

Bringing down the curtains on critical 'misquotes'



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THEATRE PRODUCERS WILL NEED TO BE MORE careful about misquoting (or at least making selective use of) critics' reviews on posters, front-of-house billboards, press adverts and other show advertising when the Consumer Protection from Unfair Trading Regulations 2007 (Consumer Protection Regulations) come into effect by April next year. The Consumer Protection Regulations implement the Unfair Commercial Practices Directive and may make illegal the widespread practice in the theatre industry of extracting a positive word or phrase from a theatre review for use in a show's publicity material even if it paints a misleading picture of the article as a whole.

CONTEXT IS EVERYTHING

Theatre-goers have long suspected that the glowing tributes outside a theatre promising a 'magnificent' or 'thrilling' evening may not be the whole story. In many cases they would be proved right. It is common practice in the theatre industry for producers to use selective 'pullquotes' from critics' reviews in a show's publicity material – often taking quotes out of context to turn a critical panning into what appears to be praise.

Examples of this sharp editing practice included the publicity material for the London Palladium production of the musical *Sinatra* in 2006. Front-of-house billboards for the production appeared to show that the production had been praised by the *Observer* as having 'energy, razzmatazz and technical wizardry'. In fact, the reviewer, Sean O'Hagan, had actually written: 'I couldn't help feeling that, for all the energy, razzmatazz and technical wizardry, the audience had been shortchanged.' In the same review he also said that it was the 'longest three hours I have spent in a theatre'.

Another example is the use by the advertising agency Dewynters of the quote, 'the massive plasma-screens are killer-diller' to promote the long-running musical, *We Will Rock You*. The quote was actually taken from a one-star review of the show in the *Times*, in which Caitlin Moran wrote: 'For all its stunning looks – the massive plasma-screens are killer-diller and all the cast have good shoes – *We Will Rock You* is just too straight. The script remains little more than two-minute blasts of knob gags and misplaced polemic between songs, and the musical numbers have nothing to do with the script.' Again, the quote placed in context has quite a different meaning.

PROTECTION FOR THEATREGOERS

In the past it has been difficult to regulate sharp practices by producers in the use of pullquotes, the only regulation being a form of gentleman's agreement between producers and

the Critics' Circle, the trade body for theatre critics. There was no protection for theatre-goers induced to buy tickets for a show as a result of seeing such misleading endorsements. This is set to change with the implementation of the Unfair Commercial Practices Directive in the UK. In essence, the Directive imposes a general obligation on all businesses not to treat consumers unfairly. Its wide scope – it applies to all business sectors – and flexible provisions means that it plugs the gaps in existing EU and UK consumer protection legislation. The Consumer Protection Regulations implementing the Directive in the UK were published by the government in draft form in May 2007. The government is now consulting on this draft before the Consumer Protection Regulations come into effect by April 2008.

TEST FOR UNFAIR COMMERCIAL PRACTICE

Part 2 of the Consumer Protection Regulations sets out the rules on determining whether a commercial practice is unfair. First, there is a general prohibition against unfair commercial practices. Secondly, there are specific examples of misleading actions, omissions and aggressive commercial practices. Finally, there is an annex of 31 specific practices that will be deemed unfair in any circumstances. Of particular relevance to theatre producers will be the general prohibition set out in Reg 3, and the provisions on 'misleading' actions and omissions set out in Regs 5 and 6.

The general prohibition defines an 'unfair commercial practice' as one which runs contrary to the requirements of professional diligence and which materially distorts the economic behaviour of 'the typical consumer', or is likely so to do. The benchmark will normally be judged by the standards of 'the average consumer', although in certain circumstances it will be adjusted to the more exacting standards of 'the vulnerable consumer'. 'Professional diligence' is defined in the Consumer Protection Regulations as the standard of special skill and care which a business may reasonably be expected to exercise towards a consumer which is commensurate with either honest market practice or the general principle of good faith in the trader's field of activity, or both.

In the consultation paper on the draft Consumer Protection Regulations, the government explains that the test 'to materially distort the economic behaviour of a typical consumer' means to appreciably impair the typical consumer's ability to make an informed decision, thereby causing them to make a transactional decision that they would not otherwise have made.

The vast majority of commercial practices defined as unfair under the general prohibition will fall into two categories; they will either be 'misleading' or 'aggressive'. A commercial practice will be a misleading action if it contains false information (ie is untruthful) or will in some way deceive, or is likely to deceive, the average consumer and causes them to make a transactional decision that they would not otherwise have made.

The Consumer Protection Regulations list specific commercial practices which will be misleading. If a commercial practice is not named, then its unfairness will need to be assessed against the general prohibition against unfairness. A commercial practice will be a misleading omission if it omits or hides material information which the typical consumer needs, according to the context, to make an informed transactional decision, and as a result it causes or is likely to cause the typical consumer to make a transactional decision they would otherwise not have made. Factors taken into account when determining whether a practice is misleading include the features and circumstances of the commercial practice, the limitations of the medium used to communicate the practice (including limitations of space and time) and, where the medium used to communicate the commercial practice imposes limitations of space and time, any measures taken by a trader to make the information available by other means.

ENFORCEMENT

The Consumer Protection Regulations will be enforceable through Part 8 of the Enterprise Act

2002 and will be enforced by the Office of Fair Trading (OFT) and local trading standards officers. Breach of the general prohibition will be a mens rea offence (ie no offence can be established unless the prosecution can prove that a trader has knowingly or recklessly breached the requirements of professional diligence). All other offences will be strict liability. In the consultation paper on the draft Consumer Protection Regulations, the government has undertaken to review the offences three years after the Consumer Protection Regulations come into force.

COMMENT

Will the changes in the law actually have any impact on producers who currently make selective use of critics' quotes? It appears that the application of the Directive and the Consumer Protection Regulations is wide enough to apply to theatre advertising. Helen Kearns, the European Commission's spokeswoman on consumer affairs, has been quoted in the *Independent* (28 April 2007) as saying that the new Directive should apply to the sale of theatre tickets. For a theatre producer's selective use of quotes to breach the general prohibition, it would need to be shown that the producer had fallen below the standards of honest market practice and/or the general principles of good faith associated with show advertising, and that this had had an impact on an audience's decision to purchase tickets.

The fact that the prohibition against 'misleading' commercial practices includes the omission of relevant information will be a key factor. Ultimately, however, the theatre industry will have to wait until the legislation comes into effect in April next year to see how strictly the OFT interprets the legislation and deals with breaches. In the meantime, producers should be aware that it may now be time to end the practice of deliberately using misleading quotes to promote their shows.

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