

General remarks on the Interpretative Communication

Objectives and general legal considerations

The Interpretative Communication aims to clarify certain questions that arise in the application of the existing Directive. It does not propose new regulations, but explains the existing rules and principles.

The European Commission thereby intends to improve legal certainty in the use of new techniques and forms of advertising while ensuring that the principles contained in the Directive are fully respected.

The Interpretative Communication does not prejudice:

- The outcome of the European Commission's future work on a revision of the Directive;
- The application of other rules laid down in community law;
- The past, present and future decisions of the European Court of Justice.

Moreover, it does not prevent Member States from adopting more detailed or restrictive measures.

General EU audiovisual policy objectives

The development of the European audiovisual industry - The European Commission's approach is to consider that television advertising is essential for the development of a European market in television and related services.

Paragraph 3 describes television advertising as an "important, often vital, source of revenue" for commercial public and private free-to-air television.

Cultural objectives - The TV Directive is also aiming at the development of a truly European audiovisual industry. In this respect, the Interpretative Communication recognises the great role that advertising revenues play in the financing of audiovisual productions (see § 1).

In her May 2004 speech to egta members, Commissioner Viviane Reding summarised both of the main EU policy objectives:

"The *'Television Without Frontiers'* Directive recognises that advertising is the economic basis for all private and for a part of public service free-to-air television, which is essential for a free and diversified television and media landscape in Europe.

At the same time, the Directive makes it clear that there have to be limits to advertising in order to safeguard the interests of the viewers, and also of the right holders of audiovisual works. This Communication enables broadcasters, viewers and right holders alike to understand better what is allowed and what is not." – *Viviane Reding, European Commissioner, Education and Culture, May 2004.*²

² "More legal certainty for TV advertising: the Commission clarifies its interpretation of the 'Television without Frontiers' (TVWF) Directive", Press release IP/04/530 Brussels, 23 April 2004

Self-regulation and co-regulation – The Communication stresses the important role that can be played by self-regulation and co-regulation in regard to the implementation of the principles and rules of the TV directive (§ 72). This was also confirmed by the EU Commissioner:

“As you know, I attach great importance to self-regulation and co-regulation. This question will be dealt [with] on a basis of the horizontal works carried out by the Commission and on a basis of a study in the near future on co-regulatory models in the media sector. {...} Above all, we must avoid over-regulation, which might hinder the development of the market, and harm Europe’s competitiveness.

I also believe that some greater importance should be given to self-regulation by the regulators themselves where appropriate, on the basis of guidelines laid down by the public authorities. This is, in my view, an up-to-date approach to preserving the balance between the essential principle of free speech and the preservation of legitimate public interest objectives.” – *Viviane Reding, European Commissioner, Education and Culture, speech given to egta members, May 2004*

Forms of advertising – The Communication states that new forms of advertising are not incompatible with the Directive per se and explains to which extent their use is compatible with the existing legal requirements.

In accordance with the Case Law of the European Court of Justice, the prohibition of a form of advertising applies to the extent – and only to that extent - that the prohibition is clearly stated in the Directive (“*In view of the fact that certain provisions are open to interpretation and given the absence of relevant case law, the approach rests on the ‘in dubio pro libertate’ principle*”, § 6”).

However, this does not prejudice the right of the Members States to apply stricter or more detailed rules for broadcasters under their jurisdiction.

Following the Case Law of the European Court of Justice, “When a provision of Directive 89/552/EEC imposes a restriction on broadcasting and on the distribution of television broadcasting services, and the Community legislature has not drafted that provision in clear and unequivocal terms, it must be given a restrictive interpretation”, i.e. it must be interpreted in the strictest possible sense (ECJ, 28 October 1999, *Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD) v. PRO Sieben Media AG*, Case C-6/98 (‘ARD’).

Specific points covered by the Interpretative Communication

- ... Rules with regard to duration and interruption p. 5
 - Hourly restrictions
 - Daily restrictions
 - The programme duration
 - The 20-minute rules and sports events
 - The notion of intervals
 - Interruption rules and news programmes

- ... The identification of advertising p. 7
 - Identification and separation
 - Surreptitious advertising
 - Undue prominence
 - Product placement
 - Prizes and gifts

- ... Forms of advertising p.10
 - Sponsorship and sponsorship reminders
 - "Telepromozione"
 - Isolated advertising and teleshopping spots
 - Mini-spots
 - Product placement (see above)
 - Split-screen
 - Interactive advertising
 - Virtual imaging

Rules with regard to duration and interruption

What the Interpretative Communication says about...

... Hourly restrictions: the notion of the 'clock hour' (§ 12)

The concept of the 'clock hour' can be read as either a 'natural clock hour' (zero clock hour) or a 'overlapping clock hour' (customised clock hour), the latter meaning that the reference hours taken into account represent periods of 60 consecutive minutes, which do not necessarily have to start at minute 0. It is up to the broadcaster to decide, on a daily basis, when the hour has to start (e.g. 08:15am to 09:14am, 09:15am to 10:14am, etc. on one day, yet on another day 08:30am to 09:29am, 09:30am to 10:29am, etc). This practice corresponds to the German model and is the most flexible solution.³

With this alternative approach, the perspective entirely changed. It was now possible to argue that the German practice of the broadcasters themselves determining the starting point of a reference hour was not a more detailed and restrictive measure (*'sliding hour'*), but a type of *'given clock hour'*.

... Daily restrictions: the notion of 'daily transmission time' (§ 18)

A 'transmission day' or 'daily transmission time' is to be interpreted as referring to the programming day, i.e. the total duration of the programmes in one day.

... The programme duration (Footnote 27, related to § 22)

The Communication points out that, in the English version of the 1989 TV Directive, the term used was 'programmed duration'. In the 1997 amended Directive, this term was replaced by 'scheduled duration' so as to make it clear that the reference duration is the one that is indicated in the broadcasters' programme. Therefore the advertising breaks are to be included in the calculation of the reference duration.

This is in line with the European Court of Justice concept of 'growth duration', which states that the length of the advertising break is to be included in the 45 minute reference period used for the interruption of a feature film or a film made for television (interpretation of article 11.3 of the TV Directive).⁴

³ For more details, please refer to the egta Newsletter n°37 (The 'customized clock hour').

⁴ See ECJ Case Law, October 1999, Arbeitsgemeinschaft deutscher Rundfunkanstalten versus PRO Sieben Media AG, affaire C-6/98.

... The 20-minute rule
(§ 22)

Sporting events without 'interruptions' or 'intervals' can be interrupted, providing 20 minutes elapse between each interruption.

egta's interpretation

The amount of time between the beginning of the programme and the first break or between the last break and the end of the programme is not specified. Therefore, one could argue that it can be less than 20 minutes. Indeed, neither the TV Directive, nor the Interpretative Communication provides that the 20-minute rule also apply between the beginning of the programme and the first break or between the last break and the end of the programme.

... The notion of 'interval'
(§ 23)

'Intervals' do not include accidental breaks as *"all conceivable programmes would otherwise be covered by Article 11.2. For football matches for instance, a corner, free kick or a player replacement which does not entail a break in the game, does not constitute an interruption"*.

However, if a period of break in the game is deducted and may be added to the prescribed duration, than we are dealing with an interval during which advertising or teleshopping spots may be inserted.

egta's interpretation

At first glance, we could question the practicality of this disposition: during the live broadcast of an event, how can one know whether a game interruption will be deducted and therefore, the prescribed duration extended accordingly? egta's understanding is that we can consider that there is an 'interval' as soon as there are good reasons to believe that the time of the break could be added to the prescribed duration of the sporting event. Of course, 'could' does not mean that it will necessarily be counted, but simply that it might be; the broadcaster has no control over the decision of the referee.

... Insertion rules and news programmes
(§ 22)

egta's interpretation

The Communication makes an interesting point in regard to the interpretation of Article 11.5. The French version of the Communication, which happens to be the original one, states that Article 11.5 applies to political news programmes, which means that all non-political news programmes (weather forecasts, sports news, traffic news, stock market news) are excluded from its provisions. Whilst this is already the case in some Member States (e.g. Belgium), the Communication can be read as clarifying this possibility at the European level.

NB: 'Political news programmes' can be defined as programmes that imply a critical approach of investigative journalism that commits the channel to a political responsibility.

Identification of advertising

What the Interpretative Communication says about...

... Identification and separation (§ 19)

The Communication recalls that Article 10.1 of the broadcasting Directive requires that advertising and teleshopping must be readily recognisable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means. The general-interest purpose of this provision is to avoid any confusion between advertising and teleshopping programmes, and the other items of the programme services.

egta's interpretation

From egta's point of view, it seems that the European Commission does not exclude the possibility of some flexibility in regard to the interpretation of the "so-called principle of separation" (§ 19) between advertising and editorial content as long as the general-interest purpose of this provision is safeguarded, i.e. as long as there is no risk of confusion between the advertisement and the programme

... Product placement versus surreptitious advertising (§ 30 – 34)

Surreptitious advertising

Article 11.4 of the TV Directive prohibits surreptitious advertising and teleshopping. Surreptitious advertising is defined in Article 1d of the TV Directive. On this basis, the Communication emphasizes that three cumulative conditions have to be met in order to conclude that a verbal or visual presentation of goods, services, names, brands or activities of providers or producers may be considered as surreptitious advertising:

- There is an intention on the part of the broadcaster – the intentionality being inferred from the existence of a "return for payment" or "similar consideration";
- There is an advertising purpose;
- There is a risk of confusion for the viewer as regards the intention for the presentation of these goods, services, brands, etc.

As it is difficult to make a practical assessment of the compliance with these criteria, the European Commission recommends appealing to the concept of “undue prominence”.

The “undue prominence” (§ 33 – 34) of a product shown during an editorial programme is to be assessed on the basis of:

- a) The recurring presence of a brand, good or service, or
- b) The editorial justification, taking into account the specific nature of the programme (e.g. a film made for TV as opposed to a news programme).

...Product placement

egta's interpretation

It seems that the Commission did not feel comfortable in addressing the issue of product placement, and therefore simply chose to avoid it. In fact, product placement appears only in § 8, in parallel to other quoted “emerging advertising practices” ('telepromozione' and 'minispot'), which are considered compatible with the TV Directive. Besides, in § 32, the European Commission stresses that:

“It follows from this definition that the Directive does not contain an absolute ban on all references in words or pictures to goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services. Such references remain integral to freedom of expression, particularly in today's world in which brands play an important part.”

The Communication does not foresee a prohibition on the mention of a product or brand during a programme. This augurs positively for the European Commission's attitude to product placement.

From egta's point of view, the Communication subtly opens the possibility of using product placement in TV-made programmes: Taking the three ‘surreptitious advertising’ criteria, the margin of manoeuvre for sales houses lies in the need to avoid any confusion regarding the commercial nature of the presentation of these goods, services, brands, etc., egta suggests the insertion of a special mention, in the programme credits. Should authorities believe that this is insufficient, a compromise solution could be to insert a special mention during the programme itself (following the example of the ‘telepromozione’, where the mention ‘promotional message’ appears during the broadcast).

Another relevant consideration is that a prohibition on product placement would be impractical and legally questionable. Firstly, given the important role played by brands in today's world, it would not be realistic to broadcast the image of a brand-free world. In fact, product placement is already present in a number of feature films. Even the EC proposal for a Directive on Unfair Commercial Practices recognises “*brand recognition or product placement*” as “*business practices which are in conformity with customs and usage*” (§ 53 of the explanatory memorandum) and that “*product placement*” belongs to “*accepted advertising and marketing practices*” (recital 5).⁵ Secondly, there is no legitimate reason why product placement could or should be treated differently in audiovisual and cinematographic works, or in foreign or domestic programmes. Moreover, this would alter European audiovisual productions.

⁵ Proposal for a Directive Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market (COM (2003) 356 final)

Conclusions: Following the Communication's provisions, product placement is compatible with the TV Directive as long as:

- It is transparent, i.e. the consumer is aware of the intention to present the good/service/brand;
- It does not take 'undue prominence', i.e. the brand, good or service does not have a recurring presence, and there is an editorial justification, taking into account the specific nature of the programme (e.g. a film made for TV as opposed to a news programme).

Moreover, in November 2004, egta's European Affairs Group agreed on a position paper and list of common principles for product placement shown in television programmes.

... Prizes and gifts

egta's concern

Prizes and gifts are not mentioned in the Communication. However, the provisions on surreptitious advertising might be challenging as they might lead Member States to make hasty conclusions about the surreptitiousness of some prizes and gifts.

Should there be a payment or "similar transaction" brought on by an advertisement, and should some regulators express concern, egta recommends mentioning the provider of prizes and gifts in the credits in order to avoid confusing the consumer.

In any case, it would be incoherent to consider these forms of commercial communication as surreptitious whilst "telepromozione", a much more daring form of advertising, is considered acceptable in the present Interpretative Communication.

Forms of advertising

What the Interpretative Communication says about...

Sponsorship and sponsorship reminders

- **Sponsorship** – The Communication subjects the possibility to show/present product or services of a sponsor or a third party during a programme to the obligation to explain the link between the programme and the undertaking sponsoring it (paras 53, 55 and 56).

Paragraph 56 states that:

“During the broadcast of sponsored programmes, no explicit reference may be made to the products or services of the sponsor or a third party, except where such a reference serves the sole purpose of identifying the sponsor or making explicit the link between the programme and the undertaking sponsoring it.”

egta’s interpretation

The clarification can be read as explicitly confirming the possibility of showing the sponsors’ product in the billboards – as it is already the practice in a number of European countries – as well as in the programmes.

Broadcasters might seize this opportunity to develop new commercial offers, as each mention of the product should be accompanied by an explicit reference to the ‘undertaking’ sponsoring it.

However, paragraph 56 raises more questions than it solves. Its unclear formulation might lead to a wide range of national interpretations:

- What was the idea of the EC when drafting paragraph 56?
- Who is the ‘third party’? A company offering the prizes and gifts that would be different from the sponsor appearing in the Billboards? A company offering the products editorially justified for the production of the programme?
- What kind of ‘link between the programme and the undertaking’ is meant?
- And what is meant with ‘sole purpose’?

For instance, the new formulation could cause problems when it comes to sponsored prizes and gifts. A restrictive interpretation could lead to the conclusion that a programme sponsor cannot offer prizes and gifts during the sponsored programme as the presentation of the sponsor’s product does not specifically aim at explaining the link between the programme and the sponsor.

Should this be an issue at national level, the broadcaster could argue that:

- As previously mentioned, the Interpretative Communication stresses that, in accordance with the Case Law of the European Court of Justice, a prohibition on a form of advertising applies to the extent – and only to that extent – that the prohibition is clearly stated in the Directive;
- It was not the intention of the Commission to discourage the offering of prizes and gifts during sponsored programmes;
- It would not be in the consumer's best interests to prevent any objective description of the product offered as a gift or prize.

- **Sponsorship reminders (§ 53) – Sponsorship reminders are compatible with the TV Directive** as this does not forbid the insertion of the name and/or logo of the sponsor at moments other than at the beginning or end of the programme.⁶ There also is no limit in regard to the number of times the sponsor may be mentioned during the broadcast of a particular programme.⁷

egta's viewpoint

Whilst egta agrees in principle with the fact that the integrity of the programme should be safeguarded, it also believes that it should not be up to the legislator to assess the acceptability of the size and/or duration of the sponsorship reminder.⁸ Sponsorship reminders are a well-accepted practice, conforming to custom and usage.⁹ Over the 15 years that such reminders have been used in different markets, the size and duration of the logo mentioned have never appeared to be a problem: the reminder lasts a maximum of 5-7 seconds and it would not be in broadcasters' interests to insert a sponsor's logo, which would be out of proportion.

⁶ TV Directive, Article 17 § 1 b

⁷ *ECJ, 12/12/96 Reti Televisive Italiane vs. Ministero delle Poste e Telecomunicazioni*

⁸ Paragraph 54 of the Interpretative Communication states that 'Although Article 17 {of the TV Directive} is not explicit on this point, it follows from a systematic and theological interpretation of the directive that the presentation of the logo and/or name of the sponsor in a manner which would prejudice the integrity of the sponsored programme would be incompatible with the TV Directive. The infringement of the integrity of the programme is assessed taking into account, in particular, the duration and the size of said presentation.'

⁹ For further information, please refer to egta's database on sponsorship – www.egta.com

Telepromozione (§ 25-29)

Telepromozione are defined as a “*form of television advertising based on the interruption of studio programmes (especially game shows) by slots devoted to the presentation of one or more products or services, where the programme presenters momentarily swap their role in the games in progress for one as ‘promoters’ of the goods or services which are the object of the advertising presentation*” (§ 25).

The Communication makes a distinction between:

- Telepromozione spots: these are to be considered as classic spots and, as such, follow the rules for traditional advertising spots.
- Telepromozione inserted within a programme: this belongs to the category of “other forms of advertising” and therefore does not have to comply with the hourly restrictions, only with the rules related to the daily amount of advertising.

Isolated advertising and teleshopping spots (Art.20)

Under the provisions of Article 10.2 of the TV Directive, isolated advertising and teleshopping spots should be “exceptional” (limited), i.e. they are acceptable when:

- There is one single, but long advertisement, or
- The time available for the break is very short (e.g. between the rounds of a boxing match) or
- The broadcaster cannot fill the entire break due to a lack of advertising.

Mini-spots (§ 21)

Mini-spots are defined as the broadcasting of “an extremely short advertising spot during an incident”. Mini-spots are compatible with the TV Directive, as long as they respect the key principles laid down in Article 10.

The European Commission leaves it up to the Member States to decide whether incidents during a programme can be considered as ‘intervals’ under the meaning in Article 11.2. The EC simply recommends that Member States should ensure that the transmission of mini-spots does not infringe upon the principles laid down in Article 10 of the Directive (mainly Article 10.1, i.e. the separation principle and the exceptionality of mini-spots).

egta’s interpretation

The notion of ‘incident’ should be interpreted in the broadest sense of the word, so as to include any type of change in the course of the broadcast action, including replay phases.

The TV Directive states that the 20-minute rule does not apply for programme with intervals, but only when the programme does not contain any interval or does not have autonomous parts. One could therefore conclude that the 20-minute rule does not apply as the insertion of a mini-spot corresponds to an ‘interval’.

Product placement (see above)

Split-screen advertising and sponsorship
(§ 41-56)

Split-screen means the use of a spatial separation, which is compatible with the TV Directive. “The separation must be such as to make advertising and teleshopping readily recognisable as such and kept clearly separate from other parts of the programme.”

The Communication distinguishes split-screen advertising and split-screen sponsorship. Both must be treated respectively as television advertising or television sponsorship.

egta’s interpretation

Split-screen advertising can easily be used in the form of minispots. In that case, as specified in the Interpretative Communication, the 20-minutes rule does not apply (see § 21).
An extreme, yet defensible, position would be to argue that, since split-screen essentially means not interrupting a programme, it should theoretically not need to abide by the 20-minute rule.

Interactive advertising
(§ 57-65)

- **Advertising linked to interactive services is outside the scope of the TV Directive (§ 57 – 60)** – The TV Directive applies to linear programmes prior to the access to the interactive application. As soon as viewers click on the icon to access the interactive commercial, they leave the framework covered by the TV Directive. On-demand service is outside the scope of the TV Directive. Reference is made to the egta Guidelines “Commercial Communication on New Interactive Services”¹⁰ and to the ITC Guidance to Broadcasters on Interactive Television Services.¹¹
- **The interactive icon needs to be integrated into an “advertising programme” (§ 61)**, the latter being separate and clearly distinguishable from the editorial content. The icon can be inserted in a classic advertising spot or within split-screen advertising. For split-screen, consent must be obtained from right holders.

egta’s viewpoint

The formulation of § 61 is far too restrictive. It even goes further than the ICC Guidelines, which provide for interactive services to be accessed from the programme provided there is an intermediary screen (double-click system) informing the viewer that s/he is about to enter an interactive environment.

The purpose of this over-protective attitude by the European regulator is hardly understandable: nothing forces the TV viewer to click on the interactive icon – it remains his/her own decision and responsibility to opt for the interactive environment and to look for branded information and advertising. Why should he/she be prevented from doing so if he/she wishes to?

Paragraph 61 is very problematic in the long run as the very interest of interactive advertising is the possibility to access branded information from the programme itself! If these provisions were to be maintained in the future, i.e. when the TV Directive is revised, this would definitively remove the possibility of having interactive sponsorship reminders, interactive product placement, or even interactive services directly accessed via the linear programme. In future discussions with the European Commission (focus groups), it will be important to argue that a small interactive icon is more consumer-friendly than the access via the split-screen technique.

- **By clicking on the icon once**, TV viewers should not automatically be directed to categories of product that cannot be advertised on TV (tobacco products, prescription-only medicines), or to advertising that would be contrary to the principles laid down in Articles 12 to 16 of the Directive (62, 63 and 65).

egta’s viewpoint

Paragraphs 62, 63 and 65 are legally and technically questionable:

Legally speaking, it is inconsistent to affirm that Articles 12 to 16 of the TV Directive apply to interactive TV, although the latter is not supposed to be covered by the TV Directive (see § 56 and 57). The European Commission could instead have encouraged recourse to advertising self-

¹⁰ www.egta.com

¹¹ http://www.ofcom.org.uk/static/archive/itc/itc_publications/codes_guidance/interactive_television/index.asp.html

Virtual imaging

- Paragraph 67 states that virtual 'advertising' is compatible with the TV Directive as long as it does not:
 - Affect the comfort or pleasure of the TV viewer; 12
 - Undermine the integrity or value of the programme;
 - Prejudice the rights of right holders.¹³
- TV viewers and broadcasters need to be informed of the use of virtual advertising beforehand. Event organisers and right holders need to give their consent before any virtual advertising is inserted (§ 68).
- When the broadcaster has a direct or indirect control (§ 69) and virtual 'advertising' is inserted in return for payment or for a similar consideration, such insertion is admissible as it can be assimilated to TV sponsorship (e.g. during the retransmission of sports event). The following conditions then apply:
 - *“Only on the surfaces of the site/stadium where advertising may be materially affixed and which are usually intended for such promotional purposes”;*
 - Messages should “not be more visible or conspicuous than those that are usually and materially displayed on site”;
 - TV sponsorship provisions must be complied with.

egta's viewpoint

A legal framework for virtual imaging – Away from the legal vacuum, the Interpretative Communication creates a legal framework for the use of virtual imaging technology.

However, the document seems inconsistent, as reference is sometimes made to virtual sponsorship, and sometimes to virtual imaging. In the drafting process, the European Commission changed its mind and decided to replace “virtual advertising” by “virtual sponsorship”. In doing so, the EC forgot that the change also needed to be made in the body of the text! In addition, the European Commission even mislead itself in its approach as it refers to some Case Law paragraphs that are dealing with advertising, yet not with sponsorship!

In actual fact, neither “virtual advertising”, nor “virtual sponsorship” are sustainable approaches – one should instead refer to the notion of ‘*virtual commercial display*’. Reference should be made to the different uses that can be made of the virtual imaging technology (see: New forms of advertising and sponsorship - *A follow-up position to the Bird & Bird/Carat Crystal study on “New advertising techniques”* – egta position n°4: Virtual imaging¹⁴)

A step forward for virtual imaging – The Interpretative Communication authorises the use of virtual imaging “*on the surfaces of the site/stadium where advertising may be materially affixed and which are usually intended for such promotional purposes*”, i.e. not only for the replacement of on-site advertising boards, a practice which is both commercially and technically more difficult to

¹² RTL Case n° C-245/1, paragraphs 62-65;

¹³ RTL Case n° C-245/1, paragraph 52

¹⁴ available at www.egta.com

apply. This means that the virtual imaging technology can be used in places which are traditionally used for commercial purposes, even in cases where there is not any physical advertising/sponsorship on site. For instance, it means that one does not need to install a plastic cover over the central circle of a football field.

Discrimination against the broadcaster – egta believes that the broadcast media is clearly discriminated against as there seems to be a double standard at play here. Indeed, the broadcaster only needs to be informed, whilst the event organiser has the power to accept or reject the insertion of virtual imaging. The text does not mention the need to obtain the prior consent of the broadcaster. Implicitly, the approach seems to emphasize that the signal belongs to event organisers as only the event organisers have the power of decision. Yet, despite numerous discussions among specialists, it has never been legally demonstrated that the signal belongs to the event organisers rather than to the broadcast media!

egta would therefore encourage members to take action against this discrimination in their discussions with their national authorities.

In conclusion, a number of questions remain:

- What is an “indirect control”? Is it linked to a financial transaction?
- How can the degree of conspicuousness be measured?
- Why should event organisers be in a position to insert virtual imaging onto the surfaces of the site/stadium where advertising may not be materially affixed and which is not usually intended for such promotional purposes and yet broadcasters cannot?