

SWITZERLAND

Native Advertising: Swiss Law Challenges and Solutions

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The use of online media continues to soar, and a large and increasing part of users access online media on mobile devices. This has changed the ways consumers are viewing advertising. Native advertising, the blending of advertising and editorial content, is an efficient way for advertisers to follow consumers into the online and mobile media. But by blurring the lines between advertising and editorial content, advertisers may confuse consumers as to the type of message conveyed.

This article gives an overview on the Swiss legal and regulatory framework for native advertising. It shows that Swiss consumers have a limited right to know that what they are viewing is advertising, and it offers general guidance on how to comply with the respective disclosure requirements.

Mobile Media Use and Challenges for Advertisers

According to a recent study by IAB Switzerland, online has overtaken offline media use in Switzerland. A large and increasing part of users access online media on smart phones (59 per cent on weekdays) and tablets (36 per cent on weekdays). The increasing popu-



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larity of tablets, large screen smart phones and the rapid diffusion of 4G networks will likely continue to boost the shift to mobile media use in Switzerland and globally. Consumers are viewing online advertising differently on mobile devices, and many traditional forms of online advertising inventory such as banner placements are not available (or accepted) to target mobile users. To overcome the physical limitations of mobile marketing, advertisers strive to adapt to the medium. They convert advertising into the look and feel of the editorial content and seek to place it above, below or within editorial content. Such blending of editorial content and advertising is referred

to as native advertising. Examples are advertorials (a blend of “advertising” and “editorial”), sponsored posts on social networks, and endorsements in tweets or posts by athletes, musicians, or other public figures. In addition, marketers run sweepstakes or similar competitions, where participants are encouraged or required to generate their own content, share it in social networks, and thereby comment on or endorse the organiser’s brand or products.

Native advertising has generated concerns that consumers may be misled about the nature of the message conveyed. They might think that the editors chose to publish an article based on its merits, whereas in fact a sponsor has paid for the placement of that article. Similarly, consumers might get the impression that in posts or tweets on social networks users convey their honest opinions on a product or brand, whereas in fact they were paid or have received some form of non-monetary compensation to endorse the product or brand.

Swiss Legal and Regulatory Framework for Native Advertising

Swiss law provides for both general and specific rules that apply to advertising, including (online) native advertising. Basic legal and regulatory conditions for advertising are set by laws that regulate commerce in general. Most relevant are laws protecting trademarks, works of authorship, data privacy, and fair competition. Further, some statutes contain specific rules on advertising to address risks associated with the advertising of products such as alcohol, tobacco, pharmaceuticals, and certain foodstuffs; or advertising in media that have traditionally

been regulated more strictly – in particular, television. In addition, advertisers and journalists are subject to industry-specific self-regulation.

Under Swiss unfair competition law and self-regulatory principles, consumers have a limited right to be informed if an advertiser is seeking to influence their purchase decisions. Swiss broadcasting law sets out stricter rules. The two pillars of television advertising regulation are (i) the principle of transparency (broadcasters must identify and disclose advertising, sponsorships and product placements as such) and (ii) the principle of separation (broadcasters must separate advertising from editorial parts of the program).

The EU Audiovisual Media Services Directive (AVMSD) applies the principle of transparency of advertising, sponsorships and product placements to both linear and non-linear audio-visual media services, and it implements the principle of separation in relation to television advertising. As a non-member state, Switzerland is not obligated to implement the AVMSD. Swiss broadcasting law only regulates radio and television, but not non-linear services such as video-on-demand (VOD) services. But VOD services are marketed and offered to a regional or global audience. It has become customary for providers to adhere to the EU requirements also in relation to offerings in Switzerland, and the existing self-regulatory principles implement similar transparency standards for all media, including VOD services (cf. below Sec. 2b).

Below we set forth the principles of fair

competition which are applicable to all types of media and limit the ways in which advertisers may blur the lines between advertising and editorial content.

a) Statutory Requirements

The Swiss Federal Act on Unfair Competition (AUC) prohibits deceptive and misleading trade practices, including deceptive and misleading advertising. Article 3 of the AUC prohibits false or misleading statements about products or prices, as well as trade practices that threaten to create confusion with a competitor's products or services. All of the mentioned practices concern confusion regarding products, prices or services, but not confusion as to whether the message conveyed is advertising.

Still, advertisers may be required, under the AUC's general provision (Article 2) prohibiting unfair and deceptive trade practices, to clearly identify advertising, sponsored content and endorsements as such. This will regularly be the case if – without disclosures – it is reasonably likely that consumers will not notice that what they are viewing is advertising, and if it is reasonably likely that such confusion would influence the consumers' purchase decisions.

A competitor has standing to claim infringements of the AUC if the allegedly deceptive or misleading advertisement threatens the business or economic interests of that competitor. Consumers have a right of action if their economic interests are threatened. In addition, the Swiss State Secretariat for Economic Affairs SECO may enforce the AUC where public interests require such action, in particular, where the interests of a large

number of persons or a group of members of a single industry are at stake.

Plaintiffs may seek preliminary or permanent injunctions, money damages (including disgorgement of profits), as well as costs and attorneys' fees. Further, the willful violation of the AUC's specific provisions (in particular, Article 3; but not violations of the general provision, i.e. Article 2) is an offence. The persons responsible may be fined, or a custodial sentence may be imposed.

b) Self-regulatory Requirements

The Swiss Commission for Fairness in Commercial Communication (Fairness Commission) and the Swiss Press Council (Press Council) apply the principles of separation and transparency on a self-regulatory level. The Fairness Commission enforces the Basic Principles on Fairness in Commercial Communication (Basic Principles) and the ICC Code of Advertising and Marketing Communications Practice (ICC Code). The Press Council applies the Declaration of the Obligations and Rights of Journalists (Declaration).

The Basic Principles allow the integration of content created by the advertiser or sponsor if such content is labelled "sponsored", "advertisement", or similar. But they deem unfair any form of advertising-in-disguise, and failure to disclose the existence (where not apparent from the circumstances) of sponsorships, product placements, or endorsements. Similarly, the ICC requires that advertising and other forms of commercial communication are clearly identifiable as such; and the Declaration – as applied by the Press Council – requires journalists to

use suitable design elements to recognisably separate editorial content from paid content. Finally, both the Basic Principles and the Declaration prohibit so-called coupling-deals. This means that the acquisition of advertising must not be coupled with an obligation of the journalist or publisher to choose a particular topic or to write in favour of the advertiser's product or service.

The Fairness Commission is a neutral and independent institution of the communications industry. Consumers, representatives of the media and advertisers are equally represented. Anyone, including competitors, may file a complaint with the Fairness Commission against any advertiser that allegedly infringes the Basic Principles or the ICC Code. The only available remedy, however, is a declaration by the Fairness Commission that the advertiser infringed the Basic Principles or the ICC Code, and the publication of the respective decision.

The Press Council is an independent self-regulatory institution of the media industry. Six of its 21 members exercise no role in the media, and 15 members are professional journalists or other representatives of the media industry. Anyone may lodge a complaint with the Press Council against a journalist or publisher that allegedly infringes the Declaration. The only remedy is a so-called (public) statement of the Press Council that the journalist or publisher infringed the Declaration.

Disclosure Requirements

As set forth above, under the Basic Principles, the ICC Code, and the AUC, consumers have a limited right to know that what

they are viewing is advertising. Since native advertising seeks to blend advertising and editorial content, it may not be evident for the average consumer that what he or she is viewing is an advertisement, or that someone paid for the placement of content or for a positive review. Clear identification of advertisements as such or disclosure of the existence of sponsorships or endorsements may be required.

In accordance with the AUC's general principles, disclosures must be true and clear. No specific language, size or duration requirements apply regarding the display of disclosures. But from the requirement that disclosures (and advertising in general) must be true and clear, it follows that consumers must be able to notice, read and understand the disclosures. Duration, size and prominence of the disclosure and its display will affect the consumers' ability to notice, read and understand.

Advertisers should place disclosures (or have them placed) next to the advertisement or somewhere within the advertisement. They must not place the disclosures where consumers would not normally notice them, or use a size or color that makes it hard for consumers to notice, read and understand. Also, they should use plain and simple words to allow consumers to understand the respective disclaimer. English will be sufficient if the advertisement or sponsored content is also in the English language.

Consumers must be able to notice, read and understand the disclosure regardless of device. Websites are displayed differently on mobile devices than on laptops or desktops.

To ensure effective disclosures, advertisers should choose websites and apps that are responsive to smart phones or tablets. Also, users should not have to scroll down to the bottom of a mobile website or social media news feed to view the disclosures. They would expect disclosures such as “sponsored” or “advertisement” to be displayed above or on the bottom of the advertorial, sponsored post, or other form of online native advertising. Short-form disclosures and abbreviations are sufficient if it can reasonably be expected that the average consumer would understand them.

Things might get more challenging with regard to endorsements or paid (or otherwise compensated) spokespersons in social media. But creative solutions are available. Organisers of a sweepstakes or similar competition or challenge should consider requiring participants to refer to the name of the competition or the sponsor, where creating and posting user content is required to participate (e.g. by adding the hashtag “#brandnameChallenge”). Further, abbreviations such as “ad” will regularly be sufficient where – as for example in endorsers’ tweets about a brand or product – only few characters are available.

It has not been tested (nor decided) in courts or before the Fairness Commission or the Press Council whether such creative forms of disclosures are sufficient. But if advertisers manage to establish industry standards for online and mobile disclosures, consumers will get used to the new forms of disclosures. In consequence, it is likely that Swiss courts, the Fairness Commission and the Press Council would find that abbrevi-

ated disclosures, hashtags and other new forms of disclosures for mobile marketing are sufficient to inform consumers about the presence of advertorials, endorsements, sponsored posts or other forms of online native advertising.

Biographies

Rolf Auf der Maur heads Vischer’s TMT Group. Since the beginning of his career as an attorney in 1992, he has focused on the legal aspects of the internet, combining his fascination with new communication technologies with his legal expertise. Dr Auf der Maur’s clients include leading companies from the media and entertainment industries as well as from the telecommunications and information technology industries. In addition to his activities as an attorney, Dr Auf der Maur publishes and speaks regularly on internet related legal issues and is a member of various industry bodies (e.g. as a board member of simsa Swiss internet industry association, IAB Switzerland and the International Association of Entertainment Lawyers). Renowned as a leading expert in Switzerland in his field, Dr Auf der Maur is listed in the first tier for TMT in leading international directories.

Thomas Steiner is an associate in Vischer’s TMT and Competition Groups. His main areas of practice are copyright law, anti-trust and competition law, and information privacy law. He advises Swiss and international clients and represents them before administrative authorities and the courts. Dr Steiner primarily counsels companies from the information technol-

ogy, communications and media industries. He regularly provides clearance advice for advertising campaigns and advises clients in relation to compliance, licensing, and the acquisition and distribution of content. He holds a doctorate degree (Dr. iur.) with a focus on international communications and media law and an advanced degree (LL.M.) from Berkeley Law School with a specialisation in Law and Technology. Dr Steiner has acquired international experience in anti-trust and information privacy law through working as a Visiting Foreign Counsel in Washington, D.C.