Advertising Regulation and Market Drivers

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ABSTRACT

In this paper the regulation of advertising is examined by considering market driven firms (those seeking to keep within the boundaries set by social and industry norms) and market drivers (those seeking to stretch boundaries so as to gain a competitive advantage). Thought is given to the costs of regulation and tolerance to the social purse, and the benefits gained by compliance and violation. Implications for advertisers, industry, and Government are offered.

Keywords: Advertising effectiveness; Market orientation

In 2005 the Australian Tourism Board launched a worldwide campaign using the line “So, where the bloody hell are ya?”. Criticised and briefly banned in the UK as offensive; the subject of attempts to persuade lawmakers to ban it as offensive in many US states; banned in a number of Asian countries as offensive; and banned in Canada (albeit for appearing to promote liquor, rather than for being offensive), the Australian Government considered the campaign to be hugely successful because of the media attention it gathered, and because it was estimated to have increased the tourism spend by approximately A$2 billion. However, while the campaign has continued, the tagline was quietly dropped in 2006. The use of language that to an Australian was considered fairly innocuous, breached the boundaries set by society and advertising regulation standards in the northern hemisphere; the marketer was censured, but still considered themselves to have gained an advantage in the marketplace. Interestingly, the campaign was also used in Australia’s closest neighbour, New Zealand, but gained little media attention until the international furore erupted. What was the difference between New Zealand and northern nations? Offensive language is not only extremely rare
in New Zealand advertising, but television (the primary media for the campaign) in general is heavily regulated by broadcasting standards with all non-news material previewed by a Government censor and subjected to a rating system determining when it can and cannot be shown. However, a few years earlier, Toyota had conducted a similar campaign, using mildly offensive language as an appeal to local cultural identity. At that time, the Advertising Standards Authority in New Zealand received numerous complaints, and the campaign was put under the type of local media scrutiny that the Australian campaign later attracted internationally. After much debate, the campaign was deemed inoffensive and became acceptable by society.

The boundary in New Zealand had shifted, such that by the time the Australian campaign arrived, whilst it was still extremely rare to see and hear such language, it had been judged before. Even though the language was new to advertising, and technically stretched or breached the boundaries established, the Government and society decided this time around to be tolerant, and not interfere with the self regulation of the industry. In this paper I suggest that a firm which is a market driver can gain potential benefits from stretching the boundaries of what is considered acceptable in advertising, particularly in an environment that is self-regulated, or only partially regulated by Government.

BACKGROUND

Advertising is a multi-billion dollar activity evident throughout the world’s economies. Varying in form from simple institutional messages such as opening hours, prices, or location, to complex positioning messages invoking images, perceptions, and attitudinal responses, advertising per se is an accepted method of communicating information to existing and potential customers. The nature and approach used however are subject to the constraints imposed upon any communication by society. Even in open societies where freedom of speech is embodied in the social order there are often conflicting norms of decency and fairness which serve to regulate what is acceptable in advertising and what is not. More often than not, the elected governments of such societies see fit to
formalise in law those norms, creating boundaries for advertisers and the general public. As is often the case in such attempts to legislate societal practice, the boundaries are generally wide creating ‘grey’ areas which need review as required. Furthermore, the norms of decency and fairness for today’s society are often far removed from those as little as a generation back, and are unlikely to hold beyond a subsequent generation, resulting in a constantly shifting boundary. The consequence of this wide and moving frontier is reluctance on the part of governments to fully regulate advertising, and a preference for leaving it to self-regulation, with the option to step in if an advertiser oversteps the mark and society cries foul.

Advertisers on the other hand are under pressure to achieve a degree of cut-through with an audience exposed to a myriad of messages, gain or maintain a brand leadership position, and constantly challenge the consumer to connect with their marketing. One way to be at the leading edge of communication is to stretch the boundaries of what is accepted as normal. This does not necessarily mean illegal or even indecent behaviour – there was a time for example when buses only advertised their own service, college sports arenas were sponsor-free, and the idea of banner-ads on the internet was laughable. The terms ‘shock-tactics’ and ‘innovativeness’ however, are often interchangeable in the world of integrated marketing communications. In some ways the advertiser has taken the role of the academic in society; to challenge and question what is right, believed, and accepted. The essential difference lies in the motives of the advertiser.

The Australian Tourism Board advertising campaign was neither the first nor the last to use bad language or some other form of shock tactic. Brown (2001) catalogues a litany of such campaigns in his chapter entitled “Revolting Marketing: Gross is Good”. As Egan (2007) points out, the boundaries of what is acceptable are forever being tested and pushed forward by advertisers. Once those boundaries have been stretched, the floodgates do not necessarily open, but it can be difficult to switch off the tap. While Benetton, an early advocate of shock tactic campaigns, was heavily criticised for their approach, it did not stop the later French Connection in their cheeky UK approach with the FCUK campaigns. Saren (2006) suggests that provocative communication works because it
stands out, is efficient (because it necessitates a second look), it is cheap because it generates free publicity, and is easily emulated.

In this paper I consider the costs and benefits to the marketplace of self-regulation versus Government regulation when firms are profit maximising in the spirit of Armstrong and Collopy (1996), by considering the case of the market drivers (Jaworski, Kohli and Sahay 2000), who will want to stretch the boundary, and the market driven (Maignan and Ferrell 2004, Jaworski et al. 2000), who will want to maintain the status-quo. I argue that boundary stretching is acceptable and the Government should not step in straight-away. This is because a. it allows market drivers seeking profit maximisation to become the focal points of implicit collusion and test society’s tolerance, and b. interference by Government is a “non-credible threat” because Government and the social purse would be better off if Government allows self-regulation.

Self-regulation in a marketplace exists when an industry creates its own standards of behaviour (1) where no such statutory or regulatory requirements exist or (2) when such standards assist in complying with or exceeding statutory or regulatory requirements (Hemphill 1992). Thus, a breach of self-regulation is a breach of one’s own market’s expectations, putting the rule-breaker outside of the market’s confidence (for an excellent review of the concept and practice of self-regulation at the national and global level, see Wotruba 1997). The question which arises is what are the costs and benefits to the market when there is non-compliance with the regulations? Furthermore, what happens when the firm attempts to “stretch” the boundaries of the regulation, ostensibly to gain a benefit? Traditionally, self-regulation has been promulgated through variants of a “code-of-conduct”. Organisations benefit from such a code in a number of ways: it may be that a code implies to the marketplace that the standards to be upheld are above those required by law; it may discourage potential entrants who need to adhere to the code; it may reduce the risk of Government-imposed regulation that is more restrictive; or it may be that a code helps counter a negative image for an industry. Wotruba (1997) also suggests that self-regulation is inherently more effective (and cost-efficient) at inducing desirable behaviour because it results from internal efforts by those who understand the subtleties and nuances far better than Government personnel.
Regulation in Advertising & Other Industries

Industry self-regulation is becoming an increasingly widespread approach to correcting market failure (Ashby, Chuah, and Hoffman 2004) whether through Government initiatives in delegating the regulatory process to the industry, or through being employed by organizations to pre-empt, complement, or even replace public regulation (Wotruba 1997). Regulation debate in the advertising industry has revolved around the First Amendment and subsequent decisions in the U.S. (see Boedecker, Morgan, and Wright 1995, for a review of the evolution of First Amendment protection for commercial speech), and similar constitutional or Government legislation concerning freedom-of-speech entrenched in most other liberal nations, which are repeatedly tested by the actions of market players (e.g. competitors, consumer groups, Government agencies).

Whilst I have chosen advertising regulation as the focus of my discussion, examination of the literature suggests that regulation is an important consideration in most marketplaces, from life insurance and newspapers (Ashby et al. 2004), to cigarettes (Scheraga and Calfee 1996), to food and claims about food (Burton, Garretson, and Villiquette, 1999, Papparlardo, Kohanski, and Ringold 2000, Li, Miniard and Barone 2000, Shaffer and Zettelmeyer 2004). Much of the debate can be viewed as self-regulation versus Government imposed regulation, and this appears to stem from two issues; what is the effectiveness of an activity that may attract regulatory measures (e.g. does advertising actually work?) and what is the intent of the market players (e.g. what is it that the players want advertising to do?). If the answer to the first issue is positive (i.e. the activity does have an effect), of concern is if the answer to the second is unacceptable to one or more players in the marketplace (i.e. the effect is perceived as undesirable by other stakeholders). If this is the case, the question has traditionally then become, which sort of regulation should there be; self- or Government? There has been research that has examined what might happen without any regulation – Rust, Kannan, and Peng (2002) for example investigated a case where internet erosion of privacy is explored with no Government intervention, and privacy is left to free market forces. Their conclusion was that privacy will decline and will become more expensive to maintain, and that a separate market for privacy will
emerge. Generally, however, it is a question of what degree of intervention is required, and by whom?

When examining advertising regulation, we need to consider what it is we are regulating. Shaffer and Zettelmeyer (2004) suggest that most advertising literature falls into one of three branches – advertising in an informative role; advertising in a persuasive role; or advertising in a signalling/coordination-between-channel-members role. Advertisers who stretch the boundaries or even break the rules fall into what Jaworski, et al. (2000) would call the “driving markets” strategy (as they are proactively shaping customers views, competitor responses, and other stakeholder positions), whereas those who stay within the (self) regulated boundaries are “market-driven”, focusing on keeping the status quo. Whilst there are debates over whether a customer-centric approach with boundary conditions is preferable (e.g. Sheth, Sisodia, and Sharma 2000), perhaps even with the advertising of conformity to stakeholder norms being used as a way of generating stakeholder support (Maignan and Ferrell 2004), it seems clear that the firm which uses advertising/promotion for profit-oriented objectives is maximising their marketing effort under traditional economic theory (Armstrong and Collopy 1996) because of the positive relationship between levels of advertising and promotional spending, and the market value of the firm (Conchar, Crask and Zinkhan 2005, in their meta-analysis of 88 models). Not only is this preferable to a competitor orientation (Armstrong and Collopy 1996) but explains why a stretching or even breaking of the boundaries may be advantageous to the firm. However, advertising effectiveness is going to vary just as regulatory effects and responses are going to vary. Take Shaffer and Zettelmeyer’s (2004) advertising in an informative role, for example; whilst Franke, Huhmann and Mothersbaugh (2004) show that advertising information effectiveness depends on the product category – e.g. search products versus shopping products versus convenience products, Li, et al. (2000) show that the Nutrition Labelling and Education Act (NLEA) of 1990 depends on consumer knowledge of how to use the information, so the regulation of the information role is not effective on its own. Thus, the effectiveness of informational advertising used for some foods may differ depending on how the consumer perceives the food, and the effectiveness of any regulated boundaries on the information given about the food may differ depending on how
well the consumer understands the information. Concurrently, we need to consider the effects of regulation per se. There may be effects beyond correcting market failures; LaBarbera (1982) found that for a no-reputation-firm regulation (self- or Government) was effective in increasing purchase intent. Scheraga and Calfee (1996) found a series of unintended regulatory effects when cigarette advertising is regulated, and Carlson, Laczniak, and Walsh (2001) showed that just as stakeholders differ, their reactions to regulation is moderated by different influences. Interestingly it is in the persuasive role of advertising that advertisers are traditionally seen as stretching the boundaries yet much of the regulation that has been imposed has insisted on greater information, thus impacting the informative role. The over-arching premise though, in any type of advertising, is that advertisers have opportunities to stretch the boundaries or even break the rules. The ‘market-drivers’ camp would encourage this, whereas the conformity camp of the ‘market-driven’ would oppose this.

**AN EXPLANATION OF MARKETER BEHAVIOUR**

Self-regulation has been examined in advertising (along with the press and life-insurance industries) by Ashby, et al. (2004). They did not, however, consider the scenario of partial tolerance and boundary stretchers, which is commonplace in the market. Such a scenario is akin to Moorthy’s (1985) discussion of implicit collusion in game theory. In this context, the “boundary stretcher” determines the focal point for what is acceptable in advertising. Moorthy (1985) states that implicit collusion requires (1) observation of competitors’ actions – easily achieved as the activity (advertising) is in the public domain; (2) a long term orientation by competitors – assumed as normal, though the situation where a “rogue” player enters the market, breaks the rules, and then exits having achieved a short-term profit may confound this; and (3) alignment of interests. It is this third point that is questionable. The profit-seekers of Armstrong and Collopy (1996) who are willing to drive the market (Jaworski, et al. 2000) are likely to want to extend the boundary if, by doing so, they can achieve greater profit. A tolerant or partially tolerant regime of regulation may accommodate these firms, to the detriment of others. For the firms using advertising in a competitor orientation
(Armstrong and Collopy 1996) who want to conform to stakeholder norms (Maignan and Ferrell 2004), a zero-tolerance level of regulation is likely to help protect the market-driven status-quo (Jaworski, et al. 2000).

The underlying principle appears to be what in game theory would be called a free-rider problem, i.e. firms seek to gain benefits from systems without either contributing to the system’s maintenance or making more than a token attempt to conform to the expectations it provides (Ashby, et al. 2004). This behaviour has a major potential impact on the performance and success of the self-regulating advertising industry. For self-regulation to be sustainable and beneficial, a collective of firms needs to comply with an agreed code of conduct. The benefits from self-regulation to an individual firm, however, are independent of its own behaviour. In other words, while all industry participants benefit from self-regulation, each firm has an incentive to at least stretch the boundaries of the conduct code to generate additional profits. Possible solutions are contingent on compliance motives of industry participants as well as potential punitive actions by Government. In effect we have a situation whereby we have a combination of the classic ‘Prisoner’s Dilemma’ - which illustrates that a firm’s own rational decision may lead to negative outcomes for the whole business community - (Maitland, 1985; Shiell and Chapman, 2000) and the Assurance Game - where cooperation ensures the best possible payoff - (Maitland, 1985). Advertisers can choose to fully comply with a self-regulatory regime, partially comply, or violate the codes established by the industry. Full compliance by the firm would ensure actions that are in the spirit of the self regulatory regime. Partial compliance would deliberately lead to the boundary stretching discussed, and violation would be deliberately breaking the boundaries and the agreed code.

Considering the motivations of firms, I suggest that if a market includes market drivers they will act as free riders and stretch the boundaries, unless there is zero tolerance on the part of the Government, which would be expensive to society. Only if the market contains just market driven firms will self-regulation operate effectively. Pragmatically this is unlikely, and certainly would be difficult to guarantee in any open market. In fact I would suggest that considering endogenous effects (e.g. Shugan 2004) and Moorthy’s focal point idea discussed earlier, the existence of a market of
market driven firms will encourage a firm to break ranks and stretch boundaries if they are following the profit seeking strategy of Armstrong and Collopy (1996), or it will encourage a new entrant who will be a market driver, at least in the short term until a Government imposes penalties. Alternatively, if a market driver already exists, unless the Government steps in and imposes penalties, self-regulation designed to maintain the status quo should ultimately fail because the boundary stretcher will become the focal point for the market driven, and what is deemed acceptable advertising practice by firms will change. The implication for marketers from this is that, generally, under a high or partial tolerance (Government) regime the firm that wishes to achieve a competitive advantage such as cut-through, brand awareness, or some other connection with consumers should be seeking ways to stretch any market-imposed boundaries. The assumption of course is that the stretching is considered acceptable by consumers, which is beyond the scope of this paper.

If the Government does not want boundary stretching (or for that matter, breaking of the boundaries), the Government would need to penalise boundary stretching in a legislative system. Failure to do so could lead to firms being encouraged to stretch the boundaries and the Government not interfering to reduce the cost to the public purse. The reason is that the Government would not penalise boundary stretching and therefore could not compensate the loss of social welfare. The cost to the public purse, however, is lowest if the industry is self-regulated. Thus the Government would prefer boundary stretching to occur in a self-regulated rather than legislated regulatory environment, otherwise such behaviour would further encourage boundary stretching and seriously undermine the credibility of the Government and industry. The practical implication from this is that if a Government prefers self regulation, it must ensure that the self regulatory body (e.g. the local version of an advertising standards authority) has the ability and the willingness to enforce boundaries.

CONCLUSION

Currently many governments allow self-regulation and follow a partial tolerance regime with potentially high direct penalties for violation under legislation but indirect penalties, such as the
withdrawal of advertising under self-regulation. This is likely to encourage partial compliance by some firms in the industry. For Government and society this is an outcome that means reduced social benefit for the cost the Government will still incur for self-regulation. Full compliance by all firms under self-regulation, however, would result in a greater social benefit for the same cost. In this sense, the public purse carries some of the burden of partial compliance. From a firm perspective, the result is not much better. The partially compliant firm will benefit from self-regulation at the expense of all firms who honour the code of conduct.

The Government would prefer full compliance by all firms and continuation of self-regulation. This would generate the largest possible social benefit while keeping costs to the public purse low. This outcome, however, would only be achieved if the government adopted a zero tolerance regime and implemented sufficiently high penalties for any violation of the code of conduct. If penalties were too low then violation may be encouraged, reducing social welfare. A zero tolerance regime is unlikely however because, despite the erosion of freedoms for commercial speech, the First Amendment in the U.S., and similar protection in other economies, maintains the ability of firms to test the market.

Furthermore, returning to my opening illustration, if Governments themselves are the violators we have a situation where social engineers are taking advantage of artificial boundaries that they know will not be enforced. This has implications for campaigns such as drink-driving, smoking, and domestic violence. The use of shock tactics is well established in such campaigns, but our findings suggest that a Government agency can gain greater benefits if they exceed the accepted norms and shock not only with the message but also with content or method, knowing that violation will not be punished in the legal arena. This would be particularly effective if at the same time tolerance was limited for marketers of products such as alcohol and tobacco.

From an industry point-of-view, a market driver, looking for growth opportunities, should try to enter markets dominated by market driven firms, and which have self regulation, because they can quickly gain a competitive advantage. Conversely, competitor oriented market driven firms should be
looking for regulatory protection from Government, and in the absence of such protection, they should act collectively to wield power over free-riders, for example by withholding their advertising from a media outlet if it accepts boundary stretching advertising from a firm. A clear example of this working is the local television channel in New Zealand that had the broadcast rights to the 2007 Rugby World Cup. Advertising is prohibited on Sunday mornings in New Zealand, but some of the games were, because of time differences between New Zealand and France (the host of the competition), shown live on Sunday mornings. The television station stretched the boundaries by exploiting a convoluted loophole in the legislation regarding live international events, knowing that it could reap abnormal advertising revenue compared with their market driven rival channels, and knowing that it only faced a maximum of $100,000 penalty if the boundary stretching was challenged and found to be a breach of the industry regulation. The really interesting outcome was that media reports suggested that viewers were not concerned about advertising per se, but wanted to ensure that the advertising did not prevent them from seeing any crucial plays during games. Thus the boundary has been stretched as society has shown the market driver’s actions to be acceptable, under certain conditions.

Clearly this paper simply presents my thoughts on how boundaries in advertising can be stretched because of market composition. It would be illuminating to actually measure the effects of a market driver entering a market made up of market driven firms and stretching the boundaries of what is accepted in advertising. As long as boundary stretching does not result in a punishment commensurate with the gain a market driver can attain, such firms will and should take advantage of this. And, as long as regulation is costly for the Government, or if the Government does not want to impose regulation either because of freedom of expression, or because they want to stretch boundaries themselves, then boundary stretching will not be stopped. Finally, it seems that from a societal perspective, the imposition of a boundary actually creates the incentive to move further a field; not only does the grass look greener on the other side of the fence, it actually is!
REFERENCES


