

## NOTE

### UNITED KINGDOM REGULATION OF GENDER STEREOTYPING IN NON-BROADCAST MEDIA

KRISTEN EDWARDINE SHIBLEY\*

#### ABSTRACT

*The United Kingdom's independent body of advertising regulation, the Advertising Standards Authority (ASA), plans to attempt to regulate and minimize the use of gender stereotyping in print advertisement with a new regulation written by the Committee of Advertising Practice (CAP). The ASA intends for this new code to help mitigate the harms that gender stereotypes in the media can perpetuate such as discrimination, unconscious biases, self-esteem and body issues.*

*This Note addresses the challenges the ASA will face in enforcing these regulations. If there is a repeated violator of CAP codes, the ASA refers such cases to Trading Standards, the governmental body responsible for prosecution under the Consumer Protection from Unfair Trading Regulations 2008 (CPUTR). This Note argues that the CPUTR is unfit to prosecute violations of CAP codes about gender stereotypes in advertising. The CPUTR in its current form has provisions which outlaw advertising that is unfair, misleading or constitutes an aggressive commercial practice. Based on prior decisions, it is unlikely that Trading Standards will find these advertisements unfair, misleading or aggressive commercial practices.*

*The current effectiveness of the CAP codes in regulating the advertising industry will be undermined if the government cannot effectively serve in its role as the legal backstop for the ASA through Trading Standards prosecutions. Effective enforcement of CAP codes is critical to the continued success of the ASA and avoidance of the harms the rules address. This Note concludes with suggestions for the ASA to mitigate this enforcement problem, while acknowledging that the current high rates of voluntary compliance with ASA rulings may minimize the need for governmental intervention.*

#### I. INTRODUCTION

In April of 2015, a large print advertisement greeted British public transit users, asking them in bold letters, “ARE YOU BEACH

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\* J.D. 2019, The George Washington University Law School; B.A. 2015, Georgetown University.

BODY READY?”<sup>1</sup> The advertisement, a campaign by Protein World, a company that sells protein supplements, was accompanied by a full-length photo of a fit, blond, fair-skinned model in a yellow bikini.<sup>2</sup> In the months following the release of the advertisement, there was strong public outcry against it, addressing both the advertisement’s placement in London public transport stations<sup>3</sup> and its content.<sup>4</sup> Those who spoke out against the advertisement argued that it insinuated that only the type of body pictured was appropriate or “ready” for the beach.<sup>5</sup> The advertisements were defaced in many areas, as individuals altered them to read “Each Body[']s Ready” or added in text declaring “If my body is on a beach, then it is ready.”<sup>6</sup> In response, Protein World released an official statement defending the advertisement as “aspirational” and the company’s chief executive went as far as condemning those who defaced the advertisements as “terrorists.”<sup>7</sup> In addition to public discussion over news and social media, unhappy members of the public brought their complaints to the independent regulatory agency of advertising in the United Kingdom, the Advertising Standards Authority (ASA).<sup>8</sup> The ASA reported receipt of 378 official complaints about the advertisement.<sup>9</sup>

Despite eventually upholding this particular advertisement, the ASA believed the backlash indicated a larger problem in advertising and compiled a report on gender stereotypes in advertising, which was released in July 2017.<sup>10</sup> The report found evidence sug-

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1. Rose Hackman, *Are You Beach Body Ready? Controversial Weight Loss ad sparks varied reactions*, GUARDIAN (June 27, 2015), <https://www.theguardian.com/us-news/2015/jun/27/beach-body-ready-america-weight-loss-ad-instagram> [<https://perma.cc/MCZ7-2A48>]; Radhika Sanghani, *London Mayor Sadiq Khan Bans Body-Shaming Ads from Public Transport*, TELEGRAPH (June 13, 2016), <http://www.telegraph.co.uk/women/life/london-mayor-sadiq-khan-bans-body-shaming-ads-from-public-transp/> [<https://perma.cc/39XB-7729>].

2. Hackman, *supra* note 1.

3. Sanghani, *supra* note 1.

4. *See, e.g., id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *See* Lisa Niven, *Beach Body Ad Withdrawn*, BRITISH VOGUE (Apr. 30, 2015), <http://www.vogue.co.uk/article/protein-world-beach-body-advert-banned> [<https://perma.cc/9DZP-BFK6>]; *see also* ADVERT. STANDARDS AUTH., <https://www.asa.org.uk/> (last visited Dec. 20, 2018) [<https://perma.cc/Z6G5-AC9K>].

9. *ASA Adjudication on Protein World Ltd.*, ADVERT. STANDARDS AUTH. (July 1, 2015), <https://www.asa.org.uk/rulings/protein-world-ltd-a15-300099.html> [<https://perma.cc/HF5E-H3D9>].

10. ADVERT. STANDARDS AUTH., *DEPICTIONS, PERCEPTIONS AND HARM: A REPORT ON GENDER STEREOTYPES IN ADVERTISING* (2017), <https://www.asa.org.uk/asset/2DF6E028-9C47-4944-850D00DAC5ECB45B.C3A4D948-B739-4AE49F17CA2110264347/> [hereinafter *DEPICTIONS, PERCEPTIONS AND HARM*] [<https://perma.cc/7SB7-ETG6>].

gesting that advertisements featuring stereotypical gender roles or characteristics can be harmful to people.<sup>11</sup> Repeated exposure to advertisements normalizes the images they present, and their pervasiveness makes them difficult for the average person to avoid on a day-to-day basis.<sup>12</sup> Children are particularly vulnerable to messages in advertising because they lack the critical thinking skills of developed adults.<sup>13</sup> Viewing gender stereotypes in advertising can influence how children interact with their world, and how they perceive their own abilities and potential.<sup>14</sup> Advertising also affects body image; in 2011, a British member of parliament presented 172 scientific studies to the ASA indicating the link between negative body images and exposure to idealized images.<sup>15</sup> Finally, studies have shown links between passive and sexualized portrayals of women in advertisements and domestic and male violence, as well as encouragement of objectification of women generally.<sup>16</sup>

In response to the findings of its independent report, the ASA resolved to create new standards on advertisements that feature stereotypical gender roles or characteristics which might be potentially harmful to people, including those that mock people for not conforming to gender stereotypes.<sup>17</sup> The Committee of Advertising Practice (CAP or the Committee) will draft the new regulations; in December 2017, it announced an update on its progress.<sup>18</sup> Guy Parker, the chief executive of the ASA, said the following:

While advertising is only one of many factors that contribute to unequal gender outcomes, we welcome CAP's decision to introduce a new rule on harmful gender stereotypes in ads. . . . We

11. *Id.* at 3.

12. See Shelley Grabe et al., *The Role of the Media in Body Image Concerns Among Women: A MetaAnalysis of Experimental and Correlational Studies*, 134 PSYCHOL. BULL. 460, 460 (2008); JON ALEXANDER ET AL., PUBLIC INTEREST RESEARCH CENTRE, WWF-UK, THINK OF ME AS EVIL? OPENING THE ETHICAL DEBATES IN ADVERTISING 4445 (2011), [http://assets.wwf.org.uk/downloads/think\\_of\\_me\\_as\\_evil.pdf?\\_ga=2.16191158.1228156679.1544485340-389395017.1544485340](http://assets.wwf.org.uk/downloads/think_of_me_as_evil.pdf?_ga=2.16191158.1228156679.1544485340-389395017.1544485340) [https://perma.cc/RZK6-VH78].

13. See Victor Strasburger et al., *Children, Adolescents, and Advertising*, 118 AM. ACAD. PEDIATRICS 2563, 2563 (2006).

14. See Jennifer J. Pike & Nancy A. Jennings, *The Effects of Commercials on Children's Perceptions of Gender Appropriate Toy Use*, 52 SEX ROLES 83, 88, 90 (2005).

15. Jo Swinson, *False Beauty in Advertising and the Pressure to Look "Good"*, CNN (Aug. 10, 2011), [www.cnn.com/2011/OPINION/08/08/swinson.airbrushing.ads/index.html](http://www.cnn.com/2011/OPINION/08/08/swinson.airbrushing.ads/index.html).

16. See generally Jackson Katz, *Advertising and the Construction of Violent White Masculinity*, in GENDER, RACE AND CLASS IN MEDIA: A CRITICAL READER 261 (3rd ed. 2011) (discussing generally role media plays in developing idea of masculinity and results of this).

17. DEPICTIONS, PERCEPTIONS AND HARM, *supra* note 10, at 5.

18. *New Rule to Ban Harmful Gender Stereotypes Next Year*, ADVERT. STANDARDS AUTH. (Dec. 14, 2017), <https://www.asa.org.uk/news/new-rule-to-ban-harmful-gender-stereotypes-next-year.html> [hereinafter *New Rule*] [https://perma.cc/H9QM-5U25].

are determined to make sure our regulation calls out harmful and outdated practices and a new rule in the Advertising Codes will help tackle the harmful gender stereotypes identified in our review of the evidence.<sup>19</sup>

It is the ASA's hope that the harm caused by gender stereotypes in advertising will be mitigated if the advertisements are more tightly regulated.<sup>20</sup>

This Note addresses potential enforcement concerns the ASA may face in implementing new rules on gender stereotyping in advertising. It discusses what a referral to Trading Standards might look like under this proposed rule, and how the language of the Consumer Protection from Unfair Trading Regulations 2008 (CPUTR) may be used to prosecute a case. Finally, it acknowledges the challenges this solution may face, particularly concerns in stretching the interpretation of the CPUTR to apply to an enforcement action under this proposed rule.

As a foundation for this analysis, Part II of this Note explains the historical development of the ASA and how the bureaucracy of the ASA functions tangentially with Trading Standards as its legal enforcement backstop.<sup>21</sup> Next, it presents an explanation of the CPUTR to contextualize the restrictions lawmakers may face in prosecution of a violation of a gender stereotyping regulation. Finally, it provides examples of how the ASA adjudicates cases internally, and the two previous cases that Trading Standards have prosecuted after ASA referrals: *Electronic Healing* and *FreeFusion*.<sup>22</sup>

Part III uses this background to argue that the current statutory framework Trading Standards relies upon is inadequate to enforce any proposed CAP codes on gender stereotypes in advertising. The analysis uses past Trading Standards prosecutions as a baseline for how future prosecutions may proceed and identifies areas where Trading Standards may struggle to prosecute a case for violations of a CAP code on gender stereotyping in advertising. It explains why the usage of the first provision of the CPUTR, historically the only provision used to prosecute CAP Code violators, is unfit for a

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19. *Id.*

20. DEPICTIONS, PERCEPTIONS AND HARM, *supra* note 10, at 6.

21. See generally *Formal Referrals: Case Handling Principles Between the UK Advertising Standards Authority and the London Borough of Camden*, ADVERT. STANDARDS AUTH., <https://www.asa.org.uk/asset/9C523FF7-FEE8-44A2-B4C77CAC219DCEAE.396C260E-16EE-4878-82B80A3F0173B89B/> (last visited Dec. 10, 2018) (explaining how the ASA functions in tandem with Trading Standards) [<https://perma.cc/J6L8-JWM6>].

22. *Trading Standards Referrals*, ADVERT. STANDARDS AUTH., <https://www.asa.org.uk/codes-and-rulings/trading-standards-referrals.html> (last visited Dec. 10, 2018) [hereinafter *Trading Standards Referrals*] [<https://perma.cc/4MND-J9GY>].

prosecution of this type. It considers the second and third provisions of the CPUTR as potential enforcement mechanisms and identifies the challenges of enforcement under this unprecedented prosecution. Finally, Part IV addresses how the United Kingdom may potentially mitigate the harm caused by gender stereotypes in advertising if regulation by a non-governmental agency proves to be ineffective. It will conclude by recognizing the significance of these new regulations, even if they are not enough to mitigate the harm caused by gender stereotypes in advertising when used alone.

## II. BACKGROUND

This Section provides a foundation for how the current system of advertising regulation in the United Kingdom came to be, and how the system is currently set up to address cases where advertisements violate the regulations in place.

### A. *Development and Functions of the CAP, the ASA and Trading Standards*

In 1961, various members of the advertising industry including agencies, media, and advertisers, came together to form the CAP in order to regulate advertisement in non-broadcast media.<sup>23</sup> While legislation controlled commercial television and advertisements, the vision for the Committee was to effectively regulate non-broadcast advertising under voluntary controls.<sup>24</sup> This was an explicit rejection of the American model of the Federal Trade Commission, which is governmentally backed and received its mandate in policing anticompetitive practices directly through Congressional acts.<sup>25</sup> The newly formed Committee produced the first edition of the British Code of Advertising Practice (CAP Code or Code) in the same year.<sup>26</sup> The United Kingdom government endorsed this form of self-regulation through the Molony Committee report on Consumer Protection in 1962, with the caveat that the “system

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23. At the time, broadcast media was controlled by governmental legislation. *Our History*, ADVERT. STANDARDS AUTH., <https://www.asa.org.uk/about-asa-and-cap/our-history.html> (last visited Nov. 21, 2018) [<https://perma.cc/R5PE-CHA9>].

24. *Id.*

25. *Our History*, *supra* note 23; *About the FTC*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc> (last visited Dec. 10, 2018) [<https://perma.cc/ADM4-FXT6>].

26. *Advertising Standards Authority: History*, HISTORY ADVERT. TRUST, <https://www.hatads.org.uk/catalogue/advertising-controls/29/Advertising-Standards-Authority> (last visited Dec. 10, 2018) [<https://perma.cc/C2ET-PSZ9>].

demonstrate[ ] continued quality and maintain[ ] its independence.”<sup>27</sup>

The independence of the Committee was paramount to CAP’s mission, and in 1962 it established the ASA to function as a regulator under the CAP written codes.<sup>28</sup> By 2004, the system for advertising regulation between broadcast and non-broadcast media was streamlined, combining various constituent parts under the ASA as an umbrella organization that functions as a single advertising regulator.<sup>29</sup> While the ASA received under 100 complaints in the first year of operation, it currently receives over 30,000 complaints a year.<sup>30</sup> The advertising industry funds the agency through a 0.1% levy on advertising space costs collected by the Advertising Standards Board of Finance.<sup>31</sup>

Before 1988, the ASA processed complaints without any governmental agency working as a co-regulator.<sup>32</sup> However, the introduction of the Control of Misleading Advertisement Regulations provided the ASA with legal backing from the Office of Fair Trading (OFT), to whom the ASA could refer repeat offenders for legal action.<sup>33</sup> The first referral to OFT was made in 1988, which resulted in an injunction to prevent misleading claims made by Tobyward Ltd., a company which was accused of making misleading claims about the body slimming properties of its product, Speedslim.<sup>34</sup> In 2008, new regulations, the CPUTR and the Business Protection from Misleading Marketing Regulations, supplanted the Control of Misleading Advertisement Regulations as

27. U.K. DEP’T FOR CULTURE, MEDIA AND SPORT, SELF- AND CO-REGULATION: THE ADVERTISING STANDARDS AUTHORITY 1, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31632/10-1279-self-co-regulation-advertising-standards-authority.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31632/10-1279-self-co-regulation-advertising-standards-authority.pdf) (last visited Dec. 10, 2018) [<https://perma.cc/Q66K-VKFS>].

28. *Our History*, *supra* note 23.

29. *See id.*

30. *Id.*

31. *Id.*; *How Advertising Self-Regulation Works*, ADVERT. STANDARDS BOARD FIN., <http://www.asbof.co.uk/how-advertising-self-regulation-works> (last visited Dec. 10, 2018) [<https://perma.cc/U4WP-JHHM>].

32. *Advertising*, NAT’L ARCHIVES (Nov. 2, 2012), [https://webarchive.nationalarchives.gov.uk/20121102145811tf\\_/http://www.offt.gov.uk/business-advice/treating-customers-fairly/advertising/](https://webarchive.nationalarchives.gov.uk/20121102145811tf_/http://www.offt.gov.uk/business-advice/treating-customers-fairly/advertising/) [<https://perma.cc/MH6A-WPPS>].

33. *Id.*

34. Tobyward Ltd. made claims stating that Speedslim was a “scientific breakthrough” with a “100% guarantee of success.” BRAM B. DUIVENVOORDE, THE CONSUMER BENCHMARKS IN THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE 114–15 (2014); MARGARET ASHWELL, THE MEDIA AND SLIMMING, PROCEEDINGS OF THE NUTRITION SOCIETY 490 (Sept. 1991), [https://www.researchgate.net/profile/Margaret\\_Ashwell/publication/21405604\\_The\\_Media\\_and\\_slimming/links/00b7d531f354025a7e000000/The-Media-and-slimming.pdf](https://www.researchgate.net/profile/Margaret_Ashwell/publication/21405604_The_Media_and_slimming/links/00b7d531f354025a7e000000/The-Media-and-slimming.pdf) [<https://perma.cc/RG9X-RRUA>].

the framework for referral; in 2013, responsibility for acting as the legal backstop for non-broadcast advertising transferred from the OFT to Trading Standards.<sup>35</sup>

Trading Standards consists of a National Trading Standards Board (the Board), which was set up by the United Kingdom government in 2012, in addition to local trading standards offices that are set up across the country.<sup>36</sup> The Board acts on behalf of consumers and businesses, providing advice, investigative services, and prosecution of traders who break the law.<sup>37</sup> The National Trading Standards Board has contracted the Camden Council's Trading Standards team for purposes of dealing with ASA case referrals.<sup>38</sup> When the ASA refers a case to Trading Standards, the sanctions may include criminal prosecution of an unlimited amount of fines and up to two years in prison, and confiscation of financial assets such as financial benefits from the crime and any personal or business income.<sup>39</sup> Failure to pay any confiscated sums may lead to imprisonment.<sup>40</sup>

#### B. *ASA Internal Adjudication and Trading Standards Referral Process*

When a member of the public presents a complaint to the ASA, the association assesses the complaint.<sup>41</sup> Over eighty percent of complaints made to the association do not actually raise any problems under the CAP codes, and thus require no further action.<sup>42</sup> However, if the ASA finds a complaint has merit for questioning under the CAP codes, the ASA will provide the advertiser with written guidance on bringing the advertisement to be in adherence with the CAP Code, and try to informally resolve the issue through voluntary advertiser compliance.<sup>43</sup> If there is a

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35. See LORRAINE CONWAY, THE ROLE OF THE ADVERTISING STANDARDS AUTHORITY 8 (House of Commons Library 2017); *Our History*, ADVERT. STANDARDS AUTH., <https://www.asa.org.uk/about-asa-and-cap/our-history.html#2010%20onwards> [<https://perma.cc/TA44-BF65>].

36. *What We Do*, NAT'L TRADING STANDARDS, <http://www.nationaltradingstandards.uk/what-we-do> [<https://perma.cc/3FY5-7WGG>].

37. NAT'L TRADING STANDARDS, MAKING ADS RESPONSIBLE: HOW WE ENFORCE THE ADVERTISING RULES, <https://www.asa.org.uk/asset/447A954A-A36D-4FEE-A9DCCC72DB35E66F/> [<https://perma.cc/6CEW-KPA2>].

38. *Id.*

39. *Id.*

40. *Id.*

41. *How We Handle Complaints*, ADVERT. STANDARDS AUTH., <https://www.asa.org.uk/about-asa-and-cap/the-work-we-do/how-we-handle-complaints.html> [<https://perma.cc/56QS-YWPM>].

42. *Id.*

43. *Id.*

potentially serious problem under the rules, the ASA will open an investigation.<sup>44</sup> An investigation involves explaining to the advertiser what the complaint is about, the relevant Code rules, a request for response, and potentially a request to limit the publication of the advertisement until the end of investigation.<sup>45</sup>

Advertisers must respond in writing within seven working days, or five working days if the complaint involves harm and offence violations.<sup>46</sup> If they fail to respond, the ASA may automatically find them in violation of the advertising codes.<sup>47</sup> In the case where an advertiser must prove a claim it makes in an advertisement, the advertiser must provide full copies of the studies that were undertaken to prove the claim.<sup>48</sup> Once the advertiser has responded, the ASA assesses the advertisement under the rules, taking the advertiser's responses into account.<sup>49</sup> The ASA draws up a draft recommendation which includes the complaint, the response, the assessment, and a recommended course of action, which is then forwarded onto the ASA Council through an online system.<sup>50</sup>

The ASA Council is a thirteen-person independent jury which is ultimately the sole decider on whether advertisements have broken the advertising rules.<sup>51</sup> Two-thirds of the members of the ASA Council are independent of the industry; current members include individuals from professions ranging from solicitor to economist to journalist.<sup>52</sup> The Council considers the ASA's recommendation but this recommendation is not binding.<sup>53</sup> The Council makes rulings on a weekly basis, and will hold a vote on whether to uphold the recommendation if there is a division of opinion.<sup>54</sup> The Council may discuss certain cases in face-to-face meetings, particularly if

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44. There are four circumstances in which the ASA will agree to informal resolution of a case. Those are (1) the breach has been remedied, (2) the number and seriousness of the complaints is not sufficient for formal investigation, (3) there is no obvious pattern of unwillingness to follow CAP codes, and (4) there is no pressing need to investigate formally. See *ASA Takes Tougher Line on Informal Case Resolution*, OSBORNE CLARKE (Aug. 14, 2014), <http://marketinglaw.osborneclarke.com/advertising-regulation/asa-takes-tougher-line-on-informal-case-resolution> [https://perma.cc/44L5-BR7S].

45. *How We Handle Complaints*, *supra* note 41.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. ASA Council, ADVERT. STANDARDS AUTH., <https://www.asa.org.uk/about-asa-and-cap/people/asa-council.html> (last visited Dec. 20, 2018) [https://perma.cc/ZDQ3-6RY9].

52. *Id.*

53. *How We Handle Complaints*, *supra* note 41.

54. *Id.*

their outcomes are expected to have a significant impact on the advertising industry.<sup>55</sup>

Once the Council has made a ruling, the ASA lets complainants and advertisers know when the case will be published online.<sup>56</sup> The ASA publishes new cases on its website weekly.<sup>57</sup> If the Council finds that the advertiser has broken the CAP codes, the advertiser must withdraw or change the advertisement.<sup>58</sup> The ASA may also impose additional sanctions including withdrawal of certain trading privileges such as the Royal Mail withdrawing its bulk mailing discount from an advertiser, and mandatory pre-vetting, which may require pre-approval for ads for up to two years.<sup>59</sup>

Advertisers or complainants may request a review of the ruling up to twenty-one days after they receive notice of the ASA Council decision.<sup>60</sup> In this situation, the Independent Reviewer will review the case, but only on the basis of a substantial flaw in the process of the ruling or in the ruling itself, or upon additional relevant information becoming available.<sup>61</sup> Following any ruling or review, the ASA monitors to ensure that advertisers have complied with the Council's rulings.<sup>62</sup> While the majority of advertisers follow the rulings, in the cases they have not, the ASA will make a referral to Trading Standards for prosecution.<sup>63</sup> The cases which the ASA has referred to Trading Standards are discussed in greater detail below in Section D.

### C. *Trading Standards Statutory Framework – CPUTR*

While it is generally not necessary for the ASA to refer a case to Trading Standards to ensure compliance, there are laws that parallel certain parts of the CAP Code to prevent misleading or unfair trade practices.<sup>64</sup> To understand the challenges Trading Standards will face in prosecuting a case under the proposed regulations on gender stereotyping, it is important to understand the statutes that

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55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Sanctions*, ADVERT. STANDARDS AUTH., <https://www.asa.org.uk/codes-and-rulings/sanctions.html> [<https://perma.cc/YM6N-AGSQ>].

60. CONWAY, *supra* note 35, at 10.

61. *Id.*

62. *See Sanctions*, *supra* note 59.

63. *Id.*

64. *Self-Regulation and Co-Regulation*, ADVERT. STANDARDS AUTH., (Nov. 15, 2004), <https://www.asa.org.uk/about-asa-and-cap/about-regulation/self-regulation-and-co-regulation.html> [<https://perma.cc/SEW4-HMNG>].

Trading Standards turns to when adjudicating cases. These two laws are the CPUTR and the Business Protection from Misleading Marketing Regulations. This Note omits an analysis of the Business Protection from Misleading Marketing Regulations because it regulates advertising directed at traders<sup>65</sup> as opposed to the general public, and is therefore outside of the scope of this Note.<sup>66</sup>

Companies may be found liable under the CPUTR for their commercial practices if they are considered (i) misleading, (ii) unfair or (iii) aggressive.<sup>67</sup> The two cases that Trading Standards prosecuted, *Electronic Healing* and *FreeFusion*, were both prosecuted for misleading consumers.<sup>68</sup> Consumers can be misled under the statute through either actions or omissions.<sup>69</sup>

There are two overarching provisions which cover ways a commercial “action” may be found to be misleading.<sup>70</sup> First, a commercial action may be misleading if it has “false information and is therefore untruthful” regarding any of the specified protected matters<sup>71</sup> or if it “deceives or is likely to deceive the average consumer.”<sup>72</sup> This provision additionally requires that a consumer make or be “likely to” make a decision regarding a purchase that he would not have otherwise made.<sup>73</sup>

Second, a commercial action may be considered misleading if, in its marketing, it creates “confusion” regarding “products,” “trade-

65. Defined in the statute as “any person who is acting for purposes relating to his trade, craft, business or profession and anyone acting in the name of or on behalf of a trader.”

66. The Business Protection from Misleading Marketing Regulations 2008, SI 2008/1276, art. 1, ¶ 2 (Eng.).

67. See The Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277, art. 2 ¶ 3–7 (Eng.) [hereinafter CPUTR].

68. *ASA Welcomes Successful Prosecution of Alternative Therapy Provider Following Misleading Advertising*, ADVERT. STANDARDS AUTH., (Aug. 4, 2016), <https://www.asa.org.uk/news/asa-welcomes-successful-prosecution-of-alternative-therapy-provider-following-misleading-advertising.html> [hereinafter *ASA Welcomes Successful Prosecution*] [<https://perma.cc/TSH3-BB8M>]; Brinsley Dresden, *Adverse ASA Adjudication Escalates to Criminal Conviction*, LEWIS SILKIN (Jan. 17, 2018), <http://adlaw.lewissilkin.net/post/102eocm/adverse-asa-adjudication-escalates-to-criminal-conviction> [<https://perma.cc/W4M3-43AM>].

69. CPUTR art. 2, ¶ 5–6.

70. *Id.* ¶ 5.

71. These matters are “(a) the existence or nature of the product; (b) the main characteristics of the product. . . (c) the extent of the trader’s commitments; (d) the motives for the commercial practice; (e) the nature of the sales process; (f) any statement or symbol relating to direct or indirect sponsorship or approval of the trader or the product; (g) the price or the manner in which the price is calculated; (h) the existence of a specific price advantage; (i) the need for a service, part, replacement or repair; (j) the nature, attributes and rights of the trader. . . ; (k) the consumer’s rights or the risks he may face.” *Id.* ¶ 5, § 4.

72. *Id.* ¶ 5, § 2(a).

73. *Id.* ¶ 5, § 2(b).

marks” or other “marks of a competitor.”<sup>74</sup> Additionally, this provision may find liability for traders who have indicated that they are verifiably and firmly “bound” by a “code of conduct” and have not complied with this code of conduct if their action would cause a consumer to make or be “likely to” make a decision he would not have otherwise made.<sup>75</sup>

A commercial practice will be found to be a misleading “omission” if it “omits” or “hides material information,” provides material information in a way that is “unclear, unintelligible, ambiguous or untimely,” or it does not identify the “commercial intent” unless this is already apparent from the context.<sup>76</sup> As with commercial actions, these omissions must also cause or be likely to cause the average consumer to make a transactional decision he would not have made otherwise.<sup>77</sup>

To date, Trading Standards has not prosecuted any ASA-referred cases under the unfair or aggressive prongs of the CPUTR.<sup>78</sup> A commercial practice is defined as unfair if “(a) it contravenes the requirements of professional diligence; and (b) it materially distorts . . . the economic behaviour of the average consumer with regard to the product.”<sup>79</sup> An aggressive commercial practice is one that “(a) significantly impairs . . . the average consumer’s freedom of choice or conduct in relation to the product . . . through the use of harassment, coercion or undue influence; and (b) it thereby causes or is likely to cause him to take a transactional decision he would not have taken otherwise.”<sup>80</sup>

The analysis section below will rely on this language in assessing the fitness of the currently existing statutory framework for the enforcement of proposed CAP codes against gender stereotyping in advertising. Below is a discussion of some examples of ASA-adjudicated cases and Trading Standards prosecutions.

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74. *Id.* ¶ 5, § 3(a).

75. *Id.* ¶ 5, § 3.

76. *Id.* ¶ 6, § 1.

77. *Id.*

78. *ASA Welcomes Successful Prosecution*, *supra* note 68.

79. CPUTR art. 2, ¶ 3, § 3.

80. *Id.* ¶ 3, § 3. The factors the statute lays out to determine whether harassment, coercion, or undue influence has occurred are “(a) its timing, location, nature or persistence; (b) the use of threatening or abusive language or behaviour; (c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer’s judgment, of which the trader is aware, to influence the consumer’s decision with regard to the product; (d) any onerous or disproportionate non-contractual barrier imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader; and (e) any threat to take any action which cannot legally be taken.” *Id.* ¶ 7, § 2.

D. *Adjudication in Action – Examples of ASA-adjudicated Cases and Trading Standards Prosecutions*

The Protein World advertisement mentioned above, portraying a bikini-clad woman and stating “ARE YOU BEACH BODY READY?” is an example of an advertisement that was reviewed and adjudicated internally by the ASA.<sup>81</sup> After 378 complaints, the ASA undertook a review of the advertisement posing two questions of potential harm.<sup>82</sup> First, it asked whether the advertisement was offensive because it implied that a body shape that differed from the one presented was not good enough or inferior.<sup>83</sup> Second, it asked whether it was socially irresponsible to combine a very slim, toned body next to the headline “ARE YOU BEACH BODY READY?” in the context of an advertisement for a slimming product.<sup>84</sup>

When made aware of the investigation, Protein World defended the advertisement on the grounds that “beach body” was a commonly used phrase that was understood as looking one’s best and that it intended the advertisement to inspire viewers to ask themselves whether they were in the physical shape they wanted.<sup>85</sup> Protein World further explained that the model in the advertisement had used its products, and that it had received pre-publication advice from the CAP Copy Advice team on whether the advertisement was irresponsible or likely to cause harm or offense.<sup>86</sup>

The ASA investigated the first question under Rule 4.1 (Harm and Offense) of the CAP Code.<sup>87</sup> Rule 4.1 states that “marketing communications must not contain anything that is likely to cause serious or widespread offense.”<sup>88</sup> It lists protected classes towards which advertisers should avoid causing offense<sup>89</sup> and specifies that an advertisement which may be considered distasteful or cause offense to some will not necessarily be found to be a breach of the Code.<sup>90</sup> The ASA ultimately decided that the Protein World advertisement did not violate Rule 4.1, and that the headline and image

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81. *ASA Adjudication on Protein World Ltd.*, *supra* note 9.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. Harm and Offense, CAP Code Rule 4.1 (2010), [https://www.asa.org.uk/type/non\\_broadcast/code\\_section/04.html](https://www.asa.org.uk/type/non_broadcast/code_section/04.html) [<https://perma.cc/AV5F-ZFJW>].

89. These classes are race, religion, gender, sexual orientation, disability or age. *Id.*

90. *ASA Adjudication on Protein World Ltd.*, *supra* note 9.

were not likely to cause serious or widespread offense.<sup>91</sup> The ASA broadly interpreted the meaning of the phrase “beach body”: the implication of feeling sufficiently comfortable in one’s physical appearance to wear swimwear in a public environment, without implying that one type of body was superior to another.<sup>92</sup>

The ASA analyzed the second question under CAP Rule 1.3 (Responsible Advertising), which provides that “marketing communications must be prepared with a sense of responsibility to consumers and to society.”<sup>93</sup> The ASA upheld the advertisement under this rule as well, finding that the image was not irresponsible, and would not shame women of differing body shapes into believing that they needed to take a slimming supplement to feel confident wearing swimwear in public.<sup>94</sup>

Considering the ASA did not find the advertisement in violation of any of the CAP codes, there was no further action recommended.<sup>95</sup> However, in the publication of this adjudication, the ASA noted that it told Protein World prior to the investigation that “due to our concerns about a range of health and weight loss claims, the advertisement could not appear again in its current form.”<sup>96</sup> There was no formal adjudication process of the advertisement regarding the concerns about health and weight loss claims. Without evidence of the ASA investigating the case on these grounds, it is presumed here that Protein World voluntarily agreed to alter the form of the advertisement.<sup>97</sup> The Protein World case is representative of the outcome of most cases presented to the ASA. In the vast majority of the time when cases are brought to the ASA, the complaints are ultimately concluded to be unfounded or the advertisers voluntarily comply with the suggestions of the ASA without the need for further prosecution.<sup>98</sup>

However, when advertisers are not compliant with ASA rulings, the body has the option to refer the case to Trading Standards, its legal backstop.<sup>99</sup> As of October 2018, there have been fifty-nine

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91. *Id.*

92. *Id.*

93. *Id.*; Compliance, CAP Code Rule 1.3 (2010), [https://www.asa.org.uk/type/non\\_broadcast/code\\_section/01.html](https://www.asa.org.uk/type/non_broadcast/code_section/01.html) [<https://perma.cc/Z2W8-6UCM>].

94. *ASA Adjudication on Protein World Ltd.*, *supra* note 9.

95. *Id.*

96. *Id.*

97. *See generally* *Rulings*, ADVERT. STANDARDS AUTH., <https://www.asa.org.uk/codes-and-rulings/rulings.html> (revealing no evidence of further investigation) [<https://perma.cc/FK2A-D6WU>].

98. *See Sanctions*, *supra* note 59.

99. *Id.*

total referrals to Trading Standards.<sup>100</sup> A majority of these cases ultimately result in the advertiser voluntarily complying before Trading Standards which concludes the adjudication process.<sup>101</sup> As of October 2018, there are fifteen cases pending, fifteen cases in which the trader became compliant, twenty-three cases in which the trader took down his website, three cases in which the trader ceased trading, one case which entered into a Primary Authority Partnership,<sup>102</sup> and two cases which were prosecuted.<sup>103</sup> In each of the prosecuted cases, only one complaint about each company had reached the ASA.<sup>104</sup> The ASA emphasizes on its website that the number of complaints about an advertisement does not influence the decision-making process; it is only concerned as to whether an advertisement does or does not comply with the CAP codes.<sup>105</sup>

The first case the ASA referred to Trading Standards that reached the level of prosecution was adjudicated in August of 2016.<sup>106</sup> Electronic Healing is a provider of alternative therapies and devices who made certain claims about the efficacy of its products that were not sufficiently supported.<sup>107</sup> For example, Electronic Healing made unsubstantiated claims on its website about its “Bob Beck Protocol” product, stating that it could “amplify the immune system, remove the need for flu vaccinations, increase oxygen in the blood, reduce HIV infections and help fibromyalgia.”<sup>108</sup> The ASA website contains two investigations of the company, from May and June 2012.<sup>109</sup> In both of these cases, the ASA held that

100. *Trading Standards Referrals*, *supra* note 22.

101. *See id.*

102. A way for businesses to partner with regulatory authorities to comply with trading standards. *See Primary Authority: A Guide for Businesses*, Gov.UK (Oct. 1, 2017), <https://www.gov.uk/guidance/primary-authority-a-guide-for-businesses> [<https://perma.cc/3AZZ-TSWG>].

103. *See Trading Standards Referrals*, *supra* note 22.

104. *See ASA Adjudication on Electronic Healing*, ADVERT. STANDARDS AUTH. (May 23, 2012), <https://www.asa.org.uk/rulings/electronic-healing-a12-186775.html> [hereinafter *May 2012 Adjudication*] [<https://perma.cc/TS88-SU99>]; *ASA Adjudication on Electronic Healing*, ADVERT. STANDARDS AUTH. (Jun. 27, 2012), <https://www.asa.org.uk/rulings/electronic-healing-a12-194057.html> [hereinafter *June Adjudication*] [<https://perma.cc/GK9K-9AFQ>]; *ASA Ruling on FreeFusion Ltd.*, ADVERT. STANDARDS AUTH. (Feb. 10, 2016), <https://www.asa.org.uk/rulings/freefusion-ltd-a15-317893.html> [<https://perma.cc/GK9K-9AFQ>].

105. *How We Handle Complaints*, *supra* note 41.

106. *ASA Welcomes Successful Prosecution*, *supra* note 68.

107. *Id.*

108. Omar Oakes, *Alternative Therapy Provider Fined After Claiming It Could Reduce HIV Infections*, CAMPAIGN (Aug. 5, 2016), <https://www.campaignlive.co.uk/article/alternative-therapy-provider-fined-claiming-reduce-hiv-infections/1404809> [<https://perma.cc/UCT7-4NZM>].

109. *See May 2012 Adjudication*, *supra* note 104; *June 2012 Adjudication*, *supra* note 104.

the advertisements could no longer appear, and the ASA referred the matter to the CAP compliance team.<sup>110</sup> Despite ASA sanctions in which Electronic Healing was placed on a list of non-compliant advertisers on the ASA website, the company continued to publish the claims.<sup>111</sup> In response to this, the ASA referred the case to Trading Standards in 2013.<sup>112</sup> The two owners of the company ultimately pled guilty to offenses under the CPUTR and the Food Safety Act.<sup>113</sup> They were each fined £1,000, ordered to pay £7,000 in costs and a £100 victim surcharge, and to forfeit £7,000 that was seized on the day of the warrant.<sup>114</sup>

Trading Standards adjudicated the second successful prosecution in January 2018.<sup>115</sup> The advertisement in question appeared on FreeFusion's website in November 2015 and included three questionable elements regarding misleading claims they made about its electronics repair business.<sup>116</sup> The first was large text reading "[a]pproved repair centre" with an Apple logo, the second was text reading "[o]riginal parts!," and the third were three claims presented inside laurels about being "the best service of the year" for 2012, 2013, and 2014.<sup>117</sup> The ASA questioned the first element because the text and image together made it appear as though the business was an Apple approved repair center, which it was not.<sup>118</sup> It questioned the statement about original parts on the grounds that the parts used were not original Apple parts.<sup>119</sup> Finally, it investigated the best service claims on grounds that the advertisement did not make it clear what the best service claims related to.<sup>120</sup>

FreeFusion defended its advertisement, stating that it was approved by Google as one of the top-ranking sites in searches for iPhone repair centers, that the logo was only to indicate it repaired Apple phones, and that users were free to check the Apple website to determine if it was an Apple-approved store.<sup>121</sup> It stated that the equipment it used to repair phones was from Original Equipment

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110. See *May 2012 Adjudication*, *supra* note 104; *June 2012 Adjudication*, *supra* note 104.

111. *ASA Welcomes Successful Prosecution*, *supra* note 68.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Dresden*, *supra* note 68.

116. See *ASA Ruling on FreeFusion Ltd.*, *supra* note 104.

117. See *id.*

118. See *id.*

119. See *id.*

120. See *id.*

121. See *id.*

Manufacturer, and that it was not claiming to use original Apple parts.<sup>122</sup> Finally, it defended its “best service of the year” awards, stating the awards were from eKomi.<sup>123</sup> It offered to change the wording to read “the best service as awarded by eKomi” and alter the presentation to use the eKomi thumbs-up logo instead.<sup>124</sup>

The ASA adjudication concluded that all three claims were misleading to consumers, finding that the advertising would mislead consumers into thinking that FreeFusion had a connection to Apple that did not exist, and finding no evidence that eKomi had ever awarded the site any awards.<sup>125</sup> The ASA held that FreeFusion could no longer repeat the claims and that it must be careful when using logos to make sure they were not misleading.<sup>126</sup> After FreeFusion failed to comply with the regulations, the ASA added it to the public list of non-compliant advertisers.<sup>127</sup> Despite this, FreeFusion continued to make the claims, and the ASA referred the case to Trading Standards.<sup>128</sup>

On January 9, 2018, FreeFusion and its sole director were prosecuted under the CPUTR and the Trade Marks Act 1994.<sup>129</sup> The company was fined £2,000 for the misleading claims about its relationship with Apple and provision of original Apple parts, £2,463 in prosecution costs and a £100 victim surcharge.<sup>130</sup> The sole director was individually fined £1,000 for the misleading claims and a £50 victim surcharge.<sup>131</sup> This case was different than the usual cases referred to Trading Standards because it was not prosecuted by Camden Trading Standards, but rather Northamptonshire Trading Standards.<sup>132</sup> Because the business was based out of Northamptonshire and the local court already had dealings with the business, the local Trading Standards outpost decided to undertake the prosecution.<sup>133</sup>

From publicly available information on Trading Standards referrals, it appears that only one of the fifty-nine referrals was referred under violation of the rule on harm and offense; the remaining

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122. *See id.*

123. *See id.*

124. *See id.*

125. *See id.*

126. *See id.*

127. Dresden, *supra* note 68.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

forty-eight appear to be violations of misleading advertising rules.<sup>134</sup> The case which was referred under the harm and offense violation was resolved before prosecution occurred, so it is unclear under what statute Trading Standards might have tried to prosecute the violator.<sup>135</sup> However, the most commonly referenced statutes used for prosecution or threatened prosecutions are the CPUTR and the Business Protection from Misleading Marketing Regulations.

### III. ANALYSIS

Because Trading Standards has only ever prosecuted companies for violations of misleading advertising, the analysis below uses the process used for misleading advertising to hypothesize how a prosecution might occur for the violation of the rule on harm and offense: the proposed new code banning gender stereotypes in advertising. The proposed rule would read “[a]dvertisements must not include gender stereotypes that are likely to cause harm, or serious or widespread offence.”<sup>136</sup> The ASA has additionally released guidance on how the rule might affect the advertising industry, including an example of an advertisement that would be found to be in violation of the new rule.<sup>137</sup> It describes the advertisement as one “which depicts family members creating a mess while a woman has sole responsibility for cleaning it up.”<sup>138</sup> This Note uses this hypothetical advertisement (hereinafter Cleaning Advertisement) as an example to analyze the process of ASA adjudication under the anticipated new rule, and the challenges Trading Standards may face in prosecuting violations of this rule. This Section first discusses prosecution under the misleading actions and omissions provisions of the CPUTR because Trading Standards has historically used this provision to prosecute ASA-referred cases to further address the potentially novel prosecutions under aggressive or unfair commercial practices. This Analysis Section argues that none of the provisions of the CPUTR provides a sufficient framework for a prosecution of this type.

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134. See *Trading Standards*, *supra* note 22.

135. See *id.*

136. *Consulting on a New Rule to Tackle Harmful Gender Stereotypes*, ADVERT. STANDARDS AUTH. (May 17, 2018), <https://www.asa.org.uk/news/consulting-on-a-new-rule-to-tackle-harmful-gender-stereotypes.html> [<https://perma.cc/4E7Y-2CLB>].

137. See *DEPICTIONS, PERCEPTIONS AND HARM*, *supra* note 10, at 62–63.

138. *New Rule*, *supra* note 18. For the sake of illustration, this Note hypothesizes that this advertisement is marketing a cleaning product of some sort.

If a member of the public made a complaint to the ASA about the Cleaning Advertisement once the new rule comes into effect, the ASA would presumably use the same process to adjudicate what it used in the past. As mentioned above, the ASA would first make the advertiser aware that the advertisement is under review for its reinforcement of gender stereotypes and try to have the advertiser voluntarily resolve the issue before opening a formal ASA investigation.<sup>139</sup> However, if the advertiser is unwilling to alter the advertisement or is generally uncooperative, the ASA would continue with the investigation process.<sup>140</sup> This analysis presumes that during the course of the investigation, the ASA Council finds the Cleaning Advertisement in violation of the CAP Code against gender stereotyping.<sup>141</sup>

Once the ASA finds an advertisement to be in violation of the CAP codes, the advertiser might choose to make its advertisement compliant with the rule by removing it from circulation or altering its form.<sup>142</sup> For example, it could alter the form of the advertisement to depict family members creating a mess, but showing women and men equally sharing the responsibility for cleaning it up. However, if the advertiser continues to run the Cleaning Advertisement despite its violation of CAP rules on gender stereotyping, it will be put on the ASA's list of non-compliant advertisers.<sup>143</sup>

This is the final step in the ASA's sanction abilities; if the advertiser continues to run the Cleaning Advertisement after being placed on the list, the ASA will refer the matter to Trading Standards for legal prosecution.<sup>144</sup> While this is a relatively rare occurrence, if the process works as intended, then the ASA would make the referral.<sup>145</sup> To avoid undermining the effectiveness of the ASA system, it is critical that all elements of the sanctioning system are uniformly implemented to censure even the most stubborn of offenders, regardless of which rule they violate. If each level of

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139. *How We Handle Complaints*, *supra* note 41.

140. *Id.*

141. Based on the current guidance that the ASA has published, this seems to be an accurate assumption. *New Rule*, *supra* note 18.

142. Many cases get resolved voluntarily before a formal investigation is even necessary; and it is plausible that advertisers who violate this rule will be willing to comply when made aware of a violation.

143. See *Non-Compliant Online Advertisers*, ADVERT. STANDARDS AUTH., <https://www.asa.org.uk/codes-and-rulings/non-compliant-online-advertisers.html> (last visited Dec. 11, 2018) [<https://perma.cc/4AAC-L3WW>].

144. *Trading Standards*, *supra* note 22.

145. *Sanctions*, *supra* note 59.

sanction, including prosecution by Trading Standards, does not apply equally across all CAP rules, then its effectiveness as a whole diminishes. Referral to Trading Standards in and of itself is often sufficient pressure to persuade non-compliant advertisers to discontinue their practices.<sup>146</sup>

Based on the precedent set by previously prosecuted cases, Trading Standards would use the CPUTR to prosecute the advertiser of the Cleaning Advertisement.<sup>147</sup> As mentioned above, there are three ways for an offender to be prosecuted under this statute: misleading actions or omissions, aggressive commercial practices or unfair commercial practices.<sup>148</sup>

The hypothetical violation of a CAP rule on gender stereotyping in advertising is unique from previous prosecutions because the proposed rule addresses the general method of presentation of a product rather than the regulation of the truthfulness of the content itself. All three provisions of the CPUTR are content-focused: they regulate what advertisements may or may not say without explicitly addressing the policy concerns of preventing the social harm that may result from certain types of product presentations.<sup>149</sup> However, comparisons may be drawn. For example, in *FreeFusion*, the advertiser used the Apple logo on its website so the consumer would associate its products with the Apple brand, and therefore would be more likely to buy it.<sup>150</sup> In the case of an advertisement portraying a gender stereotype, the advertiser intends for the consumer to associate the product with a specific type of person, and thus be more likely to engage with the product or business.

#### A. *Hypothetical Trading Standards Prosecution under CPUTR §5-6 – Misleading Actions or Omissions*

The prosecution might try to argue that, under §5 of the CPUTR, the Cleaning Advertisement is a misleading advertisement. In looking closely at the language of the statute, it seems that this is unlikely to be a successful argument. Most of the provision focuses on the way that the advertisement presents the prod-

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146. Only 2 cases have ever been fully prosecuted as of January 2018. See *Trading Standards*, *supra* note 22.

147. *ASA Welcomes Successful Prosecution*, *supra* note 68; see also Dresden, *supra* note 68.

148. See CPUTR art. 2, ¶¶ 3–7.

149. See *id.* art. 2.

150. See *ASA Welcomes Prosecution of Misleading Advertiser*, ADVERT. STANDARDS AUTH., <https://www.asa.org.uk/news/asa-welcomes-prosecution-of-misleading-advertiser.html> (last visited Dec. 11, 2018) [<https://perma.cc/MP7Q-FUEB>].

uct itself.<sup>151</sup> If the advertisement is accurate in presenting the cleaning product's effectiveness and characteristics, then the language of the statute does not apply. For example, in *Electronic Healing*, the company was prosecuted because the advertisements stated that the product could cure diseases that it actually could not.<sup>152</sup> Here, in the hypothetical case of the Cleaning Advertisement, if the product were advertised in a way which made it appear as though the cleaning product could do something that it could not, then prosecution could proceed under this statute. However, this would not be addressing the gender stereotyping aspect of the rule.<sup>153</sup> Even though one might argue that the advertisement contains false information as to the "usage of the product," which is one of the main characteristics of products that may not be misleadingly presented,<sup>154</sup> the prosecutor may try to argue that the product is presented as though it may only be used by women, when this is not actually the case. The prosecutor would further argue that this has mislead consumers into making decisions about the product which they would not have otherwise made, such as a male consumer who may choose not to buy the product.

This would be a counterintuitive interpretation of the statute: it seems as though the bent of this provision is to prevent advertisers from misleading consumers into buying products they might have otherwise chosen against. For example, in the FreeFusion prosecution above, the company was found liable because its advertising might mislead consumers into buying its products because they believe that the company has a relationship with Apple that does not actually exist.<sup>155</sup> In that case, the reverse argument that mirrors the hypothetical argument made here, would be that consumers chose not to buy a product from FreeFusion because the company presented a misleading association with Apple.<sup>156</sup> Thus, the consumer has chosen not to engage in business with the company based on the misleading advertisement. Here, it would be a novel argument that the advertisement is misleading because it has prevented a consumer from buying a product that he might have

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151. See CPUTR art. 2, ¶ 5.

152. See Oakes, *supra* note 108.

153. This altered hypothetical would probably have been referred to Trading Standards for violation of CAP Rule 3.1, Misleading Advertising, which is one of the three rule violations under which Electronic Healing was referred. See *May 2012 Adjudication*, *supra* note 104.

154. CPUTR art. 2, ¶ 5, § 5(m).

155. See Dresden, *supra* note 68.

156. See *id.*

chosen to buy if the advertisement did not have a gender stereotype. However, this may technically fit within the language of the statute.<sup>157</sup>

B. *Hypothetical Trading Standards Prosecution under CPUTR §7 – Aggressive Commercial Practices*

If the court is unable to argue the advertisement is misleading, it may next try to argue that it is aggressive, an argument that has never been made in an ASA-referred case before. Aggressive commercial practices must impair freedom of choice through harassment, coercion or undue influence.<sup>158</sup> Various factors are taken into account when proving harassment, coercion or undue influence though none seems to aptly apply to this hypothetical.<sup>159</sup> Finding an advertisement to be presenting an aggressive commercial practice is a high bar; it is far-fetched that a court would see a gender-stereotype conforming advertisement as exploitative of a specific misfortune or threatening.<sup>160</sup> The prosecutor may argue that the Cleaning Advertisement is exploiting the position of a woman who is solely responsible for cleaning up a family's mess by showing her how much easier her life would be with the product, and in doing so, influencing her decision. However, the statute requires that the exploitation is done with "such gravity as to impair the consumer's judgment," and it seems unlikely that this kind of advertisement would meet that standard.<sup>161</sup>

C. *Hypothetical Trading Standards Prosecution under CPUTR §3 – Unfair Commercial Practices*

If both of the above arguments fail to persuade the court, then Trading Standards might attempt to prosecute this violation under the prohibition of unfair commercial practices, the broadest of the three provisions, which also has not been used in an ASA-referred

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157. The relevant portion of the statute explicitly reads that the misleading information "causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise." CPUTR art. 2, ¶ 5, § 2(b).

158. *Id.* ¶ 7, § 1(a).

159. These factors are: (1) timing, location, nature or persistence; (2) threatening or abusive language or behavior; (3) the exploitation of specific misfortune of which the advertiser is aware, with such "gravity as to impair the consumer's judgment"; (4) an onerous barrier imposed by a trader to prevent consumers from terminating a contract or switching to another product; or (5) a threat to take any action which cannot be legally taken. *Id.* ¶ 7, § 2(a)–(e).

160. *See id.* ¶ 7.

161. *Id.* ¶ 7, § 2(c).

case before.<sup>162</sup> The provision defines “unfair commercial practices” as those which contravene the requirements of professional diligence<sup>163</sup> and are likely to or do materially distort the economic behavior of the average consumer.<sup>164</sup> One may argue that a knowing and persistent violation of the CAP codes is inherently an action in bad faith and thus contravenes the requirements of professional diligence. This may cause every case the ASA refers to CAP to immediately meet the first prong of the rule. Thus, the court would only have the burden of proving that this act of bad faith distorts the economic behavior of the average consumer.<sup>165</sup>

Here, a question on causation develops because it seems that the intrinsic nature of advertisements is to distort the economic behavior of a consumer.<sup>166</sup> It might be difficult to determine whether it was the bad faith—namely the violation of the rule—that caused the distorted economic behavior, or simply the inherently convincing nature of any advertisement. This question could have a clear answer in a case where, for example, an advertisement for alcohol states the product will enhance confidence and popularity.<sup>167</sup> In that case, the consumer choosing to buy the product chooses to do so in connection to the statement made in the advertisement. In contrast, portraying a gender stereotype in an advertisement has a much more tenuous connection to the consumer’s economic choice. While seeing a woman using a cleaning product might encourage a woman to buy it, the aspect of the advertisement that is actually violating the code is the gender stereotype presented; that it is the woman’s *sole responsibility* to clean up the mess of an entire family.

Thus, in the Cleaning Advertisement example, the prosecution would have to prove both that the advertiser acted in bad faith and that consumers were likely to display distorted economic behavior *because* the woman was depicted as being solely responsible for cleaning up for an entire family.<sup>168</sup> Even if a consumer behaves differently because of how the advertisement makes him feel about

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162. *Id.* ¶ 3.

163. Professional diligence is a reasonable standard of honesty and good faith.

164. CPUTR art. 2, ¶ 3, § 3(b).

165. *Id.*

166. See Jan Trzaskowski, *Lawful Distortion of Consumers’ Economic Behaviour: Collateral Damage Under the Unfair Commercial Practices Directive*, 27 EUR. BUS. L. REV. 25, 25 (2016).

167. This is a direct violation of CAP Rule 18.2. See Alcohol, CAP Code Rule 18.2 (2010), [https://www.asa.org.uk/type/non\\_broadcast/code\\_section/18.html](https://www.asa.org.uk/type/non_broadcast/code_section/18.html) [<https://perma.cc/YG2M-MPMW>].

168. See CPUTR art. 2, ¶ 3, § 3(b).

his role in society, this is not sufficient to be considered unfair commercial practice because the distorted behavior must be economic in nature.<sup>169</sup> The sociological question of whether the performance of gender stereotypes in advertising is likely to distort economic behavior is outside of the scope of this Note but will be critical in determining whether Trading Standards will be able to successfully prosecute a case under this proposed CAP rule.

#### IV. CONCLUSION

Not all advertisements that are questioned on the basis of gender stereotyping will appear in the form hypothesized here, and an analysis under these statutes has the potential to vary depending on the specifics of each case. However, the purpose of this analysis is to show the potential difficulties that the ASA and Trading Standards may face in continuing to effectively implement their co-regulation scheme under the proposed new rule.

One option in facing these difficulties would be to statutorily increase the mandate of the ASA by allowing the organization to levy fines and by giving this independent association sanction levels for its own investigations closer to those allowed by Trading Standards, without imposing the burdens of prosecution. One danger of this solution is that it removes the process of the court and the protections that process supplies, particularly to the advertisers. Another solution may be to pass further statutory regulations that would parallel the CAP rules. However, this solution may lead to debates about the extent of regulation allowed when confronting issues of freedom of speech.

The proposed regulation went through a public comment period between May and July of 2018.<sup>170</sup> The results of this comment period remain unpublished and it remains to be seen whether the general population felt strongly in favor or against the creation of such a rule. If advertisers are as voluntarily compliant with this new rule as they have been historically, then the inability of Trading Standards to effectively prosecute these violators may not hurt the system. However, the potential breadth of advertisements to which this rule could potentially apply merits the discussion.

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169. *Id.*

170. See *Tackling Harmful Gender Stereotypes in Advertising*, ADVERT. STANDARDS AUTH. (May 16, 2018), <https://www.asa.org.uk/resource/tackling-harmful-gender-stereotypes-in-advertising.html> [<https://perma.cc/B9FW-ZSPQ>].