

Marketers' legal challenges in post-apartheid SA

Marketers face unprecedented legal challenges in post-apartheid South Africa, an era in which a rain of legislations are furiously criss-crossing the marketing environment as the government multiplies efforts to 'protect' consumers.



Bylssa Siki da Silva: @sikitimedia 25 Jul 2011

According to Pria Chetty, IT lawyer, academic and founder of Chetty Law, the following legislative drivers and implications require critical thinking and application in today's marketing environment:

- [Electronic Communications and Transactions \(ECT\) Act](#)
- [Consumer Protection Act \(CPA\)](#)
- CPA regulations
- [Protection of Personal Information Bill \(PPIB\)](#)
- [Intellectual Property \(IP\)](#)

- [Codes of conduct](#)

Same legal force

For a start, marketers must understand that all electronic transactions (emails, SMSes) have the same legal force as paper-based transactions, Chetty said, speaking late last week at a forum in Bryanston, Johannesburg.

In fact, Chetty stressed, all emails sent to customers can - in terms of the law - be considered email marketing and constitute a form of marketing communication.

She said some of these emails have the purpose of acquiring new customers or convincing current customers to purchase something immediately.

"Consent is essential for email marketing," she insisted.

As for mobile marketing, she admitted that it has a wide range of marketing aspects as mobile applications continue to evolve. Chetty said mobile online purchasing, which now represents only 15% of all purchasing will reach 64% by 2015.

"Must not be violated at any cost"

"The kind of world we live in today is a landscape of several pieces of legislation, policy, case laws, regulations and self-regulation, industry codes and constitutional aspects, which must not be violated at any cost."

According to the ECT Act, a contract can be a done deal just by ticking (expression of intent, section 24), and if problems arise they will be attributed to the originator (the person who sent that email, section 25).

"Online suppliers of goods or services are therefore required to place different categories of information c

the website used to provide goods or services to consumers. This is called 'deemed provisions'."

She said the ECT Act exempts all Internet service providers (ISPs) and courier companies from any form liability, in case anything goes wrong.

'Deemed provisions' include:

- Identifying yourself, meaning disclosing a set of information about yourself, including directors of the company, and contact details.
- Ensuring that your payments systems are safe (if the customer's credit card details are stolen, you will be held responsible).

One should also keep all the electronic archives of the contract as long as it is required by the law - four, five years or eight years - but not less than two years. That can help marketers in a compromising situation in case someone files a complaint or claim based on that transaction, Chetty said.

As per unsolicited commercial communications, Chetty said marketers can send them to everyone, given that they have a record of how they got the contacts details of the people they are sending the messages.

"If they ask 'where did you get my details' and you reply 'I don't know', that constitutes an offence, meaning you can be sued for unsolicited commercial communications," she said.

Constitution is a supreme law

Furthermore, she said if traders do things that go against the principles of the Constitution, it becomes problematic because the Constitution is a supreme law.

"All these legislations try to promote trade and economics, but not to be burdensome on anyone as many in the marketing world think. There should be, however, a balance because rights are not absolute."

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