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"Did You Want Fries With That?" The Unanswered Question of Federal Product Placement Regulation

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“Did You Want Fries With That?” The Unanswered Question of Federal Product Placement Regulation

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Advertising has been called everything from “the life of trade”¹ to “legalized lying.”² While strong opinions on the virtues of advertising are nothing new, the modern regulatory state increasingly furnishes a fresh legal battle ground where these opinions transform into fierce legal arguments. Most recently, the focus of this debate has centered on the advertising technique termed “product placement.”

“Product placement is a form of promotion in which advertisers insert branded products into programming in exchange for fees or other consideration.”³ In 2004, the total American product placement market was worth \$3.5 billion.⁴ The market for television placement alone increased forty-six percent from 2003 to reach \$1.87 billion in 2004.⁵ Further, “[w]hile more than 90% of product-placement dollars

1. Brainy Quotes, Calvin Coolidge Quotes, http://www.brainyquote.com/quotes/authors/c/calvin_coolidge.html (last visited Jan. 9, 2007) (quoting President Calvin Coolidge).

2. The Quotations Page, <http://www.quotationspage.com/quote/20731.html> (last visited Jan. 9, 2007) (quoting author H.G. Wells).

3. Letter from Mary K. Engle, Associate Director for Advertising Practices, Fed. Trade Comm’n, to Gary Ruskin, Executive Director, Commercial Alert, 6 (Feb. 10, 2005), available at <http://www.ftc.gov/os/closings/staff/050210productplacemen.pdf> [hereinafter FTC Response].

4. See *Lights, Camera, Brands*, ECONOMIST, Oct. 29, 2005.

5. Raymond Snoddy, *Lack of Flexibility Will Kill TV Revenues*, MARKETING, Sept. 21, 2005, at 22.

are spent on film and television, even the value of placements in” video games, Internet, music, magazines, newspapers, books and radio was “expected to grow 18.1% to \$384.9 million” in 2005.⁶ This technique’s rapid expansion is attributed to “increasing audience fragmentation, advertising clutter, media multi-tasking and ad-skipping technology.”⁷

By progressively integrating products into program content beyond mere ancillary appearances, some complain that placement is “rapidly blurring the line between content and advertising.”⁸ The most recent complaints, filed by consumer watchdog group Commercial Alert, petition both the Federal Communications Commission (FCC) and the Federal Trade Commission (FTC) to promulgate regulations requiring disclosure of all television product placements as they occur.⁹ At this time, the FCC has not yet formally responded to Commercial Alert’s request, and the FTC has formally refused to take action.¹⁰

The FCC’s sponsorship disclosure requirements “mandate[] disclosure of the fact that sponsors have paid to have their products included within programming.”¹¹ While FCC rules do not clearly spell out the prominence of the disclosure required, “the listening and viewing public [must be able to] understand[] the nature and source of the material they are hearing and seeing and [] place it in its proper context.”¹² “[M]ost television shows satisfy their legal disclosure obligations merely by including a credit to the effect that ‘promotional considerations were provided by ABC company.’”¹³ Arguably, these disclosures are inadequate, since “[c]redits fly by incredibly quickly, and often shrink to a small portion of the screen.”¹⁴

6. Gail Schiller, *Report: Product Placements on Rise*, THE HOLLYWOOD REP., July 28, 2005.

7. *Id.*

8. *See Lights, Camera, Brands*, *supra* note 4.

9. *See* Letter from Gary Ruskin, Executive Director, Commercial Alert, to Marlene H. Dortch, Sec’y, Fed. Comm’n (Sept. 30, 2003), *available at* <http://www.commercialalert.org/fcc.pdf> [hereinafter FCC Complaint]; Letter from Gary Ruskin, Executive Director, Commercial Alert, to Donald Clark, Sec’y, Fed. Trade Comm’n 17 (Sept. 30, 2003), *available at* <http://www.commercialalert.org/ftc.pdf> [hereinafter FTC Complaint].

10. *See* FTC Response, *supra* note 3.

11. Barry M. Benjamin, Op-Ed., *The Call for a Code of Conduct*, MEDIAWEEK, Dec. 19, 2005; *see also* 47 C.F.R. § 73.1212 (2005).

12. Jonathan S. Adelstein, Comm’r, Fed. Comm’n Comm’n, “Fresh is Not as Fresh as Frozen”: A Response to the Commercialization of American Media, Address Before the Media Institute (May 25, 2004), *available at* 2004 FCC LEXIS 7458, at *18.

13. Benjamin, *supra* note 11.

14. *Id.*

Beyond Commercial Alert's complaints, various entertainment industry groups have also argued that "current disclosures are not meaningful, . . . they do not actually inform the viewer of the product [placement], and . . . they do not satisfy the laws mandating full disclosure."¹⁵

Section 5 of the Federal Trade Commission Act (FTCA, or "the Act") gives the FTC authority to ban unfair or deceptive acts or practices.¹⁶ In its 2003 complaint, Commercial Alert argued that product placement is "deceptive because it flies under the viewer's skeptical radar . . . [and] unfair because it is advertising that purports to be something else."¹⁷ The FTC's response argued that regulation was unnecessary because product placement generally makes no "false or misleading objective, material claims about a product's attributes."¹⁸

This note argues that the structure of existing FCC and FTC regulatory regimes is not effective in addressing challenges posed by certain types of product placement. Thus, a specific disclosure requirement targeting non-visual product placement is needed. Part I presents an overview of the existing federal regulatory structure governing product placement, and the current arguments for and against affirmative disclosure requirements. Parts II and III identify the various categories of product placement and argue that non-visual placement presents unique challenges that are absent in other categories of product placement. Finally, Part IV argues that the current regulatory regime is insufficient, states the need for and benefits of regulation targeting non-visual placement, and suggests some possible disclosure requirements.

I. FEDERAL PRODUCT PLACEMENT REGULATION GENERALLY AND THE CURRENT DEBATE

There is no governmental prohibition specifically addressing product placement. However, the FCC's sponsorship disclosure requirements and the FTC's unfair or deceptive act or practice regulations are two possible regulatory constraints on the technique.¹⁹

15. *Id.* Specifically, the Writers Guild and the Screen Actors Guild have expressed opposition to product placement's increased integration. *Id.*

16. 15 U.S.C. § 45(a)(1) (2000).

17. FTC Complaint, *supra* note 9, at 2.

18. FTC Response, *supra* note 3, at 3.

19. See Matthew Savare, Note, *Where Madison Avenue Meets Hollywood and Vine: The Business, Legal, and Creative Ramifications of Product Placements*, 11 UCLA ENT. L. REV. 331, 361 (2004).

A. FCC Sponsorship Identification Regulation

It is a longstanding principle of government broadcast media regulation that “listeners are entitled to know by whom they are being persuaded.”²⁰ “[A]s far back as the Radio Act of 1927 and continuing with Section 317 of the Communications Act of 1934 there has been an unvarying requirement that all matter broadcast by any station for a valuable consideration is to be announced as paid for or furnished, and by whom.”²¹ This requirement remained largely unchanged (and generally unenforced) until amendments prompted by the 1959 payola scandal.²² These amendments expanded the sponsorship identification requirement into the two-section multipart structure still in use today.²³ Significant changes included: i) granting the FCC discretion to develop or suspend rules; ii) extension of the legal obligation to disclose covert promotions beyond the broadcast licensees to the parties involved in production; and iii) barring disclosure requirements for broadcasters’ routine use of free records or programs.²⁴

1. FCC Rulemaking

The 1961 FCC rulemaking largely tracked the language of the 1960 amendments.²⁵ However, a significant addition waives the Section 317 sponsorship disclosure requirements “with respect to feature motion picture film[s] produced initially and primarily for theatre exhibition.”²⁶

2. Chain of Production Disclosure

Section 317, as amended, requires “[t]he licensee of each radio station [to] exercise reasonable diligence to obtain from its employees,

20. Applicability of Sponsorship Identification Rules, Public Notice, 40 F.C.C. 141 (1963) (explaining the 1963 sponsorship identification requirements after the payola scandal) [hereinafter *Applicability of Sponsorship Identification Rules*].

21. *Id.*

22. See generally Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963*, 56 FED. COMM. L.J. 329, 336-56 (2004).

23. *Id.*; 47 U.S.C. § 317 (2000); 47 U.S.C. § 508.

24. Kielbowicz & Lawson, *supra* note 22, at 356.

25. See *id.* at 359.

26. 47 C.F.R. § 73.1212(h) (2005). The FCC originally assumed “that all new films were ‘produced with the intent that they would at some time be broadcast by television stations,’” and therefore should be subject to the same disclosure requirements as everyone else. Kielbowicz & Lawson, *supra* note 22, at 366. However, after massive movie industry protest, the FCC yielded and granted the waiver. *Id.*

and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section.”²⁷ Additionally, Section 508 “encompasse[s] the whole chain of program production and distribution; any party who [pays] to insert or accept[s] payment to insert, covert promotions ha[s] an obligation to report this arrangement to the next party in the chain and ultimately to the broadcasters so they [can] air an announcement.”²⁸

3. Free Records or Props Exception

The Section 317 sponsorship identification requirement exempts any

service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name *beyond an identification which is reasonably related to the use of such service or property on the broadcast.*²⁹

Thus, “when [the] matter supplied for on-air use [is] identified in the program beyond the extent needed for the broadcast, the audience deserve[s] to be so informed though an announcement.”³⁰

The FCC provides thirty-six examples of what does and does not constitute a reasonable relation.³¹ For example, an announcement is not required if “[a] record distributor furnished copies of records to a broadcast station or disc jockey for broadcast purpose,” or if “[a] refrigerator [was] furnished for use as part of the backdrop in [a] kitchen scene . . .”³² Announcement is required if “[a] refrigerator [was] furnished by X with the understanding that it would be used in a kitchen scene on a dramatic show and the brand name [would] be mentioned,” or if “[a] manufacturer furnishe[d] a grand piano for use on a concert program . . . [and] insist[ed] that [an] enlarged insignia of its brand name be affixed over normal insignia on the piano.”³³

27. 47 U.S.C. § 317(c).

28. Kielbowicz & Lawson, *supra* note 22, at 363; see 47 U.S.C. § 508.

29. 47 U.S.C. § 317(a)(1) (emphasis added); see 47 C.F.R. § 73.1212(a)(2).

30. Kielbowicz & Lawson, *supra* note 22, at 358.

31. Applicability of Sponsorship Identification Rules, *supra* note 20.

32. *Id.*

33. *Id.*

B. FTC Unfair or Deceptive Act or Practice Regulation

Section 5 of the Federal Trade Commission Act (FTCA, or “the Act”) declares unfair or deceptive acts or practices unlawful.³⁴ The Act grants the FTC power to require a company “. . . to affirmatively disclose information without which the company’s current advertisements . . . might deceive the public.”³⁵

1. Deceptive Act or Practice

A deceptive act or practice consists of: 1) a “representation, omission, or practice that is likely to mislead the consumer”; 2) “acting reasonably in the circumstances”; and 3) where the representation, omission, or practice is “material.”³⁶

a. Misleading Representations and Omissions

“Most deception involves [an affirmative] oral or written misrepresentation[] . . .”³⁷ However, “[s]ome cases involve the omission of material information, the disclosure of which is necessary to prevent the claim, practice, or sale from being misleading.”³⁸ “[T]o be considered misleading the undisclosed information must be necessary to correct a material misimpression or assumption in the minds of consumers, whether that impression is created by affirmative acts or arises from consumers’ expectations in the circumstances of the transaction.”³⁹ Extrinsic evidence of consumer expectations may be required before the FTC reaches a conclusion.⁴⁰

34. 15 U.S.C. § 45(a)(1).

35. Russell J. Davis, Annotation, *Power of Federal Trade Commission to Issue Order Requiring Corrective Advertising*, 46 A.L.R. FED. 905 (2002); see, e.g., 15 U.S.C. § 45(b); *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977).

36. See Letter from James C. Miller III, Chairman, Fed. Trade Comm’n, to The Honorable John D. Dingell, Chairman, Comm. on Energy and Commerce, U.S. House of Representatives, FTC Policy Statement on Deception (Oct. 14, 1983), available at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm> [hereinafter FTC Deception Statement].

37. *Id.*

38. *Id.*

39. GEORGE ERIC ROSDEN & PETER ERIC ROSDEN, 2-18C THE LAW OF ADVERTISING (II.) (2005); see *Peacock Buick*, 86 F.T.C. 1532 (1975), *aff’d*, 553 F.2d 97 (4th Cir. 1977).

40. ROSDEN & ROSDEN, *supra* note 39; FTC Deception Statement, *supra* note 36.

b. The Perspective of the Reasonable Consumer

"The test is whether the consumer's interpretation or reaction is reasonable."⁴¹ This is judged from the particular standpoint of the consumer.⁴² Also, where "consumers can easily evaluate the product or service, it is inexpensive, and it is frequently purchased, . . . the [FTC] will examine the practice closely before issuing a complaint based on deception."⁴³

c. The Omission Must be Material (i.e. Cause an Injury)

"A 'material' misrepresentation or practice is one which is likely to affect a consumer's choice of or conduct regarding a product."⁴⁴ Actual or constructive knowledge of a false claim or necessary omission results in a presumption of materiality.⁴⁵ "[I]njury and materiality are different names for the same concept."⁴⁶

2. Unfair Act or Practice

An act or practice is unfair under the FTCA if it 1) injures consumers, or 2) violates public policy.⁴⁷

a. Consumer Injury

The injury: i) must be "substantial"; ii) must not be one consumers could "reasonably have avoided"; and iii) must not be "outweighed" either by "countervailing benefits to consumers" or by "competition that the practice produces."⁴⁸

The most common cases of substantial injury are cases involving monetary harm, such as "when sellers coerce consumers into purchasing unwanted goods or services . . ."⁴⁹ "Emotional impact and

41. FTC Deception Statement, *supra* note 36.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. Letter from Michael Pertschuk, Chairman, Fed. Trade Comm'n, to The Honorable Wendell H. Ford, Chairman, Consumer Subcomm., Comm. on Commerce, Science, and Transp., FTC Policy Statement on Unfairness (Dec. 17, 1980), *available at* <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm> [hereinafter FTC Unfairness Statement].

48. *Id.*

49. *Id.*

other more subjective types of harm, on the other hand, will not ordinarily make a practice unfair.”⁵⁰

The FTC normally relies on consumers’ ability to make their own private purchasing decisions and correct the market without regulation.⁵¹ “However, it has long been recognized that certain types of sales techniques may prevent consumers from effectively making their own decisions, and that corrective action may then become necessary.”⁵²

“The [FTC] . . . takes account of the various costs that a remedy would entail,” and “will not find that a practice unfairly injures consumers unless it is injurious in its net effects.”⁵³

b. Public Policy Violation

To the extent that the [FTC] relies heavily on public policy to support a finding of unfairness . . . the policy should be declared or embodied in formal sources such as statutes, judicial decisions, or the Constitution as interpreted by the courts, rather than being ascertained by some general sense of the national values.⁵⁴

3. Commercial Speech

Although no federal court has addressed whether product placement constitutes commercial speech, several commentators have identified it as such.⁵⁵ Commercial speech is protected from burdensome regulation by the Supreme Court’s intermediate scrutiny test synthesized in *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*.⁵⁶ Under the test, if the speech is not misleading or related to unlawful activity,⁵⁷ the courts must ask whether: 1) the “asserted governmental interest is substantial”; 2) “the regulation directly advances the governmental interest asserted”; and 3) the regulation “is not more extensive than is necessary to serve that interest.”⁵⁸

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. See Savare, *supra* note 19, at 369.

56. 447 U.S. 557 (1980).

57. Speech that is misleading or related to unlawful activity is not protected. *Id.* at 566.

58. *Id.*

D. The Fight Over Agency Regulation

1. Arguments For Regulation

a. The CSC Complaint

In 1991 the Center for the Study of Commercialism (CSC) submitted to the FTC a complaint and request for investigation and rulemaking regarding motion picture product placement.⁵⁹ Citing the FTC's criticism of infomercials, the complaint argued that movie product placements were a similarly deceptive act or practice under Section 5 of the FTCA "because they exploit the relaxed sensibilities and less vigilant and critical attitude of the movie audience."⁶⁰ Additionally, the CSC argued that product placements are not only likely to mislead the consumer, but are "designed with the intent to deceive . . ."⁶¹

The CSC recommended two separate remedial rule structures.⁶² For films directed at adults, the organization suggested requiring producers to attach a clear audio and visual notice immediately before the start of any film, apprising the audience of the paid advertisements therein.⁶³ For films directed at children, the CSC suggested a complete ban on paid product placements.⁶⁴

b. Commercial Alert's Complaints

More recently, Commercial Alert (CA) petitioned both the FCC and the FTC to require adequate disclosure of product placement on television.⁶⁵ CA's FCC complaint alleged specific wrongdoing by "ABC, Inc., CBS Television, Fox Broadcasting Company, Fox Sports Networks LLC, National Broadcasting Company, Inc., United Paramount Network, Walt Disney Co. and the WB Television Network."⁶⁶ Specifically CA attacked various new forms of product

59. See Center for the Study of Commercialism, Complaint and Request for Investigation and Rulemaking, May 30, 1991, 1991 FTC LEXIS 557 [hereinafter CSC Complaint].

60. *Id.* at 11.

61. *Id.* at 16.

62. *Id.* at 18-19.

63. *Id.*

64. *Id.* at 19.

65. See FCC Complaint, *supra* note 9; FTC Complaint, *supra* note 9.

66. FCC Complaint, *supra* note 9 at 1.

placement, which it identified as paid spokespersons,⁶⁷ product integration,⁶⁸ plot placement,⁶⁹ and virtual advertising.⁷⁰

Addressing the FCC, CA complained that “[t]elevision stations . . . cram their programs with product placements, yet fail to identify the sponsors in a conspicuous way [thereby] violating the public’s right to know who is seeking to persuade them.”⁷¹ CA further argued that FCC Rule 73.1212, “as currently written, is not adequate to the new challenges posed by embedded advertising” and should be changed.⁷²

In its FTC complaint, CA argued that product placement should be considered an unfair or deceptive act or practice within the meaning of the FTCA.⁷³ “It is deceptive because it flies under the viewer’s skeptical radar. It is unfair because it is advertising that purports to be something else.”⁷⁴ CA cited three instances where the FTC had required disclosure that an advertisement was in fact an advertisement: 1) infomercials masquerading as independent programming; 2) misleading formats where ads pose as articles in magazines or newspapers; and 3) search engine results that are paid ads in disguise.⁷⁵ Additionally, the petition argued that marketing-related diseases in children constituted the “substantial injury” necessary for an unfairness finding.⁷⁶ Specifically, CA alleged child injury from soft drinks, fast food, beer, tobacco, and gambling related product placements.⁷⁷

67. “Such stars as Lauren Bacall, Rob Lowe and Kathleen Turner have promoted specific drugs on TV programs such as NBC’s *Today* show and the *Montel Williams Show*, often without disclosing that they were paid by pharmaceutical companies, or had other financial ties to them.” *Id.* at 5.

68. Product integration involves introducing a product as a regular part of a show. For example, in FOX’s *American Idol*, “Coke had its logo-ed beverage cups in front of the three judges, [and] had the traditional green room renamed the ‘Coca-Cola Red Room’” *Id.* (quoting Wayne Friedman, *Madison + Vine: Product Integrators Tackle Learning Curve; Marriages Of Marketers, Media Are Hot, But Risks Are Still Plenty*, ADVERTISING AGE, Oct. 21, 2002).

69. Plot placement occurs when a product is written into the plotline. For example, “NBC is integrating Avon’s new cosmetics line, ‘Mark,’ into the plotline of its soap opera, *Passions*.” *Id.* at 7.

70. Virtual advertising involves digitally inserting product placements into “reruns of syndicated TV programs, sports programs, dramas, and even news footage.” *Id.* at 8.

71. *Id.* at 2.

72. *Id.* at 3-4.

73. FTC Complaint, *supra* note 9.

74. *Id.* at 1.

75. *Id.* at 2-3.

76. *Id.* at 10.

77. *Id.* at 12-15.

CA suggested that both the FCC and FTC require prominent identification of product placements “*when they occur*,” because “[t]he impact of product placement . . . occurs at the moment of exposure.”⁷⁸ They added that “[t]his should be in addition to disclosure at the outset of the program.”⁷⁹

2. Arguments Against Regulation

a. The Freedom to Advertise Coalition Opposition

On November 12, 2003, the Freedom to Advertise Coalition (FAC) filed two oppositions to CA’s petitions.⁸⁰ The FAC argued that “[p]roduct placement is advertising that is protected by the commercial speech doctrine.”⁸¹ FAC then claimed that CA’s petitions did not “identify a strong enough governmental interest,” or show “that product placement is unlawful or misleading,” and therefore did not pass constitutional muster.⁸²

The FAC also alleged CA’s “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.”⁸³

b. The Washington Legal Foundation Opposition

In March of 2004, the Washington Legal Foundation (WLF) filed comments with the FTC concerning CA’s petition, in which it

78. FCC Complaint, *supra* note 9, at 4; see FTC Complaint, *supra* note 9, at 2.

79. FCC Complaint, *supra* note 9, at 4.

80. Letter from Darryl Nirenberg, Counsel, Freedom to Advertise Coalition, and Penelope Farthing, Counsel, Freedom to Advertise Coalition, to Donald Clark, Secretary, Federal Trade Commission, Opposition to Request for Investigation of Product Placement on Television and for Guidelines to Require Adequate Disclosure of TV Product Placement (Nov. 12, 2003), *available at* http://www.ana.net/news/2003/FTC_letter.pdf [hereinafter FTC Opposition]; Letter from Darryl Nirenberg, Counsel, Freedom to Advertise Coalition, and Penelope Farthing, Counsel, Freedom to Advertise Coalition, to Marlene H. Dortch, Secretary, Federal Communications Commission, Opposition to Petition for Rulemaking related to Disclosure of Product Placement on Television, (Nov. 12, 2003), *available at* http://www.ana.net/news/2003/FCC_letter.pdf [hereinafter FCC Opposition] (“The Freedom to Advertise Coalition . . . 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.”).

81. FCC Opposition, *supra* note 80, at 6; FTC Opposition, *supra* note 80, at 5.

82. FCC Opposition, *supra* note 80, at 6; FTC Opposition, *supra* note 80, at 5.

83. FCC Opposition, *supra* note 80, at 3 (emphasis in original); see FTC Opposition, *supra* note 80, at 4.

asserted that CA failed to demonstrate the harm necessary to a finding of unfairness or deception under the FTCA.⁸⁴ The WLF noted that CA's objection to placements for soft drinks, fast food, and beer "appeare[d] to be the commercial promotion of those products *at all*, not their promotion through product placements."⁸⁵ The comments also identified product placement as commercial speech and claimed that CA's proposed requirements were overreaching.⁸⁶

3. Agency Responses

a. FCC "Response"

Although the FCC has not formally responded to CA's petition, Commissioner Jonathan S. Adelstein has spoken out against product placement on various occasions.⁸⁷ For example, in a May 2004 speech before the Media Institute, Commissioner Adelstein stated that "it is a cardinal right for Americans to have the commercial elements of radio and TV broadcasting clearly marked and made explicit to even undiscerning viewers and listeners."⁸⁸ Additionally on May 12, 2005, Commissioner Adelstein testified before the U.S. Senate Committee on Commerce, Science & Transportation, expressing "concern[] that there seems to be a lack of awareness of the need for disclosure under [FCC] rules" regarding undisclosed product placements.⁸⁹ Further, he has called for increased public involvement by asking people to record suspected violations and to send formal complaints to the FCC.⁹⁰

84. Letter from Daniel J. Popeo and David Price, Washington Legal Found., to Mr. Donald S. Clark, Sec'y, U.S. Fed. Trade Comm'n, Comments of the Washington Legal Foundation to the Federal Trade Commission Concerning Television Product Placement, (Mar. 26, 2004), *available at* <http://www.wlf.org/upload/FTC%20product%20placement%20comments.pdf> [hereinafter WLF Comments]. "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." *Id.*

85. *Id.*

86. *Id.*

87. Benjamin, *supra* note 11.

88. Adelstein, *supra* note 12, at 20.

89. *Pre-packaged News Stories, Hearing on S.967 Before the S. Comm. on Commerce, Science & Transp.*, 109th Cong. (2005) (statement of Jonathan S. Adelstein), *available at* 2005 FCC LEXIS 3084, at *2-3.

90. Jonathan S. Adelstein, Comm'r, Fed. Commc'ns Comm'n, Remarks at the National Conference for Media Reform (May 14, 2005), *available at* 2005 FCC LEXIS 2949, at *2-3.

b. FTC Response

On February 10, 2005, the FTC formally responded to CA's petition stating that "it does not appear that failure to identify the placement as advertising violates Section 5 of the FTC Act."⁹¹ In fact, "[t]he principal reason for identifying an advertisement as such is that consumers may give more credence to objective representations about a product's performance or other attributes if made by an independent third party than if made by the advertiser itself."⁹² The FTC then noted that CA's petition had not suggested that consumers were "giving more credence to objective claims."⁹³ "Indeed, in product placement, few objective claims appear to be made about the product's performance or attributes. That is, in most instances the product appears on-screen . . . or is mentioned, but the product's performance is not discussed."⁹⁴ Addressing CA's child injury argument, the FTC stated that "[i]f no objective claims are made for the product, then there is no claim as to which greater credence could be given; therefore, even from an ordinary child's standpoint, consumer injury from an undisclosed paid product placement seems unlikely."⁹⁵

The FTC also noted "that consumer vulnerability to new advertising techniques that pose a risk of deception may diminish with time as consumers become accustomed to the technique."⁹⁶ The response concluded:

. . . there may be instances in which the line between advertising and programming may be blurred, and consumers would be deceived absent a disclosure clarifying that a communication is an advertisement. However, we believe that the existing statutory and regulatory framework provides sufficient tools for challenging any such deceptive acts or practices.⁹⁷

II. CATEGORIZING PRODUCT PLACEMENT

There are no generally accepted categories or terms used to identify types of product placement.⁹⁸ Thus, for clarity and consistency, this section attempts to formulate an endogenous identification and categorization system.

91. FTC Response, *supra* note 3, at 2.

92. *Id.*

93. *Id.* at 3.

94. *Id.*

95. *Id.* at 4.

96. *Id.* at 2 n.2.

97. *Id.* at 5.

98. Compare Doreen Carvajal, *Placing the Product in the Dialogue, Too*, N.Y. TIMES, Jan. 17, 2006, at C9, with FCC Complaint, *supra* note 9.

A. Product Placement and Product Integration

Many commentators distinguish between product placement and product integration.⁹⁹ However, the line separating these two concepts is far from clear. In fact, many use the terms interchangeably, and neither term elicits a customary definition.¹⁰⁰ The President of the Writers Guild of America interprets the distinction by defining product placement as “simply putting a branded box of cereal on the kitchen table in a show” and product integration as “having the characters talk about the crunchy deliciousness of the cereal or provoking them to go out and tell their neighbors to buy that cereal.”¹⁰¹ Either way the product is finding its way into the show. Thus, the distinction is unnecessary, and the remainder of this note refers to all activities in which “advertisers insert branded products into programming in exchange for fees or other consideration”¹⁰² as product placement.

B. Visual, Non-Visual, and Mixed Product Placement

Product placement may consist of purely visual elements (visual placement), purely non-visual elements (non-visual placement), or a combination of both (mixed placement).¹⁰³

Visual placement usually involves a physical or graphic product in use by a character on-screen or shown as a static prop.¹⁰⁴ For example, *The Best Damn Sports Show Period* has “feature[d] a bar decked out with . . . neon signs . . . [advertising] Rolling Rock, Labatt Blue and Dos Equis.”¹⁰⁵ Additionally, “each day a dinner from Outback Steakhouse is delivered to the set as the hosts discuss the sports news of the day.”¹⁰⁶ Similarly the *American Idol* judges drink out of Coca-Cola “logo-ed beverage cups.”¹⁰⁷

Non-visual placement involves a product, brand name, or company alluded to either orally or in writing.¹⁰⁸ For example, in

99. See Carvajal, *supra* note 98.

100. See FCC Complaint, *supra* note 9, at 2.

101. Carvajal, *supra* note 98.

102. FTC Response, *supra* note 3, at 1 (defining product placement).

103. See Savare, *supra* note 19.

104. See *id.*

105. FTC Complaint, *supra* note 9, at 6.

106. Nat Ives, *The Media Business: Advertising; Television Shows like 'Nike Training Camp' Widen the Scope of Product Placements*, N.Y. TIMES, Oct. 27, 2003, at C8.

107. FTC Complaint, *supra* note 9, at 4.

108. See Savare, *supra* note 19, at 356.

spring of 2005, AdAge.com “reported that McDonald’s Corp. had hired an entertainment marketing firm” to find hip-hop artists willing to mention “Big Mac” in their lyrics.¹⁰⁹ Artists would not be paid upfront, but would receive \$1 to \$5 per radio play.¹¹⁰ Additionally, McDonalds would have “final content approval of any lyrics incorporating the Big Mac to ensure that it’s in an appropriate setting.”¹¹¹ The deal was scrapped due to the AdAge.com leak.¹¹² However, the marketing firm responsible, Maven Strategies, had previously brokered a deal “with Seagram’s, where the name of its gin was worked into rap songs by such artists as Kanye West and Petey Pablo.¹¹³ “In Petey’s massive 2004 hit ‘Freek-A-Leek,’ . . . he winds up with the line, ‘Now, I got to give a shout-out to Seagram’s Gin. ‘Cause I drink it, and they payin’ for it.’”¹¹⁴

Similarly, a few years ago Italian jewelry company Bulgari paid British writer Fay Weldon for a prominent place in her 2002 novel, which she aptly titled *The Bulgari Connection*.¹¹⁵ The deal required that Ms. Weldon “mention Bulgari at least a dozen times.”¹¹⁶

Further, “[s]uch stars as Lauren Bacall, Rob Lowe and Kathleen Turner have promoted specific drugs on TV programs such as NBC’s *Today* show and the *Montel Williams Show*, often without disclosing that they were paid by pharmaceutical companies, or had other financial ties to them.”¹¹⁷

Finally, mixed placement involves an oral or written product or brand reference that coincides with the visual presentation or use of that brand or product.¹¹⁸ For instance, the WB’s show *Pepsi Smash* uses Pepsi’s name and Pepsi’s “multi-colored swirl” as its logo.¹¹⁹ Further, the Wall Street Journal reported that during a product review segment on NBC’s *Today* show, Hewlett-Packard and Eastman

109. Renee Graham, *Slip a Big Mac Into a Rap, Get a Check From Ronald*, BOSTON GLOBE, Apr. 5, 2005, at C1.

110. *Id.*

111. Todd Wasserman, *Playing The Hip-Hop Name Drop*, BRANDWEEK, July 25, 2005.

112. Snoddy, *supra* note 5.

113. Graham, *supra* note 109; Snoddy, *supra* note 5.

114. Graham, *supra* note 109.

115. David D. Kirkpatrick, *Now, Many Words From Our Sponsor*, N.Y. TIMES, Sept. 3, 2001, at A1.

116. *Id.*

117. FTC Complaint, *supra* note 9, at 4-5.

118. See Savare, *supra* note 19, at 356.

119. FTC Complaint, *supra* note 9, at 6.

Kodak Co. paid reviewers to praise their products without disclosing that the reviewers were being paid.¹²⁰

III. FAILING THE TESTS: WHAT MAKES UNDISCLOSED NON-VISUAL PRODUCT PLACEMENT UNLAWFUL

A. Failing the Sponsorship Disclosure Requirements

“CBS [CEO] Leslie Moonves . . . was supposedly quoted as saying that some shows will do product placement so well that ‘you’re hardly aware that you’ve been sold something.’”¹²¹ This statement hardly seems consistent with the “principle that listeners are entitled to know by whom they are being persuaded.”¹²² FCC sponsorship disclosure regulations require that “all matter broadcast by any station for a valuable consideration is to be announced as paid for or furnished, and by whom.”¹²³ However the type or degree of disclosure required is not specified,¹²⁴ and two conditional exceptions exist.¹²⁵

1. The Prop and Free Records Exception

As stated above, the prop exception exempts any

service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is *reasonably related* to the use of such service or property on the broadcast.¹²⁶

The FCC added this exception in 1960 after massive radio and television industry protests against FCC’s announcement that free records, free props, and other free matter commonly supplied for programming would be interpreted as triggering the Section 317

120. Jube Shiver Jr., *FCC Asks for Help on Stealth TV Ads*, L.A. TIMES, June 15, 2005, at C3.

121. Benjamin, *supra* note 11.

122. Applicability of Sponsorship Identification Rules, *supra* note 20.

123. *Id.*

124. Benjamin, *supra* note 11.

125. 47 C.F.R. §§ 73.1212(a), 73.1212(f) (2005). This does not include the film exception in § 73.1212(h) (which waives disclosure requirements for any announcement otherwise “required by Section 317(b) of the Communications Act of 1934, as amended, . . . with respect to feature motion picture film[s] produced initially and primarily for theatre exhibition.”) because this blanket waiver is not conditioned upon the placement’s content and is therefore irrelevant for the purpose of this note. *Id.* § 73.1212(h).

126. 47 U.S.C. § 317(a)(1) (2000) (emphasis added).

disclosure requirement.¹²⁷ This uproar is understandable considering that *most* product placement “deals involve the content creator ‘bartering’ exposure for free goods from the manufacturer.”¹²⁸ Visual placement often stems from the need for props, and the consequent visual identification naturally result from the products provided.¹²⁹ Thus, visual placement often complies with these regulations.

However, a non-visual product mention is ancillary to almost any possible use of a tangible product. Since use of tangible goods does not usually necessitate a non-visual reference, it follows that most such identifications are not reasonably related to a product’s broadcast use. For example, identification is not reasonably related to broadcast use where a “refrigerator is furnished by X with the understanding that it will be used in a kitchen scene in a dramatic show and . . . [d]uring the course of the program the actress says: ‘Donald go get the meat from my new X refrigerator.’”¹³⁰ However, identification is reasonably related where “[a] Coca-Cola distributor furnishes a Coca-Cola dispenser for use as a prop in a drugstore scene.”¹³¹

It may be argued that products are necessary as prizes for radio giveaways or to enable product reviews, and in those situations a non-visual product mention would be reasonably related to the use of the product.¹³² However, these few aberrations do not negate the common-sense reality that the prop exception stems primarily from the practical need for props and the consequent visual identifications of the products filling that need.

2. The Commercial Advertisement Exception

A second exception exists, “[i]n the case of broadcast matter advertising commercial products or services, [for] 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 a sponsorship identification . . .*”¹³³ The FCC has interpreted this exception as applying only “when a sponsor and

127. Kielbowicz & Lawson, *supra* note 22, at 357.

128. Savare, *supra* note 19, at 357.

129. *See id.*

130. Applicability of Sponsorship Identification Rules, *supra* note 20.

131. *Id.*

132. *See id.* In these instances identification is necessary and reasonably related to the product’s use. *Id.*

133. 47 C.F.R. § 73.1212(f) (2005) (emphasis added).

commercial product are clearly connected.”¹³⁴ This exception may rationally apply to traditional advertisements where the broadcast matter’s commercial nature is known and contextually enables a product mention to suggest sponsorship.

However, it fails to adequately address non-visual product placement that offers the public no way of delineating between advertisement and program.¹³⁵ For example, without disclosure even the most discerning listener cannot distinguish between a rapper paid to mention “Big Mac” from the same rapper’s voluntary cultural or aesthetic reference to “Courvosier.”¹³⁶ Similarly, no viewer can separate a talk-show host’s (or guest’s) usual banter from a sponsored product mention.¹³⁷ Even where the sponsor and product are clearly connected, the public is unable to determine whether the sponsor was paid *for that particular* non-visual mention (as opposed to a traditional advertisement where payment is assumed from the context).¹³⁸ Thus, an undisclosed non-visual placement will arguably never clearly indicate sponsorship.

It may be argued that the public can guess the commercial nature and source of a product placement. However, “it is a cardinal right for Americans to have the commercial elements of radio and TV broadcasting *clearly* marked and made explicit to even undiscerning viewers and listeners.”¹³⁹ Thus, non-visual placement always requires a separate announcement.

B. Failing the Unfair or Deceptive Act or Practice Regulations

“[U]nfair or deceptive acts or practices in or affecting commerce, are declared . . . unlawful.”¹⁴⁰ A deceptive act or practice consists of: 1) a “representation, omission or practice that is likely to mislead the consumer”; 2) “acting reasonably in the circumstances”; 3) where the representation, omission or practice is “material.”¹⁴¹

134. In re Classical Acquisition Ltd. P’ship, 12 F.C.C.R. 1869, 1 (1997).

135. See Adelstein, *supra* note 12, at 13-14.

136. This example refers to a product mentioned within the content of a song rather than a rapper who appears on a commercial. Product placement is, by definition, outside of traditional advertisement, and thus a paid spokesperson appearing in a thirty-second commercial and mentioning a product is not product placement. See FTC Response, *supra* note 3, at 1.

137. See Adelstein, *supra* note 12, at 13-14 (“Listeners are left wondering if the on-air personality really liked the product, or whether the station was paid to promote it.”).

138. See *id.*

139. *Id.* at 20 (emphasis added).

140. 15 U.S.C. 45(a)(1) (2000).

141. FTC Deception Statement, *supra* note 36.

Further, an act is unfair if it: 1) injures consumers; or 2) violates public policy.¹⁴²

For example, in *Kerran v. Federal Trade Commission*, the Tenth Circuit upheld the FTC's order requiring petitioners to stop "selling . . . re-refined [lubricating] oil without indicating on the containers or otherwise that the commodity is produced from previously used oil."¹⁴³ The petitioners argued that "contamination . . . [and] additives put into the oil by the prior producer are eliminated by the re-refining process . . . and that such re-refined product is the equivalent in quality of [new] lubricating oil. . . ."¹⁴⁴ The FTC found that "a substantial portion of the public who purchase lubricating oil prefer new and unused oil to that produced by . . . re-refining. . . ."¹⁴⁵ The FTC also found "that the failure of petitioners to disclose that their oil is made from previously used oil ha[d] a tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the belief that such oil [was] new and unused."¹⁴⁶

A similar order, upheld in *Brite Manufacturing Co. v. Federal Trade Commission*, prohibited the petitioners from selling watches made with Japanese watch bands where the mark of foreign origin was not visible due to packaging.¹⁴⁷ The FTC found "[t]hat there are among the members of the purchasing public a substantial number who have a preference for products originating in the United States over products originating in foreign countries."¹⁴⁸ The FTC then found "[t]hat when the country of origin of merchandise offered for sale in the United States is not marked or if so marked, the markings are concealed, the purchasing public or a substantial segment thereof understands and believes such products to be wholly of domestic origin."¹⁴⁹ Thus, in both cases a material omission resulting in a misleading expectation necessitated disclosure.

In their response to Commercial Alert's arguments, the FTC noted that paid product placements were lawful because "in most instances the product appears on-screen . . . or is mentioned, but the product's performance is not discussed."¹⁵⁰ Thus, where a product is

142. FTC Unfairness Statement, *supra* note 47.

143. 265 F.2d 246, 247 (10th Cir. 1959).

144. *Id.* at 248.

145. *Id.*

146. *Id.*

147. 347 F.2d 477, 478 (D.C. Cir. 1965).

148. *Id.*

149. *Id.*

150. FTC Response, *supra* note 3, at 3.

not discussed, no misleading representation concerning the product occurs.¹⁵¹ However, where the product *itself* contains a product placement, the lack of disclosure can constitute an unfair or deceptive omission. For instance, a consumer acting reasonably under the circumstances may assume that a CD he or she is purchasing is free of any product placement. This expectation is reasonable since product placement is not historically present in music.¹⁵² Further, it is possible that this consumer may be unwilling to purchase a CD containing a non-visual placement.¹⁵³ However, without disclosure, this consumer may rely upon his or her faulty assumption and purchase the CD. This omission is material because it is “likely to affect a consumer’s choice of or conduct regarding a product.”¹⁵⁴ Thus, as a result of reasonable consumer expectations, this material omission violates the deceptive act or practice regulations.¹⁵⁵

Similarly, the omission constitutes an unfair act or practice injuring consumers. This omission may result in a “substantial injury involv[ing] a monetary harm as when sellers coerce customers into purchasing unwanted goods or services.”¹⁵⁶ Additionally, the injury is not reasonably avoidable by consumers because the omission “prevent[s] consumers from effectively making their own decisions.”¹⁵⁷ Further, the injury is not outweighed by any benefit to consumers or by competition produced by the practice.¹⁵⁸ Finally, this omission violates public policy underlying the Federal Communications Act “that listeners are entitled to know by whom they are being persuaded.”¹⁵⁹

151. See *id.*

152. See Krissah Williams, *In Hip-Hop, Making Name-Dropping Pay*, WASH. POST, Aug. 29, 2005, at D1. Reasonableness is judged from the targeted consumer’s standpoint. FTC Deception Statement, *supra* note 36, at 3.

153. Even if the consumer is willing to purchase the CD, the consumer may attach a negative monetary value to the presence of product placement, and if fully informed the consumer may be unwilling to pay the CD’s requested price.

154. FTC Deception Statement, *supra* note 36.

155. *Id.*

156. FTC Unfairness Statement, *supra* note 47.

157. *Id.*

158. *Id.* As argued below, non-visual placement does not fill an already existing production need, and thus its absence is unlikely to pass higher prices on to the consumer. For example, the McDonald’s deal mentioned above was structured so that payment was contingent upon radio airplay. Graham, *supra* note 109. Thus it is unlikely that this uncertain revenue stream would be figured into the initial price of the CD containing the song at issue. Further, this note argues below that an affirmative disclosure requirement will actually reduce administrative costs.

159. Applicability of Sponsorship Identification Rules, *supra* note 20.

It may be argued that "consumer vulnerability to new advertising techniques that pose a risk of deception may diminish with time as consumers become accustomed to the technique."¹⁶⁰ Thus, the public's expectations may change as non-visual placement becomes more prevalent, and the lack of disclosure will no longer be deceptive or misleading.¹⁶¹

However, this argument ignores how consumers form expectations regarding the different forms of product placement. Specifically, consumer expectation and acceptance of visual product placement pragmatically result from the need for props.¹⁶² A public that is aware of both the existence of product placement and the need for props must rationally conclude that at least some of the props in a DVD it purchases were provided by product manufacturers.¹⁶³ After all, why would a producer pay for a prop when product placement deals are readily available? Thus, knowing that every car chase requires a car, most consumers would likely expect an actual product would be provided to fill that role. Additionally, accepting products in exchange for on-screen exposure creates an effective means for producers and studios to reduce production costs.¹⁶⁴ It is this reality that necessitated the FCC motion picture and prop exceptions.¹⁶⁵ This need accounts for consumer acceptance and expectation of product placement in movies and television.

In comparison, a CD, book, periodical, or videogame producer needs no tangible props. Even a movie or television show doesn't require an oral product reference. The cheapest substitute for a paid non-visual product mention is an unpaid non-visual product mention which, unlike a prop, does not result in substitution costs. Without the need for tangible goods, the consumer may rationally assume that any non-visual product mention is made for purely cultural or aesthetic effect. Even if a consumer skeptically expected a paid non-visual placement to be present in every product, at least two instances may alter consumer expectation.

First, the source of the product may alter consumer expectations. For example, consumers may not usually base their decision to purchase a DVD upon the movie's producer or director. However, consumers almost certainly base their decision to purchase a

160. FTC Response, *supra* note 3, at 2 n.2.

161. *See id.*

162. *See* Kielbowicz & Lawson, *supra* note 22, at 357-58; Savare, *supra* note 19, at 357.

163. Thus the public can figure this information into its purchasing decision.

164. Savare, *supra* note 19, at 357.

165. *See* Kielbowicz & Lawson, *supra* note 22, at 357.

CD, book, or periodical on the musical group, author, or publication respectively. Where each movie by one studio is usually a new entity, each musical group, author, or periodical acts as a brand. This may become problematic if a consumer purchasing a CD, book, or periodical is unable to identify the presence of a non-visual placement, and rationally assumes that future works from that source would not contain a placement.

Second, a consumer may listen to a song on the radio or preview a free MP3 version before purchasing a CD or MP3.¹⁶⁶ In these cases a consumer unable to identify any non-visual placements may assume their absence. Further, this consumer may detrimentally rely upon this assumption and purchase a product that he or she otherwise would not buy.

Thus, as in *Kerran* and *Brite Manufacturing*, disclosure of placements should be required if the FTC determines that a substantial amount of the purchasing public prefers products without placement, and that without notice the public will be misled into faulty and injurious assumptions.¹⁶⁷ While the FTC must draw upon its extensive experience while analyzing these public preferences, the rise of ad-skipping devices and ever more ingenious integration strategies strongly indicate that Americans prefer their media products without the ads.¹⁶⁸

C. Why the Commercial Speech Exception Does Not Protect Non-Visual Placement

Both the Freedom to Advertise Coalition and the Washington Legal Foundation have argued that product placement is commercial speech protected by the First Amendment.¹⁶⁹ No court has found that

166. Similarly a consumer may preview a movie in the theater before purchasing the DVD version.

167. See *Brite Mfg. Co. v. FTC*, 347 F.2d 477 (D.C. Cir. 1965); *Kerran v. FTC*, 265 F.2d 246 (10th Cir. 1959).

168. FTC Deception Statement, *supra* note 36; see *Lights, Camera, Brands*, *supra* note 4 (“[A]dvertisers are pushing their way into content far more aggressively than ever before. This is chiefly because they doubt the effectiveness of 30-second spot advertisements. Increasingly, viewers are using personal video recorders to skip them, or are choosing to pay for content without commercials.”). It is remotely possible that the Commission could find that consumers prefer product placement. In that case, the material omission may still injure the consumer. For example, a consumer that really loves placement may purchase a rap CD assuming that all product mentions are paid-for. If these mentions are really unpaid cultural references then this consumer may not have purchased the CD and will have incurred a material injury.

169. FCC Opposition, *supra* note 80, at 6; WLF Comments, *supra* note 84, at 2.

product placement qualifies as commercial speech.¹⁷⁰ Non-visual product placement in particular would not qualify for protection under the Supreme Court's test in *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*.¹⁷¹ The *Central Hudson* Court describes "[t]he First Amendment's concern for commercial speech [as] based on the informational function of advertising."¹⁷² Thus, under *Central Hudson*, speech that is either misleading or related to unlawful activity is not protected under the First Amendment.¹⁷³ Consequently, "[t]he government may ban forms of communication more likely to deceive the public than to inform it."¹⁷⁴

The FTC has noted that "in most instances the product appears on-screen or is mentioned, but the product's performance is not discussed."¹⁷⁵ If the product is not discussed, then the placement can hardly be said to contain any informational value. Further, as argued above, undisclosed non-visual placements are misleading and fail to inform the public that they are advertisements. Finally, even if a placement were not misleading or deceptive, it has been persuasively argued that a mandatory disclosure requirement (as compared to a complete ban) would pass muster under *Central Hudson's* intermediate scrutiny.¹⁷⁶

IV. WHY AN AFFIRMATIVE DISCLOSURE REQUIREMENT TARGETING NON-VISUAL PLACEMENT IS A NECESSARY AND VIABLE SOLUTION

A. The Need for an Affirmative Disclosure Requirement Targeting Non-Visual Placement

When presented with a product placement complaint, the FCC and FTC investigate whether the placement violates the sponsorship identification regulations or the unfair or deceptive act or practice regulations respectively.¹⁷⁷ These broad regulations police everything from posting minimum octane numbers on gasoline dispensing

170. Savare, *supra* note 19, at 369.

171. 447 U.S. 557 (1980).

172. 447 U.S. at 563.

173. *Id.* at 566.

174. *Id.* at 563.

175. FTC Response, *supra* note 3, at 3.

176. See Steven L. Snyder, Note, *Movies and Product Placement: Is Hollywood Turning Films Into Commercial Speech?*, 1992 U. ILL. L. REV. 301, 333-34.

177. See FCC Complaint, *supra* note 9; FTC Complaint, *supra* note 9.

pumps¹⁷⁸ to wireless communications services.¹⁷⁹ Despite their broad scope, the FCC regulations do not spell out disclosure specifics and the FTC regulations do not require disclosure.¹⁸⁰ In their complaints, both CA and the CSC argued that the existing regulatory structure does not effectively address product placement's rapid growth, and suggested new regulation establishing a bright line disclosure requirement for all product placements.¹⁸¹ This section argues that while existing regulations are indeed ineffective, disclosure requirements should only target non-visual placement.

1. The Current Regulatory Structure is Insufficient

The current regulatory structure is no longer viable or efficient due to the increasing scope and breadth of product placement. CBS Chairman Leslie Moonves recently stated that "three-quarters of all scripted [television] . . . will soon contain product placement."¹⁸² In 2004, the total American product placement market was already worth \$3.5 billion.¹⁸³ Only midway through its 2005-2006 television season, NBC had "8,757 total product placement occurrences on its shows, according to . . . Nielson Product Placement Service."¹⁸⁴ Currently, *each* complaint warranting an investigation must be analyzed under context-specific agency standards determining both compliance with underlying regulations¹⁸⁵ *and* sufficiency of disclosure.¹⁸⁶ This case-by-case method is no longer viable in light of product placement's massive volume and rapid growth. Additionally, agency resources are spent equally on every category of placement regardless of each category's individual potential for deception. The inefficiency resulting from this approach could be decreased by targeting consistently offending placement categories.

178. See FTC Unfairness Statement, *supra* note 47, at 3 & n.21 (citing the posting of minimum octane numbers as an example of an unfair practice regulated by the FTC).

179. See, e.g., 47 C.F.R. § 27.1 (2005).

180. Benjamin, *supra* note 11; FTC Response, *supra* note 3.

181. See FCC Complaint, *supra* note 9; CSC Complaint, *supra* note 59.

182. *Lights, Camera, Brands*, *supra* note 4.

183. See *id.*

184. Peter Lauria, *Placement & the Rise of Scripted Coca-Cola*, N.Y. POST, Jan. 8, 2006, at 29.

185. See, e.g., FTC Response, *supra* note 3 (describing the rules for determining what is a "deceptive practice" under the FTC Act).

186. See Shiver, *supra* note 120 (noting FCC policies encouraging disclosure of payment for product placement).

2. Benefits of a Targeted Affirmative Disclosure Requirement

A disclosure requirement targeting non-visual placement will put the public and the chain of production on notice as to exactly what types of placement are improper. In a recent speech, FCC Commissioner Adelstein referred to viewers as “troops that can and will call corporate media into account” by identifying and recording undisclosed product placements.¹⁸⁷ Admittedly, relying on public recognition when undisclosed non-visual placements are almost always unrecognizable does not seem sensible. However, as with the leaked “Big Mac” deal described above, industry insiders often report undisclosed non-visual placements. Without targeting categories of placement, these insiders must guess as to whether the agency would find a context-specific situation lawful. Where reporting such violations may involve risk, vague regulations will not incentivize the necessary public enforcement.

Additionally, by establishing a specific bright line disclosure rule, agency investigations can focus on whether the required disclosure is present rather than on whether disclosure is sufficient. Thus, targeted regulation will increase investigatory efficiency by conserving agency time and resources. Increased efficiency will also permit agencies to shift their efforts from investigation to identification and enforcement.

3. The Target Should be Limited to Non-Visual Placement

In their FTC complaint, the CSC suggested a pre-movie audiovisual notice of all brand names and companies placed in the film.¹⁸⁸ Similarly, CA requested that both the FCC and FTC require visual notice of a placement *as it occurs* in addition to disclosure at the outset of the program.¹⁸⁹ Because they address all forms of product placement, these requests are both unrealistic and unreasonable. For example, the CSC’s complaint noted that product placements in the movie *Home Alone* contained thirty-one different brand-names.¹⁹⁰ It is unreasonable to assume that an audience would be willing or able to absorb and recall a lengthy notice identifying thirty-one sponsors. Further, as product placements become more prevalent, this solution would become unbearably cumbersome. Thus, under CA’s solution, “[a]ll programming would become virtually impossible to watch as

187. Adelstein, *supra* note 90, at 2-3.

188. CSC Complaint, *supra* note 59, at 18-19.

189. FCC Complaint, *supra* note 9, at 4; FTC Complaint, *supra* note 9, at 2.

190. CSC Complaint, *supra* note 59, at 5.

viewers get distracted by pop-ups flashing the word 'advertisement' interrupting scene after scene."¹⁹¹ While the CSC and CA do not request an outright ban on all product placements, the practical effect of their requested pop-up and lengthy pre-movie notices would be to render much content virtually unwatchable.¹⁹²

Additionally, by requiring separate disclosure for *all* forms of product placement, both the CSC and CA necessarily assume the public is unable to anticipate *any* type of placement. However, due to the legitimate need for props, the public will often expect *visual* placements (and consequently mixed placements).¹⁹³ A consumer who expects a visual placement can factor that information into his or her product evaluation prior to purchase. Where consumers can easily evaluate a product, the FTC is reluctant to issue a complaint based on a deceptive act or practice.¹⁹⁴ The FTC correctly stated that "given the fact-specific nature of the deception analysis under Section 5, a one-size-fits-all rule or guide would not be the most effective approach to addressing any potential for deception in *some* forms of product placement."¹⁹⁵ However, where the need for props is absent, the most effective approach for addressing potential deception in non-visual placement requires targeted and specific disclosure rules.

Current FCC disclosure requirements sufficiently regulate visual placements in broadcast media. The prop exception accommodates both production needs and audience expectations. Where the "identification . . . is [not] reasonably related to the use of such . . . property on the broadcast," audience expectation is absent and disclosure is appropriate.¹⁹⁶ Non-visual placements do not fill any expected production need and thus products offered as compensation for such mentions are rarely (if ever) reasonably related to the use of such property on the broadcast. Additionally, product placement is inherently different from traditional advertising because it places ads in content. Where program and advertisement cannot be separately identified, a product's mere mention cannot clearly indicate sponsorship.¹⁹⁷ Thus, non-visual placement does not fall into any of the disclosure exceptions and should always require disclosure.

191. FTC Opposition, *supra* note 80, at 4.

192. See WLF Comments, *supra* note 84, at 6-7.

193. See Kielbowicz & Lawson, *supra* note 22, at 357-58; Savare, *supra* note 19, at 357.

194. FTC Deception Statement, *supra* note 36, at 5.

195. FTC Response, *supra* note 3, at 3 (emphasis added).

196. 47 U.S.C. § 317(a)(1) (2000) (emphasis added).

197. FCC Complaint, *supra* note 9, at 4.

B. Viable Disclosure Requirement Possibilities

1. FCC Regulations

As stated above, the FCC has the authority to require disclosure on matter broadcast via television or radio.¹⁹⁸ FCC Commissioner Adelstein has stated that “[d]isclosures should . . . be meaningful. A disclosure that appears on screen for a split second during the credits in small type that no one could possibly read without pausing their DVR – and pulling out a magnifying glass – could not possibly qualify.”¹⁹⁹ However, the massive scope of product placement presents a daunting obstacle in the way of detailed product disclosure requirements. Overly detailed disclosure requirements will be ineffective or annoying, while no disclosure will fail to inform the public “by whom they are being persuaded.”²⁰⁰ Thus, disclosure must inform the viewer or listener without being ineffectively cumbersome.

Various recommended solutions addressing product placement generally may be applied to non-visual placements specifically. One commentator has suggested “a voluntary crawl at the bottom of the screen” that could be turned on or off.²⁰¹ The same commentator suggested alternatively “includ[ing] a disclaimer either at the beginning or end of the show, to publicize [a] website address where viewers could go for a list of the specifications of all product integrations and the names of sponsors.”²⁰² Another commentator suggested “the creation of an additional rating that alerts viewers to the nature and extent to which the forthcoming program contains product placements.”²⁰³ A successful parental guidance rating system already informs television viewers, and a similar non-visual placement rating system may present the most viable solution for both radio and television. Additionally, a website should be made available listing all companies and products with non-visual placements in a

198. See 47 U.S.C. § 317.

199. Adelstein, *supra* note 12, at 17.

200. Applicability of Sponsorship Identification Rules, *supra* note 20.

201. Benjamin, *supra* note 11.

202. *Id.* As of 2003 only 54.7% of American households had internet access. U.S. CENSUS BUREAU, COMPUTER AND INTERNET USE IN THE UNITED STATES: 2003 2 tbl.A (2005), available at <http://www.census.gov/prod/2005pubs/p23-208.pdf>. As such, this solution may not sufficiently inform a large percentage of the population. However, many people without home access may be able to connect to the internet at a public library or other location.

203. Savare, *supra* note 19, at 378.

broadcast program for those viewers and listeners who wish to fully inform themselves.

2. FTC Regulations

The FTC has the “power to require a company . . . to affirmatively disclose information without which the company[] . . . might deceive the public.”²⁰⁴ One possibility is for the FTC to require notice similar to the current parental advisory sticker or movie rating²⁰⁵ systems on CDs, books, periodicals, and DVDs. This simple disclosure option would not result in substantially increased cost to the consumer. Further, choosing a format already familiar to consumers will keep informational costs down.²⁰⁶ Once alerted to the presence and extent of non-visual placement, the consumer will be able to make a more informed purchasing decision. Thus, with appropriate notice, the consumer will no longer be unfairly deceived.

V. CONCLUSION

The purpose of this note is not to vilify advertisers or product placement. Without advertising revenue, much of our favorite entertainment would not exist. Further, product placement offers advertisers a vital tool in a world of digital video recording such as TiVo and commercial-free satellite radio. As stated by FCC Commissioner Adelstein: “[t]here is nothing inherently wrong with product placement – so long as it is disclosed as required by law.”²⁰⁷

The law requires sponsorship disclosure any time a party pays more than nominal consideration to insert covert promotions into broadcast matter.²⁰⁸ The disclosure must be meaningful so that the public is able understand “the nature and source of the material they are hearing and seeing and can place it in its proper context.”²⁰⁹ Without separate disclosure, non-visual product placement is indistinguishable from an unpaid product mention. Non-visual placement does not clearly identify itself as an advertisement, and

204. Russell J. Davis, Annotation, *Power of Federal Trade Commission to Issue Order Requiring Corrective Advertising*, 46 A.L.R. FED. 905 (2002); see, e.g., 15 U.S.C. § 45(b) (2000); *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 756 (D.C. Cir. 1977).

205. The MPAA is a self-regulatory agency that developed the movie rating system. Savare, *supra* note 19, at 378.

206. For example, rather than a massive informational campaign, the FTC may be able to simply provide a rating key.

207. Adelstein, *supra* note 12, at 17.

208. See 47 C.F.R. § 73.1212 (2005).

209. Adelstein, *supra* note 12, at 18.

thereby prevents the viewer from understanding the nature and source of the material. Additionally, non-visual placement does not qualify for any disclosure exception, and therefore should not require an inefficient context-specific inquiry. As such, affirmative disclosure requirements targeting non-visual placement are needed to ensure that sponsorships are clearly and comprehensively identified.

The law also declares unfair or deceptive acts or practices unlawful. An act is unfair if it injures consumers or violates public policy.²¹⁰ Further, a deceptive act or practice consists of a "representation, omission or practice that is likely to mislead the consumer," who is "acting reasonably in the circumstances" where the representation, omission or practice is "material."²¹¹ Non-visual placement is unfair because it causes a significant monetary injury that is not avoidable by the consumer. It is deceptive because a reasonable consumer assuming the absence of a placement may detrimentally rely upon this assumption. It follows that an affirmative disclosure requirement targeting non-visual placement is necessary to remedy this faulty assumption and prevent further injury as the use of non-visual placement expands.

While various regulatory options exist, perhaps the most viable broadcast disclosure requirement option is a mandatory audio or visual rating system. A similar mandatory label may viably identify placements within other non-broadcast media products. Whatever the method used, the agencies have a statutory obligation to ensure that the public "know[s] by whom they are being persuaded," and that the public is not unfairly misled or deceived.²¹²

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210. FTC Unfairness Statement, *supra* note 47, at 2.

211. FTC Deception Statement, *supra* note 36, at 1.

212. Applicability of Sponsorship Identification Rules, *supra* note 20, at 1; *see* 15 U.S.C. § 45(a)(1) (2000).

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