

ARTICLES

DIGITAL ADVERTISING AND PURCHASING: FUN OR A NEW TYPE OF DECEPTION?

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The interactive digital platform for advertising and purchasing is fun. It can also be manipulated in a way that leads to deception and misleading advertising.

This paper uses the example of “drip pricing” as an illustration of the larger challenges in the digital world. Drip pricing is an advertising technique in which firms frontally advertise only part of a product’s price, and later reveal other charges as the customer navigates the buying process. Behavioral economic research is surveyed which finds that drip pricing often impacts consumer decisions so that they spend more money than they had originally budgeted or anticipated.

Our central thesis is that the complexity of the product or service should be the governing principle in regulating digital advertising in the future. Products in the digital market will range from tickets to a live event to the purchase of a car with specific options.

The paper proposes four general principles as an approach to regulate the digital economy:

Principle one: When a product or service being digitally advertised is transparent, in the sense of being relatively simple to apply, the first screen that a consumer sees should display all-inclusive information (such as pricing).

Principle two: Where the product or service being advertised has complex options, the first screen that a consumer sees should contain a description of the methodology to be applied in subsequent screens in accordance with a matrix of timing and complexity.

Principle three: The interactive digital process should facilitate consumer reversal of choices to the extent that the technology will permit

Principle four: In the case where there is a finding that a digital process constitutes a violation of competition law, an aggravating factor in the assessment of penalty should be whether disadvantaged consumers are impacted in their ability to satisfy basic needs.

On apprécie les plates-formes numériques interactives pour l'achat et pour le marketing; cependant, les commerçants peuvent facilement les manipuler pour produire de la publicité trompeuse et induire le consommateur en erreur.

Pour donner un exemple particulier des vastes problèmes qui se présentent dans l'univers numérique, l'article se penche sur le cas de la « tarification au goutte-à-goutte » : une technique publicitaire dans laquelle un commerce n'affiche d'abord qu'une partie du prix réel d'un produit, puis sale la facture à mesure que le consommateur progresse dans le processus d'achat. Les auteurs ont recensé la recherche en économie comportementale pour constater que ce type de tarification était souvent préjudiciable à l'acheteur, qui se trouve en effet à dépenser plus que ce qu'il aurait cru ou avait originalement prévu à son budget.

Les auteurs avancent la thèse principale suivante : c'est la complexité du produit ou du service qui devrait être le facteur déterminant dans la réglementation de la publicité sur le marché numérique à l'avenir. Celui-ci proposera des produits pouvant aller du simple billet de spectacle au véhicule automobile assorti de nombreux équipements en option.

L'article propose quatre grands principes pour réglementer l'économie numérique.

Premièrement : Lorsque le produit ou service affiché est de nature transparente, à savoir qu'il est relativement simple à tarifier, il faut que le premier écran que voit le consommateur affiche l'information complète (dont le prix).

Deuxièmement : Lorsque le produit ou service affiché est assorti d'options complexes, il faut que le premier écran que voit le consommateur décrive le cheminement qui sera appliqué aux écrans suivants en fonction d'une matrice de temps et de complexité.

Troisièmement : Il doit être aussi aisé que possible pour le client, selon les limites technologiques, de revenir sur ses décisions dans le cadre du processus interactif.

Quatrièmement : Dans les cas où l'on constate qu'un processus numérique contrevient aux lois sur la concurrence, il faut considérer comme facteur aggravant, dans la détermination d'une sanction, la difficulté accrue que peut subir un consommateur désavantagé pour la satisfaction d'un besoin fondamental.

The digital world is an exciting place. It is also fun. The entertainment aspect of interactive digital forums is one of the reasons it is such a psychologically addictive process.² It is no wonder that online advertising is the wave of the future.³

Even though the interactive digital process is fun, it can also be manipulated in a way that leads to deception and misleading advertising. Regulators must adapt to this new technology in a way that balances the advantages of digital processes with fairness in advertising.

To illustrate the larger issues involved in regulating the digital economy, this paper uses the example of “drip pricing” as it applies in the digital world. Drip pricing is an advertising technique in which firms frontally advertise only part of a product’s price, and later reveal other charges as the customer navigates through the buying process.⁴ Drip pricing often impacts consumer decisions which lead to consumers spending more money than they had originally budgeted for and/or anticipated.

We can imagine, for example, a person of modest income planning a trip to fly into Toronto Pearson Airport to visit an ill relative in downtown Toronto for the weekend. This person has a choice: they can either take the Union-Pearson Express train for \$12.35, or they can rent a car. The person may go online and notice that a car can be rented “from \$57.99”,⁵ which would allow the person to have access to the car all weekend and at a price that they can afford. Drawn in and excited by this online digital price, the person then clicks through to the payment phase of the transaction only to notice (perhaps with surprise) that an additional \$26.48 of fees have been added at the very end of the transaction, leaving the estimated total closer to \$100 than just over \$50.⁶

Psychology indicates that this person will likely complete the transaction, and thus would have paid money that could have been used to buy essential items for their ill relative or for the person’s family back home.

You may be thinking to yourself at this moment that you, as a rational person, would have cancelled the online transaction and decided to take the train from the airport to the city at a more affordable price than renting a car. This paper has been written at least partially to stress upon you that it is not likely that you would have made that choice. Rather, like our hypothetical person of modest income, you would have been drawn in and *anchored* by the low price of the car rental—and by the time the extra fees had been dripped upon you, you would have committed to the transaction, felt that the car you were renting was already yours for the weekend, and be bound

by the *inertia* of not wanting to cancel the transaction. The corollary of such a cancellation would be the extra effort to then go back online to book tickets for the train from Pearson.⁷ You, like our hypothetical consumer, would have likely completed the transaction and paid significantly more money than you had budgeted for and/or could afford. And the worst part is, due to the powerful psychology behind drip pricing, you would have not even realized or felt that you had been deceived.

Our central thesis is that the complexity of the product or service should be the governing principle in regulating digital advertising in the future. When the product or service being advertised is transparent, such as tickets to a live event, the first screen that a consumer sees should display all-inclusive information (such as pricing). A corollary of this thesis is that where the product or service being advertised has complex options, such as telecommunication bundles or options on a car, the first screen that a consumer sees should at least contain a simple description of the methodology to be applied in subsequent screens. From a public policy perspective, we argue that the rules governing digital advertising can have a very real economic impact and disadvantaged consumers may be impacted in their ability to satisfy basic needs.

This paper is organized as follows. The first part of the paper surveys existing Canadian law and comparative legal regimes in other jurisdictions that prohibit deceptive marketing. The challenge is to apply existing laws developed in the old print medium to the digital medium. The battleground is the first screen that the consumer clicks through to complete the transaction. Does this first screen have to include all relevant information, or can the interactive process provide the information in stages or steps? If steps are allowed, how long can this process take? Various permutations and combinations of this matrix will be considered.

The second part of the paper outlines the example of drip pricing to illustrate the challenges of legal regulation in the digital world. There are various combinations of physical latency, product or service sophistication, and timing across industries.

The third part of the paper reviews existing literature in the field, both from behavioural and economic perspectives. We conclude that the existing literature uses behavioural economics to identify drip pricing as a manipulative marketing technique. While helpful, this research may suffer from over simplification of the problem because the more challenging question

is whether drip pricing may be an acceptable form of marketing in more complex situations.

The fourth part of the paper applies a matrix analysis to analyze the competing considerations of timing on one axis and complexity of the product or service on the other.

The fifth part of the paper proposes four general principles as an approach to regulate the digital economy. The general principles support the establishment of protective rules, while also allowing for flexibility in internet marketing.

Principle one: When a product or service being digitally advertised is transparent, in the sense of being relatively simple to apply, the first screen that a consumer sees should display all-inclusive information (such as pricing).

The first digital screen that a consumer sees should display all-inclusive information (such as pricing) where the product or service is transparent in the sense of being relatively simple to apply. In the Pearson online car rental example, the first screen should ideally present the price as \$84.47. This is a transparent price with additional fees being easy to calculate and display on the first screen.

This principle is limited by the complexity of the product or service. Depending on the product or service and the digital parameters, it may not be possible to display the entire range of options or information on the first screen. For example, it is possible to “build” a car online with different colours, options, and prices.⁸ However, it is not possible for all of the information to be displayed on the first screen. This leads to principle two.

Principle two: Where the product or service being advertised has complex options, the first screen that a consumer sees should contain a description of the methodology that will be applied throughout the transaction in accordance with a matrix of timing and complexity.

Where the complexity of a product or service does not facilitate a full analysis on the first screen, it should at least contain a simple description of the methodology that will be applied throughout the transaction. In the example of building a car online, the first screen should explain that pricing will vary depending on subsequent choices of engine type and model ranging from sport to luxury.⁹ The various combinations on subsequent

screens should be guided by a matrix analysis of time versus latency, consistent with risk management principles.

Ultimately, we need more thought and rules surrounding online marketing across complex industries which make use of nuanced and fast transactions. One can imagine how choosing a telephone package or choosing additional options while buying a car online is fundamentally different from car rental, for example.

We propose a matrix developed in the fourth part of the paper of timing on one axis and complexity of the product or service on the other to assist with this balancing exercise.

Principle three: The interactive digital process should facilitate consumer reversal of choices to the extent that the technology will permit.

This principle applies particularly if there is sophistication or physical latency elements attached to the object.

Principle four: In the case where there is a finding that a digital process constitutes a violation of competition law, an aggravating factor in the assessment of the penalty should be whether disadvantaged consumers are impacted in their ability to satisfy their basic needs.

If there is a finding of a violation to the extent that disadvantaged consumers are impacted by deceptive advertising techniques, and as a result, are negatively affected in fulfilling their basic needs, a judge should consider this to be an aggravating factor in assessing the penalty. A disadvantaged consumer can be defined as one who is officially under the poverty line, one who is at risk of poverty, and one who is in need or at risk of needing aid from the state to have access to essential products and services.¹⁰

PART I: DECEPTIVE MARKETING IN THE CANADIAN CONTEXT

i) Framework governing deceptive marketing

Part VII.1 of the Canadian *Competition Act* (the “Act”) sets out an administrative regime dealing with deceptive marketing practices. It is a violation to make a representation to the public that is false or misleading in a material respect.¹¹ There are detailed rules dealing with discrete matters such as ordinary price representations¹² and representations relating to the testing of products.¹³ The old “bait and switch” offence is now a violation in the administrative regime.¹⁴ Administrative penalties can be up to \$10 million.

Further guidance may be found in consent agreements filed and registered with the Competition Tribunal (the “Tribunal”). For example, the VW Diesel 3.0 settlement with the Competition Bureau (the “Bureau”) was filed and registered as a consent agreement. The Bureau’s Deceptive Marketing Practices Digest is also a good resource for guidance.¹⁵ There are authoritative texts on Canadian law that should be consulted for guidance on the statute and cases.¹⁶

Some guidance about the parameters of deceptive marketing is found in cases such as *Chatr*.¹⁷ In *Chatr*, at issue were advertisements that claimed “Fewer dropped calls than new wireless carriers”; and representations that Chatr subscribers would have “no worries about dropped calls.” Justice Marrocco defined the consumer perspective as “that of a credulous and technically inexperienced consumer of wireless services.”¹⁸ This test was applied on two levels: (i) literal meaning; and (ii) visual images and sounds.

On the literal meaning level, the Act contains an explicit provision. Section 74.03(5) states: “In proceedings under sections 74.01 and 74.02, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the person who made the representation engaged in the reviewable conduct.” The literal meaning required analysis on the basis of claims such as “You will have worry-free unlimited talk.”

On the level of visual images, the advertisements conveyed the impression that the non-Chatr customer would have difficulty with his or her phone reception. This person has a cloud or fuzzy speech bubble over his or her head. Sounds included the Bobby McFerrin song “Don’t Worry, Be Happy.”

After considering expert evidence, Justice Marrocco concluded that the fewer dropped calls and more reliable network general impressions represented to the “credulous and technically inexperienced consumer” of wireless services that these advantages were available to consumers in each Chatr zone. The Court found that Chatr failed to conduct an adequate and proper test in certain cities prior to making the fewer dropped calls claim at the time of Chatr’s launch in those cities and therefore engaged in reviewable conduct contrary to s. 74.01(1)(b) of the Act.

An important aspect of the reviewable matters stream is that, similar to the old regulatory offence, the Act conceives of the defense of due diligence. If a Court concludes that the internet process violates the standards set out in the Act, the Court must then consider whether the defendant demonstrates

that it has exercised due diligence. Under the Act, the due diligence defense means that:

74.1 (3) No order may be made against a person under paragraph (1)(b), (c) or (d) if the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring.

ii) Drip pricing and the Canadian legal regime

In Canada, some cases of drip pricing may constitute false and misleading advertising. In these cases, it is more likely that drip pricing will be reviewed on the civil track of deceptive marketing practices pursuant to paragraph 74.01(1)(a) and section 74.05 of the Act.

In 2018, the Bureau took on key players in the car rental industry over hidden fees, resulting in a total of \$2.25 million in administrative monetary penalties.¹⁹ For example, in the case of *Canada (Commissioner of Competition) v Hertz Canada Ltd*,²⁰ Hertz and Dollar Thrifty made representations to the public about the price at which consumers could rent cars and related products and also about percentage-off discounts starting from at least 2009 across various media, including their websites, mobile apps, and emails.

Hertz and Dollar Thrifty charged consumers non-optional fees in addition to the prices initially advertised. The non-optional fees increased the cost of renting a car from 10% to 57%, depending on the rental location and vehicle type. These initial price representations created the general impression that consumers could rent cars and related products at prices that were not in fact attainable, because consumers were required to pay additional non-optional fees. A consent agreement filed with the Tribunal included an administrative monetary penalty in the amount of \$1,250,000.

The Bureau collected a \$300,000 penalty from Comwave Networks, a telecommunications service provider.²¹ Comwave Networks advertised “unattainable” prices for internet and phone plans. The Consent Agreement reached between the Commissioner of Competition (the “Commissioner”) and Comwave indicated that the company made “concerning” “price representations ... at which consumers could obtain various telecommunications services.”²²

Comwave allegedly made “fine-print disclaimers” about certain “non-optional fees,” disclosing them in the “telephone sales intake process” and requiring personnel “to provide consumers with an itemized breakdown of charges, including these non-optional fees.” According to the Commissioner,

however, all of these disclaimers and disclosures proved insufficient to correct the overall impressions that the initial price representation left with consumers. The Commissioner concluded that notwithstanding the disclaimers and telephone intake process, Comwave's advertisements created the general impression that consumers could obtain telecommunication services at prices that were not in fact *attainable*, because "consumers were required to pay ... additional non-optional fees."

In January 2017, the Ontario government introduced consumer protection legislation aimed to enforce "all-in pricing" in the travel industry, requiring companies to display the total cost of a product, including all taxes and fees in travel advertising. The airline industry has been required to display final prices inclusive of extra charges since 2012. As well, most provinces require all-in pricing to be displayed by auto dealerships. For example, in Quebec, consumer protection laws require that merchants cannot sell their products for prices higher than the advertised price.²³

Advertising in the digital world is a little more nuanced. Transparency should be encouraged, but what does transparency mean? We know with drip pricing, the final price is revealed before payment is made. In the digital sphere, is it enough that the final price is advertised before payment? Where should the line between persuasion and deception be drawn?

As a starting point from which to answer these questions, the rules for the sale of tickets to events in Ontario, outlined in the *Ticket Sales Act*,²⁴ seek to promote fairness, transparency, and consumer protection in Ontario's ticket industry by preventing ticket fraud and providing consumers with more information when purchasing tickets. When making a ticket available for sale or facilitating the sale of a ticket, ticketing businesses must ensure that "the offer discloses the total price of the ticket and includes a separately itemized list of any applicable fees, service charges and taxes."

The legislation has not yet been tested in court. There is potential ambiguity as to the exact point in the process when the face value and total price per ticket must be disclosed. In other words, on one interpretation, the offer must immediately set out the all-inclusive price. On the other hand, it may be argued that as long as the all-inclusive price is disclosed before the purchase is made and credit card authorization (or some other form of payment method) is accepted, there would be compliance. It is our view that the point at which the all-inclusive price must be disclosed depends on the timing of the drip in its relationship with the sophistication of the object, and whether there is risk of physical latency.

Drip pricing in the digital arena is now arguably constrained by consent agreements filed with the Competition Tribunal in the *Ticketmaster* and *StubHub* cases, discussed below under the heading “Drip Pricing in the New Digital Economy”.

iii) Drip pricing and the international legal regime

Drip pricing is considered to be misleading and deceptive advertising in some jurisdictions, but considered to be acceptable in others. Legal treatment of drip pricing also varies depending on the industry sector.

The European Commission in its Directive 2011/83/EU on Consumer Rights addressed drip pricing within the airline sector. Before the investigations and the subsequent prohibition of certain pricing techniques, airlines kept adding charges (fuel surcharges, payment by credit card, etc.) during the online purchasing process. The European Commission now requires airlines to include all applicable taxes, charges, and surcharges in the final flight price; any surcharges should reflect costs.²⁵ Nevertheless, incremental pricing is still an important issue in the airline industry. Some fees for cabin baggage and seat allocation procedures are such that consumers may be forced into paying for additional services. For example, this is the case when a family traveling on a reservation with a (young) child is required to pay extra in order to sit in a seat adjacent to their offspring.²⁶

In the United States, the Federal Trade Commission (the “FTC”) has addressed the issue of drip pricing within the hospitality sector. Jon Leibowitz, a previous Chairman of the FTC, observed, “So-called ‘drip pricing’ charges, sometimes portrayed as ‘convenience’ or ‘service’ fees, are anything but convenient, and businesses that hide them are doing a huge disservice to American consumers.” Despite this, regulation of drip pricing has not been unified, clearly defined, or consistently expressed in the United States.²⁷ David Friedman has written a very comprehensive and thoughtful article titled “Regulating Drip Pricing” which argues that regulatory scrutiny in the United States should heighten particularly where three circumstances overlap — violation of existing guidance, pressures unique to transactional place, and concerns about “attainability”.²⁸

The Australian Competition and Consumer Commission (the “ACCC”) has taken measures to investigate and enforce drip-pricing practices, even calling out “drip pricing” by name. The ACCC brought “drip pricing” actions in Australian Federal Court against Jetstar Airways and Virgin Australia Airlines. The Australian Federal Court found in favour of the ACCC and held that the airlines violated Australian Consumer Law by advertising

fares that “failed to adequately disclose an additional Booking and Service Fee ... that ... was only disclosed to consumers once they had moved through a number of stages of the booking process”.²⁹

iv) Issues specific to the digital economy

In *Bell Canada v Cogeco Cable Canada GP Inc.*,³⁰ a civil case, Bell challenged Cogeco’s use of the phrase “the best Internet experience in your neighbourhood.” Justice Matheson granted an interlocutory injunction with respect to the use of this phrase, and specifically commented on the importance of a first screen of an internet process in the context of the misleading advertising provisions of the Act:

It is at least arguable that, for the purposes of s. 52, the court should consider what the consumer would see on a single screen, including the labels on the hyperlinks on that screen.

I recognize that the amount of content presented on the screen could depend to some extent on the size of the screen on the device chosen by the consumer. Even taking that into account, much of what Cogeco seeks to rely upon would not appear on that first screen.³¹ [emphasis added]

In granting the injunction, Justice Matheson applied the test of a credulous and technologically inexperienced consumer of internet services as set out in *Chatr*³² discussed above.

Each case must of course be evaluated on its own facts. The first screen may contain fine print disclaimers; however, disclaimers have not been favoured by Canadian courts as they tend to be in small print and not drawn to the attention of the consumer in a meaningful way. If the main body of the advertisement on the first screen creates a materially false or misleading general impression in itself, then fine print may not do much to alter the general impression in a way that ensures that consumers will not be misled.³³

The Bureau is responding to evolving challenges in the digital economy.³⁴ The Bureau’s Deceptive Marketing Practices Directorate is continuing to prioritize investigating misleading representations made online in keeping with the digital economy focus.³⁵ The digital sphere poses new challenges and grey areas which will need to be refined. As Josephine Pulumbo, the Deputy Commissioner of Deceptive Marketing Practices, said in remarks delivered on January 22, 2020, “It is true that [the Competition Bureau] may not always win cases, but it is important to take them on regardless—so potential targets know that we are watching, and to bring clarity to the law.”

Pulumbo noted that the digital economy has necessitated greater clarity in the law, as the “global sea change” of the digital economy “means we must re-evaluate how we look at marketing and advertising as the industry shifts to an increasingly digital focus, and we must work to build consumer trust in the digital economy.”³⁶

This changing landscape means that there must still be room for persuasion on the internet, even as consumer protection is prioritized.

PART II: NAVIGATING ONLINE ADVERTISING AND PURCHASING

i) New developments in technology

New developments in technology, artificial intelligence,³⁷ and social media means that technology is pushing our society to progress at a fast rate. These new developments indicate now, more than ever, that the digital world operates differently from the print media.

Unlike newspaper advertisements and mail-order catalogues, online advertising and purchasing occurs in a fast-paced and interactive process. Unlike print media, the first digital screen gives way to an interactive process as the consumer clicks through several pages to complete their online transaction. Regulations need to adapt to fit these new transactions to protect consumers, while at the same time protecting the fun of the internet, and businesses which rely on this model.

The Organisation for Economic Co-operation and Development has observed that “trust is essential in situations where uncertainty and interdependence exist.”³⁸ Existing laws that govern misleading and deceptive advertising must be adapted to the new digital world. Consumers need to have trust that the prices they see online are the prices they will actually pay as they click through to complete the transaction. At the same time, the internet is not like a newspaper: part of the fun of the internet is the collaborative nature of transactions, and the positive feelings people get from completing those transactions. There should be room for digital advertising to retain the fun of the internet in their processes. In recognition of the importance of digital platforms, the existing gray areas, and the high levels of trust consumers place in the digital world, governments are beginning to develop regulations specific to the digital world.³⁹

Additionally, and more than ever, regulators such as the Bureau are responding to evolving challenges in the digital economy.⁴⁰ In particular,

the Bureau's Deceptive Marketing Practices Directorate has committed to investigating misleading representations made online to foster a transparent digital economy in line with consumer protection.⁴¹ In her January 22, 2020 remarks, Palumbo highlighted that the Competition Bureau has resolved five hidden fees cases since 2015. She further noted that deceptive marketing cases are important to the Bureau "because they send a message to all digital advertisers that Canada's competition watchdog is on guard for anyone who tries to use misleading pricing schemes and deceptive claims to attract consumers."⁴²

ii) From partition pricing to drip pricing: A case study within the new digital framework

Before considering the digital application of alternate pricing models within the context of drip pricing, it is essential to define the basic pricing concepts and differences between them. Different pricing concepts include partition pricing, flat fee pricing, and drip pricing. Investigating these different pricing mechanisms, and their impacts on consumers, is important: experimental studies have demonstrated that pricing practices can be "profitable strategies that may harm consumers."⁴³ For example, in his book entitled *Pre-suasion: A Revolutionary Way to Influence and Persuade*,⁴⁴ Robert Cialdini offers psychological studies to support the thesis that the background settings people encounter, which can include whether a consumer sees a flat price upfront or not, may impact the decisions they will make. For a simple example, if we want managers to be achievement oriented we can show them a picture of a runner winning a race, but if we want managers to make careful assessments we can show them a picture of Auguste Rodin's *The Thinker*.⁴⁵ The following chart summarizes the differences between types of pricing applied to a simple example of a ticket to a sports event, as sold through a ticket broker.

Figure 1

All inclusive	Partition	Flat fee	Drip
\$125 per ticket	\$100 face value + \$25 fee disclosed up front	\$100 face value + \$20 fee + plus \$5 flat order fee disclosed up front	\$100 face value disclosed up front. \$20 (profit) \$5 processing fee disclosed before payment authorization

All-inclusive pricing

All-inclusive pricing is the final dollar figure that the consumer must pay the ticket broker to get the ticket, priced on a per ticket basis. This price includes the profit that the broker will make, plus the cost of processing and delivery. In some cases, this may even include government taxes so that the advertised price is truly the final total price the consumer will be expected to pay.

Partition pricing

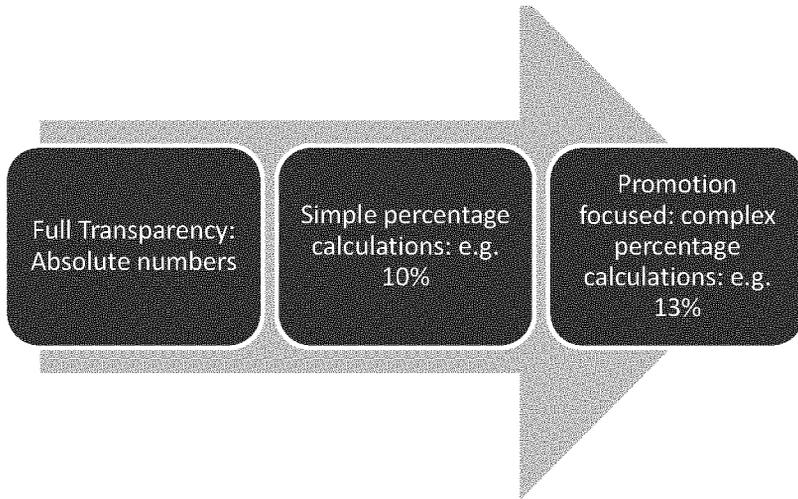
Partition pricing is defined as an advertised price divided into two parts: the larger price is the *base* price (in the example being the face value of the ticket) and the smaller component is the *surcharge* price.⁴⁶ In the ticket example, the advertisement shows the face value of a ticket of \$100 + \$25 in “fees” (made up of \$20 profit + \$5 processing costs for printing or electronic or mobile delivery). Research in the pricing literature suggests partitioned pricing is more effective than combined all-inclusive pricing in increasing demand. People tend to underestimate surcharges and have significantly lower perceptions of the total cost when the price is offered in a partitioned rather than a combined format. One explanation for this is based on the anchoring and adjustment heuristic.⁴⁷ Research shows that consumers are likely to anchor on the base price (in the above example, the face value of \$100) and tend to adjust insufficiently upward to incorporate the surcharge (in the above example of \$25).⁴⁸ However, the partitioned pricing strategy is influenced by whether the surcharge is presented in dollars or as a percentage of the base price, as well as, other factors related to how the format of the price is presented.⁴⁹

An interesting twist is the research that looks at the type of consumer, which leads to varying impacts of partitioned pricing. For example, “promotion focused” individuals perceive partitioned prices to be more attractive than combined prices, while “prevention focused” individuals do not differentiate between the two pricing types.⁵⁰

There are various permutations as to the manner in which the price is partitioned which impacts consumer perception. There is a sliding scale here from fully transparent partition pricing with absolute numbers (such as \$100 plus \$25 in our example above) to versions where the surcharge is calculated by percentages or in other ways that make it more difficult for the consumer to do the calculations. For example, if the surcharge is set out as a percentage, instead of dollar terms, consumers must expend more cognitive effort and are more likely to use the lower effort heuristic or “ignoring

strategies". This leads to lower recalled total costs and likely increased demand.⁵¹ The sliding scale is illustrated by the following spectrum:

Figure 2



Pausing here for a moment, one might ask, what is wrong with using partition pricing to convince consumers to buy products or services? With partition pricing, behavioural research shows that the consumer is being psychologically influenced in ways in which they are not aware. Here is where the spectrum is a useful tool. Where the surcharge is calculated by percentages or in other ways that make it more difficult for the consumer to do the calculations, there is an increased likelihood that the process is manipulative (for example, 10% of a numerical value is easier to calculate than is 13%).

Flat fee pricing

Flat fee pricing is a practice where a flat fee is charged on a per order basis, rather than on a per person or per product basis. For example, a face value of \$100 may have two additional surcharges: a \$20 profit being made by the ticket broker or agent, and a \$5 administrative flat fee charged per order and not per ticket. If 2 tickets are purchased, the total price is 2×120 plus \$5 = \$245, which computes on a per ticket price to be the amount of \$122.50. If 4 tickets are purchased the total price is 4×120 plus \$5 = \$485 which computes on a per ticket price to \$121.25. The challenge for retailers (or in this example ticket brokers) is that it is difficult to know what the final

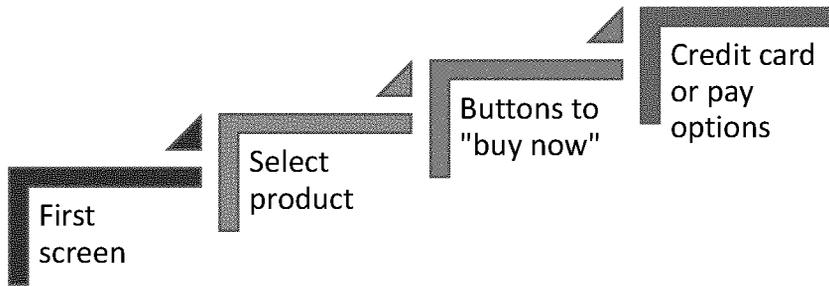
all-inclusive price will be until after the size of the order is determined, as the order fee must be pro-rated to calculate the per ticket all-inclusive price.

Drip pricing

The FTC informally defines “drip pricing” as “a ... technique in which firms frontally advertise only part of a product’s price and later, reveal other charges as the customer navigates the buying process. The additional charges can be mandatory charges ... or fees for optional upgrades and add-ons.”⁵² Drip pricing has been referred to as “partitioned pricing with a temporal delay” in disclosing the entirety of the required commitment, as “[d]rip pricing reveals the partitioned offer in ... drips, with the surcharge presentation coming later.”⁵³ Think back to our example of the person visiting a sick relative needing to rent a car, and being surprised when the final estimated quote was significantly higher than the advertised price. For another example, some gas stations have added a surprise 35-cent surcharge for using a debit card at the pump. As a plaintiffs’ attorney colourfully commented, this practice left consumers without much choice but to pay extra for nothing: “The gas was already in your car, you would go inside, and congratulations, your \$10 of gas is now \$10.35.”⁵⁴

Given the interactive and complex nature of digital platforms, drip pricing is especially prevalent in online transactions. Drip pricing is more complicated than plain partitioned pricing. The key to understanding drip pricing is to understand the time, energy, and emotional impact on a consumer in navigating the process that leads to the ultimate purchase. Consumers must delve deeper into the drip transaction presentation, consuming time and making further commitment to encounter the revelation of the entire offering.⁵⁵ Examples of drip pricing are manifold and can be found in many industries: flight-ticket prices, online admission tickets, tourism fees, ATM fees, and cleaning and service fees on Airbnb.⁵⁶ In the example from a ticket broker sale, the fees of \$20 (profit) plus the processing fee of \$5 per ticket (or \$5 per order of bundle of tickets) are disclosed only after seats have been selected for purchase but before credit card authorization.

In the digital context, drip pricing is an interactive process. The following diagram illustrates the interactive process of clicking on digital buttons and other media.

Figure 3

The interactive process can be overlaid on top of the ticket broker example set out above.

First screen: The first screen aims to impress the consumer. The first screen of a hypothetical ticket broker’s website shows that tickets are available within the consumer’s price range. This will “anchor” the consumer to believing that they can get the tickets for the price range on the first screen.⁵⁷

Select Product: The next screen shows the range of products available, and allows the consumer to explore the seating of the venue within the chosen price range. The consumer is often able to click on the actual seats they might purchase. Research suggests that at this stage of the process, the consumer has likely become excited by the prospect of obtaining tickets at their desired price.

Buttons: Websites will often have “buy now” buttons in vivid colours; once clicked on, the website responds with a sign saying “getting your tickets”. Psychologically, this creates a feeling of ownership over the tickets. This sense of ownership is known as the endowment effect.⁵⁸

The tickets usually can be printed, mailed, or sent by electronic means to a mobile device that the consumer can take to the arena. The electronic option creates the incentive of instant gratification by the receipt of the tickets within minutes, if not seconds, which may further anchor the consumer to the transaction.

Credit Card: Our hypothetical consumer is then asked for credit card authorization (or other pay method such as debit), and for the first time it is revealed (the drip) that the price of a ticket is 25% higher than anticipated. The extra 25% cost represents profits above the face value of the tickets and processing fees.

The consumer now has a choice. The consumer can either proceed to credit card authorization for the tickets available at a higher price than anticipated, or can abandon the process and exit. We will apply behavioural research below to consider what paths this hypothetical consumer is likely to take.

It is also apparent that digital processes have the capacity to both enhance and minimize competition, depending on a series of factors. On the one hand, it is relatively easy for a consumer to compare alternate pricing through a simple internet search. In the travel industry, there are products that do just that.⁵⁹ On other hand, once a consumer spends time wandering down the paths of an internet buying process, they may decide to not repeat that effort with a competitor's website. We recommend flexible principles to take into account the various ways in which consumers interact with the buying process in the digital world.

iii) Drip pricing in the new digital economy

The “new digital economy” presents increasing challenges and leaves us in uncharted legal waters as the framing of the length and depth of the process may impact the legal analysis. The practice of drip pricing in online transactions is the subject of a consent agreement in the case of the *Commissioner of Competition v Ticketmaster*.⁶⁰ In this first Canadian case on digital advertising and pricing, the Bureau settled with Ticketmaster via a consent agreement for an administrative monetary penalty of \$4 million and costs of \$500,000. As part of the consent agreement, Ticketmaster also committed to establishing and adhering to an internal corporate compliance program.

The Ticketmaster consent agreement sets out the following conclusions of the Commissioner which are not contested (but do not constitute formal admissions):

- Ticketmaster supplies or offers to supply tickets to sports and entertainment events and have made representations about the price at which consumers could purchase tickets;
- Representations were made to and target the public in Canada;
- The Commissioner concluded that Ticketmaster advertised prices for tickets that were not in fact attainable, because Ticketmaster charged consumers non-optional fees in addition to the prices initially advertised;
- The Commissioner concluded that certain of the Ticketmaster's

representations created the general impression that consumers could purchase tickets for less than what Ticketmaster actually charges, because consumers were required to pay additional non- optional fees that were added later in the purchasing process;

- The Commissioner concluded that disclosure of the amount of the non-optional fees at later stages of the purchasing process was inadequate to prevent the representations from being false or misleading in a material respect;
- The Commissioner concluded that the non-optional fees often increased the cost of tickets by over 20%, and in some cases, by over 65%;
- The non-optional fees consist of per-ticket fees and per-order fees, with the former charged on a per ticket basis and the latter charged on a per transaction basis;
- The Commissioner acknowledged that Ticketmaster made a number of changes to their websites and mobile applications beginning in July 2018, including changing many of their representations regarding certain non-optional fees and redesigning certain of their websites and mobile applications so that consumers are shown a price inclusive of per-ticket fees, and the maximum per-order fee that could be charged on the entire ticket order, the first time they are shown a price;
- Ticketmaster advised the Commissioner that they have applied these changes voluntarily across Canada in circumstances where their competitors have not made similar changes;
- The Commissioner concluded that Ticketmaster made representations to the public that were false or misleading in a material respect;
- The Commissioner concluded that Ticketmaster has supplied tickets to consumers at prices higher than those advertised; and
- The Commissioner concluded that Ticketmaster has engaged in conduct reviewable pursuant to paragraph 74.01(1)(a) and section 74.05 of the Act.

It is important to note that the settlement between the Bureau and Ticketmaster is a consent agreement. Consent agreements are not law, but they are persuasive and can be good indications of regulatory requirements. As

such, the settlement between the Bureau and Ticketmaster may affect the digital advertising practices of other vendors.

The sequel to the *Ticketmaster* case is the consent agreement filed in the *StubHub* case.⁶¹ Similar to Ticketmaster, StubHub operate online platforms that connect buyers and sellers of Tickets to sports and entertainment events. The Commissioner of Competition concluded that certain of the StubHub's representations created the general impression that consumers could purchase tickets for less than StubHub actually charged, because the initial price shown on the Event Page did not include the non-optional fees added on the Check-Out Page.

The prices shown on the Check-Out Page were often 28% higher than the prices shown on the Event Page due to non-optional fees.

Similar to Ticketmaster, the Commissioner concluded that disclosure of the amount of the non-optional fees at later stages of the purchasing process, including on the Check-Out Page, is inadequate to prevent the representations from being false or misleading in a material respect.

What was different in the StubHub case was an electronic "toggle" which gave consumers an option to use a "show prices with estimated fees" toggle on the Event Page since 2015. However, the Commissioner concluded that, even with this toggle turned "on", in certain cases consumers are required to pay more than the price represented as inclusive of estimated fees.

As is typical for consent agreements, StubHub did not contest the Commissioner's conclusions but did not admit any wrongdoing. StubHub voluntarily made changes to their websites, mobile application, and email to ensure that consumers are shown a price inclusive of non-optional fees the first time they are shown a price.

The Commissioner agreed to more favourable terms in the StubHub agreement than would otherwise be the case because of StubHub's' cooperation with the Commissioner's investigation. Accordingly, the administrative monetary penalty was assessed at \$1,300,000. A corporate compliance program was required to be implemented consistent with the Commissioner's bulletin titled "Corporate Compliance Programs".

PART III: LITERATURE REVIEW

The existing literature on drip pricing focuses on behavioural economics to evaluate the impact of a delay in pricing information. The implications of the research on drip pricing will have larger ramifications for the digital

world going forward. Behavioural economics is a large field, which encompasses at least both behavioural psychology, which leads to decisions, and the economic impacts a decision will have on the market.

The Bureau has endorsed the use of behavioural research. Historically, a court could read a print advertisement and arrive at a conclusion about the general impression of the advertisement without the aid of expert evidence about the meaning of words, or their likely impact on consumers. More recently, the Court in *Chatr* looked beyond mere literal meaning of advertisements to consider visual images and sounds that were also online, which makes a literature review grounded in behavioural psychological research important.

As Ellison and Ellison point out, the study of obfuscating prices has taken on additional urgency with technological and internet retail services, wherein firms have strong incentive to sidestep intense price competition.⁶² The importance of such a review is also heightened when considering how drip pricing can manipulate consumer decision making. In considering the research on behavioural psychology, the following factors stand out as relevant to assess drip pricing's impacts on consumer decision-making: 1) length to complete the process or transaction; 2) level of excitement generated by the process, which may anchor the consumer; 3) use percentages to express fees, or other methods which are more ambiguous or difficult to calculate for the consumer; 4) level of effort required to complete the transaction, which may create endowment, self-justification, and inertia. The presence or frequency of these factors may point to a greater need for competition and consumer protection guidelines, while lower frequencies of these factors may allow for more marketing flexibility.

With respect to advertising in telecommunications, the Bureau opposes drip pricing. The Bureau relies on studies which demonstrate that this pricing strategy can be harmful for consumers by significantly limiting their ability to make well-informed decisions.⁶³ The Bureau cites one study which found that drip pricing reduced consumer welfare by 22% by allowing firms to charge higher prices to consumers than they otherwise would have been able to.⁶⁴ As a result, the Bureau recommends that the price advertised by a service provider should represent the "all-in" price for the service, including all mandatory fees (e.g., modem rental fee). In the eyes of the Bureau, simply including a fine print disclaimer should not permit service providers to advertise prices that are not available.

A) Behavioural psychological literature

In the digital world of pricing, there can be a gray area between the hard lines of lawful influential marketing and unlawful manipulation of a consumer. Cass Sunstein suggests that an effort to influence people's choices is manipulative *to the extent that it does not sufficiently engage or appeal to their capacity for reflection and deliberation*.⁶⁵ The word "sufficiently" is important as it adds some flexibility along a spectrum. Applied to pricing like partition or drip pricing, the task would be to define the dividing line on the spectrum between influencing deliberation (which is permissible and the goal of good marketing) and a type of trickery that is designed to subvert deliberation.

Existing literature confirms that drip pricing plays with a consumer's psychology thus allowing a vendor to manipulate a consumer into spending more money than the consumer anticipated; however, there is little headway on developing guiding legal principles which may aid judges in their decisions, and lay out a standard of ethical practices regarding transactions in the digital world. Our contribution is to propose these guiding principles in light of literature suggesting that such principles are needed to protect consumers. We also suggest that these principles should not be applied in a uniform way, as the timing of the drip in relation to the context of the industry is an important factor in determining whether marketing practices are psychologically manipulative.

(i) Anchoring: The basic principle of anchoring is the concept that first impressions last.⁶⁶ Returning to our example of a person of modest income flying into Toronto Pearson Airport to visit an ill relative in downtown Toronto for the weekend, recall that this person has a choice: they can either take the Union-Pearson Express train for \$12.35, or they can rent a car. The person may go online and notice that a car can be rented "from \$57.99",⁶⁷ which would allow the person to have access to the car all weekend and at a price that they could afford. Drawn in and excited by this online digital price, the person then clicks through to the payment phase of the transaction only to notice (perhaps with surprise) that an additional \$26.48 of fees have been added at the very end of the transaction, leaving the estimated total closer to \$100 than just over \$50.⁶⁸

Our hypothetical person of modest income is drawn in and anchored by the lower price of the car rental, and by the time the extra fees have been dripped, has committed to the transaction.

Consumers may anchor themselves onto the lower advertised price, even when they know additional surcharges will be included in the final price as with partitioned pricing. People tend to underestimate surcharges and have significantly lower perceptions of the total cost when the price is offered in a partitioned rather than combined format. One explanation for this is based on the anchoring and adjustment heuristic.⁶⁹ Research shows that consumers are likely to anchor on the base price (for example, a ticket face value of \$100) and then tend to adjust insufficiently upward to incorporate the surcharge (for example, an extra \$25).⁷⁰ We saw this in our example of the car renter: he had anchored onto the initial price and ultimately paid the final higher price because he had decided the initial price was one he could afford.

(ii) Fast Pace: The digital environment is fast paced, which leaves consumers with an abundance of information in a world where choices must be made quickly. Henry Su explains consumers' need to think fast in the digital sphere where snap judgments based on instinct and bias, and where heuristics are encouraged over longer deliberation.⁷¹ Encouraging consumers to make fast decisions in the internet space can impact the legality of drip pricing, as limited time to purchase may intensify the process and make consumers more likely to fall prey to false headline prices—and pay the dripped amount anyway.

(iii) Endowment effect: A survey of psychological studies show that background settings that people encounter may impact the decisions they make.⁷² Interactive and fast-paced internet processes are often designed to create psychological effects such as an endowment effect which subconsciously impacts consumer choice.⁷³ The endowment effect is when consumers perceive it to be costly to exit a transaction and search for alternative options.⁷⁴ The opening phases of the transaction may have taken up the buyer's limited time and completing the transaction, even on less-desirable dripped terms, may emerge as the consumer's perceived best option in a fast paced digital sphere.⁷⁵ Since going back to search for alternatives may be costly, this can lead to a lock-in of consumers.⁷⁶ Under drip pricing, consumers may therefore underestimate the total price and spend little time searching for alternative options.⁷⁷

(iv) Inertia: Inertia (consumers' belief that switching takes too much time) may also help explain the stickiness of consumers' initial selections when exposed to drip pricing. Inertia is an example of a behavior that is not rational but rather a reflection of the modern and hectic pace of life. Consumers do not feel as if they have the energy or time to spend fixing an issue

that leads to them paying more. As Niels, Van Dijk, and Fields point out, consumers prefer to protect what they perceive they already own more than they like “making gains”.⁷⁸ Consumers tend to remain with their original choice, even when pricing is dripped on the consumer because consumers worry that switching may be a worse deal.⁷⁹ While it may be a rational choice to fix the issue, or switch to a different provider or set of tickets, decision making is not always completely rational. Humans take “shortcuts” and make automatic or subconscious decisions, because making informed and rational decisions all the time would be exhausting.⁸⁰

In addition to the fast-paced nature of digital transactions, Santana, Dallas, and Morwitz⁸¹ found across five studies that participants selected higher priced and relatively unsatisfying options when prices were dripped versus when they were not. Participants read a purchase scenario and made a choice between competitors, then selected any optional add-ons, and were next given the opportunity to either complete the transaction or to start over. Even when participants exposed to drip pricing were given the opportunity to start over and change their selection, they generally adhered to their initial choice. Santana, Dallas, and Morwitz found evidence that participants’ beliefs regarding the similarity of surcharges across firms, self-justification, and inertia help explain their obduracy. In the case of the Pearson car rental, reversal of the transaction would require that the consumer exit, and then access the Pearson train website to book tickets.

(v) Self-Justification: The concept of self-justification requires some elaboration as to why consumers exposed to drip pricing stick with their initial selection, even though it is more expensive and they are relatively dissatisfied with it. Santana et al. found that participants who learned they initially made a mistake by choosing a more expensive option because of drip pricing indicated they were more satisfied with their choice than were those who evaluated the choice from an outsider’s perspective. In other words, consumers subjected to drip pricing convince themselves that the final price is satisfactory.⁸² In this way, consumers protect their self-image as smart shoppers.

(vi) Evidence to the contrary: Though not all of the experimental research supports the anchoring hypothesis, the studies conducted can be distinguished from the profit surcharges we are investigating here. For example, Hayashi et al. argue a hypothesis opposite to the anchoring hypothesis in *Experimental Evidence of Tax Salience and the Labor-Leisure Decision: Anchoring, Tax Aversion, or Complexity?* In the context of partitioned pricing, Hayashi et al. write that if we ascribed to the anchoring hypothesis,

we would expect “that willingness to participate in the labor force would be greater when wages are presented as a higher base wage minus a tax.” Instead, the authors found that portioned pricing “reduces work effort both when wages are presented as a lower base wage plus a bonus or tax credit and when wages are presented as a higher base wage minus a tax.” Hayashi et al. propose an alternative hypothesis to explain the effects of partition pricing: “some individuals may have preferences with respect to actual price descriptions.” For example, there is evidence that some individuals are adverse to taxes and have negative views towards extra costs characterized as taxes as opposed to extra costs not characterized as taxes. However, as previously alluded to, tax surcharges are different from profit surcharges accumulated through drip pricing. Indeed, the authors of this study concede that it might well be that individuals are completely adverse only with respect to labour supply decisions. It also may be that the anchoring hypothesis applies to consumer purchasing decisions and not to labour supply decisions.

(vii) The addictive properties of an internet process that is fun to use:

As set out above, the digital platform takes the consumer through a process starting with the first internet screen and then working through screens which display the range of goods and utilizing interactive buttons that add fun to the process. The fun aspect of the internet should not be underestimated. This entertainment aspect of interactive digital forums is one of the reasons it is such a psychologically addictive process.⁸³

According to the Variable Ratio Reinforcement Schedule (VRRS) theory, the reason internet activity is potentially addictive is because it provides multiple layers of rewards. Constant surfing of the internet leads to multiple rewards that are unpredictable. Each sign gives a user unpredictable results that keep them entertained and coming back for more.⁸⁴ Even simple symbols like a green checkmark or a thumbs up can target a consumer’s affect heuristic to make them feel good about their purchase.⁸⁵ Through symbols and the entertaining interactivity of the transaction, consumers may not even feel “betrayed”⁸⁶ after being dripped with additional charges and resulting in spending more money than they would have otherwise spent.

The “fun” aspect of the internet is largely built upon these multiple layers of rewards and entertainment. These layers should not be eliminated—after all, to do so would be to severely restrict the best parts of the internet. A balance must be struck between maintaining the fun interactive

internet experience and protecting consumers depending on the context and industry.

(viii) Degrees of persuasion to manipulation: As we mentioned previously, Cass Sunstein writes that manipulation occurs when one tries to influence another's choice without giving the latter a sufficient chance to reflect and deliberate.⁸⁷ Again, Sunstein's inclusion of "sufficient" is important as it adds some flexibility along a spectrum. Sunstein gives the example of the Department of Transportation embarking on a vivid, even graphic public education campaign to reduce texting while driving, to demonstrate that some acts of manipulation may count as such even if they leave the chooser better off (indeed, Sunstein says that you might be manipulated to purchase a car that you end up enjoying). We might say that such acts are justified—but they are manipulative all the same. To clarify, Sunstein adds that often the distinguishing mark of manipulation is a justified sense of ex-post betrayal.

Sunstein constructs the philosophical debate underlying the objections to manipulation. The most strongly felt moral objections to manipulation are deontological in character. The objections reflect a sense that people are not being treated respectfully. By way of contrast, a welfarist analysis of manipulation closely parallels the welfarist analysis of fraud and deceit. In a sense, the manipulator can even be seen as a thief, taking something from the chooser without real consent; this illuminates recent initiatives in the area of consumer financial protection.

We propose that matrix analysis may assist with the delicate balancing identified by Sunstein, which is developed further in our four recommended principles.

B) Economic harm literature

Existing literature also addresses the economic harm drip pricing incites. Some wonder why competition does not erode the practice of drip pricing if consumers are likely harmed and largely dissatisfied by the practice.

i) Dominant players and market power

David Friedman suggests that when the drip pricing model becomes dominant, industry players find defection from the model difficult.⁸⁸ For example, in industries like ticket brokerages, arenas will grant exclusive rights to only one ticket broker—thus, reducing robust competition for that event. Further, Friso Bostoen explains that a company like Facebook can

impose an intrusive data policy on its users because Facebook has market power.⁸⁹ This mirrors how one ticket broker can monopolize the competition for one event, and thus has little incentive to mitigate unfair practices like drip pricing. Bostoen also writes that by processing user data inappropriately, Facebook gains a competitive advantage and contributes to market entry barriers—further securing Facebook’s market monopoly.⁹⁰ Similarly, when online ticket brokers use drip pricing, they incentivize other ticket brokers to use drip pricing to remain competitive in the market. Market monopoly is a compelling reason why competition does not eradicate the practice of drip pricing: industry usually gives exclusives to one ticket distributor for an event, which means the consumer has no choice but to use that distributor.⁹¹

Indeed, online platforms have an incentive to engage in manipulative pricing schemes, like drip pricing. Bostoen notes that platforms “compete *for* the market rather than *in* the market” because a platform’s value is linked to the amount of users it has. The market space is small: there is only room for one or a few platforms to achieve the critical mass of consumers necessary to be competitive.⁹² To attract consumers, advertising lower prices upfront and dripping additional surcharges later gives platforms a competitive edge.

ii) Economic decisions based on rounding up

Dripping surcharges on a consumer is effective at least partially because research suggests that people base economic decisions by rounding costs up.⁹³ For example, if a consumer knew the price upfront, they may decide that \$250 is too much to spend on one hockey game. They would reach this conclusion by rounding the \$250 price up to \$300. By comparison, the consumer could purchase a basic 4K HD TV of a decent size for just under \$300, or more fundamentally, our hypothetical consumer could spend the \$300 on books for their children or food for the family. However, if the tickets were initially \$200 and the extra \$50 cost was dripped to the consumer, the consumer may justify the price based on the psychological behavioural effects enumerated above. Alternatively, drip pricing may convince the consumer to spend \$250 on a pair of hockey tickets instead of getting cheaper seats for \$200 a pair.

C) A Consumer Needs Hierarchy

Drip pricing may interfere with savings goals which respect the hierarchy of needs, and in particular basic needs. While this is an unanswered question, Lee and Hanna survey the relationship between spending decisions

and human needs in their article *Savings Goals and Saving Behavior From a Perspective of Maslow's Hierarchy of Needs*.⁹⁴

Maslow developed a model of psychologically healthy people in his seminal *Motivation and Personality*.⁹⁵ He identified a hierarchy of human needs as follows:

- a) the Physiological Needs
- b) the Safety Needs
- c) the Belongingness or Love Needs
- d) the Esteem Needs
- e) the Need for Self-Actualization

Lee and Hanna's results are consistent with Abraham Maslow's theory, which provides empirical evidence to link financial goals to Maslow's hierarchy of needs. Household saving can reflect human needs and the connection between the psychology of human nature and household saving needs in an economic model can open a broader discussion.

Lee and Hanna found that the willingness to save for individual desires (for things that bring pleasure) can be a more important motivation than from a sense of duty (such as future uncertainty) or supporting one's family.⁹⁶ In other words, the higher need for self-actualization is a major motivator to save. This is consistent with Maslow's theory and has implications for financial planners.⁹⁷ Thus, though one could argue the market itself could solve the problem of drip pricing as consumers would frequent firms which do not drip price over ones which do, consumers are not always rational agents. Additionally, as mentioned before, market monopoly limits consumers choices to buy from other firms.

D) Existing recommendations from literature

A literature review demonstrates that many psychological and legal experts consider drip pricing to be a misleading advertising technique. The literature also proposes techniques for consumers to avoid falling prey to targeted and manipulative advertising, like drip pricing. As the existing literature does not propose concrete principles for judges to guide their decisions regarding misleading online pricing models, our contribution is to develop such principles so judges know what to look for in cases, and

understand when they may need expert evidence, as they apply existing laws and regulations to the digital economy.

Henry Su suggests that policy makers and judges should reject models of perfect rationality, and instead look at actual consumer behaviour, to understand the adverse effects of drip pricing on consumers.⁹⁸ We agree.⁹⁹ Our proposed principles are developed with behavioural economics in mind to provide the relevant context for judges to assess manipulative digital marketing techniques. We believe the reason *why* consumers respond to drip pricing is important for legal actors and decision-makers to understand. Further, it is important to recognize situations in which drip pricing is deceptive and to develop policy and judgement guidelines accordingly.

Ellison and Ellison suggest competition agencies may consider specific goals when developing regulations against potentially deceptive online pricing techniques, like drip pricing. They suggest that regulations should be designed to reduce consumers' search costs, "promote efficient consumer choice," and "encourage efficient pricing" of both the base-price and add-on pricing.¹⁰⁰ They also note that "direct regulation of add-on prices could be a useful policy lever" because it simplifies the process for consumers, but that such regulations cannot be so assertive as to destroy the market for valuable add-ons.¹⁰¹ Similarly, to avoid overly paternalistic regulations and protect consumers' choice, Niels, Van Dijk, and Fields propose that firms should disclose salient information to avoid inertia and information overload, activate consumers to make a choice rather than encouraging inertia, and use of opt-in or opt-out models rather than defaulting to an undesirable outcome for the consumer.¹⁰²

Little analysis has been done, however, as to concrete principles judges and policy-makers should consider when confronted with cases of drip pricing in the digital world. The principles we propose bridge the law with the latest research on behavioural economics. Our contribution is to propose guidelines for judges and policy makers in deceptive digital marketing cases, as well as proposing ethical marketing beyond minimum standards.

There exists a spectrum of acceptable marketing practices in relation to drip pricing. Any policies or decisions should not be applied uniformly across industries and drip pricing techniques, because different industries market different products and psychologically implicate people differently. There needs to be some flexibility in applying policies and best practices, because some marketing practices are nefarious, while others merely retain the fun and interactive process of the internet.

We propose that each industry needs to analyze the spectrum of the relationship between their product, the timing of the drip, and the risk of physical latency to adapt the below principles to their purposes.

PART IV: MATRIX ANALYSIS OF COMPLEXITY VERSUS TIME

In some cases, the literal analysis of the first screen will suffice for a court to find that digital advertising is deceptive. Justice Matheson's decision in *Cogeco*, surveyed above, stated that for the purpose of this motion, the Court did not accept Cogeco's submission that the entirety of what a consumer can scroll down to or link to should be considered.

In other cases where the process is more fluid and quick, a court may need to review the impact of visual images, as was the case in *Chatr*. If this path of inquiry is followed, in most cases, this will require consideration of expert evidence in relation to consumer behaviour.

As Archibald and Jull note, a matrix analysis—which is an analysis first derived from a mathematical model—can help with assessing risk management. A matrix analysis “simplifies multiple factors into the balancing of two concepts which then yields priority for action.”¹⁰³ A risk management matrix is grounded in the concepts of negligence law that form the basis of due diligence.¹⁰⁴ The equation of $PL = OC$, which is a type of basic risk management. Matrix analysis in the context of antitrust law has been endorsed by the International Chamber of Commerce in its Antitrust Compliance Toolkit, launched in Paris in April of 2013.¹⁰⁵

The combination of time and complexity can be placed into a matrix analysis.¹⁰⁶ Indeed, the matrix model can be adapted to our purposes to assess the different combinations and permutations of time and complexity depending on the transaction and object at hand. Inserting these factors into the matrix analysis can aid policy-makers, judges, and firms in understanding which regulations should be implemented depending on the nature of each transaction. The matrix analysis gives us a framework for regulation, while also leaving flexibility so that each individual situation may be approached on its own merits. At the same time, the matrix analysis in its flexibility can leave intact the fun, heuristic elements of the internet.

An important consideration in the matrix analysis is how long it would take a consumer to navigate the onscreen process from the first screen until the final purchase, as authorized by a credit card or other form of payment. A spectrum of possibilities depends on the length of the time of the process. At one end of the spectrum are those processes that take only a few seconds

or less than a minute. The profit and fees are therefore disclosed within a few seconds or less than a minute after the base price is presented. This model is close to but not identical to partition pricing as described earlier. Framed in this way, it might be argued that consumers who make purchases online do not expect the first page of the buy-flow to represent the final, total price to be paid.¹⁰⁷

At the other end of the spectrum are processes where the dripped fee is disclosed much later in a lengthy process. The object in this case can be understood to have physical latency, which is an interval between when the consumer agrees to purchase the good or service and when that good or service is actually delivered. The most extreme example of this is the online reservation made for a hotel or resort, where the dripped fee is not disclosed until the guest arrives at the site many months later. The timeframe of the disclosure of pricing is critical.

The following simple matrix illustrates the concept:

Figure 4

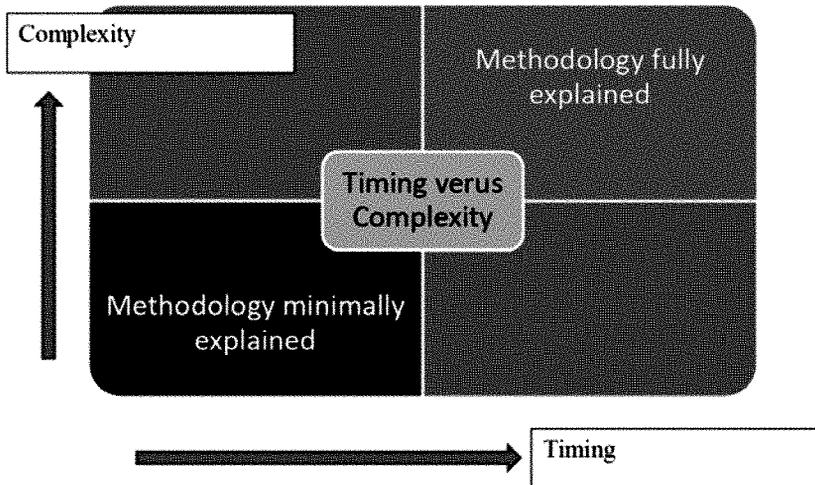


Figure 4 highlights the extremes in the matrix. Where there is maximum complexity and the timing is delayed, the quadrant “maximum explanation” requires a fulsome explanation of the subsequent methodology of calculations. The reverse is lower levels of complexity and time expended, which calls for minimum explanation. In between these extremes are

various combinations of timing and complexity, which call for regulators to develop nuanced approaches.

The matrix analysis is important in assessing drip pricing, because it may shed light on the types and weight of regulations needed in different contexts. As previously discussed, the same levels of regulations are not appropriate across all industries. The matrix analysis is important not only for policy makers who are increasingly called upon to regulate marketing in the digital age, but also for firms which use digital platforms to sell goods and services.

PART V SUGGESTED PRINCIPLES FOR MARKETING IN THE DIGITAL WORLD

Based on the above legal and behavioural analysis, this paper advances four basic principles which are proposed as a framework in the digital economy. (Note that these principles apply more generally beyond the example of drip pricing). These proposed principles are general principles, and will not fit each industry the same way. Each industry should investigate the types of goods or services that are being sold, and should apply these rules as appropriate to their digital marketing practices.

Similarly, regulators should apply such principles in ways which support industry growth, while also allowing for flexibility depending on each unique industry.

Governments have a choice between imposing prior restraint by way of a licensing regime (*ex ante*) or using an offence regime to redress harm that occurs after the fact (*ex post*).¹⁰⁸ Industries like telecommunications are undergoing rapid and fundamental technological and business transformation with the result that they are not simple or stable and the economic stakes are very high. In such contexts, a principles based *ex post* approach is likely more appropriate.¹⁰⁹ Cass Sunstein argues that rules can be overtaken by changing circumstances in fields such as telecommunications:

In the face of rapidly changing technology, current rules for regulation of telecommunications will become ill-suited to future markets. For this reason it may be best to avoid rules altogether, or at least create only a few simple rules that allow room for private adaption.¹¹⁰

This general approach leads to the following four principles:

Principle one: When a product or service being digitally advertised is transparent, in the sense of being relatively simple to apply, the first screen

that a consumer sees should display all-inclusive information (such as pricing).

The first digital screen that a consumer sees should display all-inclusive information (such as pricing) to the extent that the product or service is transparent. In the Pearson car rental example, the first screen should ideally state the price as \$84.47.

Ticketmaster is a good example of the potential for an all-inclusive model to apply at the first screen stage. The product being offered is simple and transparent: tickets to live events have a face value. The subsequent charges add in profit for the ticket broker.

As noted earlier, in the *Ticketmaster* consent agreement, the Commissioner acknowledges that *Ticketmaster* made a number of changes to their websites and mobile applications beginning in July 2018, including changing many of their representations regarding certain non-optional fees and redesigning certain websites and mobile applications so that consumers were presented with an inclusive price of per-ticket fees, and the maximum per-order fee that could be charged on the entire ticket order the first time they are shown a price. *Ticketmaster* advised the Commissioner that it had made these changes voluntarily across Canada in circumstances where their competitors had not made similar changes.

Ticketmaster's Canadian platform is an example of how technology can be used to present all-inclusive pricing on the first screen. A visit to the *Ticketmaster* website in your area¹¹¹ demonstrates the sophistication of a revised digital platform. The first screen for the Elton John “Farewell Yellow Brick Road” concert displays a range of seats with the all-inclusive price displayed prominently. Below the all-inclusive price, the calculation of that price is broken down into a base amount plus an amount for fees, including taxes. The section of the arena for each ticket is noted, alongside a diagram of the arena on the first screen which shows the location of that section in proximity to the stage where Elton John will be performing. A green “next” button sets out the combined face value of the tickets and the added fees with a total amount shown.

The limitation on our first principle is complexity. Depending on the product or service and the digital parameters, it may not be possible to display the entire range of options or information on the first screen. For example, some car manufactures have online capabilities that allow a consumer to request a combination of engines and colours, with additional

options.¹¹² It is not feasible to have all of these options combined on a single screen.

This leads to principle two.

Principle two: Where the product or service being advertised has complex options, the first screen that a consumer sees should contain a description of the methodology that will be applied throughout the transaction in accordance with a matrix of timing and complexity.

Where the complexity of a product or service does not facilitate a full analysis on the first screen, it should at least contain a simple description of the methodology that will be applied throughout the transaction. In the example of building a car online, the first screen should explain that pricing will vary depending on subsequent choices of engine type and model ranging from sport to luxury.

Ultimately, we need more thought and rules surrounding online marketing across complex industries which make use of nuanced and fast transactions. One can imagine how choosing a telephone package online is fundamentally different from renting a car, for example. The goals of accurate quality description while also encouraging a fun interactive internet process are mutually compatible.

We propose a matrix developed in the fourth part of this paper of timing on one axis and complexity of the product or service on the other to assist with this balancing exercise.

Principle three: The interactive digital process should facilitate consumer reversal of choices to the extent that the technology will permit;

Recall that Dallas and Morwitz found that participants who learned they initially made a mistake by choosing a more expensive option because drip pricing indicated they were more satisfied with their choice than were those who evaluated the choice from an outsider's perspective. They convince themselves that the price is satisfactory as a result of self-justification.¹¹³ In other words, the customer's ego may dissuade them from realizing that they may have been duped by the process.

Inertia (consumers' belief that switching takes too much time) also helps explain the stickiness of consumers' initial selections when exposed to drip pricing.

To counter these psychological effects, a transparent and interactive process should contain accessible “buttons” and instructions that make it easier for the consumer to navigate back and reverse decisions in a quick fashion, to the extent that the technology will permit.¹¹⁴

This rule is particularly important when the sophistication and physical latency of the goods or services are engaged. If the product is sophisticated, and a person is psychologically more likely to become invested in the product as a result, there should be early opportunities to reverse the transaction. Similarly, if the person is receiving the object at the same moment they are told about the drip, this leaves little room for the transaction to be reversed.

Principle four: In the case where there is a finding that a digital process constitutes a violation of competition law, it should be an aggravating factor in the assessment of the penalty if disadvantaged consumers are impacted in their ability to satisfy their basic needs.

A set of rules can be derived from John Rawls’ *Theory of Justice* when combined with a behavioural model. The “justice as fairness” theory was constructed by placing peoples behind a “veil of ignorance” so that they do not know their own position in society, and then asking these people to create an agreement to construct a society.¹¹⁵ Since all these people are in an original position of equality and are rationally self-interested, the final agreement reached will be “fair.”

Rawls deduced a series of rules of justice which were ordered in lexical priority:¹¹⁶

- *First Principle*

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

- *Second Principle*

Social and economic inequalities are to be arranged so that they are both:

(a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and

(b) attached to offices and positions open to all under conditions of fair equality of opportunity

Beyond the two basic principles, Rawls articulated two priority rules.

His first priority rule (The Priority of Liberty) ranked liberty as the primary value that could only be restricted for the sake of liberty. Rawls' second priority rule (The Priority of Justice over Efficiency and Welfare) puts the principle of justice before efficiency by recognizing that social and economic inequalities are to be arranged so that they are to the greatest benefit of the least advantaged. Rawls maintains that the persons in the initial situation would choose two different principles:

... the first requires equality in the assignment of basic rights and duties, while the second holds that social and economic inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society.¹¹⁷

In *Profiting From Risk Management and Compliance 2019*, Archibald and Jull integrated the model developed by Abraham Maslow to mitigate one of the largest critiques of Rawls' theory.¹¹⁸ As we identified earlier in this paper, consumers can be more motivated to save money to spend goods which bring pleasure rather than saving money for obligations like supporting one's family or mitigating future uncertainty. These choices seemingly appear irrational, even though studies support that these are the implicit savings considerations of most people. As such, many critics argue that Rawls' assumption of the rational person is a myth: when we predict what a rational person would do, we are probably thinking about what we would choose as most people believe themselves to be rational. This leads to implicit biases. Archibald and Jull propose imputing a verifiable model of personhood in Rawls' original position behind the veil of ignorance, and predicting which system this person would choose. The model of the person in this schema should be one of a psychologically healthy person, which is enumerated in Maslow's hierarchy of human needs. A psychologically healthy person, according to Maslow, prioritizes in order: 1) physiological needs; 2) safety needs; 3) belongingness or love needs; 4) esteem needs; and 5) the need for self-actualization.¹¹⁹ Referencing psychologically healthy people avoids ethical relativism that may result from relying on actual behaviour.

If we were to place Maslow's model of the person behind Rawls' veil of ignorance, the rules would more likely reflect priority of belongingness within the community than the priority of liberty that Rawls envisioned. The equality principle would remain intact, however, if we use Maslow's

model of the person: a society will be just if the benefits earned by a few also improves the situation for disadvantaged consumers.

Archibald and Jull contend that marrying a Rawls framework with a behavioural model will result in the following four principles: 1) regulatory measures must promote human health and safety as a first priority; 2) regulations should promote the growth of community to the greatest extent possible by making basic services accessible to all; 3) social and economic inequalities are to be arranged so that they are to the greatest benefit of the disadvantaged consumer; 4) long term gains should be balanced against short term costs with respect to community based groups.

To the extent that disadvantaged consumers are impacted by deceitful advertising techniques, and are negatively affected in fulfilling their basic needs as a result, a judge should consider this an aggravating factor in assessing the penalty. A disadvantaged consumer can be defined as those who are officially under the poverty line, those who are at risk of poverty, and those who need or are at risk of needing aid from the state to buy essential products and services.¹²⁰ This principle is derived from the third rule stated above: social and economic inequalities are to be arranged so that they are to the greatest benefit of the disadvantaged consumer. This rule can be applied to the digital economy at the stage of the assessment of penalty.

Consumers must balance their spending to ensure that basic needs of their families are met.¹²¹ There is an important relationship between the psychological needs of human beings and their saving decision.¹²² Behavioural research shows that techniques such as drip pricing lead consumers to make sub-optimal choices. In the case of the disadvantaged lower income consumers, drip pricing will likely influence them to make poor decisions and budget choices.

CONCLUSION

This paper has identified the existing regulations surrounding drip pricing, and instances where stronger regulations may be warranted. An analogy can be drawn between the psychology behind techniques such as drip pricing and hypnotism. The consumer may be in agreement with the final price, but psychological factors change the consumer's behaviour in ways in which they are not aware—much like hypnosis. Obviously the analogy drawn between hypnosis and the psychological effects of drip pricing is not a directly parallel one, but it does serve to demonstrate the point of how powerfully techniques such as drip pricing can manipulate a consumer into spending more money than they budgeted.

However, a balance must be struck between growing industry, protecting consumers, and retaining the interactive ethos of the internet. Our proposed general principles may be adapted and applied to guide various industries in their digital marketing practices, and to afford flexibility in regulations.

These rules were developed through the case study of drip pricing, but we propose that they should be applied to the digital economy as a whole to protect consumers. Indeed, these rules can be expanded and adjusted to many issues in the digital economy—particularly as it continues to develop at a fast rate across various sectors.

Where does this leave the state of digital advertising? The key in a flexible application of our general principles is that firms should *persuade* consumers, not *manipulate* them. The protection of society's disadvantaged depends on it.

APPENDIX I

AVIS
DELIVERS GREAT WEEKEND RATES



2-Day Weekend Rental Rates Starting at \$55!
 And each additional day (to a maximum of 5 days) from \$21/day.

Plus earn 1,000 Bonus Aeroplan® Miles.*

For details and to reserve visit

avis.ca/metro

or call 1 800 TRY-AVIS
(879-2847)

Must quote AWD # H960200
and Coupon # MCAA009



*Terms & Conditions apply. Rates quoted are valid on a sub-compact or compact car. Special rates also available on min-size cars (Group C). Offers valid at off-airport locations in the USA until June 28, 2011. Blackout periods apply.
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9:51 AM

AVIS

Step 3: Your Information Optional

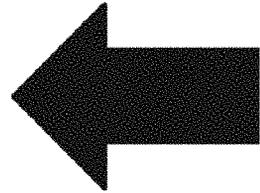
Last Name	Last Name
Wizard Number	Wizard Number

Step 4: Discounts Optional

Avis Worldwide Discount	AWD
Coupon Code	Coupon Code

Step 5: Vehicle Selection Required

Small to Full Size	from 57.99 CAD >
Luxury & Convertibles	from 72.99 CAD >



AVIS

Email Address

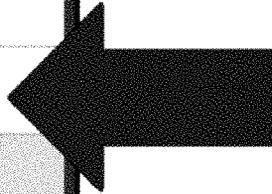
Mobile Number

Step 3: Finish Reservation

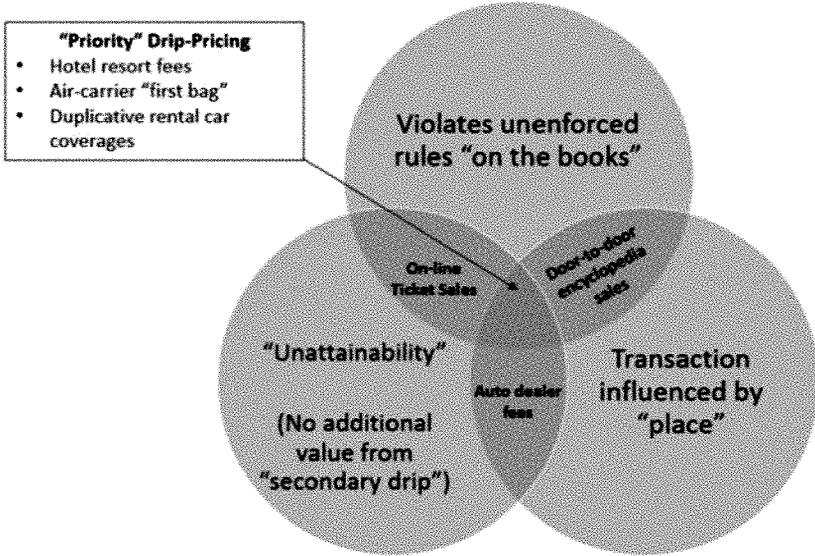
Base Rate	57.99	CAD
Options	0.00	CAD
Taxes & Fees	26.48	CAD
Estimated Total	84.47	CAD

Reserve

84.47 CAD



APPENDIX II



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ENDNOTES

¹ Kenneth Jull is Counsel at Gardiner Roberts LLP, an adjunct Professor at the University of Toronto, Faculty of Law and an adjunct member of the graduate faculty at Osgoode Hall Law School. Nicole Spadotto is in her third year of the combined B.C.L./J.D. programme at the McGill University Faculty of Law. She was a summer student at Gardiner Roberts in 2019.

² Christina Gregory, “Internet Addiction Disorder: Signs, Symptoms, Diagnosis, and Treatments for Those Who May be Addicted to the Web on Their PC or Smart Phone” (2019) *Psycom*, online: <www.psycom.net/iadcriteria.html> [permalink here].

³ Damien Geradin & Dimitrios Katsifis, “‘Trust Me, I’m Fair’: Analysing Google’s Latest Practices in Ad Tech from the Perspective of EU Competition Law” (2019) TILEC Discussion Paper No. DP 2019-029, online: <papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3465780_code362710.pdf?abstractid=3465780&mirid=1&type=2> [permalink here].

⁴ David Adam Friedman, “Regulating Drip Pricing” (2019) 31 *Stan L & Pol’y Rev*, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3337073> [permalink here] [Friedman].

⁵ See Appendix I for this real advertisement. In this case, the ad was in traditional media newspaper advertisements. See <https://www.ct-tc.gc.ca/CMFiles/CT-2015-001_Notice%20of%20Application_2_38_3-11-2015_4527.pdf> [permalink here].

⁶ See Appendix I for the real final price of this transaction. *Ibid*.

⁷ Greater Toronto Airports Authority, “Train to City (UP Express)” (2019) *Toronto Pearson*, online: <www.torontopearson.com/en/transportation/up-express> [permalink here].

⁸ See e.g. BMW Canada, “Build Your BMW” (2019) *BMW.ca*, online: <www.bmw.ca/en/ssl/configurator.html#> [permalink here].

⁹ *Ibid*. In this example, the first screen contains a disclaimer that the pricing does not constitute an official offer to buy or sell and is subject to conditions set out.

¹⁰ Muhammad Yunus et al, “Reaching the Rich World’s Poorest Consumers” (March 2015) *Harvard Business Review*, online: <hbr.org/2015/03/reaching-the-rich-worlds-poorest-consumers> [permalink here].

¹¹ 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, makes a representation to the public that is false or misleading in a material respect; makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation; or makes a representation to the public in a form that purports to be a warranty or guarantee of a product, or a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result, if the form of purported warranty or

guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out.

¹² Ordinary price: suppliers generally (2) Subject to subsection (3), 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, makes a representation to the public concerning the price at which a product or like products have been, are or will be ordinarily supplied where suppliers generally in the relevant geographic market, having regard to the nature of the product, have not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and have not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

¹³ Representation as to reasonable test and publication of testimonials. A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of any product, or for the purpose of promoting, directly or indirectly, any business interest, makes a representation to the public that a test has been made as to the performance, efficacy or length of life of a product by any person, or publishes a testimonial with respect to a product, unless the person making the representation or publishing the testimonial can establish that such a representation or testimonial was previously made or published by the person by whom the test was made or the testimonial was given, or such a representation or testimonial was, before being made or published, approved and permission to make or publish it was given in writing by the person by whom the test was made or the testimonial was given, and the representation or testimonial accords with the representation or testimonial previously made, published or approved.

¹⁴ 74.04 (1) For the purposes of this section, bargain price means a price that is represented in an advertisement to be a bargain price by reference to an ordinary price or otherwise; or a price that a person who reads, hears or sees the advertisement would reasonably understand to be a bargain price by reason of the prices at which the product advertised or like products are ordinarily supplied. Marginal note: Bait and switch selling (2) A person engages in reviewable conduct who advertises at a bargain price a product that the person does not supply in reasonable quantities having regard to the nature of the market in which the person carries on business, the nature and size of the person's business and the nature of the advertisement.

¹⁵ Competition Bureau Canada, "The Deceptive Marketing Practices Digest" November 2015 update (Ottawa: Competition Bureau, 2015).

¹⁶ Todd L Archibald & Kenneth Jull, *Profiting From Risk Management and Compliance* (Toronto: Thomson Reuters 2019) at ch 16 [Archibald]. See also Antonio Di Domenico, *Competition Enforcement and Litigation in Canada* (Toronto: Emond Publishing 2018).

¹⁷ *Canada (Commissioner of Competition) v Chatr Wireless Inc*, 2014 ONSC 1146 [Chatr].

¹⁸ *Ibid* at para 132.

¹⁹ Canada, Competition Bureau, “From Bread to Banking: Driving Competition and Innovation in Canada” (2018), *Annual Report of the Commissioner of Competition for the Year Ending March 31, 2018* (Commissioner: John Pecman), online: <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04380.html> [permalink here].

²⁰ 2017 CarswellNat 1793.

²¹ Canada, Competition Bureau, “From Bread to Banking: Driving Competition and Innovation in Canada” (2017), *Annual Report of the Commissioner of Competition for the Year Ending March 31, 2017* (Commissioner: John Pecman), online: <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04328.html> [permalink here].

²² Consent Agreement, *Commissioner of Competition v Comwave Networks*, Doc CT-2016-014, online: <www.ct-tc.gc.ca/CMFiles/CT-2016-014_Registered%20Consent%20Agreement_02_38_9-13-2016_7866.pdf> [permalink here].

²³ Blakes, “Competition Bureau Resolves Two Drip Pricing Cases” (26 February 2018), online: *Business Class*, <www.blakesbusinessclass.com/competition-bureau-resolves-two-drip-pricing-cases/> [permalink here].

²⁴ *Ticket Sales Act, 2017*, SO 2017, c 33, Schedule 3, s 6.

²⁵ Alexander Rasch, Miriam Thöne & Tobias Wenzel, “Drip Pricing and its Regulation: Experimental Evidence” (2018) Düsseldorf Institute for Competition Economics Discussion Paper No 297, online: <www.dice.hhu.de/fileadmin/redaktion/Fakultaeten/Wirtschaftswissenschaftliche_Fakultaet/DICE/Discussion_Paper/297_Ra_sch_Thoene_Wenzel.pdf> at 2 [permalink here] [Rasch].

²⁶ *Ibid* at 3.

²⁷ Friedman, *supra* note 3 at 3.

²⁸ See Appendix II for Friedman’s helpful diagram demonstrating this principle [re-printed with permission of the author].

²⁹ Friedman, *supra* note 3 at 32, citing the Australian Competition & Consumer Commission, “Court Finds that Jetstar and Virgin Australia Engaged in Misleading ‘Drip Pricing’ Practices” (26 Nov 2015), online: <www.accc.gov.au/media-release/court-finds-that-jetstar-and-virgin-australia-engaged-in-misleading-drip-pricing-practices> [permalink here].

³⁰ 2016 ONSC 6044.

³¹ *Chatr*, *supra* note 16 at para 27.

³² *Ibid*.

³³ Competition Bureau Canada, “The Deceptive Marketing Practices Digest” (10 June 2015), online: <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03946.html#s2_0> at s 2.3.2 [permalink here]. See also *Commissioner of Competition v Yellow Page Marketing BV*, 2013 ONSC 2852 [Yellow Page Marketing].

³⁴ Competition Bureau Canada, “Highlights from the Competition Bureau’s Data Form” (Gatineau: Competition Bureau Communications and Marketing Branch, 2019) online: <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/>

[CB- DataForumHighlights-Eng.pdf/\\$file/CB-DataForumHighlights-Eng.pdf](#)> [[permalink here](#)].

³⁵ Matthew Boswell, “No River Too Wide, No Mountain Too High: Enforcing and Promoting Competition in the Digital Age” (Remarks delivered at the Canadian Bar Association Competition Law Spring Conference, 7 May 2019), online: <www.canada.ca/en/competition-bureau/news/2019/05/no-river-too-wide-no-mountain-too-high-enforcing-and-promoting-competition-in-the-digital-age.html> [[permalink here](#)] [Boswell].

³⁶ Josephine Palumbo, “Honest Advertising in the Digital Age” (Remarks delivered at the Canadian Institute 26th Annual Advertising and Marketing Law Conference 22 January 2020), [Competition Bureau Canada], archived online: <<https://www.canada.ca/en/competition-bureau/news/2020/01/honest-advertising-in-the-digital-age.html>>.

³⁷ See e.g. Mireille Hildebrandt, “Law as Computation in the Era of Artificial Legal Intelligence: Speaking Law to the Power of Statistics” 68:1 U Toronto LJ 12.

³⁸ OECD, “Managing Digital Security and Privacy Risk: 2016 Ministerial Meeting on the Digital Economy” (2016), OECD, OECD Digital Economy Papers No 254, online: <<https://www.oecd-ilibrary.org/docserver/5j|wt49ccklt-en.pdf?expires=1573585421&id=id&accname=guest&checksum=F4F3053504532474C853761C61AE4093>> [[permalink here](#)]; Background Report. Paris: OECD, cited in “Trust in the Digital Economy: Towards A Framework for Comparative Analysis” by Terry Flew, Professor of Communication and Creative Industries, Creative Industries Faculty, Queensland University of Technology, Brisbane, Australia Presentation to International Communication Association- Shanghai Jiao Tong University International New Media Forum, Shanghai, China, online: <<https://ssrn.com/abstract=3334704>>.

³⁹ For example, a new digital charter will dictate how Canada will combat hate speech, misinformation and online electoral interference in Canada, Prime Minister Justin Trudeau told a technology conference in Paris on May 16, 2019. The Canadian Press, “Trudeau Warns of ‘Meaningful Financial Consequences’ for Social Media Giants That Don’t Combat Hate Speech”, *CBC* (16 May 2019), online: <www.cbc.ca/news/politics/digital-charter-trudeau-1.5138194> [[permalink here](#)]

⁴⁰ The Commissioner announced that, under the Interchange Canada program, Mr. George McDonald, currently Associate Partner and Senior Account Leader at IBM, will bring his experience and expertise in organizational evolution and digital transformation to the Competition Bureau. Competition Bureau Canada, News Release, “George McDonald Joins the Competition Bureau as New Chief Digital Enforcement Officer” (2 July 2019), online: <www.canada.ca/en/competition-bureau/news/2019/07/george-mcdonald-joins-the-competition-bureau-as-new-chief-digital-enforcement-officer.html> [[permalink here](#)]. As of July 2, 2019, Mr. McDonald will begin serving as Chief Digital Enforcement Officer, reporting directly to Mr. Matthew Boswell, the Commissioner of Competition. Mr. McDonald will help the Bureau monitor the digital landscape,

identify and evaluate new investigative techniques, and boost its digital intelligence gathering capabilities.

⁴¹ Boswell, *supra* note 34.

⁴² Pulumbo, *supra* note 35.

⁴³ Gunnar Niels, Reinder Van Dijk & Leon Fields, “Behavioural Economics and Its Impact on Competition Policy: A Practical Assessment” (2013) 12:3 Competition LJ 374 at 376 [Niels].

⁴⁴ (Toronto: Simon & Schuster, 2016).

⁴⁵ *Ibid* at ch 10, “Six Main Roads to Change: Broad Boulevards as Smart Shortcuts” at p. 151.

⁴⁶ Vicki G Morwitz, Eric A Greenleaf & Eric J Johnson, “Divide and Prosper: Consumers’ Reactions to Partitioned Prices” (1998) 35:4 J Marketing Research 453–463 at 453 [Morwitz].

⁴⁷ Kiljae Lee, Jungsil Choi & Yexin J Li, “Regulatory Focus as a Predictor of Attitudes Toward Partitioned and Combined Pricing” (2014) J Consumer Psychol 355 at 400, citing Amos Tversky & Daniel Kahneman, “Judgment Under Uncertainty: Heuristics and Biases” (1974) 185:4157 Science 1124 [Lee].

⁴⁸ Morwitz, *supra* note 45 at 455.

⁴⁹ *Ibid* at 460.

⁵⁰ Lee, *supra* note 46.

⁵¹ Morwitz, *supra* note 45 at 456.

⁵² Friedman, *supra* note 3.

⁵³ *Ibid* at 7.

⁵⁴ *Ibid* at 26.

⁵⁵ *Ibid* at 7.

⁵⁶ Rasch, *supra* note 24 at 2.

⁵⁷ Morwitz, *supra* note 45 at 455.

⁵⁸ Friedman, *supra* note 26 at 9.

⁵⁹ For example, see TripAdvisor and Expedia.

⁶⁰ Competition Tribunal Ct. 2018-005. The Consent agreement is with Ticketmaster L.L.C., Tnow Entertainment Group, Inc., and Ticketmaster Canada LP. One of the authors, Kenneth Jull, was listed as counsel on the Bureau’s original Notice of Application in this case.

⁶¹ C T-2020-2 The Competition Tribunal, Consent Agreement, The Commissioner of Competition and StubHub Inc., StubHub Canada Ltd.

⁶² Glen Ellison & Sara Fisher Ellison, “Search and Obfuscation in a Technologically Changing Retail Environment: Some Thoughts on Implications and Policy,” (2018) 18 Innovation Pol’y & Econ 1 at 4 [Ellison].

⁶³ Competition Bureau Canada, “Submission by the Interim Commission of Competition—Telecom Notice of Consultation CRT 2018-422—Proceeding to Establish a Mandatory Code for Internet Services” (20 December 2018), online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/044405.html [*permalink here*], citing Rasch, *supra* note 26; Charlotte Duke et al, “Study Into the Sales of Add-On General Insurance Products: Experimental Consumer Research” (2014) Report for the Financial Conduct Authority, *London Economics*, online: www.fca.org.uk/consumer-research.

fca.org.uk/publication/market-studies/gi-add-ons-experimental-consumer-research-report.pdf> [*permalink here*].

⁶⁴ Steffen Huck & Brian Wallace, “The Impact of Price Frames on Consumer Decision Making: Experimental Evidence” (2015), *Journal of Economic Literature* 1—47 as cited by the Bureau; *Supra* note 16.

⁶⁵ Cass R Sunstein, “Fifty Shades of Manipulation” (2015) 1:3–4 *J Marketing Behavior* 213 [Sunstein].

⁶⁶ Morwitz, *supra* note 45 at 455.

⁶⁷ For this real advertisement, see Appendix I. In this case, the ad was in traditional media newspaper advertisements. See *Commissioner of Competition v Aviscar Inc* 2015 CarswellNat 6184, CT-2015-001, online: <www.ct-tc.gc.ca/CMFiles/CT-2015-001_Notice%20of%20Application_2_38_3-11-2015_4527.pdf> [*permalink here*] [Aviscar].

⁶⁸ *Ibid.*

⁶⁹ Lee, *supra* note 46.

⁷⁰ Morwitz, *supra* note 45 at 455.

⁷¹ Henry C Su, “Thinking, Fast, Free, and Fashionable: Competition and Consumer Protection in a Mobile Internet World” (2012) 27:1 *Antitrust* 82 at 82 [Su].

⁷² For a broad discussion of this phenomenon, see generally: Robert Cialdini *Pre-suasion: A Revolutionary Way to Influence and Persuade* (Toronto: Simon & Schuster, 2016).

⁷³ Friedman, *supra* note 26; Katja Seim, Maria Ana Vitorino & David M Muir “Drip Pricing When Consumers Have Limited Foresight: Evidence from Driving School Fees” (2017) online: <repository.upenn.edu/cgi/viewcontent.cgi?article=1345&context=marketing_papers> [*permalink here*].

⁷⁴ Friedman, *supra* note 26 at 9.

⁷⁵ *Ibid* at 4.

⁷⁶ *Ibid* at 9.

⁷⁷ Rasch, *supra* note 24 at 2.

⁷⁸ Niels, *supra* note 42 at 375.

⁷⁹ Mike Walker, “Behavioural economics: the lessons for regulators,” (2017) *European Competition Journal* 1 at 6.

⁸⁰ Niels, *supra* note 42 at 376.

⁸¹ Shelle Santana, Steven Dallas & Vicki G Morwitz, “Consumer Reactions to Drip Pricing” (20 September 2017), online: <faculty.tuck.dartmouth.edu/images/uploads/faculty/nemc/Santana_Dallas_Morwitz_Drip_Pricing.pdf> [Santana] [*permalink here*].

⁸² *Ibid* at 30–31.

⁸³ *Supra* note 1.

⁸⁴ *Ibid.*

⁸⁵ Su, *supra* note 70 at 84.

⁸⁶ Sunstein, *supra* note 64.

⁸⁷ *Ibid.*

⁸⁸ Friedman, *supra* note 3 at 13.

⁸⁹ Friso Bostoën, “Online Platforms and Pricing: Adapting Abuse of Dominance Assessments to the Economic Reality of Free Products,” (2019) 35:3 Computer L & Sec R 263 at 277 [Bostoën].

⁹⁰ *Ibid* at 277.

⁹¹ We note that part of the issue of drip pricing, as it relates to competition, is the exclusiveness many ticket companies have in the market for a particular event. We suggest that this may be an abuse of dominance; while this discussion is out of the scope of this paper, more research should be conducted in this regard.

⁹² Bostoën, *supra* note 88 at 270.

⁹³ Using basic math and rounding to 100, if it is smaller than 250, we round it off to 200 (round down). If it is 250 or bigger, we round it off to 300 (round up).

⁹⁴ Jae Min Lee & Sherman D Hanna, “Savings Goals and Saving Behavior From a Perspective of Maslow’s Hierarchy of Needs” (2015) 26:2 J Fin Counseling & Planning 129 [Lee & Hanna].

⁹⁵ A.H. Maslow’s classic model was developed in his work, *Motivation and Personality*, 2nd ed (New York: Harper & Row, 1970) [Maslow]. For a full discussion of this model as part of a theory of justice, see Archibald, *supra* note 15].

⁹⁶ Lee & Hanna, *supra* note 92 at 140.

⁹⁷ *Ibid* at 142–143.

⁹⁸ Su, *supra* note 70 at 85.

⁹⁹ For a counter argument, see Niels, *supra* note 41 at 384.

¹⁰⁰ Ellison, *supra* note 59 at 22.

¹⁰¹ *Ibid* at 28.

¹⁰² Niels, *supra* note 42 at 381.

¹⁰³ Archibald, *supra* note 15 at s INT:10:40—Introduction and Overview.

¹⁰⁴ The equation of $PL = OC$, is a type of basic risk management. It premises that some losses will not attract liability. If the probability multiplied by the loss is less than the object times the cost, the conduct is blameless. Justice Linden has cited Mr. Justice Learned Hand in expressing the notion in terms of the burden of adequate precautions. He suggested that liability depended upon whether B is less than PL. See Allen M Linden, ed, *Canadian Tort Law*, 6th ed (Toronto: Butterworths, 1997) at 6.

¹⁰⁵ See generally, International Chamber of Commerce, “ICC Antitrust Compliance Toolkit” (2013), online (pdf): <<https://iccwbo.org/content/uploads/sites/3/2013/04/ICC-Antitrust-Compliance-Toolkit-ENGLISH.pdf>> [permalink here].

¹⁰⁶ Archibald, *supra* note 15 at s 2:20:10—Application of Matrix Planning at the Policy Level.

¹⁰⁷ For an example of an argument that consumers do not expect the first page of an internet process to include all inclusive pricing, see the response of counsel for Live Nation in *Commissioner of Competition and Live Nation Entertainment et al.*, 2018 CarswellNat 5661, CT 2018-005, Response of the Respondents, at paras 40–42.

¹⁰⁸ See Ken Jull & Stephen E Schmidt, “Preventing Harm in Telecommunications

Regulation: A New Matrix of Principles and Rules within the *Ex Ante* Versus *Ex Post* Debate” (2009), 47 CBLJ 329.

¹⁰⁹ The exception to this is where telecommunications can impact life and safety, such as the case in 911 emergency service. See Archibald, *supra* note 15 at 6–5.

¹¹⁰ Sunstein, *supra* note 64 at 993–94.

¹¹¹ See <<https://www.ticketmaster.ca/>>.

¹¹² See <<https://www.bmw.ca/en/ssl/configurator.html#/>>.

¹¹³ Santana, *supra* note 80 at 30–31.

¹¹⁴ For a diagram illustrating the complexity of digital platforms, and the potential places buttons should be present to allow a consumer to turn back in the transaction, see Appendix IV.

¹¹⁵ (Cambridge, Mass: Harvard University Press, 1971) at 136–142.

¹¹⁶ Rawls, *supra* note 114, at 302–303.

¹¹⁷ *Ibid* at 14 to 15. Rawls then developed the above basic principles into a full statement that contained two principles combined with two priority rules, at 302–303.

¹¹⁸ Archibald, *supra* note 15.

¹¹⁹ Maslow, *supra* note 93.

¹²⁰ Muhammad Yunus et al, “Reaching the Rich World’s Poorest Consumers” (March 2015), *Harvard Business Review*, online:<hbr.org/2015/03/reaching-the-rich-worlds-poorest-consumers> [*permalink here*].

¹²¹ Lee & Hanna, *supra* note 93 at 129–47.

¹²² *Ibid*.