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Toying with children's emotions, the new game in town? The legality of advergaming in the EU

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A B S T R A C T

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Marketing techniques such as advergaming have proven to be an extremely useful marketing tool for advertisers and in particular when targeted towards children. Such techniques allow for the development of a positive product or brand association through the delivery of fun interactive content. As a result, children are no longer merely passive receivers of commercial communications. Instead, they become actively involved in the advertising process. Advergaming has a potentially manipulative aspect. Children are often unable to distinguish between the commercial message and the non-commercial content. This has negative consequences when one considers the potentially persuasive nature of marketing techniques such as advergaming which can further heighten this confusion.

Moreover, as modern business models are based on data, advertisers are increasingly interested in the personal information of their young customers. Increased computing capabilities mean that commercial entities are now able to profile individual consumer behaviour online and assess how it differs from rational decision-making and to leverage this for economic gain. Such profiles facilitate the targeting of personalised advertisements thereby tailoring marketing campaigns based on children's behaviour. The capacity to collect and process information in addition to the technical ability to personalise consumer services online potentially allows for the triggering of consumer frailty. This has particular importance when one considers the effects of positive emotions, caused by advergaming. The purpose of this paper is to examine the legal issues associated with advergaming from an EU perspective and, in particular, this advertising technique's capacity to manipulate emotions.

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1. Introduction

In 1977, the US academics Reed and Coalson published an article which tracked the historical increase of emotional appeals in advertising, offered insights into the origins of this gradual

adoption and attributed technological development as a key determining factor in its rise. The authors noted that this practice of "emotional conditioning" was potentially detrimental to society and thus challenged the Federal Trade Commission (F.T.C.) "to regulate 'emotional' advertising that subconsciously stimulates consumers to purchase generic products which do not vary

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in their composition or use.”¹ Although the importance of emotions and moods has long been empirically established by marketers and investigated by communication science researchers, the legal approach to advertising and emotion manipulation has been somewhat muted. In their analysis, Read and Coalson noted that traditional protections in the context of advertising have focused on deceptive practices and misrepresentations by marketers and that perhaps more modern safeguards were required.² Although this article was written almost half a century ago its argumentation has retained, if not increased, in importance due to rapid development of internet technologies in recent years and has thus provided inspiration for this paper.

New digital advertising technologies are to a significant extent directed towards a young consumer audience. Marketing techniques such as advergimes have proven to be an extremely useful tool for advertisers and in particular when targeted towards minors.³ Such techniques allow for the development of a positive product or brand association through the delivery of fun interactive content.⁴ As a result, children are no longer merely passive receivers of commercial communications. Instead, they become actively involved in the advertising process and their emotions have become extremely valuable for advertisers.

Previous studies have shown that advergimes have become a ubiquitous feature of online marketing practices that target children.⁵ Such a practice requires a detailed assessment under the scope of the applicable EU legal framework. A primary consideration for all actions taken by public authorities or private institutions in relation to children is the principle of “best interests of the child” contained in the United Nations Convention

on the Rights of the Child.⁶ The principle is key for the assessment of children-related legislation and requires a proper appreciation of the position of the child.

A wide array of legislative provisions regulate advertising to which children are exposed, across various channels. For the purposes of this article the analysis will focus on the e-Commerce Directive, the Audiovisual Media Services Directive, the Data Protection Framework and the Unfair Commercial Practices Directive. Moreover, self-regulatory codes also play an important role in the regulation of online advertising. Indeed, the International Chamber of Commerce has drafted a Code of Advertising and Marketing Communication Practice (Consolidated ICC Code),⁷ and in many countries self-regulatory bodies observe compliance with the principles of this Code. Furthermore, companies are strongly encouraged by the Unicef Children’s rights and business principles to use marketing and advertising that respect and support children’s rights (principle 6).⁸

For the purposes of this paper, the analysis has been restricted to an assessment of the EU legal framework and the specific Directives mentioned above. These have been selected based on the relevance vis-à-vis their substantive and material scope in the context of advergimes. However, where relevant, references to US practices are made in order to highlight possible avenues for development and provide comparative forms of analysis. The secondary sources used in this paper were selected based on their material scope and their relevance to the topic.

The article is divided into 3 sections, each representing a level (or layer) of the advergime namely, Level 1 – Confusing the players – Blurred lines, mixing emotions?, Level 2 – ‘Nosey nose cheeky cheeky, that’s my business’ – are children the biggest losers? and Level 3: Game over or rebalancing the rules?

¹ L. Reed Jr. and J. L. Coalson Jr., ‘Eighteenth-century legal doctrine meets twentieth-century marketing techniques: F.T.C. regulation of emotionally conditioning advertising’ (1977) 733-782.11 4 Ga. L. Rev. 733.

² Ibid.

³ E. Van Reijmersdal, E. Rozendaal and M. Buijzen, ‘Effects of prominence, involvement, and persuasion knowledge on children’s cognitive and affective responses to advergimes’ (2012) 26 Journal of Interactive Marketing 33-42.

⁴ A. Nairn and H. Haiming, ‘Advergimes: it’s not child’s play’, a review of research’ (2012) Family and Parenting Institute, 5-6, retrieved from http://www.agnesnairn.co.uk/policy_reports/advergimes-its-not-childs-play.pdf accessed 24.09.2015.

⁵ For instance, research has shown that advergimes are incorporated in 63% to 85% of company websites that feature special areas for children. K. Weber et al., ‘Internet food marketing strategies aimed at children and adolescents: A content analysis of food and beverage brand web sites’ (2006) 106 Journal of the American Dietetic Association 1463.

⁶ It is important to note that currently a standardised approach with regard to the definition of ‘a child’ is lacking. For instance, in the UN Convention on the Rights of the Child, a child is defined as “every human being below the age of eighteen years of age unless under the law applicable to the child, majority is attained earlier” (Article 1 UN Convention of the Rights of the Child (1989)). This differs from the approach in certain EU Member States, like Belgium, where the Belgian Media Decree defines a ‘child’ as a person under the age of 12 years and further makes a distinction with ‘youth’ being a person aged between 12 and 16 years (Article 2, 15° and 18° of the Decree of 27 March 2009 of the Flemish Community on radio and television, BS., 30 April 2009 (hereinafter ‘the Flemish Media Decree’)). The Ofcom Broadcasting Code on the other hand speaks of children when under 15 years (Section 1: Protecting the Under-Eighteens, Ofcom Broadcasting Code (2005)). Furthermore, social science research often uses specific categories linked to stages of cognitive development, such as 3-7 years, 8-12 years and 13-16/18 years of age. However, it is significant to note that capacities and skills of children of the same age can vary widely, for instance due to personality differences or gender characteristics.

⁷ International Chamber of Commerce, ‘Advertising and Marketing Communication Practice (Consolidated ICC Code)’ (2011).

⁸ UNICEF, ‘Children’s Rights and Business Principles’ (2013).

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