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# THE EFFECTS OF MODERN-DAY PAID DIGITAL ADVERTISING ON THE ESCALATING SALES OF COUNTERFEIT GOODS IN SOUTH AFRICA<sup>1</sup>

## SUMMARY

This article focuses on the effects of modern-day paid digital marketing, commonly known as digital content creation, on the escalating sales of counterfeit goods in South Africa. The marketing and promotion of South African businesses has always been facilitated by established media and marketing houses, which are formal businesses and statutorily bound. This arrangement caused these establishments to shy away from advertising counterfeit goods, to avoid liability from third parties. However, with the move towards digitisation, businesses have swayed from using traditional marketing companies for advertisements and promotion to using the services of individual content creators, popularly known as social media influencers. These influencers/digital content creators are best described as independent personalities who can affect the buying behaviour of their social media audience, as a result of their persuasiveness and engagement with their audience. This is done through advertising on various online platforms such as social media networks, video channels, websites, and blogs. Formerly, celebrities were considered for digital marketing under the guise of “company endorsements and ambassadorships”. Nonetheless, this has since changed as ordinary people, irrespective of their age, financial backgrounds, and with a substantial social media audience, are eligible. Nowadays, social media marketing has become a suitable platform for advertising almost every product or service, despite the legality or illegality thereof. This article aims to investigate the effects of South Africa’s modern-day digital advertising on the increasing sales of counterfeit goods in South Africa and to show a need for explicit legal rules aimed at prohibiting the marketing of fake goods.

**Keywords:** Content creators; digital advertising; marketing; counterfeit goods; social media influencers



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## 1. INTRODUCTION

The marketing and promotion of South African businesses has always been through conventional media houses, which are formal business institutions that are part of regulatory bodies and are statutorily bound. This arrangement causes these establishments to shy away from advertising counterfeit goods, to avoid possible intellectual property claims instituted against them.<sup>2</sup>

However, with the advent of electronic commerce<sup>3</sup> (hereafter, e-commerce) two decades on and the ushering in of the Fourth Industrial Revolution (hereafter, 4IR), exacerbated by the COVID-19 pandemic, came a global shift to digitalisation. This shift has caused companies to sway away from using traditional methods of advertising offered by marketing companies to use the services of independent digital content creators, informally and widely known as social media influencers.<sup>4</sup> Prior to this, the only recognised and acceptable form of social media marketing was reserved for celebrities, sports, and movie stars under the guise of company endorsements and ambassadorships.

Digital content creators are described as individual social media personalities, who are capable of influencing the purchasing interests and behaviours of their audience, resulting from their social media presence, persuasiveness, and level of engagement with their social media audience.<sup>5</sup> They position themselves throughout various online communication platforms by sharing self-generated virtual information, to which they refer as “content”, on their lifestyles or any topic, product, or service of their interest.<sup>6</sup>

The business of social media influencing has increasingly gained popularity in the South African marketing domain. Companies dealing with either legal or illegal products have become aware of the existence of digital content creators and have started seeking their customers’ attention using online methods of advertising.<sup>7</sup> As of the year 2022, 31 per cent of South African businesses employ the services of digital content creators for marketing, and the figure is expected to grow by eleven per cent each year.<sup>8</sup>

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2 EWN “Influencer culture in South Africa: Consumers demanding authenticity and honesty – Expert”, <https://ewn.co.za/2022/07/02/future-of-the-influencer-industry/amp> (accessed on 21 August 2022).

3 Chu et al. 2006:154.

4 Marketing Edge “The power of social media and influence in today’s Fourth Industrial Revolution”, <https://marketingedge.com.ng/the-power-of-social-media-and-influence-in-todays-4th-industrial-revolution/> (accessed on 21 August 2022); *Daily Maverick* “Social media: It’s more than a numbers game”, <https://www.dailymaverick.co.za/article/2021-07-27-social-media-its-more-than-a-numbers-game/> (accessed on 21 August 2022).

5 Pahwa “What is an influencer? How do they work?”, <https://www.feedough.com/what-is-an-influencer/> (accessed on 20 August 2022).

6 Spiers 2021:6.

7 Dreifaldt & Todd 2019:1.

8 Statista “Making use of social media influencers by company brands in South Africa from 2020 to 2022”, <https://www.statista.com/statistics/1342031/social-media-influencers-usage-for-company-brands-africa/#:~:text=%2C%20Nov%2021%2C%202023%20As%20of%202022%2C%2064,media%20influencers%20to%20market%20their%20brands%20in%202022> (accessed on 6 June 2024).

Concerning the digital advertising of counterfeit goods, the work of social media influencing involves either approaching or being approached by a company producing or distributing counterfeit products, providing the particular company with their rate card, and receiving a brief from the company to develop content to be used as an advertisement to their audience, thus putting a monetary value to the content they would have created for the company.<sup>9</sup> Once the company has accepted the content created, these content creators then publish the approved content using any social media platform of their choice such as video channels, personal blogs, social media pages, and the like.<sup>10</sup>

This article aims to investigate the effects of South Africa's modern-day digital advertising, with specific regard to the advertising of counterfeit products and the increase of counterfeit sales in South Africa. It also seeks to highlight the need to implement legal rules aimed at prohibiting the marketing of fake products.

## 2. THE EVOLUTION OF MODERN-DAY PAID DIGITAL MARKETING IN SOUTH AFRICA

### 2.1 Background of marketing

Marketing refers to “the process of planning and executing the conception, pricing, promotion, and distribution of ideas, goods, and services to create exchanges that satisfy individual and organisational goals”.<sup>11</sup> This practice can be traced back to the 1760s<sup>12</sup> and only until 2016 was it confined to physical places (traditional marketing) comprising of billboards, print media, and television commercials.<sup>13</sup> In the early 1870s, companies used to consider individual media personalities only as a remedy for marketing trouble. They would approach a famous and well-recognised face to add appeal and glamour to the reputation of the business.<sup>14</sup> These personalities would lend their good names for advertising, in exchange for payment, while creating a sense of advertising credibility and awareness. Companies would only use someone regarded as a public figure as an ambassador and a communication tool between themselves and their customers.<sup>15</sup>

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9 Kohler “How to calculate the cost of a South African social media influencer”, <https://www.nichemarket.co.za/blog/temping/south-african-influencer-cost-formula> (accessed on 20 August 2022).

10 Spiers 2021:7.

11 Iwu 2009:2.

12 Goyal “Blog: Raising a toast to 250 years of celebrity advertising”, <https://www.campaignindia.in/article/blog-raising-a-toast-to-250-years-of-celebrity-advertising/447282/amp0-years-of-celebrity-advertising/447282/amp> (accessed on 10 February 2023).

13 Ravi & Kumar 2021:13.

14 Prasad 2012:3634.

15 Dewi *et al.* 2020:2.

## 2.2 Modern-day digital marketing in South Africa

Digital marketing is not a new phenomenon in South Africa. Its origins can be traced back to the introduction of computers<sup>16</sup> and the establishment of the World Wide Web in 1989.<sup>17</sup>

Generally explained, digital marketing is an integration of social media elements and advertising principles, with the aim of creating sustainable client-and-company relationships.<sup>18</sup> Unlike traditional media advertising, digital marketing finds its footing in social media networks, which are a collection of online communication platforms comprising billions of individuals with shared concerns or interests, thus enabling interactions among these people and creating a global virtual community.<sup>19</sup> Social media platforms accelerate conversations between users, in contrast to traditional media which only conveys information and does not cater to audience participation.<sup>20</sup>

At its inception, social media was mainly for private human conversation, especially among families and companions.<sup>21</sup> Nowadays, through inconceivable transformations<sup>22</sup> and the ongoing development in digital technology,<sup>23</sup> social media has developed into an effective medium of business marketing, forming part of the modern-day modes of advertising.<sup>24</sup> It has since become an intrinsic part of our everyday lives and its use has shifted from being a luxury to a necessity.<sup>25</sup>

Until 2016, there had been a reluctance to fully accept digital marketing as a means of communication between companies and customers, because marketing practitioners categorised digital marketing as a “fledgling” medium of advertising.<sup>26</sup> This hesitation can generally be associated with the normal attitude towards change, especially when introducing a new method of advertising. Marketing practitioners feared that this new medium of advertising is largely led by technology entrepreneurs, who have hardly any to no marketing knowledge or experience.<sup>27</sup> Despite the uncertainty that

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16 Ravi & Kumar 2021:64.

17 Hensel & Deis 2010:87. See also Buys (2002:35), where it is noted that “South Africa’s first sustainable e-mail link was in 1988 between Rhodes University in Grahamstown and a private home in Portland, Oregon. That link was later connected to the Internet.

18 Chikandiwa *et al.* 2013:366.

19 Oni *et al.* 2014:308; Duffett & Wakeham 2016:21.

20 Hensel & Deis 2010:87.

21 Duffett & Wakeham 2016:21.

22 Oni *et al.* 2014 307.

23 Duffett & Wakeham 2016:22.

24 Ravi & Kumar 2021:63.

25 Hensel & Deis 2010:90.

26 Jilkova 2018:114-115.

27 McFadyen “Fledgling – Still the best word to describe influencer marketing”, <https://m.bizcommunity.com/Article/196/423/196008.html> (accessed on 12 September 2022); Beckman *et al.* 2012:3-4.

came with adopting this medium of advertising, marketing practitioners could not be oblivious to the broad audience that digital marketing gathers, in reach and size.<sup>28</sup>

At present, digital marketing has become a dominant medium of advertising. Engagements and collaborations between clients and businesses, created by social media marketing, aid in building brand awareness and reputation, and make companies to be “seen”.<sup>29</sup> Advertising through content marketing has allowed corporations to effectively communicate with their customers in a manner that resonates best with them, through influencers, and has enabled consumers to share their opinions regarding a product or service before and after they have acquired what has been advertised.<sup>30</sup> These engagements make it possible for companies to know how<sup>31</sup> customers perceive the products or services they offer. If the perception is negative, businesses can change their offerings to best suit customers’ needs and wants.<sup>32</sup>

### 2.3 Influence of e-commerce, Fourth Industrial Revolution, and the COVID-19 pandemic on modern-day digital marketing in South Africa

As discussed earlier, there has been a change in how businesses promote and sell their products.<sup>33</sup> The internet, which was developed to enable communication and share information,<sup>34</sup> has since become a marketplace where customers are able to buy a wide range of products and acquire services from companies.<sup>35</sup> Consequently, this development has made it easy for South Africa to put into effect e-commerce.<sup>36</sup> Studies have shown that over seventy per cent of South Africans in today’s day and age are well aware and familiar with e-commerce<sup>37</sup> and are more trusting of the products and services that are portrayed on the internet.<sup>38</sup>

The COVID-19 pandemic also played a role in the evolution of the digital method of advertising. The harsh lockdown restrictions forced South Africans to stay home. This limitation to movement resulted in South Africans using the internet more, thus increasing their screen time and overall social media usage and engagement.<sup>39</sup> The pandemic, to some extent, increased the level

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28 Oni *et al.* 2014:308-309.

29 Chikandiwa *et al.* 2013:366.

30 Duffett & Wakeham 2016:23; Spiers 2021:7.

31 Chikandiwa *et al.* 2013:365; Hensel & Deis 2010:90.

32 Ravi & Kumar 2021:63-64.

33 Matheena & Riswan 2018:88.

34 Duffett & Wakeham 2016:22.

35 Matheena & Riswan 2018:88.

36 Ahu 2022:66.

37 Ahu 2022:67.

38 Dreifaldt & Todd 2019:1.

39 Ahu 2022:2; Fornillos “Covid’s impact on social media marketing and what you can do about it”, <https://www.agilitypr.com/pr-news/public-relations/covids-impact-on-social-media-marketing-and-what-you-can-do-about-it/> (accessed on 14 September 2022).

of consumer-advert engagement and the social distancing rules increased online sales, as customers tried to avoid crowded areas and enjoyed the convenience of shopping in their abodes. This resulted in the expansion of e-commerce, as businesses started acquiring new customers with differing product needs.<sup>40</sup> For some South Africans, the pandemic turned into an opportunity for them to tap into the paid digital content creation space as a means of acquiring income and coping with the uncertainty caused by the pandemic.<sup>41</sup> Because of how informal modern-day digital marketing is, these events paved the way for unscrupulous companies to manipulate this medium, in order to advertise counterfeit goods.

### 3. SOUTH AFRICA'S ADVERTISING REGULATIVE FRAMEWORK

In South Africa, there is no overarching legal framework explicitly prohibiting the advertising of counterfeit products. However, there is a significant body of peripheral sources regulating advertising that cannot be ignored, which may also apply to influencer marketing. This body is divided into three general types of advertising regulations, namely statutory regulation, common law restrictions, and self-regulation.

#### 3.1 Common law restrictions on advertising

##### 3.1.1 Puffering

Puffering refers to exaggerated expression, especially for advertising purposes, regarding the qualities or abilities of a product or service. Common law prohibits marketers from attributing non-existent and deceptive qualities to their goods and services. If an advertiser, or his or her marketing agent, inflated commendations regarding the quality of their offerings, such a person may be held accountable on the part of their customers or competitors, who suffered harm as a result of puffering.<sup>42</sup>

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40 Fornillos "Covid's impact on social media marketing and what you can do about it", <https://www.agilitypr.com/pr-news/public-relations/covids-impact-on-social-media-marketing-and-what-you-can-do-about-it/> (accessed on 14 September 2022).

41 IMM Graduate School "Digital vs traditional marketing – How has it been influenced by Covid-19?" <https://imm.ac.za/digital-vs-traditional-marketing-how-has-it-been-influenced-by-covid-19/> (accessed on 14 September 2022).

42 Munn *et al.* 2003:11-12.

### 3.1.2 False disparagement of a competitor's goods, services, or business

When advertising, common law prohibits both traditional and modern-day advertisers, including digital content creators, from making any false allegations regarding the business and offerings of its rivals, because disparagement constitutes a delictual injury to the business, which results in unfair competition.<sup>43</sup>

### 3.1.3 Comparative advertising

Common law prohibits all forms of advertising that are comparative in nature. Comparative advertising, also known as combative advertising, is an act in which an advertiser of a specific product or service, places his or her product or service next to that of a rival, or mentions such rival by name, to show that his or her product is superior to that of their rival. The motive behind comparative advertising is to increase the sales of one's product or service to the detriment of another established product or sale.<sup>44</sup>

### 3.1.4 Unlawful competition

Common law prohibits any advertisements that serve to infringe on the goodwill of a rival business, because common law regards this infringement as unlawful competition. The infringement referred to may be either direct or indirect infringement. Direct infringement refers to when an advertiser does not make use of his or her goodwill but belittles or implies to denigrate the goodwill of a rival business. Indirect infringement refers to when an advertiser uses his or her goodwill to deride or ridicule that of a rival.<sup>45</sup>

## 3.2 Statutory regulation

### 3.2.1 The *Constitution of the Republic of South Africa, 1996* (hereafter, the *Constitution*)

South Africa is a constitutional democracy.<sup>46</sup> As such, the *Constitution* is regarded as a salient and supreme source of law. Every law, conduct, or issue is considered through the prism of the *Constitution*. Should it be found that either issue, law, or conduct contradicts any provisions of the *Constitution*, it stands to be declared invalid by a court of law.<sup>47</sup>

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43 Nims 1933:63-64.

44 Kadelbach 2003:10.

45 Burns 2018:335.

46 *Constitution of the Republic of South Africa, 1996:sec. 1.*

47 *Constitution of the Republic of South Africa, 1996:sec. 2.*

In the context of advertising, constitutional issues relating to a consumer's right to privacy,<sup>48</sup> an advertiser's freedom of expression,<sup>49</sup> and the general public's right to equality,<sup>50</sup> in the event of possible discriminatory advertisements, must be considered through the spectrum of the *Constitution*.

### 3.2.2 The *Consumer Protection Act* (hereafter, the *CPA*)

The *Consumer Protection Act*<sup>51</sup> was enacted to encourage and advance the economic and social well-being of consumers in South Africa.<sup>52</sup> The *CPA* gives rise to consumer rights, some of which are also found in the Bill of Rights. Sec. 8 provides for the right to equality and protects consumers against advertising practices that are discriminatory in nature. This section provides that, when advertising, marketers should treat their customer audience equally, despite their differing racial, geographical, gender, or socio-economic statuses.<sup>53</sup>

Sec. 11 makes provision for consumers' right to privacy. This right is prevalent where direct marketing is concerned.<sup>54</sup> Sec. 1 of this *Act* defines direct marketing as a marketing practice in which an advertiser communicates with pre-selected customers, either physically or through his or her personal

48 *Constitution of the Republic of South Africa*, 1996:sec. 14. "Everyone has the right to privacy, which includes the right not to have-

their person or home searched;  
their property searched;  
their possession seized, or  
the privacy of their communications infringed".

49 *Constitution of the Republic of South Africa*, 1996:sec. 16. "(1) Everyone has the right to freedom of expression, which includes-

freedom of the press and other media;  
freedom to receive or impart information or ideas;  
freedom of artistic creativity, and  
academic freedom and freedom of scientific research".

50 *Constitution of the Republic of South Africa*, 1996:sec. 9. "Equality  
(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair".

51 *The Consumer Protection Act 68/2008*.

52 *The Consumer Protection Act 68/2008*:preamble.

53 *The Consumer Protection Act 68/2008*:sec. 8.

54 *The Consumer Protection Act 68/2008*:sec. 11.



electronic mediums of communication, for the purposes of advertising his or her goods or services.<sup>55</sup> The *CPA*, under this section, provides that customers have the right against unwanted direct marketing, including digital marketing that comes in the form of unsolicited SMSs and emails. This section grants consumers the right to accept, refuse or restrict unwanted advertising, and prohibits companies from sending subsequent advertisements, once a customer has rejected an advert.<sup>56</sup>

Sec. 22 of the *CPA*, inspired by sec. 32 of the *Constitution*,<sup>57</sup> provides for the right to access information. Where advertising is concerned, the *Act* requires advertising to be in a language that is plain and understandable to its recipients or audience.<sup>58</sup> Where a marketer is an agent, advertising on behalf of a brand, customers should be made aware of their affiliation or association with the brand that they represent.<sup>59</sup>

Sec. 29 makes provision for the right to marketing that is fair and responsible. To start, this provision protects customers against bait marketing,<sup>60</sup> by prohibiting advertisers from misleading customers in respect of the pricing, specifications, availability, and nature of the goods or services.<sup>61</sup> The *Act* further protects customers against other unfair and irresponsible marketing such as negative option marketing,<sup>62</sup> catalogue advertising,<sup>63</sup> consumer loyalty programs,<sup>64</sup> and so forth.

Sec. 40 provides for the right to fair and honest marketing practices.<sup>65</sup> It prohibits any advertising that is aimed at deceiving customers, can mislead them, or is fraudulent in any manner.<sup>66</sup> It proscribes advertisers from, through their words or conduct, directly or indirectly, expressing or implying an untrue, fallacious, or delusive representation of the factual state of a good or service to a customer.<sup>67</sup> The *Act* further protects consumers from purchasing decisions that stem from coercive advertising, duress, harassment, undue influence, or

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55 Papadopoulos & Tladi 2022:131.

56 *The Consumer Protection Act 68/2008*:sec. 11.

57 *The Constitution of the Republic of South Africa*, 1996:sec. 32. "(1) Everyone has the right of access to-  
any information held by the state; and  
any information that is held by another person and that is required for the exercise or protection of any right."

58 *The Consumer Protection Act 68/2008*:sec. 22.

59 *The Consumer Protection Act 68/2008*:sec. 27.

60 *The Consumer Protection Act 68/2008*:sec. 30.

61 *The Consumer Protection Act 68/2008*:sec. 29.

62 *The Consumer Protection Act 68/2008*:sec. 31.

63 *The Consumer Protection Act 68/2008*:sec. 33.

64 *The Consumer Protection Act 68/2008*:sec. 35.

65 *The Consumer Protection Act 68/2008*:sec. 40.

66 *The Consumer Protection Act 68/2008*:sec. 41.

67 *The Consumer Protection Act 68/2008*:sec. 41.

any unfair marketing tactic.<sup>68</sup> It also prohibits advertisers from using ambiguity, innuendo, or exaggeration, especially when referring to the properties or quality of the goods or services they offer.<sup>69</sup> The *Act* cautions all advertisers from advertising illegal and fraudulent activities, with the intent of defrauding the public.<sup>70</sup>

### 3.3.3 The *Electronic Communications and Transactions Act*<sup>71</sup> (hereafter, the *ECTA*)

This piece of legislation was fundamentally enacted to provide for the adequate facilitation and control of all electronic transactions and communications.<sup>72</sup> The objectives of the *ECTA* include, among others, promoting the principle of technological impartiality; retaining and restoring customer's trust in electronic transactions; providing a secured and safe transacting and communication environment for businesses, customers, and the state, while continuously improving electronic transaction services to best suit the ever-changing needs of customers and businesses.<sup>73</sup>

The *ECTA* applies to all types of electronic communication.<sup>74</sup> Given that digital advertising, especially through social media networks, constitutes electronic communication between a business and its customers, digital advertisers ought to be mindful of, and conduct their virtual content in accordance with the provisions of this *Act*.<sup>75</sup>

### 3.2.4 The *Protection of Personal Information Act*<sup>76</sup> (hereafter, *POPIA*)

The *POPIA* is a statute introduced to protect the constitutional right to privacy, by putting into effect rules sketched out to protect the personal information of the general public, including customers who are exposed to any form of advertising.<sup>77</sup> Its scope of application extends to all natural and juristic persons.<sup>78</sup>

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68 *The Consumer Protection Act* 68/2008:sec. 40.

69 *The Consumer Protection Act* 68/2008:sec. 41.

70 *The Consumer Protection Act* 68/2008:sec. 42.

71 *The Electronic Communications and Transactions Act* 25/2003.

72 *The Electronic Communications and Transactions Act* 25/2003:preamble.

73 *The Electronic Communications and Transactions Act* 25/2003:sec. 2.

74 *The Electronic Communications and Transactions Act* 25/2003:sec. 1 defines electronic communication to mean "communication by means of data message".

75 *The Electronic Communications and Transactions Act* 25/2003:sec. 4.

76 *The Protection of Personal Information Act* 4/2013.

77 *The Protection of Personal Information Act* 4/2013:preamble.

78 *The Protection of Personal Information Act* 4/2013:sec. 3.

In the context of advertising, the *POPIA* applies where a business' marketing involves the capturing of customers' personal details. It protects customers by prescribing how a company captures, stores, and uses their confidential information and prohibits them from collecting information from clients that could lead to a possible invasion of their privacy.<sup>79</sup>

Where direct marketing is concerned, the *Act* grants advertisers a single chance to obtain consent from their customers or potential clients, for further or subsequent advertising.<sup>80</sup>

### 3.3 Self-regulation

#### 3.3.1 What is self-regulation?

South Africa's advertising industry has an extraordinary history of voluntary regulation which is beyond comparison with other industries.<sup>81</sup> Self-regulation is best described as a "judicious middle-way between total exemption from all rules, whether laws, codes or policies that govern any behavior, and total subjection to statutory or bureaucratic controls that govern all behavior".<sup>82</sup> Self-regulation is regarded as a substitute for official legislation but does not have the status and force of legislation. It is merely designed to work within statutory control to generate results which formal laws fail to achieve on their own.<sup>83</sup>

The essence of self-regulation has been highly criticised. The most cogent criticism is that self-regulation is created by industries that fear being under governmental regulation, thus establishing a system that prevents effective legislative regulation.<sup>84</sup> Despite this criticism, practice and evidence show that South Africa's advertising system of self-regulation is well-developed and sophisticated when compared with many foreign jurisdictions. For instance, advertisements under the Australian advertising system receive yearly increases in the number of grievances, resulting from misleading and deceptive advertising content relating to food and beverages, environmental claims, and children.<sup>85</sup> If the South African system of self-regulation continues

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79 *The Protection of Personal Information Act 4/2013*:secs. 69 and 106.

80 *The Protection of Personal Information Act 4/2013*:sec. 69. The *Act* defines direct marketing as a "means to approach a data subject, either in person or by mail or electronic communication, for the direct or indirect purpose of- Promoting or offering to supply, in the ordinary course of business, any goods or services to the data subject, or Requesting the data subject to make a donation of any kind for any reason".

81 De Jager & Smith 1995:31.

82 Blakeney & Barnes 1982:29.

83 European Advertising Standards Alliance Analysis [s.a.]:13.

84 Desmarais 2014:517-518.

85 Ad Standards "Submission to the ACCC digital platform inquiry – Social media – Issues Paper", <https://www.accc.gov.au/system/files/Ad%20Standards.pdf> (accessed on 6 June 2024).

to develop, be safeguarded and nurtured, it has the potential of protecting the advertising industry from any undue encroachment or interferences from the state, and could be the starting point of eliminating the advertising of counterfeit goods in the country.<sup>86</sup>

### 3.3.2 Transition from Advertising Standards Authority (hereafter, ASA) to Advertising Regulatory Board (hereafter, ARB)

South Africa's advertising self-regulation system is currently under the ARB, which administers the long-standing Code of Advertising Practice.<sup>87</sup> Until 2018, the advertising self-regulatory system was under the administration of ASA of South Africa. ASA was an independent body, funded and organised by members of the advertising and marketing communities, to manage South Africa's self-regulatory advertising system. It operated largely on a membership system and its processes were binding only to its members. The ASA struggled with administration and this resulted in business rescue practitioners ordering for its liquidation. ASA was then replaced by the ARB, which is made up of a completely new body and has a newly developed system of membership and constituency.<sup>88</sup>

The ARB was established by the comprehensive advertising, communications, and marketing industry to shield South Africa's customers through voluntary regulation of advertising. The ARB holds the responsibility of dispensing the Code of Advertising Practice in the interest of the marketing and advertising communities operating in South Africa.<sup>89</sup> The Code is largely based on international instruments and has been accepted as a regulatory code. Although the provisions of the Code are to be discussed in detail, the essence of the Code is that advertising ought to be truthful, legal, honest, and decent.<sup>90</sup>

Unlike ASA, the ARB's scope of application extends to non-members. This power is floodlit in the case of *Advertising Regulatory Board NPC and Others v Bliss Brands (Pty) Ltd*, wherein the court ruled that the ARB is capacitated to make rulings and sanctions against non-members and to guide its members.<sup>91</sup>

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86 De Jager & Smith 1995:3, 21.

87 Advertising Regulatory Board, <https://www.arb.org.za/phone/index.html> (accessed on 10 October 2022).

88 Shimmel 2014:5.

89 Go Legal "Is the new Advertising Regulatory Board a redo of the ASA, or better?", <https://www.golegal.co.za/arb-advertising-ruling/> (accessed on 10 October 2022).

90 Go Legal "Is the new Advertising Regulatory Board a redo of the ASA, or better?", <https://www.golegal.co.za/arb-advertising-ruling/> (accessed on 10 October 2022).

91 *Advertising Regulatory Board NPC and Others v Bliss Brands (Pty) Ltd* 2022 2 ALL SA 607 (SCA);par. 45.

### 3.3.3 The Code of Advertising Practice<sup>92</sup>

The Code is made up of four sections. Section 1 of the Code provides for the definitions, the preamble, the Code's scope of application, and how the Code is to be interpreted.<sup>93</sup> The Code defines advertising to include all forms of oral and visual references, notifications, representations, or communications which are directed at promoting the lease, use, or sale of any goods or service. In this definition, the Code includes representations or adverts made in support of any cause.<sup>94</sup>

In its preamble, the Code prohibits advertising that is illegal, dishonest, untruthful, and indecent. It provides that marketers should prepare their advertisements with an acute sense of responsibility to the audience that is to receive the advert. In all advertisements, advertisers should comply with the common law rule of fair competition and should not produce advertisements that have the potential of bringing the advertising industry into disrepute or diminish the confidence which the public has in it.<sup>95</sup>

The scope of the Code extends to political,<sup>96</sup> commercial,<sup>97</sup> and non-commercial advertising,<sup>98</sup> controversial, and advocacy advertising.<sup>99</sup> In respect of commercial advertising, the Code is applicable to any form of advertising for the provision of a service, facilities by way of trade, and the supply and sale of goods.<sup>100</sup> Where controversial advertising such as opinion-based advertisements are concerned, the Code requires that such an advertisement be recognisable as one, the identity of the advertiser to be known, and if the identity is not known, then the audience should be provided with the address and contact details of the advertiser.<sup>101</sup>

Section 2 of the Code makes provision for the general principles regulating advertisers.<sup>102</sup> The first clause under this section prohibits advertising that is offensive. The clause provides that advertisers should guard against advertising content that is insensitive, indecent, offensive to sectoral values, and infringes upon human dignity, freedoms or is discriminatory in any manner.<sup>103</sup>

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92 The Code of Advertising Standards, <https://www.arb.org.za/phone/index.html> (accessed on 10 October 2022).

93 The Code of Advertising Standards:sec. 1.

94 The Code of Advertising Standards:sec. 1, Clause 4.1.1-4.1.2.

95 The Code of Advertising Standards:sec.1, Clause 1.

96 The Code of Advertising Standards:sec. 1, Clause 2.3.

97 The Code of Advertising Standards:sec. 1, Clause 2.1.

98 The Code of Advertising Standards:sec. 1, Clause 2.2.

99 The Code of Advertising Standards:sec. 1, Clause 2.4.

100 The Code of Advertising Standards:sec. 1, Clause 2.1.

101 The Code of Advertising Standards:sec. 1, Clause 2.4.

102 Code of Advertising Practice, obtained from Advertising Regulatory Board, <https://www.arb.org.za/phone/index.html> (accessed on 10 October 2022).

103 The Code of Advertising Standards:sec. 2, Clause 1.

The second clause under this section provides that advertisements should not be developed in a way that abuses the confidence which customers have in advertising or undermine the audience's level of knowledge and/or experience.<sup>104</sup>

The third clause makes provision for the types of advertising practices that are regarded as unacceptable. These include advertising practices that instil fear into the audience, promote violence, practices that are discriminatory in nature, practices that have discriminatory undertones, consist of gender stereotyping, or support illegal conduct and dealings.<sup>105</sup>

The fourth clause serves as a cautionary principle to advertisers. It provides that, before an advertiser publishes any advertising content that makes any claims regarding the specifications or qualities of goods or service, such an advertiser should have documentary evidence to support his or her claims. The clause further prohibits advertising that contains misleading statements.<sup>106</sup> Where puffery is concerned, the Code only permits expressions that are of an opinion, and not those viewed as factual expressions. In respect of hyperbole statements, the Code only allows untrue claims that are harmless, obvious, intended to amuse the audience, or are obvious exaggerations. As far as the value of the goods is concerned, the Code prohibits any advertising that over- or underestimates the price of the goods or services advertised.<sup>107</sup>

The fifth clause regulates advertising that compares prices. The Code permits advertisers to make claims that their prices are less than those of their competitors. However, the Code prohibits instances in which advertisers mention the names of their competitors, when making price-related claims.<sup>108</sup>

The sixth clause prohibits advertising disparagement, and the seventh clause regulates comparative advertising. Both similar to common law restrictions, the Code proscribes advertisers from discrediting or attacking the services or products of their competitors, with the intent of spiking their sales, to the detriment of another.<sup>109</sup>

The ninth clause regulates advertising imitations. The Code prohibits advertisers from using an existing advert, or any part thereof, in a way that may be recognisable and diminish the value of the original advert. The Code is not concerned with the possibility, or lack thereof, of whether the subsequent advert would or would not cause confusion.<sup>110</sup>

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104 The Code of Advertising Standards:sec. 2, Clause 2.

105 The Code of Advertising Standards:sec. 2, Clause 3.

106 The Code of Advertising Standards:sec. 2, Clause 4.

107 The Code of Advertising Standards:sec. 2, Clause 4.2.

108 The Code of Advertising Standards:sec. 2, Clause 5.

109 The Code of Advertising Standards:sec. 2, Clauses 6 and 7.

110 The Code of Advertising Standards:sec. 2, Clause 9.

### 3.3.4 The Social Media Code (hereafter, the SMC)

The Advertising Regulatory Board introduced a SMC in 2017, with the purpose to regulate the digital advertising sphere, to ensure advertising that is authentic and credible.<sup>111</sup>

The SMC defines social media marketing as the act of making use of social media, to pilot specific user action. This happens in two ways. The first way is by creating digital content and growing an online community and, secondly, by paying social media personalities to advertise on their platforms. The SMC further defines social media advertising as a medium which companies pay money to grow their advertising reach through social media platforms.<sup>112</sup>

The third clause of the SMC compels digital advertisers to disclose their brand relations when their posts form part of paid advertising or a paid campaign.<sup>113</sup>

The fifth clause prohibits social media advertisers from making any false, deceptive or misleading claims concerning a product or service which they are advertising. The clause provides that all information, regarding the qualities of a product or service, should be accurate and responsible, and be backed up by evidence.<sup>114</sup>

The sixth clause regulates influencer marketing. It sets out certain responsibilities which companies assume, by virtue of their relation with digital content creators.<sup>115</sup> First, the clause provides that corporations should ensure that all claims made by digital content creators are in line with both the Code and the SMC.<sup>116</sup> The clause further provides that businesses ought to ensure that influencers disclose their working relationship when posting content that is for paid advertising purposes.<sup>117</sup> Thirdly, it provides that companies should brief digital content creators of all the information necessary for the goods or service advertised and require that influencers disclose such information to their audience.<sup>118</sup> Lastly, it provides that businesses are required to enter into written contracts with their digital advertisers stipulating all the terms necessary to conduct fair and responsible advertising.<sup>119</sup>

The discussion of the regulative framework shows that legislation in South Africa does not speak to the advertising of counterfeit goods. This lack of express laws causes challenges in the trading industry. The challenge to be discussed, which is the focal point of this article, relates to the advertising of counterfeit goods and its effect on the increasing sales of counterfeit goods in South Africa.

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111 Social Media Code, obtained from the Advertising Regulatory Board, <https://www.arb.org.za/phone/index.html> (accessed on 10 October 2022).

112 Social Media Code:Clause 2.

113 Social Media Code:Clause 3.

114 Social Media Code:Clause 5.

115 Social Media Code:Clause 6.

116 Social Media Code:Clause 6.1.1.

117 Social Media Code:Clause 6.1.2.

118 Social Media Code:Clause 6.1.3.

119 Social Media Code:Clause 6.3.

## 4. THE EFFECTS OF MODERN-DAY PAID DIGITAL ADVERTISING ON THE SALE OF COUNTERFEIT PRODUCTS IN SOUTH AFRICA

### 4.1 The advertising of counterfeit goods

The act of counterfeiting is labelled as a criminal offence under South African law. Counterfeit goods refer to merchandise of an inferior quality, which is produced or sold by an unauthorised third party, without the brand owner's permission, thus resulting in unmerited profit and theft of the brand owner's intellectual property.<sup>120</sup> Counterfeit goods often appear as identical to the authentic product<sup>121</sup> and are regarded as alternatives to the genuine products, as they serve the same purpose or use as the original product.<sup>122</sup>

In South Africa, counterfeit goods are regulated by the *Counterfeit Goods Act*.<sup>123</sup> This *Act* was enacted to pre-empt the release of counterfeit merchandise into South Africa's trade market and to introduce measures directed at preventing the commerce of counterfeit goods, while protecting the intellectual property of brand owners.<sup>124</sup> This piece of legislation prohibits specific acts in relation to counterfeit goods. The acts prohibited are:

1. The possession of counterfeit merchandise for the purposes of trade;
2. The production, packing, and storing of counterfeit goods for uses other than personal use;
3. The hiring, selling, offering, bartering or exchanging of counterfeit merchandise;
4. The displaying of counterfeit goods on business premises for trade purposes;
5. The distribution of counterfeit products, including local and international shipping, and
6. Any other act, which has the potential of infringing upon the intellectual property right of a brand owner.<sup>125</sup>

The *Counterfeit Goods Act* makes no mention, nor explicitly prohibits the advertising of counterfeit goods.

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120 Go Legal "A simple understanding of counterfeit law in South Africa", <https://www.golegal.co.za/counterfeiters-legal-brand-protection/> (accessed on 22 October 2022); International Anti-Counterfeiting Coalition "What is counterfeiting", <https://www.iacc.org/resources/about/what-is-counterfeiting> (accessed on 22 October 2022).

121 Ndereyimana *et al.* 2021:1225.

122 Priporas *et al.* 2013:3-5.

123 *Counterfeit Goods Act* 37/1997.

124 *Counterfeit Goods Act* 37/1997:preamble.

125 *Counterfeit Goods Act* 37/1997:sec. 2(1).



The advertising of counterfeit goods occurs in three ways, namely deceptive, non-deceptive, and blur counterfeit advertising.<sup>126</sup> The first form of advertising occurs in instances where the audience is not explicitly informed that the product advertised is counterfeit. Non-deceptive counterfeit advertising refers to when the advertiser expresses the non-originality of the product, and the audience is aware of the true state of the product.<sup>127</sup> The last form of counterfeit advertising refers to when the audience is not certain as to whether the product advertised is a genuine or counterfeit version.<sup>128</sup>

South African companies invest millions of rands into digital content creators to market their goods and services.<sup>129</sup> These influencers use marketing techniques such as discount codes, personal product testimonials, sharing of links, and specific social jargon to reach their audience.<sup>130</sup> Regrettably, this has created a case wherein digital content creators, deliberately or inadvertently, advertise products that are not authentic. There exists no legislation that requires South African digital content creators to assess the products they advertise for businesses. This has led to a situation where content creators are only concerned with the cheque that follows, after they have created and published advertising content.<sup>131</sup>

Often, social media influencers are not aware of, and do not understand the legal implications involved in the sale of counterfeit products in South Africa.<sup>132</sup> Theirs is to use the psychology of selling to urge their followers to buy fake products, thus creating a market for counterfeit products.<sup>133</sup> Because a digital content creator's audience views them as an acquaintance or a friend, rather than media houses that are known to conduct advertising as a form of business, this results in customers having confidence in the counterfeit products advertised and them trusting their authenticity. This then makes the audience more willing to buy the products, without questioning their genuineness.<sup>134</sup>

The issue of counterfeiting has evolved into a worldwide challenge. Despite counterfeit goods being illegal, modern-day marketing enables the continuous sale of fake products.<sup>135</sup> A browse was made through a social media video platform, YouTube, which revealed incalculable videos made and presented

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126 Priporas *et al.* 2013:3.

127 Wilcox *et al.* 2009:245.

128 Priporas *et al.* 2013:3.

129 The Media Online "Creators on humanz platform earned over R100 million from 2019 and 2021", <https://themediainline.co.za/2022/06/creators-on-humanz-platform-earned-over-r100-million-from-2019-and-2021> (accessed on 22 October 2022).

130 Chaudry 2022:720-723.

131 Go Legal "Influencers and counterfeit goods – Are influencers inciting their followers to buy counterfeit products?", <https://www.golegal.co.za/influencers-counterfeit-products/> (accessed on 22 October 2022).

132 Chaudry 2022:720.

133 Chaudry 2022:720-723.

134 Chaudry 2022:720-723.

135 Priporas 2013:3.

by digital content creators promoting counterfeit luxury clothing, beauty products, and accessories to their followers. This behaviour of digital content creators who advertise counterfeit goods is illicit and aids in the facilitation of criminal trade.<sup>136</sup> With regards to the South African trade market, an example of the effects of advertising counterfeit products was noted on a social media post made by a popular luxury company, Gucci, which revealed that they ran a survey to determine the number of their products that are in circulation in South Africa. The findings of the survey revealed that 28 million Gucci items are circulating, whereas the records of their sales show that only 900,000 items have been imported into the South African market.<sup>137</sup>

On average, South Africa loses over twenty-one million rands annually as a result of counterfeit sales.<sup>138</sup> The growth of the sale of counterfeit goods in South Africa poses a threat to the state and businesses. On the part of the government, the increasing amount of counterfeit goods lessens tax revenue, impedes the growth in our economy, discourages direct foreign investment, and the state loses out on the costs incurred to enforce intellectual property rights.<sup>139</sup> With reference to businesses, the act of counterfeiting deprives corporations of their rightful intellectual property and market share, and it presents harm to customers who are deceived into purchasing “knock-offs”.<sup>140</sup>

With the continued silence of the Competition Commission and the *Counterfeit Goods Act* on the advertising of counterfeit goods, if not managed well, counterfeiting will continue to be a challenge in South Africa and could lead to capital flight, elevate the existing crisis of unemployment and disinvestment by foreign venture capitalists.<sup>141</sup>

## 5. RECOMMENDATIONS AND CONCLUSION

### 5.1 Recommendations

Because legislation in South Africa is silent on prohibiting the advertising of counterfeit products, the first and most obvious recommendation is that South Africa’s formal advertising legislation should be amended to include provisions prohibiting and guarding against the advertising of counterfeit products.

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136 Intellectual Property Office “Influencer report: The impact of complicit social media influencers on the consumption of counterfeit goods in the UK” 2021 at 7. <https://assets.publishing.service.gov.uk/media/619ccef8fa8f50381640313/Social-media-Influencer.pdf> (accessed on 22 October 2022).

137 N’wamitwa Times “Gucci is planning to close its stores in South Africa due to low sales”, <https://nwamitwatimes.co.za/2023/07/14/gucci-is-planning-to-close-its-stores-in-south-africa-due-to-low-sales/> (accessed on 06 June 2024).

138 Thenga & Masiloane 2023:3.

139 Creamer Media Engineering News “Counterfeiting remains a challenge in Africa”, [https://m.engineeringnews.co.za/article/counterfeiting-remains-a-challenge-in-africa-2019-10-18/rep\\_id:4433](https://m.engineeringnews.co.za/article/counterfeiting-remains-a-challenge-in-africa-2019-10-18/rep_id:4433) (accessed on 23 October 2022).

140 Organisation for Economic Co-operation and Development 1998:4.

141 Thenga 2021:45.

This will enable corporations to pursue legal action against companies employing the services of content creators to advertise unlawful replicas of their products,<sup>142</sup> and will ultimately reduce the demand, entry, and sale of counterfeit goods in South Africa.

The second recommendation is that there should be an established national anti-counterfeiting association, which is to work together with e-commerce channels, social media platforms, and the Advertising Regulatory Board to prevent the advertising of counterfeit products in South Africa.<sup>143</sup>

The third recommendation is the establishment of a system aimed at monitoring the content uploaded by content creators. Because content creators use specific jargon such as “replicas” and “dupes” when advertising counterfeit products, companies and social networking platforms should invest in monitoring tools that can detect post captions, hashtags or links to established retailers of counterfeit products, and eliminate such posts.<sup>144</sup>

The fourth recommendation relates to raising awareness against counterfeit products, and influencers advertising fake goods. Companies should employ the services of established content creators to run campaigns aimed at degrading fake products, and those advertising them. The purpose of these campaigns would be an attempt to educate customers of what counterfeiting is, and the consequences that result from supporting counterfeiting businesses.<sup>145</sup>

The fifth and last recommendation relates to partnerships with inter-country and inter-regional anti-counterfeiting operations, to form alliances aimed at creating an online counterfeiting surveillance system and ensure that regulations are put in place to alleviate the issue of advertising of counterfeit products.<sup>146</sup>

## 5.2 Conclusion

This article acknowledges the extent of reach which is made possible by the modern-day paid digital advertising. However, this article submits that there is a dark side to this, being the advertising of counterfeit goods. As the content creation and digital advertising realm is becoming more accessible, this lack of express laws prohibiting the advertising of counterfeit goods continues to enable infringement on the intellectual property of businesses that are victims of counterfeiting. The longer the legislature stalls to incorporate provisions prohibiting the advertising of counterfeit goods, the more the market for fake items grows, and widens the global problem of counterfeiting.

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142 Chaudry 2022:726.

143 Marketing Week “Michael Barnett, Warning: How social media is a danger to brands”, <https://www.marketingweek.com/warning-how-social-media-is-a-danger-to-brands/> (accessed on 10 November 2022).

144 Chaudry 2022:725.

145 Lee *et al.* 2017:3.

146 Lee *et al.* 2017:3.

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