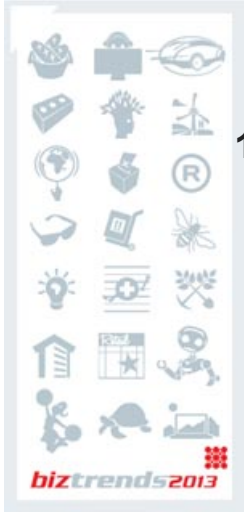


# Media and advertising regulation in 2013

By  Gail Schimmel

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So here we are in 2013 - the Mayan trend predictions for 2012 having spectacularly failed to materialise, leaving some of us with hangovers and debt that we had secretly hoped would be wiped clean in a Mayan-flavoured apocalypse. Ah, well, one can only dream.



So now is the time for us to look into our crystal balls, and see if we can get our predictions for media and advertising regulation a bit more spot-on than the poor Mayans did.

## 1. Making a stand of freedom of speech

Last year's movement around the controversial "[Secrecy Bill](#)" saw an enormous rise in awareness about the importance of [freedom of speech and media freedom](#), which I believe sets the tone for the regulatory environment going forward.

I think that all the relevant regulators - the [Press Council of South Africa](#), the [Broadcasting Complaints Commission of South Africa](#) (BCCSA) and my own "favourite", the [Advertising Standards Authority of South Africa](#) (ASA), will have to make conscious decisions about where they stand in relation to these issues, and therefore in relation to where they "draw the line".

Hopefully the regulators will, in so-doing, send a message about exactly how unwilling the South African media is to return to apartheid-style censoring. *2013 will therefore be a year of strong decisions around issues relating to freedom of expression.*

Now, turning to my area of advertising regulation...

## 2. Litigation

Last year was probably one of the most litigious and controversial in the history of the ASA.

The ASA is embroiled in litigation the likes of which it has not seen before. While, from the little I know of the matter, I believe that the merits are in the ASA's favour, the ASA finds itself in a precarious position. It needs to strongly defend any litigation threats, but this carries both financial burden and risk, and it is no secret that the ASA is in financial trouble.

One can only hope that its professional indemnity insurance is fully paid up. A loss on the merits could also open a flood gate of litigation.

*My prediction is that 2013 will see a rise in the litigation against the ASA*, with medium-sized marketers getting overexcited about the example already set, and hungry lawyers pushing for class-action suits. The highest risk is in the complementary medicines industry, where marketers feel misunderstood and targeted.

I will not be advising my clients to take this route. I consider litigation against an industry self-regulatory body counter-productive. In addition, the prospects of success are always going to be negligible unless the ASA commits an act of gross negligence.

### 3. Complementary Medicine Code

Speaking of the complementary medicine industry, *I hope that 2013 is also the year that the HPA finally manages to push through its Code of Marketing for [Complementary Medicines](#).*

However, the fact that the code has been rejected when other weakly drafted codes have been merrily inserted into the [Code of Advertising Practice](#) makes me think that the ASA is being influenced by certain strongly opinionated complainants. I challenge the ASA to prove its independence in this regard.

### 4. New president at ASA

The potentially most important change at the ASA is the [change](#) from [Mervyn King](#) as president and appeal chair to [Kate O'Regan](#).

King regarded the role of president as non-executive and strived to maintain his independence from the hurly-burly of daily ASA problems. Legal experts speculate that this will not be the case with O'Regan, and that *we might see the board and CEO of the ASA called to account for the financial crisis of the ASA, and the dissatisfaction around the management and communication of the ASA.*

*We can also expect a subtle shift in the ASA Final Appeal rulings.* While King took a very legalistic approach, with rulings often being made on technicalities, it is expected that O'Regan, with her Constitutional Court background, may be more given to rulings in the spirit, rather than the letter, of the code.

For those of us whose livelihood depends on accurately assessing the probabilities of success before the ASA, this is an exciting but somewhat uncertain year.

### 5. New media

Without a doubt (she says, in Mayan) *we can expect an increase in complaints about new media - tweets and Facebook in particular* still need to be tested by the South African ASA, and I predict that 2013 will see cases focusing on both these areas before the ASA.

While I have no doubt that the definition of advertising in the code is wide enough to encompass practically any type of advertising that may arise, the enforcement of these rulings will always present a challenge.

### 6. A hope

I am often called in by marketers and lawyers at the last minute, when, having tried to handle an ASA matter themselves, they realise that they are deep in the proverbial, and now need expert assistance. Often, it is too late to solve the problem.

Advertising law is a narrow and specific field of expertise, and it is my hope that this year will see a rise in marketers requesting assistance at the beginning of the campaign or when they first get an ASA complaint, rather than when they are facing sanctions for breach of a ruling.

So that's what my crystal ball reveals for 2013. But then, of course, I might be wrong.

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Gail Schimmel is a specialist in advertising law. She runs a consultancy - Clear Copy ([www.clearcopy.co.za](http://www.clearcopy.co.za)) - that offers advice to marketers and advertisers in relation to the Advertising Standards Authority (ASA) and other aspects of advertising law. An admitted attorney (with BA, LLB, Psychology Honours and LL.M degrees), she was previously head of legal and regulatory at the ASA, and subsequently joined Edward Nathan Sonnenbergs as a director in 2008. Email [gail@clearcopy.co.za](mailto:gail@clearcopy.co.za) and follow @GailSchimmel.

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