



**Submission of comments by the Motion Picture Association (MPA) in response to the Consultation on Proposals for Implementation of the Audiovisual Media Services Directive in the United Kingdom (DCMS, July 2008)**

The Motion Picture Association (MPA) is a trade association representing six major international producers and distributors of films, home entertainment and television programmes<sup>1</sup>. Our Member Companies distribute their own productions as well as those of independent film-makers. They are also devoting substantial effort and resources to the development of a wide range of entertainment content and services in a variety of formats and on a variety of media. We are grateful for the opportunity that is offered by the DCMS to contribute on an issue that is of particular importance to us and our Member Companies.

First and foremost we should like to express our general belief that while the AVMS Directive needs to be implemented in UK legislation, it does not however call for an overhaul of all rules currently in place. We are somewhat perplexed by what may look like a departure from a regulatory situation that has in a large measure contributed to the UK's vibrant audiovisual media industry and feel that a cautious balancing act is essential.

Indeed, emerging services seem to be covered under the DCMS's seven boxes test and risk finding themselves burdened by unfair restrictions. At the Q&A session of the 26 September Stakeholders Meeting, video electronic sell-through (EST), for example, was said to fall within the scope of the considered regulation. At a time when the market for EST services is nascent and encouraged by the UK Government to satisfy the ever growing appetite for AV content through legitimate offerings, legal certainty on the regulatory regime applicable is critical.

In addition, DCMS's recommendation to prohibit product placement in all types of programming could create tremendous difficulties for the production of certain AV content. Therefore, we wish to spend some time explaining the importance of product placement in the production of AV content as well as demystifying this financing tool. In doing so, we should like to follow the order of the consultation document's questions:

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<sup>1</sup> The MPA's members comprise: Buena Vista International, Inc., Paramount Pictures Corporation, Sony Pictures Releasing International Corporation, Twentieth Century Fox International Corporation, Universal International Films, Inc., Warner Bros. Pictures International, a division of Warner Bros. Pictures Inc.

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

No, we do not think so.

**Understanding Product Placement: Long-established, yet not an advertiser's panacea**

Product placement is an old and common financing tool found in a content maker's toolbox<sup>2</sup>, and "a favourite prospective source of finance especially for low-budget filmmakers"<sup>3</sup>. It is a method of reducing the cost of motion picture which can be traced back to the Lumière brothers in 1895<sup>4</sup>.

There are many elements to take into account when resorting to product placement: the subject and storyline of the film, the director, actors, contractual incompatibility (with talents already endorsing other brands), the story's characters and even the music associated. These elements very much condition the use or absence of product placement in a given work. It also should be noted that entire genres of content (historic narration or heroic fantasy, for example) are not fit to contain product placement. Encouragingly so, the liberalized use of product placement abroad has not squeezed those genres out of cinema and television screens or even video game consoles.

***An intrinsically self-regulated commercial communication***

Of all types of advertising communications, product placement requires unique expertise and delicate synergies between advertisers and the makers of audiovisual content.

"If a PP [product placement] is over-emphasized, or becomes too blatant, it is likely to face a backlash – and research among gamers shows that if the gamer has a negative attitude to ads in games to start with, even a sympathetically integrated PP will not find favour.(...)"<sup>5</sup> In other words, if prominence is ever undue (a risk no content maker and advertiser wishes to take nowadays), it immediately penalizes both the film and the product displayed. Undue prominence is certainly not sought, as it has already been recognized in Ofcom's current Broadcasting Code.

The longevity of product placement in film-making and the fact that it was extensively tried and tested in the United States has provided useful lessons to both advertisers and content producers to the point where authors, today, can easily define "the limit of intolerable over-exposure"<sup>6</sup> and approach product placement advertising as a mature commercial communication that cannot be improvised or, for that matter, abused.

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<sup>2</sup> Gunnar, E. *et al.*, *The Independent Film Producer's Survival Guide*, Schirmer Trade Books, NY, 2005, p. 122.

<sup>3</sup> Dally, P. *The Audiovisual Management Handbook*, Fundación Cultural Media, 2002, p. 372.

<sup>4</sup> Newell, Jay, *The Hidden History of Product Placement*, J. of Broad. & Elec. Media, Dec. 1, 2006.

<sup>5</sup> White, Roderick, *Product placement: panacea or partner?*, Admap, January 2007, Issue 479, p. 14-15.

<sup>6</sup> Lehu, Jean-Marc, *Branded Entertainment*, London, 2007, p. 141.

### ***Not one type of Product Placement***

Product placement comes in a number of flavours and thus renders its regulation extremely acrobatic. Indeed, one finds:

- “non-integrated and non-expressed” product placement – brand is on-screen, but not mentioned or used.
- “integrated and expressed” product placement – mentioned by name in the script, but not handled or used
- “integrated and used” product placement – consumed (or used) in the course of the narrative.<sup>7</sup>

A 2005 study<sup>8</sup> by Human Capital on behalf of Ofcom addresses those differences in similar terms. We would like to suggest that the DCMS take this valuable research into consideration.

### ***Economic Impact of a Possible Ban***

In a 2005 interview with the Financial Times, European Commissioner Viviane Reding said that the AVMS Directive would help create jobs, spur the production of European programmes and allow new technologies to flourish<sup>9</sup>. The flexibility of the AVMS Directive and derogations allowed in the Directive were meant to fuel that initial, noble ambition.

According to the European Commission, "Europe's unclear, disparate, rules on product placement or in some cases a lack of rules, have so far prevented audio-visual content producers from making use of this important means of financing."<sup>10</sup>

27. Should any such legal prohibition allow for Ofcom and the co-regulator(s) 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, we firmly believe so. We also believe that flexibility should be extended to new types of content created specifically to meet the needs of online and mobile audiences. Indeed, not all video-on-demand content is recycled from film or television. The production of original digital content relies for a large part on product placement, because such content does not yet benefit from established business models involving, for example, minimum guarantees. More often than not, distributors expect producers to

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<sup>7</sup> White, Roderick, *op. cit.*, p. 14-15.

<sup>8</sup> Human Capital (on behalf of Ofcom), *The Future of Television Funding – Findings of a research study looking at attitudes towards existing and potential new funding mechanisms*, Sep. 2005.

<sup>9</sup> Sarah Laitner and Tobias Buck (2005) Brussels to liberalise television advertising, Financial Times, 12 December - <http://www.ft.com/cms/s/2/e8753bc8-6b4c-11da-8aee-0000779e2340.html>

<sup>10</sup> Steve Castle (2005) Brussels opens the door to the US-style product placement in TV programmes, Independent, 14 Dec. - <http://www.independent.co.uk/news/world/europe/brussels-opens-the-door-to-usstyle-product-placement-in-tv-programmes-519393.html>

share risks and rewards, and although there is consumer demand for content that is short, fast-paced, entertaining, designed for small screens, sometimes with limited visual and audio effects, revenues are still limited and do not always allow producers to recoup their investments. The brevity of original digital content also challenges the ad-supported business model, as it limits the number of advertising breaks that can be inserted around and within the content itself.

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?

Economic advantages are obvious for the production of content. The windfall benefit for the UK's content industry are undeniable, as mentioned above through the European Commission's comments in 2005. Discriminating between genres might, aside from warping the UK's audiovisual industry at its core, very well lead to loss of competitive advantage on the international scene as the UK runs the risk of developing poor quality reputation in some genres as opposed to others, or some media as opposed to some others. Case in point is Italy's recent Government proposal towards increased liberalisation of product placement.<sup>11</sup>

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

Regulation of AV media services can only be realistically implemented through ex-post verification. With that fact in mind, self-regulation is a proven approach that the audiovisual industry has learnt to implement in a variety of domains, not the least important being the protection of minors. We trust that product placement can equally be covered by that regime.

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

Understanding the mechanisms behind product placement helps address this question. We refer you to our answer to Question 26 above.

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

We believe that product placement rules should not apply to on-demand audiovisual media services for the reasons contained in our answer to Question 27.

32. Should prop placement continue to be permitted?

We believe that prop placement should continue to be permitted. Prop placement is an irreplaceable tool for AV production. We believe that restricting it would have a tremendous negative impact on production in the UK.

<sup>11</sup> [http://www.hollywoodreporter.com/hr/content\\_display/film/news/e3i0731a974271226255a1072db99bb527d](http://www.hollywoodreporter.com/hr/content_display/film/news/e3i0731a974271226255a1072db99bb527d)

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?

Prop placement, even more so than product placement, can allow producers to make ends meet by cutting costs (as opposed to bringing financing, in the case of product placement). Setting a specific value (even one that would be proportional to the overall cost of production) might have the effect of curbing the ambitions of a film director in need of products or services beyond the set value. Such prohibition would have a great impact on editorial freedom.

On the other hand, for the more modest productions relying more on prop placement, setting a value might actually lead to a fragmentation of prop placement over many more products. The value of the products provided in prop placement has no direct or indirect effect on the degree of prominence.

Finally, should there be consideration for an overall proportion of prop placement in content, we would like to point out that the seemingly straightforward practice of prop placement addressed in the Consultation is not as simple or cost-free as it looks: While a fleet of cars might be lent at no cost, the filmmaker is likely to be responsible for the insurance linked to their use, for example.<sup>12</sup>

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?

We do not believe that a recital (Recital 61) of the AVMS Directive containing the mention of a significant value should supersede the Directive's substantive provisions and we reiterate the argument that product placement ought to benefit from the same regime as prop placement.

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(s)?

We refer you to our answers to Questions 33 and 34.

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?

We believe that product placement should continue to be permitted in programmes acquired from outside the UK and in films made for the cinema. However, we question the distortion that may result from prohibiting product placement from other formats in general. Indeed, a number of new media content, especially of the "made-for-on-

<sup>12</sup> Dally, P., *op. cit.*, p. 371.

demand” type, rely heavily on product placement for their financing. As mentioned above, more traditional financing does not apply to them. Furthermore, content (and this fits in the initial spirit of the TWF/AVMS Directive since 1989) is encouraged to travel and in doing so recoup financing across territories. A ban on the exploitation of certain British content means that they will either only be destined for export (hardly conceivable – or then likely leading to parallel imports or piracy back in the UK) or motivate divestment from certain types of entertainment in the UK.

37. How should product placement be signalled to viewers?

Should there be compelling arguments supporting signalling, a “generalised acknowledgement” (point 56 of the Consultation document) appears as an appropriate option.

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(s)?

Should rules on signalling be set, we believe that they should rest with the appropriate co-regulator.

We thank you for your attention and remain at your disposal should you have any questions.

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