

LEGAL CONSIDERATIONS

Wherein the Digital meets the Law

The Internet is still seen by many people as a place where business is in tug of war with lawless freeriders and destroying business as we know it. Could there be a way for the law to provide stability for both to win now?



DISCLAIMER
Because they're good practice to have, so why would we miss out. In appropriately small text.

We provide general educational information that may be helpful to those interested in the legal issues arising out of social media and their practical applications. We do not claim to have any legal ability or expertise. This chapter is simply designed to point you to general, background guidance about legal issues within a digital context. It is not intended to be definitive legal advice and is not provided as such. We advise you always to seek professional legal advice before taking any action that could have a major impact on your life or business.

You will note that there are links to web pages we have not compiled or written. We do not endorse any of the sites, any companies behind them, or any of the advice they may offer. We have not checked the accuracy of the pages linked here and do not warrant that they are lawful, accurate, complete, safe, reliable, or up-to-date. Be certain to double-check any legal advice you gain from a website unless you are certain it comes from an obviously reliable source like a firm of properly qualified lawyers.

This chapter introduces a broad guide to where digital media has impacted the law. And vice versa.

There have already been indicators of where to tread with care in previous chapters, but it's important enough to pay singular attention to on its own,

The Internet is a giant (almost free) copymachine, so we'll look at the obvious copyright concerns. How good legislation can promote creativity. Company issues around

social media access to staff, social media marketing, defamation, the risks & rewards of being globalized. Trademarks, endorsement delicacies await you.

Reference your glossary (at chapter's end) to enrich your understanding .

Legal issues generally have people nodding off, but within the context of the Internet, it *can* be thrilling. Come discover why it might be worth staying awake for:

MYTHBUSTING

There is a myth that piracy of creative-wares online is killing cultural civilization as we know it. That artists will starve or worse, take office jobs should it continue.

The economic reality through the ages has been that culture precedes commerce. An innovation, invention or creative movement gathers momentum and eventually somebody will seek to make a market there.

There has been no diminishing of creative impetus on the Internet, for

all its "freeness".

Artists are nimble and will always find a way. The interests of those who have the vast distribution and marketing networks built around the creators (art or science) are the ones feeling the pain of a business model dissolving and seek any means possible of retaining its form, buttressing with law and campaign to vilify the unruly masses assaulting it



COPYRIGHT | COPYLEFT
WHAT'S LEFT WHEN YOU'RE RIGHT WITH THE LAW



Copyright has two primary purposes: protecting the creator's right to commercial benefit from valuable work and more recently, the protection of how a work is used.

With the fluidity of copying and trading value that the Internet offers, it becomes less important how a creative artefact is encoded - whether CD, video, MP3, book format or website. Enter the fiercely difficult challenge of protecting the intellectual property rights in creative industries, trade secrets, governments or financial markets alike. Legal and policy frameworks are needing to adjust constantly to keep up with the innovations, cultural and technological and still afford enjoyment and efficiency demands for consumers and creators alike. because the copyright laws aren't tailored to the Internet, so the court have to interpret and apply laws as best they can. Without strong precedent to rely on the results aren't consistent.

Generally interpreted, copyright law, ideas and facts cannot be copyrighted, but the way a person expresses those ideas or facts can be. It is also a generally accepted proposition of U.S. copyright law that titles and short phrases are not protected under copyright law.

FAIR USE

Under copyright you have the ability to use small portions of original works to illustrate your point whether in article, video, book etc.

1. Courts consider fair use along 4 primary conditions:
The purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes
2. The nature of the copyrighted work
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole
4. The effect of the use upon the potential market for or value of the copyrighted work.



A movement arose from the software community that realised they would evolve the code faster if the restrictions around copyright were relieved. Known as the OpenSource movement it informed a host of alternative legal licensing options called **copyleft**.

Copyleft doesn't mean no copyright, but stipulates how a work can be used, shared and *modified*, without asking the author's permission each time. It has proven to be one of the most robust and creatively generative conditions for creators, in allowing them to legally build on someone else's work (with credit in most cases) and avoid building from the ground up. So it enhances the pace of innovation, in research, science, culture, fashion, art.

Creative Commons is one licensing option within the copyleft movement that is closest to the traditional copyright in structuring for marketing, distribution and commercial interests.

You'll see this chapter is Creative Commons licensed if you peek at the footer

CREATIVE COMMONS
a brief overview



Creative Commons offers a legal alternative to extend copyright. It's a simple, standardized way to grant copyright permission from individual creators to large companies and institutions as to their creative work. The Creative Commons licenses enable people to easily change their copyright terms from the default of "all rights reserved" to "some rights reserved." Which promotes dispersal and sharing in ways that traditional copyright shuts down.

A Creative Commons license is based on copyright. So they apply to all works that are protected by copyright law like books, websites, blogs, photographs, films, videos, songs and other audio & visual recordings.

It's often mistaken as a fancy way to offer your work for *free* and precludes the ability to profit from your creative work.

But that depends on the license you choose to apply. For example, a noncommercial license option is an inventive tool designed to allow people to maximize the distribution of their works while keeping control of the commercial aspects of their copyright. The "noncommercial use" condition applies only to others who use your work, *not to you* (the licensor).

So if you choose to license your work under a Creative Commons license that includes the "noncommercial use" option, you impose the "noncommercial" condition on the users (licensees).

However, you, the creator of the work and/or licensor, may at any time decide to use it commercially. Including drawing royalties. People who want to copy or adapt your work, "primarily for monetary compensation or financial gain" must get your separate permission first.

Copyright Best Practices for New Media

Avoid lawsuits with some simple routines. When in doubt, ask for consent!

- If someone else created a valuable piece of content, don't use it without crediting them. Simple.
- In keeping with fair use, do not reproduce whole stories. Use only the portions of headline and content needed to make your point or identify the story.
- Prominently identify the source of the content/article.
- Where possible, link to the original source.
- Provide your own original context and commentary for the material you used.



PAY ATTENTION

to places where culture & opportunity outrun the law

1. Social Media Policies
2. DataMining & the bounds of Privacy
3. Bloggers Rights
4. Freedom of Speech, Activism, Terrorism
5. Social Media Marketing
6. Data Protection
7. Trademarks, Fans and Cybersquatters
8. Virtual Objects. Real Money

SOCIAL MEDIA POLICIES

A company's social media policy outlines how employees or those speaking on behalf of the business share their views/recommendations/information online. Companies are right to be nervous about the legal and commercial risks that social media introduces. Blanket bans are rarely effective though, and miss the competitive advantages a strong social media strategy can offer.

Consider some of these angles:

- Are employees barred from social media? Consider emails as well as networking sites.
- Beware of leaking sensitive info.
- Monitoring employees' online activity? They have a right to know
- Are disclosures around endorsements and prizes, advertising, ratings, gifts etc. clear? Who deals with PR emergencies?
- Are you marketing to minors? People in other countries?
- Is one person the "voice" of your organisation?

Unchecked these could get you into trouble quickly.

The art is balancing current marketing practice within a clear legal framework.

DATA-MINING & PRIVACY

With a strong market developing for finely-grained marketing data culled and collated by data brokers from behavioural tracking, installing hidden tracking software and buying sensitive personal info from sites, close attention is being paid to what has to now been lightly legislated online. Particularly where realworld personal data can be matched and adjusted to online behaviour and information.

BLOGGER'S RIGHTS

Bloggers haven't traditionally been accorded the protection that journalism offers. It's important for bloggers to understand where the bounds of endorsements, slander and news-gathering can land them in court.

FREEDOM OF SPEECH

Many issues come out of this including censoring comments on your site or adjusting ratings to sculpt positive PR. Political activists in repressive regimes or journalists seeking press freedom, these may challenge human rights or constitutions - a legal concern.

DATA PROTECTION

Even though almost no-one reads the privacy documentation when signing up for a new service, data protection is vital to uphold. Recently companies who sell on entrusted data have been at the brunt of class action suits as customers discover the breach of trust. Even negligence through insecure storage is a liability.

TRADEMARKS & BRANDS

Applying someone else's trademark in a way that could harm or confuse you with the real owner - allowing you to profit from their reputation is actionable. As it is in the realworld. Domain names however are treated like street addresses within the law. So cybersquatting (see glossary) has proliferated. Appeals can go to court, but often settle with a buy-out. Do get your name ASAP

VIRTUAL GOODS

Economies are created through the trade of virtual worlds and games. With it has come counterfeiting and blackmarkets because virtual goods are translated into real money. Where there is money there needs to be legislation to protect and to take action against criminal activity.

SOCIAL MEDIA MARKETING

in the preceding chapters we've looked at the growing spectrum of online marketing opportunities. Herewith the caveat. Some issues to pay attention to to avoid legal injunction include:

If you're compensating someone to endorse or recommend your brand, you need to disclose it. Especially when it's a financial relationship. Employees or contracted agencies posing as consumers who post comments and ratings to promote the brand that look like organic feedback.

This includes fake blogs and fake identities on social networks. The US introduced legislation to address this in the form of the Consumer Protection from Unfair Training Regulations in 2008.

Gaming the system is not ethical marketing practice, nor legal now.

PRACTICAL APPLICATION

now you know, give these a go:

- Go to creativecommons.org and discover how much creativity, music and research has been offered with easier sharing/adapting/using under the CC licenses and try creating a license yourself.
- Most online arenas are DIY-friendly, but this is one where mistakes CAN get you into trouble. It is HIGHLY recommended that you read your T&C's and be very careful with sensitive personal information, and get a lawyer who understands digital when there's something valuable at stake.

THE BIG 3 ESSENTIAL IDEAS

(the least you'll need to know)

Idea #1 Copyright isn't the only legal issue we have to be aware of on the Internet.

Idea #2 There is a lucrative **datamining** business-model opening up to marketers - at the cost of privacy. Until the law catches up we need to take care of our personal data.

Idea #3 The Internet is still mistaken for a place outside of the **laws that bind realworld citizens**. It's difficult to stay anonymous if you've annoyed those with the law on their side, and Google has a *long* memory. Take care.

REFERENCE WORKS

& RECOMMENDED RESEARCH LINKS

Front page image The Giant Vermin on Flickr <http://www.flickr.com/photos/tudor> under AttributionShare-Alike CCLicense

Attributions

Citizen Media Law Project (Glossary)
<http://www.citmedialaw.org/glossary>

New Media Rights (Glossary)
<http://www.newmediarights.org/glossary/>
Creative Commons FAQ

http://wiki.creativecommons.org/Frequently_Asked_Questions
10 Myths about Copyright Explained. Templetons.org. 2008
<http://www.templetons.com/brad/copymyths.html>

Recommended readings:

COPYRIGHT

Gawker and the Washington Post: a case-study in Fair Use. Nieman Lab. Harvard University. 2009
<http://www.niemanlab.org/2009/08/gawker-and-the-washington-post-a-case-study-in-fair-use/>
Associated Press' Copyright Infringement Accusations. Nieman Lab. Harvard University. 2010
<http://www.niemanlab.org/2009/08/who-really-is-the-associated-press-accusing-of-copyright-infringement/>

SOCIAL MEDIA POLICY

Social Media Policies: the good, the bad and the ugly. Fast Company. 2010
<http://www.fastcompany.com/1668368/social-media-policies-the-good-the-bad-and-the-ugly>
Quick Guide to Designing a Social Media Policy. WOMMA. 2009
<http://womma.org/main/Quick-Guide-to-Designing-a-Social-Media-Policy.pdf>

SOCIAL MEDIA MARKETING

Social Media Marketing Disclosure. WOMMA. updated 2010
<http://womma.org/ethics/disclosure/Social-Media-Marketing-Disclosure.pdf>

SOUTH AFRICAN RESOURCES

SA Copyright Review. Shuttleworth Foundation. 2010
www.shuttleworthfoundation.org/sites/shuttleworthfoundation.org/files/SA_Copyright_Review_Report_09_v3.5.pdf
WebTechLaw (Website Terms Guide)
<http://webtechlaw/anatomy-website-terms-use>

THE FLIP-SIDE

Only going forward 'cos we can't find reverse

As disturbing as it is to have to revisit all the underlying laws that have held businesses, individuals and governments stable for the last century or more, our society and commerce have irrevocably been changed by the Internet and deeplinked globalization.

Albeit that we should have access to specialist digital legal counsel, it's in all our best interests to engage in active participation with the law as it tests our daily choices, or risk a future where those who can pay the finest lawyers dictate the shape of the world to come.

ENRICH & ENLIVEN
THOSE LEGAL
CONVERSATIONS
*handy sites worth bookmarking
to keep up with the dynamic
state of digital law*

- World Intellectual Property Organisation
wipo.int/copyright/en/
- Internet Society (Legal)
isoc.org/internet/law/
- Nieman Journalism Lab (Harvard)
niemanlab.org
- Berkman Center for Internet & Society
cyber.law.harvard.edu/
- Electronic Frontier Foundation
eff.org
- The African Copyright & Access to Knowledge Project (ACA2K)
aca2k.org/
- Wireless Access Service Providers Association (Mobile regulation in SA)
waspa.org.za
- Centre for the Public Domain
law.duke.edu/cspd/
- Lectric Law Library
<http://www.lectlaw.com>

DOWNLOAD THESE:

- Quick Guide to Designing a Social Media Policy (WOMMA)
<http://womma.org/main/Quick-Guide-to-Designing-a-Social-Media-Policy.pdf>
- Social Media Marketing Disclosure (WOMMA)
<http://womma.org/ethics/disclosure/Social-Media-Marketing-Disclosure.pdf>

(very) BASIC LEGALESE GLOSSARY

Attribution The act of crediting an individual, group of persons, or company for the work that they have done. Beyond that, however, it is also a legal action. Attribution of some other entity is the legal acknowledgement of their ownership of the copyright to that work. When copying, building upon, or reproducing someone else's work, attribution is usually required. It is a nod to the creator and also a way to ensure that liability for copyright infringement is avoided.

Actionable Sufficient to establish grounds for a legal claim.

Actual malice The characterization of a certain type of fault regarding defamation, where the publisher made statements knowing that they were false, or acting with reckless disregard for the truth of the statements. Defamation claims involving public officials and public figures require that the plaintiff show the defendant acted with actual malice.

Bittorrent An increasingly popular means to download audio, video or software files online. BitTorrent technology is often synonymous with illegal downloading.

Cease and Desist A cease and desist letter is an order or request to halt an activity at the risk of facing legal action. A cease and desist order can be issued by a judge or government authority. A cease and desist order is an unambiguous direction to cease a particular activity. A governmental cease and desist letter can also be used as an emergency measure to prevent possible irreparable harm, otherwise known as a temporary injunction. A cease and desist letter, on the other hand, can be sent by anyone. Letters can be sent by companies or individuals are a type of warning to persons they feel are infringing upon their copyright or trademark rights, and often threaten an infringement lawsuit should the recipient not stop their activities.

Civil In terms of actions under law, civil refers to conflicts between private individuals.

Commercial misappropriation

A category of invasion of privacy where one's name or likeness is used without permission for commercial purposes.

Compensatory damages Damages awarded by a court to compensate a plaintiff for the actual harm suffered.

Copyright A property right in an original creative work. Owning a copyright gives the copyright holder the exclusive right to, among other things, copy and display the work.

Copyright infringement

The act of tortiously exercising one or more of the exclusive rights held by a copyright owner.

Copyright license A license is a grant of permission to exercise the copyright holder's rights under copyright. In copyright terminology, there are non-exclusive and exclusive licenses.

Copyright notice A notice that a work is copyrighted. Generally, the copyright notice appears either as a © or as the phrase "all rights reserved."

Corporation An organization formed with the approval of a state governmental entity to act as an artificial person to carry on business or other activities.

Cybersquatting The registration of domain names associated to celebrities or popular companies with the goal of reselling them later at an inflated price. Celebrities and companies do not automatically have a right to the website names most logically connected to them, and so are often forced to buy domain names from cybersquatters when they eventually decide to create their own website. However, cybersquatters are often prosecuted for using the domain names in "bad faith," or in a manner counter to the reputation or mission of the trademark or corporation.

Damages A remedy in the form of monetary compensation to the harmed party.

Defamation A false statement of fact, whether written or oral, that is communicated to a third-party and injures the subject's reputation.

Defendant In a civil matter, the party sued by the plaintiff; in a criminal matter, the party being prosecuted.

DMCA Digital Millennium Copyright Act. Passed in 1998, the DMCA extended the reach of copyright law and is generally regarded as favoring the interests of copyright owners, it also created provisions limiting the liability of certain online actors like website operators, ISPs, hosting providers and search engines from copyright infringement claims made against them due to the behaviour of their customers or users.

Digital Rights Management (DRM) A generic term for access control technologies that can be used by hardware manufacturers, publishers, copyright holders and individuals to impose limitations on the usage of digital content and devices.

Fair use The doctrine that permits certain limited uses of copyrighted materials without the permission of the copyright holder. Generally, to be protected by the fair use doctrine, the use of the copyrighted material must contribute to society by continuing the public discourse or by creating a new work in the process.

False light A type of legal claim, which is similar to defamation, that generally involves untrue factual implications.

Immunity

Generally refers to freedom from a legal obligation to perform actions or to suffer legal penalties.

Injunction A court order requiring a person or entity to do or cease doing a specific action.

Intellectual property A broad class of property, that generally includes four different kinds of rights: patent, copyright, trademark, and trade secrets.

Liability Legal accountability, either to another party or to the state, that can be enforced through damages or criminal punishment.

Libel A form of defamation that generally refers to statements or visual depictions in written or other permanent form, such as web pages, blog posts, and forum posts.

Limited-purpose public figure A private individual who, while not generally a public figure, is prominent in a particular field or on a particular issue. As a result, the individual is considered a public figure in regards to those specific activities or expertise.

Open Source The term for the software development method where a software program's underlying code is released to the public for free to encourage programmers to contribute to make improvements to that software.

Patent law provides ownership rights and protection for unique processes, procedures, methods, inventions, and discoveries. It gives the patent owner the exclusive right to exploit (i.e. create, use, sell, distribute) the invention for a limited period of time (typically twenty years from the time of a patent application filing).

Plaintiff In a civil matter, the party who initiates a lawsuit against the defendant.

Private figure A private individual who does not fall under the category of public figure under defamation law.

Public Domain Works in the public domain are not protected by copyright, and can be reproduced or adapted freely, without fear of infringement legal action.

Public figure Under defamation law, an individual who is so famous, powerful, or influential that they are subject to public interest and scrutiny. Public figures include movie stars, elite professional athletes, and the heads of major corporations. The passage of time does not affect one's public figure status as long as the original source of their fame is of continued interest to the public.

Publication The dissemination of information to one or more persons. Publication can include news articles, blog posts, podcasts, videos, or even user comments. In the defamation context, publication occurs if the statement is made to one or more persons other than the plaintiff.

Publication of private facts The legal claim known as "publication of private facts" is a species of invasion of privacy. A person commits this kind of invasion of privacy by publishing private facts about an individual, the publication of which would be offensive to a reasonable person. Such a claim can only be successful, however, if the facts in question are not legitimately newsworthy.

Punitive damages Damages awarded in addition to compensatory damages in certain circumstances. Punitive damages are considered punishment and are awarded when the defendant's behavior is found to be especially willful.

Right of publicity The "right of publicity" is the right of a person to control and make money from the commercial use of his or her identity

Secondary meaning A term used in trademark law to denote when a descriptive trade name or other trademark used in connection with a good or service comes to be uniquely associated in the minds of the public with that particular good or service.

Slander A defamatory statement, usually made orally, in which damages are not presumed and must be proven by the party suing.

Statute The product of a legislative body (i.e., a law).

Subpoena An order to compel an individual or entity to give testimony on a particular subject, often before a court, but sometimes in other proceedings

Subpoena duces tecum A type of subpoena that requires the witness to produce documentary evidence pertinent to a proceeding. From the Latin duces tecum, meaning "you shall bring with you."

Temporary restraining order A short-term order, issued by a judge, which prevents one party from acting in a way that could irreparably harm another before a hearing can be held.

Tort A negligent or intentional civil wrong not arising out of a contract or statute. A tort is an act that injures someone in some way, and for which the injured person may sue the person for damages.

Trade libel A form of defamation that disparages a business, product, or service.

Trade secret Confidential information held by a business or individual, that is not made available to the public, and which has commercial value.

Trademark Trademark law creates usage rights in words, phrases, symbols, and other indicators that identify the source or sponsorship of goods or services. The owner of a valid trademark can stop others from using its trademark or a similar mark under certain circumstances.

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Citizen Media Law Project <http://www.citmedialaw.org/glossary>
New Media Rights <http://www.newmediarights.org/glossary/>
