Chapter 2.17
Web Systems Design, Litigation, and Online Consumer Behavior

Cherie Ann Sherman
Ramapo College of New Jersey, USA

ABSTRACT

This chapter discusses recent court decisions, important to both Web site developers and corporations that restrict the software techniques that a developer may use, without legal liability for infringement. It demonstrates that e-commerce may be threatened by patents that have been recently awarded for long-existing software techniques and business methods, which are vital to the operation of most sites. The author explains that some software patents and business method patents were awarded in error because lack of a database of existing software made it difficult for patent examiners to identify whether an invention was truly new. Government and industry have taken steps to create a database of existing software and to adopt more rigorous standards for awarding these patents, which should help alleviate this problem. Nevertheless, the author contends that ultimately, consumers will experience less variety on the Web, as corporations become more aggressive in patenting Web-related inventions and asserting those patents against infringing Web sites. The author hopes to convey the benefits of conducting a legal audit for each Web site.

INTRODUCTION

The lone Web designer of the early 1990s, hand coding a Web site in HMTL, probably did not see himself or herself as a product designer and thought little about the threat of litigation. In those days, managing the technology was a primary concern because software tools were quite primitive. With site development software such as Front Page® and Dream Weaver® yet to be invented, the software designers of yesteryear invested a lot more time and energy in producing minimally functional Web sites than they do today in producing very sophisticated Web sites. Likewise, e-commerce was not yet a reality, little was known about the potential online consumer, and the concept of "reverse auction" was not even a pipe dream.

Today, e-commerce has become a reality and lawsuits of the last decade have altered the Web design landscape. Now, like designers of cars, refrigerators, and toys, the Web site designer cannot afford to design in a vacuum, free from knowledge of government regulation and the possibility of litigation. Whole areas of law, such as product liability, patent infringement, and antitrust, which

were promulgated to protect the consumer and the public, also impact the product design process, even for software designers.

The goal of the Web site designer is to provide an interface that best meets the needs of the consumer and the vendor. However, the threat of litigation related to Web design may hamper these efforts and diminish innovation, as companies patent Web-based business methods and assert these patents against infringing Web sites. In a worst-case scenario, designers of the future may become subject to an involuntary template, forged by litigation, which severely limits the functionality and aesthetics a Web site can offer. The behavior of the online consumer will be similarly circumscribed, and this would have profound effects upon the future potential of Web-based e-commerce.

BACKGROUND

The increase in Web-related lawsuits is a response to the amount of money generated by software and its pervasiveness in the marketplace. Corporate attention has become focused on Web site design and its impact on revenue because Web sites have matured into a productive asset. Simultaneously, changes in the implementation of the patent law have made Web site design both more lucrative and more risky, as software and business method patents have become more acceptable to the United States Patent and Trademark Office (USPTO).

Most recently, corporations such as Amazon.com and Ebay have incorporated patentable business methods into the design of their Web sites and brought suit against other Web sites which have incorporated these methods. Therefore, today's Web designer must consider not just the online consumer's wants and needs but also, the legal constraints and requirements which regulate a Web site's appearance and functionality.

The software industry has responded to these lawsuits by calling for an end to software

patents and/or business method patents. Notably, Europe has taken a less permissive attitude toward awarding software patents (Daly, 2001). Some patent owners, in particular Jeff Bezos of Amazon.com, have suggested that the USPTO be permitted to grant a software patent with a reduced term, which would better reflect the short development cycle of innovation on the Web (Cave, 2000). Congress has responded with legislation to protect early software innovators, who did not patent their software, from lawsuits by patent holders (American Inventors Protection Act, 1999.) It is now time for Web site designers, themselves, to become familiar with the issues and how they can best deal with them. A first step is to understand the type and magnitude of litigation that is ongoing. To aid in this endeavor, the cases discussed below are organized by the Web site feature at issue, in order to offer guidance to the Web designer who is contemplating implementing these particular features. Because cyber law is still in its infancy and rapidly changing, legal generalizations are difficult to make. Next, the designer should understand the importance of the Web design agreement and which clauses require special attention. Finally, the designer needs to consider the steps the designer needs to take to avoid designs which invite a lawsuit.

ISSUES FOR THE WEB SYSTEMS DESIGNER

One-Click Online Shopping

Designing a commercial Web site generally includes providing a method for consumers to pay for their purchases and this interface has been the focus of much of the litigation. Over time, the shopping cart metaphor has come to permeate the Web, allowing a consumer to flag items the consumer wishes to buy and place them in a virtual shopping cart. However, placing items in a cart does not necessarily mean a purchase will result.

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