

## ADVERTISING & MARKETING BULLETIN

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### STEALTH MARKETING: TO DISCLOSE OR NOT TO DISCLOSE - THAT IS THE (LEGAL) QUESTION

Stealth marketing, a subset of word-of-mouth marketing ("WOMM") strategies, is marketing that promotes a product without disclosing any direct connection between the advertiser and the message. With the stealth marketing industry valued at between US\$100-150 million and growing at 100% year, stealth marketing is fast becoming the darling of marketers around the world. However, some industry insiders are concerned about the legal issues related to the lack of disclosure of the direct marketing connection.

An executive editor of *Advertising Age* stated that "this is a practice that may be illegal ... it's probably only a matter of time before someone jumps on it" to stop it.<sup>1</sup> Commercial Alert, a U.S. based consumer protection organization, has tried to do exactly that. On October 18, 2005, it requested that the U.S. Federal Trade Commission (FTC) undertake an investigation of companies that conduct stealth marketing. Commercial Alert argued that by failing to disclose that they have been enlisted to promote products/services, stealth marketers are fundamentally fraudulent and misleading.

#### WHAT EXACTLY IS STEALTH MARKETING?

Stealth marketing involves a marketer engaging with customers without disclosing that they are in fact paid by the business for which they are marketing a product or service. For example, a business might hire an actor or charismatic person to use a certain product visibly and convincingly in locations where target consumers of such product are located. While using the product in the location, the actor will also discuss the product with people he or she meets in that location and possibly hand out samples. The actor will often be able to sell consumers on their product without those consumers even realizing it.

#### STEALTH MARKETING: SOME LEGAL ISSUES

##### *False or Misleading Advertising*

Under the *Competition Act* (Canada) (the "Act"), there are civil and criminal sanctions against false or misleading advertising in any medium. The civil prohibition states a person contravenes the Act where such person, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public that is false or misleading in a material respect.

Whether or not it is "material" can be measured by determining whether the false representation would likely lead the average person to make a decision that they believe would be advantageous to them because of the representation. Also, the general impression of the representations must also be taken into account. The criminal sanction is only triggered when such representations are done knowingly or recklessly. Similar prohibitions exist under the consumer protection legislation of most provinces.

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<sup>1</sup>USA Today, "P&G 'Buzz Marketing' Unit Hit with Complaint", October 18, 2005, available online: [http://www.usatoday.com/money/industries/retail/2005-10-18-buzz-usat\\_x.htm](http://www.usatoday.com/money/industries/retail/2005-10-18-buzz-usat_x.htm).

Whether these prohibitions apply to stealth marketing is an interesting issue but not entirely clear. In the case of stealth marketing where the marketers are making false or misleading representations about the product or service, the prohibitions against false or misleading advertising would certainly apply. However, where the marketers are making accurate representations about the product or service, it is less clear that the prohibitions would apply.

On the one hand, stealth marketers argue that since they are not saying anything false or misleading and are letting consumers reach their own conclusions regarding their motives, their activity should be allowed. On the other hand, entities such as Commercial Alert argue that by not disclosing their identity, stealth marketers are in some sense deceiving consumers as to the source of the representations made by the stealth marketers. In other words, consumers would treat representations made by a stranger differently if they knew such stranger was employed by the business that produces the product or service rather than if they knew such person was an objective third party.

Another way of looking at the issue is that stealth marketers are in fact offering endorsements or testimonials with respect to the products or services that they are marketing. In this context, the Competition Bureau (the "Bureau") has stated that representations contained in such endorsements or testimonials must be free from ambiguity, since audiences normally attach greater weight to them. In addition, consumers are more likely to accept representations about products made by other consumers when apparently based on practical use and conveyed with a candor that may itself vouch for the reliability of the representations.

While a definitive answer as to whether non-disclosure of identity is contrary to Canadian law will have to wait for judicial review in Canada, our informal discussions with the Bureau suggest that the Bureau would conclude that such practices are deceptive and misleading and thus would be contrary to the Act. This, coupled with the judicial trend under Canadian law that consumer protection legislation is interpreted broadly in the consumers' interest, suggests that marketers would be prudent to curtail their stealth marketing campaigns if they do not want the possibility of legal complications in the future.

If a court determines that a person is offside the civil regime under the Act, it may order the person not to engage in such conduct, to publish a corrective notice and/or to pay an administrative monetary penalty of up to \$50,000 in the case of a first time occurrence by an individual and \$100,000 in the case of a first time occurrence by a corporation. For subsequent orders, the penalties increase to a maximum of \$100,000 in the case of an individual and \$200,000 in the case of a corporation.

If a court determines that a person is offside the criminal regime under the Act, such person is guilty of an offence and liable (a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both; or (b) on summary conviction, to a fine not exceeding \$200,000 or to imprisonment for a term not exceeding one year, or to both. Provincial consumer protection legislation may also allow the consumer to escape liability of any kind relating to the product or service and may expose a vendor to damages as well as the loss of all profit.

## **CONCLUSION**

This U.S. debate about stealth marketing provides a warning to Canadian organizations that use such techniques without regard to the applicable advertising and marketing laws in Canada. So, how is the North American marketing industry addressing these concerns?

The Word of Mouth Marketing Association, a leading organization representing marketers who practice WOMM, states in its Code of Ethics that consumers must not be confused or misled about the true identity of the individual with whom they are communicating.<sup>2</sup> This practice has garnered favour with some marketers who had previously practiced stealth marketing. BzzAgent, one of the largest and most visible buzz marketing agencies in the U.S., decided to change its policy to require its agents to disclose their identity because it found the campaigns were actually more successful with identity disclosure than without.

In light of the foregoing, it is prudent to have WOMM marketing campaigns, especially those involving stealth marketing, reviewed by legal counsel during the initial creative planning stage of the campaign to avoid a situation where the campaign is compromised at the last minute because of a legal compliance risk resulting from misleading representations as discussed above, or any of the other myriad legal issues that may apply.

*Written by Jeff Scanlon and Bill Hearn*

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<sup>2</sup>See <http://www.womma.org/ethicscode.htm>.

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*The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.*

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