



Legal Issues of Web 2.0

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Agenda



- corporate and personal blogs
- wikis and content licensing
- applicable laws:
 - defamation
 - jurisdiction / choice of law
 - ISPs' liability
 - trade marks
 - passing off
 - copyright



Corporate and personal blogs



- user generated content can create problems both for the individual publisher, their employer and those associated with the published content
- personal blogs – individual posts to a blog in his or her own time and on a space which is not controlled by an employer
- corporate blogs – where employees of a company are able to blog
 - internally (e.g. only to other employees, intranet)
 - externally (company's public facing website)

Corporate blogs – good and bad



- <http://scobleizer.wordpress.com>
originally for Microsoft
- Vichy, division of L'Oreal – diaries of a flawless-looking character called Clare who lamented the onset of age (invented by the ad agency!)

Risks of corporate blogging



- damage to individual's or company's reputation
- liability for infringement of IP rights
 - blogger posts content from another source without permission
- liability for defamation or illegal content
 - e.g. unfair comparisons with the competition
- leaking confidential information
- harassment
- failing to recognise a statutory grievance
 - any complaint capable of forming a claim before an employment tribunal when it has been put in writing and sent to the employer (required grievance procedures) [monitor or prohibit?]

Personal blogs



- employer unlikely to incur liability for content of personal blog unless there is some connection between the personal blog and the blogger's work
- “La Petite Anglaise”
 - employee dismissed despite never once identifying her own name or identity of her employers (although did publish photographs of herself)
 - allegations of “loss of confidence”; “bringing the firm into disrepute”; note duty of loyalty (France), cf “duty of trust and confidence”

Setting of policy



- review existing communications or internet / email policy
- at what times may blogging be allowed?
- if a corporate blog; who will contribute and when?
- clear policy and/or guidance on what is inappropriate, and consequences of transgression

Liability for third party content – to moderate or not?



- do not moderate at all, or
- check every submission for suitability, or
- review all content after it appears and have a robust takedown policy

Unmoderated sites

- legal advantage; easier to avoid liability for defamation
- but need a clear, easy-to-use facility for complaint

Moderated sites

- operator assumes responsibility for material; relatively high risk and labour intensive
- moderators must be given clear guidelines on how to fulfil their role [Terms and Conditions]

Particular risks



- YouTube.com runs a very high risk of users uploading copyright-protected video clips without authority
 - YouTube makes users follow several steps before joining and before uploading any clip
- linking
 - risks of linking to offensive material or infringing the rights of others (e.g. music files)
 - without links blogs writ thrive, so rely on take down policies
- complaints
 - must be dealt with in a matter of hours

Problem users



- should you identify a person who made an offensive posting?
 - should require a court order, unless request is made by a law enforcement agency with appropriate authority
- if you post the blog on your own servers, store the IP addresses of contributors together with dates and times of access (and make it clear to users that you do this)
- *e-silkroad.net –v- IceRed*

wikis



- every page should link to terms and conditions: with users forced to accept terms before proceeding
- contributors to give wide licence to use content, and waive moral rights
- consider use of GNU Free Documentation Licence (GFDL) (open source rules)

Defamation



- any published statement identifying or referring to a person, and that damages that person's reputation, can be defamatory
- a defamed person can bring an action against the operator of a site in the country in which the person accesses the site and (if the person so chooses) that action will be subject to the laws of the country in which the person is based

Gutnick –v- Dow Jones

P sued in Victoria, Australia where his business was headquartered, and where his reputation lay

- but if there is only a very limited readership in the chosen jurisdiction case liable to be struck out (note forum shopping)

No protection for online hosts or “mere conduits” under Hong Kong law



- many jurisdictions grant statutory protections
 - for online hosts against defamation (UK Defamation Act 1996)
 - for all categories of infringing content where service provider
 - is acting as a mere conduit
 - is caching certain information; or
 - is acting as a web host
- UK's E-Commerce Regulations (2002)
- no equivalents in Hong Kong

Trade marks



- registered trade mark infringed if, without consent, person uses in the course of trade a sign which is identical with the trade mark in relation to goods as services which are identical to those for which it is registered
- “passing off”: requires
 - a misrepresentation
 - made by a trader in the course of trade
 - to his prospective customers or consumers
 - which is calculated to injure the business or goodwill of another trader, and
 - which causes actual or likely damage to the other’s business or goodwill

Copyright



- copyright automatically comes into existence when a work is recorded in some way (including typed into a blog)
- originality required; but a low threshold
- some copying is allowed, but “fair dealing” exceptions are in reality extremely limited
- mere acknowledgment (apart from for reporting current events) does not avoid liability in the absence of consent
- as a matter of technicality, linking does not involve copying; but this is untested in the Hong Kong Courts