

Make your brand a star

Douglas N Masters and **Nerissa Coyle McGinn** explain how to maximise the benefits of product placement through the increasingly complex technique of branded integration

Product placement dates back to silent films from the early part of the 20th Century. For many years, it continued as products having cameo appearances in films or television programmes. Sometimes these appearances led to huge successes for the brands. For instance, in the 1980s, there was the phenomenal 65% increase in the sales of the American candy, Reese's Pieces, after they were placed in the film *ET*. In the last decade, brands have attempted to further develop the roles of products in entertainment, and product placement deals have grown in size and complexity.

Branded integration generally refers to a variety of marketing strategies in which a branded product or character is featured or integrated into something other than a commercial – usually an entertainment vehicle, such as a movie, television show, video game or a sporting event – to promote its product to consumers.

In addition to the growth of the types of product placements, another key component of branded integration deals which has changed dramatically from past product placement deals is the brand's funding of the entertainment content and its control over the entertainment content. The brands now will fund the television programme or entertainment vehicle in exchange for more control of the content of the television programme and the ability to coordinate commercials and promotions with the appearance of the product in the entertainment content (see box).

With the complexity of these deals growing over the past few years, branded integration has grown into a cottage industry. Brands will now have their own agents promoting their potential placement into different entertainment vehicles and negotiating the deals with the producers. In 2009, global product placement spending was estimated at approximately \$6.25 billion with over half of that spent in the US.

One-minute read



The nature of product placement has changed drastically since the early 20th Century. With the advent of digital video recorders and online viewing, advertising has had to evolve in order to remain effective. No longer is product placement limited to a brief mention on a television show or a shot in the background of a scene of a movie. Product placement has now blossomed into a whole new form of advertising called branded integration, and trade mark owners must take steps to understand the pros and cons in order to make sure their brands are protected.

Branded integration options

Specific examples of branded integration include the following:

Product placement	Product placement no longer is limited to just movies or television shows. Now brands will pay to have their products featured in video games, online content, music videos and mobile phone applications.
Sponsorship	Sponsorships also have grown as an advertising vehicle. It is no longer limited to the sponsorship of athletic events such as the Olympics or the Super Bowl. It now can include sponsoring a television programme, a television series, or concert tour. An example of a sponsored television show is when the show is aired without commercial interruption by a specific brand.
Advertiser-created content	Advertiser-created content many times includes short films or online television channels. One of the most famous examples of Advertiser-created content is <i>The Hire</i> , a series of eight short films directed by well-known directors including Guy Ritchie and Wong Kar-wai and funded by BMW. The films, which each promote a different BMW model, were featured on the BMW website.
Multi-platform deals	This can include buying a product placement or sponsoring a television show but also include advertising in a different form of media. For instance, Chevrolet advertising agreement with the television programme <i>Glee</i> includes product placement of cars in the show, the <i>Glee</i> cast performing in a Chevrolet commercial, contests for <i>Glee</i> concert tickets, and sponsoring the <i>Glee</i> tour.

Why branded integration?

This growth of branded integration as an advertising method can be attributed to the fact that branded integration can provide advertisers with unique opportunities that traditional commercials cannot deliver. With the advent of digital video recorders, many users will skip or bypass commercials. However, with branded integration, because the advertising is part of the entertainment content, consumers cannot skip it. The distribution of the product placement also can be worldwide. Unlike a regional buy for a commercial, branded integration will be seen wherever the entertainment content is distributed. In addition, seeing the characters in the entertainment content interact with the product provides a sense of realism and a subtle psychological form of advertising that cannot be captured in a commercial. Because of these unique attributes, this form of advertising is considered extremely cost-effective.

Despite such perks of branded integration, there are some problems.

One negative with branded integration is the lack of control that the advertiser has over the content. This can lead to several different problems for the advertiser. For instance, the placement of the product may not be prominent enough for consumers to recognise the product. The lack of control also can lead to the wrong type of exposure for the product. If the brand is featured in a live or unscripted show, there is no control over the use of the product or what the characters say about the product. For instance, if a weight loss drug is featured on the American reality show, *The Biggest Loser*, the brand would run the risk that the drug may not work, the drug may harm a character, or that the characters may criticise the drug. Another possible issue is that the product may be used in a controversial show or scenes in the programming. If any of these things happen, the advertiser would have no ability to stop the airing or edit the content. Finally, because the advertiser does not have control over the content, the message cannot be tailored specifically to the product. Advertisers cannot specifically target the advertisement to a demographic or compare the product to another product in branded integration advertising.

Another consideration is that the product will be captured in the entertainment content for an unlimited period of time. In several years in a rebroadcast of a television programme or in a DVD release of a movie, the product may have changed or the product may have been recalled. In that case, the advertiser still would not have an ability to change the entertainment content.

Trade mark considerations

Once a media company decides to have products in its programmes, it must determine whether it needs to ask permission of the brand owners for its use. Not all references to products in a television show or movie require permission from the trade mark owner. In fact, media companies may not always receive permission for use of a third party's trade mark or

Brand integration deals - key terms

1. Definition of the entertainment product (Material) - movie, TV series, video game, etc.;
2. Grant of rights - Advertiser grants to Producer the non-exclusive right to license and use the product, and associated trade marks, service marks, copyright and artwork;
3. Use of Product - Product will be visually identifiable in the Material in a manner to be mutually agreed upon; failure of the Product to appear in Material will not be a breach of agreement;
4. Fees, if any;
5. Define term and renewal options;
6. Define territory;
7. Advertiser will supply producer with sufficient quantity of Product;
8. Producer has creative control;
9. No changes to the Product allowed; Product must be used as intended; no disparaging portrayals of Product;
10. No transfer or license of property rights in the Product; and
11. Each party has right but not obligation to publicise appearance of Product in the Material.

trade dress. To determine whether to ask permission for the use of the mark is based upon a risk analysis by the media company.

Use of a mark for a fictional product or service: When a word or phrase is used for a fictional product or service, the risk analysis for the media company will hinge on a likelihood of confusion analysis. The media company will have to determine whether consumers are likely to confuse the fictional use of the product with an actual use in the real world. Because one of the marks is fictitious, the likelihood of confusion analysis will focus primarily on the similarity of the marks and the products. The key to this analysis is to review all of the different uses of the mark including shortened marks before making a risk assessment. The risk assessment for the fictional mark Princesses and Goblins for use in connection with soap and shampoo is completely different than P&G for the same products. If a word or phrase is used as a trade mark for a fictional product or service in a pro-

gramme, and the same word or phrase is used as a trade mark for the same type of product or service by a third party outside of the context of a programme, the risk to the media company is high. In this case, the trade mark holder could argue that because the goods or services used in connection with the marks are similar, it is likely that the consumers may be confused by the media company's use of the mark.

However, the opposite is true if the word or phrase is used as a trade mark for a fictional product or service in a programme and the same word or phrase is used as a trade mark for a different type of product or service by a third party outside the context of the programme. In contrast, because there is a low likelihood that consumers will be confused by the use, the risk by the media company is low.

Use of a mark for a real entity to refer to that entity: When a trade mark of a real person or entity is used to identify that same real person or entity in the context of the programme, the risk is determined by an analysis of the nominative fair use test. If the nominative fair use test is satisfied, the risk that the real person will be able to bring a trade mark or unfair competition claim that survives a motion to dismiss is low. The factors of the nominative fair use test are as follows:

- i) the defendant uses a trade mark to describe the trade mark owner's product, rather than its own;
- ii) the product or service of the third party in question must be one not readily identifiable without use of the trade mark (in other words, there is no descriptive substitute or the descriptive substitute is unwieldy);
- iii) only so much of the third party's mark or marks may be used as is reasonably necessary to identify the third party or its product or service; and
- iv) the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the third party trade mark holder.

On first glance, it would appear that the first prong of the nominative fair use test – the use of the mark in connection

with the trade mark owner's product – would be obvious. However, this prong is more difficult to argue in the context of a virtual product placement in a video game. For instance, it may be unclear whether the use of the Nike mark in connection with clothing worn by the video game characters or the athletic products used by the characters. Another twist on this prong is the use of marks in connection with similar products. For instance, in the movie *Minority Report*, which was set in the future, the main character played by Tom Cruise used a Nokia branded phone which had capabilities which were far beyond a cellular phone at the time the movie was released. Is this considered a use with the trade mark owner's product? (In *Minority Report*, the use of the Nokia phone was a paid placement).

For the third prong of the nominative fair use test – only use the amount necessary – the courts will examine the context and how the mark is featured. For instance, if the actual product is seen, or if a logo is used instead of simply the word mark. It becomes more difficult to claim a nominative fair use if the use of the mark is in the title of the program or extends into the context of advertising the program.

Finally, for the fourth prong of the nominative fair use test – the user must do nothing to suggest an endorsement by the trade mark holder – the courts again will examine the context of the use of the mark. This prong becomes more difficult to argue if the mark or the product is a recurring element in the movie or the series. Courts also have looked to see if the products appear in a manner which consumers would attribute any approval or sponsorship. For instance, in *Caterpillar, Inc v The Walt Disney Company* (CD Ill, 2003), Caterpillar brought a trade mark infringement and unfair competition claim against Disney for the use of Caterpillar bulldozers in the movie *George of the Jungle 2*. In the movie, George battles the Caterpillar branded bulldozers as they are attempting to destroy his jungle home. In ruling on the preliminary injunction, the court argued that the Caterpillar was unlikely to succeed in part because viewers of the movie were unlikely to attribute any approval or sponsorship of the movie by Caterpillar given the manner in which the Caterpillar products were used. Similarly, in *Wham-O, Inc v Paramount Pictures, Corporation*, Wham-O claimed that the unauthorised use of the Slip 'N Slide water slide in the movie *Dickie Roberts: Former Child Star* constituted trade mark infringement and dilution. In the movie, the main character injures himself by using the Slip 'N Slide without any water. The Ninth Circuit argued that the use was permitted under the nominative fair use test because viewers likely would not assume any sponsorship or approval by Wham-O because the use of the slide was so exagger-

Brand integration deals – key issues

- 1) Grant of rights;
- 2) Schedule for broadcast or distribution or entertainment Material;
- 3) Define who owns final entertainment Material and future exploitation opportunities;
- 4) Use of product - when and how it will appear in Material. Size, placement, appearance of product;
- 5) Define who has creative control;
- 6) Sponsor has approval rights over script and appearances of Product approval process and deadlines - avoid negative depiction;
- 7) Exclusivity in category; sponsor may have right to approve all third-party product placements. Will advertiser be guaranteed it will be the only product depicted in its category;
- 8) Fees, financing of production;
- 9) Define term and renewal options - Are you guaranteed sequel or next season rights?;
- 10) Define territory;
- 11) Each party's obligation to market the entertainment Material; each party's right to use entertainment material and both parties' trade marks and service marks to promote Product and entertainment Material;
- 12) Confidentiality of certain information; and
- 13) Screen credit.

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Negotiating branded integration deals

In a simple product placement deal, a company usually gives permission for the opportunity to have its product appear in an entertainment product, the advertiser usually has little or no creative control or approval rights as to how the product is featured and the producer might not guarantee that the product appears in the final version. Product placement is often arranged by a third party agency that specialises in product placements and has access to scripts and then negotiates agreements between products and client. It can also be arranged directly between advertisers or their advertising agencies and the producers.

In contrast, a branded entertainment deal generally refers to a more sophisticated agreement between the advertiser and product in which the advertiser pays some or all of the production budget, the advertiser might have more control over the final product and both parties engage in co-branded promotions to market both the entertainment property and

the branded product (see box).

Branding: the next generation

As brands have become further intertwined with entertainment content itself, brand integration deals have grown in complexity. Just as an agent would negotiate a movie role for a movie star, lawyers now have to negotiate the role of the brand in connection with the entertainment content. The agreements must be crafted to protect the brand and to capitalise upon the brand's investment. They can include anything from control of the content to future roles in sequels to cross-promotion of the brand and the entertainment content. Trade mark lawyers are now negotiating the agreements of the new stars of entertainment – the brands.

On managingip.com
 The subtle art of product placement, May 2011
 UK to relax product placement rules, July 2010
 The interface between advertising and IP law, September 2009



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