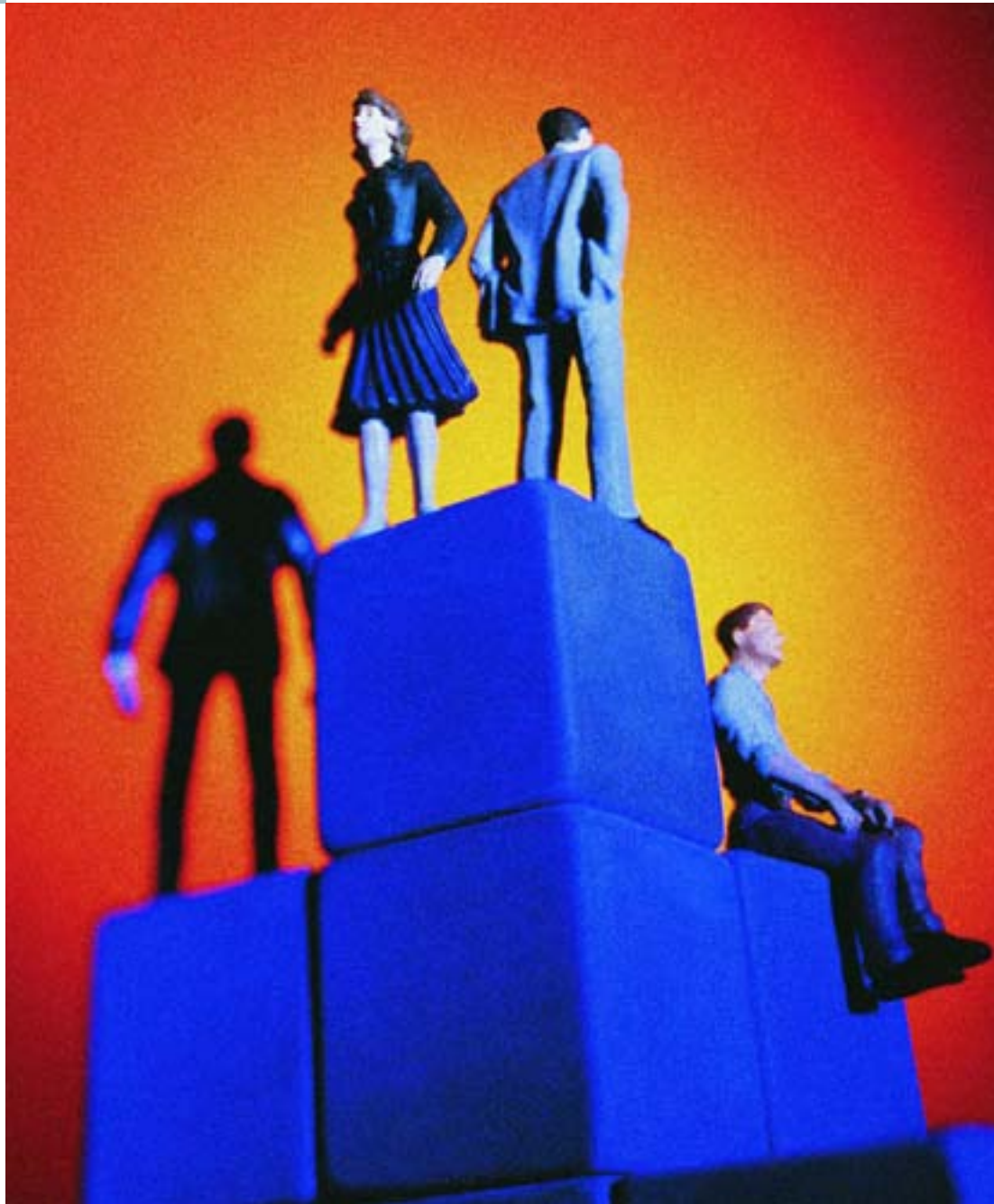


shape the
agenda

No marketer is an island: Marketing and the Law



Executive summary

How can the marketing community respond to this ever more complex legal environment in order to continue to do its job responsibly and effectively?

Marketers are facing a climate of increasingly restrictive legislation. Heavy-handed Bills are regularly placed before governments in the UK, the US and further afield. Marketers face confusion over the number of laws, regulations and codes that they have to be knowledgeable about. And increasingly, marketers even need to know about laws that have been passed elsewhere in the world.

But such skills are not necessarily a marketer's forte. How can the marketing community respond to this ever more complex legal environment in order to continue to do its job responsibly and effectively?

In the past, self-regulation has been the basis for marketing's relationship with governments. But this self-regulatory

framework is being overwritten with legislation. Companies themselves need to take a more proactive role in order to assist and reinforce self-regulation, to avoid brand damage at best and costly legal proceedings at worst.

In fact, the raised bar of marketing legislation allows a real opportunity to present marketing in a positive light - as a mature, responsible discipline. By recognising the role of Marketing Compliance Officer, companies can show that they are willing to identify and comply with their legal responsibilities, and communicate their actions to the wider business community, governments and self-regulatory bodies.

ONE

Keeping up appearances

In the UK alone, 21 new Acts, regulations or amendments affecting marketers have been passed in the last year...

The current environment marketers face in their day-to-day work is one that is being increasingly restricted by new laws. In the UK alone, 21 new Acts, regulations or amendments affecting marketers have been passed in the last year, with another 10 Bills being put before Parliament in 2006. [Source: CIM Insights Team]

Globally, the problem is compounded by laws affecting marketers working via the Internet - such as COPPA. This is a recent US law that forbids companies, whether in the US itself or overseas, from collecting personal data about minors (defined as children under 13), if that company is a commercial enterprise; whether or not the data is eventually used for commercial purposes. Marketers need to be aware that legislation from all corners of the globe can affect them, or they risk falling foul of a legal suit at some point in the future.

In the UK, there is a climate of self-regulation that has served the marketing community and the public well. But this culture of self-regulation is being gradually and irretrievably diminished. The recent Olympic Bill is an example of how extreme and constrictive legislation is becoming. The new bill makes it illegal to combine words like 'games', 'medals', 'gold', '2012', 'sponsor' or 'summer' in any form of advertising. [Source: <http://www.publications.parliament.uk/pa/cm200506/cmbills/045/2006045.htm>]

The bill is designed to stop businesses 'cashing in' on the Olympics, despite a London 2012 spokesperson's statement that "there is absolutely no intention of stopping London businesses from becoming involved in the Games". [Source: Andrew Fraser, Olympics bill comes under attack, http://news.bbc.co.uk/sport1/hi/other_sports/olympics_2012/4744983.stm, accessed 9.9.05]

However, as Marina Palomba, Legal Director at the IPA says, "You won't even be able to say, 'Come to London in 2012' because it will infringe the [proposed] Act." Palomba goes on to add that even witty advertising for suntan lotion saying something like "Get bronze in London in 2012" would break the law. [Source: *ibid.*]

Understandably, the London 2012 committee wants to clamp down on 'ambush marketing'. This is where companies who have not paid to be the official sponsors of an event associate their products with players or grounds, or where they advertise nearby, in order to imply to consumers that the event they have 'ambushed' endorses their product. But the ferocity of the provisions of the Bill, and the government's apparently willing complicity with its contents, should set alarm bells ringing amongst the huge majority of responsible marketers, who are being punished because of a minority who flout reasonable rules and regulations.

...marketers need to be fully cognisant of what new laws, regulations and EU Directives are on the horizon - as well as what is in place now.

Similarly, the recent EU Comparative Advertising Directive makes it difficult for companies to make claims about their products. According to Rafi Azim-Khan, Partner and Head of Marketing Law at law firm Wragge & Co (www.wragge.com), the new directive "impacts not just obvious comparisons, but most things you want to say about your product - benefits, price, even what it does." [Source: Correspondence with Insights, November 2005]

Without a competent working knowledge of how the Directive works, companies lay themselves open to potential litigation. As it is the marketing department that is likely to make product claims, it's vital that marketers know the provisions of the Directive. If they do not, Azim-Khan paints an alarming picture of what can happen: "Burger King v. McDonalds, Compaq v. Dell, Colgate v. Listerine, Dyson v. Electrolux, RBS v. Barclaycard - the examples of expensive battles go on

and on." As a result, marketers need to be fully cognisant of what new laws, regulations and EU Directives are on the horizon - as well as what is in place now.

The Olympic Bill may be revised before it becomes law. But it is an example of the general trend of the UK government's increasingly belligerent attitude towards marketing. In an environment where the self-regulatory framework is becoming relegated to history, what can marketers do to reassert some autonomy, in order to operate responsibly and ethically, and stem the increasing flow of legislation?

TWO Raising the bar

Some 94% of marketers believe that in the next five years, the industry will face more legal regulation.

Marketers are well aware of the legislation time bomb that they are facing. Some 94% of marketers believe that in the next five years, the industry will face more legal regulation. [Source: Legal Implications and their Impact, MORI/CIM, 2005]

Yet despite a separate survey which recently showed that 87% of marketing professional respondents feel it is up to individual marketers to be aware of legal constraints around marketing, [Source: Special Report for The Chartered Institute of Marketing, Croner Reward, 2005] there is a great deal of doubt on the part of marketers about how existing laws affect them.

For example, some 48% of marketers are unaware of the International Financial Reporting Standards 2005. And 44% of marketers are unaware of the Privacy and Electronic Communications Regulations (PECR) - which require, amongst other things, that companies provide 'opt-in' boxes for unsolicited electronic mail, rather than the 'opt-out' boxes which are still prevalent. [Source: Legal Implications and their Impact, MORI/CIM, 2005]

PECR does not cover direct postal mail. But many marketers are unaware that unsolicited direct mail communications are required to offer the option for customers to decline further unsolicited communications. Many otherwise reputable companies do not provide such

an option on their direct mail communications. The blame for this lies squarely with the marketing department - as does the presence of 'opt-out' instead of 'opt-in' boxes in electronic communications.

The story is worryingly similar with other laws affecting marketers. A recent survey by Mortgages Plc (May 2005) showed that one in four advertisements for private home mortgages were not compliant with FSA (Financial Services Authority) regulations that have been in place since 31 August 2004. The new regulations require advertisements to carry the warning 'Your home may be repossessed if you do not keep up repayments on your mortgage'. This is considerably stronger wording than the old Mortgage Code Compliance Board (MCCB) 'wealth warning', 'Your home is at risk if you do not keep up repayments on your mortgage or any other loan secured on it'. [Source: Legal and Ethical Issues in Marketing, Ryan Storey, Cambridge Marketing Colleges, September 2005, p13]

Most of the 25% of advertisements that do not comply with the new rules are guilty of using the old warning. Again, the responsibility to get this right rests with the marketing department.

Nor are marketers any more certain about the industry's self-regulatory codes. According to Marina Palomba, "Many

The situation is complicated by confusion over the number of codes, some of which occasionally contradict each other...

marketers I come across on a daily basis do not even know what the CAP Code is." [Source: Correspondence with Insights, September 2005]

The situation is complicated by confusion over the number of codes, some of which occasionally contradict each other (outlined in our paper *The Long Arm of the Law*), and the hazy knowledge some marketers have about whether a particular regulation is a voluntary code or a legal requirement.

We are all familiar with the problem of customers becoming frustrated with marketers when they send repeated unsolicited mail. There are codes in place to monitor this and marketers who know what they should and shouldn't do follow these suggestions. But, quite rightly, if marketers cannot even be trusted to implement their own self-regulatory codes, the Government will have to intervene.

THREE

Seek - locate - legislate

...comparative advertising and pricing claims, are the two areas that most frequently get companies into legal hot water...

There are a number of legal areas of concern to marketers.

- Comparative advertising
- Pricing claims
- Product descriptions
- Data protection
- International laws
- Financial products and services
- Food and drink
- Mobile products and services
- Medicines
- Marketing to children

The first two, comparative advertising and pricing claims, are the two areas that most frequently get companies into legal hot water, according to Rafi Azim-Khan. [Source: Correspondence with Insights, November 2005] And in both cases, it is usually the marketing department that, if not directly to blame for any potential legal case, can anticipate and avoid a litigious situation - if their compliancy skills are improved.

Such a proactive approach has helped Wilkinson Sword/Schick in its well-

publicised 'razor wars' against Gillette. When challenged by Gillette's Mach 3 range, Wilkinson Sword was able to win a number of legal battles, not only in defending attacks on its own claims for the Quattro razor, but also in forcing Gillette to withdraw an expensive advertising campaign featuring David Beckham for its Turbo and Power razors. This was due to a product claim that was found to be false and unsubstantiated in a number of major jurisdictions in Germany, the USA and elsewhere. [Source: Rafi Azim-Khan, Correspondence with Insights, November 2005]

FOUR

Abide with me

The Olympic Bill and the EU Comparative Advertising Directive constitute a wake-up call - it's time to act on it.

The problems of legislating for marketing include:

- The time factor - by the time you've legislated, it's often too late to prevent the 'rogue traders' you were trying to stop
- New technology making new scenarios all the time. It takes time for Bills to be put before Parliament and passed. Action needs to be taken in the meantime
- The Government trying to strike a balance between allowing an open market on one hand, and protecting the public on the other. This can lead to a split in interests within the Government and make it difficult for the laws that are eventually passed to be both appropriate and effective

These reasons, taken as a whole, explain why self-regulation has set the historical precedent for marketing's relationship with the law. According to Ryan Storey of St John's Innovation Centre, Cambridge Marketing Colleges, "Self-regulation helps to create trusted communications of quality and integrity, due to general industry compliance without any further need for legal instigation." [Source: Legal and Ethical Issues in Marketing, Ryan Storey, Cambridge Marketing Colleges, September 2005, p6] Because of the nature of self-regulation, codes can be implemented quickly to respond to the rapidly changing technological situation, and become effective more quickly than legislation.

And self-regulation can close loopholes in existing regulations. This is why, according to Storey, it has been "recognised as a feasible alternative to statutory control by both the Department of Trade and Industry and the Office of Fair Trading, and also various EU Directives (84/450 and 97/55 EC.)" [Source: *ibid.*]

But as we have seen, the effectiveness of the self-regulatory system is being encroached on. We believe there has to be a more proactive stance taken by marketers to prove to the government that the industry is a responsible one, and that the rate of increasing legislation can be slowed. If a more interactive stance is not taken, it is increasingly likely that the hands of responsible marketers will be tied to the point that it becomes difficult to work effectively.

Rafi Azim-Khan stresses that marketers must become more responsible. " 'Can we do this?' is a question commonly raised by clients," he says. Azim-Khan wants this mentality of pushing limits to be reversed. "I prefer to turn the question round," he says, "and ask, 'what is your objective?' Once we know what they are trying to achieve, we can help steer through what is now, without question, a legal minefield." For Azim-Khan a proactive approach "is no longer optional, but essential."

The Olympic Bill and the EU Comparative Advertising Directive constitute a wake-up call - it's time to act on it.

FIVE

Who governs the governors?

The MCO [Marketing Compliance Officer] ...needs to be someone who marketers can go to for relevant, accurate, up-to-date and impartial advice.

In fact, the situation is not as problematical as it might first appear. Instead, says Marina Palomba at IPA, it is simply that "the industry is rather naïve and unsophisticated." [Source: Correspondence with Insights, September 2005] There is also the issue that it is in legal consultants' and lawyers' interests to make the legal scenario more complicated than, in fact, it needs to be. The self-regulatory bodies try to reduce this aura of mystery. Together with these bodies, we want to see more transparency in discussion of legal matters. How can we achieve this goal?

One way is for companies to recognise the role of Marketing Compliance Officer. The MCO, who should be a prominent member of the marketing department (the role does not have to be a separate post, but may be so in larger companies), needs to be someone who marketers can go to for relevant, accurate, up-to-date and impartial advice.

The MCO will be the point of contact for marketers wanting to ensure compliancy with laws and regulations, particularly the new International Financial Reporting Standards (IFRS), and the Operating and Financial Review (OFR). By doing so, the MCO fills a gap in the current make-up of the marketing department - someone whose role it is to identify, assess and respond to the environmental and social impacts of marketing.

It is likely that the MCO will be a Chartered Marketer. Additionally, the MCO needs to

be clear about the differences between self-regulatory codes and laws, both in the host country and in any foreign markets the company works in, and able to smooth out inconsistencies in application of codes and laws. That knowledge can then be passed on to the marketing team.

This new role will help to solve several of the key problems currently facing the marketing profession:

- Marketing is perceived as an untrustworthy profession, where duplicitous methods are used to sell customers products they do not particularly need nor want. Whatever the level of truth of this accusation, the perception exists - and the presence of an MCO can help reduce it
- Inadvertently, otherwise respectable companies can sometimes make mistakes, where they are unaware that they are breaking a particular code, regulation or law. The MCO can foresee, circumvent and close down such pathways before they occur
- The role will smooth the sometimes uncomfortable relationship between companies (especially consumer products companies) and the ASA. It also means the ASA has a quick, easy-to-locate contact in any company in the event of any issue or dispute. According to Professor Malcolm McDonald, "much of the criticism levelled against marketing is in fact directed against one aspect of it: advertising." [Source: Correspondence with Insights,

In companies larger than 150 employees, we believe that the Marketing Compliance Officer will become an increasingly recognised role.

October 2005] By having someone in the marketing department who is aware of what can and cannot be done in advertising campaigns, many of these criticisms can be anticipated and avoided

- The MCO raises the status of marketing as a profession - because it is further evidence of the profession taking its responsibilities seriously

In companies larger than 150 employees, we believe that the Marketing Compliance Officer will become an increasingly recognised role. For SMEs and micro-organisations, it is unlikely that there will be the resources to allocate to an MCO. Here, according to Laurie Wood of Salford Business School, "compliance is met on an ad-hoc, needs-based level." But it is important that all companies, large and small, recognise and address the issue.

Where an MCO is not a viable proposition, individual marketers can take a certain level of responsibility upon themselves to ensure they are legally compliant. The Chartered Institute of Marketing has prepared an area of its Knowledge Hub,

www.cim.co.uk/knowledgehub, that lists the main laws affecting marketers, outlines their provisions, and directs marketers to external links for more information and clarification.

None of this shift in thinking about compliancy will be achieved without buy-in at director level. This is because compliancy requires a budget, and as Laurie Wood points out, "what gets measured (and funded) gets done." Unless there is a budget line against the activity, "it will always be a low priority squeezed out against other more pressing needs which provide a more visible return on investment to the organisation." [Source: Correspondence with Insights, October 2005]

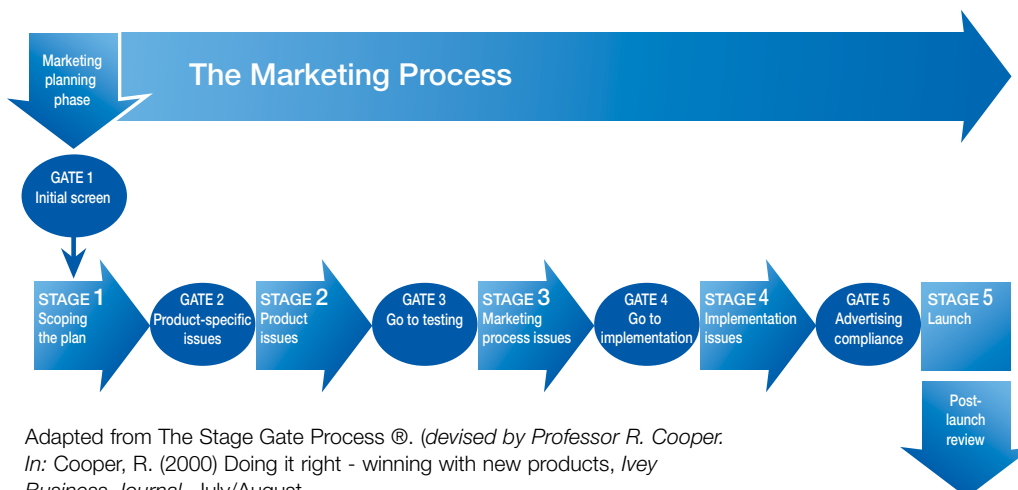
The board and managers of any company (or in the case of smaller firms, the owners) must 'support the agenda visibly, if they truly believe it is an important aspect of their business operations.'

A process for this new way of considering legal compliance for marketing is outlined overleaf. Adapted from The Stage Gate Process ®.

(devised by Professor R. Cooper. In:

Cooper, R. (2000) Doing it right - winning with new products, *Ivey Business Journal*, July/August), the Marketing Compliance Process shows how at each stage of the marketing process, legal compliance is checked by a clearly identified 'gate' that the product has to pass through before it can move to the next stage.

Diagram 1: Marketing Compliance Process



Adapted from The Stage Gate Process ®. (devised by Professor R. Cooper. In: Cooper, R. (2000) Doing it right - winning with new products, *Ivey Business Journal*, July/August.

SIX

From red tape to blue skies

By brushing up on our knowledge of legal matters and increasing awareness of the need for compliance among marketing departments, the uncomfortable tide of legislation can be stemmed.

We are not going to be able to turn the clock back and return to a supposedly 'golden age' where self-regulatory frameworks were sufficient for marketing's compliancy needs.

The Chartered Institute of Marketing is revising its course and exam content to ensure it contributes in an educatory role, and to increase public awareness of the Marketing Compliance Officer role. The Chartered Institute of Marketing is also actively developing its role as an interface between self-regulatory bodies, the Government and individual marketers and companies.

Marketers can help themselves too, adds Rafi Azim-Khan. "Legal clearance is often thought of as a nuisance. However, it can be a powerful tool to help you beat off spoiler tactics from competitors, as well as interference from regulators." [Source: Correspondence with Insights, November 2005]

Rather than being a time-wasting obstacle, Azim-Khan asserts that it is in a company's interests to consider legal compliancy as a priority. "Get it right and

you can achieve your objectives. Get it wrong and, aside from convincing the legislators that more law is needed, all the hard work, time and money can be for nothing. The worse case scenario is a damages claim, product recall and hefty costs - not to mention the related brand damage."

By brushing up on our knowledge of legal matters and increasing awareness of the need for compliance among marketing departments, the uncomfortable tide of legislation can be stemmed. A more cogent, systematical procedure for legal compliancy can be introduced to companies nationally and globally. Marketers can then prove to customers that they are not the ogres they are sometimes painted to be, who need ever-stricter laws to keep them on the straight and narrow.

APPENDIX

Children's Online Privacy Protection Act (COPPA)

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.' [Source: <http://www.coppa.org/coppa.htm>]

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. 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 its contents 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 need to ensure 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.

PECR does not cover direct postal mail

Although PECR does not cover direct postal mail, marketers do have to offer customers the opportunity to be marked on any database they use, **not** to receive further unsolicited communications.

It is not sufficient for companies to delete customers from their database - because if, for example, they buy in another list from a third party, the customer who has asked not to receive unsolicited communications may be on it.

The opt-out box is the facility that, in this specific case, enables the company to update the mailing list. But the company then has to manage that facility. This requires resources and buy-in at management level.

Comparative advertising and pricing claims

It is a myth, according to Rafi Azim-Khan of Wragge & Co LLP, that the most common legal action affecting a company's marketing activities is a breach of legislation or being hauled before the ASA. The most common problem, Azim-Khan outlines, is "action by your competitors, whether a direct legal suit or simply a pretext to 'shop' you to the authorities."

Azim Khan's company "helps clients to help themselves by identifying the potential legal problems early and devising a 'road map' to steer clear of the likely pitfalls ahead", particularly with the new EU Comparative Advertising Directive.

This approach assisted Wilkinson Sword in its battles against Gillette, as outlined in the main paper. Azim-Khan adds that "this initial work has been proven time and again to give the advertisers the initiative and an advantage when engaging in a new campaign. It gives them the ammunition they need to successfully fight off challenges from the regulators and competitors, and ensure that nothing derails the advertiser's campaign as it tries to achieve its objectives." Further information on work in this area can be found at www.wragge.com/partners/rafiiazimkhan.html.

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