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by Shaun Clark

At the Crossroads

Brand integration deals involve copyright, trademark, and insurance considerations

At the crossroads of Hollywood Boulevard and Madison Avenue, a variety of legal and business issues must be considered and addressed in order to set the stage for a successful brand integration deal. In the historical television network model, the advertiser-brand indirectly finances the content by purchasing television commercial spots on a television network, and the network uses the revenues from the commercial spots to acquire content from studios or independent producers with the expectation of making a profit on the margins between the cost of the content and the value of the advertising.

In the new world of greatly expanded channels of distribution, more opportunities are open for advertiser brands to deliver their messages to particular demographics. Opportunities exist for brand integration into the programming, for characters in the program to represent or use a brand, for brands to be featured on the desks of judges, for brands to be the prizes that are sought by competitors, or for brands to otherwise appear within the story of the show. Integrations take place in all forms of audiovisual content, including scripted television series, reality series, talk shows, games shows, movies of the week, music videos, theatrical motion pictures, video games, Web-specific digital content, viral videos, and content for in-store use. Among other benefits, when the brand is integrated into the content (as opposed to appearing as a commercial), it is more difficult for the viewer to fast forward through the message.

No simple answer exists to the question of how brand integration deals happen. Currently, countless independent reality producers and production companies are attempting to identify the perfect combination of business ties, compelling characters, and interesting stories to create the next big hit. Likewise, brand and advertising agencies are looking for new opportunities to establish or deliver brand messaging and to identify suitable content for the target demographic. Sometimes the studio or producer of an existing, established series looks to generate additional dollars for the production budget by selling integrations into their series. Also, it is not uncommon for network media sales executives to parlay the value of television commercials or aggregate specific media into the programming as a component of the media package that the brand may purchase. The prominent advertising agencies recognize the value of a successful brand integration and are now developing specific content, including television series, around brands.

At first glance, brand integration opportunities appear to deliver fantastic value, costing far less than the old model of paying for production of a commercial and then paying additional amounts to have it exhibited. The first glance deserves a second look, however, because successful brand integration is not that easy. Risks can be managed, but

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they should be carefully considered and addressed before embarking on a brand integration adventure.

Some issues are of equal concern to household names and to start-ups striving for brand recognition. With others, the difference in approach and tolerance for risk varies between the established national public company and the smaller single-owner business. The deals increase in complexity when the integration includes more than just the brand and the content, and negotiations among the brand, the producer, and the distributor (i.e., the network, in the case of television) can be very complex. No two situations are the same, leverage can vary dramatically from deal to deal, and the unique brand- or series-specific issues require that the various representatives think about each variable and address all legal and business issues during the deal negotiations (and often after). A prudent lawyer or executive should consider every possible factor in determining whether a proposed brand integration opportunity is right for the client or should be avoided.

For example, a successful brand integration may showcase the brand, but it is not a commercial. If a commercial fails, the brand can simply elect not to exhibit the commercial. On the other hand, if the content featuring the integration does not favorably depict the brand, the brand will have little to no ability to stop delivery of the content. In an unscripted show, for example, the brand's products could malfunction or otherwise appear in a manner detrimental to the brand. While steps can be taken to reduce the likelihood of a negative depiction (e.g., limit involvement to scripted projects), brand executives who want to realize the value of a successful integration may be willing to take the risk.

Before taking the risk, however, executives should understand that they will not have sole control over how the brand is depicted or what role the brand will play in the content. With scripted content, the brand may simply ask to read each teleplay or screenplay to determine how the brand is being depicted and whether there is any component of the content that is objectionable to the brand or inconsistent with its message. However, in reality programs or video games, this issue may not be as easy to address because of the uncertainty of what will result after turning the cameras on or making the video game. In situations in which there is no way to ensure that the brand's product is going to be depicted in a positive light or that the product will function properly when being filmed, the key is to negotiate basic parameters regarding the use of the products within the content and to be as involved as possible in production. Occasionally, the studio producing the content is secretive about the screenplay (for example, the next installment of a major superhero franchise). The studio will only provide the brand with a basic description of how the product is going to be depicted, and it is up to the brand to determine whether it is comfortable enough with what the studio or director is saying about how the brand will be used.

The most successful integration permits the brand to deliver a specific message, showcases a new product or service, and independently activates promotions. Sophisticated brands seek to engage key talent from the content in separate promotional appearances or the production of commercials or additional content specific to the brand. Sometimes, success is found in a jointly funded copromotional campaign, promoting the content and the brand. For example, an auto manufacturer's new line of vehicles is depicted in a hot new video game and the video game publisher and the auto manufacturer coproduce a series of television commercials around the launch of the video game. This additional content drives mutually beneficial brand awareness for the automobile brand and the content. These types of copromotional campaigns can be very successful, but they often require significant resources from the brand for activation of the campaign and the purchase of media.

The monetary aspects of brand integration deals vary considerably. With some deals, the brand pays for all or some of the production costs. Often the brand provides some in-kind consideration, such as free vehicles, accommodations, or use of the branded products, including as prizes for contest winners. In other situations, producers and networks make the argument that the content's contribution to the brand is so valuable that they want an equity interest or participation in sales of branded products. The brand may even be considered so essential that the brand receives a fee for involvement in the content.

Depending upon the level of integration into the program, it is becoming more prevalent that the networks seek a concurrent media buy. In other words, the brand may be require to purchase advertising on the network. This dynamic occurs more frequently when the brand is seeking the integration or paying a portion of the production cost. The ad sales teams at networks receive commissions and so are likely to want to make sure that they are being compensated in a situation in which money that might otherwise have gone to purchasing advertising is instead going to cover production costs. From the brand's point of view, a brand that purchases media during the exhibition of the content is more likely to be able to protect against ambush marketing during the content. No less important, the greater the investment in the success of the program and the relationship—often evaluated by financial contribution—the greater the likelihood of being able to seek "make goods" if things do not go as planned or if the ratings for the program are lower than anticipated. "Make goods" are additional benefits accorded to a brand or advertiser when the integration does not meet minimum expectations or the ratings for the content are materially below the values used to calculate the fees paid by the brand for the integration or commercial advertising inventory. Make goods often come in the form of additional integration of the brand in future episodes or content or additional exhibition of the brand's commercials.

While concurrent media buys are fairly common, other agreements also occur. For example, a brand may become a producer or coproducer of the content and receive a fee, ownership, or potential backend participation. Brands even occasionally finance all or a majority of the costs of developing or producing the content rather than just paying an integration fee or purchasing media. When the brand is a financier, it can seek the protections typically accorded to financiers. These range from repayment of financial contributions, participation in revenues derived from exploitation, and ownership or attachment to subsequent productions. Attorneys for brands should remember that without a proper agreement, a successful initial release (e.g., a motion picture or the first season of a series) in which the brand plays a key role may be followed by a second release in which the producer or network elects not to be affiliated with the brand, or even elects to be affiliated with a competitor of the brand.

Workplace Production

When cameras are permitted in the brand's workplace as a component of the integration, it can be burdensome and create issues with the brand's employees. A television episode may only be 22 minutes long, but the filming that goes into production can take days, if not weeks, and can be very intrusive in the workplace. A workplace is not necessarily as interesting on film as it is in real life, and requests are often made to enhance the workplace for the filming. Often, art such as posters may be removed to avoid rights claims, and additional lighting is required. Customers may be asked to sign releases when they visit the brand's premises. The brand has to be prepared for the disruption of a production team's filming employees for weeks and weeks, with multiple crews maneuvering to capture the required footage. It is, therefore, very important to have a comprehensive understanding of the producer's expected access requirements and production-related accommodations before completing a deal.

In some situations, the brand's employees are not deemed to be ideal for television. Producers may request that the brand hire new employees who may be more attractive for the television audience. The brand's regular employees can prove problematic. Each employee represents the brand, and the things an employee says or does not say can have positive or negative effects on the success of the brand, making it all the more important to screen the employees who will be involved in the content to assure that selected employees obtain adequate media training before the cameras start recording.

Throughout the production process the brand should foster a close relationship with the producer in order to mitigate production issues. What may be best for the program may not be best for the brand, and vice versa. Except in special circumstances, brands should not expect final approval over the content. A good relationship with the producer goes a long way toward avoiding situations in which a network refuses to eliminate a particular storyline or scene that could be problematic for the brand. For example, it can be good entertainment if a product malfunctions or employees are disrespectful to customers behind their backs. With a respectful producer, these scenes may not even make it to the rough cut.

Negotiating the Deal

Regardless of the level of sophistication of the brand and its executives, the value of the brand, and how much the producer or financing network desires to include the brand within the content, brands can take certain precautions during negotiations to protect the brand. In a brand integration deal, the brand accords the producer and network the right to depict the brand in the content. The producer or network will control the exploitation of the content pursuant to a very broad license. It is not uncommon for brands to seek reasonable limitations on the use of the brand and to block footage depicting the brand in copromotions with third-party brands, certain merchandise, or in any programs other than the content in which the footage was filmed.

Additionally, brands should determine if the integration agreement contains minimum obligations regarding the nature of the depiction of the brand in the content. First, brands should be cautious when considering integration into content that does not have guaranteed distribution. Even with guaranteed distribution, it is a mistake to think that because the brand is permitting a producer to shoot at the brand's facilities, they will appear in the final content. The brand may expect that when one of its employees appears on screen, a graphic will identify that person (e.g., John Smith, VP of Customer Relations at Brand). However, without a contractual obligation to depict the brand for a certain amount of time, or that there will be graphic identification or voice-over recognition of the brand during the content, the producer may not include the shots, graphics, or audio references that deliver value to the brand. In situations in which the brand has a significant amount of leverage or is paying for the integration, minimum depiction requirements and even potentially minimum protections regarding the time and date of exhibition of the content should be set forth as obligations or as conditions to payment of any integration fee.

Networks and producers will sometimes require strict confidentiality agreements in connection with the brand integration deal. For example, the success or failure of contest-based reality programming is maintaining secrecy over who wins, who gets a rose, or who goes home until the initial public exhibition of the episodes. It may be weeks or months between the completion and exhibition of an episode. As a result, the networks and producers require strict confidentiality obligations from anyone who is involved in the production, and this includes the brands involved in providing benefits or services in connection with the content. As a brand executing an integration agreement, internal procedures must be established to avoid the disclosure of confidential information, as even inadvertent disclosures can result in damage claims in the millions.

To ensure the brand gets the most from the integration arrangement, a brand may want to prohibit the depiction of a competitor in the content. If a brand's integration deal is for one episode, it is unlikely that the brand will have the leverage to demand categoric exclusivity for the entire series. For example, episode one of a series could feature the brand's new vehicle extensively, and the brand may be able to negotiate that no other automobile brands will be prominently featured in that episode or that no other auto brands can purchase advertising during the episode. Episode two, however, could be home for a new integration deal with a competitive automobile brand. This can be acceptable. However, the owner of a high-end sushi restaurant that is the inspiration for a new series called The Sushi Samurai may not countenance other sushi chefs or restaurants in the same episode, season, or subsequent seasons, because the affiliation between the brand and the series is so inextricably linked that an association with another sushi restaurant could be detrimental to the brand. Likewise, if the brand is making a real contribution to the costs of production, it is reasonable to seek protections against the integration of (or even the mention or depiction of) competitors in the same content.

There also may be implications for the brand if competitors are allowed to advertise during the content. A brand that makes a significant contribution to the series (e.g., through a media buy, contribution to production financing, or extensive access to the company and its employees) is often able to obtain protections from the producer and the network that the network will not exhibit competitor advertising during the program. While the definition of "competitor" or "categoric exclusivity" can be subject to a significant amount of negotiation, it is essential that a brand not make a big investment into a series and leave open the possibility that a brand competitor can engage in ambush marketing during the program. For example, consider an adventure-driven competition series in which an auto manufacturer contributes vehicles for the contestants to drive, pays an integration fee, purchases commercial spots on the network, and agrees to promote the series at its dealerships. In that situation, it would be disastrous for the network to sell a competitive automobile brand advertising during the program. It is therefore essential that the brand negotiate its expectations and exclusions in detail.

When negotiating the integration agreement, a brand should determine whether the agreement will limit the brand's normal media exposure. The producer or network may seek to limit media exposure of the brand in the weeks or months leading up to the initial exhibition of the content and sometimes for a period thereafter. These types of restrictions may not be consistent with the ongoing customary media strategy for the brand or may be inconsistent with the brand's expectations in connection with the integration. Sometimes these restrictions can even go as far as to limit or restrict key executives from making appearances in the press or on other television programming during a window around the initial exhibition of the content. It is crucial that the brand fully understand the expectations regarding any restrictions on the brand prior to proceeding forward with the integration.

Finally, a brand should evaluate the opportunity to utilize the content for its own purposes and how to do so. The brand may be able to help copromote the content through its digital platforms, social media, e-mail, and point-of-sale materials. In most brand integration relationships the brand does not own the content. As a result, any use of the content (or even references to it) needs to be made pursuant to a license from the entity that owns the content. The licensed use is likely to be subject to approvals designed to maintain the quality and consistency of message regarding the content. The use also must avoid divulging confidential information regarding the content. If there are celebrities or actors depicted in the content that the brand desires to license, this can trigger an additional layer of approvals and royalty obligations.

Little Case Law, but General Guidance

Brand integration arrangements are relatively new to the legal landscape and, as a result, a dearth of legal precedent exists to guide parties and their representatives. These deals involve a variety of general legal issues that do appear in case law, which in turn can affect agreements.

For example, if the brand's business involves significant trade secrets or confidential information about customers, careful consideration should be given to the access accorded to the producers of the content. Contracts should address procedures to avoid disclosure of trade secret or confidential information. A florist who handles celebrity weddings may have confidential information regarding a wedding that is subject to an nondisclosure agreement. A medical facility may have HIPPA liability regarding patient information. A security company or advertising agency could have information that should not be broadcast to the world. The brand needs to consider and negotiate appropriate limitations on what can and cannot be recorded or divulged, and the brand should take steps to adequately police this process during production.

If the brand is going to be involved in the production of the content, the brand should make sure that adequate insurance exists for the production. Special insurance policies are available to protect producers. The brand's general liability insurance policy may or may not cover claims arising out of production (e.g., a fire started by a short in production equipment). Thus, it is prudent to not only confirm coverage with existing carriers but also have the brand added as an additional insured on the policy carried by the producer. It is also common that the brand be added to the producer's errors and omissions policy.

Further, the brand should understand that in most situations its remedies will be limited by contract. In other words, in the event of a material breach—even one regarding depiction of the brand—it may not be possible to seek any type of injunctive relief as these contracts usually limit the brand's remedies to monetary damages or make goods.

The brand should also be aware that the law requires disclosures regarding any promotional consideration paid for inclusion of products or services in content exhibited on television. Section 317 of the Communications Act[1] requires that stations broadcast a notice that there is a sponsorship arrangement in connection with television programming when money, services, or other consideration have been provided in exchange for the agreement to include a brand or product in programming. As a result, the brand engaging in a brand integration deal with content that is going to be broadcast should expect to hear a voice-over or see credits stating, "Promotional consideration was provided by Brand."

Trademark issues can also arise, especially if the content has a title that includes the brand's trademark. If the content is based on the brand (e.g., a television series about a fashion designer and her company called Hot Fashion) and the producer wants to use the brand in the title of the content (e.g., the series will be titled Hot Fashion), discussions should take place regarding the scope of rights accorded to the producer in connection with the use of the brand's trademark. While the proposed use of the brand's name and trademarks in the title of the content might be valuable for the brand, it can create confusion in the marketplace and present a legal puzzle for those crafting the agreement. For example, the producer and network may seek to sell Hot Fashion T-shirts at Target in promotion of the content, but that might not be consistent with the Hot Fashion company's exclusive distribution arrangement with Neiman Marcus. When this issue arises, the trademark rights accorded to the producer and network should be subject to a carefully crafted license. Similar issues arise in connection with the official Web site for the content, as the brand will want to ensure that consumers seeking the brand's products or services are not misdirected to the series site when attempting to purchase the brand's products online.

Traffic is increasing at the intersection of Hollywood and Madison. Ultimately, the quality of the content is the most determinative factor in the success or failure of the integration. If the content is compelling, it is more likely that a greater number of people will view the content and that when it is viewed it will resonate favorably with the viewer. However, it is possible that great content with significant viewership can be considered a failure for the brand. Sometimes even less successful content can still be considered a win for the brand. Addressing the foregoing factors does not guarantee a successful brand integration deal. However, lawyers and executives charged with responsibility for these deals will certainly be better able to sleep at night knowing that they have addressed these issues, matching expectations with obligations and mitigating risk for their clients. ■

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[1] 47 U.S.C. §317.