PRODUCT PLACEMENT AND BRAND INTEGRATION STRATEGIES: Managing the Risks of Regulatory Uncertainty

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Products have been strategically placed in film for more than a century. The pioneering Lumiere brothers featured Lever Bros. products (now branded Unilever) in silent films in the 1890s; Buick automobiles and General Electric refrigerators were used as props in many of the late 1920s and 1930s Warner Bros. movies; and Chesterfield cigarettes, Coca-Cola products, De Beers diamonds, and America Airlines, among other products and services, were placed in movies throughout the 1940s and 1950s.[1]

Fast forward to the 1980s with Steven Spielberg's film, *E.T. the Extra-Terrestrial*, in which Elliott offered his new alien friend Reese's Pieces to coax him into his home. The scene helped launch Reese's Pieces for Hershey Foods Corporation and increased candy sales by 65 percent after the movie's release.[2] Similarly, Red Stripe Jamaican-brewed beer was featured in *The Firm*, a popular movie featuring Tom Cruise; the placement increased Red Stripe sales by 50 percent in the United States market in the month after the movie's release.[3]

Clearly product placement is not a new marketing fad. Its staying power derives from proven success at capturing consumers' attention and emotion in a way that translates into sales. What *is* new is an emerging trend in product placement in movies, television, and other media, where the line between traditional advertising and creative programming is less clear. To the extent this trend involves objective express or implied claims about the featured products and services, regulators, consumer protection advocates, and even some in the media industry are questioning how truth-in-advertising laws apply. This article analyzes factors that have led to the renewed embrace of product placement by marketers, current product placement trends, and how the Federal Trade Commission (the "FTC") and other regulators have approached complaints about product placement.

Why the Trend?

With more consumers using ad-skipping products like TiVo and the growing popularity of reality television programs that attract the sought-after 18- to 34-year old demographic, advertisers are finding that product placement can be a more effective way to reach consumers than the traditional 30-second commercial spot. This strategy is not the brainchild of a select few. Competition among advertisers for the right placement deal resulted in a sharp increase in paid product placement deals over the past couple of years, with all signs pointing towards a continuation of this trend for years to come. In 2004, paid product placements in movies and television increased by 44 percent and generated revenues in excess of $1 billion.[4] Spending on television placements was up by 84 percent and outpaced film for the first time in thirty years.[5] The total value of the product placement market grew by 31 percent to an all-time high of $3.5 billion and was expected to expand another 23 percent to $4.2 billion by the end of 2005.[6]

Where in the past, most product placements were arranged through barter and gratis agreements, hefty paid product placement deals are now the norm. As a result, advertisers are demanding more control over how the product is featured and what actors are saying about the products. Appreciative of the increased revenue, producers of creative content, in large part, are giving in, asking the writers to weave into story lines certain brands of cars, potato chips, soft drinks, body washes, building supply stores, among other products and services.[7] For example, in announcing a $200 million product placement deal between Volkswagen and NBC Universal in January 2005, Stephanie Sperber, an executive vice president at Universal Studios Partnerships (a division of NBC Universal), explained the extent to which the deal will factor into future programming: "We want this to be front and center when people are writing scripts. . . . There is no limit to their exploitation of our assets."[8]

These types of deals recently prompted the Writers Guild of America to issue a white paper entitled "Are You Selling To Me?: Stealth Advertising in the Entertainment Industry."[9] The document criticizes the expanding practice of product placement, asserts that the writers are being used as conduits to facilitate stealth advertising, and stresses that the line between advertising and content needs to be more firmly drawn.[10] They assert that clear visual and aural disclosure of product placement deals should be included in the beginning of each program so that the audience "knows ahead of time that it will be subject to hidden or stealth advertising."[11]

Current Product Placement Trends

The increased use of paid product placements and consequential influence by advertisers over the creative content, from a consumer-protection standpoint, trigger several considerations: what claims are being communicated to consumers; can the claims be substantiated; and what risks should be considered when considering a paid product placement deal?

1. Reality Shows

Mark Burnett, executive producer of a number of reality shows, such as Survivor, The Apprentice, and The Restaurant, is often credited with introducing the new formulation of unscripted, competition-based primetime television shows that thrive, in large part, because of product placements.[12] After the success of Survivor in 2000, in which millions of viewers watched dehydrated, hungry Survivor contestants win rewards like Doritos and Mountain Dew, advertisers queued up to sponsor the next line-up of reality shows.[13] As a result, consumers soon saw judges drinking Coke on American Idol, Sears appliances and products being used on Extreme Makeover: Home Edition, all kinds of men's apparel, beauty, and home products on Queer Eye for the Straight Guy, and apprentices promoting brands like Burger King, Crest, and Mattel on The Apprentice.[14] In other words, the reality show/product placement relationship was sealed. Explaining the success of this relationship, Burnett states "It's a great opportunity for sponsors to have more control and networks to have less risk. It's a very good business move for [advertisers] to have integration into the show that can't be TiVo'd out."[15] The question remains, however, whether consumer protection obligations apply to claims that are made in such shows.

For example, in an episode of the Newlyweds, Jessica Simpson and Nick Lachey walk into a Home Depot store looking for a product to fix their "bee" problem. Nick asks the Home Depot sales representative what product she recommends. The camera zooms in on a number of different bee killer sprays, and the prices listed for the products. The sales representative suggests Raid. The camera zooms in on the Raid Pest Spray product label. Nick reads the label approvingly and, after the sales representative touts the effectiveness of the spray, selects the Raid product. If this was a paid product placement, would the price and efficacy claims need to be truthful and substantiated? Would a celebrity endorsement disclosure be required if Nick was paid to pick the Raid product?

Similarly, various episodes of The Apprentice have focused on how to make the sale of certain products a success, including launching the next new Dominos Pizza, Mattel toy, Burger King hamburger, among other products. What legal obligations apply to health claims that a team makes about the ingredients of a pizza or hamburger, safety or efficacy claims about a featured toy, or other objective claims about a product or service that an advertiser has paid to be promoted in the show?

2. Movies

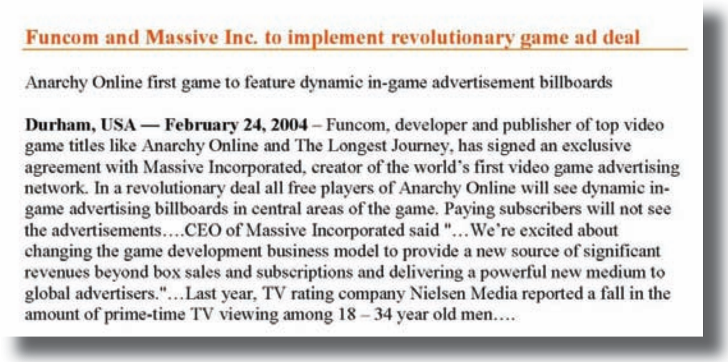
These questions also apply to paid product placements in movies. For example, in The Italian Job, the 2003 movie showcases the Mini Cooper car throughout the film, demonstrating the vehicle's agility as it maneuvers through traffic, careens down stairs, weaves through subway tunnels, and races down sidewalks. In this film, one could reasonably contend that there is no need for a "Demonstration Performed on a Closed Course" disclosure (the type regularly seen on car commercials with similar stunts) because an integral part of the movie's plot was the extensive modifications the characters made to the car to enable it to perform the death-defying stunts. In other words, no reasonable consumer would take away the message that the Mini Cooper off the assembly line would perform the same way.

But it is not a stretch of the imagination to question whether other product placements will have similar integral qualifications to the story line. Specifically, in paid product placement deals like the Volkswagen/NBC Universal agreement noted above, or others where creative staff are being asked to integrate products into the story line with a positive spin on the featured product, is there a review process in place so that objective claims included in the script are legally compliant? Do they need to be?

3. Real-Time Advertisements In Online Video Games

A number of companies, like Massive Interactive, Inc., offer advertisers the opportunity to insert advertisements into online videogames real-time and to targeted demographics. To date, Massive Interactive has partnerships with 29 leading videogame publishers and over 60 advertisers, resulting in videogames that include advertisements by Coca-Cola, Comcast, GameFly, Honda, National Highway Traffic Safety Administration, Navy, NBC, Nokia, Panasonic, Paramount Pictures, Sci-Fi Channel, The WB Television Network, TLC, T-Mobile, Universal Music Group, Verizon DSL, Warner Bros., and XFM Radio.[16]

To some extent the claims made in this medium fly under the radar and often go unchecked by in-house counsel under the category of "low-risk" product placement. The recent product placement trend, however, suggests



Funcom and Massive Inc. to implement revolutionary game ad deal

Anarchy Online first game to feature dynamic in-game advertisement billboards

Durham, USA — February 24, 2004 – Funcom, developer and publisher of top video game titles like Anarchy Online and The Longest Journey, has signed an exclusive agreement with Massive Incorporated, creator of the world's first video game advertising network. In a revolutionary deal all free players of Anarchy Online will see dynamic in-game advertising billboards in central areas of the game. Paying subscribers will not see the advertisements….CEO of Massive Incorporated said "…We're excited about changing the game development business model to provide a new source of significant revenues beyond box sales and subscriptions and delivering a powerful new medium to global advertisers."…Last year, TV rating company Nielsen Media reported a fall in the amount of prime-time TV viewing among 18 – 34 year old men….

that some of the claims featured in these advertisements may trigger the same type of questions that arise with respect to paid product placements in traditional advertising media.

Regulators Weigh In

1. FEDERAL TRADE COMMISSION

In September 2003, Commercial Alert, a non-profit organization whose mission, according to its website, is to "keep the commercial culture within its proper sphere," filed a complaint with the FTC, urging the Commission to investigate product placement practices on television.[17] Gary Ruskin, the executive director of Commercial Alert and author of the complaint, argued that "the line between programming and 'infomercials' has become increasingly blurred," and that viewers need to know, at the time they see paid product placements, that the advertiser has paid for the placement. According to Commercial Alert, without such disclosure, consumers are misled about whether the product placement is an advertisement.

Mr. Ruskin explained that, as part of the Commission's mandate to prevent unfair and deceptive advertising, the FTC has required advertisers to include similar disclosures, pointing to enforcement actions concerning infomercials that purported to be independent programming rather than a paid advertisement, advertisements that looked like independently written articles in a magazine or newspaper, and Internet search results retrieved through Internet search engines that appeared as a top search result, but in reality were paid for by companies to appear in response to such searches. Mr. Ruskin argued that product placements during television shows similarly mislead consumers and require intervention by the FTC.

In February 2005, the FTC responded, concluding that paid product placement alone does not violate Section 5 of the Federal Trade Act.[18] The FTC pointed out that the product placement and brand integration examples raised by Commercial Alert did not suggest that "product placement results in consumers giving more credence to objective claims about the product's attributes." Accordingly, it rejected Commercial Alert's request to order pop-up "Advertisement" disclosures to appear during television programming each time there is a paid product placement.

Significantly, however, the FTC agreed to monitor future uses of product placement and if "false or misleading objective, material claims about a product's attributes are made," the Commission would consider enforcement action pursuant to Section 5 of the FTC Act.

2. FEDERAL COMMUNICATIONS COMMISSION

Commercial Alert filed a substantially similar complaint with the Federal Communications Commission ("FCC") in 2003, arguing that the television networks failed to comply with the FCC's sponsorship identification requirements with respect to paid product placements and requesting the FCC to investigate such practices.[19] While the FCC has not responded to the complaint, Federal Communications Commissioner, Jonathan S. Adelstein, in May 2005, stated publicly that the FCC should toughen its product placement disclosure requirements and expand its investigations into the practice of product placement.[20]

3. CHILDREN'S ADVERTISING REVIEW UNIT

In September 2005, the National Advertising Review Council ("NARC"), a self-regulatory body that provides guidance and sets standards of truth and accuracy for national advertisers,[21] announced that it is expanding its panel of academic experts to help set standards for reviewing advertisements, and that it has asked its Children's Advertising Review Unit ("CARU") to take a closer look into product placements.[22] NARC's president-CEO, James R. Guthrie, explained that these efforts were a response to some of the concerns raised at a recent joint FTC and Department of Health and Human Services workshop that looked into the role marketing plays in the childhood obesity crisis. Among the concerns and proposals discussed included a complete ban on paid product placement in children's programming.[23]

Looking Ahead

Currently, straight-forward, paid product placements that appear in adult or children's media do not violate truth-in-advertising obligations. That said, the laissez-faire attitude by regulators towards such use may be over. The more aggressive advertisers become in promoting their products through creative programming, the more likely it is that we will see a regulatory response.

Specifically, if paid product placements – whether in television, movies, videogames, or in any other medium that reaches consumers – include expressly or impliedly false or misleading claims about a product or service, the FTC has made clear that such use may be a violation of Section 5 of the FTC Act, and the advertiser could be subject to cease and desist orders, lawsuits, injunctions, fines and/or civil penalties up to $11,000 per violation, and even damages alleged in civil suits. See 15 U.S.C. § 45 et seq. Violations of court orders also could result in civil or criminal contempt proceedings. Id. In addition, more aggressive product placement may prompt the FCC to issue disclosure requirements and initiate compliance investigations, and cause CARU to increase its scrutiny of product placements in programming that is targeted to children.

Given the changing regulatory climate, advertisers (and their legal counsel) would be wise to implement compliance practices similar to those in place for traditional advertising. At a minimum, these measures should include a process that ensures that express and implied claims about the advertiser's products and services made vis-à-vis paid product placements are truthful, non-misleading, and substantiated. Scripts and/or footage of television, movie, and videogame content reflecting paid product placement should be reviewed, and modifications should be made, if necessary, to ensure that all express and implied claims comply with truth-in-advertising laws. Finally, going forward, advertisers may want to refrain from making public statements that tout the extent of control that they have over the creative content; those statements could come back to haunt them in an enforcement proceeding for false advertising.

Endnotes

[1] *Product Placement in the Movies* (TNT television broadcast, Mar. 4, 2005).
[2] Dale Buss, *Product Placement Hall of Fame*, Business Week (June 11, 1998), www.businessweek.com/1998/25/b3583062.htm.
[3] *Id*.
[4] PQ Media Report, *Product Placement Spending in Media 2005: History, Analysis & Forecast* (2005).
[5] *Id*.
[6] *Id*.
[7] Writers Guild of America, *Are You Selling To Me: Steal Advertising in the Entertainment Industry* (Nov. 14, 2005) (quoting a statement by CBS Chairman Less Moonves that "*You're going to see some shows doing [product integration] extremely well, where you're hardly aware that you've been sold something.*") (citing S. Donaton, *Madison and Vine: Why the Entertainment and Advertising Industries Must Converge To Survive*, at p. 154 (McGraw-Hill 2004), www.wgaeast.org/pdf/2005/11/14/Product_Integration_White_Paper.pdf.
[8] Nat Ives, *The Media Business: Advertising; That Abundance of Volkswagens on TV Shows Will Be Product Placement, Not Coincidence*, NY Times (Jan. 13, 2005) at C9.
[9] Writers Guild of America, *Are You Selling To Me: Steal Advertising in the Entertainment Industry*.
[10] *Id*.
[11] *Id*.
[12] See Hollywood Reporter.com, *Brand Practice: Product Integration Is As Old As Hollywood Itself* (Apr. 28, 2005), *available* at www.hollywoodreporter.com/thr/film/feature_display.jsp?vnu_content_id=1000901394.
[13] *Id*.
[14] *Id*.
[15] Wade Paulson, *NBC's The Restaurant Funded Solely By Product Placement*, Reality TV World (July 18, 2003), *available* at www.realitytvworld.com/index/articles/story.php?s=1429.
[16] *Available* at www.massiveincorporated.com.
[17] Gary Ruskin, *Request for Investigation of Product Placement on Television and for Guidelines to Require Adequate Disclosure of TV Product Placement*, Commercial Alert (Sept. 30, 2003), *available* at www.commercialalert.org/ftc.pdf.
[18] Commercial Alert, FTC Staff Op. Letter from Mary K. Engle (Feb. 10, 2005), *available* at www.ftc.gov/os/closings/staff/050210productplacemen.pdf.
[19] Gary Ruskin, *Request for Investigation of Product Placement on Television*, Commercial Alert (Sept. 30, 2003), *available* at www.commercialalert.org/fcc.pdf.
[20] Ira Teinowitz, *FCC Commissioner Decries "Commercialization of the Media*," AdAge.com (May 25, 2005), *available* at www.commercialexploitation.org/news/articles/fccdecries.htm.
[21] *N*ARC's website is *available* at www.narcpartners.org.
[22] Ira Teinowitz, *CARU Targets Product Placement and Cartoon Ads*, AdAge.com (Sept. 15, 2005), *available* at www.commercialexploitation.org/news/carutargetspp.htm.
[23] Advocated by the Grocery Manufacturers Association ("GMA"). It suggested that CARU should oversee advertisements in video, computer and online games; forbid paid product placement in children's programming; and govern the use of licensed characters in advertisements. In addition, GMA suggested that CARU should have greater resources and enforcement capacity; offer consumer access via toll-free lines and a website; post regulatory activities online, including details of complaints and their resolutions; and push food companies to let CARU review more advertisements. *See* Betsy Spethmann, *Junked Food*, PROMO Magazine (Sept. 1, 2005), *available* at http://promomagazine.com/mag/marketing_junked_food/.