inbrief

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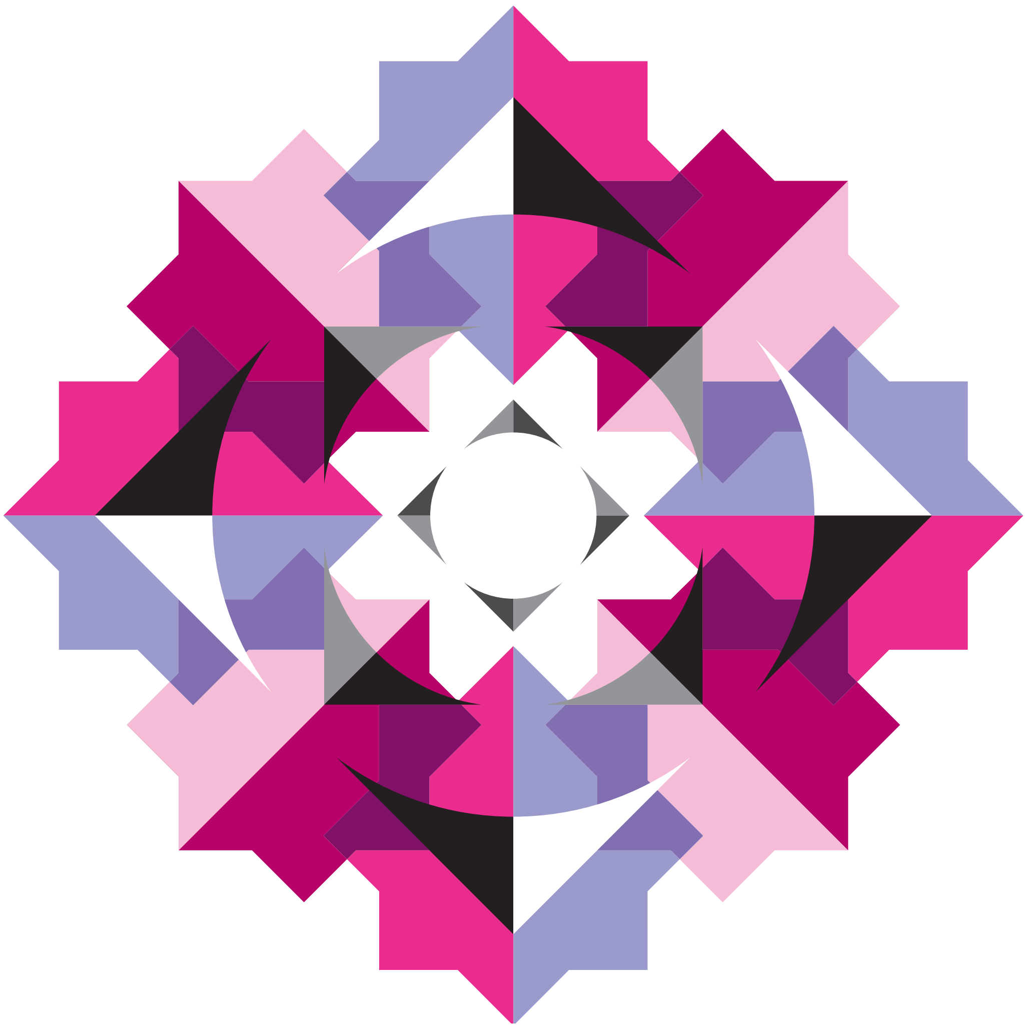
Turning commercial realities into fiction



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Product Placement

Introduction

For brand managers looking to increase their product's profile and producers wanting to find new ways to finance movies and TV shows, product placement could be a winwin solution, says Brinsley Dresden, as he outlines negotiating tactics to help IP owners strike the deal they want.

Given the longevity of product placement as a marketing technique, it is surprising how many column inches it has commanded in recent months, and how much criticism it can provoke. Perhaps all this media interest is not so surprising, however, considering the happy coincidence of two events. First, the release of Casino Royale, the latest James Bond film (the Bond franchise has been credited with inventing product placement in feature films), and second, the passage through the European Parliament of the Audio Visual Media Services Directive, a precursor to the lifting of the ban on product placement in European television programmes under the current Television without Frontiers Directive.

From a brand owner's perspective, the commercial imperatives for product placement have never been greater. When the first Bond movies were released, it was still possible to reach tens of millions of UK consumers through a well-placed 30 second television commercial on the UK's one commercial channel. In today's multi-channel, multi-platform, multi-media world, even if you can find a consumer under the age of 35 watching television, chances are he'll be using a personal video recorder to skip through the commercials anyway.

Nor has life become any easier for film and TV producers, with production and marketing costs spiralling, while tax incentives come and go according to the political and economic vagaries of the day. Any additional funding or cost saving for programme or movie making is likely to be gratefully accepted.

The climate is right for a mutually advantageous marriage of brand and entertainment, outside the traditional confines of the spot advertisement, provided that expectations are managed on both sides.

Understanding product placement

Confusion exists between prop placement on the one hand, and product placement on the other. The distinction is simple: money. In a prop placement deal, a brand owner, often acting through a specialist prop placement agency, will arrange for a brand owner's product to be featured in a film or television programme without payment. This means that the present ban on product placement in television programmes under the

Television without Frontiers Directive is not infringed. The production company will be supplied with cars, or electronic devices, or any other product, free of charge. In return, the brand owner will require an agreement about which characters will use the products and how they will be used, which will utilize many of the other controls discussed below. The brand owner has to bear in mind, however, that if its demands are too stringent or run contrary to the creative treatment of the film or programme, the producers may simply decide to buy or hire another brand of car, in a deal that may have no strings attached. Specialist prop placement agencies can help brand owners to steer the right course between wanting too much and ending up with nothing.

In the case of product placement, in addition to supplying its products for use in a film, a brand owner will also make a financial contribution. This can take several forms, from a straightforward payment of a fee to the producers, to the commitment of a specified sum of money to a marketing campaign to promote both the film and the product. Of course, product placement is not just a creature of films and television programmes. The device has been used in connection with literature (notably in Fay Weldon's book, the Bulgari Connection), and increasingly in connection with computer games, where it provides access to the youth market which is particularly difficult to reach through traditional media.

Negotiating tactics

So what are the commercial terms that a brand owner should expect to negotiate? Of course, there is a direct correlation to the amount of money being committed by the brand owner, and the degree of control, or at least consultation, that it will be afforded. If the film would work just as well with your brand reference on the cutting room floor, do not expect to have much say over the final edit of the film. The creative treatment of the film, and how the product will be integrated into it, is at the centre of any product placement agreement. The brand owner should expect to review –rather than approve – the script, the story, and the cast. Consider how the product will be used. For example, if your brand is a car, will it be driven by the thoughtful and attractive detective? Or will it be driven at high speed through a crowded shopping precinct by a drug-crazed bank robber hell bent on death and destruction? It is highly unlikely that the producers will give a final right of approval over the film, so it is important to agree at the script and storyboard stage the scenes in which the product will be used, the manner of its depiction, and some degree of reasonable prominence, at least by way of a specified number of continuous seconds on screen.

There may be particular features of a product that the brand owner would like to be used in the film. Although the producers may be unwilling to commit to anything so prescriptive that it inhibits their creative freedom, it may be possible to agree a menu of features from which the producers can select those to be incorporated into the film.

Controlling the process

It may also be appropriate to review the cast. Does the brand owner's involvement only make sense if the slated actors end up in the finished film? Conversely, is there a danger that if certain actors were cast, who are known as brand spokesman of rival brands, that it would undermine the value of the investment for the brand owner?

The brand owner should also specify a schedule of the goods to be supplied, and whether they are to be returned. In some circumstances it may be appropriate for the brand owner to supply scale models of its products, although that it is most likely to involve a portrayal of the destruction of its products. All brand owners are likely to want to agree the wording, prominence, and duration of an on-screen credit. Sometimes the brand owner may want to impose an undertaking that following the completion of the film, any unused film (the rushes) will be destroyed. This helps minimize the risk of negative references to the brand showing up later in programmes such as the UK's It'll be alright on the night or other so-called blooper shows. Sector exclusivity is also vital for the brand owner. The producer will usually be willing to agree (provided there is clarity) that if you provide the car for the hero in a film, for example, then although he may not be seen driving any other car, there may well be many other cars featured in the programme.

Can too much publicity be bad publicity?

Casino Royale also included a notable variation on the theme of exclusivity. Bond's girlfriend could be forgiven for asking him whether his watch was a Rolex, given that Rolex is the brand worn by 007 in Ian Fleming's novels, but it does afford him the opportunity to retort, "No, it's an Omega". Arguably, that particular piece of product placement committed the sin of being so conspicuous that the audience was awoken from its suspended disbelief, and reminded that money had changed hands at some point in the creative process. That is not good for the producer or the brand owner.

That example also illustrates the limited options available to brand owners who object to a piece of unauthorised product placement. In late 2006, the American owner of the In Sink Erator brand of waste disposal unit sued NBC about the prominent use of its brand in the pilot episode of a new show called Heroes. Suffice to say, the brand owner was unhappy about the depiction of a woman who ended up with fewer fingers than she started with after using the In Sink Erator product. The company's claim included trade mark infringement, trade mark dilution and trade libel, tortuous interference with contracts, unfair competition and defamation. The case settled, with NBC agreeing to remove the offending footage from future screenings of the show. As a result, we will never know how a court would have interpreted those claims, particularly in the light of the negative portrayal of the product. In the Casino Royale example, on the other hand, it is difficult to see what Rolex could have done, since damning with faint praise does not appear to give rise to a cause of action.

Warranties

Producers and brand owners may seek warranties from each other, in addition to the usual ones about owning their respective IP rights, and not infringing any third party rights by entering into the agreement. The brand owner may want a warranty that the producer will at least use its best endeavours to release the film. If a marketing campaign is planned to coincide with the release of the film, a further warranty may be required around the release date, with obligations on the producer to notify the brand owner of any changes to the timetable. Warranties may also be required about the classification of the film. In the US, a beer brand was criticized for using product placement in a horror film that was cleared for audiences of 15 and above, although both brand owner and producer had anticipated that it would be given an 18 certificate. From the producers' perspective, particularly if they are based in the US, they may want warranties from the brand owner about the safety of the product, and about the level of product liability insurance that the brand owner has in place.

Payment plans

Finally, crucially, comes the money. This is a far more complex question than simply how much the brand owner has to pay. Although there is a direct correlation between how much the brand owner pays, and how much control he can expect, there are other ways to exert control. Payments can be staged, so that a proportion is paid on signature of the agreement, and the balance is only paid if the brand owner is satisfied with the final edit of the film. If the second payment is a contra-payment towards a joint marketing campaign for the film and product, then unless the second payment is made, the brand owner will not get the collateral marketing materials needed for the campaign, such as stills and footage from the film, and the right to use its name and artwork. On the other hand, if the producer does not cooperate with the brand owner during the production of the film, then the producer risks finding himself with a substantial hole in his marketing plan. If some or all of the financial commitment by the brand owner is a contra agreement about marketing spends, the details of that marketing campaign will have to be agreed. While the producer may have to supply footage, artwork and other materials, the brand owner will have to commit to a level of marketing spend timed to coincide with the release of film.

Remedies

Apart from the usual remedies for warranty breaches, the main remedy for both parties is a commercial one: the brand owner may not get to reach its audience through a different medium and an ancillary advertising campaign, and the producer may not get the benefit of the brand owner's funds to support its marketing for the film.

The healthy marriage of Madison & Vine in the US between the advertising and entertainment industries amply demonstrates that product placement can work very successfully in unregulated media, such as feature films, computer games, books and even records. With the changes anticipated in the Audio Visual Media Services Directive, the product placement that is already commonplace in many US TV shows, such as Desperate Housewives, Sex and the City and Friends may soon be a feature of British programming as well. There are dangers: clunky placement can alienate audiences, and brand owners may be targeted for criticism by a small but vocal minority who are opposed to product placement in principle. The biggest danger may be the inflated expectations of brand owners who want total control, even for modest expenditure. If you want total control, shoot a commercial!

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