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Social Media Marketing – Protecting your brand online

Do you know your flog from your blog?

This Ad Guide aims to cover succinctly the main issues faced by advertisers wishing to engage in social media marketing activity. Online advertising spend is increasingly taking over from more traditional forms of advertising in both the UK¹ and the US². In February 2010 Sony announced that it had generated £1 million in sales of its VAIO laptops as a direct result of the brands twitter page alone.³

However while there is huge potential to raise the profile and desirability of brands and services, there are also considerable risks involved in social media marketing. Frequently people think that the online environment is a safer place to operate than in print media or even broadcast media, however as a general rule of thumb, what is illegal offline is also illegal online and this is made worse by the international nature of the Internet and the myriad of developing laws on the subject around the world.

The most appropriate legal strategy therefore for reputable brands is to comply with the laws and regulations of ones main jurisdiction and to adopt the strictest standards. This guide is intended to steer marketers in the right direction to help avoid the pitfalls.

The guide will therefore cover in the marketing and advertising context

- What is social media marketing, and some of the techniques involved, such as flogs, word of mouth advertising, augmented reality and geosocial marketing techniques
- User Generated Content, brand protection and the moderation of websites
- Consumer Protection Regulations and repercussions for word of mouth advertising and flogs
- Children
- GPS location marketing developments and geosocial marketing privacy implications and behavioural advertising
- Intellectual property rights, and defamation in social media
- Advertising regulations and industry best practice guidelines

1. What is social media marketing?

Blogs, micro blogs and social network websites, either advertiser owned or run by third parties, offer companies opportunities to reach new audiences and markets. They are also potential minefields when it comes to infringing laws and increasing regulation and can cause untold damage to brand reputation if things go wrong. Social media marketing is a term to describe use of social networks, online communities, blogs, wikis or any other online collaborative media for marketing, sales, public relations and customer service. While advertisers are using social media websites such as Twitter, Facebook, LinkedIn, Flickr, and YouTube, many also have their own websites and have been interfacing with customers for some years.

Social media marketing also utilises mobile marketing via mobile phones and personal handheld devices, ipad and others. The rise in user generated content (UGC) and GPS location marketing systems is perhaps the area however where risks increase the most for advertisers and marketers.

Social media marketing aims to create a buzz around a brand or product or service and uses any type of content, videos, tweets, blog entries or flogs (fake blogs), to attract the attention of its target market. If enough interest is raised the news is passed on virally and of course many very successful advertising campaigns on line hardly refer to the advertiser product or brand at all but use materials and information that may be funny or shocking or of general use and interest. One new development is brands selling direct from social networks. EasyJet will shortly start selling flights from within its Facebook page. This budget airline wishes to exploit

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1. www.guardian.co.uk/media/2009/sep/30/internet-biggest-uk-advertising-sector
 2. www.guardian.co.uk/media/pda/2010/mar/09/us-online-ad-spend
 3. New Media Age, 26 February 2010: <http://www.nma.co.uk/news/sony-generates-over-%C2%A31m-in-sales-through-twitter/3010491.article>

the fact that on line users spend three times as much time on Facebook as they do on Google. It has even launched an online holiday planner which lets users make plans with their friends on Facebook. The ramifications for privacy and data protection issues are of course considerable.

Greatest risks arise when marketers encourage user participation and dialogue and engage in word of mouth campaigns and brand ambassadors. Marketers have embraced the concept of user conversations but this puts a brand at risk of adverse comments as well as positive endorsement, (see sections below on UGC and moderating sites).

Some of the latest developments in social media marketing relate to location marketing techniques using GPS systems. The customer needs to opt-in to this type of marketing, but the benefits to all are considerable. Following Google, Nokia has just launched its free OVI GPS street navigation system for its smartphone to push handset sales and prices. This is another blow for satnav makers, whose \$25 billion market has already been hit by Google.

Mobile marketing is inextricably linked to social media marketing and the GPS systems introduced by Google and Nokia are also thought to be a potential means for the introduction of what is called Augmented Reality or AR, (or perhaps better described as 'blended or layered media'). The future holds for mobile and social media marketing lies with AR. This is basically layering computer-generated imagery over a real-world environment, thus creating "augmented" reality and opens the door to a plethora of new mobile and social media marketing opportunities, as well as a great deal of legal risk.

2. User Generated Content and moderating sites

Whether an advertiser is encouraging comments via a third party social media site such as Twitter, or via its own website, great care must be taken. There must be strict controls in place at the time the user uploads material and comments, along with detailed terms and conditions and steps to limit and disclaim the liability of the advertiser where possible. UK case law demonstrates that a failure to bring important terms and conditions, such as the need to ensure that materials uploaded to a website are original or that content does not infringe third party intellectual property rights, to the attention of the user, might invalidate any disclaimer of liability.

It is recommended that at the point of upload there is a statement which the user must accept (e.g. by ticking a box before proceeding) which confirms that materials being uploaded do not infringe any intellectual property rights, are not defamatory, offensive or pornographic. There should also be full terms and conditions and a privacy policy included in the website which is easily accessible from the main page via a prominent link. These ought to deal with terms of permitted use of the site and the intellectual property in uploaded materials, especially UGC. The privacy policy should contain details of how the personal information of the user is used and managed. If an advertiser is running a promotion through a social media site the advertiser may wish to explain to what extent personal information will be used in a marketing context and may wish to have an opt-in or opt-out option as well.

Website operators must not copy terms and conditions from other sites. Terms and conditions need to be tailored to each scenario in order to ensure that they are fit for purpose and comply with relevant laws and regulations.

A word on moderation

There is often a debate about whether it is better to moderate a site or not and if so then by whom. The purpose of moderation is either to screen content before it goes live onto a blog or site or to remove anything defamatory, offensive or even merely undesirable later. Although this is costly in time and money, it is highly desirable, particularly for sensitive websites such as those aimed at children or where the advertiser has other compliance issues to contend with, such as financial institutions.

Alternatively advertisers can adopt a YouTube style "notify and take down" policy whereby anyone affected by the content can complain to the site moderator, who can then investigate and expeditiously remove anything which infringes third party rights or is in any other way contentious. Websites typically include a "Report and Abuse" or "Flag as inappropriate" link which can be used for these purposes. This essentially seeks to remove the onus on the operator of the site to constantly check the content, and though it remains to be seen if this is an effective way of removing liability, it is at any rate a means of quickly removing harmful or infringing material and is certainly advisable.⁴

Most advertisers will, however, wish to have their own UGC sites moderated, which then begs the question as to who should undertake the task. It is recommended that advertisers undertake such duties themselves or at the very least have very detailed policies to provide to third party specialist moderators.

4. Section 3 of the Terrorism Act 2006 requires operators to remove content which is deemed to encourage terrorism within 2 working days of being notified of such by a police constable.

3. Word of Mouth Advertising and Consumer Protection Regulations

Social media marketing inevitably encompasses viral marketing, word of mouth advertising and the use of brand ambassadors, as well as techniques such as astroturfing and using fake advocates known as sock puppets. However advertisers ought to be aware of both existing laws and new regulations soon to come into force.

The Consumer Protection from Unfair Trading Regulations (CPRs)⁵, prohibit practices which could be deemed aggressive or misleading and blacklist 31 practices which are automatically deemed unfair.⁶ In the context of social media marketing, the CPRs contain one important prohibition and that is *"falsely claiming or creating the impression that the trader is not acting for the purposes relating to his trade, business or craft or profession, or falsely representing oneself as a consumer."*⁷

It is therefore a breach to establish a blog, or to undertake viral or word of mouth advertising or to astroturf without making it clear that the site or material is part of a marketing campaign or advertiser content.

Leaving aside the legal implications of breaching these regulations, which can result in an investigation and fines by Trading Standards, there is a real risk of brand damage. Probably the most famous case of such activity going seriously wrong was in the USA by Wal-Mart. *Wal-Marting Across America* was a blog fiasco for Wal-Mart and its public relations agency, Edelman. The blog was written by a pair of Wal-Mart employees who travelled across the country spending their nights in Wal-Mart parking lots and saying wonderful things about the company and its employees. When it was denounced as a fake blog the company was subjected to a wave of hostility which damaged the brand's reputation and ultimately led to a formal apology by Edelman.

In addition to CPRs however advertisers should also note that self regulation and the CAP Codes⁸ apply to paid-for space on the internet and to mobile marketing messages and viral email. Shortly, the Code may be extended to all promotional messages on the internet including companies' own websites.⁹ This latter move has been discussed for over two years and has yet to come into force, not least because it is controversial and the enforcement mechanisms have yet to be agreed by all stakeholders. Nevertheless it is indicative of government and consumer sentiment that the advertisers and businesses must be forced to take more responsible attitude to statements and materials published in the online environment as much as they are required to do in print and broadcast advertising.¹⁰

4. Children

When websites are aimed at children under 16 years of age it is extremely advisable to take note of all the above mentioned regulations and in addition to incorporate some form of age verification procedures. While these are far from perfect they do at least show good intentions. Many social media sites such as Bebo do not permit use by children under 13 for example.

Equally if an advertiser is an alcohol brand, or other sensitive product or service, age verification procedures are essential. Under the CAP Codes and the Code of Conduct of the Portman Group¹¹ alcohol advertisements cannot be targeted under the age of 18 and advertisers running social media ought to be careful about taking steps to protect such vulnerable groups. Always have clear wording on such sites excluding children as well as an age verification process for those entering the site.

Social networking sites, though, are also under pressure from the British child protection agency to increase online security measures. Facebook has just launched a facility for users of the site to report any unwanted or suspicious behaviour directly to child protection organisations. Advertisers need to be aware of not infringing third party site guidelines about appropriate content and also need to consider what safety measures they need to put in place on own sites and networks and to take heed of recommendations by bodies such as the Child Exploitation and Online Protection Centre, which advocates the use of a "panic button" on all pages of sites.¹²

5. Consumer Protection from Unfair Trading Regulations 2008. See http://www.opsi.gov.uk/si/si2008/draft/ukdsi_9780110811574_en_1

6. Please see ReACTS Ad Guide Consumer Protection from Unfair Trading Regulations 2008 for full explanation

7. Consumer Protection from Unfair Trading Regulations 2008 Schedule One s.22

8. Committee for Advertising Practice <http://www.cap.org.uk/>

9. <http://www.cap.org.uk/Media-Centre/2010/Digital-remit.aspx>

10. See ReACTS Ad Guide ASA proposed extension of remit to on line promotions April 2010

11. Portman Group 4th edition Code of Conduct <http://www.portmangroup.org.uk/?pid=18&level=2>

12. Child Exploitation and Online Protection Centre (Ceop) <http://www.ceop.gov.uk/>

5. Data protection and privacy and GPS location marketing developments and behavioural advertising

This guide discusses mobile marketing and GPS systems above. The era of location based services is really only just in its infancy but it is rapidly evolving. It is a trend being propelled by GPS on mobile devices and it is technology that allows, for example, your iPhone to pinpoint you on a map and then recommend a local restaurant or shop. Increasingly people are using such GPS devices to plug into their social networks.

For advertisers, the possibilities of exploiting this geosocial networking are endless, it is a more developed form of behavioural advertising¹³ based not only on browsing on the web but on physical location. Considerable debate ensued stoked by privacy advocates after online behavioural advertising came to the fore as long ago as 2006 and undoubtedly new providers of geosocial advertising will need to step carefully to avoid the sort of mistakes made by Phorm.¹⁴

“Augmented reality”, where consumers could be provided additional information about local shops and services in a real time environment, is one such form of geosocial behavioural advertising. Foursquare lets users “check in” to places via GPS notifying their friends where they are, and recommend places they have visited. As a motivation there is a gaming element and one earns points. It launched in March 2009 and already reports 275,000 users.

So for users it is a lifestyle aid and to businesses a marketing bonanza, enabling not only targeted advertising but an ability to reach potential customers almost anywhere at any time. Incentives such as coupons for visiting the same restaurant more than once or with friends are being considered by Foursquare. Then there is the potential to analyse consumer behaviour and provide smart recommendations based on location and which shops consumers physically visit.

Naturally, all this, while very exciting, has huge implications for privacy and data protection. Consent and transparency will be crucial. The iPhone asks its users for consent every time a location based service is activated, for example. Google received bad press for revealing too much personal data when it launched its Buzz service. However this technology can also apply to inanimate objects. This is not as incredible as it sounds. A restaurant could tweet messages as to whether it is full or not, or tell users what music is being played. Your pot-plant can even ask to be watered.

The Information Commissioner’s Office (ICO) has just completed its public consultation on a proposed “*Personal Information on Line Code of Practice*”¹⁵ which will provide organisations with a practical and common-sense approach to protecting individuals’ privacy online. The new draft guidance explains how the law applies and calls on organisations to give people the right degree of choice and control over their personal information.

Risks to social media networks, advertisers, and brand owners will be in ensuring compliance with such government guidelines and managing data use, ensuring they not only have adequate privacy policies but that they are actively policed and enforced. Advertisers often seek to gain personal information by incentivising existing customers to “recommend a friend”. Even this relatively innocent technique can fall foul of the Information Commissioner’s Office (ICO) interpretation of the Data Protection Act and the Privacy and Electronic Communications regulations.¹⁶

6. Intellectual Property rights and Defamation

The purpose of this guide is not to discuss complex intellectual property rights which are a subject in themselves and deserve more attention than can be given here. However advertisers that use social media sites need to be at least aware, as indicated above, that such rights exist and that, contrary to common belief, anything found on the web is not open to free use. Material found on YouTube for example may not be used in advertising without specific consent. Copyright automatically vests in original, literary, dramatic, musical and artistic work and also sound recordings, films, broadcasts and typographical arrangements. Copyright cannot protect an idea, but can protect the physical expression of that idea.

It is perhaps worth mentioning the defence to copyright known as *fair dealing*. Suffice to say this defence is never available to advertisers and therefore need not be gone into in any further detail.

13. OBA is the process of analysing internet users’ web-surfing habits to determine their interests. The data collected during this process can then be used to deliver highly-targeted advertisements that are tailored to the interests of the user.

14. Phorm caused some controversy when it developed its own OBA technology, “Webwise”. The technology worked by partnering with Internet service providers to monitor users’ complete web behaviour (also referred to as “deep packet inspection”). It was trialled without the users’ knowledge and caused outcry and concerns about data protection and the EU e-privacy rules and the unlawful interception of online communications.

15. ICO Guide to managing personal information on line. http://www.ico.gov.uk/about_us/consultations/our_consultations.aspx

16. www.ico.gov.uk

Similarly though care should be taken when using others brand names, logos and marks as these are likely to be registered trade marks. Even if a mark is not registered there is also the UK law of passing off which protects the goodwill of another, often competitor, business. Again given the borderless nature of the internet and the fact that there are international registries it is always dangerous to use the brand and logos of other businesses without consent.

Finally the issue of defamation is raised under the topic of moderating UGC. Defamation or trade libel can occur when a third party makes any intentional false communication, either written or spoken, that harms a person's or business' reputation; decreases the respect, regard, or confidence in which a person or business is held; or induces disparaging, hostile, or disagreeable opinions or feelings against a person or business.

In short the risks of infringing third party intellectual property are enormous, and as copyright holders and consumers become more aware of their rights and remedies so they are also complaining more.

7. Self regulation, extension of remit to online promotional messages and ad industry best practice guidelines

The growth in social media marketing, online advertising and mobile marketing has spawned a plethora of industry guides, some useful and some not so useful. The starting point for advertisers in creating compliant advertising material is the self regulatory CAP Code which governs all non-broadcast advertising, sales promotion and direct marketing¹⁷ and in particular paid-for space on the internet.

Shortly, the CAP Code will be extended to cover promotional messages on the internet. Many businesses will be surprised, and appalled, by this extension of remit for the Advertising Standards Agency, (ASA)¹⁸. Delay in introducing this extension has been largely due to problems of funding and enforcement. Self regulation has been funded in non broadcast media by a levy collected from all advertisers by a body known as ASBOF¹⁹, which consists of a board of advertising industry bodies and an even longer list of current and ex trade industry chairmen. It is ASBOF that funds the ASA.

If the ASA is to be able to resource internet promotional messages it obviously requires much greater funding than presently exists. Exactly how much more has been a subject of some debate and conjecture. One of the proposals that is alleged is that the present levy applied to traditional media spend will be extended to search advertising and collected by advertising agencies. In the short term, there has also been much debate and speculation that Google has agreed to fund the first two years of ASA regulation.

It may come as somewhat of an unwelcome surprise to search advertisers and agencies previously not involved with advertising regulation to find themselves funding a system that governs content issues. Perhaps even more difficult and controversial will be the proposed enforcement mechanisms. The present system largely relies upon the bad publicity big brand owners get when the ASA uphold complaints. This will be no different, it is argued, in the on line space. Other enforcement powers in traditional media include take down powers for posters, having to pull television commercials which breach the BCAP Code, and newspapers have played their role in refusing to accept any advertising that breaches the CAP Code. But the internet is a very different media and one that can be adapted and changed in seconds. Take down powers do not work in such media.

How the ASA and CAP plan to deal with the issues of foreign owned, managed or originating sites that are viewed by consumers in the UK is also unclear.

Proposed enforcement powers are allegedly so controversial that the issue appears to have further delayed introduction of the extended remit. No details of the remit extension were announced in the CAP Code Review and public consultation which has just been carried out by the ASA. It is also unclear as to whether or not another public consultation on the internet proposals is intended. What is certain is that internet service providers will be naturally reticent about agreeing to take down advertising upon which their revenues depend. Any self regulatory system has to balance issues such as where the advertising appears, to who it is aimed, whether it is pushed or "pulled" by the consumer and how adverse adjudications and repeat offenders will be dealt with in the on line arena.

In the meantime there are more than sufficient concerns for the unwary social media marketer.

These are just a few of a number of other useful industry guides:

17. www.cap.org.uk

18. Advertising Standards Agency www.asa.org.uk

19. The Advertising Standards Board of Finance Ltd, Guide to Operation of the Levy http://www.asbof.co.uk/resources/guides/asbof_levy_guide_2007.pdf

- Mobile Marketing Association Code of Conduct²⁰ which recommends consumer privacy standards when marketing to mobile devices.
- Code of Ethics and Standards of Conduct for the Word of Mouth Marketing Association²¹
- Information Commissioner's Office on how to manage a corporate presence on Twitter²² and on privacy in the marketing context.²³
- Information Commissioner's Office *Personal Information Online Code of Practice*²⁴
- IAB behavioural advertising good practice principles which have been adopted by most internet²⁵ service providers.

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20. MMA UK Code of Conduct <http://mmaglobal.com/policies/education>

21. Word of Mouth Advertising Association UK <http://womuk.net/ethics/>

22. ICO Guide on How to manage a corporate presence on Twitter http://www.ico.gov.uk/upload/documents/library/corporate/notices/twitter_policy_20100204.pdf

23. www.ico.gov.uk Privacy and Electronic Communications (EC Directive) Regulations 2003

24. http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/pio_consultation_200912.pdf

25. Internet Advertising Bureau: Behavioural advertising good practice principles www.iabuk.net

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