

# THE INTERNET LAWYER™

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## Legal Briefs

### Use of Screen Shot Ruled Fair Use

By Valentine Brown

In *Sony Computer Entertainment America Inc. v. Bleem LLC*, Slip Op. CV-9917137v2 (9th Circ., May 4, 2000; amended July 10, 2000), the Ninth Circuit Court of Appeals vacated a preliminary injunction issued by the U.S. District Court for the Northern District of California. The Ninth Circuit held that Bleem's unauthorized use of a screen shot from a Sony PlayStation game for the purposes of advertising and compari-

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## Don't Surf the Net Without a License

Content agreements can be sticky situations

By Ari Kaplan

These days, content such as news, photos, and stock picks on your Web site is often the key to drawing visitors and ensuring their return. The questions generally are, where do you get the content, and do you provide it yourself or do you license it from another party? The purpose of this article is to highlight some of the essential issues to consider when licensing material for the Web.

### How Best to Get Paid

In most agreements, the key issue is compensation. This issue can become very complicated when licensing content for the Web. Obviously, cash is always accepted. The main issue regarding compensation is generally the basis on which it is paid or received.

Do you get paid a flat fee for your content or do you get paid per click? Just for fun, consider what happens if, in addition to cash or in lieu thereof, you provide or request advertising on the particular site the content appears. Or, what if you pay for content with equity in the company, such as shares of stock or options to purchase them?

Each element of compensation creates various issues, not the least of which is the risk of giving away too much access or control on your site. Be cautious when locking yourself into paying or receiving a particular compensation amount or price.

This is because you may not know how visitors to your site will react to the content, and, therefore, you probably cannot fully anticipate its true value. Thus, you may want to consider using a "flexible" compensation schedule.

### Location, Location, Location

Another key point to remember when negotiating is the location of the content. On the Net, as on the street, the three rules of "real estate" are location, location, location. So, bear in mind during negotiations that if a visitor to the site has to scroll down, or even more undesirable, hyperlink to your content, it may diminish its value. On the other hand, prominently posting content that viewers are not particularly inclined to read may detract from your site and cause a drop in eyeballs.

What about marketing and promoting the content? If you are creating content that someone is buying from you, you want to make sure it gets promoted. That is a factor that may be important enough for you to include in an agreement.

If you are the party purchasing the content, then you have to think of a creative means of promoting it. This may include posting banner ads or linking buttons on the sites of your partners and affiliates. You may even want to develop offline promotions on television and radio.

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## ◀ 1 License

And, of course, what happens if the content is so hot that it attracts a ridiculous number of visitors. If it were my content that was causing the frenzy, I would want a piece of the advertising revenue. As such, for purposes of an agreement, I would want to very carefully define what constitutes ad revenue, when it is paid, and how it is tracked.

But be careful not to miss the forest for the trees. There is also incredible value in the data that is collected from visitors to the site. Your agreement may want to account for the ownership aspects of this information.

Another interesting sidebar to licensing agreements these days is pre-installed default information on palm pilots and cell phones. So, for example, if Ameritrade is the default Web broker on the palm pilot, then Ameritrade has a huge advantage over its competitors.

### Delivery and Duration

There are also smaller, but equally important issues to keep in mind when reviewing a content agreement. The type of medium through which the content will be viewed has become increasingly important. For example, will viewers visit the Web site directly over the Internet, or will they view the site using their WebTV?

The medium could materially affect the factors previously discussed, such as ad revenue and user data, as it may not be as easy to gather user information when content is accessed through a cell phone as it is when sitting at a PC.

Duration of the agreement can also be important. What is the term of the license? How long do you or the other party have access to the information

**‘If you are creating content that someone is buying from you, you want to make sure it gets promoted. That is a factor that may be important enough for you to include in an agreement.’**

provided? If you are licensing the content from someone else, there are a number of representations and warranties that you want to make sure you get.

First, confirm that the person providing the content owns it or has the right to license its use. Second, verify that the content is free from viruses or worms or anything else that might affect access. Third, make certain that the content comports with what your visitors want to see. If you are licensing content for a children’s site, you do not want profane, violent, or hateful content on your site.

### Litigation? Just in Case ...

Another important issue these days in light of the recent fall of the “dotcoms” is what happens if you, as the person putting the content on the site, are sued and have to pay money damages as a result of the content. In traditional contracts, the parties might include a provision in their agreement for protective indemnification.

Now, however, the other party may be a “dotcom” whose funding has run out and there may be nothing you can do. So,

while an indemnification provision is usually an essential part of most agreements, you may want to consider more creative ways to ensure payment in this regard (e.g., putting funds in escrow). If you are the content provider, on the other hand, you may want to include a provision that limits the amount you will have to pay if monies are assessed.

Of course, many of these issues are subject to extensive modification, and I have only scratched the surface. One thing that is certain though, whether you are the content licensor or the licensee, make sure you have a license before driving down that information superhighway.

### TIL

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