

# **Economic Analysis of Advertising in the Legal Market in Ghana and Proposals for Reform**



## **Economic Analysis of Advertising in the Legal Market in Ghana and Proposals for Reform**

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## Abstract

A law and economics framework is used to study the implication of lifting the ban on social media use in advertising in the legal market in Ghana, and how transaction costs, the information, bargaining, and policing costs (IBP) associated with a transaction or an agency rule, defines the integrity of the interaction between parties. The analysis revealed that high social media content policing costs might have led the General Legal Council (GLC) to outright ban the use of social media in legal advertising. The ban stifles competition and innovation in the legal market. It is proposed that the touting and advertising rules be removed and the IT capacity of the GLC enhanced to better police the legal market. The proposal creates employment, increases income and wealth in the legal market, and prevents welfare losses due to constitutional failure.

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## 1.0 Policy Context

The issue of the ban on using social media in legal advertising is at the forefront of public discussion in Ghana. There are several reasons for this sudden interest. First, is the view of Her Ladyship, Sophia Akuffo, the Chief Justice of Ghana, during the public vetting in Parliament. Her Ladyship did not mince words regarding her opposition to using social media for advertising by lawyers, “personally, I believe that dignity of the bar is as important as the dignity of the judiciary, and the idea of lawyers touting themselves on social media is personally distasteful to me.”<sup>1</sup> Second, is the suspension of a lawyer who used social media (Facebook) to advertise his services.<sup>2</sup> Third, there are calls from various publics for lifting the ban on social media advertising given the growth of information and communications technology (ICT) in the global economy. For example, a group called, United for National Interest described the suspension of the lawyer as discriminatory and a failure to take into account the trend and role of information technology in modern society.<sup>3</sup>

In the midst of the above events, the General Legal Council (GLC) posted on its webpage on June 6, 2017, “Guidelines for Lawyers to Create Websites & Place Their Profile on the Internet. These Guidelines were adopted by the GLC on 15th July 2013.”<sup>4</sup> The guidelines on lawyer advertising contained an unambiguous rejection of social media as a lawful advertising tool, “For the avoidance of doubt, social media is not website.”<sup>5</sup> The rules governing advertising by lawyers has finally reached the courts.<sup>6</sup> Most commentators consider the General Legal Council’s ban on use social media in advertising to be inconsistent with growth of modern technology, and hence have called for lifting the ban.

<sup>1</sup> Her Ladyship, Justice Sophia Akuffo, “Lawyers advertising on social media is distasteful” Ghanaweb General News of Friday, 16 June 2017. <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/Lawyers-advertising-on-social-media-is-distasteful-Sophia-Akuffo-549062>

<sup>2</sup> General Legal Council, “Suspension of Lawyer Xavier Sosu From Legal Practice,” 05/06/2017. <http://www.glc.gov.gh/suspension-of-lawyer-francis-xavier-sosu-from-legal-practice/>

<sup>3</sup> United for National Interest, “Akuffo’s touting comment ‘unacceptable’, ‘prejudicial’” Ghanaweb, General News of Saturday, 17 June 2017. <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/Akuffo-s-touting-comment-unacceptable-prejudicial-Group-549513> See Also, Franklin Cudjoe, President of IMANI Africa, “This whole thing about advertising by lawyers; Hello, we are in the 21st Century. How do you want us to know which lawyers are doing well or not?” he said about the GLC’s anti-advertisement guideline during an interview on Hard Truth, a current affairs programme that airs on the Joy News channel on Multi TV, Wednesday. See, “Sophia Addo must Rid Legal Council of archaic’ rules.” Ghanaweb, General News of Friday, 16 June 2017. <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/Sophia-Akuffo-must-rid-Legal-Council-of-archaic-rules-IMANI-548880> Also, “The practice of law is considered as a service, and in the provision of a service if you don’t market yourself, if you are not able to market yourself within the ethical rules of the profession, then how will people know the services you can provide and what is your level of expertise? So I think that the rule needs to be looked at.” Dr Dominic Ayine (A former Deputy Minister of Justice and Attorney General), “Review touting law - Ayine urges CJ.” Ghanaweb, General News of Tuesday, 20 June 2017. <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/Review-touting-law-Ayine-urges-CJ-550325>

<sup>4</sup> <http://www.glc.gov.gh/guidelines-for-lawyers-to-create-websites-place-their-profile-on-the-internet/>

<sup>5</sup> GLC, Guidelines, Number (9).

<sup>6</sup> “The General Legal Council (GLC) has been dragged to the Supreme Court of Ghana for engaging in an alleged illegality by subtly amending the law prohibiting lawyers from touting and advertisement without recourse to Parliament.” See, Ghanaweb, General Legal Council sued for ‘amending’ law without parliament. General News of Wednesday, 5 July 2017. <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/-General-Legal-Council-sued-for-amending-law-without-parliament-555658>

The efficiency characteristics of the rules governing the use of social media in advertising in the legal market in Ghana have not received the needed attention in the literature. The legal market consists of lawyers and other legal institutions as suppliers of legal services, and government, households, firms, and private parties as the consumers of legal services. Lifting the ban on social media advertising is justifiable based on at least three important considerations – (1) the positive fiscal impact (employment), and enhanced efficiency in the regulatory performance of the GLC; (2) legal market, income and wealth growth effects; and (3) minimizing welfare losses due to constitutional failure.

The paper is organized as follows: We begin the discussion with a restatement of the provisions of the law on advertising in Ghana. This is followed with a discussion of the theoretical framework, specifically, the economics of information and transaction costs, to guide the policy discussion.<sup>7</sup> The fiscal implications of the ban on social media advertising by lawyers are presented followed by a discussion of issues related to protecting the dignity of the judiciary. We offer some conclusions and policy guidelines.

### 1.1 The Advertising, Touting, and Publicity Rules

Generally, advertising of lawyers' services is banned in Ghana. The Legal Profession (Professional Conduct and Etiquette) Rules, 1969 (LI 613) issued by the General Legal Council states in part: <sup>8</sup>

- i A lawyer shall not directly or indirectly apply for or seek instructions for professional business, or do or permit in the carrying on of his practice any act or thing which can reasonably be regarded as touting or advertising or as calculated to attract business unfairly.
- ii It is the duty of every lawyer at all times to uphold the dignity and high standing of his profession and his own dignity and high standing as a member of it.

It is contrary to professional etiquette for a lawyer to do or cause or allow to be done anything for the purpose of touting directly or indirectly, or which is calculated to suggest that it is done for that purpose.

- iii Read together, the provisions suggest that touting or advertising is banned because it offends the "dignity and high standing of the legal profession and the lawyer's own dignity...and is contrary to professional etiquette."<sup>9</sup>

<sup>7</sup> Kenneth Parsons explains the importance of appropriate theoretical constructs in policy planning, "the only alternative to seeking insights out of experience regarding desirable courses of action is to rely upon the absolutes of ideology, dogma, or revelation." See, Kenneth Parsons, "The Institutional Basis of an Agricultural Market Economy." *Journal of Economic Issues*, Vol. VIII No. 4 December 1974.

<sup>8</sup> The Legal Profession (Professional Conduct and Etiquette) Rules, 1969 (LI 613) states in part:

"IN exercise of the powers conferred on the General Legal Council by sections 23 and 53 of the Legal Profession Act, 1960 (Act 32) these rules are made by the General Legal Council this 26th day of October, 1968."

<sup>9</sup> *Id.*

## 1.2 Economics of Information, Transaction Cost, and the Efficiency of Regulations

Modern theory of advertising is based on Stigler's seminal paper on the economics of information.<sup>10</sup> In its barest form, the theory advocates the addition of information as a factor in analysis of the free market. Information reduces the 'search costs' for consumers and producers as they trade in a market. Advertising allows consumers to obtain information about products and services at a lower cost to maximize utility, and for producers to maximize profits.

'Social media' has been defined as "the means of interactions among people in which they create, share/and or exchange information and ideas in virtual communities and networks"<sup>11</sup> Some of the popular social media platforms are Facebook, Twitter, WhatsApp, Instagram, and You Tube, but the list is always expanding as tech-savvy individuals create new applications.<sup>12</sup> The dynamic and widespread development and use of social media pose significant challenges for regulatory agencies charged with monitoring how and for what purposes social media are used. Transaction costs economics provides insights into alternative policy choices responding to the challenges encountered in promoting the use of social media advertising in the legal market in Ghana.

The Nobel Laureate, Ronald Coase's two articles, *The Nature of the Firm* (1937) and *The Problem of Social cost* (1960), have contributed to an understanding of the efficiency characteristics of market exchange (contracting) and the behavior of agencies in general.<sup>13</sup> The Coasian analysis focused on the nature of the firm and later Oliver Williamson extended the analysis to organizations and agencies such as the GLC. According to Coase, firms exist to minimize transaction costs, and according to Williamson, organizations exist to minimize governance costs.<sup>14</sup> The source of transaction costs according to the extensive literature is ignorance. As Allen puts it, "regardless of which stream of literature is examined, the underlying theme for transaction costs is the notion of *ignorance*."<sup>15</sup> Using an example from a market contract situation, Allen explains how ignorance drives transaction costs. He described the market transaction between parties as follows. The parties must:

*find each other, they have to communicate and to exchange information . . . goods must be described, inspected, weighed and measured. Contracts are drawn up, lawyers may be consulted, title is transferred and records have to be kept. In some cases, compliance needs to be enforced through legal action and breach of contract may lead to litigation.*

This description of the market transaction has led economists to define transaction costs as the *information, bargaining, and policing* (IBP) costs associated with a transaction.

<sup>10</sup> Stigler, George J., "The Economics of Information", *The Journal of Political Economy*, vol. 69. Issue 3 (June, 1961), 213-225.

<sup>11</sup> Tufts university, "Communications and Marketing: Social Media Overview", <http://communications.tufts.edu/marketing-and-branding/social-media-overview/>

<sup>12</sup> A Social Media use tracking dashboard lists 18 social media tools as of May 2017. See, U.S. National Archives, Office of Innovation, Social Media Team (6/01/2017). <https://www.archives.gov/files/social-media/reports/social-media-stats-fy-2017-05.pdf> Also, the Pew Research Center reports that 77% of online adults used social networking as of November 2016. <http://www.pewresearch.org/data-trend/media-and-technology/social-networking-use/>

<sup>13</sup> Coase, Ronald H. (1937), 'The Nature of the Firm', 4 *Economica*, 386-405. Reprinted in Kronman, Anthony T. and Posner, Richard A. (eds) (1979), *The Economics of Contract Law*, Boston, Little Brown, 31-32. and Coase, Ronald H. (1960), 'The Problem of Social Cost', 3 *Journal of Law and Economics*, 1-44. Reprinted in Ackermann, Bruce A. (1975), *Economic Foundations of Property Law*, Boston, Little

<sup>14</sup> See Williamson, Oliver E. (1979), 'Transaction-Cost Economics: The Governance of Contractual Relations', 22 *Journal of Law and Economics*, 233-261.

<sup>15</sup> Douglas W. Allen, "Transaction Costs" (1987, p. 676) <http://www2.bren.ucsb.edu/~glibecap/Allentranscosts.pdf>



Ideas from transaction cost theory have been extended to explain the behavior of regulatory agencies. The theory considers regulation as a transaction that entails the gathering of information, bargaining among groups as to the contents or nature of the regulation, and when implemented to police (enforce) the regulation against violators.<sup>16</sup> Touting and advertising rules are being used to implement the social objective to protect the dignity of the legal profession and to promote fair competition in the legal market. The prediction from transaction cost economics is that, the information, bargaining, and policing costs associated with these rules must be minimal for the rules to be considered efficient.<sup>17</sup>

One may argue that the information costs needed to design the touting and advertising rules were relatively minimal because according to the GLC, “the Ghana Bar Association (GBA) adopted the International Bar Association (IBA) guidelines on websites” and proposed these guidelines to the GLC in preparing the touting and advertising rules for Ghana. These rules were adopted by the GLC on 5th July 2013. Needless to say that on May 24, 2014, the International Bar Association adopted principles to guide the use of social media in the legal market based on a report issued in 2012.<sup>18</sup> Since the report was released prior to the adoption of the GLC rules, one may assume that the GBA knew about the IBA guidelines on social media but chose not to adopt them, and instead proposed the guidelines on website development that the GLC adopted.

The second element in transaction cost analysis is bargaining costs. Here again, it is plausible to conclude that bargaining costs were relatively minimal because the GBC simply proposed to the GLC, the IBA guidelines. Maybe there was cost associated with bargaining on the amount the GBA may charge lawyers for posting their webpages on the GBA website, but no information on such bargaining has been reported.

The third element in transaction cost analysis is policing cost. I theorize that the prohibitively high policing costs influenced the GLC to exclude social media as a tool in advertising. Social media is difficult to control in terms of content and usage, and policing costs are correspondingly extremely high. For example, in the United States, 18,712 individuals were victims of a crime using social media at a cost of \$66,401,318 in 2016. These numbers are lower than corresponding numbers in 2015, 19,967 victims imposing a cost of \$ 98,652,510.<sup>19</sup> In addition to the susceptibility to crimes, the content of social media in Ghana has left a sour taste in the mouths of many. Largely protected by free speech rights, social media has been a tool for not only committing crimes but also for propagating vile ideas and public commentaries, lewdness, and offensive images that sometimes shock the conscience and sensitivities of citizens of a good society, and yet content policing costs are prohibitively high.

<sup>16</sup> See, Pablo T. Spiller, “A Tribute to Oliver Williamson: Regulation: A Transaction Cost Perspective,” *California Management Review*, Vol. 52, No. 2 Winter 2010. <http://journals.sagepub.com/doi/pdf/10.1525/cmr.2010.52.2.147>

<sup>17</sup> Mark A Cohen and Paul H. Rubin, “Private Enforcement of Public Policy” *Yale Journal on Regulation*, Vol. 3, No. 1 (Article 6), 1985. “A policy is a social decision to regulate a certain activity. A rule is the method used to implement the policy. In the context of government regulation, an efficient policy maximizes the difference between the social benefits and costs of the policy. An efficient regulation will be defined here as one that attains the social goal established by policymakers and does so at the least cost.”

<sup>18</sup> International Bar Association, “IBA International Principles on Social Media Conduct for the Legal Profession.” Adopted 24 May 2014. <https://www.ibanet.org/Document/Default.aspx?DocumentUid=27ebac25-0d13...> The 2012 report is entitled, “The Impact of Online Social Networking on the Legal Profession and Practice An initiative of the Legal Projects Team.” February 2012. file:///C:/Users/-foboadu/Downloads/Online%20Social%20Networking%20report%20(Feb%202012).pdf

<sup>19</sup> U.S. Federal Bureau of Investigations: Internet Crime Complaint Center, 2016 Internet Crime Report. P. 17 and p. 18 [https://pdf.ic3.gov-/2016\\_IC3Report.pdf](https://pdf.ic3.gov-/2016_IC3Report.pdf) and [https://pdf.ic3.gov/2015\\_IC3Report.pdf](https://pdf.ic3.gov/2015_IC3Report.pdf)



So what must an agency such as the GLC do? There are at least two options. First, ‘do nothing,’ and let the status quo remain, that is, totally ban touting and advertising using social media, and enforce violations with efficient sanctions; or second, remove all rules, that is, scrap the law on touting and advertising and let the free market control transactions. Both solutions are *efficient* but may not necessarily be desirable. The free market option is not likely to attract wide public support because of the potentially negative impact on the legal profession. The banning of social media use in advertising in the legal market is efficient because the policing costs are relatively low. There seems to be an acceptance among lawyers that advertising is not an acceptable practice in the legal market. Until the recent case of *Xosu*, there is no recorded GLC sanction against a lawyer under the advertising rules. However, while efficiency may be a useful necessary condition, it is not sufficient in policy design and implementation. Efficiency is not unique, and settling on efficiency alone as a criterion in public policy-making may deprive society of opportunities to move to higher levels of production. We discuss the impacts of the touting and advertising rules under two broad themes: (1) the fiscal policy impacts; and (2) minimizing welfare loss due to constitutional failure. The fiscal policy impact is further broken down into (a) employment impacts and (b) impact on income and wealth-creation.

## 2.0 Fiscal Impact of the Touting and Advertising Rule

Advertising has both microeconomic and macroeconomic impacts on an economy. At the microeconomic level, economists have focused on firms’ advertising practices and the effects on consumers’ decisions. The macroeconomic or fiscal policy impacts address the implications of government policies on expenditure, employment, and tax policies on advertising. For example, government’s tax policies may influence advertising expenditures by firms creating income and job opportunities.<sup>20</sup> There is not adequate information on advertising expenditures in Ghana, or tax provisions affecting firms’ advertising expenditures to permit a useful discussion of the issue. In the context of Ghana, we will focus on (a) the employment impact and (b) impact on income and wealth creation in the legal market.

### 2.1 Potential Employment Impact

The working hypothesis is that the high cost of policing content is the rationale for the total ban on the use of social media for advertising purposes in the legal market in Ghana. It was also suggested that efficiency alone is not sufficient to support ban on social media use. Thus, policies to encourage the use of social media advertising must focus on ways to reduce the high content policing costs in the legal market. One option is to introduce a strong information technology division within the GLC with a primary assignment to monitor transactions in the social media market. The group of highly-skilled computer graduates engaged by the GLC to monitor market advertising practices by lawyers constitutes our initial measure of employment impact. The number of graduates from these institutions is large.<sup>21</sup> As a policy matter the employment of this critical group of graduates will reduce the content policing costs in using social media in advertising because there are significant economies in permitting lawyers to

<sup>20</sup> See, for example, HIS Global Insight, Inc. (2013), “The Economic Impact of Advertising Expenditures in the United States, 2012-2017”. A Report Prepared for: The Advertising Coalition. <https://www.ana.net/getfile/20391>

<sup>21</sup> A google search of the question, “how many computer training schools in Ghana?” returned 391 computer training schools in Ghana. Ghana Yelo, “Computer Training in Ghana.” [http://www.ghanayello.com/category/computer\\_training](http://www.ghanayello.com/category/computer_training) (viewed 7/8/2017).

reach a larger population to offer services.<sup>22</sup> As Table 1 shows, internet penetration is quite impressive within the ECOWAS zone and we must promote the penetration.

Africa	Population (2017 Est.)	Internet Users 31-Dec- 2000	Internet Users 31-Mar- 2017	2000 to 2017 (% change)	Penetration (% Population)	Africa Internet % Users	Facebook 30-Jun- 2016
Benin	11,458,611	15,000	1,232,940	81.2 %	10.8 %	0.4 %	800,000
Cote d'Ivoire	23,815,886	40,000	5,230,000	129.8 %	22.0 %	1.5 %	2,400,000
Gambia	2,120,418	4,000	373,865	92.5 %	17.6 %	0.1 %	220,000
Ghana	28,656,723	30,000	7,958,675	264.3 %	27.8 %	2.3 %	3,500,000
Guinea	13,290,659	8,000	950,000	117.8 %	7.1 %	0.3 %	950,000
Guinea-Bissau	1,932,871	1,500	84,000	55 %	4.3 %	0.0 %	84,000
Liberia	4,730,437	500	395,063	789.1 %	8.4 %	0.1 %	330,000
Mali	18,689,966	18,800	2,212,450	116.7 %	11.8 %	0.6 %	1,000,000
Mauritania	4,266,448	5,000	714,132	141.8 %	16.7 %	0.2 %	370,000
Niger	21,563,607	5,000	439,164	86.8 %	2.0 %	0.1 %	280,000
Nigeria	191,835,936	200,000	93,591,174	467.0 %	48.8 %	27.1 %	16,000,000
Senegal	16,054,275	40,000	3,647,939	90.2 %	22.7 %	1.1 %	2,300,000
Sierra Leone	6,732,899	5,000	310,000	61.0 %	4.6 %	0.1 %	310,000
Togo	7,691,915	100,000	545,020	4.5 %	7.1 %	0.2 %	340,000
Burkina Faso	19,173,322	10,000	2,156,498	214.6 %	11.2 %	0.6 %	600,000
<b>AVERAGES</b>	<b>24,800,931.53</b>	<b>32,186.67</b>	<b>7,989,394.67</b>	<b>214.60 %</b>	<b>13.9</b>	<b>2.169</b>	<b>1,965,600</b>

**Table 1. Developed based on Internet World Stats, “Internet Penetration in Africa, March, 2017”.**

(Internet Users Statistics for Africa) (Africa Internet Usage, 2017 Population Stats and Facebook Subscribers) <http://www.internetworldstats.com/stats1.htm>

Ghana may be considered a major consumer of social media services in the ECOWAS region. Internet usage in Ghana rose from 30,000 in year 2000 to almost 8 million in 2017, representing an increase of over 264 percent. The average percent increase for the ECOWAS region over the same period is approximately 215%. The table also shows that internet use (penetration rate) in Ghana (27.8%) is second only to Nigeria (48.8%) and the potential to further expand. As of 2016, there were over 3.5 million Facebook users in Ghana. This is almost twice the average for the number of Facebook users in the ECOWAS region. The market will grow with population and technology, such as the fibre-optic connectivity around the country. This growth could spur innovations such as use of local languages to reach rural populations.

<sup>22</sup> Similar views have been expressed by legal experts in Ghana. See, Ayine, note 3 *supra*.

What is being proposed is to remove the ban on social media advertising by lawyers and set up a monitoring unit within the GLC to track dynamics in the market and enforce violators of the advertising rules. The proposal does not require overhaul of the existing GLC guidelines. For example, there is no need to remove the ban on false or misleading advertising, use of obtrusive and annoying language, comparative advertising, referring to oneself as “best”, “expert” among other such phrases.” The use of adjectives in advertising is banned even in matured legal markets such as found in the United States. The rationale for banning use of adjectives is because consumers of legal services will have difficulties assessing the validity of the claims by the lawyer. “use of the term expert is a subjective claim that leaves much to the reader’s imagination. In doing so, it can easily cross the line into false and misleading communication. State bar ethics opinions are unanimous on this point.”<sup>23</sup>

The guidelines also prohibit the use of social media to communicate the success rate by a lawyer or a law firm. This ban may be problematic. The success rate of a lawyer is an important consideration for consumers of legal services to make decisions on whether to employ a particular lawyer.<sup>24</sup> A rational consumer of legal services considers the amount of recovery multiplied by the probability of winning a case before engaging the services of a lawyer to file a lawsuit. Firms’ factual statements about their success rates are important in determining the probability of success. The ban is unwarranted and frustrates transactions in the legal market.

One obvious question is funding or implementation cost. The proposed IT unit is under the control of the GLC so the challenge is to find funding for the provision of a public service such as monitoring the legal market for effective performance. In addition to budget allocations by Parliament to the judiciary for the administration of justice, Ghana’s development partners have played key roles in judiciary reform efforts by the government. The bulk of judiciary/court/law reform activities have accompanied some type of economic project. For example, a program to establish a market-monitoring unit within the GLC may include allocations for laws and regulations to control the unit. Examples of how laws emerge as part of an economic program may be found in agriculture, natural resources, water, etc. projects. Two Land Administration Projects funded by the World Bank included several law reform components.<sup>25</sup> An ongoing eGhana/eTransform Project includes components to “improve the efficiency of the country’s legal system.”<sup>26</sup> Scattered throughout the project identification document are references to employment generation, extending service to rural communities, and elimination of poverty. These are the foundations for our call to reform rules governing social media advertising in the legal market in Ghana.

I recommend the setting up of a pilot program using funds from the eTransform project. The objective of the program will be among other technology responsibilities, to monitor use of social media in advertising in other sectors, and working with experts to propose an IT-based market policing program for the legal market. If successful, the GLC would lift the ban on use of social media in advertising in the legal market along with a scaling-up program to the broader legal market in Ghana.

<sup>23</sup>American Bar Association, Peter Geraghty (director, ETHICSearch) and Sue Michmerhuizen, (ETHICSearch Counsel), “Think twice before you call yourself an expert.” March 23, 2013. <https://www.americanbar.org/newsletter/publications/youraba/201303article11.html>

<sup>24</sup>Generally, the efficiency rule suggests that an individual will go to court if the amount of recovery multiplied by the probability of winning is greater than the cost.

<sup>25</sup>World Bank, Land Administration Project (07/31/2003 - 06/30/2011) Project ID : P071157. IEG ICR Review, Independent Evaluation Group. <http://documents.worldbank.org/curated/en/805541474634688190/pdf/000020051-20140625080330.pdf>

<sup>26</sup>World Bank, World Bank, GH eTransform Ghana (October 24, 2013 - June 30, 2019. Project cost: US\$ 97.00 million). Project ID P144140. <http://projects.worldbank.org/P144140/gh-ettransform-ghana?lang=en>

## 2.2 Fiscal Impacts of Ban on Income and Legal Market Growth

### 2.2.1 Definition of the Legal Market

A second fiscal impact of the ban on social media use in advertising is the impact on the overall growth of the legal market. Legal advertising has contributed significantly to the growth of the legal market in the United States. A recent survey found that the contribution of advertising to the U.S. legal market has “grown by 68 percent over the past eight years from \$531 million in 2008 to \$892 million (projected) for 2015; grown six times faster from 2008 to 2014 than all other ad spending; doubled its share of local spot advertising; quadrupled its share of syndicated TV ads; and moved toward better strategic ad buy positions in more expensive and preferred dayparts and programs.”<sup>27</sup>

A market is any context in which the sale and purchase of goods and services takes place. The legal sector produces a service - facilitating the resolution of disputes.<sup>28</sup> The definition of a legal market as used by Luckman is used in this paper, “In this series of articles I shall explore some of the implications of looking at the legal profession as a way of organising a particular complex of markets: a market for the skills in advocacy, counselling, drafting and negotiation which legal specialists supply; and closely associated with it a labour market for lawyers themselves, considered as “factors of production.”<sup>29</sup> The buyers of lawyers’ services include foreign investors, domestic private individuals and urban and rural households, businesses, and government. Private lawyers are the suppliers of legal services. The size of the legal market is the total value of all transactions in the market in a given year.<sup>30</sup>

### 2.2.2 Measuring the size of the legal market

The size of the legal market is measured using data for one 2011 Commercial court cases.<sup>31</sup> There are 104 reported cases from the court. The size of the market in 2011 is measured by the total value of all the amounts in controversy brought before the court.<sup>32</sup> The measure is essentially a total transactions value measure of a market in a given year. There are several deficiencies in using the value of transactions in the commercial court as a measure of market size. First, not all cases brought before the court have an easily quantifiable monetary value. For example, the POLYTANK Ghana Ltd. vs. New Star Poly Products was a trademark infringement dispute and not easily quantifiable in money terms.<sup>33</sup>

<sup>27</sup> U.S. Chamber, Institute for Legal Reform. *Trial Lawyer Marketing: Broadcast, Search, and Social Strategies*, October 2015, p. 7.

<sup>28</sup> See, Robin Luckman, “The Market for Legal Services in Ghana, 9 Rev. of Ghana Law (R.G. L) 7 (1977). “A broader definition of the legal market would include the sale and purchase of legal forms, motion application materials, documents, including copies of briefs, and judges’ opinions, the services of law publishers, legal data banks, commissioners of oath, and other quasi-judicial entities, the sale of Parliamentary documents, Incorporation papers, the operation of registries and the export of law books or reports are all part of the legal market broadly construed”.

<sup>29</sup> Luckman, *op. cit.*, note 49 at 7.

<sup>30</sup> For the definition of market, see, ‘Size Parameters’ in Wikipedia at [http://en.wikipedia.org/wiki/Market\\_%28economics%29#Size\\_parameters](http://en.wikipedia.org/wiki/Market_%28economics%29#Size_parameters) (viewed on 4/16/2014).

<sup>31</sup> This measure is illustrative only. The legal market is certainly bigger than the transactions in a single court in a single year in a commercial court.

<sup>32</sup> One study of the U.S. legal market uses “the estimated revenue collected by private sector legal services firms in the United States” as the measure of the market size.” See, U.S. Legal Services Industry: Market Size Blog at <http://www.marketsize.com/blog/index.php/2013/03/18/u-s-legal-services-industry/> (viewed 6/11/2014).

<sup>33</sup> POLYTANK Ghana Ltd. vrs. New Star Poly Products. See, High Court of Justice (Commercial Division), Accra. Friday the 25TH Day of November, 2011 (before Her Lordship Justice Mrs. Novisi Aryene).

Second, there are timing issues. A case may commence in 2008 but be resolved in 2011 making it difficult to determine the value in the case, especially given the influence of inflation. This is what occurred in the *Augusta Okai v. Mrs. Esperance Anang* case which began in 2008 and ended up in court in 2011.<sup>34</sup> A third difficulty is currency units. For example, part of the amount in controversy in the case of *Aewaha Company Limited v. National Communication Authority* was in Euros and the other part in Ghanaian Cedis.<sup>35</sup> Conversion to a single currency as was done in this paper may lead to inaccuracies because of timing and exchange rate fluctuations. With these deficiencies noted, the following procedure was used to demonstrate how the size of the legal market may be measured using transaction for a single court in Ghana.

Information from all cases decided by one Commercial court, including, the case file number, names of parties, type of case (debt collection, contract, loan, etc.), the amount in controversy, court decision and award, interest ordered and paid, court costs, and the party paying court costs was used in the determination of market size. All monetary values were measured in Ghanaian currency terms, for example, a contract dispute involving an amount in British pound sterling (£) was converted to Ghanaian Cedis using the exchange rate on the date the case was decided.

Adding all monetary value of transactions, the size of the legal market as measured using the 2011 Commercial court transactions is GHC 6,325,951,988.33.<sup>36</sup> Based on the schedule of fees published by the GBA, we used a mean fee rate of 17.5% of the amount in controversy, giving lawyers GHC1, 106,448,274.09 of the total market value. We find that 81.5% of the market value is distributed to lawyers as payment for their services. The residual 18.5% is equal to GHC 204,821,152.97 (18.5%) This amount is generally considered the value of welfare loss due to government control of the market.<sup>37</sup> One should not be surprised by such high estimate because the commercial courts are the drivers of growth in the legal market in Ghana. This is why restrictions on information in the market could have negative impacts on incomes and wealth creation. A similar trend is being observed in the ICT market. One study has estimated overall contribution of ICT industry to GDP in Ghana at about USD 750 million a year (about 1 per cent of GDP).<sup>38</sup> An aggregate of all transactions in all courts in Ghana will probably yield an amount greater or at least equal to the figure found for the ICT sector.

<sup>34</sup> *Augusta Okai v. Mrs. Esperance Anang* began in 2008 and ended up in court in 2011. Suit No.. BDC 3/2010. High Court of Justice (Commercial Division), Tuesday the 11th Day of January, 2011. (before Her Lordship Mrs. Justice Novisi Afua Aryene).

<sup>35</sup> *Aewaha Company Limited v. National Communication Authority* had both foreign and Ghana currency components. High Court of Justice (Commercial Division)), Suit No. OCC3/07, 8th September 2011, (before Her Ladyship Barbara Ackah-Yensu).

<sup>36</sup> A study of the size of the legal market in the U.S. in 2012 was \$270.567 billion. See, U.S. Legal Services Industry: Market Size Blog at <http://www.marketsize.com/blog/index.php/2013/03/18/u-s-legal-services-industry/>

<sup>37</sup> Studies have consistently found the social cost of monopoly to be less than 1 percent. See, for example, Richard A. Posner, "The Social Costs of Monopoly and Regulation." *The Journal of Political Economy*, Vol. 83, No. 4 (Aug., 1975), pp. 807-828. <http://www.jstor.org/stable/1830401> Our presentation does not rise anywhere close to the theoretical and empirical tools used by researchers such as Posner and Stigler in addressing the cost of monopoly problem. Our contribution is to show that government failure that leads to the emergence of monopolies has a real monetary impact on society. Also, Stigler, George J. "The Statistics of Monopoly and Mergers." *J.P.E.* 64, no. 1 (January/February 1956): 33-40; and Tullock, Gordon. "The Welfare Costs of Tariffs, Monopolies, and Theft." *Western Econ. J.* 5 (June 1967): 224-32. The challenge is to estimate the loss to guide policy in a developing country context. This is what is attempted in this paper.

<sup>38</sup> "In 2000, the World Bank indicated that the sector's contribution for Ghana was 1.8 per cent of GDP." See, Ministry of Finance, Ghana, (Ghana News Agency (GNA), "ICT contribution...." <http://www.mofep.gov.gh/?q=news/210610>



The ban on social media use in advertising is inconsistent with the government's commitment to free-market growth. Fiscal policies in Ghana since the early 1980s have been driven by the acceptance of the International Monetary Fund and World Bank's structural adjustment program (SAP). There were three main transitions under SAP: a transition to market-led growth; transition from one party state to multi-party systems, and a transition to constitutionalism and the rule of law.<sup>39</sup> The market reform transition entailed "macroeconomic adjustments such as reduced budget deficits, devaluation, and reduced domestic credit expansion, and structural conditions like freeing controlled prices and interest rates, reducing trade barriers, and privatizing state enterprises".<sup>40</sup> All indications are that after 1983 Ghana had settled on the path of a market-led economy, and it is in this sense that rules restricting information in the form of advertising become suspect.

None of the countries known to restrict the use of social media (Facebook, Twitter, and YouTube) in one form or another: China, Iran, Vietnam, Pakistan, North Korea, Eritrea, and to some extent and in specific contexts, Cuba, Afghanistan, Libya, Turkey, Bangladesh, and Myanmar did so for market control reasons."<sup>41</sup> Once a society embarks on the path of market-led growth, it becomes necessary to follow the principles that support the growth policy choice. We identified potential high social media use content-policing cost as the efficiency rationale to ban the use of social media. We found the solution in appropriate institutional design that supports employment, income, and wealth-creation within a credible fiscal policy regime. Lessons in preparing the guidelines on social media use published by the Law Society of South Africa (LSSA) will be a good beginning in approaching the situation in Ghana.<sup>42</sup>

### 3.0 Government Failure, Rent-Seeking, Regulatory Capture, and the Integrity of the Judiciary

Government failure has been defined as "a situation in which government intervention leads to the inefficient allocation of resources."<sup>43</sup> Government failure does not mean that government intervention is bad. For example, governments subsidize farm inputs such as fertilizer, chemicals, information to increase agriculture production. This is a good idea. However, the subsidy distorts market prices. This distortion leads to welfare losses which are unacceptable under a free market system. It is the distortionary impact of the subsidy that is being referred to as government failure. Government intervention in a market often is the result of lobbying by strategic groups.

<sup>39</sup> See, William Easterly "IMF and World Bank Structural Adjustment Programs and Poverty", in *Managing Currency Crises in Emerging Markets*, (Michael P. Dooley and Jeffrey A. Frankel, eds.), NBER Published Volume, 2003. <http://www.nber.org/chapters/c9656> See also, Cass Sunstein, "Constitutionalism, prosperity, democracy: Transition in Eastern Europe", *Constitutional Political Economy*, September 1991, Volume 2, Issue 3, pp 371–394.

<sup>40</sup> Easterly, Id.

<sup>41</sup> Mother Jones, "MAP: Here Are the Countries That Block Facebook, Twitter, and YouTube" <http://www.motherjones.com/policy/2014/03/turkey-facebook-youtube-twitter-blocked/>

<sup>42</sup> Law Society of South Africa (LSSA), "LSSA Guidelines Introduction to Social Media: Legal Implications for South African Law Firms." Pretoria, 2012 [http://www.lssa.org.za/upload/documents/LSSA%20Introduction%20to%20Social%20Media\\_Legal%20Implications%20for%20SA%20Law%20Firms%20and%20draft%20policy%20December%202012.pdf](http://www.lssa.org.za/upload/documents/LSSA%20Introduction%20to%20Social%20Media_Legal%20Implications%20for%20SA%20Law%20Firms%20and%20draft%20policy%20December%202012.pdf)

<sup>43</sup> Farlex Financial Dictionary, (2012). <http://financial-dictionary.thefreedictionary.com/Political>

Activities by private individuals and groups to influence legislation to their benefit are referred to as rent-seeking. Formally, rent-seeking occurs “when a firm uses its resources to procure an unwarranted monetary gain from external elements, be it directly or indirectly, without giving anything in return to them or the society,... instead of creating wealth, a firm seeks to obtain financial gains from others through alteration/ manipulation of the environment where economic activities take place”<sup>44</sup> or by *getting a special regulation that hampers their competitors* (emphasis mine).<sup>45</sup>

The general conclusion in the literature is that rent-seeking has negative impacts on society because it leads to welfare losses. Buchanan’s observation is widely considered as the standard summary of the pernicious impacts of rent-seeking. He wrote, “Rent seeking involves social waste. Resources that could otherwise be devoted to value-producing activity are engaged in competitive effort that determines nothing other than the distributive results. Rent seeking, as such, is totally without allocative value, although, of course, the initial institutional creation of an opportunity for rent seeking ensures a net destruction of economic value.”<sup>46</sup>

Some scholars have pointed to potential positive outcomes from rent-seeking. The view is that since rent-seeking involves a private entity seeking benefits from a public entity (the government), then rent-seeking provides a way to channel public resources to the provision of private goods and services. As one study concluded, “our analysis points to factors with contrary implications. It may be optimal for the public sector to produce some private goods precisely because politicians are selfish. Governmental provision of private goods may compensate public officials who manage public goods. Such institutions as pork-barrel politics and corruption can offset the selfishness of public sector participants, because they reward political effort.”<sup>47</sup> Research on rent-seeking has focused more on the negative impacts. The immediate question is whether the GBA has influenced rules introduced by the GLC so as to shift benefits (wealth) to its advantage. Specific in the case of the GLC Guidelines on Advertising the relationship between the parties is not complicated:

The immediate question is whether the GBA has influenced rules introduced by the GLC so as to shift benefits (wealth) to its advantage. Specific in the case of the GLC Guidelines on Advertising the relationship between the parties is not complicated:

*“It is against this emerging trend in Information Technology the world over that the Ghana Bar Association adopted the International Bar Association guidelines on websites and proposed to the General Legal Council, the regulatory body for the Legal Profession to permit lawyers and law firms to create websites and place their profiles on the internet using the guidelines below.”*<sup>48</sup>

<sup>44</sup> The Economic Times, “Rent Seeking” <http://economictimes.indiatimes.com/definition/rent-seeking>

<sup>45</sup> The Concise Encyclopedia of Economics (David R. Henderson, ed.). “Rent-Seeking,” <http://www.econlib.org/library/Enc/RentSeeking.html>

<sup>46</sup> Buchanan, J. M., 1980, *Reform in the rent-seeking society*, in: J. M. Buchanan, R. Tollison, and G. Tullock, eds, *Towards a theory of the rent-seeking society* (College Station, Texas A & M University Press) cited in Tyler Cowen, Ami Hai Glazer, and Hen Ry McMillan, “Rent Seeking can Promote the Provision of Public Goods,” *Economics and Politics*, Vol. 6, No. 2, July 1994.

<sup>47</sup> Cowen, Glazer, and McMillan, *supra*, p. 142.

<sup>48</sup> Guidelines



Whether an activity by a group constitutes rent-seeking is an empirical question. There is not enough information from the relationship between the GBA and the GLC to infer rent-seeking on the part of the GBA. By allowing the GBA to determine how advertising may be introduced to the legal market, the GLC avoided considerable transaction costs and welfare losses to society, thereby increasing the welfare of society. The more difficult issue is why the GBA did not include social media in its proposal. It could be oversight given the short time period during which the IBA guidelines were published (2012), and the publication of the GBA-recommended guidelines by the GLC (2013). It could also be that the GBA knew about the IBA guidelines but chose not to recommend them to the GLC. Given the high cost of monitoring the content of social media, there are genuine concerns that drawing lawyers into the market could contaminate and threaten the “dignity of the Profession.” What is the market value of the “dignity of the profession” since it has become the centerpiece of the rules governing advertising in Ghana? We explore this question in the broader context of the economics of decorum.

### 3.1 Economics of Decorum

Decorum has been defined as “correct or proper behavior that shows respect and good manners”<sup>49</sup>. Lawyers and judges address each other in such terms as ‘noble’ and ‘honourable’.<sup>50</sup> The objective of the GBA under Part 1, Section 2 (2)(a) of the GBA states “(b) the maintenance of the honour, independence and integrity of the legal profession; its purpose to “promote legal professionalism”<sup>51</sup> Decorum as a factor in determining value in the market has been discussed by several prominent economists.

Thorstein Veblen discussed the economic significance of *decorum* in his famous book, “*Theory of the Leisure Class*”. Veblen considered decorum as a product of the leisure class and has the ultimate effect of conferring status, “A breach of faith may be condoned, but a breach of decorum cannot. “Manners maketh man.”<sup>52</sup> Paul Turpin (2005) has argued that under a free market system that operates free from any institutionalized control, it is decorum that provides the stability needed for ordered market behavior. He wrote:

*This commutative-distributional dynamic can be seen in the appeals to decorum in Adam Smith and Milton Friedman. Their theories of the market implicitly position social decorum alongside an explicit commutative framework as the conditions for a naturally self-regulating market, with decorum serving as a naturally-occurring source of social stability. These fundamental presumptions not only permeate modern economic thought generally, but also influence liberal moral and political philosophy, even among critics of the market.*<sup>53</sup>

<sup>49</sup> (<http://www.merriam-webster.com/dictionary/decorum>) (viewed 05/02/2014).

<sup>50</sup> “let me use this platform to once again congratulate all the hard working lawyers and judges who in their addresses and judgments expanded the frontiers of the law and by so doing did such honour to our noble profession.” Hon. Nana Abayaataye Amegatcher, President, Ghana Bar Association. Speech at the 2013/2014 Annual Conference, 16th September, 2013, Ho, Volta Region, Ghana.

<sup>51</sup> Ghana Bar Association, Constitution, Code of Ethics and Regulations. <http://www.uanet.org/sites/default/files/Ghana%20Bar%20Association%20Code%20of%20Ethics.pdf>

<sup>52</sup> (Chapter Three, “Conspicuous Leisure”).

<sup>53</sup> Paul Turpin (2005). Paul Turpin, *The Moral Rhetoric of Political Economy: Justice and Modern Economic Thought*. New York: Routledge, 2011. xv + 163 pp. \$115 (hardcover), ISBN: 978-0-415-77392-8.

Many years ago, Adam Smith wrote, “Honour makes a great part of the reward of all honourable professions. In point of pecuniary gain, all things considered, they are generally under-recompensed, as I shall endeavour to show by and by. Disgrace has the contrary effect”.<sup>54</sup>

The GBA promotes decorum as a standard of social behavior and public reverence to enhance opportunities for lawyers to increase their wealth in the market place. Economic theory predicts that the ban on advertising using social media leads to under-production of *decorum* which represents a welfare loss to society. We estimated such a welfare loss to be about 0.30% of the 2011 Commercial court data.<sup>55</sup> If welfare losses due to the ban on social advertising are large, then the ban would be frustrating a core principle of the Ghana Constitution. The Supremacy clause of the 1992 Constitution of Ghana, Article 1, Clause 1, states, “The Sovereignty of Ghana resides in the people of Ghana in whose name and for whose welfare [emphasis mine] the powers of government are to be exercised in the manner and within the limits laid down in this Constitution.”<sup>56</sup> The constitutional failure can be cured by lifting the ban on social media advertising and capturing further benefits by creating employment in the market for the services of ICT graduates.

There is further evidence that decorum has market value, and that the legal profession has worked very hard to protect this value. It is surprising that given the robust growth of the ICT market, the legal market, especially the regulatory agencies have not kept pace with the growth. One reason is the ban that has proven to be effective in checking the use of social media in advertising by lawyers. Until the recent case of General Legal Council v. Sosu, and ensuing lawsuits, the literature is empty on this subject which has real economic implications for the legal profession and households. A search of the literature since Ghana introduced the touting or advertising rules in 1960 revealed only two instances where the rules are tangentially mentioned.

The first encounter with the touting or advertising issue comes from Luckman’s study on the legal market in Ghana in 1976.<sup>57</sup> In a survey, Luckman asked lawyers about their views on visiting clients at their homes or offices. The author concluded from the survey:

*The link between the social distance they keep from clients and their consciousness of class distinctions comes sharply into focus. The majority of lawyers neither visits their clients (51%) nor feels that it is appropriate for them to do so (59%). And even among those who make such visits, most made a distinction between client companies and businesses—which they might have purely technical reasons for visiting—and private individuals, visits to whom were not to be encouraged. Practitioners in sum felt that visits to clients would alter the terms of exchange on which they made themselves available to the public. Clients should come to them, and they should not be seen to be going to see clients. Not only could this lead to accusations of touting but it would also demean their social status. The few who disagreed, on the other hand, placed emphasis on the needs of their clients which, they argued, are best served if lawyers visit them in familiar surroundings.*<sup>58</sup>

<sup>54</sup> Adam Smith, *The Wealth of Nations*, Book I, Chapter X, “Of Wages and Profit in the different Employments of Labour and Stock.”

<sup>55</sup> In our study of the structure of the GBA (forthcoming). We found the welfare loss due to the structure of the GBA to be approximately 18 percent of the total market value that is GHC 1,185,942,774 in money terms.

<sup>56</sup> Government of Ghana, “Constitution of the Republic of Ghana, 1992,” Accra, Ghana.

<sup>57</sup> Robin Luckman, “The Economic Base of Private Law Practice” [1976] Vol. VIII No. 2 RGL 116-39.

<sup>58</sup> Luckman, P. 120.

Luckman's finding that "practitioners in sum felt that visits to clients would alter the terms of exchange on which they made themselves available to the public; and that, such visits "would also demean their social status,"<sup>59</sup> suggests that the advertising rules allow lawyers to extract rents from consumers of legal services with the assistance of a rule that prohibits enterprising lawyers to use modern technology to enter the market. It is in this sense that the advertising rules frustrate the constitutional objective to promote the welfare of the citizens.

The second situation where one encounters the issue of touting or advertising is the case of *Ward-Brew v. Ghana Bar Association (No. 1)*.<sup>60</sup> The Ghana Bar Association by resolution decided to honor some of its members with the designation Senior Advocate of Ghana (SAG), an honor scheme in recognition of their outstanding performance as a lawyer. Part of the scheme would involve sewing onto the black gowns of lawyers designated as SAG, red lapels that distinguish them from other lawyers. The plaintiff challenged the GBA scheme as illegal and ultra vires, arguing that only the GLC has authority to alter dress code for lawyers. The defendant, GBA challenged the capacity of the plaintiff to bring the action, and that the plaintiff has "failed to show by his pleadings that he had a personal interest in the matter, that is that he had any personal interest in the operation of the Senior Advocate of Ghana (SAG) scheme."<sup>61</sup> In addition to other discriminatory impacts of the SAG scheme on the plaintiff, the plaintiff explained how his personal interest has been negatively affected by the dress to be worn by those who are honored with a SAG designation.

According to the plaintiff, his interest in the market place is negatively affected because he is in a less favorable position "so far as prospective clients are concerned."<sup>62</sup> The SAG has the effect of placing some lawyers "in a special class and holds them out as lawyers who are superior to the other lawyers, including him, some of whom may even be senior to them at the bar."<sup>63</sup> Specifically, according to the Plaintiff, "the alteration of the black gowns by sewing onto them the red lapels, not only seriously violates the General Legal Council's circular on court dress, but the wearing of such gowns would also be considered as violating regulation 2(1) and (3) of LI 613 which forbids advertising, touting and publicity by lawyers."<sup>64</sup> The court found the GBA scheme illegal and ultra vires so did not address the touting, advertising issue raised by the plaintiff. The recent *Sosu* case and other cases that have been filed should shed light on the contours of the touting and advertising rules governing transactions in the legal market in Ghana.

<sup>59</sup> See, note 100, *supra*.

<sup>60</sup> *Ward-Brew v. Ghana Bar Association (No. 1)* [1993-94], 439-53. High Court, Accra, 27 March 1992 (Adjabeng JA). *Ward-Brew v.*

<sup>61</sup> *Ghana Bar Association (No. 1)* [1993-94], 430-353, High Court, Accra, 27 March 1992 (Adjabeng JA).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

## 4.0 Conclusions and Recommendations

The study finds that the law and economics framework is appropriate in analyzing issues related to the performance of the legal market in Ghana. Specifically, the study finds that the cost of policing social media use for advertising in the legal market in Ghana could be very high. Unable to police the market, the GLC has banned the use of social media for advertising purposes to protect the “integrity of the profession.” While the GLC rule is efficient, it is not desirable because it fails to account for significant macroeconomic benefits such as employment-creation, income and wealth growth in the legal market, and leads to welfare losses due to constitutional failure.

The study proposes an alternative institutional arrangement that entails (1) removal of the ban on the use of social media for advertising in the legal market in Ghana; (2) building the ICT capacity of the GLC to better monitor the use of social media in the legal market; and (3) clearer definition of the relationship between the GLC and the GBA to avoid the appearance of rent-seeking and operating under government-sponsored anti-market rules. The potential welfare loss associated with the ban on the use of social media in advertising in the legal market could be very high.







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