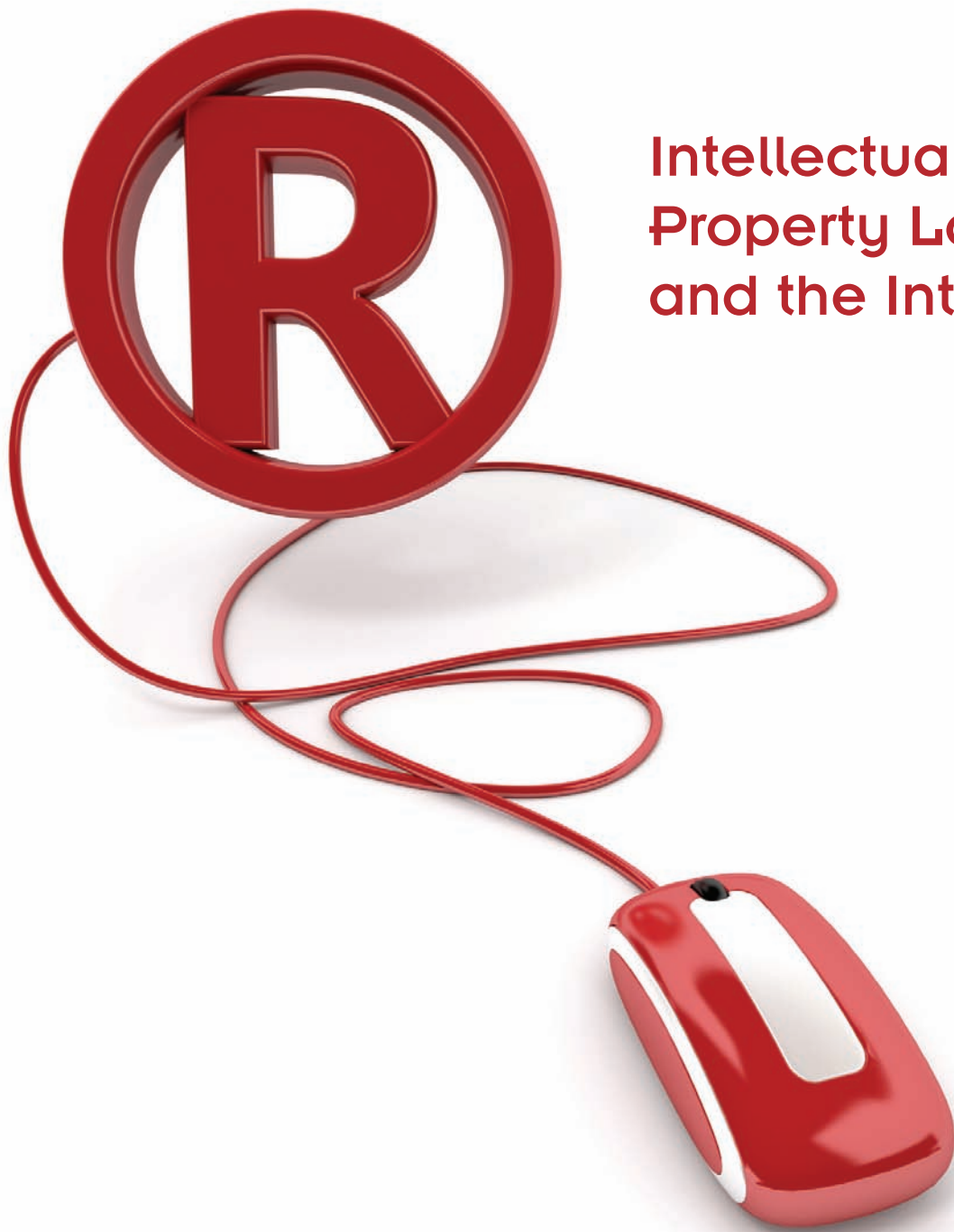


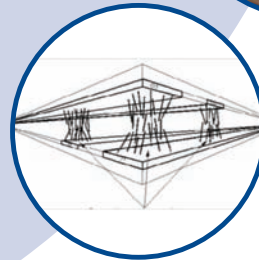
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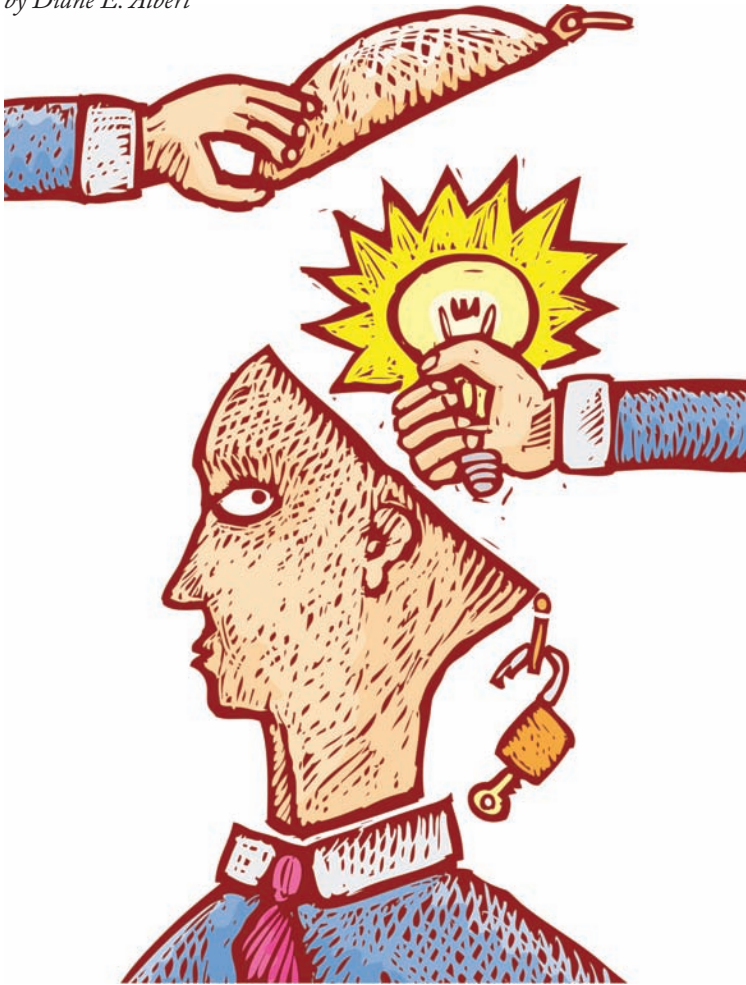
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An Overview of Intellectual Property Theft on the Internet

by Diane E. Albert



The Internet has evolved into a virtual market for intellectual property (IP) where theft is easily accomplished by unscrupulous infringers. Valuable IP, which often has a short shelf life, is easily infringed because digitization allows perfect copies to be made and data to be easily extracted from websites.

Scraping

A robot, or bot, is a program that operates as an agent for a user or another program or simulates a human activity. Bots called “spiders” or “crawlers” access websites and gather their content for search engine indexes, which are basically databases of websites that a search engine has found. This automated content gathering is called “scraping,” and it allows a company’s competitor to gain access to valuable copyrighted information without properly licensing and buying the information.

Deeplinking

Deeplinking is making a hyperlink to a specific website page or image instead of that website’s home page, thus potentially bypassing

expensive homepage ads. When customers can click directly to an interior page instead of clicking through from the homepage, the other parts of the website may make a less vivid impression on the customer. Even though customers may appreciate deeplinking because it makes searching for a product easier and faster, companies that have placed ads on a website’s homepage view deeplinking as IP theft. However, a company may choose to internal deep link within its own website. Hyperlinks deeper into a company’s site is an excellent search engine optimization practice because visitors will be driven deeper into the company’s website.

An interesting deeplinking case concerned a Texas court that ruled that deeplinking by a motocross website to videos on a Texas-based motocross video production website did not constitute fair use.¹ A U.S. district judge granted a preliminary injunction to cease deeplinking directly to streaming audio files copyrighted by SFX Motor Sports, a large producer of “Supercross” motorcycle racing events. Fans who went to the SFX Motor Sports website saw sponsor names and logos; however, anyone who clicked on the link from the deeplinking site would not see the logos of paid sponsors.

Filesharing

Illegal peer-to-peer (P2P) filesharing infringes online copyrighted material. P2P works by thousands of individual users installing special file-sharing software on the users’ computers and then cooperatively sharing and trading, but not paying for, music files, electronic books, news service content, and movie and television video downloads. Electronic books are not as widely downloaded as music or videos, but finding a pirated version of almost any popular book online is still easy.

In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 US 913 (2005), defendant distributed freeware that allowed computer users to share files through peer-to-peer networks. The Supreme Court held that companies distributing such software were liable for the resulting acts of infringement because they promoted the software to infringe upon copyrights.

For those who don’t believe in the legal concept of copyright, the <http://torrentfreak.com/> blog will provide hours of interesting reading.

Fan Fiction

Fan fiction (FanFic) is a type of amateur creative expression that features characters from movies, TV shows, and popular culture in new situations or adventures that fans “borrow,” often posting those stories on the Internet.

The owner of a copyrighted work has the right to stop others from creating “derivative works.” FanFic is considered to be a derivative work because the authors use copyright-protected characters from

ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 10-457, August 5, 2010: Lawyer Websites

Lawyers must not include misleading information on websites, must be mindful of the expectations created by the website, and must manage inquiries invited through the website, which may create a prospective client-lawyer relationship under Rule 1.18.

Cautionary statements on a lawyer's website can be designed to, and may effectively limit, condition, or disclaim a lawyer's obligation to a website reader. Such warnings or statements may be written to avoid a misunderstanding by the website visitor that (1) a client-lawyer relationship has been created; (2) the visitor's information will be kept confidential; (3) legal advice has been given; or (4) the lawyer will be prevented from representing an adverse party.

Limitations, conditions, or disclaimers of lawyer obligations will be effective only if reasonably understandable, properly placed and not misleading. This requires a clear warning in a readable format, the meaning of which can be understood by a reasonable person. For more information, see <http://www.abanet.org/cpr/pdfs/10-457.pdf>

someone else's creation in a new work derived from the original work. Copyright holders routinely use search engines to discover their characters being used in unauthorized or unapproved ways, even though the majority of FanFic is written by fans with no commercial intent. Owners of original works often look unfavorably upon these works and try to stop the creation of FanFic through cease and desist letters and lawsuit threats. An alternate view holds that FanFic works are transformative works, i.e., works that add something new, with a further purpose or different character, altering the [source] with new expression, meaning, or message.² Since 2007, the Organization for Transformative Works (OTW), led by FanFic writers, has advocated for the transformative nature of fan fiction and thus its legitimacy.

Cybersquatting

Cybersquatting, sometimes called "domain squatting," is using a domain name with the intent to profit from the goodwill of a trademark belonging to another party. Cybersquatters often buy domain names containing trademarks then often sell them for an inflated price to the entity who owns the trademark. A recent example of cybersquatting involved the actress Julia Roberts, who won back her domain name from a cybersquatter after complaining before the Arbitration and Mediation Centre of the World Intellectual Property Organisation (WIPO). The complaint was filed against a businessman who had registered www.juliaroberts.com. WIPO's arbitration panel ruled Roberts had common law trademark rights in her name and that the businessman had "no rights or legitimate interest in the domain name" and registered it in bad faith, having placed the name, along with other famous names he had registered, for sale online.

Typosquatting

Typosquatting, also called "URL hijacking," is a form of cybersquatting which relies on typos in a website address to lead users to an alternative website owned by a cybersquatter. The typosquatter's URL is usually a common misspelling (e.g., www.goggle.com), a foreign language spelling of the intended site, a misspelling based on common typing errors, or a different top-level domain (e.g., www.whitehouse.net). Do not click on these examples!

Fighting Back Against Cyber Crime

Posting terms of use that limit site use and page access to compliance with the stated terms is a method of defense for IP owners. A company should review its terms of use to ensure that they expressly prohibit any unwanted access, such as scraping, copying, or sharing for illegal commercial purposes.

The Robot Exclusion Standard (RES), also known as the "robots.txt protocol," is a convention to prevent cooperating web robots from accessing all or part of a website which is otherwise publicly viewable. Site owners post a text file called robots.txt in the root of the website hierarchy containing instructions that function as a request that robots ignore specified files or directories in their search. Robots that choose to follow the instructions try to fetch this file and read the instructions before fetching any other file from the website. However, this protocol is purely advisory and relies on the cooperation of the web robot.

The Computer Fraud and Abuse Act (CFAA), codified in 18 U.S.C. § 103, covers computers "used in interstate commerce or communication" and provides a civil remedy to "any person who suffers damage or loss by reason of a violation" of the CFAA.

Proactive strategies such as monitoring the Internet for thieves and issuing cease and desist letters, using the RES, and conspicuously posting a terms of use statement offer some protection for your online IP. Contacting your copyrighted material infringers and offering a licensing agreement to them may be a practical option. However, litigation under the CFAA may be the option of last resort to stop malicious cyber criminals.

Endnotes

¹ *SFX Motor Sports Inc., v. Davis*, 2006 WL 3616983.

² *Campbell v. Acuff-Rose Music, Inc.*, 510 US 569 (1994).

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Intellectual Property Associated with Your Website: *Who Owns It? How Do You Avoid Infringement?*

By Simone M. Seiler and Alberto A. León



The Internet has allowed people to disseminate and share their ideas and market products and services more broadly than ever before. During those activities, website owners, creators or operators generate and use intellectual property. Designing, creating and publishing a website has intellectual property implications that legal practitioners should understand and be prepared to manage.

Websites have multiple components that, by their very nature, constitute or contain intellectual property. Most website content constitutes copyrightable subject matter. Visible and encoded text, metatags, HTML code, CSS layout, images, graphics, audio and audio-visual components, and any software programs on a website are all copyrightable subject matter. Even works that do not include a copyright notice can be copyrighted.

A website may display words, names or symbols that, because of the way they are used, fall within the recognized definition of trademark. Generally, a name or logo eligible for trademark protection should include the “™” or “®” designation depending on whether the owner has obtained a federal trademark certificate. Trade dress is product design or packaging that creates a visual impression distinctive enough to identify the source of the product. The look and design of the website, including the color scheme, may be

elements of trade dress. While trade dress is not denoted in any fashion, it will generally be recognizable to consumers of the associated product.

Identifying the intellectual property associated with a website and determining who owns each item can be complicated. There are, however, general rules that make those determinations simpler. Any tangible expression of an idea, whether written, visual or auditory, is automatically entitled to copyright protection, thus guarding the owner against unauthorized reproduction, modification and distribution. The author of a copyrighted work is generally the owner of the copyright. The most notable exception is when an employee or someone acting under a “work for hire” agreement creates the work for someone else.

An essential consideration when designing your website is whether you own or have a right to use the intellectual property you want to incorporate in your finished product. The first decision you must make is the domain name of your website. When choosing a name, due diligence is recommended to ensure you are not using someone else’s trademarked name. Multiple causes of action may accrue from attempts to profit from another’s trademark, even for unrelated products.

Because all images, text, logos, audio-visual works and the like are the intellectual property of the author, any material reproduction, alteration or dissemination without permission is infringement. You can permissibly use copyrighted works in your website if: (1) you get the owner’s permission via a license or an informal agreement; (2) the work has been dedicated to the public, meaning either that the copyright has expired or the author has given the public free use of the work; or (3) you meet several factors required under Fair Use.

Thinking through the content and name of your website from the standpoint of intellectual property allows you to protect what you are creating and avoid unnecessary litigation.

About the Authors

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My Registered Trademark Just Appeared on the Internet and I Didn't Put it There!!

Now How Do I Get Personal Jurisdiction?

By Jeffrey H. Albright and Marshall Ray



A surprising and alarming experience for a business owner is to be surfing the Internet only to find an identical or similar trademark or tradename being used by an out-of-state business advertising seemingly competitive goods or services. An added difficulty is getting personal jurisdiction over the alleged infringer. Establishing minimum contacts can simplify the process and will establish personal jurisdiction to bring the case to New Mexico.

In this hypothetical, the website with a name similar to your client's mark includes a drop-down box that allows New Mexico customers to purchase goods on the web. Trademark infringement? As with any trademark infringement case, ultimate success depends on the similarity of goods and services and potential confusion in the marketplace. However, whether the litigation occurs in New Mexico or in the state in which the potential infringer has his or her business is more difficult to determine. Establishing this personal jurisdiction can be simplified by looking for sufficient contacts—even though limited only to the Internet—that would allow the case to be tried in New Mexico.

A district court may exercise personal jurisdiction over only those defendants "who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located." *United States v. Botefuhr*, 309 F.3d 1263, 1271 (10th Cir. 2002). A district court's ability to take personal jurisdiction over a non-consenting defendant is further limited in that a court's exercise of jurisdiction must not offend due process. If the lawsuit is filed in New Mexico, then New Mexico law applies in determining personal jurisdiction. This is an important step, in that some jurisdictions have recognized that a "cease and desist letter" from the non-infringer can be sufficient cause of action for the

potential infringer to file for and receive jurisdiction where they are doing business.

If a lawsuit is filed in New Mexico, a three-part test is applied for determining personal jurisdiction: (1) the defendant's actions must be one of the five enumerated in the long-arm statute; (2) the plaintiff's cause of action must arise from the act; and (3) the defendant's act must establish minimum contacts sufficient to satisfy due process. *State Farm Mutual Ins. Co. v. Conyers*, 109 N.M. 243, 244, 748 P.2d 986, 987 (1989). In New Mexico, the minimum contacts requirement may be met in one of two ways. "A court may exercise specific jurisdiction if a defendant has purposefully directed activities at residents of the forum and the litigation results from injuries that arise out of, or relate to, those activities." *Purpose*

Onion Foods, Inc. v. Blue Moose of Boulder, Inc., No. CIV 98-0758, at 3 (D.N.M. 1998)(Black, J.) citing *Kuenzle v. HTM Sport-Und Freizeitgarate AG*, 102 F.3d 453, 455 (10th Cir. 1996). Alternatively, a court may exercise general jurisdiction over a defendant whose contacts with the forum state are systematic and continuous.

The first and only New Mexico court case to consider whether a website establishes minimum contacts sufficient for the exercise of personal jurisdiction is *Sublett v. Wallin*, 2004-NMCA-089, 94 P.3d 845 (2004). The defendant franchisor in *Sublett* operated a home inspection business. The franchisor had a website that contained a feature allowing users to "[l]ocate an inspector." This feature allowed potential customers to enter the name of their city. The website would then re-direct customers to the nearest local franchise.

The plaintiff, a California resident, used the franchisor's website to locate a franchisee to inspect a house in Tijeras, New Mexico. To pay for the inspection, the plaintiff tendered a check to the franchisor. The plaintiff purchased the home, based partly on the representations that the inspector made regarding its condition. Upon discovering certain alleged defects that the franchisee-inspector did not catch, the plaintiff sued the franchisee for failure to reveal the existence of polybutylene pipes inside the house. The only question on appeal was whether the New Mexico court could properly exercise jurisdiction over the defendant.

In deciding that there were insufficient contacts to establish jurisdiction, *Sublett* formally adopted the framework expressed in *Zippo Manfg Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa.

continued on page 10

WHEN INTERNET SEARCHING BECOMES TRADEMARK INFRINGEMENT

By Gina Constant



Performing a Google search for a brand name such as “Priceline” or “Tiffany” often yields competitors’ advertisements above and beside the search results; sometimes, a competitor’s website will rank at the top of the list. This practice, when it leads to consumer confusion, is sometimes considered trademark infringement under the initial interest confusion doctrine.

Under the Lanham Act, the unauthorized use of a registered trademark in a way that is likely to cause consumer confusion regarding the source of a product constitutes trademark infringement. 15 U.S.C §§ 1051 – 1141. A classic example of this practice would be selling a counterfeit Rolex. With the advent of the Internet, however, trademark infringement is taking on a whole new dimension.

In *Australian Gold Inc. v. Hatfield*, the Tenth Circuit stated, “[i]nitial interest confusion results when a consumer seeks a particular trademark holder’s product and instead is lured to the product of a competitor . . . [e]ven though the consumer eventually may realize that the product is not the one originally sought.” 436 F.3d 1228, 1238 (10th Cir. 2006). There, the defendant sold a variety of tanning products online, including those manufactured by the plaintiff. Defendant used plaintiff’s trademark in their metatags (which are parts of a website that are not seen by the public but can

be picked up by search engines), paid a search engine to list them in a preferred position whenever a web user searched for the plaintiff’s trademark, and continued to use these tactics even after it stopped selling plaintiff’s products. The court held that these actions constituted initial interest confusion.

Another questionable practice occurs when spyware detects what site a web user is on and causes advertisements for competing products to pop up in separate windows. In *1-800 Contacts, Inc. v. WhenU.com, Inc.*, the defendant provided a spyware program that, once installed on a computer, would track the user’s activity and generate pop-up advertisement windows. 414 F.3d 400 (2d Cir. 2005). However, the defendant did not allow their clients to purchase trademarks as keywords. The Second Circuit held that the pop ups did not have a tangible effect on appearance or functionality of the visited website, so defendant did not “use” the plaintiff’s trademark for purposes of the Lanham Act.

In *Rescuecom Corp. v. Google Inc.*, the Second Circuit revisited the issue of trademark “use” when the plaintiff computer services company sued Google for encouraging plaintiff’s competitors to purchase its registered trademark as a search keyword. The Second Circuit held that Google was “using” Rescuecom’s mark, but remanded on the issue of consumer confusion. Interestingly, when one performs a Google search for the term “Rescuecom” today, no advertisements or competitor’s links are displayed.

It is clear that technology evolves more quickly than the law. Most search engines no longer use metatags when computing search results and most computers now have pop-up blockers and anti-spyware programs installed. Nonetheless, the current trend of cases reveals that “using” another’s trademark has moved far beyond counterfeit watches. Trademark infringement can occur even when a business is not using a competitor’s brand name on goods or services or in any visible location on its website, if a web user is lured to the business’ website through the surreptitious use of a competitor’s brand name. Additionally, search engines and tracking software companies may be liable for infringement if they encourage or profit off of such practices.

About the Author

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Website Liability in an Age of User-Generated Content

By Benjamin Allison and Monica Ewing



In the early days of the Internet, companies often used websites merely to publish their own information. Now that websites are far more interactive—a development sometimes referred to as Web 2.0—web hosts can face significant liability for infringing material posted by users.

Three types of secondary infringement liability have developed: contributory infringement, vicarious liability, and inducement. Contributory infringement occurs when the defendant knows or has reason to know of the direct infringement and “substantially participates” in it. In *Gershwin Publ’g Corp. v. Columbia Artists Mgmt.*, 443 F.2d 1159 (2d Cir. 1971), a band management agency sponsored concerts at which bands played copyrighted musical works without permission. The copyright owners sued the management agency, and the court held the agency liable for the bands’ infringement because the agency substantially participated in the unlicensed performances.

Vicarious liability is based on an owner’s ability to control infringing activities and its direct financial interest in infringement. In *Fonovisa, Inc. v. Cherry Auction*, 76 F.3d 259 (9th Cir. 1996), the owners of a swap meet were held vicariously liable for their vendors’ infringing sales of pirated music.

Inducement liability was created by the United States Supreme Court in *MGM Studios, Inc. v. Grokster, Ltd.* 545 U.S. 913 (2005) to apply to a defendant who distributes a technology with the object of promoting its use to infringe on others’ rights.

To encourage Internet commerce, however, Congress created a safe harbor from this liability for Internet service providers (ISPs). The Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (the DMCA) allows an ISP to avoid liability for infringing material posted by users if the ISP:

1. has no actual knowledge of a user’s infringement;
2. is unaware of facts or circumstances from which infringement is apparent (no red flag knowledge);
3. and acts quickly, upon notice of infringement, to remove access to infringing material.

This safe harbor was recently tested by significant claims against both YouTube and eBay. YouTube was sued by the media conglomerate Viacom Inc., which claimed that much of the television programming and other material being posted on YouTube was Viacom’s copyrighted material. Viacom had sent YouTube more than 100,000 notices at one time of infringing videos pursuant to the DMCA’s notice and takedown procedure, which allows a rights-owner to inform an ISP of infringement. To take advantage of the safe harbor, an

ISP must have a system allowing such notices and must respond to them promptly. YouTube in fact responded promptly, removing most of the videos within twenty-four hours. Viacom still sued, however, seeking \$1 billion on the theory that YouTube was liable for the infringing material posted by its users.

The trial court ruled on summary judgment that YouTube was protected by the safe harbor and that “mere knowledge of prevalence of [infringing] activity in general” is not enough to lose the safe harbor. *Viacom Int’l Inc. v. YouTube, Inc.*, 2010 WL 2532404 (S.D.N.Y. 2010). YouTube was only responsible for removing infringing material when a rights-holder specifically notified YouTube of a particular infringing item. The court was satisfied that YouTube had a well-functioning notice and takedown system and that YouTube went beyond the requirements of the law to locate and remove infringing material.

Tiffany Inc. tested secondary liability for trademark infringement. Tiffany discovered that a majority of items labeled “TIFFANY” on eBay were counterfeit and sent thousands of infringement notices to eBay—which eBay promptly honored. Unfortunately, for every auction Tiffany identified and eBay removed, many more appeared. Tiffany sued eBay on the theory that eBay was making substantial money on these auctions, which infringed and damaged the TIFFANY trademark.

continued on page 10

My Registered Trademark *continued from page 6*

1997). *Zippo* states that “jurisdiction c[ann]ot be avoided merely because the defendant d[oes] not *physically* enter the forum state.” *Id.* at 1123. *Zippo* instructs that “the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.” *Id.* at 1124.

The *Zippo* analysis divides websites into categories of “passive” and “interactive.” Passive websites do little more than make information available to those that access them. Interactive websites are those in which a user can exchange information with the host computer and that involve the knowing and repeated transmission of computer files and information that allow the defendant to enter into contracts with residents of a foreign jurisdiction. That provides sufficient contacts to establish personal jurisdiction.

In *Sublett* the court held that the defendant-franchisor’s website was primarily passive. 2004-NMCA-089, ¶ 30, 94 P.3d at 853. The court noted that the only evidence in the record pertaining to the website was a two-page printout of the defendant’s webpage that contained information on the franchisee. Other evidence existed that the transaction had occurred while the plaintiff was in California, not New Mexico. Importantly, the court also found that the defendant benefitted monetarily from the plaintiff’s visit to the defendant’s website.

On at least one occasion, the Tenth Circuit has confronted the issue of whether a website provides minimum contacts sufficient to exercise personal jurisdiction over a defendant. In *Soma Medical Int’l v. Standard Chartered Bank*, 196 F.3d 1292 (10th Cir. 1999), the Tenth Circuit dismissed the issue in one paragraph holding that the defendant’s website was passive, “merely providing information to interested viewers.” *Id.* at 1296.

Where does this leave our business owner? There are two important facts that apply. First, *Sublett* contemplated this situation. “[W]e can contemplate defamation, libel, or trademark actions in which even a passive website may meet the minimum contacts threshold.”

Website Liability *continued from page 8*

eBay won. The Second Circuit held that general knowledge by eBay that its service was being used to sell counterfeit goods was not enough to impose liability. To be liable, eBay would have to continue to provide its services to a user when eBay has specific, contemporary knowledge of the user’s ongoing infringement. eBay’s prompt responses to takedown notices and its other preventive measures to control fraudulent sales satisfied the court that eBay was not being willfully blind. *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93 (2d Cir. 2010).

ISPs do not have an affirmative duty to police their websites to ascertain and remove infringing materials, but they would do well to

2004-NMCA-089, ¶ 33, 94 P.3d at 853 (emphasis added). Second, if there are drop-down boxes that allow purchases to be made and that specifically target New Mexico consumers, minimum contacts likely exist. The website is no longer passive, and personal jurisdiction may be exercised.

Some district courts in the Tenth Circuit have found that the lack of any specific transactions between the alleged infringer and the state may serve as a bar to personal jurisdiction. See *Xactware, Inc. v. Symbility Solution Inc.*, 402 F.Supp.2d 1359, 1363-66 (D.Utah 2005) (emphasizing that there was no evidence of any Utah resident ever accessing defendant’s website). However, the Tenth Circuit encouraged the practice of allowing plaintiffs to conduct limited discovery regarding the existence of personal jurisdiction. See *Far West Capital, Inc. v. Towne*, 46 F.3d 1071, 1077 n.5 (10th Cir. 1995). Even more recently, the Third Circuit has stated, “Although the plaintiff bears the burden of demonstrating facts that support jurisdiction, courts are to assist the plaintiff by allowing jurisdictional discovery unless the plaintiff’s claim is merely frivolous.” *Toys ‘R’ Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 456 (3rd Cir. 2003).

In our hypothetical, the website is interactive. Also, the website attempts to get business in New Mexico by allowing New Mexico residents to initiate direct business relationships via the Internet. A strong argument exists for personal jurisdiction in New Mexico and, as a minimum, the plaintiff should be afforded the opportunity for discovery to establish personal jurisdiction.

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Jeffrey Albright is a partner with Lewis and Roca LLP. His IP practice emphasizes trademarks, copyrights, trade secrets, work for hire, IP licensing and assignments, and litigation in federal court and before the TTAB. Mr. Albright was the initial chair of the State Bar IP Section.

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note that their affirmative efforts to combat infringement are very important in presenting themselves to courts as responsible citizens rather than willfully blind profit-makers.

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