

# A Checklist Of Corporate Website Legal Issues

By Lawrence Savell

As companies initiate and expand the scope of their presence on the Internet, corporate counsel need to be sensitive to and prepared to deal with the myriad potential legal liabilities that may be involved. This article provides counsel with an overview of many of the issues that may arise based on what companies post on their websites, along with practical suggestions on how to minimize such litigation risks.

## Defamation/Libel

As in the print medium, false statements published on websites that defame a person, entity, or product of another can provide the basis for a libel or disparagement claim. While definitions vary, the key is injury to reputation. Classic examples include statements: (1) affecting one's esteem or social standing (such as assertions of criminal conduct or immorality); (2) ridiculing another; (3) imputing current disease or mental illness; (4) alleging general incompetence in one's trade, occupation, office, or profession; or (5) challenging a corporation's integrity, credit, or ability to carry on business, including charges of dishonest or unethical behavior. Care must be exercised that photographs of persons, entities, or products not be incorrectly associated with unrelated negative stories. Defenses to libel actions include truth and the fact that a statement is a fair and accurate report of a court ruling, legislative action, or other official governmental proceeding or record. Statements expressly and clearly of opinion rather than asserted facts still enjoy protection, although the scope of such protected statements has been narrowed in recent years. If a valid claim of libel is raised, a quick, full, and comparably-prominent retraction or clarification may significantly reduce the scope of potential damages.

## Invasion Of Privacy

Statements which invade the privacy of another can provide the basis for a claim. Depending upon the jurisdiction, actions exposing a website operator to liability include use ("appropriation") of a person's name, portrait, or picture for advertising or trade purposes without prior written consent; public disclosure of private and embarrassing facts; and statements portraying one in a "false light" (similar to libel). One defense to an appropriation claim is that a picture was used to depict a newsworthy event or illustrate a matter of public interest with which the picture was reasonably related. There is increasing federal and state legislation regarding Internet privacy. Many companies have drafted and posted "privacy statements" on their websites, promising to protect the confidentiality of user information that may be provided or collected. Companies that undertake such measures must make sure they comply with the representations made in such statements.

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## Copyright Infringement

The use on a website of material to which another owns the copyright may provide the basis for an infringement claim. Caution must be exercised in assuring that text and pictures posted either are internally created or were commissioned by the website operator (as a "work made for hire"), or that permission has been obtained from the copyright owner. A privilege such as "fair use" may apply in certain circumstances, allowing limited use without such permission; however, such privilege may be viewed narrowly by some courts.

A currently "hot" issue is the right of a company to publish electronically on a website, without specific consent, material it had previously published in print with consent. Although some publisher-friendly early rulings have come down, the issue is not fully resolved. The safest way to proceed is with a written contract with the content provider that transfers the broadest range of rights (such as a grant of "all rights").

Recent Internet-specific copyright claims include unauthorized "framing" (the creation by one site of an on-screen border that stays constant even as a visitor jumps to other sites; the leading case was settled with the originator agreeing to cease such activity) and unauthorized linking to specific sub-pages in another's site (bypassing the latter's home page and other material, including advertising; the leading case there was similarly settled). Although limited court guidance currently exists regarding these matters, exercising caution and obtaining appropriate advance consents are warranted.

## Trademark Infringement

Similarly, the unauthorized use of another's trademark on a website may provide the basis for liability. Currently "hot" legal issues are the registration of domain names which allegedly infringe on existing trademarks, and the use of trademarks of others in hidden "metatags" (internal website programming code that is accessed and utilized by many Internet search engines).

## Violation Of Advertising Laws

Given the possibility that a website may be viewed in whole or part as an advertisement, companies must make sure they comply with all applicable advertising, "deceptive practice," and "unfair competi-

tion" laws and regulations. Of course, statements on company websites may also be cited by plaintiffs in support of traditional fraud or breach of contract claims. The use of disclaimers and qualifying language, expressly affirming no warranties are being made and denying any liability for damages, plus specification of the other terms and conditions under which the site and its information are being made available, coupled with a "click-through" agreement from users before proceeding further onto the site, may provide additional insulation to reduce liability exposure.

Particular websites may face specific risks. For example, product manufacturers and sellers must avoid making any unsubstantiated health claims, and investment company operators must properly qualify statements regarding potential outcomes, to avoid lawsuits alleging misrepresentation in and reliance upon same.

## Tortious Interference

A plaintiff may claim that statements appearing on a website have wrongfully interfered with the plaintiff's contractual or business relations with another, causing the plaintiff harm. An example might be a statement on a product manufacturer or service provider's website improperly advocating that consumers not use the products or services of a competitor, which allegedly causes a customer to cease such relations.

## Contracts With Content Providers

Expanding on the point regarding securing electronic rights to materials previously published in print, it is very important that a website operator enter into written contracts with outside authors and other content providers. Such contracts should include a variety of additional provisions such as representations and warranties by the creator that the material is the creator's sole work, that it contains no material that is libelous or which infringes the rights of others or is unlawful, and that it is accurate; indemnification of the publisher against claims relating to the content (the value of this may be limited by the "shallow pockets" of many authors); and the right of the operator to edit or otherwise change the work.

## Statements/Materials Posted By Others

If an operator allows statements or materials by others to be posted on its website through uploads or "chat room" exchanges, a plaintiff might argue that the operator is responsible for or has "republished" such matter. Courts looking at such situations have sometimes been more inclined to find liability where the site operator has exercised some degree of editorial control over such matter. Although the legal issues in this context have not been fully resolved, the prudent course is to exercise caution in the decision whether to allow any third-party postings.

## Linking

A plaintiff may allege that a company's link to another's website makes the company responsible for the content of that other site. To minimize the risk of such a claim, any linking to third-party sites should be accompanied with a notice disclaiming responsibility for and affirmatively denying any endorsement of products, services, or information contained

on that outside site.

Should operators of other sites wish to link to your company's site, counsel should consider requiring that such operators enter into a website linking agreement, an increasingly-popular tool setting forth the requirements with which the operators must comply. As a business matter, however, such precaution should be weighed against the downside of potentially reducing the frequency of desirable linking.

## International Law

As the Internet is an international medium, companies operating websites may potentially be subject to the laws and the jurisdiction of courts anywhere in the world. Obviously, in many countries the freedom of the press and protections and privileges we enjoy under our First Amendment do not exist. In addition, certain products and services promoted on websites may be illegal to advertise or sell in some countries.

## Maintaining Records

Website operators should consider employing an appropriate backup and retention policy and program, presumably consistent with the company's overall retention approach. This may allow the company in the event of a claim to ascertain and establish what in fact was posted on the website at a given time.

## Evaluating Insurance Coverage

Counsel should investigate whether the company's website activities are covered by existing insurance policies, and consider recommending obtaining additional coverage if such is not the case.

## Affirmatively Protecting Property Rights

Companies should take steps to protect their own copyrights and trademarks (such as their name and logo) from being infringed by others. Appropriate copyright and trademark notices must be posted on the companies' websites, as in other publications. Internet searches for company trademarks should be run regularly, including searches for "cybersquatting" domain names registered by others improperly incorporating company trademarks. Intellectual property in digital form can be protected through the appropriate use of emerging technologies such as "watermarking" and encryption.

## Conclusion

The law of the Internet is continually evolving, and many questions remain unanswered. For now, the best advice is caution, adherence to the principles developed in the traditional print realm and guidelines already adopted for the company's other business dealings, and either refraining from proceeding or obtaining prior written consent in situations of potential liability. Internet design and maintenance personnel should be educated and periodically updated about pertinent legal considerations. Internal procedures should be developed to provide that corporate counsel (and, if in-house counsel deem necessary, appropriate outside counsel) will be consulted in the case of any questions or uncertainty as to the legal implications of contemplated website efforts.