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FTC RULING ON PRODUCT PLACEMENT CALLS FOR CAUTION ON PRODUCT CLAIMS

by
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The Federal Trade Commission (FTC) issued an opinion letter on February 10, 2005, rejecting a petition from an activist group urging greater regulation of product placement on television. The pro-regulatory petition was filed by Commercial Alert, an activist group co-founded by Ralph Nader. In its opinion letter, the FTC agreed with the position urged by the Washington Legal Foundation (WLF) that paid product placement does not inherently mislead or confuse consumers.

The ruling signaled the agency's skepticism toward the policy objectives of activist groups opposed to various forms of product advertising. At the same time, however, the letter flagged the potential legal vulnerability of product placements that make product claims.

"Product placement" refers to the entertainment industry practice in which a consumer product is either shown or mentioned within a film or television program in return for payment, promotion, services, or other consideration from the maker of the product. Commercial Alert had petitioned the FTC and the FCC in September, 2003 to adopt new regulations that would mandate a warning for all instances of product placement on television. Under Commercial Alert's proposal, each product placement would have been accompanied as it occurred by an on-screen label of "Advertisement."

In rejecting the proposal, the FTC emphasized that product placements rarely incorporate claims about the products involved. The FTC added that if a product placement makes "false or misleading objective, material claims about a product's attributes," the agency can bring an enforcement action on that basis. Moreover, in view of the vulnerabilities of children, if such claims are made within children's programming, the FTC would consider whether the claims would "deceive an ordinary child."

Product placement is, by all accounts, a rapidly-growing form of promotion. The FTC ruling serves as a reminder that just as corporate counsel must assess the content of conventional advertising, counsel must also assess the content of product placements to the extent they go beyond showing or mentioning the product.

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The Washington Legal Foundation (WLF) is the nation's largest non-profit, free enterprise public interest law and policy center. WLF litigates *and* publishes in order to advocate legal policies that promote economic growth, job creation, and the civil liberties of business. As a 501(c)(3) tax exempt organization, WLF relies upon the charitable support of individuals, businesses, associations, and foundations to fund its programs.

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