

How to be e-Ready for e-Business – A Legal Perspective

When entering the new dimensions of the Internet, a business can encounter legal issues where the law is breaking new ground and striving to keep current with issues arising from new technology. This article will look at some of the issues facing an e-commerce business, namely, at how a business can protect its website content and trademarks, deal with website ownership issues and address linking to other sites.

Conducting business on-line can create new demands and challenges for any organization. Whether an organization is considered a new Internet start-up or a company is adding a new dimension to its traditional business by launching a website, the issues remain the same. In any event, the website launch will be based upon an organizational business or strategic plan and be accomplished through a phased approach. Using the following illustration, this article presents some of the issues that a company may encounter when launching its business on the Internet.

A travel Agency, known as "TTG", has decided to launch its website. TTG hired an outside web developer namely, Web Screen, to create the site. TTG employees, working with Web Screen, have devoted considerable time to prepare advertising and promotions that would draw visitors to the website. The website for ttgtravelagency.com is launched. Their hard work has begun to pay off as TTG is now receiving some business through the site particularly for their Outback Survivor[®] package which promises the traveler a "thrill a minute" and "close encounters with assorted poisonous reptiles." They have even registered the website with numerous search engines to draw more visitors to their website.

Erin Brach, the president of TTG, decided to personally review the new company website. After reviewing the website, Erin tried to locate the TTG website through some search engines using the TTG registered trademark, Outback Survivor[®]. Unfortunately, the TTG site was well down the list of matches in the Outback Survivor search. TTG's major competitor, *Seek Thrills Travel*, was listed first. Erin was upset and immediately contacted Terry James in TTG technical support. Terry decided to visit the *Seek Thrills Travel* website and review that site's metatags. Metatags, written in HTML, are not visible to visitors to the site but can be used by search engines to index sites thus assisting users in locating information on the Internet. *Seek Thrills Travel* had inserted TTG's Outback Survivor mark as a metatag on its site.

Possible Trademark Infringement

As described in the illustration, a competing website owner has inserted key words or phrases of its website to attract the competitors' customers. Is it proper to use a competitor's trade name or trademark in this manner? Seek Thrills Travel used the TTG mark as a metatag in an attempt to lure users TTG customers to the Seek Thrills Travel site. Seek Thrills Travel could be viewed as enticing consumers to its website through the use of TTG's Outback Survivor mark and thereby trading on the goodwill that TTG's has created in its trademark. TTG may be able to do something about this situation. The

use by Seek Thrills Travel of the TTG mark is often referred to as invisible trademark infringement. In looking at this issue, courts, applying the laws relating to trademarks, have indicated that using someone else's trademark as a metatag is equivalent to posting a sign with another's trademark in front of one's own store. In this situation, TTG would view Seek Thrills Travel's use of metatags as an infringement of its trademark and could take action that would require Seek Thrills to remove the metatags from its site. That action would include requiring Seek Thrills to take appropriate steps to eliminate any confusion that might exist regarding the use of Outback Survivor.

Defining Ownership Interests

When Terry James was reviewing the Seek Thrills Travel site, he also decided to look at the general website content on their website. When looking at the Seek Thrills Travel website, Terry thought that it looked very much like the TTG website so Terry decided to look further and viewed some of the web pages on the Seek Thrills website. The Seek Thrills Travel website contained a note stating that it was designed by Web Screen, the developer of the TTG site. Based upon the dates on the Seek Thrills Travel website, Terry determined that the TTG website was launched prior to the Seek Thrills Travel website. Terry thought TTG, not Web Screen, owned the designs and computer code that were created for their website and was upset that Web Screen had not only reused that design but had provided it to *a TTG competitor*.

The first question to examine is whether TTG owns the website program code and content created by Web Screen. Payment for the Web Screen development services does not necessarily mean that ownership in the website Web Screen developed for TTG transferred to TTG. For this reason, it is important when contracting for web development services that the parties enter into a written contract defining the ownership interests. Because Web Screen may have used programming code that it developed prior to beginning the project for TTG or it used open source code, identifying and delineating the ownership interests in the website can be complex. Having a written website development agreement is key to defining the ownership interests in the website code. Even if Web Screen does not want to transfer ownership to TTG, TTG could include restrictions in the agreement with Web Screen so Web Screen could not use the TTG computer code or content to develop websites for TTG's competitors.

Not only was the design of the Seek Thrills Travel website similar to TTG's site but their product descriptions and other content contained on the TTG site was duplicated on the Seek Thrills Travel website. For example, the Seek Thrills Travel package was described as a "thrill a minute" and described "access to poisonous reptiles." TTG spent considerable time developing its website content and is concerned about the duplication of this information on the Seek Thrills Travel website. Based upon what Terry James found, it appeared that Seek Thrills Travel had copied the content from the TTG website after Web Screen had developed the Seek Thrills Travel website.

Website content can be subject to copyright protection. Where Seek Thrills Travel has improperly copied the content of the TTG website, Seek Thrills Travel has

misappropriated the copyrighted works of TTG. As such, TTG may bring a claim against Seek Thrills Travel relating to the misappropriation.

Linking to Other Websites

While reviewing the issues relating to the Seek Thrills Travel website, TTG became concerned about issues relating to their own site. In particular, TTG has placed links on its site to other websites. They are now concerned as to whether those links are proper. In reviewing this issue, Erin and Terry learned that linking to a “surface page”, i.e., a home page that displays a website’s trademark and banner ads, may be considered similar to giving directions to the linked site and is not considered improper. Therefore, to link to a surface page does not generally require permission. However, it is important to review the terms of use contained on the websites to which TTG is linking since the terms of use for those websites may create restrictions particularly where the links to other sites provide the visitor with helpful information and/or resources for goods or services. As Erin and Terry learned, it is a prudent business practice to obtain permission to link in order to avoid any misunderstandings.

Summary

To summarize what TTG may have learned from its experiences presented in this article, TTG may be able to take action under existing trademark law against Seek Thrills Travel where they have created metatags using the TTG trademarks on the Seek Thrills Travel website and are thus attracting TTG customers to the Seek Thrills Travel website by trading on TTG’s goodwill. TTG also learned the importance of having a written agreement with its website developer, Web Screen, prior to commencing a website development project. That agreement should contain provisions to address ownership rights in the developed website and include a provision restricting Web Screen’s ability to provide the same technology to a TTG competitor. The copyright laws may be the basis for TTG to deal with issues relating to the content of the TTG site and Seek Thrills Travel’s misappropriation of the TTG website content. Also TTG now plans to review its website links and will obtain permission where necessary. As TTG has learned, cyberspace may create many legal challenges but businesses do have remedies to protect them where problems arise.