

ACTIVISTS' PRODUCT PLACEMENT PROPOSAL THREATENS COMMERCIAL FREE SPEECH

by

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The Federal Trade Commission (FTC) and Federal Communications Commission (FCC) are facing requests to require real-time disclosure of product placements in television programs. The petitions by Commercial Alert, a group that lists Ralph Nader among its Board of Advisors, ask the FTC and FCC to write new rules to require prominent pop-up messages identifying product placements as advertisements as they occur.¹

If granted, the twin requests would radically alter the entertainment business, effectively ending product placement on television, and severely restricting First Amendment protected artistic expression. Commercial Alert's proposals represent a dangerous incursion into the long-held public policy assumption "that the speaker and audience, not the government, assess the value of the information presented." *Thompson v. Western States Med. Ctr.*, 122 S. Ct. 1497 (2002).

Product placement, also referred to as product integration, describes arrangements in which advertisers pay to have their product featured or mentioned during a TV program or movie. The practice has been common for decades.

Commercial Alert's requests for investigation and rulemaking describe in detail a variety of product placement arrangements used in television programming today. The group cites the use of the "Coca-Cola Red Room" on *American Idol*, a demonstration involving Dockers stain-resistant Go Khaki pants on *The Best Damn Sport Show Period*, and the showcasing of the Mandalay Bay resort and casino in *Fear Factor*. CA Letter to the FTC at 4-5, 7; CA Letter to the FCC at 5-6, 8. This

¹Letter from Gary Ruskin, Executive Director, Commercial Alert, RE: Request for Investigation of Product Placement on Television and for Guidelines to Require Adequate Disclosure of TV Product Placement, to Donald Clark, Secretary, Federal Trade Commission (Sept. 30, 2003) [hereinafter CA Letter to the FTC]; Letter from Gary Ruskin, Executive Director, Commercial Alert, RE: Complaint, Request for Investigation, and Petition for Rulemaking to Establish Adequate Disclosure of Product Placement on Television, to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 30, 2003) [hereinafter CA Letter to the FCC] (both may be downloaded from www.commercialalert.org).

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LEGAL BACKGROUNDER addresses the issues presented by Commercial Alert’s petition with the FTC, although similar arguments and issues exist with respect to its petition to the FCC as well.

The organization does not, however, demonstrate that the public has suffered specific harm from product placement practices. Instead, Commercial Alert cites media reports on the increase in frequency and types of product and brand integration methods, quotes those in the industry who tout the effectiveness of these practices, and therefore concludes more stringent disclosure is needed. CA Letter to the FTC at 8-9; CA Letter to the FCC at 9-10.

Protected Artistic Expression. Product placement is inextricably intertwined with artistic expression, which is typically on the front line of First Amendment protected free speech. In its opposition to Commercial Alert’s requests, the Freedom to Advertise Coalition, which represents advertisers, marketers and media, notes that “product placement can be an essential ingredient in the story being told through a program or show.”² In the real world, people eat, drink, and wear brand-name products,” the Coalition states. FAC Letter to the FTC at 3; FAC Letter to the FCC at 4. The use of real products contributes “nonverbal cues and near universal reference points.” Govani, Shinan, *Product Placements in Movies—is it really so bad?*, quoted in FAC Letter to the FTC at 3 and FAC Letter to the FCC at 4.

Branded products not only help tell the story, they can become part of the story. Examples cited by the Coalition include Katherine Hepburn’s famous overboard dumping of Gordon’s Dry Gin in *THE AFRICAN QUEEN*, Carrie Bradshaw’s fixation with Monolo Blahnik and Jimmy Choo shoes in *Sex and the City*, and the prominent role the Dodge Charger played in *Dukes of Hazard*. FAC notes that requiring pop-up disclosures whenever product placements occur “would destroy the artistic integrity of any program containing such speech, and would be a nuisance to the viewer.” As, such, the Coalition states, “[a]t its core, the Commercial Alert petition is a thinly-veiled attempt to lure the FTC [and] FCC down the path to elimination of this form of commercial free speech.” FAC Letter to the FTC at 2; FAC Letter to the FCC at 2.

First Amendment Rights. Commercial speech is protected under the First Amendment unless it is false or misleading or concerns unlawful activity. The Supreme Court recently reiterated that “the commercial marketplace, like other spheres of our social and cultural life provides a forum where ideas and information flourish.... [E]ven a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.” *Thompson v. Western States Med. Ctr.*, 122 S. Ct. 1497 (2002). Under Supreme Court doctrine, courts apply a medium scrutiny test to determine whether regulation of commercial speech violates the First Amendment, as opposed to the strict scrutiny standard applied to noncommercial speech.

To decide whether government regulation violates commercial free speech rights, the Supreme Court established a four-part test in *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). The first prong determines whether the speech is protected under the First Amendment; i.e., is neither misleading nor concerns unlawful activity. If the speech is constitutionally protected, then the court examines whether: 1) the asserted government interest is substantial; 2) the regulatory policy directly or materially advances the asserted governmental interest; and 3) the regulatory policy is no more extensive than necessary to serve the government’s asserted interest. In its requests to the FTC and FCC, Commercial Alert does not address

²Letter from Darryl Nirenberg, Counsel, and Penelope Farthing, Counsel, Freedom to Advertise Coalition, RE: Opposition to Request for Investigation of Product Placement on Television and for Guidelines to Require Adequate Disclosure of TV Product Placement, to Donald Clark, Secretary, Federal Trade Commission (Nov., 12, 2003) [hereinafter FAC Letter to the FTC]; Letter from Darryl Nirenberg, Counsel, and Penelope Farthing, Counsel, Freedom to Advertise Coalition, RE: Opposition to Petition for Rulemaking related to Disclosure of Product Placement on Television, to Marlene H. Dortsch, Secretary, Federal Communications Commission (Nov. 12, 2003) [hereinafter FAC Letter to the FCC] (both can be downloaded from www.ana.net).

constitutional free speech concerns nor does the group seek to determine whether its proposed restrictions pass First Amendment muster.

However, Commercial Alert's proposal contains significant First Amendment concerns. In comments to the FTC and FCC voicing its opposition to Commercial Alert's requests, the Washington Legal Foundation notes that the forced, conspicuous label of "advertisement" on every product placement would create a "real time 'scarlet A'" that would undermine dramatic effect and substantially devalue programming.³ "Although the petition's proposed rule masquerades as a mere disclosure requirement, its undoubtable effect would be to act as a ban on the majority of product placements," the WLF states. WLF Letter to the FTC at 6; WLF Letter to the FCC, at 6.

A disclosure requirement resulting in the demise of a long-time industry practice would have great difficulty meeting the requirement under First Amendment jurisprudence that regulatory policy be no more extensive than necessary to serve the government's asserted interest. The Supreme Court has ruled that government overreaching, which results in practical banning of legal commercial speech, and which exhibits a lack of tailoring to address the harm intended, violates the First Amendment. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

Truth in Advertising. Commercial Alert asks the FTC, under its mandate to prevent unfair and deceptive advertising, to conduct an investigation into product placement practices on television. But the group has a ready-made conclusion. Urging the FTC to "acknowledge that the failure to prominently inform viewers of product placements is unfair and deceptive," Commercial Alert requests the Commission establish industry-wide guidelines above and beyond those of the FCC. CA Letter to the FTC at 1. The group wants the FTC to require "clear and conspicuous" product placement disclosures that appear when product placements occur, and are "large enough, and kept on the screen long enough, so [they] can be read and understood." *Id.* at 2.

The FTC has previously considered, and rejected, a similar industry-wide rulemaking request. In 1992, the FTC denied a petition by the Center for the Study of Commercialism to require motion picture companies to stop undisclosed product placements, and require studios to disclose paid product placements at the outset of films. 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>). In that instance, the FTC determined that "[d]ue to the apparent lack of a pervasive pattern of deception and substantial consumer injury attributable to product placements...an industry-wide rulemaking is inappropriate." *Id.* The Commission concluded it would address allegations of consumer injury from product placements on a case-by-case basis. This precedent, requiring both a "pervasive pattern of deception," and a showing of "substantial consumer injury," sets the bar high for future petitioners seeking industry-wide regulation of product placement practices.

The FTC considers an advertisement to be "deceptive" if it contains a misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances to their detriment." Federal Trade Commission, Federal Trade Commission Policy Statement on Deception, 4 Trade Reg. Rep. (CCH) § 13, 205 (Oct. 14, 1983). An advertisement or trade practice is deemed "unfair" if it (1) causes or is likely to cause substantial consumer injury; (2) which is not reasonably avoidable by consumers themselves; and (3) is not outweighed by countervailing benefits to consumers or competition. 15 U.S.C. § 45(n).

³Letter from Washington Legal Foundation, Product Placement on Television to Federal Trade Commission (Mar. 26, 2004) at 7; Letter from Washington Legal Foundation, Product Placement on Television, to Federal Communications Commission (Mar. 26, 2004), at 6.

The fact that product integration typically takes place in fictional and entertainment-based settings weighs against the finding that such placements are deceptive or unfair because such product placements are not linked with claims of veracity. The fans of *All My Children* are unlikely to be misled by the depiction of Revlon as a rival to the cosmetics company owned by soap character Erica Kane.

The complaint that product placements violate FTC standards is further undercut by the very nature of product integration — i.e. to prominently display branded products and their producers. Few would question who sponsored *Texaco Star Theater*, or the Warner Brothers music show, *Pepsi Smash*.

Evidence indicates that the practice of product integration is well understood by the public. Commercial Alert's petition is replete with examples of media critics pointing to programming that makes liberal use of product placements. CA Letter to the FTC at 7-8, 12. With the practice widely recognized, viewers can easily vote their convictions regarding product placement via remote control. See *Thompson v. Western States Med. Ctr.*, 122 S. Ct. 1497 (2002) (the speaker and audience, not the government, should assess the value of commercial information presented).

Commercial Alert does not tie product placement to consumer injury. The group's petition cites a few reports on the increased use of product integration techniques, but does not indicate how these increased practices harm consumers. The group quotes reports indicating product placement can be an effective form of advertising, but concedes, "[t]his is not a new discovery. Ad agencies have known it for a long time."⁴

In its petition, Commercial Alert asks regulators to "consider the role that product placement may play in the epidemic of marketing-related diseases in American children," listing obesity, diabetes, alcoholism, smoking-related illnesses and gambling. CA Letter to the FTC at 10. However, tobacco product placement is barred under the 1998 Master Settlement Agreement. With regard to the integration of products such as soft drinks, fast food and beer, Commercial Alert makes no attempt to distinguish product placement practices from other forms of advertising and promotion.

Uphill Battle. Commercial Alert faces an uphill battle to obtain real-time, pop-up advertisement disclosures of product placement or sponsorship integration in television programming. As written, the group's proposal violates First Amendment protections of artistic expression and commercial speech. The proposal is so invasive, that if implemented, it would result in the practical ban of the long-standing practice of weaving real-life products and corporate identities into fictional plots and entertainment settings.

The FTC addressed this issue more than a decade ago, and sensibly concluded there was insufficient showing of consumer harm to justify industry-wide rulemaking. As important, current FCC disclosure rules to ensure consumers are notified of sponsorship in a manner that is palatable to viewers and does not limit creative license.

Regulators and the courts have developed a carefully crafted balance between viewers' rights to be informed, program developers' desires to determine content, and advertisers' need to communicate with consumers.

⁴CA Letter to the FTC at 9. Commercial Alert's petition cites, among other reports, Vernon Scott, *'E.T.' Invades Five More Continents*, UPI, Nov. 2, 1982 (use of product placement in the movie E.T. boosted sales of Reese's Pieces by 65% in 1982, and drove sales for years).