

Viral advertising – EU law, social media and neuroscience

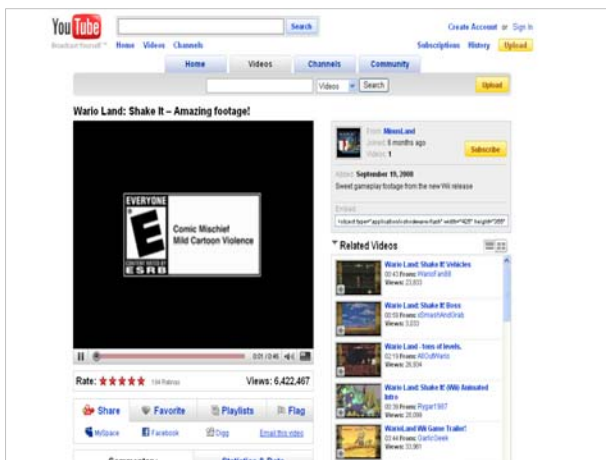
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Priming

- Pick a word:
 - Good
 - Great
 - Excellent
 - Fantastic
 - Outstanding



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Viral advertising

- Communities
 - Websites
 - Blogs and »micro blogs«
 - Social media (Facebook etc.)
 - Computer games
 - »Virtual worlds«
- Between private and public spaces
- Degree of consumer involvement

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User generated advertising

- Viral advertising
 - Enthusiastic fanbase
 - Communities (e.g. Facebook)
 - LEGO Ambassador Program
- But why?
 - Entertained users?
 - Status seeking users?
 - Dopamine?
 - »reward prediction error«
 - Payment, endorsement, benefits?

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The Internal Market

- Free movement and establishment
 - Justifiable restrictions
 - Public order, health etc.
 - Mandatory requirements
 - Non-discriminatory, not sufficiently harmonised, and pursue an overriding requirement of general public importance
 - The importance of harmonisation
- The e-commerce directive (00/31)
 - The country of origin principle
 - The coordinated field
 - Home country control and mutual recognition



The legal framework for advertising in EU

- Misleading and comparative advertising directive (06/114)
 - Protect traders against misleading advertising
 - Minimum harmonisation
 - Except comparative advertising
- E-privacy directive (02/58)
 - Right to privacy
 - Full harmonisation

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The legal framework for advertising in EU

- E-commerce directive (00/31)
 - Full harmonisation (?) and internal market clause
- Unfair commercial practices (05/29)
 - Unfair commercial practices harming consumers' economic interests
 - Full harmonisation
 - Exceptions until 2013
- From minimum to full harmonisation

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Total, Sanoma and Plus

- Concerning UCP-directive
 - VTB-VAB NV (C-261/07) v Total Belgium NV
 - Galatea BVBA (C-299/07) v Sanoma Magazines Belgium NV
 - Zentrale zur (C-304/08) ... v Plus Warenhandel ...
- Does [the] Directive ... preclude a national prohibition of combined offer / prize competition (lottery)

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The judgments

- Does constitute commercial practices
- The Directive fully harmonises those rules »... as Article 4 thereof expressly provides ...«
 - »Member States may not adopt stricter rules than those provided for in the Directive, even in order to achieve a higher level of consumer protection.«

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The judgments

- »Thus, in accordance with Article 5(2), a commercial practice is unfair if it is contrary to the requirements of professional diligence and materially distorts or is likely materially to distort the economic behaviour of the average consumer with regard to the product.«

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The judgments

- »Annex I to the Directive also establishes an exhaustive list of 31 commercial practices which, in accordance with Article 5(5) of the Directive, are regarded as unfair 'in all circumstances'.«
- »... are the only commercial practices which can be deemed to be unfair without a case-by-case assessment under the provisions of Articles¹³5 to 9 of the Directive.«

First critical question

- Article 4 - Internal market:
 - »Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive.«
- Directive on Consumer Rights (prop.)
 - Article 4 - Full harmonisation
 - »Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection.«

Second critical question

- What is the approximated field?
 - Article 1 (purpose)
 - »... unfair commercial practices harming consumers' economic interests.«
 - Article 3 (scope)
 - »... shall apply to unfair business-to-consumer commercial practices ...«
- Two examples
 - Incentive programs for vendors
 - Disparaging remarks about a competitor

Marketing Law

- Traditional considerations
 - Business interests (unfair competition)
 - Consumer interests
 - Societal interests (taste and decency)
 - UCP Directive Recital 7
 - »... It does not address legal requirements related to taste and decency ... Commercial practices such as, for example, commercial solicitation in the streets, may be undesirable in Member States for cultural reasons. ...«

Viral advertising

- Legal issues
 - [Privacy]
 - Identification
 - Spam
 - Buzzing
 - [International issues]
- Policy issues
 - Who should be regulated?
 - What is »unfair«?
- Consider »best case scenario«

Developments in advertising law

- Informational advertising
 - Price indication
 - Misleading advertising
 - Comparative advertising
- Image and lifestyle advertising (emotions)
 - »Signaling theory« (investment)
 - Unfair commercial practices
- Consumer interaction (2.0)
 - No (commercial) »signaling«

Unfair commercial practices directive

- Contrary to professional diligence
 - Likely to distort economic behavior materially
- Misleading and aggressive practices
 - Blacklisted commercial practices
- Vulnerable consumers
 - 28) exhortation to buy products

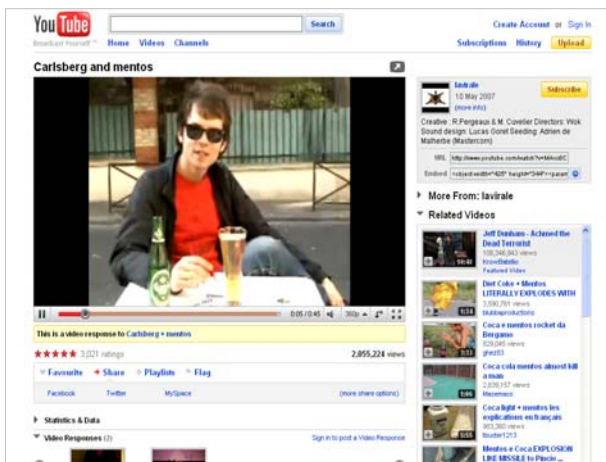
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Identification of advertising

- Misleading omission not to identify commercial intent
 - 11) Advertorial (also blogs etc.?)
 - Product placement
- Undue influence («aggressive»)
 - Timing, location, nature or persistence
- Identification of the advertiser
 - E-commerce and invitation to purchase

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Unsolicited advertising

- E-privacy directive (2002/58)
 - What is «electronic mail»?
 - Public communication Network«
 - Messages and applications on Facebook
 - Sent by who?
 - »Use of ... purposes of direct marketing ... «
 - Concealing the identity
 - Omit reply address
- Aggressive commercial practice
 - 26) persistent and unwanted solicitations



(Ab)use of social relations

- ICC code
 - »Relevant factors likely to affect consumers' decisions should be communicated in such a way and at such a time that consumers can take them into account.«
 - Children: »not undermine positive social behaviour, lifestyles and attitudes« and »not exploit inexperience or credulity«
 - »... not suggest that possession or use ... will give ... physical, psychological or social advantages ... «

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Non-commercial activities

- Degree of encouragement
 - Who is responsible?
- Examples
 - Tobacco directive (2003/33)
 - Private or public sponsorship
 - Audiovisual Media Services Directive (2007/65)
 - Surreptitious audiovisual commercial communication is prohibited
 - »intended by the media service provider to serve as advertising«
 - in particular if consideration



Non-commercial activities

- What is a commercial activity?
 - Approaches
 - Sender, content and context/framework
 - Adopt, endorse or sponsor
- Should it be regulated?
 - Free speech vs unfair practices
 - Commercial vs non-commercial speech
 - Degree/nature of encouragement
 - Who is responsible?

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- Klik for at tilføje en disposition

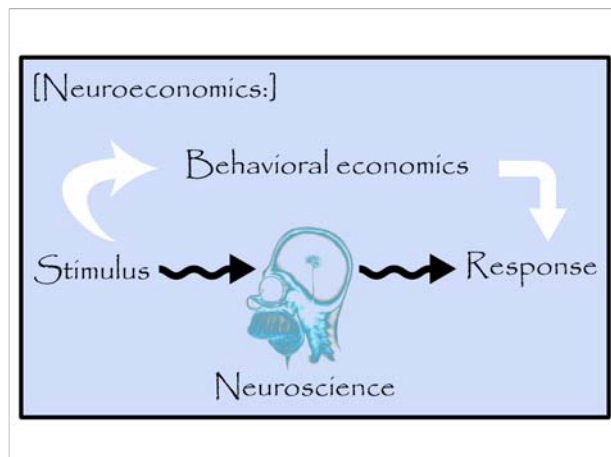
Are humans rational?

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Neuroscience in advertising law

- Misleading advertising
 - Gut Springenheide (C-210/96)
 - »... presumed expectations which it evokes in an average consumer ...«
 - Does not preclude consumer poll or expert's report as guidance for judgment
- Unfair commercial practices
 - Undue influence: exploit power ... limits ability to make an informed decision
 - Commission Staff Guidance SEC(1999) 1666 (3/12-09)



What we can learn from neuroscience

- How do we make choices?
- What is unfair?
 - Distort economic behavior materially
 - What about emotions?
 - What kind of [ir]rationality?
 - Goals are about what we value
 - The brain is build for survival
 - How does it cope with symbolic values?
- The fine line between legitimate influence and economic distortion

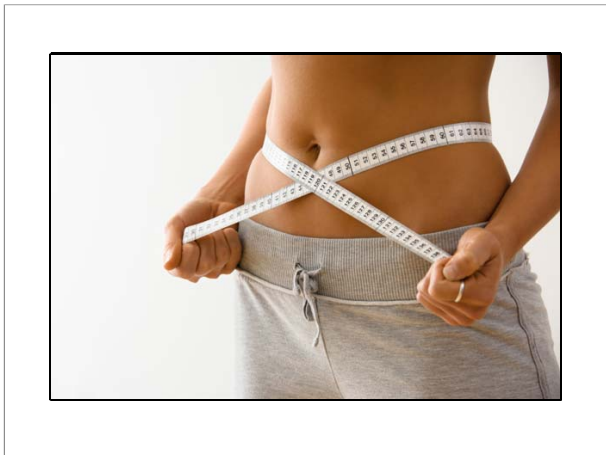
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Dopamine

- »Reward prediction error«
 - Dopamine plays an important role in our valuation system
 - Addictions
 - Drugs, gambling, shopping etc.
- May be the new utility
 - Advertising
 - Brands influence the reward
 - The nervous system can simulate experiments

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The greatest city in the world

