Submission on

Draft Guide to Advertising on the Internet

[01-w]

NATIONAL COMPETITION LAW SECTION AND
NATIONAL MEDIA AND COMMUNICATIONS LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Competition Law Section and National Media and Communications Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved by the Executive Officers as a public statement by the National Competition Law Section and National Media and Communications Law Section of the Canadian Bar Association.

Submission on
Draft Guide to Advertising on the Internet

I. INTRODUCTION

The Canadian Bar Association's National Competition Law Section and National Media and Communications Law Section (the Sections) are pleased to comment on the Competition Bureau's draft guide entitled *Staying 'On-side' When Advertising Online: A Guide to Compliance with Competition Act When Advertising on the Internet* (the Guidelines).

The Sections commend the Bureau for taking this initiative. As the Guidelines note, misleading advertising laws are the same whether the communication occurs through the internet or any other medium. Nevertheless, the Bureau is right to provide guidance on its enforcement approach in this area, given the differences associated with internet communications and the relative novelty of internet communications and internet advertising.

Despite this, the Sections are concerned that the Guidelines go further than the usual rules applicable to misleading advertising. The Guidelines should not establish rules which are different from, or more restrictive than, those which apply to other media. The Sections strongly believe that special rules for the internet have not been established in law and that they should not be. Consequently, no special rules should be articulated in the Guidelines.

The Sections support many of the approaches in the Guidelines. Although this submission will focus on areas which should be improved, the Guidelines overall reflect the law well and set out the appropriate enforcement policy. We say little

or nothing in some areas because there is much in the Guidelines which need not be changed.

II. MATTERS WHICH SHOULD BE ADDED

The Guidelines would benefit from additions in three main areas. The first addition deals with the interaction between internet advertising and telemarketing. The Bureau's Telemarketing Guidelines distinguish telemarketing from internet communication. A similar statement should be in these Guidelines.

The second addition arises from section 53 of proposed Bill C-23, *Amendments to the Competition Act and Competition Tribunal Act*, which deals with contests. Insofar as this section and related provisions of the Bill may apply to internet communications, this should be explained in the Guidelines. Although Bill C-23 is not yet law, it is important for the public to understand the intended scope of the Bill C-23, and particularly how it is intended to apply to internet communications. The Guidelines should reflect the position of the Bureau once the Bill becomes law.

The third addition is to provide footnote references accompanying statements on existing law or Bureau policy. These references would make the Guidelines more persuasive and more useful. In particular, they should accompany the following statements:

(a) *Section 2.1, first paragraph* – "This phrase has been interpreted to mean that the representation could lead a person to a course of conduct that, on the basis of the representation, he or she believes to be advantageous.";

(b) *Section 2.1, second paragraph* – "Often, the test for materiality is to examine whether the representation could influence a consumer to buy

a product or service. If it could, the representation is considered to be material.";

(c) *Section 3.1 - first paragraph* – "The Commissioner has taken the position that disclaimers which expand upon and add information to the principal representation do not raise an issue under the *Act*."; and

(d) *Section 4 – first paragraph* – "In the past, law enforcers have been called upon to consider the role of traditional media outlets such as print and television, advertising and lessees of major retailers."

III. MATTERS WHICH SHOULD BE RECONSIDERED

Some areas of the Guidelines raise serious questions. The first is in the seventh paragraph of section 2, which provides that the *Competition Act* and the Guidelines apply equally to all on-line representations, including those in e-mails and in chat rooms. This raises the important question of whether such representations are being made to the public. In our view, representations made on websites which are open to the public would qualify as representations to the public. Representations made in individual but identical e-mails sent to a large number of people would likely also be captured by the provisions of the *Act*. However, communications to subscribers to a particular chat room or e-mail service, individual 'conversations' in chat rooms, or person-to-person e-mails that are not sent on a mass basis, are unlikely to meet the definition of representations *to the public*.[1] Private personal e-mail messages should not be considered as representations to the public. These important distinctions deserve greater consideration in the Guidelines.

In the third paragraph of section 2.1, the Guidelines state: "for example, a false or misleading representation which influences consumers to frequent one website

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[1] See *R. v. Acme Novelty B.C. Ltd.* (1971), 4 C.P.R. (2d) 20 (B.C. Prov. Ct.), aff'd. (1972), 5 C.P.R. (2d) 221.

over another may give rise to an examination by the Commissioner, even though both websites are accessible at no cost to consumers". While we acknowledge that this circumstance might raise an issue, the misrepresentation would have to be particularly egregious in order to be "material", given that it is relatively easy for members of the public to view websites. If the misrepresentation merely causes members of the public to view a website at no cost, this will at worst result in a minimal inconvenience.

Part of our concern is with the word "frequent". If it is intended to cover members of the public who return to the site often and use it actively, based on a misrepresentation, then the Sections do not take issue with this portion of the Guidelines. However, if the word is intended to cover a representation which causes people to view a website and quickly conclude that they do not wish to use it, then the misrepresentation would have to be quite egregious to be material. This situation is more analogous to causing a person to switch between television stations than it is to causing them to go to a retail store where they choose not to buy anything.

The second paragraph of section 2.2 states that "the Bureau cautions on-line advertisers to take special care in advertising or marketing targeted to classes of consumers who may not have the capacity to fully understand the information...presented to them". This is vague. The Bureau should clarify the concerns and the classes of consumers that it is trying to address. For instance, if the Bureau is concerned about marketing directed at children, then that should be stated clearly. In general, the law of misleading advertising recognizes differing levels of sophistication among consumers. If the Guidelines seek to impose additional requirements on internet advertising, then this is not appropriate.

The third paragraph of section 2.2 states: "Advertisers should also assume that consumers do not read an entire website". This raises serious issues. If an

advertiser has created a website which is fully accessible to consumers and has encouraged consumers to review the relevant portions,[2] then it is not appropriate to assume that consumers will not have read the relevant portions. Similarly, it would not be appropriate to assume that consumers have not read all relevant portions of a print advertisement. Again, this would seem to establish specific rules for websites which do not apply to other types of advertising.

In the third paragraph of section 2.2, the Guidelines state that "information required to be communicated to consumers to ensure that a representation does not create a false or misleading impression should be presented in such a fashion as to make it *highly probable* that consumers will see it."[3] The "highly probable" requirement appears to be inconsistent with the second paragraph of section 3.1, which states: "Accordingly, it is not sufficient for the disclaimer to be present, it must also be *likely* to be read to alter the general impression...".[4] It is also inconsistent with the case law.[5] "Likely" is the appropriate test. Again, the Guidelines should not articulate different standards for internet advertising.

The second paragraph of section 3.1 provides that "some advertisers may attempt to use disclaimers to limit or contradict the principal representation. Disclaimers such as this could violate the *Act*." The Sections recognize that the Bureau has a long standing view that disclaimers cannot contradict the main text. Nevertheless, this view appears to be inconsistent with some case law.[6] Further, disclaimers are

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2 See discussion below with respect to disclaimers and hyperlinks.

3 Emphasis added.

4 Emphasis added.

5 See *R. v. RM Lowe Real Estate Ltd.* (1978), 39 C.P.R. (2d) 266 (Ont. C.A.), which provides that if there are two equally reasonable interpretations, one of which is not misleading, the advertisement should be found to be not false or misleading.

6 See *R. v. Pepsi-Cola Ltd.* (1991), 40 C.P.R. (3d) 243 (Ont. Gen. Div.), in which a disclaimer on

(continued...)

virtually always employed to limit the main claim in some manner. Given the case law and the use of disclaimers generally, it is not possible to establish strict rules concerning those which contradict the main message or concerning their location within an advertisement. Rather, it is a question of fact whether the general impression created by the entire advertisement or representation, including the disclaimer, is misleading. This must be left to the court to determine in each case.

The Sections strongly disagree with the statement in paragraph (a) of section 3.1 that: "The disclaimer should generally be placed on the same screen and close to the representation to which it relates". This is commercially unrealistic. It is not the way the internet business operates nor the way consumers expect disclaimers to be displayed, whether on the internet or elsewhere. Further, it is inconsistent with the *Pepsi-Cola* case.[7] It entirely ignores the advantages of the internet medium, which allows disclaimers to be clearly available by "clicking here" adjacent to the main representation. Indeed, compliance with such a rule could lead to web advertising pages filled with too much disclaimer text, obscuring the primary message and all of the disclaimers. Creative use of technology, such as pop-up boxes or links, can be much more useful in highlighting key supplementary information.

The attempt to establish an absolute rule on the placement of disclaimers is not likely to succeed. In the online world, the scope for an advertiser to use disclaimers is potentially far greater because the space limitations in other media — television, radio or even print advertising — do not apply. Theoretically, an almost infinite amount of qualifying text can be provided to supplement a claim,

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[6](...continued)
the back of a package arguably contradicted the representation on the front panel of the package. Nevertheless, it was found not to be misleading.

[7] *Ibid*.

using techniques such as scroll-downs continuing onto subsequent pages, click-through links to separate web pages, or pop-up boxes. Disclaimers in internet advertising can be in a user-friendly format, without having to resort to media-limited techniques such as mice-type and multi-line television "supers" that no one can read.

This proposal also ignores the fact that computers have a wide variety of screen sizes, which can in any event be changed by the user. The advent of new technology such as hand-held personal digital assistants widens this variety even further. Therefore, there is no possible way to guarantee that a disclaimer will be on the same screen as the principal representation, regardless of what the advertiser does. The Guidelines ought to be drafted in a technology-neutral manner. Particularly in the context of the internet, any other approach will result in them being out of date almost before they are issued.

Similarly, the Sections disagree with the statement, also in paragraph (a) of section 3.1, that: "In appropriate circumstances, advertisers should consider disclosing important information on each page of a website in order to increase the likelihood that it will be read and understood". There will likely never be "appropriate circumstances" where something has to be disclosed on every page of a website. This is inconsistent with practice in any other medium and is also inconsistent with the nature of the internet, which allows for constant reference back via hyperlinks.

The Sections also have concerns about paragraph (e) of section 3.1. While disclaimers should be available to all reasonably anticipated users, it is simply not possible for disclaimers to be equally prominent regardless of the viewing technology. The type of device and size of the screen used by the consumer will vary in ways that the advertiser is not capable of knowing. Also, the Guidelines

refer to the practice of bypassing disclaimers for repeat customers but do not indicate whether this is an acceptable practice.

In paragraph (g) of section 3.3, the Guidelines suggest that such charges as shipping, taxes, customs duties, custom broker fees and currency conversion need to be disclosed. This is inconsistent with requirements placed on advertising in other media and is likely impractical. Depending on where the purchaser is located, these charges may vary considerably. It may be appropriate to disclose that they will be incurred by the consumer, unless the advertiser is providing the product for a single delivered price. However, it is not appropriate to require disclosure in the advertisement of the precise charges which a consumer may incur. A supplier may need to disclose these charges in a transaction, but this is not within the scope of the misleading advertising provisions of the *Act*.

In section 3.4, the Guidelines note that in an online environment, consumers cannot physically inspect products available for sale. However, this is not unique to the online environment. Customers usually cannot physically inspect products in catalogue or other remote sales. Indeed, this is also true for sales made by traditional retailers when the product is boxed or otherwise not accessible. Again, we stress that internet advertising should not be treated differently from advertising in other media.

In paragraph (c) of section 4, the Bureau notes that there is a difference between the statutory treatment of advertisers located within Canada and those abroad. We agree. However, as a practical matter, internet intermediaries would probably not be liable for misrepresentations in advertisements, whether placed by foreign-based advertisers or domestic advertisers. This is particularly so given the nature of the service provided by most internet intermediaries, with the possible exception of website designers. If the Bureau agrees with our view, then this should be reflected in the Guidelines. If it disagrees, we would welcome hearing

the Bureau's views, and, in particular, more detail on the circumstances in which internet intermediaries could be liable for foreign-based advertising, but not for similar domestic advertising.

This raises the question of whether intermediaries who have not had a hand in creation of the advertisement can be liable at all. They are effectively the broadcaster, not the creator or publisher. Special rules ought not to be established for internet service providers or other internet-related entities.[8]

Paragraph (e) of section 4 of the Guidelines provides that: "The Commissioner would examine the liability of a web page designer under the *Act* if the designer played an active role in initiating, conceiving, drafting or shaping a representation that raised issues under the *Act*". Charges against non-internet advertising agencies or intermediaries have been rare.[9] A firm, such as a website designer or advertising agency, should only face charges or civil liability under the *Act* for internet advertising if they possessed actual knowledge of the misrepresentation which they helped to create or were willfully blind. The Bureau should refer to

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8 Internet intermediary liability issues have been analyzed by other Canadian bodies. Any rules concerning the liability of intermediaries for misleading advertising should be established in a manner which takes into account analogous rules in other areas of the law. For example, in Phase 1 of its Tariff 22 decision, the Copyright Board decided that persons who fall under the common carrier exception under paragraph 2.4(1)(b) of the *Copyright Act* (which generally includes all internet intermediaries such as the internet service provider of the person making the work available on the internet) do not "communicate" a given "work". However, an entity cannot fall under the common carrier exception if it has acted in concert with the person who made the work available or if the entity does not confine itself to the role of an internet intermediary (decision reported at (1999), 1 C.P.R. (4th) 417). The Society of Composers, Authors and Music Publishers of Canada (SOCAN) has applied for judicial review of this decision. Industry Canada commissioned an investigation into the liability issues raised by content posted on the internet. This resulted in a 1997 report, entitled *Cyberspace is Not a No Law Land* (Cat. No.: C2-312/1997E), which contains an extensive discussion of the legal principles under which various internet actors may face content-related liability in Canada.

9 The only case of which we are aware is *R v. Foote, Cone & Belding Advertising Limited* (1977), 34 C.P.R. (2d) 26 (Ont. Co. Ct.).

that level of culpability in the Guidelines in discussing potential civil liability. Paragraph (f) appears to address this point in the criminal context.

IV. CONCLUSION

The Sections commend the Bureau for its work on the Guidelines. They provide useful and timely guidance to firms operating on the internet. At the same time we urge the Bureau to consider the modifications outlined above. These would improve the usefulness of the Guidelines, and would make them conform more closely with the practice and approach of the internet business and with the decided cases for other media.