

# Legal Issues of Web 2.0 and Social Media

STEPHEN KUNCEWICZ



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### UK/EUROPE OFFICE

Ark Group Ltd  
Paulton House  
8 Shepherdess Walk  
London N1 7LB  
United Kingdom  
Tel +44 (0)20 7566 8276  
Fax +44 (0)20 7324 2373  
publishing@ark-group.com

### NORTH AMERICA OFFICE

Ark Group USA  
4408 N. Rockwood Drive  
Suite 150  
Peoria IL 61614  
Tel +1 309 495 2853  
Fax +1 309 495 2858  
publishingna@ark-group.com

### ASIA/PACIFIC OFFICE

Ark Group Australia Pty Ltd  
Main Level  
83 Walker Street  
North Sydney NSW  
Australia 2060  
Tel +61 1300 550 662  
Fax +61 1300 550 663  
aga@arkgroupasia.com

---

### Commissioning editor

Anna Shaw  
ashaw@ark-group.com

### Assistant editor

Stephanie Ramasamy  
sramasamy@ark-group.com

### Managing director

Jennifer Guy  
jguy@ark-group.com

### UK/Europe marketing enquiries

Robyn Macé  
rmace@ark-group.com

### US marketing enquiries

Daniel Smallwood  
dsmallwood@ark-group.com

### Asia/Pacific marketing enquiries

Steve Oesterreich  
aga@arkgroupasia.com

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## Executive summary

EVERY ORGANISATION, whether a public sector body or a private sector business, is affected by Web 2.0 and social media. Some are actively using social media as a tool to achieve business aims – whether it's to reach new clients, stay in touch with existing clients or launch new products. Others are watching what happens online with a view to becoming part of the conversation. Others simply have staff members who engage in personal use of social media at work (whether permitted or not). There may even be a tiny minority who make no use of social media whatsoever – while their competitors get ahead and change the game.

Whatever stage of social media adoption your organisation is at, it will already be clear that social media is changing the way companies operate and how people go about their work. But what have long been ignored are the legal ramifications of social media – the fact that the same laws apply online as offline. With all this information freely available online, how do you ensure that your organisation's valuable intellectual property is not being misused, copied or redistributed by others? And what rights and remedies do you have if a third party has been illegally using your intellectual property? And on the other side of the coin, what responsibilities does your organisation have with regard to employees' use of social media – should an employee make a potentially libellous comment online about a competitor, using a work computer, what

involvement might the company be deemed to have?

Understanding these complex issues is a challenge for all organisations, but one that must be faced. Recent cases have shown that the courts take a dim view of online misdemeanours, but there is still some uncertainty about how laws which were written before social media was even conceived can, should and will be applied in this context. Whether transgressions are deliberate or accidental, the 'copy and paste' generation must be aware of the consequences.

*Legal Issues of Web 2.0 and Social Media* outlines the key areas of law, both civil and criminal, that govern social media use, analysing how the courts have interpreted this in previous cases. Examples are given throughout of both previous and current court cases, as well as mishaps in the online world which have been successfully managed so as to avoid court cases.

Part One sets the scene, introducing some of the key concepts involved in the report and clarifying just why legal issues in the online world cannot be ignored. It introduces incidents which have dramatically changed the way in which individuals, organisations and the law interact with social media.

Part Two focuses on copyright in use of Web 2.0 and social media, explaining the main points of law and discussing how these are likely to be encountered (indeed, infringed) in the online world. This section provides invaluable advice on how to stay on the right side of the law if you are

publishing content to the web, but also makes clear the remedies at your disposal should someone else be abusing your rights as a copyright holder.

Part Three examines the challenges of online brand management, exploring issues relating to both registered and unregistered marks. It pays particular attention to some of the very specific challenges faced in the online world, including key issues such as domain name registration.

Part Four goes on to look at how privacy issues commonly encountered in the 'real-world' press translate into online activities: data protection, an individual's right to privacy, confidentiality and defamation. This section contains crucial advice for any organisation that attracts customers online, as well as any organisation that has found itself on the receiving end of unfair bad press.

Part Five examines the key elements of criminal law that are likely to apply in the online world, including harassment, contempt of court and unfair commercial practices. While these may be some of the least commonly thought-of problems facing web users, some high-profile cases have shown that the courts will not tolerate online behaviour which breaks offline laws.

## About the author

STEVE KUNCEWICZ is a solicitor in the Intellectual Property & Media team at Halliwells LLP in Manchester, handling mainly contentious matters for local, national and multinational businesses.

Steve handles all intellectual property matters with a particular emphasis on media, new media and Web 2.0 issues and is listed in the North West Legal 500.

Steve is described by clients as “bringing tact, discretion and common sense to business dealings”, “a one-off specialist in his field” with “a fairly unique understanding of IP Law [who] in particular...has been able to apply that to the online environment with great ease and foresight” and “a straight talking professional who knows his business as well as anyone.”

Steve is a regular media spokesperson and has given interviews to the local and national press on various legal issues to outlets such as BBC Breakfast, Sky News, Granada TV, More4, BBC Radio Manchester, Century FM, Talk 107, CityTalk, Rock Radio, Kerrang Radio and LBC.

Steve has also appeared in the *Law Society Gazette* as ‘Lawyer In The News’ and has been featured in the *Times*, *Financial Times*, *Daily Star*, *Manchester Evening News*, *Liverpool Echo*, *Crain’s Manchester Business*, *PR Week*, *Insider*, *EN Magazine*, *Credit Today*, *Information World Review*, *How-Do*, *Sky Movie News*, *UK Screen*, *Financial Director*, *TSG Life*, *Music and Copyright* and *Computer and Videogames*.

Steve is heavily involved in business development, developing Web 2.0 and social media strategy for Halliwells as well as at his former firm, which won a commendation at the inaugural ‘Golden Twit’ awards for best business-to-business use of Twitter.

Steve is a board member of Pro-Manchester, Manchester’s Cluster Group for the Financial and Professional Sector, Honorary Solicitor to the Manchester Publicity Association, a Council Member of Manchester Law Society and an Ambassador for Forever Manchester.



# Acknowledgements

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## Dedication

To Claire, Bish, Sylvia, Hannah and Marian Kuncewicz and Susan Rhodes – they know why

To Ian Hudson and Philip Hemsted – it's all their fault

To Eddie Glass, RIP



## Foreword

I WAS first asked to write this... book, report, publication (its identity tends to change with alarming regularity depending upon its content and the mood I'm in when writing it) in December 2009 having contributed an article called 'Anti social or media savvy?' to *Managing Partner* magazine. This identity crisis brought home to me the central challenge of the project. The subject matter of this report (there, I said it) is massive, and the definitions of many of the terms around which it revolves – social media, Web 2.0 – are fluid and open to question. The speed at which I can research and then type is not fast enough to keep pace with evolution.

For a lawyer, this is both difficult and commonplace. We spend our careers trying to summarise for our clients, in simple terms, difficult concepts which have an alarming tendency to change at varying speeds with the passing of time. We take at least some comfort in the fact that certain areas of law – private client work and property, for example – tend to be fairly resistant to change and we only need to buy new textbooks every so often.

This brings up a phrase that sums up the legal profession at the end of the first decade of the new millennium: resistant to change. I work within a practice area that is by its very nature dynamic and about which I find it easy to be passionate or afraid to talk about at parties, but I may be in the minority. Passion may be in short supply within the profession for a number of reasons at the moment, the most obvious

being that it's an interesting and difficult time for the profession. I'm not asking the reader to feel too much sympathy for us – some of it is very much our own fault – but the reality is that it is becoming harder to run a legal services business under the old model.

I'm also perhaps in the minority (although I would be delighted to be proven wrong) in being of the very firm belief that the way we work as a profession and that old model not only must change, but have changed beyond recognition and without our consent.

There are a number of reasons for this, foremost among which are the credit crunch and the resultant global recession. Many of the practice areas upon which the legal industry has based its continued prosperity for the majority of at least the last 50 years have now been proven to be less reliable in the face of an economic slowdown – property work dries up when clients can't afford to buy or rent new premises, corporate deals don't take place when there is no money to fund them and litigation slows down when clients can't afford to sue each other.

And, as much as intellectual property and media law are not completely immune to the recession, they are becoming more and more important as well as increasingly resistant to a harsh economic environment, even if they deal in some concepts – the value of creativity, innovation and reputation – that casual observers may see as ethereal; issues which revolve around concepts that are to some simply smoke and mirrors.

Worse, certain sections of the public's prevailing attitude to copyright in the digital world – being unwilling to pay for the music, software, movies and television shows which they have been able to get for free through sites such as LimeWire, Napster (both of whom are no longer able to provide downloads which infringe copyright) and so on – may eventually lead to intellectual property (IP) lawyers facing the same kind of hostility which currently greets our colleagues in personal injury. Media lawyers have already had a taste of that through the criticism of their willingness to run defamation and privacy cases through conditional fee arrangement (CFA) or 'no win, no fee' agreements which contain uplifts on fees of up to 100 per cent if a case is successful. As many cases settle under threat of payment of such massive legal costs, judges and the media are concerned that a chilling effect is starting to take hold of the media, and as such recent reviews of our civil litigation system have contained proposals to seriously curtail the use of CFAs.

Many in the profession feel a similar scepticism about the use and incorporation of social media into the legal services business model. Why should we bother? Surely clients don't actually find a lawyer through the internet? Surely the referrers we work with don't care about this kind of thing? Surely they don't use LinkedIn, Facebook or Twitter? Surely we'll never actually make any money out of this? Surely this is all just a fad that only the techies will actually get?

Wrong.

I may remain (for now) in the minority, but that minority is vocal and growing. One of its more public members, as well as one whose opinions have a tendency to divide his audience, is Richard Susskind, author of *The End of Lawyers? Rethinking the Nature*

of *Legal Services*.<sup>1</sup> For any lawyers who happen across this report, I recommend it strongly.

Susskind's book paints something of a bleak future for the profession, setting out a number of new pressures upon us after a period of economic upheaval and fundamental change. Susskind's first book, *The Future of Law*, predicated that the law "would be transformed by IT".<sup>2</sup> He was right. I have seen how case management systems and other technological innovations really have changed the way that we work. E-mail is a prime example – how many firms do you now come across who don't have individual e-mail addresses for each fee earner? When I broke into law (quite literally) at the turn of the century, it wasn't uncommon for smaller firms only to have one e-mail address.

*The End of Lawyers* goes further and foresees the next big change in what we do – fully embracing the impact of technology and having it systematise much of our working lives, and dealing with what he describes as "disruptive technologies" and arguing that "relentless connectivity" will mean that unless we're part of the online conversation (Susskind hints at the impact of social media but perhaps sensibly, discusses this subject on a theoretical level), we will be left out in the cold.

Some firms are already looking to social media as the next frontier, some aren't. Susskind's theories have as many detractors as they do admirers. I am, in case it's not completely obvious from the fact that I've even taken on this project, one of the latter. The legal world faces major and unstoppable change from the advent of technology and from the influence of social media, much like the rest of the world.

Social media in its most cutting-edge form is not for everyone, or so they think. These are the people who, having laughed

off the idea of Facebook, now have profiles of their own. Many of Facebook's newest converts are among the older members of the population; recent research suggests that their biggest growth area is in females aged over 55.<sup>3</sup> More statistics can be found in Chapter 4.

If the Baby Boomers are only now waking up to the possibilities which social media offers them, Generations Y and Z already have done. Some call social media the most important shift since the industrial revolution. It may not be just yet, but it certainly has that kind of potential.

To sum up, if the lawyers are starting to realise that they may need to change their approach, you're probably already doing so. If you've taken the time to either buy or read this report, then the chances are that you're thinking about it or at least concerned enough to know a little bit more about what's going on in the online world. If so, then you've taken the first step.

Social media isn't just for big brands with huge budgets or technology companies. It allows its users to become part of a community without boundaries where, if the message is right, any voice can be heard. Traditional barriers to getting that message out, such as the availability of a huge public relations (PR) or marketing budget, are eroding fast. That's not to say that you don't need PR or marketing staff any more – that is a dangerous assumption. They will know how to build your strategy in an integrated manner, but you can at least start the ball rolling and connect directly with your audience in the meantime.

We are now very much in the age of the dialogue rather than the monologue. This is both a risk and an opportunity, as you'll see later. You could choose to ignore it, but if you do then the dialogue will continue without you.

The world has changed enough to allow me to write about it in the form of this report. I'd like to call it a book, but to do so may well be a disservice to the number of truly great legal publications I've read over my short career. As much as it's a risk – I'm sure that this report will draw negative reviews as well as positive, many from the social media world – it's a huge opportunity.

Hopefully this report will at least give you an awareness of the growing importance of social media and the rules by which its users are expected to play. If it is received well, I would imagine it will need updating on a fairly regular basis. Keeping up with those changes will be half the fun.

It's a brave new world, in which you can stake your claim as easily as anyone else. I hope that this report helps you to do so with your eyes open.

Steve Kuncewicz  
June 2010

#### References

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