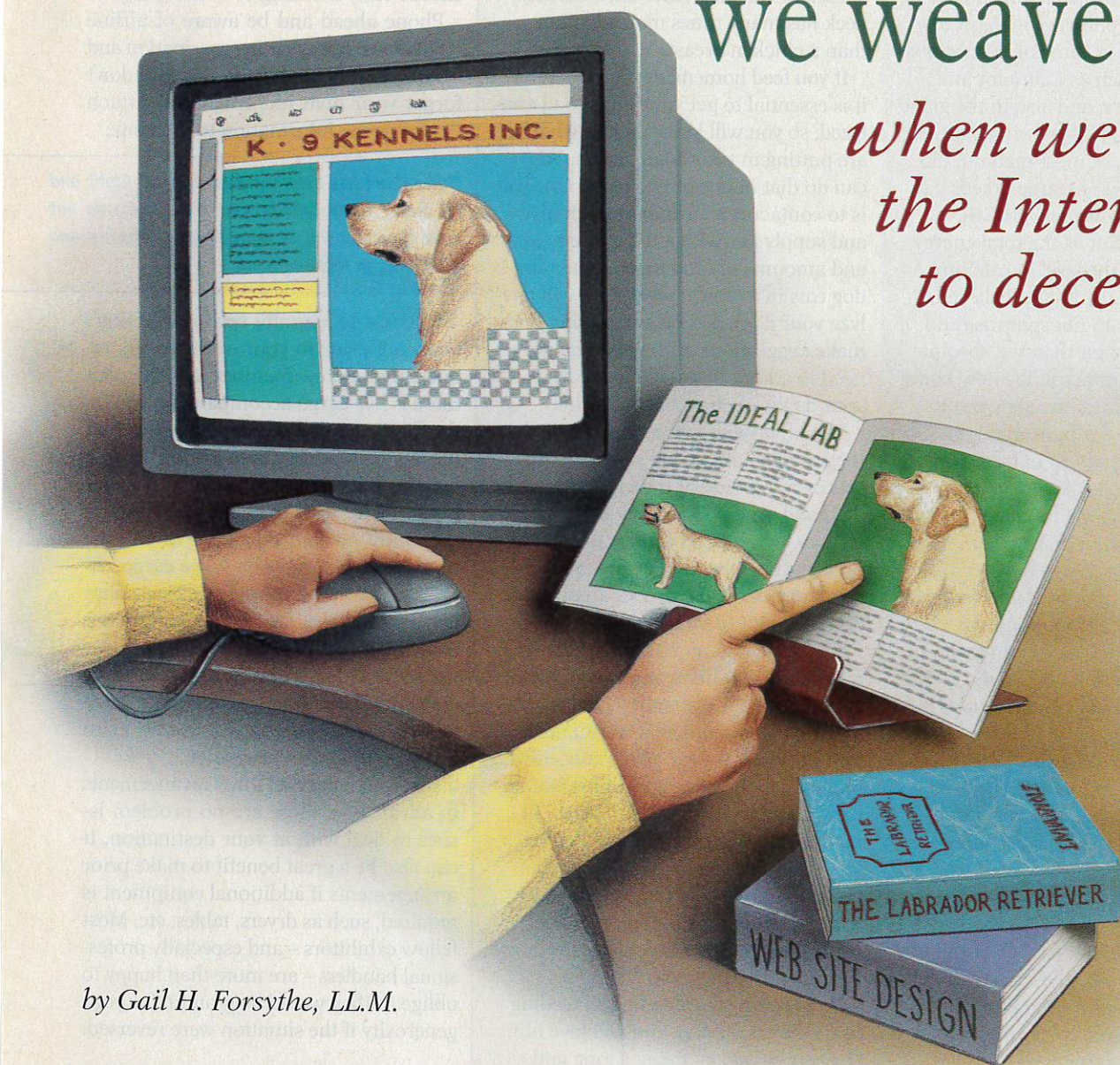


Oh, what a tangled web we weave...

*when we use
the Internet
to deceive.*



by Gail H. Forsythe, LL.M.

Twenty years ago, dog-related hobby and business communications occurred via mail, fax and telephone. Today, word spreads around the world as quickly as you can 'click a mouse'! Web sites, e-mail, digital video transmission and on-line chat groups are now used by Canadians on a daily basis. More and more dog people and their businesses are taking advantage of this exciting, fast-paced and rapidly changing technology.

Not only is technology changing, but so is the nature of the legal problems that arise in the context of Internet and e-mail use. Let's look at some examples of actual and possible events:

- You allow a person to photograph your dog and the image appears on a commercial, foreign-owned web site. The webmaster refuses to remove it, claiming copyright.
- A club newsletter is overdue; you are the editor. You find an article on the

Internet, make minor changes and publish it in the newsletter, claiming it as your work. It is so well received that you sell it on your web site. You also include in the newsletter an e-mail that you received from a highly trusted friend; a "true" story about the unethical practices of a rival dog breeder.

- Your dog is ill. You send out a distress call to an Internet chat list. You rely on one of the "remedies" presented on-line and your dog dies. You decide

to use the Internet for revenge. You know who wrote the 'advice,' so you encourage your friend, who lives outside Canada, to post hate messages on a web site. The hate messages are aimed at the same ethnic group as the author of the 'advice.'

- A consultant designs a web site for you. It includes photos, your business and kennel name, commercial dog products and services, and your trademarked business logo and slogan. You discover your logo and slogan on a Canadian competitor's web site, both being passed off as your competitor's. Because of the confusion experienced by your customers, you obtain a court injunction to stop the use. You discover the same material on your competitor's American corporate web site. The American company directs the use of your logo and slogan at the Canadian market.

The first example raises the topic of property rights to your dog's image. If your dog's image is used to sell a product or promote a TV series, you may try to persuade a court that it should protect the "public image" because of its commercial value. However, the image may not be yours; it may be "owned" by the manufacturer or producer. Contracts with movie studios have been known to include a term that restricts the use of a dog's image "in perpetuity (forever) and throughout the universe"! Most dog owners cannot claim that their dog's image has commercial value. In that case, the concept of copyright may protect the photographer's right to use and distribute his or her 'work' (the photo); however, consumers may allege misrepresentation if the dog's image is falsely portrayed.

Copyright is defined in *The Copyright Act*, s.1, as "the sole right to produce or reproduce the work or any substantial part thereof in any form." The Act includes protection for written works, photographs and other forms of "expression." Copyright arises, whether the 'work' is published or not, if the person who generated the work is ordinarily a resident of a Berne Convention country or a World Trade Organization member country. Under s.6 of the Act, copyright lasts for the life of the author, the remainder of the calendar year in which

the author dies and 50 years following.

Under s.41 of the *Copyright Act*, the author has three years from the date the infringement occurred (or the date the author could have reasonably known about the infringement) to commence a court action. In the second example involving the reprinted article, if a court concludes the work had value to the author, then the club, the editor and the members of the club may be personally liable under s.35 of the Act for damages. If a defendant (i.e., the club) can show that it had no reasonable basis to suspect a copyright infringement, the court may simply impose an injunction against the club to stop further use of the material.

Section 42 of the *Copyright Act* provides for a summary or indictable criminal offence if the infringement of copyright is "for trade." If convicted of an indictable offence, a fine of up to one million dollars and/or imprisonment for up to five years could occur! In the second example, the newsletter editor and the club members may have additional legal problems. If the e-mail about the rival breeder is untrue, and that person's reputation is damaged, the rival dog breeder may have a defamation action. If the e-mail transmission occurred from work, the employer has the right to access its property (the computer), retrieve a copy of the e-mail and take it into consideration when assessing employee performance. If the company is involved in litigation, it may have a legal duty to retrieve and produce e-mail records that are "personal" in nature but relevant to the matters at issue in the case.

In the example involving the revenge-seeking person who targets an ethnic group with hate messages, two points arise. First, the person was foolish to rely on information from a source that could be, at best, unreliable and, at worst, an intentional infliction of harm. Second, *Zündel v. Canada* (Attorney General) (Fed.Ct. T.D. 1999) established that a person in Canada does have the capacity to control, and communicate, hate messages directed at an ethnic group contrary to human rights principles, even though the person may have paid a webmaster to post the information; the person is technically incapable of posting it; and the server and webmaster operate outside Canada. In *Zün-*

del, the court compared the computer to a newspaper by noting that a reader does not cause newspaper content to be communicated; it is the journalist who writes the material that is published who communicates the message. This case illustrates that courts will look beyond 'technobabble' and geographic boundaries to reach a common sense solution.

In the last example, involving use of a trademark, infringement occurs if a person passes off wares, services and business in a manner that causes confusion, or is likely to cause confusion, with the activities of a registered trademark holder. *Tele-Direct Publications Inc. v. Canadian Business Online Inc. and Sheldon Klimchuk* (Fed.Ct. 1998) involved a Canadian company that published telephone directories. It owned the word and design trademarks in Canada for "Yellow Pages" and "Walking Fingers." These trademarks were "in the public domain in the United States."

Klimchuk was the director of the Canadian company, CBO, and was also the president of an American company. Tele-Direct obtained an injunction to stop Klimchuk and CBO from using Tele-Direct's slogan and logo in Canada. Klimchuk's American company continued to use the words and logo on their Internet site and they targeted Canadian customers. The court said that the defendants "cannot do by the back door what they cannot do by the front door." The court concluded it had jurisdiction to find these American companies or individuals in contempt of court because they disobeyed the court's order.

These examples illustrate the wide array of traditional legal issues that can arise in the Internet era. Although 'the wheels of justice' may move slowly, the judiciary is quick to recognize that it is not the computer, but the person who uses it, who is ultimately responsible for the consequences associated with this incredibly versatile tool.

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