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Online Testimonials and Endorsements

Many businesses now use social media platforms to promote their products and services. Online testimonials and endorsements from customers and other third parties are becoming increasingly important. While social media channels can be of great value to an advertiser, they can also become a source for misleading representations. Before launching a program of using online testimonials and endorsements, advertisers should consider any unintended consequences and be sure to meet all regulatory requirements for due diligence and compliance. In Canada, advertisers need to consider the *Competition Act* and the Canadian Code of Advertising Standards, among other things.

Objective Reviews or Advertising?

In 2014-2015, Bell Canada employees were encouraged to post positive reviews and ratings for various mobile apps from Bell, without disclosing that they worked for Bell. The company was investigated under the *Competition Act* and in October, 2015 agreed to pay an administrative monetary penalty of \$1.25 million and to improve its corporate compliance programs.¹ In announcing the settlement, the Competition Bureau emphasized the increasing importance of impartial consumer reviews on digital platforms, for both consumers and businesses.

In a more recent U.S. example, the Federal Trade Commission charged that Lord & Taylor had deceived customers by paying for an article in an online publication and for Instagram and other social media posts that appeared to be objective.² The retailer's promotion focussed on a particular dress. It gave away the dresses, and paid 50 online

¹ Competition Bureau press release, "Bell Canada reaches agreement with Competition Bureau over online reviews", October 14, 2015 <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03992.html>

² "Federal Trade Commission press release, "Lord & Taylor Settles FTC Charges It Deceived Customers Through Paid Article in an Online Fashion Magazine and Paid Instagram Posts by 50 'Fashion influencers'", March 15, 2016 <https://www.ftc.gov/news-events/press-releases/2016/03/lord-taylor-settles-ftc-charges-it-deceived-consumers-through>

“influencers” between \$1,000 and \$4,000 each to post photos of themselves wearing it, using a particular Instagram designation. As noted by the FTC in announcing the settlement, “customers have the right to know when they’re looking at paid advertising.”

Competition Act: False or Misleading Representations

The *Competition Act* prohibits making representations that are false or misleading in a material respect, and made directly or indirectly to promote the supply or use of a product or service, or any business interest.³ “Material” representations are those that would influence a customer’s buying decision. The general impression of the representation is considered, rather than just its literal meaning. Testimonials and endorsements from “influencers” and other third parties on platforms such as Facebook or Pinterest can be characterized as representations of the business indirectly, where there is a material connection between the business and the person providing the testimonial or endorsement. As noted by the Bureau, genuine customer product reviews have become an important source of information for consumers. When an advertiser participates in “astroturfing”, and creates or supports the creation of commercial representations that “masquerade as the authentic experiences and opinions of impartial customers”, it may be engaging in the reviewable conduct.⁴

Other provisions of the *Competition Act* may apply to online third party testimonials and endorsements. First, the 2010 “CASL” amendments⁵ can apply where a misleading representation, as described above, is made in a commercial electronic message. Second, all performance claims, including those made online, must be based on an “adequate and proper test” and the onus is on the person making the representation, directly or indirectly, to prove that is the case.⁶ Third, the specialized “publication of testimonials” section, s. 74.02, applies where a business publishes a testimonial, including a report of a test to support a performance claim, without ensuring that the

³ The conduct is generally subject to review as a civil matter, under s. 74.01(1)(a) of the *Competition Act*, but if misleading representations are made “knowingly and recklessly” they are subject to the criminal prohibition, s. 52(1).

⁴ Competition Bureau press release, “Too good to be true: Don’t buy into fake online reviews” March 10, 2015 <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03882.html> and The Deceptive Marketing Practices Digest, p. 10, June 10, 2015 <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03946.html>.

⁵ *Canada’s Anti-Spam Legislation* amended the *Competition Act*, such that false or misleading representations contained in an electronic message, in the sender or subject matter information or in the locator are subject to review under s. 74.011.

⁶ Subsection 74.01(b).

representation accords with the statement previously made, published and approved by the person, and that the required approvals have been provided. Finally, s. 74.06 requires certain disclosures for promotional contests, including those conducted through social media or on websites.

Advertising Standards Canada's *Canadian Code of Advertising Standards*

Advertising Standards Canada ("ASC") is the self-regulatory body for advertisers in Canada⁷. It regularly updates and administers the *Canadian Code of Advertising Standards* (the "ASC Code"). Complaints that advertising has contravened the ASC Code may be filed by consumers or by competing advertisers, under different procedures. As noted in ASC's introduction to the ASC Code, it consists of general statements that are "designed to set and maintain standards of honesty, truth, accuracy, fairness and propriety in advertising". A number of the principles will apply to online testimonials and endorsements.

Clause 7, Testimonials, is the most specific reference, which states: "Testimonials, endorsements or representations of opinion or preference, must reflect the genuine, reasonably current opinion of the individual(s), group or organization making such representations, and must be based upon adequate information about or experience with the product or service being advertised, and must not otherwise be deceptive". A proposed new Interpretation Guideline to this clause is open for comment until the end of this month.⁸ It expands upon the general requirement by stating that a testimonial, endorsement, review or other representation must disclose any "material connection" between the endorser, reviewer, influencer or person making the representation, except when it is one that "consumers would reasonably expect to exist, e.g., a television advertisement in which a celebrity publicly endorses a product or service". Where, for example, a blogger has been provided with free products or other consideration for providing the review or endorsement, that material connection must be "clearly and prominently disclosed in close proximity to the representation".

Two other provisions of the ASC Code will also apply to online testimonials and

⁷ The ASC website includes the Code and descriptions of the procedures for filing complaints for consumers and for advertisers: <http://www.adstandards.com/en/>.

⁸ Proposed Interpretation Guideline: <http://www.adstandards.com/en/Standards/Proposed-Interpretation-Guideline-EN.pdf>.

endorsements: Clause 1, which imposes an overall obligation for “accuracy and clarity”; and Clause 2, which prohibits “disguised advertising techniques” by stating that “No advertisement shall be presented in a format or style that conceals its commercial intent”.

Other Sources of Potential Risk

There are a number of other sources of potential risk that should be considered by advertisers when soliciting or relying on online testimonials and endorsements. One general area includes copyright, moral rights, so-called “personality rights” and other intellectual property rights in the content being provided by the endorser or influencer. If the advertiser wants to use the endorsement in a number of advertising channels, in various territories and, potentially, over a long period of time, the appropriate assignment or license should be obtained.

Another area to consider is that provincial consumer protection statutes also prohibit false or deceptive representations, and may include specific prohibitions that apply to certain types of products, transactions, representations or claims. For example, the general prohibitions in sections 14 and 15 of the Ontario *Consumer Protection Act*⁹ are supplemented by a number of specific examples of representations that constitute either “false, misleading or deceptive representations” or “unconscionable representations”.

While online testimonials and endorsements are becoming increasingly important to advertisers, it is also important to be sure that they do not expose the business to new liabilities, either from misleading representations or otherwise.

Please address any questions about the legal requirements for advertising and marketing to Carol Anne O’Brien at caob@caobrienlaw.com, or (416) 640-7270.

Carol Anne O’Brien’s law practice is focused on regulatory matters including communications law (broadcasting and telecommunications), competition law, advertising and marketing, Internet domain names and privacy.

⁹ For example, the Ontario *Consumer Protection Act*, s. 14(2)
<https://www.ontario.ca/laws/statute/02c30#BK17>