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# Legal Compliance Issues and the Internet

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Any organisation currently using the Internet (including email), or considering implementing an Internet strategy such as a website, needs to be aware of the peculiar legal risks associated with this new information resource. Recent civil claims and individual prosecutions have triggered wide concern about the possible liability of organisations and individual employees.

The Internet is often mistakenly treated as either simply a new broadcasting medium or an extension of the fax and telephone. Care must be taken not to underestimate how the increased speed, availability and immediacy of the Internet impacts on the application of existing laws and the creation of new laws. The Internet is new and government and organisations are still trying to understand its uses and applications.

This article is set out in three sections as follows:

- developing a website;
- maintaining a website; and
- employee conduct and the Internet.

This article is based on an Internet Compliance Manual recently published by Gilbert & Tobin.

## Developing a website

There are a number of legal issues which must be addressed in relation to development of a website, namely:

- content;
- third party developers;
- corporate issues; and
- contracting issues.

## Content

The development of a website and the publication of material on the web carries legal risks and issues that, on one level, mirror that of the

publishing world generally, and, on another, involve media specific issues. These issues include the following:

- The publication of defamatory material on a website will expose an organisation to legal action in multiple jurisdictions. It is important to note that defamatory material may come from web users posting material to a website, whether through a guestbook, comments section or bulletin board.
- There is also the issue of privacy. Australian Privacy laws in their current form are unlikely to impact on an organisation's use of the Internet unless that operation is connected with the collection, assessment or other dealing with personal credit information. That said, if the Federal Government restarts its push to amend Australia's privacy regime, then the ability to use information received through a website will be tightly regulated.
- Commonwealth and State legislation also prohibits organisations from engaging in misleading or deceptive conduct, or conduct that is *likely* to mislead or deceive. These laws mean it is crucial that all material posted on the Internet be cleared by legal staff.
- Recently most State governments have passed new, or amended old, legislation to make the transmission, storage or accessing of "objectionable material" illegal in a digital and hard copy format. This prohibition includes child pornography, sexually degrading material and material that provides instructions on the commission of violent crimes.
- Finally, failure to adequately protect intellectual property could have substantial adverse

consequences on the commercialisation of that property. Similarly, failure to secure the necessary rights and licences to content on a website from third parties could expose an organisation to legal action.

## Third party developers

The website development industry is a newly emerging, highly competitive market. That said, as an immature market there are a number of legal problem areas that need early identification and monitoring.

A website development contract usually involves the preparation and organisation by the developer of content, graphics, sound and icons for the website. Further, the developer is likely to use their own confidential information and intellectual property in the development of the website. Care must be taken that copyright in the developed website is transferred to the organisation and licences are granted to use the intellectual property of the developer. Website developers should also be required to grant warranties and corresponding indemnities regarding content developed by them.

## Corporate issues

There are a number of seemingly minor corporate issues that require different application in the website environment. For instance the *Corporations Law* requires that an organisation's ACN (or ARBN) be displayed on all public documents. It is likely that a website is a public document for the purposes of the *Corporations Law*. Therefore consideration needs to be made as to where and how the relevant number should appear on a website.

## Contracting

There are essentially four phases in the business process of electronic commerce:

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- pre-contractual;
- contractual;
- settlement; and
- post-contractual.

Some of the important legal issues in each of these phases are:

- Taxation issues which arise in electronic commerce, both in terms of Australian based taxes and international taxes. Trading on the Internet obviously has taxation consequences and governments are now alert to these potential consequences.
- Goods and services sold in Australia via the Internet will be subject to Australian laws governing consumer protection. One Australian peculiarity is that contracts for goods and services for domestic (ie household) consumption or for a value of less than \$40,000, are subject to a number of implied conditions and warranties.
- In the event that an organisation's website is designed to solicit advertisers or establish a closed or "special" membership section, those arrangements require special terms and conditions. Any access rights or location rights should be by way of a licence only and should not convey any intellectual property rights.

### Hosting and Maintenance of a Website

There are a number of elements that go into hosting and maintaining a website and connecting an organisation to the Internet. Of particular concern are:

- Selection of a domain name. In the absence of a better entitlement to a name, domain name registration is on a first come first served basis. There have been successful US actions where parties unconnected to a domain name registered in that name ("domain name squatters") have been deregistered by a court.
- Hosting of the website. Under a website host agreement, a host organisation maintains and

supports the content of the organisation's website on a server or bank of servers. There are several key elements that are essential to a hosting agreement, for example the website's availability must be 24 hours a day seven days a week. Additionally, intellectual property rights in the content must be owned by the organisation.

### Employee conduct and the Internet — email & Web usage

As email revolutionises the way organisations and individuals communicate, corporate counsel and managers need to be aware of the legal issues which arise in the use of internal and external email and networked computing. There are essentially three areas of concern:

- email usage;
- email content; and
- special contracting concerns.

#### Email usage

In the same way that a combination of organisation policy and general business etiquette has established how an organisation and its employees use written communications and the telephone, organisations need to prepare a policy which governs email and Internet use. This policy should address:

- Usage parameters for what types of messages employees are permitted to send and when and how they can use the Internet. The more freedom that is granted to employees regarding the use of email, the more an organisation needs to establish structures for ensuring employee responsibility for the content of those emails.
- Document management. Consideration needs to be given to the practical and legal issues involved in the management of emails, particularly given that email is often used to replace telephone calls. It is now established law that emails are discoverable during legal proceedings. Organisations are therefore bound by law not to

destroy documents (including emails) that relate to existing or likely legal proceedings.

- The email policy should make a clear statement about ownership of the copyright in organisation emails sent by employees. The general rule is that copyright in all documents on networked computers and sent by employees by email belong to the organisation.

Finally, there are a number of technology issues which need to be addressed in implementing an email policy including security procedures, firewalls, encryption and passwords.

#### Email content

As well as addressing the usage of email, an organisation's email policy should alert employees to the legal and organisational policy issues involved with the content of emails sent within and outside of the organisation:

- Defamation can occur through email. Liability for defamatory emails can attach to both the individual employee (as the author) and an organisation (as the distributor or publisher).
- Again, intellectual property is an issue. Email usage can result in inadvertent transmission of an organisation's confidential information and/or copyrighted material to third parties. Similarly, employees may inadvertently infringe the copyright of third parties by forwarding the email of third parties, or by copying and downloading copyrighted material from the Internet.
- Sexual harassment and sex and race discrimination must also be considered. There have been incidents in the US where sexist and racist jokes have resulted in successful harassment/discrimination suits.
- As mentioned previously, most Australian States prohibit the possession, transmission and copying of "objectionable material".

### Special contracting concerns

Correspondence, including emails, may create legal liability. The casual culture surrounding the use of emails has resulted in an increased use of informal communication in business. An organisation may wish to consider informing employees as to how the employee can inadvertently end up binding the organisation to commitments through either the laws

of contract or through "misleading or deceptive" conduct as discussed previously.

### Conclusion

This article has mapped some of the more important issues to be addressed in preparing, implementing and monitoring an Internet strategy. It also

highlights some of the legal compliance peculiarities associated with the use of the Internet and electronic mail. Care should be taken to not assume the Internet is simply an extension of the telephone or fax machine.

<sup>1</sup> David Standen is a partner and Timothy Hughes is a Lawyer at Gilbert & Tobin (<http://www.gtlaw.com.au>). This article was prepared with the invaluable assistance of Brendan Scott, Simon Pollard and Tim Gole, all of Gilbert & Tobin.

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# Software Copyright Issues crystallised in a landmark decision

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A ruling vital to the Australian computer software industry was delivered by the Full Court of the Federal Court of Australia on 4 June 1997 in *Powerflex Services Pty Ltd and Ors. v. Data Access Corporation* (VG 295 of 1996) ("The Powerflex case"). The decision is justly referred to as a landmark decision.

### Fundamental issues

The Court comprised Chief Justice Black and Justices Hill and Sundberg. The Court was required to determine complex questions of law relating to the application of the *Copyright Act* to computer programs. The fundamental importance of the decision is that the Court affirms the principle that copyright law does not protect *an idea*, only *the expression of an idea*. The Court is to be congratulated for applying this principle to an extremely complex issue with great clarity and certainty.

The difficult task faced by Court was the analysis of two competing software programs with a view to determining the distinction between the concepts and functions of each of them and the expression of those concepts and functions. As an Appellate court, the Court had to rule on the submissions of the appellant (Powerflex) contending that the trial judge was wrong to find that Powerflex had infringed the copyright of Data Access Corporation

by use of reserved words of the vocabulary of the Dataflex language and other features of the program .

### CAN COPYRIGHT PROTECT A LANGUAGE?

Traditionally the protection of ideas is the realm of patent law. Fundamentally, patents are granted to protect physical objects, inventions or processes. Words which constitute the vocabulary of a language are in fact no more than tags which identify a function or underlying concept. It is submitted that patent law will not and should not protect the words of a computer language as the words are nothing more than tags descriptive of function and are not utilitarian ideas or objects requiring protection. An illustration of this point would be if simple words of the English language were patented by their first user (e.g. "print") thereby depriving other users of that language from the use of that word. The whole point of a language is to enable the users of the language to communicate with each other. This fosters a growth of expression by use of the language. The fact that the language is a computer language should not create a monopoly over the use of that language. If it did, the users would be permanently trapped by the deviser of that language.

Powerflex carefully studied the functions of the Dataflex language and deliberately set out to develop a superior program. It was necessary to use the same words constituting the Dataflex language to attract existing users of the Data Access program to Powerflex. In common parlance Powerflex set out to build and sell a better mouse trap. In the view of many existing customers this was achieved and they switched to Powerflex. In late 1993 Data Access had decided it had lost enough customers and took action to assert its belief that the copyright in the Dataflex program had been infringed.

### RESULT AT TRIAL

This litigation required the trial judge to decide issues which had rarely been dealt with judicially anywhere in the world. Not surprisingly, this was a difficult task and the software industry watched closely. The trial judge was required to determine whether the words found commonly in the Dataflex program and Powerflex program were themselves computer programs. This question requires application of the definition of the expression "computer program" in section 10 of the Copyright Act 1968 (Commonwealth of Australia). That definition refers to an expression of a set of instructions in any language, code or notation intended to cause a