

WENGER PLATTNER

B A S E L · Z Ü R I C H · B E R N



IBA Congress 2006 Chicago

Advertising in the Digital Age: What is different?

Dr. Stephan Netzle, LL.M.
Zurich, Switzerland

19 September 2006

Topics



- To what extent is advertising in the new media (i.e. via internet, mobile phones) different from “classic” advertising?
- How does the law deal with these differences?
- What about Sp@m?



Advertising Standards in the Analog Age (1)

- **Principle of freedom of advertising;**
 - Free access to the market place.
- **Advertising should be legal, decent, honest and truthful:**
 - Advertising may not be misleading or deceptive;
 - Advertising must be distinguishable from editorial matters.
- **Advertising shall respect intellectual property rights:**
 - Copyrights, Trademarks, Patents, Designs;
 - Personality rights.

Advertising Standards in the Analog Age (2)



- **Advertising must observe specific regulatory provisions:**
 - Tobacco, alcoholic beverages, medication;
 - Lotteries;
 - Loans;
 - Illegal goods or services;
 - Protection of minors.
- **Consumers should not be seduced to imprudent business transactions.**
- **The advertiser should be identifiable!**

Applicability of the Advertising Standards



These Advertising Standards apply to the advertising in its entire content and form, irrespective of the channel or medium by which it is distributed.

Digital Advertising: Differences and Threats (1)



- Digital Advertising is easy to establish and to distribute:
 - Bulk advertising;
 - Low entry costs – big effects;
- Digital Advertising is difficult to escape
 - Unsolicited advertising, Spam, Cookies
 - Defense costs of recipient

Digital Advertising: Differences and Threats (2)



- Digital Advertising is global and does not stop at the borders
 - Violation of territorial limitations of IP-rights;
 - Ambush marketing;
 - Disregard of local regulations and cultural, ethical or religious standards.
- Digital Advertising can easily interact with the consumer
 - Confusion between advertising and editorial matters
 - Increased risk of imprudent business transactions
 - Protection of customer's privacy

Digital Advertising, Differences and Threats (3)



- The source of Digital Advertising is difficult to identify
 - Invitation to reckless or illegal behaviour
 - Law enforcement exceedingly difficult



"On the Internet, nobody knows you're a dog."



How the Law responds (1)

- Specific legislation on (traditional and new) advertising:
 - Unfair Competition;
 - Consumer Protection;
 - Data Protection.
- Industry Standards
- Specific restrictions on the advertising for certain products and services:
 - e.g. tobacco, gambling.
- Protection of IP and personal rights:
 - National legislation on trademarks, copyrights, designs
 - Treaties and Conventions (e.g. WIPO-treaties)
- Criminal prosecution

How the Law responds (2)



- Specific Legislation on the Use of New Media
 - Communication laws (e.g. SPAM)
 - Data Protection
 - Consumer Protection re. business transactions by electronic media/Distance Selling
 - Regulations on Digital Signatures
- EU Ordinances and Directives
 - Data protection in the electronic communications sector
 - E-Commerce
 - Distance Selling
- Guidelines, Standards, Initiatives
 - OECD Guidelines on E-Commerce
 - ICC Guidelines on Advertising and Marketing on the Internet

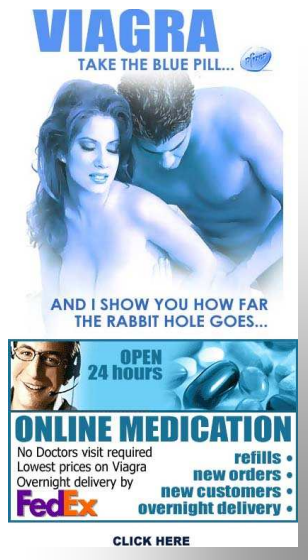
Sp@m



- What is Spam?
 - „Unsolicited message sent to a large number of recipients“
- The negative effects of spam:
 - Waste of millions of hours and money spent daily with the task of differentiating between spam and legitimate messages
 - Occupation of a significant fraction of total internet bandwidth;
 - Consumption of a large amount of storage space on mail servers, affecting the regular use of the internet;
 - Spam is often associated with illegal methods or contents, i.e.
 - Identity theft campaigns,
 - Misleading, pornographic or criminal content,
 - Abuse of email addresses (harvesting)
- „Spam! Lovely spam! Lovely spam!“



Spam: Challenges for the Legislator



- Legal definition of Spam
 - „Bulk?“
 - „Unwanted?“
 - „Commercial?“
- Constraints of an effective Anti-Spam Policy
 - National jurisdiction and cross-jurisdictional issues;
 - Hiding the origin of spam;
 - Stopping spam without stopping legitimate messaging;
 - Quantum of the damage.
- Consent of the recipient – the solution?
 - Degrees of consent;
 - Opting-out vs. Opting-in;
 - Labelling / Informed choice (ADV, ADLT)
- International co-operation indispensable
- The role of ISPs

Legislative Efforts against Spam



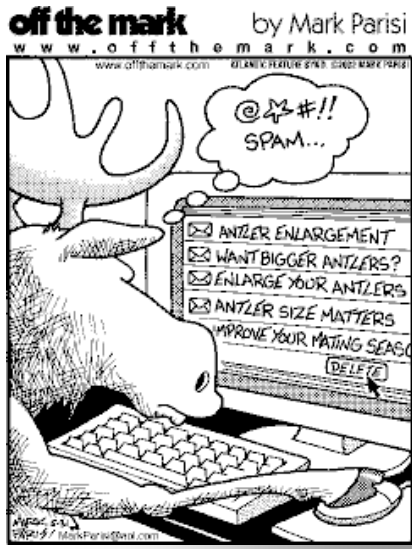
- EU Directive 2002/58/EC on Privacy and Electronic Communication:
 - Prior consent (unless contact details were obtained within the context of an existing customer relationship);
 - Direct marketing messages must be clearly and accurately identify the sender;
 - Prohibition of address harvesting (Data Protection Directive 95/46/EC)
 - Germany, Austria, Danmark, Finland
- US Can-Spam Act (Controlling the assault of non-solicited portnography and marketing act“)
 - Opt-out
 - Harvesting and dictionary attacks are not independent violations but may trigger inreased penalties.
- California:
 - Opt-out
 - Labelling (ADV, ADLT)
- Louisiana:
 - > 1000 recipients
- Australian Anti-Spam Act 2003
 - Consent-based legislation
 - Commercial approach
 - Address harvesting and dictionary attacks prohibited
- Industry Standards

What you can do against Spam



- Avoid short email-addresses (e.g. xy@worldnet.com) but prefer firstname.familyname@worldnet.com ;
- Use a separate email address for private correspondence;
- Don't respond to spam-mails – not even to express your anger;
- Don't open a link in a spam-mail;
- Deactivate the automatic preview function in your email software;
- Delete cookies and temporary internet pages on your computer regularly;
- For emails to larger numbers of recipients, use the bcc-function;
- Don't disclose your email-address on your website. Use a contact form instead;
- Install a spam-filter software;
- Don't use your principal business address for online-shopping.

Summary



- The principles governing “traditional advertising” also apply to advertising in the digital age.
- The new challenges of digital advertising relate to its cross-border and cross-jurisdictional aspects. International co-operation is essential.
- Disclosure of identity of the sender and the possibility of the recipient to opt-in or opt-out are essential for the discharge of the internet-resources from spam.

off the mark

by Mark Parisi

www.offthemark.com

