



Canadian
Association of
Broadcasters

L'Association
canadienne des
radiodiffuseurs

September 20th, 2004

Mr. Marc O'Sullivan
Executive Director,
Broadcasting
CRTC
1, Promenade du Portage
Gatineau, Quebec K1A 0N2

RE: **Matters related to the interpretations of regulations pertaining to Advertising Restrictions**

Dear Mr. O'Sullivan:

The Canadian Association of Broadcasters (CAB) – the national voice of Canada's private broadcasters, representing the vast majority of Canadian programming services, including private conventional television, networks and specialty television services is pleased to provide its comments concerning the above-noted matter.

This letter follows two consultations that have taken place between the CAB, a number of our specialty and conventional television members and Commission staff on March 9 and April 22, concerning matters related to the interpretation of how advertising content is defined by the Commission in certain programs. First and foremost, we wish to thank you and your staff for meeting with us to discuss this important matter. As agreed, this letter is being filed as a follow-up to those discussions in an attempt to resolve issues related to the definition of advertising material in certain programs.

Background

Over the past year or so, many CAB conventional and specialty television members have been advised by Commission staff that certain programs they air or plan to air have been deemed to be infomercials or "promotional", and have therefore, been denied Canadian content certification numbers (C-numbers). In some cases, C-numbers have been revoked after programs have aired. In other

cases, portions of certain programs were deemed to constitute “advertising material”, as defined under the *Television Regulations, 1987* and *Specialty Television Regulations, 1990*. While portions of such programs retained Canadian content certification, other portions were deemed to be advertising material that exceeded regulatory limits.

In many instances, this has resulted in compliance issues when such matters have been brought to our members’ attention after the programs in question have been on the air for some time. Many programs have had to be taken off the air, either temporarily or permanently, to avoid compliance concerns in relation to Canadian content levels and allowable advertising minutes per hour.

It is important to state at the outset that our members have worked with Commission staff in good faith in order to ensure that they are complying with Commission rules. In fact, for many months, our members and the producers who have created these programs, many of whom are small independent producers, have been involved in lengthy consultations with Commission staff in an attempt to address discrepancies and apparent compliance issues in order to get programs back on the air and/or obtain Canadian content certification numbers. In certain cases, progress has been made. However, despite good intentions on the part of everyone, we believe that the evaluation of programming content and advertising material is made difficult by the current interpretation of guidelines set out in Circular No. 350.

In addressing the relevance of the Circular today, we believe it is important to highlight not only the changes that have occurred since the Circular was issued, but also the context in which the guidelines were themselves initially formulated. Circular 350 was written in 1988, at a time when the broadcast universe consisted of fewer than 30 channels, long before the introduction of a multitude of other channels and niche programming genres, or the advent of new technologies such as digital distribution, the Internet and personal video recorders, and consequently the increased use of other revenue-generating opportunities such as sponsorship and product placement. In fact, at the time, the Circular had been drafted to distinguish infomercial-like advertising content from programming content.

The Canadian broadcasting system and the Canadian production sector, including program funding, have undergone tremendous change since the Circular was drafted sixteen years ago. Consequently, we believe the interpretation of these guidelines should better reflect today’s broadcast environment.

“How-To” Programming

Consumer habits, tastes and expectations in programming have changed significantly. With so many channels available, demand for lifestyle or information-based programming has increased significantly.

However, the categorization of lifestyle, information-based or “how-to” programming is made difficult by its inherent blend of information and entertainment. Traditional programming in this genre has focused on consumer lifestyles (e.g. cooking, fashion, home renovation, travel or leisure sports). The information elements of “how-to” programming often contain descriptions

of products and services, including how to use them or where to buy them. In many instances, the products themselves may be used by the program hosts or participants. More importantly, viewers to this type of programming have vastly different expectations regarding the nature of programming content. They not only expect, but in fact demand, the supply of detailed information about various products and services available in the marketplace.

Interestingly enough, the popularity of the genre has also more recently prompted the emergence of programming that incorporates a much greater degree of entertainment. The basic “how-to” concept has evolved to develop programs that are geared more towards challenges, competitions or transformation reveals. In truth, they closely resemble game shows or reality TV programs in terms of their competitive nature. While viewers still receive basic “how-to” information, the focus of the program is on the competition or challenge involved. In doing so, a much greater emphasis is placed on the entertainment factor developed through the storyline and script, as well as the hosts and participants in the program.

Canadian Program Production

Sponsorships, product placements and commercial tie-ins have become important sources of revenue for Canadian programming producers - especially small independent producers. In our view, these revenue-generating opportunities should not be prohibited, as long as the focus of the programming content in question is clearly to inform and/or entertain. Within these parameters, Canadian producers can develop entertaining and informative programs, while not otherwise raising concerns about commercial content.

The Commission has already explored issues related to product placement and non-traditional advertising, within the context of the group licence renewals of CTV and Global. Following an extensive public hearing process in April 2000, with comments provided by viewers, producers, advertisers and broadcasters, the Commission determined that it would postpone making any determinations concerning product placement until such time as a thorough review of advertising was undertaken at a later date.

It is also important to note that the producers who create these programs include small independent producers who rely on additional sources of revenue, such as sponsorship, to fund their programs. When programs are taken off the air, not only do producers incur revenue losses that result from not being broadcast – their entire businesses are at risk because they have no other way of funding their programs.

Aside from reasons based on the foreign programming that is being broadcast into Canada, we also believe that a revised interpretative approach would be entirely consistent with Subsection 3(s) of the *Broadcasting Act*:

Private networks and programming undertakings should, to an extent consistent with the financial and other resources available to them,

- (i) *contribute significantly to the creation and presentation of Canadian programming;*
- and*

(ii) *be responsive to the evolving demands of the public. (Emphasis added.)*

Although we recognize the importance of appropriately distinguishing between programming and commercial messages, we also believe it is significantly more important that any interpretation by the Commission reflect the current realities of the Canadian broadcasting system and the demands and tastes of viewers.

Recommended approach

We are pleased to provide Commission staff with recommendations that we believe might help our members, content producers and the Commission in reducing the apparent interpretation difficulties regarding programming and advertising content. Circular 350 was established in response to concerns about infomercial content, and the purported infringement of regulatory restrictions on advertising. In the first instance, parts of a program contained elements that directly served to sell or promote goods or services. In the latter, the issue was not explicit commercial messages, but rather the implicit relationship between certain programming content and the goods or services advertised during commercial breaks.

As a result, we believe there are two issues in question: 1) what constitutes an infomercial; and 2) what constitutes advertising material within a program when it is presented outside commercial breaks. We will address each of these issues separately.

How Infomercials are Defined

Although Circular 350 touched on infomercials, the issue was later discussed in much greater detail through a Commission policy on infomercials (Public Notice CRTC 1994-139). The Commission's policy is now established, and we believe the Canadian television viewer is well aware of the differences between infomercials and traditional programming content.

In accordance with Public Notice 1994-139, an "infomercial" is now defined as:

programming exceeding 12 minutes in length that combines entertainment or information with the sale or promotion of goods or services into a virtually indistinguishable whole. [Emphasis added.]

The policy also included criteria which required the use of production elements to assist the viewer in recognizing the commercial nature of infomercials:

- a) each production broadcast must be preceded and concluded with a clear and prominent written and oral announcement that the programming constitutes paid commercial programming; and*
- b) a clear and prominent written announcement must also be made prior to each ordering opportunity indicating that the programming the viewer is watching constitutes paid commercial programming.*

In a subsequent public notice (Public Notice CRTC 1995-93), the Commission also defined an “ordering opportunity” as:

a direct solicitation, made by an on-screen host through a voice-over, that provides information on how to purchase the product or service being advertised. (The display of either a 1-800 phone number or a company name or address by itself does not constitute an ordering opportunity.)

Reviewing the infomercial criteria, we believe the Commission clearly focused on the need to avoid viewer confusion. The Commission wanted viewers to be able to easily distinguish infomercials from regular programming.¹ In our view, with the infomercial criteria developed by the Commission, Canadian television viewers can easily make that distinction.

The combination of entertainment/information and sales/promotion of goods and services into a virtually indistinguishable whole suggests that infomercials make no distinction between programming and commercial sales. The primary purpose, in fact the sole purpose, of infomercials is to sell or promote goods or services – any information or entertainment components are ancillary. That is why, during infomercials, viewers are made aware, through written and oral announcements at the beginning and end of the program, as well as prior to each ordering opportunity, that they are watching paid commercial programming.

In our view, there is a clear and unmistakable distinction between infomercials and programs that contain product placements and commercial tie-ins. For example, unlike infomercials, the primary purpose of “how-to” programming is to entertain and inform. There are also no ordering opportunities to buy products or services. The programs are formatted very differently from infomercials. They are usually series-based, and often structured around a theme or concept. They often garner significant ratings, and their hosts are often marketable television stars (e.g. Lynda Reeves and Debbie Travis on HGTV Canada).

As noted above, the most recent development in “how-to” programming has been the emergence of competitions, contests or transformations. These programs, although incorporating “how-to” elements provide greater entertainment value. In doing so, they resemble reality programs like “Survivor” or “The Apprentice” more than they do the traditional “how-to” programs. It is the storyline involved in the competitions, contests or transformations that draws viewers back each week to see how contestants are doing and, ultimately, who will win.

Since its inception, we believe the Commission’s infomercial policy has been clear, and has set out specific criteria that have been consistently applied. Canadian television viewers have become accustomed to infomercials that are typically formatted in a way that must be consistent with Commission policy criteria. As a result, we believe programs should not be deemed to be infomercials, unless they meet the applicable criteria from the Commission’s policy:

¹ Thus, for example, the Commission also insisted that the criteria for the identification of infomercials also apply to commercial messages exceeding two minutes in length.

- (i) the programming must exceed 12 minutes in length;
- (ii) the primary purpose of the program must be the sale or promotion of goods;
- (iii) the program combines entertainment or information with the sale or promotion of goods or services into a virtually indistinguishable whole;
- (iv) the program constitutes paid programming; and
- (v) the program includes ordering opportunities to purchase products or services.

What Constitutes Advertising Within a Program

The emergence of information-based programming and reality television is not new. However, as evidenced by ratings, programs in these genres have grown significantly in popularity with Canadian audiences over the past few years, and will only continue to soar as consumer appetite continues to grow for alternative types of programming. With the growing popularity of reality and information-based programming, Canadian television viewers have become accustomed to sponsorships, product placements and commercial tie-ins in all genres of programming.

These programs make significant contributions to the Canadian production sector, creating jobs for Canadians and providing compelling programming for Canadian audiences. The production efforts for these programs are entirely consistent with the attainment of the objectives of the *Broadcasting Act*. In our view, it is imperative that Canadian producers and broadcasters be allowed to create homegrown versions of these programs that can be counted towards meeting Canadian content requirements, without being penalized because of perceived regulatory concerns regarding sponsorships, product placements or commercial tie-ins. It is our hope that this process will allow us to agree that such programming should qualify as Canadian content.

Both the *Television Regulations, 1987* and *Specialty Television Regulations, 1990* include specific definitions for commercial advertising content:

“Advertising material” means any commercial message and programming that promotes a station, network or program, but does not include....(station identifications, Canadian program promos, etc.)

“Commercial message” means an advertisement intended to sell or promote goods, services, natural resources or activities and includes an advertisement that mentions or displays in a list of prizes the name of the person selling or promoting these goods, services, natural resources or activities.

Circular 350 provides guidelines and criteria to use in determining the commercial content of a program. In our view, many of these interpretative guidelines conflict with today’s programming reality, and should be re-examined and re-evaluated with such a different context.

a) Intention to sell or promote

In Circular 350, the Commission notes that the intention to sell or promote is an integral part of the definition for a “commercial message”. However, it then also provides a few examples of what could be deemed an intention to sell or promote.

In programming where there is an explicit advertising message, for example, a company logo or an image of a product for sale, this intention is self-evident. An intention to sell or promote, however, is also present in programming with no explicit messages but with indirect or implicit advertising outside of the recognizable commercial breaks.

We disagree that the mere presence of company logos or images of products constitutes a commercial message. In recent years, we have seen an explosion of sponsorships and product placements in all types of programming.

Due to a variety of factors that are well known to the Commission, including unprecedented fragmentation, program funding gaps and the use of ad-blocking technologies like PVRs, program producers are turning to alternative ways to fund their programs. Sponsorships, product placement and commercial tie-ins have become important sources of revenue to fill some of that gap.

Coupled with the growing popularity of information-based programming and reality TV, we find ourselves in an environment where more and more foreign programming comes into Canada with commercial tie-ins already embedded in the programming content. This is a relatively new phenomenon, but one that is steadily growing due to the increasing appetite of consumers for this type of content. Foreign programming of this type enjoys advantages that are not available to Canadian broadcasters who must compete for audiences and make significant contributions to the broadcasting system. (Please see attached, a recent article from the New York Times on product placement which was reproduced in the National Post earlier this month, and an article from the October issue of *RealScreen* discussing this year’s MIPCOM and its focus on branded content.)

In our view, these tie-ins should not be counted as part of a licensee’s 12-minute per hour advertising restriction unless there is a direct and explicit attempt to sell or promote – in other words, unless there is a hard sell or call to action. Product placement, including implicit messages within a program, including the display of website addresses and company logos should not be considered to be commercial messages.

b) Enhancement of Commercial Messages in Programming Content

The other problematic area within the Circular is the comment relating to the impact of commercial breaks being significantly enhanced by the program itself. For example, if a program deals with fishing or personal wealth, the commercial breaks cannot indicate where the viewer can obtain further information. According to Circular 350, the Commission will consider such programs, either in whole or in large part, as a form of advertising material.

This interpretation ignores the reality of television today, especially the widespread growth and emergence of information-based, “how-to” programming. Unlike other categories of programming such as dramas or documentaries, “how-to” programming, by its very nature, will include detailed descriptions and consumer information regarding many different products and services. Again, reflective of the programming genre, commercial advertising breaks may include an indication of where the viewer may be able to get more information. For example, a programming segment on basement renovations may include a commercial from the Home Depot, or a segment on Thai cooking may include a commercial from Amazon.ca.

The mere presence of commercial breaks that include advertisements for the sponsor of a program or that relates to any products or services discussed in the program should not in and of itself qualify a program as an infomercial or as a commercial message. In our view, Circular 350 should be interpreted more strictly. Otherwise, it has the potential to unduly impact information-based programming.

In Circular 350, the Commission also recognized that the mix of information with sales and promotional elements would be an important factor in determining whether particular programming segments should instead be considered commercial messages. To remain as programming, the mix of functions must be heavily weighed towards information and entertainment, with only very incidental sales and promotion.

This criterion in Circular 350 is particularly appropriate for information-based, “how-to” programming. By its very nature, information-based programming may have sales or promotion components. That’s because, whether through sponsorships, product placements or commercial tie-ins, the programming may include company logos, descriptions of various products, how to use them or perhaps where to get them. However, any such sales and promotion components are very incidental, and in no way affect the information and entertainment core of the programs.

In our view, Canadian producers and broadcasters should not be penalized for offering viewers comparable Canadian content that provides the same mix of entertainment and information as what we typically find in foreign programs. As a result, we believe that such programs should qualify as Canadian content, without counting product placement or commercial tie-ins as commercial content. Accordingly, the CAB submits that guidelines within Circular 350 should be interpreted as follows:

- Programming must be heavily weighted towards information and entertainment, with only incidental/implicit elements of sales or promotion. Website and company addresses, company logos, the display of products and how to use them should not constitute advertising material, unless combined with ordering opportunities as defined by the Commission’s infomercial policy.
- Any advertising that appears in a commercial break must be clearly distinguishable from the programming content.

- Programming cannot include ordering opportunities as defined by the Commission's infomercial policy – product placement and/or commercial tie-ins must be integrated into the information/entertainment programming elements.

Given that “how-to” programming, by its very nature, includes detailed descriptions and consumer information regarding many different products and services, and given the Commission's concerns regarding the enhancement of commercial messages in these types of programs, CAB members are willing to accept the following practice with respect to “how-to” programming:

- Commercial breaks may include advertisements for program sponsors, however, such commercials must be inserted in the middle of commercial breaks – in other words, the commercials cannot be the first or last commercial spot within the commercial break.

Conclusion

We thank you for the opportunity to comment on these important issues, and look forward to further discussing them in our combined attempt to resolve the current problems in this area.

Sincerely,

A handwritten signature in black ink, appearing to read 'Glenn O'Farrell', written in a cursive style.

Glenn O'Farrell
President & CEO

cc: Nick Ketchum, CRTC
Doug Wilson, CRTC

Television treks onto brand placement trail

TAKES LESSON FROM MOVIES

BY EVELYN NUSSENBAUM

Leslie Moonves loves to talk about the Steven Spielberg movie *Minority Report*.

Mr. Moonves, co-president and co-chief operating officer of Viacom International Inc., which owns CBS, Paramount Television and Showtime, still sings the praises of the movie two years after he saw it.

But it was not the cinematography or Tom Cruise's star turn that moved him. It was all the brand names — Lexus, Gap, Reebok, Guinness and American Express — that found their way into the film.

"That movie was packed with brands," he said. "I sat in the movie theatre and thought, A, the movie's working, and B, if Spielberg can do it without compromising the artistry, we can, too."

Television networks have worked hard in the past two years to strike their own product placement deals, closing the gap with the movies.

CBS plans to broadcast product-themed nights, with a single brand featured on consecutive shows, although Mr. Moonves declined to offer details. Entire episodes of NBC's *The Apprentice* will revolve around one brand: instead of selling lemonade or giving rickshaw rides, the aspiring business tycoons will sell Mars's newest candy bar, hawk Crest toothpaste and construct a new toy for Mattel. Campbell's Soup has been written into *American Dreams*, with NBC and the soup maker sponsoring a real-life essay contest mirroring one in the show's plot.

The new emphasis on product placement in television has brought new players into the business — brand wranglers who work with programmers and advertisers.

They are pushing the placement, which they like to call "brand integration," into new territory, sometimes acting as co-producers and even building new programming around the brands.

"There's been a gold rush that reminds me of the Internet 10 years ago," said Scott Donaton, editor of *Advertising Age* and the author of *Madison & Vine*, a book about the convergence of the entertainment and advertising industries. "Many went to the advertisers and said, 'You can't handle Hollywood. Let me do it for you.' Then they went to the networks and promised to handle the advertisers."

Some of the new integrators are traditional product placement firms, while others are advertising agencies that have started entertainment divisions. New companies devoted to product integration have also popped up. All see the chance to profit from the growing closeness between programmers and advertisers, who have been forced to band together to counter falling ratings, a fragmented audience and new technology like digital video recorders that allow viewers to skip traditional commercials altogether.

Madison Road Entertainment, which calls itself an independent, advertiser-driven television studio, is one of the newest players. The two-year-old Los Angeles company was created by Tom Mazza, the former president of Columbia TriStar Television; Jak Severson, a long-time marketing executive and Rob Long, a former writer for *Cheers*.

The company worked on some of this season's highest-profile product integration deals — for example, helping bring Levi's, Crest and Mars to the *The Apprentice*. Madison Road also struck a deal to brand the photo shoots that cap episodes of UPN's *America's Next Top Model*, and its executives said they had a deal in the works for the Fox Network's *Bernie Mac* show.

But the small company is hunting much bigger game. Madison Road is aiming to create what programmers and advertisers call branded entertainment, working products into the fabric of a show from the start of its development.

Alliance, the product placement arm of the advertising company Grey Global, is moving aggressively into the product integration business. Its chief executive, Jarrod Moses, recently brokered a deal for the Hasbro game Operation game to be written into NBC's medical show *Scrubs*. Now he is pushing the company further. "My clients are now asking me to be present in the development process with the brands," he said.

Mindshare, the media buying company owned by the WPP Group, has gone right into the production business. This summer it co-produced the family drama *The Days* with ABC, splitting ownership and commercial rights. Mindshare then sold its share of the commercial time and placement opportunities to longtime clients like Unilever. The Omnicom Group, the advertising conglomerate, has hired Robert Riesenber, an executive producer of the reality show *The Restaurant*, to run its branded entertainment unit. And MPG, the media-buying unit of the French ad firm Havas, recently hired two journalists from *Advertising Age* to start its entertainment business.

There is, of course, no guarantee that these middlemen will be successful. Nobody knows whether audiences will watch branded entertainment, or, if they do, that it will move them to buy the products they see.

It is also tricky to measure the success of product integration if there is no immediate, significant bump in sales after the program is broadcast. Nielsen Media Research recently introduced a service called Place*Views, which monitors where, how many times and for how long a brand is featured on television, along with the size of the audience. A placement firm called iTVX has developed a system that it says actually measures the return on investment of paid placement, using measurements that include the cost per second of a commercial during the same period.

Even if branded entertainment has legs, the middlemen face another risk; they could get pushed

aside if the programmers and advertisers figure out how to collaborate on their own.

Pepsico, for example, is starting to develop its own branded programming. The company worked with Joel Gallen, producer of the Video Music Awards on MTV, to produce its Pepsi Smash televised concert series featuring performers like Avril Lavigne on the WB Network this year. Pepsico was so pleased with the results that it plans to try other kinds of shows.

Some say that what could ultimately limit branded entertainment, and the prospects of those promoting it, is the advertisers' ability to tolerate the vagaries of the entertainment business.

"Not everyone will want to be in the position of owning these things and worrying about how a movie or television show performed," Mr. Donaton said.

That might be bad for the middlemen. But it could be a great relief to viewers who are already suffering from ad fatigue.

Even Mark Burnett, the creator of "Survivor" and "The Apprentice" and a product placement impresario himself, says that integration has his limits.

"I think it's insane to try and create a show around a brand," he said. "I only make shows I'm interested in. Then, with the right environment, you can have 30 placements and the audience won't care."

The New York Times

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Branded content gets push at TV market

by Brendan Christie

Every October, TV programmers and producers from around the world flock to MIPCOM at the Palais des Festival in Cannes to buy, sell and coproduce content. For the first time in its history, the keynote at this international TV market will be delivered by an advertising executive.

Maurice Lévy, president and director of the Publicis Group, plans to delve into the relationships between the ad and television worlds. Developing branded content - the integration of clients directly into the production process - is becoming more of a focus for marketers and TV prodcos, and all you have to do is look at this market's floor plan for proof.

The Branded Content Marketing Association is returning for its second TV market - its first being MIP-TV last spring, where it also ran a panel on branded content and sponsorship. While the BCMA currently has outlets in London, New York, and L.A., and could soon have offices in Australia and Germany, its location in the Palais says the most about the future of the industry - it's right beside U.K. broadcaster Channel 4, in the heart of production country.

The umbrella organization returns with U.K. ad agencies BBH, and Universal McCann Programming; the latter exhibited for the first time itself last MIPCOM after attending the market every year since 2000. Also under the BCMA banner are two prodcos: London-based All3Media arm North One Television, and Munich's Telcast International. In fact, Telcast is giving up its own booth space this time around to come in under the BCMA banner.

Telcast is among many European production companies that have recently set up branded content divisions. Although other Telcast subsidiaries continue to produce and distribute "traditional" programming, head of marketing Sarah Coursey says the company had an epiphany of late.

"We had a lot of broadcasters," says Coursey, "who said: 'We love your program. If you can get a brand on board and get it sponsored, we'll put it on air.' So we thought, 'Okay, let's go to the brands...' We learned more and more that we were a branded content company that was marketing itself as a production company."

Coursey adds: "Brands are realizing they need to become the owners of content. They need to engage audiences by creating an experience to help them to find the brand...because the consumer is getting more hip."

Story courtesy of MIC's sister publication *RealScreen*, October 2004 issue.

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