

ADVERGAMING: A LAWYER'S TAKE

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1. Introduction

“Can you pitch a product to a god when even mortals go out of their way to avoid us?”

Ilya Vedrashko

There is no need to explain the importance of advertising in the age when information is paramount, and presence on the stage highly coveted, this is an established fact. Little space should be devoted to extolling the virtues of new forms of media in getting ideas or products noticed¹. Advergaming is one such attempt to woo the networked consumer and make him listen.

One of the facets of digital culture is corporate and technological convergence, which has now produced a seamless integration of content and advertising. The opening quote summed up the challenge that awaits a marketing expert who travails this new medium. Gamers are a strange sort, the creators, heroes and deities of their experience, at the same time shackled like no one in the real world² and with powers parallel to none. Computer games are surging to prominence in the modern media and entertainment structure³ so much that there is more and more talk about the “gamification”⁴ of everyday activities. It seems that everybody plays these days – which naturally opens the door to a whole slew of connected enterprise.

The forests of advergaming are still untamed, opportunities considered abundant and possibilities of expression refreshing. Indeed, it is a tree that has been expected to bear serious fruit for a while. When the author first broached this topic, advergaming seemed like a hip, new idea. “The rise of the social networks”, the “advent of the casual gamer”, were the headlines supposed to dominate this introduction. Partially, this point still stands; however, a humbling realization, as it oft does, came with research: advergaming is hardly a completely novel concept, going as far back as computer games

¹ “The touch”, of course, remains crucial. With Internet and on-demand, perhaps more than ever, content is king. However, it is imperative not to forget the means of transposition. The success of the 2010 Old Spice campaign is attributed to its’ innovative entrenching of an interesting concept into the Web 2.0 world of Twitter, YouTube and Facebook. Opening new venues for commercial messages in the sea of content is, however, a neverending story.

² “Code is law”, as Lawrence Lessig would say.

³ GameVision Europe’s 2010 study of gamers has shown that in the eight indicative nations within the EU, on average, 25.4% of adults have played a computer game in the last 6 months, 31% of all males and 20% of females. Preconception that only the young are interested is contradicted by the findings: *exempli causa*, while around 70% of the 16-19 aged population play, this figure is around 50% in the 20-29 and around 30% in the 30-44 age group, respectively. A study done for the Commission in 2006 estimated that the European market for computer games had total revenue of more than €6.3 bn, with an expected rise to €7.3 bn by 2008. PriceWaterhouseCoopers’, on the other hand, claimed that Italy, Spain, UK, Germany and France accounted for 10.9 billion euros in 2009, 30% of the global computer games market. PWC has heralded games as “the fastest growing and most dynamic sector in the European content industry”.

⁴ „Gamification” is used a namer for the inclusion of gameplay mechanics in non-game applications in order to facilitate their adoption. A question posed to advergaming: are they the herald or the consequence?

themselves⁵, rising and falling with the many waves of the industry. The difference today to these venerated ancestors lies more in scale, availability, sheer size, and the gradual shift towards the mainstream of marketing. Advergaming is growing discontent with being reserved for geeks among ad-men⁶. There are many reasons for such an ascent, and a deeper analysis of causes and symptoms outreaches the confines of this paper – the mentioned rise of casual gamers, expanding console network capacity, mobile gaming, massive multiplayer online games, the unimaginable explosion of Internet itself and its subsequent social phase, Web 2.0, all play a part. This leads to the conclusion that advertising in undreamt of ways, spurred by a fluid fusion of gaming, social networks and classic tricks, looms just around the corner. With opportunities for cross-promotion⁷ and actual acceptance of commercial content among gamers⁸ also accounted for, future seems bright for the advergaming industry⁹.

Lawyers have a tendency to arrive at the scene the last, in order to play (more or less) informed catch-up and introduce order into social dynamics. This has only been confirmed in the digital age, with its inconceivable speed. After all, our vocation is, by its very nature, rooted in tradition and oft conservative rather than transformative. Small wonder, then that most of the literature on the topic was written by ad-men for the ad-men, legal texts being few and far between. However, as competing agendas¹⁰ come into play in a multi-million euro industry, the question of legal certainty asserts itself – the attitude of “anything goes”, afforded by relative obscurity, poised to dissolve. The duty of the regulator is to set the rules for governing the interaction of actors in a society. Law will step in. The author will strive to be bold and go a step beyond merely displaying

⁵ In 1973, Digital Equipment Corporation commissioned a graphical version of the game Lunar Lander from Atari, in order to demonstrate the capabilities of their new GT40 graphics terminal, in which an astronaut could order a Big Mac, or destroy a McDonalds on the Moon. In the early eighties, Kool-Aid, Pepsi, American Home Foods and several other brands developed Atari 2600 games that featured their products. In 1983, Atari had developed a special version of Space Invaders, called Pepsi Invaders – for Coca Cola. Some other examples of early full-fledged advergaming would be 7-Up's *Spot* games (*Cool Spot*, 1993 and *Spot Goes to Hollywood*, 1995) and Frito-Lay's *Chester Cheetah* (*Too Cool to Fool*, 1992 and *Chester Cheetah: Wild Wild Quest*).

⁶The allure of the disposable income in the 18-35 male market is especially relevant. Available estimates on the growth of advergaming vary: on the low end, Parks Associates expected it to reach \$432 million by 2010. Yankee Group put the number at \$732 million for the same period, while Jupiter Research forecast \$1 billion. CEO of the in-game advertising placement company Massive Inc, had expected a rise of up to \$1.8 billion. The 2007 eMarketer report, *Video Game Advertising: Getting to the Next Level*, had suggested that advergaming would generate almost \$2 billion by 2011, mobile gaming notwithstanding.

⁷Creative applications, such as Capcom's cooperation with the clothing company Diesel through its *Devil May Cry* franchise or Puma's cross promotion with *True Crime: New York*, have already been tried.

⁸ Although this is tied to the phenomenon of immersion, according to an UK survey conducted by CNET Networks for the IAB '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 that they 'do not see in-game ads as intrusive'. *Gamers respond well to in-game advertising*, Jennifer Whitehead, Brand Republic, 2007, <http://www.brandrepublic.com/news/733658/Gamers-respond-in-game-advertising/>

⁹ In 2006, such a statement would have been unconditional. However, several factors since then have caused a slowdown in expected growth. An IAB survey at the time showed that unless major advertisers are already familiar with an emerging format, in a harsh economic climate they are unwilling to experiment with unproven formats. However, it seems that since 2010 things are once again starting to pick up.

¹⁰ Just a brief overview of all the interests involved is impressive: game developers, publishers, retailers, advertisers, ad-brokers, ad-developers, platform vendors, gamers, consumer, child protection, privacy and various other NGOs.

advergaming and associated rules, into illuminating some of the more interesting problems that may arise in the future. It is the intention of this paper to provide a glimpse into this new frontier, the perils and rewards it keeps, the paths legislation has taken so far, and serve as a call for examining a very interesting topic further.

2. Advergaming: Forms and Shapes

Advergaming¹¹, fundamentally, is used to denote the promotion of products or brands¹² with or within computer games, principally through gameplay mechanics¹³. The monetary value charged for the content provided alongside the commercial message, the manner of access¹⁴, designated goal¹⁵ or object¹⁶ or the peculiarities of the mechanics themselves are irrelevant; the core of this definition is the promotion of information

¹¹ Invention of the term “advergames” is attributed to Anthony Giallourakis, who registered the domain names *advergames.com* and *adverplay.com* in 2000. It later appeared in the *Wired*'s “Jargon Watch” column in 2001 and spread out since. Nota bene: This paper uses the term “advergaming” to encompass all of the myriad forms that the fusion of advertising and gaming might take. This approach is not uniform in literature or popular depiction – some equate it synonymous with advergames alone; others use it to encompass, for instance, sponsorship of gamer tournaments, or game characters’ used in classical promotion schemes (eg. Mario of *Mario Bros*’ fame advertising Ralston Cereal or Kraft noodles), which are not distinctive enough from traditional advertising.

¹² This work mainly focuses on classical commercial ventures. However, political advergaming and edugaming, that is, use of gameplay for expression and propagation of ideas, worldviews or education, will and has become a question unto itself, which we shall briefly touch on at several points. Some light examples would be *Good Willie Hunting*, an advergame deriding the extramarital escapades of former US president, Bill Clinton or *FreeRice*, which raises money for the U.N. Food Program.

¹³ Discussion on the terminology of these games is in itself varied and interesting. Suffice to say that differentiation between “electronic games”, “video games” and “computer games” shall not be considered relevant for the topic at hand. Computer game theorist Jesper Juul defined these games as “a rule-based system with a variable and quantifiable outcome, where different outcomes are assigned different values, the player exerts effort in order to influence the outcome, the player feels emotionally attached to the outcome, and the consequences of the activity are optional and negotiable.” It should be noted that some systems, although colloquially considered games, do not necessarily fall within this spectrum: Linden Lab’s *Second Life* is often defined as a “virtual world”. Although a bitter rivalry exist between the so-called “serious” or “triple A” and “casual” games, with “social” games gaining a large foothold in recent years, this needs not affect advergaming at all – it can work well within all three environments

¹⁴ They can be downloaded, played on the company’s website, or via social networks. While the online environment is dominant (and vital) today, many nutrition companies conducted campaigns wherein they gave out games as value meals’ prizes or inside cereal boxes (a notorious example was Chex Quest, a Doom clone, in 1996; both Burger King and McDonalds had such campaigns). In the eighties, some of the premier advergames were distributed by mail-order (*Tooth Protector* for Johnson & Johnson, *Kool Aid Man* for General Foods, *Chase the Chuck Wagon* for Chuck Wagon dog food)

¹⁵ To name a few: boosting brand awareness, encouraging a trial, market research (not only via metrics, explained further; car companies often track design preferences in advergames) or classic sales promotion (for instance, by offering a downloadable coupon as a reward). *Lada Racing Club* (2006) features real-life autopart and accessory suppliers’ products in the part where players tweak their vehicles. The game provides real-life pricing and suppliers’ contact information along with performance statistics.

¹⁶ Food and beverages were always dominant in this market, but virtually any commercial message has been tried – clothing (a line by Marc Ecko in *50 Cent: Bulletproof*), TV shows (HBO’s “*Maester’s Path*” for *Game of Thrones*, 2011), movies (*Avatar*, on Xbox Live, 2009), cars (Ferrari, Renault and Lotus, as early as Formula One, 1983, now everywhere, for a fee, of course), recording artists (*Escape the Fear*, used to promote Lilly Allen’s album *It’s Not Me. It’s You*, 2008), even computer games themselves (a mini-game promoting Ubisoft’s *Heroes of Might and Magic V*, 2006 or Bioware’s *Dragon Age: Legends*, 2010).

intended to alter certain behavior of recipients – via computer games. The value exchange involved seems simple: gamers give a brand their attention, and the brand provides an entertaining experience. The unique opportunities that distinguish this use of advertising and games from other venues are, above all, interactivity and impressiveness¹⁷, metrics¹⁸, customization and generativity¹⁹. Some of the inhibitors would be the learning curve and difficulty, platform fragmentation and low interoperability, lack of access for some categories of consumers and operational inefficiencies caused by no clear industry-wide standards. Their ultimate effectiveness as marketing tools is dependant on the particulars of a given case²⁰.

In order to bear the ramifications of an intervention, one must first understand the beast he is trying to tame. We shall try to do this by briefly going through the various modalities, especially between the two core ones: advergaming and in-game advertising. Caution is advised: advergaming is by its nature a hybrid creature, fluid and unimpressed with strict boundaries and clear-cut definitions. In many cases, the difference between named concepts may be blurry indeed²¹.

Advergaming are computer games specifically designed and developed for the sole purpose of serving as vessels for marketing content, utilizing gameplay to facilitate the adoption of a commercial message. This raison d'être distinguishes advergaming from other advergaming and, based on certain given factors, presupposes some ways in which

¹⁷ Unlike other media, gaming is intrinsically goal-oriented and competitive, whether the fight is against a human adversary or a hostile environment. Players shape their own experience and are much more involved, compared to mere recipients. They can interact with a brand much more intimately and directly. As a result of the games' interactivity, players are more likely to retain the commercial message. <http://www.microsoft.com/presspass/press/2008/jun08/06-03adeffectivenesspr.msp> A study has demonstrated that the more involved a player is in the gameplay, the less he remembers the brand placements, "Recall of Brand Placements in Computer/Video Games", Michelle Nelson, 2002. This implicates that it is harder to position meaningful content in a game, but also that if the player sees a placement during a state of high emotional involvement, it will likely be very effective. A 2009 study for NeoEdge Networks had shown that online gamers are more likely to recall brands embedded in games, partially credited to the way the eye perceives motion. This also leads to less advertising fatigue.

¹⁸ The ease of tracking ad-exposure and information gathering, and subsequent adaptation, is astounding. Websites can allow for assessment of factors such as the number of visitors, time spent, repeat visits, etc. In-game, statistics can be retrieved from the platform to rate demographic profile, behavior, needs, attitudes and preferences, measure impression rates, deduce the optimal positioning of advertisements, the player type (again with regional and other factors taken into account) etc.

¹⁹ Consumer-created content is considered a step forward in the advertising world. Machinima (the practice of making short animations and comics using game software), modding and skinning all fall into this category, but this represents only the tip of the iceberg. Chrysler partnered with the developers of *The Movies*, making all vehicles in the game bear its brand, and submissions for the Chrysler's "The Movies Virtual Film Competition" in 2006 featured the company's cars. Player-made Coke machines can be found in many bars in *Second Life* and an entire Ikea furniture collection had been uploaded on the *Sims Online*.

²⁰ Gurău Călin identifies these "effectiveness factors" as accessibility, difficulty of understanding, competitive level, relevance for the object, capacity to induce and maintain the state of flow and viral marketing capacity.

²¹ "It is unclear, for instance, if the Austrian and Swiss public service broadcasters' 2008 *Ski Challenge* qualifies as an advergaming, a sponsored MOG (multiplayer online game), or a MOG featuring the placement of many products, such as various ski resorts, banner ads alongside the slope, logos on the ski-suits, and, most importantly for the broadcasters, the live broadcasting of the "real" race.", *Advertising in Online Games and EC Audiovisual Media Regulation*, pg 9, Thomas Steiner.

they are used²². In recent periods, most advergimes are provided free, online, with a strong drive towards social gaming²³ and simplicity²⁴. For the advertiser, their comparative advantages are interactivity²⁵, flexibility²⁶ and ease of customization to the target audience²⁷, no multi-tasking²⁸, simplicity and speed of the development cycle, cost-effectiveness²⁹ and a potential for strong viral marketing³⁰.

In-game advertising represents advertising embedded into the virtual environment, but in a way secondary to gameplay itself. This is a crucial factor – unlike advergimes, whose whole point is to promote the product, the commercial content here is not supposed to affect the key elements of the game³¹. In-game advertising integrates a

²² For a reasoned comparison between demonstrative and illustrative advergimes, see

http://advergamingtoday.blogspot.com/2006_04_01_archive.html.

²³ This significantly cuts down on transfer costs, and ensures a large diffusion, enticing players to participate and adding to the viral component, a coveted element for advertisers in Web 2.0. An advergime that utilized this aspect was developed for GAP, where players could dress their avatar and notify friends.

²⁴ “Serious” advergimes are rarer due to high development costs, distribution complexities and the problem common for advergimes in general - they need to fight for consumer attention with other games. Although it is possible for several complementary, non-competing brands to pool resources and showcase together, such advergimes remained a luxury affordable only to the largest few, and still mostly in the sports arena. Some of the more recent examples would be Volvo’s *Drive for Life* for Xbox (2005), *World Racing* for Xbox (2003), Burger King’s *King* games (2006). An interesting cross media experiment was the development of *50 Cent: Bulletproof* (2005). There are also advergime virtual worlds, such as Disney’s *Virtual Magic Kingdom* or the *Neopets.com* virtual pet community (which, compared to *Second Life*, can be used to nicely demonstrate the difference between advergimes and in-game advertising).

²⁵ They are by definition on-demand and participatory, contrary to involuntary and passivizing.

²⁶ They can be developed for IM applications, mobile devices, web sites, Facebook applications, widgets etc. On the low end of the budget, the most basic ones are built into banners and pop-ups, from *Orbitz* to *Shoot the Rapper* (a pop-up game that caused litigation against Traffix Inc. by rap artist Curtis Jackson, alias 50 Cent) but even on the simple front, there are more complex executions such as a customizable shooting scroller for Microsoft or a trivia mini-game for Sony’s PlayStation.

²⁷ Both pre-release and post-release. On the one hand, it is relatively easy to differentiate various games depending on a segmented market. Although targeting is even easier with in-game advertising, the philosophy of modern social, simple games itself is “design by feedback”, so it is easy to add new content based on consumer demand, or integrate player-made content. For example, Pepsi developed an interactive microsite with an online contest, which offered downloads. Because music videos were favored four-to-one, more were added, and daily user stats grew by 100 percent.

²⁸ Traditional advertising suffers from averting the recipient’s attention from the desired content. In order to avoid this, the recipient multitasks during the commercial break, eg getting a snack.

²⁹ This is a relative feature, as noted above, based on the type, complexity, effort input etc. In general, however, advergimes are estimated to be several times cheaper, with hosting and distribution costs minimal, greater consumer retention and exposure compared to traditional counterparts. Studies have shown that the typical player may replay an advergime 15 times or more (*Pereira, 2004*) and that average time spent in an advergime is 7 to 30 minutes (*Cálin*). Estimates suggest that when development costs are spread across players, an advergime can cost less than \$2 per a thousand users (*Pereira, 2004*).

³⁰ The traditional, friendly word of mouth can enflame cyberspace in mere seconds through social networks, the blogosphere etc. Studies have shown that 90% of the players participate because of challenge links, e-mails sent by friends or word of mouth. A survey conducted by Jupiter Media Metrix reveals that 86% of Internet users passed the information about a good game to other persons and 49% passed it to more than three persons. This makes “seeding” games a necessary activity.

³¹ The keyword here is not particularly the storyline itself, the mechanics or the visuals, but immersion, a combination of factors that induces the player’s willingness to treat the game elements as actual events, his emplacement within the virtual environment, and ability to “become” a character. Immersion is closely related to suspension of disbelief, or the willingness of players to suspend their critical faculties to the extent of ignoring inconsistencies. As long as immersion is not challenged, if an advertisement “fits” the

brand into a *pre-existing* narrative. At first, the technology allowed only for static³² advertisements. However, Internet connectivity has made it possible to display and adapt in-game advertisements real-time, dynamically³³, with especially interesting activities conducted in virtual worlds³⁴. It can also include the more common product placement³⁵ or sponsorship³⁶ mechanisms. The benefits revolve on access to gamers (especially the young in the population), use of gameplay mechanics and immersion, and the possibility to tap into the creative well of consumer-generated content. However, there are problems with this advertising, as well – competition with other computer games, the sales margin³⁷, costs of development and preparation³⁸ and lackluster use of the medium's unique properties³⁹. In 2006, the advent of advertising networks⁴⁰, that had the capacity to

context of a game and its unique setting, this enhances the reality factor, and the players are willing to accept advertising. The movie *Deuce Bigalow: European Gigolo* has no place in the sci-fi themed *Planetside*, but Nuka Cola, drank in the post-apocalyptic wastelands of *Fallout*, works. Verdashko suggests that using “fake brands”, allusions on popular brands adds to imagination and entertainment value of the game, and advises advertisers to use proxy brands, equipped with strong but non-binding associative links to real-world originals, to build a memorable presence, similar to the Sprunk drink (Sprite) or Cluckin' Bell (Kentucky Fried Chicken) in *GTA: San Andreas*.

³² Traditional posters or billboards within an environment, but also advertisements that appear during loading screens or around game menus. The important part is that these are long-term, planned placements, hard-coded during development. Some examples would be a Shell-branded station in *Test Drive Unlimited* (2006) or the appearance of McDonald's and Coca-Cola in *Doom 3* (2004). AXE had used the medium's interactivity by providing an obstacle for the gamer to overcome in *Splinter Cell: Chaos Theory* (2005).

³³ By updating the code with additional features, advertisements can change through a feedback channel. Besides adapting the chosen messages shown, this can be used for tailoring the message according to the specific player: his location, the weather conditions, the time, length of play or any number of factors,. Video commercials can be displayed on a building in a virtual city, and even interactive game kiosks can be incorporated within another game. T-Mobile's appearance in EA's *Battlefield 2142*, Massive's Cadbury Crème egg campaign performed over several titles in 2009 or billboard ads featuring then US presidential candidate Barack Obama in October 2008 in *Burnout Paradise* represent such advertising.

³⁴ There are numerous promotional examples inside open worlds, like *Second Life*. American Apparel had opened a store there (which even suffered an attack by a terrorist group, “*Second Life Liberation Army*” *Targets Brands*’, MarketingVOX, 2006), MTV ran fashion shows and had bands regularly perform, Toyota used its Scion City for market research and promotion etc. Closed and advertising-dedicated virtual worlds can essentially be considered advergames, as mentioned.

³⁵Product placement works a lot like placement in standard audiovisual media, with opportunities for integrated brand messaging and use of products or services by the characters. Electronic Arts contracted with Intel and McDonald's for *The Sims Online*, and Activision with Nokia for *Kelly Slater's Pro Surfer*. Lara Croft drove a Jeep Wrangler in *Lara Croft Tomb Raider: Legend* (2006), as part of a movie/game cross-promotion.

³⁶ Notorious examples are more political in their nature: *America's Army*, sponsored by the recruitment office of the United States military, and *Special Forces*, developed for the islamist group Hezbollah. An advertiser may particularly sponsor additional content, special features etc.

³⁷ The AAA games rely on blockbuster sales as does the movie industry, 90% titles fail to break even.

³⁸ This is the reason why static ads were mostly unviable en masse.

³⁹ The main sinners are insufficient integration with the plot and little interactivity. Content-related decision-making is programmed directly into games and should be used accordingly. Billboard ads suffer from similar problems as do their real-world analogs, maybe even more due to the player's concentration on the content. A product placement may help the player (Red Bull power-ups, *Worms 3D* or Alfa Bank ATMs in *Night Watch*), act as a reward (Pepsi's Pepsiman, *Fighting Vipers* or Burger King's King, *Fight Night Round 3*, common in racing games, as well, with branded cars), a plot point (Puma sneakers, *True Crime: New York City*, Sony Ericsson phones, *Splinter Cell: Pandora Tomorrow*, Visa credit card, *CSI: 3 Dimensions of Murder*), or a cheat code (*NASCAR 2005: Chase for the Cup* or Pizza Hut in *Everquest II*).

spread a message across different titles, thus lowering transaction costs, was expected to alleviate some concerns and usher in the halcyon days of in-game advertising. However, the economic situation and competition from other forms of interactive advertising (including social advergaming) had left the field worse for wear, and its' future less than certain.

3. The Law

After this cursory overview of basic forms of advergaming, the pertinent questions become those of the values and the manner in which regulation is supposed to in face of a challenge, in this case, from these advertising hybrids. Media services, and games in particular, hold a far too substantial economic⁴¹ and cultural significance, one only likely to increase, for the law to overlook them⁴². The growth in scale and importance of gamers and the industry, and the need for a uniform approach EU-wide may mean that, while a nascent field should be encouraged to evolve on its own, a necessity for a clear, unambiguous framework and legal certainty, will rise over time.

It is vital to note that, due to its' mixed origins, both rules governing computer games as such *and* advertising and media law might apply to advergaming. Depending on the *ratio legis*, rules designed to protect competition⁴³, information flow, privacy and consumer protection may also come into play. Localization, access issues and the stated policy of propagating European works provide their own trials⁴⁴. Some of the more celebrated characteristics of advergaming pose certain legal problems. While advertisers and affiliated commercial interests are overjoyed by the possibility for effective metrics, especially with in-game advertising, the possibilities of using IP addresses for behavioral targeting and gamer profiling constitutes a threat for privacy advocates⁴⁵, one covered by

⁴⁰ The notable players being Exent, IGA, Double Fusion and Google-owned Adscape Media. Using dynamic advertising was expected to significantly cut down production costs, time and increase the longevity of a campaign. However, the profits did not seem to materialize: Microsoft had shut down its Massive division (formerly Massive Inc) late 2010, in part because of the advertising potential of Xbox Live. The paradox is that in early 2010, in-game advertising had a comeback, as *Alan Wake* came out, loaded with brand name product including Verizon, Ford, Duracell and Energizer. CNBC.com, 2010. http://www.cnbc.com/id/37274199/Microsoft_Reaps_Benefits_of_In_Game_Advertising

⁴¹ "As companies provide real services inside virtual worlds, such as employment and investment opportunities, they could draw attention - and regulation - from real-world authorities like the courts and legislatures.", BusinessWeek, http://www.businessweek.com/magazine/content/06_18/b3982007.htm

⁴² Thomas Steiner identifies economic welfare and the interests of the internal market for media and entertainment content as the principal economic, and privacy and cultural diversity, especially freedom of information, opinion and expression, and consumer protection, as the main cultural reasons for regulation. *Advertising in Online Games and EC Audiovisual Media Regulation*. Advergaming may play a part in enhancing public awareness and media literacy, notable goals of the EU legal and policy documents.

⁴³ For instance, gatekeeping or bundling issues, or vertical dominant positions by the advertising networks.

⁴⁴ „Without intervention it is inevitable that country markets outside the big five games markets in Europe will continue to be left out with regards to content localisation.“, *Interactive Content and Convergence: Implications for the Information Society*. The report also recommends various policy approaches for increasing consumer-enabling technology, such as broadband penetration and 3G mobiles.

⁴⁵ The DPD defines personal data as any information pertaining to an identified or identifiable natural person, and puts forth requirements for properly informed consent, while granting specific rights to data subjects. The question of the relation of the fundamental right to privacy, as envisioned by the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights

the 95/46/EC Data Protection Directive. A special concern exist for minors, whose informed consent to data collection and retention in the name of market research is dubious at the very least, even under traditional contract law, let alone the existing practices of widespread negligence and legally ill-advised behavior.

As far as content control is concerned, first of all, a paradox. In the area of copyright, piracy is generally not a concern with advergaming⁴⁶. Instead, there are intellectual property issues and questions of equity in the division of rights regarding consumer-generated content and effort harnessed, with game publishers claiming sweeping rights on any third party in-game creations, contractually, through the adhesive terms of use⁴⁷. Further on, content regulation, usually in the name of protecting minors from violence and pornography⁴⁸, is seen by many as the impending future for virtual environments⁴⁹. A greater threat still might be self-censorship and the necessity for business interests, which drive the industry forward, to put on a “presentable image”. While one side of the isle may cry censorship, from a legal standpoint, in this field, the use of advergaming reflects a trend of integrating marketing, that is, a fundamentally commercial cause, into an area traditionally granted higher protection through freedom of speech and expression⁵⁰, whereas the courts have in general been more restrictive with

and Fundamental Freedoms, and the legitimacy of controller’s interests in lieu of Article 7 of the DPD would be an interesting arena to try advergaming as a platform. There are other issues, such as the question of proper information and protection of minors. Google currently holds the patent for target advertising in computer games: *USPTO Patent Application No. 20070072676, ‘Using information from user-video game interactions to target advertisements, such as advertisements to be served in video games for example’*, assigned to Google Inc, invented by Shumeet Baluja, filed 29 Sept. 2005, and published 29 Mar. 2007.

⁴⁶ The advertising message can be transmitted whether or not the game itself was pirated. In addition, as mentioned, the bulk of advergaming today are provided free of charge.

⁴⁷ Neopets.com, a site primarily catering to children, has terms that require the players to agree to: “Automatically grant...to Neopets a perpetual, royalty-free, irrevocable, nonexclusive right and licence to use, reproduce, modify, adapt, publish, translate, create derivative works from and distribute such materials or incorporate such materials into any form, medium or technology (now known or hereafter developed or devised) throughout the universe”, *Kids’ Ad Play: Regulating Children’s Advergaming in the Converging Media Context*, Sara M. Grimes. Although stricto sensu unrelated to advergaming, EA, whose *Spore* creature creator was a big hit in 2008, is another interesting example: “In exchange for EA enabling your contribution of Content, when you contribute Content to an EA Service, you expressly grant to EA a non-exclusive, perpetual, worldwide, complete and irrevocable right to quote, re-post, use, reproduce, modify, create derivative works from, syndicate, license, print, sublicense, distribute, transmit, broadcast, and otherwise communicate, and publicly display and perform the Content, or any portion thereof, in any manner or form and in any medium or forum, whether now known or hereafter devised, without notice, payment or attribution of any kind to you or any third party. You grant EA all licenses, consents and clearances to enable EA to use such Content for such purposes. You waive, and agree not to assert any moral or similar rights you may have in such Content.” On the other hand, *Second Life*, the epitome of user-generated content, empowers creators through technology to limit distribution and modification of their wares by marking them with the “no copy”, “no modify”, or “no transfer” flags.

⁴⁸ In addition, while some EU jurisdictions strive to severely regulate online gambling, free poker sites, supported by advertising, continue cropping up.

⁴⁹ Children truly are a vulnerable group in advergaming. It is unlikely that they fully comprehend online business practices and are able to differentiate between media content and marketing, but they are targeted in particular, and effectively so, by fast food and soda companies. Because children are spending more time online, advergaming are a very effective way for marketers to reach and hold their attention, <http://www.expressindia.com/news/fullstory.php?newsid=36180>.

⁵⁰ A series of federal cases in the US (*Interactive Digital Software Association v. St. Louis County, DOOM, Mortal Kombat, Wilson v. Midway Games Inc, House of the Dead*) have deemed computer games

regard to business endeavors. This fragile line surrounding freedom of speech has already been tested in regards to discrimination, as well⁵¹. In the face of all these issues, the European regulator did not opt for the route of direct content control⁵² so far, preferring to encourage classification primarily through the unified industry led Pan European Games Information age rating system⁵³, administered by the Interactive Software Federation of Europe, which induces a rating scheme and upholds consumer information. It is generally adopted and considered adequate in most member states, however certain segmentation does seem to be forthcoming, with steps taken in favor of content control in national legislation⁵⁴. A firmer guideline, improved dissemination, development and enforcement in practice, maybe even community-level hard law that would hold a liberal and unified approach (not necessarily by giving surveillance and monitoring powers to governmental structures) may be desirable and could encompass advergaming.

On the advertising front, Directive 2010/13/EU, commonly referred to as the Audiovisual Media Services Directive, is considered the premier legal framework. However, the wording leaves questions on whether or not computer games, especially online games, are included under the rules. Recital 22 explicitly rules out “[...]games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services, as well as on-line games and search engines[...]

protected speech, akin to books and movies. Freedom of speech applies to both the developers and gamers, whom would not have the possibility to access content. Under the logic employed, games are considered as such only if they possess certain characteristics: such as narratives, themes, and dialogue, or well-developed visual and musical components resembling those found in other forms of protected speech. Under this reasoning, rudimentary games, such as the majority of advergaming today, would not hold these privileges. *Grand Theft Oreo: The Constitutionality of Advergame Regulation*, Seth Grossman.

⁵¹ A prime political example being the game which the Swiss People’s Party provided on its website before the October 2007 elections, enabling players to kick black sheep out of the country, while protecting white sheep from “evil” immigrants, <http://www.zottel-game.ch/>.

⁵² Rare and isolated incidents of banning games in certain member states did occur, a notable case being *Manhunt 2* in UK, Ireland, Germany and Italy.

⁵³ Although there was a push for stricter rules and measures in 2006 and 2007 by Justice and Security Commissioner Franco Frattini and the German Presidency. <http://www.euractiv.com/en/infosociety/violent-video-games-ban-self-regulation/article-159911>, PEGI and PEGI On-line have remained the chief operation in place Europe-wide.

⁵⁴ Germany is not a member of PEGI, but has an autonomous, state-controlled system, which has been criticized for its stringency (especially the “harmful media index”). Some member states have been aiming at a classification for distribution, circulation and advertising based on an age/content rating (Italy, UK, Germany, Estonia, Greece, Latvia, Lithuania and Slovakia). France, Sweden and the Netherlands prohibit certain violent games under criminal law (in Sweden constitutional law, even). In Belgium and Malta, there are a number of legal provisions covering the sale of computer games, such as laws on racism and xenophobia, commerce, consumer protection and public order. *COM/2008/0207, Communication from the Commission on the protection of consumers, in particular minors, in respect of the use of video games*.

⁵⁵ The reasoning given – the incidental nature of audiovisual content, does not hold water for advergaming. Such wording has been branded a result of lobbying efforts by the Interactive Software Federation of Europe and other players in the industry, e.g. Microsoft. In a submission to the EC in June 2006, the ISFE urged the exemption of online games from the application of the AVMS Directive. Major reasoning was that, because the plot of the game is unscripted and AI is present, online games (in general) are about user created content and that the “general public” is not provided *with* but *creates* the content. Therefore, it is “impossible to affix editorial responsibility to one particular natural or legal person”, since participants are “constantly reorganizing and creating content in the form of everchanging identities, ad lib chat, etc. While this is true to an extent for some games, it is hard to claim so for a significant part – advergaming included –

Fact is that, while recitals are indicative means of interpretation, they are not part of the enforceable text of the directive. The idea of regulating advertising is explicitly not intended to be lenient towards “new” forms of media⁵⁶. It would be interesting to have a court examine this issue; however, a deeper analysis of the relevant provisions seems to put advergaming into an audiovisual media service context. It is by its nature on-demand, or non-linear, in the wording of the Directive. It can be interpreted to fall under “a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes⁵⁷, in order to inform, entertain or educate, to the general public by electronic communications networks⁵⁸” (audiovisual media service in general). But also, “images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity, which accompany or are included in a programme⁵⁹ in return for payment or for similar consideration or for self-promotional purposes” (audiovisual commercial communication). The requirement of making available to the public via electronic communication networks would limit advergaming coverage to online-distributed content alone; however, with new business models, this should be less of an issue. This approach would mean that the rules of AMSD are valid for the situation, especially Articles 5-13. Problems with advergaming in practice might arise from the transparency principle and the ban on surreptitious advertising⁶⁰, restrictions on alcohol and tobacco advertising, and especially children-targeted limitations⁶¹. Handling

and for quite a few advertising practices, solely by virtue of venue, do not fall under this umbrella. *Advertising in Online Games and EC Audiovisual Media Regulation*, Thomas Steiner, 2008.

⁵⁶ “The availability of harmful content in audiovisual media services is a concern for legislators, the media industry and parents. There will also be new challenges, especially in connection with new platforms and new products. Rules protecting the physical, mental and moral development of minors as well as human dignity in all audiovisual media services, including audiovisual commercial communications, are therefore necessary.”

⁵⁷ Contrary to the claims of the ISFE, the requirements of Article 1 for existence of effective control over the selection and organization of programmes, meaning individual sets of moving images with or without sound, within a catalogue established by a media service provider, the form and content of which are comparable to that of television broadcasting, simply is the state for most advergaming content. A pertinent question and a subject for deeper analysis might be: who, out of the numerous stakeholders, asserts this control and in what capacity? It need not even be focused on a particular natural or legal entity, but shared along the lines. This would depend on the advergaming at hand, and is utterly different for advergaming and in-game advertising. As for the required “television-likeness”, there are grounded assertions of similarity between games and movies. *Advertising in Computer Games*, Ilya Vedrashko.

⁵⁸ Within the meaning of point (a) of Article 2 of Directive 2002/21/EC: “transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed”.

⁵⁹ An analysis and appropriateness of this “companionship” and “inclusion” in the case of a hybrid is compelling. However, gameplay is more relevant in the definition of advergaming than the images themselves. AVCC was designed to be as encompassing as possible, while excluding radio, and this shows.

⁶⁰ How is one to separate entertainment from commercial content in a perfect mishmash of both? Recital 81 holds that “the principle of separation should not prevent the use of new advertising techniques”.

⁶¹ While advertising unhealthy food is delegated to a recommendation for encouraging media providers to develop codes of conduct, Article 9, (g) clearly forbids abuse of the child’s vulnerable status.

advergames in a manner significantly different from the Directive in lieu of sponsorship⁶² and product placement⁶³ is hard to imagine. It should be noted that the fragmentation of rules regarding product placement, with member states being allowed to introduce stricter regulation in certain cases, can not be beneficial for legal certainty and development of the internal market.

Other common provisions must be observed, and here another floodgate of directives opens. When introducing an advergame, care should be taken of both Directives 2003/33/EC on tobacco advertising, and especially 2006/114/EC on misleading and comparative advertising, which sets precise standards for sanctioning advertising that can be considered misleading⁶⁴ and rules on permitted, though very regulated, comparative advertising⁶⁵. Related consumer protection rules are also important, especially unfair commercial practices, as regulated by the Directive 2005/29/EC (which can be utilized in an advergaming environment without greater difficulty) and the 2000/31/EC e-commerce Directive⁶⁶. Of course, seeing as how most of the subject matter is covered by directives, national provisions that transpose them come to the forefront.

There are several contentions that may be drawn from this overview. There is a great amount of regulation partially concerning the subject matter, but it is diffused and segmented, somewhat complementary, somewhat supplementary. It is not really properly geared to the topic of discussion, even if found applicable in a concrete case. Indeed, for the most part, it does not take it into consideration. This leads to legal uncertainty and offers gamers, but also, industry interest, less protection than intended by the regulator. Neither does adequate court practice, so far, exist to light the way. Enhanced coordination and integration into a fully-fledged regime is imperative.

⁶² Media law generally distinguishes sponsorship and advertising by underlining the difference in promoting a specific product or brand, versus financing a programme without being part of the creative process. The Directive names sponsorship as any contribution made by public or private undertakings or natural persons not engaged in providing services or producing audiovisual works, to the financing of audiovisual media services or programmes. This must be done with a view to promoting their name, trademark, image, activities or products and can easily be applied to advergaming.

⁶³ The regime of AMSD has somewhat liberalized product placement. Examining it from an advergaming perspective would surely be fruitful. It defines it as ‘any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration’. In-game product placement, thus, yields an abundance of legal questions and is a very shaky ground.

⁶⁴ “any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor”. Criteria for determining misleading advertising is also set, and includes the characteristics of goods or services, the price and the advertiser himself

⁶⁵ There are quite a few factors involved, mostly related to making the comparison as informative, fair and objective as possible. Pepsi Wars would probably not have passed the requirements of this directive.

⁶⁶ Especially Articles 6 and 7, on regulating commercial communication through an information society service and an opt-in system for unsolicited commercial communication (a bit less relevant, since advergames are demand-driven, but could pop up, pun intended).

4. Conclusion

Advergaming is a relatively new, inspiring commercial frontier. This fusion of entertainment, creative expressionism, technical prowess and mechanics has its roots and consequences in the social structure and the norms that try to steer it. It came on the wings of global interconnection and gaming turning mainstream, and there is no reason to think it will vanish any time soon. Emerging business practices often elude outdated regulation and codes of conduct, and whispers of game legislation have focused, at least up to now more on hot button, short-term expedient topics, mainly computer-game related violence. The question for policymakers, regulators, and judiciary, whether dealing with editorial responsibility of advergaming providers or the validity of data-mining practices, to ask themselves is about control – who has the capacity to make important decisions, and who stands to gain from them? In some forms, the central creative work is initiated and sculpted by a third party, a game developer or publisher, and the advertiser is the one who begs entry. In others, it is commissioned and controlled by the advertiser himself. It is doubtless that the rewards for wise utilization of these tools shall be plentiful, but a system for equitable sharing of the benefits must be established. In order to do so, lawyers must examine, acknowledge, respect and adapt to the state of the field.

How much regulation is enough? We have seen some of the affected interests, shed light on a few actors and shapes. Are private regimes and the industry itself capable enough to be trusted with the future of advergaming? Should the advertising, gaming, and interactive software industry extend its codes of conduct in order to substitute or complement regulation and soft law and recommendations be deemed sufficient? While they are more expedient, in order for any self-regulatory system to truly work in the interest of citizens, independent review must be established. Is this co-regulation the way forward? What would an act, authentically devised to be inclusive and straightforward towards gaming, look like? Moreover, how much room would there be for hybrids such as advergaming?

A regulatory challenge is brewing. Infusion of advertising funds may bolster the computer game industry to unprecedented heights and provide consumers with prime content. The gamification of advertising can only be expected to increase in innovative ways the benefit of all the market players. Advertising itself has been regulated. Yet, the framework in which advergaming is supposed to operate is complex, interwoven, often treacherous and fragmented, with scarce regard paid to the nascent medium. At some points, it is found wanting; at others restrictive. Do the rules preserve culture, property and privacy or do they not? Gaming laws need not threaten freedoms, profitability or the creative potential. Clear and comprehensive regulation, crafted with knowledge, care and understanding of the medium's particularities, may foster dialogue, improve market certainty and confidence, foster development and provide reasoned and firm guarantees for some of the issues ahead. A gaming charter.

Gamers, a quarter of European population, watch the future anxiously. Their experiences may hang in the balance. For now, this is uncertain. Advergaming is still under the radar. Anything goes. Let it not be forgotten that in advertising, as in computer games, context rules.

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