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Between advertising and surreptitious advertising. Legal aspects of sponsored articles and product placement in the Polish printed and online press

KEY WORDS

advertisement, surreptitious advertising, product placement, sponsored article, printed press, Internet/the Web

ABSTRACT

Legal regulations concerning advertising on the radio and television are numerous and exhaustive. A different situation occurs when looking at advertising in the printed and online press. This article, citing the normative definition of advertising, includes consideration of surreptitious advertising. Although this type of practice is forbidden, the fight against this phenomenon is difficult. The paper makes attempts to look at the boundary between what is permitted and what is forbidden through the prism of promotion tools in the printed and online press, including product placement and sponsored articles.

The analysis of the issue of advertising in the Polish media reveals a gross disparity in the scope of provisions on advertisement, which is scant for the printed and online press and wide and detailed when it comes to the radio and television. In the latter case, it was primarily enforced by the market and Poland's membership in the European Union, requiring that a number of Community regulations should be implemented in the local law. Appropriate measures were neglected in the case of advertising in printed and online media: the legislator did not see the pressing need of this task, leaving it to the applicable normative acts, adopted at various times.

First, for the sake of order, the regulations which are in place in the given area should be determined. Where reference is made to electronic media, the Broadcasting Act¹ with its implementing regulations are of crucial importance. Also, in the view of Art. 3 of this Act,

¹ The Act of 29 Dec 1992, Dz.U. [Journal of Laws of the Republic of Poland] No. 7 item 34, with am. Further in the paper referred to as the Broadcasting Act.

stating that the Press Law² regulations should be applied unless the Act provides otherwise, it should be considered whether or not the referred press act should be taken into account when reaching solutions concerning advertising in electronic media. However, the level of detail of the regulations in the Broadcasting Act seems to preclude such a need. Thus, the Broadcasting Act (with the executive acts issues under it) appears to fully regulate the basic issues associated with the publication of commercials in the radio and television. Moreover (just as it is the case of other media), the provisions of the Act on Combating Unfair Competition³ and the Act on Counteracting Unfair Market Practices⁴. It is worth to add, from the outset, that the significance of these acts for the question at hand is enormous, especially when it comes to enforce certain orders and prohibitions, and (particularly under the current state of law) not secondary by any means.

For the above reasons, the Press Law is valid wherever it comes to advertising in the printed and online press, as the regulations on the radio and television do not apply to the former media. However, the adduced act still does not take into account the specificity of the online press, whereas in the case of the printed press it cannot be said that the norms found in the press law are compatible with the present-day reality.

In the situations of insufficient legal regulation, it is not only the regulations of the competition law mentioned above which gain special significance, but ethical norms as well. Such intracommunity rules, especially related to the participation of journalists in advertising projects are contained in many documents. These include, among others, Journalistic Moral Codes (Pol. *Dziennikarskie Kodeksy Obyczajowe*) of the Polish Journalists' Association (Pol. *Stowarzyszenie Dziennikarzy Polskich*) and the Association of Journalists of the Republic of Poland (Pol. *Stowarzyszenie Dziennikarzy Rzeczypospolitej*). Such regulations are also found in the Code of Good Practice for Press Publishers (Pol. *Kodekst Dobrych Praktyk Wydawców Prasy – KDP*)⁵ adopted by the Polish Chamber of Press Publishers. This act contains particularly broad regulations of the rules related to the publication of promotional and PR materials in the printed press, which is evidence that the analysed question was of no little significance for its designers. The sheer comprehensiveness and meticulousness of the

² The Act of 26 Jan 1984, Dz.U. No. 5 item 24, with am.

³ The Act of 16 Apr 1993, Dz.U. No. 47 item 211, with am. Further in the paper referred to as the CUC Act.

⁴ The Act of 23 Aug 2007, Dz.U. No. 171 item 1206, with am.

⁵ The Code was adopted by the General Meeting of the Chamber of Press Publishers on 16 Nov 2005. Its content (in Polish) can be found at <http://www.iwp.pl/pliki/KDPWP.pdf> [accessed: 1 Sep 2014].

regulations it contains is enough to convince us that there is a gap in the unamended Press Law⁶.

The present state of affairs leads to a number of questions, significant from the viewpoint of this paper's topic. First, to what extent are the ethical regulations currently significant and commonly applied? And second, in the scope of the discussion, should proposing changes to the Press Law be seen as necessary? In the context of these questions, a need arises to take a closer look at the issues from the border area between advertising and surreptitious advertising, and in particular at the sponsored materials and product placement, so ubiquitous in the Polish press.

Normative definition of advertising

It is absent from the Press Law. It is included in the Broadcasting Act, amended in 2011⁷. Currently, Art. 4(17) of the Act stipulates that “ ‘advertising’ shall mean a commercial communication, originating from a public or private entity, in connection with its economic or professional activity, aimed at promoting the sale or use of goods or services in return for payment; self-promotion shall also be a form of advertising”. A number of changes can be observed compared to the previous legal status. First, there has been a move away from the statement that advertising is a “communication not originating with the broadcaster”⁸. The assumption that self-promotion is also advertising required an appropriate revision. For this reason, the current text does not preclude that the advertising material may come not only from external entities, but also from the media service provider. They were included under the common denominator of public and private entities⁹. Moreover, the legislator defined the notion of self-promotion, which means “any broadcast originating from a media service provider that is intended to serve to directly or indirectly promote its programmes, goods or services” (Art. 4(23) of the Broadcasting Act).

Second, the legislator waived the statement that advertising is broadcast in exchange for payment or some other form of remuneration. It is worth to stress here that the lack of such a mention does not change the commercial nature of the message itself; it is logically

⁶ Likewise, a document related to the rules on the publication of advertisements was developed in the circles of advertisers and advertising agencies. It took the form of the Code of Advertising Ethics, adopted on 12 Apr 2006. Its current binding form was adopted on 30 Oct 2013. The PR community also decided to create its own rules, which have been included in the Code of Ethics of the Polish PR Association of 26 June 1996 and the Code of Good Practices of the Polish Public Relations Consultancies Association of April 2004.

⁷ The Act of 25 Mar 2011 on Amending the Broadcasting Act and Certain Other Acts, Dz.U. No. 85 item 459.

⁸ Art. 4(6) of the Broadcasting Act prior to the 2011 amendment.

⁹ On the beneficiary of advertising, see S. Piątek (ed.), *Ustawa o radiofonii i telewizji: Komentarz* [The Broadcasting Act: The commentary], Warszawa 2014, p. 56.

related, however, to the reflection that self-promotion is also advertising. Even though the question of remuneration does not directly ensue from the adduced definition, it has to be taken into consideration because of the wording of Art. 4(16) of the Broadcasting Act. It provides that commercial communication (which, under the Act, includes advertising) “mean[s] any broadcast (...), which is designed to promote, directly or indirectly, the goods, services or image of an entity pursuing an economic or professional activity, accompanying or included in a programme in return for payment or for similar consideration or for self-promotional purposes”. As a result, the legislator still draws attention to the payment, with the exception, however, that it is expressly excluded in the case of self-promotion. It should be stressed, that it was payment that was regarded as one of the basic criteria to distinguish advertising from editorial material. It was one of the indicators facilitating the identification of surreptitious advertising, i.e. advertising that, apart from the hidden intention to place it, was not clearly marked as advertising material. For years in science there have been two opposing views on this matter: one of them assumes that advertising does not cease being such or lose its character in the situation when it is placed without charging payment¹⁰, while according to the other promotional communications, other than self-promotion, disseminated free of charge, are not advertising under the Broadcasting Act¹¹.

While implementing the Audiovisual Media Services Directive in 2011, the legislator made one additional significant change. While advertising is still communication “designed to promote sale or paid use of goods or services”, the wording that advertising aims at “promoting certain causes and ideas”¹² has been removed. This way, only marketing activities

¹⁰ See: E. Nowińska, *Reklama, sponsoring, telesprzedaż, lokowanie produktu* [Advertising, sponsorship, teleshopping, product placement], in: J. Barta, R. Markiewicz (eds.), *Prawo mediów* [Law of media], Warszawa 2005, p. 292–293, 314. Its author, even before the amendment of the Act in 2011, that the question of payment for advertisements, signalled not only by the wording of the discussed Act but also the Press Law Act (Art. 36 of which still contains the information that the press may post announcements and advertisements in exchange for payment), should not preclude that advertising may be broadcast for free. She points out that, “in the current market conditions the question of paid or free publication of such communications is not fundamental (as long as they do not incur negative market consequences for other entrepreneurs – publishers), in particular in situations where the absence of payment is justified by social or charity reasons.” It should be stressed that this view was formulated under the state of was which assumed that advertising is communication designed not only to promote sale or other forms of using goods and services but also to support certain causes or ideas. See also: M. Ożóg, *Reklama radiowa i telewizyjna* [Radio and TV advertising], in: E. Traple (ed.), *Prawo reklamy i promocji* [Law of advertisement and promotion], Warszawa 2007, p. 272–274. Its author speaks against the view that advertising should be remunerated, otherwise the editors would be solely responsible for its publication.

¹¹ As explained, among others, by S. Piątek (ed.), *Ustawa o radiofonii i telewizji*, p. 57. On the same subject, see also: J. Sobczak, *Prawo prasowe: Komentarz* [Press Law: Commentary], Warszawa 2008, p. 795 f.

¹² See: E. Czarny–Drożdziejko, *Ustawa o radiofonii i telewizji: Komentarz* [Broadcasting Act: Commentary], Warszawa 2014, p. 84 f.

are being regulated¹³. This claim is additionally supported by the fact that the legislator, when defining advertising, calls it commercial communication.

Even though the synthetic definition of advertising is contained in the act concerned with radio and television, it remains just as valid in the context of the remaining media, i.e. printed and online press. For such is the nature of advertising that it serves promotion, both that which an external entity would like to carry out through the media and that carried out by the broadcaster or publisher itself and related to its own “products”¹⁴. Most of all, from the point of view of the clarity of the relationship between the Press Law and the Broadcasting Act, it might have been better if the former contained such a general definition¹⁵. Still, its lack does not make it a stalemate or difficult to accept. It should be remembered, however, that when we say that the definition found in the Broadcasting Act is universal, it does not mean we simply apply it to the Press Law. In this happens in this case, it is more due to an analogy. As I mentioned before, the Press Law is of general nature and regulates the rights and obligations of all journalists. Whereas the Broadcasting Act is specific and applies in cases not regulated by the Press Law, as well as when the specificity of electronic media requires separate regulations.

The nature of advertising is defined by the Code of Good Practice¹⁶ in a similar way to the Broadcasting Act. While the clause therein is less clear than that in the Act, it results rather from a less sophisticated wording than significant differences in content. According to KDP, “advertisement is an independent communication containing, in particular, an information or a statement, especially in exchange for payment or another form of

¹³ About the definition of advertising including marketing activities, see: E. Nowińska, in: *Prawo mediów*, p. 311.

¹⁴ Much room in the legal literature was dedicated to the definition of advertising. See, e.g.: J. Dobczak, *Radiofonia i telewizja. Komentarz* [Radio and television: Commentary], Kraków 2001, p. 84; K. Grzybczyk, M. Jagielska, *Obowiązek informacyjny w prawie wtórnym* [Obligation to provide information in secondary law], in: M. Namysłowska (ed.), *Reklama. Aspekty prawne* [Advertising: Legal aspects], Warszawa 2012, p. 59 ff.; E. Nowińska, *Zwalczanie nieuczciwej reklamy. Zagadnienia cywilnoprawne* [Combating unfair advertising: Civil-law questions], Kraków 2002, p. 16; J. Masiota, *Wolna reklama i jej granice* [Free advertising and its limits], „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2000, No. 2, p. 65; G. Rączka, *Wprowadzenie do terminologii prawa reklamy* [Introduction to the terminology of advertising law], in: *Reklama...*, op. cit., p. 35–37; M. Sieradzka, *Istotność wprowadzenia w błąd jako przesłanka ochrony konsumenta* [The significance of misleading as the premises for protecting the customer], in: *Reklama...*, op. cit., p. 117–118; J. Sobczak, *Prawo prasowe*, p. 484–485; J. Sobczak, *Ustawa o radiofonii i telewizji. Komentarz* [Broadcasting Act: Commentary], Poznań 1994, p. 25; R. Stefanicki, *Prawo reklamy w świetle przepisów ustawy o zwalczaniu nieuczciwej konkurencji na tle prawnoporównawczym* [The law of advertising under the regulations of the Act on Combating Unfair Competition in a comparative legal context], Poznań 2003, p.44 ff.; R. Walczak, *Prawne aspekty reklamy w ustawodawstwie polskim, europejskim i międzynarodowym. Orzecznictwo* [Legal aspects of advertising in Polish, European, and international legislature: Case law], Warszawa–Poznań 2001, p. 51–59.

¹⁵ The need to create such a regulation was also stressed by K. Grzybczyk. According to her, it is justified by the “protection of the citizens’ trust in the freedom and professionalism of the press”; see: eadem, *Lokowanie produktu* [Product placement], Warszawa 2012, p. 157–158.

¹⁶ It should be remembered that this document is addressed to the printed press only.

remuneration, accompanying the activities of any party, designed to increase the sale of products, a different form of their use, or achieving another effect desirable for the advertiser. Advertising also includes promotion of sales and sponsoring” (section 6.4)¹⁷.

Surreptitious advertising in media

It is a phenomenon as common as it is difficult to fight, in spite of the existence of prohibitive norms and the agreement that such practices are dangerous to the recipients of the communication, who are more likely to trust informational content than strictly commercial one¹⁸.

The subject of this paper obligates to adduce, in the first place, the regulations from the scope of the media law to make this notion more familiar. Art. 12(2) of the Press Law states that “a journalist must not engage in surreptitious advertising activities associated with obtaining material or personal gain from a person and organizational entity interested in the advertisement”. Under the Act, the ban is binding to all journalists, and those associated with the radio, television, printed or online press are all obligated to respect it to the same extent. The ethical documents, such as the Code of Good Practices, see it similarly rigorously. In the Press Law Act itself, however, one can notice the lack of a general ban on surreptitious advertising which would apply to the publishers just as it does to the journalists.

The clarification of what surreptitious advertising is has found a special place in the Broadcasting Act, which forbids its use in Art. 16c¹⁹. The Act uses the notion of “surreptitious commercial communication,” understanding it as “the representation of goods, services, the name, business name, the trade mark or the activities of an entrepreneur who is a producer of goods or a provider of services in programmes when the intention of the media service provider, in particular related to payment or another benefit, is to achieve an advertising effect and the public might be misled as to the nature of the communication” (Art. 4(20)). The fact that this wording indicates that “the public might be misled,” irrevocably binds surreptitious advertising with the Act on Combating Unfair Competition. The Art. 16 of the latter, defining the acts of unfair competition in advertising, includes among them a “statement encouraging the purchase of products or services, creating the impression of a neutral information” (Art.

¹⁷ It is worth to notice that this wording from 2005 does not make the aforementioned payment obligatory. Moreover, the author of the code clearly stresses that advertisement “is not a communication intended to promote socially desirable behaviour” (section 6.4). It means that, for the publishers of printed press, the promotion of ideas and attitudes is not advertising.

¹⁸ On this subject see, e.g., Z. Okoń in: E. Traple (ed.), *Prawo reklamy i promocji* [Law of advertising and promotion], Warszawa 2007, p. 695 ff.

¹⁹ See: M. Barańska, *Polityka ograniczania reklamy w polskiej telewizji. Studium politologiczno-prawne* [Policy of limiting advertising in Polish television: A study in political science and law], Poznań 2012, p. 118 ff.

16(1)(4)). Surreptitious advertising is also qualified among unfair market practices²⁰. The act on counteracting such practices forbids using “editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer” (Art. 7(11)).

Advertising vs. surreptitious advertising

The delimitation of the area where the undertaken promotional activities are legal from that where they are forbidden is one of the most important issues associated with the subject of this paper. It does not have a simple solution on the planes of either normative law or its application²¹. The basic difficulty is the qualification of a promotional material as a forbidden surreptitious advertisement²². The legislator indicates three criteria designed to facilitate the identification²³. The first is a hidden, but present, advertising intention²⁴. It has to take the form of intentional action, not simply negligent or reckless²⁵. In practice, proving it is extremely difficult, particularly since the law does not preclude the production of materials dedicated to, e.g., latest novelties in publications or automotive industry. Moreover, it is unimaginable to introduce an absolute prohibition on publishing such content to combat surreptitious advertising. Indubitably though, skilful actions by journalists and editors may result in hiding the promotional goal in such a way, that it will not be possible to prove it has occurred, whereas the intended effect on the recipient (encouraging him or her to purchase goods or services) has been achieved). The second criterion – and not an easy one to prove, either – is the possible material or personal gain. Let us add that it is not a necessary condition to assume that a given action amounts to surreptitious advertising²⁶. The third indicator is the

²⁰ More on this topic in: Namysłowska, K. Sztobryn, *Ukryta reklama po implementacji dyrektywy o nieuczciwych praktykach handlowych* [Surreptitious advertising after the implementation of the Directive on Unfair Commercial Practices], “Państwo i Prawo” 2008, No. 11, p. 52–65.

²¹ Cf.: M. Namysłowska, K. Sztobryn, *Zwalczanie nieuczciwej reklamy ukrytej w prawie polskim i niemieckim* [Combating unfair surreptitious advertising in Polish and German law], in: *Reklama...*, op. cit., p. 217 ff.

²² This difficulty is commonly pointed out by the authors of studies. See, e.g.: J. Dudzik, R. Skubisz, in: J. Szwaja (ed.), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz* [Act on Combating Unfair Competition: Commentary], Warszawa 2013, p. 762–763; K. Grzybczyk, *Prawo reklamy* [Advertising law], p. 203–204; R. Walczak, *Prawne aspekty reklamy...*, op. cit., p. 92.

²³ See: E. Nowińska, *Reklama, sponsoring...*, op. cit., p. 317.

²⁴ See: E. Nowińska, M. du Vall, *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz* [Act on Combating Unfair Competition: Commentary], p. 315; E. Nowińska, *Z problematyki ochrony rynku przed czynami nieuczciwej konkurencji...* [On the issue of protecting the market from the acts of unfair competition], in: *Reklama...*, op. cit., p. 81; G. Rączka, *Wprowadzenie do terminologii reklamy* [Introduction to advertising terminology], in: *Reklama...*, op. cit., p. 47.

²⁵ See: K. Wojciechowski, *Ustawa o radiofonii i telewizji* [Broadcasting Act], ed. by S. Piątkowski, p. 46.

²⁶ E. Nowińska, *Reklama, sponsoring...*, op. cit., p. 317, and eadem, *Zwalczanie nieuczciwej reklamy. Zagadnienia cywilno-prawne*, Kraków 2002, p. 126; J. Dudzik, R. Skubisz, in: J. Szwaja (ed.), *Ustawa o zwalczaniu nieuczciwej konkurencji*, p. 763; G. Rączka, *Wprowadzenie do terminologii prawa reklamy*, p. 47. See also the ruling of the Court of Justice of 9 Jun 2011, C-52/10 (LEX No. 818466), in which the Court stressed

possibility of misleading the public as to the nature of the communication. There are many regulations which help to avoid such a situation and introduce obligations to place advertisements in a certain way. The Press Law, albeit very concise on the discussed subject, states that “advertisements must be marked in a manner that does not cause any doubts that they are not editorial material” (Art. 36(3) of the Press Law Act). However, this provision does not contain any precise information on how they should be marked. Similarly, it does not ensue from the Act on Combating Unfair Competition or the Act on Counteracting Unfair Market Practices, either²⁷. Still, this question was regulated in detail regarding radio and TV advertising. The Broadcasting Act stresses that commercial communications should be easily recognizable and distinguishable from editorial materials. This goal is to be achieved with visual, audio, or spatial means. In practice, it is done by creating announced advertising breaks²⁸ or, in the case of the printed press, by placing an information like “advertisement” or “advertising material”. Is the legislator’s intention that, by upholding these rules, the recipients should know about the promotional character of the communication, which eliminates the risk of them being misled. It is the position adopted by the Supreme Court in its ruling of 6 December 2007 (III SK 20/07). Justifying this thesis, the Court stressed that, by the fact alone that an advertisement has been broadcast in an advertising break, “such a statement is an open, publicized communication, the advertising nature of which is not being hidden.” Not to put the adduced thesis in doubt, the ruling itself is equally interesting and controversial regarding several positions presented within. Considering the subject of this paper and the scant case-law in this area (which was pointed out by the judicial organ itself, stressing that it was a landmark case for surreptitious advertising), it is worth analysing in more detail both the ruling itself and the preceding rulings of the Regional Court for Competition and the Appellate Court. The case concerned the commercial of

that the existence of payment or a similar remuneration is not necessary to establish that surreptitious advertising is intentional. This decision related to the interpretation of the Directive of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Official Journal of the EU 2010, L 95, p. 1). It has been accepted in the doctrine that the provision concerning remuneration found in the Art. 4(16) of the Broadcasting Act should be interpreted in a similar way. See: S. Piątek, *Ustawa o radiofonii i telewizji*, p. 64. See also the approval of A. Sieradzka, M. Namysłowska, and M. Sztobryn (LEX nr 818466). In spite of the sympathy for this position, some authors voiced their doubts concerning the wording of the directive itself. M. Barańska points out that it applies to the editorial content used in the media, which significantly limits the practicable forms of surreptitious advertising, or, speaking more strictly, covers only some of the cases of surreptitious advertising; eadem, *Polityka ograniczania reklamy...*, op. cit., p. 118.

²⁷ Cf.: M. Namysłowska, K. Sztobryn, “Zwalczanie nieuczciwej reklamy ukrytej w prawie polskim i niemieckim”, in: *Reklama...*, op. cit., p. 217 ff.

²⁸ § 3(2) of the Regulation of the National Broadcasting Council of 30 June 2011 concerning principles of advertising and teleshopping in radio and television programme services (Dz.U. No. 150 item 895) directly states that “[t]he identification of advertising, except for self-promotion, shall contain the word ‘reklama’ (advertisement) or the words ‘ogłoszenie płatne’ (paid announcement).”

Telekomunikacja Polska S.A., broadcast by the TVP, prepared and presented as informational material, which was indicated by numerous components, such as the title of the advertisement, “Telekomunikacja Polska News Service” (Pol. *Serwis informacji Telekomunikacji Polskiej*), the television studio used in the advertisement, the well-known TV host, and the inclusion of consumer surveys, which had the appearance of being random, and not arranged. According to the Chairman of the Office of Competition and Consumer Protection (Pol. *Urząd Ochrony Konkurencji i Konsumentów – UOKiK*), the use of such means as well as the fact that commercial clips have been isolated from the news qualify such an activity as an act of unfair competition in advertising. In the opinion of UOKiK, the use of the means mentioned above was designed to create the appearance of neutral information and to hide the promotional nature of the advertising campaign. The Regional Court (for Competition and Consumer Protection) which examined the appeal from the decision of the Chairman of the UOKiK in the first instance consented to this opinion in its judgment of 23 February 2006 (XVII Ama 118/04)²⁹. According to the Court, the plaintiff (i.e. TP S.A.) “too hastily assumed that consumers, seeing the information broadcast before the film and the TP S.A. company logo, would realize they were watching a commercial and not a neutral informational programme.” In its judgment, the Court did not refer to the question of the analysed commercial being placed outside of an advertising break. It should be considered here, that the Broadcasting Act, where it states that commercial communications are to be easily recognizable, does not introduce the notion of advertising break. The position of the appellate court was similar of that of the first instance: it sustained the judgment of the Regional Court and shared its view regarding the surreptitious character of the analysed advertising communication and its qualification as an unfair competition act. The Supreme Court examining the cassation, however, believed the opposite. In the cited decision, it stressed that an advertisement broadcast in advertising time, separated from the programme in a way that complies with the rules defined in the Broadcasting Act, is not the so-called surreptitious advertising under the Art. 16(1)(4) of the Act on Combating Unfair Competition. It has to be added that, even though the adduced thesis suggests that the TP S.A. commercial had been broadcast during an advertising break (traditionally introduced with the announcement “advertisement”, Pol. *reklama*), it is not precisely stated. Actually, it was broadcast in the time for paid announcements. For the SC it did not influence the assessment of the situation, whereas for the lower instance courts this very fact (combined with other

²⁹ Orzecznictwo Sądu Najwyższego – Izba Pracy i Ubezpieczeń Społecznych [Rulings of the Supreme Court – Labour and Social Security Chamber] 2009, No. 3–4, item 55.

circumstances) led to the conclusion that the advertisement, placed outside of an advertising break, was not duly marked³⁰.

The adduced rulings show how the issue of qualifying an advertisement as surreptitious advertising can be a problem when related to the television, a medium for which broad legal regulation has been provided. It is no wonder therefore, in this state of affairs, that the problem is growing where there are no appropriate provisions, that is in the printed and online press. Which, in turn, favours undertaking actions bordering on surreptitious advertising in these media.

In the discussed context, what appears to be of particular interest are two commonly observed phenomena: product placement and the publication of sponsored articles.

Printed and online press and product placement. Sponsored articles

Product placement is one of the forms of promotion currently undergoing the most dynamic development. It is particularly popular when it comes to cinema and television production. In the case of the former, products and services are placed in various reality and talent show ventures, breakfast television shows, and series³¹. The Broadcasting Act currently in force does not treat this form of advertising as an action permitted in principle, as the Art. 16c contains a provision that forbids hiding commercial communication, product, and thematic placement. In the case of product placement, however, there is an exception that permits it under the rules defined further in the act. In practice, this exception is so wide that this form of promotion is said to have been legalized in circulation. It could easily appear that, even though the exception should not swallow the rule, it is exactly the case in this matter.

In defining the issue of product placement, it is stressed that its very essence is to show, in an apparently unintentional way, a certain product, a trademark, or another symbol,

³⁰ In the adduced judgment of 6 Dec 2007, the Supreme Court also expressed the view that the Art. 16(4) of the Act on Combating Unfair Competition (which declares a statement which, while encouraging to purchase a good or service, takes the appearance of a neutral information to be an act of unfair competition) “must be read in such a way that it applies only in the cases where the advertising nature of the communication is being hidden in such a manner that the recipient does not suspect that a given statement (communication) is advertisement by nature, not as much due to the way in which the statement is worded, as it is actually an advertisement, but rather as a result of hiding all references whatsoever to the actual source of the communication or the relationships between the entity whose statement is directed to the consumers and the entrepreneur whose products the communication concerns.” In the conclusion, the SC decided that the TP S.A. advertisement was not the “statement” that the legislator had intended, and for this reason (not fulfilling a statutory condition) this advertisement cannot be qualified as an act of unfair competition.

³¹ In spite of the popularity of this form of promotion, there is an ongoing discussion whether it is as efficient a form of advertising as we got used to treat it, since examples of its inefficiency can be cited. On this subject, see: K. Grzybczyk, *Lokowanie produktu...*, op. cit., p. 34 ff.

which the recipient associates with the manufacturer³². It is also stressed that the conscious and paid placement of selected props in certain communication is associated with a clear intent to cause an advertising effect³³. While the good is not in the centre of attention, as in the traditional commercial communication, the attention still focuses on it³⁴. By applying the criterion of the manner of showing (exposition) of a product, one can distinguish verbal, visual, and functional placement. The first of them occurs when a person (an actor, a journalist) informs about a good, service, or company; the second when the given product, trademark, or symbol are made visible (shown) in the communication; while the third, the functional, makes the product a thread of the plot³⁵.

These mechanisms have been used for years, verging of the risk of the charge of surreptitious advertising. It was a temptation for both broadcasters and advertisers, yet the 2011 amendment to the Broadcasting Act accepted the existing state of affairs and provided it with legal boundaries. Currently, product placement is allowed in cinematographic films, films and series produced for the purposes of audiovisual media services, as well as in entertainment and sport programmes, or in the form of making a good or a service available free of charge for the use in the programme, in particular as a prop or a reward (Art. 17a(1)). It was the decision of the legislator to exclude children's programmes. However, the acceptable range of using product placement is already so broad that it exhausts not only the list of potential programmes suitable for placement but also that desired by advertisers. The omitted programmes, which could still spark some interest, are information services.

The amendment introduced the obligation to mark programmes in which products are placed with a visual or audio sign informing about the product placement in the beginning and the end of the programme, as well as when it is resumed after an advertising break. Also, an obligation was introduced to place a neutral information about the placed product or its

³² S. Malarski, *Instrumenty prawne marketingu* [Legal instruments of marketing], Kraków 1996, p. 176. On the subject of defining product placement, see also: R. Adamus, *Problematyka lokowania produktu (product placement)* [The issues of product placement], "Przegląd Prawa Handlowego" 2003, No. 11, p. 15; K. Grzybczyk, *Product placement na tle prawa polskiego po implementacji dyrektywy o audiowizualnych usługach medialnych* [Product placement under the Polish law after the implementation of the Directive on audiovisual media services], in: *Reklama...*, op. cit., p. 413 ff.; K. Grzybczyk, *Lokowanie produktu...*, op. cit., p. 11 ff.; R. Skubisz, in: *Ustawa o zwalczaniu nieuczciwej konkurencji* [Act on combating unfair competition], ed. by J. Szwaja, p. 475; and J. Dudzik, R. Skubisz, in: *Ustawa o zwalczaniu...*, op. cit., s. 763; R. Stefanicki, *Prawo reklamy...*, op. cit., Poznań 2003, p. 190.

³³ E. Nowińska, *Zwalczanie nieuczciwej reklamy...*, op. cit., p. 127.

³⁴ Cf.: E. Nowińska, *Reklama, sponsoring...*, op. cit., p. 374. For more on this subject, see also: P. Bulak, *Product placement*, "Marketing i Rynek" 2000, No. 4, p. 13 ff.

³⁵ Such a classification is found, among others, in: P. Bulak, *Product placement...*, op. cit., p. 17; R. Stefanicki, *Prawo reklamy...*, op. cit., p. 190–191, E. Nowińska, *Reklama, sponsoring...*, op. cit., p. 378; K. Socha, *Sila product placement. Część I* [The power of product placement: Part 1], "Marketing w praktyce" 1999, p. 63 ff. Other classifications are also recalled by scholars, cf.: K. Grzybczyk, *Lokowanie produktu...*, op. cit., p. 29–34.

vendor at the end of a programme. Moreover, product placement must not violate the editorial independence and autonomy by influencing the content or place of the programme. The placement of the products which are prohibited to advertise is also forbidden. The programmes containing product placement cannot overexpose it and directly encourage to purchase or hire goods or services. The latter provision, in particular, shows the fundamental difference between a typical advertisement and product placement. Nevertheless, even though the product cannot be exposed by itself, its presence (for several consecutive weeks) in the hands of a favourite character on the show, to whose lifestyle some viewers subscribe, can be a tremendous, results-wise, promotional mechanism.

Such, in a short sketch, is the situation in the electronic media. The question remains what it looks like in the printed and online press. One should begin, first of all, with the reflection on the lack of parallel or appropriate legal regulations in these areas. They are absent from the Press Law, which establishes a prohibition on engaging in surreptitious advertising activities by journalists, or any other normative act. There should also be no doubt that product placement is a form of surreptitious advertising, which is permitted in electronic media as an exception, provided certain rules are observed³⁶. Therefore, if it is a kind of breach, and even the legislator in principle forbids this form of promotion in Art. 16c of the Broadcasting Act, there are no grounds to assume the contrary in the case of printed and online press. Here, product placement also constitutes forbidden surreptitious advertising, while the conditions to be observed to make it acceptable were not specified³⁷. This thesis (regarding the printed press) is corroborated by the provision found in the Code of Good Practices, where the section 6.4 states that “*product placement* (embedding) is a conscious use or presentation in an editorial material or column, regardless of the apparent randomness or neutrality of information, of a certain good, service, name, company, trademark, company label and other distinctive marks, such as, in particular, colour theme, typeface, or the activity of an entrepreneur manufacturing the good or performing the services, with the aim to achieve an advertising result, if the publication of the material described above is associated with the intention of the publisher, not disclosed to the readers, to receive payment or obtain other benefit.” Thus defined product placement is considered, under the section 4.1.10, as surreptitious advertising and thus forbidden.

A cursory analysis of the content of the printed and online press leads to a conclusion that the discussed form of promotion is extremely common here as well, especially in the

³⁶ Cf.: K. Grzybczyk, *Lokowanie produktu...*, op. cit., p. 42 ff.

³⁷ Cf.: R. Adamus, *Problematyka lokowania produktu...*, op.cit., p. 18.

automotive and IT press, as well as in the women's sector. It involves, among other things, such products as cosmetics, clothing, handbags, and shoes. Many titles contain columns dedicated to what you should wear for a given occasion, what is the hit of the season, and how to make oneself up well. Under the guise of factual and reliable information, offers of products are presented, naming brands, and often even quoting prices. These communications, unlike in the radio and television, are not accompanied by any information about product placement. Such practices are just as common in the interviews with famous actresses, who tell us to what they owe their perfect looks while sharing their discoveries in cosmetics or fascinations with a fashion brand or designer. This phenomenon is, to a similar extent, observed in the blogosphere. It is also facilitated by the fact that all regulations applied to the printed and online press contain fairly general provisions, and introduce no detailed ones regarding the marking of promotional content, as is the case of the radio and television³⁸.

It is also worth to notice the moment when the legislator introduced the legal regulations on product placement in the electronic media. It coincided with the worsening condition of the printed media in Poland. Their publishers kept pointing it out and stressed that allowing for a broad range of product placement in the television may contribute to a further weakening of the already languishing printed press. They feared that the strong interest of advertisers in the ability of placing their products or services in a popular series or entertainment show, which was already a fact then, will increase even more to their detriment: the advertisers would forgo placing advertisements in the hardly popular printed press, placing their products in TV programmes with high ratings instead³⁹. One has to admit that, from the perspective of several years of the new regulations remaining in force, their fears were not ungrounded. The latter form of promotion is among the most popular ones now.

The traditional media were forced to seek answers and prepare equally attractive advertising offers for advertisers. Presently, product placement is a common measure in the press as well. The problem is, however, that whereas there are norms in this matter for the television and the radio, for the printed media it is just the opposite. It somewhat resembles the state of the electronic media before the 2011 amendment to the Broadcasting Act. The

³⁸ The Press Law Act, Art. 36 states that "announcements and advertisements must be marked in such a manner that does not cause any doubts that they are not editorial material." The Act on Combating Unfair Competition restricts itself to the prohibition on using advertising in the form of statements taking the appearance of neutral information (Art. 16(1)(4)). Whereas the Act on Counteracting Unfair Market Practices bans the surreptitious advertising which involves using editorial content in the mass media when the entrepreneur has paid for it, "and this fact is not clear from the content, images, or sounds easily recognizable to the consumer" (Art. 7(11) of the quoted Act).

³⁹ Zob. M. Zielińska, J. Nowakowska, *Wyjście z podziemia* [Leaving the underground], „Media & Marketing” 2009, No. 40, p. 32.

Press Law contains the obligation to mark advertisements and the ban on engaging in hidden advertising activities by journalists. Additionally, a prohibition against surreptitious advertising results from the Act on Combating Unfair Competition and the Act on Counteracting Unfair Market Practices.

As such, product placement is considered to be surreptitious advertising. As a result, without any regulations permitting this form of promotion as an exception, such an activity is not permissible from the legal point of view. The assessment of a material containing an exposition of a product or service cannot be so restrictive if they are marked as advertising. In such a case, the argument that the recipient does not know what kind of communication he or she is facing and is being misled will be much more difficult to prove. In practice, much is going to depend on the finesse and cunning of the editors. The printed press is moving away from the marking of these communications with such words as “advertisement” (Pol. *reklama*), “promotion” (Pol. *promocja*), or “sponsored material” (Pol. *material sponsorowany*). Neglecting to place this information is becoming a common phenomenon, which is facilitated by the aforementioned lack of legal regulations equally clear as those for the electronic media. It is worth remembering that it was not only the Regulation of the National Broadcasting Council of 30 June 2011 concerning detailed conditions of product placement⁴⁰ that introduced the graphic symbol, which should be used in programmes, but also the Act itself contains detailed provisions on using this symbol by placing it at a certain time. The result of the lack of appropriate regulations regarding printed newspapers and magazines is that the circulation itself develops practices connected to the marking of materials using product placement. It would not be anything wrong if not for the fact that some of these practices result in an easy to catch message about the kind of materials we are facing, while some other do not. It is not difficult to find examples in the latter group, which may allow the editors to invoke the defence that the material was suitably marked; yet, unlike in the former group, it is usually hardly noticeable, discreet, with the information about what kind of communication the recipient is facing verging on the lack thereof. This phenomenon is just as common in the Internet. Taking into consideration the popularity of internet advertisements and their market share, we are touching upon extremely important matters here. It is generally known that what is important for advertisers is not only that their advertisement should reach the general public: what also counts is how it will affect this recipient, stimulating sales. Undeniably, the Internet has much to offer in this area. From the

⁴⁰ Regulation of the National Broadcasting Council of 30 June 2011, Dz.U. No. 161 item 977.

legal point of view, it is facilitated, among other things, by the fact that, apart from the Act on Combating Unfair Competition, which establishes the ban on surreptitious advertising, and the Act on Counteracting Unfair Market Practices, which forbids covert advertising, there are no other solutions which would introduce clearly stated limitations. These normative acts, while significant, contain fairly general provisions. The Broadcasting Act is not applied to this sphere. The press law, apart from being concise on the issue of regulating advertising, can only be applied where it comes to advertising in printed and online press. Which gives rise to yet another problem. Even though, undeniably, the definition of the press covers many publications disseminated in the Internet, a vast number of web pages does not fulfil its criteria. Even a blog cannot be unequivocally qualified as press or not: the decision depends on its content. On the one hand, we are going to find examples that blogs can be periodical, varied, open publications bearing a fixed name, and thus matching the definition of the press⁴¹. On the other hand, there are many blogs that do not fulfil these criteria. A question no less controversial than qualifying various websites as press is whether or not, even if a given site fulfils these premises, it can be defined as a daily newspaper or magazine⁴². A certain twofold approach to how treat a blog is also noticeable. If its author or authors want to up its rank, they do not shirk from stressing they are creating press. Whereas should it require them to respect the obligations imposed on the media representatives, they would prefer to cast off this yoke. Therefore, if in many cases it is difficult to determine whether a given website is press or not, it is too much to expect in the current market reality that the regulations of the Press Law Act will be applied in dubious situations⁴³.

⁴¹ The definition of the press is contained in the Art. 7(2)(1) of the Press Law Act.

⁴² The definition of a daily newspaper in the Press Law states that it is a “general informational periodical printed, audio, or audiovisual communication, issued more than once per week” (Art. 7(2)(2)). Whereas a magazine is a periodical print or communication via auditory or audiovisual channel, issued no more often than once a week and not less often than once a year (Art. 7(2)(3)). The analysis of this regulation may lead to the conclusion that where the legislator speaks about print, the online communication is being excluded. The situation is similar where the reference is made to picture and sound, as the essence of online communication is not the manipulation of sound or sound and image. This ambiguity led to a dispute regarding the obligation to register press in Poland, as the Press Law Act introduces the obligation to register a newspaper or magazine under the penalty of a fine. More on this subject in: J. Skrzypczak, *Problemy z definiowaniem pojęcia prasa w erze cyfrowej* [Problems in defining the notion of the press in the digital age], in: *Dziennikarz, utwór, prasa. Księga jubileuszowa z okazji pięćdziesięciolecia pracy naukowej prof. dr. hab. Bogdana Michalskiego* [Journalist, work, press: A congratulatory book on the 50th jubilee of the scientific profession of Prof. Bogdan Michalski, PhD Hab., Warszawa 2014, p. 303 ff.

⁴³ Cf. K. Grzybczyk, *Lokowanie produktu...*, op. cit., p. 155–156. On the subject of the law applicable to online advertising, see more broadly in: A. Malarewicz, *Prawo właściwe dla reklamy internetowej* [Law applicable to online advertising], “Rejent” 2004, No. 12, pp. 108–119. See also: J. Sobczak, *Granice prawne reklamy w internecie* [Legal boundaries of advertising on the internet], in: M. Jeliński (ed.), *Nowe media a media tradycyjne* [New media vs. traditional media], Toruń 2009, p. 138–157.

For years, the phenomenon linked to and coexisting with product placement has been the publication of sponsored articles. This notion does not come from the legal language. It is absent from normative acts. It is among those little worked upon in the literature. In spite of these, it is a commonly known term⁴⁴. This is due to the unusually large number of materials of this kind, placed both in the printed and online press. For these very reasons this question, especially in the legal and ethical context, requires a deeper approach.

To begin with, it is worth to pay attention to the notion of “article”, which does not cover advertisements, announcements, or letters to the editors placed in the press. This term has been reserved for a different kind of texts. According to the online *Dictionary of the Polish Language*, an article (Pol. *artykuł*) is a “journalistic, literary, or scientific text placed in a newspaper or a magazine”⁴⁵. This describes the nature of the strictly editorial materials, i.e. these created at the editorial office, or on commission and in cooperation with the editors⁴⁶. They undeniably have a certain form, and it was probably due to that element that sponsored texts, which copied and imitated typical press articles, were given this name. They are not classical advertisements but rather materials difficult to distinguish from press texts written by journalists, containing a title and a lead, and illustrated with photos. Quite often they look just like the rest of the texts in the press title with regard to the typeface and other details that make them similar. Moreover, they often do not differ in their substantial preparation from the remainder of the publications found in the daily newspaper or magazine, and they are often signed by the authors with their full names. They differ in their promotional character, the lack of the title in the table of contents, and sometimes the information that they are sponsored communications⁴⁷. By doing so, the publisher fulfils the requirement of the Art. 36 of the Press Law saying that “announcements and advertisements must be marked in such a manner that does not cause any doubts that they are not editorial material,” that is, material with

⁴⁴ It is being used interchangeably with another moniker, that of advertorial. The latter term was coined from the words editorial and advertisement. See: K. Grzybczyk, *Lokowanie produktu...*, op. cit., p. 173.

⁴⁵ *Słownik Języka Polskiego*, <http://sjp.pwn.pl/szukaj/artykuł> [accessed: 1 Sep 2014].

⁴⁶ According to the *Słownik Terminologii Medialnej* [Dictionary of Media Terminology], ed. by W. Pisarek, Kraków 2006, p. 11, “article is a journalistic genre found only in written media (it can be read or quoted in electronic media). (...) In concordance with its etymology, in journalism article is the name given to a text which, on the one hand, is a part of a greater whole (e.g. a magazine or newspaper) and, on the other, is meant to shed light on a given issue, explain or interpret it; it may solve a dispute in order to encourage readers to a discussion or reflection upon its subject. The chief function of the article, however, is to present the author’s own point of view and to gain the reader’s appreciation for it. The article is worth more if its author presents more points of view in a reasonably objective way and skilfully persuades the readers to side with him/her, affecting their sensitivity and imagination.”

⁴⁷ The marking of such text as “sponsored material” or a “sponsored article” used to be the norm, which was derived from the obligation to label advertisements, even though it was not directly mentioned in any legal act. Nowadays, it is a frequent practice to omit marking texts in this way and to advocate the view that the place where they have been published (e.g. the middle of the issue, an insert, etc.) is enough to suggest to the reader the type of publication he or she is facing.

which the editors identify and which they have verified. Until recently, a fairly common occurrence was a declaration that these texts were not authored by any journalists from the staff⁴⁸. Just like all advertisements, they were created outside of the editorial office. This rule, while not directly expressed in the Press Law, should be derived from this Act. Its provisions obligate journalists to maintain due care and accuracy when gathering and using press materials, ban them from surreptitious advertising, and obligate the press to present the described events fairly. The inspection of the ethical documents further strengthens this view. The Code of Good Practices for Press Publishers contains an expressly stated obligation imposed on the publishers of the press to observe the rule that a “journalist must not – even for the benefit of his/her editorial office or publisher – prepare advertising materials, sponsored texts, promotional or public relations materials” (section 4.1.3)⁴⁹.

Even a cursory analysis of the content of the printed press leads to the conclusion that, unfortunately, this obligation is more and more frequently neglected. There is an enormous discrepancy between the cited declarations (especially the one found in the Code of Good Practices) and the views expressed in the literature of the subject that “journalists can never publish materials of advertorial type or write sponsored articles”⁵⁰ and what it actually looks like. Even more so, in the economic turnover this phenomenon is not being uniformly condemned or criticized. It rather seems to have been accepted as a certain standard. The situation is similar in the online press. Online, it is not difficult at all to find not only commissioned texts but also publications dedicated to what a good sponsored article should be like and how to professionally prepare it to efficiently sneak in the information about a brand⁵¹. The advice is highly detailed and pertains to a number of basic questions. First, the authors stress the importance of the lead for making the reader click “read more”. It should be no longer than 2 lines of text; should be intriguing, shocking, or funny; has to contain the essence of the whole article; should inform on what the text is about but does not give away the whole of it. It can be a quote or a question. Second, the text should be of factual value.

⁴⁸ The *Dictionary of Media Terminology* reads that a sponsored article is an “information of commercial, non-journalistic character of publication.

⁴⁹ This provision, where it comes to self-promotion, seems not to match the present-day reality. For it is hard to expect that the journalist of a given title would not encourage to purchase its next issue. This regulation also deviates quite far from what is now a ubiquitous behaviour not only in the online media but others as well.

⁵⁰ J. Pleszczyński, *Etyka dziennikarska* [Journalistic ethics], Warszawa 2007, p. 240. See also: R. Grochowski, *Granice prawne i etyczne reklamy w ustawodawstwie krajowym i europejskim* [Legal and ethical boundaries of advertising in the national and EU legislation], Poznań–Opole 2010, p. 263.

⁵¹ The issue of the easiness of hiding advertising content in online communication was pointed out by E. Nowińska, *Nieuczciwa reklama w Internecie* [Unfair advertising online], in: *[The Internet: Legal issues]*, Lublin 1999, p. 56. The author notices numerous problems associated with disguising promotional content online and postulates the necessity of marking them clearly to indicate their particular nature.

The person who writes it should have a perfect knowledge of the product and present it not as an expert but a user. Third, one should employ a clear and understandable language, using preferably the present tense and the active voice. Fourth, a well-thought-out and attractive form is indispensable. It is also worth remembering about the clarity of the message, dividing it into paragraphs, as well as various icons and graphs to present the more complex pieces of information. Photographs are considered obligatory⁵². The significance of not only the lead but the title as well is stressed. All the above advice can be applied to materials prepared for both the printed press and publication in blogs. In the latter case, the role and importance of the title are being underlined. Similarly to the lead, the title should also be catchy and draw attention⁵³. This easy-to-find tutorial demonstrates how widespread the phenomenon is and shows that it is not treated as taboo any more. One could even risk to say that it has left the underground behind. Sponsored texts as a highly convenient form of advertising are discussed openly, without the proverbial beating around the bush. It should be stressed as well that some of the authors point out that, while working on such a material, one should remain objective and impartial. And even though it may be difficult to encourage readers to buy a good or use a service without imposing one's opinion, yet it is worth to leave the choice to them⁵⁴. In the context of the objective for which sponsored articles are created, this task seems quite challenging. By their very nature, such texts are a form of promotion, which has a certain role to play. It is therefore an exaggeration to expect, that such a text will be multifaceted. What should thus be understood by the notion of "ethical sponsored article"? It seems, first of all, that it is a text recognizable for an average recipient as this kind of material, which is made possible, above all, by the information on the nature of the communication that can be placed besides the text, above, or under it. Such a text thus takes the form of a peculiar but recognizable and legal advertisement. Presently, however, we can easily find numerous examples of publications which (as has already been mentioned), lack such a marking. The recipient who is familiar with the given title can usually distinguish them, thanks to, for instance, the placement of these articles in the middle of the issue or the use of a different colour and typeface in the title. The camouflage is often perfect, as on the one hand the text is confusingly similar to all the rest of the daily newspaper or magazine, which might suggest surreptitious advertising, and on the other, having subjected it to careful scrutiny, the recipient would declare that the difference can be seen. Such "concealed" communications are most

⁵² The advice comes from <https://www.ehitepress.pl/baza-wiedzy/2/artukul-sponsorowany> [accessed: 1 Sep 2014].

⁵³ <http://sbart.pl/artukul-sponsorowany/> [accessed: 1 Sep 2014].

⁵⁴ <https://www.ehitepress.pl/baza-wiedzy/2/artukul-sponsorowany> [accessed: 1 Sep 2014].

highly valued by the advertisers, for they are safe, on the one hand, and effective on the other. These cases show how difficult it is to combat surreptitious advertising and how blurred the boundaries between what it is and is not sometimes are⁵⁵. It used to be a grey area, but it is not so today. What is more, the behaviour involving the preparation of a text by the journalist of the same title in which it is going to be placed, which used to be considered as reprehensive, is not judged so harshly provided (and here it is assumed to be the necessary condition) the text is clearly marked. Until recently, at least in the official accounts, the writing of sponsored texts was left to the entity interested in the advertisement or the agency. Nowadays, it is not only so that the preparation of such a text by a journalist is not shocking, it becomes part of the normal turnover practice. This shows how far the ethical norms created years ago diverge from what is currently seen as not only permissible but also justified and reasonable. What we have nowadays is, on the one hand, declarations which few people seem to remember and, on the other, the market which supplants them and inclines towards different behaviours. The evaluation of the situation, however, cannot fail to take into consideration a broader perspective and just say that we have journalists of low standards and greedy editors. One should remember that the described state of affairs is under a vast influence of the situation of the printed press in Poland. Its far-from-the-best condition, linked with diminishing means and the advertisers switching mostly to the Internet, constitutes an incentive to use the forms of promotion which are appreciated by and interesting to the producers. Sponsored articles seem especially attractive in this context. In addition, the position of the printed press deteriorated even further after the introduction of the described above regulations of product placement in the Broadcasting Act, which gave the television and its production an undeniably privileged position. In order to be able to compete and stay on the market, the printed press is going to reach for such forms of promotions which will bring it profits. If we want a clear and stringent evaluation of behaviours associated with sponsored articles (in particular poorly marked and written by a journalists), it is only fair to adduce the argument voiced by many publishers and editors-in-chief that, from their point of view, it is no less unethical and drastic to lay off journalists due to the lack of means to support the title. It is hard to remain indifferent towards such an argument. How then one should weigh the interests of the parties? And what is the solution of this situation?

⁵⁵ It is indicated in the subject literature that the criterion allowing to distinguish between surreptitious advertising and an advertorial is who wrote the given text. If it was a journalist, it is an act of surreptitious advertising and incurs a liability for violating Art. 12 of the Press Law, and if it was an advertiser, it is the publisher and the editor-in-chief who are liable. Cf.: K. Grzybczyk, *Lokowanie produktu...*, op. cit., p. 179.

Summary and final conclusions

The presented situation resembles the state of the television and radio before the regulations on product placement were introduced. On the one hand, the placement was forbidden as surreptitious advertising. On the other, though, the market had developed guidelines allowing to circumvent this prohibition and employ product placement. With time, with no little controversy, they were implemented in the regulations now in force⁵⁶. It should be urged then to introduce in the near future corresponding solutions allowing for the publication of sponsored articles in the printed and online press. It is important when fighting against what cannot be utterly vanquished, that is surreptitious advertising, to develop clear rules for the publication of sponsored materials and, in particular, with their appropriate marking. They will not completely eliminate surreptitious advertising (as they failed to do in the television after product placement was authorized as an exception) but they will make the market practices more civilized and orderly. It is visible to the naked eye that the restrictive approach of the ethical documents has failed to fulfil its role. Therefore, if the wolf cannot be made harmless, mayhap it is better to tame it? Should the counterargument against the introduction of the proposed provisions be that both the printed and online press would then gain the ability to adopt sponsored articles as a form of promotion to an even larger extent, it is best to remember that even today there are some titles which have exceeded the reasonable boundaries both in the number of such publications and in making them similar to strictly informational texts⁵⁷. Is it profitable for publishers? More in the short run if so, as readers not accustomed to such a great amount of advertising material may give up buying the next issue. The fight for advertisers is like a double-edged sword. On the one hand it generates profits yet on the other it may lead to the title being abandoned by the readers overloaded with promotional content and opposed to the changes in the profile of the newspaper or magazine which they do not accept. It is also the question of the title losing its credibility. This situation often takes place when the publisher, in order to please the advertisers, refrains from

⁵⁶ Cf.: M. Ożóg, *Reklama i promocja w środkach masowego przekazu* [Advertising and promotion in the means of mass communicating], in: *Prawo reklamy i promocji*, p. 305–308.

⁵⁷ For instance, one observed phenomenon is that press titles, in their discussion of various issues, select one of them to be tackled more broadly in every issue. Consequently, there are at least two published texts on the chosen subject. Some of them come from the employed journalists, while some are sponsored texts, besides which traditional advertisements are placed. By doing so, they create a kind of a content package related to the subject selected for broader treatment. Due to the fact that what we have here are easily recognized publications created by journalists besides standard, traditional advertisements, the sponsored texts (not marked as such), signed with someone's name, are treated by the recipients as normal journalistic texts. More and more often one encounters celebrity interviews held by journalists about their lifestyle and how they like to live. They are accompanied by advertisements from developers and housing investments, which were mentioned by the interviewed person, even if indirectly. One could easily find more such examples.

publishing difficult, problematic content, to which the readers are already accustomed. In the end, it is the sense and far-sightedness of the publisher which determine the amount of advertisements they decide to include. Even if it might be possible for a daily newspaper or magazine containing more advertisements than other content to stay on the market and even gain much profit for some time, eventually the readers will lose interest in the title and the advertisers will no longer see the purpose in placing their commercial content in it.

Obviously, this reflection should not lead to the conclusion that amending the Press Law in terms of the issues associated with advertising in the printed and online press⁵⁸. Even though surreptitious advertising has been and still is a problem in the practice of the turnover, it is naïve to think that additional normative regulations are going to change the attitudes of advertisers and publishers on whether it is still worth using it or not. The phenomenon will remain. Still, we have to remember that it is most of all the consumers who suffer from these unfair market activities, as they take in with trust the information disguised as neutral and objective, as well as those producers and service providers who do not employ such methods⁵⁹. The prohibitions contained in the Act on Combating Unfair Competition and the Act on Counteracting Unfair Market Practices, while valuable and important, are general and do not adhere to the more specific rules concerning separating promotional content from the rest. Therefore without undermining their purpose in any way and taking all adduced arguments into account, it is worth to postulate the introduction of regulations similar to those which, as an exception and under certain conditions, permitted the use of product placement. Instead of pretending (although this is not done any more nowadays) that the discussed phenomenon is not common, it is better to put it into a reasonably delineated legal framework creating specific norms. Norms, which most certainly will not get rid of the attempts to circumvent the law and make use of illegal practices but will make the existing market more orderly, which will mostly benefit the readers and consumers.

⁵⁸ In this paper, the issue of online advertising, or more precisely of the advertising in online press was only undertaken to a limited extent in the context of product placement and sponsored articles. However, the issue itself is much broader and touches on many other topics, including, e.g., the advertisements of liquors in communications accessible for children. There are many more issues which require developing new standards.

⁵⁹ On this subject see, e.g.: E. Nowińska, *Z problematyki ochrony rynku przed czynami nieuczciwej konkurencji*, in: *Reklama...*, op. cit., p. 71 ff.