# THE SOUTH AFRICAN CONSITUTION AND ELECTRONIC COMMERCE

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ABSTRACT

In the world of electronic commerce individuals unwittingly impart their information to possible predators of personal information. For example, cookies are used to "tag" users accessing a specific web site. When the user accesses the same site again, a copy of the cookie alerts the remote server, who then knows whom the user is and that s/he visited the site before. Obtaining and dealing in data about web users have become everyday occurrences – in some instances such "data mining" forms the main focus of several businesses.

It is common cause that the Internet may be and indeed is used quite frequently in manners that infringe various rights contained in our Bill of Rights. In many cases, what happens on the Internet may also attract criminal liability. As a result it often happens that two fundamental rights, namely the right to freedom of expression and the right to privacy, come into potential conflict.

In a democracy, freedom of expression is almost taken for granted. The press and other media, especially, rely heavily on this right. In South Africa, section 16(1) of the Constitution guarantees the right to freedom of expression, which includes, among others, freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; academic freedom and freedom of scientific research. As such, it may be that spammers have the constitutional right to commercial expression. The question is: Do spammers have the right to express themselves in private property? It is suggested that they be only allowed to do so after having obtained the consent of the individual to be included in a mailing list that would be used to send unsolicited e-mail advertising. Section 45 of the Electronic Communications Transactions Act of 2002 (ECTA) now prohibits the sending of unsolicited goods, services or communications.

The right to privacy is protected by section 14 of the South African Constitution. In contrast thereto, section 32 of the Constitution guarantees the right to access to information. Neither of these rights are absolute rights, as they may be limited in accordance with section 36 of the Constitution.

The ECTA prescribes that suppliers of goods on the Internet need to, amongst others, make its privacy statement available to users of its site. The ensuring of the right to privacy is not, however, a compulsory provision of ECTA. Section 50 of the ECTA provides for the voluntary compliance of the principles pertaining to the collection of personal information as set out in section 51 of the Act.

Against this background, this paper addresses the South African legal background to privacy on the Internet.

KEY WORDS

Right to freedom of Expression - Right to privacy – limitation of fundamental rights – Spamming - Electronic Communications Transactions Act

# THE SOUTH AFRICAN CONSITUTION AND ELECTRONIC COMMERCE

## 1. INTRODUCTION

When considering several of the methods employed in electronic commerce conducted via the Internet, e.g. the use of spam[1] and cookies[2], two potentially conflicting fundamental rights contained in the Bill of Rights of the South African Constitution[3] come into play, namely, the right to freedom of expression, and the right to privacy.

Spamming has been defined as "the bulk sending of unsolicited e-mail advertisements to huge numbers of Internet users"[4]. It may be argued that spammers have the constitutional right to commercial expression[5]. The question is: Do spammers have the right to express themselves in private property? The same question may be posed regarding the use of cookies, data mining, etc.

In certain instances the fundamental rights contained in the Bill of Rights may be limited in accordance with the so-called "limitations clause" - section 36 of the Constitution. In what follows, the limitations clause will firstly be examined, after which the rights to privacy and freedom of expression, and in particular the circumstances relating to their limitation, will be analysed. In the second part of this paper, the provisions of the ECTA as being a "law of general application" in terms of Section 36 will be discussed in detail.

## 2. SECTION 36 – THE LIMITATIONS CLAUSE

Section 36 of the Constitution, the so-called "limitations clause", specifically allows a limitation of a fundamental right in certain circumstances. The section states that the rights in the Bill of Rights may be limited only in terms of a law of general application, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom[6]. In order to determine whether this is so, one should further take into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose[7].

## 3. SECTION 36 THROUGH THE CASES

In considering the constitutionality of the death penalty, the Constitutional Court in S *v Makwanyane*[8] formulated certain guidelines concerning the application of the general limitations clause[9] in the interim Constitution[10]. It was pointed out that the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society is ultimately an assessment based on proportionality. This in turn calls for the weighing up of the purposes, effects and importance of the infringing legislation against the nature and effect of the infringement caused by the legislation. The more severe the

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3 *Constitution of the Republic of South Africa* Act 108 of 1996 (**"the Constitution"**).
4 Buys (Ed). 2000. *Cyberlaw @ SA: The Law of the Internet in South Africa* 381.
5 Section 16(1) of the Constitution. The issue regarding the substantive content of any spam will not be addressed here.
6 Section 36(1).
7 Section 36(1)(a)-(e).
8 1995 3 SA 391 (CC).
9 *S v Makwanyane* (op.cit.) para 104
10 The Constitution of the Republic of South Africa Act 200 of 1993 herein referred to as "the Interim Constitution".

limitation/s of a fundamental right, the more compelling the reasons for its justification should be[11].

In *Makwanyane* the court weighed up the rights to life, to human dignity and to freedom from inhuman or degrading punishment against the purposes of the death penalty, viz. as a deterrent to violent crime and its recurrence and as a fitting retribution for such crimes[12]. The court found that, given the drastic effects of the death penalty, a far less restrictive means of achieving the same purpose, namely life imprisonment, should be preferred[13].

The balancing approach formulated in *Makwanyane* was subsequently applied in several cases. In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*[14] the Constitutional Court was asked to adjudicate upon the constitutionality of various statutory prohibitions concerning sodomy[15]. After finding that the criminalisation of sodomy infringed the right to privacy in section 14 of the Constitution[16], the Court enquired whether such infringement of the right to privacy could be justified in terms of s 36 of the Constitution. It was held that such limitation was unjustifiable as it was a *severe* limitation of the right[17], the limitation itself served no valid purpose[18], and furthermore, an analysis of the jurisprudence of other open and democratic societies based on human dignity, equality and freedom on balance supported the conclusion that the criminalisation of sodomy was unjustifiable[19].

In *S v Manamela* the reverse onus provision of the *General Law Amendment Act*[20] was weighed up against the right of arrested, detained and accused persons to remain silent[21]. It was held that the effective prosecution of crime was a societal objective of great significance which could, where appropriate, justify the infringement of fundamental rights[22], and that it outweighed the right to silence in this instance[23].

Ultimately therefore, the purpose of any given law will be weighed up against the importance of the fundamental right that it stands to infringe.

## 4. RIGHT TO PRIVACY

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[11] See *S v Bhulwana* 1996 1 SA 388 (CC) para 18. See also *S v Manamela and Another (Director-General of Justice intervening)* 2000 3 SA 1 (CC) para 32.
[12] *S v Makwanyane* (op.cit.) para 117 and para 185.
[13] *S v Makwanyane* (op.cit.) para 128. See also para 184 in which Didcott J questions the deterrent effect of the death penalty.
[14] 1999 1 SA 6 (CC).
[15] Viz. section 20A of the *Sexual Offences Act* 23 of 1957; the inclusion of sodomy as an item in Schedule 1 to the *Criminal Procedure Act* 51 of 1977 and the inclusion of sodomy as an item in the Schedule to the *Security Officers Act* 92 of 1987.
[16] *National Coalition for Gay and Lesbian Equality* (op.cit.) para 32.
[17] *Ibid* para 36.
[18] *Ibid* para 37.
[19] *Ibid* para 39 read with para 57.
[20] Act 62 of 1955, section 5. This section provided for an accused to prove that she or he had reasonable cause for believing that goods acquired or received were the property of the person from whom they were received or that such person had the authority of the owner to dispose of them.
[21] S 35(1)(a) of the Constitution.
[22] *S v Manamela* (op.cit.) para 27.
[23] *Ibid* para 38 where it was held that "there was nothing unreasonable, oppressive or unduly intrusive in asking an accused who had already been shown to be in possession of stolen goods, acquired otherwise than at a public sale, to produce the requisite evidence, namely that she or he had reasonable cause for believing that the goods were acquired from the owner or from some other person who had the authority of the owner to dispose of them."

## 4.1 INTRODUCTION

Section 14 of the Constitution states that everyone has the right to privacy, which shall include the right not to have their person or home searched; their property searched; their possessions seized; or the privacy of their communications infringed[24]. It is said that section 14 protects *information* to the extent that it limits the ability to gain, publish, disclose or use information about others[25].

## 4.2 RIGHT TO PRIVACY THROUGH THE CASES

That a high premium was to be placed on the right to privacy in the new South Africa became clear soon after the Interim Constitution was adopted. Ackerman J analysed and discussed the concept of personal privacy in the Constitutional Court case of *Bernstein v Bester*[26], and stated that a very high level of protection should be given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions, and that there was a final untouchable sphere of human freedom that was beyond any interference from any public authority.

In a subsequent case[27], Langa DP elaborated on the above by clearly stating that the right to privacy does not relate solely to the individual within his or her intimate sphere:

> "[W] hen people are in their offices, in their cars or on mobile telephones, they still retain a right to be left alone by the State unless certain conditions are satisfied. Wherever a person has the ability to decide what he or she wishes to disclose to the public and the expectation that such a decision will be respected is reasonable, the right to privacy will come into play."

In *Case v Minister of Safety and Security*[28] the accused successfully challenged the constitutionality of statutory charges relating to the possession of pornography[29]. The Constitutional Court held that any ban imposed on the possession of erotic material kept within the privacy of one's home invaded the personal privacy guaranteed by the (interim) Constitution[30].

It is important to note, however, that like most other fundamental rights, the right to privacy is not absolute. While stressing the importance of the right to privacy, the Constitutional Court in the *Case* matter also stated that "the protection accorded to the right of privacy is broad but it can also be limited in appropriate circumstances"[31], and that the scope of a person's privacy should extend only to those areas where he/she would have a *legitimate expectation* of privacy[32].

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[24] Section 14(d).
[25] McQuoid-Mason. 1998. *Constitutional Law of South Africa* "Privacy" 18.
[26] *Bernstein op.cit.*
[27] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 1 SA 545 (CC).
[28] *Case and Another v Minister of Safety and Security and Others* 1996 3 SA 617 (CC); *Curtis v Minister of Safety and Security and Others* 1996 3 SA 617 (CC).
[29] Viz. the prohibition on the possession of indecent or obscene photographic matter in terms of s 2(1) of the *Indecent or Obscene Photographic Matter Act* 37 of 1967. In para 91 of *Case* (op.cit.) Didcott J held "What erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine. It certainly is not the business of society or the State. Any ban imposed on my possession of such material for that solitary purpose invades the personal privacy which section 13 of the Interim Constitution…guarantees that I shall enjoy."
[30] *Case* (Op. cit) para 91.
[31] Madala J in *Case op.cit.* para 106.
[32] *Bernstein op. cit* para 75.

It has been pointed out that a "legitimate expectation of privacy" will be that which society recognises as an objectively reasonable expectation of privacy[33]. This in turn means that a person cannot complain about an invasion of privacy if he/she has consented to having his/her privacy invaded, which consent may be express or implied.

In the *Bernstein* case supra, Ackerman J in his analysis of the *continuum* on which the legitimacy of an expectation of having one's privacy respected may fall, noted that "[t]his inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual's activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation."[34]

## 5. THE RIGHT TO FREEDOM OF EXPRESSION

### 5.1 INTRODUCTION

In a democracy, freedom of expression is almost taken for granted. The press and other media, especially, rely heavily on this right. Section 16 of the Constitution provides that everyone has the right to freedom of expression, which includes freedom of the press and other media[35] and freedom to receive or impart information or ideas[36].

As is the case with almost all the rights enumerated in the Bill of Rights, the right to freedom of expression is not absolute. Section 36 of the Constitution[37] sets out the circumstances under which a fundamental right may be limited. In addition, section 16 contains its own restrictions[38], which provide that the right to freedom of expression does *not* protect the following: Propaganda for war; incitement for imminent violence; or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. (These relate to the *content* of an expression, and are therefore beyond the scope of this paper.) Suffice it to say that these forms of expression can be limited even without adhering to Section 36[39].

### 5.2 CONSTITUTIONAL PROTECTION FOR SPAMMING?

It is common cause that spam can be regarded as a subspecies of advertising, and as such, should be regarded as commercial expression[40], which, in turn, attracts the protection afforded by Section 16(1)(b) of the Constitution. The next logical question relates to how far this protection would extend. Would spammers, for example, have the right to express themselves on private property without the consent of the owner?

To date, no court case dealing directly with this issue has been decided in South Africa. However, it is submitted that two recent decisions by our High Courts relating to the Constitutional protection of the (unauthorised) erection of billboards may be very illuminating, as both examined the question about the extent of protection accorded to *commercial* expression.

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[33] De Waal *et al*. 1998. *The Bill of Rights Handbook* 212.
[34] *Bernstein* (op.cit.) para 77.
[35] Section 16 (1)(a).
[36] Section 16(1)(b). The right to freedom of expression also contains the right to freedom of artistic creativity (Section 16(1)(c)) and to academic freedom and freedom of scientific research (Section 16(1)(d)).
[37] See paragraphs 2 and 3 above.
[38] Section 16(2).
[39] Rautenbach & Malherbe. 1996. *Constitutional Law* Johannesburg: Butterworths.
[40] De Waal at 243 defines commercial expression as "…expression proposing a commercial transaction. The most obvious example is advertising."

In *North Central Local Council and South Central Local Council v Roundabout Outdoor (Pty) Ltd and Others*[41], Kondile J made it clear that advertising is a form of commercial speech, and furthermore, that commercial speech itself is an entrenched right in terms of the Constitution[42]. However, it was further stated that there are elements of a right that constitute its core values and others that are at the periphery of protection (and are therefore accorded lesser protection.) Most commercial speech, the court found, is regarded as of peripheral value[43].

The learned Judge then proceeded to a Section 36 analysis of the facts in which the aim of the infringing legislation (namely to achieve the objective of traffic safety and to improve and preserve the appearance of the city) was weighed against the right to freely erect billboards as protected by the right to freedom of expression. It was found that the limitation of the right was indeed reasonable and justified.

In contrast to the above ruling, the Cape Provincial Division in *City of Cape Town v Ad Outpost (Pty) Ltd and Others*[44] found that a similar municipal by-law absolutely prohibiting the erection of billboards within certain areas was unconstitutional. Davis J furthermore cautioned against the "…tendency to conclude uncritically that commercial expression bears less constitutional recognition than political or artistic speech…[45]"

In the Section 36 analysis the Court stated that the desired result of the by-law could have been achieved by means less damaging to the right in question – even if commercial expression is to be considered to carry less weight than other forms of expression[46].

The difference in conclusions reached by these two High Courts may be explained by the fact that the relevant by-law in *Ad Outpost* constituted a <u>complete</u> prohibition of commercial speech (in the form of outdoor advertising), while the by-law in *Roundabout* offered at least the possibility of permission being granted for the erection of an outdoor advertisement[47]. Nevertheless, the issue as to the status of commercial expression (and by implication, of spamming) remains unclear.

Against this background the provisions of the ECTA may now be examined.

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[41] 2002(2) SA 625 (D & CLD).
[42] Ibid at 633 D.
[43] Ibid at 634 C – E; 635 A - B.
[44] 2000 (2) SA 733.
[45] Ibid at 749 D.
[46] Ibid at 750 J – 751 A.
[47] *North Central Local Council and South Central Local Council v Roundabout Outdoor (Pty) Ltd and Others* (op. cit) at 635 D – E.

## 6. ELECTRONIC COMMUNICATIONS AND TRANSACTIONS ACT

### 6.1 INTRODUCTION

The Electronic Communications and Transactions Act[48] was assented to on 31 July 2002 and it entered into force on 30 August 2002[49]. The ECTA repealed and replaces the Computer Evidence Act[50].

Some of the objects of the ECTA are to[51]:

(a) Remove and prevent barriers to electronic communications and transactions in South Africa;
(b) Promote legal certainty and confidence in respect of electronic communications and transactions;
(c) Ensure that electronic transactions in South Africa conform to the highest international standards; and
(d) Develop a safe, secure and effective environment for the consumer, business and Government to conduct and use electronic transactions.

This section of the paper focuses on the salient provisions of the ECTA as provided for in Chapters VII[52] and VIII[53] thereof.

### 6.2 GENERAL PROVISIONS

It is important to note that the ECTA must be interpreted in such a manner as not to exclude any statutory provisions nor the common law[54].

### 6.3 CONSUMER PROTECTION

#### 6.3.1 INTRODUCTORY REMARKS

Part VII of the ECTA provides for the protection of consumers[55] that enter into electronic transactions. This part also deals with the receipt of unsolicited goods, services or communications.

It is interesting to note that the legislature confers the rights of protection as set out in this Part VII of the ECTA to all agreements entered into, irrespective of the legal system applicable to an agreement[56]. This provision ensures that a supplier cannot state that the agreement concluded electronically is governed by, for example, a legal system that places lesser obligations on the supplier. In addition hereto, section 49 provides that any provision that excludes the rights provided to consumers will be null and void.

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[48] Act No. 25 of 2002 (hereinafter "ECTA").
[49] Proc R66 in *Government Gazette* 23809 of 30 August 2002.
[50] Act No. 57 of 1983.
[51] Section 2.
[52] Consumer Protection.
[53] Protection of Personal Information.
[54] Section 3.
[55] Defined in section 1 as "any natural person who enters or intends entering into an electronic transaction with a supplier as the end user of the goods or services offered by that supplier".
[56] Section 47.

### 6.3.2 CONCLUDING TRANSACTIONS ON THE WEB

Any supplier that wants to offer goods or services for sale, for hire or exchange on the Internet must provide certain information to consumers in the goods or services so offered. The following, amongst others, are required to be provided[57]:

(a) the full name and legal status of the supplier[58];
(b) full contact details[59];
(c) full description of the goods or services;
(d) full price of the goods (inclusive of transport costs, taxes, etc)[60];
(e) terms of the agreement (including guarantees, the refund or exchange policy);
(f) security procedures and privacy policy of the supplier in respect of payment, payment information and personal information of the consumer; and
(g) reference to the cooling off period.

Section 44 provides an automatic right to cool off to consumers. In the event of an agreement to supply goods, the consumer may cancel the agreement within seven (7) days of receipt of such goods or in terms of an agreement to supply services; same may be cancelled within seven (7) days of having concluded the agreement. It should also be noted that this right to cool off also relates to all related credit agreements for the supply of the goods or services[61]. The only costs that may be recovered from the consumer are the direct costs related to returning the goods.

On the other hand, section 43(3) provides that a consumer may cancel an agreement within 14 days after having received the goods or services in the event that the supplier does not provide the required information or not allowing a consumer to review the electronic transaction, correct mistakes and to allow the consumer to withdraw from the transaction before it being completed.

There is also an obligation on suppliers to ensure a safe payment system being in place. Failing to provide this, could result in any damages suffered by the consumer being claimed back from the supplier[62].

It should, however, be borne in mind that the right to cool off does not relate to the following transactions[63]:

(a) financial services;
(b) auctions;
(c) supply of foodstuffs intended for everyday use at home;
(d) where the price for the supply of the goods are services are dependent on price fluctuations beyond the suppliers' control;
(e) goods that were made for the consumer, where the nature of the goods dictate that they cannot be returned or in the case of goods that are likely to deteriorate or expire rapidly;
(f) where audio or video recordings or computer software were unsealed by the consumer;
(g) gambling or lottery services;
(h) sale of newspapers, periodicals, magazines and books; and

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[57] Section 43(1).
[58] In the case of a juristic person, the registration number, names of office bearers and place of registration (s 43(1)(f)).
[59] Physical address, telephone number, website address, e-mail address, *domicilium citandi et executandi* (ss43(1)(b); (c) & (g).
[60] Section 43(1)(i).
[61] Section 44(2).
[62] Section 43(5) & (6).
[63] Section 42(2).

(i) the provision of accommodation, transport, catering or leisure services and where the supplier undertakes to provide these services on a specific date or within specific period when the agreement is concluded.

## 6.4 UNSOLICITED GOODS, SERVICES AND COMMUNICATIONS

### 6.4.1 SPAMMING DEFINED

Spam may be defined as any form of unsolicited e-mail that is received. In its purist form, this definition could thus also include e-mails that are received from, for example family and friends, without having solicited the e-mail from the sender. However, such receipt of unsolicited e-mails is not the problem that is encountered by unsuspecting Internet users. Generaly, spamming refers to include amongst others[64]:

- Chain letters
- Pyramid schemes (including Multilevel Marketing)
- Other "Get Rich Quick" or "make Money fast" schemes
- Offers of phone sex and advertisements for pornographic web sites
- Offers of software for collecting e-mail addresses and sending unsolicited commercial e-mail ("UCE")[65]
- Offers of bulk e-mailing services for sending UCE
- Stock offerings for unknown start-up corporations
- Quack health products and remedies
- Illegally pirated software ("warez")
- Mail bombs (i.e. flooding of mail box or mail system)

Windows-based pop ups are also now used by spammers. These are very annoying when they pop up whilst working[66].

### 6.4.2 WHAT ARE THE PROBLEMS WITH SPAMMING?

Spamming is very costly. However, the spammer does not carry the costs as these are ultimately borne by the end-user. These costs not only relate to the costs carried for access to the ISP, but a lot of time is wasted by having to wage through all unsolicited mail. In addition thereto, the network becomes slower[67], which also has a cost implication[68]. Moreover, bandwidth is also wasted by junk mail which may, in turn, lead to an increase in the costs to the end-user.

In order to circumvent filters, used by ISPs, spammers often resort to fraud, i.e. by stating something other than advertisement in the subject line. In addition thereto, the e-mail headers are often forged. In other cases spammers use an innocent third party's e-mail address to send their mail from, with a result that both the receiving and innocent relaying systems are flooded by unwanted e-mails.

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[64] http://www.cause.org/about/problem.shtml; http://internetprivacyfordummies.com/modules.php?op=modload&name;
[65] Unsolicited commercial e-mail, which is the biggest spamming problem (http://www.peterman.co.za/spam.html).
[66] These pop up windows must be distinguished from pop up windows on web sites. These are adverts, paid for by the vendor, which helps to sponsor the site that is being visited.
[67] http://www.cause.org/about/problem.shtml. For an Internet Service Provider ("ISP") time not only includes the processing time in their mail servers, but it also includes time spent on their CPUs, which slows down the other mail in their queues.
[68] It has been estimated that if all 400 million Internet users were to spend only one hour per month to clear their e-mail boxes from junk mail, it will take to 4.8 billion hours (or 2.5 million working years per annum) – http://www.peterman.co.za/spam.html

Spamming also has a huge annoyance factor. One may be waiting for urgent mail to come through and instead vast quantities of unsolicited e-mails arrive in your mail box. It takes time to sort through the wanted and the unwanted e-mails. Spamming slows down your system, which leads to further frustration.

More importantly, one's constitutional right to privacy is infringed upon. A person pays for her/his e-mail address and same ought not to be in the public domain. The situation therefore presents itself where one person's (the e-mail user's) right to privacy must be weighed against another's (the spammer's ) right to freedom of expression. From the aforegoing discussion of these fundamental rights[69], it is submitted that, should such a question ever be judicially scrutinized, precedence suggests that the right to privacy would be accorded the higher importance[70].

### 6.4.3 ETHICS OF SPAMMING[71]

It is unethical to spam. Not only is spamming based on fraud and deceit, it also shifts the costs attached to spamming to the consumer. It also slows down the performance of the Internet. Lastly, spamming is also considered to be very rude – i.e. it is not acceptable to send unsolicited e-mails to others.

### 6.4.4 SOUTH AFRICAN LEGAL POSITION ON SPAMMING

Section 45 of the ECTA does not prohibit spamming[72], but it places an obligation on a person that sends UCE to provide:

(a) a consumer with an option to cancel her/his subscription to the mailing list[73];
(b) identifying particulars from the source from which the person's particulars were obtained[74].

Failure to comply with the above may result, upon conviction, in a fine or imprisonment not exceeding 12 months[75]. Any person who continues sending unsolicited e-mails, after having been advised that same is not welcome, is also guilty of an offence. Upon conviction the same penalties as aforestated may be imposed[76]. In practice, this does not work, as an e-mail requesting the removal from an e-mail list is often used to confirm the recipient's e-mail address to which spammers then continue sending unsolicited e-mails.

UCE is not defined in the ECTA. However, it is submitted that Gereda's[77] interpretation is the correct one, i.e. spamming as a general nuisance is not prohibited by the ECTA, but only those e-mails that have as an end-goal some commercial gain. It is submitted that this lack by the legislature in addressing spamming as a general problem

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[69] Paragraphs 4 and 5 *supra*.
[70] Compare the importance placed by the Constitutional Court on privacy in the cases discussed under paragraph 4.2 above, to the lesser importance placed on the right to commercial expression by the High Court in *Roundabout* (op.cit).
[71] http://www.biz-community.com/AntiSpamPolicy.aspx; http://www.cause.org/about/problem.shtml;
[72] S Gereda. Sep. 2003 "The Truth about Spam" ***De Rebus*** 51 (hereinafter "Gereda") criticises G Ebersöhn's article in 2003 (July) ***De Rebus*** 25 in which he stated that 'section 45(3) provides that where A sends B an unsolicited message and fails to include an opt-out option in the message, he commits an offence. Gereda is of the opinion that some sort of commercial gain is necessary before one can state that there was a breach of the provisions of the ECTA.
[73] Section 45(1)(a).
[74] Section 45(1)(b).
[75] Section 45(3) read with section 89(1).
[76] Section 45(4).
[77] *Cf* note 23.

that needs to be curbed is regrettable, in that there is no penalty for spamming in its broader sense.

Furthermore, it is indeed ironic[78] that, despite its undesirability, a total prohibition on spam could violate the Constitutional right to freedom of expression[79] This does not, however, mean that there is absolutely no way of addressing spamming as a problem at, for example, the work place. As an employer one can prohibit spamming at the work place through policy, linked to the organisation's disciplinary code[80]. Internet users can also report spammers to their ISP, usually at the address abuse@.... The ISP will then investigate the complaint and remove the spammer from utilising its website.

## 6.5 PERSONAL INFORMATION

### 6.5.1 PRIVACY

Section 14 of the Constitution guarantees the right to privacy. However, the computer age does not always recognise the unsuspecting users', and in particular that of unsophisticated internet users', right to privacy.

### 6.5.2 PERSONAL INFORMATION

Part VIII of the ECTA deals with the right to privacy. It provides for the *voluntary* compliance with the principles of the collection of personal information. However, if an organisation opts to comply with the principles it must comply with all the provisions of section 51.

Personal information is any information that is about an identifiable individual and it includes, amongst others[81]:

- Information relating to the race, sex, gender, nationality, ethnicity, etc, of an individual;
- Information relating to the educational qualifications; medical, criminal and employment history of an individual;
- The views or opinions of an individual about another, subject to certain exclusions, etc.

Section 51 of the ECTA lays down a set of principles within which data controllers[82] ought to operate. These include, *inter alia:*

- Data may only be collected with the *express* written permission of a data subject[83];
- Data controllers may not collect information that is not useful for a lawful purpose;
- The information may not be used for any reason other than the reason for which same is collected, unless the data subject gives her/his *express* written permission to doing so;
- Information that has become obsolete must be destroyed, etc.

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[78] As pointed out by Gereda (op.cit) at 52.
[79] *Cf* the discussion of the *Roundabout* and *Ad Outpost* cases in paragraph 5.2 above.
[80] As an employer, one must, however, be wary of the provisions of, in particular, section 6 of the Regulation of Interception of Communications and Provision of Communication Related Information Act No. 70 of 2002.

[81] Section 1.
[82] Defined in section 1 as "any person who electronically requests, collects, collates, processes or stores personal information from or in respect of a data subject". The latter, in turn, is defined as "any nature person from or in respect of whom personal information has been requested, collected, collated, processed or stored, after the commencement of the Act".
[83] Section 51(1) – emphasis added.

A large percentage of reputable collectors of data inform a user of which information will be collected, which information will not be disclosed and which may be disclosed (obviously other than in accordance with an order of Court). This is usually contained in the terms and conditions of use of the site where a user then can agree to accept or not. However, most people do not read the terms and conditions before they "agree" to all the terms and conditions of the site. As stated above, the common law hold true and as such, unsuspecting Internet users fall "victim" to the maxim *caveat subscriptor*[84].

## 6.6 COOKIES

Cookies are stored in a small text file on one's hard drive when one visits certain web sites. It usually contains information regarding the user's preferences and when one revisits a site certain information need not be re-entered. Cookies are automatically collected unless one disables the use of cookies on your browser. Again, a lot of web site operators make users aware of the collection of cookies in their terms and conditions. The ethical operators even go so far as to explain to unsophisticated users how to disable the creation of cookies. However, this cannot be said in respect of unscrupulous web site operators!

## 6.7 TRACKING DEVICES

A large number of organisations use network software packages that contain features that allow administrators to monitor utilisation of the net by, for example, employees. Again, one has to take cognisance of the provisions of section 6 of the Regulation of Interception of Communications and Provision of Communication Related Information Act [85], i.e. one must obtain the permission of the employee to monitor her/his data messages, failing which one is guilty of an offence[86].

## 7. CONCLUSION

Although the ECTA has addressed some aspects and ensured legal certainty in certain regards, it does not address the right to privacy and consumer protection to the fullest extent possible.

[84] He who signs, be aware.
[85] Act 70 of 2002.

[86] Upon conviction one can be fined not exceeding R 2 000 000 or imprisoned for a period not exceeding 10 years.