

# False and Misleading? Advertising on Social Media in China and Hong Kong

Social media occupies a particularly prominent spot in commercial life in Hong Kong and China, giving advertisers an easy outlet for direct outreach to consumers. **Richard Bird** and **Victoria White** explain the contrasting approaches to the regulation of false and misleading advertising on social media in Hong Kong and China.

Social media platforms continue to evolve rapidly and expand in scale, becoming integrated across service lines. The corporate uses of social media increasingly have a commercial focus on marketing products and developing sales opportunities. A McKinsey study in 2012 showed that 40% of companies globally use social media as their most important medium of communication to consumers. Advertising revenue from social media is expected to have exceeded US\$10 billion during 2013, and total revenue is predicted to reach US\$34 billion by 2016, according to Gartner. The integration of online and offline activities has thus become a key part of consumers' engagement with brands.

In Hong Kong and China, social media occupies a particularly prominent place in commercial life. Hong Kong has one of the highest social media penetration rates and highest smart phone usage figures in the world (approximately double the global average, and much greater than the United States). More than half of China's still-growing number of approximately 600 million internet users actively participate in social media, from micro-blogs to social networking sites (SNSs) and other online communities. One-fifth of Chinese consumers now make purchases on their smart phones.

Online forums have been more popular for longer in China than elsewhere, and have developed more functionality more quickly than in most other markets. Social media users are

also more active in China than elsewhere. The large number of individual micro-blogging, SNS and local-based services dwarfs the overseas competition. Domestic platforms dominate, such as 163.com, Sohu, Douban, RenRen, Sina Weibo and Tencent Weibo, while many of the most popular platforms in the rest of the world are excluded from access to China altogether. The data metrics consultancy Nielsen described Chinese micro-blogs in 2012 as "the key social media source for all user needs, including news, connecting with friends, and entertainment."

The resulting network effect is self-perpetuating. Studies have shown that Chinese consumers place great reliance on recommendations from family and friends to influence purchasing decisions. In a large and geographically vast country, social media stands as a proxy for such interaction. Unsurprisingly, a Nielsen study showed that approximately 50% of Chinese micro-blog readers use them as a source of information about products and a means to share recommendations.

Tencent has recently started to add e-commerce and payment features to its WeChat chat app, which had more than 270 million monthly active users by the end of 2013. And in June 2013, Daimler began taking orders for its limited edition Smart city cars through Sina Weibo, China's largest micro-blog service with nearly 400 million current subscribers. At least one major e-commerce provider is known to have taken a minority shareholding in a popular messaging service. Similarly, in Hong

Kong, when Kimberly-Clark launched an interactive Facebook fan page in 2011 for its Huggies nappy brand that invited parents to upload their baby photos to appear on buses in the territory, the page went on to become the most “liked” Facebook brand page in Hong Kong within three weeks.

### False and Misleading Advertising on Social Media

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An early and now infamous example was the exposure of an apparently independent, ‘user-generated’ blog, *Wal-Marting Across America*, in 2006. On the blog, a couple wrote about their positive experiences at various Wal-Mart stores across the US. It was subsequently alleged by *Business Week* magazine that the couple had received undisclosed financial and logistical support from Wal-Mart through an interest group set up by a Wal-Mart public relations firm.

In China, the seeding of positive comments and trolling of competitors on social media is a frequent occurrence. In an example of this practice, the brand manager of the Meng Niu infant formula company and employees of a Beijing internet PR consultancy were arrested in 2010 for allegedly making false posts in online forums and websites defaming the safety of Meng Niu’s competitor Yili’s QQ Star Children’s Milk. The smear campaign involved allegations of early-onset puberty connected with Yili’s infant formula products. According to information released by the Public Security Bureau (the PSB), the PR agency hired third party agencies to fabricate Wiki-style Q&A sessions and online forum posts, and to post responses and rig online votes on SNS websites to create mistrust in the safety of Yili’s products.

It was reported in February 2013 that the State Administration of Industry and Commerce (the SAIC) had taken action against the Chinese merchant Paris Wedding Dress for posting a lengthy one-sided commentary on a public forum praising its own services in the guise of a consumer. Action was also taken against a Shanghai company for employing fake reviewers (also known as “internet review packagers”) to post hits, comments and favourable reviews about its products. Another common abuse is the exaggeration of the number of purchases on a website or social media platform.

### The Regulators’ Responses

Regulators around the world have responded in different ways to these issues. The UK Advertising Standards Authority (the ASA) has recently extended its self-regulatory remit to include social media platforms. The reach of the US *FTC Guidelines on Online Advertising Disclosure* has similarly been expanded to

encompass social media.

Meanwhile, in Hong Kong, Custom & Excise’s Enforcement Guidelines for the newly amended Hong Kong Trade Descriptions Ordinance (the TDO) directly bring social media practices within its scope. The Enforcement Guidelines create requirements for companies that post comments and reviews about their own products and services in online forums and social networking platforms that are backed with criminal sanctions for non-compliance.

China does not have a specific law or regulatory approach that addresses social media postings. Nevertheless, a patchwork of laws and regulations of general application have been applied to regulate advertising and marketing on social media.

In this article, we look at the different approaches to the regulation of advertising, marketing and promotional activities on social media in the UK, the US, Hong Kong and China.

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### The United Kingdom

The ASA’s *Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing* (the CAP Code) is an early

example of self-regulation of commercial advertising that has operated continuously since 1962.

The CAP Code lays down requirements for non-broadcast advertisements, sales promotions and direct marketing communications. It is primarily concerned with the content of marketing communications rather than the actual quality of the products and services promoted. All non-broadcast advertising and marketing must be obviously identifiable as advertising and must comply with general requirements of legality, decency, honesty and truthfulness. The basic rule is that marketing communications must also not materially mislead or be likely to mislead, and must adhere to the spirit, not merely the letter, of the CAP Code. The basic rule is fleshed out in other sections of the CAP Code, which also contain further more detailed product-specific or audience-specific rules. Marketing communications must not falsely claim or imply that the marketer is acting as a consumer.

The ASA will investigate complaints received from any source against marketing communications in non broadcast media in the UK. Adjudications are published weekly on the ASA’s website and marketers instructed to withdraw or amend offending marketing communications. The system is widely respected, whereby the vast majority of advertisers, promoters and direct marketers comply with the CAP Code voluntarily to the avoid adverse publicity associated with a finding of non-compliance.

The ASA is empowered to refer non-compliant parties to the Office of Fair Trading for prosecution under the *Consumer Protection from Unfair Trading Regulations 2008* or the *Business Protection from Misleading Marketing Regulations 2008*.

From March 1, 2011, the ASA has also begun to regulate advertisers’ own marketing communications on their websites and in other non-paid-for space online under their control, including on social media. All of the general rules in the CAP Code now apply to advertisements and other marketing communications falling within the extended digital remit.

In three recent cases involving tweets on the social media platform Twitter, the ASA investigated compliance with the CAP Code’s requirement to identify advertisements as marketing communications. The ASA upheld two out of the three complaints

against advertisers, finding that unless reference to the advertiser was prominently displayed to consumers in the communication and the communication was labeled as advertising, for instance with the “#ad” hashtag, it would not be obvious to consumers that the tweets were marketing communications and they would breach the CAP Code.

In the first case, two tweets for Nike were posted on Twitter from the official accounts of Premiership footballers Jack Wilshere and Wayne Rooney, with the purpose of directing Twitter followers to Nike’s website. The tweets read: “My resolution – to start the year as a champion, and finish it as a champion...#makeitcount go nike. me/makeitcount” and “In 2012, I will come back for my club – and be ready for my country. #makeitcount.gonike.me/Makeitcount”. The ASA concluded that there was nothing obvious in the tweets to indicate they were Nike marketing communications and the ASA instructed Nike to ensure its advertising was obviously identifiable as advertising going forwards.

In the second case, a television celebrity posted favorable comments on her Twitter account about her Toni & Guy hair salon treatment, for which Toni & Guy had decided to waive their fees. The tweets also referred to a discount the celebrity’s Twitter followers could obtain at Toni & Guy by quoting her name. Following a complaint received about the tweets, the ASA investigated, concluding that there was an absence of any identifier that marked the tweets as advertising, which they clearly were, and therefore they breached the Code.



## Two celebrities posted the five tweets on their respective Twitter accounts within a one hour period.

In contrast, a sequence of five tweets sponsored by a global confectioner was held by the ASA to not breach the Code despite the disclosure of a marketing purpose having been withheld until the last tweet in the sequence. Two celebrities posted the five tweets on their respective Twitter accounts within a one hour period. The first four consisted of pronouncements that were clearly out of character with the celebrities’ usual behaviour. Only the fifth tweet was clearly labeled as a sponsored marketing communication. It contained a photograph of the celebrities with one of the manufacturer’s chocolate bars, the “#spon” label and the tagline “you’re not you when you’re hungry.” The ASA held that the tweets formed part of an orchestrated advertising campaign, and that the marketing identifiers in the fifth tweet were sufficient to make clear to consumers overall that the sequence was a marketing communication.

### The United States

In March 2013, the Federal Trade Commission (FTC) released revised *Guidelines on Online Advertising Disclosure* (the Dot Com Disclosure Guidelines) taking into account the expanding use of social media for advertising and the proliferation in the use of smart phones as a viewing device. However, unlike in the UK, although published in the form of guidelines, the Dot Com Disclosure Guidelines are backed by the force of law and reflect

the FTC’s approach to its enforcement of consumer protection laws applicable to online media.

The FTC Act itself prohibits “unfair or deceptive acts or practices,” and the revised Dot Com Disclosure Guidelines make it clear that the brevity of social media advertising does not exempt this platform from the application of this law in relation to advertising claims, marketing and promotional activities. In a section dealing with ‘space-constrained ads,’ including tweets and other short posts, the FTC requires advertisers to make a disclosure of advertising content that is clear and conspicuous (in light of proximity and placement), in each advertisement (and not in a later tweet, for example) or in a clearly signposted hyperlink to a related website. The revised guidelines warn that short form disclosures such as “ad” or “#spon” may or may not adequately inform consumers of the disclosure, depending on the positioning and context in each case, and advises against the use of disclosures in pop-up boxes. Bloggers are also required to disclose (at the top of the page) when products they review were provided free of charge. This is in specific response to the alleged Wal-Mart incident.

The guidelines are not exhaustive, and warn that there is “no set formula” for a clear and conspicuous disclosure. Illustrative examples are given in an appendix, including the example of a sponsored tweet for diet pills.

The FTC’s guidance is reflected in the terms of use of social media platforms such as Facebook, which has recently changed its terms of use to require advertising to be clearly indicated as such.

### Hong Kong

Hong Kong’s *Trade Descriptions Ordinance* was amended in July 2013 to create several new offences, including the offence of a misleading omission in advertising and marketing texts. In broad terms, the offence is committed where a company fails to identify the commercial intent of a commercial practice that is not otherwise apparent from the context. The



enforcement authorities for the TDO are the Customs and Excise Department and the Communications Authority (in relation to commercial practices of telecommunications and broadcast licensees).

These authorities jointly issued Enforcement Guidelines for the amended TDO. The Enforcement Guidelines address, among other things, specific requirements for marketing and advertising on social media platforms.

The Enforcement Guidelines require marketers on social media to clearly identify the commercial intent of all posts and reviews. The guidelines state that companies that disguise themselves as consumers and post comments in discussion forums or on social media platforms to promote their own products or undermine their competitors’ products will commit the offence of misleading omission under the amended TDO.

The Enforcement Guidelines give the example of a beauty salon that instructs its employees or a blogging agent to post on online forums and social networking websites favourable comments to promote its services under the guise of being consumers. If non-disclosure of the commercial intent is likely to cause the average consumer to patronize the beauty salon, the practice may constitute a misleading omission offence.

As of the end of 2013, there had been no published enforcement decisions relating to advertising on social media.

## China

China does not have an equivalent regulation to the TDO or the CAP Code. Nevertheless, a patchwork of laws and regulations of online activity have been used to enforce against false and misleading advertising on social media platforms.

### **Anti-Unfair Competition Law and Advertising Law**

The Anti-Unfair Competition Law, promulgated in 1993, and the Advertising Law of 1994 have general application, including to online activities, although have never been amended or supplemented specifically to reflect the development of the internet. The Advertising Law requires information relating to a company's sale of products or services to be clearly designated as advertising (Article 13). China's Advertising Law also prohibits advertisements that disparage the goods or services of other producers or providers.

Companies in China are therefore prohibited from instructing their employees to post negative reviews about competitors' goods in online review forums. Both the Anti-Unfair Competition Law and the Advertising Law have been used to prosecute marketing on social media, although published enforcement decisions are rare.

Prosecutorial decisions are delegated to individual provincial and city authorities, and certain innovative approaches have been taken to monitoring activity on social media. In February 2013, the *Liberation Daily* reported that the Public Security Bureau in Shanghai's Changning district had commissioned an internet monitoring platform to monitor online e-commerce activity and take action against breaches of the law. The platform conducts weekly scans of e-commerce websites and social media to check for false advertising and fake reviews, etc.

The Changning branch of the Department of Trade and Industry reported that it monitored 1,272 regional network operators during 2012 and investigated 99 cases, issuing fines amounting to some Rmb600 million (US\$98.6 million). It was through this channel that the Paris wedding dress case was detected and prosecuted.

### **Strengthening Online Information Protection**

The National People's Congress issued a decision on strengthening online information protection in December 2012 that requires companies to register with their real identities on Chinese social networking blogs and forum websites. The decision may help to dissuade companies from posing as consumers and concealing the commercial source of the posts, and provides another indirect plank in the regulation of social media.

### **Consumer Protection Law**

The revised Consumer Rights and Interests Protection Law, which comes into effect on March 15, 2014, introduces a general prohibition against false or misleading advertising. The new law does not itself specify which advertising practices will be considered false or misleading. Neither does the law directly address advertising by way of social media, user forums or sponsored reviews. Implementing regulations on the new Consumer Rights and Interests Protection Law have not yet been released, and no other guidance as to what will be held to constitute false or misleading advertising has been published.

The law however provides for significant penalties for business operators responsible for false or misleading advertisements, although none that provide for criminal liability. Business operators face civil liability for any consumers whose rights and



Richard Bird is head of Freshfields' IP/commercial practice group in Asia, and is based in Freshfields' Hong Kong and Shanghai offices. Bird advises clients in commercial and contentious intellectual property matters in Asia, with a particular focus on China. He advises clients in the telecoms/TMT, consumer goods/retail, healthcare and automotive sectors in particular, and advises clients on advertising and consumer

protection on social media and the protection of trademarks, content and other IP rights on social media and other internet marketplace platforms in Hong Kong and China.



Victoria White is an associate in Freshfields' IP/commercial practice group in Hong Kong. White's practice covers brand protection and commercial IPR strategy in new media and communications technology, including trademark and copyright protection and enforcement. She also specializes in IT, data protection and telecoms and media regulatory matters in Asia.

interests have been harmed as a result of false advertisements or advertising methods. The SAIC may impose warnings, confiscation of illegal income and a fine of up to 10 times the illegal income (or a fine of up to Rmb500,000 (US\$82,000) where there is no illegal income) on business operators, and in serious cases, suspend business operations and revoke business licences, as well as blacklist the business operator on the credit reference register.

### **Possible Upcoming SAIC Regulation on Online Advertising**

In March 2013 the SAIC was reported to be working on a draft online advertising regulation that would address the issue of bid ranking with search engines. Although there was no explicit mention in the reports of the application to advertising on social media, the regulation can be expected to address these issues as well when it comes out.

In contrast to US platforms, including Facebook, Chinese social media has been slow to adopt specific terms of use that address the form of advertising, marketing and promotional uses on the platform.

### **Prevention Through Awareness – the Best Policy**

The scale of the alleged offences in the Meng Niu case in particular in China raises key issues for companies' management and supervision of digital PR and marketing strategies. Strict controls and protocols to approve PR campaigns should be put in place that involve all key stakeholders in the company, not just the marketing teams. This should aim to ensure that no unlawful campaigns are instigated that could have an impact on the good-standing and reputation of the company.

The increasing focus of national laws and regulation on companies' use of social media as part of their marketing strategies underlines the importance for companies to establish a robust social media policy. Devising and implementing a policy is crucial to assist companies manage the associated legal and reputational risks.

A social media policy should provide clear guidelines to employees on how to use the company's social media accounts appropriately, what content is allowed and, if employees comment on the company's products or services on their own accounts, where labelling of commercial intent and affiliation with the company is required. **AIP**