A French perspective on …
Misleading advertising campaigns for Internet access

Dr Christine Riefa, Senior Lecturer, University of Hertfordshire

Article published in (2003) Hertfordshire Law Journal 1(2) 23-29 – Available online ***http://www.herts.ac.uk/courses/schools-of-study/law/hertfordshire-law-journal/volume-1-issue-2-autumn-2003.cfm***

Introduction

Advertising can have a huge impact on consumer's purchasing behaviours and there is no doubt that this explains the colossal amounts spent each year by advertisers. However, advertising campaigns are designed to arouse customer's interest. They are hardly compatible with providing full and objective information to the consumer so that he or she can make an informed choice. The dangers of advertising are especially acute when it comes to subscribing to a service such as Internet access, where many of the technicalities such as modem capabilities, broadband or email box Mb size can be important factors in the decision process.

In an effort to protect vulnerable consumers, French law prohibits misleading advertising.

Article L121-1 of the French Consumer code[1] relating to misleading advertising states:

"All advertising comprising, in any form whatsoever, representations, information or presentations which are false or likely to mislead, is prohibited, where the latter cover one or more of the items listed hereinafter: existence, nature, composition, substantial qualities, content in useful principles, species, origin, quantity, mode and date of manufacture, properties, price and terms of sale of goods or services which are the subject of advertising, conditions for their use, results which may be expected from their use, reasons for sale or service provision, sale or service provision procedures, scope of obligations undertaken by the advertiser, the identity, qualities or aptitude of the manufacturer, retailers, promoters or service providers"[2].

Following the implementation of Directive 84/450/ECC of 10 September 1984[3], relating to the approximation of the laws, regulations and administrative provisions of the

[1] This article emanates from article 44 of the Royer Act of 27 December 1973, which created the offence of misleading advertising. Prior to this, an Act of 2 July 1963 prohibited false advertising. This legislation was not successful as the scope was rather reductive requiring demonstration that the professional had intentionally made a false statement to attract the consumer.

[2] Translation from www.legifrance.fr, with the participation of Henri Temple, Director for the Consumer Law Research Centre – Montpellier University, Avocat à la Cour and Geoffrey Woodroffe, Director for the Consumer Law Research Centre – Brunel's West London University, Solicitor.

[3] Official Journal L250/17, 19 September 1984. This text was implemented in the UK via the Control of Misleading Advertisements Regulations 1988 (SI 1988/915) which came into force on the 20 June 1988.

Member States concerning misleading advertising, this article was not altered since it already afforded sufficient protection to consumers[4].

Misleading advertising is criminal offence[5], and as such the constitutive elements of a misleading Internet access advert will necessitate the demonstration of the existence of an *Actus Reus* (I) and a *Mens Rea* (II).

I) The *Actus Reus* in misleading adverts for Internet access

To characterise the *Actus Reus* in the offence of misleading advertising, it must be shown that the litigious statement is an advert (A) and that it is misleading (B).

A) An advert

French legislation does not define what an advertisement is although the term is used in article L121-1 of the Consumer code. We must therefore find such definition elsewhere. Article 2(1) of Directive 84/450/EEC[6] concerning misleading advertising defines 'advertising' as the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations.

In French law, the Cour de Cassation[7] defined the notion as: *"any means of information seeking to allow potential clients to form an opinion on the characteristics of the goods or service offered"*. This is a rather loose definition allowing the application of the prohibition concerning misleading advertising to a large number of statements.

The adverts concerned by article L121-1 can indeed take many forms. For example, the offence will be constituted whether the statement is made either orally or in writing. For example, a label required by law[8], commercial documents[9], or indications contained in a catalogue[10] have all been defined as written adverts. Statements on a poster on public streets will also be considered an advertisement.

Specifically with regards to Internet access, the Versailles Court of Appeal considered that written statements on CD-ROM wrappings, in magazines and on television screens were to be considered as advertising[11]. But equally, the statements made by a

[4] For general developments concerning misleading advertising in France, see Jean Calais-Auloy and Frank Steinmetz, *Droit de la consommation*, 5th edition, Précis Dalloz, Dalloz 2000.
[5] Misleading advertising as a criminal offence attracts up to two years imprisonment and a fine of up to FRF 250 000. In addition, the maximum fine can be raised to up to 50 per cent of the total spent for the litigious advert, and the judge can order the publication of the decision in appropriate newspapers or magazines. This is a particularly adapted sanction as it can be used to draw attention in the same publication that the one that carried the misleading advert in the first place.
[6] Official Journal L250/17, 19 September 1984.
[7] The Cour de Cassation is the highest judicial institution in France. The term "publicité" or advert, was defined in a decision from the Criminal chamber from 14 October 1998. Crim, 14 october 1998, JCP, ed. E., 1999. 462, note Conte; D. 2000, som. 130, obs. Gozzi.
[8] Crim 25 June 1984, D85, 80, note Forgoux.
[9] Crim 21 May 1974, D74, 579, conclusions Robert.
[10] Crim 8 December 1987, RTDCom, 1988, 666, observations Hemard and Bouloc.
[11] CA Versailles, 21 November 2001, SNC AOL Bertelsman Online France v. SA Liberty Surf and SA T-Online, EBL April 2002, Volume 4, Number 3, p. 15.

sales representative[12] for the provision of Internet access, could be defined as advertising.

Misleading advertising can also concern the sale of goods or services, which off course, clearly includes the provision of Internet access to a consumer.

B) A misleading advert

To evaluate the misleading qualities of an advert, the judge has to refer to the average member of the target audience. For the European Court of justice[13], this means that the judge must take into account the presumed expectations, which it evokes in an average consumer who is reasonably well informed and reasonably observant and circumspect.

The target audience will therefore have to be carefully considered, as the expectations of the consumer may be different from one target group to another. For example, the advert placed on a specialised IT online discussion group, may not have to be so clear as to what Mb sizes or broadband connection may mean, compared to the same advert placed in a general consumer magazine[14].

Article L121-1 of the consumer code, prohibits plain lies, i.e. adverts containing false information altogether[15] as well as misleading advertising which without being false leads the consumer to believe in virtues that the product or service does not have.

When the advert is misleading it must concern one of the elements listed in article L121-1. Article 3 of the Directive 84/450/ECC of 10 September 1984[16] also introduces an indicative list of criteria, which if fulfilled would characterise a misleading advert. Unfortunately, the French text does not make article's L121-1 list an indicative one, but rather an exhaustive list requiring that at least one of the elements be fulfilled to prohibit the advert as misleading. Nevertheless, the French list is so wide that is has always managed to cater for all conceivable situations, especially since one criterion will suffice to characterise the offence.

Many adverts concerning Internet access can be caught under this branch of article L121-1. Those adverts that have stolen the judicial limelight have done so with regards

[12] Article L 121-1 also applies to oral statements made on television or radio adverts.

[13] ECJ 16 July 1998, C- 210/96, Gut Springenheide GmbH and Rudolf Tusky v.Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung, on Marketing standards for eggs - Promotional descriptions or statements liableto mislead the purchaser - Reference consumer.

[14] In all our case law examples, the target audience to consider was that of an average consumer, without particular knowledge in the ways of the Internet.

[15] For example, in 1997, at the premises of Internet access development in France, the provider World-Net was claiming in its commercial documentation that it was the *"first internet access provider in France with 25000 users and 23 access points"*. This information was in fact erroneous. Indeed, during the same period, a study conducted by the consumer association 60 millions de Consommateurs revealed that Compuserve had 75000 subscribers and CalvaNet also had 23 access points in France. This could have resulted in a condemnation in front of a court but the access provider withdrew the information before any complaints was made. Nevertheless it is highly likely that a court of law would have characterised that the statements were false and, giving the circumstances surrounding the offer of such service, opted for a prohibition and pronounced criminal sanctions. Indeed, at the time, Internet access was not very well developed and consumers only started discovering the Internet. Connections via local phone numbers was rare and claiming that 23 access points were available suggesting that World-net was the first provider could have unduly influenced some customers.

[16] Official Journal L250/17, 19 September 1984.

to protecting consumers mislead by statement of "gratuity of service" (1) or "unlimited access" (2).

1. Free Internet access

In order to illustrate the mechanics of article L121-1 with regards to defining the *Actus Reus* of the offence, we will use the example of an AOL advert. A few years back, in 1998, AOL was offering, on CD-ROM wrappers *"50 hours free connection*"*. A footnote, hardly visible at the end of the statement was referring consumers to restrictive conditions of use described at the back of the wrapper in small letters. This statement explained that:

"AOL is accessible from all metropolitan France for the price of a local telephone call. This offer comprises 50 free connection hours to use within 30 days from the first connection. At the end of the free trial period, you have nothing to do to continue with your subscription. You can unsubscribe at all times by writing to the above address. To benefit form the free trial offer to AOL, you must be over 18 and hold a valid credit card or bank account. This offer is reserved to one trial per address, in metropolitan France and until the 31/12/1998. This information is accurate as on 01/07/1998".

The offence of misleading advertising was constituted here on two counts: it was likely to mislead on the price and terms of sale of service (a) and on the conditions of use of the service (b).

a) Practice likely to mislead on the price and terms of sale of goods or services, which are the subject of advertising

Such an advert was likely to mislead on the price, as it claimed to be a free offer when it fact, the consumer had to pay for the telecommunications necessary to connect to the Internet and to the provider's service. The use of the term "free" was thus misleading.

Under French law, the term "free" should only be used when the service offered is totally free and does not hide any costs or incorporate them into the price of the service or product. The Paris Court of Appeal confirmed this last principle in 1999[17], deciding that the offence of misleading advertising was constituted in the case of the resale of modems with the mention that the cost of internet access was free, when in fact it was build into the price of the modem.

In 2001, the Versailles Court of Appeal went even further with regards to the use of the word "free" in the case of *SNC AOL Bertelsman Online France v. SA Liberty Surf and SA T-Online*[18]. Following this case, it can be inferred that the term "free" not only means that the free trial must be absolutely free of any hidden costs during the trial but that it must also be free of any costs following this period.

In this instance, AOL had launched another campaign, during the autumn of 2001, advertising a 20 hours trial offer, "free and without commitment" on all connection kit wrappers, radio, television, in magazines and on AOL's web site.

---

[17] CA Paris, 13e section A, 31 May 1999, X v. Ministère public, Com. Com. Electr. 2000, Number 33, p. 22, note Jean-Christophe Galloux.

[18] CA Versailles, 21 November 2001, *SNC AOL Bertelsman Online France v. SA Liberty Surf and SA T-Online.* See case commentary by Christine Riefa, EBL April 2002, Volume 4, Number 3, p. 15.

The 20 hours free trial offer, presented as 20 hours of Internet time completely free of charge was including communications costs. This was nevertheless deemed to be misleading by the judge as the statement suggested that the consumer would be without obligations at the end of the period, whereas in reality, the consumer was automatically locked into a contract unless and until AOL was informed. The consumer was also to pay all hours used over and above the 20 hours free trial.

This practice, known as "negative option", consists for the Internet access provider to proceed with the debit of the consumer's account at the end of the free trial period, considering that the silence kept by the consumer amounts to acceptation of the subscription. This practice is however extremely dangerous, especially since consumers are very badly informed. Free trial offers normally states the terms and conditions applicable at the end of the trial period in small character and do not provide for a reminder to be sent to the consumer explaining that unless he or she contacts the provider to cancel, they will be entering into a binding contract and be liable for the full amount of the subscription. It is therefore clear that the *Actus Reus* of the offence of misleading advertising will be constituted, the statement being likely to mislead on the price and terms of sale of services.

b) Practice likely to mislead on the conditions for the use of the service subject of advertising

The use of footnotes in adverts has always been slightly controversial. The referral to another statement may indeed be quite confusing and make it difficult to clearly understand what the offer contains. Nevertheless when those footnotes refer to statements simply to add more precisions, they are normally tolerated by law and by the BVP[19], providing that they can be read in normal conditions. That is, the mention should be horizontal, with a font size proportional to the size of the main statement.

In the AOL campaign from 1998, the use of a footnote to refer consumers to further conditions of use of the free trial was likely to mislead consumers, as it did not concern purely matters of details, but concerned information changing the conditions of use of the service. Indeed, the advert stated: *"This offer comprises 50 free connection hours to use within 30 days from the first connection",* when on the main side of the wrapper, the statement only mentioned *"50 hours free connection*"*. This referral had the effect of reducing the period during which the consumer could enjoy its free trial and as a consequence mislead on the conditions of use of the service, which at first glance appeared to be 50 hours without any other limitations.

Another AOL advertising campaign launched in 1999, offering *"100 hours! Free*"*, would have also be considered misleading[20], this time in the way the statement referred to by the footnote was presented to the consumer. In this advert, published in a magazine, the footnote was referring to a statement made on the left-hand side of the page. It was printed vertically forcing the consumer to turn the magazine around to be able to read. The font size was extremely small and the statement was in fact

[19] The BVP stands for Bureau de Verification de la Pubilcité. It is the professional body regulating the advertising industry in France.

[20] The Advertising Standard Authority in an adjudication of 12 December 2001 also deemed an identical campaign, for the UK market misleading. This case concerned a poster headlined "100 Hour Free Internet Trial". A footnote stated that the trial was open for one month only and that monthly subscription applied afterwards. The ASA considered that the advertisement was misleading because readers were likely to overlook such a small footnote and the statement would affect the reader's decision to respond to the offer. See www.asa.org.

obstructed as it was printed on the inside of the page. Only a careful opening of the magazine, loosening the glued binder allowed reading the statement.

2. Unlimited Internet access

Following the decision of the Versailles Court of Appeal in the case of *SNC AOL Bertelsman Online France v. UFC Que Choisir* [21], it is now clear that the use of the word "unlimited" on its own when the length of connections is in fact limited characterises the element of *Actus Reus* necessary to constitute the offence of misleading advertising. To illustrate this point we will first highlight the definition given by the judges to the word unlimited (a) and then proceed to see how the use of such term in AOL adverts was likely to mislead with regards to the existence, nature, substantial qualities, price and terms of sale of goods or services which are the subject of advertising (b).

a) The definition of the term "unlimited access"

During the summer of 2000, AOL advertised an all-inclusive (with connections and telephone charges) unlimited access package for a set amount per month. Prices varied depending on the length of the contract (12 or 24 months). The advert stated that with this subscription, customers could surf the net for as long as they wanted, without having to worry about the time spent online.

A victim of its own success, AOL was soon incapable of providing Internet access to all subscribers and had to install technical means forcing automatic log-offs after a set time. This was done through the use of timers, which were on the one hand modulating the length of sessions insuring a rotation amongst users at busy periods and on the other hand requesting users to confirm their presence online or face disconnection for inaction. This situation resulted in many unwanted disconnections and complaints from customers. UFC Que Choisir, a national consumer association sued AOL for misleading advertising.

In first instance, the Nanterre Tribunal[22] held that AOL's advertising campaign, in particular its use of "unlimited" was likely to mislead the consumer, rejecting AOL's argument that "unlimited access" meant that the customer could log on to the service as often as they wished and not that they could stay online continuously. The judge considered that the word unlimited meant "without limits".

The Versailles Court of Appeal[23] confirmed this definition concluding that in the absence of restrictions, AOL subscribers were entitled to stay connected to the Internet for as long as they wanted to.

However, in this case, the Appeal judge also decided that the "timers" limiting the duration of the connection could have positive impact on the consumer if they were used in times of total inaction only, i.e. when there is no traffic on both end. They could ensure the phone line to be free and more capacity allocated to active surfers.

He therefore controversially reformed the decision of the first judge on that point allowing AOL to keep using timers in situations where the line is unused by either

[21] CA Versailles, 14th chamber, 14 mars 2001, *UFC Que Choisir v. SNC AOL Bertelsman Online France*. See Christine Riefa, *Spotlight on French Cyberlaw: ISP headaches and evolving IP rights*, EBL September 2001, Volume 3, Number 8, pp. 9-12.
[22] TGI Nanterre, Ordonnance of 20 February 2001, Register Number: 01/00381, minute: REF/2001/466, can be consulted on www.Juritel.com
[23] Decision of 14 mars 2001.

parties. So whilst “unlimited” means “with no limits”, once the line is completely silent, AOL is entitled to limit the use of the connection it provides.

b) Term likely to mislead on the existence, nature, substantial qualities, price and terms of sale of goods or services which are the subject of advertising

The use of the term “unlimited” lead the consumer to believe that, in the ordinary meaning of the word, he or she would have access to the Internet with no restriction and would be able to go online at any time and for the length of time it chooses to. The fact that timers and other technical means where restricting this potential use was misleading. Should AOL wish to offer the possibility to connect how many times as the consumer wants but not for as long as he or she wishes to, it should have done so by rephrasing the advert. Since the advert was claiming offering unlimited access, it was misleading with regards to the existence, the nature and the substantial qualities of the service.

Also, since it was claiming a certain price for the facility of unlimited access, the advert was misleading consumers who were to receive a restricted service for a price they thought represented an unlimited service. Having known about the restrictions, consumers may not have been willing to pay such a price. The terms under which the service was provided were also erroneous since the terms and conditions did not mention those possible restrictions in service use.

The material element necessary to realise the offence was therefore more than satisfied[24] and the advert rightly qualified as misleading. This was off course, if the existence of the *Means Rea* attached to the offence was to be established.

II) The *Means Rea* in misleading adverts for Internet access

With regards to *Means Rea*, the offence of misleading advertising has evolved drastically in French law over the last 40 years. First conceived as an offence for false advertising by the Act of 2 July 1963, it required the demonstration of an intention to deceit and the advertiser’s bad faith had to be established. With article 44 of the Royer Act of 27 December 1973, the offence became one of misleading advertising, rendering such demonstration redundant once the offence was constituted if the materiality of the offence could be proven.

Since 1994, a radical reform of the French penal code has disposed of the category of material crimes, constituted by the only demonstration of the existence of the facts, since it states that they are no crimes or offence without any intention to commit them. However, in cases where the law made dispositions there can be offences in case of recklessness, carelessness or deliberate endangerment of others.

In addition, article 339 of the Act of 16 December 1992[25] relating to the entry into force of the New penal code in 1994, stated that all non-intentional offences that were reprehensible before the entry into force of the present law remain constituted in cases of recklessness, carelessness or deliberate endangerment of others, even if the law does not expressly make provisions to this effect.

[24] As we previously mentioned, only one of the listed criteria is necessary to characterise the offence. We had here 4 criteria fulfilled.

[25] Loi number 92-1336 of 16 December 1992 relating to the entry into force of the new penal code and to the modification of certain penal law and procedural clauses necessary by this entry into force, JO 23 December 1992.

Therefore, there is today no requirement of bad faith (A) and objective recklessness suffices (B).

A) No requirement of bad faith

The advertiser does not have to act in bad faith for the *Means Rea* of the offence of misleading advertising to be constituted. Article L121-1 of the Consumer code deals with both false statements and misleading ones. If the consumer wants to establish that the advert is making unsubstantiated claims and is therefore false it will have to prove this. In the past, as this was the only option, this proof could be difficult to establish as many advertisers would claim that they had been negligent but did not have the intention to deceit. Without this intention, the offence of false advertising could not be qualified. Today, if this proof is impossible to bring, establishing negligence will suffice.

B) Objective recklessness

Today, it is enough that the advertiser acts negligently or recklessly to fulfil the *Means Rea* required in the offence of misleading advertising.

But case law[26] goes even further, claiming that negligence will be constituted for a professional by the simple fact that he has failed to ensure the sincerity and clarity of the statement or to check their contents. For example, in the case of *SNC AOL Bertelsman Online France v. UFC Que Choisir*[27], the access provider can be seen to fail to ensure the sincerity and the clarity of the advert, since the advert voluntary used the adjective “unlimited” to attract consumers, and since no attempt was made to modify such a statement when it became clear that he could no longer fulfil this promise.

It is therefore highly protective of consumers who can rely on the *Means Rea* being realised every time a professional they are dealing with has not proceeded with high level checks. The professional is always to be considered as negligent since he should be aware that some of its statements could mislead some category of the targeted public and should as a matter of professional practice be subject to some verification.

[26] CA Paris, 9 June 1993, BID 94, Number 10, p. 18.
[27] CA Versailles, 14th chamber, 14 mars 2001.