

## Law & Technology

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# Getting To Know You

*Negotiating the complex hazards of ownership, tracking and other aspects of building an interactive online site.*

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**T**HERE ARE many services that will design a Web site and run certain functions on behalf of the owner, but the owner should remain alert to a number of legal implications, some of which are unique to the Internet. Recognizing which aspects of a client's Web site may give rise to liability or objections from competitors before the site goes live can protect a client from bad press and expensive legal fees.

Consider the Vacation Charity, a new charity dedicated to making sure overworked attorneys have a least one vacation a year.

### The Right Name

As a new entity, the Vacation Charity should conduct a comprehensive trademark search for two reasons:

1. The search will identify any other organizations using "Vacation Charity" as their name; if there are others, it may be necessary to choose a different name for the charity.
2. Since the founders of the Vacation

Charity want to raise money on the Internet, the search will let them know if they can register <vacationcharity.org> as the domain name for their Web site. If a search is not performed, the Vacation Charity may be risking charges of trademark infringement and cybersquatting (under either the Uniform Domain Name Dispute Resolution Policy or the Anticybersquatting Consumer Protection Act) if it chooses a name similar to an existing charity and begins operating a Web site at a domain name that is similar to the name of an existing charity.

Once a suitable name is chosen and a corresponding domain name has been registered (through a registrar such as Network Solutions, Register.com or Go Daddy), a Web site will need to be constructed. Like many other companies, the Vacation Charity chooses to hire an outside designer to create, or "code," its Web site. This raises several issues.

### Ownership

Is the copyright in the resulting Web site and the computer code that creates the site owned by the Vacation Charity or the designer? If the designer develops the Web site and code on her own, with little or no input from the charity, then, under the Copyright Act, the designer would likely own the copyright in the Web site and code.

If the designer were an employee of the charity and designing the Web site and writing the code were among the duties for which she was hired, then, pursuant to the Copyright Act, the charity would likely own the copyright in the Web site. To avoid any dispute over ownership of the copyright in the Web site and the code, there should be a written agreement between the Vacation Charity and the designer in which the designer agrees to assign all of her rights (including copyright rights, trademark rights and rights in any invention that may be patentable) in the Web site and the code to the charity.<sup>1</sup>

### Access

Any agreement with the designer should also require the designer to give the charity access to all files needed to maintain and operate the Web site, and, in particular, to provide any logins and passwords necessary for accessing the servers where the Web site is hosted. This is particularly important if the designer will be modifying and updating the Web site for the charity on an ongoing basis.

If the designer feels that she is being underpaid for her work, she would be able to wreak havoc with the charity's online fundraising efforts by, for example, modifying the Web site so that it could no longer accept credit card payments. Without the appropriate login and password information (this includes any so-called

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“security” information, or information needed to retrieve a password when it is forgotten, since a designer with the login and password for the server hosting the charity’s Web site could change the login and password), the charity would be unable to reverse the harmful acts of the disgruntled designer.<sup>2</sup>

## Patent Protection

If the charity’s Web site incorporates patented technology relating, for example, to the receipt of payments through the Internet, the Web site should be clearly marked with the number of the applicable patent, since failure to include the patent number on the Web site could preclude the availability of damages if a third party infringes that patent.<sup>3</sup>

## Liability

Once the Vacation Charity’s Web site is operating for a little while, it may decide to add features. One feature it may want to add is an area of the Web site where users can post images and video from the Vacation Charity’s fundraising events. This may very well be a popular feature, and a few users may post video showing a local news broadcast covering such an event. The act of posting the video on the Vacation Charity’s Web site would not necessarily give rise to liability on the part of the charity for direct copyright infringement.<sup>4</sup> However, if users could play back the posted video (or audio) without having to first download the video, the Web site could give rise to liability for direct infringement resulting from the unauthorized public performance of the video.<sup>5</sup>

Even if users cannot play the posted video from the news broadcast without first downloading it, the Vacation Charity may be liable for contributory and/or vicarious copyright infringement unless it takes appropriate steps to shield itself from such liability. The shield from liability is found in provisions added to the Copyright Act in 1998 as part of the Digital Millennium Copyright Act,<sup>6</sup> which limits the liability of “service providers” for direct, contributory or vicarious copyright infringement in certain circumstances if “service providers” comply with complex statutory provisions requiring, among other steps: the adoption and implementation of a policy for terminating repeat infringers and of a notice and take-down system by which copyright

owners can notify the “service provider” that infringing material is on its Web site, so that the “service provider” can promptly remove that material.

Compliance with the statute requires close consultation between counsel and the Web site designer to insure that all of the statutory requirements are satisfied.

## Data Collection and Privacy

The Vacation Charity may also choose to collect information from visitors to its site, for instance, to ensure that it understands the personal history and vacation preferences of the overworked attorney who may be awarded the vacation of a lifetime. The Federal Trade Commission (FTC), which has the authority to challenge unfair or deceptive practices (15 USC §45), has set forth five “Fair Information Practice Principles” that the charity should follow.<sup>7</sup>

1. The first is notice to the visitor of the charity’s information collection practices. Web sites commonly include (a) the identity of the entity collecting the data, (b) the use that will be made of the data, including how long the data will be saved, (c) potential recipients who will share the data, (d) the type of data being collected, (e) whether the data is collected actively through direct questioning of the visitor or passively via cookies,<sup>8</sup> (f) whether the Web site requires the data (and the consequences of not providing the same) or whether the provision of the data is voluntary, and (g) how the data collector is safeguarding the “confidentiality, integrity and quality of the data.” This information is typically set forth in the Privacy Policy section of the Web site, along with notices regarding the Conditions of Use of the Web site. The goal of the FTC is to ensure that the policies are simply, clearly and obviously displayed on the Web site so that the consumer is not misled. This is especially important if financial data are being collected.

2. The second practice principle relates to consumer choice and consent, or opt-in/opt-out. An opt-in policy lets the consumer decide whether he or she will divulge the requested information; an opt-out policy asks the consumer to prevent the disclosure and collection of the information.

3. Next, in following the third principle, the Vacation Charity would provide the visitor

with access to the data collected, with the ability to advise the charity of the accuracy and complete nature of the data and to change the same.

4. Fourth, the charity must provide that the data are secure from unauthorized access, theft, tampering and destruction.

5. Last, the charity’s Web site should have a mechanism whereby consumer complaints can be remedied.

If the charity were to collect information directly from the attorney’s children (under 13 years of age), the provisions of the Children’s Online Privacy Protection Act (COPPA) would come into play.<sup>9</sup> Under COPPA, Web sites must obtain “verifiable” parental consent before collecting, using or disclosing a child’s personal information. A site that is not directed to children but may be attractive to them might consider implementing an opt-in process (such as the entry of one’s birth date) to screen out children under age 13. COPPA permits the entry and use of credit card information as a way to verify parental consent. However, if the Web site can offer its content to children without collecting any personal data, then it is permitted to do so.

COPPA also provides exceptions; a Web site operator is allowed to collect a child’s e-mail address once to respond to a specific request. The operator may also collect the child’s and the parent’s e-mail addresses more than once, for instance, to subscribe the child to an electronic newsletter. But the operator must notify the parent of the site’s information practices and give the parent the option to opt out.

Although the implementation of these best practice principles may appear very theoretical, in practice, they are quite important to the protection of consumer data. Privacy advocates recently noted that Sears’ community portal, in violation of Sears’ privacy policy, permits a visitor to the site to download another user’s personal purchase history by merely inputting the other user’s name, phone number and address.

## Tracking and Conditions of Use

It is conceivable that as part of its business plan, the Vacation Charity will want to track its visitors’ online activity on its site in order to target advertising—for instance

from airlines, hotels, or travel-related companies—to each particular visitor. Information tracked could include the searches conducted by the visitor, the Web pages and content viewed, and identification of any downloads. Although such online behavioral advertising is a popular way for Web sites to raise revenue, many privacy organizations, and the FTC, are concerned about the privacy issues surrounding such tracking. In November 2007, the FTC proposed for public and industry comment, self-regulation incorporating the following four principles.<sup>10</sup> The comment period expires on Feb. 22, 2008.<sup>11</sup>

The first principle (“transparency and control”) responds to consumers’ complaints that they are unaware that their activities are being tracked; in response, the FTC proposes that each Web site post a clear, concise policy statement explaining the tracking and allow consumers an option to permit or deny the Web site the ability to track (either opt-in or opt-out).

The second principle concerns the site’s implementation of adequate security protocols to protect the consumers’ data. It encourages the site to hold the data only for the limited period of time needed to accomplish the site’s reasonable business purpose.

For the third principle, the FTC focused on consumers’ comments regarding Web sites’ unilateral and hidden changes to privacy policies. The FTC notes that each site is required to follow the policy it has initially set forth with respect to protection of consumer data even if changes to the policy are implemented later; accordingly, the FTC suggests that the site be required to gain consumers’ direct consent to any changes in the way consumer data are collected, used and shared by the site.

The fourth principle is likely to engender the most comment from the public and industry. The FTC proposes that consumers be given the ability to opt in or opt out of the collection by Web sites of sensitive personal data for behavioral advertising purposes. For obvious reasons, consumers are concerned about the tracking of their Web site searches about health conditions, sexual orientation, or political views, among others. Since other consumers might find targeted advertising helpful in these areas,

the FTC, as a consumer protection agency, proposes affirmative express consent and asks for public comment regarding what type of data should be considered “sensitive,” and whether such tracking of sensitive data should be permitted at all, even with affirmative express consent.

Prior to the Nov. 1-2 Town Hall Meeting on this issue in Washington, D.C., (see note 10), nine privacy organizations<sup>12</sup> recommended that the FTC implement a “Do Not Track” list similar in theme to the “Do Not Call” list, whereby consumers could prohibit servers on the list from tracking, storing and using their data for behavioral advertising. The proposal would necessarily require each advertiser that places tracking technologies on consumers’ computers to register the domain names of all servers employed for tracking purposes and would encourage the development of a plug-in so that consumers could download the Do Not Track list directly on their own computers, preventing any site from tracking behavioral data.

In addition to having a comprehensive Privacy Policy posted on the Vacation Charity’s Web site, the site should also conspicuously post its Conditions of Use. Commonly found in this section of the site are its policy regarding electronic communications with site visitors, namely use of the visitor’s e-mail address; notice of the site’s own trademarks, copyrights and patents; the site’s explanation of the use the visitor is permitted to make of the site as well as restrictions on the visitor’s ability to copy the site in whole or in part or to download certain material from the site; information regarding the visitor’s responsibility to secure her password and account information; the site’s policy regarding posting of content; a complaint procedure; legal notices, such as a disclaimer, dispute resolution or notification to the site by the visitor of copyright or trademark infringement; and, for sites selling products, the site’s policies regarding pricing, payment, purchase, shipment, and returns. Last, most sites have “Help” sections, which can be static or interactive (live chat).

Addressing the issues raised here, which often requires the involvement of experienced counsel, can help protect clients from nasty surprises and smooth their entry into the ever-more pervasive arena of cyber visibility and marketing.

1. Situations where the Web site designer owns the copyright in a Web site have the potential for bitter disputes. Thus, if the designer of the Vacation Charity owns the copyright to the charity’s Web site (as well as the underlying code), it could be difficult for the Vacation Charity to make minor modifications to or update its Web site; if the modified or updated Web site retains most of the look and feel of the Web site created by the designer and, therefore, is substantially similar to the Web site created by the designer, the designer could assert a claim for copyright infringement.

2. See, e.g., Electronic Communications Privacy Act, 18 USC §2702; Computer Fraud and Abuse Act, 18 USC §1030.

3. 35 USC §287; *Sovereign Software LLC, v. Amazon.com Inc.*, 383 F.Supp.2d 904, 909 (E.D. Tx. 2005) (failure to mark Web site selling patented software limits availability of damages from alleged infringement of patented software).

4. *CoStar Group Inc. v. LoopNet Inc.*, 373 F.3d 544, 555 (4th Cir. 2004); *Religious Tech. Ctr. v. Netcom On-Line Comm. Servs. Inc.*, 907 F.Supp 1361, 1367-1373 (N.D. Cal. 1995) (bulletin board system not directly liable for copyright infringement resulting from user’s posting of infringing content). See *Sega Enterprises Ltd. v. Maphia*, 948 F.Supp. 923 (N.D. Cal. 1996) (service provider not liable for direct infringement resulting from uploading since someone other than service provider had uploaded files to bulletin board system).

5. See *UMG Recordings v. MP3.com Inc.*, 92 F.Supp.2d 349 (SDNY 2000) (finding presumptive case of infringement where defendant played music copied from CDs over the Internet).

6. 17 USC §512.

7. Fair Information Practice Principles, Federal Trade Commission, [www.ftc.gov/reports/privacy3/fairinfo.shtm](http://www.ftc.gov/reports/privacy3/fairinfo.shtm).

8. A Cookie is “a computer file containing information about a user that is sent to the central computer with each request. The server uses this information to customize data sent back to the user and to log the user’s requests;” [http://encarta.msn.com/dictionary\\_1861600123/cookie.html](http://encarta.msn.com/dictionary_1861600123/cookie.html).

9. 15 USC §§6501-6508 (1998).

10. The FTC on Nov. 1-2 held a Town Hall Meeting in Washington, D.C., on this subject titled “Behavioral Advertising: Tracking, Targeting and Technology.” Information about the meeting can be found at <http://www.ftc.gov/bcp/workshops/ehavioral/index.shtml>.

11. Comments may be sent to [BehavioralMarketingPrinciples@ftc.gov](mailto:BehavioralMarketingPrinciples@ftc.gov).

12. The Center for Democracy and Technology, Consumer Action, Consumer Federation of America, Electronic Frontier Foundation, Privacy Activism, Public Information Research, Privacy Journal, Privacy Rights Clearinghouse, and World Privacy Forum; see <http://www.cdt.org/privacy/20071031donottrack.pdf> for a practical illustration of the function of the list.