

## Submission to Impress Code Review 2021

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<https://www.arts.ac.uk/colleges/london-college-of-communication/research-at-lcc/branded-content-research-hub>

Impress has invited submissions on specific aspects of the code. This submission relates to the following issues: journalism online; accuracy; children. It focuses on Section 10 of the Impress Code and addresses the practices and regulation of sponsored editorial content, native advertising and related forms of branded content (Hardy 2018). It makes the following recommendations

1. Strengthening of the Code
2. Guidance on best practice for Impress members
3. Adoption of common labelling by Impress members
4. Adoption of 'kitemarking' scheme for agreed standards by Impress members (mandated or voluntary)
5. Further review and discussion on source identification measures

This is a summary submission produced at speed to meet the consultation deadline. I will be happy to provide a more expansive version incorporating a review of the relevant research, industry and policy literature on request.

### The existing code

The current Impress code sets out the relevant guidance in 10.1:

Publishers must clearly identify content that appears to be editorial but has been paid for, financially or through a reciprocal arrangement, by a third party

This has a number of problems. It makes it discretionary to determine whether content requires identification based on whether it 'appears to be editorial'.

The Code provision is weaker than the relevant European law which continues to apply in UK law through the Consumer Protection from Unfair Trading Regulations 2008 (known as CPRs), which incorporate into UK law the EC Unfair Commercial Practices Directive (2005). Unfair Commercial Practices. The Directive (European Parliament and Council 2005b, Directive 2005/29/EC annex 1, Item 11) prohibits:

Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial).

The same wording is used in the Unfair Trading Regulations 2008. The 2005 Directive was subsequently amended by the DIRECTIVE (EU) 2019/2161, (European Parliament and Council 2019) designed to address 'the better enforcement and modernisation of Union consumer protection rules'. This addressed payment for search results listing, prohibition of fake consumer reviews and endorsements by traders, but did not amend the rule (cited

above) on advertorials. The Unfair Commercial Practices Directive is valuable, but limited and outdated. It applies when the content is obviously promotional, but is not sufficient to cover all forms of brands involvement in editorial or published content; for instance, paid or sponsored content by brands may not promote the brand, may not even mention the brand at all. However, it does require disclosure wherever there is payment by a trader. There is a legal obligation on all publishers to disclose if a trader has paid for content. The current Impress code goes no further than the minimum legal obligation already applicable. As formulated it provides greater discretion over disclosure than is required by law.

The wording 'has been paid for, financially or through a reciprocal arrangement' is intended to capture arrangements involving either payment or a relevant economic consideration. However it is poorly worded and so make be confusing for complainants, Impress members or other stakeholders.

### **Revision to 10.1**

The new rules should state clearly the obligation that any content that is paid for, supplied by, produced or co-produced by, sponsored by, or subject to any material connection between, a third-party and the publisher, is clearly and prominently labelled so that the material connection is disclosed and the nature of the content is suitably identified and apparent to users who may encounter the material.

Recommended code change:

10.1 Publishers must clearly and prominently identify all paid-for and sponsored content and ensure any material connection between a third-party supplier and published content is disclosed.

### **Guidelines for Impress members**

I recommend that Impress produce guidelines on labelling ,identification, disclosure and other aspects of best practice, Impress code adherence and legal-regulatory compliance.

Forms of branded content are fast developing across platforms. Users encounter Impress members' content through an ever expanding range of platforms and services. These services are continually revising their contractual, transactional, monitoring, labelling and disclosure requirements. Alongside the code, there should be more frequently reviewed and updated guidance for members on relevant legal requirements, wider governance arrangements, Impress Code requirements and best practice recommendations.

### **Kitemarking**

I recommend that Impress discusses the establishment of kitemarking to indicate to readers adherence to a set of editorial and publishing standards that includes how all advertising and commercial sponsorship is managed and how sources and source attribution is managed. The proposal is for a kitemark/logo that can be displayed at publication level

(surrounding mastheads, etc) and not only at story/content level as most disclosure on sponsored content is currently located.

There should also be discussion of a mandatory, or voluntary, universal logo, akin to the P-sign that is required to alert consumers to the paid presence of brands in UK television production. There should be a single, standardised sign displayed for publications carrying editorial-like content items produced by, for, or in association with third-party marketers, to feature prominently at masthead and individual item levels. This might be a B-sign, for Branded Communications, or an S- sign for Sponsored Content, for example, with the selection on what is most suitable made following wider consultation with stakeholders and testing for user recognition and effectiveness. As the report by Newman (2018: 16) recommends, there needs to be 'better source labelling, signals of quality, and improved news literacy'. There needs to be better labelling of sources for content (including brands), better signalling and kitemarking (for both branded content and also high quality independent journalism), improved news and media literacy (part funded by levies on platforms and aggregators).

The standards for Impress members should at least as high as those that apply to social media influencers many of whom self-publish and operate outside of the professional, institutional and governance arrangements found in news and periodical publishing. Yet, there are currently stronger obligations on influencers in the UK than are outlined in the Impress code on publishers.

It will be vital ethically, but also economically and politically, that Impress and its members contribute to the wider review and reform of commercial and sources disclosure that will occur in the next few years, not least as a result of reviews announced by the UK Government or regulatory agencies themselves. For instance, the current guidance on influencer marketing produced by the Competition and Markets Authority and Committee on Advertising Practice (CMA-CAP 2020: 4) states:

If you have any sort of commercial relationship with the brand, such as being paid to be an ambassador, or you're given products, gifts, services, trips, hotel stays etc. for free, this is all likely to qualify as 'a payment [or other reciprocal arrangement]'. There's nothing wrong with getting paid to create content, but you need to be upfront about this with your audience.

That level of disclosure for influencers, who may be 'amateur' and individual self-publishers, exceeds the practices of professional news and periodical publishers in the UK, where junkets, gifts, supplied goods and other 'reciprocal arrangements' are not consistently, clearly and explicitly disclosed. Such anomalies are best addressed by proactive development of standards and here Impress can take an important step and lead.

### **Source Identification**

The current Impress code draws on the earlier Press Complaints Commission and other codes that identify problems in discrete areas and set out specific, circumscribed requirements. So, section 10 includes the requirement to identify paid-for content, alongside requirements on disclosure of 'significant' conflicts of interest (10.2, 10.4) and reporting on

information about financial products (10.3). The latter is based on Clause 14 of the PCC code introduced following the recommendations of the Calcutt Privacy Committee in 1990, including for the Press Council to be replaced by the PCC. It reflects the prevailing power dynamics shaping press self-regulation at the time. It was an 'editors' code', established by and on behalf of the owners of the major press holdings in the UK. The financial reporting clause (and the clause requiring for reporting of libels involving the publication) both acknowledged that the publication as a whole, or staff, may have conflicts of interest, but it delimited these, and made no mention of the broader concerns set out in journalists' code, such as the International Federation of Journalists, which states that 'Journalists must remain independent of advertisers' wishes or the strictly business concerns of their employers' (International Federation of Journalists <http://europe.ifj.org/en>)

There is a general argument that the Impress code review should take this opportunity to review and move beyond the institutional and governance legacy that shaped the creation and maintenance of these code provisions, and draw up provisions that are suitably broad-based to guide practice today. Why, for instance, should financial product reporting be identified for protection (10.4) while reporting on ownership or economic interests of the publication or parent company is not mentioned? My earlier research (Hardy 2010) examined the practices and governance of cross-media promotion including in the UK media. I examined the Sadler Enquiry (1991) which investigated the promotion of Murdoch's Sky television services in his UK newspapers. A voluntary disclosure was introduced, and unevenly applied, within and across News International newspapers but the PCC resisted moves to adopt, in its code, such a disclosure requirement in covering matters pertaining to a publishers own corporate or commercial interests. It is time to establish a code based on standards of transparency and disclosure suitable for 21<sup>st</sup> century media rather than extend the limited scope of a code created under specific conditions three decades ago.

There is a further key argument here. It is not enough to establish provisions for the disclosure of certain types of source (paid or sponsored content) without addressing the broader issues of source identification and disclosure. Those issues are undoubtedly complex, contentious and challenging but there are strong grounds to argue that they are unavoidable, and also that it is integral to its purposes and values that Impress should address them. The issue of source identification and disclosure is raised in policy areas of misinformation/disinformation, political advertising, in misleading trading (fake reviews, likes, testimonials, etc) as well as across commercial content and promotion (native advertising, sponsored content, influencer marketing, endorsements and testimonials). These matters are converged in practices, such as the use of sponsored content by state actors. One example is the Thai government which paid for sponsored content carried by Reuters that refuted the work of its own journalists in covering 'seafood slavery' and the trafficking of Rohingya migrants from Myanmar into the seafood industry. A paid for article appeared on Reuters.com paid for by Thailand's military junta, promoting a 'sea change in ethical marine commerce' brought about by reforms that included 'stringent measures to protect the rights of workers' (Carroll 2019). The article was labelled as 'sponsored', but indicates how a more robust set of agreed standards (kitemarking) is required to protect against the economic power of rebuttal, search ranking visibility/ordering and 'censorship' that powerful political and commercial interests can

pursue using the tools and opportunities afforded by the growth of sponsored content and native advertising in publishing.

The various issues of source power, provenance and disclosure remain comparatively discrete in UK policy debates but they are becoming more integrated in both analysis and in policy and governance recommendations. The Culture Select Committee has recommended stronger rules on identification for the provenance of political communications across all publishing and platform-publishing. The same arguments apply to commercial communications. The Cairncross Review (DCMS 2019) proposed a 'news quality obligation' should be imposed upon social media companies, requiring them to improve how users understand the origin of a news article and the trustworthiness of its source, a proposal under consideration by the UK Government (DCMS 2020).

There are some indications of a more integrated approach to source identification developing, although it is still fragmentary. Within policymaking networks, sponsored content has been addressed in policy areas including the regulation of platforms, ad tech, data management and privacy, online harms, harmful advertising, digital literacy and misinformation. The EU High Level expert group on fake news (European Commission 2018: 32-33) recommended that sponsored content is 'clearly identifiable', that platforms 'should ensure that sponsored content, including political advertising, is appropriately distinguished from other content' and that 'Source transparency Indicators should be developed based on professional codes of conduct and users' expectations for what constitutes credible and trustworthy content, adjusted to cater for online journalistic practices. The EU Policy Department for Citizens' Rights and Constitutional Affairs' report *Disinformation and propaganda* (2019) includes among its recommendations that platform providers should be responsible 'for distinguishing sponsored content and ads from other content, identifying and disabling fake accounts, protecting the privacy of users, including those who are not members of their services'. The European consumer organisation, BEUC, voted against the report, arguing that consumer exposure to disinformation needs to be addressed primarily at its source and in relation to the ad revenue practices of platforms, and that the absence in the report of any reference to clickbaiting was unacceptable. Nevertheless, this is indicative of a broader shift in policy discussion towards consideration of source identification that extends beyond branded content and includes action such as publisher kitemarking for agreed standards of source transparency as well as legal-regulatory or self-regulatory rule-making on disclosure and other aspects.

The principle that users should be aware of the source of the content, and should be made aware of material interests relevant to their assessment of that content, stands for a wider class of material than commercial communications, and indeed for all public communications. Implementation of source disclosure is far from straightforward, however. Any measures need to ensure protection for the anonymity of journalists sources. There needs to be strong public interest protection. The strengthening of disclosure requirements needs to be conducted within a media pluralism and human rights framework that strengthens safeguards for the protection of journalistic sources. International human rights law has established the importance of this protection for whistleblowers, for the protection of journalists, for safeguarding freedom of expression and disclosure of information. The bribery of journalists through payment by third-parties is recognised as a threat to media

freedom and integrity worldwide so requirements to disclose sources is a tool in combatting corruption.

There are also additional considerations and obligations for identification and disclosure for content aimed at or reaching children. To address children's communication rights and protection, a good starting point is the principle set out in the European Commission (2016: 6) report that '[c]hildren should not be exposed to online marketing when it is likely that they will not understand the persuasive intent of the marketing practice'. The report for UNICEF (Nyst 2018: 28) recommends that '[a]ll advertising to children should be identified as such. Branded and immersive environments should be used with caution, and only under circumstances in which children understand that the content is advertising'.

### **Recommendation**

Using the language of the US Federal Trade Commission, material connections between sources and public content should be evident or declared in both third-party and self-published content. Payment, or 'material connection' related to the published content, should be declared for all third-party content. This should be a mandatory legal requirement and so goes beyond the voluntary code of Impress. Action might include a simple, automatic penalty for failure to declare payment, with bands set for the severity of the offence, the type of actor responsible, and reach of the published material. Repeat offences would result in a more thorough investigation leading to action including fines, monitoring, approval mechanisms and disbaring from access to platforms. The latter indicates the value and importance of the interlinking of industry self-regulation with formal regulation to create a culture of professional (and pro-am) awareness and standard-setting, with the public accountability and enforcement action that only statutory regulation can guarantee.

For the Impress code, the recommended changes to 10.1 would go some ways towards strengthening source identification (10.1 Publishers must clearly and prominently identify all paid-for and sponsored content and ensure any material connection between a third-party supplier and published content is disclosed). The recommendations for guidance and kitemarking are made in recognition that there will be different views among Impress members on the pace and extent of change in source identification. It may be advantageous, therefore, to identify agreed rules for all members in the revised code and discuss higher standards of source disclosure and transparency that members may be encouraged to adopt and promote as a 'kitemarking' standard.

**Are you happy for IMPRESS to contact you in the future? Yes**

**Which of the following best describes you? (please select one of the following options)**

- An academic

**Would you be happy for IMPRESS to publish your response? (please select one of the following options)**

- Yes, I would be happy for you to publish my response and attribute it to me.

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