

## Not masquerading as consumers while you're blogging

Despite attempts to crackdown and restrict such rogue behaviour, the growth of the Internet as a commercial forum has seen the development of some unsavoury marketing and selling techniques: the widespread adoption of e-mail laid the foundations for the development of spam, online stores such as Amazon have seen authors provide positive reviews of their own books (whilst pretending to be an innocent reader), and it is not unknown for sellers on auction sites such as eBay to use alternative user IDs to bid up the price of items.

One of the latest phenomena to hit the Internet is the growth of "flogs" - websites containing blogs which have been created by a company or marketing/PR agency for the specific purpose of promoting or marketing a website or product, but appear to be originating from an independent and impartial consumer source.

The word "flog" hints at the selling purpose of the website; although the word itself was developed by a New York Times reporter as an amalgam of "fake" and "blog", which indicates the negative perception surrounding such websites ("fake" is almost never a good word when describing user generated content websites).

Blogs may have started off as a method for authors to share their quirky thoughts and philosophies with other members of cyberspace, but they are now evolving into more than simple repositories of their authors' inner monologues. It has been estimated by Technorati ([www.technorati.com](http://www.technorati.com)) in their *State of the Blogosphere 2008* study, there are more than 133 million active blogs worldwide. Blogs now feature in top 10 web site lists across all key categories. With such widespread appeal around the world, it is not surprising that many bloggers have seen the lure of advertising revenue, with over 50% of blogs containing some form of paid advertisements.

Aside from paying for advertising, and working with click-through revenue models, or pop-up windows, blogging has been turned into a marketing tool through flogs and "flogging". It costs nothing more than hosting a website (or using a free blogging service provider) and your time, to write about the virtues and brilliance of your website and product. For online gaming operators, flogging sounds like an ideal solution for two distinct business needs:

1. it helps advertise their websites without breaching regulatory restrictions on gaming-related advertising in some jurisdictions
2. flogs can be used to help fight some of the negative feedback or comments that disgruntled players may leave in various consumer sites, forums or chat rooms

The first objective is straightforward: advertising is always a good thing if it increases the flow of customer traffic to a gaming operation. The second objective would not exist in an ideal world, as customers would never post negative comments or feedback. However, operators need to acknowledge that any player losing significant sums of money is going to be frustrated and will be looking for outlets to vent such feelings. It is an integral part of being a gaming operator, that customers who lose money will be disenchanting (to put it mildly), and look to blame the operator for those losses.

However, flogging should not be viewed as a legitimate business solution to any of these issues. Flogging has many risks and pitfalls, and with gaming operators already facing various social challenges, it is imperative that they operate in a "whiter than white" manner, with a high degree of ethical and social conduct. Notwithstanding such concerns, operators need to be aware that flogging may also be illegal in certain circumstances. Further, there is a risk of extremely negative publicity if operators are exposed as floggers, and unfortunately, it is no longer true that all publicity is a good thing, especially for the gaming industry which is particularly susceptible to negative publicity.

One of the biggest retailers in the world, Wal-mart, which suffers allegations of poor employee relations, was caught red-handed promoting flogging. Walmart hired a marketing agency, Edelman, to help create a flog called "*Walmarting for America*" where it paid two individuals to travel across America visiting Walmart stores and write about Walmart's virtues. Sony was also caught for disingenuous blogging, when it paid for the creation of a flog entitled "*All I want for Xmas is a PSP*", which claimed to be written by some teenagers to convince a friend's parents to buy a PSP device. Once exposed, both Walmart and Sony took down the flogs, but the reputational damage was already inflicted. Consumer advocate sites such as consumerist.com continue to publish content discussing the flogs and the apparent disdain and disrespect the companies show towards their customers. These companies have an uphill battle to regain consumer trust – which is critical in the gaming industry, especially as it handles large sums of customer money. Any operator that loses trust within the marketplace is undoubtedly going to lose business to the competition. The online gaming community already runs multiple sites and forums where players can voice their opinions on different operators. Such forums would only multiply the reputational damage to operators who are discovered to be engaging in flogging.

There are also legal obstacles to flogging. In the UK, the main barriers are set out in the recently enacted Consumer Protection from Misleading Marketing Regulations 2008 and similar regulations have been enacted throughout the European Union. The Regulations have replaced some of the older legislation governing trading practices and misdescriptions. Breaching the Regulations opens up the operator to the possibility of a fine and/or up to two years imprisonment (Regulation 13).

The Regulations prohibit any form of misleading advertising which deceives consumers into altering their economic behaviour. Advertisements, for the purposes of the Regulations, are any form of representation which is made in connection with a trade or business in order to promote the supply of a good or service. Flogs, which are found to be originating from operators, or commissioned at the request of the operator are likely to be viewed as a form of advertising. The Regulations have a very narrow definition of "altering economic behaviour", and any advertising which is designed to induce a customer to change its playing habits and preferences will be caught by the Regulations. Any flog comments, for example, which contain tips or suggestions on using particular websites, will be viewed as attempting to alter consumer behaviour.

Schedule 1 of the Regulations also contains a list of certain activities which are prohibited under all circumstances. Paragraph 11 of Schedule 1 in the Regulations prohibits advertorial practices, where content in any media format is paid for by the operator (either by paying the hosting charges of the flog, or by engaging a marketing firm to write a flog on its behalf) unless it is made clear to consumers that the operator is paying for the content as an advertisement. A flog, by its masquerading nature, will breach this restriction and is automatically deemed an unfair commercial practice, and operators may be subject to prosecution.

There are also data protection issues which should be at the forefront of any flogger's mind. Operators will have access to the personal data of each customer, which cannot be disclosed publicly without the

customer's express permission. For example, a certain Premiership player may have registered an account with an online operator, and what better publicity than to say that punters have an opportunity of playing online poker against a Premiership player? The temptation to do so is overwhelming, but so are the legal risks: aside from a breach of the Data Protection Act 1998, such statement also expose the operator to an action for false endorsement – whereby the operator is trying to show some type of affiliation or endorsement of the website by the player.

Blogs are no different from any other form of publication, and the contents can give rise to liability for defamation. For gaming operators, particular care has to be done when referring to any customers, as labelling someone as a regular customer can be seen to imply the customer is a regular gambler – which is a label that some may find offensive. Defamation proceedings, whether justified or not, can be expensive for operators, and provoke further negative publicity. After all, who wants to develop a reputation as an operator that publicly humiliates its players?

Flogging may also expose operators to various contractual problems. Third party software providers who host the blogging may take a dim view of any flogging activities and suspend the flog (or publicly expose the operator as a flogger). If operators post comments on forums hosted as part of third party gaming software (which is not strictly within the definition of flogging), it could be a breach of the software licence and entitle the provider to terminate the licence, leading to consequences which include the closure of the operator's site.

Its clear that flogging may be an attractive way of generating some low cost publicity, and pushing forward operators' viewpoints into the gaming community – but the legal barriers, together with the other potential risks mean that no operator should consider flogging as a viable marketing tool. Notwithstanding the potential illegality of flogging within the UK (and Europe), the reputation risk of being exposed as a flogger is a challenge that even the most seasoned operator may not wish to chance.

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