Legal aspects of digital and interactive marketing

Jan-Diederik Lindemans

May 7, 2009
Introduction

1. digital marketing = ?

2. interactive marketing = ?

3. legal aspects thereof = ?
Introduction (2)

1. digital marketing = ?
   “Digital Marketing is the practice of promoting products and services using digital distribution channels to reach consumers in a timely, relevant, personal and cost-effective manner.” (Wikipedia)

2. interactive marketing = ?

3. legal aspects thereof = ?
Introduction (3)

1. digital marketing = ?

2. interactive marketing = ?

“Interactive marketing is the ability to address the customer, remember what the customer says and address the customer again in a way that illustrates that we remember what the customer has told us.” (John Deighton (Harvard Business School))

3. legal aspects thereof = ?
Introduction (4)

1. digital and 2. interactive marketing

Banner, webvertising, search engine optimisation, search engine advertising, adwords, metag manipulation, spam, social media, mobile advertising, blog, microsite, voice broadcast, etc.

3. legal aspects thereof = ?
Introduction (5)

1. digital and 2. interactive marketing

3. legal aspects thereof = ?

- No “Facebook Treaty”, “SEO Act”, … no rules ?
- New applications of copyright, trademark, unfair trade practices, …
- New broad rules: ISP liability, data protection, …
- As many legal aspects as there are marketing applications
Introduction (6)

1. digital and 2. interactive marketing

3. legal aspects thereof = ?

- As many legal aspects as there are marketing applications

ISP liability, data protection, cross border, free riding, defamation, safe havens, notice and take down, cease and desist order, penalty payment, IP-rights (copyright and trademark), (user generated) content clearing, unfair trade practices, personality rights, etc.

=> Solution ?
Introduction (6)

» Legal Rules of Thumb

- Selected and limited number of topics

- Other presentations (Module 2 « e-mail marketing » – IAB Legal Task Force – C&M lunch seminar) already address numerous topics (and in greater detail)

- Not about problem-solving but about problem-spotting
Rule of Thumb 1: It’s all advertising

» Definition of advertising (« reclame/publicité ») under Belgian law:

“communicatie die rechtstreeks of onrechtstreeks ten doel heeft de verkoop van producten of diensten te bevorderen ... ongeacht de plaats of de aangewende communicatiemiddelen.” / “elke vorm van communicatie bestemd voor het direct of indirect promoten van de goederen, diensten of het imago van een onderneming”

» Similar broad « catch-all » definitions in legislation of other EU Member States
Rule of Thumb 1: It’s all advertising (2)

» Provisions on advertising from Unfair Trade Practices Act and E-commerce Act must be respected

» Similar legislation in other EU Member States (e-commerce and misleading advertising are harmonized throughout Europe)
Rule of Thumb 1: It’s all advertising (3)

» Identify advertising as such

- **BE** – (Ministry of Economic Affairs Guidance to) Unfair Trade Practices Act / E-Commerce Act:

  Principle: Advertising must be recognizible and advertiser identifiable

- **EU** – Unfair Commercial Practices Directive

  "misleading omission when ... a trader... fails to identify the commercial intent of the commercial practice if not already apparent from the context"

  => not mentioning publicitary nature is misleading omission
Rule of Thumb 1: It’s all advertising (4)

- Sometimes problematic in practice:

  • Fan-page on Facebook
  • Google Sponsored links
  • Stereo equipment manufacturer sends top of the line headphones to influential bloggers and pays them to write about their user experience
  • « Mystery » videoclip on Youtube of masked Mudjahedin turns out to be eyecatcher for small Antwerp production company
  • Orangina-monster campaign
Rule of Thumb 1: It’s all advertising (5)

- **Solution: 94/7, §3 FTPA**

« Indien het voor de handelspraktijk gebruikte communicatiemiddel beperkingen qua ruimte of tijd met zich meebrengt, wordt bij de beoordeling of er informatie werd weggelaten rekening gehouden met deze beperkingen, alsook met maatregelen die de verkoper genomen heeft om de informatie langs andere wegen ter beschikking van de consument te stellen »

=> argument in favor of advertisers?
Rule of Thumb 2: Contentious content

‘Self’ generated (vs. UGC): What, where, when, … can it be used?

- Article 3 Copyright Act:
  "§1, para. 2: Ten aanzien van de auteur worden alle contracten schriftelijk bewezen. Para. 3: De contractuele bedingingen met betrekking tot het auteursrecht en de exploitatiewijzen ervan worden strikt geïnterpreteerd."

- Applies to all levels: agency vs. content supplier, agency vs. advertiser, …

- Applies to all content: image, sound, software, portrait, …

- Typical issue: banner use for « website » = autorisation for 3rd party website?
Rule of Thumb 2: Contentious content (2)

» User generated: Similar issues, less control

- Typical issues: (musical) copyrights, trademarks and defamation

- Core problem: less / no control
Rule of Thumb 2: Contentious content (3)
Rule of Thumb 2: Contentious content (4)
Rule of Thumb 2: Contentious content (5)

Toon aan dat ge nen echte vent bent!

M!LF

Yow mannen,

Upload hier ulle fotokes waarin ge pronkt met ulle 'Befrievd door het M! LF T-shirt'? Wij zetten ulle kiekskes dan op onze site!

Of upload een vettig filmke en maak kans op een gratis vat Jupiler in ulle stamcafé!

Maakt een vettig 'ventenfilmke' en upload het op onze M!LF server! Wij zullen al die videokes 's rustig bekijken en pikken daarna het bangelijkste filmke eruit. De kerel die het beste weekfilmke heeft gemaakt, krijgt van ons een gratis vat Jupiler in zijn eigen stamcafé! Elke week geven we zo een nieuw vatje weg!

Geen inspiratie? No problem... Wat dacht ge van een vettig filmke op de voetbal met uw maten? Of tijdens de repetitie met uw groepke? Of in uw stamcafé terwijl ge een echte M!LF mop aan 't vertellen zijt aan uw makkers? Of in uw living als uw vrouw aan 't stofzuigen is en gij vraagt om een pintje te brengen? Enfin kerels, ge snapt de bedoeling. Pak die camera en verras ons!

Naar ulle filmkes

Klik hier om ulle foto of vettig filmpje up te loaden!
Rule of Thumb 2: Contentious content (6)

» User generated: Similar issues, less control

- Typical issues: (musical) copyrights, trademarks, portrait rights and defamation
- Core problem: less / no control

- User terms and conditions not always ideal solution:
  • claim damages from users? => perception issues
  • editing? => ISP-liability issues

- Ultimate test: What’s the damage (to product, to brand, to image, to…)
Rule of Thumb 3: ISP liability

» E-commerce directive (in a nutshell):

- Operators storing **own** content are liable
  => paid advertisements?

- Operators storing **third-party** content are not liable provided
  (i) they remain passive and (ii) they swiftly remove upon notice
  => issue: what is unlawfull content?
Rule of Thumb 3: ISP liability (2)

» Practical advice:

- Terms & conditions

- Have ‘abuse team’ and procedures ready and in place

- Discuss any monitoring attempts with legal department

- Proceed to takedown only under reservation of (i) all rights (ii) statement that this is not a precedent and that case-by-case notice remains required
Rule of Thumb 4: Protect yourself against SEO

» Metatag (manipulation)
Kh. Dendermonde, 6 juni 2007
Rule of Thumb 4: Protect yourself against SEO (2)

» Metatag (manipulation)
- Violation of trademarks, unfair trade practice, tort, …
- What is lawfull today, may not be so tomorrow:
Rule of Thumb 4: Protect yourself against SEO (3)

Metatag (manipulation)
- Violation of trademarks, unfair trade practice, tort, …
- What is lawfull today, may not be so tomorrow:
- Metatag manipulation is so 2000: Spamdexing
  - hidden links, mirrored websites, etc.
  - technically possible = lawfull?
Rule of Thumb 4: Protect yourself against SEO (4)

» **Metatag (manipulation)**
- Violation of trademarks, unfair trade practice, tort, …
- What is lawfull today, may not be so tomorrow:
- Metatag manipulation is so 2000: Spamdexing
  • hidden links, mirrored websites, etc.
  • technically possible = lawfull ?
- The Calimero-excuse:
  • avoid spamdexing
  • agree on liability
  with SEO Co. / client
Cheat sheet

» It’s all advertising => not always reasonable/possible to respect all applicable rules, but keep in mind in case of controversial creations (C&D-orders / penalty payments)

» Beware of (User Generated) Content: what, who, where, when, …!

» Consult legal dept. \ lawyer prior to development campaign

» ISP is in a powerful / vulnerable position => is in control of the medium, but entails responsibilities and obligations

» SEO: if you go to the edge, contractual safetynet
Questions?

Jan-Diederik Lindemans

jlinde@crowell.com

+32/2/282.40.82

www.crowell.com