Advertising on the Net

UNITED KINGDOM

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This article considers the common pitfalls of advertising on the Net, looking in particular at United Kingdom regulation of pricing, and trade descriptions and comparative advertising.

Introduction

The Internet is an increasingly attractive means of communicating advertisements, promotions and other marketing communications to a significant and growing audience. In March 1999 the Trade and Industry Committee enquiry into e-commerce estimated that in the United Kingdom alone there were 7.5 million on-line consumers and this figure is set to double in 1999. Other estimates predict that over 110 million consumers will have access to the Internet within the next few years.

The Internet is particularly attractive as an advertising medium as it permits companies to be much more focused in their targeting and in their responses to queries. For example, it is known that 29% of consumers aged 25-34 currently use the Internet (the age group which has shown the most rapid increase in use over the last 18 months), and that the majority of those users are male. Typical advertising rates are somewhere in the region of £15-18 ($25-30) per thousand "hits". A site delivering one million hits per month has a marketing/advertising revenue potential of £15,000 to £18,000 per advertiser.

"Webvertisers" seeking to comply with the law must therefore initially find answers to two question.

1.Can national regulations be sensibly applied to the Internet?

In terms of UK law, webvertising and site content must comply with a wide range of marketing, consumer, privacy and contract laws, regardless of whether those laws were conceived with Internet activity in mind. In the United Kingdom, advertisers must consider liability in three areas:

(i) censure for breach of a regulatory code;

(ii) criminal liability for a statutory offence; and

(iii) civil liability for infringing third party rights.

2.Which laws apply, given the global, multi-national accessibility of the medium?

Advertising in general is regulated by a complex web of legislation, case law, statutory law and self-regulatory codes. This is mirrored in other countries where separate systems and controls exist. Unfortunately, no uniform system applies. Deciding which laws are relevant may not be straightforward, given the Web's global reach (jurisdictional matters in general pose interesting problems for e-commerce).

The British Codes of Advertising and Sales Promotion

The combined Code of the British Codes of Advertising and Sales Promotion (BCASP) laid down by the Committee of Advertising Practice (CSP), governs non-broadcast advertising. Although BCASP does not specifically refer to advertising on the Internet, the Advertising Standards Authority (ASA) has taken a view that it does nonetheless apply to advertising in this form. It should be noted that a new revised BCAP is due sometime in 1999. Compliance with the BCASP is supervised by the ASA.

BCASP states that all advertisements must be legal, decent, honest and truthful; they must be prepared with a sense of responsibility to consumers and to society; and adverts must respect the principles of fair competition generally accepted in business. All claims made by an advertiser must be capable of substantiation and supported by relevant documentary evidence. Advertisers are also obliged not to mislead consumers with inaccuracy and ambiguity, exaggeration or omission.

The sales promotion section of BCASP addresses issues of relevance to distance selling. For all web pages promoting sales the BCASP requires that any promotion should state the full name and address of the advertiser and the main characteristics of the service being offered, including the price (with details of any additional costs, such as VAT or transport and delivery charges). If there are any peculiar conditions affecting the availability of the goods these should be explained. Any order received from a consumer should be fulfilled within 30 days and the customer should be provided with written information on payment arrangements, the right to withdraw and the most appropriate address for contact. Money should be refunded promptly if consumers have not received their goods or services, or where goods are returned because they are damaged.

The terms of the EU Distance Selling Directive (to be implemented by the United Kingdom by 4 June 2000) also dictate that the consumer's right to a seven-day cooling-off period following acceptance (and right to terminate the contract) must be stated on the web page and in any terms.

Although BCASP is not statute-based, the ASA may require an advertiser to withdraw or amend on advertisement in breach of it. This policing is possible due to the Code's industry-wide backing. The ASA can request media organizations not to publish an offending advert. Failure to comply with BCASP results in adverse rulings and a description of the breach is published in the ASA's monthly report – which is not good for the public relations of the offending advertiser. Serious breaches or persistent offenders may be referred to the Director General of the Office of Fair Trading under the terms of the Control of Misleading Advertisements Regulations 1988, which empower

the Director General to obtain an injunction to prevent publication of the offending advertisement.

Advertising Legislation

There are also two important pieces of legislation that apply to website content and webvertising, namely those governing (a) pricing and (b) product descriptions.

Pricing

The Consumer Protection Act 1987 deals with pricing issues and states that it is a criminal offence to give price indications to consumers which are or become misleading and which relate to the price of any goods, service, accommodation or facility. A price will be "misleading" if a reasonable consumer could reasonably infer from the advert (or from an omission from an advert) that the price is less than in fact it is. Key problem areas are, for example: hidden extras (e.g., packaging and transport), not comparing like with like, failing to update prices which become out-of-date, and not quoting VAT-inclusive prices to consumers. Certain products such as mobile phones and hi-fi upgrades are notoriously problematic due to the amount of options available and related on-going contracts.

As a breach of the Act is a criminal offence, it should be noted that not only does the company risk being fined on a corporate level, but also any "consenting or conniving" directors or managers, or any other persons in positions of responsibility involved, risk personal fines and/or imprisonment!

Product Descriptions

These are governed by the Trade Descriptions Act 1968. It is a strict liability offence to apply a false description, or a truthful but misleading description, in the course of business which affects the goods to a material degree. Trade descriptions can cover a multitude of claims: for example, a car salesman who turns back the odometer before selling a car is applying a false trade description; more obviously, the direct marketing agency which describes its client's yoghurts as "real fruit" when it only contains flavourings, is committing an offence.

The 1968 Act provides a defence of "innocent publication" for third parties. The defence is available to persons who can show that they received the advertisement for publication in the ordinary course of their business (as publisher of such information) and that they did not know (and had no reason to suspect) that its publication would amount to an offence under the Act. It should be noted that this defence is not available to the advertiser responsible for creating the problematic material, although a company which can show it exercised due diligence to avoid committing an offence may have a defence.

All content and copy should be carefully checked to ensure it does not infringe any third party rights and give rise to a possible action from third parties.

Trademarks

Trademark infringement can arise if a website uses registered trademarks of third parties without consent, unless the trademark is being used honestly and simply for the purpose of identification and is not bringing the mark into disrepute. The Trademarks Act 1994 introduced some wide-ranging changes to UK trademark law and essentially made it possible to apply for registration of any mark "capable of graphical representation". This means that in addition to the obvious word marks and logos, advertising straplines, slogans, shapes, colours and even smells are theoretically registrable and therefore protected. Even if a mark is not registered there may still be liability for any use of a "well known" mark under §56 of the Act.

Hypertext Links and Copyright

A particular concern in relation to Internet sites is the potential for copyright infringement through hypertext links to a third party site. This will be covered in more detail in a later issue.

Comparative Advertising

In comparative advertising, naming your competitors raises issues relating to various relating to various areas of intellectual property, namely registered and unregistered trademarks, passing-off, copyright, defamation (through both libel and malicious falsehood) and the Codes.

The Trademarks Act permits comparative advertising using a third party's registered trademark where the use (for the purpose of identifying goods or services as those of the proprietor or a licensee) is not contrary to honest practices in industrial or commercial matters and it does not, without due care, take unfair advantage of, or is not detrimental to, the distinctive character or repute of the trademark (§10(6)).

There are two important cases which have helped shape the interpretation of what is meant by "honest practices", "unfair advantage" and "detrimental". In *Barclays Bank v. RBS Advanta* [1996], it was held that a trademark may be used to compare goods provided use is not dishonest. The burden of proof is on the trademark owner to show that the use of the mark is not in accordance with honest practices, and that the infringement was something more that just the use of the mark in a trademark sense. This was to be determined by an objective test: would a reasonable member of the public, knowing the full facts, consider that the advertisement was not honest? It would also depend on the circumstances and the goods being sold (e.g., claims about second-hand cars would be treated differently from claims about medicines).

A comparison which is unfavourable to a competitor does not necessarily mean that it is dishonest or unduly detrimental. Failure to point out your competitor's advantages is not necessarily dishonest. The court said the words "unfair advantage" and "detriment" added little to the honesty test and ruled in favour of the defendant.

In *Vodafone Group Plc.v. Orange Personal Communications Services Limited* [1997] decided shortly after the *RBS Advanta* case, the plaintiff complained about a claim in Orange's advertisement which stated "on average, Orange users save £20 [$30] every month". The advertisement compared its services to that of the plaintiff's on apparently "equivalent tariffs". The plaintiff argued that the defendant had taken unfair advantage of its registered trademark. The court followed the ruling in the *RBS Advanta* case and held that the use of the trademark fell within the proviso under §10(6). He also held that a substantial proportion of the intended recipients of the advertisement would not be misled by the above slogan. The courts accordingly have taken a robust view of where the boundaries of §10(6) will be drawn in relation to registered trademarks.

The Trademarks Act also applies to references to "well known" unregistered marks. This gives the proprietor a statutory alternative to the common law action of passing-off.

Passing-off can often arise in comparative advertising disputes. The key essence of a passing-off action is confusion: which is at the crux of the high-profile case, *Mc-Donald's Hamburgers Ltd v. Burger King (UK) Ltd* [1987]. Burger king had advertised its "Whopper" burger by including the catch-phrase "it's not just Big, Mac". This was a jibe at the McDonalds' best selling burger. McDonalds conducted a survey and found that a significant number of consumers believed the advertisement to be for McDonald's Big Mac burger as opposed to the Burger King's Whopper burger. They accordingly argued passing-off to the extent that the confusion was causing a loss in revenue and successfully obtained an injunction against Burger King.

The issue of copyright clearance and infringement is equally of concern to advertisers who are using a competitor's logo, label, graphics, etc., in their comparative advertising promotions. It is an infringement under the Copyright, Designs and Patents Act 1988 to copy in material form the whole or substantial part of a copyright work. Note that whilst an advertiser may be entitled to use a rival's trademark (but see the provisos stated above), it is not entitled to use a copyright work in the same way. An anomaly thereby arises where the use of a trademark logo within the meaning of §10(6) of the Trademarks Act may not infringe the trademark but the same use may nevertheless infringe the copyright in the logo.

Care must be taken in using comparative advertising techniques to ensure that statements of comparison with competitors' products are not defamatory or libelous. This could arise where an advertisement is factually incorrect and where the complainant/plaintiff can show in court that the words used tend to lower its reputation in the eyes of the public. A statement can be libelous without necessarily being malicious (unless the defendant pleads fair comment or qualified privilege). And the plaintiff need not prove special damage. The defendant advertiser in turn must prove the allegations are true.

By contrast, where a comparative advertisement contains a false statement about a competitor's goods or services, an action for "malicious falsehood" may lie against the webvertiser if a false statement has been made with malice (some dishonest or improper

motive) calculated to cause the plaintiff pecuniary loss. There is no requirement to show actual damage to reputation.

BCAPS also applies to comparative advertising. It allows comparisons between the advertiser's own and a competitor's products, explicit or implied, provided the comparisons are clear and fair and create no artificial advantage from selected comparisons. Any comparison must not unfairly attack or discredit a competitor's products or goods nor can it make unfair use of goodwill attached to the competitor's trademark, brand or name.

Price comparisons are governed by the legislation and common law relating to defamation and contract law as well as the provisions of the Consumer Protection Act and the regulations stipulated in the Code on Price Indications (§25).

Conclusion

At present, webvertising in the United Kingdom is governed by the same restrictions as other kinds of non-broadcast advertising. However, extra attention should be given to issues which are peculiar to the Internet as an advertising medium: webvertisers must be conscious of the laws of countries where consumers have access to their web pages, and they should be cautious especially in relation hypertext links with other websites and comparative claims (explicit or implied).