

ADVERTISING WITHIN THE LAW

GROWTH

QUICK WINS

- *Read and digest the ASA's codes of practice to understand what the rules permit and ban.*
- *When devising adverts think about the target market and how they will perceive your communication.*
- *Consider that your action can lead to legal sanctions, both civil and criminal, and may lead to a sale being unwound.*
- *Social media comes under the spotlight too so ensure that posts are easily identifiable as adverts.*

The needs of a high street optician are, in many senses, the same as for retailers in any other sector – enough footfall to make a practice economically viable. And with competition coming from all quarters – local rivals, the chains, warehouses such as Costco, and the internet – the need to advertise has probably never been greater.

Most will advertise knowledgeably, others on false assumptions of the rules, but some will actively bend or break the law, thereby setting themselves up for a potentially expensive and public fall.

OPTOMETRY ISN'T INNOCENT

Sadly, it is not hard to find examples of opticians being examined by the Advertising Standards Authority (ASA). Three complaints were made against Boots Opticians Ltd in 2015. The first regarded a radio advert involving a testimonial relating to Boots' range of children's glasses suggested that lenses were unlikely to break (not upheld by the ASA). The second was about a television advert that claimed that an anti-glare coating would help night-time driving (also not upheld). The third complaint regarded a national press advert that noted blue light from various sources could damage eyesight which could be protected against with Boots Protect Plus Blue lenses. This case was upheld.

More recently, in March 2016, the London Eye Hospital Ltd was told not to repeat a press advert that its iolAMD optical implant could improve vision affected by wet or dry age related macular degeneration, in the absence of adequate evidence.

THE RULES

The first place to look for guidance is the ASA, the advertising industry regulator whether it involves advertising in print, broadcast or online. The ASA operates two codes of practice, CAP and BCAP Codes. However, going beyond the codes is the law.

Opticians also need to note the Consumer Rights Act 2015 (CRA). Any claims concerning goods or services made by a retailer in an advert, printed material, or other communication will be considered in relation to the CRA.

Also relevant are the Consumer Protection from Unfair Trading Regulations 2008 (CPRs). These automatically ban any unfair, misleading and/or aggressive commercial practices and specifically note 31 blacklisted practices such as claiming that a deal is time limited when it's not (to give impetus to the buying decision), displaying membership of a professional body when the business is not a member, or suggesting that a consumer's legal rights are a feature of the retailers offer.

ACTING RESPONSIBLY

Every advert must be identifiable, must not be misleading and not likely to cause harm or serious or widespread offence. Restrictions noted in the ASA's codes cover, for example, the target of the advert and what is being promoted. There are specific restrictions that relate to, among things, children and medical products.

When examining a complaint, the ASA notes what the CPRs ban. In essence, an advert will breach the rules if it is likely to deceive consumers and could influence them to buy something that they would not have otherwise bought. Omitting facts is dealt with similarly.

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Aggressive advertising tactics are frowned upon. Adverts that unfairly influence a consumer to buy something they would not have bought had they been treated fairly (that is, without harassment, coercion or undue influence) will break the rules. Vulnerability such as timing, location, or nature of the advert and whether the advertiser is exploiting a consumer's weakness are especially important.

SOCIAL MEDIA IS COVERED TOO

If asked, most would think that the ASA's rules apply only to print, radio and TV. However social media is covered too. Just as with other media, social media posts that advertise must be clearly identifiable for what they are. It is fair to say that it is often clear what ads are from where they appear and/or the overall nature of the material. For example, paid for advertising on social media websites and apps, promoted tweets on Twitter and sponsored posts on Facebook, are usually obvious as such by their appearance and placement.

That said, it can be much harder for some, especially those who are less experienced with this form of advertising, to tell advertorials apart from genuinely posted content. This means that to stay within the rules advertisers should ensure that marketing communications are obviously identifiable as such. Here the ASA thinks that in some cases the inclusion of a clear identifier (for example, a hashtag such as '#ad' or similar) is the most straightforward way to achieve this.

Where only an image is (initially) visible, such as on social media site Instagram, an identifier should be included on the image itself, as well as in the accompanying post. This also applies to videos which should make their commercial intent clear before consumers click through or watch a video.

BREAKING THE RULES

So, what happens if the rules are broken? The CRA and CPRs are overseen and enforced by the Competition and Markets Authority (CMA) and Trading Standards.

In the first instance, where an advert is found to breach the ASA's CAP or BCAP Codes, the advertiser can be told to withdraw or change it. The ASA cannot impose a fine, but it does publish its decisions and can effectively ban an advertisement until it meets the rules. The ASA also has the power to refer an advertiser to Trading Standards and the CMA. They can use the courts to prevent the same or similar claims being made in future adverts.

It is worth pointing out that acting in contravention of the CPR's is a criminal offence punishable by a fine, up to two years in prison or both. Further, consumers have the civil law which can lead to an unwinding of the contract or the receipt of a discount.

REMEMBER - when a consumer makes a claim under the CRA, anything a business has said in an advert may be considered. It is just as important to note that consumers can reject goods that are defective (for a refund) within 30 days of receipt. If the goods are not rejected a consumer can require the goods are repaired or replaced and, if this is not possible, a reduction in the price paid.

Those opticians that use best efforts to not be economical with truth or seek to mislead will rarely have any problems. In contrast, those that sail close to the wind could find themselves with the wrong kind of publicity given free of charge by the authorities while having their sales made refundable. Further, they also risk criminal sanction.

By Adam Bernstein