

# The Long Arm of the Law: Marketers and Legislation



# Executive summary

***The Long Arm of the Law asks marketers to question what they know, consider whether their legal compliance is all it should be - and think hard about the implications for the future.***

In an environment of increasing legislation, marketers have to be more knowledgeable about the law than ever before.

But there is a large number of regulations and codes. Some of these are set by the government, and some by other organisations. Just in the last year, 21 new Acts, regulations or amendments that directly affect marketers in their daily activities have been passed in the UK alone. In addition there are a further 10 Bills before Parliament in 2005-6 that will directly affect marketers if they are passed, including the Consumer Credit Bill, the Equality Bill, the Fraud Bill, the Occasional Sales Bill, the International Development (Anti-corruption Audit) and the London Olympics Bill. [Source: CIM Insights Team.]

And as the global marketplace becomes smaller, and more business is conducted via the Internet, marketers have to have increased knowledge of laws in other countries

too. Across the marketing community, who can honestly say that they are fully aware of the extent of the legislation that can affect their work, and that they regularly check to make sure their marketing activities don't flout any of the regulations that exist? The fact is that many marketers are woefully ignorant of what is required from them legally. And whilst the vast majority of marketers follow the line of the law as far as they know it, many do not fulfil their legal obligations as much they should do. Furthermore, a small minority wilfully ignore the law, even when they know their activities are illegal.

If marketing is to be recognised as a responsible profession that has status, and is to be seen as a profession that young people aspire to enter, this situation has to change. *The Long Arm of the Law* asks marketers to question what they know, consider whether their legal compliance is all it should be - and think hard about the implications for the future.

# ONE

## The evolutionary war

**As the battle increases in ferocity, the law steps in and tells marketers what they can or cannot do. As marketers continue to find loopholes, so the law will step in more strongly.**

Wherever you look, technology is increasing. Increasing technology gives rise to new issues - new ways for marketers to invade customers' privacy that need to be regulated; new channels for advertising messages to reach consumers.

But this quantity of technology works both ways. As much as it works to marketers' advantage, it can work against marketers too. Customers have anti-spam software and pop-up blockers on their computers. They can edit out the adverts on TIVO television sets. Or they can use Telephone Preference Services and call minder systems to screen out unsolicited phone calls.

As a result, a kind of 'evolutionary war' develops between marketers and customers. Marketers find ways round pop-up blockers, for example, so software manufacturers have to invent anti-anti-pop-up blockers. And so on. As the battle increases in ferocity, the law steps in and tells marketers what

they can or cannot do. As marketers continue to find loopholes, so the law will step in more strongly.

It's clear that something has to be done. Marketers have the choice between working harder and harder to get round the legal obstacles in their way, or self-regulating more effectively, in the hope that short-term restraint will lead to longer-term freedom. If the guardians of our society are not pushed to act, they will refrain from placing increasingly severe restrictions in the way of law-abiding marketers going about their daily business.

Assuming that self-regulation is seen as the way ahead, a further problem rears its head. There is a plethora of regulatory bodies - e.g. Ofcom, ASA (recently submerged into Ofcom) and MRHA (the Medicine and Healthcare products Regulatory Agency) - all of which have different codes. Which set of rules should take precedence? How do marketers choose which set of code(s) to follow?

# TWO Cracking the code

**There is much confusion about conflicting codes and regulations. ... Many marketers do not know whether a particular regulation is a law or a code.**

There is much confusion about conflicting codes and regulations. This situation is complicated by differences between legal codes - which companies must obey - and codes of practice, which companies voluntarily support. Many marketers do not know whether a particular regulation is a law or a code. For example, the ASA (the Advertising Standards Authority) is a self-regulatory body with no connection with the government - but it can ban broadcast-media adverts or instruct that they only be shown post-9pm, or be modified, if a specific law has been breached.

And there is confusion too about the interpretation of EU Directives; some countries have more strict requirements for consent to market than others. Consider privacy regulations. CAP's interpretation of the draft of the Privacy and Electronic Communications (EC Directive Regulations 2003) revealed a large discrepancy between CAP's view and what the regulation actually required.

CAP's broad definition of 'consumer' effectively bans opt-out business-to-business email marketing - because CAP considers B2B customers to be

private consumers, not business customers. This, whilst seemingly in line with PECR (a further piece of recent regulation that requires marketers to offer an opt-in option rather than opt-out) is at odds with the EC Directive, which does not ban unsolicited B2B electronic mail.

In other words - at the moment, you could carry out an opt-out B2B direct marketing email campaign and be within your rights according to the EU Directive, but fall foul of the ASA.

Similarly, the ASA's interpretation of the EU code varies. Duncan Smith, MD of icompli, a training company that helps companies with legal compliance, points out how the delicacies of interpretation can lead to dangerous minefields for the unwary marketer: "If you purchase a list of business contact email addresses from a reputable broker and email the list with a business proposition like 'Come on our *e-Marketing and the Law training course*', you will stay on the right side of the law. But, change the proposition to 'Come on our de-stress your life seminar' and you will fall foul of the ASA's interpretation of the CAP Code."

# THREE

## Here, there and everywhere

**... if your web site can be accessed from other countries, you'd better make sure that any marketing activities you execute take notice of any laws any country may have introduced....**

Just within the UK, there is confusion about what marketers must do, what they ought to do, and how much they can get away with. As the global marketplace becomes ever more accessible, serious issues can arise when marketers in country X do not know country Y's rules.

In the US, the Children's Online Privacy Protection Act (COPPA) states that it is illegal if any commercial web site "in any state or nation" to collect personal data about children (defined as persons under 13). "It is unlawful for an operator of a website or online service directed to children, or any operator that has actual knowledge that it is collecting personal information from a child, to collect personal information from a child in a manner that violates the regulations... where such website or online service is operated for commercial purposes, including any person offering products or services for sale through that website or online service."

It's clear that the US wants to protect its minors against web sites targeting children for commercial purposes by using their personal information to get in touch with them. No surprise there. But the significance for international marketers is that the US is saying that other countries and territories are included in the terms of the Act, and that ignorance of the act is no excuse.

COPPA goes on to state that "the State, as *parens patriae*, may bring a civil action on behalf of the residents of the State in a district court of the United States" if any unwitting marketers violate the Act. In other words, if your web site can be accessed from other countries, you'd better make sure that any marketing activities you execute take notice of any laws any country may have introduced - because the first you may know about it is a civil action from the US Government.

# FOUR

## Government or organisations

**Should there be more government intervention than there is at present, or should governments take a back seat and let organisations (and marketers) govern themselves?**

To what extent should organisations set their own codes; to what level should marketers be held by them; and to what degree should governments decide? Should there be more government intervention than there is at present, or should governments take a back seat and let organisations (and marketers) govern themselves?

Or should the public themselves be entrusted to self-regulate, and let 'buyer beware' apply to the more dubious aspects of marketing? Witness the furore over RFID tagging, which led to calls to boycott supermarkets that were believed to be planning to introduce the system. Some would argue that the government and regulatory bodies should mind their own business and let customers take their own responsibility in the marketplace.

All this is important for marketers to consider because there has never been a common consensus on marketers' interpretations of the law.

We see bad practice all about us, every day - much of this dubious, immoral or even illegal practice was explored in depth in our paper *New Year's Revolution*. It's important for marketers to step up a gear in the pursuit of ethical best practice. It's important to educate marketers so that companies don't find themselves served with costly writs; and it's useful for competitive advantage to be able to show that you are transparent and 'square trade'.

Being knowledgeable about the law is an important part of that square trade branding. And corporate reputation is aided by being knowledgeable about legal issues and transmitting this. But many marketers are blasé about what they need to know and a few even wilfully behave badly. By improving their knowledge, the good majority can edge out the minority.

# FIVE Educating marketers

**In our main paper on marketing and the law, which will be published in January, we will explore what effect these disparate codes and confusing regulations are having on practising marketers.**

Many marketers are fearful of what their legal obligations are and avoid engagement because of an aversion to numbers and statistics. Evidently, there is a need for marketers to keep up to date. Many companies do not have adequate knowledge of legal matters - a very small proportion, for instance, have knowledge of legal compliance included as part of a job specification. When marketers (or anyone else in the organisation for that matter) need to sort out a legal question, there should be a person within the organisation they can speak to. This does not necessarily have to be someone from the marketing department - but the role has to exist.

In our main paper on marketing and the law, which will be published in January, we will explore what effect these disparate codes and confusing regulations are having on practising marketers. We will consider the problems that technology and increasingly complex legislation create for small businesses and B2B companies (such as wanting to stay within the law, but not having the resources to appoint a privacy manager). And we will offer some solutions for marketers who want to know that their actions are legitimate, but don't want to compromise on building their business or increasing shareholder value.

If you are concerned with keeping up to date with the mountain of new legislation that piles up at home and abroad, we'd like to hear from you.

Email your views to **[shapetheagenda@cim.co.uk](mailto:shapetheagenda@cim.co.uk)**