

THE IMPACT OF THE CONSUMER PROTECTION ACT ON SOCIAL MEDIA MARKETING



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ATTORNEYS

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Report



Introduction

The much anticipated Consumer Protection Act 68 of 2008 (“CPA”) comes into effect on April 1, 2011. It is expected that this act will have a significant effect on the industry both for consumers and for corporations alike.

This preliminary report is intended to educate companies - marketers in particular - about the act, as well as provide some practical steps that should be taken to protect both consumers and businesses, specifically regarding any social media platforms. It is by no means an exhaustive study on the topic and it is recommended that a legal professional should be consulted if you wish to get a formal legal opinion.

Applicable Laws

There are three important laws and codes that marketers should familiarise themselves with when

dealing with consumers on the Internet:

1. The Advertising Standards Authority Code of Advertising Practice
2. The Electronic Communications and Transactions Act 25 of 2002 (“ECTA”)
3. The CPA

All online advertising (which grew in SA by 17% in 2010 compared with the same period on 2009 according to a Price Waterhouse Coopers report*) will now be subject to the ASA Code, as well as the two acts. Both acts will also apply to any website, whether hosted overseas or owned by a non-South African resident, that performs a transaction with South African consumers. A transaction will include the supply, or potential supply of goods and services as well as the giving of information or advice for some form of consideration. Even if the

transaction is free the CPA may still apply, depending on the nature of the services, advertisements or advice dispensed. The act therefore applies to a wide range of products and providers, whether they operate from South Africa or not.

For example, if an advertisement or Facebook page recommended a specific product to a consumer, the CPA will apply. While this is a debatable topic, every piece of advice dispensed given on the web needs to be treated as though the CPA applies to it. Marketers using social network sites such as Facebook and Twitter must err on the side of caution and take all steps to ensure they are compliant with the CPA.

Understanding the risks

The act presents real risks to any business marketing their products through the Internet with lawsuits, class actions and even criminal

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prosecution a potential and costly reality for a company.

Section 61 of the CPA imposes product liability on suppliers. In other words if a consumer uses a product or service, which would include advice dispensed, and by using the product or service correctly dies, becomes ill or has property damaged, then the supplier of that good will be liable for all the damages suffered by the consumer.

This means that if a customer follows the advice posted on a website or social networking site, and consequently suffers damages, whether by economic loss or becomes ill etc, they can sue the website or social network or the member of the social networking site to compensate them. This will also include, among others,

and members of the social networking site must be extremely careful about what information they make available online and how the consumer must follow it. The same applies to online advertisements.

Privacy

Confidentiality has become critical and is taken seriously by the CPA. If you give away confidential information about your communities you could be at risk of up to 10 years in jail. If you find yourself in contravention of any other section of the Act you may be fined up to 10% of your annual turnover for the preceding year, or R1 million.

Accountability

The CPA does not prohibit advertisements and dispensing of advice over

the internet, however, all website owners and social networking forums must be aware of the rights the consumers will have when dealing with them, as well as the obligations they will have to fulfill under the CPA regarding the quality and source

any medical costs. This form of liability cannot be limited by the supplier in terms of section 61 and the website. Social networks

of the information they provide. If these standards are not met it will not make the activity illegal, but it will

open the website to law suits including class actions.

Consumer Rights

The following are selected fundamental rights

available to consumers in terms of Chapter 2 of the CPA and broadly speaking are most likely to affect websites and social networks:

1. The right to fair and responsible marketing
2. The right to fair and honest dealing
3. The right to fair value, good quality and safety

Again, it is important for websites owners, social networks and members of social networks to familiarise themselves with the requirements for marketing and advertising as contained in the CPA.

Defining Direct Marketing

Direct marketing, according to the CPA, entails **approaching** someone, in person or electronically (e.g., email marketing or approaching a LinkedIn business connection), for the direct

or indirect purpose of promoting and/or selling goods or services or even requesting a donation.

The use of the verb

approach in the definition is crucial. A related form of marketing is catalogue marketing (governed by section 33 of the CPA). Unlike direct marketing, this

is a form of interaction between business and the consumer where a product or service is sold, but not in person, for example online shopping or retailing. It includes an agreement concluded telephonically (if the customer initiates the contact), by postal order or fax, in fact, any instance where the consumer is not able to inspect the goods before making payment.

The supplier of the goods or services is required to disclose specific information such as license or registration number (if any), physical address and contact details, sales record information required by section 26 of ECTA, currency in which the goods are payable, delivery arrangement and their cancellation, return, exchange and refund policies.



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Cooling-off period

A consumer may, within five business days after any goods were delivered as a result of direct marketing, send the product back to the supplier without reason or penalty, as long as the supplier is notified in writing or some other recorded manner. The supplier has to return any payment received from the consumer within 15 days of receiving the notification. Moreover, the consumer must be informed of this cooling-off period.

Restrictions on Direct Marketing

According to section 11(1) of the CPA, every person as part of their right to privacy has the right to:

1. refuse to accept;
2. require another person to discontinue;
3. or (in the case of an approach **other** than in person) pre-emptively block any approach or communication from those who are engaging in direct marketing.

In light of the above, there are several conclusions that can be drawn in response to websites and social networks.

1. If a business actively approaches a consumer, even using an e-mail address provided to it by the consumer, this is likely to constitute direct marketing and selling. **This is something to keep in mind for any email or SMS marketing.**
2. However, this will nonetheless always remain a question of fact. If the consumer approached the business and left his e-mail address with the business, actively requesting it to contact him, it is unlikely to qualify as direct marketing and selling;
3. Therefore, any marketing which includes approaching a consumer

should in all probability fall within the ambit of direct marketing or selling.

4. Websites, online advertisers, social networks and members of social networks should therefore be cautious about their marketing strategies involving e-mails and sms's sent to consumers.

5. All websites (including blogs), online advertisers, social networks and members of social networks would be well-advised moreover to set in place a procedure to facilitate any consumer requests to opt-out of receiving any company communication, whether via email, a blog subscription, a Facebook page wall or Tweet stream.

Registration as a Direct Marketer

While this provision is not yet enforced, in the near future every direct marketer must register with the administrator of the registry, supplying all business contact details and the name and contact details of a person responsible for any applications lodged under this regulation. These details will need to be confirmed or updated in writing annually. Consumers who do not wish to receive any form of direct marketing will also be able to register with the body.

Three Steps to Limit Liability

Given the fact that, under the CPA, you must provide information of a certain standard it is strongly advised that all websites and social networking sites and members comply with the CPA. There are three general steps that can be applied to each online platform to help limit company liability:

1. It is important that all websites and social network members providing information clearly state and display

who is dispensing the information and their qualifications, or authority to provide the content.

This makes it a lot harder to hide behind a company brand or logo, particularly on sites such as Facebook and Twitter. Any email newsletters or marketing should also include such detail.

2. Include terms and conditions on your website or social networking page.

3. Develop internal policy and processes within your company to help employees involved with company websites or social networks to advise consumers on how to opt out of communications, with simple step-by-step instructions that they can easily follow.

Conclusion

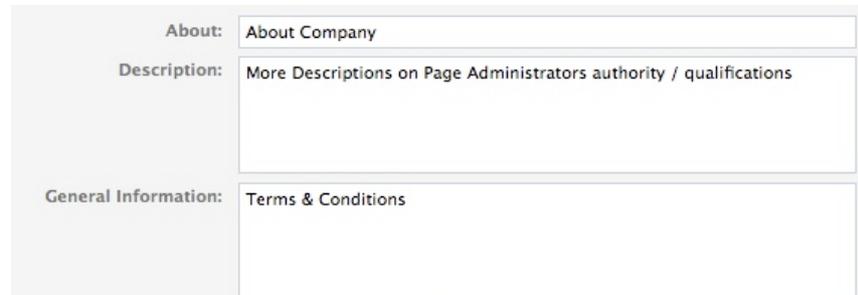
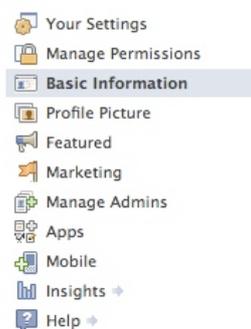
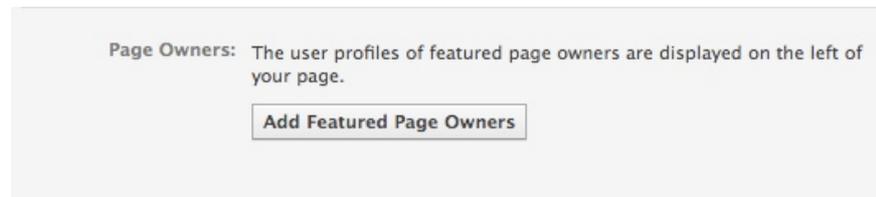
Today marks an interesting turn around for online marketing agencies, companies and even individuals marketing products and services. Online marketers have often thought of social media marketing as 'permission-based' marketing. According to the CPA, nothing is permission-based unless explicitly gotten in writing. Ensure that your online marketing efforts comply with the CPA by applying the above tips in conjunction with the details specified by the act and regulations, as there are many other parts of the act that may be relevant to your business. Download a copy of the CPA and use the report as a starting point to protect your customers and business.

For more on the practical applications of the CPA on social networks go to page 6 & 7.

Practical Application of the CPA on Social Networks

Six steps to take as a Facebook marketer on Pages

1. State clearly on the page 'who' is speaking. Facebook has now made this possible as an option to page administrators. Make use of this new functionality to show whom the administrators are behind the brand or page name. Click on 'Edit Page' in top right hand corner, click on the 'Featured' tab on the left hand side and finally click on the button 'Add Featured Page Owners'. The Page Owners will be featured on the left hand side of the page under the number of people who 'Like' the page.
2. In the page information (Info) make clear the qualifications or authority of those people posting on the page.
3. Private messages in Facebook may constitute direct marketing, depending on the content of the message, if they were not prompted first by the member. Do not send private messages for marketing or direct marketing, unless prompted, or unless you follow steps 4 and 5.
4. Set up Terms & Conditions in accordance with the Act on your page. A good place to put this would be a link under 'Info' or all the information under 'Notes'. It is specified in the Act that these need to be in simple and very clear language, for the ordinary consumer to understand. In the Terms ensure that it is explained that joining the page amounts to explicit permission to receive posts on their personal wall and other forms of communication, for example an event invitation.
5. Set up internal systems and processes to allow consumers to 'opt out' of your communications if and when they want to. Describe these in your Terms & Conditions.
6. Make sure that your page advertising follows the code of the Advertising Standards Authority Code of Advertising Practice, the CPA and the ECTA.



AND / OR INCLUDE T&C
UNDER NOTES



Notes

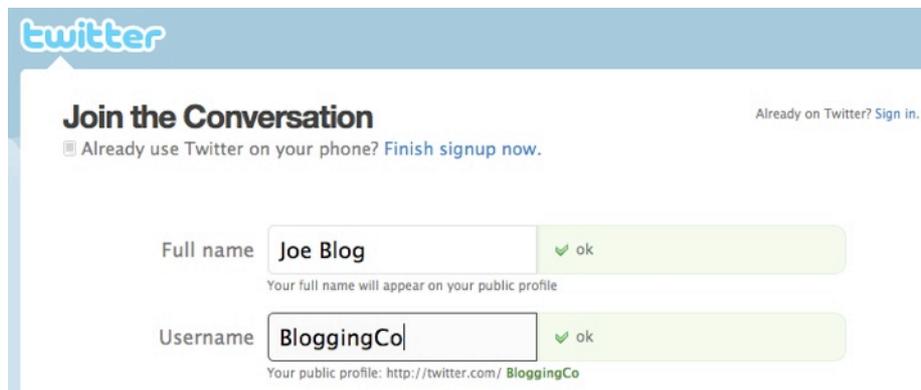
With Facebook Notes, you can share your life with your friends through what they can leave comments.

[Go to App](#) · [Edit Settings](#) · [Link to this Tab](#)

Practical Application of the CPA on Social Networks

Five steps to take as a Twitter marketer on Pages

1. State clearly on the page 'who' is speaking. Ensure the person tweeting is listed underneath your company name or 'handle' to show who the administrator is behind the brand or 'handle'.
2. Make the qualifications or authority of the administrator clear on the page, either within the profile information visible on your Twitter page OR embedded within the design elements of the page.
3. Do not send Direct Messages for marketing purposes, unless prompted, or unless you follow steps 4 and 5.
4. Set up Terms & Conditions in accordance with the Act on your Twitter page. Shorten the url link to the Terms and include in your profile blurb.
5. Set up internal systems and processes to allow consumers to 'opt out' of your communications if and when they want to. Describe these in your Terms & Conditions.



The image shows a screenshot of the Twitter sign-up process. At the top, the Twitter logo is visible. Below it, the text "Join the Conversation" is displayed, along with a link "Already on Twitter? Sign in." and a checkbox "Already use Twitter on your phone? Finish signup now." The form fields are as follows:

- Full name:** "Joe Blog" (with a green checkmark and "ok" next to it). Below the field, it says "Your full name will appear on your public profile".
- Username:** "BloggingCo" (with a green checkmark and "ok" next to it). Below the field, it says "Your public profile: <http://twitter.com/BloggingCo>".

LinkedIn, YouTube & Forum Tips

1. Do not use the messaging feature within LinkedIn to send direct marketing messages promoting your goods or services.
2. When offering business, product or service advice remember that if a contact follows the advice and consequently suffers damages, whether by economic loss or becomes ill etc, they can sue LinkedIn, YouTube or the community Forum and you as a member. This is applicable across all networks.



The Authors

About Phatic Communications

Phatic Communications is a Johannesburg-based digital PR and social media agency. Co-directors Candice De Carvalho and Sarann Buckby combine a strategic, creative and opportunistic approach with the setting of measurable objectives that assess, refine and improve on communication results that directly support business outcomes.

Their combined knowledge and experience in social media, digital and traditional PR has aided them in devising and implementing social media campaigns for clients.

Sarann has her Honours in BA Corporate Communication and Candice is currently in the final stages of a Masters in Bioethics and Health Law after gaining her MSc Honours & Masters in Human Genetics.



About Goldmin Judin Inc. Attorneys

Gareth Cremen from Goldman Judin Inc. Attorneys has extensive knowledge in litigation in the High Court and Magistrates Court, contracts, debtor recoveries, liquidations, sequestrations, advertising law, competition law and consumer protection law.

He works closely with Michael Judin as his associate and has been exposed to various types of local and international law. Worked with Mr Judin on King III and various new pieces of legislation including the Consumer Protection Act and the Tobacco Act. Other areas of law is Advertising & Marketing Law and Competition Law.

Gareth has drafted the industry codes in terms of the Consumer Protection Act for the travel industry and have very closely with DTI in the drafting phase and lectures on CPA to clients.

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