

Analysis of Surreptitious Advertising: How Does It Become An Increasing Trend?

Authors: Gönenç Gürkaynak, Esq, Metin Berat Ataseven and Nazlı Gürün, ELIG Gürkaynak Attorneys-at-Law

ABSTRACT

Advertisements play a central role in today's commercial world, both for the companies engaged with the advertising sector and their effects and impact on consumers. For businesses, it is an essential and instrumental tool for introducing their products/services to potential and existing customers, as well as for sustaining their financial resources; whereas for consumers, advertising serves as a driving force in guiding them toward products/ services, while also giving rise (at times) to a variety of controversial topics. For these reasons, the advertising sector is often scrutinized by regulatory authorities and is subjected to a variety of limitations and restrictions for the purpose of protecting consumers who have no discernible control over the marketing activities they become subjected to. Along with the current developments in the modern global economy and the fierce competition engendered by them, technological advances and growing internet use are also in a continuous progress, creating new platforms and mediums advertising activities can filter into and gradually permeate. These changes and advancements also bring the challenge of amending the current legislation in Turkey, especially for surreptitious advertising, having certain harmful effects on consumers. To that end, it can be argued that the existing legislation is deficient in terms of monitoring and detecting violations of advertising regulations that occur on these emerging platforms. This article aims to provide general background information and analysis on surreptitious advertising and its implementations in daily life in a legal context. Furthermore, the basic components and key characteristics of surreptitious advertising, the incentives underlying this activity, and its implementation in a variety of platforms will be illustrated. On that note, the definitions of advertising and surreptitious advertising will be provided, and then what surreptitious advertising really is will be discussed.

Finally, the ways in which surreptitious advertisements influence consumers in practice will be examined by focusing on examples.

KEYWORDS

Surreptitious, advertising, advertisement, consumer, law, Turkey.

I. General Overview of Advertising under the Turkish Legal System

Definition

Before delving into the details of what surreptitious advertising is, it would be useful to first provide some insight into the basic tenets of advertising law in Turkey, in order to gain a better understanding of the core subject and key issues addressed in this article.

As per the existing doctrine, advertising is defined as a means of communication with the purpose of promoting a product or service, whereas the relevant statutes generally define advertising as the promotion of products, services, activities or corporate identities (*i.e.*, brands) through verbal, visual or written communication tools, among numerous other regulations that address the scope of “advertisements” such as Article 3/f of the Regulation on Turkish Radio and Television Supreme Council and Article 4/h of the Regulation on the Principles and Code of Practice of Commercial Advertisement and Announcements (Yaşar, 2011). To that end, the fundamental pieces of legislation regulating advertisements under Turkish laws include, *inter alia*, the Consumer Protection Law No. 6502 (“**Law No. 6502**”), the Law on the Establishment and Principles of Radio and Television Broadcasting No. 6112 (“**Law No. 6112**”), the Turkish Commercial Code No. 6102 (“**Law No. 6102**”), together with the Commercial Advertisement and Unfair Trade Practices Regulation No. 29232 (“**Commercial Advertising Regulation**”), extensively regulating and overseeing all aspects of commercial advertisements.

In view of this legal framework, we observe that there is no single commonly accepted definition of “advertisement,” as it concerns various legal matters. Thus, advertising activities are approached and handled in various ways by several law branches, including but not limited to contract law, intellectual property law, and consumer law. Nevertheless, it can be stated that there exists a commonsense of definition of “advertisement,” which is as follows:

“Advertisement serves as a mutually beneficial method for producers who aim to inform or influence consumers, and for consumers by way of directing them to make the most suitable choices with regard to the relevant products or services” (Pinar, 2008).

Components of Advertising

The types of advertising activities can be initially divided into two groups, as (i) commercial or (ii) non-commercial advertisements. Non-commercial advertisements generally consist of advertisements that are embarked upon with the intent of raising public awareness (e.g., advertisements relating to charities), thereby contributing to the public interest without seeking any commercial interest. On the other hand, commercial advertisements can be defined as any type of advertisement that seeks to gain a commercial interest, hence is undertaken for the purpose of eventually earning profits (Erol, 2018, p. 5). Taking a more in-depth approach to commercial advertisements from a consumer law perspective, it could be stated that the goal of commercial advertising activities, in broad terms, is to convince the consumer to enter into an agreement with the advertiser (Aydoğdu, 2015).

As for the basic components of advertising, the four fundamental elements that comprise an advertisement come to the forefront as commonly accepted and acknowledged by the authorities and practitioners, which are discussed below:

The first component of an advertisement is the *intention of advertising*. For an advertisement to be categorized as a commercial activity, it must (i) intend to influence and direct the target consumer group, and (ii) it must carry the purpose of achieving a material benefit, since advertisements aim to generate demand for the subject product/service (Erol, 2018, p. 28). To elaborate further, an advertisement must raise consumers’ awareness and convey a message to create a desire in consumers to enter into an agreement concerning the subject product/service and obtain a benefit in return. We observe that the role of remuneration in determining the intent of advertising is a relatively grey area, as respective legislative regulations have failed to establish a unanimous rule on this issue, leaving the matter unsettled and leading to some controversy. For instance, the Commercial Advertising Regulation does not mention remuneration in its definition of advertisement, whereas the Law No. 6112 includes remuneration (or similar types of compensation) as part of the definition.

The second component of an advertisement is the *message of the advertisement*. As advertisements aim to introduce products/services to consumers, they also seek to convince those consumers to buy them, by way of informing and influencing them, and they utilize the message(s) contained within the advertisement to achieve this purpose. Such messages could pertain to the properties of the advertised product or service, its preferable or superior features, as well as usage, origin, price, purposes, quality, or other features (İçöz, 2008). These messages are usually directed toward the “average consumer,” although it is possible to target a particular group as well, depending on the purpose of the advertisement, which has introduced the concept of “*customized advertisements*” that are conveyed to specific groups of consumers (Tekelioğlu, 2016, p. 13).

The third component is the *medium of the advertisement*, which is required for advertisements to make contact (*i.e.*, communicate) with consumers. Television, radio, newspapers, the internet, billboards, catalogues, books and social media are, *inter alia*, all considered and used as advertising mediums (Tekelioğlu, 2016, p. 13). Each day these mediums evolve and improve and their numbers and variety increase correspondingly. As the Commercial Advertising Regulation does not specify or provide a strict definition of “medium”, it is argued that any and all platforms could fall under the term “advertising medium,” provided that the message is delivered through the platform to the consumers. It has also been suggested that there are no limitations as to the type of advertising platform to be employed, or even the requirement to utilize one, within Article 4(n) of the Commercial Advertisement Regulation. According to this argument, a face-to-face promotional activity, for instance, could also be considered as an advertisement, even though no tangible platforms would be used for this activity.

The fourth essential component is the *identifiability of the advertiser (i.e., source of the advertisement)*: The identity of the advertiser must be disclosed within the advertisement, in order for the advertisement to reach its goal and attain its expected utility. This disclosure can be carried out through any means (such as mentioning the commercial name of the advertiser or the name of the product/service), as long as the disclosure ensures that consumers are able to clearly identify the advertiser.

Board of Advertisement

The competent body assigned with the authority and responsibility to ensure that the Turkish advertising market operates smoothly and in the interest of consumers is the “Board of Advertisement” (“**Board**”). The Law No. 6502 sets forth the scope of the Board’s authority which includes (i) determining advertising principles, (ii) protecting consumers by assessing the compliance of advertisements with the relevant principles and legislations, and (iii) penalizing advertisers for any type of violation. The Board is authorized to rectify and/or rectification and ban the noncompliant advertisements, and to impose monetary fines on advertisers responsible for the infringing advertisements. On that note, the decisions of the Board are publicized by the General Directorate of Consumer Protection and Market Supervision, to inform the public and raise awareness regarding these violations.

Article 61/2 of the Law No. 6502 expresses that commercial advertisements must be fair, honest, and comply with public morality, public order and personal rights, as well as the principles determined by the Board. To that end, all advertisements must comply with the relevant legislations, even though they are not mentioned under the foregoing (Şahinci, 2014). Simply put, the main principle for advertisements is the requirement to be fair, honest and not misleading, in order to protect the interests of both consumers and advertiser’s competitors (Şahinci, 2014).

Accordingly, the Commercial Advertising Regulation sets out detailed requirements that advertisements must satisfy in order for them to be deemed “fair and honest.”, which include: (i) taking into consideration the perception level (*i.e.*, discernment and awareness) of the average consumer and the possible effects of the advertisement, (ii) avoiding breach of confidence or exploitation of lack of knowledge or experience on consumer’s part, and (iii) not violating the fundamental rules listed under Article 5 of the same. Yet another obligation to be fulfilled by advertisers is that they must ensure their own identifiability by the consumers. In other words, consumers must be able to view or experience the advertisement with the knowledge that it is, indeed, an advertisement. It is of significance that the Commercial Advertising Regulation uses the term “average consumer” instead of the term “consumer,” which it defines as “*real persons or legal entities who possess information within reason while engaging in consumer-related transactions or activities without seeking any commercial benefits*” under Article 4/1 (j). With

respect to the prevention of unfair competition, the Commercial Advertising Regulation prohibits (i) discrediting of competitors' products or services, (ii) unfairly taking advantage of competitors' reputations, and (iii) any type of imitation.

Taking into consideration the foregoing and in view of the Board's past operational activities in conjunction with its declared aim of protecting consumers, one may reach the conclusion that surreptitious advertising can be regarded as problematical in Turkey.

II. Surreptitious Advertising

Definition

When the Law on Consumer Protection No. 4077 was still in force (before the enactment of the Law No. 6502), there was some legal uncertainty in terms of the definition of "surreptitious advertising," as there was no direct or clear-cut definition of the term within the relevant legislation. The Law No. 4077 simply prohibited surreptitious advertising, without defining surreptitious advertising. Following the implementation of the Law No. 6502, in line with the criticisms and suggestions pertaining to the legislation, such legal uncertainty has fortunately been eliminated. Article 61/4 of the Law No. 6502 defines surreptitious advertising as, "[I]ncluding or promoting trade names or company names within articles, news, broadcasts or programmes for the purpose of advertising, by way of using names, trademarks, logos or other distinctive shapes or expressions pertaining to the products or services, without explicitly disclosing or clearly expressing that it is an advertisement." The exact same definition can also be found in Article 4/1(k) of the Commercial Advertising Regulation.

On the other hand, the Law No. 6112 adopts a different approach to the definition of surreptitious advertising, referring to it as "*hidden commercial communications*." Accordingly, as per Article 3/1(g) of the Law No. 6112, hidden commercial communications include "*promotions of commercial activities, trademarks, trade names, services and products of the manufacturer of a product or service through words or images within the programmes broadcast by a media service provider for the purpose of advertising a product or service or in a way that can channel or influence public opinion, outside of commercial breaks and without using any sounds or images to disclose the act of advertising*." Doctrinal opinions on the matter generally suggest that both terms have the same legal meaning (İnal, 2008, p. 43). However, there are

opposing viewpoints, arguing that the term “hidden advertisement” applies to a broader range of activities, as the recent amendment of the Law No. 6112 adopted and included various other terms, such as “product placement” and “subconscious techniques.” Moreover, the definition put forth under the Law No. 6112 does not require the *intent of advertising* (Erol, 2018, p. 43).

In addition to the foregoing regulations, the principle of the *identifiability* of advertisements has been adopted and implemented by many other legislations and institutions. For instance, the Advertising Self-Regulatory Board, which is an institution established for the purpose of implementing the Code of Advertising Practices of the International Chamber of Commerce, adopted this principle through Article 9 of the Law No. 6102. Relatedly, in one of its decisions, the 13th Chamber of State Council stated that the purpose of the legislation requiring advertisements to be identifiable is to prevent consumers from being caught off guard (13th Chamber of State Council, 2005).

To briefly examine surreptitious advertising from an “unfair competition” standpoint, the main principle introduced by the Commercial Advertising Regulation is for advertisements to be honest (*i.e.*, truthful). In parallel with this principle, as explained above, one of the main components of advertisements is the disclosure that informs consumers that they are being exposed to advertising, also ensuring the identifiability of the advertiser. Therefore, advertisements that fail to meet the foregoing criteria are considered to be dishonest (Özdemir, 2013). On the other hand, Article 55/1(a) of the Law No. 6102 clearly stipulates that dishonest advertisements constitute unfair competition, giving competitors the right to request compensation for damages arising from surreptitious advertising activities.

The Prerequisites of Surreptitious Advertisements

The prerequisites of surreptitious advertisements can be divided into three intrinsic elements, in addition to those pertaining to advertisements in general, as follows:

(i) *Absence of disclosure*: The most characteristic feature of surreptitious advertisements is the absence of disclosure, where advertisers fail to provide consumers with any warnings or disclosures concerning the fact that they are being advertised to (*i.e.*, identifiability and awareness of the advertisement). As an alternative method to conventional advertising strategies, advertisers sometimes resort to deliberately subjecting consumers to advertisements without any

warning or disclosure, and compel them to see advertisements during time periods and through platforms that consumers do not prefer, thus denying them their basic right to choose not to be exposed to advertisements.

(ii) Promotions outside the advertising area: The Law No. 6112 stipulates in detail the general rules regarding the manner, platform (*i.e.*, medium), and timing of advertising activities, which advertisements must conform to. The main framework of these rules is that advertisements must be shown only during advertorial periods (*i.e.*, commercial breaks) and consumers must be alerted at the beginning and end of such commercial breaks. The Commercial Advertising Regulation, on the other hand, regulates the visual aspects of advertisements, such as the size and color or positioning of texts within advertisements. However, failing to satisfy the requirements set forth in the Commercial Advertising Regulation will not constitute surreptitious advertising on its own, as the main element with regard to the foregoing requirement is that consumers must be informed that they are being exposed to advertisements.

(iii) Displaying features of a certain product/service with the intent of advertising: Since the *intent of advertising* constitutes the subjective prerequisite of surreptitious advertising, it must be determined separately on a case-by-case basis. Some commentators have argued that the intent of advertising can be detected by taking into consideration the perspective of a rational person with common sense, although it is possible that a communication could still be considered as an advertisement, even if there were no intent of advertising (İnal & Baysal, 2008, p. 46). Disproportionality is another (and much more objective) criterion with regard to detecting the presence of intent of advertising. It is relatively easy to detect or identify an advertisement when the product or service in question is discussed or promoted at length within a news report, or when the image or description of a product/service occupies a considerable amount of space in a newspaper column or article. For instance, in one of its decisions, the Board indicated that displaying a brand mark for a disproportionately long period of time during a programme constituted surreptitious advertising (Board's Bulletin, 2004). However, when assessing the *intent of advertising* requirement, the prerequisite of "displaying" a certain product or service should not be construed narrowly or interpreted in a strict sense. There could be scenarios in which an advertisement may not include the logo, trademark or trade name of the owner of a product or service, but can still be considered as an advertisement. Even if the communication

merely provides the contact details of the owner of a product/service (*i.e.*, telephone number, website, social-media account, etc.), the consumer will have been provided with sufficient access or exposure to the product/service, and the advertisement will have reached its goal.

Legality of Surreptitious Advertising and Representation of Products Falling Under the Scope of Surreptitious Advertising and Examples in Practice

As explicitly laid out within the preamble to the Law No. 6502, advertising plays a significant role in shaping consumer preferences and informing consumers. The preamble also states that advertisements should not be misleading, deceptive, or surreptitious. While surreptitious advertising can be a highly effective marketing technique for companies and advertisers, there is a strong argument that it also constitutes an unethical method for influencing consumers. This is because surreptitious advertising achieves this goal by exposing consumers to advertisements and influencing them without their knowledge or will, and also by flouting legislative regulations and limitations, rendering them impervious to inspection and oversight (Erol, 2018, p. 61). Another downside of the practice is that advertisers and advertising companies are able to avoid paying taxes and evade Radio and Television Supreme Council (“*RTUK*”) fees, leading to economic loss on the administrative side (Erol, 2018, p. 71). Furthermore, surreptitious advertising may also result in unfair competition between the competitors in a particular sector. In this context, Article 55 of the Law No. 6102 explicitly regulates that advertisements and marketing methods that violate the principle of good faith constitute unfair competition, providing several examples and illustrative practices. Without a doubt, an undertaking could easily surpass its competitors and cause serious economic harm, both in terms of influencing consumers and in terms of legislative sanctions and company expenses, by engaging in surreptitious advertising activities.

It could be contended that the main areas in which consumers are exposed to surreptitious advertising are (i) documentaries and (ii) news reports, as consumers’ confidence in overt advertisements has been declining and they have become fairly desensitized to the traditional methods of promotion/marketing of products/services (Erol, 2018, p. 62). As a result, since news reports are still perceived as trustworthy sources of information, they are particularly well-suited tool for surreptitious advertisements, as unethical as such practices may be (Aktekin, 2009). This is usually achieved by concealing the *intention of advertising* and by infiltrating consumers’

minds through the provision of extensive and detailed information on a certain product/service in the course of a purported news programme.

It can easily be observed that the rules concerning news reports protect the “audience for news” against its transformation into an “audience of consumers” through the use of surreptitious advertising within news reports. To achieve this purpose, the right to freedom of information has been curtailed to a certain degree. Article 1 of the Law No. 6112 asserts that ensuring and enabling the freedom of information is one of its primary purposes, while the Regulation on the Procedures and Principles of Broadcasting Services sets forth the main principles of broadcasting news and newscasts by adopting a similar approach. The freedom to receive and impart information is also regulated under Article 28 of the Turkish Constitution, where taking the necessary measures to ensure the freedom of information is listed as one of the obligations of the State. The right to provide information consists, in a broader sense, of the right to learn and gather information, as well as the right to provide and interpret such information, and to distribute information (Dönmezer, 2016).

Accordingly, “news” could be defined as providing up-to-date, accurate and objective information that concerns and affects a vast majority of the public, and could also be regarded as a social utility (Erol, 2018, p. 75). In this context, a news report could include, without limitation, information relating to social, economic, political or cultural events, as stated within the Regulation on Broadcasting Services. This information should always be accurate and truthful, and the importance of accuracy mostly comes to the forefront in relation to television broadcasts. However, the veracity and truthfulness of the information in news reports is a highly significant issue, which can easily be overlooked or disregarded. The objectivity of the news, on the other hand, plays the biggest role in distinguishing news reports from advertisements. News reports cannot deliver any comments regarding products/services, and they cannot direct or influence their audience toward a specific product/service, contrary to advertisements. This fundamental characteristic of news reports must also be put into perspective when a news report appears to consist solely of references to a specific trademark and/or product/service, in addition to scrutinizing the behavioral tendencies of certain news reports toward commenting on products/services and influencing their audiences.

Surreptitious advertisements can also be frequently detected in the realm of educational and informational broadcasts, such as programmes in which health issues are discussed, as well as cultural or travel programmes and platforms for personal discussions and opinions. In this regard, the principal legal restriction concerns advertising by healthcare professionals, which has been prohibited through a number of regulations such as the Disciplinary Regulations of the Turkish Medical Association, Business Ethics Rules of Medicine and Medical Deontology Regulations. By extension, the involvement of healthcare professionals in broadcasts, particularly in programmes in which health issues or products are being promoted or discussed, poses a significant legal risk, both in terms of surreptitious advertisements and in terms of advertising activities by healthcare professionals.

Culturally informative programmes present a different type of risk in this regard, though this danger is no less significant. Documentaries, travel writings (or videos), and discussion programmes on services, places or products can have a strong influence on consumers. In this context, the crucial point and key task of regulators would be to detect the *intent of advertising* with regard to such texts or programmes (Erol, 2018, p. 94). For instance, it would be considered quite normal and expected for a travel programme to introduce various places (such as restaurants, museums, or other entertainment venues) to its audience during the course of the programme; however, if the programme serves as an extended promotion, by presenting the name, logo, or trademark of a particular venue or introducing or openly complimenting its owners, such actions would surely guide consumers toward these venues and affect their travel choices. The influencing effect of such behaviour would surely be amplified if the programme in question was prepared, produced or hosted by a trusted and popular famous public figure. It should be noted that simply mentioning such companies, venues or places in the context of a travel programme would not constitute surreptitious advertising on its own; therefore, the crucial line between the *intent of providing information* and the *intent of advertising* must be carefully considered and sharply drawn when examining these types of programmes (Tekelioğlu, 2016, p. 87).

Relatedly, this brings up the question of surreptitious advertising through social media posts (e.g., Instagram, Facebook, YouTube), where users can promote a certain product or service without disclosing or identifying their posts as advertisements. This is a relatively new and

rapidly growing field, in which the legal boundaries are not as clear as they are in the case of traditional broadcasts. Delving deeper into this issue, we observe that social media posts that contain promotional material can be considered and treated as public relations (“PR”) activities, as PR activities require media communications to be conveyed to a key target audience. Companies and organizations aspire to share their messages by using written, auditory and visual PR tools, in order to reach the audience that their products or services are designed for. Consequently, it is safe to say that social media plays a substantial role with regard to delivering these messages to consumers, especially in an era in which second-screen applications are becoming more and more widely used, almost as second nature. In other words, the habit of passively watching television has been gradually giving way to the growing popularity of newer electronic devices and digital broadcasts. Generally speaking, it could be argued that PR messages only address a key audience, whereas advertisements openly disclose their intent to advertise and they are usually directed toward all consumers, as a result of (and as evinced by) their choice of medium. However, social media posts promoting certain products or services cannot be exempted from the restrictions and sanctions against surreptitious advertising solely because they are deemed as resulting from PR activities. In this regard, such promotional social media posts can be included within the scope of the regulations relating to surreptitious advertising, if the relevant promotional strategy includes viral sharing and displays micro-messages to followers or subscribers, who become and serve as consumers within this context (Çamdereli & Şener, 2018). Nevertheless, it would not be appropriate to jump directly to the conclusion that every PR activity automatically constitutes surreptitious advertising. For example, the business cards or letterheads of lawyers that appear within legal petitions should not be considered as surreptitious advertising (or even regular advertising), and they should not be held to violate the regulation prohibiting lawyers from advertising their legal services.

In this regard, the number of followers or subscribers that a social media user has plays an important role in evaluating the effect of the social media posts in question and in determining whether they serve as advertisements for consumers. Needless to say, the promotional effect of social media posts rise significantly when social media “influencers” with high numbers of followers promote certain products or services by sharing their personal experiences, especially in light of the current popularity and widespread usage of social media platforms. In this context, it is worth underlining a few essential points on this subject, including the recent proliferation of

surreptitious advertisements on social media platforms, and, in tandem with this problem, the challenges of detecting/identifying these surreptitious advertisements. The difficulty of detecting such surreptitious advertisements could stem from the limited reach and comparatively small size of the audience of each influencer. Furthermore, social media platforms are relatively new mediums, which could require further regulation and supervision in the future. It could well be argued that the social media posts of influencers allow their audiences to feel as if they are part of the influencers' personal lives, thus stirring a sense of intimacy and turning the influencers into trustworthy sources of information. Clearly, such "personal" advertisements would naturally be more successful and effective compared to regular advertisements in terms of influencing and guiding the commercial preferences of consumers. On the other hand, the freedom to gather and impart opinions on products, services or experiences, which is a fundamental component of freedom of information and freedom of expression, cannot be overlooked within the course of a "surreptitious advertising" assessment, provided that such opinions involve objective remarks and explanations without the intent of advertising.

Sponsorships and products placements are two simple (yet hard to discern) practices that bear certain similarities to surreptitious advertising activities. These two practices are, in fact, entirely legal, provided that they comply with all the provisions of their respective regulations and satisfy the relevant legal requirements, as opposed to surreptitious advertising, which is altogether prohibited by law. Sponsorships, which have historically been used as a distinct promotional method and which have existed for a longer period than product placements, are defined under the Regulation on the Establishment and Principles of Broadcasting as "all kinds of support provided to programmes by real persons or legal entities who are not affiliated with the broadcasting services or with the production of audiovisual works, for the purpose of promoting their name, trade name, logo, image, activities or products." In this regard, sponsorships may easily be confused with surreptitious advertising activities, even though they consist solely of support (of any kind) that is provided to an independent work, and although such an independent work is certainly required to be a programme or movie. The European Commission's Audiovisual Media Services Directive, which is the source regulation for the Regulation on the Establishment and Principles of Broadcasting, clearly states that information on the sponsoring person or entity must be disclosed by displaying their name, logo or product image at the beginning or at the end of the programme/movie, and strictly prohibits any other promotional

information from being disclosed, as well as forbidding the relevant information from being presented during the related movie or programme itself. Several additional requirements and rules of sponsorship activities can be laid out as follows:

- (i) The programme's name cannot fully or partially include the sponsoring person or entity's name;
- (ii) The editorial independence of the work cannot be interfered with;
- (iii) The supporting person or entity's products cannot be subject to product placement within the same programme;
- (iv) News reports and religious programmes cannot be sponsored.

Product placement could be defined as the complete opposite of sponsorship practices, for which many doctrinal definitions focus on the “*representation of a product within and during a programme.*” On the other hand, the Law No. 6112 defines product placement as “*all types of commercial communications where products, services or trade names are displayed during programmes, by way of incorporating or referring to them during the subject programme in exchange for remuneration or any other kind of compensation,*” without limiting the variety of items that can be displayed. Product placement was regarded and treated as a type of surreptitious advertising prior to the enactment of the Law No. 6112 in 2011, through which it was legally sanctioned and became a permissible activity. As with sponsorships, we observe that visual or auditory product placements appear mostly in television programmes or movies, since both practices require broadcasts or videos of a certain timespan for such advertisements not to seem out of place. In this context, the Law No. 6112 sets forth the types of programmes and platforms on which product placements will be allowed, as follows: (i) movies that can be streamed through cinemas or television, (ii) television series, (iii) sports and entertainment programmes, and (iv) radio broadcasts. Furthermore, the Law No. 6112 stipulates a number of rules that must be followed with respect to product placement activities, including: (i) the exclusion of product placements from children's programmes and religious programmes, (ii) the requirement that the disclosure relating to the product placement must be placed either at the beginning or at the end of the programme, and (iii) not emphasizing or focusing on the promoted product in such a way as to interfere with the integrity of the programme. Therefore, the essential factor differentiating product placements from surreptitious advertisements is that there is a

disclosure addressed to consumers in product placements, so that consumers will be alerted to the fact that they are being marketed to, and they will be aware of the presence of the advertising.

Taking into account the foregoing considerations, it is quite apparent that the detection of surreptitious advertising requires a delicate interpretation and examination of the advertisement in question. Such an examination would certainly involve determining whether the advertisement carries any intent or purpose of ensuring the sale or usage of a product/service and whether it is aimed at informing or influencing the key audience. However, in practice, this “purpose and intent” criterion is not so easily discerned, and, at times, not even adequately examined. As a result, trademarks that are routinely seen by consumers in daily life hardly ever appear in programmes, shows, or on the screen in general. In this context, the Board has been heavily criticized by commentators with regard to its tendency to excessively scrutinize the appearance of such trademarks or logos, and its overly rigorous and suspicious approach to surreptitious advertising, as discussed in detail below. As a matter of fact, it has even been argued that the Board has “declared war” against surreptitious advertising; commentators have warned, in this regard, that the Board must not lose its common sense (İnal & Baysal, 2008, p. 43).

Moreover, icing, hazing, pixelization and various other methods are frequently used in order to censor trade names, logos or symbols for the purpose of preventing surreptitious advertising on visual media, particularly in television broadcasts. In contrast to the Board’s approach, it could be argued from a different perspective that censoring certain trade names or symbols is not a sufficiently effective method in terms of preventing or thwarting surreptitious advertising in this day and age, when distinctive commercial features of products and services are recognizable as a whole, along with their physical appearances (Şua, 2017). In other words, it may not be possible to prevent surreptitious advertisements simply through censoring a symbol, without covering or concealing all components that carry or represent the brand’s equity. There are numerous examples of figures, shapes, models, or forms relating to brands that surround the entirety of the relevant products, rendering them distinctive and identifiable without having to include a logo, brand or company name. Consequently, it becomes manifestly more difficult to censor or cover the discernible features of products at times, especially with respect to moving images (*i.e.*, TV shows or movies). It can be persuasively argued that the appearance of trademarks with logos or symbols (or even words) should be accepted and recognized as a legal practice and not deemed

to constitute surreptitious advertising within the flow of daily life. To provide an example, we often come across smartphones in movies that tell realistic stories about real persons and which take place in the present, due to the constant presence of smartphones and their great significance to our daily lives. Censoring smartphones in movies or TV shows or excluding them altogether from such fictional constructs would be absurd, as the presence of smartphones in such fictional worlds is essential for presenting a realistic and authentic view of ordinary life in the 21st century to the audience.

Another important aspect of this thorny issue pertains to the limitations included within the definition of an “advertisement.” Voices, sounds, melodies or certain word clusters might constitute advertisements as well. This is because the Industrial Property Law No. 6769 acknowledges the “trademark value” of sounds and thus makes it possible to register them as trademarks (Erol, 2018, p. 53). Accordingly, such trademarked sounds should also be subject to the rules and sanctions regarding surreptitious advertising activities, as this limitation undermines the related regulations and weakens their purpose and effectiveness.

It should also be noted that informal reviews or sharing of information relating to specific sectors could also be considered as analogous to news reports. This is because information on companies or establishments (including their names) and interviews with persons who are involved with or related to these establishments would inevitably be published within such reviews or informational notes. In a similar vein, talk shows pose yet another problematic situation with regard to mentioning or discussing the trademarks or services of specific companies. Needless to say, the disproportionality factor would need to be taken into consideration when detecting the existence of surreptitious advertising in these types of situations, as it is crucial to accurately draw the line between complimenting or promoting a product/service and merely providing objective information.

Taking into account all the variable and circumstantial information, it is safe to say that the most suitable approach to combating surreptitious advertising would involve subjectively evaluating the level of prominence of the discernible features of the investigated product/service within the relevant platform on a case-by-case basis, in order to accurately determine *the intent of advertising*. This becomes particularly relevant and apparent in the case of television broadcasts, which are generally heavily scrutinized by the Board without being thoroughly examined to

determine the intent of advertising. Needless to say, this strict regulatory approach carries potential risks with respect to infringing on the broadcasters' and the public's right to freedom of press and to freedom of expression (İnal & Baysal, 2008, p. 44).

Incentives for Surreptitious Advertising

In order to comprehend the incentives underlying surreptitious advertising practices, the role of advertisements in our daily lives and the growth and progress of the advertising sector should be thoroughly analyzed, as well as observing the approach and perspective of consumers with respect to advertisements.

It could be convincingly argued that advertisements have lost their reliability and noticeability in terms of the consumers' interest and attention, where consumers have become so desensitized to advertising that they are actively looking for ways to avoid advertisements altogether. In this context, the Television Viewing Habits Research Study, conducted by RTUK in 2018, lays out the current status of the consumers' approach to advertisements in detail. The report published by RTUK indicates that the frequency and length of advertisements is the primary complaint of the viewing public with respect to advertising activities, followed by the misleading nature of advertisements, which was identified as a secondary consumer complaint.

With regard to the low ratings of advertisements that are broadcast on television, it can be safely declared that the issue arises out of the ability of consumers to easily avoid advertisements by changing channels (*i.e.*, "channel surfing") or by focusing on second-screen applications through smartphones or tablets during commercial breaks (Soydemir, 2014). Similarly, on social media platforms, consumers are usually given the option to skip advertisements without being forced to watch them until the end. Moreover, as consumers are keenly aware of the fact that they are viewing advertisements during advertorials or commercial breaks, they automatically adopt a skeptical approach to the information that is communicated to them through advertisements. In parallel with this tendency, it is plainly clear that news reports (or celebrity posts on social media platforms) have a stronger effect on consumer behaviour, simply as a result of their presumed sincerity and perceived authenticity, which has also been demonstrated by research studies (Anderson, 2006). In this context, another problematic issue arises out of the prohibitions and

restrictions imposed on advertising activities for certain sectors and product types, primarily relating to alcoholic beverages, tobacco, and medicines or healthcare services.

As a result of (i) consumers' conscious avoidance of advertisements, as well as (ii) various impediments and restrictions relating to advertising activities, and (iii) fierce competition in the marketplace, which leads to new products being put into market almost on a daily basis, companies and advertisers whose survival and financial conditions depend heavily on the ratings of advertisements have begun to develop new strategies and started resorting to alternative advertising methods, including surreptitious advertising. In time, surreptitious advertising has proven itself to be a beneficial and feasible advertising technique in a number of ways. This fact is also pointed out and attested by the preamble to Article 55 of the Law No. 6102, which declares that companies employ various methods to influence consumers' purchasing decisions within highly competitive environments in order to increase their sales; however, the preamble also asserts that these methods and strategies should be employed in a fair manner and should not include surreptitious advertising.

Sanctions

The administrative sanctions for surreptitious advertising are regulated within Article 77/12 of the Law No. 6502 giving the Board has a wide range of options in this regard. In addition to the sanctions stipulated for noncompliant advertisements in general, such as rectification and bans, the Board may decide to impose administrative monetary fines (ranging from TL 6,907 to TL 276,345 in 2018), which are updated on an annual basis, depending on the method by which the advertisement was broadcast (*i.e.*, on a national television channel, through a short message service, on the internet, etc.). Considering the relatively high level of administrative fines, it can be observed that the lawmaker seeks to ensure that surreptitious advertising regulations are strictly followed.

On that note, as per Article 61/7 of the Law No. 6502, these sanctions can be imposed on the advertisers, advertising agencies, as well as the medium operators, separately or collectively, depending on which party is determined to have breached the laws and regulations on surreptitious advertising in a particular case.

CONCLUSION

Since advertisements constitute a ubiquitous presence in our daily lives, it is no wonder that surreptitious advertising has become a popular practice adopted by companies seeking a competitive edge or a financial advantage, particularly in light of the fierce competition for the attention of consumers. Frequently encountered through various programmes, such as news reports and interview shows, surreptitious advertising has proven itself to be a significantly beneficial and cost-effective marketing tool for companies.

However, it goes without saying that surreptitious advertising violates the consumers' right to make their own decisions with respect to being exposed to advertisements. Moreover, surreptitious advertisements also influence consumers without their knowledge or will. As a less strictly regulated medium, internet sites (and social media platforms in particular) are especially vulnerable to surreptitious advertising, since it is even more challenging to ensure the compliance of advertisements in the digital realm with the rules and regulations relating to advertising activities. Consequently, the Board's perspective on surreptitious advertising and its approach to this matter is fairly strict, partly in reaction to the widespread implementation of surreptitious advertising practices by companies. In this regard, it could be safely concluded that the related legislation is in dire need of an update, so that the relevant laws can be adapted to most recent technological and social developments, both for the sake of consumers and companies operating in this vital sector.

Article contact: Gönenç Gürkaynak, Esq.

Email: gonenc.gurkaynak@elig.com

(First published by Mondaq on May 1, 2019)

REFERENCES

Book

- Aydođdu, M. (2015). *Tüketici Hukuku Dersleri*, 1st edn., Ankara, Turkey
- Dönmezer, S., Bayraktar, K. (2016). *Basın Hukuku*, 6th edn., Istanbul, Turkey
- Erol, A. (2018). *Türk Hukukunda Örtülü Reklam*, 1st edn., Istanbul, Turkey
- Tekeliođlu, N. (2016). *Tüketicinin Korunması Açısından Hukuka Aykırı Reklamlar*, 1st edn., Istanbul, Turkey
- İnal, E., Baysal, B. (2008). *Reklam Hukuku ve Uygulaması*, 1st edn., Istanbul, Turkey
- Yaşar, A. (2011). *Televizyon Reklamlarının Hukuki Niteliđi ve Televizyon Reklamları Üzerinde Hak Sahipliđi*, 1st edn., Istanbul, Turkey
- Pınar, H. (2008). *Reklam Hukukunun Esasları, Turgut Akıntürk'e Armađan*, 1st edn., Istanbul, Turkey
- Özdemir, S. S. (2013). *Haksız Rekabet Kavramı Açısından Dürüstlük Kuralına Aykırı Reklamlar* 1st edn., Istanbul, Turkey

Journal

- Şahinci, D. (2014). 6502 Sayılı Yeni Tüketici Kanunundaki Reklam Hükümlerine Eleştirel Bir Bakış. *Terazi Hukuk Dergisi*, [online] Volume 9(89), pp. 97-109. Available at: <https://jurix.com.tr/article/2130> [Accessed 30 September 2018]

Internet Sources

- Anderson, C. (2006). *Recall and Recognition of Brand Modified Product Placement in Movies* [online] CiteSeerX Available at: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.1003.8134&rep=rep1&type=pdf> [Accessed 22 February 2019]
- İçöz, D. (2008). *Aldatıcı Reklamlara Karşı Tüketicinin Korunması*, Yayınlanmamış Yüksek Lisans Tezi, Ege Üniversitesi Sosyal Bilimler Enstitüsü
- Çamdereli, M., Şener, N. K. (2018). *Örtülü Reklamın Örtüsünü Aralamak*, [online] DergiPark Available at: <http://dergipark.gov.tr/download/article-file/497233> [Accessed 22 February 2019]

Aktekin, U., Gürbüz, B. (2009). *Türkiye’de Örtülü Reklamlar ve Uygulamadaki Durum*, [online] Ankara Barosu Available at:

<http://www.ankarabarusu.org.tr/siteler/ankarabarusu/frmmakale/2009-4/2.pdf> [Accessed 22 February 2019]

Soydemir, G. (2014). İkinci Ekran Uygulamaları ve Örtülü Reklam, *Terazi Hukuk Dergisi*, [online] Volume 9(89), pp. 724-730. Available at: <https://jurix.com.tr/article/2750> [Accessed 30 September 2018]

Şua, M. F. (2017). Örtülü Reklamların Yasaklanmasının Marka Hukuku Bakımından Değerlendirilmesi, *Yeditepe Üniversitesi Hukuk Fakültesi Dergisi* [online] Volume 13(2), pp. 45-68. Available at: <https://jurix.com.tr/article/11841> [Accessed 30 September 2018]

Cases

Board’s Bulletin (2004) No. 109, Decision No. 20

State Council (2005), 13th Chamber, Decision No. 2005/4856 E. 2005/7449 K.