

AFFILIATE MARKETING: ONCE UPON A TIME...

...In 1995, Jeff Bezos, the founder of Amazon, was talking at a cocktail party to a guest who wanted to sell her books online. Bezos decided that he could sell her books on Amazon but that she could link her website to Amazon and receive a commission for any sales that were generated through that link. The following year, Amazon launched the first online affiliate program and so laid the foundations for online affiliate marketing. Some quarters dispute these origins and, instead, regard the flower industry and online CD sales as the true forefathers of affiliate marketing.

Either way, there is no disputing that the marketing concept of rewarding an affiliate for each customer spawned by the affiliate's own marketing endeavours is big business these days, particularly within the online gambling industry. In fact, it is estimated that some online gambling operators spent more than half of their overall marketing budget on affiliates. Whilst some gambling operators may have cooled their enthusiasm for affiliate marketing over the last twelve months, placing a greater emphasis on top level marketing spend (such as television advertising) and social media opportunities, it remains an important feature of marketing strategy.

From a legal perspective, operators need to support their affiliate programmes with robust terms and conditions. In no particular order, here are some (but not all) of the key considerations:

1. Commission

One of the first things to establish is the commission mechanism. Careful thought needs to be given to the net revenue calculation and the deductions that need to be made to ascertain the sum against which the commission percentage will be applied. For example, most affiliate introductions are generated through bonus promotions that are offered by the operators. These bonuses

are essential in attracting new customers and operators should ensure that they are taking due credit for these incentives by deducting them from gross revenues.

Care should also be taken to ensure that monthly calculations take account of negative balance carry-over where an affiliate's referrals have resulted in a loss to the operator – this is particularly relevant in the case of online casinos.

Once these deductions have been clearly determined, the terms and conditions should set out the applicable percentages – commonly, some operators scale these percentages according to the aggregate net revenue generated by its referrals whilst others are based on the number of unique depositing players during each calendar month. Each operator must decide which model they prefer but it is worth considering whether the latter example might be more open to affiliate abuse than the former. As a practical measure, affiliate managers should closely monitor the geographical location of referred customers in relation to the affiliate's own location.

2. Lifetime revenue

Operators also need to consider whether or not they are offering their affiliates lifetime revenues – in other words, a guaranteed

revenue share in respect of introduced customers for such time as they continue to wager on the operator's website. In recent years, operators have started to re-evaluate the concept of a lifetime guarantee on the rationale that customer retention is as tough as acquisition and customer loyalty is down to the not inconsiderable efforts of the operator itself. Consequently, operators are increasingly looking to cap affiliate revenue shares to a fixed period of time. The legal difficulty here is the extent to which operators may implement a policy change by seeking to vary these terms, both in respect of historically introduced customers and new customers.

3. Variations

One would expect most affiliate terms to include the right for the operator to vary or modify the affiliate terms and often expressly in relation to the commission percentages and/or the requisite minimum level of activity on affiliate accounts. Whilst a unilateral right to vary the terms of an agreement is permitted at common law, there may well be restraints on its exercise. For example, the Unfair Contract Terms Act 1977 states that, where one party is a consumer, any clause which allows a party to perform in a way that is substantially different to what was reasonably expected will be subject to the test of reasonableness. It is highly questionable, however, whether affiliates would qualify as a "consumer" on the basis that they are effectively operating "in the course of a business". Case law has indicated, however, that where a contract confers a discretionary power on one of the parties to the contract, the Courts have often imposed limits on the exercise of

the discretion conferred. In other words, operators should tread extremely carefully in attempting to vary any of the material terms of an affiliate agreement, particularly where the effect of such variation is to limit or minimise an affiliate's pre-agreed revenue share. Operators would be well advised to take a pragmatic approach where they are restructuring their affiliate programmes – for example, they might vary the terms in respect of all future referrals but not necessarily so in respect of pre-existing customers.

4. Termination

Similar principles should be applied to the operator's right to terminate affiliate agreements. Operators understandably wish to protect their position in the form of termination provisions, particularly where an affiliate has been in material or persistent breach of its obligations and responsibilities. Affiliate terms will typically only entitle an affiliate to commission earned up to the effective date of termination. Again, an operator should adopt a cautious approach in evaluating whether their right to terminate (which can often be contractually exercised at any time and for any reason i.e. without due cause) is being done so honestly and in good faith. The Courts would be likely to take a dim view if they believe that an operator has acted capriciously or unreasonably.

5. Affiliate obligations

One would also expect terms and conditions to include general obligations on affiliates to use their best endeavours to generate traffic to the operator's website without adopting poor industry practices. This is emphatically relevant in the gambling sector, which is subject to its own specific set of socially responsible advertising codes, particularly in relation to the protection of children, young persons under 18 and other "vulnerable persons", not to mention the complicated patchwork of jurisdictional restrictions on the promotion of gambling. With this in mind, the terms and conditions should vigorously protect the operator's reputation which is understandable when one considers that

affiliate marketing effectively amounts to an outsourcing of marketing initiatives, often to unproven and unfamiliar entities.

6. Intellectual Property

Also of importance is the intellectual property portfolio of the operator. Affiliates will be granted access to marketing collateral belonging to the operator containing valuable IP but the terms and conditions should ensure that these materials should not be used in such a way that might lead to confusion with the operator's website. Essential to this is a restriction on the affiliate from using the operator's trademarks without the operator's consent or acquiring domains that contain the operator's name or protected terms.

7. Advertising

From an internal perspective, it is important to ensure that the affiliates are being supplied with marketing materials that comply with the Advertising Standard Authority's (ASA) requirements. This is particularly important when it comes to banner adverts which are commonly used by affiliates. It is essential to ensure that these banners contain the key terms of the relevant promotion, regardless of the limitations on space, or that they link directly to a landing page comprising the promotional terms. In all likelihood, the ASA will register their displeasure at a non-compliant banner with the operator rather than the affiliate as was the case in one such ruling against an online gambling operator. In that ruling, the ASA stated that "significant conditions likely to affect a consumer's decision to participate in the promotion should have been displayed in the banner ad itself or no further than one click-through away". Even more recently, the Office of Fair Trading has taken an interest and secured undertakings from an online affiliate marketing operator that affiliates within its network would not engage in any commercial practices that breach Consumer Protection from Unfair Trading Regulations. These undertakings included an obligation to pro-actively spot-check 50 percent of its affiliates annually for compliance.

8. Regulation

One interesting development that operators should be aware of is the growing interest that gambling regulators are taking in affiliate programs. In July, the Nevada Gaming Control Board included "marketing affiliates" in its draft list of interactive gaming "service providers" that may require licensing prior to the legalisation of intrastate online poker in the United States. Nevada appears to be taking the view that anyone who directly shares in revenue generated by online gambling should be subject to licensing. It remains to be seen whether European jurisdictions will have the appetite to pursue Nevada's line of reasoning, given that its horse has already bolted, but operators should be mindful that their terms and conditions may need to future-proof such a scenario. This might be achieved by an obligation on the affiliate to obtain any licence that may be required from time to time or risk termination. Alternatively, it could give rise to payment structures whereby affiliates are paid on a per-registration basis rather than on a revenue share basis.

It's not what it says, it's what you do...

Whilst the terms and conditions are essential in underpinning the legal relationship between operators and affiliates, the commercial viability of an affiliate programme will ultimately hinge on effective management and sound communication. Internet forums are awash with tales of affiliate programmes that are poorly run and operators should take care to ensure that an overly bureaucratic approach does not tarnish their reputation amongst existing and potential affiliates. Those who can successfully navigate some of the highlighted pitfalls through pragmatism will need to call on their terms and conditions less frequently than those who do not.



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