

Wireless Applications Require Comprehensive IP Protection Plan

By Gregory W. Carr and Theodore F. Shiells

As higher-speed third generation wireless communications come on-stream during the coming months, a new period of expansion of the wireless Internet delivery for new Web-enabled services is likely to emerge. These new technologies are capable of merging nearly every aspect of a business, including its technology, business methods, services, advertising, and data into a single delivery vehicle.

The potential merger of an entire business into one screen demands that all forms of intellectual property protection available be applied in a comprehensive and consistent manner. That protection could prepare a company for rigorous review in any acquisition, licensing and infringement litigation.

Broad wireless technologies enable services previously unimaginable. For example, think of a plumber-technician using a 3G wireless personal digital assistant to diagnose a drain problem and coach a customer, with a similar device, who is replacing a pipe.

A device configured with a digital camera and pointed by the customer at the problem pipe, would allow the technician to view the project remotely. An associated Web page could allow access by the customer to tools and parts needed for the job at nearby stores. Voice recognition also could allow selection of the tools and parts or diagnostic services. Visual and audible symbols and sounds unique to this service guide the customer through the process and service options available.

A Web-enabled service, whether advanced or more conventional, is pure information to which all forms of IP might apply. Care must be taken to protect valuable aspects of such Web page offerings with the correct forms of IP, or risk invalidation of those rights later. Of course, infringement of valid and enforceable IP rights of third parties must also be avoided.

Selecting which form of IP to apply requires an understanding of all important aspects of Web pages and their interrelationship. IP can secure exclusive rights to information and things that perform a useful function with utility patents; indicate the source or approval of a product or service through trademark or trade dress; or are organized in an original or nonobvious forms relating to copyrights and design patents. Information reserved from disclosure could be protected as a trade secret.

Successfully protecting various Web page features requires both a thorough technical understanding and a coordinated application of all IP. Functional aspects or features of the many sounds, symbols and devices of a Web page must be protected differently than the nonfunctional. The primary determination of functionality and the secondary determination of what type of protection to apply must be followed consistently across the spectrum of patent, trademark, copyright, and trade secret forms of protection.

The importance of distinguishing functional and nonfunctional features and applying the appropriate form of protection is clear from recent pronouncements of the U.S. Supreme Court. In *Traffix Devices, Inc. v. Mktg. Displays, Inc.*, the Supreme Court found that the existence of a patent on a product and prior patent infringement litigation indicated a mechanism was functional, precluding trade dress protection. In *Wal-Mart Stores, Inc. v. Samara Bros.*, the Court indicated that protection of the appearance of a product as a trade dress requires proof of nonfunctionality of the allegedly infringing feature. The Supreme Court has also drawn similar lines distinguishing subject matter that can and cannot be protected by copyrights.

Therefore, portions of the graphics, buttons, icons, sounds, processes and interactive tools that are “functional” are appropriately protected by a utility patent and are not appropriately addressed with trademark or copyright protection. Portions that are not functional potentially would be protected under design patent, trademark, copyright and trade secret. To a great extent, this functionality determination will be defined by the features selected for patenting and their descriptions. To avoid raising validity issues unnecessarily, care must be taken in all official correspondence with the Patent & Trademark Office, advertising and third-party communications to be consistent with the distinctions.

Despite the current financial climate, innovative firms with strong business plans are still receiving funding. This time around, however, the funding comes with more time and budget constraints and strict requirements that all aspects of the intellectual and technological capital are properly protected.

Preserving all IP rights available for even a single Web page will become a more important part of the equation, as broadband merges key aspects of an entire business into a single portable place.

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