

OKLAHOMA CITY UNIVERSITY LAW REVIEW

VOLUME 49

FALL 2024

NUMBER 1

ESSAY

PRODUCT PLACEMENTS ARE COMMERCIAL SPEECH TOO: AN ANALYSIS OF PRODUCT PLACEMENTS IN MODERN MEDIA AND THE EXTENSION OF COMMERCIAL SPEECH TO REACH THESE PLACEMENTS

*Caroline Rowland**

I. Introduction

Technological advancements have made the digital world a marketing agency's playground. Once confined to paper pamphlets and advertisements on the radio and television, the rise of the digital age has made it nearly impossible to escape advertising. Not only does online media allow for more voluminous marketing techniques, but many companies will now even track a particular user's internet searches to

* Juris Doctor Candidate, Oklahoma City University School of Law, May 2025. First, I would like to thank each of my friends and family—especially my father, Scott Rowland, who has inspired me from a young age to pursue a legal career. I would also like to thank Professor Marc Blitz for his feedback and guidance during the writing and research of this Essay. Finally, I would like to thank each of the members of the Oklahoma City University Law Review for their diligent work and constant support throughout this first publication.

reach that user with advertisements targeted at their personal interests. One specific area of advertising that has seen substantial growth is the long-standing practice of “product placement.” While this practice can be done both in person and online, it is more commonly used to promote products through online media due to the rise in accessibility to such platforms. The growth in this area raises an important First Amendment question: Do product placements in online media—such as television shows, movies, and the like—fall within commercial speech, a less protected class of speech under the First Amendment, or are they mere forms of artistic speech? Distinguishing between commercial and artistic speech is vital because it determines the level of scrutiny that government regulations of such speech will receive.

Product placements are “an entertainment marketing strategy in which brands are incorporated within films, television shows, music videos, or other entertainment content in order to reach consumers.”¹ This form of advertisement “is effective because it enables the audience to develop a stronger connection with the brand in a more natural way, rather than being directly marketed to.”² Product placements have been shown to have significant impacts on the marketing of a product including “[e]nhanced [r]ealism and [e]ngagement” with the consumer; “[i]ncreased [p]rofit [m]argins for [f]ilm [c]ompanies”; “[b]rand [p]ersonality [e]mbodiment”; and providing a “[n]ew [r]evenue [s]tream for [c]ompanies.”³ While this practice has deep roots in the Hollywood and marketing industries, its popularity has increased throughout the past several decades with the rise of the technological age making this advertising technique more accessible and pervasive than more traditional forms of advertising. Specifically, the number of product placements has increased “by an estimated 14 percent” from 2020 to 2022.⁴

1. *Product Placement: An In-Depth Look from BENlabs*, BENLABS, <https://www.benlabs.com/product-placement-an-in-depth-look-from-ben/> [https://perma.cc/6VZ3-NMC4].

2. Will Kenton, *Product Placement: Definition, How It Works, Examples*, INVESTOPEDIA (Dec. 31, 2022), <https://www.investopedia.com/terms/p/product-placement.asp> [https://perma.cc/6LCQ-RN8S].

3. *Is Product Placement in a Movie/TV Show a Good Marketing Strategy?*, C&I STUDIOS (Jan. 26, 2024), <https://c-istudios.com/is-product-placement-in-a-movie-tv-show-a-good-marketing-strategy/#:~:text=Some%20examples%20of%20product%20placements,which%20led%20to%20negative%20consequences> [https://perma.cc/U7T7-ZDY7].

4. Sophie Haigney, *Anatomy of a Product Placement*, N.Y. TIMES (June 24, 2022),

While product placements bear many of the same characteristics of typical advertisements—which do fall under the commercial speech framework—there are several differences. Namely, the product displayed in the placement is typically not the main focus of the media source that it is featured in. For example, when a specific brand of soda is placed in a movie, it is the movie itself that is meant to be the primary focus and the soda that is the secondary focus. But in a traditional television advertisement, the soda is the main focus. Plus, there is typically not much, if any, discussion about the specifications of the product and purchasing information: There is no telephone number or website address attached to the product placement directing the consumer where to buy the product or information regarding pricing details. But in a typical television or radio advertisement, the purchasing information and pricing details are typically at the center of attention. These few differences do not remove product placements from the reach of commercial speech. The product's mere presence is itself the advertisement because it is promoting the item and enticing potential consumers to purchase it. This Essay will argue that product placements should be included within the meaning of commercial speech for four main reasons: (1) when applying the test previously used by the Supreme Court to determine whether speech is considered to be commercial, product placements certainly qualify as commercial speech; (2) this classification as commercial speech logically follows the Court's approach taken in *Central Hudson Gas & Electric Corp. v. Public Service Commission*; (3) technological advancements have caused a shift away from the more traditional forms of advertisements and a movement towards the use of product placements; and (4) product placements are easily distinguishable from the non-commercial portion of the media platform they are placed in making it unnecessary to treat the entirety of the speech as non-commercial speech.

II. The Commercial Speech Framework and its Application

“The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws ‘abridging the freedom of speech.’”⁵ “This protection does not end at the spoken or

<https://www.nytimes.com/interactive/2022/06/23/arts/product-placement.html>
[<https://perma.cc/SY9U-8XKC>].

5. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (quoting U.S. CONST. amend. I).

written word, but extends to various forms of artistic expression.”⁶ Commercial speech—”speech which does ‘no more than propose a commercial transaction’”—received no protection from government regulation until 1976, when the Supreme Court held that commercial speech is subject to some form of protection but did not specify what level of scrutiny such regulations would be subject to.⁸ But in “extend[ing] the protection of the First Amendment to commercial speech,”⁹ one thing is certain: Commercial speech receives less constitutional protection than other forms of speech due to “the ‘commonsense’ distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.”¹⁰ The notion that commercial speech receives less protection against government regulation than other forms of speech stems from the traditional purpose of the First Amendment: “to protect political speech and broader conversations about society.”¹¹ Commercial speech does not play a large role in furthering political speech, thereby lessening the need for heightened protection.

Before applying the commercial speech framework, a court must first determine that the speech at issue is in fact considered to be commercial. Some forms of speech are more easily classifiable as commercial speech than others. Traditional forms of commercial speech include in-person or online pamphlets, billboards and signs, pop-up advertisements on the internet, and television commercials.¹² These rarely pose major issues as there is little argument over whether they are considered commercial speech or not—the arguments regarding these more traditional forms of commercial speech typically arise when determining whether commercial speech should receive less First Amendment protection than other forms of speech, but this issue will be addressed later on in this analysis.

6. *Buehrle v. City of Key W.*, 813 F.3d 973, 976 (11th Cir. 2015) (citations omitted); see also *Kaplan v. California*, 413 U.S. 115 (1973).

7. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Human Rels. Comm’n*, 413 U.S. 376, 385 (1973)).

8. See *Virginia State Bd. of Pharmacy*, 425 U.S. at 771.

9. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64 (1983) (footnote omitted).

10. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 562 (1980) (quoting *Ohrlik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455-56 (1978)).

11. Kevin Goldberg, *Commercial Speech and Truth in Advertising: Everything to Know*, FREEDOM FORUM, <https://www.freedomforum.org/commercial-speech/> [https://perma.cc/R87Y-5RHR].

12. *Id.*

But some forms of speech are not as clearly classifiable as commercial speech as the above-mentioned forms. When there is question over whether speech is commercial or not, the Court has previously looked at several specific characteristics of the speech involved. In *Bolger v. Youngs Drug Products Corp.*, the Court examined three types of unsolicited promotional flyers and informational pamphlets and found that all three of the flyers and pamphlets qualified as commercial speech.¹³ The Court emphasized the presence of three defining characteristics in the materials: first, the pamphlets and flyers were conceded to be advertisements; second, there was a reference to a specific product in the materials; and third, the distributors of the materials had “an economic motivation for mailing the pamphlets.”¹⁴ While the Court noted that each of these characteristics on their own would not be enough to characterize the materials as commercial speech, when the characteristics were taken together this was, in fact, sufficient to categorize them as such.¹⁵

Once the speech at issue is categorized as commercial speech, the framework established in *Central Hudson* is applied:

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.¹⁶

Although the protections of the First Amendment do in fact extend to commercial speech, this framework illustrates how commercial speech is afforded less protection than other forms of speech.¹⁷

13. *Bolger*, 463 U.S. at 67-68.

14. *Id.* at 67.

15. *Id.* at 66-67.

16. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

17. *Id.* at 563.

III. The Background of Product Placements and the Applicability of Commercial Speech to Such Placements

The practice of placing specified products into various forms of media to attract attention to the product is by no means a new practice. In fact, one of the first recorded examples occurred in the late-nineteenth century when two filmmakers, the Lumière brothers, placed a specific brand of soap in one of their movies to show off—or promote—the product.¹⁸ With the rise of the technological age, this practice has only risen in popularity since then and now proves to be “a \$23 billion industry.”¹⁹ One specific reason for such is the rise in streaming platforms—such as Netflix, Hulu, and HBO Max—which limit, or in certain subscription packages completely eradicate, advertisements.²⁰ But the use of product placements allows for companies to get around the limitations that streaming platforms place on traditional advertisements by integrating the products directly into the television show or movie, leaving no way for the consumer to avoid seeing the product.

What many people consider to be some of the most memorable moments in iconic movies are actually product placements: the Etch-a-Sketch, Mr. Potato Head, and Barrel of Monkeys toys featured in *Toy Story*; a Wilson brand volleyball as seen in *Castaway*; Nike shoes in *Forrest Gump*; and Reese’s Pieces in *E.T.*²¹ These are just a few of the many examples that demonstrate the impactful influence that product placements have on consumers. Even though each of the above-mentioned scenes may at first glance seem like no more than an artistic choice—thereby making government regulation of such speech subject to strict scrutiny—this is not the case. The specific placement of these products into the media of choice was purposely done so in order to promote the product, not merely as an expression of the producer’s artistic style.

18. Haigney, *supra* note 4.

19. *Id.*

20. *Id.*

21. Brett Miller, *The Top 20 Most Ridiculous Movie Product Placement Examples of All Time*, 123 PRINT BLOG (July 18, 2022), <https://blog.123print.com/blog/the-top-20-most-ridiculous-movie-product-placement-examples-of-all-time/> [https://perma.cc/L8TV-ZQDR].

A. Product Placements as Commercial Speech

While the platform that the product is placed in is typically considered artistic speech in which government regulation of such is subject to strict scrutiny,²² the product placement itself should be considered commercial speech making the regulation subject to a less demanding level of scrutiny. The four main reasons for this will be illustrated below.

i. The Test Set Forth in Bolger as Applied to Product Placement Classifies it as Commercial Speech

While many forms of commercial speech are easily classifiable as such—like sales magazines²³ and billboards²⁴—the Court in *Bolger* faced a situation in which they could not easily decipher the type of speech at play. At issue in *Bolger* were three separate types of promotional pamphlets and flyers: (1) “flyers promoting a large variety of products available at a drug store”; (2) “flyers exclusively or substantially devoted to promoting” a specific drug; and (3) “informational pamphlets discussing the desirability and availability of [a specific drug] in general.”²⁵ To determine whether these were commercial speech or not, the Court decided to apply what appears to be a totality of the circumstances test.²⁶ The Court found that, when considering the three defining characteristics of the pamphlets and flyers at issue, they were commercial speech.²⁷ The three defining characteristics included the following: (1) the fact that it was conceded that the speech was an advertisement; (2) there was a reference to a specific product in the materials; and (3) the distributors of the speech had an economic motivation.²⁸

The above-mentioned test should be explicitly established by the Supreme Court and utilized to determine that product placements are commercial speech. If this test is utilized more frequently, the Court may decide to apply the *Bolger* test on a case-by-case basis to future forms of speech that are argued to be commercial but are not easily identifiable as

22. Buehrle v. City of Key W., 813 F.3d 973, 976 (11th Cir. 2015).

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

24. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501-02 (1981).

25. Bolger, 463 U.S. at 62 (footnote omitted).

26. Id. at 66-68.

27. Id.

28. Id.

such. But it is not necessary to do a completely new analysis under *Bolger* here because the three considerations looked at in *Bolger* are present in product placements. Therefore, product placements should be treated the same as the pamphlets and flyers in *Bolger* and found to be commercial speech.

First, product placements are undeniably advertisements. Companies utilize them to induce consumers to buy their product by either paying “large sums of money for their brand to be placed in . . . movies” and television shows,²⁹ or doing these product placements “quid pro quo” and hoping for something in return.³⁰ Even though some individuals argue that product placements are not advertisements because they do not contain aspects of traditional advertisements, there is without a doubt one main purpose for intentionally placing a product into a media platform: to show off the product in hopes of gathering the attention of the public and gaining potential future consumers.

Looking at the second factor that the *Bolger* Court considered, the reference to the product typically occurs either with a close-up camera shot of it; with a character in the media platform making a comment about it; or with a more subtle shot of the item that does not necessarily contain the “label or logo but featur[es] a product’s distinctive color or packaging, such as a curvy glass Coca-Cola bottle.”³¹ Although some product placements include explicit mention of the product itself—such as a character on a television show commenting about it—some do not. But this most certainly does not mean that the second consideration of *Bolger* is not met. Referencing a product does not necessarily mean that a character has to explicitly name the product in question, rather, there merely has to be some sort of recognition of that product. Clearly, every sort of product placement meets this requirement because the entire purpose of a product placement is to focus attention on and recognize the product.

Finally, the individual placing the item into the media platform at issue certainly has some form of economic motivation, as they have one main financial goal with product placements: to gain potential customers and

29. *What is Product Placement, Why Does it Matter and How to Get It*, ACCION OPPORTUNITY FUND, <https://aofund.org/resource/product-placement-why-it-matters-and-how-get-it/#:~:text=Product%20placement%20is%20a%20modern,in%20another%20form%20of%20media> [https://perma.cc/T67C-J5Q6].

30. Haigney, *supra* note 4.

31. Kenton, *supra* note 2.

consumers. Many product placements are done on a “quid pro quo” basis, meaning that the product is given to the movie or television show producers in exchange for airtime featuring the particular product.³² There would be little reason for companies to engage in this exchange unless there was some potential for economic gain; this exchange is more than just a gift, there are hopes that the product will be actually utilized in production. This counteracts the argument that product placements are merely a form of artistic speech that should be subject to strict scrutiny because it is being done for more than artistic purposes, it is being done in the hopes of financial profits.

It is important to note that even if a court finds that one of the three above-mentioned factors is not present, the Court noted in dictum that “[n]or do we mean to suggest that each of the characteristics present in this case must necessarily be present in order for speech to be commercial.”³³ Although this comparison of product placements to the Court’s application of the *Bolger* factors might alone prove sufficient to categorize product placements as commercial speech, this is not the only reason this should be done.

ii. Product Placements are Similar to the Commercial Speech in Central Hudson

The lack of available caselaw expanding the *Central Hudson* commercial speech framework to include product placements is no barrier here. The Court’s actual application of the framework in *Central Hudson* illustrates precisely why these placements should be categorized as commercial speech. At issue in *Central Hudson* was a statute that banned the promotion of electricity use.³⁴ The statute banned two forms of advertisements: typical advertisements that were clearly within the realm of commercial speech and “advertis[ements] not clearly intended to promote sales.”³⁵ The Public Service Commission of New York claimed that the law violated the First and Fourteenth Amendments once the use of electricity was no longer as major of a concern as it was when the statute first went into effect.³⁶ The Court, creating the commercial speech

32. Haigney, *supra* note 4.

33. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 n.14 (1983).

34. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 558 (1980).

35. *Id.* at 559.

36. *Id.* at 558-59.

intermediate scrutiny framework as set forth above, stated that commercial speech—although subject to a less demanding level of scrutiny—still receives some form of protection from government regulation.³⁷ In creating this framework, the Court struck down the New York statute finding that it was impermissibly burdensome on the Commission's First Amendment right to freedom of expression.³⁸

While the first form of banned advertisements at issue in *Central Hudson* was clearly commercial speech, the second form of advertising was not as clearly classifiable as such. These advertisements were promotional in nature but did not explicitly promote sales.³⁹ This is precisely what product placements are: the inclusion of a specific product to show it off without explicitly stating that it is being promoted. In other words, the advertising is done in a way that is focused more on the exposure of the product rather than active promotional advertisement of it. Although both advertisement forms at issue in *Central Hudson* were physical pamphlets or flyers, while product placements are embedded within another form of digital media, the main idea is that explicit wording is not necessary to categorize speech as being commercial in nature. So it would sensibly follow that product placements be treated the same as the advertisements depicted above—as commercial speech.

*iii. Evolving Technology: The Movement Away from Traditional
Advertisements and Towards Product Placements*

The world of advertising has undergone a drastic remodel since the commercial speech doctrine first arose in the late twenty-first century. No longer are the days where a person must sit through television commercials. One can now simply turn on one of the plethora of available streaming services and either skip through the commercials or avoid them altogether with certain platforms and subscriptions.⁴⁰ Over 41% of television viewers in 2017 consistently skipped advertisements.⁴¹ Because of this, companies have found that “[b]randed integrations have become one of the most effective forms of marketing, which is why so many brands are looking for a product placement agency to cut through the

37. *Id.* at 563.

38. *Id.* at 571.

39. *Id.* at 559.

40. *Product Placement: An In-Depth Look From BENlabs*, *supra* note 1.

41. *Id.*

advertising clutter.”⁴² Product placements play the same role as commercials—to encourage one to engage in a transactional relationship with the brand—but cannot be easily bypassed by the consumer skipping through it. These placements are not for mere artistic pleasure, they are methodically placed to draw in consumers to purchase the item. Product placements are the modern form of advertisements and demonstrate how the marketing and advertising agencies have adapted to fit their clients’ needs in the wake of emerging technology. It would only make sense to treat product placements the same as their more traditional counterparts and subject them to the commercial speech framework.

Product placements produce the same results as traditional advertisements. This is best illustrated through specific examples. First, *Toy Story*, a series of four movies known and loved by children and adults around the world, proved to be quite a success for multiple toys: Etch-A-Sketch sales increased by 4,000%, Mr. Potato Head sales increased by 800%, and the Slinky Dog—which had gone out of production before the movie first aired—was actually put back into business with over 20,000 orders placed just after the first *Toy Story* movie hit theaters.⁴³ After the placement of Eggo waffles in the television show *Stranger Things*, there was a 14% spike in Eggo sales.⁴⁴ Hershey’s agreed to spend one million dollars to promote the movie *E.T.* in exchange for a product placement deal which resulted in a 65% increase in Reese’s Pieces sales.⁴⁵ While product placements are highly effective and most commonly used in the realm of movie and television shows, they are also utilized outside of this genre. A Beats by Dre speaker was used in the music video for the song “Break Free” by Ariana Grande, and Nike partnered with the creator of the video game *Fortnite* to create new character skins that were available for consumers of the game to purchase for their personal avatar.⁴⁶

While the examples mentioned thus far show the positive impacts that product placements can have on a company’s economic standing, the opposite has also proven to be true—some of these product placements have actually resulted in economic loss for the company producing the product. In the television show *And Just Like That*, one of the main

42. *Id.*

43. Imogen Beech, *18 Ingenious Product Placement Examples*, BREEZY (Jan. 14, 2021) <https://breezy.io/blog/product-placement-examples> [<https://perma.cc/SNZ6-XPDH>].

44. Haigney, *supra* note 4.

45. Beech, *supra* note 43.

46. *Id.*

characters “had a heart attack while riding a Peloton” which in turn caused the Peloton stock “to plunge.”⁴⁷ Furthermore, “Reebok paid \$1.5 million to have a commercial included in the movie ‘Jerry Maguire,’ but the brand was insulted in the film, which led to negative consequences.”⁴⁸

These examples demonstrate that, even though product placements may not be delivered in exactly the same form as typical advertisements are, they produce the same results: recognition of the product and economic gain (or economic loss in some cases). So, regulations of these placements should be analyzed in the same way: under the *Central Hudson* commercial speech framework.

*iv. Product Placements are Easily Distinguishable from
Non-Commercial Portions of the Media Source*

When speech contains both commercial and non-commercial components, the Supreme Court has previously treated the entirety of the speech as non-commercial, subject to higher protection against government regulation than commercial speech. But product placements are not such speech and, therefore, should not be lumped together with the non-commercial portions of the advertisement.

The Supreme Court has previously stated that “we do not believe that . . . speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech” and that the Court “cannot parcel out the speech, applying one test to one phrase and another test to another phrase.”⁴⁹ Essentially, continuously creating new tests to analyze commercial speech proves to be unworkable due to how inextricably intertwined the commercial and non-commercial portions are. A specific example of this entanglement is shown through *Dex Media West, Inc. v. City of Seattle*.⁵⁰ At issue was a Yellow Pages book. The Ninth Circuit held that although the book contained both commercial material—advertisements placed within the book—and non-commercial material—the actual phone numbers and addresses—all of the speech was so inextricably entangled that the entirety of the book should be considered

47. Haigney, *supra* note 4.

48. *Is Product Placement in a Movie/TV Show a Good Marketing Strategy*, *supra* note 3.

49. *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 796 (1988).

50. *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952 (9th Cir. 2012).

non-commercial.⁵¹ Therefore, the whole Yellow Pages book was afforded the full protection of the First Amendment with the Court stating that “[t]he full First Amendment protection of newspapers, magazines, television shows, radio programs, and the like demonstrates that the inclusion of commercial material does not support treating those publications and broadcasts as commercial speech entitled to less First Amendment protection.”⁵²

While advocates of the decision in *Dex Media West* might argue that product placements are analogous to cases like this because the product placement itself is so inextricably intertwined with the media platform it is placed in that it is too difficult to separate them, this is not the case. Product placements are distinguishable from these situations because they can easily be separated from the non-commercial aspects of the media platform they are placed into. In the case of a Yellow Pages book, a person not well-versed in the commercial speech doctrine is not expected to be able to recognize that merely placing a business’s phone number and address is not an advertisement while the more explicit advertisements are. Even someone who has never before heard the words “commercial speech” would be able to recognize that a movie itself is not an advertisement, but if a particular brand of water is held up and displayed, this is a product placement and therefore an advertisement.

B. Hesitations Toward Analyzing Product Placements Under the Commercial Speech Doctrine

Although the Court’s prior decisions regarding commercial speech tend to support the proposition that product placements should fall into this category due to their vast similarities to typical advertisements, some individuals still have hesitations towards allowing product placements to be treated as commercial speech. Furthermore, opponents of the *Central Hudson* commercial speech framework argue that the inclusion of product placements into the realm of commercial speech furthers their argument that commercial speech should not be subject to a different form of scrutiny and that *Central Hudson* should be overturned. But even those who believe that *Central Hudson* should be overturned do not agree on what level of protection, if any, commercial speech should receive. While some believe that commercial speech should be treated the same as other

51. *Id.* at 962.

52. *Id.* at 963.

forms of speech—regulations of such should be subject to strict scrutiny—others believe that commercial speech should receive no form of protection. This Essay is not intended to take a stance on this issue, but both perspectives will be discussed and analyzed below.

i. Fears of the Potential Negative Consequences on the Digital Media Industry

Some fear that allowing for the expansion of the commercial speech doctrine to include product placements could have detrimental repercussions on the digital media industry. There is some concern that classifying product placements as commercial speech would create “a real time ‘scarlet A’ that would undermine dramatic effect and substantially devalue programming.”⁵³ The fear is that this will allow for government regulations to intrude more easily into the artistic portions of entertainment, in turn subjecting these portions of advertisements to intermediate scrutiny rather than the traditionally followed strict scrutiny. But this is not the case. These product placements are carefully articulated. It is not overly difficult to determine when an item has been placed into entertainment on purpose—this also reaffirms the idea that product placements should not be lumped together with the non-commercial portions of the speech because the non-commercial and commercial portions are easily distinguishable from each other. One of the classic ways to spot this is the careful placement of a label and a quick camera shot focusing in on the item. So not all products in every digital media platform will be subject to commercial speech. Plus, holding certain advertisements to different standards merely because of the form they are delivered to the consumer would be unjust. It would be like subjecting art sculptures and oil paintings to two different forms of scrutiny merely because the artistic expression is conveyed in a different form. Because product placements are clearly advertisements, they should be treated as such.

Furthermore, opponents argue that product placements are not even

53. Douglas J. Wood, *Activists' Product Placement Proposal Threatens Commercial Free Speech*, REEDSMITH (June 11, 2004) (citation omitted), [https://www.reedsmith.com/en/perspectives/2004/06/activists039-product-placement-proposal-threatens#:~:text=at%209%2D10.-,Protected%20Artistic%20Expression.,First%20Amendment%20protected%20free%20speech \[https://perma.cc/W6C8-PHYR\]](https://www.reedsmith.com/en/perspectives/2004/06/activists039-product-placement-proposal-threatens#:~:text=at%209%2D10.-,Protected%20Artistic%20Expression.,First%20Amendment%20protected%20free%20speech [https://perma.cc/W6C8-PHYR]).

advertisements because they are so dramatically different from traditional advertisements. Product placement industry officials have even explained that the placement “has to be executed in a way that doesn’t feel like an advertisement.”⁵⁴ One producer in charge of product placements stated that “[t]hey are not explicit advertisements.”⁵⁵ But the fact that it may not *feel* like a typical advertisement and is not *explicitly* an advertisement most definitely does not vitiate the fact that it *is* one. Merriam-Webster defines the word “advertise” as “to present (something or oneself) to the public in a way that is intended to attract customers.”⁵⁶ That is exactly what product placements do: place products in various forms of media in order to gain potential consumers. They just do it without explaining so.

ii. Overturning the Central Hudson Framework

Apart from those who fear the potential repercussions that may arise from allowing product placements to be treated as commercial speech are those who attack the commercial speech doctrine as a whole. This group of opponents might argue that the potential for product placements to be treated as commercial speech is precisely the reason that *Central Hudson* should be overturned and commercial speech should not be treated as its own category. They might argue that allowing these forms of speech that are not easily classifiable as commercial will open the door to creating more and more carveouts to the doctrine and get further away from what the true meaning of commercial speech was supposed to resemble in the first place. Within this group are two subgroups. The first group includes those who think that commercial speech should be treated the same as all other speech and government regulation of such should be subject to strict scrutiny—mainly arguing that product placements contain both commercial and non-commercial components which makes it too difficult to separate the two. The other group includes those who argue that things should go back to how they were prior to *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council* when commercial speech received no protection from the First Amendment.⁵⁷ This Essay is not meant to assert a position on the existence of the commercial speech framework,

54. Haigney, *supra* note 4.

55. Kenton, *supra* note 2.

56. Advertise, MERRIAM-WEBSTER (11th ed. 2019).

57. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 758 (1976).

but rather it is meant to argue that, in the framework's current state, product placements should be analyzed under it. Both positions will be analyzed in further detail below.

a. Overturning Central Hudson and Giving Commercial Speech the Same Amount of Protection as Other Speech

Those in favor of abolishing commercial speech altogether argue that *Central Hudson* should be overturned and all speech that may be considered commercial in nature should be treated like all other forms of speech and government regulations of such subject to strict scrutiny. They argue that this debate over whether product placements are considered commercial speech or not is precisely the reason this should occur. What is classified as commercial speech is not black and white, and with advancements in technology we are bound to face even more situations where the speech at issue might be commercial speech but is not necessarily easily classifiable as such. So the easiest way to ensure that this speech receives protection is to treat all speech the same rather than try to treat commercial speech differently.

b. Overturning Central Hudson and Giving Commercial Speech No Protection from Government Regulation

Those on the other side of the argument argue that *Central Hudson* should be overturned and commercial speech should receive no First Amendment protection. In fact, this was the majority viewpoint until the Supreme Court held in *Virginia State Pharmacy Board* that commercial speech receives some form of First Amendment protection, but did not specify what level of scrutiny that government regulation of such speech would be subjected to.⁵⁸ Specifically, the Court reasoned that “[s]peech likewise is protected even though it is carried in a form that is ‘sold’ for profit . . . and even though it may involve a solicitation to purchase or otherwise pay or contribute money.”⁵⁹ While the Court did not specify what level of protection commercial speech receives, it did make sure to

58. David L. Hudson Jr., *Central Hudson Test*, FREE SPEECH CTR. MIDDLE TENN. STATE UNIV. (July 2, 2024) (citations omitted), <https://firstamendment.mtsu.edu/article/central-hudson-test/> [https://perma.cc/WM5L-AVEB].

59. *Virginia State Bd. of Pharmacy*, 425 U.S. at 761 (citations omitted).

specify that it is not completely immune from regulation stating that “[i]n concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way.”⁶⁰ This viewpoint argues that commercial speech as a whole “extend[s] too much rather than too little protection to commercial speech” and therefore continuously adding new forms of speech that are not traditionally considered to be “commercial speech” is improper.⁶¹ This group would argue that on point is Justice Clarence Thomas’s concurring opinion from 44 *Liquormart v. Rhode Island*, in which he argued that the *Central Hudson* test is unworkable. Specifically, “the *Central Hudson* test asks the courts to weigh incommensurables—the value of knowledge versus the value of ignorance—and to apply contradictory premises—that informed adults are the best judges of their own interests, and that they are not.”⁶² Essentially, commercial speech itself already extends too much protection, and to add speech that is not easily identifiable as commercial speech is too far of a stretch and the spirit of the commercial speech doctrine would be lost.

IV. Conclusion

In conclusion, product placements are forms of commercial speech and should be treated as such under the First Amendment. While these placements may not be as overt in their goals to promote a product and engage with potential consumers as other forms of advertisements are, the end goal is the same: regulations governing them should be analyzed under the same level of scrutiny. The expansion of commercial speech to include product placements does not stand as an obstacle to the current form of commercial speech and will not serve as a vehicle to allow for government invasion into artistic portions of advertisements.

60. *Id.* at 770.

61. Nat Stern, *The Stubborn Survival of the Central Hudson Test for Commercial Speech*, SEATTLE L. REV. 647, 661 (2022).

62. 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 528 (1996) (Thomas, J., concurring).

