by Benjamin R. Mulcahy

That's Advertainment!

The practice of branded entertainment runs the risk of violating regulations on program-length commercials

THE ADVERTISING and entertainment industries have merged. While product placement and brand sponsorship have been features of entertainment programs since the early days of radio, the efforts to integrate brands and brand messages into entertainment programming during the past few years have become more systematic and sophisticated than ever before.

This is so because content producers are looking in nontraditional places for source material and partners to finance and promote their programs. Producers also are seeking to lend authenticity to their programs by having their characters interact with real people, places, and things. At the same time, an increasingly fragmented media landscape—replete with blogs, DVRs, video iPods, and other personal media "game changers"—has prompted marketers to look for innovative opportunities to engage with consumers. So-called branded entertainment—also known as product integration, plot placement, advertainment, or whatever other name is in fashion to describe the process of embedding products and services into entertainment—is emerging as a popular means to that end.

Product integration can work extremely well for advertisers and producers if it strikes a balance between being noticed while also being transparent and germane. The practice is likely to be more successful with consumers if the product fits in seamlessly and naturally with the program's story line, fulfills an actual need presented by the story, and serves that need in a way that is not awkward or contrived.

But seamless and natural product integrations are causing consumer watchdog groups to complain. One group, Commercial Alert, claimed in its petition to the Federal Trade Commission that the failure to clearly and conspicuously identify and disclose product placements has risen to the level of false and deceptive advertising. Although the FTC rejected Commercial Alert's petition late last

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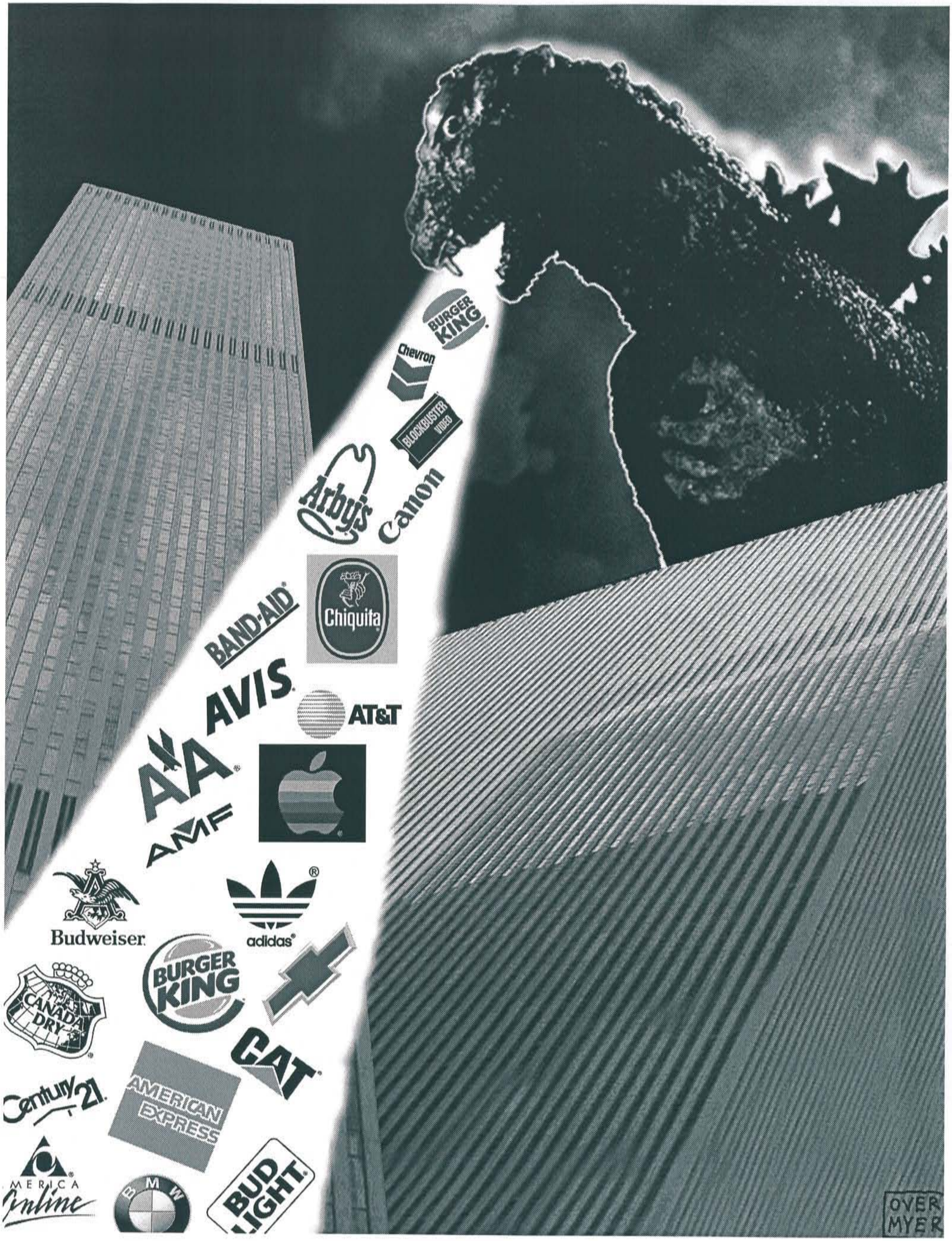
RON OVERMYER


BURGER KING
Chevron
BLOCKBUSTER VIDEO
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OVER MYER

year,[1] the rejection nevertheless forebodes an even greater risk—the exposure of product placement and brand integration in entertainment programs to scrutiny under Section 5 of the FTC Act, which has been reserved historically for pure commercials. In addition, the Writers Guild of America recently expressed concerns about the expanding practice of product integration in episodic and reality television. The guild has threatened to petition the Federal Communications Commission to impose restrictions unless producers agree to a code of conduct that would increase what they pay WGA members and give writers more creative control over the practice.[2]

Examples of product integration abound in feature films, video games, print publications, online media, and television. For films, the placement of Reese's Pieces in *E.T.* is mentioned most frequently as representing the start of the current bandwagon, with honorable mentions to the placement of the Mini Cooper in *The Italian Job* (in which the car was expertly positioned as a character in the film through exciting chase scenes down stairs and narrow Italian roads), a plethora of futuristic product integrations in *Minority Report*, the weaving of references to Federal Express throughout the plot in *Castaway*, and plugs for Starbucks and other brands in the *Austin Powers* film franchise.

Companies like Massive Inc. have partnered with video game publishers to deliver real-time ads across an online video game network. In this way the companies essentially sell and rotate postproduction product placements in lieu of hard-coding advertisements into the game in a single, fixed placement.

Online media features search engines selling "sponsored links" in their search results pages. In print media, advertisers can purchase all the advertising space in a publication—as Target did in the August 22, 2005, issue of *The New Yorker*—or sponsor special sections of an issue. Advertisers, most particularly auto makers, are increasingly pressing to buy their way into the editorial pages of magazines—a move that threatens the church-and-state separation of editorial and advertising espoused by the American Society of Magazine Editors.

Product integration appears extensively on broadcast, cable, and pay television every day. *The Apprentice* is often singled out for placing brands front and center by making teams compete to see who can create the best marketing or brand positioning strategy for a real advertiser that has paid or provided other consideration for the opportunity to appear in the program.

Beyond entertainment programming, brands and other commercial influences are becoming more apparent in the presentation of local and national television news. The involvement of advertisers in news programming has included paying networks to produce segments about an advertiser's industry, sending paid experts on satellite media tours to conduct interviews about the industry, or creating advertiser-produced "video news releases" (VNRs) and providing them—prepackaged and ready-to-use—to stations that may not have the resources to produce 100 percent of their news programming and can choose to air the VNRs in their entirety.

With the increased scrutiny of branded entertainment, it appears that the FTC and the California Attorney General are trawling for a test case that will have major implications for the commercial speech doctrine and state law publicity rights. Producers, networks, and advertisers—particularly those that appear in television—need to be carefully advised regarding the existing law in this area and where it may be headed. No attorney wants his or her client to be named in that sought-after test case or the others that are sure to follow.

Current State of the Law

Under a straightforward application of existing law, producers and networks who embed brands into television entertainment programming must disclose that they are doing so. Under the Communications Act of 1934, as amended, and the FCC regulations promulgated under it, production personnel must disclose when they receive consideration or free products or services in exchange for including products or mentioning products or services in a program.[3] The law also requires disclosure up the production and distribution chain to the broadcaster, who must identify the sponsor or sponsors during the program using language such as "promotional services or other valuable consideration provided by...."[4]

If a paid spokesperson or VNR is used as part of news programming, the advertiser or other entity that is associated with the spokesperson or VNR should be disclosed as well, unless the association is reasonably clear under the circumstances.[5] Failing to disclose this type of association may expose the advertiser and the station or network that broadcast the program to fines. It could also expose the advertiser to public embarrassment or even the type of outright condemnation that the Bush administration received in mid-2005 for paying conservative commentator Armstrong Williams to promote the No Child Left Behind Act in radio and television appearances without disclosing that he had been paid for his supportive statements. The Government Accountability Office found that Williams's activities constituted illegal covert propaganda.[6]

Complying with the Communications Act disclosure requirements is relatively easy. What is harder for advertisers and broadcasters—and the real issue lurking on the edge of this television industry phenomenon—is trying to figure out if and when a branded entertainment program should be legally characterized as a "program-length commercial." For example, in a bona fide program about fashion, the host could almost certainly list the names of celebrities seen wearing a particular designer's clothes. The program could even feature footage of those celebrities wearing the clothes in public. But what if the program were also available online, with an accompanying article containing hypertext links to places where the designer's clothes could be purchased? Moreover, what if the designer paid to be mentioned in the online article? Or paid for the television program to be produced?

Fundamentally, the line that separates entertainment programming from advertising is the same line that separates noncommercial speech from commercial speech under the First Amendment.[7] How a program is characterized for First Amendment purposes is critical because the characterization affects, among other things, whether product claims must be substantiated as well as the latitude that content producers have in using third-party trademark and publicity rights.

Product integrations in entertainment programming have not historically risen to the level of product claims that need to be substantiated. So entertainment programs may, and often do, depict products being misused or used to accomplish things they are not truly capable of accomplishing.[8] Similarly, entertainment programs have broad latitude in referring in nondefamatory ways to people or third-party brands without their consent. The programs also can generally feature real people without violating their publicity rights[9] and depict third-party trademarks without violating the owners' trademark rights,[10] unless the unauthorized use falsely implies that the trademark owner originated, endorsed, or approved of the program or is affiliated with the program.

But if the program is deemed an advertisement, the latitude that traditional entertainment programs enjoy under right of publicity and trademark law goes away.[11] In addition, advertising law requires advertisers to be able to substantiate all express and implied product claims that are made in their advertising. Moreover, an advertiser must be able to substantiate the claims *before* they are made.[12] The typical analysis of whether a product claim is substantiated involves 1) a review of the ad in question for express and implied claims, 2) an identification of the substantiation that exists for those claims, and

3) an evaluation of whether the substantiation actually supports the claims.

Thus, if the Mini Cooper sequences in *The Italian Job* were deemed advertisements, the advertiser would need to have prior substantiation for the express or implied claims made during those sequences. The advertiser must support the claims that the car can withstand major shrapnel without affecting its ability to perform and is perfectly safe to drive even after it has been severely damaged during a high speed chase down stairs and through narrow roads. Similarly, there would need to be substantiation for claims espoused about a product featured as an integral element of a challenge during *The Apprentice*.

Distinguishing Commercial Speech and Noncommercial Speech

According to FCC policy in the early 1970s regarding whether a program can be characterized as a program-length commercial, "The primary test is whether the purportedly non-commercial segment is so interwoven with, and in essence auxiliary to the sponsor's advertising (if in fact there is any formal advertising) to the point that the entire program constitutes a single commercial promotion for the sponsor's products or services."[13] If that were the legal standard, producers and broadcasters probably could breathe easy, because even when a product is deeply woven into the plot on a program such as *The Apprentice*, the program arguably involves much more than a single commercial promotion for the named sponsor's products or services. But case law on the distinction between commercial and noncommercial speech has evolved much differently and does not give as much comfort or predictability as the FCC pronouncement.

Courts have concluded at various times and in various contexts that noncommercial speech includes matters that are in the broadly defined public interest, such as the reporting of current or recent events. In addition, courts have concluded that expressive, artistic, or entertainment content is a significant medium for communicating ideas. Therefore, this type of noncommercial expression also is entitled to the full breadth of First Amendment protection.[14]

But rather than precisely define what noncommercial speech *is*, the cases have preferred to define noncommercial speech by what *it is not*. Essentially, noncommercial speech, according to the cases, is not commercial speech. In deciding whether something constitutes commercial speech, the U.S. Supreme Court has instructed that "the core notion of commercial speech is that it does nothing more than propose a commercial transaction."[15] The cases have done little to expound on what has been characterized by the Supreme Court as nothing more than a "common sense" standard for distinguishing between speech that proposes a commercial transaction and other varieties of speech.[16] But the facts of two cases from the Ninth Circuit and a troubling opinion from the California Supreme Court give some guidance on the distinction.

One of the Ninth Circuit cases is *Hoffman* v. *ABC/Capital Cities*,[17] in which the court held that the use in question was noncommercial and, therefore, the First Amendment trumped the plaintiff's publicity rights. The other is *Downing* v. *Abercrombie & Fitch*,[18] in which the court held that the use in question was commercial and, therefore, the plaintiff's publicity rights trumped the First Amendment.

So what was it about Dustin Hoffman's

Kidvid Rules

In the Children's Television Act of 1990,[1] Congress directed the Federal Communications Commission to adopt rules that would, among other things, limit the number of commercial minutes that television stations may air during children's programming. Pursuant to this statutory mandate, the FCC adopted its "kidvid rules"—regulations that implement the CTA[2] and limit the amount of "commercial matter" that may be aired during children's programming to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays.[3]

In late 2004, the FCC, in its Digital Kidvid Order, extended its kidvid rules to digital broadcasting. The order also ushered in new restraints on the display of Web site addresses during programs directed to children ages 12 and under and expanded the definition of "commercial matter." These changes have resulted in competing court challenges. Children's advocates claim that the new rules do not go far enough in regulating commercial matter directed to children. On the other hand, industry entities claim that the new rules unduly restrict their legitimate activities and attempt to impose content restrictions on the Internet—a medium that does does not fall within the FCC's jurisdiction.

Under the rules, broadcasters, cable operators, and DBS providers may transmit Web site addresses during children's programming only if the Web sites offer a "substantial amount" of bona fide program-related content or other noncommercial content. Further, the Web sites 1) must not be intended primarily for commercial purposes, including e-commerce or advertising, 2) must distinguish noncommercial sections of the site from commercial sections through clear labeling on the home page and other menu pages, and 3) must not use the page to which viewers are directed for e-commerce, advertising, or other commercial purposes, such as an online store.

Also, in the new rules the FCC introduced two content triggers that potentially lead to an *entire program* being characterized as one long commercial—and a "program-length commercial" constitutes a major violation of the rules. First, the FCC decided to count promotional announcements for any programming other than qualified "educational and informational" children's shows as commercial matter. Broadcasters and cable operators may still air promotions for other programming during children's shows, but the promotions will be counted toward the commercial time cap.

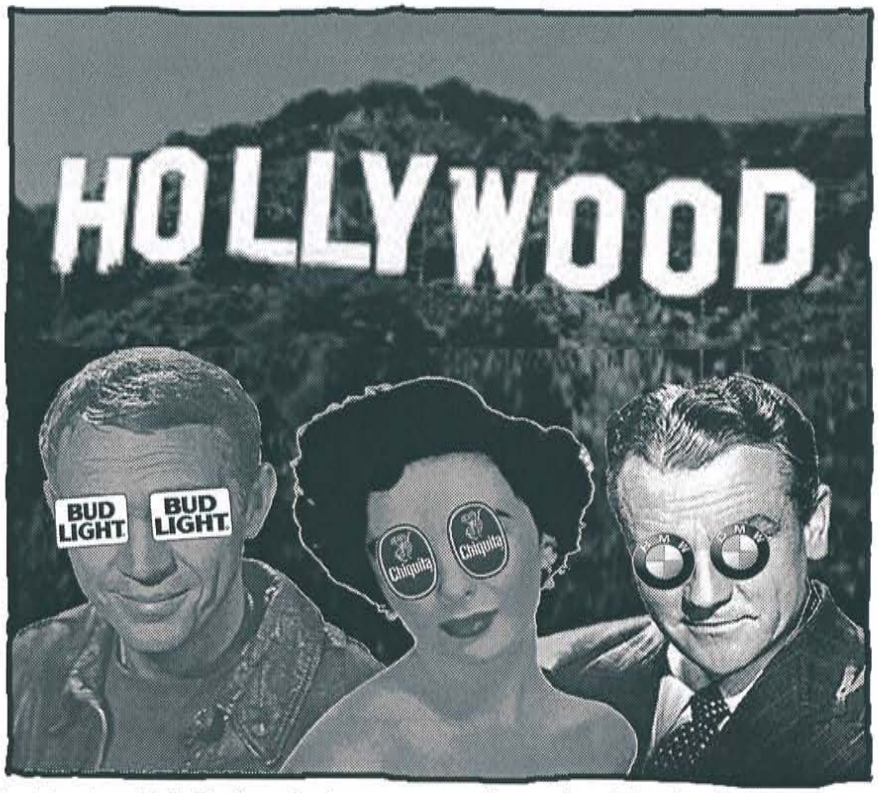
Second, the FCC "reaffirmed" and "clarified" its longstanding policy that broadcasters can turn a children's program into a forbidden program-length commercial if they air a commercial during a children's program that features goods, services, or characters associated with that program. This restriction also encompasses a much older FCC policy against "host-selling," which bars the use of program characters or show hosts to sell products in commercials during or adjacent to the shows in which the character or host appears.

A word of caution—if host-selling or airing a commercial during a program that features goods, services, or characters associated with the program is sufficient to turn a children's program into a program-length commercial, similar logic might apply to the product integration practices being used in programs for older audiences.—**B.R.M.**

[1] 47 U.S.C. §§303a, 303b, 394.

[2] 47 C.F.R. §73.670.

[3] *See* FCC Report and Order, In the Matter of Policies and Rules Concerning Children's Television Programming and Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, MM Docket Nos. 90-570 and 83-670, 6 FCCRcd 2111 (Apr. 12 Order), Erratum, 6 FCCRcd 3535 (1991).



suit against the publisher of *Los Angeles* magazine that doomed his claim to failure on appeal? Hoffman claimed that the magazine violated his state law publicity rights and his rights under Section 43(a) of the Lanham Act when the magazine used a still photograph of him from the motion picture *Tootsie*—in which Hoffman's character impersonated a woman—to create a computer-generated composite image that depicted Hoffman wearing a fashion designer's clothes for women. The photograph appeared in an article titled "Grand Allusions," which used computer technology to alter classic film stills of famous actors to make it appear that the actors depicted in the photos were wearing Spring 1997 fashions. In the Hoffman photo, the American flag and Hoffman's head were retained from the original still from *Tootsie*, but Hoffman's body and the long-sleeved red sequin dress that he was wearing were replaced by the body of a male model in the same pose wearing a spaghetti-strapped silk evening dress and high-heeled sandals. The text on the page announced that the still was from *Tootsie* and stated: "Dustin Hoffman isn't a drag in a butter-colored silk gown by Richard Tyler and Ralph Lauren heels."[19] *Los Angeles* magazine did not ask Hoffman for permission to publish the altered photograph, and Hoffman sued.

The district court entered judgment in favor of Hoffman, but the Ninth Circuit reversed, holding that the magazine's use of Hoffman's image was not pure commercial speech and thus was entitled to the full protection of the First Amendment. In his argument to the court that the magazine's use of his likeness constituted a commercial use, Hoffman emphasized that the body double in the *Tootsie* photograph was identified as wearing Ralph Lauren shoes and that there was a Ralph Lauren advertisement (which did not feature shoes) elsewhere in the same issue of the magazine. Hoffman noted the existence of a "Shopper's Guide" in the back of the magazine, which provided stores and prices for the shoes and gown. The Ninth Circuit held that these facts were not enough to make the *Tootsie* photograph pure commercial speech.

In dicta, the *Hoffman* court explained that, if the altered photograph had appeared in a Ralph Lauren advertisement, then the case would have been similar to a trio of well-known rights-of-publicity cases—*Waits* v. *Frito-Lay*,[20] *White* v. *Samsung*,[21] and *Midler* v. *Ford Motor Company*.[22] But *Los Angeles* magazine did not use Hoffman's image in a traditional advertisement printed merely for the purpose of selling a particular product: "Viewed in context, the article as a whole is a combination of fashion photography, humor, and visual and verbal editorial comment on classic films and famous actors. Any commercial aspects are 'inextricably entwined' with expressive elements, and so they cannot be separated out 'from the fully-protected whole'."[23]

Reciting the "common sense" distinction between speech that does no more than propose a commercial transaction and other varieties of speech, the Ninth Circuit stated that "common sense tells us this is not a simple advertisement and therefore the Los Angeles Magazine's publication of the altered 'Tootsie' photograph was not commercial speech."[24] Accordingly, the court held that *Los Angeles* magazine's noncommercial use of the photograph was entitled to the full protection of the First Amendment.

Just two months later, however, in *Downing*, the Ninth Circuit determined that the use of a photograph in the context of a clothing catalog, which also contained articles tailored to the catalog's surfing theme, was less like the protected use in *Hoffman* and more akin to a simple advertisement. Abercrombie & Fitch is a clothing retailer that sells casual apparel for men and women through stores nationwide and also through its subscription catalogue, the *Abercrombie & Fitch Quarterly*. The quarterly contains photographs of models wearing Abercrombie's garments as well as pictures of the clothing displayed for sale. In addition, approximately one-quarter of each issue is devoted to stories, news, and other editorial pieces. The Spring 1999 quarterly contained a section titled "Surf Nekkid," which included an article recounting the history of surfing. The section also contained a 700-word story titled "Your Beach Should Be This Cool," which described the history of a famous California surfing beach. The page following this story featured a photograph of the plaintiffs when they were surfers at the 1965 Makaha International Surf Championship in Hawaii. The two pages immediately thereafter featured T-shirts that were replicas of the T-shirts worn by the surfers in the photograph.

The surfers depicted in the photograph sued Abercrombie & Fitch for using the photograph without their permission, asserting statutory and common law commercial misappropriation claims under California law and the Lanham Act. The Ninth Circuit overturned the district court's grant of summary judgment on First Amendment grounds in favor of the defendants.

Although the Ninth Circuit acknowledged that a First Amendment defense extends "to almost all reporting of recent events" as well as to publications about "the people who, by their accomplishments, mode of living, professional standing or calling, create a legitimate and wide-spread attention to their activities,"[25] it concluded that the quarterly's use of the plaintiffs' names and photograph was distinguishable from protected uses.

Under the facts presented, the court held that Abercrombie used the plaintiffs' photograph "essentially as window-dressing to advance the catalogue's surf theme."[26] The quarterly did not indicate that the plaintiffs were legends of the sport and did not in any way connect the plaintiffs with the story preceding the photo. In distinguishing *Hoffman*, the court held that while Abercrombie used the plaintiffs' images in its catalogue to promote its clothing, *Los Angeles* magazine was unconnected to and received no consideration from the designer for the gown depicted in the article in question in *Hoffman*. Further, while *Los Angeles* magazine had a shopping guide buried in the back of the issue that provided stores and prices for the gown, Abercrombie placed the plaintiffs' photograph on the page immediately preceding pictures of T-shirts that were not only replicas of the T-shirts worn by the plaintiffs in the photograph but were also available for purchase. Based on these factors, the court concluded that Abercrombie's use was more commercial in nature than *Los Angeles* magazine's use of Hoffman's image and, therefore, was not entitled to the same First Amendment protection accorded to *Los Angeles* in *Hoffman*.

The Ninth Circuit's opinion in *Downing* echoes the U.S. Supreme Court's reasoning 18 years earlier in *Bolger* v. *Youngs Drug Products Corporation*.[27] In *Bolger*, a manufacturer and distributor of contraceptives brought an action challenging a federal statute that prohibited the unsolicited mailing of contraceptive advertisements. The district court found the statute unconstitutional and the Supreme Court affirmed, holding that the statute was an unconstitutional restriction on commercial speech. The *Bolger* case is useful in the context of branded entertainment to the extent that it helps distinguish between commercial and noncommercial speech.

The plaintiff in *Bolger* publicized the availability and desirability of its products using various methods, including mass mailings. The Supreme Court explained that most of the plaintiff's mailings fell within the core notion of commercial speech—"speech which does no more than propose a commercial transaction."[28] The plaintiff's informational pamphlets, however, could not be characterized merely as proposals to engage in a commercial transaction. Instead, the Supreme Court explained that the reference to a specific product does not by itself render the pamphlets commercial speech. Further, the fact that the plaintiff had an economic motivation for mailing the pamphlets was deemed to be clearly insufficient by itself to turn the materials into commercial speech. The Court found, however, that the combination of these characteristics, in a manner that closely resembled a traditional advertisement, provided strong support for the district court's conclusion that the informational pamphlets were properly characterized as commercial speech, even though they also contained discussions of important public issues such as venereal disease and family planning.

Together, *Hoffman*, *Downing*, and *Bolger* instruct that a hybrid medium comprising commercial and newsworthy elements, such as a branded entertainment program, will retain its noncommercial character so long as the program maintains its focus on primarily providing information that can be characterized as news or entertainment as opposed to offering "no more than [a proposal for] a commercial transaction." The First Amendment protection afforded to *Los Angeles* magazine in *Hoffman* is analogous to the protection extended to motion pictures and television programs that are not branded entertainment. Those films and programs are prototypical protected speech even though they are distributed for a profit, may contain liberal amounts of product placement, and may even be surrounded and interrupted by paid advertising.

The distinction between protected noncommercial use and commercial use is one of degree. The *Hoffman* case can be cited for the conclusion that the closer a branded entertainment program is to "a combination of...photography, humor, and visual and verbal editorial comment on" something of public interest, something newsworthy, or something creative or entertaining, as opposed to doing nothing more than proposing a commercial transaction, the more likely it will be characterized as noncommercial speech entitled to the full protection of the Constitution. In contrast, the *Bolger* and *Downing* cases support the contention that the more a branded entertainment program is structured to provide information or entertainment merely as "window-dressing" for an advertiser's effort to sell products, and the more that branded logos and third-party advertising predominate over the content of the program, the more likely it is that the program will be deemed commercial speech.

The *Kasky* Decision

This analysis of the extent of branded entertainment's protections from liability in the light of *Hoffman*, *Downing*, and *Bolger* has been complicated by the California Supreme Court's unnecessarily broad opinion in *Kasky* v. *Nike, Inc.* in 2003.[29] In a 4-3 opinion, the court in *Kasky* held that Nike could be found liable for false advertising under California Business and Professions Code Sections 17200 et seq. for statements made in press releases. The *Kasky* case arose after the footwear company issued a press release in response to television and newspaper stories that alleged injurious labor practices at its overseas factories. The state supreme court held that Nike's statements were commercial speech, which meant that the statements received a lesser degree of First Amendment protection than they would if they had been found to be noncommercial speech. As a practical matter, this decision allowed Nike to be sued for its decision to join the public discourse on a topic in the public interest.

The court reasoned that "[b]ecause the messages...were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products, we conclude that these messages are commercial speech for purposes of applying state laws barring false and misleading commercial messages."[30] The court admonished that "when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully."[31]

One of the dissents to *Kasky* warned that it was improper and unconstitutional to restrict Nike's ability to engage in the "important worldwide debate" regarding the use of foreign labor to manufacture goods sold in the United States. The dissent emphasized that Nike's campaign had not been made through product labels, inserts, packaging, or commercial advertising intended to reach only Nike's actual or potential customers but rather via press releases, letters to newspapers, and letters to university presidents and athletic directors. Thus Nike's statements, whether true or false, should have been treated as noncommercial speech entitled to the full breadth of protection under the First Amendment.[32] Another dissent excoriated the majority for creating an overbroad test that, taken to its logical conclusion, renders *all* corporate speech commercial speech: "Because all corporate speech about a public issue reflects on the corporate image and therefore affects the corporation's business goodwill and sale value," all statements by a corporation about any topic may be found to be "commercial speech under the articulated test."[33]

The distinction, or lack thereof, by the *Kasky* court between commercial speech and noncommercial speech has far-reaching and likely unintended consequences in the area of branded entertainment. But even if *Kasky* is distinguished on its facts and the comments about the press releases are characterized as dicta, it is now difficult to define with confidence what constitutes a program-length commercial. To some extent, maybe the best definition is the one used by U.S. Supreme Court Justice Potter Stewart to define "hardcore pornography": "I know it when I see it."[34] Against this ambiguous backdrop, attorneys must try to advise their clients on how best to proceed.

Branded entertainment is evolving and unlikely to disappear in the near future. Not everyone is a proponent, however. Besides skeptical regulators, there are those on the creative side who do not care for it either. John Densmore, the drummer for The Doors, recently refused to allow the group's songs, including "Light My Fire," to be used in television commercials for a deodorant. His reasoning is reminiscent of the lyrics of the band: "People lost their virginity to this music, got high for the first time to this music. Kids died in Vietnam listening to this music...On stage when we played these songs, people felt mysterious and magic. That's not for rent."[35] Perhaps that's true, or perhaps that just means that advertisers will need to use someone else's songs to help them break on through to the other side. ■

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[1] *See* Letter from Mary K. Engel, Associate Director for Advertising Practices Federal Trade Commission, to Gary Ruskin, Executive Director Commercial Alert (Feb. 10, 2005), *available at* http://www.commercialalert.org/ftc.pdf.

[2] *See Are You Selling to Me? Stealth Advertising in the Entertainment Industry, available at* http://www.wga.org/uploadedFiles/news_and_events/press_release/2005/white_paper.pdf (last visited Feb. 28, 2006).

[3] 47 U.S.C. §508.

[4] 47 U.S.C. §317; 47 C.F.R. §§73.1212, 76.1615.

[5] FTC Guides Concerning Use of Endorsements and Testimonials in Advertising, 255.5 Disclosure of material connection, 46 Fed. Reg. 3873 (Jan. 18, 1980). In its Policy Statement on Deception, the FTC further defined deceptive and misleading omissions:

> A misleading omission occurs when qualifying information necessary to prevent a practice, claim, representation, or reasonable expectation or belief from being misleading is not disclosed....In determining whether an omission is deceptive, the [FTC] will examine the overall impression created by a practice, claim or representation.

FTC Policy Statement on Deception, appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 174 n.4 (1984).

[6] *See* Government Accountability Office September 2005 Report, *available at* http://www.gao.gov/ (last visited Dec. 20, 2005). The GAO rules provide that "[government] agencies may not use appropriated funds to produce or distribute prepackaged news stories intended to be viewed by television audiences that conceal or do not clearly identify for the television...audience that the agency was the source of those materials." GAO, B-304272, Report, Prepackaged News Stories (Feb. 17, 2005), *available at* http://www.gao.gov/decisions/appro/304272.htm.

[7] Entertainment content constitutes noncommercial speech and thus is entitled to the highest level of protection under the First Amendment. *See, e.g.*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952). An intermediate level of scrutiny historically has been applied as the appropriate standard to evaluate regulations restricting commercial speech. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557 (1980).

[8] *See, e.g.*, Whamo Inc. v. Paramount Pictures Corp., 286 F. Supp. 2d 1254 (C.D. Cal. 2003) (denying toy manufacturer's motion to enjoin Paramount's alleged misuse of the plaintiff's Slip 'N Slide toy in a motion picture).

[9] Polydoros v. Twentieth Century Fox Film, 67 Cal. App. 4th 318 (1997) (The use of a character in the fictional motion picture *The Sandlot*—a character who shared a similar name and similar characteristics with the plaintiff—was entitled to protection.); Dora v. Frontline Video, Inc., 15 Cal. App. 4th 536 (1993) (The use of footage of famous surfers, including the plaintiff, in a video documentary that chronicled the early days of surfing was protected.); Tyne v. Time Warner Entm't Co., L.P., 336 F. 3d 1286 (11th Cir. 2003) (Florida right of publicity statute does not apply to publications, including motion pictures, that do not directly promote a product or service.); Winter v. DC Comics, 30 Cal. 4th 881 (2003) (The use of comic book characters resembling the plaintiff brothers was protected.). *But see* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) (holding that "[w]herever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent.").

[10] When a trademark of a real person or entity is used to identify that same real person or entity in the context of an artistic work such as an entertainment program, it is generally held that the use constitutes a nominative or "non-trademark" use falling outside the strictures of trademark law. *See, e.g.*, New Kids On The Block v. News America Publ'g, 971 F. 2d 302 (9th Cir. 1992); *cf.* Century 21 Real Estate v. Lendingtree, Inc., No. 03-4700 (3d Cir. Oct. 11, 2005) (articulating an alternative nominative fair use analysis); Caterpillar Inc. v. The Walt Disney Co., 287 F. Supp. 2d 913 (C.D. Ill. 2003) (rejecting the plaintiff bulldozer manufacturer's claim for trademark dilution and infringement arising out of the use of "evil" Caterpillar brand bulldozers in a motion picture); Mattel, Inc. v. MCA Records, Inc., 296 F. 3d 894 (9th Cir. 2002) (finding that the use of Barbie in a song was protected); Rogers v. Grimaldi, 695 F. Supp. 112 (S.D. N.Y. 1988), *aff'd*, 875 F. 2d 994 (2d Cir. 1989) (holding that the use of a person's name in a movie title will be protected unless it has "no artistic relevance" to the underlying work or, if there is artistic relevance, the title "explicitly misleads as to the source or the content of the work"). Nevertheless, in the unusual case, the use of another's trademark as a source identifier for a fictional product or service or in an otherwise confusing manner will support a claim even if the use is made in a noncommercial context, such as a feature film or book. *See, e.g.*, Films of Distinction v. Allegro Film Prods., 12 F. Supp. 2d 1068 (C.D. Cal. 1998).

[11] *See, e.g.*, Newcombe v. Adolf Coors Company, 157 F. 3d 686, 691 (9th Cir. 1998) (use of baseball pitcher's image in printed beer advertisement not protected); Abdul-Jabbar v. General Motors Corp., 85 F. 3d 407, 409 (9th Cir. 1996) (use of basketball star's former name in television car commercial not protected); Waits v. Frito-Lay, Inc., 978 F. 2d 1093, 1097-98 (9th Cir. 1992) (use of imitation of singer's voice in radio snack food commercial not protected).

[12] FTC Policy Statement Regarding Advertising Substantiation, appended to Thompson Medical Co., 104 F.T.C. 648 (1984), *aff'd*, 791 F. 2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

[13] 44 FCC 2d 985 (1974). *See also* FCC Memorandum Opinion and Order, In the Matter of Policies and Rules Concerning Children's Television Programming, MM Docket No. 90-570, 6 FCC Rcd 5093, 5099 (Aug. 1, 1991) ("There is no perfect abstract rule for defining a program-length commercial.").

[14] *See supra* note 7.

[15] Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983).

[16] *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978).

[17] Hoffman v. ABC/Capital Cities, 255 F. 3d 1180 (9th Cir. 2001).

[18] Downing v. Abercrombie & Fitch, 265 F. 3d 994 (9th Cir. 2001).

[19] Hoffman, 255 F. 3d at 1183.

[20] Waits v. Frito-Lay, 978 F. 2d 1093, 1097-98 (9th Cir. 1992).

[21] White v. Samsung, 971 F. 2d 1395, 1396 (9th Cir. 1992) (as amended) (use of game show hostess's "identity" in print advertisement for electronic products not protected).

[22] Midler v. Ford Motor Co., 849 F. 2d 460, 461 (9th Cir. 1988) (use in television car commercial of "sound-alike" rendition of song that singer had recorded not protected).

[23] Hoffman, 255 F. 3d at 1185.

[24] *Id.* at 1186.

[25] Downing v. Abercrombie & Fitch, 265 F. 3d 994 (9th Cir. 2001).

[26] *Id.* at 1002.

[27] Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983).

[28] *Id.* at 66.

[29] Kasky v. Nike, Inc., 27 Cal. 4th 939 (2002), *cert. granted and dismissed*, Nike, Inc. v. Kasky, 539 U.S. 654 (2003).

[30] *Id.* at 946.

[31] *Id.*

[32] *See id.* at 971.

[33] *Id.* at 984.

[34] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not attempt further to define [hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.").

[35] Geoff Boucher, *Ex-Door Lighting Their Ire*, latimes.com, Oct. 5, 2005, *at* http://www.latimes.com/ (last visited Feb. 28, 2006).