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The risks in paying for links (and accepting payment for them)

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EXECUTIVE SUMMARY

The practice of Search Engine Optimisation agencies (SEOs) paying bloggers for links and advertorials is widespread. But these practices may expose the parties involved to legal challenge. Jeanette Burgess explains the issues for brands, SEOs and bloggers.

- Many link-building practices have serious legal and commercial implications
- Ignorance is no defence. The ASA has made it clear that “*ultimately the buck would stop with the advertiser*”
- Brands need a detailed understanding of what their SEO agencies or in house teams are doing
- A more rigorous approach to SEO contracts is needed to protect both parties
- Bloggers need to ensure they don't breach ASA, HMRC or trading standards guidelines

THE PRACTICE

House PR, the agency handling PR activity for Mastercard's sponsorship of February's Brit awards, has found both itself and its client at the centre of some unwelcome PR. It is reported that House PR offered journalists free passes in exchange for favourable promotional tweets and sponsor mentions in editorial coverage. House PR has defended its activities as part of its responsibility to "pursue all coverage opportunities" on behalf of its clients.

This type of activity is also commonplace in the digital world. SEO agencies regularly pay bloggers to host links, or to write favourably about their clients. And website owners and bloggers are often happy to oblige. Bloom Agency was recently retained by a client to approach bloggers and website owners to invite them to host content on the client's behalf. They carried out a statistical analysis of the responses which showed that 75% of bloggers requested payment. Bloom's policy is not to pay for content but the analysis serves to illustrate that there is a common expectation of payment for hosting such links.

Two SEO practices in particular are worth highlighting. The first is guest blogging, a practice which only a few years ago represented something of a badge of honour for the author, but which has become increasingly tarnished by false guest bloggers and an association with spam. The second is advertorials - thinly disguised advertisements posing as editorial content. Both practices are coming under increasing legal and commercial pressure.

The practice has serious legal and commercial implications.

THE LEGAL IMPLICATIONS

First, advertorials. The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (the CAP Code) states at paragraph 2.1 that marketing communications must be obviously identifiable as such. In November 2013, the Advertising Standards Authority (the ASA) published a notice reminding bloggers of this. In its words, "*Put simply, a blogger who is given money to promote a product or service has to ensure readers are aware they're being advertised to*". The ASA makes clear that bloggers are allowed to accept payment for advertising – it's just

that they have to spell out that this is advertising, such as signposting the content in question as an "ad", "advertorial" or "sponsored content".

It is also possible, where the blogger is a "trader", that this practice may breach the Consumer Protection from Unfair Trading Regulations 2008 (the 2008 Regulations). This bans as a misleading practice the practice of falsely representing oneself as a consumer. In addition to this, the CAP Code states that falsely presenting yourself as a consumer is a misleading practice. This may well apply to the practice of giving a view that appears to be a genuine opinion but is actually a financially sponsored comment. This could result in an unwelcome visit from Trading Standards.

HM Revenue & Customs are also likely to be interested if the income is not declared.

From a brand owner's point of view, the 2008 Regulations prohibit the use of editorial content in the media to promote a product, where the trader has paid for the promotion, unless this is made clear in the content. It is also prohibited to mislead consumers by act or omission (for example in relation to any endorsement of the product), where this is likely to have an impact on the consumer's decision making about the product. These rules apply to any trader involved in the promotion, sale or supply of products to or from consumers.

The ASA has also made it clear that *"although the blogger would be named as part of any ASA investigation into misleading advertising, ultimately the buck would stop with the advertiser"*.

THE COMMERCIAL IMPLICATIONS

The legal implications have focused primarily on the blogger, but the commercial fall-out is likely to be felt most severely by the brand and its SEO agent.

The first of these is the risk that Google will penalise the brand by ranking it lower in search results or, in extreme cases, removing it from Google search results altogether. The potentially disastrous consequences of this will be apparent if you think how few internet users click onto a second page of search results, let alone the tenth, or twentieth.

Google has not been shy in stating its position. In January 2014, Matt Cutts, who leads Google's Webspam team, said in his blog: *"If you're using guest blogging as a way to gain links in 2014, you should probably stop. Why? Because over time it's become a more and more spammy practice, and if you're doing a lot of guest blogging then you're hanging out with really bad company"*. This is a clear warning from Google that it will not tolerate guest blogging whose purpose is SEO benefit.

Matt Cutts also said in February 2013 that Google would be taking action against selling links that pass PageRank (the algorithm used by Google to rank websites in its search engine results). Cutts made two key points: (1) that where money is changing hands, there needs to be a statement to this effect – effectively echoing the ASA position described above; (2) where this happens there should be a "nofollow" tag within the URL. The effect of this is to stop the link from passing PageRank. To quote Matt Cutts again: *"We do take this issue very seriously, so we recommend you avoid selling (and buying) links that pass PageRank in order to prevent loss of trust, lower PageRank in the Google Toolbar, lower rankings, or in an extreme case, removal from Google's search results"*.

It is not surprising that Google is getting tough with this. Its business model depends on the integrity of its search results and it will not allow these to be manipulated. We will highlight some illustrations of this in the next section.

EXAMPLES

- **Interflora** - Probably the most high-profile brand, at least in the UK, to suffer Google's wrath for passing PageRank is Interflora. In 2013, for 11 days between Valentine's Day and Mothering Sunday, Interflora was removed altogether from Google's UK searches after it had posted around 150 advertorials on regional news sites. There were also rumours that Interflora was offering gifts to bloggers in return for links. This was around the time of Matt Cutts' pronouncement regarding undisclosed advertorials. Interflora did not disclose that the articles were paid for and Google quietly consigned it to search oblivion.
- **JC Penneys** - A similar fate befell JC Penneys in the States when Google became aware that its SEO had paid for links to numerous sites. Penneys - a big name in the States - was demoted down Google's rankings. Interestingly, the company denied being aware of what its SEO had been up to and, it is reported, promptly terminated the relationship with its SEO agent.
- **Handpicked Media** - The Office of Fair Trading (the OFT) took enforcement action against Handpicked Media, the operator of a commercial blogging network, under the 2008 Regulations after it became concerned that bloggers were publishing content promoting the activities of Handpicked Media's clients, without disclosing that the promotions were paid for. Handpicked Media cooperated with the OFT and signed undertakings as to its future compliance with the law.
- **Others** - A quick internet search will reveal all sorts of speculation as to the identity of other brands penalised by Google for their nefarious linking practices - from banks to law firms to retailers. There will invariably be graphs showing a stable level of SEO activity followed by a precipitous plunge, when Google - apparently - has pulled the plug. What is more, the rate at which the online community are reporting Google penalties for breaching PageRank is increasing month on month.

HOW TO MITIGATE THE RISKS

Brands

Google and ASA have been clear about their position and taking action. The OFT no longer exists, but its actions may still be taken into consideration by Trading Standards and the Competition and Markets Authority who are responsible for enforcing the 2008 Regulations. It will be hard for PR departments to argue, as Penneys did, that they did not know what was going on. Some SEO agencies may have been transparent and disclosed that they are paying for links, others may not have been, but the result either way, could be reputational damage and/or a fine and/or a stint in the Google search wilderness.

The first step for PR departments is to find out what their SEOs have been doing. The second step will be to instruct them, where necessary, to begin tidying up the offending backlinks before Google takes action.

In the worst case scenario brands may consider whether they have a claim against their SEO agency. This could be for breach of contract or it could be a negligence-based claim. In negligence, the brand will need to show the existence of a duty of care, which has been breached by the SEO and which has caused loss to the brand and that the loss was reasonably foreseeable. Quantification of the loss would not be easy but clearly a Google delisting, or reduced ranking, would have an appreciable impact on throughput.

Brands should also begin to take a much more rigorous approach to their contracts with their SEOs. Traditionally, SEOs have been given something of a carte blanche. That won't do any more. There will need to be contractual provisions restricting what the SEO can do. For example, consider making a breach of Google's Webmaster guidelines a material breach of contract (i.e. so the brand can terminate and claim damages). If the SEO doesn't like it and won't sign up, then it may be time to consider one that does.

SEOs

For their part, SEOs will have to accept that times have changed. Contracts will be renegotiated and time will be spent reviewing clients' backlinks rather than paying for new links. Previously tolerated SEO practices may actually be harming their clients. SEOs that don't recognise this may quickly find themselves losing business and/or possibly facing a claim.

Bloggers

For bloggers, it's quite simple. Only accept paid-for content if (1) you are prepared to say that it's paid for; and (2) you trust the integrity of the provider. Hosting spammy links will only be detrimental to your reputation. There are, of course grey areas – for instance, receiving free gifts or samples in the hope (expectation?) of a positive review. Care needs to be taken in these cases and, if in doubt, err on the side of caution. In the worst cases, Trading Standards might get involved with the possibility of a prosecution resulting in a fine.

Remember also that HM Revenue & Customs is looking at bloggers who have not declared their income from blogging. If HMRC finds out that income has not been declared, the blogger may be charged interest and penalties on top of their tax bill.

Ultimately, it is about being transparent and not misleading people – from your followers to the taxman.

WALKER MORRIS SOCIAL MEDIA GROUP

Whether you are a brand, an SEO agency or a blogger, the Walker Morris Social Media Group would be happy to hear from you. We have a wealth of experience in advising on commercial contracts, compliant promotion, intellectual property management and litigation covering all legal aspects of social media. We offer legal guidance to companies and agencies on how to manage brands effectively and operate compliantly. Our services range from providing a commercial health check to ensure contracts comply with the relevant regulations to advising clients how they can maximise their review through the management of their intellectual property and trade marks.