



Advertising Standards Authority
Mid City Place 71 High Holborn London WC1V 6QT
Telephone 020 7492 2222 Fax 020 7242 3696
Textphone 020 7242 8159 E-mail enquiries@asa.org.uk
Online www.asa.org.uk

Email: becom@parliament.uk

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Advertising Standards Authority evidence on the advertising of broadband speeds

1. Introduction

- 1.1. The Advertising Standards Authority (ASA) is grateful for the opportunity to provide evidence to the Business and Enterprise Select Committee fact-finding review into broadband. The ASA is happy for this submission to be published.
- 1.2. The ASA is the UK self-regulatory body for ensuring that all advertisements, wherever they appear, are legal, decent, honest and truthful.
- 1.3. The protection of consumers is at the heart of the ASA's work. The rules we administer aim to ensure that advertising does not mislead or offend.
- 1.4. This response provides:
 - A summary of the UK advertising self-regulatory system. More detailed information can be found on our website www.asa.org.uk.
 - Details on how the ASA regulates advertisements for broadband speeds and the particular regulatory challenges it raises.
- 1.5. All rulings mentioned in this submission are included in full in the Annex.

2. Advertising self-regulation in the UK

- 2.1. The system is based on a concordat between advertisers, agencies and the media that each will act in support of the highest standards in advertising. Compliance with the Codes and ASA adjudications is binding on all advertisers. It is not a voluntary system.
- 2.2. The system is both self-regulatory (for non-broadcast advertising e.g. press, poster, cinema, online) and co-regulatory (for TV and radio advertising).
- 2.3. The Codes sit within a legal framework, which means that, where appropriate, they reflect the standards required in law, e.g. the Consumer Protection for Unfair Trading Regulations 2008 (CPRs) for misleading advertising. The Codes also contain additional protections that are not required under law e.g. rules related to taste and decency and social responsibility.
- 2.4. The ASA is responsible for administering five Advertising Codes and deals with more than 26,000 complaints per year. Just one complaint can cause the ASA to launch an investigation and remove an advertisement, if the ad is found in breach of the Codes.
- 2.5. The Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) are the industry committees responsible for writing and maintaining the Advertising Codes.

Chairman Rt Hon Lord Smith of Finsbury • **Chief Executive** Guy Parker
ASA Council James Best • Louisa Bolch • Sally Cartwright • Elizabeth Fagan • Alison Goodman • David Harker • Gareth Jones • Andrew Motion • Susan Murray • Colin Philpott • Ruth Sawtell • Nigel Walmsley • Neil Watts • Diana Whitworth • Anthony Wilkes

The Advertising Standards Authority Limited, registered in England No 733214, Mid City Place, 71 High Holborn, London WC1V 6QT.
The Advertising Standards Authority (Broadcast) Limited, registered in England No 05130991, Mid City Place, 71 High Holborn, London WC1V 6QT.

- 2.6. The Committee members represent the three main parts of the advertising industry, namely the advertising agencies, media owners (e.g. poster site owners, newspapers, broadcasters) and the advertisers themselves.¹ CAP and BCAP also enforce the adjudications of the ASA.
- 2.7. CAP writes and updates:
- The British Code of Advertising, Sales Promotion and Direct Marketing ('the CAP Code'), which governs non-broadcast advertising (e.g. print, poster, cinema, online).
- 2.8. BCAP writes and updates:
- The BCAP TV Advertising Standards Code
 - The BCAP Radio Advertising Standards Code
 - The BCAP Code on Text Services
 - The Rules on the Scheduling of Television Advertisements
- 2.9. Final adjudications on investigations are decided by the ASA Council and published on the ASA website. The Council's membership incorporates two-thirds members of the public, one-third advertising experts and is independently chaired by the Rt Hon the Lord (Chris) Smith of Finsbury.
- 2.10. In the event that the ASA upholds a complaint against an advertisement, the advertiser or broadcaster is required to amend, withdraw or schedule the advertisement appropriately.
- 2.11. Advertisers that breach the Code face financial loss from having an ad campaign pulled and loss of reputation through the publication of upheld adjudications.
- 2.12. The vast majority of advertisers comply with ASA rulings straightaway. For those advertisers who refuse to comply, industry and other pressures can be brought to bear. For example, pre-vetting can be imposed and direct marketing companies can have benefits such as Royal Mail bulk-mailing discounts removed. In serious and persistent cases of non-compliance advertisers can be referred to the OFT (for misleading advertising) and broadcasters can be referred to Ofcom. Referrals are rarely required.
- 2.13. The system places a lot of importance on helping advertisers to get their ads right before they are published, through education and pre-publication advice.
- 2.14. For broadcast advertisements, the broadcasters have set up pre-clearance bodies: Clearcast for TV, and the Radio Advertising Clearance Centre (RACC) for radio. These bodies clear ads before they go on air and are very effective at maintaining high standards. However, pre-clearance does not prevent the ASA from investigating or upholding a complaint about a broadcast advertisement.
- 2.15. It would be impossible to pre-clear the many millions of non-broadcast advertisements that appear every year in the UK. However, CAP offers pre-publication advice for non-broadcast advertisers through its Copy Advice team and providing comprehensive online guidance.²

¹ Details of the members of CAP and BCAP can be found at:
<http://www.cap.org.uk/About-Us/Who-We-Are.aspx>

2.16. The total number of ads about which the ASA receives complaints accounts for less than 1% of all advertising published or broadcast in the UK. The ASA also monitors ads to check levels of compliance and have non-compliant ads removed. Compliance surveys regularly show that the vast majority of advertising is compliant with the Advertising Codes.³

2.17. The Advertising Codes can be accessed at <http://www.cap.org.uk/The-Codes.aspx>

3. Advertising broadband speeds

3.1. The ASA is fully aware of the concerns that exist around how broadband internet service providers (ISP) advertise the speed of their services. The basic concern has been the disparity between the headline speed advertised (e.g. 2Meg or 8Mb) and the speeds actually achieved by consumers.

3.2. As the advertising regulator, the ASA has considered this issue extensively. We have a duty under the Advertising Codes to ensure that consumers are not misled and that a level playing field is maintained for business.

3.3. ASA policy is set by 'case law'; that means every adjudication the ASA makes helps to build up a picture of what is, and is not, acceptable in advertisements. This approach means that the ASA position can evolve over time and in response to changes in technology and consumer understanding.

3.4. As mentioned in 2.3 above, the rules in Codes for misleading advertising reflect the CPRs. The CPRs transposed the Unfair Commercial Practices Directive, which is the EU framework directive for consumer protection and is maximum harmonisation in its effect. Members of the Committee will therefore understand that the Advertising Codes and ASA decisions may not go beyond or drop below these legal requirements.

3.5. Why does the headline speed differ from the consumer experience?

3.5.1. There are limitations inherent in ADSL technology, which mean that the broadband speeds achieved by individual consumers will vary significantly due to a number of factors:

- principally, the distance from the exchange (signal attenuation);
- the number of consumers who have signed up to the service in the local area (contention ratio);
- the time of day (contention - the number of people using the service at certain times of the day can cause speeds to fluctuate at peak times) and;
- the equipment the consumer is using at home.

² The Advice Online section has articles on advertising of Internet speeds, and the full list of all Advice Online articles can be found at: <http://www.copyadvice.org.uk/>

³ The high compliance rate is often demonstrated in the various sector-specific surveys undertaken by the ASA. These surveys can be found on the ASA website at <http://www.asa.org.uk/asa/research/>

3.5.2. This means broadband speeds achieved by consumers vary significantly around any given telephone exchange. Distance from the exchange (signal attenuation) is the main factor, but its effect is by no means uniform. Add to this the fact that even an individual's connection is not consistent – it can fluctuate according to the time of day - and the difficulties of creating a meaningful message for consumers about the speed of a broadband service quickly become clear.

3.6. **What do the Advertising Codes say?**

3.6.1. Broadly, the Advertising Codes contain clear rules that state that advertisers must not mislead consumers, by act or omission.

3.6.2. The Advertising Codes also require advertisers (and broadcasters) to hold substantiation for the claims they make. The substantiation must be robust and capable of withstanding third party scrutiny.

3.7. **What is the ASA's regulatory position?**

3.7.1. In response to consumer concerns, the ASA made a series of rulings in 2006 and 2007 that required ISPs to make their ads clearer about the limitations affecting their services in order to set more realistic consumer expectations of the speeds they were likely to achieve.

3.7.2. During the ASA's investigations it became apparent that the only consistent speed that is capable of being objectively substantiated is the speed of the service as it leaves the exchange. There is no independent third party that is continuously and comprehensively monitoring broadband speeds, although we are aware that Ofcom has started to look at the issue and has done some recent research on user experience.

3.7.3. The ASA recognised the intractable problem of trying to devise a meaningful way of communicating the wide variations in speed achieved by each individual user in the form of a simple 'speed claim' [see section 4 below for more details of the options we considered]. We were particularly mindful of the need for consumers to be able to compare services between broadband providers. So in its decision-making the ASA has worked hard to strike a balance that allowed broadband providers to advertise their services and consumers to distinguish between products.

3.7.4. The position the ASA has arrived at, after careful consideration of all the various factors, is that the broadband provider may make a headline speed claim based on the speed of the service as it leaves the exchange, subject to the following qualifications which must be made clear in the advertisement:

- The broadband speed must be preceded by the words 'up to', in order to make it clear that a consumer can receive anything up to the advertised speed.
- The ad must contain a clear notice in the main body copy (i.e. not in a footnote) that states that speeds vary significantly subject to a number of factors, such as distance from the exchange.

- The ad must also make clear where the service is available i.e. geographical limitations that might mean a headline speed is only available to those in, for instance, urban areas.
- 3.7.5. The requirement for body copy information comes from a 2006 ruling against Bulldog Communications Ltd. The ASA received a complaint that signal attenuation on ADSL broadband services of up to 8 Mbps would detrimentally affect the user experience of such a significant number of 8Mb customers that “Up to...” on its own was not sufficient to qualify the headline speed claim.⁴
- 3.7.6. The ASA has also upheld against Be Un Limited for their claims "Up to 24 meg broadband ...” again on the basis that signal attenuation due to line length meant that many users would never get close to the headline speed.⁵
- 3.7.7. In practice, over half of Be Un Limited users achieved speeds of over 12 Mbps and, in terms of user experience, we considered that the difference in speed from what was claimed and what was achieved was unlikely to have a significant effect on the user. This was because virtually all (98%) Be Un Limited users achieved speeds of over 6 Mbps. This was the speed in the Bulldog investigation that we considered (at that time) adequate to meet nearly all demands users might place on the broadband service. However, unlike previous cases, we considered that the gulf between the typical speeds achieved by users and the headline speed quoted was so large that it also warranted prominent qualification in the body copy of the ad.
- 3.7.8. The Be Un Limited adjudication is therefore an extension of the Bulldog adjudication applying to the newer ADSL2+ broadband technology.
- 3.7.9. It is worth noting that during these investigations and subsequent instances where we have revisited the matter to review the policy, the ASA has based its decisions on significant amounts of line test data provided by ISPs. In some instances, rather than requesting a sample, we have actually required an ISP to provide data on the user experience of their entire customer base on a particular package. In the absence of broad third party data, we have relied on this information to give us a picture of user experience and to ensure that our decisions are rooted firmly in the available evidence.
- 3.8. **Compliance and other regulatory activity**
- 3.8.1. The ASA’s adjudications have been backed-up by subsequent and on-going work by the various arms of CAP. The CAP Compliance team wrote to broadband ISPs shortly after the Bulldog adjudication to ensure that the ruling would be followed across the entire sector.
- 3.8.2. Furthermore, CAP’s monitoring function has pursued advertisers who have not adhered to the position established in the ASA adjudications. They have been particularly active in ensuring that the requirement for a prominent disclaimer is followed by advertisers.
- 3.8.3. Clearcast and the RACC ensure that TV and radio advertisements are in line with relevant ASA adjudications.

⁴ See the attached Annex

⁵ Ibid

- 3.8.4. It is important to remember that the ASA is not the only part of the regulatory landscape. Broadband providers are regulated by Ofcom, with whom we liaised when they developed their Code of Practice for broadband providers.
- 3.8.5. The Ofcom Code requires ISPs to give consumers, prior to signing up to a contract, an indication of the likely speed that they will personally achieve when using the service. This is done through a simple test the ISP can carry out on a consumer's telephone line.
- 3.8.6. The CPRs recognise that it is not always possible to provide consumers with full information in an advertisement. Limitations on space and time and individual circumstances mean that advertisements can sometimes only give an indication of the service or product. The CPRs recognise that businesses communicate at various points with consumers and that, sometimes, businesses can provide information at different points in time, so long as consumers receive full and timely information in order to make an informed purchase.
- 3.8.7. The ASA believes that the measures we have taken, in conjunction with the roll out of Ofcom's ISP Code of Practice have made a significant impact in alerting consumers at various stages of the marketing and transaction process to the potential limitations to ADSL broadband services. In simple terms, we would contend that it is highly unlikely that a consumer can subscribe to a mainstream broadband provider without having been alerted beforehand to the speed limitation issue.
- 3.8.8. We firmly believe that the combined approach of the Ofcom Code and ASA regulation provides a pragmatic, proportionate response to a very complex problem affecting consumers' experience of broadband services. Furthermore, recent data would appear to support our view that the approach is working. Consumer concerns about disparities appear to have lessened significantly in recent years. We have seen a decrease of over 80% in the number of complaints made about the speed claims in residential broadband advertising in the past two years.

4. **Other options**

- 4.1. The ASA would like to reassure the Committee that when arriving at its adjudications and its current position, the ASA Executive gave significant consideration to other regulatory options. A couple of examples were:
 - 4.2. *Avoiding all numerical headline speeds*
 - 4.2.1. This option would clearly resolve the issue, but ignores the benefit for consumers of having a useful and relatively straightforward way of differentiating between different services and at different price points.
 - 4.2.2. We were also concerned that such a blunt approach to the question would create significant consumer detriment in the form of confusion created by the vacuum in the wake of any decision coupled with providers inevitable attempts to devise new, and potentially more misleading, methods of communicating the speeds of their services.

4.3. *Individual performance based headline speeds*

- 4.3.1. We examined the idea of restricting ISPs to advertising only headline speeds based on their individual and up-to-date user performance, as demonstrated by a representative and up-to-date sample of their users' performance data.
- 4.3.2. We envisaged that this could work by applying a formula to the company's dataset which would determine an acceptable headline speed based on actual user experience. One way of framing the approach would be: X% of users should be shown to have achieved speeds above Y% of any headline. For instance, whatever speed say 60% of users can be shown to have achieved is 75% of the permissible headline; if 60% achieve 4.5Mb, the ISP could claim only a 6Mb headline, even if the service is provided at 8Mb.
- 4.3.3. The concept has a clear advantage in that it creates an incentive for providers to improve their service and might therefore encourage competition.
- 4.3.4. However, our primary concern with this approach was the difficulty in enforcing compliance with the approach. As already mentioned, there is no independent third party capable of providing up-to-date line test data, which would therefore make verification of the claim and evidence difficult. This would be likely to lead to inter-competitor complaints, which we would have little choice but to investigate taking up significant costs in time and resources, but with little overall benefit to the consumer.
- 4.3.5. Moreover the appropriate values for 'X' and 'Y' are difficult to determine without a comprehensive dataset for the entire industry. The approach would require a significant amount of work from the regulators to determine an 'acceptable' level of performance. The values would have to be developed in consultation with consumers and the industry. However, given the speed with which the technology is developing (and the speed with which consumer expectations would change), it is highly likely that the level of acceptability would be a quickly moving target. This would be likely to become very burdensome regulation.
- 4.3.6. Finally, we also doubted whether this option would actually help consumers. The scope for confusion would be significant, in our view, because the option would still leave many consumers achieving below the new headline speed (and some exceeding it). So all the qualifications that we require advertisers to include in their advertisements would still have to be used.
- 4.4. Our overriding concern when considering the alternative approaches was whether the steps were actually necessary and whether they would markedly improve the position of consumers looking to purchase broadband services. We concluded that while such options appeared on paper to be an improvement, difficulties emerged when we looked at the practicalities of implementation and the potential benefits to consumers.
- 4.5. In particular, we noticed that, irrespective of how representative a revised headline speed could be, by the very nature of ADSL technology, a significant proportion of consumers would continue to suffer technical difficulties affecting the speeds they achieved. Therefore, any headline speed would still necessitate the type of disclaimer required by the Bulldog adjudication.

5. Ongoing and future regulation

- 5.1. The ASA recognises that broadband technology – and the consumer experience - is developing extremely rapidly, as evidenced by Ofcom's recent research. This shows that advertising regulation needs to be flexible and fleet-footed.
- 5.2. We envisage that our position on speed claims will continue to evolve as services develop, new evidence emerges and data collection methods improve. It is an advantage of the advertising regulatory system that it is flexible and can adapt to changing circumstances. Issues can be revisited and, through a new adjudication, a position can be changed or amended as appropriate.
- 5.3. However, in order for the ASA to revisit an established position through a formal investigation, we would require reasonable grounds, for example in the form of new evidence, to lead us to question our current stance. We have noted for instance, Ofcom's recent research, but do not at this point consider that it significantly changes the basis of our position, in that it fits with much of the data we have seen over the past few years.
- 5.4. It is important to note that advertising is just one part of the consumer experience. Ensuring that consumers are adequately protected and receive the information they need to make informed purchasing decisions requires the use of a number of interventions. Some of which relate to advertising regulation and the ASA continues to liaise closely with Ofcom on this matter. However, other approaches include sectoral regulation (which is undertaken by Ofcom), consumer education and a responsible business approach.
- 5.5. The ASA believes that it has adopted a pragmatic approach, which takes into consideration both consumers' expectations and the need for ISPs to market their services. The number of complaints the ASA receives suggests that the issue is no longer a significant cause for concern among consumers. The ASA has published three upheld rulings against ISPs this year (2009), of which two were misleading about the costs involved, and the final one referred to a fair use policy for very heavy users of the available bandwidth.⁶

The ASA is grateful for the opportunity to provide evidence to the Select Committee. If the Committee has any questions arising from this response then please do not hesitate to contact me.

Yours sincerely



Lynsay Taffe
Communications and Policy Manager

⁶ All rulings are published on the ASA website here: <http://www.asa.org.uk/asa/adjudications/public/>