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A REVIEW OF THE GOVERNMENT GAZETTE AND NEW DEVELOPMENTS IN LAW

Regulating advertising content

The ASA Code applies to the advertiser, advertising practitioner and the medium

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THE Advertising Standards Authority of South Africa (ASA), through its Code of Advertising Practice (Code) largely regulates commercial advertising in SA.

The Code is based on the International Code of Advertising Practice as drafted by the International Chamber of Commerce. A common misconception is that the Code only applies to the advertiser while, in fact, it also applies to the advertising practitioner and the medium involved in the publication of the advertiser's message.

Although the Code is primarily aimed at regulating advertising content

within the borders of SA, it does protect international advertisers whose advertisements have never been used in the country. Clause 9 of the general principles of the Code prohibits the use and copying of an international advertisement or any part thereof in a manner that is recognisable or clearly evokes the existing concept and which may be likely to result in the loss of potential advertising value. Not only does it protect the international advertisement, but it applies for a period of two years since the date of the last usage of the advertisement.

Even more significant is the fact that it is not limited to the advertisement but also covers product packaging or labelling since both packaging and labelling fall within the definition



of "advertisement" as determined by the Code.

This clause flies in the face of established trademark principles aimed

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at protecting international trademarks. The Trade Marks Act does protect international well-known trademarks which have not been used or registered in SA against the use and registration thereof in SA by third parties. The principle is clear: the international trademark is required to enjoy a local reputation in the relevant industry which is not insignificant if the trademark is not in use in this country. Most internationally well-known trademarks will be afforded the protection contained in the legislation if they comply. However, those trademarks, which could include packaging or labelling, which do not qualify for protection as well-known trademarks, would be vulnerable to be

appropriated by third parties, without any recourse.

The ASA Code breaches that gap by providing protection against the unauthorised use of the advertising, packaging or labelling of the international advertisements. This clause can cause major embarrassment for the advertising agency, and ultimately the unsuspecting client launching a new product, which was cleared insofar as a normal trademark use and registrability search goes.

It is relevant in those businesses where the local advertising campaign does not mimic the overseas campaign and a competitor jumps the gun by launching a specific slogan or distinguishing colour, which are unprotected in this country from a trademark point of view. The ASA has been strict in enforcing the international rights, particularly where the parties are direct competitors.

The copying of an international advertisement is not the only issue of which advertisers should be aware. The UK has recently widened the scope of its Advertising Standards Authority's regulatory remit. The UK's advertising codes will, as from March 1 this year, cover advertisers' own marketing on their websites and will also extend to other content which is not paid for and which the advertiser is able to control. In this regard, SA's code is a step ahead. The Electronic Communications Act of 2005 determines that all electronic broadcasters must adhere to the ASA Code. We have, in contrast with the UK, regulated the electronic marketing media for some time already.


The extended scope of the UK ASA Code will apply to: "Advertisements

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