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Product Placement in the UK

Introduction

The Audiovisual Media Services (Product Placement) Regulations¹, implementing the Audiovisual Media Services Directive², come into force in the UK on 16 April 2010. Under these Regulations, product placement will now be permitted in television programmes made in the UK, although programmes featuring product placement will not be permitted to be broadcast until Ofcom has amended the Broadcasting Code³, which may not be until sometime in the Autumn of 2010.

What does product placement mean?

“Product placement” is defined in the Regulations as the inclusion in a programme of, or the reference to, a product, service or trademark, where the inclusion is for a commercial purpose, has been paid for (by way of cash or other valuable consideration), and does not amount to prop placement.

Prop placement, which has been allowed in UK programme making for a number of years, is also defined in these Regulations as the inclusion of a product in a programme where the provision of the product has no significant value and where no payment or valuable consideration has been made for the inclusion. There is no definition of “no significant value”, which leaves this a little uncertain.

What programmes are permitted to include product placement?

There are four types of programmes in which product placement is now permitted:

- i) films made for cinema;
- ii) films or series made for television or on-demand services;
- iii) sports programmes; and
- iv) light entertainment programmes.

No children’s programmes are entitled to carry product placement. Children’s programmes are those primarily aimed at viewers under 16. News programmes also fall outside these permitted types.

In addition, the Regulations state that UK-made religious, consumer affairs or current affairs programmes are not permitted to include product placement. There is also some catch all wording in the Regulations to prevent programmes for which product placement is “unsuitable” from carrying it: this term is undefined and wide open to different interpretations.

The BBC remains bound by section 76 of its Royal Agreement⁴, and is thus prohibited from making or commissioning programmes which carry product placement. However, programmes which the BBC acquires from third parties may carry product placement, including programmes made by the BBC’s commercial enterprises, such as BBC Worldwide, but these will be subject to the new rules and will be governed and enforced by Ofcom.

Are there any products which can not be placed?

The Regulations prohibit the showing of any programmes, whether made in the UK or acquired from abroad, which carry placement of cigarettes, tobacco products or prescription-only medicines. Also prohibited are programmes which carry the placement of alcoholic drinks if the programme is aimed at under-18s or encourages immoderate drinking.

The UK Government has gone further than the Directive required by including in the Regulations, in addition to the above, a number of other products which cannot be placed in UK produced or commissioned television or on-demand programmes (although they can be included in films for cinema). These are:

1. See http://www.opsi.gov.uk/si/si2010/ukxi_20100831_en_1
 2. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:332:0027:0045:EN:PDF>
 3. See <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>
 4. See http://www.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/agreement.pdf

- i) smokeless cigarettes and other smoking accessories;
- ii) medicines (i.e. over-the-counter medicines as well as prescription-only medicines);
- iii) any alcoholic drinks;
- iv) infant formula and follow on formula;
- v) foods or drinks that are high in fat, salt or sugar (HFSS); and
- vi) gambling services.

These additional products were prohibited by the Government in order to protect the health and welfare of viewers, especially children, but the result of this is that a vast swathe of potential advertisers who may have considered paying to place their products in programmes, particularly food and drinks manufacturers, are now unable to do so.

The Regulations also fail to deal with the difference between product placement and brand placement. Can McDonalds, for instance, pay to have their name referred to in a programme (e.g. "Let's all go to McDonald's for lunch") or would this be regarded as a promotion of an HFSS product. McDonalds would legitimately argue that it does not, since many of their products are not HFSS, but many so-called consumer groups would think otherwise.

Are there any conditions on placement?

There are a significant number of conditions set out in the Regulations which must apply for product placement to be legitimate. These are that:

- i) the product placement must not influence the content or scheduling of the programme in such a way that it affects the editorial independence of the programme maker;
- ii) there must be no direct encouragement in the programme to purchase or rent the products;
- iii) the programme must not give undue prominence to the products;
- iv) no subliminal advertising techniques can be used; and
- v) the way the product is included in the programme is not socially irresponsible and does not harm children.

This final point means that it cannot "prejudice human dignity", promote any type of discrimination, encourage behaviour prejudicial to health, safety or the protection of the environment, cause physical or moral detriment to under 18s, encourage pester power, exploit children's trust in parents or show children in a dangerous situations.

What about informing viewers of the placement?

The Regulations require that the fact that there is product placement is contained in a UK made or commissioned programme is signalled to viewers at the start and end of the programme and, if there are advertising breaks, once the programme recommences after each such break. Ofcom may provide further guidance on how this will be done.

Final Thoughts

The Government had only last year indicated that it did not support product placement, but these Regulations are indicative of the new Secretary of State, Ben Bradshaw's, greater understanding of the need for commercial television channels to bolster their finances and to compete effectively with other European and US production houses. However, it is not at all clear whether these rules will have the effect hoped for by both the Government and the commercial companies.

Firstly, there is no indication, particularly in the current climate, that advertisers will increase their marketing budgets to take advantage of the new rules as opposed simply to changing their priorities within their existing budgets: so it is unclear what financial benefit the channels will gain.

Secondly, the Government has said that the new rules will "provide meaningful commercial benefits to commercial television companies and programme makers". However, since these are two entirely different entities, it is unclear to whom the payments are made and thus which of the two will get the benefit. If, as would be most likely, it is the production house which is paid, then the new Regulations will not help the broadcasters much financially. The two entities no doubt will come to some compromise, but it will not be straightforward. We understand that ITV, for instance, is intending simply to add products digitally after the programme has been made.

Finally, advertisers may be reluctant to part with their funds if they have no control or influence over the way their product is portrayed or used in a programme, or indeed whether it ends up being used at all. If the parties enter into contracts stating how, how often, when or whether the product is placed into the programme, then this is completely contrary to the requirements for editorial independence.

Ofcom has its work cut out....

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