

Extending the Digital Remit of the CAP Code

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1. The Purpose of this Document

- i. From 1 March 2011, the Advertising Standards Authority (ASA) will regulate advertisers' own marketing communications on their own websites and in other non-paid-for space online under their control.
- ii. The extension of remit poses operational challenges for the ASA and the Committee of Advertising Practice, the body that writes and enforces the CAP Code. The purpose of this document is therefore to recognise and address the obvious jurisdictional and enforcement challenges ahead and, in doing so, guide stakeholders as to how the new remit is intended to be operated.
- iii. This document also signals the start of an ongoing and lengthy review period (see 1.12), which invites comments from all stakeholders about any aspect of the remit extension with a pledge to act, as appropriate, on the significant comments received.

2. Overview

Background

- 2.1. For nearly 50 years the CAP Code¹ has set out the remit and the rules covering non-broadcast marketing communications in the UK. Over time it has been updated to take account of new technologies and to reflect changes in advertising standards, ensuring the CAP Code remains fit for purpose. Today it applies to marketing communications across all non-broadcast media including online where it already covers advertisements in paid-for space and sales promotions wherever they appear (See 2.2).

Reviewing the digital remit of the CAP Code

- 2.2. The Committee of Advertising Practice (CAP)² has reviewed the remit of the CAP Code in the light of the growing level and changing nature of marketing in the digital space.
- 2.3. In the two years covering 2008-2009, the Advertising Standards Authority (ASA)³ rejected approximately 3,500 complaints relating to the content of organisations' own websites because they fell outside the remit of the CAP Code. The complaints were registered by consumers, businesses and other organisations and typically concerned potentially misleading claims.
- 2.4. CAP notes the growing social and political concern to ensure children, young people and vulnerable adults are adequately protected in the digital space, including online. In its February 2010 manifesto, the Conservative Party pledged to 'Tackle currently unregulated marketing on corporate websites targeted at children' and 'to shut this regulatory loophole and clamp down on irresponsible online marketing targeted at children'⁴. The Byron Review of 2008⁵ and the Buckingham Report of 2009⁶ had previously highlighted concern about children's engagement with the online world, including marketing online.

Extending the digital remit of the CAP Code

- 2.5. CAP has taken into account stakeholder expectations that the ASA regulates organisations' own marketing communications on their own websites, and the social and political concerns relating to this growing and ever-changing sector. CAP notes that advertisers are increasingly using their own websites and other non-paid-for space online, such as social networking sites, to target their own marketing communications to UK consumers. Taking these factors into account and to ensure that the same high standards are achieved in marketing communications on websites as in other media, CAP has decided to extend the digital remit of the CAP Code.

1 The CAP Code: the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing

2 The Committee of Advertising Practice (CAP) is the UK's self-regulatory body that writes and enforces The CAP Code. The CAP Code is the rule book governing the content and placement of non-broadcast marketing communications in the UK. To find out more about CAP, including its membership, and to access the CAP Code, visit www.cap.org.uk.

3 The Advertising Standards Authority (the ASA) is the independent, one-stop-shop that investigates complaints about marketing communications across all media. It determines breaches of the Advertising Codes, including the CAP Code, and publishes its adjudications weekly on the ASA website, www.asa.org.uk.

4 'Responsible Business: Conservative action to tackle the premature sexualisation and the excessive commercialisation of childhood'; page 2.

5 <http://www.dcsf.gov.uk/byronreview/>

6 <http://publications.education.gov.uk/default.aspx?PageFunction=productdetails&PageMode=publications&ProductId=DCSF-00669-2009&>

- 2.6.** CAP's decision takes effect following a six months period of grace, which will allow time for CAP to train and educate stakeholders about the extended digital remit and permit contractual marketing arrangements to run out or be renegotiated as necessary. On 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.

- 2.7.** 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. (See paragraphs 2.3-2.7 for further commentary on the drafting and intent of the remit clause.)
- 2.8.** CAP confirms that all the rules in the CAP Code will apply to advertisements and other marketing communications falling within the extended digital remit. The CAP Code includes rules about misleading advertising, the protection of children and social responsibility in advertising. Conformity with the CAP Code is, as always, assessed according to the marketing communication's probable impact when taken as a whole and in context.
- 2.9.** CAP's decision to extend the digital remit of the CAP Code endorses and implements the recommendations of the UK advertising industry as represented by the Council of the Advertising Association⁷. The Council of the ASA has agreed to administer the new remit and the Advertising Standards Boards of Finance (ASBOF)⁸ has confirmed that the advertising industry will fund the regulation of the new remit.

The benefits of self-regulation

- 2.10.** In agreeing to extend the remit of the CAP Code, CAP seeks to ensure that UK consumers including children and others whose circumstances appear to CAP to put them in need of special protection are protected and that truthful and responsible marketing communications can flourish throughout digital media.
- 2.11.** CAP's decision extends the benefits of self-regulation further into the digital space. Stakeholders gain from a cost-free, fast and established complaints-handling service. The marketing community benefits from joined-up regulation, which reinforces the integrity of digital marketing communications and which strengthens the principles of fair competition generally accepted in business. Self-regulation is a faster and cheaper alternative to statutory regulation and its value, as a complement to statutory control, is recognised in important EC Directives including on misleading advertising (Directive 2005/29/EC). The ASA is recognised by the Department of Business, Innovation and Skills and the Office of Fair Trading as a first line of control in protecting consumers and the industry from misleading advertising.

⁷ <http://www.adassoc.org.uk/aa/index.cfm>

⁸ The Advertising Standards Boards of Finance (ASBOF) raises funds for the ASA and CAP through a voluntary 0.1% levy on advertisers' media spends. Read more about ASBOF at www.asbof.org.uk.

Reviewing the extended digital remit and inviting feedback

- 2.12.** CAP, the ASA and ASBOF are committed to an ongoing, quarterly review of the extended digital remit with the intention of carrying out a comprehensive review in quarter two, 2013 (two years after the implementation of the extended remit). This level of review is considered necessary in order to ensure that the UK's advertising self-regulatory system continues to work in the best interest of consumers and the marketing community in the online and offline world. As part of that commitment, the three parties invite and encourage feedback from stakeholders throughout the review period about any aspect of the remit extension with a pledge to act, as appropriate, on the significant comments that they receive. Feedback should be addressed to the Secretary of CAP and sent to:

Email: codepolicy@cap.org.uk

Address: Committee of Advertising Practice
Mid City Place
71 High Holborn
London
WC1V 6QT

Advice and guidance for stakeholders

- 2.13.** CAP is committed to helping stakeholders get up to speed on the implications of the extended remit and to ensure marketing communications on websites and in other non-paid-for space online under an advertiser's control are compliant with the CAP Code. In order to be notified of forthcoming training events on CAP's digital remit, particularly as it relates to marketing communications online, CAP encourages stakeholders to sign up to CAP Services (at www.cap.org.uk)

3. The Extended Digital Remit of the CAP Code

The current online digital remit of the CAP Code

- 3.1. The current digital remit of the CAP Code is well-established and extensive. Marketing communications subject to it are shown to have a high level of compliance with the CAP Code⁹. The current online remit is not subject to the review process set out in paragraph 1.12.
- 3.2. The current digital remit applies to advertisements in e-mails and advertisements in paid-for space including, for example, banner and pop-up advertisements, paid-for search listings, commercial classified advertisements and paid-for listings on price comparison sites. The remit also applies to sales promotions in paid-for space and non-paid-for space online.

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

⁹ Digital Media Survey 2008, <http://asa.org.uk/Resource-Centre/Reports-and-surveys.aspx>

¹⁰ The General Media Panel is composed of industry experts and one ASA Council member. It helps the ASA and CAP to produce advice for the industry and to interpret the Code.

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?
- 3.10.** 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.

Revisions to the CAP Code

- 3.15.** Revisions to the CAP Code, effective from 1 March 2011, are presented in the annex to this document.

4. Sanctions

Background

- 4.1. CAP works closely with the marketing community to maintain high standards in advertising. CAP Services offers training and advice to help marketers comply with the Advertising Codes. This helps to create an environment in which advertising, promotions and direct marketing are welcomed and trusted by consumers and the freedom to advertise responsibly is maintained. The compliance figures published from time to time by the ASA have demonstrated that the vast majority of marketing communications comply with the Advertising Codes.
- 4.2. Underpinning the ability of CAP to maintain and improve high standards in marketing communications is an effective range of sanctions. If a marketing communication is in breach of the Advertising Codes, the marketer responsible is told by the ASA (or the CAP Compliance team) to amend or withdraw it. The vast majority of marketers willingly undertake to do so. If they do not, sanctions are applied, although the possibility of imposing sanctions is often sufficient to secure compliance with the CAP Code.
- 4.3. Sanctions include adverse publicity arising from an ASA adjudication, pre-publication vetting by the CAP Copy Advice team and the withdrawal of trading privileges, including media space. On the very rare occasions that compliance with the CAP Code cannot be secured, CAP may, depending on the nature of the breach, refer a non-broadcast marketer to the Office of Fair Trading for action under the Consumer Protection from Unfair Trading Regulations 2008 or the Business Protection from Misleading Marketing Regulations 2008.

The approach to issuing sanctions

- 4.4. Sanctions are issued by the CAP Compliance team. The team relies on the general consent and, if necessary, the specific cooperation of CAP's member bodies.
- 4.5. Sanctions are issued proportionately taking into account the nature of the breach and the aim of securing the team's primary objective: to amend or have withdrawn non-compliant marketing communications as quickly as possible and thereby ensure consumers are protected and a level playing field is maintained for marketers. The team adopts a sensible, flexible and pragmatic approach to its work with the emphasis on persuading marketers to comply with the Advertising Codes.
- 4.6. Some sanctions are more punitive than others. In the event of continued non-compliance, the CAP Compliance team's strategy is therefore to escalate the pressure on marketers to comply with the Advertising Codes by raising the possibility of imposing and then, if necessary, issuing progressively more punitive sanctions.

New sanctions

- 4.7. To strengthen CAP's ability to secure compliance on websites and in other non-paid-for space online under the advertiser's control, CAP's member bodies have agreed new sanctions. It is understood that the possibility of imposing and then, if necessary, issuing these sanctions would follow the custom and practice set out in paragraph 3.4 to 3.6. The new sanctions may be applied until such time as the non-compliant marketing communication is amended to comply with the CAP Code or withdrawn. The new sanctions are:
 - Providing details of an advertiser and the non-compliant marketing communication (appearing on the advertiser's website or in other non-paid-for space online under the advertiser's control) on an ASA microsite, to which the ASA may make a particular effort to draw public attention.
 - Removing, with the cooperation of the search engine, paid-for search advertisements that link directly to the *page* hosting the non-compliant marketing communication on the advertiser's website or in other non-paid-for space online under the advertiser's control.
 - Placing paid-for advertisements on internet search engines that highlight the continued non-compliance of an advertiser's marketing communication and link through to the ASA microsite described above.

5. ANNEX: Changes to the CAP Code effective from 1 March 2011

Additions to the CAP Code are **highlighted**.

Introduction

This twelfth edition of the Code comes into force on 1 September 2010. It replaces all previous editions.

As well as this Code, non-broadcast marketing communications are subject to legislation. See www.cap.org.uk for a non-exhaustive list. The advertising rules that apply to video-on-demand services which are subject to statutory regulation are reflected in the rules set out in Appendix 2.

I The code applies to:

- a. advertisements in newspapers, magazines, brochures, leaflets, circulars, mailings, e-mails, text transmissions (including SMS and MMS), fax transmissions, catalogues, follow-up literature and other electronic or printed material
- b. posters and other promotional media in public places, including moving images
- c. cinema, video, DVD and Blu-ray advertisements
- d. advertisements in non-broadcast electronic media, including but not limited to: online advertisements in paid-for space (including banner or pop-up advertisements and online video advertisements); paid-for search listings; preferential listings on price comparison sites; viral advertisements (see III l); in-game advertisements; commercial classified advertisements; advergames that feature in display advertisements; advertisements transmitted by Bluetooth; advertisements distributed through web widgets and online sales promotions and prize promotions
- e. marketing databases containing consumers' personal information
- f. sales promotions in non-broadcast media
- g. advertorials (see III k).
- h. **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.**

II The code does not apply to:

- a. broadcast advertisements (The BCAP Code sets out the rules that govern broadcast advertisements on any television channel or radio station licensed by Ofcom)
- b. the contents of premium-rate services, which are the responsibility of PhonepayPlus; marketing communications that promote those services are subject to PhonepayPlus regulation and to the CAP Code
- c. marketing communications in foreign media. Direct marketing communications that originate outside the United Kingdom and sales promotions and advertisements in paid-for space that are published on non-UK-registered websites, if targeted at UK consumers, are subject to the jurisdiction of the relevant authority in the country from which they originate if that authority operates a suitable cross-border complaint system. If it does not, the Advertising Standards Authority (ASA) will take what action it can. Most members of the European Union, and many non-European countries, have a self-regulatory organisation that is a member of the European Advertising Standards Alliance (EASA). EASA co-ordinates the cross-border complaints system for its members (which include the ASA)
- d. claims, in marketing communications in media addressed only to medical, dental, veterinary or allied practitioners, that relate to those practitioners' expertise

- e. classified private advertisements, including those appearing online
- f. statutory, public, police and other official notices or information, but not marketing communications, produced by public authorities and the like
- g. works of art exhibited in public or private
- h. private correspondence, including correspondence between organisations and their customers about existing relationships or past purchases
- i. live oral communications, including telephone calls and announcements or direct approaches from street marketers
- j. press releases and other public relations material not covered by part I above
- k. editorial content; for example, of the media or of books and regular competitions such as crosswords
- l. flyposting (most of which is illegal)
- m. packages, wrappers, labels, tickets, timetables and price lists unless they advertise another product or a sales promotion or are visible in a marketing communication
- n. point-of-sale displays, except those covered by the sales promotion rules or the rolling paper and filter rules
- o. political advertisements as defined in Section 7
- p. website content not covered by I d and I h, including (but not limited to) editorial content, news or public relations material, corporate reports and natural listings on a search engine or a price comparison site
- q. sponsorship; marketing communications that refer to sponsorship are covered by the Code
- r. customer charters and codes of practice.
- s. investor relations (see III m).
- t. '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.

III These definitions apply to the code:

- a. product encompasses goods, services, ideas, causes, opportunities, prizes or gifts
- b. consumer is anyone who is likely to see a given marketing communication, whether in the course of business or not
- c. the United Kingdom covers the Isle of Man and the Channel Islands
- d. a claim can be implied or direct, written, spoken or visual; the name of a product can constitute a claim
- e. the Code is divided into numbered rules
- f. a marketing communication includes all forms of communication listed in part I
- g. a marketer includes an advertiser, promoter or direct marketer
- h. a supplier is anyone who supplies a product that is sold by a distance-selling marketing communication (and can be the marketer)
- i. a child is anyone under 16
- j. a corporate subscriber includes corporate bodies such as limited companies in the UK, limited liability partnerships in England, Wales and Northern Ireland or any partnerships in Scotland.

It also includes schools, hospitals, Government departments or agencies and other public bodies. It does not include sole traders or non-limited liability partnerships in England, Wales and Northern Ireland. See rule 10.14

- k. An advertorial is an advertisement feature, announcement or promotion, the content of which is controlled by the marketer, not the publisher, that is disseminated in exchange for a payment or other reciprocal arrangement
- l. A viral advertisement is an e-mail, text or other non-broadcast marketing communication designed to stimulate significant circulation by recipients to generate commercial or reputational benefit to the marketer. Viral advertisements are usually put into circulation ("seeded") by the marketer with a request, either explicit or implicit, for the message to be forwarded to others. Sometimes they include a video clip or a link to website material or are part of a sales promotion campaign.
- m. Investor relations material is information about an organisation (including its goods or services) addressed to the financial community, including shareholders and investors, as well as others who might be interested in the company's stock or financial stability.