

From 1 March 2011, the Advertising Standards Authority (ASA) began to regulate advertisers' own marketing communications on their own websites and in other non-paid-for space online under their control. The following explains the tests the ASA Council apply when determining whether a communication falls within the remit of the Code, and also contains illustrative ASA remit decisions demonstrating how these tests are applied in practice.

**On what basis does a communication in non-paid-for space online under a marketer's control constitute advertising, and therefore fall within the ASA's remit?**

The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (the CAP Code) applies 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 fundraising activities."*

This phrase brings within the online remit material which can properly be accepted as constituting an advertisement or other marketing communication, and distinguishes this material from other types of communication e.g. editorial content. A marketing communication is a type of communication for a good, service, opportunity or gift that primarily sets out to sell something. Of course, marketing communications may set out to sell in a myriad of different ways and may not necessarily include a price or seek an immediate financial transaction.

The ASA considers both the content and the context of such communications when deciding whether they constitute advertising falling within the remit of the CAP Code. For example, a product performance claim in an online annual report that would fall within the remit of the CAP Code if it featured in a newspaper ad, would be unlikely to do so when presented in the online annual report. Why? The claim is the same but the differentiating factor is the context: the primary purpose of the press ad, a business to consumer communication, is to sell the featured product; the primary purpose of the online annual report, a publication targeted at and of interest to those interested in the general wellbeing of the company, is clearly not to sell the specific product. The following are examples of ASA remit decisions that illustrate how the ASA Council has considered both content and context in practice in determining if an online communication falls within the remit of the CAP Code.

**Adjudication:** [Amazon EU Sarl t/a Amazon.co.uk, 10 July 2013](#)

**Content:** The complained-about communication for a book, which reproduced text from the book's cover, featured self-help efficacy claims that, according to the ASA, had the potential to discourage treatment for a condition for which medical supervision should be sought.

**Context:** The communication was hosted on a page of the e-tail site Amazon and included statements of the supposed benefits of the product and its price, along with the ability to directly purchase the product.

**Remit decision:** On an assessment of the content and context of the communication, particularly the efficacy claims made, the fact a price was stated for the product, and that the site offered a mechanism to directly purchase it, the ASA Council determined that the claims made formed part of a B2C marketing communication directly connected with the supply of a good and therefore falling within the remit of the CAP Code.

**Lesson:** The claim, though a verbatim reproduction of text from the books cover, was reproduced in a marketing communication directly connected with the book's sale. The claim was therefore within the remit of the Code and the rules preventing marketers from discouraging essential treatment applied.

**Adjudication:** [Steve Scrutton Homeopathy, 18 September 2013](#)

**Content:** The complained-about communication featured efficacy claims for products relating to the treatment of medical conditions for which suitably qualified medical supervision should be sought, in particular depression. A small footnote at the bottom of the page stated "The information on this webpage represents the views and opinion of the author based on his clinical experience. This material is provided for information only".

**Context:** The communication was hosted on a page on a homeopath's own website. The ASA Council noted that the page contained contact information and a link to "Appointments & Fees".

**Remit decision:** Having assessed both the content and context of the communication, in particular the efficacy claims made for the offered products, the fact prices were listed, and that information was provided as to how the products could be ordered, the ASA Council determined that it was a B2C marketing communication directly connected with the supply of goods falling within the remit of the CAP Code.

**Lesson:** Here, the statement that the information represents the views and opinions of the author and is presented for information only did not override what the ASA understood to be the primary purpose of the web page: to sell something. The ASA Council will take into account the entire context in which claims are made in determining whether the primary purpose of the communication is to sell something and therefore whether it falls within the remit of the CAP Code.

**Remit decision:** unpublished

**Content:** A company's website featured responsible sourcing claims that were obviously connected to one of its products.

**Context:** The claims appeared in the corporate social responsibility section of the company's PLC, rather than consumer-facing, website. This section contained information relevant to investors and suppliers, as well as further information not directly connected with the supply of the product the responsible sourcing claims related to. This section did not include a direct link to a retail facility to purchase the product.

**Remit decision:** Having assessed both the content of the claims and the wider context in which those claims were presented, the ASA Council concluded that the claims were outside of remit. Although the claims themselves could in another context have been considered directly connected with the supply of goods, the fact they were presented in a more general section on corporate social responsibility - with no direct link to a retail facility to purchase the product – meant they were not directly connected with the supply of goods.

**Lesson:** Whilst the type of claim (especially those capable of objective substantiation) will be taken into consideration by the Council, the context also plays an essential part in judging whether a communication is primarily intended to sell something.

Adjudication: [Healing on the Streets-Bath, 13 June 2012](#)

**Content:** The website communication contained healing claims relating to conditions for which medical supervision should be sought.

**Context:** The claims were made in the context of a healing event to take place on a certain date and at a certain time to which members of the public with related conditions were invited to attend. The claims were presented on a page on a Christian healing organisation's website containing information on the faith-healing of serious medical conditions.

**Remit decision:** On balance, the claims were understood to be an espousal of faith (a 'cause') rather than claims directly connected with the supply of a healing 'service'. The communication was considered outside of the remit of the Code.

**Lesson:** Statements of belief, broadly falling within the scope of 'causes' or 'ideas' communications, do not fall within the non-paid-for online remit of the Code, unless they directly solicit donations.

Adjudication: [Weetabix Ltd, 13 February 2013](#)

**Content:** Communications within an online game encouraged the player to consume Weetabix: "What?! No Weetabix?! Why make things harder for yourself?", "Remember what I told you! A failure to prepare is preparation for failure!", "You're not eating your Weetabix? What about the extra energy? Oh good heavens!"

**Context:** The game could be accessed via the “WeetaKid” app, which used interactive QR (Quick Response) technology for iPhones, iPods and iPads, and could be downloaded via a link on the Weetabix website. The app included two games in which players controlled the WeetaKid character to collect items to populate WeetaKid’s ‘world’. Each day players were prompted to scan the QR code on packs of Weetabix in order to reenergise the “W” icon in the game.

**Remit decision:** The ASA Council considered the fact that the comments regarding Weetabix were made in the fantastical Weetakid’s ‘world’, but that they also blurred the line between that world and reality by prompting the player to scan the QR code on a box of Weetabix, and failed to distinguish clearly enough whether the repeated exhortations to eat were directed at the player or their in-game character. Given the statements were clearly intended to encourage the consumption of the product they were considered directly connected with the supply of goods. The fact that the games were accessed through the product website, and branded as such, also meant the context was directly connected with the supply of a good and the communication was therefore considered in remit.

**Lesson:** Advergames featuring the branding of the specific product are highly likely to be considered directly connected with the supply of goods or services, especially when there are repeated exhortations to consume the product, and scan a product pack, and they are accessed via the product website. In such circumstances they are highly likely to fall within the remit of the Code.

### **User generated content (UGC) is generated by users though? How can the brand be responsible for UGC?**

There are two tests applied by the ASA to determine whether what was previously UGC should be considered an advertisement. The first is to look at whether the marketer has incorporated UGC into one of their own marketing communications, for example using an image generated by a social media user. The second is to look at whether the marketer has actively promoted the UGC, for example by retweeting or “liking” it. If the marketer has engaged in either of these practices the content is very likely to be considered a marketing communication and will fall within the remit of the Code. It is worth noting that an embedded feed of a review site is not within the remit of the Code, given its a genuine review from a consumer rather than a marketing communication, and the content of the reviews themselves has not been incorporated into a marketing communication, it has merely been linked to from a new page. If an advertiser is exercising control over which reviews appear however, for example showing only positive reviews, the UGC will be considered to have been incorporated into a marketing communication and will therefore fall within the remit of the Code.

Adjudication: [Hi Spirits Ltd, 1 May 2013](#)

**Content:** User generated content featuring a young man seemingly unconscious on his bed with decorative flags bearing the brand logo draped across him and the words “Very poor effort! Can you do better than this?”

**Context:** The alcohol brand had taken a user generated image and included its own wording with the image before posting it to their Facebook page.

**Remit decision:** The ASA Council noted that the brand had incorporated the UGC into a communication of their own, and then actively promoted it by posting it to the brand’s Facebook page. Given the brand had incorporated the UGC, and used it to promote their product in a B2C context, the post was considered to be within remit given its primary intent was to sell something.

**Lesson:** UGC is outside of remit as it is not directly connected with the supply of goods or services. If, however, a brand takes UGC and incorporates it into a marketing communication, or actively promotes it, it will very likely be considered directly connected with the supply of goods or services and therefore within the remit of the Code.

Further guidance on contextually targeted branded content or “native advertising” can be found [here](#).

As ever the CAP Copy Advice team is on hand to offer guidance on making your ads compliant and can be contacted [here](#).