

## 5. ADVERTISING & MARKETING

This lesson considers mainly the regulation of online advertising and marketing. It primarily focuses on the regulation of unsolicited Commercial Communications and concludes with a brief overview of the regulation of other aspects of marketing in a bid to ensure fair and responsible marketing. These other aspects include bait marketing, negative option marketing, loyalty programs and promotional offers.

### UNSOLICITED COMMERCIAL COMMUNICATIONS

The Electronic Communications and Transaction Act (ECTA) and the Consumer Protection Act (CPA) regulate unsolicited commercial communications and other marketing practices. These statutes are not directed at non-commercial or bulk communication and focus on commercial communication.

They are both applicable to all kinds of communications and are not limited to electronic communication as shown by the definitions quoted below.

- Section 45(1) ECTA provides: “Any person who sends unsolicited commercial communications to consumers, must provide the consumer...” This definition does not refer to electronic communications; therefore it applies to more than just email.
- Section 1 CPA provides for the following definition of direct marketing: “to approach a person, either in person or by mail or electronic communication, for the direct or indirect purpose of—
  - (a) promoting or offering to supply, in the ordinary course of business, any goods or services to the person; or
  - (b) requesting the person to make a donation of any kind for any reason”.
 This definition expressly refers to approaches in person or by ordinary mail and therefore goes beyond electronic communication.

### Forms of unsolicited commercial communications

Unsolicited commercial communications may be sent through a multiplicity of forms these include:

- email (spam)
- telephone
- SMS or text message
- Spim: spam based on MS instant Messenger
- Spit: VoIP spam
- Social networking tools: Facebook, Twitter



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- Mobile phone messaging services: Whatsapp, BBM

The sections which follow focus on spam.

## **SPAM**

### **Issues raised by spam**

The sending of spam raises a multiplicity of issues, which include the following:

#### *\*Invasion of privacy*

- Harvesting email addresses and data can amount to an invasion of privacy
- Overloading mailboxes with unwanted material can be a nuisance and an invasion of privacy

#### *\*Cost of managing spam*

- ISPs that have to cope with traffic
- Businesses whose information systems and employees waste resources and time deleting spam or buying and installing filtering mechanisms
- Individuals who waste time deleting spam

#### *\*Security risk*

- Spam can be used to spread computer viruses

#### *\*Loss of reputation to individuals and businesses*

- If email address is spoofed
- If email is identified as spam and blocked by ISP or businesses

#### *\*Danger to internet*

- Spamming campaigns can act as a form of denial of service and slow internet connections
- Offensive content
- Promoting illegal products

### **Regulation of spam**

Spam may be regulated in various ways as listed below:

- A. Legislation which may follow various models -
  1. Opt-out: a recipient can ask not to receive email. Any further email is illegal.
  2. Opt-in: a recipient must have agreed to receive email or sending email is illegal.
  3. Prohibiting sale and distribution of spam ware.
  4. Enforcing ISPs' anti-spam policies.



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- B. Blacklisting by industry blacklisting organisations: for example in South Africa the Internet Service Providers' Association (ISPA) publishes an annual spam culprit list, known as the ISPA Hall of Shame. Such activities raise issues about the legal status of blacklisting organisations and in some cases lead to defamation claims by blacklisted persons. For example, following the publication of the 2012 ISPA Hall of Shame, it was reported that one of the listed culprits had brought a damages claim against ISPA (see Bonnie Tubbs 'ISPA sued for defamation' ITWeb, 19 June 2012).
- C. Common law –: civil claims for nuisance or the invasion of privacy may be brought by spam recipients.

The following section takes a closer look at South African legislative provisions.

### **ECTA: Regulation of spam**

Section 45 of ECTA provides for an opt-out scheme. This section places the following obligations on senders of unsolicited commercial communications:

- “(1) Any person who sends unsolicited commercial communications to consumers, must provide the consumer-
- (a) with the option to cancel his or her subscription to the mailing list of that person;
  - and
  - (b) with the identifying particulars of the source from which that person obtained the consumer's personal information, on request of the consumer.”

A number of inadequacies of this section have been pointed out (see L Michalson 'The Law vs the Scourge of Spam'). Just two of these issues are canvassed here. First, section 45(1) provides for an opt-out scheme which is unsatisfactory because it requires a consumer to take action to terminate the continued despatch of unsolicited communication. Second, the definition of consumer in section of the Act negatives the protection intended to be given by s 45 by limiting it severely. Section 1 defines a consumer 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” (emphasis added). This narrow definition of consumer excludes those who do not enter, or intend to enter, into an electronic transaction with the sender. It leaves a huge section of the public unprotected.

Section 45(1) is bolstered by sections 45(3) and 45(4). Section 45 (3) provides that “any person who fails to comply with or contravenes subsection (1) is guilty of an offence and liable, on conviction, to the penalties prescribed in section 89 (1)”. This means that criminal prosecution and conviction may follow if a sender of spam does not provide an opt-out



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mechanism for recipients or does not provide details of the source of the recipient's personal information at the request of the consumer.

Section 45 (4) provides that "any person who sends unsolicited commercial communications to a person who has advised the sender that such communications are unwelcome, is guilty of an offence and liable, on conviction, to the penalties prescribed in section 89 (1)".

Therefore spam senders who ignore or refuse to act on the opt-out instructions issued by a spam recipient may face criminal sanctions.

The penalty provided for by section 89(1) is "a fine or imprisonment for a period not exceeding 12 months".

Section 45(2) provides that "no agreement is concluded where a consumer has failed to respond to an unsolicited communication" thus ensuring that consumers are not forced into contracts simply because they failed to respond to spam.

### **The CPA**

Sections 11 – 12 of the CPA are applicable to spam. Section 11(1) provides that every person's right to privacy includes the right to refuse to accept, require the cessation of further communication, and to pre-emptively block communication for the purposes of direct marketing. Section 11(2) provides that recipients of direct marketing communications may issue opt-out instructions and section 11(4) provides that the senders of direct marketing communications must provide opt-out mechanisms for the recipients of their direct marketing communications. Section 11(3) provides for the establishment of registry for pre-emptive blocks. However, as at 4 August 2012 this registry has not yet been established.

Section 12 provides that consumers may not be contacted at home during prescribed periods. These times have been provided for by a notice under the Consumer Protection Regulations. They are:

- Sundays or public holidays contemplated in the Public Holidays Act, 1994 (Act No. 36 of 1994);
- Saturdays before 09h00 and after 13h00; and
- all other days between the hours of 20h00 and 08h00 the following day,

except to the extent that the consumer has expressly or implicitly requested or agreed otherwise.

The notice also provides that "direct marketing may not be timed to be delivered to the consumer during the prohibited times referred to in item 1 above unless expressly, in writing, agreed to by the consumer".



### Industry Bodies' Approach

Some industry bodies provide guidance to their members through Codes of Conduct. These codes do not have force of law and must comply with the CPA and ECTA. The Direct Marketing Association of SA (DMA) established National opt-out register which enables anyone to pre-emptively block spam in 2007 (<https://www.nationaloptout.co.za/>). The ISPA addresses spam in clauses 14 -15 of its Code of Conduct (<http://ispa.org.za/code-of-conduct/>) and is in favour of opt-in provisions (<http://ispa.org.za/press-release/ispa-urges-opt-in-approach/>). The Wireless Application Service Providers' Association's Code of Conduct addresses spam in clause 5 and uses an opt-out approach ([http://www.waspa.org.za/code/waspa\\_coc\\_6.1.pdf](http://www.waspa.org.za/code/waspa_coc_6.1.pdf)).

### Reform: Protection of Personal Information Bill, 2009

The Protection of Personal Information Bill, 2009 provides for an opt-in scheme.

Section 66 (1) provides that: “

The processing of personal information of a data subject for the purpose of direct marketing by means of automatic calling machines, facsimile machines, SMSs or electronic mail is prohibited unless the data subject—

- (a) has given his, her or its consent to the processing; or
- (b) is, subject to subsection (2), a customer of the responsible party.”

Further, section 66 (3) provides for an unsubscribe option for recipients as follows:

“Any communication for the purpose of direct marketing must contain—

- (a) details of the identity of the sender or the person on whose behalf the communication has been sent; and
- (b) an address or other contact details to which the recipient may send a request that such communications cease”.

### Some legislation from other jurisdictions

US: Can-Spam Act of 2003

Directive on Privacy and Electronic Communications (2002/58/EC)

E-Privacy Directive: Directive 2002/58/EC Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector, 2002 O.J. (L 201) 37

E-Commerce Directive: Directive 2000/31/EC on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178) 1

Distance Contracts Directive: Directive 97/7/EC on the Protection of Consumers in Respect of Distance Contracts, 1997 O.J. (L 144) 19



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Data Protection Directive: Directive 95/46/EC on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31

Australian Spam Act 2003

For a useful overview see: L-Soft 'Opt-In Laws in the USA and EU' available at <  
<http://www.lsoft.com/resources/optinlaws.asp>> (accessed 4 August 2012)

## **FAIR AND RESPONSIBLE MARKETING**

The CPA provides comprehensively for other aspects of marketing. As stated above, these provisions are applicable to electronic transactions, unless expressly excluded. Some of the provisions that are applicable to electronic transactions are summarised or listed below.

### **CPA section 29: right to fair & responsible marketing**

This section provides that a producer, importer, distributor, retailer or service provider must not market any goods or services—

“(a) in a manner that is reasonably likely to imply a false or misleading representation concerning those goods or services, as contemplated in section 41; or  
 (b) in a manner that is misleading, fraudulent or deceptive in any way, including in respect of—

- (i) the nature, properties, advantages or uses of the goods or services;
- (ii) the manner in or conditions on which those goods or services may be supplied;
- (iii) the price at which the goods may be supplied, or the existence of, or relationship of the price to, any previous price or competitor’s price for comparable or similar goods or services;
- (iv) the sponsoring of any event; or
- (v) any other material aspect of the goods or services.”

### **CPA section 30: bait marketing**

A supplier is prohibited from advertising goods or services and alleging that they are available at a specified price in a manner that may mislead or deceive about the actual availability at the advertised price. If a supplier advertises particular goods or services, states a price and the advert states there is a limitation in respect of availability (e.g. “while stocks last”), the supplier must make those goods or services available at that price, to the extent of the expressed limits.

### **CPA section 31: negative option marketing**



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This section prohibits suppliers from using negative option marketing. This type of marketing occurs where suppliers offer goods or services to consumers and then regard the goods or services as being automatically sold unless the consumer declines the offer. Section 31 provides that any contracts which are purported to have arisen by failure of a consumer to decline an offer made by a supplier are invalid.

### **Section 34: Trade coupons and similar promotions**

This section is directed at promotional offers and does not apply to franchise agreements; loyalty programmes, loyalty credit or award regulated in terms of section 35; or promotional competitions, as defined and regulated in terms of section 36.

The section defines a promotional offer as “an offer or promise, expressed in any manner, of any prize, reward, gift, free good or service, price reduction or concession, enhancement of quantity or quality of goods or services, irrespective of whether or not acceptance of the offer is conditional on the offeree entering into any other transaction”.

Promotional offers are prohibited where there is no intention of fulfilling the offer (section 34(3)). The sponsor of the offer must ensure that there is enough of the particular prize or reward being offered to meet demand (section 34(5)). No administration, processing or handling fee can be charged to a consumer who is using a trade coupon to make a purchase (section 34(5)(d)). Limitations or restrictions cannot be introduced after the offer has been accepted by a consumer (section 34(6)).

Section 34(4) provides that promotional offers must clearly state the following information

- a) the nature of the prize, reward, gift, free good or service, price reduction or concession being offered;
- b) the goods or services to which the offer relates;
- c) the steps required by a consumer to accept the offer or to receive the benefit of the offer; and
- d) the particulars of any person from whom, any place where, and any date and time on or at which, the consumer may receive the prize etc.

### **Section 35: Customer loyalty programmes**

Customer loyalty programs are permitted and loyalty credits/points are a legal form of payment for goods or services offered in the program for purposes of the CPA even if they are not recognised as such by any provision in any other law, agreement or notice (section



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35(1)). However a person must not offer participation in a loyalty programme, or offer any loyalty credit or award with the intention of not providing it; or providing it in a manner other than as offered (section 35(2)).

Section 35(3) provides that any document in which a loyalty program is offered must clearly state the following information:

- a) the nature of the program, credit or award being offered;
- b) the goods or services to which the offer relates;
- c) the steps required by a consumer to participate in the program or to receive any benefit in terms of the program.

Section 35 (4) provides that the sponsor of a loyalty program must provide the loyalty awards offered and must ensure that enough of the particular goods or services offered are available. If they are not, the sponsor of the program must notify all members. They are allowed to offer comparable goods or services of the same kind at no additional charge.

### **Section 36: Promotional competitions**

Promotional competitions are defined as

“any competition, game, scheme, arrangement, system, plan or device for distributing prizes by lot or chance if—

- (i) it is conducted in the ordinary course of business for the purpose of promoting a producer, distributor, supplier, or association of any such persons, or the sale of any goods or services; and
- (ii) any prize offered exceeds the threshold prescribed in terms of subsection (11), irrespective of whether a participant is required to demonstrate any skill or ability before being awarded a prize”.

Section 36(2) prohibits promotions, where a consumer is informed that they have won a competition, where no competition was held, or that person didn't win, or winning is subject to additional conditions.

In terms of section 36 the following rules apply to promotional competitions:

- a) Consumers cannot be charged anything for entering a promotional competition.
- b) No prize can be awarded to a consumer where it is unlawful to do so.
- c) Prizes cannot be awarded to someone related to the promoter or the supplier of the goods or services linked to the competition.



- d) Competition rules must be prepared and made available to participants before the beginning of the competition.
- e) An offer to participate in a promotional competition must clearly state:
  - (i) the benefit or competition to which the offer relates;
  - (ii) the steps required by a person to accept the offer or to participate in the competition;
  - (iii) the basis on which the results of the competition will be determined;
  - (iv) the closing date for the competition;
  - (v) the medium through or by which the results of the competition will be made known; and
  - (vi) where and how the consumer can obtain a copy of the competition rules and a successful participant can claim their prize.
- f) No further conditions or payments requirements can be imposed to claim a prize.

### **Section 37: Alternative work schemes.**

No false representations about the availability of work or the actual profitability of that work can be made when promoting a “work from home” scheme (section 37(1)). The advert for such schemes must include a caution that there is uncertainty as to the extent of work available and the income to be earned (section 37(2) (a)).

The advert for work from home schemes must include the following information (section 37(2) (b)):

- a) The full name, or registered business name, of the person promoting the scheme;
- b) The address and contact numbers of that person’s primary place of conducting the business; and
- c) the nature of the work, business, activity or investment.

No fee may be charged by the promoter of the scheme except to the extent that the person charged has been assigned and performed work or made or received the investment (section 37(4)).

### **Section 38: Referral selling**

Section 38 does not apply to franchise agreements (section 38(3)). Section 38(1) provides that a person must not promote any goods or services on the representation that the consumer will receive a rebate, commission or other benefit if the consumer subsequently gives the supplier the names of consumers; or otherwise assists the supplier to supply goods



or services to other consumers; and that rebate, commission or other benefit is contingent upon an event occurring after the consumer agrees to the transaction. A statement by a consumer, whether in an agreement or otherwise, to the effect that the consumer was motivated to enter into a transaction based on referral selling predominately for the value of the goods or services, rather than for the rebate, commission or benefit, is not a defence to an allegation that a person has contravened section 38(1).

### Recommended Reading

S Papadopoulos 'unsolicited communications and direct marketing' *Cyberlaw@SA III* pp 85 – 91

Lance Michalson 'The Law vs the Scourge of Spam' September 2008 available at <<http://www.michalsons.co.za/the-law-vs-the-scourge-of-spam/1019>> (accessed 4 August 2012)

Sebo Tladi 'The regulation of unsolicited commercial communications (spam): is the opt-out mechanism effective?' (2008) 125(1) *South African Law Journal* 178

Bonnie Tubbs 'ISPA sued for defamation' ITWeb, 19 June 2012 available at <[http://www.itweb.co.za/index.php?option=com\\_content&view=article&id=55959&A=EBU&S=Electronic](http://www.itweb.co.za/index.php?option=com_content&view=article&id=55959&A=EBU&S=Electronic)> (accessed 4 August 2012)



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