



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

Mary K. Engle  
Associate Director for Advertising Practices

February 10, 2005

Gary Ruskin, Executive Director  
Commercial Alert  
4110 S.E. Hawthorne Boulevard #123  
Portland, OR 97214-5246

Dear Mr. Ruskin:

On September 30, 2003, Commercial Alert filed with the Federal Trade Commission a Request for Investigation of Product Placement on Television and for Guidelines to Require Adequate Disclosure of TV Product Placement. Commercial Alert asked the Commission to require advertisers to disclose product placements in a clear and conspicuous fashion and specifically to require advertisers to identify product placements when they appear on screen with the prominent superscript "ADVERTISEMENT."

I. Background

Product placement is a form of promotion in which advertisers insert branded products into programming in exchange for fees or other consideration. Commercial Alert raises concerns that product placements may deceive consumers by blurring the line between advertising and programming, and that the appearance of product placement is implicated in diseases such as obesity and Type 2 diabetes in children. In addition, Commercial Alert raises concerns about advertisers' use of paid celebrity spokespersons to appear on programs without disclosing the celebrities' financial ties to the company in question. Commercial Alert contends that the failure to disclose that advertisers have paid for their products' appearances in programming constitutes an unfair or deceptive practice in violation of Section 5 of the Federal Trade Commission Act.

As you know, an act or practice is deceptive under Section 5 of the FTC Act: 1) if there is a representation or omission of information that is likely to mislead the consumer acting reasonably under the circumstances; and 2) if that representation or omission is "material" – defined as an act or practice "likely to affect the consumer's conduct or decision with regard to a product or service." FTC Deception Policy Statement, appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 175 (1984). An act or practice is unfair under Section 5 if it causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers and that does not have countervailing benefits to consumers or competition. 15 U.S.C. § 45(n).

## II. Product Placement and Adults

The core of Commercial Alert's complaint is that viewers need to know, at the time they see paid product placements, that the advertiser has paid for the placement. Otherwise, Commercial Alert contends, consumers are misled about whether the product placement is an ad.

Some products appear in programming because advertisers pay for such placement, while other products appear because of the creative judgment of the program's writers. We are not aware of any empirical data concerning whether consumers distinguish between these two uses of products in programming.<sup>1</sup> Assuming, however, that consumers are not aware when an advertiser has paid for a product to appear in programming,<sup>2</sup> it does not appear that failure to identify the placement as advertising violates Section 5 of the FTC Act.

The principal reason for identifying an advertisement as such is that consumers may give more credence to objective representations about a product's performance or other attributes if made by an independent third party than if made by the advertiser itself.<sup>3</sup> For example, in the Commission's case against JS&A Group, a program-length infomercial for BluBlocker sunglasses called itself Consumer Challenge. The infomercial was introduced with a voice-over from a narrator, "Welcome to Consumer Challenge, hosted by Jonathan Goldsmith, the show that examines popular new products for you, the consumer, with investigative reporters Don Hale and Catherine Grant." In fact, Consumer Challenge was not a news program. Rather, it was a thirty-minute commercial sponsored by the marketer of BluBlocker sunglasses featuring actors hired to play to role of "investigative reporters." The Commission's complaint alleged that the respondents violated Section 5 by falsely representing that Consumer Challenge was an

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<sup>1</sup> Nielsen Media Research recently instituted a product placement measuring service that tracks occurrences of product placement on television programs, but the service does not distinguish paid from unpaid product placements. See Wayne Friedman, "'Idol,' Coke Top Placement Tallies," TelevisionWeek, Sept. 6, 2004 at 6, 48.

<sup>2</sup> We note that consumer vulnerability to new advertising techniques that pose a risk of deception may diminish with time as consumers become accustomed to the technique.

<sup>3</sup> See, e.g., Statement in Regard to Advertisements that Appear in Feature Article Format, 3 Trade Reg. Rep. (CCH) Para. 7559 (1967) (an affirmative disclosure is required if consumers would be led to believe that an advertising feature was part of a newspaper's editorial content).

independent investigative program similar to 60 Minutes or 20/20 and that the program's favorable evaluation of the product was based on objective product testing.<sup>4</sup>

Commercial Alert's complaint describes many instances and varieties of product placement and brand integration into programming. For example, on American Idol, the judges drink from cups with Coca-Cola logos and the contestants wait in the Coca-Cola Red Room. On Who Wants to Be a Millionaire, when a contestant wants to call a friend for help with a question, host Regis Philbin says, "Let's go to our friends at AT&T" to place the call; this is reported as being tied to an AT&T purchase of advertising on the show. Hosts of the sports show The Best Damn Sports Show Period drink Snapple beverages while the Snapple logo appears as part of the set backdrop. Revlon cosmetics were placed in All My Children.

Despite the variety and frequency of product placement and brand integration into programming, your complaint does not suggest that product placement results in consumers giving more credence to objective claims about the product's attributes. Indeed, in product placement, few objective claims appear to be made about the product's performance or attributes. That is, in most instances the product appears on-screen (e.g., American Idol hosts are seen drinking from cups with the Coca Cola logo), or is mentioned, but the product's performance is not discussed.<sup>5</sup> Therefore, 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. If, through product placement, false or misleading objective, material claims about a product's attributes are made, the Commission can take action against the advertiser through an enforcement action pursuant to Section 5 of the FTC Act. Accordingly, a rule or guide requiring an "advertisement" disclosure is not warranted under Section 5. Moreover, given the fact-specific nature of the deception analysis under Section 5, a one-size-fits-all rule or guide would not be the most effective approach to addressing any potential for deception in some forms of product placement.

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<sup>4</sup> JS&A Group, Inc., 111 F.T.C. 522 (1989) (consent order). Commercial Alert's complaint cites many other cases in which the Commission has challenged the format of an advertisement as deceptive.

<sup>5</sup> One instance of product placement mentioned in your complaint that possibly involved objective performance claims was a demonstration of Dockers stain-resistant Go Khaki pants on The Best Damn Sports Show Period. Your complaint, however, does not suggest that false or misleading claims were made about the stain-resistant quality of the pants.

### III. Product Placement and Children

Your request for an investigation also discusses the effect of product placement on children and its contribution to what you describe as “marketing-related diseases” such as obesity, Type 2 diabetes, alcoholism, smoking, and gambling. You state that seeing the products causes children to demand them from their parents. Some of the examples you cite include Coca-Cola having been heavily featured on American Idol and Young Americans, McDonald’s coupons and products being featured on the reality TV programs Lost and Big Brother, Budweiser placements in Survivor, and a casino as the center of a Fear Factor episode. As a remedy, you suggest that programs containing product placement be clearly labeled so that parents can decide whether or not they want their children to watch the program.

As you know, the Commission is aware of the vulnerabilities of children and has taken action to protect them from unfair or deceptive practices.<sup>6</sup> When the Commission considers whether an advertisement directed to children is deceptive, it examines the ad from the standpoint of an ordinary child.<sup>7</sup> If objective claims about a product’s attributes were made through product placement in programming directed to children, the Commission would consider whether the claims made would deceive an ordinary child.<sup>8</sup> If no objective claims are made for the product, then there is no claim as to which greater credence could be given; therefore, even from an ordinary child’s standpoint, consumer injury from an undisclosed paid product placement seems unlikely.

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<sup>6</sup> E.g., Lewis Galoob Toys, Inc., 114 F.T.C. 187 (1991) (consent order); Hasbro, Inc., 116 F.T.C. 657 (1993) (consent order); Phone Programs, Inc., 115 F.T.C. 977 (1992) (consent order); Audio Communications Inc., 114 F.T.C. 414 (1991) (consent order); Teleline, Inc., 114 F.T.C. 399 (1991) (consent order).

<sup>7</sup> Deception Policy Statement, 103 F.T.C. at 179.

<sup>8</sup> In this regard, we note with respect to children’s programming (programming originally produced and aired primarily for an audience of children 12 years old and younger), the Federal Communications Commission has long-standing policies against “program-length commercials” (programs associated with a product, in which commercials for that product are aired), as well as against “host selling” (the use of program talent to deliver commercials, including endorsements or selling by animated cartoon characters as well as “live” program hosts). Children’s Television Programming, 6 F.C.C. Rcd. 5529, 5530 (1991). In addition, regulations enforced by the FCC require disclosure 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 and accepted by such station. . . .” See 47 C.F.R. § 73.1212.

You allege that consumer injury from product placement in programming arises from the demands children place on their parents to buy the product as a result of seeing the product in the program.<sup>9</sup> In that regard, product placement seems no different from ordinary advertising. That it may result in children asking their parents to buy products seen on television does not constitute an unfair or deceptive practice in violation of Section 5 of the FTC Act.<sup>10</sup>

For these reasons, I believe that continuing the Commission's policy of evaluating on a case-by-case basis whether an advertising format is deceptive appropriately protects consumers, including children, from misrepresentations, even as advertisers develop creative new forms of promotion. To the extent that specific uses of product placement can be demonstrated to likely cause consumer injury, the FTC can bring law enforcement actions under the existing statutory framework.

#### IV. Endorsements

With regard to the specific issue of advertisers using spokespersons to promote products in programming without disclosing the spokesperson's financial ties to the advertiser, the Commission's Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255, address the issue of any "material connection" between an endorser and an advertiser. The 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) . . . ." 16 C.F.R. § 255.5. The question of whether an advertiser should disclose if a celebrity has been paid to discuss a product in news or entertainment programming will be considered in the Commission's upcoming regulatory review of its Endorsement Guides.

#### V. Conclusion

As Commercial Alert has noted, there may be instances in which the line between advertising and programming may be blurred, and consumers would be deceived absent a disclosure clarifying that a communication is an advertisement. However, we believe that the existing statutory and regulatory framework provides sufficient tools for challenging any such deceptive acts or practices. The decision not to take formal action in this matter should not be

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<sup>9</sup> We note that the examples you give of product placement involve programming that does not appear to meet the FCC's definition of children's programming.

<sup>10</sup> See, e.g., J. Howard Beales, III, Advertising to Kids and the FTC: A Regulatory Retrospective That Advises the Present 8-9 (2004), at <http://www.ftc.gov/speeches/beales/040802adstokids/pdf>.

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construed as a formal Commission determination of whether the actions challenged in the Consumer Alert submission comply with Section 5. We invite Consumer Alert to continue to bring to our attention instances in which the use of product placements, brand integration, or other new forms of advertising may cause consumer injury.

Thank you for contacting the Commission about this issue.

Very truly yours,

A handwritten signature in black ink that reads "Mary K. Engle". The signature is fluid and cursive, with the first name "Mary" and the last name "Engle" clearly legible.

Mary K. Engle  
Associate Director for Advertising Practices

cc: Freedom to Advertise Coalition  
Washington Legal Foundation