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Commercial Law Update

The world wide web of laws entangling Social Media

The nature of communication and the interaction between people is drastically evolving. Technology is dictating the way we communicate with each other, the way we do business, and the way products and services are marketed. We are moving towards a world where everything is connected through the internet, specifically via social media. The traditional methods of communication are slowly vanishing and more and more people and businesses are using social networking sites such as Facebook, Twitter and LinkedIn to keep in touch and market their businesses, services and products.

We have a strong desire to obtain information and news instantaneously as it is released or happens and the capability of being able to communicate via our smartphones or Tablet PC's has only increased this hunger. Figures released late last year by Facebook show there are currently 10 million Australian users of Facebook¹ and the use of Twitter and LinkedIn is increasing. If the Facebook community was a country, it would be the third most populated country with more than 800,000,000 active users².

What is Social Media?

The term 'social media' has rapidly increased over the last few years. The term refers to the use of web-based and mobile technologies to turn communication into an interactive dialogue. Academics have defined social media as "a group of Internet-based applications that build on the ideological and technological foundations.....that allow the creation and exchange of user-generated content."³ Social media is a group of new kinds of online media that allows social communication, as a superset beyond more conventional notions of social communication. Anthony Mayfield in his ebook "What is social media?"⁴ says the new kinds of online media share most of the following characteristics:



Participation: everyone who is interested has the opportunity to contribute and provide feedback on an issue through social media. The line between media and audience is blurred.

Openness: the majority of social media services encourage feedback and contribution allowing users to vote, comment and share information. Any form of barrier prohibiting access and the sharing of content is non-existent. Very little is a secret anymore. The results of sporting events, awards ceremonies, the death of a celebrity (at its peak there were over 6,000 tweets per second recorded on Twitter in response to the announcement of the death of Apple co-founder Steve Jobs⁵) or the occurrence of a natural disaster are able to be broadcasted to the whole world within seconds.

Conversation: social media is seen as a conversation between two, three or more users opposed to traditional media which is generally a one-way broadcast.

¹ "10 million Aussies in love with Facebook", Lee, Julian, Sydney Morning Herald, 10 December 2010.

² Facebook - www.facebook.com/press/info.php?statistics

³ "Users of the world, unite! The challenges and opportunities of Social Media", Kaplan, Andreas M.; Michael Haenlein (2010).

⁴ "What is social media?", Mayfield, Anthony, V1.4 – Updated 01.08.08, icrossing.co.uk/ebooks.

⁵ "Tweets about Steve Jobs spike but don't break Twitter peak record", Sullivan, Danny, Search Engine Land, 6 October 2011, <http://searchengineland.com/tweets-about-steve-jobs-spike-but-dont-break-twitter-record-96048>

Community: people that share a common interest (such as a sporting team, particular film genre or political view) are able to communicate effectively and instantaneously as soon as something occurs.

Connectedness: most kinds of social media allow for links to other websites, video material, resources and people creating a web of connectivity between users and content.⁶

There are various forms of social media and there are always new forms of social media being developed hoping to be the next big thing. The main forms of social media are:

- » Social networks (Facebook, MySpace, Google+);
- » Blogs;
- » Wikis (Wikipedia, Wikinews, Geo-wiki, GeoNames);
- » Podcasts;
- » Forums;
- » Content communities (YouTube, Flickr, wesabe);
- » Microblogging (Twitter, Posterous, Dailybooth);
- » Virtual game worlds (World of Warcraft); and
- » Virtual social worlds (Second Life).

Using Social Media to Advertise

We have seen in recent times a number of innovative ways in which social media has been used by businesses to promote their products and services, but this must be done in a way which ensures that representations made in relation to the products or services of a business are accurate. This includes information relating to price, quality and performance.

Material advertised through social media must be clearly identifiable and be easily distinguished from any other content, such as terms and conditions and independent product reviews. Businesses should also monitor their social media pages to ensure testimonials, feedback or comments from third parties do not contravene any laws. A recent decision by the Federal Court of Australia highlights how businesses may be liable for misleading and deceptive statements made on their social networking sites by third parties. In *Australian Competition and Consumer Commission v Allergy Pathway Pty Ltd (No 2)* the court found that the company and its former director were liable for testimonials posted on its Facebook and Twitter pages by clients, even though the company itself did not post the testimonials. The Court found that the company had become the “publisher” of the testimonials because it knew of the posts and chose not to remove them.

Complex Web of Laws

There are generally three schools of thought regarding social media law:

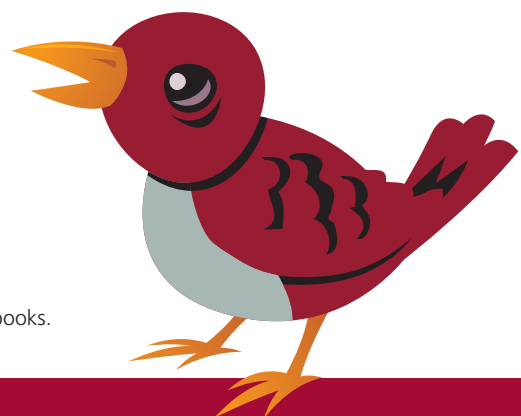
1. those that believe that social media law does exist, but it is made up of a complex web of laws that are generally misunderstood in the online environment;
2. those that deny that social media law exists; and
3. others who are of the misconceived perception that a social media law does not exist in cyberspace.

In a nutshell, the laws that apply in the real world also apply in cyberspace.

Although there are a number of benefits that social media brings to both personal usage and business purposes, there are certain risks and implications that can arise. While the law has not entirely caught up with technology and there is no specific piece of legislation that regulates social media sites and the use of social media, it is important to keep in mind that what you do with social media can have real world legal consequences.

In examining the law and how it applies to social media, it is difficult to pinpoint one particular area of the law that social media applies to. It spans a number of areas of the law because issues cross social boundaries and business use, employers and employees, contract and tort and common law and statute. The nature of the jurisdiction and deciphering which law applies are key issues to be considered as most of the more popular social networking sites are based overseas, mainly in the United States.

At this stage there has not been any discussion of legislation specifically tailored towards the regulation of social media sites and the use of social media but it isn't hard to imagine a law in the future that could regulate social media. The basis for a specific social media law would arise from laws that currently exist. The following are some of the areas of law that currently govern the way we interact and do business through various social networking sites.



⁶ “What is social media?”, Mayfield, Anthony, V1.4 – Updated 01.08.08, icrossing.co.uk/ebooks.

Privacy

If a business stores contact details and personal information about its customers, the *Privacy Act 1988 (Cth)* requires the business to make the customer aware of what personal information is being collected, how it is to be handled and give them the opportunity to "opt-out" from receiving any marketing material from the business.

However, if your business is considered a 'small business' meaning it has an annual turnover of \$3 million or less, then it does not need to comply with the Privacy Act unless:

- » it is a health service provider;
- » trading in personal information;
- » related to a larger business;
- » a contractor that provides services under a Commonwealth contract;
- » a reporting entity for the purpose of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)*.

Despite the above examples as exemptions from the Privacy Act, there is a general perception in the wider community that when a business collects and stores personal information via the internet that it should do so pursuant to the Privacy Act. Even if your business does not need to comply with the Privacy Act, there is always the risk of your business database being hacked into and customer personal information being stolen. It is good business practice to put in place some procedures that comply with the Privacy Act regarding the collection and storage of personal information in an effort to defend against any potential cyber attack.



Spam and Commercial Messages

Spam is defined under the *Spam Act 2003 (Cth)* as "unsolicited commercial electronic messages".

Commercial electronic messages such as email, instant messaging, SMS, MMS are an important tool for businesses as they are an easy and cost-effective way for a business to communicate with its employees and customers.

The Spam Act applies to any commercial electronic message with an Australian link, regardless of the size of the business that sent the message.

The Spam Act also applies to emails sent by a business to anonymous email addresses, where the identity of the individual cannot be reasonably ascertained. This principle would apply when a business purchases a list of email addresses for marketing purposes.

Depending on what other information is held, an anonymous email address may or may not be considered as 'personal information' under the Privacy Act. Information is deemed 'personal information' if the business can identify or reasonably ascertain the identity of the individual to whom it relates.

If a commercial electronic message is sent without the use of personal information, then the Privacy Act would not apply, although the Spam Act may still apply. Alternatively, if a sender is deemed exempt under the Spam Act (such as religious organisations, registered charities, political parties and educational institutions), the sender must still comply with the Privacy Act if the direct marketing message contains personal information.

When sending a commercial electronic message, the sender must comply with the Spam Act to ensure the commercial electronic message:

- » is sent with the consent of the recipient;
- » identifies the sender;
- » allows the recipient to unsubscribe from receiving further commercial electronic messages.

Even where messages are 'exempt', they must still identify the sender.

Intellectual Property

Businesses need to be familiar with copyright laws whenever they develop social media content. The copyright in social media content developed by a business or its employees belongs to the business. However, posting a comment, image or video file without the permission of the author could be a breach of copyright.

In certain circumstances, Facebook status updates, the posting of links/photos/logos or the re-tweeting of another's original work can amount to breaches of copyright or trademark infringement.

Businesses need to be mindful of the terms of use of social networking sites such as Facebook and Twitter when posting photos, logos or comments on these sites. Facebook and Twitter's terms of use clearly state that for content that is covered by intellectual property rights (photos, logos, videos etc.) the user grants Facebook and Twitter a worldwide non-exclusive, royalty-free license (with the right to sub-license) to, amongst other things, use, re-produce, copy, publish and transmit any IP content that you submit, post or display through your account. Facebook's terms of use provide that "the license ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it." Twitter's terms of use do not contain a period on which the license ends.

Businesses need to be mindful that even though they do not intend to establish a Facebook or Twitter account, it is very easy for a person to create an account using the businesses name or brand causing confusion. Even if a business does not intend to use a social networking site it might be worthwhile to create an

account to prevent another person creating an account using the name of your business or logo.

Another issue that is creating confusion for businesses is the creation of millions of Facebook community pages by Facebook. Many businesses have been angered by the creation of the community pages as they had invested time and money into creating their official Facebook page for their business. The purpose of a Facebook community page is to let the user connect with others who share similar interests. These pages are auto-generated from users 'likes and interests' and 'work and education' sections of a users personal profile and depending on how users have described their place of employment or education, there could be more than one Facebook community page for a particular company or educational institution. Depending on the subject matter of each community page, content (including that page photo) is automatically taken from Wikipedia. All other content is auto-populated from wall posts and status updates made by any Facebook user containing the keywords of the community page. Unfortunately, there are no administrators monitoring community pages meaning businesses have no control over what shows up on the page.

Businesses need to be vigilant that social networking sites could in fact be creating pages that contain content about their business that might not be favourable.

Defamation

Users of social media, whether it be for business or personal use, must recognise that posting content to a social media site is the same as publishing that material via traditional forms of media. Posting or tweeting a slanderous comment against another person via a networking site can in fact be a lot more dangerous than a defamatory comment appearing in the local newspaper as there is little control over how far and wide that material could spread and the amount of damage it could cause. Traditionally, a defamatory comment could be retracted via publishing a suitable retraction in the local newspaper, however, given the speed in which information is updated and moves through cyberspace, this would seem near impossible, especially if it has gone viral.

Even though action can be taken against the writer, the difficult part is ascertaining who the actual writer of the defamatory comments is as most people post comments under an alias. One way is to search the IP address of the writer of the defamatory comments, but technology has advanced allowing posters of defamatory comments to disguise their IP addresses.



In the Workplace

Businesses are increasingly relying on social media to promote their business. With this comes the increased use of social media in the workplace. There are an increasing number of businesses that are restricting their employees access to social media sites such as Facebook and Twitter. However, a number of businesses are reluctant to restrict access as they hope allowing employee access to these sites could increase promotion of their business or assist with the recruitment of new staff.

Employers need to be mindful that they must provide clear guidance to their employees of their businesses social media policy to ensure employees are aware of their social media responsibilities in the workplace. There have also been cases where the inappropriate use of social media against co-workers (such as harassment) outside of work hours has resulted in employees being dismissed for serious misconduct.

Recent decisions by Fair Work Australia have again confirmed that proof of excessive use or the inappropriate use of social media during or outside of work hours may constitute a valid reason for termination of employment.

Employers have used Facebook profiles as evidence in workers compensation cases and to dismiss rogue employees who have continually failed to show up for work without any apparent reason.

Conclusion

The growing impact that social media is having on our lives and on the way we do business should make us all a lot more vigilant and cautious of the possible legal consequences that could arise. Some points that you should consider when using social media:

- » even though there isn't a dedicated piece of legislation known as 'the Social Media Act' there are legal consequences from the misuse of social media;
- » ensure that you provide customers the opportunity to "opt-out" from receiving any online marketing material from the business;
- » put in place procedures that comply with the Privacy Act regarding the collection and storage of personal information to defend against any potential cyber attack;
- » make sure posting a comment, image or video file is not a breach of copyright;
- » make sure a post or tweet via a networking site is not a slanderous comment against another person;
- » be mindful that social networking sites such as Facebook and Twitter can use any content that you post on your Facebook page or Twitter account; and
- » implement a social media policy in the workplace to ensure employees are aware of their social media responsibilities in the workplace.

If you have any questions on the possible legal ramifications that social media might have on your business, please contact Hunt and Hunt.

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