Advertising and VR: regulatory challenges ahead

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Abstract: As virtual reality (VR) products increase in popularity, stakeholders in the games industry wanting to promote their VR products, or to leverage VR technology for advertising more generally, need to be aware of the most common legal and regulatory pitfalls, particularly as this is an area in which advertising and consumer protection regulators are likely to take a keen interest. Meanwhile, the regulators themselves will also have to be agile. They face the challenge of having to apply laws and self-regulatory codes which were not drafted with VR technology in mind to new situations, in a fair and rational manner which does not expose them to the risk of judicial review.

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The rise in popularity of virtual reality (VR), bolstered by investments from substantial corporations, has captured public attention in recent years. As anticipated, the interactive entertainment industry has been one of the early adopters of this new technology. With the release of next-generation consoles and steady drops in price of PC hardware capable of running VR applications, it seems that larger-scale user adoption is only a matter of time.

The intersection between advertising regulation and the interactive entertainment industry is a lively and interesting one. There has been no shortage of attention from regulators on advertising and consumer issues specific to games,¹ often with an emphasis on protecting minors and other vulnerable groups from harmful or misleading practices – the recent coverage regarding loot boxes being the latest example.²

This article provides a brief overview of the self-regulatory landscape in the UK, considers some of the regulatory issues which have arisen in games-related advertising, and explores the challenges that are likely to be faced by developers, regulators and other stakeholders as VR achieves mainstream adoption, both as a medium for advertising and a medium for games themselves.

It should be acknowledged that VR is a broad term which encompasses many sub-divisions, ranging from fully immersive experiences implemented on proprietary hardware, to Augmented Reality (AR) applications designed for mobile phones. For present purposes, references to VR are meant in the broadest possible sense of that word.

1. The legal and regulatory landscape

To consider the possible effects of VR on advertisements in the interactive entertainment industry, a brief introduction to the legal and regulatory landscape is needed. It is worth noting that each country has its own laws and regulations which apply to advertising, with varying degrees of perceiving strictness, sanctioning powers, and balances between direct enforcement of laws and a softer self-regulatory approach. What follows is an overview of the position in the UK.

The legal and regulatory landscape can broadly be separated into laws and self-regulatory codes. Laws come in the form of statutes enacted by Parliament (some of which have their origins in EU legislation)

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1 Aside from the specific ASA rulings discussed further below, UK regulatory investigations involving games commonly arise in the context of inappropriate targeting (for example, the adjudication on Activision Blizzard UK Ltd in relation to ad for Call of Duty: Advanced Warfare – <https://www.asa.org.uk/rulings/activision-blizzard-uk-ltd-a14-282062.html>), and the misleading use of the word 'free' in the context of free-to-play games (such as the ASA Adjudication on Electronic Arts Ltd t/a EA Games in relation to Dungeon Keeper – <https://www.asa.org.uk/rulings/electronic-arts-ltd-a14-258907.html>). In 2016 and on the other side of the Atlantic, the FTC notably

investigated (and eventually reached a settlement with) the YouTube MCN Machinima in relation to a 'false and misleading' promotion in which content creators were paid to talk favourable about the Xbox One following its launch (<https://www.ftc.gov/news-events/press-releases/2016/03/ftc-approves-final-order-prohibiting-machinima-inc>).

2 Which has prompted comments by several national regulators, including the UK Gambling Commission (<http://www.gamblingcommission.gov.uk/news-action-and-statistics/news/2017/Loot-boxes-within-video-games.aspx>).

and case law. There are a large number of laws which potentially apply to advertising content, and it is impractical to list them all here. The laws which are most frequently engaged are those which focus on protecting consumers and businesses from unfair commercial practices, such as the Consumer Protection from Unfair Trading Regulations 2008 (CPRs), and the Business Protection From Misleading Marketing Regulations 2008. In addition to this, the Communications Act 2003 regulates a number of areas, including sponsorship and product placement in broadcast media; the Comparative Advertising Directive (Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising) applies to ads which compare products or services against those of an identifiable competitor; and the Video Recordings Act 1984 applies to commercial video content (including online video content and games) more generally. Laws are typically enforced by regulatory bodies, such as the Competition and Markets Authority or Trading Standards (considered further below) either through the courts, or in some cases by consumers directly.

In parallel to this, the UK has a self-regulatory system, which provides a different approach. It is comprised of a series of codes which members of an industry have voluntarily agreed to abide by. These often adopt existing legislation as a starting point, and seek to build on it to fill any perceived gaps. In the UK, the Ofcom code³ covers, among other things, sponsorship and product placement in TV, radio and on-demand content. Adverts in non-broadcast media are covered by the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (CAP Code) and broadcast adverts fall within The UK Code of Broadcast Advertising (BCAP Code). 'Non-broadcast' includes most forms of online advertising, and is the most likely to be of relevance to adopters of VR in the near future. There are also a number of industry and sector-specific codes.

Several bodies are involved in administering and enforcing these codes. Ofcom is the UK's principal communications regulator. It enforces the Ofcom code, but sub-contracts most of its regulatory functions in relation to advertising to the Advertising Standards Authority (ASA), which works alongside the Committee of Advertising Practice (CAP) to administer and enforce the CAP and BCAP Codes. The ASA publishes guidance⁴ and, on occasion, proactively targets a particular industry or trade practice.⁵ However, much of the ASA's work is reactive. It receives complaints from consumers or competitors, investigates them where it deems appropriate, and either seeks to resolve the complaint informally, or hands down adjudications which are published on a weekly basis and circulated to the press under embargo every Monday. The ASA's primary tool for ensuring compliance is the risk of negative PR if a complaint is upheld.⁶ As well as publishing adjudications, it can place non-compliant advertisers on a list which is published on its website; issue 'ad alerts' to prevent advertisers from getting access to buy certain advertising space; force the withdrawal of certain privileges; or force advertisers to have their adverts pre-cleared for up to two years. The ASA's ultimate legal backstop is a referral to Trading Standards – a collection of regional local government authorities which look after the interests of consumers and businesses. Trading Standards can bring prosecutions where a criminal offence has been committed under one or more consumer protection laws.

Lastly, the Competition and Markets Authority (CMA) is a separate body which deals with competition issues, but also has an important consumer protection role. It publishes guidance (such as its Report on Children's Online Games published in 2014⁷) and has powers to conduct its own investigations. It can also work with the ASA to tackle particular areas of concern.

As the law typically lags behind technological advances, self-regulation is intended to be a more agile system which can adapt more quickly to new trends.

3 <https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code>.

4 Examples are numerous and include guidance on 'Video games and films' (<https://www.asa.org.uk/advice-online/video-games-and-films-1.html>), 'Guidance on how to advertise films and video games responsibly' (<https://www.asa.org.uk/resource/video-games-and-films.html>) and non-sector-specific guidance which can have an impact on advertisers of games, such as the guidance on 'Children: Direct exhortation' (<https://www.asa.org.uk/advice-online/children-direct-exhortation.html>).

5 For example, the ASA recently targeted higher education establishments which were making comparative claims which they were unable to substantiate, resulting in adjudications being upheld against six universities, summarised here: <https://www.asa.org.uk/advice-online/universities-comparative-claims.html>. At the time of writing, the ASA's focus is also

on the broadband sector, and in particular speed claims (for example, see here: <https://www.asa.org.uk/news/major-change-to-broadband-speed-claims-in-ads.html>) and Gambling Advertising (see here: <https://www.asa.org.uk/news/tougher-standards-on-gambling-advertising-announced.html>).

6 Adjudications are published weekly on the ASA's website (here: <https://www.asa.org.uk/codes-and-rulings/rulings.html>) and made available to the press under embargo several days prior to the publication. It is not uncommon for the mainstream media to pick up stories based on adjudication, particularly if they involve a high-profile brand (for a recent example relating to the ASA's investigation into higher education establishments, see here: <http://www.telegraph.co.uk/education/2017/11/10/universities-investigation-advertising-watchdog-misleading-students/>).

7 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288360/oft1519.pdf.

However, a downside of this is that the regulator must be given flexibility and discretion to apply rules to new situations, which may never have been encountered before. The ASA thus has considerable leeway in how it interprets the CAP and BCAP Codes (indeed, rule 1.2 of the CAP Code and rule 1.1 of the BCAP Code expressly state that ‘Marketing communications must reflect the spirit, not merely the letter, of the Code’). It is also not, strictly speaking bound by its own previous adjudications. The ASA has also seen its regulatory remit expanded considerably over the years. It took over responsibility for regulating Broadcast advertising from Ofcom in 2004. In 2011, ‘online’ was added to its jurisdiction, and is now by far the biggest in terms of complaints. However, the funding which the ASA receives, which is taken from a levy on sales of ad space, has arguably not kept pace with these extensions, meaning that its resources are more stretched than before.

The combination of these factors adds an element of unpredictability, which makes the task of clearing advertising more challenging, and requires a close understanding of the regulator’s latest thinking on a particular issue.

2. What constitutes an ad?

The issue of whether or not a particular piece of content is an ad, or ‘marketing communication’ in the language of the codes, is one which arises surprisingly often. In the context of games and VR in particular, there is some uncertainty over which regulatory code (if any) applies to in-game product placement – a key area of interest for brands wanting to take advantage of VR content. Product placement would normally fall within the remit of Ofcom, but its codes only apply to TV, radio and on-demand services.⁸ The CAP code applies, broadly, to all advertisements in non-broadcast electronic media, and it specifically lists ‘in-game advertisement’ and ‘advergames’ as non-exhaustive examples.⁹ However, it also expressly excludes ‘sponsorship’. In a situation where a brand pays a developer to feature its product, but exercises no control over the content, it is at least arguable that this type of relationship is closer to ‘sponsorship’ than anything else. To be clear, that relationship would still need to be disclosed to comply with the CPRs, which prohibit ‘Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear’, but

it is unclear whether it would fall within the wider scope of the CAP Code, and which regulatory (if any) would deal with a complaint concerning it.

A related issue, which has recently been dealt with by the ASA, is whether the monetisation mechanics of games should be considered ‘ads’ for the purpose of the CAP code. In 2015, the ASA published adjudications against the developers of two free-to-play games, *Moshi Monsters*¹⁰ and *Bin Weevils*.¹¹ Both games were free to download, but offered a premium membership option which could be purchased for real money. Both games were also, in the ASA’s view, targeted at or likely to appeal to children (it should be noted that, under the ‘Principles for Online and App-based Games’ published by the Office of Fair Trading in January 2014, this is not a difficult bracket to fall into, even if children are not a developer’s core or target audience).

In both games, when a player tried to access premium content, an in-game dialogue box alerted the user that the content was locked, and provided a button which, if clicked on, would take the user to a page where he or she could buy a premium membership. The ASA considered whether this breached rule 1.3 of the CAP Code, which requires ads to be prepared with a ‘sense of responsibility to consumers and to society’, and rule 5, which prohibits the making of ‘direct exhortations’ to children to buy a product or service.

Both complaints were ultimately upheld. One of the deciding factors was that the dialogue boxes in both games used imperative language such as ‘Join now’ and ‘Top up’, and the only way to close the boxes was a graphical ‘X’ in the corner, which was far less prominent than the other buttons and text. There was also no statement that players could return to the game without buying a subscription. Both developers agreed to make changes to address these issues fairly early on, but that did not stop the adjudications from going ahead. This is less surprising when one considers that both of them were initiated by the CMA (so there was arguably an element of setting an example).

Although there was no detailed discussion of this point in the adjudication, the fact that there *was* an adjudication implies that in-game dialogue boxes were deemed by the ASA to be ‘marketing communications’ (i.e. ads). This may be somewhat counter-intuitive to a developer, which might think of these as being part of the product itself, rather than an advert to which the CAP code applies. Developers of VR games will need to be

⁸ <https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry>.

⁹ Paragraph I(d), Scope of the Code (https://www.asa.org.uk/type/non-broadcast/code_folder/scope-of-the-code.html).

¹⁰ ASA Ruling on Mind Candy Ltd t/a Moshi Monsters, 26 August 2015 (<https://www.asa.org.uk/rulings/mind-candy-ltd-a15-305018.html>).

¹¹ ASA Ruling on 55 Pixels Ltd t/a Bin Weevils, 26 August 2015 (<https://www.asa.org.uk/rulings/55-pixels-ltd-a15-305045.html>).

mindful of this and ensure they have legal input on the content of dialogue boxes and any similar mechanics at the appropriate stage during the development process.

3. Challenges specific to VR

Challenges specific to VR could arise where VR is used as a medium for the ad itself; or where the product being advertised is a VR game (but the ad itself appears on traditional, non-VR, media).

Where VR is used as the medium for advertising, one of the factors to consider is the much greater degree of immersion which it offers, compared to more traditional media. Whilst the ability to grip a consumer's attention for longer may be an attractive for advertisers, it could have a number of consequences in terms of ad regulation.

Firstly, we know that, in the context of applying the rules on 'harm and offence' and 'social responsibility' the ASA treats video content with greater sensitivity than still images or posters. It is therefore reasonable to expect that ads served in VR would be treated with even greater sensitivity. Advertisers may therefore need to moderate the content of their marketing communications to make sure it is suitable for VR. How those ads are targeted, and what precautions the advertiser has taken to make sure that they are not served to inappropriate audiences, will play an even bigger role where VR is the medium of choice.

Secondly, one can foresee issues surrounding the separation of editorial (i.e. non-advertising) content and marketing communications, which is a fundamental principle of the CAP/BCAP codes and the CPRs. Rule 2.1 of the CAP Code, for example, clearly states that marketing communications must be 'obviously identifiable' as such, before the consumer has started to engage with the content. When creating ads which will be served in VR, advertisers will be tempted to create a seamless experience, so as not to disrupt the user's immersion. At the time of writing, some middleware providers are already offering 'native VR' advertising as an option – 'native' being the term used to describe advertising which seeks to match the form of its surrounding content. The danger is that, much like native advertising in traditional media, the lines between advertising and editorial content may become blurred, and consumers may not know when they are being advertised to. This is a line which those wishing to advertise in VR will need to tread carefully.

Thirdly, advertising in VR will be of particular interest to advertisers because of the detailed metrics which

can be obtained from it. Providers of advertising inventory are able to, for example, track a consumer's gaze to see where they have been looking and for how long, and to provide detailed statistics on the effectiveness of an ad. The gathering of this data, and its subsequent use by the advertiser and its agency, will need to be done in compliance with data protection laws, which will usually mean obtaining an appropriate level of consent from the user. This is an area where advertising regulation overlaps with the laws on data protection and privacy.

Where the product being advertised is a VR game (rather than the ad itself being served in VR), there is an inherent danger of over-promising on the features, capabilities and/or performance of that game. This is an issue which applies to all games, but it is particularly pronounced in respect of VR games because the medium of the ad is fundamentally different to the one in which the game will appear once a consumer has purchased it. This makes it more difficult to accurately convey the experience; it could be compared to advertising a film using only text. Advertisers will want to demonstrate the capabilities of their VR game using trailers and pre-rendered animated sequences. If these overstate the capabilities of the game, they could fall foul of the CAP code rules on 'Misleadingness', 'Substantiation' and 'Exaggeration'.¹²

A similar issue was recently considered by the ASA in connection with the game 'No Man's Sky' (which is not a VR title, but provides a good illustration of this issue). The ASA received a number of complaints that videos, screenshots and text on the game's Steam page over-exaggerated the quality of the graphics and certain in-game features, and were therefore misleading.¹³ The complaints were ultimately not upheld, because the developer was able to satisfy the ASA that the game featured all of the content which was advertised, and that content could be experienced by players within a reasonable amount of time spent playing the game. The successful defence of these complaints can be credited in part to the detailed response and substantiating evidence provided to the ASA by Hello Games, the developer, which included in-game footage in support of every claim made on the Steam page, as well as links to third-party in-game footage, and a copy of the game itself.

4. Conclusion

Looking ahead, we can expect regulators such as the ASA to continue to prioritise the protection of

¹² All contained in section 3 of the CAP Code (https://www.asa.org.uk/type/non_broadcast/code_section/03.html).

¹³ ASA Ruling on Valve Corporation and Hello Games Ltd t/a Steam, 30 November 2016 (<https://www.asa.org.uk/rulings/valve-corporation-and-hello-games-ltd-a16-351045.html>).

vulnerable audiences. The growing popularity and accessibility of VR also means that it is likely that it is an area which is proactively targeted by the ASA or CMA in the future, both in terms of publishing guidance, and bringing direct enforcement action.

Whether the current self-regulatory codes are adequate to deal with the expected influx of VR content remains to be seen, but it seems likely that these, too, will need to be adapted. We may, in due course, see the introduction of a separate section of the CAP Code to deal with issues specific to VR as a product and medium (in the same way that an 'e-cigarettes' section was added in 2014, following a rise in their popularity).

We are less likely to see immediate changes to the underlying laws, which are, on the whole, more widely drafted and all-encompassing.

There have yet to be any ASA adjudications specifically in connection with VR content, but this is only a matter of time. In view of the interactive entertainment industry's status as an early adopter of this technology, it also seems likely that test cases will have to be dealt with by games companies. Until those test cases are decided, advertisers in this space would be prudent to assume that the existing CAP and BCAP Code rules will be interpreted by the ASA in a more conservative manner when the product or medium in question involves VR.