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The Lanham Act Goes to the Movies

April 21, 2010 @ 10:30am
by Ian Ayres



An occupational hazard of teaching intellectual property for the first time is that IP violations now repeatedly jump to mind. (I'm a bit like the hypochondriac med student who imagines encountering all the illnesses she just studied.)

Last week was no exception. My beloved spouse and I had a date night where we went to see the movie *Date Night*. (I'm a big fan of both **Tina Fey** and **Steve Carell**, but, like many critics, I was underwhelmed by the movie. The extended dancing scene was a particular misstep.) Aside from the movie's artistic merit, I, as a newbie IP professor, was surprised by the movie's use of a Kindle, the Amazon book reader.

Mild Spoiler Alert

Steve Carell's character asks a New York cab driver if he has a laptop or some device that can read a flash drive (also referred to in the movie by the less tech-savvy Tina Fey character as a "computer stickie thing"). The driver responds that he has a Kindle, and Carell's character then proceeds to insert the flash

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Some people argue that

drive into the Kindle and immediately display certain incriminating pictures taken from the drive.

As an initial matter, do cab drivers really have Kindles in their cabs? Here's a mini-bleg: please add a comment if you've seen a cab driver with a Kindle (or if you're a cab driver and keep one in your car from time to time). I'd be amazed if 10 cab drivers in New York City have Kindles currently in their cabs. I mention the implausibility of finding a Kindle because it makes me think that Amazon probably paid for the "product placement." (I have ridden in many cabs where the driver has a flash drive-compatible laptop, which would have been the more natural device for the driver in the movie to offer.)

But my larger concern is that Kindles can't read flash drives. They don't have USB ports. (Second mini-bleg: is there some snap-on adapter that would allow you to download files from a flash drive? This [user board](#) suggests I'm not alone in thinking that the movie attributes to the Kindle a feature that it simply doesn't have.)

If my two conjectures are correct (i.e., that Amazon paid for the Kindle product placement, and that Kindles can't read flash drives in the way depicted in the movie), then it seems to me that the movie violates the Lanham Act.

You see, [Section 43\(a\) of the Lanham Act](#) (our nation's core trademark provision) prohibits false or misleading advertising:

Any person who, on or in connection with any goods or services . . . uses in commerce any word, term, name, symbol, or device . . . which in commercial advertising or promotion, misrepresents the nature, characteristics [or] qualities . . . of his or her or another person's goods . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

sugar should be regulated, like alcohol and tobacco, on the grounds that it's addictive and toxic. How much sense does that make?...



If Amazon paid for the product placement, it qualifies as a “commercial advertis[ement] or promotion” that “misrepresents the nature, characteristics [or] qualities” of the Kindle.

I think it would be fine for movies to take some artistic license with the qualities of a product if it is clear to the audience that the qualities are the script writer’s fantasy. For example, if Carell and Fey traveled through time by unlocking a hidden Kindle time-machine function, I don’t think there would be any liability (even if Amazon paid for the placement).

But what is troubling about the Kindle reference in “Date Night” is that it is not depicted as fantasy, but as an actual attribute of the product. There may be actual audience members who go out and buy a Kindle in part because of the movie’s depiction, and then are surprised to learn that the device cannot download files directly from a flash drive.

Any competitor “who believes that he or she is or is likely to be damaged” by this misrepresentation has standing to bring suit. Heads up Apple, Microsoft, and Barnes & Noble: you have a colorable claim. If I were the maker of the Onda VX560, I’d be particularly put out by “the ad” because the **VX560 reader** has a USB port and can actually download files from a flash drive.

I say this with no animus toward Amazon. Indeed, I love my Kindle. It let me **discover something** about **SuperFreakonomics** that I never would have found without it. The Kindle has **improved the quality of my reading experience** (even if I haven’t figured out how to download files from my flash drive).

But in a world where product placements are on the rise, it is entirely appropriate that our deceptive advertising laws respond. Merely wrapping an ad inside a work of art should not empower advertisers to misrepresent the attributes of their products.

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 Subscribe  Add Disqus to your siteAdd DisqusAdd Privacy**Eric M. Jones**

April 21, 2010 @ 2:46pm

Dude...It's a movie.

Nitin Roper

April 21, 2010 @ 2:58pm

It appears the kindle does have a USB connection, but only to connect it to a computer. See below from amazon.com website.

<http://www.amazon.com/gp/help/customer/display.html?nodeId=200375630>

Transferring Files Via USB

Both Macintosh and Windows users can download and transfer Kindle content, personal documents, and MP3 and Audible files from their computers to their Kindles through the USB connection. When your Kindle is plugged into your computer, your Kindle will appear as a removable mass-storage device.

System Requirements

Making the Connection

The illustration below shows a Kindle and a laptop computer connected through the USB cable.

Illustration of Kindle connected to a computer via USB

MikeM

April 21, 2010 @ 3:22pm

Wouldn't you have to make the case that dramatization within a movie scene is "in commerce"?

I could see a court being persuaded to rule that way, but not automatically. Is there any precedent for that?

Gordon

April 21, 2010 @ 3:29pm

@Eric -- it's not a movie, it's an ad within a movie. Just because it "fits" in the "narrative structure" doesn't change what it actually is.

Ben April 21, 2010 @ 3:40pm

Movies are very poor representations of technology. Always have been. A side effect of working with technology professionally is that you can barely stand to watch movies where computers or technology takes any role at all. The things they do with computers are preposterous and almost always entirely wrong.

brent April 21, 2010 @ 3:48pm

According to Amazon, here:

http://www.amazon.com/Kindle-Wireless-Reading-Display-Generation/dp/B0015TG12Q/ref=sr_1_1?ie=UTF8&s=electronics&qid=1271864737&sr=1-1

The Kindle has a micro USB connector, so a flash drive is not compatible.

Sally April 21, 2010 @ 4:04pm

I have a computer science degree. Anytime computers enter into a movie, their abilities are exaggerated. For example: "zoom in on his face...enhance by 10x...that's our man" Chloe in 24 is probably the my favorite character ever - just for her ability to take advantage of these futuristic technologies.

Eric is right. It's just a movie. No more can be expected than would be from CSI's science or legal advice from The Practice.

Jonathan Linde

April 21, 2010 @ 4:10pm

I'm an antitrust lawyer and frequently lack the ability to compartmentalize antitrust doctrine from my daily life (e.g., wondering whether local retailers selling cub scouts equipment are engaging in impermissible cartel behavior), so I empathize. That said, because there are so many flights of fancy in Date Night (the chase scene involving a cab locked together with an Audi R8 wasn't exactly believable), I think it's unlikely that the putative "reasonable" consumer would presume that the movie

[Read more...](#)**Rob**

April 21, 2010 @ 4:12pm

Nitin, you are correct that a Kindle can connect to a computer via usb, but that does not mean that it would be able to connect to a usb drive.

A usb connection is asymmetric, and requires a "host" that can then connect to one or more devices. A kindle is not able to be a host, not is a usb drive.

You could only connect the two if you have some device that could act as a host for both of them (serving as an intermediary between them).

Despite all this, it doesn't seem all that deceptive that they'd show this in a movie. Not as a way to try to deceive people about the function of the kindle, but just because there isn't a good well-known device that could plausibly serve the function they needed for this scene in the movie.

RJ

April 21, 2010 @ 4:26pm

If this was a valid Lanham Act-able representation, does that mean people could sue over ads or product placements that happen to feature people enjoying XBoxes not plugged into TVs or Game Boys with no game cartridges in them? If so, I wonder why no one's done so yet.

Raymond

April 21, 2010 @ 4:27pm

What about movies where cell phones work underground, in subways, under tunnels, etc? It wouldn't necessarily advertise a particular carrier, but I'm sure a lot of different technologies get misrepresented in movies.

PaulD

April 21, 2010 @ 4:30pm

I don't think the Lexus that Tom Cruise drove in The Minority Report could actually do what was portrayed, either. Do you get a special dispensation if you place your product in a Sci-Fi movie?

Ellen

April 21, 2010 @ 4:39pm

I this this is a very interesting point- but there may need to be a car (and bobsled and jet-ski and so on) loophole. When James Bond does his thing in his Mercedes or whatever, that might qualify as misrepresenting the quality of the vehicle.

Most people would know that the car can't do some of the things it does on film, but it would be very difficult for the average viewer to spot where real life ends and

fantasy begins. And I would hate for them to make care chases realistic.

ad

April 21, 2010 @ 4:50pm

I haven't seen the film, but I don't think it's a foregone conclusion that Amazon paid for product placement, either. The Kindle is undisputably the most used and most recognized brand name for a "reader" device and thus the obvious choice for a scriptwriter who wants to feature such a device, even in the absence of financial compensation for doing so. Saying "I've got a tablet-style reader" is a little awkward, the iPad was not yet introduced when the movie was filmed, and reference to a "Nook" would potentially be alien to many viewers.

Beyondken

April 21, 2010 @ 4:52pm

I'm sure Freakonomics lived up to its own high standards when it stated in the blog regarding the Iceland volcano: "If this eruption is anything like the 1815 eruption of Mount Tambora".

I'm sure they wouldn't say this if it wasn't a real danger, would they?

Brian

April 21, 2010 @ 4:55pm

My new GM car doesn't turn in to an autobot, so can I sue the producers of Transformers?

Jose

April 21, 2010 @ 5:23pm

@Raymond

In Lisbon, Portugal, the cell phones work inside the subway. All the phone carriers have installed special equipment inside the tunnels to allow the phones to work there.

Kate

April 21, 2010 @ 5:35pm

I can totally imagine a scenario where someone remembers 'Kindles have a port for a USB drive' without actually remembering where they heard that information in the first place. And would they remember to check closely the specs before purchasing? Maybe, maybe not.

Colin

April 21, 2010 @ 5:35pm

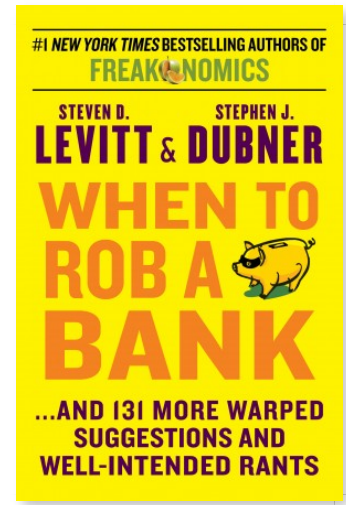
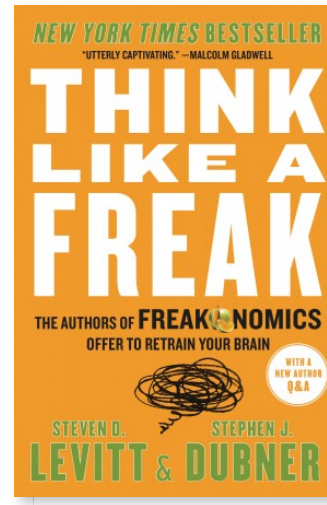
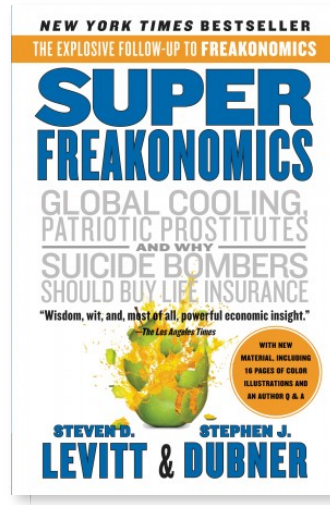
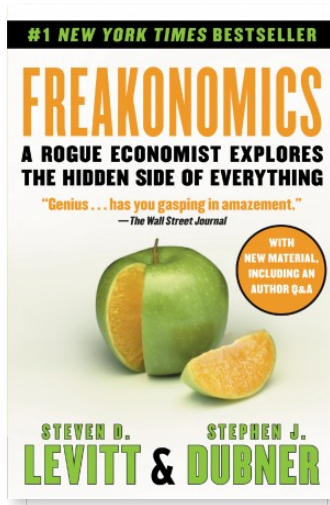
The jump from "The film contains clips of the Kindle doing unrealistic things" to "Amazon paid for clips of the Kindle doing unrealistic things" is quite a leap of faith, Ian.

Matthew

April 21, 2010 @ 6:57pm

Anybody expecting technical accuracy in a movie needs to call me about some ocean front property in Arizona I have for sale. When technology becomes part of the plot the writers make it capable of doing whatever it must to move the story along. It doesn't matter if it is warp drive, on-demand repositioning of satellites that can read newsprint or uploading a virus to aliens to save the Earth, "movie technology" and "real word technology" share few attributes.

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