Someone Copied My Company's Website Without Permission — What Can I Do About It?

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You encounter a website that looks very similar to your company's website. The similarities make clear that your website was copied. Even worse, it was copied by a competitor.

Whether you hired a professional to design your company's website, or invested your own time in building it from scratch, you naturally will wonder what laws have been violated, and what remedies you may have.

Are there any legal protections against unauthorized website copying?

Intellectual property laws may provide a variety of protections for your company's website. Trademark, patent, and copyright principles may apply.

Trademark-

Trademark law may protect your company's name, image, and brand, whether or not you have registered those symbols with the United States Patent & Trademark Office. Similarly, the "look and feel" of your website may be protected as trade dress, a type of trademark. Trade dress law may protect the commercial presentation, and sometimes even the visual appearance, of a product, including features such as size, shape, color combinations, textures, and graphics. Some critical questions when considering whether you can claim exclusive rights in features of your company's website include:

- The degree to which the features are "distinctive," i.e., serving to identify and distinguish your company as the source of goods or services sold on the website — if so, the features may be protectable;
- Whether those features are symbolic, as opposed to functional — only the former are protectable; and
- Whether those features were developed specifically for the website, or whether those features were part of a template or other common design material shared by other websites — only the former are protectable.

Patent-

Patent law, generally speaking, is not likely to supply a viable source of protection against conventional copying. This is not to say that patents cannot play a role in protecting website features; they can and do. Utility patent protection can be obtained for a new, useful, and nonobvious "process, machine, manufacture, or composition of matter."[1] But, absent unusual circumstances, the display copying we are discussing here is not the kind of misconduct that patent protection would protect against.

Copyright-

Copyright law provides a potential source of protection against unauthorized website copying. Even the copyright law, however, does not provide "slam dunk" assistance.

Copyright law protects "original works of authorship fixed in any tangible medium of expression."[2] Thus, it may protect various aspects of your website, such as original text (a blog post, or the HTML code for the website, for example), artwork, music, and audiovisual material. Copyright law does not, however, protect every original and creative work of authorship.

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1 35 U.S.C. § 101.

2 17 U.S.C. § 102.

For example, the display generated by the website code likely is not protected, because a work is considered "fixed in any tangible medium of expression" only when it is "sufficiently stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[3]

The website content that you see displayed on a computer screen is not fixed on the computer screen, but instead is only a transitory display of content generated by the execution of website code (such as HTML, JavaScript, and similar coding languages). Without diving into too many technical details, when a user enters a web address to access a website, the web browser retrieves the website code from a remote web server. The underlying website code may be executed by the user's computer or by the web server, depending on how the website is set up, and the resulting execution of code generates content to be displayed onto the user's screen. Therefore, it is not the visual display itself, but only the underlying website code, that has been "fixed," yet it is the similarity in display which you, the aggrieved victim of copying, would like to stop.

Are there any benefits to registering my business's website code with the Copyright Office?

Copyright protection begins at the moment that the original work becomes fixed in a tangible medium of expression. Registration is not a prerequisite to copyright protection. As such, whether or not you have registered it, your work is still copyrighted. That said:

- Registration is required in order to bring a civil action for copyright infringement.[4] (A civil action for copyright infringement must be brought in a federal court.[5])

- The owner of a registered copyright may seek statutory damages for infringement,[6] avoiding difficult proof problems that may accompany any effort to recover actual damages.

- The prevailing party in a copyright infringement lawsuit may also be awarded reasonable attorneys' fees if the copyright was registered prior to commencement of the lawsuit.[7] Registration is also a prerequisite to a fee award. (Fee awards are discretionary, but courts often award them.)

Seeking copyright registration of a website, however, may present several practical difficulties.

First, and critically, the business owner may not actually own the copyright in the underlying website code. Ownership of a copyright vests in the initial author (or coauthor) of the work.[8] Often a company will have hired a third-party website designer to create the website. Unless the website code was created by an employee within the scope of her employment, or there is a contract stating that the code was a work made for hire, the copyright is owned by the designer author.[9]

Second, the Copyright Office maintains that registration extends only to the copyrightable content of the work identified at the time of registration.[10] Each new version of the website that contains new revisions must, therefore, be registered separately, with a new application and fee due each time. This position presents an obvious problem for websites, where the HTML code may be in constant flux as design and textual revisions are made. This can further add to the complexity of deciding how and when to seek registration of both the initial website and any subsequent new version of the website.

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[3] 17 U.S.C. § 101 ("A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission.").

[4] 17 U.S.C. § 411.

[5] 28 U.S.C. § 228(a).

[6] 17 U.S.C. § 412; see also § 504 (discussing available statutory damages for registered works).

[7] 17 U.S.C. § 412; see also § 505 (discussing an award of reasonable attorney's fees to the prevailing party).

[8] 17 U.S.C. § 201(a).

[9] See 17 U.S.C. § 101 (defining a "work made for hire" as either a work prepared for an employee within the scope of his employment, or a work specially commissioned "as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas," if the parties expressly agreed in a written contract that the work was a work made for hire); see also Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989).

[10] See generally, Circular 66, "Copyright Registration for Online Works," U.S. COPYRIGHT OFFICE, available at http://www.copyright.gov/circs/circ66.pdf ("[F]or all other computer programs that are transmitted or accessed online, as well as for online automated databases, the registration extends to the entire copyrightable content of the work owned by the claimant, even though the entire content is not required in the identifying material deposited.").

What can I do to remove the copied material?

One potential remedy you may be able to pursue is to serve a takedown notice under the Digital Millennium Copyright Act ("DMCA").[11] The DMCA allows a copyright owner to contact search engines (such as Google) and webhosting companies (such as GoDaddy) to request that they deny access to copyrighted material that has been copied. A copyright owner can send a DMCA takedown notice to the search engines and webhosting companies, specifying the infringing material and the copyrighted work that has been copied. In exchange for taking fast and reasonable action on the DMCA takedown notice, the DMCA provides protection to those companies against future copyright infringement lawsuits. Unless the person who uploaded the copied copyrighted material submits a counter-notification, swearing that his use of the copied material is permissible, companies typically take prompt action on the takedown notice by either ordering the owner of the website to remove the copied material, or by blocking access to the copied material themselves. Because a DMCA takedown notice can be such a powerful tool for removing material from the Internet, however, filing an inaccurate or false DMCA takedown request can have negative consequences for the copyright owner. It's important to be accurate and truthful.

Conclusion

We have not here offered legal advice; application of the intellectual property laws involved when someone copies your website depends on the particulars of your situation. Counsel versed in website technology and the pertinent laws can help you optimize your path forward; we encourage you to consult with the counsel of your choice as to your individual situation. We hope, however, that this brief piece has proved helpful in orienting you, as to some of the issues and complexities that may lie before you in responding to unauthorized copying of your company's website.

[11] 17 U.S.C. § 512.

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