

BRIDGING THE GAP: IMPROVING INTELLECTUAL PROPERTY PROTECTION FOR THE LOOK AND FEEL OF WEBSITES

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Every company strives for a unique and memorable website. There is a growing threat, however, that this valuable investment in website design will be copied by competitors without effective legal remedy and with potentially devastating consequences. The “look and feel” of a website - the immediate impression that makes a website recognizable, easy to use, and deserving of consumer trust - is not adequately protected by copyright, trademark, or any other intellectual property doctrine. Website look and feel protection falls into a chasm between copyright on one hand and trade dress on the other, neither of which adequately addresses this modern problem. While copyright protects fixed texts, it cannot offer the scope and fluidity of protection needed to capture the look and feel of entire websites. Trade dress falls short because existing law does not adequately address the blend of form and function essential to website protection. This article proposes the adoption of a multi-factor test adapted from trade dress law in order to secure more effective protection for websites and clarify that trade dress is the proper doctrinal home of “look and feel” protection.

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INTRODUCTION

Every company strives for a unique and memorable website. There is a growing threat, however, that this valuable investment in website design will be copied by competitors without effective legal remedy and with potentially devastating consequences. The “look and feel” of a website—the immediate impression that makes a website recognizable, easy to use, and deserving of consumer trust—is not adequately protected by copyright, trademark, or any other intellectual property doctrine.

No intellectual property doctrine currently provides companies with a predictable way to ensure that a competitor does not copy their websites’ look and feel. Website look and feel protection falls into a chasm between copyright on one hand and trade dress on the other, neither of which adequately addresses this

modern problem. While copyright protects fixed texts, it cannot offer the scope and fluidity of protection needed to capture the look and feel of entire websites. Trade dress falls short because existing law does not adequately address the blend of form and function essential to website protection. This article proposes the adoption of a multi-factor test adapted from trade dress law in order to secure more effective protection for websites and clarify that trade dress is the proper doctrinal home of “look and feel” protection.

In evaluating the potential legal protections for web sites, it is important to distinguish the parts from the whole. Some website elements are relatively easy to protect. These elements include the array of fonts, text size, colors and spacing mainly controlled by a cascading style sheet, or CSS. Copyright may protect CSS, like other code, along with specific images or text on any particular web page.¹ The business name and logo qualify for trademark protection.

While copyright law protects a website’s source code and fixed elements and trademark law can protect logos, intellectual property law does not protect the more fluid look and feel of the site overall. A competitor may copy a website’s look and feel without infringing the original site’s copyright in any particular text. A website’s look and feel is different from, but partly dependent on, the specific code that defines how the text and images appear on the website. It is the composite effect of the technical elements, together with design features, that creates a unique user experience.

The lack of effective protection for the look and feel of websites presents a serious legal and economic problem. Websites are essential to modern business, the electronic bridge between companies and their customers and the basis of all e-commerce. As companies as large as Facebook are discovering, those vital assets are susceptible to outright copying without permission. Because of gaps in intellectual property law, competitors can copy the overall look and feel of a trusted website, tricking customers into patronizing a different website, with few clear repercussions.

Unless this gap is filled, the problem is likely to get worse over the coming years with potentially severe commercial impact. The cost to businesses, in the

¹ See, e.g., H.R. Rep. No. 94-1476, at 54 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5667 (“The term ‘literary works’ . . . includes . . . computer programs to the extent that they incorporate authorship in the programmer’s expression of original ideas, as distinguished from the ideas themselves.”); *accord* Atari Games Corp. v. Nintendo of Am., Inc., 975 F.2d 832, 838 (Fed. Cir. 1992).

forms of revenue, trust and goodwill, of such copying is vast. The cost to consumers, who provide confidential data and payments based on misimpression of commercial source, has sparked investigations by the Department of Homeland Security.²

Although look and feel protection is not a particularly new issue, courts and scholars continue to struggle with it. Some courts have suggested that website look and feel protection should stem from copyright law, which protects the expression of ideas.³ Others have adopted trade dress, with its emphasis on protecting a firm's impression on consumers, as a more appropriate basis for protecting website look and feel.⁴ Scholars have noted the doctrinal confusion in the few cases addressing look and feel protection but have not proposed a workable solution.⁵ Recent case law and technological developments make it clear that a comprehensive solution must be found soon.

The ubiquity of website copying, combined with the increasing commercial value of website look and feel, creates a significant but ineffectively regulated threat to online commerce. As no satisfactory judicial approach to the problem of website copying has yet emerged, the questions remain: What is the best way to protect the look and feel of websites from illicit copying? What is the proper doctrinal basis for such protection? What is the optimal mechanism for putting it in place?

The underlying thematic differences between copyright and trade dress law—in essence, the difference between protecting a website owner's expression and protecting consumer impression—suggest that trade dress is the more appropriate basis for look and feel protection. While copyright law protects the expression of ideas, trade dress law essentially protects the consumer's association between a given product or place (or perhaps a website) and a particular source.

² See *infra* note 23.

³ See, e.g., *Allen v. Ghoulsh Gallery*, No. 06CV371 NLS, 2007 WL 4207923 (S.D. Cal. Nov. 20, 2007).

⁴ See, e.g., *Card Tech Int'l, LLLP v. Provenzano*, No. CV 11-2434 DSF PLAX, 2012 WL 2135357 (C.D. Cal. June 7, 2012).

⁵ See, e.g., Lisa M. Byerly, *Look and Feel Protection of Web Site User Interfaces: Copyright or Trade Dress?* 14 SANTA CLARA COMPUTER & HIGH TECH. L.J. 221, 246 (1997); Xuan-Thao N. Nguyen, *Should It Be a Free For all? The Challenge of Extending Trade Dress Protection to the Look and Feel of Web Sites in the Evolving Internet*, 49 AM. U. L. REV. 1233 (2000); Gary Franklin & Kevin Henry, *Protecting Your Company's Website: The Application of Intellectual Property to the Digital Marketplace*, 37 VT. B. J. 28 (2012).

The latter is more relevant to the harms posed by website look and feel infringement. courts across the country, however, continue to struggle with this issue.

This article explains the nature of the problem, analyzes recent case law, explores the limits of copyright and trade dress as bases for protecting website look and feel, and proposes a multi-factor judicial test for look and feel infringement. Part I discusses why the gap in website look and feel protection exists and its potential impact on businesses and consumers. Part II explores why neither copyright nor trade dress protects the look and feel of websites well enough, and the ways in which recent cases expose the gaps in this area of the law. In Part III, I propose a new judicial approach in the form of a multi-factor test for look and feel infringement, adapted from trade dress law and modified to address technological realities. Part IV concludes by offering additional advice for addressing these issues under current law and suggesting possible next steps in resolving these and related issues.

I

COPYING WEBSITES' LOOK AND FEEL: A GROWING THREAT TO E-COMMERCE

The “look and feel” of a website refers to the overall visual impression that allows a consumer to identify the website with a particular service provider or merchant, and confirms that the user is on the website she intended to visit.⁶ As one court explained, “when a person visits a web site, she is comforted by the distinctive design, knowing that the look and feel is clearly associated with a specific brand name. This branding facilitates the association with a firm’s reputation.”⁷ At least, it should. Website look and feel infringement disrupts the consumer’s trusted association of site with source, resulting in damage to both the merchant and the consumer.

A. The Nature of Look and Feel Copying

The following hypothetical illustrates the problem of copying look and feel. Assume there are two similarly worded websites: restaurant.com and

⁶ The term “look and feel” has evolved in the case law. *See, e.g.*, *Blue Nile, Inc. v. Ice.com, Inc.*, 478 F. Supp. 2d 1240, 1241-42 (W.D. Wash. 2007); *Conference Archives, Inc. v. Sound Images, Inc.*, No. CivCiv. 3:2006-76, 2010 WL 1626072, at *11 (W.D. Pa. Mar. 31, 2010); *Sleep Sci. Partners v. Lieberman*, No. 09-04200 CW, 2010 WL 1881770, at *8 (N.D. Cal. May 10, 2010); *Athleta, Inc. v. Pitbull Clothing Co., Inc.*, No. CV 12-10499-CAS FMOX, 2013 WL 142877 at *7 (C.D. Cal. Jan. 7, 2013).

⁷ *Conference Archives, Inc.*, 2010 WL 1626072, at *1515.

restaurants.com. Although their domain names are similar, they have different business models. Restaurant.com offers discounted vouchers to a range of participating restaurants. Consumers can buy \$25 vouchers for local restaurants at the discounted price of \$10, or \$5 during one of their frequent promotions. The main function of Restaurants.com, in contrast, is to aggregate customers' restaurant reviews. It also offers some discounts, but vouchers are not the heart of its business.

These websites' patrons may not always remember the domain name of the website they want to visit. While some consumers bookmark a favorite website enabling their computer to recall the specific site, many others rely on a search engine. They can do so because they know that when they click on the "right" website, it will look familiar. Familiarity and past positive experience engender the trust necessary to encourage consumers to purchase a restaurant voucher and for the website to profit.

When two similar domain names like restaurant.com and restaurants.com come up near each other in a web search, the visual distinctiveness of a website is especially important.⁸ When websites look different from each other, and are viewed on a large enough screen, this works well.

A problem arises, however, when one company decides to mimic the look and feel of a competitor's website. If restaurants.com were struggling, it might consider a new business and marketing strategy, perhaps focusing more on voucher sales. It could then redesign its website to look more like restaurant.com, a leading competitor in that field. By changing its font to mimic the restaurant.com site, adjusting its spacing, changing its colors, rearranging its layout, and redesigning the search box, it can make its site look more like restaurant.com. By doing so, it can siphon business from restaurant.com consumers who reached restaurants.com in error but do not realize their mistake before entering their credit card information.⁹

⁸ The issue of look and feel infringement is different from that of cybersquatting. Two websites legitimately may have similar domain names even if they have similar or identical business models. Unlike trademarks, domain name registration does not require a unique field of use. Look and feel infringers need not have similar domain names in order to confuse customers into false associations. Similarly, cybersquatters need not have visually similar websites to the websites from which they divert traffic.

⁹ Purchasing Google Adwords or using other tagging strategies can maximize the success of this mimicking strategy. Scholars have debated whether doing so should support additional claims of trademark or copyright infringement. See, e.g., Rachel Friedman, *No Confusion Here*:

If the copycat restaurants.com redesigns its website in this way, the original restaurant.com faces significant potential losses in what is, more or less, a zero-sum game. It loses customers, income, trust and good will. The original site, restaurant.com, can sue for infringement of the look and feel of its website. Restaurants.com will respond that it is competing legally because it has not infringed any of restaurant.com's copyrights or trade dress rights. Who wins?

There is no reliable answer to this question. No published case has established a claim for protecting the look and feel of websites. Although there is a growing body of case law on this issue, the few reported decisions do not form a coherent precedent. This problem, however, is far from hypothetical. It is something that even the largest websites face, including Facebook.

In 2008, Facebook sued a German rival, StudiVZ, for infringement of its website look and feel.¹⁰ StudiVZ had developed a website that looked and operated like Facebook, although it used a red background instead of blue. The StudiVZ site launched in Europe, where Facebook's popularity had begun to grow.¹¹ Facebook brought suit in Northern California and Germany but retreated a year later, settling with StudiVZ in the United States because it could not succeed on its legal claims.¹²

Athleta, a Gap-owned brand, faced a similar problem in 2012. One of its competitors, Pitbull, gradually changed its atletica.net website design over the course of three years to more closely resemble athleta.com. Athleta sued Pitbull for trademark infringement, unfair competition and false advertising, among other claims, in the Central District of California. It accused Pitbull of copying large

Proposing a New Paradigm for the Litigation of Keyword Advertising Trademark Infringement Cases, 12 VAND. J. ENT. & TECH. L. 355 (2010), and Stephanie Lim, *Can Google be Liable for Trademark Infringement? A Look at the Trademark Use Requirement as Applied to Google AdWords*, 14 UCLA ENT. L. REV. 265 (2007).

¹⁰ See Complaint at 75-119, Facebook, Inc. v. Studivz Ltd., No. C08 03468., 2008 WL 2914576, at *1 (N.D. Cal. July 18, 2008).

¹¹ See Caroline Winter, *How Three Germans are Cloning the Web*, BLOOMBERG BUSINESSWEEK (Feb. 29, 2012), <http://www.businessweek.com/articles/2012-02-29/the-germany-website-copy-machine>.

¹² Facebook settled its Northern District of California case with StudiVZ in September 2009, three months after a German court ruled against Facebook in its German litigation, finding *inter alia* that StudiVZ's actions did not constitute copyright infringement under German law. See Kevin D. Hughes & David E. Rosen, *Screen Grabbing: The Marketplace, Rather than the Courthouse, May Determine the Ultimate Winner in Web Site Infringement Battles*, 33 LOS ANGELES LAWYER 4, 40 (2010), <http://www.lacba.org/Files/LAL/Vol33No4/2709.pdf>.

parts of its website, misleading consumers into thinking that Athleta operated the *athletica.net* website. Pitbull's copying included the adoption of *athleta.com*'s graphic layout and even extended to including consumer reviews "that were identical to the ones appearing on plaintiff's site describing plaintiff's products."¹³ As the court noted, the defendants were "generally adopting a similar look and feel to plaintiff's website for their *athletica.net* website."¹⁴ The court granted Athleta's motion for a preliminary injunction.¹⁵

B. *The Economic Impact of Look and Feel Infringement*

Businesses increasingly rely on websites as their calling cards and on e-commerce as their main source of income. As the commercial importance of website look and feel increases, so has the ease with which websites can be copied in their entirety. Many video tutorials demonstrate how to copy a website in five minutes or less.¹⁶ Alternatively, several companies offer website copying services. One example is *clonewebsite.com*, which offers to copy a website for a flat fee of \$49.

As the frequency of look and feel copying has grown, entrepreneurs have created profitable businesses premised on look and feel infringement. Rocket, the company that created Facebook's competitor StudiVZ, is a prime example. It has created successful knockoffs of well known websites including Fab, Priceline, and others. One journalist noted that Rocket's clone of Zappos "now dominates six European markets and is estimated to be worth \$1 billion by *Financial Times Deutschland*."¹⁷

¹³ *Athleta, Inc. v. Pitbull Clothing Co., Inc.*, No. CV 12-10499-CAS FMOX, 2013 WL 142877 at *3 (C.D. Cal. Jan. 7, 2013).

¹⁴ *Id.* at *7.

¹⁵ *Id.* at *13.

¹⁶ See, e.g., Phentic Tutorials, *How to Copy Any Website*, YOUTUBE (July 1, 2010), <http://www.youtube.com/watch?v=OGM47jJm7Gs>; Ilan Patao, *Tutorial - How to Copy / Duplicate Web Sites*, YOUTUBE (May 19, 2008), http://www.youtube.com/watch?v=cue_uZWNfUY.

¹⁷ Winter, *supra* note 11. Rocket also invested in copycat versions of Facebook and YouTube, which sold for \$112 million and \$36 million respectively. When Rocket cloned Groupon, the resulting site became Europe's most popular deal-of-the-day site within five months of its launch. *Id.* Its success indicates that there is a lot of money to be made from knockoff websites, if the law permits. *But see* Katie Linsell, *Facebook Wins Competition of Clones as Europeans Seek Global Network: Tech*, BLOOMBERG BUSINESSWEEK (Nov. 7, 2011), <http://www.bloomberg.com/news/2011-11-07/facebook-wins-competition-of-clones-as-europeans-seek-global-network-tech.html>.

The financial impact of website look and feel copying is potentially vast, as there is a lucrative market to capture. Websites are a powerful source of revenue. According to some scholars, “E-commerce in the United States is predicted to grow by over 40% between 2011 and 2015, reaching more than \$270 billion in sales accounting for 15% of total retail sales excluding food products. In 2010, more than three-quarters of the North American industrial businesses that reported growth said that websites made a significant contribution to that growth. Overall, global e-commerce revenue is forecasted to hit \$960 billion by 2013 and \$1.4 trillion in 2015.”¹⁸

Because e-commerce is growing so rapidly, the look and feel of a website provides a competitive advantage. The overall visual impression a website creates is the primary source identifier for businesses on the Internet.¹⁹ The look and feel of a website increases in importance as people use smaller screens to access the Internet. In 2013, the Pew Research Center reported that 63% of mobile phone owners use their phones to access the Internet, and 34% of them use their phones, rather than a laptop or home computer, as their primary Internet device.²⁰ Nearly half of respondents in the 18–29 age group said that their mobile phone is their primary device for the Internet.²¹

As more consumers view websites on mobile devices, on which it is often impossible to read domain names, businesses and consumers rely increasingly on the website’s overall visual impression as a source identifier.²² The rapid growth of consulting companies that specialize in designing mobile-friendly web sites, like Mobiquity, attest to the impact increased mobile usage is having on web site

¹⁸ Franklin & Henry, *supra* note 6.

¹⁹ Cf. Peep Laja, *First Impressions Matter: The Importance of Great Visual Design*, CONVERSION XL (Nov. 15, 2012), <http://conversionxl.com/first-impressions-matter-the-importance-of-great-visual-design/#>.

²⁰ Pew Research Internet Project, *Cell Internet Use 2013*, <http://www.pewinternet.org/2013/09/16/cell-internet-use-2013>.

²¹ *Id.*

²² See *Global Entertainment and Media Outlook: 2013-2017: Internet Access*, PRICEWATERHOUSECOOPERS, <https://www.pwc.com/gx/en/global-entertainment-media-outlook/segment-insights/internet-access.jhtml> (last accessed Feb. 23, 2014) (showing penetration of mobile-Internet services will reach 54% by year-end 2017 compared with 51% for fixed broadband); see also Chaitrali Amrukar et al., *Measuring SSL Indicators on Mobile Browsers: Extended Life, or End of the Road?*, In PROCEEDINGS OF THE 15TH INTERNATIONAL CONFERENCE ON INFORMATION SECURITY (ISC'12) 86, 91 (Dieter Gollmann & Felix C. Freiling eds. 2012) (describing mobile browser’s limitation on visibility of domain name when rendering screens).

development.²³ The smaller the screen, the more important visual recognition of the website becomes to the user's brand, because the domain name becomes illegible.

Knockoff websites pose risks for consumers who are fooled into buying counterfeit goods from them. In July 2012, the Department of Homeland Security announced an investigation into 70 different knockoff websites that had sold counterfeit goods to American consumers. John Morton, director of the department's U.S. Immigrations and Customs Enforcement unit, noted that the copycat websites were using increasingly sophisticated methods to pass themselves off as genuine. "The fake sites and the real sites are almost indistinguishable," Morton said. "And the fake sites aren't offering obvious knockoffs. They are trying to masquerade as the real deal."²⁴ The fake web sites had confused consumers, who bought goods on the fake sites under the misimpression that they were legitimate businesses.

When consumers lose money due to website copying, the original website owners suffer as well. When Athleta sued its competitor for mimicking the look and feel of its website, for example, the court noted that Athleta had established a likelihood of confusion by demonstrating actual consumer confusion.²⁵ Consumers who mistakenly paid for goods through a competitor's knockoff website "have called or emailed Athleta with complaints that they have not received order status confirmation emails from Athleta, that products they ordered have not yet arrived, or that their Living Social discount codes that they purchased are not being accepted by Athleta's website."²⁶ The court agreed that it damaged Athleta in the form of lost goodwill and reputation. "These consumers have expressed frustration to plaintiff with regards to the untimely shipment of

²³ See Erika Morphy, *What's Ahead for the Net: Mary Meeker Explains It All*, E-COMMERCE TIMES (May 30, 2013), <http://www.ecommercetimes.com/story/78166.html> (predicting explosive growth of mobile technology and wearable computing); Dave Uhler, *Catching the Mobile Commerce Wave*, E-COMMERCE TIMES (Apr. 7, 2012), <http://www.ecommercetimes.com/story/74807.html> (noting prediction that mobile commerce will grow at a compound annual rate of 39 percent through 2016 and advising that "[a]t this moment, every enterprise should be devising new strategies for reaching customers through mobile applications in addition to the web.").

²⁴ Benny Evangelista, *Feds Crackdown on 70 Fake Websites that "Copy Cat" Real Sites*, SF GATE (July 12, 2012), <http://blog.sfgate.com/techchron/2012/07/12/feds-crackdown-on-70-fake-websites-that-copy-cat-real-sites/>.

²⁵ See *Athleta, Inc. v. Pitbull Clothing Co., Inc.*, No. CV 12-10499-CAS FMOX, 2013 WL 142877 at *3 (C.D. Cal. Jan. 7, 2013).

²⁶ See *id.* at *3.

merchandise or the non-receipt of confirmation emails, when in fact these consumers have ordered from defendants' website."²⁷ The fact that Pitbull was selling poor quality copies of Athleta's goods caused further damage. "[T]o the extent the parties' goods differ in quality, consumers' satisfaction with plaintiff's products may decrease as a result of these consumers purchasing defendants' products." The resulting loss of goodwill and reputation in the marketplace led the court to rule that Athleta was being irreparably injured by the defendants' copying.²⁸

II

USING COPYRIGHT OR TRADE DRESS TO PROTECT WEBSITE LOOK AND FEEL

When victims of website copying have turned to the courts, they have brought claims under a variety of theories, including intellectual property infringement and unfair competition. The two most promising and commonly discussed intellectual property claims related to this kind of copying are copyright and trade dress. As described below, neither offers entirely effective protection.

A. The Ambiguous Nature of Look and Feel Protection

Although there is relatively little case law on look and feel infringement, a few key decisions illustrate the confusion often wrought. The lack of certainty as to which intellectual property doctrine best protects the look and feel of websites is obvious from the plaintiffs' claims and the courts' responses in these cases.

In one of the most frequently cited look and feel cases, *Blue Nile v. Ice.com*, a 2007 case from the Western District of Washington, the court struggled with the legal nature of plaintiff's look and feel infringement claim.²⁹ An initial problem was that the plaintiff's claims were less than clear. Blue Nile had asserted copyright protection for certain elements of its website, including some search features, and had registered them with the Copyright Office. At the same time, Blue Nile alleged state law claims relating to the "look and feel" of the website, which it claimed were outside of the purview of copyright. In stating those claims, however, Blue Nile incorporated by reference its copyright claims. The court crossly pointed out that "Plaintiff cannot both expressly rely on the copyright

²⁷ See *id.* at *10.

²⁸ *Id.*

²⁹ *Blue Nile, Inc. v. Ice.com, Inc.*, 478 F. Supp. 2d 1240, 1247 (W.D. Wash. 2007).

allegations in all of its state law claims and assert that the state law claims are outside copyright's subject matter for purposes of avoiding preemption."³⁰

The ambiguity in the court's own language is also striking. In some respects, the court's reasoning is internally inconsistent. At one point, the court asserted that the look and feel of a website is a matter of copyright law rather than trade dress ("The look and feel of plaintiff's website is within the subject matter of copyright."³¹ At another point, the court allowed that the look and feel of a website might also be a matter of trade dress law rather than copyright ("[What] portions of the website relate to the look and feel of its trade dress claims require greater factual development").³² Had the litigation continued, presumably, the court could have evaluated more precise claims as to what specific elements comprised the "look and feel" of the websites at issue. Unfortunately for scholars, the Blue Nile litigation ended with dismissal two weeks after the court ruled on the motion to dismiss.³³

There was also confusion on both sides of the bench in *Conference Archives, Inc. v. Sound Images, Inc.*, an unreported case from the Western District of Pennsylvania.³⁴ Although Sound Images admitted that it copied Conference Archives' website and "the facts [were] largely uncontroverted," the court denied both parties' summary judgment motions.³⁵ The court acknowledged the unsettled nature of the issue it faced, noting that "while protection of source code and other electronic processes have found refuge in copyright or patent law, protection of the "look and feel" of a website remains unclear" and calling the matter "a case of first impression in this Circuit."³⁶

The novelty of the issue apparently perplexed the plaintiff, too. The court observed that "Plaintiff's motion for summary judgment is nebulous as to what ground of intellectual property law it relies on."³⁷ In its complaint, Conference

³⁰ *Id.*

³¹ *Id.* at 1245.

³² *Id.* at 1248.

³³ Blue Nile did succeed in asserting a copyright claim four years later, however, when another competitor copied images from the bluenile.com website and used them on its own website without permission. See *Blue Nile, Inc. v. Ideal Diamond Solutions, Inc.*, No. C10-380Z, 2011 WL 3360664, at *3 (W.D. Wash. Aug. 3, 2011).

³⁴ See *Conference Archives, Inc. v. Sound Images, Inc.*, No. Civ. 3:2006-76, 2010 WL 1626072, at *2 (W.D. Pa. Mar. 31, 2010).

³⁵ *Id.*

³⁶ *Id.* at *1.

³⁷ *Id.* at *9.

Archives referred to its claim as rooted in copyright law and yet acknowledged that “no federal copyright claim is asserted here.”³⁸ It stated that the “‘look and feel’ of a web site can be ‘protected in multiple ways, such as by copyrights, trademark, [and] trade dress [*sic*].’”³⁹ Taking matters somewhat into its own hands, the court decided to consider the website copying claims under trademark, trade dress, trade secret and copyright theories.⁴⁰ The parties, however, apparently settled before trial.

In addition to doctrinal uncertainty, another problem with existing case law is the number of decisions that have issued at a preliminary stage rather than after a full hearing on the merits. For example, the often-cited *Blue Nile v. Ice.com* decision resolved only the defendant’s motion to dismiss on preemption grounds.⁴¹ In most cases, the courts have evaluated the claims under the relatively minimal standards of pleading sufficiency, or to resolve basic questions of preemption, instead of issuing a more complete evaluation of the issues after a trial.

The preliminary stage at which these decisions are issued means that many of the critical issues have not yet been played out, including the extent to which functionality might bar a trade dress claim. In *Salt Optics v. Jand*, for example, the defendant had asserted that the plaintiff could not claim trade dress rights in the look and feel of its website because the website “is functional on its face and [...] the “look and feel” of Plaintiff’s website has not acquired secondary meaning.”⁴² While the court ruled that the Plaintiff had pled the elements of non-functionality and secondary meaning well enough to state a claim, it reserved “a more exacting factual analysis of these elements [...] for a later stage of the case.”⁴³ The case settled, however, before the court could carry out such an analysis.

While courts are slowly gaining more experience with look and feel claims there is still some confusion as to the proper nature of these claims. Website owners most frequently assert one of two kinds of claims: copyright and trade dress. The next sections address the viability of each.

³⁸ Complaint at 3, *Conferences Archives, Inc. v. Sound Images, Inc.*, Civil No. 3:2007-76, 2010 WL 1626072 (W.D. Pa. Mar. 21, 2006), 2006 WL 6495532.

³⁹ *Conference Archives, Inc.*, 2010 WL 1626072, at*10.

⁴⁰ *See id.* at *10-11.

⁴¹ *See also* *Int’l Union of Operating Engineers, Local 150, AFL-CIO v. Team 150 Party, Inc.*, No. 07C3972, 2008 WL 4211561 (N.D. Ill. Sept. 5, 2008).

⁴² *Salt Optics, Inc. v. Jand, Inc.*, No. SACV 10-0828 DOC, 2010 WL 4961702 at *11 (C.D. Cal. Nov. 19, 2010).

⁴³ *Id.*

B. The Limits of Copyright Law in Protecting Look and Feel

Because copyright law generally protects both legible text and software code, it is logical to start there as a potential basis for website protection.⁴⁴ Copyright law protects many components of a website, including the text an end user can read and the software code that specifies how that code will be displayed. Unlike more traditional art forms, the design features of a web page are controlled through a specific kind of code called a Cascading Style Sheet (CSS), which can be embedded in a website's HTML. Like other kinds of software, CSS may be subject to copyright^{45 46}.

In order to bring a copyright claim for infringement of a website's look and feel, however, the website owner must meet the threshold requirements of any copyright claim.⁴⁷ Specifically, the plaintiff must show (1) that it owns a valid copyright, (2) that the copyright has been registered with the Copyright Office, and (3) that the defendant has copied its protected work, which requires both copying-in-fact and substantially similar copying.⁴⁸

Applying these requirements in the context of website look and feel is not straightforward. Copying-in-fact can be demonstrated either by direct evidence or by showing access to the work and probative similarities.⁴⁹ Given the public nature of websites, it is hard to imagine a defendant successfully challenging the issue of access.

⁴⁴ See, e.g., Franklin & Henry, *supra* note 6.

⁴⁵ See, e.g., 1st Lake Mobile Website, Copyright TXu001885424 (2013-07-16).

⁴⁶ An author can register computer code with the Copyright Office under class TX.

⁴⁷ As an initial matter, only the author of a copyrightable work may sue for copyright infringement, unless the work is made "for hire." Most corporations hire a website developer to create an online presence and the developer is the default author for copyright purposes. In order to sue for copyright infringement, the contract with the developer must include a specific work for hire provision. Without such a provision, there may be no basis for claiming rights to the website in the first place. See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 738 (1989) (stating that the work does not satisfy the copyright requirements for a work for hire because there was no written agreement). These provisions are relatively common, but not universal.

⁴⁸ See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 817 (9th Cir. 2003) (Stating that "the plaintiff must show ownership of the copyright and copying by the defendant"); see also *LGS Architects, Inc. v. Concordia Homes of Nevada*, 434 F.3d 1150, 1156 (9th Cir. 2006); 17 U.S.C. § 411 (2008) ("no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title").

⁴⁹ See, e.g., *La Resolana Architects, PA v. Reno, Inc.*, 555 F.3d 1171, 1178 (10th Cir. 2009).

While it is easier to establish access to the copied work, it may be more difficult to establish substantial similarity among websites, in part because of their interactivity. “An allegedly infringing work is considered substantially similar to a copyrighted work if ‘the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.’”⁵⁰ Some simple changes in a copied website design may lead a court to conclude that no such substantial similarity exists, even where there is direct evidence of intentional copying-in-fact. In the New York case of *Crown Awards Inc. v. Trophydepot*, for example, the defendant conceded that it had intentionally copied plaintiffs’ website. Because the defendants had changed some colors and added some text, however, the court found that the knockoff website was not “substantially similar” and denied plaintiff’s copyright claim on that basis.⁵¹ Facebook, however, pursued claims against StudiVZ for look and feel infringement even though the knockoff site used red as its primary color instead of Facebook’s hallmark blue.⁵²

1. *The Copyright Office May Not Register “Look and Feel” Elements*

The registration of a valid copyright is required to assert copyright claims.⁵³ While the Copyright Office will accept registration of the specific source code or text to be used in a website, it sends conflicting signals as to whether it will accept registration of the website’s look and feel overall.

As at least one court has recognized, source code itself is not a proxy for the look and feel of the website. In *Athleta v. Pitbull*, the defendants argued that the court should compare the source code of their website with that of the plaintiffs’ website in order to evaluate their similarity.⁵⁴ The court rejected that argument, noting that any similarity between the source codes of the website was irrelevant to the main harm claimed, which was a likelihood of confusion by consumers who might mistake the defendants’ website for that of the plaintiffs. “The court does not see how the source code of the parties’ respective websites could create a likelihood of confusion as to the source of defendants’ goods or to defendants’

⁵⁰ *Boisson v. Banian, Ltd.*, 273 F.3d 262, 272 (2d Cir. 2001) (quoting *Folio Impressions, Inc. v. Byer Cal.*, 937 F.2d 759, 763 (2d Cir. 1991)).

⁵¹ *See Crown Awards, Inc. v. Trophydepot*, No. 2:03-CV-02448-DRH, 2003 WL 22208409, at *13 (E.D.N.Y. Sept. 3, 2003).

⁵² *See Complaint, Facebook, Inc. v. Studivz Ltd*, *supra* note 12, at 7.

⁵³ *See* 17 U.S.C. § 411(a).

⁵⁴ *See Athleta, Inc. v. Pitbull Clothing Co., Inc.*, No. CV 12-10499-CAS FMOX, 2013 WL 142877, at n.6 (C.D. Cal. Jan. 7, 2013).

affiliation with plaintiff; it is the overall look and feel of defendants' website vis-a-vis plaintiff's that causes confusion."⁵⁵

Stepping back from the source code, then, the questions remains as to whether the Copyright Office will register websites overall. Its own publications suggest that it will not register websites, website designs or website layouts. In Circular 66, the Copyright Office offers guidance for registering online works. It advises authors completing an application for registration to do the following:

Use terms that clearly refer to copyrightable authorship. Examples are "text," "compilation," "music," "artwork," [...] Do not use terms that refer to elements that are not protected by copyright or may be ambiguous, for example, "website," "interface," "format," "layout," "design," "look of website," "lettering," or "concept."⁵⁶

The Copyright Office's inclusion of the terms "website" and "look of website" among the "elements that are not protected by copyright or may be ambiguous" dissuades companies wishing to copyright their websites as a whole. This language is somewhat vague, since it is not clear whether "website" and "look of website" fall into the category of ambiguous elements or unprotectable elements. Regardless, this language suggests that neither may be registered.

The Copyright Office explains that while the code underlying a website may be registered for copyright protection, the resulting website content may not be included in that protection unless it can be described according to the Office's requirements:

For a claim in a computer program that establishes the format of text and graphics on the computer screen when a website is viewed (such as a program written in html), registration will extend to the entire copyrightable content of the computer program code. It will not, however, extend to any *website* content generated by the program that is not present in the identifying material received and that is not described on the application.⁵⁷

The Copyright Office also suggests that it will not register the spatial arrangement of individually registered elements or the appearance of the website.

⁵⁵ *Id.*

⁵⁶ UNITED STATES COPYRIGHT OFFICE, COPYRIGHT REGISTRATION FOR ONLINE WORKS (2002), available at <http://www.copyright.gov/eco/>.

⁵⁷ *Id.* at 1.

A prior version of Circular 66 stated that “in general, formatting of web pages is not copyrightable” and that its “longstanding practice ... is to deny registration of the arrangement of elements on the basis of physical or directional layout in a given space, whether that space is a sheet of paper or a screen of space meant for information displayed digitally.”⁵⁸ The July 2012 revision of Circular 66 deleted that language, but did not replace it with any more specific or encouraging guidance for website creators.

One reason for the Copyright Office’s reluctance to register websites is their mutability. The frequently changing nature of web sites may be fundamentally incompatible with the fixation requirement of copyrightable works. Copyright traditionally protects only texts that are fixed and unchanging.⁵⁹ Indeed, the Copyright Office requires that a web page’s source code and text be separately registered each time they are updated, revised or otherwise changed, unless they are databases, serials or newsletters. Again, Circular 66 provides the following guidance:

Many works transmitted online, such as websites, are revised or updated frequently. Generally, copyrightable revisions to online works that are published on separate days *must each be registered individually*, with a separate application and filing fee[.]⁶⁰

Characteristically, and increasingly, website texts are not fixed.⁶¹ They must change frequently in order to fulfill one of their purposes: as a means of updated communication between the business and the consumer. Consumers expect websites to change often to reflect, for example, news that affects the company, daily or weekly sales or promotions, and any other element of a marketing campaign.

⁵⁸ Darden v. Peters, 402 F. Supp. 2d 638, 643 (E.D.N.C. 2005) (quoting UNITED STATES COPYRIGHT OFFICE, COPYRIGHT REGISTRATION FOR ONLINE WORKS 3 (2009)).

⁵⁹ The problems of requiring fixedness in online text are also apparent in the debate over fluid trademarks, an emerging area of concern. See, e.g., Johanna Pyhälä & Erkki Holmila, *Are Fluid Trademarks Your Cup of Tea?*, WORLD TRADEMARK REVIEW, <http://www.worldtrademarkreview.com/issues/article.ashx?g=d1b0a0a9-5bd2-411a-8d9a-781e47a2c019> (last accessed Feb. 23, 2014).

⁶⁰ UNITED STATES COPYRIGHT OFFICE, *supra* note 56, at 2.

⁶¹ A work need not be entirely fixed to receive copyright protection, however. Video games, for example, satisfy copyright’s fixation requirement by having effects that can be “reproduced, or otherwise communicated’ for more than a transitory period.” Williams Elecs., Inc. v. Artic Int’l, Inc., 685 F.2d 870, 874 (3d Cir. 1982) (citing Stern Elecs., Inc. v. Kaufman, 669 F.2d 852, 855-56 (2d Cir. 1982)).

A strict reading of Circular 66 suggests that a website owner would have to register new content with the Copyright Office on a daily basis to ensure protection since each change is likely to result in a new work, even if the overall look and feel of the website remains the same. The administrative burden of filing new paperwork daily with the Copyright Office is probably more than most website owners wish to expend.

2. *Judicial Use of Copyright Claims In Look and Feel Cases*

Given the Copyright Office's directives, one might expect that copyright law would not protect the look and feel of websites effectively. While the Copyright Office may register both the individual elements of a website and the overall arrangement of those elements in theory, its advice to authors suggests that it is unlikely to do so in practice.

That seemed to be the case after *Darden v. Peters*.⁶² In *Darden*, the plaintiff had created a website designed to help users locate real estate appraisers nearby. The website consisted largely of maps taken from census sources, which were colored and labeled. When Darden tried to register its website with the Copyright Office, the clerk denied his request. The adaptation of the maps, the clerk reasoned, did not reflect an original work of authorship and therefore was not entitled to copyright registration. Darden sued to overturn the denial. The court sided with the Copyright Office, concluding that the website was primarily a compilation of maps rather than an original work. While certain creative compilations may be entitled to copyright protection, the court ruled, it upheld the denial because it did not find anything especially original about Darden's compilation.⁶³

In a later case, *Salt Optics v. Jand*, the court again refused to allow copyright protection for either the specific elements of a website or its arrangement of them.⁶⁴ The case arose from competition between two online eyewear sellers. Plaintiff Salt Optics had created a distinctive, modern-looking website to sell its line of eyewear, featuring sparse white backgrounds and blocky black type. Defendant Jand operates the popular eyewear website Warby Parker. Salt Optics asserted that the Warby Parker website had an "overall look and feel" that was

⁶² *Darden v. Peters*, 402 F. Supp. 2d 638, 643 (E.D.N.C. 2005).

⁶³ *See id.* at 487.

⁶⁴ *See Salt Optics, Inc. v. Jand, Inc.*, No. SACV 10-828, 2010 WL 4961702 (C.D. Cal. Mar. 4, 2011).

confusingly similar to Salt's, and claimed both trade dress and copyright infringement.⁶⁵

The court granted Jand's motion to dismiss Salt Optics' claim for copyright protection in the specific elements of its website. It based its decision on its view that Salt Optics had not claimed anything particularly original about the basic elements or their layout. The court categorized the elements as "(1) eyeglasses bearing names (2) smaller images of products displayed on one side of a web page, (3) an image of a model wearing the product on the other side of the web page, (4) a close-up photograph of the product shown at a distinct angle (5) multiple smaller images of the product displaying color choices, and (6) two different views of a model wearing the product."⁶⁶ The court saw nothing protectable about any of them, and deemed them all incidental to the sale of eyeglasses online. "Each of these elements, considered alone, are, on their face, commonplace expressions naturally associated with the idea of selling a fashion accessory over the Internet," the court observed.⁶⁷ As such, none was eligible for copyright protection individually.

In addition, the court saw no reason why Salt Optics' arrangement of these elements might qualify for copyright protection. Nor, it pointed out, had Salt Optics alleged that its arrangement was creative enough to merit such protection. As the court stated, "[a]lthough certain combinations of unprotectable elements may qualify for copyright protection (e.g. music notes combined together to form a composition), "commonplace" or "typical" combinations do not."⁶⁸

Implicit in that observation, however, was the possibility of copyright protection for a demonstrably original array of elements on a website. Unfortunately for Salt Optics, the court regarded its particular compilation of elements as "standard, stock and common" and therefore unworthy of protection.⁶⁹

In at least one case, however, a court denied copyright protection for individual elements of a website but upheld copyright protection for their arrangement. The case, *Allen v. Ghoulis Gallery*, concerned two competitors who

⁶⁵ *See id.* at *1-2.

⁶⁶ *Id.* at *12-13.

⁶⁷ *Id.* at 13.

⁶⁸ *Id.*

⁶⁹ *See id.*

“design, create, market and sell ‘changing portraits’ in the haunt industry.”⁷⁰ Both the plaintiff and defendant were artists who “take an antique photo and use lenticular technology to make the portrait “change’ into a haunted spirit, vampire or other spooky creature.”⁷¹ The plaintiff alleged, among other things, that the defendant copied the look and feel of its website. Although the court found that there was nothing copyrightable about the individual elements of the plaintiff’s website, it held that he was entitled to copyright protection for “the selection, arrangement and presentation of the contents of his website.”⁷² Two other federal courts have suggested that copyright law may protect website design and layout.⁷³

The *Darden* and *Salt Optics* courts’ refusals to allow copyright protection has not stopped other companies from alleging copyright infringement as a means of protecting their websites from illicit copying. Indeed, more recent decisions also suggest that the Copyright Office may be more willing to register website elements than its publications imply. In an unpublished 2011 case from the District of New Jersey, an educational organization sued its former webmaster for converting its website and copying it for another organization. The plaintiff brought a number of state law claims including conversion and trespass to chattel.⁷⁴ The court noted that the defendant “registered the website contents [...] with the U.S. Copyright Office, effective July 1, 2009” and that the “registration application included text, software, code and graphical elements taken from the [plaintiff’s] website.”⁷⁵ The Copyright Act, the court ruled, preempted the state law claims, prompting the removal of the case to federal court.⁷⁶ The parties apparently settled before any ruling issued on the copyright claim.

⁷⁰ *Allen v. Ghoulish Gallery*, No. 06CV371 NLS, 2007 WL 4207923, at *1 (S.D. Cal. Nov. 20, 2007).

⁷¹ *Id.*

⁷² *Id.* at *4. The Court did not find that there was copyright infringement, however, because there was no substantial similarity between the two websites. *Id.* at *6.

⁷³ *See Kantemirov v. Goldine*, No. C05-01362 HRL, 2005 WL 1593533 (N.D. Cal. June 29, 2005)

(“[g]iven the flexible definition of ‘works falling with the scope of the Copyright Act...website design and layout...fall[] within the general subject matter of the Copyright Act’); *Order, TheStreet.com, Inc. v. Wall St. Interactive Media Corp.*, No. 98 CIV. 6974 (LAP), 1998 WL 34194887 (S.D.N.Y. Nov. 9, 1998) (enjoining alleged infringer from copying design or layout of website).

⁷⁴ *Infantry Div., World War II Living History Ass'n v. Oprendek*, No. Civ.A.11-165, 2011 U.S. Dist. LEXIS 140014 (D. N.J. Aug. 4, 2011).

⁷⁵ *Id.* at *3-4.

⁷⁶ *See Id.* at *21-22.

While the Copyright Office may be increasingly willing to register certain components of a web page, whether the Copyright Office will register the entire site as a unit is a separate question. Under *Darden* and *Salt Optics*, the protection will not extend to the entire web page unless that page is a particularly innovative composition of elements. Whether a website's design is innovative, however, is a different inquiry from whether it has a distinctive look and feel. *Darden* led at least one commentator to conclude that "a copyright claim concerning the overall layout and design of a website would be weak."⁷⁷

Even if the Copyright Office were willing to register the overall composition of a website, it is not clear that copyright would effectively protect the look and feel of the site. The user's overall impression of the website depends on more than the static visual layout that copyright would protect. It depends in part, for example, on the user's interaction with the menus and other functionality of the site. It transcends the specific colors used in one part of the website or another, although such minor changes might prevent a competing website from being similar enough for infringement.

The limits of copyright law to protect look and feel are becoming more obvious. Even if a website owner copyrights every page of its website, it will need to bring trade dress claims for the look and feel of that site because the overall impression of a website is more than the sum of the appearance of its pages. In *Express Lien v. National Association of Credit Management Inc.*, plaintiff Zlien did exactly that.⁷⁸ It alleged that defendant NACM violated copyright law by copying Zlien's compilation of materials related to mechanics' liens and bond claim laws, as it appeared on Zlien's website.⁷⁹ It also alleged that NACM violated trade dress law by copying its "stylistic choices along with the content of the website, including the color, font, and hyperlinks, in a manner that is confusingly similar to Zlien's website."⁸⁰ Zlien's decision to assert separate copyright claims to protect its pages and compilation and trade dress claims to protect the look and feel of its website reflects an evolving awareness of each doctrine's proper use in website copying cases.

In sum, copyright is a less effective basis for website look and feel protection. The Copyright Office's guidance on what may be registered for

⁷⁷ Franklin & Henry, *supra* note 6.

⁷⁸ *Express Lien v. National Association of Credit Management Inc.*, Civil Action No. 13-3323, 2013 WL 4517944 (E.D. La. August 23, 2013).

⁷⁹ *Id.* at *1.

⁸⁰ *Id.* at *4.

copyright protection is somewhat at odds with at least some case law. The level of detail at which these cases are reported makes it difficult to parse exactly what makes an element of a website, or the composition of a website, sufficiently original to merit copyright protection. Even if a plaintiff could demonstrate originality, the formal requirements of copyright registration, including the obligation to register revised text on a daily basis, diminish the appeal of using copyright to protect websites' look and feel. The uncertainty of copyright as protection for the look and feel of websites may explain why Facebook did not include a copyright claim with the eight other causes of action in its complaint against StudiVZ.⁸¹

C. *The Limits of Trade Dress Law To Protect Website Look and Feel*

Given the limits of copyright, some plaintiffs turn to trade dress law instead to protect the look and feel of their websites. Trade dress, one of the less common forms of intellectual property, protects the overall image of a product, store, or potentially a website, which connotes a particular source, from illicit copying. Like trademark law, trade dress protection is primarily defined by the Lanham Act.⁸² Perhaps the most famous example of such protected packaging is the iconic Coca-Cola bottle. Another well known example of trade dress protection is the size, shape and graphic design of National Geographic magazine. Its signature yellow border identifies the magazine with its source, regardless of whether one can read the "National Geographic" title on the cover. In August 2012, a jury in the Northern District of California found that Samsung had diluted Apple's trade dress in the iPhone 3G because several of Samsung's phones, including the Galaxy, had confusingly similar designs.⁸³

Trade dress protection is also available for retail stores, hotels and restaurants. This protection ensures that customers can reliably identify a particular business by the overall look and feel of the commercial interior. The characteristic white walls, floors, and fixtures of an Apple Store, together with other key design elements, are protectable as trade dress. So too is the combination of taupe walls, green accents and pale wood fixtures that tell a customer she is in Starbucks. In other words, it protects the affiliation in the consumer's mind between a specific interior design scheme and a commercial source.

⁸¹ See Complaint, Facebook, Inc. v. Studivz Ltd., *supra* note 12, at 75-119.

⁸² 15 U.S.C. § 1125 (2012).

⁸³ See Apple Inc. v. Samsung Elecs. Co., 888 F. Supp. 2d 976 (N.D. Cal. 2012).

Websites are in many ways the storefront equivalents of today's commercial environment.⁸⁴ Trade dress therefore provides the most logical basis of intellectual property protection for the look and feel of a website. Yet the particular requirements of trade dress and the case law applying this type of protection to the look and feel of websites make its likelihood of success unclear. Indeed, even in July 2013, the District Court for the Eastern District of New York wrote that "the application of trade dress law to websites is a somewhat 'novel' concept" and an issue of "first impression in this Circuit."⁸⁵

1. Articulating the Elements of the Alleged Trade Dress

In order to bring a trade dress infringement claim for website copying, the plaintiff must first articulate the elements of the website that make up the trade dress at issue. Specificity and finality are both critical to the success of a trade dress infringement claim, especially for website copying.

This point was underscored in *Sleep Science Partners v. Lieberman*, a 2010 decision from the Northern District of California.⁸⁶ Plaintiff Sleep Science made a mandibular repositioning (e.g., snore-reducing) device and sold it on its website. Sleep Science showed its product and website to Avery Lieberman. He showed them to two Vermont residents, who allegedly copied the website and launched a similar one under the corporate name Sleeping Well.

Sleep Science alleged, among other things, that the Sleeping Well website "has the same format, design and feel as [its] website."⁸⁷ It alleged trade dress infringement, and described its trade dress as the "unique look and feel of SSP's website, including its user interface, telephone ordering system and television commercial[.]"⁸⁸ Sleep Science itemized various features of its website in its complaint, including the ability to view its commercial, user testimonials, a

⁸⁴ In fact, the terms "storefront" and "web storefront" are becoming synonymous with e-commerce retail websites.

⁸⁵ *Parker Waichman LLP v. Gilman Law LLP*, No. 12-CV-4784 JS AKT, 2013 WL 3863928, at *4 (E.D.N.Y. July 24, 2013).

⁸⁶ *See Sleep Sci. Partners v. Lieberman*, No. 09-04200 CW, 2010 WL 1881770 (N.D. Cal. May 10, 2010).

⁸⁷ *Id.* at *2.

⁸⁸ *Id.* at *6.

screening questionnaire and “the PureSleep method.”⁸⁹ Sleeping Well argued that this listing was too vague to give it sufficient notice of the trade dress claim.⁹⁰

The court agreed with Sleeping Well. “Although it has catalogued several components of its website, Plaintiff has not clearly articulated which of them constitute its purported trade dress,” the court observed.⁹¹ The open-ended nature of the list also worried the court: “Notably, Plaintiff employs language suggesting that these components are only some among many Without an adequate definition of the elements comprising the website’s ‘look and feel,’ Sleeping Well is not given adequate notice.”⁹² This decision underscored the importance of explaining both (1) the elements that give rise to a website’s look and feel and (2) the interaction among those elements clearly and specifically to the trier of fact.

2. *Proving Distinctive Trade Dress*

Articulating the elements of a claimed trade dress in the look and feel of a website is necessary but not sufficient. A plaintiff must also show that the alleged trade dress is distinctive and non-functional, and that there is a likelihood of consumer confusion between its alleged trade dress and that of the defendant.⁹³

Of these requirements, distinctiveness is the most elusive in the context of websites. Although Section 43(a) of the Lanham Act itself does not require distinctiveness, distinctiveness is required for registration under Section 2. As the Supreme Court has noted, “Nothing in § 43(a) explicitly requires a producer to show that its trade dress is distinctive, but courts have universally imposed that requirement, since without distinctiveness the trade dress would not ‘cause confusion . . . as to the origin, sponsorship, or approval of [the] goods,’ as the section requires.”⁹⁴

Two legal standards of distinctiveness in trade dress law have evolved in case law. This branching evolved in *Wal-Mart Stores, Inc. v. Samara Brothers*,

⁸⁹ *Id.* at *9.

⁹⁰ *See id.* at *6.

⁹¹ *Id.* at *3.

⁹² *Id.* at *8-9.

⁹³ 15 U.S.C. §§ 1125(a)(3), (c)(2)(B).

⁹⁴ *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 210 (2000).

*Inc.*⁹⁵ In *Wal-Mart*, the Supreme Court ruled that the distinctiveness of product design is measured differently from that of product packaging.⁹⁶

The difference between product packaging and product design is somewhat elusive. Product packaging refers to the appearance of the package a product comes in, as well as to interior design schemes found in stores, restaurants and hotels.⁹⁷ In order to be eligible for trade dress protection, the product packaging must meet the “inherently distinctive” standard, set in the Court’s 1992 ruling in *Two Pesos, Inc. v. Taco Cabana Inc.*⁹⁸ “Inherently distinctive” trade dress suggests a particular source to consumers without need for repeated association.⁹⁹

Product design, in contrast, refers to the way a product looks and feels. Product design can only be distinctive enough to warrant trade dress protection if it has acquired “secondary meaning.”¹⁰⁰ Secondary meaning refers to a level of distinctiveness acquired by longstanding use in the market, as opposed to the inherent design of the site.¹⁰¹ In part because it must evolve over time, secondary meaning is intrinsically more difficult to demonstrate than inherent distinctiveness.

Given the case law, it is unclear whether websites must be inherently distinctive or have acquired secondary meaning. One argument posits that because websites are more akin to storefronts than to tangible products, the inherent distinctiveness standard of *Two Pesos* is more appropriate. On the other hand, that standard may be hard to apply to website design in practice. In a commercial world where many different websites may have similar general layouts, as dictated by principles of efficient user experience, what should qualify as “inherently distinctive”?

The few published decisions applying trade dress law to website copying suggest that the owners must demonstrate secondary meaning to state a trade dress claim, although no published decision has discussed whether this standard logically applies to websites in particular.¹⁰²

⁹⁵ *See id.*

⁹⁶ *See id.* at 215.

⁹⁷ *See, e.g., id.* at 212-13.

⁹⁸ 505 U.S. 763, 768 (1992).

⁹⁹ *Two Pesos*, 505 U.S. at 768..

¹⁰⁰ *See Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 215 (2000).

¹⁰¹ *See id.* at 211; *see also Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163 (1995).

¹⁰² *See, e.g., SG Servs. Inc. v. God's Girls Inc.*, No. CV 06-989 AHM, 2007 WL 2315437, at *9 (C.D. Cal. May 9, 2007); *cf. Card Tech Int'l, LLLP v. Provenzano*, No. CV 11-2434 DSF

3. *Secondary Meaning in the Website Context*

Courts consider several factors in order to determine whether secondary meaning exists, including:

1. Whether consumers in the relevant market associate the trade dress with the maker;
2. The degree and manner of advertising under the claimed trade dress;
3. The length and manner of use of the claimed trade dress;
4. Whether the use of the claimed trade dress has been exclusive;
5. Evidence of sales, advertising, and promotional activities;
6. Unsolicited media coverage of the product; and
7. Attempts to plagiarize the trade dress.¹⁰³

In *Wal-Mart*, Justice Scalia noted that it was entirely reasonable to require proof of secondary meaning in order to secure trade dress protection. Questioning the value of an “inherently distinctive” standard for product design, he observed that:

[T]he game of allowing suit based upon alleged inherent distinctiveness seems to us not worth the candle. That is especially so since the producer can ordinarily obtain protection for a design that *is* inherently source identifying (if any such exists), but that does not yet have secondary meaning, by securing a design patent or a copyright for the design¹⁰⁴

In other words, the Court reasoned that any inherently distinctive design could be protected as well by copyright or by a design patent. The implication seems to be that manufacturers could seek relief from infringement of their allegedly proprietary product designs by resorting to copyright or patent law instead of or in addition to trade dress law. Unfortunately for website owners, as we have seen, copyright does not protect web sites effectively. It is also unlikely that a website would qualify for a design patent because it is not an “ornamental design for an article of manufacture” as 35 U.S.C. § 171 requires.¹⁰⁵

PLAX, 2012 WL 2135357, at *22 (C.D. Cal. June 7, 2012) (suggesting that either standard may apply to web sites).

¹⁰³ *First Brands Corp. v. Fred Meyer, Inc.*, 809 F.2d 1378, 1383 (9th Cir. 1987).

¹⁰⁴ *See Wal-Mart Stores*, 529 U.S. at 214.

¹⁰⁵ *See, e.g., Ex parte Tayama*, 24 U.S.P.Q.2D (BNA) 1614, 1614 (B.P.A.I. 1992) (rejecting design patent for computer icon because it is not a design for an article of manufacture).

It is tempting to question the relevance of secondary meaning in today's commercial context. One factor traditionally used to demonstrate secondary meaning is length of time the product design has been used in the market. Length of time in the modern marketplace, however, is not an efficient proxy for consumer identification. On the Internet, companies that have only been in business for a short time, and thus have only had operational web sites for a relatively short time, can develop stronger consumer associations than more established companies with less striking or resonant websites.

4. *The Difficulty of Proving Non-functionality*

Protectable trade dress cannot be functional. The Ninth Circuit Court described the functionality test as follows:

“A product feature is functional if it is essential to the product's use or if it affects the cost and quality of the product “Functional features of a product are features which ‘constitute the actual benefit that the consumer wishes to purchase, as distinguished from an assurance that a particular entity made, sponsored or endorsed a product.’”¹⁰⁶

This raises a difficult set of issues for website protection. Every company wants its website to be functional, in that it encourages consumer use, but the overlap between website functionality and the “benefit the consumer wishes to purchase” can vary greatly. While some websites merely describe the product the customer wishes to purchase, other websites, such as search engines, review sites or booking sites, *are* the product the customer wishes to purchase. Accordingly, it is impossible to impose a single trade dress standard for all website look and feel cases with regard to their functionality.

Courts have approached the non-functionality requirement in website cases in different ways. At least one court has denied trade dress protection for a website based on its functionality. In an unpublished 2008 opinion, the District Court of New Jersey analyzed whether visuals illustrating various features of the bond market on the plaintiff's website were protectable under copyright or trade dress.¹⁰⁷ Because the visuals were inextricably linked to their function, the district court held that they could not meet the non-functionality requirement of trade

¹⁰⁶ *Rachel v. Banana Republic Inc.*, 831 F.2d 1503, 1506 (9th Cir. 1987) (citation omitted).

¹⁰⁷ *See Mortgage Mkt. Guide, LLC v. Freedman Report, LLC*, No. CIV.A. 06-CV-140-FLW, 2008 WL 2991570, at *1 (D. N.J. July 28, 2008).

dress. It found, however, that these functional features were entitled to copyright protection because of their creativity and “unique expression.” The decision did not extend copyright protection, however, to the look and feel of the website as a whole.

Few cases discuss the functionality as a potential bar to trade dress protection of websites. In *SG Services, Inc. v. God's Girls*, plaintiff (“SG”) owned an adult services web site and claimed that the defendant (“GG”) had copied various elements of SG’s web site.¹⁰⁸ Among other claims, SG asserted that GG had infringed its trade dress by using (1) the color pink and (2) certain stock phrases, including “they’re the girl next door” and “so you wanna be a suicide girl?” on its website. The *SG Services* court agreed with the plaintiff that the color and stock phrases were “merely adornment” and therefore eligible for trade dress protection.¹⁰⁹

Non-functionality is somewhat easier to assess in the context of a website promoting a physical product. In *Card Tech International v. Provenzano*, for example, the District Court for the Central District of California concluded that both the website for a cleaning card, which is used to clean the slots of credit card machines and other card readers, and the packaging of the card were nonfunctional and qualified as trade dress.¹¹⁰ “There is nothing about the layout or overall appearance of the trade dress, both packaging and website, that enables the package or website, respectively, to function. [...] The content of the website can be arranged differently; the package can have a different appearance. Neither the appearance of the packaging nor the website provides a benefit apart from identifying the source of the product.”¹¹¹ The court concluded on this basis that protecting the website as trade dress would not “impair competition in the industry.”¹¹²

¹⁰⁸ See *SG Servs. Inc. v. God's Girls Inc.*, No. CV 06-989 AHM, 2007 WL 2315437 (C.D. Cal. May 9, 2007).

¹⁰⁹ See *id.* at *9. Even so, the court ruled in favor of the defendant on the trade dress infringement claim as a whole because the plaintiff failed to prove either distinctiveness or likelihood of confusion. In addition, plaintiff’s sole evidence in support of its infringement claim was a declaration that did not meet the federal evidentiary standards, as it was not signed under penalty of perjury, and was therefore inadmissible. See *id.* at *34.

¹¹⁰ See *Card Tech Int'l, LLLP v. Provenzano*, No. CV 11-2434 DSF PLAX, 2012 WL 2135357 (C.D. Cal. June 7, 2012).

¹¹¹ *Id.* at *6.

¹¹² *Id.*

That said, courts have allowed trade dress claims to go forward where the copied website provided a service as well. In *Conference Archives v. Sound Images*, an unpublished case from the Western District of Pennsylvania, a competitor admitted copying a product that “displays recorded video within a web browser.”¹¹³ The court ruled that the presence of some functional features in the website does not exclude the possibility of trade dress protection. The determination of functionality, the court held, should properly focus on the “look and feel” of the website overall than on the function of its individual elements. “Look and feel” could serve “several possible functions,” only some of which might bar trade dress protection:

First, it can provide ‘branding, helping to identify a set of products from one company, [and s]econd, it [can] increase[] ease of use, since users will become familiar with how one product functions (looks, reads, etc.) and can translate their experience to other products with the same look and feel. If a ‘look and feel’ becomes functional, it can no longer avail itself of trade dress protection. Thus the look and feel must be distinctive, but nonfunctional. But, the mere presence of functional elements does not by necessity preclude trade dress protection. Rather, a web site may be protectable ‘as trade dress if the site as a whole identifies its owner as the creator or product source.’¹¹⁴

The court’s observation that the look and feel of a website must be “distinctive, but non-functional” serves as a guide for other courts assessing the potential for trade dress protection.

5. Likelihood of Confusion in Look and Feel Cases

The last requirement for trade dress infringement is proof of likelihood of consumer confusion. While the specific factors vary among the circuit courts, the Ninth Circuit’s eight-factor test to assess this likelihood, including the following, is illustrative:

1. The similarity of the two trade dresses;
2. The relatedness of the two companies’ products or services;
3. The advertising or marketing channels each party uses;
4. The strength or distinctiveness of the plaintiff’s trade dress;
5. The defendant’s intent in selecting the mark, including evidence of intent to infringe;

¹¹³ See No. 3:2006-76, 2010 WL 1626072, at *1 (W.D. Pa. Mar. 31, 2010).

¹¹⁴ *Id.* at *58-59 (citations omitted).

6. Evidence of actual confusion;
7. The likelihood of expansion in product lines leading to more direct competition down the line; and
8. The degree of care that consumers are likely to use.¹¹⁵

Likelihood of confusion plays an important role in website look and feel cases. In *Faegre & Benson LLP v. Purdy*,¹¹⁶ the plaintiff law firm sued a group that had copied its website, alleging trade dress infringement. Although the defendant had labeled every page of its website as a “parody,” the plaintiff alleged that the defendant’s website “feature[d] the same color scheme, layout, buttons, fonts and graphics” as its own.¹¹⁷ The court concluded that the “overall dissimilarity” between the two sites, however, created a “low likelihood of confusion,” and the parody disclaimer further reduced that likelihood.¹¹⁸

Consumer confusion on fake websites can cause real harm to the public as well as the website owners. As noted above, the Department of Homeland Security has launched an investigation into scores of knockoff websites because of the harm that results to defrauded consumers. One would expect state Attorneys General to investigate these knockoff websites as a matter of consumer protection. As more government agencies step up their investigations, it may become easier to develop proof of actual consumer confusion.

Although trade dress is imperfectly suited to protect the look and feel of websites, it is the most sensible basis for an improved test for website look and feel infringement. The complexities inherent in proving secondary meaning, establishing non-functionality, and validating evidence of actual consumer confusion required by traditional trade dress law in the context of website claims suggest that a new solution is needed to address this unique form of infringement. The multi-factor test described in Part III will clarify many of these issues.

D. The Threat of Copyright Preemption in Look and Feel Cases

One problem resulting from the lack of clarity surrounding look and feel cases is the ongoing question of copyright preemption. Because neither copyright nor trade dress provides a sure basis for protecting the look and feel of websites, plaintiffs have asserted both claims at once. When they do so with insufficient

¹¹⁵ *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 349 (9th Cir. 1979).

¹¹⁶ 367 F. Supp. 2d 1238, 1240 (D. Minn. 2005).

¹¹⁷ *Id.* at 1244.

¹¹⁸ *Id.* at 1245.

clarity, they face the threat of copyright preemption. “Claims for copyright infringement under the Copyright Act and claims for Trade Dress Infringement under the Lanham Act are mutually exclusive,” one court explained. “Plaintiff[s] cannot receive a remedy for both.”¹¹⁹ Whether or not a plaintiff claims copyright infringement, its claims may be preempted if the defendant can prove that the gist of its claims is within the scope of copyright law. Courts have “long limited application of the Lanham Act so as not to encroach on copyright interests.”¹²⁰

The preemption defense played a key role in *Blue Nile v. Ice.com*.¹²¹ Blue Nile developed a unique website that allows consumers to search for a specific diamond from its inventory, and then select a setting for the diamond, resulting in a customized piece of diamond jewelry. The diamond search feature of Blue Nile’s website allowed consumers to perform a search using a number of preferences, including carat size, cut, and clarity, which are presented in a distinct layout. Blue Nile alleged that the defendant, Ice.com, copied its proprietary search tool and incorporated that tool in its own website. It also alleged that Ice.com effectively infringed the “look and feel” of its website. While these were two distinct allegations, they are in some ways hard to separate in fact. The alleged copying of various elements was integral to copying the overall look and feel of the website.

Blue Nile asserted both copyright and trade dress claims against Ice.com, in addition to a number of state law claims. Ice.com moved to dismiss the trade dress claims on the basis that relief for the gist of those claims was available under the Copyright Act. If there is an adequate relief for a claim under the Copyright Act, defendants argued, relief under the Lanham Act should be preempted.

The court did not agree. It acknowledged that “[c]ourts limit application of the Lanham Act in areas traditionally occupied by copyright or where the copyright laws ‘provide an adequate remedy.’”¹²² It also observed that “[p]arallel claims under the Copyright Act and Lanham Act, however, are not per se impermissible.”¹²³ That was not the end of the preemption analysis. “Although the Ninth Circuit has not addressed the issue of whether a website’s “look and feel” is protected under § 102, other circuits have held that a work may be unprotected by copyright under § 102(b) and yet be within copyright’s subject

¹¹⁹ Conference Archives, Inc. v. Sound Images, Inc., No. 3:2006-76, 2010 WL 1626072, at *12 (W.D. Pa. Mar. 31, 2010)

¹²⁰ 1 MELVIN B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 1.01[D][2] (2013).

¹²¹ 478 F. Supp. 2d 1240, 1243 (W.D. Wash. 2007).

¹²² *Id.*

¹²³ *Id.*

matter for preemption purposes.”¹²⁴ In effect, the court warned, certain elements might fall into a legal no-man’s land, where they could not be protected by either copyright or any other intellectual property law. A critical issue for the court, then, was whether allegations of copying the design and presentation of specific search features on a website should be analyzed under trade dress or copyright law. While the look and feel of a website might be protected by trade dress, the court reasoned, more evidence was needed to isolate exactly what constituted the look and feel of the website at issue.¹²⁵

The defendant also asserted copyright preemption as a basis for its motion to dismiss in *Salt Optics v. Jand*, but the court denied its motion. Relying in part on *Darden v. Peters*, and apparently in part on intuition, the court held that look and feel of a website as a whole cannot be copyrighted: “Although the Ninth Circuit has yet to rule on this issue, existing precedent and common sense indicates that, absent special circumstances, a website's overall "look and feel" is not entitled to protection under the Copyright Act.”¹²⁶ Because it falls outside of the scope of copyright, the court ruled, there can be no preemption of that type of claim.¹²⁷ It was possible, the court observed, to obtain copyright and trade dress protection at the same time without running afoul of preemption standards. “Indeed, relevant to the present case, a website may contain original works that infringe another's copyright and simultaneously present an overall "look and feel" that violates another's trade dress.”¹²⁸

Adopting a multi-factor test for look and feel infringement rooted in trade dress law will mitigate the risk that a website owner’s look and feel claims will be preempted by copyright law. It will do so by dispelling the confusion that currently surrounds the proper judicial treatment of website infringement and clarifying the proper scope of any copyright claims the website owner may also assert.

Until courts adopt some form of the multi-factor test, plaintiffs in look and feel infringement cases can best avoid dismissal based on copyright preemption by

¹²⁴ *Id.* at 1248.

¹²⁵ *See id.* at 1245.

¹²⁶ *Salt Optics, Inc. v. Jand, Inc.*, No. SACV 10-0828, at 4 (C.D. Cal. Mar. 4, 2011), available at http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012_hot_topics_in_ip_lit/2012_aba_panel3_salt_optics_inc_v_jand_inc_et_a_do_35_authcheckdam.pdf, *Salt Optics, supra* note 38, at *8.

¹²⁷ *See id.*

¹²⁸ *Salt Optics, Inc. v. Jand, Inc.*, No. SACV 10-0828, at 9.

pleading their trade dress and copyright claims in the alternative. In *Sleep Science Partners*, for example, the “either/or” nature of the plaintiffs’ claims compounded the problem of determining preemption. “Plaintiff may have plead its trade dress claim in the alternative, accounting for a possibility that its website may not be copyrightable,” noted the court, but it did not. The court found it hard to tell where the trade dress claim ended and the copyright claim began. “[If] it intends to maintain a Lanham Act claim based on its website’s “look and feel,” in addition to articulating clearly the website features that comprise its alleged trade dress, Plaintiff must plead a “look and feel” that does not fall under the purview of the Copyright Act.”¹²⁹

E. New Technology Requires a New Framework

Rather than offering a coherent precedent for litigants to follow, look and feel infringement cases offer inconsistent and incomplete reasoning on the best approach to website protection. In general, they compound rather than resolve the questions surrounding the legal protection of websites’ look and feel.

Why has this issue been so difficult to resolve? One possible explanation is that websites represent a relatively new hybrid of product, text, service and marketing functions. They integrate decorative elements and functional ones in a way that is fundamentally novel and that has never required protection before. The appearance of a product used to be relatively straightforward and limited to two or three dimensions. Whether it was a can of soda or a motorcycle, each item looked more or less the same to everyone. Websites, however, are mutable. They often have multiple levels, and their specific appearance depends on the user’s interaction.

Complicating this further is the fact that websites may look different depending on where and how they are viewed. Two consumers may see even the same page of a website differently if, for example, one of them is viewing the website on an iPad and the other is viewing it on an iPhone. The shape of the screen and its orientation (vertical or horizontal) will vary across devices. On tablets and phones, the view may change depending on how the device is held. The characteristic look and feel of a site may not be defined by a static screen, but by something that can be generalized across different devices.

¹²⁹ *Sleep Sci. Partners v. Lieberman*, No. 09-04200 CW, 2010 WL 1881770, at *5 (N.D. Cal. May 10, 2010).

III PROPOSING A TRADE DRESS-BASED SOLUTION FOR LOOK AND FEEL INFRINGEMENT

If the two most obvious doctrinal homes for a solution are copyright and trade dress law, as discussed above, the nature of the doctrines makes it clear that the latter is more appropriate. One productive way to think about these two areas is the difference between protecting expression, through copyright, and protecting impression, through trade dress. While websites express many things, the gravamen of this problem is protecting the user's first impression of the source of the site. That is what the Lanham Act was written to protect. Trade dress, with its emphasis on impression rather than expression, source identification and consumer confusion, is inherently better suited to protect website look and feel.

Grounding a new solution in trade dress law might happen in either of two ways. One option would be to amend the Lanham Act to address the infringement of website trade dress specifically. Laws do evolve to address changes in technology, although they generally move much more slowly than technology itself. In 1999, for example, Congress passed the Anti-Cybersquatting Consumer Protection Act, amending the Lanham Act to prohibit the registration and use of domain names based on another person's trademark.¹³⁰ In 2003, Congress amended the Criminal Code to make computer hacking illegal.¹³¹ While there may be a legitimate need for a Lanham Act amendment to protect website look and feel, the urgency of the problem demands another potential solution.

An alternative idea is to encourage courts to adopt an infringement test that is well suited to the unique nature of websites and yet grounded in the traditional concerns of trade dress law. This test might resemble, in its basic form, the multi-factor test for likelihood of confusion that courts have developed based on the *Polaroid Corp. v. Polarad Electronics* case.¹³² One form of such a test follows.

¹³⁰ See 15 U.S.C. § 1125(d)(1) (2008).

¹³¹ See 18 U.S.C. § 1030 (2008) (criminalizing fraud and related activity in connection with computers); see also 18 U.S.C. § 2701 (proposed legislation criminalizing unlawful access to stored communications).

¹³² See *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492 (2d Cir. 1961); see also *Conference Archives, Inc. v. Sound Images, Inc.*, No. 3:2006-76, 2010 WL 1626072, at *18 (W.D. Pa. Mar. 31, 2010).

A. A Multi-Factor Test For Website Look and Feel Infringement

A test to determine whether the look and feel of a website has been infringed should take a number of factors into account. The range of factors should be calibrated to ensure that a court does not restrict fair competition in the process of protecting and encouraging innovation in website development. An outline of the factors looks like this:

1. Overall Similarity
 - a. Fonts and Formatting
 - b. Color Scheme
 - c. Sounds, Animations, Visual Effects
 - d. Symbols, Logos and Marks
 - e. Layout and Arrangement
 - f. User Experience Design
2. Proximity of Products or Services in the Relevant Market(s)
3. Intentional Copying
4. Likelihood of Consumer Confusion

In taking all of these sub-factors into account, no single element should be dispositive. It is possible to have confusingly similar websites even when, for example, the colors of the two websites are somewhat different. The determination of overall similarity should be holistic. In addition, the trier of fact should be guided by expert testimony from user experience designers, as described in more detail below.

1. Overall Similarity

The first factor is the similarity of the overall impression between the two websites, when comparing views on similar devices. The look and feel of a website is the result of multiple elements working together in a complex way. The imperative, stated in cases like *Sleep Science Partners*, for plaintiffs alleging trade dress infringement to explain which elements of the website work together to create that proprietary look and feel reflects that fact.¹³³

¹³³ See, e.g., *Sleep Sci. Partners*, 2010 WL 1881770, at *7-9.

In *Salt Optics v. Jand*, the court required the website owner to provide both a detailed list of the elements giving rise to its website's distinctive look and feel and an explanation of how they work together.¹³⁴ The court granted Jand's motion to dismiss the trade dress claims, with leave to amend, on the grounds that Salt Optics did not give sufficient notice as to what constituted the look and feel of the website. Although the plaintiff had listed some elements of its alleged trade dress, the court observed that "absent from the FAC is any attempt to synthesize these elements in order to describe the way that the listed elements, in conjunction, combine to create the website's protectable 'look and feel.' The lack of any such synthesis, in conjunction with Plaintiff's expressly stated intention to incorporate other elements of the website into the trade dress claim at a later stage, gives the court pause."¹³⁵

When Salt filed an amended complaint, Jand moved to dismiss again.¹³⁶ This time, however, the court was satisfied with Salt's amended claims.¹³⁷ It noted with approval that Salt had submitted a "fixed and finite" list of website elements, helpfully juxtaposing images from Salt's website with images from the competing website so that the court could appreciate the overall similarities between the two.

Because it is difficult to assess overall similarity without more specific points of comparison, the test should include several sub-factors to help the court assess similarity.

i. Fonts and Formatting

One such sub-factor concerns the fonts used on the senior website and the junior website. The court should compare the specific fonts used in each site, taking into account any customization of the fonts and any associated text formatting. Many corporations customize fonts for their marketing materials,¹³⁸

¹³⁴ See *Salt Optics, Inc. v. Jand, Inc.*, No. SACV 10-0828, 2010 WL 4961702, at *5 (C.D. Cal. Nov. 19, 2010).

¹³⁵ *Id.*

¹³⁶ Mot. of Def. Jand, Inc. to Dismiss Pl.'s Second Am. Compl. for Failure to State a Claim, *Salt Optics, Inc. v. Jand, Inc.*, No. SACV 10-0828, 2011 WL 1158953 (C.D. Cal. Jan. 3, 2011).

¹³⁷ See *Salt Optics, Inc. v. Jand, Inc.*, No. SACV 10-0828 828 (C.D. Cal. Mar. 4, 2011), available at http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012_hot_topics_in_ip_lit/2012_aba_panel3_salt_optics_inc_v_jand_inc_et_a_doc_4.authcheckdam.pdf.

¹³⁸ Times New Roman, for example, originated as a proprietary font designed in 1931 for the British newspaper *The Times*. See *A Brief History of Times New Roman*, PRACTICAL TYPOGRAPHY, <http://practicaltypography.com/times-new-roman.html> (last visited Feb. 23, 2014).

including website texts, often at great expense¹³⁹. Examining the specific fonts used on each of two competitive websites can increase the granularity of the comparison process.

ii. Color Scheme

Another sub-factor that helps a trier of fact assess overall similarity is the website's color scheme. As the court noted in *Conference Archives*, website colors can be ascribed precisely because they are determined in accordance with a specific hexadecimal notation system. That is, each color on a website has a six-digit code. Accordingly, when a court compares the color scheme of two websites, it can make a more specific comparison than "light blue vs. medium blue." The court's comparison should include not only the exact colors of each site but the predominance of each color on the websites.

In *Conference Archives*, the court parsed the technology behind the look and feel of a website in more detail than any court had done before. The court noted that there are "three technical elements that determine how a web site appears: colors, orientation and code elements."¹⁴⁰ It explained that the colors used on websites can be described more exactly than traditional paint colors because of their digital nature. Website colors are coded according to a hexadecimal notation system that converts every color into a six number code known as a hex triplet. As a result, the court noted, it was possible to reach a greater degree of specificity when comparing the colors of two websites. This greater specificity, the court noted, allowed a greater degree of certainty about potential copying: "While some colors are more common than others, if two products utilize the same exact hex triplet, there is a likelihood that the color was copied."¹⁴¹

An effective comparison of website colors will include not only their technical differences but also the resulting difference in user experience.¹⁴²

¹³⁹ See, e.g., Stefan Thiemert et al., *A Digital Watermark for Vector-Based Fonts*, PROCEEDINGS OF THE 8TH WORKSHOP ON MULTIMEDIA & SECURITY 120 (2006), http://delivery.acm.org/10.1145/1170000/1161387/p120-thiemert.pdf?ip=128.103.135.173&id=1161387&acc=ACTIVE%20SERVICE&key=986B26D8D17D60C820E5CAEFCFBCFDD1&CFID=295346429&CFTOKEN=88570658&__acm__=1393188979_6bd339cdcc07c97edc233e706a3b0732.

¹⁴⁰ *Conference Archives, Inc. v. Sound Images, Inc.*, No. 3:2006-76, 2010 WL 1626072, at *4 (W.D. Pa. Mar. 31, 2010).

¹⁴¹ *Id.* at *5.

¹⁴² Traditional consumer surveys, such as those endorsed in *Eveready*, would be useful here. See *Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366, 385-88 (7th Cir. 1976); see, e.g., 65 J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 32:175 (4th ed. 2007). In

Website colors are chosen carefully, not only to reflect firm branding but also to improve user experience and maximize accessibility (for example, to color-blind users). Effective use of color is integral to good website design.¹⁴³ The impact of different colors on website users has been well documented, but the consequences of certain color changes may not be immediately obvious to a trier of fact.

iii. Sound Effects and Animation

A third sub-factor is the similarity of sounds, animations, and other effects associated with the two websites at issue. As an increasing number of websites incorporate unique sound effects, fixed animations, and embedded videos, these should be taken into account when comparing the overall look and feel of a website. Although none of these would be apparent from a singular screen shot of a website (or even a series of screen shots), they all contribute to the overall user experience and the likelihood of consumer confusion.

iv. Symbols, Logos and Other Marks

In addition to the sounds and animations, the comparison must also take into account the similarity of any symbols, logos, marks, motifs, or other non-textual visual elements on the site. The court need not resolve the question of trademark infringement to find that similarities between marks contribute to the overall similarity of two websites' look and feel. In *Athleta v. Pitbull*, for example, the court compared the logos of the two sites.¹⁴⁴ In mid-2012, Pitbull had affixed an "athletic" logo to its goods that closely resembled that of Athleta.com:



By the time of the lawsuit, Pitbull had changed its logo to look somewhat more distinctive.

designing those surveys, however, comparison on similar devices is critical because of the potential effect of adaptive site design differences on user experience.

¹⁴³ See, e.g., Dianne Cyr et al., *Colour Appeal in Website Design In and Across Cultures: A Multi-method Evaluation*, 68 INT. J. HUMAN-COMPUTER STUD. 1-21 (2010); Christian Vasile, *How Colors Help Make Websites Successful*, 1ST WEB DESIGNER, <http://www.1stwebdesigner.com/design/colors-in-web-design-make-websites-successful/> (last visited Feb. 23, 2014); Vishal Verma, *The Importance of Color Theory*, WEBDESIGN.ORG (Oct. 29, 2007), <http://www.webdesign.org/web-design-basics/color-theory/the-importance-of-color-in-web-designing.12437.html>.

¹⁴⁴ *Athleta, Inc. v. Pitbull Clothing Co., Inc.*, No. CV 12-10499-CAS FMOX, 2013 WL 142877, at *2, *7 (C.D. Cal. Jan. 7, 2013).



Even with the change in Athletica's logo, the court found that the similarity between the two marks contributed to consumers' likelihood of confusion. Importantly, the court ruled that the marks should be viewed in the larger context of the websites overall. "[T]he marks themselves are only part of the inquiry. These marks coexist in a marketplace that has changed as a result of defendants' gradual encroachment on plaintiff's marks. [...] [T]his encroachment has taken many forms, including defendants' ... generally adopting a similar look and feel to plaintiff's website for their *athletica.net* website."¹⁴⁵

The court's reasoning has merit. Whether a competitor's mark infringes a trademark is a separate inquiry from whether the use of that competitor's mark contributes to the overall similarity of the look and feel of the websites at issue. A competitor's use of marks should play a role in the look and feel assessment, but as with every other factor, should not be dispositive in itself.

v. Layout and Arrangement

Moreover, the court should consider the layout and arrangement of all content on the website, including its menus, navigational elements and visual elements, even though many of those elements may themselves be functional. The fact that graphic layouts can be described by reference to the number of pixels between elements might allow the court to infer copying by comparing pixel distance instead of merely eyeballing similarities between layouts.¹⁴⁶

Importantly, the court's comparison should ensure that the websites are viewed on comparable devices. Many websites are designed to adapt their appearance to the device that is being used to view them, like technological chameleons. This aspect of website development is called responsive design. Responsive design is an increasingly common element of website design. Its purpose is to ensure that users have a consistent, intuitive experience of the website, no matter what device it is viewed on. Responsive design also helps website owners address differences in detail across viewing platforms. Because laptop screens allow users to view a website in relatively greater detail than a smart phone, for example, a responsively designed website will display different but

¹⁴⁵ *Id.* at *7.

¹⁴⁶ *Conference Archives, Inc. v. Sound Images, Inc.*, No. 3:2006-76, 2010 WL 1626072, at *19 (W.D. Pa. Mar. 31, 2010).

equivalent displays on each device. Although the specific display will differ from device to device, the overall look and feel of the website will be the same.

vi. User Experience Designer Testimony

The few issued look and feel decisions suggest that courts are not uniformly well equipped to assess the effect of these factors on the user's experience of a website. Indeed, it can be difficult for any lay person to appreciate the ways in which graphic and interactive factors affect the overall user experience of a website. The interactivity of a website adds another dimension to what has traditionally been a fairly straightforward comparison of appearance in trade dress cases.

In *Sleep Science Partners v. Lieberman*, the court suggested that the “look and feel” of a website is something more than, or different from, a rote list of the website's constituent elements. This raises the possibility that courts would benefit from reliable evidence as to what, exactly, gives rise to the specific look and feel of a website. Plaintiffs may benefit from introducing, for example, expert testimony from user experience designers. These designers can testify about the impact of connections among specific website elements on the look and feel of a website from the user's point of view.¹⁴⁷ They can also help the court assess usability as a potential element of the website's overall look and feel. Such testimony would be more helpful to the trier of fact than the court's own subjective impressions.¹⁴⁸

Just as courts consider expert testimony in assessing economic damages, it may be helpful for a trier of fact to receive testimony from an expert in website design. Such expert testimony should include (1) an exhaustive list of all website elements that give rise to the unique look and feel of the website and (2) a description of how each one of these elements affect user experience and contribute to the users' ability to connect the website with its source. The list should be finite and final. It is important to avoid disclaimers that imply the possibility of later amendment, such as “by way of illustration, not limitation.” As *Salt Optics v. Jand* demonstrates, such open-ended claims provide an easy mark for the defendants' motion to dismiss. A lack of finality in the list of alleged trade

¹⁴⁷ See, e.g., Frank Guo, *More Than Usability: The Four Elements of User Experience, Part I*, UX MATTERS (Apr. 24, 2012), <http://www.uxmatters.com/mt/archives/2012/04/more-than-usability-the-four-elements-of-user-experience-part-i.php>.

¹⁴⁸ Whether the court ought to protect a website because it is more usable than another, however, is a difficult question. One could argue that usability is akin to functionality, in that enforcing protection of these qualities might have the unwanted effect of stifling competition and/or undercutting the overall goal of consumer protection.

dress elements may well be read as a lack of sufficient notice for the defendant. While the defendant will submit its own supporting expert testimony, as in *Markman* hearings, the detailed descriptions provided by both sides will help the trier of fact reach a more informed decision.

2. *Proximity of Products or Services in the Relevant Market(s)*

In addition to overall visual similarity, several other indicia of likely copying should factor into the court's analysis. One additional factor should be the proximity of the products and/or services offered on the senior and junior websites. As with trademarks, the likelihood of consumer confusion is heightened when the two competing websites are in the same field. Because similar products can be marketed in the same way, the extent of similarity among other websites in the same industry or field should be taken into account as well.

3. *Intentional Copying and Other Fraudulent Measures*

Any evidence of intentional copying, including replication of HTML and/or CSS code, should play into the court's analysis as well.¹⁴⁹ ¹⁵⁰ Unlike traditional print media, websites can be replicated by copying code. As discussed above, there is a thriving website copying industry, and providers of such services are ubiquitous. While intent has been criticized as a factor in some kinds of IP infringement cases,¹⁵¹ courts should consider it here because of the deterrent impact it would likely have on future infringement. Reviewing evidence of intentional copying would allow the court to consider the extent to which the website copying was strategic, as opposed to accidental.

Fake websites can use a variety of strategies to lure consumers into providing their credit card information and other sensitive data. One common

¹⁴⁹ See, e.g., *Sally Beauty Co. v. Beautyco, Inc.*, 304 F.3d 964, 973 (“Proof that a defendant chose a mark with the intent of copying the plaintiff's mark may, standing alone, justify an inference of likelihood of confusion.”).

¹⁵⁰ See, e.g., Blake Tierney, *Missing the Mark: The Misplaced Reliance on Intent in Modern Trademark Law*, 19 TEX. INTELL. PROP. L.J. 229 (2011); Soonbok Lee, *Induced Infringement as a Strict Liability Claim: Abolishment of the Specific Intent Requirement*, 4 HASTINGS SCI. & TECH. L.J. 381 (2012).

¹⁵¹ In many cases, the website owner will bring claims of unfair competition alongside the infringement claims. See, e.g., *Allen v. Ghoulsh Gallery*, No. 06CV371 NLS, 2007 WL 4207923 (S.D. Cal. Nov. 20, 2007); *Card Tech Int'l, LLLP v. Provenzano*, No. CV 11-2434 DSF PLAX, 2012 WL 2135357 (C.D. Cal. June 7, 2012). Whether the court's consideration of intent, or scienter, in connection with these unfair competition claims is sufficient to accomplish the deterrent effect suggested here is subject to further debate.

strategy is “typo-squatting,” in which the infringer registers the copycat website at a domain name that is a close misspelling of the original site, hoping that consumers who mistype the domain name will not notice the difference.¹⁵² Another is the use of meta-tags, in programs such as Google AdWords, which drive traffic on search engines to a knockoff website instead of the original.¹⁵³

4. *Likelihood of Confusion*

As with more traditional Lanham Act claims, evidence of likely consumer confusion should play a central role in the court’s analysis. The court should consider evidence of actual consumer confusion, as indicated by customer surveys and other data, in addition to likely confusion. As with all such data, the weight accorded to these reports should depend in part on the methodology used.

While evidence of actual confusion may be the best indicator of likely confusion, it may also be the hardest to prove. User comments tending to suggest that the users are confused about which website they have visited may be tempting to include in a complaint. Because so many people use fictitious or partial names when commenting on websites, however, it may be nearly impossible to verify their identity, let alone get them to sign sworn testimony.

In order to prove likelihood of confusion, as required for trade dress infringement claims, plaintiffs should submit side-by-side comparisons of their original websites and the alleged infringing site. A comprehensive comparison of the two websites will help the court understand every point of similarity. Including technical details for each page of the website, including the hexadecimal notation of the colors used and the pixel distance between elements, will also support a finding of likelihood of confusion.¹⁵⁴ A side-by-side comparison, however, illustrates the effects of these technical details on the consumer and, in turn, the likelihood of confusion.

¹⁵² See Hughes & Rosen, *supra* note 13, at 44.

¹⁵³ See, e.g., *FragranceNet.com, Inc. v. FragranceX.com, Inc.*, 679 F. Supp. 2d 312, 315 (E.D.N.Y. 2010) (plaintiff alleged trademark infringement, *inter alia*, when defendant used plaintiff’s trademarks as meta-tags for its own site).

¹⁵⁴ See *Conference Archives, Inc. v. Sound Images, Inc.*, No. 3:2006-76, 2010 WL 1626072, at *19 (W.D. Pa. Mar. 31, 2010) (describing plaintiff’s exhibit comparing to website in great technical detail and characterizing it as “very instructive to the Court’s analysis.”).

5. *Additional Considerations*

One issue that should not play a role in the court's decision is the proximity of competitor's site in search engine results. Search results differ based on a variety of factors, including the skills of a coder in search engine optimization and the geographic location where the search is being performed. The fact that two websites come up next to or near each other in a search engine result should not be considered evidence of "look and feel" infringement or its absence.

B. Designing An Effective Remedy

Designing a damages scheme that provides a sufficient deterrent to website copying is a particularly important issue for further study. Because it is so easy to copy another website, as we've seen, courts must ensure that their damages awards are severe enough to deter such copying. But what is the most effective and efficient form of penalty for copying the look and feel of a website? While a full answer to this question deserves greater study, some starting points are clear.

Courts may adapt remedies for website infringement from notable trade dress cases. One noteworthy example is the trial court's penalty in *Taco Cabana v. Two Pesos*. The Two Pesos restaurant chain, found guilty of willful trade dress infringement, was required to post a sign on the interior and exterior of each of its locations for one year, notifying customers that it had been found guilty of copying Taco Cabana's concept.¹⁵⁵ Adapting this "sign of shame" remedy to websites, a court could require an infringing website to post a banner advertisement explaining the verdict and directing users to the original website. At least one court has issued a similar directive.¹⁵⁶

Some observers have characterized changing a website's colors as a relatively simple process, and one that is less time consuming than redesigning a product or a store interior. On that basis, it is tempting to conclude that requiring a look and feel infringer to redesign a website, may not be as effective a deterrent as it might be in the retail context:

¹⁵⁵ The sign was to read, in one-inch block letters: "Notice: TACO CABANA originated a restaurant concept which Two Pesos was found to have unfairly copied. A court order requires us to display this sign to inform our customers of this fact to eliminate the likelihood of confusion between our restaurant and those of TACO CABANA." Hughes & Rosen, *supra* note 13, at 45.

¹⁵⁶ See *Garden of Life, Inc. v. Letzer*, 318 F. Supp. 2d 946, 968 (C.D. Cal. 2004).

Losing a trade dress claim involving a tangible product like a children's toy could cost the copycat millions in packaging redesign, withdrawing and destroying infringing packages, revising promotional materials, and retooling factories. By contrast, losing a web site trade dress case may mean little more than asking a junior IT consultant to spend a few hours changing the site's design and color scheme.¹⁵⁷

Although a website can be changed quickly, quick changes are not always effective from a marketing or user experience perspective. The perspective quoted above on the time it takes to revamp a website is too dismissive, and reflects a misperception that good website design is arbitrary. In fact, compelling website design is as much science as art. Most companies hire professional website designers who understand that the apparently simple act of "changing the site's ... color scheme" is not so simple. As noted above, for example, the choice of color can have a significant psychological effect on a user's experience of the site, so a site-wide color change cannot be undertaken lightly without changing the potential effect on consumers.¹⁵⁸ Even so, changing a website's colors may not be enough to distinguish its look and feel from a competitor if other graphic elements are identical. StudiVZ, the knockoff website that incited Facebook to sue, featured red as its predominant color instead of Facebook's blue – yet Facebook still concluded that the similarities between the sites were troubling enough to merit a set of lawsuits.

The scope of a proper remedy requires attention to the realities of website design. Some courts have issued injunctions that go too far in response to look and feel claims, without regard to these concerns. The *Athleta v. Pitbull* case, for example, suggests the dangers of an insufficiently specific injunction in remedy for look and feel infringement. In that case, Athleta successfully argued that it was suffering irreparable harm as a result of Pitbull's look and feel infringement. The court issued a preliminary injunction forbidding Pitbull from, among other things, using "any graphic, textual or other design elements on athletica.net website that are similar to plaintiff's website."¹⁵⁹ The terms of that injunction are troublingly vague. What constitutes "graphic, textual or other design elements," for example?

¹⁵⁷ Hughes & Rosen, *supra* note 13, at 44.

¹⁵⁸ See generally, George A. Agoston, *Color Theory and Its Application in Art and Design* (Dr. Jay M. Enoch et al., eds., 1979); Deane B. Judd & Gunter Wyszecki, *Color In Business, Science, and Industry* (Stanley S. Ballard ed., 3d ed. 1975); Steven Bleicher, *Contemporary Color Theory & Use* (2005).

¹⁵⁹ *Athleta, Inc. v. Pitbull Clothing Co., Inc.*, No. CV 12-10499-CAS FMOX, 2013 WL 142877, at *12 (C.D. Cal. Jan. 7, 2013). As of Apr. 27, 2014, athletica.net was no longer a functioning website.

Athleta's website, like most, contains an elliptical search button, links to customer support information, and other graphic and textual elements that may not contribute to its distinctive look and feel but are essential to a legitimate consumer-facing website. Prohibiting another website from using any of those elements prevents that website from competing fairly in the online marketplace.

Another example of courts' overreaching in the definition of a protectable look and feel comes from the *Conference Archives* decision.¹⁶⁰ Unlike earlier decisions concerning the look and feel of a website, the court suggested that "look" and "feel" be considered separately. In distinguishing a website's "look" from its "feel," the court noted that websites are unlike posters, in that they involve user interaction. It went on to describe a website as having a series of functional "layers." One layer, it noted, was the visual design or appearance of the site on the screen. A second layer is the user's interaction with the website, or the interface design. The court characterized the visual design as the "look" and the interface design as the "feel" of a website.¹⁶¹

Functioning in harmony, the court noted, these elements can give rise to a protectable website "experience:" "Combined, the 'look' and 'feel' coalesce to form a protectable virtual experience that provides the user with 'cognitive absorption' [...]. This interface promotes the efficient, predictable, and reliable use of a web site. The hallmark of a protectable "look and feel" trade dress is a graphical user interface that promotes the intuitive use of the web site."¹⁶²

This last statement reflects a troubling view of protectability. Extending protection to a graphical user interface because it "promotes the intuitive use" of a website is not in the best interests of consumers. In general, all web sites should be intuitive and easy to use. The professional fields of user experience design and computer-human interaction are dedicated in part to maximizing the intuitive use of websites. To be sure, two well designed websites that are not confusingly similar can both be easy to use. There should be no protection for this essentially functional aspect of a website. Ease of use is one aspect of website design that should be ubiquitous rather than proprietary.

¹⁶⁰ See *Conference Archives, Inc. v. Sound Images, Inc.*, No. 3:2006-76, 2010 WL 1626072 (W.D. Pa. Mar. 31, 2010).

¹⁶¹ See *id.* at *14.

¹⁶² See *id.* at *15.

IV ADDITIONAL ISSUES

There is a rich stream of issues related to the look and feel of websites that is beyond the scope of this article. Additional scholarship on these issues will improve our understanding of the best approach to protecting websites from illicit copying.

One critical issue is the extent to which global intellectual property laws can protect U.S. companies against website look and feel copying abroad. As the Facebook vs. StudiVZ case demonstrates, the websites of U.S. companies may be copied overseas without an obvious, effective remedy. Even if U.S. law ultimately provides a satisfactory defense against website look and feel copying, the borderless nature of the Internet and global commerce in general demands a global response to the problem. Whether the problem can be remedied adequately through the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) binding on all WTO members, or requires protection through a different treaty or another form of intervention, bears further study.

Given the borderless nature of the Internet, one critical area for further study might be a comparison of the legal protection available for the look and feel of websites in other countries and in the European Union. Facebook's unsuccessful attempt to sue the creators of StudiVZ in Germany, their host country, invites questions as to how any United States corporation might protect the look and feel of its websites abroad.

Another question is the extent to which the World Intellectual Property Organization is a proper venue for resolving look and feel claims. In at least one case, the WIPO agreed to transfer the domain name of a knock-off website to another party in response to a look and feel infringement claim.¹⁶³ The complainant owned LeSportsac, a trademark used on women's handbags and luggage in use since 1974. In August 2012, the respondent, an Arizona resident, registered the name "Lesportsacaustralia.com" for a website carrying counterfeit LeSportsac goods. In evaluating LeSportsac's claims, the arbitrator noted that "Respondent's site shares many of the distinct elements of the 'look and feel' of Complainant's website, including the prominent use of the LESPORTSAC mark at the top left and a vertical column on the left side of the home page in which LeSportsac products are divided by category."¹⁶⁴ Finding that the respondent used

¹⁶³ Lesportsac, Inc. v. Kathy Clapp, No. D2012-2506, 2013 WL 1146701, at *6 (2013).

¹⁶⁴ *Id.* at *2.

the website in bad faith, the arbitrator ordered the transfer of the Lesportsaustralia.com domain name to LeSportsac.¹⁶⁵

An additional area of research might be to compare the effectiveness of private law remedies, including breach of contract claims, with some intellectual property theories described in this article as a basis for protecting the look and feel of websites. The provision that “no part of this website may be reproduced or transmitted” is often included in a website’s “Terms and Conditions.”¹⁶⁶ Competitors who access websites for the purpose of copying them arguably subscribe to those terms. Website owners therefore may protect against illicit copying by asserting breach of contract claims against such competitors.

A particularly interesting topic for smaller companies is the extent to which they may be liable for website copying based on their adaptation of a standard website template. Companies such as Hubspot and WordPress offer “one stop shopping” convenience for companies in need of a new website. While the range of basic website models they offer may be impressive, it is limited. It would seem to be only a matter of time before the owner of one website finds a competing website developed from the same professional source.

While adopting a specific test can clarify the legal issues surrounding website look and feel infringement, it is an imperfect solution. The issue of copyright preemption, for example, is still troubling. The Copyright Act intended to provide an exclusive remedy for anything subject to copyright protection, and it may be difficult in practice to draw the line between copying several individually copyrightable web pages and copying the look and feel of a website. A more detailed trade dress law, no matter how carefully crafted, cannot encroach on that territory. If courts were to grant copyright protection for creative and original compilations on websites, it would be more difficult for website owners to argue that their trade dress claims were not preempted by the Copyright Act.

As always, in matters of intellectual property protection, the legal system must strike a delicate balance. If the courts were to grant website designers too much protection, that practice could result in a monopoly of highly intuitive, useful website designs. On the other hand, too little protection could stifle innovative website design, increase the chances of consumers being defrauded by counterfeit websites, and impede the normal growth of e-commerce.

¹⁶⁵ *See id.* at *6.

¹⁶⁶ *See, e.g., Sleep Sci. Partners v. Lieberman*, No. 09-04200 CW, 2010 WL 1881770, at *1 (N.D. Cal. May 10, 2010).

CONCLUSION

There is a critical gap in the legal protection available for one of today's most valuable business assets: the consumer-facing website. Although every company strives for a unique and memorable website, there is a growing threat that what makes a website memorable - its "look and feel" - may be copied wholesale by competitors without clear legal recourse for the website's owners. Website look and feel protection falls into a chasm between copyright on one hand and trade dress on the other, neither of which adequately addresses this modern problem.

The lack of effective protection for the look and feel of websites presents a serious legal and economic threat. The cost to businesses, in the forms of revenue, trust and goodwill, of such unlicensed copying is vast. The cost to consumers, who provide confidential data and payments based on misimpression of commercial source, has sparked investigations by the Department of Justice.

This article has explained the nature of the problem, analyzed recent case law, explored the limits of copyright and trade dress as bases for protecting website look and feel, and proposed a multi-factor judicial test for assessing look and feel infringement. The underlying thematic differences between copyright and trade dress law - in essence, the difference between protecting commercial *expression* and protecting consumer *impression* - suggest that trade dress is the more appropriate basis for look and feel protection. Adopting a trade-dress based multi-factor test will increase the stability of intellectual property protection for the look and feel of websites and provide greater security for businesses and consumers alike.