

consumers find shelter from dodgy websites



ASA Guidelines and Business Compliance – Extension of the CAP Code

The extension to the ASA Code which governs advertising was extended to cover websites and this was advertised in a series of offline and online media campaigns. These campaigns highlighted the extension to the powers of the ASA to receive and act on complaints about websites. Over 3,500 complaints about websites were given to the ASA in a single 2 year period which they had to ignore as they fell outside their guidelines, prompting an extension to the CAP (Committee of Advertising Practice) remit. The ASA code is not a law but is an extension of a law, in addition to other rules, and is a much easier and less onerous way of dealing with a breach of the law. The rules also lay out common sense guidelines around the execution of marketing communications on the web, what is reasonable and what is not.

These are a set of rules that govern the way that businesses are expected to behave. The rules are rules and as such the ASA takes the view that clarity in what the rules state mean they pursue both perceived breaches as well as investigating complaints.

What Do the Rules Say

There is, as there is with any code of conduct, guideline or law, a certain amount of interpretation to the code. Some have interpreted it to extend to certain practices which are highly likely to be outside the remit of the codes. According to the ASA.org.uk website, they put forward the following interpretation:

“The Advertising Codes contain wide-ranging rules designed to ensure that **advertising does not mislead, harm or offend**. Ads must also be socially responsible and prepared in line with the principles of fair competition. These broad principles apply regardless of the product being advertised.

“In addition, the Codes contain specific rules for certain products and **marketing techniques**. These include rules for alcoholic drinks, health and beauty claims, children, medicines, financial products, environmental claims, gambling, direct marketing and prize promotions. These rules add an extra layer of consumer protection on top of consumer protection law and aim to ensure that UK advertising is responsible.

“The ASA administers the rules **in the spirit as well as the letter**, making it almost impossible for advertisers to find loopholes or ‘get off on a technicality’. This common sense approach takes into account the nature of the product being advertised, the media used, and the audience being targeted.”

Upon reading the rules in detail, they are basic marketing common sense and steering clear of the Consumer Protection Act 2008 which, when enforced, is more effective at punishing unfair behaviour, coming with a criminal conviction and fine as it can. While common sense can seem amorphous, the rules the ASA has set out they are practical common-sense for more than just websites. Moving beyond websites to look at the ASA more generally, the guidelines specify such activities as not encouraging drinking and driving, not using extremely distressing and shocking images, being clear that an email or other form of communication is marketing and other related common sense guidelines. As common sense is relative, the ASA have worked to lay out the limitations and specifics of common sense in this case.

Google has invested a significant amount of funding into the ASA, becoming part of the regulatory system through support, as have other search engines through the continual funding of the ASA though this is not directly. The funds go into a different company who then use those funds gathered to pay for the ASA so the ASA is never directly aware of where the funding comes from. Except, of course, in the case of the initial money from Google. Whether this was in response to a

growing number of complaints sent to Google themselves against the sheer volume of websites violating the Consumer Protection from Unfair Trading Act 2008 (law – not just guidelines) which appear in their search results but, aside from penalising them, they are helpless to act against is not clear.

What Does the Code Cover

The ASA rules add an extra layer of interpretation on top of the consumer protection law and aim to ensure that UK advertising is responsible. The code has existed for quite some time and this change merely extends the remit of the code to cover websites under the control of the advertiser but stops short of including the natural search results. This omission, likely at the behest of Google, limits the code and provides a convenient outlet into which misleading and false advertising claims can continue to be broadcast with seemingly no controls.

The CAP digital remit specifies the sites under the control of the ASA regulations from 1 March 2011 which are advertisers of any sort: whether a fast food chain making a video game which is meant to raise awareness of late opening times; or a marketer communicating with a consumer for some purpose. This code conveniently continues to leave large holes in the coverage of the rules and specifically does not cover some transactions which have been construed by some in the search industry.

According to the clause in the rules dealing with the new regulation “CAP has taken into account stakeholder expectations that the ASA regulates organisations’ own marketing communications on their own websites, and the social and political concerns relating to this growing and ever-changing sector. CAP notes that advertisers are increasingly using their own websites and other non-paid-for space online, such as social networking sites, to target their own marketing communications to UK consumers. Taking these factors into account and to ensure that the same high standards are achieved in marketing communications on websites as in other media, CAP has decided to extend the digital remit of the CAP Code.”

It specifically covers “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 their control, that are directly connected with the supply or transfer of goods, services, opportunities and gifts, or which consist of direct solicitations of donations as part of their own fund-raising activities”

One would argue that common sense would lead any advertiser to continue adhering to the ASA rules whether online or offline, on their own website or on social networking sites. Any and all marcomms activity is subject to scrutiny and the question any responsible advertiser will ask is whether there is a compliance issue with the ad, regardless of the platform the message is broadcast on.

On a fairly serious note, failure to comply with the Consumer Protection from Unfair Trading 2008 is a criminal offence. While the ASA guidelines are a code of conduct, they are an extension of this regulation which was set into law in 2008 following several years during which the UK did not comply with this EU legislation. The two main sections under which digital advertisers are likely to be found in breach of, if any, are:

The Consumer Protection from Unfair Trading Regulation 2008
No. 1277 PART 5 SUPPLEMENTARY
Regulation 3(4)(d)
SCHEDULE 1

Commercial practices which are in all circumstances considered unfair:

11. Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial)
22. Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.

The ASA merely extends this law and adds common sense practical advice on how the law is to be interpreted with a few additional extensions to the guidelines.

What Does the Code NOT Cover

The code here as clearly laid out does not cover a number of things, including assertions made by some in the search marketing world. For example, paid links whose purpose is to increase rankings, which while a violation of the Google TOS, would not necessarily be a contravention of the ASA Code provided they were correctly identified as such. Links in editorial content are excluded and while paid blog posts could fall under the remit, it would likely be only where a specific claim was being reiterated. It will remain to be seen whether a paid blog post where the blogger has full editorial control falls under the guidelines.

Additionally, blog posts which have been paid for but not directly written by the “advertiser” fall outside this remit as the contents was generated by a third party, for use on a non-advertiser controlled space and may or may not result in sales as once a blogger has a product for review, the review can be negative. Placing control of the content outside the control of the “advertiser”, provided it is not then used in further advertising communications which then bring those under ASA remit, is clearly outside the guidelines of the ASA.

While the ASA claim to regulate within both the “spirit and the letter” of the code, it is a set of rules which while linked to sanctions, do not carry the full weight of a criminal conviction and therefore not very strong. The ASA itself has a limited ability to regulate the millions of sites within the UK proactively due to time and resource. Reprimands under the guidelines, which include taking paid advertising against the offending site, are costly both to the ASA and the business. These sanctions could be enough to deter most businesses.

What Are the Penalties

There are a number of penalties outlined in the code which can include taking out paid advertising notifying of the non-compliance. Generally complaints are dealt with by the ASA and no further action needs to be taken after an investigation following a complaint if the complaint is upheld. While lacking legal power, a number of companies and agencies will withdraw from trading agreements with a non-compliant trading partner including a partner trading in the digital space.

Digital advertisers can find their ads pulled from all of the major search engines, as well as sanctions such as all marketing requiring pre-approval which can last up to 2 years. For any agency working in the digital space, having all PPC ads subject to pre-approval before going live would significantly impact on their ability to trade profitably. Since all paid advertising rights could be pulled from the search engines as well, this could kill off an agency.

A worst-case scenario could be being found in breach of the consumer protection act and facing a fine or jail time. Since the ASA rules are only rules and not laws, they do not in and of themselves result in a criminal prosecution, criminal record or possible jail time. Breaching the guidelines can

result in hefty commercial penalties but the actual legal penalties are nonexistent under just the ASA code. Penalties under the consumer protection act are more serious and if found in breach of this law, especially if the lengthy process involved in an ASA investigation is found to have happened prior to prosecution, it could go quite badly.

In Summary

The ASA guidelines are full of common sense rules & advise about what not to do in advertising. That what constitutes advertising now extends to websites is both a good and bad thing. The extension of the ASA code to websites can be seen as an extension to the business and consumer protection acts and thus a chance to fix a breach of the law without having to go to court. Breaking the rules, if upheld, is still a serious issue and breaches can result in significant business damage. Criminal prosecution is much more traumatic than an ASA investigation and whether web-based business websites wish it or not, they are now covered under a sensible code of practice. In all cases where there is any question at all, a lawyer should be consulted.

