IPSP078 - Legal Aspects of Electronic Commerce

Portfolio Exam: 691859

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NOTE

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[1] 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 a Paris Convention Member State the provisions of [article 9(1)][3], [section 5][4] [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. Moreover as per the provisions of [section 1(1)][4] 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)][4] provided Ofentse can demonstrate that his database is indeed original, and as per [section 2(2)][4] that the database can be recorded in digital data. Furthermore copyright shall be conferred to the database if Ofentse can demonstrate that he meets the *'inherent'* and *'formal'* or *'statutory'* requirements for copyright to subsist in his work.

- Inherent Requirements
  - The requirement of material embodiment is clearly satisfied as the work exists in material, albeit electronic form.
  - As per [article 9(2)][3] and [article 2][7], it can be argued that the database is a *'particular form of expression of thought'*, thus satisfying the requirement of originality.
- Formal Requirements
  - It is implied that he is either a citizen of, or domiciled in, or a permanent resident of [section 3(1)(a)][4], a Berne Convention country [section 3, section 37][6], meaning that he was a **qualified person** at the time of creation of the work and thus making him the author.
  - Moreover it is implied that the work was first made in South Africa, [section 4][4], and therefore meets the statutory requirements for the subsistence of copyright in the work.

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. Moreover as per the provisions of [sections 50 & 51][1] together with [section 26][2], acting as a data controller, all electronic requests, collection, collation, processing, storage or disclosure of any personal information of their 'prospective clients' is prohibited with the clients' express written consent.

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 regrading 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 spa in that jurisdiction, 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 statues within which they are contained [1], [2], [10], [11] as is the case with the instruments 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)

As per the provisions of [section 1][1] together with [section 1(q)(b)][2], the act of clicking the "Submit Order" icon will constitute the generation of a **'data message'** in that it is a form of electronic communication stored as a record. In the matter *Spring Forest Trading v Wilberry (Pty) Ltd t/a Ecowash Combined Motor Holdings Limited (725/13) [2014] ZASCA 178* [17], which was an appeal concerning a series of emails purporting to the consensual cancellation of the written agreements between the parties. Stipulated within those written agreements was that 'consensual cancellation' to be effected **in writing and signed by both parties**. As per the provisions of [sections 11, 12 and 13][1], statutory regulations of the Republic afford legal recognition to transactions concluded electronically via email. The SCA[2] was required to consider whether the dispute arising from the exchange of emails between the parties, did indeed satisfy the **writing** [section 12][1] and **signature** [section 13][1] requirements, thereby constituting legal consensual cancellation.

The SCA held that the stipulations for the requirement of an 'advanced electronic signature' [section 13(1)][1] did not apply to the circumstances of this case, whereas however the less restrictive requirements of an 'electronic signature' [section 13(3)][1] do indeed apply. Wherein it need only be demonstrated that the requirement is indeed met if a method of electronic signature used to identify a party and indicate their approval of the contained information [section 13(3)(a)][1], and that the method was indeed 'appropriately reliable' for the intended purposes of the information communicated [section 13(3)(b)][1]. In the SCA's analysis of [section 13(3)][1], Justice Cachali argued [paragraph 19][17]:

> *'The respondent submits that the phrase: "Where the signature of a person is required by law" (emphasis added) in s 13(1) it should be interpreted not only to include formalities required by statute but must also incorporate instances where parties to an agreement impose their own formalities on a contract, as in this case. And, so the contention goes, because the parties required their signatures for the contracts to be cancelled the requirement could only be satisfied by the use of an advanced electronic signature as contemplated in s 13(1), which did not occur in this case.'*

The SCA ordered that the appeal be upheld with costs, and that the order of the HC be set aside and dismissed with costs [paragraph 32][17]. Similarly as per the provisions of [section 13(3)][1] there did indeed exist a method to identify Kate and to indicate her approval of the information communicated: during the procurement process she'd read the retailer's terms and conditions, and she *'must'*[3] have been logged in to her uniquely registered profile. Moreover that this was as reliable as was appropriate for those purposes. Therefore one can conclude that the requirements for an electronic signature have indeed been met by clicking the 'Submit Order' icon.

3.2 Does South African law recognize this type of transaction, and what are the legal implications thereof? (10)

Within the ambit of American case law in the matter *Register.com, Inc. v. Verio, Inc*, [18], the court described a click-wrap license with respect to software installation and/or usage, even though the license in questions was distinguished from a click-wrap license where Judge Pierre N. Leval pointed out that:

> *'Essentially, under a click-wrap agreement licensees are presented with the proposed license terms and forced to expressly and unambiguously manifest either assent or rejection prior to being given access to the product.'*

[2] Supreme Court of Appeals.

[3] This is a reasonable assumption considering the manner in which online retailers conduct their enterprises.

As per the provisions of [section 11][1] together with those of [section 8][2] data messages enjoy legal recognition. In addition, as per the provisions of [section 22(1)][1] an agreement is not without legal force and effect merely because it was concluded either partially or in whole through data messages. Moreover as per the provisions of [section 24][1], clicking 'Submit Order' constitutes and expression of intent or other statement that is legally enforceable in that it is in the form of a data message or other electronic means from which one's intentions or other statements can be inferred. Lastly, as per the provisions of [section 26][1] acknowledgment of receipt of a data massage is not a prerequisite to establish legal effect of that message. It can therefore reasonably be argued that these type of transactions are indeed recognized in South African law.

Referring again to the matter heard in [17], the SCA held that courts seek to determine whether the method of signature used fulfills the function of a signature which is to authenticate the identity of a signatory and to appropriately validate it's authenticity, rather than insisting on the form a signature may assume. The judgment held that the approach of courts has in general been pragmatic and not overly formal, citing a case [paragraph 148F-G][19] where the courts have accepted any mark made by a person attesting to a document [paragraph 25][17]:

> *'In the days before electronic communication, the courts were willing to accept any mark made by a person for the purpose of attesting a document, or identifying it as his act, to be a valid signature. They went even further and accepted a mark made by a magistrate for a witness, whose participation went only as far as symbolically touching the magistrate's pen.'*

The SCA held that the typed written names of the respective parties appearing at the foot of the emails in question, were indeed intended to identify the parties, amounted to data that was logically associated with data in the body of the emails, and thus constituting legal electronic signatures, [paragraph 29][17]:

> *'There is no dispute regarding the reliability of the emails, the accuracy of the information communicated or the identities of the persons who appended their names to the emails. On the contrary, as I have found earlier, the emails clearly and unambiguously evinced an intention by the parties to cancel their agreements. It ill-behoves the respondent, which responded to clear questions by email itself, to now rely on the non-variation clauses to escape the consequences of its commitments made at the meeting on 25 February 2013 which were later confirmed by email.'*

Given that the SCA upheld the appeal, finding that the email cancellation of the agreements in question was indeed valid, raises the important and difficult question of whether courts of the Republic would hold a similar view in terms of an agreement canceled via other electronic instant text messaging platforms and social media, such as SMS[4], WhatsApp, FaceBook status updates, Twitter, etc...

3.3 Can she cancel the contract? (5)

As per the provisions of [section 44(1)(a)][1] Kate is entitled to cancel without reason nor penalty any transaction for the supply of goods within seven days after the date of receipt of said goods. Additionally as per the provisions of [section 20(1)][10] Kate has the right to return *defective* goods, or as per [sections 19(5) and 20(2)(b)][10] Kate has the right to return goods which she did not have a reasonable opportunity to inspect before delivery and was effectively denied the right to choose or examine the goods as per [section 18][10]. Moreover she is entitled to a full refund [section 44(3)][1] and [section 20(5)][10], only being liable for direct costs of returning the software as per the stipulations of [section 44(2)][1] and [section 20(6)][10].

As per the definitions of [section 53(1)(a)][10], Kate may argue that the software is **'defective'** in that its performance is less than acceptable, useful or practicabl,e than persons generally would be reasonably

[4]Short Message Services.

entitled to expect in the circumstances. Moreover that the deployment of the software on her machine could constitute **'failure'** [section 53(1)(b)][10], from the inability of said software to perform in the intended manner or to the intended effect. Additionally as per the provisions of [section 55(2)][10] Kate has the right to assume that the software was of good quality, reasonably suitable for the purposes for which it was intended, in working order and free of any defects.

With regards to when Kate can return the goods to the supplier for a refund, it is interesting to note the discrepancy with regards to the **'cooling-off period**' which is stipulated as **seven days** in the ECT[5] [section 44(1)(b)][1] and **six months** in the CPA[6] [section 56(2)][10], which also stipulates provisions for the repair of defective goods. Kate would be strongly advised to cancel the contract within 7 days.

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)][20], generally giving rise to income or VAT[7] liability [article 7(1)][20] 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 DTA[8], falling under the ambit of legislation to be administered by an authorized person or commissioner as described in [schedule 1][21], and details the requirements a non-resident enterprise must meet under which profits generated through commercial actives in a foreign state may subsequently be taxed in said foreign state. As per the provisions of [section 1][22], which directly refers to [article 5(2)][20], 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)][20]. 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)][20], 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][20]. 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][20], and in turn a PE.

[5]Electronic Communications and Transactions Act No. 25 of 2002.
[6]Consumer Protection Act No. 68 of 2008.
[7]Value added tax.
[8]Double taxation agreement.

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[9], 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][20], provided it is fixed in that location for a sufficient period of time [paragraph 125][20].

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, [paragraphs 126 and 130][20],
- the computer equipment is automated and that no personnel of that enterprise are required at the location [section 127][20],
- no PE may exist where the computer equipment provides preparatory or auxiliary services, for example the advertising goods and services, supplying information, [paragraph 128][20], unless these activities are themselves essential and significant core functions of said enterprise [129][20],
- as per the provisions of [paragraph 131][20] ISPs[10] cannot constitute dependent agents as they do not have the authority to conclude -at least not regularly- contracts on behalf of enterprises, or they constitute independent agents and as such a PE may never arise in the case of ISPs,
- as per the provisions of [article 3][20] a website cannot constitute a dependent agent as it is not itself a person.

During the course of 2015, OECD[11] published the final version of their BEPS[12] Project [23], with the aim of addressing tax avoidance strategies that exploit the use of commissionaire arrangements to avoid [article 5(5)][20], and reliance of specific activity exemptions [article 5(4)][20]. As per the provisions of [article 5(5)][20] 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][23]. Such a person constitutes a **dependent agent** and in such a capacity a dependent agent can indeed constitute a PE, [24].

References

[1] Electronic Communications and Transactions Act No. 25, 2002.

[2] Electronic Communications and Transactions Amendment Bill, 2012.

[3] Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994.

[4] Copyright Act No. 98, 1978.

[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.

[9] Through ownership or lease agreement.
[10] Internet service providers.
[11] Organization for Economic Co-operation and Development
[12] G20 Base Erosion and Profit Shifting

[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] *Spring Forest Trading v Wilberry (Pty) Ltd t/a Ecowash Combined Motor Holdings Limited (725/13) [2014] ZASCA 178*, KwaZulu-Natal Local Divsion, 2015 2 SA 118 (SCA).

[18] *Register.com, Inc. v. Verio, Inc*, (2d Cir. 2004) 356 F.3d 393.

[19] *Putter v Provincial Insurance Co Ltd & another*, 1963 (3) SA 145 (W).

[20] 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.

[21] South African Revenue Service Act No. 34, 1997.

[22] Income Tax Act No. 58, 1962.

[23] 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.

[24] OECD, "Additional Guidance on the Attribution of Profits to Permanent Estrablishments, BEPS ACction 7," vol. OECD/G20 Base Erosion and Profit Shifting Project, 2018.