

DOCTORAL DISSERTATION SUMMARY

Title: *Polish legal restrictions on surreptitious advertising against a comparative background*

Dissertation author: Joanna Radziszewska, MA

Dissertation supervisor: Dr. habil. Paweł Sut

Faculty of Law and Administration, University of Gdańsk

Advertising is one of the most important marketing instruments of significant impact, serving to attract wide a range of customers and, at the same time, supporting the financing of media activity¹. The dynamic development and creation of various new forms of advertising in the last two decades have, paradoxically, contributed to a decrease in its effectiveness as a marketing tool. Entrepreneurs have thus been intensively searching for means of facilitating the process of reaching the widest possible range of potential buyers². One of these means is precisely surreptitious advertising (hidden advertising)³.

The considerations presented in the dissertation address the legal restrictions on surreptitious advertising contained in Polish law, in confrontation with the relevant European, international and selected foreign regulations. These regulations do not entail simple descriptions of the issue indicated and the legislative solutions adopted in this regard. The normative analysis (carried out on the basis of the applicable regulations, statements of doctrine and decisions of the jurisprudence), in particular, extends beyond the area of the provisions directly addressing the legal restrictions on surreptitious advertising.

The work begins with a brief introduction to the subject matter addressed. Chapter 1 then outlines the issues of key importance in the construction of the work. The first subsection (1.1.) provides a rationale for the choice of the research topic and a brief explanation of why

¹ E. Nowińska, *Zwalczanie nieuczciwej reklamy. Zagadnienia cywilno – prawne*, Kraków 2002, p. 11; J. Masiota, *Wolna reklama i jej normatywne ograniczenia*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2000, Vol. 2, p. 65; M. Sieradzka, *Reklama ukryta* [in:] M. Zdyb, M. Sieradzka (eds.), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz.*, Warszawa 2016, pp. 881-882.

² E. Nowińska, *Ukryta reklama. Lokowanie produktów* [in:] M. Kępiński (ed.) *System Prawa Prywatnego. Prawo konkurencji*, Vol. 15, Warszawa 2014, p. 479; M. Namysłowska, K. Sztobryn, *Zwalczanie nieuczciwej reklamy ukrytej w prawie polskim i niemieckim* [in:] M. Namysłowska (ed.), *Reklama. Aspekty prawne*, Warszawa 2012, p. 217.

³ The work employs the terms ‘hidden advertising’ and ‘surreptitious advertising’, as well as ‘hidden advertising message/communication’, ‘hidden commercial message/communication’, ‘hidden message of a commercial nature’ interchangeably when referring to hidden advertising.

surreptitious advertising has gained prominence in the last two decades. It also indicates the reasons for the legislature's interest in bringing such communication under legal control. The second, extremely important issue, presented in Chapter 1, pertains to the scope and focus of the study and the definition thereof. The focus is on the legal limitations of surreptitious advertising contained in Polish law, juxtaposed with the relevant European, international and selected foreign regulations. Subsection 1.2 also briefly introduces the content of the work, emphasizing the issues analyzed in each section. In the third subsection (1.3.), the objectives of the research are defined, by indicating the problems considered in the work, which include the following issues: (I) surreptitious advertising as a legal concept; (II) the failure of the law, including the legal regulations on hidden advertising, to keep up with the development of new technologies and digital media; (III) determination of whether and what difficulties exist in terms of normative qualification of surreptitious advertising in Polish law; (IV) the identification and description of the social values justifying the legal prohibition of surreptitious advertising; and (V) the need to formulate possible *de lege ferenda* postulates with regard to this phenomenon. The next, fourth subsection of Chapter 1 (1.4.) presents the main and specific research problems and hypotheses, which have been developed based on the research objectives indicated in subsection 1.3. The starting point for the considerations carried out in the work entails the belief a need exists for legal regulation (restriction) of hidden advertising. On this basis, the main research problem was formulated, to determine the optimal shape of the surreptitious advertising ban, which should be adopted in the current provisions of Polish law. The specific problems, on the other hand, pertain to: the desirability and possibility of adopting a single, universal legal definition of surreptitious advertising; the process of identifying this phenomenon among different types of communication and promotional means, including the difficulties accompanying it; the current legal scope of the ban on hidden advertising in Poland; as well as the values underlying this ban, and the regulation of the status of such content in modern digital media, particularly on the Internet. The last of the subsections making up Chapter 1 of the dissertation presents the research methods used, which include: dogmatic, comparative and historical methods. It should be noted that the comparative considerations are of a limited nature yet constitute a confrontation of the Polish regulations with selected exemplary European, international and foreign norms. The study also includes a comparison of the legal regulations on various related institutions relevant to the subject matter of this work with hidden advertising. The historical analyses outlining the brief genesis of advertising, surreptitious advertising and the related legal regulations, particularly those contained in Polish law, are of similarly limited scope.

Chapter 2 presents the subject aspect of advertising and surreptitious advertising (as a concept closely related to goods and services offers - functioning in Polish language, and as a legal concept - functioning in legal and jurisprudential language), including a brief genesis of these phenomena. These aspects have been subjected to additional considerations, as social and market phenomena, as well as legal concepts, against the background of adopted legislative solutions, doctrine and case law. The subject of consideration in this chapter additionally entails the legal definitions of surreptitious advertising contained in the acts of Polish, EU and international law, as well as the regulations developed by the jurisprudence of Polish courts and the Court of Justice of the European Union. To supplement the reflection, surreptitious advertising is presented against the background of related phenomena, such as placement, native advertising or subliminal message, in particular. The hidden commercial communication has been shown here through different approaches, so as to highlight its distinctiveness from other marketing means more explicitly. The legal matter of surreptitious advertising has been presented in Chapter 2 as a phenomenon which occurs in various media, both those defined as ‘traditional,’ i.e., radio, television and newspapers, as well as those defined as ‘new,’⁴ such as social networks, instant messaging and mobile applications. The issue of inconsistent, but relating to hidden advertising, nomenclature in Polish, EU and international legal acts has been highlighted as well. In addition, the Chapter presents the reasons underlying these differences, and discusses the matter of whether they constitute an impediment to the interpretation of the provisions normalizing the issue.

Chapter 3 of the dissertation is devoted to each of the entities involved in the process of creating and disseminating surreptitious advertising, including the recipients thereof. The status of those entities has been analyzed in the context of the current legislation (legal analysis of the subjective aspect of the issue). A separate consideration has been given to the addressees of such communication, the legal situation thereof, and way in which covert advertising may affect them. The Chapter additionally analyzes the nature of the links between the participants in the process of surreptitious advertising creation and dissemination,

⁴ Many authors have formulated definitions of what is meant by ‘new media,’ as it is a very topical issue, e.g., M. Szpunar, *Czym są nowe media – próba konceptualizacji*, „Studia medioznawcze” 2008, No 4, p. 32, R. Sajna, *Nowe media – perspektywy badawcze*, „Świat Idei i Polityki” 2010, Volume X, pp. 133-134 and O. Witczak, *Nowe media w budowaniu marki i wizerunku przedsiębiorstwa*, „Zeszyty Naukowe Uniwersytetu Ekonomicznego w Katowicach” 2013, No 10, p. 90. A definition by the Internetowa Encyklopedia Zarządzania [Internet Encyclopedia of Management] captures the dynamics of what new media is, by indicating that it is a concept the perception of which changes over time. The technological advances are occurring so rapidly that for many people the changes taking place due to the development of technology come as a surprise. The meaning scope of the term ‘new media’ has been changing rapidly. Fifty years ago radio and television were referred to in this way; now it is obsolete. Subsequent years have expanded the use of the term to include many other mass media, which, owing to digital technology, provide very high quality communication, accessibility, and at the same time are extremely functional.
https://mfiles.pl/pl/index.php/Nowe_media; dostęp: 07-06-2021.

as well as discusses the issue of whose interests, and in what manner, such communication violates. The considerations contained in Chapter 3 also constitute an introduction to the reflection (contained in Chapter 4) on the related value system.

Chapter 4 includes an attempt to reconstruct the axiology underlying the restrictions on the use of surreptitious advertising, justifying introduction of a ban on its use. It formulates a catalog of the most important values to be protected against such fraudulent activity, explaining how hidden advertising conflicts with those values. In order to organize and systematize the values discussed, the Chapter divides them by two different criteria. The first pertains to the type of entity (trader or consumer) whose interest is to be protected by the ban on surreptitious advertising, adopted as the key criterion, within which two groups of values have been distinguished (the values protecting B2B and B2C relationship interests). The second, in turn, is based on the type of the normative act by virtue of which a particular value is protected. A distinction can thus be made between the values protected by the Basic Law, ordinary laws, EU legal acts or acts of public international law.

Chapter 5 entails broad considerations of the surreptitious advertising legislative solutions adopted in Polish, EU and international law. These considerations are complemented by a presentation of exemplary related regulations adopted in selected countries. The first part of the Chapter focuses on the analysis of the legal ban on hidden advertising (5.1.), while the second includes considerations pertaining to the issue of legal liability for violation of this ban (5.2.). The Chapter additionally provides a comprehensive assessment of these solutions, in the context of implementing a catalog of the values reconstructed in Chapter 4.

The work ends with a section entitled 'Conclusions', which constitutes a recapitulation of the considerations carried out in the dissertation, followed by a synthesis of the verification of the hypotheses set, including the *de lege ferenda* postulates.