When The Screen Becomes a Billboard

Grantly Brown examines product placement in the US to determine likely legal developments in Australia

Product placement involves the display of branded products in film and television programs as props. In exchange producers are paid a fee, or, more usually in Australia, are given the prop at no cost. A popular variant in the US includes film producers benefiting through advertising campaigns which tie in the placed products with the new film. Pepsi, for instance, recently spent US$10 million to promote Pepsi in association with the release of the film *Terminator II* in which Pepsi was placed.

Product placement appears to be the perfect solution for film and television producers seeking to trim total production costs and businesses seeking to promote products in a manner which does not provide viewers with an opportunity to "zap" or fast forward commercials. While product placement occurs in Australia it is most developed in the USA, where dozens of agencies specialise in securing placements for the majority of *Fortune's* 500 top corporations.

The US industry

The cost of placing a product in feature films generally varies from several thousand dollars to hundreds of thousands of dollars for films considered likely to do well at the box office. For example, McDonald's paid the producers of *Santa Claus — The Movie* US$5 million to have Dudley Moore eat one of its hamburgers on screen.

While some scepticism exists among mainstream advertising agencies as to the effectiveness of product placement, specialist placement agencies claim that surveys show viewers are twice as likely to recall a placed product than the subject of a distinct advertisement. Rates are also attractive. A 30 second national exposure on prime-time network TV will cost a six figure sum. Accordingly, US$20,000 for a placement in a major studio film which, after international theatrical release, will be released on video, then pay TV before finally being shown on free-to-air television across the world several times, must seem an attractive option.

Placement in free-to-air television programs, instructional videos and pay TV are also common. For example, IBM supplies computers to act as props for *LA Law.*

The US Federal Trade Commission has been petitioned to require disclosure of placed products in film credits. The Centre for Science in Public Interest (CSPI) claims that all compensated product placements constitute advertisements. In 1989 CSPI wrote to all US State Attorneys-General stating that *"undisclosed paid product placements are inherently deceptive, because they purport to be part entertainment material, but are in fact commercial matter."* CSPI wants oral and full screen messages at the beginning of films detailing which products are placed and subscript to scenes including placed products reading "advertisement".

Last February it was reported that a suit had been filed in Los Angeles against Philip Morris, American Tobacco Corp., Eddie Murphy Productions and Warner Communications, claiming that sequences in *Superman II* promoted Marlboro cigarettes and that *Beverley Hills Cop II* promoted Lucky Strike and Pall Mall cigarettes. The producers of *Superman II* were paid $42,000 by Marlboro. Pall Mall and Lucky Strike provided $25,000 worth of cigarettes to the makers of *Beverley Hills Cops II* for that film's opening sequences involving cigarette smuggling. The plaintiff in these proceedings claims that the defendants breached the *Federal Labelling and Advertising Act* 1979 (which banned cigarette advertising on TV) as these films were available on video and had been aired a number of times on free-to-air and cable TV in the United States.

Australian broadcast law

In Australia under the new *Broadcasting Services Act* operators of broadcast and narrowcasting services will be prohibited (at Schedule 2 of the Act) from broadcasting an advertisement or sponsorship announcement for cigarettes or tobacco products. Paragraph 2(1) provides that for the purposes of that Schedule a person will not be taken to be broadcasting an advertisement if:

(a) the advertising matter is an accidental or incidental accompaniment to the broadcasting of other matter; and
b) the person does not receive payment or other valuable consideration for broadcasting the advertising matter.

This paragraph is similar to section 110(10) of the current *Broadcasting Act,* which was recently considered by the Australian Broadcasting Tribunal in relation to the broadcasting by the Nine Network of the 1990 Adelaide Grand Prix. That inquiry examined whether the broadcast of the Grand Prix breached the prohibition on broadcasting advertiseaments for cigarettes and cigarette products at section 100(5A) of the *Broadcasting Act.*

The Nine Network had not been paid for the 653 sponsorship images shown during the broadcast and it was conceded that the broadcast of these images was not an accidental accompaniment of the broadcast. However, the Tribunal found that the objective of this promotional material was subordinate, and therefore only incidental, to the broadcast as a whole.

Outside of Schedule 2, program standards will be largely left to broadcasters themselves to develop in the form of Codes of Practice under Part IX of the new Act. Section 123(2)(e)(iv) provides that these Codes of Practice may relate to preventing the broadcasting of programs that:

> *"Use or involve the process known as 'subliminal perception' or any other technique that attempts to convey information to the audience by broadcasting messages below or near the threshold of normal awareness."*

There is no legal authority on the status of product placement as subliminal, or near subliminal advertising, but consideration by courts or legislators of this issue cannot be far away.

A program standard on product placement can only be developed by the soon to be established Australia Broadcasting Authority (ABA) under section 125 of the new Act where it is satisfied that there is a need for such regulation and that the industry developed Codes have not dealt with that need or have not addressed it properly. It therefore remains to be seen whether and how broadcasters will tackle this question of product placement.

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Trade Practices Act

Also relevant to product placement in Australia is the Commonwealth *Trade Practices Act 1974* (and the related *Fair Trading Acts*) which regulate many aspects of the conduct of commerce in Australia. Section 52 provides that corporations will not in trade or commerce engage in conduct which is "misleading or deceptive or is likely to mislead or deceive".

It is unlikely that courts in Australia, in applying section 52, would accept the proposition of the CSPI in the USA that product placement is inherently deceptive, at least in relation to product placement in general entertainment programs. This was, however, the position taken in Germany in the case of *Altenburger und Stralsunder Spielkartenfabriken v Zweites Deutsches Fernsehen* (1990) which involved a similar provision to Australia's section 52.

An example of product placement in editorial and, indeed, entertainment programming that may constitute a breach of the *Trade Practices Act* is the close association of particular journalists or characters with placed products such as the wearing of clothes supplied by a particular manufacturer or retailer. If these persons do not actually favour the product used, it may be argued that they have been portrayed in a manner which falsely suggests that they personally endorse these products. This kind of character merchandising without the consent of the presenters or actors involved may fall foul of sections 52 and 53 of the Act. Section 53(c) provides that corporations may not:

> *"represent that goods or services have sponsorship, (or) approval, they do not have"*

US actress, Daryl Hannah, recently received a six figure settlement after clips from her film *Roxanne*, in which Coca-Cola had been placed, were made available to Coca-Cola for a promotion campaign without her consent.

Another type of product placement is negative product placement. This may occur as intentional competitive conduct or inadvertently. For example, in the film *Missing*, Coke was the preferred drink of the good guy, while an over-large Pepsi vending machine was evident in the background at the offices of the complicitous authorities.

In Australia the unfortunate victim of such advertising could bring an action against the producers and broadcasters under the rubric of the exotic tort of slander of goods, but would be more likely to bring the action under section 52. Under section 52 it would be unnecessary to prove any intent on the part of the producers to slander its products or establish that it had suffered identifiable damage.

In the 1985 case of *Decor Corporation v Bowater-Scott* the Federal Court found that the use of the applicant's readily identifiable wine cooler product to advertise the respondent's new "Sorbent" toilet tissue in television advertisements was not in breach of the *Trade Practices Act* or a slander of goods. The court held that the incidental use of the wine cooler would not be considered by a reasonable viewer as anything other than a prop. Accordingly, the alleged representations conveyed by the carrying of toilet rolls to restaurants in a wine cooler, that the cooler was not a prestigious or quality product, were not found by the court to be made out.

Implications for broadcasters

Hitherto, Australia's broadcasters, newspaper and magazine publishers, have considered themselves largely immune from attack under the provisions of Part V of the *Trade Practices Act*, due to the operations of section 65A of that Act.

Section 65A exempts persons who carry on the "business of providing information" from the operation of the substantive sections of Part V of that Act in relation to publications (which may be by way of broadcast), provided such publications were not made "on behalf of, or pursuant to a contract, arrangement or understanding with" a supplier of goods or services. The exemption is expressed not to apply to publications promoting the information provider's own goods and services and the goods and services of related corporations.

The recent Federal Court decision of *Sun Earth Homes v ABC* (1990) has dramatically narrowed the potential operation of the section 65A exemption. The ABC unsuccessfully sought an order that claims made by the applicants that the ABC had engaged in misleading and deceptive conduct should be struck out. The Court found that the editorial TV program in question fell outside the ambit of the exemption, partly because the program's subject matter concerned the supply of the applicant's services to consumers and had been broadcast pursuant to "an understanding" between the ABC and the applicants that if they allowed themselves to be interviewed for the program, the program would be balanced and fair.

At a time when Australia's television networks are increasingly turning to independent production houses for programming, it is also unclear whether a broadcaster could rely upon the exemption in relation to purchased programming heavily influenced by the program maker's sponsors. The defences available under the Act provide some comfort for broadcasters who have purchased programs found to be in breach of the Act. Section 85, however, requires that for a broadcaster to escape liability it has to establish that:

(a) it had made a "reasonable mistake" (sub-section 85(1)(a)); or
(b) that its breach was the result of its reasonable reliance on the information supplied by another person (sub-section 85(1)(b));
(c) that it had taken reasonable precautions to avoid the breach which was due to the act of another (sub-section 85(1)(c)); or
(d) in relation to a breach contained in an advertisement, that the advertisement was received by it in its ordinary course of business and that it "did not know and had no reason to suspect that its" broadcast would be in breach of the Act (sub-section 85(3)).

The first three of these defences require the broadcaster to establish its conduct was reasonable. Certainly a broadcaster who made no effort to satisfy itself that purchased programming was not in contravention of the Act would have some difficulty making out these defences. The final defence turns upon the offending material being an "advertisement" which begs the question: are programs with placed products advertisements?

It does not appear likely that product placement will be prevented under Australian broadcasting law in the near future or that it is currently misleading and deceptive *per se*. However, experience from the more developed US industry suggests broadcasters, producers and advertisers should still be careful in entering into placement arrangements. As the practice becomes more widespread locally, it is likely that there will be pressure from public interest and consumer groups to prevent, or at least severely limit, product placement.

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