

Web 2.0, Social Networking and the Courts[†]

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Abstract

In the last decade or so, we have witnessed the growth of web 2.0 technology and social networking platforms, and their rapid rise in popularity as methods of social interaction and communication. Yet, platforms such as Facebook and Twitter are not just online social phenomena, but can impact on the way the law and courts operate. This article highlights the issues that legal practitioners and courts need to be aware of in engaging with this technology, and suggests possible ways forward.

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Introduction

In recent years, we have seen a phenomenal increase in the use of social networking platforms such as Facebook and Twitter. These technologies have become a constant presence in our society, with Australians among the largest users of social networking platforms.¹ In addition to changing the way we communicate and interact with one another, these new technologies have also challenged traditional ways of thinking about the administration of justice.

In facing these challenges, we need to understand how these technologies enable online interaction and communication and be aware of the possible legal implications. Therefore, this paper will firstly, outline what these platforms are; secondly, explain how they have had an impact on courts and legal practice; and finally, make some suggestions for the future.

Social Networking Technologies: An Overview

Facebook and Twitter are currently the major social networking platforms that make up Web 2.0 (i.e. ‘applications that facilitate participatory information sharing’).² For this reason, it is these two sites that will be the focus of this paper. However these are just two examples of the many social networking platforms operating online today.³ In addition to these sites, there are also virtual worlds such as Second Life which raise many novel issues of their own.

Facebook

In very basic terms, Facebook is a web page that allows users to instantaneously communicate with friends; letting each other know where they are and what they are doing at any given time. According to Facebook, ‘people use Facebook everyday to keep up with friends, upload an unlimited number of photos, share links and videos, and learn more about the people they meet’.⁴

Those who have seen the film ‘The Social Network’ will know that Facebook was built in 2004 by Mark Zuckerberg, a student at Harvard University. Zuckerberg says the site was ‘built around a few simple ideas’; namely:

People want to share and stay connected with their friends and the people around them. If we give people control over what they share, they will want to share more. If people share more,

¹ In December 2009, Australians led the world in average time spent per person on social media sites (nearly 7 hours per month, compared with global average 5.5 hours per month): NielsenWire (blog), ‘Led by Facebook, Twitter, Global Time Spent on Social Media Sites up 82% Year over Year’ (22 January 2010) at <http://blog.nielsen.com/nielsenwire/global/led-by-facebook-twitter-global-time-spent-on-social-media-sites-up-82-year-over-year/>.

² Wikipedia, ‘Web 2.0’, at http://en.wikipedia.org/wiki/Web_2.0 (accessed on 12 December 2011).

³ Other examples include: MySpace (www.myspace.com), LinkedIn (au.linkedin.com), Google Plus+ (plus.google.com/), Bebo (www.bebo.com/) and Hi5 (hi5.com).

⁴ <http://www.facebook.com/facebook?sk=info> (accessed on 13 December 2011).

the world will become more open and connected. And a world that's more open and connected is a better world. These are still our core principles today.⁵

Since 2004 the site has had a dramatic increase in popularity and currently has more than 800 million monthly active users worldwide.⁶ Time magazine even declared that “Facebook is the future”.⁷ In Australia nearly 11 million people use Facebook, of whom over nine million visit the site weekly and over seven million log on every day.⁸

Finkelstein J of the Federal Court of Australia provided a succinct description of the platform’s functionalities in *Australian Competition and Consumer Commission v Allergy Pathway Pty Ltd (No 2)*:

Most Facebook users have a “profile”. A user’s profile is the page that third parties see when they look up the user on Facebook. A user’s profile is divided into several parts. One prominent part is the user’s “wall”, which is a space that allows people to post messages for the user. Facebook’s website describes the wall as “a place to post and share contents with your friends”. Only those people who the user has accepted as a friend can post on the user’s wall. A user is able to delete messages posted by friends on the user’s wall. A Facebook user can choose who can see particular parts of his/her Facebook page. For example, the user may choose to only allow only persons who s/he accepts as friends to see their photos, wall, etc while those who are not friends may only be able to see limited parts of a user’s profile.⁹

Although Facebook is primarily used as a personal tool for socialising, it is also increasingly being utilised by organisations and businesses for promotion and other marketing purposes. Finkelstein J noted this, explaining that:

Individuals or organisations can create a Facebook “Fan” page, as [the respondent] has done. Fan pages are similar to personal Facebook pages although there are some differences. A Fan page allows other Facebook users to become “fans” of that individual or organisation or one of its products or services (rather than becoming a user’s “friend”). While a user must confirm a person to be their friend, a user elects to become a fan without confirmation from the individual or organisation. Typically Fan pages are...viewable by anyone with internet access (ie not just Facebook users or a user’s Facebook friends). A person can post on the wall of a Fan page if they are a fan of the individual or organisation. The individual or organisation can

⁵ Mark Zuckerberg, ‘From Facebook, Answering Privacy Concerns with New Settings’, *The Washington Post*, 24 May 2010, at <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/23/AR2010052303828.html> (accessed on 22 March 2012).

⁶ Facebook Fact Sheet at <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (accessed on 23 March 2012).

⁷ Lev Grossman, ‘Nerd World: Why Facebook Is the Future’, *TIME*, 23 August 2007 at <http://www.time.com/time/magazine/article/0,9171,1655722,00.html> (accessed on 6 December 2011).

⁸ Statistics at 11 March 2011. See Hon Mozelle Thompson, Advisory Board and Policy Adviser, Facebook, *Transcript of Evidence*, 21 March 2011, p. CS3 cited in Australia, Joint Select Committee on Cyber-Safety, *High-Wire Act: Cyber-Safety and the Young – Interim Report*, (Senator Dana Wortley, Chair), June 2011, Part 1.5

at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=/jscc/report/index.htm (accessed on 22 March 2012).

⁹ [2011] FCA 74, [15]. Another popular feature of the site is the ability of a user to ‘tag’ a friend in a photograph, location check-in or other post. A ‘tag’ allows users to specify who is in a particular photo, location or post, and links that photo or post to the friend’s page.

delete any messages posted by third parties. Many corporations now use Fan pages to promote their business.¹⁰

As suggested, the ease with which Facebook enables users to communicate to a large number of people means that the site is useful in a variety of ways, which extend beyond socialising with friends or marketing a brand. The benefits of the platform as a communication tool were displayed in early 2011 by the Queensland Police Service (QPS), which had established a Facebook page¹¹ in 2010. Through Facebook, QPS aimed to establish a social media presence, engage with the public, and ‘develop an online community of followers before a disaster occurred, in light of international examples such as the Mumbai terrorist attacks where social media dominated mainstream media coverage but authorities were not able to contribute or manage it with their own social media presence’.¹² QPS’s Facebook page (and also its Twitter portal)¹³ played an instrumental role in the dissemination of important information during the various natural disasters which struck Queensland early last year. It was able to reach the public within the shortest timeframe, and the Facebook page became the trusted, authoritative hub for the dissemination of facts to the community and media.¹⁴ This is evidenced by the dramatic increase in “likes” (i.e. users actively following the Facebook page for updates), which rose from approximately 17,000 to 100,000 in a 24-hour period after significant floods hit Ipswich and Brisbane (Figure 1).

¹⁰ *Australian Competition and Consumer Commission v Allergy Pathway Pty Ltd (No 2)* [2011] FCA 74, [16]. Note that Facebook now refers to ‘Fan’ pages as ‘Like’ pages, so that a user can elect to ‘like’ the page of a particular organisation or one of its products or services. See <http://www.facebook.com/help/like> (accessed on 23 March 2012).

¹¹ See http://www.facebook.com/QueenslandPolice?sk=app_112334705547081 (accessed on 23 March 2012).

¹² Queensland Police Service, *Disaster Management and Social Media – a case study* (2011), ii, available at <http://www.police.qld.gov.au/Resources/Internet/services/reportsPublications/documents/QPSSocialMediaCaseStudy.pdf> (accessed on 23 March 2012).

¹³ <http://twitter.com/#!/QPSmedia> (accessed on 23 March 2012).

¹⁴ *Ibid.*

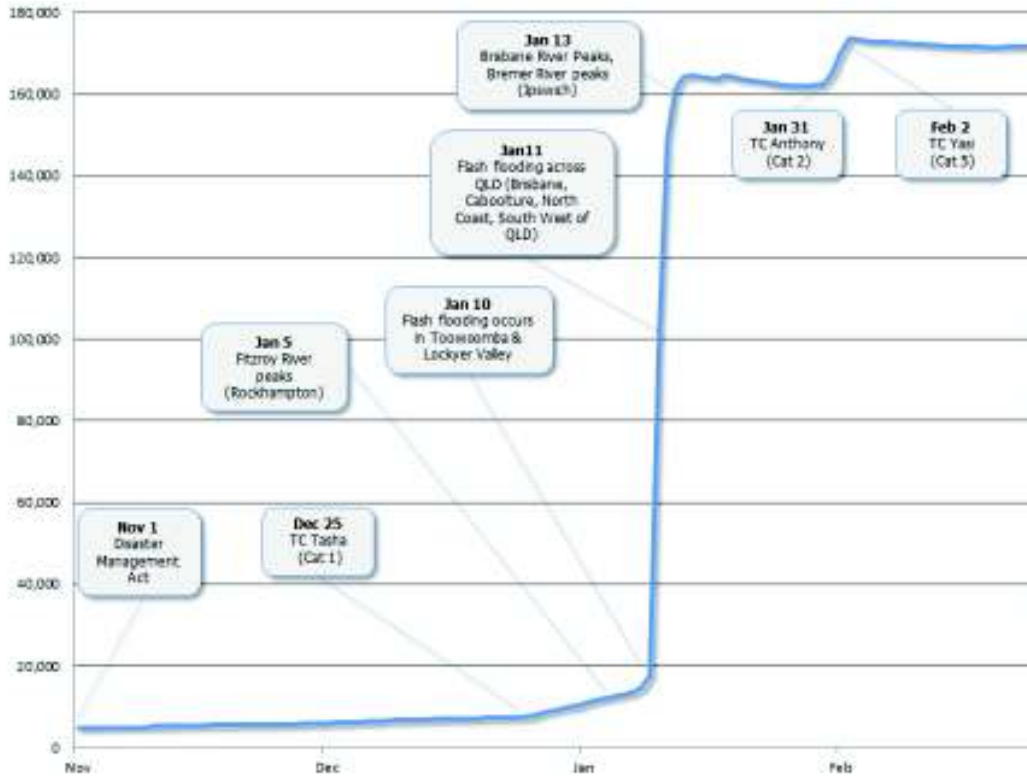


Fig 1 - GROWTH OF QPS FACEBOOK “LIKES” FROM MAY 2010 TO FEBRUARY 2011 (In Queensland Police Service, *Disaster Management and Social Media – a case study* (2011), iv (FIG. 03), available at <http://www.police.qld.gov.au/Resources/Internet/services/reportsPublications/documents/QPSSocialMediaCaseStudy.pdf> licensed under a Creative Commons Attribution 2.5 Australia licence <HTTP://CREATIVECOMMONS.ORG/LICENSES/BY/2.5/AU>.

Twitter

Twitter is another social networking platform which, like Facebook, allows users to instantaneously communicate with a large number of people worldwide. However unlike Facebook, which is used as a tool for socialising through various media (e.g. sharing photos, videos, links and tagging friends in these posts), Twitter allows the user to provide a live stream of short text updates (i.e. bite-sized information, perhaps with links to photos or more details) to their “followers”.

Finkelstein J provided a brief explanation of Twitter in *ACCC v Allergy Parthway (No. 2)*:¹⁵

“Tweets” are short text-based posts displayed on the user’s Twitter page. Tweets are publicly visible by default, although senders can restrict message delivery only to certain users. Users subscribe to other users’ Tweets (which is referred to as “following” and subscribers are known as “followers”). When a user makes a Tweet, their followers can see the Tweet.

Twitter was created in 2006 and quickly became popular, with the site announcing that they had reached 100 million followers in 2011.¹⁶ Part of the appeal of Twitter is that it may be used for

¹⁵ [2011] FCA 74, [18].

numerous purposes. A user's tweet can be anything from a general comment about the person's thoughts and feelings to special news, jokes or more mundane topics like the weather. Friends and family may use Twitter to keep each other up to date, while others use the site to follow their favourite celebrities. Many high-profile people, from sports stars to politicians, have taken to Twitter. As at 22 March 2012, Australian cricketer Shane Warne had 717,659 followers,¹⁷ Prime Minister Julia Gillard had 201,850¹⁸ and Foreign Minister Kevin Rudd (apparently the most popular Australian on Twitter)¹⁹ had 1,078,910.²⁰ At the global level, Lady Gaga has the highest number of followers (over 21 million), while U.S. President Barack Obama is the highest ranked politician (with over 13 million followers).²¹ For these famous "Tweeters" (or "Twitterati"),²² Twitter tends to be utilised as a live online soapbox with unlimited reach, due to the immense number of people who may be following them at one time. In addition to these recreational purposes, many people also use Twitter to keep up to date with the news and current events. Twitter users often tweet details of significant happenings such as sporting events and other significant world occurrences, during which time the site's activity is at its peak.²³ In one exceptional case, what appeared to be mundane tweets by a user turned out to be records of a significant event. In May 2011, Sohaib Athar²⁴ unwittingly live-tweeted about the raid on Osama bin Laden's hideout in Pakistan, and became a much wanted "citizen journalist" on the ground.²⁵

Twitter users themselves have developed practices which enhance the functionality of Twitter. For instance, the custom of "retweeting" (i.e. the act of copying another person's tweets and reposting it to your followers) enables the viral spreading of information and news,²⁶ while the practice of "hash-tagging" keywords (i.e. adding # to the front of a keyword to enhance its search-ability) facilitates pointed discussion on particular topics and events.

¹⁶ Twitter Blog, 'One Hundred Million Voices' (8 September 2011) at <http://blog.twitter.com/2011/09/one-hundred-million-voices.html> (accessed at 7 December 2011).

¹⁷ See Shane Warne, alias 'Warne888' on Twitter at <http://twitter.com/warne888> (accessed on 22 March 2012).

¹⁸ See Julia Gillard on Twitter at <http://twitter.com/juliagillard> (accessed on 22 March 2012).

¹⁹ '10 Most Followed Australians on Twitter – 5 Years On' *webMONEY.com.au* (26 March 2011), at <http://www.webmoney.com.au/10-most-followed-australians-on-twitter-5-years-on/> (accessed on 12 December 2011).

²⁰ See Kevin Rudd, alias 'KRuddMP' on Twitter at <http://twitter.com/KRuddMP> (accessed on 22 March 2012).

²¹ See 'The Twitaholic.com Top 100 Twitterholics based on Followers' at <http://twitaholic.com/> (accessed on 22 March 2012).

²² See Pete Cashmore, 'Twitterspeak: 66 Twitter Terms', *Mashable* (blog), 16 November 2008, available at <http://mashable.com/2008/11/15/twitterspeak/> (accessed 20 February 2012).

²³ For example, in 2010 fans were posting at a rate of 2,940 tweets per second during the FIFA World Cup and in 2009 after Michael Jackson's death, Twitter crashed due to the volume of users posting about the star. See Wikipedia, 'Twitter' at http://en.wikipedia.org/wiki/Twitter#cite_ref-39 (accessed 15 December 2011); Maggie Shiels, 'Web slows after Jackson's death' *BBC News* (26 June 2009) at <http://news.bbc.co.uk/2/hi/technology/8120324.stm> (accessed 15 December 2011).

²⁴ Twitter name "ReallyVirtual", see <http://twitter.com/#!/ReallyVirtual>.

²⁵ See Melissa Bell, 'Sohaib Athar's Tweets from the attack on Osama bin Laden – read them all below', *Washington Post*, 2 May 2011, at http://www.washingtonpost.com/blogs/blogpost/post/sohaib-athar-tweeted-the-attack-on-osama-bin-laden--without-knowing-it/2011/05/02/AF4c9xXF_blog.html (accessed on 15 December 2011).

²⁶ Note that Twitter has embedded a retweet function or command into the platform. See FAQs About Retweets at <https://support.twitter.com/articles/77606-what-is-retweet-rt#> (accessed on 22 March 2012).

Second Life (Virtual Worlds)

Virtual worlds have become increasingly popular in the past decade. One of the more prominent online virtual worlds is Linden Lab's Second Life, which is designed to be a role playing game simulating the real world. Users interact with one another in the game via representations of themselves known as 'avatars' which they use to socialise with other users, establish personal and business relationships, and also create and trade virtual property, including land.²⁷

Second Life can be distinguished from social-networking platforms such as Twitter and Facebook in that the program adds a 3D effect to online engagement and communication. While Twitter and Facebook are focussed on the sharing of information and content about real world incidences, Second Life enables users to replicate or simulate the real world in the virtual environment, but with different boundaries and characteristics. Also, while Facebook and Twitter are easily accessible through any browser or mobile application, users must install a software program in order to access Second Life. For this reason it does seem more technically complex, and consequently attracts a much lower number of users.²⁸ Nevertheless, this smaller group of users can, and do, immerse themselves in Second Life. The extent of control that users' exercise over their environment means they often become very attached to their second virtual life, investing real emotions and money into building and enhancing this "life".

Impact of Web 2.0 Technologies on Court Procedure

As explained above, the growing popularity of Web 2.0 technologies and social media in recent years has significantly changed the way we operate in many areas of life, and inevitably has also extended to the operations of the courts. Australian courts are now faced with novel questions as to how to deal with these new technologies where they impact on court procedure and the communication of court proceedings. It also appears that our courts are considering ways to implement new technologies to benefit or expedite the court process.²⁹

²⁷ Brian Fitzgerald, et al. *Internet and E-commerce Law, Business and Policy* (Thomson Reuters, Australia: 2011), [1.240].

²⁸ Although Second Life has been reported to have over 7 million registered users, the actual number of users with repeat logins is closer to 1 million. See Allison Fass, 'Sex, Pranks and Reality', *Forbes*, 2 July 2007 at <http://members.forbes.com/forbes/2007/0702/048.html?token=MTMgSnVsIDIwMDcgMTQ6NDQ6MDYgKzAwMDA%253D> (accessed on 6 December 2011); cf Linden Lab, 'The Second Life Economy in Q3 2011', *Second Life Blog*, 14 October 2011, at <http://community.secondlife.com/t5/Featured-News/The-Second-Life-Economy-in-Q3-2011/ba-p/1166705> (accessed at 6 December 2011).

²⁹ See Chief Justice P de Jersey AC, 'The courts and the media in the digital era' [Speech delivered at Bond University, 12 February 2011] available at <http://archive.sclqld.org.au/judgepub/2011/dj120211.pdf>:

"The internet era has produced dramatic changes in the way hallowed institutions go about their work, art galleries and museums for example, but also the courts. No longer do judges correspond by letters and memos. Case management is conducted by email between lawyer and list manager. Orders are recorded by consent without the need for attendance by lawyers at the courthouse. In substantial litigation, disclosure of documents is managed electronically. Trial dates are sought and allocated electronically. But all of this relates to basic, contemporary efficiency. The media – court interface arises particularly in relation to the way we are beginning to conduct long and difficult trials, especially those which involve lots of documents."

Chief Justice de Jersey also observes that Queensland was the first Australian jurisdiction to develop an 'eTrial' (electronic trial capacity) within its courts (at p 7):

Service of documents

Recent cases suggest that courts may be willing to allow social media websites such as Facebook to become a possible avenue for service of court documents.

In 2008 Master Harper in the Australian Capital Territory Supreme Court case of *MKM Capital Pty Ltd v Corbo & Poyser*³⁰ allowed a default judgment to be served on defendants by private message via Facebook. The plaintiff in this case had made several attempts, but could not locate the defendants in order to effect service on them personally. Master Harper was satisfied by the plaintiff's evidence that the Facebook profiles of two particular individuals were the profile pages of the defendants, because the dates of birth and email addresses provided on the Facebook profile pages matched those of the defendants. In addition, the "friend" lists displayed on the profiles also showed the two individuals were friends with one another.³¹ Master Harper allowed service to be effected by sending a private message to the Facebook pages of the defendants informing them of the entry and terms of the default judgment. A copy of the relevant papers was also left at the last known address of the defendants and sent to a specified email address.³²

This decision can be contrasted to an earlier Queensland District Court decision, *Citigroup Pty Ltd v Weerakoon*,³³ where Justice Ryrie was not satisfied that service via the defendant's Facebook account would be sufficient to give the defendant notice of the proceedings. Her Honour was concerned about the uncertainty of Facebook accounts and the ease with which people can pose as others on social networking sites.

Outside of Australia, in the 2009 case of *Blaney v Persons Unknown*³⁴ the British High Court for the first time ordered that an injunction could be served via Twitter (with a direct message linking to the full order), finding that the social network website was the best way to reach an anonymous "Tweeter" who had been impersonating conservative political blogger Donal Blaney on the site.³⁵ According to the *BBC News*, Blaney's decision to use Twitter was sparked by the recent developments in Australia and 'Mr Blaney turned to Twitter to serve the injunction rather than go

"We provide computer monitors for Judge, Judge's Associate, witness, seven for the jury and two for the media. An eCourtbook stores the documents. When a particular document is needed, it is displayed for all to see, including the media, and the public have their own large screen. An expansion-reduction capacity means that parts of documents can be shown. Documents can be compared and contrasted, placed side-by-side on the screen. Spreadsheets and tables can be produced and displayed electronically, and hyper-linked to relevant documents."

³⁰ (Unreported, ACT Supreme Court, Master Harper, 12 December 2008).

³¹ Note no written judgment is currently available. See: Noel Towell, 'You've been served: court approves Facebook notice' *The Canberra Times*, 16 December 2008 at <http://www.canberratimes.com.au/news/local/news/general/youve-been-served-court-approves-facebook-notice/1387146.aspx> (accessed on 5 December 2011); Julie Cheeseman, 'Service of Court Documents via Facebook', *IT, Communications and Media Update*, 18 March 2009 at http://www.blakedawson.com/Templates/Publications/x_article_content_page.aspx?id=54557 (accessed on 5 December 2011).

³² *Ibid.*

³³ [2008] QDC 174.

³⁴ (Unreported, British High Court, Lewison J ChD, 1 October 2009).

³⁵ See Bobbie Johnson, 'High court approves injunction via Twitter', *The Guardian* (1 October 2009) at <http://www.guardian.co.uk/technology/2009/oct/01/twitter-injunction>; 'Court order served over Twitter', *BBC News*, 1 October 2009, at <http://news.bbc.co.uk/2/hi/technology/8285954.stm> (accessed on 14 December 2011).

through the potentially lengthy process of contacting Twitter headquarters in California and asking it to deal with the matter'.³⁶

A recent development regarding this issue in Australia can be found in the case of *Symes v Saunders*.³⁷ In this 2011 decision, service via Facebook was allowed by the Queensland District Court for an application for criminal compensation.³⁸ Originally the Court permitted substituted service by newspaper advertisement. However the advertisement was never placed and a private message was instead sent to the respondent's Facebook page. Judge Robin QC accepted that the respondent had received the application based on the fact that he had replied to the message, discussed the matter with the applicant's solicitor and provided further contact details. His Honour also conceded that, through the use of Facebook, the respondent was probably much more aware of the application than if an advertisement had been placed in the newspaper.³⁹ His Honour spoke positively about the use of social media:

[the applicant's lawyer] deserves some commendation for his initiative and in the circumstances in my opinion the court is justified and ought, in the interests of efficiency and not requiring further costs to be incurred, to proceed to determine the application. In effect, the court is determining that there has been sufficient service of the originating application for purposes of [informal service under] rule 117.

Australian courts are apparently 'regarded as being amongst the most technologically advanced in the world'.⁴⁰ The above examples confirm the willingness of Australian courts to utilise new technologies such as social networking sites to expedite the court process.

Communication of court proceedings and outcomes

By Jurors

Widespread social media use, combined with the increasing proliferation of handheld/mobile devices⁴¹ has the potential to cause problems if used inappropriately in connection with legal proceedings, by raising issues such as witness or jury contamination. The internet offers a pathway for jurors to unearth all sorts of prejudicial material concerning the defendant and other facts pertinent to

³⁶ 'Court order served over Twitter', *BBC News*, 1 October 2009, at <http://news.bbc.co.uk/2/hi/technology/8285954.stm> (accessed on 14 December 2011).

³⁷ [2011] QDC 217.

³⁸ *Symes v Saunders* [2011] QDC 217.

³⁹ *Symes v Saunders* [2011] QDC 217.

⁴⁰ Nick Abrahams, 'Australian courts serve documents via Facebook', *The Sydney Morning Herald*, 12 December 2008 at <http://www.smh.com.au/articles/2008/12/12/1228585107578.html> (accessed on at 5 December 2011).

⁴¹ On a global scale, Australia has the second highest smartphone penetration in the world (higher than the United States, Britain and Japan): Official Google Australia Blog, *Smartphones at the dinner table? Smartphone trendspotting down under*, 8 September 2011, at <http://google-au.blogspot.com/2011/09/smartphones-at-dinner-table-smartphone.html> (accessed on 9 December 2011). See also Asher Moses, 'Australia's white hot smartphone revolution', *The Age*, 8 September 2011, at <http://www.theage.com.au/digital-life/mobiles/australias-white-hot-smartphone-revolution-20110908-1jz3k.html> (accessed on 9 December 2011).

the case in which they are sitting in.⁴² If a juror were to search for this type of material, or even unknowingly come across it, this has the potential to cause significant ramifications for the fairness of the trial.⁴³ Social networking technologies, in turn, seem to have amplified this risk, by enabling jurors to broadcast their deliberations and interact with the general public.

In a weeklong study of 10 randomly picked Twitter users in the US and UK who posted tweets including the terms “jury duty” or “jury service”, it was found that most posts concerned mundane comments about things like boredom and lack of refreshments.⁴⁴ However there have been more controversial examples of jurors misusing social media in the courtroom by uploading posts containing details of the trial or jury deliberations. In the United States, a jury foreman posted detailed information about the proceedings in a burglary case, including descriptions of the physical appearance and mannerisms of other jurors.⁴⁵ The defendant’s conviction was vacated and remanded for a hearing on juror misconduct, but eventually the judgment was reinstated on the basis that the State had rebutted the presumption of prejudice.⁴⁶

In another case, one indecisive juror in the United Kingdom even went so far as to hold a poll on Facebook, posting the facts of the case and encouraging friends to vote as to whether she should decide the defendant guilty or not guilty. The juror was dismissed as a result and the trial continued with 11 jurors.⁴⁷ It is interesting to note that even where tweets do not expose the specifics of the trial, tweeting generally about proceedings can still lead to serious consequences. In one instance, a juror’s obscure tweets⁴⁸ contributed to a decision to overturn a death row conviction in the United States. The decision was reversed and the case remanded for a new trial based on a number of reasons, including the fact that the court had initially failed to dismiss the juror after he disregarded instructions by posting on his Twitter account during the trial.⁴⁹ In deciding juror misconduct, reference was made to an earlier decision where a US court reasoned:

If anything, the risk of such prejudicial communication may be greater when a juror comments on a blog or social media website than when she has a discussion about the case in person, given that the universe of individuals who are able to see and respond to a comment on Facebook or a blog is significantly larger.⁵⁰

⁴² Research suggests that up to 12% of jurors could be turning to the internet in big trials: Cheryl Thomas, ‘Are juries fair?’ Ministry of Justice Research Series 1/10, February 2010, 43, available at <http://www.justice.gov.uk/publications/docs/are-juries-fair-research.pdf> (accessed on 23 March 2012).

⁴³ See Caren Myers Morrison, ‘Can the jury trial survive Google?’ (2011) 25(4) *Criminal Justice* 4; Caren Myer Morrison ‘Jury 2.0’ (2011) 62 *Hastings Law Journal* 1579. See also ‘Lord Chief Justice issues warning over Jurors’, Judicial Office news release, 9 December 2011, at <http://www.judiciary.gov.uk/media/media-releases/2011/news-rel-cop-crim-div-ann-rep-2010-11> (accessed on 16 December 2011).

⁴⁴ Michael Bromby, ‘The Temptation to Tweet - Jurors’ Activities Outside the Trial’ (2010) *Institute for Advanced Studies* 2-4 Glasgow (unpublished paper), <<http://ssrn.com/abstract=1590047>>.

⁴⁵ *People v. McNeely* (2007) WL 1723711 *1 (Cal. App. 4th Dist. 2007).

⁴⁶ See *People v. McNeely* (2009) WL 428561 *1 (Cal. App. 4th Dist. 2009).

⁴⁷ Guy Patrick, ‘Juror Axed for Verdict Poll on Net’ *The Sun (UK)*, 24 November 2008 at 5 December 2011 <http://www.thesun.co.uk/sol/homepage/news/article1963544.ece> (accessed on 15 February 2012).

⁴⁸ The juror’s various tweets throughout the trial included “Choices to be made. Hearts to be broken. We each define the great line.” and “If its wisdom we seek. . . We should run to the strong tower.” See *Erickson Dimas-Martinez v State of Arkansas*, 2011 Ark. 515 (Supreme Court of Arkansas), available at <http://law.justia.com/cases/arkansas/supreme-court/2011/cr11-5.html> (accessed on 23 March 2012).

⁴⁹ *Erickson Dimas-Martinez v State of Arkansas*, 2011 Ark. 515 (Supreme Court of Arkansas).

⁵⁰ *United States v. Fumo*, 655 F.3d 288, 305 (3d Cir. 2011).

The misuse of Web 2.0 technologies and other devices may also render users guilty of contempt of court under a body of legal rules broadly designed to protect the administration of justice, predominantly through the imposition of penal sanctions.⁵¹ For instance, a 19 year-old man in the UK received a harsh lesson for disobeying the court's policy against photographs, and was sentenced to two months in jail for contempt.⁵² What instigated his conduct seems rather minimal, in contrast to the charge: he had received a message from a friend asking where he was, so he took a photo of the courtroom and sent it to her.⁵³ While in this instance the youth's conduct showed a lack of understanding for the court's clear stance against photography,⁵⁴ the same cannot be said for policies on the use of other technologies such as live-text based communications, which remain largely undefined.

By Journalists and the Public

The rise of social media platforms such as Facebook and Twitter and the impact these technologies have had on the way people communicate has similarly led to a shift in the way legal proceedings can be reported.⁵⁵ In the past the reporting of legal proceedings was confined to professional journalists. Today, laptops, smartphones and other wireless devices allow people to instantaneously upload information to a blog or Twitter, and make it available to the public at large. Therefore, anyone sitting in the courtroom has the ability to report on proceedings directly to the public as the litigation unfolds.

At present it is for the individual judge to decide whether or not to permit these devices to be used in his or her courtroom.⁵⁶ Justice Cowdroy in presiding over the case of *Roadshow Films Pty Ltd v iiNet Ltd (No. 3)* ("*iiNet case*"),⁵⁷ informed the media that he had "no objection" to the use of Twitter in his courtroom, so long as it "does not distract or interfere with the conduct of [his] court." His Honour was of the opinion that "...the public has a legitimate right to be fully informed of proceedings, particularly proceedings (such as the *iiNet case*) which have attracted considerable public interest." Justice Cowdroy also observed that "Twittering can serve to inform the public in a more speedy and comprehensive manner than may be possible through traditional media coverage."⁵⁸ The Victorian Supreme Court has issued a Media Policy which allows journalists to use electronic equipment in

⁵¹ See *Re Dunn; Re Aspinall* [1906] VLR 493; *Attorney-General (UK) v Times Newspapers Ltd* [1974] AC 273; [1973] 3 WLR 298; [1973] 3 All ER 54. See also *High Court of Australia Act 1979* (Cth), s 19(8); *Federal Court of Australia Act 1976* (Cth), s 31; *Criminal Code Act 1983* (NT), s 8; *Criminal Code Act 1899* (Qld), s 8; *Criminal Code Act 1924* (Tas), s 10; *Criminal Code Act Compilation Act 1913* (WA), App B s 7.

⁵² 'Teenager jailed for taking photo at Luton Crown Court', BBC News, 26 September 2011, at <http://www.bbc.co.uk/news/uk-england-beds-bucks-herts-15057842> (accessed on 13 December 2011).

⁵³ Owen Bowcott, 'Technology in the dock after man imprisoned for taking photo in court', *The Guardian - Butterworth and Bowcott on Law Blog*, 26 September 2011, at <http://www.guardian.co.uk/law/butterworth-and-bowcott-on-law/2011/sep/26/modern-technology-court-imprisoned-taking-photo> (accessed on 13 December 2011).

⁵⁴ See e.g. <http://www.fedcourt.gov.au/how/cameras.html>.

⁵⁵ 2011 Supreme Court Oration Thursday 15 September 2011. The Ft. Hon Beverley McLachlin PC, Chief Justice of Canada on "The Courts and the Media".

⁵⁶ Sally Jackson, 'Judges have final decision on Twitter', *The Australian*, 19 October 2009 <http://www.theaustralian.com.au/news/judges-have-final-decision-on-twitter/story-e6frgal6-1225788184795> (accessed on 5 December 2011).

⁵⁷ (2010) 263 ALR 215.

⁵⁸ Sally Jackson, 'Judges have final decision on Twitter', *The Australian*, 19 October 2009 at <http://www.theaustralian.com.au/news/judges-have-final-decision-on-twitter/story-e6frgal6-1225788184795> (accessed on 5 December 2011).

court so long as it does not interfere with court proceedings.⁵⁹ However, such equipment may not be used for contemporaneous publication of material on the internet without the permission of the presiding Judge.⁶⁰

The issue of live-tweeting or live-blogging from the courtroom was considered by the British courts, a move reportedly prompted by the posting of live Twitter updates by journalists at Wikileaks founder Julian Assange's bail hearing.⁶¹ A Consultation Paper⁶² published by the Lord Chief Justice in December 2010 recognised that there is an obvious advantage in permitting these devices in the courtroom, in that they 'allow members of the public to follow the case in real time.'⁶³ While acknowledging that 'the internet is assuming an important role in reporting certain events as they unfold', the Lord Chief Justice expressed concern that 'very often blog and microblog messages are posted in a trivial manner, even when they relate to a serious subject matter.'⁶⁴ One potential disadvantage identified was that posts to platforms such as Twitter are available instantly with no opportunity for review and not subject to any editorial control. Furthermore, posts on social networking platforms and blogs may encourage comments by other users who could post prejudicial and inappropriate material.⁶⁵ Jurors could be tempted to engage in these Twitter discussions on the topic.⁶⁶ In addition, content posted to these platforms can be quite difficult to remove once it goes viral.⁶⁷ In summary, the Consultation Paper found that 'that the circumstances in which live, text-based communications from court are permitted must be tailored to the nature of the proceedings in question in order to mitigate the risks inherent to such communications'.⁶⁸

In December 2011, the final Practice Guidance on "The Use of Live Text-Based Forms of Communication (Including Twitter) from Court for the Purposes of Fair and Accurate Reporting" was

⁵⁹ Victorian Supreme Court, *Media and Policies and Practices*, 'Journalists Using Electronic Equipment in Court' (current as at 26 August 2010), p 6. Available at <http://www.supremecourt.vic.gov.au/home/library/supreme+-+media+release+-+media+policies+and+practices> (accessed on 23 March 2012).

⁶⁰ Ibid. The policy states:

Use of electronic equipment in Court:

- Journalists may use personal laptop computers, digital assistants, and mobile phones capable of transmitting emails, for electronic note-taking, messaging by text, and filing stories, so long as that use does not interfere with the proceeding.
- Journalists should not use such equipment for recording or for the contemporaneous publication of material on the internet (blogging, twittering and similar), without the express permission of the presiding Judge.
- Journalists should desist from use of such equipment, if requested to do so by the Judge or a Court officer acting with the Judge's approval.

⁶¹ 'Lord Chief Justice allows Twitter in court', *BBC News*, 20 December 2010 at <http://www.bbc.co.uk/news/uk-12038088> (accessed on 14 December 2011). See a tweet by journalist Alexi Mostrous, Special Correspondent for The Times, announcing the permission from District Judge Howard Riddle to Tweet at Assange's hearing at <http://twitter.com/#!/AlexiMostrous/status/14677851739521024>

⁶² Judicial Office for England and Wales, *A Consultation on the Use of Live, Text-Based Forms of Communications from Court for the Purposes of Fair and Accurate Reporting* (20 December 2010), available at <http://www.judiciary.gov.uk/publications-and-reports/guidance/2011/courtreporting>. The consultation opened on 7 February 2011 and closed on 4 May 2011.

⁶³ Des Butler and Sharon Rodrick, *Australian Media Law* (Thomson Reuters, Australia: 4th ed, 2012), [5.20].

⁶⁴ Judicial Office for England and Wales (Consultation Paper), above n 62, [5.4].

⁶⁵ Ibid, [5.2]-[5.3].

⁶⁶ Ibid, [5.3]. Jurors' use of Twitter is discussed in more detail below.

⁶⁷ Ibid, [6.1].

⁶⁸ Ibid, [4.7].

issued.⁶⁹ The Guidance provides that in certain circumstances, persons may activate and use a mobile phone, laptop or similar equipment in silent mode solely to make live, text-based communications of the proceedings.⁷⁰ If a member of the public wishes to use live text-based communications during court proceedings, they must first make an application (formal or informal) to the judge for permission.⁷¹ In allowing such use, the judge's overriding responsibility is to ensure that proceedings are conducted consistently with the proper administration of justice, and to avoid any improper interference with its processes.⁷² Where a representative of the media wishes to use live text-based communications from court however, they need not apply to the court for permission, as it is presumed that their use will enable fair and accurate reports of the proceedings and will not pose a danger of interference to the proper administration of justice.⁷³ It was suggested in the Consultation Paper that the behaviour of accredited members of the media is governed by codes of practice, and therefore they are less likely to engage in prejudicial reporting.⁷⁴

Concerns about the general risk of inaccurate reporting due to the inherent limitations of these services are not unwarranted. One might question if it is possible to accurately report court events, in 140 characters or less, on Twitter. In November 2011, Magistrate Peter Mealy declared that tweeting "will be contempt if it does occur from this court" upon discovering that freelance journalist Margaret Simon had been tweeting about committal proceedings from court.⁷⁵ *The Australian* newspaper criticised Simon's tweets of the hearing as inaccurate due to the word restriction, and complained that her tweets included few direct quotes and failed to record important contextual details.⁷⁶ On the other hand, one may also argue that Simon's followers understood the inherent limitations of Twitter, and were looking to her tweets as instant but brief updates (which could be followed up in more comprehensive reports e.g. in her blog or on a news bulletin). However putting this general concern about inaccuracy aside, there appear to have been more substantive reasons for this decision, including the risk that instantaneous tweets would prejudice the preliminary (committal) hearing on a serious criminal matter, whereby the evidence could have been subject to admissibility issues.⁷⁷

⁶⁹ Lord Chief Justice of England and Wales, *Practice Guidance: The Use of Live Text-Based Forms of Communication (Including Twitter) from Court for the Purposes of Fair and Accurate Reporting* (14 December 2011) at <http://www.judiciary.gov.uk/publications-and-reports/guidance/index/lcj-interim-prac-guide-text-based-comms-20122010> (accessed on 20 January 2012). Note that the Guidance applies to court proceedings which are open to the public and which are not subject to reporting restrictions.

⁷⁰ *Ibid*, Principles 8 and 9.

⁷¹ *Ibid*, Principle 9.

⁷² *Ibid*, Principles 4 & 11.

⁷³ *Ibid*, Principle 10.

⁷⁴ Judicial Office for England and Wales (Consultation Paper), above n 62, [8.3], [8.6]. See also Lord Chief Justice of England and Wales, *Interim practice guidance: The Use of Live Text-Based Forms of Communication (Including Twitter) from Court for the Purposes of Fair and Accurate Reporting* (20 December 2010), [15b], at <http://www.judiciary.gov.uk/publications-and-reports/guidance/index/lcj-interim-prac-guide-text-based-comms-20122010> (accessed on 23 March 2012).

⁷⁵ See Pia Akerman, 'Magistrate hearing evidence against Simon Artz bans Twitter from court', *The Australian*, 4 November 2011, at <http://www.theaustralian.com.au/media/magistrate-hearing-evidence-against-simon-artz-bans-twitter-from-court/story-e6frg996-1226185500720> (accessed on 15 December 2011).

⁷⁶ Chip Le Grand & Pia Akerman, 'With court a'Twitter, magistrate bans tweets', *The Australian*, 4 November 2011, <http://www.theaustralian.com.au/media/with-court-atwitter-magistrate-bans-tweets/story-e6frg996-1226185137003>. See Simon's response on Crikey (blog) at <http://www.crikey.com.au/2011/11/04/simons-to-tweet-or-not-to-tweet-from-court/>.

⁷⁷ See Pia Akerman, 'Magistrate hearing evidence against Simon Artz bans Twitter from court', *The Australian*, 4 November 2011, at <http://www.theaustralian.com.au/media/magistrate-hearing-evidence-against-simon-artz-bans-twitter-from-court/story-e6frg996-1226185500720> (accessed on 15 December 2011); Nic Christensen and

Furthermore, while courts may be able to exert some level of control on the use of handheld devices within the courtroom, the use of social networking technologies in general is practically impossible to police. An example is British footballer Ryan Gigg's failed attempt to keep the details of an extra-marital affair from the public, via a court ordered "super-injunction" which sought to suppress *The Sun* newspaper from identifying the footballer as a party to the affair.⁷⁸ Whereas mass media outlets were once a domain limited to established newspapers and magazines, in this instance, the public was seemingly empowered to utilise social media to release the details themselves, despite the injunction. Within hours of Gigg's launching his attempt to enforce the order (by obtaining details of the Tweeters from the Twitter platform),⁷⁹ over 50,000 Twitter users had tweeted Gigg's name.⁸⁰ Interestingly, this mass Twitter response in turn prompted MP John Hemmings to name Gigg under parliamentary privilege and Scottish newspaper 'The Sunday Herald' to identify Gigg's on its front page.⁸¹ 'The Sunday Herald' stated in its editorial column: "Today we identify the footballer whose name has been linked to a court super-injunction by thousands of postings on Twitter. Why? Because we believe it is unsustainable that the law can be used to prevent newspapers from publishing information that readers can access on the internet at the click of a mouse."⁸²

The Attorney General, however, warned that Twitter users in England and Wales were not exempt from the requirement to observe the super-injunction, and said 'I will take action if I think that my intervention is necessary in the public interest, to maintain the rule of law, proportionate and will achieve an end of upholding the rule of law'.⁸³ While the use of social media may at times be difficult to police, it is not impossible. For instance, those who had set up Facebook pages to incite riots in the

Pia Akerman, 'No-tweeting edict 'a timely reminder' for journalists', *The Australian*, 5 November 2011, at <http://www.theaustralian.com.au/media/no-tweeting-edict-a-timely-reminder-for-journalists/story-e6frg996-1226186217464> (accessed on 15 December 2011).

⁷⁸ *CTB v News Group Newspapers* [2011] EWHC 1232 QB. Note that Australian courts may make an order prohibiting the disclosure of information with respect to the whole or part of proceedings, contravention of which would constitute contempt: *Judiciary Act 1903* (Cth), s 49. A particularly high profile example is *R v A* [2008] VSC 73, where King J of the Victorian Supreme Court granted a suppression order prohibiting Channel 9 from broadcasting the television series "Underbelly" in Victoria simultaneously with the trial.

⁷⁹ *CTB v. Twitter Inc., Persons Unknown*, High Court of Justice (Queens Bench Division), HQ11X01814 (21 May 2011); see 'Footballer obtains Twitter disclosure order', BBC, 21 May 2011 at <http://www.bbc.co.uk/news/technology-13477811>.

⁸⁰ 'Top soccer player Ryan Gigg named in UK parliament as sportsman with injunction preventing details of affair with glamour model Imogen Thomas being published', *DailyMail*, 23 May 2011, at <http://www.dailymail.co.uk/news/article-1390108/Ryan-Gigg-named-injunction-sportsman-affair-Imogen-Thomas.html>. Note that the primarily online phenomenon in which an attempt to hide or remove a piece of information has the perverse effect of publicising the information more widely has been termed "the Streisand effect", after Barbra Streisand's attempt in 2003 to suppress photographs of her residence caused the image to "go viral", see http://en.wikipedia.org/wiki/Streisand_effect (accessed on 13 December 2011).

⁸¹ *Ibid.*

⁸² See Kashmir Hill, 'Scotland Herald Puts He-Who-Cannot-Be-Named On Its Front Page', *Forbes*, 22 May 2011, at <http://www.forbes.com/sites/kashmirhill/2011/05/22/scotland-herald-puts-he-who-cannot-be-named-on-its-front-page/> (accessed on 13 December 2011). The Scottish Sunday Herald considered that "The so-called superinjunction holds no legal force in Scotland where a separate court order is needed."

⁸³ 'UK Twitter users warned they could face contempt action from the Attorney General himself, for breaching privacy orders', *Daily Mail*, 7 June 2011 at <http://www.dailymail.co.uk/news/article-2000179/Twitter-users-warned-face-contempt-action-Attorney-General-breaching-privacy-orders.html> (accessed on 16 December 2011). Listen to the Attorney General's address to BBC Radio 4's Law In Action 'Super injunctions' which aired 9 June 2012, available at <http://www.bbc.co.uk/programmes/b011p60f> (accessed on 23 March 2012).

UK in August 2011 were subsequently jailed or subject to detention for their “reprehensible” actions.⁸⁴

By the Courts

While these new technologies can cause concern for the judiciary, it appears that it is not only those sitting in the gallery who wish to utilise these new technologies to report on events in the courtroom. Some courts are beginning to consider the positive opportunities for public engagement and education which these platforms allow. Recent reports show Australian judges are frustrated with being on the receiving end of criticism about their sentencing decisions and are considering ways to use Twitter and other social networking services to have a voice of their own.⁸⁵ Chief Justice of the Supreme Court of Victoria Marilyn Warren explained that “The courts are getting to a stage where they have had enough of the inappropriate criticism, the skewing of information in the media, and we really need to try and seize the day ourselves and give some information to the community.”⁸⁶ One of Her Honour’s ideas was to have an anonymous judge blogging from the Supreme Court; providing information about sentences delivered and the reasoning behind these decisions in order to restore public confidence in Victorian judges.⁸⁷

While it does not appear that the suggestion for judges to blog from the court has been taken up, a number of courts have utilised Twitter to provide timely notice of decisions and various related events being made available online. These include the UK Judiciary,⁸⁸ Scottish Judiciary,⁸⁹ US Supreme Court,⁹⁰ Canadian Supreme Court⁹¹ and even the International Criminal Court in Hague.⁹² Tweets from these courts range from reminders about court policy and procedure,⁹³ to announcements on the

⁸⁴ *R v Blackshaw* (Rev 1) [2011] EWCA Crim 2312, [53]-[75]; *HMA v Shaun Divin and Jordan McGinley* (Sentencing Statement by Dundee Sheriff Court Sheriff Munro, 12 December 2011), available at <http://www.scotland-judiciary.org.uk/8/837/HMA-v-SHAUN-DIVIN-and-JORDAN-McGINLEY> (accessed on 16 December 2011).

⁸⁵ Kellee Nolan, ‘Victorian courts look at tweeting rulings’ *The Sydney Morning Herald* (31 August 2011) at 8 December 2011 at <http://news.smh.com.au/breaking-news-national/victorian-courts-look-at-tweeting-rulings-20110831-1jloc.html>. Also see Chief Justice P de Jersey AC, ‘The courts and the media in the digital era’ [Speech delivered at Bond University, 12 February 2011] available at <http://www.sclqld.org.au/qjudiciary/profiles/pdejersey/publications/> (accessed on 23 March 2012).

⁸⁶ See Nolan, *ibid*.

⁸⁷ *Ibid*.

⁸⁸ “JudiciaryUK” <http://twitter.com/#!/JudiciaryUK> (accessed on 23 March 2012).

⁸⁹ “JudgesScotland” <http://twitter.com/#!/JudgesScotland> (accessed on 23 March 2012).

⁹⁰ “USSupremeCourt” (US Supreme Court, Washington DC) <http://twitter.com/#!/USSupremeCourt>; “DCCourtsInfo” (DC Courts’ Public Information Office, Washington DC) <http://twitter.com/#!/DCCourtsInfo>; “PhilaCourts” (Philadelphia Courts) <http://twitter.com/#!/PhilaCourts>; “NHCourts” (New Hampshire Courts) <http://twitter.com/#!/NHCourts>; “PACourts” (Pennsylvania Courts) <http://twitter.com/#!/PACourts>; “NJCourts” (New Jersey Courts) <http://twitter.com/#!/njcourts>; “InCourts” (Indiana Courts) <http://twitter.com/#!/incourts> (accessed on 23 March 2012).

⁹¹ “CanCourtSCC” (Supreme Court of Canada) <http://twitter.com/#!/cancourtssc> (accessed on 23 March 2012).

⁹² “IntlCrimCourt” (International Criminal Court, Hague) <http://twitter.com/#!/IntlCrimCourt> (accessed on 23 March 2012).

⁹³ E.g. “DCCourtsInfo” (DC Courts’ Public Information Office, Washington DC) tweeted on 10 December 2011: “Security lines @ Courthouse can take 15-20 mins, please plan ahead. Phones, eReaders, laptops, iPads are OK; cameras & sharp items aren’t” (<http://twitter.com/#!/DCCourtsInfo/status/145151974759870464>); “JudgesScotland” (Judicial Office of Scotland) tweeted on 14 December 2011: “The Lord President comments on the Guidance released today on the use of live text based communication from court <http://tinyurl.com/c6sdsfa>” (<http://twitter.com/#!/JudgesScotland/status/146920083334246400>); “JudiciaryUK” tweeted on 9 December 2011: “Lord Chief Justice issues warning over jurors <http://bit.ly/u3ruWb> and

availability of full-text decisions and sentencing statements.⁹⁴ In an Australian first, the Victorian Supreme Court has set up a Twitter account to be the first contact for media. The page tweets details of sentences delivered in the court and provides links for followers who wish to listen to the sentencing.⁹⁵

The Law and Social Networks

The intersection between social networking technologies and the law not only raises concerns over court procedure, but also raises a whole host of substantive legal issues and disputes. In these instances, the relationship between the platform and users' and the ownership of Intellectual Property (IP) tend to be common themes. Often, a significant factor for the resolution of these issues is the way in which the platform's terms of use allocate user rights, and how these rights are governed. In particular, interactions on Second Life have been a source of novel and challenging legal issues, such as ownership of virtual property and the prevention of virtual crimes. Facebook and Twitter have also been sources of legal debate. For example, some have questioned whether 140-character Tweets can be subject to copyright protection.⁹⁶ While this question seems more like an academic exercise at this stage, it could gain attention as more and more innovative uses of this rich data source are discovered.⁹⁷ The issue of privacy on Facebook on the other hand, is a pertinent concern for many users, and is often hotly debated due to the serious ramifications it can have.⁹⁸ An overall problem, it seems, is Facebook's "insufficiently granular" controls and keenness to utilise users' information for its own purposes.⁹⁹ Furthermore, as Facebook moves away from a rolling news feed on users'

<http://bit.ly/sdc3ON>" (<http://twitter.com/#!/JudiciaryUK/status/145071154183413760>) (accessed on 23 March 2012).

⁹⁴ E.g. "CanCourtsSCC" (Supreme Court of Canada) tweeted on 5 November 2011: "R. v. Sarrazin, 2011 SCC 54 (CanLII): jury — verdict — attempted murder — curative proviso — causation <http://bit.ly/tZEcA6>" (<http://twitter.com/#!/CanCourtsSCC/status/132475884748816384>); "JudgesScotland" tweeted on 13 December 2011: "Two charged with inciting a riot on Facebook are sentenced in Dundee Sheriff Court by Sheriff Munro <http://tinyurl.com/bwr7xdm>" (<http://twitter.com/#!/JudgesScotland/status/146261405153239041>) (accessed on 23 March 2012).

⁹⁵ 'SCVSupremeCourt' <<https://twitter.com/#!/SCVSupremeCourt>> (accessed on 23 March 2012)..

⁹⁶ Rebecca Haas, 'Twitter: New Challenges to Copyright Law in the Internet Age' (2010) 10 J. *Marshall Rev. Intell. Prop. L.* 230.

⁹⁷ See e.g. twyric (twyric.com), which searches Twitter for poetry-related hashtags and matches the tweets with images tagged with similar words from Flickr; Happy Rain (www.zeitgeistbot.com/happyrain/) which searches Twitter for tweets expressing happiness, and then displays them in a colourful and dynamic manner; and Timetweets (www.timetweets.com), which displays tweets within a digital clock, by quoting tweets with the number corresponding to the relevant hour, minutes and seconds.

⁹⁸ See e.g. Asher Moses, 'Facebook tracks you even after logging out', *Sydney Morning Herald*, 26 September 2011, at <http://www.smh.com.au/technology/technology-news/facebook-tracks-you-even-after-logging-out-20110926-1ksfk.html> (accessed on 12 December 2011); Chris Griffith, 'Australia's Privacy Commissioner will not investigate Facebook', *The Australian*, 3 October 2011, <http://www.theaustralian.com.au/australian-it/australias-privacy-commissioner-will-not-investigate-facebook/story-e6frgaxk-1226156749063>. Note that Facebook has had to answer the privacy concerns of US and German privacy officials regarding features such as the "like" button and automatic photo-tagging via face recognition technology: Christopher Williams, 'Facebook battles Germans on privacy', *The Telegraph*, 1 December 2011, at <http://www.telegraph.co.uk/technology/facebook/8926232/Facebook-battles-Germans-on-privacy.html> (accessed on 16 December 2011).

⁹⁹ See *Fraley v. Facebook Inc.*, 11-cv-01726, U.S. District Court, Northern District of California (San Jose). In this case, Judge Koh denied in part Facebook's motion to dismiss the plaintiffs' allegations that Facebook had exploited their publicity rights via its Sponsored Stories advertisements by automatically badging their profile pictures with a company's name once the user has "liked" that company. Cf *Cohen v. Facebook, Inc.*, C10-5282,

Facebook profiles, and implements its plan to make every single Facebook activity of users visible and easily discoverable on a personal “Timeline”,¹⁰⁰ the issue of privacy and social networking will inevitably gain prominence.

While this paper is unable to cover all of the substantive legal issues that can arise from the use of social networking technologies, cases involving virtual property and virtual crime on Second Life are illustrative of the types of issues that can arise.

Virtual property

As suggested above, online virtual worlds such as Second Life raise new issues and challenges for the law. One area of particular concern in recent times has been the protection of virtual property, especially where transactions in the virtual platform translate to real-world dollars. For example, Second Life users buy and sell virtual property using Linden dollars (L\$), which can be traded for real-world currency. Often users accumulate significant property and currency in the game,¹⁰¹ which they risk to lose if their account is terminated pursuant to the Terms of Service.

Where users’ accounts are terminated or frozen, and their virtual property and currency are effectively confiscated, issues of fairness, due process, and more broadly, digital constitutionalism are raised.¹⁰² In *Bragg v Linden Research*,¹⁰³ Bragg, a user of Second Life, brought an action against the owners of the game, Linden Research Inc and CEO Philip Rosedale for unlawfully terminating his account, freezing all of his virtual property and currency, without just terms or due process. Linden Research Inc sought to compel Bragg to submit to arbitration according to the Second Life Terms of Service, while CEO Philip Rosedale argued the case against him be dismissed for lack of personal jurisdiction. In determining jurisdiction, the Court considered it relevant that both Linden and Rosedale had previously publicly stated that they would recognise users’ intellectual property rights in any content they created in the game, and therefore, in their virtual property.¹⁰⁴ Rosedale in a press release in 2003 had stated that ‘We believe our new policy recognises the fact that persistent world users are making significant contributions to building these worlds and should be able to both own the content they

2011 U.S. Dist. LEXIS 124506 (N.D. Cal. Oct. 27, 2011). See also *In re Facebook, Inc.* (Nov. 29, 2011) (Settlement & Proposed Consent Decree), available at <http://www.ftc.gov/os/caselist/0923184/111129facebookagree.pdf> (accessed on 23 March 2012).

¹⁰⁰ See <http://www.facebook.com/about/timeline>. See also Samuel W Lessin, ‘Tell Your Story with Timeline’, *The Facebook Blog*, 22 September 2011, at <http://www.facebook.com/blog.php?post=10150289612087131>; Paul McDonald, ‘Timeline: Now Available Worldwide’, *Facebook Blog*, 15 December 2011, at <http://blog.facebook.com/blog.php?post=10150408488962131> (accessed on 16 December 2011); Kashmir Hill, ‘Facebook’s Timeline Is Going To Force You To Do Privacy Housekeeping’, *Forbes*, 15 November 2011, at <http://www.forbes.com/sites/kashmirhill/2011/11/15/facebooks-timeline-is-going-to-force-you-to-do-privacy-housekeeping/> (accessed on 12 December 2011).

¹⁰¹ Second Life avatar ‘Anshe Chung’ earns a real living buying and developing virtual real estate in the game. At 2006 the extent of her virtual property was reportedly worth one million US dollars. See ‘Anshe Chung Becomes First Virtual World Millionaire’ (26 November 2006) at www.anshechung.com/include/press/press_release251106.html (accessed on 23 March 2012).

¹⁰² See Brian Fitzgerald et al, *Internet and E-commerce Law, Business and Policy* (Lawbook Co, Sydney: 2011), 52-54; Nicolas Suzor, ‘The Role of the Rule of Law in Virtual Communities’ (2010) 25(4) *Berkeley Technology Law Journal* 1817.

¹⁰³ *Bragg v Linden Research Inc* 487 F Supp 2d 593 (ED Penn 2007).

¹⁰⁴ *Bragg v Linden Research Inc* 487 F Supp 2d 593 (ED Penn 2007), 596.

create and share in the value that is created'.¹⁰⁵ It was based on these representations that the Court decided it had jurisdiction. The Court also held the arbitration clause in the Terms of Service unconscionable and so would not enforce it.

This case also raises a number of interesting issues, such as whether Bragg could claim a right of due process for his case to be heard before his property was taken away, whether such acquisition should have been on just terms, or whether this was simply a matter of construing the contractual terms of service between the user and Second Life. Unfortunately this matter was settled after the decision and so these issues were never fully explored.¹⁰⁶

*Evans v Linden Research Inc*¹⁰⁷ concerned a similar set of facts, where the plaintiffs brought a class action against Linden and Rosedale for wrongfully terminating their various accounts and thereby depriving them of their virtual property without compensation. The action brought by the plaintiffs alleges violations of various competition and consumer laws,¹⁰⁸ fraud, conversion, intentional interference with contractual relations or prospective economic advantage, unjust enrichment and wrongful expulsion.¹⁰⁹ The plaintiffs' argument was similar to Bragg's; that they were induced into acquiring significant virtual property based on the representations made by Linden and Rosedale that they would retain all of their rights in such property.¹¹⁰

Since *Bragg v Linden Research*, Linden had changed the arbitration clause to contain more reasonable terms. In this instance, the arbitration clause was held to be enforceable, and under the forum selection clause, the case was transferred to the US District Court for the Northern District of California (after an initial hearing in the US District Court for the Eastern District of Pennsylvania early in 2011). As at March 2012 the case appeared to be still on foot¹¹¹ and a final decision is not yet available. It will be interesting to see if the case provides any answers to some of the unresolved issues that arose out of *Bragg v Linden Research*. It should be noted that Second Life has recently changed its terms to provide for a limited right to compensation upon termination (though this does not include compensation for the value of any property held in the game).¹¹²

¹⁰⁵ Press Release, Linden Lab, *Linden Lab Preserves Real World Intellectual Property Rights of Users in its Second Life Online Services* (14 November 2003), cited in *Bragg v Linden Research Inc* 487 F Supp 2d 593 (ED Penn 2007), 596.

¹⁰⁶ Brian Fitzgerald, et al. *Internet and E-commerce Law, Business and Policy* (Thomson Reuters, Australia: 2011), [1.240].

¹⁰⁷ *Evans v Linden Research Inc* 763 F Supp 2d 735 (ED Penn 2011).

¹⁰⁸ Specifically: violations of the California Consumer Legal Remedies Act, False Advertising Law, provisions of the California Code governing auction transactions and California Unfair Competition Law. See the class action filed against Second Life 15 April 2010, *Evans v Linden Research Inc*, at http://www.virtuallanddispute.com/pleadings/evan_spencer_carter_v_linden_labs_virtual_land_property_rights_class_action_lawsuit.pdf (accessed on 23 March 2012).

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ See Virtual Land Dispute Class Action at <http://www.virtuallanddispute.com/>, a webpage set up by counsel for the plaintiffs to track the development of the case and provide updated information to class members and the public (accessed on 23 March 2012). See also Stephen Wu, 'Evans v. Linden Virtual Worlds Case Continues On' *3D Internet Law* (31 October 2011) at <http://www.3dinternetlaw.com/Blog/files/c2b3cbf82bb45c3e69e60e3b37dd5dba-66.html>.

¹¹² Linden Lab, *Terms of Service* (last updated 15 December 2010) at <http://secondlife.com/corporate/tos.php?lang=en-US>. See at 11.3: In the event of termination by Linden Lab of your Accounts under this Section 11.3, you will be entitled to receive the stated current value of any credit balance held in your Account(s), i.e., amounts you have cashed out on the LindeX, as your exclusive remedy and our sole liability. This does not include any Linden dollar balance held in your Account(s). In order to

Aside from conflict between a user and the platform owner, *Eros, LLC v John Doe*¹¹³ is an illustrative example of how virtual property disputes may arise between users. The plaintiff, Eros, alleged that another avatar, “Volkov Cattaneo”, was infringing its copyright and registered trademarks by making and selling counterfeit copies of its virtual products on Second Life. The products in question were essentially software code applications designed to facilitate sexual connections between avatars, in the form of interactive virtual beds.¹¹⁴ These beds were sold exclusively within the Second Life platform.¹¹⁵ Eros managed to obtain a court ordered subpoena to compel Linden Labs to expose Volkov Cattaneo’s true identity. The two parties have since settled their dispute out of court.¹¹⁶

Virtual crime

In addition to the issues relating to virtual property, there is also increasing interest in the concept of virtual crime. Reference is made to ‘virtual murder’ or ‘virtual rape’, which is committed where one user hacks into the account of another and commits a ‘murder’ by deleting the user’s account or a ‘rape’ by controlling the user’s avatar and making it engage in obscene virtual acts.¹¹⁷ Some commentators argue that these virtual crimes should be taken seriously given they have real psychological effects on the victims, who often experience very strong attachment to their avatars.¹¹⁸ ‘Murder’ and ‘rape’ may not be the correct legal terminology, but these acts are nevertheless likely to constitute crimes. Hacking into another’s account may constitute a crime under the Federal and Queensland Criminal Codes¹¹⁹ and as is currently being experienced in many social networks, there is inevitably going to be some interaction between users in these virtual worlds that raises issues of online harassment and bullying.¹²⁰

The above cases may appear strange to those who view Second Life as simply being a game or those who are unfamiliar with these types of virtual platforms. However, as explained by Judge Eduardo C. Robreno in *Bragg*, ‘While the property and the world where it is found are “virtual”, the dispute is real.’¹²¹ Where real-world rights are infringed in a virtual environment or there are real-life consequences, users may be inclined to turn to the legal system. Alternatively, there has been suggestion that virtual courts could be the answer to mediating these types of disputes in online

receive any sums pursuant to this Section 11.3, you must establish and inform us of a verified PayPal account into which we may transfer those sums. We will deduct from any or all of the above sums any outstanding fees or charges due to Linden Lab.

¹¹³ *Eros, LLC v John Doe* No. 8:07-CV-01158-SCB-TGW (M.D. Fla. 2007).

¹¹⁴ Compl., *Eros, LLC v. John Doe*, No. 8:07-CV-01158-SCB-TGW (M.D. Fla. 2007), 32-42.

¹¹⁵ Brandy Tricker, ‘Taming the Wild West: Solving Virtual Disputes Using Non-Virtual Law’ (2008) 35 *Rutgers Computer and Technology Law Journal* 138, 151.

¹¹⁶ Benjamin Duranske, ‘Eros Reaches Settlement with Robert Leatherwood’ *Virtually Blind* (14 March 2008) at 5 December 2011, at <http://virtuallyblind.com/2008/03/14/leatherwood-settlement> (accessed on 23 March 2012).

¹¹⁷ Amanda Mason, ‘Can virtual crimes be punished under Australian law?’ (2010) 13(4) *Internet Law Bulletin* 70.

¹¹⁸ Jessica Wolfendale, ‘Virtual Harm and Attachment’ (2009) 21 *Australian Centre for the Study of Sexual Assault Newsletter*, 8 December 2011 at < <http://www.aifs.gov.au/acssa/pubs/newsletter/n21.html#feature>>.

¹¹⁹ Criminal Code Act 1995 (Cth) s 478.1 (Unauthorised access to, or modification of, restricted data) and possibly other offences under Divisions 477, 478 (Access or modify data without authorisation); Criminal Code Act 1899 (Qld) s 408E (Computer hacking or misuse).

¹²⁰ See Des Butler, Sally Kift & Marilyn Campbell, ‘Cyber Bullying in Schools and the Law: Is there an Effective Means of Addressing the Power Imbalance?’ (2009) 16(1) *eLaw Journal* 84.

¹²¹ *Bragg v Linden Research Inc* 487 F Supp 2d 593 (ED Penn 2007), 595.

worlds.¹²² In 2005, Second Life users ‘Judge Mason’ and ‘Judge Churchill’ (who described themselves as law students specialising in Internet issues), set about creating a mediation court within the platform. The ‘judges’ acknowledged that their court would have no power of enforcement but were nevertheless enthusiastic about their venture. Judge Mason stated that:

Just because we cannot enforce a decision against the Lindens does not mean we cannot enforce any decisions. Often in cases where both parties appear in front of the court, the property in dispute will be held in trust, pending the court's decision. I foresee in the future that property owners would love to have a system in place where disputes could be resolved.¹²³

There is apparently also a Second Life Bar Association¹²⁴ and many individuals within the platform claiming to be lawyers, some even specialising in avatar divorce.¹²⁵ In the spirit of the game, these developing “virtual” legal avenues seem well-placed to resolve entirely “in-world” disputes such as divorce. However, it is unclear at this stage whether these virtual courts, which appear similar to alternative dispute resolution in the real world, will be able to handle more substantive legal issues involving real world consequences.

Conclusion

Social networking technologies are valuable communication tools, which enable greater engagement. Whether or not their use leads to positive solutions or brings negative implications ultimately depends on the user. Rather than shun these technologies in light of the negative potential however, we should consider ways of alleviating the negative uses of social media, and also encourage positive uses of the technology. In relation to their use in courts, it is suggested that courts should draft standard guidelines for litigants, witnesses, jurors and public attendees, which clearly set out their responsibilities when using social networking technologies in the courts. In order to raise awareness about these responsibilities and to require consistent compliance with court rules, there needs to be a conscious and uniform decision to allow or disallow certain uses for explicit reasons. On the positive side, where these technologies provide an efficient and expedient way to streamline court processes, use of these technologies should be sponsored and encouraged by the courts.

In contrast to procedural issues, substantive legal problems in this context may be harder to address given the myriad of issues which could potentially arise. Nonetheless, it is important to at least understand the technology and recognise how traditional legal doctrines may apply within these different settings. These legal disputes often revolve around the relevant online platform’s “terms of use”, which tend to represent a power imbalance between the platform and the users. In these instances, it is critical to consider the users’ right to fairness and due process, and examine how laws can uphold these basic values in this new environment. For example, we should investigate whether

¹²² Tricker, above n 115, 159.

¹²³ Wagner James Au, ‘Laying down the law: Judging us’ *New World Notes* (blog), 7 October 2005, at 5 December 2011, at http://secondlife.blogs.com/nwn/2005/10/laying_down_the_1.html (accessed on 23 March 2012).

¹²⁴ Tricker, above n 115, 159.

¹²⁵ Carrie Kirby, ‘Avatars, attorneys in new world of virtual law’ *San Francisco Chronicle* (29 April 2009) at 8 December 2011, at http://articles.sfgate.com/2009-04-27/business/17194388_1_second-life-virtual-worlds-san-francisco-s-linden-lab (accessed on 23 March 2012).

the unfair contract terms provisions in our Australian Consumer Law can be of utility in understanding these issues. Another avenue that perhaps should be explored is the role of virtual or online courts, which have yet to establish an accepted presence.

We do not have an answer to all these issues. Nevertheless, we need to start asking these questions and understanding the technology, rather than dismissing their relevance.¹²⁶ In the process, it is hoped that our court procedure and laws will be able to accommodate these new technologies and find ways to utilise them to their benefit.

¹²⁶ As the Hon Justice David Levine of the NSW Supreme Court succinctly articulated, ‘the onus is certainly on the justice system to come up with a solution, rather than to completely proscribe the technology’: ‘The courts and the media’ ABC Radio broadcast, Damien Carrick discussion with The Hon Justice David Levine, former NSW Supreme Court Judge, at <http://www.abc.net.au/radionational/programs/lawreport/the-courts-and-the-media/2996908> (accessed on 23 March 2012).