

COMMERCIAL LAW

Snapshots

SPRING 2021

KEY DEVELOPMENTS FOR TODAY'S COMMERCIAL LAWYER

Your
advertising and
marketing
fix



“Filters are usually applied at the time of creating the content, rather than to an existing image or video after it has been created.”

ASA upholds use of filters in social media beauty ads as misleading

The question

Should influencers be allowed to use filters when advertising cosmetic products?

Key takeaway

Filters should not be used to advertise products on social media if they exaggerate the effect of the product. Influencers and advertisers promoting beauty products should avoid applying filters to photos or videos which are directly relevant to the product being advertised to avoid potentially misleading consumers.

The two recent ASA cases

In 2011, the ASA released guidance on the use of pre and post-production techniques in ads for cosmetics, which established that the re-touching of images requires particular attention to avoid misleading consumers, and visual claims should not misleadingly exaggerate the capabilities of the product. The guidance was published well before in-app beauty filters became available on social media and the historic rulings in this area tended to focus on post-production techniques for cosmetic products in TV ads; nonetheless these are useful in setting a baseline.

More recently, the ASA applied its core principles to two rulings against ads from Skinny Tan Ltd and We Are Luxe Ltd. Both ads consisted of Instagram stories by influencers promoting tanning products. In both cases, the influencers featured had applied beauty filters that made their skin tone appear darker than it would have without the filters. The ASA considered that, because the filters were directly relevant to the performance of the products being advertised, they were likely to have exaggerated the efficacy of the products and materially misled consumers.

Why is this important?

Using filters in ads is not inherently problematic but is likely to cause issues if a filter exaggerates the effectiveness of the product being advertised. It will be the advertiser's responsibility to demonstrate that is not the case. Even if an advertiser was able to create a filter which accurately reflects the efficacy of their product, the onus would still be on the advertiser to hold evidence to show that any visual claims made are unlikely to mislead.

Any practical tips?

Filters are usually applied at the time of creating the content, rather than to an existing image or video after it has been created. As such, it's unlikely that there will be "before" material which could be retained by an advertiser to demonstrate the effect of the filter and show that it wasn't likely to mislead. Advertisers could consider retaining such images or taking comparison ones before the application of any filters, to better ensure compliance or an adequate response to any ASA inquiry.

It's important to remember that the responsibility ultimately lies with the advertiser where the use of a filter is likely to mislead consumers about the efficacy of a product. Brands may therefore wish to clarify in their commercial agreements with influencers their responsibilities when marketing cosmetic products on social media and advise them against the use of beauty filters if they are likely to exaggerate the efficacy of the advertised product.

Avoiding “Fake Views” – CAP publishes guidance on testimonials and endorsements

The question

What enforcement options are available against marketers who use fake reviews to promote their goods or services?

Key takeaway

The Committee of Advertising Practice’s (CAP) guidance reminds marketers of the need to be proactive in ensuring that they do not use fake reviews, either directly or indirectly due to a failure to verify. Remember, incoming European legislation, in the form of the Omnibus Directive (due to land in 2022), is set to give regulators real teeth to the enforcement options available to them against those who engage in fake reviews.

The new guidance

CAP has published guidance on [Testimonials and Endorsements](#) and specifically why not to use “fake views”. The guidance contains seven common-sense steps towards compliance:

- 1. Demonstrate they’re genuine:** this is self-explanatory, but the ASA also advises retaining the contact details of the person featured for as long as the ad is used
- 2. Obtain consent:** there are limited exceptions to this rule (see [CAP Code rule 3.48](#))
- 3. Make sure they’re relevant:** eg don’t use endorsements or testimonials in a way that misleads consumers as to the efficacy of a product (such as inaccurate before and after photos for weight loss products)
- 4. Don’t be sad, use #ad:** the ASA has produced a wealth of [guidance](#) around the use of appropriate marketing hashtags
- 5. Avoid incentivising positive endorsements:** this could take the form of either encouraging consumers to post positive reviews in such a way

that breaches the code, or amending or deleting negative reviews to give a misleading positive impression;

- 6. Be aware of restricted categories:** for example, neither health professionals nor celebrities should be used to endorse medicines
- 7. Ensure all testimonials and endorsements comply more generally.**

Given the importance of consumer reviews to business success, and their use as a legitimate method of promoting products or services, this is one area where it could be tempting to artificially bolster reviews. In 2019, the CMA investigated this exact practice and its prevalence on large online platforms such as Facebook and eBay. Its [finding](#) was that there is a “thriving marketplace for fake and misleading online reviews”. The CMA also secured commitments from Instagram, Facebook and eBay to tackle the risk of fake reviews being bought and sold through their platforms.

The Omnibus Directive

CAP’s advice is a salient reminder for brands to get their customer review processes in place before new European legislation in the form of the “New Deal for Consumers” lands next year. This package of legislation is intended to enhance and modernise the EU’s consumer protection regime by increasing powers against non-compliant businesses and bringing regulations up to date for a modern, digital focussed market. Of relevance to the field of consumer reviews is the “Directive on better enforcement and modernisation of EU consumer protection rules”; more commonly known by its catchier title of the Omnibus Directive.

The Omnibus Directive seeks to increase transparency around consumer reviews. It will require traders to publicly provide

information around how they have ensured that the consumer reviews they publish have been produced by verified product or service users. Further, the Omnibus Directive has expressly blacklisted certain activities, which will be added to the existing list of banned practices under the Unfair Commercial Practices Directive 2005. These include prohibitions on:

- the procurement and/or posting of false reviews
- the deletion of negative reviews to manipulate the consumer’s product perception
- the transferal of endorsements from one product to another
- claiming that consumer reviews are authentic when this has not been verified.

The concept behind this new legislation is to ensure that consumers are presented with the most accurate account possible and are not misled by marketers when purchasing goods or services online.

Member States must adopt the Omnibus Directive by 28 November 2021 and must apply the rules of the Directive by **28 May 2022** at the latest. Despite the UK no longer being bound to implement the Omnibus Directive following Brexit, businesses who market their products or services to EU based consumers will still be caught by its provisions and expected to comply. Further, the UK Government published the Green Paper “Modernising Consumer Markets” in early 2018. This broadly mimics the Omnibus Directive but currently the proposal is for a cap on financial penalties of 10% of a firm’s worldwide turnover.

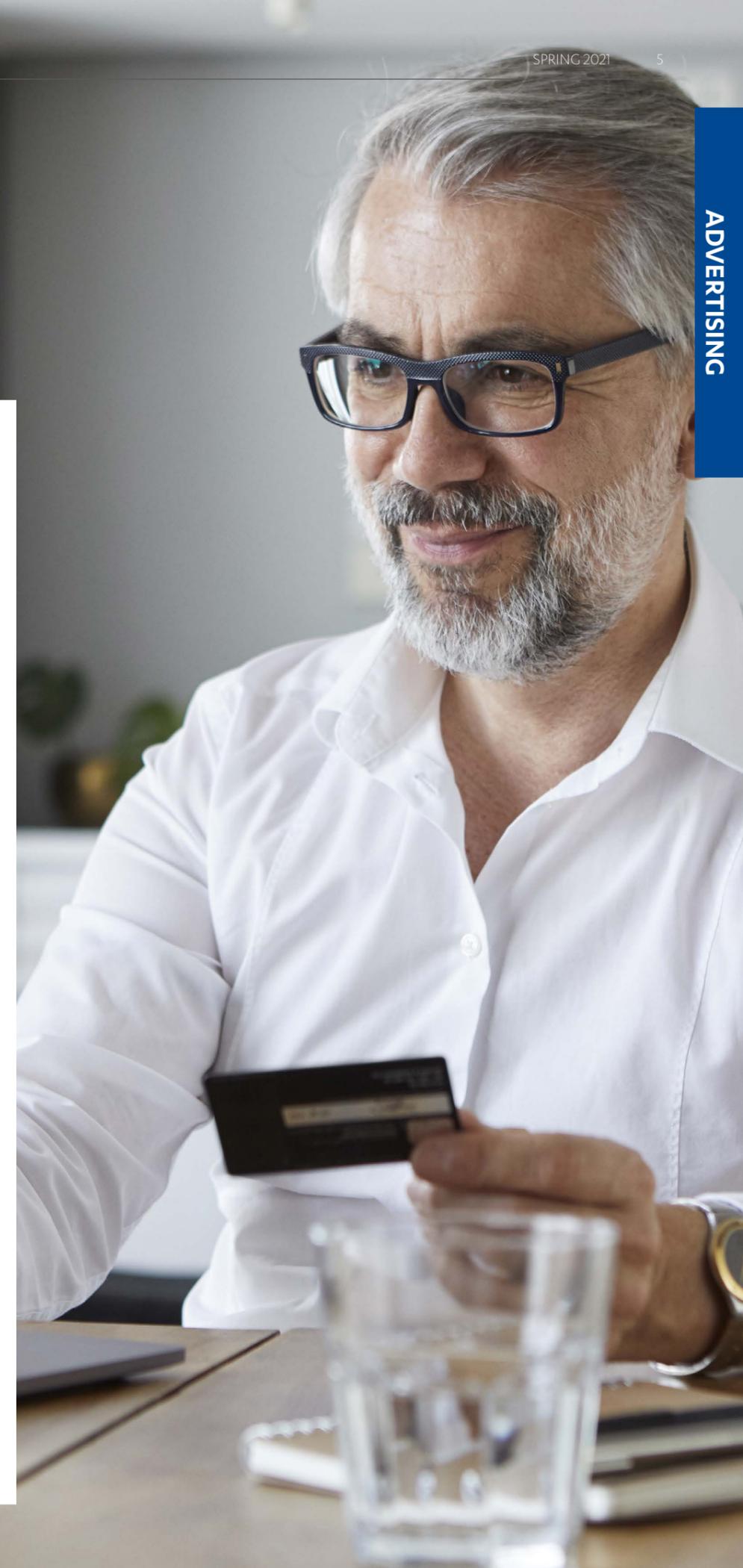
Why is this important?

Looking at the broader picture of developing European consumer protection legislation, the CAP guidance note is helpful. It gives clear guidance on how a good customer review process should run and is a great reminder about the importance of achieving compliance before the arrival of the Omnibus Directive next year.

Put another way, using the guidance to help get your review processes in shape now will pay dividends later when the Omnibus Directive lands with its GDPR-level fines for non-compliance. Member States have the power to assess the gravity of a breach and, in the most serious cases can issue a fine of up to 4% of the annual turnover of the marketer “in the Member State or Member States concerned” or €2,000,000 if this figure cannot be calculated. As mentioned, while the UK itself will not be bound by the Directive, organisations who target EU-based consumers will be.

Any practical tips?

The ASA has for a long time warned marketers that they should be prepared to substantiate review claims used in promotions, whether made by influencers or members of the public. This advice is more relevant now than ever before, with the Omnibus Directive now racing down the track towards us. Considering the substantial potential fines for those found to be in breach under the Directive, ensuring that reviews used to market goods and products are legitimate and verifiable is quickly becoming a critical area for all consumer brands to focus on.



ASA upholds Ladbrokes gambling ad as socially irresponsible for problematic behaviour

The question

Is a gambling ad that features potentially problematic behaviour socially irresponsible?

Key takeaway

Advertisers must ensure that any ads associated with gambling do not highlight any problematic behaviour, such as detachment from surroundings and preoccupation with gambling, to avoid the ad being found socially irresponsible.

The ad

On 25 October 2020, All4 played a Ladbrokes video-on-demand ad which showed various people using the Ladbrokes app on their mobile phones. One scene showed a clip of a horse race, before showing a man in a café with several other people watching the horse race. The man is shown shaking the table with his knee and is described as “a bag of nerves”. A woman turns to him and says, “Really?” which captures his attention briefly, but he then subsequently turns away. The man’s food remains untouched and his interaction with others is brief, indicating that he is too preoccupied with the outcome of the race to eat or chat.

The complaint

The complainant challenged whether the ad depicted gambling behaviour that was socially irresponsible.

The response

Ladbrokes did not believe the ad depicted socially irresponsible behaviour because the character was not shown gambling or talking about gambling – the scene in question only showed the character waiting for the race to start. Ladbrokes also argued that nerves before a sporting event were a natural reaction – whether the person was gambling or not – and that it was the character’s nerves that were

being highlighted in the ad, as opposed to unhealthy gambling behaviour. They claimed that the scene did not indicate that nerves or gambling caused harm or distress for the character and that the character did not demonstrate any behaviour that could be considered socially irresponsible. They argued that the ad featured people in everyday situations and characters continuing with life in normal day-to-day activities – ie the character was in a social environment with friends eating a meal waiting for a race to start. In addition, the ad intended to convey that enjoyment that can be had from gambling and it portrayed using the app as fun and entertaining.

The decision

The ASA concluded that the ad depicted gambling behaviour that was socially irresponsible, breaching CAP Code rules 16.1 and 16.3.1. It noted Clearcast’s view, which was that the ad implied the man was watching a race on TV. It agreed that, based on the scene and the simultaneous voice-over, viewers were likely to interpret the ad as showing him watching the television as the race was about to begin. The ASA noted that he was watching intently, and his shaking the table with his knee which, while clearly intended to be humorous, suggested he was preoccupied with the race as his food remained untouched.

The ASA also took the view that the character was so engrossed in the race that his companion had to point out his actions to draw his attention away from watching the television. The ASA noted that, after responding to his companion, the man appeared to turn away, though the shot was brief, and he was looking down. The ASA disagreed with Clearcast’s view that the man was not disconnected from his companion, or from the room, but that viewers would assume from his

behaviour that he was preoccupied with the outcome of the race in relation to a bet he had placed. Finally, the ad described the character as being a “bag of nerves”, which the ASA believed viewers were likely to interpret as a result of him having placed a bet on the race.

Why is this important?

The ASA upholding the complaint is a clear warning to marketers that, even if a depicted scenario is intended to be humorous, an ad must not portray, condone or encourage gambling behaviour that is socially irresponsible or could lead to financial, social or emotional harm.

Any practical tips?

Marketers should refer to CAP’s 2018 “Guidance on Gambling advertising: responsibility and problem gambling”, which makes it clear that ads which portray or otherwise refer to individuals displaying problem gambling behaviours or other behavioural indicators linked to problem gambling are likely to breach the CAP Code.

Behaviours associated with people displaying or at risk from problem gambling include detachment from surroundings and preoccupation with gambling. Marketers should take care to avoid any implication of such behaviours, including outwardly light-hearted or humorous approaches that could be regarded as portrayals of those behaviours.

DCMS begins inquiry into influencer culture and the power of influencers in marketing



The question

What are the UK government’s future plans for influencer marketing?

Key takeaway

The government is clearly keeping a keen eye on influencers and their impact on society at large, including in the sphere of influencer marketing. The Department for Digital, Culture, Media and Sport’s (DCMS) inquiry will shape potential future legislation, so all relevant stakeholders are encouraged to participate to allow for proper input from the industry.

The background

The DCMS has recently started an inquiry into the power of influencers on social media, how influencer culture operates and the absence of national regulation on the promotion of products or services on social media. The inquiry is also set to look at influencers’ impact on media and popular culture, as well as the positive role they can play through raising awareness of specific issues.

The inquiry follows on from the ASA’s report earlier this year, which shows a high level of non-compliance by influencers on appropriately labelling advertising

posts as such. The CMA also found similar levels of non-compliance in their research into influencer marketing (with 75% of influencers “burying” their disclosures in their posts).

The inquiry

The DCMS is inviting written submissions from stakeholders, for example social media platforms and services like YouTube where influencers are featured prominently. The questions are:

- how would you define “influencers” and “influencer culture”? Is this a new phenomenon?
- has “influencing” impacted popular culture? If so, how has society and/or culture changed because of this side of social media?
- is it right that influencers are predominantly associated with advertising and consumerism, and if not, what other roles should influencers fulfil online?
- how are tech companies encouraging or disrupting the activities of influencing?
- how aware are users of the arrangements between influencers and advertisers?
- should policymakers, tech companies and influencers and advertisers themselves do more to ensure these arrangements are transparent?

Why is this important?

The inquiry appears to signal intent by the government to propose further legislation around influencers in the future, which will undoubtedly apply to brands as well as influencers.

The DCMS has indicated that it is looking into further regulation around a lack of transparency around the promotion of products or services by influencers on social media (potentially including the specific terms under which companies and influencers collaborate on social media). The extent of any future legislation remains to be seen and will be shaped by the inquiry and answers DCMS receive from stakeholders.

Any practical tips?

The deadline for the submission of answers to the DCMS’ queries was on 7 May 2021, and the DCMS’ findings will be hotly anticipated in the near future.

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