

Response of the European Sponsorship Association ("ESA") to the Department of Culture Media and Sport's ("DCMS") consultation on the proposals for implementation of the Audio Visual Media Services Directive ("AVMS") in the United Kingdom.

Introduction

ESA is the trade organisation of the sponsorship industry in Europe. As such it is able to provide an independent, objective and authoritative view on all European sponsorship issues. Known as the European Sponsorship Consultants Association (ESCA) until October 2003, when it merged with the Institute of Sports Sponsorship, it was founded in 1990 and now comprises over 200 members from the leading brand owners, consultancies, rights holders, media agencies, suppliers and professional advisers associated with and working in the sponsorship business.

ESA welcome DCMS's decision to consult on whether product placement should be allowed in UK programming. ESA view product placement as an additional mechanism by which sponsors' branded products can be communicated and promoted to consumers and therefore would wish to see a relaxation of the UK rules to permit product placement in UK programming.

However, we are concerned that product placement has the potential to adversely conflict with programme sponsorship arrangements since the inclusion and disclosure of "placed" brands could conflict with the rights of programme sponsors. Further, if product placement is allowed to be too prominent, this may drive consumers away from programming in which product placement appears, again to the detriment of programme sponsors.

Product placement should therefore be permitted, but on a carefully controlled basis in order to protect the interests of those brand owners with associated promotional rights such as sponsorship and prop placement rights.

Response to specific product placement questions set out in the Consultation.

26. Should product placement be prohibited by law? Please explain the reasoning behind your preference.

No, controlled product placement should be permitted by UK law.

Programme sponsors are keen to see the continued creation of high quality programmes with high production values, and generally only want to be associated with this type of programming. We do not believe that product placement would have a negative impact on production values, provided it is appropriately controlled¹. Permitting product placement could in fact benefit UK production by providing increased funding at a time when production finances are under increasing pressure. ESA's specific concerns surrounding the nature of the required disclosure of product placement, and the potential risks of programme and event sponsors' interests being ambushed, are detailed further below.

¹ This also protects viewers' interests (since evidence suggests viewers do not object to product placement in principle, with some valuing it for the realism it can bring to programming).

ESA would be reluctant to see product placement banned in the UK but permitted elsewhere in the EU. This would result in non-UK sponsors being able to take advantage of this additional promotional route to the consumer, to the detriment of the UK sponsorship sector. Further, if brands were only legally able to make product placement investments in non-UK productions, this would also disadvantage the UK production industry. The intention of the AVMS Directive was to create a "level playing field" on this (and other) content issues across Europe, and the UK should accordingly seek to ensure that its national industries are not disadvantaged relative to its EU neighbours.

27. *Should any such legal prohibition allow for Ofcom and the co-regulator of video-on-demand services to permit product placement in some or all of the programme genres specified by the AVMS Directive (feature films, television films and series, sports and light entertainment programmes)?*

Yes, product placement should be allowed in all the genres specified by the AVMS Directive. ESA see little reason to distinguish between any of these programmes, all of which would be suitable for controlled product placement.

However, events programming (such as live and non-live coverage of sporting events, concerts and other public occasions) is a genre which may require additional product placement controls, at least in the initial stages of the regime's liberalization. There is potential for product placed brands to gain association with specific events through, for example, branded drinks cans/cups placed on a presenter's desk during television coverage. Whilst there is nothing wrong with this per se, if there are existing arrangements with programme sponsors of the coverage of the relevant event, and with event sponsors of the event itself, this would be detrimental to each of their sponsorship rights. In the case of future events where sponsorship contracts have not yet been executed, programme and event sponsors should each be in a position to mitigate this risk in their contractual arrangements with broadcasters, events organisers and other media owners (as applicable). However, sponsors will not necessarily have any negotiating power to amend sponsorship agreements which have already been contractually documented by the time any product placement deal is introduced. There is therefore a need for regulatory control to prevent the value of existing programme and event sponsorship being eroded by the sale of new placement rights to competitors and other third parties; the rights of all three brands need to be fairly balanced.

Product placement within events programming should therefore only be permitted "subject to the rights of existing rights holders in connection with the particular programme and/or event".

28. *What advantage would there be in permitting product placement in any or all of the specified genres? If so, which genre(s), when and why?*

See earlier comments above in response to questions 26 and 27.

29. ***If product placement were permitted, how could audiences and regulators be assured that editorial integrity had been preserved, as required by the Directive?***

It is not in broadcasters' interests to allow their editorial integrity to be compromised. Ultimately broadcasters are responsible for ensuring compliant programming, and as such are self regulating. This system currently works well and ESA see no need for any additional layers of regulation on this issue to specifically address product placement.

30. ***How could "undue prominence" be avoided, given the commercial imperatives for audiences to recognise the products placed?***

Currently prop placed products are subject to the Ofcom rules on undue prominence. Whilst these rules could benefit from additional clarity on the precise meaning of "undue prominence", products which have been placed in return for a fee should simply be subject to these same rules and guidelines, which have worked effectively in connection with prop placement for many years. There is no reason why product placement should be afforded any additional "recognition" within editorial – indeed most (if not all) brands which are suitable for prop/product placement are extremely concerned to ensure that their products form a logical and editorially appropriate part of the programming. Brands are highly sensitive to the fact that overtly prominent placement will inevitably alienate viewers, and risks creating the wrong kind of brand awareness, which will ultimately be detrimental to the placed brand.

31. ***Should the same rules apply to both television broadcasting and on-demand audiovisual media services? If not, how should they differ and why?***

In ESA's view the same product placement rules should apply to both. With increasing convergence, it is difficult to justify differing product placement rules for each medium; broadcast content is now available on-line, and on-line content is making the transition onto traditional broadcast platforms. It would therefore be simpler for brands and producers/broadcasters to be subject to one consistent set of rules.

32. ***Should prop placement continue to be permitted?***

Yes, ESA see no reason why prop placement should not continue; it can co-exist alongside product placement. Certain products, such as fast moving consumer goods, are not necessarily well suited to paid for product placement, which is expected to attract higher value products (such as cars or luxury goods) for which higher fees can be charged. Free prop placement is therefore a valuable mechanism for lower value products to gain exposure and collectively they enable the UK production and broadcast industry to make considerable savings by avoiding the need to buy or hire such products for use in production. Prop placement should therefore be allowed to continue to the benefit of both brands and programme producers/broadcasters.

33. ***Should there be a specific set value above which prop placement is subject to the Directive's rules on product placement? If so, what should it be?***

In ESA's view there is little advantage in setting a specific value above which prop placement must be treated as product placement. Prop placement is currently (and presumably would continue to be) subject to rules against undue prominence. If permitted, product placement is also required by the AVMS Directive to comply with undue prominence rules. In effect the market will regulate and set the financial distinctions between the two, which will vary per production. Whether brand owners and producers agree on free or paid use of particular products in particular programmes will (and should) be determined according to the commercial realities and appeal of each programme (as is currently the case with programme sponsorship where the audience appeal of each programme determines its programme sponsorship value).

34. *What other ways are there of ensuring that the UK meets the Directive's requirement that prop placement above a 'significant value' must be treated as product placement? Which test is best and why?*

See above response to question 33.

35. *If there is to be a set value for this purpose, should it be set by the Government in legislation, or by Ofcom (for television broadcasting) and the video-on-demand co-regulator?*

Fixing any value in legislation could be inflexible as compared to a value set by guidance from Ofcom and the video-on demand co-regulator. The latter would allow regulators to make necessary changes depending on how this market develops, and to react more easily if the initially set value proves to be damaging to the prop placement and production industries.

36. *Should product placement continue to be permitted in programmes acquired from outside the UK and in films made for the cinema? If not, why not and how could such a ban be made effective in practice?*

Yes. Programme sponsors outside the UK welcome the ability to be able to reach audiences outside the jurisdiction in which they are established, via exporting programming containing product placement to the UK. UK viewers are well used to seeing such placements in imported programming.

Even if product placement in UK programming is ultimately prohibited by the regulators, it would be a backward step to prohibit product placement in imported programming.

37. *How should product placement be signalled to viewers?*

Whilst the AVMS Directive requires there to be "appropriate identification" to viewers that product placement appears in programming, overt identification would be of concern to sponsors.

Firstly, drawing attention to product placement may create a false impression to viewers that the placed brands have exercised editorial control over the use of their

products in the production. This makes product placement less credible and therefore less effective for brand owners. Secondly, consideration also needs to be given to the interplay between programme sponsor credits and bumpers, and product placement notifications. Whilst broadcasters will need to balance programme sponsorship and product placement deals carefully to ensure that sponsors' rights are not ambushed by competing brand integration within sponsored programming, the rules governing the signalling of placement also need to achieve a fair and equitable balance between the interests of placed brands and programme sponsors.

The nature, size and location of product placement messages will have a direct effect on sponsors' rights.

Detailed product placement messages at the start of programmes would interfere with programme sponsorship bumpers if they were to appear simultaneously in limited screen space. Even adjacent messages would impact on programme sponsor's rights, since these sponsors value being the first and/or last commercial message going into or out of the programme. This key right could be ambushed if placement identifications for competitor or other third party products appeared between the programme and the programme sponsor's bumper. From a viewer perspective, increased screen clutter in opening credits can create confusion in relation to the promotional messages, is visually off-putting, and would cause annoyance to viewers – brands would not want to be associated with this. As a result advertiser support for programme sponsorship may be reduced, to the detriment of UK production.

ESA therefore favour product placement identification via a discreet logo or short reference in the top right or left hand corner of the screen at the start of programming, and when the programming resumes after ad breaks. This identification could take the form of a small logo (in much the same style as films currently use for age ratings warnings) for example incorporating the letters "PP" or the words "contains product placement". More detailed identification could be included at the end of programmes, within the programme credits, but (in order to minimise the potential concerns outlined above) should be in the form of text only credits, and should not be given any more prominence than standard end credits allocated to cast, producers and directors etc.

38. *Should the rules on signalling be set by the Government in legislation or by Ofcom (for television broadcasting) and the video-on-demand co-regulator?*

Signalling rules should be set by Ofcom/the video-on demand co-regulator since this would allow for changes to be made more easily if the interests of sponsors, other brand owners or viewers were found to be damaged by these requirements.

European Sponsorship Association, 31 October 2008.