

UNITED KINGDOM



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| 1. Self-Regulation | |
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| Topic: | Food Advertising to Children |
| Who: | Food Standards Agency |
| When: | 27 January 2004 |
| Where: | United Kingdom |
| What Happened: | <p>Any intelligent person unfortunate enough to attend the Food Standards Agency 'debate' on food advertising to children this January could not fail to have been profoundly depressed. Blame for the 'obesity time bomb' was laid exclusively at the door of advertising, with a ban served up as a tasty panacea and calls for a ban on sports celebrities in advertising to children going down a treat with delegates.</p> <p>The possible existence of other causes for the ballooning waistlines of the nations' kids was not admitted. So it remains a mystery how an advertising ban will restore playing fields to schools. Or disgruntled teachers back to supervising sports. Or kids to their bicycles for the commute to school. Or decent food into school canteens. Or mums out of the work place and back to the kitchen.</p> <p>Nor was there any discussion about financing the production of all the children's television required to amuse our podgy little cherubs, now that a combination of parental paranoia about cars, drugs and paedophiles means that they can no longer play outside.</p> <p>A recent FSA study has already condemned food advertising on TV for promoting unhealthy diets and encouraging pester power, with chilling references to controls on tobacco and alcohol advertising, raising the spectre of health warnings on food packaging.</p> |
| Comments: | <p>Tessa Jowell, the UK Culture Secretary, has conceded that a complete ban on 'junk food' advertising might not be the answer to tackling childhood obesity. As OFCOM announces that it needs more time to review the codes on broadcast advertising, it seems a complete ban may be kept off the menu. For now.</p> |

| 2. Self-Regulation | |
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| Topic: | The Future Regulation of Broadcast Advertising |
| Who: | OFCOM |
| When: | Consultation Closed on 29 January 2004 |
| Where: | United Kingdom |
| What Happened: | If you want to get your head round OFCOM's proposals for the future of broadcast advertising regulation, think Advertising Standards Authority. |

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| | <p>The idea is to create a single portal using the existing ASA brand for all advertising regulation, with parallel organisations for broadcast and non-broadcast advertising. So there'll be a Broadcast Committee of Advertising Practice to write the Codes, an ASA (Broadcast) to enforce them and a Broadcast Advertising Standards Board of Finance to pay for it all, by collecting a 0.1% levy on airtime from advertisers. The arrangements for reviews and the imposition of sanctions are also very familiar.</p> <p>But there is still a role for OFCOM in the world of co-regulation? Although BCAP will 'own' the Codes, they will require OFCOM approval. OFCOM will also retain responsibility for issues such as the amount of TV advertising, scheduling restrictions and advertising separation, by controls on product placement, virtual advertising and artist separation.</p> <p>The new arrangements should create greater regulatory consistency across different media, remove the old regulatory double jeopardy between the ITC and the Broadcasting Standards Commission, and be more appropriate for new forms of advertising, such as moving image poster advertisements, which look like television commercials, but are not broadcast.</p> <p>The consultation period set by OFCOM closed at the end of January. The proposals had appeared uncontroversial, being the result of work with the industry task force, led by the Advertising Association. However, the National Consumer Council (NCC), a government-backed body representing consumers, threw a spanner in the works at the end of the consultation period, with a scathing attack alleging that the proposed self-regulatory system is toothless.</p> |
| Comments: | <p>Despite criticisms from the NCC, the proposals appear to have widespread support. OFCOM has set down processes for monitoring and auditing the co-regulator's performance, so even if the NCC's worst fears are realised, any defects should be corrected. If nothing else, the NCC criticisms serve as a timely reminder to advertisers to hold on tight to the self-regulatory model. The alternatives are far worse.</p> |

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| 3. Self-Regulation | |
| Topic: | Passing Off |
| Who: | David Bedford and The Number (118 118). |
| Where: | United Kingdom |
| What Happened: | <p>The career of long-distance runner, David Bedford, prepared him for the long haul and his dispute over the 118 118 running twins, has certainly been a marathon, not a sprint.</p> <p>The campaign started in early 2003, but it was not until January 27 2004 that OFCOM announced its first major content decision since taking over from the ITC last December. With a judgement that would have done credit to King Solomon, OFCOM has allowed both sides to feel both vindicated and aggrieved simultaneously. How clever is that?</p> <p>Critics argue that the ITC rule to protect privacy should not protect the way someone looked 30 years ago. But age shall not weary them, those that are protected by the ITC.</p> |

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| | <p>OFCOM has publicly confirmed that Bedford has nothing to do with The Number, a point never in dispute. But the complaint was very slow off the mark, and by deciding that the award winning campaign should not be banned, OFCOM has avoided the disproportionate effect of shooting the messengers.</p> <p>So will Bedford now sprint to Court, following in the tracks of Eddie Irvine, who successfully sued Talksport for passing off? The Courts are unlikely to be interested in a regulator's decision on an entirely different issue. Unlike Irvine, he has no history of celebrity endorsements. Would anyone seeing the campaign think that he is endorsing it? Finally, even Ofcom has concluded that he suffered no financial loss.</p> |
| Comments: | Bedford was a fine runner, but these are insurmountable hurdles, even for him. |

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| 4. European Initiative | |
| Topic: | Distance Marketing of Financial Services |
| Who: | European Commission |
| When: | End of 2004 |
| Where: | Distance Marketing of Consumer Financial Services Directive (2002/65/EC) |
| What Happened: | <p>Fed up with the seasonal avalanche of offers for new credit cards flooding through your letter box? Then you'll be pleased to hear that this type of marketing of financial services will soon be smothered by new regulation.</p> <p>Rules due in force towards the end of 2004 lay down strict EU-wide criteria for distance marketing - by post, telephone, fax, e-mail, internet or mobile - of banking, credit, insurance, personal pension or investment products to consumers.</p> <p>More than 20 specified pieces of information will be required for a consumer to be bound by any contract concluded at a distance. These concern the supplier's identity, the nature of the services on offer, the contract terms and the means of redress, and must all be supplied at the right time. The information must be provided on paper or other durable medium, such as floppy disks, CD-ROMS, DVDs or a computer's hard drive. If that's impossible in the circumstances, (e.g. telesales), then it can be provided after the conclusion of the contract.</p> |
| Comments: | The Directive covers a wider range of activities than existing UK financial services legislation so businesses should start planning for these changes now, as the impact will be enormous. |

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| 5. Broadcast Advertising | |
| Topic: | Contracts Rights Renewal |
| Who: | Merger of ITV Companies Carlton and Granada |
| When: | October 2003 |
| What Happened: | Unless you've been lost in a crater on Mars with Beagle, you will be aware of the merger between Carlton and Granada. With more than half of total advertising revenues, advertisers expressed concern that the combined entity |

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| | <p>would effect their ability to negotiate contracts freely and fairly. But have no fear, CRR is here!</p> <p>The Contracts Rights Renewal (“CRR”) remedy gives advertisers and media buyers the right to renew their current contracts with Carlton/Granada with no increase in the share of their spend that they commit to ITV and no reduction in the discounts they receive. If they chose to negotiate different arrangements, then they must be offered fair and reasonable terms. In addition, advertisers have the right automatically to reduce the proportion of their spend they give to ITV if the merged entity’s audience shrink, under a pro-rata ratchet mechanism.</p> <p>If dissatisfied, advertisers can take their grievances to an adjudicator – David Connolly – who will act as an expert in determining the outcome of disputes. Mr Connolly will have access to all Carlton/Granada’s contracts and trading information. There will be a right of appeal to OFCOM, and ultimately to the Courts.</p> |
| Comments: | <p>Although Carlton and Granada can now work together in the sale of airtime and rules prohibiting other large TV sales houses from collaborating in the sale of airtime have also been removed with immediate effect, such arrangements will now have to comply with general competition law. With hefty penalties for breaches of those rules, broadcasters should collaborate with caution.</p> |

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| 6. European Initiative | |
| Topic: | Misleading and Aggressive Advertising Practices |
| Who: | European Commission |
| When: | Proposed by the European Commission on 18 June 2003 |
| Where: | Unfair Commercial Practices Directive COM (2003) 356 final |
| What Happened: | <p>The old adage says it’s difficult to define an elephant, but you know one when you see it. That has not deterred the European Commission from trying to define ‘misleading’ and ‘aggressive’ practices in its draft Directive on Unfair Commercial Practices, designed to harmonise EU-wide laws concerning business-to-consumer practices, and imposing a general prohibition on such wickedness.</p> <p>An unfair practice is defined by two cumulative questions. Is it ‘contrary to professional diligence’? If so, will it ‘materially distort the economic behaviour of a consumer’. Critics point to the elephantine uncertainty created by a definition reliant on such vague concepts. The UK Government is also sceptical about finding a single definition of such practices that can be interpreted with sufficient certainty throughout Europe.</p> <p>The African elephant is a very different beast from its Indian cousin, a fact acknowledged by the Directive in its application of the country of origin principle. But it may still stifle creativity, as innovative and guerrilla-style marketing techniques are often outside the boundaries of professional diligence. Where advertising targets a specific group, such as children, fairness will be determined by reference to the characteristics of an average member of that group. However, it is not yet clear what will happen if such an advertisement materially distorts the economic behaviour of another group.</p> |

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| Comments: | The Directive may not lead to significant new restrictions for British advertisers, because most are already prohibited by our existing laws and regulations. So the prohibited practices may be more like the mammoth than the elephant: extinct. |
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| 7. Case Report | |
| Topic: | Registration of sound as a trade marks |
| Who: | <i>Shield Mark BV v Joost Kist h.o.d.n. Memex</i> (Case C-283/01) [2003] All ER (D) 405 (Nov) |
| What Happened: | <p>It has long been possible to register sound as a trade mark in the UK but a recent decision of the ECJ in a Dutch dispute over registered sound marks, has turned this grey area black and white.</p> <p>The court helpfully identified the essential elements that a sound mark must possess to be a sound trade mark. Like any trademark, it must distinguish the goods or services of one trader from those of any other and must be capable of being represented graphically. In the words of the court, the mark must be accessible, intelligible, permanent and objective.</p> <p>The most unequivocal means of graphic representation is a musical stave, divided into bars with the precise notes and their relative value. Such a notation, especially where instruments are named, would constitute a faithful 'photograph' of the mark.</p> <p>A mark that is simply described in words is likely to be too subjective to satisfy the court. In the Dutch case, the ECJ rejected a mark for this very reason. It consisted of the onomatopoeic word "kukeleku". This may mean "cock-a-doodle-doo" to a Dutchman, but it's Greek to an Englishman and double Dutch to a Greek.</p> |
| Comments: | Ultimately, national judges will decide whether a representation is sufficient. Although the decision merely confirms the existing position in the UK, by harmonising the registration of sound marks across the EU, it should set the bells ringing across the Continent. |

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| 8. Legislation | |
| Topic: | Sales Promotion |
| When: | November 2003 |
| Where: | United Kingdom |
| What Happened: | <p>The UK Government has confirmed its intention to repeal the Trading Stamps Act 1964, the driver behind statements such as "cash value 0.001p" on gift vouchers. With no known prosecutions under the Act, it has the distinction of having passed from enactment to repeal, without the usual intervening period of enforcement.</p> <p>The Government has also unveiled plans to modernise our antediluvian sales promotion laws in the draft Gambling Bill. The Bill would replace current controls on advertising for gambling products and premises with a Code of Practice to be drafted and enforced by the Gambling Commission (GC). Some fear that this will create a double jeopardy, with advertisers facing censure by both the GC and the ASA, but are relieved that the GC will not be responsible for enforcement of prize competition laws, as originally envisaged.</p> |

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| | <p>The Bill will also clarify the definitions of lotteries and prize competitions, and remove the requirement for success to depend to a 'substantial degree' on skill and judgement for a prize competition to be legal. In view of the proposal to legalise 'forecasting competitions', there are no prizes for guessing how these proposals will be received, if they become law.</p> |
| Comments: | <p>More worrying is the possibility of introducing 'wealth warnings' on gambling adverts raised by the policy document accompanying the Bill. Is this an indicator of the Government's enthusiasm for such warnings in other sectors, such as alcohol and car advertising, despite the limited evidence of their effectiveness? You have been warned.</p> |