

Web Site Legal Issues

Advising Clients: Web Development Issues

BY TIMOTHY B. MCCORMACK



Published In: De Novo, VOLUME XV, ISSUE III
MAY/JUNE 2001

mccormack
Intellectual Property Law
Business Law ps

617 Lee Street
Seattle, WA 98109 USA
p.206.381.8888 / f.206.381.1988
tim@McMormackLegal.com

Advising Clients: Web Development Issues

A variety of legal issues can arise in developing and operating a web site.

As the development of e-commerce unfolds, an organization's web site presents valuable potential benefits to the organization. The World Wide Web provides tremendous business opportunities, whether the organization is a software vendor, a service provider or an individual who wants to start an on-line business.

In fact, the customer market and business-to-business market on the World Wide Web is estimated to reach trillions of dollars in the coming years. A web site, however, also exposes an organization or individual to potential liabilities for violations of state and federal law and, in some cases, international law.

Internet related law is one of the fastest growing areas of the law. In some ways, it is practically impossible to address every conceivable legal issue that might arise in the operation of a successful Internet-based business.

Web site owners must, at least, consider a basic range of legal issues when developing and operating a web site.

Listed below is an overview of some of the issues most commonly faced by businesses developing and operating a web site. The list is broken down into do's and don'ts organized under three major topic headings. This overview, while not fully comprehensive of all possible legal issues, provides an excellent starting point for understanding some of the most common legal issues facing businesses with web sites in the United States.

WEB SITE AND CONTENT

DO have your client get a written assignment and a Work-For-Hire Agreement from all independent contractors and web developers, to insure that the organization owns rights to the intellectual property

that comprise the site, including the web site's HTML code, design features, and user interface. Without a written agreement, a web site developer may have a plausible claim of ownership for some copyrighted aspects of the developed web site.

DO have your client obtain federal or foreign trademark registration for important domain names to protect against a third party claiming trademark infringement.

DO have your client review web site content for accuracy, fair advertising practices, intellectual property rights and marking issues, and other regulatory related issues.

DO NOT have your client assume that it is okay to copy contents from other web sites. If your client does not want to create their own content, then they will need to license the content from others. Although there is a Fair Use provision under the United States Copyright Act for copying small portions of any particular work, the safest procedure have your client license content that they do not wish to independently create. Such a license might provide the right to distribute, alter, publish, or otherwise use the licensed content, as well as provide representations, warranties, and any appropriate indemnification from the licensor.

DO have your client register all important top-level domain names and variations of the same and consider international country code top-level domain name extensions.

DO have your client register a copyright agent with the United States Copyright office to help limit liability for some copyright infringement claims under the Digital Millennium Copyright Act.

DO have your client post a policy regarding submissions from third parties to their web site in the site's Terms and Conditions or Click Wrap Agreement.

Third party content might appear on the web site in places like bulletin boards and chat rooms and may create liability based on

defamation, harassment, copyright infringements or trademark infringement or other causes of action.

DO NOT have your client link or frame other web sites in such a way as to block the original source of origin or advertising and do not link or frame to web sites engaged in activities such as blatant copyright infringement.

Under various theories of liability, an organization might be found liable for trademark infringement, patent infringement or unfair competition for framing another web site.

WEB SITE USER AGREEMENT

DO have your client post a Click Wrap, or Terms and Conditions Agreement on their web site to bind users of the site.

A Click Wrap Agreement is a screen or page that presents a web site's legal terms and conditions to a user and requires the user to click "I Agree" or similar wording for gaining access to the site for completing a transaction.

Terms and Conditions, or Terms of Service are legal terms usually accessible through a link at the bottom of a home page of the site, the review of which is not a condition to obtaining information on the site or completing a transaction.

DO have your client include Proprietary Rights notices, disclaimers of liability, and warranty for the site, linking disclaimers, framing prohibition, a statement concerning the governing law and jurisdiction of any disputes, language conveying rights to use any content submitted to the site, return and refund policies (when applicable), rules for games or sweepstakes (when applicable), a prohibition on using the site to post obscene, infringing, or unlawful material and rules regarding conduct on bulletin boards, chat rooms, etc. (when applicable).

DO NOT have your client post a policy and then not comply with it.

SECURITY AND TECHNICAL ARCHITECTURE

DO have your client understand that security is a business and a legal issue.

A web site's performance can be dramatically affected if a site is attacked.

In a business-to-business environment, their partners need assurance that their network is protected from hackers and the like. In a business-to-customer model, your client's customers need to be assured that their transactions with credit cards, or otherwise, are secure.

DO have your client post a security statement on their site and designate an employee to manage the organization's security responsibilities.

DO NOT have your client forget that their web site's technical architecture must be adequate for its purpose. To reduce the likelihood of problems arising in this area, organizations might consider obtaining appropriate performance warranties and representations and indemnification from their web site developers, web site hosts, system integrators and providers of relevant software and hardware components.

As the area of Internet related law expands the rapid changes and complexity of the law make it important for lawyers to help their clients stay out of trouble. Sometimes a simple web site audit is all that stands between a heartbreaking lawsuit and breathtaking success in e-business. The issues identified above are a great starting point for helping clients to navigate the complex web of Internet law. Web site owners should be strongly encouraged to at least consider a basic range of legal issues when developing and operating a web site in the United States or internationally.