

TO DISCLAIM OR NOT TO DISCLAIM

Category: Commercial Law,Media and OTT,Privacy Law, Infosec, and POPIA,Technology Law
written by Lucinda Botes | September 3, 2019



Disclaimers are a good way for businesses to contract out of liability. Most businesses disclaim any improper or unlawful use or dissemination of information contained in an electronic message or attachment or any harm or loss resulting from malicious software, code or viruses contained in an electronic message.

Generally, an email disclaimer may address issues such as confidentiality, copyright, contract formation, defamation, discrimination, harassment, privilege and viruses.[\[1\]](#) Disclaimers are usually found at the bottom of nearly all outgoing electronic communication. Given their apparent overuse, the question is, how effective are they at limiting the liability of a business?

Confidentiality

A disclaimer may indicate that an email is confidential and is only for the attention of the intended recipient. It usually goes further and instructs the erroneous recipient to delete all copies of this document. The confidentiality clause is usually added to mitigate risks against a breach of confidentiality.[\[2\]](#)

Contract

A disclaimer may prohibit the formation of a contract by email since most types of agreements may be entered into using electronic means.[\[3\]](#) An email disclaimer may also draw attention to the fact that certain persons do not have the requisite authority or signing powers to conclude any transaction on behalf of a company. Section 20 of the Companies Act 51 of 2008 states that where a company official has limited or restricted powers and authority, including signing powers and the power to conclude any transaction, a third party will not be expected to have any knowledge of that, unless it has expressly been brought to their attention.[\[4\]](#)

Viruses

An email may contain a virus which may cause the recipient of the email, loss or harm when such email is opened. To mitigate this risk, where a recipient may have recourse against the sender of the email which contained a virus, a disclaimer would warn the recipient of the possibility of infection and advises the recipient to conduct their own scan.'

How effective is a disclaimer?

In the Afrox^[5] matter, the Supreme Court of Appeal had to decide whether a disclaimer in a contract entered into between a patient and a hospital was enforceable. The SCA held that a disclaimer or indemnity clause which excludes liability for gross negligence could be contrary to public policy. This means that a website disclaimer or email disclaimer should not exclude liability for gross negligence. For example, if an employee of a business intentionally disseminates malicious malware via an email to the customers of that business which results in the files of the customers being corrupted, the business will be held liable for such gross negligence despite having an email disclaimer.

For more good, clear, precise advice, contact us

^[1] Jessica Rajpal "Reading the Small Print - Are e-mail disclaimers really important?" 2016 Derebus 30.

^[2] Jessica Rajpal "Reading the Small Print- Are e-mail disclaimers really important" 2016 Derebus at 30.

^[3] Allison Lee "Email Disclaimers" 2015 Without Prejudice at 79.

^[4] Allison Lee "Email Disclaimers" 2015 Without Prejudice at 80.

^[5] Afrox Healthcare Ltd v Strydom 2002 (6) SA 21 (SCA)