Lawyering at the Intersection of Madison and Vine: It's about Brand Integration

By Scott Shagin and Matthew Savare

The marriage of art and commerce

The revolution has begun and it has been televised. This revolution is the convergence of the entertainment and advertising industries. Conceived at the intersection of Madison and Vine, it will certainly be coming to a theater, video game, book, song and Web site near you.

Although brand integration[1] and similar promotional strategies have existed for some time, the business relationships and strategies surrounding the marriage between content and commerce are no longer fragmented or haphazard. Creators, advertisers, manufacturers and service providers have made deliberate and coordinated attempts to integrate products into entertainment programming in a systematic, transparent and compelling way. Dozens of agencies specializing in brand integration have spawned a lucrative new industry. Virtually all the major broadcast networks, movie studios, cable channels, production companies and manufacturers have departments that exploit such opportunities.

The intersection of Madison and Vine is fast-crowding, yet relatively unmapped. But if navigated carefully, it provides business opportunities not only to entertainment sectors facing ruptured business models, but also to marketers seeking elusive consumers. This article describes legal and business issues surrounding brand integration, along with practical advice to lawyers who represent clients seeking to structure such deals.

The problem: Ruptured business models

Digital video recorders, audience fragmentation and the skyrocketing costs of reaching potential consumers have negatively affected the advertising industry. Similarly, ballooning production costs and technological developments, such as peer-to-peer file sharing, have challenged the music and motion picture industries. These changes and others described below have forced leaders in advertising and entertainment to adapt their business models or risk extinction.

Television

Broadcast television has suffered from precipitous declines in viewership for decades. The proliferation of alternate media sources such as the Internet, video games, hundreds of competing cable stations and DVDs has eroded the economic and social significance of broadcast television, particularly among the elusive male 18-to-34-year-old demographic.

In addition, the emergence of commercial skipping devices has empowered viewers to undermine the commercially sponsored programming business model on which broadcast television is based. Instead of wading through commercials, millions of consumers are using digital video recorders to circumvent commercial interruptions and save themselves time. This assault on the "interruption" or "push" model of television has caused network and cable executives to reevaluate their strategies. It has also cost them advertising revenue.

Music

The music industry has been hemorrhaging for several years. This model is predicated on record labels financing their large development, production, marketing and distribution costs with the money they generate from consuming youths purchasing their CDs. The peer-to-peer file-sharing phenomenon has turned this model upside down, leading to the filing of hundreds of lawsuits and the advent of dozens of legitimate sites from which users can legally download music. The Supreme Court's recent decision in *Grokster*[2] is just the latest permutation of the copyright wars.

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Film

Although not yet as rampant as illegal music downloads, the electronic piracy of films over the Internet is becoming more prevalent, particularly as bandwidth speeds increase. Even without unauthorized Internet downloads, the motion picture industry has struggled with bootlegged "screeners" and pirated DVDs. Moreover, there has been a meteoric increase in film budgets, especially with respect to marketing costs.

Notwithstanding these greater production and marketing costs and the concomitant financial risks, profit margins within the industry remain relatively static. Theatrically releasing a motion picture is an extremely expensive, risky and typically financially unsuccessful proposition in the current environment. Because major studios usually control the full bundle of rights associated with a motion picture, they often endure frequent short-term losses associated with a movie's release in order to garner the prestige of making the movie and to participate in the eventual stream of revenue that a movie *may* generate.[3]

Video games

Although gross sales of video game hardware and software have eclipsed the box office receipts of motion pictures,[4] there are still challenges in the video game industry. Most notably, budgets for the creation of video games are increasing and, in many cases, rival the budgets for motion pictures. Brian Fukuji, the senior manager of business affairs for the Sony Playstation, notes that budgets for many video games are between $12 million and $15 million. Fukuji estimates that games for the new consoles (Play Station 3 and Xbox 360) will approximate $20 million to $25 million.[5]

In addition to the rapid increase in video game budgets, the bursting of the Internet bubble sent shockwaves throughout the online interactive game arena. Advertising rates for online games have plummeted from the $80 CPM[6] range and there is now intense competition for advertising dollars.

Every operator of a significant online gaming destination or "content aggregator" that offers game play is struggling with its business model. Such companies as AOL, Microsoft, Real.com, Shockwave and Yahoo! are debating whether to offer advertising content, charge premium prices, sell downloads, seek sponsors, treat their games as loss leaders to retain subscribers or some combination of these options.[7]

Books and publishing

The publishing industry is one of increasing costs, severe competition and modest growth. Also, there are only a few major retailers in the industry. Such dominant outlets include Barnes and Noble, Borders and Wal-Mart. The size and market power of these companies enable them to exert pricing pressure on publishers, which has shrunk already-tight margins. And, like the music and motion picture industries, the publishing sector is also battling rampant unauthorized copying, demonstrated recently by the online piracy of *Harry Potter and the Half-Blood Prince* the day it was officially released.

A solution: Brand integration

These challenges have spurred industry executives to search for more lucrative models. In his recent book, *Madison & Vine: Why the Entertainment & Advertising Industries Must Converge to Survive*, Scott Donaton explains that the continued economic viability of the entertainment industry lies in the ability of its creative, business and marketing elements to collaborate and develop new ways to integrate brands seamlessly and subtly into content.

Brand integration offers several benefits to advertisers and manufacturers. First, unless a viewer skips part of the actual program, integrating products into the content precludes that person from "zapping" that brand exposure the way he or she would zap a commercial. Second, product integration can build brand awareness in an otherwise cluttered media environment and use a "soft-sell" approach. The quality impressions, especially when replayed frequently, can be tremendously effective marketing tools. Brand integration also creates an indirect celebrity endorsement when a particular actor or actress is shown with the product.

Brand integration affords numerous advantages to the creators of the entertainment content.

Finally, the economics of product integration are compelling. For example, if a show or movie becomes popular, the cost to reach potential consumers becomes several orders of magnitude less than traditional forms of advertising, as the movie is released on DVD and video. The effect is the same in television. This affords a potentially enormous return on a brand integration investment, leading one industry executive to boast, "when a show becomes a hit, it's like hitting the lottery."[8]

Brand integration also affords numerous advantages to the creators of the entertainment content. First, integration deals create an effective way for production companies, studios, record companies and publishers to reduce production costs. These types of agreements, particularly for big-budget theatrical films, have the potential to be extremely lucrative. For example, Samsung invested $100 million to associate itself with "The Matrix Reloaded,"[9] and Miramax sought more than $35 million to feature a car in its summer 2005 release "The Green Hornet."[10]

Second, under many integration deals, manufacturers will provide free goods to the content creator in return for product exposure. Finally, creators

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often negotiate cross-promotions for their content, including free advertising and merchandising tie-ins.

There are many examples of hugely successful product-integration deals. In film, the "Minority Report" received critical acclaim for creatively featuring a number of brands in its story, including Lexus, Gap, Reebok, Guinness and American Express. The value of AOL's brand increased after being integrated in "You've Got Mail" and "Sleepless in Seattle." However, after all these years, the gold standard for product integration remains a lovable extraterrestrial following and eating a trail of Reese's Pieces in "E.T." Within several months of the movie's theatrical release, sales of the candy surged 65 percent.[11]

Although product-integration deals in television date back to the dawn of the medium, they have experienced a marked resurgence since 2000 with the proliferation of reality programming. Many examples abound: on "American Idol," the celebrity judges drink from Coca-Cola cups, while contestants wait on a Coca-Cola coach; on "Who Wants to be a Millionaire," AT&T sponsored one of the "lifelines" where contestants could phone a friend to receive help with a trivia question; on "Extreme Makeover Home Edition," numerous products from Sears are featured and the cast frequently mentions the company and takes excursions to the store to purchase consumer items and home appliances.

With video game industry hardware and software sales now eclipsing motion picture box office sales and users playing new games for hundreds of hours, marketers are increasingly looking to these games to launch new branding messages and products. For example, in Electronic Arts' "NCAA Football 2004," players drive down the field into the Old Spice Red Zone. Similarly, in Tony Hawk's "Underground," a Butterfinger vending machine and McDonald's are displayed prominently. McDonald's is also featured in the world's leading interactive online game, "Sims Online," where gamers eat virtual burgers and fries.

In music, corporations often sponsor tours and CD releases. Also, there have been instances where songs contain paid references to products. For example, in 2002, Def Jam Music Group negotiated with Hewlett-Packard to insert favorable lyrics about the latter's products in its artists' songs.[12] Artists have also given away certain rights in exchange for free promotional support.

The most successful example of this involves a song from Sting's 1999 record, "Brand New Day." The video for the album's second single, "Desert Rose," called for Sting to be driven through the desert. The director selected a Jaguar for the role of elegant vehicle. After filming the video, Sting's manager called Jaguar and offered the car company the rights to use the video for free, provided it pay for a sizable TV campaign. Jaguar accepted the offer and edited its own commercial using the video footage. After the commercial featuring "Desert Rose" was first aired, sales of the car quadrupled and Sting's album went on to sell 8 million copies worldwide, making it his best-selling solo album.[13]

Although product integration is not as prevalent in publishing as it is in television or film, variations exist. For example, a jewelry store paid to be featured in Fay Welton's novel *The Bulgari Connection*. In another case, a Beverly Hills Maserati dealership threw a $15,000 party for author Beth Ann Herman in exchange for her featuring its car in her book *Power City*.[14] Recently, at a charity event, Mary Higgins Clark auctioned off the right to be a character in her next book.

Product integration has profoundly and irrevocably altered the entertainment landscape. The practice is here to stay. To capitalize on it, content creators and their business and legal staffs should understand several practical considerations.

The First Amendment is a strategic asset

In addition to the marketing and economic benefits of product integration, there are also important legal payoffs. Consider briefly the taxonomy of constitutional speech.

It is axiomatic that not all speech is created equal. In evaluating the degree to which different types of content are protected, courts have classified speech into three broad categories: editorial/newsworthy, entertainment and commercial speech.[15] Courts afford news, especially information concerning the political process, the highest degree of constitutional protection.[16] Other content that falls within the category of editorial speech includes journalism, nonfiction writing, documentaries and educational information.

Although entertainment speech receives less protection than newsworthy speech,[17] it is still afforded broad constitutional protections.[18] Such speech predominates in the entertainment industry and includes novels, motion pictures, video games, most TV shows and music. Although the last type of speech, commercial speech, is protected from most content restrictions, it is this category that receives the least amount of judicial deference.[19]

Determining what constitutes commercial speech is vexing, however, as the U.S. Supreme Court has used numerous definitions for this classification. For example, in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council Inc.*,[20] the court defined commercial speech as speech that does "no more than propose a commercial transaction." By contrast, in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,[21] the court classified speech as commercial when the "expression related solely to the economic interests of the speaker and its audience."

The California Supreme Court, asserting that the U.S. Supreme Court "has not adopted an all-purpose test to distinguish commercial from noncommercial speech," developed its own three-part test in *Kasky v. Nike Inc.*[22]

In *Kasky*, the California Supreme Court held that when courts classify speech to determine whether the speech may be regulated by laws preventing false advertising or deception, the court must consider: "the speaker, the intended audience and the content of the message."[23] In dissent, Justice Brown recommended that the U.S. Supreme Court adopt a more "nuanced approach" to classify

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speech: "[T]he commercial speech doctrine needs and deserves reconsideration and this is as good a place as any to begin. I urge the high court to do so here."[24]

In January 2003, the U.S. Supreme Court granted certiorari to address the issue, but changed course in June 2003 and dismissed the writ as improvidently granted.[25] In doing so, the court passed on the opportunity to clarify the definition of commercial speech. Notwithstanding these numerous definitions and tests, courts generally consider advertising to be commercial speech, although courts have struggled with advertorials and hybrid speech.[26]

Aside from not being protected to the extent of newsworthy or entertainment speech, commercial speech is also regulated by the government, particularly by the Federal Trade Commission.[27] Entertainment speech, on the other hand, is virtually immune from government regulation, aside from rare cases involving obscenity, indecency or incitement.[28]

Therefore, it behooves content creators, from both a business and legal perspective, to blend their speech and inextricably intertwine their branding and commercial messages with entertainment content to gain the advantage of constitutional case law that defines commercial speech narrowly, to reduce the regulatory and third-party liability to which they are exposed and to reach their target audiences in new and powerful ways.

Although not involving brand integration, *Hoffman v. Capital Cities/ABC Inc.* demonstrates the utility to marketers of using hybrid speech. In *Hoffman*, *Los Angeles Magazine* ran a piece titled "Grand Illusions," which featured digitally altered images of living and deceased celebrities in famous poses, wearing spring 1997 fashions. The clothes displayed in the article were created by designers who were also major advertisers in the magazine at the time of publication. In addition, the text of the article referenced a "shopping guide" that provided an advertisers' index and price and store information for the clothing shown in the article.

Dustin Hoffman, whose name and famous image from "Tootsie" were used, claimed that the article violated his right of publicity. The district court, finding the unauthorized use to be commercial in nature, denied the magazine's First Amendment defense and awarded Hoffman compensatory damages of $1,500,000. The Ninth Circuit reversed, holding that the altered photograph was not pure commercial speech, entitling the defendant to First Amendment protection.

The result of *Hoffman* was strong precedent for content creators, advertisers and manufacturers. By transforming his image and injecting their commercial message into other forms of speech, the advertisers and the magazine were able to publish the article without having to clear the rights with Hoffman, which could have been impossible or very expensive.

The stakeholders, the stakes and the deal points[29]

The increase in the number and size of product-integration deals has sharpened the focus of the contract negotiations among the parties. The creators of entertainment content, particularly writers and directors, do not want to compromise their artistic integrity by being forced to change their works for what they deem purely commercial reasons. Similarly, advertisers and manufacturers are hesitant to invest money on product-integration deals without certain assurances that their products will be displayed, integrated or used in a certain way.

Courts generally consider advertising to be commercial speech.

Furthermore, A-list celebrities are beginning to demand a portion of the revenue generated from these types of arrangements. With all these competing interest groups vying for exposure, money and creative control, clarity in negotiating and drafting integration deals is essential.

Creative control

Nowhere are creative control issues in the product integration area more complicated than in the motion picture industry. Generally there are at least four groups competing for creative control of integration efforts in the motion picture industry: (1) the producers, (2) the writers and directors, (3) the actors and (4) the product or brand marketers.

Producers are the profit maximizers; they seek to reduce negative costs without sacrificing the box office and home video demand for their film. The writers and directors, as the main creative forces behind nearly all films, generally seek to create the most compelling movie possible. Actors are concerned not only with their craft and their integrity, but also with their ability to endorse other products and services.

Finally, marketers and brand strategists want their goods and services to be associated with popular entertainment products. To that end, they seek the appropriate project with which to be associated, the most effective type and amount of product exposure and a suitable context for their brand. Moreover, brand owners demand a certain degree of creative control with these "activation" strategies in order to avoid granting naked licenses, which could result in the abandonment of trademark rights.

With these considerations in mind, creative control is predictably a significant issue in product-integration deals. Although such discussions have arisen concerning actors, writers and directors,[30] the most public disputes have arisen between producers and manufacturers.

For example, in a 1996 complaint, Reebok alleged that it invested more than $1.5 million in "promotional, product and dollar commitments" for a product placement in TriStar's film, "Jerry Maguire."[31] In exchange for a vari-

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ety of expenditures, Reebok alleged that TriStar agreed to feature specific in-film associations with Reebok and its products, with the "cornerstone" being a fake Reebok commercial that was to run over the final credits. However, the director opted to cut the final scene from the film's theatrical release and Reebok sued for, *inter alia*, breach of contract, breach of promise, negligent misrepresentation and fraudulent concealment. The parties eventually settled out of court without disclosing the terms.

When "Jerry Maguire" appeared on Showtime, the 47-second Reebok commercial that the director had cut from the theatrical version was included, leading one commentator to proclaim: "When commerce struts in, art gets left at the altar."[32]

The larger the fee the marketer pays to the producer, the more creative control the company seeks to assert. Understandably, production companies are hesitant to grant broad approval rights to the marketer and they may even be precluded from doing so because of contractual commitments to the producers, directors, talent or others. Disgruntled marketers have, on occasion, successfully argued to have scenes rewritten or re-shot to improve the visibility of their products.[33] Alternatively, marketers have reduced the fee payable to the studio or production company.

However, as the Reebok litigation demonstrates, if the parties cannot negotiate a reduction in fee or an acceptable creative change, the matter may be submitted to arbitration or litigated. One key to avoiding such disputes is careful contract drafting, particularly a clear articulation of the manner and the frequency in which the product will be displayed and how the parties will reconcile creative disputes. Similarly, the contract should articulate what happens if the movie does not get distributed or the TV show is not broadcast.

A-list celebrities are beginning to demand a portion of the revenue generated from these types of arrangements.

Money

Financial terms are also key to every product integration deal. The production company or the studio and the marketers will negotiate the overall financial structure of the deal. Increasingly, however, actors also seek financial remuneration for appearing in motion pictures that contain products for which the production company received a fee to display or integrate into the story.

Although this compensation is usually reserved for top talent, more managers and representatives will seek some type of compensation for their actors, particularly if such an integration deal precludes the actor from accepting endorsement deals from competitors of the products or brands integrated into the movie.

Several factors affect how much a manufacturer will be willing to pay to finance an integration deal. Such factors include the film's projected box office success, the talent associated with the project and the way in which the brand appears in the film. An actor can allude to a product or company verbally. This type of passive reference generally does not garner significant fees. A product can be shown visually, either in the foreground or in the background.

Obviously, a product shown close up will attract more dollars than a product shown in the background. An actor can handle, use, consume or mention the product, which would command a much larger fee, particularly if the actor is well known. In addition to merely appearing on screen, the brand can be integrated into the storyline. This type of product integration can command exorbitant fees, as demonstrated by Miramax for its film "The Green Hornet."

The horizon: Important business considerations

Notwithstanding the numerous opportunities and benefits product integration offers creators and advertisers, inherent risks and challenges still remain. Donaton[34] and others have correctly warned that creators and advertisers must not lose focus that the most important party to any product-integration deal is the consumer. Inartfully integrating commercial messages into creative programming risks alienating viewers. Therefore, it is imperative that creators and advertisers follow the mantra that *the show must always come before the biz*. The integration must be seamless.

Creators and marketers should follow several fundamental principles. At its core, a product integration must be designed in an imaginative and creative way to advance the story line. Obvious and obtrusive product placements that do no more than showcase a product or sponsor are generally ineffective. Commercials masquerading as entertainment tend to insult viewers, readers, gamers and listeners. Creators and marketers must be true partners, ensuring that the product and its integration are appropriate for the entertainment program.

When BMW produced a series of short films featuring its cars for distribution over the Internet, it hired top directors and talent and ceded virtually complete creative control to the creative team. The risk was very successful, both creatively and financially.[35]

The various stakeholders within each industry need to collaborate for the process to succeed. For example,

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ad agencies have resisted losing control of their clients and the direct collaboration between their client and the content creators. Similarly, some talent agents and talent have opposed actors appearing next to brands, fearing such implied endorsements will inhibit their ability to do commercials promoting competing products.

Likewise, network television sales departments have resisted embracing product-integration deals because such agreements undercut their attempts to sell commercial ad time. Savvy industry professionals, recognizing the need for greater partnering, have forged strategic alliances. Ad executives, talent agents and lawyers are starting new brand-integration firms that are spreading rapidly throughout the entertainment industry. [36]

Aside from the creative and business challenges facing branded entertainment initiatives, there may be legal and regulatory issues on the horizon. Although the federal and state governments do not strictly regulate the practice, several public interest groups have called for the FCC and the FTC to regulate product placements. For example, an organization called Commercial Alert that watchdogs commercial content filed petitions with both agencies on Sept. 30, 2003.

Although the FTC declined to characterize product placements as misleading and rejected Commercial Alert's request for formal action, calls for regulation may increase, particularly as the practice becomes more prevalent.

The practice of product integration is uncertain in Europe. Under a European Union directive, subliminal advertising in TV programming is illegal and surreptitious advertising is heavily regulated. However, European regulators appear to be liberalizing their rules, which could allow television broadcasters and marketers an opportunity to integrate brands into programming content.[37] Some experts in Europe believe that a decision challenging the applicability of this directive to product placements could be on the horizon.[38]

Frances Page, a principal of MAGNA Global Entertainment's Strategy and Business Affairs Division, also notes that the different EU member states generally do not enforce the directive equally, which further complicates matters.[39] For example, Holland is liberal in its application of the directive, even setting specific rate cards for product placements.[40]

Although the legality of the practice is uncertain, the vagaries of the directive and the varying applications by different member states make it clear that seeking the assistance of counsel who has a specialized understanding of European law is essential when navigating the European entertainment landscape.

Conclusion

The confluence of legal doctrine, business opportunity, social transformation and technological change has paved the intersection at Madison and Vine. The current categorizations of speech create incentives for advertisers and entertainment companies to blend their commercial and entertainment speech into hybrid content, potentially avoiding the panoply of regulations and legal doctrines promulgated for commercial content. The use of commercial skipping devices, peer-to-peer file sharing and media alternatives to television and movie theaters have forced mass marketers of culture and commerce to rethink their "push" model of delivery in favor of a more consumer-centric and seamless "pull" model.

These factors, along with the hemorrhaging business models prevalent in the entertainment industry, have created an environment in which the advertising and entertainment industries must collaborate to prosper. Done well, branded entertainment initiatives offer an effective way to entertain and market simultaneously. The intersection has been paved and some of the traffic signs are up. Please drive carefully.

Scott Shagin practices entertainment, intellectual property and media law and is an adjunct professor at Seton Hall Law School. His e-mail is digitalesq@prodigy.net. Matthew Savare practices intellectual property, media and entertainment law with Lowenstein Sandler, PC. His e-mail is msavare@lowenstein.com.

Endnotes

1. Brand integration is the term used to describe weaving specific products and brands into entertainment content. Although it is conceptually similar to product placements, brand integration connotes a more transparent, subtle and creative approach.

2. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, LTD.*, 545 U.S. ____ (2005).

3. *See generally* Richard Jay Epstein, *The Big Picture: The New Logic of Money and Power in Hollywood*, Random House, New York, 2005, pp. 14-23.

4. When ancillary revenue streams such as DVD sales and licensing are considered, the motion picture industry still grosses more overall money than the video game industry. However, the meteoric rise in video game sales and the transformation of the industry from a technology–centric model to an entertainment-based model should not be underestimated.

5. Brian Fukuji, Remarks at the ABA's Forum on the Entertainment and Sports Industries, 2005 Annual Meeting (Oct. 8, 2005).

6. CPM denotes cost per thousand of impressions.

7. *See generally 2004 Web and Downloadable Games White Paper,* International Game Developer's Association, 2004 (www.igda.org/content/reports.php, lasted visited July 10, 2005).

8. Telephone interview with Ryan Moore, partner, Set Resources Inc. (Sept. 22, 2003). Set Resources Inc. is a California product placement and entertainment relations company. Set Resources, About Us, *available at* http://www.setresources.com/setr.html (last visited March 20, 2005).

9. Marc Graser, *Falling Off the Brand Wagon: Studios Cope with Ad-versity in Lining Up Promo Partners*, *Variety*, Oct. 20-26, 2003, at 1.

10. Richard Linnett & Wayne Friedman, *Miramax Hawks Record Product Placement Deal*, Adage.com, May 26, 2003, *at* http://www.adage.com/news.cms?newsId =37901 (last visited Mar. 20, 2005).

11. Steven L. Snyder, Note, "Movies and Product Placement: Is Hollywood Turning Films Into Commercial Speech?," 1992 *U. Ill. L. Rev*. 301, 302 (1992).

12. Hank Kim, *Marketers Explore Product Placements in Music*, Adage.com, Sept. 9,

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2002, *at* http://www.adage.com/news.cms?newsId=35982 (last visited March 20, 2005).

13.Scott Donaton, *Madison & Vine: Why the Entertainment & Advertising Industries Must Converge to Survive*, 137-145 (2004).

14. Snyder, *supra* note 11 at 308.

15. For an in-depth discussion of the taxonomy of constitutional speech, see Matthew Savare, "Where Madison Avenue Meets Hollywood and Vine: The Business, Legal and Creative Ramifications of Product Placements," 11 *U.C.L.A. Ent. Law R*. 336-356 (2005).

16. *See Saenz v. Playboy Enters. Inc.*, 841 F.2d 1309, 1320 (7th Cir. 1988) ("[T]he Constitution stands as a safe harbor for all but the most malicious political speech.").

17. *Harper & Row, Publishers Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985) (noting that the "law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.").

18. *See, e.g.*, *Young v. Am. Mini Theaters Inc.*, 427 U.S. 50, 77 (1976) ("Our cases reveal . . . that the central concern of the First Amendment in this area is that there be a free flow from creator to audience of whatever message a film or book might convey.").

19. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002) ("Although commercial speech is protected by the First Amendment, not all regulation of such speech is unconstitutional.").

20. 425 U.S. 748, 762 (1976).

21. 447 U.S. 557, 561 (1980).

22. 45 P.3d 243, 256 (Cal. 2002).

23. *Id.* at 256.

24. *Id.* at 280 (Brown, J., dissenting).

25. *Nike Inc. v. Kasky*, 537 U.S. 1099 (2003), *cert. dismissed*, 123 S.Ct. 2554 (2003).

26. *See, e.g.*, *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *Hoffman v. Capital Cities/ABC Inc.*, 33 F. Supp. 2d 867 (C.D. Cal. 1999) *rev'd on other grounds*, 255 F.3d 1180 (9th Cir. 2001) (reversed on First Amendment grounds). *See also* Matthew Savare, "The Price of Celebrity: Valuing the Right of Publicity in Calculating Compensatory Damages," 11 *U.C.L.A. Ent. Law Rev*. 179-180 (2004).

27. Such regulation concerns false and misleading advertising and unfair or deceptive business practices.

28. The various entertainment sectors generally self-regulate in an attempt to stave off governmental intervention. For example, the Motion Picture Association of America (MPAA) polices its "voluntary" ratings system, as do the Recording Industry Association of America (RIAA) and the Entertainment Software Rating Board (ESRB).

29. We address only the contract terms in the motion picture industry. The ideas discussed in this section are equally applicable to the other fields of entertainment.

30. Generally, A-list talent have consultation and approval rights regarding what products will be integrated into a motion picture.

31. See Compl., *Reebok Int'l, Ltd. v. TriStar Pictures Inc.*, Civ. No. 96-8982 SVW, (C.D. Cal. filed Dec. 23, 1996), available at http://www.courttv.com/archive/legaldocs/business/reebok.html (last visited March 23, 2005).

32. Patt Morrison, "*Three* Views of the Southland: A Word From Our Sponsor," *L.A. Times*, Jan. 2, 1998, at B2.

33. Robert Adler, "*Here's Smoking at You, Kid: Has Tobacco Product Placement in the Movies Really Stopped?*," 60 *Mont. L. Rev*. 243, 247 (1999).

34. Donaton, *supra* note 13, at 147-156.

35. See Donaton, *supra* at note 13 pp. 95-105.

36. See Donaton, *supra* at note 13 pp. 157-171.

37. "European Regulators Rethink Product Placement Rules: Broadcasters Expect Freer Reign for Brand Integration," *Madison and Vine Newsletter*, Oct. 5, 2005, *at* http://adage.com/madisonandvine/ (last visited Oct. 8, 2005).

38. "Product Placements: Legitimate Branding or Unethical Subliminal Advertising?," *Patent, Trademark & Copyright Journal*, Vol. 70, No. 1721, 54-55 (May 20, 2005).

39. Frances Page, Remarks at the ABA's Forum on the Entertainment and Sports Industries, 2005 Annual Meeting (Oct. 7, 2005).

40. E-mail from Frances Page, principal, MAGNA Global Entertainment's Strategy and Business Affairs Division, to Matthew Savare (Oct. 31, 2005, 3:03 pm EST) (on file with author).

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