Legal risks for students using social networking sites

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ABSTRACT

There are significant privacy, intellectual property, copyright and disclosure risks associated with the ill-considered use of social networking sites, however, the implementation of regulatory actions may also undermine the social and emerging educational utility of social networking sites for young people. Inevitably the burden of dealing with the risks of social networking sites must necessarily fall on the development of educational strategies designed to equip young people with the skills and tools to manage their own personal information, and respect the privacy of others, including their teachers. While several valuable projects have tackled the issue of cyberbullying surrounding the use of social network sites, little research has been performed in Australia on the broader legal issues. This paper describes some of these serious and frequently misunderstood legal risks and outlines the current large scale research project aimed at identifying student practices as well as the perceptions of their teachers and parents. This paper will provide a valuable discussion point for teachers and administrators who are trying to understand the broader legal implications of personal and educational use of social networking sites.

INTRODUCTION

Social Network Sites (SNS) have been defined as "web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system." (boyd & Ellison, 2007, p. 210). While this definition has not been accepted without question (for example see Beer, 2008), it has been adopted for the current study and consequently allows for the investigation of recognised SNS such as Facebook to less obvious candidates such as YouTube and Flickr.

SNS have been the subject of rapid growth in Australia and overseas, particularly among young people. They have arguably become an essential part of life for many Australian teenagers. For some teenagers, social networking may offer particularly valuable social benefits. For example, teenagers who are geographically remote or socially marginalised can network with like-minded peers. SNS affords experimentation with identity which may not otherwise be possible for some young people.

Educational advantages to SNS are also increasingly being explored by teachers and researchers. For instance Dalsgaard (2006) argued that "social networks support self-governed, problem-based and collaborative learning processes" and consequently lend themselves to social constructivist pedagogies. Mason and Rennie (2008) make a similar point that Web 2.0 and SNS have increasingly been thought to support a constructivist approach and consequently the move towards using SNS for education is not surprising or revolutionary, but rather should be considered an evolution of teaching method. A scan of the research literature indicates a growing argument that social software, including social networks, provide a valuable educational opportunity and should be carefully included into course design (Alexander, 2006; Carter, Foulger, & Ewbank, 2008; Dalsgaard, 2006; Heavin, 2007; Mason & Rennie, 2008; Mazer, Murphy, & Simonds, 2007; Pearson, 2009; Trzeszkowski-Giese, 2007)

Clearly the educational research literature does suggest that the use of SNS can have a range of positive outcomes. However, there are also risks. For instance, there have been instances, reported by the media, of SNS being used to bully, mislead and even form suicide pacts. Another example is the media's use of photos of Australian Olympic swimmer Stephanie Rice at a private party highlighted the unforseen risks of setting privacy settings of a social networking site to allow public view. More recently, a disturbing trend is emerging of children placing naked and explicit photos of themselves and their friends, or photos sent to them via mobile phones (termed 'sexting'), on sites such as Flickr. These cases highlight that the repercussions of engagement with social networking can be far-reaching and usually unforseen by the individual involved.

The exploration of identity is a characteristic of childhood and especially teenage years however the use of SNS adds a complex layer of communication, practices and consequences. Despite the recent release of major reports on children and online behaviour in the UK (Safer Children in a Digital World, The Report of the Byron Review: Byron, 2008) and the US (Internet Safety Technical Taskforce: Berkman Center For Internet & Society, 2008; Macarthur Foundation Digital Youth Project: Mizuko, et al., 2008) little research has been performed in Australia on the legal framework for the operation of social networking sites, and on the perceptions of parents, teachers and children in relation to legal risks. While there has been considerable focus on cyberbullying, and a number of educational programs directed at school students regarding cyberbullying, there are no similar projects which focus on legal issues such as privacy, intellectual property, copyright and disclosure. This paper describes some of these serious and frequently misunderstood legal risks and outlines the current

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large scale research project aimed at identifying student practices as well as the perceptions of their teachers and parents. This paper will provide a valuable resource for teachers and administrators who are trying to understand the broader legal implications of personal and educational use of social networking sites.

Intellectual property, risk and social networking

SNS are used to create and project the user's identity, to strengthen existing social links and in some cases, forge new ones, and all of this must be done through the vehicle of the online 'identity' or 'profile'. A common way to do this in SNS is through the display of images and extracts from popular culture to send a particular message about the user, for instance the use of a movie star or cartoon character photo as your Facebook profile image. Most of this content is protected by copyright and/or trade mark rights. As Palfrey and Gasser (2008) observe in their book on Digital Natives:

> These young people are not passive consumers of media that is broadcast to them, but rather active participants in the making of meaning in their culture. Their art form of the remix, where digital files are combined to create a new video or audio file, is already having an effect on cultural understanding around the world.... Creativity is the upside of this brave new world of digital media. The downside is law-breaking. The vast majority of Digital Natives are currently breaking copyright laws on a regular basis. (Palfrey & Gasser, 2008, pp. 131-132)

This raises questions regarding both how to educate such users regarding the application of the law to their activities and the broader question whether the law itself remains appropriately adapted to the new technologies and uses reflected in online creativity.

In using SNS to create profiles that reflect their (idealised) version of self, users are responding to invitations within and the nature and structure of SNS. As Williams (2008) has observed, users are encouraged by the nature of SNS to upload certain content:

> The templates ask people to think of their identities in terms of popular culture references: with the requests for lists of favourite movies, television programs, books; with the capability to choose a song to play when the page opens; and with the capability to load images and video from other sources. (Williams, 2008, p. 29)

The performance of identity is therefore encouraged and facilitated by the technology. The irony is that users are actively encouraged to embed this material in their identity and lifestyle, often as a sign of their individual taste (Hodkinson, 2007, p. 627), but that culture remains 'owned' by the corporate intellectual property owners. A counter culture icon such as 'Emily the Strange' is as much a piece of intellectual property protected by her owners as 'Barbie' or 'Hannah Montana'.

Often users assume that because their creations are not made for profit that they do not require permission from copyright owners to include music or images in such creations. This assumption is without any legal foundation. A further issue for consideration is that students can produce and publish their own copyright content such as artwork, stories, photos, machinima, and they need to consider whether and how to protect their own creations.

Images, video, music, and text uploaded to SNS are the subject matter of copyright, and which may also be protected by trade mark law. In Australia copyright automatically comes into existence upon the reduction of the idea to material form, and thus copyright is said to protect the form of expression rather than the underlying idea. Infringement can occur when that work is reproduced or adapted without the copyright owner's permission, and can apply to the person who does the act or who authorises someone else to do the act (see Copyright Act 1968 for more details). The act of infringement must be done with respect to a substantial part of the relevant work (see section 14). However, contrary to public belief there is no blanket personal use exception.

In Australia, there are limited defences to the infringement of copyright. The most relevant defences for SNS users are fair dealing for the purposes of criticism or review or parody and satire. In each case, the taking of the work must be both 'fair' in the circumstances and for the stated purpose. Therefore, mere display of a whole image or performance of an entire song, with no critical or parodic purpose, is unlikely to satisfy the elements of the defence.

Therefore, whilst some postings to SNS may be expressly or impliedly licensed or permitted by copyright owners or within the scope of copyright defences for example fair dealing, or may not constitute a substantial part, it is most likely that the majority of such uses are infringing. Copyright infringement is subject to both civil and criminal liability. The existence of authorisation liability also means that it is possible that the service provider, SNS provider or school could be liable for the infringement.

The posting of fiction, poems and role plays onto SNS and blog communities can raise substantial copyright issues. For example, if students have authored original works then the social networking site terms of use may have copyright implications. Another example of a potentially serious copyright issue is if students publish materials that are based on copyright creations, such as fan fiction. Furthermore the existence of active fan fiction communities such as those formed around Harry Potter and Twilight may encourage young people to think that the creation of fan fiction is legally condoned. However, Australian law is not clear in this matter. In a recent US case JK Rowling and Warner Bros successfully sued the publishers of the Harry Potter lexicon for infringement of copyright (*Warner Bros. Entertainment, Inc. and J. K. Rowling vs. RDR Books* (2008) 575 F.Supp.2d 51). The Court held that there was infringement as there had been significant taking of material from the original works, although the Court was not opposed to derivative creations per se, in this case it had gone too far. It should be noted that US law may allow more latitude on this point than Australian law.

Many users in uploading content and adopting standard form licences, including Creative Commons, do not take the time to read what they are agreeing to, nor do they contemplate the complexities that may arise due to later re-use. In September 2007, a family in Texas filed an action against Virgin Mobile Australia, Virgin Mobile USA and Creative Commons with respect to the use by Virgin Mobile Australia of an image of teenager Alison Chang, which had been downloaded from Flickr (Associated Press, 2007). The photo had been taken by a family friend and uploaded by another family member who tagged them with the default Creative Commons sharealike licence. The image was then used in the 'Dump Your Pen Friend' advertising campaign. Virgin claimed that the use of the images was within the spirit of the Creative Commons Agreement, including permission for use for commercial activities.

The complexity and lack of clarity of copyright law make it hard even for people who want to do the right thing. Lawrence Lessig (2008) has argued that copyright infringement is a 'gateway' crime, leading children to disrespect the law. Whilst this argument has been criticised from both pro and anti copyright sides it should be acknowledged that the application of copyright law in this context is very complex. Palfrey et al. (2009) have responded to this problem by outlining a Creative Rights Copyright Curriculum that is intended to educate students regarding creation and re-use of copyright material. Certainly, as students increasingly interact and create through networked digital technology some basic copyright guidance should be given to them at the outset.

Privacy, Students and Social Networking Sites

The popularity of SNS among school students gives rise to two distinct kinds of threats to privacy. The first set of concerns relates to the disclosure of personal information by the students themselves. The second set of concerns, on the other hand, relates to the posting of personal information about a student by other people, or the alteration of personal information by other people.

SNS are built on the sharing of information, including users posting their own text, photographs and video images. In the online environment, the consequences of posting personal information are not always immediately apparent. There is evidence to suggest that, for a variety of reasons, including peer group pressure, young people are less cautious about posting private information to SNS than older users. For example, a July 2009 study by the Australian Communications and Media Authority (ACMA, 2009) found that:

> Often young people choose to be open and expressive. The option of protecting their privacy online often falls by the wayside in favour of wanting to stand out to others online.… Sometimes personal information was divulged without an understanding of the potential consequences of disclosure (for example, posting information about going on holiday and not realising that this could give an unintended recipient information about their whereabouts). (p. 8)

The poorly thought-through disclosure of personal information, such as information about sexual activities or drug taking, may not only have immediate negative consequences, but may come back to haunt the person later on in life.

Although young people seem more willing to share personal information, it is important that this is not interpreted as a lack of concern about privacy, or as a complete lack of attention to the management of personal information. Thus, a 2007 study of the use of SNS by American teenagers by the Pew Internet & American Life Project reported that:

> Most teenagers are taking steps to protect themselves from the most obvious areas of risk … Most teens believe some information seems acceptable – even desirable – to share, while other information needs to be protected. (Lenhart & Madden, 2007, pp. i-ii)

SNS provide the ability for users to publish personal information about others, including text, photographs and videos. For example, a teenager may post naked images of friends or of friends engaged in recreation drug-taking. At the extreme, the posting of embarrassing or lewd information relating to others, whether true or not, takes the form of cyber-bullying. The difficulty that arises in dealing with the posting of private or embarrassing information about others to SNS is how to provide an appropriate redress for the affected person, while not impeding the ability of teenagers to freely interact online. This is a difficult balancing act.

1.1 Legal and policy responses

A variety of proposals have been made for dealing with the privacy threats posed to young people by SNS. One possibility is to regulate the use of SNS by people under a certain age. In the US, for example, the Children's Online Privacy Protection Act (COPPA), requires operators of commercial websites directed to children under the age of 13 to provide notice to parents, and to obtain parental consent before collecting personal information from the child. There have also been proposals for introducing legislation restricting access to SNS by children under a certain age. Moreover, some SNS, including MySpace, already have policies of restricting access based on age. The practical difficulty with these proposals is that it is extremely difficult, if not impossible, to accurately verify the age of a user. Over and above this, however, heavy-handed regulation fails to acknowledge the extent to which online social networking has become an integral feature of young peoples' lives, with positive as well as negative consequences.

Another potential response is to encourage SNS to deal with conduct that threatens privacy by means of self-regulation. For example, in April 2008, the UK Home Office Task Force on Child Protection on the Internet (2008), which included SNS industry representatives, released the self-regulatory *Good Practice Guidelines for the Providers of Social Networking and Other Use Interactive Services*. The Guidelines include recommendations that SNS take certain steps, including that they:

- set the default for full profiles to 'private' or to the user's approved contact list for those registering under the age of 18;

- encourage users not to disclose excessive personal data;

- clearly inform users of the options they have to adjust privacy settings, manage 'who sees what' and control whom they interact with; and

- ensure that private profiles of users under the age of 18 are not searchable either on the service or via search engines.

The 2008 Australian Law Reform Commission (ALRC) report on privacy, while acknowledging that there are legitimate concerns about the use of SNS by young people, considered that it was neither practical nor desirable to regulate individual non-commercial activities in the on-line environment. In addition, while the ALRC noted the value of self-regulatory initiatives, such as the UK Good Practice Guidelines, it pointed out that they were unlikely to substantially inhibit young people from making 'bad privacy choices' online (ALRC, 2008, p. 2250). The ALRC concluded that "the most effective measure that can be taken at present is to educate children, young people, teachers and parents about social networking websites" and in particular to "highlight the privacy dangers associated with the disclosure" (ALRC, 2008, p. 2250).

Disclosure and Social Networking Sites

Disclosure of personal information by individuals when using social network sites has been highlighted in the media as a major concern, especially for younger users (for example see: Baxter, 2008; Rawstorne, 2006). The disclosure of personal information can lead to consequences such as stalking (Whelan, 2005), identity theft, harassment, blackmail (Gross & Acquisti, 2005) and the discovery of information by individuals it was unintended for, such as university officials or future employers can be detrimental to a teenagers future employment prospects (Schweitzer, 2005).

De Souza and Dick (2009) in a study of 263 Sydney secondary school students concluded that there were six key drivers or factors that encourage users, and in particular teenagers, to disclose personal information on social network sites:

1. *Peer pressure:* The studies by Govani and Pashley (2005) and De Souza and Dick (2009) highlight the significant role of peer pressure in youth decision making, and in particular that it can result in higher levels of disclosure of personal information.

2. *Signalling:* The more the user desires to portray him/herself in a certain light, the more likely he/she is to disclose a variety of information to support the desired perception. Donath and boyd (2004) have suggested that for social network website users the benefit of presenting oneself in a positive light may outweigh the costs of possible privacy invasions.

3. *Trust*: Users of social network sites may disclose personal information as they may be overly trusting of the social network website or other members because of the kinds of information they share or people who follow them. For example, students overly trusting of their Facebook network have made sexual or drug references that have led to parent discovery or police action (Govani & Pashley, 2005; Gross & Acquisti, 2005).

4. *Myopic view of privacy*: This view leads individuals to disclose personal information on social network sites as the magnitude of the perceived costs of privacy, under certain conditions, will not deter on-line behaviour that the individual admits as risky (Acquisti, 2004; De Souza & Dick, 2009).

5. *Design*: It has already been indicated in this paper how the design interface of social network websites can contribute to teenage disclosure (De Souza & Dick, 2009; Stutzman, 2005; Williams, 2008). Registration forms, privacy options and the bombardment of choices can be confusing, misleading, or simply difficult to navigate. In addition, some privacy options, such as the public sharing of photos, may be set by default to allow public access.

6. *Relaxed attitudes to privacy*: Users' evaluations of privacy risks and their relaxed attitudes can lead to increased disclosure as they do not consider or know the full risks of the information they reveal (Dwyer, 2007; Govani & Pashley, 2005). Lenhart and Madden (2007) concluded that not all teenagers are aware of the risks of putting information in a public and durable environment such as a SNS.

Understanding and responding to SNS risks

The extent to which SNS have become integrated into the lives of young people, becoming an important component of self-expression and social interaction means that heavy-handed regulation is impractical, and unlikely to be effective or productive. It is important to acknowledge the significant privacy, intellectual property, copyright and disclosure risks associated with the uncontrolled use of SNS, but at the same time, to avoid actions that undermine the social and emerging educational utility of SNS for young people. While there is clearly a role for self-regulatory initiatives, as the ALRC (2008) report pointed out, there are limits on the ability of SNS operators to control the behaviour of users. In the absence of immediately applicable legal or regulatory solutions, the burden of dealing with the legal (and we suggest other) risks of SNS must necessarily fall on the development of educational strategies designed to equip young people with the skills and tools to manage their own personal information, and respect the privacy of others. However, such an approach needs to be founded on a clear understanding of student, parent and teacher perceptions of SNS risks. Moreover, we need to be careful about the use of data from other countries, educational systems, as well as socio-cultural and legal contexts.

Consequently, the authors have embarked on a large scale mixed-method research project surveying and interviewing students, parents and teachers to understand how SNS are being used, and their perception of risks. Having identified what and how SNS are being used the project will identify the relevant legal risks within the regulatory environment concerning the operation of social networking sites in Australia. Using this information, one of the outcomes of the project will be an educational package which will provide guidance for students, teachers and parents as to legal risks associated with engagement with social networking sites. It will also include case studies and activities linked in to the school syllabus, to encourage and facilitate uptake and use of the material. The data collection phase is currently underway and the project is anticipated to conclude in late 2010.

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