

ONLINE PUBLICATIONS MEDIA PANEL (OPMP)

Background

The Online Publications Media Panel was established at the instigation of the Council of the Advertising Association and with the endorsement of CAP to help police the boundary between advertisements and other marketing communications and other forms of content, on websites and other non-paid for space online under the control of an online publication. The Panel responds to the particular concerns of online publishers for which the proper divide between editorial and advertisements and other marketing communications is a fundamentally important issue.

Composition

Panellists:

The Chairman of Pressbof (or, in his / her absence, an individual representing Pressbof nominated by the Pressbof Chairman)

The Chairman of Asbof (or, in his / her absence, an individual representing Asbof nominated by the Chairman)

Executive support:

CAP Secretary (Executive)

The Panel may call upon other individuals as required, whose participation may assist the Panel to fulfil its terms of reference.

Quorum

A quorum of both Panelists is required.

Core Principles

1. The Panel may reject requests if it believes the Panel is being used to hamper the effective running of the advertising self-regulatory system.
2. The ASA Council's judgment on the interpretation of the CAP Code is 'final' irrespective of opinions offered by the Panel.

Terms of reference

1. To advise the ASA and CAP Executive on whether a complaint, compliance action or copy advice relating to online content that is not clearly identifiable as an advertisement or other marketing communication and that appears on an online publication website or in other non paid-for space online under the publication's control, falls within the extended digital remit of the CAP Code.

2. To advise, on the basis of a request from an online publisher whose content is the subject of a complaint or compliance action relating to the publication's online content – appearing on its website or in other non paid-for space online under the publication's control - whether the content falls within the extended digital remit of the CAP Code.

For ease of reference, Annex A reproduces paragraphs 3.3 to 3.14 of CAP's document 'Extending the Digital Remit of the CAP Code', published on CAP's website on 1 September 2010. CAP intends these paragraphs to assist stakeholders, including the ASA to demarcate newly in-remit digital marketing communications from content that falls outside the ASA's remit.

Mindful of the importance placed on consistency in regulation, the OPMP shall have regard, as relevant and if appropriate, to advice given by the General Media Panel, decisions reached by the ASA Council and any other relevant information when it gives its advice.

Agenda and minutes

The agenda is distributed, ideally at least a week before the meeting, to:

1. The Panel;
2. The Chairman of CAP;
3. The Chairman of the GMP
4. relevant Executive staff.

Minutes are distributed to:

1. The Panel;
2. The Chairman of CAP;
3. The Chairman of the GMP
4. all CAP members;
5. relevant Executive staff.

Forum for assessment of cases:

The Panel will ordinarily receive agenda items by email only and will discuss those items by teleconference. The Panel may decide to arrange a face-to-face meeting to discuss Panel agenda items and the ASA will make available its meeting rooms to the Panel for this purpose.

ANNEX A: Extract from Extending the Digital Remit of the CAP Code

The extended online digital remit of the CAP Code

3.3. From 1 March 2011, the CAP Code will apply to:

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.

3.4. The drafting of the new remit is framed so as to focus specifically upon material which can be properly accepted as constituting an advertisement or other marketing communication. This responds to a particular challenge of regulating websites and other non-paid-for space online under an advertiser's control. Websites can include marketing communications and other types of communication including, for example, editorial, public relations e.g. press releases and investor relations material that must properly remain outside the remit of the CAP Code and, therefore, outside the jurisdiction of the ASA. The drafting of the extended digital remit, the additional assessment criteria and a list of categories of content excluded by the CAP Code (both of which are discussed in this document) are intended to assist stakeholders, including the ASA, to identify marketing communications coming within the extended digital remit.

3.5. Three important factors arise from the drafting of the extended digital remit:

I. 'directly connected with supply or transfer of goods, services' etc: this phrase is intended to identify and bring within the extended digital remit material which can be properly accepted as constituting an advertisement or other marketing communication. It is intended to help distinguish material that will fall within the extended digital remit from other types of communication that will remain outside the CAP Code. The phrase conveys the primary intent of marketing communications coming within the extended digital remit: to sell something. It is understood that a marketing communication may set out to sell something in a myriad of different ways. It need not necessarily include a price or seek overtly an immediate or short-term financial transaction or include or otherwise refer to a transactional facility. In judging the intent of a communication to sell something, the ASA may call upon one of CAP's advisory bodies, the General Media Panel¹⁰ for example, which consists of advertising industry practitioners and acts as a forum to advise the ASA and CAP in its core functions.

II. Marketing communications promoting causes or ideas: the current offline and online remit covers marketing communications promoting causes or ideas. CAP is not aware of any significant call for regulatory action in the area of websites that promote causes or ideas, either by complainants to the ASA, by industry, government or the third sector, to which the advertising self-regulatory system would be an appropriate response. The extended digital remit does not, therefore, cover marketing communications promoting causes or ideas but it does explicitly apply to marketing communications which

consist of direct solicitations of donations as part of fund-raising activities. CAP notes the potential for consumer detriment, especially financial loss, arising from these marketing communications. For example, consumer detriment could arise from misleading information about the purpose of the charity or donation being sought.

III. 'non-paid-for space online under [the advertiser's] control': this phrase covers, although not exclusively, advertisements and other marketing communications on advertiser-controlled pages on social networking websites. Social networking websites have a significant consumer reach, are popular with children and young people and play an increasing role in public policy debates.

Additional assessment criteria

3.6. Determining whether material constitutes an advertisement or other marketing communication coming within the extended digital remit involves a careful assessment of its specific content and the context in which it appears.

3.7. The assessment must consider, on a case-by-case basis, whether it can be reasonably assumed that the advertiser intended to sell something (the primary purpose of a marketing communication). The following additional criteria may assist stakeholders in these assessments but they do not alone determine what can be properly accepted as constituting an advertisement or other marketing communication. For example, depending on the context in which it appears, an advertisement or other marketing communication is likely to consist of commercial communication that:

- has appeared in the same or very similar form as an advertisement in paid-for third party space, or
- may include, or make easily accessible, an "invitation to purchase" as defined by the Consumer Protection from Unfair Trading Regulations 2008 ("*a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of that commercial communication and thereby enables the consumer to make a purchase.*")

Advergames

3.8. Advergames are typically video games that are used to promote a product or an organisation. The current digital remit covers advergames in paid-for space. Advergames on own websites or in non-paid-for space online under the advertiser's control which amount to marketing communications that are directly connected with the supply or transfer of goods, services etc will fall within the extended digital remit.

User-generated content

3.9. User-generated content (UGC) is content created by private individuals. In establishing whether UGC should be regarded as a marketing communication, and

consequently fall within the remit of advertising self-regulation, the primary and preliminary areas of enquiry to be considered are:

- Did the website owner originally solicit the submission of UGC from private individuals, then adopt and incorporate it within their own marketing communications?
- Did a private individual provide the website owner, on an unsolicited basis, with material which the website owner subsequently adopted and incorporated within their own marketing communications?

4.10. If the answer to either question is yes, (and of course that the content of the material and the form in which it is re-used by the marketer does itself constitute an advertisement or marketing communication by the marketer) then prima facie the UGC under consideration will be regarded as a marketing communication.

Communications excluded from the extended online digital remit

3.11. Communications that do not constitute an advertisement or other marketing communication coming within the extended digital remit will obviously remain out of remit. (As stated, the extended digital remit does not apply to marketing communications that promote causes or ideas.)

Existing exclusions

3.12. The extended digital remit will not apply to the list of content already excluded by the CAP Code. The most relevant exclusions include:

- Classified private advertisements
- Press releases and other public relations material
- Editorial content
- Political advertisements
- Corporate reports
- Natural listings on a search engine or a price comparison site
- Marketing communications in foreign media
- Claims in marketing communications in media addressed only to medical, dental, veterinary or allied practitioners, that relate to those practitioners expertise
- From the preface to the CAP Code: 'The Code is primarily concerned with the content of marketing communications and not with... products themselves'

New exclusions

3.13. From 1 March 2011 the CAP Code will be updated to reflect two new exclusions. The first, 'investor relations', clarifies a category of content that CAP understands is presently excluded by the CAP Code.

- Investor Relations. This refers to marketers' communication about their own company (including their goods or services) with the financial community, including shareholders and investors, as well as others who might be interested in their company's stock or financial stability.

3.14. The second, 'heritage advertising', relates to content that CAP considers should fall outside the extended digital remit. CAP considers it is appropriate to exclude heritage advertising from the extended digital remit because of the role that advertisements play in the UK's social history and because websites provide the facility to ensure heritage advertising is placed in an appropriate context. Amendments to the CAP Code may have rendered past advertising campaigns non-compliant. In some instances, such campaigns may be iconic material of value and relevance to the brand owner's website, and should therefore be permitted in an appropriately identified part of the website.

- 'Heritage advertising' by or from companies, organisations or sole traders on their own websites, or in other non-paid-for space online under their control, where that advertising is not part of their current promotional strategy and is placed in an appropriate context . In cases where advertisements or other marketing communications recently adjudicated against by the ASA are featured, rule 1.2 (the spirit of the Code) may be invoked to bring those advertisements or other marketing communications within remit.