

Playing hide-and-seek?

A legal perspective on the complex distinction between commercial and editorial content in hybrid advertising formats

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Abstract

Trends related to digitisation and convergence have led to the emergence of various highly sophisticated advertising formats. Advertisers who traditionally distributed their commercial messages through mostly national mass media platforms now increasingly distribute commercial content through a variety of emerging digital platforms, networks and devices. As such, commercial messages on traditional media, such as television, are extended to techniques such as digital TV overlays, clickable banners or pop-ups and brand presence on social media. These advertising formats are characterised by a specific feature: the advertising content (i.e. the persuasive, commercial message), is often *embedded* into the non-promotional media content (i.e. entertainment, information) in a more or less *integrated* manner. In other words, in these advertising strategies, the link between advertising, information and media content is increasingly blurred. This absence of a clear distinction between the editorial and promotional content seems to be contrary to the specific legal requirement set forth in European and national regulatory instruments, i.e. that *'audiovisual commercial communications shall be readily recognisable as such'* (Audiovisual Media Services Directive). Fundamental questions raise as to (1) whether the explicit identification and separation principles need to be revisited against the continuously changing advertising and media landscape and (2) how this (whether positive or negative) could be implemented in practice. The paper intends to address both questions. In essence, it will examine the impact of the embedded nature of new advertising strategies on the legally required separation between editorial and commercial content and, more in particular, the legal requirement to ensure *'recognisable audiovisual commercial communication'*. The origins of these concepts and their key elements will be examined in detail and applied to various concrete advertising formats. Next, the implementation in national legislation and a number of decisions of media regulators will be analysed in order to assess how the principles are interpreted in practice. Finally, the paper will explore European developments in this area.

Short bio

Liesbeth Hellemans (ICRI/CIR - KU Leuven – iMinds) obtained her law degree at the Catholic University of Leuven, followed by a Master in International and Comparative Law (LL.M) at the Vrije Universiteit Brussels. Between 1997 and 2001, she was active as an attorney at the Bar of Leuven and Brussels. As of 2002, she has been working as an in-house legal counsel in private industry, where she built up a significant expertise in international contracts, outsourcing agreements, ICT law and data privacy. Liesbeth joined ICRI as a legal researcher on 1 December 2013. Her research focuses on cloud computing, media law and data protection. She is currently legal researcher in the AdLit project, a project on advertising literacy and children.

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Eva Lievens (ICRI/CIR - KU Leuven – iMinds) has been a member of the Interdisciplinary Centre for Law & ICT (ICRI/CIR; www.icri.be; KU Leuven) since 2003 and is currently a Postdoctoral Research Fellow of the Research Fund Flanders. Her research focuses on legal challenges posed by new media phenomena, such as the regulation of audiovisual media services, user-generated content and social networks, with a specific focus on the protection of minors and fundamental rights. Eva is the Associate Editor of the International Encyclopaedia of Laws – Media Law, the Programme Coordinator of the Advanced Masters in Intellectual Property Rights and ICT Law, and a Guest Professor at Ghent University.

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Peggy Valcke (ICRI/CIR - KU Leuven – iMinds) is research professor ICT and media law at ICRI / CIR - KU Leuven, part-time professor at the European University Institute in Florence and visiting professor at the University of Tilburg. She is ICRI's research leader within the Security Department of iMinds. In previous years she has been involved in over 30 research projects – funded by the European Commission, KU Leuven, Fund for Scientific Research-Flanders, the Agency for Innovation by Science and Technology, iMinds, national authorities and regulators – dealing with legal aspects of IT and media innovation. Topics that she worked on include: fundamental rights of the digital citizen, data protection and media freedoms, data portability, right to be forgotten, big data, media convergence, social media, personalized media, user-generated content, online journalism, media pluralism and ownership, market regulation and competition in media and telecommunications, public service broadcasting and state aid, co- and self-regulation in the media, privacy in electronic communications and social networks. She has published widely on these topics in English, Dutch, French, German, Hungarian and Chinese, and has served as an expert for organisations like the European Commission, the Council of Europe, the German Media Concentration Commission, as well as administrations and authorities in Belgium. Peggy is assessor of the Belgian Competition Authority and member of the General Chamber of the Flemish Media Regulator since 2008. She is currently a member of Google's Advisory Council on the Right to be Forgotten.

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