techlawadvisor.com/docs/google-motion-dismiss.pdf.

21 *Rescuecom Corporation v Google, Inc.* 456 F. Supp. 2d 393 (N.D.N.Y. 2006) per Mordue, Chief Judge at 14.

22 For a detailed discussion of the concept of 'use' in American trademark law see general Graeme Dinwoodie and Mark Janis 'Confusion Over Use: Contextualism in Trademark Law' (2007) *Iowa Law Review*, Vol. 92, No. 1597.

23 *American Airlines Inc v. Google Inc* No. 4:07-cv-00487 (N.D. Tex. Oct. 24, 2007)

24 *Reed Executive Plc v Reed Business Information Ltd* [2004] EWCA Civ 159 per Jacob LJ at 140.

25 *Reed Executive Plc v Reed Business Information Ltd* [2004] EWCA Civ 159 at 142.

26 S*.A. Louis Vuitton Malletier v. Société Google, Inc. et S.A.R.L. Google France*, T.G.I. Paris, 3e ch., Feb. 4, 2005, NºRG 04/05745. Available at www.juriscom.net/documents/tgiparis20050204.pdf.

27 Louis Vuitton was ultimately awarded €300,000 in damages and a further €60,000 for legal expenses. *S.A.R.L. Google France et Société Google, Inc v* S*.A. Louis Vuitton Malletier* Court D'appel De Paris. 4eme ch. Jun 28, 2006. NºRG 05/06968. Available at www.juriscom.net/documents/caparis20060628. The Louis Vuitton case is consistent with the decision of a Versailles appellate court in *Société Google France v. Société Viaticum et Société Luteciel*, CA Versailles, 12e ch., March 10, 2005, NºRG 03/00051.

28 Google's statement claimed: 'We have a trademark policy, which prevents bids on other people's registered trademarks, and we do not allow people to advertise with AdWords for counterfeit products. Today's case does not raise any new issues whatsoever.' Elinor Mills, 'Google loses French Trademark lawsuit' *CNet News* (28 June 2006) available at http://www.news.com/Google-loses-French-trademark-lawsuit/2100-1030_3-6089307.html.

29 See N Vidyasagar 'India's secret army of online ad clickers', The Times of India, 3 May 2004 available at http://timesofindia.indiatimes.com/articleshow/654822.cms

30 In early 2007, Yahoo settled a click fraud class action lawsuit by Checkmate Strategic Group for close to an estimated US$5m and in 2006, Google $US90m settlement of a click fraud class action lawsuit was approved by Arkansas courts.

31 Matt Hines, 'Experts say the issue of click fraud not improving' *Infoworld* (19 October 2007).

32 In relation to Google, this practice has been dubbed 'Google bombing', the most infamous involving search terms linking to websites of US politicians. See ''Miserable failure' links to Bush' *BBC News* (7 December 2003) Available at http://news.bbc.co.uk/2/hi/americas/3298443.stm.

33 *SearchKing Inc v Google Technology Inc.,* No. CIV-02-1457-M (W.D.Oklahoma, 13 January 2003). The court found that a pagerank amounted to an opinion of website relevance capable of constitutional protection under the First Amendment.

34 *Kinderstart.com LLC v Google Inc.,* Slip Copy, 2007 WL 831806 (N.D.Cal) 2007-1 Trade Cases p 75, 643

Risk Issues for Web 2.0 – To Block or Not to Block Facebook

Nick Abrahams and Robert Rudolf look at how organisations might respond to Web 2.0 in the work place.

With the enormous surge in popularity of social networking programs such as Facebook and MySpace, employers are nervously looking at the ramifications the use of such applications at work can have on company productivity and exposure to vicarious liability for an employee's actions. Given the interactive nature and the ever expanding development and reach of Web 2.0 applications, companies must now consider how to best address such concerns, hopefully without upsetting employees in the process.

What is Web 2.0?

Web 2.0 is the general term used to describe 'second generation web-based communities and hosted services such as social-networking sites, wikis, and blogs, which aim to facilitate creativity, collaboration, and sharing among users'.[1]

This includes applications where the content is generated by the user such as MySpace, YouTube, Facebook and virtual worlds like Second Life.

MySpace is reported to be the most popular Web 2.0 application, with 100 million users worldwide, followed by Facebook with 60 million.[2] The recent uptake of Web 2.0 applications in Australia has been nothing short of phenomenal. Neilson Online statistics show that one third of all profiles created by Australians on social networking sites occurred in the past three months with close to two thirds created in the past year.[3]

Why all the fuss?

Web-based social networking applications allow users to create personal profiles, online identities and interact with friends, colleagues and other users all over the world. The reach of these applications is great, unlike the time taken to reach an audience. The now infamous *Leave Britney Alone* YouTube clip created by internet 'personality' Chris Crocker was viewed over 4 million times in the first two days after being posted by its creator.[4] The video has been viewed nearly 17 million times since being uploaded in September 2007, and has attracted over 240,000 user comments.[5]

Web 2.0 applications not only have a personal appeal. Many companies, such as Intel and IBM have cottoned on to the power of Web 2.0 applications and have established presences in the virtual world of *Second Life* to conduct cost effective meetings with employees in different countries and to demonstrate products to customers.[6] Telstra's Bigpond is in fact the largest global brand in *Second Life*.[7]

Why the cause for concern?

There are legal risk issues for an organisation allowing the use of Web 2.0 applications in the workplace. Key areas of concern include:

Copyright: under Australian copyright law, an organisation may be liable for copyright infringement by directly infringing a copyright owner's rights, or by authorising the infringing acts of an internet user's activities.[8] If a Court determines that an organisation had the power to prevent the infringing activities of its employees and failed to take reasonable steps to avoid such infringement, the organisation may be considered liable.

Defamation: an organisation may decide to monitor the activities of its employees' use of Web 2.0 applications. An employer may be liable for the defamatory content of an employee's work related Web 2.0 applications if it becomes aware of defamatory content and fails to take measures to take down the content or address the issues. Furthermore, if an organisation is seen as the 'publisher' of defamatory material, it will generally be held liable for such defamatory content.

Privacy: a user's personal pages of their MySpace or Facebook sites should be treated carefully by employers. An organisation should never use Web 2.0 applications such as Facebook or MySpace to 'screen' potential employees by reference to their personal sites. Such pre-employment checking may open the company up to the risk of being sued for breach of privacy or discrimination. It should also be noted that the use of Facebook by an organisation for this purpose is a breach of Facebook's terms and conditions which allow only personal, non-commercial use. Termination of employment

due to an employee's personal activity on social networking sites must be carefully considered as the activities may not be sufficiently associated with the individual's work performance.

Vicarious legal liability for an employee's actions is not the only concern organisations have with Web 2.0 applications. There have been several recent reports of employee productivity being affected by social-networking site use in the workplace during business hours. It has been estimated that if an employee spends an hour each day on Facebook, it could cost a company more than $6200 a year and Australian business as a whole $5 billion annually.[9] Another major factor to consider is the drain on network performance by employees viewing video content.

What can we do about it?

To block or not to block? This is likely to be a familiar concern for any organisation when it comes to identifying ways in which to minimise potential liability for employee's Web 2.0 activities or to address productivity or network performance issues in the workplace. Indeed, the trend of blocking or limiting employee access to Web 2.0 applications in the workplace seems to be increasing, with 36 per cent of Australian and New Zealand social networking users reporting that access to sites at work is limited in some way.[10] Latest figures indicate 15 per cent of Australian organisations have blocked Facebook.

Short of blocking or restricting access to Web 2.0 applications in the workplace, organisations should at the very least implement employee policies and procedures for use of these applications at work.

Suggested employee policy terms include:

- allow employees to use Web 2.0 applications through the organisation's internet network in a limited reasonable way, but caution that such use should not interfere with the business functions or processes or hinder the fulfilment of an employee's workplace obligations;
- employees should be instructed to ensure that the disclosure of the Company's intellectual property and confidential information does not occur;
- employees should never purport to speak on behalf of an organisation via social-networking sites without prior approval by the organisation. Policies should indicate that use of all Web 2.0 applications is use by an employee in their individual capacities and that the individual employee is personally liable for his/her own activities;
- organisations should advise employees to always use Web 2.0 applications in a lawful manner, which includes complying with the terms and conditions of the relevant Web 2.0 application; and

- policies should state that the organisation may monitor use of Web 2.0 applications at work and, if access to Web 2.0 applications impacts negatively on the organisation's business or processes, or if employee productivity is seen to be adversely affected by use of such applications at work, access to such programs may be terminated at the discretion of the organisation.

Policies should make it clear that failure to follow the policy can result in termination of employment.

Conclusion

Web 2.0 is here to stay and it is generally poorly received by employees when employers block access to sites. Global law firm Allen & Overy had to do a backflip recently. Due to network performance impact, Allen & Overy blocked Facebook, but were forced to unblock the site after massive complaints from staff. In order to maintain relationships with employees, organisations need to consider the alternative of reasonable use policies rather than blanket bans.

Nick Abrahams, is a Partner and Sydney Office Chairman and Robert Rudolf a Lawyer at Deacons in Sydney

(Endnotes)

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2 Chris Jenkins, 'Employers curb surge in social networking', *Australian Financial Review*, 12 February 2008.

3 Chris Jenkins, 'Employers curb surge in social networking', *Australian Financial Review*, 12 February 2008.

4 http://en.wikipedia.org/wiki/Chris_Crocker_%28Internet_celebrity%29, accessed 24 February 2008.

5 http://www.youtube.com/watch?v=kHmvkRoEowc, accessed 24 February 2008.

6 http://www.msnbc.msn.com/id/19982107/, accessed 24 February 2008.

7 http://www.theprojectfactory.com/images/stories/TPFStats080218.jpg, accessed 24 February 2008. See also http://my.bigpond.com/pond/secondlife/.

8 *Copyright Act 1968* (Cth) s36.

9 http://www.smh.com.au/news/web/facebook-labelled-a-5b-waste-of-time/2007/08/19/1187462123708.html, accessed 24 February 2008.

10 Chris Jenkins, 'Employers curb surge in social networking', *Australian Financial Review*, 12 February 2008.