

PRODUCT PLACEMENT IN INTERNATIONAL FILM AND TELEVISION PRODUCTION: A GLOBAL APPROACH FOR A GLOBAL INDUSTRY

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I. INTRODUCTION

Product placement, defined as the integration of a branded product into entertainment content² for the purpose of heightening brand awareness and boosting sales,³ has exploded as a marketing technique and critical source of funding for film and television in the last few decades.⁴ The practice was born out of changes in the film, television, and marketing industries, largely in response to consumer preferences, and then spurred on by subsequent technological developments.⁵ Part of the overall shift from information-based to image-based advertising, product placement has been critical to the concept of brand identity, whereby a particular brand, identified by its trademark, develops a persona that is independent of the products to which it is attached.⁶ Trademark has itself become a product, with its own market value.⁷ Thus product placement might more properly be called “trademark placement,” as it is really the trademark, whether a logo, symbol or slogan, and not just the product, which is placed in media content.

Product placement has contributed to the evolution of trademark from a tool identifying the source of a good to a standalone product which is bought and sold, both by consumers and media producers. Because trademark has become a product all its own, with associated property rights, mark holders now assert protections for their marks based on the independent value of the mark as a signifier, and not just based on the mark’s ability to identify the source of the product to which it is attached. As a result, the traditional definition of trademark and grounds for its protection are increasingly irrelevant. However, while a paradigmatic shift has occurred in trademark practice, trademark law has failed to adapt.⁸ Additionally, while trademark first developed as a consumer protection

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² Brittany Robbins, *Quiet on Set! We Have a Trademark to Sell*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 585, 600 (2014).

³ Mark Litwak, *When Products Become Stars*, 23 DEL. LAW. 8, 8 (2005-2006).

⁴ Steven N. Lewis, *Branded Entertainment and Product Integration: A Revolution in its Infancy*, 23 ENT. & SPORTS LAW. 9 (2006).

⁵ *Id.* at 11.

⁶ Lesli Harris, *The New Old Spice: Business Identities, Trademarks, and Social Media*, 31 MISS. C. L. REV. 309, 310 (2012).

⁷ Daniel E. Newman, *Portraying a Branded World*, 2008 U. ILL. J.L. TECH. & POL’Y 357, 374 (2008).

⁸ Sandra Lee, *Product Placement in the United States: A Revolution in Need of Regulation*, 26 CARDOZO ARTS & ENT. L. J. 203, 208 (2008).

measure, the explosion of “trademark placement” in film and television has raised concerns about manipulative marketing and threats to consumer autonomy by subtle advertising techniques.⁹

The question of how to classify trademark use via product placement and the practice of product placement itself has been a thorn in the side of American scholars, legislators, and regulators for decades. There is virtually no jurisprudence regarding product placement because, inevitably, any trademark-related litigation concerns unauthorized and/or defamatory use of a mark, and, even then, cases are generally settled out of court.¹⁰

This lack of clarity and consistency is made more complicated by the increasing globalization of film and television production and distribution.¹¹ The differing approaches taken by the United States and several Western European countries,¹² and the absence of any legal definition or regulatory classification in many South American, African, and Asian countries,¹³ creates uncertainty as to the legal and regulatory status of product placement. Such uncertainty jeopardizes content creation, given the lack of clarity regarding how product placement is treated as a financing mechanism, marketing technique, and creative choice.

This article will examine the practice of product placement, its rise and how it should be characterized from a legal and regulatory standpoint, particularly in light of the expansion of international film and television production and distribution. Part II will provide an overview of product placement in film and television; its emergence in response to changes in consumer preferences, production financing and technological capabilities; and its position in the relationship between marketers and producers. Because product placement by definition involves trademark, Part III will focus on trademark, its history and evolution, as well as its treatment in American law and jurisprudence. This section will also analyze the practice of product placement in light of standards and tests set forth by American courts to balance the competing claims of mark holders asserting exclusive rights, and creators of expression who may be eligible for First Amendment protections.

⁹ Micah L. Berman, *Manipulative Marketing and the First Amendment*, 103 GEO. L.J. 497, 522 (March 2015).

¹⁰ Litwak, *supra* note 3, at 10.

¹¹ Jody Simon and Arnold Peter, *Facing Reality: A New Era of Deal Making Requires Strong Negotiating Pressure by Attorneys Representing Talent in the Television Industry*, 28 L.A. LAW. 44, 46 (May 2005).

¹² Lee, *supra* note 8, at 221.

¹³ See Global Advertising Lawyers Alliance, *Advertising Law: A Global Legal Perspective*, 2015; see also Lily Han, *Regulation of Product Placement in China*, Lehman, Lee & Xu, http://www.lehmanlaw.com/fileadmin/lehmanlaw_com/Publications/The_Regulatory_System_on_Product_Placement_in_China_LH_.pdf (2007); Sharad Vadehra, *Sponsored Content - The Indian Perspective*, Kan & Krishme, <http://galalaw.com/india-sponsored-content-the-indian-perspective>.

Part IV will discuss how product placement should be understood from a legal and regulatory standpoint, given the competing interests of content producers, marketers, and consumers, with a particular focus on concerns that product placement amounts to manipulative marketing which should be subject to consumer protection regulation. This section argues that, following the jurisprudential standards outlined in Part III, the practice of product placement should be legally defined as sponsored content rather than fraudulent or deceitful advertising. Such a definition would recognize and reflect how product placement is a hybridization of expressive activity undergirded by commercial sponsorship.

Part V expands the analysis to consider product placement in the arena of global film and television production. It contrasts the United States' approach with that of the European Union and specific countries in Africa, Asia, and South America. The article then examines the implications of each approach for individual autonomy, which is typically invoked as the motivation for consumer protection laws. Lastly, Part VI proposes that product placement be recognized internationally as sponsored creative content subject to harmonized disclosure rules. This section urges international consensus in order to respond to the reality of globalized film and television production and distribution, and to facilitate further collaboration between content producers in various countries. Such an effort at international dialogue and accord should be spearheaded by the World Intellectual Property Organization (WIPO), which has experience streamlining countries' varied approaches to intellectual property and a permanent standing Committee on Development and Intellectual Property.¹⁴

II. DEFINING PRODUCT PLACEMENT: ITS HISTORY AND EVOLUTION

Product placement is a long-standing practice in American film and television. The practice represents the latest stage of the relationship between film and television producers and marketers. Also referred to as "product integration," product placement takes place when marketers negotiate a deal with content producers to include a branded product or service within their programming.¹⁵ A trademarked good or service is integrated into the film or television show in hopes that the audience will associate the brand with the entertainment content.¹⁶ By so doing, "commercial messages of various kinds are made an intrinsic part of programs."¹⁷ Advertisers seek product placements in order to increase the visibility and awareness of their brands, and ostensibly to boost sales.¹⁸

¹⁴ World Intellectual Property Organization: Policy, <http://www.wipo.int/policy/en/index.html#bodies> (last visited Nov. 4, 2016).

¹⁵ Lee, *supra* note 8, at 204.

¹⁶ Robbins, *supra* note 2, at 600.

¹⁷ Simon & Peter, *supra* note 11, at 47.

¹⁸ Litwak, *supra* note 3, at 8.

Although branded products have been included in American film and television content for decades, the method and means of inclusion have varied due to the different historical relationships between marketers and producers of film and television content.¹⁹ Broadcast television has relied principally upon advertisers to finance their content,²⁰ and, in the early days, corporate sponsors footed the bill for particular shows and episodes, allowing them great influence over a sponsored program's content.²¹ In many instances, sponsors included their names in the show titles, making their involvement unmistakable.²² Even more often, sponsors would have their products visibly featured in show content.²³ For example, Philip Morris and Macy's sponsored various episodes of "I Love Lucy," with Phillip Morris cigarettes displayed in the Ricardos' apartment and Macy's shopping excursions discussed by Lucy and Ethel. Both represent early instances of product placement.²⁴

Over time, however, these traditional forms of product placement lost their efficacy, as consumers became disillusioned with such blatant promotional messaging.²⁵ Television producers were therefore compelled to alter their practice to accommodate the change in consumer taste.²⁶ Simultaneously, several technological developments encouraged broadcasters to seek out new marketing opportunities.²⁷ As cable television grew in popularity, viewership fragmented, making it more difficult for marketers to reach their intended audience. This fragmentation has been heightened by the rise of the Internet and the ability to watch television content online.²⁸ Marketers have therefore been forced to communicate more messages to an increasingly disparate audience while remaining within budgetary constraints.²⁹ Product placement has provided a low-cost method of reaching audiences with the subtle marketing messages viewers prefer.³⁰

¹⁹ See generally Simon & Peter, *supra* note 11, at 47.

²⁰ Indeed, in some cases, programming was created specifically to gather an audience for a particular marketer, as was the case with soap operas, which functioned as vehicles for advertising by cementing a targeted audience at a given time every day for the purpose of communicating marketing messages to a consistent audience. See ROBERT C. ALLEN, *SPEAKING OF SOAP OPERAS* 101 (1985).

²¹ Simon & Peter, *supra* note 11, at 47.

²² Litwak, *supra* note 3, at 8-9.

²³ Lee, *supra* note 8, at 207.

²⁴ Harris, *supra* note 6, at 311.

²⁵ Cindy Tsai, *Starring Brand X: When the Product Becomes More Important than the Plot*, 19 *LOY. CONSUMER L. REV.* 289, 293 (2007).

²⁶ Berman, *supra* note 9, at 501.

²⁷ Lee, *supra* note 8, at 204; Michael Zimbalist, *Fragmentation, Data and the Future of Television Advertising*, *ANA MAGAZINE*, Sept. 2016, at 10, <http://www.ana.net/magazines/show/id/ana-2016-september-the-future-of-tv-advertising>.

²⁸ Zimbalist, *supra* note 27.

²⁹ Lee *supra* note 8, at 208.

³⁰ Litwak, *supra* note 3, at 9.

Beyond its cost-efficiency and alignment with consumer tastes, product placement has also enabled marketers to overcome the thwarting of their communication by DVR technology.³¹ After all, “product integration cannot . . . be fast forwarded, zapped or ignored.”³² Consequently, MillerCoors has negotiated deals with TNT and TBS to ensure that characters would drink only their beer, *The Apprentice* has built entire storylines around competitions to craft the best marketing strategy for integrated sponsored brands, and the winner of the spring 2003 season of *American Idol* was paid by a sponsor to wear its clothing on air.³³ Indeed, entire networks exist to partner with brands and provide content focused on particular industries.³⁴

Although product placement has always been common in American television, marketers used to view film as a poor investment for advertising dollars.³⁵ As mentioned previously, marketers were already on the hunt for new, subtler advertising channels, as the traditional “hard-sell” approach had lost both credibility and effectiveness.³⁶ Thus, when sales of Reese’s Pieces jumped following the 1982 premiere of *E.T.*, marketers took note of the correlation between product integration and real-world profits.³⁷ As a result, they began making concerted attempts to place their products in films, with hopes that such placement would translate to increased sales.³⁸

At the same time that marketers were waking up to the potential of product placement in films, producers of film content were in search of new funding sources. The demise of the studio system and decline of other traditional financing strategies, such as presales, coincided with marketers’ discovery of product integration as an advertising method.³⁹ Consequently, product placement in film expanded as producers and marketers developed a symbiotic relationship.⁴⁰ Not only did the two sides benefit, with producers gaining access to funds up-front and marketers tapping into a whole new world of communicative potential, but content authenticity also

³¹ Schuyler M. Moore, *Financing Drama: The Challenges of Film Financing Can Product as Much Drama as Takes Place on the Screen*, 31 LOS ANGELES LAWYER 26, 29 (May 2008).

³² Lewis, *supra* note 4, at 10.

³³ Berman, *supra* note 9, at 529; Benjamin R. Mulcahy, *That’s Advertainment!*, 29 LOS ANGELES LAWYER 44, 46 (May 2006); Kristen E. Riccard, *Product Placement or Pure Entertainment? Critiquing a Copyright Preemption Proposal*, 59 AM. U.L. REV. 427, 455 (Dec. 2009); Melissa Cheung, *Co.: We Paid Ruben to Wear Shirt*, ASSOCIATED PRESS (Aug. 1, 2003, 11:27 PM), <https://www.cbsnews.com/news/co-we-paid-ruben-to-wear-shirt/>.

³⁴ Litwak, *supra* note 3, at 9. For example, the Food Channel and TLC are specialized networks which provide programming focused on a particular industry sector. More specifically, shows like *Trading Spaces* have joined with corporate sponsors (Home Depot in this case) to incorporate shopping excursions into the show’s content.

³⁵ Tsai, *supra* note 25, at 289.

³⁶ *Id.*

³⁷ Lee, *supra* note 8, at 207.

³⁸ Litwak, *supra* note 3, at 9.

³⁹ Moore, *supra* note 31, at 29; *see also* Mulcahy, *supra* note, 33 at 44.

⁴⁰ *See* Lewis, *supra* note 4, at 11.

seemed to benefit, as recognizable brands made the on-screen world familiar to audiences who used those same brands in their daily lives.⁴¹ Product placement in American film thus arose at the convergence of changes in production financing and shifting consumer preferences.

This trend has not been limited to the United States, however. Chinese films have increasingly featured product placement, particularly as state funding has decreased following the implementation of the Open Door Policy and the decline of the Communist state's studio system.⁴² The practice has enabled the expansion of Chinese film production in the face of liberalization, while also inculcating a new culture of post-socialist cosmopolitanism.⁴³ Additionally, as the middle class in China has grown, giving rise to a consumerist culture interested in global products, product placement has fostered the brand identities both marketers and their purchasing audiences desire.⁴⁴ Thus product placement in Chinese films serves "as a means to explore market and identity" while also financing the very content production that is part of this cultural dialogue.⁴⁵

Product placement has therefore arisen in film and television in response to changing consumer tastes, evolving technology, and shifts in product financing.⁴⁶ The practice is now considered sacrosanct: "[there is] nothing more compelling for brand owners than to have their brands positively portrayed in a hit movie."⁴⁷ At root, product placement is the integration of a trademark into entertainment content. Placement may be visual, in which a good or service is simply visible on screen; spoken, involving verbal mention by an actor either on or off screen; or functional, wherein an actor actually utilizes the good or service on screen.⁴⁸ Thus James Bond wears an Omega watch and drives an Aston Martin,⁴⁹ Carrie Bradshaw wears Manolo Blahnik,⁵⁰ FedEx plays a prominent role in *Castaway*,⁵¹ and Ford is the car of choice in *Are We There Yet?*, *Alias*, *24* and *Die Another Day*.⁵²

⁴¹ Kai Falkenberg & Elizabeth McNamara, *Using Trademarked Products in Entertainment Programming*, 24 Comm. Lawyer 1 (2007), available at https://www.americanbar.org/content/dam/aba/publishing/communications_lawyer/commlawyer.authcheckdam.pdf.

⁴² Leung Wing-Fai, *Product Placement with 'Chinese characteristics': Feng Xiaogang's films and Go Lala Go!* 9, J. OF CHINESE CINEMAS, 125, 126-27 (2015).

⁴³ *Id.* at 126, 135.

⁴⁴ *Id.* at 127.

⁴⁵ *Id.* at 129.

⁴⁶ Lee, *supra* note 8, at 204.

⁴⁷ Samrawi Araia, *Fight Or 'Flight': Testing Trademark iPower in Film*, LAW360, (December 17, 2012).

⁴⁸ Tsai, *supra* note 25, at 291-92.

⁴⁹ Riccard, *supra* note 33, at 428.

⁵⁰ Robert M. Schwartz, Jennifer Glad and Jordan Raphael, *16 Entertainment Law & Litigation* § 6.13, Matthew Bender & Company, Inc. (2014).

⁵¹ Mulcahy, *supra* note 33 at 46.

⁵² Litwak, *supra* note 3, at 9.

III. TRADEMARK: ITS HISTORY AND EVOLUTION

A. *The Origins and Development of Trademark*

Trademark protection is available for any word, phrase, symbol, design or combination thereof that distinguishes the mark user's product or service from products or services offered by others.⁵³ While trademark arose in the United States as the result of specific market developments, the utility of trademarks is recognized around the world and protected by international cooperative efforts, such as WIPO's global trademark registration system.⁵⁴

In the United States, consumer autonomy and the ability to make informed decisions in the marketplace based on accurate information were the predicates for recognizing trademark as a legally protectable form of commercial speech.⁵⁵ From the beginning of their use, trademarks have performed a source-identifying function, communicating to consumers the origin of a particular product, which both protected the integrity of consumers' choices in the marketplace and reduced search and transaction costs.⁵⁶ Marks provide information and protect consumers from confusion or deception as to the source of a product or service while also guarding the reputation merchants have developed for their trademarks based on the quality of their products.⁵⁷ Thus trademarks "brand" a company's product or service and distinguish its offerings from those of competitors.⁵⁸

However, as mass production resulted in the manufacture of nearly identical goods, products had to be differentiated by more than information concerning their components or functions; such "parity products" are distinguishable only by their brand identification and associated qualities.⁵⁹ At the same time that the Industrial Revolution mechanized production processes and enabled more products in greater varieties to become available, advertisers shifted their focus to mass audiences. They began fostering "product personalities" that would draw connections between a product, a particular setting, and an associated meaning.⁶⁰

As a result, goods became distinguished by image rather than product facts,⁶¹ and advertising became less about communicating

⁵³ United States Patent and Trademark Office, Trademark, Copyright or Patent?, http://www.uspto.gov/trademarks/basics/trade_defin.jsp (last updated Jan. 11, 2010).

⁵⁴ See World Intellectual Property Organization, *Madrid - The International Trademark System*, <http://www.wipo.int/madrid/en/> (last visited Nov. 18, 2016).

⁵⁵ See Berman, *supra* note 9, at 537-38.

⁵⁶ See Newman, *supra* note 7, at 361.

⁵⁷ See Araia, *supra* note 47.

⁵⁸ Harris, *supra* note 6, at 310.

⁵⁹ Ronald K.L. Collins and David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697, 704 (Mar. 1993).

⁶⁰ *Id.* at 701-02.

⁶¹ *Id.* at 704.

information. Instead, it focused on drawing connections between a particular lifestyle and the product necessary to achieve it.⁶² The increasing reliance upon image and association has led to the rise of branding and caused a shift in trademark over time to become a property right which allows the mark holder to protect investment in their brand by preventing unauthorized use.⁶³ Therefore, though trademark was originally focused on consumer protection, in recent decades it has expanded to also safeguard brand identity,⁶⁴ prohibiting the exploitation of a competitor's mark, and hence its reputation, for the purpose of profit.⁶⁵

B. Trademark Jurisprudence

Given the shift in emphasis from trademark being primarily a consumer protection device to its status as a property right, much of trademark jurisprudence is based on mark holders' allegations of unauthorized use,⁶⁶ as trademark owners seek to preserve the symbols and images they have developed in association with their products and services.⁶⁷ Liability for unauthorized use of another's trademark is grounded in a violation of the Lanham Act, whereby the unconsented-to, deceptive or misleading use of another's mark in commerce,⁶⁸ such that the mark's economic value is appropriated, is considered an infringement of that trademark.⁶⁹ Under the Lanham Act, liability is based on either an explicitly misleading unauthorized use, a threat of confusion, or a mistake arising from an unauthorized use.⁷⁰

American courts have often accommodated unauthorized uses of trademarks in creative works by either refusing to find a Lanham Act violation when neither deception nor confusion is threatened, or by recognizing a fair use defense.⁷¹ Courts generally permit expressive use of another's mark so long as the use is neither expressly misleading nor likely to confuse consumers.⁷² By so doing, the courts have given wide latitude to

⁶² See *id.* at 699.

⁶³ See Harris, *supra* note 6, at 310-11.

⁶⁴ See William McGeeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49, 51 (2008).

⁶⁵ See *Films of Distinction v. Allegro Film Prods.*, 12 F. Supp. 2d 1068, 1074 (C.D. Cal. 1998).

⁶⁶ There is very little litigation regarding authorized use, as most disputes are settled out of court. See Litwak, *supra* note 3, at 10.

⁶⁷ See Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489, 491 (2006).

⁶⁸ Lanham Act, 15 U.S.C. § 1125 (2012).

⁶⁹ See *Brookfield Comms. v. West Coast Entm't Corp.*, 174 F. 3d 1036, 1046 (9th Cir. 1999).

⁷⁰ See Jennifer E. Rothman, *Initial Interest Confusion: Standing at the Crossroads of Trademark Law*, 27 CARDOZO L. REV. 105, 107 (2005).

⁷¹ Cf. *Wham-O, Inc. v. Paramount Pictures, Corp.*, 286 F. Supp. 2d 1254, 1263-64 (N.D. Cal. 2003).

⁷² Cf. *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2nd Cir. 1989); *No Fear, Inc. v. Imagine Films, Inc.*, 930 F. Supp. 1381, 1384 (C.D. Cal. 1995).

creators of expressive content while also preserving the consumer protection and mark holder investment interests which have been at the core of trademark since its inception.

The Second Circuit in *Rogers v. Grimaldi* articulated a balancing test which sought to avoid public confusion while also protecting free expression.⁷³ In *Rogers*, famed actress Ginger Rogers sued an Italian director for violations of the Lanham Act stemming from his choice of *Ginger and Fred* as the title for his film.⁷⁴ The court held that, in order to avoid public confusion, the Lanham Act applied to prevent unauthorized uses of marks which have acquired secondary meaning. here an unauthorized use of trademark in a title amounts to artistic expression rather than commercial speech, with the title bearing some relevance to the underlying work, the Lanham Act does not apply.⁷⁵ Thus, the court gauged infringement based on whether the unauthorized use in a title was artistically related to the underlying work and, if so, whether the use was explicitly misleading.⁷⁶

Mere months after the *Rogers* decision, the Second Circuit described the *Rogers* test as a mechanism by which to account for the “likelihood of confusion” arising from an unauthorized use, such confusion being the primary ill which trademark law seeks to avoid.⁷⁷ Accordingly, later courts which invoked the *Rogers* test to assess trademark infringement claims also referenced factors related to the risk of confusion caused by the unauthorized use, distinguishing the “explicitly misleading” approach of *Rogers* from other cases which lay out various methods of determining “likelihood of confusion.”⁷⁸ Thus “likelihood of confusion” appeared to be a supplement to the *Rogers* test,⁷⁹ allowing courts to rely upon their own schematics to evaluate the risk of confusion stemming from a challenged use.⁸⁰

The twin tests of *Rogers* and “likelihood of confusion” guided the court in *No Fear, Inc. v. Imagine Films, Inc.*, when it adjudicated a trademark infringement claim against a film studio’s use of “No Fear” as a movie title.⁸¹ The plaintiff sportswear company had trademarked “No Fear” and sought to enjoin the studio from utilizing it as its title.⁸² In evaluating

⁷³ *Rogers*, 875 F.2d at 999.

⁷⁴ *Id.* at 996-97.

⁷⁵ *Id.* at 999.

⁷⁶ *Id.*

⁷⁷ *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc.*, 886 F.2d 490, 495 (2nd Cir. 1989).

⁷⁸ *No Fear, Inc.*, 930 F. Supp. at 1382-83.

⁷⁹ *Id.* at 1382.

⁸⁰ See, e.g., *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979) (where the 9th Circuit laid out eight factors relevant to whether confusion was likely in a case of unauthorized trademark use).

⁸¹ *No Fear, Inc.*, 930 F. Supp. at 1382.

⁸² *Id.*

the question of infringement, the court relied on the *Rogers* test to determine the relevance of the film's title to its underlying content, finding "No Fear" was artistically relevant to the film's content.⁸³ It then invoked "likelihood of confusion" factors from two prior cases (*Twin Peaks* and *Sleekcraft*), but found the evidence on record insufficient to determine how likely it was that confusion would arise from the defendant's unauthorized use of the plaintiff's trademark.⁸⁴ Consequently, both the concept of "artistic relevance" from *Rogers* and "likelihood of confusion" factors are brought to bear when evaluating whether an unauthorized use of another's trademark constitutes infringement under the Lanham Act.

Though initially only applied to unauthorized uses in titles, the *Rogers* test has subsequently been expanded and applied to other expressive activity.⁸⁵ In the case of *Warner Bros. Entm't v. Global Asylum, Inc.*, a film studio that produced "mockbusters" was subject to a temporary restraining order and preliminary injunction against its use of Warner Brothers' trademarks in the *Lord of the Rings* trilogy.⁸⁶ The court found infringement arising from both the title of the defendant's film, *Age of Hobbits*, and its promotional poster, which used similar individual elements and the same overall aesthetic as Warner Brothers' film advertising for their Tolkien-based series.⁸⁷ Because the Hobbit marks had acquired strong secondary meaning, the defendant used a mark identical to Warner Brothers' mark and the use was in no way related to the trademarked term, the court denied the defendant any defense based on the *Rogers* test.⁸⁸

Beyond a defense based on artistic relevance and low risk of confusion, the court has also recognized the fair use defense in the context of unauthorized trademark use. *Wham-O v. Paramount Pictures* presented the question of whether the plaintiff's trademark "Slip-N-Slide" was infringed when the mark was used without authorization in a brief scene showing a film's main character, an adult, misusing the slide while attempting to relive his boyhood.⁸⁹ Weighing the four fair use factors in the

⁸³ *Id.* at 1384.

⁸⁴ *Id.*; see also *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d at 348-49. (The factors from *Twin Peaks* and *Sleekcraft* include the strength and similarity of the marks at issue; the proximity of the goods represented by the marks; the degree of care purchasers of the goods could be expected to exercise; the defendant's intent; artistic relevance of the disputed use; and evidence of actual confusion); Cf. *Twin Peaks Prods. v. Publications Int'l. Ltd.*, 996 F.2d 1366, 1379 (2nd Cir. 1993).

⁸⁵ See, e.g., *E.S.S. Ent. v. Rock Star Videos*, 444 F. Supp. 2d 1012, 1044 (C.D. Cal. 2006) (in which the court explicitly applied the *Rogers* test to find no infringement when the unauthorized use of a strip club's trademark and trade dress as sources for the independent design of a virtual strip club in a video game was relevant to the underlying work and not likely to mislead players as to the source or content of the game).

⁸⁶ *Warner Bros. Ent. v. Global Asylum, Inc.*, 2012 U.S. Dist. LEXIS 185695 at *2, 4-5 (C.D. Cal. 2012).

⁸⁷ *Id.* at *23-24, 35-36.

⁸⁸ *Id.* at *50.

⁸⁹ *Wham-O, Inc. v. Paramount Pictures, Corp.*, 286 F. Supp. 2d 1254, 1257-58 (N.D. Cal. 2003).

context of a film's use of a child's water slide, the court granted fair use given that the use was limited to only what was necessary and was unlikely to cause confusion as to endorsement.⁹⁰

Likelihood of confusion as to source or sponsorship has remained central to questions of what trademark uses are permissible or not. Unauthorized uses which are likely to result in confusion are generally held to be infringements, validating the consumer protection purpose which gave rise to trademark recognition originally while also ensuring that mark holders can protect the value of their marks as brand identifiers. At the same time, the fair use defense accommodates expressive activity that neither threatens the mark's value nor imperils consumer understanding by restricting permissive use to only that which is limited to what is necessary and referential to the product itself.

IV. PRODUCT PLACEMENT AND THE LAW

The aforementioned cases, while validating the mark holder's property interest in its mark, also give wide latitude to unauthorized uses which pose little to no threat to the mark's value or effectiveness. This rationale recognizes the shift of trademark from a source identification device to a standalone product. Because trademarks are now ubiquitous and have been invested with meaning beyond simply pointing to a product's origin, such marks have value apart from the good or service to which they have traditionally been affixed.⁹¹ Trademarks are now social signifiers, communicating values and allowing consumers to convey information about themselves by virtue of the trademarks they display.⁹² Therefore, product placement is really "trademark placement", with marketers seeking to associate their brands (and not just products or services), with particular content or specific stars.

Not only do brands benefit from the associations fostered by product placement, but consumers also derive utility from the image a brand develops through such placements.⁹³ Consumers often utilize trademarks in their own identity formation and communication,⁹⁴ and may pay more for a

⁹⁰ *Id.* at 1263-64. The four fair use factors are the purpose and character of the disputed use, including whether it is of a commercial or nonprofit nature; the nature of the copyrighted work, including whether it is fictional or factual; the amount and substantiality of the disputed use; and the degree of market harm from the disputed use. 17 U.S.C. §107; *Sony Corp. Of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448-51 (1984).

⁹¹ Newman, *supra* note 7, at 361-62. The fact that trademarks now have standalone value is further underscored by the practice of merchandising, whereby brands may license use of their trademarks on other goods, entirely contrary to the traditional function of trademark as a source identifier. *See, e.g., Id.* at 357-58.

⁹² *Id.* at 375-76.

⁹³ *Id.* at 360-61.

⁹⁴ Robbins, *supra* note 2, at 625.

particular brand based on the value they place upon that brand's image and reputation.⁹⁵

As has been discussed, consumers prefer the subtlety of product placement to traditional hard-sell advertising, which has driven in part the evolution of trademark into a product all its own.⁹⁶ Given this preference for more image-based and less information-driven marketing, the information content in advertising has been steadily decreasing.⁹⁷ Instead, advertising now appeals to consumer emotions and fosters "lifestyle associations" rather than providing information about a product.⁹⁸

Consequently, contemporary advertising tends to be non-rational, more focused upon conveying meaning and image than facts; the economic exchange is therefore converted into a trade of money for reputation, values, and personality.⁹⁹ Such "lifestyle advertising" appears increasingly like artistic expression, as it fosters associations between products and particular settings and seeks to elicit specific emotional responses from its audience.¹⁰⁰

Product placement is thus a creative choice, as producers seek to enhance the authenticity of their works by including recognizable brands in their programming.¹⁰¹ Incorporating familiar brands also augments the audience's experience by making the content more realistic.¹⁰² Therefore, product placement is not a purely commercial practice, but is quasi-expressive, a hybrid of entertainment and advertising.¹⁰³ Additionally, product placement is part of the social dialogue about brand and consumer identities; as brands foster particular associations, consumers either accept, reject or appropriate those associations, and brands then respond.¹⁰⁴ As a result, the trademarks which represent a particular brand and symbolize the values and lifestyle associated with that brand are also social signifiers, communicating information about individual identity and personality.¹⁰⁵ Nor can it be forgotten that, as a funding source, product placement enables expression which would otherwise be precluded.¹⁰⁶ In a way, mass-marketing practices such as product placement subsidize content creation.¹⁰⁷

⁹⁵ Newman, *supra* note 7, at 360.

⁹⁶ *Id.* at 361.

⁹⁷ Berman, *supra* note 9, at 516.

⁹⁸ *Id.*

⁹⁹ Collins & Skover, *supra* note 59, at 702-03.

¹⁰⁰ Neel U. Sukhatme, *Making Sense of Hybrid Speech: A New Model for Commercial Speech and Expressive Conduct*, 118 HARV. L. REV. 2836, 2855 (2005).

¹⁰¹ Lee, *supra* note 8, at 208.

¹⁰² Tsai, *supra* note 25, at 305.

¹⁰³ See Mulcahy, *supra* note 33, at 46.

¹⁰⁴ Sukhatme, *supra* note 100, at 2855.

¹⁰⁵ See Newman, *supra* note 7, at 375-76.

¹⁰⁶ Edward L. Ong, *An Embedded Solution: Improving the Advertising Disclosure Rules for Television*, 18 UCLA ENT. L. REV. 114, 130-31 (2011).

¹⁰⁷ Collins & Skover, *supra* note 59, at 740-41.

Given the multifaceted nature of product placement, determining how to situate the practice legally is a challenge. Because product placement does not convey information in a proposal for a monetary transaction, contrary to traditional advertising, it does not fall into the historic definition of commercial speech.¹⁰⁸ Likewise, unlike the substantiation requirement for commercial speech, wherein any claims asserted have to be demonstrably accurate,¹⁰⁹ product placement conveys images, not information, and makes claims concerning values and lifestyles which cannot be substantiated in the traditional sense.¹¹⁰ Consequently, product placement blurs the line between entertainment and marketing.¹¹¹ The practice, as a form of “advertainment,”¹¹² is therefore best considered hybridized commercial-noncommercial speech.

This blurring between commercial and noncommercial speech, between entertainment content and marketing messages, raises questions regarding whether product placement should qualify as a form of protected expression and what misleading means in an era of non-informational advertising.¹¹³ These questions reach the heart of contemporary concerns among consumer advocates who fear that product placement is a form of manipulative marketing.¹¹⁴ In theory, advertising communicates product information to consumers so that they can make rational choices, limiting the effect of advertising to commercial transactions.¹¹⁵ However, as previously observed, product placement does not make any material claims about a good or service.¹¹⁶

Communicating ideals rather than facts, product placement runs contrary to the conventional model of advertising as a vehicle for conveying information to rational consumers, whose reasoned decisions in the marketplace are thereby empowered.¹¹⁷ This model of the consumer as a rational problem-solver does not reflect reality, as consumers are motivated by emotion, image, and values.¹¹⁸ The very rise of product placement as a tool to communicate brand values and associations is reflective of this alternate reality, that modern consumers prefer image to information.

This contemporary preference flies in the face of traditional information-based models of and approaches to marketing and other forms

¹⁰⁸ Berman, *supra* note 9, at 500.

¹⁰⁹ Mulcahy, *supra* note 33, at 46.

¹¹⁰ Collins & Skover, *supra* note 59, at 700. Given this reality, product placement has never been subject to the substantiation requirement, as the practice does not make any direct claims about a particular good or service. See Tsai, *supra* note 25, at 298.

¹¹¹ Riccard, *supra* note 33, at 428.

¹¹² Mulcahy, *supra* note 33, at 44.

¹¹³ Berman, *supra* 9, at 515.

¹¹⁴ Mulcahy, *supra* note 33, at 44.

¹¹⁵ Collins & Skover, *supra* note 59, at 708.

¹¹⁶ *Id.* at 700.

¹¹⁷ *Id.* at 700, 727.

¹¹⁸ *Id.* at 708, 737–38.

of commercial speech. Advertising regulation and sponsorship disclosure requirements have been undergirded for decades by the concept of the public's right to know when they are being presented with a promotional message.¹¹⁹ However, this right to know is compromised by the shift towards non-informational advertising, making it difficult, if not irrelevant, to distinguish between truth and falsity in such advertising content.¹²⁰ In reality, "[t]here is no right to know" in terms of the public's claim upon information in order to make rational decisions, because in contemporary commercial culture decisions are not made based on reason or information.¹²¹

This is the state of affairs that most concerns consumer advocates, who maintain the public should be made aware of when they are being exposed to advertising, particularly in light of the explosion of advertising appealing to emotion rather than reason.¹²² Nor are these concerns limited to the American context. Critics evaluating product placement in Chinese films have voiced concern about the elevation of conspicuous consumption through such practices and the equation of consumption with identity.¹²³ Similarly, the integration of branded products into media content in India has raised worries about how democratic culture could be impacted by the growing nexus between corporations and media.¹²⁴ Europe has also had long-standing suspicion of incorporating sponsored products into content, largely due to experiences with political propaganda disseminated through state-run media.¹²⁵

Consumer advocates voice fears that hidden marketing messages manipulate consumers and undermine their autonomy.¹²⁶ Undisclosed sponsored messaging, also called "stealth marketing," is considered problematic because of the lack of consumer awareness of the advertising intentions behind the message¹²⁷ and the fact that the producer's voice is appropriated for the marketer's purpose without the audience realizing it.¹²⁸ Consumer advocates worry that undisclosed sponsorship undermines trust in media institutions and damages public discourse.¹²⁹

As a result, these advocates are voicing concerns over practices that have been partially driven by consumer preferences: the rise of product

¹¹⁹ Lee, *supra* note 8, at 232.

¹²⁰ Collins & Skover, *supra* note 59, at 739.

¹²¹ *Id.* at 740.

¹²² Lee, *supra* note 8, at 205.

¹²³ Wing-Fai, *supra* note 42, at 134.

¹²⁴ Vadehra et al., *supra* note 13.

¹²⁵ Lee, *supra* note 8, at 221.

¹²⁶ Ong, *supra* note 106, at 124; *see also* Lee, *supra* note 8, at 230 (quoting Jonathan Adelstein interview); Litwak, *supra* note 3, at 9.

¹²⁷ Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 83-84 (2006).

¹²⁸ *Id.* at 87.

¹²⁹ *Id.* at 86.

placement occurred in part because consumers tired of traditional information-based, direct-sell advertising.¹³⁰ At the same time, trademarks became increasingly associated with a brand image and identity rather than a physical product, investing the marks with independent value as social signifiers.¹³¹

Hence, personal identity is negotiated based on one's relationship to products and services.¹³² Because images have come to replace ideas, the marketplace has become one of "commercial symbols,"¹³³ which consumers appropriate, and at times transform, as part of their own identity formation and communication.¹³⁴ Trademarks are used as much, if not more, by consumers as they are by content producers to communicate values, personality, and identity.¹³⁵

Consequently, product placement and other forms of subtle advertising that convey associational rather than informational messages are a response to consumer preferences, and have utility for consumers who either incorporate the association into their own identity or else challenge the association in public discourse. Product placement exists in the nexus between content production and financing, mass marketing and public discourse. It is difficult to classify legally because of the many functions it serves and its position at the convergence of commercial and noncommercial speech. As a result, there is ongoing debate as to whether the practice should be considered commercial speech, manipulative marketing or expressive activity.¹³⁶

However, the principle of consumer autonomy underscores all three categories and should continue to guide legal and regulatory approaches to the practice. Commercial speech doctrine is rooted in the provision of information to consumers so that they can make rational decisions in the marketplace.¹³⁷ Disclosure requirements further this informational purpose by protecting consumers from fraud and preventing their manipulation by putting them on notice as to sponsors' influence so that they demand only what is in their interest.¹³⁸ Such requirements ensure consumers have complete information as to the monetary incentives behind a particular product's inclusion in content¹³⁹ and therefore advance consumer autonomy.¹⁴⁰

¹³⁰ Berman, *supra* note 9, at 501.

¹³¹ Robbins, *supra* note 2, at 624.

¹³² Collins & Skover, *supra* note 59, at 716.

¹³³ *Id.* at 698.

¹³⁴ See Newman, *supra* note 7, at 376.

¹³⁵ *Id.* at 375-76.

¹³⁶ See generally Berman, *supra* note 9, at 497.

¹³⁷ Collins & Skover, *supra* note 59, at 708.

¹³⁸ Ong, *supra* note 106, at 126.

¹³⁹ Lee, *supra* note 8, at 205.

¹⁴⁰ Goodman, *supra* note 127, at 87.

It is concern for consumer autonomy that animates advocates opposed to manipulative marketing based on fears that undisclosed sponsored messages insinuate desires and preferences into consumers' minds without their awareness.¹⁴¹ Likewise, the right to free speech and expression is rooted in concepts of individual autonomy and the role such expression plays in self-realization.¹⁴² Consequently, autonomy provides the foundation for expressive freedoms as well as consumer protection from manipulative marketing and commercial speech doctrine. Given its centrality, the principle of autonomy must be kept in mind as legal and regulatory categories are negotiated, particularly as relates to practices, such as product placement, which defy traditional classifications.

Thus, defining product placement in law and regulation must account for the interests of consumers, content producers, and mark holders, as all three parties have a stake in the practice. Product placement must be permitted for producers to continue financing content creation, for consumer preferences to be satisfied, and for marketers to foster the associations which define their brands while also contributing to social discourse. However, any regulation of product placement must allow producers to retain creative control¹⁴³ and should be subject to some form of disclosure so that consumers are aware how their preferences for subtler marketing techniques are being catered to.

Negotiating a legal and regulatory definition of and approach to product placement would be best achieved utilizing the same principles and factors at play in the "likelihood of confusion" and *Rogers* tests. While these tests, and the principles undergirding them, have been developed in response to claims of unauthorized trademark use, they are relevant to the authorized usage which product placement, by definition, is. The courts crafted balancing tests for cases of unauthorized use in order to protect mark holders' investments in their trademarks. In instances of product placement, the use is authorized and the mark holder has contracted and paid for a certain quality and quantity of use. If a producer goes beyond the authorized use, the mark holder may bring a breach of contract action.

Thus, a product placement agreement authorizing particular usage of a trademark provides protection for the mark, satisfying one of the three core interests which courts have sought to protect via their balancing tests. The remaining interests, those of the content producer and of the audience, may be protected when product placement is at issue by applying the principles of the "likelihood of confusion" and *Rogers* tests as well as the fair use defense. These three jurisprudential lodestars encourage more, not less, speech and allow producers to utilize marks so long as the usage does not jeopardize consumers' autonomy via confusion or deception. As such,

¹⁴¹ Berman, *supra* note 9, at 522.

¹⁴² See Collins & Skover, *supra* note 59, at 734-35.

¹⁴³ Moore, *supra* note 31, at 29.

all three seek to ensure that consumers have maximum access to creative content and to information regarding who paid for or sponsored the content.

These tests account for consumer interests in being informed of sponsorship arrangements, thereby avoiding confusion as to who is behind a particular message: the producer or marketer. Additionally, the *Rogers* test recognizes producers' interests in utilizing trademarks that are artistically relevant to their content.¹⁴⁴ The one caveat with such use is that it not be misleading,¹⁴⁵ which both protects consumers from deception while also preserving the value of a mark to its holder by ensuring the mark will not be misappropriated.

The principles of the "likelihood of confusion" and *Rogers* tests, coupled with disclosure, serve the interests of all the actors involved with product placement. They provide guidance to producers and marketers seeking to integrate products into content without running afoul of consumer protection concerns. Additionally, they reflect the standards that make product placement effective as a communicative tool,¹⁴⁶ and which elevates the practice as a consumer preference. Placements that are artistically relevant foster the associations from which both brands and consumers benefit and, so long as the placement is subtle, in keeping with consumer preferences, there is little risk of confusion and no threat of consumers being explicitly misled.

V. PRODUCT PLACEMENT AND GLOBAL FILM AND TELEVISION PRODUCTION

Combining the three core principles of American trademark jurisprudence (not explicitly misleading, low likelihood of confusion and artistic relevance) with disclosure requirements balances the interests of producers, marketers, and consumers. These elements should guide the formation of industry standards and guidelines for increasingly globalized film and television production and distribution. As production expands internationally, in part due to tax incentives to film in foreign countries,¹⁴⁷ producers operating in a global space need harmonized standards concerning product placement as both a financing mechanism and a creative choice. Additionally, distributors need unified guidelines so that exhibition of works can take place in multiple territories without having to edit a different version of the program for every jurisdiction.

Countries have diverged in their approaches to product placement and many have yet to address the practice specifically, leaving producers and distributors uncertain as to how the practice may be defined and

¹⁴⁴ *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2nd Cir. 1989).

¹⁴⁵ *Id.*

¹⁴⁶ Ong, *supra* note 106, at 124.

¹⁴⁷ Lewis, *supra* note 4, at 9.

regulated in any given territory. Historically the United States has been much more permissive of product placement, in contrast to Europe's approach, which is generally much more suspicious of the practice given the decades of state ownership of television.¹⁴⁸ The United States has tended to focus on disclosure requirements and avoid regulation¹⁴⁹ while Europe has taken the opposite approach, heavily regulating if not categorically prohibiting product placement.¹⁵⁰ Both Germany and Britain have imposed bans on the practice¹⁵¹ and the latest Directive from the European Commission specifies the parameters within which product placements may be allowed while also allowing individual countries to implement additional restrictions.¹⁵²

Beyond the United States and Europe, few other countries have dealt specifically with product placement in their laws and regulations, despite the growing use of the practice. Israel classifies as "misleading" any advertisement which is "incidental, masked or unconscious," such that the consumer does not recognize it as an advertisement, and prohibits blending marketing messages with editorial content.¹⁵³ In South Africa, product placement within news content is prohibited, while the use of the practice in any other broadcast content is subject to regulation requiring the advertisements be clearly recognizable.¹⁵⁴ However, neither Kenya nor Nigeria, both hubs for African film production (particularly Nigeria, with its Nollywood industry), have any rules specifically pertaining to product placement.¹⁵⁵ Turkey permits product placement in film and television content, so long as accompanied by disclosures at the beginning and end of the program as well as immediately following any commercial break.¹⁵⁶ Additionally, the placed product must not be misused or overemphasized, such that the integrity of the creative content might be compromised.¹⁵⁷ Venezuela only permits product placement in sports programming, requiring that the advertiser disclose its sponsorship and prohibiting certain goods (alcohol, tobacco, etc.) from being promoted in product placement.¹⁵⁸

Although China's domestic film industry has grown rapidly in the past few decades as a result of the Open Door Policy and product placement has become commonplace,¹⁵⁹ there are no laws or regulations in China

¹⁴⁸ Lee, *supra* note 8, at 221.

¹⁴⁹ *Id.* at 229-30.

¹⁵⁰ Chuck Cosson & Andrew M. Mar, *EC, Product Placement and the Web*, 24 COMM. LAWYER 16, 15-16, 21 (2007); Lee, *supra* note 8, at 221-24.

¹⁵¹ Litwak, *supra* note 3, at 11.

¹⁵² Cosson & Mar, *supra* note 150, at 21.

¹⁵³ GLOBAL ADVERTISING LAWYERS' ALLIANCE, *Advertising Law: A Global Legal Perspective*, 379 (2015).

¹⁵⁴ *Id.* at 674.

¹⁵⁵ *Id.* at 438, 532.

¹⁵⁶ *Id.* at 739.

¹⁵⁷ *Id.* at 739.

¹⁵⁸ GLOBAL ADVERTISING LAWYERS' ALLIANCE, *supra* note 153, at 822.

¹⁵⁹ Wing-Fai, *supra* note 42, at 126.

which address the practice directly.¹⁶⁰ Likewise, in India, where film production has grown so substantially that the domestic industry has been dubbed “Bollywood,” there are a handful of regulations pertaining to advertising and sponsored content, but nothing that focuses on product placement specifically.¹⁶¹ Consequently, outside of the United States, product placement is either severely restricted if not banned outright, or it occupies a grey area under the umbrella of general advertising law.

Categorical bans fail to take into account the pivotal role that product placement may play in production financing, and do not reflect the consumer preference for and utility from the use of product placement. Indeed, imposing heavy restrictions and outright prohibitions actually threatens the very autonomy which is purportedly at stake in the practice: government regulation may be paternalistic in trying to limit choices and keep information from the public, purportedly for the public’s own good.¹⁶² Additionally, product placement enables the creation of content which would otherwise never be produced, increasing consumer choice and access.¹⁶³ Consequently, consumers might accept product placement and other hidden marketing messages as a “trade-off for other benefits.”¹⁶⁴

Whereas regulation and prohibition might threaten autonomy, disclosure requirements enhance autonomy by informing consumers “when and by whom [they are] being persuaded.”¹⁶⁵ Autonomy is furthered when individuals have more complete information upon which they may make decisions, not the least of which is deciding what lifestyle and identity one prefers.¹⁶⁶ Product placement, and trademarks more generally, is part of social discourse concerning brand and personal identity.¹⁶⁷ Because individuals utilize trademarks to communicate information about themselves, creating an association between their own personality and the trademarks they use, such “emotional investiture” may be harmed by “disassociating people from their prepared social images.”¹⁶⁸ Additionally, consumers purchase particular brands based on their personal valuation of the brand’s utility as a social signifier, often paying a premium for that value.¹⁶⁹ Consumers contribute just as much, if not more, to the public discourse concerning brand identity and reputation,¹⁷⁰ while also using

¹⁶⁰ See Han, *supra* note 13.

¹⁶¹ Vadehra et al., *supra* note 13.

¹⁶² Berman, *supra* note 9, at 500.

¹⁶³ *Id.* at 536.

¹⁶⁴ *Id.* at 535-36.

¹⁶⁵ Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963*, 56 FED. COMM. L.J. 329, 332 (2004).

¹⁶⁶ See Collins & Skover, *supra* note 59, at 742.

¹⁶⁷ Newman, *supra* note 7, at 362.

¹⁶⁸ *Id.* at 362-64.

¹⁶⁹ *Id.* at 379.

¹⁷⁰ *Id.* at 376.

brands for their own communicative and identification purposes,¹⁷¹ making any ban on product placement an intrusion into this public dialogue.

Product placement has value and benefits for consumers, which is unsurprising given the role of consumer preference in the expansion of product placement to begin with. To properly safeguard consumer autonomy (not to mention producers and marketers), any legal and regulatory approach to product placement should focus on more speech, not less. Disclosure requirements serve this end by empowering consumers with more information and facilitating content creation by informing producers, distributors, and marketers of the standards they must meet for the use of product placement.¹⁷²

VI. DEFINING PRODUCT PLACEMENT INTERNATIONALLY

Given the reality of globalized film production and distribution, the industry needs a streamlined approach to product placement to ensure content is financed, created, and exhibited without unnecessary obstacles. The World Intellectual Property Organization (WIPO) would be most effective in facilitating discussion and drafting a standard for product placement. WIPO has been in existence for decades and has developed expertise about intellectual property worldwide.¹⁷³ It has standing committees on Copyright and Related Rights and on Development, and Intellectual Property, both of which could provide a viable forum for discussions and drafting of an international product placement standard.¹⁷⁴

The standard should clearly articulate disclosure requirements and avoid the “hard sell” trap of discredited advertising from decades ago,¹⁷⁵ lest disclosure wind up as ineffective and disliked as old-school marketing. Disclosure which is too aggressive or disruptive, such as Commercial Alert’s suggestion of in-program popups, are likely to frustrate consumers and be avoided by advertisers, which would compromise content financing.¹⁷⁶ Placing disclosures before or after a program may not reach the intended audience, as many viewers do not watch opening and closing credits.¹⁷⁷

A possible solution to this disclosure conundrum, at least for television, might be to integrate disclosure into the program via an ad spot

¹⁷¹ Robbins, *supra* note 2, at 624.

¹⁷² Goodman, *supra* note 127, at 86.

¹⁷³ *Inside WIPO*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/about-wipo/en/> (last visited Jan. 19, 2018).

¹⁷⁴ *See Standing Committee on Copyright and Related Rights (SCCR)*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/policy/en/sccr/> (last visited Jan. 19, 2018); *Committee on Development and Intellectual Property (CDIP)*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/policy/en/cdip/> (last visited Jan. 19, 2018).

¹⁷⁵ Tsai, *supra* note 25, at 293, 304.

¹⁷⁶ Ong, *supra* note 106, at 134-35.

¹⁷⁷ *Id.* at 133.

occurring immediately before or after a given program segment. Producers could create a 15-second disclosure message that meshes well with the program at hand, perhaps by having one of the show's actors deliver it, or even creating a mini-scene in which the disclosure message is creatively communicated. These disclosure messages need not be long to be effective, as demonstrated by countless viral videos of very brief duration and the entire enterprise of Vine videos, which by definition are limited to six seconds.¹⁷⁸ Additionally, utilizing the already familiar on-screen talent would likely increase consumer awareness, as the audience would recognize the actor(s) and setting and pay attention.

Such inventive messaging would be short, keeping costs down, and would rely upon cast and crew already employed for the production, which would also help to keep the price low. The costs of producing these short messages could be distributed across the overall supply of traditional ad spots and/or be incorporated into the price tag of product placement itself, requiring the marketers who benefit from product placement to bear responsibility for consumer education.

A similar approach could be taken with film, wherein producers would be required to incorporate a disclosure message as either part of the opening or closing credit sequence, in exchange for government refraining from further regulation of the practice. Industry standards, rather than government rules, could be developed to guide disclosures, allowing producers to exercise their creativity and craft messages which integrate well into their content.

Credits are increasingly a form of art all their own, often including elements of the film in the sequence. Opening credits might provide an introduction to the characters, setting, and storyline of a film, while closing credits may include an epilogue, blooper reel or teaser for a subsequent sequel or spin-off. Integrating a disclosure message into this format would be creatively appropriate and likely more effective in raising audience awareness, particularly if included at the beginning of a film. Producers would have discretion to craft a disclosure which is apropos for the film and integrates well with the genre, theme, tone, and overall storyline.

In addition to encouraging producers to create disclosures tailored to their content, WIPO could invite governments, advocates, nonprofits, and individual consumers to get into the act by contributing their own "disclosure" messages, whether about a specific program or film or regarding the practice of product placement in general. These entities could run competitions to garner consumer-created disclosure messages, leveraging the power of social media to engage viewers and expand the reach of such awareness campaigns. Schools and universities could

¹⁷⁸ See VINE, <https://vine.co> (last visited Jan. 19, 2018); Mike Isaac, *Vine, the Six-Second Video App, Is Not Quite Shutting Down*, THE N.Y. TIMES (Dec. 16, 2016), <https://www.nytimes.com/2016/12/16/technology/vine-app-twitter.html>.

contribute to public education by also creating disclosures, which would simultaneously increase media literacy amongst adolescents and college students while multiplying the information concerning product placement available in the marketplace.

As the public becomes more aware of product placement as both a financing tool and a marketing strategy, they can formulate their own preferences as to the practice. Those who dislike product placement may be willing to contribute funding to content production in other ways, perhaps through crowd-sourced financing or increased ticket sales. At the very least, consumers could engage in a frank discussion as to whether they want government attempting to regulate neurology and, if so, the potential for regulatory capture.¹⁷⁹

In the end, the goal for an international standard concerning product placement should be more speech, not less. Consumers should be involved in increasing awareness and the very technology which has helped drive product placement ought to be leveraged to facilitate disclosure and more discourse about film and television production, financing, and content and the participation of marketers in this process.

VII. CONCLUSION

Rather than undermine autonomy, any legal or regulatory response to product placement ought to focus on enhancing autonomy, which is furthered by informed decision making. Thus, more speech, rather than less, should be encouraged. Expanding speech via disclosure requirements would allow consumers to assess the involvement of a sponsor in a particular film or television show and determine for themselves their perspective on the sponsorship. Indeed, because there is such a history of disclosure in the United States, consumers are generally aware of the practice of product placement and often recognize when it takes place. A similar approach in other countries could educate consumers as to the role sponsors play in financing the films and television shows of which they are fans. Then the consumers could decide how they feel about the sponsor's involvement and whether they want to continue viewing the content. Given that consumer preferences have been a central driver behind the rise of product placement, deference ought to be given to their informed choices.

Beyond disclosures in individual works, the government could undertake public service campaigns aimed at informing consumers of the research regarding the subconscious effects of product placement. Increasing public awareness would permit consumers to reach their own conclusions about the practice of product placement more generally, then signal their preferences to producers and marketers by the choices they make in the marketplace. Indeed, part of the discussion must include

¹⁷⁹ See Lee, *supra* note 8, at 228.

whether consumers want the government to regulate in the interest of protecting them from their own neurology. If product placement influences consumers at an unconscious level, then those consumers should have a say in whether and how they want the government to intervene. Additionally, the vital role that product placement plays in financing content development cannot be ignored and consumers should grapple with whether they prefer content paid for by sponsoring marketers or whether they would be willing to pay more for sponsorship to be unnecessary.

The most effective way to harmonize the approach to product placement would be through WIPO, situated under the UN. WIPO has already instituted an international trademark registration system, whereby mark holders can file a single application for trademark recognition in multiple countries. Thus, WIPO has expertise in the field of trademark and its conceptualization around the world. Additionally, WIPO has a Permanent Committee on Development and Intellectual Property which could take the lead in discussions and in drafting an international standard for disclosure of product placement practices. Such a standard would facilitate content creation by providing producers and marketers with clear guidelines regarding product placement while advancing autonomy by ensuring that consumers are informed when the practice is included in the content they are viewing.

WIPO can also encourage countries to engage citizens with public awareness campaigns and advocacy competitions, leveraging the Internet and social media to enhance consumer understanding of film and television production, financing, and content creation. Overall, the goal should be more speech, more dialogue, and more citizen engagement, fostered by an international coalition.