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Social Media and the Law

Protecting your business

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- Different perception
- More casual/less cautious approach
- Leaves trail
- Reputational exposure

- Defamation Act: tort applies to “electronic communications”
 - ...includes a communication of information in the form of data, text, images or sound (or any combination of these)... (s 4)
- Email communications
 - Forwarding = publication to third party = defamatory

- Material published on websites
 - Electronic communication → actionable defamation
 - Publication occurs in place where material is downloaded – Gutnick v Dow Jones & Co. Inc
 - Law of place where material downloaded applies
 - New publication/breach each time downloaded – refreshes limitation period

Myth 1

The internet is different – the legal rules that apply elsewhere don't apply there

Truth

- The law is the law – if it applies to other publications, it will apply to the publications on the internet. There may be practical enforcement issues but if something is illegal or an infringement elsewhere, it will still be illegal or an infringement online.

If someone else said it first, it is OK to repeat it

Truth

- If you republish a defamatory statement (eg, copying and pasting the statement on your site, forwarding a tweet), you are treated as if you were the author. The fact that you repeated it accurately or attributed it to the actual author is no defence.

Myth 3

You can't be responsible if someone else repeats or forwards your defamatory statement or infringing material to others

- Giving an interview to a television crew may be publication to a handful of people but broadcast to a wide audience is a natural and probable consequence.
- Similarly, sending a Letter to the Editor or encouraging visitors to your website/Facebook page to forward your comments to others.

Myth 4

If someone posts a photo or video or article online, they are consenting to use by anyone

- Some sites have special contractual conditions, eg, licence to allow Facebook to use material and consent (if posted on “everyone” setting) to allow others to use material.

Myth 5

You can't be responsible if someone else posts defamatory or infringing material on your site or page

- If you elicit material that is likely to defame or infringe rights (eg, send in your “Top 10 reasons why you hate George Lucas, post 1989”), you are effectively part of the publication process.

Myth 6

If someone takes a photo of me, they can't post it online without my consent

The possible exceptions would be:

- if the photo breaches confidentiality
- if it conveys a defamatory meaning
- if it is obtained by trespass
- if it wrongly gives the impression of endorsement or association
- if it is owned by someone else.

The St Kilda football club case is a good example.

- No right to privacy enshrined in Constitution/general law
- Legislation protecting private information
 - Privacy Act 1988 (Cth)
 - Other Commonwealth and State legislation
- Collection/use of personal information (IPPs/NPPs)
- Reform – UPPs, broader obligations, statutory cause of action for invasion of privacy

- Protection of intellectual property rights in original literary, dramatic, musical or artistic works or subject matter
- Subject to rights created by contract or employment, author/creator is usually the owner of copyright
- Rights generally survive for 70 years after life of author (but varies)
- Defences for fair dealing (eg, research, duty, review, reporting news)
- Moral rights

Brandjacking

- Cybersquatting in social media
- Misuse of trade marks/brands
- Reputational damage
- Loss of business/opportunities

- Terms of Use/End User Licence Agreements
 - Standard form, grant site owners broad rights
 - Applicable law, indemnity, jurisdiction
 - Third party advertising and ownership of material
- Legislative requirements
 - Depending on business/organisation type
 - *State Records Act* and Local Councils
 - Materials authored and posted on social media could be deemed to be “official records” and subject to record keeping obligations

- Important business/communication tool but risks
- Use for recruiting purposes
- Monitoring use/content
- Disciplinary action/termination
- Communication of employer's expectations essential

- Misleading & Deceptive Conduct
- False Representations
- Non-compliance with consumer/other requirements
- Cartel/anti-competitive behaviour

- Establish specific social media policy:
 - Define appropriate/prohibited use in work and personal situations
 - Give examples of what is acceptable/unacceptable
 - Explain consequences of breach of policy
 - Provide education about policy
- Update existing policies to include social media issues, eg, IT, OH&S, confidential information, anti-discrimination/harassment, privacy

- Incorporate social media issues in employee training/compliance programs
- Implement software to monitor objectionable /excessive use

- Monitor marketplace
- Protect brand – get there first and often – register key names, brands and taglines on all major sites
- Communicate expectations clearly to employees/contractors/competitors
- Don't tolerate breaches – take-down notices
- Don't over-react - pick fights carefully
- Mitigate damage
- Get advice