WOMBLE CARLYLE SANDRIDGE & RICE
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Product Placement

April 23, 2006

To: **Attendees, ABA Program – Representing Your Local Broadcaster**
From: **Gregg P. Skall**

> **"This concept of [product] integration is a big push. There are a lot of corporations that realize being integrated from a product placement standpoint has a greater value than a 30-second spot."**
> Steve Rasnick, vice-president of UPP Entertainment Marketing[1]

FCC Commissioner Jonathan Adelstein has called the increasing commercialization of American media to be one of the most pernicious symptoms to emerge from media consolidation. In particular he is describing the use of product placements in television shows and planted stories and news segments in entertainment shows which he likens to well-trained marketers, preying on unsuspecting minds. Commissioner Adelstein rings the alarm that the use of covert commercial pitches is penetrating deeper and deeper into our media.[2]

In September, 2003, the organization Commercial Alert filed complaints and requests for rulemaking with the Federal Trade Commission and the Federal Communications Commission seeking to halt the practice in television programming of placing products and product messages in the body of programs for compensation, claiming that broadcasters not only fail to identify their sponsors, but even worse, they fail to identify the ads themselves.

These petitions as well as the recent attention drawn to new forms of payola and plugola by Eliot Spitzer with the July 2005 settlement between the Office of the New York Attorney General[3], and music recording giant Sony BMG, and the recent FCC guidance and proceedings concerning so-called video news releases (VNRs), have caused broadcasters to take new note of the law and focus on the legality and potential exposure from the practice of product placement. The Commercial Alert petition to the FCC quotes a *Wall Street Journal* article where company heads themselves view the product placement practice as infomercials.

> Some TV programs are so packed with product placements that they approach the appearance of infomercials. The head of a company that obtained repeated product placements actually called one such program "a great infomercial."[4]

The FCC

Federal law requires disclosure of sponsored broadcast materials. The language of Section 317 of the Communications Act states:

> All matter broadcast by any radio station for which money, service, or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the

> same is so broadcast, be announced as paid for or furnished, as the case may be, by such person. . . [5]

This provision of the Act is reflected in Section 73.1212 of the FCC rules. This rule provides, in relevant part:

> (a) 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 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 supplied. . . .
> (f) In the case of broadcast matter advertising commercial products or services, 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, shall be deemed sufficient for the purpose of this section and only one such announcement need be made at any time during the course of the broadcast.[6]

As regards products placed in programs or for which consideration has been received for the program making use of the product, broadcasters usually implement this provision with an announcement in the credits at the beginning or end of a program such as “promotional consideration provided by.” Commercial Alert believes this is inadequate, arguing that the impact of the product placement, like that of ordinary ads, occurs at the moment of exposure. “To inform viewers of product placements only at the start or end of a show is not adequate, because they might not be viewing then. Honesty and fair dealing require that the label be attached directly to the thing to which it pertains – in this case, the product placement.”

Several “product placement” practices have been identified by public interest groups for concern. The outright paid-for or sponsor-related reference to products in the show such as Coke logo-ed beverages in front of the judges on *American Idol* and the Regis Philbin references “…let’s go to our friends at AT&T” when a contestant needs to call a friend for help with a question on ABC’s *Who Wants to be a Millionaire* are the more familiar examples. But other cited practices include pharmaceutical companies and others placing paid celebrity spokespersons on interview shows such as NBC’s *Today* show and the *Montel Williams Show*, without disclosing the financial ties or that the celebrities were paid by the companies whose products were discussed. Product placement is also said to have expanded to “plot placement,” a practice where the plot of a show is written to involve, or even revolve around, the product.

Trade publications such as *Advertising Age* and general press such as the *New York Observer* and the *Wall Street Journal* have reported that product placement is on the rise. In the *Observer* article, Les Moonves, chairman and CEO of CBS was reported to say it was done in *Survivor* and *American Idol*; that Speilberg’s movie *Minority Report* “. . . had more product placement than any TV show I've ever seen” so “If it's good enough for Spielberg, it's good enough for us . . . so you're going to see more and more of that . . .”[7]

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The Commercial Alert FCC letter called these practices an affront to basic honesty and requested a Commission investigation of the practice and rulemaking to strengthen the sponsorship identification rules. The Commission has yet to issues its response, although there is an investigation underway and Commissioner Adelstein is outspoken on the issue. The business of product placement has come into the fore and every broadcaster can expect to be faced with requests in this area. Broadcasters would be well advised to be extremely careful when accepting product placement or product placement-like arrangements, to carefully comply with Section 73.1212 and to include within any such agreements provisions that permit full discretion to assure compliance with the current FCC rules as well as future rules and policies that may issue from the FCC.

The FTC

In 2003, Commercial Alert also requested investigation of product placement practices by the Federal Trade Commission, calling the practice "stealth advertising" and claiming that it violated the Federal Trade Commission Act prohibitions against unfair and deceptive acts and practices affecting commerce.[8] It asked the FTC to require advertisers to ensure that their product placements on television be disclosed in a clear and unmistakable manner, claiming that the current practice and manner of implementation is deceptive because it "flies under the viewer's skeptical radar."

The difference between the FCC and the FTC, however, is that to meet the test of unfairness, required for jurisdiction under the Federal Trade Commission Act, there must be "substantial" consumer injury. To demonstrate such injury, Consumer Alert urged the FTC to consider the role that product placement may play in the epidemic of marketing-related diseases in American children, including obesity, type-2 diabetes, alcoholism and smoking. Gambling, it said, is a serious problem for millions of young people as well. Commercial Alert requested the same type of full-scale investigation of current TV practices.

Although the FCC has yet to answer the Commercial Alert 2003 letter, the FTC did respond in February 2005. While recognizing the variety and frequency of product placement and brand integration into programming cited, the letter, sent by Mary K. Engle, Associate Director for Advertising Practices, concluded that the Consumer Alert request did not suggest that product placement results in consumers giving more credence to objective claims about the product's attributes. Although the product generally appears on-screen, if the product's performance is not discussed, the rationale for disclosing that an advertiser paid for a product placement (i.e., that consumers will give more credence to objective claims about a product's attributes when made by a party independent from the advertiser) is absent. Thus, when no statement is made, the rationale for FTC action is absent.

The FTC did say that in the case of advertisers using spokespersons, its Guides require disclosure "where there exists a connection between the endorser and the seller of the advertised product which might materially affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by the audience) . . . ."[9] However, it simply said that this would be covered in an upcoming review of its Endorsement Guides and that existing regulatory guidance is sufficient for the purpose of challenging any deceptive acts or practices.

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Conclusion

While there does not appear to be a current legal prohibition against product placements as currently practiced, prudent broadcasters will treat this area with extreme caution. FCC rules do require a disclosure. The current practice of making a promotional consideration announcement at the end of a program appears to be sufficient at the present time, but the topic is receiving massive attention and the situation may change at any time. The FCC is actively investigating and may attempt to change Section 73.1212 of its rules as Commercial Alert has suggested. Careful scrutiny of the manner in which broadcasters reveal commercial relationships may demonstrate that some current practices violate the letter or the spirit of the FCC sponsorship identification rule and fines might issue. It would be advisable to make sure that these relationships are properly revealed.

Finally, broadcasters should note that many states have their own fair trade laws that are not preempted by federal regulations. State attorneys general have the jurisdiction to pursue activities they consider to violate principles of their state fair trade and deceptive practices laws. An analysis of state action in this area is warranted by all broadcasters.

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ENDNOTES:

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[1] Quotation from Letter of Gary Ruskin, Executive Director, Commercial Alert, to Marlene H. Dortch, Secretary, Federal Communications Commission, September 30, 2003

[2] Remarks of Jonathan S. Adelstein Commissioner, Federal Communications Commission *"Fresh is Not as Fresh as Frozen:" A Response to the Commercialization of American Media* Before The Media Institute Washington, DC May 25, 2005; See also, Amy Schatz, *FCC Watchdog Presses Case For Enforcement of Payola Laws, Wall Street Journal* (Eastern Edition). New York, N.Y.:Jun 8, 2005. p. B.2B

[3] Under the agreement between Sony BMG and the New York Attorney General, Sony BMG agreed to stop inducing radio stations from playing music from Sony BMG record labels with secret payments of cash and gifts, issue a statement acknowledging improper conduct, and make a $10 million payment to state of New York charities focused on music and education appreciation. (A copy of the Attorney General's press release describing the settlement may be read at: *http://www.oag.state.ny.us/press/2005/jul/jul25a_05.html*.

[44] Christina Binkley and Emily Nelson, *NBC Casts Vegas Casino in a Starring Role, Wall Street Journal*, August 5, 2003.

[5] 47 U.S.C. § 317(a)(1).

[6] 47 C.F.R § 73.1212.

[7] Jason Gay, "At CBS, Les Is More." *New York Observer*, May 19, 2003.

[8] 15 U.S.C. §45(a)(1).

[9] 16 C.F.R. § 255.5

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