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(In)Game Advertising: The European Perspective on related legal problems.

By Avv. Felix Hofer¹

1. When I came around 'game advertising' for the first time my attitude as a lawyer, not necessarily familiar with what I – snobbishly – considered as basically being “kid's or nerds' stuff”, was obviously extremely skeptic. Running more and more frequently into articles published on the topic, I very soon had to realize that this was already a definitely “hot” topic to a number of industry sectors, involving an incredible amount of investment as well as offering truly exciting business perspectives.

According to an interesting US study², published in June 2007 on in-game ad spending targeted to digital homes in the period 2006–2012, companies had already invested 370 mln. of USD and were expected to increase such figure up to 2.051 mln. USD in year 2012.

Fairly impressed by the forecast exposed in the US study I got curious about how feelings would be in Europe about potential business development with respect to the specific area. Again surprise, surprise: according to a study performed on behalf of the EU Commission³ total revenues from on-line content sales will reach 8,3 bln. on Euro by 2010 (at an increase rate of a growth of over 400% in five years!) and on-line games will contribute with a significant share to that quite remarkable pie. In Fall 2007 another study⁴ showed that the Internet had already become the most popular communication tool among youngsters aged between 16 and 24; in the specific target group 82% affirmed to go on-line at least 5 days per week for entertainment and information purposes, while 46% declared that they preferred the Internet over (and used it more than) TV.

With the final blow I was provided when I had to realize that 9,8 bln. Euro had been spent for game consoles only during the 2007 Christmas period, that even traditional community venues (as sports arenas, shopping centers) were arranging specific gaming areas and organizing new

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² Industry Report from PARKS ASSOCIATES 2007: 'Electronic Gaming in the Digital Home: Game advertising'.

³ Comments of the Commissioner for Information Society and Media on the results of the study.

⁴ Named 'Mediascope Europe' and performed by Synovate on behalf of the European Interactive Advertising Association- EIIA.

entertainment events (e. g. "disc burn" sessions) attractive for gamers, that digital platforms did score important come-backs for popular past-time games and that in France the gaming sector had surpassed the entertainment industry for the first time in annual revenues.

2. So, this wasn't exactly a 'niche area'! It was fairly obvious that this was actually big, big business and therefore extremely attractive to the advertising industry for a number of reasons, the most evident ones being that:

- gaming had definitely developed from a 'lost boys' domain into a widely accepted 'social activity', not limited to a young public, but intensely practiced by entire families and people of all ages,
- gamers did not appear to be disturbed by in-game ads (a reaction very different from that widespread among the TV audience), they actually did perceive those ads as relevant for (and realistic within) the gaming context,
- they were even more eager to accept such advertising when it reflected positively (through some additional benefit as a lower sales price) on their game purchase ⁵,
- during recent years dynamic in-game ads had been on a constant rise compared to static ads (2006, 40% of global spending - 2007, approx. 55%).

Furthermore industry enthusiasm appeared widely justified by the fact that:

- game play metrics offered an extremely interesting perspective both, on marketing effectiveness as well as on user habits (just think of details as: angle/distance of ad views, game pauses, position changes; not to speak of a truly exciting profiling potential, where users' in-game behavior can be evaluated and categorized, e. g. the "dishonest/unfair", "brave/daring", "non-competitive/confrontational" guy),
- identical in-side views were available with respect to demographic targeting (based on the kind of game it's possible to deliver different dynamic ads to specific audience groups), while real time placement may easily be performed and consumer engagement may be achieved (e. g. by combining an on-line ad with an advergame),
- the opportunities for product placement and cross marketing appeared to be simply immense.

3. Not much doubt about the attractiveness to business, but what are the legal implications of this popular new marketing tool? Well, from a European (more specifically from an EU) perspective those implications are multiple and somehow worrying. Let's therefore have a closer look at the provisions likely to come into play, when in-game advertising is performed.

3.1. A company intending to promote and advertise a game will need to properly consider:

- the general principles laid down in the EU Directive on misleading and illicit comparative

⁵ According to UK survey 'a vast majority of gamers, 86%, said that they were happy to see ads placed within games if it brought down the prices they had to pay' and also that they 'do not see in-game ads as intrusive'. Source Jennifer Whitehead's article 'Gamers respond well to in-game advertising' in Brand Republic 28-Aug-07.

advertising ⁶,

- the principles and criteria established by the EU with the aim of preventing unfair commercial practices ⁷,
- the additional rules introduced by the so-called “Audiovisual Media Services Directive - AVMSD” ⁸,
- the national implementing provisions of the Directives indicated above as well as some (domestic) sector specific regulations ⁹.

3.2. When a game is sold through an on-line order system, it'd be advisable to bear in mind that the EU Directive on Distance Sales ¹⁰ grants customers a specific right of withdrawal ¹¹, which may not be waived, and puts a number of obligations on the seller ¹².

3.3. Where a game reaches users through on-line purchase (e. g. through a download) it's to be borne in mind that the so-called E-commerce Directive ¹³ imposes specific consumer information duties, peculiar obligations as to sales promotions and also restrictions on (unsolicited) commercial communication.

4. Industry and Business (especially marketing experts) have given a particular hype to the opportunities of 'product placement' quite obviously offered by in-game advertising. This hype was even more stressed as several European countries ¹⁴ apparently felt that the upcoming “Audiovisual Media Services Directive” ¹⁵ would remove most of the previous restrictions and obstacles, which up till now resulted in significant limitations to product placement tactics.

Aside from remarkable lobbying efforts performed with the patent aim of liberalizing product placement throughout the territory of the EU, it's all but clear on which legal basis such convincement was grounded.

4.1. As a matter of fact, while EU Directives did not specifically deal with 'product placement', it's

6 Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising.

7 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council. Section 6 of the Directive specifically governs marketing and advertising.

8 Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. The Directive is due to be implemented by EU Member States no later than by December 19th, 2009.

9 Reference is to countries' rules on State Monopoly eventually covering games of chance with entry fees and awarding money prizes (should such a system be built into the game).

10 Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.

11 To be called on within a “cool off” period from 7 up to 30 days (but not after a sealed package's opening).

12 As to contract performance, delivery costs and terms, pricing, product's characteristics and functioning requirements.

13 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

14 In particular the UK.

15 Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007.

been quite clear that the so-called Television without Frontiers Directive¹⁶, requiring both, all advertising to be readily recognizable and to be kept quite separate from other program parts as well as surreptitious advertising to be strictly avoided, did actually leave little space for a broad use of product placement¹⁷.

In addition, on a national level European Courts have constantly been quite sensitive and coherent in interpreting laws and regulations governing advertising as hardly compatible with product placement techniques. An Austrian Administrative Control Authority did not hesitate¹⁸ to consider headlines in a TV program, crediting fashion houses for the supply of the host's and moderator's clothing, as an unacceptable and illicit practice. In Switzerland an independent Advertising Watchdog upheld¹⁹ a complaint against the Swiss Public TV and Broadcasting company, filed with respect to images of a moderator commenting on the sailing team victorious in the America's Cup with a mike in his hand featuring the winner's logo.

4.2. On these premises too much of expectation seems to have been placed in the upcoming provisions of the AVMS Directive no. 65 of 2007, as it:

- strictly maintains the “transparency principle” for all commercial communication,
- actually confirms the previous ban of hidden/surreptitious advertising,
- contains strict limitations as to advertising targeted to children,
- finally, allows - but entitling Member States to rule differently - product placement :
 - for movies and TV films/serials, sports and entertainment programs, or
 - when resulting in free supply of products/services,

provided it does not:

- exercise undue influence on content or programming,
- directly push products/services' purchase,
- excessively high lighten the product/service,
- lack of appropriate identification (at program's beginning and end).

It actually appears as if the Directive, originally meant²⁰ to ease product placement – in its function of a crucial financial resource for the broadcasting and media industry - had to compromise on a significantly “watered down” text²¹, which is likely to face further limitations²²

16 Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, now due to be amended and integrated by the Audiovisual Media Services Directive.

17 The Consolidated ICC Code of Advertising and Marketing Communication Practice (which inspires most of the Self-Regulation systems) also provides (in Section 9) that “*Marketing communication should be clearly distinguishable as such, whatever their form and whatever the medium used*”.

18 “Bundeskommunikationssenat” – (Austrian) Federal Office for Communication, decision April 4th, 2006; previously, on an identical topic, decision October 14th, 2005.

19 “Bundesamt für Kommunikation (BAKOM)” – Federal Office for Communication - and “Unabhängige Beschwerdeinstanz für Radio und Fernsehen” – Independent TV and Broadcasting Complaint Authority - decision December 7th, 2007.

20 On huge pressure of the Media Industry.

21 Consumer protection advocacy groups have certainly played a crucial role in this outcome.

22 Strong objections against product placement in TV programs had already been voiced by the German Journalists' Association in

in the context of national implementation throughout the EU ²³.

5. Identically critical and problematic do result two other beneficial aspects, generally associated with in-game marketing: behavioral targeting as well as gamers' profiling.

Such marketing tools will have to keep a sharp eye on the provisions governing processing of personal data in countries members to the EU.

In fact, Directive no. 46 of 1995 ²⁴:

- defines as “personal data” any information apt to identify a physical person,
- requires for processing the consent of (properly informed) data subjects,
- grants data subjects specific rights as to their personal information,
- may eventually require in-advance notification with Personal Data Commissioner.

Furthermore, Directive no. 58 of 2002 ²⁵ additionally:

- harmonizes data handling in electronic communication,
- sets an opt-in system with respect to unsolicited commercial communication,
- allows use of location data only previous consent or under anonymity,
- requires an easy opt-out mechanism (“killer bottom”).

It's no secret that the EU Commission plans to have a closer look on how personal data submitted by consumers are used by search engines, social networks and IS providers and has repeatedly voiced serious concern ²⁶ about deep packet inspection techniques allowing consumers' online tracking even after cookies have been deleted.

6. This legal framework doesn't make in-game advertising exactly easy to perform. Marketers are clearly challenged to weave through a battleground crowded with legal mines. On the other hand, the EU results also in an – highly appealing – plus 500 million consumers market, which definitely induces to take some risks.

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23 Rather surprisingly, according to recent press reports, the UK Culture minister announced – in a public statement – that “.. *the government had examined the idea of introducing branded products on screen - as is increasingly common in the United States - but had decided to keep its current ban in place*”.

24 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

25 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

26 In March 2009 Commissioner Meglena Kuneva, in charge of Consumer Protection, has announced a “black list” of improper and misleading terms with respect to policies aiming at making on-line access conditional to the submission of personal data.

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