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Facebook - Advertiser Liability For User Comments… A Post Too Far?

Linda Luu and Alison Willis consider two recent determinations by the Australian Advertising Standards Bureau concerning the liability for the posting of user comments on an advertiser's Facebook sites.

Introduction

In two recent landmark case reports,[1] the Australian Advertising Standards Bureau (***ASB***) has determined that user comments on an advertiser's Facebook site are an *'advertising or marketing communication'* as defined in the Advertiser Code of Ethics (the ***Code***). In one of these decisions, an advertiser was also held liable for the user comments.

As a result, not only will advertisers in Australia be held responsible for content generated by or on behalf of themselves on their own Facebook site, but also for material or comments posted by users or friends. In practice, this requires advertisers who have Facebook or similar social media sites to regularly monitor user comments and remove posts which may breach provisions of the Code.

This determination has serious implications for advertisers that engage in social media or other interactive advertising. This article analyses these decisions and considers their implications for the increasing number of businesses which make use of social media. The authors also consider whether the Code is properly equipped to deal with new forms of communications such as social media.

ASB determination

On 11 July 2012, the ASB published two case reports in response to a single complaint made in relation to user comments posted on both the official VB and Smirnoff's Facebook sites (owned by Fosters Australia, Asia & Pacific, part of Carlton United Brewers (***CUB***) and Diageo Australia Ltd[2] respectively). The role of the ASB is to receive and review the merits of complaints made in relation to advertising and marketing communications and it may initiate a formal investigation based on a single complaint.

The key question to be determined by the ASB was whether the user comments on VB and Smirnoff's Facebook sites were an *'advertising or marketing communication'*, which is defined in the Code as:

- 'any material which is published or broadcast using any Medium or any activity which is undertaken by, or on behalf of an advertiser or marketer, and
- over which the advertiser or marketer has a reasonable degree of control, and

1 Case number 0271/12 (Fosters Australia, Asia Pacific) and case number 0272/12 (Diageo Australia Ltd). ASB case reports are available at http://www.adstandards.com.au/.

2 Case number 0272/12.

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Inside This Issue:

Contents

- that draws the attention of the public in a manner calculated to promote or oppose directly or indirectly a product, service, person, organisation or line of conduct…'

In making the determination, the ASB found that:

> '…the Facebook site of an advertiser is a marketing communication tool over which the advertiser has a reasonable degree of control and that the site could be considered to draw the attention of a segment of the public to a product in a manner calculated to promote or oppose directly or indirectly that product. The Board determined that the provisions of the Code apply to an advertiser's Facebook page. As a Facebook page can be used to engage with customers, the Board further considered that the Code applies to the Content generated by the page creator ***as well as material or comments posted by users or friends***...'[3] [our emphasis]

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The ASB found the user comments to be an advertising or marketing communication within the meaning of the Code and went on to assess whether the user comments breached the Code. A number of the particular allegations of Code breaches were upheld against Fosters but all allegations of Code breaches were dismissed against Diageo.

Analysis of the determination

Fosters submitted that there is a distinction between comments, questions and material posted by or on behalf of advertisers and user comments. Fosters argued user comments were not an advertising and marketing communication for the following reasons:

> '…they are not material "over which [CUB] has a reasonable degree of control". While CUB has the ability to monitor and remove User Comments from the VB Page…pre-moderation by CUB of User Comments on the VB Page is not commercially feasible therefore CUB has no practical control over the content of the User Comments…pre-moderation of every User Comment would be contrary to the spirit of social media and would cause users to become disengaged from the page… Further… User Comments… are not "calculated to promote or oppose directly or indirectly a product, service, person, organisation or line of conduct"…'

1. First Limb: Does the advertiser have a reasonable degree of control?

Despite Foster's claim that it has no practical control over the user content, as the owner of the Facebook site and as acknowledged in its submissions, it does have the ability to monitor and remove user comments from the VB Page, which appears to satisfy the first limb of the definition.

2. Second Limb: Are the comments calculated to promote a product or organisation?

There are strong arguments on both sides as to whether the second limb of the definition of 'advertising or marketing communication' is or isn't satisfied. The key question to be applied is, is all dialogue in response to an advertiser post on its own Facebook site:

> 'calculated to promote or oppose directly or indirectly a product, service, person, organisation or line of conduct'?

The ASB appears to have given weight to two factors, however it did not specify these in detail in its reasoning – so we have expanded on the reasons they provided. First, the user comments are on an advertiser's Facebook site and accordingly it is compelling for the ASB to have found that the site is most likely calculated to 'indirectly promote that company'. Secondly, the user comments identified in the complaint were posted in reply to questions posted by the advertiser such as *'Besides VB, what's the next essential needed for a great Australia Day BBQ?'.* In our view it is also reasonable for the ASB to have found that responses to the questions posted by the advertiser are most likely calculated to 'promote the product'.

3 Case number 0271/12, at 7.

How do users 'use' social media?

However, with respect to the ASB determination, we have difficulty in accepting the decision in respect of the second limb without testing. It is evident in the ASB determination that it elected not to consider the mechanics of how user comments can ultimately be posted to a Facebook site. When we posted a user comment to VB's Facebook page, that comment then appeared on all of that user's friend's newsfeeds and provided those friends with the option of also commenting on the user comment (or 'liking' it). We noted that although there is some identification of the VB Facebook site in the newsfeed, the friend can comment or 'like' the photo without clicking through to the actual VB Facebook site (only the picture and the relevant comments and 'likes' are viewable).

This is a grey area that is not addressed in the determination – whether it is fair that an advertiser is liable for comments that users have made, when those users are not even required to have visited the advertiser's Facebook page to make the comment. We acknowledge that the answer may still be yes because the advertiser benefits from having the Facebook site and is therefore fully responsible for the site. However, as considered further below, we doubt this would have been in the contemplation of the Australian Association of National Advertisers (***AANA***) in 1997 when it established the Code. Although the determination is currently confined to Facebook sites, we note that social media includes all web and mobile-based technologies which are used to turn communication into interactive dialogue among organisations, communities, and individuals.[4] This could have many more implications for other web interactions between advertisers and users.

Further, as stated above, Foster submitted that advertiser generated content and user content should be treated differently under the Code, specifically with user content being more analogous to a conversation at a restaurant or a pub.

Is user content more analogous to a conversation at a restaurant or a pub? The general public, which uses and engages in social media, would probably agree as they understand the difference between advertiser content and user content. However, there are also unsophisticated users of social media who may not understand the difference.

For the reasons set out above it is arguable that user comments themselves fall into two categories. User comments that mention VB or competitor products clearly satisfy the second limb of the definition. However a user comment such as *'is a man's job women should b chained 2 da kitchen! Lmfao'* (in response to an advertiser post about brewing being every man's dream job) is arguably part of an interactive dialogue which is not promoting the advertiser's product.

The same complaint is also due to be considered by the Alcohol Beverages Advertising Adjudication Panel against the Alcohol Beverages Advertising Code (***ABAC***), which will consider similar issues, and which has not yet occurred at the time of writing.

Limitations of the Code

Since its inception in 1997, the Code has not been updated to address the new challenges of social media, despite the increased use by advertisers of sites such as Facebook and Twitter.

Readers will recall that the media industry in 1997 comprised traditional forms of media such as television, radio, print and billboards. Back then, advertising on the internet was in its infancy and social media was unheard of. It is now appropriate for a review of the Code to provide specific guidance for advertisers in relation to use of social media as an advertising tool.

Allergy Pathways

Before we return to the VB and Smirnoff case, it is useful to revisit the Federal Court decision in *ACCC v Allergy Pathway Pty Ltd and Anor (No 2)*.[5] In 2009, the Australian competition and consumer protection regulator, the Australian Competition and Consumer Commission (***ACCC***), brought an action against Allergy Pathway for engaging in misleading and deceptive conduct, falsely representing that goods or services were of a particular standard or quality, or had benefits which they did not have under the (then) *Trade Practices Act* 1974 (Cth).[6] Allergy Pathway offered up undertakings to the Court to refrain from making any further misleading or deceptive publications or statements about their products and services.

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In 2011, the ACCC commenced separate proceedings alleging Allergy Pathway was in contempt of the undertakings because of testimonial claims posted by users of its products on Facebook and Twitter about Allergy Pathway's allergy treatment products. Allergy Pathway and its sole director were found to be in contempt because of the Facebook and Twitter statements. Key factors in the decision were that Allergy Pathway knew the statements had been posted on its Facebook and Twitter pages and did not remove them. Additionally, if Allergy Pathway had made the statements itself, it would have been in breach of the undertaking.

Finkelstein J said:

> 'While it cannot be said that Allergy Pathway was responsible for the initial publication of the testimonials (the original publisher was the third party who posted the testimonials on Allergy Pathway's Twitter and Facebook pages) it is appropriate to conclude that Allergy Pathway accepted responsibility for the publications when it knew of the publications and decided not to remove them. Hence it became the publisher of the testimonials.'[7]

While the test applied in the Allergy Pathway case is different (i.e. the test applies the first limb of the test in the Code and not the second limb), it is relevant that the user comments were testimonial claims about the relevant products (and not comments such as in the VB case which were often irrelevant to the advertiser post or to the VB products themselves).

Implication of the cases

The consequence of the VB and Smirnoff case when viewed together with the Allergy Pathway case is potentially wide-ranging and legal observers are still considering the extent to which an advertiser will be responsible for what is posted to their Facebook sites.

One fairly dramatic example is whether individuals will be liable in the future for defamatory comments made on their Facebook pages which are not removed in a timely fashion. Obviously the contexts are vastly different but the principle is the same (given that individuals would not be responsible for the initial publication but would accept responsibility for the publications when they knew of the publications and decided not to remove them).

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4 http://en.wikipedia.org/wiki/Social_media.

5 *ACCC v Allergy Pathway Pty Ltd and Anor (No 2)* [2011] FCA 74.

6 [2011] FCA 74, at [5]. The *Trade Practices Act* has since been re-enacted as the *Competition and Consumer Act 2010* (Cth) (***CCA***), The prohibitions on misleading and deceptive conduct and false representations are now contained in the Australian Consumer Law, which comprises Schedule 2 of the CCA.

7 [2011] FCA 74, at [33].

The ACCC statement appears to place more stringent regulation on large companies as opposed to smaller companies

The ACCC was quick to contribute its own commentary, issuing a statement to warn large companies using Facebook to promote themselves that, *'If you are a big corporate player with lots of resources that's putting a lot of effort into social media then it wouldn't have to be too long [that corporations have to take down comments]. Perhaps 24 hours or less.'*[8]

This statement appears to place more stringent regulation on large companies as opposed to smaller companies, even though such a distinction has no basis in either the Code or the *Competition and Consumer Act* 2010. We also question whether it is fair for different advertising rules to apply to 'big' or 'small' advertisers and note there is no guidance as to what the ACCC considers a big or small company.

In response to the case report, Fosters has already implemented twice daily monitoring of user comments (in addition to removing all of the user comments that were highlighted in the complaint).[9] Of course, many large companies are already sophisticated users of social media - at an American Chamber of Commerce lunch in Sydney in July this year, Telstra's Chief Executive David Thodey revealed that Telstra employed around 60 people to monitor social media sites.

However, not every company which has a Facebook page is a large company with extensive resources. The Sensis *e-Business Report*[10] found that companies in Australia have clearly embraced social media engagement - 27% of small and medium enterprises which have internet connectivity (being 92% of all small and medium enterprises) also used social media in their business. The most common usage of social media was to have a Facebook page for their business, presumably because social media (to date) has been low cost and low maintenance. It is too early to measure the potential impact of the determination on companies which are not resourced to monitor their Facebook sites regularly.

Will regulatory bodies in other jurisdictions follow suit?

A final point to bear in mind is that the ASB determinations apply only to advertisers in Australia. There is a possibility that advertising watchdogs in other jurisdictions may follow suit. We note that in the United States, section 230 of the *Communications Decency Act 1996* (***CDA***) provides 'computer services providers' (as defined in the CDA) with immunity in certain circumstances for publishing tortious statements (e.g. defamatory statements) online. This legislation has been successfully used as a defence by website owners such as AOL,[11], Ebay[12] and Google[13] to negate their liability for user generated content. However, at the date of this article, we are not aware of any cases alleging the liability of advertisers for user generated content uploaded on their branded social media pages.

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8 Julian Lee, 'Warning to firms on Facebook comments', *Sydney Morning Herald* (online), 13 August 2012 <http://www.smh.com.au/technology/technology-news/warning-to-firms-on-facebook-comments-20120812-242vr.html>.

9 Case number 0271/12

10 Sensis, *eBusiness Report: The Online Experience of Small and Medium Enterprises* (August 2012) 4 <http://about.sensis.com.au/small-business/sensis-ebusiness-report/.

11 *Zeran v America Online. Inc.,* 129 F. 3d 327 (4th Cir 1997).

12 *Gentry v. eBay, Inc.,* 99 Cal. App. 4th 816, 830 (2002).

13 *Goddard v. Google, Inc.,* 640 F. Supp. 2d 1193 (N.D. Cal. Jul. 30, 2009).