

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Sponsorship Identification Rules	)	MB Docket No. 08-90
and Embedded Advertising	)	
	)	

**REPLY COMMENTS OF  
THE AMERICAN ADVERTISING FEDERATION,  
THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES,  
THE ASSOCIATION OF NATIONAL ADVERTISERS,  
AND EIGHT STATE BROADCASTERS ASSOCIATIONS**

**American Advertising Federation  
American Association of Advertising Agencies  
Association of National Advertisers, Inc.  
Alabama Broadcasters Association  
Iowa Broadcasters Association  
Maine Association of Broadcasters**

**Michigan Association of Broadcasters  
Missouri Broadcasters Association  
Nevada Broadcasters Association  
Washington State Association of Broadcasters  
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## **EXECUTIVE SUMMARY**

Advocates of stricter product placement rules exaggerate and distort product placement's alleged impact by making selective and misleading references to academic literature. Such comments fail to support either the FCC proposals in this proceeding, or those that exceed anything contemplated by the Commission, such as a pre-10 p.m. ban on product placement. Existing rules, which reflect the Communications Act's overriding recognition of a fundamental need to preserve commercial support for programming, are sufficient to notify consumers of paid product placements. Proposals for more restrictive regulation disregard this historic purpose of the law, and would require the FCC to exceed its statutory and constitutional authority.

Much of the support for more stringent rules reflects general hostility toward advertising and commercial activity, while ignoring the foundation on which ad-supported media and public interest programming depend. "Beliefs" that product placement is a form of "subliminal advertising" are of no consequence given that academic literature long ago debunked claims that such practices occur and/or have any impact, especially since the comments cite no research showing any real-world impact from product placement as "subliminal advertising." In fact, articles cited by pro-regulation commenters find there is no consensus on product placement's impact, so in the end, there is nothing to support any assertion of harm. This lapse is significant since the FCC must support any policy change on product placement with substantial evidence.

Even if it could be shown product placement has some extraordinary persuasive effect, the proposed rules are unnecessary. Those favoring new rules also undermine any claim of product placement as "stealth advertising" by offering comments replete with examples of placements they deem to be blatant or obvious. Assertions that product placement is deceptive in design or in effect are belied by research acknowledging that infomercials, product placements, and other "covert" marketing does not seek to deceive, but is simply a pragmatic response to

audiences being increasingly difficult to reach with traditional mass media. Further, research cited in comments favoring expanded rules suggests that audiences are aware of the growing prominence of product placement, and are not concerned about it.

Extreme proposals to regulate product placements as if audiences consist solely of minors – such as adapting broadcast indecency rules to ban them before 10 p.m., requiring contemporaneous notices, or targeting them due to a possibility they may involve alcohol – not only are excessive, but are unsupported by statutory authority and would be unconstitutional. The Supreme Court has made clear that government interests in shielding children from certain material does not justify broad suppression of speech addressed to adults. It also has warned repeatedly against reducing the adult population to only what is fit for children, and has invalidated ad restrictions that limit speech available to adults based on asserted interests in protecting children. While FCC authority to regulate indecency rests on a particular statutory command, there is no corresponding statutory authority to similarly regulate product placement. This absence of specific statutory authority to ban product placement, either entirely, or for a substantial portion of the broadcast day, is entirely dispositive of requests for new restrictions. The Commission cannot rely on its general authority to promote the “public interest,” and as an overall matter, lacks constitutional authority to enact the various restrictions on product placement proposed in the comments.

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The American Advertising Federation (“AAF”), the American Association of Advertising Agencies (“AAAA”), the Association of National Advertisers (“ANA”), and eight state broadcasters associations hereby reply to the comments filed in the above-captioned proceeding.<sup>1</sup> Although ANA’s, AAF’s, and AAAA’s positions on the legal and policy questions the *Notice* raised are set forth fully in their initial comments, a couple of issues raised by proponents of more stringent regulation should not escape scrutiny. These include certain comments containing selective and misleading references to academic literature that greatly exaggerate and distort the purported impact of product placement. Based on such inflated claims, these

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<sup>1</sup> *Sponsorship Identification Rules and Embedded Advertising*, 23 FCC Rcd. 10682 (2008) (“*NOI/NPRM*” or “*Notice*”). ANA, AAF, and AAAA submitted initial comments along with fifteen other companies and trade associations identified as the National Media Providers. In addition, these reply comments are joined by the Alabama Broadcasters Association, Iowa Broadcasters Association, Maine Association of Broadcasters, Michigan Association of Broadcasters, Missouri Broadcasters Association, Nevada Broadcasters Association, Washington State Association of Broadcasters, and Wisconsin Broadcasters Association. These state broadcasters associations also hereby evidence their general support for the portions of the initial comments submitted by the National Media Providers dealing with the application of the proposed new rules and policies to broadcast station operations. Reply commenters are described in the Appendix.

commenters advocate restrictions on product placement that far exceed anything contemplated in the NPRM or NOI, including a ban on all product placement before 10 p.m.

There is no evidence to support these extreme claims, and there is no legal basis for such overly restrictive policy proposals. As explained in the initial comments of the National Media Providers, existing regulations are entirely sufficient to notify consumers of any paid product placements. The current rules were adopted as part of an overriding balance in the Communications Act that recognizes the fundamental need to preserve commercial support for public interest programming. Proposals for more restrictive regulation of product placement disregard this historic purpose of the law. As a consequence, they exceed the Commission's statutory and constitutional authority.

**I. THERE IS NO SUBSTANCE TO HYPERBOLIC CLAIMS REGARDING THE PERSUASIVE POWER OF PRODUCT PLACEMENT AS "SUBLIMINAL ADVERTISING" OR ASSERTIONS THAT IT IS "INHERENTLY DECEPTIVE"**

Much of the support for more stringent rules in this proceeding reflects general hostility toward advertising and commercial activity in general. *See generally* 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 ("Commercial Alert Petition"). *See also* Comments of Campaign for a Commercial-Free Childhood. With respect to product placement, the campaign for heightened regulation is illustrated by increasingly florid rhetoric, describing the practice as "hidden" or "stealth" advertising, and by constant references to the "harmfulness" of commercial activity. However, as fully set forth in the National Media Providers' initial comments, this hostility ignores the foundation upon which advertiser-supported media and public interest programming depend. *See* Comments of the National Media Providers at 7-18. And with respect to the supposed "harms" of product

placement, most proponents of new rules offer little more than alarmist descriptions about how the practice exists and is increasing, and offer nothing to support their policy preferences.

#### **A. Subliminal Advertising is a Myth**

Where commenters have attempted to marshal some support for their assertions of consumer harm, they have relied on incomplete and misleading references to academic literature. Commercial Alert, for example, cites a survey of “product placement professionals” published in 2003 that suggested a “strong belief” that product placement can be “considered a form of subliminal advertising.”<sup>2</sup> Similarly, N.E. Marsden asserts that “[t]he impact of these messages is often subliminal, and may not be ‘counterargued’ as commercials are.” Ominously, she adds, “[t]he risks this practice poses to society” are “profound.”<sup>3</sup> As explained more fully below, the primary articles cited expressly undermine their claims about the impact of product placement, but their attempt to hype the issue by reference to “subliminal advertising” is quite illuminating.

Commenters’ claims about “subliminal advertising” harken back to pop culture scares that have been widely reported since the 1950s, but have been thoroughly debunked in the academic literature and elsewhere. Most of the apocryphal stories originate with an experiment in a Fort Lee, NJ movie theater, purportedly conducted in 1957 by psychologist and marketing researcher James M. Vicary, the man who coined the term “subliminal advertising.” He claimed that in a six-week study, popcorn sales increased by 57.8 percent and cola sales increased by 18.1 percent when he projected the words “eat popcorn” and “drink Coca-Cola” on the screen for 1/3,000 of a second. The claimed results were widely reported in the popular press, although the

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<sup>2</sup> Comments of Commercial Alert at 16 (citing James Karth, Kathy Brittain McKee, Carol Pardun, *Practitioners Evolving Views on Product Placement Effectiveness*, J. OF ADVER. RES., June 2003, pp. 138-149) (“*Product Placement Effectiveness*”).

<sup>3</sup> Comments of N.E. Marsden at 19. Marsden, a self-described “Educator and Integrated Marketing Consultant,” lists no affiliation or relevant experience in her comments. Nor is any additional background information available online. See, e.g., [http://www.huffingtonpost.com/n-e-marsden/#blogger\\_bio](http://www.huffingtonpost.com/n-e-marsden/#blogger_bio).

study as described had no control group and was never reported in a scientific journal. Nevertheless, the tale fed a paranoia of media power such that it caused an immediate and widespread public outcry concerning the supposed psychological manipulation of consumers.<sup>4</sup>

But the experiment was a hoax. When a major research company and several academic researchers failed to replicate the original results, Vicary admitted that he had fabricated his experiment's results in an effort to revive his then-failing research firm.<sup>5</sup> Vicary's admission was widely covered in the trade press of the period, yet despite exposure of the "experiment" and results as fraudulent, "the concept of subliminal advertising continues to be an issue today." *Playing to People's Paranoia, supra*, at 60. As Herbert Jack Rotfeld, editor of the JOURNAL OF CONSUMER AFFAIRS, has noted, "[i]t was a research myth, a conscious effort to generate interest in his company, and it has created a monster that is still with us."<sup>6</sup>

Professor Rotfeld has observed there is "not a scintilla of evidence from consumer psychology that consumers can be manipulated by messages they are unable to perceive," but he notes "[i]t is difficult to think such sellers of subliminal manipulation theories actually believe a great conspiracy exists to manipulate consumers, but it provides a source of income as long as they find an audience willing to believe their tales." *Id.* at 61. Professor Shari Broyles likewise has written that "[a]s long as popular authors bring their road show on subliminal advertising back to the front of consumer awareness, they needlessly scare consumers into believing that

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<sup>4</sup> See Timothy E. Moore, *Subliminal Advertising: What You See Is What You Get*, J. OF MKTG. (Spring 1982), at 46.

<sup>5</sup> See Sheri J. Broyles, *Subliminal Advertising and the Perpetual Popularity of Playing to People's Paranoia*, J. OF CONSUMER AFFAIRS (Winter 2006) ("Playing to People's Paranoia") at 40. See also Herbert Jack Rotfeld, ADVENTURES IN MISPLACED MARKETING 152-153 (Westport, CT: Quorum Books: 2001) ("ADVENTURES IN MISPLACED MARKETING"); Frank R. Kardes, *The Psychology of Advertising*, in PERSUASION: PSYCHOLOGICAL INSIGHTS AND PERSPECTIVES 297 (Timothy C. Brock and Melanie C. Green, eds, 2d ed., 2005).

<sup>6</sup> Herbert Jack Rotfeld, *The Cynical Use of Marketing to the Unwitting Consumer*, JOURNAL OF CONSUMER MARKETING (Winter 2005), at 60.



they are being psychologically manipulated.” *Playing to People’s Paranoia, supra*. Other experts in the field have expressed similar views.<sup>7</sup> In addition, Snopes.com, a website that debunks urban myths, confirms that Vicary falsified his results and expresses doubt on whether he even conducted the experiments at all. It concludes:

For neither the first nor the last time, a great deal of time and money and effort was expended on “protecting” the public from something that posed no danger to them. As numerous studies over the last few decades have demonstrated, subliminal advertising doesn’t work; in fact, it never worked, and the whole premise was based on a lie from the beginning. James Vicary’s legacy was to ensure that a great many people will never be convinced otherwise, however.<sup>8</sup>

Contrary to popular misconceptions (and to the pro-regulation comments filed in this proceeding), numerous academic reviews of the literature covering nearly 50 years have shown that “no empirical evidence exists to demonstrate that any subliminal advertising technique has an effect on changing attitudes or an impact on consumers’ purchasing behavior.”<sup>9</sup> In any event, “subliminal directives have not been shown to have the power ascribed to them by advocates” and “the literature on subliminal perception shows that the most clearly documented effects are obtained only in highly contrived and artificial situations.”<sup>10</sup> In short, “it is a big leap from the psychology lab all the way to the grocery store.” *See supra, Playing to People’s Paranoia*. As Professor Rotfeld has observed, “numerous mass communications and persuasion studies failed

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<sup>7</sup> Jim Avery, author of a textbook on advertising campaigns, observed that “the comparison of studying subliminal advertising [is] like a chemist giving serious discussion to alchemy.” Another scholar in residence wrote “[i]t is like having someone publish a book for the Flat Earth Society as a serious scientific study.” *See supra, Playing to People’s Paranoia*.

<sup>8</sup> *See* Snopes.com, [www.snopes.com/business/hidden/popcorn.asp](http://www.snopes.com/business/hidden/popcorn.asp) (last visited Oct. 17, 2008). *See also* Rotfeld, *supra* at 64.

<sup>9</sup> *See Playing to People’s Paranoia, supra*. *See also* Joel Saegert, *Another Look at Subliminal Perception*, J. OF ADVER. RES. (1979) at 55-57; Eric J. Zanot, J. David Pincus, and E. Joseph Lamp, *Public Perceptions of Subliminal Advertising*, J. OF ADVER., (1983) at 39-45.

<sup>10</sup> *See Subliminal Advertising: What You See Is What You Get*, at 46.

to find any support for the idea that subliminal advertising is able to control people's behavior." ADVENTURES IN MISPLACED MARKETING, *supra*, at 152.

Perhaps for this reason, commenters in this proceeding do not purport to cite research that demonstrates any real-world impact from product placement as "subliminal advertising," but instead rest their argument on "beliefs" of a small group of "product placement professionals" who participated in a survey.<sup>11</sup> The comments then rely on the popular myth that such "subliminal" appeals have an extraordinary impact. Not only do comments such as these simply misuse the term "subliminal advertising" (since – obviously – if you can see the product, "it does not qualify as subliminal"),<sup>12</sup> the reference entirely begs the question of the effect of product placement on consumers. Bottom line, there is nothing to support the various commenters' assertions of "harm." This lapse is significant, because the Commission must support any policy change toward product placement with substantial evidence.<sup>13</sup>

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<sup>11</sup> Comments of Commercial Alert at 16 (citing *Product Placement Effectiveness*). However, the "study" cited by Commercial Alert has been criticized in the academic literature for having a small sample size (a total of 28 *respondents*) and for generally being inconclusive. See, e.g., Cristel Antonia Russell and Michael Belch, *A Managerial Investigation into the Product Placement Industry*, J. OF ADVER. RES., March 2005, at 74 ("the study's small sample and main reliance on close-ended survey questions could not fully confront and address all the challenges and opportunities associated with product placement planning") ("*Managerial Investigation into Product Placement*"). Although Commercial Alert also cites the Russell and Belch article, it does not mention this critique.

<sup>12</sup> See *Playing to People's Paranoia*, *supra*.

<sup>13</sup> At a minimum, the Commission must demonstrate that the "the harms it recites are real" and not based on "mere speculation or conjecture." Comments of National Media Providers at 55 (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993)). But that is only if the regulations to be adopted are considered restrictions just on commercial speech. The Commission faces a much heavier burden of proof to the extent it regulates programming content, *id.* at 45-48, and may not regulate at all where it lacks the necessary jurisdiction. *Id.* at 36-41, 48-49.

**B. Claims That Product Placement is Inherently Deceptive and Inordinately Persuasive are False**

Not only do the pro-regulation comments fail to offer any support for their claims that product placement is extraordinarily persuasive – and therefore inherently deceptive – the very articles cited by Commercial Alert conclude that *there is no consensus* on the impact of product placement. *Product Placement Effectiveness, supra*, at 147. Lacking research to support their exaggerated claims, pro-regulation commenters often fall back on anecdotes to support their positions. The most frequently mentioned example is the use of Reese’s Pieces in the Steven Spielberg film *E.T., The Extraterrestrial*, despite the fact that this was an example of free publicity – not paid placement – and thus would not be subject to Section 317 or the FCC’s rules even if the regulations applied to feature films. *E.g.*, Rotfeld, *supra*, at 64. Nevertheless, the Campaign for a Commercial-Free Childhood observes that the film “showcased the adorable alien eating Reese’s Pieces” and cites a BUSINESS WEEK article for the conclusion that “[t]he placement was a huge success and the candy company saw sales in the new product surge 65% in three months.” Comments of the Campaign for a Commercial-Free Childhood at 3.

Of course, this example says nothing about the persuasive “power” of product placement *per se*, since Reese’s Pieces is a unique product that had been introduced nationwide in the U.S. just over a year before *E.T.* was produced. *See, e.g.*, Reese’s Pieces, [http://en.wikipedia.org/wiki/Reese%27s\\_pieces](http://en.wikipedia.org/wiki/Reese%27s_pieces). It is likely that most theater-goers simply did not know about the product before seeing it in the popular film, and that their newfound awareness accounted for the asserted increase in sales. Nor do those who cite the *E.T.* example address other factors necessary to measure the impact – *e.g.*, Did people buy more candy after the movie than before, or did they just supplant other purchases with a newly-discovered brand? Did the interest persist over time? Were other factors involved, such as promotions or sales? Such anecdotes are a notoriously flawed basis on which to formulate general policies. *See, e.g.*, Richard Posner,

*Obsession*, NEW REPUBLIC, Oct. 18, 1993 at 34 (“in a nation of 260 million people, anecdotes are a weak form of evidence”). It is also worth noting that Coors Beer – a product that was neither new or unique – also appeared in *E.T.*, yet Coors experienced no increase in sales as a result. *Managerial Investigation into Product Placement*, *supra*, at 74. Strangely, proponents of regulation rarely offer an explanation for why the moms and dads who accompanied their tykes to the theater failed to develop a sudden thirst.

But even if some extraordinary persuasive effect could be demonstrated, the proposed rules are unnecessary. Commercial Alert argues that “viewers do not apply the same filters” for product placement “as they do when watching commercials” because they are “[u]naware that they are being advertised to.” Comments of Commercial Alert at 16. However, it is evident from both the comments themselves and from the sources quoted therein that this claim is baseless. To begin with, the academic sources upon which Commercial Alert relies do not claim that consumers are unaware of product placements, but state only that when a product placement is “prominent,” the audience “may interpret the placement to be an attempt to influence the viewer,” and that this is particularly true for programs the audience likes.<sup>14</sup> As Commercial Alert puts it, “[t]he more obvious the placement – that is, the more apparent that it is commercially driven – the less effective it is.” *Id.* In other words, consumers “know it when they see it” when it comes to product placement.

It is ironic that commenters who favor new rules can maintain that product placement is “stealth advertising,” since their comments are replete with examples of placements they deem to be blatant or obvious. *See, e.g., id.* at 19 (“Product placements and integration are widespread on commercial radio, *as any listener to sports broadcasts knows.*”) (emphasis added); *id.* at 21

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<sup>14</sup> *See e.g.,* Elizabeth Crowley and Chris Barron, *When Product Placement Goes Wrong*, J. OF ADVER. (Spring 2008) at 89.

(giving examples of obvious product placements). But more importantly, research cited in these comments does not suggest existing sponsorship identification disclosures are ineffective. Instead, it concludes that as practices such as product placement become more common, consumer awareness “evolves over time; as consumers become more familiar with a tactic, their interpretations and evaluations change.”<sup>15</sup> Simply put, consumers have become more aware of the product placements themselves even without some type of enhanced disclosure requirement.<sup>16</sup>

As another substitute for data, pro-regulation commenters quote statements by industry executives as supposed admissions-against-interest to support the argument that product placement exerts some kind of mysterious power over the audience because it communicates “under the radar.” *E.g.*, Marsden Comments at 12; Commercial Alert Comments at 16-17. However, this hardly constitutes evidence that would support new restrictions. As the articles cited by Commercial Alert observe, such anecdotal claims by practitioners may be the result of various institutional factors and are not based on actual evidence. *Product Placement Effectiveness*, *supra*, at 147. *See also Managerial Investigation into Product Placement*, *supra*, at 83. In any event, Professor Rotfeld has explained that it is of no consequence whether or not some may believe they are “bypassing consumer skepticism or other perceptual defenses,” since consumers ultimately are well aware of product placement practices. Rotfeld, *supra*, at 67. Consequently, he describes it as a public policy “nonissue.” *Id.*

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<sup>15</sup> *Id.* at 97. *See also* Rotfeld, *supra*, at 67.

<sup>16</sup> In addition, there is significant tension between the pro-regulation commenters’ assertions that audience members will notice and be influenced by even the most fleeting and subtle product placement, but do not see the announcements that are provided under the current rules. *See, e.g.*, Comments of the Writer Guild of America, West at 10.

Claims that product placement are deceptive in their design or in their effect are simply false.<sup>17</sup> Academic researchers have acknowledged the prospect that “most users of infomercials, product placements, hired buzz agents, or other covert marketing tools are not trying to deceive anyone,” but instead “are merely facing a pragmatic problem that audiences are increasingly difficult to reach through traditional mass media tools.” Rotfeld, *supra*, at 65. And there is no credible argument that consumers are “deceived” by product placement. As with other phenomena such as infomercials, members of the audience are not confounded by the programming format. *Id.* In part because of the growing prominence of product placement, listeners and viewers are aware of it and are not concerned about it.<sup>18</sup> If anything, consumers tend to assume any appearance of a product is a paid placement, even when it is not (*e.g.*, use of *Reese’s Pieces* in *E.T.*). Thus, “when celebrities freely mention a product during an appearance on a popular talk show, audience members probably think that someone was paid by the company to make the endorsement.” Rotfeld, *supra*, at 65. Indeed, one of the studies cited by Commercial Alert found that “American respondents were more likely to believe that placements are usually a form of paid advertising ... and less likely to support government restrictions on the practice.” *Product Placement Effectiveness*, *supra*, at 140. *See id.* at 141 (“Many placements are far from unexpected occurrences for program audiences.”).

Finally, advocates of new regulation often try to make their case by posing a rhetorical question rather than by offering evidence. Why would advertisers spend so much money on

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<sup>17</sup> And if any particular example of product placement proved to be deceptive – to the extent it makes any actual claims about a product – existing rules are sufficient to deal with the situation. *See* Comments of the National Media Providers at 28-30. The FTC has made clear that if any problems of deceptiveness arose, it already has sufficient authority under current law. *Id.*

<sup>18</sup> In fact, some advertisers are beginning to play off television viewers’ awareness of product placement practices and incorporate it into their advertising campaigns. For example, an ad for the Sprint “Instinct” phone is presented as a faux trailer for “the most heartwarming product placement movie of the year.” *See e.g.*, <http://www.youtube.com/watch?v=IbnFrT5m1jY>.

product placement, they ask, if they were not certain that it exerted some inordinate power over consumers? The answer to that question is simple, and is explained in a number of the articles the commenters cite. To begin with, an obvious motivation for expanding use of product placement is to try to keep up with the changing face of a media landscape in which there is a growing array of media platforms and consumers can skip traditional commercials. Rotfeld, *supra*, at 65. Although product placement is not necessarily viewed as a “substitute[] for traditional advertising,” *Managerial Investigation into Product Placement, supra*, at 74, it represents one way to try to deal with audience fragmentation and ad-skipping. But there are other important motivations as well. Product placement is seen as a way to generate “buzz” by generating favorable associations with a brand,<sup>19</sup> it serves internal purposes such as “company hype” or “employee pride,”<sup>20</sup> and can play “both external and internal roles in public relations.”<sup>21</sup> In short, product placement often is part of an overall public relations strategy for companies or brands as distinguished from traditional “advertising.”

## **II. PROPOSALS TO INCREASE REGULATION OF PRODUCT PLACEMENT ARE EXCESSIVE AND HAVE NO LEGAL BASIS**

ANA, AAF, and AAAA, in conjunction with 15 other groups, have already submitted comments that provide a comprehensive legal analysis of the regulatory proposals raised in this proceeding. *See* Comments of the National Media Providers at 18-63. The initial comments

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<sup>19</sup> *Managerial Investigation into Product Placement, supra*, at 84-85 (“While exposures constitute the main objective [of product placement], association with the celebrity and the resulting brand image are highly sought – particularly when the buyer is willing to pay for this association.”). *See also* Rotfeld, *supra*, at 64 n.3 (“Recent examples of one-second commercials by Master Lock or the General Electric ‘One Second Theater’ were not hidden persuasion efforts, but, announced and overt, an effort to generate secondary interest in the advertising and consumer buzz.”).

<sup>20</sup> *Managerial Investigation into Product Placement, supra*, at 85 (“they go around saying ‘my company was in the movie,’ and they feel good about that, and their productivity goes up”).

<sup>21</sup> *Id.* at 86 (“some companies use placements like other PR components, often employing a public relations firm”).

explain that the commercial broadcast system was predicated on commercial support and that the FCC historically has rejected policy proposals that would undermine that system. The current sponsorship identification rules have been sufficient to address the issue of product placement without disrupting the balance established by the Act. *Id.* at 25-33. By contrast, proponents of more stringent regulation generally oppose the concept of commercial support *per se*, as if it were somehow alien to the premises of the Communications Act. Consequently, their policy proposals lack both statutory and constitutional support.

Most advocates of regulation have provided little or no legal analysis in their initial comments, submitting instead policy “wish lists” for new rules they would like to see. For example, the Campaign for a Commercial-Free Childhood advocates treating product placement as the equivalent of broadcast indecency, prohibiting *all* placements before 10 p.m. to reduce the risk that children might see them. Comments of CCFC at 19. Commercial Alert endorses this approach, along with proposing expanded sponsorship identification, including contemporaneous notices.<sup>22</sup> The Marin Institute proposes similar restrictions to protect minors because of the possibility of product placements involving alcohol beverages.<sup>23</sup> Because we addressed the legal and policy questions raised by the *Notice* in our initial comments, we will confine this reply to these more extreme proposals to regulate product placement as if the audience was made up entirely of children.<sup>24</sup>

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<sup>22</sup> It is worth noting that these extreme proposals exceed the scope of the questions raised in the Commission’s *Notice*.

<sup>23</sup> Comments of Marin Institute at 3-7 (advocating concurrent disclosure, prohibition of product placement involving alcohol drinks before 10 p.m., regulation of such placements on cable networks, and regulation of feature films to limit placement of alcohol-related products).

<sup>24</sup> Comments of Commercial Alert at 29. *See id.* at 11 (“Product placement advertisements should be disclosed at the time they occur, with the word ‘advertisement’ appearing on screen during the airing of a product placement.”). Commercial Alert is one of the few commenters supporting regulation that provides any substantive constitutional analysis. *Id.* at 20-25, 29. However, it erroneously assumes the proposed regulation should be analyzed as a commercial



As the Supreme Court made clear in, *e.g.*, *Butler v. Michigan*, 352 U.S. 380, 383 (1957), any governmental interest in shielding children from certain materials “does not justify [ ] unnecessarily broad suppression of speech addressed to adults.” The Court has repeatedly warned against “reducing the adult population to only what is fit for children.”<sup>25</sup> And it has specifically invalidated advertising restrictions that limited speech available to adults that were predicated on an asserted interest in protecting children.<sup>26</sup>

Here, however, pro-regulation commenters fail to make *any* argument for banning product placement during hours “when children might be in the audience.” To begin with, the FCC’s authority to regulate indecency – upon which this proposal is patterned – rests on a particular statutory command set forth in 18 U.S.C. § 1464 which purports to prohibit any “obscene, indecent, or profane” utterances on the broadcast medium. But there is no corresponding statutory authority to ban product placement, and commenters point to none. In this regard, the Commission is subject to the basic truism that administrative agencies do not have the power to make law; they are accorded delegated authority only “to adopt regulations to carry into effect the will of Congress as expressed by ... statute.” *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976). The FCC is bound “not only by the ultimate purposes Congress has selected,

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speech problem. *But see* Comments of National Media Providers at 44-54. In addition, Commercial Alert’s constitutional analysis is based almost entirely on the incorrect premise that product placement is inherently deceptive – a claim the Federal Trade Commission rejected. *See* Letter from Mary K. Engle, Associate Director for Advertising Practices, FTC, to Gary Ruskin, Commercial Alert (Feb. 10, 2005). *See also* Comments of National Media Providers at 54-64.

<sup>25</sup> *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 759 (1996) (quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, (1989) (quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73 (1983))).

<sup>26</sup> *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001) (quoting *Reno v. ACLU*, 521 U.S. 844, 875 (1997) (“the governmental interest in protecting children from harmful materials ... does not justify an unnecessarily broad suppression of speech addressed to adults”).

but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.” *MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218, 231 n.4 (1994).

The absence of specific statutory authority to ban product placement, either entirely, or for a substantial portion of the broadcast day, is entirely dispositive of commenters’ requests for new restrictions. In this regard, the Commission cannot rely on its general authority to promote the “public interest.” Reviewing courts have made clear that the FCC’s general authority will not support such restrictions on programming. *MPAA v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) (“[T]he FCC can cite no authority in which a court has upheld agency action under § 1 where program content was at the core of the regulations at issue. And it does not matter that the disputed rules here are arguably ‘content-neutral.’ The point is that the rules are about program content and therefore can find no authorization in § 1.”).

Even if the commenters could identify some authority in the Communications Act to treat product placement as if it were indecency and to implement “time channeling” restrictions, there would be no constitutional support for such an expansive restriction. As a threshold matter, this is an inopportune time for commenters to seek to expand content regulation, as courts have grown more skeptical of the FCC’s ability to regulate broadcast indecency consistently with the First Amendment.<sup>27</sup> But in any event, the Supreme Court stressed that the FCC’s authority to regulate “indecent” content – even when backed by statute – is limited, narrow, and confined to a specific factual context.<sup>28</sup> It is plainly illegitimate to infer that the Commission may have the authority to impose a sweeping ban on product placement during times when children “might be

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<sup>27</sup> *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008).

<sup>28</sup> *FCC v. Pacifica Found.*, 438 U.S. 726, 742 (1978) (“our review is limited to the question whether the Commission has the authority to proscribe this particular broadcast” in a “specific factual context”); *id.* at 750 (“[i]t is appropriate ... to emphasize the narrowness of our holding”). See also *Sable Communications*, 492 U.S. at 127 (*Pacifica* was “an emphatically narrow holding”); *Bolger*, 463 U.S. at 74 (emphasizing narrowness of *Pacifica*).

in the audience” based on the approval of more limited regulation of “indecent” speech. An even more difficult constitutional problem is presented by proposals to regulate the placement of certain products, such as alcohol.<sup>29</sup> Overall, the Commission lacks the constitutional authority to enact the various restrictions on product placement as proposed in the comments.

## **CONCLUSION**

For the foregoing reasons, the Commission should decline to adopt the rules proposed in the *NOI/NPRM* as unnecessary, counterproductive, disruptive and in many instances potentially unconstitutional. The Commission should reject imposition of new requirements on sponsorship identification announcements, and should terminate the present inquiry by doing no more than clarifying how existing FCC rules, policies and examples apply to product placement.

Respectfully submitted,  
**American Advertising Federation**  
**American Association of Advertising Agencies**  
**Association of National Advertisers, Inc.**  
**Alabama Broadcasters Association**  
**Iowa Broadcasters Association**  
**Maine Association of Broadcasters**  
**Michigan Association of Broadcasters**  
**Missouri Broadcasters Association**  
**Nevada Broadcasters Association**  
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<sup>29</sup> *E.g.*, *Lorillard Tobacco Co.*, 533 U.S. at 564-567 (striking down regulations designed to shield children from tobacco advertisements as insufficiently effective and inadequately tailored); *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004) (striking down prohibition of alcohol advertisements in student publication).

## **APPENDIX**

**American Advertising Federation.** Headquartered in Washington, D.C., the American Advertising Association (“AAF”) is the trade association that represents 50,000 professionals in the advertising industry. AAF’s 130 corporate members are advertisers, agencies and media companies that comprise the nation’s leading brands and corporations.

**American Association of Advertising Agencies.** Founded in 1917, the American Association of Advertising Agencies (“AAAA”) is the national trade association representing the advertising agency business in the United States. AAAA’s nearly 450 members represent virtually all the large, multi-national advertising agencies, as well as hundreds of small and mid-sized agencies, which together maintain 13,000 offices throughout the country. Its membership produces approximately 75 percent of the total advertising volume placed by agencies nationwide.

**Association of National Advertisers, Inc.** The Association of National Advertisers, Inc. (“ANA”) leads the marketing community by providing its members insights, collaboration and advocacy. ANA’s membership includes over 350 companies with 9,000 brands that collectively spend over \$100 billion in marketing communications and advertising annually in the U.S. The ANA strives to communicate marketing best practices, lead industry initiatives, influence industry practices, manage industry affairs and advance, promote and protect all advertisers and marketers. For more information, visit [www.ana.net](http://www.ana.net).

**State Broadcasters Associations.** Each of the named state broadcast associations is a trade association of the radio and television broadcasters who serve that state. These associations not only represent the interests of the broadcasters before Federal, state and local decision makers, but also engage in educational and informational efforts to educate and inform their members and the public at large about business, regulatory, technology and other issues of importance to broadcast stations, the greater broadcast industry and the public served by that industry.