



MARKETING YOUR BUSINESS

INTRODUCTION

Every business markets its products and services using strategies and methodologies tailored to suit its own ambitions and customer base.

Marketing opportunities change constantly and now include social media, web and app sales, interactive TV and SMS along with more traditional channels. Marketing can cover a vast range of promotional activities from “buy one, get one free” leaflet drops to sophisticated multimedia, multi-jurisdictional advertising campaigns.

Whatever mechanic or method suits your business, it is important to make sure you get it right – errors in this arena are highly public and mistakes can cost reputations as well as money. Practically all marketing activities have a legal dimension and need to be taken seriously. We can advise you on avoiding the legal pitfalls – making sure that you stay within the law and protect what is yours.

REGULATION

Most advertising is subject to control and in the UK, this is achieved through legislation and industry self-regulation.

The main legislation in this area is the Consumer Protection from Unfair Trading Regulations 2008 (as amended by the Consumer Protection (Amendment) Regulations 2014) (“CPRs”) and the Business Protection from Misleading Marketing Regulations 2008 (“BPRs”). In addition there is legislation affecting particular products and services, for example, financial services, pharmaceuticals, alcohol and tobacco.

Publishers of advertisements which include statements about products or prices may find themselves the subject of an action under the CPRs if such statements are unfair commercial practices. Businesses could face costly criminal fines and, in certain circumstances, consumers themselves could have a direct civil right of action against a business for unfair commercial practices. In the context of advertising, “unfair commercial practices” include misleading or false statements or omissions concerning the product in question or aggressive advertising practices. To avoid costly reprinting, wasted media space and even product recalls, it is important that advertising copy (particularly on-pack) is properly screened and copy checked to make sure relevant codes and further legal requirements are complied with.

Comparative advertising is also regulated by the CPRs and BPRs, depending on whether the target audience are consumers or businesses.

Advertising is also subject to self-regulatory control, for example, The British Code of Advertising, Sales Promotion and Direct Marketing (“the CAP Code”). The CAP Code is one of the main controls on non-broadcast advertising and all advertisers should be familiar with it. It is enforced by the Advertising Standards Authority (“ASA”) and complaints can come not

Unfair Trading
Regulations 2008 (as
amended by the
Consumer Protection
(Amendment)
Regulations 2014)
 (“CPRs”)

Misleading Marketing
Regulations 2008
 (“BPRs”)

The British Code of Advertising, Sales Promotion and Direct Marketing (“the CAP Code”)

only from the public, but from competitors. Non-compliance carries serious negative publicity and can lead to withdrawal of campaigns.

Advertising over broadcast media is covered by other codes such as those issued by the Broadcast Committee of Advertising Practice in partnership with OFCOM. In addition, some sectors have their own codes e.g. the Direct Marketing Association and Phone-paid Services Authority.

SALES PROMOTIONS

Sales promotions come in many different forms and use many different delivery mechanics including on-pack, mailshots, web, app, TV and radio.

They may typically include:

- free offers;
- money-off next purchase;
- voucher codes/token collections;
- prize draws and competitions; and
- pricing claims.

The CAP Code includes rules specific to the running of sales promotions. Each promotion has its own issues and the terms and mechanics of each promotional offer need careful review to ensure it is compliant with the CAP Code and any other applicable regulations.

COMPETITIONS AND PRIZE DRAWS

These are perhaps one of the most popular forms of sales promotions, and considered to be suitable for promoting many different types of goods and services. This is a particularly complex legal area as many lotteries and competitions are illegal. This is regulated by the Gambling Act 2005 and the ASA’s guidance on gambling advertising. Careful consideration is needed to minimise the risks of infringing this legislation. Also, when using social media platforms such as Facebook, Twitter or Instagram to run promotions, promoters should ensure that they also comply with the rules of the media platform in question.

PRICING

Sales promotions linked to price reductions or pricing claims are also specifically covered by the CAP Code and also by the Pricing Practices Guide. Complaints often arise because of confusion created by pricing offers and claims. Advertisers must bear in mind that under the CPRs it is a criminal offence to give a misleading statement about price.

CHARITIES

Promotions linked to charities raise special considerations, principally under the Charities Act 1992 and associated legislation. The CAP Code also specifically addresses charity-linked promotions. The controls are stringent because of the risk of misleading the public about the extent to which a charity may benefit from any particular promotion. The legislation therefore affects the information that has to be given in any promotion, and also requires comprehensive written agreements between the charity and the advertiser clearly setting out the benefits to the charity and the obligations of the promoter.

INTERNET AND SOCIAL MEDIA

The use of the internet, e-mail and social media has seen an increase in the number of potential consumers who can be reached world-wide by both advertisements and sales promotions. With these come the challenges (both practical and legal) of advertising or promoting in numerous jurisdictions. The use of blogs, influencers, affiliate marketing and editorial content all require careful consideration including the application of guidance under the CAP code.

General Data Protection Regulation 2016/679 (GDPR), the Data Protection Act 2018 and the Privacy and Electronic Communications Regulations 2003

ADVERTISING AGENCIES AND FULFILMENT HOUSES

Even relatively simple sales promotions can involve a number of relationships which should be documented and a contract put in place. The need for clear contractual commitments is greatly increased in high profile or strategic advertising and marketing campaigns.

Typically businesses will employ both above the line (“ATL”) and below the line (“BTL”) advertising agencies, sales promotion houses and even design agencies. Written agreements should outline the responsibilities of both parties clearly, covering such matters as copy and print authorisation procedures, responsibilities for legal compliance, ownership of intellectual property rights, a detailed charging mechanism and any exclusivity. It may be left for each agency to then make its own arrangements, for say printing, media space, etc. but the advertiser should have confidence that these arrangements are being put in place. Where large sums of money are at stake, the advertiser may want to put in place its own arrangements to make sure that important suppliers are paid on time. Written contracts should also be in place for the sourcing of goods or prizes and for the general fulfilment of sales promotions – often undertaken by a handling house.

If these sorts of arrangements are not finalised before an offer goes live, there is a real risk that the advertiser will not be able to fulfil the offer and will waste valuable business time.

DATA PROTECTION, DIRECT MARKETING AND COOKIES

Any form of marketing which involves using names, addresses, telephone numbers or e-mail addresses of people has data protection implications. All personal data must be obtained and held fairly and lawfully – the main regulation and legislation in this area is the General Data Protection Regulation 2016/679 (GDPR), the Data Protection Act 2018 and the Privacy and Electronic Communications Regulations 2003. Failure to comply with data protection legislation may make it impossible to use data you have collected and so damage one of your most valuable assets. Whether you are constructing your own customer database or buying in lists for direct marketing purposes, or appointing others to do this for you, the data protection implications should be considered.

If you intend to send direct marketing communications by telephone, fax, e-mail, voice, picture or text message or automated calls, then specific rules apply and, in particular, you must ensure that you have obtained the necessary consents. Similarly, if you intend to use cookies for advertising purposes, for example on apps or websites, you must ensure that the necessary notifications and consents are in place.

INTELLECTUAL PROPERTY RIGHTS

Copyright, patents, trademarks, design rights are some of the intellectual property rights that are created and/or involved in the context of the design of advertising materials and promotional techniques. For example in the use of:

- a character’s name or image;
- music or images written or created by someone else;
- your business’ name on someone else’s goods; and
- agencies or freelancers to write copy for your business.

These activities create potentially valuable intellectual property rights and your business should make sure it protects its position by addressing ownership and/or licensing in written agreements.

SPONSORSHIP AND ENDORSEMENT

There are commercial advantages to positioning a brand name, trademark or logo with an event or product, or even an individual. Although often expensive, such deals can result in lucrative profile raising and much sought after kudos. The sponsoring business must feel comfortable that its name or logo will appear in the right place with sufficient prominence. It is important to know what you are getting and that your sponsorship is not overshadowed by other sponsors (particularly any competitors) and does not become associated with an inappropriate product or reputation. Anyone seeking to sponsor an event or product should ensure an appropriate written contract is in place protecting the use of its name and the commercial benefits that it is getting.

Businesses should also bear in mind that online testimonials and endorsements will constitute advertisements where the business controls the message, for example where a vlogger (i.e. video blogger) is paid to promote a product or service on a social media platform. These are therefore subject to the CAP Code and all other applicable regulations and, in particular (and as with all advertisements), any such testimonials and endorsements should be clearly identified upfront as advertisements.

HOW CAN STEVENS & BOLTON LLP HELP?

The commercial lawyers at Stevens & Bolton LLP have considerable experience in advising both businesses and agencies on advertising and promotional issues. Areas of advice include:

- agreements - advertising agencies, sponsorship, fulfilment;
- sales promotion activities;
- data protection advice;
- direct marketing and cookies guidance;
- protecting intellectual property rights;
- comparative advertising issues; and
- copy clearance - advertising claims, pricing claims

KEY CONTACTS

For further information about any of the issues raised in this guide, please contact:



Beverley Flynn

Partner

T: +44 (0)1483 734264

M: +44 (0)7769 708486

E: beverley.flynn@stevens-bolton.com



Beverley Whittaker

Partner

T: +44 (0)1483 734281

M: +44 (0)7867 522929

E: beverley.whittaker@stevens-bolton.com

STEVENS&BOLTON

Wey House, Farnham Road
Guildford, Surrey, GU1 4YD
Tel: +44 (0)1483 302264
Fax: +44 (0)1483 302254
DX 2423 Guildford 1
www.stevens-bolton.com

The information contained in this guide is intended to be a general introductory summary of the subject matters covered only. It does not purport to be exhaustive, or to provide legal advice, and should not be used as a substitute for such advice.

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