

Tips on How Media Owners Can Cope with CASL Compliance

Since Canada's anti-spam legislation ([CASL](#)) came into effect on July 1, 2014, the Canadian Radio-television and Telecommunications Commission (CRTC) have received more than 200,000 complaints concerning CASL violations. The CRTC is pursuing numerous investigations and issued an undisclosed number of *Notices of Production* with the potential to be very costly and onerous for businesses to respond.

The fines for CASL have been well publicized – fines can reach as high as \$10 million for businesses and may be broadened to include the over-reaching personal vicarious liability of officers and directors. Many small to mid-size organizations spanning all sectors – including media owners of newspaper and magazine brands – find it challenging at best to adapt to CASL's overly prescriptive rules. In order to be compliant under CASL, organizations need to adopt new technologies and processes. While an organization may be compliant under [CAN-SPAM](#), there are [unique requirements to be compliant under CASL](#).

Media owners are intensive users of electronic communication and at risk of committing violations under CASL. What should media owners be aware of?

1. Send messages to recipients for which consent exists

CASL is concerned with Commercial Electronic Messages (CEM), which include a broad range of electronic messaging promoting products and services (CASL, section 1(2)). While some electronic messaging is exempt from CASL, it is fair to assume that all media owners are issuing CEMs to recipients served by their respective brands and must comply with CASL.

Every CEM sent to an electronic address – most often email, but may include SMS, instant messaging or social media – should be vetted to ensure consent has been obtained. While it is ideal for media owners to obtain express consent, temporary provisions permitting implied consent exist until June 30, 2017. If challenged, the responsibility to prove consent is with the media owner (CASL, section 13). Audited media, particularly those audited by BPA Worldwide/CCAB, [are better positioned than most to handle CASL compliancy investigations](#).

Express consent may be obtained orally or in writing. It is a violation to send a CEM to a recipient for which consent does not presently exist to seek express consent to receive future CEMs (CASL section 6 (1)(a)). Express consent is limited to the brand that obtained express consent from the recipient, and consent cannot be shared amongst affiliated brands. For example, a consumer magazine brand owner with three separate brands serving the fashion, real estate and entertainment markets can't cross-pollinate

email marketing lists for all three brands if express consent solely exists to receive selected CEMs about the fashion brand.

While express consent is indefinite until a subscriber opts-out, implied consent exists for a limited amount of time. Implied consent exists under the following circumstances: there is an existing business relationship; the recipient has conspicuously published her email address without a statement of opting out of receiving unsolicited CEMs; and the message is relevant to the person's business, and where the recipient has disclosed her electronic address without indicating a preference not to receive unsolicited CEMs. For a publisher of paid subscriptions, an existing business relationship with a recipient comes from the result of serving the subscription term within the two-year period immediately before the day on which the message was sent. (CASL section 6 (14)(e)). One advantage of paid media brands is that the two-year period tied to subscription sales would begin as the subscription term expires. If a media owner has an existing business relationship with a recipient and the business is sold, the acquirer is considered to have, in respect of that business, an existing business relationship with that recipient (CASL section 6 (12)). An existing business relationship also includes an inquiry within the six-month period immediately before the day on which the message was sent. It is obviously quite onerous for media owners to determine if a business relationship exists for each recipient and when this relationship started and ended, as well as determining if a CEM is relevant to the recipient's business.

The exceptions

There are limited exemptions under CASL and [Industry Canada \(IC\)](#) that permit organizations to send CEMs to recipients for which consent doesn't exist. Some notable exemptions for media owners include: Responding to an inquiry (CASL section 6(5)(b)); Responding to a request, inquiry or complaint that (IC Regulations section 3(b)); Confirming a subscription sale with the purchaser (CASL section 6(6)(b)); Notifying of factual information about the ongoing subscription purchased (CASL section 6(d)(i)); and Sending a message that is reasonably believed to be accessed in a [listed foreign state](#) and the message conforms to the law of the foreign state that addresses conduct that is substantially similar to conduct prohibited under section 6 of CASL (IC Regulations section 3(f)).

2. Clearly identify yourself and your organization

CASL requires every CEM contain the name of the media organization, as well as its brand(s), name of the person sending the message, organization's mailing address and telephone number and email address to reach the sender or web address of where contact information can be obtained ([Electronic Commerce Protection Regulations \(CRTC\), SOR/2012-36](#), section 2 (1)). Simply including the media owner's name and email link in a CEM is not sufficient under CASL rules.



3. Provide an opportunity for recipients to unsubscribe

Every CEM must allow recipients to quickly communicate, without difficulty or delay, their preferences to no longer receive future CEMs ([Electronic Commerce Protection Regulations \(CRTC\), SOR/2012-36, section 3](#)). The most common means for media owners to allow recipients to unsubscribe is through a link that brings the individual to a webpage where he or she can unsubscribe from receiving all or a choice of CEMs.

4. Exercise greater care in how subscriptions are being communicated

The Competition Bureau's memorandum of understanding (MOU) with the Privacy Commissioner of Canada and the CRTC means amendments to the [Competition Act](#) require media owners to ensure there are no misleading claims in any or all parts of an electronic message, including sender description, subject matter field, message field and URL in an electronic message or webpage. Statements in the message can't qualify the claims made in an email subject line.

BPA Worldwide/CCAB media members who haven't undergone any CASL compliance checks or sought legal advice may wish to seek basic input on CASL as a service included under membership. In addition to seeking independent legal advice, basic CASL compliancy tips can be shared with members, specifically those reporting or planning to report digital editions and electronic newsletters.

CASL is the world's most aggressive anti-spam legislation. Media owners are at risk and may face arduous fines and penalties if not in compliance, Violations go beyond email, and include SMS and instant messaging, social networking, Voice over Internet Protocol (VOIP) and others. Every media owner should conduct a full assessment of their electronic communication practices to determine the scope of changes to be made with policies, procedures and technologies. [Independent organizations, including CCAB, provide compliance checks to mitigate media owners' liability in the event of a CASL infraction or investigation.](#)

To learn more about CASL – Guard, BPA/CCAB's service to assess and reduce risk under CASL, or BPA/CCAB's media audits, please contact [Tim Peel](#). The contents described above are intended to be used as an aide for compliancy under CASL, and should not be construed as formal advice which should solely be relied on.

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About BPA Worldwide/CCAB. BPA Worldwide, and CCAB, its Canadian division, is in the business of providing assurance. For 80+ years as a not-for-profit assurance service provider, BPA was originally created by advertisers, advertising agencies and the media industry to audit audience claims used in the buying and selling of advertising. Today, in addition to auditing audience claims, through its iCompli service, BPA verifies compliance to defined government, industry, and organizational standards as well as adherence to privacy, data protection and sustainability guidelines and best practices. Performing nearly 3,800 audits in over 20 countries, BPA is a trusted resource for compliance and assurance services. Its latest offering, Ad iCompli, measures and scores online ad campaign performance for business and consumer marketers. For more information on BPA and its services, please visit the [website](#).