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Can Lois Lane Smoke Marlboros?: An Examination of the Constitutionality of Regulating Product Placement in Movies

William Benjamin Lackey†

In the past decade, motion pictures have become veritable moving billboards. The widespread practice of "product placement," by which a company either pays to have its product included in a film or provides the product free of charge in exchange for exposure, has created the impression that Hollywood is more interested in producing feature length advertisements than in making films.

Although product placement may generally be dismissed as a mere annoyance, the practice of placing harmful and addictive products in films is disturbing, particularly when tobacco products appear in films that are marketed for viewing by children and teenagers. This targeting of children is made more problematic by evidence revealing that product placement is generally a more effective marketing device than other forms of advertising.

† B.A. 1991, Bard College; J.D. Candidate 1994, University of Chicago.


2 The founder of MMI Product Placement, an agency devoted to placing its clients' products in films, estimates that "[three] percent [of placements] are paid, [while] the remaining 97 percent are contra arrangements, in which the product is provided ... during filming in exchange for an appearance." Don Douloff, Place, Show & Win, Toronto Star H1 (July 27, 1991).

3 See Bruce Horovitz, New Twist in Tie-Ins: 'Home Alone 2' May Redefine Merchandising, LA Times D1 (Nov 12, 1992) (noting the views of critics who describe the inclusion in Home Alone 2 of toys developed by the director, 20th Century Fox, and Tiger Electronics, as "product placement at its ugliest"); Kenneth R. Clark, Group Goes After Brand-Name Film Props, Chicago Trib C3 (June 10, 1991) (examining the views of the Center for the Study of Commercialism, which petitioned the Federal Trade Commission to either regulate the practice or ban it outright); Strauss & Reeves, USA Today at 6B (cited in note 1) (providing a brief overview of the controversy over product placement); Marc Gunther, Product Placement Angers 22 Groups, Calgary Herald E11 (Sept 5, 1992) (quoting a consumer advocate and law professor as saying that product placement "is really George Orwell's 1984 vision of the future put into place").

4 Miller, 265 Atlantic at 45 (cited in note 1).
If product placement constitutes "commercial speech," then it enjoys a lesser degree of protection under the First Amendment than other speech, and Congress can constitutionally regulate it. Although no court has expressly addressed this question, two bills which propose to ban paid product placement of tobacco products have already been introduced in Congress. Classifying product placement as commercial speech and seeking to restrict its use, however, raises important constitutional questions about the propriety of government regulation of film content.

This Comment argues that product placement, whether paid or unpaid, constitutes commercial speech as defined by the Supreme Court, and concludes that Congress should prohibit the product placement of cigarettes by passing a modified version of one of the bills that has already been introduced in Congress. Part I of this Comment examines the practice of product placement and describes why it should be regulated. Part II sets forth the definition of commercial speech as outlined by the Supreme Court and argues that product placement constitutes commercial speech under that definition. Part III discusses the two legislative proposals to prohibit the placement of tobacco products in films, and proposes modifying one of these bills so as to improve Congress's ability to prevent cigarette placement. Part IV argues that this modified bill would pass constitutional muster and would not violate the First Amendment rights of the filmmaker or the commercial speaker. This Comment concludes by considering whether placement of other products can and should be similarly regulated.

I. PUSHING PRODUCTS THROUGH THE MOVIES

Product placement is a classic case of one hand washing the other: filmmakers defray production costs while manufacturers gain access to a massive advertising market. Manufacturers either pay movie producers to include their products in films, or, more commonly, provide the products to the studios free of charge. As film production costs soared during the 1980s, producers began to more actively seek this type of financial help from manufacturers

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* "Commercial speech" is a legal term of art referring to speech that proposes a commercial transaction. It is afforded lesser protection under the First Amendment than other types of speech. See, for example, Bd of Trustees of the State University of New York v Fox, 492 US 469, 473-76 (1989).

* See Protect Our Children from Cigarettes Act of 1989, HR 1250, 101st Cong, 1st Sess (Mar 2, 1989), in 135 Cong Rec E725-26 (Mar 9, 1989); Tobacco Control and Health Protection Act, HR 5041, 101st Cong, 2d Sess (June 14, 1990).
in order to cut expenses. In return, filmmakers provided manufacturers with access to a huge market at a cost far lower than that for conventional advertising.

Product placement first gained widespread notoriety when the prominent appearance of Reese's Pieces in *E.T.* caused sales of that candy to skyrocket. The success of the Reese's placement "paved the way for a flurry of commercial involvement in feature films." The practice of product placement has now become so routine that it often blends unnoticeably into films. For example, some recent movies containing placements include *Terminator 2* (Diet Pepsi), *Wayne's World* (Pizza Hut, Doritos, Reebok, Nuprin, and Pepsi), *Total Recall* (28 different products shown 55 different times), and *Thelma and Louise* (Diet Sprite, Coca-Cola, and Ryder Trucks). Virtually every big-budget Hollywood film now contains some placed products.

Of all the products placed in films, cigarettes have generated the greatest controversy. Tobacco companies began to place their products in movies long before the successful *E.T.* placement, often in films designed to appeal to children and teenagers. For example, Philip Morris provided Marlboros for Margot Kidder, who played the chain-smoking Lois Lane in the 1978 release of *Superman*. Marlboros reappeared in *Superman II* after Philip

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8 A moderately popular film is viewed by millions in theaters and by tens of millions through videocassettes. David Kalish, *Now Showing: Products*, 23 Marketing and Media Decisions 28 (Aug 1988). A film that grosses about $50 million dollars at the box office can be expected to sell between 200,000 and 300,000 videocassettes, resulting in an "additional 25-30 million impressions." Id. Furthermore, a sizable cable television industry adds millions of additional viewers to the potential audience. Id.
10 See Kalish, 23 Marketing & Media Decisions at 28 (cited in note 8).
11 Id.
14 Tri-Star Pictures 1990. See Strauss & Reeves, USA Today at 6B (cited in note 1).
16 Miller, 265 Atlantic at 41-46 (cited in note 1).
17 See, for example, Anita M. Busch, "FTC Looking Into Movies With Paid Tobacco Placement," *Back Stage* 1 (Apr 6, 1990). Ben Cohen, senior counsel to the House Subcommittee for Tourism, Transportation, and Hazardous Materials, notes that tobacco companies arouse more ire than other product placers because "[t]oothpaste doesn't kill people." Id.
18 Clark, Chicago Trib at C3 (cited in note 3); Busch, *Back Stage* at 1 (cited in note 17).
Morris paid $42,000 for numerous exposures to their cigarettes, including scenes of Superman being thrown into two cigarette delivery trucks and Superman flying past a billboard bearing the familiar Marlboro logo.\textsuperscript{21} The Liggett Group entered the fray in 1983 when it paid Universal $30,000 to have its Eve cigarettes appear in \textit{Supergirl}.\textsuperscript{22} Indeed, the highest placement fee to date was paid by a tobacco company; Philip Morris paid $350,000 to have its Lark cigarettes\textsuperscript{23} displayed prominently as 007’s cigarette of choice\textsuperscript{24} in \textit{License to Kill},\textsuperscript{25} a 1988 James Bond film. Timothy Dalton, the actor who played Bond, also used a pack of explosive Larks to shatter a glass window in a villain’s office.

Although the tobacco industry has adopted new industry guidelines that “formally eliminate paid product placements in movies,”\textsuperscript{26} it has not abandoned the practice of supplying valuable “props” to studios upon request.\textsuperscript{27} For example, the American Tobacco Company provided an estimated $25,000 worth of Lucky Strikes and Pall Malls to the makers of \textit{Beverly Hills Cop},\textsuperscript{28} a film in which comedian Eddie Murphy posed as a smuggler with a cigarette-filled truck.\textsuperscript{29} Because tobacco companies and film producers generally fail to disclose in the final credits whether the cigarettes used in the film were provided free of charge by the manufacturer, it is difficult to determine whether products have been placed or purchased by the studio. Martin Scorsese’s recent production of \textit{Goodfellas},\textsuperscript{30} for example, featured a series of scenes similar to—and involving the same products as—those in \textit{Beverly Hills Cop}. It is likely that American Tobacco provided the cigarettes to

\textsuperscript{21} Thomas Ferrarro, \textit{The Hollywood-Madison Avenue Connection?}, UPI (Oct 17, 1985), in LEXIS (Nexis library, Omni file). See also 135 Cong Rec at E726 (cited in note 6) (remarks of Thomas Luken introducing HR 1250, a bill which would have banned paid product placement of cigarettes); Cheryl Wetzstein, \textit{Tobacco Companies Decide to Stop Smoking Up the Silver Screen}, Wash Times C1 (Dec 20, 1990).
\textsuperscript{22} Universal Pictures 1983. The Liggett Group has publicly admitted making the payment. See 135 Cong Rec at E726 (cited in note 6).
\textsuperscript{23} Lark cigarettes are manufactured and marketed jointly by Philip Morris and the Liggett Group. See 135 Cong Rec at E726 (cited in note 6).
\textsuperscript{24} See Busch, \textit{Back Stage} at 2 (cited in note 17); 135 Cong Rec at E726 (cited in note 6); Wetzstein, \textit{Wash Times} at C1 (cited in note 21).
\textsuperscript{25} 20th Century Fox 1988.
\textsuperscript{26} Wetzstein, \textit{Wash Times} at C1 (cited in note 21).
\textsuperscript{27} See id; Busch, \textit{Back Stage} at 2 (cited in note 17).
\textsuperscript{28} Paramount Pictures 1984. See Wetzstein, \textit{Wash Times} at C1 (cited in note 21).
\textsuperscript{29} Wetzstein, \textit{Wash Times} at C1 (cited in note 21).
\textsuperscript{30} Warner Brothers 1990.
the studio free of charge although neither party has confessed to such an arrangement.\footnote{Note, Movies and Product Placement: Is Hollywood Turning Films into Commercial Speech?, 1992 U Ill L Rev 301, 301 n 1 (citation omitted) (quoting one marketing executive as stating that "[n]othing in . . . movies is incidental . . . If a product appears on camera in a movie, you can be sure somebody put it there.").}

Critics of product placement often compare this practice to subliminal advertising, deriding it as "one of the sneakiest and most insidious forms of advertising around," and arguing that it "represents the crass commercialization of movies and products."\footnote{Miller, 265 Atlantic at 45 (cited in note 1).} Unlike subliminal advertising, however, product placement is often effective,\footnote{See Wetzstein, Wash Times at C1 (cited in note 21) (noting that sales of Reese's Pieces rose 70 percent after E.T.); Douloff, Toronto Star at H1 (cited in note 2). Within a year after Ray-Ban provided two free pairs of Wayfarer glasses for Tom Cruise to wear in Risky Business, sales of that model tripled. Douloff, Toronto Star at H1. Similarly, after Ray-Ban provided 30 to 35 pairs of its Aviator model sunglasses for Cruise and his fellow flight school students to wear in Top Gun, its sales increased between 30 and 40 percent. Id.} as illustrated by the explosion in sales of Reese's Pieces after E.T. and Ray-Ban "Wayfarers" after Risky Business.\footnote{135 Cong Rec at E726 (cited in note 6).}

As noted above, products are often placed in films that are designed to appeal to children and young adults. Congress has acknowledged that when cigarettes\footnote{See Cut! It's Miller Time, 13 Am Mkplace (Sept 10, 1992), in LEXIS (Nexis library, Omni file). For an examination of the possibility of regulating the product placement of alcohol, see note 113 and accompanying text.} or alcohol\footnote{135 Cong Rec at E726 (cited in note 6).} are the placed products, this type of "targeting" presents particular problems that make regulation desirable. Representative Thomas Luken, for example, upon introducing a bill that would have banned tobacco placement, explained that one of the "most important[ ]" motivations for the bill was ending "an insidious technique by the merchants of addiction to get young people to smoke . . . ."\footnote{See HR 5041 at § 2(1) (cited in note 6); HR 1250 at § 2(1) (cited in note 6).} Tobacco companies, however, have continued to place their products in a number of films that appeal to children (for example, the three Superman films, License to Kill, and Beverly Hills Cop), despite the fact that tobacco use is the most preventable cause of illness and premature death in the United States,\footnote{See HR 5041 at § 2(1) (cited in note 6); HR 1250 at § 2(1) (cited in note 6).} and is unique.
in its ability to kill the user when used as intended. Although some tobacco companies have ended paid placement, they have not yet abandoned the practice of unpaid placement. Moreover, although several bills have been introduced to ban or limit this practice, there currently exist no legal restrictions on the use of product placement.

II. PRODUCT PLACEMENT CONSTITUTES REGULABLE COMMERCIAL SPEECH

Commercial speech doctrine provides that although the First Amendment affords some constitutional protection to commercial speech, it is nevertheless regulable. The application of commercial speech doctrine to the practice of product placement poses two basic questions: first, is product placement commercial speech; and second, if it is, how may Congress regulate it. The first question, addressed by this Part, raises two sub-issues: first, is product placement, on its own, commercial speech; and second, even if product placement is commercial speech, is it immune from regulation because it is part of a larger artistic work which is fully protected by the First Amendment.

A. Product Placement Is Commercial Speech

When the Supreme Court first drew a distinction between commercial and non-commercial speech in Valentine v Chrestenson, the Court held that the First Amendment provided "no restraint on government [from proscribing or regulating] purely commercial advertising." Although the Court has since held that commercial speech does enjoy First Amendment protection, its original distinction between non-commercial speech on the one hand and "purely commercial advertising" on the other, informs the Court's current understanding of commercial speech.

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39 HR 5041 at § 2(2) (cited in note 6).
40 See notes 86-95 and accompanying text.
41 316 US 52 (1942). The opinion was only three pages long and cited no precedent, a fact emphasized by virtually every citation to Valentine in the past two decades. Justice Douglas, a member of the Valentine Court, later noted that "[t]he ruling was casual, almost offhand. And it has not survived reflection." Cammarano v United States, 358 US 498, 514 (1959) (Douglas concurring).
42 Valentine, 316 US at 54. The speech at issue was a combination of political protest and advertising. Id.
43 See note 86 and accompanying text.
In *Pittsburgh Press Co. v Pittsburgh Commission on Human Relations*,\(^4\) the Court defined commercial speech as speech which does "no more than propose a commercial transaction," thereby establishing an understanding of commercial speech that largely survives today.\(^5\) The Court, in applying this definition to classified advertisements, held that the ads in fact did no more than propose a commercial transaction—that of possible employment—and were "thus classic examples of commercial speech."\(^6\)

The *Pittsburgh Press* Court reasoned that in order to determine whether speech proposes a commercial transaction, courts must examine both the content of the speech and the motivation of the speaker.\(^7\) In subsequent decisions, however, the Court has emphasized these two factors to varying degrees. For example, in *Central Hudson Gas & Electric Corp. v Public Service Commission of New York*,\(^8\) the Court held that its earlier definition of commercial speech in *Pittsburgh Press* is only satisfied when the "expression relate[s] solely to the economic interests of the speaker and its audience."\(^9\)

In two more recent cases, *Posadas de Puerto Rico Associates v Tourism Co. of Puerto Rico*\(^10\) and *Board of Trustees of the State University of New York v Fox*,\(^11\) the Court broadened its understanding of the types of speech that constitute a proposal of a commercial transaction, while continuing to incorporate in its definition of commercial speech *Central Hudson*'s economic motivation criteria. In *Posadas*, the Court found that a statute prohibiting references to gambling in hotel-casino advertisements aimed at local Puerto Rican residents constituted a permissible regulation of


\(^{5}\) Id at 385. This definition of commercial speech was subsequently reaffirmed by the Court in *Bigelow v Virginia*, 421 US 809 (1975), and *Virginia State Bd of Pharmacy v Virginia Citizens Consumer Council, Inc.*, 425 US 748 (1976).

\(^{6}\) 413 US at 385. The question in *Pittsburgh Press* was whether a city ordinance which forbade sex discrimination in hiring was constitutional as applied. Id at 378. The Pittsburgh Human Relations Commission charged that the Pittsburgh Press had violated the ordinance by publishing classified ads under headings designating jobs as "male" or "female." Id at 379. The classification was either specified by the advertiser or offered in response to inquiries by the newspaper. Id at 380.

\(^{7}\) *Pittsburgh Press*, 413 US at 386-88. The Court examined both the commercial motives behind the advertisements and the actual message of the ad.

\(^{8}\) 447 US 557 (1980).

\(^{9}\) Id at 561.

\(^{10}\) 478 US 328 (1986).

\(^{11}\) 492 US 469 (1989).
commercial speech.\textsuperscript{52} According to the Court, the speech at issue proposed a commercial transaction for gambling, and thus could be restricted.\textsuperscript{53} In so holding, \textit{Posadas} suggested that the mere mention of a product sold by a producer-advertiser constitutes a proposal for a commercial transaction and is thus commercial speech under \textit{Pittsburgh Press}. Further, by emphasizing that the statute at issue in \textit{Posadas} was limited to casino owners, the Court implicitly adopted \textit{Central Hudson}'s holding that the identity and motivation of the speaker is important in determining whether the speaker is proposing a commercial transaction.

In \textit{Board of Trustees of the State University of New York v Fox}, the Court addressed the constitutionality of a New York statute that prevented a representative of American Future Systems ("AFS") from holding, on a state university campus, a "Tupperware party"\textsuperscript{54} that included a presentation of household tips and homemaking information.\textsuperscript{55} The \textit{Fox} Court expanded its understanding of commercial speech by reformulating the \textit{Pittsburgh Press} definition to include any speech which "propose[s] a commercial transaction,"\textsuperscript{56} not just speech "which [does] no more than propose a commercial transaction."\textsuperscript{57} Applying this modified test, the Court concluded that there was "no doubt" that at least part of the speech at the Tupperware party proposed a commercial transaction.\textsuperscript{58} In so holding, the Court included "mixed" commercial and non-commercial speech in its definition of speech that can serve to propose commercial transactions.

The incorporation of \textit{Posadas} and \textit{Fox} into the framework of \textit{Pittsburgh Press} and \textit{Central Hudson} suggests that the current Court would view any speech or "mixed speech" that proposes a commercial transaction as commercial speech. Under this view, any speech by a seller of a product designed to persuade consumers to purchase the product would constitute commercial speech. Under the current holdings of the Court, therefore, product placement

\textsuperscript{52} \textit{Posadas}, 478 US at 340. Among other things, the statute prohibited hotels from making specific reference to the word "casino" in advertisements that were accessible to the Puerto Rican public. Id at 333.

\textsuperscript{53} Id.

\textsuperscript{54} The party consisted of "demonstrating and offering products for sale to groups of 10 or more prospective buyers at gatherings assembled and hosted by one of those prospective buyers (for which the host or hostess stands to receive some bonus or reward)." \textit{Fox}, 492 US at 472.

\textsuperscript{55} Id at 474.

\textsuperscript{56} Id at 473-74 (emphasis added).

\textsuperscript{57} \textit{Pittsburgh Press}, 413 US at 385 (emphasis added).

\textsuperscript{58} \textit{Fox}, 492 US at 473.
should be included in commercial speech because by seeking to persuade movie viewers to purchase the placed product, the practice of product placement proposes a commercial transaction.\footnote{For an opposing view, see Note, 1992 U Ill L Rev at 315-27 (cited in note 31), which argues that product placement does not constitute commercial speech.}

1. **Product placement is economically motivated by the “placer.”**

If Philip Morris paid a magazine to publish a full-page advertisement consisting solely of the Marlboro logo, it would clearly possess the requisite economic motivation to qualify the ad as commercial speech. Similarly, product placement is speech driven by an economic motive. The manufacturer’s speech in product placement stems solely from the economic interests of the speaker and its audience. The manufacturer’s motive is to induce the movie viewer to buy the placed products.

Commercial speech is created only when a manufacturer places the product in the film for an economic purpose. Thus, the mere exposure of brand names in a film is not rooted in an economic motive sufficient to qualify the entire film as commercial speech. For example, a filmmaker who, on his own, includes commercial references in his film, does not produce commercial speech. The speaker in that case, the filmmaker, would have no economic motivation for including the goods in the film. Indeed, he would most likely be unaffected by whether the viewer purchases the product. In contrast, the conscious placing of products in films is expressly rooted in economic motives, and thus constitutes commercial speech.

2. **The content of product placement proposes a commercial transaction.**

The advertisement described above, a full-page Marlboro logo in a magazine, would constitute a proposal for a commercial transaction under *Posadas* and *Fox* although the content of the ad may not specifically propose that the reader purchase the product. Indeed, such an ad would be analogous to a hotel purchasing a billboard with the word “casino” emblazoned across it, which, in *Posadas*, the Court deemed commercial speech.

Similarly, product placement proposes a commercial transaction. The manufacturer of a product pays or provides “props” to a movie producer for the sole purpose of exposing his product to a wide audience. Like the Puerto Rican casino owner using a bill-
board featuring the word "casino," or a merchant purchasing a newspaper ad, a manufacturer obtains space in a movie in order to propose a commercial transaction. Thus, under the expansive standard established in *Posadas* and *Fox*, product placement clearly constitutes commercial speech.

B. Product Placement May Be Regulated

In determining whether product placement is regulable as commercial speech, a court must examine the nature of the product placement itself, not the film as a whole. This is consistent with the Supreme Court's decision in *Pittsburgh Press*, which recognized that commercial speech within a larger work protected by the First Amendment can indeed be regulated. The Court held in *Pittsburgh Press* that classified advertisements, although a part of a newspaper, are regulable as "classic examples of commercial speech." Similarly, although motion pictures are accorded the same First Amendment protection as a newspaper or book, the portions of a film that contain placed products can be distinguished from the whole; like newspaper editors, filmmakers can sell or trade space in their movie to a manufacturer.

Moreover, the fact that a filmmaker retains a great deal of control over how a product is included in the movie does not remove the placement from the realm of commercial speech. The Supreme Court has stated that a publisher's exercise of editorial judgement over a commercial advertisement "does not necessarily strip commercial advertising of its commercial character." Finally, product placement cannot be insulated from regulation on the ground that it is somehow intertwined with the film as a whole. In *Fox*, the Court held that commercial speech is not immune from regulation unless it is "inevitably intertwined" with non-commercial speech by some "law of man or of nature." Under this standard, the Court concluded that "advertising" was

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60 One commentator has suggested that because a movie is entitled to the same First Amendment protection as a novel, the movie as a whole must be examined in order to determine the reach of the First Amendment. Id at 321.
62 See, for example, *Joseph Burstyn v Wilson*, 343 US 495, 501-02 (1952) (movies are "included within the free speech and free press guaranty of the First and Fourteenth Amendments").
63 *Pittsburgh Press*, 413 US at 387. See also *Capital Broadcasting Co. v Mitchell*, 333 F Supp 582, 584 (D DC 1971).
64 *Fox*, 492 US at 474.
not "entitled to the constitutional protection afforded noncommercial speech" merely because it was linked to a public debate. In Fox, the Court rejected the contention made by AFS that a presentation at a Tupperware party was fully protected by the First Amendment merely because it addressed a number of noncommercial subjects, such as financial responsibility and how to run a home efficiently. The Court stated that because the noncommercial and commercial speech were not inextricably intertwined, the speech need not be classified as non-commercial in its entirety. Writing for the Court, Justice Scalia reasoned that "[n]o law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares," and nothing in the statute precluded the presentation of the noncommercial messages or required them to be combined with commercial messages.

One commentator has argued that products used in movies are inextricably intertwined with the film because it would be virtually impossible for a film to be realistic if all commercial references were excluded. Under the reasoning of Fox, however, cinematic realism is not a "law of man or of nature" that makes it impossible to sell products without producing movies, or to produce movies without placing products. Under the holding in Fox, therefore, product placement can be regulated.

III. MODIFYING THE CONGRESSIONAL PROPOSALS TO ELIMINATE THE PRODUCT PLACEMENT OF CIGARETTES

Congress has already considered two bills that would restrict placement of tobacco products in films. Representative Luken's bill, the "Protect Our Children from Cigarettes Act of 1989," would have prohibited all tobacco consumer sales promotion that can "be seen or heard by any person under the age of 18," with the exception of text advertisements that could appear in specified locations. The bill sought to cover product placement by defining

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66 Fox, 492 US at 474.
67 Id. The respondents relied on Riley v Natl Federation of the Blind, 487 US 781 (1988), which held that speech can be classified as non-commercial speech even if state law requires it to include many commercial elements. Id at 796.
69 Fox, 492 US at 474.
70 HR 1250 at § 1 (cited in note 6).
71 Id at § 3(a).
“consumer sales promotion” as any “payment to have a registered 
brand name of a tobacco product appear in a movie or play.”

During hearings on the bill, tobacco companies attacked the 
proposed legislation as unconstitutional, claiming that the limita-
tions it placed on cigarette advertising were excessively restric-
tive. The bill ultimately failed to make it out of the House Sub-
committee on Transportation and Hazardous Materials.

In the second session of the 101st Congress, Representative 
Henry Waxman introduced a second bill that would have re-
stricted the placement of tobacco products in movies. In particu-
lar, the “Tobacco Control and Health Protection Act” would have 
prohibited paid product placement in films by making it:

unlawful within the United States for the manufacturer, 
packager, or distributor of tobacco products . . . to pay 
or cause to be paid to have any tobacco product or any 
tobacco product trademark appear in any movie, music 
video, television show, play, video arcade game, or other 
form of entertainment.

A modified version of the Waxman bill, with the product 
placement provision intact, made it out of the House Subcommit-
tee on Health and the Environment, but was not taken up by the 
full Commerce Committee before the end of the 101st Congress. 
Although its present status is uncertain, aides expect the bill to 
resurface in the near future.

The product placement provisions of these two bills are under-
inclusive and thus preclude them from effectively addressing the 
practice of product placement by tobacco companies. The Luken 
bill suffered two notable shortcomings. First, by permitting the 
placement of products whose “brand name is the name of a corpo-
ratin” in existence prior to the passage of the bill, the bill ironi-
cally would have allowed paid product placement by Philip Morris

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73 Id at § 3(b)(2)(G).
74 See Cheryl Wetzstein, Advertising, Tobacco Industries Call Cigarette Act Unconsti-
tutional, Wash Times C3 (July 26, 1989); Kathy Kadane, States News Service (July 28, 
1989), in LEXIS (Legis Library, Alleg File).
75 Bill Tracking Report, in LEXIS (Legis Library, BLT101 file).
76 HR 5041 (cited in note 6). The initial draft of the bill would also have severely re-
stricted other types of tobacco advertising by permitting advertisements to include only a 
warning about the dangers of smoking and the brand name of the product. Id at §§ 4-6.
77 Id at § 6(b)(4).
79 Id.
80 HR 1250 at § 3(b)(2)(G) (cited in note 6).
for their "Philip Morris" brand cigarettes or by the Dunhill company for their "Dunhill" brand cigarettes although the harm from those cigarettes is no different than the harm from cigarettes with other names. Second, the Luken bill failed to specifically address the problem of unpaid product placement,\(^1\) the practice by which the tobacco industry provides their products free of charge to movie producers and studios.\(^2\)

Like the Luken bill, the Waxman bill would have failed to solve the problem of unpaid product placement. By limiting the product placement ban to those cases in which a tobacco company has "paid or cause[d] to be paid" to have its product included in a film, the bill would have failed to address the problem of unpaid product placement.\(^3\)

Because the Waxman bill, or a modified version of it, will likely be reintroduced in the future, it should be amended to address the problem of the unpaid product placement of tobacco products. One solution would be to add another subsection to the product placement provision of the original bill—section b(6)—which would read as follows:\(^4\)

\(^1\) The bill did ban all "consumer sales promotion" which could be seen or heard by a person under the age of 18, but defined "consumer sales promotion" as "payment" to have a tobacco product appear in a movie or play. Id at §§ 3(a), 3(b)(2). This definition would not, on its face, sweep in unpaid product placement.

\(^2\) See notes 26-31 and accompanying text.

\(^3\) HR 5041 at § 6(b)(4) (cited in note 6). Although courts may interpret the bill as categorizing the practice of providing free cigarettes in return for exposure as an "in-kind" payment, such a result could easily be avoided by the proposed rewording of the bill.

Section 6(b)(1) of the bill would prevent any tobacco manufacturer or distributor from "distribute[ing] or caus[ing] to be distributed any tobacco product as a free sample or to make any tobacco product available at no or reduced cost through the use of coupons or other promotional method." This clause, however, would not necessarily prevent unpaid product placement, because the underlying intent of the phrase, "free sample," appears to limit the ban to the provision of cigarettes free of charge to consumers. The proposed amendment is clearer and specifically targets unpaid product placement.

\(^4\) The original version of Section 6(b) of HR 5041 reads in full as follows:

(b) PROMOTION: It shall be unlawful within the United States for the manufacturer, packager, or distributor of tobacco products—

(1) to distribute or cause to be distributed any tobacco product as a free sample or to make any tobacco product available at no or reduced cost through the use of coupons or other promotional method,

(2) to sponsor or cause to be sponsored any athletic, music, artistic, or other event in the name of a tobacco product trademark or in a manner so that a tobacco product trademark is publicly identified as a sponsor of, or in any way associated with, such an event,

(3) to market, or cause to be marketed nontobacco products (including toys) or services which bears [sic] the name of a tobacco product trademark,
Section 6(b) — It shall be unlawful . . . for the manufacturer, packager, or distributor of tobacco products.

6) to provide free of charge, or at a reduced price, any tobacco products, products bearing the name of a tobacco product, or products bearing the tobacco product trademark to any person for the purpose of having the products included in a movie, music video, television show, play, or other form of entertainment.

This subsection would effectively prevent the promotion of tobacco products by tobacco companies in the specified media. Companies would be prohibited not only from placing their products, but also from attempting to circumvent the ban by providing to the studio any promotional materials other than tobacco which bears the name of a tobacco product. Because the bill is aimed solely at tobacco companies, however, it would not prohibit a producer or director from choosing to include a tobacco product in his film; he simply would no longer be able to receive these “props” free of charge.85

IV. THE MODIFIED WAXMAN BILL WOULD PASS CONSTITUTIONAL MUSTER

Although product placement may be regulated as commercial speech, the government is limited in its ability to restrict its use.96

(4) to pay or cause to be paid to have any tobacco product or any tobacco product trademark appear in any movie, music video, television show, play, video arcade game, or other form of entertainment, or
(5) to pay or cause to be paid to have any tobacco product trademark appear on any vehicle, boat, or other equipment used in sports.

85 As drafted, the Waxman bill provided for potentially severe penalties. The Act was to be enforced by the Attorney General upon the recommendation of the Secretary of Health and Human Services. Violators of the Act were to be subject to a civil penalty of no more than $100,000 per day for each violation. HR 5041 at § 11 (cited in note 6). The bill also provided that “any interested organization” could seek injunctive action and be compensated for its attorney’s fees and expenses if it prevailed. Id.

The penalties provided in the Waxman bill are more structured than those in the Luken bill. The Luken bill provided that a violation of the advertising ban would be considered a violation of section 5 of the Federal Trade Commission Act, which grants the FTC the discretion to levy fines and other penalties. The bill also provided for a private cause of action for damages against any person who violated the ban. HR 1250 at § 4 (cited in note 6).

96 Commercial speech is no longer denied First Amendment protection. In Virginia Board of Pharmacy, the Court held that commercial speech must be afforded some protection. 425 US at 762. Justice Blackmun stated that “[i]t is a matter of public interest that [private economic decisions], in the aggregate, be intelligent and well informed. To this end,
The current test for evaluating the constitutionality of speech restrictions calls for a balancing of the importance of the expression against the government's interest in regulation. In *Central Hudson*, the Supreme Court adopted a four-part balancing test that has largely survived subsequent decisions. Under the four-part test, courts must ask whether: (1) the commercial speech concerns a lawful activity and is not misleading; (2) the asserted governmental interest is "substantial"; (3) the regulation "directly advances[s] the governmental interest asserted"; and (4) the regulation is "more extensive than necessary to serve that interest."

After Fox, the fourth prong of the *Central Hudson* test has served only as a minor restriction on the scope of the First Amendment's protection of commercial speech. Indeed, the fourth prong does not require the government to use the least restrictive regulation to reach the desired end. Rather, the First Amendment requires only a "'fit' between the [government's] ends and the means chosen to accomplish those ends" which is "reasonable" and "narrowly tailored to achieve the desired objective." Therefore, if the government is able to assert a substantial interest, it may choose any narrowly tailored regulation reasonably designed to advance that objective.

The relevant provisions of the Waxman bill, including the proposed addition, would pass constitutional muster under the four-part *Central Hudson* test as modified by Fox, and therefore should be upheld as an acceptable restriction on commercial speech. Under the first prong of the *Central Hudson* test, the expression sought to be regulated clearly concerns a lawful activity and is not

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77 *Central Hudson*, 447 US at 563. The Court stated that the protection afforded to commercial speech depended upon "the nature both of the expression and of the governmental interests served by its regulation." Id.

78 Id at 566.

79 See id.

80 See *Central Hudson*, 447 US at 563.

81 Id.


83 Id at 480.

84 Id.

85 The Court stated that "[w]ithin those bounds" outlined, "governmental decisionmakers [must] judge what manner of regulation may best be employed." Id.

86 Although the bill contains a number of different provisions regarding tobacco advertising and packaging, this Comment examines only the constitutionality of section 6(b)(4) and the proposed section 6(b)(6), which would address product placement.
tobacco is legal and, for the purposes of this analysis, this Comment assumes that product placement is not misleading.98

Second, the state’s asserted interest in protecting the health of American citizens and in reducing the volume of cigarette advertising that induces minors to smoke99 is “substantial.”100 Indeed, the Supreme Court has recognized that the government’s “interest in the health, safety, and welfare of its citizens constitutes a ‘substantial’ governmental interest.”101 Because tobacco use is the most preventable cause of illness and premature death in the United States,102 lower federal courts, not surprisingly, have explicitly recognized the government’s substantial interest in reducing the number of new smokers.103

Third, the restrictions “directly advance[ ]” the state’s asserted interest.104 In Capital Broadcasting v Mitchell,105 a district court upheld a Congressional ban on cigarette advertising on television and radio, noting that the rational basis for imposing such a ban was that broadcast ads were effective, particularly with young people.106 Regulating product placement of cigarettes has the same rational basis. As noted earlier, studies show that product placement is a very effective form of advertising.107 Moreover, cigarette companies have often placed their products in films that are obviously designed to appeal to children and young adults. Restricting

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97 Fox, 492 US at 475.
98 If product placement were “more likely to deceive the public than inform it,” it could be banned without constitutional objection. Central Hudson, 447 US at 563-64.
99 HR 5041 at §§ 2(1)-(17) (cited in note 6). This section of the bill outlines a number of findings regarding the aggregate effects of smoking on the United States. It particularly noted that “children are beginning to smoke today at a younger age than ever before,” and chronicled previous failed attempts by Congress to address the problems caused by cigarette advertising. Id at §§ 2(4), 2(17).
100 Central Hudson, 447 US at 564. A ban on all product placement would almost certainly be unconstitutional because it would be difficult for the government to assert the requisite “substantial interest.”

The interests asserted by the government in the Waxman bill are clearly more serious and enjoy more evidentiary support than the amorphous interests found to be substantial in Fox. In Fox, the Court found that SUNY’s interests in “promoting an educational rather than commercial atmosphere” on campus, “preventing commercial exploitation,” and “preserving residential tranquility,” were substantial. 492 US at 475.
101 Posadas, 478 US at 341. See also Fox, 492 US at 475 (stating that “promoting safety and security [and] preventing commercial exploitation of students” are substantial interests).
102 See note 38 and accompanying text.
103 See, for example, Capital Broadcasting, 333 F Supp at 585.
104 Fox, 492 US at 475.
105 333 F Supp at 582.
106 Id at 585.
107 See note 34 and accompanying text.
the product placement of cigarettes would therefore reduce the aggregate amount of cigarette advertising to which viewers are exposed. This would help to reduce the number of persons, particularly children and young adults, who begin smoking each year. Statistical evidence of a link is not required: the Court has expressly acknowledged that “advertising . . . serve[s] to increase the demand for the product advertised.” Indeed, if tobacco companies did not believe that product placement would increase sales, they would have no motive to engage in it.

Finally, there is a reasonable “‘fit’ between [Congress’s] ends and the means chosen to accomplish those ends.” The relevant portions of the bill would prevent only the placement of cigarettes by tobacco companies. Filmmakers could continue to purchase cigarettes for inclusion in a film if they so desired. Further, the bill would not place a blanket prohibition on smoking in movies, or even on showing brand name cigarettes in a film; rather, it would simply seek to reduce the number of smokers by restricting the ability of tobacco companies to promote their cigarettes in movies. Moreover, Fox stated that courts must defer to governmental decisionmakers in determining which “manner of regulation may best be employed”; therefore, the existence of a theoretically less restrictive measure would not render the provision unconstitutional. The limited restriction proposed by the modified bill is, therefore, narrowly tailored to meet the stated objective and would constitute a “reasonable” fit.

Conclusion

Films today are filled with placed products. Indeed, product placement is so prevalent in modern filmmaking that the products blend unnoticeably into films. Under the most recent views announced by the Supreme Court, the portions of films containing product placement should be defined as commercial speech, and thus should be regulable.

The government can and should move to restrict the placement of products, like cigarettes, which are dangerous to movie viewers, particularly given the willingness of manufacturers and

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108 Posadas, 478 US at 342. See also Central Hudson, 447 US at 569 (stating that “[t]here is an immediate connection between advertising and demand”).
111 Id at 480.
112 Id.
filmmakers to direct these placements towards young people. Restrictions or outright bans on product placement of other products which, like tobacco, are already subject to federal regulation, are both possible and desirable. Initially, however, Congress should work to pass a modified version of the Waxman bill such as the one proposed in this Comment. Only when such a measure is passed will the government be able to end disturbing efforts by tobacco companies to peddle their wares to unsuspecting moviegoers.

A strong case can be made that brewing and distilling companies should be prohibited from placing alcohol products and logos in films. At least one commentator has argued that the tremendous costs to American society as a result of alcohol consumption constitute a substantial governmental interest in the health and welfare of the country and would justify restrictions on advertising. Note, We Can Share the Women, We Can Share the Wine: The Regulation of Alcohol Advertising on Television, 58 S Cal L Rev 1107 (1985). Like tobacco products, alcoholic beverages are often placed in films that are designed to appeal to children and teenagers who are below the legal drinking age. See, for example, 13 Am Mktplace (cited in note 36) (describing placement of Miller Brewing Company products in Gremlins and Police Academy 2, as well as in television shows and music videos); Miller, 265 Atlantic at 44-47 (cited in note 1) (noting the placement of Miller beer, Budweiser, and Jim Beam in Bull Durham, Lite beer in Mr. Mom, and Budweiser in Rocky III and Over the Top).