



FREEDOM TO ADVERTISE COALITION

November 12, 2003

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Donald Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave. NW, Room 159
Washington DC 20580

**RE: Opposition to Request for Investigation of Product
Placement on Television and for Guidelines to Require
Adequate Disclosure of TV Product Placement.**

Dear Mr. Clark :

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.

FAC strongly opposes Commercial Alert's "Request for Investigation of Product Placement on Television and for Guidelines to Require Adequate Disclosure of TV Product Placement."¹

We note that Federal Trade Commission ("FTC") precedent calls for the examination on a case-by-case basis of any specific issues regarding disclosure of product placement. We strongly urge the Commission to adhere to this time-tested precedent.

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 "Request for Investigation of Product Placement on Television and for Guidelines to Require Adequate Disclosure of TV Product Placement" with the FTC. The organization argues that this type of advertising 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 FTC and FCC conduct investigations and 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 a program, Commercial Alert recommends that product placements be identified when they occur by flashing the word "advertisement" on the television screen.



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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 FTC 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.

The FTC has appropriately previously denied a similar petition and determined that an industry-wide rulemaking on the matter was “inappropriate.”² We agree with that determination and urge the FTC to adhere to its own precedent and deny Commercial Alert’s request for new guidelines.

I. Claims that Product Placement is “Unfair” and “Deceptive” are not supported by law.

At its core, 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 FTC 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.³

² See FTC File No. P914518

³ Federal Trade Commission Policy Statement on Deception, 4 Trade Reg. Rep. (CCH) § 13, 205 (FTC Oct. 14, 1983).



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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.⁴

Product placement is neither “unfair” or “deceptive” within the meaning of the law. The conclusions Commercial Alert asks the FTC to reach are without precedent. 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.

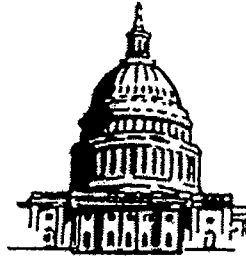
II. Product Placement Is Essential to the Creative Process

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 viewer 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.”⁵

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,”

⁴ 15 U.S.C. § 45(n).

⁵ 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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encapsulates a certain stylish type of New York woman when she buys Monolo Blahnik and Jimmy Choo shoes.

For decades, products placed in popular films have helped convey images and impressions now inextricably tied in the minds of viewers to the films 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.⁶ Even the famous alien in the film “ET” was shown following and eating a trail of Reese’s Pieces candy.

III. First Amendment Rights are at Stake.

The Commercial Alert petition is a thinly veiled 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 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

⁶ *Id.*



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no more than propose a commercial transaction is entitled to the coverage of the First Amendment.”⁷

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 regulations that violate 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, however, 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 enough 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.

IV. 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.⁸ 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.

⁷ *Thompson v. Western States Med. Ctr.*, 122 S.Ct. 1497 (2002)

⁸ 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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The FTC responded by finding industry-wide rulemaking “inappropriate.” If, however, particular instances of product placement arise where there is significant evidence of consumer injury, the Commission said that it would consider these matters on a case-by-case basis.

V. Conclusion.

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 FTC to follow its own precedent and reject this misguided and unconstitutional set of proposals.

Thank you for your time and consideration.

Sincerely,

Darryl Nirenberg
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Freedom to Advertise Coalition

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