Using brands and products in film

This information sheet covers the legal issues as well as the money-making opportunities that exist when placing products in films.

Introduction

It is commonplace for characters in films to eat, drink, drive, purchase and wear branded products. Filmmakers wanting to use branded or recognisable products in their films should consider the relevant legal issues and also the money-making opportunities that exist when placing products in films. This information sheet will cover three key areas:

1. Restrictions on the use of tobacco and alcohol products in your film;
2. General legal issues when using recognisable brands and products in your film; and
3. Product placement – a means of raising funds for your film.

Using tobacco products in film

Prohibition of advertising

There are national as well as State laws in Australia that impose obligations on filmmakers in relation to tobacco products. In essence, these laws prohibit any advertisement (which is defined widely to mean more than the conventional idea of an advertisement) for tobacco products in a film or television broadcast in Australia.

The *Tobacco Advertising Prohibition Act 1992* (Cth) (**TAP Act**) aims to restrict the exposure of the public to messages and images that promote, encourage or persuade people to smoke or continue smoking. It prohibits incorporating a tobacco advertisement into a film and defines a 'tobacco advertisement' as including a moving picture that gives publicity to, promotes or intends to promote:

- smoking;
- the purchase of tobacco products, a particular brand of tobacco product, a specific tobacco manufacturer or any words or images closely associated with a tobacco product.

Recent amendments in 2012 to the TAP Act place even greater restrictions on tobacco advertisements published electronically, including over the internet. These amendments are relevant to film makers who wish to upload to the internet or otherwise electronically publish films or film excerpts containing material which could be considered a tobacco advertisement. Film makers should be aware that they can be liable under the Act even if the offending footage did not originate in Australia but has an Australian link and is accessible or intended to be accessible by the Australian public.

Exceptions

There are exceptions when a film will not infringe this prohibition, for example if the purpose of the footage is to discourage smoking or the use of tobacco products. Accidental or incidental publication/broadcasting of tobacco advertisements is also allowed where:

1. the person publishes/broadcasts the advertisement as an accidental or incidental accompaniment to the publishing/broadcasting of other matter; and
2. the person does not receive any direct or indirect benefit (whether financial or not) for publishing/broadcasting the advertisement (in addition to any direct or indirect benefit that the person receives for publishing/broadcasting the other

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matter).

Courts have held that to fall into an exception like this the tobacco advertisement must not dominate or form a substantial feature of a program.

How does the TAP Act affect filmmakers?

Films, videos and programs that have not yet been screened in public may offend the tobacco advertising prohibitions if they are intended to be screened in public. Promoting a film that contains a prohibited tobacco advertisement is also prohibited. Therefore TV stations, film distributors and cinemas are unlikely to want to purchase content if it offends the TAP Act.

You cannot make an agreement to, for example, receive funding monies for a film in return for using a particular brand of cigarettes in your film because the TAP Act prohibits agreements which promote or publicise a tobacco product, brand name or manufacturer in return for some sponsorship.

Filmmakers can still present an actor, in character, smoking what appears to be tobacco. You can also have a cigarette packet in shot. However the use of the cigarette packet must not be presented as a 'tobacco advertisement' as described above. The application of the exceptions described above focus on whether the appearance of what is otherwise a 'tobacco advertisement' is accidental or incidental accompaniment to the contents of the film or the scene in the film. In documentary films, smoking or any advertising material relating to tobacco may appear as a fortuitous or accidental aspect of a shot. In drama, as the direction of a shot is usually intentional rather than accidental, smoking or any advertising material relating to tobacco should have a subordinate or incidental function in the shot, so as to avoid claims that the film breaches the TAP Act.

Example: Russell Crowe

In an interview for the current affairs television show *60 Minutes*, Russell Crowe was shown smoking a cigarette and with a Marlboro packet in front of him. This broadcast was considered to be a tobacco advertisement but was not an infringement of the TAP Act as it was an accidental or incidental accompaniment to the other footage.

However, when the same footage was shown on a later episode as part of a "Mailbag" viewer feedback segment, the court considered that the tobacco advertisement was not accidental or incidental and the broadcaster had infringed the tobacco product placement prohibitions. This was despite the fact that the segment was concerned mainly with viewer displeasure at Russell Crowe's smoking. In part, however, the court did not see it necessary to broadcast the actual footage of the smoking along with the complaint letters, and the Mailbag segment was a dispassionate review of correspondence that did not necessarily take an anti-smoking stance.

It seems likely that a televised news item portraying a public scene where tobacco marketing images are visible will be merely incidental to the broadcast and therefore unlikely to be an infringement.

What happens if you don't comply?

Under the TAP Act, you can be fined up to $21,600 for incorporating a tobacco advertisement into a film or broadcasting. (The penalty is 120 penalty units; as of 31 July 2015 a penalty unit has a value of $180).

Using alcohol products in film

Alcohol advertising is less strictly regulated than tobacco advertising. You are generally free to include alcohol products and show alcohol consumption in your film subject to the matters discussed below and as long as in doing so, you comply with the laws relating to trade-mark, copyright and passing-off. If your film portrays alcoholic beverages or particular alcoholic products in a manner and to such an extent that it can be said to constitute an advertisement for alcoholic beverages, then

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you may find that screening the film may give rise to issues under one or more of the following codes:

- the Australian Association of National Advertisers (AANA) Code of Ethics;
- the Commercial Television Industry Code of Practice;
- Alcohol Beverages Advertising Code (ABAC) Scheme.

Alcohol product placement deals

If you have negotiated an alcohol product placement for your film, the placement deal is likely to be considered as a form of advertising of that product, and the alcohol manufacturer or distributor will want to be satisfied that your film's portrayal of its product complies with its obligations under the ABAC Scheme and follows guidelines for responsible and moderate consumption by avoiding promoting things such as:

-underage drinking;

-unhealthy drinking (e.g. by a pregnant woman);

-alcohol abuse; or

-drunk driving.

Rewarding crowd-funders with alcohol

If you are crowd-funding your film and choose to reward your crowd-funders with rewards of alcohol, or invitations to events where alcohol is served, you may need a liquor licence from each State or Territory where that reward is offered (and possibly any overseas jurisdictions where you have funders). You must also ensure that deliveries are only made to adults of legal drinking age.

In addition to liquor licensing, you must closely read your platform's guidelines to determine what you are permitted to offer. Kickstarter.com rules, for example, forbids all alcohol as a reward. Pozible.com rules, on the other hand, allows project creators to offer alcohol on the condition that they conform to applicable licensing laws.

The regulation of crowdsourcing of funding is discussed in the Arts Law information sheet, Crowdfunding.

Alcohol sponsorship of film festivals

If you are organising a film festival, you may seek sponsorship from an alcohol manufacturer or dealer only if your event does not clearly target underage people. The alcohol advertising displayed at your event must conform to the applicable industry guidelines including that it must:

- be aimed only at those legally eligible to consume alcohol;
- comply with the Australian Guidelines to Reduce Health Risks from Drinking Alcohol (e.g. not promote over-consumption);
- not suggest that alcohol is a cause for success (personal, business, sexual…) nor that it offers any therapeutic benefit;
- not link alcohol consumption to driving, sport or any potentially hazardous activity.

Arts Law publishes: Organising a festival checklist.

Use of other branded or recognisable products in film

The following areas of law are generally relevant to the use of branded or recognisable products in film:

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1. Trade mark;
2. Copyright;
3. Passing off as well as misleading and deceptive conduct.

Trade mark

A trade mark is a sign used in business to indicate that goods or services come from a particular trader or service provider. A trade mark can be a letter, name, signature, word, numeric device, brand, heading, label, aspect of packaging or shape, and even a scent or sound. It can consist of words alone or images alone or a combination of words and images.

The *Trade Marks Act 1995* (Cth) prohibits unauthorised use of trade marks as trade marks. In other words, use of a trade mark to indicate a connection between the goods or services and the manufacturer or service provider. For more information see Arts Law's information sheet on Trade marks.

The question for filmmakers is whether the placement of products bearing a trade mark in their film is use of the trade mark **as a trade mark**. The answer to this question is generally "no". If a character is simply drinking from a can of coke bearing the "COCA-COLA" trade mark or wearing a t-shirt bearing the "MAMBO" trade mark there will be no trade mark infringement. The trade mark is not being used as a "badge of origin" and as such is not an issue for the filmmaker.

For further information, see the Arts Law information sheet, Trade marks.

Copyright

Another issue to consider when placing branded products in films is whether the label bears an artistic work and whether the reproduction and communication to the public of that artistic work in a film could be a copyright infringement. The *Copyright Act 1968* (Cth) defines "artistic works" to include paintings, sculptures, drawings, engravings or photographs "whether the work is of artistic quality or not". Clearly some logos come within the ambit of this definition.

Copyright owners of artistic works control the right to:

- reproduce (by photographing, photocopying, filming);
- publish (by making copies available for sale) and;
- communicate the work to the public (via television, radio or the internet.).

To use a "substantial" part of an artistic work in one of these ways, without the permission of the owner, is a copyright infringement. Defences for infringement include fair dealing for the purpose of criticism and review, news and current affairs reporting, parody and satire, and research and study.

Additionally in the case of artistic works:

"copyright … is not infringed by the inclusion of the work in a cinematograph film or in a television broadcast if its inclusion in the film or broadcast is only *incidental* to the principle matters represented in the film or broadcast. "

What is regarded as "incidental" is a question of degree and will depend on the circumstances of the particular case. An example of "incidental use" would be a painting in an art gallery incidentally televised during an interview with the gallery director. If, however, the gallery director was interviewed standing in front of a particular painting for the whole interview and the artwork was in focus it would be more difficult to argue that such use was "incidental".

With respect to product placement in film, a filmmaker will in most cases have a strong argument that the use of branded products or well-known logos in a film is "incidental". A character in a film wearing sunglasses bearing the Gucci logo or eating from a pizza box bearing the PIZZA HUT logo is arguably an "incidental" use of the artistic work in the film. Whether or not the use of an artistic work in a film is "incidental" will depend on a number of considerations including the prominence of

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the artistic work, the importance of the artwork to the script of the film, the duration of time in which the logo is visible. Contact Arts Law for specific advice on whether an intended use of an artistic work is “incidental”.

If the use of the artwork in a film is more than “incidental”, the filmmaker should seek permission in the form of a licence from the copyright owner. Generally, licensing the use of a copyright work will involve the payment of a licence fee to the copyright owner. However, in the context of films and the use of artistic works embodied in logos and branded products, copyright owners will often see commercial benefit in having their products included in the film. As a consequence, filmmakers may be able to negotiate a product placement deal with a brand owner which will actually subsidise the cost of producing the film.

For further information, see the Arts Law information sheet, Copyright.

Parody and satire of copyright products and trademarks

Parody and satire are a ‘fair dealing’ exception in the Copyright Act so that the parody and satire of copyright material is not an infringement of copyright provided the use of the work is fair. You should be aware that the understanding of what is a ‘fair dealing’ under Australian copyright law is not the same as the ‘fair use’ exception under United States copyright law. The specific context and elements of any parodic or satirical use of copyright material are important to determining whether there is a successful parody; that is, one the does not infringement copyright law of any jurisdiction in which the film is communication to the public. There are other areas of law, such as trade mark infringement or passing off and misleading and deceptive conduct that may also be relevant to any parody or satire of copyright material, which are discussed below, so that the best practice would be to obtain legal advice.

For further information see the Copyright Council of Australian information sheet, Parodies, Satire & Jokes & Fair use and the ALRC Inquiry.

Parody is not a statutory defence to trade mark infringement but parody may be relevant to the question whether the parodied trade mark is being used as a ‘badge of origin’ to indicate a connection in the course of trade. If not, then it is not being used “as a trade mark” and the issue of infringement does not arise.

The context in which the trade mark parody is presented to consumers is relevant to the question whether consumers will be confused as to there being a connection between the parody mark and the owner of the famous mark. Keep in mind that the famous copyright works and trade marks that you may want to parody are usually owned by people or companies that have the resources to litigate to protect their valuable assets, so that attempts to parody famous work or marks can get buried in court proceedings.

For a more detailed discussion see Arts Law’s information sheet Trade marks.

Passing off and misleading and deceptive conduct

The legal action for passing off protects business reputation from wrongful appropriation. In the context of product placement in film, the following elements would need to be established:

1. Goodwill or reputation in the branded product;
2. A misrepresentation, by the filmmaker, of a connection between the brand owner’s product and the filmmaker’s film/business; and
3. Financial damage, or threat of it, usually in the form of lost sponsorship fees

A closely related legal action is the action for misleading or deceptive conduct under the *Australian Consumer Law* (Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) (**ACL**). Actions for passing off are usually brought in conjunction with an ACL claim. Passing off is founded upon protection of goodwill or reputation of a business, whereas an ACL claim is directed at preventing the deception of consumers which in turn may injure goodwill or reputation.

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See the Arts Law information sheet: Australian Consumer Law and creators.

With respect to product placement in film, the brand owner may claim that the inclusion of their product in the film implies an association with, or endorsement from, the brand owner. The strength of such a claim is clearly going to depend on the way in which the product is used and how prominently it features in the film. As with the copyright infringement, whether a brand owner could have an action in passing off will depend on the particular circumstances of the case. Where the product is actually integrated into the plot of the film without agreement from the brand owner, it is more likely that the brand owner could bring a successful passing off action. An example of actual product integration can be seen in HBO's *Sex and The City*, where the plot involved an attractive male model who was dating one of the main characters. The male model was part of an "Absolut Vodka" advertising campaign. The particular episode centred on a billboard in Times Square featuring the model naked protected only by a large "Absolut Vodka" bottle. Contact Arts Law for specific advice on whether the product placement in your film raises issues of passing off.

To avoid liability for passing off or misleading or deceptive conduct it may be a good idea to include a disclaimer at the beginning of the film making clear that the film is not endorsed by, or associated with, any of the products featured in the film. An alternative is to contact the brand owner seeking written permission to use the products in your film. As mentioned above, the savvy negotiator may even be able to negotiate some benefit for the film from the brand owner in return for the inclusion of the product in the film.

Product placement

Product placement in films is widespread. We are all familiar with the use of Omega watches and Aston Martin cars in the "James Bond" films or "Motorola" mobile phones in "The Departed". The objective of entering into a product placement deal for the brand owner is to obtain a form of subconscious advertising by showing the product in an apparently non-commercial context. For the low budget filmmaker, product placement can be a way of getting props or costumes for free or sometimes even getting some cash.

Even low-budget filmmakers may be able to negotiate advantageous product placement deals. Low-budget films may provide marketing access to a niche market. The low budget filmmaker should consider why an association with their film may appeal to a sponsor and therefore make an appropriate pitch. If the characters in the film are young and trendy and drinking lots of beer (as in the TV show "The Secret Life of Us") and there is a beer manufacturer that is repositioning its brand as young and funky, they may be very keen to have the characters in your film sipping on their beer.

If you agree to profile a brand in your film in exchange for some benefit, it is important to be clear, preferably in writing, about the terms of the arrangement:

- Don't commit to something you are not willing or able to offer. The producers of "Die Hard 2" learned this the hard way. They agreed to use a "Black & Decker" power tool in a scene in exchange for Black & Decker promoting the film. When that scene ended up on the cutting room floor Black & Decker ran straight to its lawyers, managing to negotiate a substantial settlement fee.
- Be open and honest about the type of film you are making and how the brand will appear in the film. If the brand thinks it is agreeing to allow its product to be used in a family drama, and you are in fact planning on producing a soft porn thriller, you are going to run into problems.
- Be specific about what your obligations are in relation to profiling the brand and what the brand owner will provide in return. If they are providing cash, how much and when will it be payable? If they are providing free products, what, how many, when and who will deliver them? Will the brand owner be given any creative control over the product placement in the film?
- If you agree to credit the brand owner then be specific about the size of the credit, where it will appear and whether it will consist of their logo, their name or both.

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While you obviously do not want to compromise the integrity of your film by using branded products in a way that makes your film look like a montage of advertisements, product placement can an effective way of subsidising production costs.

The editorial policies of television broadcasters, in particular public service broadcasters such as the Australian Broadcasting Corporation (ABC) or the Special Broadcasting Services (SBS), may provide guidance or rules as to the use of product placement as a source of financing. The ABC advice producers to discuss funding arrangements with ABC Editorial Managers or ABC Executive Producers, where the ABC is involved in the funding of a film, such as where the ABC will be the Australian broadcaster of the film. The ABC editorial policies include:

- Free and Discounted Products, Services or Facilities
- Managing External Funding in Broadcast Television

SBS also publishes *SBS Producer Compliance Guidelines for factual material* and *SBS Codes of Practice and Editorial Guidelines* relevant to commissioned content.

Disclaimer

The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (Arts Law) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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