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CALIBRATING THE ELECTRONIC SCALES: TIPPING THE BALANCE IN FAVOUR OF A VIGOROUS AND COMPETITIVE ELECTRONIC MARKET FOR CONSUMERS

*Nicole Ladouceur**

I. INTRODUCTION

This Article focuses on identifying consumer concerns with respect to the evolving electronic marketplace, and discusses some responses to those concerns in the Canadian context. This will include a discussion of the application of the misleading advertising and deceptive marketing practices provisions of the Competition Act to representations made over the Internet.¹

The Competition Bureau considers the development of the Internet and electronic commerce to be intrinsically pro-competitive in nature, in that the strengths inherent in the Internet tend to encourage vigorously competitive markets. It reduces information costs for businesses and consumers and it improves access to markets. Location is no longer a barrier, thus allowing smaller firms to compete on an equal footing with larger firms. Consumers are empowered by having access to a wealth of product information, and by being able to compare products and prices on-line easily. As comparison shopping electronically becomes easier, vendors are required to compete directly with rival products from around the world, creating a more integrated international economy. Electronic commerce also encourages the development of new technologies and services.

Canada is well-situated to capitalize on the competitive advantages of an electronic marketplace of ideas, products, and services. Canada has the lowest residential telephone charges in the world, the lowest Internet access charges among the G-7 countries,² and ranks second in Internet users in the G-7.³ Internet usage increased over sixty percent in 1996 alone, with more than forty-three percent of small businesses being connected to the Internet in

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¹ See *Competition Act*, R.S.C. 1985, c. C-34.

² See Industry Canada, *The Canadian Electronic Commerce Strategy*, 1998, at 14 (visited June 22, 1999) <<http://e-com.ic.gc.ca/english/60.html>> (hereinafter *Canadian E-commerce Strategy*).

³ See *id.* at 17.

1998. A recent survey indicates that by the end of 1998, 13.5 million Canadians over the age of eighteen had Internet access,⁴ in a country with a total population of just over thirty million.

Industry Canada, under the leadership of Minister John Manley, has played a pivotal role in connecting Canadians electronically as part of the strategy of establishing Canada as a leader in the development of a knowledge-based economy. As part of this initiative, Industry Canada introduced the Community Access Program, which has helped more than 2200 rural and remote communities get on-line so far. By the year 2000, this program will see connectivity in every rural community in Canada with a population of over 400 people – that is 5000 sites.

Canada's role in this respect has been further advanced by our SchoolNet program, which has seen all public schools and libraries connected to the Internet, including 385 First Nation schools. Additionally, the CANARIE project, being a partnership of some 120 private and public sector organizations, has resulted in the building of the world's fastest all-optical research network backbone, CA*net-3. The result is a backbone that is nearly one million times faster than just five years ago.

II. IDENTIFYING CONSUMER CONCERNS ABOUT ELECTRONIC COMMERCE

It is clear that the basic technological infrastructure is in place to make electronic commerce flourish in Canada. Canadians have already established that they are early adopters of one common form of electronic commerce, electronic data interchange (EDI), in that they lead the world in automated banking machine transactions per capita,⁵ with over one billion InterAc transactions in 1997, totaling over forty-four billion dollars in electronic transactions.⁶ Further, consumers have identified that convenience, increased access to information, lower prices, and choice are all benefits that they see as flowing from electronic commerce.⁷ These benefits are also encouraged by the Competition Bureau, in that they are fully consistent with the stated purposes of the Competition Act.⁸

⁴ ComQuest Research: *13.5 Million Canadians Have Net Access* (visited June 22, 1999) <http://www.nua.ie/surveys/?f=VS&art_id=905354743&rel=tru>.

⁵ See Canadian E-Commerce Strategy, *supra* note 2, at 17.

⁶ See InterAc Corporation Homepage (visited July 15, 1999) <<http://www.interac.com/services.htm>>.

⁷ See Canadian E-Commerce Strategy, *supra* note 2, at 7.

⁸ Section 1.1 of the Competition Act states: "The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to

While business-to-business electronic commerce has boomed exponentially, business-to-consumer electronic commerce is still falling short of expectations. Where are the on-line buyers? Clearly, there remain some concerns that need to be addressed. The problem appears to come down to a lack of consumer trust. Surveys show that in Canada, sixty-three percent of consumers are currently unwilling to use the Internet to transact business.⁹ Until consumer's affairs are allayed, the movement of the Internet from an information medium to a transaction medium will be difficult, and electronic commerce may not realize its full potential.

Consumer concerns can be grouped into the following broad categories:

A. Identity

Owing to the very nature of the Internet, it can be difficult for consumers to verify the identity of the person with whom they are dealing, where the business is physically located, and whether it is a legitimate vendor. It is relatively easy and inexpensive to set up a virtual storefront, and just as easy for a Web site to disappear. The vendor may not have a physical presence at all, and may be located in another jurisdiction, without the consumer knowing it. In order to be sure that they are dealing with a reputable vendor, consumers may limit their on-line transactions to reputable, well-established "brands" and companies. Consumers may be reluctant to look to smaller or lesser-known suppliers, thereby creating a smaller market and thwarting the development of new businesses.

B. Privacy and the Protection of Personal Information

Consumers are extremely concerned with issues of personal privacy while on-line. Consumers have little control over personal information in on-line purchases, and the risk of misuse clearly exists. Consumers are highly conscious of the privacy risks that the Internet poses and want assurances that the collection of personal information is transparent and that they have some control over what is collected, by whom, and for what purpose. Personal information is a valuable commodity, particularly in the world of electronic commerce. Businesses can use details of a customer's past on-line

ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices." Competition Act, *supra* note 1, §1.1.

⁹ See Industry Minister John Manley, *Speaking Notes for the LawTech+ 99 Conference: Connecting Canadians* (Feb. 12, 1999), available at <<http://info.ic.gc.ca/cmb/Welcomeic.nsf/503cec39324f7372852564820068b211/85256613004a2e178525671b00586477?OpenDocument>> (visited July 15, 1999).

behaviour to develop a “consumer profile” of their buying preferences. Companies can sell or otherwise make available this personal information about their customers to other parties, resulting in their names being added to various mailing lists for direct marketing and other purposes.

C. Security of Financial Information

Security of on-line payment systems is a large concern among consumers. Although many experts have suggested that making on-line payments through a secure site with state-of-the-art encryption is safer than handing a credit card to a stranger in a restaurant, few consumers understand encryption, and accordingly security of on-line payment systems continues to be a key issue.

D. Applicability of Existing Legal and Commercial Frameworks

Finally, consumers are concerned about what redress mechanisms are available in the event that a dispute arises with respect to an on-line transaction, and whether consumer protection legislation continues to apply to this medium. The new global marketplace allows consumers to buy goods from other countries, which raises complex issues about the practical and legal barriers to obtaining redress. There are a number of difficulties associated with pursuing and enforcing cross-border actions. A court must first establish jurisdiction to hear the matter. In addition, different countries have different consumer protection legislation, and it is not always clear which law applies in any particular cross-border transaction. The cost of pursuing a cross-border claim can be extremely high, and the outcome may be unpredictable. The uncertainty surrounding consumer redress with respect to on-line transactions is a major concern, and will need to be addressed in a timely fashion to bolster consumer confidence.

III. ADDRESSING CONSUMER CONCERNS ABOUT ELECTRONIC COMMERCE

Industry Canada has taken consumer concerns about electronic commerce seriously, and has made building trust in the digital economy a priority for action.¹⁰ While these concerns have been voiced by consumers, most of these concerns are in fact shared by business and government alike.

While the consumer concerns set out above can be conveniently grouped into four separate categories, the Canadian responses to these concerns are

¹⁰ See Canadian E-commerce Strategy, *supra* note 2, at 23.

multi-disciplinary in nature, in that both governments and the private sector have a role to play. Some of the responses to these issues are as follows:

A. Establishing Principles of Consumer Protection for Electronic Commerce (Best Practices)

An important step in resolving the impediments to electronic commerce is an articulation of the principles upon which a framework for electronic commerce should be based. To this end, a working group made up of industry players, such as the Canadian Association of Internet Providers, and consumer groups, such as the Consumers Association of Canada, is being coordinated by the Office of Consumer Affairs of Industry Canada and facilitated by the Competition Bureau, among others. The Working Group on Electronic Commerce and Consumers is finalizing a summary of these principles, and is developing guidelines to define consumer protection requirements through voluntary and legislative measures.

On the international front, measures to promote greater consumer protection on-line are being developed around the world. Ministers from twenty-nine countries attending the OECD Ministerial Conference on Electronic Commerce in Ottawa in October 1998 endorsed the Declaration on Consumer Protection in the Context of Electronic Commerce.¹¹ The Declaration expressed a commitment to ensure that consumers who participate in electronic commerce are afforded a transparent and effective level of protection for electronic transactions by 1) reviewing and adapting laws and practices, if necessary, to address the special circumstances of electronic commerce; 2) supporting and encouraging the development of effective market-driven self-regulatory mechanisms that include input from consumer representatives, and contain specific, substantive rules for dispute resolution and compliance mechanisms; 3) encouraging the development of technology as a tool to protect consumers; 4) taking steps to educate users, fostering informed decision-making by consumers participating in electronic commerce, and increasing business awareness of the consumer protection framework that applies to their on-line activities; and 5) increasing awareness among judicial and law enforcement officials of the need for effective international cooperation to protect consumers and combat cross-border fraudulent, misleading, and unfair commercial conduct.¹² In addition, the ministers also committed to the development of consumer protection guidelines that will set out the princi-

¹¹ See Declaration on Consumer Protection in the Context of Electronic Commerce, Oct. 7-9, 1998, OECD Ministerial Conference on *A Borderless World: Realising the Potential of Global Electronic Commerce*, Conference Conclusions, Annex 2, OECD Doc. SG/EC(98)14/REV6, at 16.

¹² See *id.*

ples that countries should follow as they adjust their domestic consumer protection programs to cover electronic commerce. Canada is currently chairing a working party of key member countries to produce these guidelines in 1999.

B. Voluntary Codes & Self-Regulation

As discussed, the full potential of electronic commerce may be limited if consumer confidence is eroded by fraudulent and misleading conduct on-line. Businesses have a vested interest in helping to create and promote a safe environment for consumers. Voluntary codes established by the business community can assist in building consumer confidence which will in turn help realize the full potential of electronic commerce.

Voluntary codes of conduct are not a new concept, however they are becoming more common as governments search for better and more efficient ways to achieve program objectives. Indeed, the use of voluntary codes in Canada is well-established. There are presently over thirty Canadian voluntary codes currently in operation, covering a wide range of subject matter.¹³

Industry Canada released an extensive study in March of 1998 on voluntary codes. According to the study, voluntary codes have several advantages for consumers, businesses, and government. Voluntary codes can assist in addressing consumer concerns such as quality, price, choice, and privacy. Voluntary codes can discourage undesirable behaviours or activities by businesses, while helping code signatories maintain or improve their market share. Voluntary codes can further public policy objectives through non-regulatory means, and they can complement or expand traditional regulatory regimes. Voluntary codes can avoid jurisdictional and constitutional obstacles that are part of legislative development, and can assist in establishing the appropriate legal standard of care for an activity. Additionally, voluntary codes can set and adjust standards more quickly and less expensively than laws and regulations.

With respect to issues regarding the Internet and electronic commerce, several industry associations and organizations have developed voluntary codes of conduct. In January 1998, the Canadian Marketing Association (CMA) amended its Code of Ethics and Standards of Practice to require its members to seek consumers' consent before sending them marketing e-mail. In addition, the code requires marketers to inform consumers what personal information they are collecting from on-line sources and how it will be used.

¹³ See Office of Consumer Affairs, *Inventory of Voluntary Codes Currently in Operation* (visited July 10, 1999) <<http://strategis.ic.gc.ca/SSG/ca00801e.html>>.

Consumers must also be given an opportunity to decline to have this information collected.¹⁴

In 1992, Stentor (an alliance of Canadian telecommunications companies) introduced a *Code of Fair Information Practices*.¹⁵ In March 1996, the new Canadian Standards Association Model Code for the Protection of Personal Information (the CSA Code), was published as a National Standard of Canada. The Stentor Companies revised their *Model Code of Fair Information Practices* to describe how they subscribe to the principles of the CSA Code. The Code was used by the Stentor companies to develop and implement individual company codes and privacy policies to address customer concerns about the protection of personal information. The Code consists of ten principles relating to the collection, use, disclosure, and retention of personal information. The target date for implementation of the revised Stentor Code by the individual Stentor Companies is June 1999.

The Canadian Association of Internet Providers (CAIP) has also established a voluntary *Code of Conduct* for its members.¹⁶ The Code sets out seven principles and procedures:

1. CAIP will cooperate with all Government officials, international organizations, and law enforcement authorities seeking to clarify the responsibilities for each of the different functions performed by Internet companies.
2. CAIP members pledge to comply with all applicable laws.
3. CAIP members are committed to public education about Internet issues and technology.
4. Privacy is of fundamental importance to CAIP members who will respect and protect the privacy of their users. Private information will be disclosed to law enforcement authorities only as required by law.

¹⁴ See Canadian Marketing Association, *Code of Ethics and Standards of Practice* (visited June 23, 1999) <<http://www.cdma.org/new/ethics.html>>.

¹⁵ Stentor is the national alliance of leading Canadian telecommunications companies. It includes Bell Canada, BC TEL, Island Tel, MTS, MT&T, NBTel, NewTel Communications, SaskTel, and Telus. See Stentor, *Stentor Code of Fair Information Practices* (visited June 23, 1999) <http://www.stentor.ca/body2.cfm?page_id=newscor3.html>.

¹⁶ See Canadian Association of Internet Providers, *Code of Conduct* (visited June 23, 1999) <<http://www.caip.ca/caipcode.htm>>.

5. CAIP members will not knowingly host illegal content. CAIP members will share information about illegal content for this purpose.

6. Although Internet providers are unable to monitor all content, CAIP members will make a reasonable effort to investigate legitimate complaints about alleged illegal content or network abuse, and will take appropriate action.

7. Prior to taking any action, upon receipt of such complaints CAIP members will:

- a) conduct an internal review to determine the nature and location of the content or abuse, and where warranted;
- b) consult with legal counsel and/or outside authorities, and/or;
- c) notify the content provider or abuser of the complaint, with a request for a response within seven days.

Over the past several years, the electronic marketplace has also seen the development of third party seal programs. These seals indicate that a commercial Web site had agreed to submit to third party oversight and compliance review. For example, in September of 1997, the Canadian Institute of Chartered Accountants (CICA), in conjunction with the American Institute of Certified Public Accountants (AICPA), launched the *CA WebTrust* program.¹⁷ *CA WebTrust* is an electronic commerce "seal of assurance" which signifies that a commercial Web site meets CICA-defined criteria for standard business practices, transaction integrity, and information protection. To obtain the *WebTrust* seal, a company must obtain an unqualified report from a licenced CPA or CA practitioner stating that the company is following all of the *WebTrust* principles. The practitioner updates his or her examination on a periodic basis, and companies are obligated to notify the practitioner of any significant changes to its business policies or practices.

Despite their advantages, voluntary codes have a number of potential drawbacks. First and foremost, these codes are voluntary, and therefore depend on the goodwill of businesses to comply with them. The market reaction to a voluntary code may be unpredictable, as it is difficult to predict

¹⁷ See *Canadian Institute of Chartered Accountants, About WebTrust* (visited July 16, 1999) <<http://www.cica.ca/cica/cicawebsite.nsf/public/SPASWebTrust>>.

whether a code will be accepted and used. Codes may be poorly drafted, not provide adequate complaint investigation and redress mechanisms, or not have independent oversight. This may erode consumer confidence, and prevent the code from being accepted and used. In addition, offensive practices may be “tolerated” because the majority of members are doing the same thing. Voluntary codes of conduct can also be stifling, because new ideas or practices are sometimes silenced by the majority of members. Finally, there is the potential for non-participating firms to enjoy a “free ride” on the positive image that a code helps to create. Consumers can develop a false sense of security about a firm that is not actually the subject of a code.

In addition to the above-noted drawbacks, competition issues may arise where an industry association establishes voluntary codes of conduct or issues “seals of approval.” There is the potential for codes to be anti-competitive, in that they can erect barriers to entry or be used to engage in collusive behaviour. Under the provisions of the Competition Act, voluntary codes or other arrangements cannot be used in a way that substantially reduces competition, prevents non-participating firms from entering the market, or negatively affects consumers by significantly raising prices, reducing service, or limiting product choice.

Notwithstanding the above-noted potential for anti-competitive behaviour, the Bureau generally supports voluntary codes as a substitute for more direct command-and-control forms of regulation. The Bureau would seek to inform parties which might be interested in establishing a voluntary code about the application of the Competition Act, and encourage the parties to consult with the Bureau at an early stage. The Bureau provides both oral and written advisory opinions on the applicability of the Competition Act to specific situations.

Voluntary codes may also have other legal consequences. If a company does not comply with a voluntary code, it may be used against them in a prosecution to refute a defense of due diligence by showing that the company was not meeting the industry standard. Failure to comply with a voluntary code may also give rise to liability in tort and/or contract in some instances.

Despite their many advantages, it is clear that voluntary codes may be insufficient by themselves to protect consumers. They work best against a backdrop of regulatory legislation, and this legislation must be rigorously enforced. Regulators will have an on-going role to play with respect to voluntary codes. This role will include providing guidance to assist in the development of these codes, and enforcement of legislation to back up self-regulation efforts. Voluntary codes can serve as an effective complement to government regulation, and because of their flexibility, may be well-suited to the evolving Internet environment.

C. Privacy Initiatives

1. Government Action

Bill C-54, the Protection of Personal Information and Electronic Documents Act,¹⁸ was tabled in Parliament and received first reading on October 1, 1998. Bill C-54 establishes a right to the protection of personal information. It sets out in law rules on how that information may be collected, used, and disclosed in commercial activities.

Under the proposed legislation, the Privacy Commissioner of Canada will oversee compliance. The Privacy Commissioner's role will include receiving and investigating complaints, and mediating disputes. Unresolved disputes can be taken to the Federal Court for resolution. The legislation will apply first to the federal regulated private sector, which includes federal works, undertakings, and businesses such as chartered banks, telecommunications and broadcasting companies, airlines, and interprovincial transporting firms. It will also immediately apply to interprovincial and international trade in personal information, where the information is sold. Three years after coming into force, the legislation will cover all commercial activities conducted by the private sector, except where a province or territory has passed similar legislation.

Bill C-54 also establishes rules for the use of electronic documents. Many federal statutes and regulations specify that information must be given "in writing" or "signed." Such references may be interpreted as restricting transactions to paper, thereby precluding electronic delivery of government information and services. Bill C-54 will assist in making existing statutes compatible with an electronic environment by recognizing electronic signatures and clarifying rules with respect to electronic documents.

2. The Private Sector

The private sector has taken a leading role in addressing consumer concerns about privacy. The CSA International (formerly the Canadian Standards Association) has developed the Model Code for the Protection of Personal Information, which was adopted as a National Standard in 1996. The CSA standard is a set of principles addressing two broad concerns: the way

¹⁸ See Bill C-54, *An Act to support and promote electronic commerce by protecting personal information that is collected, used, or disclosed in certain circumstances, by providing for the use of electronic means to communicate or record information or transactions and by amending the Canada Evidence Act, the Statutory Instruments Act, and the Statute Revision Act*, 1st Sess., 36th Parl., 1988 (1st reading 1 Oct. 1998).

organizations collect, use, disclose, and protect personal information, and the right of individuals to have access to personal information about themselves. Many firms in Canada have implemented the Standard, or are in the process of doing so.

3. Privacy Enhancing Technologies

The protection of personal information can also be accomplished through the use of privacy enhancing technologies such as cryptography, firewalls, and screening devices. While a detailed discussion of these technologies is beyond the scope of this Article, it is clear that these technologies may serve as complimentary tools to privacy legislation. The Canadian government has identified cryptography as an important area of policy development, and on October 1, 1998, released Canada's Cryptography Policy.¹⁹ Similarly, the OECD released its *Guidelines for Cryptography Policy* in 1997.²⁰

D. Application of the Misleading Advertising and Deceptive Marketing Practices Provisions of the Competition Act

The Competition Act is the only comprehensive statute with federal jurisdiction to address anticompetitive practices, regardless of the medium used. Accordingly, the Competition Bureau, which is charged with enforcement of the Act, will play an important role in addressing consumers' concerns about the safety of the Internet. A brief review of a few of the current methods of advertising electronically is appropriate to frame this discussion.

1. Current Methods of Advertising Electronically

a. Web Sites

Web sites may well be the most popular form of Internet advertising.²¹ A Web page offers “. . . a means by which advertisers can deliver product information, establish a corporate identity, build brand awareness and loyalty, capture customer leads, provide customer service, conduct sales transactions, and conduct research. Advertisers can measure the number of ‘clicks’ (or

¹⁹ See, e.g., INDUSTRY CANADA, SETTING A CRYPTOGRAPHY POLICY FRAMEWORK FOR ELECTRONIC COMMERCE, Feb. 1998 (visited July 19, 1999) <<http://strategis.ic/crypto>>.

²⁰ Organization for Economic Cooperation and Development, *Guidelines For Cryptography Policy* (visited July 10, 1999) <<http://www.oecd.org/dsti/sti/it/secur/prod/crypto2.htm>>.

²¹ See A. GAHTAN, ET AL., INTERNET LAW: A PRACTICAL GUIDE FOR LEGAL AND BUSINESS PROFESSIONALS 171 (1998).

'hits') to their site from an ad on another site, and the volume of product sales through the site."²²

b. Cybermalls

These are collections of on-line businesses which allow consumers to browse different goods and services available from various on-line merchants in the mall.

c. Electronic Bulletin Boards

These allow users to access or subscribe to topics of interest. This system allows for advertisements to be posted, usually targeted to specific relevant areas of interest.

d. Browser Programs and Search Engines

Most users need to access browsers and search engines in order to search the Web, view files, and follow hyperlinks. Advertising space is available on these pages, often in the form of banner ads, which frequently allow users to click on the ad to link directly to the advertisers' Web site.

e. E-Mail

This is the mailing of advertisements directly to consumers.

While these are some of the main forms of advertising, there are a myriad of others available on the Internet. For example, advertisers can sponsor a site of interest in exchange for a clickable hyperlink to the advertiser's Web site, or can run contest pages in order to promote their product.

2. Applying the Competition Act to On-line Advertising

On March 18, 1999 the Competition Act was amended by Bill C-20. The Act now provides two adjudicative regimes to address misleading advertising and deceptive marketing practices. A general criminal prohibition requiring *mens rea* has been retained to deal with the most egregious matters, and a civil regime has been established to address most instances of misleading advertising and deceptive marketing practices. The provisions with respect to

²² David M.W. Young & James B. Musgrove, *Competition Law for the 21st Century: Developments in Marketing Law for a Borderless World*, Canadian Bar Association 1997 Annual Competition Law Conference, Sept. 18-19, 1997, Aylmer, Quebec, at 33.

multi-level marketing and pyramid selling have remained under the criminal regime.

The general criminal prohibition against misleading advertising can be found in section 52 of the Competition Act, which reads:

52.(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, *knowingly or recklessly* make a representation to the public that is false or misleading in a material respect (emphasis added).²³

The principal civil provision can be found in section 74.01, which reads:

74.01 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(a) makes a representation to the public that is false or misleading in a material respect;²⁴

The only significant difference between the two provisions set out above is that the civil reviewable provision omits the reference to “knowingly or recklessly,” but contains a publisher’s defense in section 74.07 which states:

74.07(1) Sections 74.01 to 74.06 do not apply to a person who prints or publishes a representation on behalf of another person in Canada, where the person establishes that the person obtained and recorded the name and address of that other person and accepted the representation in good faith for printing, publishing, or other dissemination in the ordinary course of that other person’s business.²⁵

Since both provisions deal with representations made to the public “by any means whatever,” it appears that the medium utilized to convey the representation is irrelevant, and therefore applies to advertising on the Internet. Similarly, the provisions of the Act dealing specifically with multi-level marketing and pyramid selling are also not sensitive to the means by which representations are made, and therefore, would appear to apply to representations on the Internet.

²³ *Competition Act*, *supra* note 1, § 52(1).

²⁴ *Id.* § 74.01.

²⁵ *Id.* § 74.01.

The case of *R. v. The Integrity Group (Canada) Inc.*²⁶ is an example of the applicability of the marketing practices provisions of the Competition Act to cyberspace. The defendant in that case ran a multi-level marketing scheme. Section 55(2) of the Act requires *inter alia* that promoters of multi-level marketing schemes disclose the actual compensation received or likely to be received by typical participants in the plan.²⁷ The Integrity Group promoted their plan on the Internet, as well as in various meetings, without the requisite disclosure. The court in that case had no difficulty in applying the requirements of the Competition Act to the on-line representations.

While it therefore seems clear that the deceptive marketing provisions of the Competition Act will continue to apply to advertisers both under the civil and criminal regimes, the issue of liability of third parties, such as Web page designers, proprietors of cybermalls, proprietors of electronic bulletin boards, and Internet service providers (ISPs) presents itself. As yet, these issues have not been tested in Canadian courts. In this regard, Section 52.(1.2) of the Act may provide guidance:

52.(1.2) For greater certainty, a reference to the making of a representation, in this section or in section 52.1, 74.01 or 74.02, includes *permitting* a representation to be made.²⁸

It would seem that all of the third parties mentioned above could conceptually be liable for having either made a misleading representation or permitting one to be made. In the criminal sphere, the issue will turn on whether the third party acted in a manner that could be described as knowingly or recklessly.

For example, a Web page designer might theoretically attract liability by designing a Web page where the designer knew that the page contained a representation that was false or misleading, or was reckless about whether the representations contained therein were false or misleading, in the same way that an advertising agency designing a television commercial involved in initiating, conceiving, or implementing the advertisement can be held liable.

Perhaps the more troublesome issue is that of the potential liability of the other third parties mentioned, the proprietors of cybermalls, proprietors of electronic bulletin boards, and Internet service providers (ISPs). Notionally, it seems appropriate to group these together, in that they are publishing the representations at issue by hosting or providing access to them, rather than being involved in the actual design of the representations. This group might

²⁶ *R. v. The Integrity Group (Canada) Inc.* (1997), 73 C.P.R. 3d 525 (Alta. Prov. Ct.).

²⁷ See *Competition Act*, *supra* note 1, § 55(2).

²⁸ *Id.* § 52(1.2).

best be considered as being on a spectrum in terms of their respective ability to practically control the content to which they are providing access, with cybermall proprietors having perhaps the greatest degree of control over content, and ISPs having the least control.

The facts in any given case will have to be carefully evaluated under both the criminal provisions with their *mens rea* requirement as well as under the civil reviewable provisions with their concomitant publisher's defense, and with a view towards developing a principled and well-reasoned approach to third party liability.

The Competition Bureau has in place a long-established compliance program with respect to the statutes it enforces. This program contains a wide range of elements that ultimately are designed to encourage compliance with the respective legislation. The "Conformity Continuum," as we call it, consists of a variety of compliance tools. These include public education in the form of guidelines, pamphlets, and participation in conferences, such as the Canada/United States Law Institute Conference. Other tools include oral and written advisory opinions; information contacts; voluntary codes of conduct; written undertakings; consent orders; prohibition orders; and finally, contested proceedings. The Bureau employs a wide variety of these tools to achieve compliance with the four statutes which it administers. The approach chosen (which could be a "blended" approach) depends on the particular circumstances of the case at hand. Our choice of response would depend on a variety of factors, including the gravity of the alleged infraction, previous anti-competitive conduct, the willingness of the parties to resolve the particular matter, and Bureau priorities.

E. International Co-operation

Enhanced co-operation and communication between enforcement agencies is essential to deal with emerging inter-jurisdictional problems. Where misleading conduct transcends borders, there is clearly a requirement for cross-border co-operation, which may be through the exchange of information and coordinated enforcement. OECD members should work to enhance the information-sharing networks that currently exist to deal with the speed at which this technology can disseminate misleading information between Member countries.

In 1995, our Memorandum of Understanding as to notification, consultation, and co-operation with respect to the application of national antitrust laws was replaced by a broader co-operation agreement known as the Agreement between the Government of the United States of America and the Government of Canada Regarding the Application of their Competition and

Deceptive Marketing Practices Laws.²⁹ This agreement expanded the scope of cooperation to include marketing practices offences and has allowed our agencies to notify, consult, and co-operate with each other to address anti-competitive activity that affects both or either country.

An example of co-operation between enforcement agencies was Internet sweep days, during which the Competition Bureau, members of provincial law enforcement organizations, the U.S. Federal Trade Commission and other international law enforcement counterparts participated in intensive searches on the Internet to identify deceptive promotions. Promoters of these types of representations were informed of the applicable laws.

The Competition Bureau is also a participant in the International Marketing Supervision Network (IMSN), which was chaired by Canada in 1996-97. The IMSN is an informal alliance of twenty-nine OECD Member countries. Its members regularly exchange information with a view to promoting international co-operation in detecting and fighting unfair and deceptive marketing practices.

The Bureau is also considering amendments to the Competition Act that would permit us to enter into international mutual assistance treaties with other countries, particularly those contemplated under the U.S. International Antitrust Enforcement Assistance Act (IAEAA).³⁰

F. Consumer Education

Consumer education will play an important role with respect to ensuring that consumers feel confident about making on-line purchases. The Fair Business Practices Branch of the Competition Bureau is examining the need to enhance consumer awareness with respect to on-line purchasing issues. In addition, the Working Group on Electronic Commerce and Consumers is currently finalizing a series of principles for consumer awareness.

IV. CONCLUSION

The benefits of electronic commerce to both consumers and businesses are substantial. Electronic commerce has the potential to significantly increase competition by expanding the range and sources of products and services available. The challenge will be to develop a framework capable of

²⁹ See Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, Aug. 3, 1995, U.S.-Can., 35 I.L.M. 309 (1995), reprinted in 4 Trade Reg. Rep. (CCH) § 13,503.

³⁰ International Antitrust Enforcement Assistance Act of 1994 (IAEAA), Pub. L. No. 103-438, 108 Stat. 4597 (codified at 15 U.S.C. §§ 6201-6212 (1994)).

building trust in the digital marketplace. This framework will include legislation, voluntary codes and standards, technology, and consumer education.

It is clear that competition law enforcement issues will arise in protecting the competitive process in the electronic marketplace. Technology now makes it possible for businesses to communicate rapidly and at a low cost with their clients, no matter where they are located. The enforcement of competition laws can no longer be conducted on a strictly national basis without consideration of enforcement policies in other jurisdictions. Furthermore, due to the cross-border nature of electronic commerce, it is often difficult to obtain information or evidence concerning competition law offenses which originate in a foreign jurisdiction and affect Canadians.

Efficient co-operation among enforcement agencies is a key component to deal with these cross-border issues. As discussed, significant parts of the infrastructure are already in place. However, government agencies will need to critically examine current methods of international co-operation and information sharing, and explore new models of co-operation.

From the Bureau's perspective, we see the Competition Act as a key component of the legal and regulatory framework for electronic commerce. The study and analysis of enforcement issues will be an ongoing process, and the Bureau will continue to adapt its compliance and enforcement techniques to ensure low-cost, effective enforcement in the global economy and the electronic marketplace.

