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SAVING YOUR WEBSITE FROM INDENTITY THEFT

By: Frank A. Natoli, Esq.

Your website can be a casualty of identity theft. Businesses spend substantial time and money developing web presence that communicates a look-and-feel that captures the businesses' philosophy and mission. The look-and-feel of your website is the combination of its art, style, layout, colors, photographs, and of course, content.

But many website owners won't be in a legal position to do anything about the theft of their website identity – even when confronted with blatant copying of their websites. The reason for this is that many website owners are unaware that they in fact don't possess intellectual property (IP) ownership over their web design. I will explain how this happens and how to ensure that you retain copyright ownership of your web design when contracting with web-developers.

Do I have a leg to stand on?

An individual or company must have standing, a legal right to initiate a law suit. In most cases, a victim will have standing if their legal rights were infringed upon. In copyright infringement cases, the plaintiff - the one taking legal action - must be the copyright owner. That is, you must have a copyright interest in the materials that have been infringed upon to take legal action against the infringer.

Of course, unless you have a written agreement with your web-developer, that clearly explains who owns what, the web-developer likely would be the copyright owner of at least some of the site's components - not you! In fact, absent a written agreement to the contrary, it would be the web-developer who could take action if your website were copied by another. Can you imagine how frustrating that would be?

Do you own the copyright interest in your website?

Again, the default rule when it comes to copyright law is that the one who creates it owns it. Although you hired your web-developer to design your website, the developer – as the creator – owns the copyrights in the website design. (For the sake of this entry I assume that your web-designer is not your employee but is instead an independent contractor).

Let's apply the default copyright principle to the three major components making up your web-pages:

a) The Website Content. The IP rights to the text on your website usually are retained by the writer even without an agreement. So if you or a member of your company was the writer of that content, the web-developer would have no copyright ownership over that text. The IP rights to the images would be retained by the photographer unless some licensing arrangement was made.

b) The Website Design. Unless there is a written contract to the contrary, the web-developer would retain all rights to the website design – the look-and-feel, which includes the unique combination of images, colors, sizes and page layout.

c) Source Code. Source code is usually generated by the web-developer, and as a result, the developer would retain copyright ownership over it.

Why should copyright ownership matter to me?

There are lots of good reasons. Technically speaking, if copyright ownership is retained by your web-developer, you would be obligated to obtain your web-developer's permission before making copies of that design for other web pages. Also, you would not be permitted to create a new page design based on the developer's original one. This is because the owner of the copyright interest has the "exclusive right to create such derivative works." But much more importantly, your lack of copyright ownership means that you won't be in a position to protect your site and take legal action when necessary to protect your website's design.

What can I do to ensure that my company retains copyright ownership of our website?

There are two types of contracts you need to consider when having a website developed: (1) a work-made-for-hire agreement; and (2) an assignment of copyrights. A work-made-for-hire, which is entered into before the developer begins work, generally states that any future work performed with respect to the copyrighted work under the contract will be the IP of the hiring party and not that of the developer. If the site has already been designed, an assignment of copyrights will be needed to transfer the copyright interest from the developer to you.

Before you sign any contracts with a web-developer make sure you discuss the IP ownership of the various elements of the future website. Certainly, you want to ensure that your company will retain all brand-specific IP, such as any logos or other imagery that is closely associated with your product or service and which the developer is designing. You may want to include a work-made-for-hire clause in the website development contract, or at the very least include a provision stating that the web-developer agrees to transfer all copyright interest in the design elements of the website once he or she has been paid in full.

At the end of the day, this is your property and you need to protect it. A little due diligence and forethought will go a long way to protect your interests.

I am Frank Natoli, Esq., the Founder & CEO of the law firm of Natoli-Lapin, LLC, home of Lantern Legal Services. Lantern Legal is our suite of cost-effective, flat-rate legal solutions designed for entrepreneurs, small businesses, independent inventors & artists. If you believe we can ever be of service, feel free to contact us - your inquiries are always welcome!

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