

Commercial Advertising in Digital Space: A Study of the Concept and Civil Liability

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Abstract:

Technological development has profoundly transformed commercial advertising, shifting it from traditional media to the online sphere thanks to the Internet's advantages, particularly speed of dissemination, wide audience reach, and the interactive and flexible presentation of goods and services. As a result, electronic advertising has become a key marketing tool. However, it also raises legal challenges concerning the limits of its use and the protection of consumers from deception and misleading practices. This has made it necessary to establish regulatory mechanisms within a legal framework suited to the specific nature of the digital environment.

In this context, Algerian Law 18-05 on electronic commerce provides a specific framework for regulating electronic transactions and services, including online advertising, with the aim of enhancing transparency and protecting consumers from misleading or unlawful practices. Its implementation represents an important step toward balancing freedom of commercial communication with consumer rights in the digital sphere.

Keywords: *Consumer; Electronic commercial advertising; Digital environment; Misleading practices; the protection of consumers.*

Introduction:

Business and commercial operations have undergone major changes because of technological progress which require professionals to adapt to these developments by using current tools. The digital revolution has transformed commercial advertising because it now operates through electronic media which uses the Internet as its main platform.

The Internet functions as a global network which allows users to maintain continuous communication while evolving into a unique advertising platform that delivers faster distribution and unrestricted audience access at any time and place. Internet advertising functions as the main marketing instrument for product promotion which leads experts to classify it as a marketing revolution for contemporary business.

The Internet functions as an independent advertising platform which legal scholars and courts recognize to perform identical functions as

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conventional advertising methods. The Court of Appeal of Rennes supported this perspective through its 31 March 2000 decision which recognized the Internet enables public communication through text and images and sound and provides users with access to product information and pricing details.

The Internet functions as an advertising platform which generates several risks that endanger both customers and society, so a legal framework needs to balance advertising freedom with protecting people from harmful practices.

The Internet functions as a primary advertising platform which leads to questions about whether it has transformed traditional commercial advertising methods or functions as an extension of existing advertising techniques. The investigation needs to determine whether this advertising method should follow existing legal frameworks or if it requires new regulations because of its electronic cross-border operations.

The study adopts a legal analytical approach through the analysis of legal texts and jurisprudential opinions related to Internet advertising, while comparing its characteristics with those of traditional commercial advertising and examining relevant judicial decisions to determine the adequacy of the current legal framework governing this type of advertising.

This study is based on the hypothesis that Internet advertising, despite sharing the same functions and objectives as traditional advertising, possesses technical and cross-border characteristics that create new legal challenges, which may render traditional legal rules insufficient for its effective regulation. The study also assumes that achieving a balance between freedom of advertising and consumer protection requires the development of an appropriate legal framework adapted to the digital environment.

The study aims to highlight the impact of technological development on commercial advertising, clarify the legal nature of Internet advertising, analyses the risks arising from it, and assess the extent to which existing legislation is adequate to regulate it, as well as to determine the need for specific legal rules that correspond to the particularities of the electronic environment.

To address this issue, the study is divided as follows:

The first topic:

The Conceptual Framework of Online Commercial Advertising

Online commercial advertising opens new horizons through which promotional messages can reach an unlimited number of individuals, given that the Internet offers vast possibilities for advertisers. Any company can

advertise its products and services worldwide without facing territorial constraints.

Moreover, Internet users can examine advertisements carefully and return them whenever they wish, in addition to the possibility of direct interaction with professionals, thereby providing consumers with the information they desire about a product or service.¹

This section addresses two principal topics:

The first focuses on defining the concept of online commercial advertising, while the second is devoted to outlining the most important legal principles governing such advertising and the issues it raises regarding its regulation within the contemporary legal framework.

First requirement: The Concept of Online Commercial Advertising

Defining the scope and notion of online commercial advertising is not a simple task, owing to the distinctive nature of the Internet.²

Most scholarly and judicial definitions have adopted a broad concept of advertising, one that allows the inclusion of all forms of communication used in this field if they aim to promote products and services, attract consumers, and encourage them to make purchases.³

First section: Definition of Electronic Commercial Advertising

Algeria does not have a specific law exclusively regulating electronic advertising; rather, it is governed through a set of dispersed legal provisions. Among the most important of these is Law No. 18-05 of 10 May 2018 on electronic commerce, which establishes the conditions for commercial advertising on the Internet, particularly the requirements of transparency, the prohibition of misleading practices, and the obligation to disclose the supplier's identity as well as the characteristics of the product or service.

Although numerous definitions of commercial advertising have been proposed, there is broad consensus regarding its constituent elements—an issue that will be addressed later. Among the legislative definitions of commercial advertising is that contained in Law No. 04/02, which sets out the rules governing commercial practices. Paragraph 3 of Article 3 provides the following definition: “Any announcement aimed, directly or indirectly, at promoting the sale of goods or services, regardless of the place or means of communication used.”

Prior to this law,⁴ concerning quality control and the suppression of fraud (90/39, 1990), stipulated in paragraph 8 of Article 2 that advertising comprises: “All proposals, publicity materials, statements, offers, or announcements, or any service conveyed through visual or audiovisual media.” Accordingly, it encompasses everything used by the electronic

merchant to encourage consumers to engage with the offered goods, whether through visual, auditory, or written means.

As for the French legislator, advertising was defined in Article 3 of the Law of 29 December 1979 regulating advertising and visual signage, which states that advertising is: “Any description, form, or image directed at the public with the intention of attracting its attention...”⁵

It is noted that this definition emphasizes the purpose of the advertising message, which is to attract the attention of the public, regardless of the form or medium used. Accordingly, the criterion adopted is the promotional objective rather than the means employed. On the other hand, the French Consumer Law of 1993 addressed the concept of advertising within the framework of the offense of misleading advertising provided for in Article 121/1, which states: “Any advertisement that contains—in any form whatsoever—false claims, statements, or offers, or any content likely to mislead if it relates to one or more of the following elements....”⁶

Here, the legislator used the expression “any advertisement” in a general and comprehensive manner, without restriction or qualification, indicating that all forms of advertising fall within the scope of legal regulation whenever they contain false or misleading content.

Regarding the definition of ⁷electronic advertising, Article 6, paragraph 6, of ⁸on electronic commerce addressed this concept, stating: “Any advertisement aimed directly or indirectly at promoting the sale of goods or services through electronic communications.” From the content of this article, it can be concluded that electronic advertising encompasses any behavior or action undertaken by a professional prior to concluding a contractual transaction, through the Internet or any other electronic means, with the purpose of influencing the consumer and persuading them of the advantages of goods or services and the potential benefits derived from them.

Second section: The Legal Nature of Electronic Commercial Advertising and Its Forms

Electronic commercial advertising constitutes a fundamental tool in digital markets. To delineate its legal concept, it is necessary first to determine its legal nature and, second, to indicate its various forms, which differ according to the medium used—such as electronic platforms, social media websites, email, and search engines—as well as according to the mode of presentation, whether written, visual, or interactive.

A. Legal Nature

Jurists differ regarding the legal nature of electronic commercial advertising. Some consider it an offer, while others view it merely as an

invitation addressed by one party to another—or to the public—with the aim of encouraging them to contract with the advertiser, without specifying essential contractual elements and without an intention to be directly bound should the invitation be accepted (i.e., an invitation to treat). Accordingly, electronic commercial advertising constitutes merely an invitation to contract if it does not include reference to the essential elements of the contract which align with the nature of electronic contracts.⁸

One of the main criticisms directed at this view is that it no longer corresponds to the developments in electronic advertising. Advertising messages now often contain all the components and conditions of a binding offer, making advertising a fundamental stage in the pre-contractual process, even if it is not explicitly classified as an invitation to contract.

Another opinion considers advertising directed to the consumer through electronic means to constitute an offer. Proponents of this view emphasize that electronic advertising must contain the essential conditions of the contract and clearly specify the price, as well as the advantages and characteristics of the good or service (that is, expressing a positive and definitive intent to contract).⁹

In our view, the second position is the more convincing one. This conclusion is supported by Article 11 of Law No. 18-05 on Electronic Commerce, in which the Algerian legislator sets out all the essential and substantive elements of the electronic commercial offer. This clearly indicates that such an offer constitutes a complete legal offer rather than a mere invitation to negotiate. Article 11 provides: “The electronic supplier must present the electronic commercial offer in a visible, readable, and comprehensible manner, and it must include at least—but not exhaustively—the following information: ... the nature, characteristics, and prices of the proposed goods or services, inclusive of all fees; the availability of the good or service; and the methods, costs, and time limits of delivery...”¹⁰

B. Forms of Electronic Commercial Advertising

The presentation of commercial advertisements exists in various forms which have been developed because of advances in information technology. The research focuses on the main ways commercial advertising spread through online channels.

– *The Web: The internet stands as the leading platform which businesses use to share their promotional messages with customers across the world. Online commercial advertising generates greater financial benefits than traditional advertising channels including television because advertisers need to create websites that both attract users through visual design and*

provide organized content for easy navigation. The main form of web advertising exists in the form of banner advertisements which appear across various websites. These consist of dedicated advertising spaces occupying part of a webpage, designed primarily to attract the user's attention and prompt them to click on the banner, thereby redirecting them to the advertiser's website to introduce the products or services being promoted. The advertising banners appear in different formats which include small banners and interactive content that features games and promotional messages like "Win a trip." The websites serve as commercial advertisements because they display paid products and services from their owners. Websites with advertisements that meet these two conditions should classify these ads as commercial content.¹¹

– Email: Every Internet user receives an electronic mailbox through which they can send and receive messages.¹² Email operates as a digital marketing tool which delivers messages at a speed that surpasses traditional mail services. Email messages contain user information which includes their name and the country where their account was registered to help advertisers send targeted promotional content to specific users or their entire mailing list. Electronic promotional messages operate through multiple formats which include text and multimedia content such as images and audio files and videos and interactive elements that enhance their ability to attract and influence consumers. The message needs to reach people who do not have specific identification for it to qualify as commercial advertising according to legal standards. The content becomes private correspondence when it targets one person or a defined group of recipients who share a specific identity. The question arises whether Internet-based commercial promotions for products and services meet the legal definition of advertising.¹³ In this context, French law—similar to many comparative legal systems—affirms that the essential element of advertising is the existence of communication with the public, meaning that the message is directed to persons who are not individually identified. Consequently, if the message is sent to a specific individual or to a closed, clearly defined group, it does not constitute commercial advertising but merely private, individual communication. The owner of an email inbox possesses the authority to block advertising messages from entering their inbox. The email holder needs to provide consent before receiving advertising messages through this communication channel when the messages comply with public order and morality standards and do not violate commercial advertising restrictions. Finally, it should be noted that commercial advertising on the Internet is not limited to the traditional,

well-known formats; rather, it takes various other forms that are widely used in the digital environment. Among the most prominent are advertising bars, pop-up messages, search engines and electronic directories, as well as hyperlink technology, which enables users to move directly to the advertiser's website.

Second requirement: Principles Governing Commercial Advertising on the Internet

All advertising content must follow basic rules which stem from multiple legal requirements that control online commercial advertising at national and international levels. The rules about online commercial advertising also stem from self-regulatory systems which various online commercial advertising entities create.

Advertising practices together with legal regulations have established essential principles which organizations need to follow. The principles establish fundamental guidelines which help commercial advertising become defined and reliable and transparent in the digital space.

First section: The Principle of Identification and Clarity of Advertising

The advertisement needs to show its information clearly while maintaining a clear presentation. The content requires a clear disclosure as an advertisement so it can separate itself from other kinds of messages. The advertising message needs to show all required information about the advertiser who created it. The practice of sending unsolicited commercial messages to email addresses which constitute illegal advertising creates a major problem.

French courts—preceded by courts in the United States—have addressed these unwanted messages. The Paris High Court with its extensive jurisdiction declared spam to be illegal advertising which France strictly prohibits.

The following conditions establish the principle which we have discussed throughout this entire section:

- Online commercial advertising must contain clear and noticeable information.
- The advertised item and its related data must appear on the same screen.
- Information relating to the advertisement must reach the consumer before the purchase is made (providing all details concerning the transaction, including the product itself, its method of use, the means of acquisition, the price, etc.).
- Information or data should be repeated, when necessary, as repetition increases the likelihood of it being seen.

Second section: The Principle of Transparency and Honesty in Commercial Advertising

Electronic advertising serves to inform customers about product specifications and service details and their operational methods and their advantages and safety measures. The promotional message needs to maintain absolute honesty because electronic suppliers use deceptive practices to trick customers into buying products or services for illegal purposes.

In addition to the requirement of honesty in preparing the promotional message, the Algerian legislator has imposed an obligation on the supplier to provide the electronic consumer with all conditions related to the electronic commercial offer and the information it contains, which must be truthful and clear. This refers to the mandatory information that the supplier is required to disclose when presenting the promotional message, information that must be included in the electronic advertising offer so that it encompasses all the conditions necessary for benefiting from the electronic commercial offer. The supplier may add any other conditions deemed appropriate for advertising through electronic means in addition to the mandatory information stipulated in Article 11 of the Electronic Commerce Law, as evidenced by the phrase “at least, but not exhaustively.”¹⁴

The concept of falsity and deception in commercial advertising over the Internet does not differ in substance or subject matter from forms of fraud found in advertisements disseminated through traditional or modern media, such as television or the press.

Based on the foregoing, the concepts of falsity and deception can be understood in the manner addressed by the relevant legal texts:

A. False Advertising

In Arabic, falsehood (*al-kadhb*) refers to reporting something contrary to its actual state in reality¹⁵.

In French, it denotes asserting or stating something contrary to the truth intentionally for the purpose of deception¹⁶.

Legislative definitions have generally not provided a specific definition of false advertising; instead, they have focused on defining misleading advertising, considering falsity to be one of its forms. In Algerian legislation, the term used is misleading advertising (*l’ “’ëshihâr al-tadlîl”*) rather than deceptive advertising.

B. Misleading Advertising

Linguistically, *tadlîl* (misleading) derives from the verb “to mislead,” meaning to cause someone to stray or fail to find something; one

may say, “he lost his plant,” meaning it became scattered or lost¹⁷. The same meaning is adopted in French.

Terminologically, misleading advertising is advertising that can deceive the consumer or may lead to deception through claims or assertions that are not false in themselves but may nonetheless mislead¹⁸. The primary difference between misleading advertising and false advertising stems from the fact that false advertising contains completely fabricated or incorrect information. The first section of the document explains how misleading advertising uses language or statements to create uncertainty which results in wrong interpretations by consumers about the presented information.

The practice of linking from one website to another while showing the linked website's homepage constitutes misleading behavior. The user who visits the site under the impression they are on the original website of the second person will find out that they have been taken to a different website which belongs to the first person who made the link. Online advertising practices use a deceptive strategy called framing to harm consumers through implementation of this technique¹⁹.

The second topic:

Liability Arising from Commercial Advertising on the Internet

The Internet functions as a major advertising platform yet this role creates several harmful effects through false advertising and unfair competitive practices which damage consumer interests. The current situation demands that we investigate who should bear responsibility for these advertisements. The actual process of determining liability for commercial advertising on the Internet becomes difficult because multiple entities participate in the advertising network²⁰ which includes advertisers and service providers and website owners and hosting providers and others.

The rules which apply to conventional advertising also establish the rules for Internet-based advertising liability. However, relying solely on these general rules may give rise to numerous gaps resulting from attempts to adapt broad legal provisions to advertising carried out online²¹. The section will analyze the legal responsibilities of all parties who participate in online commercial advertising based on the following structure.

First requirement: Liability of the Supplier and Service Provider

Among the parties involved in online commercial advertising are the supplier and the service provider. This section seeks to define each of them separately.

First section: The Supplier (Content or Information Provider)

Numerous definitions have been given for the supplier, including the following:

- The supplier is the person who provides other intermediaries with the information and data disseminated on the website²². This party determines the content published on the site, and the data supplied may take the form of written text, images, musical pieces, or trademarks that are advertised²³.*
- In the case of email advertising, this person is the owner of the email account and the one who uses it to send advertisements to others.*
- The electronic supplier is also defined in Article 6 of the Electronic Commerce Law as: “a natural or legal person who markets or proposes the provision of goods or services through electronic communications²⁴.”*

The Algerian legislator has required the electronic supplier to establish an electronic system that enables any person to explicitly express their desire not to receive any advertisement from the advertiser, without the need to provide justification or pay any fees²⁵. The purpose is to oblige the supplier to obtain the consumer’s prior consent before sending any advertising message, thereby protecting the recipient from unwanted messages.

There is no disagreement—whether doctrinal or judicial—regarding the supplier’s liability. Most views affirm the same point: the supplier bears direct responsibility for the legality of the data and advertisements disseminated through the website, just as the advertiser does in traditional advertising.

In this regard, Chapter Five of Law 18/05 sets out the legal provisions governing the duties and responsibilities of the electronic supplier. Through these provisions, the Algerian legislator specifies the obligations imposed on the electronic supplier, which may be summarized as follows:

- The obligation to send an electronic copy of the contract to the electronic consumer.*
- The obligation to prepare and deliver an invoice to the electronic consumer.*
- The obligation to refund the amount paid, along with the costs associated with returning the product, if the supplier fails to respect delivery deadlines.*
- The obligation to retrieve the product in cases where a non-conforming item is delivered or where the product is defective.*

– The obligation to preserve records of completed commercial transactions and their dates, and to transmit them electronically to the National Center for the Commercial Register.

Second section: The Service Provider

The service provider is referred to by several terms, including access provider, service provider, and supplier of services. It is also defined as the entity that enables Internet users to access websites or the email addresses of the individuals they intend to contact²⁶.

As for the Algerian legislator, the service provider is defined in Article 02 of Law No. 09-04 of 5 August 2009 concerning specific rules for the prevention and combating of crimes related to information and communication technologies²⁷. The article states: “Any public or private entity that provides its users with the ability to connect through an information system and/or a communications system, and any entity that processes or stores data for the benefit of said communications service or its users.”

The liability of the service provider has sparked extensive scholarly debate between those who deny its existence and those who affirm it. Some scholars argue that the service provider bears no liability for false or misleading advertisements disseminated through the service it offers, since its role is limited to the technical function of enabling users to connect to the desired website. Accordingly, it possesses no actual authority to know or monitor the content of websites containing such false or misleading advertisements²⁸.

Second requirement: Liability of the Service Provider and Organizers of Discussion Forums

Several questions and doctrinal as well as judicial disagreements have arisen regarding the liability of this category when harm occurs. However, this issue has not been addressed by explicit legislation that clearly defines the scope and limits of such liability.

First section: The Hosting Provider

A hosting provider is a person who leases space on the Internet, offering to host online services on his own servers in return for payment²⁹.

The role of the hosting provider consists in hosting the website on the Internet, and subsequently allocating advertising space in which words, graphics, or images supplied by the advertising company are stored. The provider’s function is therefore comparable to that of a managing editor in print newspapers, who designates advertising space for a specific company. From this, it is understood that the hosting provider is not the owner of the website on which the advertisements are displayed, nor is he the advertiser responsible for creating the advertisement. Rather, he

ensures the technical service that allows the advertisements to appear on the site; without him, the website owner could not make use of the site, nor could the advertiser implement his advertisement online³⁰.

The question about hosting provider liability continues to generate ongoing discussions among legal professionals and industry participants. Legal systems along with court decisions have reached consensus about this responsibility because providers carry out content verification and commercial advertisement review before they publish materials online³¹.

The hosting provider establishes liability when it gains control through its review of advertisement content and information. The hosting provider must perform content verification before the advertisement becomes available according to their service obligations.

The core element which determines hosting provider's liability depends on their responsibility to monitor website content. The provider will face liability when monitoring becomes feasible and they fail to perform their duties, but the opposite situation happens when monitoring is not available. The hosting provider must fulfill this legal duty to exercise control.

The analysis of hosting provider liability shows that Internet freedom requires protection at the same time as consumer rights need defense against all types of violations. The hosting provider achieves this equilibrium by gaining freedom from content monitoring duties but needs to maintain control over commercial advertising materials after they appear. The provider must remove or block illegal content when they discover it themselves or receive official notification from the proper authority.

Second section: Discussion Forum Moderators

A discussion forum functions as a communication platform which allows people to share their viewpoints openly from any location, they happen to be in³². As for the forum moderator, this term refers to the person who organizes the forum and ensures that it is suitable for receiving opinions and messages.

Discussion forums operate as virtual spaces which enable people to communicate with each other while maintaining physical separation from their current geographical location. The digital nature of electronic media enables users to delete messages easily while they exchange their opinions and contributions with others. Since the message is disseminated through a website, it may be associated with another message or document published on the same site containing unlawful content or linked to a website with illicit or undesirable material. The author of the original

message becomes liable when the message produces damage to third parties.

The discussion forums operate as open communication platforms which enable users to share messages that might get exploited for spreading false or misleading advertisements about specific institutions or trademark violations, so the question arises about moderator responsibility for damages caused by these unlawful actions³³.

The legal system has not established the same level of responsibility for discussion forum moderators that it has created for service providers and hosting providers. The absence of specific laws creates different interpretations among scholars and courts about the existence of this type of responsibility. The legal community together with court decisions have reached an agreement about forum moderators becoming responsible because of their position and their duty to oversee content that gets posted or shared in these forums.

Our evidence for this is the judgment issued by the Paris Criminal Court on 14 May 2004. In this decision, the court concluded that “Mr. M may be held liable in his capacity as publisher unless he is able to examine in advance the content disseminated on the forum.” The plaintiff appealed before the Paris Court of Appeal, which overturned the judgment of the Criminal Court in its decision of 10 March 2005.

The Court of Appeal affirmed that the application of Article 93-3(2) of the Law of 29 July 1982, as amended, leads to the conclusion that the person responsible for a discussion forum made accessible to the public via the Internet may be held liable as the principal perpetrator of the offenses committed, even if the messages were not subject to prior examination before being made available to the public³⁴

Conclusion:

The worldwide reach of the Internet creates a special environment for commercial advertising because it enables promotional content to spread globally without any geographical barriers. The process of electronic advertising becomes more complicated because multiple parties participate in this system which includes advertisers and suppliers and service providers and hosting providers and discussion forum moderators.

The transition from traditional advertising media which includes press and radio and television and print media to contemporary Internet-based technological tools represents a fundamental shift that delivers multiple advantages to advertisers and their target market. The Internet serves as a superior advertising platform which provides cost-efficient solutions and search engine visibility and extensive consumer reach and detailed understanding of their preferences and behaviors.

The service offers consumers a quick and easy way to browse multiple ads while providing them with a direct line of communication to the businesses.

The technical and economic benefits of this system require specific legal rules to operate properly. The Electronic Commerce Law protects consumers through detailed rules which apply to online commercial advertising and electronic transactions to stop deceptive and illegal business activities. The law establishes a fundamental framework which enables businesses to advertise freely while protecting consumers from unfair practices in digital spaces.

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