Playing hide-and-seek?
A legal perspective on the complex distinction between commercial and editorial content in hybrid digital advertising formats

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Introducing the AdLit project

Advertising Literacy in a New Media Environment
Investigating Minors’ Persuasion Knowledge in Relation to New Advertising Formats

2014-2018
Project overview

WP 1: AdLit general

WP 2: Ad Cues

WP 3: Educational programs

WP 4: Awareness for the topic

WP 5: Policy and (self-) regulation
Hybrid advertising formats

Infomercial

Commercial overlays
Hybrid advertising formats

Connected TV
Hybrid advertising formats: specific feature

- Advertising content embedded in the non-promotional content

  → increasing blurring between advertising, information and media content

  → significant societal impact

  → contrary to specific legal requirements?
Articles 9 & 19 AVMSD

Article 9 (commercial communication)

‘Audiovisual commercial communications shall be *readily recognisable* as such’.

Article 19 (television advertising)

‘Television advertising and teleshopping shall be *readily recognisable and distinguishable* from editorial content. Without prejudice to the use of new advertising techniques, television advertising and teleshopping shall *be kept quite distinct* from other parts of the programme by optical and/or acoustic and/or spatial means’.
Key elements?

2 components

1. ‘readily recognisable’ → identification principle

2. ‘distinguishable’ / ‘quite distinct’ → separation principle
## National implementation: overview

<table>
<thead>
<tr>
<th>Country</th>
<th>Legal Basis</th>
<th>Enforcement</th>
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<tr>
<td>Belgium</td>
<td>Flemish Decree on radio and television (articles 53 and 79)</td>
<td>Vlaamse Regulator voor de Media (VRM)</td>
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<td>The Netherlands</td>
<td>Media law (various articles)</td>
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<td>United Kingdom</td>
<td>Ofcom Broadcasting Code</td>
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<td>UK Code of Broadcast Advertising (BCAP code)</td>
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<td>UK Code of Non-broadcast Advertising (CAP code)</td>
<td>Advertising Standards Authority (ASA)</td>
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</table>

Also self-regulation, e.g. ICC Code

Analysis of decisions
National implementation: key learnings

• the “distinction” between editorial and commercial content is key

• aim of the “distinction”: protect the viewer from being
  (1) confused or misled about the nature of the broadcasted message and
  (2) subconsciously influenced by commercial messages.
National implementation: key learnings

- broadcast commercial message within ‘regular’ advertising blocks

- a variety of circumstantial elements may influence compliance with the identification principle:
  - duration (an ad of 3, 4 or even 5 minutes)
  - scheduling (start at fixed time with repetitions)
  - broadcasting as a series (varied topics per episode)
  - format (title, ‘thank you notice’)
  - presenter (identical in advertising & programme)
  - active involvement of the viewer
  - content of the ad

- enforced by a variety of sanctions (warning, financial penalty, broadcast prohibition, statutory sanction)
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<th>VRM</th>
<th>Commissariaat voor de Media</th>
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<td><strong>Purpose of principles</strong></td>
<td>avoid confusion / subconscious commercial influencing</td>
<td></td>
<td>avoid confusion and misleading the viewer</td>
<td>avoid circumventing restrictions advertising minutage avoid control advertisers</td>
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<td><strong>Separation</strong></td>
<td></td>
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<tr>
<td>Scheduling message</td>
<td>within regular advertising blocks</td>
<td>within regular advertising blocks</td>
<td>within regular advertising blocks</td>
<td>within regular advertising blocks not necessarily sufficient</td>
</tr>
<tr>
<td>Notice</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Format notice</td>
<td>visual / acoustic / spatial means</td>
<td>optical / acoustic means</td>
<td>‘notice of 3-5 seconds seems sufficient’</td>
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<tr>
<td>Wording notice</td>
<td>‘publiereportage’ or ‘infomercial’ not always sufficient</td>
<td>‘advertising’ or ‘infomercial’ not always sufficient (minors)</td>
<td>‘advertisement’ or ‘this is an advertisement’</td>
<td></td>
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<tr>
<td>Timing notice</td>
<td></td>
<td></td>
<td>opening intermittently throughout the ad</td>
<td></td>
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<tr>
<td><strong>Identification</strong></td>
<td></td>
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<td>Circumstantial Elements</td>
<td>duration scheduling broadcasting as series format presenter active participation of the viewer</td>
<td>duration scheduling broadcasting as series format presenter</td>
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<td>presenter</td>
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<td>broadcast prohibition</td>
<td>statutory sanction warning</td>
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Newsflash

• 23 March 2015:
  • publication by the Flemish Media Regulator of Guidelines concerning the separation between commercial and editorial content (re television advertising)
  • (more) detailed requirements with which ‘bumpers’ need to comply (e.g. number of seconds, not ‘integrate’ end bumper in commercial nor editorial content)

Challenges for hybrid advertising formats

2 key challenges

- broadcast within the regularly announced advertising blocks?
  → scheduling outside regular advertising blocks; bumpers?
  → against ‘nature’ of hybrid techniques?

- clear notice at start and intermittently broadcasted?
  → certain wording not sufficient (i.e. infomercials)
  → quid with convergent devices?
Aim of regulation?

facilitate an average consumer to as such recognise and distinguish between editorial and commercial, persuasive content
Potential solutions?

- a responsible & coherent implementation of the identification principle
- with different emphasis according to target audience
- supported by the creation of cues or labels
- framed within a (self- or) co-regulatory framework (?)
- building upon the active involvement of all players
- while guaranteeing public interest goals
THANK YOU

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