

WAYBACK MACHINE EVIDENCE

WHEN CAN YOU RELY ON IT?

By Liz Lawson



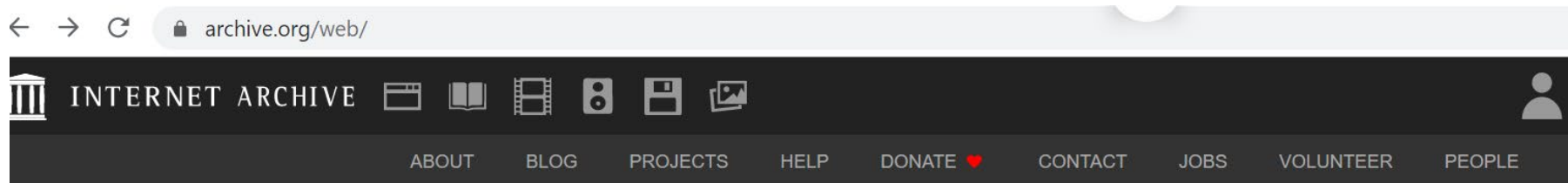
INTELLECTUAL PROPERTY
TECHNOLOGY AND
COMMERCIAL LAW

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OVERVIEW

1. Wayback machine – what is it and how does it work?
2. Trade Marks, Designs, Patents Office evidence
- versus -
Federal Court evidence
3. Take home points

WAYBACK MACHINE: [HTTPS://ARCHIVE.ORG/WEB/](https://archive.org/web/)



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BROWSE HISTORY

Rectangular Strip

Find the Wayback Machine useful?

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STEP 1:

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WayBackMachine [BROWSE HISTORY](#)

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STEP 2:

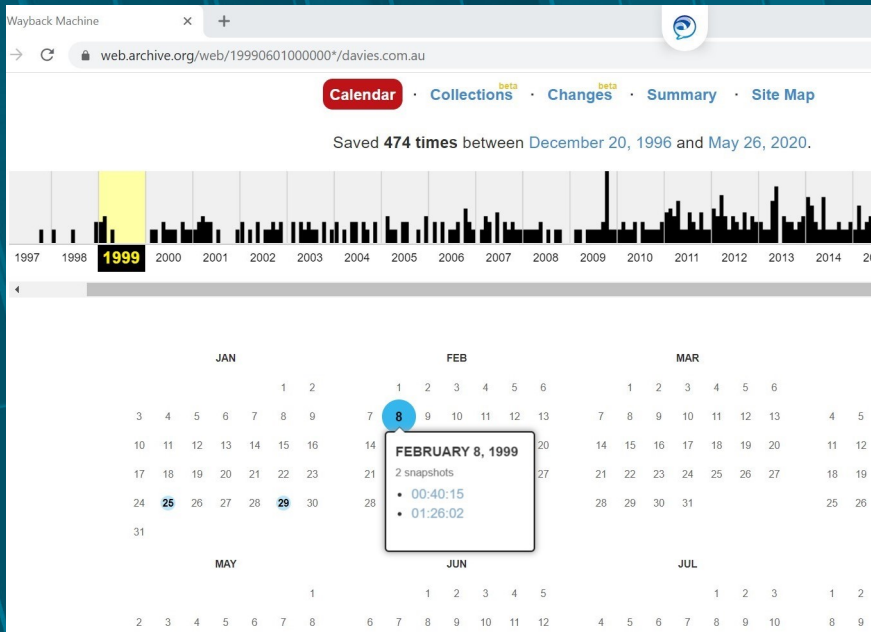
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[Calendar](#) · [Collections](#)^{beta} · [Changes](#)^{beta} · [Summary](#) · [Site Map](#)

Saved **474** times between [December 20, 1996](#) and [May 26, 2020](#).

1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 **2020**



STEP 3

STEP 4

web.archive.org/web/19990202200831/http://www.davies.com.au/protect_home.html

18 captures
24 Oct 1997 - 31 Mar 2004

DEC FEB MAY
02
1998 1999 2000

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INTELLECTUAL PROPERTY PROTECTION

- [WHAT IS INTELLECTUAL PROPERTY?](#)
- [PATENTS](#)
- [REGISTERED DESIGNS](#)
- [REGISTERED TRADE MARKS](#)
- [COPYRIGHT](#)
- [COMMON LAW RIGHTS](#)
- [INFRINGEMENT OF RIGHTS](#)

WHAT IS INTELLECTUAL PROPERTY?
"Intellectual Property" may be regarded as a collective term for a group of rights which provide varying degrees of exclusivity in relation to products, processes, names, designs, and drawings in industry, science or commerce. The rights in question are patent, registered design, trademark, copyright, and common law rights. Intellectual property law represents an expanding and relatively complex area of the law and in this nature it is necessary for us to write in generalities only. Our objective is to give clients just an outline understanding of the nature of the rights and protection involved so that you are at least aware of some of the rights to which you might be entitled and also of some of the problems which you are likely to be facing.

PATENTS

TRADE MARKS, DESIGNS & PATENTS OFFICE

- Pages on the Wayback machine are acceptable as valid evidence of the date on which they appeared.
- Rules of evidence do not apply.
- But...
 - Rebuttable!
 - Inherent limitations! Including:
 - timing – when website visited, not when updated
 - content – page, images, links can be omitted
 - not every website
 - negative result does not establish website does not exist

FEDERAL COURT

- Same inherent limitations as in Office.
 - Rules of evidence apply.
 - Factors relevant to admissibility:
 - Direct evidence from Wayback machine employee about how it operates (no human involvement – software populated).
 - Webpages that are business records – eg description of the product, price, other terms and conditions of offer - not merely promotional or descriptive of activities of business eg 'about us' page.
- Other evidence to support accuracy of Wayback materials.

TAKE HOME POINTS

1. Wayback machine evidence can be very useful, particularly in the Office
2. In the Federal Court it is more difficult to rely on it, but it has been admitted in two recent decisions
 - Pinnacle Runway Pty Ltd v Triangl Limited [2019] FCA 1662
 - Dyno Nobel Inc v Orica Explosives Technology Pty Ltd (No 2) [2019] FCA 1552
3. Keep good records independently of Wayback machine:
 - if rebrand, record branding pre and post rebrand (including contemporaneous documents such as contract with website developer)
 - keep record of other changes to your website
 - screenshots of potentially infringing conduct and seek advice.