



MARKETING LAW - 10 ISSUES FOR 2009

1. UNFAIR COMMERCIAL PRACTICES

In 2008, new Regulations were introduced to prevent 'unfair commercial practices', in particular misleading and overly aggressive marketing techniques. These are the Consumer Protection from Unfair Trading Regulations and The Business Protection from Misleading Marketing Regulations. Contrary to some early reports, the Regulations do not outlaw "Buy One Get One Free" promotions, but they do contain many restrictions on marketing activity, with possible civil and criminal sanctions if you get it wrong. The CAP Code has been amended to take account of the new law.

Under the Regulations, certain marketing techniques are designated as banned practices (such as 'bait' advertising, disguised advertorials, and 'free' offers that are not actually free). Stealth marketing techniques (including viral, word of mouth and buzz marketing) have also been singled out as particular areas to watch.

2009 may see the first enforcement actions being brought under the legislation. Tesco is already under investigation by the OFT for its bait marketing techniques and Tiscali has taken action against BT, in part relying on an alleged breach of the Regulations by BT.

At present there is no private right of action for breach of the Regulations (either by consumers or companies), but this is under consideration. Companies (such as Tiscali) adversely affected by competitors breaching the Regulations may be able to bring separate legal action (e.g. for the use of "unlawful means") thereby getting a private right of action through the back door. They might also complain to the ASA for breach of the CAP Code.

ACTION: Sales and marketing teams should be fully trained in the do's and don'ts of new regulations, especially where 'edgy' marketing techniques are being used by the client or where the target market is particularly vulnerable (e.g. children or the elderly). Failure to comply could lead to ASA complaints, legal action, and ultimately, criminal sanctions.

2. KEYWORD ADVERTISING - USE OF TRADE MARKS AS KEY WORDS

In early 2008, the UK court ruled that Yahoo was not liable if it 'sold' trademarks as keywords. Google then changed its Adwords policy to allow bidding on trade marks (which it had previously blocked). These developments were a boost for advertisers bidding on competitors' marks, but a clear threat to brand owners.

In December 2008 Interflora issued a claim against M&S for M&S' bidding on INTERFLORA as a keyword. In Europe, the Austrian, French, Belgian and German Courts have all referred keyword cases to the European Court of Justice, and we are now waiting for clarification from Europe as to whether search engines or advertisers should be held liable for the use of trademarks as keywords. It is not impossible for Europe to decide that use as a keyword is OK, but use in the text of an advertisement is not. Depending on the outcome, these cases could cause a shakeup in keyword advertising.

ACTION: Keep keyword advertising policies under review; audit the use of your own trade marks to see whether competitors are bidding on them; keep an eye on legal developments in the UK and Europe.

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3. **REGULATION OF ONLINE CONTENT**

The current CAP Code (enforced by the ASA) is primarily concerned with 'paid for' advertising space. With the rapid growth of digital advertising, there are increasing calls for the ASA's remit to extend to online content generally. The Byron review (on child safety) concluded that the Code must extend to online content. The government says the industry must self-regulate or face legislation.

The Advertising Association's Digital Media Group has been considering an extension of the ASA's remit since 2007, and is due to publish its recommendations in March, with a possibility of changes to the CAP Code later in the year or early next year. This coincides with an overall review of the CAP Code, which is likely to be put to public consultation in March. Interested parties will then have an opportunity to submit responses. Any changes to the Code will have significant ramifications for advertisers and agencies.

ACTION: Consider whether to submit responses to the consultation; keep up to speed on any changes to the Code.

4. **PRODUCT PLACEMENT - THE AUDIO VISUAL MEDIA SERVICES DIRECTIVE**

The AVMS Directive replaces the 'TV Without Frontiers Directive' and creates a 'platform neutral' approach to broadcasting regulation across Europe. It is designed to bring all 'TV-like' services (such as traditional linear TV, video on demand and IPTV) under one regulatory umbrella. The Directive contains important provisions relating to programme sponsorship and product placement.

The Directive permits member states to allow product placement in certain areas, but the UK government has said that when it implements the Directive later this year it will not allow any relaxation of UK product placement rules. Industry is very concerned that this will put UK production at a competitive disadvantage, but at present it seems unlikely that the Government position will change.

5. **PERSONAL DATA - ITS USE AND ABUSE**

2008 was the year of missing data. 2009 is likely to be the year that the Information Commissioner strikes back with greater powers to penalise those who don't use data 'fairly and lawfully' and fail in their obligations to protect personal data. Increased powers to fine companies and protect data use are expected later this year. For marketers (agencies and clients), complying with obligations means ensuring that adequate consents are obtained on collection (through adequate opt-in and opt-out procedures), that data is used responsibly, and that data is properly protected. The UK has rejected calls for a compulsory notification regime if data is lost, but good practice dictates that notification procedures should be in place in case data is mislaid.

Invasive marketing techniques are also under scrutiny, in particular behavioural marketing tools such as BT's 'Phorm' targeted advertising technology, and similar products that serve ads based on web-users' activity. Such technologies give rise to serious privacy and data protection concerns, and anything other than the fully informed consent of target customers could be problematic. The use of such technology is likely to require 'opt in' rather than 'opt out' consents.

ACTION: Review your data protection compliance procedures to ensure that your teams comply with the legislation.

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6. **GAMBLING ADVERTISING**

The Gambling Act 2006 (in force since 2007) created a vastly more permissive regime for gambling advertising. Changes to the CAP Code reflected the new law. In 2008, an ASA report concluded that most gambling advertisers were complying with the new regime, and were engaging in responsible advertising of gambling related services. That said, certain advertisements have been the subject of adverse rulings by the ASA, and this is likely to continue as gambling companies and the ASA get to grips with the new rules. The key is striking a balance between the more permissive regime whilst ensuring that advertising remains socially responsible and does not exploit the vulnerable or encourage irresponsible and addictive behaviour.

7. **"WE WILL SAVE THE WORLD" - REGULATION OF ENVIRONMENTAL CLAIMS.**

2008 saw a crackdown on unhealthy food products, in particular HFSS foods (high fat salt sugar content). 2009 may well be the year that we get to grips with increasingly virtuous claims by advertisers who promise that their products will save the world. BP has been in trouble over its "we use our CO2 to grow flowers" campaign (only 0.3% of its CO2 was used). Lexus, British Gas, and Ryanair have also been subject to adverse rulings. As the environment continues to move up the agenda, claims to be the 'greenest, leanest, cleanest', energy, car, or aeroplane etc are likely to increase, and competitors and consumers will be ready to challenge such claims at the ASA.

8. **THE OLYMPICS - LONDON 2012**

2012 is getting closer, and advertisers will be thinking about their campaigns to leverage off the global focus on London and the goodwill associated with the Games. Likewise, London 2012 will be ramping up its brand protection team to protect its official partners by preventing ambush marketing and other unauthorised association with the Games. Advertisers must ensure they are very familiar with the Olympic Symbols Protection Act, and the London Olympic Games and Paralympic Games Act 2006 which creates a defined "Olympic Association Right". Both create severe restrictions on non-official partners from advertising in any way that may create an 'association' with the Games. And ... LOCOG, the organising body of the Games, has just put out to pitch the Olympic brief. If you can't beat them, join them ...

9. **EMPLOYMENT LAW**

Cut backs in client budgets have already lead to redundancies at agencies and clients. Proper procedures must be followed to ensure compliance with employment law.

TUPE may cause problems where an agency team has been dedicated to one client and that client takes the work back in-house, or transfers it to another agency. TUPE can apply to automatically transfer that team, whether the agency or the client likes it or not. The new agency, or the client, is saddled with salary costs that they were not expecting (and possible redundancy issues) and agencies can end up losing good people that they have spent time and money recruiting and training. Any agency taking on a new client must factor this into their calculations of likely profitability of the new account.

More and more age discrimination claims are working their way through the Tribunals. An industry stereotypically perceived as 'young' can expect to have to reconsider the ways in which it promotes, hires and fires.

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10. AGENCY/CLIENT RELATIONSHIPS AND CONTRACTS

Harsh economic times will inevitably put a strain on all but the best managed client/agency relationships, a strain which can be minimised by clear agency contracts which set out the terms of the relationship, in particular terms regarding remuneration, IP, termination, and service levels. Agencies and clients would be well served ensuring that adequate contracts are in place and be open to renegotiation of terms (e.g. retainers and sponsorship commitments) as a means of safeguarding their key relationships. Where problems do arise, good relationship management should resolve many of them, but in extreme cases more formal dispute resolution (e.g. through mediation or litigation) may be necessary, a process which needs careful thought and guidance.

If you would like any more information on any of these issues, or would like to be kept up to speed on any developments, please contact Dominic Bray at K&L Gates: dominic.bray@klgates.com +44 (20) 7360 8191.

K&L Gates is an international law firm with 1,800 lawyers in Europe, the US and the Far East. Its marketing and advertising law group provides specialist legal advice to all businesses operating in the sector on a range of issues including commercial contracts, corporate transactions, employment law, intellectual property, data protection, copy clearance, regulatory complaints and dispute resolution.

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