

Legal issues to consider for the (new) media

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Deacons



Great questions of the modern era

Is there really a God?

Did man really land on the moon?

Are the Rolling Stones better than the Beatles?

Will Richmond ever make the final eight?

Why are you here today?

(a)
To enjoy a
nice lunch?





(b) Because you have to be here?

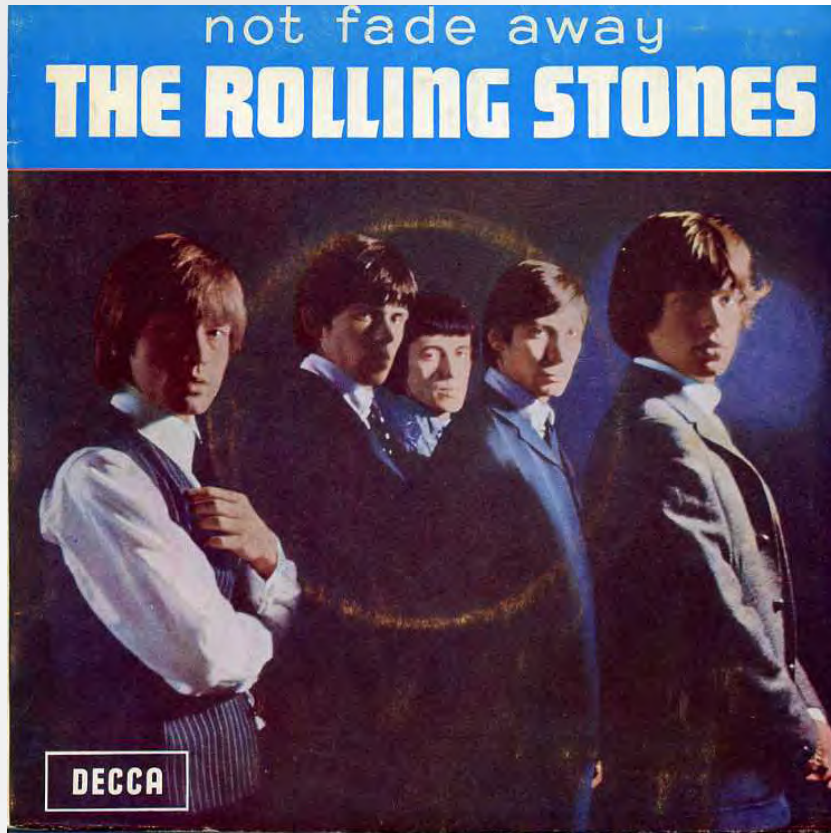


(c)
To learn
something?





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Fact:
You will fade away
every 6 to 7 minutes

Fact: You will only remember 2% to 9% of this session



But don't worry –
I'll point out the
most important 9%
at the end



So what will you (hopefully) learn today?

1. Playing in the new digital sandpit with Web 2.0
2. Who's playing in it? Social networking case study
3. What are the legal considerations for Web 2.0?
4. How to construct a blogging policy to minimise risks
5. The latest on domain names
6. Conclusion: the 9%



Playing in the new digital sandpit

- What is this new environment?
 - Web 2.0
- Primary characteristics
 - Online participation
 - One to many platform
 - Control ↓ as Interactivity ↑
- Examples
 - Blogging
 - Social networking (eg Facebook, MySpace)
 - Information sharing (eg podcasting) / Wikis
 - Immersive virtual worlds (eg Second Life)



Who's playing in it?

Deacons Social Networking Survey 2008

- Methodology

- The sample was 693 workers (full time or part time), aged 16 years and older and distributed throughout Australia
- Age, gender and region quotas were applied to the sample
- Following the completion of interviewing, the data was weighted by age, gender and region to reflect the latest ABS population estimates



Main Findings – Internet Use

- Almost two thirds (62%) of workers use the internet at work and almost half (47%) use it frequently
 - 52% of workers aged 35 years and over use it frequently
 - 63% of white collar workers use the internet at work frequently
- Almost everybody (91%) says that they use the internet appropriately while at work, with only 1% saying that they frequently use it inappropriately (4% among social network site users)



Main Findings – Use of Social Networking Sites

- Overall - 14% of workers who use the internet use SNS at work
 - 16-24 years : 32% use SNS at work
 - 25-34 years : 23% use SNS at work
 - > 35 years : 4% use SNS at work
- 46% of SNS users would prefer a job with an organisation that didn't block
- 20% of employees are blocked



Main Findings

- Most employees who use the internet (76%) see benefit to organisations if they allow employees to access SNS while at work
 - 68% say that it shows an element of trust in their employees (80% of people 16-24 years)
 - 48% of workers say that it gives them a break from day-to-day work and keeps them fresh
 - 40% say that it allows employees to better network with other employees, customers and suppliers



Issues – Social Networking

1. Commercial – Issues for employer

- Employees' productivity
- Employees' morale
- IT system performance

2. Legal – Workplace Relations

- Extension of workplace – but very informal
- Content clash – work versus social – appropriate
- Harassment – “Friend”
- Discrimination – exclusionary groups or scanning sites
- Bullying – anonymity

3. Legal – Confidentiality

- Is it that different to existing platforms?



Issues – Social Networking

4. Legal – End User Licence Agreement (EULA)
 - Scanning for recruitment – a breach of EULA?

5. Legal – Policies for employers
 - Reinforce general HR policies
 - Reasonable use may be permitted
 - Reinforce confidentiality obligations
 - Caution about reputation – corporate and personal
 - Not to speak on behalf of the employer
 - Employer may monitor
 - Consequences of failure to comply

6. Legal – Private social networks
 - Terms of use



Legal considerations for Web 2.0 generally

- Multiple legal relationships to consider
 - User \leftrightarrow Platform Providers (governed by EULA)
 - User \leftrightarrow Platform Member
 - User \leftrightarrow Platform Non-Member (Visitor)
 - User \leftrightarrow Others (eg defamed person)

Legal considerations for Web 2.0 generally

1. EULA

- Who is signing up to the EULA?
 - the employee?
 - the employee on behalf of the employer?
- Employers “scanning” sites for information about existing and prospective employees
 - May be a breach of the EULA
- Platform–owner = God-like powers
 - Bragg v Linden Research



Legal considerations for Web 2.0 generally

2. Jurisdictional issues

- Defamation – multiple jurisdictions (*Dow Jones v Gutnick*)
- Trade Practices Act – consumer protection provisions, including misrepresentation

3. Intellectual property

- Does user have the right to post content in the first place?
- Who has rights to the posted content?
- Open platform operated by a company – liability for third party content – authorisation and monitoring
- Moral rights – have appropriate consents been obtained?
- Linking (*Universal Music v Cooper*) – purpose of linking



Legal considerations for Web 2.0 generally

4. Privacy

- Adverse publicity and reputation damage
- No real stick – YET!
- Proposed amendments include data breach notification

5. Breach of confidence

- Release of sensitive information of the company
- Release of sensitive information of customers / suppliers

6. Defamation on blogs

- Publication liability
- Employer may be liable



Legal considerations for Web 2.0 generally

7. Vicarious liability – employer liable for employee's posts
 - Misrepresentation by employee
 - Providing a platform vs allowing employees to use external platforms – sufficient for liability?
8. Offensive material and criminal liability
 - Vilification – race, religion, sexuality or gender
 - Obscenity and indecency
 - Pornography
 - Seditious
 - Criminal acts



Legal considerations for Web 2.0 generally

9. Employment

- Extension of workplace – but very informal
- Content clash – work versus social – what is appropriate?
- Use at work
 - Productivity
 - System resources
 - Gen Y networking
 - What is “out of work”?
- Harassment/discrimination – “Friend”
- Discrimination – exclusionary groups or scanning sites
- Bullying – anonymity



Why have a blogging policy?

- Existing company policies will apply
 - But they may be uncertain in their specific application to blogging
- Blog-specific issues can be addressed
- A specific blogging policy increases certainty for employees and reduces risk for the company
- Blogging policy clearly sets out how the company addresses and utilises blogs as part of its business
- The bottom line
 - All of this minimises the legal and reputational risk to the company



Constructing a blogging policy

- Determine high level approach
 - Forbid it?
 - Tolerate it?
 - Do not prohibit it but do not encourage use
 - Encourage it?
 - But make it clear that all posts are personal and not company communications
 - Utilise posts for marketing?
 - Needs to be treated as a company communication
 - Will senior management participate?

Constructing a blogging policy

- Develop policies to support this approach
 - Reinforce general HR policies
 - Reinforce general duties of employees
 - Clear policy assists understanding and lower risk of breach (inadvertent or otherwise)
 - Clearly set out consequences of non-compliance
 - Policy must be supported by active implementation
 - Initial training
 - Regular refresher training
 - Enforcement



What should the blogging policy cover?

- Key elements of a blogging policy
 - Distinguish between “hard” legal requirements and “soft” non-legal requirements
 - Requirements may vary depending on type of activities
 - Personal blogs by individuals
 - Marketing blogs by the company
 - Senior management blogs



What should the blogging policy cover?

- Key elements of a blogging policy
 - Personal responsibility of blogger + disclaimer
 - Monitoring by company
 - Degree of editorial control
 - Marketing or senior management posts
 - Should be vetted
 - Confidentiality and proprietary information
 - Intellectual property
 - Copyright and brands
 - Defamation
 - Misleading or deceptive conduct



What should the blogging policy cover?

- Key elements of a blogging policy
 - Discrimination
 - Illegal/inappropriate conduct generally
 - Media enquiries
 - Retention of blogs
 - Restrictions on email/website access
- Non-legal elements
 - Company philosophy
 - Best practice guidelines



What should the blogging policy cover?

- Encourage compliance with best practice guidelines
 - Ensure factual accuracy
 - Speak in the first person
 - Don't post when angry or in a hurry
 - Treat audience/co-workers with respect
 - Add value to the business
 - Avoid sarcasm and avoid fights
 - Acknowledge mistakes



The latest on domain names

1. ICANN draft proposals for new top level domains
 - For example, .yahoo or .ebay
 - Also expand beyond 37 characters (eg non-Latin)
 - Need support from industry, public and country regulators
 - .xxx rejected in the past
2. auDA New Transfer Policy (1/6/08)
 - Previous transfer policy was restrictive
 - Can now register .au domain for sole purpose of resale
 - But must hold new registration for 6 months before sale
 - Standard transfer form
 - Sale method and price disclosure voluntary



Finally, the 9% summary

- Web 2.0
 - More of the same – but control ↓ as interactivity ↑
 - Multiple relationships between parties to consider
- Social networks
 - Clearly a wealth of potential opportunities
 - But with many issues to consider
- Blogging policy
 - Hard legal requirements and soft non-legal requirements
- Domain names
 - ICANN draft proposals for new top level domains
 - New auDA transfer policy

Discussion

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