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Fineprint

INSIDE:

Social Media and Intellectual Property

WHAT ARE THE ISSUES?

The use of social media as a business tool is becoming the norm rather than the exception. Twitter, Facebook and LinkedIn are just some of the websites used to promote businesses and products, as well as being excellent tools for interacting directly with customers and associates. But there can be risks associated with publishing too much information online, particularly in relation to your intellectual property. What steps can you take to ensure that you are getting the best exposure possible without jeopardising your intellectual property?

Copyright

Copyright protects the way something looks, or the form of expression of a particular work. For example, there may be copyright in the specific layout of a website, and/or the colour schemes, fonts and styles used.

These days there are millions of websites on the internet. To a certain extent there is a basic functionality that needs to be present across all websites in order for them to work properly. There are also some fairly well known rules regarding the layouts, styles or fonts that work best to attract and retain visitors to your site.

As a consequence of this, any copying of your site needs to be fairly substantial for copyright infringement to be proven. Therefore, in order to improve your chances of protecting your rights, the more original and distinctive you can make your website the better.

Every website page should ideally be marked with the copyright symbol ©, the year of launch and the company or designer's name. If copying ever does become an issue, the presence of this symbol should prevent any infringer from claiming that they didn't realise there was copyright in the work.

Additionally, if your website contains information that could potentially be used by third parties and published elsewhere, you may want to consider stating that you assert your right to be named as the author of the information provided from that website. In the event of any copyright dispute in the future, having this statement clearly displayed may help you in your attempt to claim damages. A further option is to use a watermark across any text or image on your site, so that if the user wishes to have a clean copy they must obtain it from you.

Trade marks

Your trade mark, logo or slogan is likely to be a fairly prominent feature on your webpage or social media site.

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If you choose not to register your trade mark, you may have some rights under local consumer protection legislation. For example, in New Zealand if you show that you have a reputation in your mark then you may be able to stop other traders from using the same or similar mark. To do so, you would need to go to the High Court and show that the public is being deceived or confused (which can be both costly and difficult). If you do register your mark however, you will have a clear monopoly in your trade mark in the countries in which you have registered.

It is possible to use the symbol TM in combination with your trade mark at any time. If your mark has been registered, the trade mark can be accompanied by the registered trade mark symbol ®.

If your website is directed outside a country in which you have a registration, care should be taken that you are not infringing another trader's rights. For example, you may have a registered trade mark in New Zealand but another trader may own a registration for the same or similar trade mark in the United States. If your website includes information specifically directed at United States customers eg: costs in US dollars, then you may be infringing the United States trader's rights.

The safest option is to make it clear somewhere on the website where the registration is held. For example, you may refer to the trade mark registration in the small print and state that XXXX is a registered trade mark in New Zealand and Australia. If you are looking to expand into additional international markets, it may be worth considering extending your trade mark registration to other countries as well.

Patents

How do patents relate to social media and your online presence? The main issue is disclosure. If your company is using online media to promote your latest research and development, new product or service, you need to think about what information you are providing before you publish it online.

In New Zealand, the public disclosure of an idea or new development may be enough to render it unpatentable. In order for a patent to be secured, the applicant needs to be able to show the invention was novel and inventive at the time of filing the patent application. This means that the information must not have been made public, and as most people know, there is nothing more public than the internet.

Disclosure requirements differ from country to country. The USA and Australia, for example, have grace periods where an applicant is still able to apply for patent protection following a public disclosure, provided the application is made within a certain period of time of that disclosure.

If you do disclose an idea on your website before a patent application is filed, you may be then limiting your patent protection options to those countries that have this grace period. Therefore any public disclosure of unprotected information could be detrimental.

Blogs and forums

Online blogs and forums are a great way to increase traffic to your website, and provide the opportunity for realtime feedback about your product or service. Again, as with patents, disclosure of confidential information should be avoided.

Some company sites invite the public to submit ideas for new products or for suggestions how existing products can be improved. Often this type of activity will be accompanied by a disclaimer from the website owner stating that by posting an idea, the author agrees to give up rights in the idea to the website owner. This way, should a great new idea (that may be patentable) be submitted, the company may pursue it further.

Again, if this is a tool you are interested in using it would be prudent to review any submissions you receive before allowing them to be publicly posted as this will give you a chance to keep a great idea under wraps and avoid public disclosure. It would also avoid any potentially infringing material being uploaded and possible liability under the proposed new s92A of the New Zealand Copyright Act 1994.

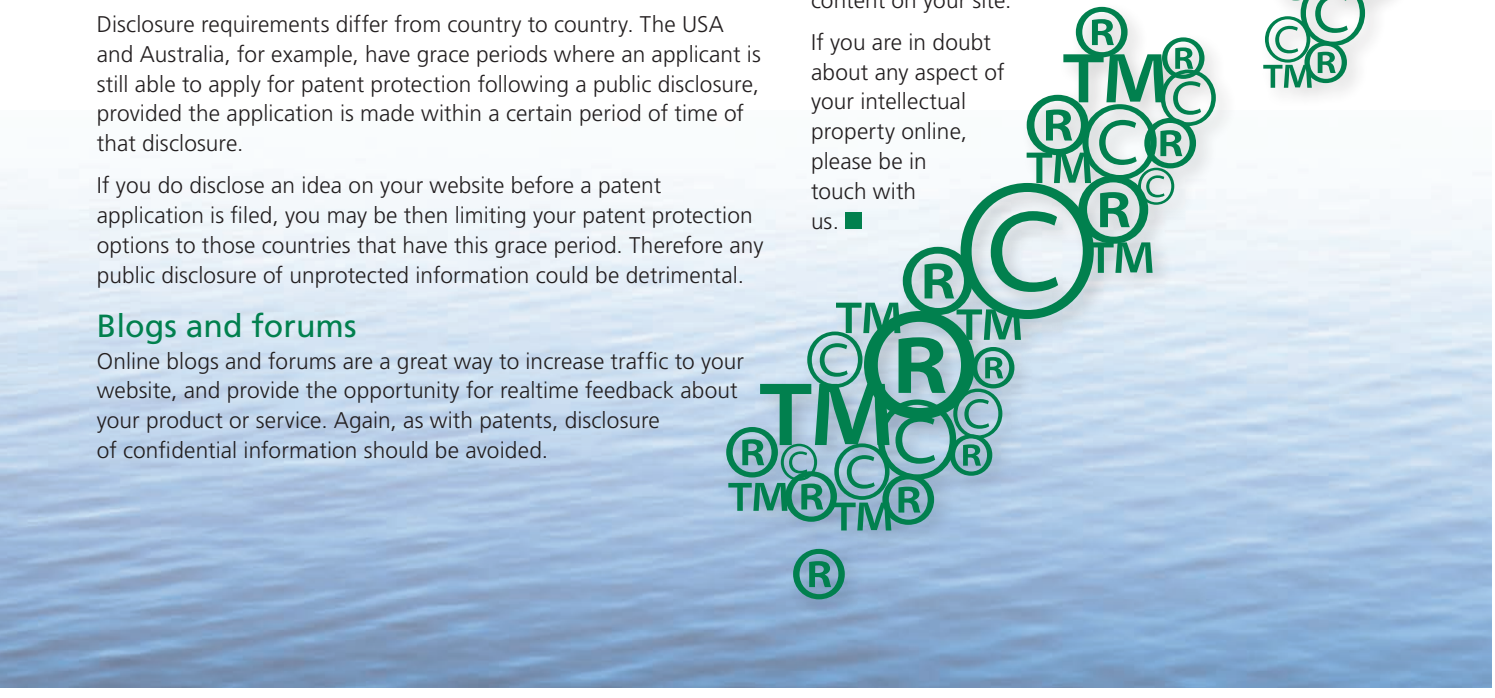
Generally most blogs and forums are moderated in some way. Even so, it is sensible to ensure you have a disclaimer of sorts that clarifies that the views posted are those of the individual authors and not necessarily consistent with those held by the company.

General rules

The temptation to put a lot of information onto your website or to tweet about new advances or discoveries can be great. You may want to promote your company, sell your product or perhaps attract investors. If you are unsure whether something you are posting may turn into a potentially patentable concept in the future do not post it. It is better to keep something back than to jeopardise your intellectual property rights.

If you are unsure about what information you need to post regarding your existing rights, it is always safer to claim too much rather than too little. Make it clear to readers where your registered rights are held and who holds the copyright in your work. Add disclaimers regarding blogs or forums and include contact details for anyone who has a question regarding the content on your site.

If you are in doubt about any aspect of your intellectual property online, please be in touch with us. ■



Guardianship

THE REALITY

From birth until they are of an age to undertake this for themselves, children are dependent on others to contribute to their wellbeing and make important decisions in their lives.

Who legally has this right, duty, responsibility and power to look after children? You do, if you are the guardian of the child. But what makes you a guardian? This article helps define who is a guardian, and their role and responsibilities.

Are all parents guardians?

Generally a mother and father will be joint guardians of a child. A child's mother is automatically a guardian. However, being the biological father does not automatically make you a guardian.

A father is automatically a guardian in the following situations:

- He was married to or in a civil union with the mother of the child at any time during the period beginning with the conception of the child and ending with the birth, or
- The child was conceived on or after 1 July 2005 and he was living with the child's mother at any time during the period beginning with conception of the child and ending with the birth, or
- The child was conceived before 1 July 2005 and he was living with the child's mother at the time the child was born, or
- He is recorded on the child's birth certificate on or after 1 July 2005.

If you are not automatically a guardian but as the father you wish to have guardianship rights for your child, you can make an application to the Family Court to become a guardian. The court will consider whether or not it is in the child's best interests for you to be appointed. In addition to parents, there are circumstances in which other people may also be appointed guardians of a child either by the court or in a deceased parent's Will – these are called 'testamentary guardians'.

What is the role of a guardian?

If you are a child's guardian you have the rights, duties, powers and responsibilities to:

- Contribute to the child's intellectual, emotional, physical, social, cultural and other aspects of their personal development
- Decide, or help the child decide, important matters such as:
  - The child's name (and any changes to it)
  - Where the child lives
  - Where the child goes school
  - How the child is to be educated
  - What their culture, language and religion will be, and
  - Medical treatment for the child.

Your rights, duties, powers and responsibilities as a guardian do not cease due to separation and not having the child in your day to day care.

The reality is that, as long as you are a guardian, and that role has not been removed by the court, the child depends on you to act jointly with the child's other guardian/s, to make good decisions that are in their best interests.

Legally guardianship ends when a young person reaches 18 years of age or gets married, enters a civil union or starts a de facto relationship (although all these need a guardian's permission). However, commonsense says that guardianship (and parental) moral responsibilities to those in their care never end.

The decision making process

Guardians have a duty to consult each other before they make any guardianship decisions. The best decisions guardians can make for a child are those reached by agreement. When guardians are on the same path, children are more likely to have certainty and security in what they are doing than when their guardians are in disagreement, or only one guardian is making all the decisions.

When attempting to reach agreement, guardians may consider the following:

- The advantages and disadvantages of various options, for example, which school best caters for the child's needs
- The child's views or wishes (if they are of an appropriate age and maturity to express these, it tends to be around the age of 12 and upward), and
- The child's welfare and best interests including the:
  - Impact that the decision may have on the child both now and in the future, for example, considering a surname change, and the
  - Effect the decision may have on the child's continuing relationships with important people in their lives, for example, considering moving the child to another town.

Early discussion of issues between guardians in an open, co-operative way, ensuring the child's welfare and best interests are the first consideration, can save time and money later.

If agreement cannot be reached, you can attend free counselling through the Family Court. If no agreement is reached at counselling you can ask the Family Court to make the decision for you. The court will consider the child's welfare and best interests, and will take into account the child's views and wishes if they are old enough to express them.

Conclusion

Guardians should all contribute in a positive way to a child's life by working together when faced with guardianship decisions for the benefit of the child. Don't give away the opportunity or shy away from the responsibility to be involved in the child's life. ■

Bank Accounts and Ownership

WHEN YOU RECEIVE A LUMP SUM

When you have been gifted a sum of money, received a legacy or made a significant financial gift to someone it becomes separate property on the date it is received and no taxes are generally due on it. What happens to it after that is what can turn it into joint property and/or attract tax, usually in the form of gift duty. This article discusses the implications of ownership of that lump sum in a joint bank account.

Bank accounts are often the place where complications arise when a lump sum has been deposited. Accounts are often held in the joint names of married couples, civil union or de facto partners. Which of them actually 'owns' the account may become an important issue if they separate, or if the Inland Revenue Department undertakes an audit to assess income tax or gift duty liability.

Asset ownership

There are two types of ownership of any asset: legal and beneficial. In most cases, they are the same. However, a trust is a good example of a situation where legal and beneficial ownership of an asset are different. If a trust owns your family home, the trustees hold the legal title to the property but you, as beneficiaries of the trust, hold the beneficial ownership.

Whether the legal and beneficial ownership of an asset is held by the same people depends on the intention of the parties. That intention can alter from time to time but not just arbitrarily. Some formal, or at least definite and provable, steps would have to be taken to alter the ownership structure.

So if the ownership of a bank account, for example, is to be proven, the intention of the parties may need to be investigated. The date the account was opened would be checked, together with the owners' intention at any time, the dates the names on the account were altered or some other distinct step regarding ownership of the account.

Legal ownership

For a bank account held in the joint names of a couple, the legal ownership is relatively clear. The account is in both their names and, accordingly, the legal title to the account belongs to them both.

Beneficial ownership

However, the beneficial interest in a bank account, arguably the more important aspect of ownership, is a very different matter.

If the account is in joint names simply as a matter of convenience, say, to manage a couple's funds, then it could be argued that they each intended to keep 'ownership' of their own funds in the account. That is to say, they each intended to keep the beneficial ownership of any funds they each put into the account.

In that case each party would effectively be a 'bare' trustee of the other's funds. A 'bare' trustee is someone who holds legal ownership of an asset and is a trustee of it only because of a rule of law, rather than under a formal deed of trust.

Alternatively, if a couple opens an account intending that the deposited funds should belong to them both, then beneficial ownership of all funds put into it by either party passes to them both.

In that case, if they separate, the account would be treated as joint property and divided equally between them both.

However, if either one of the parties dies, the other would take the account by what is called 'survivorship'.

In modern times there is a relatively strong presumption that joint accounts are held for the equal beneficial interest of both parties. So some fairly good proof would be required to show that those inherited or gifted belonged beneficially to only one of the parties.

Tax issues

There are also potential tax consequences that flow from the different ownership structures of bank accounts.

Gift duty, for example, may apply if there is a transfer of the beneficial ownership of money between a couple following the payment of a large sum into a joint account. Gift duty rises on a graduating scale from nil for gifts by each person which total under $27,000 per 365 days, to a hefty 25% on gifts which total over $72,000. Gift duty may be avoided in some cases by the use of a relationship property agreement under s21 of the Property (Relationships) Act 1976.

In conclusion, we recommend you get some advice on the management of any lump sum you might want to treat as your own at some point. Preferably, seek that professional advice before receiving the money, rather than after putting it into a joint account, and definitely before using it to pay off the mortgage on joint property. ■

Fonterra Capital Restructuring

WHAT DOES IT MEAN FOR YOU?

Following the recent successful vote to change Fonterra's capital structure, there are now some important issues to be considered by both farm owners and sharemilkers. This article briefly discusses the serious implications that the changed capital structure has for sharemilking agreements and the resulting payments.

The way it was

Under the previous scheme shareholders (farm owners) instructed Fonterra about how the payments for milk were to be split between themselves and their sharemilker. This instruction applied to both the milk payment and the value add payment, for example in a 50/50 contract, both the payments for milk and the value-add payments would be split 50/50.

The new structure

As a result of the first stage of the restructuring, farm owners may now hold shares for up to 120% of their milk production. There is now a clearer distinction between the amount paid for the milk farmers' supply to Fonterra and the dividend paid on shares they have invested in the cooperative. The dividend paid will be based on the number of shares owned on 31 March and 31 May in each year, and payments will be made on 20 April and 20 October following these dates.

By law this dividend payment must be paid in its entirety to the shareholder (which in most cases is the farm owner). There is no ability for farm owners to instruct Fonterra to split this payment with the sharemilker.

Your sharemilking agreement

Sharemilkers with existing contracts are entitled to continue receiving the equivalent portion of the payout they currently receive on all Fonterra payments; and this includes the dividend portion. For example, a 50/50 sharemilker currently receiving 50% of all payments from Fonterra will continue to receive 50% of all payments (for production shares), even though the value-added portion of the payout has now been changed to a dividend payment. However, sharemilkers have no entitlement to any payments related to 'dry' shares, ie: shares in excess of production.

Sharemilkers with current agreements that specifically state that any payment changes that occur are not to adversely affect either party will be protected, therefore any changes will not adversely affect a sharemilker's income. This includes the Federated Farmers' agreements. Sharemilkers and farm owners alike should talk with us to clarify individual contractual details. Federated Farmers is reviewing the Variable Order Sharemilking Agreement but their current agreement is still operative.

Dividend Related Payment Adjustment

Fonterra realises that there are concerns around the inability to split the dividend payment between the farm owner and the sharemilker. As a result they have introduced a Dividend Related Payment Adjustment (DRPA). This will allow shareholders to adjust the milk payment allocation to reflect the terms of their sharemilking agreement.

Sharemilkers who were entitled to a portion of the dividend had until 28 February to get the required form to Fonterra. If you did not send this form, it may potentially be difficult for you to ensure that each party receives their correct share of the dividend, and could also create unnecessary paperwork and potential GST traps. Please contact us if this affects you.

There will be complications where there are increases and decreases in production. If production is higher than the number of shares owned at the beginning of the season, the DRPA to the sharemilker will be less than had it been based on actual production. Likewise, if production decreases, the sharemilker will get more and the shareholder less.

Where to from here?

All sharemilkers and farm owners should revisit their existing contracts to decide how these issues are to be dealt with. We recommend that you talk with us about your rights and obligations under your sharemilking agreement to ensure that it accurately reflects your intentions. ■

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Postscript

New business tool available

Statistics New Zealand recently introduced its Business Toolbox, a suite of online tools providing quick and easy access to information for businesses. This is the latest in a series of government initiatives to improve access to and use of official information by a wide range of users.

The toolbox has been targeted towards the small and medium-sized enterprises (SMEs), although its application is business-wide. It incorporates a visual mapping tool allowing a broad audience to understand the data applicable to their industry and geography.

Incorporated into the package are two tools: Market Mapper which can be used to find target markets and potential customers, and Industry Profiler which gives details on industry performance over time, staff turnover and survival of similar-sized businesses.

To find out more about the Business Toolbox, go to **www.stats.govt.nz/businesstoolbox**

Casual employees

Employing casual staff can be a boon for businesses that need labour on an 'as and when required' basis. However, some employers are unaware that casual staff members have the same rights and entitlements as all employees.

Each casual staff member requires an employment agreement, they are entitled to paid annual holidays, alternative holidays on pay (previously 'a day in lieu') and, if meeting the criteria, sick leave and bereavement leave.

For more information and a very useful table of holiday and leave entitlements, look at: **www.ers.dol.govt.nz/relationships/casuals.html**

Changes to prohibition of company directors

A company director who has mismanaged a company or companies can be 'prohibited' and is therefore denied the benefit of trading with limited liability. Section 385 of the Companies Act 1993 gives the Registrar of Companies the power to prohibit a person from acting as a director, manager or promoter of a company for up to five years.

Prohibiting a director protects the public from people who have a proven public record of commercial failure. This can be a balancing act, the power of prohibition is not intended to be punitive and not all company failures warrant director prohibition. The protection of limited liability is essential for encouraging business and the growth of the economy.

A much more cost-effective method than a full investigation, the prohibition process starts with a candidate being notified that they are being considered for prohibition on the basis of multiple company failures. They are given the opportunity to explain the failures and their actions, and comment is also invited from the liquidator, receiver or administrator of the failed companies.

A list of current banned directors can be viewed on the Companies Office website, **www.companies.govt.nz**, together with more information about the prohibition process.

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