

10 WAYS TO LEGALLY PROTECT YOUR BUSINESS ONLINE

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The internet has opened a new era of business opportunities. Many online businesses involve less staff, lower overheads and have no lease agreement. It is therefore reasonable to assume that to start a business online should be more affordable than to start a business offline. For this reason, some businesses start-out as online businesses and progress to physical premises later. It is perhaps not correct to distinguish between online and an offline businesses, as the internet is a tool used in business, whether online or offline. It is fair to say that business, regardless of what nature, is likely to benefit from an online presence on the internet.

For lawyers the internet poses new challenges in applying laws due to jurisdiction problems. Each country generally has its own national laws on how to start, operate and protect certain business rights. Lawyers often refer to the internet as “cyberspace” as if to suggest that it is a separate territory in which cyber law applies. Unfortunately, there is no single cyber law which applies to the internet. Fortunately though, South African law has progressed over the years to provide statutes and mechanisms to govern and protect local businesses online.

As the world is divided into different countries, it appears that cyberspaces are divided into different domain name spaces which are subject to different national laws. In this regard, the country level domain for South Africa is .ZA and all domain name levels ending with .ZA are generally covered by South African laws.

Before starting a new local business online, or taking your existing business online, there are some important national laws to consider complying with to protect your business. The list is not conclusive, but I discuss below the most important laws with which to comply when starting to do business online.

1. Protect your name

The .CO.ZA domain name space is the most important for South African businesses. Domain names are registered on a “first come, first served” basis. When registering a domain name, which will serve as the name of the business, it is recommended to select a name which is capable of distinguishing your business from other businesses in the same trade. Such distinctive name will have a trade mark function. Trade marks are registered on the Trade Marks Register in terms of the Trade Marks Act 194 of 1993. Trade mark registrations generally provide statutory and monopolistic rights in a specific mark in a specific sector.

If you are considering forming a company, for convenience, registration of the same name/trade mark could also be considered on the Companies Register.

There is no cross-referencing between the Trade Marks Register, Companies Register and relevant Domain Name Registers. Due to this factor, disputes arise, if different traders use and register their names on the different Registers concerned. Such disputes could cost start-up businesses dearly concerning time and money, and many start-up businesses do not have sufficient funds to start over with a new name, if they have to change their names due to a conflict.

2. Protect your copyright

Generally, the creator of a copyrighted work, is the first and automatic owner of such works. However, there are general exceptions to this rule, for example in the case of works developed by employees in the course and scope of their normal employment, in which case copyright automatically belongs to the employer. Apart from such exceptions expressly provided for, the Copyright Act 98 of 1978 generally provides that copyright can only be assigned from one person to another in writing. This means that, if you employ a graphic designer, web designer or software developer to contribute to your website business, regardless of whether you paid them or not, it is best that copyright in such designs and software be assigned to your business in writing. Written copyright agreements will confirm that copyright has duly been assigned to your business and belongs to your business.

3. Transact legally

Generally, the same rules for contracts apply to transactions executed online on a website as would apply when doing business in South Africa over the counter. For example, minors (persons under 18 years) still require assistance from guardians or parents to conclude any agreement, such as buying or selling a car, cellphone or music. The challenge for online transactions is that it is more difficult to confirm identities of parties and thus certain controls must be put in place to obtain more certainty when contracting.

The Electronic Communication and Transactions Act 25 of 2002 (“the ECT Act”), in particular, provides guidelines on the formation of online agreements and electronic signatures.

4. Protect Personal Data

Almost all online businesses compile information from visitors, leads or prospective clients. The compilation, use, storage and archiving will soon be governed by the proposed Protection of Personal Information Act (“POPI Act”).

The proposed Act applies to personal information collected, stored and disseminated by automated and non-automated processes. It generally applies to South African businesses processing personal information in the context of their trade activities.

Chapter 3, Part A provides the principles for the processing of personal information, which main principles include:

- personal information must be processed in accordance with the law and in a proper and careful manner in order not to intrude upon the privacy of the data subject to an unreasonable extent;
- personal information must be collected for a specific, explicitly defined and legitimate purpose;
- personal information may not be kept for longer than is necessary for archiving purposes;
- personal information must not be further processed in a way incompatible with the purpose for which it has been collected in the first instance;
- the data collector collecting and processing personal information must take practical steps to ensure that the quality of personal information is complete, not misleading, and accurate;
- personal information may only be collected by a data collector which has given notice and has been recorded in a Register kept by the Commissioner;
- appropriate technical and organisational security measures must be taken to secure the integrity of personal data by safeguarding against the risk of loss, or damage or destruction

of personal information and against the unauthorised or unlawful access to, or processing of personal information;

- where personal information is collected, the data subject is entitled to obtain, free of charge, confirmation whether and what personal information is being kept;
- and the responsible party will be kept accountable and must ensure that there are measures taken that give effect to the Principles set out in Chapter 3, Part A.

5. Protect Consumers

The ECT Act provides for consumer protection rights, including certain cooling- off periods relating to online transactions with consumers. The ECT Act furthermore does not prejudice the rights of consumers provided for in any other law.

In this regard, it should be noted that the Consumer Protection Act 68 of 2008 (“CPA”) came into full effect on 1 April 2011. Every business (referred to as “suppliers” in the Act) providing products or services to local consumers, is required to comply with this Act. The Act provides that the definition of a “consumer” does not only include natural persons, but also any business with an asset value or annual turn-over below R3 million. All suppliers must update their online policies and standard agreements to comply with this Act, in particular return of goods policies and warranties. The CPA also impacts on marketing campaigns and materials.

6. Limit technical liability

As humans make errors, so does technology. In this regard, especially if you intend to operate a website with online order or payment facilities, it is important to have reasonable measures to limit your liability for any technical factors which may, for instance, delay transactions or cause internet customers harm in any way.

7. Supply information

To protect consumers, the ECT Act requires that a supplier offering goods or services by way of an electronic transaction provide certain information on the relevant webpage. The required information can be categorised as follows:

- Information relating to the business
- Information relating to the goods or services
- Information on how disputes will be handled

In addition, the Promotion of Access to Information Act 2 of 2000 (“PROATIA”) prescribes that private and public bodies must compile manuals containing certain information.

The main purpose of PROATIA is to foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information flowing from Section 32 the Constitution of South Africa.

Copies of the prescribed information manual must be made available to the Human Rights Commission, on websites and at physical offices. It must furthermore be published in the Government Gazette. The manuals of public bodies must be published online and made available in at least three different official languages.

8. Linking third parties

Reciprocal linking of websites is helpful to stimulate online traffic and form affiliations with businesses offering complimentary products and services. However, when allowing a link to a third party website, it is likely that you will not be monitoring such third party website all the time for possible incidents which may harm or cause detriment to your online consumers, which incidents may reflect badly on your website. It is important to apply your mind when authorising linking to and from third party websites. Your website should include a disclaimer limiting your liability for any damage or harm caused by visiting third party websites which are linked to your business website.

9. Socialise responsibly

Chapter 2 of the Constitution of South Africa provides for the protection of fundamental human rights. These rights include *inter alia* the right to privacy, the right to freedom of expression, the right to information, and the right to non-discrimination. These fundamental human rights must also be protected online.

In the event that your website provides for social facilities, such as a blog, or online discussion forums, it is important to monitor and filter comments which conflict with these supreme rights of individuals. To ensure that bloggers can be identified, it is best that such users register to use such facilities.

10. Supply terms and conditions

Generally, good Terms and Conditions for use of your website should accommodate at least all points discussed above. Such Terms and Conditions document is usually a web-wrap agreement which requires no positive acceptance by users. However, depending on the functionality of your website and the nature of possible online transactions, steps should be taken to draw the user's attention to the terms of the agreement first. It is best to publish Terms and Conditions on a login page.

Conclusion

Following the above points, it is clear that "cyber space" is not without rules. Appropriate steps to protect your business online include at least the drafting and publishing of good Terms and Conditions for use of your website. Websites are accessible by users all over the world and the laws in South Africa differ substantially from other national laws which may apply to websites for foreign jurisdictions. As business owners should educate themselves on these aspects to comply with the law and avoid disputes with online users, on the same basis, clear Terms and Conditions should inform users of their rights, rules of valid online contracts, and correct dispute processes.

Disclaimer

Please note that the above remarks are not meant as formal legal advice and are merely provided as general information. Each website should be fully considered by an attorney with appropriate knowledge and experience in Information Technology and Intellectual Property Law.

If you require legal assistance or a formal opinion, you are welcome to contact De Kock Attorneys at Tel (012) 664 8960, email: info@dekock.co.za, or via their website at www.dekock.co.za for further information, or a free quotation.

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