



Expert insight into advertising, marketing and sponsorship

WIGGIN



Contents

- 3 Introduction
- 4 Image rights
- 6 Audience measurement
- 8 Technology driving corporate value
- 10 Brand protection
- 12 Data and personalisation
- 15 Native advertising
- 16 Advertising breaches
- 18 Sports sponsorship

The new age of advertising

The advertising industry is experiencing a period of immense change. Marketers are pushing the creative boundaries, technology and data offer new opportunities (and new threats) and the balance of regulatory requirements requires a more delicate hand than ever before.

Thankfully, we love a challenge. We regularly advise on advertising and marketing services arrangements that are an integral element in driving brand value and revenue. By combining our market leading broadcast and digital media experience, we have also helped many organisations to maximise revenues from digital production and interactive sponsorship opportunities.

More traditionally, we advise broadcasters, rights holders and brands on the interpretation of the Ofcom Broadcasting Code, Ofcom's Code on the Scheduling of Television Advertising and the CAP and BCAP Codes and we represent clients who encounter difficulties with the regulators.

Wiggin also helps more conventional advertisers navigate the world of online media and the associated technology and data considerations that are less familiar to them.

We are committed to sharing our expertise and experience for the benefit of others and we hope you find the insights in this publication interesting and thought-provoking. Please do get in touch if you'd like to discuss any of the issues in more detail with our team.



Shaun Lowde

Partner

T: +44 (0) 20 7927 9683

E: shaun.lowde@wiggin.co.uk



Sarah MacDonald

Senior associate

T: +44 (0) 20 7612 7718

E: sarah.macdonald@wiggin.co.uk

Shades of

grey

Jamie Dornan is pictured wearing your brand's headphones on Twitter. Naturally, you want to make use of the images in your marketing materials but you don't want to contact him and potentially incur a usage fee. Can you use the image anyway and how safe is it?

Answering this question requires a mastery of several areas of law and knowledge of the advertising regulations. An individual assessment has to be made for each person and each situation – there are no black and white rules, just shades of grey.

Privacy first

Assuming that you aren't going to request Jamie's permission, the first concern is privacy. The picture might have been shared on social media but you need to make your own assessment as to whether he can nevertheless claim an expectation of privacy. What would a reasonable person of ordinary sensibilities feel in the same position and faced with the same publicity? Where is he? What is he doing? What might be the expectation of other people in the background of the shot?

Your responsibilities

The CAP code (at 6.1) compels marketers to obtain written permission before referring to or portraying a member of the public or his or her identifiable possessions. It also urges caution where you imply that there is personal approval of the advertised product, noting that it could result in a false endorsement claim.

It is often said that the UK (unlike the US) does not have image rights, so celebrities have less ability to prevent their name or image being used in marketing communications. In legal terms, there is not much difference. You want to share the images because you would like to show the connection with the actor, to suggest endorsement of your product. But would that be a true representation? Does wearing headphones mean he likes them? You need more information – is he regularly seen wearing them? Is this a one-off? Has he shared images himself where he has the headphones on? To accurately assess the risk, you also need to know about his own marketing activities – does he endorse other products?

Channel matters

Assuming you are comfortable with the answers to all these questions, you also need to consider how you want to share the image. Re-tweeting will not cause you any copyright issues but if you use a different platform, the image needs to be licensed from the photographer. You would not have a 'fair dealing' excuse and you should be aware that there is a growth in agencies collecting fees for use of social media images without licence.

The last word: reputation

Finally, there is reputation to consider. The PR advantage of connecting a celebrity with your product can quickly be undone if a grievance is raised. Savings on fees could be cancelled out – or worse – committed to dealing with a legal complaint. It's never an easy call.



Anna Doble

Legal director
T: +44 (0) 20 7927 9686
E: anna.doble@wiggin.co.uk

Mind the gap: measuring TV audiences

Analysis by Thinkbox (the marketing body for commercial TV in the UK) of the UK's video consumption in 2016 reveals that TV is still the dominant channel, accounting for 74.8% of video viewing. Perhaps more interestingly, this is only down 1.2% compared with 2015, despite repeated reports of TV's rapid decline.

More importantly for the advertising industry, 93.8% of the average person's daily video advertising views are on TV (full screen, most likely with the sound on). This means that in 2016, the average person in the UK watched almost 19 minutes of TV advertising each day,

compared to just 8.4 seconds on YouTube. For advertisers attempting to appeal to a mass-market audience, the importance of TV advertising cannot be overstated.

But for those brands who want to reach those not gathered around the television screen, what are the options? Out of home opportunities (including digital viewing and in locations such as the pub or gym) are not measured by the Broadcasters Audience Research Board (BARB) so brands must either keep their fingers crossed that they are reaching their target audiences or look to other forms of measurable advertising.



Sean James

Partner

T: +44 (0) 20 7927 9682

E: sean.james@wiggin.co.uk



Sarah MacDonald

Senior associate

T: +44 (0) 20 7612 7718

E: sarah.macdonald@wiggin.co.uk

An improving picture

The issues are widely recognised and BARB initiated Project Dovetail to combine the data that it collects from its representative panel of people with data collected from the devices used to watch this content. Once the project is fully operational, advertisers will have viewing data for online and catch-up TV but timings are not yet confirmed and in the meantime, media planners remain stuck between a rock and a hard place with online measurement. Reported lack of transparent business practices (largely centred on rebates between media agencies and other parties in the supply chain) and concerns around viewability of ads in the various digital "walled gardens" have resulted in a severe loss of faith with online measurement.

Although Project Dovetail had been considered to be the answer to online TV audience measurement, it is now less clear whether this will adequately plug the gap. Sky AdSmart is targeting ads at consumers watching different things at different times and now that platforms like Virgin Media have signed up to deliver target advertising via AdSmart, how advertisers measure the effectiveness of campaigns delivered in such a targeted way is anyone's guess.

Plugging the gap

As the ways in which TV can be consumed multiply, advertising opportunities proliferate but the industry must be able to effectively measure results. The platforms with the ability to evaluate the opportunities and their effectiveness are those that are likely to plug the gap first.

Technology driving corporate value

Much of the investment and M&A activity in the advertising and marketing sectors is focussed on businesses that harness technology to deliver their services. As with other sectors, technology allows advertising and marketing businesses to achieve scale without the level of cost required to grow more traditional businesses, which are heavily reliant on people. Here, we are broadly looking at investment in “Adtech” and “Martech” - the technologies used in the selling and buying of advertisements and the relationship with customers and potential customers (such as CRM solutions, analytics and digital content).

Corporate activity in Adtech and Martech

Corporate activity in the Adtech space in particular was very strong over the last few years but has shown signs of slowing in more recent times. That said, investment and M&A activity in both the Adtech and Martech spaces in the UK continues to be generally strong. While the market is maturing and investor and acquirer criteria are evolving, the sector continues to attract strong deal flow relative to many other sectors and for the businesses meeting these evolving criteria, strong valuations and profit multiples are still achievable. Here at Wiggin we have continued to see healthy deal flow in both areas over the last 18 months, advising on venture debt investments, venture capital investments and M&A deals across both Adtech and Martech businesses.

Changing landscape leading to new opportunities

In the M&A space, there are clear signs that the buyer profile is becoming more diverse with private equity taking an increasing proportion of market share, alongside the consistently acquisitive advertising giants such as WPP and Dentsu. Traditional media companies are also entering the fray with Time Inc. and Conde Nast acquiring companies in the space over the last year. In addition, internet giants such as Alphabet and eBay and enterprise software players like IBM and Oracle have also been active in the M&A market. This means that even though a huge amount of consolidation has already taken place across Adtech and Martech, deal activity continues to be strong given the broader pool of potential acquirers.

Many commentators agree that Artificial Intelligence (AI), machine learning, Virtual Reality (VR) and Augmented Reality (AR) will become increasingly important to building value in Martech businesses in particular. Those businesses that can effectively deliver enhanced solutions built around those technologies will be the ones attracting the most attention from investors and acquirers over the next few years, thereby fuelling further deal activity.



Ciaran Hickey

Partner

T: +44 (0) 20 7927 6659

E: ciaran.hickey@wiggin.co.uk

Protecting your brand online

Positive brand association is crucial for any company. When a customer thinks of a brand, the images that come to mind should enhance the desirability and prestige of that company - businesses spend millions on advertising to ensure this is the case.

As a result, it is understandably frustrating when your advert appears next to unsavoury, or even illegal, content. We see an increasing number of these incidents online as technology continues to take control of ad placement. Notably, it has recently been reported that over 250 organisations have announced that they will not advertise on YouTube and Google until they can be certain their ads will not feature alongside extremist content.

The issue stems from the use of programmatic advertising - an automated process that employs algorithms to enable ad space to be bought across many different sites instantaneously. This makes the buying and placement of advertising more efficient but also results in a loss of control. While it is often possible to specify "block words" to help guide the software away from unsuitable websites, this is trickier in the context of video content.

Legal implications

Brand reputation is not the only consideration. Questions are being raised as to whether companies whose ads end up on illegal websites are effectively funding the illicit activities of the operators.

Research undertaken by INCOPRO into the placement of ads on illegal pirate websites shows that legitimate advertisements are still being placed on these sites. Legitimate ads are more prevalent on the less popular piracy sites because targeted advertising is less common on the more popular sites. Unfortunately for advertisers, the less popular sites constitute the majority of pirate sites on the web, which means that legitimate ads are likely to be placed across a vast number of sites whose combined usage accounts for a considerable proportion of piracy.

Protect your brand

Ultimately, pulling ads from Google/YouTube is not a long-term solution and in a landscape where the law is catching up with technology, brands must protect themselves from the outset. Arrangements with ad agencies should be underpinned by watertight terms and conditions, including (where possible) specific restrictions on ads appearing on certain types of websites. For example, it may be possible to include a term that ads must not be served on pirate sites or on specific sites identified in a blacklist.

A good place to start in preparing a blacklist is the *Infringing Website List*, which has been set up by the City of London Police and catalogues sites that are confirmed to infringe copyright. In the event that an ad does end up on a blacklisted or specifically restricted website, a contractual claim against the ad agency may then be possible.



Rachel Alexander

Partner

T: +44 (0)20 7927 9689

E: rachel.alexander@wiggins.co.uk



Olivia Brown

Associate

T: +44 (0) 20 7612 7711

E: olivia.brown@wiggins.co.uk

Big data and data protection

Advertising is a data rich industry, with data now informing key decisions such as how much to bid for impressions, where to place adverts, who to target and the overall design of advertising campaigns.

The benefit of using mathematical models to manage the collection and analysis of data and to make data-based decisions has long been recognised but the advancement of cloud computing and machine learning technology (MLT) / artificial intelligence (AI) is taking things one step further - algorithms are now learning from the data they consume and adapting their output based on the data they process. MLT and AI thrive on access to large data sets and predictive models improve as they consume more data. The technology is primed to handle high-volume, real-time data with many variables, such as data collected from the internet about user habits and preferences.

Profiling and personalisation

The application of this technology to the advertising industry offers exciting potential. In particular, it is increasingly being put to work to enable personalised ad targeting - learning the type of advertising to which an individual is most responsive, tracking changes to an individual's tastes and preferences and using that data to select products and adverts likely to be of most relevance and interest to that individual. Arguably this is in the spirit of the CAP code (the rules for non-broadcast advertising enforced by the industry regulator, the Advertising Standards Authority), which requires advertisers not to make persistent and unwanted marketing communications. However, the use of machine learning for customer profiling is not without legal risk.

Data protection considerations

In March 2017 the Information Commissioner's Office (ICO) published a paper on big data, artificial intelligence, machine learning and data protection, encouraging organisations to bear in mind compliance with data protection legislation (and in particular the General Data Protection Regulation (GDPR) which will take effect on 25 May 2018) as they introduce automated decision processes into their business practices.

A key principle of data protection legislation is that personal data should be processed fairly, lawfully and in a transparent manner. In determining whether processing is fair, one has to consider the effect of that processing on the individual and the individual's expectations of how that data will be used.

Under the Data Protection Act 1998, individuals have the right to find out what decisions are made about them using automated means and, if they significantly affect them, to prevent such decisions being made. This would include profiling, assuming it is conducted solely using automated means. The laws relating to automated decision taking are set to be supplemented under the GDPR, when it comes into effect next year. One key change is that individuals must be informed that profiling will be taking place and the consequences of it when their data is obtained - not just if they ask.

How might individuals be affected by profiling?

How could a decision about displaying a particular advert to a particular individual be deemed to 'significantly affect' that individual? The ICO paper highlights the potential for machine learning algorithms to make decisions that are potentially discriminatory.

For example, the paper cites research in the USA which suggested internet searches for 'black-identifying' names generated adverts associated with arrest records far more often than those for 'white-identifying' names. Advertisers may need to consider ways to build discrimination detection into their machine learning systems and maintain human oversight of the adverts that are being displayed.

Advertisers should also consider whether an individual would reasonably expect to have their data used for big data analytics purposes, including profiling. This is sometimes a grey area. An example from the ICO's paper is whether people who post on social media have a reasonable expectation that their data could be used for market research purposes. In determining whether this is an unfair use of personal data, much will depend on the level of transparency about how data is used.

Finding the right balance

What is clear is that the ICO believes that exploiting big data for commercial purposes and complying with data protection laws are not necessarily mutually exclusive. However, the advertising industry should recognise that bringing its operations into compliance with the GDPR will require careful thought and some resources - it is not going to be possible to achieve compliance overnight.



David Naylor

Partner

T: +44 (0) 20 7927 6642

E: david.naylor@wiggin.co.uk



Christina Henry

Associate

T: +44 (0) 20 7612 7720

E: christina.henry@wiggin.co.uk

Getting tough on native advertising

Native advertising - where marketers and social influencers use a range of social media to discuss brands in a more natural or editorial way than we typically experience in more traditional advertising or celebrity endorsements - is thriving, perhaps as a result of the growth of ad blocking technology or consumers' increased trust in word of mouth recommendations.

Complaints on the rise

Correspondingly, the Advertising Standards Authority has noticed an increase in the number of complaints it has received about social media content featuring advertising that is not obviously identifiable, in violation of Rule 2.1 of the CAP Code.

In response to a complaint made about a post on AJ Odudu's Twitter page (in which she promoted an Alpro snack) the ASA clarified that if an influencer promoting an advertiser's product has received some sort of payment or reciprocal arrangement from an advertiser and the advertiser retains editorial control over the content of the post, the post constitutes advertising and needs to be obviously identifiable as such (for example by using "#Ad").

What is 'obviously identifiable'?

The ASA has issued further guidance as to what will satisfy the obligation to be obviously identifiable and confirmed that what constitutes proper notice on one social media platform may not do so on another. For example, on Instagram, the ASA stated that the word "Ad" (or similar) should feature within all posted photos and, on video sharing platforms, an indication that content constitutes advertising must be given before the viewer engages with the content.

It also clarified that marking an advert "#Spon" will not satisfy this obligation as in sponsorship arrangements, influencers retain editorial control of their posted content. Where editorial sign-off lies with the advertiser, this constitutes advertising as opposed to sponsored content and so a more obvious indicator (such as "#Ad") is required.

Failure to comply

Despite the ASA's obvious message that native advertising falls squarely within its remit and that action will be taken against advertisers and influencers (jointly responsible for compliance) who violate the CAP Code in publishing such content, it is arguable that the threat of being rapped on the wrist and told not to do it again by a self-regulatory body is not a sufficient deterrent.

However, in the US, 100 influencers who were paid to promote the disastrous Fyre Festival, billed as an exclusive getaway but turning out to be more of a dystopian nightmare, have been sued in a class action under federal trade rules for not disclosing their social media promotions as ads. Perhaps this escalation in the US will alert advertisers and influencers to the possibility of more serious consequences of non-compliance in the UK at some point in the future?



Sarah MacDonald

Senior associate

T: +44 (0) 20 7612 7718

E: sarah.macdonald@wiggin.co.uk



Tiffany Dale

Associate

T: +44 (0) 1242 631281

E: tiffany.dale@wiggin.co.uk

Real consequences of advertising breaches

The ASA openly states that its intention is not to punish advertisers and broadcasters who are having difficulty following their rulings but rather to educate them on how to stay on the right side of the Advertising Codes. For those advertisers seen to be “breaking the rules”, however, the question most often asked is “what are the consequences”?

Is bad publicity enough?

There is certainly truth behind the ASA's belief that one of its most persuasive sanctions is bad publicity, especially if the breaches arise from rules designed to protect consumers. While the breaching ads may be disqualified from industry awards and advertisers may even appear on a ‘bad advertisers’ list, unless the public views the breaching ad as damaging, the sanctions don't necessarily hurt the brand in breach.

Learning from the gambling sector

Online betting operators and their infringing ads have been the subject of much press coverage - sometimes because there is real public concern that the advertisements are socially irresponsible or misleading and sometimes highlighting the creativity of the teams or agencies behind the adverts and their skilful avoidance of code breaches.

The ASA's adjudications may at times be considered toothless - perhaps even tempting some in the industry to run ads which are close to the bone. However, the industry's regulator, the Gambling Commission (the Commission), has backed up its well published intention to increase enforcement efforts and has issued fines against two operators for advertising failings.

The Commission has issued a £300k fine to gambling operator BGO Entertainment Ltd (BGO)¹ and has accepted £150k payment in lieu of a fine from EU Lotto Limited (Lottoland)², for misleading advertising presented on its own and its affiliates' websites. The BGO fine represents the first time the regulator has used its powers to impose a fine for advertising failings and is a clear indicator that it is losing patience with the continued prevalence of misleading gambling promotions.

Breach of licence conditions

The Commission reinforces the obligations imposed under Britain's advertising codes by making it a condition of holding a British licence that marketing must abide by the CAP and BCAP codes. A breach of a licence condition can lead to enforcement action, as it has done here.

It's clear from BGO's decision notice that it might have avoided a licence review and/or a fine by taking steps to remedy the issues that the Commission had previously identified in their advertising materials.

Lottoland has previously come under pressure regarding the transparency of its betting product and despite acknowledging that Lottoland had made improvements in clarifying its offer, the Commission identified a number of marketing instances where Lottoland had misled its audience by failing to properly clarify that it was offering the chance to place a bet rather than play a lottery.

Cross-sector lessons

These decisions have real consequences for betting operators - perhaps there is a lesson for advertisers in other sectors? Regulators such as Ofcom hold similar powers to the Commission, which are applicable both in the linear and on-demand world. Also, in each of the decision notices, the Commission placed emphasis on the need for operators to take responsibility for the actions of their affiliates, holding BGO and Lottoland to account for failings identified with affiliate marketing carrying their respective brands. All advertisers, not just operators of online betting services, must satisfy themselves as to the ability - and appetite - of their service providers to behave in a compliant manner.



Chris Elliott

Associate

T: +44 (0) 20 7927 9680

E: chris.elliott@wiggin.co.uk

¹ Decision notice - Review of BGO Entertainment Limited's operating licence (April 2017)

² Lottoland public statement (June 2017)

The changing face of sports sponsorship

With six billion hours of competitive eSports viewed in the past year and a global audience predominantly made up of the traditionally difficult to engage, but lucrative, millennial male demographic, eSports is a promising arena for brand promotion - increasing both exposure and recognition. With Premier League teams signing eSports players, heavy NBA investment in the US and the inclusion of eSports as a demonstration sport in next year's Asian Games (and an official medal sport in 2022), eSports can no longer be considered a niche market.

Sponsors required

The compelling commercial reasons for brands to become involved are, happily, paired with increasing demand for sponsorship from the eSports industry. Whilst growing rapidly, viewing figures are yet to translate into media rights revenues anywhere near the scale of its traditional counterparts and so the ever increasing number of eSports teams, leagues and organisations need diversified funding models - and are likely to be more reliant on advertising and sponsorship in the near future.

A few notes of caution

The opportunity for brands comes with a few important health warnings. Firstly, the eSports audience is very fragmented with China accounting for 57% of all viewing in 2016. This may not suit all brand strategies.

Further, there are no established protections and norms - until these materialise, brands need to ensure deals work for them on a commercial and legal level, such as getting the right level of exclusivity at events to avoid sharing the stage with competitors.

eSports are also largely consumed on digital and mobile platforms, with the associated regular technology trials and tribulations and content protection issues. Brands therefore also need appropriate digital IP protection strategies in place and must be vigilant of possible brand-safety scandals when seeking to capitalise on this expanding and exciting new market.



Ross Sylvester

Partner

T: +44 (0)20 7927 9681

E: ross.sylvester@wiggin.co.uk



Andrew Lindsay

Associate

T: +44 (0) 1242 631154

E: andrew.lindsay@wiggin.co.uk

Key contacts



Sarah MacDonald

Senior associate

T: +44 (0) 20 7612 7718

E: sarah.macdonald@wiggin.co.uk



Sean James

Partner

T: +44 (0) 20 7927 9682

E: sean.james@wiggin.co.uk



David Naylor

Partner

T: +44 (0) 20 7927 6642

E: david.naylor@wiggin.co.uk



Chris Elliott

Associate

T: +44 (0) 20 7927 9680

E: chris.elliott@wiggin.co.uk



Shaun Lowde

Partner

T: +44 (0) 20 7927 9683

E: shaun.lowde@wiggin.co.uk



Anna Doble

Legal director

T: +44 (0) 20 7927 9686

E: anna.doble@wiggin.co.uk



Ciaran Hickey

Partner

T: +44 (0) 20 7927 6659

E: ciaran.hickey@wiggin.co.uk



Tiffany Dale

Associate

T: +44 (0) 1242 631281

E: tiffany.dale@wiggin.co.uk