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

By Kenneth Jullⁱ

INTRODUCTION

The digital world operates differently from the old world of print media. Notably, online advertising and purchasing are performed in a fast paced and interactive process. When purchasing online, the first screen a consumer sees is similar to the print advertisements of old. However, unlike print advertising, the first digital screen gives way to an interactive process as the consumer clicks through pages to complete their online transaction.

The Organisation for Economic Co-operation and Development (OECD) has observed that “trust is essential in situations where uncertainty and interdependence exist.”¹ 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 their transaction. In recognition of the importance of digital platforms, and the high levels of trust consumers place in the digital world, governments are beginning to develop regulations specific to the digital world.²

Additionally, and more than ever, regulators such as the Canadian Competition Bureau are responding to evolving challenges in the digital economy.³ 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.⁴

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 the buying process.⁵ Drip pricing often impacts consumer decisions so that they spend more money than they had originally budgeted or anticipated.

In the case of a person of low income, this extra spend may take money away from the budget for items such as books and school supplies for children or more nutritious food. We address this scenario as an aggravating factor which should be the subject of separate treatment.

¹ OECD. (2016). Managing Digital Security and Privacy Risk: 2016 Ministerial Meeting on the Digital Economy – 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, <https://ssrn.com/abstract=3334704>

² 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. <https://www.cbc.ca/news/politics/digital-charter-trudeau-1.5138194>

³ The Bureau is the final stages of hiring a Chief Digital Enforcement Officer to support all aspects of enforcement work in the digital economy.

⁴ <https://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>

⁵ David Adam Friedman “Regulating Drip Pricing” 31 STAN. L. & POL’Y REV. __ (forthcoming)

We can imagine, for example, a person of modest income flying into Toronto Pearson Airport to visit an ill relative in downtown Toronto for the weekend. This person has a choice: they can take the Union-Pearson Express train at a cost of \$12.35, or they can rent a car. This person may go online and notice that a car can be rented “from \$57.99”⁶ and make the calculation that they can rent a car for the weekend at just over \$50 – a price they can afford – and have access to the car for their whole visit. Drawn in and excited by this price, the person will then click through to the payment phase of the transaction only to notice (perhaps with surprise) that an additional \$26.48 of fees had been added at the very end of the transaction, leaving the estimated total closer to \$100 than \$50.⁷ Psychology shows us that this person will likely complete the transaction, and thus will have paid money that could have been used to buy essential items for the ill relative or this person’s family back home.

You may be thinking to yourself at this moment that you, as a rational person, would have cancelled the transaction and taken the train from the airport to the city at a price you can afford. This paper has been written at least partially to stress upon you that you would not make this choice. Rather, like our hypothetical person of modest income, you will have been drawn in and anchored by the low price of the car rental – and by the time the extra fees have been dripped upon you, you will be committed to the transaction, feel that the car you are renting is already yours for the weekend, and be bound by the inertia of not wanting to walk across the airport to buy the train tickets and wait the extra time to catch the train. You, like our hypothetical consumer, would likely complete the transaction and pay significantly more money than which you had budgeted – or even could afford. And the worst part is, due to the powerful psychology behind drip pricing, you would likely not even realize or feel that you had been deceived.

This paper will first define key terms and mechanisms of pricing techniques. The second 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 sees. Does this first screen have to include all relevant information, or can the interactive process provide the information in stages or steps and if so how long can this process take? We will then review existing literature in the field. We will conclude that the existing literature uses behavioural economics to identify drip pricing as a manipulative marketing technique, but does not offer concrete principles from which to change policies surrounding the practice. Given the challenge of adopting old law to new digital platforms, we propose four general principles as an approach to regulate the digital economy. These four principles are developed through an analysis of online drip pricing and its relationship with consumer protection.

First, the “first internet screen” viewed by a consumer must accurately set out total pricing per unit, with disclosure of all fees, to the extent that technology will permit. Second, the interactive digital process must accurately portray the quality of the good or service. Third, the interactive digital process should facilitate consumer reversal of choices to the extent that technology will permit.

⁶ For this real advertisement, see Appendix I. 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

⁷ See Appendix I for the real final price of this transaction (https://www.ct-tc.gc.ca/CMFiles/CT-2015-001_Notice%20of%20Application_2_38_3-11-2015_4527.pdf). This matter was resolved by way of a consent agreement filed with the Competition Tribunal. See https://www.ct-tc.gc.ca/CMFiles/CT-2015-001_Registered%20Consent%20Agreement_82_66_6-2-2016_6072.pdf

Finally, 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 the least advantaged are impacted in their ability to satisfy basic needs. We propose that these principles can be applied more broadly to the digital economy.

I NAVIGATING ONLINE ADVERTISING AND PURCHASING

Before considering the digital application of alternate pricing models, 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.”⁸ For example, in his book entitled *Persuasion: A Revolutionary Way to Influence and Persuade*,⁹ 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*.¹⁰

Of course, in the digital world of pricing, the line between lawful influential marketing and trickery designed to dupe a consumer can be a gray area. Cass Sunstein suggests that an effort to influence people's choices counts as manipulative *to the extent that it does not sufficiently engage or appeal to their capacity for reflection and deliberation*.¹¹ The word “sufficiently” is important as it adds some flexibility along a spectrum. Applied to pricing which does not fall under the flat fee category, 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.

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.

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

(i) All-inclusive pricing

⁸ Gunanr Niels, Reinder Van Dijk, Leon Fields, “Behavioural Economics and Its Impact on Competition Policy: A Practical Assessment” (2013) 12 Competition Law Journal 374 at 376.

⁹ (Toronto: Simon & Schuster, 2016).

¹⁰ Supra, Chapter 10, “Six Main Roads to Change: Broad Boulevards as Smart Shortcuts”.

¹¹ Cass R. Sunstein “Fifty Shades of Manipulation” 2/18/2015

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.

(ii) 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.¹² 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 combined format. One explanation for this is based on the anchoring and adjustment heuristic.¹³ Research shows that consumers are likely to anchor on the base price (in the above example, the face value of \$100) and then tend to adjust insufficiently upward to incorporate the surcharge (in the above example of \$25).¹⁴ However, the partitioned pricing strategy is influenced by whether the surcharge is presented in dollars or as a percentage of base price and other factors related to the presentation format.¹⁵

An interesting twist is the research that looks at the type of consumer, which will lead 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.¹⁶

There are various permutations as to the manner in which the price is partitioned which will impact on 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 of this 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 will lead to lower recalled total costs and likely an increased demand.¹⁷

Pausing here for a moment, one might ask, what is wrong with using partition pricing to convince consumers to buy products or services? On its face, partition pricing sets out all the information that

¹² Morwitz, Greenleaf, Johnson, “Divide and Prosper: Consumers’ Reactions to Partitioned Prices” (1998) XXXV Journal of Marketing Research 453-463 at 453.

¹³ Lee, Choi, and Li, “Regulatory Focus as a Predictor of Attitudes Toward Partitioned and Combined Pricing” <http://ssrn.com/abstract=2377129> at 5, citing Tversky & Kahneman, 1974.

¹⁴ Morwitz, Greenleaf, Johnson, “Divide and Prosper: Consumers’ Reactions to Partitioned Prices” (1998) XXXV Journal of Marketing Research 453-463 at 455.

¹⁵ Morwitz, Greenleaf, Johnson, “Divide and Prosper: Consumers’ Reactions to Partitioned Prices” (1998) XXXV Journal of Marketing Research 453-463 at 460.

¹⁶ Lee, Choi, and Li, “Regulatory Focus as a Predictor of Attitudes Toward Partitioned and Combined Pricing” <http://ssrn.com/abstract=2377129>

¹⁷ Morwitz, Greenleaf, Johnson, “Divide and Prosper: Consumers’ Reactions to Partitioned Prices” (1998) XXXV Journal of Marketing Research 453-463 at 456.

the consumer needs. On the other hand, the behavioral 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 more potential for the process to be manipulative.

(iii) 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.

(iv) Drip pricing

The Federal Trade Commission (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.”¹⁸ 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.”¹⁹ Think back to the example of the person visiting a sick relative needing to rent a car, and being surprised when the final estimated quote is 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.”²⁰

Given the interactive and complex nature of digital platforms, drip pricing is especially prevalent in online trade. 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.²¹ 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

¹⁸ David Adam Friedman “Regulating Drip Pricing” 31 STAN. L. & POL’Y REV. __ (forthcoming)

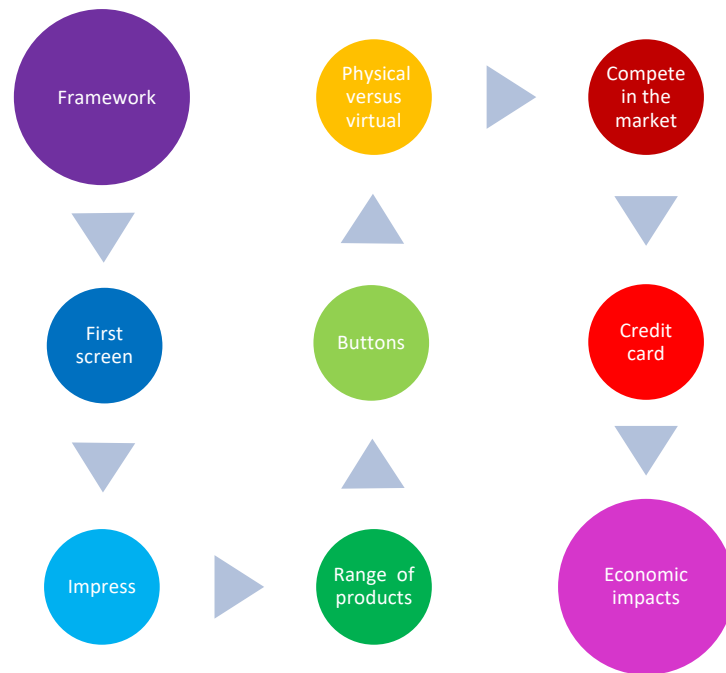
¹⁹ David Adam Friedman “Regulating Drip Pricing” 31 STAN. L. & POL’Y REV. __ (forthcoming). See <https://ssrn.com/abstract=3337073> at 7.

²⁰ David Adam Friedman “Regulating Drip Pricing” 31 STAN. L. & POL’Y REV. __ (forthcoming). See <https://ssrn.com/abstract=3337073> at 28.

²¹ David Adam Friedman “Regulating Drip Pricing” 31 STAN. L. & POL’Y REV. __ (forthcoming). See <https://ssrn.com/abstract=3337073> at 7.

service fees on Airbnb.²² 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.



The interactive process can be overlaid on top of the ticket broker example set out above. The first screen of a hypothetical ticket broker’s website shows that tickets are available in the consumer’s price range, which will serve to impress the consumer. 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 the consumer has likely become happily excited by the prospect of obtaining tickets at their desired price, and has been “anchored” to the realization of the transaction by this initial feeling of excitement.²³ 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 known as the endowment effect.²⁴

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

²² Rasch, Thoene, Wenzel “Drip Pricing and its Regulation: Experimental Evidence” http://www.dice.hhu.de/fileadmin/redaktion/Fakultaeten/Wirtschaftswissenschaftliche_Fakultaet/DICE/Discussion_Paper/29_7_Rasch_Thoene_Wenzel.pdf at p.2

²³ Morwitz, Greenleaf, Johnson, “Divide and Prosper: Consumers’ Reactions to Partitioned Prices” (1998) XXXV Journal of Marketing Research 453-463 at 455.

²⁴ David Adam Friedman “Regulating Drip Pricing” 31 STAN. L. & POL’Y REV. __ (forthcoming). See <https://ssrn.com/abstract=3337073> at 9.

by the receipt of the tickets within minutes which may further anchor the consumer to the transaction.

Our hypothetical consumer is then asked for credit card authorization, and for the first time it is revealed (the drip) that the price of a ticket contains an extra 25% more than anticipated. The extra 25% cost represents profits above the face value of the tickets and processing fees.

The consumer now has a choice. They can either proceed to credit card authorization for the tickets available at a higher price than anticipated, or they can abandon the process and exit. We will apply behavioral 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.²⁵ 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.

II DRIP PRICING AND THE CURRENT STATE OF THE LAW

(i) Deceptive marketing in the Canadian context

Part VII.1 of the Canadian *Competition 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.²⁶ There are detailed rules dealing with discrete matters such as ordinary price representations²⁷ and representations about testing of products.²⁸ The old “bait and

²⁵ <https://www.tripadvisor.ca/?fid=cb062ca5-42ab-4c01-a661-b6b97240166e>; <https://www.expedia.ca/>

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

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

(b) 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

(c) makes a representation to the public in a form that purports to be

(i) a warranty or guarantee of a product, or

(ii) 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.

²⁷ Ordinary price: suppliers generally

74.01 (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,

switch” offence is now a violation in the administrative regime.²⁹ Administrative penalties can be up to \$10 million.

Guidance about the parameters of deceptive marketing is found in cases such as *Chatr*³⁰. Further guidance may be found in the numerous consent agreements filed with the Competition Tribunal. For example, the VW Diesel 3.0 settlement with the Competition Bureau was filed as a consent agreement. The Competition Bureau’s Deceptive Marketing Practices Digest is a good resource for guidance.³¹

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.”³² This test was applied on two levels: (i) literal meaning and (ii) visual images and sounds.

On the literal meaning level, the *Competition 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”.

- (a) 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
- (b) 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.

²⁸ Representation as to reasonable test and publication of testimonials

74.02 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

- (a) 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
- (b) 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.

²⁹ 74.04 (1) For the purposes of this section, bargain price means

- (a) a price that is represented in an advertisement to be a bargain price by reference to an ordinary price or otherwise; or
- (b) 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.

³⁰ *Canada (Commissioner of Competition) v. Chatr Wireless Inc.* (2014), 238 A.C.W.S. (3d) 334, 2014 ONSC 1146 (Ont. S.C.J.)

³¹ <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03946.html>

³² *Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, 2013 ONSC 5315, paragraph 132.

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 Competition Act.³³

The Competition Bureau is responding to evolving challenges in the digital economy.³⁴ Under Canadian law, the Bureau's Deceptive Marketing Practices Directorate will continue to prioritize investigating misleading representations made online in keeping with the digital economy focus.³⁵

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

Due diligence requires the consideration of a matrix of factors, set out in Appendix II.

(ii) Drip pricing and the Canadian legal regime

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

In 2018 the Canadian Competition 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.³⁶ For example, in the case of *Canada (Commissioner of Competition) v. Hertz Canada Ltd.*,³⁷ Hertz and Dollar Thrifty made representations to the public about the price at which consumers could rent cars and related

³³ For a discussion on the due diligence defense available to firms, see Appendix II.

³⁴ The Bureau is the final stages of hiring a Chief Digital Enforcement Officer to support all aspects of enforcement work in the digital economy.

³⁵ <https://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>

³⁶ Annual Report of the Commissioner of Competition for the Year Ending March 31, 2018 <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04380.html>.

³⁷ (April 21, 2017), Doc. CT-2017-009 (Competition Trib.).

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 a car rental by 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 these additional non-optional fees. A consent agreement filed with the Competition Tribunal included an administrative monetary penalty in the amount of \$1,250,000.

The Competition Bureau collected a \$300,000 penalty from Comwave Networks, a telecommunications service provider.³⁸ Comwave Networks advertised “unattainable” prices for internet and phone plans. The Consent Agreement reached between the Commissioner of Competition and Comwave indicated that the company made “concerning” “price representations... at which consumers could obtain various telecommunications services.”³⁹

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.” All of these disclaimers and disclosures proved insufficient, however, according to the Commissioner, 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 communications 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. In Quebec, consumer protection laws require that merchants cannot sell their products for prices higher than the advertised price.⁴⁰

The rules for the sale of tickets to events in Ontario, outlined in the *Ticket Sales Act*,⁴¹ 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, ticket 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.”

³⁸ COMPETITION BUREAU CANADA, ANNUAL REPORT OF THE COMMISSIONER OF COMPETITION FOR THE YEAR ENDING MARCH 31, 2017 (2017), [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-annual-report-2016-2017-e.pdf/\\$file/cb-annual-report-2016-2017-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-annual-report-2016-2017-e.pdf/$file/cb-annual-report-2016-2017-e.pdf) [Note this moved to an archived page.]

³⁹ Consent Agreement, Commissioner of Competition v. Comwave Networks (Sep. 13, 2016), http://www.ct-tc.gc.ca/CMFiles/CT-2016-014_Registered%20Consent%20Agreement_02_38_9-13-2016_7866.pdf

⁴⁰ <https://www.blakesbusinessclass.com/competition-bureau-resolves-two-drip-pricing-cases/>

⁴¹ Ticket Sales Act, 2017, S.O. 2017, c. 33, Sched. 3, section 6.

The legislation not yet been tested in court. There is a potential ambiguity as to the exact point in the process that 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 is accepted, there would be compliance. In my view, given the use of the word “offer”, this suggests that prior to an actual purchase, the offer or advertisement must disclose the all-inclusive price up front at the first instance. In other words, on this interpretation, drip pricing would be prohibited in the ticket industry in Ontario.

(iii) Drip pricing and the international legal regime

Drip pricing is considered to be misleading and deceptive advertising in some jurisdictions, and is 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 has tackled drip pricing in 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 procedure. The European Commission now requires airlines to include all applicable taxes, charges, and surcharges in the final flight price; any surcharges should reflect costs.⁴² 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.⁴³

In the United States, addressing the hospitality sector, FTC Chairman Jon Leibowitz 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.⁴⁴ 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”.⁴⁵

The Australian Competition and Consumer Commission (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 ACCC won a finding that the airlines violated the Australian Consumer Law by advertising fares that “failed to adequately disclose an additional Booking and Service Fee...that...was

⁴² Rasch, Thoene, Wenzel “Drip Pricing and its Regulation: Experimental Evidence” http://www.dice.hhu.de/fileadmin/redaktion/Fakultaeten/Wirtschaftswissenschaftliche_Fakultaet/DICE/Discussion_Paper/29_7_Rasch_Thoene_Wenzel.pdf at page 2.

⁴³ Rasch, Thoene, Wenzel “Drip Pricing and its Regulation: Experimental Evidence” http://www.dice.hhu.de/fileadmin/redaktion/Fakultaeten/Wirtschaftswissenschaftliche_Fakultaet/DICE/Discussion_Paper/29_7_Rasch_Thoene_Wenzel.pdf at page 3

⁴⁴ David Adam Friedman “Regulating Drip Pricing” 31 STAN. L. & POL’Y REV. __ (forthcoming). See <https://ssrn.com/abstract=3337073> at 3.

⁴⁵ See Appendix III for Friedman’s helpful diagram demonstrating this principle.

only disclosed to consumers once they had moved through a number of stages of the booking process”.⁴⁶

(iv) 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 matter before the Courts in Canada in the case of the *Commissioner of Competition and Live Nation Entertainment et. al.*⁴⁷ As this matter is before the Courts, it is not possible nor appropriate to draw any conclusions from the allegations.⁴⁸ The case does, however, assist in framing the parameters of the debate in the new digital economy.

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.⁴⁹

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 on gives a user unpredictable results that keep them entertained and coming back for more.⁵⁰ 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.⁵¹ Through symbols and the entertaining interactivity of the transaction, consumers may not even know to feel “betrayed”⁵² after being dripped additional charges and spending more money than they would have otherwise.

Bell Canada v. Cogeco Cable Canada GP Inc suggests that the first screen a consumer sees should be as transparent as possible. If the focus is on the first screen of the internet process, the advertisement of an initial price (without the dollar amount of surcharges that will be dripped later) would appear to be on its face deceptive and misleading.⁵³ In *Cogeco*,⁵⁴ which was a civil case, Bell challenged

⁴⁶ David Adam Friedman “Regulating Drip Pricing” 31 STAN. L. & POL’Y REV. __ (forthcoming). See <https://ssrn.com/abstract=3337073> at 32 citing AUSTRALIAN COMPETITION & CONS. COMM’N, Media Release, Court Finds that Jetstar and Virgin Australia Engaged in Misleading ‘Drip Pricing’ Practices (Nov. 26, 2015), <https://www.accc.gov.au/media-release/court-finds-that-jetstar-and-virgin-australia-engaged-in-misleading-drip-pricing-practices>.

⁴⁷ Competition Tribunal Ct. 2018-005.

⁴⁸ The author was one of the counsel listed on the Notice of Application filed by the Bureau. The views in this article are solely those of the author and are not intended to represent the views of the Competition Bureau or Department of Justice.

⁴⁹ Christina Gregory, PhD, “Internet Addiction Disorder”

Signs, symptoms, diagnosis, and treatments for those who may be addicted to the Web on their PC or smart phone, see <https://www.psycom.net/iadcriteria.html>

⁵⁰ Christina Gregory, PhD, “Internet Addiction Disorder”

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⁵¹ Su, “Thinking Fast, Free, and Fashionable: Competition and Consumer Protection In a Mobile Internet World,” (2012) Antitrust 82 at 84.

⁵² Cass R. Sunstein “Fifty Shades of Manipulation” 2/18/2015

⁵³ *Bell Canada v. Cogeco Cable Canada GP Inc*. 2016 CarswellOnt 14895, 2016 ONSC 6044

⁵⁴ *Bell Canada v. Cogeco Cable Canada GP Inc*. 2016 CarswellOnt 14895, 2016 ONSC 6044

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:

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.⁵⁵

In granting the injunction, Justice Matheson applied the test of a "credulous and technologically inexperienced consumer of Internet services" as set out in *Canada (Commissioner of Competition) v. Chatr Wireless Inc.* discussed above.

Each case must of course be evaluated on its own facts. The first screen may contain some reference to the subsequent charging of fees without specifying the amount of those fees. This type of notice is similar to a disclaimer, and disclaimers have not typically found favour with 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 creates a materially false or misleading general impression in itself, before any reference is made to a disclaimer, then fine print may not do much to alter the general impression in a way that ensures that consumers will not be misled.⁵⁶

Part of assessing the accuracy of information shown on the first screen is by assessing the interactive screens as a holistic process. What does assessing the advertisement holistically entail? *Cogeco* offers some guidance, but because it was only an interlocutory injunction, the case is not definitive precedent in this regard. Justice Matheson recognizes that the debate will require consideration of the internet process itself.

In the Internet context, there is an issue regarding what constitutes looking at the advertisement as a whole. That question need not be finally resolved now. However, for the purpose of this motion, I do not accept Cogeco's submission that I should proceed on the basis that the entirety of what a consumer can scroll down to or link to should be considered. The Cogeco homepage consists of five pages of text, graphics and hyperlinks and two pages of terms and conditions in the seemingly inevitable fine print. Cogeco asks me to proceed on the basis that the consumer would or should view all of this material. As I indicated at the hearing, I have some difficulty with that proposition. This sort of Internet homepage is not comparable to an ad published within a single page of a print newspaper or magazine: e.g., *Richard c. Time Inc.*, 2012 SCC 8, [2012] 1 S.C.R. 265 (S.C.C.).⁵⁷

An important consideration is how long it takes 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 to negotiate. The profit and fees are therefore disclosed within a few seconds or less than a minute after the base price

⁵⁵ *Bell Canada v. Cogeco Cable Canada GP Inc.* 2016 CarswellOnt 14895, 2016 ONSC 6044 at paragraph 27.

⁵⁶ https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03946.html#s2_0, Section 2.3.2

⁵⁷ *Bell Canada v. Cogeco Cable Canada GP Inc.* 2016 CarswellOnt 14895, 2016 ONSC 6044 at paragraph 26.

is presented. This model is close to but not identical to partition pricing as described earlier. Consumers who use the internet will be aware of clicking processes that take some time to navigate. 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.⁵⁸

At the other end of the spectrum are processes where the dripped fee is disclosed much later in a lengthy process. 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 time frame of the disclosure of pricing is critical.

Recall that in *Cogeco*, for the purposes of the preliminary motion, Justice Matheson did not accept Cogeco's submission that the entirety of what a consumer can scroll down to or link to should be considered. The Cogeco homepage consisted of five pages of text, graphics and hyperlinks and two pages of terms and conditions in fine print. Cogeco asked the Court to proceed on the basis that the consumer would or should view all of this material. Justice Matheson had some difficulty with that proposition, which seems to suggest that the accurate portrayal of the good or service must be simple for consumers to access and understand.

It is worth noting that in some cases, the literal analysis of the first screen will suffice for a Court to find that digital advertising is deceptive and does not accurately portray the quality of the good or service. 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 the *Chatr* decision. If this path of inquiry is followed, in most cases, this will require consideration of expert evidence in relation to consumer behavior.

In order to assist a Court in assessing the transparency of an internet process, it is useful to conduct a literature review.

III LITERATURE REVIEW

The existing literature on drip pricing focuses on behavioural economics to evaluate the impact of a delay in pricing information. 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 Canadian Competition Bureau has endorsed the use of behavioral 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.⁵⁹ The importance of such a review is also heightened when considering how drip pricing can manipulate

⁵⁸ 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.* Competition Tribunal Ct. 2018-005, Response of the Respondents, paragraph 40-42.

⁵⁹ Glen Ellison and Sara Fisher Ellison, "Search and Obfuscation in a Technologically Changing Retail Environment: Some Thoughts on Implications and Policy," (2018) Innovation Policy and Economy 1 at 4.

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.

With respect to advertising in telecommunications, the Canadian Competition Bureau opposes drip pricing. The Bureau relies on studies which have shown that this pricing strategy can be harmful for the consumer by significantly limiting their ability to make well informed decisions.⁶⁰ 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 could.⁶¹ 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). Simply including a fine print disclaimer should not permit service providers to advertise prices that are not available.

(i) Behavioural psychological literature

Existing literature confirms that drip pricing plays with consumer psychology so that the vendor manipulates the consumer into spending more money than the latter anticipated; however, there is little headway on developing guiding legal principles which should 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.

The digital environment is fast paced, which leaves consumers with an abundance of information in a world wherein choices must be made quickly. Henry Su explains that consumers' need to think fast in the digital sphere 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 anyways.⁶²

Indeed, a survey of psychological studies show that background settings people encounter may impact the decisions they will make.⁶³ Interactive and fast-paced internet processes are often designed to create psychological effects such as an endowment effect which subconsciously impacts consumer choice.⁶⁴ The endowment effect is when consumers perceive it costly to exit a transaction

⁶⁰ <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04405.html> citing Rasch, Alexander; Thöne, Miriam; Wenzel, Tobias (2018): Drip pricing and its regulation: Experimental evidence, DICE Discussion Paper, No. 297, ISBN 978-3-86304-296-7, Düsseldorf Institute for Competition Economics (DICE), Düsseldorf; Duke, C; Huck, S.; Lewis, M., Sinn, M., Wallace, B., Ellison, G. (2014): Study into the sales of Add-on General Insurance Products: Experimental Consumer Research. A report for the Financial Conduct Authority.

⁶¹ Huck, S., & Wallace, B. (2015). The impact of price frames on consumer decision making: Experimental evidence. *Journal of Economic Literature*, 1-47.

⁶² Su, "Thinking Fast, Free, and Fashionable: Competition and Consumer Protection In a Mobile Internet World," (2012) *Antitrust* 82 at 82.

⁶³ Robert Cialdini *Pre-suasion: A Revolutionary Way to Influence and Persuade* (Toronto: Simon & Schuster, 2016).

⁶⁴ David Friedman "Regulating Drip Pricing" (February 18, 2019) <https://ssrn.com/abstract=3337073>, Seim, Vitorino, Muir "Drip Pricing When Consumers Have Limited Foresight: Evidence from Driving School Fees" (2014),

and search for alternative options.⁶⁵ 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.⁶⁶ Since going back to search for alternatives may be costly, this can lead to a lock-in of consumers.⁶⁷ Under drip pricing, consumers may therefore underestimate the total price and search too little.⁶⁸

In addition to the fast-paced nature of digital transactions, Santana, Dallas, and Morwitz⁶⁹ 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.

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. Consumers subjected to drip pricing convince themselves that the final price is satisfactory.⁷⁰ In this way, consumers protect their self-image as smart shoppers.

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 Neils, Van Dijk, and Fields point out, consumers prefer to protect what they perceive they already own more than they like "making gains."⁷¹ 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.⁷² 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

⁶⁵ David Adam Friedman "Regulating Drip Pricing" 31 STAN. L. & POL'Y REV. __ (forthcoming). See <https://ssrn.com/abstract=3337073> at 9.

⁶⁶ David Friedman "Regulating Drip Pricing" (February 18, 2019) <https://ssrn.com/abstract=3337073> at 4.

⁶⁷ David Adam Friedman "Regulating Drip Pricing" 31 STAN. L. & POL'Y REV. __ (forthcoming). See <https://ssrn.com/abstract=3337073> at 9.

⁶⁸ Rasch, Thoene, Wenzel "Drip Pricing and its Regulation: Experimental Evidence" http://www.dice.hhu.de/fileadmin/redaktion/Fakultaeten/Wirtschaftswissenschaftliche_Fakultaet/DICE/Discussion_Paper/29_7_Rasch_Thoene_Wenzel.pdf at p.2

⁶⁹ Santana, Dallas and Morwitz, "Consumer Reactions to Drip Pricing" Draft September 20, 2017 http://faculty.tuck.dartmouth.edu/images/uploads/faculty/nemc/Santana_Dallas_Morwitz_Drip_Pricing.pdf; <https://www.hbs.edu/faculty/Pages/item.aspx?num=53909>.

⁷⁰ Santana, Dallas and Morwitz, "Consumer Reactions to Drip Pricing" Draft September 20, 2017 http://faculty.tuck.dartmouth.edu/images/uploads/faculty/nemc/Santana_Dallas_Morwitz_Drip_Pricing.pdf; <https://www.hbs.edu/faculty/Pages/item.aspx?num=53909> at pp. 30-31.

⁷¹ Neils, Van Dijk, and Fields, "Behavioural Economics and its Impact on Competition Policy: A Practical Assessment," (2013) Competition Law Journal 374 at 375.

⁷² Mike Walker, "Behavioural economics: the lessons for regulators," (2017) European Competition Journal 1 at 6.

automatic or subconscious decisions, because making informed and rational decisions all the time would be exhausting.⁷³

Finally, 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.⁷⁴ 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).⁷⁵ 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.

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 labor supply decisions. It also may be that the anchoring hypothesis applies to consumer purchasing decisions and not to labour supply decisions.

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.⁷⁶ 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. Some acts of manipulation count as such even if they leave the chooser better off. (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. Sunstein adds that often the distinguishing mark of manipulation is a justified sense of ex post betrayal.

⁷³ Neils, Van Dijk, and Fields, “Behavioural Economics and its Impact on Competition Policy: A Practical Assessment,” (2013) Competition Law Journal 374 at 376.

⁷⁴ Lee, Choi, and Li, “Regulatory Focus as a Predictor of Attitudes Toward Partitioned and Combined Pricing” <http://ssrn.com/abstract=2377129> at 5, citing Tversky & Kahneman, 1974.

⁷⁵ Morwitz, Greenleaf, Johnson, “Divide and Prosper: Consumers’ Reactions to Partitioned Prices” (1998) XXXV Journal of Marketing Research 453-463 at 455.

⁷⁶ Cass R. Sunstein, “Fifty Shades of Manipulation” (2016), 1 J. Marketing Behav. 213.

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 kind of thief, taking something from the chooser without real consent; this illuminates recent initiatives in the area of consumer financial protection.

(ii) Economic harm literature

Existing literature also addresses the economic harm drip pricing incites. Some wonder whether competition does not erode the practice of drip pricing if consumers are likely harmed and largely dissatisfied by the practice. David Friedman suggests that when the drip pricing model becomes dominant, industry players find defection from the model difficult.⁷⁷ 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.⁷⁸ 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.⁷⁹ Similarly, when online ticket brokers use drip pricing, they incentivize other ticket brokers to use drip pricing as well to remain competitive in the market.

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.⁸⁰ To attract consumers, advertising lower prices upfront and dripping additional surcharges later gives platforms a competitive edge.

Dripping surcharges on a consumer is so effective at least partially because research suggests that people base economic decisions by rounding costs up.⁸¹ 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.

⁷⁷ David Adam Friedman “Regulating Drip Pricing” 31 STAN. L. & POL’Y REV. __ (forthcoming). See <https://ssrn.com/abstract=3337073> at 13.

⁷⁸ Friso Bostoen, “Online platforms and pricing: Adapting abuse of dominance assessments to the economic reality of free products,” Computer Law & Security Review (2019) 263 at 277.

⁷⁹ Friso Bostoen, “Online platforms and pricing: Adapting abuse of dominance assessments to the economic reality of free products,” Computer Law & Security Review (2019) 263 at 277.

⁸⁰ Friso Bostoen, “Online platforms and pricing: Adapting abuse of dominance assessments to the economic reality of free products,” Computer Law & Security Review (2019) 263 at 270.

⁸¹ 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). <https://www.basic-math-explained.com/rounding-off-numbers.html#.XMnsoDBKhhE>

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. The extra \$50 could have been spent on children's needs.

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."⁸² Lee and Hanna's results were 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 desire (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.⁸³ 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.

(iii) Existing recommendations from the 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 the consumer 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.⁸⁴ We agree. Conversely, Neils, Van Dijk, and Fields believe that though behavioural economics can illuminate how firms exploit consumer biases, the study of behaviour will not likely have a major impact on reform in competition policy.⁸⁵ Departing from Neils, Van Dijk, and Fields, our proposed principles are developed with behavioural economics in mind to provide the relevant context to judges as they assess manipulative digital marketing techniques.

Ellison and Ellison suggest competition agencies may consider specific goals when developing regulations against deceptive online pricing techniques, like drip pricing. They suggest that regulations should be designed to reduce consumers' search costs, "promote efficient consumer

⁸² Lee and Hanna, "Savings Goals and Saving Behavior From a Perspective of Maslow's Hierarchy of Needs" *Journal of Financial Counseling and Planning* Volume 26, Issue 2 2015, 129-147.

⁸³ Lee and Hanna, "Savings Goals and Saving Behavior From a Perspective of Maslow's Hierarchy of Needs" *Journal of Financial Counseling and Planning* Volume 26, Issue 2 2015, p. 140.

⁸⁴ Su, "Thinking Fast, Free, and Fashionable: Competition and Consumer Protection In a Mobile Internet World," (2012) *Antitrust* 82 at 85.

⁸⁵ Neils, Van Dijk, and Fields, "Behavioural Economics and its Impact on Competition Policy: A Practical Assessment," (2013) *Competition Law Journal* 374 at 384.

choice,” and “encourage efficient pricing” of both the base-price and add-on pricing.⁸⁶ 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.⁸⁷ Similarly, to avoid overly paternalistic regulations and protect consumers’ choice, Neils, 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.⁸⁸

Little analysis has been done, however, as to concrete principles judges 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.

IV 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.

(i) The “first internet screen” viewed by a consumer must accurately set out total pricing per unit, with disclosure of all fees, to the extent that technology will permit

Given the importance of the first screen in regards to deceptive marketing techniques, I propose that the first internet screen a consumer views should accurately disclose the total pricing per unit and disclose all fees. Today, with available technology, it is now possible for software to enable a corporation to include a total price on that first screen. The price can then be broken down into base price plus fees. For example, it is possible to display on the first screen a large array of tickets to the Ariana Grande concert in Toronto and to show the all-inclusive price of these tickets on that first screen, all linked to different areas in the arena.⁸⁹ In this way, the consumer will not feel betrayed ex post or tricked after paying a large amount to see a particular event for buy a particular product. Doing so also gives the consumer accurate information from which to choose a large array of products.

I propose this to the extent that a platform’s technology will permit. If the technology is able, there is no reason why it should not be employed in a transparent way. I recognize that some companies will not have the capacity to make this change; to encourage competition, I suggest that these companies disclose information on the first screen once they are able. A companies’ capacity to

⁸⁶ Glen Ellison and Sara Fisher Ellison, “Search and Obfuscation in a Technologically Changing Retail Environment: Some Thoughts on Implications and Policy,” (2018) *Innovation Policy and Economy* 1 at 22.

⁸⁷ Glen Ellison and Sara Fisher Ellison, “Search and Obfuscation in a Technologically Changing Retail Environment: Some Thoughts on Implications and Policy,” (2018) *Innovation Policy and Economy* 1 at 28.

⁸⁸ Neils, Van Dijk, and Fields, “Behavioural Economics and its Impact on Competition Policy: A Practical Assessment,” (2013) *Competition Law Journal* 374 at 381.

⁸⁹ <https://www1.ticketmaster.ca/ariana-grande-sweetener-world-tour/event/1000557CCB88383B>;

introduce this technology should be assessed based on the amount spent on internet design in relation to their annual profits.

This rule does not, in my view, restrict the creativity of advertising or reduce the fun of the internet. Rather than manipulating consumers with respect to pricing, creative advertising can attempt to persuade with techniques related to the good or service in issue. For an example from tickets for live events, the website can show enticing views from various angles of the seats, and their relation to both the view of the event and other activities of interest such as food and beverage locations. This leads to the next rule.

(ii) The interactive digital process must accurately portray the quality of the good or service

This is an easy rule to state, but may be harder to implement in practice. Quality of goods and services are measured both objectively and subjectively. Additionally, the use of online reviews and influencers raise many issues about proper disclosure of quality.

As previously mentioned, in *Chatr* the court was presented with an allegation that Chatr had not accurately portrayed the quality of the goods and services they were marketing. By way of reminder, Chatr had claimed fewer dropped calls on their network without having previously tested the verity of the claim. Indeed, claims about dropped calls are materially claims about the quality of service Chatr claimed to be offering consumers. In finding that Chatr had misrepresented the quality of their service, Justice Marrocco clarified that “permitting untested claims to be made in the marketplace will decrease consumer confidence because some claims will turn out to be false and misleading.”⁹⁰ *Chatr* confirms that, at minimum, the true quality of the good should be tested (where applicable) and disclosed to the consumer when they are buying the product.

For further information, a good reference is the Competition Bureau Deceptive Marketing Digest.⁹¹

(iii) The interactive digital process should facilitate consumer reversal of choices to the extent that 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 of 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.⁹² 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.

⁹⁰ *Canada (Commissioner of Competition) v. Chatr Wireless Inc.* (2014), 238 A.C.W.S. (3d) 334, 2014 ONSC 1146 (Ont. S.C.J.) at para 8.

⁹¹ [https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/DMPD-Volume3-Eng.pdf/\\$file/DMPD-Volume3-Eng.pdf](https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/DMPD-Volume3-Eng.pdf/$file/DMPD-Volume3-Eng.pdf); <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04372.html>

⁹² Santana, Dallas and Morwitz, “Consumer Reactions to Drip Pricing” Draft September 20, 2017 http://faculty.tuck.dartmouth.edu/images/uploads/faculty/nemc/Santana_Dallas_Morwitz_Drip_Pricing.pdf; <https://www.hbs.edu/faculty/Pages/item.aspx?num=53909> at pp. 30-31.

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 technology will permit.⁹³

(iv) 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 penalty if the least advantaged are impacted in their ability to satisfy 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.⁹⁴ Since all these people are in an original position of equality and are rationally self-interested, the final agreement reached will be “fair.”

In my past writing, I have integrated the model developed by Abraham Maslow to mitigate one of the largest critiques of Rawls’ theory.⁹⁵ 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. I 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.⁹⁶ 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 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 of the least advantaged.

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 least advantaged; 4) long term gains should be balanced against short term costs with respect to community based groups.

⁹³ 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.

⁹⁴ (Cambridge, Mass.: Harvard University Press, 1971) at 136-142.

⁹⁵ Archibald and Jull, *Profiting From Risk Management and Compliance 2018* (Thomson Reuters); “From the Slow Lane to the Fast Lane of Broadband: Application of a Theory of Justice”, with S. Schmidt, presented at the 2011 Regional Conference of the International Telecommunications Society (Budapest, Hungary), September 18-21, 2011, K. Jull and S. Schmidt, “Preventing Harm in Telecommunications Regulation: A New Matrix of Principles and Rules within the Ex Ante Versus Ex Post Debate” (2009), 47 C.B.L.J. 329.

⁹⁶ A.H. Maslow’s classic model was developed in his work, *Motivation and Personality*, 2nd ed. (New York: Harper & Row, 1970)

If there is a finding of a violation to the extent that least advantaged 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 person 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.⁹⁷ 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 least advantaged. 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.⁹⁸ There is an important relationship between the psychological needs of human beings and their saving decision.⁹⁹ Behavioral research shows that techniques such as drip pricing lead consumers to make sub-optimal choices. In the case of the least advantaged lower income consumers, drip pricing will likely influence them to make poor decisions and budget choices.

The *Competition Act* provides for a wide array of remedies to address misleading and deceptive marketing. S. 74.1(1) of the *Competition Act* lays out the basic remedy structure of an administrative monetary penalty.

74.1 (1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person

(a) not to engage in the conduct or substantially similar reviewable conduct;

(b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including

(i) a description of the reviewable conduct,

(ii) the time period and geographical area to which the conduct relates, and

(iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed;

(c) to pay an administrative monetary penalty, in any manner that the court specifies, in an amount not exceeding

(i) in the case of an individual, \$750,000 and, for each subsequent order, \$1,000,000, or

⁹⁷ <https://hbr.org/2015/03/reaching-the-rich-worlds-poorest-consumers>

⁹⁸ Lee and Hanna, "Savings Goals and Saving Behavior From a Perspective of Maslow's Hierarchy of Needs" *Journal of Financial Counseling and Planning* Volume 26, Issue 2 2015, 129-147.

⁹⁹ Lee and Hanna, "Savings Goals and Saving Behavior From a Perspective of Maslow's Hierarchy of Needs" *Journal of Financial Counseling and Planning* Volume 26, Issue 2 2015, 129-147.

(ii) in the case of a corporation, \$10,000,000 and, for each subsequent order, \$15,000,000; and

(d) in the case of conduct that is reviewable under paragraph 74.01(1)(a), to pay an amount, not exceeding the total of the amounts paid to the person for the products in respect of which the conduct was engaged in, to be distributed among the persons to whom the products were sold — except wholesalers, retailers or other distributors, to the extent that they have resold or distributed the products — in any manner that the court considers appropriate.

The purpose of these penalties is not punitive, and there is an extensive list of aggravating and mitigating factors.¹⁰⁰ The \$10 million administrative monetary penalty provided for in s. 74.1(1)(c) has been found to not engage s. 11 of the Charter.¹⁰¹

S. 74.1(5) enumerates factors which may be considered in assessing monetary penalties,¹⁰² which we have previously mentioned in this paper. In the context of drip pricing, class actions may be commenced on behalf of consumers. In one class action, the representative plaintiff estimated paying over \$1,000 in drip fees in the last five years.¹⁰³

Using relative advantage as an aggravating factor in determining damages may be an especially important option as the current fines for anti-competitive behaviour may not outweigh the financial benefits of such behaviour, like drip pricing. Indeed, firms continue to engage in the practice because it is highly profitable. Industry data show that, in 2016, U.S. airlines earned \$41 billion in “ancillary fee” revenue above the base ticket prices. Similarly, U.S. hotels earned over \$2.5 billion from fees and surcharges in 2015. Consistent with this, some economic models of drip pricing show that the practice leads to increased profits for firms.¹⁰⁴

The level of profits in the digital economy from practices such as drip pricing versus potential fines raise economic issues. The recent case of Facebook’s public acknowledgement of a “major breach of trust” in the Cambridge Analytica scandal is a case in point. Facebook came under fire earlier this year when it was revealed that the private data of roughly 87 million people around the world had been harvested by Cambridge Analytica. The firm’s CEO bragged in undercover footage that it had helped get President Donald Trump elected.¹⁰⁵ In April of 2019 the Washington Post reported that Facebook was in negotiations with the Federal Trade Commission over fines relating to the company’s misuse of user data in the Cambridge Analytica scandal. Around the same time, Facebook made it public that it was setting aside between \$3 billion and \$5 billion for the fine.¹⁰⁶

Facebook has been fined £500,000 by the United Kingdom Information Commissioner’s Office in the wake of the Cambridge Analytica scandal, after allowing third party developers to access user

¹⁰⁰ Competition Act, s. 74.1(4) and (5).

¹⁰¹ *Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, 2013 ONSC 5315, paragraph 575.

¹⁰² Competition Act, s. 74.1(4) and (5)

¹⁰³ <https://globalnews.ca/news/3990837/ticketmaster-live-nation-class-action-lawsuit/>

¹⁰⁴ Santana, Dallas and Morwitz, “Consumer Reactions to Drip Pricing” Draft September 20, 2017 http://faculty.tuck.dartmouth.edu/images/uploads/faculty/nemc/Santana_Dallas_Morwitz_Drip_Pricing.pdf; <https://www.hbs.edu/faculty/Pages/item.aspx?num=53909> at 3.

¹⁰⁵ <https://gizmodo.com/facebook-fined-just-645-000-in-uk-over-cambridge-analy-1829989116>

¹⁰⁶ <https://www.nytimes.com/2019/04/26/opinion/facebook-fine-ftc.html>

information without sufficient consent.¹⁰⁷ Critics commented that based on previous year's revenue, Facebook makes \$645,000 in less than 9 minutes of operation.¹⁰⁸

In response, the Canadian Competition Bureau has called on the federal government to raise financial penalties for anti-competitive behaviour and advertising, as current penalties lack the teeth to deter these practices.¹⁰⁹ The financial benefits of practices such as drip pricing may still outweigh the penalty cost of engaging in these practices.

At the same time, these practices can and do adversely impact those who are both psychologically manipulated by, and cannot afford, the excess fees dripped upon them. As such, penalties should be higher if the least advantaged among us is barred from satisfying their basic needs due to anti-competitive practices like drip pricing.

CONCLUSION

By investigating the ways in which humans are psychologically manipulated by drip pricing, this paper has argued that drip pricing is an anti-competitive and deceptive marketing practice. Behavioural economics can help explain why drip pricing can be harmfully manipulative to consumers, even though they may agree to the price at the end of the transaction. An analogy can be drawn between the psychology behind 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 drip pricing can manipulate a consumer into spending more money than they budgeted.

My aim is not to limit advertising, or even limit that which is lawfully persuasive: I recognize that all advertising aims to influence human choice. Rather, my aim has been to demonstrate that because of the interactive and digital nature of drip pricing, the technique is adversely manipulative. The obscuring of the final price is clever because of the digital nature of the transaction – the consumer becomes tied to it, largely because the transaction is fun and appeals to heuristics. When a consumer is presented with a face value price he believes to be the true price, finally being presented with a higher price than what was advertised is deceptive. This holds true even if the consumer is psychologically manipulated through the digital process to accept the final higher price. Behavioural economics supports that the consumer will not always feel deceived, just as the hypnotised may not know they had been under, because the buying process is interactive: the platform and consumer are completing the transaction together.

The current state of the law is still developing in Canada. For example, the *Ticket Sales Act* has not yet been tested in court. Canada can look to other jurisdictions including the European Union, Australia, and the United States for inspiration about how to treat these new cases. The digital economy is still relatively nascent, and litigation may sharpen some of these hazy questions about which practices are anti-competitive and which are legal.

¹⁰⁷ <https://www.theguardian.com/technology/2018/oct/25/facebook-fined-uk-privacy-access-user-data-cambridge-analytica>

¹⁰⁸ <https://gizmodo.com/facebook-fined-just-645-000-in-uk-over-cambridge-analy-1829989116>

¹⁰⁹ <https://www.cbc.ca/news/politics/digital-economy-regulation-competition-1.5156743>

Through the assessment of drip pricing, this paper has developed four guiding principles which judges can use to ascertain whether marketing prices was deceptive or not, and which set an ethical standard for marketing techniques.

- (1) The “first internet screen” viewed by a consumer must accurately set out total pricing per unit, with disclosure of all fees, to the extent that technology will permit;
- (2) The interactive digital process must accurately portray the quality of the good or service;
- (3) The interactive digital process should facilitate consumer reversal of choices to the extent that technology will permit;
- (4) 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 penalty if the least advantaged are impacted in their ability to satisfy basic needs.

These rules were developed through the case study of drip pricing, but I 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? If drip pricing is labelled a deceptive marketing practice, how can firms advertise their tickets and entice consumers to buy them? I wish to stress that all-inclusive pricing is not the end of advertising. Instead, for example, firms can show views from seats or photos from a previous concert – both of which are persuasive and non-manipulative advertising techniques. The key is that firms should *persuade* consumers, not *manipulate* them. The protection of society’s least-advantaged depends on it.

Appendix I

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AVIS

Step 3: Your Information Optional

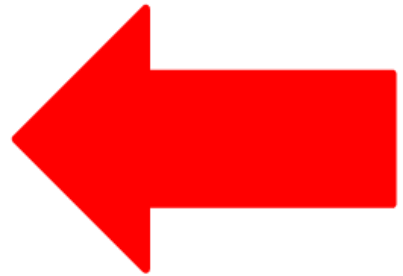
Last Name	Last Name
Wizard Number	Wizard Number

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 >



9:53 AM

AVIS

Email Address


Mobile Number

Step 8: 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

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

In assessing whether a defendant has exercised due diligence, the following factors may be relevant:

- Has the defendant conducted its own behavioral analysis of the process in issue?
- If the defendant has conducted its own behavioral analysis, does it demonstrate good faith or to the contrary knowledge that consumers might be deceived?
- Is the process a new one or established?
- Did consumers complain about the system, and if not, is this the result of psychological forces that created self-justification?
- What is the level of data driven decision making?¹¹⁰

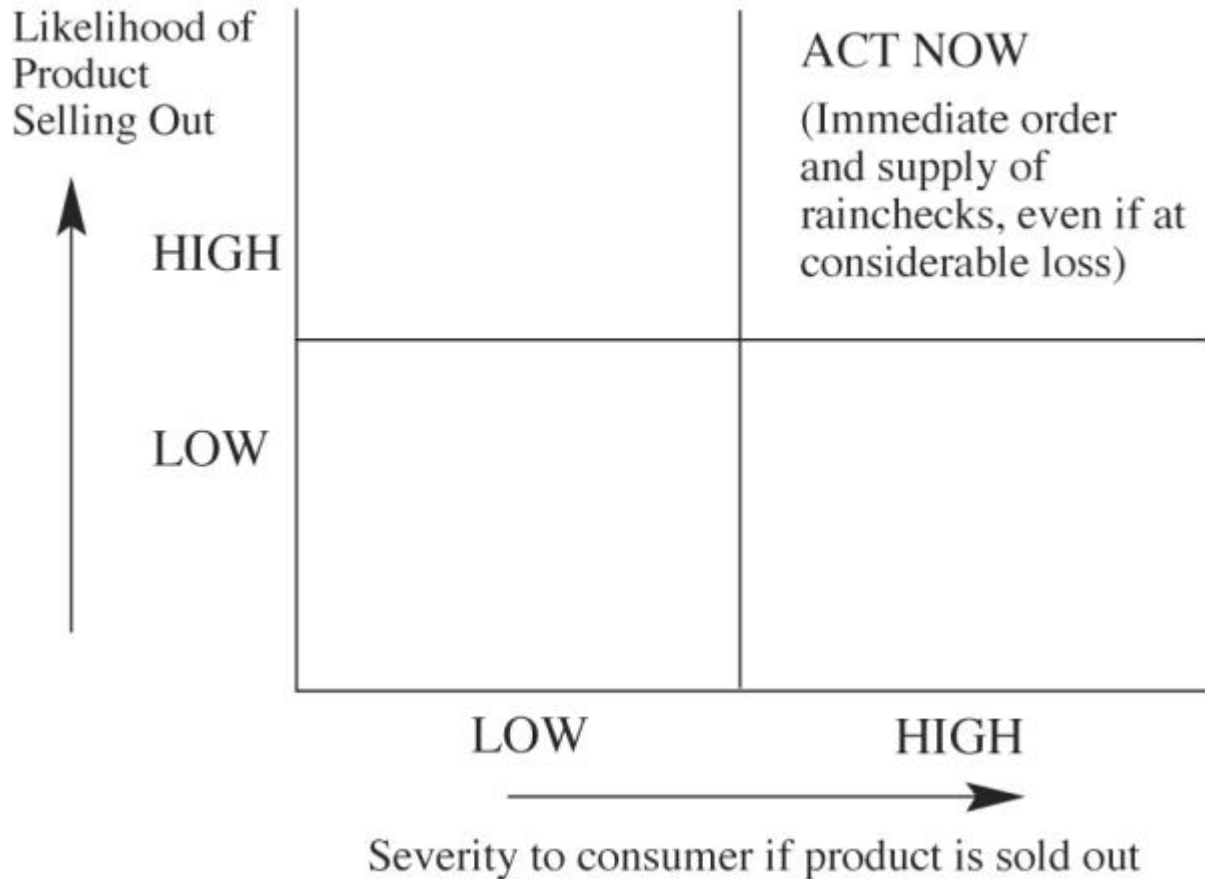
Specific to competition law, the 14 item list of factors in due diligence¹¹¹ has been used by Courts in the context of misleading and deceptive advertising. In the *Woolworth and Cameron* case¹¹², the Court considered time frames and the volatility of fad products such as toys in the context of an allegation that a store had advertised toys for bargain prices (but had run out of product early in the sale). The Court found that there was due diligence. A key fact was the efforts that the defendants made in contacting the toy supplier to obtain more supply at higher retail prices in order to meet the consumer demand.

This example can be used to demonstrate how matrix analysis can assist a Court in structuring the balancing of the 14 factors of due diligence. The following basic matrix was set out.

¹¹⁰ Data-driven decision making is a modern trend that integrates mathematical models with legal models. For example, academics have attempted to mathematically measure the progress of constitutional change. This numerical analysis has its challenges and problems as the legal model is integrated with mathematical analysis, but this is an evolving science. Scott L. Kafker, *The Difficulty of Mathematically Measuring the Many Factors Driving Constitutional Change in Our State Supreme Courts: A Judicial Perspective*, 51 New Eng. L. Rev. 519 (2017)

¹¹¹ The 14 factors of the “due diligence” defense are as follows: 1) the nature and gravity of the adverse effect; 2) the foreseeability of the effect, including abnormal sensitivities; 3) the alternative solutions available; 4) legislative or regulatory compliance; 5) industry standards; 6) the character of the neighbourhood; 7) what efforts have been made to address the problem; 8) over what period of time, and promptness of the response; 9) matters beyond the control of the accused, including technological limitations; 10) skill level expected of the accused; 11) the complexities involved; 12) preventative systems; 13) economic considerations; and 14) actions of officials. For additional information on these 14 factors, see: Todd L Archibald and Kenneth E Jull, “Profiting From Risk Management and Compliance” (Toronto: Thompson Reuters) at 4-33 – 4-34.

¹¹² *R. v. Woolworth* (2000), 2000 CarswellOnt 175, 3 B.L.R. (3d) 174 (Ont. C.J.).

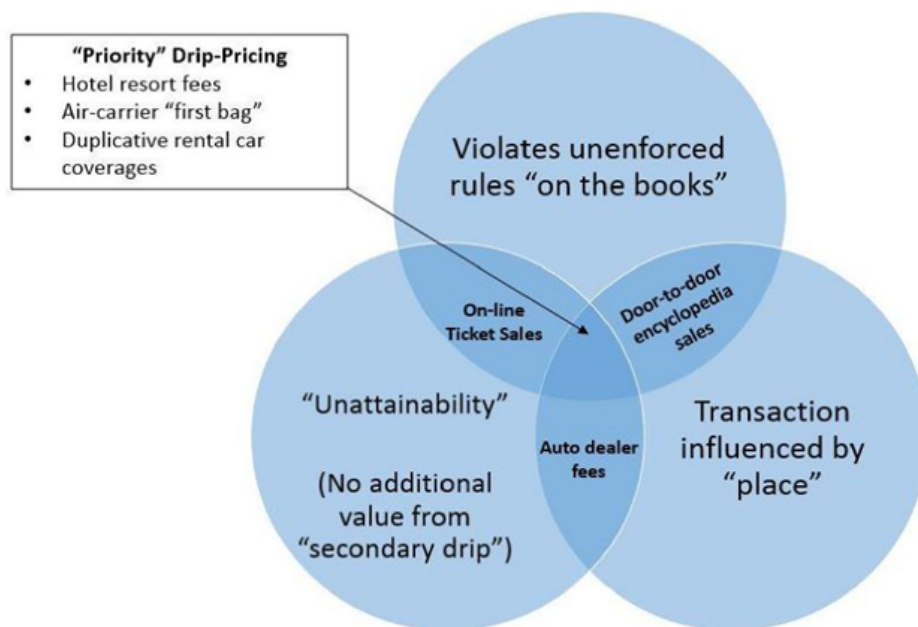


This matrix is an example from the bargain price requirement of the act to supply reasonable quantities. Extreme hypothetical examples illustrate the matrix. Suppose a store puts on sale de-icing windshield fluid and advertises it widely. And suppose customers defer buying the de-icing fluid from their regular store in order to benefit from the bargain. "Precautions taken to avoid the event" relate to tracking systems to measure inventory. "Systems to measure potential gravity of impact" relate to the importance of the product in issue. If there is a forecast of severe winter storms, there may be significant harm to consumers who run out of de-icing fluid. A high likelihood of a sell-out combined with the severity of harm to the consumer puts this into the "act now" box. The "act now" box requires contingency plans, such as obtaining inventory quickly from head office. To qualify for the due diligence defense, in the highest "act now" quadrant, the store must pay a premium to its supplier. By way of comparison, if the sale is on chocolate, the likelihood of selling out is lower (track records will likely show that chocolate can be purchased almost anywhere in a competitive market) and the severity of harm to the consumer is minimal, putting the risk into the low/low quadrant. If there is a sell-out, provision of rainchecks for chocolate, to be delivered in the next several months at the bargain price, should suffice as due diligence. Obviously, a "raincheck" for the de-icing fluid would not suffice as due diligence if there is a severe winter storm. Between these extremes, a range of permutations and combinations is possible.

In summary, the matrix of "precautions taken to avoid the event" versus "systems to measure potential gravity of impact" does not undercut risk assessment but, rather, gives both regulated

actors and courts a template for measuring risk management in due diligence. The suggested use of a matrix will only be as effective as the values that are used as common currency to develop priorities for action. Systems to measure potential gravity of impact ought to be empirically verified, in accordance with scientific methodology. In accordance with the new empiricism, we suggest that any ranking of human needs or wants ought to be measured empirically. This ranking would not be mere poll research, but rather would be based on a health-based analysis of physical and mental well-being. This analysis applies to consumer goods in the context of competition law.

Appendix III



ⁱ Counsel at Gardiner Roberts LLP, Adjunct Professor at the University of Toronto, Faculty of Law. I would like to acknowledge the significant contribution to the research and writing of this paper of Nicole Spadotto of the McGill Law School and summer student at Gardiner Roberts LLP. I would also like to acknowledge the very helpful peer review of Stephen Schmidt, Chief Regulatory Legal Counsel, TELUS.