



Technology & Intellectual Property *Legal Trends*

Second Quarter 2006

Web Site Terms of Use

By Jonathan Frieden

An increasing number of businesses, even those that do not view themselves as working in the "e-commerce" industry, are taking to the Internet to generate or consummate business relationships. These relationships, between an e-commerce business and the visitors to its Web site, are typically governed by the provisions of a Terms of Use page. From a legal standpoint, the Terms of Use page may be the most important part of any Web site.

Properly drafted Terms of Use can be an invaluable tool in protecting businesses from frivolous lawsuits and crippling legal exposure. Though the Terms of Use used by many Web sites are similar, they are not a "one-size fits all" solution. They should be professionally drafted and tailored to the particular needs of the Web site publisher.

In addition to terms and conditions specifically addressing the products or services advertised or offered by the e-commerce company, most Terms of Use should contain one or more of the following general contract clauses:

Choice of Forum

Choice of Forum provisions permit the parties to a contract to select, with certain limitations, the jurisdiction in which any disputes pertaining to their relationship are resolved. In many instances, a Web site's Terms of Use will require that any legal action pertaining to the Web site be brought in the jurisdiction in which the publisher is located, which may be quite inconvenient to a distant user of the site.

Choice of Law

Choice of Law provisions permit the parties to a contract to select, with certain limitations, which jurisdiction's laws will be applied to their relationship. Generally, a Web site's Terms of Use will apply the law of: (a) the jurisdiction whose laws are most favorable to the publisher; (b) the jurisdiction in which the publisher is physically located; or (c) the jurisdiction whose laws are most familiar to the attorney who drafted the contract.

Limitation of Liability

These provisions permit one or both parties to place limitations on their liability for breaching the agreement. Properly written, Limitation of Liability provisions can cap a party's legal exposure for certain conduct.

Indemnification

Indemnification provisions permit a party to shift the burden associated with an anticipated loss to the other party. In many instances, Terms of Use require the user of a Web site to indemnify the Web site's publisher against any losses associated with that use.

Attorneys' Fees and Costs

In the American judicial system, a party is generally required to pay his or her own legal fees and expenses, win or lose. However, parties to a contract may, with certain limitations, require that a party who loses in a legal action brought pursuant to the agreement pay the attorneys' fees and costs incurred by the prevailing party.

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Choosing A Trademark

By Kevin Oliveira

The names, phrases, taglines, logos and designs that identify your brand have the potential to influence buying decisions for the lifetime of the product or service you associate with them. This savvy branding effort is also fundamentally impacted by trademark law.

The most flexible, most advantageous and economical opportunity to initiate trademark research is when you initiate a branding initiative. Routinely searching trade press Web sites, search engines and the database of the U.S. Patent and Trademark Office will likely show you if similar brands already exist. In addition, an attorney's input becomes important to properly overlay the trademark law.

Here are five keys to selecting good brands without conflicts.

Distinguish – A brand should distinguish your products and services from your competitors. Choosing a name that is close to the brand name used by a market leader, will inevitably cause trademark infringement claims. In addition, once you have established consumer recognition and garnered marketplace praise, a product or service branded too closely to a competitor's may lead people to your competitor's brands.

Avoid Generic Names – No one party can protect a generic name for a product or service. Remember, any business offering products and services will always be able to use generic or common names. For example, "Soap," "Soda," "Consulting," and "Phone" are not capable trademarks.

Avoid Descriptive Names – A descriptive term that conveys some idea about the nature of the goods or services offered is given trademark protection only if the owner can prove that the public association of the name is tied exclusively to the

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As in the drafting of any other written contract, businesses should seek competent advice from a properly licensed attorney. The failure to do so may result in Terms of Use that provide no protection or, worst yet, may create legal exposure where none previously existed.

This material originally appeared in "Common Issues Faced by E-Commerce Businesses" a seven-part series published on the E-Commerce Law blog at www.ecommercelaw.typepad.com.

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Trademarks continued...

owner's product or service. "Oatmeal Soap," "Root Beer," "Business Consulting," and "World Phone" are not significantly distinctive. While they might eventually become trademarks if one party exclusively uses the marks, the distinctiveness develops very slowly and often at great expense.

Think Suggestive – Suggestive terms, like Ivory Soap, Limon or Nextel imply attributes without describing the characteristics of the product and services. As such, they are considered relatively strong trademarks.

Think Arbitrary – Arbitrary names like Dove, Coke, 7-Up, Xerox and Sprint, have no prior association with the product or service branded. They are also relatively strong trademarks, and after creating an association with the product or service branded, have potential to become the strongest trademarks.

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