Look and Feel Protection of Web Site User Interfaces: Copyright Or Trade Dress?

Lisa M. Byerly

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Lisa M. Byerly, Look and Feel Protection of Web Site User Interfaces: Copyright Or Trade Dress?, 14 SANTA CLARA HIGH TECH. L.J. 221 (1998).
Available at: http://digitalcommons.law.scu.edu/chtlj/vol14/iss1/4

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LOOK AND FEEL PROTECTION OF WEB SITE USER INTERFACES: COPYRIGHT OR TRADE DRESS?*

Lisa M. Byerly†

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* Copyright © 1997 Lisa M. Byerly.
† B.A. California State University at Fullerton; Candidate for J.D., Santa Clara University School of Law, 1998. Many thanks to all those who inspired me to publish this comment, including, but not limited to: my family who always provide support and encouragement, Dr. Michael T. McGuire, Dean Mark F. Grady, Veronica C. Devitt, and Dorothy J. Glancy.
A. General Theory of Trademark Protection

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I. INTRODUCTION

This comment presents two prominent legal theories for protecting the overall design and concept of a Web site user interface, i.e. the “look and feel” of the interface. As explained by David Bender, the “‘look and feel’ refers to the user interface, generally manifested by the display screens that a computer program generates and the keystroke combinations that are used for particular program functions.”\(^1\) Protecting an individual element contained in a Web site page, like a registered trademark or picture protected by copyright, is not this comment’s main focus. Instead, this comment discusses how to legally protect the scheme, design, or total layout of individual elements in a particular Web site user interface.

When a business hangs out its shingle on the Internet, the Web site user interface is the shingle. A computer program that is comprised of sequential commands assists in the generation of the interface that allows the user to interact with the program. With an estimated thirty million users on the Internet, Web site user interfaces are valuable as marketing and advertising tools for selling products and promoting businesses on the Internet.\(^2\) This interface is the first impression a consumer has contact with on the Internet, so its presentation is vital for commercial selling purposes. Some designers of computer programs even consider the user interface, which is the visual, external expression of their creativity, to be the most important

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element of the program. Thus, the entire Web site user interface is valuable intellectual property and worthy of legal protection.

The two theories of law discussed in depth here are copyright and trade dress. Both present problems when applied to user interfaces which exist in an electronic environment. However, these established areas of the law could feasibly protect a Web site owner from copying or exploitation of the creativity in the site. This discussion will present some of the most difficult problems in applying both of these areas of intellectual property law to Web site user interfaces. Also, this comment proposes that in certain situations, trade dress could be a more successful means for protecting a Web site's visual design or look and feel. It is clear that trade dress protection is not an absolute solution to the problem of protecting the total look and feel of a Web site user interface from being copied or exploited without permission. Trade dress may, however, afford greater protection than copyright law.

As a practical matter, this comment focuses on Web sites found on the World Wide Web component of the Internet because it is the portion most widely used by the public for selling goods and services. The World Wide Web is now a commercial entity, not just a means for obtaining or transferring information. For instance, it is difficult to watch television without seeing Web sites posted in commercials so consumers can obtain further information about products on the Internet. Thus, Web site user interfaces are a valuable advertising tool and means for presenting products or services to potential consumers in cyberspace.


Part II of this comment explores the basic problems with protecting the total look and feel of a Web site interface on the Internet, regardless of the legal theory of protection applied. Part III addresses the application of copyright law to the overall look and feel of computer user interfaces, which provides insights on how to apply copyright law to the look and feel of Web site user interfaces. Part IV examines the basics of trademark law and the feasibility of utilizing a trade dress theory to protect the total look and feel of a Web site user interface. Part V deals with the broadening scope of trade dress protection, evidenced by recent case law, which indicates a possible trend towards using a trade dress theory to protect Web site user interfaces.

II. PROBLEMS WITH PROTECTING THE LOOK AND FEEL OF USER INTERFACES ON THE INTERNET

The initial problem with legally protecting the overall creative look and feel of a Web site user interface under copyright or trade dress lies in the inherent, non-tangible nature of the Internet. First and foremost, the Web site is an electronic communication. This communication is generated with the assistance of a computer program that is structurally similar to software applications used to organize one's business or play video games, i.e. the software programs involved make requests to the operating system of a computer so the visual user interface will be displayed to the user. But on the Internet, the end visual presentation a user sees on the computer screen will be used to attract potential consumers to the Web site. Setting up a Web site can provide many commercial benefits for a business. For instance, among its many commercial benefits, a Web site can identify one's business or products and be used as an advertising tool. These benefits can help a business gain a competitive advantage in the marketplace. Therefore, the user interface, which helps grab a

8. A central problem is that the Internet is not a physical entity and existing legal rules or principles are based on physical borders that are tangible. Jonathan Freedland, The Writing on the Toilet Wall, THE GUARDIAN (London), Feb. 14, 1995, at 18.

9. On the Internet, a browser (software) interprets the instructions in an HTML file or maybe a Java Script file and makes a request of the user’s computer’s operating system (software) to display the visual user interface, based on the specific instructions the browser received from the server of the Web site. The HTML file itself is not a computer program or software, it is a file that has been marked up or formatted with tags that tell the Web browser how to represent information to the user viewing the Web site interface. Java Script does contain lines of computer code, so it can be more likened to a computer program or software.
user's attention and helps the user easily navigate the site, is the most important component of the Web site.

In addition, it is important to understand that Web site user interfaces on the Internet are a different kind of electronic environment than user interfaces in a video game or in application software because there is not a uniform regulatory entity controlling the Internet. It is not like states that have boundaries, whereby interstate commerce is regulated by the federal government according to one unifying law of the land. The Internet is so vast and difficult to define that even if a central governing body existed, enforcing uniform rules would be difficult. Most people using the Internet would likely object to strict regulatory confines or rules. Many cyberspace participants want to perpetuate a free flow of ideas and share information even if it violates the intellectual property rights of another. Although it creates many problems and leaves other problems unresolved, state and federal courts must apply existing laws to this new medium, as a means of controlling the Internet environment.

There are many other problems created by the Internet that affect the legal protection of intellectual property contained in a Web site. First, the marginal costs to distribute and copy information on the Internet are less than costs to physically distribute the information or purchase a copy. The Internet is an international, interconnection of computer networks that links millions of Internet users together and permits them to access and share information at a low cost. Copying shared information onto one's own Web site or downloading this shared information provides Internet users with free digital copies of valuable intellectual property. Even worse, these copies are of original quality and can be made with the click of a button. Secondly, the ease and accessibility of downloading such valuable intellectual property from the Internet perpetuates a mindset in users that taking without paying is acceptable behavior. Some users believe that copying the layout of a competitor's site is not wrong, but

10. "Cyberspace, in its present condition, has a lot in common with the 19th Century West. It is vast, unmapped, culturally and legally ambiguous, verbally terse, hard to get around in, and up for grabs." John P. Barlow, Crime and Puzzlement: In Advance of the Law on the Electronic Frontier, WHOLE EARTH REV., Sept. 22, 1990, at 44.


12. Id. at 34, 36.

13. Id. at 20.

merely a practical utilization of information readily available in cyberspace. What some call wrongful stealing, other Internet users would call smart business tactics. For example, riding the coat tails of a competing product’s strength in the market by confusing the public is a somewhat efficient business tactic, but a tactic not allowed under trademark law. Thirdly, the boundaries of the Internet are difficult to ascertain. Consequently, traditional notions of jurisdiction for courts are severely challenged because pinpointing where something is located in cyberspace is nearly impossible.\(^1\) Currently, jurisdiction, venue, and the choice of law for any particular case is uncertain. Finally, the exact identity of Internet users is often difficult to establish, so even pinpointing potential wrongdoers on the Internet can be extremely difficult.\(^6\)

The need for look and feel protection will likely continue to expand in the near future and into the next century due to the consumer market demand for more creative and complex interactive interfaces.\(^7\) Modern American society is bombarded with stimuli, especially visual stimuli. So, businesses will have to use very creative means to catch and hold a consumer’s attention on the Internet. Also, commercial usage of the Internet is vital for any business or entrepreneur who wants to successfully compete in today’s markets because our American society is becoming more dependent on the Internet for communication and conducting business. Finally, as the Internet becomes more commercialized, businesses will want assurances that valuable intellectual property contained in Web sites will be protected, thereby reducing the risks of doing business on the Internet.

However, the existing theory of legal protection best applicable for protecting the valuable intellectual property found in the look and feel of Web site user interfaces may be difficult to ascertain. It is already apparent that applying existing laws to the Internet will present a challenge to lawyers and courts. So, applying copyright or trademark law to Web site user interfaces may seem like trying to fit the proverbial square peg into a round hole due to the nature of the Inter-

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\(^1\) The immense reach of the Internet clearly has the potential to eviscerate or circumvent any traditional jurisdictional limitations.” Richard Raysman & Peter Brown, On-Line Legal Issues, N.Y.L.J., Feb. 15, 1995, at 30.

\(^6\) Id. at 20.

\(^7\) Russo & Nafziger, supra note 3, at 572.
However, it is a necessary consequence of the growth and commercialization of the Internet.

III. COPYRIGHT PROTECTION OF WEB SITE USER INTERFACES

A. General Theory of Copyright Protection

Copyright law is like other areas of intellectual property law in that it strives to stimulate creativity and innovation by granting property rights as an incentive, while at the same time perpetuating public interests. Copyright protection recognizes a property right in an author’s creative works, but also furthers the public’s free access to information by limiting the scope of what subject matter is protected by copyright. Similarly, patent protection stimulates new and useful inventions by granting inventors a monopoly for a limited time so the public can benefit from more efficient processes, machines, manufactures and compositions of matter. Another example is trademark law, which protects the good will in creative, distinctive source identifiers, while protecting the public from confusion about the quality and integrity of goods and services they purchase. However, with copyright law, it is difficult to balance the interest in keeping public access to information open against the interest in protecting an author’s property rights in his creations. The protec-

18. Courts have already expressly stated that applying copyright law to computer programs is like trying to fit the “proverbial square peg into a round hole,” since programs are utilitarian by nature. Computer Assocs. Int’l, Inc. v. Altai, Inc., 982 F.2d 693, 712 (7th Cir. 1992). This frustration will likely be felt when applying copyright law and even trademark law to the look and feel of Web site user interfaces on the Internet. See also John Perry Barlow, Selling Wine Without Bottles: The Economy of Mind on the Global Net, WIRED, Mar. 1994 at 85.


20. The struggle to strike a balance between protection and the public’s benefit can be seen expressly in the United States Constitution. The Constitution’s Patent Clause granted Congress the power to protect inventions, via patent monopolies, but with the limitation that protection could only be afforded to inventions that “promote the progress of science and the useful arts . . . .” U.S. CONST. art. I, § 8, cl. 8. The importance of only protecting inventions that also perpetuate public benefit is reflected in the Patent Act which limits patentable subject matter to “any new and useful process, machine, manufacture, or composition of matter . . . .” 35 U.S.C. § 101 (1994).

21. The concern for protecting the public from being confused about the source of different products in the marketplace can be seen directly in the federal statute that governs the protection of trademarks, the Lanham Act. 15 U.S.C. § 1052 (1994). This protection allows a consumer to make an informed buying decision, so the public is benefited from the protection.

22. The United States Constitution limits copyright protection to those works that “promote the progress of science and useful arts,” which limits what content is taken from the public domain.” U.S. CONST. art. I, § 8, cl. 8. The Copyright Act also distinguishes the type
tion of intellectual property and public interests are at odds, so determining a balance under the law is often a challenge.

The United States Constitution expressly gives Congress the power to grant authors exclusive rights in their "writings," and the scope of protectable writings has been broadly interpreted. But, the Copyright Act of 1976 extends copyright protection to an author's original "works of authorship," not to all of an author's writings. This new language seems to narrow the scope of copyright protection, indicating that Congress did not intend copyright protection to extend to all types of works eligible for copyright protection under the Constitution. Again, the public's interest in free access to information resonates in this limitation. Ultimately, copyright protection is not the end all, be all for protecting all creative works in our society.

Furthermore, it is important to understand that copyright law only protects the expression of the idea from being copied without permission, not the idea itself. Anyone can freely express an idea or concept in a different manner, even if the idea is identical to another author's idea. For example, the creative choice of colors and textures used to create a painting of a forest is protectable intellectual property under copyright law, but the idea being expressed, the forest, is not individually protectable. Only expressions are protected because the policy of promoting a competitive marketplace lies in the background of copyright protection. In copyright law this "idea/expression dichotomy," as it is often called, again reveals the tension between the public's free access to information and the protection of intellectual property. It would be unfair and stifle creativity to grant an author the right to exclude others from painting a forest in a different way. Copyright law only protects an author's original expression from acts of copying or paraphrasing; it does not

of content that is protected and that which should remain accessible by the public. 17 U.S.C. § 102 (1994).

23. "The Congress shall have Power To . . . promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8.


prohibit another from independently producing similar expression of an idea.  

B. Copyright Protection of an Electronic Environment

The Internet, like a painting canvas, is merely another medium by which an author can express an idea or convey information. But, the electronic nature of the Internet creates special problems in applying existing copyright law. We are not dealing with a tangible literary work, such as a book or painting, that can be analyzed more readily under the law. A Web site user interface on the Internet can be more likened to a computer program’s visual user interface. Since there is not a medium of expression that exactly fits the characteristics of a Web site user interface, we must look at the closest relative — computer program user interfaces.

A computer program consists of a written work in the code, a functional work in the tasks executed by the software, and a visual work in the user interfaces. It is generally settled that most elements in a computer program are eligible for copyright protection. Further, as a result of recommendations to Congress from The Commission on New Technological Uses for Copyrightable Works (“CONTU”) in 1978, Congress added a definition of “computer program” to § 101 of the Copyright Act and added § 117 to the Act which specifies certain kinds of permitted copying of computer programs. Thus, a written computer program is considered a literary work under § 102(a)(1) of the Copyright Act and protected by copyright.

However, the visual user interface of a computer program could lack originality or contain purely functional aspects that are individu-

29. Joseph & Vogel, supra note 59, at 381.
30. Id. at 381-382.
31. CONTU was created to look at computer uses of copyrighted works and to offer recommendations on how to apply copyright law to computer programs. This group consisted of experts who could advise Congress on how to deal with the perplexing problem of fitting computer programs into the existing copyright protections provided under the Copyright Act.
32. “A ‘computer program’ is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a result.” 17 U.S.C. § 101 (1994).
33. “It is not an infringement for an owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program . . . .” 17 U.S.C. § 117 (1994).
34. Joseph and Vogel supra note 59, at 381. See also Apple Computer, Inc. v. Formula Int'l, Inc., 725 F.2d 521, 525 (9th Cir. 1984) and Apple Computer, Inc. v. Franklin Computer Corp., 714, F.2d 1240, 1249 (3d. Cir. 1983).
ally not protectable by copyright. The graphical user interface as a whole, which includes the visual screen display and command hierarchy, could be considered just a method for operating the computer. Unfortunately, the Copyright Act expressly states that methods of operation are totally excluded from copyright protection. Congress and courts have struggled to stabilize the meaning of copyright protection when dealing with aspects of computer programs beyond the literal code, like user interfaces. Copyright protection of elements beyond the actual computer code creates a great struggle to draw the line between an expression that is afforded copyright protection and the idea, itself, that is not afforded protection. Courts have especially had difficulty deciding what components beyond the literal computer code are just functional elements which should not be extended copyright protection.

Copyright protection extends to the source and object code of computer programs used to generate graphical user interfaces. In addition, some non-literal elements in a computer program, (i.e. non code elements) which manifest the underlying structure and organization of the program, are eligible for protection under copyright law. Thus, the user interface, which is generated by a computer program, that a consumer views when they visit a Web site could also be considered a creative, original expression that is eligible for copyright protection. The problem is deciphering the scope of copyright protection for these non-code elements in a computer program or Web site, in light of the limits on and exceptions to an author's property rights to copy and distribute his original work of authorship.

35. 17 U.S.C. § 102(b) ("[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work").


37. Apple Computer, Inc. v. Franklin Corp., 714 F.2d 1240, 1247 (3d Cir. 1983). The computer code contains the instructions used for operating the computer. There are three levels of computer language used for writing these “instructions.” “High level language . . . uses English words and symbols” and is readable by human eyes. “A somewhat lower level language is assembly language, which consists of alphanumeric labels.” These two levels of code language are considered the “source code.” The “lowest level computer language is machine language, a binary language using two symbols, 0 and 1 . . .” This low level language which is only readable by the computer is referred to as object code. Id. at 1243.


39. 17 U.S.C. §§ 102(b), 107 (1994). Section 102(b) lists subject matter that is not protectable under copyright, including subject matter that is protected by patent law. Section 107 provides affirmative defenses to copyright infringement.
These limits and exceptions create difficulties in gaining copyright protection of all look and feel aspects of user interfaces on the Internet as discussed in the next section of this comment, III C.

C. Basic Requirements for Copyrightable Subject Matter

In order for any expression contained in a computer program user interface or Web site user interface to even be considered copyrightable subject matter, the § 102(a) requirements of "originality" and "fixation in a tangible medium of expression" must be met. According to the statute, copyright protection can be found "in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated." The language, "now known or later developed," shows that new technologies and mediums were anticipated by the statute and could be considered tangible mediums for fixation purposes.

Courts have previously held that information embedded in computer Read Only Memory ("ROM") constitutes "fixation in a tangible medium." Likewise, another more permanent storage medium is the hard drive or hard disk of a computer; permanent in the sense the information stored remains stored beyond power turn off. Files stored on the hard drive can be erased by the user. However, the information is essentially fixed, like with information in the ROM, such that data on the hard drive can be retrieved again once the computer is turned off. Web site page files, which contain the instructions for generating the user interface that a user sees on each linked page of a Web site, are saved on a computer's hard drive. Thus, the displayed Web site user interfaces would likely satisfy the fixation requirement because the instructions for the layout that will be displayed are fixed in the file on the hard drive. But, proving the second element, originality, could be difficult when dealing with the look and feel of computer programs and, similarly, Web sites on the Internet. This would be particularly true with Web Sites that are straightforward or just simplistic presentations of information. Courts have

43. "The ROM (Read Only Memory) is an internal permanent memory device consisting of a semi-conductor "chip" which is incorporated into the circuitry of the computer. A program in object code is embedded on a ROM before it is incorporated in the computer." Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240; 1243 (3d Cir. 1983).
not yet thoroughly addressed this issue, but insight is found in existing case law which discusses the requirements for finding originality under copyright law.

1. Originality

To find that a work is original, there must be some independent creation by the author, and some minimal degree of creativity. In the seminal case, *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, the Supreme Court provided guidelines for determining whether works are original. In *Feist*, the selection and arrangement of telephone white page listings were not sufficiently creative to satisfy the originality requirement for copyright protection. The Court noted that originality is required by the U.S. Constitution as well as by § 102(a) of the Copyright Act. The Court also acknowledged that the level of creativity required is low, and that "even a slight amount will suffice." This case is important because even with this low standard, the choices used in the layout and arrangement of phone book information did not possess the requisite level of creativity to qualify for copyright protection. Likewise, a simple Web site user interface that just arranges common information may not be protected by copyright according to the reasoning in *Feist*. Unfortunately, after the case, we know what is not enough creativity, but deciding what is enough creativity can be more difficult.

The Court also rejected the "sweat of the brow" doctrine used by lower courts to justify a finding of originality. This means that putting time and effort into a work does not necessarily make the work original. So, a Web site owner can't claim copyright protection just because effort was put forth to create the site. Moreover, originality does not necessarily mean "novel," so there can be similarities between works that are both considered original, so long as there is not actual copying.

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44. MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 2.01[A] (1996).
46. *Id.* at 361.
47. U.S. Const. art. I, § 8, cl. 8.
49. *Id.* at 346.
51. *Id.* at 353.
52. *Id.* at 345.
The visual user interface component of a computer program or a Web site will likely be considered original if there are some graphics or a creative, visual presentation. Although the level of creativity required is low, it may be difficult to find the originality required for copyright protection in simplistic Web sites that just arrange facts or information. It is likely that many Web sites will be simplistic because many entrepreneurs and small businesses do not have the resources to create an elaborate site. The Web site may lack highly creative, visual graphics and, instead, contain mostly functional elements used for navigating through the information on the site. Also, under the Copyright Office’s regulation prohibiting copyright protection in blank forms, a simple screen display that simply asks for customer information and does not itself convey information would not likely receive copyright protection anyway. Furthermore, many structures for creating a Web site user interface are basic and offer limited variations for creating the Web site. If there are only a few alternatives available for creating the design of a Web site, such that the idea merges with the expression, copyright protection will not be extended to that expression. Thus, potentially only elaborate and somewhat creative Web site interfaces will satisfy the originality requirement for copyright protection.

2. Subject Matter Excluded from Copyright Protection

While originality and fixation in a tangible medium of expression are preliminary hurdles for determining what subject matter can obtain copyright protection, the main problem for protecting computer user interfaces is the limitation in § 102(b) of the Copyright Act. Copyright protection extends to expression, and not to the “idea, procedure, process, system, method of operation, concept, principle, or discovery . . . .” It is logical to argue that “the 'look

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53. Id. at 361.
54. “Material not subject to copyright . . . Blank forms, such as time cards . . . report forms, order forms . . . which are designed for recording information and do not in themselves convey information.” Copyright Office Regulation, 37 C.F.R. 202.1(e) (1997).
56. “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of form in which it is described, explained, illustrated, or embodied in such work.” 17 U.S.C. § 102(b).
and feel' of a program is nothing more than a combination of all the controls and procedures that a user has at their disposal to control the computer.59 While highly creative expressions of this procedure in a user screen display may give rise to copyright protection, current case law seems to leave screen displays of a Web site with potentially limited protection. In turn, this leaves the look and feel of a site's user interface, which includes the screen display, with limited protection.

D. Substantial Similarity

It is important to consider the standard for finding copyright infringement because any legal protection of intellectual property is only as strong as the potential for enforcing the protection against a wrongdoer. In copyright law, the standard used to find infringement is the substantial similarity between the two works at issue.59 However, in reality, it is not likely a court would even get to the point of considering the substantial similarity between two Web sites because the look and feel of a Web site interface would not likely be copyrightable subject matter, as pointed out in the previous discussion. For the sake of analysis, if the total concept of the Web site was deemed copyrightable subject matter, then the substantial similarity between the interfaces would be considered. Unfortunately, the judge-made tests that are applied for finding substantial similarity of works that contain arguably functional elements is not uniform among the circuits.

The primary problem with finding a substantial similarity between two Web site interfaces in most circuits, such that copyright infringement can be found, is that usually only similarities between protectable expression are compared. The circuits have struggled with exactly how to filter out or dissect the protectable elements from those elements that are not copyrightable subject matter, and there is still not a clear answer.61 For instance, many elements in a Web site

interface or computer interface may be considered merely functional or found to be merely ideas as a result of the Merger Doctrine\textsuperscript{62}, such that they do not qualify for copyright protection. So, a defendant could copy all these unprotectable elements because they would not be considered in the substantial similarity comparison. Again, the real problem with copyright protection of Web site interfaces revolves around what constitutes copyrightable subject matter.

The Second Circuit pioneered the "Abstraction, Filtration, Comparison" test for analyzing substantial similarity of protectable elements in the case \textit{Computer Associates v. Altai}\.\textsuperscript{63} This test, or similar variations, is also used in other circuits. Basically, the levels of structural "abstraction" found in a given work are determined in order to identify what is idea and what is expression. This is not well defined in the cases, and is thus, for lack of a better word, abstract. Then, ideas which are dictated by efficiency, are filtered out of the allegedly infringed work. This process arguably leaves only elements protectable by copyright. But, there are many different ways to make a computer program and interface efficient, so this exclusion seems to be too broad. In the final step of the test, the elements that are left are compared to see if there was copying by the alleged wrongdoer. However, in the case of a the user interface, often times by this point there would be nothing left to compare, so infringement would not be found. Thus, in reality, a Web site owner could not enforce his rights against an infringer.

The substantial similarity standard can be proven with circumstantial evidence that the wrongdoer had access to the work to copy it, or with direct evidence of copying. So, it is not a tremendously difficult standard to prove, especially in the case of Web sites, due to the ease of accessing the sites. The problem is how courts filter out certain elements before even comparing similarities. Even worse for those pursuing copyright infringement of a Web site, it is likely that the problem for a Web site owner will originate with the lack of copyrightable subject matter in the user interface, even before substantial similarity is considered.

\textsuperscript{62} The Merger Doctrine stands for the notion that when an idea is so closely merged with the expression in the work, then the expression is actually submerged by the idea and no copyright protection is available. \textit{See MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 13.03[B][3] (1996).}

E. History of Look and Feel Protection of Computer Programs

The revisions to the Copyright Act of 1976 indicate that Congress intended to protect computer programs under copyright law. Unfortunately, the statute does not explicitly state that copyright protection extends beyond the source and object code of a program to the look and feel of the computer program, which includes the creative screen display and keystroke combinations in the user interface. But, case law dealing with the copyright protection of video games offers some confirmation that at least the visual screen display portion of a computer program’s user interface can be protected by copyright. Although the federal circuits are not always consistent in the area of copyright law, insights can still be gained by reviewing a case from another circuit.

The prominent case Atari, Inc. v. North American Philips Consumer Electronics Corp. helps support the argument that a screen display in a user interface may be extended copyright protection as an audiovisual work. This case started a trend which open the scope of what subject matter is protected by copyright. The Supreme Court denied certiorari, leaving the decision unchallenged, so it can be relied upon when deciding the scope of copyright protection of a Web site user interface.

The copyright at issue in the case did not involve the underlying code of the computer program, but instead the screen display copyright in an audiovisual work. To analyze the substantial similarity of the screens, the Seventh Circuit considered the similarities of the game characters in both computer games. Defendants used K.C. Munchkin “gobblers” and “ghost monsters” which were similar in both appearance and concept to Atari’s “Pac-Man.” Even though there was not exact copying of the screen displays by the Defendant, the court found that Defendant’s game captured the “total concept

65. “A ‘computer program’ is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.” 17 U.S.C. § 101 (1994). “Statements and instructions” to “bring about a certain result” clearly includes the source and object code of a computer program, but the interactive visual display generated by the program or “look and feel” of the program seems unprotected by the Act.
67. Id. at 607, 614.
68. Id. at 610.
69. Id. at 617-620.
70. Id. at 611.
and feel” of Atari’s game.\footnote{71} This case opened the door for protection of the overall presentation and “feel” of video game screen displays, but the Seventh Circuit court did not address how far this theory of copyright protection should be extended. It is unclear from the case if original expression contained in screen displays in other operating environments would be copyrightable.\footnote{72}

Soon after this case, “registering the ‘look and feel’ of all computer programs became routine.”\footnote{73} Copyright exists the minute the work is fixed in a tangible medium, but in order for a copyright owner to enforce his rights against an infringer and gain a remedy under the Copyright Act, the copyright must be registered. First, “the Copyright Office . . . allowed registration of visual displays either as separate audiovisual works or as separate literary works.”\footnote{74} Subsequently, the Office decided to allow registration of an underlying computer program to extend to all the elements of the audiovisual screen display that the program generated.\footnote{75} In 1987, the Office held public hearings to decide how to proceed with copyright protection of computer programs.\footnote{76} Then in 1988, the Office adopted internal guidelines to support single registration for all aspects of computer programs, including the visual screen displays.\footnote{77} However, it is still unclear exactly what subject matter is covered in the copyright protection of computer programs. Thus, enforcing a single registration for all aspects of the computer program in court is unpredictable.

While each case must be examined separately on its facts, making the extraction of guidelines from case law is difficult. The existing copyright laws are more readily applicable to individual graphic elements in a screen display or user interface, but it is hard to tell how far copyright protection will extend beyond source and object code and if it will adequately protect the entire look and feel of computer user interfaces.\footnote{78} Likewise, it is difficult to pinpoint the look and feel protection of Web site user interfaces even after \textit{Atari}. 

\footnote{71.} \textit{Id.} at 619-620.  
\footnote{72.} See generally Jack Russo & Douglas K. Derwin, \textit{Copyright in the “Look and Feel” of Computer Software}, 2 \textit{Computer Law} 1 (Feb. 1985) (provides more analysis about how far copyright protection will be extended to other operating environments).  
\footnote{73.} Russo & Nafziger, supra note 3, at 575.  
\footnote{74.} \textit{Id.} at 576.  
\footnote{75.} \textit{Id.} at 576.  
\footnote{76.} 36 Pat. Trademark & Copyright J. (BNA) 152-155 (1988).  
\footnote{77.} \textit{Id.} at 155.  
\footnote{78.} Russo & Nafziger, supra note 3, at 577.
Lastly, it is difficult to know if only the graphic visual screens alone are copyrightable, or whether the icon buttons are individually copyrightable too, or if graphic visual screens in combination with icon buttons, as a whole, are protectable as the look and feel of a computer program user interface or Web site user interface. Copyright protection for video game graphical interface is at best unpredictable. This, in turn, leaves many questions about the copyright protection for Web site user interfaces on the Internet.

F. Cases that Diminish Copyright Protection of the Look and Feel of User Interfaces

The following two cases provide insights into the analysis a court would likely follow to determine copyright protection of a computer user interface. It is logical that this reasoning could apply to Web site user interfaces on the Internet because they serve the same purpose as computer user interfaces. Both interfaces allow a user to interact with the presentation displayed on the screen. Basically, the interface provides a means of communication between the user and the computer.

1. Apple Computer, Inc. v. Microsoft Corporation

The leading case that sheds light on the applicability of copyright protection to computer program graphical user interfaces is Apple Computer, Inc. v. Microsoft Corporation.\(^79\) ("Apple") While the Ninth Circuit affirmed the district court’s approach to solving the copyright issues, the district court’s opinion provides more complete and valuable insights about copyright protection of the look and feel of a computer user interface.\(^80\) This case denied copyright protection at the substantial similarity phase of looking at infringement, but the substantial similarity test has a great deal to do with deciphering copyrightable subject matter contained in the interface. Regardless of any possible separate protection for each individual element in the interface, the court clearly rejected the approach of considering the entire look and feel of an interface to find copyright protection of the whole interface.\(^81\) Due to the court’s filtering out of subject matter that was individually unprotected by copyright, the decision left most

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80. \(\text{Id.}\)
81. \(\text{Id. at 1016; see also Apple Computer, Inc. v. Microsoft Corp., 35 F.3d at 1445.}\)
of the important aspects of Apple’s user interface unprotected under copyright.82

Apple sued Microsoft Corporation ("Microsoft") and Hewlett-Packard for copyright infringement of the graphical user interface on its Macintosh computer.83 The graphical interface included overlapping windows, iconic representation, object opening/closing, menus and iconic manipulation.84 The case involved complex issues about licensing agreements, whereby Apple granted Microsoft a limited license to use its visual displays in Microsoft’s software, and in turn Microsoft licensed these visual displays to a third party, Hewlett-Packard.85 So, the court ruled against Apple on many of its copyright claims, due to the licensing agreement.86 But, the main value of the case to this comment is the manner in which the court reasoned the proper scope of copyright protection of graphical user interfaces.

The user interface of a computer program is protectable under copyright if "on the particular facts of each case, the component in question qualifies as an expression of an idea."87 To decide the scope of protection allowed for the expression in the user interface, the court employed a two-step analysis for finding copyright infringement.88 According to the test, the disputed works are compared for substantial similarity under an "extrinsic test" (an objective standard).89 Then, once the court finds that there is a substantial similarity in the essence of the plaintiff’s work, an "intrinsic test" (using a subjective standard) is applied.90 The intrinsic test is limited to comparing only those elements of a work that can be the subject of copyright, so this prong is not considering the work as a whole, but instead comparing the work’s individual components.

One problem for Apple was that analytic dissection was used under part one of the test to filter out which elements were protect-
able in the interface.91 Then, only protectable features were compared for similarities.92 This dissection approach means that if the similarities found between two original works stem from features in the graphical interface that are individually not protectable by copyright, the court will not even get to step two of the test for infringement.93 This clearly leaves the copyright protection available for a Web site user interface diminished because many elements in the interface will not be considered copyrightable subject matter individually, even though they contribute to the look and feel of the interface. Apple argued that the court should consider the entire look and feel of the graphical interfaces, regardless of the protection allowed for each individual element of the visual display.94 However, the court clearly discounted this line of reasoning by employing the two-step test, which filtered out unprotectable elements before similarities between the two works were even considered.95 This dissection process defines the scope of the plaintiff's copyright, such that the "intrinsic" step of the test is not even needed if there are no protectable elements to compare.96

When filtering out elements, or dissecting the work, to identify the protectable features of a plaintiff's work, the court looked at doctrines used to decipher the line between an idea and expression.97 For example, Apple could protect the expression or particular manner in which it displayed the garbage can icon for deleted materials, but not the general idea of using a waste receptacle for deleted material.98 It is clear from the case that only expressions are protected and ideas that merge with expression only get copyright protection from identical copying.99 Although some elements in a graphical interface may be set aside and only granted protection from identical copying, this is actually a limited form of copyright protection. So, certain expressions that do not qualify individually for copyright protection will be unprotected in an interface, even if taken together with individually protected elements these expressions could actually qualify for copy-

91. Id. at 1020.
92. Id.
95. Id. at 1021.
96. Id.; see also Brown Bag v. Symantec, 960 F.2d. 1465, 1475-76 (9th Cir. 1992).
97. Id. at 1021.
98. Id. at 1035-1036.
99. Id. at 1021. But see Sid & Marty Krofft Television v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977).
right protection. For example, if an element is found to be lacking originality or is functional, it would not be included in determining the total expression to be protected in an interface. Dissection clearly hurts any overall copyright protection that might be available for the graphical interface and likewise a Web site user interface.

While Apple lost on many claims of similarities between its graphical interfaces and Microsoft’s interfaces, it is important to notice that this outcome could be the result of asserting the wrong cause of action. Many arguments made by Apple to persuade the court to grant copyright protection of all the elements contained in the interface as a whole were actually trademark arguments. Apple argued that “to understand the distinctive appearance of the Macintosh interface, one needs to consider not only the individual elements that make up the appearance of the interface but also the way those elements are arranged and interact with one another to create the consistent and distinctive Macintosh interface.”

This basic argument could fit under a trade dress theory because the references to “distinctive appearance” and the arrangement of elements in the interface sound like references to trademark law. So, it makes sense that the district court quickly discounted these arguments under a copyright analysis. The court reasoned that the “look and feel” of Apple’s interface was actually just a “collection of visual displays and user commands designed to render use of the computer.” The court deemed these command elements of the interface utilitarian or functional, so they were not protectable under copyright law when viewed together with other protectable elements in the interface.

Apple’s claims may have been more successful under a trade dress theory. It seems copyright protection of Web site user interfaces will be limited, at best, after Apple. It is likely that many elements in a Web site interface could be viewed as functional and only needed to operate the site. These functional elements will be dissected out of the whole look and feel of the interface when copyright protection is considered. Thus, the interface could be left virtually unprotectable by copyright because a large portion of many Web

100. Id. at 1022.
101. The threshold question for trademark infringement is whether the mark is distinctive. Trade dress protection considers the overall impression of a product and the arrangement or combinations of graphics in a product’s packaging. See Abercrombie & Fitch Co. v. Hunting World, 537 F.2d 4, 9 (2d Cir. 1976).
103. Id. at 1023.
sites consist of the command buttons used to navigate the information in a particular manner. The feasibility of successfully applying a trade dress theory to Web site user interfaces will be discussed in Part IV of this comment.

2. **Lotus Development Corp. v. Borland International, Inc.**

The Supreme Court addressed the issue of protecting the command hierarchy portion of a computer program’s user interface under copyright law in the case *Lotus Development Corp. v. Borland International, Inc.*104 ("Borland") It is difficult to predict what impact this will have on other types of computer program environments, like Web site interfaces, since the command hierarchy component of the interface at issue in the case, without consideration of the visual screen display, was not held to be protectable under copyright law. However, the case could cause the protection of an interface’s total look and feel to be diminished in the future.

"In *Lotus Development Corp. v. Borland International, Inc.*105 the U.S. Court of Appeals for the First Circuit ruled that the menu structure of Lotus 1-2-3 was a ‘method of operation’ and thus, unprotected by copyright.”106 The Supreme Court affirmed this decision,107 so Web site owners on the Internet seeking protection of their valuable intellectual property are bound by this decision. Unfortunately, the Supreme Court did not issue a written opinion in the case, so we must look at the First Circuit’s reasoning for the decision.108 Even so, the proper scope of copyright protection of software is still difficult to ascertain because the First Circuit did not provide a clear justification for its result.109 It is hard to tell if the totality of Web site user interfaces, which is distinguishable from the menu structures standing alone, will be afforded copyright protection. The following discussion will explore the First Circuit’s decision in *Borland* be-

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106. Id. at 816.
109. See id. at 467.
cause this analysis would likely be applied to future cases dealing with copyright protection of Web site interfaces.

The sole question on appeal in the First Circuit was “whether the Lotus menu command hierarchy is copyrightable subject matter.”110 The command hierarchy, standing alone, had to be an original expression in order to be afforded copyright protection.111 The issue of whether the creative screen displays were capable of being copyrightable was not before the court.112 So, it is undecided if the visual displays and the hierarchy, considered together, would have been a protectable look and feel of the program’s interface. However, the case pointed out that if the expressive aspects of the screen displays were not needed to operate the computer program, they would not necessarily be deemed unprotectable methods of operation.113 Thus, the separate protection of the visual screen display in a Web site interface is not necessarily affected by the court’s decision in Borland.114

In Borland, the First Circuit relied on the express language in § 102(b) of the Copyright Act115 to explain its application to the case: “We think that ‘method of operation,’ as that term is used in § 102(b), refers to the means by which a person operates something, whether it be a car . . . or a computer.”116 The Court stated that the Lotus 1-2-3 command hierarchy was a method of operation because the hierarchy “provided the means by which users control and operate Lotus 1-2-3.”117 Just because Lotus made some creative decisions about the arrangement and word choices available for the command hierarchy did not mean the hierarchy was copyrightable subject matter. Once something is deemed a method of operation under copyright law, it does not matter how original or creative it is, there cannot be copyright protection. This is the main problem of applying Borland to Web site user interfaces. Arguably, a user interface is used to operate a program. A Web site user interface may be original and minimally creative, but if it is likened to the command

111. Id. at 813.
112. “As they are not before us on appeal, we take no position on whether the Lotus 1-2-3 screen displays constitute original expression capable of being copyrighted.” Id. at 816 n. 10.
113. Id. at 816.
114. There are other potential problems with protecting the visual screen display of a Web site interface under copyright law, as discussed infra Part II[D].
117. Id. at 815.
hierarchies at issue in *Borland*, then copyright protection will not be extended to the entire look and feel of the user interface.

Furthermore, the First Circuit likened the command hierarchy of Lotus 1-2-3 to the buttons used to control a video cassette recorder ("VCR"). This analogy to unprotectable VCR buttons seems to support the notion that the command buttons and icons in a Web site user interface that help a user navigate the site will not be protectable elements under copyright. The First Circuit reasoned that users operate the VCR by pressing buttons that perform certain functions. Just because these buttons are arranged in a certain manner, arguably a creative manner, does not make the buttons a literary work or an expression. Instead, the buttons are themselves the ‘method of operating’ the VCR. According to the First Circuit, choosing a command on the Lotus screen was analogous to pressing a button on a VCR. Since the Lotus menu commands were necessary for operating and using the program, the command hierarchy was considered a method of operation. The mechanisms for navigating a Web site are also necessary for operating the Web site and gaining information from it. Pursuant to the *Borland* decision, it is easy to see that a court might not extend copyright protection to these command aspects of a Web site user interface. Thus, a large portion of a Web site user interface may be left unprotected by copyright as a result of this decision. Further, these unprotectable elements would be filtered out when a court considers substantial similarity for infringement. So, when this case’s reasoning is coupled with analytic dissection, the look and feel of the entire Web site interface would likely be unprotected by copyright.

There is a chance that there could still be some copyright protection of the command part of a Web site user interface if the command buttons or icons, which navigate the site, are deemed mere labels. The court does not directly address this possibility because Lotus 1-2-3 did not design their interface in this fashion. However, the creative labels used on a Web site to jump to another screen or activate a hyperlink might get copyright protection if the labels could

118. *Id.* at 817.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
be designed without solely being an operation. Unfortunately, this would be a difficult argument to advance because the only way to navigate a Web site is by "pushing" the buttons, like in the court's analogy to VCR buttons. Thus, it is difficult to predict how a court will rule on the copyright protection of the command elements contained in a Web site user interface's look and feel.

To further complicate any predictions about the feasibility of protecting Web site user interfaces under copyright, the First Circuit relied on considerations of competition and public policy to decide that the Lotus 1-2-3 command hierarchy was not eligible for copyright protection. These considerations are not as relevant when dealing with the Internet. The concerns over program function compatibility and writing macros for the simplicity of operation, which were present in Borland, are not issues when protecting Web site interfaces. It made sense in Borland that forcing a user of several different computer programs to learn all the different ways to operate similar functions in each program was not practical. But, in cyberspace, many Web sites are visually set up differently, operate in different ways and are used to represent different entities and products. Other sites collect and present information from many individual entities, so they do not need to have functioning mechanisms that are similar to other Web sites. Thus, the policy considerations so heavily relied upon in Borland may not be as relevant when considering the copyright protection of the keystroke commands or icons in Web site interfaces, either as individual protectable elements or as the entire look and feel of the interface.

Arguably, some buttons used to operate command aspects of a Web site user interface may be compatible with other sites because the software used to create Web sites only allows a limited number of choices. In addition, most Internet users want some standardization and compatibility between commands for convenience. These arguments could add fuel to the position that the look and feel of Web site interfaces should not be copyrightable, but it is unclear how much weight a court would give these arguments. Standardization and compatibility would perpetuate convenience for the Internet, but they are not necessary for it to function as a marketplace for goods and services. Also, future innovations will likely create an infinite number of options for generating buttons, icons, or visuals on a Web site.

125. See Bocchino, supra note 108 at 472.
Since the Supreme Court in *Borland* did not address protection of the Lotus 1-2-3 visual screen displays alone or the effect of considering the visual displays and command hierarchy together as a whole, copyright protection of the look and feel of an entire interface is still unclear after the case. It is feasible that some graphics in a Web site interface could be separately protected under the audiovisual category of § 102(a), if the graphics are original and creative. But, this kind of copyright protection would only protect some aspects of a Web site user interface and not the presentation in its entirety, i.e., its look and feel. This overall concept and impression represents the business image generated in consumers' minds which affects their buying decisions. It is the overall impression and complete layout or organization that is so valuable to a Web site owner and gives the owner a competitive advantage in the marketplace because it grabs the attention of consumers and helps build brand recognition. This overall impression or look and feel carries out a consistent theme, so a Web site can stand out among the massive volume of Web sites out there.

It is apparent that copyright protection will fall short of completely protecting a Web site owner from someone else using his creative Web site interface look and feel. First, it may be difficult to find sufficient originality in a Web site interface for copyright protection if the Web site merely presents and organizes facts, as seen in the *Feist* case. Second, many individual elements in a user interface may be left unprotected after subject matter is dissected by the substantial similarity analysis for infringement, as seen in *Apple*. Third, individual elements or the entire Web site may be deemed a method of operation or fall under other § 102(b) exceptions which exclude copyright protection of certain types of subject matter, as seen in *Borland*. Finally, even if some copyright protection is afforded, it may not be for the entire look and feel of the Web site, and it is this total presentation that is so valuable for marketing purposes in cyberspace.

IV. TRADEMARK PROTECTION OF WEB SITE USER INTERFACES

A. General Theory of Trademark Protection

Trademark law protects the public from being confused about the source of a particular product.130 According to the Lanham Act,131 which provides federal protection of trademarks, a mark is used "to identify and distinguish... goods... from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown."132 Consumers assume that products or services from a single source remain consistent, so trademarks enable a consumer to rely on their previous buying experiences when making new purchasing decisions among competing products and services. If a consumer is confused about the source or sponsorship of a product, that consumer might make a poorly informed buying decision. Trademark law attempts to encourage businesses to invest in the "good will" generated by their image, reputation, and products.133 If this "good will" can be linked to a specific trademark and protected from consumer confusion under the law, then businesses will also be encouraged to make products of a consistent quality, which clearly benefits the public.134

Consumers are buying products and services via the Internet at increasing frequencies. Even new commercials advertise that it is simple to set up "store fronts" on the Internet.135 Consumers must be able to identify and obtain the goods they desire. Also, a business must be able to retain an advantage in the marketplace from the good

130. The Lanham Act provides that infringement of a trademark occurs when a defendant uses a mark in a manner listed in the statute and "such use is likely to cause confusion or to cause mistake, or to deceive..." 15 U.S.C. § 1114 (1994). The Restatement of Unfair Competition refers to this "likelihood of confusion" standard for protecting consumers in the marketplace. RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 20-23 (1995).
133. 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2.10 (3d ed. 1996).
134. Trademark law strives to prevent a competitor from gaining an unfair benefit from consumer confusion as to source because this confusion hinders competition. "If such confusion occurs, meaningful competition is frustrated because '[w]ithout some... method of product identification, informed consumer choice, and hence meaningful competition in equality, could not exist.'" Landscape Forms, Inc. v. Columbia Cascade Co., 940 F. Supp. 663, 666-667 (S.D.N.Y. 1996) quoting Smith v. Chanel, Inc., 402 F.2d 562, 566 (9th Cir. 1968).
135. AT&T started running television commercials in October 1997 telling consumers to use AT&T products for the purpose of setting up a "store front" on the Internet.
will contained in its image and reputation, which is reflected in a Web site user interface. Thus, there is a great need for trademark protection of a business’s trade dress that is represented by its Web site user interface on the Internet.

B. Basic Differences Between Copyright and Trademark Protection

The idea of protecting consumers from confusion about the source of a product is very different from protecting an author’s original work under copyright. This basic difference is why trademark law may be better suited to protect Web site user interfaces. Copyright law does not acknowledge the protection of a consumer’s association with a particular product or the good will generated from source identification of a product. Copyright law looks at the similarity between two types of expression, while trademark law focuses on the likelihood of consumer confusion. While similarities between two trademarks will provide evidence that there could be consumer confusion, the similarities alone between the marks are not dispositive of confusion. So, while there may not be an infringement of rights under copyright law, due to a lack of substantial similarity between the Web sites, there may still be an infringement under trademark law because trademark infringement is based on a different rationale; preventing consumer confusion. This is helpful in look and feel cases, in light of the problem with the filtration and dissection methods that are used for finding substantial similarity in copyright law.

With Web site user interfaces, something could be expressed in a different manner, but still mislead a consumer because the overall impression from the visual display triggers an association with the wrong source. For example, a seller of Mexican spices might have a particular Mexican villa motif on his Web site, while another company operated a site with a different colored and designed Mexican villa motif for selling its products on the Internet and there would not necessarily be copyright infringement. However, if these two com-

136. To find copyright infringement, a court will compare the similarities between the two works at issue to decide if the similarities are substantial. But, to find trademark infringement, a court is concerned with whether the public will be confused if two trademarks exist side by side in the marketplace, i.e., are the two trademarks confusingly similar.

137. The similarity between the marks represents only one factor considered in deciding likelihood of confusion. Restatement (Third) of Unfair Competition § 21 (1995); see also Polaroid Co. v. Polarad Elecs. Co., 287 F.2d 492, 495 (2d Cir. 1961).
panies were competitors and prospective consumers were confused about who was selling which goods on a particular Web site, there could be a trademark infringement of the look and feel of the Web site under a trade dress theory.

The language in the United States Constitution granting Congress the power to pass laws to protect copyrights does not contain a natural right of authors to own their works. It is clear that the public interest of promoting "the progress of science, and useful arts" takes precedence over an author's limited statutory right to control the copying and distribution of his original work because the public interest is expressly mentioned in the Constitution. It is no secret that the Constitution preempts meanings and applications of federal laws when they are directly at odds. Since the public interest of fostering competition and creative arts carries greater weight than the author's rights, it is likely that copyright protection is not as strong as trademark protection in the context of a volatile commercial medium like the Internet.

There is a strong public interest in protecting trademarks because distinguishing goods and services helps to reduce consumer confusion as to the source of goods in the marketplace and helps to avoid unfair competitive practices. Thus, copyright protection can have a more limited application than trademark protection to Web site interfaces, due to the competitive nature of the Internet. In addition, opening up copyright protection to include the look and feel of Web site interfaces could dilute the protection afforded for other works of authorship. Trade dress is already more on point for protecting the overall arrangement, design, or look and feel of a computer or Web site user interface, so it seems a better theory to apply.

In addition, copyright protection lasts for a limited duration, while trademark protection is infinite, provided it is maintained.  

138. The argument that an author has an automatic "natural" or basic right in his own creations is a debated concept. Many believe that this "natural right" in copyright is reflected in the Constitution, even though it is not expressly stated. Harvard Professor Nathaniel Shaler stated, "[I]ntellectual property is, after all, the only absolute possession in the world ... [l]he man who brings out of the nothingness some child of his thought has rights therein which cannot belong to any other sort of property." ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT FOR THE NINETIES 29 (4th ed. 1993). The Copyright Act of 1976 clearly does not incorporate this natural right idea because all the rights protected are limited in scope and not absolute as if they are natural rights.


141. 17 U.S.C. § 302 (1994). For trademarks, registration must be renewed every five years and the trademark owner must take necessary precautions to prevent the mark from los-
Web sites are dynamic and always changing, so the perpetual life of a trademark does not seem like an advantage over copyright protection. However, long term investments in source identification through trade dress could create an advantage for some established companies when they decide to use their trade dress on a new medium, like the Internet or whatever new form of communication is used in the future.

C. Trade Dress

1. Theory of Protection

Trade dress is a form of trademark protection. "Trade dress" refers to the "total image and overall appearance of a product". Or put another way, it is the "manner in which the goods or services are presented to prospective purchasers..." to indicate source. Trade dress encompasses the "arrangement of identifying characteristics or decoration connected to a product, whether by packaging or otherwise, intended to make the source of the product distinguishable from another and to promote it for sale." Once source significance is attached to the appearance or image of the goods and services offered for sale, "the appearance then functions as a trademark."

For protecting Web site user interfaces, the focus is not so much on the appearance of the product itself, but on the interface display used in presenting the product and the image of its source to prospective customers. Remember, the statute states that decoration can be "...connected to a product, whether by packaging or other-
wise,” so the interface itself can act to distinguish the product. The Web site is like a large store display for products or services of a particular entity. However, this Internet display is better than a poster or mannequin because it is interactive, much like a live demonstration. The trade dress at issue when evaluating the total look and feel of a Web site includes the visual screen display and the command buttons or icons used for navigating the site. Trade dress is specifically concerned with protecting the overall organization and concept presented in a display used to present a product or source to a potential consumer. So, trade dress is well suited to protect the entire look and feel of a Web site interface, which is essentially the overall concept presented in the display.

2. Statutory Protection

Trade dress registration can be costly, time consuming, and difficult due to filing requirements under § 2 of the Lanham Act. While it is possible to register a trade dress, a business’s trade dress would not likely be registered in practice because it can be expensive. It is particularly difficult to register the trade dress on Web sites because the sites are dynamic and frequently changing. Also, an entrepreneur or small business with a Web site on the Internet may not have legal counsel to advise them about the pitfalls of doing business on the Internet. Fortunately, an unregistered mark or an unregistered trade dress can gain protection under § 43(a) of the Lanham Act. The case law decided under § 43(a) has broadened the scope of what

147. Ferrari v. Roberts, 944 F.2d at 1239.


150. 15 U.S.C. § 1125 (1994). Section 43(a) of the Lanham Act has been applied for protection of trade dress, unregistered marks, and protection from false advertising, commercial disparagement and passing off. See generally 3 MCCARTHY, supra note 133, § 27.03[1][b].
is protectable as a trade dress, so Web site user interfaces have a better chance of being protected under § 43(a).151

The analysis for a registered and an unregistered trademark or trade dress are very similar.152 The main advantage with a registered mark comes from the fact that a court presumes a registered mark's validity in an infringement action.153 The main requirements for validity are that the mark is used to identify a single source of goods in commerce, the mark is distinctive and the mark is nonfunctional. An invalid mark would prevent a plaintiff from going forward with an infringement action. This is important because trademark protection is only valuable if the owner of the mark can enforce his rights and stop another party from using a trademark that causes consumer confusion. There are clear advantages to registration, but protecting Web site user interfaces will likely be more feasible under § 43(a) of the Lanham Act.154

Section 43(a)155 "protects against confusion or the likelihood of confusion as to source, sponsorship or association between the goods and services of competitors in the marketplace."156 Basically, this portion of the Lanham Act provides a cause of action for plaintiffs who have been injured by deceptive commercial practices that cause consumer confusion.157 Further, the scope of trade dress protection under § 43(a) is generally broader than trademark protection under the statute. As one court noted:


155. 15 U.S.C. § 1125(a) (1994). Section 43(a) of the Lanham Act provides:

(a) Any person who, or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact or false or misleading representation of fact, which

(1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . . .

156. MICHAEL A. EPSTEIN, MODERN INTELLECTUAL PROPERTY, 7.03[A][2] (3d ed. 1995).

Trade dress protection is broader in scope than trademark protection, both because it protects aspects of packaging and product design that cannot be registered for trademark protection and because evaluation of trade dress infringement claims requires the court to focus on the plaintiff's entire selling image, rather than the narrower single facet of trademark.\(^{158}\)

As stated earlier, many entrepreneurs and small businesses who use the Internet may not have a registered trade dress due to expense. These entrepreneurs and small businesses could still enjoy protection under § 43(a).\(^{159}\) Thus, § 43(a) will likely be the best means to protect the trade dress contained in a Web site user interface, so long as the elements of distinctiveness and nonfunctional are satisfied.

3. Requirements for Trade Dress Protection

To be eligible for protection as a trademark under the Lanham Act,\(^ {160}\) the trade dress must be inherently distinctive, or have acquired secondary meaning, and be nonfunctional.\(^ {161}\) Once a trade dress is deemed distinctive and nonfunctional, the ultimate inquiry for infringement is whether another trade dress causes a likelihood of confusion in consumers' minds.\(^ {162}\) This likelihood of confusion is not only the basis for finding an infringement of a trade dress, but also the basic rationale behind why a trade dress is protected. This standard would be potentially easier for a plaintiff to prove than the substantial similarity needed for copyright infringement. The trademark standard for infringement is more favorable for protecting Web site interfaces because it focuses on consumer perceptions and market factors—not the actual creative expression in the site.

a. Distinctiveness

To protect a Web site user interface under a trade dress theory, the first issue is whether the site's look and feel is distinctive, either inherently or due to acquired secondary meaning.\(^ {163}\) Distinctiveness means that a consumer is capable of identifying one source's product

\(^{158}\) Bauer Lamp Co., v. Shaffer, 941 F.2d 1165, 1170 (11th Cir. 1991) (for trade dress infringement the three elements a plaintiff must prove are: (1) the product is distinctive or acquired secondary meaning; (2) the elements or features in question are nonfunctional and (3) the similarities between the two products are confusingly similar).


\(^{161}\) \textit{Restatement (Third) of Unfair Competition} § 16 (1995).

\(^{162}\) \textit{See generally} \textit{Two Pesos, Inc. v. Taco Cabana, Inc.}, 505 U.S. 763 (1992)

and distinguishing that source's product from another source's goods. The distinctiveness classifications from \textit{Ambercrombie & Fitch Co. v. Hunting World}\textsuperscript{165} have been applied to trade dress protection under § 43(a), and accepted by the Supreme Court. So, application of the classifications to a Web site's trade dress should not be any different.

According to \textit{Ambercrombie}, the two highest categories on the classification scale are arbitrary or fanciful marks, and suggestive marks, which are considered inherently distinctive. They are considered the two "highest" categories because these types of marks have a high level of distinctiveness by their very nature. For example, using an apple symbol for a computer is an arbitrary mark because it has an unexpected association with the product. The third category is descriptive "marks" which can become distinctive once they sufficiently acquire secondary meaning.\textsuperscript{168} For example, calling a machine that makes pickles a "Pickle Machine" is a descriptive label for the product. A mark achieves secondary meaning when the primary significance of a product's trade dress in the minds of consumers is not the product but the source of the product.\textsuperscript{169} It must be proven that consumers link the trade dress to a single source, even if the consumer is not aware of that particular source or the source is anonymous.\textsuperscript{170} The final category is generic marks which are never protectable as a trademark or trade dress.\textsuperscript{171} For example, using "soda" for the name of a soft drink would just be using a generic name for the product because it does not distinguish the product. Sometimes, a once distinctive mark can become a generic term for a certain type or class of products. For example, when someone uses

\textsuperscript{164.} \textbf{Restatement (Third) of Unfair Competition} § 9 (1995).

\textsuperscript{165.} The distinctiveness scale was formulated by Judge Friendly in \textit{Ambercrombie & Fitch Co. v. Hunting World, Inc.} \textit{Ambercrombie & Fitch Co. v. Hunting World, Inc}, 537 F.2d 4, 9 (2d Cir. 1976).

\textsuperscript{166.} The Fifth Circuit followed the \textit{Ambercrombie} analysis to determine that the trade dress of a Mexican restaurant was inherently distinctive in \textit{Two Pesos}. \textit{Two Pesos, Inc. v. Taco Cabana, Inc.}, 505 U.S. 763 (1992). The Supreme Court then affirmed the Fifth Circuit's ruling stating that the lower court was correct in applying the \textit{Ambercrombie} classifications to the facts. \textit{Id.} at 773.

\textsuperscript{167.} \textit{Ambercrombie & Fitch Co. v. Hunting World, Inc}, 537 F.2d at 9. "Marks" includes trade dress so, in the context of protecting a Web site interface, the interface is actually the trademark.

\textsuperscript{168.} \textit{Id.} at 9.


\textsuperscript{170.} \textit{Two Pesos, Inc. v. Taco Cabana, Inc.}, 505 U.S. 763, 769 (1992).

\textsuperscript{171.} \textbf{Restatement (Third) of Unfair Competition} § 15 (1995).
“xerox” instead of saying “a copy”, the trademark in the company name Xerox can get diminished to the point that “xerox” is just another noun for the word copy. To have a protectable trade dress, the Web site interface must either be arbitrary or fanciful, suggestive, or descriptive with acquired secondary meaning. However, as a practical matter it may be difficult for a Web site to acquire secondary meaning when the site’s design or layout is substantially changed or frequently updated.

Some problems exist with finding arbitrary or fanciful distinctiveness in a Web site user interface as well. The features contained in the visual display of a Web site interface would have to be creative and not features necessarily found in other interfaces. This is not to say that the “‘packaging’ of the product, or interface is ‘inherently distinctive’ merely because it is not identical to features commonly found in the marketplace.” However, Web site interface features could not just reflect a “variation on a commonplace theme,” instead they would have to be so arbitrary that “one can assume without proof that [the trade dress] automatically will be perceived . . . as an identifier of the source of the product.”

There are many ways to create a visual display through computer graphics and an infinite number of graphical elements that an owner could include in a Web site user interface. So, a creative graphic screen display could satisfy the arbitrary requirement provided it was so unique that other sites would not necessarily possess the same look and feel. However, the command or icon elements for navigating the information could be considered commonplace in many other sites. Fortunately, to find trade dress protection, a court would likely consider the entire layout of the Web site interface, so the inclusion of commonplace elements will not necessarily bar trade dress protection.

The limited ways of presenting the buttons used for moving about the site could present a problem with finding the whole site distinctive because the buttons might be considered a standard or merely functional. If the command buttons used to navigate the site are simple and standard, a court may just protect the visual graphics in the screen display without including the buttons, even if the buttons are labeled creatively or have animation. Again, it is difficult to

172. 1 McCARTHY, supra note 133, § 8.02[4].
predict what features will be included in the look and feel of the interface even when seeking protection under a trade dress theory, rather than copyright. But, the potential for protection seems more favorable than under a copyright theory.

Next, showing that the interface is suggestive as to its source could present similar problems. "A term is suggestive if it requires imagination, thought, and perception to reach a conclusion as to the nature of the goods." A consumer visiting a particular site must use some imagination to understand the whole scheme of how the site looks in order for the trade dress to be considered suggestive. But, if mere observation only tells the consumer some descriptions about the product in a basic sense, then there is arguably not a suggestive trade dress. The consumer must identify with some source when he views the Web site. It is more feasible that a consumer would see the graphic presentation on the screen and perceive some "suggestion" about the source, rather than some arbitrary or fanciful association.

Again, it would be difficult to show that seeing the creative buttons or commands for navigating the information caused some identification with the source. Many Web sites may have similar buttons. The only way to protect the buttons and the graphic presentation together would be to show that they are so unique or dependent on each other for the overall look and feel of the interface that they could not be separated out of the total trade dress impression. This may be difficult to prove because similar command hierarchies for navigating a Web site are used on the Internet. The command hierarchy would have to be elaborate and creative, so when it was considered with the totality of the interface the appropriate level of distinctiveness could be found in the look and feel of the interface.

b. Secondary Meaning

Trade dress protection of a descriptive mark requires secondary meaning. Secondary meaning is acquired distinctiveness that results from using the descriptive mark extensively, such that it identifies a single source instead of just describing a product. Gaining secondary meaning could be problematic for Web site user interfaces. First, "a high degree of proof is necessary to establish secondary

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Second, showing secondary meaning is difficult because it takes time to establish a consumer's association of a product with its source. If the trade dress in a Web site just describes the business or products and is not elaborate and catchy to the consumer, it will obviously take substantial time for association to the trade dress to be built. Since Web sites are often changed and modified, it may be difficult for a descriptive trade dress to ever acquire secondary meaning such that it would be afforded trademark protection. The best situation for a descriptive trade dress would be an elaborate trade dress that is already used in other advertising materials for the product or company, so that its use is already established when used on the Web site. In this case, there would be a better chance that the requisite level of secondary meaning could be shown in order for distinctiveness to attach the descriptive trade dress.

Since it is crucial to find that there has been sufficient consumer exposure to a particular trade dress in order to have secondary meaning, a court may consider the following factors from the Third Circuit: (1) the duration and exclusivity of the design's use; (2) the amount and nature of advertising that emphasizes the design and its distinctive, identifying features; (3) consumer survey evidence linking the design to a single source; and (4) the defendant's intent in copying the design.

These factors for finding secondary meaning could be problematic when applied to Web site user interfaces. The duration and exclusivity of all elements in use of a Web site user interface design may not be very lengthy, due to frequent changes and updates. Second, a Web site can often be a primary source of advertising itself, so there may not be many other materials beyond the Web site that reflect the trade dress of a business. Further, the trade dress presented in a Web site may be in keeping with the image of a particular business, but not reflect the exact trade dress used in other advertising for the business. So, protection of the trade dress contained in the Web site interface may not be easily gained if secondary meaning is required. Next, consumer survey evidence can be costly and inaccurate. It is hard to tell how many people are even using the Internet, much less how many people made associations to a particular source after viewing a Web site. A small business or entrepreneur may not have the resources to gather the proof needed to show that the Web site user interface acquired secondary meaning.

Finally, showing intent in copying the design does not trigger a presumption of secondary meaning. It is not determinative, but merely evidence.\textsuperscript{179} Given the number of Web sites on the Internet, it may be onerous to prove that a defendant had an actual intent to copy a plaintiff's trade dress.

Due to the standards for proving distinctiveness and the fact that Web sites are modified often, it is likely that only Web site interfaces which are inherently distinctive would be protected under a trade dress theory. For example, interfaces with an elaborate border or motif that is consistently used throughout the site, even though the site's information is changed and updated, would likely qualify for trade dress protection. Another example is a Web site that contains similar content to material that is already used as a motif on brochures or in other marketing materials. It is unclear if all elements in the visual screen would be protected as the total look and feel or trade dress of the interface. It is possible that a court would filter out those command elements that are widely used by other Web sites, like the filtration analysis used under copyright law. A command key or button would have to be very unique and not separable from the total presentation of the visual screen display in order to be included in the trade dress protection available for a Web site user interface's look and feel. Of course, even if a plaintiff proves distinctiveness or secondary meaning, there are still problems with proving that the user interface is nonfunctional.

c. Functionality

A design is "functional" ... if the design affords benefits in the manufacturing, marketing, or use of the goods or services with which the design is used, apart from any benefits attributable to the design's significance as an indication of source, that are important to effective competition by others and that are not practically available through the use of alternative designs\textsuperscript{180}

"Functionality" is a term of art in trademark law that does not just mean a utilitarian use. As the court in \textit{In re Morton-Norwich Products, Inc.}\textsuperscript{181} reasoned, "'functionality' is determined in light of 'utility,' which is determined in light of 'superiority of design,' and

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\item[180.] \textsc{Restatement (Third) of Unfair Competition} § 17 (1995).
\item[181.] \textit{In re Morton-Norwich Prods., Inc.}, 671 F.2d 1332 (C.C.P.A. 1982).
\end{enumerate}
\end{footnotesize}
rests upon the foundation "essential to effective competition."\textsuperscript{182} Basically, merely using a design that adds efficiency to the look and feel of a Web site user interface would not be enough to keep the design from being functional. There is a balance between the public interest of using innovations and encouraging competition and the need to provide an incentive for investments in innovations. Subject matter will not be protected by trademark law, due to its functionality, when "the public and private interest of avoiding consumer confusion is outweighed by the anti-competitive consequences of trademark protection."\textsuperscript{183}

Computer programs are arguably completely functional or utilitarian because they cause an operation to occur. Likewise, under copyright law, the user interface on a Web site could be deemed a purely functional aspect of the site because it provides a means for a potential consumer to interact with the information or products for sale. However, according to functionality in terms of trademark law, a Web site could satisfy the nonfunctional requirement because it does not just mean utilitarian. The rationale behind the doctrine of functionality in a trademark sense can be described as "encouraging competition by preventing advances in functional design from being monopolized."\textsuperscript{184} For example, the purely graphic visual screen presentation part of the user interface, in particular, could be nonfunctional because there are many competitive alternatives to what is presented in the display. Having a monopoly on the overall arrangement, i.e., trade dress, of the Web site user interface would not interfere with competition because there would be so many other equally efficient ways to arrange a site.

The design of a Web site user interface would be functional if those benefits gained from the particular design could not be easily duplicated by simply using another design. For example, the arrangement of the user interface might make it more user friendly, or make it easier to navigate the product information. A competitor would likely be able to duplicate or create this benefit of use simplicity in a different manner, so there may not be a functionality preclusion. Even so, when dealing with a commercial Web site, the most prominent benefit gained would be the identification of a product's source for marketing purposes. This source identification advantage

\textsuperscript{182} Id. at 1340 citing Ives Labs., Inc. v. Darby Drug Co., 601 F.2d 631, 643 (2d Cir. 1979).

\textsuperscript{183} \textit{Restatement (Third) of Unfair Competition} \S 17 (1995).

\textsuperscript{184} LeSportsac Inc. v. K Mart Corp., 754 F.2d 71, 77 (2d Cir. 1985).
from the arrangement or look and feel of one's Web site would clearly be nonfunctional.

However, strong evidence that something is functional exists when few comparable alternatives in the marketplace are available or when the design is so superior that other alternatives may not readily compete. This is the main problem when looking at the functionality of a Web site user interface because the alternatives for arranging a Web site can be somewhat limited. It is hard to tell exactly how many alternatives would be needed to satisfy a court. It is clear that the main concern in granting trademark or trade dress protection is that the protection should not hinder competition. Thus, so long as there are ample options for creating the arrangement of a Web site beyond the particular arrangement choice used by one owner, the site's interface should not be considered functional. Also, as the Internet grows, it is likely that numerous alternatives will be available for creating or building a Web site. Finally, it is unlikely that the arrangement or combination of a Web site user interface would be considered a superior design. While a particular Web site arrangement may be creative or clever, such that it attracts consumers, this quality will not be enough to make the site a so superior in design that competition would severely suffer without public use of the design.

In light of the potential problems, does this competition rationale for functionality allow protection of the visual screen display and the layout presentation of the "buttons" that operate the Web site together as a whole? Fortunately for Web site interfaces, the likely answer to this question is "yes." Copyright law's notion of functionality could preclude specific elements of a Web site from gaining protection.\textsuperscript{185} Unlike with copyright protection, the functionality of a trade dress is determined by considering all the elements in a combination, rather than considering if each element is individually functional.\textsuperscript{186} The protection sought by trade dress is based on the arrangement or combination of elements as a whole. So, the combination of the functional elements may be deemed nonfunctional "if it serves to distinguish the product from rival products

\textsuperscript{185} 17 U.S.C. § 102(b) (1994).
\textsuperscript{186} Vaughan Mfg. Co. v. Birkham Int'l, Inc., 814 F.2d 346, 350 (7th Cir. 1987) ("Whether the configuration of [an article] is functional or can receive trademark protection depends on whether its design as a whole is superior to other designs, not whether its component features viewed individually have a function.").
rather than being necessary to the product’s use." It has been established that "a particular arbitrary combination of functional features, the combination of which is not itself functional, properly enjoys [trade dress] protection." So, the overall trade dress is not functional just because there are some elements contained in the trade dress that are arguably trademark functional; like the buttons for navigating a Web site.

The concept behind trademark functionality makes trade dress protection of all the elements comprised in a user interface more feasible than copyright protection of all the elements. Unlike copyright protection, the total look and feel, which includes the visual display and command icons, has a better chance of being deemed nonfunctional under trade dress.

D. Standard for Infringement: Likelihood of Confusion

When determining the likelihood of confusion between a plaintiff's trade dress contained in a Web site interface and someone else's Web site trade dress, a court will consider many factors. The Restatement (Third) of Unfair Competition and case law provide many factors to consider, but frequently the eight factors enumerated in *Polaroid Corporation v. Polarad Electronics* are applied. The factors applied from the *Polaroid* case are: (1) the strength of the mark (trade dress); (2) the similarity between the two marks (trade dress); (3) proximity of products in the marketplace; (4) quality and price of defendant's product; (5) bridging the gap; (6) actual confusion; (7) defendant's good faith and intent; and (8) sophistication of the buyers.

The strength of a trade dress will be evaluated by the distinctiveness of the trade dress and its potential to identify the source. As discussed, it will be very feasible to prove a Web site interface is inherently distinctive. A court will consider how distinctive the trade dress appears in the eyes of the purchasing public. However, if the

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189. *RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 21 (1995).*
trade dress is registered, there will also be the advantage of presumed validity, which means presumed distinctiveness. Next, a court will look at the content of the two Web site interfaces at issue to find similarities in the whole arrangement. However, the similarity between two sites is just one factor considered for finding infringement, unlike copyright law where the standard is only accounting for the substantial similarity between the works. In addition, while actual copying will be strong evidence of substantial similarity under copyright law, it is not required for trade dress infringement.

A court will look at several market factors affecting the products to determine a likelihood of confusion. First, the proximity of the products is considered, i.e., if products are in competition with each other. If the goods are similar in nature and type, such that they compete for consumers, there would likely be more confusion in a consumer's mind about the source of the goods when the consumer sees a similar looking Web site interface. Second, the market position of a defendant's product is taken into account by considering such things as the price and quality of the products. A defendant's products that are less expensive and made from materials of poor or lesser quality will not likely be confused with a plaintiff's products that are very expensive and of high quality. For example, a site selling Dooney & Bourke purses, which are made from fine leather and sold at high prices, will be less likely to be confused with a site selling inexpensive vinyl purses. Third, a court will take into account the likelihood of the plaintiff naturally expanding into markets that are similar to the defendant's selling markets, such that confusion would occur, i.e., bridging the gap. On the Internet, it will probably not be very helpful to look at the expansion into geographic markets because the Internet is essentially accessible worldwide. These market factors may not all be relevant to a Web site interface, but depending on the facts, a court will apply them.

193. The standard is likelihood of confusion, not whether copying occurred. Furthermore, the Restatement points out, "likelihood of confusion should not be inferred from proof that the actor intentionally copied the other's designation." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 22(2) (1995).
194. See Polaroid Corp. v. Polarad Elecs. Corp., 287 F.2d at 496 (discussion of the situation when two products are in competition or in fields similar enough that a likelihood of confusion could occur).
195. Id. at 497.
196. Id. at 497-499.
Proof of actual confusion is strong evidence for showing a likelihood of confusion, but it is not required. It may be difficult to calculate this actual confusion on the Internet because it is so vast and undefined, but it could be a relevant factor. Next, a court will consider the defendant’s intent regarding the infringement. On the Internet, there could be a good faith mistake by a defendant because there are so many Web sites in cyberspace. A small business may not realize they have created an infringing site, so a court will consider this and possibly just require the defendant to modify its site. Finally, a court will consider the sophistication of the buyers of plaintiff’s products. The more sophisticated and informed buyers are, the less likely they are to be confused by a similar brand or product on the Internet. For example, a doctor buying expensive, high technology medical equipment will likely be very informed about the products available and their sources, so the doctor’s likelihood of confusion with other medical equipment would be more remote. However, on the Internet, there may be many buyers who will not be sophisticated since the Internet is so widely accessible. Also, young children who do not have a great deal of buying experiences to rely upon are using the Internet. So, this factor may be very important for determining confusion of consumers on the Internet, especially for products that are marketed to young children.

For infringement, a court will weigh and consider these factors in light of the facts presented in each case to determine if an ordinary, prudent consumer would be confused as to the source. This is not an exhaustive list, but these factors will help a court evaluate the likelihood of confusion about the source in a consumer’s mind. The goal is to prevent the unfair competitive practice of exploiting the good will of a plaintiff’s trade dress, which represents a plaintiff’s image and source in the marketplace.

Based on the combination of these above factors, proving a likelihood on confusion may be easier than proving substantial similarity under copyright. Under copyright law, a Web site interface may only be eligible for “thin” protection because the protectable

198. See 15 U.S.C. § 1114(1) which allows recovery of profits or damages when reproduction of a mark is done “with knowledge that such imitation is intended to be used to cause confusion . . . .” Id.; see also RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 22 (1995).
creativity is only in the arrangement of facts or public domain information. In this case, copyright infringement would only be found for exact copying of the arrangement or layout of a plaintiff’s Web site user interface. However, exact copying is not always the problem. Due to the analysis used for finding a likelihood of confusion, trade dress would provide more complete protection for a wider range of misuses of a Web site owner’s creative user interface.

V. THE OPENING SCOPE OF TRADE DRESS PROTECTION

Trade dress protection is more difficult to calculate than protection of a trademark because there is not just one individual mark to consider. Instead, an overall impression, concept, or arrangement of elements is at issue. In the past, trade dress protection was not broadly applied because it was difficult to define and many courts were hesitant to grant such protection. Today, many courts seem to be less skeptical, due to the recognition that consumer association with motifs, sounds and colors exists. For instance, color alone can be a protected trade dress under § 43(a), even when it is not inherently distinctive.

Additionally, the Supreme Court in *Two Pesos, Inc. v. Taco Cabana, Inc.* ("Taco Cabana") held that the protection of trade dress should not be less than trademark protection because it complies with the Lanham Act’s purpose to “secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers.” It is also of note that the type of subject matter deemed protectable in *Taco Cabana* seems to indicate the Supreme Court’s willingness to apply trade dress protection in a broad manner. If the “festive and vivid color scheme” of a Mexican restaurant can be a protectable trade dress, then surely the creative look and feel of a Web site user interface can be afforded protection when it is distinctive and nonfunctional.

*Taco Cabana* further widens the scope of trade dress protection in another important way. Some courts required secondary meaning in order for inherently distinctive marks to gain trade dress protection

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under § 43(a)\textsuperscript{206} because the mark being protected was not eligible for registration.\textsuperscript{207} But, this rationale has been discounted by the Supreme Court.\textsuperscript{208} We now know that a trade dress can be inherently distinctive under § 43(a)\textsuperscript{209}. The Court made it clear in \textit{Taco Cabana} that requiring secondary meaning would have anticompetitive effects by disadvantaging new companies or a business entering a new selling market.\textsuperscript{210} This is especially helpful for protecting Web site interfaces because many new businesses are entering product markets all the time, and they would clearly be disadvantaged by having to immediately prove secondary meaning just to gain protection of their trade dress on the Internet. If secondary meaning was required in order to enforce the protection of a trade dress under § 43(a), then a trade dress theory would likely not be feasible for protecting Web site interfaces from being copied or "knocked off."\textsuperscript{211}

Since trade dress is becoming more widely used and clearly recognized by courts as legitimate legal protection equal to actual trademarks protection, it is very probable that trade dress will be used to protect the look and feel of Web site interfaces. Legal practitioners of trademark law propose that trade dress protection is broad enough to protect distinctive, nonfunctional Web site interfaces that go beyond simple listings of information.\textsuperscript{212} Also, case law confirms that the scope of what subject matter qualifies for trade dress protection is broadening.\textsuperscript{213} If the trend continues, the look and feel of Web site user interfaces will probably be added to the list of items protected under a trade dress theory.

\begin{itemize}
\item \textsuperscript{206} 15 U.S.C. § 1125(a) (1994).
\item \textsuperscript{208} \textit{Id.} at 776.
\item \textsuperscript{209} 15 U.S.C. § 1125 (a) (1994).
\item \textsuperscript{210} \textit{See} Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. at 775.
\item \textsuperscript{211} In marketing and fashion terms, a "knock off" is like a copy, but there may not be exact copying of a design or pattern. The "knock off" product, for example, a dress, reminds consumers of another similar dress that was released to the public before the "knock off." This usually happens when couture fashion is "knocked off" by a designer that uses inexpensive materials to make a garment similar to the couture garment.
\item \textsuperscript{213} Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. at 765.
\end{itemize}
VI. Conclusion

Protecting a Web site interface as valuable intellectual property will be difficult, but it is a necessary consequence of the growing computer age. It is clear that all aspects of a Web site interface may not be protected by copyright law because the theory of protection is limited. User interfaces are arguably utilitarian and functional methods of operation, so they may be excluded from copyright protection due to exceptions in the Copyright Act. Also, in light of the current trend toward lower protection for non-literal elements in a computer program, copyright may not completely protect the overall presentation of a Web site interface, in other words the look and feel of the interface.

It is possible that trade dress will be a more successful means by which to protect the overall design or look and feel of a Web site user interface. Distinctiveness may be difficult to prove under a trade dress theory, but consumers are increasingly demanding more advanced graphics and interactions on the Internet, so more complex distinctive interfaces are being created all the time. Also, trademark functionality is not utilitarian based, as in copyright law. So, a Web site user interface may still gain protection even with some utilitarian elements included in the layout. It is hard to predict how a court will apply a trade dress theory to protecting Web site interfaces from being “knocked off” in cyberspace. However, the trade dress theory of protecting the total scheme or layout that identifies and distinguishes a specific source in the marketplace seems a fitting theory for protecting Web site user interfaces because they are so widely used for distinguishing businesses and selling goods in cyberspace.