



**KLEMCHUK LP**  
PROTECTING INNOVATION

# HELP!

## THEY'RE COPYING MY HOME PAGE!

COMMON ISSUES AND POSSIBLE SOLUTIONS  
FOR PROTECTING WEB DESIGN AND CONTENT

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hotels

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“[The travel site] feels so much like Kayak that without asking, I assumed Microsoft licensed the technology from Kayak. Can you say ‘eerily similar’?”

- David Radin *Pittsburgh Post-Gazette*

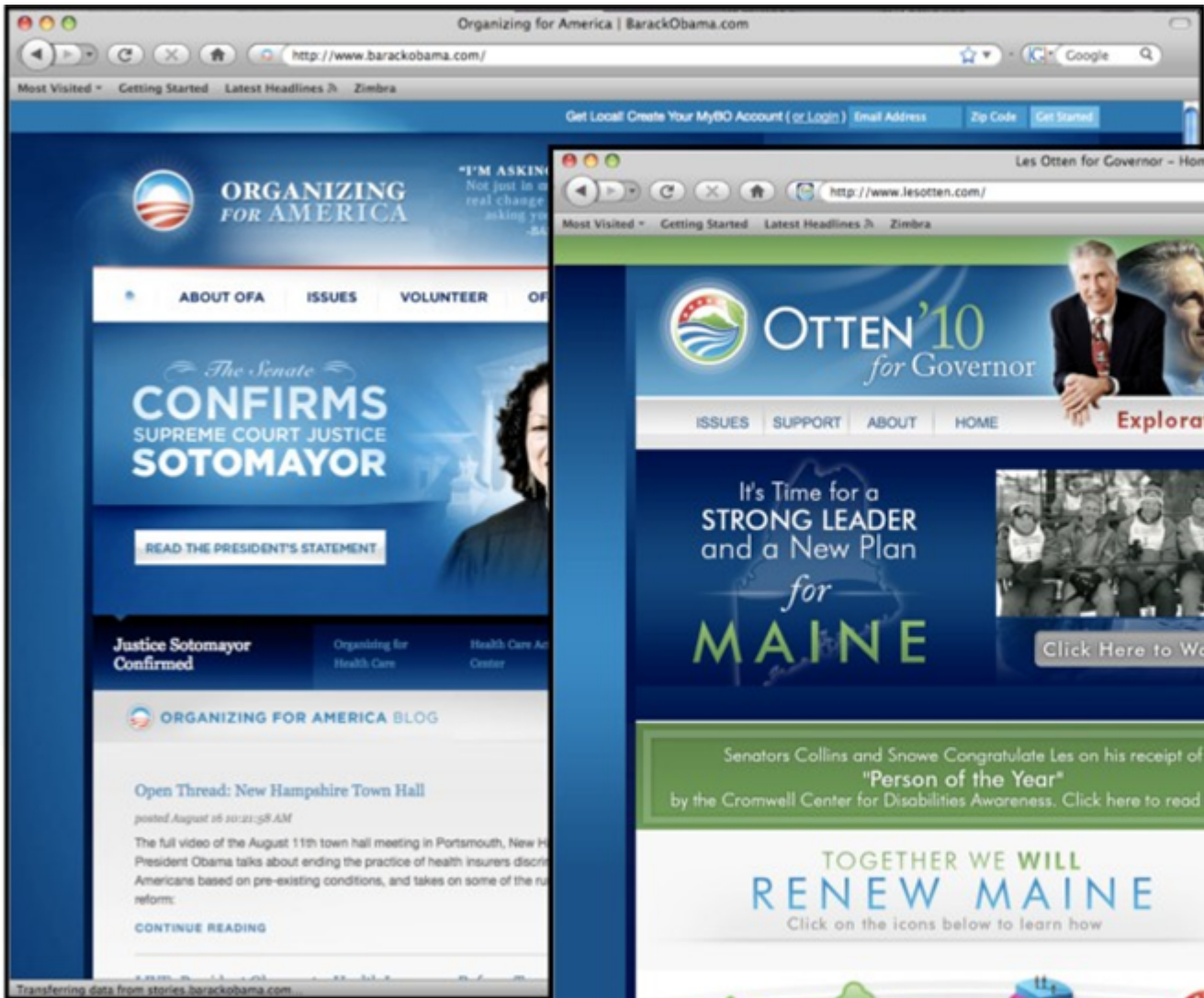
“We are discussing the matter with Kayak. Bing Travel is based on independent development by Microsoft and Farecast.com, which Microsoft acquired in 2008. Any contrary allegations are without merit.”

- Whitney Burk of Microsoft



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“We are very proud of our Web site, which was built from scratch, from the ground up, by a locally owned company -- INsyt of Farmington, Maine.”

Edie Smith, campaign manager for Otten’s exploratory committee



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# Why So Sensitive?

- Websites promote one's brand, which in turn acts as an indicator of quality and goodwill
- Consumers will be confused as to the source or sponsorship
- Diverts traffic away from website
- Could ruin website's goodwill by causing consumers to believe: (a) that the two sites are affiliated; or (b) that the initial website somehow sponsors the repugnant one
- Time and expense of graphic design and coding
- A copied website can deter the originator of the website design from expanding into other markets



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# Strategies

Copyright  
Registration for  
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Copyright  
Registration for  
Screen Shots

Trade Dress  
Protection

Terms of Use  
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Agreements



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# WWW.COPYRIGHT.GOV

The screenshot shows the Copyright.gov website with a navigation menu at the top: About, News, Publications, Forms, Law, Licensing, Registration, Search Records. A 'Hot Topics' sidebar on the left lists various sections like 'Fees Changed Aug. 1', 'Section 105', 'Section 106', 'Section 107', 'Section 108', 'Section 109', 'Section 110', 'Section 111', 'Section 112', 'Section 113', 'Section 114', 'Section 115', 'Section 116', 'Section 117', 'Section 118', 'Section 119', 'Section 120', 'Section 121', 'Section 122', 'Section 123', 'Section 124', 'Section 125', 'Section 126', 'Section 127', 'Section 128', 'Section 129', 'Section 130', 'Section 131', 'Section 132', 'Section 133', 'Section 134', 'Section 135', 'Section 136', 'Section 137', 'Section 138', 'Section 139', 'Section 140', 'Section 141', 'Section 142', 'Section 143', 'Section 144', 'Section 145', 'Section 146', 'Section 147', 'Section 148', 'Section 149', 'Section 150', 'Section 151', 'Section 152', 'Section 153', 'Section 154', 'Section 155', 'Section 156', 'Section 157', 'Section 158', 'Section 159', 'Section 160', 'Section 161', 'Section 162', 'Section 163', 'Section 164', 'Section 165', 'Section 166', 'Section 167', 'Section 168', 'Section 169', 'Section 170', 'Section 171', 'Section 172', 'Section 173', 'Section 174', 'Section 175', 'Section 176', 'Section 177', 'Section 178', 'Section 179', 'Section 180', 'Section 181', 'Section 182', 'Section 183', 'Section 184', 'Section 185', 'Section 186', 'Section 187', 'Section 188', 'Section 189', 'Section 190', 'Section 191', 'Section 192', 'Section 193', 'Section 194', 'Section 195', 'Section 196', 'Section 197', 'Section 198', 'Section 199', 'Section 200'. The main content area features a 'Fees Changed August 1' banner, followed by sections: 'About Copyright' (Copyright Basics, Frequently Asked Questions (FAQ), Current Fees, Taking the Mystery Out of Copyright), 'Search Copyright Records' (Registrations and Documents, Notices of Restored Copyrights, Online Service Providers, Vessel Hull Designs), 'How to Record a Document' (Record a Document), 'Law and Policy' (Copyright Law, Federal Register Notices, Current Legislation, Regulations, Mandatory Deposit, Rulemaking, Rulings Regarding the CRE, More...), 'Related Links' (Patents and Trademarks, Copyright Royalty Board, More...), 'Licensing' (Compulsory and Statutory Licenses), and 'Preregistration' (Preregistration Information, Preregister Your Work). A 'What's New' section is also visible. At the bottom, there is contact information for the U.S. Copyright Office and a feedback icon.

## How to Register a Work



## Publications

- Circulars and Brochures
- Forms
- Factsheets
- Reports and Studies



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# Why Register the Copyright?

- It's cheap!
  - \$35 per work if registered through the eCO. \$50-\$65 per work if registered using paper forms.
- Before a copyright infringement suit may be filed, copyright registration is necessary.
  - Expedited registration is possible for a significantly higher fee (approximately \$760 per work).
- If made before or within 5 years of publication, registration will establish prima facie evidence of the validity of the copyright and of the facts stated in the certificate.
- If made: (a) within 3 months after publication of the work; or (b) prior to an infringement of the work, **statutory damages and attorney's fees** will be available to the copyright owner.
  - Otherwise, only an award of actual damages and profits is available to the copyright owner.



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# Copyright Registration for Code

- Copyright protection extends to copyrightable expression embodied in the computer program.
  - Copyright protection does not extend to ideas, program logic, algorithms, systems, methods, concepts, or layouts.
- Each separately published version of a computer program that contains new, copyrightable authorship has to be registered separately, with a new application and fee.
  - Registrations of subsequent versions cover only the new or revised material.



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# Copyright Registration for Code

- A single registration may be made for a computer program and its screen displays.
  - Registration will extend to any copyrightable screens generated by the program, regardless of whether identifying material for the screens is deposited.



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# Circular 61: Copyright Registration for Computer Programs

- How to Register a Computer Program and Its Screen Displays:
  - Option 1: Answer “computer program” to the “Author Created” question. In this case, deposit the source code as described above. Depositing identifying material for screens is optional.
  - Option 2: Answer “computer program, including text of screen displays,” or “computer program including audio-visual material” or “computer program including artwork on screen displays” in the “Other” portion of the “Author Created” question.



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# Circular 61: Copyright Registration for Computer Programs

- When Using Option 2:
  - You must deposit identifying material for the screen displays in addition to the source code.
  - When the screens are not copyrightable (e.g., de minimis menu screens, blank forms, or the like), the application should not refer to screens.
  - The description of authorship on the application should not refer to elements such as “menu screens,” “structure, sequence and organization,” “layout,” “format,” or the like.



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# Copyright Registration for Screen Shots



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# What Parts of Screen Shots Are Copyrightable?

## Case Law Not Exactly Clear

- *Darden v. Peters*, 402 F. Supp. 2d 638, 643 (E.D.N.C. 2005).
  - “The longstanding practice of the Copyright Office is to deny registration of the arrangement of elements on the basis of physical or directional layout in a given space, whether that space is a sheet of paper or a screen of space meant for information displayed digitally.”



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# What Parts of Screen Shots Are Copyrightable?

## Case Law Not Exactly Clear

- *Int'l Union of Operating Engineers, Local 150, Affico v. Team 150 Party, Inc.*, 2008 U.S. Dist. LEXIS 83828 (N.D. Ill. Sept. 5, 2008).
  - The look and feel of a website may be covered by copyright.



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# Circular 66: Copyright Registration for Online Works

- Applies to works accessed via network.
  - Websites, homepages, and FTP sites
- “The registration will extend only to the copyrightable content of the work as received in the Copyright Office and identified as the subject of the claim.”
- Copyrightable revisions to online works that are published on separate days must each be registered individually.



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# Copyright Registration for Screen Shots



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Terms of Use  
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# Trade Dress Protection vs. Copyright Protection

- Copyright Preemption?
  - Is look and feel protectable under copyright?
  - *Int'l Union of Operating Engineers – N.D. III.*
    - Maybe



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# Trade Dress Protection vs. Copyright Protection

- *Blue Nile, Inc. v. Ice.com, Inc.*, 478 F. Supp. 2d 1240 (W.D. Wash. 2007).
  - The overall look and feel of the website was within the subject matter of copyright.
  - However, determining which portions of a website relate to the “look and feel” of its trade dress claim required greater factual development.
  - Another “maybe” regarding preemption



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# Trade Dress Protection

- Requirements for Protectability
  - Must be distinctive or have acquired secondary meaning
  - Features must be nonfunctional
  - Primary significance is as source identifier
- Likelihood of Confusion



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# Trade Dress Protection

- Is Inherent Distinctiveness Possible?
  - Or is acquired secondary meaning required?
  - Product packaging versus product configuration?
    - *Samara* - Supreme Court held that product configuration cannot be inherently distinctive
    - *Two Pesos* - Supreme Court found that restaurant décor was both packaging and configuration
- Is a website a “virtual storefront”?



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# *GoTo.com v. The Walt Disney Company*, 202 F.3d 1119 (9<sup>th</sup> Cir. 1999)

- Acquired Secondary Meaning?
  - As long as the “vast majority of impressions” of the design have been in its “prototypical form” then secondary meaning may attach.
- Likelihood of confusion standard - *Sleekcraft* factors:
  - Similarity of the marks
  - Relatedness of the goods or services
  - Simultaneous use of the Web as a marketing channel



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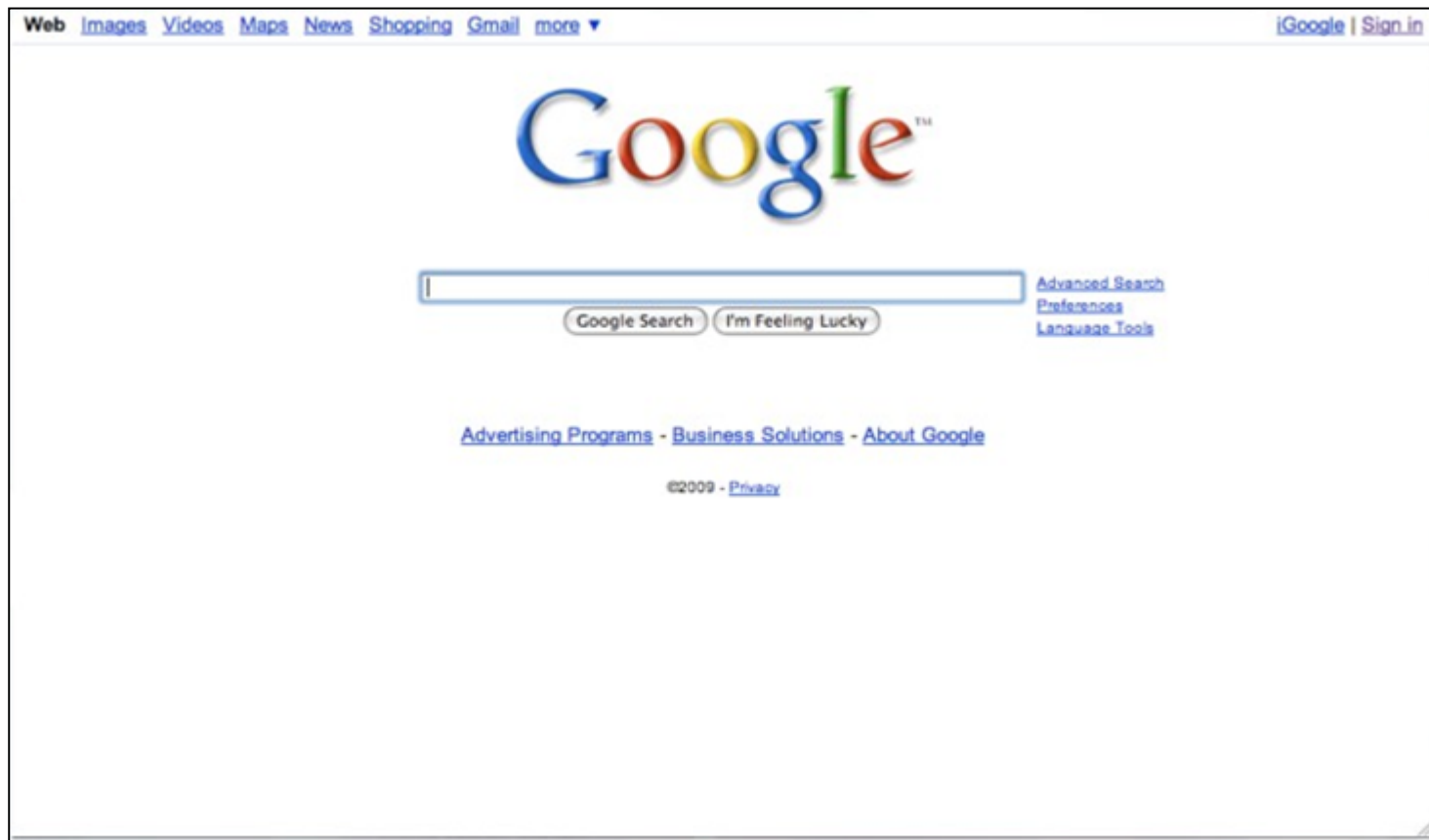
# 15 U.S.C. § 1125(a)(3)

- “the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional.”



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How does functionality fit into the placement of click buttons, commands, titles, etc.?



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# Why not functional items?

- Identification Theory

- A feature is functional if it provides value to the product other than merely identifying the source of the product.
  - Pink insulation?
  - Black engine?
  - Colored dry cleaning pads?

- Competition Theory

- A feature is functional if the feature inhibits a competitor from succeeding in the marketplace.
  - Pink insulation?
  - Yellow traffic signs?



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# Source identifier...

- The primary significance of a product feature or term is to identify the source of the product rather than the product itself.
  - Fundamental tenet of trademark law.



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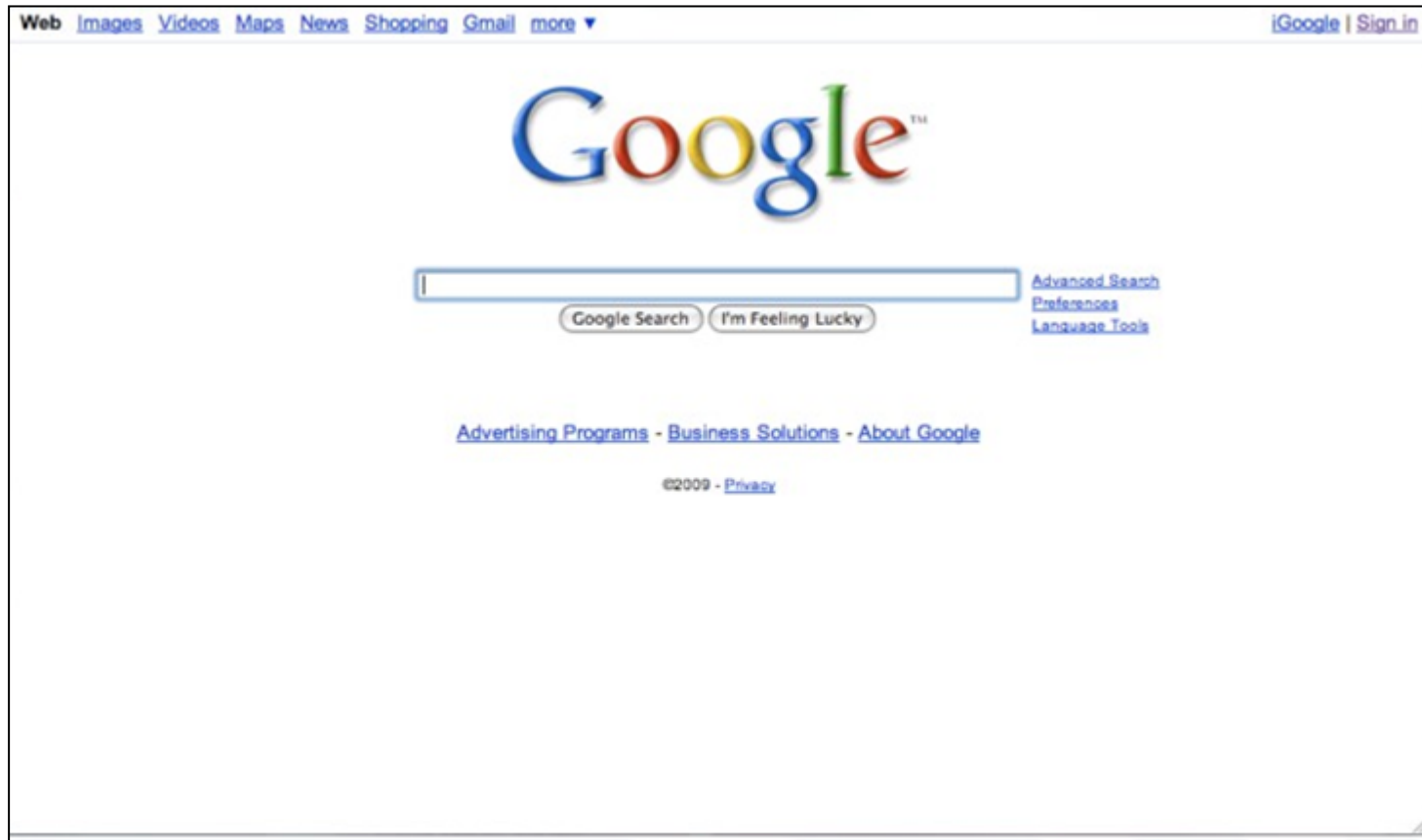
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- Less is more, color scheme, significant white space, font
- Careful selection of trade dress elements



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# Terms of Use and Conditions Agreement

- Is it enforceable?
  - Terms of use are generally enforceable.
  - But claim of intellectual property protection does not establish protectability.
- What the heck – let's give it a shot.



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# Practical Tips: “An ounce of prevention...”

- Ownership & Indemnification
  - Prepare to Attack - Clarify in writing and in advance ownership of the website and its source code as between the business and the website designer
  - Prepare to Defend - Include indemnification obligation against website designer in case allegation of copying is made
- Copyright
  - Register the program code and screen displays frequently - implement a policy/procedure
    - Possible statutory damages and attorney fees
  - Maintain “gold standard” archived copies (unmodified and complete) that directly correspond to each registration



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# Practical Tips: “An ounce of prevention...”

- Trade Dress
  - Identify the key elements sought to be protected
  - Maintain consistency with key elements even when website modifications are made
  - In some cases, may even consider seeking a federal trademark registration (but this would be very rare)
- Terms of Use
  - Include appropriate language to provide possible breach of contract cause of action and to help deter knock-off artists





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