Examination of the relationship in the creation of advertising messages and issues of intellectual property in the digital era

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Abstract

Advertising entails the use of content which includes the pictures, description of the product or service, layout and trademarks while a trademark on its own identifies the product or services advertised. Creating and disseminating advertisements and verifying their property may be then associated with issues of intellectual property law. This is an important step so as to enforce rights upon advertising messages. Two issues are though raised which are contradictory: on the one hand, advertising aims to promote and disseminate information as much as possible regarding the product or service promoted regardless of copyright protection, while on the other, the issue of data protection and intellectual property should be solved. In other words, protection of advertising stifles the free flow of commercial information and contradicts with the aim of advertising. Advertising stands with one leg on whether it is a cultural art product that should be protected by intellectual property legislation. Some argue that advertising is different from most other copyrighted work because advertising content may not be beneficial to and desired by the public. At the same time, its other leg, stands on the aim of disseminating information created by advertising for marketing purposes; thus, advertising should not be protected as intellectual property. Issues become even more complicated if we consider that we live in the society of information age where the internet and webpages can be used as ways of advertising and then, issues of intellectual property emerge. How is then, advertising content legally protected? The paper aims to present the way the US copyright law protects advertising, considering it to be intellectual property, -legislation stands for advertising as well as for e-commerce and websites. Then, reference is made to European Union (EU) legislation regarding advertising focusing on the harmonisation that has taken place for member states such as Greece where European directives are implemented. Advertising is legally bound as a commercial communication but may be also considered to be intellectual work. The person in charge of advertising communication, should be aware of these issues contributing in that way, to the best presentation of advertising messages within a legal framework in the information age.

Keywords: advertising messages, intellectual property, digital era, US intellectual property rights, protection of the creation of advertising in EU, Greece and intellectual property

1 Introduction

Advertising may be considered as an entreprenual activity where many parties are involved such as businesemen, agents, media but may be also considered to be part of modern art [Zotos, 2008: 33; Thlikidou-Stogianni, 2003: 87].

Issues which are examined with the highest frequency according to legislation and advertising mainly focus on advertising and medical products, where it has been found for example, that in USA, justifications are made in advertisements aiming at minorities for food substitutes which should be prohibited [Chung, Hwang and Kim, 2007] or for advertisements aiming at children [Cross 2002 cf Gao, 2005] following a different way of dealing with advertising than in Europe.

On the other hand, references to issues of ethics, of influence that non acceptable types of advertising or of insulting advertising may have to people [Balasubramanian, Karrh and Patwardhan 2006; Russell and Belch 2005; Russell and Stern 2006] or the understanding of the way consumers see advertising which is not following the legal elements and may cause reactions [Gulas and McKeage, 2000 cf Drumwright and Murphy, 2004: 8], are very few.

Some argue that advertising is different from most other copyrighted work because an increase in advertising created as a result of copyright protection may not be beneficial to and desired by the public [Ramsey, 2006: 191]. Greece and other countries in Europe do not explicitly consider intellectual property right for advertising as is the case in USA. In regard to intellectual property, there is a defence of intellectual property rights that takes place in Bottis and Spinello [2009] and there is also the valuable work of the International Encyclopaedia of Laws which incorporates legislation from countries in the world and Greece is also included with the characteristics of Greek legislation [Bottis, 2003]. An issue, then, is raised regarding advertising, or better its content, and whether or not is included in legislation regarding protection of intellectual property and cultural resources.

The paper aims to present the way the US copyright law protects advertising, considering it to be intellectual property where legislation stands for advertising as well as for e-commerce and websites, providing information on types of intellectual property rights. Reference is then made to European legislation regarding advertising focusing on Greece as part of the European Union where European directives are implemented. Then, advertising's connection with intellectual rights is argued.

In 1903, the Supreme Court in USA concluded -for the first time- that advertising was within the protection of U.S. copyright law because of the difficulty of distinguishing between commercial and fine art [Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251–52 (1903) cf Ramsey, 2006:191]. Nowadays, it is referred to as "commercial" art-to the protection of copyright statutes. Congress has already determined it is possible for courts to distinguish between advertising and other works because it excluded "advertising" from protection under the Visual Artists Rights Act, a 1990 amendment to the U.S. Copyright Act 17 U.S.C. § 106A; 17 U.S.C. § 101 [definition of a "work of visual art" protected under 17 U.S.C. § 106A excludes "advertising" cf Ramsey, 2006: 193].

Implications may exist from the adoption of such a system for advertising from one country to the other and caution needs to be taken [Bottis, 2004a]. The person in charge of advertising communication, should be aware of these issues contributing in that way, to the best presentation of advertising messages within a legal framework in the information age that advertising takes place.

2 Advertising as a subject of protection of intellectual property

The object of the right of intellectual property is consisted of all the intellectual creations of their creators, which is intellectual work, as are the intagible resources [Bitsani, 2004] while cultural resources is the result of human activity which provide information for all sectors (socio economic or political) [Bitsani, 2004: 4].

These cultural resources are connected to their creator and this relation is sealed by the right of intellectual property which incorporates rules, protecting creators of work of speech, work of art and science, as is mentioned for example in Greek Law 2121/1993 entitled “Intellectual Property, related rights and cultural issues” which was amended by Greek Law 3057/2002 regarding intellectual property and cultural issues. Although there is no reference there in advertising per se but only in audiovisual works of the creator, allowing someone to initially exclude the content of advertising messages from these works -since it is not written in these words in legislation per se,- it is stated that every intellectual work of speech, work of art and science which is original, is protected from the right of intellectual property. It is the aim of the paper to argue that then advertising may be included in such work.

According to Greek Law 2121/1993, the object of the right of intellectual property is the work, that is, the intellectual creation (article 1 § 1 N. 2121/93) while the subject of this right is the creator of the intellectual work (article 1§ 1, article 6 § 1 N. 2121/93). Two more rights are included in intellectual property, one of the possessive and one of the moral nature. In order for intellectual property to be substantive, such work needs to be included in material form. Two rights exist, that of work property as creation of intellect and that of proprietorship of the material form.

In article 2 §1 of Greek Law 2121/1993,

1 works of speech are associated with language symbols of written or oral speech, for example written and oral texts
2 works of art are associated with classical or modern forms such as visual or pictorial creations multidimensional, digital photographs or not, audiovisual work and expressions of modern digital communication era such as virtual reality works, video art work or multimedia -the example of the festival of video art work which has been created for advertising purposes by the International Centre of Dance in Kalamata, Greece within the framework of activities of International Dance Festival is typical for works of art described in Greek Law 2121/1993.
3 works of science are associated with individuality and a combination of form and innovation and originality as an expression of the creator.

To make a step further so as to illustrate the connection of the object of the right of intellectual property with advertising, a definition of the term originality stands in article 2 §3 of Greek Law 2121/1993: “a computer programme is considered original, since it is the personal intellectual work of its creator”, a definition, though, which does not cover all the other categories. Definition is then provided in theory and regulation.

The originality of a work is consisted due to elements that elevate it to a unique and not everyday human creation as well as elements which differentiate it from existing intellectual creations and works of cultural heritage. This position is influenced by the subjective element which exists in Central European rightful system of protection and which underlines the personal bind of the spiritual creator with its work–personalised work due to personal contribution of the creator [Court of Appeals Athens 2768/2003, NoB, 2004: 51]. In the English and American system of protection of copyright, the emphasis is put on the work itself, in the sense that something different is created which has not be copied and the personal seal of the creator is not necessary [Kotsiris,

2005: 58-61; Kallinikou, 2001: 37].

Thus, it is open for discussion
a) the concept of innovation as a reference point for the protection of work especially with the technological advances and
b) the form of the work and what to include in the intellectual work creation apart from the basic categories, because every intellectual creation, if it has specific form and innovation, may be as well incorporated for protection. In that way, in the intellectual work of the law, we may include all the contemporary forms and types of work of digital era such as virtual reality works, webpages and programmes in the computer, as well as every artistic creation with the contribution of the computer, such as musical compositions, cartoon animations, digital photographs, even visual and pictorial works in digital form and others, thus, the usual content of contemporary advertisements.

The concept of the innovative work, in regard to its protection, is not differentiated from digital-communication era. In that sense, authentic is the programme in the computer and authentic is the photograph, which is the result of the personal contribution of the creator [Directive 91/250 article 3; Directive 93/98 article 6]. In regard to the form of the work, Greek Law 2121/1993 article 2 § 1 protects every innovative intellectual creation, "as is expressed in any form"and thus, the creators may express their ideas through advertising. Therefore, ideas should not be placed in blocks, they are free, such as information and is related to the inspiration and the creative capture of every artist, who will process an idea or information, offering it shape with uniquenes [Court of Athens 3859/2001: 601].

3 What does US intellectual property rights include for advertising, e-commerce and what is excluded

The U.S. Copyright Act protects copyright "in original works of authorship fixed in any tangible medium of expression" [Ramsey, 2006: 199]. Under intellectual copyright property and trademark laws, advertising as well as elements of the website can be protected falling in the category of the creative content such as

1. written material which may be characterised as a literary work,
2. the layout of an advertisement, pictorial, graphic images, signs or sculptural work (e.g., illustrations, photographs, or threedimensional advertising displays),
3. musical work or sound recording (e.g., jingles),
4. or audiovisual work (e.g., commercials)
5. advertising slogans, sounds, logos, business names
6. webpages, creative website content, website designs,
7. software to create digital advertisements, such as computer generated imagery, or software including the text based HTML code used in websites and e-commerce systems,
8. search engines [Ramsey, 2006: 202; Verbauwhede, 2005: 2; Verbauwhede, 2004: 2].

Intellectual property rights for advertising and e-commerce in USA share similar

issues in legislation [Verbauwhede, 2005; Verbauwhede, 2004]. There are also limits to copyright protection for advertising that exist for the US copyright law. These include the presentation of basic factual information in advertisements, such as

1. lists of goods or prices,
2. the ideas of commercial artists, such as the idea of using cartoon characters –the idea itself is not protected by copyright. Copyright only protects the expression of ideas, not the ideas themselves [Verbauwhede, 2005: 4]–,
3. or standard treatment of a particular idea and in that way it may not be considered that only one person has the exclusive right to use a specific theme for an advertising campaign or a short phrase used in advertising –[for court decisions on the abovementioned issues from USA see Ramsey, 2006: 202-204].

In that way, advertising work is considered to be intellectual property providing exclusive rights to traditional advertising or advertising over the internet offering at times more emphasis than necessary.

4 The protection of the creation of advertising in EU and the case of Greece regarding advertising content

Legislation and deontology go hand in hand in many European countries as in Greece in relation to the creation of advertising messages. Regulation in advertising has many forms including regulation from the state or self regulation even if the role of state is invaluable and most professionals stick to the state regulation rather that self regulation created by themselves [Gao, 2005: 76]. At European level, harmonisation of regulation for the content of advertising creation, is imperative since markets are open for the free movement of products and people [Kavoura and Kiriakidis, 2004; Bitsani and Panagou, 2003].

TRIPS (Trade Related Aspects of Intellectual Property Rights) Treaty, is incorporated in the Final Act of the Ourougouay Round -Marakes, 1994-, which was harmonised in European countries -in Greece with Greek Law 2290/1995. This Treaty covers the intellectual property incorporating industrial and intellectual where in article 7 is mentioned that “the protection of rights of intellectual property need to contribute to the promotion of technological advances, and the transmission and dissemination of technological knowledge in such a way so that there is mutual benefit from those who produce and use technological knowledge and social and economic prosperity is succeeded”.

Advertising is finally considered to be intellectual work protected by intellectual property law as was previously described. For example, in Greek Law 2121/1993 advertising in the broad sense of “work of art” and “computer programme” is included, falling under such protection as other works do since it is the result of a creator. The harmonisation of intellectual property law in the framework of European Community with Directives was enforced in Greek legislation with Greek Law 3057/2002, article 81 with the further aim of the inclusion of the protection of intellectual and related rights in the information society.

In Greece, following and incorporating European Directives in Greek legislation,

advertising is considered to be a commercial communication; entreprenual business practices towards consumers, includes every action, or way of behaving and being represented, a commercial communication, which is directly related to promotion, sales of a product to consumers [Greek Law 3587/2007, article 9a §d which amended Greek Law 2251/1994 incorporating Directive of the European Council 2005/29 and Committee EE L 149].

European Directive 89/552/EEC of the Committee of the European Communities of 3.10.89, as this was amended with European Directive 97/36/EK of the European Parliament and the Council of European Union concerning radiotelevision activities was incorporated in member states' legislation. In Greece, harmonisation exists with the Greek Presidential Decree 100/2000 following European Directives and legislation so that Greek legislation acts in accord with them. The Greek Presidential Decree 100/2000 covers the legal framework within which the content of advertising communication is created (article 2§c, d, e) so that the creation of misleading, unfair, or comparative advertising is avoided.

In addition, Directive of the European Parliament and the Council 2006/114/EC 12.12.2006 concerning misleading and comparative advertising replaced Directive 84/450/EC on misleading advertising and codifies the amendments made to Directive 97/55/EC which included comparative advertising. This Directive essentially has effect from 12.12.2007 from member states for their policy and legislation.

The abovementioned legislation refers to misleading advertising which includes false or not true information as a whole regarding the product and its characteristics while it may be also manipulative when it is contrary to the demands of professional deontology; comparative advertising as the one which implies the identity of the competitor, yet, the creation of such advertising may be allowed when this is done in an objective way for more than one characteristics of a product and does not aim to the depreciation of trademarks or the name of the competitor. Directive 89/104 EEC approximated the laws of the member states relating to trademarks.

Those involved with the implementation of the advertising campaigns need to be aware and become familiar with the legal advertising framework for the best possible adjustment of advertising messages in society and the avoidance of the creation of an advertising communication programme of a business or of a cultural organisation which does not pay attention to the legal requirements created for the protection of the business sector and the consumers.

Advertising may be also in control within the framework of self-regulation from the field of advertising itself and the agencies and committees control, such as the German advertising Council (Werberat) [Kroeber-Riel, 1998: 60] or the Council of Control for Communication for Greece created by the Committee of Greek Advertising Agencies and enforcing the Greek Code of Advertising-Communication [http://www.edee.gr]. This is a Code which was initially enforced voluntarily then was legally established and which incorporates rules that are associated with the way communication ought to be promoted [Kavoura, 2008].

5 Who is entitled to the intellectual property for the creation of advertisements according to legislation?

The legal protection of intellectual property in European Union came from the law for the protection of industrial and commercial property.

In the beginning, the term intellectual property was not in the text of the Treaty of Rome for the European Community (EC) and was harmonised in Greece with Greek Law 2054/1992. In the passage of time, the Court of the European Communities [Cotidel v. Cine' Vog Films S.A. 62/79; Musik Vertrieb Membran et K. Tel/GEMA 55-57/80] judged that in the article 36, already article 30 of the EC, "industrial and commercial property" intellectual property needed to be included. In that way, intellectual property was incorporated in the original legislation. The economic importance of intellectual rights and the initiatives of USA in copyright issues led the European Community to create Directives. This harmonisation effort begins from the Community and the Green Book of 7/6/1988 leading to 8 Directives so far which comprise of a solid cell of legislation, as is property part of which is intellectual property [Kotsiris, 2005].

The costs of intellectual property protection normally include transaction costs, rent seeking, and enforcement costs. Copyright vests initially in the author or authors of the work. The author of the work is the person (or persons) who created the expression in the advertising, unless the advertising is a work made for hire.

Other times advertising departments of advertising agencies, hire free lancers to plan, create, and communicate their advertising while if advertising messages are created by employees who work in advertising agencies, the employer has the copyright in the advertising unless another agreement has been signed.

As far as the advertiser and the advertising agency is concerned in regard to ownership of copyright in the advertisements, the agency retains copyright in the creation of advertising [Ramsey, 2002: 13-14]. Whichever is the case, contracts safeguard all the involved sides. Then, issues related to bullying the work place is safeguarded because there is beforehand agreement on the rights and responsibilities of the parties involved (Kiriakidis and Kavoura, 2005).

The example described below illustrates that contracts may actually define each specific case. The example is from the Hellenic Organisation's of Tourism International Analytic Invitation in 1997, Directorate of Advertising, Public Relations in regard to the creative printed material (photographic and artistic) that would be created by an advertising agent. The Hellenic Organisation of Tourism asked that this material would be its property and may be used whenever needed. Intellectual and related rights for the use in any way from the Hellenic Organisation of Tourism will belong to it and the advertising agency will resign the rights [Kavoura, 2006].

6 Conclusion

Management of content and information in a digital environment [Bottis, 2004b] is an

issue that is very much associated with the content of advertising messages. Freedom of expression should not be constrained from legislation regarding the content of advertising which aims to promote and disseminate information as much as possible regarding a product or service regardless of copyright protection. Freedom of expression in advertising communication is a necessity to exist yet, control mechanisms safeguard justice and equality for all.

That is why, examination of the way the content of advertising messages are created needs to be continuously evaluated since changes follow society and society needs to follow changes. The person in charge of the creation of advertising communication, should be aware of copyright issues and legislation regarding the way advertising content is defined in order not to create misleading, comparative or unfair messages or even depreciating trademarks of competitors. In order not to reach courts and deal with legislation, contracts need to take place (Varka-Adami, 1995). Effort should be continuously made for the best possible presentation of advertising messages, respecting the consumer, the competitor, society, the creator, within a legal framework in the information age.

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