



The Global Voice of Mobile Entertainment

BCAP Code Review

MEF's response to the BCAP Consultation document

MEF RESPONSE | JUNE 2009

Introduction

Formed in 2000, the Mobile Entertainment Forum (MEF) is the global trade association of the mobile media industry, working on behalf of its diverse membership to drive mobile entertainment adoption, shape regulation and deliver competitive advantage to its members. MEF's membership base spans the entire range of mobile entertainment activities, including music, film, TV and video companies who create and package content; publishers, retailers, service providers and technologists who sell and deliver content and network operators who get the content to the end users.

With global headquarters and an EMEA branch in London, a Hollywood-based Americas secretariat and an Asian chapter in Hong Kong, MEF's member network encapsulates a comprehensive list of leading mobile entertainment businesses and entrepreneurs from across the value chain. For more information and a full list of members please visit: www.m-e-f.org.

General Overview

MEF welcomes the opportunity to respond to the BCAP Code Review Consultation and recognise that The Communications Act 2003 requires Ofcom to set and, from time to time, review and revise a code containing standards for the content of broadcast advertisements carried by TV and radio services licensed under the Broadcasting Acts 1990 and 1996.

We support BCAP's proposed Code as drafted to meet the relevant requirements set out in the Act. In particular, we note that BCAP's proposed Code includes rules best calculated by BCAP to secure the Act's "standards objectives". We note that if it considers that the BCAP Code has been breached, the ASA can require the broadcaster not to repeat the advertisement in its present form. On those occasions that a TV channel or radio station continues to broadcast an advertisement that the ASA has found in breach of the BCAP Code, the ASA can refer the broadcaster to Ofcom, which can impose statutory sanctions on the broadcaster. However, we would remind you that, in the interests of clarity, where advertising contains premium rate services, such issues should be referred to PhonepayPlus.

A single BCAP Broadcast Advertising Standards Code

BCAP presently has four Codes: the BCAP Television Advertising Standards Code, the BCAP Rules on the Scheduling of Television Advertisements, the BCAP Advertising Standards Code for Text Services and the BCAP Radio Advertising Standards Code ('the BCAP Codes'). MEF supports the proposition that BCAP's proposed Code will replace the present BCAP Codes.

We support BCAP's general policy objective to create a code that adequately protects children and others whose circumstances seem to BCAP to put them in need of special protection and yet retains an environment in which responsible broadcast advertising can flourish. We support the need for all regulatory Codes to be in keeping with the five principles of good regulation. The principles state that any regulation should be transparent, accountable, proportionate, consistent and targeted – only at cases where action is needed

General Response

We have provided responses to those sections of the consultation that have a direct bearing on our members and the services they operate.

MEF believes that BCAP must take note of other regulatory Codes that exist and developments that have either recently taken place or are currently being consulted on. Without taking into account the regulatory overlap which occurs, the regulatory burden on MEF members runs the serious risk of becoming disproportionate and contrary to the goals of the five principles of good regulation. We believe that developments that BCAP should take full account of are:

- Prior permission requirements for certain mobile services from PhonepayPlus¹
- The Ofcom Scope Review² which is seeking to ensure the current PRS regulatory regime meets the needs of consumers, affords an appropriate level of consumer protection and, at the same time, supports an innovative and changing PRS industry.
- The process of forming a new regulator in the UK for video on demand services³. This is being led by the DCMS and Ofcom.

All the above issues have specific impacts on the content and promotion of mobile media services. MEF would urge BCAP to ensure it is engaging fully in discussions with Ofcom, the DCMS and PhonepayPlus to ensure proposals considered and implemented will not cause a direct conflict between Codes and/or create any unnecessary overlap of provisions and responsibilities.

Specific Response to Questions

- **Part 2 - Section 1 (Compliance)**

Question 1

Given BCAP's policy consideration, do you agree that rule 1.2 should be included in the proposed BCAP Code? If your answer is no, please explain why.

MEF Response:

We agree that advertisements must be prepared with a sense of responsibility to the audience and to society.

- **Part 2 – Section 2 (Recognition of Advertising)**

Question 3

i) Given BCAP's policy consideration, do you agree that rule 2.1 should replace present TV rules 2.1.2 (b) and 2.2.2 (c), be applied to TV and radio and be included in the proposed BCAP

¹ This rule came into effect on 22 January 2009: <http://www.phonepayplus.org.uk/upload/SPPNOTICE.pdf>

² http://www.ofcom.org.uk/consult/condocs/prs_scope/

³ http://www.culture.gov.uk/reference_library/consultations/5309.aspx/

Code? If your answer is no, please explain why.

ii) Given BCAP's policy consideration, do you agree that rule 2.3 should replace present TV rule 2.2.2 (d), be applied to TV and radio and be included in the proposed BCAP Code? If your answer is no, please explain why

MEF Answer:

MEF agrees that advertisements must be clearly distinguishable from editorial content, especially if they use a situation, performance or style reminiscent of editorial content, to prevent the audience being confused between the two. The audience should quickly recognise the message as an advertisement.

- **Part 2 – Section 3 (Misleading)**

General comment:

As all the new provisions relate to a general duty to not mislead, it might be appropriate to have just one provision. Earlier in the consultation document, BCAP proposes that the Code will be supplemented by guidance, which will be made available separately from the code. The guidance is to help users of the Code to interpret rules. Many of the proposed provisions appearing in Section 3 could be provided as guidance rather than prescriptive rules contained in the Code.

Amongst others, this could apply to the following proposed provisions:

Rule 3.13

Advertisements must not suggest that their claims are universally accepted if a significant division of informed or scientific opinion exists.

Rule 3.23

Price claims such as “up to” and “from” must not exaggerate the availability or amount of benefits likely to be obtained by consumers.

Rule 3.27

Broadcasters must be satisfied that advertisers have made a reasonable estimate of demand.

Rule 3.28

if the advertiser does not intend to fulfil orders, because the purpose of the advertisement is to assess potential demand, the advertisement must make that clear.

Rule 3.39

Advertisements may compare a price with a recommended retail price (RRP) or similar if it does not differ significantly from the price at which the product is generally sold.

3.28.3

advertisements must state restrictions on the availability of products, for example, geographical

restrictions or age limits.

Question 8

Given BCAP's policy consideration, do you agree that rules 3.4 and 3.5 should be included in the Code? If your answer is no, please explain why.

MEF Response:

We agree that that a proper distinction is made between claims that require substantiation and those that do not.

Use of the word 'Free'

There is the possibility of conflict and confusion if the promotion relates to a product or services obtained by engaging a premium rate number.

The PhonepayPlus Code states:

5.11 Use of the word 'free'

"No premium rate service or product obtained through it may be promoted as being free unless:

- a. a product or service has been purchased by the consumer using a premium rate service and a second product or service of an equal or greater value is provided at no extra charge, or
- b. a product is provided through the premium rate service and the cost to the user does not exceed the delivery costs of the product and the promotional material states the maximum cost of the call."

As can be seen, the above PpP provision differs from the proposed provision in the BCAP Code. This is likely to cause confusion and multiple rules for similar services paid for with different mechanisms. Where services are paid for using a premium rate mechanism, only one set of rules should apply to avoid double jeopardy.

- **Part 2- Section 4 (Harm and Offence)**

MEF agrees with all proposals under this section.

- **Part 2 – Section 5 (Children)**

Question 28

Given BCAP's policy consideration, do you agree that rule 5.7 should be included in the Code? If your answer is no, please explain why.

MEF Answer

We agree that advertisements must not exploit the special trust children place in parents, guardians, teachers or other persons.

Question 29

- i) Given BCAP's policy consideration, do you agree rule 5.14 should be applied to advertisements broadcast on all Ofcom-licensed television channels and not only those broadcast to a UK audience? If your answer is no, please explain why.
- ii) Given BCAP's policy consideration, do you agree rule 5.14 should define an 'expensive' product of interest to children to be £30 or more? If your answer is no, please explain why.
- iii) Given BCAP's policy consideration, do you agree rule 5.14 should be included in the Code? If your answer is no, please explain why.

Rule 5.14 – Television only states that: “Advertisements for an expensive product or service of interest to children must include a statement of the product or service’s price or, if it is not possible to include a precise price, an approximate price. BCAP considers a product or service of interest to children costing £30 or more to be expensive.”

The paragraph appears to apply to ‘services’ that are ‘of interest’ to children. This is much wider drafting than the equivalent provision that appears in the CAP Code consultation. It is not clear whether the provision applies to products or services paid for in one go or over a period of time or both? Rule 5.14 also seems to contradict rules set out in Rule 5.15 which states:

“5.15

Advertisements for promotions directly targeted at children:

5.15.1

must include all significant qualifying conditions

5.15.2

must not include a direct exhortation to buy a product

5.15.3

must make clear if adult permission is required for children to enter.

Advertisements for competitions directly targeted at children are acceptable if any skill required is relevant to the age of likely participants and if the values of the prizes and the chances of winning are not exaggerated.

Advertisements for promotions directly targeted at children should comply with Section 28: Competitions.”

It seems that a distinction is now being made between products or services which may be of interest to children compared with services targeted at children. There is a real need for very clear guidance as to how such advertisements will be judged in practice. It is not clear from the proposed wording in the BCAP Code.

Question 30

- i) Given BCAP's policy consideration, do you agree that rules 5.15 adequately replaces rule 11.8, section 2, of the Radio Code? If your answer is no, please explain why.
- ii) Given its policy consideration, do you agree with BCAP's proposal to introduce a rule that

prohibits advertisements for a promotion directly targeted at children if they include a direct exhortation to buy a product? If your answer is no, please explain why.

iii) Given BCAP's policy consideration, do you agree that rule 5.15 should apply to television and radio advertisements? If your answer is no, please explain why.

iv) Given BCAP's policy consideration, do you agree that rule 5.15 should be included in the Code? If your answer is no, please explain why.

MEF Answer:

The inclusion of the new rule is also in direct conflict with the current PpP Code of Practice which states:

“7.5.1 Definition of children’s services

Children’s services are services which, either wholly or in part, are aimed at or should have been expected to be particularly attractive to children, who are defined for the purposes of this Code as people under 16 years of age.”

The PpP Code goes on to state that:

“7.5.2 Promotional material for children’s services must clearly state:

- a. the usual cost of the service,
- b. that the service should only be used with the agreement of the person responsible for paying the phone bill.

7.5.3 Children’s services, and any associated promotional material, must not:

- a. contain anything which is likely to result in harm to children or others or which exploits their credulity, lack of experience or sense of loyalty,
- b. include anything which a reasonable parent would not wish their child to hear or learn about in this way,
- c. make direct appeals to children to buy or donate, unless the product, service or donation is one which they could reasonably be expected to afford for themselves,
- d. encourage children to use other premium rate services or the same service again.

7.5.4 Children’s services must not:

- a. generally cost more than £3, or in the case of subscription services (see paragraph 7.12), more than £3 per month,
- b. involve competitions that offer cash prizes or prizes readily converted to cash.”

These paragraphs are seemingly incompatible with the new wording set out in the BCAP Code and create a conflict between rules applicable to the advertising for the services falling under the jurisdiction of the two regulatory bodies.

There is a serious need for BCAP to provide clear examples on the practical application of the proposed provisions given the conflict between the BCAP and PpP Codes. This is especially true since the BCAP Code does not cover, for example, programme sponsorship.

Part 2 - Section 22 (Premium-Rate Services)

As the consultation states, the PpP Code of Practice sets standards for the promotion, content and overall operation of all premium rate services. Rather than have provisions in the BCAP Code that replicate provisions in the PpP Code (which could change as a result of a future PpP Code consultation), MEF feels it would be better to state that all promotions for PRS services must comply with the PpP Code. This includes advertisements for PRS of sexual entertainment services.

The provisions listed below are not required to be present in the BCAP Code:

22.2

Advertisements for premium-rate telephone services must include clear pricing information if the service generally costs 50 pence per call or more.

22.3

Advertisements for premium-rate children's services, services accessed by automated equipment or subscription services must always include clear pricing information.

22.4

Advertisements for premium-rate services must state the identity of the service provider or the information provider.

22.5 – Radio

If it is not included in the advertisement, radio broadcasters must retain and, on request, make available a non-premium-rate telephone number for the premium-rate service for customer care purposes.

22.6 – Television

Television advertisements for premium-rate services must include a non-premium-rate telephone number for customer care purposes.

22.8

Advertisements for live premium-rate services must not appeal particularly to people under 18, unless those services have received prior permission from PhonepayPlus to target people under 18.

MEF can see no need to create a new section, entitled Telecommunications-Based Sexual Entertainment Services, in the proposed BCAP Code. Advertisements for PRS of a sexual nature should be required to comply with the PpP Code of Practice and be enforced by PpP.

Conclusion

MEF would seek to have a meeting with BCAP as soon as possible to discuss the proposals.

If you need any more information or have any questions, please do not hesitate to contact Suhail Bhat at Suhail@m-e-f.org

MEF

June 2009