

THE AUDIOVISUAL MEDIA SERVICES DIRECTIVE

**CONSULTATION ON PROPOSALS FOR
IMPLEMENTATION IN THE UNITED KINGDOM**

Response to DCMS from Endemol UK plc

31st October 2008

About Endemol UK plc

Endemol UK is one of the largest independent production companies in Britain and annually produces over 5,000 hours of output. It incorporates a number of production brands including Brighter Pictures, Cheetah Television, Initial, New State and Zeppotron. These brands specialise in a broad range of genres including comedy, gameshows, entertainment, specialist factual and scripted series. The UK group has offices in London and Bristol and employs up to 1000 people at any one time.

Endemol UK is part of Endemol, a global leader in entertainment that comprises an international network of companies that spans over 20 countries on five continents.

Introduction

This paper provides a response to questions 26-38 only in the DCMS consultation document, i.e. the questions in the Consultation relating to product and prop placement.

Endemol welcomes the AVMS Directive's approach to product and prop placement. In particular Endemol believes that a controlled permission of product placement in suitable programme genres, with safeguards to maintain editorial integrity and avoid undue prominence, as outlined in the Directive, could make a significant contribution to the ongoing growth and vibrancy of the UK's television production sector.

Response to DCMS Questions on Product Placement

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

The AVMS Directive indicates that 'Product placement shall be prohibited'¹. Endemol therefore agrees that product placement should be prohibited by law, but with derogations for certain types of programmes. The nature of these derogations and the rationale for them is discussed below.

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)?

Endemol strongly believes that any legal prohibition of product placement should allow for Ofcom and the co-regulator of video-on-demand services to permit product placement in all of the programme genres specified by the AVMS Directive, i.e. feature films, television films and series, sports and light entertainment programmes.

Our rationale for this assertion is set out in our response to question 28 below.

¹ Chapter IIa, Article 3g, AVMS Directive

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?

Endemol believes that permitting product placement in feature films, television films and series, sports and light entertainment programmes could, over time, make a significant contribution to the ongoing growth and vibrancy of the UK's creative economy.

The UK's television production sector is renowned for its creativity and for the contribution it makes to the UK economy. The UK production sector is the second biggest global exporter of finished programmes behind the US industry, and the largest exporter of television formats.²

This success has been stimulated by a range of interlocking regulatory initiatives, such as the Independent Production quota and the recent Communications Act, that have enabled the UK's television producers to thrive creatively and commercially.

But it is widely acknowledged that new technologies are putting commercial television's advertising-funded model under increasing pressure. As Ofcom indicated in its recent Second Public Service Broadcasting Review, 'Commercial public service broadcasting under the current system will not survive the transition to an all-digital world.'³ As viewers consume more content via digital channels, on-demand platforms and online, the economic impact on the current model is forecast to be acute: in Ofcom's view, 'if audiences continue to want to enjoy the same mix of public and private content they have today, we estimate that public funding of between £330-420 million is likely to be required by 2012 in addition to the core [BBC] licence fee. Towards that total, we estimate existing regulatory assets will contribute around £185 million, leaving a likely gap of £145-235 million. After 2012, it is increasingly difficult to be precise about funding requirements given uncertainty about the wider media environment.'⁴

80% of consumers surveyed by Ofcom in the course of its PSB review want 'a high proportion of first run programmes i.e. not repeats', 76% wanted 'lots of new and innovative programme ideas' and 74% wanted 'a high proportion of programmes made in the UK.'⁵ But Endemol is concerned that the business model that currently funds the production of the high quality, innovative and entertaining UK programmes that consumers clearly value is under increasing pressure. Endemol does not see product placement as a complete solution to this funding gap. But Endemol does advocate the controlled permission of product placement as an important potential contribution to this funding gap, a gap that needs to be bridged if the UK production sector is to retain and build on its current strong position and if UK audiences are to continue to enjoy 'the continued availability of high quality, original UK content that meets public service purposes, from a range of providers'.⁶

It is difficult to quantify accurately the commercial value of product placement to the UK television sector, particularly in the early years, but Endemol believes that it could be a material source of funding for the production of UK television programmes in the longer

² *Rights of Passage 2*, Television Research Partnership, commissioned by Pact and supported by DTI

³ *Ofcom's Second Public Service Broadcasting Review Phase 2: preparing for the digital future*, p.2

⁴ *ibid*, p.5

⁵ *Ofcom review of public service television broadcasting: Phase 1 supporting documents, Volume 1 – the role of television in society*, p. 12

⁶ *Ofcom's Second Public Service Broadcasting Review Phase 2: preparing for the digital future*, p.2

term. In the USA, for example, where product placement is a mature business model, at \$1,710m the product placement is worth c.5% of the US television advertising market, which is in turn worth an estimated \$42 billion.⁷ Applying this 4% benchmark to the UK television advertising market, which is worth an estimated £3.5bn⁸, implies a product placement market for the UK of £140m p.a. The immaturity of the UK product placement market and a tighter regulatory market (e.g. product placement prohibited for certain programme genres such as news) might serve to reduce this number but Endemol remains convinced that product placement has a key role to play in the ongoing funding of the production of original UK television programmes.

Endemol is also concerned that a complete prohibition of product placement in the UK would put the UK television production sector at a significant competitive disadvantage to countries outside the EU where product placement is already permitted (e.g. USA and Australia) and to those countries within the EU that decide to permit product placement in certain television genres as part of their implementation of the AVMS Directive.

For example, at present the UK is playing 'an important part in the global rise in co-production hours. The total volume of worldwide co-production hours rose 22% compared to 2003 levels, while UK co-production increased by 90%.⁹ UK producers at present are highly attractive co-production partners but if product placement is prohibited in the UK but permitted elsewhere, we risk losing our current competitive advantage to producers in territories where product placement becomes a core component of the funding mix.

As the DCMS concluded recently, 'the UK has a headstart in an expanding global creative economy. But we need to be constantly ready to adapt, building on our strengths and recognising those of other countries.' Endemol regards a carefully-controlled permission of product placement as an appropriate measure to ensure the ongoing competitiveness of the UK's television production sector, both by mitigating the impact of ongoing technological change on the current broadcast funding model and by ensuring the UK retains its ability to compete on a level playing field with other EU and international producers.

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

Ofcom, UK broadcasters and UK producers currently work within an existing Broadcasting Code that governs a wide range of issues relating to editorial integrity. Producers and broadcasters focus heavily on ensuring that their programmes comply with the Code and there is a robust set of regulatory processes in place to enforce the Code consistently. The existing Broadcasting Code already aims 'to ensure that the independence of editorial control over programme content is maintained and that programmes are not distorted for commercial purposes' and Endemol agrees that this central tenet should remain in any regulation of product placement.

⁷ *PricewaterhouseCoopers Global Media and Entertainment Outlook 2007-2011*, p. 146

⁸ *Ofcom Communications Market Context 2008*, p.55

⁹ *Rights of Passage 2*, Television Research Partnership, commissioned by Pact and supported by DTI

Regarding Product Placement, the AVMS Directive clearly requires that:

Programmes that contain product placement shall meet at least all of the following requirements:

- (a) their content and, in the case of television broadcasting, their scheduling shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider;
- (b) they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services;
- (c) they shall not give undue prominence to the product in question;
- (d) viewers shall be clearly informed of the existence of product placement.

Programmes containing product placement shall be appropriately identified at the start and the end of the programme, and when a programme resumes after an advertising break, in order to avoid any confusion on the part of the viewer.

Endemol believes that this requirement is both clear and helpful. In implementing this requirement in the UK, Endemol believes that Ofcom (and the video-on-demand co-regulator) could be tasked with amending the existing Broadcasting Code to incorporate the key principles required by AVMS.

Endemol believes that the existing regulatory framework, which is sufficiently robust to be trusted with the regulation of key issues such as Harm and Offence, Fairness, Privacy and Due Impartiality, is also able to govern the measured implementation of legitimate product placement.

In addition, to provide further confidence to regulators and audiences, Endemol believes that there could be merit in creating a system whereby either a programme's producer or broadcaster could veto the inclusion of any product placement in that programme. Endemol believes that this additional check could help ensure that the editorial integrity of a programme containing product placement was preserved, as it would extend the regulatory responsibility to the producer and broadcaster, whereas the current Broadcasting Code applies ultimately to the broadcaster.

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

The current Ofcom Broadcasting Code notes that ‘brands are an integral part of modern society and this will inevitably be reflected on television and radio as it is in other media.’¹⁰ Equally, the Code states that ‘no undue prominence may be given in any programme to a product or service’¹¹ and Ofcom also provides an explanatory note which states that

“Undue prominence” may result from:

- the presence of, or reference to, a product or service (including company names, brand names, logos) in a programme where there is no editorial justification; or
- the manner in which a product or service (including company names, brand names, logos) appears or is referred to in a programme.

¹⁰ *Ofcom Broadcasting Code Guidance Notes Section 10: Commercial References and Other Matters*

¹¹ *Ofcom Broadcasting Code 2008*, Clause 10.4,

The concept of undue prominence is well entrenched in the current regulatory framework and is well understood by UK producers and broadcasters. Endemol believes that the existing guidance on undue prominence is sufficient to govern the way in which product placement could be incorporated into UK programmes. In particular, Endemol believes that maintaining the requirement for editorial justification is key to ensuring that product placement is implemented in a way that preserves the editorial integrity of the programme.

Endemol notes that Ofcom's guidance on undue prominence is currently applied to programmes produced outside the UK that contain product placement and Endemol believes that the current arrangement works well, suggesting that the UK's existing undue prominence tests can be successfully extended to regulate product placement.

Endemol also notes the AVMS requirement that programmes that contain product placement 'shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services'. This requirement also appears helpful to Endemol in establishing how undue prominence should be avoided.

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

Endemol believes that the same rules should apply to both television broadcasting and on-demand audiovisual media services. The distinction between 'linear' television broadcasting and on-demand viewing is becoming increasingly blurred, as broadcaster-led on-demand services such as the BBC's i-Player and Channel 4's 4OD rapidly increase in popularity. Endemol believes that the same rules should be applied across both platforms to maintain a level regulatory playing field and to ensure that audiences are equally protected in either environment.

32. Should prop placement continue to be permitted?

Prop placement enables producers to create 'realistic' programmes that appeal to audiences whilst keeping production costs down. Endemol believes that prop placement works well under the current Broadcasting Code in the UK and should continue to be permitted.

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?

The AVMS Directive stipulates that 'the provision of goods or services free of charge, such as production props or prizes, should only be considered to be product placement if the goods or services involved are of significant value,' but the Directive does not call for a specific set value. Endemol does not believe that there should be a specific set value and is concerned that the imposition of a specific monetary value could become a rigid and unnecessary restriction on wholly legitimate prop placement activity. For example, some props are loaned to productions rather than gifted outright, and the £ value in these instances is often difficult to assess accurately.

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?

Endemol believes that 'significant value' is a sufficiently clear guideline when considered in the context of nature of the goods or services being supplied, and how the goods and services are to be included in the programme. More detailed guidance regarding how 'significant value' should be interpreted by broadcasters and producers could be incorporated into Ofcom's Broadcasting Code.

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?

As stated above, we do not believe there should be a set value. But if there is to be a set value for this purpose, Endemol believes it should be set by Ofcom (for television broadcasting) and the video-on-demand co-regulator, as Ofcom already regulates prop placement through its Broadcasting Code. In particular, Endemol feels that rules set by regulators could evolve more easily over time in response to market changes than would be the case if the rules were set out in statutory legislation.

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?

Product placement is firmly established practice in many television markets around the world, such as the USA, and is also commonplace in many feature films, including films for the cinema that are produced in the UK. These programmes and films are extensively broadcast on television in the UK. US programmes such as *24*, *CSI* and *Desperate Housewives* contain product placement and are extremely popular with UK audiences. Similarly, a wide variety of films contain extensive product placement and are broadcast on UK terrestrial and digital multichannel television.

If a ban was to be introduced, it could be attempted in two ways:

- A prohibition on the broadcast in the UK of any programme or film containing any product placement;
- The editing of any programme or film containing any product placement so as to remove all instances of product placement.

In Endemol's view, neither of these alternatives is practical.

- The first option would see the removal of a wide range of popular films and television programmes from UK broadcasters' schedules, causing significant commercial damage to the broadcasters and great inconvenience to audiences. Consumers would acquire these programmes and films on DVD, through legitimate digital download sources and possibly through illegal file-sharing services, rendering any such ban ultimately ineffective.

- The editing of any programme or film containing any product placement is also impractical. Significant numbers of scenes would need to be excised from programmes and films, rendering them in many cases more or less unintelligible.

Endemol believes that the current regime with regard to acquired programmes and films containing product placement works effectively, with no discernible negative impact on UK audiences, who are enthusiastic viewers of many of these programmes. Product placement is currently permitted in programmes acquired from outside the UK and in films made for the cinema, but where the brand or product is unduly prominent the programme is amended to comply with the Broadcasting Code (e.g. the presence of the Coca-Cola brand in American Idol, broadcast in the UK by ITV). Endemol believes that the status quo here should be preserved.

However, Endemol believes that the ongoing permission of product placement in programmes acquired from outside the UK and in films made for the cinema, whilst logical and sensible, only serves to underscore the need for a reciprocal permission of product placement in programmes produced by UK producers. As noted in Recital 61 of the AVMS Directive, 'Product placement is a reality in cinematographic works and in audiovisual works made for television, but Member States regulate this practice differently. In order to ensure a level playing field, and thus enhance the competitiveness of the European media industry, it is necessary to adopt rules for product placement.' The controlled permission of product placement in the UK would enable UK producers to compete effectively with foreign producers, and the major US producers in particular.

37. How should product placement be signalled to viewers?

Endemol does not have detailed proposal on how product placement should be signalled to viewers but is ready to work with regulators, broadcasters, producers and other stakeholders to devise a signaling system that is clear, concise and readily understandable by viewers and that does not impinge on viewers' enjoyment of the programme.

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?

In line with our response to question 29, Endemol believes that the rules on signaling should form part of the overall oversight of product placement exercised by Ofcom and the video-on-demand co-regulator. As set out above, Endemol feels that rules set by regulators could evolve more easily over time in response to market changes than would be the case if the rules were set out in statutory legislation.