

Chapter II - Regulation of advertising

1. Introduction

Woker suggests that it is generally accepted that the content of advertising should be regulated.¹ This ensures that rivals play by the same rules.² Although only a small proportion of the millions of advertisements published each year are false, misleading, unfair, offensive, or socially irresponsible, or are perceived as such by the marketplace,³ Sinclair points out that “[e]very industry has its charlatans and advertising is no exception”.⁴ These offenders “hamper the functioning of the market system, harm or insult consumers, and reduce the overall credibility of advertising”.⁵ It is therefore generally argued that it is both in the public interest and in the interest of the marketing communications industry that advertising be regulated to secure the confidence of consumers and government alike,⁶ and achieve the necessary credibility and reputation to inspire public confidence in advertising.⁷

¹ Woker *Advertising law in South Africa* (1999) 9; Woker “Legitimate protection of the public or censorship? Advertising controls and the right to freedom of speech” *SA mercantile law journal* (1997) 291-309, 307.

² Lord Borrie QC “Is self-regulation still the best way to protect advertising freedom?” *ISBA annual conference*, London www.asa.org.uk (accessed March 2001).

³ Harker “Achieving acceptable advertising: an analysis of advertising regulation in five countries” *The international marketing review* (June 1998) 101-118, 106; Boddewyn *Global perspectives on advertising self regulation: principles and practices in thirty-eight countries* (1992) 4.

⁴ Sinclair *The South African advertising book: making the other half work too* (1993) 55.

⁵ *National Brands v Kwality Biscuits* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 2003; and Sinclair *Advertising book* 55.

⁶ Lord Borrie *Self-regulation* www.asa.org.uk (accessed March 2001).

⁷ European Advertising Standards Alliance *Advertising self-regulation in Europe - an analysis of advertising self-regulatory systems and their codes of practice in 22 European countries* (2001) 13; and *Kwality Biscuits* (ASA Final Appeal Committee ruling).

The question, therefore, is not whether advertising ought to be controlled, but rather who should be responsible for exercising the imposition of restraints on advertising, and where to draw the line in respect of the rules applicable to advertising content.⁸

2. Forms of advertising regulation

It is accepted that advertising should be effectively regulated without unnecessarily stifling creativity.⁹ Traditionally, two forms of advertising regulation exist, namely statutory regulation,¹⁰ and self-regulation.¹¹ Advertising is mostly self-regulated in developed countries.¹² Thus, we find that advertising content is self-regulated in most European countries, the United States of America, Canada, New Zealand, South Africa, Latin America and Asia / the Pacific.¹³

Statutory regulation and self-regulation should, however, not be regarded as mutually exclusive alternatives.¹⁴ Self-regulation has been described as “a judicious middle way between total exemption from all rules - whether laws, codes or policies - that govern any behaviour and total subjection to statutory or bureaucratic controls that govern all behaviour”.¹⁵ Self-regulation may thus be viewed as an alternative to detailed legislation, but not to legislation itself, as self-regulation is designed and developed to work within and to complement statutory controls producing a result

⁸ Woker Advertising law 10-11.

⁹ Woker Advertising law 228.

¹⁰ The common law is, for ease of discussion, included in the category of *statutory regulation*.

¹¹ EASA Analysis 13.

¹² Fenwick *Civil liberties and human rights* (2007) 306 with reference to Akdeniz Walker & Wall (eds) *The internet, law and society* (2000) 6-14; *Kwality Biscuits* (ASA Final Appeal Committee ruling).

¹³ European Advertising Standards Alliance *Advertising self regulation bodies and systems* www.easa-alliance.org (accessed May 2008).

¹⁴ Business Practices Committee “Report in terms of section 10(1) of the Harmful Business Practices Act 1988 (Act No 71 of 1988)” (Report No 15) (18 May 1992) *Government Gazette* 13988.

¹⁵ Barnes & Blakeney “Advertising regulation in Australia: an evaluation” *The Adelaide law review* (1982) 22-60, 29.

that neither system of control could achieve on its own.¹⁶ For as consumers and business require the protection and predictability of law supplemented by ethical business practices, only then will both consumers and business have the confidence to take full advantage of the benefits of a market economy.¹⁷

Self-discipline is sometimes mentioned as a further option, but in a self-disciplinary system, there are no formal controls.¹⁸ Advertisers are restrained by their competitors who may run better advertisements and by consumers who would respond to unacceptable advertising with the *power of the purse*. In addition, honest traders would be governed by their own conscience; by ethical business practices; or by their fear of earning a bad reputation.¹⁹ However, as the history of the advertising industry demonstrates that this *laissez-faire* approach does not adequately control the abuses of advertising,²⁰ it will not be discussed any further.

The legal framework for the control of advertising content in South Africa is a hybrid system in which advertising is partly self-regulated and partly state-regulated. It is a mixture of the common law and legislation, as well as the self-regulatory system based on the South African advertising code,²¹ which is administered by the South African advertising regulator.

¹⁶ EASA *Analysis 13*, 19. The *Consumer Protection Act* (Act 68 of 2008) intends to prescribe the principles applicable to advertising content (refer Chapter 2, Fundamental consumer rights, Part E (Right to fair and responsible marketing), articles 29 to 39), and furthermore expresses the desire for industries to self-regulate prior to government involvement (refer Chapter 3, Protection of consumer rights and consumers' voice, Part A (Consumer's right), article 69 dealing with the enforcement of rights by a consumer; and article 70 dealing with alternative dispute resolution; and Chapter 4, Business names and industry codes of conduct, Part B (Industry codes of conduct), article 82 dealing with industry codes. See also EASA *Analysis 13*.

¹⁷ Council of Better Business Bureaus *Annual report* (1989) 9.

¹⁸ Boddewyn *Global perspectives* 4.

¹⁹ Boddewyn *Global perspectives* 6.

²⁰ Refer, in general, Nevett *Advertising in Britain: a history* (1982); and Turner *The shocking history of advertising* (1952).

²¹ Advertising Standards Authority of South Africa *Code of advertising practice* (2008); and www.asasa.org.za.

In discussing this hybrid system the focus will firstly be on a critical and comparative evaluation of the South African self-regulatory system before turning to the statutory and common law system that also governs advertising content.

2.1. Self-regulatory framework²²

The following elements are characteristic of a sufficient and effective advertising self-regulatory system:

2.1.1. Independence

In a self-regulatory system, it is in the interest of fair competition that the administrator of the system is not also a competitor in the market place.²³ This means that the administrator must be seen to be impartial, and that the operation and decisions of the administrator should be made independently of government, specific interests, and interest groups.²⁴

The South African advertising regulator is such an independent body and is responsible for self-regulating advertising content in South Africa.²⁵ The same can be said of the British advertising regulator;²⁶ the Canadian advertising regulator;²⁷ and the United States advertising regulator.²⁸

²² It falls outside the ambit of this study to discuss the criticisms and benefits of self-regulation. See generally Woker *Advertising law* 17; and Boddewyn *Global perspectives* 717.

²³ *Kwality Biscuits* (ASA Final Appeal Committee ruling); *EASA Analysis* 14.

²⁴ European Advertising Standards Alliance *Self-regulation – a statement of common principles and operating standards of best practice* www.easa_alliance.org (accessed June 2008).

²⁵ *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 4; and *Rape Crisis 'Charlize Theron' v Various Complainants* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 1999.

²⁶ Lawson "Challenging the Advertising Standards Authority" *New law journal* (2001) 526-527; Boddewyn "Outside participation in advertising self-regulation: the case of the Advertising Standards Authority (U.K.);" *Journal of consumer policy* (1983) 77-93, 92-93; www.asa.org.uk/asa/about.

²⁷ www.adstandards.com/en/standards.

²⁸ Boddewyn *Global perspectives* 129-130.

In the United States the principle of independence is, however, negated through the print media, which set individual standards that vary from one publication to another based on each publication's audience and management.²⁹ As the mandate of the United States advertising regulator specifically excludes undesirable advertising from its ambit,³⁰ regulation by individual print media owners fills this potential gap. In addition, the broadcast media licensed by the United States broadcast regulator are subject to regulator's regulations, with the result that each of the major networks have their individual *Standards and Practices* rules, which determines the acceptability of commercials for their particular audiences. Commercials are pre-screened based on these rules.³¹ Accordingly, in the United States - unlike in South Africa, the United Kingdom and Canada - there is no uniform standard for offensive advertising content, as the decision of what constitutes offensive advertising content is media owner specific.

2.1.2. Contractual relationship

Businesses cannot be compelled to participate in self-regulatory activities, since self-regulatory systems are normally based on an agreement between members of an industry to, amongst others, accept and act in accordance with a code of practice.³² The mandate of the South African advertising regulator, a juristic person exercising a public function, is no exception. The relationship between the South African advertising regulator and its members and the power vested in the South African advertising regulator also arises out of contract.³³ Although freedom of contract is given a high premium, it has long been the approach of the South African courts that they are entitled to interfere in contractual relationships in certain

²⁹ Boddewyn *Global perspectives* 131.

³⁰ Boddewyn *Global perspectives* 132.

³¹ Boddewyn *Global perspectives* 131; Dessart *Standards and practices* www.museum.tv (accessed May 2008).

³² *Telematrix* para 27; and Boddewyn *Global perspectives* 4, 135; *EASA Analysis* 13.

³³ *Turner v The Jockey Club of South Africa* 1974 (3) SA 633 (AD); and *Rape Crisis* (ASA Final Appeal Committee ruling).

instances: The common law has always recognised that contracts, which are contrary to public policy, are unenforceable. However, the Bill of Rights should be employed to determine public policy, taking a balanced approach and weighing up all of the relevant constitutional provisions.³⁴ For example, in *Brisley v Drotzky*,³⁵ Cameron JA stated the following:

It is not difficult to envisage situations in which contracts that offend these fundamentals of our new social compact will be struck down as offensive to public policy. They will be struck down because the Constitution requires it, and the values it enshrines will guide the courts in doing so. The decisions of this Court that proclaim that the limits of contractual sanctity lie at the borders of public policy will therefore receive enhanced force and clarity in the light of the Constitution and the values embodied in the Bill of Rights ...What is evident is that neither the Constitution nor the value system it embodies give the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith ... On the contrary, the Constitution's values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint. One of the reasons ...is that contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity... The Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual 'freedom', and securing a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity ...³⁶

In *Nestle (SA) Pty Ltd v Mars Inc*³⁷ the South African Supreme Court of Appeal correctly enforced the terms of the South African advertising code in determining that the South African advertising regulator had incorrectly refused to entertain Mars' complaint against Nestle, and that the South African advertising regulator was contractually bound to consider it.

³⁴ Hopkins "The influence of the bill of rights on the enforcement of contracts" *De rebus* (2003) 22, 25.

³⁵ 2002 (4) SA (1) SCA.

³⁶ At paras 92 to 95.

³⁷ 2001 (4) SA 542 (SCA).

The relationship between the Canadian advertising regulator and its members, and the power vested in the Canadian advertising regulator also arises out of contract.³⁸ This is also true of the relationship between the United States advertising regulator and its members.³⁹ Unlike the South African advertising regulator, where individual legal entities are members via their trade associations, resulting in indirect membership,⁴⁰ individual legal entities in the United States and Canada are members of the advertising regulators. In their efforts to ensure fair-trade practices, it is a paradox that United States government regulatory bodies find themselves required by anti-trust law to prohibit the kinds of industry-wide agreements and sanctions upon which the self-regulation of advertising is based in other developed countries.⁴¹

Whilst the regulation of advertising content in the United Kingdom also arises out of contract, the British advertising regulator has no contractual relationship with advertisers, advertising practitioners, or media owners.⁴² The British advertising regulator has instead contracted with the two CAPs, namely *CAP (Broadcast)* and *CAP (Non-broadcast)*. In turn, the CAPs contracted with trade associations representing marketers, agencies, and media owners.⁴³ Therefore, much like in South Africa, individual legal entities have indirect membership, albeit that such membership is of the CAPs and not the British advertising regulator itself.

2.1.3. Code of conduct

The European Advertising Standards Alliance suggests that the differences between self-regulatory advertising codes in use today are insignificant by comparison with

³⁸ The Canadian advertising regulator has over 160 members, which include leading Canadian advertisers, advertising agencies, media organisations, and suppliers to the advertising sector (refer www.adstandards.com)

³⁹ www.nadreview.org.

⁴⁰ *Telematrix* para 4.

⁴¹ Boddewyn *Global perspectives* 136; Harker *Acceptable advertising* 114. It does not, however, fall within the ambit of this stuffy to discuss this any further.

⁴² *R v Advertising Standards Authority, ex parte Insurance Services plc* (1989) 2 Admin law review 77.

⁴³ www.asa.org.uk.

the major differences between national laws affecting advertising, over which self-regulation has no control.⁴⁴ The reason for the uniformity in advertising codes is that all these codes have their origins in the ICC code.⁴⁵ In some countries, national codes have been developed well beyond the ICC code, but are still based on the same premise: that advertising must be legal, decent, honest, and truthful, prepared with a due sense of social responsibility and the respect for the principles of fair competition.⁴⁶

Codes are more flexible than regulation by statute: they can be readily revised to respond to new circumstances, and responsibility for their enforcement lies with those who have specialised knowledge of the sector and of what are reasonable and fair standards.⁴⁷

The South African advertising code, as administered and determined by the South African advertising regulator;⁴⁸ the British non-broadcast advertising code;⁴⁹ the British radio advertising code;⁵⁰ and the British television advertising code,⁵¹ as administered by the CAPs and determined by the British advertising regulator;⁵² as well as the Canadian advertising code,⁵³ as administered and determined by the

⁴⁴ EASA *Analysis* 16.

⁴⁵ EASA *Statement* www.easa_alliance.org (accessed June 2009); *Rape Crisis* (ASA Final Appeal Committee ruling).

⁴⁶ EASA *Analysis* 14.

⁴⁷ *Business Practices Committee Report*.

⁴⁸ *South African code of advertising practice* (2008); and www.asasa.org.za.

⁴⁹ The Committee of Advertising Practice *British code of advertising, sales promotion and direct marketing* (2003); and www.cap.org.uk.

⁵⁰ The Broadcast Committee of Advertising Practice *Radio advertising standards code* (2002); and www.cap.org.uk.

⁵¹ The Broadcast Committee of Advertising Practice *Television advertising standards code* (2002); and www.cap.org.uk.

⁵² Lawson *Challenging the ASA 526-527*; www.asa.org.uk.

⁵³ Advertising Standards Canada *Canadian code of advertising standards* (November 2007); and www.adstandards.com.

Canadian advertising regulator,⁵⁴ are all based on the same premise as the ICC code. These codes therefore differ in detail rather than in principle, dealing with all forms of marketing communication rather than just with what was traditionally regarded as advertising.⁵⁵

It would appear that these advertising codes all intend regulating advertising in two ways: Firstly, ensuring that advertising is not harmful or misleading; and secondly, ensuring that certain standards are maintained. A distinction can thus be drawn between advertising regarded as harmful or misleading, and advertising regarded as undesirable.⁵⁶ Offensive advertising falls within the latter category.

Although the United States advertising regulator does not administer a comprehensive advertising code like other self-regulatory bodies,⁵⁷ its specific mandate is to control harmful or misleading advertising. Undesirable advertising is specifically excluded from its ambit. In addition, the CARU, the United States children's advertising unit, responds to public concerns and promotes responsible children's advertising. This is not only with regard to issues of truth and accuracy, but includes the promotion of socially responsible advertising that is sensitive to the special needs of children.⁵⁸

⁵⁴ www.adstandards.com.

⁵⁵ Refer Clause 4.1 of Section I of the South African advertising code; the definition of "advertising", Canadian advertising code; Introduction, Clause 1.1 of the British non-broadcast advertising code; and Clause 1 of the British radio advertising code dealing with advertisements.

⁵⁶ Refer Clause 1 of Section I of the South African advertising code; the Canadian code; the Preface of the British non-broadcast code; the Foreword of the British radio advertising code; and the Foreword of the British television advertising code.

⁵⁷ National Advertising Division *The [American] advertising industry's process of voluntary self-regulation – policies and procedures* www.nadreview.org (accessed August 2007); Harker *Acceptable advertising* 102.

⁵⁸ NAD *Policies and procedures* www.nadreview.org (accessed August 2007) - Section 1 dealing with *Advertising monitoring* and Section 2 dealing with *Filing a complaint*; and Boddewyn *Global perspectives* 132-3.

Like other advertising codes, the intention of the United States advertising code is to promote the highest standards of truth and accuracy in national advertising and to promote responsible advertising to children.⁵⁹ Where the United States advertising code, however, conflicts with other advertising codes is that it does not set out ethical standards of professional conduct, and accordingly does not deal with offensive advertising. However, the approach that has been taken by individual media owners to offensive advertising fills this potential gap.⁶⁰ Individual stations pre-screen material to determine its acceptability based on individual commercial clearance guidelines.⁶¹ This is as a result of the requirement imposed by the United States broadcast regulator that a broadcast station must ensure that, amongst others, advertising content does not offend the sensibilities of their individual viewers, failing which the broadcast station may be fined or its license revoked.⁶² The result is that there is no uniform standard in the United States by which offensive advertising is judged.

2.1.4. Functions

Internationally, standards and principles are set that self-regulatory bodies should endeavour to meet in order to offer an effective system for the control of advertising content.⁶³ These standards and principles are the following: The reason for the uniformity in advertising codes is that all these codes have their origins in the ICC code.⁶⁴ In some countries, national codes have been developed well beyond the ICC code, but are still based on the same premise: that advertising must be legal,

⁵⁹ Boddewyn *Global perspectives* 129-30.

⁶⁰ Boddewyn *Global perspectives* 131.

⁶¹ Weisman & Monagan "Back to the basics – clearing your copy" *Advertising & Trademark Law Seminar* (June 2004) (unpublished and unnumbered); Anonymous "I have a great commercial, so why won't the networks air it?" www.library.lp.findlaw.com/articles (accessed February 2003); Boddewyn *Global perspectives* 131; and Dessart *Standards and practices* www.museum.tv (accessed May 2008).

⁶² *Communications Act of 1934*.

⁶³ See, for example, *EASA Analysis*; *EASA Advertising self-regulation*; and Boddewyn *Global perspectives*.

⁶⁴ *EASA Statement* www.easa_alliance.org (accessed June 2009); *Rape Crisis* (ASA Final Appeal Committee ruling).

decent, honest, and truthful, prepared with a due sense of social responsibility and the respect for the principles of fair competition.⁶⁵

- ***A self-regulatory body normally⁶⁶ offers voluntary pre-publication advice to practitioners.⁶⁷***

The South African advertising regulator does not offer such advice itself. Advertisers who wish to ascertain whether their advertisements conform to the principles contained in the South African advertising code may, however, voluntarily approach the ACA advisory service for an opinion. The ACA represents advertising practitioners in South Africa, and is a member association of the South African advertising regulator.

The South African position is very similar to the situation in the United Kingdom, where the CAPs and not the British advertising regulator offer pre-publication advice.⁶⁸ Also, in Canada the Canadian advertising clearance division, which operates separately and apart from the Canadian advertising regulator, provides voluntary advisory and copy clearance services.⁶⁹

In the United States, the United States advertising regulator does not offer a pre-publication vetting service. However, as has already been stated, the

⁶⁵ EASA Analysis 14.

⁶⁶ Barnes & Blakeney *Advertising regulation* 29.

⁶⁷ Working on the principal that prevention is better than cure, most national self-regulatory bodies provide copy advice, on request, to advertisers and agencies on the acceptability of proposed advertising campaigns (this service is called copy advice) (refer EASA Analysis 15). In some countries, certain categories of advertising have to be submitted to the self-regulatory body for clearance before they can be broadcast or published. This is known as pre-clearance. It superficially resembles copy advice, but whereas copy advice is not usually binding, pre-clearance is. In some cases pre-clearance is a legal requirement applicable to all advertising in a particular medium (for example television) or product category (for example medicines or tobacco) while in others it may be used by a self-regulatory body as a sanction against advertisers who have breached the codes (refer EASA Analysis 16).

⁶⁸ EASA Analysis 117.

⁶⁹ Canadian advertising code 10.

individual media owners vet advertising content, including offence, against standards based on each media owner's audience and management discretion.⁷⁰

- **A self-regulatory body normally⁷¹ monitors advertisements in various media.⁷²**

The South African advertising regulator does not monitor advertising, but relies solely on complaints to initiate its processes. The same is true of the Canadian advertising regulator.

The British advertising regulator, however, monitors advertisements and will, in appropriate circumstances, intervene to stop an advertisement, which it considers in contravention of the British codes, even if no complaint has been received.⁷³ The United States advertising regulator also monitors both traditional advertising, such as broadcast and print consumer, as well as new media, including the Internet, in order to investigate the acceptability of claims.⁷⁴

⁷⁰ Boddewyn *Global perspectives* 131.

⁷¹ Barnes & Blakeney *Advertising regulation* 29.

⁷² So many advertisements appear each year that it would be quite impossible for any organisation to examine every one. However, some self-regulatory bodies monitor advertising on their own initiative, dealing with apparent code breaches in the same way as they would complaints. Often such monitoring concentrates on specific media or categories of advertising, particularly those where there may be some public concern (refer EASA *Analysis* 15).

⁷³ www.asa.org.uk.

⁷⁴ NAD *Policies and procedures* www.nadreview.org (accessed August 2007) - Section 1 dealing with *Advertising monitoring*; Council of Better Business Bureaus *Annual report* 4; Boddewyn *Global perspectives*; Harker *Acceptable advertising* 115.

- **A self-regulatory body normally⁷⁵ deals with competitor and consumer complaints.⁷⁶**

Generally, the advertising industry⁷⁷ actively polices itself by lodging complaints against others' advertising if such advertising appears to be in breach of the advertising code. Consumers, collectively or individually, are also afforded an opportunity to object to advertising directly to the advertiser via the self-regulatory body.⁷⁸ It is clear from the provisions of the South African advertising code that in addition to companies in competition with each other, any person, including government or departments of State, may complain about a breach of the South African advertising code, whether the person is a member or not.⁷⁹ The British advertising regulator,⁸⁰ the Canadian

⁷⁵ Barnes & Blakeney *Advertising regulation* 22.

⁷⁶ Sometimes complainants have misunderstood the advertisement, have not read it properly, or have complained about matters not covered by the advertising code. When a self-regulatory body receives a complaint, it will first decide whether the complaint concerns a matter that can be considered by a complaints committee. Complaints from individual consumers are normally handled free of charge. Some self-regulatory bodies charge for dealing with disputes between advertisers (refer EASA *Analysis* 14). If the self-regulatory body decides that the complaint warrants consideration by a complaints committee, the advertiser is afforded an opportunity to respond to the complaint. Where the advertiser agrees to change the advertisement since the complaint resulted from an unintentional mistake or omissions, the complainant is informed of the outcome (refer EASA *Advertising self-regulation* 14). If the advertiser disagrees with the complainant, or fails to respond, the case is referred to the complaints committee. Both the complainant and the advertiser are informed of the complaints committee's decision. If either party disagrees with the decision, most self-regulatory bodies have an appeals system (refer EASA *Analysis* 15).

⁷⁷ Traditionally, the advertising industry consists of three parts: the advertisers who pay for the advertising; the advertising agencies responsible for the form and content of the advertising; and the media that carry it.

⁷⁸ The *Consumer Protection Act* expresses the desire for industries to self-regulate prior to government involvement (refer Chapter 3, Protection of Consumer Rights and Consumers' Voice, Part A (Consumer's right), article 69 dealing with enforcement of rights by a consumer and article 70 dealing with alternative dispute resolution; and Chapter 4, Business Names and Industry Codes of Conduct, Part B (Industry codes of conduct), article 82 dealing with industry codes. See also EASA *Statement* www.easa_alliance.org (accessed June 2008).

⁷⁹ *Nandos v Uthingo* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 2001.

advertising regulator,⁸¹ and the United States advertising regulator⁸² also respond to complaints from individuals, organisations, or competitors. However, all these self-regulatory bodies, including the South African advertising regulator, only initiate a formal investigation once it has been determined that the complaint meets the criteria for pursuing an investigation.⁸³

o **A self-regulatory body normally⁸⁴ imposes sanctions when necessary.⁸⁵**

Self-regulation amounts to more than self-restraint on the part of individual companies or entities.⁸⁶ Therefore, advertising codes would be incomplete without effective sanctions to enforce compliance. A self-regulatory system needs to ensure that advertisements, which fail to comply with the advertising code, are quickly corrected or removed in an effective manner.⁸⁷

Most advertisers and advertising agencies use conventional media and, therefore, the threat of a withdrawal of advertising privileges has generally

⁸⁰ EASA Analysis 116-8; www.asa.org.uk.

⁸¹ Canadian advertising code 3.

⁸² Boddewyn *Global perspectives* 130-2; Harker *Acceptable advertising* 109-115.

⁸³ Clause 8.2 of the Procedural Guide of the South African advertising code; Advertising Standards Canada *Ad complaints report* (2002) 3; EASA Analysis 118; Boddewyn *Global perspectives* 132.

⁸⁴ Barnes & Blakeney *Advertising regulation* 22.

⁸⁵ Generally speaking, self-regulation has the backing of the advertising industry, so in most cases advertisers accept the decision of a self-regulatory body, even if they do not agree with it. Self-regulation cannot, however, depend on voluntary compliance with its decisions - it must be able to enforce them. If the complaints committee upholds the complaint, the advertiser is asked to withdraw the advertisement or change it within a specific period of time (EASA Analysis 15). In cases where advertisers refuse voluntary co-operation, self-regulatory bodies have at their disposal a variety of sanctions. These include, for example, instructing the media to refuse the advertisement, or adverse publicity through the publication of decisions. On those rare occasions where all else fails, the self-regulatory body may refer the case to the statutory authorities, which have the power to prosecute the advertiser (EASA Analysis 15).

⁸⁶ Canadian advertising code 15.

⁸⁷ Boddewyn *Global perspectives* 4; EASA Analysis 13.

proved to be effective, as advertisements stopped by a self-regulatory body can be costly for companies, in terms of reputation and financially.⁸⁸ Thus, where advertisers, advertising agencies, and the media are involved in the advertising self-regulatory process - like in South Africa,⁸⁹ the United Kingdom,⁹⁰ and Canada⁹¹ - the chances of compliance are greatly enhanced as the self-regulatory body is given teeth.⁹² If, however, a small independent printer or 'back-yard' printer carries the advertisement the sanctions can generally not be enforced.

In the United States, however, only advertisers and advertising practitioners are involved in the self-regulatory system.⁹³ As the media are not involved in the self-regulatory system in the United States, but rather set their own individual standards based on each medium's audience demographics and management requirements,⁹⁴ the United States advertising regulator only has the power of persuasion.

In South Africa, the United Kingdom and Canada, on the other hand, self-regulatory bodies can draw on a number of sanctions, which compel advertisers to change or withdraw their advertising:^{95 96}

- *Refusal of further advertising space*

Where an advertiser refuses to comply voluntarily with a ruling of the South African advertising regulator, the regulator can issue what is

⁸⁸ www.asa.org.uk.

⁸⁹ Preface, Clause 3 of the South African advertising code.

⁹⁰ www.asa.org.uk.

⁹¹ www.adstandards.com.

⁹² *Telematrix* para 27; and *Harker Acceptable advertising* 110.

⁹³ *Boddewyn Global perspectives* 130.

⁹⁴ *Boddewyn Global perspectives* 131; *Council of Better Business Bureaus Annual report* 4.

⁹⁵ *EASA Analysis* 118.

⁹⁶ It is not within the ambit of this study to critically evaluate these sanctions.

termed an *Ad-Alert* to its member associations to request their members not to publish the unacceptable claim and/or material in future.⁹⁷ This sanction is also available to the British advertising regulator⁹⁸ and the Canadian advertising regulator.⁹⁹

- *Pre-publication advice*

The South African advertising regulator can also impose mandatory pre-publication advice on all advertising for a specific advertiser for a period of normally six months, if certain criteria are met.¹⁰⁰ The British advertising regulator can impose a similar sanction.¹⁰¹ In the case of outdoor advertising, advertisers found to have breached the British codes' rules on taste, decency or social responsibility may be required to seek mandatory pre-publication advice for a two-year period.¹⁰²

- *Adverse publicity*

The South African advertising regulator can also order an advertiser to publish an advertisement in which the South African advertising regulator's ruling is summarised in a prescribed form, in the media of the South African advertising regulator's choice.¹⁰³ This can be costly for an advertiser, both in terms of reputation and financially, as an advertiser has to pay for the advertising space booked by the South African advertising regulator as well as the production costs of the

⁹⁷ Clause 15.4 of the Procedural Guide of the South African advertising code.

⁹⁸ www.asa.org.uk; EASA Analysis 118.

⁹⁹ Advertising Standards Canada *Trade dispute procedure* www.adstandards.com (accessed November 2007) - Clause 6.11 deals with failure to comply with procedure or comply with decision.

¹⁰⁰ Clause 14.3 of the Procedural Guide of the South African advertising code.

¹⁰¹ www.asa.org.uk.

¹⁰² EASA Analysis 118; Jardine "How far can you go before an ad is banned?" *Marketing* (1999) 14.

¹⁰³ Clauses 14.6 and 14.6 of the Procedural Guide of the South African advertising code; and, as an example of the application of this sanction, *Kentucky Fried Chicken / Chicken Licken* (Ruling of the Final Appeal Committee of the Advertising Standards Authority of SA) 2004.

advertisement. This sanction is unique to South Africa and has no equivalent in other self-regulatory systems.

o ***A self-regulatory body normally¹⁰⁴ publicises its decisions.¹⁰⁵***

The South African advertising regulator publishes its decisions on its website at the conclusion of its investigations.¹⁰⁶ This is in line with the actions of the United States advertising regulator,¹⁰⁷ the Canadian advertising regulator,¹⁰⁸ and the British advertising regulator.¹⁰⁹ As the media, government departments, the advertising industry and consumer bodies, normally read these decisions, the publication of these decisions constitute a form of adverse publicity. These decisions are also reflected in the annual reports of these self-regulatory bodies.

In summary, the South African advertising regulator is a sophisticated and well-developed system of self-regulation, which compares very favourably with that in many other countries.¹¹⁰ The actions of the South African advertising regulator do, however, raise interesting questions about censorship.¹¹¹

¹⁰⁴ Barnes & Blakeney *Advertising regulation* 22.

¹⁰⁵ Most self-regulated bodies publish its decisions on a regular basis (EASA Analysis 15).

¹⁰⁶ Clause 14.4 of the Procedural Guide of the South African advertising code.

¹⁰⁷ Boddewyn *Global perspectives* 130-1.

¹⁰⁸ Canadian advertising code 15.

¹⁰⁹ www.asa.org.uk; and EASA Analysis 118.

¹¹⁰ De Jager & Smith *Advertising and the law* (1995) 21.

¹¹¹ Woker *Advertising law* 16, note 39. It is not, however, within the ambit of this study to debate this issue further. On censorship in South Africa, see, for example, Van Rooyen "Censorship in a future South Africa: a legal perspective" *De jure* (1993) 283-296; Van der Westhuizen "Do we have to be Calvinist puritans to enter the new South Africa?" *SA journal on human rights* (1990) 425-439, 425; Van der Vyver "Censorship in South Africa by JCW van Rooyen" *De jure* (1988) 182, 182; Marcus "The wider reaches of censorship" *SA journal on human rights* (1985) 69; Haysom & Marcus "'Undesirability' and criminal liability under the Publications Act of 1974" *SA journal on human rights* (1985) 31.

2.2. Statutory framework¹¹²

2.2.1. Legal recognition

Self-regulatory bodies can be divided broadly into two types: those created or acknowledged by statute, and those that are purely voluntary organisations having no statutory authority.¹¹³ The former category principally relates to self-regulatory bodies that are created or acknowledged in respect of broadcast media, but this acknowledgment does extend, in certain instances, to non-broadcast media.¹¹⁴ What follows, is an evaluation of the regulatory framework within which the South African advertising regulator operates, against the backdrop of other relevant jurisdictions:

2.2.1.1. Broadcast media

The South African advertising regulator falls within the former category. In terms of the *Electronic Communications Act*,¹¹⁵ the South African advertising code is the accepted standard to which all broadcast advertising in South Africa must conform. The Act further stipulates that, in accordance with the provisions of the *Independent Communications Authority Act*,¹¹⁶ the *Broadcast Monitoring and Complaints Committee* (BMCC) of the South African broadcast regulator must deal with non-adherence to the advertising code. Broadcasters are therefore legally bound to familiarise themselves with the principles contained in the South African advertising code and to ensure that their advertisements conform accordingly. Marcus & Spitz¹¹⁷ are of the opinion that the result is that the South African advertising code has the status of delegated legislation. The effect of this statutory recognition of the

¹¹² It falls outside the ambit of this thesis to discuss the criticisms and benefits of statutory regulation vis-à-vis self-regulation.

¹¹³ EASA Analysis 19.

¹¹⁴ For a discussion of the benefits of a self-regulatory body not only being a creature of contract, but of law, refer chapter III, para 3.2.1.

¹¹⁵ Act 36 of 2005.

¹¹⁶ Act 13 of 2000.

¹¹⁷ Marcus & Spitz "Expression" in Chaskalson et al (eds) *Constitutional law of South Africa* (1999) 20-52A footnote 1. This view is not dealt with in Woolman et al (eds) *Constitutional law of South Africa* (2009).

South African advertising code is that, whilst the South African advertising regulator's status as an independent body remains unaffected, the South African advertising code enjoys statutory backing.

The European Parliament adopted the *Audiovisual Media Services' (AMS) Directive* in 2007, which updated the 1989 *Television without Frontiers Directive* – the then centrepiece of advertising regulation in the European Union. The *AMS Directive* deals with broadcasting in the European Union, and recognises that self-regulation and co-regulation play an essential complementary role to statutory legislation and encourages European Union Member States to make more use of such systems.

In line with the *AMS Directive*, the situation in the United Kingdom is therefore similar to that in South Africa. The British broadcast regulator¹¹⁸ contracted out its responsibility to regulate the content of broadcast advertising to the British advertising regulator. Sections 319(2) and 325 of the *Office of Communications Act* require that the British advertising regulator should ensure that “generally accepted standards are applied to the content of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material”. The British broadcast regulator therefore provides a ‘legal backstop’, enforcing compliance both with the broadcast codes and with decisions of the British advertising regulator through its licensees.¹¹⁹

This means that the regulation of the content of broadcast advertising, including the regulation of offensive advertising, is mandated by statute in both South Africa and the United Kingdom,¹²⁰ even though these codes are still self-regulatory codes.¹²¹

¹¹⁸ *Office of Communications Act 2002*.

¹¹⁹ www.cap.org.uk.

¹²⁰ *EASA Analysis 14*.

¹²¹ Anonymous “Courts back ASA against human rights attack” *The in-house lawyer* (February 2001) (unnumbered).

In the United States, there is no statutory recognition of the United States advertising regulator. The United States broadcast regulator¹²² has the responsibility to oversee the acceptability of the content of programming and advertising, and a broadcast station can be fined or its license revoked if advertising content that is not truthful, or is false, misleading or deceptive, or offends against the sensibilities of their viewing audience is broadcast. Accordingly, individual stations therefore pre-screen material to determine its acceptability based on individual commercial clearance guidelines.¹²³

There are no similar provisions in the Canadian *Radio-television and Telecommunications Commission Act*. The Canadian advertising system is voluntary and is not mandated by statute.

In view of the above discussion, it is therefore clear that in the United States, the United Kingdom, and in South Africa, offensive broadcast advertising is legally regulated. Whereas the self-regulatory advertising codes dealing with offensive advertising in South Africa and the United Kingdom are legally recognised, there is no similar code provision in the United States, as broadcasters are required not to publish offensive advertising content due to a broadcasting licence condition.

2.2.1.2. Non-broadcast media

South African legislation provides no legal recognition of the South African advertising regulator or the South African advertising code in non-broadcast media. However, the *Consumer Affairs (Harmful Business Practices) Act*¹²⁴ prohibits advertising that is likely to unreasonably prejudice or deceive consumers.¹²⁵ The *Consumer Affairs Act* thus serves as a 'legal backstop' in that the South African advertising regulator is able to refer unresolved matters falling within the ambit of this

¹²² *Communications Act*.

¹²³ Boddewyn *Global perspectives* 131; Anonymous *Great commercial* www.library.lp.findlaw.com (accessed February 2003); Weisman & Monagan *Clearing your copy* (unpublished and unnumbered).

¹²⁴ Act 71 of 1988.

¹²⁵ *Woker Advertising law* 41.

Act to the Department of Trade and Industry. It is likely that the *Consumer Protection Act* will recognise the South African advertising code by law.¹²⁶

Advertising standards concerning misleading and comparative advertising in the European Union are governed by *Council Directive 84/450/EC (as amended by Directive 97/55/EC)*. The Directive applies minimum standards to protect against misleading advertisements.¹²⁷ In the United Kingdom, this Directive has been implemented into law through the *Control of Misleading Advertisements Regulations 1988*,¹²⁸ which gives the Director General of Fair Trading the power to apply to court for an injunction against an advertisement that is considered misleading, to prevent the same or similar claims being made in future advertisements.¹²⁹ Before doing so, however, reg 4(4) obliges the Director General to have regard to the “desirability of encouraging the control, by self-regulatory bodies, of advertisements ...” It was held in *R v Advertising Standards Authority, ex parte Matthias Rath*¹³⁰ that reg 4(4) gave the British codes an “underpinning of subordinate legislation”, albeit this fell “short of direct statutory effect”. Lawson points out that, while this observation is doubtless true, there must remain an element of doubt as to whether the oblique reference to the British advertising regulator in reg 4(4) means that the British advertising regulator is “prescribed by law”.¹³¹

Given that the *Consumer Protection Act* is likely to recognise specific industry bodies, based on certain criteria, it is submitted that Lawson's critique is not of concern in a South African context, and that the enactment of the *Consumer Protection Act* is

¹²⁶ *Consumer Protection Act*, Chapter 3, Protection of Consumer Rights and Consumers' Voice, Part A (Consumer's right), article 69 dealing with the enforcement of rights by a consumer; and article 70 dealing with alternative dispute resolution; and Chapter 4, Business Names and Industry Codes of Conduct, Part B (Industry codes of conduct), article 82 dealing with industry codes.

¹²⁷ Pinto “Putting advertising claims to the test” *Managing intellectual property* www.managingip.com (accessed December 2003).

¹²⁸ www.asa.org.uk.

¹²⁹ www.asa.org.uk; EASA Analysis 119.

¹³⁰ [2001] EMLR 582.

¹³¹ Lawson *Challenging the ASA* 526-527.

likely to result in the South African advertising code being granted the status of delegated legislation in broadcast and non-broadcast media.

In the United States, the United States advertising regulator works effectively because of voluntary industry co-operation, since it does not have legal authority to enforce its decisions.¹³² If an advertiser is unwilling to adhere to a recommendation of the United States advertising regulator, a notice of intent is issued to the advertiser, explaining that, if the advertiser fails to respond or comply with the decision of the panel within ten days, the appropriate government agency¹³³ will be informed by letter, and the complete file turned over to that agency upon request.¹³⁴ Government agencies in the United States therefore also act as a 'legal backstop' to the self-regulatory United States advertising regulator.

The Canadian advertising regulator relies on the criminal legal system as a 'legal backstop' to regulate advertising. The Bureau of Competition Policy, established in terms of the *Competition Act*, issues guidelines on misleading advertising. These guidelines are legally enforceable.¹³⁵

It is therefore clear that all four jurisdictions in question operate on the basis that the self-regulation of advertising content has a 'legal backstop'. It is also evident that whereas all the self-regulatory bodies, except for the United States advertising regulator, deal with advertising content on the basis that advertising content must be legal, decent, honest and truthful, prepared with a due sense of social responsibility and the respect for the principles of fair competition,¹³⁶ the 'statutory backup' systems are only concerned with misleading advertising. There is thus an

¹³² Boddewyn *Global perspectives* 130-1.

¹³³ Refer, for example, the Federal Trade Commission (FTC), the Food and Drug Administration (FDA); the U.S. Postal Service; the Federal Communications Commission (FCC); the Bureau of Alcohol, Tobacco and Firearms of the Internal Revenue Service (IRS); and the Securities and Exchange Commission (SEC).

¹³⁴ Boddewyn *Global perspectives* 132-3.

¹³⁵ Business Practices Committee *Report* 23.

¹³⁶ EASA *Analysis* 14.

anomaly between broadcast and non-broadcast advertising content insofar as statutory recognition / backup is concerned, whereas this disparity does not exist on the self-regulatory front.

2.2.2. General legal framework

In South Africa, there is no overarching legislation concerning the content of advertising, but there is nevertheless a significant body of fragmented legislation that cannot be ignored.¹³⁷ Whilst some of these statutes, making up this body of fragmented legislation, prohibit misleading statements,¹³⁸ others relate to the control of specific goods and products¹³⁹ or intellectual property.¹⁴⁰ Racism and hate speech is also controlled by statute,¹⁴¹ and there is also so-called 'censorship legislation'¹⁴² such as the *Films and Publications Act*.^{143 144}

In the United Kingdom, like South Africa, the legislative regulation of advertising is limited to framework legislation as opposed to detailed legislation.¹⁴⁵ In addition to legislation covering in principle rather than in detail, amongst others, misleading advertising,¹⁴⁶ there is also 'censorship legislation'.¹⁴⁷

¹³⁷ See, for example, Guideline 9 to the South African advertising code, which lists sixty four statutes making up the body of fragmented legislation. It is not necessary, for purposes of this study, to list or deal with each one of these statutes but only those statutes that concern offensive material. See also Business Practices Committee Report 16.

¹³⁸ Refer, for example, the *Consumer Affairs Act* (Act 64 of 2008).

¹³⁹ For example, the *Medicines and Related Substances Control Act* (Act 101 of 1965) makes all medicines liable for registration by the Medicines Control Council.

¹⁴⁰ *Trade Marks Act* (Act 194 of 1993).

¹⁴¹ *Promotion of Equality and Prevention of Unfair Discrimination Act* (Act 4 of 2000).

¹⁴² Refer, for example, Johannessen "Judgment of the European Court of Human Rights, 23 September 1994 – Jersild v Denmark" *SA journal on human rights* (1995) 123-132, 132.

¹⁴³ Act 65 of 1996.

¹⁴⁴ For a critical analysis of statutory regulations relating to offensive material, see Chapter IV.

¹⁴⁵ EASA Analysis 13, 77; In-house lawyer *Courts back ASA* (unnumbered).

¹⁴⁶ *Control of Misleading Advertisements Regulations*.

¹⁴⁷ *Theatres Act* 1968.

In the United States there are few other sectors of business, which are subjected to as many types of federal, state, and local legislation as the advertising industry.¹⁴⁸ At the heart of advertising law in the United States are three basic doctrines:¹⁴⁹ Substantiation; deception, and unfairness.¹⁵⁰ In addition, there is also 'censorship legislation'.¹⁵¹ The situation in Canada is no different.¹⁵²

It is thus clear that all four jurisdictions have introduced 'censorship legislation'.¹⁵³ Self-regulation is, however, considered more flexible in dealing with "soft" issues such as taste, decency, and sexism.¹⁵⁴ These issues will be critically analysed in the following chapters.

3. Concluding comments

In most European countries, the United States, Canada, New Zealand, South Africa, Latin America, and Asia and the Pacific, the content of advertising is controlled on a statutory and self-regulatory basis.¹⁵⁵ These two forms of regulation are not regarded

¹⁴⁸ Boddewyn *Global perspectives* 135-6.

¹⁴⁹ Boddewyn *Global perspectives* 136; Weisman & Monagan *Clearing your copy* (unpublished and unnumbered); Harker *Acceptable advertising* 114.

¹⁵⁰ *Federal Trade Commission Act (15 United States Code sections 41-58, as amended)*

¹⁵¹ Refer, for example, 18 *United States Code* section 1464; Cutri & Jarosch "What did the Super Bowl reveal ... about decency?" (June 2004) *Advertising & trademark law seminar* Chicago (unpublished and unnumbered).

¹⁵² www.adstandards.com.

¹⁵³ These statutes will be critically discussed in Chapter IV.

¹⁵⁴ Boddewyn "Advertising self-regulation: true purpose and limits" *Journal of advertising* (1989) 19-27, 21.

¹⁵⁵ Woker *Advertising law* 9; Fenwick *Civil liberties* 6-14; *National Brands* (ASA Final Appeal Committee ruling); EASA *Analysis* 13; EASA *Bodies and systems* www.easa-alliance.org (accessed May 2008); In-house lawyer *Courts back ASA* (unnumbered).

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as mutually exclusive alternatives.¹⁵⁶ Whilst self-regulation is an alternative to detailed legislation, it is not an alternative to legislation itself.¹⁵⁷

In South Africa, the United Kingdom, and Canada, the content of offensive advertising is covered in self-regulatory advertising codes and regulated by an independent advertising regulator. With the exception of Canada, these advertising codes are recognised by statute in regulating broadcasting. In the United States offensive material is also covered in its broadcast legislation, but it is left to the individual media members to determine whether material is medium appropriate. Furthermore, 'censorship legislation' that could affect the regulation of offensive advertising, is in force in all four these jurisdictions.

¹⁵⁶ Business Practices Committee Report 41.

¹⁵⁷ EASA Analysis 13.