

December 20, 2002

Larry Bryenton
Senior Competition Law Officer
Competition Bureau
Fair Business Practices Branch Division C
50 Victoria Street
Hull, Quebec K1A 0C9

Dear Mr. Bryenton,

RE: Draft Guidelines on Internet Advertising

The National Competition Law Section and National Media and Communications Law Section of the Canadian Bar Association (the CBA Sections) are pleased to offer their comments on the Competition Bureau's revised draft guidelines on Internet advertising, *The Competition Act and Representations on the Internet: A Guide to Compliance with the Competition Act When Making Representations On The Internet*. This submission follows our August 2001 submission on the Bureau's first draft guidelines in the area: *Staying 'On-Side' When Advertising On-Line: A Guide to Compliance under the Competition Act When Advertising on the Internet*.

The CBA Sections commend the Bureau for seeking to provide guidance related to on-line advertising. As the revised draft Guidelines note, misleading advertising laws are the same whether the communication occurs through the Internet or in any other medium. Nevertheless, it is helpful that the Bureau provide guidance on its enforcement approach in this area, given the unique aspects and relative novelty of Internet communications.

The CBA Sections expressed concern in the 2001 submission that the first draft Guidelines went further than the established rules applicable to misleading advertising. We expressed the view that they purported to establish rules different from, or more restrictive than, those that apply to other media. Special rules applying to the Internet have not been established in law and they should not be. Many of the concerns in the 2001 submission pursued this theme. The CBA Sections are pleased that many of the 2001 comments have influenced the Bureau in redrafting the Guidelines. Many of the changes recommended in the 2001 submission have been incorporated, or the Guidelines altered to avoid the issue raised.

This submission will address some of the recommendations not adopted from the 2001 submission, and offer specific comments on the new draft Guidelines.

CHANGES NOT IMPLEMENTED

The 2001 submission noted a number of statements in the first draft Guidelines that would be both clearer and more helpful if supported by a footnote referring to case law or other sources. While the revised Guidelines contain some supporting references, a number of propositions remain unsupported. We urge the Bureau to include appropriate citations and references in the Guidelines, particularly with respect to:

Part 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." It would be helpful for the Guidelines to indicate where the phrase has been so interpreted.

Part 4.1, second paragraph — "The Bureau has taken the position that disclaimers which expand upon and add information to the principal representation do not raise an issue under the Act". Again, it would be helpful if the Guidelines provided the reference to the Bureau's earlier articulation of this position.

The discussion in Part 4.1, dealing with disclaimers, is much improved from the first draft Guidelines. The Guidelines now contain some recognition of the inherent flexibility and creativity of Internet technology. Nevertheless, the approach to disclaimers remains too restrictive for the medium of communication. Disclaimers on the Internet, like all disclaimers, must be evaluated in their context, and no higher obligation with respect to disclaimers on the Internet may be established than is provided for in the law generally. This issue is discussed in greater detail below.

The issue of media liability has been substantially rewritten in the revised draft. The approach is significantly improved, although, as noted below, we believe additional improvements could be made.

SPECIFIC COMMENTS ON THE REVISED DRAFT GUIDELINES

1. Differential Pricing

In Part 2.1, we suggest redrafting the final paragraph as follows:

This test is not limited to representations that could influence strictly on-line purchases, but includes on-line representations that could influence off-line purchasing decisions as well. Businesses should take care to disclose differences between purchasing environments. For example, while it is perfectly proper to have different prices through

different distribution channels (eg. on-line vs. in-store vs. catalogue), if price differences exist between an on-line purchase and in-store or other purchase methods it is important that there be no misleading representation respecting such differences. Not disclosing these differences may be viewed as materially misleading, depending on the rest of the representation made, and the context of the advertising. Care should be taken to avoid giving the impression that the prices are the same in each channel, if they are not.

These changes would remove the potentially misleading inference that the Bureau discourages different pricing in different distribution channels where there is no legal reason to prevent such pricing.

2. 'Twenty-four Hour Support' Issue

In Part 2.2, General Impression Test, an example is given in the first paragraph, that on-line statements of "24 hour on-line shopping" and "technical support available on-line" might imply that technical support is available both on-line and 24 hours. The CBA Sections question this conclusion. Failure to disclose any limitation on technical support would only constitute a material misrepresentation if the layout of the website led to the implication that both shopping and technical support are available 24 hours. The example should either be deleted or revised to indicate that it would depend on all the circumstances whether there is a material representation.

3. 'Review of Entire Website'

In the final paragraph of Part 2.2, the CBA Sections propose rewording the initial sentence to make it clear that the law is the same regardless of the media. We suggest that the sentence read:

Depending upon the circumstances in the particular case, consumers may not read an entire website, just as they may not read every word on a printed page.

4. Advertising Agency Liability

In the third paragraph of Part 3, Liability for Internet Representations, the CBA Sections suggest adding "advertising agencies and" before "web page designers", to acknowledge that advertising agencies sometimes also play a role in Internet advertising. Again, that would be consistent with the application of the law to other media.

5. Examples Need Analysis

The examples in Part 3 are not as helpful as they might be, as they do not analyse the reasons for the conclusions. Giving the reasons for the conclusion, as well as references to case law and past Bureau statements on advertising agency liability, will improve the usefulness of the Guidelines.

6. Publisher's Defense

The final paragraphs of Part 3 deal with the defence under sections 60 and 74.07 of the Competition Act for publishers, broadcasters, etc. It would be useful and appropriate to add the following after the required conditions for the exceptions under sections 60 and 74.07:

It is the Bureau's view that this defense applies in the on-line context as well, and will generally be available as a defense to Internet service providers, web hosts and firms performing functions similar to those performed by publishers and broadcasters.

7. Disclaimer Placement

The opening statement in Part 4.1(a) of the revised draft Guidelines provides: "Generally the disclaimer should appear on the same screen and close to the representation to which it relates." In the view of the CBA Sections, this is sufficiently unrealistic to make such statement of a desired norm unhelpful. The discussion that follows in Part 4.1(a) is, however, generally helpful, and reflects the redrafting efforts of the Bureau. The CBA Sections again urge the Bureau to delete the statement that disclaimers should generally appear on the same screen as the primary representation. The requirement is at odds with the nature of the technology, and would likely encourage website designs that fail to use technology in a way that would maximize the chances of consumers being fully informed. Rather, the emphasis in the Guidelines should be that, however placed and designed, disclaimers must be likely to come to the attention of the target audience to be effective. The CBA Sections are also concerned that the treatment of disclaimer location in Part 4.1(a) is significantly different than the use of hyperlinks discussed in Part 4.1(b). Hyperlinks should be acceptable and the Bureau should explicitly acknowledge this, in the view of the CBA Sections.

8. Disclaimer Notices

The CBA Sections are of the view that the statement in Part 4.1(a), which deals with the location of disclaimers, is not appropriate. The sentence reads:

For example, text prompts such as 'see below for restrictions on eligibility' may be appropriate whereas 'see below for details' may not.

This example may set a standard higher than that set by the case law. In any case the proposed notice would be inappropriate where there are multiple issues addressed in the disclaimer, because then the notice respecting the disclaimer would, on the logic of the example, have to refer to each such issue. The use of the words "may", "may be" and "may not" imply a certain flexibility and mutes the concern of the CBA Sections, but nevertheless we are of the view that the particular example suggests a higher standard than does the law, and should be removed.

9. Technology Issues

With regard to the third paragraph of Part 4.1(a), the CBA Sections are of the view that a business advertising on-line should take into account technologies in a reasonable manner and take account of how a disclaimer is viewable by consumers using all standard available types of

hardware or software. The current wording of the first sentence of this paragraph is too broad, calling for all possible viewing options to be considered. Expecting an advertiser to support all possible viewing options is unreasonable, given the rapid change in the technology and the fact that new options may be used in a business context whilst the advertisement may be consumer directed.

10. Consistency with Telemarketing Guidelines

In Part 5 of the revised draft Guidelines, the CBA Sections propose adding the word "voice" to the second sentence, so that it would then read:

The Bureau interprets the terms "interactive telephone communications" to mean live voice communications between two or more persons.

This is consistent with the Bureau's position on telemarketing, as set out, for example, in the pamphlet "What You Should now About Telemarketing" or the Bulletin "Telemarketing: Section 52.1 of the Competition Act". Indeed, the Telemarketing Bulletin expressly provides that the telemarketing provisions do not apply to Internet communications, and these Guidelines should say so as well, to be consistent.

CONCLUSION

The revised Guidelines will provide useful guidance to businesses operating on and employing the Internet. The CBA Sections appreciate the Bureau's efforts to improve the Guidelines. We urge the Bureau to consider our further suggestions, in the hope that they may improve the usefulness of these Guidelines yet further.

Yours very truly,

Bruce M. Graham
Chair
National Competition Law Section