
COMMENTS

of the

WASHINGTON LEGAL FOUNDATION

to the

FEDERAL TRADE COMMISSION

Concerning

TELEVISION PRODUCT PLACEMENT

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March 26, 2004

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Mr. Donald S. Clark
Secretary
U.S. Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Re: **Product Placement on Television**

Dear Mr. Secretary:

The Washington Legal Foundation (WLF) is submitting these comments to express its opposition to the September 30, 2003, petition from Commercial Alert seeking certain requirements for disclosure of television product placement (hereinafter "petition"). For the reasons set out below, WLF believes such requirements are unjustifiable and would infringe upon free speech principles.

I. Interests of WLF

WLF is a public interest law and policy center with members and supporters in all 50 states. It devotes a substantial portion of its resources to advocating for reasonableness in government regulations, including in the areas of advertising and other avenues of commercial speech. WLF, founded in 1977, has participated as a party or as an *amicus curiae* in numerous cases involving commercial free speech, most recently including *Nike, Inc. v. Kasky*, *cert. dismissed*, 123 S. Ct. 2554 (2003); *Fed'n of Adver. Indus. Representatives, Inc. v. City of Chicago*, *cert. denied*, 124 S. Ct. 302 (2003); *Trans Union LLC v. FTC*, 536 U.S. 915 (2002); and

Gerawan Farming, Inc. v. Lyons, rev. granted, 43 P.3d 130, 118 Cal. Rptr. 2d 301 (Cal. 2002).

WLF's Legal Studies Division frequently publishes papers by expert practitioners on commercial speech issues; among the dozen papers WLF published on commercial speech in 2003 are *Compelled 'Counter Advertising' For Alcohol Products Would Tread On Free Speech* by Marc Sorini and Cary Green; *Commercial Speech And The Limits Of Federal Anti-Kickback Laws* by Rosemary Maxwell; and *High Court Cases May Shape First Amendment's Application To Federal Securities Laws* by Professor Larry Ribstein. WLF believes product placement is a longstanding and legitimate form of commercial speech, and is concerned that Commercial Alert's proposal, if adopted, would effectively ban this form of entertainment sponsorship to the detriment of viewers.

II. Background

"Product placement" refers to the entertainment industry practice in which a consumer product is either shown or mentioned within entertainment programming in return for payment, promotion, services (*e.g.*, free use of automobiles for filming), or other consideration from the maker of the product. Movies have included product placements since Hershey Foods agreed to promote the 1982 film *E.T.* with \$1 million in advertising in return for the appearance of Reese's Pieces candy in the film.¹ Every major film studio has had its own product placement office for over a decade.²

¹ See L.M. Sixel, *Chocolate empires: Journalist probes the secret world of America's candy kings*, Houston Chronicle, Mar. 14, 1999, at 22.

² See Eric Harrison, *Cashing In: E.T. Led the Way*, Los Angeles Times, Aug. 29, 1999, at 25.

On television, product placement dates to the medium's earliest days, with the hosts of 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-) promoting the sponsor's products. The Walt Disney Co. promoted its new theme park on its ABC show *Disneyland* (1954-1958), a predecessor of *The Wonderful World of Disney*. 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 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.'"³ Today, the judges of *American Idol* drink Coca-Cola, detectives on *CSI: Miami* drive Hummers, and Home Depot vans bring furnishings on *Trading Spaces*.⁴

Petitioner Commercial Alert perceives this practice as a great wrong to be righted, and argues that it "may violate federal prohibitions against unfair and deceptive acts and practices affecting commerce" under 15 U.S.C. § 45(a)(1).⁵ Commercial Alert accordingly urges the Commission to impose highly restrictive rules on product placement, mandating that a warning statement be superimposed over any scene containing a product placement:

³ Museum of Broadcast Communications, *General Electric Theater*. Available for download at <http://www.museum.tv/archives/etv/G/htmlG/generalelect/generalelect.htm>.

⁴ See Naomi Aoki, *Where Reality TV, Commerce Meet*, Boston Globe, Mar. 21, 2004, at A1.

⁵ Petition at 1. The statute provides, "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." 15 U.S.C. § 45(a)(1).

It [the Commission] should require advertisers to insist that TV networks and stations prominently disclose to viewers that their product placements are ads. In addition, product placements should be identified *when they occur*, much as print advertisements must be identified *on the ad* when they might be confused with editorial content. This should be in addition to disclosure at the outset of a program.

Such disclosure should be clear and conspicuous. It should be large enough, and kept on the screen long enough, so that it can be read and understood. Concurrent disclosure should read “Advertisement” when the product is placed on the TV screen. Disclosure at the outset of the program should be in plain English, such as: “This program contains paid advertising for....”

Petition at 2 (emphasis in original).

In petitioner’s view, any appearance or mention of a product, where that appearance or mention is in return for anything of value, is in and of itself an “unfair or deceptive” practice. The Commission has previously considered and rejected this argument in connection with a similar petition filed to request regulation of product placement in films. In rejecting the petition filed by the Center for the Study of Commercialism and other groups, the Commission stated in 1992, “Due to the apparent lack of a pervasive pattern of deception and substantial consumer injury attributable to product placements, the Commission has determined that an industry-wide rulemaking is inappropriate at this time.”⁶

III. The Petition Identifies No Substantial Harm From Product Placement

The petition gives no reason to overturn the Commission’s 1992 determination regarding the lack of consumer injury. The petition recites one instance after another of product placement

⁶ Federal Trade Commission, *FTC Denies CSC's Petition To Promulgate Rule On Product Placement In Movies*,

on television without even attempting to demonstrate any harm from them. To take a few of the petition's examples: Where oh where is the injury from Simon Cowell, Paula Abdul, and Randy Jackson of *American Idol* having cups of Coca-Cola in front of them?⁷ When the soap opera *All My Children* incorporated 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?⁸ 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 *Texaco Star Theater*.⁹ 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 Philbin is not *literally* friends with AT&T.¹⁰

The petition's one foray into the issue of consumer harm is to suggest that product placement “is implicated in the epidemic of marketing-related diseases in children” – obesity, diabetes, alcoholism, smoking-related illnesses, and gambling.¹¹ But tobacco product placement, as the petition notes, has been barred for over 15 years under the 1998 Master Settlement Agreement.¹² With respect to the other product placements to which petitioner objects, such as those for colas, fast food, and beer, petitioner's real objection appears to be the commercial promotion of those products *at all*, not their promotion through product placements. Petitioner's

Dec. 11, 1992. Available for download at <http://www.ftc.gov/opa/predawn/F93/csc-petit5.htm>.

⁷ Petition at 4.

⁸ Petition at 6.

⁹ *Id.*

¹⁰ Petition at 4.

¹¹ Petition at 12-16.

¹² Petition at 14. Petitioner's suggestion of a “loophole” in the Master Settlement Agreement through the use of

fundamental complaint is that it is legal to promote these legal products. Thus, the petition complains that McDonald's "is almost as pervasive on the screen as it is on the nation's thoroughfares and on its malls" – a state of affairs that has far more to do with McDonald's standard 30-second commercial spots than with the few McDonald's product placement deals cited in the petition.¹³

IV. The Proposed Rule Would Effectively Ban Speech in Violation of the First Amendment

Even if the petition could tie the longstanding practice of product placement to some substantial harm, it must be rejected because its proposed rule would infringe on freedom of speech – specifically, the protections for commercial speech set out by the U.S. Supreme Court in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), and subsequent cases.

It is "well established that 'the party seeking to uphold a restriction on commercial speech carries the burden of justifying it.'"¹⁴ 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 television product placements. The petition would have the Commission require all occurrences of product placement be accompanied "when they occur" by a "clear and conspicuous" label of "Advertisement," one that is "large enough, and kept on the screen long

product samples in lieu of cash is unfounded. The agreement bars "any payment or other consideration to any other person or entity" for tobacco product placements.

¹³ Petition at 12-13.

¹⁴ *Thompson v. Western States Medical Center*, 535 U.S. 357, 373 (2002) (citations omitted).

enough, so that it can be read and understood.” This on-screen distraction – an extraneous, real-time “scarlet A” – would undermine the dramatic effect of the scene and substantially devalue the programming.¹⁵ The proposed requirement is, in short, targeted “with the precision of a laser beam”¹⁶ at the viability of product placements.

The Supreme Court confronted a similar brand of overreaching in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), in which the state of Massachusetts banned all outdoor advertising of tobacco products within 1,000 feet of schools and playgrounds. The Court noted that the ban would effectively “prohibit advertising in a substantial portion of the major metropolitan areas of Massachusetts,” including an estimated 87 percent to 91 percent of Boston, Worcester, and Springfield. The result was that “[i]n some geographical areas, these regulations would constitute nearly a complete ban on the communication of truthful information . . . to adult consumers” through the medium of outdoor advertising.¹⁷

Moreover, because the regulations also covered indoor signs that were visible outside, the regulations effectively banned tobacco signs in convenience stores. Although the stores could, in theory, post signs indoors by covering their windows, the Court noted that convenience stores “have unique security concerns that counsel in favor of full visibility of the store from the

¹⁵ This onerous disclosure requirement is unprecedented even in the context of “infomercials,” programming that is entirely produced by the advertiser and which solicits an order for the product. The Commission has required disclosure of an infomercial’s status merely “within the first thirty (30) seconds of the commercial or other advertisement and immediately before each presentation of ordering instructions for the product or service. *Michael S. Levey, et al.; Proposed Consent Agreement with Analysis to Aid Public Comment*, 58 Fed. Reg. 38764, 38768 (July 20, 1993).

¹⁶ *News America Pub., Inc. v. FCC*, 844 F.2d 800, 814 (D.C. Cir. 1988)

¹⁷ 533 U.S. at 562.

outside.”¹⁸ The sweeping effect of the Massachusetts regulations – particularly when considered in light of the commercial reality of the businesses at issue – demonstrated a lack of tailoring to the harm intended to be addressed and therefore violated the First Amendment. In the context of television product placement, consideration of the commercial *and dramatic* reality of television production underscores the extremely sweeping character of the proposal and its unconstitutional overbreadth.

CONCLUSION

The Washington Legal Foundation respectfully requests that the Commission reject the Commercial Alert petition.

Respectfully submitted,

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¹⁸ 533 U.S. at 565.