



## Trademark Advisory

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# The Law That Protects the Appearance of Your Website

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The appearance of a website says a lot about a company, and defines it in many ways. The look and intuitiveness of a website function much like the architecture of a building or the package of a candy bar. A company's cyber presence can provide it with a distinct image, invoking a desired emotional and psychological response and generating tremendous goodwill.

There is a growing body of case law dealing with how to protect this look and valuable ease of interactivensness, which companies spend hundreds of thousands, if not millions of dollars, perfecting and promoting.

In the fray are two primary bodies of law. The first is copyright law, which affords federal protection to certain expression found on a website. The second is trade dress law, protected at the federal level under the Lanham Act. Businesses seeking to maximize protection of their websites' look and feel from competitors can take a few practical steps when creating and maintaining their web content once they understand the basic framework for doing so.

Copyright law protects certain original expression from the moment it is created in tangible form from unauthorized copying, subject to constitutional limits. Works protected by copyright law include literary works, musical works (including lyrics), dramatic works, pictorial, graphic and sculptural works, motion pictures, and other audiovisual recordings, sound recordings, and architectural works. However, as stated in 17 U.S.C. § 102(b) "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

A copyright registration, although not needed for copyright protection to exist, can be obtained online through the Copyright Office. For websites that are frequently updated and/or revised, separate registrations will be required in order for such changes to be protected by registration. While copyright law provides automatic protection from the moment of creation, obtaining a registration provides enhanced benefits, such as the ability to obtain statutory damages and an award of attorneys' fees. Moreover, a copyright registration must be obtained for a work before a U.S. author/owner can maintain a lawsuit for copyright infringement based on the work.

Trade dress law operates on a different premise. When a person or company can show that its commercial use of certain distinct features in connection with a product or service has made consumers associate those features with that product or service, trade dress protection exists. Protectable forms of trade dress have included the packaging of a product, the décor of restaurant, the design of magazine covers, and even kiosk displays.

In the comprehensive opinion of *Conference Archives v. Sound Images*, 2010 WL 1626072 (W.D. Pa. Mar. 31, 2010), a federal district judge in the Western District of Pennsylvania traced the infusion of

copyright and trade dress law into website protection. While copyright law technically preempts trade dress law where applicable, the prevailing trend is that the overall layout of a website is not copyrightable. *Id.* at \*13. Despite this trend, many entities have successfully obtained copyright registrations for certain features of their websites. The question is whether these registered owners will be able to successfully challenge alleged infringers in court based upon these copyright registrations.

Although protecting a website under copyright law may be difficult due to the standards required for protection, trade dress much more comfortably can protect what courts sometimes refer to as the “look and feel” of the website. Under this concept of “look and feel,” trade dress law can reach beyond static elements on a website, such as photos, colors, borders, or frames, to include interactive elements and/or the overall mood, style, or impression of the site. *Id.* at \*14.

So what can you do to create a protected trade dress for your website? One suggestion is to make the interface intuitive: “The hallmark of a protectable ‘look and feel’ trade dress is a graphical user interface that promotes the intuitive use of the website.” *Conference Archives*, 2010 WL 1626072 at \*15. However, be aware that because purely functional features cannot be protected under either trade dress or copyright law, an intuitiveness that takes advantage of the only practical way of doing things cannot create trade dress protection for a website. *Id.* at \*17.

Another suggestion would be to create the website with an inherently distinctive overall combination of features and colors or unique audiovisual designs that make a user recognize the website as having a specific source. *Id.* at \*17. Next, if you want your web branding to have value, avoid templates. While these are tempting to a tight-budgeted company, they create a very weak, if any, protected trade dress vulnerable to easy challenges. Finally, if your company operates a number of web fronts, consider giving them a common theme. Websites that have acquired a distinctive look and feel by market saturation will help you claim proprietary protection if a competitor ever does steal your look and feel. *Id.*

Companies have attempted to register aspects of their website layout with the U.S. Patent and Trademark Office as either trademarks or trade dress. See, e.g. U.S. Application Serial Nos. 85149927 and 85149922. While all such attempts have not been successful, it remains to be seen how the Trademark Office will respond to the latest attempts given the growing body of case law supporting such protection. The risk, of course, is that a rejection by the Trademark Office may negatively affect future enforcement efforts.

It may seem difficult to develop a cyber strategy for the brand image of your website when the law is struggling to keep up with growing technological advances. As the *Conference Archives* court explained: “Despite several attempts from the courts and the academy, the ‘look and feel’ of a trade dress [in a website] remains a nebulous concept, largely due to the novelty of this technology.” *Id.* at \*14. However, with an understanding of the basic framework and these suggestions, you are off to a good start. And, as you create and develop your website, it still remains essential to have proper agreements in place with employees and third parties in order to ensure that any intellectual property created for the website is owned by the sponsoring company.

If you have any questions about this advisory, please contact the authors or your Mintz Levin attorney.

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