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Angelopoulos, C.J.

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# Product Placement

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## *Product Placement in European Audiovisual Productions*

by Christina Angelopoulos

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# Foreword

There are areas of law that are so complex that legislators evidently find it hard to get to grips with them, and one of these areas is presumably product placement. The starting-point for the harmonisation of national solutions, which was the aim of the Audiovisual Media Services Directive (AVMSD), was itself a complicated matter. Despite the legal framework laid down by the “Television without Frontiers” Directive, there was a (presumably correct) impression that product placement was neither really prohibited nor really permitted under EU law. The result was that it was allowed in Austria but banned in Germany but could at any rate be seen on EU TV screens in some American films.

In essence, the EU legislators have enacted the following rules to deal with this situation:

Product placement is in principle prohibited but is permitted in the cases mentioned (with the exception of children’s programmes and certain products) unless a member state decides otherwise. The permission only applies under the conditions set out in the Directive, but member states can in some cases derogate from these conditions and in other cases impose more stringent rules.

Article 1(1)(m) AVMSD defines product placement as “any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration”.

According to Recital 91 AVMSD, the provision of goods or services free of charge, such as production props or prizes, should only be considered to be product placement if the goods or services involved are of significant value, but the Directive says nothing about the decisive question of how this value is to be ascertained.

Product placement causes additional difficulties because its very nature means it cannot easily be recognised and distinguished from forms of both permitted advertising (sponsorship) and prohibited (surreptitious) advertising.

Another reason why product placement is an explosive issue is that in many cases hopes are pinned on its presumed economic potential, which could be significant in the context of the strengthening of the European market. In times when money is short, the very prospect of additional sources of income through product placement arouses acquisitive desires and leads to rivalries. Among other things, it puts the focus on the relationship between private and public broadcasters. Who can profit from product placement? Who is dependent on it?

Product placement is also complicated because the advertisers’ interest in the customer is not necessarily identical to the customer’s interest in “fair” advertising, let alone audiovisual

content. At stake are the responsibility and editorial independence of the media service provider and the protection of the consumer, as well as the protection of culture from the influences of commercialism. All these reservations have been raised against product placement and have resulted in a difficult legislative balancing act, as shown by the unusually flexible construction of the Directive's rules on product placement.

In view of the complexity of this subject (and the EU rules), we believed it was necessary to publish this *IRIS plus* in order to reconcile the provisions on "product placement" with what is becoming product placement practice. The lead article accordingly takes a very thorough look at the genesis, structure, purpose and wording of the new EU provisions and their possible interpretations. By way of illustration, some of the first instances of the transposition of the EU rules into national law are examined where possible. More concrete examples of national rules – and their application – can be found in the Related Reporting section. The Zoom completes the data currently available (early April 2010) on rules concerning product placement in the EU member states, with references to national implementation rules and their wording.

Finally, it should also be mentioned that the provisions of the AVMSD on product placement were numbered until recently as Article 3g. Following the renumbering, which was published in the Official Journal of the EU (L 95/1) on 15 April 2010 as the codified version (Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)), they have become Article 11, but there has been no change in the wording. References to the Directive in this *IRIS plus* may therefore contain the former number of Article 11 (and other rules) of the Directive. Directive 2010/13/EU is available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF>

When reading the AVMSD, I naturally recommend that this *IRIS plus* be held at the ready as a means of orientation.

Strasbourg, April 2010

**Susanne Nikoltchev**

*IRIS Coordinator*

*Head of the Department for Legal Information  
European Audiovisual Observatory*

# Product Placement in European Audiovisual Productions

Christina Angelopoulos  
*Institute for Information Law (IViR), University of Amsterdam*

## I. Introduction

In the branded new world we live in logos and the products and services they represent are familiar sights.<sup>1</sup> Yet the reflection of this reality in audiovisual works cannot always be freely effected. The inclusion of or reference to branded goods and services in the programmes offered by audiovisual media services can of course constitute an independent, and thus unregulated, editorial decision on the part of the programme-maker; however, when such inclusions or references are commissioned by advertisers in exchange for consideration or with a view to promoting the product or service, legislative attention is attracted. With product placement in foreign productions already prominent on European airwaves, cultural perceptions shifting together with sophisticated modern audiences and alternative methods of retaining advertisers' interest in audiovisual media services and of boosting net advertising revenues being sought, the regulation of product placement was introduced to the European regulatory framework with the 2007 Audiovisual Media Services (AVMS) Directive.<sup>2</sup> The European Commission's initial intention in approaching the question of product placement was full liberalisation, with the objective of strengthening the position of the European audiovisual industry vis-à-vis its foreign counterparts.<sup>3</sup> Nevertheless, this approach met with fierce opposition by member states and stakeholders.<sup>4</sup> In the final Directive, a compromise was sought in a symbolic prohibition, set off by liberal exceptions introduced within a system of optional harmonisation.

Why such a cautious approach? Despite its advantages, as we shall see below, the inclusion of product placement in audiovisual works goes against deeply ingrained European taboos against the picking and mixing of editorial and commercial content.

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1) N. Klein, *No Logo*, (Flamingo, London 2000) 107.

2) Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [2007] OJ L332/27 (hereafter Audiovisual Media Services Directive or AVMS Directive). It should be noted that in this IRIS *plus* the numbering cited will be that of the codified version of the AVMS Directive.

3) M. Robichon-Lindenkamp, "De Richtlijn audiovisuele mediadiensten: liberalisering reclameregels voor traditionele televisie en meer regels voor on-demand diensten", *Mediaforum* 2008-2, 73.

4) O. Castendyk, "Article 3g AVMSD" in O. Castendyk, E. Dommering and A. Scheuer (eds), *European Media Law*, 2008, Kluwer Law International, p. 911.

## II. Implied Prohibition: Product Placement under the TVwF Directive

In the old Television without Frontiers (TVwF) Directive,<sup>5</sup> Article 10(1) provided that “[t]elevision advertising and teleshopping shall be readily recognizable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means.” The provision enshrined two closely connected principles, which form essential underpinnings of the EU *acquis* in the area of television broadcasting and codify the fundamental concept of fairness in advertising as developed in the legal traditions of various member states:<sup>6</sup> the principles of separation of commercial from editorial content and of the identification of advertising. The rationale behind the principles of separation and identification is at least threefold: first, they aim at the protection of viewers from disguised commercial messages; secondly, they safeguard the editorial independence and integrity of broadcasters;<sup>7</sup> and third, they protect media neutrality and ensure fair competition between different brands.<sup>8</sup> The protection of authors’ rights has also been mentioned as offering additional support to the two principles.<sup>9</sup>

The principles of separation and identification are the basis of the ban on surreptitious advertising, as imposed by Article 10(4) TVwF Directive.<sup>10</sup> Surreptitious advertising was defined in Article 1(d) TVwF Directive as “the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the broadcaster to serve advertising and might mislead the public as to its nature.” In 2004, the Commission in its Interpretative Communication on the TVwF Directive<sup>11</sup> broke down the definition of surreptitious advertising and concluded that a “representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services” will be considered to be surreptitious advertising only if it meets three cumulative conditions: if it is (a) intended by the broadcaster; (b) done to serve advertising; and (c) capable of misleading the public as to its nature. Article 1(d) specifies that a representation will be “considered to be intentional in particular if it is done in return for payment or for similar consideration.”

Product placement by definition involves the appearance of branded goods or services within editorial content. By its very nature, it presupposes a blurring of the lines between the editorial content and advertising, while simultaneously flirting dangerously with the qualifications for surreptitious advertising. As a result, the emergence of this new advertising technique raised questions of compatibility with both paragraphs (1) and (4) of Article 10 TVwF Directive. It is indicative that the 2005 British Ofcom consultation on product placement described the practice as “an exemplar of a technique that breaches [the] separation principle.”<sup>12</sup> The current Irish consultation on the draft code on audiovisual commercial communications classifies it as “a type of surreptitious advertising.”<sup>13</sup>

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- 5) Council Directive of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (consolidated version) [1989] OJ L 298/23 (hereafter: Television without Frontiers (TVwF) Directive).
  - 6) Green Paper on the Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable, COM (84)300 final, 14 June 1984, available at: <http://tinyurl.com/ygt9zke>
  - 7) O. Schaar, “Article 10 TWFD” in O. Castendyk, E. Dommering and A. Scheuer (eds), *European Media Law*, 2008, Kluwer Law International, p. 511.
  - 8) It has been suggested that the principle of separation’s aim of fair competition is not relevant specifically in the area of product placement, as all competitors have the same chance to engage in the practice, see *supra* FN 4, p. 909. This issue however, as well as that of authors’ rights, shall not be analysed in this IRIS *plus*.
  - 9) I. Katsirea, *Public Broadcasting and European Law – A Comparative Examination of Public Service Obligations in Six Member States*, 2008, Kluwer Law International, p. 5 and T. McGonagle, “Workshop Report” in “Audiovisual Media Services without Frontiers: Implementing the Rules”, IRIS *Special*, September 2006, European Audiovisual Observatory.
  - 10) Commission interpretative communication on certain aspects of the provisions on televised advertising in the Television without frontiers’ Directive, 28 April 2004, OJ C 102/02.
  - 11) *Ibid.*
  - 12) Ofcom, “Product Placement: A consultation on issues related to product placement”, 19 December 2005, available at: <http://tinyurl.com/yk68zxm>
  - 13) Broadcasting Authority of Ireland, “Consultation Document – Draft Codes on Audiovisual Commercial Communications”, 2 November 2009, available at: <http://tinyurl.com/yhjnzdg>

Under the TVwF Directive the legal status of product placement was unclear.<sup>14</sup> No express mention was made of the practice, leaving national commentators, judges and legislators to draw their own conclusions. In most member states product placement was either unregulated or seen as prohibited under the rules for surreptitious advertising.<sup>15</sup> In its 2004 Interpretative Communication, on the basis of its conclusions as to the three cumulative conditions that must be fulfilled for surreptitious advertising to occur, the Commission resolved that no absolute ban on all references in words or pictures to goods, to services, to the name, the trade mark or to the activities of a producer of goods or a provider of services, thus including product placement, was imposed by the Directive. Product placement would only qualify as surreptitious advertising if it was intended by the broadcaster to serve advertising and was capable of misleading the public.<sup>16</sup> The Communication brought this point home by connecting the importance of allowing certain instances of product placement with freedom of expression in a world full to the brim with branded goods.

This interpretation aligns well with Court of Justice of the European Union (ECJ) case law clarifying the reach of the principle of separation. In the 2004 *Bacardi* case,<sup>17</sup> the Court established that “indirect advertising”, meaning advertising that is impossible to feature exclusively during the designated advertising intervals between the television programme broadcast, but unavoidably appears alongside editorial content in a random fashion that cannot be influenced by the broadcaster,<sup>18</sup> cannot be regarded as “television advertising” within the meaning of the Directive<sup>19</sup> and is therefore not subject to the principle of separation. The ECJ did not examine whether such indirect advertising is compatible with provisions on surreptitious advertising, as the referring national court did not request a preliminary ruling on that matter – we must conclude that this question will depend on whether the separate set of conditions for surreptitious advertising are fulfilled or not. Product placement arguably constitutes a form of “indirect television advertising” within the meaning of the *Bacardi* judgement. Hence, if the avoidance of product placement in a programme is impossible for the broadcaster, the principle of separation will not have been breached. Legality will be exclusively established on the basis of the rules on surreptitious advertising.<sup>20</sup>

One of the most important consequences of this interpretation is the leeway it permitted for broadcasters to offer independently produced works containing product placement. This resulted from the fact that, although arguably capable of misleading the public, a product placement could not be deemed to be intended by a broadcaster who merely acquired the rights to broadcast the work or communicate it to the public from others and had no influence over the content during the production process. This is of especial significance in relation to foreign, particularly US-made, works. Hence, the broadcasting of foreign audiovisual works from non-Member States with less stringent national media provisions was presumptively regarded as lawful under the TVwF Directive<sup>21</sup> and was unanimously accepted on the national level.<sup>22</sup> In certain jurisdictions, following the same logic, the same was true of films made for the cinema, provided of course that no national broadcaster

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14) *Supra* I. Katsirea FN 9, p. 8.

15) Bird and Bird/Carat Crystal, “Study on the Development of new Advertising Techniques”, available at: <http://tinyurl.com/y93gaws>

16) For an interpretation of the term “misleading”, as well as an analysis of the relationship between product placement and other audiovisual commercial communications and unfair commercial practices see, J. Kabel, “Audiovisual Media Services and the Unfair Commercial Practices Directive”, IRIS *plus* 2008-8, European Audiovisual Observatory.

17) Case C-429/02 *Bacardi France SAS, formerly Bacardi-Martini SAS v Télévision française 1 SA (TF1), Groupe Jean-Claude Darmon SA and Giro Sport SARL* [2004] ECR I-6613.

18) O. Castendyk and L. Woods, “Article 1 TWFD” in O. Castendyk, E. Dommering and A. Scheuer (eds), *European Media Law*, 2008, Kluwer Law International, p. 302.

19) Television advertising is defined in Article 1(c) of the TVwF Directive (now Article 1(i) AVMS Directive) as “any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment.”

20) O. Castendyk and L. Woods, “Article 1 TWFD” and O. Schaar, “Article 10 TWFD” in O. Castendyk, E. Dommering and A. Scheuer (eds), *European Media Law*, 2008, Kluwer Law International, pp. 302, 504 and 511.

21) *Supra* T. McGonagle FN 9; Department of Culture, Media and Sport, “The Audiovisual Media Services Directive – Consultation on Proposals for Implementation in the United Kingdom”, July 2008, available at: <http://tinyurl.com/yjanh3q>.

22) *Supra* FN 4, p. 512.



benefited directly from the arrangement.<sup>23</sup> The result was a dual system under which independently produced works and programmes produced or commissioned by a European broadcaster received drastically different treatment. From the point of view of broadcasters' editorial independence, the rationale behind this solution makes sense: the offering of acquired productions will have been motivated by audience appeal and not advertising money, meaning that the crucial editorial integrity of broadcasters was preserved.<sup>24</sup> From the point of view of the effect on viewers, however, it is impossible to ignore the double standard instituted.

Nevertheless, during the 2005 public consultation, the Commission appears to have recanted on this position; in its fourth Issues Paper for the audiovisual conference in Liverpool entitled "Commercial Communications", the Commission pronounced that "[t]he dual requirement of identification and separation implicitly has the effect of not authorising, within the current legal framework, recourse to product placement in programmes produced by broadcasters covered by the TVwF Directive."<sup>25</sup> The intrinsic incompatibility of product placement with the separation principle is, according to this view, sufficient in and of itself for the barring of the practice, regardless of the intricacies of the Directive's provisions on surreptitious advertising. The Issues Paper suggests a possible escape route in a reformulation of the principle of separation along precisely the same lines as those suggested by the ECJ in *Bacardi*: "For product placement to be made possible, the principle of separation should cease to be an essential criterion and should simply be one of the means to enable users to identify commercial content and to distinguish it from editorial content." As we shall see below, this was indeed the approach adopted in the AVMS Directive.

### III. The AVMS Directive's Dodge: Product Placement Escapes the Principle of Separation

In the AVMS Directive, Article 10 of the TVwF Directive is wrought asunder: the principle of separation is confined to Chapter VII AVMS Directive and thus limited exclusively to "television advertising and teleshopping". Thus, according to Article 19(1), "[w]ithout prejudice to the use of new advertising techniques, television advertising and teleshopping shall be kept quite distinct from other parts of the programme by optical and/or acoustic and/or spatial means." The principle of identification on the other hand, although also retained alongside the principle of separation in Article 19, makes an appearance in Chapter III as well, where Article 9 states that "audiovisual commercial communications shall be readily recognisable as such." The same article goes on to prohibit what has now been re-branded "surreptitious audiovisual commercial communications".

Article 1(h) AVMS Directive defines "audiovisual commercial communications" as "images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes." The term "images with or without sound" is understood as forming a broader concept than the direct, instrumental announcements conveying a clear and explicit message that characterises "television advertising".<sup>26</sup> Thus, "audiovisual commercial communications" emerges as the wider concept, embracing the sub-genus of "television advertising" within its scope. Article 1(h) clarifies for the avoidance of doubt that "[f]orms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement."

As a result, in the revised Directive, the approach hinted at in the *Bacardi* case law and the European Commission's Interpretative Communication is officially adopted. Product placement,

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23) See for example, Ofcom Broadcasting Code, Section 10.5 and Irish BCI General Advertising Code, Section 3.3.7.

24) *Supra* DCMS Consultation FN 21.

25) European Commission, "Issues Paper for the audiovisual conference in Liverpool: Commercial Communications", July 2005, available at: <http://tinyurl.com/yatj5et>

26) R. Chavannes and O. Castendyk, "Article 1 AVMSD" in O. Castendyk, E. Dommering and A. Scheuer (eds), *European Media Law*, 2008, Kluwer Law International, p. 838.



alongside other forms of audiovisual commercial communications, is only subjected to the principle of identification and not its complementary principle of separation. The latter is limited to the sister-categories of “television advertising” and “teleshopping” alone. This point is made explicit by Recital 81: “the principle of separation should be limited to television advertising and teleshopping, and product placement should be allowed under certain circumstances, unless a Member State decides otherwise.” Thus, the prohibition of product placement is officially cast aside and transparency is adopted as an adequate safeguard for viewer interests.<sup>27</sup> As under the TVwF Directive, product placement, as a form of audiovisual commercial communication, is of course also still subject to the prohibition of surreptitious advertising. Again, Recital 81 makes the connection between Article 9 and Article 11 explicit: “However, where product placement is surreptitious, it should be prohibited.”

#### **IV. The Regulation of Product Placement in the AVMS Directive**

One of the main changes brought about by the AVMS Directive was the introduction of provisions regulating product placement. Article 1(m) defines product placement as “any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration.” The mention of trade marks within the definition is especially important as it indicates that the inclusion of advertisements for products or services in a programme will qualify as product placement. In addition, it confirms that product placement is also possible in animated programmes. Other conceivable objects of placements, such as locations or landscapes, are not covered by the definition. The requirement that the communication be made in return for payment or similar consideration is also significant: firstly, it sets a stricter standard for the establishment of product placement in comparison to the Directive’s provisions on surreptitious advertising (see below Section VI.2). Secondly, it emphasises that the conditions imposed by Article 11 on lawful product placements are incumbent on all programmes shown by media service providers under EU jurisdiction, regardless of the involvement of the media service provider in their production (see below Section V).<sup>28</sup>

The wording of Article 11 AVMS Directive is complicated and speaks volumes about the conflicted European attitudes towards the practice. Its logical structure is organised around three basic elements: a rule, an exception to the rule and an exception to the exception.<sup>29</sup> Accordingly, Article 11 para. 2 states, with seeming firmness, that “product placement shall be prohibited.” This prohibition however is then significantly watered down by a set of broad exceptions. “By way of derogation”, paragraph 3 concedes, product placement is admissible:

- “in cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes”, provided these are not children’s programmes;
- or
- “where there is no payment, but only the provision of certain goods or services free of charge, such as production props and prizes, with a view to their inclusion in a programme.”

The system is an opt-out one, meaning that member states are free to impose stricter regulations or a full ban. In any case, these exceptions must adhere to a list of minimum protection principles, which is also set out in paragraph 3; accordingly, programmes containing product placement must ensure that:

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27) Compare with the *Feuer, Eis and Dynamite* case in J. Kabel, “Swings on the Horizontal: The Search for Consistency in European Advertising Law”, *IRIS plus* 2003-8, European Audiovisual Observatory.

28) It should be mentioned that the issue of virtual product placement will not be touched upon in the article.

29) *Supra* FN 4, p. 912.

- their content and, in the case of television broadcasting, their scheduling is in no circumstances influenced in such a way as to affect the responsibility and editorial independence of the media service provider;
- they do not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services;
- they do not give undue prominence to the product in question;
- viewers are clearly informed of the existence of product placement. Programmes containing product placement must be appropriately identified at the start and the end of the programme, and when a programme resumes after an advertising break, in order to avoid any confusion on the part of the viewer.

Article 11 continues with a list of exceptions to the exceptions, which detail the circumstances in which, in any case, product placement is certainly not permitted; thus, product placement is (exceptionally!) actually prohibited on a pan-European level:

- in relation to tobacco products, cigarettes or products of undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products;
- in relation to medicinal products or medical treatments available only on prescription in the member state within whose jurisdiction the media service provider falls.

Upon the adoption of the AVMS Directive, the European Commission exhorted member states to take a “light touch” approach towards its implementation, discouraging the adoption of stricter rules, despite having technically left this possibility open under such provisions as Article 11. The result has been a domino effect, with member states, wary of being left behind and thus jeopardising the competitiveness of their film industry, almost all moving to allow product placement within often slightly stricter, but generally still generous frameworks.<sup>30</sup> Below, the provisions of Article 11 shall be examined in detail. In parallel, the transposition of its rules into the national legislation of a number of member states shall also be surveyed. It should be noted that the provisions of Article 11 apply equally to both on-demand and scheduled audiovisual media services.<sup>31</sup>

## 1. The Derogations from the Rule of Prohibition

### 1.1. Product Placement Compatible Programme Genres

The term “cinematographic work” refers to full-length films (*i.e.* normally more than 75 minutes in length) wherein a fictional plot is played out by actors, produced with the intention of a cinema release (whether or not the film was in fact released in cinema theatres is irrelevant). “Films made for audiovisual media services”, by contrast, are full-length films (normally between 50 to 90 minutes long) produced with the intention of being aired on television or another audiovisual media service (again, the intention and not the actual subsequent treatment is the crucial factor). “Sports programmes” should be taken to include both live transmissions of sport events and unedited retransmissions of live coverages, as well as edited sports programmes or sports shows, which transmit only parts of the event or the highlights. “Light entertainment programmes” are programmes without a fictional plot, e.g. shows which feature acts by professional or amateur performers, such as musicians, comedians or magicians, or which involve guests participating in games. Finally, the term “series made for audiovisual media services” will refer to programmes consisting of several episodes with independent plots, which are however substantially interrelated. Such a link can be established by, for example, the recurring appearance of one or more characters, the use of the same settings in different episodes or by the further development of the same

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30) See, for example, Collège d'autorisation et de contrôle, “Recommandation relative au placement de produit”, available at: <http://tinyurl.com/yhrusn5> and B. Bradshaw, “Written Ministerial Statement on Television Product Placement”, 9 February 2010, available at: <http://tinyurl.com/yaxu7er>

31) It should be noted that, in addition, programmes containing product placement should abide by the rules set out in Article 9 applicable to all audiovisual commercial communications provided by media service providers under Community jurisdiction.

story along several episodes.<sup>32</sup> In any case, precisely delineating these genres is of limited value; as the UK Ministerial Statement on Television Product Placement suggests, a more effective and appropriate approach is the ad hoc classification of programmes, with regulators intervening in the event that media service providers unacceptably stretch the envelope by including product placement in programmes that cannot be seen as falling within any of these categories.<sup>33</sup>

Interestingly, in Article 20 AVMS Directive (formerly Article 11 TVwF Directive) the term “series” is accompanied by that of “serials”. “Serials” are productions with a continuously evolving, unified plot and set of characters spread over multiple episodes and sometimes years. A classic example of a serial would be a soap opera. There is no obvious explanation as to why product placement should be permitted in series, but precluded in serials; there seems to be no difference between the two genres as concerns possible dangers for consumers or the editorial integrity of media service providers. For this reason, it has been argued by commentators that, by way of analogy, serials should be included in the list of programme genres which may feature product placement.<sup>34</sup> This conclusion is supported by linguistic considerations: as has been noted by AG Jacobs in *RTL v. NLM*, when comparing different language versions of the TVwF Directive, the two terms seem to be imprecise and overlapping in their meanings.<sup>35</sup>

Not listed among the categories within which product placement is permitted by the Directive are TV news programmes<sup>36</sup> and documentaries; in these product placement is consequently banned. On the member state level, some legislatures have taken advantage of the latitude afforded by the Directive to impose more confining rules yet: the UK, for example, has announced the proscription of product placement in current affairs, consumer and religious programmes, despite their qualification as forms of “series”.<sup>37</sup> In France, product placement will only be allowed in cinematographic works, works of audiovisual fiction and music videos.<sup>38</sup> In Germany, a distinction is made between public service broadcasters and private broadcasters: for the former, product placement is only allowed in the permissible programme genres on the condition that they have not been produced or commissioned by the broadcaster or an affiliate; no such restriction is placed on commercial broadcasters.<sup>39</sup>

## 1.2. Provision Free of Charge – Prop and Prize Placement

Authorisation of product placement where there is “no payment but only the provision of certain goods or services free of charge, such as production props and prizes, with a view to their inclusion in a programme” (which will be referred to in this IRIS *plus* as “prop placement”) is permitted under the AVMS Directive. The provision should be interpreted in light of Recital 91, which states that “the provision of goods or services free of charge, such as production props or prizes, should only be considered to be product placement if the goods or services involved are of significant value.” One option for calculating the significance of the value of such “freebies” would be in relation to the overall budget of the production; as a rule of thumb, Castendyk suggests that the value of a prop or prize should be considered to be insignificant if under 1% of the production budget.<sup>40</sup> An alternative would be calculation on the basis of the absolute value of the goods or services involved; for example, in Austria, a set benchmark of EUR 1000 has been imposed as the dividing

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32) O. Castendyk and N. Ullrich, “Article 11 TWFD” in O. Castendyk, E. Dommering and A. Scheuer (eds), *European Media Law*, 2008, Kluwer Law International, p. 523 *et seq.*

33) *Supra* FN 30.

34) *Supra* FN 4, p. 912.

35) Opinion of AG Jacobs, Case C-245/01 *RTL Television GmbH v Niedersächsische Landesmedienanstalt für privaten Rundfunk* [2003] ECR I-12489.

36) See *supra* Belgian Recommendation FN 30.

37) *Supra* FN 30.

38) French Conseil supérieur de l’audiovisuel (CSA), “Délibération n° 2010-4 du 16 février 2010 relative au placement de produit dans les programmes des services de télévision”, available at: <http://tinyurl.com/yakmdxy>.

39) *Dreizehnter Staatsvertrag zur Änderung rundfunkrechtlicher Staatsverträge (Dreizehnter Rundfunkänderungsstaatsvertrag - 13. RÄStV)* (Thirteenth Amendment to the Inter-State Broadcasting Agreement - 13. RÄStV), Articles 15 and 44. See also C. Mohrmann, “Minister-Presidents Sign 13th Inter-State Broadcasting Agreement” IRIS 2010-1: 16.

40) *Supra* FN 4, p. 913.

line between regulated product placement and unregulated prop placement. Another option would involve calculating the expense represented by the prop or prize for the media service provider or programme-maker, *i.e.* the hire cost for a car for the required period.<sup>41</sup>

If the value of the placed product or service is insignificant, no product placement within the meaning of the Directive will be deemed to have taken place. In such a case, Article 11 does not apply and the restrictions set by paragraph 3 (a), (b), (c) and (d) do not need to be observed.<sup>42</sup> If, however, the value of the placed product or service is significant, but the product or service was provided free of charge, the placement is still permissible, but the subsequent rules governing permissible product placements in the AVMS Directive must be observed. As always, national provisions can of course impose stricter rules: in Germany, prop placement is excluded in news and current affairs programmes, consumer and advice programmes, children's programmes and religious programmes.<sup>43</sup>

Notwithstanding the above, prop placement of insignificant value is not completely footloose and fancy free under the Directive: it will in all likelihood still be caught by the definition of sponsorship and, consequently, have to comply with the provisions of Article 10 AVMS Directive.<sup>44</sup> Attention must be paid to the provisions of national law, as not all member states will incorporate the Directive's restriction to products of significant value<sup>45</sup> (in which case, all prop placement must follow the rules on product placement) or even the exception in favour of prop placement into their own legislation<sup>46</sup> (in which case the rules on sponsorship will likely apply).

## 2. The Four Principles Governing Legitimate Product Placement

Permitted product placements as outlined above must abide by at least four conditions set out in Article 11 para. 3 AVMS Directive. These are the following:

### 2.1. Undue Influence

According to Article 11 para.3 (a), the content and, in the case of television broadcasting, the scheduling of programmes containing product placement must in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider. As commentators have observed, the mention of the responsibility of the media service provider is somewhat incongruent in this context, given that media service providers will almost always carry the legal responsibility for the content of the programmes they offer anyway.<sup>47</sup> Of more relevance is the second element of "editorial independence".

When can we conclude that the editorial independence of the media service provider has been unduly influenced? Recital 93 provides an indication as to the correct interpretation of the term, by linking "editorial independence" with the notion of "thematic placements" (otherwise known as "plot placements"), *i.e.* the practice of adjusting the storyline or dialogue of a programme so as to include or make mention of a product, service or brand name.<sup>48</sup> Accordingly, experts have posited that a functional test could involve examining whether "the rules of the game"

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41) *Supra* DCMS Consultation FN 21.

42) J. Blair and T. O'Shea, "Light Touch and Don't Touch – The Government's Preferred Approach to the Regulation of VoD Services and the Prohibition of Product Placement" (2009) 20(1) EntLR 17.

43) *Supra* FN 39.

44) *Supra* FN 18, p. 320.

45) *Supra* FN 36.

46) Dutch Mediawet 2008, Article 3.19a.

47) O. Castendyk, "Product Placement – A brief summary of the current and future legal position under the Audiovisual Media Services Directive" in "Ready, Set... Go? The Audiovisual Media Services Directive", IRIS *Special*, June 2009, European Audiovisual Observatory.

48) A well-known example of thematic placement can be found in the German *Marienhof* case, where fitted carpets and last-minute travel were promoted in a popular television soap opera, see O. Castendyk, "Werbeintegration in TV-Programm – wann sind Themen Placements Schleichwerbung oder Sponsoring?", ZUM 12/2005, 857.

of content production have been broken: influence on the editorial independence of the media service provider can be said to be unacceptable, i.e. if it affected the rules of good script-writing or journalism or if it artificially influenced the programme's logical development or unnaturally altered the script, resulting in a collapse or distortion of narrative continuity.<sup>49</sup> Broader or narrower interpretations have also been put forth: thus, according to one approach, it could be said that editorial independence is inevitably influenced by any product placement. At the other extreme, undue influence would only be determined if the provider contractually transfers the right of decision to the placer.<sup>50</sup> Unless a particularly strict approach is adopted, in independently produced works the editorial independence of the media service provider logically can never be affected, as it will not be involved in the production process and will not be obliged to air the programme.

## **2.2. Undue Promotional Effect**

Programmes containing product placement are prohibited from directly encouraging the purchase or rental of goods or services, in particular by making special promotional references to those goods or services; an identical precondition is found in Article 10 on sponsorship (former Article 17 TVwF Directive). In its 2004 Interpretative Communication, the Commission clarified the term "direct encouragement of purchase or rental" in relation to sponsorship, by explaining that, although a sponsor may of course employ sponsorship as a means of promoting his or her name, trade mark, image, activities or products, no explicit reference may be made during the broadcast of the sponsored programme to the products or services of the sponsor or of a third party, except where such a reference serves the sole purpose of identifying the sponsor or making explicit the link between the programme and the undertaking sponsoring it.

In the case of product placement however, the term requires slightly different interpretation. Product placement by definition involves featuring products, trade marks or services in the action of the audiovisual work. If lawful product placement is to exist, it follows that such mere inclusion of or reference to products, services or trade marks cannot constitute direct encouragement to purchase or rent within the meaning of Article 10 para. 2(b) AVMS Directive. Even unduly prominent product placement cannot be said to contravene the principle of Article 11 para. 3(b), otherwise the subsequent express proscription of undue prominence, in Article 11 para. 3(c), would be made redundant. As a result, in product placement, as opposed to sponsorship, a stricter interpretation of the term "direct encouragement to purchase or rent" is warranted; any inclusion or reference has to be adjoined by an additional message of encouragement or endorsement if breach of the principle of non-encouragement is to be found.<sup>51</sup>

## **2.3. Undue Prominence**

Programmes containing product placement are forbidden from giving undue prominence to the products, services or trade marks that they feature. The term originates from the United Kingdom<sup>52</sup> and was first introduced into the EU audiovisual legal framework in the Commission's 2004 Interpretative Communication within the context of surreptitious advertising. According to the Communication's analysis, undue nature may result from

- (a) the recurring presence of the brand, good or service in question;
- (b) the manner in which the brand, good or service is presented and appears.

In this regard, the content of the programmes in which the brand, good or service appears should be borne in mind (ergo, standards for feature films will differ from those appropriate for

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49) *Supra* FN 4, p. 915; Compare also P. Gonzalez-Espejo and R. Izquierdo, "Viewing in a Material World: EU Revisits Product Placement" (2007) 67 *European Lawyer* 13.

50) *Supra* FN 47.

51) *Supra* FN 4, p. 916. For an example of the first application of this principle in a member state, see H. Cannie, "First Decisions on Product Placement and Sponsorship under the New Media Decree", IRIS 2010-4: XX).

52) *Supra* I. Katsirea FN 9, p. 60.

news programmes). To better illustrate the term, the Commission provides three examples: the prominent display of a good, service or trade mark will be considered to be undue when “such a display is not warranted on the editorial grounds of the programmes, is the result of an influence on the content thereof for commercial purposes or is likely to mislead the public on the nature of such a presentation.”

Not all of the examples mentioned by the Commission in the Interpretative Communication are applicable to the case of product placement. For example, in product placement, that the inclusion of or reference to a product, service or brand will be the result of an influence on the content of the audiovisual work for commercial purposes is a given. Likewise, misleading the public as to the nature of the presentation is an outcome avoided in the case of lawful product placement through the use of the warning logo (see below, Section IV.2.4.). Nevertheless, generally speaking, the analysis of the Interpretative Communication can serve as an adequate guideline for deconstructing the term: the undue prominence of a product placement will thus be surmised on purely phenomenological bases, when either (a) the brand, good or service appears recurrently in a way that is not functional or unavoidable; or (b) the brand, good or service is presented and appears in a manner that makes it clearly recognisable and appears somehow “out of place”, *i.e.* is not justified on editorial grounds.<sup>53</sup> The Belgian *Conseil supérieur de l’audiovisuel* has put forth five criteria indicative of undue product prominence: the casualness displayed towards the product; the absence of pluralism in the presentation of the product; the frequency of citation and/or display; the indication of information such as the address or phone number of the producer of the product; the absence of objective criticism.<sup>54</sup>

Some stakeholders have argued that the concept of undue prominence and product placement are inherently incompatible as advertisers will always, not unreasonably, expect to get significant return on their investment in terms of audience recognition. On the other hand, the view also exists that clumsy or heavy-handed product placement will risk alienating viewers. Successful product placement therefore seems to balance precariously on the very thin line between successful storyline integration and forbidden plot placement.<sup>55</sup>

## 2.4. *Obligation to Inform*

Article 11 requires that viewers be clearly informed of the existence of product placement. This should be achieved through the showing of warning logos, which appropriately identify programmes containing product placement in order to avoid viewer confusion. The insertion of the logo is an essential condition that enables product placement to avoid misleading viewers and thereby escape classification as surreptitious advertising (see below Section VI.2.). According to the Directive, warning logos should be shown at the start and the end of the programme, as well as when a programme resumes after an advertising break. It is worth citing the approach taken by the French-speaking Belgian Community to the matter: an initial three-month “educational” phase, intended to acquaint viewers with the concept of product placement and during which the warning icon will be accompanied by a written explanation, is to precede the subsequent “effective” (and permanent) phase, when the icon will be displayed alone.<sup>56</sup> A similar system has been instituted in France.<sup>57</sup>

Recital 90 AVMS Directive requires that the logo be neutral, so as to avoid any additional advertising effect. Some confusion seems to have developed as to when a logo will qualify as neutral, particularly in view of audiences’ right to be informed. The objective of the logo should be to enable viewers to judge for themselves whether and to what extent the content of the programme has been influenced by the placer.<sup>58</sup> Commentators have questioned whether the goods or services or their trade marks, as well as the legal or natural persons who paid for the placement should

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53) *Supra* FN 4, p. 917. Compare also with Ofcom Broadcasting Code, Section 10.4.

54) *Supra* FN 36.

55) *Supra* FN 12.

56) *Supra* FN 36.

57) *Supra* FN 38.

58) *Supra* FN 4, p. 914.



be named or described in the warning logo,<sup>59</sup> along the lines of the condition imposed by Article 10 of the Directive on sponsorship; this demands that “[s]ponsored programmes shall be clearly identified as such by the name, logo and/or any other symbol of the sponsor such as reference to its products(s) or services(s) or a distinctive sign thereof in an appropriate way.” As others have observed however, overloading the logo with excessive information can quickly not only become overly onerous for both media service provider and viewer, but could actually instead serve to reinforce the advertising potential of the placement by drawing additional attention to the product or service placed or its manufacturer.<sup>60</sup> As a result, as has happened already with sponsor credits, what would be introduced with the intention of empowering viewers could likely be reduced to a new form of “mini-advertising”, sought after by advertisers in its own right.<sup>61</sup>

By way of exception, member states are permitted to waive the requirement of appropriate identification, provided that the programme in question has neither been produced nor commissioned by the media service provider itself or a company affiliated to the media service provider. This possibility has been taken up by, for example, both the Flemish and French-speaking Communities in Belgium.<sup>62</sup> In this case, product placement in independently produced works does not have to be signalled to the viewer. As a result, media service providers can freely offer foreign-made productions like *Sex and the City* or *I, Robot* without showing a warning logo for product placement. If the programme service however includes prohibited product placements, such as placements of tobacco products, the programme cannot be aired by the audiovisual media service provider at all.<sup>63</sup>

### 3. Unlawful Product Placements

According to Article 11(3) product placement in children’s programmes is prohibited, even if these programmes qualify as cinematographic films, films or series made for audiovisual media services, sports programmes and light entertainment programmes.<sup>64</sup> By contrast, prop placement (as analysed above, see Section IV.1.2.) in children’s programmes is fully admissible under the Directive: if a product of insignificant value is provided free of charge with a view to its inclusion in a children’s programme, such inclusion may take place without regard for the four requirements imposed by Article 11 para. 3.<sup>65</sup> The placement of products of significant value is also allowed in children’s programmes when provided free of charge; however, in this case, the four principles governing legitimate product placement must be observed. It should be noted that certain member states have already instituted stricter rules on product placement in children’s programmes: for example, in the Belgian Flemish Community, legislation prohibits prop placement in addition to product placement in the children’s programmes of the public broadcasting corporation (VRT), regardless of value;<sup>66</sup> the French-speaking Belgian Community has gone one step further, by outlawing all product and prop placement in children’s programmes across the board.<sup>67</sup> As already noted above, the same is true of Germany.

A programme will qualify as a children’s programme if, by its content, form and time of transmission, it is targeted at persons below a certain age threshold. It is interesting to note that rules on age limits differ drastically within the EU, from 12 years in the Netherlands<sup>68</sup> to 16

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59) *Supra* FN 12.

60) *Supra* I. Katsirea FN 9, p. 8. See also F. Jongen, “Recommendation on Product Placement”, IRIS 2010-3: 8.

61) *Supra* FN 18, p. 322.

62) *Decreet betreffende de radio-omroep en televisie* (Flemish Decree on Radio-broadcasting and Television), Article 100(1) (4), available at: <http://tinyurl.com/yzxgcaa> and *Décret sur les services de médias audiovisuels* (French-speaking Belgian Decree on audiovisual media services), Article 21, available at: <http://tinyurl.com/yhw7e5n>

63) *Supra* FN 4, p. 914.

64) Compare with AVMS Directive, Article 11, §3 a).

65) Article 9 AVMS Directive on sponsorship, however, enables member states to forbid the showing of a sponsorship logo during children’s programmes.

66) *Supra* Flemish Decree, FN 62, Article 99(2). See also H. Cannie, “New Flemish Media Decree Approved”, IRIS 2009-5: 8.

67) *Supra* French-speaking Decree, FN 62, Article 21.

68) Dutch Mediawet 2008, Article 3.19a (2).



in the UK.<sup>69</sup> If a programme is aired in prime time, *i.e.* usually between the hours of 8 p.m. and 11 p.m., it will likely be targeted at adult audiences. Classification of animated works requires careful consideration: animated sitcoms such as *South Park*, *Futurama* or *The Simpsons* are normally earmarked for adult viewers. Cartoons on the other hand, such as the *Tiny Toon Adventures* or *Tom and Jerry*, are targeted at younger members of the audience. Opinions differ as to the classification of animated works suitable for the entire family, such as *Finding Nemo* or *The Lion King*.<sup>70</sup> If the objective of the prohibition is the protection of minors in compliance with Article 9 AVMS Directive, then the large child audiences such programmes attract should be enough to exclude product placement.

Product placement involving certain types of products is categorically foreclosed. Thus, programmes may not contain product placement of tobacco products or cigarettes or product placement by undertakings whose principal activity is the manufacture or sale of such products. The same is true of medicinal products or medical treatments available only on prescription.<sup>71</sup> As opposed to what is true of children's programmes, the placement of such products is impermissible regardless of the significance of the value of the product or whether it is provided free of charge; otherwise, the ban would be without effect, given that these are consumer goods of small retail cost. It is worth noting that an alternative interpretation could be argued according to which, if the product in question is provided free of charge and is of insignificant value (e.g. a pack of cigarettes), then, according to Recital 91, no product placement will have occurred, consequently meaning that the prohibition of Article 11(4) cannot apply. Yet, even in this case, the rules on sponsorship must be respected; Article 10 AVMS Directive also forecloses sponsorship by tobacco companies (para. 2), as well as sponsorship with a view to promoting medical products or treatments (para.3).

On the national level, the UK currently proposes moving well beyond these two categories and forbidding the placement of alcoholic drinks, foods and drinks high in fat, salt or sugar (HFSS foods), gambling and infant formula and follow-on formula.<sup>72</sup> The justification for these severe limitations rests on the protection of health and welfare and especially those of children, whose viewing is of course not exclusively confined to children's programmes.<sup>73</sup> The UK government observes that a ban on such placements exclusively in shows with a large child audience or which are shown before the watershed might ensure an identical effect, but would be harder to administer. The Netherlands have also proscribed product placement of alcoholic drinks, but only between the hours of 6 a.m. and 9 p.m..<sup>74</sup> In France, the product placement of alcohol, firearms and infant formula is additionally proscribed.<sup>75</sup>

## V. Acquired Product Placement

The system instituted in the AVMS Directive is stricter than the old one under the TVwF Directive in one important aspect: the conditions imposed by Article 11 on lawful product placements are incumbent on all programmes shown by media service providers under EU jurisdiction, regardless of the origins of the programme. Article 1(1)(m) AVMS Directive does stipulate that, in order to qualify as product placement, an audiovisual commercial communication, which consists of the inclusion of or reference to a product, a service or the trade mark thereof so that it features within a programme, has to be done in return for payment or other consideration. However, it does not specify whom such payment or consideration must benefit. Similarly, Article 1(1)(h), which defines the broader category of "audiovisual commercial communication", does not designate a specific recipient. Hence, as opposed to what is the case in television advertising or surreptitious audiovisual

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69) Ofcom Broadcasting Code, Section 10.5.

70) *Supra* FN 32, p. 537.

71) Compare with AVMS Directive, Article 9 (d) and (f).

72) *Supra* FN 30.

73) Compare with AVMS Directive, Article 9 (c)(iii), (e) and (g).

74) Dutch Mediawet 2008, Article 3.19b (3). Compare with AVMS Directive, Article 9 (e) and (g).

75) *Supra* FN 38.

commercial communications, where the payment or consideration must be made out to the media service provider, we are forced to conclude that the payee in the case of product placement may be anyone. Ergo, an audiovisual commercial communication may be prohibited under the rules on product placement even if the audiovisual service provider offering the programme service was not involved in the making of the programme, did not agree to the product placement nor exacted any payment or consideration from it and was not even aware that product placement had taken place.<sup>76</sup>

This restriction has significant consequences for the lawful offering within the EU of independently produced programme services, particularly bought in programmes imported from third countries. Recital 92 permits member states to opt out of the derogations to the principle of the prohibition of product placement, for example by permitting product placement only in programmes that have not been produced exclusively in that member state. However, given that Article 11 is a minimum protection provision, this does not enable member states to exempt foreign product placement from the rules that would be applicable to domestic productions under its provisions. Under the AVMS Directive therefore, the old dual system is either completely abolished or retained with added restrictions imposed on imported productions. We therefore observe that the effect on the audience gains some ground as a criterion for the legal treatment of product placement, with all four principles of legitimate product placement applicable to all programmes no matter what their origin. The intent of the media service provider continues to play a role – with member states able to forbid product placement in home-grown programmes or on public service broadcasters<sup>77</sup> – but not at the expense of viewer protection.

Interestingly, not all member states seem to have taken this rule to heart: According to the Ofcom Broadcasting Code, the rules on product placement do not apply to programmes acquired from outside the UK and to films made for cinema, provided that no broadcaster regulated by Ofcom and involved in the broadcast of that programme or film directly benefits from the arrangement and that the programme in question is not a children's programme produced after 19 December 2009.<sup>78</sup> A similar provision can be found in Dutch law in relation to programmes acquired from abroad and disseminated to the public there ("*daar*") which are offered by Dutch audiovisual media providers, as long as the programme was not produced or commissioned by the provider or an affiliate.<sup>79</sup> By contrast, in Ireland a matching provision in the BCI General Advertising Code<sup>80</sup> will likely be removed in the new BAI General Code on Audiovisual Commercial Communications, according to the latest draft.<sup>81</sup>

## VI. The Relationship between Product Placement and other AVMS Directive's Concepts

### 1. Product Placement and Sponsorship

Sponsorship is defined in Article 1(k) AVMS Directive as "any contribution made by public or private undertakings or natural persons not engaged in providing audiovisual media services or in the production of audiovisual works, to the financing of audiovisual media services or programmes with a view to promoting their name, trade mark, image, activities or products." The lines between product placement and sponsorship are fluid, as the issue of the legislative treatment of prop placement mentioned above illustrates. Nonetheless, on a normative level at least, attentive examination of

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76) *Supra* FN 26, p. 844.

77) UK Department for Culture, Media and Sport, "Liverpool Audiovisual Conference – Between Culture and Commerce", September 2005, available at: <http://tinyurl.com/yz5d96v>

78) A. Burnham, "Written Ministerial Statement on the Implication of the Audiovisual Media Services Directive", available at: <http://tinyurl.com/ykqh8ay>

79) Dutch Mediawet, Article 3.19c.

80) Broadcasting Commission of Ireland, General Advertising Code, Section 3.3.7.

81) *Supra* FN 13.

the definitions of the two practices illuminates two important points of divergence. The first relates to the objective of the payment or consideration extracted from the undertaking commissioning the product placement or sponsorship. According to the definitions provided by the AVMS Directive, in the case of product placement, the payment or consideration is made so as to secure the inclusion of the product, service or trade mark within the programme; in the second case, the contribution of the commissioning party is directed at the financing of the entire audiovisual media service or of programmes offered by that service.<sup>82</sup> The second difference concerns the way in which the desired promotional effect is achieved. Recital 91 explains, "in product placement the reference to a product is built into the action of a programme ... In contrast, sponsor references may be shown during a programme but are not part of the plot." As the European Parliament in its Hieronymi report<sup>83</sup> observed, "sponsoring retains the separation of advertising and editorial content, while in the case of product placement that fundamental separation is removed." As opposed to sponsorship, product placement is not even subject to that most fundamental of principles, but instead operates according to a rulebook of its own.

It should be noted that, within the AVMS Directive's framework, product placement and sponsorship are of course not mutually exclusive; both may occur in the same programme, even in relation to the same product. What is important is that each of these forms of commercial communication respects the rules that govern it.<sup>84</sup> On the national level of course, stricter rules can redefine the relationship between the two concepts; it is worth mentioning, for example, that in France the products or services of a sponsor of a programme cannot be the object of a placement within that programme.<sup>85</sup>

## 2. Product Placement and Surreptitious Audiovisual Commercial Communications

Although product placement may of course meet the conditions of surreptitious audiovisual commercial communications, it will not necessarily do so. Surreptitious forms of product placement are forbidden under the AVMS Directive (see Recital 81). As under the previous regime, product placement will contravene the ban on surreptitious audiovisual commercial communications if the three cumulative conditions set out in the 2004 Interpretative Communication on the basis of the definition of Article 1(d) TVwF Directive (now Article 1(j) AVMS Directive) are met. Legitimate product placement must thus not: (a) be intended by the broadcaster; (b) to serve advertising; and (c) be capable of misleading the public.

These requirements are reflected in the rules set by the AVMS Directive specific to product placement (see above, Section 4). According to Article 1(m) product placement can only be evidenced if the inclusion of or reference to the product, service or brand is done in exchange for payment or similar consideration. Payment or similar consideration can also be an indication of intentionality to advertise according to the rules on surreptitious advertising, but is not a necessary prerequisite for it. Accordingly, an inclusion of or reference to the product, service or trade mark may constitute surreptitious advertising, while not qualifying as product placement within the meaning of the Directive. Similarly, it is also possible that a certain product placement may be forbidden under the provisions of Article 11 without however contravening the provisions on surreptitious advertising, e.g. if no warning logo is shown, but there is also no intentionality to advertise by the media service provider. Therefore, situations may arise which fulfil the conditions for both illegal product placement and surreptitious advertising,<sup>86</sup> the two are not mutually exclusive. Product placement is not just surreptitious advertising plus a warning logo.<sup>87</sup>

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82) *Supra* FN 26, p. 845.

83) Hieronymi Report, available at: <http://tinyurl.com/yc5jrjru5>

84) *Supra* FN 36.

85) *Supra* FN 38.

86) P. Gonzalez-Espejo and R. Izquierdo, "Commercials Beyond the Break" (2008) 76 *European Lawyer* 18.

87) *Supra* FN 26, p. 843.

## VII. Conclusion

With the AVMS Directive the explicit regulation of product placement is introduced into the framework of European media law. Product placement is established as an audiovisual commercial communication, related to concepts like television advertising and sponsorship, but distinct from both. Although product placement can fulfil the conditions of surreptitious advertising, clear dividing lines between the two are established in the Directive; thus, the way is made for the authorisation of the practice under the new regime. This process is completed by the disentanglement of product placement from the principle of separation. Instead, product placement is now exclusively subject to the principle of identification: with the increased advertising awareness of audiences in complex modern media environments, it seems that transparency has emerged as the order of the day. Finally, focus seems to have shifted in the new Directive from service provider intent to viewer effect; the dual system of the TVwF Directive, which imposed divergent rules in accordance with the origins of the programme, is either done away with completely or retained in adulterated form. Product placement of insignificant value could perhaps function as a way for legitimising a second double standard that ignores identical consequences for viewers, but even here the rules on sponsorship step in to at least offer some (very similar) guarantees.

One remaining question is the application these rules will find across the board of EU Member States. With the deadline for the transposition of the Directive having passed on 19 December 2009 and given that the AVMS Directive's provisions on product placement are only applicable to programmes produced after the same date,<sup>88</sup> it is only now that their effects will begin to be felt by audiovisual media service providers across the EU. Currently, most member states, with the sole exception of Denmark, have either already adopted legislation expressly permitting product placement or have signalled a firm intention to do so.<sup>89</sup> However long and winding the road that brought it to Europe, it seems that now product placement, at least in its restricted, European configuration, is here to stay.

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88) AVMS Directive, Article 11 para. 1.

89) *Supra* FN 30.