The legality of product placement

William Van Caenegan argues that broadcasting and trade practices laws are not adequate to regulate product placement in all cases in Australia and New Zealand

These days, when watching TV, a video or a cinema film, you may notice that one or another product appears with unusual prominence or regularity. Actors show a marked preference for a certain softdrink, car or brand of sunglasses.

Increasingly, the chances are this is no coincidence. For consideration of some sort, products are visibly and recognisably displayed in productions of all kinds. The US is the biggest market for product placement, but any nation that produces and shows film or TV programs has to live with this, at least in Australia and New Zealand, still relatively new phenomenon.

Consideration for the placing of products can range from free provision of the items concerned, to large sums of money. Deals may simply provide that the products involved will not be shown in a denigrating context, but often the parameters of where and how the product will be shown are worked out in great detail between manufacturer and program producer.

Blurring the divide between advertising and non-advertising program material is attractive for several reasons. An increasingly recalcitrant TV viewing public often avoids watching advertisements by switching channels when ads appear. More people have video recorders, and hire videos or use them to record TV programs and fast-forward through advertising blocks.

Product placement has the additional advantage of eliminating the normally critical attitude the consumer has towards evaluating advertising messages, and also the mental 'switching off' that much recognisable advertising triggers.

Censorship v. freedom

Product placement arrangements put pressure on program producers to adapt form and content to the explicit or implicit expectations of the advertiser. Artistic integrity is not an absolute, however, and insistence on it varies widely.

Moreover, excessive commercialism may reduce the popular appeal of a program, thus balancing out commercial pressures to include more placed products.

More worrying than pressures on artistic freedom are restrictions on editorial freedom and integrity in non-entertainment programming that can exist where there are close ties between advertisers and producers.

For these kinds of programs the viewer expects neutral information, and the ethical journalist wishes to provide it. Commercial pressures on him or her to do otherwise are invidious. The cure might, however, be worse than the disease if excessive scrutiny of program production provides a new kind of commercially based censorship. A balance needs to be achieved, protecting freedom of speech and information from pressures from both sides.

Viewers are generally unaware that a program may be acting as a hidden commercial and targeting them as consumers. Although product placement does not lie in the realm of subliminal advertising, viewers are still unwittingly tricked out of the normal state of critical viewing and analysis.

Broadcasting law

Under section 16(d) of the *Broadcasting Act* 1942 (Cth) the Australian Broadcasting Tribunal (ABT) may determine television program standards (TPS) to be observed by licensees.

TPS provides;

"(i) *An advertisement...must be clearly distinguishable as such to the viewer.*

(ii) *This standard applies to items transmitted:*

(a) *between programs;*

(b) *during or within a program; or*

(c) *as a visual or audio superimposition over a program".*

TPS 15 (d) which provides that "programs must not present advertising matter as if it were news" is seemingly aimed at advertising spots presented as new items.

The *New Zealand Broadcasting Act* 1989 provides that broadcasters must observe any "approved code of broadcasting practice applying to the programs." The same Act created the Broadcasting Standards Authority (BSA). It has approved both the Codes of Broadcasting Practice for television (developed by a committee comprising TVNZ and Channel 3) and the standards developed by the Committee of Advertising Practice, an industry self-regulatory body made up of publishers, advertisers and broadcasters.

The TV Advertising Standards (Part of the Codes of Broadcasting Practice) contain the following rules:

"General... (i) "Advertisements shall be clearly distinguishable from other programme material."

(ii) Advertisements must not utilise news presentation methods or be presented in a form in which could cause confusion with news information."

In addition, the TV Program Standards (which together with the Advertising Standards make up the Codes of Broadcasting Practice), General Section, No 7, provide that broadcasters are required:

"To avoid the use of any deceptive program practice which takes advantage of the confidence viewers have in the integrity of broadcasting".

This last provision may be interpreted as a guarantee of editorial independence from the influence of advertisers. However, it is unclear whether product placement would be caught by this provision. A clear statement of the need for editorial neutrality would still be welcome in both countries.

The Codes of Practice of the Committee of Advertising Practice is also relevant and provides at 1:

"Identification - Advertisements must be clearly distinguishable as such, whatever their form and whatever the medium used; when an advertisement appears in a medium which contains news or editorial matter, it must be presented so that it is readily recognised as an advertisement"

Rather than ruling out any advertising within editorial or news style programs this requirement merely requires clear identification. This does not go far enough as the second leg of the provision, at least, seems to accept advertising within such programs.

What is an advertisement?

The degree to which the basic 'separation requirement' in both countries' regulations will impact on product placement depends upon the definition of 'advertisement'.

Some guidance can be had from the definitions given in the two Broadcasting Acts. In Australia the Television Advertising Code (TAC) 1 provides a definition, but it is unclear:

"(i)... matter which draws the attention of the public, or a segment thereof, to a product, service, person, organisation or line of conduct in a manner calculated to promote or oppose, directly or indirectly that product, service, per-

son, organisation or line of conduct."

The TPS states that an 'advertisement' excludes accidental or incidental advertising material, if no valuable consideration is received by the licensee for broadcasting it.

The *New Zealand Broadcasting Act* 1989, at section 2 states:

'Advertising Program' means a program or part of a program intended to promote the interest of any person, or to promote any product or service for the commercial advantage of any person, and for which, in either case, payment is made, whether in money or otherwise."

The key to both definitions is the precise meaning of 'in a manner calculated' or 'intended' to promote. There is an advertisement if certain images of products are presented in a way program producers think will have the effect of promoting that product.

Considerations

Where no consideration is given to achieve this effect, the *New Zealand Act* excludes programs automatically form being advertisements. In Australia, that is not necessarily so: only if advertising matter is an accidental or incidental accompaniment of the program does the definition make consideration relevant. In other words, it is still possible to have an advertisement, even where no consideration is received, as long as it is presented in a manner calculated to promote the product.

Although product placement will not normally be provided free, the question of consideration may be relevant in editorial style programs where there may not be obvious signs of pressures on editorial integrity, but the overall relationship between advertisers and broadcaster may influence the attitudes and decisions taken by journalists. However, it is doubtful that even if one takes the Australian definition of advertisement (which does not require consideration) sufficiently stringent separation between editorial integrity and advertising related pressures is achieved.

What is 'a manner calculated to promote'? It might be that where the showing (or manner of showing) of a product is not required or necessary in the light of the dramatic, artistic or editorial demands of the program, there is effectively an advertisement.

Some Australian cases have considered the question of what constitutes an advertisement [*Bensen & Hedges* v *ABT* (1985); *United Telecasters* v *DPP* (1988)]. These cases seem to confirm that matter which is objectively and on its face designed or calculated to promote a product is, irrespective of consideration received or of motivation or interests concerned, advertising matter. The fact that an advertisement is contained within non-advertising material does not seem relevant. Indeed, many advertisements are conceived to function in exactly that way.

By comparison, in New Zealand, the TV Advertising Standards refer to the statutory definition of advertising programs to explain the meaning of 'advertisement'. This definition clearly states that a part of a non-advertising program can constitute an advertisement.

In line with these cases and statutory definitions, it is fairly clear that both in Australia and New Zealand a case can be made out that product placement may be contrary to the Broadcasting Acts in certain circumstances.

Certainly, where consideration is received to present products in a manner aimed at promoting them, the rule of separation would be broken. Another indication would be whether the way a product is shown is dictated by (or 'necessary' for) artistic or editorial requirements.

The Broadcasting Acts do not provide sufficient safeguards for editorial style programs. In many cases pressures and influences can be brought to bear on program producers where there is no obvious form of consideration. For this reason influencing of any kind by commercial concerns should be prohibited for such programs, even if no consideration is received or there is no visible displaying of products over and above what is editorially or artistically necessary.

Trade Practices Legislation

In the recent German Federal Supreme Court decision in *Altenburger und Stralsunder Spielkartenfabriken* v *ZDF and Others* (1990). The Federal Supreme Court stated that where product placement had occurred, the public could be mislead into believing that what was actually an advertisement was intended to be neutral and objective information.

Given the wide terms of sections 52 (and 53) of the *Australian Trade Practices Act* and section 9 of the *New Zealand Fair Trading Act* a similar approach could be effective in Australia and New Zealand. In Germany, sect ion 1 of the UWG reads:

"Whoever commits acts that are contrary to good mores in commerce for competitive purposes is liable to compensation or injunctive relief."

The Australian and New Zealand formulation is even wider, not requiring any competitive purpose: section 9 of the *Fair Trading Act* reads:

"No person shall, in trade engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

The scope of Trade Practices legislation is wider: it covers conduct in any media, not just on television. It is also more flexible, because it takes the effect of conduct on consumers as a starting point, rather than imposing detailed rules and standards on commercial conduct. In that way it makes a distinction between different kinds of programs easier to achieve. Policing is more effective, because anyone can bring an action under the Acts, and a wider, more immediate and more effective spectrum of relief is available. The sole test is an objective one. It need not be shown that anyone is actually misled or has suffered damage. When product placement occurs, viewers are unaware of the true nature of what appears on screen. A program which they expect or believe is based on artistic or editorial considerations is, at least in part, based on commercial motives; accordingly, consumers may be considered to be 'misled' or 'deceived'.

Although TV programs are generally excluded from the operation of Section 53 of the *Trade Practices Act* by Section 65A of that Act, this exclusion does not apply to advertisements and to programs connected to the sale of goods or services. Product placement which involves consideration or is an advertisement on the basis of an objective test, is therefore probably covered by Section 52. Section 65A does illustrate legislative concern about 'commercial censorship'.

It would be too severe a restriction on broadcasting and freedom of speech to say that any product placement is deceptive or misleading. It would also deprive producers of potential income, an unhappy effect in the current TV climate. In that sense the German Federal Supreme Court decision goes too far, certainly for commercial broadcasting.

A distinction between informative style programs with editorial content which rely on integrity and neutrality, and entertainment style programs, might offer a balanced solution. For the latter the rule suggested earlier might be appropriate: product placement is acceptable as long as it does not influence artistic and programmatic decisions. Program producers need to use props of some kind, and it is hardly deceptive, even if they do so for consideration, when it is done in a way not aimed at influencing the consumer's buying behaviour, but purely governed by artistic considerations. That it may influence consumers is then merely a coincidental effect, that would in any case be unavoidable whenever recognisable consumer products are used. Existing Trade Practices and Fair Trading legislation is sufficient to regulate product placement in this kind of programming.

For editorial style programs, however, there is a need for stricter separation to

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Pay TV: why regulate?

Rory Sutton examines the Industry Commission paper on the continuing prohibition of pay TV being delivered to Australian households

The moratorium imposed on pay TV in 1986 technically is no more, ending in October last year. Yet the introduction of pay TV was further stalled earlier this year after Transport and Communications Minister Kim Beazley took a submission to Cabinet. It foundered ostensibly on the rock of the potential adverse effect pay TV would have on the balance of payments. The suspicion is that, in addition, there was more than a tad of political infighting and commercial pressure involved. Whatever the reasons, Beazley lost the battle, though yet may win the war, and was told to re-submit at a later date.

The irony of the 'balance of payments' argument is that the proposed carrier for pay TV is to be the fully imported, new generation of Aussat satellites. Kim Beazley's aim is to sell them to private enterprise as part of his strategy to build a strong, outward looking telecommunications industry which will survive and prosper in a global market. The proposition that Aussat should have a monopoly on the carriage of pay TV is seen as an added inducement to potential purchasers. The probability is that the successful buyer will be from overseas, with any profits presumably following the same path.

The Industry Commission's Office of Regulation Review (ORR) has provided a trenchant critique and analysis of the Cabinet's current position, a position based on a range of previous reports, reviews and it seems a predilection to continue to protect and embrace the regulated strictures of the current free to air services in Australia.

Business regulation?

In its paper *'Pay TV: Why Regulate?'*, the ORR asserts that the ongoing prohibition of household pay TV services in Australia is an extreme form of government regulation of business. It claims Australian consumers are being denied access to this service, thereby foregoing the benefits of expanded choice, and where the profit motive alone will produce the range of goods and services that most satisfies consumer preferences and enhances community welfare. Not that a public outcry demanding the introduction of pay TV exists presently.

The ORR states that pay TV should be introduced promptly and with minimum regulation. Somewhat predictably, market forces are its core tenet. Rejected is the view that Aussat should be given a monopoly as the sole carrier for pay. Rejected is the view that pay TV will affect materially the advertising revenue of the established commercial stations. The latter view, incidentally, has gained credence by the recent decision to allow SBS to carry five minutes of advertising every hour with estimates of revenue ranging between $15 to $30 million annually. Consistent with its free market philosophy, the ORR advocates an untrammelled pay TV service, without censorship, foreign ownership restrictions and without Australian content regulations.

Its only concession to regulatory forces is a recognition that radio spectrum property rights may need some protection and that there may be some danger from 'siphoning', where free to air viewers could be deprived of particular and significant programs. The ORR claims this would occur only if pay TV attained a substantial audience. It concludes that the history of costly and misdirected regulation of broadcasting and telecommunications justifies a careful approach to further government intervention in these markets.

Narrow focus

While it is difficult to dispute the 'dry' economic force of the review, it is disappointing for its narrow focus. The introduction of the Television Remote Control, or 'zapper', has revolutionised viewing habits and demands. The future appears to be 'random access' for viewers, with the opportunity to tap into a vast global video library. The technologies of fibre optic cable and signal compression foretell an access explosion for all kinds of information, including pay TV. The consequence of this may be a rapid decline of broadcasting networks as presently constituted, with the emphasis on niche markets and diversity. A dream world for 'user pay' and the smart entrepreneur.

Even if the major networks do survive, there could be significant economies to be gained from overhauling current infrastructures, such that the networks would no longer retain exclusive, but costly transmission facilities. Issues, such as compression technology, have not been addressed by the ORR, nor does it assess the opportunities for Australia to exploit its "clever country" status by developing and manufacturing its own requirements. Overall, the ORR Review essentially only reinforces the myriad of other reviews and papers supporting the introduction of pay TV into this country. It is doubtful that the Federal Cabinet has any more information now upon which to make a rational decision than it had previously.

The fear must be that Australia will miss an opportunity to be a major force in the development of a burgeoning industry. This applies especially in the Asian Region. By contrast New Zealand is an aggressive player in the pay TV market. It has introduced the service to a population of only three million. At the same time it is actively pursuing market opportunities both in Asia and the Pacific, helped by some significant partners from the U.S. The danger is that Australia could be left behind, and find itself with no say or income from any of its pay TV services. If this does occur, the outcome for the balance of payments will be gloomy indeed. It may be a case of pay now or pay even more in the long term.

Rory Sutton is an ABC TV executive

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safeguard editorial freedom and integrity and reliable, neutral news. Any product placement in such programs is undesirable. Forbidding any product placement in editorial style programs makes detailed policing as to how editorial decisions have been made unnecessary, thus doing away with the risk of excessive commercial censorship.

The existing regulatory framework is only partially effective. A two tier approach is possible.

The first tier would concern programs without any editorial or objective information content: there product placement would be acceptable, as long as products were shown in a manner dictated principally by artistic or editorial considerations.

The second tier would cover editorial style programs. All advertising influence on these kinds of programs should be avoided. Therefore any kind of product placement would be unacceptable, whether it influences editorial decisions or not, and whether consideration is received or not.

William Van Caenegan is an Assistant Professor of Law at Bond University