

## Web Law 101

**Web Site Agreements.** Have a written agreement with the developer and host of your web site (which may be the same or different individuals or companies). Before the site is created, address issues such as having a firm timeline for completion of the site, acceptance testing of the site to verify loading and operation, rights to third party content, and ownership of the site content and deliverables. When discussing hosting with your Internet Service Provider (“ISP”), determine what type of Internet connection is being made and who will be responsible for its maintenance, ensure that the host properly maintains the server and has the necessary back-up/mirrored server to protect against potential problems, and address the issue of obtaining the domain name for the web site up front and, if the host is obtaining the web site domain name, require, upon termination of the hosting contract, that the domain name be transferred to you and that a forwarding link be left in its place. You may want to have an attorney draft the Development and Hosting Agreements, as well as Terms and Conditions for access and use of the site and potential other legal content for the site.

**Privacy Issues.** If you collect personal information from visitors to your site, you may need to consider legal privacy issues. At the moment, privacy policies are not legally required on a web site unless an e-business is directed toward certain consumers. Therefore, determine whether you fall within the purview of these laws, and consider the requirements of both United States and foreign laws, given the international scope of the Internet. For example, the Children’s Online Privacy Protection Act (“COPPA”) applies to web sites directed at children or that knowingly collect information from children under 13 years of age, and your posted privacy policy must adhere to COPPA’s terms. If you are operating in the European Union, your privacy policy must conform to the European Union’s Directive on the protection of personal data that requires an individual’s specific, informed and unambiguous consent for the use of personal data. If you choose to post a privacy policy, whether required or not, you must strictly adhere to the posted policy. Forms of notice, choice, access and security should also be addressed in the privacy policy. You may also want to register your privacy policy with an industry self-regulatory organization.<sup>1</sup>

**Copyright Issues.** Copyright issues are some of the most problematic with regard to web sites, mainly because it is so easy to copy and distribute large amounts of content via the Internet. It is important to remember that *the absence of a copyright registration does not mean that it is alright to copy the work*. Any original work fixed in a tangible medium is automatically protected by copyright regardless of whether any copyright formalities have been exercised. You may be liable for copyright infringement for posting pictures, text, music and other third party content on a web site. To avoid such issues, you should obtain written permission from the copyright owner(s) prior to posting such content on your site. Otherwise, you will likely violate the copyright owner’s exclusive right to reproduction, public display and public performance of the work.

*Third Party Content.* You must also be concerned with the use of other third party content on your web site. Submissions on bulletin boards, chatrooms and the like give rise to potential liability for defamation, harassment, and copyright or trademark infringement.

*What is Protected on the Internet?* Unfortunately, there is no easy answer to this question. However, it is safe to say that original text, graphics, audio, video, HTML code and all other unique elements that make up the original nature of the material are protected by copyright laws.

*Browsing.* Browsing the Internet is an activity shielded from legal liability. “Browsing” refers only to the act of viewing a web page and does not include printing or saving the content of the viewed web page. Even when an unauthorized copy of a work has been created and is available for viewing on the Internet,

it is not the person who privately views the copy, but the person who provided the unauthorized copy for viewing on the Internet who is liable for copyright infringement.

*Linking.* A link can be considered a virtual button that allows a web surfer to be transported, at the click of a mouse, to another site without having to key in the site address. One might think that just providing a link to another web page could not possibly violate copyright laws. Think again. While basic linking has not yet been found to constitute infringement, the easy way to avoid the potential for infringement is simply to obtain permission to create the link. Most likely the web page owner will be happy to share their link, as that means that their site will have more visitors. However, “deep” linking (when a link bypasses a third parties’ home page and advertisements) and “framing” (if a third parties’ site content is encapsulated in another site (i.e., the user cannot tell that they are actually looking at a third parties’ site and believe they are still on a different site) can be actionable. Obtaining permission to create a basic link is often as simple as sending an email to the webmaster of the site for which a link is desired. Permission for deep links or frames may be more difficult to obtain. While formal linking agreements are sometimes created, a back-and-forth exchange of emails giving permission for the link will also suffice. Just remember to get permission in writing and keep a tangible copy of the agreement in a file cabinet in case a dispute arises.

*Photographs, Graphics and Text.* When copying third party works from whatever medium -- Internet, book, magazine, newspaper -- and scanning or typing the material into the computer, one must obtain permission from the copyright holder in order to reproduce the copyrighted work. One possible solution is to use commercial clip art that can be purchased and comes with warranties against copyright infringement. However, if an individual or organization creates an original photograph, musical composition or literary work, the work belongs to that individual or organization and they own the copyright. (Note: An organization should make sure to obtain a work-for-hire agreement from employees and independent contractors if they are creating works to avoid ownership disputes.) Be sure to obtain a “model release” from people in photographs before posting the photographs on the Internet.

*Music.* When music is used in conjunction with visual works, the music is considered to be synchronized with the visual works. In order to incorporate third party music into a web site, one must contact the copyright owner of the work or the publisher to negotiate and obtain a synchronization license to use copyrighted music on a web site.

*Who Needs Copyright? This is Fair Use!* In some rare instances, copyrighted material can be used without permission. The fair use exemptions to U.S. copyright law were created to allow for use of copyrighted works for commentary, parody, news reporting and research without having to obtain the author’s permission. If applicable, the fair use doctrine provides a complete defense to otherwise unlawful copyright violations. Consult counsel to determine if a use is fair.

**Trademark Issues.** Trademark issues have become a big area of concern for web site operators. The issues that usually arise involve infringement, dilution, linking, framing and cybersquatting.

*Domain Names.* Before you adopt a domain name for your web site, it is strongly suggested that you conduct an extensive trademark search to determine whether the domain name could infringe the rights of a trademark owner. Even if a domain name is not identical to a trademark, it could still potentially infringe a trademark by confusing potential customers as to the source of the web site. As domain names are often akin to and as important as the sign on a brick and mortar business, it is imperative that you protect yourself from a potential infringement action by performing a trademark search prior to doing business on the Internet. At the same time, you should be analyzing whether your domain name should be the subject of a trademark registration in its own right. Once the domain name has been chosen and

registered with a domain name registrar<sup>2</sup> and design of the web site has begun, you should make sure that any use of another's trademark is entirely descriptive and in good faith.

*Cybersquatting.* If you are unable to register your trademark as a domain name, another entity may have a legitimate claim to use the same domain name, or you may be the victim of a cybersquatter.

"Cybersquatting" is a practice whereby individuals seeking extortionate profits by reserve Internet domain names that are similar or identical to trademarked names with no intention of using the names in commerce themselves." Cybersquatters often register numerous domain names containing trademarks or trade names for the purpose of holding them ransom or to divert Internet traffic to their sites. To combat the rise in cybersquatting, Congress enacted the Anti-Cybersquatting Consumer Protection Act.

*Linking.* Often, a web site owner will try to link its site to another party's site. While ordinary linking should not require permission, if you attempt to bypass a third party's home page with your attendant advertisements - a procedure known as "deep linking" - you are likely to be challenged as misappropriation and potential trademark infringement. You will want to consider the possibility of entering into a linking license with sites that you wish to utilize as well as the issue of posting a disclaimer for link material in order to advise visitors that they are leaving your site and entering a third party's site. A relative of deep linking is the practice of encapsulating third party's content in another's web site, which is called framing. This practice may similarly constitute trademark infringement and unfair competition. You will definitely want to use a licensing agreement to engage in this practice.

**Advertising, Promotion and Sales.** You may want to register your web site with search engines in order to achieve maximum exposure.<sup>3</sup> In this regard, you should be careful regarding the use of key words and metatags -- hidden text that directs traffic to a web site -- in your web site HTML code that will attract search engine activity. The improper use of third party trademarks within metatags can constitute trademark infringement and dilution. However, a descriptive use of a mark -- or using a mark to refer to its owner's actual product -- can be a non-infringing use if it does not create an improper association in consumers' minds between the descriptive/nominative user of the mark and the actual owner of the mark.<sup>4</sup>

When analyzing your metatags, make sure the use of another party's trademark in a metatag is a fair descriptive use and not an attempt to lure visitors away from sites operated by the trademark owner. Because metatags are used to catalog the web site and attract new visitors, any use of someone else's trademark should be done only as a way to describe the web site's products and services, any other type of use could be infringing. Once again, adherence to the FTC Act<sup>5</sup> regarding advertising should be reviewed, as online advertising is no different from all other advertising as far as FTC compliance is concerned.

Depending on the type of product or service represented by your web site, you should also analyze the applicability of Federal Trade Commission ("FTC") Act<sup>6</sup> with regard to certain types of activity that, for example, may mirror the mail and telephone order business. For instance, according to the FTC's mail and telephone order rule, orders must be shipped within the time promised (or within 30 days) or the seller must inform the consumer of the delay, provide a revised shipment date and give the buyer the option to agree to the delay or cancel the order and receive a refund. These rules are also applicable to your web site.

**Only Two Things in Life Are Certain, Death and...** Taxes are another important factor in your web site. You should evaluate which taxes will be imposed upon any transactions conducted through the web site. It is unknown whether the temporary ban on discriminatory taxes associated with Internet access and services, which is currently in effect until November 1, 2003, will be continued, given the pressure by state governments to begin taxation of Internet sales. At a minimum, if you have an office or other physical presence within a state, the chances are they will be liable for sales tax for online transactions.

International tax issues, such as VAT taxes, customs duties and sales and use taxes must also be addressed for the sale of products online and in international territories. In any case, working with your tax advisors will be essential with regard to your Internet sales activities.

### **Other Issues.**

- Doing business online may create jurisdiction over the web site owner depending upon the type of web site which is operated. A purely passive “mere advertising” web site is unlikely to provide personal jurisdiction in any state other than where the web site entity resides. On the other hand, making online contracts and doing business in other states will create jurisdiction in these other states, although the exact level of activity that must take place is not a bright line test and will depend on the circumstances in each case.
- There are a number of international issues that arise if the web site is intended for use beyond residents of the United States. In addition to the tax issues and jurisdiction issues discussed earlier, you would be wise to discuss with foreign counsel the web site’s compliance with local law in terms of its activities within a given foreign jurisdiction. You may even consider offering different versions of the same web site for different foreign markets and affirmatively point foreign visitors to those different versions.
- You should also consider whether or not your sale of products online in multiple territories will conflict with or breach any pre-existing agreements with distributors of your products in those territories.
- Be sure to address security issues as part of the initial development concepts. Examples of security issues include such things as use of digital signatures, electronic payments, authentication methods, certification authorities and insurance.
- The DMCA also bans trafficking in and marketing of devices primarily designed to circumvent the use restriction protective technologies. This may be a factor in your site.
- Other matters to consider include whether you understand the liability you may incur through the transmission of unsolicited commercial e-mail (“spam”). Make sure your emails comply with state and potentially federal spam laws.<sup>7</sup>
- Obviously, the last thing you should consider is whether you have the infrastructure to handle the success that may result from the web site. Ultimately, this may be a problem that is beyond the normal purview of counsel, but yet, if addressed early enough, can prevent serious repercussions.

**Conclusion.** The laws relating to the Internet are much like the Internet itself, newly developing, changing rapidly, increasing explosively and reacting to user demand. Tread carefully, as there are no certainties on the Internet. Ask permission to copy from and link to other sites, and make sure content is owned by or licensed from the proper parties. The safest course of action is to contact an intellectual property attorney to review a web site for any potential infringing content and other legal issues. Good Luck!

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<sup>1</sup> For more information, see TRUSTe at <http://etrust.com> or the Better Business Bureau at <http://www.bbonline.org>.

<sup>2</sup> See <http://www.internic.net> for a list of registrars. Note: Registration with a domain name registrar does result in trademark protection and is not a guarantee that you are not infringing on other marks.

<sup>3</sup> See <http://searchenginewatch.com> for more information about search engines.

<sup>4</sup> *Playboy Enterprises, Inc. v. Welles*, 279 F.3d 796, 806 (9th Cir. 2002). The test for nominative use is: (1) the product or service in question must be one not readily identifiable without use of the trademark; (2) only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and (3) the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.

<sup>5</sup> For more information, see <http://www.ftc.gov/bcp/menu-ads.htm>.

<sup>6</sup> For more information, see <http://www.ftc.gov/bcp/menu-internet.htm>.

<sup>7</sup> For more information, see <http://www.spamlaws.com>.