

“ENHANCED” FCC REGULATION OF PRODUCT PLACEMENT WOULD BREACH FREE SPEECH RIGHTS

by

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Michael J. Fox’s character ordering a Pepsi in the movie *Back to the Future*. Oreo cookies being eaten and discussed throughout an episode by the cast of *Seventh Heaven*. A character on *The Office* going to work at a Staples office supply store. Product placement is ever-evolving in television and movies.

With the infiltration of alternative viewing methods such as TiVo, Hulu.com, and illegal downloading, the YouTube generation of viewers is much less persuaded by advertisements in the traditional television programming format. Advertisers and entertainment content producers have responded over the last decade with product placement,¹ whereby advertisers pay to have their products subtly, or not so subtly, included and often featured in entertainment content.

The Federal Communications Commission (“FCC”) currently regulates sponsored programming under the Communications Act of 1934,² and it requires broadcasters to disclose to their viewers at the time of broadcast if any content of the broadcast has been made in exchange for money, services, or other valuable consideration.³ Pursuant to this statute, the FCC has promulgated its sponsorship identification rule, which establishes the responsibilities of the broadcaster in making sponsorship disclosures.⁴ Under this rule, “an announcement stating the sponsor’s . . . name, or . . . product . . . [is] sufficient . . . and only one such announcement need be made at any time during the . . . broadcast.”⁵ Broadcasters typically comply with these regulations by making a single disclosure at the end of a

¹Product placement is also referred to as product integration (when a product is prominently featured and/or incorporated into a program’s storyline) and embedded advertising.

²47 U.S.C. § 151 *et seq.*

³47 U.S.C. § 317 (2006).

⁴47 C.F.R. § 73.1212 (2009).

⁵*Id.* § 73.1212(f).

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program (e.g., “Promotional consideration paid . . .”) that remains on the screen long enough to be read or heard by the average viewer.⁶ These regulations can be applied to product placement, and the FCC has enforced them in that context.⁷

At least one broadcaster became an unwitting test case on certain aspects of the boundaries of current FCC regulations in the context of video news releases. In 2007, Comcast aired what appeared to be a legitimate news segment about Wheaties and Bisquick products, which was actually designed by public relations agencies, and which did not disclose that General Mills provided the content.⁸ Since General Mills did not pay to have the content aired, Comcast believed that no disclosure was necessary. This is understandable since the FCC’s sponsorship identification rule exempts from disclosure any “service or property furnished either without or at a nominal charge for use” in broadcasting.⁹ However, the FCC issued a *Notice of Apparent Liability* noting that such exemption does not apply where the “service or property is ‘furnished in consideration for an identification of any . . . product . . . or brand name beyond an identification reasonably related to the . . . [broad]cast.’”¹⁰ The FCC stated that only material containing “fleeting or transient references” to a product falls under the exemption for sponsorships for which there was a nominal or no charge.¹¹ But increasingly, entertainment and news-like programming is taking on the role that traditional advertising has played by featuring products in ways beyond what the FCC may consider to be “reasonable” in relation to the broadcast, without disclosures to consumers.

Although the current regulatory scheme affords the FCC enforcement authority against certain forms of product placement, some interest groups have heightened the cry for more pervasive regulation, and the FCC is now considering its response. In June 2008, the FCC published a *Notice of Inquiry* and a *Notice of Proposed Rulemaking* to seek comment on its potentially more-stringent regulations.¹² The FCC is proposing: (i) more frequent and more obvious disclosures during programming with product placement;¹³ (ii) extension of product integration regulations to cable television; and, (iii) additional restrictions for children’s programming.¹⁴ Some interest groups strongly support the public policy of the

⁶See *Application of Sponsorship Identification Rules to Political Broadcasts, Teaser Announcements, Governmental Entities and Other Organizations*, 66 F.C.C.2d 302 (1977).

⁷See *In re Sponsorship Identification of Broadcast Material*, 40 F.C.C. 69, 74 (1960) (requiring “more than ordinary diligence” with respect to plugs and “sneaky” commercials, including product placement).

⁸See *In re Comcast Corp.*, 22 F.C.C. R. 17,474 (2007) (fining Comcast \$16,000 for its failure to disclose the identity of advertiser General Mills in cablecasting the “Wheaties Fit to Win Challenge” and “Bisquick’s 75th Anniversary” segments, which featured General Mills’ products). The FCC stated that only material containing fleeting or transient references to a product falls under the exemption for sponsorships for which there was a nominal or no charge.

⁹47 C.F.R. § 76.1615(a) (2009).

¹⁰*In re Comcast Corp.*, 22 F.C.C.R at 17,477.

¹¹*Id.*

¹²*In re Sponsorship Identification Rules and Embedded Advertising*, 23 F.C.C.R. 10,682 (2008), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-155A1.doc. The comment period closed in November 2008.

¹³This proposed regulation would require that sponsorship identification announcements have lettering of a particular size and air for a particular amount of time, in line with the requirements for political candidate advertising. *Id.* at 10,691.

¹⁴*Id.*

proposed rulemaking: greater transparency and less deception for consumers.¹⁵ However, in light of new media and entertainment's departure from the traditional model, the alleged harm to consumers under the current regulations must be weighed against the First Amendment interests that could be violated under tighter regulations. In fact, the creativity and quality of entertainment programming may depend on First Amendment protection of the product placement economic model.

Commercial speech is protected under the First Amendment, though somewhat less stringently than non-commercial (e.g., political) speech. The Supreme Court's four-part *Central Hudson* test is used to evaluate whether government regulation of commercial speech is permissible.¹⁶ First, in order for the speech to be protected commercial speech, it must not be false or deceptive nor concern unlawful activity.¹⁷ Next, there must be a substantial government interest in regulating.¹⁸ The third *Central Hudson* prong requires that the regulation directly advance the asserted government interest.¹⁹ And finally, the regulation must be no more extensive than necessary to serve the government interest.²⁰ An examination of the proposed enhanced FCC regulation of product placement under this First Amendment scrutiny demonstrates that the regulation would violate broadcasters' and advertisers' rights.

The protectionist concern with the consumer harm that product placement allegedly causes is entrenched in an old media perspective and the notion that deception occurs if the separation between programming content and commercial advertising is not abundantly clear. Supporters of an enhanced sponsorship identification rule argue that any positive portrayal of a product that is paid for by an advertiser without a disclosure and without regulation about what product claims are made in the portrayal is inherently deceptive.²¹ But even the Federal Trade Commission (FTC), in declining to consider promulgating its own product placement regulations, has stated that there is no sufficient showing that product placement involves "false or misleading objective, material claims" about products, but that there is an "apparent lack of a pervasive pattern of deception and substantial consumer injury attributable to product placements."²² The emerging truth in the Internet-, smart phone-, and TiVo-populated entertainment universe is that consumers are coming to expect sponsored marketing messages in places they never did before. As consumers' savvy in new media manifests further, it will be increasingly futile to argue that there is a substantial government interest in regulating product placement in the manner the FCC is considering. At any rate, product placements that include false or misleading material claims are already subject to the FTC's enforcement authority.

¹⁵See, e.g., Gary Ruskin, Executive Director, Commercial Alert, Complaint, Request for Investigation, and Petition for Rulemaking to Establish Adequate Disclosure of Product Placement on Television (Sept. 30, 2003) (hereinafter "Commercial Alert Petition").

¹⁶*Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n.*, 447 U.S. 557, 566 (1980).

¹⁷*Id.*

¹⁸*Id.*

¹⁹*Id.*

²⁰*Id.*

²¹Commercial Alert Petition at 4.

²²Press Release, FTC, FTC Denies Center for the Study of Commercialism'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>.

Even if a substantial government interest were to exist, more stringent FCC regulation of product placement likely fails the fourth *Central Hudson* prong, as it may be more extensive than is necessary to serve that interest. In papers opposing Commercial Alert's 2003 petition for rulemaking with the FCC in 2003, the Washington Legal Foundation and Freedom to Advertise Coalition argued that more frequent and concurrent disclosure requirements would result in a practical governmental ban on product placement.²³ Whether consumers would find more prominent, frequent disclosures a deterrent to viewing remains to be seen, but if advertisers perceive the regulations as a likely turn-off to viewers, they will effectively cease sponsoring entertainment content through product placement. This decrease in funding would contribute further to the diminution of the quality and creativity of television programming and lead to the further promotion of inexpensive, re-packaged reality TV in its stead. Whether or not there is a First Amendment policy concern for advertisers' free speech, there is certainly an interest in promoting creative, original artistic expression in broadcasting. That interest is currently served by the product placement economic model and threatened by the proposed over-extensive regulations, such that the FCC's rulemaking would not survive *Central Hudson* scrutiny.

As the Supreme Court reiterated in its most recent ruling on commercial speech, “the speaker and audience, not the government, assess the value of the information presented.”²⁴ The FCC should not over-regulate for the sake of protecting consumers when the current regulatory scheme suffices to address potential deception, especially at the cost of impeding the First Amendment value of creative expression.

²³Comments of the Washington Legal Foundation to the FCC Concerning Television Product Placement (Apr. 6, 2004) at 6–7 (arguing that such interference with the commercial and dramatic reality of television production would make a concurrent disclosure requirement unconstitutionally overbroad); Opposition to Petition for Rulemaking Related to Disclosure of Product Placement on Television filed by Freedom to Advertise Coalition (Nov. 12, 2003) at 5 (arguing that the disclosure requirement would greatly interfere with artistic integrity).

²⁴*Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 367 (2002) (quoting *Edenfield v. Fane*, 507 U.S. 761 (1993)).