

Client Alert.

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Watch what you say online! From 1 March 2011, the UK advertising watchdog will have extended powers to police online advertising.

By Susan McLean

Perhaps, in the past, you would not have considered messages on your company's blog or Facebook page to be considered advertising. From 1 March 2011, they could be. From that date, the UK Advertising Standards Agency's rules will apply in full to marketing messages online, including the rules relating to misleading advertising, social responsibility and the protection of children.

The Advertising Standards Agency ("ASA") is the independent watchdog responsible for regulating advertising in the UK. Historically, it has only had the power to regulate adverts in e-mails or text messages and online advertisements where they are contained in paid-for advertising space on third party websites (e.g., paid-for banner advertising pop-ups or keyword advertising on search engines). That is all set to change.

From 1 March 2011, the ASA will have the power to regulate advertisements and other marketing communications placed by businesses on their own websites and in other non-paid online space under their control. According to the ASA, the extension has "the protection of consumers and children at its heart" and is intended to fill an online gap because, in recent years, the ASA has received an increasing number of complaints about online adverts but has had no power to act.

WHO WILL BE AFFECTED?

The ASA's new remit covers the online marketing communications of all organisations operating from the UK. It is important to note that the ASA's new powers will not be limited to ads and marketing materials contained on .co.uk sites. For example, a .com website content could also be covered if registered in the UK. In addition, the new remit isn't just restricted to companies' own websites: the rules cover other non-paid-for space online under their control, e.g., Facebook pages, company blogs and twitter feeds.

BASED OUTSIDE THE UK – SHOULD YOU BE CONCERNED?

Marketing communications that originate in foreign media are not subject to the CAP Code. If an organisation is based outside the UK, it will be subject to the relevant advertising regulation in its home country.

However, most European countries, and many non-European countries (including the U.S.A., Australia, Canada, India and South Africa) have a self-regulatory body that is either a member of, or otherwise has links with, the European Advertising Standards Alliance ("EASA"). EASA co-ordinates a cross-border complaints system. Accordingly, if a UK consumer brings a complaint about a web-based advert or marketing communication that originated from a country outside the UK, then the ASA will treat this as a "cross-border complaint" and will refer the complaint, through EASA, to the regulator in the country where the advert originated.

In terms of countries with no links to EASA, the ASA would identify and work with the relevant country's advertising

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regulator. Where it is not possible to refer the complaint to such a regulator, the ASA would attempt to take steps to act on the complaint. However, its powers would be limited.

WHAT FORMS OF ONLINE ADS AND MARKETING ARE COVERED?

All advertising and marketing communications that are “directly connected with the supply or transfer of goods, services, opportunities and gifts” (*i.e.*, that have the primary aim of selling something) will now be subject to the same advertising rules as traditional media.

Such content will include traditional adverts and sales promotions, but will also extend to banners, pop-ups, paid searches, e-mails, viral marketing and advergames (*i.e.*, video games used by a company to promote itself or a product), whether such content is contained:

- on the organisation’s own website;
- in non-paid-for space that is under the organisation’s control (*e.g.*, including on any dedicated page of a social network site such as Twitter and Facebook); and
- in paid-for space under a third party’s control.

The ASA’s remit covers all forms of companies, organisations and sole traders. For example, it is not restricted to profit-making organisations; it will also be responsible for regulating content related to the direct solicitation of donations by charities as part of their fund-raising activities.

Significantly, user-generated content which constitutes an advertisement or marketing communication will be caught if it is adopted and incorporated within an organisation’s marketing content (whether it was solicited by the organisation or received on an unsolicited basis). This is a potentially tricky area; whether or not user-generated content constitutes an advertisement or marketing communication would need to be considered on a case-by-case basis. However, some situations may be more clear-cut than others - for example, if an organisation moderates user-generated content so as to remove all negative comments and leave only those comments that are positive, this is more likely to be considered advertising.

WHAT CONTENT IS NOT COVERED?

The ASA’s digital remit will not cover:

- press releases, investor relations material or other public relations materials published online;
- journalistic or editorial content;
- natural (*i.e.*, non-sponsored) search engine results or natural listings on price comparison websites; and
- historical (“heritage”) advertising (*i.e.*, material which is not part of the organisation’s current promotional strategy and is placed in an appropriate context).

WHAT ARE THE APPLICABLE RULES?

The ASA enforces compliance with the advertising rules drawn up by the Committee of Advertising Practice. These

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include the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing Code (“CAP Code”). The latest version of the CAP Code was published on 1 September 2010. The CAP Code includes rules relating to misleading advertising, social responsibility and the protection of children.

In summary, the CAP Code requires all ads:

- to be “legal, decent, honest and truthful”;
- not to include anything likely to cause serious or widespread offence;
- not to be misleading;
- to be socially responsible (there are specific rules relating to advertising featuring or addressing children);
- to respect the principles of fair competition generally accepted by business; and
- not to bring advertising into disrepute.

WHAT ARE THE ASA’S SANCTIONS?

As the ASA is effectively a self-regulatory body, the CAP Code does not have the force of law in the UK. However, failure to comply with the CAP Code can have serious consequences.

The ASA is unlikely to be pro-active and review websites to check for non-compliance, although it has said that it may carry out spot checks in relation to persistent offenders. Instead, the ASA will generally rely on receiving complaints from the public. From 1 March, anyone who has a concern or complaint about an online ad can report this to the ASA.

If, after investigating a complaint, the ASA rules that an organisation has breached the advertising rules, it will request the organisation to withdraw or change the offending material.

Where an organisation fails to comply with an ASA ruling, the ASA has further potential sanctions, which include:

- naming and shaming the offender by listing the offender in a “rogue’s gallery” on its website;
- issuing an “Ad Alert” advising media companies to withhold media space from the offender for future adverts;
- the insertion of a warning in search results alongside listings relating to the offender; and
- removing any paid-for search advertisements that link directly to the offender’s website page.

Persistent offenders could also be required to have their future ads vetted pre-publication for a period of two years.

Ultimately, the ASA has the power to refer the organisation to the Office of Fair Trading, which has the power to prosecute under consumer protection and competition laws.

However, arguably the ASA’s greatest deterrent is negative publicity, as many of its adjudications are subsequently reported in the press.

WHAT ARE THE IMPLICATIONS FOR YOUR BUSINESS?

If your organisation has an online presence, you will need to ensure that your online advertising and marketing materials

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comply with the CAP Code before 1 March 2011 and on an ongoing basis. Given the potential complexity of your online advertising strategy, this may not be a straightforward task.

Some of the steps you should consider include the following.

- Identify all of your online advertising channels.
- Introduce procedures to check that all advertising and marketing content is compliant, whether contained on: (i) your websites, (ii) non paid-for space under your control (*e.g.*, on dedicated space on social networking sites); or (iii) paid-for space provided by a third party.
- Don't just check traditional adverts and sales promotions, but also consider banners, pop-ups, paid searches, e-mails, viral marketing and advergames.
- Consider whether you use customer testimonials and comments in your marketing communications. In addition, do you moderate comments posted to message boards on your websites or social media space? If so, ensure that any user-generated content that has been incorporated into your marketing communications is compliant.
- Make sure that all of your employees who are responsible for advertising and marketing, managing websites and social media presences, and any employees who contribute content online (*e.g.*, on any company website blog) are aware of the implications of the new rules.
- If your traditional marketing and e-marketing teams are separate, consider improved integration going forward.
- Work with all relevant third parties (*e.g.*, affiliates, etc.) to discuss the implications of the new rules and to ensure that no content under their control could fall foul of the CAP Code.
- Review carefully all relevant third party contracts to ensure that any relevant issues are addressed, *e.g.*, to ensure that it is clear that you have control over the content that is posted, that third parties are required to co-operate in relation to any complaints received in relation to advertising content, etc.
- Have in place a clear set of internal rules for all website, email and social media advertising and marketing content.
- Include consideration of the CAP Code when preparing any new advertising or marketing content.
- Seek guidance and training in the new rules, if required.
- React appropriately to any complaints raised by the ASA.
- Monitor any rulings, guidance and pronouncements made by the ASA on an ongoing basis so that you remain up-to-date with the approach the ASA is taking to its new online powers, and any consequences for your online marketing activities.

In addition to ensuring your own compliance with the CAP Code, bear in mind the potential of using the CAP Code to your advantage, *i.e.*, the opportunity of bringing a complaint to the ASA in respect of any online advertising by a competitor that you consider to be misleading or otherwise in breach of the Code. However, note that competitors may be thinking along the same lines – so be extra mindful when including in your online marketing communications any comparative advertising or other content which could drive them to bring a complaint about you.

CONCLUSION

Any form of internet regulation is notoriously difficult and, given the ability for web content to be altered or removed in a

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matter of minutes, policing the new rules will be a challenge. It will be interesting to see how the ASA and the industry react to the extension of the ASA rules to the online world and what the impact will be, particularly in the potentially muddy area of user-generated content.

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