

The Use Of Generative Ai In Advertising: Towards A Flexible And Risk-Based Approach

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1.- Introduction

Artificial Intelligence (AI) systems and tools have significantly evolved from their original role of opaque back-end analytical instruments to direct facilitators of a wide panoply of expressive and creative activities. One such activity is the online advertising market where enterprises are increasingly integrating AI features to dynamize their efforts and better communicate with the public. Even though the use of AI for “editorial” purposes has been thoroughly analyzed, issues at the intersection between expressive rights, advertising and AI have so far triggered much less attention. However, there are emerging legal debates around these issues that deserve some consideration.

This integration may be of particular importance for small and medium enterprises (SMEs), which now have the possibility of using effective tools to compete with larger actors. In the case of the European Union (EU), there is a clear ambition for the continent to become a global leader in the field of AI. Relevant documents express that trustworthy and human-centric AI is both pivotal for economic growth (with the EU currently being the home of more than 6,800 AI startups) and crucial for preserving the fundamental rights and principles that underpin European societies. In this context, the existence of a set of clear rules, including the AI Act (which will be partially analyzed in this paper), preventing market fragmentation and enhancing trust and security in the use of AI technologies is seen as a fundamental factor¹.

Relevant tools include creative aspects of commercial communications, such as creating and managing tailored ads (AI-powered systems are able to partially or fully create ads for every user, based on what works best for their goals), generating ad variations automatically (an AI

¹ See the AI Continent Action Plan: <https://digital-strategy.ec.europa.eu/en/library/ai-continent-action-plan>

tool can spin an ad off into a number of different variations), and personalizing ads for consumers (AI can highly personalize advertisements based on what motivates consumers)².

These features operate in parallel with more common editing and efficiency tools (in areas such as enhancing colors and images, improving backgrounds or integrating different elements in one simple piece of content), which constitute an AI-powered version of previously existing support tools such as Photoshop, darkroom chemical techniques, manual retouching with paint, or physical production tricks (motor oil instead of maple syrup, glue instead of milk, or glycerin to imitate beads of condensation on cold soda drinks) among others.

Besides a modality of promoting products, goods and services, advertising, including online advertising, is a creative activity and a form of communication which is already subject to a significant number of principles and rules in various parts of the world, and particularly in the European Union (EU).

At the same time, the provision and deployment of AI models and systems are progressively contemplated by specific regulatory regimes that, in recent years, have been attempting to respond to the understandable uncertainties and concerns generated by the sudden and often mystified³ presence and role of AI in many aspects of life. Therefore, these new legal and regulatory provisions overlap with the existing overlay of regimes already covering commercial communications. These legal frameworks include a diversity of areas, including data protection, consumer protection, business and fair commercial practices protection, competition rules, protection of minors, intellectual property, regulation of online platforms and content moderation, as well as freedom of expression as a fundamental right protecting different types of expressive activities.

² Other relevant additional and instrumental uses in this field include the buying and placing of programmatic ads (modern platforms often use AI to manage real-time ad buying, selling, and ad placement), optimizing budget performance (machine learning algorithms are used by commercially available solutions to analyze how ads perform across specific platforms, then offer recommendations on how to improve performance), predicting effectiveness (by using AI trained on vast amounts of proprietary ad data, it is possible to predict how effective ads will be before they even launch), or running tests at scale (AI tools today allow to test hundreds or thousands of ad copy and creative variations quickly and automatically). See M. Kaput (2024), “AI in advertising: everything you need to know”. Marketing Artificial Intelligence Institute. Available at <https://www.marketingaiinstitute.com/blog/ai-in-advertising>

³ See the very interesting reflections in this area included in Caroline de Cock (2026). *AI tools, not gods. Why artificial intelligence hype threatens global governance—and how to fix it*. Antwerp, BTF Press. Available at: <https://zenodo.org/records/18271504>

This paper will explore the specific matter of the use of generative AI to create commercial content, in relation to the transparency and labelling provisions included in different legal systems, for synthetic content, and particularly to the so-called “deep fakes”⁴. The paper will consider the importance of appropriate transparency measures that properly serve the public interest, particularly when it comes to the protection of individuals from misleading content. It will also explore the creative aspects of commercial communications, which relate to the economic opportunities provided by AI, especially for SMEs. It is worth mentioning in this sense the reference made in 2024 by the Draghi report “on EU competitiveness”, and still valid, to reconsider and avoid adding regulatory burdens that are especially costly for SMEs and self-defeating for those in the digital sectors⁵. The paper will also give consideration and specifically analyze the transparency requirements included in the general EU legislation applicable to the use of AI without prejudice to the need to consider global trends in this area, in connection also with comparative regulatory regimes applicable to commercial communications.

The study will cover, firstly, the existing legal and regulatory frameworks generally applicable to all types of commercial communications. Secondly, it will analyze the juridical dilemmas and uncertainties regarding the implementation of transparency requirements in the creation and dissemination of synthetic content, in particular in relation to advertising activities. Lastly, the paper will formulate a series of conclusions and recommendations in view of the different rights and interests at stake.

As main conclusions, the paper will highlight the need for a clear and fair regulatory approach to generative AI in advertising resting on the principles of technology neutrality, risk-based proportionality, protection of fundamental rights, legal certainty and enforceability, and competitiveness and innovation.

2.- General overview of existing regulatory frameworks applicable to commercial communications

2.1.- Introduction

Advertising is an activity that has marked human relations for centuries and in many different and evolving formats. Advertising has also been subject to different types of legislation and

⁴ This concept will be presented and defined in other sections according to applicable legal instruments. From a broader perspective, this notion generally refers to AI-generated or manipulated image, audio, or video representing persons, objects, places, entities, or events to maliciously present them as authentic or truthful.

⁵ https://commission.europa.eu/topics/competitiveness/draghi-report_en#paragraph_47059

regulations, particularly in recent times. Quite often, advertising is also the object of ethical or professional rules established and implemented by business, media, and other stakeholders.

It is important to underscore that advertising is expanding its scope from the traditional area of commercial and consumer interests and transactions. Entities different from traditional businesses, such as civil society organizations, political parties, or even public bodies, are determined to use their resources to facilitate the dissemination of messages promoting their own causes and certain priorities in terms of societal principles and values, political proposals, or their own reputation and activities.

From a human rights perspective, it is necessary to underscore how the United Nations (UN) Human Rights Committee, in its General Comment no. 34⁶, has established that the exercise of the right to freedom of expression and freedom of information may also include commercial advertising (paragraph 11). The European Court of Human Rights (ECtHR) has considered that speech that conveys information of a commercial nature, aims at competition purposes, or incites the public to purchase a particular product cannot be excluded from the scope of Article 10.1 of the European Convention on Human Rights. Even though the Court has established that such statements fall outside the basic nucleus protected by the freedom of expression clause and therefore can be subject to more restrictions than “editorial” speech, it has also given particular consideration and protection to cases of commercial speech where content also incorporates satirical, creative, or artistic aspects. Interesting examples include *Sekmadienis Ltd. V. Lithuania*⁷, on clothing advertisements that featured two models with halos, including a shirtless and tattooed model, with the caption, “Jesus (and) Mary, what are you wearing!”, or *Gachechiladze v. Georgia*⁸, on packaging design advertising which allegedly was “insulting to the religious feelings of Georgians”.

Advertising has thus evolved from simple commercial transactions into a broad medium to promote social values and reputations. While subject to various legal and ethical frameworks, human rights standards increasingly recognize advertising as a protected form of expression.

⁶ HRC, General Comment No. 34, UN Doc no. CCPR/C/GC/34.

⁷ Application no. 69317/14. Judgement of 30 January 2018.

⁸ Application no. 2591/19. Judgement of 22 July 2021.

2.2.- General legal and regulatory rules regarding consumers protection from deception and misleading advertising

General advertising regulation establishes a series of fundamental and basic rules and principles aiming at protecting consumers from certain commercial messages, no matter the tools and technology used to create and disseminate them.

In the EU, the Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market defines distorting the economic behavior of consumers' as "using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise". More particularly, Article 4 describes as an unfair commercial practice (and thus prohibited) "to materially distort the economic behavior with regard to the product of the average consumer whom it reaches or to whom it is addressed". In addition to this, according to Article 5 a commercial practice is misleading if "it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct (...) and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise". Relevant elements in this context include the existence or nature of the product as well as its main characteristics.

The Directive 2006/114/EU of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising defines misleading advertising as "any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behavior or which, for those reasons, injures or is likely to injure a competitor".

Similar principles, restrictions, and protections can be found in the legislation of many countries in the world, including the Digital Markets, Competition and Consumers Act in the United Kingdom⁹, the Consumer Protection Act in India¹⁰, the Consumer Protection Code of Brazil¹¹, and the Consumer Protection Act in South Africa¹². As it will be shown in the next subsection, this legislation has been complemented with additional provisions

⁹ <https://www.legislation.gov.uk/ukpga/2024/13/contents>

¹⁰ <https://consumeraffairs.gov.in/pages/consumer-protection-acts>

¹¹ https://www.planalto.gov.br/ccivil_03/leis/l8078.htm

¹² <https://www.gov.za/documents/consumer-protection-act>

particularly concerning the online dissemination of advertising, especially via social media platforms.

It can thus be concluded that according to the general provisions included in legal and regulatory frameworks applicable to advertising and commercial communications, the creation and dissemination of misleading or deceitful commercial content would be prohibited or punished independently from the tools and technologies used for that purpose.

Therefore, the use of any AI system or tool to engage in the mentioned practices will not avoid the application of these legal frameworks. The institutions and regulatory bodies designated by the applicable law to ensure compliance, as well as, in many cases, the respective courts already count on a clear set of general principles and rules focusing on the potential deceptive and misleading intentions and results of certain commercial communications practices beyond the use of any specific technology.

It is therefore important to underscore that the integration of AI and synthetic content into the advertising ecosystem does not occur in a legal or even ethical vacuum. Rather, these technological advancements are met by a robust, technology-neutral overlay of regulations around consumer protection, transparency, and fairness.

2.3.- Regulation of online advertising

It is obvious that online advertising has acquired growing relevance. Despite the application of the general requirements and principles mentioned in the previous paragraph, this is an area of specific legal and regulatory complexity since it involves a growing number of actors and intermediaries with different types of roles and responsibilities. It is worth underscoring in this sense that the online advertising ecosystem has evolved from a simple direct transaction between a brand and a website into a massive, automated "supply chain" where an ad is bought, sold, and displayed in a matter of milliseconds (including advertisers, media agencies, publishers, search engines, demand and supply-side platforms, online platforms, etc.).

This ecosystem is thus subject to some additional rules and constraints which deserve to be briefly presented to properly understand the general framework where additional AI-focused provisions will need to be applied in a consistent manner. As it will be shown in further sections, obligations may sometimes overlap and require a coherent approach in order to avoid incongruences, inconsistency or simply legal uncertainty.

Online advertising is based on several different techniques. As mentioned, this practice has evolved from the mere posting of commercial messages placed on third-party websites, including search engines and directories available through Internet access, to the current sophisticated techniques allowing the industry to reach out to consumers in innovative manners, for example via targeted or tailored ads or through the role of influencers, quite often by blurring the line between editorial or organic content and advertising *stricto sensu*.

In the European Union, the so-called E-commerce Directive¹³ established, more than 25 years ago, a series of basic definitions and principles regarding online intermediaries, now complemented by the legal regime defined under the Regulation (EU) 2022/2065 of the Digital Services Act (DSA)¹⁴. The Directive defines commercial communication as “any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organization or person pursuing a commercial, industrial or craft activity or exercising a regulated profession.” The DSA complementarily refers to advertising as “information designed to promote the message of a legal or natural person, irrespective of whether to achieve commercial or non-commercial purposes, and presented by an online platform on its online interface against remuneration specifically for promoting that information”. The DSA does not define specific rules regarding advertising content, as it does not *vis-à-vis* organic content either, but it rather contemplates certain provisions for online intermediaries in this area.

Since 2018, the so-called Audiovisual Media Services Directive (AVMSD)¹⁵ uses the term “audiovisual commercial communication” to refer to content designed to “promote, directly or indirectly, the goods, services or image of a natural or legal person pursuing an economic activity; such images accompany or are included in, a programme or user-generated video in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, *inter alia*, television advertising, sponsorship, teleshopping, and product placement”. Regarding certain forms of audiovisual

¹³ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

¹⁴ European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC.

¹⁵ Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities.

communications, the AVMSD incorporated a series of provisions applicable to a specific type of intermediaries, i.e. video sharing platforms¹⁶.

Other relevant pieces of EU legislation in this field include specific obligations in the Digital Markets Act (DMA)¹⁷ for so-called “gatekeepers” (i.e. companies that have a significant impact in the internal market) regarding the provision of online advertising services, or certain provisions included in the General Data Protection Regulation (GDPR)¹⁸ or the ePrivacy Directive¹⁹ regarding the use of personal data for profiling or tracking users.

Despite the relevance of the European digital market, other jurisdictions have also been adopting relevant rules governing the online space since the beginning of the century, thus aiming at providing a sufficient level of legal certainty for businesses to operate and involved rights to be properly protected and promoted. It is important to note that despite the different legal regimes, the prevailing approach consists of establishing a differentiation between the responsibilities of advertisers regarding content and those of online platforms regarding the way advertising communications are hosted and presented.

In India, the Information Technology Act of 2000 deals with various aspects of electronic commerce, including online advertising, without prejudice to the provisions included in the above-mentioned Consumer Protection Act. In June 2022, the Central Consumer Protection Authority (CCPA), issued Guidelines on Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements²⁰, while in November

¹⁶ Obligations, included in Article 28b, consist of taking “appropriate measures” to protect minors from content that may impair their physical, mental, or moral development, and to protect the general public from content containing incitement to violence or hatred, and content the dissemination of which constitutes an activity which is a criminal offence under Union law, namely public provocation to commit a terrorist offence, offences concerning child pornography and offences concerning racism and xenophobia. Obviously, these restrictions apply to all types of content. Such measures include adopting appropriate terms and conditions, having a functionality for users to declare the presence of audiovisual communications in the content they upload, establishing and operating flagging and reporting mechanisms, establishing and operating redress mechanisms for the resolution of users’ complaints or providing for effective media literacy among others.

¹⁷ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828.

¹⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC

¹⁹ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector

²⁰ Available at <https://consumeraffairs.nic.in/sites/default/files/file-uploads/latestnews/CCPA%20Notification.pdf>

2023, the CCPA further issued Guidelines for Prevention and Regulation of Dark Patterns²¹. In Australia, the conduct of digital advertising is regulated by federal laws, some state agencies, and self-regulation. At a federal level, the Australian Competition and Consumer Commission (ACCC)²² regulates the content of digital advertising and disclosures through the Australian Consumer Law, which requires businesses to ensure that consumers are appropriately and accurately informed by prohibiting misleading or deceptive conduct, false or misleading claims, and the imposition of unfair contract terms. More recently, the Online Safety Act in the United Kingdom²³ also encompasses a series of obligations for certain categories of intermediaries regarding the prevention of users from encountering fraudulent advertisements.

The regulatory landscape for online advertising is therefore not only a matter of consumer protection, but a high-stakes convergence of data privacy, platform accountability, and algorithmic transparency. Jurisdictions from the EU to India move from reactive models toward proactive "duty of care" frameworks while keeping intermediary liability exemptions. For businesses and developers, the challenge lies in ensuring that the next generation of AI-driven marketing tools does not just innovate but integrates seamlessly with these overlapping layers of global compliance. Ultimately, the goal of these evolving rules must consist of fostering a digital ecosystem where commercial innovation can flourish without compromising the safety, privacy, or informed consent of the individual.

2.4.- Self-regulation and industry approaches

Besides legal and regulatory framework issues, the promotion of fair, truthful, and honest advertising has also been tackled by relevant stakeholders playing a role in the advertising market. These self-regulatory efforts not only aim at promoting respect for the rule of law around advertising and marketing communications but also at establishing a wide set of ethical principles and best practices for businesses to contribute to the development of a competitive and interoperable digital market. Voluntary codes in this area thus contemplate a wide series of principles and rules horizontally applicable to different modalities, formats, and communication techniques. This means that they also apply to cases where AI tools and systems have contributed to the creation or dissemination of this type of communication.

²¹ Available at <https://consumeraffairs.nic.in/sites/default/files/file-uploads/latestnews/Draft%20Guidelines%20for%20Prevention%20and%20Regulation%20of%20Dark%20Patterns%202023.pdf>

²² <https://www.accc.gov.au>

²³ <https://www.legislation.gov.uk/ukpga/2023/50>

Moreover, the use of AI for these purposes is already specifically contemplated by some of these instruments.

As a notable example in this area, the International Chamber of Commerce (ICC) Advertising and Marketing Communications Code²⁴ encompasses a wide variety of actors within the marketing ecosystem, including “agencies, media, market influencers, bloggers, vloggers, affiliate networks, data analytics, social/digital media platforms and ad tech companies as well as those responsible for preparing algorithms and the use of artificial intelligence for marketing communications purposes”. It also notes that its main rules “apply regardless of how marketing communications are created, modified or delivered, i.e. whether by humans or through automated means, such as AI and algorithms”. It adds that those employing such technologies “should exercise due oversight to ensure that they meet ethical standards and maintain compliance with the Code, commensurate with their role in the process”. In this sense, “marketers who use algorithms or other artificial intelligence instruments have responsibility for the communication results they produce”.

As a more specific regional example, the Digital Industry Group Inc.’s (DIGI)²⁵ Australian Code of Practice on Disinformation and Misinformation (updated 22 December 2022)²⁶ requires its digital platform signatories (including Apple, Adobe, Google, Meta, Microsoft, Redbubble, TikTok and Twitter) who offer digital advertising services or sponsored content to use commercially reasonable efforts to deter advertisers from repeatedly placing digital advertisements that contain verifiably false or misleading or deceptive information.

Last but not least, social media and search engines hosting commercial communications have developed their own and respective set of standards regarding advertising. These rules often apply in addition to the main basic policies applicable to organic content and aim at avoiding specific types of harmful content (incitement to violence, hatred, discrimination, etc.). They particularly aim at promoting transparency, fairness, protection from fraud and scams, prevention of dishonest and misleading behavior, as well as overall positive experiences from users. Relevant examples include Meta’s Advertising Standards²⁷, Google²⁸ and YouTube²⁹ Ads Policies, TikTok Advertising Policies, and X Advertising Policies³⁰. Some platforms also

²⁴ <https://iccwbo.org/business-solutions/the-icc-advertising-and-marketing-communications-code/>

²⁵ <https://digi.org.au>

²⁶ <https://digi.org.au/disinformation-code/>

²⁷ <https://transparency.meta.com/policies/ad-standards/#community-standards-overview>

²⁸ <https://support.google.com/adspolicy/answer/6008942?hl=en>

²⁹ <https://support.google.com/adspolicy/answer/10249050?hl=en>

³⁰ <https://business.x.com/en/help/ads-policies>

have specific country-based restrictions based on local considerations³¹. The incorporation of certain types of content or references into advertising messages may also be subject to restrictions in cases, for example, of lotteries, religion and culture, sensitive content for minors, weight control, and management, body, and image, HFSS food and drink, COVID-19, and, of course, synthetic/AI-created content.

All the elements mentioned above show the existence of a series of incentives across different actors and services to guarantee that the advertising ecosystem respects a series of basic principles and therefore promotes consumer trust by targeting and excluding a wide range of malicious practices. These private policies may in some cases overlap with existing legal mandates and furthermore include additional “voluntary” protections and restrictions tailored to the characteristics, impact and audience of each service.

2.5.- Conclusion

This brief overview has shown that general advertising laws already contemplate misleading and deceitful practices regardless of whether the commercial message was generated using human “artisanal” methods or a synthetic AI tool. Any use of AI to deceive or mislead consumers would therefore contradict the existing legal and regulatory regimes framing the scope and limits of commercial communications. In the same vein, the industry’s own self-regulatory infrastructure has already evolved to specifically address these risks. Leading frameworks, most notably the ICC Advertising and Marketing Communications Code, explicitly state that their ethical standards, which include clear restrictions against untruthful and dishonest advertising, apply to communications regardless of how they are created, modified, or delivered.

Furthermore, online platforms are subject to a layered system of accountability that goes beyond general consumer law. This includes the provisions existing at the EU level as well as in other jurisdictions and relevant emerging markets. These legal requirements are also bolstered by the platforms’ own internal advertising standards and voluntary codes, which are specifically designed to deter the dissemination of verifiably false, fraudulent, or deceptive information.

³¹ See for example the case of Pinterest at <https://policy.pinterest.com/en/advertising-guidelines#section-restricted-content-guidelines> or TikTok at <https://ads.tiktok.com/help/article/tiktok-advertising-policies-ad-creatives-landing-page-restricted-content?lang=en>

Collectively, these frameworks ensure that while generative AI provides new creative tools, its deployment remains subject to a substantial degree of oversight, transparency, and fairness.

3.- Advertising and transparency requirements around the creation and dissemination of synthetic content

3.1.- Introduction

Putting aside the general regulations and standards mentioned in the previous section, it is important to consider certain provisions included in the AI Act³² adopted within the context of the EU, particularly in Article 50, affecting the use of AI systems and tools in the creation of advertising content. These provisions have already been analyzed in detail in a different paper³³. It shall be noted that they are not aimed at directly regulating content or protecting audiences and consumers from certain types of messages. They play the role (which is complementary to other possible regimes applicable to the creation and dissemination of synthetic content) of guaranteeing a certain degree of transparency regarding the use of AI for specific purposes. In this sense, according to recital 27 “transparency means that AI systems are developed and used in a way that allows appropriate traceability and explainability, while making humans aware that they communicate or interact with an AI system, as well as duly informing deployers of the capabilities and limitations of that AI system and affected persons about their rights”.

The specific reference to this relevant piece of EU legislation is due to the pioneering role played by the European system to adopt and aim at implementing a general and comprehensive legal regime related to the deployment of AI in the continent. It is undeniable that this initiative has become a reference in the rest of the world (whether it is followed or instead dismissed as the wrong approach to the topic) and that some of its provisions have become the source of inspiration for legislators and regulators in a variety of jurisdictions.

3.2.- Article 50.2 of the AI Act. Marking obligations for AI system outputs

Paragraph 2 of Article 50 establishes that AI systems that generate synthetic audio, image, video, or text content “shall ensure that the outputs of the AI system are marked in a machine-readable format and detectable as artificially generated or manipulated”. This

³² Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence.

³³ J. Barata (2025). “Transparency Obligations for all AI Systems: Article 50 of the AI Act”. Available at SSRN: <https://ssrn.com/abstract=5902402> or <http://dx.doi.org/10.2139/ssrn.5902402>

obligation only applies to system providers, who also need to guarantee that “technical marking solutions are effective, interoperable, robust and reliable as far as this is technically feasible, taking into account the specificities and limitations of the various types of content, the costs of implementation and the generally acknowledged state of the art”. Recital 133 explains the main objective and the legitimate interest protected by this provision, which is to tackle cases where it would be hard or challenging for humans to distinguish between human-generated and “inauthentic” content, particularly when the use of AI is not evident and thus misleading.

On the other hand, this provision also contemplates relevant exceptions to the obligation in question, for cases of systems that perform “an assistive function for standard editing or do not substantially alter the input data or its meaning”, as well as systems authorized by law to detect, prevent, investigate, or prosecute criminal offences.

It is also important to stress that the mentioned legal obligation refers only to the need to provide tools for the proper differentiation between synthetic (i.e., AI generated or manipulated) and “authentic” content, the latter being understood as content that corresponds to “real” audio, image, video, or text content. This consideration or differentiation must, in any case, be separated from other assessments regarding trustworthiness or veracity of content.

The legal text is thus applicable to cases where the presence of synthetic content cannot properly be assessed and indicates the particular necessity of considering in this context “the specificities and limitations of various types of content”. Furthermore, another significant caveat refers to the inapplicability of these obligations to cases where systems merely perform “an assistive function for standard editing or do not substantially alter the input data or its meaning”. This standard editing or non-substantial alteration of data needs to be reasonably understood as referring to the most common editing processes for text, audio and images, including video, such as spelling correction, grammar checks, tone adjustment, or auto-complete functions, AI-generated subtitles, cropping, resizing, filtering, or adjustments to brightness, contrast, saturation, and color-grading, as well as standard audio production techniques like background noise removal, reverb, compression, or volume adjustments. This being said, it also needs to be acknowledged that the legal use of the notion of “standard editing” is significantly ambiguous and therefore opens the door to controversies in terms of interpretation and enforcement.

In this area, it is particularly important to highlight technical collaborative solutions to mark the nature and source of a piece of content as it is created or edited, even though it is essential to bear in mind that they do not aim to tackle broader issues of content veracity. A specific example in this area would be the Coalition for Content Provenance and Authenticity (C2PA), whose provenance metadata standard (“content credentials”) has a fast-growing community of contributors and implementers including, but not limited to, technology companies like Google, OpenAI, and Microsoft, media companies like the BBC and CBC, camera companies like Sony, and more. Different metadata techniques, which includes robust digital watermarking, may provide a significantly balanced solution to the trade-offs between reliability, robustness, and interoperability³⁴. These content provenance solutions in the areas of marking and labelling are already in use and therefore constitute a relevant experience and reference in this area.

3.3.- Article 50.4 of the AI Act. Disclosure of deep fakes

3.3.1.- Public disclosure and nuanced exceptions

Paragraph 4 of Article 50 of the AI Act contains a cumulative obligation to the regime contemplated in paragraph 2. Paragraph 2 basically articulates a regime of technical enablement applicable to providers of AI systems and the obligation of introducing technical measures including “watermarks, metadata identifications, cryptographic methods for proving provenance and authenticity of content, logging methods, fingerprints or other techniques, as may be appropriate” (recital 133). Paragraph 4 establishes obligations of “public disclosure” (i.e., showing a visible label) in relation with so-called “deep fakes” as a special subcategory of content that falsely appears authentic. In particular, Article 50.4 requires deployers of an AI system that generates or manipulates image, audio, or video content constituting a deep fake to disclose that the deep fake content has been artificially generated or manipulated.

The AI Act defines deep fakes as “AI-generated or manipulated image, audio or video content that resembles existing persons, objects, places, entities or events and would falsely appear to a person to be authentic or truthful” (Article 3.60). As mentioned by Thomas Gils, the definition cumulatively refers to four very important but also very broad aspects: (i) the requirement of resemblance; (ii) the reference to existing subjects, (iii) the list of relevant

³⁴ <https://c2pa.org>

subjects, and (iv) the requirement that the content falsely appears to be authentic or truthful³⁵.

Each of these elements incorporate significantly ambiguous concepts which might trigger, in many different possible scenarios, divergent interpretations and enforcement controversies. It will therefore be important to count on further and more detailed criteria provided by relevant stakeholders, and particularly the Commission.

In any case it can be said that an interpretation of the AI Act in accordance with the freedom of expression principles of necessity and proportionality determine the exclusion from the scope of Article 50.4 (and 50.2) cases where content creation merely results in material that may not present deceptive risks, such as the depiction of generic objects or persons (an artificial landscape with kids running around), unrealistic content (someone walking on Saturn's rings...), neutral alterations (including dramatic clouds in an advertising picture), minor manipulations or edits (as mentioned vis-à-vis Article 50.2), and generally content that per se does not raise the risks mentioned above (presenting the image of a newly published book on an artificially created colorful background). As already mentioned, these exclusions would apply to both editorial and commercial synthetic content. Imposing disclosure requirements on these routine edits would represent an unwarranted interference in the right to freedom of expression of those using such tools for content creation and trigger risks of "label fatigue" (as it will be further explained below) and casting a false shadow of deception over all standard commercial content.

However, the most relevant aspect in this context is the nuanced exception included in the same paragraph, by establishing that "(w)here the content forms part of an evidently artistic, creative, satirical, fictional or analogous work or programme, the transparency obligations set out in this paragraph are limited to disclosure of the existence of such generated or manipulated content in an appropriate manner that does not hamper the display or enjoyment of the work".

This provision creates two indefinite legal concepts that need to be properly framed and interpreted: (i) evidently artistic, creative, satirical, fictional, or analogous work or programmes; and (ii) disclosure in an appropriate manner that does not hamper the display or enjoyment of the work.

³⁵ T. Gils (2024). "A Detailed Analysis of Article 50 of the EU's Artificial Intelligence Act". Published in C. N.Pehlivan, N.Forgó and P.Valcke (eds.) (2025), *The EU Artificial Intelligence (AI) Act: A Commentary*. Kluwer Law International, 2025, 776-823. Available at <http://dx.doi.org/10.2139/ssrn.4865427>

Regarding the first concept, it essentially refers to a significant amount of human expressive behavior in a broad diversity of “original” content creation. The rule does not only point at content connected with artistic or fictional works but also embraces the broader concept of “creative” expressions, which potentially encompasses different modalities of human speech (including, of course, humor and satire) in relation to different aspects of economic, social, cultural, or political life. Despite the apparently limitative use of the adverb “evidently”, the reference to “analogous” types of content may paradoxically be interpreted as reinforcing the broadness of the provision. Furthermore, it needs to be reiterated that the ECtHR has recognized and protected under Article 10 of the Convention the creative and expressive nature of commercial content. In a different jurisdiction, the US Supreme Court has granted First Amendment protections to commercial speech even though, and similarly, possible restrictions are subject to a lesser strict scrutiny than other forms of speech³⁶.

In other words, and a *sensu contrario*, this specific aspect of paragraph 4 clearly frames the main target of its main disclosure obligation, which would be non-creative content devoid of any minimal economic, social, cultural, or political substance. Furthermore, recital 133 indicates that the main concern of the legislator is focused on content that would likely and falsely appear to a person to be authentic or truthful and, at the same time, potentially hinder the integrity and trust in the information ecosystem, particularly when it comes to risks of misinformation and manipulation at scale, fraud, impersonation, and consumer deception.

This interpretation of the nuanced exceptions included in the repeatedly mentioned paragraph 4 would be consistent with the parallel and already mentioned need to properly protect the right to freedom of expression in its different modalities. As also clearly stated by recital 134:

“(the transparency obligation) should not be interpreted as indicating that the use of the AI system or its output impedes the right to freedom of expression and the right to freedom of the arts and sciences guaranteed in the Charter, in particular where the content is part of an

³⁶ *Central Hudson Gas* (447 U.S. at 557) marks in this sense the beginning of modern commercial speech understanding by the Supreme Court. In this decision, the Court conceives a four-part test to determine whether or not the commercial speech in question would be protected as speech, establishing that a) speech must at least concern lawful activity and not be misleading; b) the asserted government interest in regulating speech must be substantial; c) the regulation must advance the government public interest asserted; and d) it must not be more extensive than necessary to serve that interest. Previously, in *New York Times v. Sullivan* (376 U.S. at 254) the Supreme Court accepted that First Amendment safeguards apply to a paid commercial advertisement, which must thus be considered as a form of speech.

evidently creative, satirical, artistic, fictional or analogous work or programme, subject to appropriate safeguards for the rights and freedoms of third parties”.

All the above takes us to a series of particular and interconnected conclusions when it comes to advertising content:

- a) A significant amount of AI uses in this field, particularly when it consists of usual professional enhancements, as already described in this paper, would fall outside the scope of both paragraphs 2 and 4 of Article 50.
- b) The use of AI for the creation of images, audio and video resembling existing persons, objects, places, entities or events would fall within the scope of paragraph 4 when likely and falsely appearing to a person to be authentic or truthful.
- c) However, the images, audio and video fulfilling the characteristics mentioned in sub paragraph b) will benefit from the nuanced exception contemplated in the same paragraph unless it is devoid of any creative or analogous nature and has a predominantly deceitful and misinformative character. The exception consists, as already explained, in the fact that disclosure is to be granted in “an appropriate manner that does not hamper the display or enjoyment of the work”. This will also be further elaborated in the next section.
- d) When content is devoid of any creative or analogous nature, disclosure obligations will be applicable in full (and thus without the exception mentioned in the sub paragraph c)) and, furthermore, this will also trigger enforcement of norms and sanctions contemplated in the general legislation on consumer protection and prevention of misleading advertising.

In any case, it is also important to keep in mind that this is a legal regime only applicable to deep fakes created by using AI tools. Other modalities of deep fakes (for example, those generated resorting to software applications not qualifying as AI) would not, in principle, be subject to any specific disclosure obligation, but once again, general horizontal legislation and regulation, as well as advertising industry standards would apply.

3.3.2.- Disclosure in an “appropriate manner”

Article 50.4 of the AI Act establishes that, in the cases of creative content, “the transparency obligations set out in this paragraph are limited to disclosure of the existence of such generated or manipulated content in an appropriate manner that does not hamper the display

or enjoyment of the work”. This is thus a nuanced application of the general obligation described in recital 134 indicating that deployers must “clearly and distinguishably disclose that the content has been artificially created or manipulated by labelling the AI output accordingly and disclosing its artificial origin”. This regime applies in a cumulative way with the marking obligations contained in paragraph 2.

The references to an “appropriate manner” and the need to avoid hampering “the display or enjoyment of the work” generate once again legal uncertainties that must be properly addressed in further regulatory or co-regulatory instruments.

In any case, it is important to underscore in this area a series of main principles and ideas.

As mentioned before, this is an area intimately related to the exercise of the right to freedom of expression, and therefore, the discussion about possible disclosure solutions is not merely a technical one. Moreover, as already indicated as well, possible scenarios take place within the context of a multi-layered industry and how technically difficult disclosure requirements may be to reasonably and proportionally propagate across the different actors that integrate the whole ecosystem. In this context, the standard of proportionality and necessity must undoubtedly be applied, which inevitably demands a flexible approach. A rigid disclosure solution negatively affecting the dissemination of the work or programme in question (particularly those involving prominent and on content labels) will also likely entail an illegitimate restriction to the mentioned fundamental right. In this sense, and when it comes to creative, artistic, satirical, fictional, or analogous content, specific, flexible, and properly tailored solutions need to be implemented based on the concrete characteristics of each piece of content, with a special focus on avoiding visual labels directly affecting the displayed content and considering post-click disclosures as a compliance mechanism.

Besides these important implications, disclosure tools should be practicable and enforceable by a diversity of deployers without imposing excessive burdens negatively affecting competitiveness.

The adoption and enforcement of legal and regulatory frameworks must thus take place on the basis of an appropriate timeline that should allow for the exploration and consideration of proper technical solutions, as well as for a proper understanding and adaptation process by the wide panoply of actors nowadays involved in the online advertising ecosystem, as it has already been mentioned in a previous section. In this context, all the elements of the value chain need to properly acknowledge their respective role and responsibilities when it comes to guaranteeing and adequately enforcing the corresponding obligations. It is therefore

important for the implementation of the existing legal framework to contemplate and enable the adoption of flexible solutions, such as layered disclosures, post-click information, or interoperable provenance metadata, may in many circumstances provide a more proportionate response than prominent, on-content warnings. In the case of the latter, it is obvious that direct intrication of labels and content may in several cases hamper both the transmission of the message and the desired impact on its recipients.

In this context it is necessary to note the ongoing efforts, at the moment of elaboration of this paper, by the European Commission and its AI Office to draft a Code of Practice “on marking and labelling of AI-generated content”³⁷. The Code is drafted by independent experts appointed by the AI Office, with a second version made public on 6 March 2026. Despite many improvements, and in relation with the topics discussed in this paper, the second draft still contains areas for development. Of particular note are the need for a flexible approach to icon placement, the technical impracticality of embedding labels directly into content that may be cropped or fragmented, and the importance of expanding exemptions for creative works through non-intrusive disclosure methods such as post-click disclosures.

Disclosure tools must also be effective. This particularly means that they need to properly serve the objective followed by the legislator when establishing the obligations in question. In this sense, it is important to insist on the fact that the adoption of a broad notion of deep fake and the subsequent application of labelling requirements to standard commercial content could inadvertently dilute the very trust the AI Act aims to build. This may be caused by overwhelming and fatiguing users with warnings related to “benign” content (in the sense already explained in the previous section), thus creating a false sense of security vis-à-vis unlabeled yet still potentially malicious content. To put it simply: warnings should matter.

The disclosure obligation must not only be compatible with the right to freedom of expression but also “subject to appropriate safeguards for the rights and freedoms of third parties”. The use of techniques contemplated under Article 50.4 may affect the legitimate rights of third parties, including the violation of image or reputation. It may also trigger legal disputes in the field of intellectual property or trademarks, among others. The instruments and provisions included in the AI Act are independent from and parallel to other types of legal disputes associated with the use of synthetic images for the purposes of disinformation or deception, which will need to be addressed according to the corresponding and applicable

³⁷ <https://digital-strategy.ec.europa.eu/en/policies/code-practice-ai-generated-content>

regime. It also goes without saying that marking and labeling criteria and solutions are not to be used to adjudicate legal disputes beyond the scope of AI legislation.

Finally, it is worth insisting on the fact that these obligations are not contemplated in a vacuum. As mentioned already, the different actors playing a role in the advertising ecosystem are subject to a series of legal obligations affecting many aspects of the use of AI to generate synthetic content.

3.3.3.- Beyond the EU

Transparency requirements of this kind are not unique to the European context. As a matter of fact, legislative discussions and solutions in the EU seem to have had some impact and provided inspiration in many other jurisdictions, such as South Korea with the Basic Act on the Development of Artificial Intelligence and the Establishment of a Foundation for Trustworthiness, which contains a series of transparency obligations regarding outputs created by generative AI³⁸, India with the amendments to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules of 2021 by the Ministry of Electronics and Information Technology³⁹, in Latin America with examples in countries like Chile⁴⁰ or Brazil⁴¹, or the evolving landscape in the US (both at the federal and state level) and Canada⁴².

It is impossible to analyze in this paper the specific characteristics of the mentioned legal regimes. It is however important, in comparison with the EU legal regime in this area, to underscore some distinctive elements:

- a) While the AI Act adopts a general, comprehensive and sometimes thorough approach to the risks associated with the provision and deployment of AI systems, other jurisdictions have adopted a more limited approach when it comes to the incorporation of new legal rules and principles.
- b) Another important element to highlight is the fact that the EU legislation is unique in the sense of incorporating a very broad approach to transparency, which can be

³⁸ <https://aibasicact.kr/explorer/#chapter-4-no-section-article-31>

³⁹ <https://egazette.gov.in/WriteReadData/2026/269993.pdf>

⁴⁰ <https://www.camara.cl/verDoc.aspx?prmID=17048&prmTIPO=INICIATIVA>

⁴¹ <https://artificialintelligenceact.com/brazil-ai-act/>

⁴² See M. Sloane M, E. Wüllhorst. “A systematic review of regulatory strategies and transparency mandates in AI regulation in Europe, the United States, and Canada”. *Data & Policy*. 2025, 7. doi:10.1017/dap.2024.54

detected across the whole legal text and through many different provisions and not only Article 50.

- c) EU legislation is also particularly unique in terms of its degree of specificity when it comes to principles applicable to transparency solutions (for example via all the detailed requirements included in paragraph 5 or recitals 133 and 134).
- d) EU legislation contemplates a scheduled enforcement, subjected at the same time to the development and adoption of delegated norms and co-regulatory codes of practice that require significant concertation efforts among a wide variety of stakeholders.

In any case, the discussions around the interpretation and upcoming enforcement of European standards clearly show the fundamental elements to be considered as guiding legal and regulatory principles in any jurisdiction. These elements include the necessity to consider the complexity of the commercial communications ecosystem, the importance of already existing general legal and regulatory frameworks covering relevant aspects of these activities, the utmost importance of taking into account the human rights impact of any possible obligations and requirements, as well as the importance of avoiding the imposition of burdens affecting the competitiveness of emerging economic initiatives.

4.- Conclusions

The emergence of generative AI in advertising does not take place in a normative vacuum, nor does it require a complete reinvention of the entire regulatory architecture applicable to commercial communications. As shown throughout this paper, a dense and multilayered framework already governs advertising activities, combining horizontal consumer protection rules, sector-specific regulation, platform accountability regimes, and robust self-regulatory standards. Within the European Union, instruments such as the Unfair Commercial Practices Directive, the Digital Services Act, and the Audiovisual Media Services Directive coexist with national laws and industry codes to ensure that commercial communications remain truthful, fair, and transparent, irrespective of the tools used to create them. The use of AI systems does not displace these obligations. Rather, it operates within them.

The AI Act, and particularly Article 50, introduces a complementary layer focused on transparency in relation to synthetic content. Its marking and disclosure obligations aim to mitigate risks of deception, impersonation, and large-scale misinformation. However, these

obligations must be interpreted in light of their purpose and of fundamental rights guarantees, especially freedom of expression and freedom of the arts. The distinction between machine-readable marking (Article 50(2)) and public disclosure of deep fakes (Article 50(4)) reflects a calibrated attempt to balance traceability with proportionality. Over-expansive interpretations—particularly of the notion of “deep fake” or of “standard editing”—risk generating legal uncertainty, excessive compliance burdens, and counterproductive “label fatigue”.

In the specific context of advertising, most routine and assistive uses of AI (such as image enhancement, background adjustments, automated testing, or personalization) should not trigger intrusive disclosure requirements where no realistic risk of deception arises. By contrast, AI-generated or manipulated content that falsely appears authentic and is capable of materially distorting consumers’ economic behavior may justify clear disclosure, and in certain circumstances may also fall within the scope of existing misleading advertising prohibitions. The decisive criterion should not be the mere involvement of AI, but the presence of a genuine risk of deception, fraud, or manipulation, which in any case, and it is worth insisting on this, is also the object of clear limitations and prohibitions already established by the general legislation.

The nuanced exception for evidently artistic, creative, satirical, or fictional works is of particular relevance in advertising, a field that frequently incorporates expressive, humorous, and imaginative elements. Any disclosure regime must therefore be implemented in an “appropriate manner” that does not unduly hamper the display or enjoyment of the work. Flexible solutions, such as layered disclosures, post-click information, or interoperable provenance metadata, may in many circumstances provide a more proportionate response than prominent, on-content warnings.

Furthermore, regulatory enforcement cannot be detached from the broader ecosystem of platform governance. These mechanisms, together with industry initiatives on content policies, content provenance, and watermarking, demonstrate that co-regulatory and technical approaches can play a central role in achieving the objectives of transparency without stifling innovation and affecting competitiveness, particularly of SMEs, as well as avoiding erosion of trust and effectiveness derived from excessive labeling.

Ultimately, a clear and fair regulatory approach to generative AI in advertising should rest on five guiding principles:

- a) Technology neutrality: obligations should target deceptive effects, not specific tools.

- b) Risk-based proportionality: disclosure should correspond to demonstrable risks of consumer deception or systemic harm.
- c) Protection of fundamental rights: freedom of expression, including commercial and creative speech, must remain a central consideration.
- d) Legal certainty and enforceability: ambiguous concepts such as “deep fake”, “standard editing”, and “appropriate manner” require interpretative guidance to ensure predictable application within a timeframe that allows the ecosystem to develop robust compliance strategies.
- e) Competitiveness and innovation: compliance solutions should be technically feasible and not disproportionately affect competitiveness.

Generative AI undoubtedly transforms the scale, speed, and modalities of advertising production. Yet transformation does not equate to regulatory rupture. When interpreted coherently and applied proportionately, existing consumer protection rules, platform obligations, and the transparency framework of the AI Act together provide a sufficiently robust basis to address the risks associated with synthetic commercial content. The central policy challenge is therefore not to multiply overlapping labelling requirements, but to ensure that transparency measures remain meaningful, targeted and effective—so that warnings matter, trust is preserved, and innovation in advertising can continue within a framework of fairness and accountability.