



crowell moring

Online Advertising and Social Media: Some Legal Rules of Thumb

Christoph De Preter
Jan-Diederik Lindemans

Tuesday, February 17, 2009



experience. creativity. results.

Introduction

» Social Media?

- **Wikipedia:** «*Social Media are primarily Internet- and mobile-based tools for sharing and discussing information among human beings. The term most often refers to activities that integrate technology, telecommunications and social interaction, and the construction of words, pictures, videos and audio»*
- **Monlog:** «*Social media is een verzameling van online communicatievormen en -technieken waarbij de geproduceerde media door en voor velen gemaakt wordt. Heel kort door de bocht gezegd is 'social media' online veel-op-veel communicatie »*

=> many-to-many / sharing / integrated



vimeo



NETLAG™



twitter

Introduction (3)

» Online advertising?

Various configurations:

- Paid marketing vs. Guerilla marketing

- **Netlog:** *«Onze unieke targeting technologie biedt je de mogelijkheid om specifiek je doelgroep aan te spreken, en je boodschap aan te passen voor elk marktsegment. Criteria als geslacht, leeftijd, regio en interesses laten ons toe om heel precies bepaalde doelgroepen af te lijnen».*
- **Facebook:** *adds for dating websites on 'Are you interested' application*

- Own advertisement vs. viral marketing

Introduction (4)

» Legal Rules of Thumb?

- Selected and limited number of topics
- Other presentations (privacy – Web 2.0 - ...) already address numerous topics
- Not about problem-solving but about problem-spotting

Various Perspectives (1)

- » **The owner/operator of the Social Medium:**
 - Should I intervene when I notice illegal advertising?
 - If so, when should I intervene?
 - Can I oppose to individuals using my Medium for advertising purposes?
 - What is my risk?

Various Perspectives (2)

» The advertiser:

- What can I do and what can I not do?
- What are the risks?

» The competitor/consumer:

- What can I do to combat unlawful advertising?

Rule of Thumb 1: online advertising is... 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: online advertising is... 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: online advertising is... advertising (3)

- » First consequence: identify advertising as such
- BE – (Ministry of Economic Affairs Guidance to) Unfair Trade Practices Act / E-Commerce Act:

Principle: Advertising must be recognizable 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: online advertising is... advertising (4)

- Sometimes problematic in practice:
 - Online gaming operator succeeds in getting free exposure due to massive « customer » reactions on online forum... actually reactions were originated by employees
 - 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
 - Coca-Cola action with « The Real Ray »

Rule of Thumb 1: online advertising is... advertising (5)

- EU – Unfair Commercial Practices Directive

« Where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted »

=> argument in favor of advertisers: social media by nature justifies that commercial intent is only communicated at the end?

Rule of Thumb 1: online advertising is... advertising (5)

- » **Second consequence: do not engage in disparagement of / unfair comparisons with competitors and beware for IP infringements**

Two cases:

- Telenet vs. Teletet
- Unilever vs. Delhaize

Rule of Thumb 1: online advertising is... advertising (6)


139 bezoekers online op Vrijdag 02 februari 2007 03:34

Snel posts zoeken

TT Merchandise nu goedkoper !!



LAATSTE REACTIES



do you want some?

Koop nu je Teletet Lotto biljet in de TT Shop !
Elke dinsdag om 15.00 uur wordt er een trekking gehouden. Hoeveel je kan winnen hangt af van jullie : hoe meer mensen er meespelen, hoe groter de pot !

	hitler aan tjumpen	Reacties (2)	marco2440
	gta san andreas modding vragen kunnen bij mij terecht	Reacties (3)	oegela
	coolste muziek clip ooit !!! apex twin	Reacties (2)	marco2440
	hip hop :westbam in actie (1989)	Reacties (0)	marco2440
	ricardo villalobos	Reacties (0)	marco2440
	Japanese bikini rodeo pie-fight!	Reacties (1)	mali911
	289-pro-deals	Advertentie	TeleTet

Username
.....
Remember me **logi**

Register - Password ?

REGISTREER GRATIS

- gastenboek
- foto's uploaden
- bestanden uploaden
- posts plaatsen
- reacties plaatsen
- posts raten
- Teletet Eurds
- Teletet Games
- Teletet Lotto
- en zoveel meer !

Rule of Thumb 1: online advertising is... advertising (6)

Unilever producten moeten beschikbaar zijn bij Delhaize

Mondial

Informations générales

Type : [Intérêts communs - Événements actuels](#)
Description : Door een conflict tussen Unilever en Delhaize weert Delhaize een 250 producten van Unilever.
Mogen we zelf nog beslissen welke producten we willen kopen in onze Delhaize ja !?

Membres

Affichage de 8 sur 165 membres. [Afficher tout](#)



Virginie Meunier



Stefan Van Bellinghen



Aurélie Gerth



Arnaud Donckerwolcke



Jan Develter



Tom September



Chris Orsini



Ans De Lathouwer

Le mur

Affichage des 2 seuls messages du mur. [Afficher tout](#)



Kristine Biscops a écrit hier, à 21:03

man man wat gaan we nu nog allemaal meemaken ik koop toch wat ik wil zeker weet ge ik ga den delhaize weren uit mijn winkels zal wel naar ergens anders gaan ik wil mijn eigen merken kopen waar en wanneer ik wil



[Rejoindre ce groupe](#)

[Décliner l'invitation](#)

[Partager](#) +

Type de groupe

Ce groupe est ouvert à tous. Chacun peut le rejoindre et inviter d'autres personnes à en faire autant.

Administrateurs

- [Christophe Pletschet \(Belgium\)](#) (créateur)

Groupes connexes

[STEUNBETUIGING AAN DAGVERBLIJF "FABELJESLAND" DENDERMONDE](#)

Intérêts communs - Familles

[steunbetuigingen voor slachtoffers steekpartij Dendermonde](#)

Intérêts communs - Familles

www.red-sandra.be

Rule of Thumb 2: Advertisers, be conscious of risks of free-riding

- » **Opposing interests between advertiser (maximum coverage at minimum expense) and operator of Social Media (maximize income)**
- » **General conditions generally prohibit free-riding:**

- **Netlog:**

“Ce site web est destiné uniquement à un usage personnel et par conséquent l’usage à des fins commerciales est interdit. Tu n’es pas autorisé(e) à utiliser ce site web d’une manière pour laquelle il n’a pas été conçu, à des fins illégales ou irrespectueuses des fonditions énumérées entre autres dans ce texte. Tu dois te comporter partout sur le site de façon normale, prudente et respectueuse”

- **Facebook:**

« By using or accessing the Facebook Service, you represent, warrant and agree that you will not: ... send spam or any other unauthorized advertisements or solicitations through or using the Facebook Service”

Rule of Thumb 2: Advertisers, be conscious of risks of free-riding (2)

- » Some general conditions are supportive of free-riding (Youtube and MySpace):

YouTube: *“Prohibited commercial uses do not include: uploading an original video to YouTube, or maintaining an original channel on YouTube, to promote your business or artistic enterprise”*

MySpace: *“Les Services MySpace sont destinés à l’usage personnel des Membres et peuvent également être utilisés à des fins de promotion, mais toute démarche commerciale **directe** ne sera possible que si expressément autorisée par MySpace. MySpace se réserve le droit de retirer tout contenu commercial à sa **seule discrétion**”*

Rule of Thumb 2: Advertisers, be conscious of risks of free-riding (3)

- » General terms and conditions may be sufficient to attack/block *subscriber* to use Social Media for commercial purposes but...
- » ... the sanctions will often be very non-coercive
- » ... what to do in the case of viral marketing, where the actual advertiser is not a *subscriber*?
 - No contractual link => can Social Medium do anything?
 - Three possibilities: (i) third-party liability to breach of contract (« derde-medeplichtigheid contractbreuk / tierce-complicité »); (ii) free-riding is sometimes prohibited as such; (iii) liability for acts of employees/agents

Rule of Thumb 2: Advertisers, be conscious of risks of free-riding (4)

» Third-party breach of contract:

1. Pre-existing contract
2. The third party knew or should have known about this contract
3. Collaborated to violate this contract
4. Collaborated knowingly

=> Case by case analysis

Rule of Thumb 2: Advertisers, be conscious of risks of free-riding (5)

- » Free-riding is sometimes prohibited as such
 - Depends strongly from country to country: freedom of enterprise (UK) vs. need to protect against parasitism (FR)
 - To our knowledge no (public) precedent in the online world?

Rule of Thumb 2: Advertisers, be conscious of risks of free-riding (6)

- BE: « *il convient de départager entre le fait de communiquer dans un but informatif et le fait de se placer dans leur sillage* » (Trib. Comm. Liège 24 November 2006) ; « *Er is parasitaire mededinging wanneer een handelaar voordeel haalt of tracht te halen uit de bekendheid die een derde op wettige wijze verworven heeft, ook al is het niet de bedoeling om de derde te schaden* » (Mons, 16 April 1991). Art. 93/4 WHPC: (i) act contrary to fair practices (ii) liable to damage interests of other party
- FR: « *que Unibet s'est ainsi placée délibérément dans le sillage de Roland Garros pour tirer profit, sans bourse délier, des investissements réalisés par cette dernière pour organiser et promouvoir le tournoi* » (TGI Paris 5 February 2008)

Rule of Thumb 2: Advertisers, be conscious of risks of free-riding (7)

» Liability for acts of agents / directors / employees

- Telenet not liable for certain actions undertaken by vendors
- Furniture company / medical company held liable for interview given by CEO in which unfair comparison was made with competitor / announcement re medicinal product was made => constituted publicity

Rule of Thumb 2: Advertisers, be conscious of risks of free-riding (8)

25. Er is geen reden om aan te nemen dat het lezerspubliek voor de financieel-economisch gerichte kranten tot een andere klasse lezers behoort dan die van de kwaliteitskranten in het algemeen.

Zelfs indien de berichtgeving in die kranten het financieel-economische informatieve aspect als aanknopingspunt heeft, dan blijft in het voorliggende geval nog dat ze Docpharma een forum bezorgt om de aandacht te vestigen op één van haar troeven.

Aldus is reclame voorhanden zoals bedoeld in het vermelde artikel

Rule of Thumb 3: Advertisers, be conscious of risk of advertisement recall (1)

- » Various legal systems know the system of penalty payments / dwangsommen / astreintes (Belgium: injunction under penalty of payment)
- » Are you sure you can stop your campaign in due course when confronted with a campaign fail / judgement?

Rule of Thumb 3: Advertisers, be conscious of risk of advertisement recall (2)

» Witchery-man (Australia):



Rule of Thumb 3: Advertisers, be conscious of risk of advertisement recall (3)

» Annemie (Politie Lier):

Standaard.be: « ik heb niets tegen de politie maar Annemie moet mij laten doen' telt zo'n 700 leden. De Annemie waarvan sprake op Facebook, is een agente die al enkele jaren werkt voor de Lierse verkeerspolitie... Mortelmans vraagt zich af waarom de agente of de korpschef hem niet rechtstreeks contacteerden, in plaats van een heus opsporingsonderzoek te starten. 'Facebook heeft een functie om ongepaste groepen te signaleren, waarna die meestal vlug worden verwijderd. Desnoods had ik zelf de groep van het internet gehaald. Ik wilde alleen maar de ontevredenheid van veel Lierenaars met het strenge beleid een stem geven »

Rule of Thumb 3: Advertisers, be conscious of risk of advertisement recall (4)

- » Various legal systems know the system of penalty payments / dwangsommen / astreintes (Belgium: injunction under penalty of payment)
- » Are you sure you can stop your campaign in due course when confronted with a campaign fail / judgement?
- » Contractual solution

Rule of Thumb 4: Operators, be conscious of your potential liability

» E-commerce Directive:

- 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 (« safe haven » for hosting)

=> guerilla advertisements / postings?

- operators storing **third-party** content have no general monitoring obligation (and if they would... They risk to not remain passive any longer...)

Rule of Thumb 4: Operators, be conscious of your potential liability (2)

» Not always clear in practice: eBay and Ricardo

- L'Oréal/Rolex ask removal of ads for counterfeit
- BE: they must ask each time again
- DE and FR: they are to install automatic procedure

» Problematic because:

- National judges are often unsympathetic vis-a-vis « safe haven » rules (DailyMotion 1 in FR, Ricardo and eBay in DE, Seniorennet in BE)

Rule of Thumb 4: Operators, be conscious of your potential liability (3)

» Practical advice:



- 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

Cheat sheet

- » Online advertising is advertising => not always reasonable/possible to respect all applicable rules, but keep in mind in case of controversial ads
- » There's no such thing as a free lunch => free-riders and viral marketers must pay attention
- » In case of problems, can you retract your ad?
- » The middle-man is in a powerful / vulnerable position => is in control of the medium, but entails responsibilities and obligations

Questions?

cdepreter@crowell.com

jlindemans@crowell.com

[++32/2/282.40.82](tel:++3222824082)

www.crowell.com