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MARKETING IN THE AGE OF CASL¹

Your magazine has traditionally relied on email marketing to acquire subscribers, but now that CASL is in force, you will need consent to send Commercial Electronic Messages (CEMs). How do you build your audience when an email requesting consent is itself a CEM?

The answer will depend, in part, on the type of audience you target. Professional and business-oriented publications may be able to rely on the exceptions to CASL. Magazines can also take advantage of the fact that some forms of social media (and many other forms of marketing) are not covered by CASL at all.

CASL EXCEPTIONS AND IMPLIED CONSENTS

Although CASL generally prohibits sending marketing emails without consent, in a few circumstances CASL recognizes an *implied* consent. When these exceptions apply, it is legal to send emails unless the recipient informs you that he or she does *not* want to receive them. Essentially, in these circumstances, opt-out is okay, so long as the messages follow the same content rules that apply to CEMs sent with consent.

Some other types of messages are completely excluded from CASL. Those messages do not need the recipient's consent and need not include any unsubscribe information.

One important *caveat* is that, in an enforcement context, the burden of proof lies on you. You will have to demonstrate that the exception applies, potentially for *every single CEM you send*. If these exceptions are part of your compliance strategy, you need to understand this, and plan for it by exhaustively documenting why each given CEM was legally sent. There are two full exemptions that are most likely to be relevant to magazine publishers.

1. Business-to-Business Messages

Messages can be sent to employees, representatives, consultants or franchisees of an organization provided that the sending organization has “a relationship” with the receiving organization and the message relates to the “activities” of the receiving organization. Both conditions must be satisfied for the exemption to apply. The term “relationship” has some weight to it: a one-way stream of communications is unlikely to count for the purpose of this exemption.

2. Responses to Requests

A more general exemption applies to responses to requests, inquiries or complaints. Clearly this would apply if a potential subscriber asked for information about a particular publication, or if that person asked for a trial e-copy of your magazine. However, you should take care to avoid using a response to a request as a vehicle for an unsolicited or irrelevant communication.

In addition to the full exemptions, there are three forms of implied consent.

1. Existing Business Relationships

The first applies where the sender has an existing business relationship with the recipient. There is a detailed definition in the Act but, in a simplified form, it means you have concluded some kind of business transaction within the previous two years, or the recipient has at least inquired about such a transaction within the past six months. For subscriptions and similar ongoing relationships, these time periods are counted from the day when the subscription ends.

If your magazine is part of a larger enterprise, this exception will let you contact customers who do business with you in other ways. But it won't be much help if your magazine is your only product or service.

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2. Conspicuous Publication

Professional and business publications should be able to make good use of the “conspicuous publication” exception. This rule applies if someone publicly and conspicuously displays an email address without a statement that the person does not want to receive CEMs. However, the exception only allows messages which relate to the recipient’s business, role, functions or duties in a business or official capacity.

For example, many lawyers list email addresses on their web pages. If your magazine is about the legal profession, the exception will probably apply. If your magazine is about fishing, it probably won’t, even if the lawyer happens to be interested in fishing. That’s not their business.

3. Voluntary Disclosure

A similar exception applies if someone gives you an email address, for example by filling out a web form or by dropping a business card in a goldfish bowl at a public event. However, like the previous rule, this does not apply if the person indicates she does not want to receive CEMs and, in any event, only applies to messages which relate to the recipient’s business.

SOCIAL MEDIA AND OTHER MARKETING CHANNELS

What other options are available if you can’t comfortably fit within these exceptions? There is always paper: traditional direct mailing is not covered by CASL, and neither is voice calling. (But take note that telemarketing is covered by separate legal regulations, such as those imposed by the “Do Not Call” regime.)

Even in the digital world, CASL does not cover everything. You can market on your own website. You can also buy advertising in the form of banner ads, web text ads, mobile ads or paid search. None of these activities are covered by CASL. You can also do a lot with social media, outside of CASL, but you need to take some care. CASL applies to messages to electronic addresses which are “similar” to email, instant messaging or text messaging. Some forms of social media will be covered, some probably not, and some may fall into a grey area where the answer is not obvious. You should obtain legal advice about your specific plans and circumstances.

The CRTC, which enforces much of CASL, says that Facebook wall posts, for example, are not subject to CASL, while direct messages within Facebook or LinkedIn would be. The distinguishing factor seems to be whether or not the message is directed to particular recipients.

So you can build a community through social media by publishing content and letting the users come to you. This may be a bit harder than more directed campaigns but generating interesting and appealing content should come naturally, so you have a big advantage over many other kinds of businesses! Of course, once you have their attention, you can direct potential readers to a web site where they can give you the consent you need to send them further communications.

¹This article provides general information, not legal advice. These issues are novel and complex and the analysis required is very fact specific. You should always review any CASL-related questions with expert legal counsel based on your specific facts and circumstances.

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