

Should puffery advertising in South Africa be banned?

An interdisciplinary analysis

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Advertising is employed to influence consumer decision-making by informing, persuading and reminding. Legal persuasive advertising is referred to as puffery (praise for a product by means of subjective opinions, superlatives, or exaggerations, vaguely and generally stating no specific facts). This article addresses the question whether, considering the legal, regulatory and potential welfare losses perspective, puffery in South Africa should not be banned. The article concludes that outlawing puffery would harm the self-regulating nature of the marketing industry in South Africa. It is suggested that firms re-visit their ethical standards and policies; re-commit to the societal marketing paradigm and all it entails, and re-align to the spirit of creativity and the Advertising Standards Authority Code of Practice.

Verban opgeblase reklame in Suid-Afrika? 'n Interdissiplinêre ondersoek

Reklame word benut om verbruikerbesluitneming te beïnvloed deur in te lig, te oorreed en te herinner. Daar word na wettige oorredende reklame verwys as “puffery” (lof vir ’n produk deur middel van subjektiewe opinies, superlatiewe of oordrywings, wat vaagweg en in die algemeen geen spesifieke feite stel nie). Gegewe die wetlike, regulerende en moontlike welsynsverliesperspektiewe, spreek die artikel die vraag aan of “puffery” in Suid-Afrika nie verban moet word nie. Die artikel kom tot die gevolgtrekking dat die verbanning van “puffery” die selfregulerende aard van die bemarkingsindustrie in Suid-Afrika sal skend. Daar word aanbeveel dat ondernemings hul etiese standaarde en beleid heroorweeg; hul opnuut toewy aan die sosiale bemarkingsvoorbeeld, en hul opnuut belyn met die gees van kreatiwiteit en die Raad op Reklame-Standaarde se Praktykskode.

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In an effort to influence consumer choice and achieve marketing objectives, firms make use of a variety of marketing communication mix elements, including approaches such as public relations, personal selling, sales promotion and advertising (Lamb *et al* 2008: 294-322). Over the years, advertising has profoundly influenced the lives of consumers. Since its first appearance in the seventeenth century as printed advertisements in newsbooks, through many eras (for example, industrialisation, depression, creative revolution, designer period, and so on) to the present age of consumer empowerment, branded entertainment and the E-revolution (O'Guin *et al* 2009: 74-107), advertising has been employed to achieve numerous intermediate (for example consumer beliefs, attitudes, and so on) and behavioural (for example, purchasing, behaviour, brand choice, and so on) effects (Vakratsas & Ambler 1999: 26-34). Some argue that in the process of achieving desired behavioural effects (for example, purchasing products that are not really needed) advertising claims are often exaggerated, misleading and untruthful (Lamb *et al* 2008: 294-322). The question arises whether the legality of certain types of advertising, that make themselves guilty of exaggerated, misleading and untruthful claims and messages, should not be reconsidered within the South African context, due to the potential of these claims and messages to impair consumer decision-making. This article explores the nature of advertising and its relation to the concept of puffery/puffing. The latter is treated legally and the legal redress for welfare losses due to puffing is analysed. This is followed by a discussion of the regulation of advertising in South Africa. Insights are provided about the potential economic losses due to puffery/puffing before a conclusion is drawn.

1. Advertising and consumer decision-making

Advertising as marketing communication mix element boasts various unique characteristics. As a mode of communication it is indirect and impersonal; it provides little feedback that is frequently delayed; the message flow is often one-way, and the communicator has little control over the situation in which the advertising is viewed. In addition, the advertising sponsor is usually identified in the mes-

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sage, the advertising creator has control over the message, and a large audience can be reached fairly rapidly with a standardised message.

In general, advertising has been described as any form of paid communication in which the sponsor or firm is identified (Lamb *et al* 2008: 296) or as a “paid, mass-mediated attempt to persuade” (O’Guinn *et al* 2009: 689). Cronje *et al* (2000: 218) defined advertising as the process of informing, persuading and reminding the consumer and also related the nature of advertising to the goals and tasks of marketing communications in general, as depicted in Table 1.

Table 1: Examples of marketing communications tasks

Informative	Persuasive	Reminder
<ul style="list-style-type: none"> ■ Increase awareness of new brand or product class ■ Inform market of new product attributes ■ Suggest new uses for product ■ Reduce consumer anxieties ■ Tell the market of a price change ■ Describe available services ■ Correct false impressions ■ Explain how the product works ■ Build a firm’s image 	<ul style="list-style-type: none"> ■ Build brand preference ■ Encourage brand switching ■ Change consumers’ perceptions of product attributes ■ Influence customers to purchase now 	<ul style="list-style-type: none"> ■ Remind customers that the product may be needed in the near future ■ Remind consumers where to buy the product ■ Keep the product in consumers’ minds during off-peak times ■ Maintain consumer awareness

Source: Adapted from Lamb *et al* (2008: 294-322, 324-354).

Reminder advertising is used to keep the product and brand name in the public’s mind, to trigger consumer memory and to maintain consumer awareness. Informational advertising is described as “information that goes to the consumer and genuinely adds to his knowledge of what is available” (Shepherd 1999: 111). This type of advertising seeks to provide information on product characteristics (cf Ferguson & Ferguson 1994), to convert an existing need into a want, or to stimulate interest in a new product. In South Africa, informational advertising is viewed as a legal offer to the consumer

to do business on the strength of information given by the advertisement (Van der Merwe *et al* 2000: 80). Beggs *et al* (1984: 213) describe persuasive advertising as informing the customer of genuine or perceived product differences in order to increase brand loyalty, whether the product differences are real or not. This type of advertising is aimed at stimulating consumer behaviour (for example, purchasing, and so on) or consumer action (for example, drinking more of a particular soft drink or using more of a certain laundry detergent) (Lamb *et al* 2008). According to Ferguson & Ferguson (1994: 9-11, 65-75), persuasive advertisements are designed to distort consumer behaviour in order to accommodate a higher, profit-maximising price. Shepherd (1999: 111) describes persuasive advertising as an attempt “to change consumers’ preferences because it interferes with the exercise of innate preferences, it alters choices away from the efficient lines that ‘consumer sovereignty’ would yield”. It is said that advertising in general uses emotional appeals to shift the viewer’s focus away from facts and that viewers who fail to make the distinction between provable claims and pleasant but meaningless word-play ultimately purchase an idea at a high price instead of purchasing actual benefits (Jennings 2004: 1) An understanding of the consumer decision-making process provides insight into the potential impact of advertising, in general, and persuasive advertising, in particular.

The consumer decision-making process is complex, involves multiple stages and has been constructed by researchers in a variety of model formats, often of a linear nature (Blythe 2008: 1-30, 249-59). Lee (1990: 6) suggests that the reason for the sequential nature of traditional consumer decision process models relates to the longstanding assumption that “consumers are rational decision-makers who have the ability or skills to go through a sequential decision-making process to reach an optimal choice among alternatives” (Lee 1990: 6). The models were most often based on economic theory, confirming Lee’s premise that consumers act rationally with the purpose of maximising satisfaction in their purchase of goods and services (Schiffman & Kanuk 2000). According to Lee (1990: 1-10), in most consumer-decision-making models five similar stages (first introduced by John Dewey in the early part of the twentieth century) can

be distinguished, namely problem recognition, information search, evaluation of alternatives, purchase, and post-purchase behaviour. Blythe (2008: 259) highlights the excessive rationality of the Dewey model and argues that “life is simply too busy to spend much time agonizing over which brand of biscuit to buy”. This emphasises the existence of different types of decision-making with varying levels (routine, limited, extensive) of associated consumer effort and involvement (Lamb *et al* 2008: 66-98). Researchers have expanded the model to indicate the factors that influence the five-stage consumer decision process (cf Schiffman & Kanuk 2000). These factors include individual aspects (perception, motivation, learning, values, beliefs, attitudes, personality, self-concept, lifestyle) and social aspects (culture, reference groups, opinions, leaders, family, social class). These are all potentially influenced by marketing mix elements such as the product or service itself, pricing, distribution, physical evidence (for example, facilities, store layout, and so on), processes, people and promotion, of which advertising forms part. It is obvious that advertising has the ability to influence consumer choice directly through the consumer’s own perceptions, attitudes, and so on and indirectly through social interactions and groups.

2. The concept of puffery (“puffing”)

According to Kamins & Marks (1987: 6-15), consumers have viewed a considerable amount of puffery in advertising claims over the years. Puffery is an approach often used by marketers in advertising and sales to enhance their products and boost product awareness among consumers. In general, the roots of puffery are traced back to the sixteenth century and, despite the consumerism movement of the twentieth century, the majority of the puffery approach remains unabated (Butod 2009: 1).

Wells *et al* (2003: 30-45) have defined puffery as advertising or other forms of sales representations that praise the item that will be sold by means of subjective opinions, superlatives, or exaggerations, vaguely and generally stating no specific facts. Clow & Baack (2010: 35-45) state that puffery exists “when a firm makes an exaggerated

statement about its goods or services”. Black’s *Law dictionary* defines puffery as an expression of opinion by selling not made as a representation of fact. It adds that puffery can include exaggeration by a salesperson concerning the quality of goods (not considered a legally binding promise) and that the concept usually concerns opinions rather than facts (Winston & Winston 1998: 8). Examples of puffery include slogans such as “Nestles makes the very best chocolate” (Kamins & Marks 1987: 6); “Snapple – made from the best stuff on earth, Wheaties is the ‘breakfast of champions’, Kellogg’s “brings the best to you each morning” (Gourley 1999:10), and general claims such as “the finest foods”, “the best smelling perfume” (Winston 1998: 8) or “a day without orange juice is like a day without sunshine” (Gourley 1999:10).

In South Africa the advertising industry is self-regulated by the Advertising Standards Authority (ASA). The Code of Practice of the ASA describes puffery as “value judgments, matters of opinion or subjective assessments” that are “permissible provided that it is clear what is being expressed is an opinion and there is no likelihood of the opinion or the way it is expressed, misleading consumers about any aspect of a product or service which is capable of being objectively assessed in the light of generally accepted standards. In general, the guiding principle is that puffery is “true when an expression of opinion, but false when viewed as an expression of fact” (ASA 2006). The puffery definition adopted by the ASA is linked to what constitutes the difference between puffery and a mere advertising claim. Clow & Baack (2010: 35-45) quote the Federal Trade Commission (FTC) of the USA who is responsible for regulating most advertising in that country. The FTC states that the critical difference between puffery and an advertising claim is that puffery is generally not considered to be a factual statement, whereas a claim is usually considered to be a factual statement that can be proven true or false. In general, a representation of fact or an objective claim that ties a tangible quality to something that can be measured or identified cannot be viewed as puffery. If an advertising claim can be the subject of substantiation by means of testing or measurement with the aim of proving the truth of the claim, the claim cannot be described as puffery and false claims then become a misrepresentation of fact (Winston 1998: 8).

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According to Wells *et al* (2003: 30-45) research about puffery and its effectiveness has generated mixed empirical results. Some findings suggest that the public might expect that advertisers are able to prove the truth of their superlative claims. Other studies indicate that generally reasonable people do not believe superlative claims. In 1987 Kamins & Marks (1987: 6-15) compiled an insightful overview on studies related to puffery. Table 2 provides a summary of their work.

Table 2: Overview of puffery research

Researcher(s)	Study	Findings
R. H. Bruskin Associates	Consumers review 17 puffed advertising claims.	69.5% of consumers believed the puffed statements to be partly or completely true.
Cunningham and Cunningham	Survey of 2 200 consumers in medium-sized Texas city.	More than 30% of sample either agreed or were uncertain whether a product advertised as the best is/was indeed superior to competition.
Olson and Dover	Manipulation of subjects' expectations of product performance through advertising containing false claims.	64% of subjects developed strong beliefs regarding the advertised claim; those exposed to the communication were more likely to believe the claim than a control group who tasted the product in the absence of advertising exposure.
Holbrook	Exposure of subjects to alternative forms of an advertisement, one version making six factual claims and the second presenting the claims in puffery form.	Only one statistical difference in the strength of product attribute beliefs between the ad forms and therefore limited statistical support for the notion that puffery statements are believed to a lesser degree than facts.

Researcher(s)	Study	Findings
Rorfeld and Rotzou	Observed puffery claims in a set of five commercials communicated to more than 80% of the sample.	The claims were noted as being true by nearly half of the subjects who perceived the claims.
Wyckham	Studied puffing advertising claims which imply brand superiority, used four claims which varied across product categories.	25% of the sample believed the slogans, 55% misinterpreted advertising slogans as indicating the advertised brand was better than the competition.

Source: Adapted from Kamins & Marks (1987)

In addition to providing an overview of research results about puffery, Kamins & Marks (1987: 7) analysed the impact of using two-sided claims on product attitude and purchase intention. Their findings suggested that consumers are generally not deceived by high levels of puffery in a one-sided form when provided with the opportunity of product trial. However, they appear to be more susceptible to deception when communication is of a two-sided refutational form. According to Kamins & Marks (1987: 7),

a two-sided appeal typically presents the product in a positive fashion on attributes which are salient or important to brand choice, but disclaims or limits product or brand performance claims on some attributes which are of relatively minor significance to the consumer [whereas in a] refutational form, the product's weaknesses or its limitations are refuted in the context of the communication.

The findings in Table 2 and from the Kamins & Marks (1987: 6-15) study cast doubt over the position of the FTC that puffery cannot lead to deception and indicate that puffery can indeed present claims that are frequently believed.

3. A legal and regulatory perspective on puffery ('puffing')

An overview of legal aspects related to puffery, contractual obligations due to puffery and the regulation of the method in South Africa

in particular, provides further insights into the influence of the approach within the marketing and consumer environment.

3.1 A legal view on puffery

In South Africa informational advertising is viewed as a legal offer to the consumer to do business on the strength of information given by the advertisement (Van der Merwe *et al* 2000: 80). On the other hand, persuasive advertising (“puffing”) is viewed as a legal invitation to do business and is not regarded as an offer by the advertiser (Van der Merwe *et al* 2000: 80). Such an invitation to do business (“puffing”) is only legal when the “reasonable consumer” is not misled by representations of praise and commendation made during the course of negotiations in order to persuade the consumer to do business (Van der Merwe *et al* 2000: 80). If the “reasonable consumer” is misled by such representations it is deemed to go beyond “mere praise and commendation” and the invitation to do business is deemed misleading and therefore illegal. Advertisers are therefore deemed to be “bluffing” (Van der Merwe *et al* 2000: 80).

In general, the following criteria could be used to determine whether an advertisement goes “beyond mere praise and commendation”: statements which are not illegal though they cannot be proven to be true (Preston 1975: x); statements that are so vague or hyperbolic that a reasonable person would take it neither literally nor seriously (Bergerson 1995: 15); generalised, exaggerated, vague or subjective statements that a reasonable person would not interpret as a factual claim upon which s/he could rely (Edelstein 2003: 2); an expression of the seller’s opinion only (Richards 1990: 19).

In the USA the principal statute regulating most advertising is section G of the Federal Trade Commission (FTC) Act, which states that “unfair or deceptive acts or practices [...] are hereby declared unlawful” (Honigwachs 1987: 157). What is unfair or deceptive is for the FTC and for the courts, which review its actions, to determine. In addition, many states have statutes that also prohibit deception in advertising. Many have accepted the Uniform Commercial Code (UCC) (or parts thereof) which also deals with puffing (Preston 1997: 336).

The following criteria have often been used by the courts and the FTC to distinguish between puffing statements in advertisements and objective claims: whether the statement is general or specific, with general statements more likely to be puffing; whether the statement is capable of measurement, with non-measurable statements more likely to be considered puffing, and whether the statement is couched in terms of fact or opinion, with opinion statements more likely to be considered puffing. Examples of the types of statements which constitute puffing include “The Ultimate Driving Machine” for BMW automobiles; “Nobody Does It Like We Do” for McDonald’s, and “You Can Travel the World Over and Never Find a Better Beer” for G Heileman Brewing Company (Edelstein 2003: 2).

The UCC also names

... a number of factors relevant to whether a buyer is reasonable in believing that an express warranty rather than ‘puffing’ is involved. For example the buyer might be unreasonable if the seller’s representations taken in context were verbal rather than written, general rather than specific, related to the consequences of buying rather than the goods themselves, ‘hedged’ in some way, related to experimental rather than standard goods, concerned some aspects of the goods but not a hidden or unexpected non-conformity, phrased in terms of opinion rather than fact, or not capable of objective measurement (Preston 1997: 336).

Legal writers have strongly criticised the puffing doctrine. Preston (1975: 298) is of the opinion that, in the light of the modern legal trend towards consumerism, the “puffing” defence should be abolished. He mentions a “... growing recognition that puffing is probably deceptive ...” and agrees with recommendations that the FTC apply the same substantiation requirements to “puffing” that it applies to other claims.

Honigwachs (1987: 160-1) notes that there is a clearly perceived trend away from the acceptance of “puffing” as a defence except in the most trivial of circumstances. He considers the law with regard to the “puffing” defence as ambiguous and uncertain. Pitofsky (1977: 677), a former Director of the Bureau of Consumer Protection at the FTC, considers “puffing” acceptable only when it is of the type that is clearly not to be believed. Richards (1990: 39) is of the opinion that

“the evidence [...] suggests many claims labeled puffing by the Commission and the courts convey factual implications” adding that “... it is arguable that many of these claims make explicit factual claims.” With reference to the (free) market he states that there is a concern in “the law of the marketplace [...] involving the treatment of opinions. It involves the existence of puffing ...”.

In South Africa welfare losses due to misleading advertisements can usually only be compensated by approaching the courts. However, it appears that the majority of consumers never approach the courts because they are unaware that they were/are being misled and that their capacity to make rational choices among competing goods has been impaired. Consumers often seem to lack the funds to take legal action and/or often do not trust the judicial system to provide a satisfactory outcome. The main concern of this article is therefore whether consumers should, to a greater extent, be protected from puffery advertisements.

3.2 Contractual obligations due to puffery

According to the (common) law of contract in South Africa, advertising is legal and can only be regarded as wrongful if it is contrary to the norm or standard of acceptable conduct in a particular society. *Inter alia* this means that the misrepresented must in fact have been misled and that due to the misrepresentation he suffered welfare losses (Van der Merwe *et al* 2000: 78). Such a consumer can claim damages from the advertiser on the grounds of a breach of contract.

In order to decide whether a contract exists, one should first seek consensus among the parties (Christie 1996: 21). This means that there must be an offer by one party followed by an unconditional acceptance of that offer by the other. With regard to advertising it is important to establish whether statements made in an advertisement may be construed as offers capable of acceptance, thus presenting the advertiser with a binding contract (Woker 1999: 50). In *Crawley v Rex*¹ it was held that the specific advertisement (a placard outside a shop stating the price per pound of a certain brand of to-

1 1909 RA 1105.

bacco for sale) was merely “an announcement of his intention to sell” and not an offer.²

Notwithstanding the *Crawley* decision there is no inflexible rule that declarations contained in advertisements can never amount to offers (Woker 1999: 51). If the nature of an advertisement, its wording, or the surrounding circumstances, make it clear that it is intended to be an offer, the court will treat it as such (Sharrock 2002: 61).³ A misleading advertisement may also affect the validity of any transaction which the trader and customer subsequently conclude. It may result in the transaction being void for misrepresentation or for lack of consensus (Sharrock 2002: 61).

In *Phame (Pty) Ltd vs Paizes*⁴ Judge of Appeal Holmes states that:

Whether a statement by the seller goes beyond mere praise or commendation will depend on the circumstances of each case. Relevant considerations could include the following: whether the statement was made in answer to a question from the buyer; its materiality to the known purpose for which the buyer was interested in purchasing; whether the statement was one of fact or personal opinion; and whether it would be obvious even to the gullible that the seller was merely singing the praises of his wares, as sellers have ever been wont to do.

In an earlier decision, *Carlill vs Carbolic Smoke Ball Company*,⁵ it was established that an offer made in an advertisement could constitute part of a contract. This decision is still regarded as good law and serves as a warning to advertisers in the wider context of advertising claims in general. Ultimately, the intention of the parties is of paramount importance in deciding whether or not the advertisement constitutes a binding offer.

As mentioned earlier, if the advertisement is deemed to be an offer, a consumer who has accepted the offer and suffers losses due to such a misleading advertisement can claim damages from the advertiser on the grounds of a breach of contract.

2 At1108.

3 Cf also *Bloom vs American Swiss Watch Co* 1915 AD 100.

4 1973(3) SA397 (A) at 418.

5 (1893) 1 QB (CA).

Thus, according to South African law, advertisements that “puff” do not constitute an offer and therefore no contract comes into existence. If a consumer was misled and s/he perceived the advertisement not as “puffing” but as a legal offer, it is his/her responsibility to prove that the advertiser intended to make an offer and is therefore in breach of contract.

In the remote possibility that an advertiser’s intention can be determined as an offer in a court, the benefits of that, regarding consumer welfare, will be minimal. South African consumers seldom⁶ approach the court regarding misleading advertisements. A win for one or two consumers in a court will not stop advertisers from “puffing”.

3.3 Regulating puffery in South Africa

The advertising industry in South Africa voluntarily formed the Advertising Standards Authority (ASA) in 1969 and adopted the Code of Advertising Practice (the Code). Although the ASA is an independent body, the Code has received statutory backing when the Independent Broadcasting Authority Act⁷ accepted it as the standard to which all broadcast advertising in South Africa must conform, regardless of ASA membership. The Harmful Business Practices Act⁸ afforded similar statutory backing.

As far as “general principles” are concerned, the Code states that advertisements should not be framed so as to abuse the trust of consumers or exploit their lack of experience, knowledge, or credulity.⁹

Chapter 2 of the Constitution of the Republic of South Africa,¹⁰ which deals with fundamental rights, is of special importance for the Advertising Standards Authority (ASA) in South Africa. Section 16¹¹ deals with “Freedom of expression” which *inter alia* includes “freedom

6 An indication of this is the dates of the *locus classica* still cited in our law on this topic: *Carlill vs Carbolic Smoke Ball Company* (1893)1 QB (CA) and *Crawley vs Rex* (1909) TS 1105.

7 Act 153 of 1993.

8 Act 71 of 1988.

9 Section 11, clause 2.

10 Act 108 of 1996.

11 Part of Chapter 2 of Act 108 of 1996.

of the press and other media”¹² and “freedom to receive and import information or ideas”.¹³ Freedom of expression is obviously not an absolute right and the Constitution makes provision for limitations to such (and other) rights. In *S vs Makwanyane*¹⁴ the Constitutional Court stated that a determination of whether a limitation is reasonable and necessary involves the weighing up of competing values.¹⁵

The ASA must also take note of statutes affecting “puffing” in South Africa. The advertising industry in South Africa pre-empted legislative intervention by forming the ASA. This has resulted in relatively lenient advertising laws, and the authorities prefer to leave the regulation of advertising to the industry (Woker 1999: 36).

Numerous statutes regulate certain types of advertisements referring to specific situations and professions. The Harmful Business Practices Act¹⁶ mentioned earlier could be considered dealing with “puffing”, although not referring to it by that name. This Act provides for the prohibition of certain business practices that may be regarded as “harmful to consumers”. A harmful business practice is defined as “any business practice which [...] has the effect of [...] deceiving any consumer”.¹⁷ The Act provides for the establishment of a Business Practices Committee with the power to investigate business practices and to recommend that they be declared harmful. There is close co-operation between this Committee and the ASA in the field of advertising (Woker 1999: 47). The Committee has drafted its own Consumer Code for Advertising based on the ASA Code. It states that complaints about advertising must be addressed to the ASA which remains the main body for ensuring that advertising serves the public interest (Woker 1999: 47).

The question can be asked whether or not the ASA’s Code of Advertising Practice provides redress for losses due to unacceptable advertising. The ASA has at its disposal three forms of sanctions,

12 Subsection 1(a).

13 Subsection 1(b).

14 1995(b) BCLR 665(c).

15 At 708.

16 Act 70 of 1988.

17 Section 1.

namely the withdrawal of advertising privileges, an ASA pre-clearance requirement, and adverse publicity (Cf De Jager & Smith 1995: 12).

It is clear that the Code provides for “punishment” and “harassment” of advertisers who do not co-operate, but not for the redress of losses suffered by the consumer. Any consumer can of course lodge a complaint with the ASA regarding unacceptable advertisements. However, this hardly ever occurs for the following apparent reasons: consumers might not be aware that they are being misled; consumers might be ignorant of their rights (or even of the existence of the ASA); it might not be in the nature of South African consumers to stand up for their rights; by complaining one can do no more than prevent further losses, since actual losses are too difficult to recover.

Whatever the reasons might be, consumers will have to seek relief in the courts, which rarely happens. Should they go that far, it will seemingly still be difficult to prove actual losses (which might also be a reason for not “going to court” in the first place).

6. Evaluating losses due to puffery

In analysing the possible losses by the consumer due to advertising and puffery, a number of aspects are considered. The lack of market knowledge in “the real world” is extensive (Cowan & Crampton 2002: 5, Pindyck & Rubinfeld 2001: 294, Reekie 1989: 228). The mainstream neoclassical view that consumers, firms and resource owners should have perfect knowledge of the relevant economic and technological data; that labourers and owners of capital must be aware of how much their resources will bring in all possible uses; that firms must know the price of all inputs and the characteristics of all relevant technologies; and that consumers must be aware of all prices, is regarded as too extreme and unattainable and therefore rejected (Shepherd 1999: 38).

The Austrian School encourages economic agents to collect information and to use it effectively because “anything which prevents innovation and change is undesirable” (Ferguson & Ferguson 1994: 10). Although information and knowledge should not be used syno-

nymously due to their different meanings, more information adds to more knowledge which should increase the rationality of consumers and utility (Cowan & Crampton 2002: 5). The Austrian approach mentioned earlier further holds that, although most markets are sufficiently robust to function efficiently under conditions of imperfect knowledge, more knowledge is better than less knowledge, because it increases consumer rationality. Most sales efforts mix information and persuasion (Shepherd 1999: 111). Advertisements judged by ASA to be dominantly informational, due to among others their outlay and wording, can be regarded as playing a valuable role in adding to the knowledge of consumers regarding rival goods and services in the marketplace. Consumer welfare losses in concentrated markets could to a certain extent be alleviated by informational advertising (Ferguson & Ferguson 1994: 72-3). The more information consumers have regarding rival products in the market, the more rational their choice-making becomes, thus increasing their welfare. Frank (2003: 459) states that when a firm informs the consumer regarding the attributes of its product through advertising, the firm's demand curve positively shifts to the right for two reasons: first, people who have never used that type of product learn about it, therefore changing their taste and preferences and leading some to buy it. Secondly, other people who already consume a different brand of the same product may switch brands because of advertising. The total market for the industry's product thus increases and it could therefore be argued that advertising had a positive influence. Beggs *et al* (1984: 213) are of the opinion that the first reason is difficult to criticise and could be accepted. Gwartney *et al* (2000: 506) hold the same view. The second reason represents an approach of merely redistributing existing sales among firms (Frank 2003: 459). Mansfield (1994: 387) suggests that both cases seemingly result in selling more at the same price and therefore suggests a positive parallel rightward movement of the demand curve.

Ferguson & Ferguson (1994: 73) are of the opinion that informational advertising could decrease market prices in concentrated markets and thus enhance the welfare of consumers. In discussing the positive effects of advertising, Mansfield (1994: 345) and Ferguson

& Ferguson (1994: 73) also mention the possibility of advertising increasing the price elasticity as well as the cross-elasticity of demand. Mansfield (1994: 345) states: "To the extent that it provides trustworthy information to consumers about product quality and other matters, its effect may be positive". Shepherd (1979: 367) regards informational advertising as being socially beneficial up to the point at which marginal social benefits equal its costs, as it adds to the knowledge of the consumer of what is available: "This improves competition and consumer choice, so that preferences can take effect more thoroughly."

The majority of writers in the field of economics seem to agree that a rightward move of the demand curve, as a result of an advertisement, could also have a negative effect on consumers. According to Sloman (1995: 75), advertisers in general try to shift the product demand curve to the right as well as make it less price elastic. They will therefore be able to increase both sales and price. Ferguson & Ferguson (1994: 70-2) view advertisements that result in price increases as "persuasive". If producers advertise in such a manner as to deliberately misinform consumers by for instance "puffery", market efficiency is undermined and therefore undesirable. It seems that, although markets are sufficiently robust to function efficiently with imperfect information and despite criticism to its true relevance (cf Cowan & Taylor 2002), the economics of asymmetric information is forcefully brought into play if consumers are deliberately being misled, because the producers' knowledge regarding the product quality is enhanced *vis à vis* the consumer (with the resultant misallocation of scarce resources).

Advertisements judged to be predominantly persuasive by the ASA, due to among others their outlay and wording, can be linked to product differentiation. Beggs *et al* (1984: 213) are also of the opinion that persuasive advertising attempts to increase brand loyalty in concentrated markets. Caves (1992: 21) is more cynical and comments as follows regarding money spent on any kind of advertisement:

If a seller spends money on advertising, then it is very likely that it sells a differentiated product. This holds true almost by definition,

since an undifferentiated product is one whose consumers cannot perceive any difference among brands.

Samuelson (1976: 485-7) views product differentiation as the deliberate breaking-up of the market demand curve (should this theoretical world ever exist in practice) in order to suit the profit-seeking activities of firms. An industry or groups of firms are imperfectly competitive when each firm faces its own demand curve which is not horizontal. They therefore have some measure of control over price. Mansfield further argues that the total market for the industry's product may not increase in response to the increased advertising. The effect on the sales of individual firms may be so small that the benefits of the advertisement may be cancelled out by cost increases. Such advertisements could also raise the production costs of the entire industry "since one firm's advertising campaign causes other firms to increase their advertising" (Mansfield 1994: 387).

Shepherd (1999: 111-2) clearly states that persuasive advertising is "largely a form of economic waste". Persuasive advertising impairs rational choice-making which, in turn, is tied to inefficiencies in production and detrimental to consumer welfare. Consumer welfare will be lessened because consumers are paying more for a product than they would have if markets were more competitive: "[c]onsequently, it must be associated with higher profit-maximising prices" (Ferguson & Ferguson 1994: 71). Shepherd (1999: 112) estimates that the USA could be losing at least 70 billion dollars annually to this kind of advertising. However, he also states that persuasive advertising might have some social value if it helps a new competitor into the market (Shepherd 1979 : 367).

As market concentration increases, persuasive advertising is expected to increase across the monopolistic competitive and oligopoly range and decrease as it moves closer to the monopolistic range, the so-called inverted-U hypothesis (Ferguson & Ferguson 1994: 67). Shepherd (1999: 288) clearly states that selling expenses flourish in the monopolistic competition and oligopoly range, because it is a "safer" method of competition than price-cutting, a view also held by Mansfield (1994: 339). Shepherd (1979 : 368) concludes that persuasion will be at its highest when products are identical; the con-

sumer has weak preferences because he lacks education or product experience, and facts are unfavourable to the seller. Firms operating in these markets are not price-takers, but price-makers. The firm sets the price while choosing the quantity to supply. Imperfect markets therefore do not have a market supply curve (Pindyck & Rubinfeld 2001: 335, Mankiw 2004: 323).

According to Sloman (1995: 262) and Ferguson & Ferguson (1994: 62), there is no point in advertising under perfect competition since knowledge is perfect and products homogeneous. Sloman (1995: 262) also sees little point for a monopolist to advertise since by definition there are no competing rivals. Information regarding his/her product could be gained from retailers and/or wholesalers. Consumers could also make "search" enquiries regarding product attributes (Ferguson & Ferguson 1994: 65). On the other hand, Shepherd (1999: 288) views a limited role advertisements could play for a monopolist, perhaps it could be used to reduce demand elasticity so as to raise the amount of profits taken in.

According to Hayek (1961: 1-3), although persuasive advertising is seen to be economically wasteful, they are not convinced that such advertisements also create wants as was suggested by Galbraith (1984: 145-50), therefore imposing more serious costs on the consumer and society in general. They accept the argument that as societies develop and expand, so do their needs and their fulfilment.

Finally, Shepherd & Shepherd (2004: 13) clearly state that welfare losses are much more prominent under tight oligopoly conditions than under conditions of loose oligopoly and monopolistic competition which they classify under "effective competition". According to Pindyck & Rubinfeld (2001: 227), any inefficiency in monopolistic competitive markets must be balanced against the benefit of product diversity. They state that the gains from product diversity can be large and may outweigh the inefficiency costs resulting from imperfect markets. The efficiency consequences of mere "puffery" could therefore be more severe for countries with high concentration ratios than for countries with lower ones. The highly concentrated industrial sector in South Africa (Fourie 1996: 97-121) creates the suspicion that welfare losses in South Africa, due to product differentiation, could be

in the tight oligopoly range rather than in the loose oligopoly and/or monopolistic competitive ranges. Shepherd & Shepherd (2004: 13) define a tight oligopoly as a market where the four leading firms have a combined market share of over 60%. Mere “puffery” could help to sustain inefficiencies in production by increasing barriers to entry, thus annulling welfare gains due to product diversification. It should also be remembered that exploitative actions by any South African producer that effect consumers adversely are forbidden by law. In addition to legal action that could be taken by the Competition Commission to decrease barriers to entry and increase competitiveness in such markets, competitiveness in these markets could also be improved by exposing the consumer to advertisements that inform rather than mislead. Lipsey (1993: 280) views informational advertising as playing an important part in the efficient operation of any free market system by decreasing barriers to entry.

7. Conclusions and recommendations

Informational advertising is said to appeal more to the rationality of consumers whereas persuasive advertising (“puffery”) appeals to the irrational side (Ferguson & Ferguson 1994: 71). Persuasive advertisements in South Africa are regarded as legal if it is deemed to be “puffery” (Van der Merwe *et al* 2000: 78) and if the reasonable consumer is not misled. However, research and the arguments in this article indicate that puffery has the ability to adversely influence even the reasonable consumer. “Puffery” thrives on imperfect knowledge in the market and it seems that such advertisements can impair consumers’ (who already lack market information) rational choice-making, therefore adding to production inefficiencies and welfare losses (Ferguson & Ferguson 1994: 71).

Due to the above-mentioned focus on the irrational side of the consumer and the possibility that puffery can impair consumer decision-making, some researchers and practitioners argue that puffery should be banned in South Africa unless the advertisement is worded in such a manner that the chances of deception are minimal. It is argued that the practice will continue unabatedly until such time

that it is outlawed by parliament or suppressed by other means such as the Advertising Standards Authority. Preston (1975: 209) states that he finds it

... appropriate to insist that any forms of material misrepresentation, if they are not presented to the public specifically as false, no matter how obviously false they may be, should be banned from the marketplace as deceptive.

However, Woker (1999: 61) mentions that “whether or not legislation is the solution to the problem of misleading advertising is a difficult issue as “even stringent legislation is meaningless unless it is effectively enforced”. The current challenges related to enforcing various laws in South Africa raise the question whether criminalising “puffery” would be a practical solution. It appears that large firms could continue using puffery, knowing that the chances of being prosecuted are remote and, in the (unlikely) event of legal action, the result could most probably be high levels of free publicity. Preston (1975: 16) summarises this as follows: “[Puffery is] used because it works, [and is] legalised because it doesn’t.”

The idea of banning persuasive puffery advertisements appears to be problematic for a number of reasons. First, it seems to be difficult to always distinguish precisely between an informational and a persuasive advertisement. Some advertisements seem to incorporate both informational and persuasive elements in an attempt to influence consumer behaviour and to ultimately satisfy consumer and business needs (Lamb *et al* 2008: 294-322).

Secondly, the consumer’s irrational side is seemingly connected to his/her emotion, which is an important part of the process of creating and managing a brand. Brands are aimed at being need-satisfying entities as they, among others, enable the consumer to make better decisions by differentiating between different levels of quality and associated need-satisfaction. The newest developments in brand management focus on paradigms such as “lovemarks” (Roberts 2005) and “relational brand management” where emotion is critical for creating relationships with consumers, brand personalities and brand loyalty towards brands. Therefore, the removal of all irrational, often emotion-based, advertisements might not be the

answer to the regulation of puffing as it will hamper the creation of successful brands (Roberts 2005: 1-60).

Thirdly, the postulation that consumers are rational decision-makers and buyers is based on the economic buyer theory, and one could therefore debate the relevance of the statement. In the economic buyer theory it is assumed that consumers, within reason, know all the facts. Currently, however, the numerous marketing messages that reach the consumer daily and that are supposed to provide all the facts can become so overwhelming that consumers struggle to process and are basically never equipped with all the facts. It is also supposed that consumers logically compare alternative choices in terms of values and cost. Consumers indeed compare alternatives. However, these are not all the available options, but rather the alternatives selectively included in the consumer's evoked set and based on criteria subjectively selected by the consumer based on existing knowledge and relevant preferences (Schiffman & Kanuk 2000: 54). In addition, the number of available alternatives is often too vast to consider all the options. Therefore, the logical comparison of all the alternatives seems impossible. Finally, in terms of the economic buyer theory, consumers have limited resources and therefore pursue maximum satisfaction at the lowest cost (Lamb *et al* 2008: 3-34), often basing their decisions on information that is readily available due to the advertising (informational and/or persuasive) efforts of the firm.

Despite the problems related to outlawing puffery advertising, it is acknowledged that there is an increasing uneasiness about "puffery" in the US, one of the more efficient economies of the world. The question again arises: how should puffery be dealt with in a country such as South Africa where economic and legal systems are regarded as sophisticated, but the majority of consumers are not. How should advertising be managed in a country where many consumers are still illiterate and thus not always informed about the difference between "puffery" and "truth"?

According to Davidson (1994: 14), marketers must exercise some restraint and be able to distinguish between light-hearted puffery and cynical deception. If not, government regulators might impose constraints that marketers are unwilling to adopt themselves. The

following recommendations are made. It is suggested that the regulating authority of the ASA be protected and that advertising in South Africa remains in a self-regulated context. It is suggested that both large and small firms be encouraged to reconsider their marketing paradigm, as this paradigm will dictate the nature and approach of a firm's advertising. A return to the societal marketing paradigm is suggested. The societal marketing paradigm arose in the late 1960s and early 1970s as an acknowledgement that a business exists not only to meet business objectives and satisfy consumer needs, but also to conserve or improve individuals' and society's long-term best interests (Lamb *et al* 2008: 3-34). The societal marketing concept exerts that marketing must serve the goals of business and society beyond profit generation (Lazer 1969: 3-9, Kotler & Levy 1969: 10-15). Lazer (1969: 9) stated that "there need be no wide chasm between the profit motive and social responsibility, between corporate marketing objectives and social goals, between marketing actions and public welfare", but that the firm's marketing orientation should extend to the acknowledgement of the societal dimensions of marketing and that it is more than just another firm technology. Advertising that falls within the societal marketing paradigm will focus on creating shareholder and social value and will therefore refrain from deliberately adopting approaches that communicate misleading and untruthful messages (Daw 2006: 1-20).

According to Wells *et al* (2003: 30-45), due to the fact that obviously exaggerated puffery claims are legal, the question of puffery is mainly an ethical one. Researchers argue that consumers expect exaggeration and inflated claims in advertising and therefore reasonable people will not believe that puffery statements are literal facts. Although it is generally agreed that deception in advertising is unacceptable, determining what is deceptive from both an ethical and regulatory standpoint remains a challenge. However, it remains the responsibility of the firm to conduct ethical business practices, including marketing and advertising, and to treat consumers ethically. The basic question related to puffery is still whether the act or the practice is likely to affect the consumer's behaviour or decisions with regard to a product or service. If so, the practice is material, and

consumer injury is likely because consumers are likely to have chosen differently if not for the deception (O'Guinn *et al* 2009: 689-700). It is recommended that firms be encouraged by bodies such as the ASA to revisit their ethics and to deliberately commit to ethical practices in the process of wooing consumers. Instead of regulating the industry to such an extent that creativity is stifled, it is suggested that the ASA takes on a much broader, pro-active role in which they encourage marketers and advertisers to increase their levels of responsibility, refrain from untruthful, deceptive advertising approaches, and rather opt for creative work that leaves consumers with greater knowledge. Historically, the FTC ruled persuasive puffery advertisements to be non-deceptive in nature and regarded as an approach that can provide consumers with greater knowledge and entertainment. It has the ability to fulfil the role of informing the consumer and increasing brand awareness (Butod 2009).

Researchers suggest that marketers should always ask themselves whether their messages can be objectively analysed. If so, it is a claim and must be fully capable of substantiation. Even if they appear to be puffery, if they have been defined in the body copy, they will be judged against that definition. Therefore the recommendation to marketers is: if in doubt seek advice that will enable advertising which, by nature, adheres to the societal marketing paradigm (Preston 1997: 336-44, Lazer: 1969: 3-9).

In conclusion, perhaps the challenge in South Africa is not to over-regulate the advertising industry by increasing legislation and banning puffery advertisements. Firms should rather be encouraged to renew their commitment to the general spirit of the ASA as stipulated in the preamble to the Code of Practice: all advertisements should be legal, decent, honest and truthful; all advertisements should be prepared with a sense of responsibility to the consumer; all advertisements should conform to the principles of fair competition in business; and no advertisement should bring advertising into disrepute or reduce confidence in advertising as a service to industry and to the public.

Bibliography

- ADVERTISING STANDARDS AUTHORITY OF SOUTH AFRICA (ASAS)
2006. *Code of practice*. Pretoria: Advertising Standards Authority. <http://www.asasa.org.za/default.aspx?mnu_id=11>
- BEGGS D, S FISCHER & R DORNBUSCH
1984. *Economics*. Berkshire: McGraw-Hill.
- BERGERSON S
1995. Will the puff go poof for US advertiser? *Managing Intellectual Property* 53: 14-9.
- BLYTHE J
2008. *Consumer behaviour*. London: Thomson Learning.
- BUTOD, M.
2009. The use of puffery in advertising. *Thinking made easy*. <http://ivythesis.typepad.com/term_paper_topics/2009/03/the-use-of-puffery-in-advertising.html>
- CAVES R
1992. *American industry: structure, conduct, performance*. New York: Prentice-Hall.
- CHRISTIE R H
1996. *The law of contract in South Africa*. Durban: Butterworths.
- CLOW K E & D BAACK
2010. *Integrated advertising, promotion, and marketing communications*. New York: Pearson Education.
- COWAN T & E CRAMPTON
2002. *Market failure or success. The new debate*. Mason, OH: Edward Elgar Publishing.
- CRONJE G J, DE J G S DU TOIT & M D C MOTLATLA
2000. *Introduction to business management*. Cape Town: Oxford University Press.
- DAVIDSON D K
1994. Products new, but puffery same as always. *Marketing News* 28(23): 14.
- DAW J
2006. *Cause marketing for nonprofits – partner for purpose, passion, and profits*. Hoboken, NJ: John Wiley.
- DE JAGER C & E SMITH
1995. *Advertising and the law*. Durban: Butterworths.
- EDELSTEIN J S
2003. Puffing without blowing your house down – how far can puffing take you? <http://www.adlaw.com/rc/handbk/rf_puffery.html>
- FERGUSON P R & G J FERGUSON
1994. *Industrial economics – issues and perspectives*. London: Macmillan.
- FOURIE F C VAN N
1996. Industrial concentration levels and trends in South Africa: completing the picture. *South African Journal of Economics* 64(1): 97-121.

- FRANK R H
2003. *Microeconomics and behaviour*.
New York: McGraw-Hill Irwin.
- GALBRAITH J K
1984. *The affluent society*. New
York: Houghton Mifflin.
- GOURLEY C
1999. Deception, puffery and the ad
police. *Writing Stamford* 22(1): 10.
- GWARTNEY J D, R L STROUP &
R S SABEL
2000. *Economics. Private and public
choice*. New York: Dryden Press.
- HAYEK F A
1961. The non sequitur of the de-
pendence effect. *Southern Economic
Journal* 27(4): 1-3.
- HONIGWACHS J
1987. Is it safe to call something
safe? The law of puffing in adver-
tising. *Journal of Public Policy and
Marketing* 6(1): 157-70.
- JENNINGS L
2004. Hype, spin, puffery, and
lies: should we be scared? *The
Futurist* 38(1): 16.
- KAMINS M A & L J MARKS
1987. Advertising puffery: the
impact of using two-sided claims
on product attitude and purchase
intention. *Journal of Advertising*
16(4): 6-15.
- KOTLER P & S J LEVY
1969. Broadening the concept of
marketing. *Journal of Marketing*
33(1): 10-5.
- LAMB C W, J F HAIR, C MCDANIEL,
C BOSHOFF & N S TERBLANCHE
2008. *Marketing*. South African
ed. Cape Town: Oxford University
Press.
- LAZER W
1969. Marketing's changing
social relationships. *Journal of
Marketing* 33(1): 3-9.
- LEE S H
1990. An application of a
five-stage consumer behaviour
decision-making model: an
exploratory study of Chinese pur-
chasing of imported health food.
MBA thesis, Shanghai University
of Finance and Economics.
- LIPSEY R G
1993. *An introduction to positive
economics*. New York: Oxford
University Press.
- MANKIW N G
2004. *Principles of economics*.
Mason, OH: Thomson/South-
Western.
- MANSFIELD E
1994. *Microeconomics*. New York:
W W Norton.

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- O'GUINN T C, C T ALLEN & R J SEMENIK
2009. *Advertising and integrated brand promotion*. New York: South-Western Cengage Learning.
- PINDYCK R S & D L RUBINFELD
2001. *Microeconomics*. London: Prentice-Hall.
- PITOFSKY R
1977. Beyond Nader: consumer protection and the regulation of advertising. *Harvard Law Review* 90(4): 661-701.
- PRESTON I L
1975. *The great American blow-up*. Madison, WI: University of Wisconsin Press.
1997. Regulatory position toward advertising puffery of the Uniform Commercial Code and the Federal Trade Commission. *Journal of Public Policy and Marketing* 16(2): 336-44.
- REEKIE W D
1989. *Industrial economics. A critical introduction to corporate enterprise in Europe and America*. Montpelier, VT: Gower.
- RICHARDS J I
1990. *Deceptive advertising*. New York: Lawrence Erlbaum Associates.
- ROBERTS K
2005. *Lovemarks – the future beyond brands*. New York: Powerhouse Books.
- SAMUELSON P A
1976. *Economics*. New York: McGraw-Hill.
- SCHIFFMAN L G & L L KANUK
2000. *Consumer behavior*. New York: Prentice-Hall.
- SHARROCK R
2002. *Business transactions law*. Durban: Juta.
- SHEPHERD W G
1979. *The economics of industrial organization*. London: Prentice-Hall.
1999. *The economics of industrial organization*. Washington, ILL: Waveland Press.
- SHEPHERD W G & J M SHEPHERD
2004. *The economics of industrial organization*. Washington, ILL: Waveland Press.
- SLOMAN J
1995. *Economics*. London: Prentice-Hall/Harvest Wheatsheaf.
- VAKRATSIS D & T AMBLER
1999. How advertising works: what do we really know? *Journal of Marketing* 63(1): 26-43.
- VAN DER MERWE S, L F VAN HUYSSTEEN, M F B REINECKE, G F LUBBE & J G LOTZ
2000. *Contracts. General principles*. Kenwyn: Juta.

Acta Academica 2010: 42(2)

WELLS W, J BURNETT &

S MORIARTY

2003. *Advertising principles and practice*. New York: Pearson Education.

WINSTON A & J WINSTON

1998. It's just puffery!!! *Target Marketing* 21(6): 88.

WOKER T

1999. *Advertising law in South Africa*. Kenwyn: Juta.