

# PORTLAND BUSINESS JOURNAL

PORTLAND, OREGON

BUSINESS NEWS FROM THE FOUR-COUNTY REGION

SEPTEMBER 26, 2008

## *Beware of liability tripwires when designing a Web site*

Many businesses operate under the mistaken assumption of a wide-open Internet, in which they can copy and link on Web sites without repercussion. While at one time this belief may have been true, the Internet has moved from a system based on an open source to one more based on principles of proprietary rights.

Even the smallest Web sites can cause legal headaches in the complex areas of copyright and trademark law because existing statutes apply sometimes ancient legal principles to the ever-changing technology of the Internet. Liability traps abound, including:

**There is some legislation that protects Web site owners in certain circumstances, but as with many legal issues online, the issue remains far from settled.**

- Domain names. Perhaps nothing can be more frustrating to a new business than finding out that its domain names infringe the trademark rights of others.

Even innocuous-sounding names may infringe trademarks. The United States Patent and Trademark Office has issued over 3.4 million trademark registrations, any one of which may present a roadblock to your domain name. And this only accounts for registered marks.

Unregistered marks may also create problems. A business owner is best served by securing legal help to ensure that a domain name can be used.

- Ownership. Just because a business relies on an employee or hires an independent contractor to create a Web site does not necessarily mean the business owns the content on the Web site.

For example, what if a Web site developer creates a logo that is used as a theme throughout a Web site and a company's promotional materials? The developer later sues the company, claiming that he or she, not the company, owns the rights to use the logo. Who wins?

It depends.

An employer needs to be careful that any work done by either an employee or a contractor is a



**GUEST  
COLUMNIST**

Ken  
Davis

“work for hire” such that the business owns the creative output.

This is not automatic.

It is best to put it in writing at the onset of the relationship. Similarly, what happens when it is discovered that the logo was not the wholly original creation of the developer but rather was “based on” something that he or she had seen but had not realized was subject of copyright protection? How do you best ensure your Web site professional is using material that is free from potential claims of infringement?

A proper web development agreement will contain an indemnification clause to protect a company.

- Metatags and keywords. A great Web site is wasted unless it attracts eyeballs. A big part of attracting those potential customers is the choice of keywords or metatags that generate or trigger advertisement placement or banner ads in search engines. The extent that you can use the trademark of another to advertise your own Web site is a very unsettled area of the law, creating great uncertainty over what you can and cannot do. Avoid any unnecessary use of third-party trademarks on your Web site when possible. When their use is necessary, consult with an attorney to confirm that the use does not infringe.

- Blogs, public forums and bulletin boards. Will your Web site allow others to create or post content? What if a poster defames another on your Web site, someone publishes material that infringes the copyright of another, or a post includes links to another Web site that contains infringing material?

There is some legislation that may protect the Web site owner from liability in these circumstances. However, as with many of the legal issues that manifest themselves online, the area is far from settled.

- Streaming, framing and linking. Many Web sites rely on streaming, framing or linking to or from other material on the Internet. Each technology presents its own set of legal issues. Even linking, which one could argue is fundamental

to the Internet's very existence, creates issues. While generally linking may not present any legal liability, would that change if the link is not to the third party's “home” page but rather to an embedded page deep within the tree of that Web site? At least one company has made this claim.

Ticketmaster sued Microsoft when a Microsoft Web site “deep linked” into Ticketmaster's Web site, bypassing its home page — and the associated advertising displayed on the home page. While the case settled and no legal precedent was set, it is yet another example of how even the simplest of Internet functions may create complex legal liability.

- Jurisdiction. Not only does a Web site create legal liability headaches, these headaches can turn into migraines if you are forced to litigate in a far-away forum. Even mostly local, Oregon businesses can find themselves hauled into a far-away court if they have done business through their Web sites. Some courts have gone so far as to hold that a handful of sales into a forum state can subject a company to jurisdiction in that court. As a result, small companies may be faced with lawsuits before juries thousands of miles from home.

Business owners should keep in mind that relying on someone else to develop or maintain a Web site — such as an employee with Web site design experience, an independent contractor or a professional Web site development firm — doesn't mean that the business owner is inoculating himself or herself from liability.

While the better Web site design firms know some of the basic rules regarding online liability, very few have the resources or training to be able to keep abreast of this ever-changing area of the law. As a result, a business is left holding the bag if something goes wrong.

A company developing or revamping its Web site should protect itself through advice and, potentially, through purchasing insurance to protect against such liability land mines.

**Ken Davis** is a shareholder at Lane Powell who focuses his practice on intellectual property litigation, including Internet, copyright, patent, trademark and trade secret cases. Contact him at 503-778-2121.