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Extension of Remit: the ASA's digital Anschluss?

Introduction

After three years of deliberation and prevarication by the advertising industry under the auspices of the Advertising Association, the Committee of Advertising Practice (CAP) and the Advertising Standards Authority (ASA) have announced that as of 1 March 2011, the remit of the CAP Code will extend to *"advertiser's own marketing communications on their own websites and in other non-paid-for space online under their control".*

As a result of this decision, the ASA will have jurisdiction over all marketing communications on the Internet including those made on corporate websites and social media networks such as Twitter and Facebook, and also in smartphone applications, advergames and user-generated content. It controversially extends the remit of, and the sanctions available to, the ASA into new areas without any public consultation.

It is the advertising industry's attempt to respond to governmental pressure to regulate the digital space in order to protect consumers and, especially, children. However, the move may well come as a surprise to many advertisers and some may regard the proposals as heavy-handed, misdirected and quite possibly unenforceable.

The ASA's justification for the need to introduce these proposals is partly due to the significant number of complaints received which the ASA was unable to investigate because they fell outside remit, and partly to do with the call to protect children, as outlined in the Byron and Buckingham Reports. However, over a 2 year period, the ASA has received only 3,500 such complaints, which can hardly be described as an earth-shattering number, and under these proposals, it has enlarged its remit to encompass all marketing communications online, and not just those aimed at children. Some may therefore think that the ASA is using a sledgehammer to crack a nut, and perhaps taking this as an opportunistic moment to extend its powers, without proper discussion with the industry as a whole. Advertisers may legitimately perceive this as smacking more of *government regulation and less of self-regulation*.

What is the new scope of regulation?

The main point is that the CAP Code remit will, from 1 March 2011, extend to cover:

> "advertisements and other marketing communications by or from companies, organisations or sole traders *on their websites, or in other non-paid-for space online under their control*, that are *directly connected* with the supply or transfer of goods, services, opportunities and gifts, or which consist of direct solicitations of donations as part of their own fund-raising activities." (emphasis added)

According to CAP, this wording is framed so as to focus specifically upon material which can be *"properly accepted as constituting an advertisement or other marketing communication".* Whether it does so effectively is one of a number of concerns that arise with the proposals. Although the scope excludes "editorial" and "public relations material", CAP states the scope is drafted to catch any wording that is "designed to sell something": but, taking a holistic view, is not all wording on an advertiser's website designed to sell something?

The scope does not extend to the promotion of causes or ideas in the digital space, but it does cover any direct solicitations of donations as part of fund-raising activities.

The inclusion of a reference not only to advertiser's own websites, but also to other non-paid-for space means that advertiser-controlled pages on social networking sites, such as Facebook and Twitter, will now be included within the ASA's remit.

In addition to the existing exclusions from the scope of the CAP Code, such as private classified advertising and political advertisements, there are a couple of new exemptions from the extended scope. One of these is "investor relations", which covers advertiser's own communications about their company with the financial community, including shareholders and investors.

The other new exemption is "heritage advertising". CAP has recognised that some advertisers may wish to show galleries of their historic advertising over the years, some of which may not

comply with more recent codes. For example, Guinness is not permitted now to claim that "Guinness is good for you", but it has iconic posters over many years which make that claim. Provided that advertisers place such galleries in "an appropriate context" (a term which is undefined), then it will fall out of the remit of this extended scope.

CAP's proposals nonetheless raise a number of issues for advertisers, and this Ad Guide will examine these in turn.

Editorial v Promotional

CAP state that the new extended scope is not designed to catch alternative types of marketing communications, such as editorial or press releases. However, it is easy to foresee the potential for serious dispute over what constitutes a marketing message and what constitutes justifiable editorial.

Many advertisers will regard what they write on their own website about the company or their products as editorial: the ASA may now take a different view. Equally, advertisers may wish to put out press releases on new products, which make claims about the product itself. If it houses these on its website, will the ASA claim jurisdiction? It will, after all, be "designed to sell something".

Newspapers and broadcasters, who are rightly concerned about any threat to editorial integrity, will no doubt be watching this issue closely: not least where they may make claims about their own newspapers on their own websites.

User Generated Content

CAP has stated that in certain circumstances, user-generated content (UGC) may be covered by the extended remit. It sets out two questions which need to be considered when ascertaining whether the content is included within the scope or not:

1. Did the advertiser originally solicit the submission of UGC material to its website, and then adopt and incorporate it within its own marketing communications?
2. Did a private individual provide the advertiser, on an unsolicited basis, with material which the advertiser subsequently adopted within its own marketing communications?

   If the answer to both of these questions is "yes", then CAP maintains that *"prima facie the UGC … will be regarded as a marketing communication"*. However this fails to state categorically enough that if the answer to either of these is "no", then it will not fall within remit. It also seems to suggest that any advertising campaign which encourages UGC submissions will have to be moderated prior to publication on the advertiser's website. The fact that these rules also apply to social networking sites means also that advertisers will have to monitor content which may be posted onto their Twitter or Facebook pages. These requirements to moderate will add a considerable administrative and costly burden on advertisers.

Sanctions

Perhaps most controversially of all, the new scope includes several new sanctions explicitly for digital space. One might well argue that such sanctions fly in the face of the concept of "media neutrality" previously so sacred in the eyes of the industry.

The new sanctions proposed by CAP are:

1. Including details of an advertiser and any non-compliant marketing communication on a specific ASA micro-site, *"to which the ASA may make a particular effort to draw public attention"*, although what this effort may be is left unsaid. This new sanction begs the question why the existing system of publicising adverse adjudications on the ASA is deemed insufficient in a digital context (or indeed why other miscreants in an offline context are not also included in this "wrong-doers micro-site"), and no explanation is provided by the ASA on this point.
2. Removing paid for search advertisements that link directly to the *page* hosting the non-compliant marketing communication on the advertiser's website (or other relevant space). This will need the help of the search engine, but it would seem impossible to enforce. The advertiser only needs to change the page on which the non-complying marketing communication is contained to avoid this. Obviously the search engine can monitor this, but again it will seem likely to cause more trouble than it is worth for the search engine. It may also be too slow and cumbersome to be a viable deterrent.
3. Placing paid-for advertisements on internet search engines that highlight the continued non-compliance of an advertiser's marketing communication (and link through to the ASA micro-site above). It is questionable whether this is a sensible and desirable use of the ASA's resources. For the ASA to pay to "promote" non-compliant advertisers is also quite remarkable.

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Funding

Although the main paper produced by CAP and setting out its proposals fails to mention the issue of funding, there is reference to it on their website. Many advertisers may be surprised to learn they will pay a levy on sponsored search to fund this new extended remit. Google has provided some initial funding to cover the first year or two of the new system but the 0.1% levy on advertising spend collected by advertising agencies (albeit that they represent only a fraction of spend in this sector) from their client advertisers is intended to cover the additional cost of the extended system. Whether it will do so is questionable.

Bearing in mind the likely protracted arguments about whether potentially offending material is a marketing communication or part of editorial, there is a serious risk that the ASA will be unable to cope with the number of complaints, and the funds available will therefore be inadequate in the long term to deal with this area.

Responsible advertisers, who already comply with the codes, largely for reputational reasons, may also object to an increase in their funding which will be spent principally in dealing with the smaller traders and, increasingly, the rogue traders who will no doubt carry on as they do now ignoring the provision of the code.

Advergames

Advergames in paid for space are already covered by the Codes, but the remit proposed by CAP will now extend to cover advergames on companies own websites or in non-paid-for space under the advertiser's control, provided that it amounts to a marketing communication directly connected to the sale of a product or service.

This leaves open a number of questions. To what extent would a promotional game be directly connected to the sale of a product? Are advertisers able to have online games at all, since they could always be perceived to be "directly connected" to the sale of a product? Or is it only the case that they must not include their products in the online games that they create, however unfair that appears? Is a fast food retailer able to produce an advergame for children which complies with the CAP Code given the social responsibility clauses and the restrictions on food advertising. Advertisers are encouraged to seek legal advice where they feel unsure.

Foreign websites

The new proposals provide no light on how the ASA intends to deal with non-compliant marketing communications on foreign owned or hosted websites. A failure to grapple with this issue would be unfortunate, as it will be detrimental for UK advertisers to have to comply with Codes within the UK market when their foreign based competitors need not.

What should advertisers do now?

The extension of scope comes into force on 1 March 2011. Advertisers should therefore:

1. Undertake a review of all their corporate website content and any pages on social networking sites in order to ascertain that it complies with the CAP Code before that date.
2. Consider their online marketing strategy for future campaigns and ensure their agencies are familiar with the necessity for online material to comply with the CAP Code. This may require, for example, reviewing proposed advergames or smartphone application developments, Twitter pages and online films.
3. Ensure that any claims made on the website are capable of substantiation, and that they are not misleading.
4. Ensure that any content, both on own website and on any social networking sites, is appropriate for the likely audience, and is not likely to cause widespread or serious offence.

Any advertisers whose products are aimed primarily at children (i.e. those under 16) need to take care to ensure that their websites and other promotional material complies with the rules set out in section 5 (and section 15 for food and drink retailers) of the CAP Code which relates to advertising to children.

Since the extended remit is untested, advertisers should consider taking legal advice where they are uncertain about whether, for instance, their website content is editorial or not.

Final thoughts

The extended remit is certainly adventurous. The ASA, potentially with only a limited increase in its funding, may be overwhelmed by a rise in complaints, not least from competitors complaining about their rival's corporate websites (although there are proposals to charge advertisers for competitor complaints).

The real problem faced by the ASA is that the self-regulatory regime, and its funding, are voluntary, and if these proposals do not work and the ASA's approach is seen as heavy handed and disproportionate, there is a risk that advertisers may well decide to refuse to pay the levy on paid for search.

CAP's document is available at the following link:

http://www.cap.org.uk/Media-Centre/2010/Extending-the-Digital-remit-of-the-CAP-Code.aspx

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