ADVERTISING WITH ONLINE REVIEWS & ENDORSEMENTS: What are the Rules?

With the explosion of social media and online retailers in recent years, online reviews and endorsements have become an important tool for both consumers and businesses when buying and selling products. Access to such reviews provides consumers with valuable information to make better purchasing decisions and provides businesses with valuable feedback that helps them to improve their goods and services. However, these laudable goals can be undermined when the line between an independent review and an advertisement is blurred and there can be legal consequences.

Astroturfing

Astroturfing is the practice of circulating a fake endorsement via the Internet that appears to originate from an individual consumer, but was in fact created or sponsored by the subject business. The practice is illegal. In particular, it is considered a deceptive marketing practice that may violate the civil and/or criminal prohibitions in the *Canadian Competition Act* against materially false or misleading representations. See sections 52 and 74.01(1)(a).

In October 2015, Bell Canada agreed to pay a $1.25 million penalty to the Competition Board after certain employees were encouraged to post reviews and rating of a Bell apps on the iTunes App Store and the Google Play Store and it was determined that this activity temporarily affected the overall rating for the apps.

Native Advertising

Native advertising is a type of disguised advertising that is produced by a business to promote a product or service, but mimics the form and style of the non-advertising content of the platform upon which it is published. It is often manifested as either an article or video containing testimonials or endorsements that appear in the same format as the editorial content in the same publication or Internet platform. While native advertising is not illegal per se, it can also violate the same prohibitions against misleading advertising if it cannot be distinguished from the editorial content and misleads consumers into believing that the content is an independent review.

Traditional publishers of news media have generally marked native advertising content as “advertorials” or “sponsored” content. On the Internet, search engines, social media platforms and online retailers often insert similar advertising content alongside organic search results or feed together with other user-generated content and identify these advertisements by marking them in different colours, setting them off with borders and/or prefixing them with terms like “ad” or “promoted”.

For digital influencers who routinely publish reviews on their own platform (ie. Youtube channel, Facebook account, Twitter account, etc.) in exchange for material compensation, the practice of publishing appropriate disclosure statements is not well established at present. If a business engages such parties to publish paid reviews on its behalf, the business should require the prominent publication of an appropriate disclosure statement by the digital influencer as a term of their engagement and then take steps to ensure compliance.

While native advertising is not unlawful, the failure to either: (a) explicitly identify such testimonials and endorsements as advertising; or (b) disclose the material compensation received for the endorsement, can lead to a charge that the advertisement is deceptive or misleading.

In 2015, Microsoft and its agents were investigated by the US Federal Trade Commission when one of those agents engaged to promote its Xbox One system paid digital influencers to post YouTube videos containing endorsements. Although the digital influencers had agreed to disclose that they were being paid for their reviews, many failed to do so in a clear and prominent manner and Microsoft and its agents failed to monitor their activity to ensure compliance.

The investigation resulted in a consent agreement without any monetary penalty, but only because Microsoft had specific legal and marketing policies and procedures in place respecting endorsements to ensure compliance with the law and took swift corrective action when it was alerted to the failure to disclose. In the end, the FTC concluded that the violations were isolated and occurred "in spite of, and not in the absence, policies and procedures designed to prevents such lapses".

In Canada, violations of these rules can result in a business facing consumer complaints with Advertising Standards Canada as well as administrative or criminal charges before the Competition Bureau. A verified complaint with Advertising Standards Canada may result in publication of the complaint, effective removal of the advertisement from circulation and referral to the Competition Bureau for investigation. The legal penalties for misleading advertising in Canada include injunctions, mandatory corrective advertising and fines of up to $10 million for a first offence.

Recent Developments

In December 2015, the US Federal Trade Commission (FTC) issued a new enforcement policy statement addressing the issue of native advertising. This policy and other FTC guides respecting endorsements and native advertising can be found on its web site at <ftc.gov>.

In June 2016, the International Consumer Protection and Enforcement Network, an association of consumer protection authorities, published a series of non-legal guidelines respecting the appropriate use and management of online reviews and endorsements. The three guides are directed at: (1) businesses & marketing professionals; (2) digital influencers; and (3) operators of Internet Platforms that host or facilitate the circulation of reviews. Copies of the guides can be found on the ICPEN web site at <icpen.org/for-consumer-experts/what-we-do/industry-participant-guidance>. These guides also contain helpful hyperlinks directly to the FTC documents discussed above as well as similar guides and policies published by authorities in Canada, Australia, United Kingdom, France, Denmark and Norway.

In October 2016, Advertising Standards Canada updated its code to provide a new guideline requiring clear and prominent disclosure in close proximity to a review where there is any material connection between the reviewer and the business whose product or service is the subject of the review. It refers to the US FTC guidelines for examples of appropriate disclosures of a "material connection". The amended Advertising Code can be found at <adstandards.com>.

This new guideline does exclude from the disclosure requirement situations where consumers would reasonably expect a material connection to exist, such as celebrity endorsements. However, the exception should be relied upon with caution. It should not be assumed that the average consumer is experienced in detecting subtleties found in commercial representations, especially if the targeted consumer may be considered to be young or commercially naïve as a class.

Finally, in October 2016, the Canadian Competition Bureau announced that it, together with international partners, conducted a 'sweep' of the Internet to identify web sites that use online reviews and endorsements as part of their business model. Where it identifies issues for

concerns, the Bureau plans to take enforcement steps which may range from issuing a warning letter to opening an investigation.

Tips & Takeaways

- Circulating fake reviews via the Internet and falsely inflating the online rankings of a product or service are unlawful advertising practices and all parties who participate in advertising should actively discourage such practices by their employees and agents.

- Every party who participates in the publication or distribution of native advertising may be subject to liability for the circulation of misleading advertisements and, where such advertising is circulated via the Internet, such liability may arise in multiple jurisdictions. As a result, each participant should take steps to ensure that native advertising includes appropriate disclosure statements.

- Disclosure statements should appear in front or above the headline for any native advertisement and be clearly visible BEFORE the consumer engages with the advertisement in any interactive way. Ideally, the disclosure statement should be located in the top left corner of the advertisement.

- Where native advertisements are circulated via social media, the disclosure statement must travel with the advertising content.

- Disclosure statements should NOT be contained in a footnote, a hyperlink, the web site terms of use or the "about" page for a digital influencer.

- Preferred "shorthand" disclosure statements for native advertisements include words like "ad", "advertisement", "paid" and "Sponsored Advertising Content".

- Terms like "sponsored", "suggested" and "promoted" may not be understood as paid advertising and are not recommended as "shorthand" disclosure statements.

- Where a business circulates an independently created review through paid advertising or did not have editorial approval over the content of a review, terms like "Presented by X", "Sponsored by X" or "Brought to you by X" may be acceptable alternative "shorthand" disclosure statements.

- Disclosure statements are not required when: (a) it is obvious from the context that the content is an advertisement; or (b) the advertisement is mere product placement and there is no selling message.

Conclusion

Native advertising is effective. By 2018, the Interactive Advertising Bureau of Canada estimates that $21 billion is expected to be spent globally each year on digital native advertising.

With the practice of native advertising clearly in the sights of regulatory authorities around the world, businesses are well-advised to ensure that they have policies and procedures in place to ensure compliance with the law when they engage in such advertising practices.

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