

Developments in the Regulation of Broadcasting Advertising

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Introduction

Advertising expenditure continues to rise in the UK with growth of 2.4% to £17.2 billion in 2003 and estimates of a rise of 4.2% this year (source: Advertising Association). The traditional methods of marketing and advertising have been transformed by the new forms of media brought about by the digital revolution. The landscape of communication has changed so that traditional distinctions between broadcast, outdoor, radio and print based advertising no longer appear as relevant as they once did. The challenges brought about by the digital revolution and the convergence of media have been addressed by changes to the regulatory bodies, in particular with the introduction of Ofcom and the withdrawal of the legacy regulators such as the Independent Television Commission (ITC) and the Radio Authority (RA).

All advertisements in the UK are subject to a combination of statute, common law and self-regulation. Furthermore, advertisers who fail to meet appropriate standards can expect an array of sanctions to be brought to bear upon them. This article focuses on the changes to statutory and self-regulation that has been introduced in part as a reaction to the dramatic changes to communication delivery and media convergence. Recent changes to the structure of the regulatory codes and practices demand a review of the framework of advertising regulation.

Convergence of media: Catalyst for change?

Separate regulation of different kinds of media has proven to be impracticable since media convergence itself and the consolidation amongst media businesses, means applying different rules to different media relies upon a false distinction. Rapid technological changes in both structure and content of communications mean attempts to maintain traditional approaches to regulation became problematic, particularly so when convergence tends to open up the possibilities of bypassing the regulations. Recognising the pace of change in media and the impact of developments in communications technologies, the Government brought about a concerted effort to provide practical solutions to the issues that faced the existing regulatory framework.

The Coming of Ofcom

The government's response to the changes in business communications was the White Paper; A New Future for Communications (2000). The aim of the White Paper was to lay down a framework in which the issues of regulation and consumer protection could be addressed. The main objectives were to promote dynamic competitiveness in terms of the UK market; to ensure that the quality, plurality, diversity and universal access to services were maintained and to protect consumers' interests and ensure standards of decency. One of the principal proposals was to create a super, all-encompassing regulatory body, Ofcom, to cover functions normally within the remit of the so-called 'legacy regulators' such as the ITC, the Radio Authority and Oftel. The roles of the many different players in a fragmented regulatory system, with many overlapping features were to be merged, thereby introducing a new super-watchdog. Ofcom became the UK's independent regulator and competition authority for the UK communications industry by virtue of the Communications Act 2003. At this juncture, the ASA was responsible for regulating all advertisements in non-broadcast media solely, whereas Ofcom had inherited the duties initially borne by the 'legacy regulators' in relation to advertisements in broadcast media.

The Historical Context of Recent Changes

Self-regulation of non-broadcast advertising began in 1961 when the Advertising Association established the Committee of Advertising Practice (CAP). CAP's Non-Broadcast Committee (CAP), which comprises representatives of advertisers, agencies, media owners and other industry groups, periodically produces the British Code of Advertising, Sales Promotion and Direct Marketing (the CAP Code).

The Advertising Standards Authority (ASA) was established in 1962 to ensure compliance with the CAP Code. Until recently the ASA has handled complaints about non-broadcast advertisements and carries out research on many subjects related to advertising regulation. Decisions on complaints are taken by the ASA Council, which is comprised of some members with relevant experience although most Council members come from outside of the advertising industry. Additionally, various other bodies, the 'legacy regulators', were introduced to regulate the content of advertisements in broadcast media, such as Oftel (telecommunications), the ITC (commercial television), the Broadcasting Standards Council (monitored standards for television and radio) and the Radio Authority (independent radio). These bodies derived their powers from different statutes and have differing objectives and duties.

Changes to the CAP Code

The general purpose of the CAP Code before Ofcom was introduced was to ensure that non-broadcast advertisements are honest, decent, legal and truthful. This mirrors the basic tenet adopted by national Codes throughout Europe. In addition, advertisements must be produced with a sense of responsibility to consumers and to society, they should not bring the advertising industry into disrepute and they should comply with normal accepted business practice and principles of fair-trading.

The non-broadcast elements of the CAP Code have largely been undisturbed by the introduction of Ofcom. There are general rules in the non-broadcast CAP Code as well as more specific rules. The former include: substantiation of claims in advertisements, in that, before an advertiser distributes a marketing communication, they should hold evidence to substantiate their claims regarding a product; advertisements should not exaggerate or be confusing as to value or use of the product; advertisements should indicate where a comment is an opinion and not a statement of fact; advertisements should not encourage unsafe, violent or anti-social behaviour; and, advertisements should state prices clearly, prices must relate to the product advertised and prices must match illustrations. The more specific rules relate to more sensitive matters, such as children, alcohol, cigarettes, financial products and services and health and safety of products and services.

The CAP Copy Advice team gives free publication advice and guidance on compliance with the CAP Code to advertisers or their advisers, media owners and advertising agencies. Advertisers or their agencies are ultimately responsible for compliance with these rules and other legal rules, irrespective of having obtained this advice.

The pre-Ofcom ASA

The ASA is the independent body responsible for ensuring that advertisers follow the CAP Code. Prior to the Communications Act, the ASA's main functions related to non-broadcast media such as advertisements in the print media, sales promotions and direct marketing in the UK. The ASA's remit was to promote high standards of advertising, to investigate and resolve complaints, to monitor, publicise and review the CAP Code and the ASA policies as well as to monitor compliance with the CAP Code, by conducting research and by carrying out spot checks.

In practice, the ASA considers complaints or breaches of the CAP Code that may relate to invasion of privacy, pricing, offensive material or misleading claims or information. Although the ASA considers complaints made by consumer groups, trade organisations and other businesses such as competitors as well as actions initiated by them, the majority of complaints are from members of the public and concern misleading advertisements. In receiving any complaint the ASA's first step is to decide whether there is a prima facie breach of the rules of the CAP Code. Many cases then go through an informal resolution process and a number of these matters are published by the ASA. Other cases proceed to a formal adjudication, in which the ASA will solicit comment and supporting evidence from the advertiser, request provisional withdrawal of the advertisement where it is considered appropriate and make a final adjudication, published weekly on the ASA website.

Ofcom Contracts Out the Regulation of Broadcast Advertising to the ASA

Recently the regulation of advertising underwent another significant change as a result of further governmental reform. The mechanism for establishing this new arrangement

emanated from The Deregulation and Contracting Out Act 1994, which provides for the contracting out of functions vested in Ofcom by virtue of s.1(7) Communications Act 2003. During the passage of the 2003 Act, proposals were brought forward that these powers should be utilised to contract out the regulation of broadcast advertising. Ofcom's decision published on 17 May 2004, on the future regulation of broadcast advertising, confirmed that a co-regulatory partnership would be formed between Ofcom and the ASA. As of 1 November 2004, under its new broadcast wing (ASA (B)), the ASA assumed the responsibility for standards in TV and radio advertising. One spokesman from the ASA remarked that:

Advertising presented a natural candidate for this, especially since public recognition of the ASA is greater than for most other regulators.

Similar to CAP, a new CAP Broadcast (BCAP) was established to set the broadcast advertising Code (BCAP Code). The new ASA, incorporating its broadcasting arm (ASA(B)), became a 'one-stop-shop' for all advertising issues and complaints, covering areas such as, fair competition, protection of consumers, protection of children and particular products and services including financial services or statements, health and beauty, or matters of a political or religious nature.

The New ASA & the BCAP Code - Broadcast Advertising

Ofcom essentially adopted the Codes of Practice used by its 'legacy regulators' until such time as they were updated and revised. It is now the function of CAP Broadcast to administer the BCAP Code in relation to TV and radio advertising i.e. the BCAP Radio Advertising Standards Code and the BCAP Television Advertising Standards Code combined. The TV Code is split into the following sections: TV Advertising Standards Code; Alcohol Advertising Rules; Advertising Guidance Notes; Rules on the Scheduling of Advertising; Code for Text Services; and, Guidance on Interactive TV.

Both BCAP Codes are largely the same as their forebears. For the most part, the TV Code is an updated edition of the 2002 ITC Advertising Standards Code and the Radio Code is an updated edition of the former Radio Authority's Advertising and Sponsorship Code. It should be noted that provisions relating to sponsorship have been omitted because sponsorship remains the responsibility of Ofcom. The only real changes to the previous TV and radio Codes relate to the references to the ITC and the Radio Authority respectively, which have been reviewed and, where necessary, changed to BCAP, Ofcom or the ASA, to reflect their new co-regulatory partnership. References to legislation have also been brought up to date and a new provision for Independent Review of ASA adjudications has been included. The actual content and philosophy of the BCAP Code is very similar to the CAP Code applicable to non-broadcast advertising. Over and above these, licensed TV companies must make it a term of their advertising contracts that the content of adverts will comply with the law and the spirit of the Code.

Clearance

The Broadcast Advertising Clearance Centre (BACC) is an independent body, funded by broadcasters, that works closely with CAP Broadcast as an advisory service on legal compliance for television commercials. Advice can be requested for pre-production scripts and/or pre-transmission. In practice, the BACC asks for advance pre-production scripts in order to discuss, amend, and ensure compliance, for instance, by requesting evidence to support claims for products. In this way, problems dealt with at this stage can save unnecessary expense for both the broadcaster and the regulator. Once production is complete, the BACC can give advice on the visual content. Therefore, almost all television advertising is "pre-vetted" and all national and some local radio advertisements are cleared by the Radio Advertising Clearance Centre (RACC). In a similar vein to CAP's Copy Advice & Guidance, the decisions of BACC and RACC are merely advisory and thus are not legally enforceable clearance decisions and are not any guarantee of compliance. The BACC has issued Notes of Guidance for television advertising too, which supplement and expand on the BCAP Code.

Multi-media

The developments of multi-media advertising campaigns, which deploy several seemingly quite disparate media routes to the consumer, continue apace. Multi-media practices are a key component in the landscape of the digital culture but create practical problems. Under the previous system, advertisers using both broadcast and non-broadcast platforms would be subject to two different regulatory systems. In theory, the new system should lend itself more to multi-media advertising campaigns by providing more certainty and a streamlined process, yet of all the challenges faced by the new regulatory framework, such as the general co-ordinating of the Codes, (as they do have different emphasis on some matters) and the fulfilling of the targets that Ofcom has set for the ASA, dealing with multi-media cases is probably the biggest. The Codes however, have not been unified and there remain separate rules to govern the different media with notable differences between them. Some products, for example, firearms may be advertised in non-broadcast media but not on TV. Also, it appears that separate complaints will still have to be made for each type of media. However, there are plans that the Codes shall be merged in due course.

Sanctions for breaching the Codes

As far as sanctions go for breach of the Codes, the ASA can take various enforcement measures. Without resorting to legal bans, it can require the advertiser to withdraw or amend the advertisement and insist on an undertaking not to repeat it. As a further deterrent, trade membership could be withdrawn and/ or further advertising space could be refused and in the case of non-broadcast media, the ASA has statutory powers to impose fines. The worst of all perhaps may be the risk of adverse publicity affecting reputations and brand values, resulting in a loss of valuable goodwill and custom.

Although it has delegated the day-to-day handling of complaints, Ofcom retains its statutory powers, through their broadcast licence conditions. The ultimate sanction on a licensee breaching the Codes is the loss of their licence and this happened recently with Auction World (although most of the acts in the case predate 1 November 2004). The ASA can, with the assistance of the CAP compliance Team impose additional sanctions upon advertisers who flout the rules, by making referrals to the OFT. It is noteworthy here that a breach of the Codes, may also give rise to a breach of various statutory Regulations. This is because the Codes require that advertisers comply with, for example, the Control of Misleading Advertisements Regulations, the Distance Selling Regulations and the Electronic Commerce Regulations, in conjunction with its own rules.

Self-Regulatory Codes of Practice meets Statute and Common Law

The extent to which the new industry self-regulatory system is consistent with statute and common law will become more apparent in future. In a recent case, the phone company MMO2 sued 3G UK, for trade mark infringement and unfair price comparisons. The ASA upheld all but one of the nine complaints made and contended that the advertisements were misleading for various reasons. Interestingly, the judge's preliminary view did not regard the price comparisons as inaccurate or to be in breach of the principle of "honest commercial practice". The court declined to grant the interim relief sought by the claimant. This case highlights the very real prospect of inconsistency.

Regulation of Trans-Border Advertising

The obvious weakness in any system that purports to operate across the board is that it is difficult to find a consensus for the various forms of media in the UK and even more so, internationally. There are still significant differences in the way that advertisements are treated in different jurisdictions, depending not only on variations in the legal position, but also linguistic, social, and cultural factors. National self-regulatory organisations in Europe co-operate through their membership of the European Advertising Standards Alliance (EASA). The relationship formed between the ASA and the EASA has been essential for cross-border complaints regarding pan-European campaigns, details of which are also published on the EASA website. So, if an advertisement is published in foreign media or an advert originates abroad, it will be referred through the EASA on to the relevant regulator in the country of origin. However, for the UK regardless of the advertiser's origin, the ASA remains the arbitrator.

Conclusion

The main objective of the new system was to provide a more effective and accessible complaints system for consumers than the previous arrangements. A highly unsatisfactory element of the previous system was the large volumes of broadcast complaints received by the ASA, which it was not empowered to deal with. It is hoped that the change will achieve greater coherence in regulation in tandem with a greater consistency of decision-making, regarding advertisements across all media.

The government have been accused of failing to make a proper regulatory assessment of the digital environment. As highlighted in the White Paper, new arrangement systems must be responsive to consumer concerns or efforts to change will be futile. Consumers use all forms of media as a major source of information hence social, moral and cultural concerns cannot be ignored. An ASA spokesperson sums this up:

There is a natural logic to advertising complaints going to one body as long as public confidence in the regulatory system is maintained.

The Codes are more likely to be followed if the lines they draw resemble emerging implicit cultural norms. The transition from Ofcom to the ASA has reportedly gone smoothly. There will be periodic reports on the system's progress, which Ofcom will review. The benefits of a consolidated regulatory framework and whether the results will adequately reflect the changes in the advertising industry remain to be determined.

Relevant Advertising Bodies

Advertising Standards Association (ASA) - Promotes and enforces standards in all broadcast and non-broadcast advertisements. www.asa.org.uk

Non- Broadcast media - British Code of Advertising, Sales Promotion and Direct Marketing (The CAP Code).

Broadcast media - The Radio Advertising Standards Code & The TV Advertising Standards Code (The BCAP Code)

Broadcast Committee of Advertising Practice (BCAP)

Self-regulatory body that devises and enforces the BCAP Code that is administered by the ASA.

Broadcast Advertising Clearance Centre (BACC) - www.bacc.org.uk

A specialist body responsible for the pre-transmission examination and clearance of television advertisements.

Committee of Advertising Practice (CAP) - www.cap.org.uk

Self-regulatory body that devises and enforces the CAP Code that is administered by the ASA.

Ofcom - the independent regulator and competition authority for the UK communications industries - www.ofcom.org.uk

Office of Fair Trading (OFT) - www.oft.gov.uk

Acts as a legal backstop to the ASA via the Control of Misleading Advertisements (Amendment) Regulations 2000

Radio Advertising Clearance Centre (RACC) - www.racc.co.uk

Commercial radio's advertising body, funded by commercial radio stations and administered by the trade association of the industry, the Commercial Radio Companies Association (CRCA).

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