

Product Placement – US and UK Regulatory Reviews of an Expanding Market

Lesley Hitchens considers some of the issues associated with product placement in broadcasting and discusses recent reviews commenced by US and UK regulators.

Introduction

It was recently reported that "...Australia is the third-largest paid product-placement market after the US and Brazil and advertisers are expected to spend almost \$280 million on product placement in Australian television programming ... [in 2008]".¹ The growth in product placement is attributed to the increased ability of viewers to bypass the traditional spot advertisement.² Personal video recorders are providing viewers with more sophisticated means to do what they have probably nearly always done: 'skip the ads'.³ It is surprising that a relatively small market, such as Australia, should rank so highly in the product placement market, although it is well behind US expenditure, estimated as \$US2.9 billion in 2007.⁴ The United States (US) has been identified as the largest and fastest growing product placement market in the world,⁵ which is consistent with the size of the US television market. Like the US, Australia appears to be part of a global trend as the media and advertising industries search for forms of advertising which will relieve the dependency on traditional advertising forms.⁶

This growth in the product placement market prompted the Federal Communications Commission (FCC), the US communications regulator, to launch in June 2008, an inquiry (the **Inquiry**) into whether existing broadcasting rules might need to be changed.⁷ Product placement policy is also currently under consideration by the United Kingdom (UK) Government, although the policy and regulatory context is markedly different since product placement in broadcasting is currently prohibited. The UK's interest arises following changes to European Union (EU) rules on television broadcasting which will permit product placement for certain

types of television programming if a member state decides to allow it. Accordingly, the UK Government launched a consultation (the **Consultation**), in July 2008, on whether or not product placement should be permitted.⁸ Neither the UK nor the US review is completed, but this article will provide a brief overview of the issues and concerns being canvassed by the two jurisdictions.

The US Inquiry into Embedded Advertising

Despite a well-established product placement market, the increased use of placement practices caused the FCC to establish the Inquiry. With its launch, the FCC issued a brief issues paper which outlined the practices and the possible policy and regulatory concerns.⁹ The Inquiry remains at this preliminary stage.

The Inquiry refers to the term 'embedded advertising' to describe two practices which are its focus: 'product placement' and 'product integration'. The term 'product placement' is described as "...the practice of inserting 'branded products into programming in exchange for fees or other consideration" and 'product integration' as the practice of integrating "...the product into the dialogue and/or plot of a program".¹⁰ The purpose of these practices "...is to draw on a program's credibility in order to promote a commercial product by weaving the product into the program".¹¹ The FCC described some of the new types of advertising practices which are being offered by broadcasters, such as Fox Sports Network's claim to provide 'product immersion,' the practice of "immersing products into programs ... so that they really feel like it is part of the show", and

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NBC's policy of "bringing in advertisers during programming development."¹² The goal, as the FCC noted, "... of many of these new marketing techniques is to integrate products and services seamlessly into traditional programming."¹³

From a regulatory perspective the FCC's concern is whether the existing sponsorship identification rules (**SIRs**) are adequate to embrace the changes in advertising techniques. An important principle underlying the SIRs is the entitlement of the public "...to know by whom they are being persuaded."¹⁴ The SIRs are based on legislative provisions found in the Communications Act of 1934. Section 317 requires that where matter is broadcast in return for consideration, received directly or indirectly, a licensee must broadcast, at the same time, details of the person who has requested the matter to be broadcast.¹⁵ The FCC has developed detailed rules which set out what will be required for compliance.¹⁶ Related to section 317 is a requirement that any other persons who receive consideration or who provide consideration must inform the licensee to enable compliance with the rules.¹⁷ This obligation applies "...regardless of where in the production chain the exchange takes place".¹⁸ Despite the use of the term 'sponsorship' by the FCC, these rules are broad in their reach, and capture all forms of commercial communication,¹⁹ including the traditional spot advertisement.

However, given that spot advertisements will by their very nature provide identification, mention of the trade or corporate name, or the name of the sponsor's product, will be deemed to be sufficient for compliance.²⁰

As indicated, the SIRs operate on a principle of disclosure. There is no objection in principle to paid-for content but the audience must be made aware of who is paying for that content to be presented. It follows then that practices such as product placement and other forms of embedded advertising are not in principle objectionable. The Inquiry is designed partly to gather information about trends in embedded advertising and the effectiveness of current SIRs. Although embedded advertising is not new, because of the growth in the product placement market and the more sophisticated means available to viewers to bypass traditional forms of advertising the FCC wants to establish the frequency and form of embedded advertising practices. Another aspect of the inquiry is a request for comment on possible changes to the SIRs. The areas for possible amendment include introducing a requirement that:

- the sponsorship identification announcement is made more obvious by requiring lettering to be of a certain size and to be aired for a particular time.

- an announcement must be made at the beginning and the end of the relevant program, provided it is longer than five minutes.²¹

Both these suggestions are taken from existing rules applying to television political advertising.²² Commercial communications currently require only one announcement to be broadcast and to remain on the screen long enough to be read or heard by the average viewer.²³

Currently there are no rules which explicitly prohibit embedded advertising in children's television programming, although the effect of FCC policies related to children's television makes it difficult for embedded advertising to occur. FCC policy requires 'bumpers' (for example, 'And now it's time for a commercial break') to be used to demarcate children's program content from commercial content.²⁴ Embedded advertising would fall foul of this separation policy because of the lack of 'bumpers'.²⁵ The FCC has queried whether its separation policy should be made explicit in its rules.

The FCC does not provide any indication of its likely position, but it does, by reference to submissions made in other contexts, give a flavour of the arguments which are likely to be put forward. Those who would advocate change have suggested that the current rules do not make it sufficiently clear to audiences that embedded advertising may be occurring. It has been suggested that the SIRs should also require announcements to disclose when embedded advertising is occurring.²⁶ Unsurprisingly, those likely to argue that the existing rules are adequate represent industry interests. A common assertion is that embedded advertising does not cause any substantial harm to audi-

ences. For those resisting change, it is also likely to be argued that increased disclosure requirements would amount to an unjustified interference with programming and so violate the First Amendment.²⁷ One of the arguments previously made by industry interests is that increased regulation would interfere with “artistic integrity”.²⁸ This is an interesting argument to use because it is the risk of such interference, specifically, the risk to editorial independence, which is used to justify, in part, the prohibition on product placement in the UK.

UK Consultation on Product Placement

Product placement is defined under Office of Communications (Ofcom) rules as “... the inclusion of, or a reference to, a product or service within a programme in return for payment or other valuable consideration to the programme maker or broadcaster (or any representative or associate of either)”.²⁹ Product placement is prohibited, although there are two situations which are treated as exemptions:

it is likely to be argued that increased disclosure requirements would amount to an unjustified interference with programming and would interfere with ‘artistic integrity’.

- References to products or services which are acquired at no, or less than full, cost, provided that their inclusion is justified editorially (known as ‘prop placement’).
- Product placement which may be included in a broadcast of a cinema film or non-UK originated television programming, provided that no broadcaster (regulated by Ofcom) associated with the broadcast directly benefits from the arrangement.³⁰

The ban on product placement is consistent with two broader principles which apply to all advertising, sponsorship, and commercial references:

- the requirement for advertising and program content to be clearly separated; and
- the requirement that programs are not distorted by commercial references and that editorial independence over program content is maintained.³¹

Regulation of aspects of television program content has been governed by EU rules since 1989 through the *Television without Frontiers Directive (TWF)*.³² TWF requires member states to ensure that their national laws comply with the provisions of the TWF. Because of its rules on separation of programming and advertising content and requirements for editorial independence,

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the TWF was treated by some member states (but not all) as imposing a de facto prohibition on product placement. In any event, the UK has long had in place such a prohibition. In December 2007, a new directive came into force to replace the TWF. The *Audiovisual Media Services Directive (AVMS)*,³³ which will replace the TWF, must be implemented by member states by December 2009. It is the AVMS which has explicitly opened up the possibility for product placement. The Consultation is part of the process of determining how to implement the AVMS into its national rules.

The AVMS defines product placement as “the inclusion of or reference to a product, or service or the trade mark thereof so that it is featured within a programme, in return for payment or similar consideration”.³⁴ A member state is required to implement a

- information must be clearly provided of the existence of product placement at the start and end of the program, and on resumption of a program after an advertising break. This latter rule however may be waived in the case of feature films or programs not produced by the broadcaster or an affiliate.³⁹

The rationale for this relaxation was to enable the European audiovisual media industry to secure increased revenue and to become more competitive, particularly with the US.⁴⁰

The Consultation Paper notes the justifications for a prohibition on product placement:

- the need for separation of commercial content from other content, so that viewers know “...when they are being ‘sold to’”;
- “that those licensed to broadcast are permitted to advertise to the public principally in order to fund entertaining and informative programmes (especially when the public resource of the terrestrial spectrum is used) rather than vice versa”; and,
- “that audiences are better served if the principal incentive for broadcasters is the production of attractive programmes, in the breaks of which they can sell advertising slots, rather than making editorial decisions based principally on the advertiser’s wishes to include their products”.⁴¹

general prohibition on product placement, but may, by derogation, permit product placement for certain types of programming:

- feature films;
- television films and series;
- sports; and
- light entertainment programs.³⁵

It follows from this that product placement is not permitted in news and current affairs programming, whilst product placement in any type of children’s program is expressly prohibited.³⁶ A member state may also permit prop placement provided that the goods or services have been provided free of charge.³⁷ However, where goods or services have a “significant value” (not defined), they will be treated as product placement.³⁸

Where product placement is permitted, programs making use of product placement must comply with the following:

- the editorial independence of the program must be maintained;
- programs must not directly encourage the purchase or rental of goods or services, for example, by making promotional references;
- the program must not give undue prominence to the product in question; and

The Consultation Paper canvasses the arguments to support product placement being allowed. One considered is that audiences are used to, and able to distinguish, product placement because of their exposure to US-sourced programs.⁴² However, the Government rejects the implication that this means that audiences are necessarily able “to distinguish product placement and raise their guard”.⁴³ Further the current exception for non-UK originated programming does not compromise editorial integrity because programs have been acquired on the basis of their perceived audience appeal, not for the product placement.⁴⁴ The most crucial argument canvassed is the one used by the EU, namely that product placement revenue would help television broadcasters to be more competitive, especially at a time when they are facing increased competition for audiences and advertising revenues.⁴⁵ This might be seen as a difficult argument to resist, especially in the UK where some commercial broadcasters have public service responsibilities. However, the Government appears sceptical of how significant

an important principle underlying sponsorship identification rules is the entitlement of the public to know by whom they are being persuaded

the revenue increase would be especially given the constraints of the new EU rules, and it notes the growing concern in the US about the extent of product placement.⁴⁶ For the Government however, the key issue is "...whether the comparatively modest additional income which is forecast, at least in the short term, would justify abandoning the long-held principles of European and UK broadcasting".⁴⁷

Although the position could change after consultation, the Government has indicated that its preliminary preference is to legislate to prohibit product placement in all types of programming.⁴⁸ It justifies this as follows: "[t]he Government's central intention is to ensure continued viewer and consumer confidence in the integrity of ... programming ...".⁴⁹

Conclusion

As noted earlier, neither the Inquiry nor the Consultation has yet taken any steps beyond launching the process and canvassing the issues. Whilst there is little indication as to how the FCC will proceed, the Inquiry comes at a noteworthy time as the US inaugurates a new President. The FCC is compromised of five commissioners who are appointed by the President (with the consent of the Senate), although their five year terms of office do not terminate with a change of president.⁵⁰ However, the composition of the FCC will change from its current Republican dominance. Currently there are three Republican representatives, however one of them has recently resigned. The legislation imposes a limitation on the number of members who may be from the same political party. This means that with five commissioners, no party can have more than three commissioners. This resignation will provide the new administration with an opportunity to appoint a commissioner associated with Democrat interests. Significantly, an incoming president can appoint a new FCC Chairman. No announcement has yet been made.⁵¹ It has been the Democrat members of the FCC who have been the most vocal, for some time, in raising concerns about increasing embedded advertising practices and failures in the SIRs, and so with the incoming Democrat administration and consequent FCC changes, a more proactive stance by the FCC could be possible.

The UK Government has already expressed its preliminary preference, although it has indicated that it is open to other options if the case can be made strongly enough. It is likely however that that case will have to be made very forcefully given the emphasis which the Government has placed on the

need to ensure that the trust audiences have in broadcasters is not betrayed – something which is seen as a key element of the success of UK broadcasting.⁵² This emphasis on trust is particularly relevant following a wide scale investigation by Ofcom into practices used by television (and some radio) broadcasters in relation to programs which involved competitions whereby participants paid, via premium rate calls, to participate. The investigation completed in mid-2008 resulted in the imposition of fines of about £5 million. These essentially revenue raising activities were treated by Ofcom as advertising. For those broadcasters seeking a more relaxed product placement regime, they will have to convince the Government that following this recent abuse of trust, they can "...re-build audience trust in their integrity".⁵³ This may be difficult to achieve in the short-term.

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(Endnotes)

- 1 Rachel Browne, 'Ads' 30 seconds of fame under threat', *Sydney Morning Herald*, 24 August 2008, <http://www.smh.com.au/news/technology/ads-30-seconds-of-fame-under-threat-from-technology/2008/08/23/1219262614395.html>.
- 2 Ibid.
- 3 See also, Errol Simper, 'Corporate World turns to new forms of product placement', *The Australian*, 22 September 2008, <http://www.theaustralian.news.com.au/story/0,25197,24379998-13243,00.html>.
- 4 PQ Media Research, 'Branded Entertainment Market Defies Slowing Economy', Press Release, 12 February 2008, <http://www.pqmedia.com/about-press-20080212-bemf.html>.
- 5 Federal Communications Commission, *In the Matter of Sponsorship Identification Rules and Embedded Advertising: Notice of Inquiry and Notice of Proposed Rule Making*, 23 FCC Rcd 10682, 26 June 2008, n 8.
- 6 PQ Media Market Analysis, 'Global Product Placement Spending Grew 37% in 2006', Press Release, 14 March 2007, <http://www.pqmedia.com/about-press-20070314-gppf.html>.
- 7 Ibid.
- 8 Department for Culture, Media and Sport, *The Audiovisual Media Services Directive, Consultation on Proposals for Implementation in the United Kingdom*, July 2008, http://www.culture.gov.uk/images/consultations/AVMS_Consultation_Document.pdf (Consultation Paper).
- 9 Note 5 above.
- 10 Note 5 above, n2.
- 11 Note 5 above, para 2.
- 12 Note 5 above, para 3.
- 13 Ibid.
- 14 FCC, *In re Applicability of Sponsorship Identification Rules, Public Notice*, 40 FCC 141

- (1963).
- 15 47 USC §317(a)(1).
- 16 47 CFR §73.1212 (for commercial and public broadcasting) and 47 CFR §73.1615 (for cable).
- 17 47 USC §508.
- 18 Note 5 above, para 4.
- 19 In fact, the SIRs are not confined to commercial communications but cover other forms of communications such as political or issue-based.
- 20 47 CFR §73.1212(f).
- 21 Note 5 above, para 15.
- 22 47 CFR §73.1212(a)(2)(ii) and (d)
- 23 Note 5 above, para 5.
- 24 Note 5 above, para 6.
- 25 Note 5 above, para 16.
- 26 Note 5 above, paras 7 and 9.
- 27 Note 5 above, para 8.
- 28 Ibid.
- 29 Ofcom, *Broadcasting Code*, July 2005, rule 10.5.
- 30 Ibid.
- 31 See Note 29 above, section 10 (commercial references), statement of principles and rules 10.1-2, and section 9 (sponsorship). Ofcom is specifically charged with responsibility for ensuring that the rules it establishes have regard to the desirability of maintaining editorial independence for program content: Communications Act 2003 (UK), section 319(4).
- 32 OJ L 298, 17 October 1989, 23.
- 33 OJ L 332, 18 December 2007, 27.
- 34 AVMS, article 1(m).
- 35 AVMS, article 3g(1)-(2).
- 36 AVMS, article 3g(2). There are other restrictions such as no product placement for cigarettes and other tobacco products, or for prescribed medical products.
- 37 AVMS, article 3g(2).
- 38 AVMS, Recital 61.
- 39 AVMS, article 3g(2).
- 40 European Commission, *The Modernisation of the Television without Frontiers Directive: Frequently Asked Questions*, Memo/06/419, 9 November 2006, 2.
- 41 Note 8 above, Pt 4, para 9.
- 42 Note 8 above, Pt 4, para 27.
- 43 Note 8 above, Pt 4, para 28.
- 44 Ibid.
- 45 Note 8 above, Pt 4, para 30.
- 46 Note 8 above, Pt 4, paras 32-3.
- 47 Note 8 above, Pt 4, para 34.
- 48 Note 8 above, Pt 4, para 37. Although there is currently a prohibition on product placement under Ofcom rules, the Government has taken the view that the AVMS will require a legislative prohibition: para 21.
- 49 Note 8 above, Pt 4, para 38.
- 50 47 USC §154(a) and (c).
- 51 It is usual for an outgoing chairman, although not necessary, to resign as a commissioner'. FCC Chairman Martin resigned on 20 January 2009, the day of the presidential inauguration. Chairman Martin had been appointed by President Bush. Pending appointment of a new chairman, President Obama has appointed Commissioner Copps, a Democrat, as Acting Chairman.
- 52 Note 8 above, Pt 4, para 35.
- 53 Ibid.