

Infringers, Enforcers, and Influencers, Oh My!

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Legal Challenges for Online Businesses

As the Supreme Court reminds us, the rules are fluid:

The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.

Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017)
(emphasis supplied).

What is Copyright?

Copyright is a set of rights that allow a creator (“the author”) of content (“the work”) to control the work and profit from the work, including the right to: make and publish copies of the work; make derivatives of the work; and to perform the work.

Copyright is created when the author creates an original work and reduces it to a tangible medium of expression.

What Does Copyright Protect?

- Copyright protects the creative expression of an idea in a broad range of formats (literary works, software, sculpture, sound recordings, photographs and movies, architectural works)
- Not every expression is protected by copyright. Copyright does not protect ideas, facts, formulas, titles, useful objects, slogans, expressions not reduced to a tangible medium.
- The concept of what copyright protects has changed over time.

Registration and Notice

- Copyright now applies automatically when an original work is reduced to a fixed medium of expression. There is no requirement that an author register the copyright or use a copyright notice.
- A copyright notice (such as ©) can be used without registration and puts the world on notice of a claim of copyright.
- Registration is required to sue an infringer.

Who Owns the Copyright?

- The short answer is the author of the work (writer, photographer, etc.). The bigger question is:

Who is the author?

- When an employee creates a work within the scope of employment, the employer is considered the author for purpose of copyright.
- When an independent contractor creates the work, the contractor owns copyright to the work, absent a “work for hire agreement” in writing.
- The assignee of a copyright such as a book publisher.

Who Doesn't Own the Copyright?

A licensee

A purchaser of art

Naruto

Infringers



What is Infringement?

- Use of a work without permission; and
- Use of a work in excess of license such as using an image on your website when use was limited to a client's website.
- An employer can be liable for employee's infringement.
- Fair Use/Parody/Memes.
- The DMCA process can provide a safe harbor to online publishers and a mechanism for challenging infringement.

Practical Realities

- The fact that content is available on the internet does not mean that it is available for use.
- If your client provides you with content, you need to confirm in writing that your proposed use is permitted. Get an indemnification from you client for infringement claims.
- Use a copyright notice and consider registration.
- Consider implementing DCMA protections in your terms of use to create a “safe harbor” for posted content.
- Beware of trolls.

Trademark Basics

- A trademark identifies the source of goods or products.
- A service mark identifies the source of services.
- A certification mark certifies that the goods upon which the mark appears meet identified standards or specifications.

Trademarks can be words, stylized words, logos, sounds, and in some cases, color. [Burberry].

Trademark rights are acquired through use in commerce.

Registration is not necessary but beneficial for enforcement.

Trade dress is protectable.

Spectrum of Strength of Marks

- Stronger marks have greater scope of protection. To register a mark, the mark must be distinctive.
- Arbitrary or fanciful marks (Amazon) are the strongest marks and can be registered. Suggestive marks (Roach Motel) are strong and can be registered
- It can be difficult to register marks that are descriptive of the goods or services (“Best Coffee in America”). Additional showings may be required.
- Use of the name “Cape Cod” in a mark can be an issue.
- Generic marks (ITICKETS for internet tickets) cannot be registered.

What is Infringement?

Trademark Infringement is the unauthorized use of a mark that is likely to cause confusion, deception, or mistake about the source of the goods or services.

In considering likelihood of confusion, the most important factors are the similarity of the marks and the similarity of the goods or services.

Use of a mark beyond the scope of a license will also constitute infringement.

Practical Realities

- Think carefully before choosing a mark. Consider the *strength* of your proposed mark. Do research to avoid a mark that is likely to infringe.
- Consider a trademark *symbol* to put the world on notice of your claim.

Use the symbol [®] only on registered marks

Use [™] on unregistered marks.

- You need to police your mark. Failure to do so may result in a loss of your rights.
- Failure to maintain a registered mark can result in cancellation of the registration.

Rights of Privacy and Publicity

- The Mass Commercial Appropriation Statute prohibits commercial use of name, portrait, or picture without written consent.
- Mass Privacy Law protects against unreasonable, substantial, or serious interference with privacy.
- Laws vary from state to state.
- No Spielburgers for Carls Jr.!
- Get a release.

Who Are The Enforcers?

- Federal Trade Commission
- State Attorneys' General Offices
- State Corporations Divisions
- State Tax Authorities
- EU with respect to the GDPR
- Private parties

I Just Dropped In To See What Condition My Jurisdiction Was In

- Sales tax
 - Physical presence replaced by economic nexus.
- Corporate Registration
- State Jurisdiction
 - Due process requires minimum contacts
 - Passive websites are not a basis for jurisdiction
 - Basis of jurisdiction is not clear. The more interactive, the greater the risk

Is Your Website Accessible?

ADA Compliance

- Little Guidance (no DOJ regulations)
- Many Lawsuits (over 2,200 in 2018)
- Who Needs to Comply?
 - Government funded and Commercial websites
 - Mobile apps too
- Why comply?
 - Expand customer base
 - Avoid litigation
- What is compliance?
 - Web Content Accessibility Guidelines, while not required by law, are generally considered compliant.

Making Your Website Accessible

WCAG 2.0 Guidelines

- Four Principles, Twelve Guidelines
 - **Perceivable**-“Information and user interface components must be presentable to users in ways they can perceive” (e.g., text alternatives to non-text content).
 - **Operable**-“User interface components and navigation must be operable” (e.g., all functionality available from a keyboard and avoiding content that causes seizures).
 - **Understandable**-“Information and the operation of user interface must be understandable” (e.g., make text appear and operate in predictable ways).
 - **Robust**- “Content must be robust enough that it can be interpreted reliably by a wide variety of user agents, using assistive technologies” (e.g. mobile and future technologies).

Bruh, You need to comply with FTC Endorsement Guidelines!

- The owners of the of the gambling site CSGO promoted the site on Twitter: “Bruh .. I’ve won like \$8,000 worth of CS:GO Skins today on [@CSGL Lotto](#) I cannot even believe it!”.
- The FTC responded: “Well, Bruhs, while we’re on the subject of things we cannot even believe, did either of you like consider clearly disclosing that you like “owned” the company? – a material connection requiring disclosure under FTC law?” (plus a three count complaint).

Regulations

- **FTC Endorsement Guides**
 - Truthful content, disclosure of compensation
 - Prominent disclosure, #Ad
- **Children's Online Privacy Act**
 - Enhanced privacy protections for children under age 13
- **Consumer Review Fairness Act**
 - Invalidates standard form contract provisions that restrict the ability of a consumer to publish reviews
- **Restore Online Shoppers' Confidence Act**
 - Free trials must be free. No undisclosed negative options.

Privacy Policies

- Builds trust with potential customers.
- Required by law in many jurisdictions if you collect personally identifiable information and by private companies such as Google and Apple.
- Say what you do, do what you say.
- Make sure your employees and agents do this, as well.
- Some jurisdictions require right to correct and other rights.
- Reserve the right to amend your policy.

Terms of Use

- Identify business as limited liability entity.
- Disclaimers of warranties and limitations on liability.
- Restrict access to consumers who can contract.
- Reserve right to delete (but not edit) content.
- Address ownership of contributed content and incorporate DMCA provisions.
- Indemnification from content providers.
- Arbitration provisions enforceable if reasonably disclosed and accepted.

Insurance

- Maintains status as a Limited Liability Entity
- May be required by contract and you may want to require insurance from your contractors.
- Check for coverage for
 - Infringement
 - ADA Compliance
 - Privacy and data breach coverage

Conclusion

This presentation is only general information and is not intended as legal advice nor as a complete discussion of legal issues related to online

Thank you for your time!

Resources

- Frequently Asked Questions about Copyrights, <https://www.copyright.gov/help/faq/>
- Trademark Basics, <https://www.uspto.gov/trademarks-getting-started/trademark-basics>
- Complying with COPPA: Frequently Asked Questions, <https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions>
- How to Make Your Website Accessible to People with Disabilities, <https://www.whoishostingthis.com/resources/website-accessibility>
- The FTC's Endorsement Guides: What People Are Asking, <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking#about>