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Legal and Regulatory Update

Prize promotions: Misleading competitions come under scrutiny

Paul Langford

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Particular care needs to be taken when formulating promotional campaigns that require entrants to use premium rate telephone numbers.

The first hurdle is the Lotteries and Amusements Act 1976, which provides that lotteries and raffles (save where specifically authorised, such as the National Lottery) are unlawful, and makes it an offence to be involved with their promotion. Given the current law is unclear on the distinction between prize lotteries, prize competitions and free draws, this first obstacle may not be as simple to overcome as you thought.

Next, you face the potential wrath of the Office of Fair Trading (OFT), which if the OFT considers necessary, will scrutinise your advertisements and mailings to check that they are not misleading.

In a recent action, a high profile prize promoter failed on both counts, and the High Court held that it had been guilty of misleading the public and operating an illegal lottery. Both the company and its director were required to give undertakings that they will not publish misleading prize draw advertisements or promote unlawful lotteries.

The offending mailings

The promoter concerned was Churchcastle Limited, which distributed over 446,000 mailings under the name 'Prize Line' which gave the impression that the recipient had been awarded a major prize. The company sent out similar mailings in the name 'Prize Trust' and 'UK Prize Foundation'. Consumers were urged to reply immediately by calling a premium rate number at a cost of £1.50 per minute. Calls lasted up to five minutes, with a total cost to some callers exceeding £7.50. At least 56,000 people called the premium rate number.

Misleading mailings

The OFT decided that the mailings were misleading; their layout and presentation gave the impression that, as a result of an entry in a previous competition, recipients had already won a major prize such as

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£10,000 cash, a fitted kitchen or a widescreen television. Instead, what nearly everyone who responded was in fact awarded was a low value 'giveaway' item of a voucher booklet that was subject to restrictions on its use.

Unlawful lotteries

The OFT determined that the mailings also constituted unlawful lotteries. This was because the free entry route to participate in the prize draw was not publicised in such a way as to be likely to come to a recipient's attention.

The OFT's powers

The OFT will intervene in such matters where it is in the public interest that an advertisement should be stopped. It will also ensure that future misleading advertisements are prevented by means of a court injunction against those concerned, or by the threat of it.

The Control of Misleading Advertisements Regulations (CMARs)

CMARs

The relevant legislation is the CMARs, which largely implement EU Directives on misleading and comparative advertising. Their aim is to protect the interests of consumers and businesses from misleading advertisements and advertisements that make prohibited comparisons.

To come within the scope of the CMARs, an advertisement must be:

- misleading, in the sense that it must deceive or be likely to deceive recipients and affect their economic behaviour, or for those reasons harm the interests of a competitor; and
- published, in connection with a trade, business, craft or profession, in order to promote the supply or transfer of goods or services, immovable property, rights or obligations.

The OFT can take action against anyone appearing to be concerned or likely to be concerned with the publication of a misleading advertisement.

Commentary

Unscrupulous techniques will hopefully be eradicated over time

As a greater number of such cases are brought to the OFT's attention, one would hope to see unscrupulous techniques such as those operated by Churchcastle Limited gradually eradicated. Given that a large number of such mailings are operated outside of Europe and sent from overseas, effective regulation would, however, appear to be a near impossible task.

While reputable firms are unlikely to ever consider running such campaigns, there may be times where use of premium rate telephone lines, as part of a campaign or competition, is considered. If doing so, be careful. Unless an alternative communication of entry into a competition — post, telephone or other — is made at a 'normal rate' (ie with no premium over what it would normally cost to use a

particular method of communication), you run the risk of your ‘free draw’ being far from free.

Where premium rate lines are offered, care should be taken to provide alternative entry methods at the normal rate. Otherwise, any competition that relies on chance to win a prize is likely to be subject to complex regulation by the authorities.

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Prize promotions: ASA adjudicates on prize promotions

Paul Langford

Even where your carefully considered prize promotion is neither an unlawful lottery nor misleading under the CMARs, there remains a further potential hurdle to overcome: the Advertising Standards Authority.

The ASA will investigate any complaints it receives in respect of print and broadcast advertisements. In a recent adjudication, it upheld a complaint against confectionery brand Nestlé and Channel 4, which ran a ‘Golden Ticket’ promotion giving viewers the chance to be a housemate in Channel 4’s Big Brother show.

Golden Tickets

The complaint

The promotion was conducted through national press advertisements, posters and point of sale material, which announced that Kit Kat chocolate bars were to contain the elusive Golden Tickets. The complainant made two complaints: first, that it led consumers to believe that a Golden Ticket automatically guaranteed a place in the house; and secondly, that the terms and conditions and the nature and number of the prizes were not clear in the promotional advertising material.

The ASA’s view

Although the ASA did not consider the promotion was misleading on the grounds that it made consumers believe that a Golden Ticket automatically guaranteed a place in the house, it concluded that all the key promotion details were not available on all marketing. Such details

included failing to make clear on poster advertising that participants had to be over 18 years of age. The ASA required the promoters to ensure that future campaigns included every significant condition of entry.

The rules regarding promotions

The ASA sets out some useful guidance that promoters should follow when planning campaigns. These are as follows:

Guidelines for promoters

- Be clear, readily understandable, unambiguous, accurate and do not mislead or omit vital information.
- Do not state or imply that a consumer has won a prize when this is not the case or overstate the chance of winning.
- Do not misrepresent the value, nature or availability of prizes.
- State all the key requirements for entry on all marketing communications, such as the closing date.
- Outline clearly how consumers can take the 'free entry' route, without purchasing an advertiser's product or making any kind of contribution.

The Committee of Advertising Practice (CAP) also produces comprehensive guidelines for non-broadcast marketing communications, which are available from the ASA website (asa.org.uk). These are designed to help marketers, agencies and media interpret the rules in the British Code of Advertising, Sales Promotion and Direct Marketing (known as the CAP Code).

Commentary

'Much scope for confusion'

Despite the clear guidance produced by the ASA and a regulation regime that is designed to protect consumers, the ASA concludes that there is still 'much scope for confusion'. This, it believes, is because promoters are increasingly devising bigger and more creative campaigns to grab consumers' attention.

With new media being increasingly used for campaigns, such as interactive and online competitions, and an era of internet-based television beckons, the scope for confusion seems set to expand. To avoid falling foul of the ASA, those who regularly devise promotional campaigns should take careful note of its guidance. It is worth looking to formulate internal policies that not only meet the ASA's requirements, but also help to close off any risks presented by the regulatory constraints outlined in the above article on prize promotions.

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Broadband advertising: Causing confusion among consumers

Paul Langford

Broadband terminology can be misleading

As the dial-up internet connection looks set to go the same way as the 8-track player and Betamax video, there has been a surge in advertising spend on broadband advertising. With an increasing number of service providers in a crowded market, the consumer should benefit from the competition for their custom, in terms of broader choice and lower prices.

The reality, though, is somewhat different: anyone selecting a broadband package is faced with an enormous range of facts and figures, referring to items such as 'Mbps speed', 'megabyte download limits' and numerous different types of connection. It is not surprising, therefore, that the ASA has concluded that this has caused confusion among consumers as to whether they can always obtain the speeds and low costs quoted in advertising.

Complaints

Such confusion has led to numerous complaints in the last few months, which have highlighted some of the key concerns regarding advertising of broadband products. The ASA considered complaints in respect of a number of high-profile advertisers, including the following:

— *Bulldog Broadband*

Complainants objected that, although the advertisements promised 'up to 8 meg broadband', they could not achieve this connection speed due to their distance from their local exchange. Upholding the complaint, the ASA decided that, due to the wide variations in connection speeds available to different consumers, the catch-all words 'up to' were not adequate. Bulldog was ordered to indicate the significant variation in connection speeds prominently in future advertisements.

The ASA considered this to be a particularly important ruling, with what it felt would be 'industry-wide implications'.

— *Carphone Warehouse*

Carphone Warehouse's TalkTalk telephone package promised 'free broadband forever' — this led to 145 complaints. The ASA agreed with complainants' assertions that the service was not, in fact, free because customers were required to pay a connection charge as well as a monthly payment for a telephone package. The advertisements were also deemed misleading because not all customers were connected to an appropriate exchange, and those who found themselves in such a situation would incur a further charge for the service.

**Care should be taken
when considering
broadband advertising**

Commentary

These cases illustrate the sort of issues that are likely to lead to consumer complaints and action by the ASA. The ASA stresses that great care should be taken when considering advertising for broadband services which promise high-speed services free, or at a low cost.

As a more general principle, advertisers should take steps to ensure that any claims they make can be substantiated. The ASA investigates all complaints it receives, and therefore an adjudication to remove a misleading advert may not only mean wasted expense, but may prove to be even more costly in the long run in terms of any negative publicity incurred as a result.

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Internet advertising: Further computer complaint

Paul Langford

Following the recent action against Dell for misleading customers who wished to purchase low priced PCs from Dell's website (which was covered in the previous edition of the legal update), Comet is the latest computer retailer to fall foul of the ASA's code of conduct.

The advertisement

The ASA received complaints, which stemmed from a television advert that stated:

'At Comet, we check thousands of prices every week. Save £100 on this wireless laptop now only £299'

The advert then featured Comet's website address.

There were two complainants: one tried to purchase the computer through the website, but could only find the laptop as part of a higher priced package; the other could not find the laptop at any of the stores he visited and challenged its availability at the advertised price.

The first of these two complaints is similar to the complaint made against Dell, once again demonstrating that there is a grey area between advertising media, which is regulated by the ASA (in this case, television), and advertising on a firm's own website, which is not.

Comet's response

Comet claimed the laptop was available at £299 at all their stores when the advertisement was first aired and they believed they had forecast

Grey area

enough stock to last at least two weeks. As demand was greater than anticipated, stock sold out in a few days.

The price of £299 was for the laptop alone and was exclusive of any extras that would make up a 'package price'. The £299 price was available in-store only and — so Comet claimed — their website address was included in the advertisement in error, because the laptop was only available online as part of a higher-priced package. Comet said they had put procedures in place to ensure such errors did not happen in future.

ASA assessment

The ASA upheld both complaints. It noted that Comet had attempted to assess likely demand for the laptop and that the inclusion of the Comet website address was a mistake, and appreciated that Comet had adopted a system to ensure that this type of error was avoided in future. But the ASA's main concern was that two consumers had been unable to take advantage of the offer, and that while the customer who tried to purchase in-store could not obtain the laptop at the advertised price, the same laptop remained available online as part of a higher-priced package.

Accordingly, it recommended that the advertisement should not be shown again in its current form and advised Comet to ensure future television advertisements made clear in its offers any limitations on availability.

Commentary

There are two interesting points to note: first, this case serves as a further reminder that it takes just one legitimate complaint to impact on an advertising campaign which has cost several thousands of pounds, before even considering the negative effect on goodwill; and secondly, that once again the ASA — despite having no actual jurisdiction over claims business make on their own websites — has veered into the area of online advertising.

The message is therefore clear: wherever different media interact with one another, extra care should be taken that all elements of an online promotion conform to the elements of any other media used. As stated before, if there are concerns, text should be submitted to the CAP Copy Advice team and/or appropriate legal advice sought, prior to publication.

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Just one complaint can impact on an advertising campaign costing several thousands of pounds

Data Protection: Action against unwanted telephone calls

Katherine Williams

Enforcement Notices

In the previous edition of the Legal Update, we reported that the Information Commissioner is taking more active steps to enforce the Data Protection Act 1998 (the 'Act') and the Privacy and Electronic Communications (EC Directive) Regulations 2003 (the 'Regulations'). The Information Commissioner has recently continued this stance by serving Enforcement Notices against five companies for making unsolicited direct marketing calls to individuals who had previously objected to receiving such marketing communications.

Enforcement

The companies have been ordered to stop telephoning those individuals who have registered with the Telephone Preference Service or have previously made it clear to the companies that they do not wish to be contacted for direct marketing purposes (so-called 'opt-out requests'). Furthermore, one company has been ordered to cease using its automated calling system to transmit recorded marketing messages to individuals who have not previously notified the company that they consent to receiving such communications. These actions are in direct violation of Regulations 19 and 21 respectively of the Regulations.

Compliance

This proactive enforcement by the Information Commissioner continues to make it clear that companies, and in particular their marketing departments, need to ensure that all marketing exercises comply with the Act and the Regulations. These cases highlight the importance for all businesses engaged in direct marketing of having appropriate systems in place that ensure that individuals' opt-out requests are in practice honoured. The Information Commissioner is currently also investigating Carphone Warehouse and Talk Talk and a number of other companies because of similar complaints.

Commentary

Failure to comply with the Enforcement Notices is a criminal offence, which can lead to companies being fined. In addition to regulatory action, there is typically some negative publicity and brand damage that surrounds such companies who are portrayed in the media as not taking customers' privacy rights seriously.

For advice in relation to data protection compliance, please contact Katherine Williams at katherine.williams@blplaw.com or Gary Brooks at gary.brooks@blplaw.com.

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Important for all businesses engaged in direct marketing to have appropriate systems in place