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## **FCC Ponders Embedded Advertising ID's**

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P.T. Barnum – or maybe it was H. L. Mencken – once supposedly said “You’ll never go broke underestimating the intelligence of the American public”. In some respects the advertising industry was built on the truth of that concept.

And then there’s the FCC, which often seems to do its best to underestimate the intelligence of the American public.

Put the advertising industry and the FCC together, and it’s like Diet Coke and Mentos – a near-explosive release of gas with considerable visual effects and, in the end, nothing really to show for it.

With that introduction, we alert you to the latest development in the Commission’s efforts to protect an unwary public from the dangers lurking in (organ crescendo, please) embedded advertising.

In response to several recent reports about the changing landscape of television advertising and some petitions for rulemaking from concerned citizen groups, the Commission has released a Notice of Inquiry and Notice of Proposed Rulemaking (NOI/NPRM) seeking comment on the increased use of “embedded advertising” in the forms of “product placement” and “product integration”.

“Product placement”, in the FCC’s lexicon, refers to the insertion of branded products into programming in exchange for fees or other consideration. For example, when Simon, Randy and Paula are seen at the *American Idol* judges’ table with over-sized, easily-identifiable cups of Coca Cola ® in front of them, that is almost certainly an instance of “product placement”. “Product integration”, by contrast, refers to the integration of a product into the dialogue or plot of a program. So when an episode of *The Apprentice* requires contestants to create a new food-item for sale at Burger King ® restaurants (with repeated references to Burger King ® woven into the dialogue and visuals throughout the show), you’re looking at “product integration”.

It is clear that use of both forms of embedded advertising is on the increase, presumably to make up for advertising revenues that are being lost as viewers use digital video recorders (*e.g.*, TiVo ®) to skip commercials (or as viewers simply watch programs commercial-free on the Internet). The NOI/NPRM cites one published estimate that “between 1999 and 2004, the amount of money spent on television product placement increased an average of 21.5 percent per year” and in 2005 “the net value of the overall paid product placement market in the United States increased 48.7 percent to \$1.50 billion.”

But the FCC’s sponsorship identification rules haven’t changed. They require only one announcement during the course of the broadcast of a sponsor’s corporate or trade name (or the name of the product) when the sponsor offers consideration in the form of money, product or services in exchange for airing programming. They also contain several key exceptions that stand out in the era of embedded advertising:

The sponsorship ID rules are not triggered when service or property is offered without charge or for a nominal charge. In other words, products can be shown in the background of a program or mentioned in dialogue as long as no payment occurs in exchange for their use and the extent of on-air display is not disproportionate to the subject matter. For example, an incidental reference to eating at Burger King ® would in many instances not require a sponsorship ID, but repeated statements by characters about the superiority of Burger King ® products – statements obviously designed to highlight Burger King ® – would need to be ID’d.

The rules are not triggered when both the identity of the sponsor and the fact of sponsorship of a product or service are obvious.

The rules apply only to broadcasting, *not* to the also-expanding realm of cablecasting.

Whether or not one agrees that the rules are a broadcast anachronism, neither the efficiency nor the efficacy of the FCC’s response to the changing market is likely to instill confidence from interested parties. This proceeding was begun in response to a petition for rulemaking filed five years ago by Commercial Alert. (Interesting factoid: Commercial Alert also filed an identical petition with the Federal Trade Commission, alleging that product placement without full disclosure constitutes an unfair and deceptive practice in violation of the Federal Trade Commission Act. In response, the FTC held that product placement does not necessarily constitute false or misleading objective material claims about a product’s attributes.)

Perhaps underestimating not only the intelligence but also the attention span of the average TV viewer, Commercial Alert also requested that the FCC mandate disclosure of

sponsorship concurrently with any product placement and/or integration because “requiring disclosure only at the beginning or end of the program disadvantages viewers who might miss the announcement.”

We pause momentarily so that you, the reader, might contemplate that suggestion. Anyone who remembers “Pop-Up Videos” (from VH-1 ®) can envision what television with product placement or product integration would look like if “concurrent” sponsorship ID’s were to be required. Even a single product placement would result in a distracting, in-program identification. Multiple product placements, as might be found in a feature film appearing on broadcast or cable television, would result in more time spent looking at subscreens or superimpositions than looking at programming. And then think about the likely effect of such a requirement on the broadcast of sporting events, such as NASCAR, Major League Baseball or MLS Soccer, where sponsors pay the event, the league and perhaps the broadcaster for the right to prominent placement of their logos or products. Will each such placement require its own concurrent ID?

Some commenters – notably the Washington Legal Foundation and the Freedom to Advertise Coalition – argued that the proposed rules would create a nuisance, at the very least, for viewers, and would raise very serious constitutional problems. Despite those concerns, the FCC has pressed forward with the NOI/NPRM.

The NPRM portion seeks comment on specific proposals that fall just short of the rigors sought by Commercial Alert. Specifically, the FCC proposes to change the sponsorship identification rules to require that announcements (1) have lettering of a particular size and (2) air for a particular amount of time – in effect, appearing to apply to all sponsorship ID situations the disclosure requirements imposed on political advertisements. However, the FCC also seeks “suggestions on any other requirements for these announcements.” Recognizing the particular confusion embedded advertisements pose for children, the NPRM invites comment on whether more stringent rules should be applied to children’s programming. The NPRM also asks whether all of these rules should be extended to cablecasting.

The NOI portion generally seeks comment on whether and how Sections 73.1212 and 76.1615 of the Commission’s rules should be amended to ensure that the public’s right to be informed about advertising is protected as embedded advertising increases. In true FCC fashion, the NOI asks every conceivable question applicable to these rules, seeking comment on the extent of embedded advertising, how the rules apply to every variation of embedded advertising, whether broadcasters are fulfilling their obligations under the current rules and whether the current exemptions are adequate. The Commission engages in similar interrogatory overkill relative to the concept of concurrent sponsorship ID.

It is hard not to be skeptical of the NOI/NPRM when the FCC once again appears to disregard the First Amendment rights of broadcasters much as it recently did with regard to the use of the related area of video news releases (VNRs). The reader might recall that the Commission issued a “reminder” to broadcasters as to how the use of VNRs as background in news programming might somehow violate sponsorship identification rules. (See the April, 2005, *Memo to Clients*.) Not content to leave well enough alone, the Commission followed this up with intrusive questionnaires sent to scores of broadcasters regarding their use of VNRs (see, e.g., the April, 2006, *Memo to Clients*). It then attacked Comcast for its use of VNRs, even though the sponsorship identification rules are not applicable to cablecasters (see, e.g., the October, 2007, *Memo to Clients*).

We hope that when the comment period for this NOI/NPRM ends, the FCC will act in a way that respects the public’s intelligence and ability to understand that television programs are sponsored by certain goods and services. Particularly, we hope the FCC will recognize that force-feeding this information to the public will only reduce the public’s critical viewing abilities and the integrity of the medium at large. Unfortunately, given the Commission’s historical (and somewhat hysterical) actions in this area, we are not optimistic.

Comments are currently due by September 22; reply comments by October 22. Let us know if you would like any assistance in preparing comments for submission in this proceeding.