

# Where Madison Avenue Meets Hollywood and Vine: The Business, Legal, and Creative Ramifications of Product Placements

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## TABLE OF CONTENTS

|  |     |
|--|-----|
| I. INTRODUCTION.....   | 332 |
| II. CONFUSED JURISPRUDENCE: AN HISTORICAL EXAMINATION OF THE CONSTITUTIONAL PROTECTIONS FOR ENTERTAINMENT AND COMMERCIAL SPEECH..... | 336 |
| A. <i>Entertainment Speech</i> .....   | 336 |
| B. <i>Commercial Speech</i> .....  | 340 |
| 1. Chapter One: Judicial Recognition of Commercial Speech.....   | 341 |
| 2. Chapter Two: Judicial Retreat from Broad Commercial Speech Protection .....   | 346 |
| 3. Chapter Three: The Rejuvenation of Judicial Protection of Commercial Speech .....   | 349 |
| III. CONTENT, CASH, AND CALLS TO REGULATE: THE BUSINESS AND LEGAL ASPECTS OF PRODUCT PLACEMENTS .                                    | 356 |
| A. <i>The Business of Product Placements</i> .....   | 356 |
| B. <i>The Current Regulatory Approach to Product Placements</i> .....  | 361 |
| IV. THE REGULATION OF ADVERTAINMENT: PRODUCT PLACEMENTS, COMMERCIAL SPEECH, AND GOVERNMENTAL CONTROL .....                           | 369 |
| A. <i>Product Placement Should Be Classified As Commercial Speech</i> .....  | 369 |

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B. *The Constitutionality of Governmental Regulation of Product Placements* ..... 375

V. PRODUCT PLACEMENTS AND THE CREATIVE COMMUNITY: DOES THE SHOW REALLY COME BEFORE THE BIZ? ..... 379

    A. *Product Placements and the Right of Publicity* ..... 379

    B. *Product Placements and Creative Control* ..... 385

VI. CONCLUSION ..... 397

I. INTRODUCTION

Due to a confluence of economic, technological, and social transformations, the entertainment and advertising industries have merged. Ballooning production costs,<sup>1</sup> the emergence of commercial skipping devices,<sup>2</sup> increased competition between similar products,<sup>3</sup> audience fragmentation,<sup>4</sup> and the skyrocketing costs of reaching the viewer<sup>5</sup> have

<sup>1</sup> *Brands on the Screen*, THE ECONOMIST, Apr. 20, 1991, at 70.

<sup>2</sup> Bill Carter, *NBC is Hoping Short Movies Keep Viewers from Zapping*, N.Y. TIMES, Aug. 4, 2003, at C1. Such devices, or personal video recorders (PVRs), include TiVo and ReplayTV. See TiVo Most Popular FAQ, at <http://www.tivo.com/1.6.1.asp> (last visited Apr. 12, 2004); ReplayTV 5000 Features & Benefits, at [http://www.digitalnetworksna.com/video/replaytv5000/replaytv\\_5000\\_features.asp](http://www.digitalnetworksna.com/video/replaytv5000/replaytv_5000_features.asp) (last visited Apr. 12, 2004). ReplayTV 5000 has a feature called Commercial Advance that enables viewers to “playback your recorded shows without the commercials . . .” *Id.* ReplayTV assures its customers, however, that they can still watch their favorite shows with the commercials if they “really want to” and manually skip portions in thirty-second increments. *Id.* A Yankee Group study estimates that PVRs’ ability to zap commercials will cost advertisers \$5.5 billion in wasted television ad expenditures in 2007 if the broadcast networks are not able to adapt. Sheree R. Curry, *PVR Threat Growing: Study Says Advertisers Big Losers if Networks Don’t Adapt to Commercial Skipping*, TELEVISIONWEEK, Sept. 1, 2003, at <http://www.tvweek.com/advertise/090103pvr.html> (last visited Apr. 12, 2004). Although only 3.8 million households currently have a PVR, the number is predicted to soar to 19.1 million by 2006, as cable and satellite operators integrate the technology into their services. *Id.* The study also predicts an increase in the percentage of commercials that viewers skip from the current 65-70 percent to 70-80 percent by the end of 2006. *Id.* Another study conducted by Forrester Research predicts 30 million households will have PVRs by 2006. Jane Black, *Coming Soon: A Horror Show for TV Ads*, BUSINESSWEEK ONLINE, June 27, 2003, at [http://www.businessweek.com/technology/content/jun2003/tc20030627\\_1133\\_tc119.htm](http://www.businessweek.com/technology/content/jun2003/tc20030627_1133_tc119.htm) (last visited Apr. 12, 2004). The study estimates that when PVRs reach these levels of market penetration, 46 percent of advertisers will reduce their expenditures on television commercials and increase their budgets for product placements. *Id.*

<sup>3</sup> Brian Steinberg & Suzanna Vranica, *NBC May Be the Place for Products*, WALL ST. J., Sept. 3, 2003, at B4.

<sup>4</sup> *Id.*

<sup>5</sup> Meredith Amdur, *Can Blurb Biz Go Showbiz?*, VARIETY, March 3-9, 2003, at 83. With the advent of the remote control, the proliferation of so many channels, and the increase in the number of commercials per show (currently as many as thirteen minutes of a thirty minute show might be commercials), it is becoming increasingly difficult and costly for advertisers to convey their messages to viewers. *Id.*

all fueled consternation in both industries. To combat these trends and increase profitability, advertising agencies and entertainment executives have devised a tripartite strategy: become the sole sponsor of a show, create programs around products, and increase product placements.<sup>6</sup>

The Entertainment Marketing Association (E.M.A.), formerly known as the Entertainment Resources and Marketing Association (E.R.M.A.),<sup>7</sup> defines product placement as the “practice of integrating specific products and brands into filmed entertainment.”<sup>8</sup> In return for exposing the product, the content creator receives something of value from the product’s manufacturer.<sup>9</sup> Generally, the remuneration is in the form of free goods for the creators to use during the production, but frequently there is a cash payment, free advertising, or some combination of all three forms of compensation.<sup>10</sup>

Although studios and production companies have employed product placements for decades,<sup>11</sup> there have been some fundamental shifts in the strategic and tactical execution of marketing goods in entertainment programming. First, since the phenomenally successful product placement of Reese’s Pieces in *E.T.* in 1982, the entertainment and advertising industries have changed their perceptions of the practice.<sup>12</sup> Business relationships and strategies are no longer fragmented, haphaz-

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<sup>6</sup> *Id.*

<sup>7</sup> The Entertainment Marketing Association (E.M.A.) provides product placement information and services to individuals and companies. See E.M.A., at <http://emainc.org/about.php> (last visited June 3, 2004).

<sup>8</sup> E.R.M.A. Product Placement, at <http://www.erma.org/productPlacement/proPla1.html> (last visited June 3, 2004). Although this definition may seem broad, it still does not account for all the ways in which advertisers can market goods and services. For example, in 2002, Def Jam Music Group negotiated with Hewlett-Packard to insert favorable lyrics about the latter’s products in its artists’ songs. Hank Kim, *Marketers Explore Product Placements in Music*, ADAGE.COM, Sept. 9, 2002, at <http://www.adage.com/news.cms?newsId=35982> (last visited Apr. 12, 2003). One music industry executive, speaking under the condition of anonymity, stated: “[Def Jam’s president’s] contention is if companies are willing to pay a premium to have their brands in movies, why wouldn’t they jump at the chance to be in songs . . . .” *Id.* Demonstrating the breadth of their strategy, marketers have also injected product placements into novels. Steven L. Snyder, Note, *Movies and Product Placement: Is Hollywood Turning Films Into Commercial Speech?*, 1992 U. ILL. L. REV. 301, 308 (1992). In one case, a Beverly Hills Maserati dealership threw a \$15,000 party for author Beth Ann Herman in exchange for her featuring a Maserati in her book *Power City*. *Id.*

<sup>9</sup> Telephone Interview with Ryan Moore, Partner, Set Resources, Inc. (Sept. 22, 2003). Set Resources, Inc. is a California product placement and entertainment relations company. Set Resources, About Us, available at <http://www.setresources.com/setr.html> (last visited Apr. 12, 2004).

<sup>10</sup> Telephone Interview with Ryan Moore, *supra* note 9.

<sup>11</sup> *Id.*

<sup>12</sup> Snyder, *supra* note 8, at 304. In return for a “movie tie-in,” where Hershey would mention *E.T.* in its advertising for Reese’s Pieces, the film’s producers showed the lovable

ard, or accidental.<sup>13</sup> Rather, there is a conscious and coordinated effort on the part of content creators, production companies, studios, marketers, and manufacturers to integrate products into entertainment programming in a systematic, efficient, and persuasive manner.<sup>14</sup> Second, this increased coordination among myriad interest groups has blossomed into a lucrative and recognized industry. There are dozens of agencies specializing in product placement and brand integration,<sup>15</sup> and studios, broadcast networks, cable stations, production companies, and large manufacturers all have departments that concentrate on exploiting such opportunities.<sup>16</sup> Finally, unlike early product placements, which were obvious and sloppy, contemporary efforts are more transparent and creative. Many agencies are using terms such as “product integration” in lieu of “product placement” to connote a more exacting, subtle, and persuasive approach to marketing a good.<sup>17</sup> Product Inte-

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creature following and eating a trail of the candies. *Id.* at 301, 304. Within several months of the movie’s theatrical release, sales of Reese’s Pieces surged 65 percent. *Id.* at 301-02.

<sup>13</sup> Telephone Interview with Ryan Moore, *supra* note 9.

<sup>14</sup> *Id.* As a telling example, Daimler Chrysler hosted instructional sessions during the 2003 Sundance Film Festival, at which its directors instructed aspiring filmmakers how to weave product placements into entertainment programs. Wayne Friedman, *Chrysler Coaches Filmmakers on Product Placements: Sundance Sessions Demonstrate How Art Should Bend to Big Money*, ADAGE.COM, Feb. 20, 2003, available at <http://www.adage.com/news.cms?newsId=37184> (last visited Apr. 12, 2004).

Although acknowledging a general trend in increased brand integration into entertainment programming, Ryan Moore notes that some industries and genres are more systematic than others. E-mail from Ryan Moore, Partner, Set Resources, Inc., to author (May 27, 2004) (on file with author). For example, unlike the highly structured, super cross promotions negotiated for blockbuster theatrical films like Spiderman and James Bond, the business environment for product integration in reality and cable niche programming is a more “Wild West atmosphere.” *Id.* Moore believes that this lack of standardized, large-scale integration is attributable to the newness of reality television and the recent growth in cable niche programming. *Id.*

<sup>15</sup> Some examples include: Davie-Brown Entertainment (<http://www.davie-brown.com>) (last visited Apr. 12, 2004); Feature This, at <http://www.featurethis.com/home.html> (last visited Apr. 12, 2004); A List Entertainment, at <http://alistentertainment.com> (last visited Apr. 12, 2004); and Vista Group, Inc., at <http://www.vistagroupusa.com> (last visited Apr. 12, 2004). The E.M.A. is a private association comprised of product placement companies, studios, and Fortune 500 companies that has numerous active, affiliate, and associate members. For a complete listing of E.M.A. members, see E.R.M.A. Members, at [http://www.erma.org/memberSearch/member\\_search.asp](http://www.erma.org/memberSearch/member_search.asp) (last visited June 3, 2004).

<sup>16</sup> Telephone Interview with Ryan Moore, *supra* note 9.

<sup>17</sup> The Association of Independent Commercial Producers (AICP) held its first annual “Brand Integration Honors” on June 9, 2003. AICP News & Views, at <http://www.aicp.com/news/industrynews/show-2003-in-pictures.html> (last visited Apr. 12, 2004). The program, entitled “The Future is Here: The Integration of Brand Messages into Content and Entertainment,” represents industry recognition of the fusion of advertising and entertainment. *Id.* The Brand Integration Honors were intended to “pay tribute to outstanding screen-based projects that utilize brands or products within the storyline as character.” AICP News &

grators<sup>18</sup> defines “product integration” as the “seamless weaving of a manufactured product into the *storyline* of an entertainment production.”<sup>19</sup>

The increased convergence of “ad biz” with “showbiz” has profound implications for both industries. The purposes of this Comment are to outline the current business and legal issues surrounding product placements and to investigate how the increased merger of commerce with art will affect the commercial speech doctrine, actors’ right of publicity, and authors’ and directors’ rights of creative control. Part II of this Comment provides an historical examination of the constitutional protections afforded to entertainment and commercial speech and the recent doctrinal developments concerning the latter category. Part III describes the process by which goods are injected into content and outlines current regulatory schemes, including efforts to curtail and regulate the practice. Part IV analyzes whether courts should consider product placements commercial speech and the attendant ramifications of such decisions. Part V examines the ways in which product placements impact the creative community, particularly actors, writers, and directors. Although many of these issues are managed via contract, the potential still exists to affect not only the actors’ right of publicity, but also writers’ and directors’ creative control. In an attempt to resolve potential artistic control issues posed by product placements, Part V proposes a legislative solution based on a moral rights foundation. Part VI concludes that although product integration is now a staple of American entertainment, the fusion of advertising and creative content puts pressure on our traditional notions of commercial speech, which risks alienating viewers, has the potential to degrade further the artistry of the entertainment industry, and may, in certain instances, violate the prohibition of misleading advertising. Product placements do, however, serve a useful purpose in artistic creation. The key, as is the case in any creative endeavor, is to find the appropriate balance between art and commerce.

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Views, Industry News, at <http://www.aicp.com/news/industrynews/05-23-03.html> (last visited Apr. 12, 2004).

<sup>18</sup> Product Integrators, Inc. is an entertainment marketing firm that provides branding opportunities to merchandisers. Product Integrators, at <http://www.productintegrators.com> (last visited Apr. 12, 2004).

<sup>19</sup> Product Integrators, at <http://www.productintegrators.com/pres1/slide1.html> (last visited Apr. 12, 2004). David Kreizman, the Head Writer for *Guiding Light*, acknowledges that the show’s producer, Procter & Gamble, has asked him several times to “work a product into the show’s storyline” and that he has “written entire episodes based on new Procter & Gamble products.” Telephone Interview with David Kreizman, Head Writer, *Guiding Light* (Sept. 8, 2003).

## II. CONFUSED JURISPRUDENCE: AN HISTORICAL EXAMINATION OF THE CONSTITUTIONAL PROTECTIONS FOR ENTERTAINMENT AND COMMERCIAL SPEECH

### A. *Entertainment Speech*

In balancing content regulations against a speaker's First Amendment rights, courts have classified speech into discrete categories.<sup>20</sup> Courts afford news, particularly information concerning the political process, the highest degree of constitutional protection.<sup>21</sup> Entertainment speech enjoys First Amendment protection as well,<sup>22</sup> albeit at a lesser level than newsworthy speech: "The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy."<sup>23</sup> Finally, although commercial speech is shielded from most content restrictions, it is the classification that receives the least amount of judicial deference.<sup>24</sup>

Speech in the entertainment industry was not always so highly valued by the courts. In *Mutual Film Corp. v. Industrial Commission of Ohio*,<sup>25</sup> the United States Supreme Court held that motion pictures were not entitled to the free speech guarantees of Ohio's Constitution, because the entertainment industry was motivated by profit:<sup>26</sup>

It cannot be put out of view that the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the country, or as organs of public opinion.<sup>27</sup>

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<sup>20</sup> See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-60 (1985) ("We have long recognized that not all speech is of equal First Amendment importance . . . . This Court on many occasions has recognized that certain kinds of speech are less central to the interests of the First Amendment than others.").

<sup>21</sup> See *Saenz v. Playboy Enters., Inc.*, 841 F.2d 1309, 1320 (7th Cir. 1988) ("[T]he Constitution stands as a safe harbor for all but the most malicious political speech.").

<sup>22</sup> See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee.").

<sup>23</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985).

<sup>24</sup> See *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002) ("Although commercial speech is protected by the First Amendment, not all regulation of such speech is unconstitutional.").

<sup>25</sup> 236 U.S. 230 (1915).

<sup>26</sup> *Id.* at 244-45. In so holding, the Court endorsed an Ohio statute that required a state board of censors to approve films prior to their exhibition within the state. *Id.* at 240. The statute, which the Court concluded was not beyond the power of Ohio's government, permitted only films of a "moral, educational, or amusing and harmless character." *Id.*

<sup>27</sup> *Id.* at 244.

The Supreme Court reversed itself nearly forty years later in *Joseph Burstyn, Inc. v. Wilson*.<sup>28</sup> In *Burstyn*, the Court held that a state could not ban a movie based on a censor's determination that it was "sacrilegious."<sup>29</sup> The Court rejected the reasoning enunciated in *Mutual Film* and held that motion pictures are protected by the First and Fourteenth Amendments: "That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures."<sup>30</sup>

Although *Burstyn* was a crucial ruling for the entertainment industry in that it discarded the economic motivation argument enunciated in *Mutual Film Corp.*, the Court's ruling did not expressly preclude state censors from banning "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . . ."<sup>31</sup> In fact, the Supreme Court cautioned that although motion pictures were entitled to First Amendment protection, "[i]t does not follow that the Constitution requires absolute freedoms to exhibit every motion picture of every kind at all times and all places."<sup>32</sup> Thus, if proposed restrictions were narrowly tailored and not so vague as to "set the censor . . . adrift upon a boundless sea," the statute may survive judicial scrutiny.<sup>33</sup>

Relying on *Burstyn*, the Supreme Court reiterated its requirement for narrowly drawn content restrictions in *Interstate Circuit, Inc. v. City of Dallas*.<sup>34</sup> In *Interstate Circuit*, the Court analyzed the constitutionality of a Dallas city ordinance that created a Motion Picture Classification Board for the purpose of classifying certain movies as "not suitable for young persons."<sup>35</sup> Concluding that the ordinance lacked reasonable and definite standards for government officials to follow, the Court struck it down on the basis of vagueness.<sup>36</sup> As it did in *Burstyn*, however, the Court emphasized in dicta that not all restrictions are unconstitutional, and the state has a "strong and abiding interest in youth," which permits it to "regulate the dissemination to juveniles of, and their access to, material objectionable as to them . . . ."<sup>37</sup>

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<sup>28</sup> 343 U.S. 495 (1952).

<sup>29</sup> *Id.* at 506.

<sup>30</sup> *Id.* at 501-02.

<sup>31</sup> *Id.* at 505-06 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

<sup>32</sup> *Id.* at 502.

<sup>33</sup> *Id.* at 504.

<sup>34</sup> 390 U.S. 676 (1968).

<sup>35</sup> *Id.* at 678.

<sup>36</sup> *Id.* at 690.

<sup>37</sup> *Id.*

The motion picture industry, wary of potential government regulation, responded to this judicial forewarning by creating a private ratings system.<sup>38</sup> On November 1, 1968, the Motion Picture Association of America (MPAA)<sup>39</sup> unveiled its voluntary ratings system.<sup>40</sup> Despite receiving ample criticism<sup>41</sup> and being the target of several lawsuits,<sup>42</sup> the system survived to the present day with only a few minor exceptions.<sup>43</sup>

Other entertainment sectors have emulated this model of self-regulation. For example, under pressure from various organizations concerned with the lyrics in contemporary music,<sup>44</sup> the Recording Industry Association of America (RIAA)<sup>45</sup> eventually yielded to public pressure. In 1990, the RIAA agreed to allow record distributors to affix a warning, "Parental Advisory Explicit Lyrics," on albums that they and the artists believed warranted the label.<sup>46</sup> Similarly, the Interactive Digital Software Association, now the Entertainment Software Association (ESA),<sup>47</sup> responded to congressional pressure to control the levels of violence in video games by promulgating a voluntary ratings system in 1994.<sup>48</sup> Finally, in the Telecommunications Act of 1996, Con-

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<sup>38</sup> Jacob Septimus, *The MPAA Rating System: A Regime of Private Censorship and Cultural Manipulation*, 21 COLUM.-VLA J.L. & ARTS 69, 72 (1996).

<sup>39</sup> The MPAA is a private organization of major studios tasked with controlling the standards of the American film industry. See MPAA, at <http://www.mpa.org/about/> (last visited Apr. 12, 2004).

<sup>40</sup> *Id.*

<sup>41</sup> See, e.g., *Miramax Films Corp. v. Motion Picture Ass'n. of Am.*, 560 N.Y.S.2d 730, 735 (N.Y. Sup. Ct. 1990) (criticizing sharply the ratings system for not adequately protecting children and dubbing the "unprofessional standards" to be "offensive."). The court also warned: "The [MPAA] is strongly advised either to consider proposals for a revised rating system that permits a professional basis for rating films or to cease the practice altogether." *Id.* at 736. See also Septimus, *supra* note 38, at 77.

<sup>42</sup> See, e.g., *Miramax Films Corp.*, 560 N.Y.S.2d 730; *Maljack v. Motion Picture Ass'n. of Am.*, 22 U.S.P.Q.2d (BNA) 1867 (D.D.C. Mar. 14, 1992), *rev'd*, 52 F.3d 373 (D.C. Cir. Apr. 28, 1995).

<sup>43</sup> Septimus, *supra* note 38, at 72.

<sup>44</sup> The most vocal organization was the Parent's Music Resource Center (PMRC), which was comprised of many prominent political wives such as Tipper Gore, Susan Baker, and Nancy Thurmond. PAUL C. WEILER, ENTERTAINMENT, MEDIA, AND THE LAW 89 (2d ed. 2002).

<sup>45</sup> The RIAA is a private trade group that represents the interests of the American recording industry. RIAA, at <http://www.riaa.com/about/default.asp> (last visited Apr. 12, 2004).

<sup>46</sup> WEILER, *supra* note 44, at 89.

<sup>47</sup> The ESA is a private association representing the business and public affairs interests of the video, computer, and Internet gaming industries. ESA Programs, at <http://www.theesa.com/programs.html> (last visited Apr. 12, 2004).

<sup>48</sup> ESRB Game Ratings, at [http://www.esrb.org/esrbatings\\_faqs.asp](http://www.esrb.org/esrbatings_faqs.asp) (last visited Apr. 12, 2004). A branch of the ESA, the Entertainment Software Rating Board (ESRB), is the entity tasked with applying, monitoring, and enforcing not only the rating system, but also advertising guidelines and privacy principles. *Id.*

gress provided that distributors of video programming should have the opportunity to develop their own ratings system.<sup>49</sup> In response to this new statute, the National Association of Broadcasters (NAB);<sup>50</sup> the National Cable Television Association, now the National Cable and Telecommunications Association (NCTA);<sup>51</sup> and the MPAA jointly submitted a system of “voluntary” parental guidelines to the Federal Communications Commission (FCC)<sup>52</sup> in 1997.<sup>53</sup> Known as the “TV Parental Guidelines,” the age-based rating system was adopted and implemented not only by television broadcasters, networks, and program producers, but also by cable networks and systems.<sup>54</sup> On March 12, 1998, the FCC found the industry rating system to be acceptable and in compliance with the new legislation.<sup>55</sup>

It seems that the entertainment industry and the federal and state governments are in a constant, high-stakes dance. The government, spurred on by various family, educational, and consumer groups, threatens to regulate a specific entertainment sector unless it cleans up its content. In response, the particular sector either creates or tightens up its own regulations to avoid government control. Compared to most other industries, however, such as the pharmaceutical,<sup>56</sup> aerospace,<sup>57</sup> financial services,<sup>58</sup> healthcare,<sup>59</sup> and manufacturing industries,<sup>60</sup> the

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<sup>49</sup> FCC Report and Order, Video Program Ratings, FCC 98-35 (Mar. 13, 1998).

<sup>50</sup> The NAB is a private trade association representing the interests of “free, over-the-air radio and television broadcasters.” About NAB, at <http://www.nab.org/about/> (last visited Apr. 12, 2004).

<sup>51</sup> The NCTA is the “principal trade association of the cable television industry in the United States.” About NCTA, at <http://www.ncta.com/Docs/PageContent.cfm?pageID=165> (last visited Apr. 12, 2004).

<sup>52</sup> The FCC is an independent government agency directly responsible to Congress on matters concerning the regulation of “interstate and international communications by radio, television, wire, satellite and cable.” About the FCC, at <http://www.fcc.gov/aboutus.html> (last visited Apr. 12, 2004).

<sup>53</sup> FCC Report and Order, *supra* note 49.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> See, e.g., 21 C.F.R. §§ 210, 211, 216, 225, 226 (2003) (enumerating numerous “good manufacturing practice regulations” for pharmaceuticals).

<sup>57</sup> See, e.g., 14 C.F.R. §§ 1-1310 (2003) (listing countless regulations for the aeronautics and space industries).

<sup>58</sup> See, e.g., Sarbanes-Oxley, Pub. L. No. 107-204, 116 Stat. 745, 784 (2002) (to be codified at 15 U.S.C. § 7245) (incorporating numerous amendments to the already complex federal securities laws).

<sup>59</sup> See, e.g., The Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. §§ 1320d-1320d-8) (Supp. IV 1998) (establishing strict standards for personal information transactions in the health care industry).

<sup>60</sup> The manufacturing industry is subject to a plethora of environmental regulations promulgated by the Environmental Protection Agency (EPA), various international stan-

entertainment sector is not tightly regulated.<sup>61</sup> The preponderance of restrictions on content is generated from within the entertainment industry itself. Furthermore, courts afford entertainment speakers with broad First Amendment freedoms,<sup>62</sup> and any content-based restrictions are subject to strict scrutiny.<sup>63</sup>

## B. *Commercial Speech*

Unlike the relatively firm doctrinal status of entertainment speech, the commercial speech doctrine has been described as a “notoriously unstable and contentious domain of First Amendment jurisprudence”<sup>64</sup> that is “currently in confusion.”<sup>65</sup> The confusion has resulted in several fundamental changes in the way courts have defined, analyzed, and valued commercial speech. One commentator divides the story of commercial speech jurisprudence into three chapters: the gradual recognition that such speech was entitled to First Amendment protection, the doctrinal “retreat” that nearly eviscerated all constitutional safeguards, and the current “rejuvenation” of the doctrine.<sup>66</sup>

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dards, many of which are created by the International Standards Organization (ISO), and countless sector-specific rules and regulations.

<sup>61</sup> Tara Kole, Comment, *Advertising Entertainment: Can Government Regulate the Advertising of Fully-Protected Speech Consistent With the First Amendment?*, 9 UCLA ENT. L. REV. 315, 320 (2002) (“There is currently very little direct state or federal regulation of the entertainment industry with respect to the content of motion pictures, music, television or video games, or the promotion of these products.”).

<sup>62</sup> See, e.g., *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 77 (1976) (stating “Our cases reveal . . . that the central concern of the First Amendment in this area is that there be a free flow from creator to audience of whatever message a film or book might convey.”); *Superior Films v. Dep’t. of Educ.*, 346 U.S. 587, 589 (1954) (asserting “In this Nation every writer, actor, or producer, no matter what medium of expression he may use, should be freed from the censor.”).

<sup>63</sup> See *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987) (“Arkansas faces a heavy burden in attempting to defend its content-based approach to taxation of magazines. In order to justify such differential taxation, the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.”).

<sup>64</sup> Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 2 (2000).

<sup>65</sup> William Van Alstyne, *Remembering Melville Nimmer: Some Cautionary Notes on Commercial Speech*, 43 UCLA L. REV. 1635, 1635 (1996). But see Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 56 (1999) (contending the judicial treatment of commercial speech “represents a healthy pragmatism, not jurisprudential failure.”).

<sup>66</sup> Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at “The Greater Includes the Lesser,”* 55 VAND. L. REV. 693, 793-94 (2002).

## 1. Chapter One: Judicial Recognition of Commercial Speech

Conventional wisdom holds that the Supreme Court first differentiated between commercial and non-commercial speech<sup>67</sup> in *Valentine v. Chrestensen*.<sup>68</sup> *Valentine* was a significant case for several reasons. First, it was the initial case to distinguish “commercial advertising,”<sup>69</sup> now referred to as commercial speech, from non-commercial speech. Second, it created a framework whereby “purely commercial” speech was not entitled to First Amendment protection.<sup>70</sup> Third, for reasons not described in the opinion, the Court neither defined the term “commercial advertising,” nor buttressed its holding with a single citation. Finally, the court seemed to imply that the critical determinant in analyzing commercial speech cases was the motivation of the speaker: “If the respondent was attempting to use the streets of New York by distributing commercial advertising, the prohibition of the code provision was lawfully invoked against his conduct.”<sup>71</sup>

The first case to afford First Amendment protection to advertising was *Bigelow v. Virginia*,<sup>72</sup> which concerned the publication of a newspa-

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<sup>67</sup> See William B. Lackey, *Can Lois Lane Smoke Marlboros?: An Examination of the Constitutionality of Regulating Product Placements in Movies*, 1993 U. CHI. LEGAL F. 275, 280 (1993). See also Jason E. Lavender, Note, “*Tobacco is a Filthy Weed and From the Devil Doth Proceed*”: A Study of the Government’s Efforts to Regulate Smoking on the Silver Screen, 21 HASTINGS COMM. & ENT. L.J. 205, 209 (1998).

<sup>68</sup> 316 U.S. 52 (1942). In *Valentine*, the respondent was arrested for violating an ordinance that prohibited the distribution of “commercial and business advertising matter” in the streets. *Id.* at 53. Having been told that dissemination of handbills solely devoted to “information or a public protest” was permitted, the respondent created a double-faced handbill with advertising information on one side and a protest on the other. *Id.* Despite a police warning that the double-faced handbills were forbidden, the respondent distributed them and was immediately arrested. *Id.* The district court awarded and the appellate court affirmed a decree permanently enjoining enforcement of the regulation. *Id.* at 54. Holding that the “Constitution imposes no such restraint on government as respects purely commercial advertising[.]” the Court reversed the decree. *Id.* at 54-55.

<sup>69</sup> *Id.* at 54.

<sup>70</sup> Although this is the common characterization of the case’s holding, some scholars disagree, arguing the case involved economic regulation rather than free speech. See Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 758 (1993).

This is language seemingly more appropriate for the then-recently-adopted deferential economic substantive due process jurisprudence than for a case involving a claimed freedom of speech and of the press . . . . In 1492, then, the case was easy not because the Court thought of commercial speech as a category of speech deserving no protection, but because the Court didn’t treat the case as involving speech at all.

*Id.*

<sup>71</sup> *Valentine*, 316 U.S. at 55.

<sup>72</sup> 421 U.S. 809 (1975). See also *New York Times v. Sullivan*, 376 U.S. 254 (1964). In *New York Times*, the Court granted substantial constitutional protection to an allegedly libelous newspaper advertisement. *Id.* Although the disputed speech was a paid advertisement, the Court rejected Sullivan’s argument, which relied on *Valentine*, that the speech was commer-

per advertisement for a New York abortion clinic.<sup>73</sup> Because the disputed advertisement in *Bigelow* also included factual material of a “clear public interest,”<sup>74</sup> the Court permitted “[s]ome fragment of hope for the continuing validity of a ‘commercial speech’ exception” to the free speech guarantees of the First Amendment.<sup>75</sup> Any uncertainties were quashed the following year in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>76</sup> where the Supreme Court invalidated a ban on the dissemination of prescription drug prices on First Amendment grounds.<sup>77</sup> The Court held that although the “advertiser’s interest is a purely economic one”<sup>78</sup> and that the speech did “no more than propose a commercial transaction[,]”<sup>79</sup> the advertisement was protected by the First Amendment.<sup>80</sup>

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cial in nature and not entitled to the shield of the First Amendment. *Id.* at 265-66. The Court concluded:

The publication here was not a ‘commercial’ advertisement in the sense in which the word was used in [*Valentine*]. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.

*Id.* at 266.

Describing the communication as an “editorial advertisement,” the Court held it deserved full constitutional protection. *Id.*

<sup>73</sup> *Bigelow*, 421 U.S. at 811. In *Bigelow*, the appellant, the newspaper’s managing editor, was convicted under a Virginia statute that made it a misdemeanor to encourage the procurement of an abortion. *Id.* The Supreme Court of Virginia affirmed the conviction after determining that the advertisement was commercial in nature, which stripped it of the First Amendment guarantee of free speech. *Id.* at 818. The United States Supreme Court reversed holding “[t]he fact that the particular advertisement . . . had commercial aspects or reflected the advertiser’s commercial interests did not negate all First Amendment guarantees.” *Id.* The Court distinguished *Valentine*, interpreted that case narrowly, but did not overturn its holding. *Id.* at 819. The Court did, however, emphasize that the disputed advertisement was not purely commercial: “The advertisement . . . did more than simply propose a commercial transaction. It contained factual matter of clear ‘public interest.’” *Id.* at 822.

<sup>74</sup> *Id.*

<sup>75</sup> *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 760 (1976).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 773.

<sup>78</sup> *Id.* at 762.

<sup>79</sup> *Id.* (quoting *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 385 (1973)).

<sup>80</sup> *Id.* at 773. The Supreme Court offered three justifications for extending free speech guarantees to commercial speech. First, commercial speech is similar to other forms of communication, such as speech concerning labor disputes, that receive First Amendment protection. *Id.* at 762-63. Second, consumers have a vested interest in the “free flow of commercial information” that may be “as keen, if not keener by far, than [their] interest in the day’s most urgent political debate.” *Id.* at 763. The Court deemed the ban’s goal of protecting “unwitting consumers” to be a “highly paternalistic approach.” *Id.* at 769-70. Finally, the efficient allocation of resources, which is essential in a free enterprise system, is predicated upon the “intelligent and well informed decisions” of consumers. *Id.* at 765.

Unlike the analysis in *Valentine*, which centered on the motivation of the speaker, the dispositive factor in *Virginia State Board of Pharmacy* concerned the content of the message.<sup>81</sup> The Court concluded that a state may not “completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information’s effect upon its disseminators and its recipients.”<sup>82</sup> The Court was quick to caution, however, that its holding did not preclude time, place, and manner restrictions or bans on advertising that either concerned illegal activities or was false or misleading.<sup>83</sup>

Despite this recognition of First Amendment protection for commercial speech, the Supreme Court did not articulate a standard for determining whether a particular regulation were constitutional. In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,<sup>84</sup> the Court articulated such a test, which has, in large part, remained the dominant judicial model. In *Central Hudson*, a utility corporation argued that a regulation mandating a complete ban of promotional advertising for electricity violated the First Amendment.<sup>85</sup> In analyzing the constitutionality of the regulation, the Supreme Court developed a four-part test:

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.<sup>86</sup>

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In dissent, then-Justice Rehnquist warned of the potential slippery slope ramifications of the Court’s opinion. By the Court’s logic, Justice Rehnquist argued, the prohibitions on television advertisements of cigarettes and liquor may no longer be permitted, provided the advertisements are not deceptive. *Id.* at 789 (Rehnquist, J., dissenting). Furthermore, the ruling would permit television advertisements during “family viewing time” and allow advertisers to “do everything they can to generate demand for these products . . . .” *Id.* (Rehnquist, J., dissenting). Notwithstanding Justice Rehnquist’s admonitions, the Court removed any lingering confusion from *Bigelow*; the Court now explicitly recognized the constitutional protection for commercial speech. *Id.* at 762.

<sup>81</sup> *Virginia State Bd. of Pharmacy*, 425 U.S. at 761 (“If there is a kind of commercial speech that lacks all First Amendment protection, therefore, it must be distinguished by its content.”).

<sup>82</sup> *Id.* at 773.

<sup>83</sup> *Id.* at 770-73. The Court also stated that “additional information, warnings, and disclaimers” may be required to prevent an advertisement from being deceptive. *Id.* at 772.

<sup>84</sup> 447 U.S. 557 (1980).

<sup>85</sup> *Id.* at 558.

<sup>86</sup> *Id.* at 566.

Thus, courts generally must afford First Amendment protection to commercial speech that is “neither misleading nor related to unlawful activity . . . .”<sup>87</sup> The state can still restrict such commercial speech, however, if the regulation directly advances a substantial governmental interest and is crafted so that it is not “more extensive than necessary.”

In *Central Hudson*, the Supreme Court determined that the Commission’s regulation restricted only commercial speech, which the Court defined as “expression related solely to the economic interests of the speaker and its audience.”<sup>88</sup> Because the advertising was not misleading and did not relate to an unlawful activity, the Court believed that it was entitled to First Amendment protection.<sup>89</sup> The Court then held that the regulation was unconstitutional because the state did not comply with all three remaining elements of the test.<sup>90</sup>

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<sup>87</sup> *Id.* at 564.

<sup>88</sup> *Id.* at 561.

<sup>89</sup> *Id.* at 566-68.

<sup>90</sup> First, the Court held that in light of our nation’s dependence on energy, the state’s interest in reducing the consumption of electricity was “substantial.” *Central Hudson*, 447 U.S. at 568-69. Second, claiming the existence of an “immediate connection between advertising and demand for electricity [.]” the Court found a direct link between the state’s interest in conservation and the Commission’s ban on promotional advertising. *Id.* at 569. The Supreme Court concluded, however, that the “complete suppression of *Central Hudson*’s advertising[ ]” was more extensive than necessary to effectuate the goal of energy conservation. *Id.* at 571. Since the state only satisfied two of its three burdens, the Court invalidated the regulation as violative of the First Amendment. *Id.* at 569-72.

The Court was not unanimous, however, in its embrace of the newly crafted four-part test. In his concurrence, Justice Blackmun noted that the Supreme Court’s opinion in *Virginia State Board of Pharmacy* did not analyze whether the government’s interests were substantial, whether the regulation directly advanced these interests, or whether there was a more limited regulation that would effectuate these goals. *Id.* at 576 (Blackmun, J., concurring). For Justice Blackmun, an intermediate level of scrutiny was not appropriate for cases in which the government “seeks to suppress information about a product in order to manipulate a private economic decision that the State cannot or has not regulated or outlawed directly.” *Id.* at 573 (Blackmun, J., concurring). The only instances in which application of the four-part test would be suitable, Justice Blackmun contended, concerned a regulation aimed at protecting consumers from “misleading or coercive speech, or a regulation related to the time, place, or manner of commercial speech.” *Id.* (Blackmun, J., concurring). Thus, Justice Blackmun regarded *Central Hudson* as a step backwards for the commercial speech doctrine in that the test “does not provide adequate protection for truthful, nonmisleading, noncoercive commercial speech.” *Id.* (Blackmun, J., concurring).

In dissent, Justice Rehnquist again questioned the extension of First Amendment protection to commercial speech. *Id.* at 583 (Rehnquist, J., dissenting). Unlike Justice Blackmun, however, Justice Rehnquist believed the test was too protective of commercial speech: “The test adopted by the Court thus elevates the protection accorded commercial speech that falls within the scope of the First Amendment to a level that is virtually indistinguishable from that of noncommercial speech.” *Id.* at 591 (Rehnquist, J., dissenting). For Justice Rehnquist, this elevation of commercial speech was unacceptable because it “fail[ed] to give due deference to this subordinate position of commercial speech.” *Id.* at 589 (Rehnquist, J., dissenting).

*Central Hudson* is a seminal case for commercial speech jurisprudence for several reasons. First, the decision confirmed the gradual judicial recognition that commercial speech was entitled to constitutional protection. Second, notwithstanding Justice Blackmun's objections, the case established an intermediate level of scrutiny as the appropriate standard to evaluate regulations restricting commercial speech. Finally, and most importantly, the Supreme Court, for the first time, expressly crafted a balancing test for commercial speech.

There were, however, lingering questions concerning the doctrine. One of the more pressing issues, which is still unclear today, was the proper methodology for differentiating commercial speech from non-commercial speech.<sup>91</sup> Although the Supreme Court did not define commercial speech in *Valentine*, it did examine the motivations of the *speaker* to determine the nature of the expression.<sup>92</sup> In *Virginia State Board of Pharmacy*, the Court focused its inquiry not on the speaker, but on the *content* of the message<sup>93</sup> and whether the speech does "no more than propose a commercial transaction."<sup>94</sup> In *Central Hudson*, the Supreme Court developed its famous four-part test for commercial speech, which it defined as "expression related solely to the economic interests of the speaker and its audience."<sup>95</sup> In classifying speech based on the speaker's interests rather than the content of the speech, the Court seemingly abandoned the standard enumerated in *Virginia State Board of Pharmacy* and returned to the *Valentine* paradigm.

Adding to the confusion, the Supreme Court "threw up its hands"<sup>96</sup> when it employed both standards in *Bolger v. Youngs Drug Products Corp.*<sup>97</sup> The statute at issue in *Bolger* prohibited the "mailing of unsolicited advertisements for contraceptives."<sup>98</sup> The appellee, Youngs Drug Products Corporation, planned to mail unsolicited flyers promoting its products, including prophylactics and pamphlets that discussed venereal disease and family planning.<sup>99</sup> The Court, finding the proposed mailings to be commercial speech, applied the *Central Hud-*

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<sup>91</sup> 1-6 THE LAW OF ADVERTISING, § 6.03 [3][a] (2003).

<sup>92</sup> See *supra* note 71 and accompanying text.

<sup>93</sup> See *supra* note 81 and accompanying text.

<sup>94</sup> *Virginia State Bd. of Pharmacy*, 425 U.S. at 762 (quoting *Pittsburgh Press Co.*, 413 U.S. at 385).

<sup>95</sup> *Central Hudson*, 447 U.S. at 561.

<sup>96</sup> *Snyder*, *supra* note 8, at 318.

<sup>97</sup> 463 U.S. 60 (1983).

<sup>98</sup> *Id.* at 61.

<sup>99</sup> *Id.* at 62.

son analysis and held the statute unconstitutional as applied to the appellee's mailings.<sup>100</sup>

What is noteworthy about *Bolger* is the way in which the Supreme Court characterized the speech as commercial:

The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech . . . . Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech . . . . Finally, the fact that Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech . . . . The combination of *all* these characteristics, however, provides strong support for . . . the conclusion that the informational pamphlets are properly characterized as commercial speech.<sup>101</sup>

Regardless of how the Supreme Court defined commercial speech at that time, it was clear that such expression was constitutionally entitled to a certain degree of First Amendment protection. The actual scope of these protections was debatable, however.

## 2. Chapter Two: Judicial Retreat from Broad Commercial Speech Protection

During the 1980s, the Supreme Court afforded commercial speech less than full First Amendment protection.<sup>102</sup> First, the *Central Hudson* test permitted the government to ban misleading advertising and advertising related to an unlawful activity that did not reach the level of incitement.<sup>103</sup> Such expansive governmental power distinguished commercial speech from political speech.<sup>104</sup> Second, in analyzing commercial speech cases, the Court arguably applied a "watered down" version of the *Central Hudson* test.<sup>105</sup>

For example, in *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*,<sup>106</sup> the Supreme Court applied the *Central Hudson* test and upheld a Puerto Rican statute and regulations, which restricted casino gambling advertising directed at residents of the is-

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<sup>100</sup> *Id.* at 69.

<sup>101</sup> *Id.* at 66-67 (citations omitted).

<sup>102</sup> Bruce Ledewitz, *Corporate Advertising's Democracy*, 12 B.U. PUB. INT. L.J. 389, 396 (2003).

<sup>103</sup> *Id.* See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that the First Amendment only allows the government to "forbid or proscribe advocacy of the use of force or of law violation . . . where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

<sup>104</sup> Ledewitz, *supra* note 102, at 396.

<sup>105</sup> Berman, *supra* note 66, at 794.

<sup>106</sup> 478 U.S. 328 (1986).

land.<sup>107</sup> In its analysis, the Court articulated two controversial propositions. First, the Court reasoned: "In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling . . . ."<sup>108</sup> Second, the Court expressly noted that the suppression of advertising could be a proper means to reduce the demand for a lawful product, and such a decision was under the purview of the legislature.<sup>109</sup>

The Supreme Court liberalized the *Central Hudson* test for government regulators even more in *Board of Trustees of the State University of New York v. Fox*.<sup>110</sup> In *Fox*, the regulation at issue was a university resolution that prohibited most forms of commercial solicitation on campus.<sup>111</sup> Following application of the resolution to ban "Tupperware parties" hosted by a commercial supplier of the products, several students sued for a declaratory judgment that the regulation violated the First Amendment.<sup>112</sup> The plaintiffs argued that because commercial and noncommercial speech were "inextricably intertwined" in the presentations, the Court should regard the expression as noncommercial.<sup>113</sup> The Court, led by Justice Scalia, rejected this contention and distinguished the leading case:

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<sup>107</sup> *Id.* at 330. In its opinion, authored by Justice Rehnquist, the Court applied the four *Central Hudson* elements. First, because the advertising concerned a lawful activity and was not misleading, the Court held the speech was entitled to a certain degree of constitutional protection. *Id.* at 340-41. The Court acknowledged that in order for the restrictions to be valid, the government had to prove the remaining three prongs of the test. *Id.* at 341. Second, the asserted interest at stake was the "reduction of demand for casino gambling by the residents of Puerto Rico." *Id.* The Court concluded without much analysis that the legislature's interest in the "health, safety, and welfare of its citizens constitutes a 'substantial' governmental interest." *Id.* Third, and again without much elaboration, the Court found that the restrictions directly advanced the government's interest in reducing casino gambling by its residents. *Id.* at 341-42. Finally, the Court believed it was "clear beyond peradventure" that the challenged statute and regulations were no more extensive than necessary to effectuate the legislature's interest. *Id.* at 343.

<sup>108</sup> *Id.* at 345-46.

<sup>109</sup> *Id.* at 344 ("The legislature could conclude, as it apparently did here, that residents of Puerto Rico are already aware of the risks of casino gambling, yet would nevertheless be induced by widespread advertising to engage in such potentially harmful conduct.").

Justice Brennan, in dissent, assailed the decision. Justice Brennan asserted that in cases where the government attempts to restrict commercial speech to deprive consumers of accurate information about a lawful activity, the Court should grant commercial speech the same level of protection as noncommercial speech. *Id.* at 350 (Brennan, J., dissenting). Similarly, Justice Brennan seemingly called for the abandonment of the *Central Hudson* test when he asserted such cases demand "strict judicial scrutiny." *Id.* at 351 (Brennan, J., dissenting).

<sup>110</sup> 492 U.S. 469 (1989).

<sup>111</sup> *Id.* at 471-72.

<sup>112</sup> *Id.* at 472-73.

<sup>113</sup> *Id.* at 474.

There, of course, the commercial speech (if it was that) *was* “inextricably intertwined” because the state law *required* it to be included.<sup>114</sup> By contrast, there is nothing whatever “inextricable” about the non-commercial aspects of these presentations. No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares. Nothing in the resolution prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages.<sup>115</sup>

Thus, for the Court, the dispositive factor was that the nature of the presentations did not require hybrid speech, i.e., a mixture of commercial and noncommercial elements. The speaker had the “possibility of making the speech entirely commercial or entirely noncommercial.”<sup>116</sup> Taken together, then, *Posadas* and *Fox* substantially weakened the constitutional protections for commercial speech.<sup>117</sup>

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<sup>114</sup> The case to which Justice Scalia is referring is *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). In *Riley*, charitable organizations challenged the constitutionality of a North Carolina statute, which required, *inter alia*, professional fundraisers to disclose to potential donors “the average percentage of gross receipts actually turned over to charities by the fundraiser for all charitable solicitations conducted in North Carolina within the previous 12 months.” *Id.* at 786. The Supreme Court rejected the government’s claim that because the charitable solicitations related only to the fundraisers’ profits from the contribution the speech was commercial. *Id.* at 795-96. Instead, the Court held that the fundraisers’ speech was fully protected because the compelled statements were “inextricably intertwined” with informative and persuasive speech. *Id.*

<sup>115</sup> *Id.* (citing *Riley*, 487 U.S. at 796).

<sup>116</sup> *Snyder*, *supra* note 8, at 326. The Court also delineated the proper scope of the fourth prong of the *Central Hudson* test. Rejecting the notion that *Central Hudson* required the regulation to be the “least restrictive means” to achieve the government objective, the Court held instead that the fit must only be “reasonable.” *Fox*, 492 U.S. at 480. That the Court interpreted the standard to require a regulation merely “narrowly tailored to achieve the designated objective” demonstrated the Court’s heightened deference to the legislature: “Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.” *Id.*

<sup>117</sup> See *Ledewitz*, *supra* note 102, at 396.

Not only did the *Posadas* Court uphold the government ban in order to suppress demand for gambling among local residents, but the Court also permitted restrictions on advertising on the theory that the power to ban an activity includes the power to ban advertising about that activity. Given the government’s vast power over substantive activity, such a theory would be available to uphold almost any restriction on advertising.

See also Sylvia A. Law, *Addiction, Autonomy, and Advertising*, 77 IOWA L. REV. 909, 935 (1992) (“Although the Supreme Court continues to pay lip service to the principles of *Virginia Pharmacy* and the similar standards of *Central Hudson* . . . , the majority of the Court has *sub silentio* adopted Rehnquist’s view that the First Amendment does not protect commercial speech.”).

### 3. Chapter Three: The Rejuvenation of Judicial Protection of Commercial Speech

The damage inflicted upon the doctrine was soon remedied by a series of Supreme Court opinions. In *Rubin v. Coors Brewing Co.*,<sup>118</sup> the Court held a federal law that prohibited beer labels from displaying alcohol content to be unconstitutional.<sup>119</sup> Applying the *Central Hudson* analysis, the Court acknowledged that both parties deemed the speech commercial.<sup>120</sup> The Court also believed that the government's interest in preventing "strength wars," where brewers would compete on the basis of stronger alcohol content, was a substantial interest.<sup>121</sup>

The Court, however, applied prongs three and four of the test more strictly than it had in *Posadas* and *Fox*. Concerning prong three, which requires that the regulation directly advance the government's interest, the Court mandated that the regulation must do so in a "direct and *material* way."<sup>122</sup> The Court applied this standard and held that the suppression of alcohol content information on beer labels did not directly and materially obviate strength wars.<sup>123</sup> Even if the regulation met this standard, however, the Court believed it to be unconstitutional because the availability of alternatives rendered the restrictions more extensive than necessary.<sup>124</sup>

In a second significant case for commercial speech, *44 Liquormart, Inc. v. Rhode Island*,<sup>125</sup> the Supreme Court invalidated a ban on the advertisement of retail liquor prices.<sup>126</sup> Justice Stevens, this time writ-

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<sup>118</sup> 514 U.S. 476 (1995).

<sup>119</sup> *Id.* at 491.

<sup>120</sup> *Id.* at 481.

<sup>121</sup> *Id.* at 485.

<sup>122</sup> *Id.* at 486-87 (emphasis added) (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)).

<sup>123</sup> *Id.* at 488-89.

<sup>124</sup> *Coors Brewing Co.*, 514 U.S. at 490-91. Such alternatives included "directly limiting the alcohol content of beers, prohibiting marketing efforts emphasizing high alcohol strength . . . or limiting the labeling ban only to malt liquors . . ." *Id.* Justice Stevens, who concurred in the judgment, questioned the viability of the *Central Hudson* test, particularly in light of the inherent difficulties in defining and distinguishing commercial speech. *Id.* at 493-94 (Stevens, J., concurring) ("The Court's continued reliance on the misguided approach adopted in *Central Hudson* makes this case appear more difficult than it is."). Although not advocating an abandonment of the test, Justice Stevens articulated his concerns regarding any regulation of commercial speech that is neither false nor misleading: "I see no basis . . . for upholding a prohibition against the dissemination of truthful, nonmisleading information about an alcoholic beverage merely because the message is propounded in a commercial context." *Id.* at 493 (Stevens, J., concurring). For Justice Stevens, a more appropriate remedy would be "disclosure requirements explaining the risks and predictable harms associated with the consumption of alcoholic beverages." *Id.* (Stevens, J., concurring).

<sup>125</sup> 517 U.S. 484 (1996).

<sup>126</sup> *Id.* at 516.

ing for the majority, rejected intermediate judicial scrutiny for commercial speech that is truthful and not misleading.<sup>127</sup> Instead, Justice Stevens argued, the Constitution demanded the application of strict scrutiny for such speech.<sup>128</sup> Thus, the Court developed a bifurcated approach to assessing the constitutionality of speech regulations:

When a state regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose for its regulation is consistent with the reasons of according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.<sup>129</sup>

In creating this bifurcated approach, the Court did not overrule *Central Hudson*, which required the application of intermediate scrutiny,<sup>130</sup> but relied on a footnote in *Central Hudson* that obliged courts to “review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy.”<sup>131</sup>

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<sup>127</sup> *Id.* at 501.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 501. “Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond ‘irrationally’ to the truth.” *Id.* at 503 (citation omitted).

<sup>130</sup> *Central Hudson*, 447 U.S. at 573 (Blackmun, J., concurring).

<sup>131</sup> 44 *Liquormart, Inc.*, 517 U.S. at 508 (citing *Central Hudson*, 447 U.S. at 566, n.9.).

Equally significant, the Court also repudiated *Posadas* and expressly rejected three components of that case. First, the Court renounced the “highly deferential approach” that it was “‘up to the legislature’ to choose suppression over a less speech-restrictive policy.” *Id.* at 509-10. Second, the Court renounced the “greater-includes-the-lessor” argument, which reasoned if the government has the authority to ban an activity, it obviously has the power to prohibit advertising related to that activity. *Id.* at 510-11 (“Contrary to the assumption made in *Posadas*, we think it quite clear that banning speech may sometimes prove far more intrusive than banning conduct.”). Finally, the Court rejected the notion that a doctrinal exception existed, which would allow the government to target commercial speech pertaining to a “vice” activity. *Id.* at 513-14.

In his concurrence, Justice Thomas stated directly that the Court should not apply the *Central Hudson* test in cases where the “government’s asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace . . . .” *Id.* at 518 (Thomas, J., concurring). More significant, Justice Thomas asserted: “I do not see a philosophical or historical basis for asserting that ‘commercial’ speech is of ‘lower value’ than ‘noncommercial’ speech.” *Id.* at 522 (Thomas, J., concurring). Although not as straightforward as Justice Thomas, Justice Scalia also hinted at his dissatisfaction with the *Central Hudson* test. *Id.* at 518 (Scalia, J., concurring) (“Since I do not believe we have before us the where-withal to declare *Central Hudson* wrong—or at least the where-withal to say what ought to replace it—I must resolve this case in accord with our existing jurisprudence . . . .”). Justice O’Connor, with whom Chief Justice Rehnquist, Justice Souter, and

In a third significant case concerning commercial speech, *Thompson v. Western States Medical Center*,<sup>132</sup> the Supreme Court held that a federal statute's provision, which prohibited the advertising and promotion of particular compounded drugs, was unconstitutional.<sup>133</sup> Despite acknowledging that several of its members had expressed reservations about the *Central Hudson* test, the Court applied the analysis and held that the government did not meet any of the burdens necessary to uphold the regulation.<sup>134</sup> The opinion, written by Justice O'Connor, reflected the Court's lukewarm embrace of the doctrine. For example, Justice O'Connor noted: "Neither party has challenged the appropriateness of applying the *Central Hudson* framework to the speech-related provisions at issue here."<sup>135</sup> Similarly, the opinion stated: "there is no need in this case to break new ground . . . [because,] 'as applied in our more recent commercial speech cases, [the test] provides an adequate basis for decision.'"<sup>136</sup>

Based on the foregoing Supreme Court cases, several conclusions can be drawn regarding the commercial speech doctrine. First, it is clear that the continued viability of the *Central Hudson* test is dubious, as a majority of the Court seems to favor its elimination.<sup>137</sup> Second, the bifurcated analysis articulated in *44 Liquormart, Inc.* indicates that the Court will assess restrictions on misleading or deceptive advertising under intermediate scrutiny and regulations of truthful, nonmisleading commercial speech under strict scrutiny.<sup>138</sup> Third, several commentators interpret these recent cases as an indication that commercial speech will ultimately receive the highest degree of First Amendment protection.<sup>139</sup> The criticisms of the *Central Hudson* test and the calls to abandon it in order to provide commercial speech with more protection are clear signs of such a trend.<sup>140</sup> Finally, it seems increasingly unlikely that the Court would permit a ban on commercial speech based on an

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Justice Breyer joined, concurred in the judgment, but stated she would resolve the case "more narrowly . . . by applying our established *Central Hudson* test . . . ." *Id.* at 528 (O'Connor, J., concurring). Thus, despite unanimity regarding the result, the Court was deeply divided over the proper way to evaluate commercial speech regulations.

<sup>132</sup> 535 U.S. 357 (2002).

<sup>133</sup> *Id.* at 377.

<sup>134</sup> *Id.* at 367-68, 374.

<sup>135</sup> *Id.* at 367.

<sup>136</sup> *Id.* at 368 (citation omitted).

<sup>137</sup> See Ledewitz, *supra* note 102, at 398; Berman, *supra* note 66, at 794.

<sup>138</sup> See *supra* notes 127-131 and accompanying text.

<sup>139</sup> See, e.g., Ledewitz, *supra* note 102, at 398; Berman, *supra* note 66, at 794.

<sup>140</sup> Ledewitz, *supra* note 102, at 398-99.

asserted governmental interest of reducing the demand for a lawful product.<sup>141</sup> As one scholar notes:

[I]t may not matter what test the Court announces it is using in advertising cases. Realistically any regulation of advertising that goes beyond banning fairly base fraud is unconstitutional. Increasingly, the Court seems to hold that restricting advertising may not be used as a proxy for any other governmental goal. Demand for a product may not be limited by, as it has been said, keeping people in ignorance. Advertising must be given its free reign.<sup>142</sup>

Although there is a certain degree of clarity in these doctrinal developments, many significant questions abound. One issue is the constitutionality of statutes that provide a private right of action to individuals who have suffered no injury in cases alleging false or misleading advertising.<sup>143</sup> Perhaps the most vexing uncertainty is the appropriate test by which to distinguish commercial from noncommercial speech.

In *Kasky v. Nike, Inc.*,<sup>144</sup> the California Supreme Court tackled the latter issue. The plaintiff, a California resident acting on behalf of the public, instituted an action against Nike seeking monetary and injunctive relief under the state's laws, which were designed to prevent unfair competition and false advertising.<sup>145</sup> The plaintiff alleged that Nike made false statements of fact concerning its labor practices and work-

<sup>141</sup> *Id.* at 395.

<sup>142</sup> *Id.* at 399.

<sup>143</sup> See *infra* note 155.

<sup>144</sup> 45 P.3d 243 (Cal. 2002).

<sup>145</sup> *Id.* at 247. California's unfair competition law (UCL) broadly defines "unfair competition" to mean and include "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the false advertising law]." CAL. BUS. & PROF. § 17200 (Deering 2003). The plaintiff was able to bring the action against Nike because, prior to a recent amendment, the UCL permitted such suits to be instituted by "any person acting for the interests of itself, its members or the general public." CAL. BUS. & PROF. § 17204 (Deering 2003) (amended to remove private attorney general clause; amendment approved by voters, Prop. 64 § 3, effective Nov. 3, 2004). California's false advertising law makes it:

unlawful for any person, . . . corporation . . . , or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services . . . or to induce the public to enter into any obligation relating thereto, to make or disseminate . . . before the public in this state, . . . in any newspaper or other publication . . . or in any other manner or means whatever . . . any statement, concerning that real or personal property or those services . . . , which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading . . . .

CAL. BUS. & PROF. § 17500.

Like the previous version of the UCL, an action brought under the false advertising law, could, before a recent amendment, be initiated by "any person acting for the interests of itself, its members or the general public." CAL. BUS. & PROF. § 17535. *Id.* A successful private plaintiff under the false advertising law may be entitled to restitution and injunctive

ing conditions in foreign factories in response to public criticism and in an attempt to maintain sales of its products.<sup>146</sup> The issue for the California Supreme Court was whether Nike's speech was commercial, which would bring it under the statutes' purview and entitle it to less than full constitutional protection, or noncommercial, which would warrant the greatest degree of judicial deference under the First Amendment.<sup>147</sup>

The Court, asserting that the "United States Supreme Court has not adopted an all-purpose test to distinguish commercial from non-commercial speech under the First Amendment," developed its own three-part analysis.<sup>148</sup> The Court held that when deciding whether speech may be subjected to laws preventing false advertising or deception, the court, in classifying the speech, must consider: "the speaker, the intended audience, and the content of the message."<sup>149</sup> Applying this new standard, the Court found Nike's speech to be commercial, permitting it to be regulated under California's false advertising and unfair competition statutes.<sup>150</sup> In his dissent, Justice Brown recom-

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relief (Deering 2003) (amended to remove private attorney general clause; amendment approved by voters, Prop. 64 § 5, effective Nov. 3, 2004).

For a plaintiff to state a valid claim based on false advertising or promotional practices under either the UCL or the false advertising law, "it is necessary only to show that 'members of the public are likely to be deceived.'" *Kasky*, 45 P.3d at 250 (citations omitted).

<sup>146</sup> *Kasky*, 45 P.3d at 248.

<sup>147</sup> *Id.* at 249.

<sup>148</sup> *Id.* at 256.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 259. First, the Court concluded, with virtually no analysis, that Nike, its officers, and directors were all commercial speakers because they engaged in commerce. *Id.* at 258. Second, the Court determined the intended audience to be commercial as well. *Id.* Nike, in response to numerous allegations that the company violated certain foreign labor laws and its factories broke foreign occupational and safety regulations, had made several statements to California's consuming public. *Id.* at 248. Specifically, Nike had sent letters defending its business operations to university presidents, athletic directors, and newspapers; issued various press releases; and bought a full-page advertisement in prominent newspapers to publicize a report that had discovered no evidence of unsafe or illegal working conditions at its factories in China, Indonesia, and Vietnam. *Id.* In holding these audiences to be commercial in nature, the Court emphasized that the university presidents and athletic directors were major actual and potential purchasers of Nike's products and that the press releases and letters to newspaper editors were intended to maintain and increase sales of athletic shoes and apparel. *Id.* at 258.

Finally, the Court believed that Nike's representations of fact were of a commercial nature. *Id.* The California Supreme Court justified this conclusion by citing the three reasons the United States Supreme Court has given for distinguishing commercial from non-commercial speech. First, commercial speech is more readily verifiable by its speaker than news or political speech. *Id.* at 252 (citing *Virginia State Bd. of Pharmacy*, 425 U.S. at 772, n.24). Second, commercial speech is "hardier" than noncommercial speech because commercial speakers, motivated by profit, are less likely to experience a chilling effect from regulation. *Id.* at 253 (citing *Virginia State Bd. of Pharmacy*, 425 U.S. at 772, n.24). Third,

the authority to regulate business transactions to prevent commercial harm, justifies a concomitant power to regulate speech that is “linked inextricably to those transactions.” *Id.* (quoting *44 Liquormart, Inc.*, 517 U.S. at 499). The California Supreme Court found that Nike was in a position to verify the factual representations about its business operations. *Id.* at 258. Similarly, the Court reasoned that Nike, because it is motivated by profit, will not be deterred from making truthful statements about its working conditions, and may, in fact, make a greater effort to verify the accuracy of its communications. *Id.* And finally, the Court stated the regulation of Nike’s speech is “consistent with traditional government authority to regulate commercial transactions for the protection of consumers by preventing false and misleading commercial practices.” *Id.* The California Supreme Court thus held that the nature of Nike’s statements comported with the three enumerated reasons justifying the distinction between commercial and noncommercial speech. Consequently, the Court held that Nike’s speech satisfied the third and final prong of its commercial speech test. *Id.* at 258-59.

Having held that Nike’s speech satisfied the three elements of its new test, i.e., commercial speaker, commercial audience, and commercial message, the Court addressed the four primary counter arguments propounded by Nike and the dissenting judges. First, the Court rejected Nike’s and the dissents’ contention that the speech could not be commercial because the statements related to issues of immense public interest. *Id.* at 259. In reaching this conclusion, the California Supreme Court stressed that the United States Supreme Court has held that commercial speech “commonly concerns matters of intense public and private interest.” *Id.* (citing *Virginia State Bd. of Pharmacy*, 425 U.S. at 763). The Court also found it irrelevant that Nike made its statements to counteract negative publicity. *Id.* (citing *Nat’l Comm’n on Egg Nutrition v. FTC*, 570 F.2d 157, 159 (7th Cir. 1977)). Second, the Court stated that the communications are not removed from the commercial speech category simply because Nike and the dissenting justices allege noncommercial elements were “inextricably intertwined.” *Id.* at 260. The Court, citing *Fox*, stated: “No law required Nike to combine factual representations about its own labor practices with expressions of opinion about economic globalization, nor was it impossible for Nike to address those subjects separately.” *Id.* at 260-61.

Third, the Court rejected Nike’s contention that the regulations would restrict expression from its point of view, but permit its critics to denigrate its labor practices. *Id.* at 261. The Court dubbed such an argument “misdirected” because the disputed regulations “do not suppress points of view but instead suppress false and misleading statements of fact.” *Id.* Finally, the Court refused to classify the speech as noncommercial simply because it related to Nike’s labor practices, as opposed to the price or quality of its goods. *Id.* For the California Supreme Court, the actual content of the message was subordinate to the *possibilities* engendered in the speech: “Speech is commercial in its content if it is *likely to influence consumers* in their commercial decisions. For a significant segment of the buying public, labor practices do matter in making consumer choices.” *Id.* at 262 (emphasis added).

In dissent, Justice Chin argued that characterizing Nike’s speech as commercial contravenes the United States Supreme Court’s jurisprudence. *Id.* at 265 (Chin, J., dissenting). The high court, Justice Chin noted, has defined commercial speech to be speech that “does no more than propose a commercial transaction[.]” *Id.* at 265 (Chin, J., dissenting) (quoting *Virginia State Bd. of Pharmacy*, 425 U.S. at 762; *Bolger*, 463 U.S. 66) or “expression related solely to the economic interests of the speaker and its audience.” *Id.* at 265 (Chin, J., dissenting) (quoting *Central Hudson*, 447 U.S. at 561). For Justice Chin, Nike’s speech transcended this threshold and provided “information vital to the public debate on international labor rights and reform.” *Id.* at 265 (Chin, J., dissenting). In a separate dissent, Justice Brown stated that the United States Supreme Court has “created considerable confusion over the past 60 years as it has struggled to define the difference between commercial and noncommercial speech.” *Id.* at 268 (Brown, J., dissenting). Justice Brown, believing Nike’s speech to be “inextricably intertwined” with noncommercial elements, contended the categorical ban violated the First Amendment. *Id.* at 269 (Brown, J., dissenting).

mended that the United States Supreme Court develop a more “nuanced approach”<sup>151</sup> to classifying speech: “[T]he commercial speech doctrine needs and deserves reconsideration and this is as good a place as any to begin. I urge the high court to do so here.”<sup>152</sup>

In January 2003, the United States Supreme Court accepted Justice Brown’s challenge and granted certiorari<sup>153</sup> to decide two questions: whether a corporation engaging in a public debate can be held liable for factual inaccuracies on the theory that the statements are commercial speech and whether the First Amendment permits private parties who have suffered no harm to institute litigation under California’s false advertising and unfair competition laws.<sup>154</sup> The Court changed direction in June 2003, however, and dismissed the writ of certiorari as improvidently granted.<sup>155</sup>

<sup>151</sup> *Id.* at 270 (Brown, J., dissenting).

<sup>152</sup> *Kasky*, 45 P.3d at 280 (Brown, J., dissenting).

<sup>153</sup> *Nike, Inc. v. Kasky*, 537 U.S. 1099 (2003), *cert. dismissed*, 123 S.Ct. 2554 (2003).

<sup>154</sup> *Nike*, 123 S.Ct. at 2555 (Stevens, J., concurring).

<sup>155</sup> *Id.* (Stevens, J., concurring). Having been denied the view of the Court, we are left to glean bits of information from the concurring and dissenting opinions. Justice Stevens, with whom Justice Ginsberg joined and Justice Souter joined in part, wrote a concurring opinion justifying the dismissal on three grounds: the California Supreme Court’s decision was not final; neither party had standing; and the Court should avoid prematurely adjudicating novel constitutional questions. *Id.* at 2554-55 (Stevens, J., concurring). “This case presents novel First Amendment questions because the speech at issue represents a blending of commercial speech, noncommercial speech and debate on an issue of public importance.” *Id.* at 2558 (Stevens, J., concurring). Justice Kennedy, without any elaboration or additional doctrinal support, dissented from the order. *Id.* at 2559 (Kennedy, J., dissenting).

Justice Breyer, with whom Justice O’Connor joined, issued a more substantial dissent. *Id.* at 2559 (Breyer, J., dissenting). After discussing why the Court should hear the case, Justice Breyer reached two important conclusions. First, Justice Breyer concluded that Nike’s communications were not pure commercial speech. *Id.* at 2566 (Breyer, J., dissenting). He arrived at this conclusion by analyzing Nike’s letter to the university presidents and athletic directors, a document that Justice Breyer described as the “least likely to warrant protection.” *Id.* at 2565 (Breyer, J., dissenting). Justice Breyer believed that the letter’s noncommercial components were “predominant” and the commercial elements were “inextricably intertwined.” *Id.* (Breyer, J., dissenting). Justice Breyer also stressed that the letter’s content “makes clear, that *in context*, it concerns a matter that is of significant public interest and active controversy . . . .” *Id.* at 2566 (Breyer, J., dissenting) (emphasis added). By using the qualifying language “*in context*,” Justice Breyer indicates that he is not in favor of a categorical rule or definition for commercial speech, and the Court may need to examine the facts of each case based on the context in which the speech is disseminated. Based on the form and content of the communication, Justice Breyer concluded Nike’s speech was readily distinguishable from the “more purely ‘commercial speech’ described in prior cases.” *Id.* (Breyer, J., dissenting).

Second, Justice Breyer criticized California’s regulatory regime, which permitted the use of private attorneys general to bring claims, even though the plaintiffs themselves suffered no harm. *Id.* (Breyer, J., dissenting). Justice Breyer cautioned that such a system “threatens to impose a serious burden upon speech” because it authorizes a “purely ideological plaintiff . . . to bring into the courtroom the kind of political battle better waged in other forums.” *Id.* at 2567 (Breyer, J., dissenting). Based on these two conclusions, Justice Breyer stated:

In dismissing the writ of certiorari, the Supreme Court passed on an opportunity to clarify a jurisprudence riddled with “doctrinal incoherence.”<sup>156</sup> So, to analyze whether product placements are commercial speech, assuming such a distinction is still significant, we must employ several different definitions of commercial speech; divine the proper test by which courts will evaluate the issue; and speculate as to whether being classified as commercial speech would affect the business of product placements in any discernable way. Before conducting such an analysis, however, we must outline the business and legal aspects of product placements.

### III. CONTENT, CASH, AND CALLS TO REGULATE: THE BUSINESS AND LEGAL ASPECTS OF PRODUCT PLACEMENTS

#### A. *The Business of Product Placements*

As noted above, E.M.A. describes product placement as the “practice of integrating specific products and brands into filmed entertainment.”<sup>157</sup> Such integration is accomplished in one of three ways. First, an actor can allude to a product or company verbally.<sup>158</sup> Second, the product can be shown visually, either in the foreground or in the background.<sup>159</sup> Finally, the actor can handle, use, or consume the product in a “hands on” situation.<sup>160</sup>

Proponents of product placements believe that the practice offers many benefits, not only to advertisers and manufacturers, but also to producers, studios and the consuming public. For example, Ryan Moore, a partner at Set Resources, Inc.,<sup>161</sup> avers that product placements benefit advertisers and manufacturers by building brand awareness, enhancing a product’s visibility in an otherwise cluttered media environment, generating a “soft-sell approach,” and creating an “indirect celebrity endorsement.”<sup>162</sup> The primary advantage Moore cites, however, concerns the economics of advertising: “Product placements are a cheap form of advertising. They enable enormous ROI [returns on investment] potential. The CPM [cost per thousand of impressions]

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“[I]t is likely, if not highly probable, that, if this Court were to reach the merits, it would hold that heightened scrutiny applies; that, under the circumstances here, California’s delegation of enforcement authority to private attorneys general disproportionately burdens speech; and that the First Amendment consequently forbids it.” *Id.* at 2568 (Breyer, J., dissenting).

<sup>156</sup> *Kasky*, 45 P.3d at 280 (Brown, J., dissenting).

<sup>157</sup> See *supra* notes 7-8 and accompanying text.

<sup>158</sup> Telephone Interview with Ryan Moore, *supra* note 9.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

of product placements is several orders of magnitude less than traditional forms of advertising.”<sup>163</sup> Acknowledging that there are no guarantees that a particular show will be successful or that the product will actually get used in the program, Moore asserts that “when a show become a hit, it’s like hitting the lottery.”<sup>164</sup>

That product placements also benefit the production company and the studio is evident. Product placements, by their nature, involve some form of compensation flowing from the advertiser or manufacturer to the production company or studio.<sup>165</sup> Although the preponderance of deals involve the content creator “bartering” exposure for free goods from the manufacturer,<sup>166</sup> many deals also involve the transfer of money, cross-promotions of the film or program, or free advertising flowing to the producer or studio.<sup>167</sup> These arrangements create an effective means for producers and studios to reduce their negative costs, i.e., the actual cost of producing the program or film.<sup>168</sup> And these deals have the potential to be extremely lucrative. For example, Samsung invested \$100 million to associate itself with *The Matrix Reloaded*,<sup>169</sup> and Miramax is asking for more than \$35 million to feature a car in its 2005 release *The Green Hornet*.<sup>170</sup>

Some contend that the public benefits as well, because product placements “inject[ ] a sense of realism into a scene by using commonly known items.”<sup>171</sup> It has been argued that such “verisimilitude”<sup>172</sup> is

<sup>163</sup> *Id.* The economics of product placements in theatrical films are particularly compelling. *Id.* Aside from their theatrical release, many films are shown eventually on cable, broadcast television, and home video. *Id.* As the number of exposures increases, the CPM decreases, enhancing the manufacturer’s advertising investment. *Id.*

<sup>164</sup> *Id.* Moore notes that in the more traditional advertising contexts, suppliers can demand guarantees concerning audience size. *Id.* However, such guarantees are often unavailable if a film or a television show fails to achieve commercial success. *Id.*

<sup>165</sup> See *supra* notes 9-10 and accompanying text.

<sup>166</sup> Moore estimates that over 90 percent of product placement deals are structured as barter arrangements. Telephone Interview with Ryan Moore, *supra* note 9. Freelance film producer, Georgia Kacandes, also states that the “vast majority of deals are for free goods.” Telephone Interview with Georgia Kacandes, freelance film producer (Sept. 19, 2003).

<sup>167</sup> Telephone Interview with Ryan Moore, *supra* note 9; Telephone Interview with Georgia Kacandes, *supra* note 166; Telephone Interview with Sandy Wernick, Senior Executive Vice President, Brillstein-Grey Ent. (Sept. 29, 2003).

<sup>168</sup> Telephone Interview with Georgia Kacandes, *supra* note 166; E.R.M.A., Product Placement 101, at <http://www.erma.org/stsc/propplac.html> (last visited June 3, 2004).

<sup>169</sup> Marc Graser, *Falling Off the Brand Wagon: Studios Cope with Ad-versity in Lining Up Promo Partners*, VARIETY, October 20-26, 2003, at 1.

<sup>170</sup> Richard Linnett & Wayne Friedman, *Miramax Hawks Record Product Placement Deal*, ADAGE.COM, May 26, 2003, at <http://www.adage.com/news.cms?newsId=37901> (last visited Apr. 12, 2004).

<sup>171</sup> E.R.M.A., Product Placement 101, *supra* note 168.

<sup>172</sup> Snyder, *supra* note 8, at 326.

necessary in our modern, commercial culture: “If a movie is to accurately depict today’s America, it also must depict the commercialization that has seeped into every corner of our society.”<sup>173</sup> Many reject this argument, however, and stress that product placements are developed solely for economic reasons.<sup>174</sup>

As noted, the product placement industry is highly coordinated and sophisticated. There are generally three “players” in most agreements: the content provider (e.g., producer, studio, television network, etc.), the brand (i.e., the manufacturer/supplier), and the product placement agent.<sup>175</sup> Each studio has a Production Resources Department,<sup>176</sup> and each network has a Business Affairs Division,<sup>177</sup> which is responsible for the management of product placements. Executives analyze literary properties as they are developed and read scripts as they are written to determine if product placement deals will be viable.<sup>178</sup> These executives consider a host of creative, financial, and legal issues, including, *inter alia*:

Can I reduce the negative cost of this project in a substantial way using Product Placement? Is this project of the magnitude that would warrant revenue-generating opportunities through placements, either cash or barter? Will the Director, Producer and/or cast members accommodate proper placement situations? Are there specific scenes that emphasize products such as verbal mentions or action props? What is the target audience for this picture? Would this picture be appropriate for joint promotional efforts with Corporate America including merchandising and/or licensing opportunities? . . . Must cast members be advised by contract terms prior to the studio making any placement commitments?<sup>179</sup>

Agencies, always cognizant of potential opportunities, receive development information from content creators well before production begins, usually before a script is even written.<sup>180</sup> Like studio and network executives, agents consider several factors when evaluating prospective product placement deals. Specifically, agents ask whether there is an opportunity for money or a significant barter arrangement; if the demographic and “feel” of the show are appropriate for the prod-

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<sup>173</sup> *Id.*

<sup>174</sup> Telephone Interview with Georgia Kacandes, *supra* note 166 (averring that the realism argument is “ridiculous” and that most product placements are “gratuitous”); Telephone Interview with Sandy Wernick, *supra* note 167 (opining that the realism justification is simply an “excuse to accept money”).

<sup>175</sup> Telephone Interview with Ryan Moore, *supra* note 9.

<sup>176</sup> E.R.M.A., Product Placement 101, *supra* note 168.

<sup>177</sup> Telephone Interview with Sandy Wernick, *supra* note 167.

<sup>178</sup> E.R.M.A., Product Placement 101, *supra* note 168.

<sup>179</sup> *Id.*

<sup>180</sup> Telephone Interview with Ryan Moore, *supra* note 9.

uct; if there is a believable place in the program for the product; and if the producers and talent (i.e., writer, director, and actors) are amenable to creative changes.<sup>181</sup>

Although a small minority of deals involving cash transactions does not involve an agent, the customary process for product placement agreements includes all three aforementioned groups.<sup>182</sup> Generally, the brand hires an agent on either a retainer basis, under which the agent guarantees a certain number of placements a year, or a per-placement basis, under which the agent is paid only upon verifiable exposure of the product.<sup>183</sup> The agent, an intermediary between the brand and the content creator, works to place the product in a variety of media.<sup>184</sup> On the other end, in an attempt to attract product placements, producers or studio representatives often “pitch” the project directly to the manufacturer or to the brand’s advertising and product placement agencies.<sup>185</sup>

The contracting parties vary with the particular medium. In the broadcast television market, the agent and the brand generally contract with the production company; television networks sign only huge promotional deals.<sup>186</sup> In the film industry, however, the agency often deals with the production company and the studio; if the film is a tentpole,<sup>187</sup> the agency will deal primarily with the studio.<sup>188</sup>

The specific terms of the deal are based on several factors and vary from contract to contract.<sup>189</sup> For example, compensation is always a negotiable issue. The manner and degree to which a content creator is remunerated is dependent upon many considerations, including: the nature of the placement, e.g., whether the product simply receives verbal mention or is used by a main character; the “clout” of the creative team, e.g., whether there are any “A-list” actors attached to the project; and the prospects of the project, e.g., whether the film will get worldwide distribution.<sup>190</sup>

Similarly, because the brand has a vested interest in controlling the ways in which its products are portrayed, the parties often haggle over

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Telephone Interview with Ryan Moore, *supra* note 9. *Id.*

<sup>187</sup> A tentpole is a movie that the studio anticipates will earn it the most money in a given season, usually the summer. NKA Glossary, at <http://www.nobody-knows-anything.com/glossary.html> (last visited Apr. 16, 2004).

<sup>188</sup> Telephone Interview with Ryan Moore, *supra* note 9.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

approval rights.<sup>191</sup> The supplier seeks to ensure that its products are used in a “customary manner” and that the “nature and extent” of the products’ on-screen use conform to the terms of the contract.<sup>192</sup> Typically, “[t]he larger the fee paid by the supplier, the more important it will be for the supplier to have some form of approval over the use of the product.”<sup>193</sup>

Production companies are understandably hesitant to grant broad approval rights to the supplier and are frequently precluded from doing so because of contractual commitments to the producers, directors, and talent.<sup>194</sup> There have been circumstances, however, in which manufacturers have argued successfully to have scenes rewritten or re-shot to improve the visibility of their products.<sup>195</sup> An alternative remedy is a reduction in the fee payable to the studio or production company.<sup>196</sup> If the parties cannot negotiate a reduction in fee or an acceptable creative change, the matter may be submitted to arbitration<sup>197</sup> or litigated in court.<sup>198</sup> To ameliorate such creative concerns, studios and advertisers

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<sup>191</sup> 1 Jay Kenoff and Richard K. Rosenberg, ENTERTAINMENT INDUSTRY CONTRACTS 18-37 (Donald C. Farber ed., 2002).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* See also Graser, *supra* note 169, at 1 (noting that although the filmmakers of *The Matrix Reloaded* permitted Cadillac to use footage from the film in its advertisements, Carrie-Anne Moss disapproved the arrangement because such endorsements were not part of her contract).

<sup>195</sup> Robert Adler, *Here's Smoking at You, Kid: Has Tobacco Product Placement in the Movies Really Stopped?*, 60 MONT. L. REV. 243, 247 (1999). However, such concessions apparently have not satisfied all marketers, as many are expressing concerns over “finicky and overprotective filmmakers who often don’t want to provide talent or even footage for promotional campaigns.” Graser, *supra* note 169, at 1.

<sup>196</sup> Kenoff & Rosenberg, *supra* note 191.

<sup>197</sup> *Id.*

<sup>198</sup> See *Compl., Reebok Int’l, Ltd. v. Tristar Pictures, Inc.*, Civ. No. 96-8982 SVW, (C.D. Cal. filed Dec. 23, 1996), available at <http://www.court tv.com/archive/legaldocs/business/reebok.html> (last visited Apr. 12, 2004). In its complaint, Reebok alleged that it expended over \$1.5 million in “promotional, product and dollar commitments” for a product placement in Tristar’s film, *Jerry Maguire*. *Id.* at ¶3. In addition to providing cash and shoes to Tristar, Reebok alleged it contributed a “professional football trainer, cameos of athletes, crew jackets, film clips, banners, athletic equipment and other Reebok products and creative materials.” *Id.* at ¶¶3, 39. In exchange for these expenditures, Reebok contended that Tristar agreed to feature specific in-film associations with Reebok and its products, with the “cornerstone” being a fake Reebok commercial over the final credits. *Id.* at ¶2. However, the final scene was cut from the film’s theatrical release, and Reebok sued for, *inter alia*, breach of contract, breach of promise, negligent misrepresentation, and fraudulent concealment. *Id.* at ¶4.

The parties eventually settled their dispute out of court without disclosing the terms. Patt Morrison, *Three Views of the Southland: A Word From Our Sponsor*, L.A. TIMES, Jan. 2, 1998, at B2. When *Jerry Maguire* appeared on Showtime, the 47 second Reebok commercial that the director had cut from the theatrical version was included, leaving some commentators to proclaim: “when Commerce struts in, Art gets left at the altar.” *Id.*

have negotiated long-term promotional deals.<sup>199</sup> For example, Universal Pictures has ten-year deals with Coca-Cola and Nestle Waters and five-year contracts with Kodak and MasterCard to promote these companies' products in Universal's movies, television shows, videogames, theme parks, and music.<sup>200</sup>

### B. *The Current Regulatory Approach to Product Placements*

As a general rule, there is no governmental prohibition of product placements in either the broadcast television<sup>201</sup> or motion picture industries.<sup>202</sup> There are two specific areas in which the government does regulate product placements, however. First, in response to the Payola scandals of the 1950s,<sup>203</sup> the FCC promulgated rules that require networks and television stations to disclose any paid placements in a given program and list all sponsors of the program.<sup>204</sup> Such disclosures are not required, however, if the products are donated, if the charge for exposure is nominal, or if the usage is for realistic effect.<sup>205</sup>

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<sup>199</sup> Graser, *supra* note 169, at 61.

<sup>200</sup> *Id.*

<sup>201</sup> See Kenneth Clark, *Group Goes After Brand-Name Film Props*, CHI. TRIB., June 10, 1991, Business, at 3.

<sup>202</sup> Telephone Interview with Ryan Moore, *supra* note 9; Telephone Interview with Georgia Kacandes, *supra* note 166; Telephone Interview with Sandy Wernick, *supra* note 167.

<sup>203</sup> See Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1696 n.47 (1997). Payola has been defined as "accepting or receiving money or other valuable consideration for the inclusion of material in a broadcast *without* disclosing that fact to the audience . . ." *Id.* (quoting BARTON CARTER ET AL., *THE FIRST AMENDMENT AND THE FIFTH ESTATE* 386 (1993)) (emphasis in original).

<sup>204</sup> Clark, *supra* note 201. See FCC Radio Broadcast Services, 47 C.F.R. § 73.1212 (2002), which mandates:

- (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 action, 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 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 purposes of this section and only one such announcement need be made at any time during the course of the broadcast.

*Id.*

<sup>205</sup> *Id.* The FCC expressly limits its regulatory reach:

Provided, however, That 'service or other valuable consideration' shall not include any service or property furnished either *without or at a nominal charge for use on*, or in connection with, a broadcast unless it is so furnished in consideration for an identification

Second, as part of their various settlement agreements with numerous states, the major tobacco companies have agreed on a nationwide ban on certain forms of paid product placements.<sup>206</sup> For example, under the Minnesota Settlement, the tobacco industry agreed on a nationwide ban on paid product placements in motion pictures.<sup>207</sup> Under the Master Settlement,<sup>208</sup> the tobacco industry consented to a much broader prohibition:

No Participating Manufacturer may . . . make, or cause to be made, any payment or other consideration to any other person or entity to use, display, make reference to or use as a prop any Tobacco Product, Tobacco Product package, advertisement for a Tobacco Product, or any other item bearing a Brand Name in any motion picture, television show, theatrical production or other live performance, live or recorded performance of music, commercial film or video, or video game . . . .<sup>209</sup>

Predictably, most of the “regulation” imposed on product placements emanates from internal, self-policing measures instituted from within the entertainment industry. The effects of self-regulation are most apparent in the broadcast television industry, where networks often disapprove of blatant product placements.<sup>210</sup> Networks, aware that they make a preponderance of their money by delivering audiences to advertisers, do not want to upset their major corporate sponsors or dilute their ad space by accepting product placements that conflict with their

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of any person, product, service, trademark, or brand name *beyond an identification reasonably related to the use of such service or property* on the broadcast.

*Id.* (emphasis added).

<sup>206</sup> See, e.g., Settlement Agreement and Stipulation for Entry of Consent Judgment, *State ex rel Humphrey v. Phillip Morris Inc.*, No. C1-94-8565, 1998 WL 394331, at 10 (Minn. Dist. Ct. May 18, 1998) [hereinafter *Minnesota Consent Judgment*]; Master Settlement Agreement, available at [http://www.naag.org/upload/1032468605\\_cigmsa.pdf](http://www.naag.org/upload/1032468605_cigmsa.pdf) (last visited Apr. 12, 2004).

<sup>207</sup> *Id.* Minnesota’s Consent Judgment mandates:

Settling Defendants shall not make, in the connection with any motion picture made in the United States, or cause to be made any payment, direct or indirect, to any person to use, display, make reference to, or use as a prop any cigarette, cigarette package, advertisement for cigarettes, or any other item bearing the brand name, logo, symbol, motto, selling message, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of domestic tobacco products.

Minnesota Consent Judgment, at \*10.

<sup>208</sup> The Master Settlement Agreement is between the Attorneys Generals of 46 states and the four largest tobacco companies in the United States. National Association of Attorneys General, NAAG Projects: Tobacco, at <http://www.naag.org/issues/issue-tobacco.php> (last visited Apr. 12, 2004). The purpose of the Master Settlement is to “settle state suits to recover costs associated with treating smoking-related illnesses.” *Id.*

<sup>209</sup> Master Settlement Agreement, *supra* note 206, at 18.

<sup>210</sup> Telephone Interview with Ryan Moore, *supra* note 9.

regular commercials.<sup>211</sup> This form of “major sponsor protection” seeks to prevent a reduction in the amount of money a network can charge potential or existing advertisers.<sup>212</sup>

In order to police the practice of product placements, the networks have strict approval controls in place.<sup>213</sup> Generally, if producers want to employ product placements in their shows, they must bring their ideas to the networks.<sup>214</sup> Based on a variety of factors, the most important of which is the protection of the network’s sponsors, the Broadcast Standards and Practices Group (BSPG) will either approve or reject the proposed product placement.<sup>215</sup> If the BSPG approves the placement, the group files an affidavit with its network disclosing the terms and conditions of the deal.<sup>216</sup> Although it may seem that the review and filing are done to comply with FCC regulations, the networks mandate such disclosures primarily to protect their major sponsors.<sup>217</sup> The degree to which networks oversee the usage of product placements varies considerably, with ABC being the most controlling and CBS, NBC, FOX, UPN, and the WB being slightly more liberal.<sup>218</sup>

Self-regulation in the alcohol industry plays an important role in addressing the concern that alcohol advertising should not be geared to an underage audience.<sup>219</sup> The three main trade associations in the industry<sup>220</sup> all have voluntary advertising codes, and some individual companies have their own self-imposed guidelines.<sup>221</sup> Although none of the codes specifically addresses product placements, the associations all claim the general placement and content provisions apply to the in-

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<sup>211</sup> Clark, *supra* note 201; Telephone Interview with Ryan Moore, *supra* note 9.

<sup>212</sup> Telephone Interview with Ryan Moore, *supra* note 9; Telephone Interview with Sandy Wernick, *supra* note 167.

<sup>213</sup> Telephone Interview with Sandy Wernick, *supra* note 167.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* Another major factor influencing approval decisions is the clout producers have with the network. Telephone Interview with Ryan Moore, *supra* note 9. For successful shows, producers often have free reign with respect to which products they place in the program. *Id.* For pilots, however, producers usually have no leverage with the network because only one in five pilots gets picked up, and product placement agencies do not give the test shows much attention. *Id.*

<sup>216</sup> Telephone Interview with Sandy Wernick, *supra* note 167.

<sup>217</sup> *Id.*

<sup>218</sup> Telephone Interview with Ryan Moore, *supra* note 9.

<sup>219</sup> Federal Trade Commission, Self-Regulation in the Alcohol Industry – A Review of Industry Efforts to Avoid Promoting Alcohol to Underage Consumers (Sept. 1999), at <http://www.ftc.gov/reports/alcohol/alcoholreport.htm> (last visited Apr. 12, 2004).

<sup>220</sup> These associations are the Beer Institute, the Distilled Spirits Council of the United States (DISCUS), and the Wine Institute. *Id.*

<sup>221</sup> *Id.*

tegration of alcohol products in television programs and motion pictures.<sup>222</sup>

A study conducted in 1999 by the Federal Trade Commission (FTC)<sup>223</sup> found that although companies deny requests to place their products in television shows and films that show underage drinking, alcohol product placements still occur in several teen-oriented contexts.<sup>224</sup> For example, such product placements have occurred in PG and PG-13 movies with “significant appeal to teens and children[,]” in motion pictures for which the “advertiser knew that the primary target market included a sizeable underage market; and on eight of the 15 TV shows most popular with teens.”<sup>225</sup> As part of their “best practices,” several companies have taken preventative measures to reduce such exposure to an underage audience, including: restricting product placements to R-rated movies, prohibiting placements in movies and programs in which the primary character is an underage person, and banning placements in content that concerns college life exclusively.<sup>226</sup>

Perhaps the greatest source of self-regulation derives from the creative process itself. There are many directors, producers, and screenwriters who believe that product placements sully their art and simply refuse to employ them in their television programs or motion pictures.<sup>227</sup> Similarly, “A-list” actors have enormous control over their image and “shoot down” deals all the time.<sup>228</sup> Industry veteran, Sandy Wernick, avers that although product placements do influence creative decisions, whenever the creative community disputes an issue or a particular placement, it generally wins: “I know it’s called showbiz, but the show always comes first.”<sup>229</sup>

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<sup>222</sup> *Id.*

<sup>223</sup> The FTC is an independent federal agency that enforces the nation’s antitrust and consumer protection laws. Federal Trade Commission, FTC Job Opportunities, at <http://www.ftc.gov/ftc/oed/hrmo/jobops.htm> (last visited Apr. 12, 2004).

<sup>224</sup> Self-Regulation in the Alcohol Industry, *supra* note 219.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> Telephone Interview with Georgia Kacandes, *supra* note 166.

<sup>228</sup> Telephone Interview with Ryan Moore, *supra* note 9.

<sup>229</sup> Telephone Interview with Sandy Wernick, *supra* note 167. *See also* E.R.M.A., Product Placement 101, *supra* note 168 (stating “If the placement opportunity in any way jeopardizes the creative integrity of the film, it will be dismissed as a possibility . . . . Keep in mind that all of these individuals are in the business of making motion pictures. Product Placement is an ancillary issue.”).

Notwithstanding limited FCC regulation<sup>230</sup> and two stalled congressional attempts to ban paid placements of tobacco products,<sup>231</sup> the federal and state governments do not strictly regulate product placements. That the government has essentially permitted the free reign of the business practice has sparked numerous complaints from public interest groups, demanding increased regulation. For example, on March 29, 1989 the Center for Science in the Public Interest petitioned the FCC and the attorneys general in each state to require that paid product placements be disclosed in the credits of all movies.<sup>232</sup> Similarly, on May 30, 1991, several public interest groups, including the Center for the Study of Commercialism, filed a petition with the FTC to mandate that filmmakers must disclose paid product placements before a movie is shown.<sup>233</sup>

In the most recent demand for regulation, Commercial Alert<sup>234</sup> filed separate requests with both the FCC and the FTC on September 30, 2003, petitioning for prominent disclosures of product placement, product integration, plot placement, title placement, paid spokespersons, and virtual advertising on television.<sup>235</sup> Both requests emphasize the increased usage of product placements on television, the efficacy of the practice, and the inadequacies of the current legal regime to protect consumers.<sup>236</sup> Averring that the “distinction between ‘product integration’ and infomercials has become virtually nonexistent,”<sup>237</sup> Commer-

<sup>230</sup> See *supra* notes 203-205 and accompanying text.

<sup>231</sup> See Protect Our Children from Cigarettes Act of 1989, H.R. 1250, 101st Cong. (1st Sess. 1989); Tobacco Control and Health Protection Act, H.R. 5041, 101st Cong. (2d Sess. 1990).

<sup>232</sup> Douglas C. McGill, *The Media Business Advertising: Questions Raised on “Product Placements,”* N.Y. TIMES, Apr. 13, 1989, at D18.

<sup>233</sup> *Group Asks Action on Product Placements*, L.A. TIMES, May 31, 1991, at F16.

<sup>234</sup> Commercial Alert is a non-profit consumer watchdog group organized to “keep the commercial culture within its proper sphere, and to prevent it from exploiting children and subverting the higher values of family, community, environmental integrity and democracy.” Commercial Alert, About Commercial Alert, at [http://www.commercialalert.org/index.php/article\\_id/AboutUs](http://www.commercialalert.org/index.php/article_id/AboutUs) (last visited Apr. 12, 2004).

<sup>235</sup> See Commercial Alert, Complaint, Request for Investigation, and Petition for Rulemaking to Establish Adequate Disclosure of Product Placement on Television (Sept. 30, 2003), available at <http://www.commercialalert.org/fcc.pdf> (last visited Apr. 12, 2004) [hereinafter FCC Complaint]; Commercial Alert, Request for Investigation of Product Placement on Television and for Guidelines to Require Adequate Disclosure of TV Product Placement (Sept. 30, 2003), available at <http://www.commercialalert.org/ftc.pdf> (last visited Apr. 12, 2004) [hereinafter FTC Request].

<sup>236</sup> FCC Complaint, *supra* note 235, at 9-12; FTC Request, *supra* note 235, at 9-10, 17.

<sup>237</sup> FCC Complaint, *supra* note 235, at 8; FTC Request, *supra* note 235, at 8. An “infomercial” has been defined as “a commercial typically 90 seconds or more in length designed to supply information about a product or service as opposed to a specific sales message.” Horizon Media, Inc., Media Terms, at <http://www.horizonmedia.com/glossary.htm> (last visited Apr. 12, 2004).

cial Alert urges the FCC and the FTC to stop what it deems “an affront to basic honesty.”<sup>238</sup>

The complaint to the FCC alleges that ABC, CBS, Fox Broadcasting, Fox Sports, NBC, United Paramount, Walt Disney, and the WB may be in violation of Section 317 of the Communications Act of 1934<sup>239</sup> for their failure to comply with the mandatory requirements to disclose sponsors at the time of each broadcast.<sup>240</sup> Commercial Alert argues that the broadcasters, by allegedly shifting their advertisements from commercial breaks into the content itself, are “broadly and systematically”<sup>241</sup> violating the principle that “[l]isteners are entitled to know by whom they are being persuaded.”<sup>242</sup> The organization contends that “[b]roadcasters not only fail to identify their sponsors; worse, they fail to identify the ads themselves, and instead pretend that the ads are merely part of shows.”<sup>243</sup>

In addition to its allegation that the networks and stations are not complying with the statute, Commercial Alert also claims that the applicable regulation, 47 C.F.R. § 73.1212,<sup>244</sup> is inadequate to protect consumers. Part (f) of the existing regulation holds that broadcasters need to identify sponsors only once during an entire program.<sup>245</sup> Commercial Alert believes that to prevent “stealth advertising,” the FCC should mandate that the networks and broadcasters “prominently disclose to viewers that their product placements are ads.”<sup>246</sup> Furthermore, the organization argues that the broadcasters and networks should issue such disclosures not only at the beginning of the program,<sup>247</sup> but also

<sup>238</sup> FCC Complaint, *supra* note 235, at 12; FTC Request, *supra* note 235, at 18.

<sup>239</sup> Section 317 of the Communications Act of 1934 mandates:

All matter broadcast by any radio station for which any money, services 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: *Provided*, That “service or other valuable consideration” shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

Communications Act of 1934, 47 U.S.C. § 317(a)(1) (2004) (emphasis in original).

<sup>240</sup> FCC Complaint, *supra* note 235, at 1.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* (quoting Applicability of Sponsorship Identification Rules, 40 FCC 141 (1963), *as modified*, 40 Fed. Reg. 41936 (Sept. 9, 1975)).

<sup>243</sup> *Id.* at 1-2.

<sup>244</sup> See *supra* notes 204-205 and accompanying text.

<sup>245</sup> See *supra* note 204.

<sup>246</sup> FCC Complaint, *supra* note 235, at 4.

<sup>247</sup> Commercial Alert believes that the initial disclosure should be in “plain English, such as “This program contains paid advertising for . . . .” *Id.*

“when they occur.”<sup>248</sup> Without such disclosures, Commercial Alert asserts, the “elaborate intertwining of programming and product placement should be considered an unfair and deceptive advertising practice.”<sup>249</sup>

In its request for investigation to the FTC, Commercial Alert alleges that product placements are “misleading to viewers,” which may violate the Federal Trade Commission Act’s<sup>250</sup> prohibition against unfair or deceptive acts or practices affecting commerce.<sup>251</sup> The group alleges that the failure to disclose product placements in a “conspicuous and unmistakable manner” is deceptive, because the advertising “flies under the viewer’s skeptical radar,” and unfair, because “it is advertising that purports to be something else.”<sup>252</sup> As it requests in its complaint to the FCC, Commercial Alert asks the FTC to mandate that networks and stations prominently alert viewers that the product placements are advertisements and that such disclosures appear not only at the start of the program, but also when the placement occurs.<sup>253</sup>

The FTC’s standard for unfairness requires a “substantial” consumer injury.<sup>254</sup> Commercial Alert, citing numerous “marketing-related diseases” from which American children suffer, contends product placements inflict such damage.<sup>255</sup> It notes that product placements for soda pop and fast food contribute to obesity and Type 2 diabetes; embedded advertisements for beer cause increased rates of alcoholism; loopholes in the Master Settlement Agreement lead to unpaid tobacco product placements, which in turn increase teenage smoking; and the integration of casinos into programming fuels the growth in the number of pathological adolescent gamblers.<sup>256</sup>

According to Commercial Alert, requiring the broadcasters and networks to disclose that their product placements are advertisements is consistent with FTC policy. The group identifies three contexts in which the Commission has compelled advertisers to reveal that their

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<sup>248</sup> According to the group, the concurrent disclosure should read “Advertisement” when the product placement appears on the television. *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> 15 U.S.C. § 45(a)(1) (2003) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”). *Id.*

<sup>251</sup> FTC Request, *supra* note 235, at 1.

<sup>252</sup> *Id.* at 2.

<sup>253</sup> *Id.* at 3.

<sup>254</sup> *Id.* at 11 (quoting FTC Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction, FTC Correspondence with The Honorable Wendell Ford and The Honorable John Danforth, Dec. 17, 1980).

<sup>255</sup> *Id.* at 11.

<sup>256</sup> *Id.* at 13-17.

“ads are ads.”<sup>257</sup> First, the FTC has brought numerous deceptive advertising claims against producers of infomercials, alleging that the shows were deceptive because they “purported to be independent programming rather than paid ads.”<sup>258</sup> Second, the FTC has deemed as deceptive formats that construe advertisements as independently written articles in a newspaper or magazine.<sup>259</sup> Finally, in a letter to various search engines, the FTC instructed the companies to provide “clear and conspicuous disclosures” of paid placements that have been inserted into results lists.<sup>260</sup>

Claiming that embedded advertising in television programs is the “paradigm case” for regulation, Commercial Alert states: “When TV networks sell product placements in their programming, the programming itself becomes an advertising vehicle. Without disclosure, stations make an implied representation to viewers that their programming is not what it actually is—a paid advertisement.”<sup>261</sup>

Although Commercial Alert drafted two arguably persuasive documents, there is a fundamental question that it failed to address. In arguing for governmental regulation, the group did not analyze whether and to what extent the government, under the auspices of the FCC or the FTC, has the power to control product placements. In order to evaluate such a question, we must answer several subordinate inquiries. For example, should product placements be considered commercial speech? To what extent can such speech be regulated?<sup>262</sup>

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<sup>257</sup> FTC Request, *supra* note 235, at 3.

<sup>258</sup> *Id.* (quoting Michael S. Levey. Docket No. C-3459, Federal Trade Commission, 116 F.T.C. 885, Sept. 23, 1993).

<sup>259</sup> *Id.* at 4.

<sup>260</sup> *Id.* (quoting Federal Trade Commission, Correspondence with Search Engine Companies, June 27, 2002, at <http://www.ftc.gov/os/closings/staff/commercialalertattatch.htm> (last visited Oct. 9, 2003)).

<sup>261</sup> *Id.*

<sup>262</sup> Perhaps to avoid a constitutional debate, Commercial Alert does not label product placements as “speech” in either of its petitions. It is also arguable, however, that the disclosure remedy Commercial Alert is seeking does not implicate the First Amendment at all. In order to appreciate this argument, we must draw an analytical distinction between requiring the disclosure of the *existence of a product placement* and regulating product placements based on their *content*. Commercial Alert is requesting the former, not the latter. Entertainment attorney Scott Shagin believes that this distinction may preclude the need for a First Amendment analysis because mandating the disclosure of a business practice, in this case a product placement, does not involve the regulation of speech. Telephone Interview with Scott Shagin, Esquire (Nov. 7, 2003). In concurring that the government may completely ban nude dancing, Justice Scalia offered such an argument: “[T]he challenged regulation must be upheld, not because it survives some lower level of First Amendment scrutiny, but because as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all.” *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 572 (1991) (Scalia, J., concurring).

Under what standard should courts evaluate such proposed regulations? Answering these questions is the focus of the following section.

#### IV. THE REGULATION OF ADVERTAINMENT: PRODUCT PLACEMENTS, COMMERCIAL SPEECH, AND GOVERNMENTAL CONTROL

##### A. *Product Placement Should Be Classified As Commercial Speech*

Although no court has addressed whether product placements constitute commercial speech,<sup>263</sup> several commentators have considered the issue.<sup>264</sup> In the most comprehensive discussion of the topic, Steven Snyder examined the various definitions of commercial speech delineated by the Supreme Court and concluded that product placements do not satisfy any of the tests.<sup>265</sup> He did concede, however, that a

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The Supreme Court has evaluated disclosure requirements under a First Amendment analysis, however: “[W]e explained that the State may require commercial messages to ‘appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive[.]’” *44 Liquormart, Inc.*, 517 U.S. at 498 (quoting *Virginia State Bd. of Pharmacy*, 425 U.S. at 772 n.24). This quote indicates that the government can require certain disclosures when the *content* of a commercial message is misleading and may cause consumers to be deceived. It is unclear, however, whether a court must employ a First Amendment analysis when the issue is not the content of a commercial message, but the disclosure that a particular communication is a product placement. Although this threshold question has not been adjudicated, there are at least two reasons why courts would examine disclosure requirements using a First Amendment test. First, marketers and content creators will almost certainly raise a First Amendment defense if the government attempts to mandate disclosures. Second, the existing jurisprudence is not limited expressly to deception resulting from misleading content. Courts can logically interpret *44 Liquormart, Inc* and *Virginia State Bd. of Pharmacy* to sanction a First Amendment analysis whenever a disclaimer, warning, or disclosure will prevent a commercial message from being deceptive. As such, Part III evaluates disclosure requirements under a First Amendment analysis.

<sup>263</sup> Adler, *supra* note 195, at 276.

<sup>264</sup> See Snyder, *supra* note 8 (concluding product placements are not commercial speech); Lackey, *supra* note 67 (finding product placements to be commercial speech and a potential government ban on tobacco placements to be constitutional); Lavender, *supra* note 67 (holding product placements to be commercial speech and advocating a complete ban on direct (paid) and indirect (free goods) tobacco placements); Adler, *supra* note 195 (asserting that product placements are commercial speech, but proposed federal regulation of tobacco placements in movies is unconstitutional).

<sup>265</sup> Snyder, *supra* note 8, at 320-27.

First, Snyder examined the test outlined in *Valentine*, *supra* notes 68-71 and accompanying text, which focuses on the motivation of the speaker. Snyder, *supra* note 8, at 321-22. Snyder concluded that although the manufacturer has inserted its products into the film, the true speaker is the movie studio “that is trying to produce noncommercial speech.” *Id.* at 322. As such, product placements do not satisfy the *Valentine* test for commercial speech. *Id.*

Second, Snyder applied the content-based test articulated in *Virginia State Bd. of Pharmacy*, *supra* notes 76-83 and accompanying text, which asks whether the speech does “no more than propose a commercial transaction.” Snyder, *supra* note 8, at 322-24 (quoting

“mandatory disclosure to moviegoers that the upcoming film contained product placements seemingly would be a reasonable and proportionate regulation under *Fox*, and would pass muster under the fourth strand of the *Central Hudson* test.”<sup>266</sup>

Snyder’s analyses are defective, however, because he asked the wrong question: namely, “[W]hether movies containing the product placement fit any of those definitions [of commercial speech].”<sup>267</sup> If we are to evaluate the constitutionality of governmental regulation of product placements in television, cable, or film, we must ask *if product placements are commercial speech*, not whether they transform creative expression into commercial speech.

The logic expressed by Justice Scalia in *Fox* regarding the disputed Tupperware parties is applicable here as well: There is “[n]o law of man or of nature” that makes it “impossible” to create a motion picture, television show, or cable program without accepting money or other form of compensation in exchange for integrating a commercial prod-

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*Virginia State Bd. of Pharmacy*, 425 U.S. at 771 n.24). Again, Snyder stated that although product placements may “be superfluous props[,] . . . intrude on the story line [,] . . . [or] clutter the screen[,] . . . the film itself, in its entirety, does not tell the audience to buy a product; no transaction has been proposed.” *Id.* at 324. For Snyder, employing the *Virginia State Bd. of Pharmacy* test indicated that product placements do not transform a motion picture into commercial speech. *Id.*

Third, Snyder evaluated product placements based on the holding of *Central Hudson*, *supra* notes 84-90 and accompanying text, which defined commercial speech as “expression related solely to the economic interests of the speaker and its audience.” Snyder, *supra* note 8, at 324 (quoting *Central Hudson*, 447 U.S. at 561). Conceding that manufacturers probably consider product placements advertisements, Snyder concluded that this “does not transform the film into commercial speech, for it is the filmmaker—not the manufacturer—who is the speaker, and it is the film—not the products—that is the dominant speech.” *Id.*

Fourth, Snyder analyzed product placements under the test developed in *Bolger*, *supra* notes 96-101 and accompanying text, which examined whether the speech was in the form of an advertisement, motivated by economics, and referred to a specific product. Snyder, *supra* note 8, at 324-25. Although admitting that motion pictures are driven by economic motivations, Snyder rejected the notion that films are in the form of advertisements and that movies refer to products. *Id.* For Snyder, product placements are subordinate to the film’s story line, which precludes a finding that motion pictures containing placements are commercial speech. *Id.*

Finally, Snyder discussed the standard articulated in *Fox*, *supra* notes 110-116 and accompanying text, which evaluated hybrid speech. Snyder, *supra* note 8, at 325-27. In *Fox*, the Supreme Court held that a certain mixed-message speech was commercial in nature because the speaker had the ability to remove the commercial elements from the expression; in other words, the speech was not “inextricably intertwined.” See *supra*, notes 115-116 and accompanying text. Snyder contended that motion pictures containing product placements are still noncommercial because “[u]nlike the speech in *Fox*, it is not possible for a movie to be realistic, for the speech to be effective, if the speech excludes all commercial references.” Snyder, *supra* note 8, at 326-27.

<sup>266</sup> *Id.* at 333-34.

<sup>267</sup> *Id.* at 303.

uct into the performance.<sup>268</sup> Although realism or “verisimilitude”<sup>269</sup> is often a significant goal of a content creator, product placements are not the only way to achieve this objective. Filmmakers, television and cable producers, and all other content creators can simply use the products in their shows, after clearing the rights, without receiving consideration for displaying the products.<sup>270</sup> Thus, product placements are not “inextricably intertwined” with the noncommercial elements of creative expression. Because product placements are severable from other expression embodied in a program, we must base our First Amendment analysis concerning governmental regulation on whether product placements should be classified as commercial speech.

Unlike Snyder, the three other commentators who have evaluated product placements have examined the nature of the *placements* and not whether the integration transforms the creative expression into commercial speech.<sup>271</sup> For example, William Lackey concludes that product placements are commercial speech because they are “economically motivated by the ‘placer’ . . . [and their] content proposes a commercial transaction.”<sup>272</sup> Similarly, Jason Lavender contends that product placements are commercial speech because they involve a “conscious effort by a producer/advertiser to influence consumers to buy their goods by placing those goods in situations which result in high

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<sup>268</sup> *Fox*, 492 U.S. at 474.

<sup>269</sup> Snyder, *supra* note 8, at 326.

<sup>270</sup> See Adler, *supra* note 195, at 277. Sandy Wernick also acknowledges that a focus on realism does not necessarily translate into an embrace of product placements: “If a character drinks a Coke, why does the production company need to get paid? Just have him drink a Coke.” Telephone Interview with Sandy Wernick, *supra* note 167.

Snyder argues, however, that the “prohibition of product placements could cripple some moviemakers.” Snyder, *supra* note 8, at 335. Aside from being a hyperbole, Snyder’s contention is also dubious. Ryan Moore asserts that product placement agencies generally do not pay much attention to films that they deem do not have a viable chance of being distributed. Telephone Interview with Ryan Moore, *supra* note 9. Similarly, Moore notes that product placement agencies work with producers of pilot television episodes in only two scenarios: when they have “a close relationship with the crew/producers” or when they think the pilot might “take off.” E-mail from Ryan Moore, *supra* note 14. Unfortunately for these filmmakers and these pilot producers, they are the ones who need the most assistance with financing. Telephone Interview with Ryan Moore, *supra* note 9. See also Graser, *supra* note 169, at 1 (stating that producers are frustrated with their promotional partners because the marketers “line up for the ‘hot’ mainstream pictures that already have high awareness, but are unwilling to support chancier projects that are in far greater need of support.”). As such, these independent producers generally do not employ product placements to the extent of studios or large production companies, and these larger entities would not be noticeably affected by a prohibition on product placements. Telephone Interview with Ryan Moore, *supra* note 9. Thus, although a ban on product placements would impact some creators, it would probably not “cripple” many filmmakers or television producers.

<sup>271</sup> See Lackey, *supra* note 67; Lavender, *supra* note 67; Adler, *supra* note 195.

<sup>272</sup> Lackey, *supra* note 67, at 283-84.

exposure.”<sup>273</sup> Finally, Robert Adler rejects the “inextricably intertwined” argument and concludes that “product placement[,] when it exists primarily to sell products, constitutes commercial speech . . . .”<sup>274</sup>

Product placements satisfy all of the tests for commercial speech delineated by the Supreme Court, with the possible exception of the extremely narrow definition stated in *Virginia State Board of Pharmacy*.<sup>275</sup> First, product placements are commercial speech if we use the approach endorsed in *Valentine*, i.e., examining the speaker’s motives.<sup>276</sup> Although the speaker in a film or television show is, depending on your perspective, the director, studio, producer, or writer, the speaker in a product placement is the advertiser/manufacturer.<sup>277</sup> And, it is indisputable that the motivations of the advertiser/manufacturer are purely economic in nature.<sup>278</sup>

Second, product placements are commercial speech under the definition articulated in *Central Hudson*, which is “expression related solely to the economic interests of the speaker and its audience.”<sup>279</sup> Again, although the message conveyed by motion pictures and television shows transcends a mere plea for viewers to purchase an item, the only purpose of a product placement is to stimulate demand for a product.<sup>280</sup> Additionally, in espousing the efficacy of product placements, marketers often emphasize the characteristics of the viewing public:

There are a lot of corporations that realize being integrated from a product placement standpoint has greater value than a 30-second spot . . . . Irrespective of what ad agencies tell you, there’s a falloff in a commercial. People get up, they change the channel and TiVo gets

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<sup>273</sup> Lavender, *supra* note 67, at 220.

<sup>274</sup> Adler, *supra* note 195, at 277.

<sup>275</sup> *Virginia State Bd. of Pharmacy*, 425 U.S. at 762 (defining commercial speech to be expression that does “no more than propose a commercial transaction.”). *See also supra* notes 76-83 and accompanying text.

<sup>276</sup> *See supra* notes 68-71 and accompanying text.

<sup>277</sup> Lackey, *supra* note 67, at 283.

<sup>278</sup> *Id.* *See also* Adler, *supra* note 195, at 277; Telephone Interview with Ryan Moore, *supra* note 9 (averring that the purposes of product placements are “to provide an alternate, cost-effective marketing strategy for brands and to exploit a cheap form of advertising.”); Telephone Interview with Sandy Wernick, *supra* note 167 (stating “Of course product placements are commercial. They are just not a stand alone commercial. Why would [advertisers] be paying for it if it weren’t a commercial?”); Lavender, *supra* note 67, at 220 (stating “essential element of product placement is that exhibitions are driven by purely economic motivations.”); Snyder, *supra* note 8, at 324 (admitting “It is true that manufacturers would not be paying for product placement if it did not relate to their economic interests. A manufacturer, most likely, views product placement as an advertisement.”).

<sup>279</sup> *Central Hudson*, 447 U.S. at 561.

<sup>280</sup> Lackey, *supra* note 67, at 283-84.

around commercials altogether, so by being integrated into the program, you have a *large, captive audience—and an interested one*.<sup>281</sup>

Third, product placements satisfy the three-part test for commercial speech developed in *Bolger*, which examines not only the format of the message, but also the motivation of the speaker and whether the expression references a specific product.<sup>282</sup> Although product placements are not in the form of traditional advertising messages, the highly coordinated and systematic integration of goods into creative expression reveals the practice is simply a more practical, effective, and nuanced approach to persuading viewers.<sup>283</sup> As noted, the motivations of the speaker, i.e., the marketer/manufacturer, are purely economic in nature.<sup>284</sup> Similarly, as marketers pay for the exposure of their products, an obvious purpose of product placements is to feature, reference, and showcase goods to the audience.<sup>285</sup>

Fourth, the contention of the plaintiffs in *Fox*, that an inextricable intertwining of commercial and noncommercial speech renders expression noncommercial, fails here as it failed in *Fox*.<sup>286</sup> Content creators are able to produce entertainment programs without receiving consideration for integrating goods into their shows. Because these creators have alternate ways to express themselves, the commercial element of product placements is severable from the rest of the expression, precluding a finding that the creative and the economic portions are “inextricably intertwined.”<sup>287</sup>

Finally, although it is difficult to argue that product placements do “no more than propose a commercial transaction,”<sup>288</sup> there are several reasons why this should not matter in our overall analysis. First, as noted in *Central Hudson* and subsequent opinions, the Supreme Court has classified speech based on the speaker’s interests as opposed to the content of the speech.<sup>289</sup> In doing so, the Court has drifted from the

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<sup>281</sup> FCC Complaint, *supra* note 235, at 2 (quoting Mark R. Greer, *Going Hollywood: Beverage Companies Are Dealing with Advertising Overload with Less Traditional Tie-Ins*, BEVERAGE INDUS., May 1, 2003, available at <http://www.commercialalert.org/beverage-tie-ins.htm> (last visited Apr. 12, 2004)) (emphasis added).

<sup>282</sup> See *supra* notes 97-101 and accompanying text.

<sup>283</sup> See *supra* notes 161-181 and accompanying text.

<sup>284</sup> See *supra* note 278 and accompanying text.

<sup>285</sup> See *supra* notes 7-10 and accompanying text.

<sup>286</sup> See *supra* notes 110-116 and accompanying text.

<sup>287</sup> See *supra* notes 268-270 and accompanying text.

<sup>288</sup> Admittedly, product placements are integrated into creative programming to be unobtrusive and nonobvious, and effective ones can even advance the underlying story. Telephone Interview with Georgia Kacandes, *supra* note 166 (praising the American Express product placement in *Minority Report* as “provocative” because it was woven into the plot effectively and helped develop an interesting, futuristic landscape).

<sup>289</sup> See *Central Hudson*, 447 U.S. at 561; see also *supra* notes 88-95 and accompanying text.

narrow content standard described in *Virginia State Board of Pharmacy* and seemingly revisited the motivations test in *Valentine*.<sup>290</sup> Second, the phrase “[do] no more than propose a commercial transaction” should not and has not been interpreted strictly. For example, in *Virginia State Board of Pharmacy*, the Supreme Court found the disputed speech to be commercial, even though it contained price information, which the Court deemed a “matter of public interest.”<sup>291</sup> Thus, although the expression did substantially more than merely propose a transaction, the Court nonetheless considered it to be commercial speech.<sup>292</sup> Finally, this narrow definition contravenes the actual way in which contemporary advertising is conducted.<sup>293</sup> There are many commercials today that do not propose a transaction at all,<sup>294</sup> and it seems inconceivable that any agency would run an advertisement that simply implores customers to purchase their products. If there is to be a meaningful and discernable distinction between commercial and non-commercial speech, the narrow definition articulated in *Virginia State Board of Pharmacy* should be jettisoned.

Similar to most forms of traditional marketing such as television, print, and radio advertisements, product placements generally do not directly propose a transaction.<sup>295</sup> The purpose of product placements, however, is analogous to the function of these other types of speech

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<sup>290</sup> *Id.*

<sup>291</sup> *Virginia State Bd. of Pharmacy*, 425 U.S. at 765.

<sup>292</sup> *Id.* at 761-65.

<sup>293</sup> See Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 639 (1990).

<sup>294</sup> *Id.* Kozinski and Banner offer an example of a commercial that does not directly propose a transaction:

Consider one typical television commercial, starring well-known actor Michael J. Fox. An attractive woman knocks on the door of his apartment and asks if he has a Diet Pepsi. He tells her he does, but opens his refrigerator and discovers that he doesn't; this sets him off down the fire escape and through a series of close calls and near mishaps before he obtains a can of Diet Pepsi and returns to his apartment, soaking wet and exhausted, to give the can to his startled neighbor. That's the commercial . . . . On one level, the commercial does not propose a transaction at all. It is a thirty-second minidrama that can stand on its own as a piece of film. At no point do any of the actors advocate that television viewers go out and buy Diet Pepsi, no one mentions any of Diet Pepsi's qualities, and the commercial does not disclose the price of Diet Pepsi or where it can be obtained. Extraterrestrial beings who should happen to intercept the commercial as the first transmission from Earth would be unable to discern that Diet Pepsi is a drink sold commercially at a price within reach of the average consumer.

*Id.*

<sup>295</sup> Telephone Interview with Scott Shagin, *supra* note 262. Shagin notes that imbedding a commercial within a movie or television show could conceivably constitute a product placement that “does no more than propose a commercial transaction.” *Id.* Reebok and Tristar Pictures contracted for such an arrangement in *Jerry Maguire*. See *supra* note 198.

that typically are considered commercial without much analysis:<sup>296</sup> to influence commercial decisions and persuade consumers to buy specific goods or services.<sup>297</sup> Thus, although a product placement's proposal may be indirect and slightly attenuated, it is a proposal nonetheless.<sup>298</sup> Like a business purchasing an advertisement in a newspaper or buying commercial time on television, manufacturers paying for product placements are investing money ultimately to increase sales.<sup>299</sup> It is a business proposition, however subtle, creative, and effective it may be. Based on the nature and the motivations of the speaker, the content of the message, and the severability of the commercial components, product placements are commercial speech. This does not end our inquiry, however. In order to judge the constitutionality of any regulation, we must determine the extent to which the government can control product placements.

### B. *The Constitutionality of Governmental Regulation of Product Placements*

There is a decided trend in Supreme Court jurisprudence towards granting commercial speech the highest measure of First Amendment protection.<sup>300</sup> Based on the Court's bifurcated analysis in *44 Liquormart, Inc.*, it seems that the Court is already evaluating restrictions on truthful, nonmisleading commercial speech under strict scrutiny.<sup>301</sup> The repudiation of *Posadas* also indicates that the Court would almost certainly overturn any ban on commercial speech that is premised on a governmental interest of reducing the demand for a lawful product.<sup>302</sup>

With respect to the regulation of product placements, two broad questions arise. First, can the government prohibit certain types of product integration? Second, can the government require mandatory disclosures that a program contains product placements?

Regarding any ban on product placements, *44 Liquormart, Inc.* mandates that the government can prohibit truthful, nonmisleading product placements only when the proposed regulation survives the de-

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<sup>296</sup> There has been a sharp increase in mixed message or hybrid speech, which demands more rigorous and nuanced judicial analyses. Matthew Savare, *The Price of Celebrity: Valuing the Right of Publicity in Calculating Compensatory Damages*, 11 UCLA ENT. L. REV. 129 (2004). For an example of a case involving mixed message speech, see *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867 (C.D. Cal. 1999), *rev'd*, 255 F.3d 1180 (9th Cir. 2001).

<sup>297</sup> Telephone Interview with Scott Shagin, *supra* note 262.

<sup>298</sup> Lackey, *supra* note 67, at 283-84.

<sup>299</sup> *Id.*

<sup>300</sup> See *supra* notes 139-140 and accompanying text.

<sup>301</sup> See *supra* note 138 and accompanying text.

<sup>302</sup> See *supra* notes 141-142 and accompanying text.

manding strict scrutiny test.<sup>303</sup> Although product placements tend to promote goods exclusively in a favorable light<sup>304</sup> and may distort reality for the benefit of the advertiser, courts should not deem such content untruthful or misleading. The First Amendment does give marketers a wide creative license, and “advertising which is merely suggestive cannot be declared unconstitutional.”<sup>305</sup> As such, any proposed governmental prohibition of product placements in either motion pictures or television/cable programs should be viewed skeptically and would, in all likelihood, be declared unconstitutional by the Court.

In *44 Liquormart, Inc.*, the Supreme Court also addressed restrictions based on the content of commercial speech:

[O]ur early cases recognized that the State may regulate some types of commercial advertising more freely than other forms of protected speech. Specifically, we explained that the State may require commercial messages to ‘appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive . . . .’<sup>306</sup>

It seems that *44 Liquormart, Inc.* imposes only intermediate scrutiny for regulations requiring commercial speech disclosures, which are intended to prevent consumers from being deceived.<sup>307</sup>

In its complaints to the FCC and the FTC, Commercial Alert alleges that product placements are “stealth advertising” and that the lack of prominent disclosures alerting consumers to this fact deceives viewers.<sup>308</sup> This argument has intuitive appeal, and the demand for certain disclosures may satisfy the four-part intermediate scrutiny test enumerated in *Central Hudson*, which the Court still employs.<sup>309</sup> First, as we have concluded, product placements are commercial speech.<sup>310</sup> Sec-

<sup>303</sup> See *supra* note 125-131, 138 and accompanying text.

<sup>304</sup> Telephone Interview with Ryan Moore, *supra* note 9.

<sup>305</sup> Lavender, *supra* note 67, at 232 (citing Scott Joachim, Note, *Seeing Beyond the Smoke and Mirrors: A Proposal for the Abandonment of the Commercial Speech Doctrine and an Analysis of Recent Tobacco Advertising Regulations*, 19 HASTINGS COMM. & ENT. L.J. 517, 551(1997) and Kozinski & Banner, *supra* note 293, at 627-28).

<sup>306</sup> *44 Liquormart, Inc.*, 517 U.S. at 498 (quoting *Virginia State Bd. of Pharmacy*, 425 U.S. at 772 n.24).

<sup>307</sup> See *supra* note 129 and accompanying text.

<sup>308</sup> FCC Complaint, *supra* note 235, at 1, 4 (stating “Advertisers can puff and tout, and use all the many tricks of their trade. But they must not pretend that their ads are something else.”); FTC Request, *supra* note 235, at 1 (claiming “[T]he failure to disclose the embedded . . . stealth advertising is misleading to viewers . . .”).

<sup>309</sup> Although the *Central Hudson* test has received ample criticism from scholars and from the Supreme Court, it is still the test by which the Court evaluates intermediate scrutiny cases concerning commercial speech and disclosure requirements. See *supra* notes 129-130, 132-136 and accompanying text.

<sup>310</sup> See *supra* notes 263-299 and accompanying text.

ond, because product placements are not misleading<sup>311</sup> and do not concern an illegal activity,<sup>312</sup> they are entitled to First Amendment protection. Third, courts would need to assess if the asserted governmental interest is substantial. If the regulation is based on the goal of reducing demand for a lawful product, courts should strike it down in accordance with the holding in *44 Liquormart, Inc.*<sup>313</sup> If, however, the government justifies the disclosure requirement<sup>314</sup> as essential to preventing consumer deception, courts may find the interest substantial.<sup>315</sup>

Finally, courts must evaluate whether such a disclosure mandate “directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.”<sup>316</sup> Assuming the asserted interest is to make viewers aware that a program contains product placements, disclosure of that fact would directly advance the government’s goal. Commercial Alert contends, however, that current disclosure requirements are insufficient to warn viewers of the impending advertising barrage.<sup>317</sup> The group calls for not only prominent disclosures at the beginning of the program, but also concurrent disclosures as the product is displayed.<sup>318</sup>

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<sup>311</sup> See *supra* notes 304-305 and accompanying text.

<sup>312</sup> An argument could be made that certain product placements could concern an illegal activity. For example, a tobacco company could provide free cigarettes to a studio, which then portrays a child under eighteen smoking. Although such a scenario is possible, it is more likely that the internal self-regulation in both the motion picture and tobacco industries would obviate such a result. The Broadcast Standards and Practices Group would certainly reject such an arrangement on television. Therefore, for the purposes of this analysis, it is assumed that product placements do not concern an illegal activity.

<sup>313</sup> See *supra* notes 141-142 and accompanying text.

<sup>314</sup> The reasoning of *44 Liquormart, Inc.* seems to indicate that a valid disclosure rule could require only that the content creator reveal the existence of product placements in the programs and a listing of the applicable goods and sponsors. In *44 Liquormart, Inc.*, the Supreme Court found unconstitutional a complete ban on advertising information for the purpose of suppressing demand for a lawful product. See *supra* notes 125-131, 141-142 and accompanying text. If we extend the Court’s reasoning slightly, it appears that a disclosure rule ordering the creator to attach a warning label in an entertainment program to “vice” products such as tobacco, alcohol, gambling, fast food, and soda should be deemed unconstitutional as well. Mandating warning labels would be an overt attempt to reduce demand for a lawful product by regulating commercial speech, rather than by direct regulation. Such reasoning was repudiated in *44 Liquormart, Inc.* with respect to complete bans of advertising, and it seems reasonable that courts would apply this logic to mandatory warning labels too. Furthermore, warning labels would not directly advance the government’s interest of informing an unsuspecting public that an entertainment program contained commercial messages.

<sup>315</sup> *44 Liquormart, Inc.*, 517 U.S. at 498.

<sup>316</sup> *Central Hudson*, 447 U.S. at 566.

<sup>317</sup> FCC Complaint, *supra* note 235, at 3-4.

<sup>318</sup> *Id.* at 4.

Such a request seems greater than necessary to effectuate the government's interest, as frequent disclosures will interrupt the flow of the program and create disincentives for product placements, which is not the goal of the regulation. Instead of concurrent disclosures, and before the government becomes involved in the issue, the MPAA,<sup>319</sup> NAB,<sup>320</sup> NCTA,<sup>321</sup> and other self-regulatory agencies should partner with consumer groups like Commercial Alert to develop alternative, less obtrusive solutions. One potential compromise could be the creation of an additional rating that alerts viewers to the nature and extent to which the forthcoming program contains product placements.<sup>322</sup> Such a rating would assist parents who are concerned that their children are exposed to too many commercial messages<sup>323</sup> and would alert unsuspecting viewers that the program they are about to watch contains product placements. The rating could be displayed in publications like TV Guide, in movie trailers, at the outset of the film or program, after commercial breaks, and in other fora that the parties determine would be useful in assisting viewers. This proposal's virtue is that it satisfies the goal of full disclosure without distracting viewers; if individuals want to assess the contents of a particular program, they will now have enough information to make an informed decision. This suggestion's downside is that it risks diluting the other ratings that are displayed on the screen already. The purpose of offering this suggestion is not to imply that it is the best solution to solving the product placement question, but only that many potential resolutions exist.

In sum, courts would probably find a complete ban on product placements to be unconstitutional. Similarly, a restriction on product placements based on a desire to reduce the demand for a lawful product also seems to violate the First Amendment. A regulation that requires adequate disclosures may be permissible, however, if the government bases its reasoning on a substantial interest, creates a policy that directly advances that goal, and frames the rule as narrowly and precisely as possible to effectuate that asserted interest. The proposed rating solution or a similar voluntary measure may obviate the need for

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<sup>319</sup> See *supra* note 39.

<sup>320</sup> See *supra* note 50.

<sup>321</sup> See *supra* note 51.

<sup>322</sup> Such a rating system could be based on the content of the product placement, e.g., contains product placements for fast food, alcohol, gambling, etc.; the number of placements in the program, e.g., HC could be highly commercial for programs that contain over ten product placements; or some variation thereof.

<sup>323</sup> Various consumer interest groups, such as Consumers Union, have expressed such a concern. See, e.g., Consumers Union, *Captive Kids: A Report on Commercial Pressures on Kids at School*, at <http://www.consumersunion.org/other/sellingkids/summary.htm> (last visited Apr.12, 2004).

government involvement. Should such self-regulation fail to materialize, however, the government seems to have the constitutional power to demand disclosures of product placements.

Aside from these regulatory matters, there are two other significant issues involving product placements, neither of which has received any scholarly commentary. The first concerns how product placements affect an actor's right of publicity. The second involves how product placements, particularly ones digitally inserted after the completion of a show, impact the creative control rights of writers and directors. Both of these issues are examined in the following section.

## V. PRODUCT PLACEMENTS AND THE CREATIVE COMMUNITY: DOES THE SHOW REALLY COME BEFORE THE BIZ?

### A. *Product Placements and the Right of Publicity*

The right of publicity is a nascent doctrine, evolving from the right of privacy.<sup>324</sup> The leading authority on the right of publicity, Thomas McCarthy, has defined it as the "inherent right of every human being to control the *commercial* use of his or her identity."<sup>325</sup> Although this description appears straightforward, the doctrine has been plagued with confusion and uncertainty since it was first recognized in 1953.<sup>326</sup> Much of this confusion arises because there is no federal statute governing the right of publicity;<sup>327</sup> it is a state-based right with significant variations

<sup>324</sup> For an in-depth treatment of this evolution, see Savare, *supra* note 296, at 132.

<sup>325</sup> J. THOMAS MCCARTHY, *THE RIGHT OF PUBLICITY AND PRIVACY*, § 1:3, at 1-2.1 (2d ed. 2002) (emphasis added). There is a judicial split as to whether noncelebrities enjoy a right of publicity. *Id.* § 4:16, at 4-19. The majority view is that the right exists for celebrities and noncelebrities alike. *Id.*

<sup>326</sup> The first case in which a court expressly recognized a distinct right of publicity was *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953). In his now famous opinion in *Haelan*, Judge Frank stated:

We think that, in addition to and independent of that right of privacy . . . a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross,' i.e., without an accompanying transfer of a business or of anything else . . . . This right might be called a 'right of publicity.'

*Id.* at 868.

<sup>327</sup> Many commentators have recommended that the federal government adopt a unifying federal statute to ameliorate the confusion and abrogate the conflicts among the various state laws. See, e.g., Eric J. Goodman, *A National Identity Crisis: The Need For A Federal Right Of Publicity Statute*, 9 J. ART & ENT. LAW 227, 245 (1999); Symposium, *Rights of Publicity: An In-Depth Analysis of the New Legislative Proposals to Congress*, 16 CARDOZO ARTS & ENT. L.J. 209 (1998); Richard S. Robinson, *Preemption, The Right of Publicity, and a New Federal Statute*, 16 CARDOZO ARTS & ENT. L.J. 183, 183 (1998); J. Eugene Salomon, Jr., *The Right of Publicity Run Riot: The Case for a Federal Statute*, 60 S. CAL. L. REV. 1179, 1179 (1987).

between the laws of the different states.<sup>328</sup> Twenty-eight states currently recognize a right of publicity, ten solely by statute,<sup>329</sup> ten solely by common law,<sup>330</sup> and eight by a combination of the two.<sup>331</sup> Additionally, the Restatement of Unfair Competition endorses the doctrine.<sup>332</sup>

There are wide variations among the states as to what constitutes a right of publicity.<sup>333</sup> Notwithstanding these distinctions, the Restatement of Unfair Competition holds that the right of publicity is violated when an individual or entity “appropriates the commercial value of . . . [the] person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade . . . .”<sup>334</sup> Many cases have demonstrated the extent to which courts are willing to protect a celebrity’s right of publicity.<sup>335</sup>

<sup>328</sup> Some of these major differences include the duration, descendibility, scope, and remedial measures of the right. Savare, *supra* note 296.

<sup>329</sup> The states that establish a right of publicity solely by statute are: Indiana (IND. CODE ANN. § 32-36-1-1-20 (Michie 2002)); Massachusetts (MASS. GEN. LAWS ANN. ch. 214, § 3A (West 2002)); Nebraska (NEB. REV. STAT. § 20-201-211 (2002)); Nevada (NEV. REV. STAT. ANN. § 597.770-597.810 (Michie 2002)); New York (N.Y. CIV. RIGHTS LAW § 50, 51 (McKinney 2002)); Oklahoma (OKLA. STAT. ANN. tit. 21, § 839.1-2 (West 2001)); Rhode Island (R.I. GEN. LAWS § 9-1-28-29.1 (2001)); Tennessee (TENN. CODE ANN. § 47-25-1101-1108 (2001)); Virginia (VA. CODE ANN. § 8.01-40 (Michie 2002)); and Washington (WASH. REV. CODE ANN. § 63.60.010-080 (West 2002)).

<sup>330</sup> The states that recognize a right of publicity exclusively by common law are: Arizona, Alabama, Connecticut, Georgia, Hawaii, Michigan, Minnesota, Missouri, New Jersey, and Pennsylvania. McCARTHY, *supra* note 325, § 6:4, at 6-9-11.

<sup>331</sup> The states that have both a statutory and common law right of publicity are: California (CAL. CIV. CODE § 3344-3344.1 (West 2002)); Florida (FLA. STAT. ANN. § 540.08 (West 2002)); Illinois (765 ILL. COMP. STAT. 1075/1-60 (2002)); Kentucky (KY. REV. STAT. ANN. § 391.170 (Michie 2001)); Ohio (OHIO REV. CODE ANN. § 2741.01-09 (Anderson 2000)); Texas (TEX. PROP. CODE ANN. § 26.001-15 (Vernon 2000)); Utah (UTAH CODE ANN. § 45-3-1-3-6 (2002)); and Wisconsin (WIS. STAT. ANN. § 895.50 (West 2001)).

<sup>332</sup> RESTATEMENT (THIRD) OF THE LAW OF UNFAIR COMPETITION, § 46 (1995) (hereinafter RESTATEMENT).

<sup>333</sup> For example, several states, such as Kentucky, limit the right’s scope to “name and likeness.” KY. REV. STAT. ANN. § 391.170. New York protects an individual’s “name, portrait, picture, or voice.” N.Y. CIV. RIGHTS LAW § 51. California affords a bit broader protection, defending a person’s “name, voice, signature, photograph, or likeness.” CAL. CIV. CODE § 3344. Indiana offers the nation’s broadest protection, guarding a “personality’s property interest” in his “name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, and mannerisms.” IND. CODE ANN. § 32-36-1-7.

<sup>334</sup> RESTATEMENT, *supra* note 332, § 46.

<sup>335</sup> See, e.g., *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992). In *White*, Samsung created a series of advertisements that depicted its consumer electronics equipment being used in the twenty-first century. *Id.* at 1396. The disputed advertisement portrayed a robot, dressed to look like Vanna White, beside a game board resembling the Wheel-of-Fortune, with the caption “Longest-running game show. 2012 A.D.” *Id.* *White* sued Samsung for violating, *inter alia*, her statutory and common law right of publicity under California law. *Id.* The Ninth Circuit reversed the district court’s grant of summary judgment to Samsung, stating that it “decline[s] Samsung and Deutch’s invitation to permit the evisceration of the common law right of publicity through means as facile as those in this

Such a broad interpretation is not necessary to implicate an actor's right of publicity in the context of product placements. According to industry insiders, one of the most prominent features of product integration is its ability to create an "indirect celebrity endorsement."<sup>336</sup> As noted, the right of publicity protects an individual from the commercial misappropriation of his identity.<sup>337</sup> Because we have already concluded that product placements are commercial speech,<sup>338</sup> it follows logically that an actor's right of publicity can be misappropriated when such speech is integrated into entertainment programming.

Generally, these concerns are obviated by contract<sup>339</sup> or by the actor's refusing to wear or use a product on-screen.<sup>340</sup> Although there have been no documented instances of an actor quitting a production or suing for misappropriation of his right of publicity over a product placement,<sup>341</sup> the potential for such problems exist. First, studios or production companies do not have all their product placement deals in place before they hire talent.<sup>342</sup> As such, when actors sign their contracts, they may not necessarily know what products they will be "indirectly endorsing." Second, although some actors have consultation and

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case." *Id.* at 1399. Despite a vitriolic dissent by Judge Kozinski, the court's broad interpretation of the appropriate scope of White's right of publicity stood. *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512 (9th Cir. 1993) (Kozinski, J., dissenting). Kozinski lamented:

I can't see how giving White the power to keep others from evoking her image in the public's mind can be squared with the First Amendment. Where does White get this right to control our thoughts? The majority's creation goes way beyond the protection given a trademark or a copyrighted work, or a person's name or likeness. All those things control one particular way of expressing an idea, one way of referring to an object or a person. But not allowing *any* means of reminding people of someone? That's a speech restriction unparalleled in First Amendment law.

*Id.* at 1519 (emphasis in original).

<sup>336</sup> See *Feature This!, Celebrity Endorsement*, at [http://www.featurethis.com/celeb\\_endrs.html](http://www.featurethis.com/celeb_endrs.html) (last visited Apr. 12, 2004) (stating: "The cost of celebrity endorsements is usually exorbitant and many celebrities refrain from such activities. However, product exposures act as implied celebrity endorsements [sic]. Whatever and [sic] actor or actress is wearing or using or driving is seen as a statement of preference of choice by the viewing consumer [sic]."). Mary Moore, Cadillac's promotions manager, also emphasizes the importance of celebrities in product placement deals: "[Hollywood's creative community] needs to be open to non-traditional promotional ideas. We don't want images of talent unless they're linked to our product." Graser, *supra* note 169, at 61.

<sup>337</sup> See *supra* notes 325 and accompanying text.

<sup>338</sup> See *supra* notes 263-299 and accompanying text.

<sup>339</sup> Telephone Interview with Ryan Moore, *supra* note 9; Telephone Interview with Georgia Kacandes, *supra* note 166.

<sup>340</sup> Telephone Interview with Ryan Moore, *supra* note 9; Telephone Interview with Sandy Wernick, *supra* note 167; Claire Atkinson, *Merger of Advertising and Content Worries Consumers*, ADAGE.COM, Jan. 6, 2003, at <http://www.adage.com/news.cms?newsId=36828> (last visited Apr. 12, 2004).

<sup>341</sup> Telephone Interview with Sandy Wernick, *supra* note 167.

<sup>342</sup> Telephone Interview with Georgia Kacandes, *supra* note 166.

approval rights with respect to product placements, such power is typically reserved for A-list talent.<sup>343</sup> It is “very rare” for mid-range or aspiring actors to secure such broad rights, since studios and production companies wish to maintain as much control and flexibility as possible.<sup>344</sup>

Finally, the most vexing issue concerns “virtual advertising,” where product placements are inserted digitally into syndicated television shows and previously released motion pictures.<sup>345</sup> As noted, negotiating consultation and approval rights for product placements included in the original program is extremely difficult.<sup>346</sup> Absent such formal contractual power, however, actors still maintain a certain degree of control because they are either present during the filming or aware of what products are being displayed. This type of contemporaneous creation permits actors to veto or at least object to the product placement. After the program has been completed, however, actors are seemingly powerless to prevent the digital alteration or insertion of a product, unless they have the “clout” to secure broad approval powers and the foresight to prevent future digital alterations. Thus, virtual product placements diminish actors’ ability to control their image and, absent contractual terms to the contrary, may infringe upon their right of publicity, if the content owner does not obtain the actors’ permission

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<sup>343</sup> *Id.* (“Box office receipts drive the film industry. Stars drive box office receipts. So, the bigger the star, the more clout an actor has to control his image.”). *Id.* Telephone Interview with Ryan Moore, *supra* note 9 (“A-list actors have enormous control of their image and will approve or disapprove all decisions. They have say one hundred percent of the time regarding all creative decisions that affect their image, unless the producer or director is a super ‘A++’ producer or director.”).

<sup>344</sup> Telephone Interview with Georgia Kacandes, *supra* note 166.

<sup>345</sup> Stuart Elliott, *Reruns May Become a Testing Ground for Digital Insertion of Sponsor’s Products and Images*, N.Y. TIMES, May 23, 2001, at C6; WEILER, *supra* note 44, at 495.

PVI Virtual Media Services pioneered and patented the technology enabling such virtual advertising. Richard Natale, *The Surreal Thing: Use of Computer Graphic in Product Placement*, L.A. MAGAZINE, Sept. 1999, available at [http://www.findarticles.com/cf\\_0/m1346/9\\_44/55588124/p1/article.jhtml](http://www.findarticles.com/cf_0/m1346/9_44/55588124/p1/article.jhtml) (last visited Apr. 12, 2004). PVI claims that its Virtual Product Integration technology offers “branding opportunities never before possible.” PVI, at <http://www.pvi-inc.com/pvi/index.html> (last visited Apr. 12, 2004).

There are at least two reasons why the owners of entertainment programming would utilize virtual advertising. First, some low-budget motion pictures, which did not garner any product placement deals, may become financial successes after their release, attracting various bidders. WEILER, *supra* note 44, at 495. Second, fundamental variations among audiences may warrant the exploitation of different products in different prints. *Id.* For example, the primary market for theater audiences is young males; the target group for home videos is middle-aged women; and there are distinctions between people from different continents. *Id.* “Thus, from the point of view of the firms on both sides, it may be economically rational to have different products and brand names built into different prints being sent to these various viewer settings.” *Id.*

<sup>346</sup> See *supra* notes 343-344.

before digitally inserting a product into a program in order to create an “indirect celebrity endorsement.”

Therefore, there are several considerations that astute managers and agents should address in order to protect and maximize the value of their actors’ right of publicity. First, although it will certainly be difficult to secure for their mid-range or aspiring actors, managers and agents must bargain for broad consultation and approval rights. It is often overlooked that there is tremendous value in the proper management of a celebrity’s right of publicity.<sup>347</sup> Endorsing or indirectly endorsing a product may reduce a celebrity’s publicity value, conflict with an existing contractual obligation, or preclude that celebrity from making other lucrative deals.<sup>348</sup> Therefore, an actor’s business team must be vigilant of not only obvious commercial endorsements, but also indirect ones such as product placements.<sup>349</sup>

Second, assuming there will be continued growth in virtual product placements,<sup>350</sup> an actor’s business team should negotiate for approval rights with respect to not only the initial production, but also any future product alterations or insertions. Failure to consider such a scenario could leave disgruntled actors with no contractual rights, rendering costly litigation as the only option to protect their persona. Because

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<sup>347</sup> Interview with Scott Shagin, *Esquire*, in Newark, N.J. (Feb. 11, 2003).

<sup>348</sup> *Id.* For example, many bands will not appear on “Pepsi Smash” because they do not want to be associated with such a commercial program, and it conflicts with their other sponsorship deals. Telephone Interview with Sandy Wernick, *supra* note 167.

<sup>349</sup> Telephone Interview with Sandy Wernick, *supra* note 167. Wernick, a long-time manager of A-list talent, recites an extensive list of actors who refuse to do product placements. *Id.* He also stresses the importance of protecting his clients’ publicity value by preventing such indirect endorsements. *Id.* First, he avers that there have been many instances in which he has advised clients not to participate in product placements. *Id.* His most recent example concerned a show that was to be produced by an A-list producer and aired on the WB. *Id.* The program was to be a variety show with the talent performing in front of a huge advertising backdrop. *Id.* Upon hearing the idea for the show, Wernick called the producer to inform him that none of Brillstein-Grey’s talent would appear on the show, due to its overt commercial nature. *Id.* Second, he emphasizes that managers must be cognizant of product placements occurring outside of entertainment programming, which also imply endorsement. *Id.* For example, Wernick instructs press agents to guide his clients away from commercial backdrops and logos before they are photographed at opening night premieres. *Id.* Additionally, he objects to his clients being interviewed in front of commercial backdrops at awards shows. *Id.*

<sup>350</sup> Although leading syndicators deny employing virtual product placements, James Green, the chief executive of PVI Virtual Media Services, claims his company has digitally inserted products into reruns of top television sitcoms and dramas. Peter Kafka, *Spot the Spot: Reruns Add New Product Placement*, *FORBES*, Nov. 10, 2003, at 68, available at <http://www.forbes.com/forbes/2003/1110/068.html> (last visited Apr. 12, 2004). According to Green, the syndicators have put a gag on his releasing the names of the specific shows and the identities of his customers. *Id.* Such confidential arrangements make it difficult to determine exactly how pervasive virtual product placements are in the television industry.

virtual advertising is viable, both financially and technologically, agents and managers should consider it during initial negotiations.

Third, the current structural environment in the entertainment industry is rife with potential conflict of interest issues. Many companies, such as Brillstein-Grey Entertainment, have management and production divisions.<sup>351</sup> When a producer also represents an actor, a possibility exists for a conflict of interest, especially when millions of dollars could be at stake for lucrative product placement deals. Although reputable companies such as Brillstein-Grey manage such conflicts—by obtaining the actor's informed consent, executing written agreements with disinterested third parties, and conducting all deals at an arm's length<sup>352</sup>—it is arguable that not all entertainment companies would be as scrupulous. Actors, managers, and agents must be aware of potential conflicts of interest, particularly with respect to product placements. Studios and production companies have a vested interest in exploiting product placements to reduce their negative costs,<sup>353</sup> sometimes this goal may conflict with an actor's desire to manage his right of publicity in an effective and systematic manner.

Finally, and perhaps most importantly, agents and managers should request some form of compensation from either the marketer or the studio or production company for any product placements involving their actors. As was the case regarding consultation and approval rights, A-list actors often receive compensation for product placements involving their persona,<sup>354</sup> while mid-range or aspiring actors generally receive nothing.<sup>355</sup> As Ryan Moore suggests, however: "Actors should get whatever they can get. They should strive for the best terms they can secure on every deal. If their persona brings the deal to the table, they should receive part of the proceeds."<sup>356</sup> Thus, effective representatives should bargain for some compensation for their clients, even if the actor is not yet considered A-list talent. This is true particularly

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<sup>351</sup> Telephone Interview with Sandy Wernick, *supra* note 167.

<sup>352</sup> *Id.*

<sup>353</sup> See *supra* note 168 and accompanying text.

<sup>354</sup> Such compensation includes money, free goods, and guaranteed promotional support for the motion picture or television show. Because many A-list actors receive a percentage of the film's gross revenue, promotional support is oftentimes the most significant form of compensation. Telephone Interview with Ryan Moore, *supra* note 9; Telephone Interview with Georgia Kacandes, *supra* note 166.

<sup>355</sup> Telephone Interview with Ryan Moore, *supra* note 9.

<sup>356</sup> *Id.*

when a product placement deal is secured because there is a “good fit” between the brand and the actor.<sup>357</sup>

### B. *Product Placements and Creative Control*<sup>358</sup>

Under the prevailing business and legal environment of the motion picture industry, the creative community<sup>359</sup> has very little control over the final edit of a movie or any adaptations made regarding its commercial exploitation.<sup>360</sup> Although the Copyright Act generally bestows initial ownership of the work to the actual author,<sup>361</sup> both the 1909 and 1976 Copyright Acts include exceptions for works made for hire,<sup>362</sup> which are works prepared by an employee within the scope of his employment or specially commissioned.<sup>363</sup> Unless the parties have expressly agreed in writing to the contrary, the employer or person for whom the work was prepared owns the copyright of such works made for hire.<sup>364</sup> By denying copyright protection to individuals who would otherwise qualify as “authors” under the Copyright Act, the works made for hire doctrine “severs the relationship between the creator and his work . . . .”<sup>365</sup>

The Copyright Act expressly includes motion pictures as one of the nine categories of works that can be designated a work made for hire.<sup>366</sup> Producers and studios, aware that “[o]wnership of United States films is based on contract[,]”<sup>367</sup> uniformly insert terms into their

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<sup>357</sup> *Id.* Moore acknowledges, however, that there is an extremely low probability of non-A-List actors negotiating a portion of placement deals because they are generally happy to have found work. *Id.*

<sup>358</sup> Although this section concerns creative control issues as they relate to motion pictures, the logic and reasoning apply equally to television and cable productions. Exhaustive analyses of the specific business, creative, and legal elements of these industries are beyond the scope of this paper, however.

<sup>359</sup> For the purposes of this section, “creative community” is limited to screenwriters and principal directors. For an explanation why the term is so defined, see *infra* notes 444-445 and accompanying text.

<sup>360</sup> John M. Kernochan, *Ownership and Control of Intellectual Property Rights in Motion Pictures and Audiovisual Works: Contractual and Practical Aspects—Response of the United States to the ALAI Questionnaire, ALAI Congress, Paris, Sept. 20, 1995*, 20 COLUM.-VLA J.L. & ARTS 379, 384 (1996).

<sup>361</sup> 17 U.S.C. § 201(a) (1982).

<sup>362</sup> Craig A. Wagner, Note, *Motion Picture Colorization, Authenticity, and the Elusive Moral Right*, 64 N.Y.U. L. REV. 628, 654 (1989). See 17 U.S.C. § 201(b); Act of July 30, 1947, ch. 391, §26, 61 Stat. 652, 659-60 (amending Copyright Act of 1909, ch. 320, 35 Stat. 1075).

<sup>363</sup> 17 U.S.C. § 101.

<sup>364</sup> *Id.* § 201(b).

<sup>365</sup> Wagner, *supra* note 362, at 654.

<sup>366</sup> 17 U.S.C. § 101.

<sup>367</sup> Kernochan, *supra* note 360, at 382.

contracts rendering the film a work made for hire.<sup>368</sup> As such, production companies or studios are considered “authors” under the work made for hire doctrine, which invariably grants them not only ownership in a motion picture’s copyright,<sup>369</sup> but also sole creative control of its final edit and future alterations.<sup>370</sup> As one commentator laments:

United States copyright law does not recognize the filmmaker as a creative author and denies him any interest in the motion picture copyright. Unless the filmmaker can obtain artistic rights through contract, the owner of the rights in the work can authorize any change . . . irrespective of the wishes of the various collaborators who created the film.<sup>371</sup>

Due to the creative community’s lack of copyright ownership in the motion picture, the primary way in which its members can secure artistic control is via contract.<sup>372</sup> The superior bargaining power of the studios and production companies has stymied such negotiations, however.<sup>373</sup> Although the Directors Guild of America (DGA)<sup>374</sup> and the Writers Guild of America (WGA)<sup>375</sup> have secured modest creative rights for its constituencies,<sup>376</sup> such privileges have not transferred artistic control to their members in a meaningful way. For example, although the DGA’s Basic Agreement entitles directors to a “right of consultation” with respect to certain alterations,<sup>377</sup> “[t]he Employer’s decision in all business and creative matters shall be final . . . .”<sup>378</sup>

<sup>368</sup> See *id.* at 386; Wagner, *supra* note 362, at 655-56.

<sup>369</sup> Wagner, *supra* note 362, at 656.

<sup>370</sup> Kernochan, *supra* note 360, at 384; Wagner, *supra* note 362, at 656.

<sup>371</sup> Wagner, *supra* note 362, at 656.

<sup>372</sup> *Id.*

<sup>373</sup> *Id.* at 658-59 (“While a few filmmakers have achieved celebrity status and can therefore exert greater pressure at the bargaining table, those without such name recognition cannot afford to risk losing employment by insisting on some measure of artistic control.”).

<sup>374</sup> The DGA is a labor union, which represents over 12,700 directors. Welcome to the Directors Guild of America, at <http://www.dga.org/index2.php3> (last visited Apr. 12, 2004). The primary purpose of the DGA is “to protect directorial teams’ legal and artistic rights, contend for their creative freedom, and strengthen their ability to develop meaningful and credible careers.” *Id.*

<sup>375</sup> The WGA is a labor union representing “writers in the motion picture, broadcast, cable and new technologies industries.” Writers Guild of America, at [http://www.wga.org/thewga\\_index.html](http://www.wga.org/thewga_index.html) (last visited Apr. 12, 2004).

<sup>376</sup> See Directors Guild of America Basic Agreement, arts. 7, 8 [hereinafter DGA BA]; Writers Guild of America Basic Agreement, art. 8 [hereinafter WGA BA].

<sup>377</sup> DGA’s Basic Agreement provides:

The Employer shall consult with the Director with respect to coloring, time compression and expansion, changes in the exhibition of the aspect ratio (e.g., “panning and scanning”) and changes to allow exhibition in three dimensions made to a theatrical motion picture after delivery of the answer print. The Director’s services in connection with such consultation shall be provided at no cost to the network or Employer or distributor.

DGA BA, art. 7, § 513.

<sup>378</sup> *Id.* at § 1501.

Guild agreements are only minimum protections afforded by collective bargaining, however; the parties are free to negotiate additional terms.<sup>379</sup> Typically, the parties do not negotiate such additional terms, and filmmakers' employment contracts expressly grant all rights in the motion picture, including final authority on all creative decisions, to the producer.<sup>380</sup> Absent an express reservation of rights by the creators, the "copyright owner's control over the property is virtually unrestricted."<sup>381</sup> Even in the rare instances where filmmakers are able to negotiate a degree of creative control, they may still be precluded from preventing postproduction modifications.<sup>382</sup>

That the existing copyright laws and business climate virtually preclude artists from exerting artistic control has motivated many commentators to advocate that the United States adopt moral rights protection for the creative community.<sup>383</sup> Moral rights "confer on the artist a set of entitlements that relate to how his works are treated, presented, displayed, and otherwise utilized after he has relinquished title over the physical objects in which those works are embodied."<sup>384</sup> Such rights are generally divided into four categories.<sup>385</sup> First, the right of disclosure empowers the author to determine when a work should or should not be published.<sup>386</sup> Second, the right of withdrawal permits an author to withdraw or modify a work that has already been made public.<sup>387</sup> Third, the right of paternity entitles the author to be acknowl-

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<sup>379</sup> Stuart K. Kauffman, Note, *Motion Pictures, Moral Rights, and the Incentive Theory of Copyright: The Independent Film Producer as "Author,"* 17 CARDOZO ARTS & ENT. L.J. 749, 785 (1999).

<sup>380</sup> Wagner, *supra* note 362, at 659.

<sup>381</sup> *Id.* at 659-60.

<sup>382</sup> *Id.* at 660 ("Courts have typically construed these contractual provisions narrowly to the detriment of the artist."). See, e.g., *Preminger v. Columbia Pictures Corp.*, 267 N.Y.S.2d 594, *aff'd*, 269 N.Y.S.2d 913, *aff'd*, 18 N.Y.2d 659 (N.Y. 1966) (denying injunction against distributor based on determination that director's right of final approval only applied to the film's theatrical release and not to any subsequent television broadcasts).

<sup>383</sup> See, e.g., Wagner, *supra* note 362, at 634 (claiming that "the most plausible means to ensure the artistic integrity of motion pictures is through the adoption of a federal system of creative rights within the existing structure of copyright law."); Kernochan, *supra* note 360, at 448 (arguing "at least some creative contributors should have the right to object to, or bar, uses that are likely to result in . . . gravely compromising the integrity of a film . . ."); Kauffman, *supra* note 379, at 749-50 (petitioning for the recognition of moral rights protection for independent film producers); Matthew J. McDonough, Note, *Moral Rights and the Movies: The Threat and Challenge of the Digital Domain*, 31 SUFFOLK U. L. REV. 455, 474-78 (1997) (proposing a grant of the moral right of integrity to directors and screenwriters).

<sup>384</sup> Burton Ong, *Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights*, 26 COLUM. J.L. & ARTS 297, 298 (2003).

<sup>385</sup> McDonough, *supra* note 383, at 466.

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

edged as the creator of a work and to disclaim authorship.<sup>388</sup> Finally, and most germane to our analysis, the right of integrity “protect[s] the originality, purity, authenticity, continuity, and coherence of the artist’s personal aesthetic vision as it is embodied in his work by empowering him with the ability to restrain subsequent owners from making prejudicial alterations to it.”<sup>389</sup>

Despite numerous attempts by filmmakers, Congress has not adopted moral rights protections for these creators.<sup>390</sup> In 1988, the United States became a signatory to the Berne Convention,<sup>391</sup> which requires:

Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor and reputation.<sup>392</sup>

Despite the treaty’s clear mandate for member nations to recognize an author’s rights of paternity and integrity, Congress, in enacting the implementing legislation, stated that our nation’s adherence to Berne did not require an expansion of artists’ moral rights.<sup>393</sup> Thus, compliance with Berne “does little to bolster the efforts of filmmakers to secure moral rights protection for motion pictures.”<sup>394</sup>

Congress did grant moral rights protection to certain content creators in the Visual Artists Rights Act (VARA) of 1990.<sup>395</sup> Although VARA provides visual artists with both paternity and integrity moral rights,<sup>396</sup> the Copyright Act expressly excludes motion pictures from its definition of a “work of visual art.”<sup>397</sup> Thus, VARA does not offer filmmakers any moral rights protection. Commentators who had hoped Berne and VARA would usher in an era of artistic control for the creative community expressed frustration and highlighted the political power of the studios at maintaining the status quo.<sup>398</sup>

<sup>388</sup> *Id.*

<sup>389</sup> Ong, *supra* note 384, at 301.

<sup>390</sup> Helen K. Geib, Comment, *Classic Films and Historic Landmarks: Protecting America’s Film Heritage from Digital Alteration*, 33 J. MARSHALL L. REV. 185, 193 (1999).

<sup>391</sup> *Id.*

<sup>392</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886 (Paris text 1971), art. 6bis [hereinafter Berne Convention].

<sup>393</sup> Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified as amended in 17 U.S.C. *passim*), at § 3.

<sup>394</sup> McDonough, *supra* note 383, at 472.

<sup>395</sup> 17 U.S.C. § 106A (1994).

<sup>396</sup> *Id.* § 106A (a)(1)-(3).

<sup>397</sup> 17 U.S.C. § 101.

<sup>398</sup> See, e.g., McDonough, *supra* note 383, at 474 (“The largely ceremonial joining of the Berne convention [sic], coupled with the exclusion of motion pictures from the protection of

In addition to these two setbacks, there have also been several failed legislative efforts to create moral rights protection for filmmakers. First, the Film Integrity Act of 1987<sup>399</sup> proposed to grant the “artistic authors,” defined as the principal director and screenwriter, the power to approve or reject a “material alteration” of a published motion picture.<sup>400</sup> Changes made without the written consent of these artistic authors would render the altered work uncopyrightable.<sup>401</sup> Second, the Film Disclosure Act of 1991<sup>402</sup> was introduced to amend section 43 of the Lanham Act<sup>403</sup> to require that any “materially altered theatrical motion picture” contain a label that “clearly and conspicuously” discloses “[t]hat the film has been materially altered from the form in which it was first released to the public . . . ; [t]he nature of that alteration . . . [; and t]he fact of objection, if any, by the artistic authors of the motion picture to any such alteration.”<sup>404</sup> Finally, the Theatrical Motion Picture Authorship Act of 1995<sup>405</sup> recommended the addition of section 106B to the Copyright Act, immediately following VARA.<sup>406</sup> The bill proposed the recognition of both paternity and integrity rights to the motion picture’s principal director, screenwriter, or cinematographer.<sup>407</sup> Although the film’s economic rights would still reside with the copyright owner, the proposed integrity rights would grant the artistic authors “noneconomic interests” to “prevent any intentional distortion, mutilation, or other modification of that motion picture which would be prejudicial to his or her honor or reputation.”<sup>408</sup>

Congress did pass the National Film Preservation Act of 1988 (NFPA)<sup>409</sup> in an attempt to protect classic American films. The NFPA authorized the creation of a National Film Preservation Board and National Film Registry under the direction of the Library of Congress.<sup>410</sup> The Board was chartered to select 25 films each year, which were at least ten years old, that it deemed to “represent an enduring part of our

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the Visual Artists’ Rights Act of 1990, demonstrates congressional resistance to filmmakers’ claims for moral rights and serves as testimony to the power of the studio lobby.”)

<sup>399</sup> H.R. 2400, 100th Cong. (1st Sess. 1987).

<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

<sup>402</sup> H.R. 3051, 102d Cong. (1st Sess. 1991).

<sup>403</sup> 15 U.S.C. §§ 1051-1141n (1946). Section 43 of the Lanham Act concerns false designations of origin and false advertising.

<sup>404</sup> H.R. 3051, *supra* note 402.

<sup>405</sup> H.R. 1244, 104th Cong. (1st Sess. 1995).

<sup>406</sup> *Id.*

<sup>407</sup> *Id.*

<sup>408</sup> *Id.*

<sup>409</sup> 2 U.S.C. §§ 178-178l (1988) (repealed 1992).

<sup>410</sup> *Id.* § 178a-178b.

Nation's historical and cultural heritage."<sup>411</sup> Films that the Board selected and registered could be shown even if "materially altered," but must contain a label, if true, stating: "This is a materially altered version of the film originally marketed and distributed to the public. It has been altered without the participation of the principal director, screenwriter, and other creators of the original film."<sup>412</sup> Similarly, black-and-white films that had been colorized must carry the label: "This is a colorized version of the film originally marketed and distributed to the public in black-and-white. It has been altered without the participation of the principal director, screenwriter, and other creators of the original film."<sup>413</sup>

The NFPA expired on September 27, 1991<sup>414</sup> and was repealed by the National Film Preservation Act of 1992,<sup>415</sup> which continued the Board for four more years, but did not include the labeling requirements mandated in the 1988 Act. After the 1992 Act expired on June 26, 1996, the 1996 Act reauthorized the Board for seven years and created the National Film Preservation Foundation.<sup>416</sup> Although the NFPA of 1988 did provide a small measure of protection during the three years it contained the labeling requirements, one critic derided it as a "fundamentally toothless law, totally ineffectual in addressing moral rights and producing little more than an elaborate apparatus for naming an annual list of 'national treasures.'"<sup>417</sup>

Cognizant that the laws of the United States did not adequately protect filmmakers' moral rights,<sup>418</sup> commentators have proposed that other legal theories could guard these same interests.<sup>419</sup> Such alternate approaches include a combination of libel law, right of publicity, right

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<sup>411</sup> *Id.* § 178.

<sup>412</sup> *Id.* § 178c(d)(1)(A).

<sup>413</sup> *Id.* § 178c(d)(2)(A).

<sup>414</sup> NFPB Factsheet, at <http://www.loc.gov/film/facts.html> (last visited Apr. 12, 2004).

<sup>415</sup> 2 U.S.C. §§ 179-179k (1992).

<sup>416</sup> NFPB Factsheet, *supra* note 414.

<sup>417</sup> Gary R. Edgerton, *The Germans Wore Gray, You Wore Blue*, J. POPULAR FILM AND TELEVISION (2000), available at [http://www.findarticles.com/cf\\_0/m0412/4\\_27/59599089/p1/article.jhtml?term=capra@olorization](http://www.findarticles.com/cf_0/m0412/4_27/59599089/p1/article.jhtml?term=capra@olorization) (last visited Apr. 12, 2004).

<sup>418</sup> Although there are several states that recognize artists' moral rights, the statutes do not provide adequate protection for filmmakers. Wagner, *supra* note 362, at 702-06. First, the laws generally emphasize the protection of "fine art." *Id.* at 703. Second, a few of the statutes expressly deny coverage to works of "sequential imagery such as motion pictures." *Id.* Third, the laws universally omit works made for hire. *Id.* Finally, such state laws may not survive a federal preemption challenge. *Id.* at 704.

<sup>419</sup> Wagner, *supra* note 362, at 632.

of privacy, contract law, and the federal trademark statute.<sup>420</sup> These remedies have proved “ill suited” to address creative control issues, however.<sup>421</sup>

In one notable exception, *Gilliam v. American Broadcasting Co.*,<sup>422</sup> the Second Circuit suggested in dicta that aggrieved artists might be able to state a claim under the Lanham Act.<sup>423</sup> In *Gilliam*, the British comedy group, Monty Python, filed suit to enjoin the American Broadcasting Company (ABC) from airing edited versions of three separate programs the troupe originally produced for the British Broadcasting Corporation (BBC).<sup>424</sup> Under its agreement with BBC, Monty Python reserved a large degree of creative control over script alterations, and nothing in the contract permitted BBC to modify a program once it had been recorded.<sup>425</sup> The contract did include a provision entitling BBC to license the recordings overseas.<sup>426</sup>

In 1973, Time-Life Films acquired the right to broadcast the Monty Python series in the United States.<sup>427</sup> Time-Life’s contract empowered it to edit the programs to insert commercials and to comply with applicable censorship rules and time segment requirements.<sup>428</sup> In 1975, ABC obtained from Time-Life the right to broadcast the programs in the United States.<sup>429</sup> Monty Python, unaware of this grant of editing rights, assumed ABC would air the programs in their entirety.<sup>430</sup> After viewing the ABC broadcast, which omitted 24 of the show’s original 90 minutes, Monty Python was “allegedly ‘appalled’ at the discontinuity and ‘mutilation’ that had resulted from the editing done by Time-Life for ABC.”<sup>431</sup> Unable to negotiate a suitable compromise, the group sued to enjoin ABC from airing the second special.<sup>432</sup>

In its complaint, Monty Python alleged that the unauthorized editing constituted copyright infringement and a violation of the Lanham Act.<sup>433</sup> The Second Circuit, holding that there was a likelihood the

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<sup>420</sup> *Id.* Wagner concludes that this “hodgepodge of common law tort remedies and the federal trademark statute . . . does not offer the breadth of legal recourse available under the European system of moral right.” *Id.* at 633.

<sup>421</sup> *Id.* at 657-88 (discussing the inadequacy of the various approaches).

<sup>422</sup> 538 F.2d 14 (2d Cir. 1976).

<sup>423</sup> *Id.* at 24-25.

<sup>424</sup> *Id.* at 17.

<sup>425</sup> *Id.*

<sup>426</sup> *Id.*

<sup>427</sup> *Id.*

<sup>428</sup> *Gilliam*, 538 F.2d at 18.

<sup>429</sup> *Id.*

<sup>430</sup> *Id.*

<sup>431</sup> *Id.*

<sup>432</sup> *Id.*

<sup>433</sup> *Id.* at 19, 24.

group would succeed on its infringement claim, granted Monty Python's preliminary injunction.<sup>434</sup> In reaching this holding, the court relied on the facts that the alterations were "substantial" (approximately 27 percent of the original program was deleted) and that the editing "contravened contractual provisions that limited the right to edit Monty Python material."<sup>435</sup>

The court also stated that "American copyright law . . . does not recognize moral rights or provide a cause of action for their violation . . . ."<sup>436</sup> Notwithstanding this assertion, the court stated in dicta that Monty Python might have a claim under the Lanham Act because the edited program misrepresented the group's true talents, which distorted and tarnished their work.<sup>437</sup>

Despite the dicta in *Gilliam*, the Lanham Act has not evolved into a compelling remedy for artists attempting to exert creative control over their works.<sup>438</sup> Thus, the creative community has not been able to secure moral rights through existing copyright law, the Berne Convention, various proposed pieces of legislation, or the aforementioned alternate routes, particularly the Lanham Act. As such, the primary way in which artists can attain such rights is through contract.<sup>439</sup> Standard industry agreements, however, provide that creative contributors waive all claims to moral rights of integrity, leaving artists with little protection.<sup>440</sup>

This lack of artistic control could prove problematic with respect to product placements, particularly virtual advertising inserted after a motion picture's theatrical release. As noted, many individuals in the creative community object to the practice of placing products in their work.<sup>441</sup> It is reasonable to assume that these people would find the insertion of a commercial message into their work subsequent to its initial theatrical release even more egregious. That some contracts pro-

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<sup>434</sup> *Gilliam*, 538 F.2d at 19, 26.

<sup>435</sup> *Id.* at 19.

<sup>436</sup> *Id.* at 24.

<sup>437</sup> *Id.*

<sup>438</sup> Wagner, *supra* note 362, at 684.

<sup>439</sup> Wagner, *supra* note 362, at 657-58; McDonough, *supra* note 383, at 477.

<sup>440</sup> See, e.g., Susan H. Bodine, et al., *Counseling Clients in the Entertainment Industry 2001*, 648 PRACTISING L. INST. 9, 15, 20, 34, 55 (2001) (offering to producers sample contracts in which actors, directors, and writers expressly waive "any rights of droit moral or similar rights" that the artist may have). See also Kernochan, *supra* note 360, at 384-85, 414. Unionized creators generally do not waive rights of attribution, as such rights are controlled by collective bargaining agreements. *Id.* at 414. Some commentators have suggested, however, that contracts purporting to transfer or assign an author's moral rights are unenforceable. McDonough, *supra* note 383, at 466.

<sup>441</sup> See *supra* notes 227-229 and accompanying text.

vide creative contributors rights of consultation and approval has already been established.<sup>442</sup> What remains to be seen, however, is if such contractual language would preclude digital manipulations after the release of a work. Additionally, due to inequalities in bargaining power relative to a production company or studio, most artistic contributors cannot negotiate meaningful creative control.<sup>443</sup>

To safeguard the integrity of creative works and their primary artistic contributors, Congress should implement moral rights legislation that regulates the approval process for authorizing digital alterations to existing works. Although basing such legislation on moral rights is vexing, it is not impossible. First, commentators have noted that determining authorship for collaborative efforts such as motion pictures is problematic because these works rarely have a single creative author and granting moral rights protection to multiple people could stifle the creative process.<sup>444</sup> The proposed legislation can reconcile this concern, however, by vesting the moral rights of integrity exclusively in the principal director and screenwriter. These individuals, particularly the director, are generally regarded as the creative influences behind a film,<sup>445</sup> and limiting control to two people should not prove overly cumbersome.

Second, observers have emphasized that moral rights only permit authors to prevent “substantial changes” to their work.<sup>446</sup> According to one such skeptic, many digital alterations, such as product placements, would fall outside these narrow parameters, permitting an “assault on the integrity of our film heritage . . . .”<sup>447</sup> Again, a carefully crafted law could obviate this problem by enumerating specific examples of modifications deemed “substantial” or “material,” which could include product placements, colorization of black-and-white films, and the like. Third, critics have warned that the introduction of moral rights could disrupt the motion picture industry by interrupting the flow of contrac-

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<sup>442</sup> See *supra* note 343 and accompanying text. In addition to first-tier actors, A-list producers, directors, and screenwriters frequently are also able to negotiate rights of consultation and approval. Telephone Interview with Ryan Moore, *supra* note 9.

<sup>443</sup> See *supra* notes 372-382 and accompanying text.

<sup>444</sup> See, e.g., Geib, *supra* note 390, at 202-03; McDonough, *supra* note 383, at 465.

<sup>445</sup> See Film Integrity Act of 1987, *supra* notes 399-400 and accompanying text (defining “artistic authors” to be principal director and screenwriter); Wagner, *supra* note 362, at 637 (stating “one critical school places ultimate responsibility for a film’s artistic impact on the director”); McDonough, *supra* note 383, at n.15 (acknowledging that the DGA supports limiting moral rights to directors and screenwriters). *But see* Kauffman, *supra* note 379, at 782-86 (rejecting notion that directors and screenwriters are authors of independent films and positing that producers are the primary driving force behind such films).

<sup>446</sup> Geib, *supra* note 390, at 202.

<sup>447</sup> *Id.* at 202.

tual agreements that have evolved over the course of many years.<sup>448</sup> Although moral rights legislation could increase transaction costs in the short term, in that standard form contracts would have to be redrafted, that is not a compelling enough reason to deny artistic creators the ability to protect their works from distortion, alteration, commercialization, and mutilation.

Fourth, Craig Wagner argues that “[w]ary investors may be frightened of surrendering complete artistic control to the film’s director, especially when the director does not have a stake in the commercial success of the picture.”<sup>449</sup> This contention is misplaced for several reasons: it is not required that the legislature confer all creative control to directors, only a voice in deciding if alterations can be made after a film’s release; directors often negotiate profit participation in their films,<sup>450</sup> so they certainly care about economic considerations; and the legislation can be structured to accommodate financial concerns. As Wagner suggests: “To realize the proper balance between the competing interests inherent in film production, this creative right should attach only after the motion picture’s initial commercial release. This limitation fosters a favorable environment for motion picture development by protecting the production process from disruption.”<sup>451</sup>

Finally, any restrictions imposed upon a copyright owner can arguably be construed as a taking under the Fifth Amendment.<sup>452</sup> The Supreme Court has held, however, that the government may limit the rights of individual property owners in order to advance the public interest.<sup>453</sup> One goal the Court has found to satisfy this public interest standard is the preservation of aesthetic values.<sup>454</sup> Wagner, who has proposed legislation for artistic control, claims: “Awarding filmmakers these creative rights will not constitute a taking as long as such a regula-

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<sup>448</sup> See, e.g., Robert A. Gorman, *Federal Moral Rights Legislation: The Need for Caution*, 14 NOVA L. REV. 421, 423-24 (1990).

<sup>449</sup> Wagner, *supra* note 362, at 716.

<sup>450</sup> Kernochan, *supra* note 360, at 400-01.

<sup>451</sup> Wagner, *supra* note 362, at 716.

<sup>452</sup> U.S. Const. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”).

<sup>453</sup> See, e.g., *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987) (upholding the Bituminous Subsidence and Land Preservation Act); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (upholding New York City’s Landmarks Preservation Law as applied to Grand Central Terminal).

<sup>454</sup> See *Penn Cent. Transp. Co.*, 438 U.S. at 129 (holding “States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city . . . .”) (emphasis added) (citations omitted).

tory scheme advances a legitimate state interest and does not deny the copyright owner of an 'economically viable use' of his property."<sup>455</sup>

As noted, the Supreme Court has already endorsed the state interest of protecting aesthetic values.<sup>456</sup> Similarly, Congress recognized in the NFPA that "motion pictures are an indigenous American art form that has been emulated throughout the world . . . [and] it is appropriate and necessary for the Federal Government to recognize motion pictures as a significant American art form deserving of protection."<sup>457</sup> Thus, it is fair to contend that Congress can and should conclude that protecting the artistic integrity of motion pictures and their creators qualifies as a substantial government interest.

Likewise, Congress can draft legislation that is narrow enough so as not to deny copyright owners an "economically viable use" of their property. By limiting the restrictions imposed on copyright owners to material alterations made after the release of the television show or motion picture, Congress can minimize the economic effect the regulations would have on the owners' return on investment. As Wagner correctly notes:

The proposition that creative rights legislation would impede the owner's reasonable income expectation is tenuous at best. The owner would not be prohibited from licensing motion pictures for theatrical and television distribution in both American and foreign markets. Similarly, the owner may produce a color re-make, a sequel, or serialization of the original work. Moreover, the filmmaker may consent to material alterations, and the revenues produced from exploitation of the new work would also inure to the copyright owner.<sup>458</sup>

Based on the foregoing analysis, it is not only possible, but also desirable for Congress to draft moral rights legislation for a work's primary artistic creators. Because this nation's copyright, tort, and federal trademark laws do not adequately protect artists' creative rights, they must rely on contract law.<sup>459</sup> We have seen, however, that collective bargaining and individual contract negotiations have also failed to defend these rights.<sup>460</sup> Thus, federal moral rights legislation could be one

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<sup>455</sup> Wagner, *supra* note 362, at 722 (quoting *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 (1987)).

<sup>456</sup> See *supra* note 454 and accompanying text.

<sup>457</sup> 2 U.S.C. § 178 (1), (3) (repealed 1992).

<sup>458</sup> Wagner, *supra* note 362, at 723-24.

<sup>459</sup> See *supra* notes 360-371, 418-439 and accompanying text.

<sup>460</sup> See *supra* notes 372-382 and accompanying text.

effective remedy to safeguard the integrity of not only entertainment programs, but also their artistic creators.<sup>461</sup>

Such legislation should require copyright owners to obtain written permission from a motion picture's principal director and screenwriter prior to making any material alterations to a film that has already had its initial theatrical or video release. Limiting these restrictions to post-release changes will limit any disruptions to the production process and minimize the regulation's attendant economic effects.<sup>462</sup> For our purposes, the fact that numerous writers and directors abhor product placements<sup>463</sup> should render virtual advertising a material alteration. Perhaps most importantly, Congress should expressly prohibit waivers of the moral rights prior to the picture's initial release and proscribe the payment of any compensation in exchange for a waiver. The former restriction will prevent producers and studios from forcing directors and screenwriters to waive their rights in order to gain employment, and the latter exclusion will "remove the artists' power to use this creative right as a bargaining tool."<sup>464</sup>

Considering our nation's reticence to adopt moral rights, the failure of other legislative efforts, and the strong studio lobby, it is highly unlikely Congress will pass such a law in the immediate future. With the advent of digital technology enabling virtual advertising, however, the need may soon be greater than many presently think.

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<sup>461</sup> Aside from domestic governmental regulation, there are at least two other ways to protect the integrity of the creative process. The first way is through collective bargaining. Meaningful moral rights/creative control safeguards can be inserted into the Basic Agreements of the DGA and WGA. Such self-regulation has proved ineffective, however, as studios and other copyright owners have exerted their superior bargaining power to limit the creative control rights of writers and directors. See *supra* notes 373-378 and accompanying text.

The second way is through the utilization of foreign laws to enforce an artist's moral rights. For example, in protest of the colorization of *The Asphalt Jungle*, Angelica Huston filed suit in France on behalf of her deceased father, who had directed the film. WEILER, *supra* note 44, at 476. France's highest civil court held that Turner Classic Movies had violated the director's moral rights when it colorized the film and showed it in France without his or his family's consent. *Id.* The court awarded Huston over \$100,000 in damages for the violation. *Id.* Many nations in the industrialized world recognize an artist's ability to protect these inalienable, natural rights. *Id.* With the skyrocketing costs of production, American filmmakers have come to depend on foreign sales to accommodate their massive budgets. Telephone Interview with Scott Shagin, *supra* note 262. The studios' dependence on foreign sales and distribution coupled with our nation's virtual repudiation of moral rights may lead other artists to sue in foreign countries to exploit the more favorable legislation. *Id.* Although most current contracts probably have provisions relating to such strategies, there are certainly a host of others that do not contain any such language, which leaves the door open for future suits in foreign lands.

<sup>462</sup> See *supra* notes 449-451 and accompanying text.

<sup>463</sup> See *supra* notes 227-229 and accompanying text.

<sup>464</sup> Wagner, *supra* note 362, at 717.

## VI. CONCLUSION

It is undeniable that the practice of product integration is entrenched firmly in our nation's entertainment programming. Although product placements do help producers and studios offset escalating production costs and arguably add to a program's realism, the continued blending of art and commerce alarms many consumers.<sup>465</sup> In a survey conducted by Advertising Age in December 2002, 72 percent of the respondents said product placements were "too pervasive" and 62 percent found them to be distracting.<sup>466</sup> Despite these concerns and demands for legislative action, product placements remain virtually unregulated.

Due to the nature, purpose, and effect of product placements, they should be classified as commercial speech. The consequences of such a classification are unclear, however, as the Supreme Court has held that bans on truthful, nonmisleading speech are subject to the same judicial standard as entertainment speech, namely, strict scrutiny.<sup>467</sup> Thus, a complete prohibition on product placements probably would be unconstitutional.<sup>468</sup> On the other hand, requiring adequate disclosures of a program's commercial elements should survive intermediate scrutiny, provided the government narrowly tailors the regulation and justifies it with a compelling state interest.<sup>469</sup>

In addition to these regulatory concerns, the proliferation of product placements has and will continue to impact the creative community. Because commercial product integration serves as an indirect celebrity endorsement and influences the way in which the public perceives actors, product placement implicates actors' rights of publicity.<sup>470</sup> Therefore, astute agents, managers, and entertainment lawyers should factor such considerations into their negotiation strategies.<sup>471</sup> Similarly, absent contractual consent, actors can use their rights of publicity to guard their personalities from any unauthorized misappropriations occurring in a virtual advertising context. The advent of virtual advertising also has the capacity to diminish the creative control of screenwriters and directors, damaging their reputations and status in the creative community. These creative rights are not protected suffi-

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<sup>465</sup> See Atkinson, *supra* note 340.

<sup>466</sup> *Id.*

<sup>467</sup> 44 *Liquormart, Inc.*, 517 U.S. at 501.

<sup>468</sup> See *supra* notes 303-305 and accompanying text.

<sup>469</sup> See *supra* notes 308-316 and accompanying text.

<sup>470</sup> See *supra* notes 336-338 and accompanying text.

<sup>471</sup> See *supra* notes 347-349 and accompanying text.

ciently by either the existing legal or business environment.<sup>472</sup> As such, Congress should consider implementing moral rights legislation to protect the integrity of our nation's motion pictures and the artistic authors who create them.<sup>473</sup>

Product placements have become more pervasive, as advertisers and manufacturers struggle to showcase their products in an increasingly cluttered media environment. Self-regulation in the entertainment industry may prove insufficient to protect consumers, artists, and the integrity of our creative works. Should this prove the case, the government may need to regulate the practice of product placements to restore the proper balance between art and commerce.

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<sup>472</sup> See *supra* notes 360-443 and accompanying text.

<sup>473</sup> See *supra* notes 444-464 and accompanying text.