

OFCOM Madigan Cluff Response

Background

Madigan Cluff has been involved with helping production companies and advertisers understand the value and opportunity of product placement over the last 2 years.

The government's welcome decision to allow product placement has created the need for there to be clear guidelines which production companies, broadcasters and advertisers can operate within. This will allow UK production to be internationally competitive and at the same time ensure that viewers are not bombarded with inappropriate placement.

Much of the OFCOM consultation is a welcome clarification of how paid placement can be set within the current broadcast regulation framework. We welcome the fact that the bulk of the consultation does not create a labyrinth of regulation for placement and welcome the direction the document takes.

As a result we have chosen to submit our thoughts on certain key questions. In order to be clear on the sections we are commenting on – these have been extracted from the OFCOM document and are shown below in grey. Our comments to each section are shown in [Blue](#)

Overall Summary

[The OFCOM document contains an initial summary of the issues contained within the document. Below are the key items in the summary with our brief point of view.](#)

Scope of product placement rules: the Act defines product placement as being “for a commercial purpose”. We are proposing to apply the rules to all instances of paid-for placement, regardless of whether the placement is intended to serve a commercial purpose (see [Part 4, Proposal 1](#)).

[Agree](#)

Single dramas: these are not specifically referred to in the list of programme genres in which product placement is permitted. We are proposing to clarify that such programmes fall within the definition of films and may therefore contain product placement (see [Part 4, Proposal 2](#)).

[Agree](#)

News: the Act does not explicitly prohibit product placement in news but the Government has made it clear in its statement that news does not fall within the programme genres in which product placement is permitted. We are therefore proposing a rule to clarify that product placement is prohibited in news programmes (see [Part 4, Proposal 3](#)).

[Agree](#)

Thematic placement: we are proposing to clarify that thematic placement - that is the creation of scripts/storylines as vehicles for the purpose of featuring the aims, objectives, beliefs or interests of a third party funder - is prohibited (see [Part 4, Proposal 4](#)).

We would challenge this. There are potential benefits (e.g., for services and products which promote the public good such as healthcare, saving, safe driving) where thematic placement can have a significant value both to the funding organisation and to the wider public interest. We recommend that the opportunity should be allowed for thematic placement – but that not only the organisation but also the issue should be visible in signalling and as part of any complaints procedure a test of in the public interest should exist.

Specialist factual programmes: we are seeking views on whether Ofcom should prohibit product placement in specialist factual programmes (e.g. purely factual programmes covering educational, science, medical or arts subjects, or those that are investigative in nature) (see [Part 4, Proposal 5](#)).

We believe that there should not be a blanket block on specialist factual programmes. Placement should clearly be signalled for any programme. Only where a programme clearly sets out to provide competitive assessment of a range of products/services which includes the funders product do we believe it would be appropriate either for there to be a block on placement or for there to be a clear aural flagging of the conflict in the lead into that segment of the programme (a ‘declaration of interest’).

Prohibited restricted products/services: in addition to those products, services and trade marks that are prohibited under the Act from being included in programmes as a result of product placement arrangements; we are proposing to prohibit the paid-for placement within programmes of any product, service or trade mark that cannot be advertised on television (see [Part 4, Proposal 6](#)).

Agree

Signalling of product placement: the Act includes a signalling requirement for product placement. We are proposing that audiences are made aware of instances of product placement by means of a universal neutral logo, and a universal audio signal (to ensure that both visually and hearing impaired audience members are made aware when a programme contains product placement). Additionally, we are proposing that broadcasters make available to the audience a list (in a programme’s end credits or on the broadcaster’s website) of products, services or trade marks that have been placed in a programme. We also make a range of proposals in relation to raising audiences’ awareness of the product placement signals and what they mean (see [Part 4, Proposal 7](#)).

We agree that signalling should be clear at the start/ end of the programme and that it should be very easy for viewers to obtain a list of the companies/products which have been placed.

Sponsorship

1.25 The current rules that apply to television sponsorship are based on the principle that paid-for commercial references are kept separate from editorial. The introduction of product placement changes this position. We are therefore consulting on proposed revisions to those sponsorship rules that are underpinned by the separation principle.

1.26 Sponsor references within sponsored programmes: we are proposing to remove the rules that prevent sponsorship arrangements resulting in references to the sponsor within a sponsored programme. We also intend to clarify that where a reference to the sponsor's products, services or trade mark are included in a programme, this will be treated as product placement and must therefore comply with the relevant rules (see [Part 5, Proposal 8](#)).

[Agree](#)

1.27 Identifying sponsorship arrangements (sponsorship credits): we are proposing revisions on how sponsorship arrangements are announced to ensure that audience members are made appropriately aware when they are viewing commercial messages, and can distinguish between different types of commercial arrangements, such as sponsorship and product placement (see [Part 5, Proposal 9](#)).

[Agree](#)

1.28 Sponsorship credits during programmes: we are also proposing to amend the rules on sponsorship credits to allow credits to be broadcast *during* programmes. However, to ensure that such credits do not conflict with the product placement rules and are not unacceptably intrusive, we are proposing a number of restrictions on the content and scheduling of credits shown during programmes (see [Part 5, Proposal 10](#)).

[Agree](#)

Other proposed revisions

1.29 We are proposing revisions to other Code rules that we consider are no longer applicable following the introduction of product placement. These include :Separation of programming and advertising, Surreptitious advertising rule, Virtual advertising

[In general we believe these represent straightforward tidying up of current regulation.](#)

Key Issues not covered in the Summary

Within the Summary, it is slightly surprising that there is no reference to Placement (excepting the block on thematic placement). The rules which will apply to placement are in the main body of the document. We have therefore chosen to comment on some of the detailed sections of the OFCOM consultation.

4.51/4.1 Prohibition of Thematic Placement

4.1 *Do you agree that clarification that thematic placement is prohibited is appropriate? (See proposed Rule 9.10). If not, please explain why.*

4.2 *Do you agree with Ofcom's proposed description of thematic placement? (See proposed Rule 9.10). If not, please explain why, and suggest drafting changes, if appropriate.*

4.3 Please identify any potential impacts of Ofcom's proposal that you consider should be taken into account, and provide evidence, wherever possible.

The new rule 10 in the broadcasting code says

9.10 Product placement must not influence the content and scheduling of a programme in a way that affects the responsibility and editorial independence of the broadcaster.
In particular, product placement arrangements must not involve thematic placement, i.e. the payment by a third party for the creation of storylines/scripts as vehicles for the purpose of featuring particular issues or references (including generic references) to the third party funder's aims, objectives, beliefs or interests.

Key points

- *As we flagged in our comments to the summary – a blanket ban on thematic placement would be unnecessarily limiting – indeed perfectly acceptable appearances by products currently achieved as free prop placement would not be allowed as paid placement in future, under these proposed rules.*
- *The rule seems to combine three different issues:-*
 - *Should a company paying for placement be able to influence storyline/script*
 - *Should it be possible to promote a group interest rather than an individual brand/ advertiser interest*
 - *Should a 3rd party's aims, objectives, beliefs or interests be disclosed through placement (surely even placing a moving image of a brand does this? – is not a car being driven disclosing the interest of car manufacturers that people should use their product to move around?)*

Our View

As currently written, the definition of thematic placement is insufficiently clear and would need major interpretation by the individuals tasked with interpreting the findings. The first sentence of rule 9.10 should be retained. However the section from "in particular..." needs major clarification. We believe that this statement needs more thought.

4.97 Flagging of Placements on Transmission

4.97 Stakeholders are invited to respond to the following questions:

7.1 *Do you consider it is appropriate to require broadcasters to identify product placement by means of a universal neutral logo and universal audio signal? (See proposed Rule 9.16). If not, please explain why, suggesting alternative approaches where appropriate.*

7.2 *Please provide comments on the proposed criteria for determining how any universal neutral logo looks, and any additional or alternative criteria which you consider should define the visual signal, including views on the nature, size and duration of the signal.*

7.3 Please provide comments on the proposed criteria for determining how any universal audio signal sounds, and any additional or alternative criteria which you consider should define the audio signal, including views on the nature and duration of the signal.

7.4 Please provide comments on whether you consider that such criteria should be specified in the Code or in Ofcom's guidance. If you consider that the criteria should not be specified in either, please explain why.

7.5 Do you consider it is appropriate to require broadcasters to provide the audience with a list of products/services that appear in a programme as a result of product placement arrangements, either in the end credits or on the broadcaster's website? (See Rule 9.17(a) and (b)). If not, please explain why.

7.6 Do you consider that the wording of proposed Rule 9.17(a) and (b) is appropriate? If not, please explain why, and suggest drafting changes, if appropriate.

7.7 Do you agree that broadcasters should include additional description text alongside the visual and audio signal for the first month that they are transmitted? If not, please explain why.

7.8 Do you agree that broadcasters should transmit an audience awareness message if they show programmes that must be signalled during the first six months of the rules being in force? If not, please explain why.

7.9 Please provide your comments on the proposals we have set out on the key messages, timing and duration of the audience awareness campaign.

7.10 Please identify any potential impacts of Ofcom's proposals that you consider should be taken into account, and provide evidence, wherever possible.

7.11 Please identify any areas of these proposals which, if they are accepted, you consider Ofcom should issue guidance on.

This is the rule referred to above

9.17 Broadcasters must make available to the audience a list of those products, services or trade marks that have featured in a programme as a result of a product placement arrangement. This must be provided in a brief, non-promotional manner, either:

in the programme's end credits; or

on the broadcaster's website, with a reference to this given at the end of the programme.

Product placement information included in the programme's end credits should not include any trade marks, logos or other distinctive signs. If the programme's end credits are likely to be minimised or scaled down, the product placement information should be positioned before this occurs to ensure that it is clear to the audience.

We believe that the rule as set out is reasonable. The more intrusive suggestions made within the Ofcom document would impact viewers' enjoyment of programmes and would also serve to flag up placement rather than allow it merely to exist as part of the fabric of the programme. This is a reasonable compromise.

7.3/16.1 Definition of undue prominence

7.3 Stakeholders are invited to respond to the following questions:

16.1 Do you agree that the explicit requirements of the AVMS Directive and the Act are reflected appropriately in the proposed rules for product placement, as set out in Part 4? If not, please explain why and suggest drafting changes, if appropriate.

16.2 Are there any other relevant matters you consider that Ofcom should take into account in this Review? If so, please provide details, with supporting evidence

The core rule on how placement is judged will be section 9.12 set out below

9.12 References to placed products, services and trade marks must not be unduly prominent. *Undue prominence may result from the manner in which a placed product or service features within a programme, including, but not limited to:*

- the emphasis placed on a placed product/service/trade mark within a programme;*
- the frequency of references to a placed product/service/trade mark (taken across a scene, programme or series);*
- the editorial justification for references to a placed product/service/trade mark.*

We believe that as set out, this definition of undue prominence is not specific and open to very wide interpretation. It would appear that the way in which this rule would be enforced in practice would be through consumers complaining to Ofcom and then for Ofcom to make a judgement.

In conventional advertising Ofcom refers to a range of bodies including the Broadcast Committee for Advertising Practice. In this instance, it is unclear how in practice Ofcom would adjudicate on what is reasonable on emphasis or frequency of reference.

Overall there are a series of measures which can show if the usage of placement is detracting from a programme including:-

- Whether a representative sample of the public see the placement as intrusive/ detracts from their enjoyment of the programme.
- The performance of the programme in ratings and share of television audience, for instance
 - Against the ratings performance of other programmes in the same slot
 - Minute-by-minute ratings which would demonstrate that the audience tune out of the programme.

We strongly believe that there should be an evidence based process to gain views from the viewing public on what is reasonable; this should not solely be an internal judgement by Ofcom

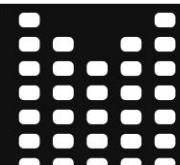
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