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New Sheriff For Websites & Social Media: Remit Extension Comes Into Force

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Some website content has, until now, escaped policing. This has now changed with a new website/social media regulator. The implications extend beyond the UK. In his capacity as Chair of the Advertising Law Group, Rafi Azim-Khan (Partner, London) recently hosted a meeting with the Chief Executive of the UK Advertising Standards Authority (ASA), to investigate the practical implications of the 1 March 2011 change and enforcement priorities. From this meeting we learned more about the ASA remit extension, which covers all website/new media content, not just paid-for space or messaging, and applies to all sectors.

Prior to 1 March 2011, the Committee of Advertising Practice Code and its broadcast equivalent (which both lay down rules which govern what you can/cannot say about your goods/services, such as claims and statements must be responsible, decent and legal, must not mislead or offend, etc.) only applied to traditional media (posters, magazines, TV, etc.) and advertising in paid space online.

However, from 1 March 2011, these Codes now apply to companies' content and messages on their own websites and new/social media marketing communications in other non-paid-for space under the advertiser's control, such as social networking sites like Facebook and Twitter.

Will the ASA only look to police .uk websites?

No. If a company is registered in the UK, any website it uses will be policed by the ASA, regardless of the top-level domain (.com, .net, .org etc).

Similarly, all .uk websites will be policed. Websites which target UK customers will also be caught, where these are not subject to regulation by an international equivalent of the ASA. As stated above, communications in other non-paid-for space online under the marketer's control will also be covered.

Being a .com or US-based website does not "save" you

Don't forget about other international forms of civil and criminal liability for your website even if you are a .com or US-based site. There is now considerable case law and legislation (e.g., the EU E-Commerce

Directive, Distance Selling Directive, E-Privacy Directive, etc.) that can still catch you if you accept inquiries or orders from or indeed target foreign consumers.

What is the position regarding user-generated content (UGC) created by private individuals?

UGC will only be caught if it is incorporated within an organisation's own marketing communications.

For example, following discussions with the ASA and commentary from The Committee of Advertising Practice (who are responsible for the Codes) it is thought that a consumer's positive comments that have been posted by the website owner in a prominent way on the front page of its website would likely be caught by the ASA, whereas genuine comments which appear within the context of a consumer message board moderated for harmful and offensive language or images only would not.

Nevertheless, it is very much a case of watch this space. Organizations do need to be very careful as to how blogs, message boards, etc. on websites appear, to ensure that they are not unintentionally deemed to be advertisements/commercial messages.

What will happen if I fall foul of the new rules?

This could have serious reputational and financial ramifications. The ASA website will name and shame those in breach. They also may place advertisements online highlighting an advertiser's non-compliance and have the support of search engines to remove advertisements which link to your website. So, customers using Google to search for your goods/services could in fact be hit with breach warnings and links to you could be deactivated.

These powers are in addition to the ASA's present sanctions, which include the right to require pre-vetting of all ads and/or to refer advertisers to the Office of Fair Trading, which in turn can consider action under the Consumer Protection Regulations and/or the Business Protection Regulations, seeking injunctions and potentially unlimited fines via the Courts. There is also potential EU-wide civil and criminal liability.

What does this mean in practice?

The policing regime for websites and social media has significantly changed. The change does not just affect UK companies. While consumers may welcome the new regime as affording them extra protection, the changes mean greater exposure for anyone doing business or promoting themselves online.

Companies should urgently review their websites and all online and social media activities and campaigns (and carefully consider such materials, activities and campaigns before going live). They should also carefully consider any competitor activity that may breach the new extension of the rules and provide an opportunity to object or take action.

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