

# IPSP078 - Legal Aspects of Electronic Commerce

Portfolio Exam: 691859

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## NOTE

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<sup>1</sup>This is a footnote.

## 1 Ofentse approaches you and wants your advise on the following: [25]

As per the provisions of [section 1][1] together with [section 1(q)][2] the data base will be understood to constitute either ‘**data**’ or a ‘**data message**’, Ofentse as the compiler of the database will be understood to be the ‘**data controller**’ and his clients whose personal information constitute the content of the database will be understood to be ‘**data subjects**’.

### 1.1 The requirements that the databases must meet in order to enjoy copyright protection. (10)

As per the provisions of [section 1(1)][3] in the context of copyright law a database i.e. *tables and compilations of data stored or embodied in a computer or medium used in conjunction with a computer*, will be considered to be a ‘**literary work**’ and as a such it will be eligible for copyright per the provisions of [section 2(1)(a)][3] provided Ofentse can demonstrate that his database is indeed original, and finally as per [section 2(2)][3] that the database can be recorded in digital data. Furthermore copyright shall be conferred to the database if Ofentse can demonstrate that he is a ‘**qualified person**’, i.e. that he is a South African citizen or is domiciled or resident in the Republic [section 3(1)(a)][3].

As a Paris Convention Member Statue the provisions of [article 9(1)][4], [section 5][3] [article 1(2)][5], [article 5(2)][6] and [article 1(4)][7] dictate that the statues of the Republic shall govern international copyright protection as it pertains to the Internet.

### 1.2 The provisions of the Electronic Communications and Transactions Act 2002 which limits the liability of the Internet service providers. (15)

As per the provisions of the ETC Act [1], a service provider is not liable for damages arising from said service provider for providing access to information system services or wireless applications services [section 70][1] together with [section 36][2], or for operating facilities as a ‘*mere conduit*’ [section 73][1] together with [section 38][2], ‘*caching purposes*’ [section 74][1] together with [section 39][2] and ‘*hosting services*’ [section 75][1]. The eligibility for the limitation of liability of a service provider is dependent on their membership with a recognized Representative body as per [sections 71 and 72][1] together with [section 37][2] Moreover the Act explicitly excludes service providers’ obligation from monitoring data, as per [section 78][1].

## 2 Advise the Committee on the following issues [25]:

### 2.1 Does EduCate’s marketing practice constitute spam according to South African law? If so, discuss those legislative provisions and state whether they adequately protect consumers? [15]

Given that the recipients email addresses were retrieved from public websites, and that there have been consumers who’ve lodged complaints against EduCate CC, EduCate’s bulk email newsletters constitute commercially motivated direct-marketing by means of unsolicited electronic communications, thus amounting to spam [8], [9]. As per the provisions of [section 45][1] together with [section 23][2] recipients of unsolicited communications are able to opt-out of future communications and may request information on where their personal information and contact details were obtained. Moreover as per the provisions of [section 45(3,4)][1] together with [section 23][2], anyone failing to comply or persisting to send unsolicited commercial communications to a person whose advised that such communication is unwelcome, is guilty of an offense and liable on conviction to penalties.

As per the provisions of [section 11(1, 2)][10] every person has the right to privacy which includes the right to restrict unwanted direct marketing through retrospective refusal to accept or request discontinuance or preemptive blockage of said unsolicited messages. Moreover as per the provisions of [section 11(3 - 5)][10] consumers may register either a general or specific preemptive block against any communications primarily for the purpose of direct marketing.

As per the provisions of [section 69(1)][11] stipulates that for the purposes of direct marketing by any form of electronic communication, the processing of personal information of a data subject is prohibited unless the data subject has given their consent. Moreover as per [subsections (2, 3) of section 69][11] a responsible party may approach existing customers or prospective consumers on a single occasion provided that said consumers have not previously withheld such consent. Lastly as per the provisions of [section 69(4)][11] stipulates that a responsible party must in their communications include identifying details of either the sender or party on behalf of whom the information has been sent, and a mechanism for the cessation of further messages.

## **2.2 Choose one country that regulates spam in its jurisdiction and give a detailed discussion on the country's initiatives. Also note what SA can learn from that jurisdiction regarding the issues of spam. (10)**

Canada's Anti-Spam Legislation [12] was enacted on 15 December 2010 and its purpose is to promote the efficiency and adaptability of the Canadian economy [section 3][12] by regulating a range of online activities including spam messaging, spyware distribution, fishing, fraudulent as well as other deceptive and harmful online threats and practices. The legislation adopts a holistic approach in encompassing through implementation within this Act amendments to their corresponding legislation: the Canadian Radio-Television and Telecommunications Commission Act [13], the Canadian Competition Act [14], the Canadian Personal Information Protection and Electronic Documents Act [15] and the Canadian Telecommunications Act [16].

The introductory [sections 1 - 5][12] deal with the interpretive definitions; conflicting provisions and the precedence of this Act; the purpose of the Act, scope and applicability of the Act respectively. [Sections 6 - 13][12] detail the **Requirements and Prohibitions** related to electronic messages during the conduct of commercial activities, namely: unsolicited electronic messages [section 6][12], alteration of transmission data [section 7][12], installation of computer programs [section 8][12], the jurisdiction where the contravention of the corresponding sections applies [sections 9, 12][12], the requirements for express consent to perform regulated and prohibited actions [section 10][12], mandatory provision of an unsubscribe mechanism with respect to unsolicited messages [section 11][12] and lastly how the burden of proof vests with the alleged perpetrator of a prohibited activity to demonstrate that they indeed had express consent to perform said activity [section 13][12].

**Administrative Monetary Penalties** are articulated in [sections 14 - 40][12], namely: the appointment of a designated authority [section 14][12]; their authority to demand preservation of and notice to produce infringing electronic data [section 15 - 18][12]; issuance and execution of warrants, including details regarding use of force and entry onto private property [section 19][12]; notification and determination of responsibility for the contravention of the prohibitions amounting to violations for which one may be found liable to an administrative monetary penalty to the value of \$1,000,000 in the case of an individual and \$10,000,000 in the case of any other person, are considered in [sections 20 - 26][12], these sections also detail how the penalties are not intended to be punitive, but rather they are intended to encourage compliance; the appeals process to the Federal Court of Appeals, the recovery of penalties and other amounts, and the rules regarding violations are the purview of [sections 27 - 33][12], including *vicarious liability* where an employer may be liable for violations committed by their employee during the course of

their employment; general provisions regarding judicial powers, rules of procedure, evidence, publication and enforcement are dealt with in [sections 34 - 40][12].

Notice and issuance of an **Injunction** is outlined in [section 41][12], whilst matters relating to **Offenses** are articulated in [section 42 - 46][12]. These include offenses resulting from non-compliance [section 42][12] with respect to refusal or failure to comply with either a preservation demand [section 15][12], presentation notification [section 17][12], and/or a warrant issued as per [section 19(4)][12]; obstruction and falsification of information [section 43]; implicit and vicarious liability of directors and officers of corporations and employers in general [sections 44 & 45][12]; with the monetary details for offenses detailed in [section 46][12].

With regards to actual litigation and the **Private Right of Action** [sections 47 - 49][12] deal with the application process; [sections 50 - 51][12] provide details for the court hearing and their respective orders; and [sections 52 - 55][12] describe the rules about contraventions and re-viewable conduct. The remaining sections details statutory regulations, as well as parliamentary and ministerial roles and responsibilities. Where [sections 56 - 61][12] described the process for the **Consultation and Disclosure of Information**, be it by an organization [section 56 - 57][12]; by a Commission [sections 58 - 59][12]; by the government of a foreign state [section 60][12]; and the reports to the Ministry of Industry [section 61][12].

The Canadian Anti-Spam Law [12] is arguably one of the most stringent in the world and should conceivably have a significant impact on reducing spam, in that it constitutes specific legislation with a targeted purpose [section 3][12], as opposed to a fragmented, piecemeal collection of a limited amount of provisions [8], [9] which are secondary to the aims of the statutes within which they are contained [1], [2], [10], [11] as is the case within the Republic.

### 3 Advise Kate on the following: [25]

- 3.1 Whether the requirements of an electronic signature have been met by clicking on the icon “submit order”. (10)
- 3.2 Does South African law recognize this type of transaction, and what are the legal implications thereof? (10)
- 3.3 Can she cancel the contract? (5)

### 4 Discuss the following questions regarding the term permanent establishment (PE): [25]

#### 4.1 Describe what the term PE means. (5)

A **permanent establishment (PE)** is a fixed place of business through which the business of an enterprise is wholly or partially carried on, [article 5(1)][17], generally giving rise to income or value added tax (VAT) liability [article 7(1)][17] in a particular jurisdiction resulting from the bilateral tax treaties negotiated for the treatment of cross-border commerce. A (PE) is created in terms of a **Double Taxation Agreement (DTA)**, falling under the ambit of legislation to be administered by an authorized person or commissioner as described in [schedule 1][18], and details the requirements a non-resident enterprise must meet under which profits generated through commercial activities in a foreign state may subsequently be taxed in said foreign state. As per the provisions of [section 1][19], which directly refers to [article 5(2)][17], examples of a (PE) include: a place of management; a branch; an office; a factory; a workshop;

a mine, an oil or gas well, a quarry or any other place of extraction of natural resources; while a number of exclusions are detailed in [article 5(4)][17]. A (PE) must satisfy the following prerequisites:

- **place-of-business test** - there must necessarily exist a distinct premises, equipment or machinery,
- **permanence test** - this must be established for a minimum prescribed duration, twelve months with respect to a building site or construction or installation project, [article 5(3)][17], and
- **business-activities test** lastly personally of the enterprise or agents on their behalf, must conduct business activities at said place.

#### 4.2 Explain whether the following constitutes a PE on the Internet: a website; a server; a dependent agent. Refer to authoritative sources. (20)

Adopting an antiquated view one may traditionally describe a **website** as a collection of software and electronic data messages or constructs of electronic data, as per [section 1][1]. From such a description one ‘could’ argue that a website is intangible and as such cannot alone constitute a *place of business* and thus failing to qualify as a (PE) [paragraph 124][17]. Whereas on the other hand, a **server** through which the website is stored and accessible is a piece of machinery or equipment having a physical location and may thus constitute a *fixed place of business* as per the commentary to article 5 [paragraph 123][17], and in turn a (PE).

Further distinction is required between the enterprises operating the server and those that carry on business through the websites hosted on said servers. Should an enterprise operating a website, also have at its own disposal<sup>2</sup>, use and operation of the server hosting said website, then pending the other requirements the place where that server is located could constitute a (PE) [paragraph 124][17], provided it is fixed in that location for a sufficient period of time [paragraph 125][17].

In addition to the already mentioned reservations in establishing whether an enterprise operating a website and/or server constitute a (PE), one must also consider whether:

- the business of an enterprise is wholly or partially carried on through such equipment needs to be examined on a case-by-case basis, [paragraph 126][17],
- the computer equipment is automated and that no personnel of that enterprise are required at the location [section 127][17],
- no (PE) may exist where the computer equipment provides preparatory or auxiliary services, for example the advertising goods and services, supplying information, [paragraph 128][17], unless these activities are themselves essential and significant core functions of the enterprise [129][17],

During the course of 2015, OECD<sup>3</sup> published the final version of their BEPS<sup>4</sup> Project [20], with the aim of addressing tax avoidance strategies that exploit the use of commissionaire arrangements to avoid [article 5(5)][17], and reliance of specific activity exemptions [article 5(4)][17]. As per the provisions of [article 5(5)][17] a person acting on behalf of a foreign enterprise, then that enterprise shall be deemed to be a (PE) within a Contracting State, despite not necessarily having a ‘*fixed place-of-business*’, provided said person has and habitually exercises authority to conclude contracts, or plays the principle role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, in respect of activities undertaken for that enterprise [paragraph 31][20]. Such a person constitutes a **dependent agent** and in such a capacity a dependent agent can indeed constitute a (PE), [21].

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<sup>2</sup>Through ownership or lease agreement.

<sup>3</sup>Organization for Economic Co-operation and Development

<sup>4</sup>G20 Base Erosion and Profit Shifting

## References

- [1] Electronic Communications and Transactions Act No. 25, 2002.
- [2] Electronic Communications and Transactions Amendment Bill, 2012.
- [3] Copyright Act No. 98, 1978.
- [4] Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994.
- [5] Directive 2000/31/EC of the European Parliament and of the Council, 2000.
- [6] Berne Convention for the Protection of Literary and Artistic Works, 1886.
- [7] WIPO Copyright Treaty, 1996.
- [8] B. Hermann and S. Papadopoulos, “Direct marketing and spam via electronic communicaitons: An analysis of the regulatory framework in south africa,” *De Jure*, vol. 1, no. 47, p. 42, 2014.
- [9] S. Tladi, “The regulation of unsolicited commercial communications (spam): Is the opt-out mechanism effective?” *South African Law Journal*, vol. 125, no. 1, 172–192, 2008.
- [10] Consumer Protection Act No. 68, 2008.
- [11] Protection of Personal Information Act No. 4, 2013.
- [12] Canadian Anti-Spam Legislation, (S.C. 2010, c. 23).
- [13] Canadian Radio-Television and Telecommunications Commission Act, (R.S.C. 1985, c. C-22).
- [14] Canadian Competition Act, (R.S.C. 1985, c. C-34).
- [15] Canadian Personal Information Protection and Electronic Documents Act, (S.C. 2000, c. 5).
- [16] Canadian Telecommunications Act, (S.C. 1993, c. 38).
- [17] OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*. Organisation for Economic Co-operation and Development, 2017. DOI: [https://doi.org/https://doi.org/10.1787/mtc\\_cond-2017-en](https://doi.org/https://doi.org/10.1787/mtc_cond-2017-en).
- [18] South African Revenue Service Act No. 34, 1997.
- [19] Income Tax Act No. 58, 1962.
- [20] OECD, *Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7 - 2015 Final Report*. 2015, vol. OECD/G20 Base Erosion and Profit Shifting Project. DOI: <https://doi.org/https://doi.org/10.1787/9789264241220-en>.
- [21] OECD, “Additional Guidance on the Attribution of Profits to Permanent Estrablishments, BEPS ACction 7,” vol. OECD/G20 Base Erosion and Profit Shifting Project, 2018.