

Federal Communications Commission Considers Whether to Regulate Product Placements

INTRODUCTION

Digital video recorders have changed the way people watch television. No longer a captive audience, viewers have the ability to fast-forward through commercials and just watch the shows themselves. In response to this change in consumer behavior, many advertisers have started to place their products within these shows themselves. This practice has increased significantly in recent years, and studies show that spending on product placements in the United States is estimated to have reached \$2.9 billion in 2007. Unfortunately for advertisers, product placements may soon be subject to new federal regulations.

CALLS FOR REGULATION

For years, consumer industry groups have been alarmed as product placements have increased, and in 2003, Commercial Alert asked the Federal Trade Commission (“FTC”) to regulate the use of product placements. Although the FTC noted that “there may be instances in which the line between advertising and programming may be blurred,” the Commission ultimately determined that existing laws were adequate for challenging any deceptive acts or practices and that no new regulations were needed.

Now, a new coalition of 23 advocacy groups is once again pressuring regulators to act. This time, however, they are focusing their efforts on the Federal Communications Commission (“FCC” or “Commission”). The groups argue that disclosures about commercial sponsorship during television programs need to be more robust to protect the public from what the groups deem to be “surreptitious marketing schemes.” Some of the proposals go as far

as to suggest that any product placement should be accompanied by a contemporaneous on-screen notice.

Advertisers have resisted such proposals as unnecessary and even unconstitutional. If the FCC is to take any action, some advertisers have urged that such action take the form of a Notice of Inquiry, rather than a Notice of Proposed Rulemaking. While the former type of notice would essentially solicit comments on whether regulation is necessary, the latter would start from the premise that regulation is necessary and solicit comments on the form of such regulation.

FCC ISSUES NOTICES OF PROPOSED RULEMAKING AND INQUIRY

With the FCC split on how much regulation may be needed, the Commission compromised by issuing both a Notice of Proposed Rulemaking (which addresses some of the “more moderate” proposals) and a Notice of Inquiry (which cordons off the more egregious ones).¹

In the Notice of Proposed Rulemaking, the FCC is seeking comments on a proposed rule change to make sponsorship identification disclosures more obvious by requiring that these disclosures be made in a specific font size and air for a particular amount of time. The FCC is also considering whether to modify its rules regarding product placements in children’s programming and cable television, as well as rules related to on-air radio endorsements by hosts.

In the Notice of Inquiry, the FCC is seeking comments on whether even broader regulations are necessary. For example, the FCC asks whether it should require a sponsor identification message to appear on screen contemporaneously with any product placement,

¹ MB Docket 08-90, Released June 26, 2008.

rather than at the end of television shows, as is now the common practice. In addition, the Commission asks whether both visual and aural disclosures may be necessary.

OPPORTUNITY TO SUBMIT COMMENTS

Whatever the FCC decides to do is certain to have a significant impact on advertisers who utilize product placements. Indeed, if the FCC adopts some of the more stringent requirements proposed by consumer groups, these requirements could effectively end the practice of product placement altogether. For example, if the FCC were to require contemporaneous disclosures, many producers would turn advertisers away rather than disturb the artistic integrity of their shows.

Advertisers would be well advised to participate in the FCC's proceeding, including by submitting comments, in order to ensure that the scope of any new regulation is narrow and any new disclosure requirements are unobtrusive. Comments will be due 60 days after the Notices are published in the Federal Register, and reply comments will be due 30 days after the comments are filed. Kelley Drye has significant experience in the areas of advertising law and FCC law and regulations. The firm's attorneys regularly draft comments and advocate on behalf of clients in the context of rulemaking proceedings. Our advocacy has helped to limit the scope of new regulations.

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