Six New Media Challenges

Legal and Policy Considerations for Federal Use of Web 2.0 Technology

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Executive summary

The Obama campaign set a new model for how to spread information through new media and social networking technologies such as YouTube, Facebook, Twitter, and others. It also sparked imagination about how these Web 2.0 technologies could usher in a new era of government transparency and citizen participation.

The Obama administration has already begun to take up some of the same technologies it used during the campaign and on change.gov. But it hasn't yet used these applications to the same extent it did previously, and that's largely because it is now subject to federal laws and regulations regarding privacy, disability access, advertising, and other issues.

This paper addresses six key legal and policy issues that the Obama administration will have to address for WhiteHouse.gov and federal agency websites to use Web 2.0 widely and effectively.

1. Privacy: Perhaps the most important privacy concern is current guidance that limits the use of persistent cookies on federal websites, even though such cookies are a standard feature of many Web 2.0 applications. The new administration will need to decide whether to alter that guidance, and it will face the related question of what privacy protections should apply when the federal government uses applications that send users to private-sector websites.

2. Access for those with disabilities: Section 508 of the Rehabilitation Act provides guidelines for making federal websites accessible to people with disabilities, including the visually and hearing impaired. All federal websites must be Section 508 compliant, but many Web 2.0 applications are not.

3. Commercial endorsement and advertising: Current regulations prohibit government websites from commercially endorsing any product or service, and also ban advertising. Use of any one Web 2.0 service over another could be considered an endorsement, particularly if it involves including a company's logo on a government website. And there could be reasons not to link to sites that include inappropriate advertising content.

4. Terms of service agreements: Federal employees and agencies are not allowed to accept any indemnification agreements, and most website terms of service use state, rather than federal, law to resolve legal disputes. No part of the federal government can therefore enter into a terms of service agreement unless it is modified to meet federal regulations.

5. The Paperwork Reduction Act and public records requirements: The PRA requires agencies to submit formal requests to the Office of Management and Budget before collecting information from the public. This does not appear to apply to user comments as long as federal websites do not require users to submit any information beyond personal identification, but will be an issue if the executive branch wants to collect any more specific information or conduct surveys. Federal agencies also need to comply with public records requirements, including the Presidential Records Act.

6. Security concerns and agency restrictions on staff Internet use: Many federal agencies block their employees from accessing social media websites and chat services, especially out of concern for computer security. These policies could essentially prohibit employees from working on Web 2.0 applications.

Many of the key issues posed by Web 2.0 technologies are legally similar. The federal government has obligations for what is done on its own websites. Those obligations do not apply when a user leaves the federal website and begins using a third-party service. Federal websites must be Section 508 compliant, for example, but as long as the federal website makes it clear to users when they are leaving for an outside website, that outside site does not have to be Section 508 compliant. The same applies for advertising and privacy issues.

Yet some significant federal policies are at stake when users leave a federal website. The federal government should not encourage the use of non-accessible web technologies, invasions of privacy, loss of security, or unreasonable commercial endorsements or advertising—even if legal restrictions do not technically apply. And a set of more specifically legal issues does arise with respect to free third-party software, such as with terms of service agreements and logos.

The Obama administration should encourage the use of Web 2.0 technologies, and lead the way on WhiteHouse.gov, but it must do so in a way that is compliant with federal law, and also in the spirit of the law. In other words, the White House New Media team should continue to work with the General Services Administration to negotiate agreements that encourage Web 2.0 companies to ensure greater protection and accessibility for users, even if it is not legally necessary.

Each of the six hurdles to implementation have their own intricacies, and the following report analyzes each and provides recommendations for how the Obama administration can move forward both quickly and legally.

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