

**Internet Legal Issues:
How to Protect Your Clients and Yourself on the Net**

presented by

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Internet Legal Issues: How to Protect Your Clients and Yourself on the Net

I. Introduction.

A. The Internet is creating a whole new group of issues which involve Intellectual Property (IP) law. Although the factual situations are new, the principles of Intellectual Property law remain the same. Lawyers, the courts, and lawmakers must face the challenge of adapting these IP principles to the Internet.

B. Before plunging into a discussion of IP issues on the Internet, it is first necessary to have a solid foundation in the basic IP principles. The discussion below provides basic information for each of the four main types of IP: trademarks, copyrights, patents, and trade secrets. Then, in Section VII below, we will discuss the legal issues arising on the internet.

II. Trademarks.

Trademarks are words, symbols, sounds, or other sensory impressions which are used by a merchant to identify and distinguish that merchant's goods or services from the goods or services of others.

Tradenames are used to identify the name of a business, as compared to trademarks, which are used to identify the source of goods or services. In some cases there can be an overlap between tradenames and trademarks.

A. Basis in Law.

1. The principal law governing trademark rights is the Lanham Act. *See* 15 U.S.C. §§1051 -1127. The Lanham Act includes provisions which protect the rights of trademark owners who have federal registrations. It also includes provisions which protect the rights of owners of unregistered marks if the mark has been used in interstate commerce..

2. Most states have trademark laws which are patterned after the Lanham Act. Louisiana's statutory provisions on trademark protection are found at L.R.S §§51: 211-284.

B. Nature of Trademark Rights.

A trademark owner has the right to prevent others from using marks which are likely to cause confusion among potential customers as to the source of the goods or services. This likelihood of confusion standard is used by courts to determine whether there is infringement.

The likelihood of confusion standard is also used by the U.S. Patent and Trademark Office (PTO) to determine whether a federal registration should be granted. Most state trademark offices perform only a perfunctory search. Except when an application is made for a mark which is an exact duplication of an existing registration, it is rare that a state trademark office will reject a trademark application for conflict with another mark.

C. How Are Trademark Rights Obtained?

1. Usage.

Generally trademark rights are acquired in two ways. The first way is by use - rights acquired this way are known as common law rights. The main disadvantage of relying on common law rights is that the trademark owner will have to prove trademark ownership in an infringement suit.

2. Registration.

The second and better way of acquiring trademark rights is by use and registration. Although one can obtain state registrations, federal registration provides the strongest procedural and substantive advantages.

a. Advantages of Federal Registration.

Federal registration affords two principal benefits to the trademark owner. The first benefit is that the trademark owner is able to acquire certain procedural advantages by virtue of the registration. Some of these procedural advantages have to do with relieving the trademark owner of the burden of having to prove ownership and use in an infringement suit. Another procedural advantage is that if the mark has been registered for five years and certain procedural requirements have been met, the mark becomes incontestable. A defendant in an infringement suit involving an incontestable mark is barred from asserting certain defenses.

The second principal benefit of federal registration is that under the federal registration procedures one can acquire a federal registration for a mark before the mark is used. This is done by the filing of an intent-to-use application. This ability to reserve a mark is in sharp contrast to common law rights, which are created only through use of the mark. Suppose, for example, that you are Ford Motor Company and you are thinking about introducing a new sports car. You want to name it after an animal as you have in the past but are unsure of which animal name to use: Palomino, Gazelle, or Springbok. Using the intent-to-use application process, Ford can apply for federal registrations for all three of those marks, and then wait until later to determine which mark it is actually going to use. There is a deadline by which the registrant must show use of the mark.

b. Procedure for Federal Registration.

The procedure for federal registration is relatively simple. There are specific classes of goods and services for trademarks, and there are certain filing fees for seeking a registration in each class. The Trademark Office filing fee for a single class application is \$245.00. As mentioned earlier, the PTO will use the likelihood of confusion standard to determine whether to allow registration of a mark. The trademark examiner will look at the mark for which registration is being sought and will conduct a search of currently registered marks as well as other data bases. The trademark examiner will decide whether the mark for which registration is sought would create a likelihood of confusion with existing marks.

c. Trademark Searches.

Prior to filing for federal registration, the applicant should obtain a full trademark search from a professional search firm (such as Thomson&Thomson) and have the search results evaluated by an attorney familiar with trademark law. Thomson&Thomson charges about \$400.00 for a full search. A computer screening search can be done for a lower cost but it will not discover as many potential problems as the Thomson & Thomson search.

D. Duration of Trademark Rights.

Federal registrations are valid for 10 years, and can be renewed indefinitely for successive 10 year periods so long as the mark is still being used. Louisiana state registrations are also effective for 10 year periods. Common law usage rights can last forever, but can be interrupted by periods of non-use.

E. How Are Trademark Rights Enforced.

To prevail in an infringement suit the plaintiff trademark owner must prove that the defendant's mark creates a likelihood of confusion as to the source of goods or services.

A prevailing plaintiff in a trademark infringement suit is entitled to recover actual damages and the defendant's profits. In cases of willful infringement the court can treble the damages and award attorney's fees. *See* 15 U.S.C. §1117.

F. The Likelihood of Confusion Standard. There are seven principal factors which are evaluated to determining likelihood of confusion.

1. The uniqueness of the mark.
2. The relatedness of the products or services, including the likelihood of expansion of the line of products or services.
3. The similarity of the marks in appearance, sound or meaning.
4. Evidence of actual confusion.
5. The channels through which the products or services would be marketed
6. The degree of study used by a consumer in purchasing the products or services.
7. The intent of the applicant or defendant in selecting the mark so as to use the good will associated with the registrant or plaintiff.

The likelihood of confusion standard is probably best illustrated by an example of an actual mark. One morning at the health club while I was churning away on the treadmill, I noticed that the treadmill had the trademark "STARTRAC." I did not see the ® symbol which would indicate a federal registration for the mark. Suppose the manufacturer applied for a federal registration for STARTRAC.

The Trademark Examiner would probably find a registration for STAR TREK in one or more of the service classes related to entertainment, and in some goods classes as well. The Examiner would ask whether there would be a likelihood of confusion between

STARTRAC for treadmills and STAR TREK for the television show and other merchandise that is marketed using the STAR TREK mark. In determining whether there is a likelihood of confusion the examiner will consider the similarity of the marks, the similarity of the goods or services, and the other factors listed above.

G. The Strength of a Trademark.

The initial strength of a trademark is based on its relation to the goods and services for which it is used. Arbitrary and fanciful marks are the strongest marks because they have no relation whatsoever to the goods and services (CHIQUITA for bananas, ZAPP'S for potato chips). Marks which are merely suggestive of the product or service (EAGLE for golf clubs) are next along the spectrum. Marks which are descriptive of the goods or services are not enforceable unless secondary meaning can be shown (EASY-GLIDE for dental floss). A generic term which is the basic word used for the product or service (CHAIR for chair) is not protectable as a trademark under any circumstances. *See* 15 U.S.C. 1152(e).

H. Dilution.

A recent change in trademark law was the Federal Trademark Dilution Act of 1995. *See* 15 U.S.C. §§1125, 1127. Prior to the federal act dilution was a matter of state law. Both state and federal law provide protection for marks which are determined to be famous; and this protection is greater in scope than that afforded the mark owner under trademark

infringement law. Take an example using a very famous and well-know mark, McDonald's. Suppose my given name is McDonald and I make grocery carts. I put my name on the carts, and call them McDonald's Grocery Carts. Under a likelihood of confusion standard, a court may determine that a potential customer would not be confused and think that the hamburger McDonald's is the source of my carts because the goods and services are very different. Nevertheless, under dilution law a court may find that allowing me to use McDonald's for grocery carts would dilute the power, fame, and goodwill of McDonald's more famous mark, and enjoin me from using the mark.

III. Copyright.

Copyright protection is attractive in comparison to patent and trademark protection because it is relatively easy and inexpensive to obtain.

A. Basis in Law.

1. The constitution gives Congress the power to promulgate copyright laws.

"To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries"

U.S. Constitution, Article I, Section 8.

2. 1976 Copyright Act - 17 U.S.C. §§101-810, 1001-1010.

3. The Berne Convention Implementation Act harmonized U.S. copyright law with the provisions of the Berne Convention.

4. The Architectural Works Copyright Protection Act of 1990 added architectural works to the list of works which can be protected by copyright.

5. The federal copyright laws expressly preempt any state laws which purport to effect any of the rights encompassed by copyright.

B. Nature of Copyright.

1. Copyright protects “original works of authorship fixed in any tangible medium of expression.” 17 U.S.C. §102.

2. The owner of a valid copyright has the exclusive right to:

- a. to reproduce the copyrighted work in copies or phonorecords;
- b. to prepare derivative works based upon the copyrighted work;
- c. to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- d. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

e. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

f. in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. §106.

3. Copyrights are different in nature than patent rights. The patent owner can exclude others from making, using or selling the patented invention regardless of whether the defendant has copied from the patent. In contrast, copyright infringement occurs only when the defendant copied from the protected work. If the defendant independently creates his or her work there is no copyright infringement.

C. Duration of Copyright.

1. When Does Copyright Protection Begin?

Copyright protection begins immediately upon fixation of the work in a tangible medium of expression.

2. When Does the Copyright Protection End?

a. For works for which the author is was the original owner, the copyright protection subsists for the life of the author plus 50 years.

b. For anonymous works and works made for hire ¹ the copyright subsists for 75 years from publication or 100 years from creation, whichever is earlier.

D. How Obtained.

Since the United States joined Berne Convention, the author does not need to “copyright” his or her work - the protection is automatic. The only requirements are that the work must be original (not copied) and must exist in some tangible medium. For example, if an artist paints a painting, copyright protection exists immediately in that painting. However, as will be discussed later, notice and registration are still prudent measures which the copyright owner should take.

E. Notice.

The copyright notice consists of three parts.

¹ 17 U.S.C. §101 defines a "work made for hire" as
(1) a work prepared by an employee within the scope of his or her employment; or
(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

17 U.S.C. §101.

1. The first part of the copyright notice is the word copyright, the symbol "©," or the abbreviation "Copr."
2. The second part of the copyright notice is the year of the first publication of the work.
3. The third and final part of the copyright notice is the name of the owner of the copyright. The name of the owner can be abbreviated so long as one trying to inquire into the nature of the copyright can ascertain the owner's identity.
4. If the work included a proper copyright notice, a defendant in an infringement suit cannot claim that his or her infringement was innocent. *See* 17 U.S.C. §401.

F. Registration.

A copyright owner should consider registering his or her work with the U.S. Copyright Office - a very simple process. Unlike the trademark and patent application processes, a search is not required prior to submitting a copyright registration. The U.S. Copyright Office registration fee is only \$20.00.

G. What Can Be the Proper Subject Matter of Copyright Protection.

1. The following works can be protected by copyright.
 - a. literary works;
 - b. musical works, including any accompanying words;

- c. dramatic works, including any accompanying music;
- d. pantomimes and choreographic works;
- e. pictorial, graphic, and sculptural works;
- f. motion pictures and other audiovisual works;
- g. sound recordings; and
- h. architectural works.

17 U.S.C. §102.

2. Copyright law will not protect any of the following: ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries, regardless of the form in which they are described, explained, illustrated, or embodied in any such works. *See* 17 U.S.C. §102

H. Infringement.

1. Injunctive Relief .

In an infringement suit the prevailing copyright owner can obtain injunctive relief.

2. Damages.

The copyright owner must elect which type of damages he or she wants to pursue, either actual damages or statutory damages. Actual damages are the greater of the copyright owner's profits or the defendants' profits. The Court can award statutory damages of up to \$20,000 for each work infringed, and up to \$100,000 for each work infringed if the

infringement was willful. *See* 17 U.S.C. §504. Attorneys fees may also be awarded in willful cases. However, with some exceptions, if the copyright owner's work was not registered at the time the infringement occurred, the copyright owner cannot recover statutory damages or attorney's fees. The Federal District Courts have exclusive jurisdiction over copyright cases.

IV. Patent.

A. Basis in Law.

1. The U.S. Constitution grants Congress the power to “promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries” *See* Article I, Section 8, U.S. Constitution.

2. Patent Act - 35 U.S.C. §§1-376

3. Patent Cooperation Treaty.

4. Paris Convention

B. Nature of the Patentholder's Rights.

1. A patent gives the patentholder the right to exclude others from making, using, selling, offering for sale, or importing the patented invention. 35 U.S.C. §154.

2. The patentholder owns a right which is negative in nature. The patent does not give the patentholder the right to practice the invention, it gives the patentholder only the right to exclude others from doing so. So in rare cases an inventor may obtain a patent on a device but when the inventor makes or sells the device, the inventor may be infringing another patent.

3. Utility Patents.

Utility patents provide the broadest protection. For a utility patent, the patentholder's right to exclude others from practicing the invention begins when the patent is issued and expires 20 years from the filing of the patent application. 35 U.S.C. §154.

4. Design Patents.

Design patents have a much narrower scope of protection than utility patents. A design patent is granted for a new, original, and ornamental design for an article of manufacture. 35 U.S.C. §171. A design patent expires 14 years from the date it was issued. 35 U.S.C. §173.

C. Obtaining a Patent.

To obtain a patent the inventor must submit a patent application to the United States Patent and Trademark Office (PTO).

1. Representation.

An inventor can be represented before the PTO by a patent attorney or agent, or the inventor can file the application pro se. Both patent attorneys and patent agents must possess a science or engineering degree, and they must pass the Patent Exam.

a. Patent agents are not attorneys; therefore they cannot represent parties in infringement suits nor can they render infringement opinions. However, they can prepare and file patent applications and represent the inventor before the PTO.

b. Patent attorneys must obtain an engineering or science degree, pass the patent exam, and be admitted to practice law in at least one state.

2. The patent application can be a rather lengthy document. It will include a detailed description of the invention and a section containing the claims. The application, if approved, will be the source document for the issued patent, to include any amendments made during the prosecution of the patent.

D. Enforcement of Patent Rights.

Patents can be enforced against a defendant even if the defendant had no knowledge of the patent. The Federal District Courts have exclusive jurisdiction over patent cases.

1. Damages.

The Defendant will be liable in some cases for the patentholder's lost profits, and at a minimum the patentholder is entitled to recover no less than a reasonable royalty. In

cases of willful infringement the patentholder can be awarded treble damages and attorney's fees. 35 U.S.C. §§284-285.

2. Injunctive Relief.

The plaintiff patentholder can also be awarded injunctive relief ordering the defendant to cease the infringing conduct. 35 U.S.C. §283.

E. Advantages and Limitations of Patent Protection.

1. Advantages.

The scope of protection from a patent is very broad. For example, a patent on a method allows the inventor to exclude others from using the method, even if they perform the method with different devices which the inventor originally used. Additionally, as discussed above, the general rule is that in determining patent infringement it is irrelevant whether the defendant copied the plaintiff's invention.

2. Limitations.

a. Disclosure.

In order to obtain a patent the patent applicant must fully disclose the invention to the public, to include "the best mode" for practicing the invention.

b. Invalidity.

Although the patent is presumed to be valid, the patent owner puts the patent at risk every time an infringement suit is brought. It is inevitable that the defendant will assert the invalidity of the patent as a defense.

F. International Considerations.

1. Patent Cooperation Treaty.

U.S. Patents are only enforceable in the United States. Obtaining foreign patent protection is an expensive process, although it is somewhat streamlined by the Patent Cooperation Treaty (PCT).

2. Absolute Novelty.

In the United States we give our inventors one year from certain triggering events to file for patent protection. In many foreign countries if any triggering event occurs before the patent application is filed no patent may issue. Novelty issues are like prescription issues - if someone talks to you about seeking patent protection, at a minimum you should advise them to not disclose the invention, publicly use the invention, sell the invention, or offer to sell it without first making decisions about patent strategy.

G. What Can Be the Proper Subject Matter of a Patent? 35 U.S.C. §101.

1. Processes

2. Articles of Manufacture

3. Compositions of Matter

4. Improvements of Any of the above

H. Requirements for Patentability. 35 U.S.C. §§101-103.

There are three statutory requirement for obtaining a patent.

1. Novelty.

To satisfy the novelty requirement the invention must be new. If, prior to the date of invention, others have described the invention in a printed publication or patent, or made certain public disclosures of the invention, the invention will lack novelty and no patent will issue. Additionally, as will be discussed below, the inventor's own acts can be a bar to patentability if the inventor does not file a patent application within one year of the inventor's own acts in publicly disclosing or using the invention, selling the invention, or offering the invention for sale.

2. Utility.

The second requirement, utility, means the invention must be useful, and normally the utility requirement is easily satisfied. However, the utility requirement may be an issue if the Patent Examiner is not convinced that the invention will work. Utility problems usually occur only in inventions related to biology, chemistry, or medicine. For example, an inventor may apply for a patent for a rubbing compound which the inventor claims can cure arthritis. The patent examiner will not simply take the inventor's word that the invention cures arthritis. The Examiner will want to see test results and studies which prove

that the compound actually works. If it is shown to work to the satisfaction of the patent examiner, the invention will satisfy the utility requirement.

3. Non-obviousness.

The last requirement for patentability is that the invention must be non-obvious. Generally, when a patent examiner examines the claims in an application the examiner will either allow or reject each claim. Because rejections based on the examiner's belief that the invention is obvious are the most common rejections, and because non-obviousness is such a subjective requirement, it is the subject of most arguments with the PTO. In a typical obviousness rejection the Examiner will cite two or more patents and tell the inventor that these two patents, when combined, contain all the elements of the claimed invention.

I. Bars to Patentability.

Even if an invention meets the requirements for patentability stated above, no patent will issue if, more than one year prior to the filing of the patent application, the inventor did any one of the following.

1. Described the invention in a printed publication anywhere in the world.
2. Publicly used the invention in the U.S.
3. Sold the invention or offered the invention for sale in the U.S.
4. As discussed above, many there is an absolute novelty requirement for many foreign countries (i.e. there is no one year grace period).

J. Claim Coverage

The claims are the most important part of the patent because they define exactly what the inventor owns.

Claims in a patent are analogous to the physical description of real property in a deed. A real property description, for example, might state "from the Southwest Quarter of the Northeast Quarter of Section 2 of the Calcasieu Township go north 50 feet, go east 375 feet,...." A claim in a patent for a method of separating oil and water may include a step which reads "heating the oil-water mixture to at least 387 degrees Fahrenheit while maintaining the mixture at a pressure of at least 700 PSI."

If an alleged infringer performs all the other steps in the claim, but for this step heats the mixture to only 250 degrees, there would be no literal infringement.² As shown by this example, the claims are extremely important and should be thoroughly reviewed by the attorney and inventor to adequately protect the invention.

V. Trade Secrets.

Trade secret law is probably the simplest area of IP law, yet it is also the most subjective.

A. Basis in Law.

² The defendant may nevertheless be liable for infringement under the "doctrine of equivalents."

1. State Law.

Uniform Trade Secrets Act. L.R.S. §§51:1431-1439

2. Economic Espionage Act (Criminal penalties only).

18 U.S.C. §§1831-1839.

B. A Trade Secret Is Information Which:

1. Derives value from not being generally known; and
2. Is the subject of reasonable efforts to keep the information secret.

C. Duration.

Duration of protection is the principal advantage of trade secret protection. It can last forever.

D. Proprietary Program.

A proprietary program should make it clear to a company's employees what the trade secrets are and should make it clear that the disclosure or use of those trade secrets is prohibited. Evidence of a proprietary program would include the following:

1. employee agreements in which the employees agreed to not disclose or use trade secrets and were told what those particular trade secrets were,
2. marking of materials, documents, computer displays and other materials to indicate that the company considered them proprietary (e.g. confidential, proprietary, do not disclose to authorized persons), and

3. physical security measures such as gate guards who control access.

E. Example.

Take the example of a manufacturing company which makes creosote-treated utility poles. The company has developed certain techniques for cutting of the poles, routing of the poles through the factory, and forcing the creosote preservative into the poles; and the company considers these techniques to be trade secrets. The company's vice president for manufacturing leaves the company to start his own company, which will also make creosote utility poles.

If the original company hopes to prevail in a suit against the departing employee for theft of trade secrets, the original company must show that it had some type of proprietary program in place. If the company had no written agreement with the employee, did not mark its so-called secrets, and had no physical security measures; the company will face an uphill battle in prevailing against the former employee.

VI. Background on the Internet.

To understand Internet IP issues, one must also clearly understand the Internet. The case of *ACLU v. Reno*, which concerned the government's attempted regulation of indecent material on the Internet, provided a very extensive discussion of the Internet. That discussion is included as an appendix to these materials.

VII. Legal Issues Specific to the Internet.

A. Linking.

1. Linking occurs when one website lists another website's address in such a way that the surfer can simply click on the address and go to the listed site.

2. Linking can cause liability for trademark infringement if it creates a likelihood of confusion.

3. The key to avoiding infringement is to not create the appearance of affiliation or sponsorship. Disclaimer language can also help. An exemplary disclaimer on a page of links might read as follows.

These links are provided for your convenience in finding more information about "_____." ABC Inc. is not affiliated with any of these sites. Additionally, ABC Inc. is not responsible for any of the information provided on these linked sites.

B. Framing.

1. What is framing? Framing occurs when one website links you to another website, but a portion of the first website remains as a border on your computer screen. Typically, the border is filled with advertisements.

2. The goal of the framing may be to sell banner advertisements, to keep control of the surfer, or both. Depending on the particular circumstances of the framing, framing may result in liability for copyright or trademark infringement. Alternatively,

the owner of the framed site may be able to stop the framing by bringing a claim for unfair trade practices.

3. Trademark aspects. As with linking, if the framing creates a likelihood of confusion between the site making the link, and the linked site, then there is trademark infringement.

4. Copyright aspects. If the framed page is the subject of copyright, the resulting image, once framed, may constitute a derivative work. The copyright owner has the exclusive right to prepare derivative works.

C. Metatags.

1. Metatags are words placed in a website with great frequency, but these words are not visible to the website visitor. The metatags are used to create “hits” by search engines which use the frequency of words to determine how to rank sites.

2. Metatags can create liability for trademark infringement if the overall metatag scheme creates a likelihood of confusion.

D. Domain Names.

1. Domain Names are the addresses for websites. The National Science Foundation has appointed Network Solutions, Inc. (NSI) to administer website addresses. The NSI site is “networksolutions.com.”

2. Disputes over domain names are resolved using both trademark law and the domain name policy of NSI. This policy is available on the NSI website.

3. Domain name disputes can arise in many ways. The following are two types of disputes.

a. Trademark v. Domain Name. In this types of domain name dispute, a company seeks to register a domain name which is based on the company's federal registration (e.g. "CocaCola.com"). The company learns that another company has already obtained rights to the domain name. Under the NSI policy, in certain circumstances, the federal registration can be used to trump the NSI registration and the domain name will be issued to the federal registrant.

b. Intermediary Holds the Registration. In this type of dispute the company uses a third party to host and design the company's website. This third party, usually also an Internet Service Provider (ISP), will obtain the domain name registration for the company. These ISPs will frequently put the NSI domain name registration in the name of the ISP. When disputes arise with the ISP, the ISP can hold the domain name hostage

E. Downloading Text and Images.

1. Copyright owners have certain exclusive rights in their works. Many erroneously believe that the mere positing of information on the Internet makes it freely available.

2. Companies concerned about the infringement of material on their websites should make it clear on the website what is and is not allowed. This information should include, at a minimum, a proper copyright notice. The notice should at least appear on the homepage, and preferably be on every page. As an additional precautionary measure, a required click-through advisement can be used. The information should also include what limited license rights, if any, the company grants to those who visit the website.

F. Click-Wrap Licenses. These are used in an attempt to make it clear to website visitors what license rights they do and do not have. The enforceability of these click-wrap licenses has not been squarely addressed by the courts. Typically the surfer will be required to check a button that says “I have read and accept the terms of this Agreement.”

G. “Internet Patents.”

1. Traditionally the Patent Office rejected applications which involved methods of doing business. Recent jurisprudence has reversed this stand and now patents are being allowed for devices and methods which relate to the Internet.

2. These patents are often referred to as computer or Internet patents, and these terms are somewhat misleading. The actual patent will be for a device, the device being a network of computers programmed to perform a certain task; or for a method, the method entailing the use of a computer network.

3. Probably one of the more famous businesses to obtain a patent for its Internet business is Priceline.com. The main Priceline patent is included with these materials.

H. Jurisdiction.

1. Personal jurisdiction on the Internet usually depends on whether sufficient minimum contacts exist for a cause of action that arises from the nonresident’s contact with the forum, i.e., specific jurisdiction.³ By far the most common context for allowing the exercise of personal jurisdiction is the use of trademarks on a web site and the resulting allegations of trademark infringement from that use. *See Millennium Enterprises, Inc. v.*

³ However, one Texas court has found “continuous and systematic contacts” for general jurisdiction based in part on defendant’s highly interactive website that allowed online shopping, customer tracking of purchases, and e-mail with customer representatives. *See Mieczkowski v. Masco Corp.*, 997 F. Supp. 782, 787-88 (E.D.Tex. 1998).

Millennium Music, LP, -- F. Supp. --, 1999 WL 27060 (D.Or. 1999) (reviewing the cases on personal jurisdiction).

The Internet is not limited, or directed specifically, by geography; which traditionally has been a factor for jurisdictional purposes.⁴ Thus, more than geographical access is typically necessary to determine jurisdiction. The *Zippo* sliding scale rule still applies where “the level of interactivity and commercial nature of the exchange of information” determines the outcome.⁵

Most courts follow the reasoning set forth in *Bensusan* and *Zippo* and decline to assert jurisdiction based solely on web site advertising. Those courts which have asserted jurisdiction in cases involving passive web sites did so because the defendant had additional contacts with the forum which related to the plaintiff’s claim.

Likewise, courts have generally exercised jurisdiction in cases at the other end of the scale, where the defendant “conducted business” over the Internet by engaging in repeated or ongoing business transactions with forum residents or by entering into a contract with a plaintiff through the Internet. Further, courts have found purposeful availment when the claim involves an intentional tort allegedly committed over the Internet, such that the defendant intentionally directed tortious activities at the forum state. These cases are based

⁴ *Id.* at *8.

⁵ *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D.Penn. 1997).

on the “effects” test articulated in *Calder v. Jones*, 465 U.S. 783, 788-90 (1984), where the Supreme Court found personal jurisdiction properly asserted over a defendant whose libelous actions were directed at the plaintiff resident of the forum state.

Courts have reached differing conclusions with respect to those cases falling into the middle “interactive” category identified in *Zippo*. In these cases, some courts find that an interactive web site alone is sufficient to establish minimum contacts. Others find minimum contacts through additional non-Internet activity in the forum, regardless whether the activity is related to the underlying claim. Finally, some courts require additional conduct in the forum that is related to the plaintiff’s cause of action.⁶

2. Evaluate your web site interactive features on a scale ranging from passive posting of information⁷ to actions arising out of web site contacts. Doing so will minimize

⁶ *Millennium Enterprises*, 1999 WL 27060 at *10-11 (citations omitted).

⁷ The following cases rejected personal jurisdiction based on a passive web site: *Bensusan Restaurant Corp. v. King*, 126 F.3d 25, 27 (2d Cir. 1997) (rejecting personal jurisdiction under New York’s long arm statute based on a cabaret’s web site listing monthly events, phone numbers and a disclaimer); *Green v. William Mason & Co.*, 996 F. Supp. 394, 399 (D.N.J. 1998) (rejecting jurisdiction based on web site advertising and a toll-free telephone number); *Blackburn v. Walker Oriental Rug Galleries, Inc.*, 999 F. Supp. 636, 638-39 (rejecting jurisdiction when web site provided information on rugs and allowed e-mail contact for questions on maintenance and care of the rugs); see also *Osteotech, Inc. v. Gensci Regeneration Sciences, Inc.*, 6 F. Supp. 2d 349 (D.N.J. 1998); *Patriot Systems, Inc. v. C-Cubed Corp.*, 1998 WL 668625 (D. Utah 1998).

Those cases finding personal jurisdiction for a passive web site have been based in part on other factors. See, e.g., *Panavision International, L.P. v. Toeppen*, 141 F.3d 1316, 1320-21 (9th Cir. 1998) (finding defendant purposefully availed himself of the forum state through tortious conduct directed toward Panavision in California by registering a domain name with their trademark in an effort to extort money); *Quality Solutions, Inc. v. Zupanc*, 993 F. Supp. 621, 622-23 (N.D. Ohio 1997) (finding jurisdiction based on advertising on internet web site and in trade

the exercise of personal jurisdiction over your firm in unexpected forums.⁸ Interactive web sites are subject to greater scrutiny by a reviewing court. Interactive web sites allow the user to exchange information with the host computer. Interactive ways to exchange information on a law firm web site include e-mail, group e-mail, bulletin boards, chat rooms, and information retrieval.

publication that enjoyed a large circulation in the forum); *see also Telco Communications v. An Apple A Day*, 977 F. Supp. 404 (E.D. Va. 1997).

⁸ The following cases rejected personal jurisdiction based on an interactive web site. *Cybersell, Inc. v. Cybersell, Inc.* 130 F.3d 414, 415 (9th Cir. 1997) (finding insufficient minimum contacts for personal jurisdiction based on mere fact that Florida company's web site was accessible to people in Arizona, even though web site advertised its services, when no proof that any Arizonans had used the services or even contacted the web site); *Millennium Enterprises, Inc. v. Millennium Music, LP*, 1999 WL 27060 (D.Or. 1999) (finding insufficient contacts when only one sale in jurisdiction was orchestrated by the plaintiff, and the web site purchases overall were an insignificant percentage of total volume); *see also E-Data Corp. V. Micropatent Corp.*, 989 F. Supp. 173 (D. Conn. 1997).

Compare to those cases finding personal jurisdiction based on an interactive web site. *See, e.g., Animation Station, Ltd v. Chicago Bulls*, 992 F. Supp. 382, 384 (S.D.N.Y. 1998) (finding sufficient personal jurisdiction in Chicago when defendant created NBA website with copyrighted animation and made it available to download where defendant should have known most of fans were located); *Blumenthal*, 992 F.Supp. at 57 (finding personal jurisdiction based on defendant's interactive web site, e-mail to and from subscribers, solicitation directed to D.C. residents, and contributions provided from D.C. residents); *Thompson v. Handa-Lopez, Inc.*, 998 F. Supp. 738, 744 (W.D.Tex. 1998) (finding personal jurisdiction based on interactive casino games on defendant's web site and contracts entered into over the Internet to play the games); *Park Inns International, Inc. v. Pacific Plaza Hotels, Inc.* 5 F.Supp.2d 762, 764-65 (finding personal jurisdiction based on 1) residents that used defendant's interactive web site to make hotel reservations and 2) advertising on the web site, on the travel agents computer network, and printed publications in Arizona); *see also GTE New Media Services Inc. v. Ameritech Corp.*, 1998 WL 682984 (D.D.C. 1998).

Note that the federal Fifth Circuit has not resolved the issue of personal jurisdiction based on web site advertising.⁹ Some suggestions to minimize the possibility of personal jurisdiction in an unexpected forum are:

- 1) include disclaimers on the web site;
- 2) comply with the state having the most restrictive rules;
- 3) minimize interactive activities on the web site.

I. Privacy Issues. All is not lost when venturing on the world wide web. Laws exist that may protect a person from government or third party access to electronic files, including e-mail.

1. Privacy Protection Act

The Privacy Protection Act, 42 U.S.C. 2000 *et seq.*, precludes government seizure of work product to be disseminated to the public by public communication such as newspaper, book, or broadcast in or affecting interstate commerce. Work product is defined as anything prepared in anticipation of dissemination to the public or possessed for the purpose of communicating with the public. 42 U.S.C § 2000aa-7(a). Work product can include the mental impressions, conclusions, opinions or theories of the preparer. *See Steve*

⁹ Only the Second, Sixth and Ninth Circuits have addressed the issue. *Cybersell*, 130 F.3d at 417.

Jackson Games Inc v. United States Secret Service, 36 F.3d 457 (5th Cir. 1994) (seizure of a computer found a violation of Privacy Act).

E-mail is generally not protected through the Privacy Act because the e-mail is not intended for public dissemination. However, group e-mail may qualify depending on the circumstances for its disclosure.

Civil relief for violations of the Privacy Act include actual damages, statutory damages, and attorney's fees. 42 U.S.C. § 2000aa-6(f). However, a defendant can plead a good faith belief in the lawfulness of his conduct that may relieve him of liability under the Act. 42 U.S.C. § 2000aa-6(b).

2. Electronic Communications Privacy Act (ECPA)

The Electronic Communications Privacy Act, 18 U.S.C. § 2701 *et seq.*, makes interception or unauthorized access to electronic communications a crime. Title I makes it a crime if a person "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any. . . electronic communication. "18 U.S.C. § 2511(a). Interception by statutory definition must occur simultaneously with transmission; thus, electronic communication already in electronic storage is not an interception. *Wesley College v. Pitts*, 974 F. Supp. 375, 385 (D.Del. 1997) (quoting *Steve Jackson Games*, 36 F.3d at 458), *aff'd*, -- F.3d -- (3d Cir. 1998). The ECPA also prohibits the disclosure of the contents of an electronic communication by anyone who knows or has reason to know

the information was obtained through the illegal interception of an electronic communication. 18 U.S.C. § 2511 (1)(c)-(d).

It is a violation of the ECPA for anyone who intentionally accesses a facility through which an electronic communication service is provided, or intentionally exceeds the level of authorized access to the facility, to then obtain, alter or prevent authorized access to a wire or electronic communication which is in electronic storage. 18 U.S.C. § 2701 (a). However, the government can obtain access for criminal investigation purposes through warrant or court order, depending on the nature of the information sought. See 18 U.S.C. § 2703(a), § 2518.

Consequences of violating the ECPA include both civil and criminal liability. Criminal violators are subject to fines, imprisonment or both. 18 U.S.C. § 2701(b). The Civil relief available to prevailing plaintiffs includes preliminary or permanent injunction, actual damages and violator's profits, statutory damages, and attorney's fees. 18 U.S.C. § 2707(b). Punitive damages are available when willful or intentional conduct is proven. 18 U.S.C. § 2707(c). An exception for a good faith belief that the conduct was authorized can be pled as a defense. 18 U.S.C. § 2708; *see Davis v. Gracey*, 111 F.3d 1472 (10th Cir. 1997)

The ECPA does not apply to authorized conduct. 18 U.S.C. 2701(c); *see Sega Enterprises Ltd v. Maphia*, 857 F. Supp. 679 (N.D. Ca. 1994) (finding authorization for bulletin board accessible by pseudonym) . The following are exempt under the ECPA:

- 1) a person or entity providing the wire or electronic communication service; and
- 2) user of service with respect to communication of or intended for that user.

18 U.S.C. § 2701(c).

Appendix

Excerpt from *ACLU v. Reno*

The Nature of Cyberspace

The Creation of the Internet and the Development of Cyberspace

The Internet is not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks. It is thus a network of networks. This is best understood if one considers what a linked group of computers -- referred to here as a "network" -- is, and what it does. Small networks are now ubiquitous (and are often called "local area networks"). For example, in many United States Courthouses, computers are linked to each other for the purpose of exchanging files and messages (and to share equipment such as printers). These are networks.

Some networks are "closed" networks, not linked to other computers or networks. Many networks, however, are connected to other networks, which are in turn connected to other networks in a manner which permits each computer in any network to communicate with computers on any other network in the system. This global Web of linked networks and computers is referred to as the Internet.

The nature of the Internet is such that it is very difficult, if not impossible, to determine its size at a given moment. It is indisputable, however, that the Internet has experienced extraordinary growth in recent years. In 1981, fewer than 300 computers were linked to the Internet, and by 1989, the number stood at fewer than 90,000 computers. By 1993, over 1,000,000 computers were linked. Today, over 9,400,000 host computers worldwide, of which approximately 60 percent located within the United States, are estimated to be linked to the Internet. This count does not include the personal computers people use to access the Internet using modems. In all, reasonable estimates are that as many as 40 million people around the world can and do access the enormously flexible communication Internet medium. That figure is expected to grow to 200 million Internet users by the year 1999.

Some of the computers and computer networks that make up the Internet are owned by governmental and public institutions, some are owned by non-profit organizations, and some

are privately owned. The resulting whole is a decentralized, global medium of communications -- or "cyberspace" -- that links people, institutions, corporations, and governments around the world. The Internet is an international system. This communications medium allows any of the literally tens of millions of people with access to the Internet to exchange information. These communications can occur almost instantaneously, and can be directed either to specific individuals, to a broader group of people interested in a particular subject, or to the world as a whole.

The Internet had its origins in 1969 as an experimental project of the Advanced Research Project Agency ("ARPA"), and was called ARPANET. This network linked computers and computer networks owned by the military, defense contractors, and university laboratories conducting defense-related research. The network later allowed researchers across the country to access directly and to use extremely powerful supercomputers located at a few key universities and laboratories. As it evolved far beyond its research origins in the United States to encompass universities, corporations, and people around the world, the ARPANET came to be called the "DARPA Internet," and finally just the "Internet."

From its inception, the network was designed to be a decentralized, self-maintaining series of redundant links between computers and computer networks, capable of rapidly transmitting communications without direct human involvement or control, and with the automatic ability to re-route communications if one or more individual links were damaged or otherwise unavailable. Among other goals, this redundant system of linked computers was designed to allow vital research and communications to continue even if portions of the network were damaged, say, in a war.

To achieve this resilient nationwide (and ultimately global) communications medium, the ARPANET encouraged the creation of multiple links to and from each computer (or computer network) on the network. Thus, a computer located in Washington, D.C., might be linked (usually using dedicated telephone lines) to other computers in neighboring states or on the Eastern seaboard. Each of those computers could in turn be linked to other computers, which themselves would be linked to other computers.

A communication sent over this redundant series of linked computers could travel any of a number of routes to its destination. Thus, a message sent from a computer in Washington, D.C., to a computer in Palo Alto, California, might first be sent to a computer in Philadelphia, and then be forwarded to a computer in Pittsburgh, and then to Chicago, Denver, and Salt Lake City, before finally reaching Palo Alto. If the message could not travel along that path (because of military attack, simple technical malfunction, or other reason), the message would automatically (without human intervention or even knowledge) be re-routed, perhaps, from Washington, D.C. to Richmond, and then to Atlanta, New Orleans, Dallas, Albuquerque, Los Angeles, and finally to Palo Alto. This type of transmission, and re-routing, would likely occur in a matter of seconds.

Messages between computers on the Internet do not necessarily travel entirely along the same path.

The Internet uses "packet switching" communication protocols that allow individual messages to be subdivided into smaller "packets" that are then sent independently to the destination, and are then automatically reassembled by the receiving computer. While all packets of a given message often travel along the same path to the destination, if computers along the route become overloaded, then packets can be re-routed to less loaded computers.

At the same time that ARPANET was maturing (it subsequently ceased to exist), similar networks developed to link universities, research facilities, businesses, and individuals around the world. These other formal or loose networks included BITNET, CSNET, FIDONET, and USENET. Eventually, each of these networks (many of which overlapped) were themselves linked together, allowing users of any computers linked to any one of the networks to transmit communications to users of computers on other networks. It is this series of linked networks (themselves linking computers and computer networks) that is today commonly known as the Internet.

No single entity -- academic, corporate, governmental, or non-profit -- administers the Internet.

It exists and functions as a result of the fact that hundreds of thousands of separate operators of computers and computer networks independently decided to use common data transfer protocols to exchange communications and information with other computers (which in turn exchange communications and information with still other computers). There is no centralized storage location, control point, or communications channel for the Internet, and it would not be technically feasible for a single entity to control all of the information conveyed on the Internet.

How Individuals Access the Internet

12. Individuals have a wide variety of avenues to access cyberspace in general, and the Internet in particular. In terms of physical access, there are two common methods to establish an actual link to the Internet. First, one can use a computer or computer terminal that is directly (and usually permanently) connected to a computer network that is itself directly or indirectly connected to the Internet. Second, one can use a "personal computer" with a "modem" to connect over a telephone line to a larger computer or computer network that is itself directly or indirectly connected to the Internet. As detailed below, both direct and modem connections are made available to people by a wide variety of academic, governmental, or commercial entities.

13. Students, faculty, researchers, and others affiliated with the vast majority of colleges and universities in the United States can access the Internet through their educational institutions. Such access is often via direct connection using computers located in campus libraries, offices, or computer centers, or may be through telephone access using a modem from a student's or professor's campus or off-campus location. Some colleges and universities install "ports" or outlets for direct network connections in each dormitory room or provide access via computers located in common areas in dormitories. Such access enables students and professors to use information and content provided by the college or university itself, and to use the vast amount of research resources and other information available on the Internet worldwide.

14. Similarly, Internet resources and access are sufficiently important to many corporations and other employers that those employers link their office computer networks to the Internet and provide employees with direct or modem access to the office network (and thus to the Internet). Such access might be used by, for example, a corporation involved in scientific or medical research or manufacturing to enable corporate employees to exchange information and ideas with academic researchers in their fields.

15. Those who lack access to the Internet through their schools or employers still have a variety of ways they can access the Internet. Many communities across the country have established "free-nets" or community networks to provide their citizens with a local link to the Internet (and to provide local-oriented content and discussion groups). The first such community network, the Cleveland Free-Net Community Computer System, was established in 1986, and free-nets now exist in scores of communities as diverse as Richmond, Virginia, Tallahassee, Florida, Seattle, Washington, and San Diego, California. Individuals typically can access free-nets at little or no cost via modem connection or by using computers available in community buildings. Free-nets are often operated by a local library, educational institution, or non-profit community group.

16. Individuals can also access the Internet through many local libraries. Libraries often offer patrons use of computers that are linked to the Internet. In addition, some libraries offer telephone modem access to the libraries' computers, which are themselves connected to the Internet. Increasingly, patrons now use library services and resources without ever physically entering the library itself. Libraries typically provide such direct or modem access at no cost to the individual user.

17. Individuals can also access the Internet by patronizing an increasing number of storefront "computer coffee shops," where customers -- while they drink their coffee -- can use computers provided by the shop to access the Internet. Such Internet access is typically provided by the shop for a small hourly fee.

18. Individuals can also access the Internet through commercial and non-commercial "Internet service providers" that typically offer modem telephone access to a computer or computer network linked to the Internet. Many such providers -- including the members of plaintiff Commercial Internet Exchange Association -- are commercial entities offering Internet access for a monthly or hourly fee. Some Internet service providers, however, are non-profit organizations that offer free or very low cost access to the Internet. For example, the International Internet Association offers free modem access to the Internet upon request. Also, a number of trade or other non-profit associations offer Internet access as a service to members.

19. Another common way for individuals to access the Internet is through one of the major national commercial "online services" such as America Online, CompuServe, the Microsoft Network, or Prodigy. These online services offer nationwide computer networks (so that subscribers can dial-in to a local telephone number), and the services provide extensive and well organized content within their own proprietary computer networks. In addition to allowing access to the extensive content available within each online service, the services also allow subscribers to link to the much larger resources of the Internet. Full access to the online service (including access to the Internet) can be obtained for modest monthly or hourly fees. The major commercial online services have almost twelve million individual subscribers across the United States.

20. In addition to using the national commercial online services, individuals can also access the Internet using some (but not all) of the thousands of local dial-in computer services, often called "bulletin board systems" or "BBSs." With an investment of as little as \$2,000.00 and the cost of a telephone line, individuals, non-profit organizations, advocacy groups, and businesses can offer their own dial-in computer "bulletin board" service where friends, members, subscribers, or customers can exchange ideas and information. BBSs range from single computers with only one telephone line into the computer (allowing only one user at a time), to single computers with many telephone lines into the computer (allowing multiple simultaneous users), to multiple linked computers each servicing multiple dial-in telephone lines (allowing multiple simultaneous users). Some (but not all) of these BBS systems offer direct or indirect links to the Internet. Some BBS systems charge users a nominal fee for access, while many others are free to the individual users.

21. Although commercial access to the Internet is growing rapidly, many users of the Internet -- such as college students and staff -- do not individually pay for access (except to the extent, for example, that the cost of computer services is a component of college tuition). These and other Internet users can access the Internet without paying for such access with a credit card or other form of payment.

Methods to Communicate Over the Internet

22. Once one has access to the Internet, there are a wide variety of different methods of communication and information exchange over the network. These many methods of communication and information retrieval are constantly evolving and are therefore difficult to categorize concisely. The most common methods of communications on the Internet (as well as within the major online services) can be roughly grouped into six categories:

- (1) one-to-one messaging (such as "e-mail"),
- (2) one-to-many messaging (such as "listserv"),
- (3) distributed message databases (such as "USENET newsgroups"),
- (4) real time communication (such as "Internet Relay Chat"),
- (5) real time remote computer utilization (such as "telnet"), and
- (6) remote information retrieval (such as "ftp," "gopher," and the "World Wide Web").

Most of these methods of communication can be used to transmit text, data, computer programs, sound, visual images (i.e., pictures), and moving video images.

23. One-to-one messaging. One method of communication on the Internet is via electronic mail, or "e-mail," comparable in principle to sending a first class letter. One can address and transmit a message to one or more other people. E-mail on the Internet is not routed through a central control point, and can take many and varying paths to the recipients. Unlike postal mail, simple e-mail generally is not "sealed" or secure, and can be accessed or viewed on intermediate computers between the sender and recipient (unless the message is encrypted).

24. One-to-many messaging. The Internet also contains automatic mailing list services (such as "listservs"), [also referred to by witnesses as "mail exploders"] that allow communications about particular subjects of interest to a group of people. For example, people can subscribe to a "listserv" mailing list on a particular topic of interest to them. The subscriber can submit messages on the topic

to the listserv that are forwarded (via e-mail), either automatically or through a human moderator overseeing the listserv, to anyone who has subscribed to the mailing list. A recipient of such a message can reply to the message and have the reply also distributed to everyone on the mailing list. This service provides the capability to keep abreast of developments or events in a particular subject area. Most listserv-type mailing lists automatically forward all incoming messages to all mailing list subscribers. There are thousands of such mailing list services on the Internet, collectively with hundreds of thousands of subscribers. Users of "open" listservs typically can add or remove their names from the mailing list automatically, with no direct human involvement. Listservs may also be "closed," i.e., only allowing for one's acceptance into the listserv by a human moderator.

25. Distributed message databases. Similar in function to listservs -- but quite different in how communications are transmitted -- are distributed message databases such as "USENET newsgroups." User-sponsored newsgroups are among the most popular and widespread applications of Internet services, and cover all imaginable topics of interest to users. Like listservs, newsgroups are open discussions and exchanges on particular topics. Users, however, need not subscribe to the discussion mailing list in advance, but can instead access the database at any time. Some USENET newsgroups are "moderated" but most are open access. For the moderated newsgroups,(10) all messages to the newsgroup are forwarded to one person who can screen them for relevance to the topics under discussion. USENET newsgroups are disseminated using ad hoc, peer to peer connections between approximately 200,000 computers (called USENET "servers") around the world. For unmoderated newsgroups, when an individual user with access to a USENET server posts a message to a newsgroup, the message is automatically forwarded to all adjacent USENET servers that furnish access to the newsgroup, and it is then propagated to the servers adjacent to those servers, etc. The messages are temporarily stored on each receiving server, where they are available for review and response by individual users. The messages are automatically and periodically purged from each system after a time to make room for new messages. Responses to messages, like the original messages, are automatically distributed to all other computers receiving the newsgroup or forwarded to a moderator in the case of a moderated newsgroup. The dissemination of messages to USENET servers around the world is an automated process that does not require direct human intervention or review.

26. There are newsgroups on more than fifteen thousand different subjects. In 1994, approximately 70,000 messages were posted to newsgroups each day, and those messages were distributed to the approximately 190,000 computers or computer networks that participate in the USENET newsgroup system. Once the messages reach the approximately 190,000 receiving computers or computer networks, they are available to individual users of those computers or computer networks. Collectively, almost 100,000 new messages (or "articles") are posted to newsgroups each day.

27. Real time communication. In addition to transmitting messages that can be later read or accessed, individuals on the Internet can engage in an immediate dialog, in "real time", with other people on the Internet. In its simplest forms, "talk" allows one-to-one communications and "Internet Relay Chat" (or IRC) allows two or more to type messages to each other that almost immediately appear on the others' computer screens. IRC is analogous to a telephone party line, using a computer and keyboard rather than a telephone. With IRC, however, at any one time there are thousands of different party lines

available, in which collectively tens of thousands of users are engaging in conversations on a huge range of subjects. Moreover, one can create a new party line to discuss a different topic at any time. Some IRC conversations are "moderated" or include "channel operators."

28. In addition, commercial online services such as America Online, CompuServe, the Microsoft Network, and Prodigy have their own "chat" systems allowing their members to converse.

29. Real time remote computer utilization. Another method to use information on the Internet is to access and control remote computers in "real time" using "telnet." For example, using telnet, a researcher at a university would be able to use the computing power of a supercomputer located at a different university. A student can use telnet to connect to a remote library to access the library's online card catalog program.

30. Remote information retrieval. The final major category of communication may be the most well known use of the Internet -- the search for and retrieval of information located on remote computers. There are three primary methods to locate and retrieve information on the Internet.

31. A simple method uses "ftp" (or file transfer protocol) to list the names of computer files available on a remote computer, and to transfer one or more of those files to an individual's local computer.

32. Another approach uses a program and format named "gopher" to guide an individual's search through the resources available on a remote computer.

The World Wide Web

33. A third approach, and fast becoming the most well-known on the Internet, is the "World Wide Web." The Web utilizes a "hypertext" formatting language called hypertext markup language (HTML), and programs that "browse" the Web can display HTML documents containing text, images, sound, animation and moving video. Any HTML document can include links to other types of information or resources, so that while viewing an HTML document that, for example, describes resources available on the Internet, one can "click" using a computer mouse on the description of the resource and be immediately connected to the resource itself. Such "hyperlinks" allow information to be accessed and organized in very flexible ways, and allow people to locate and efficiently view related information even if the information is stored on numerous computers all around the world.

34. Purpose. The World Wide Web (W3C) was created to serve as the platform for a global, online store of knowledge, containing information from a diversity of sources and accessible to Internet users around the world. Though information on the Web is contained in individual computers, the fact that each of these computers is connected to the Internet through W3C protocols allows all of the information to become part of a single body of knowledge. It is currently the most advanced information system developed on the Internet, and embraces within its data model most information in previous networked information systems such as ftp, gopher, wais, and Usenet.

35. History. W3C was originally developed at CERN, the European Particle Physics Laboratory, and was initially used to allow information sharing within internationally dispersed teams of researchers and engineers. Originally aimed at the High Energy Physics community, it has spread to other areas and attracted much interest in user support, resource recovery, and many other areas which depend on collaborative and information sharing. The Web has extended beyond the scientific and academic community to include communications by individuals, non-profit organizations, and businesses.

36. Basic Operation. The World Wide Web is a series of documents stored in different computers all over the Internet. Documents contain information stored in a variety of formats, including text, still images, sounds, and video. An essential element of the Web is that any document has an address (rather like a telephone number). Most Web documents contain "links." These are short sections of text or image which refer to another document. Typically the linked text is blue or underlined when displayed, and when selected by the user, the referenced document is automatically displayed, wherever in the world it actually is stored. Links for example are used to lead from overview documents to more detailed documents, from tables of contents to particular pages, but also as cross-references, footnotes, and new forms of information structure.

37. Many organizations now have "home pages" on the Web. These are documents which provide a set of links designed to represent the organization, and through links from the home page, guide the user directly or indirectly to information about or relevant to that organization.

38. As an example of the use of links, if these Findings were to be put on a World Wide Web site, its home page might contain links such as those:

- C THE NATURE OF CYBERSPACE
- C CREATION OF THE INTERNET AND THE DEVELOPMENT OF CYBERSPACE
- C HOW PEOPLE ACCESS THE INTERNET
- C METHODS TO COMMUNICATE OVER THE INTERNET

39. Each of these links takes the user of the site from the beginning of the Findings to the appropriate section within this Adjudication. Links may also take the user from the original Web site to another Web site on another computer connected to the Internet. These links from one computer to another, from one document to another across the Internet, are what unify the Web into a single body of knowledge, and what makes the Web unique. The Web was designed with a maximum target time to follow a link of one tenth of a second.

40. Publishing. The World Wide Web exists fundamentally as a platform through which people and organizations can communicate through shared information. When information is made available, it is said to be "published" on the Web. Publishing on the Web simply requires that the "publisher" has a computer connected to the Internet and that the computer is running W3C server software. The computer can be as simple as a small personal computer costing less than \$1500 dollars or as complex as a multi-million dollar mainframe computer. Many Web publishers choose instead to lease disk

storage space from someone else who has the necessary computer facilities, eliminating the need for actually owning any equipment oneself.

41. The Web, as a universe of network accessible information, contains a variety of documents prepared with quite varying degrees of care, from the hastily typed idea, to the professionally executed corporate profile. The power of the Web stems from the ability of a link to point to any document, regardless of its status or physical location.

42. Information to be published on the Web must also be formatted according to the rules of the Web standards. These standardized formats assure that all Web users who want to read the material will be able to view it. Web standards are sophisticated and flexible enough that they have grown to meet the publishing needs of many large corporations, banks, brokerage houses, newspapers and magazines which now publish "online" editions of their material, as well as government agencies, and even courts, which use the Web to disseminate information to the public. At the same time, Web publishing is simple enough that thousands of individual users and small community organizations are using the Web to publish their own personal "home pages," the equivalent of individualized newsletters about that person or organization, which are available to everyone on the Web.

43. Web publishers have a choice to make their Web sites open to the general pool of all Internet users, or close them, thus making the information accessible only to those with advance authorization. Many publishers choose to keep their sites open to all in order to give their information the widest potential audience. In the event that the publishers choose to maintain restrictions on access, this may be accomplished by assigning specific user names and passwords as a prerequisite to access to the site. Or, in the case of Web sites maintained for internal use of one organization, access will only be allowed from other computers within that organization's local network.(11)

44. Searching the Web. A variety of systems have developed that allow users of the Web to search particular information among all of the public sites that are part of the Web. Services such as Yahoo, Magellan, Altavista, Webcrawler, and Lycos are all services known as "search engines" which allow users to search for Web sites that contain certain categories of information, or to search for key words. For example, a Web user looking for the text of Supreme Court opinions would type the words "Supreme Court" into a search engine, and then be presented with a list of World Wide Web sites that contain Supreme Court information. This list would actually be a series of links to those sites. Having searched out a number of sites that might contain the desired information, the user would then follow individual links, browsing through the information on each site, until the desired material is found. For many content providers on the Web, the ability to be found by these search engines is very important.

45. Common standards. The Web links together disparate information on an ever-growing number of Internet-linked computers by setting common information storage formats (HTML) and a common language for the exchange of Web documents (HTTP). Although the information itself may be in many different formats, and stored on computers which are not otherwise compatible, the basic Web standards provide a basic set of standards which allow communication and exchange of information. Despite the fact that many types of computers are used on the Web, and the fact that many of these machines are otherwise incompatible, those who "publish" information on the Web are able to

communicate with those who seek to access information with little difficulty because of these basic technical standards.

46. A distributed system with no centralized control. Running on tens of thousands of individual computers on the Internet, the Web is what is known as a distributed system. The Web was designed so that organizations with computers containing information can become part of the Web simply by attaching their computers to the Internet and running appropriate World Wide Web software. No single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be blocked from the Web. From a user's perspective, it may appear to be a single, integrated system, but in reality it has no centralized control point.

47. Contrast to closed databases. The Web's open, distributed, decentralized nature stands in sharp contrast to most information systems that have come before it. Private information services such as Westlaw, Lexis/Nexis, and Dialog, have contained large storehouses of knowledge, and can be accessed from the Internet with the appropriate passwords and access software. However, these databases are not linked together into a single whole, as is the World Wide Web.

48. Success of the Web in research, education, and political activities. The World Wide Web has become so popular because of its open, distributed, and easy-to-use nature. Rather than requiring those who seek information to purchase new software or hardware, and to learn a new kind of system for each new database of information they seek to access, the Web environment makes it easy for users to jump from one set of information to another. By the same token, the open nature of the Web makes it easy for publishers to reach their intended audiences without having to know in advance what kind of computer each potential reader has, and what kind of software they will be using.

This article is designed as a general report for the information of our clients and web-browsers and does not constitute an exhaustive legal study or rendering of professional services. The applicability of the information to a particular situation would depend on the thorough investigation of specific facts.