

ADVERTISING &

MARKETING

BULLETIN

*A Report on Recent
Developments in Advertising
& Marketing Law*

March 2003

TOEING THE LINE WHEN MARKETING ON-LINE

On February 18, 2003, the Competition Bureau released an **Information Bulletin** called “**Application of the *Competition Act* to Representations on the Internet**”. The Bulletin follows consultation with stakeholders and discussion of a draft guide on Internet advertising released in May 2001. Although the Bulletin is not law, it reflects the approach the Commissioner will take in enforcing the criminal and civil provisions of the Act dealing with misleading representations and deceptive marketing in relation to marketing on-line.

FALSE OR MISLEADING REPRESENTATIONS

The Bulletin stresses that the laws applicable to advertising and marketing off-line apply on-line as well. A representation will therefore violate the Act, if it 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. The Bulletin reminds businesses that:

- An on-line representation can be misleading if it omits relevant information (e.g. that off-line prices differ from on-line prices) or if it fails to disclose important differences between making on-line purchases and off-line purchases
- One should not assume that consumers read an entire Web site, just as they do not read every word on the printed page. Accordingly, advertisers should present required information so that it is noticeable and likely to be read
- A false representation can be created by the “impression” that the consumer receives by viewing a Web site rather than any one statement. For example, a consumer seeing the words “100% cotton!” on the same screen as a list of products may assume that all those products are made of 100% cotton, even if that phrase was only supposed to qualify a certain category of the products
- Businesses should ensure that representations about the business’s physical location and identity, logos, trade-marks, purpose in making the representations and relationship with the supplier are not misleading
- Any pictures of products that appear on-line should accurately illustrate the product and should be in accordance with any accompanying text

DISCLAIMERS

The Bulletin discusses disclaimers at length. The Commissioner takes the position that a disclaimer can only qualify a representation; it cannot cure or retract a false or misleading representation. The Bulletin points out that:

- In assessing whether a disclaimer is sufficient to alter a general impression created by the principal representation, the Commissioner will consider the location, prominence, accessibility, duration and repetition of the disclaimer in addition to the use of attention grabbing tools
- Hyperlinks can be an effective means of providing disclaimers

DISCLOSURES AND REPRESENTATIONS

Only in certain circumstances does the Act list specific information that needs to be disclosed. Where such information is required, for example in the context of promotional contests, the following guidelines apply:

- Disclosures must be displayed in such a way that they are likely to be read by consumers and should not require an active step such as sending an e-mail
- Hyperlinks are an acceptable means of providing disclosures unless the disclosure is a crucial piece of the representation in which case the information should be provided on the same page as the representation

JURISDICTION

Persons making representations on-line from Canada, that are accessible on-line in Canada, are required to comply with the Act. Because the Internet has a global reach, the Bulletin advises those making representations on-line from Canada to consumers in foreign countries and those making representations on-line from outside Canada to consumers in Canada to seek legal advice on whether their representations could give rise to legal liability in Canada.

LIABILITY

Who can be held liable for false or misleading representations made on-line? The Web designers who created the page? The company that commissioned the page? The Web host which operates the servers? The service providers who provide access to the Internet? The answer is "Yes"- all or any combination could be found liable depending on the circumstances.

The Bureau will look at who caused or permitted a false representation to be made, which involves a

determination of the degree of authority or control over the content and its dissemination. However, the examples provided in the Bulletin make it clear that Web designers and Internet service providers will not usually be the focus of Bureau investigations where the final decision to approve content rests with the business whose products are advertised.

This position is welcome and probably responds to complaints made by advertising and industry groups about the Draft Guide which likened Web hosts to newspaper publishers and indicated that Web hosts would have a broad obligation to assess the veracity of claims made on their Web sites. The Bulletin reflects commercial reality much more accurately than did the Draft Guide.

BUREAU ELIMINATES PROBLEMATIC ITEMS

Guidance on enforcement of representations made on the Internet is appreciated given that the Act applies to all media. The Commissioner should be lauded for addressing the areas of greatest concern to stakeholders. Some issues that were present in the Draft Guide but have been eliminated in the Bulletin, include:

- Presenting chat room and e-mail representations as examples of representations to the public
- Advising that disclaimers should be placed close on the screen to the representations to which they relate
- Demanding that issues such as shipping charges, taxes and customs duties be disclosed in advertising

A copy of the Bulletin can be found on the Competition Bureau's website at:

<http://strategis.ic.gc.ca/SSG/ct02500e.html>.

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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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