CRIMINAL LIABILITY OF ADVERTISING AGENCIES

FRANK PALMER*

For the purposes of this paper, the term "advertising agency" shall be deemed to be an organization whose services are used by the seller of a product, for the purpose of creating or contributing to the creation of representations to be made to the consumer to induce him to make a purchase of that product, and includes those organizations who publish the representation only to the extent that the publisher was involved in the creation of the representation being made. That is, we are not concerned with the situation where the seller of the product provides the publisher with the completed advertisement (whether he be radio, TV, newspaper, etc.) who merely publishes it in that form.

There are many different ways in which an advertising agency could act so as to incur criminal liability. Again, to set the parameters, it is stated that we are here concerned only with criminal liability of advertising agencies as it relates to the creation of advertisements for their clients who are suppliers of goods and services to the consumer.

There are four main areas of criminal liability of advertising agencies which will be dealt with in the course of this paper and they are as follows:

(1) Current Legislation (Canada)
(2) Proposed Legislation (Canada)
(3) Comparative Legislation (U.S.A.)
(4) Conclusions & Possible Alternatives.

Current Legislation:

In this respect then, how does the advertising agency incur *any* criminal liability? It would appear that the criminal offence must be found in the form of the advertisement or representation itself, and particularly, that which is false and/or misleading. Canadian federal legislation which deals with false advertising in one form or another includes the *Bank Act*[1], the *Hazardous Products Act*[2], the *National*

* . A graduate of the University of Manitoba Faculty of Law in 1975, he is now attached to the R.C.M.P. Legal Branch in Ottawa.

1. R.S.C. 1970, c. B-1
2. R.S.C. 1970, c. H-3

Trademark and True Labelling Act[3], the *Textile Labelling Act*[4], the *Precious Metals Marking Act*[5], the *Food and Drugs Act*[6], the *Trade Marks Act*[7], the *Broadcasting Act*[8], the *Consumer Packaging and Labelling Act*[9], the *Combines Investigation Act*[10], and the *Criminal Code*[11]. There are few if any cases emanating from the majority of these Statutes in the context of false or misleading advertisements, therefore the primary emphasis will be on the *Combines Investigation Act* with some references to the *Criminal Code*.

Section 21 of the *Criminal Code*[12] provides that parties to criminal offences are as guilty of those offences as are the primary perpetrators. The *Interpretation Act*[13] and the procedural provisions of the *Criminal Code* provide the application of s.21 of the Code to other federal criminal statutes.

Sections 36 and 37 of the *Combines Investigation Act*[14] deal precisely with aspects of misleading advertisements and I shall deal with them in due course, but first I wish to comment on the criminal sanctions respecting false advertising in the *Criminal Code*. Most people are aware of the common law remedy for what is termed "passing off", but relatively few are familiar with the Criminal Code provisions in s.366 for "passing off". Under that section every one is guilty of an offence punishable on Indictment or Summary Conviction, who (a) passes off other wares or service for those ordered or required, or (b) makes use of a description regarding those wares or service that is materially false as to the kind, quality, geographic origin, or mode of manufacture, production or performance of those wares or service.

Therefore, insofar as an advertisement is concerned, a party, would be equally liable under this section when a reference to the product is materially false. This section, unlike the former s.306[15] of the *Criminal Code*, has been used successfully as a means towards maintaining protection of the consumer recently in this locale[16].

It is submitted that where an advertising agency is instrumental in the creation of such an advertisement and/or knows of its false nature and still promoted it, that agency would be equally liable with

3. R.S.C. 1970, c. N-16
4. R.S.C. 1970, c. 46 (1st Supp.)
5. R.S.C. 1970, c. P-19
6. R.S.C. 1970, c. F-27
7. R.S.C. 1970, c. T-10
8. R.S.C. 1970, c. B-11
9. S.C. 1970-71-72, c. 41
10. R.S.C. 1970, c. C-23
11. R.S.C. 1970, c. C-34
12. *Ibid.*, s.21
13. R.S.C. 1970, c. I-23
14. *Supra*, fn.10
15. *Supra*, fn. 11, s.306 (repealed)
16. *R.* v. *Chicago Kosher Meats Ltd. et al.* (unreported)

the advertiser/producer as a party to the offence, according to the provisions of s.21 of the *Criminal Code*. A person is a party to an offence who does anything or omits to do anything for the purpose of aiding any person to commit it, or abets anyone in committing it. As to passing off, in the case of an advertisement, the offence is complete when the representation is published or presented to the public, by whatever media. It is suggested that there can be little doubt that the creation and preparation of that representation (by the advertisement agency) is a requisite of the end result, and is an *aid* to the commission of the offence.

What then of the provisions of the *Combines Investigation Act* regarding misleading and fraudulent advertisements, with which we are primarily concerned? s.36(1) provides that:

> Everyone who for the purpose of promoting the sale or use of an article, makes any materially misleading representation to the public by any means whatever, concerning the price at which such or like articles have been, are, or will be ordinarily sold, is guilty . . . etc.

Immediately it can be stated that with regard to an advertising agency, as with the advertiser (the supplier) of the advertisement, must be misleading *as to price*, and the product must be an *article*, i.e.: not services. Exempted from these provisions are the publishers, via s.36(2), who accept the advertisement in good faith in the ordinary course of their business. In the ordinary course of business transactions in this day and age, there will often be three parties involved in an advertisement:

(1) the *supplier* – who wants to entice the consumer to buy his product and includes the retailer and manufacturer.
(2) the *advertising agency* – who creates the ad, and
(3) the *publisher* – who brings it to the attention of the consumer.

It is considered in such cases that the contents of s.36(2) may give effect to the rule – *expressio unius est exclusio alterius*, or "when certain things are specified or included or excluded in a law, an intention to exclude or include all others from its operation may be inferred". Therefore, since the Act specifically excludes publishers from s.36(1), it may be inferred that the advertising agent is to be included in s.36(1).

Precisely the same argument may be made regarding the saving clause in s.37. S.37(1) deals with offences being committed by everyone who publishes or causes to be published an advertisement containing a statement that is untrue, deceptive or misleading or arranged to be deceptive or misleading, when the advertisement is published to promote the sale or disposal of property, or interest therein. The saving clause, s.37(3) exempts the person who *publishes* the advertisement. No exemption is made for the person who *causes*

the advertisement to be published. In both sections 36 and 37, the supplier and the advertising agency undoubtedly would be included as persons who *caused* the publication to be made, but in both cases the only true person who publishes is the publisher, i.e. a supplier is convicted of misleading advertising on the basis of causing a publication to be made rather than as being the publisher per se. It is contended therefore that the only person contemplated by the legislation as being protected by the saving clauses (ss. 36(2) and 37(3)) is the actual publisher, the newspaper, radio, etc.

Dealing specifically with s.37, consider a hypothetical situation where the basic facts about a product are supplied to an advertising agency by a supplier with instructions to create an appealing advertisement that will sell the product, i.e. induce the consumer to buy. Time is a premium, but the advertisement is completed just in time to be included in a desired publication, and because of the time element, is forwarded directly to the publisher by the agency without the supplier seeing it in its final form and without giving any specific approval as to its contents. Nothing is unusual about this as the supplier and the advertising agency have done business and this particular style of business, many times before. The complete advertisement is the brainchild and product of the advertising agency, with the supplier only providing a skeleton of details with which to work. The general manager of a large well recognized advertising agency in Winnipeg[17] advises that this is a regular occurrence in the industry. In fact in his words there is usually no written agreement, as the customer calls on the telephone and advises what he wants. The advertisement is completed and forwarded directly to the publisher and the supplier is billed for services rendered. The publisher on advice from the advertising agency also bills the supplier. Suppose in this case, after the advertisement reaches the consumer, it is determined that the advertisement is deceptive or misleading. We know that under the current system the supplier is held liable. The publisher is exonerated by the provisions of s.36(2) or s.37(3) and generally justifiably so. But who is the real culprit? It seems here that the advertising agency is literally cloaked in criminal liability, under the provisions of the Act as it stands right now. It is not surprising though, that no cases appear to be in existence wherein an advertising agency has been prosecuted in Canada. It is the stated position of the Combines Investigation Branch, Trade Practices office[18] that they are not interested in prosecuting the advertising agency. They are concerned with the party who is responsible for that particular advertisement coming into being, i.e. the party who accepted financial

17. Paul Heriot, McConell Advertising
18. J.T. Rodger, Senior Investigator, Combines Investigation Branch

responsibility for its creation and publication, and that is always the supplier, in pursuit of expanding the sale of his product. There can be no argument with the statement that the supplier in the vast majority of cases is the initial instigator of deceitful, misleading or false representations as to his products, either in price or in a material concept as to the product's capabilities. In those cases the supplier must bear the brunt of the liability. But often and regularly the advertising agency uses its special knowledge, training and expertise as well as resources, to twist and manipulate fact or fiction, either *with* or *without* direction from his client (the supplier) to create something which is less than factual, and to ply on the mind of the unsuspecting consumer in order to induce him to do something he might not otherwise do. In this writer's opinion, the system is faltering when it is thus possible for the agency to exit from the matter free of liability, exceedingly well reimbursed for its efforts.

It is felt that the Act as it presently exists, contains sufficient "teeth" to "put the arm" on advertising agencies who are using their position and skills to perpetrate what amounts to fraud on the consumer, either with or without the sanction of their clientele. It is felt that doing this would have a significant effect on the overall authenticity of advertisements generally that are being thrust in the face of today's consumer.

New Criminal Legislation:

A new competition policy for Canada in the form of sweeping changes of the *Combines Investigation Act* appeared in the 1st session of the 29th Parliament, 21-22-23 Elizabeth II as Bill C-227. The proposals material to advertising agencies were eventually incorporated in chapter 76, 23-24 Elizabeth II[19] in substantially the same form, i.e. s.36, plus the general changes which include "*services*" with "*articles*" and conjunctively term them "*products*".

The potential scope of the Act's application to advertising is thereby widened considerably. Up to the present time, only advertisements (as previously discussed herein) which induce the purchasing of *articles* or personal property come within the jurisdiction of the Act. Now the Act will encompass advertisements of "*products*" which will include articles and services, whether they be industrial, trade, professional or otherwise.

S.36 of the amendments is all inclusive of the former s.36 and 37 plus a number of additions, most of which go mainly to identifying specific situations which constitute false and misleading advertisements. The section also contemplates what is to be considered in

19. *An Act to amend the Combines Investigation Act and the Bank Act and to repeal An Act to amend the Combines Investigation Act and the Criminal Code*, S.C. 1974-75, c. 76.

determining whether or not the advertisement is misleading. The question as to whether advertising agencies are liable under the legislation is not met. There is nothing in s.36 which appears to immunize or strengthen the position of advertising agencies. S.36(3) states:

> Subject to subsection (2), everyone who for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product any material or thing that contains a representation of a nature referred to in subs. (1) shall be deemed to have made that representation to the public.

It would appear this provision is aimed at the manufacturer who supplies literature and/or other material or propaganda to a retailer or supplier regarding a new product, for the purpose of the retailer passing same on to the consumer for advertising purposes, or for displaying in his premises for the attention of the consumer.[20]

It might be argued that this subsection might have application to an advertising agency who at the request of the supplier, compiled or created material of entirely their own initiative and expertise, then turned the material over to their clients for publication. If this were the legislative intent, it would certainly be innovative, and if properly administered would be effective legislation. However, I doubt if this is the intent of the legislators, and it is doubtful if the courts would interpret it thus.

Section 37.3 of the amended act replaces the former saving clauses, ss.36(2) and 37(3), and states:

> "Section 36 to 37.2 do not apply to a person who prints or publishes or otherwise distributes a representation or an advertisement on behalf of another person, where he establishes that he obtained and recorded the name and address of that other person and that he accepted the representation or advertisement in good faith for printing publishing or other distribution in the ordinary course of his business."

It is felt that this provision, properly interpreted, does not protect an advertising agency from prosecution with respect to its role in the creation of an advertisement which contravenes any of the provisions of the Act. The wording of s.37.3 indicated that the legislative intention will be to pursue that other person whose name was obtained and recorded, and that as before will not be the advertising agency, since the advertising agency as in the example earlier will give the name of his client to the publisher, i.e., the supplier. This apparent legislative intention appears to be a codification of the policy of the Department, as provided to the writer verbally and commented on previously, that the Department was interested solely in the person responsible financially for the creation of the advertisement.

20. Subsection (2) specifically deems that a representation expressed on a store display, or on anything accompanying an article offered or displayed for sale, or on the article or its wrapper, or in the course of retail selling, is made *by and only by* the person who *caused* the representation to be so expressed.

This in all cases will be the supplier (usually a retailer or manufacturer).

It is the opinion of the writer that the mechanism with which to successfully prosecute an advertising agency who has been instrumental in the creation of a false or misleading advertisement, exists just as viably in the proposed amendments as it does in the presently existing legislation.

Comparative Legislation: (U.S.A.)

There is considerable legislation in the U.S.A. dealing with consumer protection aspects of law. The most predominant of course is the Federal Trade Commission Act[21] .In administering this Act, the Commission has very broad sweeping powers and jurisdiction. However, these powers are not criminal but are entirely civil in nature and will not be dealt with per se in the course of this paper.

Criminal sanctions in the United States with respect to fraudulent, false or misleading advertising have developed primarily at the State level. This particular form of legislation has come to be known as a "*Printer's Ink*" statute. At the present time 44 out of 52 states in the Union have adopted a model of the Printer's Ink statute albeit with some minor modifications in some instances. For example in the state of Wisconsin, this form of consumer legislation is found in Chapter 100 of the Statutes of Wisconsin[22] (100.18) The wording of the statute, by comparison to the Canadian legislation is very wordy, lengthy and all-inclusive in its terms, in that the definitions are embodied within the text of the sections. It is considered somewhat broader in its general scope than the Canadian legislation, and it is interesting to note that the enforcement of these provisions is entrusted to the State Department of Agriculture. The Department may proceed in all cases either criminally or civilly. Section 100.26 provides the penalties for various provisions of that chapter. The penalty for the fraudulent advertising section (100.18) is a general penalty of a $200. fine and/or six months imprisonment (maximum).

These provisions include in the list of potential accuseds, *agents* which would appear to cover advertising agents and agencies in most cases. The only saving provision, s.100.18 (9)(b) protects:

> . . . the owner, publisher, printer, agent or employee of a newspaper or other publication, periodical or circular, or a radio or TV station, who in good faith and without knowledge of the falsity or deceptive character thereof, publishes, causes to be published or takes part in the publication of such advertisement.

This protection extends only to subs 100.18(9) which deals with a publication of an advertisement relating to the sale, purchase, hire,

21. 38 Stat 719 (1914). (as amended)
22. Statutes of Wisconsin, See Appendix "B"

etc. . . . which is part of a scheme not to sell, purchase, hire, etc. . . . as advertised. Therefore by not being within this relatively narrow exception, the conduct of a publisher, although bona fides and without knowledge, may result in liability being created under this statute.

There are a number of cases in the United States where advertising agencies have been held liable for their conduct regarding advertisements found to be misleading or fraudulent. However, a very high percentage of these are civil in nature and in most cases were actions brought by the Federal Trade Commission. The case of *U.S.* v. - *Andreadis*[23] however is a well-known case in which the advertising agency was criminally prosecuted. This involved the Regemen Diet Loss or Weight Loss program. The advertising agency rearranged some of the wording used in layouts by other advertising agencies, changing by implication the nature of the message conveyed. For this conduct, the agency was fined $50,000. by a New York court in 1965. One of the most notable cases involving an advertising agency regarding false advertising is the case of *F.T.C.* v. *Colgate-Palmolive* [24] which is the case of a TV commercial showing a particular shaving cream allegedly softening sandpaper so it can be shaved clean, when in fact the "mock-up" shown was merely sand sprinkled on plexiglass then lathered and shaved. This case however was not a criminal prosecution but a civil action by the F.T.C. Even in the United States, in relation to the number of cases before the courts, the instances where advertising agencies have been criminally charged and held liable are few and far between.

Conclusions:

At this point in time it appears that in Canada no one, including the Government is interested in prosecuting the advertising agencies for their part in the on-going deception of the consumer, termed categorically as false or misleading advertising. This is borne out not only by the application of the present legislation and Department policy, but by the apparent intention of the new legislation in this particular area.

Hand in hand with this ponderous question goes the more basic question of: "Why is a competition statute framed in criminal terms in the first place?" The historical reasons appear to be fourfold:

(1) The Original statute of 1889 was drafted at a time when the real problem in what was a simple economy was the growth of trusts. "Robber barons" were driving parliamentarians crazy, and the parliamentarians, with the double analogy of theft and conspiracy, felt

23. 238 F. Supp. 805 (1965)
24. 118 N.E. 327 (1968)

doctrinally more comfortable with criminal sanctions.

(2) The only remedial alternative to criminal sanctions was tariff reduction and the national policy of the Conservative Government of the day was to keep tariffs high.

(3) Parliament had previously used criminal sanctions to control trade union activities and wanted to avoid accusations of "class" legislation.

(4) Some members of parliament actually believed that to create criminal sanctions was to merely codify the common law.[25]

It is undoubtedly true that constitutional reasons have in the main been responsible for combines laws remaining criminal up to the present time. The Government, even if it wanted to convert the combines and consumer legislation it has developed from criminal to civil, would be reluctant to do so, because it would undoubtedly create a conflict with the Provinces on constitutional grounds, and the Federal Government conceivably may lose their control of the legislation. In light of the action taken (or the lack of it) by the provinces when enforcement was within their jurisdiction via s.306 of the *Criminal Code*, the Federal Government would undoubtedly be reluctant to try it again. In light of this it will be interesting to see provincial reaction when the civil sanctions provided in the amendments to the *Combines Investigation Act* are put into effect since there is an apparent constitutional problem created by them.

The moral basis for using the criminal law application to competition law has over the years been largely eroded. Further, competition law being what it is, does not lend itself to being expressed precisely within the context of statutory prohibition. Just how far the criminal law is to be used may well become a political question in the narrow sense. The applicability of the criminal law should, in this writer's opinion be reserved for that type of conduct that can be defined with a high degree of precision as being outright fraudulent practice. This is believed to be desirable particularly with regard to advertising agencies.

Notwithstanding the constitutional problems involved, it would seem to be in the best interests of all concerned if all areas of false and misleading advertising could be dealt with via civil remedies unless the conduct amounts to basic criminal fraud. As far as advertising agencies are concerned, there is no reason why any agency (or anyone) should escape liability for conduct which contributed to the creation of an advertisement that is contrary to the accepted legal and moral standard. That is not to say that the supplier or other person on whose behalf the advertisement was created and published

25. B.C. McDonald, *Central Legal Issues Raised by Government Proposals*, Queen's U. (Jan. 20-21, 1972)

should escape any liability because some liability is attributable to the advertising agency. On the contrary, it is felt that *all* who contribute to the advertisement's creation should accept liability at least in proportion to their contribution and knowledge of the true facts when the advertisement is found to be false or misleading. That is to say of course that the advertising agency should not necessarily incur liability on the basis of incorrect statements provided to them for inclusion in the advertisement when it would be impossible or highly inprobable for them to have knowledge of the true facts.

The advertising agencies themselves believe that they *should* incur liability when they provide advice or actual content for an advertisement which is determined to be false or misleading[26]. Some of them believe that the consumer at present has a stranglehold on the advertisers, and have stated so publicly[27].

It can be argued that to remove misleading advertising from criminal law will lessen its effectiveness, on the premise that conviction only derives its full force from publicity. You can seize wrong deceptive labels even if it means putting a firm out of business. You can impound products. In other facets of life you can cut a nonpayer off from his telephone or hydro. The law tries (unsuccessfully) to cut off bad drivers from their car and the road. But there is little point in impounding the advertisement after it has misled the consumer. What can you do to cut off misleading advertisers from their advertisements? Any criminal penalty which follows in no way helps the already misled public, on whose behalf this whole program has been set up. Then what true value is there in a criminal sanction in most cases?

Surely the Prohibition Order and the Cease and Desist Orders of the F.T.C. (U.S.A.), has to be the proper approach. The Prohibition Order is greatly feared in all facets of business as it can have devastating effects on the whole operation of *any* size organization.

Patrick Fitzgerald, Professor of Law at Carleton University, Ottawa, believes the emphasis is on the wrong party in misleading advertising. He believes that if the onus were on the publishers to ensure that what they publish is accurate and not misleading, the problem would be considerably lessened[28]. This writer disagrees in part, in that it is felt that the onus and basic responsibility should *never* be removed from the party who instituted the advertisement and who is the only one to benefit by its successful nature. To that extent I disagree that the emphasis is on the wrong party. It is contended here that the real offence in these cases is in the *creation*

26. *Supra*, fn. 17
27. *Marketing*, 79:5, p.4 (February 4, 1974)
28. *Misleading Advertising: Prevent or Punish?* (1973) Dal. L.J. 246

of the advertisement, and it is the creators who should be primarily liable, not only on the basis of morality and good faith, but on the basis that enforcement would be simpler. Simpler enforcement, as long as it is justified in the first place, make for a stronger likelihood of compliance, i.e., less need for prosecution in the long run. In most cases, if this were implemented, the supplier and the advertising agency would find themselves sharing the responsibility. If the fines were severe enough, the policy and resulting conduct of advertising agencies could and probably would be kept on a very factual and truthful plane.

In conclusion I would simply state, again, that the legislation, both in its present and proposed state have the ingredients to adequately deal with advertising agencies who are instrumental in the creation of false and/or misleading advertisements. The fact and reality of the matter that this is not being done points only to the policy considerations of the Government and the Department involved. Whether that policy is right, wrong, good or bad is another issue entirely.

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