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Consultation

Guidance on Digital Marketing Practices and Promotions

Submission by Association for Interactive Media and Entertainment (AIME)

AIME (www.aimelink.org)

AIME is the UK based trade organisation representing the commercial interests of member companies involved in the interactive media and entertainment Industry - where consumers interact or engage with services across converged media platforms, and pay for those services or content using a variety of micropayment technologies.

We uphold our Code of Ethics and Core Values to create an environment of consumer trust and industry confidence within which our members' commerce can grow. We are committed to furthering the interests of Interactive Media and Entertainment through the regular exchange of information and communication throughout the value chain, effective engagement with regulators and legislators and the presentation of a successful industry image to media.

We are the only UK trade association with membership across all elements of the interactive media and entertainment value chain, which is generally supported by Premium Rate Service (PRS) billing facilities, and our membership represents in excess of 80% of annual industry revenues.

AIME promotes and abides by the philosophy that consumers who are accurately and openly informed of the nature, content and cost of participation in an interactive service experience are perfectly placed to exercise their freedom of choice and thereby enjoy the most effective form of consumer protection.

Summary of Key Points:

- Industry members are in agreement that the practices highlighted are misleading
- Roundtable discussion is required to explore technical limitations to consumer journey tracking
- Joint working on webinars, events and best practice is key to disseminate monitoring techniques
- Scope of L1 due diligence should be limited to the L2's affiliate monitoring arrangements
- 3 strike policy advocated to separate isolated incidents from systemic issues; save for cases where the L2 is complicit or wilfully negligent
- A facility to share information on known affiliate issues is sought by the industry
- Commercial terms (such as Facebook's) should not form part of guidance, investigations or adjudications
- Existing guidance on Metatags is sufficient; and should be transposed into this guidance
- Clarity required on how one 'verifies' a Facebook 'like'
- Practices which obscure that a 'like' will take place (therefore misleading), should be separated from those that incentivise a user to knowingly 'like' a service (which should be permissible)
- Requiring a consumer to perform an action in addition to payment should be permissible, providing full, clear and transparent information ahead of a transaction
- Lack of pricing at point of sale is a general PRS issue for the L2 and not a matter relevant to the affiliate
- Industry might consider placing terms in affiliate contracts to apply financial withhold penalty

General

AIME has reviewed the proposed PhonepayPlus guidance on digital marketing practices and welcomes the opportunity to submit feedback on the content of the guidance. We understand the guidance focuses on the seven core practices which have the potential to be misleading and reflects on the responsibility down the value chain for ensuring compliance.

AIME has consulted with members at each level of the value chain and the views received are largely consistent. There was unanimous support that the practices identified were inappropriate and the general belief that the focus for enforcement should be on processes at the L2 layer to monitor suspicious patterns in the leads being generated, rather than a requirement to verify each lead or "like" individually.

Use of an Affiliate Network remains an appropriate marketing tool. We are aware that some affiliates or networks have a better track record than others. Through a collective industry approach we would hope to see rogue affiliates identified.

Many members, as well as industry participants more generally, have limited experience with affiliates. AIME's intention is to provide insight to allow experience to be gained, best practice to be shared and intelligence on issues to be held in a central repository. AIME would welcome collaborative working with PhonepayPlus towards the mutually shared goal of addressing bad practice by affiliates. Discussion through a roundtable environment will help identify the techniques available to monitor affiliate activity and traffic patterns and explore the response to the technical limitations that exist. AIME would be happy to explore with PhonepayPlus the use of joint events, webinars and best practice documentation to share the key learning points throughout the PRS value chain.

Further consideration might be given to the L2 applying withholds or penalties within commercial contracts preventing the affiliates widening the scope of marketing, or deviating from agreed copy. It is appropriate to note that with the larger affiliate networks standardised contractual terms may apply and this may not be practical in all circumstances. As standard payment terms to affiliates can be as

little as two weeks, in order to be effective industry need to pull affiliates up on bad practice as soon as it comes to light. To assist industry it would be beneficial if PPP could share findings of their monitoring to the whole industry as soon as possible to enable any similar practices to be investigated.

A repository for sharing intelligence on affiliates found to have systemic compliance issues would be welcomed. This could take the form of an extension to the PhonepayPlus registration scheme, or a separate industry managed scheme.

Given the limitation to monitoring affiliates we would advocate a pragmatic approach under the Track 1 procedure to enforcement, providing L1s and L2s the opportunity to address issues identified. Unless there is evidence that the L2 has knowingly accepted traffic generated by misleading marketing, or has failed to put in place any DDRC controls, we would hope to see a three strike principle applied. The duty of care for affiliates should rest with the directly contracting party, invariably the L2. The L1 responsibility should be limited to ensuring the L2 has monitoring arrangements in place and should not extend to auditing traffic. The L2 should have a hands-on approach to managing affiliates, though consideration needs to be given to the practical and technical limitations that exist in reverse tracking a consumer journey. In most cases, monitoring of an affiliates activity will necessitate a reliance on unusual traffic patterns to identify issues and malpractice may not be discovered immediately.

Questions

Q1. Do you agree with our assessment of digital marketing in the PRS context and with our overall approach for dealing with it? If not, why not?

AIME members are in general agreement that the practices highlighted by PhonepayPlus are misleading. Members recognise that action is necessary to prevent brand damage as well as avoid code compliance issues and therefore many are already taking steps to identify issues in the way services are promoted. The industry welcomes guidance to help disseminate the message and support the activity at account management level within individual L1s to educate the value chain.

AIME has also developed a webinar training format building upon the principles highlighted by PhonepayPlus, along with best practice in areas such as Social Media Promotions. We would welcome joint working to reach out and share these tools to the wider PRS community outside of the core AIME membership.

All levels of the value chain recognise that there is a collective responsibility to promote compliance. L1s have due diligence and risk control (DDRC) responsibility for their L2 clients and where an L2 is directly promoting services an L1 can conduct appropriate monitoring activity, for example, pre-approving web copy and carrying out spot checks on marketing. With the introduction of affiliates the ability to monitor all marketing becomes more problematic as visibility of the value chain is reduced. The widely held belief is that where an affiliate is used, primary responsibility for DDRC should shift down the value chain to lie with the L2.

Direct regulation of Affiliates has been suggested by some sections of industry. AIME acknowledges this view, though feels this would add considerable administrative cost without fundamentally changing the regulatory burden of the L2 - which would continue to hold DDRC responsibility. The registration of affiliates may provide some additional visibility, though this would need to be linked to a wider strategy for identifying affiliates and networks that have been at the centre of code breaches.

L1s are happy to support monitoring activity and to take swift action where misleading marketing is identified. The nature of affiliate marketing, particularly in a social media environment, often requires a reactive approach, such as responding to suspicious traffic patterns or identifying issues from

customer care calls. A pragmatic approach to enforcement is therefore necessary enabling L2 to operate a 3 strike policy towards problem networks. The industry would be keen, either through the registration scheme, or other information sharing facilities, to provide an early warning system to flag affiliate networks identified as having systemic compliance failings. Further discussion would be welcomed on whether such a facility should be PhonepayPlus or industry led.

The main issues identified appear to relate to marketing by affiliates that has gone beyond the initial project brief. In some circumstances, commercial contracts might be updated to place restrictions on any non-approved marketing and we would seek an assurance that mitigation will be given to L2s that have taken all practical steps to approve and control marketing.

Q2. Do you agree with our consideration of typosquatting and proposed expectations? If not, why not?

AIME agrees with the analysis of typosquatting. We have no further information to add.

Q3. Do you agree with our consideration of Clickjacking and our proposed expectations? If not, why not?

AIME agrees with the principle that clickjacking is wrong. Though we note that paragraph 3.5 goes beyond mere clickjacking in stating that

“Where a PRS promotion is linked to from another website, the link should be open and transparent, allowing consumers to make an informed choice ... Promotions should clearly state what the service offered is, how it operates and its cost, displaying relevant key information in a visible, legible and proximate format.”

AIME agrees with the principles of transparency and that advertising should not mislead, or make inaccurate statements regarding pricing or other key information. Though in common with existing PhonepayPlus guidance, and advertising in other mediums, we do not believe that adverts that do not directly carry the payment mechanism should need to carry all pricing information.

The emphasis on this section of guidance should be on not misleading consumers, rather than achieving a fully formed buying decision prior to visiting the main landing page. The main landing page will provide an environment where benefits and terms can be communicated in context. In this sense the focus should remain on not obfuscating the identity of the promoter or promotion method, or passing off the promotion as being connected or endorsed by the host site.

Q4. Do you agree with our consideration of Likejacking and our proposed expectations? If not, why not?

AIME supports the objective in connection with a prohibition on likejacking. However, a clear line should be drawn between regulatory codes and commercial T&Cs, such as Facebook. Whilst PhonepayPlus has a duty to ensure the code of practice is enforced, weight should not be added to commercial terms which must rest with the relevant commercial entity to enforce.

We believe the guidance would benefit from clarity on how one 'verifies' and audits genuine Facebook 'like'.

We believe a distinction must also be drawn between misleading services that seek to obscure that a consumer action will result in a 'like', from that which we believe to be the permissible activity of incentivising, in clear terms, a consumer to 'like' a product.

The nature of privacy settings on Facebook place additional barriers to identifying where the underlying offer is different from that against which a 'like' is placed. This is an area for further discussion.

Q5. Do you agree with PhonepayPlus' consideration of Banner ads, Pop-ups and pop-unders and our expectations around them? If not, why not?

AIME is in general agreement with the analysis of banner ads and popups/unders, though we believe that emphasis should be on code rule 2.3.2 (misleading) rather than on 2.2.1 (pricing). Similar to our comments under section 3, AIME agrees with the principles of transparency and that advertising should not mislead, or make inaccurate statements regarding pricing or other key information. Though in common with existing PhonepayPlus guidance, and advertising in other mediums, we do not believe that adverts that do not directly carry the payment mechanism should need to carry all pricing information.

The emphasis of this section of guidance should be on ensuring banner ads do not make inaccurate statements, rather than having a focus on what information is omitted. Where pricing is provided this must be accurate, though where the payment mechanic is not present we do not believe stating the price is a necessity.

Q6. Do you agree with PhonepayPlus' definition of SEM and SEO and our expectations around them? If not, why not?

AIME is in general support of the principles outlined in relation to SEM and SEO marketing. In particular we acknowledge that the term free should only be used where there is genuinely free content available.

We believe that previously issued PhonepayPlus guidance on the subject of metatags to be sufficient in this regard. Providing there is some free content available without obligation and that the paid content is clearly and separately identified we believe this is sufficient. We would not support the proposed strengthening of the guidance to require that the majority of content should be free.

Q7. Do you agree with our consideration of Content Locking practices and our expectations around them? If not, why not?

AIME notes that in some case consumers have been subject to protracted journeys under the promise of receiving content. We agree that these scenarios are unacceptable.

As a matter of best practice, AIME supports the principle that consumers should be transferred as quickly as possible through the marketing and payment flow, supported by clear terms and that promised content should be delivered in a timely manner.

Providing terms are upfront, clear and transparent and that the content is straight forward to access we believe that the principle of requiring a consumer to perform certain actions in addition to payment is not in itself wrong.

We also believe that providing, in addition, content that is not directly related to the original service should be acceptable in appropriate circumstances. Paragraph 3.37 of the guidance seems to suggest this would be considered a misleading practice, though providing content is not offensive and providing the commercial terms of any related promotion are clear, we do not see grounds to justify this conclusion. Where unrelated content is provided in proximity to paid content, we would support

the requirement that there is a clear navigable path back to the content for which a consumer has paid.

Q8. Do you agree with our consideration of Spam and our related expectations? If not, why not?

AIME is supportive of PECR principles and would advocate close alignment between these and the PhonepayPlus code. Where there is no issue regarding the PRS element of the service and issues identified are purely related to marketing consent we would encourage the matter to be handled by the ICO as the principle authority for marketing regulation.

Q9. Are there any other potentially misleading digital marketing practices that we have not identified? If so, then please suggest any, including appropriate evidence.

Many large brands use adware legitimately as part of their marketing strategy and AIME believes the guidance would benefit from a section on the compliant use of adware for PRS promotions.

We believe that adware poses only particular challenges for L2 monitoring, as a result of browser toolbars producing customised user experiences that will not necessarily reproduce under monitoring conditions.

Consumers may often have given marketing permission for adware in exchange for free software downloads and the scope of consumer opt-in should be considered within this context.

The practice of search term re-directing would also benefit from coverage within the guidance.

Q10. Do you agree with our illustrative representation of affiliate marketing? If not, why not?

AIME generally agrees with the illustrative representation of the affiliate channel, though notes that a distinction is not made between individual affiliates and the affiliate network.

Q11. Do you agree with our consideration of affiliate marketing and our expectations? If not, why not?

The use of affiliates is a well tried and successful marketing channel used throughout e-commerce, m-commerce and the PRS sectors to generate leads. In the majority of cases a click-through from an affiliate is a result of clear and transparent marketing. Well managed affiliate marketing therefore represents an appropriate, effective and cost-efficient business referral mechanism.

Affiliate marketing has brought challenges, in particular how to monitor and control promotions conducted by a large number of individual affiliates sitting under an affiliate network. Whilst providers have control over the marketing material they present for use by the affiliates, this does not prevent the affiliate using unsanctioned material or techniques. Where a rogue affiliate has adapted the advertising material there is potential for this to be non-compliant with the PhonepayPlus Code.

Clear contractual terms to re-enforce the importance of sticking to approved material, backed by the penalty of withholding referral fees in the case of failure have been suggested by a number of providers. We believe this a positive step and the principle should be encouraged. However, this is not a panacea, as some affiliates will continue to operate non-compliantly in the hope of non-detection.

We believe the primary focus should be on the L2 having processes in place to monitor suspicious traffic patterns or unusually effective marketing results. This, by its nature, is a reactive process and

the provider should be allowed the flexibility to respond to issues before regulatory sanctions are invoked. We feel a pragmatic policy should be applied where appropriate to enable a provider to differentiate between an isolated issue with a single affiliate, from that of a systemic issue with an entire affiliate network. Well managed Affiliate Networks will provide assistance in this. Additionally processes for sampling and other techniques should be applied by L2s.

Providers can and do carryout proactive monitoring of promotions to ensure compliance. We have considered tools currently on the market to assist with this process, though note at present no universal tool exists to monitor traffic fully. Tools to recreate specific customer journeys by working back from the L2s landing page are not currently available and broad market monitoring is required to proactively identify issues.

Tracking becomes particularly problematic where tracking links have been pulled out of compliant banners and re-marketed through unsanctioned social media promotions. Where an ad network is used, the identity of individual affiliates is also masked through URL forwarding, proxy servers and similar techniques to avoid the network being dis-intermediated from the value chain.

The tools we have trialled also appear resource intensive and it is simply not practical to inspect each individual affiliate site in response to every referral. Period checks can be and are carried out, though marketing material may be changed in the interim period and non-compliant marketing may take some time to be identified. The aforementioned facility to share intelligence would facilitate providers in taking mitigating action relative to the risk.

As the party with the direct contractual relationship with affiliates and the clearest visibility of the source of referrals, we believe it reasonable that DDRC rests with the L2 layer. Requiring the L1 to perform DDRC on this level of the value chain would present considerable practical issues, in addition to an unreasonable degree of oversight. As a result, we believe a L1s responsibility should extend only to DDRC on L2 systems in place to support the use of an affiliate network and not the activity individual affiliate campaigns.

We would hope to work constructively with PhonepayPlus to further explore the nature of affiliate networks and develop the tools and techniques to better monitor their activity. AIME intends to host a roundtable with the affiliate networks, which we believe will provide some further understanding of the challenges and potential solutions. This will enable additional practical guidance to be drafted on detection techniques and identifying questionable traffic patterns.

Finally we noted that the payment mechanism is not controlled or managed by the affiliate, but sits within the direct control of the L2. Therefore the lack of pricing at point of sale is generally not a matter relevant to the affiliate, or this particular guidance note. Instead the guidance should focus on reinforcing that any affiliate's activity does not mislead by intent or omission prior to reaching the L2 landing page.

Conclusion

AIME members are united behind PhonepayPlus' objectives to tackle misleading marketing and concur that the identified marketing practices have the potential to cause consumer harm. We are keen to establish clarity on some aspects of social media marketing, primarily the expectation around auditing Facebook 'likes' and establish that it remains permissible for a provider to incentivise these 'likes'. The industry remains of the view that there are some instances where a provider may legitimately request that an action is performed by the consumer in addition to payment and providing this is clear ahead of the transaction commencing and the content is straightforward to access we believe this does not constitute an unreasonable term of sale.

The use of an affiliate network introduces new challenges for DDRC and despite the reasonable endeavours of providers, there are practical issues to monitoring affiliate activity. Industry can investigate the use of contractual terms and the approval of advertising copy, though there will remain instances where a rogue affiliate may go beyond these parameters. In these instances providers are keen to work constructively with PhonepayPlus to share intelligence and best practice and we would hope to see a pragmatic approach to enforcement that acknowledges the challenges involved and process applied.

Statement of Representation

AIME confirms that this response has been compiled following a process of internal discussion and distribution of the relevant Consultation documentation to all AIME members. A list of members can be found at <http://www.aimelink.com/home/members.aspx>

The views expressed in this response are a fair representation of the majority views held by the responding AIME membership. Individual members are actively encouraged to submit their own independent views as they deem fit and at their sole discretion.

Close

We assure you that, as ever, our comments are made constructively and with the intent of achieving an effective, fair and proportional regulatory regime for Premium Interactive Media and Entertainment services in the UK.

If any clarification to our response is required or if we can be of any further assistance please contact Fleur Bowles at +44 (0) 1252 711 443, or fleur@aimelink.org

Sincerely
AIME