

# Starring Brand X: When the Product Becomes More Important than the Plot

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## I. Introduction

The intermingling of commerce and entertainment is nothing new.<sup>1</sup> Licensing and merchandising of feature films have been around for over 50 years.<sup>2</sup> However, the concept of product placement has not always been popular with advertisers and film-makers. In the past, advertisers viewed feature film licensing as a tenuous form of marketing because they believed that, with a few exceptions<sup>3</sup>, feature films have a relatively short life span.<sup>4</sup> At the same time, producers believed that consumers wanted a clear demarcation between entertainment and advertising.<sup>5</sup>

However, today's entertainment and advertising industries have changed their perceptions dramatically.<sup>6</sup> First, many believe that film is one of the most powerful mediums of communication in the world.<sup>7</sup> Second, with ballooning production costs and the sky-

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<sup>1</sup> Mark Litwak, *When Products Become Stars*, DEL. LAWYER (Winter 2005/2006) at 8.

<sup>2</sup> Robert S. Getman et. al, *Merchandising and Licensing: Protection and Exploitation of Characters, Trademarks and Other Property Rights* 1 (1985).

<sup>3</sup> E.g., *E.T.* and the *Star Wars* trilogy.

<sup>4</sup> Getman, *supra* note 2, at 1.

<sup>5</sup> John Shaeffer, *What You Need to Know About Product Placement*, <http://www.legalelite.com/articles/a-jshaeffer-product.htm#1> (last visited Feb. 26, 2007).

<sup>6</sup> Matthew Savare, *Comment, Where Madison Avenue Meets Hollywood and Vine: The Business, Legal, and Creative Ramifications of Product Placement*, 11 UCLA ENT. L. REV. 331, 332 (Summer 2004).

<sup>7</sup> Abram Sauer, *Brandsploitation: A New Genre in Film*,

rocketing costs of reaching consumers, entertainment executives and advertisers have been forced to devise new strategies to combat these trends.<sup>8</sup> Producers are looking in nontraditional places for partners to finance their programs.<sup>9</sup> In tandem, marketers are looking for innovative opportunities to engage and reach consumers.<sup>10</sup> As a result, advertisers and entertainment executives have embraced the concept of product placement.<sup>11</sup>

By tying licensing and merchandising opportunities directly into films, product placement has created a new community, blurring the line between entertainment and advertising.<sup>12</sup> This Comment discusses the legal implications of the entangled relationship between advertising and entertainment, specifically, the effects of product placement on the consumers and creative forces of the film industry. Part II of this Comment, describes the concept of product placement and the business aspects that shape it.<sup>13</sup> Next, Part III discusses the

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[http://www.brandchannel.com/features\\_effect.asp?pf\\_id=231](http://www.brandchannel.com/features_effect.asp?pf_id=231) (last visited Feb. 26, 2007). Some argue that film is the most powerful medium for communication because of the cultural force. *Id.* Going to see and knowing about movies is so woven into society that to not be “in the know” about the latest films is to risk the chance of being culturally out of touch. *Id.*

<sup>8</sup> Savare, *supra* note 6, at 333.

<sup>9</sup> Benjamin R. Mulcahy, 22<sup>nd</sup> *Annual Entertainment Law Issue: That's Adver-tainment!*, 29 L.A. LAW. 44, 44 (May 2006).

<sup>10</sup> *Id.* There is a major shift in how marketing is defined, created, distributed and consumed. Scott Donaton, MADISON & VINE: WHY THE ENTERTAINMENT AND ADVERTISING INDUSTRIES MUST CONVERGE TO SURVIVE 3 (McGraw-Hill 2005). Depending on how well a brand is able to shift from an intrusion based marketing strategy to an invitation based strategy will determine its survivorship. *Id.* In other words, brands that develop innovative ways to invite consumers to interact with the brands will survive and those who resist this change will lose its place in the industry. *Id.* at 3-4.

<sup>11</sup> Litwak, *supra* note 1, at 8. In early 2003, *Advertising Age* successfully hosted the first Madison & Vine conference where members of both industries gathered to discuss the rebirth of product placement and to begin to define the boundaries of this new community. Donaton, *supra* note 10, at xiii, 4. This conference was about two glamorous, high-profile industries coming together to ensure their mutual survival. *Id.* at 5. There was resistance from some of the attendees, who wanted to do what they could to delay the shift. *Id.* at 6-7. However, both industries were full of forward thinkers who wanted to play a role in defining and creating this new world. *Id.* at 7. Not surprisingly, the product placement market is projected to grow 14.9 percent annually from 2004 to 2009, reaching an estimated \$6.94 billion. Litwak, *supra* note 1, at 8.

<sup>12</sup> Litwak, *supra* note 1, at 8.

<sup>13</sup> See *infra* Part II (defining product placement and describing the product placement business model).

legal issues of product placement and focuses on the Screen Actors Guild (“SAG”) and the Writers Guild of America’s (“WGA”) protests against the use of product placements.<sup>14</sup> Part IV analyzes the current state of the entertainment industry, and argues that the current self-regulated industry does not sufficiently protect consumers or the creative flow of film development.<sup>15</sup> Finally, Part V proposes mechanisms that protect consumers from deceptive advertising in films, and maintain the creative flow of movie productions.<sup>16</sup>

## II. Background

Advertising legend, Leo Burnett once said, “The courage of agencies to change long-established habits and procedures and to get wet all over is, in my opinion, the index to the strength of the advertising agency business in the future.”<sup>17</sup> At television’s inception, advertisers were uncertain about switching their marketing spending from radio to television. There are many similarities between that period of time and today’s product placement world, mainly the resistance to change and alliances between the advertising and entertainment industries.<sup>18</sup> Subsection A will first provide a brief description of the concept of product placements.<sup>19</sup> Subsection B will explore the business prospective of product placements.<sup>20</sup>

### A. Product Placement 101

Product placement is the practice of integrating specific products and brands into filmed entertainment.<sup>21</sup> There are three basic

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<sup>14</sup> See *infra* Part III (discussing the regulatory and legal issues of product placement and the SAG and WGA’s complaints on implementations of product placement in film and television).

<sup>15</sup> See *infra* Part IV (analyzing the film industry and its impact on consumers and the creative forces in the industry).

<sup>16</sup> See *infra* Part V (proposing that there should be guidelines and standards in place for product placements in films).

<sup>17</sup> Donaton, *supra* note 10, at 40 (quoting advertising legend Leo Burnett).

<sup>18</sup> *Id.*

<sup>19</sup> See *infra* Part II.A (explaining how product placements work).

<sup>20</sup> See *infra* Part II.B (exploring the business perspectives of product placements).

<sup>21</sup> Savare, *supra* note 6, at 356.

types of product placement: visual, spoken, and usage.<sup>22</sup> A visual placement occurs when a product, service, or logo can simply be observed.<sup>23</sup> A spoken placement occurs when an actor or off-screen voice mentions a product, service, or corporation.<sup>24</sup> A usage placement occurs when an actor or actress actually handles or interacts with a product, service, or corporation.<sup>25</sup>

There are three “players” in this process: the content provider (i.e., producer, studio, etc.), the product placement agency, and the brand (i.e., manufacturer, advertiser).<sup>26</sup> Within each content provider, there is usually one department designated to incorporate products and brands into the script.<sup>27</sup> This department is often known as the Production Resources or Product Placement Department.<sup>28</sup> The executives analyze the scripts and create a list of potential product placement opportunities.<sup>29</sup> During this process, the executives must consider a variety of creative, financial, and legal issues.<sup>30</sup> Questions executives must answer include:

“Can I reduce the negative cost of this project in a substantial way using Product Placement? Is this project of the magnitude that would warrant revenue-generating opportunities through placements, either cash or barter? Will the Director, Producer and/or cast members accommodate proper placement situations? Are there specific scenes that emphasize products such as verbal mentions or action props? What is the target audience for this picture? Would this picture be appropriate for joint promotional efforts with Corporate America including merchandising and/or licensing opportunities? . . . Must cast members be advised by contract terms prior to the studio making any placement

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<sup>22</sup>Samuel Turcotte, *Gimme a Bud! The Feature Film Product Placement Industry* (1995) (unpublished M.A. paper, University of Texas-Austin), available at <http://advertising.utexas.edu/research/papers/Turcotte/introduction.html>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Savare, *supra* note 6, at 358.

<sup>27</sup> Laurie Babin and Sheri T. Carder, *Viewer's Recognition of Brands Placed within a Film*, 15 INT'L J. ADVER. 140, 140-51 (January 1996).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Savare, *supra* note 6, at 358.

commitments?”<sup>31</sup>

Once the studio has a list of potential product placement opportunities, the studio executives contact the placement agencies.<sup>32</sup> Agencies will receive development information from the content providers and the agents will consider several factors when determining a perspective placement deal, such as whether there is an opportunity for money or barter agreement, whether the demographic of the show is suitable for the product, whether there is a logical placement for the product in the program, and whether the producers and talent, including writers, directors, and actors, are open to creative changes.<sup>33</sup>

The agency acts as an intermediary between the content provider and the brand by contacting the brand with product placement opportunities.<sup>34</sup> Once the brand commits to the product placement, the agency works with the content provider and the brand to develop an agreeable contract.<sup>35</sup> After the contract is completed, the product is sent to the content provider.<sup>36</sup> The amount of time to complete this process varies from project to project.

## B. Product Placement from a Business Perspective

### i. From the Advertisers' Point of View

Consumers are rejecting advertisers' traditional intrusive, hard-sell approach.<sup>37</sup> As such, one of the major benefits of product placements to advertisers is implied endorsements.<sup>38</sup> An implied endorsement is perhaps the most effective way advertisers can communicate to consumers.<sup>39</sup> Implied endorsements are often made by A-list actors who do not appear in traditional thirty second advertise-

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<sup>31</sup> *Id.* (quoting *E.R.M.A., Product Placement 101*).

<sup>32</sup> Leigh Ann Hornick, *The Evolution of Product Placement: Consumer Awareness and Ethical Considerations* (available at [https://eidr.wvu.edu/files/4542/Hornick\\_Leigh\\_Ann\\_thesis.pdf](https://eidr.wvu.edu/files/4542/Hornick_Leigh_Ann_thesis.pdf), 9-10 (2006))(last visited February 16, 2007).

<sup>33</sup> Savare, *supra* note 6, at 358-59.

<sup>34</sup> *Id.* at 359.

<sup>35</sup> *Id.*

<sup>36</sup> Hornick, *supra* note 32 at 10.

<sup>37</sup> Donaton, *supra* note 10, at 3-4.

<sup>38</sup> Turcotte, *supra* note 22.

<sup>39</sup> *Id.*

ments.<sup>40</sup> For example, Clint Eastwood may never appear in an advertisement with Coca Cola's dancing polar bear, but he may ask for a glass of Coca Cola in a movie.<sup>41</sup> Product placement delivers a subtle impression—these scenes inevitably give the impression that actors and actresses are endorsing the product.<sup>42</sup>

Another advantage is the lack of clutter. There is an overabundance of advertisements through the traditional outlets. Today, consumers are inundated with advertising everywhere—television, radio, billboards, magazines, and newspapers.<sup>43</sup> Most consumers are tired of these ads and have learned to ignore them. In films, most directors are sensitive about over commercializing their films and will keep the total amount of placement at a minimum.<sup>44</sup> Most films are not cluttered with product placement.<sup>45</sup> As such, consumers are more willing to listen to advertisers subtle messages.

A third consideration is that the success of product placement is directly tied to the success of the film.<sup>46</sup> Luckily, the film industry, today and throughout the past decade, has made a conscious effort to market films to consumers.<sup>47</sup> A film's opening weekend is often seen as a predictor of the success of the film, and is becoming a greater percentage of the overall revenue than ever before.<sup>48</sup> To ensure successful opening weekends, studios will spend on average about \$40 million on marketing their films.<sup>49</sup> The opportunity for an advertiser to be part of a well marketed film with huge opening weekend numbers can lead to endless rewards. A hit film becomes part of a cultural phenomenon and the products placed in the film become staples in pop culture.<sup>50</sup>

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Neer, Katherine F., *How Product Placement Works*. (available at <http://money.howstuffworks.com/product-placement.htm>) (last visited February 19, 2007).

<sup>44</sup> *Turcotte, supra* note 22.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Donaton, *supra* note 10, at 85 (quoting Marc Shmuger, the Vice Chairman of Universal Studios).

<sup>48</sup> *Id.* at 85-86.

<sup>49</sup> *Id.*

<sup>50</sup> *E.g.*, The Ray Bans worn by Tom Cruise in *Top Gun*.

While there are many advantages for advertisers, there are also many hurdles advertisers must overcome. The shift from an intrusion model of advertising to one that requires a conscious and coordinated effort of integrating specific products into films is complicated.<sup>51</sup> First, there is no standard model for product placements. Sometimes story lines are written to include a specific product, and are then pitched to the relevant companies; in other cases, companies suggest their products for the film.<sup>52</sup> Product placements are usually arranged in one of three ways:

- (1) direct payment where a financial transaction takes place;
- (2) barter, in which the product itself serves as the form of compensation; and
- (3) gratis, in which the placement occurs to “strengthen a character’s profile, or add richness to the plot, audio or printed text.”<sup>53</sup>

While there are general protocols, each placement involves a different process<sup>54</sup> and not surprisingly, effectiveness of placements differs as well.<sup>55</sup> Second, it is difficult to measure the effectiveness of product placements. This is particularly frustrating for advertisers who are living in a business world where most decisions are made based on its return on investment (“ROIs”).<sup>56</sup> The Association of National Advertisers recently surveyed 117 advertisers, 87% of which said that existing research does not effectively measure the potential of branded entertainment.<sup>57</sup> Research is starting to develop in this area.

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<sup>51</sup> Donaton, *supra* note 10, at 8-9; Savare, *supra* note 6, at 333-34.

<sup>52</sup> Lynn Smith, *When the Plot Pushes Product*, L. A. TIMES, at E5 February 12, 2006.

<sup>53</sup> Hornick, *supra* note 32, at 2. Approximately 10% of product placement transactions are done through direct payment for the placement. Edward Harrison, *Cashing in: E.T. led the way*, L. A. TIMES, August 29, 1999 at Calendar section, 25. The rest are done for services. *Id.*

<sup>54</sup> Turcotte, *supra* note 22.

<sup>55</sup> Katy Bachman, *Product Placement Yield 20% Gain*, ADWEEK, November 15, 2006 (available at [http://www.insidebrandedentertainment.com/bep/article\\_display.jsp?vnu\\_content\\_id=1003408533&imw=Y](http://www.insidebrandedentertainment.com/bep/article_display.jsp?vnu_content_id=1003408533&imw=Y))(last visited February 7, 2007).

<sup>56</sup> See Savare *supra* note 6, at 356 (quoting Ryan Moore, a partner at Set Resources, Inc., and stating “Product placements are a cheap form of advertising. They enable enormous ROI [return on investment] potential”).

<sup>57</sup> John Eggerton, *More Spot Bucks Board Brandwagon*, BROADCASTING AND CABLE, April 19, 2006, available at <http://www.erna.org>.

Nielsen Media Research published a study showing that 58% of viewers recognized a brand when viewing a product placement in combination with a commercial, while 47% of viewers recognized a brand exposed only to a commercial.<sup>58</sup> However, this data is not enough for those executives looking to cut costs. This study simply shows that brand awareness increases with product placement, but that does not always translate into sales.<sup>59</sup>

## ii. From the Filmmakers' Point of View

Cost reduction, revenue generation, and cross-promotions are three benefits of product placement from the filmmakers' point of view.<sup>60</sup> Cost reduction is the most frequent quantitative benefit for filmmakers.<sup>61</sup> The cost savings are realized in props, set decorations, and locations which are provided for free and often end up on-screen.<sup>62</sup> These products can range from large items such as cars and boats to smaller items such as televisions, clothing and sunglasses.<sup>63</sup> Such cost-savings can be substantial.<sup>64</sup> For example, BMW agreed to custom-build 32 Minis for the production of the *Italian Job*.<sup>65</sup> The cost of the Minis totaled well over \$1 million.<sup>66</sup>

Charging advertisers a fee for placing their products generates revenue for the production. The average share of paid placements increased from 18% in 1974 to 29.2% in 2004.<sup>67</sup> With today's competitive market, advertisers are more willing to pay to have their products featured instead of their competitors.<sup>68</sup>

The film industry has really shifted over the last decade to be-

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<sup>58</sup> Bachman, *supra* note 55.

<sup>59</sup> *Id.*

<sup>60</sup> Hornick, *supra* note 32 at 10.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Prop rental typically costs 10% of an item's value for the first week and 5% for each week after. *Id.* Building or renting locations can cost anywhere between \$10,000 and \$100,000. *Id.*

<sup>65</sup> Donaton, *supra* note 10 at 90.

<sup>66</sup> *Id.*

<sup>67</sup> Hornick, *supra* note 32 at 3.

<sup>68</sup> *Id.*

come a marketing-driven operation.<sup>69</sup> A cross promotion is when a studio seeks the support of a corporate marketer to promote a film to its customers via traditional advertising, in-store displays or other means.<sup>70</sup> Generally, cross promotions help studios create more buzz about a film; however, sometimes the cross promotions save the film in the box office. The principal example is the live-action version of Dr. Seuss's *The Cat in the Hat*. When this film came out in the 2003 holiday season, there was consensus among the film critics that this was an awful, nearly unwatchable film.<sup>71</sup> However, thanks to tie-ins with marketing powerhouses such as Burger King, Kraft, Kellogg's, Hershey, and Procter & Gamble, the film dominated the box office in its opening weekend.<sup>72</sup> These marketing giants spent so much money promoting this film, that people, despite the critics' reviews, were still excited to watch the movie.

Product placements require extra coordination and effort from both the advertisers and the entertainment content provider. However, advertisers and entertainment executives are willing to make the extra effort. Advertisers realize that product placement is one way to get their consumers' attention when traditional advertising fails and filmmakers realize that product placement is an essential way to keep production cost down.

### III. Discussion

Advertisers and entertainers must be careful not to overstep the boundaries with product placement deals. They must remember the multiple dimensions involved in branded entertainment—the advertisers, the entertainment content providers, the law, and the consumers. This section will discuss the regulatory and legal issues regarding product placement.<sup>73</sup> This section will also detail the WGA and SAG's white paper calling for an industry Code of Conduct.<sup>74</sup>

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<sup>69</sup> Donaton, *supra* note 10, at 85 (quoting Marc Shmuger, the vice chairman of Universal Studios).

<sup>70</sup> Hornick, *supra* note 32 at 10.

<sup>71</sup> Donaton, *supra* note 10, at 92.

<sup>72</sup> *Id.*

<sup>73</sup> See *infra* III.A (discussing the regulatory and legal issues regarding product placement).

<sup>74</sup> See *infra* III.B (detailing the SGA and WGA's concerns with the current state of product placements).

### A. Regulatory and Legal Issues Regarding Product Placement

There is currently very little regulation of product placement in films. However, as product placements become more seamless and natural, the legal issues surrounding product placements will accordingly become more complex.<sup>75</sup> Historically, product placements did not require substantiation;<sup>76</sup> as a result, products were often depicted to accomplish things that they were not able to do.<sup>77</sup> However, at some point, someone will be injured by a movie fan imitating his favorite action film hero, and the injured party will bring suit. The question then becomes whether the entertainment content provider and/or the advertiser will be liable for inaccurate representation of products.<sup>78</sup> There is no precedent that requires entertainment content providers and advertisers to consider the advertising code of ethics and federal advertising laws for product placements. However, as the distinction between advertising and entertainment becomes blurry, consideration of the advertising code of ethics<sup>79</sup> and federal advertis-

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<sup>75</sup> Amanda Bronstad, 'Branded Entertainment' Deals Mean More Money for Companies—and More Complexity, *The National Law Journal*, May 3, 2006.

<sup>76</sup> *E.g.*, If the Mini Cooper scenes in the *Italian Job* were considered advertisements, BMW would have needed to substantiate the express and implied claims made in those scenes. In other words, BMW would need to show that the Mini could withstand major shrapnel without affecting its ability to perform and that it was safe to drive a severely damaged Mini down stairs and through narrow roads. Mulcahy, *supra* note 9, at 46.

<sup>77</sup> *Id.* See *e.g.*, *Wham-O, Inc. v. Paramount Pictures Corp.*, 286 F. Supp. 2d 1254 (N.D. Cal. 2003)(denying toy manufacturer's motion to enjoin Paramount's alleged misuse of its Slip 'n Slide toy in a motion picture).

<sup>78</sup> Litwak, *supra* note 1, at 11.

<sup>79</sup> The advertising code of ethics states:

Advertising shall tell the truth, and shall reveal significant facts, the omission of which would mislead the public; advertising claims shall be substantiated by evidence in possession of the advertiser and advertising agency, prior to making such claims; advertising shall refrain from making false, misleading, or unsubstantiated statements or claims about a competitor or his/her products or services; advertising shall not offer products or services for sale unless such offer constitutes a bona fide effort to sell the advertising products or services and is not a device to switch consumers to other goods or services, usually higher; period; advertising of guarantees and warranties shall be explicit, with sufficient information to apprise consumers of their principle terms and limitations or, when space and time restrictions preclude such disclosures, the advertisement should clearly reveal where the full text of guarantee or warranty can be examined before purchase; advertising shall avoid price claims which are false or misleading, or saving claims

ing laws becomes more important.<sup>80</sup>

The Federal Trade Commission (“FTC”) has jurisdiction over deceptive advertising because it is considered an unfair trade practice.<sup>81</sup> The FTC is charged with balancing advertisers’ right to commercial speech<sup>82</sup> with consumers’ right to be protected from deceptive advertising.<sup>83</sup> Deceptive advertising is defined as representation and/or omission of information that is misleading.<sup>84</sup> When the FTC concludes that a certain advertisement is deceptive, the FTC will ask the advertiser to sign a consent decree, where the advertiser is not necessarily admitting to the deception, but is agreeing to stop running the advertisement.<sup>85</sup> If the advertiser does not agree to sign the consent decree, the FTC can fine the advertiser, order the advertiser to stop running the advertisement, or require the advertiser to run a corrective advertisement.<sup>86</sup>

The Federal Communications Commission (“FCC”) requires that when a broadcast station “transmits any matter for which money, service or other consideration is either directly or indirectly paid or promised,” the station must announce, during the broadcast, what was sponsored, paid for or furnished and who paid the consideration.<sup>87</sup> Currently, this regulation only applies to broadcasters using public airwaves and does not regulate films.<sup>88</sup> However, consumer groups,

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which do not offer provable savings; advertising containing testimonials shall be limited to those of competent witnesses who are reflecting a real and honest opinion or experience; advertising shall be free of statements, illustrations or implications which are offensive to good taste or public decency; advertising shall be free of statements, illustrations, or implications which are offensive to good taste or public decency.

ROGER A. SHINER, FREEDOM OF COMMERCIAL EXPRESSION 111 (NY Oxford Press, 2003).

<sup>80</sup> *Id.*

<sup>81</sup> J.T. RUSSELL AND R. LANE. KLEPPNER’S ADVERTISING PROCEDURES 43 (NJ Prentice Hall, 2002).

<sup>82</sup> In other words, protecting advertisers’ right to communicate information about their products and services.

<sup>83</sup> KIM SHEEHAN, CONTROVERSIES IN CONTEMPORARY ADVERTISING 51 (CA Sage Publications, Inc., 2003).

<sup>84</sup> *Id.* at 57.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Litwak, *supra* note 1, at 11.

<sup>88</sup> *Id.*

such as Commercial Alert, claim that non-disclosure is deceptive advertising and would like to require pop-up disclaimers during the actual product placement in television shows and films.<sup>89</sup> Furthermore, while filmmakers and advertisers are not required to follow FCC regulations, failure to do so can result in negative publicity.<sup>90</sup> For example, Budweiser is under close scrutiny for its paid product placement in the *Wedding Crashers*.<sup>91</sup>

### **B. Entertainment Guilds' Call for Industry Code of Conduct For Product Placement**

The Screen Actors Guild and the Writers Guild of America are protesting the use of product placement.<sup>92</sup> From their point of view, the "weaving of paid-for product advertisements into the storylines of television and film raises serious ethical questions. . . . The traditional standards and practices governing commercial product placement are increasingly being swept aside in favor of product integration and branded entertainment. In their race to the bottom line to create the so-called new business model, network and advertising executives are ignoring the public's interest and demanding that creative artists participate in stealth advertising disguised as a story."<sup>93</sup>

The Guilds' protest is twofold. "As writers, we believe our creative rights are affected when we are told, often late in the production process, to incorporate a commercial product into the story lines we've written. . . . As parents, family members, neighbors, and citizens, we are concerned about the growing substitution of advertising for creative stories, about stealth advertising, and about government regulations that are being ignored."<sup>94</sup> On November 14, 2005, the

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 12.

<sup>91</sup> *Id.*

<sup>92</sup> Writers Guild of America, *See Are You Selling to Me? Stealth Advertising in the Entertainment Industry* November 14, 2005 (outlining the growth of commercial products being incorporated as part of storylines and the public's right to be informed of such advertising)[hereinafter *Are You Selling to Me?*] available at [http://www.wga.org/uploadedFiles/news\\_and\\_events/press\\_release/2005/white\\_paper.pdf](http://www.wga.org/uploadedFiles/news_and_events/press_release/2005/white_paper.pdf).

<sup>93</sup> *Entertainment Guilds Call for Industry Code of Conduct or FCC Regulation for Product Integration in Programming and Film* (quoting WGAw President, Patric M. Verrone)(available at: <http://www.sag.org/sagWebApp/Content/Public/productintegration.htm>) (last visited November 15, 2006)[hereinafter *Industry Code of Conduct*].

<sup>94</sup> *Are You Selling to Me?*, *supra* note 92, at 1.

Guilds released a White Paper, calling for an industry Code of Conduct.<sup>95</sup> The Code of Conduct would include the following elements:

- (1) Full and clear disclosure for both the visual and aural disclosure of product integration deals at the beginning of each program so the program's audience knows ahead of time that it will be subject to hidden or stealth advertising.
- (2) Strict limits on the usage of product integration in children's programming.
- (3) A voice for storytellers, actors, and directors, arrived at through collective bargaining, about how a product or brand is to be integrated into content.
- (4) Extension of all regulation of product integration to cable television, where some of the most egregious abuse is found.<sup>96</sup>

While there is currently very little regulation of product placement in films, the legal issues surrounding product placements are becoming more complex. Both consumer advocate groups and entertainment associations are calling for more regulation. The current self-regulated industry does not sufficiently protect consumers or the artistic integrity of films.<sup>97</sup>

#### **IV. Analysis**

The practice of writing so that "you're hardly aware that you've been sold something" raises issues for the Guilds.<sup>98</sup> "Just as there is an established right to truth-in-advertising, there should be a similar right to truth-in-programming where advertising is concerned."<sup>99</sup> This section will analyze the current state of the film industry with a particular focus on the first and third elements of the

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 8.

<sup>97</sup> See *infra* Part IV (analyzing the film industry and its impact on consumers and the creative forces in the industry).

<sup>98</sup> *Are You Selling Me?*, *supra* note 92 at 3.

<sup>99</sup> Industry Code of Conduct, *supra* note 79 (quoting Alan Rosenberg, Screen Actors Guild President).

Code of Conduct<sup>100</sup>—disclosure<sup>101</sup> and creative voice.<sup>102</sup>

### A. Disclosure

In the field of advertising and entertainment, the consumer must come first. If advertisers and entertainment content providers do not want to ruin this product placement phenomenon, the consumer must be at the center of everything.<sup>103</sup> Consumers want to be informed about the commercial dealings going on behind the scenes. “The public was outraged when it learned that . . . video news releases paid for by the Bush Administration had infiltrated journalism.”<sup>104</sup>

Currently, the FCC requires television broadcasters to disclose materials that have been exhibited in exchange for money, services, or other valuable considerations.<sup>105</sup> However, this requirement does not apply to films and only requires a single announcement, which can be made in the closing credit.<sup>106</sup> The FCC Rules do not specify the actual language that must be used, nor do they provide any other guidelines.<sup>107</sup>

Consumer groups, such as Commercial Alert, are asking the FCC to require conspicuous and concurrent disclosure for product placements, and to place new product placement guidelines on all media.<sup>108</sup> Specifically, Commercial Alert is asking that advertisers and entertainment content providers disclose product placement deals at the beginning of the program and pop-ups of notice on the screen when the product placement occurs.<sup>109</sup>

These protests from consumer groups have not gone unno-

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<sup>100</sup> The second and fourth element of the proposed Code of Conduct deals specifically with television programming. Since this paper focuses specifically on product placement in films, these two elements will not be discussed.

<sup>101</sup> See *infra* IV.A (analyzing current standard for disclosing product placements).

<sup>102</sup> See *infra* IV.B (examining current communication between studios and writers).

<sup>103</sup> Donaton, *supra* note 10, at 147.

<sup>104</sup> *Are You Selling to Me?*, *supra* note 92, at 1 (quoting USC Associate Dean Marty Kaplan).

<sup>105</sup> Shaeffer, *supra* note 5.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Are You Selling to Me?*, *supra* note 92, at 7.

ticed. The FCC Commissioner, Jonathan Adelstein, has these issues on his radar.<sup>110</sup> He remarked that “in today’s media environment, product placement has moved beyond Coke tumblers prominently displaced at the judges’ table of *American Idol*. Now products have even seeped into plotlines.”<sup>111</sup> Mr. Adelstein has called on the FCC to investigate hidden advertising more carefully;<sup>112</sup> however, no new guidelines have been introduced yet.<sup>113</sup>

## B. The Creative Voice

Issues of creative control are becoming increasingly complicated. Advertisers want their products to be on the screen for as long as possible.<sup>114</sup> They want their products to be used in certain ways.<sup>115</sup> Filmmakers want the discretion to use the product as they see fit;<sup>116</sup> they do not want the product to violate the integrity of the film.<sup>117</sup> As a result, developing and negotiating product placement deals today are more difficult than ever before.<sup>118</sup> Writers are being asked to write storylines around products.<sup>119</sup> The Writers Guild of America points out that its members are storytellers not advertising copywriters.<sup>120</sup> However, its members are being asked to be copywriters without any

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 6.

<sup>112</sup> *Id.* at 7.

<sup>113</sup> Perhaps, while the Commissioner is aware of the problem, he does not feel that it is the guidelines that are lacking, but it is the enforcement of them that are lacking. Commercial Alert sent the same petition to the FTC in September 2003. The FTC responded by stating that even though “there may be instances in which the line between advertising and programming may be blurred,” additional regulation was unnecessary because “the existing statutory and regulatory framework provides sufficient tools for challenging deceptive practices.” Mark Laswell, *Safety Embedded*, BROADCASTING AND CABLE (2004) at 18.

<sup>114</sup> Bronstad, *supra* note 75.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Dave McNary, *Scribes Chase Blurb Bonanza. Product Placement Perturbs WGA*. VARIETY, November 13, 2005 (available at: [http://www.variety.com/index.asp?layout=print\\_story&articleid=VR1117932866&categoryid=18](http://www.variety.com/index.asp?layout=print_story&articleid=VR1117932866&categoryid=18)).

<sup>120</sup> *Id.*

input and without any additional compensation.<sup>121</sup>

These issues are only between two of the key players. There is a whole new dimension when considering the consumer. One of the benefits of product placements for consumers is that it makes the film more realistic. In other words, it provides a measure of verisimilitude.<sup>122</sup> Stephen King's movies are scarier because his characters live in the same world as we do—they are driving Chevrolets and drinking Coke.<sup>123</sup> In an interview, Mr. King said, “[Product placement] is not something I was ever conscious of. . . . The one thing I did know was that when you open your medicine cabinet at home, you don't see Brand X.”<sup>124</sup>

The consumers' entertainment experience is enhanced by using subtly-placed, brand name products. Hence, consumers will reject poorly executed, transparent product placements.<sup>125</sup> For example, in 2002, ABC cut a deal with Campbell Soup Company, giving the soup a major role in the ABC morning show, *The View*.<sup>126</sup> The public was outraged with one of the programs where Barbara Walters talked about eating Campbell Soup as a child and the other hosts hummed the brand's “M'm! M'm! Good!” tag line.<sup>127</sup> Needless to say, the network soon cut a planned segment where the audience was asked to demonstrate its soup sipping abilities.<sup>128</sup> These types of deals lack creativity and treat consumers as if they were morons.<sup>129</sup>

As such, while it is understandable that advertisers want to get the most out of their product placements, trying to gain too much control over the entertainment content can be harmful to their brands. Poorly done product placements cheapen the product, lose consumers' trust and damage the consumers' relationship with the advertiser and media outlet.<sup>130</sup>

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<sup>121</sup> *Id.*

<sup>122</sup> Donaton, *supra* note 10, at 149.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 151.

<sup>127</sup> Donaton, *supra* note 10 at 151.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 28-29.

## V. Proposals

The challenge is not just overcoming the creative and economic tensions that are inherently involved in the convergence of content and commerce.<sup>131</sup> It is also to create more value for the consumer.<sup>132</sup> This section will propose various actions in order to overcome these obstacles.<sup>133</sup>

### A. Disclose All Deals At Beginning Credits of Film

The consumer advocate group, Commercial Alert, is asking product placement deals to be disclosed at the beginning of programs and an on screen notice during the actual placement.<sup>134</sup> The rationale is that, in current television programs, the sponsors are disclosed in the closing credits where the audience is not paying any attention. Furthermore, by the closing credits, the viewers have already been exposed to the selling message without realizing it. By placing the viewers on notice at the beginning of the film, the viewers will not be deceived when they see the product placement during the film.

Using a pop-up notice during the actual placement, however, is unnecessary. The true benefit of product placements for the consumer is that it enhances the entertainment experience.<sup>135</sup> It allows consumers to suspend their disbelief and be involved in the film. On-screen notices during the actual placement will ruin the entertainment experience for the consumer. Just like internet pop-up ads, on-screen notices during the actual placement will be distracting and annoying for the viewer. With pop-up notices, consumers will not be able to watch a film without constant distractions.

### B. Production Resources Department to Communicate with the Writers

The film industry needs the financial support of the advertisers. Advertisers support their presence in the films with multi-million dollar advertising campaigns and promotions.<sup>136</sup> The studios'

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> See *Infra V. A-C* (proposing disclose of deals, communication between studio and creatives, and regulatory guidelines to set minimum standards.)

<sup>134</sup> *Are You Selling to Me?* *supra* note 92, at 7.

<sup>135</sup> See *supra* notes 122-124 and accompanying text.

<sup>136</sup> Donaton, *supra* note 10, at 14-15.

production resources department works with advertisers to develop the product placement deals.<sup>137</sup> If the department is aware of the creatives' insight to the film, the production resources department will be able to negotiate contracts with the creatives' interest in mind. WHAT IS CREATIVES'? I DON'T LIKE THIS!!! This will help uphold the integrity of the film.

Furthermore, product placement deals are often made last minute and creatives AGAIN are forced to find a place in the film for the product. This places the film's integrity at risk. There should be a standard that as the film progresses into the later phases of production, advertisers cannot dictate the content in order to have their brands featured longer or in a particular way. One of the writers' greatest complaints is that they are often asked to incorporate products and brands into scripts so late in the process without much notice.<sup>138</sup> This would help eliminate that problem.

### C. Develop Regulatory Guidelines for Product Placements in Films

Either the FCC or the FTC should set forth regulatory guidelines for product placements in films. Placing product in films is a practice that has been around since the early days of film.<sup>139</sup> However, the tie-ins today are significantly more extensive.<sup>140</sup> Thus, some kind of regulatory guidelines should be put in place. The elements of the guideline should be those similar to the ones included in the Guilds' Code of Conduct<sup>141</sup> and Advertisers' Code of Ethics<sup>142</sup>, such as disclosure, limited placement in children programming, and substantiated claims or disclaimers.

## VI. Conclusion

The executives from Madison Avenue and Hollywood get together at least once a year at the Madison and Vine Conference to discuss the evolving idea of product placements. Advertisers and content providers are getting better at integrating entertainment and

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<sup>137</sup> Babin, *supra* note 27, at 140-51.

<sup>138</sup> *Reality Storytellers, WGA and SAG Unite to Protest Product Integration*, WGAWEST MEMBER NEWS, March 2006.

<sup>139</sup> Litwak, *supra* note 1, at 8.

<sup>140</sup> Donaton, *supra* note 10, at 14.

<sup>141</sup> *See supra* notes 95-97 and accompanying text.

<sup>142</sup> *See supra* note 79 and accompanying text.

commercial content, making it more seamless and difficult to tell one apart from the other. As a result, concerns regarding deceptive advertising, integrity of the films, and entertainers' right to control their work product are major issues that need to be addressed. Currently, there is very little effective regulation in this area. Standards must be set by the government and by those in the advertising and entertainment industries.