It’s not enough to be right

Last issue’s Micro Law column (May/June 1997) addressed a massive lawsuit by six prominent content providers against a Web entrepreneur whom they accused of pirating their content by “framing” it. The Washington Post, Los Angeles Times, Wall Street Journal (Dow Jones), CNN, Reuters, and Time Warner all joined to sue Total News for copyright infringement and sundry other alleged wrongs.

As reported by wire June 16, the plaintiffs announced that Total News capitulated to them and signed a settlement agreement. (Its text is now posted at www.ljx.com/internet/totalse.html.) The settlement is not a legal precedent against any third parties, and thus the underlying legal issues are left unresolved.

Under the agreement, Total News must not ever frame Web sites of the Washington Post and the other plaintiffs, with framing broadly defined as directly or indirectly causing any further material to appear on the same screen. This further information includes any link back to Total News. While the agreement does not say this, apparently included is any manipulation of the Netsite/Location box near the top of the screen. As www.totalnews.com now operates, when you link to the Washington Post Web site, the URL that appears in the Netsite/Location box is www.washingtonpost.com, and the Back button is grayed out. (However, if you close the screen—for example, by clicking on the X box at upper right in Netscape—you jump back to www.totalnews.com.)

The agreement further provides that Total News may link its users (without framing) to Web sites of the Washington Post and the other plaintiffs, but subject to various conditions. First, the link must be plain text consisting of the name of the linked site—that is, no screen buttons with logos or other symbols. Second, the plaintiffs’ agreements to permit linking may be suspended on two weeks’ notice. If Total News does not stop linking at that point, the plaintiffs may once again sue “and it shall be an affirmative defense that defendants’ conduct does not infringe or violate plaintiffs’ rights.”

The first of these provisions prevents trademark infringement, and appears reasonable and ordinary. The second is interesting because it is a lawyer’s stratagem, probably unremarked on Total News’s side, but surely well thought out on the plaintiffs’ side.

The ordinary rule in intellectual property law is that the plaintiff (copyright or patent owner) must prove infringement. Unless and until the plaintiff does so, the defendant has no need to show anything; absent such proof at the outset, the defendant is entitled to have the case dismissed.

On the other hand, an affirmative defense is something that a defendant must prove. Fair use, for example, is an affirmative defense. Unless the defendant in a copyright infringement case convinces the court that its use of the copyrighted work was fair, the defendant is liable for any infringement that occurred. Turning non-infringement into an affirmative defense turns upside down the ordinary rule of proof in an intellectual property case. Instead of the plaintiff having to prove the defendant guilty, the defendant must prove its innocence. That could be overly determinative of the outcome, particularly in as uncertain and unsettled a legal area as Internet copyright law. For one thing, it almost certainly means that the defendant, in a subsequent infringement suit, could not get the case summarily (and thus cheaply) dismissed on the ground that there is no infringement as a matter of law.

Two lessons emerge from this incident. First, it’s not enough to be right. Second, it’s risky to rely on any lawyers not well-versed in the school of hard knocks (by past copyright dis-
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