Osborne Clark is one of Europe's most respected law firms, and advises market-leading and high-performing organizations on their UK and international legal needs. Any enquiries regarding this column should be sent by email to Stephen Groom (stephen.groom@osborneclarke.com).

(The following articles of current interest come from the September 2010 update of Osborne Clarke's advertising and marketing law website (www.marketinglaw.co.uk), which is updated monthly.

CAP code addition from 1/3/11

Funding of code extension

Legal and Regulatory Update

New online ad control regime to be imposed without consultation

Stephen Groom

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Topic: Online advertising

Who: Advertising Standards Authority ('ASA') and Committee of Advertising Practice ('CAP')

When: 1 September 2010

Where: UK

Law/code stated as at: 7 September 2010

What happened:

Not by coincidence, on the very same day as the new, updated CAP Codes came into force, the pillars of the UK's world-renowned, self-regulatory system for controlling ads made a long-awaited announcement about online advertising.

After three years of debate behind closed doors, the Committee of Advertising Practice or 'CAP' (which writes the Codes), the Advertising Standards Authority or 'ASA' (which administers the system and deals with complaints that the Codes have been breached) and the Advertising Standards Board of Finance (which organizes the financing of the whole caboodle) had reached a ground-breaking agreement.

From 1 March 2011, the CAP Code would apply in its entirety (and with only 180 odd extra words) to advertisers' own marketing communications on their own websites.

The new regime would also extend to other non-paid-for space under advertisers' control such as on social networking sites such as Facebook and Twitter.

Sanctions for breaching the Code would include 'naming and shaming' repeat offenders in ASA paid-for search ads and, with the help of search engines, removing paid-for search ads that linked to the page hosting the offending content.

Funding for the likely exponential increase in complaint handling work by the ASA would come from extending the standard 0.1 per cent levy to paid-for ads appearing on search engines through media

and search agencies, supplemented initially with seed capital from Google.

Crucial clarification in CAP paper

More explanation and guidance is in the CAP Paper 'Extending the Digital remit of the CAP Code', including probably the most important explanation of all. This is the definition of what the Code will extend to from 1/3/11, which will slot into the list of what the CAP Code covers in the Introduction section viz.:

Definition of extension

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

Probably, the next most important passage in the CAP Paper relates to user-generated content. This suggests asking two key questions in order to help establish whether the UGC is caught by the Code:

Two key questions

1. *Did the website owner originally solicit the submission of UGC from private individuals, then adopt and incorporate it within their own marketing communications?*
2. *Did a private individual provide the website owner, on an unsolicited basis, with material that the website owner subsequently adopted and incorporated within their own marketing communication?*

So far so reasonably clear, though of course there will be much debate about key issues such as:

Debatable issues

- where to draw the boundaries between online marketing communications and editorial;
- at what point brand owners can be said to have 'control' over UGC on social media;
- when does a marketing communication cease to be 'directly connected with the supply or transfer of goods ...'; and
- why was the CAP Paper silent on the key issue of the new regime's geographical reach? For instance, will it apply just to websites 'operating from the UK' as suggested by further guidance hurriedly put out by CAP 24 hours later, or will it extend for instance to sites ending 'co.uk' and clearly aimed at UK consumers but operating from another country? If complaints about such sites are to be passed to local self-regulators in the relevant country under the 'Alliance' cross-border complaint handling system, will their codes have been extended like ours?

Here is the rub, however, because important questions such as these are almost bound to arise with such game-changing proposals.

And this is going to be a particular risk when, as here, the package has clearly been hurried out to coincide with the launch of new CAP Codes that we all know were originally intended to extend this far online from day one. The hurry is obvious from the erroneous paragraph cross-references and the fact that within 24 hours key questions such as jurisdiction were being quickly addressed that were simply not tackled in the original Paper.

Why not consult?

It is for this reason that such seismic changes, impacting all UK businesses and all UK consumers, would ordinarily have been put out in draft for stakeholder consultation before being finalized.

No advance consultation, but ...

This process would have avoided situations such as those cited above, where a glaring omission from the original paper is 'clarified' by further guidance issued just a day later, so that already marketers looking to find out where the goalposts are situated will have to look at two different documents.

So why then was the opportunity to consult and then finalize spurned in this case?

The regulatory bodies concerned might plead the overriding need to get these rules in place after such a long delay. But this argument simply does not wash.

The generous six months lead time could have been changed, for instance, to a two-month consultation period followed by two months to assimilate comments and make necessary changes, then publication of the final scheme allowing two months' lead time. If this were felt to be too stretching, then perhaps three months could have been allowed for each stage, putting implementation back by just three months to 1 June 2011.

Surely after this length of time, the priority should be to develop a regime that is robust from the start and free from major flaws of the kind consultations will flush out.

...2-year ongoing review

Instead, it appears from the CAP Paper that we will have a two-year 'ongoing .review period' during which changes could be made to the system at any time if 'significant comments are received'. Not a situation likely to engender trust and confidence among advertisers looking for guidance they can rely on when formulating a long-running digital campaign.

Why this matters:

This extension overdue

This extension of the ASA/CAP Code remit is long overdue and undoubtedly a major and probably a world-leading achievement by all concerned. The new sanctions are imaginative and a smart approach to the challenge of policing in the online world.

It is also to be hoped that the new levy and Google's initial help will meet the funding challenge. It remains to be seen, however, whether the failure to consult will have serious financial implications further down the line by leading to more time-consuming disputes between

advertisers and the ASA over the correct application of the Code in individual cases.

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Virgin media defends 'service' email

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Topic: Email marketing

Who: Virgin Media

When: 28 July 2010

Where: Advertising Standards Authority

Law stated as at: 3 September 2010

What happened:

Virgin Media circulated an email communication headed 'An important message from Virgin Media'. The communication's headline read: 'What great stuff could you be missing out on?' and the body of the communication went on to recognise that the recipients of the email were not currently registered to receive information from Virgin Media but that Virgin wanted to let them know Virgin Mobile was now part of the 'big Virgin Media family'.

The email pointed out that as well as being able to keep on top of their services, recipients would be able to benefit from exclusive deals if they let Virgin Media know they now wanted to hear about such deals in the future. Virgin Media also offered to keep recipients informed about its reward schemes and to give recipients 'first dibs' on V Festival tickets and other offers. Recipients were therefore encouraged to register with Virgin Media to hear about offers, news and products and as a thank you for doing so, Virgin Media would enter them into a prize draw to win a free HTC HD2 phone handset.

One recipient of the communication challenged whether such an 'advertisement' breached the CAP Code as he had previously asked Virgin Media not to send him marketing communications by email. The first question to ponder was whether this was actually an ad.

Virgin email to consumers

... some of whom opted out