The internet – its impact on SA law

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A counsel at the Johannesburg Bar was briefed on a consultation and oral opinion. The instructing attorney was a senior litigation partner at a large Johannesburg commercial practice, who selected his counsel on the basis of being a member of that younger generation that understood something about computers. The attorney was a member of that generation which did not grow up with or attend university with computers. He did however embrace computer technology; he like all others in his firm had a personal e-mail address, although his secretary admittedly accessed this for him. At the commencement of the consultation at which the opinion was sought, the attorney announced that he had explained to the client that he saw the matter as similar to the situation where a mechanic has claimed to have effected repairs to a motor vehicle in respect of which the mechanic asserts a lien until he is paid in circumstances in which the owner disputes the repairs. The client ought to provide a bank guarantee and invite a suit for payment. The attorney admitted that he did not fully understand the technicalities of what the dispute was about so he had recommended a second opinion from a counsel who might be able to understand the technical side of the client's business.

The client was an internet service provider which previously had not had a server to host its client's domain names, web sites and e-mail addresses. It had employed the services of another service provider to do so. The client had subsequently established its own server and sought to transfer its clients onto its own server. A dispute arose over what fees were owing between the service providers and the client could not carry on its business without the transfer.

Thereafter proceeded a detailed discussion over fibre optic cables, band width, domain registrations, internet protocol addresses and uniform resource locators. During this discussion eye contact with the attorney was met with a response "Don't look at me, I don't know what you are talking about." At the end of the consultation the counsel solemnly pronounced his opinion. It began: "This is like the situation where a mechanic . . ."

This situation is perhaps an illustration of what Lord Tomlinson said in *Pearl Assurance Limited v Union Government* 1934 AD 560 (PC) that the Roman Dutch law was "*a virile living system of law, ever, seeking as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society.*" A senior practitioner was able to bring his experience to bear on a novel situation with a new technology. His instincts honed by years of practice and the application of principles of the common law focused on the correct answer without a full understanding of the technical issues. Even with an understanding of the technical issues the same intuitive approach had to be employed to derive a legal rule of application.

This *intuitive approach* has been the foundation of the development of our common law from Roman law. We can all recall being taught at university the importance of Roman law as a justification for the inclusion of a Roman law course as part of the syllabus for a law degree. However, the problem with this intuitive approach is principally twofold. Firstly, there exists the possibility that through ignorance of the technical detail of the novel problem, an error may occur in characterising it for the purposes of applying an established rule for a familiar analogy; this will cause an incorrect analogy being drawn and result in the wrong rule being applied. Secondly, because of the underlying technology the new problem may be so novel that there exists no comparable analogy and no legal rule or precedent that can be readily and accurately applied or extrapolated.

Since the development of our law and legal system has been shaped by the needs and demands of a continually evolving society, modern legal rules have been developed to meet the modern society. It is in this background that we have to look at the internet. The internet has brought with it the concept of "cyberspace," a "virtual reality" generated by computers in which humans communicate and interact.

The internet and its technology has brought with it the question whether or not the common law is sufficiently developed to contain rules to govern this interaction, and how far the common law may be applied by analogy or extrapolation. The purpose of this article is to highlight a few of the immediate problems that may soon be found confronting practitioners and courts in South Africa.

Perhaps the most prominent use of the internet has been *cybersquatting*. A cybersquatter typically registers another's trade mark, or a name associated with another in order to obtain a payment from the owner of the mark or name, or to stop the owner from using the mark or name as a domain name. Recently publicity was given in the newspapers that the city of Cape Town had discovered that it could not use its name as it was registered by another as a domain name. Many cybersquatting disputes can be resolved by resort to the principles of trade marks and the law relating to passing off. However, there is an important difference between a trade mark and a domain name. Trade marks are registered for classes of goods or services. The result is that in any giving geographical area, there may be several owners of identical or substantially similar marks in different classes which co-exist without any real possibility of deception or confusion. The trade mark "*XYZ*" may be employed by three different proprietors in clothing, crockery and building construction respectively. Similarly the name could be used by the three proprietors without there being a passing off. There however can only be one domain name "*www.xyz.co.za*", although it is possible for a different person to register "*www.xyz.com*" or "*www.xyz.org.*" It is also possible for a potential infringer to register a misspelling or slight variation of a well known name, mark or domain name. Where an alleged cybersquatter has registered multiple variations of misspellings of a well known name, it might be easier to prove a dishonest intention, but only perhaps after a reexamination of our law of similar fact evidence.

Precisely what amounts to a likelihood of deception or confusion in cyberspace

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might not be determined by the same test with which we are familiar in passing off in *Capital Estate & General Agencies (Pty) Ltd v Holiday Inns Inc* 1977 (2) SA 916 (A). In *Interstellar Starship Services Ltd v Epix Inc* 184 F 3d 1107, in the United States in 1999, a Federal Appeals Court (9th Circuit) adopted a doctrine of "initial confusion." Because of initial confusion an internet visitor may visit a web site by being drawn to it in error. The confusion may only temporary because once the visitor sees the unintended site, any confusion will be dispelled by the dissimilarities. The initial confusion which leads to the visitor being drawn to the site is sufficient to establish a likelihood of confusion.

In the United Sates, the law of passing off has been developed to embrace the *concept of metatag infringement*. The internet has available to a user search engines. These "engines" are software programmes that search the web pages on the internet for keywords that match the search instruction. Metatags are index words which are inserted into a webpage by the programmer compiling the web site. A metatag is a hidden instruction which is not visible to an ordinary visitor to a website on an ordinary browser, but will be identified by a search engine performing a search query. The result of this is that the technology has allowed a new form of infringement. The manufacturer of a product "*DEF*" which competes with a product "*ABC*" can register a domain name "*www.def.com*" and insert ABC as a metatag to his web site. A visitor and potential customer seeking an *ABC* product would be directed to the *DEF* website by searching for the keyword *ABC*.

Legislation regulating cybersquatting has been enacted in the United States in the Anticybersquatting Consumer Protection Act. This legislation provides a cause of action to an owner of a trade mark including a personal name protected as a mark where a person registers uses or traffics in a domain name that is identical or confusingly similar to a mark that was distinctive or famous at the time the domain name was registered. An additional requirement is that the domain name registration was made with a bad faith intent to profit from the mark.

Copyright issues have attracted international publicity. The new technology has permitted the making of multiple and potentially infinite numbers of copies without any loss of the original quality. This is evident in copying sound recordings particularly music. The provision of web sites and bulletin boards on which members of the public may post their own content on the host's server has called for the scrutiny of the concept of a contributory form of infringement. In the United States Federal legislation, the Online Copyright Infringement Liability Limitation Act which is Title II of the Digital Millennium Copyright Act, grants exemptions from liability to internet service providers from liability for copyright infringement subject to compliance with certain requirements.

In broad terms a mechanism is set up in terms of which a service provider adopts a policy of dealing with copyright infringers. Subscribers and account holders of the service provider must be informed and notified of this policy. The service provider appoints an agent for the purposes of notification. A copyright owner who wishes to complain about an alleged act of infringement on the site of or through the service provider gives a statutory notice to the designated agent. The service provider must have a mechanism for removing or blocking access to infringing material and terminating the accounts or subscriptions of repeat infringers.

The *law of contract* as we presently know it needs to be re-examined in the light of the technology of the internet. The rules of offer and acceptance and contract formation in the medium of cyberspace will in due course probably be judicially defined. The expedition, reception and information theories will compete for application. So too will what constitutes proper communication of a notification of an election or waiver or cancellation.

The *technological realities* should be considered. An offer might well be accepted or a communication sent by e-mail. The electronic communication is sent from the sender's computer to its service provider's server from where it takes an uncertain path, possibly around the world through all manner of other servers connected to the world wide web until it reaches the mail box of the recipient on the recipient's service provider's server. The recipient may only much later access its mail box on the server and down load its content. Where the recipient is on a network of computers there may be in place software which is in place to guard against a computer virus or spam (a form of unsolicited electronic junk mail). The possibility exits that the communication may become corrupted or altered between the time it is sent and the time it is read by its ultimate addressee.

The inclusion of standard terms and conditions in a contract of sale of goods or services is nothing new. In the United States, the principles of the "ticket cases" of the late nineteenth and earlier twentieth century have been applied internet contracts; the seller's standard terms will be held to be incorporated in so called *"click-wrap" agreements*. The safest course is for a seller to have his web page structured such that prior to the purchaser being able to electronically execute his purchase he must first scroll through all the standard terms before a tab or button on the screen with the words "I AGREE" or "OK" appears on which the mouse cursor must be clicked, to proceed with the transaction.

Our *rules and laws of evidence* must be re-evaluated as written communication moves away from that done on paper to that done electronically. Litigators must apply their minds to issues of how to prove dispatch and receipt of communications and the time and place they were sent and received. Although the technology may provide answers, rules of evidence developed in and suited to the nineteenth century may no longer be as appropriate as they once were.

In the area of *criminal law* the internet provides with the new form of communication and interaction a new vista for criminal activity. The advent of internet bank banking has brought with it the possibility of internet banking fraud. The operation of savings and current accounts via the internet has created the danger that account holders may have their funds depleted, or a vast overdraft incurred by a click of a remote button by a cyber-thief. One can naturally expect that any banking agreement that deals with internet banking would have standard terms drawn by the bank for its own protection. The extent to which the banks ought to be allowed to protect themselves and contract out of any duty to put into place security measures is a matter of urgent legislative consideration.

There are other issues of *privacy*. In this regard South Africa has no developed or established legislation dealing with the privacy of information given or gathered for one purpose being packaged and sold. For a long time this has resulted in the phenomenon of junk mail. The need to develop this area of law has become all the more urgent because of the amount and speed with which data and information may be transferred and disseminated through the internet.

Jurisdictional issues fall to be considered with the internet. This is so because the internet is one seamless world without geographical or territorial boundaries. To a certain measure in a contractual transaction the parties may be able to choose the law applicable to the transaction and even choose a forum for the determination of any dispute. These may be subject to overriding public policy considerations and local consumer law legislation.

Consider that it is possible to gamble at an electronic casino at a web site in North America with a credit card in the privacy of ones own home in South Africa. The of gambling regulation and licences, foreign exchange immediately give the South African authorities an interest in regulating or prohibiting this cyber-casino. Similarly the sale of life assurance policies to South African residents by a Caribbean registered company of doubtful financial standing ought to attract the attention of local regulators.

The technology has brought with it problems of enforcement of jurisdiction by the ease with which authority may be avoided by the use of the internet. A simple illustration is the fact that software may be purchased by credit card and transmitted across and down loaded from the internet without the scrutiny of customs officials. The payment of import duty and VAT is thereby avoided.

Like it or not, the advent of the internet has had a profound impact on society and the way in which we communicate and interact. The law has to be developed and adapted to meet the new technology and the revolutionary re-organization it has brought with it. We can only hope as lawyers that we have developed some jurisprudence before all that presently bewilders us is and fills some of us with fear is rendered obsolete by the advent of a newer technology. 🕮

GCB reports

Pro bono initiative

Contributed by GJ Marcus SC, Johannesburg

Introduction

Advocates, by tradition, do work without charge when asked to do so. The request will usually emanate from an attorney on behalf of a litigant in need. Occasionally a judge will invite an advocate to appear as an *amicus curiae*. There have also been occasions when advocates have participated in campaigns to provide legal defence to those charged under the pass laws and the Group Areas Act.

The commitment by advocates to do work *pro bono* is largely a matter of choice and not a matter of ethical obligation. The purpose of this memorandum is to propose the creation of an institutionalised mechanism for the obligatory provision of *pro bono* work by advocates.

The present position

There is presently no structured system for the provision of *pro bono* services. Moreover, it is probably true to say that the majority of advocates do not perform any *pro bono* work at all. This may not reflect an unwillingness to do so. In all likelihood, it is the product of an absence of an institutional mechanism in terms of which advocates may be called upon to render services without charge.

It is beyond debate that there is an acute need for legal services in South Africa. The legal aid system is under severe strain. The resources of the Legal Aid Board are now almost exclusively directed to criminal work. There is simply not enough money for the funding of civil litigation. Public interest legal organisations like the Legal Resources Centre (LRC) and University-based legal aid clinics also function under severe financial constraints. In the result, many people in dire need of legal services simply cannot afford legal representation.

It is suggested that the Bar should seriously address this problem. The justification, if it be required at all, lies in the traditions of the Bar and the General Council of the Bar's Statement of Intent to provide "access to justice for indigent persons" and the commitment to attain "justice for all according to the Rule of Law." These goals will remain unfulfilled without a commitment to *pro bono* work sanctioned by the constituent Bars.

A proposal

It is suggested that the only realistic way in which the stated commitment of the Bar can be realised is by the imposition of an obligation on members to perform work *pro bono* and the creation of structures to implement and co-ordinate the system. To achieve this goal, I make three specific proposals set out below.

– *First,* there ought to be a specific obligation on members to perform a stipulated minimum amount of *pro bono* work. This would require an amendment to the Uniform Rules of Professional Ethics imposing the obligation. This entails no radical innovation. Rule 6.1 of the Uniform Rules already imposes an obligation on "all counsel to undertake *pro deo* defences when directed to do so by the Bar Council". Rule 6.3.1 likewise imposes a duty on all counsel "so directed by the Bar Council, to undertake legal aid matters." The only difference between the existing situation and the proposal is that the obligation to perform *pro bono* work would be, in most cases, without remuneration. (In some cases the prospect of working on contingency may well result in remuneration in the event of success.)

The minimum amount of *pro bono* work ought to be specified. I would suggest that this ought to be no less than two working days a year. In this regard, the obligation to perform *pro bono* work would extend not simply to representing clients in court. There is no reason, for example, why a mechanism could not be created requiring advocates to give advice for a day or more in a legal aid clinic or similar institution. The stipulation of a minimum amount of work may, however, result in advocates regarding this as a maximum and may militate against the creation of an ethos of public service.

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