AN ILLINOIS LAW FIRM

GETTING DOWN TO BUSINESS

HEYL ROYSTER
BUSINESS & COMMERCIAL LITIGATION NEWSLETTER

 Spring 2013

WELCOME LETTER

Dear Friends,

Welcome to another issue of our newsletter covering litigation, financial, employment and compliance issues that affect businesses in our area, and throughout the country.

In this edition of the *Heyl Royster Business and Corporate Litigation Newsletter*, Natalie Thompson provides strategies for protecting businesses from website liability related to content. Stacy Crabtree discusses website ownership, and whether paying for creation results in ownership. Similarly, in the digital age, some business records may be maintained for an infinite time, while others are randomly deleted. Tim Bertschy informs us why record retention policies are critical, and provides tips for creating your own record retention policy.

We would also like to invite you to a free educational seminar presented by our Business and Corporate Litigation Group, which will focus primarily on issues relating to the Family Medical Leave Act and the American with Disabilities Act. Please join us on Wednesday, April 17, 2013 at 12:00 in our Peoria office or via webinar.

Finally, as a member of the ABA's House of Delegates and Chair of the Standing Committee on Publishing Oversight, I'd like to welcome those of our readers who are attending the ABA Section of Litigation Annual Conference in April. Heyl Royster is proud to be a Conference sponsor.

As always, if there are any topics you would like to see in future editions, we welcome your thoughts and recommendations. If we can assist you with these or any other legal matters, please do not hesitate to contact us.

Timothy L. Bertschy
Chair, Business & Commercial Litigation
Practice Group

Tim Bertschy is the chair of the firm's Business and Commercial Litigation Practice. He concentrates his practice in the areas of complex commercial litigation, employment, and local governmental law. He has represented a large cross-section of clients throughout the federal, bankruptcy, and state courts of Illinois including Fortune 500 corporations, governmental entities, non-profits and professionals.

Lunch & Learn!

Business & Commercial Litigation Seminar

Wednesday, April 17th, 2013

Join us for our upcoming free seminar on employment issues related to the **Family Medical Leave Act** (FMLA) and **Americans with Disabilities Act** (ADA).

We will be discussing the basics every employer should know about FMLA, including FMLA policies and return to work issues.

We will also address ADA accommodation issues. Details are as follows:

The seminar will be offered **via webinar** and **in person**. Lunch will be provided to those attending in person. We hope to see you there.

Wednesday, April 17th, 2013
12:00-1:00 p.m.

Heyl Royster Offices
Suite 600, Chase Building • 124 SW Adams • Peoria

Registration and Questions: Contact Sandy Gullette
sgullette@heylroyster.com or 309-676-0400 Ext. 277.

YOU PAID FOR IT, BUT YOU DIDN'T BUY IT: THE QUESTION OF WEBSITE OWNERSHIP

By: Stacy Crabtree

Businesses often use a substantial amount of time and resources in the development of their websites. This is in large part because websites are assets which businesses use to reach customers, sell products and services, and manage information. But you may be surprised to learn that many businesses do not actually own their own website. Ownership of a website does not depend entirely on who paid for it. Instead, website ownership has its roots in copyright law.

Copyright law is a form of intellectual property law that protects original works of authorship. "Works of authorship" may be writings, artwork, photos, or music, and may be found in novels, movies, songs, computer software, websites or other media. Copyright law protects how something is expressed, but not necessarily what is being expressed. In other words, copyright law does not protect ideas, procedures, systems or methods of operation that may be the subject of other intellectual property rights such as patents. Works subject to copyright protection do not have to be registered with the U.S. Copyright Office or carry the copyright symbol in order to be protected by copyright law. This isn't to say a business shouldn't look into registering its copyrightable work with the U.S. Copyright Office. There are benefits to registering your copyrightable work, which go beyond this article. Please feel free to contact us to discuss registering your copyrightable work. The key for the purpose of this article is that when an original work is created, it is automatically protected under copyright law for the benefit of the author.

Based on these principles of copyright law, the ownership of a business's website depends on who created or designed the website. If a website is developed by an employee of the business within the scope of his or her employment, then the work made for hire doctrine tells us that the website will be owned by the employer. Even in this situation, however, an employment agreement is recommended to reflect that the website is being created within the scope of employment and the website will be owned by the employer. No business is immune from having disgruntled employees, and this type of employment agreement may alleviate the argument that the website was created outside the scope of his or her employment.

On the other hand, if the website is created or designed by a third party (i.e. non-employee), that third party is likely the sole owner of the website (with the exceptions stated below). If the third party is the sole owner, the business only has the right to use the website as it was developed by the third party. Consequently, the business may not be able to modify the website at its discretion, and if the website is hosted by the third party, the business may not be able to move the website to a different host without being liable for copyright infringement to the third party. Ultimately, the business may have to create an entirely new website with the loss of more time and money. The business may be able to claim joint authorship with the third party, but only if the business actually contributed copyrightable work to the website development process. By having joint authorship, the business and the third party merely share ownership of the website. This may mean more rights for the third party than what the business originally intended.

So how does a business claim ownership rights in its website if it is developed by a third party? The answer is by written agreement. This agreement may take one of two forms. First the agreement may be a work made for hire agreement. A work made for hire agreement allows for the business to be considered the original author of the website despite its creation by a third party. Take caution when using this type of agreement, though, because the work made for hire doctrine requires this agreement be executed before any work is commenced and may not fit every situation. The second form by which ownership can be addressed is through a copyright assignment agreement. This agreement recognizes that the third party may be the original author and therefore owner of the website, but states that the third party assigns all right, title, and interests in the website to the business. Notably, language reflecting the work made for hire or copyright assignment agreement does not need to be in standalone agreements. Rather this language can be incorporated into any website development agreement with the third party.

It is also important to think about domain names, i.e. a website's address. Domain names can cost businesses a significant amount of money. Domain names are not protected by copyright law. Domain names are purchased from domain name registrars such as GoDaddy, Namecheap, and 1&1, and they expire. Because businesses spend so much money on their domain names and use the domain name in marketing activities, businesses should take extra caution to ensure continued ownership of their domain

names. First, businesses should make sure their domain name is actually registered to the business itself. A business can do this by searching for the business's domain name through a "whois" search offered by domain name registrars. Businesses may be surprised to see that sometimes these domain names are registered to employees or third parties who purchased the domain name for the business. Second, businesses should note the expiration date for their domain names. Domain names must be renewed before the expiration date or else it may be lost at a significant cost to the business.

This article only represents two of the issues related to business website development. There are numerous other issues that may arise, such as protection in the event your third party website developer uses copyright protected work of another party thereby subjecting your business to a copyright infringement claim. We recommend consulting with an attorney when entering into any agreement related to your website to ensure your business is adequately protected.

Stacy Crabtree is an associate with Heyl Royster. She represents clients in commercial and contract law, as well as tort litigation.

Website Liability: Content Issues to Address In Order to Protect Your Business

By: Natalie Thompson

Having a website can of course be beneficial for your small business. Websites allow customers to get to know a business and are great marketing tools. However, liability issues can arise with a website. Respecting the content of your website, there are three main areas where liability can arise: linking, trademark infringement and interactive message boards. This article will discuss all three of these areas and provide tips to avoid placing your business at risk for a lawsuit based on the content on your business website.

Linking

The most straightforward case of linking is called "deep linking," which refers to placing a link on your website which leads to a particular page (other than a homepage) within another website. For example, a construction business might link to a product that it uses on another website. If the hypothetical construction business links directly to the product, rather than to the homepage of the business that sells the product, the construction business might open itself up to complaints from the other business for disrupting the flow of their business by bypassing the homepage. This is easily avoidable by directing your customers to the home page of other websites. As a benefit, courts have held that hyperlinking does not involve a copyright violation as long as the customer is transferred to a particular, genuine webpage and there is no deception in what is happening. Another alternative is to obtain written permission of the business/owner of the other website to bypass the homepage.

Another type of linking is "inline linking," which is also known as "embedding." Inline linking involves placing a line of HTML on your website so that your webpage displays content directly from another site. The most common example of this is websites embedding videos from YouTube to illustrate a point or initiate discussion. While there is some uncertainty on the liability issues arising from embedding, the Ninth Circuit Court of Appeals recently concluded that embedding does not directly infringe copyrights because no copy is made; the link is just HTML code pointing to the other material. However, if a business embeds a link from another site, it must make certain that it does not "frame" the content to make it appear that the content is owned by the linking site. A website also should not use a link to pass off another's work for its own. For example, one could tell a reader to click here to see some of your best work, and then link to photographs of work done by another company. This is clearly a misuse of linking and would open the company up to a lawsuit.

Finally, there is the issue of linking to infringing works. This involves a situation when you knowingly link to works that clearly infringe someone's copyright – like video clips. In this situation, a business might be liable for what is known as "contributory copyright infringement," which occurs by "intentionally inducing or encouraging direct infringement" of a copyrighted work. As long as you do not know that a work infringes someone's copyright, you cannot be held liable for contributory infringement for directing others to that work. On the other hand, it is not safe to simply claim that you "did not know" when the circumstances make it clear that the material you link to is infringing.

Trademark Infringement

Trademark infringement is using the mark of another in such a way as to create a likelihood of confusion, mistake or deception: for instance, creating the illusion that one company is somehow associated, affiliated or sponsored by a trademark owner when this is not the case. One way this can occur on a website is by "metatagging," or burying the trademark of another company within the HTML code of your business website so when a customer searches the competitor's mark, your business appears in the results due to the hidden tag. Some metatags are allowable, but in order to protect your business from liability it is best to avoid this practice unless you are clear about what is allowed.

Trademark infringement can also occur by purchasing search terms from a search engine to give your website a better presence. Purchasing these terms may not always lead to liability, but many trademark infringement lawsuits have been brought because of this practice, so it is best to proceed with caution.

Interactive Message Boards

Many business choose to have interactive message boards as a way to communicate with their customers and to allow their customers to communicate with one another. While there are various liability issues that can arise from this practice, websites are generally protected by the law.

For instance, 47 U.S.C. § 230 states that websites are not liable for third party content, except for federal criminal prosecutions, intellectual property claims or claims under Electronic Communications Privacy Act. As such, a website cannot be liable for defamation by a user on its message board. In one recent case, a customer on a message board posted a negative comment about a television station. The station sued the customer and the company with the website message board, but the court dismissed the action against the company pursuant to 47 U.S.C. § 230.

Although the law protects websites with message boards, it is still a good idea to have a disclaimer. Indicate that your company is not liable for the behavior of the users of the message board and state that users are not allowed to defame others, and follow up on this by deleting comments that are irrelevant to your site. Further, advise your message board users that there is no expectation of privacy.

The Digital Millennium Copyright Act (DMCA) provides another safe harbor to protect websites from liability for material posted by message board users. For example, if a user posts a copyrighted picture on a message board, but your company has complied with the DMCA provisions, its liability can be eliminated. However, failure to strictly comply with the DMCA safe harbor provisions can increase your liability. In order to comply with the DMCA, your company must: 1) designate a DMCA agent with the copyright office; 2) post the DMCA agent information online (including name, address, phone number and e-mail); 3) remove known infringing material; 4) terminate repeat offenders from your website; 5) accommodate copyright owners policing your website; and 6) comply with notice and takedown procedures.

There are other content issues that can arise with having a website and, because technology is constantly changing, there will always be new issues arising. Keeping these three content issues in mind, however, will help keep your business safer from website liability problems while allowing you to continue to promote your business with an online presence.

Natalie Thompson is an associate with Heyl Royster. She represents corporate and individual clients in the areas of commercial, tort and contract law. She also practices in appellate advocacy.

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Would you like to receive the newsletter electronically? Just send an e-mail request to rford@heylroyster.com. You'll be able to enjoy the most cost-effective, environmentally-friendly way of receiving our business and commercial litigation news!

Developing a "Best Practices" Record Retention Policy

By: Tim Bertschy

Much attention has been focused in the past few years on e-discovery. Less discussed, but the equal companion to e-discovery, are competent policies setting forth standards for record retention and record destruction.

Several business needs drive the record retention policy. First, there is an operational need for records. A record may be created for current or future business use. Records created for current use may be needed in the future.

Second are legal needs for records. Litigation may arise out of transactions or events which are based upon or memorialized in written or electronic records. Governmental agencies, federal, state or local, may require the retention of records for later audits. Proof of ownership or title may necessitate the maintenance of records over a long period of time, e.g., deeds, loan documents, etc.

Offsetting these two needs, however, is a third need. Maintenance costs and efficiency encourage the destruction of records at the earliest possible time. Whether maintained in paper or electronic form, records are generated at a rapid rate. Without sensible destruction policies, the expense of record preservation can be significant and the sheer volume of records may make ease of access to data difficult.

However, despite efficiency concerns, businesses must be alert to potential claims of spoliation. Case law, particularly in the last decade, penalizes parties in litigation which have destroyed records pertinent to the litigation where the destruction occurred either in the absence of an established record retention policy or in violation of the standards established in such a policy.

The three business needs - operational needs, legal needs and cost/access efficiencies - taken together with the legal risks of spoliation - warrant the development, implementation and maintenance of a sensible record retention policy.

The goal of a record retention policy is to identify and keep those records that are necessary to the conduct of the organization's business, to protect those records which are required to be kept by statute or regulation or which are relevant to pending or foreseeable investigations or litigation, to establish reasonable retention periods for such records, and to provide for the destruction of unneeded records in a documentable and systematic manner.

A record retention policy:

1. Should be written;
2. Should state the goals/philosophy of the policy;
3. Should be provided (not just available) to all employees;
4. Should stress the importance of compliance and note possible discipline;
5. Should identify to whom questions can be directed;
6. Should clarify that e-mail in-boxes are not record retention systems;
7. Should describe how and when to preserve e-mail;
8. Should set forth easy to understand document categories;
9. Should set forth clear retention periods;
10. Should not allow for employee judgment on the retention period;
11. Should address off-site records (such as records "maintained" at home on home computers);
12. Should set forth a destruction protocol; and
13. Should identify responsible parties.

Writing and implementing a record retention policy presents several challenges. Records must be categorized to develop appropriate retention periods, legal standards applying to those records must be assessed, administrative responsibilities must be assigned, and an education and compliance program for employees must be established.

Let's look at some of these issues in greater detail:

1. Cataloging Existing Records:

In order to develop an effective record retention system, an organization must determine what records it has and how the records are best cataloged for purposes of a retention system. "Records," as defined for a record retention policy, include all documents or things which require preservation from a business or legal standpoint. "Records" are not limited, obviously, to tangible items since digital data is typically the primary form of record keeping today.

"Records" likewise does not consist solely of documents, either in written or digital form, since "objects" may also require retention for a variety of business purposes.

Organizations should also consider the retention protocol for items which have legal significance but might not typically be thought of as "records." This would include, for example, any advertising material (regardless of where it appeared or on how many occasions it was utilized), as well as superseded web pages and internet publications or representations concerning the organization or its products.

2. Categorizing Records:

Records should be categorized in a fashion which allows for efficient and reliable access and, ultimately, destruction. Categorizing records as "letters", "memos", "e-mails", "drawings", "formulas" or the like is not helpful. Categorizing the record by form rather than topic defeats easy access or a useful method of insuring record destruction at an appropriate time.

Records should instead be categorized by subject matter. Subject matters might include: corporate organizational records; financial records; product development records; sales records; litigation files; and the like. Subject matters should be divided into subcategories. For example, corporate organizational records can be broken down into articles of incorporation and amendments, by-laws and by-law amendments, board minutes (with supplemental materials), board committee minutes (with supplemental materials), etc. Financial data can be broken into accounts payable, accounts receivable, payroll, expense reports, etc. The correct subcategorization will depend upon the nature of the business, the category itself, the numbers of records involved (the more records, the more subcategorization is required), and the frequency of need to access the records (again, the more records, the more subcategorizing is generally required).

3. Determining Retention Periods:

Once records are categorized, there should be an analysis of the appropriate retention period for each category of record. The retention periods will be guided by several factors. First, the organization must determine how long it has a business need to keep each record. In some circumstances, it may be desirable to keep the record longer than there is an immediate business need. The organization must further consider the legal need to retain records. This will be driven by federal, state and local laws and the potential for criminal or civil litigation. There will also be a need to keep certain records that reflect title issues so long as the property is owned by the organization (e.g., a deed, etc.).

In conducting this analysis, the organization must keep in mind that the different countries and even domestic states in which it operates may have different rules affecting retention periods. Identification of retention periods should ideally be a group project, with managerial, legal and accounting input.

Retention periods do not have to be a set period of years, but the time period should be easily calculable. Use of "current plus _____ years," or "expiration plus ____ years" or a similar notation is acceptable. What is not acceptable are ambiguous retention periods or employees being allowed unfettered discretion in setting retention periods.

4. Compliance:

Essential to the success of every program is compliance. This requires advance thought as to how current employees and future employees will be trained on the retention policies of the organization. It further requires consideration of disciplinary action which might be taken for violations of the policy by an employee. This may require amendment of other corporate documents or HR policies which address issues of employee discipline. It also advisable to have employees sign-off on the retention policy to verify that they have read and understand the requirements.

Each department of the organization should have at least one designee who knows the retention policy, who understands the nomenclature, who understands the philosophy of the policy, who knows how to categorize files consistent with the policy, and who marks or codes the box with appropriate retention criteria.

5. Assigning Administrative Responsibility:

Unsurprisingly, assigning responsibility for managing the record retention program is essential. The record retention policy should set forth who is responsible for administering each aspect of the policy. This includes consideration of who will have local and overall responsibility for:

- the policy,
- on-going education,
- compliance and discipline issues,
- outside storage vendor oversight, and

- record destruction issues.
- Businesses with multiple office locations must address administrative responsibility for the policy at each office.

The record retention policy should clearly identify the job position which will be held responsible for each of these functions.

Each organization should have one person or department which has ultimate responsibility for overall administration of the policy. This is typically determined by the department which has the staff, budget and ability to administer this function.

6. Outside Vendors:

It is not unusual for records no longer in active use to be stored with outside vendors. In selecting an outside vendor, reliability in protecting and retrieving documents is essential. It is also advisable that the record owner be able to access the vendor database relating to the record owner's records. The allocation of responsibility and protocol for record destruction should be clearly specified with the outside vendor and always be in writing. The outside vendor must also be able to provide appropriate guarantees of privacy.

7. Review and Spot Check:

At appropriate intervals, there should be a review and spot check of records to ensure that those records which are in storage have been maintained and have not been destroyed and that those records which were to be destroyed have in fact been destroyed.

8. Destruction of Records:

Upon the destruction of records, a log should be completed indicating that a check was made to ensure that the retention period had expired for the record and that the record was then destroyed. These logs should be retained for a reasonable period after the destruction.

In sum, a record retention program is essential for every organization. The program should be well thought out and provide for ease of access to appropriate records, for protection of records while needed, and establish an appropriate time for destruction. The record retention program should be written, provide for appropriate categorizing and cataloging of records, identify understandable periods for retention and destruction, provide for the education of employees, allocate responsibilities within the organization, establish disciplinary consequences for violations of the policy, and be routinely enforced by the organization.

Tim Bertschy is the chair of Heyl Royster's Business and Commercial Litigation practice group. He concentrates his practice in the areas of complex commercial litigation, employment, and local governmental law. He has litigated cases involving contractual breaches, business torts, partnership and corporate break-ups, stockholder disputes, ERISA, unfair competition, intellectual property, covenants not to compete, lender liability, fraud and misrepresentation, eminent domain (condemnation), computer and software problems, privacy, real estate disputes, zoning issues and business losses. Tim has represented clients in the business, banking, real estate, stock brokerage, accounting, legal, insurance, governmental, and religious fields of experience in complex litigation, including the defense of asbestos claims and other toxic torts. He has represented a large cross-section of clients in litigation throughout the federal, bankruptcy, and state courts of Illinois. Clients have included individuals, property owners, professionals, not-for-profit corporations and businesses, including Fortune 500 corporations.

SAVE THE DATE!

Wednesday, May 22, 2013

Heyl, Royster, Voelker & Allen
28th Annual Claims Handling Seminar

Concurrent Seminars:
Casualty & Property or Workers' Compensation
1:00 – 4:30 p.m.
Doubletree Hotel, Bloomington, Illinois

Agendas will be available soon
Questions? pbaysingar@heylroyster.com

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