

Legal Aspects

OF INFORMATION AND KNOWLEDGE

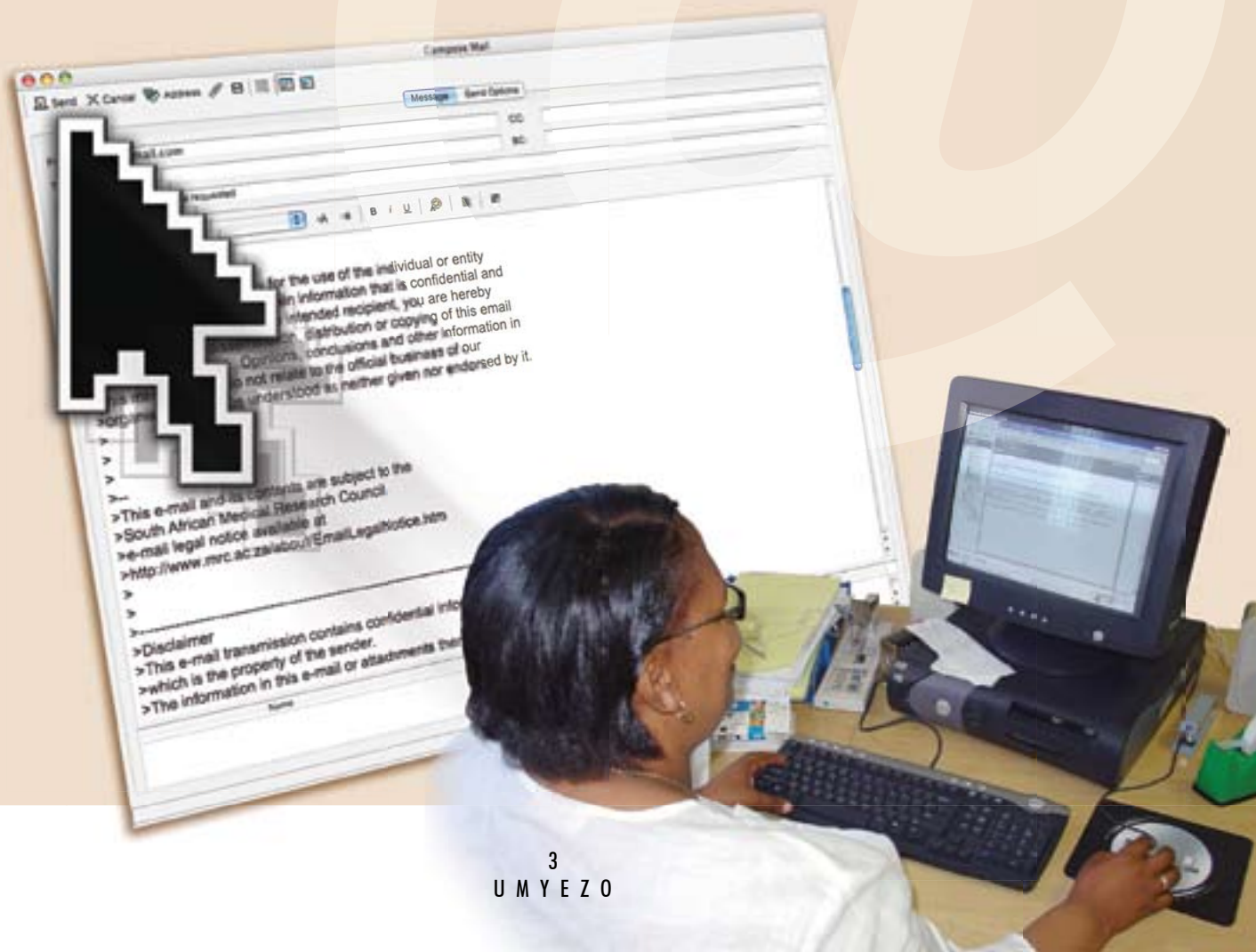
The MRC and Buys Incorporated have been working together regarding legal matters for some time. Many of these relate to information and information handling, and particularly electronic information handling.

In this article, I would like to focus on the risks associated with the use of information, the access to information, collecting information, and the electronic format. We have become so used to all the benefits of using e-mail and instant messaging and the Internet being faster and more productive, yet we tend to forget or ignore all the associated legal risks and liabilities.

Examples of these are actual experiences happening in South Africa: people going to court, organisations being sued for millions of rand because of stupid little jokes, racist and sexist jokes in e-mails or in other forms of electronic communications, etc. Notwithstanding the fact that we use technology, e-mail and the Internet more often, much more of our intellectual property and trade secrets are captured and retained in electronic format.

New laws have come into effect, such as the Electronic Communications and Transactions (ECT) Act, which means everything we could have done legally and commercially with pen and ink we can now do electronically. Who would gossip about their bosses on a company letterhead, or about what happened at an MRC Christmas party on the MRC's letterhead? Yet people do it in e-mails, and e-mail in terms of the ECT Act has exactly the same significance as something on a company letterhead signed by the person who wrote it. People are surprised when they end up in court for sexual harassment by e-mail, forgetting that you cannot harass a secretary on the company letterhead.

The other piece of contentious legislation is the Regulation of Interceptions Communications Act, which means that nobody, not the State, the police, your employer, the MRC, or the Minister of Health, can intercept your e-mail. If they do so, it is a criminal offence that will cost the organisation R2000 - R2 million, unless they have prior consent and have spent some time on that aspect as well.



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MANAGEMENT

The interesting part is whether there is any risk at all associated with e-mail? Has anybody got into trouble because of e-mail or been to a disciplinary hearing because of something written in an e-mail? Has anybody taken somebody to a disciplinary hearing? Evidence from a few examples follow.

Sexual harassment. Towards the end of last year there was a very talked about judgment, the NASPERS judgment. This judgment made legal history in South Africa by saying that, for instance, if a male employee harasses a female employee, that female employee can recover her damages — she can sue her employer. She does not have to sue the person who harassed her, she can sue the employer - and of course, the employer would have a much deeper pocket than the person that caused the harassment in the first place. This woman got harassed at NASPERS, the person was touching her all over the place at the coffee machine, and she sued NASPERS and got the money from NASPERS. In terms of the MRC environment, this means that if someone harasses somebody else at the MRC - whether it is gay, sexual or racist harassment or any kind of harassment - the harassed person can sue the MRC.

Useless information such as a stupid little e-mail, '25 reasons why beer is better than women', that was sent out and it cost a chevron corporation R2.2 million just to settle. So watch what you write in an e-mail, and watch who you send your e-mails to - it could not only be a legal battle for the MRC, but also create plenty of reputational harm. Soon it is all over the front page of the Sunday Times that there is this harassment going on at the MRC because one person sent a stupid little e-mail to somebody else.

Racial discrimination is another example, which links with what was mentioned earlier. If you do not sexually harass a secretary on the company letterhead, why would you harass somebody sexually, racially, or otherwise? It happens more and more in South Africa that people think that the electronic medium is somehow not as important as the paper medium. You get a lot of borderline medium sexual harassment going on via sms or e-mail or some other form of communication. A person in Ellisras has just been fined R10 000 for distributing a 'recipe to make black people', which was really in bad taste. However, the people are now suing Xerox, the employer at the time, while this person has been fired and is out of the picture. Now Xerox has to stand in line in terms of this judgment for data damages.

Silly jokes/clips. People start making a collection of little 'jokes', which they send to their friends and co-workers, and then they are quite surprised when they end up in trouble. Sending a stupid clip or a picture to your fellow employees makes

the MRC and yourself potentially liable for racism, copyright infringement, and trademark infringement. Especially an organisation like the MRC, a guardian of content, does not want to expose itself to the risk that it has been sued for copyright infringement.

An IT manager in Cape Town was fired recently because he sent a little clip of a cat rolling a marijuana joint to his fellow employees - and accidentally, according to him, also to about five of the company's clients. They were not impressed, and he was fired. On the other hand, pornography on the Internet is not actually such a big concern anymore. That is, everybody who wanted to have a look has done so, and this seems to have calmed down.

Today the big problem is the downloading of music, videos, and films and then sharing these. Who would want to go to Exclusive Books and pay something like R750 for the new Jamie Oliver book if you can just get it free of charge? Somebody scanned the book and it is now available in Word format. These people received it from other people and they think this is a legal copy, and they share it - and remember, with copyright infringement anybody and everybody in the queue passing it on is as liable as those people who originally put it up there. So please, if you receive something like that, the fact that it is possible does not make it legal. The fact that you can download music from the Internet does not make it legal.

Another issue is loss of productivity. Many people spend so much time on the Internet and e-mail that they do not do their actual work. Companies think they are resolving this problem by having a content filter blocking certain words, such as 'sex'. Therefore, no e-mail with the word Middlesex in it can get through, while all the e-mails with the word porn in it can get through. Filters are unconstitutional since they are blocking constitutionally protected speech. You cannot just block certain words without looking at the context in which those words appear. The point is that although your company blocks the e-mail, you are deemed in terms of the ECT Act to have received that e-mail. This could be a tender application or an application of whatever important nature that you are deemed to have received by law, but is blocked by your filter.

With these examples, your attention is drawn to the legal aspects attached to information and knowledge management concerning your electronic media.

Beware!