



LEGAL LANDMINES IN AN ONLINE WORLD: What You Don't Know Could Hurt You

Frequently Asked Questions Every Company With a Website Needs to Consider

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By Travis Crabtree

LOOPER REED & MCGRAW
A Professional Corporation
1300 Post Oak Blvd., Suite 2000
Houston, Texas 77056
(713) 986-7000
tcrabtree@lrmlaw.com

www.eMediaLaw.com

About the Author

Travis Crabtree

Travis Crabtree earned his journalism degree from the University of Missouri School of Journalism in 1995 focusing on broadcast journalism. He parlayed his sports and news, writing, producing, anchoring and reporting experience at KOMU-TV8, the NBC affiliate in Columbia, Missouri, to land a job at KCRG TV9 in Cedar Rapids, Iowa. After covering news and sports, mainly the University of Iowa Hawkeyes, for two years in Eastern Iowa, Travis returned to his hometown to attend law school at the University of Houston. After graduating with honors and serving on the Houston Law Review, Travis joined the trial team at Looper Reed & McGraw.

He now combines his media background and his broad array of business litigation experience to assist clients with issues arising in the rapidly evolving online world, including everything from starting up online to the bet the company lawsuit. Travis represents plaintiffs and defendants in complex business matters including the Digital Millennium Copyright Act, Anticybersquatting Consumer Protection Act, Children's Online Privacy Protection Act, trademarks, trade secrets, free speech, defamation, open records, antitrust, RICO, the False Claims Act, shareholder derivatives, minority shareholder oppression, corporate officer/director fiduciary duties, partnership disputes, trade secrets, the DTPA, the UCC, employment and class actions in both state and federal court. He provides advice and counsel to clients at all stages of conflict from avoiding disputes, to alternative dispute resolution, trials and appeals.

For timely information and analysis on the legal issues emerging through the ever-changing world of online media, please check out Travis's blog at www.emedialaw.com set to go live in November 2007.

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I. Introduction¹

Every business consultant will tell you that every small business needs to be on the web. The statistics and research show that more and more consumers and business to business purchasers are searching online for products and services. The decision to go online is an easy one and there is an unlimited number of web designers ready to make that happen and marketing companies that will increase your rankings on the search engines and the traffic on the website.

Going online, however, also increases your risks. It presents issues many small business owners may not have ever even considered. While a web and search engine presence can increase sales, one unnecessary lawsuit can bring all of it down swiftly. Therefore, when you make that leap online, you should contact counsel versed on digital media and ecommerce issue to work with your web developer or internet marketer. There are a few easy steps you can do to minimize the risk online. This article looks at the questions you should consider when going online, or you should think about if you are already online and have never considered before.

II. The Most Frequently Asked Questions

A. Do I need to copyright my website?

In very basic and general terms, a copyright declares ownership to text, graphics, design, and other content on your website. Without doing anything, you own all of the original content on your website and hold a copyright on it. However, if you want to take legal action to enforce your copyright, you have to register it with the government. To ensure the most protection, you should consult with counsel about copyrighting the website. One copyright should take care of the entire aspect of the website including the original content, the graphics and design.

Most of the information needed to register your website can be found at the website for the U.S. Copyright Office (www.copyright.gov). Copyrighting the site will provide a documented notice of protection for the owner of the work and strengthens any claims against someone in violation of the copyright.

B. How do I protect my trademarks and service marks on my website?

A trademark or service mark is a particular symbol, name, or phrase that identifies your business and helps consumers to recognize it. Specifically, it is used to indicate the source of the goods or service as opposed to the type or nature of goods or services. For example, “Snickers” is trademarked but not candy bars. Likewise, the quoted portion of “Yahoo!” search engine is

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servicemarked, but no one can obtain a mark on the term “search engine.”

Your site’s name may qualify as a service mark and the names of the products on your site may qualify as trademarks. In addition, if part of your site has a unique, distinctive appearance - a very recognizable graphic design, for example - then it may qualify for trademark protection, because that part of your site basically serves as “packaging” for your product or service.

To protect your trademarks, conduct a search to ensure that your mark does not infringe on an existing one, and then register your trademark with the U.S. Patent and Trademark Office. This does not guarantee that no one will ever challenge your trademark, but it does strengthen your case if there is a problem. Registering puts the world on notice to your claim and raises the presumption that your claim to the mark is superior to anyone else’s. For reasons too complicated for the scope of this paper, others may still be able to defeat your claim to the mark, but registration does make it much more difficult to challenge the validity of the use of your mark.

Copyright and trademark registrations can get complicated, and you may want to hire a legal professional to help you with the registration process. If you are serious about protecting your company’s intellectual property, however, registration is a wise investment. If you are worried that another company may be moving in on your intellectual property, you should seek legal advice on what needs to be done to protect it.

Another benefit of registering your mark is that you can help prevent others from setting up websites with a similar name to confuse consumers. The Anticybersquatting Consumer Protection Act became effective in 1999. It is a new section to the existing act dealing with the protection and enforcement of trade and service marks, the Lanham Act. It provides for civil penalties and injunctive relief allowing you to shut down others who, in bad faith, register, traffic in, or use an internet domain name that is either identical or confusingly similar to your distinctive or famous mark.

C. Does my website need a privacy policy?

Every business with a website should have a link somewhere on its page that contains a privacy policy detailing what type of information is collected when visitors come to the website. Even if your site is relatively passive, it is likely that it reads the users “cookies” or other information that should be revealed. The more interactive your site is, the more important it is to have a privacy policy.

While there is no general law in the United States that requires privacy policies, the collection of any information triggers certain obligations that should be covered by a privacy policy. For example, websites used by California consumers are required to have a posted privacy policy. Because websites are accessible anywhere in the world, it makes sense to include a privacy policy on your website.

At a minimum, your privacy policy should include a statement describing the materials you collect from the users, such as emails, names and addresses, credit cards or financial information or IP information. Even if your website is not interactive, it most likely collects information about the user such as the identity of the IP address of the site that may have referred you to the website, the user's IP address, the operating system that you may be using (e.g. Windows 98), and the version and Make of Browser (e.g. Internet Explorer 5.0). Most sites retrieve this information to monitor usage and take advantage of compatibility issues.

Most websites employ what is commonly known as "cookies." Cookies are files holding small pieces of data that are transferred to your computer's hard drive through your web browser from a website's server. A cookie cannot read data from your hard disk or read cookie files that may have been created from other sites. Websites may utilize cookies as a means of providing personalization features to visitors. For example, websites may utilize cookies to remember settings (site theme colors, music preferences, what services may interest you, etc.) that you may have made on a certain website. Users can tell their computers to disengage the cookies, but it may limit the functionality of a website. For example, Amazon will not remember your preferences or shipping addresses if you disable the cookies.

The privacy policy should state if you save, share, or sell your customers' information. If you use a third-party to help with transactions, you most likely do share this information which should be disclosed. You need to disclose whether you will retain credit card information or whether it will be sold or shared to other parties.

While many of the privacy policies are very similar, it is important to have yours reviewed by both your lawyer and your web developer or IT department. In one case, a jury awarded \$4.5 million against a company that assists students applying online for colleges. The site contained a privacy policy that said it was not sharing personal information from others and the testimony revealed the privacy policy was copied from another site. The company was indeed sharing the information and the jury penalized the company for that.

You definitely need a privacy policy if you:

- Collect any credit card information.
- To comply with the Gramm-Leach-Bliley Act which requires all "financial institutions" to provide a privacy policy to its customers. "Financial institution" is defined and construed in a broad sense to include any retailers that offer their own credit cards or extend credit to the customers.
- To comply with HIPAA which requires health care service providers to give privacy policies to customers. The meaning of health care providers has some grey areas so if you are involved in healthcare in any way and are selling items over the internet, you are better off having a privacy policy.

- To company with the Children’s Online Privacy Protection Act of 1998 which mandates all website directed toward or that collects data from children under 13 years of age to post a privacy policy. Toys “R” Us has already paid a \$400,000 fine for violating this law.
- California law requires all website that collect personally-identifiable information such as names, addresses, email addresses or phone numbers from consumers who reside in that state, post a privacy policy. Even if the website owner resides in another state, the law must be followed.

The policy should also disclose the security efforts you utilize. Do you use SSL (secure sockets layer) or other system to transmit and receive sensitive information? You should also reveal the general steps you take to prevent hackers.

Finally, you should include a name, e-mail and regular mailing address for anyone with questions to contact you regarding your privacy policy. It should encourage anyone who believes the policy has been violated to report it immediately and allow any users to report any inappropriate uses or materials on the site to voice their concerns.

D. What should my website Terms of Use Agreement cover?

All business websites should have a terms of use agreement. The contents of the terms should cover your copyrighted information, contain the necessary disclaimers and other necessary terms specifically tailored for your business. While often an afterthought, the terms of use could save you a huge headache should there be a lawsuit down the road.

Because the scope of the terms depends on the type of business, it is difficult to detail the specific terms that should be in every terms of use of agreement. It will be easier to describe several businesses and the types of things that should be in the terms.

The first example is a law firm or other highly-regulated professional services business. Such industries are often highly regulated with many duties that may exist between the professional and the client. Therefore, necessary terms for a legal website would be similar to the fine print you may see on television or print ads such as; no attorney-client relationship exists based on viewing the website or initiating contact through the website; the information (such as a paper like this) is not legal advice or one that creates an attorney-client relationship; something to the effect that all cases/matters are different and that no specific outcomes can be guaranteed; there is no guarantee that the information contained on the website is always timely or accurate because there may have been changes in the law not reflected on the website; any opinions or viewpoints on the website are those of the author and not necessarily the law firm’s or any of the law firm’s clients. To the chagrin of nonlawyers, the list could go on and on.

A second website contains copyrighted information from others that users are free to view, but cannot download or copy. The terms of use for this website would have language that forbids

the copying or sharing of the materials and listing what rights to website has to prevent any such violations.

If you sell items through your website, you would want to include the same terms and conditions you might include on your invoice. You may want a forum selection clause to make sure you are not sued in a far away place, limitation of liability provisions so that your sale of a \$10 item does not result in a \$10,000,000 lawsuit. Assuming you have terms and conditions on your contracts, invoices or other contractual documents, there is absolutely no reason not to include them on your website.

Even if you have a very basic website that simply provides information to potential clients, it makes sense to have a terms of use agreement that disclaims any expressed warranties or reliance on materials contained in the website because there may be changed circumstances or issues relating to availability of certain products of service. This should be included especially when your website is relatively static and not regularly updated.

Again, the terms of use should be specifically tailored to the functionality, technology and purpose of your website. It, too, should be a collaborative effort with your lawyer and web developer.

E. How do I enforce the Terms of Use and make sure I do not get sued in a faraway place?

The internet provides even the smallest businesses with access to customers world-wide. However, that access provides the risk someone from Anchorage to Zion (a small town in Illinois) using your website, may sue you in their hometown if things go sour.

Whether you can be sued in another state depends on your contacts in general with that state or the specific contact with that state as it relates to the contested transaction or event. Legally speaking, it is an issue of “personal jurisdiction.”

Because the law takes time to catch up with technology, the effect of websites on personal jurisdiction is still emerging. However, a clear trend has evolved and the nature of your website’s “interactivity” determines whether you have “availed yourself to the privilege of doing business” in other states and can therefore be sued in those states. Even if you have an interactive website, there are steps you can take to help limit the possibility of being sued in states other than Texas.

Courts generally characterize websites into three types on a sliding scale to determine whether or not they subject a business to being sued in another state. At one end of the scale are websites clearly used for transacting business over the internet, such as entering into contracts and knowing and repeated transmission of files, which are usually sufficient to establish jurisdiction.

On the other end are “passive” websites that are used only for advertising over the internet and are not sufficient to establish jurisdiction and should generally not be the basis for your company

being sued in another state.

In the middle are “interactive” websites that allow the “exchange” of information between a potential customer and a host computer. In these cases, jurisdiction is determined by the degree of interaction. For example, one court refused to allow an Arkansas doctor to be sued in Texas simply because he listed himself on a referral-type website a person in Texas used. The website listed his credentials, his biography and his contact information. Although the website allowed email interaction, physicians to register for continuing education classes and the application for jobs online, it was informative in nature. There was no interaction regarding patient care so the doctor could not be sued for malpractice in Texas.

Even if your website is used to solicit orders and transact business, there are ways to limit your exposure to being dragged into the courthouses of other states. The easiest way is to include terms and conditions on your website that require all disputes to be resolved in Harris County (referred to as a “forum selection clause”) or through arbitration in Harris County.

The trick is to make these terms enforceable for every transaction completed through your website. There are, at least, two types of electronic form agreements. The first type is the “click-wrap” agreement. It requires the user to review or scroll through terms and assent to the contractual terms by clicking a button that reads “I Agree” or manifesting some other means of assent. The others are “browse-wrap” agreements that include terms and conditions either posted on the Website, a hyperlink or are accessible on the screen, but do not require the user to expressly acknowledge agreement to the terms. Courts are much more likely to enforce the arbitration or forum selection clause in the “click-wrap” agreement. Courts are loathe to enforce them in “browse-wrap” agreements because there is a lack of notice of the additional terms if the user never has to acknowledge their existence.

A common format for the “click-wrap” agreement is to list details of the transaction before it can be completed including a link to “terms and conditions” requiring the user to click on something like: “I agree to the terms and conditions for this transaction” before the deal can be finalized.

While more onerous for small business websites, the best practice is the one upheld by the court in the Texas case of *Barnett v. Network Solutions*. The court upheld a forum selection clause in an online contract that required users to scroll through terms before accepting or rejecting them. Unlike pressing a simple button without having to actually review the terms and conditions, the Network Solutions’ website required a customer to scroll through the terms prior to purchasing the product. Thus, the user had sufficient opportunity to read and understand the terms. While recent case law suggests this might be overkill, it provides an extra security to enforce your website terms and conditions.

Nevertheless, the simple step of including a “forum selection clause” forcing the parties to the transaction to resolve the dispute in Harris County, and making the user “click” to acknowledge their agreement to these terms can save thousands of dollars and the headache of litigating a dispute

in a far away locale. Of course, nothing on your website can prevent the lawsuit from ever being filed in Alaska, and each state analyzes these issues slightly different. Moreover, certain limiting terms have to meet other legal requirements such as being conspicuous and should be reviewed by your attorney.

F. Do I need permission to link to someone else's website?

No. The link itself to another site does not currently have any trademark or copyright protection. Copying a trademarked symbol as the link could create some issues depending on the context of the link. If the website simply discusses the company as part of a discussion, it is likely that the use of the symbol would constitute a fair use. However, if the intent is to make it look like a company endorses or sponsors your website in some way and there is no such agreement, use of a trademarked symbol for such unauthorized commercial purposes could create liability.

G. While most of the content on websites cannot be copied, what about the design?

You are going to need permission. The design is subject to copyright, and possibly trademark or trade dress protection. The more difficult question is who owns the design. Usually, the owner of the site owns the design, but some times the designer will keep the rights to the design through contract.

H. As part of my internet marketing plan, can I bid on a competitor's name?

A business's success often depends on where they appear on search engine results. To help increase targeted web traffic Search Engine Optimization and Search Engine Management firms assist clients on increasing visibility on search engine results. Through what is often referred to as "Pay-per-click" advertising, companies can bid on certain commonly used search terms to appear on the top of what Google refers to as "Sponsored Links." Web designers can also put competitor's names in "metatags" so that search engines find the site through its organic results.

Often times, companies will bid on the trademarked names of their competitors so when consumers punch in the name, they show up right beside the competitor. For example, imagine if you sell tissue paper and want to show up when someone types in Kleenex (or copiers and Xerox, or Teflon for a coating equivalent or Band-Aid for bandages). Unfortunately, there is not a definitive answer to whether or not this is trademark infringement or not.

One of the first big cases was filed by GEICO insurance company against Google. When a customer would enter GEICO, insurance brokers and others would appear on the Sponsored links. GEICO claimed Google infringed upon GEICO's trademark because Google was making money off of GEICO's intellectual property. The trial court in *Government Employees Insur. Co. (GEICO) v. Google, Inc.*, 330 F.Supp.2d 700 (E.D. Va. 2004) found that Google's AdWords program was a "use in commerce" by Google of Geico's mark under the Lanham Act. The Second Circuit Court of appeals softened the decision against Google in 2005 when they held in *GEICO v. Google, Inc.*, 414 F.3d 400 (2d Cir. 2005) that because the advertisements never mentioned GEICO in them (as opposed to being the path to find the ads), there was no likelihood of confusion which is an essential

element to a trademark infringement claim. GEICO and Google eventually settled leaving the issue unresolved. A current search under GEICO does not display any sponsored links.

The case of *800-JR Cigar, Inc. v. GoTo.com, Inc.*, 437 F.Supp.2d 273 (D.N.J. 2006) is pending on the issue of likelihood of confusion issue. In *Rescuecom Corp. v. Google, Inc.*, 456 F.Supp.2d 393 (N.D.N.Y. 2006), a district court in New York granted Google's dismissal motion on the grounds that Google's sale of the trademarked terms was not a "use in commerce" and therefore Google was not using other's trademarks.

American Blinds' lawsuit against Google showed some traction. After seven years of litigation, however, the case settled in the late summer of 2007, again, with no real guidance from the court. The settlement does not require Google to pay any money or change its business model. Although American Blinds obtained a favorable ruling that Google took advantage of the trademarks through a use in commerce, any momentum was lost when the court ruled that the two main terms "American Blind" and "American Blinds" were not subject to any trademark protection.

The case with the most legs appears to be American Airlines case against Google. In that case, an "American Airlines" search inquiry resulted in sponsored links for discount carriers and websites offering tickets from several carriers. American Blinds specifically stated that one of the reasons it settled on otherwise unfavorable terms was based on the strength of American Airlines' trademarks and its ability to take on the search engine behemoth.

While the status of the law is unclear, there has been no verdict against a search engine marketer/optimizer, a competitor or a search engine for trademark infringement when there is no use of the actual trademark in the actual advertisement or website. As web users become more and more savvy, the chance for finding confusion as to source or sponsorship appears to be decreasing. However, as unfair competition lawsuits continue, it appears trademark infringement claims related to online advertising may increase. If you engage in this practice, make sure the competitor does not show up on your site to lessen any chance of consumer confusion. Nevertheless, if businesses decide to employ the tactic, they should do so at their own peril.

I. I suspect someone has copied my website or its content, what do I do?

Copyright law generally defines infringement as the use of someone else's work without permission. Copyrights on the internet are often covered by the Digital Millennium Copyright Act ("DMCA") initially established in 1998. Section 512(d) explicitly states copyright infringement applies to "hyperlinks, online directories, search engines, and the like."

If you suspect someone has copied your website or otherwise infringed upon your copyrighted material, unless it is egregious, the usual first step is the sending of a cease and desist letter. It is an efficient way to make the claim. Usually, it notifies the infringer about the copyrighted nature of the material and a request that it be taken down.

The Digital Millennium Copyright Act provides the formal procedure to initiate copyright infringement for online materials. It was passed to make it easy to do without the assistance of counsel and requires a content owner to send a takedown notice. It also provides a process for online service providers to receive and act to notices before incurring any liability. When an online service provider receives a takedown notice, it notifies the alleged infringer allowing a response. If the material is removed, the online service provider is not held liable.

Many online service providers, from Google, to many message boards, to even your basic web hosting companies have copyright agents listed on the U.S. Copyright Office web page.

J. Someone is operating a website or using a domain name that is too similar to mine, what do I do?

Domain registration on popular domains such as .com, .org and .net are essentially first come first served.² Most registrations require affirmations of good faith and legitimate uses for the name. However, registering the domain name does not provide a license to infringe upon other's commercial interests such as trademarks.

Most of the time, when registering a name, you are confirming your statements are true, accurate and complete; you are not knowingly infringing on someone's copyright; and, you are not registering the name for an illegal purpose.

If the budget permits, you would want to register your domain name through the various domain names (e.g., .com, .net., .biz). However, it would be almost impossible, even with unlimited resources, to register every possible variation available. Therefore, you should occasionally check the web to see if people have registered names that are similar to yours. If there is another website similar to your domain name or using the domain name of one of your trade or service marks, that is likely to cause confusion, you may have a claim. In fact, you may need to take action so that your marks and name do not become diluted so as to lose any protection in the future.

The Uniform Domain Name Dispute Resolution Policy or UDRP is an online process that helps resolves complaints made by trademark owners about domain names run by ICANN (the Internet Corporation for Assigned Names and Numbers). While not a lawsuit, ICANN has the ability to order the deletion or transfer of domain names for .biz, .com, .info, .org because each registrant agreed to be bound by the UDRP when the domain names were registered.

If you are a trademark owner, the UDRP may provide a more efficient way to resolve your complaint than litigation. As the holder of the domain, you are required to submit to a "mandatory administrative proceeding" to determine rights to the domain. Regardless of whether you participate, your domain registrar (e.g., GoDaddy.com) must enforce the decision of UDRP Panel. If either side

².biz and .name domains require additional registration information.

elects to go to court instead, the UDRP proceedings are usually put on hold.

To prevent the use of your trademarks in domain names, you must prove: (1) you have a trademark right that is identical or confusingly similar to the domain of the infringer; (2) that the infringer has no legitimate interest in the domain name; and (3) and that the person is using the name in bad faith. In other words, the process is used to prevent cybersquatters as opposed to a family website showing pictures that happens to be similar to a trademarked word or phrase.

If litigation through the courts makes more sense, then you should pursue your claim under the Anti-Cybersquatting Consumer Protection Act (“ACPA”) which is codified at 15 U.S.C. § 1125(d). To prevail under the ACPA, you must show the infringer (1) has a bad faith intent to profit from a domain name; and (2) registers, uses or traffics in a domain name that is identical, confusingly similar or dilutes your mark. Under the ACPA, the trademark does not have to be registered, but must: (1) be distinctive at the time of the registration of the domain name; or (2) is famous at the time of registration. Violators can be fined between \$1,000 to \$100,000 per wrongly used domain name. A successful plaintiff can also recover lost profits, the profits of the violator and court costs.

K. If I allow users to post or provide content on my website, can I be sued for defamation?

Section 230 of the Communications Decency Act generally shields website operators from liability when the defamatory statements come from others. Specifically, 47 U.S.C. § 230(c)(1) states: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” The courts have generally given this provision broad support granting complete protection. It provides no protection, however, against intellectual property claims.

Only recently, has one court even presented a slight crack in this protective shell. In a recent case from the Ninth Circuit Court of Appeals, the court held that because the website www.Roommate.com contained a questionnaire with certain prescribed choices, it was not entitled to protection under Section 230. The case of *Fair Housing Council of San Fernando Valley v. Roommate.com*, will be reconsidered by the entire panel of Ninth Circuit judges, but the majority of the original three-person panel held Section 230 did not shield the website from claims under the Fair Housing Act. Specifically, the website allowed users to provide preferences regarding gender, sexual orientation, and children, and then the site would send profiles to other “compatible” users.

The court determined the site was the “content provider” as opposed to merely the “site operator” because it was “responsible” for the questionnaire and then sending out the results. While factually driven, the case has concerned many in that changing from an operator to a content provider has been blurred. For now, to the extent your site has questionnaires with pre-selected choices, you should make sure none of the pre-selected choices run afoul of statutory or defamation laws.

L. If I allow users to post or provide content on my website, can I be sued for copyright?

The Digital Millennium Copyright Act (“DMCA”) provides web hosts and internet service providers a “safe harbor” from copyright infringement claims resulting from content provided from others if certain procedures are followed. If the safe harbor qualifications are met, only the customer or user can be liable and not the actual website or ISP. The following is a general summary of the DMCA. There are several detailed nuances depending upon how the alleged copyright infringing material is stored or transmitted. Nevertheless, if there is any concern that copyrighted materials could be put on your website by others, you should take advantage of the safe harbor protections.

To qualify for the safe harbor protection, the site must: (1) notify the customers of its policy; (2) follow proper notice and takedown procedures; (3) designate a copyright agent with the U.S. Copyright Office; (4) not have knowledge that the material or activity is infringing or of the fact that the infringing material exists on its network.

The notice and takedown procedures require a copyright owner to provide the following information to the service provider: (1) the name, address and electronic signature of the complaining party; (2) the infringing materials on the website or a link to it if the notice is sent to a search engine; (3) a sufficient description to identify the copyrighted works; (4) a statement by the owner that there is no legal basis for the use of the materials (e.g., fair use, nominative use, parody or other exceptions to copyright violations); and (5) a statement of authority and the accuracy of the comments in the notice.

Once notice is sent, the service provider is required to takedown the material or disable access to it. The service provider then has to notify the individual responsible for the allegedly infringing material. This allows the individuals to provide the internet service providers an opportunity to contend the takedown notice was inaccurate or invalid which is often called a counter-notice. Upon receipt, the ISP is to forward the response to the original takedown provider. Then, if the original takedown notice provider and alleged copyright owner does not bring a lawsuit in district court within 14 days, the service provider is forced to put the material back on the site.

The counter-notice must contain: (1) the name, address and electronic signature of the provider; (2) identification of the material and its location before removal; (3) a statement that it was improperly taken down by mistake or misidentification; and (4) a consent to the appropriate jurisdiction if litigation is necessary.

M. What do I need to know before I start corporate blogging?

When the CEO is making posts on message boards not affiliated with the company, there is not much the legal department or outside counsel can do about it. Thus, no amount of preparation would have protected Whole Foods CEO John Mackey, who posted unseemly messages about Whole Foods’ competitor who is now a merger target. However, there are steps companies can take to prevent other possible missteps while taking advantage of the rapidly evolving medium of blogs.

Companies have reason to be wary of embarking in this new frontier. For example, Delta Airlines recently felt compelled to fire a flight attendant who used her blog to post pictures of herself posing in the cabin of the plane. None of the pictures were overly risqué, but Delta still took action because it was not the image Delta wanted to portray. On the corporate Google blog, an employee criticized Michael Moore's new movie this summer suggesting healthcare companies should get the facts to the people by, you guessed it, purchasing Google ads. Google apologized after receiving criticism for the critique. A new Google employee began posting his initial criticisms of the company on his personal blog and was fired 11 days into his job. Google also complained the employee shared financial information that could be used by competitors. Microsoft terminated a contractor when he posted photos of Apple computers delivered to the Microsoft office.

With all of these pitfalls why should corporations concern themselves with blogs. According to a May 2, 2005 *Business Week* article, "Six Tips for Corporate Bloggers", you can't miss the wave (the article is now more than two years old). According to the article, the corporate blogs add a personal touch and add brand loyalty and identity for those customers who want to know more about you and your company; it allows for an unfiltered public relations response; it allows for an actual conversation (good or bad) with your customers; gives the impression that your company is open and cutting-edge; and provides the opportunity to create buzz by controlling the leaks of new products and services. For more on why to use corporate blogs, check out, what else?, the blog at <http://www.corporateblogging.info/>

The medium simply requires some responsibility to prevent liability and embarrassment. If a company sponsors or supports a corporate blog, then the guidelines should be clear. Anyone provided access to the corporate blog should be required to sign a statement making it clear that any content that casts the company or its employees in a negative light is grounds for termination. Moreover, the company reserves the right to immediately remove any content without notice to the poster.

This requirement should be broad enough to cover most issues that may arise. Likewise, it should be emphasized that inappropriate or untrue statements about competitors will not be tolerated. Confidential information should not be shared via the corporate blog either. Publicly traded companies also need to be cognizant of what types of information about company performance, stocks, merger targets and other information may be off limits for regulatory reasons. If it is a company-sponsored blog, the company has every right to screen every post before it is published on the site. Taking that route depends on whether the company wants to devote the resources to engage in this type of prior restraint. Different rules may apply to governmental entities which is beyond the scope of this article.

Because the corporate blog has the appearance of corporate sponsorship, there should be one person the bloggers can contact if they have any questions about the appropriateness of a post before they publish it to the world. That same person should be charged with the task of monitoring the corporate blog for any posts in violation of the company's articulated policy. Clear guidelines, education and monitoring is the only way blogging can be done without putting the company at risk.

To the extent the company has a PR or marketing department, they should train the bloggers so the message is consistent with the company's purpose. When something untoward slips through, the best thing is to be open and honest as to what was done and why. The blogosphere, with its anonymity, is forgiving when sincerity and openness is employed. Fakes are usually uncovered and not forgiven.

Even if the company does not sponsor a blog, the employee handbook should include a section on personal blogs maintained individually by the employee presumably on their own time. In other words, companies need to be concerned about this even if they do not sponsor a blog. The employee can still create the same amount of harm often unknown to the company until it is too late. For those reasons, any employment manuals should cover personal blogs as well and make it clear that any published statement in any forum detrimental to the company is grounds for termination. For example, many personal bloggers may negatively discuss co-workers, bosses, or working conditions causing resentment in the office. If an employee is warned that any behavior that casts the company *or its employees* in a negative light is out-of-bounds, then there is no reason for the employee to express surprise at any corrective action taken by the company or have any right to sue to take action against the company once appropriate action is taken.

III. Conclusion

Your attorney should be just as essential as your web developer/marketer when you go online or if you are already online. Every risk is not unavoidable and the law is doing its best to catch up to the faster-evolving internet. However, some simple steps can be taken to soften those risks and should be done by any and all companies who venture online.

IV. Helpful Resources

eMediaLaw.com www.emedialaw.com

Looper Reed & McGraw, P.C.'s blog discussing and analyzing the latest legal trends and issues related to online media, marketing, ecommerce and related issues. It is set to go live in November of 2007.

The United States Copyright Office www.copyright.gov

The place where you register as or find another website's copyright agent to send a Digital Millennium Copyright Act takedown notice. It also provides useful information on how to copyright the original materials on your website.

The United States Patent and Trademark Office www.uspto.gov

The official website with useful information on how to trademark your tradenames and servicemarks.

Internet Domain Disputes

ICANN www.icann.org

The UDRP Policy: <http://www.icann.org/udrp/udrp-policy-24oct99.htm>

The UDRP Rules of Procedure: <http://www.icann.org/udrp/udrp-rules-24oct99.htm>

The Anticybersquatting Consumer Protection Act:

It prevents the bad faith registering of domain names and can be located as enacted at <http://www.mama-tech.com/1948.html>

The Children's Online Privacy Protection Act

It requires certain disclosures from any websites that target or collect any information from any users under 13. The text can be found at http://www4.law.cornell.edu/uscode/html/uscode47/usc_sec_47_00000231----000-.html

Chilling Effects Clearinghouse www.chillingeffects.org

An advocacy based website that aims to inform users about the role of the First Amendment in online intellectual property disputes. It contains useful information on copyright, trademarks, domain name disputes and other online issues.

The Electronic Frontier Foundation www.eff.org

An online civil rights advocacy group.

TopSpot Internet Marketing Solutions www.topspotims.com