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Santa's Unlawful Surveillance of People using AI Technologies to Determine Who's Naughty or Nice

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1. Introduction

This short contribution will analyse how Santa Claus makes use of artificial intelligence (AI) technologies as surveillance on South Africans to determine who is naughty or nice with respect to Christmas gifts. Santa uses drones and AI algorithms on social media to collect data on South Africans, which makes it easier to determine who should receive Christmas gifts. This, however, raises certain privacy concerns concerning the monitoring and collection of private data without a person's consent. The contribution will examine the lawful and unlawful means of using artificial intelligence technologies and collecting data for Santa's naughty or nice Christmas gift list. Although Santa Claus is hailed as a spreader of joy, no one is above the law and he too will be required to abide by the laws of South Africa. The contribution will therefore briefly examine AI and the law, as well as privacy laws in South Africa.

2. Santa Claus and Christmas

We all know who Santa Claus is, whether he goes by the name of St Nicholas, Father Christmas or Mr Claus. He is easily identified by his big stomach, white round beard and red and white clothes with a black

belt and boots. According to resources, Santa lives in the North Pole, where he spends 364 days of the year making toys for everyone with the help of his elves, after receiving letters of wish-listed gifts from everyone across the globe (Tikkanen, 2020). Santa is usually seen flying overhead on his magic sleigh with reindeer into people's homes on Christmas Eve to deliver toys to everyone (History, 2020). He comes down the chimney and leaves the gifts by the Christmas tree and often helps himself to the milk and cookies left for him by the owners of the house (Tikkanen, 2020). The gifts are meant only for the people who behaved well during the year, whilst those who behaved badly would receive a lump of coal.

The 25th of December is seen as a religious day by the Christian faith celebrating the birth of Jesus Christ (Badina, 2016). The date is known as Christmas day and has also become popular due to Santa Claus bringing gifts for everyone the night before to open the next day (Hillerbrand, 2020). It is therefore seen as a day of celebration among family members and Santa aims to aid to this joyous occasion by providing gifts to those people who deserve them. The gifts would also be based on what people asked for in letters addressed to Santa at the North Pole.

Although Santa may be historically seen as a figure who brings joy to everyone around Christmas, he may be breaking the law in the performance of his duties. One of these relates to the right to privacy. One source has indicated that Santa breaks into our homes yearly to deliver gifts to all those who have been good throughout the year (Sky History, 2020). When one thinks about this statement one begins to wonder, when did I give Santa permission to enter my home? This article, however, focuses on how Santa determines who gets Christmas gifts by finding out who is naughty and who is nice.

3. Santa Claus and artificial intelligence

We all know the lyrics to the famous song "Santa Claus is coming to town". The music and lyrics were composed by John Frederick Coots and Haven Gillespie and the song was first performed on Eddie

Cantor's radio show in November 1934 (Christmaslyrics.com, 2019). The first three verses of the song are as follows:

"You better watch out
You better not cry
You better not pout
I'm telling you why
Santa Claus is coming to town.

He's making a list,
Checking it twice,
Gonna find out who's naughty or nice.
Santa Claus is coming to town

He sees you when you're sleeping
He knows when you're awake
He knows if you've been bad or good
So be good for goodness sake".

The song no doubt brings joy to both adults and kids, but have you ever wondered how Santa actually finds out who's naughty or nice? Furthermore, how does Santa know when you are sleeping, awake or have been good or bad? The answer: surveillance. That's right, you heard me; Santa uses various methods to keep tabs on who's naughty or nice and even tracks when you are sleeping or when you are awake. He does this by using different methods of surveillance without people knowing that he is busy watching their every move. Bilchitz argues that technology has become a standard feature in our daily lives both socially and commercially and because of this continuous usage, they exist in both private and public spaces, which in turn may lead our communications to be monitored and tracked (Bilchitz, 2016). The advancement in technology has now allowed Santa to use certain methods to gather information about people. It is through these gatherings that legal concerns are raised. The following are the main ways in which Santa uses technology to track and collect information relating to South Africans.

4. *Social media*

Social media is a popular medium used for people to communicate with each other. Social networking is a subset of the internet and most of these networks have millions of users (Leong, 2015). It may be defined as "Internet-based, disentrained, and persistent channels of mass-personal communication facilitating perceptions of interactions among users, deriving value primarily from user-generated content" (Carr, 2015). This basically entails using online platforms to upload or send personal communications among online users. In South Africa, some of the biggest and most popular social media platforms used are Facebook, Instagram, WhatsApp, Twitter and Snapchat (BusinessTech, 2019).

Social media enables smartphone, tablet or computer users to express their communications online to a large group of people within these networks (Langmia, 2013). People may disclose personal information on their profiles and this act of disclosure is referred to as a user's 'visibility' to others, which may be controlled through privacy settings on social networks (Roos, 2012). A users profile is therefore visible to everyone else on social media unless they have controlled their visibility through the privacy settings (*Isparta v Richter*, 2013). This basically means that if social media users do not place restrictions on their visibility, their uploads are in the public domain and can be seen and accessed by anyone else.

Santa uses social media to track and check people's information and he can use this information to prepare his naughty and nice list. People also tend to feel safe to share information on social networks because they feel it is a controlled environment by sharing information to a specific audience on social media through privacy settings, however, this privacy is sometimes misconceived due to the visibility of their profiles to the general public (McGuinness, 2018). By monitoring and viewing social media posts, Santa can easily check the behaviour of South Africans through social media without them being aware that they are being watched. As people tend to upload their personal thoughts and communications, Santa can easily determine whether

they will receive a gift on Christmas day. Users tend to vent online or upload controversial pictures or comments and this can easily mean that in Santa's eyes they deserve a lump of coal. South Africa is comprised of millions of people and it may seem nearly impossible to track so many social media users. Santa has to therefore use other technologies to gather information for Christmas gift list.

5. *Artificial intelligence*

Through social media websites, Santa may use artificial intelligence technologies to gather data and information about people to determine whether they have been naughty or nice. It has already been discussed that if social media users do not place visibility restrictions on their profiles then their information is publicly and readily accessible. He may also use AI to hack private social media profiles to gain that personal information that he would not be able to obtain by ordinary means. The unlawful surveillance of people by Santa however is not limited to social media. He may use AI to track other Internet-connected applications, such as WhatsApp, emails, SMS's, browser history on computers and cellular devices and blogs.

In short, AI involves intelligent computer-based systems using algorithms to learn systems and perform certain tasks (Villasenor, 2020). The applications of AI usually involve natural language processing and machine learning systems (Alarie & Niblett, 2018). AI can be based on determinative algorithms or on machine-learning algorithms that learn directly from training examples (Bathae, 2020). An "algorithm" is basically a sequence of steps programmed to move towards a goal and the AI algorithm can adapt over time as it learns from experiences (Villasenor, 2020). The natural language process involves analysing the use of words and phrases, whilst machine learning involves the process of enabling computers to learn to certain tasks without the benefit of explicit rules-based programming (Alarie & Niblett, 2018).

Santa may employ different types of AI methods to track and gather data for his Christmas list. Knowledge-based systems are based on

computers programmed to reason and make use of expert knowledge in their decision-making process, whereas machine learning systems rely on programming that can learn without explicit programming, and can change or learn when it receives new data (Barnett, 2018). As these systems are based on data, they utilise information received from the Internet or uploaded onto their systems. Much will also depend on the coding of its algorithms. Santa can therefore code his North Pole computer to process information from social media, websites and other Internet-connected devices such as WhatsApp and SMS's. Yet not everyone has a social media profile or access to electronic devices and Santa, therefore, has to rely on another method of surveillance.

6. *Drones and reindeers*

Children are the ones who arguably look forward the most to Christmas due to the expectation of receiving presents from Santa. Not all children, however, have a social media profile, email address or cellphone that Santa may use to track their behaviour. Some students may have access to tablets or iPad's that Santa can rely on using their data, but not all children have access or own such devices. Santa, therefore, has to make use of other devices of surveillance that monitors children to determine who's naughty and nice and who would receive a lump of coal or gift on Christmas. One of these devices is Santa's drones that he makes his elves build in the North Pole for the sole purpose of surveillance and recording of private information. A "drone" may be defined as an aircraft that does not have a pilot but is controlled by someone else from the ground and mainly used for the purpose surveillance (Cambridge, 2020).

These drones are quite small and are often not seen by the people of South Africa, who are most of the time unaware that they are being watched and recorded. Santa's reasoning behind using drones is because of their capabilities. He can make millions of drones in his workshop and dispatch them on missions worldwide. Drones are often small flying structures that have the function to record a vast amount of information or data through photography, video, and sensors and can even pick up facial recognition or use night vision (Scharf, 2019).

These drones can give Santa live feedback of events taking place in our homes, workplace or wherever one may be. The drones can also record videos that Santa may playback at a later stage. The capabilities of drones make Santa's job easier in determining who gets Christmas gifts and its small size allows it to travel into our homes, schools and workplace.

Besides using drones as a recording device, Santa has one more way in which he can gather information. Many of you may not know that Santa also sends out his reindeer on reconnaissance missions to gather intel for his Christmas list. Although Santa may have many reindeer, his number one agent is Rudolph the red-nosed reindeer. The true reason why Rudolph's nose is red is that he is in fact recording your every move! Rudolph flies around 365 days a year video recording all the children for Santa to determine who's naughty or nice. The children are of course, unaware that they are being watched by Santa and his minions. Authors have argued that as drones become more advanced and popular, they are a common sight in the skies and this increases the likelihood that individuals' privacy will be invaded (Scharf, 2019). It is, therefore, necessary to briefly analyse how Santa has breached South African privacy rights.

7. *Privacy and the law*

It has been explained how Santa has broken the law and it is now necessary to briefly set out the applicable law. As mentioned above, the right to privacy is one of the laws that Santa should adhere to. Privacy entails seclusion from the public by an individual and may be infringed by an unauthorised act by an outsider on the individual or her personal affairs (Neethling, 2015). Bilchitz avers that the right to privacy seeks to protect the freedom of the individual against the arbitrary exercise of coercive power by the state and further provide the individual with a sense of personal security (Bilchitz, 2016). This has also been confirmed by South African case law, which provides that the right to privacy advocates the right in a person's personal life to be free from intrusions and interference by the State (*Gaertner v Minister of Finance*, 2014). This means that people have the right to be free from

government intrusions in order to feel some sort of safety from outsiders.

Generally, there are two forms of an invasion of privacy: the first is the unlawful invasion of the personal privacy of another and the second invasion involves the unlawful publication of private facts about another (*Financial Mail (Pty) Ltd v Sage Holdings Ltd*, 1993). Swales affirms that South African jurisprudence on privacy law is extensive and privacy is protected through the constitution, common law and the courts (Swales, 2016). Although this right is constitutionally entrenched, it is also protected and regulated through the law of delict, under the *actio iniuriarum* (Roos, 2012). In *Jansen van Vuuren v Kruger*, the court alluded to the fact that the *actio iniuriarum* protects a person's dignity and such dignity encompasses privacy and is therefore better described as a right of personality (*Jansen van Vuuren v Kruger*, 1993). Case law further entrenches that when a person suffers harm as a result of an intentional violation of a personality interest that person must institute an action for non-patrimonial damages in terms of the *actio iniuriarum* to claim compensation for harm suffered (*De Klerk v Minister of Police*, 2020).

Neethling, Potgieter and Visser aver that the recording of private facts is a wrongful infringement of privacy (Neethling, 2015). The authors further provide a list of what may constitute an unlawful invasion of privacy and it appears that Santa may be liable for all these invasions:

- entry into a private residence;
- secretly watching a person;
- reading private documents;
- listening into private conversations;
- shadowing a person; and
- as already mentioned above, recording of private information (Neethling, 2015).

The gross violations of privacy committed by Santa involve the secret surveillance of people to determine who's naughty or nice in order to receive gifts on Christmas day. One does not know when or where Santa is watching, but one does know that he is in fact watching us.

The use of AI tracking of social media, drones recording people in private places, as well as Rudolph recording and spying on South Africans may all constitute a gross invasion of privacy. In *S v I*, the court stated that the wrongdoer was not justified when he peeped through a window of the victim and this act was clearly an invasion of her privacy because her dignity was injured by the invasion of her privacy (*S v I*, 1976). In the *Hickman* case, the court held that the taking and copying of private documents constitutes an *injuria* (*Reid-Daly v Hickman*, 1981). Similarly, in *S v A*, the court held the planting of a transmitting device in another person's apartment that could listen into that person's private conversations constituted two separate acts, but both were a gross encroachment on a person's privacy and an impairment of his dignity (*S v A*, 1971). In the *Epstein* case, in terms of shadowing the court remarked that it is a principle of Roman law that if a person is shadowed and constantly followed or spied on, this constitutes a most "vexatious nuisance" and one should have a right to complain about such conduct (*Epstein v Epstein*, 1906). This was confirmed by *Huey Extreme Club v McDonald*, where the court agreed that shadowing is a nuisance and constitutes a wrongful invasion of privacy (*Huey Extreme Club v McDonald*, 2005).

Other than the common law, the right to privacy is also constitutionally protected. Section 14 of the Constitution (the Constitution of the Republic of South Africa, 1996) entrenches the right to privacy:

"Everyone has the right to privacy, which includes the right not to have:

- (a) their person or home searched;
 - (b) their property searched;
 - (c) their possessions seized; or
 - (d) the privacy of their communications infringed".
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In the *Gaertner* case, the court reiterated that privacy is often seen as a fundamental personality right worthy of protection as part of human dignity and it is therefore necessary that the right to privacy in relation to the homes of individuals and their private possessions are protected and someone cannot gain entry or search such premises without

authority to do so (*Gaertner v Minister of Finance*, 2014). A person's right to privacy allows oneself to determine and to dictate the ambit of disclosure to others (*National Media Ltd v Jooste*, 1996). In the *Ketler case Investments v Internet Service Provider's Association*, the court stated that the right to privacy includes the right not to have one's personal information used by others without gaining some acceptable form of consent from that person (*Ketler Investments v Internet Service Provider's Association*, 2014).

McQuoid-Mason submits that in order to establish an infringement of the constitutional right to privacy, the plaintiff must prove she had a subjective expectation of privacy, which was objectively reasonable (McQuoid-Mason, 2000). The court in the *Gaertner* case stated that "the reasonableness of a person's expectation of privacy, and the strength of that person's privacy interest can vary depending on the regulatory scheme to which that person is subject" (*Gaertner v Minister of Finance*, 2014).

In *Bernstein v Bester*, the court provided that the 'reasonable expectation of privacy' test comprises two questions: first, there must be a subjective expectation of privacy and, secondly, the expectation must be recognised as reasonable by society (*Bernstein v Bester*, 1996). Burns argues that in South Africa, it is well-established in our law that once information has entered the public domain, there can be no legitimate expectation of privacy in relation to such information (Burns, 2015). As our homes are closely regarded as the most private and intimate spheres of our lives, South Africans have a reasonable expectation of privacy which Santa intrudes when he sends drones into our homes or tracks our social media on our private devices.

A contravention of section 14 of the Constitution may be regarded as an unlawful invasion of privacy, unless the breach is justified in terms of section 36 of the Constitution (McQuoid-Mason, 2000). Section 36 allows a right to be infringed if it is reasonable and justifiable in an open and democratic society. In terms of this section, one must also consider several factors to determine whether the limitation is warranted, including:

- (i) the nature of the right;
- (ii) the importance of the purpose of the limitation;
- (iii) the nature and extent of the limitation;
- (iv) the relation between the limitation and its purpose; and
- (v) less restrictive means to achieve the purpose.

As privacy is not absolute, it may be limited in certain circumstances. Privacy must be balanced with other competing interests and rights such as freedom of speech and access to information (Swales, 2016). Authors have also suggested that the general test to establish a wrongful infringement of privacy involves the *boni mores* or criterion of reasonableness (Neethling, 2015). It would appear that Santa would have to argue that his surveillance is reasonable and justified to limit the right to privacy as he has to decide whether to give South African gifts on Christmas day. His argument is unjustified as there are probably less restrictive means to achieve his information and the right to privacy has long been regarded as an important right to all. Although Christmas gifts may be important to some people, the right to privacy outweighs Santa's invasion. The access to information is not as important to the right to privacy in Santa's case, especially considering the methods he uses to gather that information.

Santa must also adhere to the Protection of Personal Information Act 4 of 2013 (POPI). One of the purposes of POPI is the safeguarding of personal information, subject to limitations aimed at balancing the right to privacy against other constitutional rights, such as the access to information (ss 2(a)(i)). Another purpose of the legislation is protection of the free flow of information within the Republic and across international borders (ss 2(a)(ii)). Bearing in mind that Santa resides outside the country, this is an important protection for South Africans. One may then argue that Santa is not subjected to this legislation, however POPI will apply to Santa even though he is not domiciled in the Republic because he makes use of automated or non-automated means in the Republic in collecting and processing the personal information of South Africans (ss 3(1)(b)(ii)). The definition of "automated means" falls within Santa's operations because it "means

any equipment capable of operating automatically in response to instructions given for the purpose of processing information" (s 3(4)).

The preamble recognises the constitutional right to privacy, which also includes a right to protection against the unlawful collection, retention, dissemination and use of personal information. POPI emphasizes the lawful processing of information and much relies on consent given by person whose information is being processed. Section 4 sets out certain conditions that need to be met by the responsible party for the lawful processing of information, read with section 9, which provides that personal information must be processed in a reasonable manner that does not infringe upon the right to privacy. Information is processed lawfully if it is done so in a reasonable manner that does not infringe the privacy a person (s 9(b)). Consent envisages any voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information (s 1 read with s 11). Bearing in mind that Santa prepares the majority of Christmas gifts for children and children cannot give consent themselves, POPI states that a competent person may provide consent on a child's behalf to process the personal information (s 11(1)(a)). Consent must be obtained from a person to process his information, however, the processing may occur if it is necessary for pursuing the legitimate interests of the responsible party (ss11(1)(a)-(f)).

Santa is required to collect the personal information directly from the people he wants to gain information on (s 12(1)). There are, however, several exceptions to this general and two of which may apply directly to Santa. The first exception is that Santa does not have to collect the information directly from a person if that person has consented to the processing of such information (ss 12(2)(b)). This means that Santa can ask all those who wish to receive gifts to consent to him collecting their information and processing it to determine who has been naughty or nice. The second exception is that if the information has been made public by that person, Santa does not have to collect the information directly from that person (ss 12(2)(a)). In terms of social media therefore, public communications posted by users on their pages may be used by Santa because this falls within the public domain.

It appears that South Africa heavily protects the right to privacy and Santa's methods of gathering information for his Christmas gift list are unlawful and unconstitutional. He will need to change his approach and methods of information gathering to justify his conduct and practices.

8. Santa Claus and the way forward

Santa is not above the law and needs to abide by South Africa's laws. In terms of the collection and processing of social media data, Santa should ask for consent from social media users. When one signs up on a social media website one has to accept its terms and conditions. Santa can easily also add a clause into these social media platforms asking for permission to view a user's content. If the user agrees, Santa may collect and process social media communications. If he does not get permission from a user, he will need to find an alternative way to determine if that person has been naughty or nice.

His AI algorithms should also be coded and programmed fairly and transparently so not as to discriminate against South Africans. For example, citizens should understand what information is collected and for what purpose and the grounds for not receiving a Christmas gift. Santa would need to carefully programme his AI algorithms to process social media communications and not to unjustly refuse a gift based on one communication.

In respect of his drones and Rudolph as recording devices, Santa will also need to obtain consent from the parents of children to monitor and collect information for his naughty and nice list. Without this consent, Santa's actions are unlawful and contravene the common law, the Constitution and POPI. Santa should clearly set boundaries for surveillance and respect the right to privacy, especially the privacy in one's own home. One must remember that information in the public domain can be used by Santa, but permission should still be sought from the person to whom it applies to.

Ironically, Santa is the one who is acting naughty due to his breach of privacy rights, however, should he rectify his conduct he will begin to

spread joy to South Africans again. It is clear that technology will continue to advance and it is clear that Santa has taken advantage of such developments. Technology such as AI needs to comply with the law to respect and protect the rights of citizens. We know Santa is watching us and once we have legally permitted him to do so, he may decide who is naughty and nice. Think twice the next time you post on social media or see a drone outside and remember to smile, otherwise, it may not be a Merry Christmas after all! And to you Mr Claus, we say get your act together or you shall face the mighty wrath of our Constitution and courts!

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