

# Privacy concerns around the use of empathic media

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The use of emotionally appealing information in marketing is nothing new. Advertising campaigns have long been littered with stimuli to provoke emotional responses. Yet, marketers have, for the most part, very little return information on the emotional responses of consumers to their marketing campaigns. Largely, such feedback is indirectly measured information, such as impressions, reach and engagement. Newer technologies, however, are starting to change this by providing marketers with the ability to receive sensory feedback, which could be used to interpret emotional responses to marketing stimuli. Such systems broadly fall into private and public systems, both of which influence their legal interpretation.



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## Private systems

Private systems are those which may be deployed in the home. These could also include webcam feedback of facial cues, in-car cameras in some smart and autonomous vehicles capable of driver body language monitoring, and smart adult toys with emotion sensing capabilities. This could include active-when-used tracking (such as facial recognition systems where mobile cameras are used); and always-on tracking, such as biometric-based collecting data from smart wearables.

## Public systems

Advertising in public spaces is not new, with out-of-home or outdoor media (OOH) advertising being an entire industry unto itself. OOH advertising is typically found in public common spaces, such as train stations, retail areas, billboards and other places where the attention of consumers 'on the go' can be commoditised.

Digital out-of-home advertising (DOOH) is also now employed at key locations where technical resources permit. Such systems typically already use interactive capabilities, such as high-resolution touch sensitive monitors, audio capabilities and connectivity for access to cloud-based content and resources. The inclusion of cameras and microphones in such DOOH systems is a very simple next step and, together with connectivity to a backend of cloud-based facial recognition and image processing, the ability to use such systems to interpret consumer responses is easily achievable. Some facial recognition billboards are capable of recognising gender, ethnicity and age, reportedly with 85 – 90% accuracy.

Regardless of space, such empathic media, can take a variety of forms. The basic premise is an advertising system, capable of sensing aural, visual, physiological, or other feedback of a consumer in response to marketing stimuli, which is processed and acted upon in real time in the augmentation of the advertisement.

## **Gladvertising**

Although still uncommon, the technology is already being well studied, particularly in the opportunities and challenges associated with mood recognition (what the Centre for Future Studies termed “Gladvertising”). It has been argued by some that the way such systems may interact with people does not require the use of personally identifiable personal information. This is based on the argument that such technologies do not require identifiable or even anonymized demographic data when sensing the cues used to make inferences about a person’s emotional state or mood. Basic information such as facial muscle movements, assessed using facial coding technologies, could be enough to make inferences. If this argument is accepted, this may exclude the application of various personal information protection regimes. There is some scepticism, however, that personal information can really be excluded for a system to have sufficient information to make useful inferences, but this has not yet been tested by courts.

## **Personal data**

The recently implemented Protection of Personal Information (POPIA) in South Africa sets out guidelines around the processing of personal information, which may now only be processed in a fair and lawful manner that is transparent to the individual and requires an individual’s explicit consent. Responsible parties processing personal information in South Africa must ensure that personal information is only processed for specific, explicitly defined and legitimate reasons relating to the functions or activities of the organisation, and the organization must take steps to make affected data subjects aware of the purposes for which the personal information will be processed.

However, if the relevant empathic media system processes information that is so anonymised, then there is arguably an issue of application of POPIA. It is argued that in the case of private systems, the likelihood of connection of the personal information (such as account profile data) would be easily made with processed information, and it would be difficult to imagine a scenario where full anonymisation is possible. In public systems, however, there is a far greater potential for anonymised scenarios.

The industry nonetheless treats the tracking of emotional reactions as personal information, using an explicit opt-in system. In private systems, this approach is already adopted by tech companies. In public spaces, systems that use empathic media clearly disclaim themselves as doing so, and only begin tracking required cues once a user has acknowledged their consent to being tracked. Where decisions can be made on the basis of such empathic advertising, customers are often given a right to withdraw on the basis of a cooling-off period (as is the case in some jurisdictions’ consumer protection laws in relation to unsolicited direct marketing). This is particularly relevant where the empathic media is of a more sophisticated variety (such as a digitally animated customer assistant) and contain point-of-sale capabilities.

Clearly, boundaries of exploitation are needed in the use of empathic media. It is in the supplier’s best interests to self-

establish ethical policies and guidelines on consent for intimate empathic media, which will prevent the need to wait for the inevitable regulatory intervention that will soon follow. With new uses and applications constantly emerging, and this technology receiving attention from the media, governments, regulators and the general public around the world, regulations are imminent.

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