

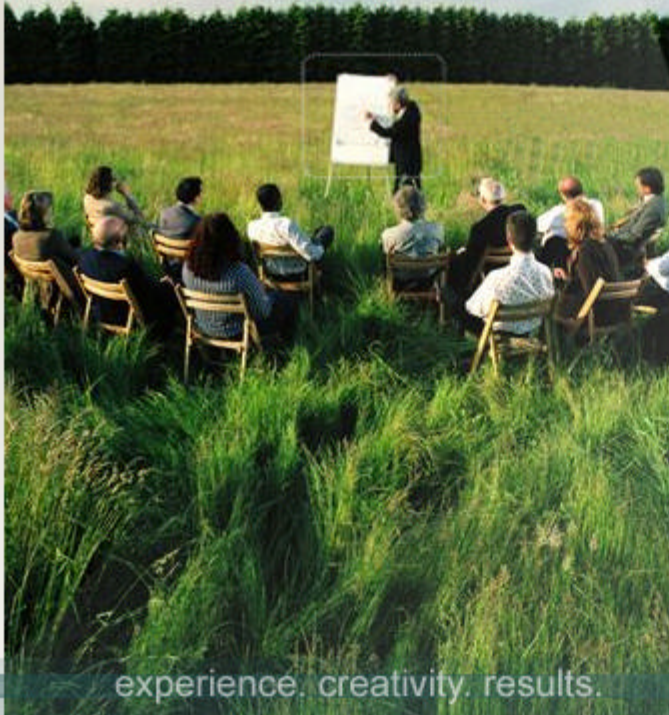


crowell moring

Legal aspects of digital and interactive marketing

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experience. creativity. results.

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 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: 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 bependingen qua ruimte of tijd met zich meebrengt, wordt bij de beoordeling of er informatie werd weggelaten rekening gehouden met deze bependingen, 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 bedingen 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 » = authorisation 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)


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Rule of Thumb 2: Contentious content (4)



Rule of Thumb 2: Contentious content (5)

TOON AAN DAT GE NEN ECHE VENT BENT!



Yow mannen,

KLIK HIER OM JE FOTO OF VETTIG FILMPJE UP TE LOADEN!

Upload hier ulle fotokes waarin ge pronkt met ulle 'Bevrijd 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 MILF 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 groepeke? Of in uw stamcafé terwijl ge een echte MILF 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 unlawful 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

139 bezoekers online op Vrijdag 02 februari 2007 03:34

Snel posts zoeken

Profiel-naam

LAATSTE REACTIES

hitler aan t jumpen - marco2440

coolste muziek clip ooit !!! a... - marco2440

vlaams blok -- geen racisme ze... - SPeeDyE

WEKELIJKSE ACTUA-POST!!!!!! - marco2440

gta san andreas modding vragen... - Ichi da

Funpost - marco2440

Cops Attacked And Beaten In Lo... - marco2

do you want some?

Koop nu je Teletet Lotto bijet 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 t jumpen	Reacties (2)	marco2440
	gta s an 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

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REGISTREER GRATIS

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

Rule of Thumb 4: Protect yourself against SEO (2)

» Metatag (manipulation)

- Violation of trademarks, unfair trade practice, tort, ...
- What is lawful today, may not be so tomorrow:

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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?

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