU15029.DTL> (reporting a survey of DVRs users finding that 35 percent never watch commercials and that 60 percent watch them only occasionally); see also Ethan O. Notkin, *Television Remixed: The Controversy Over Commercial-Skipping*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 899 (2006); Randal C. Picker, *The Digital Video Recorder: Unbundling Advertising and Content*, 71 U. CHI. L. REV. 205 (2004).

⁷³ See David Goetzl, *TV Spending Nears \$80 Billion, DVR Penetration Chasing 50%*, TVBLOG (Apr. 22, 2013, 4:24 PM), <http://www.mediapost.com/publications/article/198659/tv-spending-nears-80-billion-dvr-penetration-cha.html#axzz2bu8vdJYu>.

⁷⁴ See Jay Newell, et al., *The Hidden History of Product Placement*, 50 J. BROADCASTING & ELECTRONIC MEDIA 575 (2006).

⁷⁵ See John A. McCarty, *Product Placement: The Nature of the Practice and Potential*

Nevertheless, product placement was an afterthought in the film production process. Following the overwhelming success of the 1982 placement of Reese's Pieces in E.T., product placement became a substantial and lucrative part of the film industry.⁷⁶ Nonetheless, television broadcast networks resisted the practice at the time out of concern that embedded advertising would count against the limited commercial time to which they had agreed, while giving advertisers free airtime.⁷⁷ As a result, product placements on television programs were secretive arrangements between product manufacturers and a show's talent or writers.⁷⁸

During the past 15 years, embedded advertising has emerged as a substantial sub-industry in television and film production. It has its own trade organization, the Entertainment Marketing Association.⁷⁹ In 2011, television placements grew 11% to \$2.83 billion while film placements rose 8.4% to \$977 million.⁸⁰ Embedded advertising spending has seen double-digit annual growth over much of the past decade as traditional television advertising spending has struggled in the post-DVR era.⁸¹ Business students now learn about "integrated brand promotion" alongside traditional advertising techniques.⁸²

Product placement and integrated advertising offer numerous benefits over traditional advertisements.⁸³ These techniques are generally less expensive than traditional commercial

Avenues of Inquiry, in *THE PSYCHOLOGY OF ENTERTAINMENT MEDIA* 45, 46 (L.J. Shrum ed., 2004).

⁷⁶ See Matthew Savare, *Where Madison Avenue Meets Hollywood and Vine: The Business, Legal, and Creative Ramifications of Product Placements*, 11 *UCLA ENT. L. REV.* 331, 333-34 (2004).

⁷⁷ See Newall, et al., *supra* note 74 at 585.

⁷⁸ See *id.*

⁷⁹ See Lawrence A. Wenner, *On the Ethics of Product Placement in Media Entertainment*, in *HANDBOOK OF PRODUCT PLACEMENT IN THE MASS MEDIA* 101, 106 (Mary-Lou Galician ed., 2004).

⁸⁰ See Press Release, PQ Media, *New PQ Media Data: Global Product Placement Spending Up 10% to \$7.4 Billion in 2011, Pacing for 11% Growth in 2012, as Wireless Technology, Changing Consumer Habits & Looser Regulations Compel Brands to Invest in Alternative Marketing Solutions* (Dec. 5, 2012), <http://www.prweb.com/releases/2012/12/prweb10204688.htm>. Other sources cite much higher levels of product placement spending. See, e.g., Marc Graser, *Product-Placement Spending Poised to Hit \$4.25 Billion in '05*, *ADVERTISING AGE*, Apr. 4, 2005, at 16. Furthermore, these levels do not reflect the substantial bartering of goods. See Gail Schiller, *Brands Take Buzz to Bank Through Free Integration*, *HOLLYWOOD REP.*, Apr. 13, 2006, at 1; Zahr Said, *Embedded Advertising and the Venture Consumer*, 89 *N.C. L. REV.* 99, 112-13 (2010).

⁸¹ See Said, *supra* note 80, at 113.

⁸² One textbook changed its title from simply *ADVERTISING* to *ADVERTISING AND INTEGRATED BRAND PROMOTION* in 2003 to reflect the changing landscape of the marketing business and the "ever-expanding array of advertising and promotion brand building techniques." See O'GUINN, ALLEN, & SEMENIK, *supra* note 70, at ix.

⁸³ See Sharmistha Law & Kathryn A. Braun-LaTour, *Product Placements: How to*

spots, they live on with the program during syndication, they imply celebrity endorsement, their value to advertisers increases with unauthorized distribution of the programming, and, perhaps most importantly, viewers are unable to skip over them with DVRs. In modern practice, product placements are usually intentionally covert, with effectiveness dependent on the subtle intermixing of advertisement and entertainment and increasingly news. They seamlessly mesh with the content.⁸⁴

As a result of these advantages to advertisers, embedded advertising has expanded across the range of traditional media and Internet outlets. It has proven particularly advantageous in reality programming,⁸⁵ but has become ubiquitous. Because of its covert quality, however, consumers often cannot determine what is authentic and what is not.

Embedded advertising is also beginning to spill over into television news. The trend follows the lead of talk shows like *The View*, which despite being produced by ABC's entertainment division, once featured journalist Barbara Walters gushing about Campbell Soup and leading her co-hosts in a chorus of "M'm! M'm! Good!"⁸⁶ Standard sponsorship and product placement are taking root in more conventional news programming, beginning with local morning news programs. Starbucks became the official sponsor of MSNBC's Morning Joe in a deal bringing in over \$10 million.⁸⁷ Host Joe Scarborough already drank Starbucks on the show prior to the deal, but the sponsorship makes the relationship official—and lucrative. MSNBC president Phil Griffin has emphasized that the deal would not prevent the network from covering Starbucks in the news when appropriate.⁸⁸ A Las Vegas Fox affiliate made a deal with McDonald's to display its iced coffee during a portion of its morning show.⁸⁹ The station said that it would continue to report on McDonald's if necessary.⁹⁰ Similarly, Steak and Shake

Measure Their Impact, in *THE PSYCHOLOGY OF ENTERTAINMENT MEDIA* 63, 64 (L.J. Shrum ed., 2004).

⁸⁴ In a clever twist, the producers of the *Mad Men* series have cleverly disguised the commercial interruptions in an effort to discourage commercial skipping. See Kona Gallagher, *Behind the Scenes of Unilever's Retro 'Mad Men' ads*, HUFFPOST TV (Sept. 3, 2010), <http://www.aoltv.com/2010/09/03/behind-the-scenes-of-unilevers-retro-mad-men-ads/>.

⁸⁵ See KEMBREW MCLEOD, *FREEDOM OF EXPRESSION: RESISTANCE AND REPRESSION IN THE AGE OF INTELLECTUAL PROPERTY* 189 (2007) (noting that "[r]eality 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.'").

⁸⁶ SCOTT DONATON, *MADISON & VINE* 151 (2004).

⁸⁷ See Brian Stelter, *Starbucks Is Now the Official Joe of 'Morning Joe'*, N.Y. TIMES, June 1, 2009, at B6, available at <http://www.nytimes.com/2009/06/01/business/media/01joe.html>.

⁸⁸ See *id.*

⁸⁹ See Stephanie Clifford, *A Product's Place Is on Set*, N.Y. TIMES, July 22, 2008, <http://www.nytimes.com/2008/07/22/business/media/22adco.html>.

⁹⁰ See *id.*

arranged with a Kansas City CBS affiliate to place a coffee cup with its logo on the table during weekend news segments.⁹¹

News programming is also susceptible to a unique type of embedded advertising: marketing messages camouflaged as independently produced stories. In 2005, the Center for Media and Democracy (CMD) tracked the use of video news releases (VNRs) – pieces prepared by public relations (PR) firms and sent to news studios – and found that of the 87 pieces it followed, not one use disclosed the PR firm’s client to viewers.⁹² One gave the name of the PR firm itself, but did not identify that Chrysler was the company the firm represented in producing the spot.⁹³ In all cases, the stations changed the VNRs to match the program’s format, thereby making the piece look original to the show⁹⁴ – a technique that masks the presence of an advertising message. In 60% of the tracked VNR airings, an anchor or station reporter even revoiced the piece, sometimes adhering verbatim to the original script provided by the PR firm.⁹⁵ These VNRs are almost entirely from corporations with a product or service to promote; of the hundreds that the CMD considered tracking, only a handful came from government or nonprofit groups.⁹⁶

The CMD revisited the VNRs in 2006, to assess the effects of its recommendations for improved disclosure.⁹⁷ The study showed that 89% of VNRs included no disclosure of any kind, and several of the same stations named in the earlier report were repeat offenders and had continued to run disclosure-free VNRs.⁹⁸ According to the CMD, “[t]hese findings suggest that station and industry codes of conduct—not to mention an ongoing investigation by the Federal Communications Commission—are not sufficient to ensure the public’s right to know who seeks to persuade them via television news, the most widely used information source in the United States.”⁹⁹ One PR firm, in response to the CMD’s earlier report, began packaging its VNRs with a disclosure shown at the bottom of the screen during airing – but most stations that ran the VNRs removed the disclosure before doing so.¹⁰⁰

⁹¹ Abe Sauer, *Product Placement on the News Causing a Brewhaha*, Feb. 28, 2011, <http://www.brandchannel.com/home/post/2011/02/28/Disaster-In-The-Making-Product-Placement-On-The-News.aspx>.

⁹² See Diane Farsetta & Daniel Price, *Fake TV News: Widespread and Undisclosed*, CENTER FOR MEDIA AND DEMOCRACY (Apr. 6, 2006), <http://www.prwatch.org/fakenews/execsummary>.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See Diane Farsetta & Daniel Price, *Still Not the News: Stations Overwhelmingly Fail to Disclose VNRs*, CENTER FOR MEDIA AND DEMOCRACY (Nov. 3, 2006), <http://www.prwatch.org/fakenews2/execsummary>.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

In addition to the direct placement of advertising messages in the news through VNRs and product placement, advertiser influence may dictate the content of the news in a more subtle fashion. Networks are understandably defensive in response to this suggestion: “In 1998 Nike’s sponsorship of CBS’s Olympic coverage was rewarded when the correspondents delivered the news wearing jackets emblazoned with Nike’s symbolic swoosh. The president of CBS News vehemently denied that this sponsorship had anything to do with the thwarting of a follow-up to a hard-hitting investigative piece on Nike for 48 Hours. The editor of The San Francisco Examiner likewise denied that Nike’s co-sponsorship of their annual promotion was in any way related to the decision to kill a column by a reporter that was highly critical of Nike.”¹⁰¹

Print news has also seen a shift to acceptance of a close relationship between stories and sales tactics. The New York Times now sells display ad space on the front page of the paper after previously only running the occasional text-only classified at the bottom. The change is “regarded by traditionalists as a commercial incursion into the most important news space in the paper.”¹⁰² The move follows the paper’s shift to allowing display ad space on the front page of sections within the paper in light of steadily declining revenue.¹⁰³ Some ads, however, are more covert; NBC took out a front page ad in the Los Angeles Times featuring both a traditional color display ad and a fake news article for its show about L.A. police, *Southland*.¹⁰⁴

Two factors are contributing to this shift. Media conglomeration has introduced “synergy bias”: the use of promotional material in a commonly held entity that interferes with balanced reporting.¹⁰⁵ In addition, network news departments have become increasingly concerned with the cost of producing programming.¹⁰⁶ While early broadcast news departments were seen as building a network’s audience through credible journalism and were not seen as profit centers, broadcasters have increasingly blurred this line in order to boost profits.¹⁰⁷ News divisions are viewed as complements to other divisions of large conglomerates that struggle to compete in an increasingly Internet-centric society.

¹⁰¹ JEAN KILBOURNE, *DEADLY PERSUASION* 49 (1999).

¹⁰² Richard Pérez-Peña, *The Times to Sell Display Ads on the Front Page*, N.Y. TIMES, Jan 5, 2009, at B3, available at <http://www.nytimes.com/2009/01/05/business/media/05times.html>.

¹⁰³ *Id.*

¹⁰⁴ Josef Adalian, *NBC's 'Southland' Pushes Ad Limits in L.A. Times*, TV WEEK, http://www.tvweek.com/news/2009/04/nbcs_southland_pushes_ad_limit.php (last visited Aug. 13, 2013).

¹⁰⁵ Dmitri Williams, *Synergy Bias: Conglomerates and Promotion in the News*, 46 J. BROADCASTING & ELECTRONIC MEDIA 453, 456 (2002); cf. C. Edwin Baker, *ADVERTISING AND A DEMOCRATIC PRESS* (1994) (exploring the role of advertising in subverting objective media).

¹⁰⁶ Howard J. Blumenthal & Oliver R. Goodenough, *THE BUSINESS OF TELEVISION* 213-14 (Bob Nirkind & Margaret Sobel eds., 2d ed. 1998).

¹⁰⁷ *Id.*

The emergence of the Internet as an advertising, communication, and entertainment platform has further blurred the lines between content and advertising. Search engines, social networks, and entertainment sites depend predominantly on advertising business models – overt and covert.¹⁰⁸ Somewhat like Orwell’s dystopic vision, these entities not only broadcast advertisements (propaganda), but also collect data on users so as to optimize the effectiveness of their advertising vehicles.¹⁰⁹ Their focus, however, is not on political ends but on profit maximization. Although that might not seem problematic, it threatens social interests in everything from public health to economic sustainability and freedom of expression.

Many Internet companies provide “free” content and services in exchange for access to their users’ time spent viewing advertisements as well as to their personal information for the purposes of tailoring advertising messages to the users and their friends.¹¹⁰ In *Nineteen Eighty-Four*, Big Brother maintained visual surveillance only on party members (approximately 15% of the population) using two way telescreens.¹¹¹ Today’s private “data reapers are able to create very complex profiles of every American”¹¹² using information freely given them by Internet users. “In the online world, essentially everything we do is always being archived and searched by the companies that provide us access. . . . The government isn’t spying on us; Google is

¹⁰⁸ See Meghan Kelly, *96 Percent of Google’s Revenue Is Advertising, Who Buys It?*, VENTURE BEAT, (Jan. 29, 2012), <http://venturebeat.com/2012/01/29/google-advertising/>; Claire Cain Miller, *YouTube Ads Turn Videos Into Revenue*, N.Y. TIMES, Sept. 3, 2010, at B1, available at <http://www.nytimes.com/2010/09/03/technology/03youtube.html>; Atchee Mendoza, *How YouTube Is Playing a Big Role in Online Advertising*, SAVVY SEXY SOCIAL (Nov. 21, 2012), <http://savvysexysocial.com/2012/11/21/how-youtube-is-playing-a-big-role-in-online-advertising/>; Chris Anderson, *FREE: THE FUTURE OF A RADICAL PRICE* (2009) (exploring the use of advertising in Internet businesses).

¹⁰⁹ See Sheryl Sandberg, *The Role of Advertising on Facebook*, THE FACEBOOK BLOG (Jul. 6, 2010), <http://blog.facebook.com/blog.php?post=403570307130> (explaining that although Facebook does not share users’ personal information with advertisers, its designed its social network to provide relevant and in interesting advertising to users).

¹¹⁰ See, e.g., United States Federal Trade Commission, *In the Matter of Facebook, Inc., a Corporation*, FTC File No. 092 3184, Docket No. C-4365, Complaint and Consent Order available at <http://www.ftc.gov/os/caselist/0923184/index.shtm>, accessed August 13, 2013. See also, e.g., John Constine, *Amazon Recommends Products Based on Your and Your Friends’ Facebook Interests*, INSIDE FACEBOOK, Jul 27, 2010, <http://www.insidefacebook.com/2010/07/27/amazon-facebook-recommendation/>.

¹¹¹ See Orwell, *supra* n. 1. See also, e.g., *Telescreen*, WIKIPEDIA, available at <http://en.wikipedia.org/wiki/Telescreen> (last visited Aug. 14, 2013).

¹¹² See Natasha Singer, *Congress to Examine Data Sellers*, N.Y. TIMES, July 25, 2012, at B1, available at http://www.nytimes.com/2012/07/25/technology/congress-opens-inquiry-into-data-brokers.html?_r=0 (quoting U.S. Representative Edward J. Markey, Co-Chairman Bipartisan Congressional Privacy Caucus); cf. Neil Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1955 (2013) (noting that “[s]urveillance also gives the watcher increased power to persuade”).

spying on us, and the government is asking Google for certain results.”¹¹³ The *quid pro quo* on the Internet is free entertainment and social networking in exchange for personal data.

Whereas embedded advertising is relatively untargeted, the Internet’s exchange of search services, entertainment, and social interaction as well as its bidirectional information flow allow advertisers to increase the effectiveness of their messages both by tailoring them to their targets’ demographics and by disguising their persuasive content.¹¹⁴ The 161 exabytes of information that Americans generate annually¹¹⁵ soon “will allow marketers to create campaigns that are targeted towards every individual consumer and hence will drive the consumption economy.”¹¹⁶ Consumers of “free” internet services, by sharing their personal information with internet businesses, allow these companies to create “complex profiles” not only of themselves but also of their families and friends.¹¹⁷

¹¹³ M.S., *Should the Government Know Less than Google?*, THE ECONOMIST, June 11, 2013. See also, e.g., Robert L. Mitchell, *Google Knows Amore About You “Than Your Mother”*, IT BUSINESS (May 12, 2009), <http://www.itbusiness.ca/news/google-knows-more-about-you-than-your-mother-does/13297>; Ted Thornhill, “Google will know more about you than your partner”: Uproar as Search Giant Reveals Privacy Policy that Will Allow Them to Track You on All Their Products, DAILY MAIL ONLINE (Mar. 2, 2012), <http://www.dailymail.co.uk/sciencetech/article-2091508/Google-privacy-policy-Search-giant-know-partner.html>.

¹¹⁴ See Charles Duhigg, *How Companies Learn Your Secrets*, N.Y. TIMES MAG. (Feb. 16, 2012); ELI PARISER, THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU (2011); JOSPEH TUROW, THE DAILY YOU: HOW THE NEW ADVERTISING INDUSTRY IS DEFINING YOU IDENTITY AND YOUR WORTH (2010); Ira Rubenstein, Ronald D. Lee, & Paul M. Schwartz, *Data Mining and Internet Profiling: Emerging Regulatory and Technical Approaches*, 75 U. CHI. L. REV. 261 (2008) (describing data mining techniques); see generally Ryan Calo, *Digital Market Manipulation 5* (Univ. Wash School of Law, Legal Studies Research Paper No. 2013-27) (2013) (contending that the digitization of commerce “dramatically alters the capacity of firms to influence consumers”) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309703>.

¹¹⁵ One exabyte is equivalent to one billion gigabytes or 10^{18} bytes. The annual US data production is “equal to the information stored in 37,000 Libraries of Congress.” The Wall Street Journal, “Big Brother” and Big Data: The Alternative to Automated Sweeps Is More Privacy Invasion, June 9, 2013.

¹¹⁶ Mukesh Gupta, *Targeted Advertising vs. Intrinsic Advertising*, SOCIAL MEDIA TODAY (July 1, 2013), <http://socialmediatoday.com/rmukeshgupta/1568291/targeted-advertising-vs-intrinsic-advertising>.

¹¹⁷ See, e.g., Parmy Olson, *Google Ventures Funds Big-Data Discovery App That Tracks What Your Friends Like*, FORBES (May 30, 2013), <http://www.forbes.com/sites/parmyolson/2013/05/30/google-ventures-funds-big-data-discovery-app-that-tracks-what-your-friends-like/>; Bernard Marr, *Is Facebook Taking Big Data Analytics Too Far?*, SMART DATA COLLECTIVE (May 2, 2013), <http://smartdatacollective.com/node/121876>.

These profiles allow online advertisers to subvert their targets' natural psychological defense mechanisms by insinuating that their advertisements are "user generated content," which originates from the target's friends,¹¹⁸ or that their messages are endorsed by the targets' friends or by social "influencers."¹¹⁹ Targeted ads from social media outlets, by obfuscating their source, are designed to decrease their targets' natural resistance to persuasive messages.¹²⁰ Big Data increases advertising's ability to persuade by allowing specifically targeted advertising to be delivered in a covert manner, greatly increasing its ability to manipulate its audience.¹²¹ The modern "mediated" consumer is increasingly dependent on manipulated information designed to shape their perceptions through that consumers' idiosyncratic profile.¹²²

These potentially insidious aspects of internet companies' use of Big Data have attracted the notice of Federal regulatory agencies. Both Google and Facebook entered into consent agreements with the Federal Trade Commission during 2011 which required the companies to increase the protections they afford users' personal information for a period of twenty years and to allow augmented governmental monitoring of their privacy policies and practices.¹²³ Orwell

¹¹⁸ *Targeted Advertising with Social Media*, DWINQ, <http://www.dwinq.com/targeted-advertising-with-social-media/> (last visited Aug. 13, 2013); *See also*, Business Insider, *Why Social Media Advertising is Set to Explode*, June 6, 2013.

¹¹⁹ Neal Rodriguez, *How to Triple Your Success Using Social Media Advertising Platforms*, FORBES (May 1, 2013), <http://www.forbes.com/sites/groupthink/2013/05/01/how-to-triple-your-success-using-social-media-advertising-platforms/>; Jenna Dobkin, *Who Does Influencer Marketing Best?* SOCIAL MEDIA TODAY (July 24, 2013), <http://socialmediatoday.com/jennasd/1618081/who-does-influencer-marketing-best>. (Influencers are "key individuals within their community or industry that are well connected in their respected fields, . . . [who] can help generate genuine brand awareness and – more importantly - persuade others to take action." *Id.*).

¹²⁰ *See* Section I, *supra*, for a discussion of psychological resistance mechanisms and advertising's ability to subvert same.

¹²¹ *See* VIKTOR MAYER-SCHONBERGER & KENNETH CUKIER, *BIG DATA: A REVOLUTION THAT WILL TRANSFORM HOW WE LIVE, WORK, AND THINK* (2013); danah boyd and Kate Crawford, *Critical Questions for Big Data: Provocations for a Cultural, Technological, and Scholarly Phenomenon*, 15 INFO. COMM. & SOC. 662 (June 2012).

¹²² *See* Calo, *supra* n.114, at 8, 9-22.

¹²³ *See* United States Federal Trade Commission, *In the Matter of Google INC., a Corporation, Agreement Containing Consent Order*, File No. 102 3136, available at <http://www.ftc.gov/os/caselist/1023136/110330googlebuzzagreeorder.pdf>; United States Federal Trade Commission, *In the Matter of Facebook, Inc., a Corporation*, FTC File No. 092 3184, Docket No. C-4365, Complaint and Consent Order, available at <http://www.ftc.gov/os/caselist/0923184/index.shtm>; *see also, e.g.*, Danny Goodwin, *New Google Privacy Policy Combines User Data From All Google Services*, SEARCH ENGINE WATCH (Jan. 26, 2012), <http://searchenginewatch.com/article/2141451/New-Google-Privacy-Policy-Combines-User-Data-From-All-Google-Services>; Frank Watson, *Google Buzz Settles Privacy Case With FTC As Plus1 Launches*, SEARCH ENGINE WATCH (Mar. 30, 2011), <http://searchenginewatch.com/article/2049805/Google-Buzz-Settles-Privacy-Case-With-FTC->

envisioned a dystopia in which the government openly scrutinized every move of its populace in order to maintain social control. Ironically, the public's embrace of the Internet's and particularly of social media's entertainment-for-data business plan has resulted in Big Brother's having been called upon to protect the citizenry from its voluntary if not fully informed dissemination of personal information.

III. Public Policy Ramifications of the Embedded Advertising Age

To the titans of Madison Avenue, Hollywood, and Silicon Valley, the proliferation of embedded advertising is just another example of the free market innovation that has long served economic growth and social welfare.¹²⁴ Improving the ability to target advertisements arguably reduces consumer search costs. And embedded advertisements are more "effective" in influencing consumer perceptions. At a deeper level, however, this new form of competition undermines an important precondition of a salutary competitive marketplace: consumers' ability to perceive information biases.¹²⁵

Moreover, the proliferation of embedded advertising across mass media and Internet resources compromises creative and expressive freedom. While product integration can help to finance creative works, reduce production costs, afford access to locations, and at times lend authenticity to a creative enterprise,¹²⁶ the very nature of embedded advertising runs counter to artistic independence and expressive freedom. Furthermore, corporate sponsors typically insist upon approval rights that can impinge upon journalistic and artistic independence.¹²⁷ Funding of

As-Plus1-Launches; Kate Kaye, *Renewed Calls for Privacy Law Following Facebook FTC Settlement*, SEARCH ENGINE WATCH (Nov. 30, 2011), <http://searchenginewatch.com/article/2129112/Renewed-Calls-for-Privacy-Law-Following-Facebook-FTC-Settlement>.

¹²⁴ See Herbert Jack Rotfeld, *The Stealth Influence of Covert Marketing and Much Ado About What May Be Nothing*, 27 J. PUB. POL. & MARKETING 63 (2008) (discounting public policy concerns relating to covert marketing). Note that the Journal of Public Policy & Marketing is published by the American Marketing Association, a professional association of marketing professionals and academics. See *About the American Marketing Associations*, AMERICAN MARKETING ASSOCIATION, <http://www.marketingpower.com/AboutAMA/Pages/default.aspx> (last visited Aug. 14, 2013).

¹²⁵ See Jon Hanson & Douglas Kysar, Jon Hanson & Douglas Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1555 (1999) (suggesting that exploitation of consumers' cognitive limitations and biases represents a new market failure).

¹²⁶ See Matthew Savare, *Where Madison Avenue Meets Hollywood and Vine: The Business, Legal, and Creative Ramifications of Product Placements*, 11 UCLA ENT. L. REV. 331 (2004); see also Jessica Guynn & Dawn C. Chmielewski, "The Internship," *Now Starring . . . Google*, L.A. TIMES (May 25, 2013), <http://touch.latimes.com/#section/-1/article/p2p-76053200/> (reporting that actor Vince Vaughn commented that Google's driverless car and other products lent authenticity and aided in storytelling).

¹²⁷ See Guynn & Chmielewski, *supra* note 126; Miguel Helft, *Facebook Feels Unfriendly*

mass media through embedded advertising puts writers and directors in the role of pitchmen, compromising their artistic integrity in the name of selling soap (and often less wholesome products).¹²⁸ For that reason, the Writers Guild of America and the Screen Actors Guild have voiced strong opposition to the growing use of product placement.¹²⁹ Creative independence is essential to the values reflected in the copyright law¹³⁰ and the First Amendment.¹³¹ These values are increasingly important in the Information Age; and they are increasingly threatened by the rise of embedded advertising.

Thus, the interplay of technological advances in mass communication and competitive markets has produced a pathological equilibrium. In contrast to Adam Smith's "invisible hand" of decentralized competition producing efficient markets, the covert hand of embedded advertising manipulates tastes through subliminal messaging and implicit endorsement. Advertisers operate through market and technological forces that reward those enterprises that succeed in steering society's purchasing behavior toward their brands, causing private and social interests to diverge.

The tragic history surrounding tobacco products illustrates how corporate interests can use advertising to harm consumers. Philip Morris projected the Marlboro Man throughout mass media to associate its cigarette product with rugged masculinity.¹³² RJ Reynolds used its Camel

Toward Film It Inspired, N.Y. TIMES (Aug. 21, 2010), at A1, available at <http://www.nytimes.com/2010/08/21/business/media/21facebook.html?pagewanted=all&r=0>.

¹²⁸ Not surprisingly, the *Mad Men* series, which celebrates the emergence in the 1960s of a particularly mercenary approach to advertising, makes significant use of product placements. See Alex Konrad, *Mad Men is Back and So is Product Placement*, CNN MONEY (Jul. 27, 2010), http://money.cnn.com/galleries/2010/fortune/1007/gallery.mad_men_products.fortune/6.html.

Ironically, the creator and executive producer vehemently denies that advertising placements affect the creative choices behind the story. See Lynn Smith, *'Mad Men' and Jack Daniel's: Bad mix?*, L.A. TIMES (Jun. 21, 2007), <http://articles.latimes.com/2007/jun/21/business/fi-jack21>.

¹²⁹ See Lisa Lapan, Note, *Network Television and the Digital Threat*, 16 UCLA ENT. L. REV. 343, 376 (2009); Sandra Lee, *Product Placement in the United States: A Revolution in Need of Regulation*, 26 CARDOZO ARTS & ENT. L.J. 203 (2008); Writers Guild of America, "Are You Selling to Me?": *Stealth Advertising in the Entertainment Industry* 3 (Nov. 14, 2005), http://www.wga.org/subpage_newsevents.aspx?id=1422 (explaining that "[a]long with being asked to create memorable stories and characters, our writers are being told to perform the function of ad copywriter, but to disguise this as storytelling").

¹³⁰ See 17 U.S.C. §101 et seq.

¹³¹ See U.S. CONST. amend. I.

¹³² Marlboro was launched in 1924 as a cigarette for women, with the slogan "Mild as May." The brand was repositioned because of poor sales and the public's perception that filter cigarettes were healthier than non-filter cigarettes. The cowboy was chosen from a selection of "the manliest images [the advertising agency] could think of." Krishnamurthy Prabhakar, *How Marlboro Brand Changed its Sex?*, SMALL HISTORY OF ORGANIZATIONS, available at http://www.academia.edu/225856/How_Marlboro_Brand_changed_its_sex.

brand to cultivate a “mysterious Eastern connotation.”¹³³ As the association between tobacco use and lung cancer and other serious health effects became undeniable, policymakers eventually required disclosure of health risks and ultimately banned broadcast advertising of cigarettes.¹³⁴ By then, advertisers had addicted millions of consumers to a product that impaired their health and well-being, as well as the health of those around them.

The rise of childhood obesity suggests another tragic connection between advertising and public health. Fast food and soft drink companies spend billions of dollars per year on advertising in the United States.¹³⁵ A Nielsen study determined that during 2008, “nearly 35,000 food, beverage, and restaurant brands appeared in prime-time TV programming Children viewed five times as many product placements as they did traditional, paid television commercials for Coca-Cola products.”¹³⁶ While determining the effects of an advertising regime on sales volume or public health is fraught with difficulty,¹³⁷ there is ample reason for societal concern about the effects of advertising, and especially embedded advertising, on public health.¹³⁸

Childhood obesity has tripled in the US during the last three decades.¹³⁹ Children are inundated with commercial messages for foods of low nutritional value, whose persuasive content they are ill-equipped to recognize.¹⁴⁰ Both time watching television and the number of food commercials viewed correlate positively with childhood obesity rates.¹⁴¹ “[T]elevision food

¹³³ BRYAN BURROUGH, JOHN HELYAR, *BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO* 46 (2009).

¹³⁴ See, e.g., Sandra J. Teel, Jesse E. Teel, & William O. Bearden, *Lessons Learned from the Broadcast Cigarette Advertising Ban*, 43 J. MARKETING, 45-50 (1979).

¹³⁵ See, e.g., Tom Philpott, *The Fast-food Industry’s \$4.2 Billion Marketing Blitz*, GRIST (Nov. 10, 2010), <http://grist.org/article/food-2010-11-09-the-fast-food-industrys-4-2-billion-marketing-blitz/>; Mike Adams, *Soft Drink Company Marketing Tactics: The Experts Sound Off*, NATURAL NEWS (Jan. 8, 2005), http://www.naturalnews.com/003914_soft_drinks_food_politics.html.

¹³⁶ Yale News, *Product Placements Market Unhealthy Food to Children* (Aug. 2, 2011), <http://news.yale.edu/2011/08/02/product-placements-market-unhealthy-food-children-0>. *Further stating that*, “the majority of exposure was for regular soft drinks from just one company, Coca-Cola, which accounted for 71% of product-placement appearances viewed by children and approximately 60% of adult and adolescent exposure.”

¹³⁷ See note 61, regarding the lack of empirical studies quantifying the effects of embedded advertising.

¹³⁸ See *supra* text accompanying notes ___-___.

¹³⁹ *Prevalence of overweight among children and adolescents: United States, 2003–2004*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/nchs/data/hestat/overweight/overweight_child_03.htm (last updated Apr. 6, 2010).

¹⁴⁰ See Wilcox et al., *supra* note 61.

¹⁴¹ Louis J. Moses & Dare A. Baldwin, *What Can the Study of Cognitive Development Reveal About Children’s Ability to Appreciate and Cope with Advertising?*, 24 J. PUB. POL. &

advertising increases children’s preferences for the foods advertised and their requests to parents for those foods . . . [T]hese effects occur at both the brand and the category level.”¹⁴² A recent meta-analysis of the literature found that “food promotion has a causal and direct effect on children’s food preferences, knowledge and behavior.”¹⁴³

Numerous explanations have been hypothesized for the correlation between “excess” television viewing and obesity, including: (1) increased consumption of foods commonly advertised on TV may contribute to excessive caloric intake, (2) television advertising directed at children influences children’s preferences, requests and short-term consumption of food and beverage products advertised on television, and (3) food and beverage marketing “is a likely contributor to less healthful diets, and may contribute to negative diet-related health outcomes and risks.”¹⁴⁴ Whatever the explanation, the consensus among experts supports a causal relationship between exposure to food advertisements and obesity. In 2006, the US Institute of Medicine (IOM) released a detailed report which found that

[t]he prevailing pattern of food and beverage products marketed to children and youth has been high in total calories, sugar, salt, fat, and low in nutrients. A dietary profile that mirrors the products marketed would put our children and youth at risk for the types of nutritional problems that we see occurring today—increasing rates of obesity, and inadequacies of certain important micronutrients—and for the development of various serious chronic diseases later in life.¹⁴⁵

The study found that “[c]hild-targeted food and beverage products have steadily increased over the past decade, and are typically high in total calories, sugars, salt, fat, and low in nutrients.”¹⁴⁶ It also determined that: food preferences develop as early as two years of age, the same time when children develop food brand awareness; food marketing to children is undergoing a “notable shift” toward “unmeasured sales promotion (e.g., product placement, character licensing, in-school marketing, special event marketing)”; and the use of child-oriented spokescharacters “has been a prevalent practice used to promote low-nutrient and high calorie food and beverage products.”¹⁴⁷ The IOM study concluded that “[f]ood and beverage marketing

MARKETING 186 (2005).

¹⁴² Jennifer L. Harris, et al., *How Food Marketing Contributes to Childhood Obesity and What Can Be Done*, 30 ANN. REV. PUB. HEALTH 211, 210 (2009) (internal citations omitted). See also G. HASTINGS, ET AL., REVIEW OF RESEARCH ON THE EFFECTS OF FOOD PROMOTION TO CHILDREN (2003).

¹⁴³ S. Livingstone, *Assessing the Research Base for the Policy Debate Over the Effects of Food Advertising to Children*, 24 INT. J. ADVERT. 273, 283 (2005).

¹⁴⁴ Barbara A. Dennison & Lynn S. Edmunds, *The Role of Television in Childhood Obesity*, 25 PROGRESS IN PEDIATRIC CARDIOLOGY 191, 192 (2008).

¹⁴⁵ Committee on Food Marketing and the Diets of Children and Youth, *Food Marketing to Children and Youth: Threat or Opportunity?* ix (2006).

¹⁴⁶ *Id.* at 163.

¹⁴⁷ *Id.* at 160-75.

practices geared to children and youth are out of balance with healthful diets, and contribute to an environment that puts their health at risk.”¹⁴⁸

These results are consistent with those of a four year study conducted by the American Psychological Association which specifically studied “the impact of advertising on children, with particular attention given both to the implications of children’s cognitive development for understanding the potential effects of exposure to advertising and to specific harms that might result from exposure to advertising.”¹⁴⁹ A similar study in Britain drew somewhat broader conclusions: “[a]s the food categories most heavily promoted to children in the UK tend to be unhealthy, the effect on their food choices contributes to an unhealthy diet. . . . [Their] less sophisticated understanding of advertising suggests that children are particularly vulnerable to the effects of advertising of unhealthy food.”¹⁵⁰ The British study recommends that, “[g]iven the link between the marketing of unhealthy foods to children and poor diets amongst our nation’s young, there is the strongest possible case for further action to regulate marketing of unhealthy foods to children.”¹⁵¹

It is too early to know the myriad ways in which embedded and data-driven Internet advertising have and will affect society at large. We can reasonably surmise, however, that such techniques expand the opportunities for advertisers to shape consumer interests and perceptions by relaxing consumers’ inherent defense mechanisms.¹⁵² Without commercial interruptions, the line between news or entertainment and advertisements becomes blurred. Even when the interruptions are apparent, the ease of commercial skipping on DVRs encourages advertisers to develop more compelling commercials. As the interest surrounding Super Bowl advertisements suggests, advertising is increasingly perceived as entertainment.¹⁵³ Advertainment is the doublespeak of the embedded advertising and social media age.¹⁵⁴ Madison Avenue,

¹⁴⁸ *Id.* at 374.

¹⁴⁹ See Brian L. Wilcox, et al., *Report of the Task Force on Advertising and Children*. AMERICAN PSYCHOLOGICAL ASSOCIATION 2 (2004). Note that, as in the Moses and Baldwin study, *supra* n. __, this review acknowledges that, “concerns about advertising that have emerged as a result of new and changing technological capabilities, such as interactive forms of advertising and commercial Web sites targeting children, have yet to attract almost any empirical study.” *Id.*

¹⁵⁰ *Protecting Children from Unhealthy Food Marketing: A British Heart Foundation and Children’s Food Campaign Proposal for a Statutory System to Regulate Non-Broadcast Food Marketing to Children*, BRITISH HEART FOUNDATION AND CHILDREN’S FOOD CAMPAIGN 7 (2008), <http://www.childrensfoodcampaign.net/BHFnonbroadcastreport.pdf>.

¹⁵¹ *Id.* at 3.

¹⁵² See *supra*, pages __-__ <text accompanying notes 17-31>.

¹⁵³ See *Super Bowl Advertising*, WIKIPEDIA, http://en.wikipedia.org/wiki/Super_Bowl_advertising (last visited Aug. 14, 2013); Jack Lambert, *Top 5 Super Bowl Ads of All Time – and Why They Worked*, BALTIMORE BUS. J. (Feb. 1, 2013), <http://www.bizjournals.com/baltimore/news/2013/02/01/super-bowl-advertising-what-works.html?page=all>.

¹⁵⁴ Chris Arnold, *Want People to Talk about your Brand? Welcome to ‘Advertainment,’*

Hollywood, and Internet companies have a growing array of tools, psychological research, and consumer data to hone ever more effective messages and to identify the most vulnerable consumers. As more general experience with advertising suggests, there is ample reason for concern.

Yet solutions are hardly apparent. Thus far, policy debate has focused on advertising bans of particularly harmful products – such as tobacco – and sponsorship disclosure requirements under the Communications Act of 1934.¹⁵⁵ Such policies, however, are poorly attuned to the dual concerns posed by embedded advertising: consumer manipulation and editorial independence/artistic freedom. Advertising bans are an extreme measure that would be appropriate for only a narrow set of products. Furthermore, they arguably raise First Amendment concerns.

Even aside from the limited authority of the Federal Communications Commission to address embedded advertising,¹⁵⁶ sponsorship disclosure would be of limited efficacy. The inherent nature of embedded advertising makes it difficult to label.¹⁵⁷ Disclosure during a broadcast would interfere with the creative product and consumers would likely skip any disclosure coming at the beginning or end of programming. And it is not clear what consumers would gain from knowing that “promotional sponsorship was provided by _____.”¹⁵⁸ It seems unlikely that disclosure regulation can do much in the area of embedded advertising in entertainment programming.¹⁵⁹

BRANDREPUBLIC (Dec. 4, 2012), <http://arnoldonethicalmarketing.brandrepublic.com/2012/12/04/want-people-to-talk-about-your-brand-welcome-to-advertainment/>; *Advertainment*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Advertainment> (last visited Aug. 14, 2013) (tracing the origin of the term and defining it as “Advertainment is “both a System and Methodology that combines elements of Entertainment, Information and Reward in a precisely calibrated algorithm ('Primary Equation') which, when applied to any kind of marketing or advertising content (for any product, service, brand, offering, audience etc, using any type of media), renders the content highly ‘magnetic’ – and prone to audience response”).

¹⁵⁵ See Communications Act of 1934, 47 U.S.C. §§ 317(a), 508 (2006); see also 47 C.F.R. § 73.1212 (2010) (outlining broadcasters’ responsibilities concerning sponsorship identification).

¹⁵⁶ The Communications Act of 1934 does not cover most cable programming or films released in theaters. See Said, *supra* note 80, at 102.

¹⁵⁷ Professor Said refers to this as the consumer’s “immersion interest” “in remaining connect to and uninterrupted during her consumption of entertainment products.” See Said, *supra* note 80, at 103 n.12; see also U.S. General Accounting Office, Broadcast and Cable Television: Requirements for Identifying Sponsored Programming Should Be Clarified (Jan. 2013) (noting the confusion surrounding sponsorship disclosure requirements).

¹⁵⁸ See Said, *supra* note 80, at 102.

¹⁵⁹ Although I do not fully subscribe to Professor Said’s confidence in the “venture consumer” view of the world, see Said, *supra* note 80, at 104-05, I share her skepticism about the potential for sponsorship disclosure of entertainment programming.

Nonetheless, there are at least two areas deserving of special attention – video news releases and embedded advertising directed toward children. There is a substantial public interest in knowing whether advertising is masquerading an objective news reporting. Furthermore, children are particularly vulnerable to disguised marketing. A potentially useful regulatory approach might be to require shows targeted to children using embedded advertising to be digitally tagged in such a way that parents could block access by children, although such an approach would be complex to implement and unlikely to accomplish much. Advertisers could try to evade or circumvent enforcement. Parents would need to learn how to operate parental controls on televisions and mobile devices. And they would have to resist the persistence of children that want to watch a popular series.

Similarly, regulation of data collection and mining practices of Internet companies is fraught with difficulty. Internet users voluntarily participate in these services and many blithely consent to their data being collected and used by hosts. In many contexts, such practices serve consumers' interests by providing more relevant product suggestions, even if they are somewhat manipulative. Interference with such choices, when freely made, would be an affront to human freedom. The Federal Trade Commission and other government entities can play a modest role in requiring disclosure of and consent to data collection and usage, but such policies are unlikely to address the larger concerns about systematic consumer manipulation.

Perhaps the most promising approach to systematic manipulation of the society at large by advertisers is, ironically, to turn to Big Brother and counter-propaganda. If advertisers drive mass media and the Internet toward manipulating consumers into thinking that unhealthy products are good for them and leveraging their credit to unsustainable levels, then government agencies tasked with protecting public health and welfare can take a more direct role in counter-messaging. The National Institutes of Health and consumer protection agencies should be increasing investment in public education campaigns to balance the marketplace of ideas.

Such an approach faces several obstacles – political influence, funding, and getting consumers to pay attention. The same corporate interests that seek to manipulate consumers can be expected to lobby government officials, raising the specter of agency capture. This is an ongoing concern, but hardly a reason for capitulation. Good government requires ongoing efforts to resist the forces that will distract decisionmakers from their mission. And transparency in government go far in exposing corporate efforts to subvert sound public education.

Funding public education campaigns presents a serious problem. California's anti-smoking initiative suggests a promising approach.¹⁶⁰ In 1988, California voters passed the Tobacco Tax and Health Promotion Act¹⁶¹ which raised a tax on a pack of cigarettes by 25¢ and earmarked 5¢ of that tax to support public outreach and anti-smoking advertising efforts to prevent and discourage tobacco use. The California Tobacco Control Program used the

¹⁶⁰ See *Ads*, TOBACCOFREECA, <http://www.tobaccofreeca.com/ads/about/> (last visited Aug. 14, 2013).

¹⁶¹ Proposition 99

earmarked funds to produce an aggressive media campaign to raise public awareness of the dangers of tobacco use and secondhand smoke. California now has among the lowest smoking rates among adults and teenagers in the nation.¹⁶²

Such initiatives face the same difficulty confronting traditional advertising campaigns. Consumers can easily skip television commercials and click away from Internet advertisements that don't interest them. As a result, public counter-propaganda must resort to the same types of creative messaging techniques that increasingly work in today's media and social networking environments. Public education campaigns must draw on white hat Mad Men and Internet/social networking advertising professionals.

All of this will cost money. The California anti-tobacco policy offers a path: tax the offending behavior. Federal and state governments could enact modest taxes that are tied to advertising spending that encourages problematic consumer behavior – such as consumption of unhealthy foods and beverages, credit leverage, and conspicuous consumption. They might also take specific aim at embedded advertising. Such revenue could be directed toward public education campaigns aimed at providing the public with a fuller understanding of public health and welfare choices.

As more modest approach would be to eliminate or selectively scale-back the tax deductibility of advertising expenses. The American Advertising Federation, an ad industry lobbying group, currently is “battening down the hatches” in the face of Representative Rosa DeLauro's “move to end the expensing of costs associated with advertising “unhealthy” food to children.”¹⁶³ The concept of taxing advertising has also been considered at the state level, although more in the context of general revenue enhancement than as a disincentive to advertising potentially harmful products: “Since . . . 1987, well over half the states have considered, and rejected, a tax on advertising.”¹⁶⁴

¹⁶² See *California's Successes in Tobacco Control*, TOBACCOFREECA, <http://www.tobaccofreeca.com/successes/highlights/> (last visited Aug. 14, 2013); see also David P. Hopkins, Peter A. Briss, Connie J. Ricard, Corinne G. Husten, Vilma G. Carande-Kulis, Jonathan E. Fielding, Mary O. Alao, Jeffrey W. McKenna, Donald J. Sharp, Jeffrey R. Harris, Trevor A. Woollery, & Kate W. Harris, *Reviews of Evidence Regarding Interventions to Reduce Tobacco Use and Exposure to Environmental Tobacco Smoke*, 20 *Am. J. Preventive Med.* 16 (2001); Teh-wei Hu, Hai-Yen Sung, and Theodore E. Keeler, *Reducing Cigarette Consumption in California: Tobacco Taxes vs an Anti-Smoking Media Campaign*, 85 *Am. J. Pub. Health* 1218 (1995) (finding that both taxation and anti-smoking media campaigns are effective means of reducing cigarette consumption); Teh-wei Hu, Jushan Bai, Theodore E. Keeler, Paul G. Barnett and Hai-Yen Sung, *The Impact of California Proposition 99, a Major Anti-Smoking Law, on Cigarette Consumption*, 15 *J. Pub. Health Pol.* 26 (1994).

¹⁶³ See Ana Radelat, *Ad Groups Warn of Potential Ad-Tax Deduction Threat*, Advertising Age (August 12, 2013), available at <http://adage.com/article/news/ana-aaf-warn-potential-threat-ad-tax-deduction/243614/>.

¹⁶⁴ See American Advertising Federation, *State Advertising Taxes* (October 2008), available at <http://www.aaf.org/default.asp?id=366>. See also Katy Bachman, *Ad Biz Readies*

These policies do little to address the loss of creative and expressive freedom resulting from the proliferation of embedded advertising in the media marketplace. This concern is significantly attributable to consumers' rational distaste for commercial interruptions and thus the tremendous appeal of the DVR.¹⁶⁵ The unintended consequence has been a reshaping of the creative industries around embedded advertising. Producers now routinely engage in the dubious balancing of advertising revenue and expressive freedom.

As with the manipulation of consumer behavior through embedded advertising, there is no simple solution to loss of artistic independence and journalistic integrity. Banning or restricting DVRs would sacrifice the many benefits afforded by these devices and send a chilling message to device developers. Regulating or restricting embedded advertising would impinge upon the choices of producers for supporting their projects.

The answer to this problem may lie in the free market. Rather than regulate technology or programming, public policy should more overtly encourage a robust market for content by encouraging direct commerce between consumers and content producers. Embedded advertising is in many respects a relic of an older broadcasting age in which producers could not contract directly with consumers. Since the emergence of cable television in the 1960s, however, it has been possible for consumers to pay directly for programming. Satellite and the Internet further expand these market channels. We see in the artistic success of programming developed for HBO, Showtime, Netflix, and Hulu that subscription channels provide a hospitable environment for artistic creativity.¹⁶⁶ This marketplace can be further encouraged by policies aimed at reducing unauthorized distribution of copyrighted works.

Fight Against State Ad Taxes, Adweek (Feb. 8, 2013), available at <http://www.adweek.com/news/advertising-branding/ad-biz-readies-fight-against-state-ad-taxes-147160>; Angel Djambazov, *Why These Proposed Advertising Taxes in Ohio and Minnesota are a Dangerous Bet*, GeekWire (Feb. 27, 2013), available at <http://www.geekwire.com/2013/minnesota-ohios-proposed-advertising-tax-dangerous-bet-increasing-revenues/>.

¹⁶⁵ No less an authority than the Chairman of the FCC referred to TiVo as “God’s machine.” See Lauren Weinstein, *TiVo: The Rise of ‘God’s Machine,’* WIRED (Feb. 2, 2003), www.wired.com/entertainment/music/news/2003/02/577505.

¹⁶⁶ Subscription channels have long earned a disproportionate share of Emmy awards. See HBO Films Receives 32 Emmy Nominations; Sweeps Outstanding Lead Actor in a Miniseries or Movie Category (Jul. 18, 2013), <http://www.hbo.com/movies/talk/news/hbo-films-receives-32-emmy-nominations.html> (noting that HBO received 108 Emmy nominations in 2013, the most for any network for the thirteenth year in a row). With Netflix’s entry into the development of original programming such as *House of Cards* and revival of *Arrested Development*, we see this pattern expanding. See Bill Carter, *Upstart Roils Nerves in a Packed TV Race: Networks Brace for an Emmy Challenge by Netflix*, N.Y. TIMES, Jul. 17, 2013, at C1.

As this article has highlighted, the embedded advertising age poses paradoxes and complexities that George Orwell could not imagine.¹⁶⁷ His focus on government totalitarianism overshadowed the threat of capitalism run amok.¹⁶⁸ Although Orwell's concerns continue to resonate, we should also be mindful of the power of advertising to manipulate the population. We live in an age in which market forces and technological advance fuel brand totalitarianism that threatens consumer well-being as well as artistic creativity and journalistic integrity. A beneficent Big Brother is needed to counterbalance these forces.

¹⁶⁷ Science fiction authors Frederik Pohl and Cyril Kornbluth came closer to the mark. Writing just a few years after Orwell's great novel, Pohl and Kornbluth foretold of a vastly overpopulated world in which nation states exist primarily to ensure the survival of transnational corporations. Advertising has emerged as the most lucrative profession, deluding the public into thinking that the quality of life is improved by new products. Advertising executives aggressively compete to lure consumers to interlocking addictive products: "[A few mouthfuls of] Crunchies kicked off withdrawal symptoms that could be quelled only by another two squirts of Popsie from the fountain. And Popsie kicked off withdrawal symptoms that could only be quelled by smoking Starr Cigarettes, which made you hungry for Crunchies." See FREDERIK POHL & CYRIL M. KORNBLUTH, *THE SPACE MERCHANTS* 78 (1952).

¹⁶⁸ See Jon Hanson & Douglas Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999) (observing that "[o]nce one accepts that individuals systematically behave in nonrational ways, it follows from an economic perspective that others will exploit those tendencies for gain."); Calo, *supra* n.114, at 7.