

PRODUCT PLACEMENT IN THE UNITED STATES:
A REVOLUTION IN NEED OF REGULATION

PART I	203
Introduction	203
PART II	207
The History of Product Placement in the United States:	
A Trend Toward Revolution	207
PART III.....	209
A Problematic Revolution: Current Issues and Views.....	209
PART IV	213
The FCC: Turning a Blind Eye	213
A. General Rules That Currently Govern Product Placements in the United States	213
B. Congress and Federal Law.....	214
C. The FCC.....	215
D. The Courts	219
E. The Federal Trade Commission	220
PART V	221
Europe’s Approach to Product Placement Regulation ..	221
PART VI.....	228
Changes for the Future of Product Placements and Branded Entertainment	228
A. Congress, the Courts, and the FTC.....	228
B. The FCC.....	229
C. Help from Abroad	231
PART VII	232
Conclusion	232

PART I

Introduction

It is undeniable that the advertising and entertainment industries have intertwined. Although the entertainment industry has seen a variety of strains of product placement and branded entertainment throughout the decades past, it is only in recent

times that these practices have become very sophisticated and highly coordinated.¹ Product placement is a practice by which advertisers and producers/broadcasters bargain to place brand name products, packages, signs and corporate names within movies and television shows.² We have all been witnesses to such advertising tactics, from the trail of Reese's Pieces candy in the movie *E.T.: The Extra-Terrestrial* to BMWs placed carefully in James Bond movies, or Apple computers used by Tom Cruise in *Mission: Impossible*.³ Recently, such product placement has been taken to the next level, where entire entertainment programs have been built around a product, a practice commonly referred to as "branded entertainment."⁴ Reality television shows, like *The Apprentice*, where an entire episode can revolve around finding the most effective marketing strategy for a particular product, are prime examples.⁵

Product placement and branded entertainment are not mere trends. There are various economic, technological and social transformations propelling "advertainment," the merger between the advertising and entertainment industries, and they do not show signs of abating anytime soon.⁶ Rather, it has been predicted that product placement expenditures will increase at a compounded rate of about fifteen percent per annum through 2009.⁷ Rising production costs, ever-increasing advertising costs, devices such as digital video recorders ("DVRs"), that allow commercial skipping, and audience fragmentation have caused advertisers and producers to seek a solution to both industries' growing difficulties with product placement.⁸ As many opine, product placement is not merely a trend in the advertising and

¹ Lance Kinney & Barry Sapolsky, *Product Placement*, in 3 THE ADVERTISING AGE: ENCYCLOPEDIA OF ADVERTISING 1285 (John McDonough & Karen Egolf eds., 2003), available at <http://comm2.fsu.edu/faculty/comm/Sapolsky/research/ProductPlacement.doc>. (last visited Mar. 13, 2008).

² *Id.*

³ *Id.*

⁴ *Id.*; Steven N. Lewis, *Branded Entertainment and Product Integration: A Revolution in Its Infancy*, 23 ENT. & SPORTS LAW. 9, 9 (2006).

⁵ Keith Reed, *A Real Winner of 'Apprentice': Featured Company Marquis Jet Lands Priceless Promotion*, THE BOSTON GLOBE, Jan. 16, 2004, available at http://www.boston.com/business/globe/articles/2004/01/16/a_real_winner_of_apprentice/ (last visited Mar. 13, 2008).

⁶ Benjamin R. Mulcahy, *That's Advertainment!*, 29 L.A. LAW. 44 (2006), available at <http://www.sheppardmullin.com/assets/attachments/310.PDF> (last visited Mar. 13, 2008). See also Matthew Savare, Comment, *Where Madison Avenue Meets Hollywood and Vine: The Business, Legal, and Creative Ramifications of Product Placements*, 11 UCLA ENT. L. REV. 331, 333 (2004).

⁷ See Lewis, *supra* note 4, at 11.

⁸ See Kinney & Sapolsky, *supra* note 1.

entertainment industries but a “revolution in its infancy”⁹ and a “cataclysmic shift in the financing, packaging and selling of film and television properties.”¹⁰

The advent of increasingly sophisticated methods of advertisement has brought with it a host of artistic, public policy and legal issues that have hardly been addressed to date.¹¹ Worries abound that advertisers’ needs will squash artistic and creative control. Others condemn embedded product placement as “stealth advertising,” which deceives consumers and promotes unhealthy habits such as smoking and drinking.¹² Legal issues are even murkier: it is unclear when such advertising tactics cross the line of legality and become illegal. Importantly, it is unclear when product placement takes non-commercial content, which has traditionally been given broad protection under the laws of the United States, to the commercial arena, which receives less protection and entails a different set of applicable legal rules.¹³

However, in essence, the foremost problem is that consumers are unaware that they are being bombarded with advertisements. As Federal Communications Commission (“FCC”) regulations indicate, consumers have a right to know when they are being subjected to an advertisement.¹⁴ Obliviousness to the act of advertising carries with it a number of negative consequences. Consumers may be compelled to buy products based on incomplete information. For example, an advertisement always tries to portray a product in a positive light in order to bolster sales.¹⁵ For such advertisements, monetary motives are clear to the consumer. However, product placements, by disguising the act of advertising, usually cleverly conceal monetary motives, of which consumers have the right and need to know. Furthermore, traditional forms of advertising such as commercials or magazine ads, which are arguably more informative and straightforward about a product’s benefits,¹⁶ are projected to decrease in the long run.¹⁷ This may eventually result in a dominant form of

⁹ See Lewis, *supra* note 4, at 11.

¹⁰ *Id.* at 9.

¹¹ *Id.* at 10.

¹² See Kinney & Sapolsky, *supra* note 1.

¹³ See Mulcahy, *supra* note 6, at 46.

¹⁴ See 47 C.F.R. § 73.1212 (2007).

¹⁵ Matt Getz, “Drowned in Advertising Chatter”: *The Case for Regulating Ad Time on Television*, GEO. L.J. 1229, 1246 (2006).

¹⁶ U.S. advertising law requires substantiation of express and implied product claims made in advertising. On the other hand, product placements do not need to meet the same requirements. See *e.g.*, FTC Policy Statement Regarding Advertising Substantiation, appended to Thompson Medical Co., 104 F.T.C. 648 (1984). See also Mulcahy, *supra* note 6, at 46 (“[E]ntertainment programs may, and often do, depict products being misused or used to accomplish things they are not truly capable of accomplishing.”).

¹⁷ Amit M. Schejter, *Art Thou for Us, or for Our Adversaries? Communicative Action and the*

advertising, such as product placement, that is essentially more deceptive about a product's characteristics and claims.

This note will argue that, first and foremost, the FCC should address the rise of product placements and set up clearer rules that should be strictly enforced for the benefit of the consumer. The FCC was created by the Communications Act of 1934 and is an independent United States government agency that is accountable to Congress.¹⁸ It has jurisdiction over the fifty states, the District of Columbia, and United States possessions, and thus has the power to create uniform guidelines.¹⁹ Because the FCC is responsible for regulating interstate and international communications via radio, television, wire, satellite and cable, it has the authority to promulgate new guidelines for product placement and sponsorship identification.²⁰

However, many believe that the FCC is ignoring the issues that surround product placement, while product placement is becoming an ever-growing practice that needs to be regulated.²¹ The FCC, thus, needs to make sure that the consumer knows when he is being subjected to an advertisement and that the product that he sees onscreen has been placed there in return for compensation. Part II of this note will discuss the history of product placement in the United States and its development into a popular practice. Part III will examine the myriad views on product placement and the controversial issues that it has raised. Part IV will give an overview of the FCC regulations in this area and of the current law governing product placements. In an effort to determine what regulations the United States should employ, Part V discusses how other countries around the globe have approached the issue as well as the specific regulations that they have promulgated. Part VI will set forth guidelines for FCC's regulation of product placements and for balancing opposing interests.²² Finally, Part VII will conclude that it is possible for the FCC to set up clearer rules, and that, with product placements growing at exponential rates, doing so is not only wise but

Regulation of Product Placement: A Comparative Study and a Tool for Analysis, 15 TUL. J. INT'L & COMP. L. 89, 91 (2006-2007) [hereinafter Schejter, *Comparative Study*].

¹⁸ See FEDERAL COMMUNICATIONS COMMISSION, ABOUT THE FCC, <http://www.fcc.gov/aboutus.html> (last visited Mar. 3, 2008).

¹⁹ *Id.* It will be argued *infra* that the FCC should regulate product placements because it has jurisdiction over the entire United States and because it has the authority to regulate telecommunications. FCC regulations will allow for uniform rules, a result that cannot be achieved through a piecemeal treatment of the issue by individual states or courts.

²⁰ *Id.*

²¹ See Schejter, *Comparative Study*, *supra* note 17, at 100.

²² Namely, the differing interests of numerous parties such as broadcasters, advertisers, writers, and consumers.

necessary.

PART II

The History of Product Placement in the United States: A Trend Toward Revolution

Product placements have evolved differently for movies and television. Accordingly, they are regulated by a different set of rules.²³ Product placements were rare in Hollywood movies until the 1970s, when producers discovered that costs could be saved and realism achieved by placing brand-name props directly into the movies.²⁴ However, it wasn't until 1982 that producers and advertisers alike realized the power of product placements on the consumer.²⁵ Following the placement of Reese's Pieces in the movie *E.T.: The Extra-Terrestrial*, sales increased by 65%.²⁶ Other branded products soon encountered similar successes. After Tom Cruise wore Ray-Ban sunglasses in the film *Risky Business* in 1983, sales of Ray-Bans skyrocketed by 55%.²⁷

Product placement in television began quite differently from product placement on the silver screen. It was not uncommon for advertisers to sponsor entire television programs, with advertising agencies playing key production roles in the initial decades of television.²⁸ Thus, product placements were commonplace. This began to change in the 1950s, when the FCC enacted the "payola laws."²⁹ As stipulated by FCC rules, television producers must now disclose their programs' sponsors.³⁰ However, motion pictures (even when aired on television), cable programs, and first-run syndication programs are exempt from the FCC's sponsorship disclosure rules.³¹

In recent times, in television alone, revenues from product placements have increased dramatically.³² For example, "during

²³ See Kinney & Sapolsky, *supra* note 1.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ 47 C.F.R. § 73.1212 (2007).

³⁰ *Id.*

³¹ *Id.*

³² See Amit Schejter, 'Jacob's Voice, Esau's Hands': Transparency as a First Amendment Right in an Age of Deceit and Impersonation, 35 HOFSTRA L. REV. 1489, 1492 (2007) [hereinafter Schejter, *Jacob's Voice*]; Gail Schiller, *Product Placements in TV, Films Soar, Study Finds*, REUTERS, Mar. 30, 2005, available at <http://www.idtalent.com/branding/press.htm#10> (last visited Mar. 13, 2008); see generally, PQ MEDIA, PRODUCT PLACEMENT SPENDING IN MEDIA 2005: EXECUTIVE SUMMARY (2005), available at <http://www.pqmedia.com/ppsm2005-es.pdf> (last visited Mar. 13, 2008).

the third season of *The Apprentice*, [brands such as] Burger King, Dove Body Wash, Sony PlayStation, Verizon Wireless, and Visa all reportedly paid upwards of \$2 million *per episode* for product integration.³³ However, the skyrocketing popularity of product placements has not been accompanied by stricter governmental regulations.³⁴ At present, a mere blurb at the end of a television show, citing product sponsors, is enough to satisfy FCC regulations.³⁵ Thus, a short, barely noticeable sponsorship message is currently deemed an adequate alert to unaware consumers.

While product placements and brand sponsorships are hardly new, what is striking about such practices today is how systematic and sophisticated the efforts to integrate brands and brand messages into entertainment venues have become.³⁶ The integration strategy meets the needs of both producers and advertisers.³⁷ Producers are looking to nontraditional partners to finance and support their programs.³⁸ In addition, they want to achieve authenticity, which means characters interacting with real products, ones the audience can identify with and ones that it itself consumes.³⁹ Advertisers are stimulated by a different set of incentives. Technological advances such as the Internet, DVRs, and video iPods have led to increasing audience fragmentation, making it harder for advertisers to reach consumers and resulting in advertisers searching for innovative ways to influence their customers.⁴⁰

There are several reasons why product placements have been the advertisement strategy of choice in recent years. First, it is cost-efficient.⁴¹ For example, as a film gets aired repeatedly from its theatrical debut to televised broadcast and home video rentals, the cost of product placement per thousand exposures decreases to mere pennies.⁴² Second, it is a chance for brands to be displayed without other competition.⁴³ Third, entertainment programs, whether movies or television shows, can be pre-selected

³³ WRITERS GUILD OF AMERICA, "ARE YOU SELLING TO ME?": STEALTH ADVERTISING IN THE ENTERTAINMENT INDUSTRY (Nov. 14, 2005) (emphasis in the original), available at http://www.wga.org/subpage_newsevents.aspx?id=1422 (last visited Mar. 15, 2008).

³⁴ See Mulcahy, *supra* note 6, at 46.

³⁵ 47 U.S.C. § 317 (2007). For a more detailed discussion, see *infra* Part IV.

³⁶ See generally Schejter, *Jacob's Voice*, *supra* note 32.

³⁷ See Mulcahy, *supra* note 6, at 44.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See Kinney & Sapolsky, *supra* note 1.

⁴² *Id.*

⁴³ *Id.*

to target desired consumer groups.⁴⁴ In addition, seeing a favorite character or actor use a particular product can, consciously or subconsciously, be very persuasive to consumers. Associating brands with actors and contexts allows advertisers to manipulate the images or the usages that they want associated with their products.⁴⁵ Finally, product placements are effective in solving the ever-increasing rise of “advertising avoidance,” a term that encompasses all tactics that consumers use to avoid advertisements, from muting audio and flipping channels during commercial interruptions of their programs to “zapping” them out with the DVR.⁴⁶

All of these factors have contributed to the product placement “revolution.”⁴⁷ Today, product placements are highly desired by both the advertising and entertainment industries.⁴⁸ Contrary to the past, now “[a]dvertisers clamor for the opportunity to pay for the right to participate in product placement and more significantly, branded integration opportunities”⁴⁹

PART III

A Problematic Revolution: Current Issues and Views

The rise of product placements and branded entertainment has brought with it a whole host of issues and controversies ranging from public policy debates to unsolved legal problems. The various current views on product placements will be highlighted briefly in this section.

The issue of creative control concerns many, including producers and consumers. Moving on the spectrum from free product placements to payment for specific product integration, the pressure on producers to defer some creative control to advertisers will be inevitable. Much controversy exists over whether brand-controlled productions are able to remain artistically viable and hold an audience while refraining from becoming nothing more than infomercials.⁵⁰

The issue of creative control also brings up the problem of clutter versus exclusivity.⁵¹ With the rise of product placements,

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *See generally* Lewis, *supra* note 4.

⁴⁸ *Id.*

⁴⁹ *Id.* at 10.

⁵⁰ *Id.*

⁵¹ *Id.* at 11.

the tendency for entertainment programs to become over-branded has also grown.⁵² For example, in the motion picture *The Dukes of Hazzard*, about twenty brands were featured, including Beefeater Fun, Budweiser, Cadillac, Coca-Cola, Dodge, Doritos, Ford, Levi's, Miller, Motorola, Nike, Ray-Ban, Tabasco, Volvo and Yahoo!.⁵³ Such mass-integration trend begs the question: are these heavily-branded productions little more than advertisements disguised as entertainment, meant to deceive consumers who are already paying to view them? Do such integrated media cross the line from commercial to the non-commercial arena? In the wake of technological advances, such questions need to be addressed.

Most importantly, product placement and branded media give rise to public policy concerns. Critics argue that brand placement is "stealth advertising," embedded within media advertisements of which consumers are essentially unaware.⁵⁴ Commercial Alert, a nonprofit organization co-founded by Ralph Nader, argues that product placements are "an affront to basic honesty."⁵⁵ As Commercial Alert suggests, "[p]roduct placements are inherently deceptive, because many people do not realize that they are, in fact, advertisements."⁵⁶ Because people do not notice the advertisements, Commercial Alert argues that people are targeted in an unaware, relaxed and vulnerable state.⁵⁷

Commercial Alert has been lobbying the FCC to establish more stringent disclosure guidelines for movies and television programs.⁵⁸ More specifically, it wants to establish a system of onscreen "pop-up" notifications, disclosing product placements on television, and demands that product placement arrangements be disclosed not only at the end of television shows but at the beginning as well.⁵⁹ It has also petitioned the Federal Trade Commission ("FTC"), arguing that the failure to clearly identify and disclose product placement arrangements is deceptive and injurious to consumers.⁶⁰ This petition was rejected by the FTC in 2005 and will be discussed *infra* Part IV.⁶¹ The current view is that

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ COMMERCIAL ALERT, PRODUCT PLACEMENT, <http://www.commercialalert.org/issues/culture/product-placement>. (last visited Mar. 13, 2008).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See Lewis, *supra* note 4, at 11.

⁶⁰ Letter from Gary Ruskin, Executive Director, Commercial Alert, to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 30, 2003), *available at* <http://www.ftc.gov/os/closings/staff/050210ftccommercialalert.pdf> (last visited Mar. 13, 2008) [hereinafter Letter from Ruskin to Dortch].

⁶¹ Letter from Mary K. Engle, Associate Director for Advertising Practices, FTC, to

extreme regulation of product placements, such as pop-up notifications that continuously show up during a program, would not be well-received by Congress or the FCC.⁶²

However, as more mainstream organizations begin to advocate stricter regulations, it is foreseeable that the government will have to address the issue of product placements in the near future.⁶³ In November 2005, the Writers Guild of America (“WGA”), with the backing of the Screen Actors Guild (“SAG”), declared that it would petition for stricter FCC regulations if producers failed to negotiate the establishment of a “code of conduct governing product integration” as well as of a method of providing additional compensation for writers who are asked to weave brands into storylines.⁶⁴

The WGA released a policy report that warned the entertainment industry that it would unveil broadcasting violations of product placement regulations, and advocate complete disclosure of payment advanced for product placements at the beginning of all TV shows.⁶⁵ The policy report announced that

Along with being asked to create memorable stories and characters, our writers are being told to perform the function of ad copywriter, but to disguise this as storytelling.

....

The Guilds do not want members put in the unacceptable position of facilitating violations of FCC regulations. We, therefore, think this issue ultimately requires discussion both at the bargaining table and before the FCC in Washington.⁶⁶

However, unrestricted product placement is not without supporters. The Washington Legal Foundation, a public interest law and policy center, strongly defends the free-flowing use of product placements without the burden of disclosing them.⁶⁷ The organization opines that product placements have been around since the entertainment industry’s infancy and that such advertising techniques are a legitimate form of commercial

Gary Ruskin, Executive Director, Commercial Alert, (Feb. 10, 2005), *available at* <http://www.commercialalert.org/FTCletter2.10.05.pdf> (last visited Mar. 13, 2008) [hereinafter Letter from Engle to Ruskin].

⁶² *Id.*

⁶³ *See* Lewis, *supra* note 4, at 11.

⁶⁴ Gail Schiller, *WGA Seeks Brand Code*, HOLLYWOOD REP., Nov. 14, 2005; *see also* Lewis, *supra* note 4, at 11.

⁶⁵ *Id.*

⁶⁶ WRITERS GUILD OF AMERICA, *supra* note 33, at 3, 7; *see also* Schiller, *supra* note 64.

⁶⁷ *See generally* WLF *Media Briefings*, Washington Legal Foundation, <http://www.wlf.org/Communicating/mediabriefings.asp>. (last visited Mar. 13, 2008) [hereinafter WLF]; *see also* Claire Atkinson, *Challenge to TV Product Placement Challenged*, ADVERTISING AGE, Mar. 31, 2004.

speech.⁶⁸ It further explains that adopting proposals to regulate product placements would be too burdensome for producers and would essentially ban branded products from appearing in the media.⁶⁹ Additionally, the Washington Legal Foundation argues that there is no consumer harm or injury because this is a free-market economy; consumers may decide for themselves whether or not they want to see a specific product by simply switching their TV sets on/off or by changing the channel.⁷⁰ Organizations such as Commercial Alert have responded that product placements are not protected as commercial free speech, arguing that the Constitution protects only individual rights.⁷¹

The rise of branded entertainment, programs that are built around a brand, has brought with it a host of new issues. Because the program is built around a specific brand or brands, the line between entertainment and advertisement is blurred.⁷² Essentially, the problem lies in deciding whether the program remains in the non-commercial sphere, which carries substantially more rights and privileges, or whether it has entered the commercial sphere, an area traditionally given fewer privileges in the United States.

What is harder for advertisers and broadcasters – and the real issue lurking on the edge of this television industry phenomenon – is trying to figure out if and when a branded entertainment program should be legally characterized as a “program-length commercial.” For example, in a bona fide program about fashion, the host could almost certainly list the names of celebrities seen wearing a particular designer’s clothes But what if the program were also available online, with an accompanying article containing hypertext links to places where the designer’s clothes could be purchased? Moreover, what if the designer paid to be mentioned in the online article? Or paid for the television program to be produced?

Fundamentally the line that separates entertainment programming from advertising is the same line that separates noncommercial speech from commercial speech under the First Amendment.⁷³

Whether a program is considered commercial or non-

⁶⁸ WLF, *supra* note 67.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See generally Schejter, *Jacob’s Voice*, *supra* note 32, at 1493; Evelyn Nussenbaum, *Products Slide Into More TV Shows, With Help from New Middleman*, N.Y. TIMES, Sept. 6, 2004 (Branded entertainment, “work[s] products into the fabric of a show from the start of its development.”).

⁷³ See Mulcahy, *supra* note 6, at 46.

commercial under the First

Amendment may prove to be crucial to how much leeway producers are accorded in using third party trademarks and publicity rights.⁷⁴ In addition, its commercial/non-commercial status will determine whether product claims need to be substantiated.⁷⁵ Product claims in non-commercial programming do not need to be substantiated, which means entertainment programs may show products being misused or being used to do things they would not be able to do in reality.⁷⁶ For example, a show can feature a bicycle being able to leap over cars at racing-car speed, even though that specific model would not be able to perform in this manner in real life.

The proliferation of product placements has thus given birth to a variety of issues. Within what contexts do product placements deceive or even harm the consumer? Do producers and advertisers really have a Constitutional right to display products freely? What are the legal regulations that guide both producers and advertisers? The answers to these questions are murky. The FCC has not addressed these issues head-on, and the FTC has declined to do so altogether.

PART IV

The FCC: Turning a Blind Eye

A. General Rules That Currently Govern Product Placements in the United States

Broadly speaking, the United States government does not prohibit product placements in the broadcast television or motion picture industries.⁷⁷ However, the government does have regulations in place for two specific instances of product placements.⁷⁸ First, after the enactment of payola laws in the 1950s, mentioned *infra* Part II, the FCC requires networks and television stations to disclose paid placements and list all sponsors.⁷⁹ The exceptions to this rule include donated products, nominal consideration in return for product placement, or promotion of realism as the purpose of the product's placement.⁸⁰ Second, major tobacco companies have entered into agreements

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See Savare, *supra* note 6, at 361.

⁷⁸ *Id.*

⁷⁹ See 47 C.F.R. § 73.1212 (2007).

⁸⁰ *Id.*

with many states, consenting to a nationwide ban on paid product placements.⁸¹ An example of such an agreement would be the Minnesota Settlement, in which the tobacco industry agreed to avoid tobacco product placements in movies.⁸²

Undisclosed consideration behind product or service placements was frowned upon, but yet prevalent until the 1950s.⁸³ A congressional investigation of the radio industry revealed that radio deejays had been getting paid regularly by record labels to promote or air specific songs.⁸⁴ Since then, the practice of record companies paying money for the broadcast of songs on the radio, without disclosure of consideration, is deemed payola.⁸⁵ The term “payola” has become standard for commercial bribery, a practice that has since become illegal in the United States.⁸⁶ Following the radio deejay scandal, the United States government and the FCC began to pay closer attention to the commercial exchanges taking place within all forms of entertainment.

B. Congress and Federal Law

Section 317 of the Communications Act of 1934 (the “Act”) governs product placements in television entertainment programming.⁸⁷ Section 317 requires broadcasters to disclose “any money, service, or other valuable consideration” that is paid to, or promised to, or charged by the broadcaster in exchange for product placements.⁸⁸ Broadcasters need not disclose product placements when those are offered without charge or for a nominal fee.⁸⁹ However, according to § 317(a)(2) of the Act, the FCC is *not* precluded from requiring sponsorship announcements to be made for political programs – or any program involving controversial issues, – for which the broadcaster received any form of consideration, such as films, records, talent, scripts, or service of

⁸¹ See Savare, *supra* note 6, at 362.

⁸² *Id.* See also *Tobacco Industry ‘Surrenders’ to Minnesota*, CNN INTERACTIVE, May 8, 1998, <http://www.cnn.com> (search “Tobacco Industry Surrenders Minnesota, then click on “Tobacco Fight Moves Back to Capitol Hill,” then scroll down to “Related Stories” and click on the hyperlink to this article) (last visited Mar. 13, 2008).

⁸³ Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963*, 56 FED. COMM. L.J. 329, 349-352 (2004).

⁸⁴ *Id.* at 349-350.

⁸⁵ MERRIAM-WEBSTER ONLINE DICTIONARY, *payola*, <http://www.m-w.com/dictionary/payola> (last visited Mar. 15, 2008).

⁸⁶ See Amit M. Schejter, *Product Placement as an International Practice: Moral, Legal, Regulatory and Trade Implications*, Presentation at Telecommunication Policy Research Conference, Oct. 2004, at 11, *available at* <http://web.si.umich.edu/tprc/papers/2004/304/product%20placement%20tprc.pdf> (last visited at Mar. 13, 2008) [hereinafter Schejter, *Implications*]

⁸⁷ 47 U.S.C. § 317 (2007).

⁸⁸ *Id.* at Interpretative Notes and Decisions, II(B)(11); see also *id.* at § 317 (a)(1).

⁸⁹ *Id.* at § 317(a)(2).

any kind, as an inducement to air the program.⁹⁰

Furthermore, as § 317(c) of the Act requires, broadcasters must exercise reasonable diligence to obtain from their employees or any other person with whom they deal directly in connection with a program for broadcast, information about product placement arrangements, so that appropriate disclosures may be made.⁹¹ Thus, the law requires continuous disclosure up the production and distribution chains, which ultimately places on the broadcaster the responsibility of identifying the sponsor(s).⁹² The FCC, however, retains the authority to waive the sponsorship requirements of § 317 for any particular case, or class of cases, if it determines that public interest, convenience or necessity does not require such disclosure.⁹³ In sum, § 317 sets out a broad framework that mandates the identification of sponsors but leaves much up to interpretation by the FCC.

Section 507 of the Act requires that those who provide and those who receive compensation for product placements must disclose the exchange that took place to the respective broadcasting station.⁹⁴ This ensures that both sides involved in the exchange carry the responsibility of disclosing consideration and furthering compliance with the law.⁹⁵ Failing to abide by the rule may subject the violator to a fine of up to \$10,000, imprisonment of up to one year, or both.⁹⁶

Compliance with the Communications Act's disclosure requirements is straightforward and simple, as discussed further *infra* Part IV(C).⁹⁷ Most of the time, however, the disclosure is made at the very end of a television program and passes by so quickly, that the viewer is left unaware of it.

C. The FCC

As set forth in § 317 of the Communications Act of 1934, Congress has conferred the authority of prescribing appropriate rules and regulations needed to carry out the sponsorship identification requirement to the FCC.⁹⁸ The FCC has promulgated its own set of rules, interpreting § 317 in 47 CFR §

⁹⁰ *Id.* at § 317(a)(2). *See also* 47 C.F.R. § 73.1212 (2007).

⁹¹ *Id.* at § 317(c).

⁹² *Id.* at § 317(a)(1). *See also* Mulcahy, *supra* note 6, at 46.

⁹³ *Id.* at § 317(d).

⁹⁴ 47 U.S.C. § 507 (2007). *See also* Schejter, *Implications*, *supra* note 86, at 8.

⁹⁵ 47 U.S.C. § 507 (2007). *See also* FEDERAL COMMUNICATIONS COMMISSION, PAYOLA AND SPONSORSHIP IDENTIFICATION, <http://www.fcc.gov/eb/broadcast/sponsid.html> (last visited Mar. 15, 2008).

⁹⁶ 47 U.S.C. § 507 (2007).

⁹⁷ *See* Mulcahy, *supra* note 4, at 46.

⁹⁸ 47 U.S.C. § 317(a)(2)(e) (2007).

73.1212. CFR § 73.1212 provides:

When a broadcast station transmits any matter for which money, service, or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by such station, the station, at the time of the broadcast, shall announce:

(1) That such matter is sponsored, paid for, or furnished, either in whole or in part, and

(2) By whom or on whose behalf such consideration was supplied⁹⁹

This regulation echoes 47 U.S.C. § 317 closely. Also, like § 317, the FCC's regulation does not require disclosure when product placement was provided without charge or for nominal consideration, unless the product was used in a way that is not reasonably related to the use of such product in that particular program.¹⁰⁰

Additionally, the required announcement must disclose the sponsor's true identity.¹⁰¹ Broadcasters must exercise due diligence in disclosing the real sources behind all consideration.¹⁰² This means that if agents or other entities contract with the station for product placements, the announcement should disclose the identity of the person or entity on whose behalf the agent is acting, and not the identity of the agent.¹⁰³ In keeping with the generally stricter rules for broadcasting of political programs or programs regarding controversial issues, broadcasters must keep, for public inspection, a list of the chief executive officers or members of the executive committee of all entities that have sponsored such programs.¹⁰⁴

The FCC has interpreted the purpose of 47 U.S.C. § 317 to be that the audience members must be clearly informed that what they are viewing has been paid for, and that the entity paying for the broadcast must be clearly identifiable.¹⁰⁵ As to the adequacy of the sponsorship identification itself, the FCC has promulgated some guidelines. For example, broadcasters cannot use the sponsor's telephone number alone to identify a sponsor.¹⁰⁶ The

⁹⁹ 47 C.F.R. § 73.1212(a)(1)(2) (2007).

¹⁰⁰ *Id.* at (a)(2).

¹⁰¹ *Id.* at (a)(2)(d).

¹⁰² *Id.* at (a)(2)(b).

¹⁰³ *Id.* at (a)(2)(e). See also *In re WHAS, Inc.*, 40 F.C.C. 190 (1964) (memorandum opinion and order regarding notice of apparent liability for forfeiture of fine).

¹⁰⁴ 47 C.F.R. § 73.1212(a)(2) (2007).

¹⁰⁵ *In re Nat'l Broad. Co.*, 27 F.C.C.2d 75 (1970); Mr. Earl Glickman, 3 F.C.C.2d 326 (1966).

¹⁰⁶ *In re Liab. of George G. Beasley*, 40 F.C.C. 186 (1964); *In re United Broad. Co.*, 45 F.C.C. 1921 (1965).

wording of the sponsorship message has also been addressed:

Although the exact wording of a sponsorship identification is left to the discretion of the licensee, in this instance the announcement should at least state in language understandable to the majority of viewers that suppliers of goods or services have paid the network or producer of the program to display or promote the products or services, and each such supplier should be properly identified. In order to achieve the purpose of Section 317 and our Rules, the video portion of such announcement should be given in letters of sufficient size to be readily legible to an average viewer; should be shown against a background which does not reduce their legibility, and should remain on the screen long enough to be read in full by an average viewer.¹⁰⁷

Furthermore, broadcasters cannot merely mention a sponsor to satisfy § 317 but must announce that the program itself is sponsored by or paid for by the sponsor.¹⁰⁸ In the late 1970s, when the FCC perceived a widespread failure to meet the sponsorship requirements, particularly when it came to political sponsors, it issued a public notice entitled “Application of Sponsorship Identification Rules,” warning broadcasters that the phrase “presented by (name of sponsor)” does not fulfill the disclosure requirement.¹⁰⁹ The FCC has also warned broadcasters that the agency is aware of the widespread use of inadequate identifications, but to this day it has declined to issue size of letter or timing requirements:

Specifically, the Commission’s attention was drawn to many sponsorship identification announcements which were shown so briefly and/or printed in such small letters that comprehension was difficult, if not impossible The Commission does not believe it practical, and therefore has never attempted, to designate a specific size of letter or specific period of time to be utilized in making such identifications since a combination of factors must be considered in determining the appropriateness of any particular announcement, i.e., length of sponsor’s name, relationship of time shown to size of letters, difficulty in comprehending the words contained in the identification. However, the volume of complaints received by the Commission indicates that viewers are having difficulty reading such announcements and licensee

¹⁰⁷ *In re Nat’l Broad. Co.*, 27 F.C.C.2d 75 (1970).

¹⁰⁸ *In re Liab. of Midwest Radio-Television, Inc.*, 49 F.C.C.2d 512 (1974).

¹⁰⁹ Application of Sponsorship Identification Rules to Political Broadcasts, Teaser Announcements, Governmental Entities and Other Organizations, 66 F.C.C.2d 302, 303 (1977).

attention is hereby directed to this problem.¹¹⁰

Although these requirements may seem strict, in reality, it is easy to comply with FCC regulations. Broadcasters can usually comply by placing the flowing announcement in the credits at the beginning or end of the program: “promotional consideration provided by (name of sponsor).”¹¹¹ Indeed, the prevalent practice is to disclose consideration at the every end of the credits quickly and succinctly. Some broadcasters have allegedly completely failed to disclose even in this minimal manner.¹¹²

The FCC’s treatment of branded entertainment has been similarly lax. Theoretically, if a program is considered an advertisement, it crosses over to the non-commercial sphere and will be afforded much less legal protection.¹¹³ The rule is that in an advertisement all express and implied product claims must be substantiated.¹¹⁴ The following example shows how cumbersome the use of products in entertainment could become, if such placements are considered advertisements:

[I]f the Mini Cooper sequences in *The Italian Job* were deemed advertisements, the advertiser would need to have prior substantiation for the express or implied claims made during those sequences. The advertiser must support the claims that the car can withstand major shrapnel without affecting its ability to perform and is perfectly safe to drive even after it has been severely damaged during a high speed chase down stairs and through narrow roads. Similarly, there would need to be substantiation for claims espoused about a product featured as an integral element of a challenge during *The Apprentice*.¹¹⁵

In the early 1970s, the FCC promulgated a test that may be used to determine when a program is categorized as an advertisement.¹¹⁶ As the FCC stated, “[t]he primary test is whether the purportedly non-commercial segment is so interwoven with, and in essence auxiliary to the sponsor’s advertising (if in fact there is any formal advertising) to the point that the entire program constitutes a single commercial promotion for the sponsor’s products or services.”¹¹⁷ The FCC’s test is fairly broad, abstract and gives a high degree of protection to producers and

¹¹⁰ *Id.* at 304.

¹¹¹ Mulcahy, *supra* note 6, at 46.

¹¹² Letter from Ruskin to Dortch, *supra* note 60.

¹¹³ FEDERAL TRADE COMMISSION, FREQUENTLY ASKED ADVERTISING QUESTIONS, <http://www.ftc.gov/bcp/online/pubs/buspubs/ad-faqs.htm>.

¹¹⁴ FEDERAL TRADE COMMISSION, FREQUENTLY ASKED ADVERTISING QUESTIONS, <http://www.ftc.gov/bcp/online/pubs/buspubs/ad-faqs.htm>.

¹¹⁵ Mulcahy, *supra* note 6, at 47.

¹¹⁶ *Id.*

¹¹⁷ *In re* Public Notice Concerning the Applicability of Commission Policies on Program-Length Commercials, 44 F.C.C.2d 985 (1974).

broadcasters.¹¹⁸ For example, even if a program were peppered with product placements, as long as the program is not constructed around the sole purpose of advertising a specific product, it will not be considered an advertisement. Other than this test, the FCC has been fairly quiet about what it takes to push a non-commercial enterprise into the commercial arena.¹¹⁹ Given the lenient standards, producers generally rest easy, even though the line dividing the two spheres remains murky.

D. The Courts

The ways in which United States courts have interpreted product placements have differed from one another over the last few decades. With respect to branded entertainment, courts have generally concluded that because expressive, artistic, or entertainment content is a medium for communicating ideas, such expression is non-commercial and entitled to First Amendment protection.¹²⁰ However, the courts have been notoriously ambiguous when defining the boundaries between commercial and non-commercial speech. Essentially, noncommercial speech, according to the cases, is everything that is not commercial speech.¹²¹ In deciding whether something constitutes commercial speech, the United States Supreme Court has instructed that “the core notion of commercial speech . . . [is that it does] ‘no more than propose a commercial transaction.’”¹²²

Generally, case law illustrates that a hybrid medium, combining commercial and newsworthy elements, even in a branded entertainment program, will be deemed noncommercial if the program’s primary purpose is to inform or entertain, as opposed to purely offering or inducing a commercial transaction.¹²³ More specifically,

[t]he distinction between protected noncommercial use and commercial use is one of degree. . . [T]he closer a branded entertainment program is to “a combination of . . . photography, humor, and visual and verbal editorial comment on” something of public interest, something newsworthy, or something creative or entertaining, as opposed to doing nothing more than proposing a commercial transaction, the more likely it will be characterized as noncommercial speech entitled to the full protection of the Constitution. In contrast, .

¹¹⁸ See Mulcahy, *supra* note 6, at 47.

¹¹⁹ *Id.* at 47. See also Schejter, *Comparative Study*, *supra* note 17, at 96.

¹²⁰ See Mulcahy, *supra* note 6, at 46-47.

¹²¹ *Id.* at 47.

¹²² *Bolger v. Youngs Drugs Prods. Corp.*, 463 U.S. 60, 66 (1983).

¹²³ See *Bolger*, 463 U.S. 60; *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1002-03 (9th Cir. 2001); *Hoffman v. ABC/Capital Cities*, 255 F.3d 1180, 1184-86 (9th Cir. 2001).

. . . the more a branded entertainment program is structured to provide information or entertainment merely as “window-dressing” for an advertiser’s effort to sell products, and the more that branded logos and third-party advertising predominate over the content of the program, the more likely it is that the program will be deemed commercial speech.¹²⁴

Court-promulgated standards for distinguishing commercial and non-commercial programming are easy to understand but difficult to apply. For example, an episode of a program such as *The Apprentice* can feature one brand or product, which makes it seem closer to an advertisement, but it is clear that one of the program’s main purposes is to entertain, a factor that pushes the show back on the spectrum toward non-commercial speech. In a way, the test seems circular and is highly susceptible to subjective judgments of a program’s purpose, message and characteristics. In fact, it can be likened to Supreme Court Justice Stewart’s “test” to define “hard-core pornography”: “I know it when I see it.”¹²⁵

E. The Federal Trade Commission

Some have argued that, in addition to the FCC, the FTC should investigate product placement practices and require broadcasters to disclose product placements clearly and prominently.¹²⁶ However, for the FTC to have jurisdiction, there must be an unfair and deceptive act or practice that affects commerce and that leads to substantial consumer injury.¹²⁷ Commercial Alert has argued that undisclosed or poorly disclosed product placements can, in the long-run, encourage obesity, diabetes and alcoholism, thus injuring the consumer.¹²⁸ In a complaint letter addressed to the FTC, Gary Ruskin, the Executive Director of Commercial Alert, stated:

The Commission should require advertisers to ensure that their product placements on television are disclosed in a conspicuous and unmistakable manner. Their failure to provide such disclosure should be considered “unfair or deceptive acts and practices in or affecting commerce” within the meaning of the Federal Trade Commission Act. It is deceptive because it flies under the viewer’s skeptical radar. It

¹²⁴ See Mulcahy, *supra* note 6, at 49-50.

¹²⁵ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

¹²⁶ In 2003, Commercial Alert petitioned the FTC, as well as the FCC, claiming that product placements were unfair and deceptive acts. See Letter from Ruskin to Dortch, *supra* note 60.

¹²⁷ See 15 U.S.C. § 45 (2007).

¹²⁸ Letter from Gary Ruskin, Executive Director, Commercial Alert, to Donald Clark, Secretary, Federal Trade Commission (Sept. 30, 2003), available at <http://www.ftc.gov/os/closings/staff/050210ftccommercialalert.pdf> (last visited Mar. 15, 2008).

is unfair because it is advertising that purports to be something else.¹²⁹

However, unlike the FCC, the FTC has affirmatively declined to regulate product

placements. A letter by Mary K. Engle, Associate Director for Advertising Practices of the FTC, explained that the FTC had no basis for regulating product placements in the absence of an affirmative statement about the product within the show itself.¹³⁰ The letter further stated that there are few objective vocal claims about a product's characteristics in the traditional product placement context.¹³¹ For example, most products are utilized by actors or placed within the background but are not commented on in the same way that an advertisement would comment on them. In the absence of objective, material claims about the product, the FTC refuses to regulate.¹³² Finally, the FTC stated that a "one-size-fits-all rule or guide" could not effectively regulate product placements.¹³³

As mentioned *supra* Part I, product placements and branded entertainment are rising exponentially. Nevertheless, as this chapter explains, there is little guidance as to how product placements should be regulated. The following half of this note will propose that the FCC should take up the reins and promulgate clearer and more extensive rules that would guide all concerned parties in the future. Specifically, Part V will examine how other countries have dealt with product placements in an effort to discern whether any of the foreign regulations could feasibly be adopted by the United States.

PART V

Europe's Approach to Product Placement Regulation

The European approach to product placements vastly differs from that of the United States; in Europe, product placements are viewed with a higher level of suspicion.¹³⁴ This is so in part because the evolution of the television industry in Western Europe began with it being owned by the government, with broadcasting licenses being awarded to commercial entities only later on.¹³⁵ Most European countries did not allow advertising on television at first,

¹²⁹ *Id.*

¹³⁰ Letter from Engle to Ruskin, *supra* note 61.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See Schejter, *Comparative Study*, *supra* note 17, at 101-105.

¹³⁵ See Schejter, *Implications*, *supra* note 86, at 11.

and, to this day, some countries still ban such advertising and commercial underwriting.¹³⁶ As a result, when television advertising was first permitted in Europe, it was conditioned upon a clear separation from other programming.¹³⁷ Time and day limitations on advertising exist to this date.¹³⁸

Although each national government has its own audiovisual policies, it is the European Union that sets up rules and guidelines for member states when promoting common interests.¹³⁹ The European Union's landmark legislation, governing the audiovisual and media sector, is the Television Without Frontiers ("TWF") Directive. Legislated in 1989 and amended in 1997, the TWF Directive regulates the transmission of television broadcasts within the European market.¹⁴⁰

The TWF Directive is crucially important to the advertising industry in European countries because it governs all the member nations of the European Union.¹⁴¹ But although it places limits on already existing advertisements, the Directive is generally silent on the matter of product placements because of the era during which it was passed.¹⁴² The only guidance that it provides on product placements or branded entertainment programs is that "surreptitious advertising" is disallowed.¹⁴³ Following the timetable set out by the 1997 amendment, the TWF Directive has been undergoing a revision process since June 2001 to account for new developments in media.¹⁴⁴ The European Commission conducted a public study of the TWF Directive and concluded that revisions were necessary to account for the substantial changes in the audiovisual market and the advertising industry.¹⁴⁵ The study summarizes the European Union member states' approaches to product placements and recommends how member countries

¹³⁶ See Schejter, *Comparative Study*, *supra* note 17, at 105.

¹³⁷ *Id.*

¹³⁸ *Id.* Note that such limits exist in the United States only for children's programming.

¹³⁹ EUROPA, OVERVIEWS OF THE EUROPEAN UNION ACTIVITIES: AUDIOVISUAL AND MEDIA, http://europa.eu/pol/av/overview_en.htm (last visited Mar. 15, 2008).

¹⁴⁰ EUROPA, TELEVISION BROADCASTING ACTIVITIES: "TELEVISION WITHOUT FRONTIERS" DIRECTIVE, <http://europa.eu/scadplus/leg/en/lvb/124101.htm> (last visited Mar. 13, 2008) [hereinafter TVWF Directive]

¹⁴¹ See Schejter, *Comparative Study*, *supra* note 17, at 100.

¹⁴² *Id.* at 100. The TVWF was enacted in the 1990s, before the meteoric rise of product placements.

¹⁴³ TVWF Directive, *supra* note 140.

¹⁴⁴ *Id.*

¹⁴⁵ Bruno Liesse et al., Report, *Study on the Development of New Advertising Techniques*, CARAT CRYSTAL & BIRD & BIRD (2002), available at http://ec.europa.eu/comm/avpolicy/docs/library/studies/finalised/bird_bird/pubRapPortfinal_en.pdf (last visited Mar. 15, 2008). See also EUROPEAN COMMISSION, INFORMATION SOCIETY AND MEDIA, MODERN ADVERTISING RULES, <http://www.audiovizual.ro/reguli-moderne-publicitate.pdf> (last visited Mar. 15, 2008).

handle such placements in the future.¹⁴⁶

As exemplified by the study, product placements have generally been considered by European countries as surreptitious advertising.¹⁴⁷ Such an inherently negative connotation has given rise to stricter controls than those existing in the United States. For example, in Austria, a public broadcasting law bans product placements on public channels, unless the placement is external to the broadcaster (i.e. it is not subject to the broadcaster's control).¹⁴⁸ Feature films fall within an exception to this rule, which also includes television films and series.¹⁴⁹ However, the ban is absolute when it comes to children's programming.¹⁵⁰ Moreover, Austria defines product placements very broadly as including any goods, services or brands placed in a broadcast.¹⁵¹

Other European countries have similar provisions in place. Denmark and Italy mandated that the appearance of advertising be distinguishable from regular programming content.¹⁵² Although the language of such laws *per se* does not prohibit product placements, it effectively ends up doing so because there is no way to distinguish appearances of product placements from program content without disturbing the flow of the program. Furthermore, the Danish Radio and Television Advertising Board stated that product placements are hidden advertisements and are thus banned by the Danish Marketing Practices Act.¹⁵³ On the extreme end of the spectrum, Finland and Ireland have made product placements illegal outright.¹⁵⁴

On the other hand, Portugal allows product placements but has rules that ensure that they are subordinated to sponsorship

¹⁴⁶ COMMISSION OF THE EUROPEAN COMMUNITIES, COMMUNICATION FROM THE COMMISSION: THE FUTURE OF EUROPEAN AUDIOVISUAL REGULATORY AUDIOVISUAL POLICY, (Dec. 15, 2003), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0784:FIN:EN:PDF> (last visited Mar. 15, 2008).

¹⁴⁷ *Id.*

¹⁴⁸ Report, *The Evolution of New Advertising Techniques: Austria*, BIRD & BIRD, available at http://ec.europa.eu/avpolicy/docs/library/studies/finalized/bird_bird/pub_at.pdf (part of the 2003 European Commission Study, this report focuses on Austria) (last visited Mar. 15, 2008).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Hagen Jorgensen, Danish Consumer Ombudsman, Remarks at the European Comm'n Annual Assembly of Consumer Ass'ns (Nov. 12-13, 1998), available at http://ec.europa.eu/consumers/cons_org/assembly/event06/speech08_en.pdf (last visited Mar. 13, 2008). See also Schejter, *Implications*, *supra* note 86, at 13.

¹⁵³ See Schejter, *Implications*, *supra* note 86, at 13.

¹⁵⁴ Agnes Maqua & Ilse Hendrix, BIRD & BIRD, *Final Report: Study on the Development of New Advertising Techniques: Summaries of National Reports 19* (2003), available at http://ec.europa.eu/comm/avpolicy/docs/library/studies/finalized/bird_bird/pub_res_ume_en.pdf (last visited Mar. 13, 2008) [hereinafter *Summaries of National Reports*]. See also Schejter, *supra* note 64, at 14.

rules.¹⁵⁵ An interesting approach is taken by Portugal and Sweden: product placements are allowed within the parameters of sponsorship rules, provided that such placements are not prominent.¹⁵⁶ Interestingly, in Sweden, even if broadcasters were to comply with this requirement, a product placement would still probably violate the ban against programs showing an “undue favoring of commercial interests.”¹⁵⁷ Thus, Swedish laws work in tandem to create a *per se* ban on product placements, even though Sweden has not expressly outlawed the practice.

Various European countries have taken different approaches to product placements, but the unifying theme is that these approaches are usually stricter than those adopted by the United States. The TWF Directive, which bans *surreptitious* advertising, is the legal basis for the European states that have chosen to ban or limit product placements,¹⁵⁸ and we are compelled to wonder which country is implementing its laws in the manner intended by the pan European directive.¹⁵⁹

With the exponential growth of product placements, it seems that many European countries are seriously considering easing their limitations and are poised to approve such advertising tactics.¹⁶⁰ As mentioned previously, in many European countries, paid product placements are officially impermissible.¹⁶¹ The reality, however, is that such restrictions are becoming increasingly difficult to enforce. The difficulty of enforcement is due of a variety of reasons. First, European broadcasters are increasingly importing American shows, such as *Friends* and *Sex and the City*, that abound with product placements.¹⁶² As such, European producers opine that they feel compelled to follow suit and give their own programs the same degree of realism.¹⁶³ Second, product placements are common in independently-produced works and imported feature films.¹⁶⁴

¹⁵⁵ *Id.* As mentioned earlier, the enforcement situation differs from the United States in that sponsorship rules in the United States are ignored occasionally, with no severe consequences.

¹⁵⁶ *Summaries of National Reports*, *supra* note 154.

¹⁵⁷ *Id.* at 4, 58.

¹⁵⁸ See Schejter, *Implications*, *supra* note 86, at 15.

¹⁵⁹ *Id.*

¹⁶⁰ Council Directive 2007/65, 2007 O.J. (L 332) 27 (EC), available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l_332/l_33220071218en00270045.pdf (last visited Mar. 13, 2008) [hereinafter Audiovisual Media Services Directive].

¹⁶¹ See Schejter, *Comparative Study*, *supra* note 17, at 106-107.

¹⁶² Eric Pfanner, *Product Placements Cause a Stir in Europe*, INT'L HERALD TRIB., Oct. 3, 2005, available at <http://www.iht.com/articles/2005/10/02/business/products03.php> (last visited Mar. 13, 2008).

¹⁶³ *Id.*

¹⁶⁴ EUROPEAN COMMISSION, INFORMATION SOCIETY AND MEDIA, MODERN ADVERTISING RULES, <http://www.audiovizual.ro/reguli-moderne-publicitate.pdf> (last visited Mar. 15,

Many European countries are poised to allow product placements greater leeway because of the fear that they will escape regulation anyway, and that may end up being more deceptive to consumers.¹⁶⁵ Indeed, producers have found ways to skirt the bans by exploiting gray areas in the law.¹⁶⁶ For example,

[t]o find suitable products, producers sometimes deal with so-called prop supply houses. Under BBC guidelines and British regulations, producers cannot accept money or other favors in return for agreeing to use a certain product. The prop suppliers, however, sometimes operate under contract from marketers, which increasingly see product placements - whether free or paid - as vital advertising. One British supply house, 1stPlace, contends on its Web site that 90 percent of the cameras shown on British television are from Canon because of its efforts on behalf of that company, a client.

The Sunday Times of London contended in a recent report that the relationship between producers and prop suppliers sometimes crosses a line, with producers accepting cash or favors in exchange for agreeing to feature a product. It cited an undercover investigation in which reporters posed as representatives of a fictional Mexican beer brand and extracted agreements from producers of a BBC food show.¹⁶⁷

The Office of Communications (“Ofcom”), the regulator of the United Kingdom’s communications industries, responsible for television, radio and wireless communications, has recently conducted a study that exemplifies the beginnings of the relaxation of product placement rules in European countries.¹⁶⁸

This study contemplates that product placements should be allowed for certain programs, such as sports, contemporary dramas, game shows and magazine programs, while other genres, such as news, current affairs, religion and children’s programs, should be deemed off limits.¹⁶⁹ Furthermore, the consultation sets forth that disclosure should be done in the beginning rather than the end of a program so that viewers are alerted beforehand and to minimize the negative effects of the great speed at which end-credits usually run.¹⁷⁰ In addition, the existing advertising scheduling rules may be extended for product placements.¹⁷¹ For

2008).

¹⁶⁵ See Pfanner, *supra* note 162.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Product Placement – A Consultation On Issues Related to Product Placement*, Ofcom, http://www.ofcom.org.uk/consult/condocs/product_placement/ (last visited Mar. 14, 2008).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

example, the ban on slimming products advertised near children's programming will be extended to product placements, as will general bans on prescription-only medications and alcohol/tobacco.¹⁷² The study further recommends increasingly relaxing the restrictions on product placements because the benefits outweigh the harm.¹⁷³

Addressing such concerns, the European Commission presented a proposal to revise the TWF Directive in December 2005.¹⁷⁴ One of the main goals of this proposal is to provide a clear legal framework for product placements.¹⁷⁵ The proposal states that product placements have become common throughout the European Union through films and imported television programs, but European countries have not been able to take advantage of product placements in the way the United States has because it has remained unclear whether product placements are illegal or not.¹⁷⁶ Thus, the proposal aims to allow the European audiovisual industry to remain competitive vis-à-vis the United States, while setting up a framework that ensures that product placements are exchanged in the open and disclosed to viewers.¹⁷⁷ According to the European Commission,

[there exists a] legal vacuum on product placement in some countries, which is plainly exploited by economic operators. This is why the new directive provides for a set of basic minimum common rules that would replace today's patchwork of differing national ones for a type of commercial communication that is already in use.

....

The common rules would prevent excessively intrusive and undisclosed product placement such as that sometimes seen in the USA, where product placement is not subject to any legislative restrictions and where it is used in programs, including those for children, without any obligation to inform viewers.¹⁷⁸

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ EUROPA, THE MODERNIZATION OF THE TELEVISION WITHOUT FRONTIERS DIRECTIVE: FREQUENTLY ASKED QUESTIONS, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/419&format=HTML&aged=0&language=EN&guiLanguage=en> (discusses the TWF Directive generally and provides links to pertinent documents) (last visited Mar. 13, 2008).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* This statement is mistaken to the extent that it maintains that there are no legislative restrictions against product placements or sponsorship identification requirements in the United States. As the latter half of the quote suggests, the common view among foreign countries is that because the United States has minimal and laxly enforced requirements, it is perceived as having no regulations in place at all.

The 2005 proposal, renamed the Audiovisual Media Services Directive (“Audiovisual Directive”), was updated, consolidated and released to the public on March 9, 2007. The Audiovisual Directive, when it is officially passed, will provide a broad definition of product placement in Chapter 1, Article 1(k).¹⁷⁹ Article 3(i), a wholly new section, provides that product placements are admissible in 1) cinematographic works, films, series, light entertainment, and sports programs, and 2) in cases where products are provided free of charge, unless a member state decides to prohibit product placements through its own laws.¹⁸⁰

Article 3(i)(3) goes on to list four requirements that all programs containing product placements must meet.¹⁸¹ First, product placement arrangements cannot influence content and scheduling or undermine the responsibility and editorial independence of the broadcaster.¹⁸² Second, programs cannot directly encourage the purchase of featured products or services by making special promotional references.¹⁸³ Third, the product cannot be unduly prominent.¹⁸⁴ Undue prominence occurs when the product or brand is repeatedly represented, not in keeping with the program’s content.¹⁸⁵ Fourth, to ensure that viewers are aware of the product placement, sponsorship identifications must be made at the beginning and at the end of the program.¹⁸⁶ In addition, the sponsorship identification must be aired again after an advertising break to avoid consumer confusion.¹⁸⁷

Article 3(i)(4) stipulates that product placements are banned altogether for tobacco products, cigarettes and prescription medicine products or treatments.¹⁸⁸ Furthermore, there is a substantive ban on product placements in children’s programming.¹⁸⁹

As exemplified by the Audiovisual Directive, which is positioned to take effect throughout the European Union, product placements have been given official legislative approval.¹⁹⁰ However, there are general guidelines that must be met, and it is

¹⁷⁹ Audiovisual Media Services Directive, *supra* note 160.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 46(b). Note that the Audiovisual Media Services Directive has adopted the undue prominence standard that countries such as Portugal and Sweden already have in place, as discussed *supra*.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at art. 1(7).

¹⁹⁰ *Id.*

clear that the European Commission intends monitor the growth and use of product placements.¹⁹¹ Additionally, the general framework is meant to be supplemented by the laws of the respective nations to suit their individual goals.¹⁹² In sum, it can be expected that European countries will loosen the existing restrictions but will still approach product placements cautiously for fear of opening the floodgates. Part VI will discuss what the United States can learn from such international laws.

PART VI

Changes for the Future of Product Placements and Branded Entertainment

In the face of the exponential growth of product placements, clear regulations are needed, so that broadcasters and advertisers alike have concrete guidelines to follow in the future. Like the European Union, the United States should implement regulatory studies that suggest viable changes to the United States laws surrounding product placements. Such studies should address how broadcasters can better inform viewers of product placement arrangements to ensure that consumers know when consideration has been received for the placement of a product within a program.

A. Congress, the Courts, and the FTC

Congress holds a number of advantages over the FCC and could, theoretically, be looked to for updated regulations on product placements.¹⁹³ First, if Congress creates a law, the FCC must enforce it, even if the Commission does not approve of the law.¹⁹⁴ Second, Congress is less prone to “regulatory capture,” which occurs when interested industries have undue influence on the issuance of regulations.¹⁹⁵ However, as it will be argued *infra* Part VI.B, the FCC is presently in the best position to regulate product placements. Although Congress could play an effective role in the regulation of product placements, it seems unlikely that Congress will legislate in this area, given that the regulation of sponsorship identifications and of advertising rules have traditionally lay within the sphere of the FCC’s authority.¹⁹⁶

As discussed *supra* Part IV, the United States courts have been

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Matt Getz, “Drowned in Advertising Chatter”: *The Case for Regulating Ad Time on Television*, GEO. L.J. 1229, 1258 (2006).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *See* 47 C.F.R. § 73.1212 (2007); 47 U.S.C. §§ 154, 303, 334, 336, and 339 (2007).

largely silent on product placements because this matter is not often litigated. Due to the lack of litigation, looking to the courts for guidance on product placement law is not a viable solution. Furthermore, as mentioned *supra* Part IV, the FTC has affirmatively refused to monitor product placements, and as such cannot be relied on for the promulgation of new guidelines or disclosure provisions. Thus, regulation of product placements is effectively left to the FCC.

B. The FCC

To achieve a greater degree of success and uniformity in regulating product placements, the FCC could begin by enforcing the existing rules more strictly. As mentioned previously, the FCC does have disclosure provisions in place, but they are enforced only loosely, and broadcasters are not strictly policed or held accountable for consideration that they receive for product placements.¹⁹⁷ Acceding to more radical demands, however, such as those suggested by Commercial Alert's campaigns, would limit product placements too severely. Continually interrupting programs with pop-up signs that disclose product placements as they occur within the program is too invasive a strategy. Such a rule would probably result in a *de facto* ban on product placements and pose serious First Amendment issues pertaining to creative control.

Thus, it seems that the best first step the government should take is to enforce its promulgated rules strictly. Jonathan Adelstein, an FCC commissioner, has suggested that the FCC should conduct an investigation into which broadcasters have violated federal payola laws by engaging in undisclosed product promotions.¹⁹⁸ Commissioner Adelstein's suggestion was made in reaction to news reports that alleged payments by companies, such as Eastman Kodak Co., being made to freelancers who are hired to review products on local and national television news broadcasts, a practice that obviously undermines the objectivity of these reviewers.¹⁹⁹ According to Commissioner Adelstein, the FCC needs to take a stronger stance on the enforcement of its own laws.²⁰⁰ As demonstrated by a recent interview with him, unlike other countries, the United States does not generally condemn

¹⁹⁷ See *supra* Part IV.

¹⁹⁸ Amy Schatz, *The Advertising Report: FCC Watchdog Presses Case for Enforcement of Payola Laws*, WALL ST. J., June 8, 2005, available at <http://www.aef.com/industry/news/data/2005/3119> (last visited Mar 15, 2008).

¹⁹⁹ *Id.* See also James Bandler, *Advice for Sale: How Companies Pay TV Experts for On-Air Product Mentions*, WALL ST. J., Apr. 19, 2005.

²⁰⁰ Schatz, *supra* note 198.

product placements or view them as inherently dishonest; rather, emphasis is placed on proper disclosure to consumers:

The whole idea of product placements is to advertise to people when they're not expecting it. So the law requires that advertisers disclose then [sic] when they're on broadcast stations as something that has been paid for, and if they don't do that, it's a serious violation of the law.

....

Currently, our rules require that they disclose it sometime during the course of the broadcast. We don't spell out how that's done, but I don't think it's adequate to just have it quickly run by on a scroll so that someone would need to pause their (digital video recorder) and get out a magnifying glass to read it. That's not real disclosure.

....

I just want to make sure the disclosure—if it's at the end—runs for a sufficient period and a sufficient size so that people can read it and know they've been advertised to.

....

The best thing we can do is strictly enforce our rules. I think if we find violations and pursue them aggressively, we'll find the industry will do a better job of compliance.²⁰¹

Clearly, the FCC needs to promulgate new rules that detail the type of disclosure that it requires. One such rule would entail making disclosures longer and their letter size larger. Small disclosures that pass by quickly during the closing credits are hardly noticeable to the average viewer.²⁰² Just as there are letter size and content length requirements for disclosures for political advertisements, such regulations should apply to all other types of advertisements.²⁰³ As mentioned *supra*, the FCC already mandates "full and fair disclosure," but it needs to clarify exactly what it means by such terms; stipulating disclosure length, letter size and placement would be a step in the right direction.²⁰⁴ Although continuous pop-up notifications are likely too intrusive, disclosure notifications positioned in the beginning and at the end of programs are a feasible compromise. The FCC also must enforce its laws against violators, as a warning to others that its regulations will be strictly upheld.

Moreover, the FCC should promulgate a set of guidelines that

²⁰¹ *Id.*

²⁰² John Eggerton, *Full Disclosure: Adelstein on Ads*, BROAD. & CABLE, Feb. 6, 2006, available at <http://www.broadcastingcable.com/article/CA6304942.html?display=News>.

²⁰³ *Id.*

²⁰⁴ *Id.*

will advise producers as to what specific actions may turn non-commercial programming into a commercial programming. Although, as suggested earlier in this note, this may prove to be a difficult task, a set of specific guidelines would alert producers to instances when their works would be afforded lesser protection. For example, there could be a time guideline, alerting producers that if more than one half of their program's time is devoted to a certain product, the program is in danger of crossing over into commercial territory. There could also be a promotion guideline, stating that a program is commercial if it actively promotes a product instead of merely placing, discussing or referring to it. Obviously, studies need to be conducted before such concrete guidelines can be drafted.

C. Help from Abroad

As discussed in *supra* Part V, countries around the globe have taken different approaches to product placements, and the United States could look to these approaches for guidance. Given that the United States does not condemn product placement, and given its popularity as an advertising strategy, guidance should be sought from countries that take more moderate approaches, as exemplified by the European Union's Audiovisual Directive.²⁰⁵

The guidelines adopted by the European Commission's Audiovisual Directive could feasibly be implemented by the United States. Disclosures of product placements at the beginning and end of programs are easy to insert. In addition, re-broadcasting sponsorship disclosures after advertising breaks would be an effective way to ensure adequate disclosure without being unduly intrusive. The "undue prominence" test²⁰⁶ ensures that products are not shown in a manner that blatantly promotes the product. Moreover, by adopting the test, the FCC could allow broadcasters to take advantage of product placements while ensuring that viewers are not subjected to point-blank advertisements.

The above-mentioned requirements could also serve as guidelines that divide commercial programming from non-commercial programming. For example, if products are directly promoted or encouraged in a significant manner, the programming can be deemed to belong to the commercial sphere. Likewise, if products or brands are displayed with undue prominence, that program can be seen as exhibiting commercial

²⁰⁵ See *supra* Part V.

²⁰⁶ See Schejter, *Comparative Study*, *supra* note 17, at 107.

characteristics.

PART VII

Conclusion

Product placements are on a meteoric rise in the United States. Greater numbers of advertisers are looking for alternatives to traditional advertising avenues, in search of more effective ways to reach an ever-elusive audience. Producers' desire to achieve realism on screen and the need for alternative sources of funding are further feeding the exponential growth of product placements and branded entertainment. It is safe to say that such advertising strategies are here to stay. However, the United States lawmakers have been largely ignoring the changes that these new advertising strategies have wrought on public programming. These changes bear significant consequences for consumers and producers alike. Not only does the average viewer have the right to know when he is being subjected to an advertisement, but producers also need to know what kind of protection their artistic works will be afforded.

The FCC needs to take affirmative steps in controlling product placements and providing clarity for the consideration-for-placement process. The Commission also needs to enforce its own laws, those that require disclosure, more strictly. Furthermore, the FCC must clarify what steps would adequately satisfy disclosure guidelines. Finally, Congress and the FCC could look to product placement laws promulgated by foreign governments and determine whether similar laws should be passed in the United States.

*Sandra Lee**

* Associate Articles Editor, *Cardozo Arts & Entertainment Law Journal*; J.D. Candidate, 2008, Benjamin N. Cardozo School of Law; B.A., 2004, summa cum laude, Barnard College, Columbia University. My sincere thanks to the AELJ staff and editors for their assistance, to Professor Susan Crawford for her comments on the initial draft, and to Professor Amit Schejter for his guidance. A special thank you to my parents and uncle, Charles K. Kim, for their love and support. ©2008 Sandra Lee.