THE USE OF TRADEMARKS IN WEB SITE DEVELOPMENT
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Commercial Web site developers are charged with the task of advertising on the Internet to enhance the salability of their customers' goods and services. A developer's success is frequently gauged by the Web site owner in terms of the amount of exposure the site receives by the number of consumer "hits," and the ranking in which the Web site is posted by a search engine looking for key words. Generally, a business will be more successful if its products or services are distributed under a brand-name trademark. In such an intense commercial environment as the Internet, Web site developers are sometimes tempted to take advantage of trademark name recognition belonging to other entities to boost the frequency of hits on their customers' sites. The accidental or intentional use of a third party's trademark may raise trademark infringement issues. Therefore, trademark law must be considered when developing Web sites and exploiting Internet-related applications.

Words, phrases, symbols, designs, or even sounds can constitute a trademark. To establish federal rights in a trademark, the owner must first use the mark in the ordinary course of trade in interstate commerce. However, an "intent to use" application may be filed by persons who intend to use the mark in the near future. A federal trademark registration lasts for ten years with a ten-year renewal term, as long as the mark continues to be used to identify its goods and services. Web site developers, in some cases, have used third-party trademarks to increase the frequency of visits to their customers' Web sites.

Diversion of Customers Arriving by Search Engines

An important tool in obtaining customer exposure to a Web site is a search engine such as those offered by Yahoo, Excite, and Lycos. A customer seeking a Web site pertaining to a particular product or service typically inputs key words which typify the product, service, or general subject matter that is being searched. The search engine then robotically scans Web sites on the Internet for the occurrence of the key-word request and posts a list of Web sites in which the key words are found. The Web sites are listed as hyperlinks in order of the frequency of occurrence of the key words. A clever Web site developer can manipulate the content of its customers' Web site by loading the Web site with key words it anticipates customers will use in search engines.

From a technical standpoint, a Web site developer uses what is called "meta-tags," which are lists of key words sought by search engines, placed in the HTML code of a Web site or on a "gateway page." The meta-tags are invisible to the viewer of the Web site. Any Web surfer can view the invisible HTML code of any Web page by right-clicking anywhere on the page and then selecting the term "source" from the menu. This will reveal the HTML object code which operates as the source of information that generates the Web page. In this location, a Web site developer may place many hundreds of invisible meta-tags

composed of redundant key words to attract search engine attention. In some cases, however, Web site developers have undertaken to plant a commercial competitor's trademark in this location to divert customers seeking someone else's product on a search engine.

For example, in the case of Playboy Enterprises v. Calvin Designer Label, the United States District Court of the Northern District of California issued a preliminary injunction against the use of the "Playboy" trademark in hidden meta-tags located in the HTML source of Web pages in an adult Web site. Playboy objected to the use of its trademark because when a potential customer who was seeking Playboy's Web site inserted the trademark "Playboy" in the search engine, the search engine diverted the customer to Playboy's competitor, "Playmate Live Magazine," rather than Playboy. The intended diversion of a competitor's customer by use of the competitor's own trademark was deemed by the court to be a tactic of unfair business competition, and caused Playboy's trademark to be "diluted." Accordingly, although not visible to a customer's eye, a competitor's trademark may not be used even in an invisible location in the HTML source of a Web site. To do so creates a device to deprive the rightful owner of the trademark of the commercial benefits to which it is entitled.

Manipulation of Hyperlinks

Another area of potential trademark abuse in Web site development is the manipulation of hyperlinks. Hyperlinking increases the ease with which a business can engage in wrongful trade practices. For example, a hyperlink from one Web site to a business competitor's site with "inlining" and framing can cause a viewer to believe that the contents of the frame belong to the owner of the original Web site. A hyperlink which states "click here to see a catalogue of our products" could mislead viewers into believing that the original Web site is the source of the goods for sale.

Another means by which Web site developers may infringe on trademark rights is by providing a trademarked hyperlink as a service to its rightful customers for noncompetitive purposes. For example, in the case of Ticketmaster v. Microsoft, a case which settled out of court, Microsoft's Web site provided a hyperlink to Ticketmaster without compensation to Ticketmaster after negotiations to allow the link failed. Ticketmaster alleged misappropriation, misuse, dilution of its trademark, and unfair competition. This sort of misuse of trademark, however, does not include elements of false and misleading advertising as does the misuse of the competitor's trademark in invisible meta-tags.

Although the Internet and principles of trademark law may provide temporary challenges, they are not incompatible. Modern Web site developers need only apply common sense when attempting to obtain the best results for their commercial customers. This must, however, include consideration of the commercial rights of their customers' competitors, as well.

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