Inter-Jurisdictional Issues – Current Issues and Hot Topics

23rd Annual Advertising & Marketing Law Conference

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Overview

• What is a misrepresentation?
  • Inexperienced Consumer vs. Reasonable Consumer
  • Claims v. Puffery

• State of the Law - Clarity or Confusion?

• Country of Origin Claims

• Trusted Media & the Impact on Advertising

• Issues in the Digital Marketplace
  • Contests & Sweepstakes
  • Loyalty Programs
  • Gift Cards
What is a Misrepresentation?

• Both the literal meaning and the "general impression" of an advertisement must be accurate

• Canadians are extremely literal
What is a Misrepresentation?

- Inexperienced Consumer vs. Reasonable Consumer
  - “The general impression test ... must be applied from a perspective similar to that of ‘ordinary hurried purchasers’, that is, consumers who take no more than ordinary care to observe that which is staring them in the face upon their first contact with an advertisement. The courts must not conduct their analysis from the perspective of a careful and diligent consumer. ... In sum, it is clear that ... the ‘general impression’ test ... is the impression of a commercial representation on a credulous and inexperienced consumer. ... courts view the average consumer as someone who is not particularly experienced at detecting the falsehoods or subtleties found in commercial representations.”

(Supreme Court of Canada, Richard v. Time, 2012)
What is a Misrepresentation?

- **Claims vs. Puffery**
  - A claim must be capable of being proven
  - Superiority Claims, Parity Claims, Comparative Claims – all must be capable of being proven
  - Puffery: no reasonable consumer would believe it to be true or incapable of being proven
    - In Canada, puffery is not allowed unless it amounts to a hyperbole
    - What exactly is a hyperbole?
    - Exaggerated statements or claims not meant to be taken literally
    - ASC considers humour and fantasy but .......
Misrepresentation?

- A motorcycle gang was seen arriving at the home of a husband and wife. The leader of the gang told the husband homeowner that he was now a member of the motorcycle gang because he had moved into the gang’s territory. The new homeowners replied that they hadn’t used a realtor and the commercial ended with a voiceover stating “The largest transaction of your life deserves the expertise of a realtor.”
Misrepresentation?

- An advertisement for an insurance brokerage firm depicted a toddler dressed like a biker driving a motorcycle. The toddler was pictured wearing a red bandana on his head. The headline of the advertisement read: “No Kidding! We’ll Save You Money.”
Legislation is Clear as Mud?

• **Canada**
  - Competition Act, Criminal Code, CASL, PIPEDA, Copyright Act, Trademark Act, Quebec laws, provincial Consumer Protection laws, the common law

• **United States**
  - Federal courts, state courts, FTC, FDA, FCC, NAD, State AGs, Advisory Opinions (FTC and AGs)
Legislation Clear as Mud?

**Canadian Examples**
- Quebec is unique
- French language requirements
- Special contest rules
- No advertising to children under 13

**U.S. Examples**
- Menu boards require calorie disclosures in California
- Sweepstakes rules may be broad to encompass all laws
Country of Origin Claims

"Product of Canada" and "Made in Canada" Claims

Competition Act
Consumer Packaging and Labelling Act
Textile Labelling Act
Made in Canada

- "Made in Canada" claims subject to three conditions
  - 51% threshold of Canadian content
  - Accompanied by a qualifying statement such as "Made in Canada with imported parts" or "Made in Canada with domestic and imported parts"
  - The last substantial transformation of the product must have occurred in Canada

- "Product of Canada" claims subject to a higher threshold of Canadian content (98%)
Made in the U.S.A. Claims

• All or substantially all components must be manufactured in the U.S.

• Must look at a granular level (ingredients, fibers, etc.)
## Trusted Media & The Impact of Advertising

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<td>Ads that appear in apps or programs on your smartphone or tablet</td>
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Trusted Media In The United States

Regarding the dishonest media, to quote Melania Trump, "When they go low, we go high." Period #SeanSpicerFacts
Will Alternative Facts Become Legitimate In Advertising?
Will Fake News Present Concerns to Advertisers?

@jasongordon is the worst presenter ever. Elisa should kick him out of the conference. SAD!

7:22 AM - 24 Jan 2017 • Details
The Digital Marketplace

- Issues in the Digital Marketplace
  - “All in” or Drip Pricing
  - Testimonials and Endorsements
  - Privacy
  - Contests & Sweepstakes
  - Loyalty Programs
  - Gift Cards
Sweepstakes & Contests

- **Canada**
  - Same rules for contests/sweepstakes
  - Special rule/registration for contests in Quebec
  - Skill testing question required
  - “Short rules” (for point-of-purchase materials) and "official rules"

- **U.S.**
  - Registration/bonding for games of chance with a total prize value over US$5,000
  - No skill testing question required
  - Free method of entry is required
  - Online, in-store visit, mail-in, text message?
Special State Rules

- **Registration**
  - Arizona: Intellectual skill contests that require a purchase to enter
  - Florida and New York: Games of chance with prizes in excess of $5,000
  - Rhode Island: Games of chance conducted by or through retail outlets with prizes in excess of $500

- **Bonding**
  - Florida and New York: Games of chance with prizes in excess of $5,000

- **Post of Rules and Regulations at Retail**
  - Florida, Massachusetts, Michigan, New York, Rhode Island, Texas
Promotional Contests & Loyalty Programs

- **Entry Requirements/Consideration**

  - Can you offer a “closed universe” contest to program members?

  - Can you give “free” contest entries in exchange for signing up to the loyalty program?

  - Can someone use loyalty program points in exchange for contest entries?
Material Changes to Loyalty Programs

- Changing Loyalty Program Terms & Conditions
  - Moving from a paid to unpaid model
  - Quantity of Points Earned
  - Value of rewards

- Expiry of reward points
  - Bill 47 – Protecting Reward Points Act - amends the Ontario Consumer Protection Act
  - Makes it illegal for loyalty points to expire due to the passage of time alone
  - Subject to prescribed exceptions, loyalty program may be terminated with notice, in accordance with its terms
Gift Cards

• **Canada**
  - No expiry of most retail gift cards
  - (exception for specific service, pre-paid credit cards)
  - No activation fees, service fees or dormancy fees
  - (exception for shopping mall gift cards)

• **U.S.**
  - Gift cards where cash is paid for the gift card – that portion may not expire or incur fees
  - Loyalty cards/premiums may expire
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