

UK: Beware of advertorials

The growth of the social media industry within the last decade has been unprecedented. With Facebook now having over a billion active users, and Twitter over 200 million, there is no doubting the influence of these networks. As the social media platforms seek to monetarise their business models there are increasing opportunities for companies to market directly to their consumers. However the close and personal interaction afforded by these sites often treads a fine line between consumer protection legislation and the sites' own terms and conditions.

The Consumer Protection from Unfair Trading Regulations 2008 (the "Regulations") establish the principal consumer protection laws in the UK. The Regulations use the concept of an average consumer, of a particular group, as a benchmark from which to assess whether marketing messages are unfair or misleading. This is particularly relevant for social media as clearly one of its great advantages is the ability to target particular demographic groups precisely. Companies should therefore be aware that when targeting groups that may be considered vulnerable, such as children or the elderly, the content and sensitivity of their communications must be adapted accordingly.

As many social media platforms restrict the length of messages, such as Twitter's 140 character limit, it is likely a message will need to omit information that would be considered material from a consumer protection perspective. The Regulations provide for this by allowing the provisions to be assessed in the factual context of the medium used and any measures taken by the marketer to make the information otherwise available. For this reason companies are advised to include a condensed URL with such messages which gives access to a website containing any further information considered material to that communication.

The Regulations also contain prohibitions against some of the more prevalent online marketing misdemeanours. For example, it is illegal if a marketer uses content in the media to promote a product where it is not clear that the promotion has been paid for, a concept known as an advertorial. Marketers are also prohibited from falsely representing themselves as consumers to create the impression of popular support.

An example of this behaviour would be a hotel owner submitting reviews on Tripadvisor purporting to be a genuine guest of that hotel.

The Advertising Standards Authority ("ASA") is the established means of enforcing consumer protection principles in the context of advertising. It applies the self-regulatory CAP Code (the "Code"), which sets out the rules covering non-broadcast marketing communications in the UK. The basic rule in relation to marketing communications is that they should be obviously identifiable, and should not falsely imply that the marketer is acting as a consumer. Due to an extension of its remit in March 2011, the Code now applies to marketing communications on marketers' own websites, social media sites and even any "user generated content" which has been incorporated into a marketing communication.



Marketing communications should not falsely imply that the marketer is acting as a consumer



Final adjudications are published on the ASA's website, with an upheld complaint often attracting adverse publicity. Marketers who choose to pay for editorial content in social media to promote their brands need to ensure that the author/publisher of that content discloses that payment has been made within the body of the post. The ASA has applied a flexible approach to this requirement, for example by allowing the use of the #ad or #spon on Twitter as an acceptable way for Twitter users to disclose that content has been paid for.

As well as complying with legislative requirements, companies also need to observe the terms and conditions of the social media platforms themselves. These terms can be spread across multiple documents and are often not obvious to locate on the sites. Companies must also be aware that the terms are frequently updated and so continued monitoring is necessary to ensure compliance. In the event these terms are breached sanctions can include the removal of a particular message, suspension of an account

or even account termination. Any such sanctions are likely to have cost implications and be damaging for the brand involved.



Sanctions can include suspension of an account



The terms imposed by the social media platforms can be highly prescriptive and are not always intuitive. Examples of Facebook’s terms, in relation to promotions, include requirements that promotions must be run through separate applications and that Facebook functions cannot be used to automatically enter competition participants.

Companies opting to use third party social media platforms for marketing and brand development purposes can benefit from vast networks and highly targeted and sophisticated communication tools. However, they must also comply with extensive legislative requirements (including data protection rules) as well as the potentially limiting and frequently changing terms of the sites themselves. This can be a fine line to tread and companies should be alert to the potential pitfalls. However, if managed successfully, the use of social media for marketing can continue to be an extremely valuable tool.

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