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ACTUAL PROBLEMS OF PRODUCT PLACEMENT AND EMBEDDED (SURREPTITIOUS) ADVERTISING

Abstract:

This research paper covers examples and problems arising from product placement and surreptitious advertising. Product placement and surreptitious advertising are so similar but absolutely different types of advertising, while product placement may not be considered advertising at all. The point at issue arises when it is difficult to determine the real object of advertising. A separate cluster of marketing is a publishing of advertisement information in consumer products, which are not directly available for advertising: for example motion pictures and texts of books. There is a practice when authors include in products mentioning of specific trademarks and its characteristics for consideration. However, in some cases, it is very difficult to distinguish advertising and a describing or information naturally included in the text and is not advertising. The author focuses on the regulation of product placement and surreptitious advertising in Russia, legality of such advertising under the legislation of different countries, lawsuits, risks and academic conclusions. The choice of the research topic is due to different interpretations of these concepts and mixtures with other types of advertising in the research works and contradictory practices and terms found in the regulations of the Federal Antimonopoly service and the decisions of the courts. This research paper will be useful for lawyers dealing with cyber and digital law and all persons interested in legality of advertising materials in mass media and mass entertainment.

Keywords:

Product placement, embedded advertising, law and advertising, surreptitious advertising

JEL Classification: K39, K00, Z00

Introduction

The purpose of the study is to carry out a legal analysis of surreptitious advertising and product placement.

Study objectives:

- Criteria for the recognition of surreptitious advertising and product placement information.
- The differences of these types of advertising and placement features.
- The regulation features of this type of advertising under the law of the Russian Federation and other countries.
- The legality of such advertising.
- Question of “umbrella advertising”.

Figure 1: Main conclusions under the Russian legislation

surreptitious (or embedded) advertising	product placement
<ul style="list-style-type: none"> • “umbrella advertising” • effects through the use of special video (dual recording) and other means 	<ul style="list-style-type: none"> • advertising • information

Product placement as information

Under the Russian legislation, product placement, i.e. reference, presentation of a recognizable product/ trademark, is not considered as advertising; therefore, it is not subject to the requirements of a special law. It refers to mentioning of the product, its means individualization, manufacturer or seller of products, which are organically integrated into the science work, literature or art and are not advertising information by themselves¹. From here, there are many nuances associated with the criteria of organic mentioning in media and other products, which are somehow worked out as acts of regulators (executive bodies) and jurisprudence.

Thus, by the FAS (Federal Antimonopoly Service of the Russian Federation)² letter it was explained, that in order to recognize the information by product placement under the Russian law, in is required to comply with both conditions: be organically integrated in the work, literature, art, and not to be advertising data. What is the organic integration into a product? It is information about a product or person, which is an integral part of the plot (its part) and serves as additional characteristic of the character or situation. At the same the attention is not focused on this information

¹ Point 9, part 2, clause. 2 Federal Law «About advertising» // “Russian newspaper” №15 15.03.2006

² Russian FAS letter from 25.05.2011 N AK/20129 “About the recognition of advertising non-organically integrated in television and radio program”

(about the product, organization, their characteristics), it is not a substitute for the main characters in the product (or part thereof) does not violate the plot and cannot be removed from it without compromising the integrity of the work. Therefore, the product images, which are purchased or used by production characters in a reasonable plot situation (for example, the consumption of drinks in a bar, restaurant, without focusing the audience on the name of the product, trademark) may be recognized as organically integrated in video production.

Non-organic - repeated insistence presentation title, the title of the package, inappropriate inclusion in the work, etc.³

The second feature of product placement according to the law and the letter of the FAS - assignment to the promotional information should come from the specific content of the information provided, the purpose of its placement, in accordance with the concept of "advertising" and its characteristics according to the law:

- information
- is distributed in any way
- is distributed in any form
- is addressed to an indefinite number of persons
- is aimed at forming/supporting interest, promotion on the market.

FAS separately stressed that these explanations do not apply to placement in the TV programs, documentaries, television films, which include information about the product or the person having signs of advertising information. The question relating to the assessment of such information as organically integrated into the work of art and the allocation of such information to the advertisement, distributed in the TV program requires further study, and FAS of Russia will formulate the position on it further. There is still no clarification, but in 2013 a federal law "About protection of public health from exposure to environmental tobacco smoke and consequences of tobacco consumption"⁴ was adopted, which allows the demonstration of tobacco products and tobacco consumption process, if such action is an integral part of artistic design, productions are designed for adults (clause 16). However, before the show or during the demonstration of such work, such program broadcaster shall ensure the broadcasting of social advertising about the dangers of tobacco use.

Product placement as advertising

Focusing on the product in the works itself is not an illegal act: this information is no longer a product placement in the Russian understanding of this phenomenon and becomes simply advertising with the need of compliment with the general and special advertisement rules (the possibility of advertising in this place, general requirements for advertising, special requirements for advertising of separate products). Thus, during programs advertisement of tobacco products, tobacco accessories, tobacco is

³ KLETSKAYA M.O. Recognize And... Forbid // "Advertising and law", 2008, №1

⁴ Federal law from 23.02.2013 N 15-F3 (ed. from 31.12.2014) "About protection of public health from exposure to environmental tobacco smoke and consequences of tobacco consumption" // "Russian newspaper", N 41, 26.02.2013.

not allowed, and if the information about the product or person is non-organically integrated in the program, then the advertiser and distributor of advertising are responsible. It is worth noting that such an arrangement will be considered in the total amount of advertising on television and radio program, during which is regulated (clause 14-15 in the federal act "About Advertising"). This advertising can be called indirect advertising. It does not have signs of surreptitious advertising according to the Russian law. However, depending on the way of presenting the material, it may be considered as surreptitious advertising. Sometimes manufacturers of products which are banned for advertising run the risk of fines and try to place the information (about alcohol, gambling, ect.) in movies and media production under the guise of product placement. The consumer perceives this information unobtrusively. Persistent product placement, where characters recite the names and characteristics aloud, will be considered as advertising.

If the advertiser enters into a contract with the manufacturer of products for placement in the composition of the scenes that played up the use of the product, aiming the camera at a recognizable trademark, logo, manufacturer's name, etc., in this case it is impossible to talk about PP as information. Even if it is seamlessly integrated into the text, the placement of such information is planned to attract attention to an object, which is a sign advertising by the law.

Interestingly, some specialists believe that product placement is mentioning of products and manufacturers in reviews, articles and reports⁵. This can be agreed with: most may not know about the film, which appeared on the screen, if there is no large-scale advertising campaign, but if it appeared in the popular video review program, the number of audience will greatly increase. FAS recognized the mention of cosmetics in articles as advertising. Claims of the department were caused by texts in which FAS has found signs of advertising, but in the texts there were no marks, such as "advertisement" or "on the rights of advertising" in *Cosmopolitan Psychology*, *Harper's Bazaar*. Tips for using cosmetics were posted in the articles without specifying the brands, but a photograph of mascara available on the market was posted for illustration⁶. Taken together, this material exceeded the maximum amount of advertising in 40% of one issue of the print edition, as well as the advertising without accompanying notes.

Surreptitious advertising

According to article 9, part 5, clause 5 of the Federal Law "About advertising" surreptitious advertising is advertising which is unconsciously influences on the minds of advertisement consumers, including such effects through the use of special video (dual recording) and other means. It is not allowed to use such advertising in radio, television, video, audio and film productions or in other productions and its distribution.

⁵ Y. DONTSOVA Twenty fifth frame, or How TV spectators are crowned // EM-Yurist. 2011. N 14. P. 9.

⁶ http://fas.gov.ru/fas-in-press/fas-in-press_39686.html

Judicial practice explains in detail, that “surreptitious advertising is advertising which unconsciously influences the minds of consumers and their choice”⁷. There are many technologies of surreptitious advertising, but all of them are based on the features of human skill, which is able to absorb some information directly⁸, such as the 25th frame. However, in addition to technical ones, linguistic and psychological methods can be used (for example, in outdoor advertising).

The purpose of surreptitious advertising is to improve the consumer’s brand perception, to force the consumer to make an unconscious choice of products.

The concept of surreptitious advertising has simply unrecognizable advertising concepts, i.e. such advertising which is impossible to recognize without special knowledge or without the use of technical means at the time of submission⁹. However, based on the characteristics of human perception, such actions are not always regarded as surreptitious advertising, taking into account the obvious audience information, which is filled with the contents of the film or series. In this regard, some authors believe that it is more correct to use the term "indirect advertising", as advertising information is not hidden from the viewer¹⁰.

From this definition, it is impossible to draw a clear conclusion on the regulation of surreptitious advertising and large areas for advertising - the Internet. On the one hand, advertising on the Internet can spread through audio, video, production of video games, images (by definition, can be attributed to the "other products" by definition), the legal regime of which suggests a ban on surreptitious advertising. On the other hand, what mode should be given to promotional e-mails, which are sent to subscribers or advertising push-notifications to smartphone users. This question requires a more detailed examination.

A clear list of surreptitious advertising in the legislation is not provided. Therefore, analysis of the legality of advertising needs to be done in each separate case. Most likely, such an approach is made to comply with the balance of businesses and consumers, where each side can assess ones risk and make a choice. That is why a direct ban is imposed on the use of technology, the use of which in the usual way is impossible to realize by a person. Thus, the Central Region FAS didn’t find any violations in the advertising text, grouped “by psychological laws of memorization and” H. Ebbinghaus curve "and containing 9 slogans, some of which are hidden motives acting on the unconscious psychic level of human perception, directly inciting the use of alcohol products”¹¹.

«Umbrella advertising»

"Umbrella" advertising means drawing attention to the object of advertising through the advertisement of another product/service.

⁷ Decree of the North-Western region FAS from 30.08.2010 by the case N A52-6308/2009

⁸ Y. DONTSOVA Twenty fifth frame, or How TV spectators are crowned // EM-Yurist. 2011. N 14. P. 9.

⁹ N.N. KOVALEVA Russian information law: School-book. M.: Dashkov and K, 2007.

¹⁰ Y. DONTSOVA Twenty fifth frame, or How TV spectators are crowned // EM-Yurist. 2011. N 14. P. 9.

¹¹ I. RAZUMOVA Surreptitious advertising under embargo // "EM-Yurist", 2006, N 24. Case from 29.06.2004 N A14-2420/04.

"Umbrella advertising" can be characterized by the following signs:

- Advertising allowed for advertising of the object, similar to the degree of confusion of the marks (including trademarks (service marks) or other means of individualization of goods, works, and services) with the subject, the advertising of which is prohibited.
- advertising of objects with the use of trademarks/service marks that are registered in respect of several classes, among which are those objects which cannot be advertised in this place and in this way.
- Advertising of an entity with a recognizable image is prohibited or restricted in the promotion of the objects under permitted ones for advertising objects.
- A pun in advertising.

By itself, "umbrella" advertising is not a violation of the legislation on advertising. Problems with advertisers and distributors arise if under the proper form of the advertising object another object is hidden, to advertising of which there are strict requirements (for example, hard liquor, gambling). Such advertising is recognized as unfair and may be considered as the consumer perceives the object of advertising which is prohibited to advertise and not the one that is depicted on promotional materials. The advertising techniques are: registration of trademarks, well-known to the consumer, for other goods, to the advertisement of which is subject to special requirements, wordplay (consumer reads fluently desired advertiser information).

FAS assesses the legality of advertising "umbrella brands" according to the following criteria (for example, alcoholic beverages):

1. By which classes of *International Classification of Goods and Services*¹² for the *Purposes of the Registration of Marks* demonstrated trademark is registered, does it refer to such items as alcoholic beverages?
2. What activities are carried out by the advertiser?
3. If in the advertisement of a soft drink shows its container, it is similar to the container of a corresponding alcohol product (to make the advertisement adequate, the answer should be negative)?
4. Is the advertised product presented freely in a sufficient to the customer volume in the retail chain?¹³

Product placement as surreptitious advertising

Placing of information about the product under the guise of product placement, direct advertising of which is prohibited or restricted, can be considered as surreptitious advertising. The aim of integrating this information into production would be a circumvention of the rules in respect of direct advertising. For example, the name of

¹² Is available at <http://www.wipo.int/classifications/en/index.html>

¹³ D.A. KOPYTIN Legal aspects of separating advertising of "umbrella brands" from inappropriate advertising of alcoholic beverages on TV channels // "Business Law", 2006, N 2

the area where the film's act takes place is identical to the name of a brand of alcoholic beverages¹⁴.

Foreign experience

Let's examine foreign experience.

Great Britain

Under the Communications Act 2003 of the Parliament of the United Kingdom Ofcom (Office of Communications), the telecommunication and broadcasting independent regulators in the UK. Broadcast Committee of Advertising Practice under terms of Communications Act 2003, in APPENDIX 1: STATUTORY FRAMEWORK FOR THE REGULATION OF BROADCAST ADVERTISING provides standards for the content of television and radio services: that there is no use of techniques which exploit the possibility of conveying a message to viewers or listeners, or of otherwise influencing their minds, without their being aware, or fully aware, of what has occurred¹⁵. Before December 20, 2011 product placement was prohibited on UK TV programmes. But media regulator Ofcom confirmed that paid-for references to products and services will be permitted in programmes under the rules of Revised Section Nine of the Broadcasting Code (2011)¹⁶. Product placement is only permitted in movies, films or series made for television, sports programmes and light entertainment programmes.

It restricts the types of product that can be placed, the types of programme in which they can be placed, and how products are seen and referred to in programmes. The purposes of new rule are to access new sources of revenue for broadcasters and to provide protection for audiences. It is prohibited in all children's and news programmes and in UK-produced current affairs, consumer affairs and religious programmes. The rules provide that TV product placement "must be signalled clearly, by means of a universal logo. Under Ofcom regulations, broadcasters must inform viewers by displaying the letter 'P' for three seconds at the start and end of a programme that contains product placement. These rules apply to all programmes broadcast on channels licensed by Ofcom and include some channels that broadcast outside of the UK. Products cannot be placed in news or children's programmes. Cigarettes and other tobacco products, alcoholic drinks, gambling products, medicines that are available only on prescription, food and drink that is high in fat, salt, or sugar and baby milk can't be product placed in UK programmes.

"Prop placement" (i.e. where props are provided free of charge for inclusion in programmes) is excluded from this definition, provided that the broadcaster or on-demand service provider or the producer of the programme does not receive payment for including the prop nor any significant residual value. For example, if an expensive car is provided for use in a programme free of charge then this will constitute prop

¹⁴ http://fas.gov.ru/fas-in-press/fas-in-press_40096.html

¹⁵ <http://www.cap.org.uk/~media/Files/CAP/Codes%20BCAP%20pdf/Appendix%201%202014-09-04%20BCAP.ashx>

¹⁶ <http://stakeholders.ofcom.org.uk/binaries/consultations/724242/statement/annex1.pdf>

placement provided that the producer is not allowed to keep the car after production has ended¹⁷.

Under UK legislation there is meaning “surreptitious advertising”. It means advertising involves a reference to a product, service or trade mark within a programme, where such a reference is intended by the broadcaster to serve as advertising and this is not made clear to the audience. Surreptitious advertising is prohibited.

European Union

Before 2007 no EU regulation, only national level. Basic government rule of EU is the European Audiovisual Media Service Directive (AVMSD), which was published on 11 December 2007. The new European AVMS Directive draws a distinction between prohibited surreptitious advertising and legitimate product placement. Consequently, while the new European regime explicitly prohibits the use of product placement, it allows it under several restrictive conditions. First, product placement is permitted only in certain programs, namely, cinematographic works, films and series, sports programs and light entertainment. It is prohibited in children’s programs and news and current affairs programs. Second, even in programs in which product placement is permitted, there are certain limitations: (a) product placement shall not influence the responsibility and editorial independence of the broadcaster; (b) product placement shall not directly encourage the purchase or rent of goods or service; (c) product placement shall not give undue prominence to the product; and (d) viewers shall be clearly informed of the existence of product placement by announcements at the start and the end of the program and when a program resumes after an advertising break. Third, product placement is prohibited for certain products, such as tobacco, medicinal products and treatments which are available only on prescription. It can be argued that the new European product placement regime is more liberal than the old one; but it is still very restrictive. The new Directive allows EU member states to set stricter rules, which means that the long list of restrictions included in the AVMSD creates only minimum standards, and member states may preserve the policy of total prohibition of product placement. Note also that the EU regime does not build on voluntary codes¹⁸. Surreptitious audiovisual commercial communication is a practice prohibited by this Directive because of its negative effect on consumers. The prohibition of surreptitious audiovisual commercial communication should not cover legitimate product placement within the framework of this Directive, where the viewer is adequately informed of the existence of product placement. This can be done by signalling the fact that product placement is taking place in a given programme, for example by means of

in cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes a neutral logo

¹⁷ http://www.olswang.com/pdfs/product_placement_feb11.pdf

¹⁸ AVMSD, Article 11 <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32010L0013&from=EN>

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.

Product placement is a reality in cinematographic works and in audiovisual works made for television. In order to ensure a level playing-field, and thus enhance the competitiveness of the European media industry, rules for product placement are necessary. The definition of product placement laid down in this Directive should cover any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration. The provision of goods or services free of charge, such as production props or prizes, should only be considered to be product placement if the goods or services involved are of significant value. Product placement should be subject to the same qualitative rules and restrictions applying to audiovisual commercial communication. The decisive criterion distinguishing sponsorship from product placement is the fact that in product placement the reference to a product is built into the action of a programme, which is why the definition in point (m) of Article 1(1) contains the word 'within'. In contrast, sponsor references may be shown during a programme but are not part of the plot.

Product placement should, in principle, be prohibited. However, derogations are appropriate for some kinds of programme, on the basis of a positive list. A Member State should be able to opt out of these derogations, totally or partially, for example by permitting product placement only in programmes which have not been produced exclusively in that Member State.

Furthermore, sponsorship and product placement should be prohibited where they influence the content of programmes in such a way as to affect the responsibility and the editorial independence of the media service provider. This is the case with regard to thematic placement

It is interesting that product placement can be used not only to enhance brand and manufacturer of goods/services awareness, but also for the developer of the resource on which such information is posted. For example, a new online game will arouse great interest of the consumer, if it will be flickering recognizable brands. But in this context, there are other questions - especially the placement of trademarks owned by others, is this placement considered as using, remuneration issues, etc.

It would be good to see clear borders of placement by advertisers and authors of information productions in the Russian Federation law "About advertising". First of all, introducing the concept of "product placement", which can be understood by advertising information, integrated in the production. For the balance of interests of those experts who believe that this placement is surreptitious advertising (which is not such by the Russian legislation) and those who - don't consider it as advertising, it would be reasonable to suggest the following option - learn from colleagues from the UK and make a special insert that characterizes the promotional material as product placement.

Today the disclaimer “on the rights of advertisement” is indicated on TV, but it is difficult to integrate it, for example, in film products. Of course, before the launch of film production in the rental, preparatory work would have to be done, however this method will help to consider the balance of advertisers and product manufacturers, as well as the consumers.

Otherwise, any program that mentions the name of a particular brand will be deemed to contain advertising. For example, there are programs, which select the most popular and sold products of several brands and based on feedback from consumers and experts, the winner is selected (“Test purchase” in Russia). Such references cannot be considered as information message, because the hosts name the product characteristics, draw conclusions about their quality.

In conclusion, I would like to emphasize that the regulation of product placement and surreptitious advertising is different in many countries. This raises issues and conflicts in the case of conflict of interest when distributing entertainment content. Sometimes, legislative requirements lead to interference with the integrity and originality of the work (for example, movie launch). In countries where the advertising market is more established, there are fewer questions about the legal status of product placement and surreptitious advertising, the Russian legislations are subject to significant modifications.

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