# Intellectual Property Update

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**MISLEADING ADVERTISING IS RISKY**

Ultimately, it is in the interests of all businesses to earn and maintain the trust of their customers, but fierce competition can sometimes pressure businesses to stretch the truth in their advertising. In some cases, competitors may take action to arrest such activity to ensure that the business does not obtain an unfair advantage in the market by misleading consumers. There is also a public interest in maintaining the trust of consumers in the market so the government can also take action to arrest such activity. Two recent legal cases demonstrate that misleading advertising continues to have risks – even in the modern digital economy.

**Hyperbole or Misleading Advertising?**

In August 2016, Cogeco launched a new marketing campaign which introduced two new trademarks. First, it rebranded its residential internet packages with the brand name ULTRAFIBRE as a prefix for each package name (ie. ULTRAFIBRE 15, ULTRAFIBRE 250, etc.). Second, it adopted as a slogan on its homepage the phrase: THE BEST INTERNET EXPERIENCE IN YOUR NEIGHBOURHOOD.

On August 19th, 2016, Bell Canada launched an action against Cogeco seeking injunctive and other relief on the grounds that the new campaign was misleading and breached section 7 of the *Trademarks Act* (trade slander), section 52 of the *Competition Act* (misleading advertising) and gave rise to related common law claims including "injurious falsehood".

For the purposes of deciding a preliminary injunction motion prior to a full trial on the merits, the court was only required to determine whether there was a "serious question" to be tried on these grounds with respect to each trademark. After reviewing the evidence, the court issued a preliminary injunction on September 26, 2016 after finding that:

(a) the new slogan THE BEST INTERNET EXPERIENCE IN YOUR NEIGHBOURHOOD was a misleading misrepresentation made knowingly and recklessly in that Cogeco was well aware that its Internet services were not the fastest or most reliable in every "neighbourhood" where its services were available; and

(b) the new brand name ULTRAFIBRE was mere hyperbole in that it was not a singular claim like "best" and it was not misleading since the promised speed was also part of each package name (ie. ULTRAFIBRE 250).

From a practical perspective, the court also made the following observations of interest to advertisers:

- The general impression conveyed by an advertisement must be considered in addition to its literal meaning and it is not necessary to prove that any person was in fact deceived or mislead by the advertisement for it to be considered misleading in a material respect.

- While an advertisement must be looked at "as a whole", this does not mean the court will presume that consumers will scroll down to view the entirety of a web page or follow all the available hyperlinks to read technical specifications and/or disclaimers and other terms. In other words, advertisers are cautioned against "burying" disclaimers and qualifying information in the "fine print".

- Advertisements will be evaluated from the perspective of the average consumer who is presumed to be "credulous" and "inexperienced". In other words, advertisers are well-advised to consider the targeted consumer carefully and to generally presume that they are naïve when making any statement respecting the qualities of

their product or service.

- In order to make a singular claim that a product or service is the "best" available in a marketplace, it is necessary to have available evidence to substantiate the claim in ALL respects. Although a customer's "Internet experience" often relies on multiple factors like speed, reliability and customer service, Cogeco could not rely on its multiple awards for customer service to avoid the charge that the slogan was misleading with respect to speed and reliability. In other words, advertisers are cautioned to avoid singular claims altogether or to qualify the claim on its face to ensure it is supported by the available evidence.

- Where there is evidence that an advertisement may be misleading, the court may rely on the "public interest" to tip the scales in favour of issuing a preliminary injunction prior to a full trial on the merits of the allegation even in an action brought by a competitor. For many advertisers, such an injunction will effectively disrupt their current marketing campaign with the risk of immediate loss of market share.

**Sale Price vs. Regular Price Advertising?**

On January 11, 2017, the Competition Bureau announced that Amazon.com Inc. would pay a $1 million penalty and take corrective action as part of the settlement to resolve an investigation into its pricing practices in Canada.

The Competition Bureau's investigation disclosed that Amazon often compared its prices to a regular "List Price" in its advertising and added specific claims that the consumer would "save" a certain dollar amount or percentage off the "List Price". Amazon relied on the pricing information provided by its suppliers and took no steps to independently verify that the "List Price" provided by its supplier accurately identified the regular price for the goods in the general marketplace.

In order to make a valid comparison to the regular price, advertisers must satisfy either the "volume test" or the "time test" set out below:

(a) the "volume test" requires that a substantial quantity of the goods must have been sold at the regular price (or higher) within a reasonable period of time before or after making the "sale price" representation; or

(b) the "time test" requires that the goods must be offered for sale in good faith at the regular price for a substantial period of time before or after making the "sale price" representation.

Subject to certain exceptions depending on the nature of the goods, the Competition Bureau will consider: (i) "substantial" to be 50% or more of the total volume and 50% or more of the relevant time period; and (ii) the relevant time period is generally 12 months before and after the advertisement.

It is also important to note that where the sale price comparison is expressly restricted to the advertiser's own regular price (ie. "Our Regular Price"), the tests are restricted to the sale and regular prices offered by the advertiser's business. If the sale price comparison is not expressly restricted to the advertiser's own regular price (ie. "Regular Price" or "List Price"), the tests are applied generally so that the sale price is compared to the regular prices generally offered by ALL sellers of the product in the market.

The Competition Bureau determined that sale prices advertised by Amazon failed both the volume test and the time test and that Amazon was not entitled to rely on information provided by its suppliers. As a result, Amazon had violated section 74.01(2) [misleading price claims] and 74.011(2) [misleading advertising via electronic messages] of the *Competition Act*.

**Conclusion**

Consumer confidence in the digital economy has been eroded by a number of factors associated with our modern digital economy. The lack of direct personal contact between a business and its consumers doing business via the Internet is a challenge for legitimate businesses and an opportunity for fraudsters. In this environment, businesses should take special care to avoid eroding the trust of consumers with risky advertising claims. ■

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