

# The Shibolet Times

Published by SHIBOLETH (NY)

A ROUNDUP OF LEGAL AND COMMUNITY NEWS IN NEW YORK & ISRAEL

Vol. 2. No. 1 Summer 2007

## Someone stole my... Website!

Sagie Kleinlerer and Sam Rosen, our IP experts, review the legal use of trademarks and copyright to protect content published on the web.

Since becoming the major worldwide medium for communicating and publishing data, the internet is slowly taking over more and more aspects of our lives. Through the internet, users have been able to establish and manage new businesses, advertise and share opinions on various subjects, and connect with people having similar interests. With the ease of developing websites and quick access to treasures of information, music, images and video, the opportunities to infringe on another's copyrights and trademarks have become readily accessible more than ever. By simply hitting "copy" and "paste" on a computer keyboard, valuable protected information can instantly be misappropriated.

This article will address the protection and infringement of intellectual property online and in digital media, ways to protect an author's work, and how to address potential infringements.

Copyright protection occurs automatically and protects all original works and creations which are fixed onto a tangible form from unauthorized use. Over the years, the laws pertaining to copyright protection were expanded to include new media, digital works, and software development code. As such, a copyright protects against more than a mere unauthorized use of photographs and text contents of a website. For example, the use of the code used to build websites (HTML) is also protected and its unauthorized copying is an infringement of its legitimate author's copyright.

Beyond copying textual passages and images, copyright law also protects the graphical design and layout, which is sometimes referred to as the 'look and

feel' of a website. Many designers, who naturally browse through websites to get ideas and inspiration, end up copying

**Over the years, the laws pertaining to copyright protection were expanded to include new media, digital works, and software development code.**

without permission website designs and user interfaces which they find attractive. While it is difficult to prove copying of standard website features, unique features are protectable. To protect yourself from infringement claims, try to personalize your website's design, including color scheme, layouts, fonts and other design details, as well as the textual content. With every original addition to the website development, design, and content, the likelihood increases that you will be protected in case of an infringement claim against you, as it will be easier to prove uniqueness and originality.

In the process of designing and building a website, it is important to be careful in clearly identifying the source of the HTML code, graphics, media, layout, design and content of the website, to help defend against a claim of copyright infringement. Authoring brand new code, or using personally designed images and layout, reduces the exposure to a claim of infringement, but is not always feasible. Although current technology allows replicating another website's source code or content with ease, there is only a limited amount of media or online technology which is in the public domain and hence available to anyone for access and use. In order to determine which works are in the public domain and available for free use, a user wishing to utilize the work must check the date of the original creation of the work.

On most works, United States law currently grants copyright protection for the duration of the life of the author plus 70 years. Only then do works enter the public domain and become available for free use without prior authorization. However, the law recognizes limited situations where use of parts of a protected work is reasonable, such as for certain news or educational purposes, and allows such limited uses under the doctrine of 'fair use'.

In 1998, Congress passed the Digital Millennium Copyright Act of 1998 ("DMCA"). Congress's intent behind passing the DMCA was to expand the original copyright law in order to clarify the copyright protections available for digital creations. One of the main purposes of the DMCA was to curb the usage of software or other technology whose main purpose is to circumvent copyright protections built into digital works. For example, the DMCA prohibits the online publishing of passwords belonging to other websites, or the online publishing of methods of copying Hollywood movies from one DVD to another. Likewise, the DMCA prohibits an internet user from accessing a website using a password not obtained by that user directly from that website. In addition to addressing infringements, the DMCA also protects the rights of owners of digital works against forgeries.

Since the DMCA's enactment in 1998, Congress has consistently attempted to revise the DMCA in order to address issues not considered in its original enactment. The original anti-circumvention laws prohibited educators, researchers, and other users from using digital content in otherwise non-digital uses permissible, for example, under the *fair use* doctrine. While *fair use* generally allows uses of protected

(Continued on page 2)

(Continued from page 3) *SOMEONE STOLE MY... WEBSITE!*

works for purposes of criticism, news, education, research, parody, or satire, the original DMCA laws disallowed such uses. The DMCA has since been revised to allow such uses. Accordingly, a film professor can now utilize clips from DVD films in order to create a digital compilation for his film class or for a university library. Furthermore, the DMCA has been updated to allow for research and investigation into digital security flaws, the archiving of content of obsolete digital formats, and access to content for individuals with disabilities. However, these types of uses are limited to non-infringing uses and any deviation from such uses can be found to be infringing upon the author's rights.

**Congress's intent behind passing the Digital Millennium Copyright Act is to expand the original copyright law in order to clarify copyright protections available for digital creations.**

If a website allows users to upload text, graphics, or any other digital content, it must, under the DMCA, take steps to allow the site to protect itself against copyright infringement claims. Under 17 U.S.C. § 512(a), a service provider or website is not liable for monetary, injunctive or equitable claims of copyright infringement simply for providing a storage space for material online for purposes beyond the knowledge and control of the provider. If the website management is aware or has the ability to know and control such uses and receives a financial benefit from the infringement, then there is no protection offered to it either by the U.S. Code or by the DMCA. To be eligible for the DMCA's 'safe harbor' provisions, the website must file a notice with the U.S. Copyright Office which designates an agent of the website to receive notices of infringement, and display a copy of the notice on a page on the website accessible to the public. If the website receives notice of an infringement, it must remove the questionable content in order to abide by the DMCA and continue to be protected by it.

A 'trademark' is a name, symbol, figure, letter or word that is adopted by a merchant or manufacturer in order to distinguish itself from competitors in the marketplace. A 'service mark' denotes the same with respect to services. As is the case with copyright which has to be registered in the U.S. Copyright Office in order for its owner to be able to file an infringement lawsuit, a trademark or service mark must be registered in the United States Patent and Trademark Office (USPTO) in order to pursue a trademark infringement case. After filing with the USPTO, the trademark registration is recognized worldwide.

Trademark usage rights extend beyond using a protected term as the name of a website or as its domain name. The rights of the owner of a trademark extend also to the use of keywords that allow an internet search engine, such as Google®, to locate a website. These keywords are typically hidden in the HTML code of the website and do not necessarily appear in the text of the website. Due to this fact, it is not always simple to determine whether an owner of a website is infringing upon a competitor's trademark. One result of such an unauthorized use would be that the infringing website will rank in close proximity to the website of the original trademark owner in an internet search engine result page.

In a copyright infringement claim, the owner of the work must establish that the infringer copied the protected work and that the infringement exceeded any 'fair use'. Trademark infringement

occurs when an unauthorized user uses a protected trademark or a confusingly similar trademark in commerce. The test of infringement is whether a consumer is likely to be confused between the original true owner of the mark and the infringer, or the extent of dilution of the business reputation of the original mark owner. In most trademark infringement matters, the mark owner needs to establish one of these claims.

One way to protect against potential claims based on online trademark or copyright infringement is by performing a search on the terms a website owner wishes to use as keywords or as text on a website, and see if those terms are already being used by another website. Every prior use can result in a potential infringement claim; therefore, a quick online search before publishing a website can potentially save the website owner significant legal expenses in the future.

If a website owner believes that her copyrighted material or trademarks were infringed upon, the owner should immediately print color copies of the pages of the potentially infringing website displaying the alleged infringement. Since web pages can be altered easily and may be updated frequently, proof of infringement can disappear at any time after it is discovered. A claimant should also determine the point in time when the alleged infringing ma-

**If a website owner believes that her copyrighted material or trademarks were infringed upon, the owner should immediately print color copies of the pages of the potentially infringing website**

terial was first published online, as the material may have been published prior to when the claimant's intellectual property rights had ever attached. The next step after discovering the infringement would typically be having an attorney prepare and send a cease-and-desist letter to the infringer. This begins the process of pursuing an infringement case, and the attorney can then advise the claimant how to proceed.

While online infringement grows with the advent of new technologies, protection is similarly constantly evolving and new rules are routinely introduced by State and Federal lawmakers. By understanding your rights, the ways to develop, grow, and protect your digital portfolio online will remain, much like the internet itself, virtually endless.