



COMMERCIAL LAW

Websites, Internet, and Law: Some Basic Principles

The Internet has nowadays become nigh-universal; almost all businesses (corporations, not-for-profit organizations, non-governmental organizations, charity funds, public corporations, etc.) possess their own interface with the world wide web, whether to market their products and services, or to provide information, to their clientele. These various web interfaces contain a plethora of information, graphic designs, images, and other multimedia characteristics giving to each of them their own respective originality. Creative ideas abound when it comes to designing a website. However, in the midst of that process, many ignore or forget certain basic principles which must be taken into account as the project is elaborated.

No website may be created without content, be it visual, text, or sound. In order to add these elements to your web interface, it is important to question their origin. Moreover, many Canada and Québec regulations control the nature of a website's information, as well as the manner in which they are transmitted to the public. Think only of the Québec *Charte de la langue française* (French Language Charter), which governs the publication language of written texts, as well as the various laws governing the confidentiality of personal information.

Furthermore, when creating a website, it is also preferable to establish from the outset the terms and conditions of use applicable to web visitors, including the business' clients.

Also, an express contract between the website's designer and its owner will help both of these persons to avoid disagreements during first the conception and then the operation of the website.

The choice of a domain name constitutes an important step in a website's conception. Hence, the business' products/services marketing should be carefully planed out, not only via its trade-marks and trade names, but also through its presence on the Internet.

The present newsletter aims to sketch a brief overview of the various legal implications related to the conception and implementation of a website.

1. Websites Contents

1.1 The *Charte de la langue française* (French Language Charter)

A business whose head offices or business places are located in Québec may not use only English in its communications through its website, even if this should run against its marketing plan. Indeed, the *Charte de la langue française* requires that any form of commercial advertising in Québec be made in French. This obligation applies as well to advertisements and information communicated through the Internet, despite its international aspect. Thus, Québec businesses must provide a French-version of their website. However, under certain circumstances, certain exceptions may apply.

1.2 Confidential Information Collected Through a Website

When your website is used to collect confidential personal information, it is important to remember that certain provincial and federal laws govern the divulgation of this information. These laws apply to the re-transmission of

collected information over the Internet as equally as they would to the publishers of a magazine or newspaper. The wary business will insure to state clearly, to its website's users, its policy concerning any possible uses it may make of the information collected through the website.

1.3 The *Copyright Act*

1.1.1 Visual Contents

To avoid paying royalties, some graphic artists and website designers have the bad habit of reusing a visual work and modify it in order to make it unrecognizable. But beware: copyright protects an author's every works and allows him to claim his dues (even when his work is used in a context where the public ignores the identity of the work's author) notably through the application of moral rights protecting the work's integrity. Indeed, an author may exercise a certain control over other works derived from his own, including modifications effected through graphic design softwares. Moral rights serve to protect the reputation and the artistic and intellectual processes. As a consequence, the practice of downloading an image or graphical design, in order to modify them, is to be proscribed since it exposes its user to serious lawsuits. It is not sufficient to acquire the rights from the author; a multimedia editor must also and always consult the author before modifying a work for the purpose of his multimedia product. However, the author may implicitly renounce to exercise his right to work integrity when the specific context of the project allows so or explicitly when it is clearly established in a contract.

Allowing for certain exceptions, the protection conferred by the *Copyright Act* lapses 50 years after the death of the author. Hence, one must be careful. Not all website designers share the same level of ethics, but it is often the website's owner that shall pay the price of the copyright infraction. Also, as a website gains in popularity (and thus increases its Internet audience), the consequences related to infringing upon a copyright will increase proportionally.

1.1.2 Text Contents

Concerning the copyrights of written texts, the guidelines set out above under *Visual Contents* apply with little adaptation.

Yet, one of the aspects of a website's text content, unlike images or designs, is that it may be translated in any number of other languages. As a general rule, it is necessary to obtain the authorization of the translator before putting online the translation of a text. Indeed, the translator himself holds copyright over any work he produces, even if it is only a translation of a text created by another person. It must be remembered that the authorization of the original text's creator is also required in such a case, as he retains his moral rights over the translated text.

1.1.3 Personal Image Rights

The concept of personal image rights follows from a person's right to privacy. Indeed, it is forbidden to use a person's image without first obtaining her prior authorization. Under the Québec Civil Code, all persons, and not only celebrities, have the right to control the use of their image. This right does not end with the person's death and thus may be exercised by that person's heirs, for example when that image retains a certain value (think only of late pop-culture icons such as Marilyn Monroe, John Lennon, and Elvis Presley). Even a single photo of a stranger, taken on the street and published (on the web, in a magazine or in any other media), may create problem if the prior consent of the "subject" was not secured. The hapless photographer (and his publisher) is more likely to receive letters of claims rather than letters of thanks!

As a case in point, take a hypothetical website advocating a program against drug abuse. It publishes the photography of a group of teenagers, taken in a school yard after school. These random teenagers, even though they are not celebrities, could legally object to the publication of this photography linking their image to drug use. They could even claim damages, were they to prove that the photo's publication tarnished their reputation.

Even a schoolteacher wishing to add a photo or video of his students' school play to his website must obtain the consent of his "actors"! Indeed, it is not necessary to be a professional actor or to belong to an artists' guild to benefit from personal image rights. Neither can it be assumed that, in such a context, the "actors" *implicitly* agreed that their image be used in public communications promoting the school; their express consent is required.

Personal image rights should not be construed as a barrier against all artistic (including photographic) endeavours; their relevance *vis-à-vis* a specific work depends upon the factual context and whether the

work in question is to be published or if it is strictly private. Nonetheless, the artist should always keep in mind the personal rights of his "subject".

1.1.4 Works Created By Employees

A business is entitled to publish on its website (or any other media for that matter) any work that was compiled or created by its employees within the scope of their employment. Under the *Copyright Act*, the copyright of employee-created works automatically belongs to the employer. That employer can thus use these works without having to pay any royalties to his employees. It must be insured in such cases that each "creator" is indeed an employee, and not an independent autonomous worker (who personally owns the copyright on any works he creates unless specifically provided otherwise in the work contract).

2. Means to Prevent Eventual Litigations

2.1 The Contract with the Website Designer

A website designer is asked a client to make submit a proposition for a project. The designer has an original idea for that website's development and, of course, he wants his submission to be accepted by the client. However, at that stage, he does not yet know whether the client will grant him the contract. Between the conception and presentation of the project to the client and the time at which the client effectively grants the contract, does the designer hold any copyright over the ideas he set out in his proposition for the website's development? The answer is affirmative, as long as these ideas were sufficiently detailed and put in writing. Indeed, such ideas become more easily protected when "fixed" in writing. Yet, the best protection remains the signature, before the presentation of the project, of an agreement to this effect between the designer and his client.

The business that retains the services of an independent website designer in order to create its website does not automatically becomes the owner of the copyrights for that website (which are held by the web designer), even if the agreed price has been paid in full. It is thus highly desirable to have a signed contract stating clearly that the ownership of the website will revert to the business once it is finished and delivered. Furthermore, it should also be agreed that the moral rights of the web designer will be transferred as well to the business, since that client may wish one day to modify the website.

It would also be judicious to insure that the website designer is solely responsible of obtaining the appropriate licenses (regarding notably graphics), so that the client may use the delivered website in full legal conformity. In such circumstances, part of these materials may be provided by the client, or the client himself may insist upon the inclusion of certain elements. In such cases, it is important to identify on who it shall fall to contact the copyright holder and eventually to pay any required royalties. If a graphic designer provides images to enlighten a website, but that these images are plagiarized, the website's owner may be held liable even if he ignored that these images were copied. He would in such a case be forced to suspend his website. For this reason, it is advised to foresee a guarantee clause obligating the graphic designer to hold indemn the website owner for any infraction to the rights of third parties.

2.2 The Protection of information Contained on a Website

When a business creates a website, it is advisable to draft the site's terms and conditions of use for clients and other Internet users. Otherwise, some users may pretend that they have the *implicit* authorization to download and reproduce the contents of the website. Will the business grant users the right to reproduce the graphics only so that they may be consulted onscreen, or on the contrary, does it want to allow the possibility of downloading and saving the website's content? If the business consents to the user saving on his disk the website's content, what use of the content is allowed? For instance, take The Legal Insider, whose issues are all available online. We do wish to allow our readers to copy and pass forward to others our newsletter, but only as long as the texts' integrity is maintained and that their origin is mentioned. On the other hand, the publisher of a "private" newsletter, available only to subscribers, explicitly wishes to proscribe the distribution of his publication to non-subscribers.

Another example: a chamber of commerce is interested in distribute the list and contact information of its members. The objective is to allow Internet users to contact the chamber's members in the course of business. Should the chamber of commerce impose limits? If yes, what kind? The chamber must ask itself such questions in order to maximize its benefits from the website while reducing the risks of conflicts. Indeed, the chamber certainly does not want an Internet user to acquire the whole members' list in order to use it for his/her commercial objectives, such as for a marketing campaign. It would thus be prudent to draft a notice setting out the conditions of use allowed for the website, including the limits on the use of the information consulted or saved from the website.

The addition of a notice regarding the copyright of the website is not necessary in order for the protection under the *Copyright Act* to take effect. However, by placing such a notice on its website, a business will negate any doubts on whether or not the website is indeed protected by copyright. Such a notice will also trump any eventual excuse from an infringing user to the effect that he ignored that the website's contents were copyrighted. Finally, such a precaution is simple, costs little, and has a dissuasive effect.

Thus, it is desirable for a website to clearly set out its **Conditions of Use**. Documents of this sort are too often underestimated and thus hastily drafted, often simply by re-using the first conditions of use text found on the Internet. However, website owners would be better served by a carefully thought-out "conditions of use" text, maybe even drafted following professional advice, in order to frame clearly the limits and terms of the website's use.

2.3 Website Updates

The contents of some websites may be construed as a private document. However, a website who promotes products or services may be considered the equivalent of continuous advertisement. In consequence, it must be continually updated. If as time goes by, the website's owner modifies the characteristics of the products and services he offers, but that he omits to update his website accordingly, he may stand accused of fraudulent publicity, when a client tries to buy a product as advertised on the website. As a consequence, special attention must be paid to changes in prices or nature of the products and services offered.

Furthermore, if a website owner intends to promote his products or services through his Internet site, he must take heed of the various regulations governing advertisement; advertisement laws apply to websites as much as they do to other media (television, radio, etc.). Considering the nature itself of the Internet (who ignores frontiers by definition), it remains difficult to ascertain the laws of which jurisdiction will find application in a given case. When products or services are sold directly through the website, the laws of the state or country in which an appreciable number of clients are located, at the very least, must be followed.

2.4 Contract with Internet Users

When an Internet user buys online through a website, a contract is formed immediately, under which the business is obligated to deliver the product. Indeed, a contract may be concluded simply through communications over the Internet. Care must thus be paid to the wording used around or in the order forms available through a website, so as to insure that the business will not be selling goods or services that it cannot deliver. Various formulas and mechanisms are possible to avoid such situations, such as simply stating on the order form that no contract is concluded until an email confirming the order is transmitted to the client.

3. Choosing a Domain Name

Choosing a domain name is a crucial step in the creation of a website. The name that a website owner chooses will become the gateway through which Internet users will access the business. Nowadays, businesses oftentimes become better known under their domain name than under their business names or trade-marks.

In this context, a business should select a domain name in synergy with its business name or its trade-mark. Indeed, the use of a domain name alone does not grant exclusive right over that domain name to the user, as opposed to business names or trade-marks. The last two benefit from well-defined legal protection against their un-authorized use by third parties; it is far from definite that domain names are protected in the same fashion.

In short, before investing efforts and resources into the marketing of its website under the chosen domain name, a business should insure that the its efforts will not ultimately be in vain (for example, if others of good faith register a trade-mark or use a business name similar to the domain name, leading to confusion).

Conclusion

The creation or development of a website can be an interesting and stimulating project for a business, who generally invests a great amount of time and financial resources into this project. Yet, haste makes waste: web designers and website owners must pay careful attention to the legal ramifications of the exploitation of a website.

Although adapting the textual, visual, or sound elements of another website may prove less onerous (in time and money), one must be very careful before incorporating such elements in one's own website. Indeed, any creation (be it under written, visual, or graphic form) is potentially protected under the *Copyright Act*. The use of actual protected works, even if they are extensively modified, may incur the user's liability to the author of the original work. Before an element is incorporated within a website, its origin must be ascertained.

Also, various laws such as the French Language Charter and laws regarding the protection of personal information govern the manner in which information may be transmitted over the Internet. Infractions to these laws may carry heavy consequences.

There are many ways to avoid potential legal conflicts surrounding the creation of a website. In all cases, it is preferable to conclude a written contract with the website's designer, governing issues such as copyrights ownership and transfer, and the responsibility of obtaining appropriate licenses for using graphics and other elements created by third parties.

Any website possesses content which is susceptible to being downloaded and copied by other persons. It must be insured that this content may not be used by the website's users in a way violating the laws governing personal information protection and copyright, or otherwise used in a way unwanted by the website's owner. Adopting a clear policy, most often under the form of a "**terms of use**" document on the website, constitutes the best manner of attaining that goal.

Regarding businesses who promote their products and services on their website, it is important to regular updates so that only accurate information on said products and services is made available to potential clients. This prevents occurrences such as being obligated to deliver a product no longer available. Thus, for e-trade purposes, it is highly recommended to include within order forms a notice to the effect that no contract is formed between the website's owner and the client as long as the order has not been confirmed to the client, through email or otherwise, by the seller.

Finally, when choosing a domain name, one must be aware that at the present time there is no legal protection related to the use of a domain name. As result, a domain name identical or near-identical to one's existing business name or trademark is the surer bet.

The World Wide Web has constituted a commercial space for some years; yet it remains an ever-evolving field, where frontiers are almost inexistent. The main issue with the Internet arises from the fact that it creates intangible relationships in a world whose emergent rules are ill-defined at best. It also remains difficult to determinate the applicable law in any given case, as the laws of a nation traditionally apply only within a specific territory and to a well-defined population. On the contrary, the Internet is a communication medium accessible by all regardless of physical frontiers, regardless of where in the world the user is located: welcome to cyberspace!

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