

# Covert Marketing Activities: Identifying Commercial Communication

## 1. Introduction

Advertising should be clearly distinguishable as such whatever form or medium used. If not, it is considered an example of covert advertising and therefore a violation of section 4 of the Danish Marketing Practises Act [DMPA]. This section makes it an offence to employ covert marketing methods.

The hidden nature of commercial communication is characterised by a deliberate intention on the part of the sender to disguise the commercial message and its purpose to induce the consumer to buy a specific product. This type of advertising is highly efficient because the recipients don't realise that they are being exposed to advertising. The consumers are caught off guard, and are therefore easily manipulated to act in a certain way.

The present guideline is first and foremost intended as a tool for businesses, ad agencies, lawyers and other consultancies. It outlines the DCO's position on how section 4 of the DMPA should be interpreted and applied, and presents the general ideas that lie behind his administration of the DMPA with regard to this provision. This guideline should be perceived as a "general advance indication" which comments on typical marketing methods and concepts. The guideline is not an exhaustive account of all matters regarding covert marketing activities and commercial communication.

It is for the courts to decide on a case-to-case basis whether the rules set out in the DMPA have been violated and whether it should be considered a criminal offence.

The present guideline is a revision of the May 2005 DCO guideline on covert advertising.

## 2. Codes and legislation

### 2.1. The Danish Marketing Practises Act and the ICC International Code of Advertising Practise

Section 4 of the DMPA reads as follows:

*'An advertisement shall be framed in such a way that it will be clearly understood to be an advertisement irrespective of its form and irrespective of the medium in which it is couched.'*

Violations of section 4 are punishable by fine unless a more severe punishment is incurred under other laws, cf. section 30(3) of the DMPA. This means that businesses must use advertising in a way which clearly distinguishes it as such.

No one seeing an advertisement or in any way being exposed to commercial communications must be left in doubt as to the nature of the communication. This applies regardless of the form of the media, whether it appears in TV or on radio, in magazines, films, on the Internet or in any other place where businesses may want to do promotion, for example, for their products. It also applies regardless of the nature of the product/service promoted and whether the commercial communication is targeted to consumers or businesses.

The rules set out in section 4 on identification of commercial communication do not necessarily require the name of the advertiser/sender to appear. However, in most cases, information about name, trademark, brand name or logo will appear from the advertising as a practical necessity. Even when this kind of information is not included in the advertising, consumers will nearly always know that its objective is of a commercial

character: One can immediately ‘decode’ advertising stanchions displaying posters with a well-known logo, trademark or poster person.

The sender of the commercial message is free to decide how to present the message as long as the receiver cannot be left in doubt as to the commercial content and objective of the message.

Lack of information about the sender might mean, however, that those seeing the commercial message may not recognise it as such or think that the sender could be a public authority, for instance. Depending on the circumstances, such incidents are likely violations of section 4 of the DMPA.

The requirements with regard to identification of commercial communication should not be considered the end to the so-called ‘teasers’, a type of marketing method which does not give away the commercial objective of, say, a photo or object displayed in public straight away. Painting a gable red prior to launching an advertising campaign in which red is the dominant colour or is otherwise connected to the gable discloses its part in the advertising campaign. This is an example of an acceptable advertising method.

Special care must be taken with regard to young age groups and their exposure to commercial communication. Section 8(1) reads as follows:

*(1) ‘Marketing directed at children and young people shall be framed with specific reference to their natural credulity and lack of experience and critical sense, as a result of which they are readily influenced and easy to impress.’*

Children and young people as a segment are particularly vulnerable in regard to commercial communication. They are impressionable, easily manipulated and lack experience and critical sense. Special care should therefore be taken by business and trade to ensure that children and young people easily recognise commercial communication as such. The more sophisticated and intricate the marketing activity, the more difficult it is for children and young people to identify it as such. Further, business and trade should pay attention to the fact that small children in particular cannot distinguish between commercial and other communication; after all, they have still to learn that the primary objective of advertising is to boost sales. See 5, 6, 8 and 9.3. See also the DCO guideline “Children, Young People and Marketing” ([link](#)). Item three in the guideline sets out that no absolute age limits have been established for the terms "children" and "young people". As a basis, the upper age limit is 18 years of age.

Depending on the circumstances, covert advertising activities may violate section 3(1 and 3) of the DMPA on misleading and improper statements and methods. Violations of section 3 are punishable by fine, cf. section 30(3) of the DMPA. Section 3(1 and 3) reads as follows:

*3.’ Incorrect, misleading or unreasonably perfunctory statements designed to influence demand for or supply of products, real property, other property, labour and services must not be employed’.*

*(3) ‘Misleading practices similar in significance for supply and demand to those referred to in subsection 1 or equivalent practices must not be employed insofar as they are unwarrantable when employed vis-à-vis other traders or consumers as a result of their specific form or because they relate to immaterial matters.’*

According to the DMPA, the responsibility to ensure that advertising is distinguishable as such rests with the advertisers. By advertisers are meant businesses marketing their products or services. This, however, does not exclude other businesses from incurring liability under the existing rules of the Danish Penal Code on complicity in the event that they have contributed to the violation by instigation or with advice. Ad agencies and other consultancies may also be held responsible for having participated, cf. section 23 of the Danish Penal Code. They may incur criminal liability if they realise, or should have realised, that an advertisement conflict with the DMPA. This also applies if they have contributed to keep the true nature of the advertising

undisclosed – as with a medium which agrees to bring a commercial message unidentifiable as such. In order to incur liability, the commercial message should not only be covert; the medium must also have played an active part in keeping the commercial objective undisclosed. This may be the case where an agreement, concluded between the business and the medium, outlines the conditions under which the commercial message should be presented or made public; whether a fee or other considerations were given to keep the commercial objective undisclosed. However, persons or businesses that convey covert advertising bona fide cannot incur liability.

Section 27 of the Danish Media Liability Act reads as follows:

*27. Any person who has inserted an advertisement shall be liable for the content thereof under the general provisions of the applicable legislation. This shall also apply to any person who has assisted therein*

*Subsection 2. The editor shall share in the liability for the contents of advertisement under the general provisions of the applicable legislation. Where the editor does not comply with his obligation to notify in pursuance of section 6 of this Act, he/she shall be liable for the content of the advertisement even though the offence cannot be imputed to the editor as intentional or negligent..*

The obligation to notify in pursuance of section 4 and 6 of the above Act refers to information which the editor is obliged to state concerning the identification of the persons responsible under section 27.

## **2.2. Special legislation, guidelines etc.**

Advertising, which cannot be identified as such, may also conflict with other acts, depending on the form of media and the nature of the product/service advertised.

Several special laws, executive orders, guidelines etc. contain explicit provisions on identification of commercial communication and covert marketing.

- Section 9 of the Danish E-Commerce Act ([link](#))
- Sections 72 and 80 the Danish Radio and Television Broadcasting Act ([link til kum – older version](#))
- Section 2(2) of the Danish Tobacco Advertising Ban Act (Danish only) See [www.forbrug.dk](http://www.forbrug.dk)
- Section 1 of the Danish Medicines Advertising Act (Danish only?) See [www.laegemiddelstyrelsen.dk](http://www.laegemiddelstyrelsen.dk)
- Section 4 of the Executive Order on Advertising of Health Services (Danish only) [www.sundhedsstyrelsen.dk](http://www.sundhedsstyrelsen.dk)
- Items 4, 6 and 8.2 of the DCO guideline on “Children, Young People and Marketing” ([link](#))
- Items 2 and 8 of the Nordic Consumer Ombudsmen’s Position Statement on E-Commerce and Marketing on the Internet ([link](#))
- The guidance “Press Ethic Rules” ([link](#))
- The 1980 Position Statement on Printed Advertising (Danish only)
- Article 14 of ICC International Code of Advertising Practise ([link](#))

The rest of the guideline is laid out as follows:

3. Printed media
4. TV and radio programs
5. The Internet etc.
6. Films (motion pictures)
7. Objects of art
8. Sponsorships
9. Advertisement display pillars and poster people: Ways of appearing in advertising

- 10. Scent marketing and advertising
- 11. Miscellaneous

### **3. Printed media: newspapers, magazines etc.**

Editorial copy and advertisements in magazines and newspapers must be separated clearly so that the two cannot be confused. This is important as editorial copy is trusted and regarded as proper journalism, the product of ideas, research and a critical approach to one's sources. Journalists are considered objective and editorially independent.

The business which advertises in e.g. a newspaper is held responsible for the content and layout, i.e. the advertisement should be distinguishable as such, cf. the principles of good marketing practise set out in section 4 of the DMPA.

Similarly, it lies with the newspaper to ensure that an advertisement is distinguishable as such and does not form part of or gets mixed up with editorial copy, cf. section 34(1) of the Danish Media Liability Act (the rules on press ethic). Please see the rules on good press ethic issued by the Danish Press Council here ([link](#)).

Complaints concerning Danish press and publications can be lodged to the Danish Press Council ([link](#)), or to the owner of the media itself (if printed media). The latter type of complaint may be lodged to the Danish Press Council if the decision reached by the enterprise itself is deemed unsatisfactory. It is required that the complainant has a cause of action, i.e. the person, organisation, business etc. was mentioned, depicted or in any other way identified in the media. The Press Council may also conduct enquiries on its own initiative in the event that the case is likely to have a certain influence or considered of general importance; in reality, this does not take place very often.

However, in 2003, the Press Council issued a statement in which it criticised an advertisement in a magazine issued by a trade association. Its contents and layout was presented as editorial copy. Where the Press Ethical Rules are violated, this may also entail a violation of section 1 of the DMPA which requires business and trade to comply with the principles of good marketing practises. To do this, they must also comply with other relevant codes and legislation. The DCO has long been concerned over the development in the area and calls on the press to enforce discipline within its ranks, e.g. with the Press Ethical Rules.

In the following, a number of cases concerning printed media are discussed in which covert marketing activities, in the DCO's opinion, were involved.

#### **3.1. Mutual agreements between publishers and traders**

Covert marketing is when a publisher agrees to print an article about a product/service for a trader which in return offers money, dinners, travels or hotel stays for journalists or inserts an advertisement.

It is also covert marketing when a publisher agrees to print an advertisement which in layout and contents resembles an editorial article.

This mix of advertising and editorial copy is known as "advertorials" – a genre frequently used by free, weekly pamphlets, distributed on a door-to-door basis. The articles are characterised by detailed and laudatory descriptions of a company or a product. Various named – and sometimes depicted - people praise the product and its outstanding qualities while referring to their positive experiences with the product(s). Health products and alternative medicines are often advertised this way, but it is a widely used marketing technique.

If, following a mutual agreement, a publisher undertakes to mention or make an article about a company which in the main does not look like an advertisement although its objective is to promote a specific product

or service, the publisher must as a minimum add the word “advertisement”. The word “advertisement” must be immediately visible to the reader. Do not use fine print or put it in the corner. And do not print it on a coloured background which may blur the type. If the article covers more than one page, the word “advertisement” must, as a basis, appear on all pages.

*Examples:*

*The DCO has dealt with a number of cases where traders make agreements with publishers to get mentioned editorially. In one case, the DCO got possession of an order confirmation which affirmed one such agreement between a fitness centre and a newspaper. A clear example of covert marketing the newspaper later regretted the agreement and took steps to prevent similar situations in the future.*

*Some years ago a number of local newspapers adopted their own guidelines on editorial copy, which included clear distinctions between advertising and editorial copy. However, it was deemed okay to disregard the guideline in the event that the survival of the paper was at stake. The DCO did not accept this explanation; in his view, this exception constituted a contravention of both the DMPA and the Press Ethical Rules.*

In order to assess whether an advertising activity is in fact an example of covert advertising, it has to be clarified whether the editorial coverage that the product or business in question has received is a result of a specific agreement between the business and the medium. Editorial coverage of a product which not only takes place against the background of sound, editorial and journalistic criteria, but also speaks for publication does not fall under section 4 regardless of whether the journalist came to know about the product in connection with an event hosted by the producer/business. The same goes for situations in which a business puts one of its products at the journalist’s or another person’s disposal. It is not considered a marketing initiative to present a gift to someone or put a product or service at someone’s disposal provided that the receiver is not obliged to use the product in a specific way. As an example: It is not an advertising activity for a car maker to put a car at a journalist’s disposal for a test drive in order for him/her to review the car provided that the he or she does not have a say on the final review.

### **3.2. Promotions and advertorials**

“Advertorials” or “promotions” are advertisements ordered by advertisers and written and published by the magazine in which it is placed.

Advertisements whose layout and contents may make it virtually unrecognisable as such and lead the reader to believe that it is editorial copy must, as a minimum, be labelled with the word “advertisement”, cf. 3.1.

The words “advertorial” or “promotion” (in English) are considered inadequate substitutions as readers cannot be expected to be familiar with these terms and associate them with advertising.

A magazine may of its own initiative come up with ideas for a photo shoot or an article about a product or a company. Where the magazine introduces the idea to the company in order to have the story fully or partially funded, it must be indicated in connection with the article/reference/photo shoot that it has been subsidised and therefore is a piece of advertising.

*Examples:*

*A four-page advertisement with editorial layout about hair dye was inserted in a fashion magazine. Easy to confuse with a fashion review or the like, the advertisement was in fact an example of “promotion” or “advertorial” as the magazine had written it for the advertiser. Although labelled “promotion” (in English), the DCO found this indication inadequate as readers could not be expected to be familiar with this term; in short, it constituted an example of covert advertising.*

*Advertising, free circulation in fashion and design outlets, cafés and cultural institution and cooperation partners who paid to get mentioned in the index and to have it circulated was the backbone of one magazine which the DCO investigated. Further, these cooperation partners were guaranteed access to the editorial columns should they have news appropriate for the magazine. The people behind the concept publicly stated that merging editorial copy and advertising would be the hallmark of the magazine. However, the magazine later assured the DCO that steps were taken to separate editorial matter and advertising.*

### **3.3. Press releases**

Press releases covering business affairs usually take the form of editorial material and thus often pass for a news item. However, in the event that a newspaper or any other media decides to bring the press release or convey its message, the media must ensure that sound journalistic evaluation lie behind the publication, cf. appendix 1. If not, it may constitute an example of covert advertising, see section 3 above.

### **3.4. Advertising wraps**

An advertising wrap is a full-size advertisement that covers the front cover, the inner front cover, outer back cover and back cover: the front page, page two, the next-to-last page and the back is in fact one big advertisement. The front page is usually reserved for editorial news; ad wraps turn this section of the paper into an advertisement.

*Example:*

*An advertising wrap, ordered by a telecom service supplier, was made to look like the editorial part of the paper in which it featured. The paper's flag formed part of the advertising wrap, and the most prominent headline congratulated a member of the royal family on his birthday. In connection with this case, the DCO declared that advertising wraps must be presented in a way that makes it easy to identify it as such. Headlines and text should be easy to distinguish from the editorial ditto for readers. The DCO finds that advertising wraps should be labelled "advertisement" if necessary.*

### **3.5. Features in newspapers, magazines etc.**

Newspapers and magazines frequently sent out issues that partly or fully contain specific features. If the main feature is a commercial event e.g. a new film, an exhibition or the opening of a department store, editorial matter and advertising must be separated clearly. Great care must be taken to ensure that the layout and presentation of the feature is easy to distinguish from a commercial campaign.

To what extent this will be considered an example of covert advertising depends among other things on whether commercial interests have had a say in the presentation of the feature and whether payment has been accepted for copy which cannot be categorised as traditional advertising.

*Examples:*

*An issue of a magazine covered a new film about to come out. Not only did the film and its approaching opening night receive extensive editorial coverage in several articles; the event was also heavily advertised in the magazine. Both the articles and the advertisements were scattered across the pages. The background from the advertisements was repeated several places in connection with the page references and two regular columns on editorial topics. The DCO informed the magazine that this type of presentation conflicted with the principles of good marketing practises in that the articles supported the advertisements in a way which tied the editorial and commercial elements in as if it were an integrated marketing campaign. The magazine accepted to discontinue this kind of marketing*

### **3.6. Separate advertising supplements in magazines and newspapers**

Separate advertising supplements are often distributed along with the papers. Subjects like lifestyle, gardening, cars, fashion and travel usually fill the columns. Supplements must be labelled “advertising supplements” very clearly.

It should be noted, however, that this label does not entitle the publisher/advertiser to include traditional advertisements alongside advertising masked as editorial content. Commercial content should be easily distinguishable as such. Headlines, text and visual images must not confuse readers as to its true nature. To use a type different from the editorial one or the like when referring to a company or a product may not necessarily prevent the piece from being regarded as editorial content. See 3.1. above.

*Example:*

*The DCO informed one paper that the advertising supplement “Fashion, Home and Lifestyle” was not labelled “advertising” as required. Another paper along with which the same supplement was distributed had taken care to ensure that it was labelled correctly.*

### **3.7. Free newspapers and magazines**

The circulation of free and publicly available newspapers and magazines is entirely based on advertising. This convergence of commercial and media interests means that both parties must take extra care to keep paid and editorial content separated in order to observe the principles of good marketing practises as well as the principles of sound press ethics.

### **3.8. Newspapers and magazines targeted to business and trade**

Editors are also required to keep editorial and commercial copy separated when the magazine etc. is targeted to business and trade.

*Example:*

*A paper offered “editorial profile solutions” to retail sellers such as editorial copy next to an advertisement or product tests with photos published as editorial content. The DCO found this to be an example of covert advertising and in conflict with the principles of good marketing practises. The paper accepted his evaluation and subsequently changed the concept.*

### **3.9. Commercial publications distributed to consumers**

It is now common that marketing activities include commercial publications targeted to consumers. Look and contents often resemble that of ordinary papers and weekly magazines. Articles about consumer matters as well as the company and its product line usually make up the contents. They are usually available at the business premises, distributed door-to-door or sent to customers.

The DCO holds the opinion that the name, trademark or logo should appear from the publication in a way that conveys its commercial purpose clearly.

*Examples:*

*The DCO learned about one commercial publication which resembled an ordinary magazine with an issue on fireplaces. The magazine contained articles and tips about fireplaces; yet they were clearly promotional boosts. The magazine also featured advertisements for fireplace equipment. The publisher behind the magazine was the fireplace supplier whose products featured in the articles. The DCO declared that the publication was a piece of marketing material and by presenting it as a magazine with a mix of consumer information and product-boosting articles it clearly constituted an example of covert advertising.*

*A free magazine targeted to families with children was distributed in a Danish county. The magazine contained information from the county authorities as well as various societies, clubs and institutions. Further, it also featured stories about suppliers of children's products. However, it turned out that the publisher behind the magazine was a commercial enterprise – not the county authorities. As it contained sponsored articles and advertisements for all the parties involved, the DCO found that the magazine was in actual fact a commercial magazine and that the individual features should be labelled as advertisements if a private enterprise or a public comparable with the former is behind. He continued that the issue has become ever so important with the new liberalised markets – i.e. the fact that consumers can choose freely among a number of public service providers within a specific area. The more freedom to choose hospitals, schools, day-care institutions, the more care must be taken to ensure that advertisement senders are easy to identify.*

### **3.10. Material produced for public information**

More and more public authorities, municipalities and counties included, send out information material to the public, often in the form of folders, leaflets or the like.

Advertisements may feature in such information material as long as advertising and editorial matter is kept strictly separated.

When advertisements feature in material produced for public information, it is advisable to bear in mind that it may be perceived as an official blue print or endorsement if a commercial enterprise and/or its product line appears from this kind of material.

*Examples:*

*The DCO approached the authorities in one Danish county following their publication of a folder about emergency/accident clinics. In one article about emergency transportation service, the last period read: "For absolutely reliable ambulance transportation, take out a subscription with X". This mix of public information and advertising could, in the DCO's view, lead readers to believe it to be a piece of public advice or an endorsement. This impression was reinforced by an advertisement for this emergency transportation service which followed immediately after the reference.*

*A supplier of security equipment sponsored a public leaflet about the kind of security equipment which he produced. The DCO declared that the leaflet should state the name of the sponsor clearly. Further, photos and text should not focus one-sidedly on the sponsor's products.*

## **4. Radio and TV programmes**

Section 72 of the Danish Radio and Television Broadcasting Act lies down that advertising should be easy to distinguish from regular programmes. Sponsored programmes must be clearly identifiable as such by appropriate credits appearing at the beginning or end, or both, of the programme, showing the sponsor's name or trademark (logo), cf. section 80 of the above Act.

Pursuant to section 8(3) of the Executive Order concerning Radio and Television Advertising and Programme Sponsorship, the sender/advertiser must be identified by means of name, logo or other business emblems in the advertising.

The broadcast management is responsible for observing the rules in the Radio and Television Broadcasting Act – also when it comes to keeping commercials and regular programmes separated.

The Radio and Television Board is the competent authority with respect to radio and television enterprise. The Board also has the competency to decide, among other things, in matters where radio and television

enterprises have violated the Radio and Television Broadcasting Act with respect to its provisions on identification of advertising, sponsor identification and sponsored programmes.

The provisions in the Radio and Television Broadcasting Act are derived from the Directive “Television without Frontiers”. The EU Commission proposal of 28 April 2004 fleshes out how to assess covert marketing activities in relation to radio and television. This proposal forms part of the framework against which the Radio and Television Board makes its decisions.

For more background information, please see the Media Secretariat ([www.mediesekretariatet.dk](http://www.mediesekretariatet.dk)) and the Danish Ministry of Culture ([www.kum.dk](http://www.kum.dk)).

The Radio and Television Board has dealt with several cases regarding the identification of commercial content on radio and television.

*Examples:*

*The Radio and Television Board processed a complaint about covert advertising in relation to a jubilee interview on an evening show. A CD, released to celebrate the occasion, was mentioned several times during the interview with the comedians behind; at one point, one of the comedians took over the role as host in order to recommend the CD. Facts about the CD appeared on the lower part of the screen; the last piece of information was on for nearly a minute. While the Board did not object to the fact that the CD received some coverage, it nevertheless found that the display of facts on the screen as well as the focus on the CD rather than the jubilee had little to do with lawful consumer information.*

*The above Board also processed a complaint regarding a feature in a news show. A reporter was going to visit a Mars scientist, and bought two Mars chocolate bars on the way. Although irrelevant for the news story, the chocolate bars appeared several times during the feature. Although the chocolate bars had nothing to do with the interview, the Board nevertheless found that some leeway should be given to TV stations to use humour and creativity.*

Pursuant to the DMPA, it lies with the trader advertising on television or radio to ensure that the commercial is clearly distinguishable as such. The DCO may only take action against the advertiser behind the commercial – not the commercial itself, cf. section 4 of the DMPA on identification of commercial communication.

In order to ensure a practicable coordination of cases relating to covert advertising, the DCO and the Radio and Television Board have decided to establish an informal coordination forum concerning the processing of cases pursuant to the Radio and Television Broadcasting Act and the DMPA respectively.

For the press ethical rules for journalists, see appendix one.

Editors of TV and radio programmes may likewise be held liable for the content of commercials they are broadcasting, cf. section 27 of the Danish Media Liability Act. See also 2.1. above.

For press releases, see 3.3. above.

*Examples:*

*The DCO, at the time member of the Radio and Television Board, learned about the broadcasting of a programme on electrotherapy. While starting out as consumer information, the programme, lasting one and a half hours, gradually went on to focus on one distributor of electrotherapy appliances and the treatments offered. The distributor’s address, telephone number and opening hours was displayed and mentioned several times throughout the programme. The DCO then brought an action against the distributor and the*

*programme editor for violating section 2(3) of the DMPA on misleading advertising. The Court found that the marketing methods employed were improper as well as misleading to the detriment of businesses and consumers alike. The TV programme purported to present an objective, journalistically researched story despite the fact that it was little more than a commercial feature. As it was, the defendants were acquitted on technicalities.*

## 5. The Internet

Special legislation governs this field. It follows from section 9(1) of the Danish E-commerce Act that:

**“All commercial communication that is part of or constitutes an information society service shall be framed and presented so that it is clearly identifiable as such. The party on whose behalf the commercial communication is made shall be clearly identifiable.”**

The Internet is a very popular place for advertising in that it leaves more room than other media for dynamic and creative marketing activities. Websites often contain games, films, full-motion commercials and banner advertisements.

Moving features and sound leads to more intense and direct communication with website users which in turn means that it becomes harder and harder to distinguish between information, commercials, entertainment and games.

Internet advertisements should be clearly distinguishable as such and it should be stated clearly on whose behalf the advertisement is shown, cf. the section above.

When targeted to children and young people, it is even more important that the age group for which the commercial communication is intended is able to discern. See 2.1. above.

The requirements set out in section 4 on identification of commercial communication are tightened when compared to those set out in section 8 of the same Act on children, young people and marketing. This means that great care should be taken to ensure that commercial communication is straightforward and easy to distinguish as such – also in interactive media. Online games in which brands and products used as props appear regularly may therefore violate the above rules.

A game promoting marketing activities where the commercial intentions behind are obvious is, on the other hand, legal if the game is found on the business' own website. Products, brands, logos etc. which do not belong to the trader must however not appear in the game or plays.

If a business buys its way into a chat room or fun sites in order to regularly expose children and young people to commercial messages and advertising, it acts in breach of section 8, subsection 1 and, depending on the circumstances, section 4.

Children and young people use new media frequently for both work and fun. When they seek out websites which contain games, play and fun, they are quickly carried away by these activities.

This is why it is very important, as a basis, to draw a clear line between entertainment, games, and play activities on the one hand and interactive advertising on the other when talking children, young people and marketing.

*Example:*

*The DCO investigated an open chat room and play place for young people which also turned out to be a*

*commercial universe where companies could buy their way into the chat room and take part in it. Branded products would then pop up at regular intervals. This mixture of chat, play, games and advertising was found by the DCO to constitute a clear example of covert marketing activities and also a violation of the principles of good marketing practise.*

## **6. Films (motion pictures)**

Product placement has become a stable feature of today's film productions. Brands pop up invariably to make the films mirror everyday life and become more realistic. It is usually the property master that takes care of the contact to the companies from which the props are purchased, borrowed or handed over for free.

The explanatory notes concerning section 4 states the following: No absolute requirements apply as to whether the identification of the sender should take place in the advertising or in connection with it, even if this is the most practical procedure. The identification requirement will be considered fulfilled where, following an agreement concerning the display of specific products, it is stated in the roll-up titles before or after the film that products supplied by one or more businesses were used or displayed according to agreement.

To have one's products promoted in connection with a children's film will not in general be in keeping with the considerations that business and trade is required to take under section 8 of the Marketing Practises Act. This applies regardless of whether the existence of such agreement is stated in the rolling titles. Children and young people will rarely read these titles; the youngest age group cannot read it whatsoever. See 2.1.

Many films intended for a grown-up audience are likely to appeal to children and young people, who may watch these films. Business and trade should therefore thoroughly consider whether these films should be subjected to the same standard with respect to product placement as the children's films mentioned above.

The DCO attitude to product placement is evident from his response to the hearing on the Directive 'Television without Frontiers' ([link](#))

It is the DCO's view that film producers must inform the public about products placed at his/her disposal. Rolling titles shown before or after the film could inform the audience that product placements appear in this film subject to agreement with one or more private businesses.

Thus the DCO might investigate cases involving product placements and the identification of such. This could become important in connection with films targeting children and young people as they are susceptible and lack experience and critical sense. See 2.1. above.

## **7. Objects of art (books, paintings, music etc.)**

If a writer, musician or painter agrees to advertise for a private enterprise and/or its products, or agrees to make mention of or use a private enterprise's products in their respective pieces of art, it will constitute a clear example of covert advertising unless it is stated clearly and visibly that an agreement has been entered into and with whom.

Listeners, readers and art lookers trust the piece of art to be the result of talent and personality. They do not expect a commercial tie-in.

*Example:*

*A private enterprise had contacted a number of artists with a view to have its products incorporated into their work. The DCO informed the enterprise that it would be a case of covert advertising should it enter into such agreements with the artists.*

## **8. Sponsorships**

In a sponsorship marketing program, a corporate sponsor commits itself to support, often financially, for instance athletes, sport clubs, clubs in general, exhibitions, museums, theatres, schools and day care institutions in exchange for promotion of the company. Depending on the circumstances, such a sponsorship may be considered a covert marketing activity. The DCO has not dealt with any complaints regarding sponsorships and covert marketing yet.

School sponsorship is when a corporate sponsor donates free materials and instruction to a school. Children may start developing a liking for the sponsor and its products, without even being aware of it. This indirect commercial pressure on children in schools and day care centres prompted the DCO to list a number of recommendations and principles regarding in-school marketing activities and marketing in day care centres in his guideline “Children, young people and marketing”. They are aimed at eliminating this commercial pressure – whether it is overt or covert. See 2.1. above.

## **9. Advertisement display pillars and poster people: Ways of appearing in advertising**

The media has dealt with this issue on several occasions. While the DCO has not handled any complaints regarding this issue yet, he holds the opinion that it may constitute an example of covert advertising. In order to be so, an agreement has to exist between the business whose products are being promoted and the person who displays the advertising. To present a gift to someone or to put goods or products at someone’s disposal without obliging the receiver to use the gift or the product in any particular way is not considered advertising.

### **9.1. Celebrities and other “famous” people**

Some private enterprises give their brands away for free - usually clothing, jewellery, bags or watches – to celebrities in order to “build buzz” for their brands, hoping that if the brand is worn by a famous person, then others will follow. If the business makes arrangements with the person(s) as to how they should wear the article, the persons become an advertisement display pillar when parading the brands in public. The celebrities being role models to many people, the effect of advertising this way may have a huge impact; however, it constitutes an example of covert advertising.

A celebrity may also enter into an agreement with a business to do promotion for which he or she is paid. The general rule is obviously that the advertising must be easy to identify as such. If e.g. a footballer is paid to do the usual exultation in front of a specific advertising hoarding after having shot a goal, then it is considered an example of covert advertising.

### **9.2. Ordinary people**

Ordinary people may also be offered brands at a reduced price or for free in exchange for using them on a daily basis and/or according to instructions/recommendations. This also constitutes an example of covert advertising according to the DCO. As display pillars, they may inspire family, friends and colleagues to purchase the product.

### **9.3. Children and young people**

Children and young people influence each other's taste in food, drinks, sweets, clothing, toys, music, mobiles etc. Some businesses take advantage of this trend by making arrangements with other young people to display the business's brand at popular hang-outs – discos, cafés etc. Dressed in the latest fashion outfit or equipped with the latest mobile, the young person get his/her peer group's attention when promoting the products and, as a result, provide inspiration for the next purchase. This, however, constitutes another clear example of covert advertising, and it will be considered an aggravating circumstance if this kind of marketing activity deliberately is designed to target children and young people. For more information, see 2.1. and the DCO guideline "Children, Young People and Marketing".

## **10. Scent marketing**

Scent marketing is a kind of marketing method designed to use scents to stimulate people's subconscious minds with the purpose of boosting sales. The DCO holds the view that such methods, as a basis, constitute a violation of the principles of good marketing practises – and an example of covert marketing - if consumers are not made aware of this exposure. Using scents which emphasise or present the properties of a product – take for instance the smell of an orange in the supermarket's fruit department – are not in general considered to be in breach of the principles of good marketing practises. However, if scents are used to mislead consumers as to the true scent properties of a product this may conflict with the provisions laid down in section 2 of the DMPA.

Where scents form part of a marketing initiative, the DCO finds it reasonable to inform those exposed by means of signs.

## **11. Miscellaneous**

The abovementioned examples of covert advertising and marketing are by no means exhaustive. There are other ways in which covert advertising may form part of a marketing concept.

Those may include:

- Dealer rewards – salespeople who deliberately recommend one product over another due to the prospect of a gift or a reward on selling a particular item.
- Recruiting-a-friend schemes - consumers who recruit friends for a business venture in return for remuneration.
- Advice from experts, specialists or friends whose recommendations are based on the prospect of personal gain – this be discounts, gifts or the like.
- Conferences, seminars or travels arranged by producers and targeted to specific professional groups in order to induce these groups to make purchases for their workplaces.
- Market surveys which are cover-ups for sales promotion.

All the above examples are in one way or another related to covert marketing. The examples all have in common that the consumer trusts the impartiality of the advice or recommendation given by an expert and that it is based on personal experience.

## **12. References**

The ICC International Code of Advertising Practice ([link](#))

The Press Ethical Rules ([link](#))

The DCO guideline “Children, Young People and Marketing”. See chapters 4, 6 and 8 on identification of commercial communication, school sponsorships and the Internet respectively. ([link](#))

## Speeches

“Is that supposed to be an article?” DCO speech delivered at the Danish Journalist Festival on different types of hidden advertising, 2000

“Identifying Commercial Communication: Children and Young People”. Speech delivered at the ICPEN-meeting, 9 October 2003

The DCO, Copenhagen Business School and the Radio and Television Board have conducted surveys, tried cases and issued statements in relation to this area which are only available in Danish. Contact the DCO’s office for a complete overview.

## Special legislation: Ethical press rules

Section 34(1) of the Danish Media Liability Act reads as follows:

*‘The content and conduct of the mass media shall be in conformity with sound press ethics.’*

The Danish Public Prosecutor decides whether to bring a case under the Media Liability Act, cf. section 28 of this Act. This means that it lies with the Public Prosecutor to assess whether to bring charges against, say, a daily paper in pursuance of the Media Liability Act for violations of e.g. section 2 of the DMPA.

The guideline on press ethical rules states among other things that:

The rules apply to editorial content (text and illustrations/pictures) made public in the written press, radio and television as well as remaining mass media;

The rules also apply to advertisements and advertising in general in the written periodical press and the remaining mass media in the event that no specific rules govern the area;

Breaches on sound press ethics also include compliance with third party influence on editorial content in the event that it compromises the editorial independence of the mass media. Journalistic tasks which contravene press ethical rules are also considered a breach of press ethical standards.

Under ‘Content of the code’, item A(1) on ‘correct information’, it is stipulated that:

*‘It is the duty of the press to bring correct and prompt information.’*

Item B(4) on ‘Conduct contrary to good press practise’ stipulates that:

*‘There should be kept a clear dividing line between advertising and editorial text. Text and pictures occasioned by direct or indirect mercantile interests should be brought only if a clear journalistic criterion calls for publication.’*