

# What you see isn't always what you get: the legal implications of photo manipulation in Canadian advertising

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Photo manipulation or digitally altering a photo is a common industry practice that transforms an image using various techniques—these may involve retouching methods or even artificial intelligence (AI) tools. Adjusting a photo's colours, exposure and saturation are often steps taken to accurately portray the material, without changing or misrepresenting the content.

While photo retouching is a relatively common advertising practice, companies need to be aware of the potential legal and reputational implications of manipulating images. In fact, in early 2024, news outlets around the world were heavily reporting on Catherine, Princess of Wales' alleged “retouching” of a published portrait of herself and her children. Scrutiny over the lack of transparency and materiality of the “retouching” swiftly resounded across worldwide media, causing reputable news agencies to retract the photo from publication. The Princess ultimately issued a public apology over the confusion and an explanation for the photo alterations.

When photos are altered in advertising, it is necessary to proceed with caution to avoid falling offside legal and contractual obligations pertaining to accuracy, truthfulness and transparency of the advertising content.

## Deceptive marketing practices: *Competition Act*

Companies need to be vigilant of their photo-altering practices in their marketing materials for online and hard copy advertisements, including images accompanying promotional materials, emails and social media posts. Federal and provincial laws in Canada, including the *Competition Act*<sup>1</sup>, prohibit products from being marketed in misleading or deceptive ways.

The *Competition Act* sets out provisions to address materially false or misleading representations and deceptive marketing practices, made knowingly or recklessly to the public, that can influence a consumer to buy or use the product or service as advertised<sup>2</sup>. Companies need to ensure that any visuals, illustrations or representations about products or services that accompany an advertisement are accurate and do not create an erroneous impression on the consumer.

The *Competition Act* does not require actual evidence of the audience being deceived or misled. Rather, when a court decides whether a representation is false or misleading in any material respect, both the general impression conveyed and the literal meaning of the representation are considered<sup>3</sup>. A representation is “material” if it could influence a consumer to buy or use the product as advertised. A finding of deceptive marketing practices can result in offences under the criminal or civil regime, and corporations can be liable to the greater of \$10 million and three

times the value of the benefit derived from the deceptive conduct<sup>4</sup>. Therefore, given the ease at which technology permits photo alterations in today's age, including through AI-generated tools, advertisers should put in place robust policies and procedures to set appropriate boundaries around photo manipulation in marketing activities.

## Intellectual property considerations: *Copyright Act* and *Trademarks Act*

A photo is an artistic work protected under the *Copyright Act*, and owners of a photo have the exclusive right to reproduce and publish their work to the public by telecommunication. A copyright owner also has the right to exclude others from altering and changing their original work. Companies that decide to manipulate photos for advertising need to be highly sensitive to altering and using third-party copyrighted work, otherwise they may be subject to claims of copyright infringement.

Prior to manipulating a photo, companies should first ensure that they are the full copyright owners of the photo or otherwise have the rights to perform the intended activities in respect of the photo. For example, where a freelance photographer has been hired to take advertising photos, contractual terms should be put in place to ensure that the photographer has assigned their entire rights in the copyrighted photo to the company.

Public personalities or influencers who agree to have their image used in association with product advertising should ensure that the contract giving a company the right to use their image addresses manipulation of images (whether permitted or not).

The *Copyright Act* also bestows on the author of copyright works a series of personal rights, called moral rights, that protect the right to integrity of the work and the right to be associated with the work by name<sup>5</sup>. Moral rights are particularly relevant in the context of photo manipulation, as a photographer could argue that the integrity of the work has been negatively affected by particular alterations not authorized by them. Moral rights cannot be assigned to companies, and these rights persist even after a work is no longer in the author's possession. However, a photographer's moral rights can and should be waived in whole to ensure that companies have the right to manipulate and modify the photo.

The *Copyright Act* sets out fair dealing exceptions where a third party may use an owner's copyrighted material for the purpose of research, private study, education, parody or satire<sup>6</sup>. Unless prior authorization from the photo's owner is obtained, digitally manipulating a photo for the purposes of commercial advertising is generally not a fair dealing exception.

Further, if a company manipulates a photo containing a trademark, then the *Trademarks Act* may also be engaged. For example, a trademark owner's manipulating a trademark in a photo may result in the depreciation of the goodwill of the trademark if the mark is blurred or tarnished<sup>7</sup>. Therefore, companies should follow clear trademark quality control guidelines, including when performing photo manipulation activities.

## Advertising in highly regulated industries

Within highly regulated sectors, such as the food, cosmetic, pharmaceutical and medical devices industries, not only do the general advertising laws found in the *Competition Act* apply but laws within the *Food and Drug Act* (FDA) also apply. The FDA and its regulations impose additional rules that regulate advertising practices aimed at protecting the safety of Canadians.

The FDA prohibits advertising of products that are false, misleading or deceptive or likely to create an erroneous impression regarding character, value, quantity, composition, merit or safety. Ad Standards' consumer advertising guideline for marketed health products also includes guidelines for accurate depiction of product results<sup>8</sup>. In the cosmetic context, an advertisement for anti-aging cream could be misleading if an image of a hypothetical product user was retouched to remove wrinkles, as this could falsely suggest that all users should expect similar results. Further, "before and after" images should accurately reflect the actual results of the product. Digitally manipulated "before and after" photos that portray a more drastic or exaggerated change in appearance may fall into misrepresentation of the product.

## Contractual considerations

Advertisers must proceed with caution when they advertise using a retouched photo. In addition to the laws discussed above, media broadcasters and social media websites often require compliance attestations or impose contractual terms of use that advertisers must comply with when advertising on their platforms. These terms often require advertisers to ensure their advertisement's claims are accurate and not misleading, and do not infringe the copyright or other intellectual property rights of third parties. As such, in addition to breaches of the law, deceptive advertisements could result in contractual breaches by the advertiser vis-à-vis the broadcaster and media outlet.

As photo manipulation techniques become more sophisticated with the use of artificial intelligence, companies should seek to find the “goldilocks zone” where a desirable level of retouching is attained, but the photo is not manipulated to the point that it is untruthful or deceptive to the consumer, or otherwise in violation of the law or third-party rights.

### FOOTNOTES

*To discuss these issues, please contact the author(s).*

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