

Law 2.0 – The New Legal Implications of Web-based Advertising and Marketing

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Introduction

The way Canadians use the Internet has changed. They are no longer satisfied with scrolling through text-based pages. Today's users expect web applications that allow them to create, share and edit content. These applications form the foundation of Web 2.0 – “a perceived second generation of web-based communities and hosted services which aim to facilitate creativity, collaboration and sharing.”²

Web 2.0 applications can play an important role in a company's online presence. The applications encourage users to participate on corporate websites. This participation can increase website traffic, attract new customers, and improve customer loyalty. For these reasons, it is anticipated that Internet advertising revenues in Canada could exceed television advertising revenues as early as 2010.³

Canon, for example, used web-based marketing to “forge an emotional connection between its high-tech cameras and target consumers.”⁴ It developed the award-winning “Tell Your Story” campaign that asks consumers to submit 12-photo stories. The submissions are hosted on a microsite where visitors can vote for their favourites.⁵

Online advertising, however, raises unique legal and ethical considerations. Lawyers advising on these campaigns need to be familiar with the laws and guidelines that affect online advertising. This familiarity will allow lawyers to tailor

¹ The authors would like to thank Ken Bursey for his assistance in preparing this paper.

² Mark Hayes, “User-generated content: an uneasy fit with copyright law” *The Lawyer's Weekly* (2 May 2008) (QL).

³ Canadian Radio-television and Telecommunications Commission, *New Media Background*, online: Canadian Radio-television and Telecommunications Commission <<http://www.crtc.gc.ca/ENG/media/media1.htm>>.

⁴ “2008 Digital Marketing Awards: Online Advertising” *Marketing Magazine* (3 November 2008), online: Marketing Magazine <<http://www.marketingmag.ca>>.

⁵ *Ibid.*

their advice in a way that ensures that a campaign is both creative and legally compliant.

This paper discusses exploiting online marketing opportunities while minimizing their legal risks. It consists of three parts. Part one introduces the legislation and guidelines relating to online advertising in Canada. Part two identifies specific online applications and examines the unique legal considerations for each. Part three discusses the jurisdictional issues that arise due to the global nature of the Internet.

PART ONE: LEGISLATION AND CODES

Online advertising is not governed by any one comprehensive piece of legislation. Therefore, lawyers advising on these campaigns must consider several areas of the law. It may also be helpful to refer to non-binding industry guidelines that outline best practices.

This part of the paper identifies the areas of law and industry guidelines that affect online advertising.

Law

The following is a non-exhaustive list of legal issues that may be triggered by online marketing:

- (a) deceptive marketing practices;
- (b) privacy; and
- (c) intellectual property.

Each will be discussed in turn.

Deceptive Marketing Practices

In Canada, the *Competition Act*⁶ prohibits misleading representations and deceptive marketing practices.⁷ The Competition Bureau explains that “[t]he same basic rules

⁶ R.S.C. 1985, c. C-34.

that govern truthfulness in traditional advertising and marketing practices apply to on-line representations and on-line marketing practices.”⁸ Advertisers, therefore, should ensure that the representations posted on their websites do not “create a false or misleading impression.”⁹

Disclaimers can be used to clarify representations.¹⁰ It should not be assumed, however, that a user will read the entire website.¹¹ Disclaimers should be displayed “clearly and conspicuously” so that they are likely to be read by users.¹²

Advertisers should consider requiring website visitors to click through disclaimers that are critical in clarifying a representation. The click-through method helps ensure that visitors have at least seen the disclaimer.

The click-through method, however, is not required for every disclaimer. The Competition Bureau will consider the following general principles “when determining whether an on-line disclaimer is sufficient to alter the general impression created by the principal representation.”

- (a) *Location of the Disclaimer:* In some cases, it is sufficient to have a disclaimer located on a separate web page from the principal representation. Generally, however, the disclaimer should appear on the same screen as the representation.
- (b) *Attention-Grabbing Tools:* Advertisers should avoid using attention-grabbing tools such as graphics, sounds or images to distract consumers’ attention away from disclaimers.
- (c) *Prominence of Disclaimer:* Advertisers should display disclaimers in a font size and colour that ensure they are noticeable and likely to be read by consumers.

⁷ Competition Bureau Canada, *Application of the Competition Act to Representations on the Internet* (Information Bulletin) at 3.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.* at 8.

¹¹ *Ibid.* at 5.

¹² *Ibid.* at 7.

- (d) *Accessibility*: Disclaimers should be accessible to all users. Therefore, advertisers should not rely solely on audio disclaimers because not all devices have audio technology. Advertisers should also consider whether disclaimers should be available in a durable form that consumers can save or print.
- (e) *Repetition*: In some cases, it might be appropriate to repeat a disclaimer at several points on the website.

Privacy

Web 2.0 applications allow users to interact on corporate websites. This interaction typically requires users to share personal information with their corporate hosts. Corporations must comply with privacy laws when collecting and protecting users' personal information.

Canada's private sector is generally governed by the *Personal Information and Electronic Documents Act* ("**PIPEDA**").¹³ *PIPEDA* applies equally to paper-based and electronic commercial activities.¹⁴

Under *PIPEDA*, corporate websites are required to "fully and accurately" disclose the following:

- (a) what personal information is collected;
- (b) why it is collected;
- (c) how the information is used; and
- (d) how it will be protected.¹⁵

The user must provide informed consent before their personal information can be collected, used or disclosed.¹⁶ Informed consent is a significant issue in online marketing because of the astounding amount of personal information that can be collected online and the ease with which it can be collected, cross-referenced, used

¹³ S.C. 2000, c. 5.

¹⁴ Industry Canada, *Privacy for Business*, online: Industry Canada <http://www.ic.gc.ca/epic/site/ecic-ceac.nsf/en/h_gv00464e.html>.

¹⁵ Online: Office of the Privacy Commissioner of Canada <http://www.privom.gc.ca/fs-fi/02_05_d_13_e.asp#001>.

¹⁶ *Ibid.*

and shared. Therefore, websites' privacy policies should be easily accessible to users.

Even with a user's informed consent, a corporation has "to limit collection, use and disclosure to purposes that a reasonable person would consider appropriate under the circumstances."¹⁷

There are business reasons apart from complying with *PIPEDA* for posting a sound, accessible privacy policy. The Office of the Privacy Commissioner of Canada suggests that:

[r]especting and protecting privacy is a key element of good customer relations – and that makes it a key element of competitive advantage. Your customers want privacy,...and your competitors are going to provide it.¹⁸

Certain provinces have enacted privacy legislation deemed to be substantially similar to *PIPEDA*.¹⁹ In these jurisdictions, the collection of personal information for commercial use within the province is exempt from *PIPEDA*.²⁰ The following provincial Acts have been deemed to be substantially similar:

- (a) Quebec's *An Act Respecting the Protection of Personal Information in the Private Sector*;²¹
- (b) Alberta's *Personal Information Protection Act*;²²
- (c) British Columbia's *Personal Information Protection Act*;²³ and

¹⁷ Office of the Privacy Commissioner of Canada, *Complying with the Personal Information Protection and Electronic Documents Act* (Fact Sheet) (20 June 2005), online: Office of the Privacy Commissioner of Canada <http://www.privcom.gc.ca/fs-fi/02_05_d_16_e.asp>.

¹⁸ *Ibid.*

¹⁹ Office of the Privacy Commissioner of Canada, *Your Privacy Responsibilities* (A Guide for Businesses and Organizations) (Ottawa: September 2006) at 3.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

- (d) Ontario's *Personal Health Information Protection Act* (limited to privacy issues in matters relating to health care).²⁴

Advertisers operating in these jurisdictions should also review the provincial Acts.

Intellectual Property

Intellectual property "has been under siege since digital technologies became widespread."²⁵ Users can easily store and distribute files on the Internet.

Intellectual property concepts, such as copyright and trade-marks, are ill-suited for this environment. The operators of corporate websites, however, must make best efforts to ensure that users are not posting content that contravenes the *Copyright Act*²⁶ or *Trade-Marks Act*.²⁷

Guidelines

Lawyers advising on web-based campaigns should also refer to industry associations' guidelines. These guidelines are not legally binding. They outline, however, the standards being followed by other advertisers. Consumers may expect a corporate website to adopt the high standards they have experienced elsewhere on the Internet. Therefore, compliance with industry standards may provide a competitive advantage.

The following are examples of guidelines created by advertising-industry organizations:

- (a) *Canadian Marketing Association's Code of Ethics and Standards of Practice* (the "**Code**");²⁸
- (b) *The Principles for User Generated Content Services* (the "**Principles**");²⁹ and

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Lesley Ellen Harris, Editorial, *Copyright and New Media Law Newsletter* 11:3 (2007) (QL).

²⁶ R.S.C. 1985, c. C-42.

²⁷ R.S.C. 1985, c. T-13.

²⁸ Canadian Marketing Association, *Code of Ethics and Standards of Practice* (revised December 2005).

(c) *Advertising Standards Canada's Canadian Code of Advertising Standards (the "CCAS").*³⁰

Each will be discussed below.

Code of Ethics and Standards of Practice

The Canadian Marketing Association ("**CMA**") publishes the Code.³¹ Its purpose is "to identify the ethical principles and best practices...essential to the conduct of marketing...in Canada."³² CMA members who refuse to follow the Code can be expelled for non-compliance.³³

The Code includes a section addressing Internet marketing.³⁴ The section requires websites to include a privacy policy.³⁵ The privacy policy "must be provided in every location, site or page from which the marketer is collecting such data."³⁶

The Principles for User-Generated Content Services

In 2007, several commercial copyright owners, including Disney, Sony, and NBC, in cooperation with a number of user-generated content ("**UGC**") websites, including MySpace and Veoh, published the Principles.³⁷ The Principles' objectives include eliminating copyright infringing material from UGC websites. The parties believe that "the Principles...strike a balance that...will result in a more robust, content-rich online experience for all."³⁸

²⁹ CBS Corporation *et al.*, *Principles for User Generated Content Services*, online: <<http://www.ugcprinciples.com>>.

³⁰ Advertising Standards Canada, *Canadian Code of Advertising Standards* (revised December 2005) online: Advertising Standards Canada <<http://www.adstandards.com/en/consumerSite/14CodeClauses.pdf>>.

³¹ *Supra* note 28.

³² *Ibid.* at D1.

³³ *Ibid.* at Q4 c.

³⁴ *Ibid.* at N5.

³⁵ *Ibid.* at N5.7.

³⁶ *Ibid.* at N5.7.

³⁷ *Supra* note 2.

³⁸ *Supra* note 29.

The Principles suggest that:

- (a) UGC websites should post Terms of Service (“**TOS**”) prohibiting the uploading of infringing materials; and
- (b) the operators of UGC websites should remove infringing material.

The Principles, however, have not been universally accepted. They “have been criticized for their limited protections for fair use, the required use of filtering technologies and the presumption of infringement for any content not on a ‘whitelist’ approved by copyright owners.”³⁹

Canadian Code of Advertising Standards

Advertising Standards Canada publishes the CCAS. The CCAS is “designed to help set and maintain standards of honesty, truth, accuracy, fairness and propriety in advertising.”⁴⁰

The Internet helps marketers produce creative, interactive advertising campaigns. There are, however, general legal and ethical considerations that must always be addressed. The above information is a non-exhaustive list of legislation and guidelines that should be considered for any campaign. Part two of this paper will focus on specific web applications and their unique legal issues.

Part Two: Specific Applications

Dave Forde, founder of Protefectio.com suggests that “[d]igital communities have...reached critical mass, and words like blog and wiki have become as commonplace as e-mail.”⁴¹ Corporations can harness the popularity of Web 2.0 by developing web-based campaigns that demand consumer participation.

This part of the paper examines specific elements of Web 2.0 that advertisers can incorporate into their online campaigns. The following elements will be examined:

³⁹ *Supra* note 2.

⁴⁰ *Supra* note 30.

⁴¹ Michelle Halpern, “Somewhere hidden behind MySpace and YouTube you’ll find the untapped power of social media” *Marketing Magazine* (29 October 2007), online: Marketing Magazine <<http://marketingmag.ca>>.

- (a) UGC;
- (b) social networking;
- (c) viral marketing;
- (d) blogging; and
- (e) virtual worlds.

The main legal issues that arise from each element will be discussed.

User-Generated Content

UGC is content provided by users and made publicly available on the Internet. It includes posting photographs and videos, commenting on existing content, or simply recommending hyperlinks that direct other users to interesting sites.

UGC is not new. Amazon.com, for example, has been encouraging customers to write and post book reviews on its site since 1995.⁴² It has been projected, however, that UGC websites will grow to attract “101 million users in the U.S. and earn \$4.3 billion in ad revenue” by 2011.⁴³ Therefore, businesses are increasingly incorporating UGC into their websites. In fact, some businesses are developing advertising campaigns around UGC. Steve Weiss observes that:

[o]nce upon a time, it was a put down to say that a piece of marketing collateral looked like an adolescent created it. Today, the online world and its associated demographic realities have made such an assessment almost a compliment if not an outright necessity.⁴⁴

ING Direct, for example, used UGC for its successful “Canadian Superstar Saver Search” contest. The contest, designed to increase brand awareness, asked consumers to submit videos showing original ways to save money. The videos were posted to YouTube and to ING Direct’s corporate website. Visitors to YouTube

⁴² Christine Frey and John Cook, “How Amazon.com survived, thrived and turned a profit: E-tailer defied predictions it would do none of those” *Seattle Post-Intelligencer* (28 January 2004), online: Seattle Post Intelligencer <<http://seattlepi.nwsourc.com>>.

⁴³ Interactive Advertising Bureau, *User Generated Content, Social Media, and Advertising – An Overview* (April 2008) at 1.

⁴⁴ Steve Weiss, “Subway vs. Quiznos”, QSR Magazine, online: <http://www.qsrmagazine.com/articles/columnists/steve_weiss /1008/>.

could vote for their favourite video. This type of campaign is referred to as consumer-generated advertising (“**CGA**”).

CGA increases consumer engagement in a campaign. It is, however, legally problematic.⁴⁵ The legal issues raised by CGA include the following:

- (a) intellectual property;
- (b) false advertising; and
- (c) privacy and defamation.

Each of these issues is examined below.

Intellectual Property

The operators of CGA websites must adhere to copyright law. The consumer holds copyright in the content he/she creates. Therefore, the advertiser needs the consumer’s permission to use the content. Without permission, the advertiser is in jeopardy of contravening the *Copyright Act*.

Advertisers, however, should not require consumers to assign ownership of their content. The preferred method is for the advertiser to obtain a license to use the content. A license is less likely to be successfully challenged in court.

The license should be sufficiently broad that the advertiser has flexibility to use the content in a variety of ways and at different times. For example, the corporation may want to use a consumer’s contest submission to promote the same contest in subsequent years.

The following is an example of a broad license:

...provides the company with a worldwide license ... to use, copy, edit, publish and distribute the material, in any media, forever, as well as the right to use the contributor’s name, likeness and performance.

⁴⁵ *Supra* note 2.

Advertisers should also ask consumers to waive their moral rights to the content. Moral rights are a bundle of rights in the *Copyright Act* that provide the author of a work with the ability to:

- (a) ensure the work's integrity; and
- (b) decide whether to be associated with the work.

Moral rights cannot be assigned to the advertiser. They can, however, be waived by the author.⁴⁶

In some cases, the consumer may not hold all of the rights in the content. For example, the consumer may submit a short film that includes music. Although the consumer created the film, he or she may not own the rights to the accompanying music. The rights to the music may be held by a third party. The consumer, therefore, cannot fully license the submission.

There are several ways an advertiser could be liable for handling submissions that are not fully licensed. Storing the material on a server, for example, creates an unauthorized reproduction. In addition, the third party's public performance rights are infringed when the content is posted on the website. These activities might contravene the *Copyright Act*.

As an advertiser, it is impossible to guarantee that CGA will not infringe third-party copyright. The procedures listed below, however, will help limit an advertiser's exposure to liability.

First, the website's TOS should outline the type of content acceptable for submission. Consumers should be instructed to limit their submissions to material for which they own all of the rights. This information should be presented in an easy-to-read format. It should never be assumed that users have an understanding of copyright law.

⁴⁶ *Supra* note 26 at s. 14.1(2).

Second, consumers should be required to warrant that they own all copyright in their submission. This requirement demonstrates to third-parties and the courts the advertiser's intentions to avoid posting infringing content.⁴⁷

Third, the advertiser should reserve the right to edit and remove offending submissions. This right should be highlighted in the website's TOS.

Fourth, the consumer should indemnify the advertiser for any liability. It is important to note, however, that enforcing an indemnity may be difficult if the consumer lacks the funds to satisfy a claim.

Finally, the advertiser should consider reviewing submissions. Submissions clearly offending the *Copyright Act* or *Trade-marks Act* should be removed.

The above procedures, however, are ineffective if the consumer is a minor. As the CMA's Code suggests: "[m]arketers must recognize that children are not adults and that not all marketing techniques are appropriate for children."⁴⁸ The warranties contained in a website's TOS, for example, are unenforceable against minors. For this reason, advertisers should prohibit minors from submitting content without the consent and an indemnity from the minor's parent or legal guardian.

False Advertising

Advertisers must ensure that the representations made in CGA do not offend the *Competition Act*. Users' comments cannot be misleading or deceptive.

Product performance claims made by a user, for example, should be reviewed by the advertiser for accuracy. Performance claims are representations about the quality, efficacy or length of life of a product. Section 74.01(1)(b) of the *Competition Act* prohibits performance claims that are not based on an "adequate

⁴⁷ *Supra* note 2.

⁴⁸ *Supra* note 28 at K2.

and proper test."⁴⁹ The onus is on advertisers to ensure performance claims have been properly substantiated.⁵⁰

For these reasons, advertisers should:

- (a) review the content and remove submissions that include misleading comments; and
- (b) disclose the fact that the consumers are the authors of the comments.

Advertisers, however, should be especially cautious when dealing with user testimonials. Section 74.02 of the *Competition Act* prohibits altering testimonials to make the comments more favourable towards the product.⁵¹ Editing user testimonials, therefore, is a risky activity for advertisers. The advertiser should either post the testimonial as submitted or remove the testimonial in its entirety.

Privacy, Defamation, and Disparaging Remarks

Consumers may post comments that invade the privacy of or defame and disparage other individuals or companies. The victims of these comments could seek damages against the advertiser operating the website.

In the United States, sandwich chain Subway launched an action against its rival Quiznos over comments made in CGA.⁵² Quiznos ran a contest that encouraged the public to post videos that drew "a comparison between Quiznos and Subway with Quiznos being the superior."⁵³ Subway claims the CGA contained false statements and depicted Subway in a disparaging manner.⁵⁴ Subway believes that Quiznos

⁴⁹ Competition Bureau Canada, *Performance representations not based on adequate and proper tests*, online: Competition Bureau Canada <<http://www.competitionbureau.gc.ca>>.

⁵⁰ *Ibid.*

⁵¹ Competition Bureau Canada, *Untrue, misleading or unauthorized use of tests and testimonials*, online: Competition Bureau Canada <<http://www.competitionbureau.gc.ca>>.

⁵² Louise Story, "Subway sues Quiznos over user-made ads" *The International Herald Tribune* (28 January 2008), online: The International Herald Tribune <<http://www.iht.com/articles/2008/01/28/technology/adco.php>>.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

should be responsible for CGA that it solicited and posted.⁵⁵ The case is scheduled to be heard later this year.⁵⁶

A website's TOS, therefore, should prohibit CGA that comments on individuals or competitors. The advertiser may also consider monitoring the website for offending content. Offending content should be promptly removed in accordance with the website's published "take down" policy.

Social Networking

Social networking sites are online communities where users share personal information and opinions. Facebook and MySpace are examples of popular social networking sites. Facebook alone boasts over 150 million active users.⁵⁷

These sites offer marketing opportunities. Facebook, for example, sells "Engagement Ads". These ads allow Facebook users to comment on a company's campaign or become a "fan" of a particular product.

TD Canada Trust ("**TD**") experienced success with its "Split It" campaign on Facebook. It features "an online calculator that lets roommates divide household expenses."⁵⁸

Lawyers, however, need to consider the legal issues inherent in social networking. These concerns include:

- (a) being subject to a social networking site's TOS;
- (b) privacy rights; and
- (c) defamation or cyberbullying.

These issues are discussed below.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Facebook, *Facebook Factsheet*, online: Facebook <<http://facebook.com/press/>>.

⁵⁸ Jeromy Lloyd, "The Society of Social Media" *Marketing Magazine* (29 October 2007), online: Marketing Magazine <<http://www.marketingmage.ca>>.

Subject to a Social Networking Site's TOS

The easiest way for an advertiser to participate in social networking is by creating a corporate page ("**Page**") on a social networking website. Facebook, for example, allows corporations to create Facebook Pages. Facebook Pages "can be used to conduct commercial activities, including ... transactions, advertising, fundraising, contests, or promotions."⁵⁹

Rogers Communications Inc. ("**Rogers**"), for example, has its "urMusic" Page. Visitors to the Page can access exclusive music and interviews from popular musicians. Rogers uses the Page to direct online traffic towards its online music store where users can purchase songs and download them to their PCs or mobile phones.

The downside of creating a Page is that the advertiser is bound by the host website's TOS. The TOS may include onerous terms for advertisers. Under Facebook's TOS, for example, an advertiser:

- is solely responsible for selecting the correct setting that restricts Facebook Pages to adult use;
- is responsible for protecting the security of personal information the Facebook Page gathers from users;
- waives its right to have disputes with Facebook settled outside of an arbitration process or the Californian courts;
- agrees to indemnify Facebook against any claim arising from the operation of the Facebook Page; and
- grants to Facebook an "irrevocable, perpetual, non-exclusive, transferable, fully paid, worldwide license...to use, copy, publicly

⁵⁹ Facebook, *Additional Terms Applicable to Facebook Pages* (revised 7 November 2007), online: Facebook <http://www.facebook.com/terms_pages.php>.

perform, publicly display, reformat, translate, excerpt...and distribute" the content posted on the FaceBook Page.⁶⁰

For these reasons, an advertiser planning to create a Page on a social networking website should:

- (a) carefully review the website's TOS;
- (b) periodically review the social networking website's TOS because some sites, such as Facebook, reserve the right to change the TOS without notice; and
- (c) consider posting on its Page the guidelines or terms of use for users visiting the Page.

Privacy

Social networking sites raise privacy issues due to the volume and quality of personal information they collect. This feature of social networking has not gone unnoticed by unscrupulous individuals. Recently, Facebook launched a lawsuit "against a Toronto-based pornography company for making more than 200,000 attempts to hack into its servers to obtain personal data about its users."⁶¹

For this reason, advertisers using social networking should warn users about privacy concerns. The CMA's Code states that "[m]arketers must clearly display a privacy policy on their website."⁶² The policy "must be provided in every location, site or page from which the marketer is collecting such data."⁶³ Users should be instructed to use caution when deciding with whom to communicate and what information to share.

Advertisers may also decide to create their own social networking applications on a corporate site. These initiatives must comply with *PIPEDA*. Therefore, the site operators are charged with securing the users' personal data. The site should

⁶⁰ Facebook, *Terms of Use* (revised 23 September 2008), online: Facebook <<http://www.facebook.com/terms.php?ref=pf>>.

⁶¹ Kevin Lo, "Social networking sites pose danger to law firms" *The Lawyers Weekly* 27:35 (25 January 2008) (QL).

⁶² *Supra* note 28 at N5.7.

⁶³ *Ibid.*

require password entry and encryption for the collected data. The site's security systems should be routinely probed by the operators for possible weaknesses.

Defamation and CyberBullying

Users may abuse social networking sites. For example, they may defame or bully other users.⁶⁴ It is important to explain acceptable conduct. The advertiser should create "Community Standards" that outline the type of content that is appropriate. Further, the advertiser should consider monitoring the site and removing content that offends the guidelines.

Viral Marketing

Viral marketing describes campaigns that encourage consumers to spread a company's marketing message to other consumers. This type of campaign is effective because, according to a 2007 Nielsen study, "consumer recommendations are the most trusted form of advertising around the world."⁶⁵ By introducing these campaigns online, an advertiser has the opportunity to quickly spread its message to a global market.

Hotmail, for example, successfully used viral marketing. Each message sent from a Hotmail account included a link asking the recipient to create a new Hotmail account. Therefore, Hotmail customers were advertising the service to their friends simply by using the product.

Some viral marketers, however, have used deceptive tactics. The Word of Mouth Marketing Association ("**WOMMA**") warns that "[s]leazy behaviour [by advertisers] will be exposed by the public and backfire horribly on anyone who attempts it."⁶⁶ For this reason, WOMMA publishes a Code of Conduct establishing guidelines for

⁶⁴ "Facebook hurts society: 24% of Canadians say" *Canadian Press* (14 April 2008), online: Marketing Magazine <<http://www.marketingmag.ca>>.

⁶⁵ *Supra* note 43 at 2.

⁶⁶ Word of Mouth Marketing Association, *Word of Mouth 101: An Introduction to Word of Mouth Marketing* (2007).

advertisers using techniques such as viral marketing.⁶⁷ The code suggests that advertisers:

- (a) respect that consumers – not advertisers – are fundamentally in charge of the consumer-advertiser relationship;
- (b) disclose the origins of comments and the relationship between the commenter and the advertiser;
- (c) respect the rules of any online communications venue;
- (d) manage relationships with minors responsibly; and
- (e) respect the privacy of the consumers.⁶⁸

Some viral marketing campaigns can trigger privacy issues. In one case, for example, a man complained to the Privacy Commissioner about a contest he entered through an electronic newsletter.⁶⁹ The man was given additional chances to win the contest by providing his friends' email addresses. He became embarrassed when his friends were sent emails addressed from him offering a chance to enter the contest.

The Assistant Privacy Commissioner, however, decided the contest complied with *PIPEDA*. The advertiser provided the complainant with contest rules that explained how the information collected would be used. The complainant confirmed reading the rules at the time of entering the contest.

For these reasons, advertisers should disclose the nature of their viral campaigns. The consumers should have easy access to a privacy policy describing how their personal information will be used.

Blogging

Blogs are frequently updated websites. Entries are arranged in reverse chronological order and may include links, images, or the blogger's comments.

⁶⁷ Word of Mouth Marketing Association, *Word of Mouth Marketing Ethics Code of Conduct* (2005).

⁶⁸ *Ibid.*

⁶⁹ *Re. PIPEDA Case Summary #373*, 2007 WL 5211207 (Can. Privacy Commr.) (WL).

Blogs have grown in popularity. In 2006, Tecnorati.com, a website that indexes blogs, announced “that it tracked its 50 millionth blog.”⁷⁰

Advertisers recognize the power of blogging. EMarketer reports that “[a]s of December 2006, 19% of the fastest-growing private companies in the U.S. reported use of blogging as a form of communication.”⁷¹ It allows them “to reach out to customers in an informal way, put a human face on the company, or provide quick and easy information.”⁷² Several companies, however, have experienced public relations crises by using blogs.

Sony, for example, was embarrassed “[w]hen it was revealed that [the company] was behind the seemingly user-generated ‘All I Want For Xmas Is A PSP’ blog.”⁷³ The company was criticized for misleading consumers. The incident even created a new word: “Flog” (a fake blog).⁷⁴

This type of practice is frowned upon in the CMA’s Code. The Code states that “[m]arketers should avoid undercover...marketing initiatives that encourage a consumer...to believe that the marketer’s agents are acting independently and without compensation.”⁷⁵ Section 2 of the CCAS also discourages advertising “presented in a format or style that conceals its commercial intent.”⁷⁶

Advertisers should disclose their involvement in corporate blogs. This information should be easily accessible to readers.

Virtual Worlds

Virtual worlds are online environments that allow users to interact using avatars (digital characters). Second Life is a popular example of a virtual world. It has

⁷⁰ Gerry Blackwell, “The dark side of a blogging tsunami”, *Canadian Lawyer* (February 2007) 17.

⁷¹ *Supra* note 43 at 4.

⁷² *Supra* note 70.

⁷³ *Supra* note 58.

⁷⁴ *Ibid.*

⁷⁵ *Supra* note 28 at s. 15.4.

⁷⁶ *Supra* note 30.

over 8 million registered users.⁷⁷ The residents (as users are called) travel through the Second Life environment meeting other residents. Residents can even buy and sell virtual products using Linden dollars, which are exchangeable to U.S. dollars.

The popularity of virtual worlds has not gone unnoticed by advertisers. Companies such as Nike, Sony-BMG and Toyota have built storefronts and billboards in Second Life.⁷⁸ Nike even sells virtual shoes that allow Second Life avatars to run faster.⁷⁹ Brian Haven, a senior analyst studying virtual worlds for Forrester Research Inc., believes that advertisers “can get a lot of mileage out” of having a virtual world presence. He said that “[a]t this point you can make a big splash because there are not a lot of people in the pool right now.”⁸⁰

Advertisers, however, should not rush into establishing a virtual world presence without considering the risks. Perhaps, the most important consideration is how an advertiser’s intellectual property will be protected in the virtual world.

Intellectual Property

Virtual worlds are not public. They are created, operated, and owned by corporations.⁸¹ These corporations set the rules of the virtual world by requiring users to agree to terms of use. The terms of use may be unfavourable for users interested in protecting their intellectual property.

The terms of use may go as far as requiring users to relinquish their intellectual property rights in content they create in the virtual world.⁸² In this situation, advertisers would be prohibited from launching copyright infringement claims

⁷⁷ Rakshande Italia, “Canada Post Hosts holiday retail on Second Life” *Media in Canada*, online: Media in Canada <<http://www.meidaincanada.com>>.

⁷⁸ Julia Layton, “Can I make a living in Second Life?” *HowStuffWorks* (26 January 2007), online: HowStuffWorks <<http://computer.howstuffworks.com>>.

⁷⁹ Allison Enright, “How the Second Half Lives” *Marketing News* (15 February 2007).

⁸⁰ *Ibid.*

⁸¹ Susan Abramovitch and William Darling, “Preparing for the Virtual Apocalypse: Managing Business Risks in Virtual Worlds”, online: Gowlings <http://www.gowlings.com/resources/PublicationPDFs/Abramovitch_Paperonbusiness.pdf>.

⁸² *Ibid.*

against third party infringers because the advertiser would no longer hold the rights to the content.⁸³

Second Life, however, allows users to retain the intellectual property rights in their virtual creations.⁸⁴ A virtual world with this policy may be more appropriate for an advertiser interested in creating virtual world content. For this reason, advertisers should carefully read and understand the terms that govern the virtual world in which they market their products.

It is important to note, however, that simply abstaining from creating an official presence in a virtual world will not guarantee that your brand will not appear in that virtual world. Virtually Blind, a website dedicated to covering legal issues that impact virtual worlds, reported that trademark infringement was Second Life's "dirtiest little legal secret."⁸⁵ The article claims that users can purchase Ferrari cars, Rolex watches, and Gucci sunglasses for their Second Life avatars. Interestingly, none of these brands have an official presence in Second Life.

Part Three: Jurisdictional Issues

The foregoing discussion outlines the laws and guidelines that apply to online advertising in Canada. Online content created in Canada, however, can be accessed around the world. This feature is one of the key benefits of online marketing: it "grants businesses...access to a global market."⁸⁶ The down side, however, is that Internet content which is legal in Canada may infringe the laws of other countries.

The Canadian *Copyright Act*, for example, includes a "fair dealing" defence. This defence allows for the use of copyright protected works for the purpose of research, criticism or news reporting. Therefore, a website posting material under copyright

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ Benjamin Duranske, "Rampant Trademark Infringement in Second Life Costs Millions, Undermines Future Enforcement" *Virtually Blind* (4 May 2007), online: Virtually Blind <<http://virtuallyblind.com>>.

⁸⁶ *Supra* note 7 at 2.

may have a valid defence. The “fair dealing” defence, however, is not universal. Posting infringing material may expose the website operators to liability in other jurisdictions.

For this reason, it is not enough for marketers to be familiar with the laws in Canada. They should keep apprised of the legal developments around the world.

Conclusion

Web 2.0 applications can be the foundation of creative, online marketing campaigns. Lawyers advising on these projects, however, need to be aware of the unique legal issues that are created by these applications.

Lawyers should take the following steps in evaluating any online marketing campaign:

- (a) review legislation that commonly affects online campaigns;
- (b) read the advertising guidelines published by industry associations; and
- (c) consider the laws of other jurisdictions.

Lawyers evaluating online campaigns, therefore, must make best efforts to keep up-to-date on any legal developments in the evolving industry of online advertising. Familiarity with the law will allow lawyers to assist marketers in designing innovative campaigns.