

WHEN REALITY ENTERS THE FICTION

Webinar Cineforum



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PROGRAMME

80'
Presentation

Introduction
Product Placement
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Conclusion

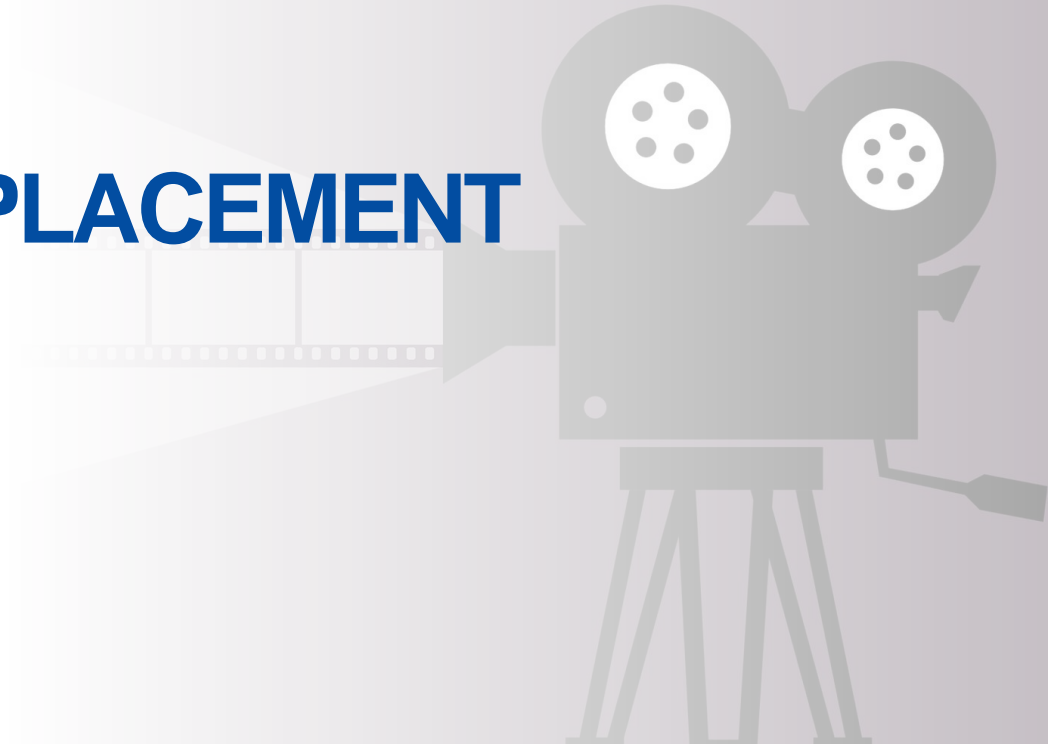
10'
Questions and answers

Introduction

- The line between reality and fiction is thin
- Trade marks and fictional characters – Trade marks becomes a part of the world of fiction
- It raises a number of legal questions
- Authorized use = product placement
- Unauthorized use = infringement?

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PRODUCT PLACEMENT



What is product placement?



- **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
- **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**)

Product placement

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

Definition in the new Directive ((EU) 2018/1808)

- 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 or a user-generated video in return for payment or for similar consideration

Distinction with « sponsorship »

- any contribution made by public or private undertakings or natural persons not engaged in providing audiovisual media services or video-sharing platform services or in producing audiovisual works to the financing of audiovisual media services, video-sharing platform services, user-generated videos or programmes with a view to promoting their name, trade mark, image, activities or products
- In the case of product placement, the reference to the product is integrated into the plot of the work

History of the product placement

The film **"Washing days in Switzerland"** features **barrels of Sunlight Soap detergent**.

The Lumière brothers apparently made a deal with the Lever Brother company. In exchange for visibility in their films, the soap company agreed to export the Lumière films throughout Europe.





See: *Les placements produits au cinéma en 139 Exemples*
(15/04/2011)



Importance

Product
budget

170 millions \$

m's



Give and take partnership



Product placement

- The product or brand may only be **in the background** (screen placement)
- They may be **in the foreground** (screen placement)



Product placement

- The product, with the brand visible, **may or may not be used by an actor**



- It may then be present over a **long period of the program - or not** , be presented **orally** or be **integrated into a dialogue**

Product placement

Screen placement: This is when a brand features in the foreground or background of a shot but isn't mentioned by name. It could be a recognizable logo on the back of a laptop, something that a character is eating, or a popular restaurant chain just in focus behind the action.

Script placement: When a character mentions a particular brand by name, even if it's interchangeable or unrelated to the plot or characters of the film, then it counts as script placement.

Plot placement: Plot placement is where brands really become entwined in the fictional world of films to the extent that they are an unchangeable part of the story or the characters that feature within it.

Product placement

Corporate placement - where we don't present a specific product, but the entire brand.

Innovation placement - a new technology.



Back to the Future, by Robert Zemeckis, Universal, Ambrin, 1985

Product placement

Creative placement: brands become an integral part of the plot

« The Gods Must Be Crazy », Jamie Uys, 1980



Product placement

- The notion of product placement was incorporated into the texts rather late
- Product placement in cinema was not an issue
- No specific regulations
- **Directive 89/552/EEC 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

Article 11

1. Paragraphs 2, 3 and 4 shall apply only to programmes produced after 19 December 2009.

2. **Product placement shall be prohibited.**

3. By way of derogation from paragraph 2, product placement shall be admissible in the following cases unless a Member State decides otherwise:

(a) in cinematographic works, films and series made for audio visual media services, sports programmes and light entertainment programmes;

(b) 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 point (a) shall not apply to children's programmes.

Programmes that contain product placement shall meet at least 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.

4. In any event programmes shall not contain product placement of:

(a) tobacco products or cigarettes or product placement from undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products;

(b) specific medicinal products or medical treatments available only on prescription in the Member State under whose jurisdiction the media service provider falls.

Article 11

2. Product placement **shall be allowed** in all audiovisual media services, except in news and current affairs programmes, consumer affairs programmes, religious programmes and children's programmes.

3. Programmes that contain product placement shall meet the following requirements:

- a) their content and organisation within a schedule, in the case of television broadcasting, or within a catalogue in the case of on-demand audiovisual media services, shall under 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 by an appropriate identification at the start and at 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.

Member States may waive the requirements set out in point (d) except for programmes produced or commissioned by a media service provider or by a company affiliated with that media service provider.

4. In any event programmes shall not contain product placement of:

- (a) cigarettes and other tobacco products, as well as electronic cigarettes and refill containers, or product placement from undertakings whose principal activity is the manufacture or sale of those products;
- b) specific medicinal products or medical treatments available only on prescription in the Member State under whose jurisdiction the media service provider falls.;

Product placement

- **The condition of undue influence**
 - Such influence would be unacceptable if, for example, it had an impact on good scriptwriting or journalistic practice.
 - Or if it artificially influenced the logical development of the programme or led to unnatural script changes.
- **They must not have an excessive promotional effect.**
 - They must not directly encourage the purchase or rental of goods or services.
 - This requirement would not be met if the integration or quotation of the product were to be accompanied by an additional incentive or endorsement message.

Product placement

- **The emphasis must not be unjustified.**
- This would be the case if there is a recurring presence of the brand or product concerned or depending on the way in which these products are presented or highlighted.
- The "undue prominence" of a product placement will therefore be analysed on purely phenomenological grounds, either (a) when the brand, good or service appears repeatedly in a way **that is neither useful nor unavoidable**; or (b) when the brand, good or service is presented and appears in a way that makes it clearly **identifiable and seems somehow "out of place"**, i.e. its presence is not justified for editorial reasons

Product placement – information to the audience

Spectators must be informed of their presence

Decision of the CSA (16/02/2010)



- Article 7 of this decision states that **viewers must be clearly informed of the existence of product placement**. To this end, programs containing product placement are identified by a pictogram
- This pictogram appears for one minute at the start of the program, for one minute after each commercial break and, at the end of the program, for the duration of the credits.
- This information must be provided regardless of the **origin and production conditions of the program**. Finally, television services regularly inform viewers of the meaning of this pictogram by broadcasting a banner with the following sentence: "This program contains product placement"



Product placement

- **Real business**
- It can be very lucrative, not only for the producers, but also for the brand owners
- Does this apply to trademarks as defined in trademark law?
- The registered trademark? or not?
- Does this apply only to traditional trademarks, verbal and figurative, or to non-traditional trademarks?
- A very simple question: does the use of a sound trademark in the credits of a film constitute product placement? For the record, the James Bond credits are a trademark... so product placement or not?

2

UNAUTHORISED USE



Unauthorised use

Trademarks regularly appear in films without the consent of their owners

- Free advertising
- Infringement?
- Conditions in order to implement TM right



"The Hangover Part II", Todd Phillips, Warner Bros, 2011

Unauthorised use

- **A use**
- The contested use **implies active conduct and a direct or indirect master of the act constituting the use.**
- **Only a third party in control of the act constituting use can be ordered to cease it.** It is possible, without too much difficulty, to state that the use of a trademark in a film constitutes use within the meaning of trademark law.

Use in the course of trade

Context of a commercial activity for economic advantage and not in the private sphere

The trade mark has been used by the third party in the context of its own commercial communication

The concept of commercial communication means any form of communication intended for third parties, designed to promote its activity, goods or services, or to indicate the pursuit of such an activity

The use of a sign in an undertaking's own commercial communication therefore presupposes that the sign appears to third parties to be an integral part of the undertaking and therefore part of its business

Use in the course of trade

- Use as a trade mark
- In order to identify goods and services
- In a movie?
- The functions of Trade marks?

Unauthorised use

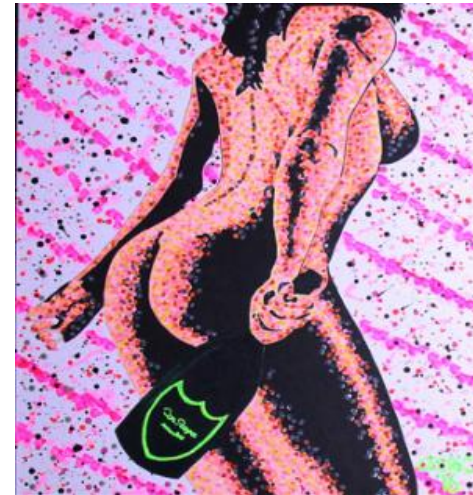
« Camping 2 », Fabien Onteniente, 2010

- Infringement?
- TM with reputation?



Unauthorised use

- **Article 10(6):** "The provisions applicable in a Member State relating to the protection against the use of a sign for purposes other than to distinguish goods or services, where the use of such a sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark" are not affected



Unauthorised use

- In the **Louis Vuitton case**, on appeal, the Court of The Hague notes that **multinational companies must show greater tolerance towards criticism of their activities** (*Trib. The Hague, Civil Section, 4 May 2011, Case No. 389526/KG ZA 11-924*)
- **Dom Perignon case: artistic freedom constitutes a just cause** [...] if [it] is the original result of a process of creative shaping which is not intended to be detrimental to the trade mark or its proprietor' (*Benelux Court of justice, 23 Sept. 2019, Case No. A 2018/1/8*)

Preamble of the Trade mark Directive

- The use of a trade mark by third parties for **the purposes of artistic expression should be considered fair**, provided that it also complies with honest practices in industrial or commercial matters.
- The Directive should be applied in such a way as **to ensure full respect for fundamental rights and freedoms**, in particular freedom of expression...
- **The preamble is not binding**, it could be used **to interpret the concepts of use in the course of trade or use as a trade mark...** or just cause in the case of a trade mark with a reputation. We shall see what the Court of Justice has to say on this point in the Ikea case. Between you and me, I hope that the Court of Justice will not make the mistake of seeing freedom of expression as just cause, but that's not the point here.



Act of parasitism outside trademark law, or even an act of denigration, again outside trademark law.

In such cases, the rules of civil liability must be applied to ensure that the person responsible for the use can be held civilly liable

Author's right - infringement should be considered
Work must be original – economic rights but also moral rights

Theory of accessory use

- Work reproduce in the background or reproduce it in small size
- The work is not actually communicated to the public



The Court of Cassation has ruled that "the representation of a work in a public place is only lawful when it is incidental to the main subject represented or dealt with".

Cass. 1re ch. civ., 4 July 1995

Unauthorised use

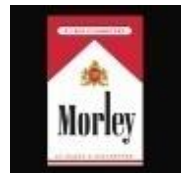


The Court of Cassation has also stated that a work may be used lawfully if its inclusion in another work is fortuitous and therefore the result of chance

*Directive 2001/29/EC. Cass. 1^{re} ch. civ. 12
May 2011*

Conclusion

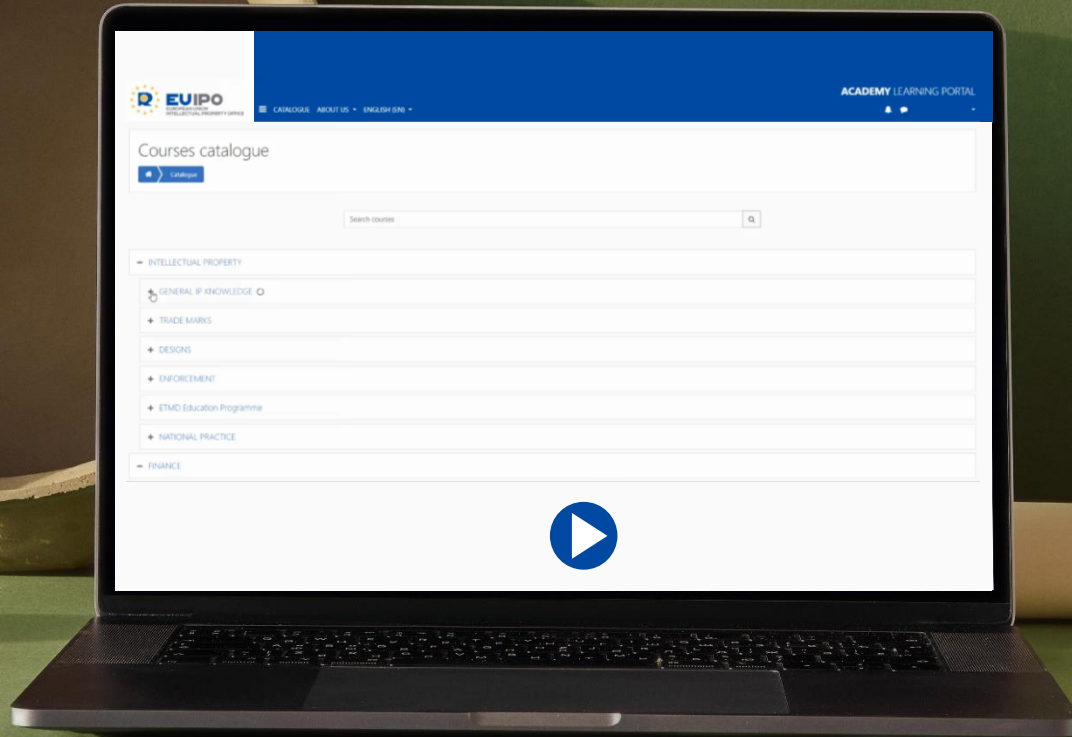
- The question of the use of the Trade mark in movie is not exhausted
- We still have questions concerning the product placement (concept of TM)
- Freedom of expression
- Fictional TM...it is another story



To be continued...



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Credits – Movies extracts

Cast away, by Robert Zemeckis, Dreamworks, 20th Century Fox, 2000

E.T., by Steven Spielberg, Universal Pictures, 1982

Back to the Future, by Robert Zemeckis, Universal, Ambrin, 1985

The Hangover Part II, by Todd Phillips, Warner Bros, 2011

The Truman show, by Peter Weir, Paramount Pictures, 1998

Logorama, written and directed by F. Alaux, H.De Crecy, L. Houplain (H5),
Produced by Autour de Minuit

Coming to America, by John Landis and Robert D. Wachs, Paramount
Pictures, 1988



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THANK YOU