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When Products Become Stars

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What do the blockbuster movies *Star Wars* and *Mr. & Mrs. Smith* have in common with television shows such as *American Idol*? They are classic examples of product placement — the practice of advertisers inserting their products in movies and television shows in order to build brand awareness and increase sales. The product placement market is projected to grow at a compound annual rate of 14.9 percent from 2004 to 2009, reaching an estimated $6.94 billion.[1]

By tying licensing and merchandising opportunities directly into movies and TV shows, product placement blurs (and, some would argue, eliminates) the line between entertainment and advertising. As a result, it is becoming increasingly difficult to distinguish commercial speech (i.e., speech that proposes a commercial transaction) from noncommercial speech (i.e., speech with artistic or political content).[2] Traditionally courts have extended greater protection to noncommercial speech, although restrictions on commercial speech may be invalidated if they unconstitutionally limit dissemination of information to the public.[3] This article explores the legal implications of the increasingly intertwined relationship between advertising and entertainment.

How Product Placement Came To Be, and Where It Is Today

The intermingling of commerce and entertainment is nothing new. Advertisers played an important role in the early days of television by sponsoring programs. The J. Walter Thompson advertising agency produced *Kraft Television Theatre*, a popular program during the Golden Age of television, which aired on NBC from 1947 to 1958.

Likewise, selling movie-related products is not a recent phenomenon. Walt Disney built an empire marketing Mickey Mouse ears and other toys,

not to mention the enormous revenue generated from theme parks. While merchandising has been around a long time, there has been a resurgence of activity since the release of *E.T. — The Extra-Terrestrial* in 1982. You may recall the scene in which the young boy, Elliott, shares some of his Reese's Pieces candy with the friendly alien. As a result of exhibiting that product in the film, sales of Reese's Pieces reportedly increased an incredible 65 percent. This bonanza delighted the makers of Reese's Pieces, but was much to the chagrin of M&M's execs. They had denied Steven Spielberg's request to use their candy after their marketing guru figured that having an alien eating M&M's would reflect badly on the product — one of the greatest marketing blunders of all time.

After the *E.T.* incident, many product marketing managers began to make more of an effort to place their products in films. They realized that insertion of their product in a successful film could boost sales, and cost less than the cost of advertising. Studios also took notice and made more of an effort to promote products in their movies, as well as look for spin-off products that could be marketed.

Traditionally, studios have entered into two basic types of agreements:

- Product placement deals where a manufacturer has its product shown in a film or television program; and
- Merchandising deals where the studio licenses, to a manufacturer, the right to use names, characters, and artwork for spin-off products such as toys, clothing, novelizations, and soundtrack albums. Such arrange ments are no longer limited to motion pictures — they now expand into music, video-games, and print media.

Initially advertisers didn't seek out product placement opportunities. Producers approached manufacturers asking permission to show a product in a film or show. Even as product placement became more popular and widely used, paid placements were uncommon.[4] Most placements were barter arrangements with the manufacturer offering some freebies for use in filming. Expensive goods, such as jewelry and cars would be loaned to the producer. Cash payments were rare, and when made, they were often part of a back-end promotion deal.[5]

That is no longer the case. Today we live in the golden era of paid and brokered product placements. Manufacturers hire agents to seek out and negotiate film and television deals. Bidding wars for placement of products are commonplace. Stars demand a piece of the action as well (wanting, at minimum, to keep the clothing and props used in a show or film).

There are several reasons why product placement has become so popular.

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The remote control is a primary cause. With hundreds of channels to watch, viewers routinely click to another channel to avoid commercials. Then there are the Digital Video Recorder (DVR) devices such as TiVo, which allow viewers to easily skip advertising. Add all this to the fact that consumers have become much more sophisticated in their television viewing, thanks to a daily onslaught of advertising claims which some experts estimate total up to 3,000 per day.[6] Marketers are attracted to product placement for all these reasons because, if done correctly, it appears more natural and closer to a true endorsement rather than a blatant hard-sell pitch.

The growth of reality television has provided many more opportunities for product placement.[7] Shows such as *Survivor* and *American Idol* actively partner with brands, and the entire show becomes a product placement forum. Likewise, the growth of specialized cable networks such as the Food Channel and The Learning Channel enable their producers to deliver niche audiences of great interest to certain manufacturers.[8] The show *Trading Spaces*, for example, integrates sponsors such as The Home Depot directly into the shopping and building experiences of its stars.[9]

Digital technologies such as "virtual placements" permit film and television library owners to offer up-to-date product placements in older programs when they are rerun or syndicated to television stations, or when released as a DVD collection. Princeton Video Image, a company best known for its digital yellow "first down yard line" in college and pro football game broadcasts, provides this "virtual placement" technology to eager advertisers.[10] This technology allows advertisers to seamlessly replace old products digitally with new ones. On a rerun of a *Seinfeld* episode, for instance, Jerry might drink a PepsiOne even if his character originally drank a Diet Coke.

At the extreme end of the product placement world is something referred to as product integration, a concept that automakers embrace. Unlike traditional product placement, which features a product in a movie or television show, product integration goes one step further by creating a movie or TV show around the product. Ford Motor Company recently signed a deal with Revolution Studios that allows Ford to write its cars and trucks into movie scripts. Ford marketing executives play an active role in the scriptwriting and approval process.[11] The producers of the film *Are We There Yet?*, starring Ice Cube and a tricked-out Lincoln Navigator, ensured Ford that the Navigator would appear in 75 percent of the film. Ford has also paid hefty sums for vehicles appearances in *Alias* and *24*, and the James Bond movie *Die Another Day*. It's estimated that in 2004, automakers made up 40 percent of all product placement spending.[12]

As product placement, merchandising and other forms of stealth advertising multiply, attorneys need to carefully consider the legal issues that arise to protect their clients' interests.

Product Placement Releases and Permissions

Almost every time a viewer can identify a brand name, logo, or product appearing in a major studio film or network television show, the manufacturer has given the producer a release or license to depict it. Sometimes companies refuse permission, or the production company neglects to obtain a release, so producers ask their prop department to create a pseudo-looking product that does not exist. If the footage has already been recorded, brand names can be blurred out or virtually removed from a scene.

If the product is shown in a neutral or positive light, of course, a manufacturer is unlikely to complain. Indeed, most of the time they will be thrilled to obtain such exposure. But if they are not pleased, their legal counsel will advise them that it can be difficult, if not impossible, to prove damages (as will be explained later), since the legal basis for a recovery is murky at best.

Manufacturers will usually give a release if asked, provided they are assured that their product will not be depicted in a derogatory manner. Coca-Cola is happy to have a character in a television show drink its soda, but will not be if the character goes into convulsions and vomits after drinking Coke. Some companies may attempt to negotiate restrictions on use, but the majority of manufacturers are pleased to have their product shown because it is free publicity, and much less expensive than buying a 30-second spot. Even low-budget independent producers are often able to secure permission to include products in their films.

There is little case law concerning the unauthorized use of products in motion pictures, because most disputes are settled out of court. Attorneys for product manufacturers have contended that a nonapproved use of a product in a motion picture, even if nondisparaging, could be a violation of the Lanham Act. In *Wham-O, Inc. v. Paramount Pictures Corp.*, the manufacturer of the Slip 'N Slide toy slide brought suit and sought a temporary restraining order against Paramount Pictures for its unauthorized use of the toy in the movie *Dickie Roberts: Former Child Star*.

In *Dickie Roberts*, David Spade plays a former child star seeking to reenact the childhood experiences he missed while busy working in the entertainment industry. In an amusing sequence, the character misuses the toy slide to comic effect and suffers injuries. Paramount said the film used the Slip 'N Slide to convey an image of childhood fun, but Wham-O argued that in a world where consumers know about product placement "the viewing public … has come to expect, that trademarked products featured in movies … are there because, in fact, the trademark owner is associated with or has endorsed the movie through such product placement arrangements."[13]

The court determined that Wham-O was not likely to succeed on the merits of the case because Paramount's use of the product amounted to a nominative use that did not create an improper association in consumers' minds between the product and the trademark. Wham-O's trademark infringement and dilution claims were likewise rejected and the request for injunctive relief was denied.[14]

Giving it Away

Even though cash-induced placements are increasing, many companies prefer in-kind donations in exchange for product exposure in films and television shows. Some manufacturers donate generous numbers of samples. For independent filmmakers, donated products can reduce the cost of a movie by supplying products that might otherwise have to be purchased. If lunch on the set is an eclectic mix of green jello, peanut butter and pickles, the reason may not be an incompetent caterer, but a producer relying on product placements to feed the crew.

Stars, producers and studios also benefit from the flow of freebies. They like to retain props, costumes and products, sometimes auctioning them off to collectors for considerable sums. The designer or manufacturer reaps a benefit from this largesse if young women visit stores with a picture of Jennifer Aniston in her latest movie and ask to purchase the clothing, shoes or jewelry she is wearing.

Drafting a Product Placement Deal

When drafting a product placement agreement, it is important to ensure that 1) product placement requirements do not conflict with other production contracts related to the film or television show; and 2) there are clear examples of authorized and nonauthorized product uses. The more positive the light, and the greater the level of celebrity use/endorsement, the more willing the manufacturer will be to cooperate. However, attorneys also need to understand that some directors will refuse to allow insertion of products in their scripts, and stars may refuse to use such products. Robin Williams is renowned for not accommodating product placements,[15] and Pamela Anderson refuses to be shown with any fur or meat products. It is common for a star's employment contracts to require that promotional tie-ins and merchandising deals will be subject to the star's approval.

Merchandising

Merchandising is when studios license the right to sell spin-off products to manufacturers of products such as toys, T-shirts, and posters. Studios usually do not manufacture film-related products themselves. In most instances there is no risk to the studio because the manufacturer bears all manufacturing and distribution expenses. The studio typically receives an advance payment for each product, as well as royalty payments, often between 5 and 10 percent of gross wholesale revenues from sales to retailers.

If the movie flops and the products don't sell, the manufacturer, not the studio, incurs the loss. On the other hand, a hit film can generate huge amounts of revenue from the sale of such merchandise. Since its debut in 1977, *Star Wars*-themed merchandise has generated $9 billion in retail sales — far outpacing the nearly $3.4 billion the film series has generated at the global box office. These figures were calculated before release of the latest episode, *Star Wars: Episode III — Revenge of the Sith*, which is expected to generate an additional $1.5 billion in merchandise sales.[16]

With the 1995 release of *Toy Story*, the incestuous relationship between products and movies has come full circle. Here is a story about toys — some new and some old favorites — which serves as a vehicle to promote its toy characters whose sale, in turn, promotes the film they star in. Rarely has such synergy between movies and products been so fully realized.

Whether you view *Toy Story* as nothing more than a thinly disguised commercial hawking toys to youngsters, or as a creative masterpiece that smartly capitalizes on spin-off opportunities, there is no doubt that movie merchandising has become big business. Licensed products generate more than $73 billion dollars a year, of which $16 billion is derived from entertainment such as movies.

In drafting a merchandising agreement, the scope of the license needs to be carefully defined. Since hundreds of different licenses may be granted, and each is typically exclusive for that kind of product, care must be taken to ensure that the licensed rights do not conflict with any other license granted.

Merchandising efforts can also conflict with product placement. McDonald's may be discouraged from signing a deal for an upcoming movie whereby it would sell toys as part of its Happy Meal if a scene in the movie takes place in a Burger King.

Regulatory and Legal Issues Regarding Product Placement

Section 317 of The Federal Communications Act and the Rules promulgated under it[17] require radio and television broadcasters to disclose paid sponsorship to viewers. The Federal Communications Commission (FCC) requires that when a broadcast station "transmits any matter for which money, service or other consideration is either directly or indirectly paid or promised," the station must, at the time of broadcast, announce that the matter is sponsored, paid for or furnished, and by whom such consideration was paid. These regulations apply only to broadcasters using the public airwaves, and do not regulate sponsorship of films or shows exhibited in theaters or over cable television. The broadcast industry has been criticized for not disclosing integration of products into the plots of television programming. International regulation of product placement in some countries has been more restrictive than what has been allowed in the United States. European countries have traditionally restricted product placement. Great Britain and Germany, prohibit it, especially in television.[18]

However, recently some countries such as Italy, Spain, and Austria, and the European Commission (the executive body of the European Union) have considered relaxing their tight restrictions on integrated branding, merchandising and product placement.[19] By the end of the year, the commission is poised to propose clear rules authorizing and regulating product placement. Among the options, the commission will allow advertisers to utilize product placement, but it must be disclaimed in the show's ending credits. At present, marketers and studios still have to abide by the rules of individual nations due to the lack of uniformity on the product placement question in Europe.

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As product placement has increased, especially on television, U.S. consumer groups have noticed and taken offense. Recently, a group called Commercial Alert brought a petition to the Federal Trade Commission (FTC) requesting that it become mandatory for all television shows containing any paid product placements to carry a label identifying that the show contained such a paid form of advertisement.[20] Commercial Alert lobbied to have in-show disclaimers pop up on screen during the actual product placement. In a positive decision for product placement, the FTC denied Commercial Alert's request, finding that the FCC and false advertising laws already offered enough protection to consumers. Commercial Alert now plans to bring the issue before Congress.[21]

Another issue raised by product placement is potential liability to consumers from an inaccurate representation of products. In traditional advertising, there are regulations to protect consumers from misrepresentations, and advertisers may be required to substantiate their claims or add disclaimers.

> Due to the potentially lethal effect of car crashes or malfunctions, automotive advertising is heavily regulated. For instance, many television car commercials require a disclaimer stating that a professional or stunt driver is operating the vehicle on a closed course and such maneuvering in unsafe if undertaken by the general public.[22]
>
> Such disclaimers serve multiple purposes. They assure compliance with FCC and FTC rules and regulations, they serve to enable the companies to keep the ads on the air when competitors make false advertising or cease and desist claims, and also — most importantly — they serve to help eliminate corporate liability by immunizing the company from lawsuits from potential viewers who drive the car carelessly and harm themselves or others as a result.

Movies and television shows, however, have no such disclaimers. When Pierce Brosnan (or, soon, Daniel Craig) flips his Jaguar in a James Bond flick, or Matt Damon gets his Mercedes G500 to outrun every policeman and bad guy in *The Bourne Supremacy*, the automotive manufacturers are getting tremendous exposure and publicity, and are able to demonstrate their cars performing in ways divorced from reality that would not be permitted in a commercial. At some point, an injured consumer run over by a movie fan imitating James Bond will bring suit and the question will arise whether the studio and/or auto company can be liable. Constitutional issues may arise because, in the

past, entertainment has been treated differently from the commercial use of media. Should disclaimers and liability be predicated on the medium in which it appears? This debate has been the subject of several law review articles.[23]

Product placement has always been a popular form of marketing with the heavily regulated cigarette and liquor industries.[24] Neither is allowed to advertise to younger viewers, and until recently, only print advertising was allowed for liquor. Although liquor may now be advertised on cable television, it is still limited.[25] So while a cigarette company can't advertise on a Nickelodeon TV show aimed at 13-year-olds, they can reach this audience by showing an idolized teen figure smoking in a movie. Movie studios and producers must make sure that product placements within the movies are not in violation of federal regulations. Failure to do so can result in negative publicity and regulatory sanctions. For instance, Budweiser is under close scrutiny by watchdog groups and the FTC for its recent paid product placement in the blockbuster hit, *Wedding Crashers*.[26]

Breach of Contract and Remedies

What happens if the studio and the advertiser strongly disagree regarding the manner in which a product is used or shown, or was "promised" to be depicted? Of course the circumstances of the product placement (unauthorized, used with permission, paid or unpaid) will have implications here. If a director or studio portrays a product or brand in an unfavorable light, does the advertiser have a legal remedy? The outcome of any dispute is likely to become a matter of contract interpretation. Thus, even for informal off-the-cuff product placement deals, it is imperative to have some sort of contract, even if it is just a letter of intent to show the interests and agreements of the parties regarding such matters.

Reebok brought suit against TriStar Pictures, claiming that TriStar had failed to honor its oral product placement deal with Reebok for the movie *Jerry Maguire*. Reebok alleged that it had paid more than $1.5 million in products and cash in return for the producers' promise to feature a Reebok commercial in the closing credits of the film, and the commercial was ultimately edited out.[27] In addition to being excluded from the ending, Reebok was snubbed in the movie by Cuba Gooding Jr.'s character. The case was settled out of court on confidential terms, after both parties spent considerable sums in a dispute that could have been avoided if the parties had expressed their understanding in a clearly written agreement.

Because publicity about such disagreements can damage a motion picture and the product, the parties often include provisions for terms to be kept confidential and disputes to be resolved by arbitration. The parties may also want to agree upon an amount of liquidated damages for a breach, rather than leave such questions to a third party who may have difficulty quantifying such speculative injuries to a brand. Some agreements specify that the manufacturer's obligation to pay a fee is conditioned on the product actually appearing in the motion picture a certain amount of times, with certain prominence and with clear prohibitions about how the product will not be portrayed. For instance, Ford will not allow its vehicles to be shown driven by a drunk driver, criminal, or drug dealer, nor can the producer show the car running out of gas, not starting, getting a flat tire, or even being sprayed with mud.[28]

Even if a product is included in a motion picture, and is portrayed positively, the advertiser may be disappointed for reasons outside the control of the producer, such as when a film performs poorly at the box office. Mercedes had agreed to pay $30 million for inclusion of its vehicles in the *Jurassic Park* sequel *The Lost World*, with $15 million paid upfront. The film was a flop. While Mercedes didn't pay the second $15-million-dollar installment, it didn't have much to show for its financial contribution.[29]

Conclusion

The legal implications of product placement are many and complex. Product placement is only going to get bigger in the years ahead, as are the contractual, constitutional, and free speech issues surrounding it. As product placement increases, so will the need for attorneys familiar with its legal implications. ◆

FOOTNOTES

1. PQ Media LLC, Report, "Product Placement Spending in Media 2005," March 2005, *available at* http://www.pqmedia .com/ppsm2005-es.pdf.

2. Protection of commercial speech is relatively new. At one time, the U.S. Supreme Court held that commercial speech was not protected under the First Amendment. In 1942, in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), the Court found that the constitution allows states to limit commercial speech as they see fit, but subsequent decisions changed course. The Supreme Court first held that commercial speech is entitled to constitutional protection in *Bigelow v. Virginia,* 421 U.S. 809 (1975), and later in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976).

3. *See Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 563 (1980); and *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

4. Kate Burnett , *WORLD: MEDIA ANALYSIS – Product placement thrives as advertisers look for subtlety*, CAMPAIGN, Nov, 21, 2003, at 23, *available at* 2003 WLNR 4471551.

5. David Drum, *Branded: Bartering cameos for promotions, the business of placing products in movies has grown from a whimsy to a science*, HOLLYWOOD REP., Sept. 26, 1994, at S1, *available at* 1994 WLNR 3481382.

6. Lee Ann Gjertsen, *Insurers Cut Marketing, But 3 Campaigns Shine*, AM. BANKER, March 11, 2004 (Vol. 169, Issue 48), at 11, *available at* 2004 WLNR 4062609.

7. Amy Johannes, *TV Placements Overtake Film*, PROMO MAGAZINE, May 1, 2005 at 7.

8. *Id.*

9. Steve Rogers, *The Home Depot to take over the sponsorship of TLC's "Trading Spaces" from Lowe's*, REALITY TV WORLD, Aug. 11, 2003, at http://www.realitytvworld.com/index/articles/story.php?s=1548

10. Wayne Friedman, *Eagle-eye marketers find right spot, right time*, ADVERTISING AGE, Jan. 22, 2001 (Vol. 72, Issue 4) (Midwest Region Ed., at S2), *available at* 2001 WLNR 9681673.

11. Amy Wilson, *Ford woos Hollywood partners; Agreement assures product placement in Revolution Studios' films*, AUTOMOTIVE NEWS, Feb. 23, 2004, at 1.

12. Jason Stein, *Automakers go Hollywood*, AUTOMOTIVE NEWS, Mar. 22, 2004, at 42 (Vol. 78, Pub. No. 6085), *available at* 2004 WLNR 175832.

13. *Wham-O, Inc. v. Paramount Pictures*

Corp., United States Court of Appeals for the Ninth Circuit, Appeal No. 03-17052, Appellant's Reply Brief, May 18, 2004.

14. *Wham-O, Inc. v. Paramount Pictures Corp.*, 286 F. Supp.2d 1254 (N.D. Cal. 2003).

15. *See* fn. 5, *supra*.

16. Candice Leone, *"Star Wars" merchandise invades commercial galaxy*, THE SHREVEPORT TIMES, May 5, 2005, *available at* www.shreveporttimes.com/apps/pbcs.dll/article?AID=/20050505/LIVING/505050302/1004/LIVING

17. 47 C.F.R. § 73.1212.

18. Eric Pfanner, *Product Placements Cause a Stir in Europe*, INTERNATIONAL HERALD TRIBUNE, Oct. 3, 2005, *available at* http://www.nytimes.com/iht/2005/10/03/business/IHT-03products03.html.

19. Leo Cendrowicz, *EC May Bend on Branded TV Fare*, HOLLYWOOD REP., April 26, 2005.

20. Brooks Boliek, *FTC: No need to label products. Commercial Alert's request rejected by the Federal Trade Commission*, HOLLYWOOD REP., Feb. 11, 2005 (Vol. 397, Issue 43), at 3, *available at* 2005 WLNR 3102455.

21. *Id.*

22. Jere Beasley, *Ford To Pay $51.5 Million Over Ads for SUVs*, THE JERE BEASLEY REPORT, January 2003, at 23, *available at* www.beasleyallen.com/jlb_report/JBR_Jan_03.pdf.

23. *See* Rebecca J. Brown, *Genetically Enhanced Arachnids and Digitally Altered Advertisements: The Making of* Spider-Man, 8 VA. J. L. & TECH. 1 (Spring 2003). *See also* Matthew Savare, *Where Madison Avenue Meets Hollywood and Vine: The Business, Legal, and Creative Ramifications of Product Placements*, 11 UCLA ENT. L REV. 331 (Summer 2004).

24. Robert Adler, *Here's Smoking at You, Kid: Has Tobacco Product Placement in the Movies Really Stopped?*, 60 MONT. L. REV. 243, 247 (1999).

25. Gail Schiller, *Movie, TV tie-ins often sobering for liquor firms*, HOLLYWOOD REP., Aug. 1, 2005.

26. *Id.*

27. *Reebok Int'l, Ltd. v. TriStar Pictures, Inc.*, Civ. No 96-8982 SVW (C.D. Cal.) (Complaint, filed Dec. 23, 1996).

28. *See* fn. 5, *supra*.

29. *See* fn. 12, *supra*.