



DECLINATIONS OF PRODUCT PLACEMENT IN ITALIAN LAW AND IN THE EUROPEAN CONTEXT

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SUMMARY: 1.The limit of the principle of transparency in the advertising field. - 2. *Product placement* as an advertising instrument. - 3.The absence of normative references for product placement and equating it to misleading advertising. - 4. Legislative acknowledgment in the Italian system.- 5. The European perspective: the directives 2007/65/CE and 2010/13/CE. - 6. An overview on European context. - 7. Conclusions.

1. The principle of transparency (or identification) constitutes one of the cornerstones of the micro-system of norms that constitutes Italian advertising law. Stated by art. 5, legislative decree no. 145/07 and by art. 7 of Code of Marketing Communication Self-Regulation, this rule ensures that advertisements, independently of the communicative instruments used and the typology of chosen *medium*, must always be recognizable as advertisements. Consequently, an advertisement must be distinguishable from any other form of communication, giving its audience the opportunity to understand the promotional purpose of the information and to calibrate their level of attention¹.

The principle of transparency is therefore a rule that aims to protect the users of the *marketing communication*, and to defend them against forms of misleading advertisements, that are not normally “readable” according to the normal critical

¹ In Italian doctrine, P. MARCHETTI–L.C. UBERTAZZI (edit. by), *Commentario breve al diritto della concorrenza anti-trust, concorrenza sleale, pubblicità, marchi, brevetti, diritto d'autore*, Padova, 2004, p. 1928 ff.; F. CAFAGGI, «Pubblicità ingannevole», in *Dig. disc. priv.*, XI, Torino, 1995, p. 433 ff., G. GHIDINI – A.M. GAMBINO – C. DE RASIS – P. ERRICO – F. FARUFFINI DI SEZZADIO – A. LAZZARETTI, *La pubblicità ingannevole. Commento sistematico alla normativa vigente*, Milano, 2003, *passim*; L. SORDELLI, *Problemi giuridici sulla pubblicità commerciale*, Milano, 1968, *passim*; M. FUSI, *La comunicazione pubblicitaria nei suoi aspetti giuridici*, Milano, 1970, *passim*; G. GHIDINI – N. CIAMPI – R. GAMBARDELLA, *Codice della pubblicità: leggi italiane e direttive CE*, Milano, 2002, *passim*; V. MELI, *La repressione della pubblicità ingannevole (commento a DL n. 74 del 25 gennaio 1992)*, Torino, 1994, *passim*; M. FUSI – P. TESTA – P. COTTAFAVI, *Le nuove regole per la pubblicità comparativa*, Milano, 2000, *passim*; L. SORDELLI, *Problemi della pubblicità e prospettive giuridiche*, in *L'impresa*, 1970, 2, p. 178 ff. In order to have a clear and short vision about the commercial advertising, consult also A. RAPISARDI, *Il diritto industriale 10 anni dopo. Il punto su...la pubblicità*, in *Dir. ind.*, 4, 2002, p. 398 ff. See also, in social and economic perspective, G. CESERANI, *Storia della pubblicità in Italia*, 1988, *passim*; G.L. FALABRINO, *Pubblicità serva padrona*, 1999, *passim*; M. GAMBARO - F. SILVA, *Economia della televisione*, 1992, *passim*; G. FABRIS, *La pubblicità: teorie e prassi*, 1997, *passim*; M. BONFERRONI, *La pubblicità diventa comunicazione?*, Milano, 2005, *passim*; M. GIUSTI, *Il grande libro di Carosello*, Milano, 1995, *passim*.



sense and the natural reserves that physiologically accompany relations between advertisements and audience. Essentially, the statement of the principle of transparency has the primary purpose of allowing consumers to activate, at any given moment, the common mechanisms of self-defence that accompany the decoding of commercial advertising, which, on the contrary, are not normally activated with other kinds of information typologies, as happens for journalistic information for example.

On the other hand, if the principle of identification of marketing communication has as its main purpose the protection of the user of the message, who is also a potential consumer, it also protects the fair trading of competitive relations between enterprises. In fact, the use of misleading marketing communication by a competitor gives the latter an unfair advantage in market competition².

Product placement (or, in Italian doctrine, “hidden sponsorship”) for a long period of time has been considered as a form of misleading advertising, consisting in the highlighting of a product or of its brand name during audiovisual works (for example, cinematographic or television programmes). In particular, the image, whose purpose is to promote a product, is depicted in the general context of the performance as a cultural choice of the author, although it hides in reality a precise commercial agreement between the producer of the show and the company who promotes its brand or product through hidden advertising³.

² Within the principle of identification (or transparency) there is also the difficult relation between the right of expression of thought of reporters and editors and also indirectly promotional purposes of certain forms of information, given that only the clear distinction of advertising from other forms of communication and the subsequent ban of admixture between information and promotional messages can ensure the credibility of journalists and the advertisers themselves. A reflection on the relation between standardized means of communication and distortion of normal market relations caused by advertising communication is offered by A. PACE, *La locuzione «comunicazioni di massa» e la discutibile sua rilevanza giuridica*, in *Dir. inf.*, 1993, p. 1031 ff. In part, the same reflections are proposed by V. CUFFARO, *Profili civilistici del diritto d'informazione*, Napoli, 1986, p. 40 ff. One of the crucial moments in the application of the principle of transparency must be identified precisely in the relationship between camouflaged advertising and news reporting, independently of its spread both by the press - as explicitly required by law - or any other media, primarily radio and television. The phenomenon of editorial advertising, CDs are an example of major risk for self-determination of consumers in their economic choices because it is presented as a newspaper article, a television or radio service. It is only apparently the result of free choices by enterprises or journalists but in reality the content is predetermined by the company or commissioned by the director to make him insert the advertising. Therefore, the purpose of promotional communication is hardly noticeable by the consumer, because being camouflaged by technical devices, the real nature of a commercial item or service is hidden. See also V. D'ANTONIO, *La comunicazione commerciale*, in S. SICA - V. ZENOVICH, *Manuale di diritto dell'informazione e della comunicazione*, 3rd. ed., Padova, 2012, p. 215 ff.

³ Cf. R.F. HOEFGES, *Regulating Professional Services Advertising: Current Constitutional Parameters and Issues Under the First Amendment Commercial Speech Doctrine*, in *24 Cardozo Arts & Ent. L. J.*, 2007, p. 953 ff., and T. BARRY - D.J. HOWARD, *A Review and Critique of the Hierarchy of Effects in Advertising*, in *Int. J. Adh.*, 1990, p. 121 ff.



2. In an attempt to retrace briefly the origins of this advertising instrument, it must be said, broadly speaking that the expression “*product placement*” indicates 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 program, in return for payment or for similar consideration⁴.

At the beginning of its use, *product placement* found a good position in films and rapidly evolved from an occasional marketing instrument into a real and concrete institutionalized praxis. At the present time, considering its success in the cinematographic field, the praxis of product placement has been extended to various cultural performances, from publishing to video games, including television programmes of various kinds and theatrical performances and the world of music.

According to recent research⁵, once having established the possibility of resorting lawfully to product placement in the field of television too, the market of product placement will grow to over 130 million euro in the next three years with an annual growth rate of 30%. Payable product placement will constitute the largest share of this value, about 55%, while the remainder will cover the so-called *barter product placement*.

The phenomenon of the use of this advertising instrument is undoubtedly on the increase and its growth is due to two main reasons. The first being the benefits that product placement can offer to the two main actors: the commercial companies and the media industry. The second being the fact that business companies consider

⁴ See art. 1(1)(m) of *Audiovisual Media Services EU Directive* (2010/13/EU): *infra*. In doctrine, G. GISTRI, *Il product placement cinematografico. Una forma di comunicazione tra impresa e cultura*, Milano, 2008, p. 102. About the topic you can consult also, S. K. BALASUBRAMANIAN, *Beyond advertising and publicity: Hybrid messages and public policy issues*, in *Journal of Advertising*, 1994, p. 4, where product placement is defined as “a paid product message aimed at influencing movie or television audiences via the planned and unobtrusive entry of a branded product into a movie or television program”; J. A. KARRH, *Brand placement: A review*, in *Journal of Current Issues and Research in Advertising*, 1998, p. 2, where it is defined as “the paid inclusion of branded products or branded identifiers, through audio / or visual means, within mass media programming”.

⁵ The source of the research is “Stage Up”, a trade journal that deals with leisure business (sport, special events, testimonial, exhibitions, truism, cultural, cultural and sports events) for the business of sport, in particular it concentrates on marketing, media and communication. For further information visit the web site: www.stageup.com. See also D.A. FARBER, *Commercial Speech and First Amendment Theory*, in 74 *Nw. U. L. Rev.*, 1979, p. 372 ff., and R. COASE, *Advertising and Free Speech*, in 6 *J. Legal St.*, 1977, p. 1 ff.

⁶ The barter product placement is the contribution that an advertiser offers by providing goods, services or locations for the realization of a program reducing production costs. Barter product placement distinguishes itself from traditional product placement where the producer of a program and the advertiser agree in advance on a sum of money that is required to be paid in exchange for the visibility of a product or brand. Barter product placement is also different from gratis product placement where the production fully supports the costs of goods. In doctrine, A.M. ABERNETHY – G.R. FRANKE, *The Information Content of Advertising: A Meta-Analysis*, in *Journal of Advertising*, 1996, p. 10 ff.



product placement as a further possibility of communication that differs from traditional advertising that has always been considered less effective towards current consumers. It is also a useful instrument to finance the production of several works, as evidenced by the widespread increase of communication agencies specializing in the activity of product placement⁷.

It is important to specify that the presence of brands and products in a narrative context, with particular reference to the cinema and television, does not always have a commercial purpose. In fact, consumer goods and the graphic symbols that identify them on the market are now an integral part of daily life of the users and are bearers of symbols and their own meanings. Therefore their placement in an audiovisual context is justified by the need to give realism to the context, to connote the characters or contextualize the story. This is a mechanism which facilitates the process of understanding and identification of the audience, who recognize the symbols belonging to their own daily life. With these hypotheses, its use is justified only by the demands of “narrative” and in conformity with the requirements of an artistic narrative, the total absence of promotional purpose and of resulting royalty income will make it impossible to rank these placements of brands and products as product placement and the consequent inapplicability of the relative branch of law.

Generally, the modality of implementation of product placement is realized in the *screen placement*, *script placement* and *plot placement*⁸. Screen placement is the visual presentation of the product or of brands without verbal reference, while in script placement the brand and the product or its characteristics are verbally mentioned. In plot placement, instead, the brand is perfectly placed in the narrative plot with different degrees of integration, becoming, in some cases, almost a co-star actor⁹.

A further circumstance that confirms the spread and the effectiveness of this advertising instrument is the increasing number of operational variations that it has assumed: this is the case of *reverse product placement*, of *location placement* and of *expanded placement*. *Reverse product placement* is the production and marketing of fictitious products and brands, after the success inside the entertainment magazine

⁷ On this theme, see J.M. LEHU, *Branded Entertainment: Product Placement & Brand Strategy in the Entertainment Business*, London, 2007, p. 125 ff. Generally, these companies own a customer's portfolio made by advertisers and producers with an intermediate position to guarantee the synergistic achievement of purposes of both parts.

⁸ For further information, R.P. NELLI - P. BENSI, *Il product placement nelle strategie di convergenza della marca nel settore dell'intrattenimento*, Milano, 2007, p. 34, where the authors propose a careful analysis of the modality of realization of product placement, taking into account a plurality of aspects such as the prominence and centrality of product placement, the level of dearness of the insertion of the brand and its connection with the show.

⁹ See also R.P. NELLI - P. BENSI, *op. cit.*, p. 39, in which are mentioned the example cases of several films: “*Italian Job*” (2003), where the Mini is the element that allows for the development of the plot, “*Herbie*” (2005), where the Volkswagen beetle is the protagonist of the story, and “*Cast Away*”, with the repeated presence of FedEx brand.



programmes, generating the inflow in the real market of brands and products that are creations of the imaginary. Through *location placement*, however, advertisers seek to promote not a simple product, but the identity of a place, where it becomes an integral part of an entertainment product which can represent certain peculiarities¹⁰. Finally, *expanded placement* concerns the communication activities carried out after the negotiation of placement agreements, with the aim of further expanding the effect created by brand inclusion in entertainment media¹¹.

3. The presence of brands and products inside different types of magazine entertainment programmes, which originated in American cinematographic industries, has also found widespread use in the rest of the world, with obvious consequences on aspects of an economic, legal and communicative nature. Even in Italy, after World War II, product placement began to take its first, faltering steps in a small number of films, spreading fairly rapidly despite a seemingly unfavourable atmosphere around its use.

The spread of product placement in our system, in fact, from its earliest appearances was strongly opposed by a normative framework that ended up by equating it to a case of misleading advertising and therefore considering it as damaging to the interests of both consumers and competitors¹². This prejudice would develop because of the equating of product placement to editorial advertising, the purposes of which are not able to be clearly perceived by the recipients.

This deception may take place when the presence of brands and products in the unfolding of narrative context would hide the true nature of the message from the

¹⁰ Location placement takes place mainly through the providing of services to the production and the hospitality in a particular territory controlled by the Film Commission. The assistance of Film Commissions, also supported by public entities facilitates the work of audiovisual production, thus becoming attractive for them. In doctrine, P. SPINK – R. PETTY, *Comparative Advertising in the European Union*, in 47 *Intern. and Comparative L. Q.*, 1998, p. 855 ff.

¹¹ See D. BORELLI – G. DALI – G. GISTRI, *Marche alla ribalta. Il product placement cinematografico in Italia e la sua gestione manageriale*, Milano, 2008, p. 59 ff., where it is hypothesized that together with the activities of introducing a brand/product in the plot, called in-program, it is possible to put activities called ex-program which broadens the relation between brand/product. The ex-program activities can become promotion activities whose purpose is to increase, in the short-term, the sales of the placed product, or a dedicated publicity especially for the operators of media system in order to make the audience know about the realization of the product placement.

¹² About this topic, consult P. SIEGEL, *Product Placement and the Law*, in 10 *Journal of Promotion Management*, 2004, 1/2, p. 89 ff.; L. MANSANI, *Product placement: la pubblicità nascosta negli spettacoli cinematografici e televisivi*, in *Contr. impr.*, 1998, p. 188 ff., and F. UNNIA, *La pubblicità clandestina: il camuffamento della pubblicità nei contesti informativi*, Milano, 1997, p. 197, where the Author points out that the development of TV and cinema has allowed for the spread of a large number of hidden advertising forms and its own product placement that has shown, better than others, the strength of non-transparent communication forms.



eyes of the recipients. It would gain greater credibility and would not be interpreted critically, as is the case of communications that reveal their own publicity purposes.

In the specific case of product placement, therefore, in consideration of the complex legislation in our juridical system that insists on clear recognition of promotional messages, more than any other informative content present on the medium¹³, means that product placement not would be a legal display of their advertising purposes, being inherent to the presence of brands and products in a narrative context which had been planned by the advertiser and the producer of shows.

It must be said, however, that in our system there is no total prohibition on the insertion of brands and products in a narrative context, if they should be necessary to the narration and, therefore, lacking any publicity purpose. The practice of product placement would be reprehensible only if this purpose were overt but appeared as misdirection to its audience'. The same Italian Competition Authority, better known as the Antitrust Authority, in fact, equates product placement to misleading advertising, when the misleading placement of a product between the scenes of a film comes to be promoted through specific framings¹⁴.

As there is no outright illegality of the presence of brands and products within a narration, the same Antitrust Authority has the problem of having to discern between its illegal nature and the possibility of recourse to it, when, in fact, it may the result of freedom of artistic expression of those who have created a work. As previously mentioned, the reference to brands and products may be dictated by artistic narrative

¹³ A. DIXIT - V. NORMAN, *Advertising and welfare*, in 9 *Bell Journal of Economics*, 1978, p. 1 ff., and G.M. GROSSMAN - C. SHAPIRO, *Informative advertising with differentiated products*, in 51 *Review of Economic Studies*, 1984, p. 63 ff. The use of product placement would be a violation of the principles of transparency and recognisability of advertising, introduced in our system for the first time in art. 4 of Legislative Decree January 25th 1992, no. 74 about misleading advertising. According to the principles of transparency, the advertisement must always be recognizable for its real purpose and kept separate from other information present in the communication. The transparency of a promotional messages is fundamental because it allows its recipients to recognize and interpret them critically. At the moment, the principle of transparency is established in art. 5 of Legislative Decree August 2th, 2007, no. 145, paragraph 1 where it is stated that advertising must always be recognizable as such. The same principle is repeated in the Code of Marketing Communication Self-Regulation in art. 7 where it is written that "marketing communication must be clearly distinguishable as such. When a medium presents news and other editorial matter to the public together with marketing communication, it should be ensured that the marketing communication is readily distinguishable as such". Also in art. 36-bis, (a), of recent *Consolidated Law on audiovisual media services* that imposes the obligation of transparency, reconfirming that audiovisual commercial communications must be readily recognizable as such and forbidding hidden audiovisual commercial communications. See W.L. BERNS - F.W. MORGAN, *Comparative Advertising in the European Union and the United States: Legal and Managerial Issues*, in 11 *Journal of Euromarketing*, 2002, 3, p. 7 ff.

¹⁴ Measure no. 3903 "Rai- Ford- MS" 16/05/1996, in *Boll. 20/96*; for further information visit the web site: www.agcm.it.



needs, as the necessity to give realism to certain scenes or connote characters, or even be completely random, especially if we take into consideration works of entertainment representative of our times.

The Antitrust Authority has therefore elected to assess cases of illegal product placement in the same way as is applied to editorial advertising. First of all, it verifies the existence of a relationship of patronage between the producers who create the work and the company that owns the goods or services included in it. To support this evidence, it is useful to find the existence of possible economic relations between the parties, which can be: the disbursement of a sum of money, or a free supply of goods, in exchange for its visibility in the entertainment product¹⁵.

Evidently, the practical difficulties in rebuilding a relationship of matrix business at the basis of product placement, concealed by the parties as illegal evidence, has led the Antitrust Authority to develop a set of presumptive indicators from which to derive, indirectly, evidence of promotional placement. These clues mainly refer to:

- a) the framing of the brand when it is not necessary to the narration¹⁶;
- b) the type of framing, its duration and recurrence¹⁷;
- c) when the scenes or the behaviour of the characters is not natural but purposely dictated to focus on a product or a brand¹⁸;
- d) special acclamation referred to the product and its features, using the typical language of commercial communication¹⁹.

On the contrary, when the presence of brands and products has been considered necessary for artistic or narrative needs or the framing not reiterated or unnatural, the Antitrust Authority has ruled in favour of the nonexistence of a promotional purpose²⁰. Clearly, if this purpose, although present, were presented to

¹⁵ See also M.L. GALICIAN, *Handbook of Product Placement in the Mass Media*, Binghamton-New York, 2004, p. 5 ff.

¹⁶ Measure no. 1291 “*Un commissario a Roma*” 12/7/1993, in *Boll. 17/93*; measure 4845 “*Marlboro-Carramba*” 22/3/1997, in *Boll. 13/97*, see also www.agcm.it.

¹⁷ Measure no. 1291 “*Un commissario a Roma*” 12/7/1993, in *Boll. 17/93* cit.; measure no. 5326 “*Linda e il Brigadiere*” 18/09/1997, in *Boll. 38/97*; measure no. 4845 “*Marlboro – Carramba*” 22/3/1997, cit.; measure no. 16097 “*Giubbotti Adidas su Sky Sport 1*” 19/10/2006, in *Boll. no. 42/06*, see also www.agcm.it.

¹⁸ Measure no. 3654 “*Marlboro- Ra?*” 29/2/1996, in *Boll. 9/96*; measure no. 3305 “*Film College-Muratti?*” 4/10/1995, in *Boll. 40/95*, see also www.agcm.it.

¹⁹ Measure no. 4846 “*Technogym*” 27/3/1997, in *Boll. 13/97*; Measure no. 6146 “*Versace- Quelli che il Calcio*” 25/6/1998, in *Boll. 26/98*; Measure no. 5326 “*Linda e il Brigadiere*” 18/09/1997, cit., see www.agcm.it.

²⁰ Measure no. 6388 “*Il domani non muore mai?*”, in *Boll. 35/98*; measure no. 3903 “*Rai – Ford- MS*” 16/5/1996, cit.



the public through appropriate measures, it would not be verifiable for any form of abuse²¹.

According to the consolidated case law rules of the Antitrust Authority²², the presumptive evidences must be therefore: serious, precise and consistent, they must be examined in their entirety and not taken out of context. The field in which the Antitrust Authority is operating is very sensitive. An uncritical and rigid judgement or intentional censure would end up by violating the freedom of expression of the creators of the work.

²¹ D.M. SANDLER – E. SECUNDA, *Point of View: blurred boundaries – where does editorial end and advertising begin*, in 33 *Journal of Advertising Research*, 1993, 3, p. 73 ff.

²² In Italy, the first important measures regarding product placement concerned the series “*Un commissario a Roma*”, where the Antitrust Authority identified the occult promotion of the newspaper “*La Repubblica*”. Starting from the assumption that the editorial itself was co-producer of the fictional series, the Antitrust Authority considered the framings of the newspaper, within the various scenes, repeated, too artificial and unnatural, in order to make the name of the newspaper better-recognized. In particular, a framing of a luminous sign with the writing incomplete was considered a commercial artifice, in order to make the audience complete the name of the journal. This case underwent an examination by a *Jury* that considered only the scene of the luminous sign illicit while the other framings were considered respectful of the law system (measure no. 1291 “*Un commissario a Roma*” 12/7/1993). On this theme, see A. D’ASTOUS – N. SÉGUIN, *Consumer reactions to product placement strategies in television sponsorship*, in 33 *European Journal of Marketing*, 1999, 9/10, p. 896 ff., and C.A. RUSSELL – B.B. STERN, *Consumers, Characters and Products: A Balance Model Of Sitcom Product Placement Effects*, in 35 *Journal of Advertising*, 2006, 1, p. 7 ff. Even the unnatural gestures of the characters using a particular product in the narrative context, adding to the lack of a narrative need to justify the presence of a product, led to an identification of the existence of a planned promotional purposes in the film “*Collegè*” and “*Il Burbero*”, respectively in favor of the cigarettes Muratti and Marlboro (measure no. 3305 “*Film Collegè-Muratti*” 4/10/1995 and measure no. 3654 “*Marlboro- Rai*” 29/12/1996). On the contrary, the Antitrust Authority has not found any illicit promotional end in the case of the film “*Il domani non muore mai*” and in the fiction “*Il Maresciallo Rocca*”. In the first case it has excluded the promotion of BMW, because this type of car was appropriate to the needs of the characterization of the character, moreover, according to the decision of the Antitrust Authority, the scenes in which cars appeared were functional to the plot and framing neither artificial or unnatural (measure no. 6388 “*Il domani non muore mai*”). The same is valid for Ford cars in the fiction “*Il Maresciallo Rocca*”, whose framings were not “dose, extended, devoid of naturalness and artful, that is uprooted from the normative context and essentially dictated by an essential advertising logic” (measure no. 3903 “*Rai-Ford-Ms*” 16/5/1996). In relation to symbolic measures taken with regard to television broadcasts, we can mention the cases, which ended with the imposition of a penalty to Adidas Italy S.p.A. and Sky Italy Ltd. For the misleading promotion of the Adidas brand during the commentary of the football match “*Milan – Juventus*” of March 2006. The framing of the Adidas brand on the jackets of commentators of the match have been judged, as “prolonged, repeated and exceeding the informative needs of the same program”, hiding an advertising purpose (measure no. 16097 “*Giubbotti Adidas su Sky Sport 1*” 19/10/2006). Equally, the Antitrust Authority has esteemed as occult promotion the framing of Nardelli jewels, worn by the anchorwoman “*Mattina in Famiglia*” in winter 2008 imposing a penalty on the Rai and Nardelli joint-stock company (measure no. 20010 “*Nardelli Gioielli*” 25/5/2009). These measures only exemplify and are not exhaustive of those examined by the Antitrust Authority, that you can find at www.agcm.it.



4. The advertising practice of product placement has become widespread in Italy in the absence of specific regulation on this subject, giving the possibility for sector operators to use the sole reference to the general principles on advertising (in particular those related to the identification of commercial communication) and the case law of the Antitrust Authority. Only with legislative decree January 22th, 2004, no. 28 is it explicitly permitted to use the instrument of product placement, but only within cinematographic works²³.

Legislative decree, January 22th, 2004, no. 28 (*"Reform of the regulation concerning cinematographic activities"*²⁴), the third paragraph of art. 9, entitled *"Film qualifies for the benefits"*, contains the first reference to the activity of product placement, where it states that for films containing framings of brands and products, however coherent with the narrative context, there is provided a suitable warning notice that is applicable to company owners of brands and products, at the cost of production of the movie.

Given the position of the norm, films may take advantage of the decree, if they have made use of product placement in the manner prescribed by the law. Although the precise set of rules on product placement is apparent in the subsequent implementation decree, the new introduction remains relevant, that concerning the production of the film being able to benefit from funding from product placement, without the risk of being excluded from government funding. The provision of paragraph 3 of art. 9 of the Urbani Decree is implemented by the Decree of July 30th, 2004, entitled *"Technical modality of fulfilment of the planned placement of brands and products within a cinematographic product placement"*. The implementing decree, in addition to laying down explicitly the admissibility²⁵ of the planned placement of brands and products in scenes of a film, defers the decisions regarding the agreement of placement to the discretion of the involved parties. The two main actors, the business advertisers and the producer of the film, freely decide the modality and typology of placement of brands and products, and they will be also free to agree whether the contribution to

²³ See A. SCHWARTZ – L.L. WILDE, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis?*, in 127 *Univ. Pennsylvania L.R.*, 1979, p. 630 ff.

²⁴ The Legislative decree, also called "Decreto Urbani" after the name of its proposing Minister, wants to reorganize the discipline for the cinematographic activity and to support the development of the cinematographic industry. See A. BEZJIAN-AVERY – B. CALDER - D. IACOBUCCI, *New Media Interactive Advertising vs. Traditional Advertising*, in *Journal of Advertising Research*, 1998, p. 23 ff.

²⁵ Except for the measures that prohibit the advertising of smoking products, the advertising of medicines and medical treatment available only on prescription and the restrictions on alcoholic beverages: paragraph 3 at art. 2 of the decree explains that *"to the forms of planned placement are applied the limitations of April 10th 1962, no. 165, of the law of August 6th 1990, no. 223 and art.2 of ministerial decree November 30th 1991, no. 425"*. With reference to this, consult V. D'ANTONIO, *La pubblicità commerciale*, op. cit., 223 ff.



the cost of production will consist of an outlay on a sum of money or by barter product placement.

Therefore, in the legal system there are two conditions that confer the condition of legality to the planned placement activities of brands and products in cinematographic works: the coherence with the narrative context and adequate notice to the audience of the existence of a previous economic agreement.

The first case establishes that any insertion of brands and products within film scenes must occur without interruption of the treatment of a plot and must integrate with it. It is forbidden to make any reference outside the narration, through the use of excessively laudatory tones or using language which in the domain of the advertising world. The purpose of the norm is to avoid forms of placement that can affect the artistic quality of the cinematographic work. It reveals a perfect coherence with what is inferable from the case of the Antitrust Authority before the Decreto Urbani, where the lack of integration of brands or products in the narration was one of the main clues to support the hypothesis of the existence of promotional purposes.

As regards the obligation to disclose to the public that the presence of brands and products is the result of planned and previous commercial agreements that have occurred between the producer and business advertiser, the legislature identifies in the presence of credits to the names of companies that have participated in the production costs, the solution to highlighting the promotional purposes of placement in the films. In this way, it conforms to the obligation of recognition of messages with an advertising purpose. This option, however, can produce perplexity in terms of substantial effect compared to the real awareness of the public about the promotional purpose. In fact, often the public has little interest in the end credits. In this sense, the present legislation cannot satisfy the legal obligation of the norm²⁶.

With the Decreto Urbani in 2004, the final purpose of the legislation is therefore essentially to incorporate into the side of legality, according to the rules established by the case addressed by the Antitrust Authority, a practice which had in reality already become widespread, thus healing the wide gap between the foreign cinematographic film industry and that of Italy²⁷. With the Decreto Urbani, then,

²⁶ In relation to the thesis about the relative ineffectiveness of the notice in the credits, see M. FUSI, *Il product placement tra divieto di pubblicità non trasparente e nuova disciplina del cinesponsorring*, cit., 2005, p. 1 ff. According to the author, although it is difficult to imagine instruments more suitable, it might have been sufficient to insert notices in the opening credits. Also L. MANSANI, in *La repressione della pubblicità nascosta*, in *Contr. Impr.*, 1995, p. 188, it suggests the solution of a notice before the beginning of the film to inform the audience of the presence of advertising. F. UNNIA, *op. cit.*, p. 301, proposes including the notice in the film poster.

²⁷ The Italian cinematographic industry, before the adoption of the *Decreto Urbani* could not log in funding of advertising, which could benefit foreign productions. In fact, for foreign cinematographic companies there are no prohibitions. On psychological implications of product placement, see J.A. MCCARTY, *Product Placement: The Nature of the Practice and Potential Avenues of Inquiry*, in L.J. SHRUM (edited



National cinema can benefit not only from state funds, but also from those arising from advertising agreements with private entities.

5. In 2007, the phenomenon of product placement finds legal standing in the European Community, given the transverse spread of this form of advertising in the European media industry, and not just in the cinematographic industry. For this reason, the article 61 of Directive 2007/65/CE²⁸ states that: “*product placement is a reality in cinematographic works and in audiovisual works made for television, but Member States regulate this practice differently. In order to ensure a level playing field, and thus enhance the competitiveness of the European media industry, it is necessary to adopt rules for product placement*”²⁹.

The placement of products is distinct from traditional advertising in the European Community, with sponsorship and teleshopping. The same directive, reconfirming the prohibition of any form of misleading audiovisual commercial communication, takes into account the negative effects resulting from product placement, although it does not observe the obligations of identification established by the law. Art. 3-*octies* prohibits the placement of products, which can be admitted, if the obligations established by the same directive are respected³⁰.

by), *The psychology of entertainment media: blurring the lines between entertainment and persuasion*, Mahwah, NJ, 2003, p. 45 ff.

²⁸ The Directive 2007/65/CE was adopted by Parliament and the European Union Council on December 11th, 2007 and it refers to the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, modifying the directive 89/52/CE.

²⁹ According to the law in art.1, let. m), of Directive 2007/65/CE, the product placement “*means 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*”.

³⁰ According to the statement in art. 3g “*product placement shall be prohibited. By way of derogation from paragraph 1, product placement shall be admissible unless a Member State decides otherwise: in cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment 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 derogation provided for in the first indent shall not apply to children's programmes. Programmes that contain product placement shall meet all of the following requirements: (a) their content and, in the case of television broadcasting, their scheduling shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider; (b) they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services; (c) they shall not give undue prominence to the product in question; (d) viewers shall be clearly informed of the existence of product placement. Programmes containing product placement shall 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. By way of exception, Member States may choose to waive the requirements set out in point (d) 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 approach to product placement regulation has been confirmed by Directive 2010/13/CE, the “*Audiovisual Media Services Directive*”³¹, where product placement against payment is only allowed in certain kinds of program (cinematographic works, films and series made for audiovisual media services, sports and light entertainment programs). However it is prohibited in children’s programs. In contrast product placement provided free of charge (production props or prizes) is allowed in all programs including children’s programs. Nevertheless, Member States are able to adopt stricter rules and choose to opt-out of such provisions allowing product placement totally or partially, for example by prohibiting product placement in certain programmes, such as documentaries³².

Every programme featuring product placement should comply with a set of criteria, such as editorial independence of the media service provider and no undue prominence given to the product or service referred to. Moreover, product placement may not be used in order to promote supply of the products or services.

Further, viewers must be clearly informed about the existence of product placement, meaning that product placement should be appropriately identified at the start and at the end of the program and when the program resumes after an advertising break. Member States may decide not to apply this requirement to programs that have either been produced or commissioned by the media service provider itself³³.

The transposition of the first directive (2007/65/CE) was passed in Italy through Legislative Decree March 15th, 2010, no 44³⁴, where, in art. 4, letter l), the placement of products is defined as “*any form of commercial audiovisual communication that allows for the placement or the reference to a product, a service or a brand that appears within a program after payment or compensation*”. Afterwards the approval of this measure, the *Consolidated Law on audiovisual media services*, art. 40 - *bis*, allowed for the use of product placement in cinematographic works, films and series made for audiovisual media services, sports and light entertainment, while it reiterates the absolute ban on children’s programmes.

The insertions are allowed even in television, both following payment of an equivalent sum of money or through the exchange of goods and services to support the production, in the program.

³¹ See article 11 of the Directive. The rules on product placement should only apply to programmes produced after December 19th, 2009.

³² See M.R. NELSON, *Recall of brand placements in computer/video games*, in 42 *Journal of Advertising Research*, 2002, 2, p. 80 ff., and C.A. RUSSELL, *Toward a framework of product placement: theoretical propositions*, in 25 *Advances in Consumer Research*, 1998, p. 357 ff.

³³ Anyway, product placement of tobacco products and medicinal products for prescription is prohibited under any circumstances and, where product placement is surreptitious, it should also be prohibited.

³⁴ Legislative Decree March 15th 2010, no. 44 modifies the *Consolidated Law on radio and television* that assumes the denomination of “*Consolidated Law on audiovisual media services*”.



This proposes, even for television product placement, to set strict limits to protect the program itself and its users. In fact, paragraph 2 of the previous article, establishes the principle that the content of programmes and their programming should not be influenced by placement in such a way as to compromise the responsibility and editorial independence of the media provider service. The content of the program, in particular, must never be subordinated to the economic needs of business advertisers, even if they participate in production costs. Moreover, product placement must never be similar to traditional advertising by adopting the language and modality of presentation of products and brands. In fact, it is prohibited to encourage directly the purchase of goods included, or to refer to special offers or to give undue prominence to them.

The users of television programmes, the object of product placement, will have been guaranteed their right to be informed of agreements on placement by notices, both at the beginning and at the end of the transmissions and after the commercial breaks. This requirement applies if the programme in which the placement is made was commissioned by the media service provider or by companies controlled by the same, when this latter has benefited from advertising revenue³⁵. Essentially, the activity of product placement, both in film and in television, runs along similar tracks, it allows for an increase in its use but on the other hand it decries uncritical development that would harm both the contents where products and brands fit and the interests of the public benefitting from it.

Thus, in this sense, the provision of specific obligations and restrictions cannot be ignored, such as integration with the narrative context and the recognition of the placement which constitute a limit of quality and quantity to the practice of product placement. In particular, as regards this provision, it would be interesting to study product placement legislation in other European countries.

6. Product placement was admitted in the UK from February 28th, 2011 for the programmes made for a UK audience as long as they complied with the Ofcom's Broadcasting Code³⁶. Product placement is thus allowed in films, dramas and documentaries, TV series, entertainment shows and sports programmes, but it is banned in news, children's and religious programmes, current affairs and consumer advice programmes. Product placement is not allowed in programmes made for BBC licence fee funded services, but it is permitted for programmes acquired and for those made by the BBC's commercial TV services, Ofcom's rules apply. There are, also in

³⁵ If the insertions of products and brands in a television program are the result of agreements between the advertiser and the producer of the program, this latter must follow the conditions of Decreto Urbani.

³⁶ The OFCOM is the *Independent Regulator and Competition Authority for the UK Communications Industries*, see www.ofcom.org.uk. See R. TIWSAKUL – C. HACKLEY – I. SZMIGIN, *Explicit, Integrated Product Placement in British Television Programmes*, in *24 Int. J. Adv.*, 2005, 1, p. 95 ff.



the UK, some products that cannot be placed such as cigarettes, alcoholic drinks, gambling products or medicines that are able to be purchased only on the presentation of a prescription, food and drink that are high in fat, salt, or sugar and baby milk, guns and other weapons.

Also Ofcom's Broadcasting Code provides for specific restrictions about placed products in programmes, in fact the product must be integrated with the narrative context because the programme cannot promote it.

In addition to what has been said until now it would be relevant to add that if a UK programme contains product placement, it is necessary to put a special logo in order to facilitate the recognition of the presence of product placement. OFCOM, in fact, has determined that TV channels, in resorting to the activities of product placement must highlight this option by placing a pre-established logo by the same OFCOM Code. It must be visible at the beginning and at the end of the program and repeated after any advertising break and again at the end of the programme. OFCOM has established that all broadcasters who use product placement must show on-screen information campaigns that allow viewers to know about product placement and explain the meaning of the product placement logo³⁷.

Undoubtedly the creation of a unique symbol to which is given sufficient visibility, satisfies the specific need of the public to be properly informed, ensuring more protection. It would be desirable to have a similar solution in our system, where the various broadcasters could provide in their procedures of self-government³⁸, the design of a single logo that is valid for all, in order to ensure safe and easy recognition by the audience.

In France the transposition of legislation on product placement was done through Deliberation 2010-4 of 16 February 2010, relating to Product Placement in Television Service Programmes by the *Conseil supérieur de l'audiovisuel*³⁹.

Due to this deliberation, product placement is authorized in cinematographic works, audiovisual fictions and music videos, except when the target audience is oriented towards children. This deliberation bars the placement for the following

³⁷ For further information, J. ENSER – V. GASKELL – R. HAMMOND, *Product placement. A Guide to the New Rules*, February 2011, on web site http://www.olswang.com/pdfs/product_placement_feb11.pdf.

³⁸ According to art. 15 paragraphs 5 of Legislative Decree on March 15th 2010, no. 44, the application discipline of principles set out in the same article is adopted by procedures for self-government by producers, televisions, advertising agencies and other stakeholders that are then notified to the Authority that checks its implementation. See also I.D. NEBENZAHL - E. SECUNDA, *Consumers' attitudes toward product placement in movies*, in *Int. J. Adv.*, 1993, p. 1 ff.

³⁹ The *Conseil supérieur de l'audiovisuel* (CSA) was established by the President of the French Republic on 13 February 1989 for guaranteeing and promoting audiovisual communication freedom in France. See <http://www.csa.fr>.



products: drinks with alcohol content in excess of 1.2; tobacco; medications; firearms and ammunition and infant formula.

The CSA imposes strict limits on television product placement to protect the programme and its users, according to Product Placement Form Requirements established by Article 3(g) ASM- directive⁴⁰.

Furthermore, a pictogram must inform viewers that programmes include product placement. Such a pictogram will be displayed for one minute at the start of the programme, another minute after each advertising break and will be mentioned in the credits at the end of the programme. Even in France as well as the UK, the form and technical specifications of the pictogram is directly determined by the Conseil, in order to have a unique symbol. It is important to note that the CSA provided for the implementation of viewers' advisory provisions in two separate periods. In fact, the Conseil established in paragraph IX that "for a 2-month period starting from the date of the first broadcast by a broadcaster of a programme including placement of a product, the pictogram shall be displayed for five seconds at the start of the programme in a banner stating in an easily readable font: "*This programme includes product placement*". Following the display of the banner, the pictogram shall be used in the terms and conditions set forth in paragraph VII of this deliberation. At the end of this initial period, viewers will be acquainted with the fact that a product is being placed in the terms and conditions set forth in paragraph VII of this deliberation". The advisory conditions will apply irrespective of the programme's origin or production conditions.

Product placement has been incorporated into German media law through 15, 44 and 63 articles of "*The 13th amendment to the Interstate Broadcasting Treaty*"⁴¹, which completes the transposition of the ASM- directive into German media law.

With reference to art. 7(7) of this amendment, product placement, as surreptitious advertising and thematic placement are prohibited, but, under art. 7(7)(2), it is allowed on condition that editorial independence would not be prejudiced and it must not directly encourage viewers to purchase goods or services and there must be no undue prominence of the product. Furthermore, the programmes containing product placement must be clearly identifiable, at the beginning and at the end of a programme as well as at its continuation after an advertising break. The broadcasting corporations forming the ARD⁴² association, the ZDF and the state media authorities have stipulated a uniform system of identification. Under art. 15, in derogation from article 7(7), sentence 1, product placement is admissible in

⁴⁰ Cf. P. DAMBRON, *Sponsoring et Politique de Marketing*, Les Editions d'Organisation, Paris, 1991, p. 8 ff.

⁴¹ The *Interstate Broadcasting Treaty or Rundfunkstaatsvertrag* (RStV) is a treaty between all sixteen German federal states, it allows for the creation of uniform federal rules for the broadcasting law. It entered into force on April 1st 2010.

⁴² The ARD together with the ZDF and Radio Germany forms public broadcasting in Germany.



cinematographic works, films and series, sports programmes and light entertainment programmes, which are not produced by the broadcasters itself or produced or commissioned by an affiliated company to the broadcaster, except for children's programmes. The products must be placed also when there is no payment, but only the provision of specific goods or services free of charge, unless news programmes, current affairs programmes, advice and consumer programmes, programmes for children or religious broadcasts.

In the Spanish legal system product placement is regulated by art. 17 of Law 7 / 2010 of March 31, General Communication Audiovisual (LGCA). According to this article it is admitted in documentaries, movies and TV shows, sports and entertainment programming apart from children's and religious programmes. It is important to note that The RTVE, the state corporation responsible for the management of public service broadcasting, cannot receive income from advertising activities following the Law 8 / 2009 of 28 August, including revenue from product placement. Art. 17 does not refer to the prohibition of product placement for tobacco products and medicines available only by prescription, but this prohibition is contained in art. 18 for any type of commercial communication. On the contrary what is specified in art. 17 establishes that product placement cannot directly encourage the purchase or lease of goods or services, do specific promotions or give undue prominence to the product and must respect editorial independence. Furthermore the viewers should be clearly informed of product placement at the beginning and end of the program, and when it resumes after an advertising break, when the program was produced or commissioned by the service provider or one of its affiliates. All service providers of audiovisual media have adopted a special logo that appears in the top left-hand corner of the picture⁴³.

In Portugal, the ICAP (*Instituto Civil da Autodisciplina da Publicidade*) with the CPMCS (*Confederação Portuguesa dos Meios de Comunicação*) social have signed a self-regulation agreement (Acordo de Auto-Regulação em Matéria de Colocação de Produto, Ajudas à Produção e/ou Prémios of February 6 2009) in order to regulate product placement. As a result of this agreement, product placement is admitted in TV programmes except in children's, religious, current affair and news programmes. This agreement imposes the same limits as the ASM – directive for the use of product placement, to preserve the programme and the viewers, in particular programmes containing product placement must be recognizable thanks to a particular logo positioned at the start and the end of the programme, and after an advertising break.

7. At the moment, the forecast for a specific discipline of the phenomenon in television as well, just as has happened in the cinema, can only enhance the

⁴³ See F. BOMBILLAR, *El derecho al emplazamiento de productos*, January 5th, 2011 on web site www.medialaw.eu.



development of product placement, being safer and easier for business advertisers to invest on the communicative level. Probably, the next issues that the media industry, not only in Italy, will have to face in relation to product placement will be in the qualitative and quantitative limits: the spread of this phenomenon, in fact, if unchecked, it could undermine the quality of the entertainment content and the interests of the public which is more and more “submerged” under media products such as commercial advertising⁴⁴.

In fact, an endemic limit to this risk is linked to the effectiveness itself of product placement, which is characterized precisely by shunning typical advertising language, and in the ability to shape an insert into the narrative, exploiting the peculiarities of the product itself for entertainment. Subverting this setting would most probably give rise only to the dislike of the audience, thwarting the investments made, especially given the fact that today's viewer/consumer is certainly more critical and disillusioned than before: In the presence of film productions characterized by excessive promotional content, the viewer/consumer would be inclined to implement the same mechanisms of defence used for traditional advertising⁴⁵.

In conclusion, with reference to the national and EU community framework, product placement is a new form of consolidated advertising, disconnected from the original approach to misleading advertising⁴⁶.

In this sense, the “*juridification*” of the phenomenon is an opportunity for all the “players” involved in various ways in product placement. The users because they can protect themselves against any form of misleading commercial communication and advertisers because their investments are guaranteed, thanks to a clear and definite normative framework⁴⁷. A framework of principles, which, although it explicitly applies to television and cinematographic works, is a point of reference, possibly applicable by analogy to all sectors of the entertainment industry, where recently

⁴⁴ W. BREHM, *Legal Restrictions on Product Placement and Sponsorship in Films and Television Programs*, in 14 *Journal of Media Law and Practice*, 1993, 2, p. 97 ff.

⁴⁵ Cf. P.B. GUPTA – S.J. GOULD, *Consumers' Perception of the Ethics and Acceptability of Product Placements in Movies: Product Category and Individual Differences*, in 19 *Journal of Current Issues and Research in Advertising*, 1997, 1, p. 5 ff.

⁴⁶ See M. FUSI, *Il product placement tra divieto di pubblicità non trasparente e nuova disciplina del cinesponsoring*, op. cit., p. 26 ff. The Author thinks that is exaggerated to assign to product placement the enormous persuasive effect generally given to it, because modern people have plenty of autonomy of judgment and therefore are free from any kind of manipulation and conditioning.

⁴⁷ Cf. C. MORTAN – M. FRIEDMAN, “*I saw it in the movies*”: *Exploring the link between product placement beliefs and reported usage behaviour*, in 24 *Journal of Current Issues and Research in Advertising*, 2002, 2, p. 33 ff. Always according to M. FUSI, *Il product placement*, op. cit., p. 27, the danger of product placement lies only in its not always easy identification. For this reason, it is not right to demonize this communicative formula, but it would be preferable to suppress it only in the case of prejudice originating from non-transparency. So the Author invites reflection on its compatibility with artistic expression freedom.



product placement has spread considerably (for example, videogames, theatre plays, music and publishing)⁴⁸.

⁴⁸ See S.K. BALASUBRAMANIAN, *Beyond Advertising and Publicity: The Domain of Hybrid Messages*, Cambridge, 1991, p. 8 ff.