Online Astroturfing and the European Union’s Unfair Commercial Practices Directive

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**Introduction**

In the first part of this study, I will start by briefly explaining the etymology of the concept of astroturfing and its current signification (I).

In the second part, I shall comment on the aim, the scope and the content of the European Union’s Unfair Commercial Practices Directive\(^1\). I shall then analyse if and how astroturfing towards consumers is dealt with by the UCPD and what difficulties one may encounter in trying to effectively detect and deter such a practice (II).

In the third part, I offer a conclusion (III).

**I. Astroturfing – Etymology and current signification**

To grasp the meaning of astroturfing, one must understand what a grassroots movement is. A grassroots movement is one that is triggered and driven by a spontaneous upwelling of public opinion\(^2\).

In the literal sense, astroturfing refers to the practice of laying down Astroturf, a form of artificial plastic grass that was installed in 1966 in the world’s first domed sports stadium in Houston, Texas known as the Astrodome, where real grass could not survive for lack of natural light.

In the figurative sense, astroturfing refers to the practice of disguising an orchestrated campaign as a grassroots movement\(^3\).

Astroturfing, in this second acceptation, occurs in multiple areas of society.

For example, in the political sphere, there have been many cases of politicians feigning spontaneous support from their would-be electorate or spreading falsely citizen-based criticism damaging towards their political opponents’ reputation\(^4\). Astroturfing

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\(^3\) “Astroturfing”, New Scientist, ibid.

techniques are likewise often used for lobbying purposes whereby companies – or their public relations intermediaries – conveniently identify demands or complaints from concerned members of a community who support/oppose a practice that the company happens to be lobbying for/against.

Astroturfing is also found in the area of consumer sales, with sellers passing themselves off as consumers in order to make laudatory comments about their own product or service.

The list goes on, though it is essentially about astroturfing towards consumers that this paper shall focus on.

With the arrival of the Internet, and especially the second generation Internet 2.0 which enables users to actively contribute to enhancing online content by posting their own comments, videos or other materials on websites, astroturfing has reached a new threshold.

False consumer reviews can be posted on the Web rapidly, cheaply and on a massive scale.

Given that cynics and astroturfing advocates will argue that advertising is all about make-believe and bending reality anyway, one could be forgiven for wondering if astroturfing is condemnable. Yet I contend it is.

There is a line between bluster and self-boosterism on one side and outright fraud on the other. However thin the line – and sometimes it becomes very thin indeed – it should not be crossed.

For example, an individual usually tends to play up his qualities while downplaying his faults. That in itself is not reproachable because it is expected and falls within the reasonable ethos of marketing (and human nature). However, if a producer/distributor/seller surreptitiously reviews his own product without revealing his quality or while implying or explicitly stating he is acting as a (disinterested) consumer, his review will most certainly be biased and duplicitous vis-à-vis the consumer.

Several major companies, such as Microsoft\(^5\), Wall-Mart\(^7\), Sony\(^8\), Belkin\(^9\), etc. have been caught practicing astroturfing towards consumers on- and/or off-line.


\(^6\) G. Goodale and A. Tully, “Who's that selling at your (online) door?”, 100 77 Christian Science Monitor, 08827729, (17 March 2008).
It must be noted that very few cases of astroturfing have led to actual lawsuits and condemnations at this time, despite the important media coverage some of them have received\textsuperscript{10}.

In America, the so-called Lifestyle Lift case\textsuperscript{11} may set an important precedent for future cases of astroturfing.

In Europe, there has not yet been to my knowledge any significant court decision on astroturfing, though the matter is clearly dealt with under the Unfair Commercial Practices Directive, on which I shall now comment.

II. The Unfair Commercial Practices Directive and Online Astroturfing

The purpose of the European Union’s directive 2005/29 concerning unfair commercial practices is, as stated in article 1 of the directive, to approximate the laws, regulations and administrative provisions of the Member States on unfair commercial practices by a trader harming consumers' economic interests. The directive only protects consumers’ (B2C\textsuperscript{12}) economic interests (as opposed to moral interests for example) and does not concern unfair commercial practices which may damage business’ economic interests (B2B\textsuperscript{13}), for there is at this time no clear consensus\textsuperscript{14} in Europe on the harmonisation of unfair competition rules.

Article 2 of the directive provides an extensive list of definitions of the key concepts employed for the purposes of the directive. Among other notions, the consumer is defined as “any natural person who, in commercial practices covered by this directive, is acting for purposes which are outside his trade, business, craft or profession”\textsuperscript{15}, while

\begin{itemize}
  \item J. Goldberg, “Selling Wal-Mart”, 83 6 New Yorker, 0028792X (2 April 2007).
  \item See letter of apology by the President of Belkin on the company’s website, available at http://www.belkin.com/pressroom/letter.html (last visited January 15, 2010).
  \item Though from a purely marketing point of view, the mere fact of revealing that a company practices astroturfing will affect the company’s name and image, which does constitutes somewhat of a sanction.
  \item Business-to-consumer. See also article 3 (1) of the directive.
  \item Business-to-business. In some cases, member states have decided to harmonise certain aspects of unfair competition, while in others, they have discarded this possibility, Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising for example applies to business-to-consumer but also business-to-business transactions. Likewise, directive 2005/29/EC does not preclude Member States from extending its application also to businesses through national law.
  \item Article 2 (a) of the directive.
\end{itemize}
the trader is defined as being “any natural or legal person who, in commercial practices covered by this directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader”\textsuperscript{16}. A consumer is thus only a natural person, while a trader can be either a natural or a legal person. The term “product” is defined in a broad matter as “any goods or service including immovable property, rights and obligations”\textsuperscript{17} \textsuperscript{18}.

The directive was supposed to be transposed into national law by 12 June 2007\textsuperscript{19}. However, many Members States were/are late in doing so\textsuperscript{20}. Article 3 (5) of the directive foresees that for a period of six years\textsuperscript{21} from 12 June 2007, Member States shall be able to continue to apply national provisions within the field approximated by this directive which are more restrictive or prescriptive than the directive and which implement directives containing minimum harmonisation clauses, provided these measures are essential to ensure that consumers are adequately protected against unfair commercial practices and are proportionate to the attainment of this objective.

This provision seems to set a sort of transition regime of minimal harmonisation\textsuperscript{22}, at the end of which the directive shall become a directive of maximum harmonisation, save in certain areas specified by the directive\textsuperscript{23}. However the directive is to be reviewed and, if necessary, revised in 2011 in such a way that the situation might differ in the future\textsuperscript{24}.

Chapter 2, article 5 of the directive contains a general ban on unfair commercial practices while Chapter 2, section 1 (articles 6 to 9) distinguishes two types of unfair commercial practices which the directive focuses on: misleading commercial practices on the one hand (articles 6 and 7) and aggressive commercial practices on the other hand (articles 8 and 9).

The directive also enumerates, in its Annex I, a Black List of practices which are in all circumstances considered unfair. The Black List covers all media, including the Internet\textsuperscript{25}. This list is essential for the purpose of this paper because astroturfing is

\textsuperscript{16} Article 2 (b) of the directive.  
\textsuperscript{17} Article 2 (c) of the directive.  
\textsuperscript{18} For the other definitions, see article 2 of the directive, especially “business-to-consumer commercial practices”, “to materially distort the economic behavior of consumers”, “professional diligence” and “transactional decision”.  
\textsuperscript{19} Article 3 (5) of the directive.  
\textsuperscript{21} Prolongable if considered appropriate following article 18 of the Directive. See article 3 (5), in fine.  
\textsuperscript{23} See esp. article 3 (9) and (10) of the directive.  
\textsuperscript{24} See article 3 (5) in fine and article 18 of the directive.  
contained in this enumeration. Indeed, under point No. 22 of the said list, “falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer” shall constitute a misleading practice.\(^{26}\)

The directive thus explicitly condemns astroturfing towards a consumer. The same single list applies in all Member States and may only be modified by revision of the directive.\(^{27}\) The advantage of a Black List is that it considerably lightens the weight of the burden of proof for the consumer: a practice which figures on the list will be considered unfair in all circumstances, i.e. without having to answer all the conditions set forth in Chapter 2 of the directive, provided, as noted supra, the said practice concerns a “product”, is being performed by a “trader” and is harmful to “the economic interests of a consumer”, in the sense of the directive. It must be recalled that legal persons may not complain about astroturfing under the directive because they may not qualify as consumers in the meaning of the directive, which considerably narrows the protection offered by the instrument. Member States may however, for the time being, extend the definition of the consumer to legal persons.\(^{30}\)

The sanction of an unfair commercial practice is left to the Members States, which may consequently lead to asymmetry in consumer protection across the European Union.

In sum, the legal framework in Europe for fighting astroturfing towards consumers has been put into place. There remain however some major practical issues that may considerably hinder the effectiveness of the directive, especially with regards to online transactions.

Ultimately, astroturfing can be performed on the internet on a large scale and go relatively unnoticed. Several solutions have been thought out in attempts to fight the practice, though they remain relatively mild. IP mapping technology can be used to trace the origin of online content for example. However, IP addresses, especially for

\(^{26}\) One could also, subsidiarily, mention practice No. 11 of the list as a form of astroturfing.

\(^{27}\) Article 5 (5) of the directive.

\(^{28}\) G. Howells, H-W. Micklitz and Th. Wilhelmsson, op. cit., 158.

\(^{29}\) See supra, article 3 (5) of the directive.

\(^{30}\) However, this raises the issue of determining when a legal person may be considered as acting for purposes which are outside his trade, business, craft or profession, as required by the definition of article 2 (a), in fine. On this matter see M. Van Den Abbeele, “Les contours de la notion de consommateur dans la loi sur les pratiques du commerce” ?7 Droit de la Consommation (2007) ; Ch. Biquet-Mathieu, Les contrats du consommateur - Rapport de droit belge (2007) Association Henri Capitant Journées , colombiennes Bogota – Carthagène 24 au 28 septembre 2007 ; J. Herre, E Hondius and G. Alpa, The notions of consumer and professional and some Related questions, available at http://www.sgecc.net/media/downloads/consumers_and_professionals.pdf (last visited January 15, 2010).

\(^{31}\) Article 13 of the directive.


\(^{32}\) Internet Protocol.
small and medium businesses, are more often dynamic than static (meaning that the internet user is assigned a new IP address every time he reconnect to the internet\(^\text{33}\)) and at any rate, aren’t sufficient to identify the person(s) posting the online content. The cooperation of the Internet Service Provider is often required in this case to reveal the needed information, which itself raises considerable privacy issues\(^\text{34}\).

Exhorting companies to adhere to codes of conduct and charts of good practices is another solution, and is highly encouraged by the directive itself\(^\text{35}\).

Elsewhere, new computer programs can be developed to detect large scale astroturfing (by counting the number of similar occurrences of a review of a product online, or performing a temporal analysis of the frequency at which a review was made, etc). Requiring identification for online message posting and using anti-bot technology may also discourage astroturfing.

Consumer review websites are increasingly setting up internal complaints procedures as well as “flag and tag” systems\(^\text{36}\), and other monitoring strategies, for suspicious reviews.

At this time however, strengthening consumer vigilance via awareness-raising campaigns may prove to be the best countermeasure against astroturfing\(^\text{37}\). As it was eloquently put in Gloria Goodale’s article *Who’s that selling at your (online) door?*, “we all need to develop a healthy skepticism and the ability to question messages we receive on the Internet”\(^\text{38}\).

III. Conclusion

There has been increased awareness within the EU of the existence of the practice of astroturfing, especially online astroturfing, and of the damages it can cause to consumers’ economic interests and to the market.

The European Union’s Unfair Commercial Practices Directives places astroturfing towards consumers in its Black List of practices that are considered unfair in all


\(^{35}\) See Preamble (20) and Chapter 3 of the directive.


\(^{38}\) G. Goodale and A. Tully, *loc. cit.*
circumstances. The list is identical in all member states but the sanction for astroturfing varies from one member state to another. At a minimum, the legal framework is in place to fight astroturfing.

However, this appears to be a paradigmatic instance where law in the books and material reality collide. Though legally condemnable, astroturfing is very difficult to deter, yet even to detect. Some solutions have been proposed to identify astroturfing, but they remain quite mild. More stringent measures would mean more intrusion into internet user’s activity and would raise considerable privacy issues.

Currently, the most efficient way to prevent and deter astroturfing is to raise consumer awareness by ensuring that consumers understand that internet reviews are a very relative and secondary source of information; that such reviews may be self-serving, false and duplicitious; that “the Internet would be but an ordinary web, did it not count its millions of spiders” –Maxime Allain\(^39\).

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