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Legal and Regulatory Update

This section of the Journal looks at marketing, data protection, technology and e-commerce issues, providing an overview of recent key legal developments in these areas.

Web 2.0 — The key legal questions

QUESTION 1

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Journal of Direct, Data and Digital Marketing Practice (2008) **9**, 298–300.
doi:10.1057/palgrave.ddmp.4350093

QUESTION 1

'In recent months these issues have arisen related to social networking sites, in particular Facebook and MySpace. Some companies are trying to stop staff accessing the sites- unscrupulous use of the details in individual's profiles — groups of individuals using the sites to put pressure on companies to change their policies. What are the legal issues that companies need to understand about social networking sites, particularly when used by their staff?'

ANSWER

Time wasting v goodwill

Like the introduction of email, the use of social networking sites has prompted a series of headline-grabbing reports about the amount of time wasted by employees during the working day. Peninsula estimates this cost at around £130m per day in wasted hours.

However, despite the impressive statistics, the problem is not a new one for employers, as the recent TUC briefing asserts, 'Facebook is just another way of using the web to organise your social life — it isn't the first and it won't be the last'.

Just like drawing the line between an acceptable amount of chit-chat at the coffee machine and a level of coffee-time banter that becomes detrimental to productivity, companies should have in place an internet and email policy that extends to social networking sites, online business networking and blogging. This policy should make it clear if employees are allowed to use the internet for personal use and to what extent.

While some companies such as British Gas, Bloomberg and Credit Suisse are banning use of the sites altogether, such a strict approach may not be applicable in all organisations and can lead to an erosion of

Social networking sites

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Erosion of goodwill

goodwill. A complete ban may be easier in some sectors but will be difficult where networking is an integral part of the job. Indeed, a city law firm recently did a u-turn on its Facebook ban when its employees argued they used it for business networking.

If use of sites for business networking is legitimate, organisations should remind employees that they are representing the company and consider whether staff should be required to record any useful contacts acquired through this method of networking to ensure the activity can benefit the business in the longer term.

An alternative approach is to restrict access to such sites to lunchtimes or after work. In any event, guidelines about access should be clear and stress that any use that interferes with employees' work will be considered as a disciplinary offence.

Recruitment

Recruitment and cyber vetting

The use of social networking sites for recruitment purposes have divided opinion. While HR teams have honed application forms and recruitment policies over time to cut down the risk of decision makers being influenced by irrelevant factors, a quick search of social networking sites can potentially reveal marital status, sexuality and age. Although some say that this means that a search is inappropriate and raises issues of privacy as well as discrimination, it is open to an individual to limit the public access to his or her profile to avoid access by anyone other than invited friends.

Dishonesty

On the other hand, a search could reveal dishonesty such as information about job history that contradicts statements on an application form, or inappropriate postings about the business of a former employer. The key thing for companies to remember is that if they decide to search for a candidate's profile they should verify any information they find and ensure they take up proper references to assess suitability in addition to the search.

Brand damage and cyber bullying

Like the wider issue of blogging, postings and group discussions on social networking sites can result in employees making derogatory comments about their employers or disclosing confidential information. They may also criticise colleagues that could result in discrimination, harassment and constructive dismissal claims by the victim.

Organisations from Argos to the Conservative party have suffered embarrassment because of Facebook forums and postings by employees. The Argos employee who set up a thread entitled 'I work at Argos and can't wait to leave because it's sh*t' and the 118 118 employees who created a page called 'The Survivors of 118 118' to slag off the users of the system have been widely publicised and caused unknown damage to the companies' reputations.

An employer should therefore ensure that their policy makes it clear that any offensive, defamatory or discriminatory comments on any social network site or blog and any disclosure of confidential

information about the company, its staff or customers will result in disciplinary action that may lead to dismissal.

Summary

In summary, companies should:

- clearly establish rules of use
- set out consequences of misuse
- publicise the policies
- seek advice if in doubt.

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QUESTION 2

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Journal of Direct, Data and Digital Marketing Practice (2008) **9**, 300–301.
doi:10.1057/palgrave.dddmp.4350092

QUESTION 2

Video sharing sites

‘Video sharing web sites, in particular YouTube, contain a lot of illegally copied materials. What are the legal issues if this material is then advertently used by a company (ie on the blog of an employee)?’

ANSWER

The answer is straightforward. If the person who copies the material does not have the agreement of the copyright owner to do this then it is copyright infringement.

However, when it comes to the responsibility of the employer for this, it is a little more complicated. Whether the employer is responsible depends upon concepts of vicarious liability. In simple terms, if the employee creating the blog is acting in the course of his or her employment then the employer will be vicariously liable.

If the employee is using the employer’s assets (communication systems) to set up a personal blog, then the position is less clear. At one end of the spectrum it could be argued that the employer is allowing its facilities to be used much like a telephone system and the employer would not be responsible if, for example, the employee in a personal telephone call said something defamatory about someone else.