



Alliance of Independent Agencies

Diploma 2021




Keeping It Legal

Dominic Bray
Lee & Thompson LLP





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Today





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Regulation	Law
<ul style="list-style-type: none">• Across all industries– CAP and BCAP Codes• Industry specific – financial services, healthcare etc.• Codes of Practice – DMA, IAB etc.	<ul style="list-style-type: none">• IP (copyright and trade marks)• Consumer Protection• Defamation and privacy• Data protection• Gambling• Contract



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Marketing Codes – CAP and BCAP





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Two Codes

CAP Code Non-broadcast ads, sales promos + direct marketing	BCAP Code Broadcast Advertising.
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CAP ✓ Writes the Codes and provides free guidance: www.cap.org.uk

ASA ✓ Administers and enforces the Codes www.asa.org.uk



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Poll question: what is the most complained about advert of all time?



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1. Ryanair



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2. Booking.com




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3. Paddy Power




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A: Paddy Power


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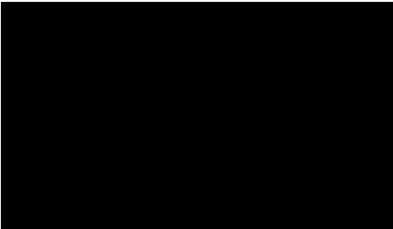
What if you breach the Codes?

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Withdrawal (can be immediate)



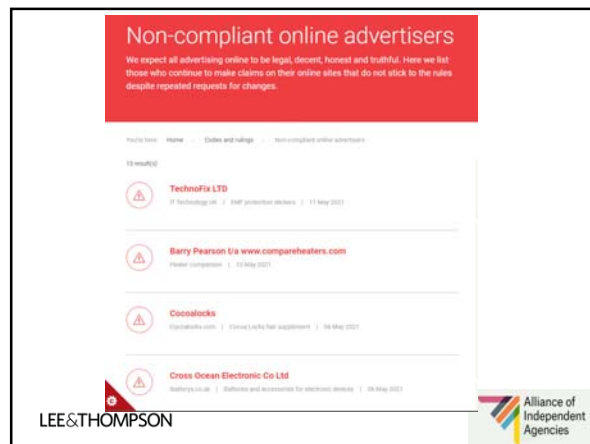
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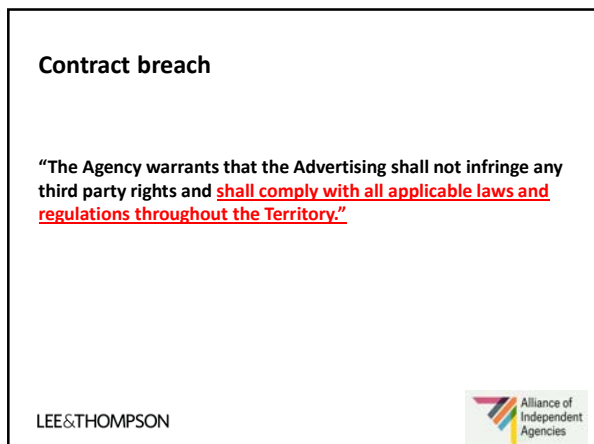
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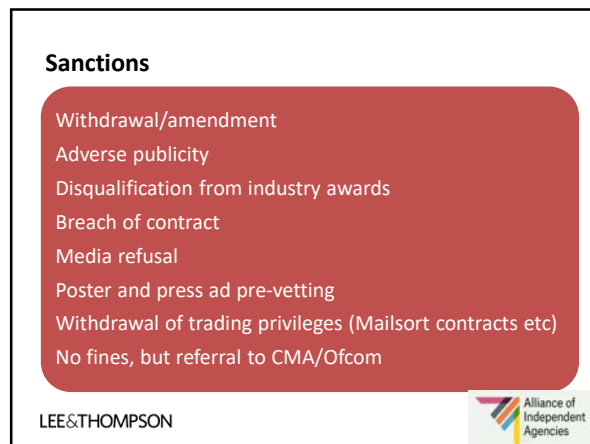
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The CAP Code

“Legal, decent, honest and truthful”.


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“a sense of responsibility to consumers and society”

and

“reflect the spirit not merely the letter of the codes.”


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What do the Codes cover?

Cover:

- Print, press, TV, radio, cinema ads
- Billboards + posters
- Teleshopping
- Sales promotions
- Emails + text messages
- Internet ads (banners etc.)
- Online marketing
- Marketing on own website
- Social media controlled by advertiser


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What do the Codes *not* cover?

Do not cover:


- Sponsorship
- Packaging (unless a sales promo)
- Shop windows/street marketing
- Telephone calls
- Press releases
- Online editorial

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Online remit

- ♦ on advertisers websites or in other non-paid-for space online under their control ...
- ♦ ... **directly connected with the supply or transfer of goods, services, opportunities and gifts ... or direct solicitations of donations as part of their own fund-raising activities.**


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Online remit: Key distinction


“... **directly connected** with the supply or transfer of goods, services, opportunities and gifts...”

In remit ...



Outside remit ...



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“... or in other non-paid-for space online **under their control**”



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#adviceam



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Comments/UGC – not adopted – out of remit



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Comments –adopted – in remit

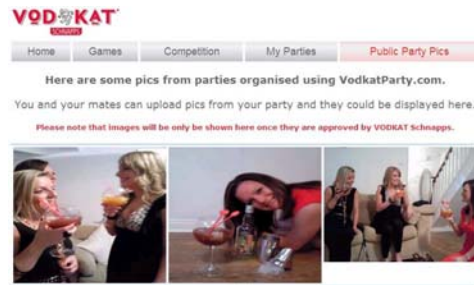


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UGC – adopted - in remit



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Likes/retweets – maybe in remit



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UGC – adopted in remit



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Key considerations

Likely to be in remit

- Moderating for negative or off-brand comments
- “Liking” otherwise unmoderated content
- UGC created in response to a specific request


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Key considerations

Likely to be out of remit:

- No moderation of user comments, or only filtered for swearing etc.
- No request for specific content or “shares”

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The Rules

General Sections:

- Misleading advertising
- Harm and offence
- Social responsibility
- Children
- Privacy
- Sales promotions
- etc.

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The Rules

Category Specific Sections:

- Alcohol
- Gambling
- Financial Products
- Medicines, medical devices, health & beauty
- Food, food supplements
- Weight control and slimming
- Motoring

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Misleading Advertising

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Q: What percentage of complaints concern misleading ads

?

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A: Around 70%

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Key principles


- ◆ Do not mislead
- ◆ Important limitations and qualifications must be made clear
- ◆ Substantiation - prove your claims

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Q: Why do you think the following ads were considered misleading


?

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Burger King



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J Sainsbury plc



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P&G Olay Definity




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Deliveroo

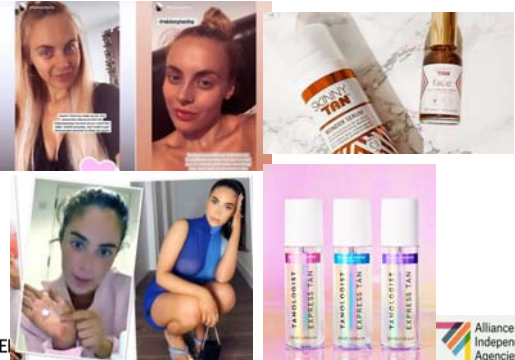


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Misleading social media filters



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Comparative marketing

"Market Leader"

"The best"

"Fastest download speed"

"Unbeatable customer service"

"The greenest car on the planet"

"Cheaper than all high street supermarkets"

"Lowest emissions"

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Environmental Claims

- Cap Code
- Green Claims Code



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Harm and Offence

- ◆ Ads shouldn't contain anything likely to cause serious or widespread offence (especially on grounds of race, religion, sex, sexual orientation or disability)
- ◆ Ads may be distasteful without necessarily breaching the Code
- ◆ If a particular product is offensive to some people this is not sufficient grounds for objecting to an ad for it

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Go Compare



UK resident & car insurance purchase only. Excess refunded after claim settled. Excludes breakdown, windscreen & glass repair / replacement. For full T&Cs visit website.

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CHELTEMHAM FIREWORKS

WE DON'T SELL PET EAR DEFENDERS BUT WE DO SELL FAWKING GOOD FIREWORKS!

UP TO 50% OFF DELIVERED TO YOUR DOORSTEP!

07496 124651

www.cheltenhamfireworks.co.uk

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Social Responsibility

- ◆ a sense of responsibility to consumers and society
- ◆ Marketing addressed to, targeted at or featuring children shouldn't contain anything likely to result in their physical, mental or moral harm

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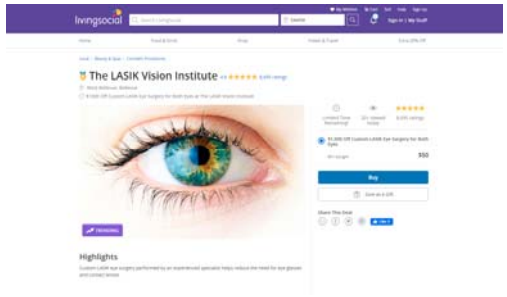


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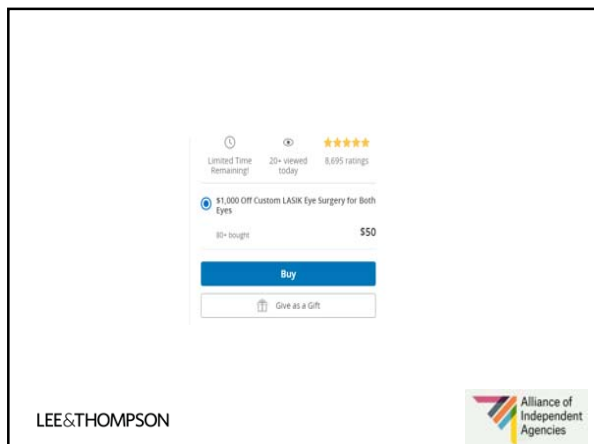
Living Social



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Targeting ads on Social Media

- Ads for age-restricted products must not be placed in media directed at children e.g. on their social media accounts:
 - Under 18: alcohol, gambling, lotteries, e-cigarettes
 - Under 16: HFSS products

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Targeting ads on Social Media

- Ads not for age-restricted products, but content unsuitable for children/public display should be appropriately targeted.
- When cannot individually target, must not place ads in mediums where more than 25% of audience is under 18/16.

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Category Specific Sections

- Children
- Alcohol
- Gambling
- Financial Products
- Medicines, medical devices, health & beauty
- Food, food supplements
- Weight control and slimming
- Motoring

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Children

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Key principles

Ads must not:

- take advantage of children's inexperience
- encourage pester power
- imply a child would be inferior to others if they don't use a product or service
- contain material which could lead to social, moral, psychological or physical harm of children

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Merlin Entertainments (Dungeons) Ltd



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High fat, salt or sugar

- ◆ HFSS ads can't appear in children's media
- ◆ Nor in other media where children make up over 25% of the audience
- ◆ Ads for HFSS products targeted at under-12s cannot use promotions, licensed characters and celebrities popular with children (other than if promoting healthier alternatives).


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McDonald's & Burger King

- ◆ Burger King ad at bus stop 96m from a school
- ◆ McDonald's ad at bus stop 47m from a school



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Kellogg's



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Sexualisation of Children

Must not portray or represent **anyone who is, or seems to be**, under 18 in a sexual way.

Except where principal function is to promote the welfare of, or to prevent harm to, under-18s, provided any sexual portrayal or representation is not excessive.

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Back to Basics American Apparel



American Apparel




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Alcohol

- ◆ Must be socially responsible
- ◆ **Should not**
 - ◆ encourage excessive drinking
 - ◆ suggest drinking can overcome problems (e.g. boredom)
 - ◆ be directed at under 18s
 - ◆ feature people who look/are under 25
 - ◆ link alcohol with seduction, sexual activity or sexual success
 - ◆ imply alcohol can enhance attractiveness, masculinity or femininity

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Alcohol

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The Scottish Gin Society

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Gambling

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Key principles

- ◆ **Ads must not:**
 - ◆ Portray, condone or encourage gambling behaviour that is socially irresponsible or could lead to financial, social or emotional harm
 - ◆ Exploit susceptibilities of children, young persons or vulnerable persons
 - ◆ Suggest gambling as a solution to financial concerns/personal problems
 - ◆ Link gambling to sexual success

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Primegaming

"I am a single mom and I live on family benefits. I played and won £46,799.


I was very stressed for my son's future and I couldn't sleep, but now that I won I know that I can help my son build a better future."

ARE YOU FEELING LUCKY?

Sophie Texier
"I am a single mom & I live on family benefits, I played & won £46,799 and it is incredible for me.
I was very stressed for my son's future and I couldn't sleep, now that I won I know that I can help my son build a better future.
Thank you all the staff of "Primegaming".

Play now

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bet-at-home.com

Bet Promotions @BetPromotions4u · Nov 26
It's your lucky day!
bit.ly/1HjLXv
#betting #gambling #europaleague #liverpool #klopp

LUCKY DAY? bet-at-home

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William Hill



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Responsibility and problem gambling

- ♦ Targeting 'risk factors' that might influence vulnerable groups, e.g.
 - ♦ Inappropriate sense of urgency – "Bet Now!" offers during live events
 - ♦ Irresponsible perception of risk – "Risk Free Deposit Bonus"
- ♦ Vulnerability
 - ♦ Men aged 18-34 at heightened risk of irresponsible gambling behaviour

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Gender stereotyping

Marketing communications must not include **gender stereotypes** likely to cause harm or serious or widespread offence

Examples provided include:

- ♦ Gender-stereotypical roles and characteristics
- ♦ Aimed at/featuring children
- ♦ Aimed at/featuring potentially vulnerable groups

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"THE BAD OLD DAYS"

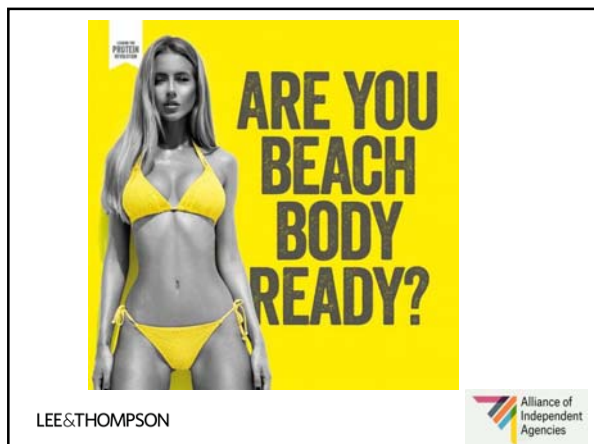
- ♦ generalised view or preconception
- ♦ attributes
- ♦ characteristics
- ♦ roles



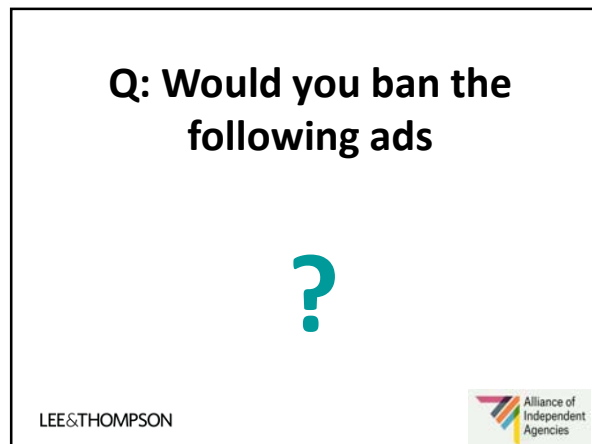
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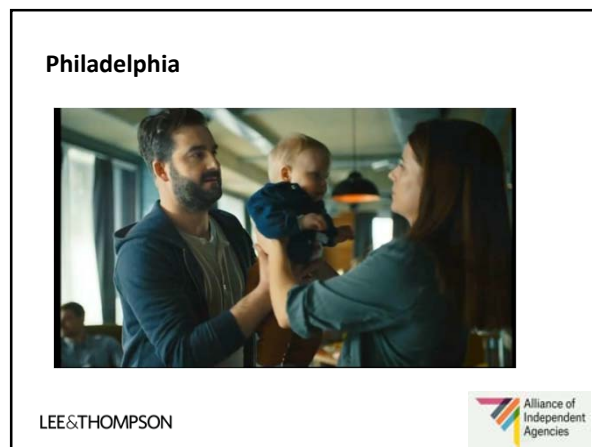
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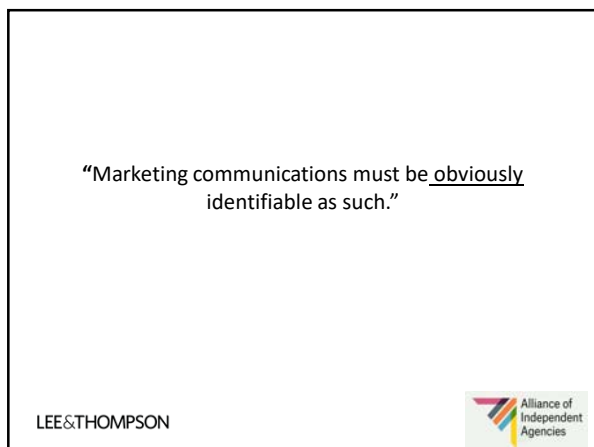
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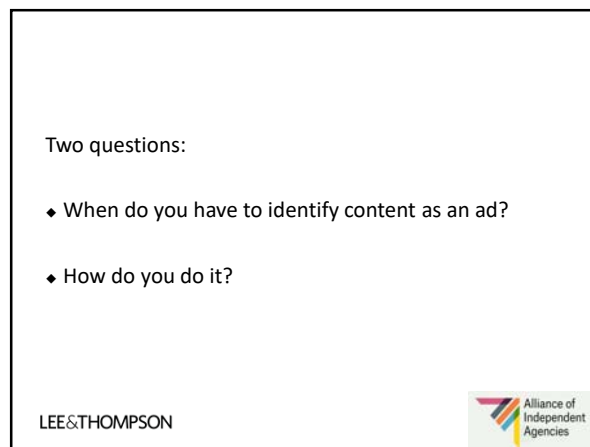
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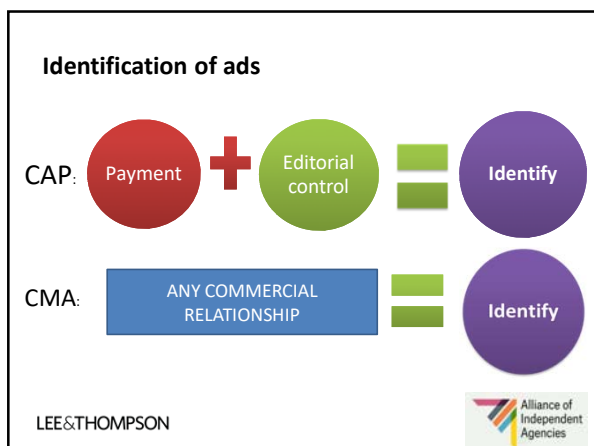
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Mondelez UK Ltd t/a Oreo

- Editorial nature
- "Thanks to Oreo for making this possible"
- Most of the disclaimers also required engagement with the videos
- Not obviously identifiable as ads



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Q: How effective are these Instagram hashtags?


#spon #sp

#ambassador #partner

#gifted #ad

#affiliate #sponsoredbutiloveit

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How to identify - what should the label say?

Recommended	Not recommended
<ul style="list-style-type: none"> • Ad • Advertising feature • Advert 	<ul style="list-style-type: none"> • Sponsored, #sp, #spon • Brand publisher • Brought to you by X • Thanks to X for making this possible • With • @

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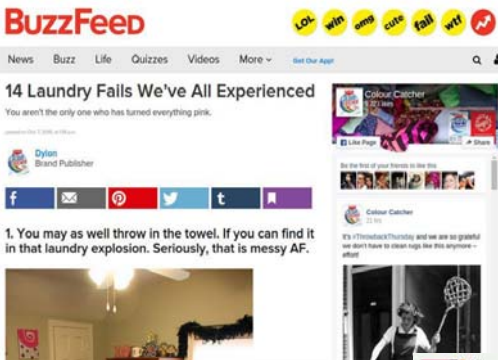
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Influencer Marketing

January 2020: Prettylittling/ Molly-Mae




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Daniel Wellington AB

- “sippin on yummy coconuts 3x size of my skull! Wearing my @danielwellington classic petite Melrose 28mm watch and matching cuff... you can get 15% off using the code 'LOUISE'”




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Vanity Planet

- Instagram story
- “Obsessed with my glowspin! Swipe up for \$100 off using my code 'louiseglow Swipe up awesome @vanityplanetstore”



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A: Where should the label go?

Commercial intent should be made clear **prior to** engagement


- Whole content ads:**
 - Label should be visible before video is viewed (in thumbnail/title or top of article)



- Partial content:**
 - Label should be visible/audible when ad content starts



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Where should the label go? Influencer posts


Recommended	Not recommended
<ul style="list-style-type: none"> Upfront – in title, thumbnail or image itself 	<ul style="list-style-type: none"> #ad hidden among other text or hashtags Requiring viewer to expand a post or click through to see

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CMA Investigation




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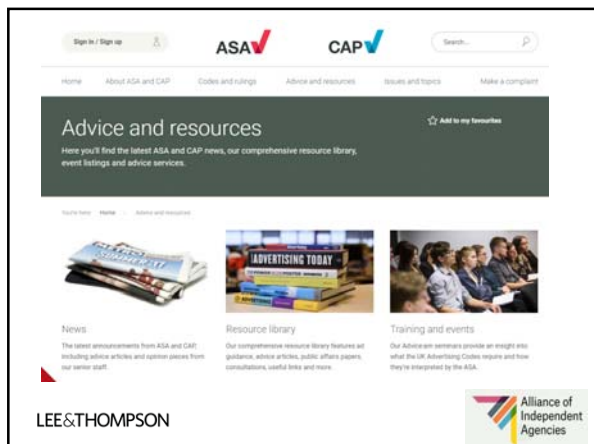
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Help and Resources

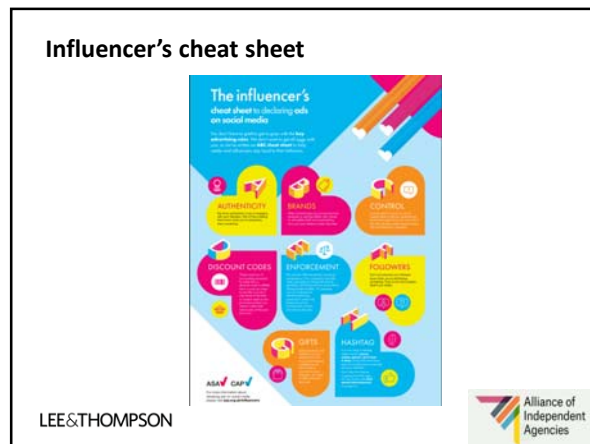
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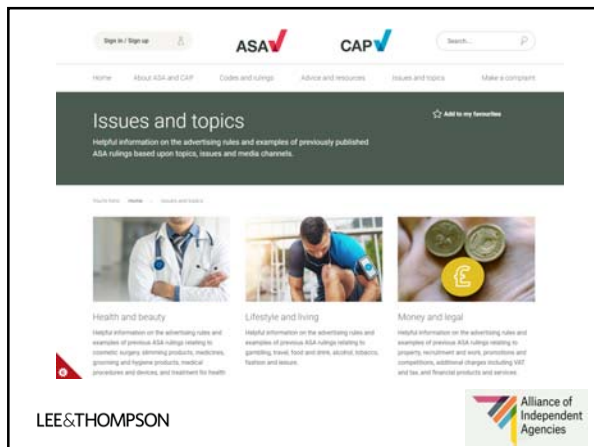
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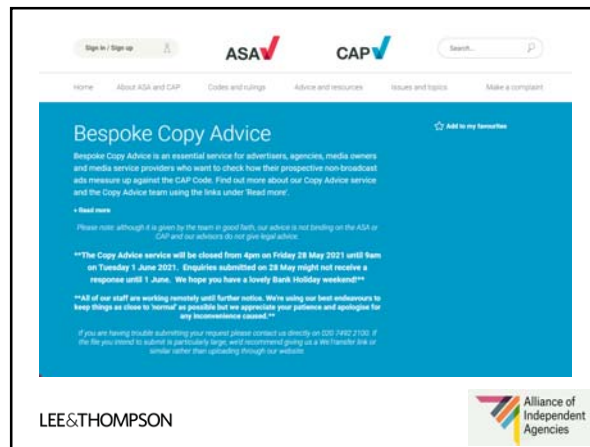
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Misleading advertising

- ◆ The Consumer Protection from Unfair Trading Regulations 2008
- ◆ Regulate commercial communications (and marketing and ads) relating to promo, sale + supply of products and services
- ◆ Communications before, during and after sale
- ◆ Covers: 31 prohibited practices, misleading acts and omissions, aggressive practices and general obligation not to trade unfairly

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Tesco strawberry 'scandal'



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Which? super complaint

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Online Reviews

Consumer spending after reading online reviews

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Online reviews

- Unlabelled endorsements (native advertising)
- Fake reviews
- Site practices

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Intellectual Property

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Intellectual property

- ◆ Copyright
- ◆ Trade marks and passing off
- ◆ Confidentiality

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Copyright

- ◆ Does not protect "ideas"
- ◆ Protects creative works (drawings, literary works, photos, music, film etc.)
- ◆ Owner has exclusive right to use the work
- ◆ First owner = author (creator)
 - ◆ not the client, not the agency if it sub-contracts
 - ◆ employers own rights in employee work

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Copyright infringement

- ◆ Are you using a substantial part?
- ◆ Main defences
 - ◆ Incidental use
 - ◆ Fair dealing
 - ◆ (Reporting current events)
 - ◆ (Criticism and review)
 - ◆ Caricature, parody and pastiche
 - ◆ Quotation

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Caricature, parody and pastiche

- ◆ Can use copyrighted work without permission for caricature, parody or pastiche
- ◆ As long as the use is “fair dealing”
 - ◆ limited, moderate amount
 - ◆ reasonable and proportionate

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BoohooMAN




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Copyright




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Copyright



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Copyright

- ◆ If you infringe:
 - ◆ May have to withdraw the campaign
 - ◆ And pay:
 - ◆ compensation (damages) for unauthorised use
 - ◆ legal costs

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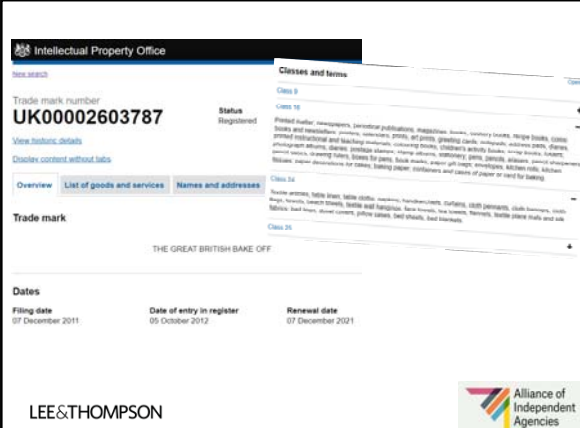
Trade marks


Trade Marks Basics

- Trade marks protect brand identity:
 - names
 - logos
 - signatures
 - shapes, colours, smells etc.
- Some registered, some not.
- Trade mark infringement or passing off.

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Registered trade mark infringement

Mark	Goods/services	Infringement?
Identical	Identical	Yes
Identical	Similar	Yes if confusion
Similar	Identical	Yes if confusion
Similar	Similar	Yes if confusion
Well known marks – extra protection		
Identical or similar	Identical or similar	Yes if: Unfair Advantage Tarnishment Dilution

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Unregistered trade marks - Passing Off

Goodwill/reputation
 +
 Misrepresentation (through use of the mark)
 +
 Likelihood of confusion
 =
Passing Off

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Passing off



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Q: Do you think a claim for passing off was successful here?



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M&S begins legal action against Aldi over Colin the Caterpillar cake

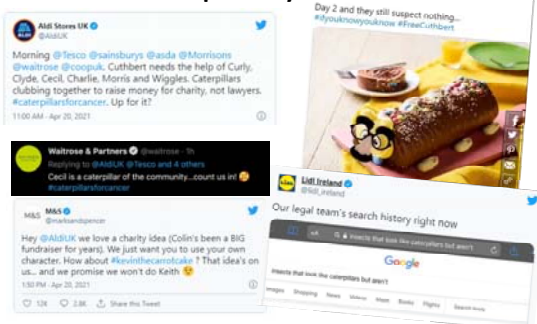


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Colin vs Cuthbert publicity



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Use of celebrities – false endorsement



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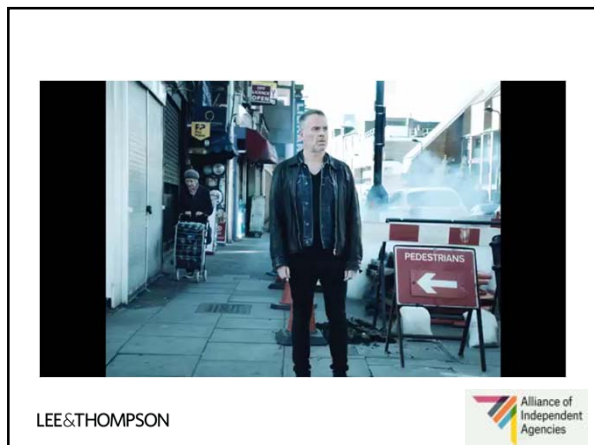
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Prize promotions

Legal if:

- 1) No payment to enter; or
- 2) Payment to enter, plus
 - a) genuine free entry route; or
 - b) skill, judgment or knowledge-based.

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Prize promotions ...

- ◆ What is payment?
 - ◆ Payment of money;
 - ◆ Entry via premium rate telephone line;
 - ◆ Transferring money's worth;
 - ◆ Inflated price for products.

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Prize promotions continued


- ◆ Free Entry Routes
 - ◆ Letter sent by ordinary post / online entry
 - ◆ Publicise the free entry route
 - ◆ Must not affect allocation of prizes

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Prize promotions continued


- ◆ Skill, judgment or knowledge, must:
 - ◆ Deter significant proportion from entering or
 - ◆ Prevent significant proportion from receiving a prize.
- ◆ Judge must be independent.

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T&Cs – significant conditions


- ◆ How to participate
- ◆ Free entry route
- ◆ Start date
- ◆ Closing date
- ◆ Proof of purchase
- ◆ Number of prizes/gifts
- ◆ Restrictions – e.g. location, age, access to internet
- ◆ Limit on availability
- ◆ Promoter’s name and address

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Significant conditions - limited space


- ◆ If limited by space (e.g. on packaging, in Tweet):
 - ◆ Include as much information as possible; and
 - ◆ Direct consumers to easily accessible source where all significant conditions are stated (e.g. link to website)

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Fairness

- ◆ Changing entry route
- ◆ Changing terms and conditions
- ◆ Availability of prizes

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Vindicta Digital

“We’ve decided to give everyone another way of increasing their chances of winning this competition ... LEAVE us a 5 STAR REVIEW on Facebook and DOUBLE YOUR ENTRY”

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Promotions on social media

Additional rules will depend upon the platform used:

Twitter

- Discourage creation of multiple accounts
- Discourage posting the same Tweet repeatedly

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Promotions on social media

Facebook – Promotion Guidelines:

- Promotions can be run on page timelines and apps with entry by posting, commenting, liking, voting
- Can't run promotion involving posts/shares on personal timelines
- Can't encourage people to tag themselves in pictures to win a prize

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And don't forget ...

- Don't just use material found online (inc. social media, photos, videos, music)
- If asking for UGC as part of a competition – make sure user has rights to the UGC and grants you the right to use it for a specified purpose
- Get express consent to use the winner for publicity purposes
- If there's a judging element, must be conducted independently

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Major events marketing

Be careful of:

- Use of official names and logos
- References to 'partner', 'sponsor' 'supporter' etc.
- Creating domain names using the event name
- Creating products/packaging using event name/logo
- Implied messages of endorsement
- Ticket promotions/prize competitions: breach of ticket conditions

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Agency/Client Contracts

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The Agency/Client Contract

- ◆ Term
- ◆ Services
- ◆ Delivery Dates
- ◆ Payment
- ◆ Exclusivity
- ◆ IP

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The Agency/Client Contract (cont'd)

- ◆ Use of Ideas
- ◆ Responsibility for Compliance
- ◆ Territory
- ◆ Team
- ◆ Limitations and Exclusions of Liability

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Contact


Dominic Bray
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Rebecca Bennis
rebeccabennis@leeandthompson.com

020 3073 7600

www.leeandthompson.com

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Keeping it Legal

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