The Delaney Report
"Legal Perspectives"

"Legal Perspectives" is a supplement that appears periodically in *The Delaney Report* to update and inform our readers on the latest legal issues that are of relevance and importance to their industries.

Michael Zweig serves as editor of "Legal Perspectives." He is a partner in the New York and California law firm of **Loeb & Loeb LLP**, which has an extensive marketing, advertising, media and entertainment law practice. Mr. Zweig and **Po Yi**, an associate at the firm, authored this article.

Branded Entertainment

Corporate marketing departments and Madison Avenue increasingly have been embracing "branded entertainment" as a complement to traditional advertising. Branded entertainment is simply product placement on a grander scale that typically gives the advertiser more control over the entertainment product and greater branding opportunities. Branded entertainment has always been around but is much more sophisticated today than ever before and is ubiquitous in music, television, radio, movies, video games, mobile phones and even on Broadway. Consequently, it is under increasing scrutiny by consumer groups, the Hollywood creative community and the **Federal Communications Commission** (FCC). This article discusses one of its more popular forms, brand integration in TV programs, and highlights some of the legal and regulatory issues involved.

Anatomy Of Branded Entertainment Deals

The two most common forms of branded entertainment in TV are (1) advertiser-funded programs; (2) integration of brand messages into the storyline of a TV program. In both cases, advertisers coordinate commercials and collateral promotions with branding within the TV program.

In a typical brand entertainment deal for an advertiser-funded TV program, there are three major players: (1) the advertiser who is solely or primarily funding the program (and its advertising agency that acts on behalf of the advertiser in putting the deal together); (2) the producer producing the program; and (3) the network distributing the program. Each player's roles and rights are: (i) the advertiser funds the production and engages a producer; (ii) the advertiser licenses the program to a network for initial domestic distribution (usually the network doesn't pay a license fee for the program, but gives up part of the commercial inventory on the program and provides certain promotional consideration); (iii) the producer produces the program subject to advertiser's final approval, and integrates brand messages into the storyline at advertiser's request; (iv) the advertiser owns the program and the secondary and foreign distribution as well as related ancillary and subsidiary rights -- if the program was developed by the producer and/or the producer is partially funding it, the producer could own/co-own the program and/or the secondary, ancillary, and subsidiary rights.

By funding program production, an advertiser can control the type of program it wants to be associated with, the use of the program as a vehicle for promoting its brands, and brand integration. Advertisers purchasing brand integration work closely with the producer but have much less control. There is typically more than one advertiser and the program is owned by the producer or network.

(over)

The most important aspect of both types of branded entertainment deals for the advertiser is the right to use editorial content to deliver its brand messsage and the ability to build a collateral marketing campaign around the show. The advertiser will want to make sure that the program is consistent with its brand image and doesn't contain any material or have any association with competing brands. The advertiser will want to make sure it can use any derivative products (spin-offs, DVDs, video games, etc.) as part of its branding campaign. If the advertiser is funding the program, the surest way to achieve this objective is to own the TV show and all derivative rights. Next best is to freeze ancillary and subsidiary rights, so that such rights cannot be exploited without the advertiser's approval. If neither is possible, as when an advertiser is purchasing brand integration, then the advertiser can negotiate for the right of first negotiation with respect to exploitation of such rights.

Legal Issues Related To Branded Entertainment In Television

There is currently very little regulation of branded entertainment. The FCC requires broadcasters and cable operators to disclose to viewers/listeners if material has been exhibited in exchange for money, services, or other valuable considerations. This requirement is limited in that it requires no more than a single announcement, which can be in the closing credits, that the program is sponsored, paid for or furnished by the identified sponsor. The FCC rules do not specify the actual language that must be used or provide any other specific guidelines. As brand integration has become more frequent and sophisticated, consumer groups have demanded the FCC require conspicuous and concurrent disclosure of embedded ads on TV and issue new guidelines for disclosure of product placement. At least one FCC Commissioner, **Jonathan Adelstein**, concurs with the position of consumer groups that current disclosure practices as to product placement are inadequate and could violate sponsorship identification laws, and has called for the FCC to require clear and conspicuous disclosures and to define what is meant by that. To date the FCC has not issued any new guidelines. The FCC has additional rules regarding children's programing. In addition to limiting the amount of commercial time, the FCC prohibits airing of (1) any product advertisement in a show associated with that product; (2) a commercial announcement made primarily for a product otherwise unrelated to the program, which makes references to or promotes a product related to the show. It also prohibits "host selling" and has imposed restrictions on the display of commercial website addresses. Also, CARU (ad industry's self-regulatory body for children's advertising) has announced increased scrutiny of product placement in children's programing.

The **Writers Guild of America** and **Screen Actors Guild** have joined the debate. The WGA has mounted a campaign to establish a Code of Conduct to govern brand integration, which includes: (1) full and clear disclosure for both visual/aural product integration deals at the start of each program; (2) limits on usage of product integration in children's shows; (3) a voice for storytellers, actors and directors through collective bargaining about how a product is to be integrated into content; (4) extension of all regulation to cable TV. The WGA threatened to seek additional FCC regulation if the Code of Conduct can't be established through negotiations with producers and networks, and is preparing a complaint that will document alleged violations of FCC regulations.

Conclusion

Branded entertainment is here to stay. The types of branded entertainment will only increase. As more advertisers use the editorial content of entertainment products as a major vehicle to promote their brands, branded entertainment will attract more regulatory scrutiny that could result in FCC or other governmental regulation.

Editor-in chief: Thomas F. Delaney. Editor: Michael Zweig. Managing Editor: Julia T. Igoe

149 Fifth Avenue, New York, N.Y. 10010 • 212/979-7881