



FREEDOM TO ADVERTISE COALITION

American Advertising
Federation (AFF)
1101 Vermont Ave., NW, Suite 500
Washington, DC 20005
(202) 898-0089

November 12, 2003

American Association of
Advertising Agencies (4-As)
1203 - 19th Street, NW, Suite 4R
Washington, DC 20036
(202) 331-7345

Marlene H. Dortch, Secretary
Federal Communications Commission
9300 East Hampton Dr.
Capitol Heights, MD 20743

Association of National
Advertisers (ANA)
700 11th Street, NW, Suite 650
Washington, DC 20001
(626-7800)

**RE: Opposition to Petition for Rulemaking related to
Disclosure of Product Placement on Television**

Direct Marketing Association
1111 19th Street, NW, Suite 1100
Washington, D. C. 20036
(202) 955-5030

Dear Ms. Dortch:

Magazine Publishers
of America (MPA)
1211 Conn. Ave., NW, Suite 610
Washington, DC 20036
(202) 296-7277

The Freedom to Advertise Coalition ("FAC") is a not-for-profit organization of advertising, publishing and media associations committed to the protection of the First Amendment right to truthfully advertise all legal products and services.

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FAC strongly opposes Commercial Alert's "Petition for Rulemaking to Establish Adequate Disclosure of Product Placement on Television."¹ The Federal Communication Commission's (FCC) Rule 73.1212 is sufficient to address any potential concerns related to the use of product placement in the broadcast media.²

Product placement has occupied a well accepted place in film and broadcast television for decades. Long-standing and time-tested disclosure rules help protect the artistic integrity of programming while properly informing the public of the presence of this form of commercial speech. The rules permit a

¹ On September 30, 2003, Commercial Alert filed a "Complaint, Request for Investigation, and Petition for Rulemaking to Establish Adequate Disclosure of Product Placement on Television" with the FCC. The organization argues that product placement is misleading to viewers, and that it may violate federal prohibitions against unfair and deceptive acts and practices affecting commerce. Commercial Alert requests that the FCC promulgate new rules that would require television networks to disclose all product placements in their programming to their audiences. In addition to disclosure at the outset of the program, Commercial Alert recommends identifying product placements when they occur by flashing the word "advertisement" on the television screen.

² 47 C.F.R. § 73.1212.



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program containing product placement to be broadcast as the network intends as long as the presence of any product placement is noted.

At its core, the Commercial Alert petition is a thinly-veiled attempt to lure the FCC down the path to elimination of this form of commercial free speech. The suggestions offered in the petition, including a proposal that television programs be interrupted with “pop-up” disclosures acknowledging placements as they appear, are impractical, and border on the ludicrous.

But, the proposals set forth in the petition are also dangerous. They establish new and unwarranted limitations on commercial speech rights. They pose a threat to artistic freedom – traditionally the “front line” in the protection of our Constitutional rights. They seek to extinguish the free speech rights of those who wish to communicate via these means.

As you are aware, the FCC presently has regulations that adequately address the issue of commercial sponsorship, and the Federal Trade Commission (FTC) previously denied a similar petition, determining that an industry-wide rulemaking on the matter was “inappropriate.”³ The FTC precedent calls for the examination on a case-by-case basis of any specific issues regarding disclosure of product placement. We agree with the determination of the FTC and urge the FCC to follow suit.

I. The FCC’s Present Regulations Are Sufficient.

The FCC’s present regulations are sufficient to address the potential threats of product placement. Commission Rule 73.1212 provides, in relevant part:

- (a) 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 . . .

³ See FTC File No. P914518.



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(f) In the case of broadcast matter advertising commercial products or services, an announcement stating the sponsor's corporate or trade name, or the name of the sponsor's product, when it is clear that the mention of the name of the product constitutes sponsor identification, shall be deemed sufficient for the purpose of this section and only one such announcement need be made at any time during the course of the broadcast.⁴

This rule has proven adequate to address the issue of product placement. Commercial Alert's suggestion proposal that product placements be identified with "pop-up" disclosures whenever such placements occur would destroy the artistic integrity of any program containing such speech, and would be a nuisance to the viewer. Furthermore, any thought of dedicating scarce FCC resources to writing new orders would detract from the Chairman's stated goal of focusing more resources on enforcement of existing rules.

II. Claims that Product Placement is "Unfair" and "Deceptive" are not supported by law.

Commercial Alert's petition smacks of a paternalistic lack of confidence in the ability of Americans to discern fact from fiction. Product placements are not deceptive or unfair because consumers know that they are simply watching fictional programming.

As the FCC is aware, an advertisement is considered deceptive if it contains a misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances to their detriment.⁵

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.⁶

⁴ 47 C.F.R. § 73.1212.

⁵ Federal Trade Commission Policy Statement on Deception, 4 Trade Reg. Rep. (CCH) § 13, 205 (FTC Oct. 14, 1983).

⁶ 15 U.S.C. § 45(n).



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Product placement is neither “unfair” or “deceptive” within the meaning of the law. The conclusions Commercial Alert asks the FCC to reach are without precedent. As you are aware, it is the Federal Trade Commission which has jurisdiction over “unfair” and “deceptive” advertising.

In any event, the petitioner has provided no evidence whatsoever to support its conclusions that certain societal trends are at all related to this particular form of commercial speech, and for good reason. It takes a substantial stretch of the imagination to conclude that having fictional characters drink a certain brand of soft drink, eat a certain brand of snack cookie or pour a certain brand of breakfast cereal, is a “misrepresentation or omission” likely to mislead consumers. It is just as difficult to conceive how such clearly fictional activity can be deemed to cause substantial consumer injury not reasonably avoidable by consumers themselves.

III. Product Placement is Essential to the Creative Process

Product placement can be an essential ingredient in the story being told through a program or show. In the real world, people eat, drink, and wear brand-name products. The visual picture painted for the viewers gains vibrancy when products are portrayed as they are used in everyday life. Such products help tell the story, and sometimes become the story. Indeed, as has been noted, “because products come encoded with certain symbolism, they can provide a variety of nonverbal cues and near universal reference points.”⁷

For example, the use of the Dodge Charger in the show “Dukes of Hazard” and the use of the Pontiac Trans Am in the show “Knight Rider” captures the essence of the 1970s and 1980s. When Matt Damon’s character in “Good Will Hunting” talks about Dunkin Donuts, it immediately creates verisimilitude. Carrie Bradshaw, in the HBO series “Sex and the City,” encapsulates a certain stylish type of New York woman when she buys Monolo Blahnik and Jimmy Choo shoes.

For decades, products placed in films have helped convey images and impressions now inextricably tied in the minds of viewers to the films

⁷ Govani, Shinan. “Product Placement in Movies – is it really so bad?”
(www.csmonitor.com/durable/1999/02/10/fp11s1-csm.shtml).



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themselves. Commentators point to examples like “The African Queen” where Katherine Hepburn dumped Gordon’s Dry Gin overboard, or “The Caretakers” where Joan Crawford came upon a Pepsi trade show display.⁸ Even the famous alien in the film “ET” was shown following and eating a trail of Reese’s Pieces candy.

IV. First Amendment Rights are at Stake

The Commercial Alert petition is a transparent attempt to secure new and we believe, unconstitutional, restraints on commercial speech. For example, the proposal that product placements be identified when they occur in addition to disclosure at the outset of the program, is no more than a Trojan horse designed to suppress expression of this form of commercial speech.

All programming would become virtually impossible to watch as viewers get distracted by pop-ups flashing the word “advertisement” interrupting scene after scene. This type of intrusion would deface the artistic process. Its likely result, and we believe intent, will be to censor or ban this long-standing means of commercial speech.

The United States Supreme Court has held that the freedom of speech guaranteed by the First Amendment to the United States Constitution extends to commercial speech. The Supreme Court has stated that:

“the commercial marketplace, like other spheres of our social and cultural life provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.”⁹

⁸ *Id.*

⁹ *Thompson v. Western States Med. Ctr.*, 122 S.Ct. 1497 (2002).



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Courts apply a strict scrutiny test to non-commercial speech, while an intermediate scrutiny test is used to determine whether a regulation of commercial speech is in violation of the First Amendment. In order to identify violations of 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 test first asks whether the commercial speech at issue involves unlawful activity, or is misleading. If so, the speech is not protected under the First Amendment. If the speech is not misleading and concerns lawful activity, then courts must ask: (1) whether the asserted government interest is substantial; (2) whether the regulatory policy directly and materially advances the governmental interest asserted; and (3) whether the regulatory policy is no more extensive than necessary to serve the government's asserted interest.

Product placement is advertising that is protected by the commercial speech doctrine. Commercial Alert's petition has not made the case that product placement is unlawful or misleading, nor do its proposed restrictions pass First Amendment muster. Since it fails to identify a strong governmental interest in accordance with the present commercial free speech doctrine, Commercial Alert's suggestions threaten to infringe upon the free speech rights of broadcasters.

V. The precedent set by the FTC is correct, and should be followed

On December 11, 1992, the FTC denied a similar petition filed by the Center for the Study of Commercialism.¹⁰ The petition asked the FTC to order motion picture companies to stop using undisclosed product placement in movies, and require production studios to disclose paid for product placements at the beginning of any film containing them.

The FTC responded by finding industry-wide rulemaking "inappropriate." If, however, particular instances of product placement arise where there is

¹⁰ On December 11, 1992, the FTC issued a press release that denied CSC's petition to promulgate rules on product placement in movies. See FTC File No. P914518.



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significant evidence of consumer injury, the FTC said that it would consider these matters on a case-by-case basis.

Given both the impracticality of Commercial Alert's suggestions and the constitutional underpinnings of commercial free speech, the best course of action is for the FCC to follow the precedent of the FTC and address these issues on a case-by-case basis as opposed to through an industry-wide rulemaking.

VI. Conclusion

Commercial Alert's petition for rulemaking should be denied. The FCC's present regulations adequately address the issue of product placement in television. Further action is not only unnecessary, but impractical. The FCC should reject this misguided and unconstitutional set of proposals.

Thank you for your time and consideration.

Sincerely,

Darryl Nirenberg
Counsel
Freedom to Advertise Coalition

Penelope Farthing
Counsel
Freedom to Advertise Coalition