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Corporate Website Audit Issues

By Ray K. Harris

Corporate websites should be periodically audited to review business practices and mitigate business risks for Internet related activities. Even if the website was initially audited before it became active, both business objectives and Internet strategies are dynamic and website compliance should be periodically reviewed.

Exclusive Territories: A website audit should consider both the business goals of the website owner and the broader business context in which the website owner competes. For example, a website audit focused exclusively on the content of the site might miss legal exposures related to competition between website sales and exclusive distributorship or franchise agreements. At least one arbitration decision has held that website sales by a franchiser may violate the franchise agreement. Stuart Gittleman, "Franchisees Win Landmark Internet Arbitration Ruling", Am. Lawyer Media (September 12, 2000). Therefore a website audit should include a review of supply and distribution agreements to confirm that Internet sales do not violate any exclusive territorial rights.

Terms of Use: It is now well established that websites that enable commercial transactions probably expose the operator to litigation in distant forums for disputes arising out of Internet transactions with distant consumers. Indeed, in the extreme case, a single email contact with a foreign jurisdiction may be sufficient to support specific jurisdiction. *Internet Doorway*

Inc. v. Parks, 138 F. Supp.2d 723 (SD Miss. 2001); see *Zippo Mfg. Co. v. Zippo Dot Com., Inc.*, 952 F. Supp. 1119, 1124 (WD Pa. 1997).

The Internet provides an opportunity to invoke contractual choice of venue provisions (in addition to the typical disclaimer of warranty and limitation of liability provisions found in most form agreements). The interactive nature of the Internet may obviate the principal

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impediment to enforcement of shrink wrap licenses (lack of assent by the purchaser prior to receipt of the goods). Internet transactions (indeed access to the website as a whole) may be conditioned upon assent by the consumer to terms of use. Where that assent is obtained by displaying clear terms and requiring acceptance before the user can access the site (or at least before the user can consummate a transaction) the fact of assent facilitates the enforcement of the contractual

relationship. See *Register.com Inc. v. Verio Inc.*, 126 F. Supp.2d 238 (SD NY 2000). Conversely, where the terms are not clear or assent is not unambiguously required courts are less likely to enforce the contractual terms. See *Specht v. Netscape Comm Corp.*, 150 F. Supp.2d 585 (SD NY 2001). Be clear that all claims, whether arising under state or federal law are subject to the venue provision in the terms of use. *Stomp Inc. v. Neato LLC*, 61 F. Supp.2d 1074 (CD Cal. 1999).

Email Policies: In addition to the terms of use imposed on consumers through the website, the website audit should also consider the conditions generally imposed on Internet usage by employees of the company. Clear policies should be established prohibiting inappropriate email (prohibiting content that is offensive, libelous or infringes upon the copyrights or trademarks of others) and providing for appropriate sanctions for breach of policy. Policies respecting the rights of third parties and enforcing employee compliance may help avoid vicarious or contributory liability on the part of the company in the event of employee misconduct. Moreover, legislation such as the Digital Millennium Copyright Act and Communication Decency Act contain safe harbors for certain Internet service providers (which may include the company as a website operator), but only if the required policies and practices are in place.

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Copyright: Although website content changes over time, it should be periodically reviewed to confirm that the company owns the material contained on the website (or has appropriate licenses for electronic publication). In light of the Supreme Court's decision holding the New York Times did not have the right to electronically republish articles by freelance writers (*Tasini v. New York Times*, 121 S.Ct. 2381 (2001)), third parties can be expected to aggressively assert intellectual property rights in response to electronic publications. Likewise, Internet publishers have aggressively sought to prevent unauthorized use of framing technology which can make it appear the publisher's content is contained on the company's website. The audit should take a skeptical view of the use of framing technology, as well as any content which is justified by reference to the fair use doctrine or an implied license.

Hyperlinks: Commentators have suggested that several recent cases may give rise to copyright infringement liability merely from the use of hyper-text links. The cases imposing such liability, however, have done so in egregious circumstances. *See Universal City Studios v. Reimerdes*, 111 F. Supp.2d 294 (SD NY 2000) (linking to cites containing decryption technology held sanctionable as contempt of the court's order barring publication of the decryption technology by the defendant). As with framing technology, competitors have objected to linking technology that has the effective of reducing advertising revenue (e.g., deep linking to avoid advertising on the opening splash page). *See Ticketmaster v. Tickets.com*, 2000 WL 1887522 (CD Cal. Aug. 10, 2000). Competitors also object to the use of spider technology to misappropriate compilations of data. *See Ebay v. Bidders Edge*, 100 F. Supp.2d 1058 (ND Cal. 2000). Protecting compilations of data is another reason to include powerful contractual provisions in the terms of use.

In evaluating website content, audits should periodically view existing links to ascertain if they are active and still display the desired content. Many sites have been embarrassed by the existence of links to pornography or other inappropriate material as a result of changes at the linked site. Where links between sites are sufficiently important for competitive purposes, the audit should consider the execution of formal weblink agreements. *See Web Linking Agreement: Contracting Strategies and Model Provisions* (ABA Bus. Law Section 1996).

Metatags and Domain Names:

A website audit should consider how users locate the company's website. First, the company should consider trademark protection for the domain names currently in use. Conversely the company should consider registering domain names for the company's major trademarks and common misspellings of those trademarks. Again, pornographers seem to delight in placing undesirable material on sites with domain names spelled similarly (but not identically) to popular domains and trademarks. Policing these typosquatters should be a component of the company's trademark protection program.

The company must also consider customers who use search engines rather than the actual domain name to locate the site. Many companies, particularly Playboy, have been frustrated by the use of metatages, triggers and other technologies that allow competitor's sites to be placed more prominently than that of a trademark holder when certain trademarks are used as metatags or triggers. *See Playboy v. Netscape*, 55 F. Supp.2d 1070 (CD Cal. 1999).

Privacy: Finally, although privacy statements generally go unread, increasing legislative and regulatory attention is addressed to privacy issues on the Internet. Specific legislation exists to protect children online and the FTC has brought action to enforce compliance with privacy polices adopted by commercial websites. Financial and

medical information on the Internet will be the focus of continuing regulatory efforts. The company must adopt and adhere to a privacy policy which is drafted to accommodate business interests with regard to the collection and use of user information.

Conclusion

A website audit entails a great deal that cannot be summarized here. Conceptually, however, an audit should:

1. confirm the website promotes continuing business objectives and does not engage in activity that enhances corporate risks without a commensurate corporate benefit;
2. confirm policies in place are appropriate to deter intellectual property infringement and mitigate any risk of vicarious or contributory liability for inappropriate employee conduct;
3. confirm the company has either copyright ownership or appropriate licenses for website content and protects valuable copyrights through the registration process; and
4. confirm the company has registered trademarks for domain names used by consumers to locate the website or metatags used by search engines to locate the website.

Periodic audits addressing these concerns can avoid the risk of litigation and identify competitors, cybersquatters or even well meaning supporters who need to be reminded of the proprietary nature of the company's valuable intellectual property rights.

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