

The Moving Picture



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WIDGET MANIA: PERSONALIZING THE INTERNET FOR ONLINE MARKETING AND CONTENT DISTRIBUTION

IF WE'VE LEARNED NOTHING ELSE from the past few years of Internet phenomena, we've seen that users definitely want control over their web experience. This was evident from the rise of user-generated content services like YouTube and social networking sites like Facebook. The next wave in user control is a desire by users to personalize and customize their Web presence. And widgets are providing users the perfect tool to do so.

A widget? If you've never seen or heard of web widgets, brace yourself. They will soon be taking over the Internet and quite likely your computer desktop. Widgets are mini-applications or "gadgets," which can be incorporated into your personal website, blog, social network page, and even onto your computer desktop. Widgets have become "digital candy"—a small, sweet morsel to

embed into your Internet life. They are especially popular additions to the social network pages of Internet users, such as MySpace, and Facebook.

Internet portals like Google and Yahoo! are already in the game. They offer thousands of widgets to choose from: calendars; clocks; news updates; sports score; weather information; games; an iPod player control; a thesaurus-dictionary look-up function; and even "mood rings" to let users know what mood their computers are in. Traditional media companies also are starting to embrace widgets to allow users to design a more customized web page to appear when users access the home page of, for example, *The New York Times* or ESPN.

The magic of widgets is that they are "live," constantly updating with content or information. Rather than having to constantly go to certain web sites throughout the day to check on the latest news or sports scores, Internet users can essentially bring the Web to them by having widgets from their favorite web sites available in one Web location. In short, widgets allow Internet users to personalize and customize their Web experience—everything that interests you can be on one homepage for easy access.

More powerfully, widgets can now be added to not just webpages (such as your MySpace profile), but also to computer desktops so they are available all day on your computer screen. In 2007, Apple Computers released the newest version of its Mac OS X operating system, named "Leopard." That operating system contains an application called Web Clip, which allows users to create live widgets with their favorite web sites.

Widgets can be effective marketing vehicles for several reasons:

- (1) They usually are framed by or positioned next to a brand name. For example, Google and Yahoo! pro-

vide numerous desktop widgets, such as stock tickers and airline schedules, which carry their brand.

- (2) Widgets are integrated into webpages or desktops, and thus live passively and constantly (with their associated brands) on the computer screen all day for users to view. Once installed, the widget brands become part of a user's "personal" brand, much like collecting digital bumper stickers.
- (3) Because they appear more passive and chosen by users, they are less annoying than banner ads and large video pop-up ads that take over the computer screen.
- (4) Users distribute widgets virally, so widgets can spread like viral wildfire through social networks.
- (5) Widgets can allow users to interact with the content, and interactivity is great for advertisers.
- (6) Widgets can allow marketers to track eyeballs and "clicks," providing valuable user data and means to calculate advertising revenue shares.

Widgets have thus become an Internet marketers' dream. UPS has a package-tracking widget. Magazine publications such as *Sports Illustrated* offer widgets to provide users with live information updates. Purina has a branded "Pet Weather" widget so a pet owner can track when the weather is nice enough to take the dog for a walk. There's even a "Garfield 2 Desktop Kitty" so you can have a cat with attitude living on your desktop.

Motion picture studios also are getting in the game. For example, in 2006, Paramount Studios used widgets to pro-

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is satisfied, the court must compare the magnitude of the harm to each party's interests that would result from a ruling in favor of either.

But what is the standard? Must plaintiff establish a *prima facie* showing of each element at the pleading stage, as in *Highfields*, or a "good faith standard for disclosure," or the "standard applicable to a plaintiff opposing summary judgment"?

The court here found it "unnecessary and potentially confusing to attach a procedural label," particularly because in Internet libel cases, California subpoenas may relate to actions filed in other jurisdictions with other standards. The court thus agreed generally with courts that have compelled the plaintiff to make a *prima facie* showing of the elements of libel, relying upon the information available to the plaintiff, in order to overcome a defendant's motion to quash a subpoena seeking identity information

Prime Facie Case for Defamation is Not Established

The court noted that when defamation arises, as here, from debate or criticism that has become heated and

caustic, as often occurs in Internet chat rooms and message boards, a key issue before the court is often first whether the statement constitutes fact or opinion, or may amount to "mixed opinion." Mixed expression of opinion occurs when a comment is made which is based upon facts regarding a plaintiff or his conduct that have not been stated in the article or assumed to exist by the parties to the communication, and the communicator is implying that a concealed and undisclosed set of defamatory facts would confirm his opinion. In making this determination the court must examine the statement in its totality and the context in which it is uttered or published, considering all of the words used and the context, medium, and audience.

While noting its distain for such comments, the court concluded, as had the Federal District Court in *Highfields*, that many of the messages viewed in the context of the communications, consisted of sardonic commentary on a public corporation, through irony and parody, expressing dissatisfaction with stock performance or the company executives, which "fall into the category of crude, satirical hyperbole which, while

reflecting the immaturity of the speaker, constituted protected opinion under the First Amendment." As the court noted, "the fact that society may find speech offensive is not a sufficient reason for suppressing it." Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. Accordingly, because plaintiff has stated no viable cause of action to overcome Doe's First Amendment right to speak anonymously, the subpoena to obtain identifying the information is quashed. ■

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Endnotes

1. *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964).
2. *Highfields Capital Management L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005). Note that the author was counsel for Highfields in this case.

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mote the Hillary Swank film "Freedom Writers." Widgets can be powerful for movie promotion because they can be used to offer movie clips, games, or other content specifically related to the film and allow users to interact with that content.

Thus, widgets are a creative new tool for trademark and copyright owners to promote their brands, products, and

services over the Internet. For content owners, they also can provide a new platform to distribute content—especially short-form video.

For lawyers, that means keeping widgets in mind when we advise clients about:

- (1) Marketing, brand promotion, and sponsorship deals, especially involving the Internet;
- (2) Modes to distribute content on the Internet, and agreements for such distribution;
- (3) Potential for abuse of trademark and copyright rights on the Internet—for example, if users create widgets featuring unauthorized marks or content in a manner that is harmful to the intellectual property owner.

The Internet world waits to see how far widgets will go. Meanwhile, now is a good time to experiment with widgets for your own webpage or desktop. There are thousands to choose from, or use some imagination to create your own. After all, this latest Internet personalization movement is all about expressing your interests, your individual brand,

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TRADEMARKS – REQUESTS FOR INFO. ▶▶

Registration was properly refused where an applicant repeatedly refused to respond to an Examining Attorney's requests for information on the potential geographical significance of "Normandie Camembert." *In re Cheezwhse.com, Inc.*, 85 USPQ2d 1917 (TTAB 2008).

TRADEMARKS – SAFE DISTANCE ▶▶

While applicable in injunctions and contempt proceedings, no authority was found for giving a "safe distance" jury instruction in a civil action alleging a new infringement by one previously adjudicated to have infringed the plaintiff's marks. *PRL USA Holdings, Inc. v. United States Polo Ass'n, Inc.*, 520 F.3d 109, 86 USPQ2d 1022 (2nd Cir. 2008).

TRADEMARKS – SPECIMENS ▶▶

Internet printouts were acceptable even though "futures contract" was used before or after the trademarks "Sugar No. 14," "Sugar No. 11" and "Cotton No. 2." The marks were not merely descriptive, because no evidence showed the numbers used with the marks had any descriptive aspects. *In re ICE Futures U.S., Inc.*, 85 USPQ2d 1664 (TTAB 2008).

TRADEMARKS – SURNAME ▶▶

"Vose & Sons" was rejected as primarily merely a surname based on 838 phone listings from a Phone Disc search, and based on 93 stories involving persons named Vose from a NEXIS search. The addition of "& Sons" emphasized the surname rather than distinguish it. A prior (expired) registration did not justify the current registration. *In re Piano Factory Group, Inc.*, 85 USPQ2d 1522 (TTAB 2007).

TRADEMARKS – SURVEY ▶▶

A mall intercept survey by Dr. Wind on the geographic descriptiveness of

MOSKOVSKAYA was given no weight by the TTAB. It did not survey the correct universe of American consumers who understood Russian, incorrectly calculated the results, and had other perceived defects. *In re Spirits Int'l N.V.*, 86 USPQ2d 1078 (TTAB 2008).

TRADEMARKS – USE ▶▶

An opposition to an ITU application was properly amended to allow a priority claim based on use analogous to trademark use. *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536 (TTAB 2007).

TRADEMARKS – USE ▶▶

"My Life My Card" was used by an advertising agency to promote potential services to credit card companies, but the agency provided no credit card services and thus there was no service mark use for credit card services. There was no use analogous to trademark use because the slogan was used on limited communications with credit card companies rather than open and notoriously to popularize the phrase in the public mind, and there was never actual use by the claimant in connection with credit card services. A summary judgment finding no protectable rights was affirmed. *American Express Co. v. Goetz*, 515 F.3d 156, 85 USPQ2d 1913 (2nd Cir. 2008).

TTAB – DISCOVERY ▶▶

Discovery sanctions were awarded despite a ten months delay seeking sanctions after an order compelling discovery, because the action was suspended for settlement discussions and sanctions were sought soon after resumption of proceedings. Producing 1,100 documents in response to the order to compel showed an intent to obstruct discovery for which the oppose was precluded from relying on evidence relating to confusion in opposer's possession before the sanctions motion was filed. A survey and

survey expert also were barred from use at trial because opposer's counsel insisted on resolving payment of the expert's fees before the deposition and was thus responsible for the expert's nonappearance at a noticed deposition. *HighBeam Marketing LLC v. Highbeam Res. LLC*, 85 USPQ2d 1902 (TTAB 2008).

UNFAIR COMPETITION ▶▶

A § 17200 claim based on alleged misrepresentations arising in numerous contracts between karaoke competitors and customers who are not parties to the lawsuit would force the court to administer numerous private contracts of non-parties. As there was no § 43(a) and no copyright claim and no pleading such claims were likely to deceive the public, the claims were dismissed under § 12(b)(6). Common law unfair competition claims were dismissed because no passing off was pled. *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 86 USPQ2d 1065 (9th Cir. 2008). ■

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and creating an Internet experience that's just right for you. ■

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