

# Vacation rental websites create difficult choices for hotels

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In just a few years, vacation rental websites have exploded onto the scene, commanding a significant market presence in the hospitality industry and redefining traditional “vacation rentals.” In particular, websites like Airbnb and VRBO have succeeded in large part because of their accessibility to users worldwide.

That’s not necessarily good news for hotel brand owners. Aside from the obvious potential lost revenue, these websites are creating a new breed of potential risk to hoteliers. Indeed, many owners of residential units within hotels or resorts that seek to rent out their properties via these websites include some reference to the hotel or resort brand in their listing. This is often in the title of the listing and in other prominent locations. These listings also generally include a description of the resort’s amenities and photos of the resort property. Listings may even include the hotel’s logo.

As a result, whether the listing is actually sponsored by the hotel or resort can become very confusing for consumers. In particular, all of these branding elements taken together can lead unwitting consumers to the mistaken conclusion that these are official hotel listings or are otherwise authorized by the hotel.

## Threats to hotels

The use of hotel brands in this manner threatens to damage the hotel, and its reputation and goodwill for several reasons. Besides diverting sales that may otherwise go to the hotel, association with any given vacation rental website may not be desirable, particularly if that website has a less-than-stellar reputation or if the hotel brand is up-market. Finally, these listings often include misinformation about the rental unit, renters’ access to hotel facilities and amenities, resort fees and other critical information.

As a result, if a renter is unhappy with their rental experience or was not granted access to hotel amenities that were (perhaps inappropriately) promised in the rental

listing, and the renter believes that the rental listing was derived from or approved by the hotel, the renter’s negative experience will likely reflect poorly upon the hotel and harm consumer goodwill in the brand. Of course, this forces hotel brand owners to maintain their reputation and goodwill among consumers while simultaneously and unwittingly having to interface with customers of these third-party rental websites.

This issue now appears to be reaching a boiling point. Last month, Omni Hotels Management Corporation filed suit against HomeAway.com Inc., the owner of VRBO. In its 23-page complaint, Omni alleges that 29 listings on VRBO.com posted by the website’s “Authorized Users” infringe its trademark rights, potentially causing damage to its reputation and goodwill, and diverting sales from the hotel chain.

The thrust of Omni’s claims is that the manner in which its trademarks have been incorporated into these listings could lead consumers to believe that Omni has somehow approved of each listing and, by extension, VRBO.com. Omni further explains that “if customers of [VRBO.com] experience inferior services, they could mistakenly attribute the bad experience to Omni” due to the use of Omni’s trademarks in these listings.

The lawsuit comes after Omni apparently made numerous requests to HomeAway to remove its marks from the infringing listings, but to no avail. In demand letters attached to the complaint, some of which date back to 2011, Omni argues the listings could lead the public to believe the two companies are affiliated in some way. According to Omni, the vacation rental website repeatedly ignored its demands and when HomeAway finally did respond, it argued that use of Omni’s marks constituted fair use.

## ‘Fair use’

Under U.S. trademark law, a party other than the trademark owner may under limited circumstances use a trademark without the trademark owner’s permission to refer to the actual trademark owner or to identify a product

or service of the trademark owner. This legal doctrine is called “nominative fair use.” To qualify as nominative fair use, the use must accurately refer to the owner of the trademark or the services sold under the trademark, may not imply endorsement by or affiliation with the trademark owner, and may only use so much of the trademark as is necessary to identify the trademark owner and no more.

In its response to Omni, HomeAway claims that its listings do just this. However, Omni claims that the use of its trademarks within the VRBO.com listing is causing confusion and diverting sales. If this case proceeds, the outcome may hinge upon whether HomeAway can sufficiently establish this defense, and the outcome may have ramifications for hotel brand owners in defining the scope of their rights and their ability to enforce those rights against vacation rental websites like VRBO.

Regardless of how this case plays out, it seems clear that hotel brand owners need to balance fair use concerns and public relations with residential unit owners against their interest in protecting their brand and reputation. There are several avenues that brand owners can take to protect themselves from potential damage: (1) disseminating trademark usage guidelines to hotels, residential unit managers and property owners; (2) entering into robust agreements with hotel developers, homeowners’ associations and residential unit owners; and (3) actively monitoring and policing potential infringement.

### **Create trademark guidelines**

First, hotel brand owners should strongly consider preparing and disseminating guidelines that govern the way in which its trademarks, logos and other brand identifiers may be used in advertising, rental solicitations, and other communications. These guidelines should be robust and clearly define what constitutes acceptable use of the hotel’s brand name and what does not. Specifically, the guidelines should distinguish between referring to the hotel name in the context of identifying the location of a property, on the one hand, and using the hotel name in the title of a rental listing, on the other. Including specific examples is particularly helpful in fostering understanding among these various third parties.

In addition, the guidelines should make clear that while use of the brand name may, in certain circumstances, be used, the hotel brand’s logos and proprietary materials – images, content, domain names, etc. – may never be used without prior written permission. Guidelines serve the dual purpose of staving off potential infringement and establishing a clear policy that brand owners, property owners, and other interested parties can rely upon.

### **Create agreements with unit owners**

Guidelines should be implemented in conjunction with

robust agreements between hotel brand owners, hotel developers, the residential homeowners’ association and the residential unit owners. Hoteliers should employ a suite of agreements with these parties that govern the use of their trademarks in any and all mediums.

Specifically, hotel brand owners should enter into a license agreement with the hotel building owner/developer that address any rental considerations. Brand owners should also employ a robust license agreement with the homeowners’ association. Finally, hotel brand owners should also enter into trademark-specific agreements with the individual residential unit owners that participate in their management programs. Each of these agreements should clearly define the hotel brand owners’ trademark rights, and should provide limited, precisely defined licenses to use its brand in a specific manner, binding the relevant parties to those terms.

### **Monitor your brand name**

Finally, hoteliers should take an active role in monitoring and policing the use of their brand names in advertising and other communications, including vacation rental websites and other online listings, to ensure compliance with their trademark rights, guidelines and agreements. Where the hotel brand owner identifies instances of infringement, it should take immediate action to put the infringer on notice of its rights and request that corrective measures be taken. It is in hotel brand owners’ interest to carefully consider each potential infringement matter to ensure that its response is measured and appropriate.

Each of these steps is aimed at putting hoteliers in the best possible position to protect themselves, and their valuable goodwill and reputation. Nonetheless, particularly in view of the fact that the patchwork of agreements governing each hotel frequently exists at the property level, and is inherently varied, there is no foolproof way to entirely prevent these issues from arising. Indeed, given the growing popularity of rental vacation websites and third-party rental managers, and given the lack of relevant jurisprudence governing their use of third-party trademarks, we are likely to see additional issues and cases like that filed by Omni.

Hopefully, this anticipated further development of the law will ultimately provide additional guidance to hoteliers on how best to protect their brands and reputations from damage as the online marketplace continues to mature.

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