

**De gustibus non est disputandum:  
Regulating offensive advertising  
in a democratic South Africa**

by

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## Summary

The Advertising Standards Authority's system of self-regulation compares favourably with that of similar bodies in many other countries. Its advertising code regulates, amongst others, offensive advertising. This study investigates whether the limitations imposed by the South African advertising code accord with the provisions of the South African Constitution. In order to examine this critically, an interpretative, comparative review of the literature on this topic was conducted.

Offensive advertising is a form of freedom of expression that is protected in South Africa. It is accepted as such in constitutional jurisprudence, both in South Africa and internationally. The advertising code may therefore only limit advertising freedom insofar as the limitations of s 36 of the *Constitution of the Republic of South Africa, 1996* permit it.

In terms of s 36, the South Africa advertising code needs to constitute a 'law of general application'. As a contract between advertisers and the Advertising Standards Authority, and also based on the advertising code's legal underpinning in broadcast advertising, the code is 'law'. Moreover, as a published document based on international advertising principles, the code is furthermore also accessible; and it has general application.

However, the vague terminology employed in the offensive advertising clause means that the clause constitutes an unenforceable contract term. It is not sufficiently clear and precise to qualify as 'law of general application', with the exception of the provisions on gender offence, the offensive advertising provisions are not formulated with sufficient precision so as to enable advertisers to reasonably ascertain prior to publication whether an advertisement is likely to be acceptable.

The Constitutional Court in *Islamic Unity Convention v Independent Broadcasting Authority NO 2002 (4) SA 294; 2002 (5) BCLR 433* para 30 highlighted the categories of offensive material that can be expected to be regulated in a democratic society, if fairness and a diversity of views representative of South African society is to be

achieved, namely material that is (1) indecent, obscene or offensive to public morals; (2) offensive to religious convictions; or (3) offensive to feelings of sections of the population .

The study concludes that in respect of sex, nudity, violence, and language, advertising material should be limited to appropriate media placement in that the South African advertising code should aim to protect children and unwilling adult recipients from offence occasioned by encountering such material, rather than preventing moral deterioration.

The study also concludes that when dealing with religious convictions, race, sexual orientation, ethnic or social origin, age, disability, and culture, the prohibitions on advertising should mirror the provisions of the *Promotion of Equality and Prevention of Unfair Discrimination Act* (Act 4 of 2000), dealing with hate speech: If a category of offence is to be banned, such offence cannot be merely shocking but must result in hate speech. The *Promotion of Equality and Prevention of Unfair Discrimination Act* is a direct result of the requirement in the *Constitution, 1996* that national legislation must be enacted to prevent or prohibit unfair discrimination.

Finally, the study proposes amended provisions relating to offensive advertising for the South African advertising code: Firstly, it is proposed that an advertiser's freedom of expression should be curtailed in a manner that ensures fairness and a diversity of views broadly representing a democratic South African society. Secondly, the proposal aims to ensure that offensive advertising provisions accord with the value system of the *Constitution, 1996*, when collectively weighing up the requirements and factors provided for in s 36 of the *Constitution, 1996*, together with all other relevant factors.

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## Glossary of terms

### **ACA**

Association for Communication and Advertising of South Africa

### **AMS Directive**

Audiovisual Media Services' Directive of the European Union

### **BCAP**

British Broadcast Committee of Advertising Practice

### **BMCC**

Broadcast Monitoring and Complaints Committee of the Independent Communications Authority of SA

### **British advertising codes**

Collectively referring to the British Code of Advertising, Sales Promotion and Direct Marketing; the British Radio Advertising Standards Code; and the British Television Advertising Standards Code

### **British advertising regulator**

Advertising Standards Authority of the United Kingdom

### **British broadcast regulator**

Office of Communications in the United Kingdom(OfCom)

### **British non-broadcast advertising code**

British Code of Advertising, Sales Promotion and Direct Marketing

### **British radio advertising code**

British Radio Advertising Standards Code





**British television advertising code**

British Television Advertising Standards Code

**Canadian advertising clearance division**

Advertising Clearance Division of the Canadian advertising regulator

**Canadian advertising code**

Canadian Code of Advertising Standards

**Canadian advertising regulator**

Advertising Standards Canada (ASC)

**CAP**

Committee of Advertising Practice of the United Kingdom

**CAPs**

Collectively referring to the British Broadcast Committee of Advertising Practice and the Committee of Advertising Practice of the United Kingdom

**CARU**

Children's Advertising Review Unit of the National Advertising Division of the Council of Better Business Bureaus of the United States

**CBBB**

Council of Better Business Bureaus of the United States

**ICC**

International Chamber of Commerce

**ICC code**

Advertising and Marketing Communication Practice code of the International Chamber of Commerce



**NAD**

National Advertising Division of the Council of Better Business Bureaus of the United States

**NARB**

National Advertising Review Board of the Council of Better Business Bureaus of the United States

**South African advertising code**

Code of Advertising Practice as administered by the Advertising Standards Authority of South Africa

**South African advertising regulator**

Advertising Standards Authority of South Africa

**South African broadcast regulator**

Independent Communications Authority of SA (ICASA)

**South African broadcast regulator's code**

The statutory Code of Conduct for Broadcasting Services, administered by the Independent Communications Authority of SA (ICASA)

**South African broadcast programming code**

The voluntary broadcast programming code of the Broadcast Complaints Commission of SA (BCCSA)

**United States advertising regulator**

Collectively referring to the National Advertising Division, the National Advertising Review Board, and the Children's Advertising Review Unit of the National Advertising Division of the Council of Better Business Bureaus of the United States



***United States broadcast regulator***

Federal Communications Commission of the United States (FCC)