

# Website 'look and feel' gains more legal protection

A well-designed, user-friendly and easily navigable website isn't just a good idea — it's a powerful marketing tool that can attract business and cement your company's good will.

Getting just the right look and feel of a website — one that connects with users — requires a significant investment of cash and creative labor. That investment may be worth even more now.

Two recent federal court decisions take a fresh look at the protection that intellectual property laws afford to the look and feel of a website, and have created a new avenue for keeping the screen design out of the hands of imitators.

Historically, the display of a computer screen consisted of nothing more than green or amber text and a blinking cursor. There was nothing much to protect. As technology advanced, the screen displays became much more complex and afforded developers more creativity in how a program's function was presented to users.

In a series of landmark decisions in the 1980s, courts embraced the concept that the overall "look and feel" of a screen display in the operation of a computer program could be protected under copyright laws, the same as the protection afforded other literary, creative or artistic work products.

But this protection faced a key limitation rooted in a basic tenet of copyright law, which is that a copyright won't

## Legal Bytes



David Schachter

and other user-selection methods, color schemes, overall layout of information and so forth have found little protection under copyright laws. This has made it possible for competitors to imitate such features without fear of liability for copyright infringement.

The problem, however, is that while copyright protection is weak, the look and feel of a website can nonetheless be so distinctive that customers form an affinity to a particular format and come to associate it with a specific company or its products.

In two recent federal cases, lawyers have argued that this association — the fact that users identify a website's look and feel with a particular source of business — means that even if a screen display is considered "purely functional" under copyright analysis, the display

protect "purely functional elements of a work. The rationale is that functional elements aren't dictated by creative or artistic endeavor, and thus fail to meet the threshold test necessary to be considered copyrightable subject matter.

Thus mundane website elements such as font style, the placement and layout of buttons, tool bars

still deserves protection under a different but equally strong area of intellectual property, the law of trademarks.

In a federal case pending in the Western District of Pennsylvania, the plaintiff is suing a competitor, who openly admitted to having copied the plaintiff's website layout, on the theory that the website's look and feel had come to uniquely identify the plaintiff's company and thus qualified as a form of protectable trade dress.

They should receive the same legal treatment as the shape of a shampoo bottle, or the design of a restaurant interior or other tangible features that consumers associate with a particular company or product. The court is allowing this claim to proceed and has rejected the defendant's arguments that mundane website features are purely functional and thus not entitled to protection.

Similarly, in a Northern District of California case, the plaintiff has successfully argued that its website, containing unique screen designs for navigating around the website, were copied almost verbatim in the design of a direct competitor's website. The court is accepting the theory that if there are specific distinctive screen elements — including size and location of graphics, font style, location of hyperlinks and other similar features — it could be enough to support a claim that this creates confusion.

If they succeed, the defendant will be

liable not for copyright infringement, but for infringing on the trademark rights of the website owner by copying protectable trade dress.

Trade dress protection is nothing new, and courts routinely have enforced trademark rights in product shapes, restaurant interiors, color schemes and so forth. The extension of this theory to the look and feel of a website, however, is a new frontier, and it could shake up a number of web-development strategies.

Here is what it may mean.

- First, if your company has designed a truly unique and creative website, the features, even elements that would be considered "purely functional" under copyright laws, may now have much greater protection under trademark principles. If customers form an association between the design of the website and the company's products, that design may now be fully protected against imitation.

- Second, for those who design and develop websites, it means they must ensure the content delivered to the customer is truly original and unique. Otherwise, it could lead to claims of trade dress infringement from a competitor of the customer.

**DAVID SCHACHTER**, a member of the Denver law firm of Sherman and Howard LLC, and who specializes in intellectual property and technology law, can be reached at 303-299-8385 or via e-mail at dschachter@sah.com.