

Guarding against copyright transgressions

THE use of the Internet for trading purposes relies on the effective operation of a commercial Web site.

Companies engaged in electronic commerce activities regard their Web site as a virtual branch from where their business will flourish.

Therefore, businesses presenting themselves to the world through a Web site need to consider their legal responsibilities in this area.

It is well known that the use of copyrighted material is frequently abused on the Internet. The reason for this is the ease with which information can be copied and transmitted from the privacy of the office or home.

When a business creates its own Web pages, it is relatively simple to borrow, paste, modify and otherwise use the resources of the Internet to fashion its corporate presence on the Web.

Copyright is the right to copy in any form, in whole or in part, an original creative work.

Original creative works — works produced by a person's own creative endeavours as opposed to simply "existing" — include original narrative, graphics and tables, all of which are found on most corporate Web pages.

In law, the owner of the copyright in a work has the exclusive right to make copies of that work and issue them to the public.



For businesses with a Web site, copyright infringement is a potential minefield. Lawyer MARK COPELAND explains.

This principle applies equally to the use of the Internet as to any other media in essence the medium is irrelevant.

The New Zealand Copyright Act 1994 indisputably states that copying includes storing a work "in any medium by any means".

Therefore, if a Web site features original narrative, graphics or tables (all of which may be protected by copyright) without the authorisation of the owner, it is likely to be in breach of copyright law and, as a result, those responsible for the site may be liable for copyright infringement.

As far as expression of an idea goes, a Web page is not much different to a magazine, book or multimedia CD-ROM. Generally, all original content on a CD is copyrighted. If you look at a multimedia encyclopedia CD, it is generally understood that the graphics and narrative are protected by copyright.

Yet it is not uncommon for companies (or their contracted Web site designers) to approach the creation of Web sites very casually. Liberal use is made of other businesses' well-designed Web pages in creating the new corporate Web site.

Poaching of attractive artistic work is easily done and can be achieved in different ways. The browser's Save function can be used to save the desired Web page as it looks (minus the graphics), or the designer can use the browser's Source/Save function to save the HTML code to its local hard drive.

In like manner, by right-clicking on a specific graphic displayed on a Web site, the graphic, defined by a specific digital algorithm, is transferred to the chosen hard-drive (Programs like Web-whacker are also available which allow browsers to download entire Web sites).

At this point, the copyright work has been transferred from dynamic Ram to a fixed space on the hard-drive, and the Web site designer has effectively copied the material.

Whether or not such copying on its own is enough to breach copyright laws has been the subject of considerable international debate.

Think the equivalent English legislation, the Copyright Act does not specifically deal with the question as to whether or not transient copying is an infringement.

However, the act does provide that "incidental copying" of original creative works does not constitute infringement of

copyright (section 41). Further, if the copying in question cannot be deemed to be incidental copying, the copying may be construed as "private use" and not infringing (section 43), although this will be difficult to maintain where the creation of a commercial Web site is at issue.

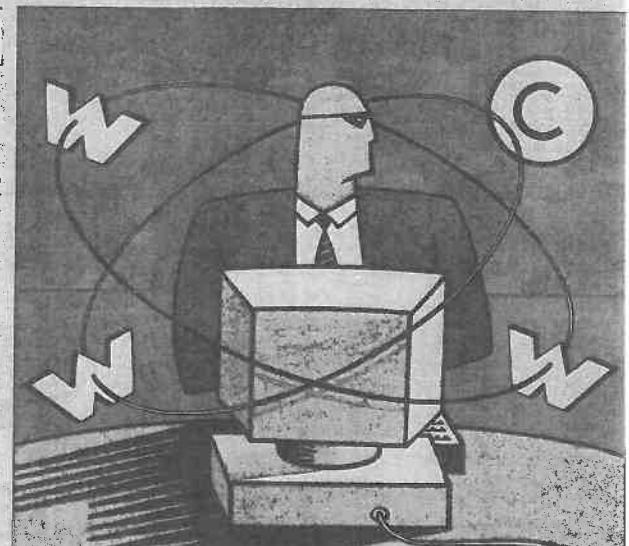
If neither category applies, unless the Web site designer's motivation is clearly untoward, the copying will probably still qualify as "authorised copying" since the original site could not be viewed otherwise.

What is clear, however, is that when a Web site designer accesses a second party's Web site for the purpose of identifying material to extract for a new commercial Web site, copies such material and displays it for public consumption as an original work, copyright infringement clearly occurs.

The difference is between getting a great idea for a tree from a competitor's site and creating your own tree for the new Web page, and copying the competitor's tree directly on to your Web page — the former approach is fine, the latter is illegal.

What then of businesses who construct "composite" Web pages using different elements from diverse pages or servers to create a new Web page? Instead of copying the elements to the composite page, the elements are linked into the URL address of the original material elements, thereby creating a series of hyperlinks which will take effect when the viewer accesses the composite page.

The ability to create composite Web pages goes to the heart of the online copyright debate. It is often argued that, given the nature of the Internet, all Web sites should be fair game for linking. After all, becoming part of the World Wide Web involves the joining of a sameness in which the shared values include



things being as strongly cross-linked as possible.

In general this is true. But it is not the fact of linking itself which causes copyright infringement problems. It is how a particular business chooses to actually link to other Web pages.

Hyperlinking can take different forms. The viewer can be linked to a different page in the same site or to a completely different site belonging to another business or Internet host.

The Web site owner does not infringe copyright by providing a hyperlink using a word or a phrase (it is fairly settled that the use of a third party's URL address on a Web page is an acceptable form of linking). The hyperlink is simply a direction to the viewer's computer. The fact that the viewer reproduces the link site on-screen or by printing

the contents of that site is not considered an infringement of copyright per se.

The widespread view is that the linked site owner "implicitly licences" the viewer to look at the material and print it out.

However, if the linked site owner owns copyright in a logo or icon and the linking (that is, corporate's) site reproduces that logo or icon without the owner's authority on its Web pages as the hyperlinking image, then that act of reproduction will almost certainly amount to copyright infringement.

Another potential minefield for copyright infringement by companies is the use of "framing" on their Web sites. For example, if a business sets up its Web site with hyperlinked frames, and displays the other advertisement in one frame while another customer's Web site

is being displayed in the other, the business is effectively pocketing advertisement revenue for displaying the work of others.

For the purposes of copyright law, the resulting page may be considered a "derivative work" — exclusive rights in which are held by the copyright owner.

How the framing is actually set up will be important. It is an offence under section 37 of the Copyright Act to provide means for the making of infringing copies of a work, and creating framing around the copyrighted material of a competitor will arguably fall within that section. Further, prosecutions for "Passing-Off" offences under the Fair Trading Act 1985 are possible where framing is used by a business to sell its products by linking up to a competitor's products.

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THE use of "deep links" (hyperlinks to pages "deep" within a second party's Web site which avoid the need to access those pages through the linked company's gateway) has also raised copyright issues for many companies, not the least being Microsoft in the United States.

Surprisingly, online copyright infringement has yet to be properly tested by the New Zealand courts, and the courts of other Commonwealth jurisdictions.

In 1997 a widely publicised case, involving an Internet-based news service that used headlines of *The Sheridan Times* on its Web site without the permission of the newspaper publisher, was settled out of court.

This prevented the Scottish courts from establishing a helpful precedent that would have confirmed the application of copyright law on the Internet.

Yet corporate are well advised to take the possibility of online copyright infringements seriously in the United States, this issue is specifically addressed by a Federal statute with implications for

to electronic commerce, including copyright issues, should be tightened.

Innocent infringement is also extremely difficult to prove — the infringer must be genuinely innocent, a fact very difficult to substantiate unless the infringing copy was already in the public domain.

Foreign courts' treatment of the innocent infringement defence offer little additional hope, as illustrated in a recent United States copyright case. A business innocently displayed clip art owned by another company on its Web site. This enabled the pictures to be downloaded by viewers.

The owner company's sales fell as a result of the free availability of its clip art on the defendant's Web site, and the owner sued for copyright infringement. The Federal Court noted that the copyright owner need only demonstrate that it has a valid copyright and that its exclusive rights have been infringed.

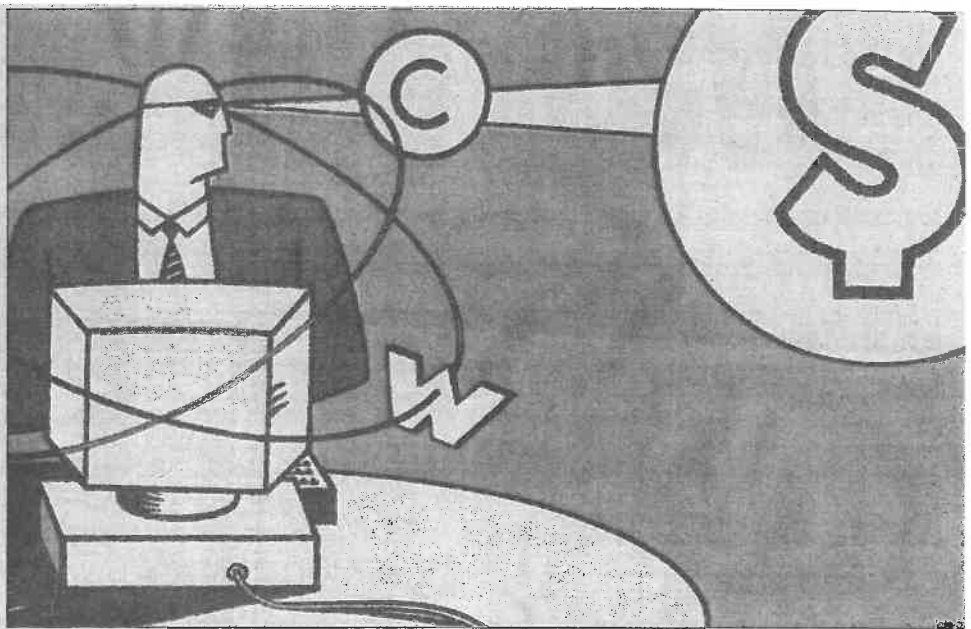
This fact having been established, the placing of the clip art on to the Web site in question was a violation of the plaintiff's rights as the copyright owner. This was despite the fact that there had been no copyright notice attached to the clip art. (The use of a copyright notice is not mandatory in most jurisdictions, including New Zealand.)

If a copyright notice ("©") is used by foreign copyright owners then they are entitled to full protection in New Zealand for copyright works. This is expressly stated in the Copyright Act.

The right to protection of copyright works is also protected in international law by the Berne Convention for the Protection of Literary and Artistic Works, to which all of New Zealand's main trading partners are parties. If copyright infringement occurs in New Zealand, and the copied work has a copyright notice attached, the ambit of remedies available to the courts for such infringement are substantially increased.

The remedies can be onerous, not only could a company be ordered to close down its Web site, but it could also be ordered to deliver up its computers and software — if the abuse is flagrant the full value of the company's system may be payable in damages.

Also, it is unlikely that the "fair dealing" exception in copyright law which allows limited use of copyright materials without the permission of the owner ("Fair use" in the United States) would be available to businesses sued for alleged copyright infringements.



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The concept of fair dealing is aimed at not-for-profit purposes. For example, in the United States clip art case the Federal Court noted that the clip art enhanced the defendant's Web site and furthered his commercial purposes, which were not "fair use" purposes under United States copyright law.

What then should a company do if it knows of an excellent graphic or table that it would like to use on its Web site, that was created by someone else and it

knows or suspects is copyrighted? The most prudent course of action is to license the right to use that work from the copyright owner (see Practice Points below).

For example, if the business wants to insert a graphic of Darth Vader on its Web page, it should contact Lucas Films and obtain a licence to use the Darth Vader image. The licensee should spell out how the company will use the image, how much the user is to pay to use the image, and any other conditions and restrictions deemed relevant.

Once such terms are agreed, Lucas Films would then provide either the rights for use or licence for use of the graphic. As corporate have embraced the Internet, there has been growing conflict between the interlinked nature of the World Wide Web and the natural instinct of businesses to protect the intellectual property in their Web pages from abuse by other companies, in particular competitors.

Given the current uncertainties surrounding the application of copyright laws to the Internet, businesses would be wise to adopt a "better safe than sorry"

approach. Where there is any doubt as to potential copyright infringement on its Web site, a business should assume everything is copyrighted and procure written permission to use, copy or modify all borrowed works on its Web site in the form of a deed.

Practice Points

Given the potential risk of infringing copyright laws, the following basic measures should be adopted by any business setting up or running a Web site:

● The person responsible for development of the Web site should make sure that all leged copyright works will be required from the materials (such as text, images, animation and sounds) are either original creations or free from any copyright restrictions.

● For example if the Web site is to feature music, licences will be required from one of the music collecting societies such as PRS or MCPS. The rights to use copyrighted material are usually fairly cheap to buy, unless they're really famous like Andy Leibowitz photos or Andy Warhol.

● If a third party is engaged to develop the Web site for the business, make sure that all relevant authorisations are ob-

tained before the site goes live (including an assignment or licence of copyright works from whoever develops the site).

● If the Web site is to feature regular contributions make sure that the contributors are aware of the risks and consequences of online copyright infringement and get an agreement in writing with those contributors which includes assurance and indemnities to help protect the business against any possible claims for copyright infringement arising from those contributions.

● If a complaint is received from an alleged copyright owner, don't ignore it — prompt response may help to avoid litigation. However, professional advice should be sought before responding, as your position may be prejudiced by making unintentional admissions.

● The penalties for copyright infringement are onerous — why not do it properly the first time around?

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