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Deceptive Online Marketing Practices: Intermediaries, what is your legal exposure?

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In recent decades, online advertising has become the single most efficient and interactive way to reach consumers and assess their behaviour. While television and print audiences continue to dwindle and overall marketing strategies that focus on these mediums are less able to effectively measure and assess performance, online advertising targets a growing market whose technological medium allows for the direct measurement of a marketing campaign's success. These changes in the marketing world, exciting and new as they may be, pose an important set of legal risks. In using and displaying online ads, merchants and intermediaries should be wary of consumer protection and competition laws, both provincial and federal, so as to avoid unpleasant surprises in the form of pricy sanctions and lawsuits. The law may not have evolved as much as the technologies, but its broad language can adapt to the modern reality so as to protect those who receive the merchant's new messages.

The two main types of online marketing are Search Engine Marketing ("**SEM**") and Social Media Marketing ("**SMM**"). Search engine companies index website content to organize and present the available information in an understandable format. Merchants offering products at retail can present themselves on top of these rankings, targeting specific keywords consumers search for. SMM is a form of display advertising that allows advertisers to present their services in an engaging manner on various popular social media platforms. This targeted conversation with consumers increases brand awareness and provides insights and feedback. Both SEM and SMM represent advertising formats governed by law.

Provincial legislation

The *Consumer Protection Act*[1] of Québec ("**CPA**") regulates and governs advertising activities in the Province of Québec. Namely, the CPA prohibits false or misleading advertising. The provisions of the CPA are aimed at both the merchants and the actors of the advertising industry. The CPA indicates that "no merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer."[2] This prohibition applies to all media including print, radio and television, the Internet being no exception.

The Province also enacted the *Act to establish a legal framework for information technology*[3] ("**LCCJIT**"), in force since 2001, which provides for the liability of online intermediaries such as search engines and website hosts, in a context that is not specific to advertising. Indeed, Justice Rochon in the Court of Appeal case of *Prud'homme c. Rawdon*[4] explains that while "a contributory

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fault may be committed by third parties who communicate, broadcast, or host the information [...] sections 22, 26, 36 and 37 of the Act to establish a legal framework for information technology (R.S.Q., c. C-1.1) appear [...] to reduce if not remove certain third parties from any liability." Section 22 establishes that a non-search engine host will be exempt from liability unless it has knowledge that the information it stores is being used for illegal activity or if it does not promptly act to impede access to such illegal documentation. Similarly, a search engine will be liable if it has knowledge that the service it provides enables illegal activity and if it does not promptly cease to provide such a service to the people it knows are engaged in that activity. Either way, the determining factor is knowledge.

Section 27 of this same Act states that:

> **A service provider, acting as an intermediary, that provides communication network services or who stores or transmits technology-based documents on a communication network is not required to monitor the information communicated on the network or contained in the documents or to identify circumstances indicating that the documents are used for illicit activities.**

As such, knowledge is not presumed and hence, there is an implicit necessity of notifying the intermediary of the existence of such illicit content. Once such notice is given, the intermediary, as defined in section 22, must act promptly to take down the content or limit access to it.

Federal legislation

The *Competition Act*[5] ("**CA**") regulates most business conduct in Canada, its main purpose being to prevent anti-competitive practices in the marketplace. The CA prohibits false or misleading representation and deceptive marketing practices in promoting the supply of a product or any business interest. Moreover, persons who "caused the representation to be made" are held liable for false or misleading representations or deceptive practices. This implies that not only is liability imposed on the person who crafts misleading or false advertisement, but also on the person who permits a representation to be made or sent.

The "Enforcement Guidelines – Application of the *Competition Act* to Representations on the Internet" mention that, in the online environment, the Competition Bureau will be called upon to consider the respective roles of the different intermediaries involved in advertising on the Internet. It is further explained that:

> **[i]n its enforcement efforts, the Bureau focuses on the party who "causes" the representation to be made. Determining causation requires an analysis of the facts to ascertain which player possesses decision-making authority or control over content and to assess the nature and degree of their authority and control.[6]**

[our emphasis]

Thus, the level of liability attributed to a given party will largely depend on the level of control they have over the content and whether they played a part in deciding whether the ad ran or not.

Under the CA, there are two adjudicative regimes which sanction false or misleading representations: a civil track or the criminal track. The civil regime applies to most instances of misleading representations and deceptive marketing practices since the burden of proof is lighter.

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The general criminal process, however, covers “the most egregious matters” and requires that a component of criminal intent be demonstrated.[7]

Potential liability for advertising generators

Merchant

The merchant is the party that has the authority to decide whether an ad is run or not. As such, it is usually easiest to attribute liability to the merchant, who is the party most often held liable for deceptive marketing practices, be it with respect to the CPA or the CA.

Media planning agency

The media planning agency can have a dual role. That is, it may act as a creative agency that creates the advertisement (liable under the CA) and/or may assist an advertiser in determining which media to use, be it television programs, newspapers, bus-stop posters, in-store displays, banner ads on the web, or a flyer on Facebook.

The liability of an Internet media planning agency will naturally depend on the exact role it plays in the advertisement. In terms of the criterion of authority and control, if the agency acts as “the creative” and is responsible for the ad content, then it is likely to be held liable for false or misleading representation. If, on the contrary, the media planning agency is solely responsible for speculating on the viewer demographics and accordingly elaborating strategies as to which media would be the most effective to run ads in, then it is not likely to be held liable for deceptive marketing practices. As the agency’s participation increases so does its duty of care.[8] Participation, in the eyes of the Federal Trade Commission and the courts is taken to mean when the agency carries out the will of the advertiser.[9] Ultimately, whether an agency’s participation is “active” depends on a case-bycase analysis.[10] There could also be instances where the agency would be responsible towards the merchant.

Potential liability for advertising disseminators

Media placement agency

The media placement agency, also known as media buyer, is responsible for the negotiation and placement of the media campaign. Its role includes optimizing and evaluating the ad’s effectiveness both during and after the advertising campaign’s completion. Additionally, the media placement agency generates added value by either negotiating lower rates with the host or adding layers of behavioural or location based targeting through ad-platforms (typically not liable).

Website or web page host

The host, also known as the publisher, is an entity that owns a web page or a website and that, in exchange for some economic compensation, is willing to publish ads of other parties in some spaces of its page or site. LCCJTI establishes that a non-search engine host will be exempt from liability unless it has knowledge that the information it stores is being used for illegal activity or if it does not promptly act to impede access to such illegal documentation. Similarly, a search engine will be liable if it has knowledge that the service it provides enables illegal activity and if it does not promptly cease to provide such a service to the people it knows are engaged in that activity. Either way, the determining factor is knowledge. With respect to the CA, a host may benefit from the publisher’s

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defense and not be held liable in a civil suit provided it does not knowingly or recklessly partake in or allow false or misleading advertising.

The take-away

In navigating new online marketing strategies, one should bear in mind that as efficient as online advertising can be, it has also significantly contributed to a rise in the potential for false or misleading representations. The threshold in assessing false or misleading representations is particularly low, as it is evaluated from the average consumer's perspective, i.e. a "credulous and inexperienced" consumer.[11] Although the various players in the marketing world are no strangers to the concept of false or misleading advertising, they should be cautious in using new forms of marketing so as not to go beyond this low threshold. Indeed, there are certain considerations that are specific to the Internet medium, which involve among other things, the speed and efficiency with which consumers can perceive ads.

One should also be wary of legislative changes regarding consumer protection and competition law. For instance, Bill 134[12] has recently set out to amend the CPA so as to prohibit merchants from "falsely or misleadingly representing to consumers that credit may improve their financial situation or that credit reports prepared about them will be improved."[13] There is a considerable volume of credit offering advertising that circulates via SEM and SMM. Advertisers should be cautious and make sure they respect these measures once they are enacted as well as the other legislative tools mentioned in this publication.

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1. R.S.Q., c. P-40.1.
2. *Ibid.*, s. 219.
3. R.S.Q., c. C-1.1.
4. 2010 QCCA 584, para 75 [Unofficial English translation].
5. R.S.C. 1985, c. C-34.
6. Innovation Government of Canada, "Application of the *Competition Act* to Representations on the Internet", (October 16, 2009).
7. Innovation Government of Canada, "Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track under the *Competition Act*", (September 22, 1999).
8. Kelley Drye & Collier Shannon, "Ad Agency Liability" (2005) Ad Law Advisory.
9. *Ibid.*
10. *Ibid.*
11. *Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 SCR 265, para 78.
12. *An Act mainly to modernize rules relating to consumer credit and to regulate debt settlement service contracts, high-cost credit contracts and loyalty programs*, Bill 134 (Introduction – May 2, 2017), 1st Sess., 41st Legis (QC).
13. *Ibid.*, Explanatory Notes.

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