

## **PRODUCT PLACEMENT & GOVERNMENT REGULATION: FCC vs. FTC**

### **WHY GOVERNMENT REGULATION OF PRODUCT PLACEMENTS WILL LIKELY EXPAND DESPITE INSUFFICIENT EVIDENCE OF CONSUMER HARM**

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For 30 years, the nation's political system has been tilted in favor of business deregulation and against new rules. But that is about to change, now that the government has intervened in the financial industry to avert an economywide crash. In a year during which the public's collective anger has been reflected in opinion polls which consistently show Americans welcome "change," the pro-regulation climate is poised to spread change in the form of greater government regulation to many business sectors: new emission curbs and energy limits to address climate change; health care mandates to expand insurance coverage and restrain costs; new safeguards for food, prescription drugs and toys from China, as well as increased regulation for any number of sectors which have spent the greater part of the past months in a regulatory shadow, including the entertainment industry.

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Is increased government regulation of product placements warranted? Before we debate that question, let's revisit the history and current state of product placement regulation.

### *Product Placement - An Abbreviated History*

Product placements have evolved differently for movies and broadcasting. Long accepted within movies, it was not until the 1970s, when producers discovered that costs could be saved and realism achieved by placing brand-name props directly into the movies, that their potential as a revenue source began to be understood. However, it wasn't until 1982 that producers and advertisers alike fully realized the power of product placements on consumer purchases after Hershey Foods agreed to promote *E.T.: The Extra-Terrestrial* with \$1 million in advertising in return for the appearance of Reese's Pieces brand candy in the film.<sup>2</sup>

On television, product placement dates back to broadcasting's earliest days, when the hosts of America's most popular shows such as Milton Berle's *Texaco Star Theater* (1948-1953), *The Alcoa Hour* (1955-1957), and *Mutual of Omaha's Wild Kingdom* (1963-) promoted the sponsor's products. The practice is so well-established that even a future United States President promoted General Electric as the host of *General Electric Theater*. The Museum of Broadcast Communications has noted, "*General Electric Theater* saturated its audience with Reagan's genial progress-talk in introductions, segues and closing comments, and [Don] Herbert's commercials. From the viewpoint of its sponsors, the program's entertainment component

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<sup>2</sup> See L.M. Sixel, "Chocolate Empires: Journalist Probes the Secret World of America's Candy Kings," *Houston Chronicle*, Mar. 14, 1999, at 22.

seemed beside the point of audience ‘recall scores,’ ‘impact studies’ and the penetration of company messages culminating with the motto, ‘Progress is our most important product.’”<sup>3</sup>

Today, these placement practices, like marketing generally, have become increasingly sophisticated. Product placement deals are everywhere, as when a fleet of Ford vehicles ferry TV reality show contestants on their back-country adventures or radio talk show hosts speak of the virtues of a new car they have been driving. Purchases of advertising may carry product placement perks as well, or the promotional message is sometimes rolled into the substance of the broadcast. In a deal with Ford Motor Company, for example, NBC agreed that Lincoln automobiles would be featured on *The Tonight Show with Jay Leno* in exchange for \$9 million of Ford advertising spread across the network’s programs<sup>4</sup>. Similarly, in 2003, ABC and Sears struck a deal, for which Sears was initially estimated to have paid more than \$1 million to air a program in which trucks delivered Sears brands from a Sears store, while plumbers and other workers from the Sears home-improvement services department undertook repairs.<sup>5</sup>

Finally, excess capacity in news programming has yielded reports of alleged payments by companies, such as Eastman Kodak Co., being made to freelancers who are hired to review products on local and national television news broadcasts.<sup>6</sup>

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<sup>3</sup> Museum of Broadcast Communications, *General Electric Theater*. Available at <http://www.museum.tv/archives/etv/G/htmlG/generalelect/generalelect.htm>, (last visited Oct. 17, 2008).

<sup>4</sup> Suzanne Vranica, “Coming: Jay Leno and the Lincolns,” *WSJ*, Apr. 1, 2002, p.B1.

<sup>5</sup> Stuart Elliott, *On ABC, Sears Pays To Be Star of New Series*, *N.Y. TIMES*, Dec. 3, 2003, at C1.

<sup>6</sup> James Bandler, *Advice for Sale: How Companies Pay TV Experts for On-Air Product Mentions*, *WSJ*, Apr. 19, 2005.

Critics argue that product placement is “stealth advertising,” reaching consumers which are essentially unaware. Commercial Alert, a nonprofit organization co-founded by Ralph Nader, argues that product placements are “an affront to basic honesty.”<sup>7</sup> As Commercial Alert suggests, “[p]roduct placements are inherently deceptive, because many people do not realize that they are, in fact, advertisements.”<sup>8</sup>

Commercial Alert has been lobbying the FCC to establish more stringent disclosure guidelines for movies and television programs.<sup>9</sup> More specifically, it wants to establish a system of onscreen “pop-up” notifications, disclosing product placements on television not only at the end of television shows but at the beginning as well. It has also petitioned the Federal Trade Commission (“FTC”), arguing that the failure to clearly identify and disclose product placement arrangements is deceptive and injurious to consumers.<sup>10</sup>

On the other hand, there are those who believe that product placements are a legitimate form of commercial speech, that additional regulation would be too burdensome and would essentially ban branded products from appearing in the media.<sup>11</sup> Opponents of further regulation argue that there is no consumer harm or injury because this is a free-market economy; consumers

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<sup>7</sup> COMMERCIAL ALERT, PRODUCT PLACEMENT, <http://www.commercialalert.org/issues/culture/product-placement> (last visited Oct. 17, 2008).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Letter from Gary Ruskin, Executive Director, Commercial Alert, to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 30, 2003), *available at* <http://www.ftc.gov/os/closings/staff/050210ftccommercialalert.pdf> (last visited Oct. 17, 2008) [hereinafter Letter from Ruskin to Dortch].

<sup>11</sup> *Id.*

may decide for themselves whether or not they want to see a specific product by simply switching their TV sets on/off or by changing the channel.<sup>12</sup>

### *Product Placement & The FCC*

The United States does not prohibit product placements in the broadcast or motion picture industries. However, undisclosed commercial messages in broadcasting have been regulated since 1927.<sup>13</sup>

Section 317 of the Communications Act of 1934 (the “Act”) governs product placements in all radio and television broadcasts. Section 317 requires broadcasters to disclose “any money, service, or other valuable consideration” that is paid to, or promised to, or charged by the broadcaster in exchange for product placements.<sup>14</sup> Broadcasters need not disclose product placements when those are offered without charge or for a nominal fee.<sup>15</sup> However, according to § 317(a)(2) of the Act, the FCC is *not* precluded from requiring sponsorship announcements to be made for political programs — or any program involving controversial issue — for which the broadcaster received any form of consideration, such as films, records, talent, scripts, or service of any kind, as an inducement to air the program.<sup>16</sup>

Furthermore, as § 317(c) of the Act requires, broadcasters must exercise reasonable diligence to obtain from their employees or any other person with whom they deal directly in

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<sup>12</sup> *Id.*

<sup>13</sup> Radio Act of 1927, **KC** Pub. L. No. 69-632, 44 Stat. 1162 (repealed 1934).

<sup>14</sup> *Id.* at Interpretative Notes and Decisions, II(B)(11); *see also id.* at § 317(a)(1).

<sup>15</sup> *Id.* at § 317(a)(2).

<sup>16</sup> *Id.* at § 317(a)(2). *See also* **C** 47 C.F.R. § 73.1212 (2007).

connection with a program for broadcast, information about product placement arrangements, so that appropriate disclosures may be made.<sup>17</sup> Thus, the law requires continuous disclosure up the production and distribution ladder, which ultimately places on the broadcaster the responsibility of identifying the sponsor(s).<sup>18</sup> The FCC, however, retains the authority to waive the sponsorship requirements of § 317 for any particular case, or class of cases, if it determines that public interest, convenience or necessity does not require such disclosure.<sup>19</sup>

Congress has given the FCC authority to prescribe appropriate rules and regulations needed to carry out the Act's sponsorship identification requirements.<sup>20</sup> The FCC's rules, interpreting § 317 in 47 CFR § 73.1212, provide:

When a broadcast station transmits any matter for which money, service, or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by such station, the station, at the time of the broadcast, shall announce:

- (1) That such matter is sponsored, paid for, or furnished, either in whole or in part, and
- (2) By whom or on whose behalf such consideration was supplied.<sup>21</sup>

This regulation closely tracks 47 U.S.C. § 317. Like § 317, the FCC's regulation does not require disclosure when a product placement was provided without charge or for nominal consideration, unless the product was used in a way that is not reasonably related to the use of such product in that particular program.<sup>22</sup>

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<sup>17</sup> *Id.* at § 317(c).

<sup>18</sup> *Id.* at § 317(a)(1).

<sup>19</sup> *Id.* at § 317(d).

<sup>20</sup> 47 U.S.C. § 317(a)(2)(e) (2007).

<sup>21</sup> 47 C.F.R. § 73.1212(a)(1)(2) (2007).

<sup>22</sup> *Id.* at (a)(2).

Additionally, the required announcement must disclose the sponsor's true identity.<sup>23</sup> Broadcasters must exercise due diligence in disclosing the real sources behind all consideration.<sup>24</sup> This means that if agents or other entities contract with the station for product placements, the announcement should disclose the identity of the person or entity on whose behalf the agent is acting, and not the identity of the agent.<sup>25</sup> In keeping with the generally stricter rules for broadcasting of political programs or programs regarding controversial issues, broadcasters must keep, for public inspection, a list of the chief executive officers or members of the executive committee of all entities that have sponsored such programs.<sup>26</sup>

The FCC has interpreted the purpose of 47 U.S.C. § 317 to be that the audience members must be clearly informed that what they are viewing has been paid for, and that the entity paying for the broadcast must be clearly identifiable.<sup>27</sup> As to the adequacy of the sponsorship identification itself, the FCC has promulgated some guidelines. For example, broadcasters cannot use the sponsor's telephone number alone to identify a sponsor.<sup>28</sup> The wording of the sponsorship message has also been addressed:

Although the exact wording of a sponsorship identification is left to the discretion of the licensee, in this instance the announcement should at least state in language understandable to the majority of viewers that suppliers of goods or services have paid the network or producer of the program to display or promote the products or services, and each such supplier should be properly identified. In order to achieve the purpose of Section 317 and our Rules, the video portion of such announcement should be given in letters of sufficient size to be readily legible to an average viewer; should be shown against a background which does not reduce

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<sup>23</sup> *Id.* at (a)(2)(d).

<sup>24</sup> *Id.* at (a)(2)(b).

<sup>25</sup> *Id.* at (a)(2)(e). See also **KC** *In re WHAS, Inc.*, 40 F.C.C. 190 (1964) (memorandum opinion and order regarding notice of apparent liability for forfeiture of fine).

<sup>26</sup> 47 C.F.R. § 73.1212(a)(2) (2007).

<sup>27</sup> *In re Nat'l Broad. Co.*, 27 F.C.C.2d 75 (1970).

<sup>28</sup> **KC** *In re Liab. of George G. Beasley*, 40 F.C.C. 186 (1964); **KC** *In re United Broad. Co.*, 45 F.C.C. 1921 (1965).


their legibility, and should remain on the screen long enough to be read in full by an average viewer.<sup>29</sup>


Furthermore, broadcasters cannot merely mention a sponsor to satisfy § 317, but must announce that the program itself is sponsored by or paid for by the sponsor.<sup>30</sup> In the late 1970s, when the FCC perceived a widespread failure to meet the sponsorship requirements, particularly when it came to political sponsors, it issued a public notice entitled “Application of Sponsorship Identification Rules,” warning broadcasters that the phrase “presented by (name of sponsor)” does not fulfill the disclosure requirement.<sup>31</sup> The FCC has also warned broadcasters that the agency is aware of the widespread use of inadequate identifications, but to this day it has declined to issue size of letter or timing requirements:


Specifically, the Commission’s attention was drawn to many sponsorship identification announcements which were shown so briefly and/or printed in such small letters that comprehension was difficult, if not impossible . . . . The Commission does not believe it practical, and therefore has never attempted, to designate a specific size of letter or specific period of time to be utilized in making such identifications since a combination of factors must be considered in determining the appropriateness of any particular announcement, i.e., length of sponsor’s name, relationship of time shown to size of letters, difficulty in comprehending the words contained in the identification. However, the volume of complaints received by the Commission indicates that viewers are having difficulty reading such announcements and licensee attention is hereby directed to this problem.<sup>32</sup>

Although these requirements may seem strict, broadcasters can usually comply by placing the flowing announcement in the credits at the beginning or end of the program:

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<sup>29</sup>  *In re Nat’l Broad. Co.*, 27 F.C.C.2d 75 (1970).

<sup>30</sup>  *In re Liab. of Midwest Radio-Television, Inc.*, 49 F.C.C.2d 512 (1974).

<sup>31</sup> Application of  Sponsorship Identification Rules to Political Broadcasts, Teaser Announcements, Governmental Entities and Other Organizations, 66 F.C.C.2d 302, 303 (1977).

<sup>32</sup> *Id.* at 304.

“promotional consideration provided by (name of sponsor).” Indeed, the prevalent practice is to disclose consideration at the end of the credits quickly and succinctly.

Are the FCC’s sponsorship identification rules inadequate to address product placement practices in today’s marketplace? We are about to learn more. The FCC announced on June 26, 2008, that it is going to revisit product placements (which the agency now refers to as “embedded advertising”) through a new inquiry.<sup>33</sup> The proceeding will focus on whether or not current required disclosures should be made more obvious, whether additional steps should be taken to regulate placements in children’s programming,<sup>34</sup> whether the FCC’s current policies are adequate in light of actual industry placement practices and technologies, and whether special rules should be developed to deal with talk-radio hosts’ on-air endorsements of products or services that may have been provided to them at little or no cost. The initial comment period was due to expire on September 22, 2008.

### *Product Placement & The Courts*

The ways in which United States courts have interpreted product placements have differed over the last few decades. With respect to branded entertainment, courts have generally concluded that because expressive, artistic, or entertainment content is a medium for communicating ideas, such expression is non-commercial and entitled to First Amendment

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<sup>33</sup> *In re Sponsorship Identification Rules and Embedded Advertising*, MB Docket No. 08-09 (June 26, 2008) (Notice of Inquiry and Notice of Proposed Rule Making).

<sup>34</sup> The Children’s Television Act of 1990, 47 U.S.C. §§ 303b, imposes time limitations on the amount of commercial matter in children’s programming. The Commission also has several longstanding policies that are designed to protect children from confusion that may result from the intermixture of program and commercial material in children’s television programming. See [Policies and Rules Concerning Children’s Television Programming](#), Report and Order, 6 FCC Rcd 2111, 2118 (1991), *recon. Granted in part*, 6 FCC Rcd 5093 (1991).

protection. However, the courts have been ambiguous when defining the boundaries between commercial and non-commercial speech. One commentator has labeled product placement a form of “hybrid speech.”<sup>35</sup>

Generally, case law illustrates that a hybrid medium, combining commercial and newsworthy elements, even in a branded entertainment program, will be deemed noncommercial if the program’s primary purpose is to inform or entertain, as opposed to purely offering or inducing a commercial transaction.<sup>36</sup>

Essentially, noncommercial speech, according to the cases, is everything that is not commercial speech. In deciding whether something constitutes commercial speech, the United States Supreme Court has instructed that “the core notion of commercial speech . . . [is that it does] ‘no more than propose a commercial transaction.’”<sup>37</sup>

In the early 1970s, the FCC promulgated a test that may be used to determine when a program is categorized as an advertisement. As the FCC stated, “[t]he primary test is whether the purportedly non-commercial segment is so interwoven with, and in essence auxiliary to the sponsor’s advertising (if in fact there is any formal advertising) to the point that the entire program constitutes a single commercial promotion for the sponsor’s products or services.”<sup>38</sup> The FCC’s test is fairly broad, abstract and gives a high degree of protection to producers and broadcasters. For example, even if a program were peppered with product placements, as long as

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<sup>35</sup> John M. Olin, *Making Sense of Hybrid Speech: A New Model for Commercial Speech and Expressive Conduct*, 118 HARV. L. REV. 2836, 2841 (2005).

<sup>36</sup> See *Bolger v. Youngs Drugs Prods. Corp.*, 463 U.S. 60, 66 (1983); *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1002-03 (9th Cir. 2001); *Hoffman v. ABC/Capital Cities*, 255 F.3d 1180, 1184-86 (9th Cir. 2001).

<sup>37</sup> *Bolger*, at 60.

the program is not constructed around the sole purpose of advertising a specific product, it will not be considered an advertisement.

### *Product Placement & The FTC*

In contrast to the FCC, the Federal Trade Commission has broad jurisdiction over advertising practices regardless of the medium. With respect to the FTC's treatment of product placements, if a program is considered an advertisement, it crosses over to the non-commercial sphere and will be afforded much less legal protection.<sup>39</sup> The rule is that in an advertisement all express and implied product claims must be substantiated.<sup>40</sup> However, for the FTC to have jurisdiction, there must be an unfair and deceptive act or practice that affects commerce and that leads to substantial consumer injury.<sup>41</sup> Commercial Alert has argued that undisclosed or poorly disclosed product placements can, in the long-run, encourage obesity, diabetes and alcoholism, thus injuring the consumer.<sup>42</sup> In a complaint letter addressed to the FTC, Gary Ruskin, the Executive Director of Commercial Alert, stated:

The Commission should require advertisers to ensure that their product placements on television are disclosed in a conspicuous and unmistakable manner. Their failure to provide such disclosure should be considered "unfair or deceptive acts and practices in or affecting commerce" within the meaning of the Federal Trade Commission Act. It is deceptive because it flies under the viewer's

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<sup>38</sup>  *In re Public Notice Concerning the Applicability of Commission Policies on Program-Length Commercials*, 44 F.C.C.2d 985 (1974).

<sup>39</sup> FEDERAL TRADE COMMISSION, FREQUENTLY ASKED ADVERTISING QUESTIONS, <http://www.ftc.gov/bcp/online/pubs/buspubs/ad-faqs.htm>.

<sup>40</sup> FEDERAL TRADE COMMISSION, FREQUENTLY ASKED ADVERTISING QUESTIONS, <http://www.ftc.gov/bcp/online/pubs/buspubs/ad-faqs.htm>.

<sup>41</sup> *See*  15 U.S.C. § 45 (2007).

<sup>42</sup> Letter from Gary Ruskin, Executive Director, Commercial Alert, to Donald Clark, Secretary, Federal Trade Commission (Sept. 30, 2003), *available at* <http://www.ftc.gov/os/closings/staff/050210ftccommercialalert.pdf> (last visited Oct. 17, 2008).

skeptical radar. It is unfair because it is advertising that purports to be something else.<sup>43</sup>

However, unlike the FCC, the FTC has affirmatively declined to regulate product placements. A letter by Mary K. Engle, Associate Director for Advertising Practices of the FTC, explained that the FTC had no basis for regulating product placements in the absence of an affirmative statement about the product within the show itself.<sup>44</sup> The letter further stated that there are few objective vocal claims about a product's characteristics in the traditional product placement context.<sup>45</sup> For example, most products are utilized by actors or placed within the background but are not commented on in the same way that an advertisement would comment on them. In the absence of objective, material claims about the product, the FTC refuses to regulate.<sup>46</sup> Finally, the FTC stated that a "one-size-fits-all rule or guide" could not effectively regulate product placements.<sup>47</sup>

### *Conclusion*

The existence of regulatory regimes such as the FCC and the FTC with differing opinions of product placement may seem illogical to those unfamiliar with the many contradictions in the American regulatory system.

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<sup>43</sup> *Id.* The applicable statute, 15 U.S.C. § 45(a)(1) provides: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."

<sup>44</sup> Letter from Mary K. Engle, Associate Director for Advertising Practices, FTC, to Gary Ruskin, Executive Director, Commercial Alert (Feb. 10, 2005), available at <http://www.comercialalert.org/FTCletter2.10.05.pdf> (last visited Oct. 17, 2008).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* The Commission also previously considered and reject a similar petition to regulate product placement in movies. Federal Trade Commission, *FTC Denies CSC's Petition To Promulgate Rule On Product Placement In Movies*, Dec. 11, 1992, available at <http://www.ftc.gov/opa/predawn/F93/csc-petit5.htm> (last visited Oct. 17, 2008).

Nevertheless, it may be suggested that the FTC's focus on consumer injury, and the lack thereof, "gets it right." Where is the injury from Simon Cowell, Paula Abdul and Randy Jackson of *American Idol* having cups of Coca-Cola in front of them? Do these images make any discernable impression on audiences apart from the cumulative effect of Coca-Cola's other advertising efforts? When the soap opera *All My Children* incorporates the cosmetics company Revlon into a story line (as a rival to the fictional cosmetics company owned by the manipulative Erica Kane), the injury to viewers was – what? When Warner Brothers used the name *Pepsi Smash* as the title of a 2003 music show and used the Pepsi logo, it was doing nothing different from television networks in the days of *General Electric Theater*. And when Regis Philbin of *Who Wants to Be A Millionaire* precedes a phone call by saying, "Let's go to our friends at AT&T," surely it is understood that Regis is not *literally* friends with AT&T.

Further restrictions on product placements are unnecessary in the absence of quantifiable consumer injury.