

No Trespassing! Have License, Can Hyperlink.

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Abstract

The burgeoning amount of information on the Internet has given rise to the need for efficient methods to link web pages. It has not only grown with the expansion of the Internet, but has resulted in numerous disputes regarding its legality. Linking to and framing of content contained on an unrelated web site is controversial. Under current copyright law, almost any artistic or linguistic composition which may be posted on a web site is likely to be copyrighted.

Numerous cases have been brought before various national courts claiming that hyper linking and framing infringe copyrights, trademark dilution, unfair competition, breach of confidentiality, and trespassing. The courts have applied the traditional doctrine of copyright and trademark in some instances. But in general, courts are at loss how to deal with this kind of situation. The legal issue confronting courts today is whether a Website sponsor may implement such a link unilaterally and without an agreement from the owner of the third party Website. Does the proprietor of the site have any right to control who links to his site? Could deep linking, framing, spidering and use of meta-tags constitute copyright infringement, unfair competition, trademark dilution, or other possible causes of action? Are links copyrightable? It seems the jury's still out when it comes to deep linking, framing and meta-tags.

1. Introduction

The emergence of technologies is facilitating the rapid dissemination of ideas and information to almost every market in the world. The Internet has been designed to be a place where free global linking of information and exchange of ideas are vital elements. With the advent of computers as a basic tool of communication, marketing and information, a cyber society has come into existence linking people and organizations. The burgeoning amount of information on the Internet has given rise to the need for efficient methods to link web pages. Hyperlinks, frames, and meta-tags are just a few of the associational tools available. However the use of these tools has created a number of serious legal issues. In particular, these tools can have a significant impact on intellectual property rights. These new technologies have created new types of situations, which pre-existing law could not have predicted, and, therefore, cannot effectively control. Courts are forced to grapple with legal ambiguities in modern Internet problems. One of the most significant legal questions surrounding these emerging Internet technologies involves trademark infringement, unfair competition and copyright. The explosive expansion of hypermedia usage, particularly via the Internet, has

prompted the filing of lawsuits involving the issue of unsolicited hyperlinking. The courts have applied the traditional doctrine of copyright and trademark in some instances, but in general, courts, most of the times, are at loss how to deal with this kind of situation. Linking documents is still a relatively new phenomenon.

Deep linking still appears to be in legal limbo. The legal answer is by no means clear and commentators hold widely diverging opinions. Different courts will arrive at different results. The purpose of this paper is to pinpoint some of the major problems arising from the interaction of copyright law and the Internet technologies. In particular, this article analyses the assertion that associational tools on the Web may infringe copyright, trademark, and fair competition.

2. Linking

Tim Berner Lee invented the World Wide Web (WWW). He saw the possibility of using hyperlinks to link every unit of information to any other unit of information over the Internet. The term "hyperlink" was coined in 1965 by Theodor Nelson who was inspired by the ideas espoused in the essay "As We May Think." The essay described a microfilm-based machine in which one could link any two pages of information into a "trail" of related information, and then scroll back and forth among pages in a trail as if they were on a single microfilm reel. Nelson transposed Bush's concept of automated cross-referencing into the computer context, made it applicable to specific text strings rather than whole pages, and generalized it from a local desk-sized machine to a theoretical worldwide computer network.

Hyperlinks are the most essential ingredient of all hypertext systems, including the World Wide Web. A Web page is constructed using Hypertext Markup Language (HTML), a basic text coding technique which provides display instructions to a Web browser program viewing the file which generates the particular Web page. One particular type of HTML tag is the hyperlink. *HT* in HTML stands for Hypertext. Hyperlinks allow for easy navigation within the site or can lead to other location on the web. Hyperlinks are often represented as bolded or underlined text, or as an image. This is because most browsers default settings are set up to display hyperlinks in that manner. By "clicking" a mouse or other pointing device on a hyperlink, the contents of another Web page referenced by the hyperlink are then displayed by the Web browser (Kuester, 1998).

There are three different classifications of links: intra-page, intra-system, and inter-system. Intra-page links connect different parts of the same document. Intra-system links connect different documents on the same server. An inter-system link connects documents on

different servers.

The Web is a system of hypertext links. Where a link is created not to the home page of the target site, but to the subsidiary page, this is known as deep linking. Basically, it is referencing to pages within a site, not just the front page. The technology behind the World Wide Web- the Hypertext Transfer Protocol (HTTP) - does not actually make any distinction between deep links and any other links- all links are conceptually equal. Deep-linking results in the practice of bypassing introductory home pages and thereby bypassing a site's own content and advertising. Another type of linking is in-line linking, a means by which the author/owner of a webpage incorporates into their own webpage copyrighted materials (such as graphic files) taken from another person's website or server (via a link).

Some right holders oppose deep linking. The reason is, of course, economics. Website owners sell advertising in their WebPages. If someone created links that bypassed all those advertisements, then that money would potentially bypass them. Cross hyper linking is, however, acceptable to website owners. Cross-hyper linking or reciprocal links is the preferred method of promoting business online by website owners. Reciprocal linking is simply exchanging links with other webmasters in order to boost link popularity. It involves sending e-mails to webmasters of sites with relevant and complementary content.

In general, three types of linking agreements exist: mutual linking agreements, one-way linking agreements, and cross-linking (co-branding) agreements. Mutual linking agreements involve no revenue, as each party expects to benefit from cross-marketing and increased sales. The second type, one-way linking agreements, are typically used in arrangements with affiliates or associates, whereby brand-name companies provide "tagged" links to affiliates for visitor referrals in exchange for commissions. The third is reciprocal or cross hyperlinking (Kiritsov, 2000), which most search engine optimization (SEO) sites recommend because this will help in the search engine ranking more than having no linking program at all.

One of the most effective strategies in online marketing is to have as many people as possible to visit your website. Online success is in direct relation to the number of unique visitors that see your web pages. Ideally, those people are targeted and interested in the web site's themes. Reciprocal linking is a good solution for small businesses, which do not have the cash to spend on advertising on other sites (Reciprocal Linking, 2005). It is also a good practice for those who want to build community with other websites. Reciprocal linking evens the playing field when it comes to which sites get to be ranked in the top positions. Although, reciprocal linking does not infringe on the intellectual property rights, the problem is that you often get your link stuck on a link page with dozens of other sites and the in numerous cases the links page cannot be found. Moreover, not all links are beneficial and the best links are ones that are on pages with very few other links.

Linking is very important in advertising. Many individuals, businesses, and organizations are faced with the similar challenge of ensuring that interested parties can find their websites. Business organizations welcome linking from others because it increases traffic, advertising rates, and, by inference, revenue. Links make the web manageable to surfers, enabling users to easily find useful information on topics of interest. The link can send users to the advertiser's own information or to public documents of others. Most companies are delighted to be linked with others. It is one of the ways a company can use to increase sales via the Internet.

Hyperlinking enables a Web surfer to connect to other Web pages and retrieve information within seconds and without having to perform new searches or other complex tasks. A Web page can contain as many or as few hyperlinks as the creator wishes. These branching mechanisms may reference Web pages both within and outside of the Web site, though it is primarily the linking to outside Web pages, which raises intellectual property questions. It should be stressed that using the link does not cause any copy of the target page to be created, at any stage, on the author's Web server. When the link is clicked the user's browsers establishes a connection direct to the target site and fetches the target page directly from it, just as if the user had typed in the URL on his browser to go to the site. The user receives the target page directly from the target site and not through the author's site. The link may be to a specific item on the other site and cause browsers to bypass information or advertising that the site owner would have wished all visitors to the site to see. This could affect the potential advertising revenue from the site it carries and affect sponsorship agreements. A link may be regarded as nothing more or less than a footnote or bibliographic reference pointing the user to related materials of interest while also transporting the user there. Another way to look at it is a form of free rider misappropriation of property or unfair competition. The originating Website benefits, particularly if it has advertisers or is a single sponsor commercial site, but it may do so at the expense of the linked Web site. The branding and paid third party advertisements of the linked Web site may not be seen by the user or, if they do appear, may conflict with the advertisements of the originating site.

The legal issue confronting courts today is whether a website sponsor may implement such a link unilaterally and without an agreement from the owner of the third party Website. Does the proprietor of the site have any right to control who links to his site? The question, more correctly put, in linking is whether it is permissible to hyperlink to a third party's content without that third party's consent? Could such behaviour constitute copyright infringement, unfair competition, trademark dilution, or other possible causes of action?

3. Legal Implications of Linking

There are legal implications on hyper linking without

permission. Plaintiffs in several recent court cases have claimed that unauthorized hypertext linkages infringe the intellectual property rights, and stifles competition of the owner of the target material.

1) Copyright Infringement

The principal purpose of copyright laws is the protection work of the human intellect. Covered by copyright protections are literary works, pieces of music, fine arts, product with scientific or technical content and cinematographic, photographic and other visual or audio-visual works. The Berne Convention is the oldest copyright treaty in the world. The following are among the rights which must be recognized under the Berne Convention as exclusive rights of authorization: the right to translate and make adaptations and arrangements of the work, the right to performance of such works, the right to make reproductions in any manner or form and the right of rental and distribution. The Convention also provides for "moral rights," that is, the right to claim authorship of the work and the right to object to any mutilation or deformation or other modification of, or other derogatory action in relation to, the work which would be prejudicial to the author's honour or reputation. exclusive rights (use the work as he wishes, prevent others from using it without his authorisation); and economic rights (economic rights of the type can be transferred or assigned to other owners usually for a sum of money or royalties depending on the proposed usage of the work).

The WIPO Copyright Treaty, adopted by the World Intellectual Property Organization (WIPO) in 1996, provides additional protections for copyright deemed necessary in the modern information era. It ensures that computer programs are protected as literary works (Article 4) and that the arrangement and selection of material in databases is protected (Article 5). It provides authors of works with control over their rental and distribution (Articles 6-8). The WIPO Copyright Treaty is implemented in United States law by the Digital Millennium Copyright Act (DMCA). Copyright action is also brought under Title 17 of the United States Code where Copyright protection exists for original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. In the European Union, it is implemented by EU Directives 91/250/EC (copyright protection for software) 96/9/EC (database protection) and 2001/29/EC (protection for anti-circumvention technologies and rights management technologies) and the Enforcement Directive 2004/48/EC. In most countries, the right of the copyright owner is exclusive in nature, but far from absolute because of the doctrine of "fair use". To successfully sue for copyright infringement, the plaintiff must prove: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original."

The Internet was built on the foundation of the free and easy exchange of information. Increasingly, some large

corporate entities have been trying to throw up roadblocks to this ideal. A favourite and recurring target is the practice of "deep-linking." Deep links bypass the front page of a website and carry the visitor to a page deeper in the hierarchy of the target site. According to copyright laws, the reproduction right is violated when a copy is made of the original work. So is creating a link containing only an URL address, an infringement on the reproduction rights? The following cases illustrate the dilemma in resolving this issue.

The most famous link-litigation case is *The Shetland Times Limited v. Dr Jonathan Wills and Zetnews Limited* [1997F.S.R. 604]. The *Shetland Times* challenged the new-comer Shetland News in court in late 1996, claiming that the News' hyperlinks to some of the Times' stories constituted copyright infringement. The plaintiff filed the suit against Dr Jonathan Wills for breach of copyright. In October of 1996 the *Shetland News* made hypertext links to its competitor's news stories which connected directly to the *Shetland Times*' own web pages on its server. By using such links the first page of the Internet edition of the *Shetland Times*, was by-passed, and the appropriate stories accessed directly (the first page was planned to contain advertising). The *Shetland Times* asked Scotland's Supreme Civil Court to ban the *Shetland News* from linking to his site. The *Times* successfully obtained an injunction against such linking when Scotland's Outer Court of the Court of Session held that the Times web page was a 'cable program' under the Copyright Designs and Patents Act 1988 and that inclusion of the verbatim headlines constituted prima facie copyright infringement case. Before a judge could decide the case, the two publishers reached a settlement. Under the deal, *Shetland News* was granted permission to link to the *Times*' headlines, but must label individual articles as "A *Shetland Times* Story." Near such stories, the *Shetland News* also promised to feature a button with the *Times*' masthead logo that links to the newspaper's home page.

The issue is of course whether one's own web pages were a cable programme within the meaning of Section 7 of the Copyright, Designs and Patents Act 1988. Section 7(1) defines 'cable programme service' as "a service which consists wholly or mainly in sending visual images, sounds or other information by means of a telecommunications system, otherwise than by wireless telegraphy, for reception- a) at two or more places (whether for simultaneous reception or at different times in response to requests by different users), or b) for presentation to members of the public, and which is not, or so far as it is not, excepted by or under the following provisions of this section." Cable broadcasting involves the physical connection to a television receiver, which will not normally have a processing unit that will enable it to talk back to the cable provider. On the Internet, however, a browser can download a web page whenever he wants, from any computer in the world. A cable programme service can carry great amounts of information, including computer programs, which could in any event be transmitted on existing analogue telephone lines, whereas

broadcast quality television, or video, could not be. The Internet is *sui generis* and cannot be equated with a cable programme service.

Sections 30(2) and (3) provide that:

(2) *Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that (subject to subsection) it is accompanied by a sufficient acknowledgement.* (3) *No acknowledgement is required in connection with the reporting of current events by means of a sound recording, film, broadcast or cable programme.*

Since there was no excessive use of *Shetland Times* stories (only headlines) and acknowledgement was provided by the banners, the defendant could have raised the defence of fair dealing. And assuming for the sake of *contra arguendo*, was indeed a cable program, *Shetland News* did not even have to enter into a deal giving acknowledgement to its rival paper. Unfortunately, the issues as to whether Net links can be copyrighted that arose in the above case were not fully canvassed at a full hearing and a settlement was reached before the Scottish court could set a precedent

In contrast, in *Ticketmaster Corp. v. Tickets.com Inc.* [2000 U.S. Dist. LEXIS 12987, Copy. L. Rep. (CCH) P28146 (C.D. Cal., August 10, 2000) (No. CV99-7654-HLH (BQRx)) (unpublished opinion)], Ticketmaster Online-CitySearch Inc. and its majority shareholder Ticketmaster Corp. operate a Web site offering event tickets that Ticketmaster has an exclusive right to sell. The site's home page features advertisements and a directory of interior event pages, which have basic information like a concert's time, place and date. They also include information about how to order tickets through the site or by other means. *Ticketmaster.com* and *Tickets.com* are competitors in selling tickets online for things like sporting events and concerts. *Ticketmaster.com* often has exclusive arrangements with events it carries on its website so that tickets aren't generally available to those events except through *Ticketmaster*, the event organizers directly, and premium priced ticket brokers. *Tickets.com* also has an online ticketing service, but it operates a bit differently. While in some cases it may have the ability to sell tickets directly, when it can't, it tells you where and how to buy those tickets. It gives a short factual description including the time, date, place and price for the upcoming event. Where *Tickets.com* doesn't itself sell the tickets, the user can click for a referral to another ticket broker, or to another online ticket seller.

Ticketmaster sued *Tickets.com* in United States District Court for the Central District of California. *Ticketmaster* claimed that the *Tickets.com* site featured "thousands" of links that transported consumers to selected event pages deep within *Ticketmaster's* own site, bypassing its home page and other pages. The suit also claimed that through the use of automatic software "spiders," *Tickets.com* systematically copied and extracted protected editorial material from *Ticketmaster Online's* event pages and placed it in a new form on *Tickets.com* pages. The suit also

accused *Tickets.com* of publishing false and misleading information about *Ticketmaster's* ticket availability (Kaplan, 2000).

One of *Ticketmaster's* arguments was that it had a link at the bottom of its web pages to "Terms and Conditions of Website Use." As is typical with this type of agreement, it apparently stated that by using the website, you were agreeing to the terms of the agreement. *Ticketmaster* argued that this agreement prohibited deep linking and using the site for commercial purposes. In defending this claim, *Ticketmaster* makes reference to the "shrink-wrap license" cases, where the packing on the outside of the CD stated that opening the package constitutes adherence to the license agreement (restricting republication) contained therein. This has been held to be enforceable.

U.S. District Judge Harry Hupp ruled that websites can legally provide links to any pages on all other sites. Hupp said deep linking is not illegal as long as it is clear to whom the linked page belongs. "*Hyperlinking does not itself involve a violation of the Copyright Act since no copying is involved, the customer is automatically transferred to the particular genuine web page of the original author,*" Hupp said in his ruling, "*There is no deception in what is happening. This is analogous to using a library's card index to get reference to particular items, albeit faster and more efficiently.*" (Tomwbell, 2005)

As to the claims of passing off and false advertising, the court concludes that deep linking by itself (i.e., without confusion of source) does not necessarily involve unfair competition. The court further said that merely putting the terms and conditions in this fashion necessarily create a contract with anyone using the web site.

2) Trademark Dilution

The Paris Convention for the Protection of Industrial Property ("Paris Convention") was the most far-reaching example of an attempt at uniform treatment of trademark owners and international trademark law. The Paris Convention was originally signed by representatives of eleven countries on March 20, 1883. The Convention has undergone several revisions. The primary provisions with respect to trademarks are summarized as follows: trade names may be protected in all countries of the Paris Convention without the requirement of filing or registration applicable under national law, whether or not such names form part of a trademark, thereby recognizing the importance of trade names with respect to intellectual property. Trademarks owned by persons entitled to the benefits of the Paris Convention are protected against acts of unfair competition, although the definition of unfair competition has been left to local law (Art.10). Sanctions for such acts may include injunctions, actions for damages, and criminal penalties in cases of violation of rights revealing a criminal character.

The World Trade Organization (WTO) administers the General Agreement on Trade Related Aspects on Intellectual Property (TRIPs). TRIPs extends protection to famous marks and impose trade sanctions against violating member countries. It establishes a universal legal definition of a trademark. The TRIPs definition

reads in part: "Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark" (Art. 15). Trademark owners also gain an exclusive right under TRIPS to prevent third parties from using their mark "where such use would result in a likelihood of confusion (Art. 16)."

As more of the world's population becomes dependent on the Internet, trademarks are becoming more valuable and more contentious. With the push for branding on the Internet, legal issues – a step behind technology – arise out of disputed trademark uses on the Internet. There are some instances, however, where the link is constructed in a manner that confuses or misleads the user by implying that the linked Web sites have an affiliation, such as endorsement or sponsorship. Those instances give rise to legal disputes.

In *PaineWebber Inc. v. Fortuny*, [Civ. A. No. 99-0456-A (E.D. Va. Apr. 9, 1999)], defendant registered the domain name "www.painewebber.com", a misspelling of plaintiff's domain name in that it omitted a period after "www." The site linked visitors to pornographic websites. Plaintiff sought preliminary relief, arguing that defendant's registration and use of the domain name constituted trademark dilution. The court found that plaintiff's mark was famous and would be diluted by being linked with pornography, and thus granted a temporary restraining order on April 2 and a preliminary injunction on April 9, 1999. The court preliminarily enjoined defendant from operating, maintaining, or sponsoring any website identified with the domain name, and from selling, disposing, or otherwise terminating his rights to the domain name. The court also ordered Network Solutions Inc. ("NSI") to put the domain name on hold until the parties' rights to it were determined by the court (Finnegan, 2005).

In *OBH, Inc. v. Spotlight Magazine, Inc.*, (86 F. Supp. 2d 176 (W.D.N.Y. 2000)), the plaintiff, owner of *The Buffalo News* newspaper, sought a preliminary injunction against defendant's use of the domain name "thebuffalonews.com" for a website purportedly designed to parody and provide a public forum for criticism of *The Buffalo News*. The site, however, also provided hyperlinks to defendant's own apartment rental guide business and local newspapers, magazines, and radio and television stations. In granting a preliminary injunction on plaintiff's claims for trademark infringement, dilution by blurring, and unfair competition, the court rejected defendant's argument that it did not use the name in commerce and that it did not use it with any goods or services. The court emphasized four aspects of the facts: (1) hyperlinks to defendant's own commercial website competed with a similar service plaintiff offered, (2) hyperlinks to plaintiff's competitors diverted potential customers away from plaintiff, (3) the "international nature of the Internet itself made defendant's use of its domain name a 'use in commerce' for the purposes of the Lanham Act," and (4) defendant's use of plaintiff's trademark affected plaintiff's ability to offer its services to its natural

audience, i.e., those seeking *The Buffalo News* online. The court also rejected defendant's other defences. The disclaimer on defendant's website indicating that it is a parody and commentary site not affiliated with the newspaper did not remedy the initial-interest confusion, which diverted customers from plaintiff's site. Nor did defendant's site constitute a parody because it relied on confusion, not recognition, to make its point. Finally, defendant's use of the domain name was not protected expression under the First Amendment because the domain name itself was not part of a communicative message, but rather served as a source identifier.

However, suing website owners for designing websites to parody or hyperlinking to web pages containing negative opinions will not always be upheld as trademark dilution. To succeed in their claim plaintiffs have to show that the use of their mark as the domain name constitutes commercial use. In *Ford Motor Company v 2600 Enterprises* [177 F.Supp.2d 661 (E.D. Mich. 2001)], *Ford* requested an injunction against *2600 Enterprises* to prevent it from hyperlinking from the website "fuckgeneralmotors.com" to its own Website. In December, 2001, Judge Robert Cleland of the Eastern District of Michigan dismissed *Ford's* lawsuit in its entirety for "failure to state a claim upon which relief may be granted". The decision meant *Ford* had no legal right to prohibit *2600 Enterprises* from pointing *FuckGeneralMotors.com* at *Ford's* homepage. Trademark law does not permit (*Ford*) to enjoin persons from linking to its homepage simply because it does not like the domain name or other content of the linking Web page. *Ford* has dismissed its appeal to the Sixth Circuit U.S. Court of Appeals, meaning that *Ford* has completely given up all attempts to reverse the victory that *2600 Enterprises* won on December 20, 2001 (2600 News, 2002).

These cases underscore that linking to other sites is less likely to be met with hostility if there is an otherwise friendly relationship with the owners of those sites. The decisions seem to suggest that where linking causes a likelihood of confusion as to the source or sponsorship of a Web site or of goods or services offered on a Web site through confusingly similar domain name, the linking can constitute unfair competition and trademark dilution.

3. Unfair Competition

Linking or "deep-linking" to another website may give rise to liability under state unfair competition and trademark laws. In *Playboy v. Universal Tel-A-Talk Plaintiff, Playboy* [Civ. Action No. 96-6961, 1998 U.S. Dist. Lexis 17282 (E.D. Pa., November 2, 1998)], (Loundy, 2005) *Playboy Enterprises, Inc* filed action on October 2, 1996, alleging trademark infringement and related causes of action under the Lanham Act (15 U.S.C. §§ 1114-1125) and Pennsylvania's anti-dilution law (54 Pa.C.S.A. § 1124, *et seq.*) at defendant's web site "adult-sex.com/playboy." The court enjoined the defendants from providing a link to *Playboy's* site, where the defendant was attempting to capitalize on *Playboy's* marks in promoting their own site. In addition to defendant's direct linking to *Playboy's* site, the court considered several other factors in finding

liability, such as defendant's display of Playboy's trademark/logo on its website, and its use of the *Playboy* name in its email address. The court found that the defendants have infringed on plaintiff's *Playboy* trademark, have violated the anti-dilution provision of the Lanham Act, 15 U.S.C. §1125(c) and that the defendants' activities constituted counterfeiting of plaintiff's registered trademark in violation of 15 U.S.C. §1116(d) and unfair competition (Link & Law, 2005).

Deep linking to articles on public news websites in Germany is totally legal. The Bundesgerichtshof, Federal Supreme Court and court of ultimate resort, dismissed the case of the publishing house Georg von Holtzbrinck against the Paperboy. The German Federal Court of Justice held that Paperboy did not violate the authors' rights or competition law by linking internet users to articles on news websites, bypassing home pages of the news services. Holtzbrinck is a big media group that publishes several regional newspapers, the financial newspaper *Handelsblatt*, and has many more properties. Paperboy is a pure news search engine that has shown abstracts and then linked to the articles on news websites (mostly newspaper sites), avoiding the home pages of the news services. Holtzbrinck sued the search engine Paperboy claiming that its use of "deep links" violated the Plaintiff's copyright and database rights, as well as the Unfair Competition Act. The lawsuit against an online news search engine which allowed users access to articles in the database of the plaintiffs via deep links was based on paragraph 87 b of the German copyright law (UrhG). This paragraph derives from European Union Directive 96/9/ECC of March 11, 1996 which states:

Article 5: "In respect of the expression of the database which is protectable by copyright, the author of a database shall have the exclusive right to carry out or to authorize:

- a) temporary or permanent reproduction by any means and in any form, in whole or in part;
- (b) translation, adaptation, arrangement and any other alteration;
- (c) any form of distribution to the public of the database or of copies thereof. The first sale in the Community of a copy of the database by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community;
- (d) any communication, display or performance to the public;
- (e) any reproduction, distribution, communication, display or performance to the public of the results of the acts referred to in (b)."

The Directive also protects against the "unfair extraction" of materials contained in a database, specifically mentioning downloading or hyper linking as examples of prohibited extraction methods. The Plaintiff argued that the Defendant's engine violated the Act because it enabled Internet users to bypass their homepage, and thus bypass the homepage's advertisements. Deep linking would tantamount to "unfair extraction" of materials contained in a database. Temporary reproduction" such as linking and downloading are

specifically addressed in the Directive, which also gives the database owner the right to control or prohibit any sort of temporary reproduction of all or substantial amounts of the contents of a database. It also said that bypassing the advertising in its introductory pages amounted to unfair competition. The court held that the plaintiff's copyright and database rights were not violated because by putting the articles online the plaintiff had consented to such use.

The German court ruled that web users could access stories within Holtzbrinck web sites by entering the URL into their browser, and so avoid home pages. However, the court also implied that the outcome would be different for sites that operated by subscription. The judgment of the court explicitly refers to free websites. The judge said that they might have ruled differently if the case had been about paid services. The court added that the plaintiff could still prevent deep linking via technical measures. The German court also thought the plaintiff's demand that users must start with the home page was unreasonable, says *Links and Law*. The court did not answer the question if the circumvention of these measures would be illegal.

This ruling contradicts the Munich court decision in the 2 year battle between German newspaper *Mainpost* and German search service *NewsClub*. According to a recent ruling by judges in Munich's Upper Court, using a search engine to locate stories on newspapers' sites violates European Union law (Delio, 2002). The law in question is the Database Directive. The original proposal for the Database Directive specified that only electronic databases would be protected, but the directive was eventually expanded to include all "collections of works, data or other independent materials arranged in a systematic way and which are capable of being accessed by electronic or other means." Temporary reproduction also gives the database owner the right to control or prohibit any sort of temporary reproduction of all or substantial amounts of the contents of a database. Extraction of "insubstantial amounts" of data is permitted, but the Directive is "rather vague on what constitutes an insubstantial amount." *NewsClub's* court battle began in November 2000 when it included *Mainpost's* site in the list of newspapers that are searched by *NewsClub*. *Mainpost* discovered *NewsClub's* transgression through admittance by *NewsClub*. *NewsClub's* *Mainpost*-search-engine wasn't working so *NewsClub* e-mailed *Mainpost*. *Mainpost* responded with the demand that *NewsClub* remove its *Mainpost*-search-engine. *NewsClub* complied, but *Mainpost* sued for \$249,000 anyway. *Newsclub* promptly deactivated the search engine for their website. Nevertheless, shortly afterward, it was accused of copyright infringement at a Berlin court.

In a similar case, the Bailiff's Court of Copenhagen ordered *Newsbooster* to stop deep linking to newspaper articles on three Danish newspapers' Internet sites. The Copenhagen Lower Bailiff's Court ordered *Newsbooster.com* to stop linking to websites of Danish newspapers. Copenhagen's lower bailiff's court ruled that *Newsbooster.com* was in direct competition with the newspapers and that the links it provided to specific news

articles damaged the value of the newspapers' advertisements (Delio, 2003).*Newsbooster.com* is a subscription based service that provides links to specific newspaper web pages based on subscribers' keywords. In contrast, in an unpublished Dutch Trial Court opinion (2000), a Dutch court dismissed a suit by several national newspapers to enjoin an Internet news service from deep linking to newspaper stories on grounds that the additional links served to increase traffic to the newspaper sites.

Opponents of the ruling contend that since copyright is intended to promote authorship and dissemination, it is best served by encouraging these deep links, not threatening and suing them out of existence. Requiring permission before linking could jeopardize online journals, search engines, and other sites that link - which is to say, just about every site on the Internet. On the other hand, right holders claim that a search engine that only directs a user to articles from a particular selection of newspapers and thereby generates a commercial profit from material freely accessible online constitutes a breach of authors' rights.

In *Ticketmaster v. Microsoft* dispute [U.S. Dist. LEXIS 97-3055], *Ticketmaster* sued *Microsoft* on April 28, 1997, for including a link to the *Ticketmaster* home page on *Microsoft's Seattle Sidewalk* entertainment site. *Ticketmaster* argued that a formal license agreement is required before anyone can link to its site. *Ticketmaster* had been negotiating such a license with *Microsoft*, but negotiations broke down. Instead, *Ticketmaster* entered into an agreement with *CitySearch*, a competitor of *Microsoft's* sidewalk site. *Ticketmaster* based its lawsuit on a claim that the use of *Ticketmaster's* name and trademark in the unauthorized link dilutes the value of *Ticketmaster's* trademark and sponsorships with other companies. This claim apparently rested on the legal theory that the inclusion of the *Ticketmaster* link on *Microsoft's* page constitutes trademark dilution under the 1995 Federal Trademark Dilution Act. In its answer, *Microsoft* defended its link, relying primarily on the First Amendment and the fair use doctrine. In addition, *Microsoft* asserted that linking is ubiquitous and that by placing a web site on the Web, *Ticketmaster* impliedly consented to links, including deep links. By way of counterclaim, *Microsoft* sought a judicial declaration that its deep link was lawful and suggested that *Ticketmaster's* complaint raises the issue of whether hypertext linking in any form is legal. In responding to the counterclaim *Ticketmaster* expressly denied attacking the use of hypertext links in general, limiting its claim to the validity of *Microsoft's* deep link. The case was settled with *Microsoft* agreeing to make no further deep-links.

The issue of hyperlinking was dealt with in the *Stepstone v. Ofir* case. An on-line recruiter *Stepstone* became the first company to use the EU database directive to stop a company linking its site to another. In the German case, the complainant (*Stepstone*) argued successfully that a website was a compilation which enjoys protection as a database. The company obtained an injunction against *Ofir* to stop the link. *Ofir* was using

Stepstone's advertisements to make it appear more jobs were on offer through the *Ofir* site and the linking to the *Stepstone's* site meant people missed the *Stepstone's* homepage. A substantial part of *Stepstone* was used without consent. The German court held that (1) *Stepstone's* collection of job advertisements was a database (2) that enabling users to have direct access to *Stepstone's* job vacancies bypassing the main pages infringed the exclusive right of copying, distribution, and representation and that the defendant had made repeated and systematic use of insubstantial parts (3) that what the defendant had done was prejudicial to *Stepstone* since it deprived it of advertising revenue and (4) that the question of implied consent did not arise where such prejudice exists. The case then addressed the question of whether a substantial part of the database was infringed. The courts agreed that although individual "hits" would not constitute substantial unauthorised re-utilisation, the making of an unauthorised hypertext link would encourage and make possible repeated systematic extraction and this would constitute a substantial unauthorised re-utilisation. What is more, said the court, a hypertext link clearly falls within the definition of 'making the contents available to the public'. The Database Directive creates a brand new right in law – the database right. The criterion for protection is lower than for copyright – simply requiring substantial investment in the compilation. It extends protection to the circumstance where the contents of a database are extracted, rearranged and then made available by an unauthorised party. Making available to the public the contents of a database' is a prohibited and infringing act. The legal basis for an unauthorized deep link is typically not rooted in copyright theory. Rather, it is usually based on some other property right such as trespass, trademark dilution or misappropriation. As e-commerce flourished, it seems likely that linking rights will depend upon laws of unfair competition and intellectual property.

4) Confidentiality

Intentia, a prominent, mid-sized enterprise software vendor, filed a complaint with Sweden's National Criminal Investigation Department. *Intentia* alleged that *Reuters* had accessed its computers without authorization. It openly accused the news agency of "breaking in to" its systems. *Intentia*, a company listed on the Stockholm Stock Exchange, was due to report its third quarter results. The news agency *Reuters* then published a news story revealing *Intentia's* quarterly results several hours before the company was scheduled to publicly announce the information (Delio, 2002a)Both *Intentia* and *Reuters* agree the *Reuters* reporter obtained *Intentia's* financial statement directly from *Intentia's* website. But since *Intentia* did not provide an explicit link to the report, *Intentia's* lawyers consider *Reuters'* retrieval and early publication of the information a violation of intellectual property and computer system protection laws (Leyden, 2002).*Reuters* believes that once *Intentia* placed its quarterly report on its website, the information could no longer be considered confidential or private. The prosecutor, Mr Hakan Roswall, chose to do nothing with

Intentia's complaint. Mr Roswall concluded that it is illegal to access information stored in a computer that the proprietor deems to be secret and the proprietor protects. Mr Roswall stated that *Intentia* did not clearly state that the information should be secret and did not protect the information (Greplaw, 2003). On the contrary, it was very easy to access the information. *Intentia* stated that the report would be available at a certain time, and you only had to slightly change the URL (web address) from the report of the previous quarter in order to obtain the current report. Hence, Mr Roswall did not initiate proceedings against *Reuters* or any of its reporters. Computer Sweden reported that the press release issued by *Intentia* did not expressly state when the report would be made public. If the press release had stated that the report would be made available at a given time, the outcome might have been different. In this case, *Intentia* only stated that the report would be made public 'around 2 pm' (Reuters, 2003).

5) Contributory Infringement

A linking party may be found liable for contributory or vicarious copyright infringement where it with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another.

In *Universal City Studios, Inc. V. Shawn C. Reimerdes* [(00 Civ. 0277 (LAK) (S.D.N.Y. Aug. 17, 2000)], computer hackers developed a computer program called DeCSS that circumvented a DVD's encryption protection and allowed movies to be copied. They then provided links to other sites offering the software, and urged visitors to download the software there. The court held that linking and encouragement to link are unlawful (the Digital Millennium Copyright Act, proscribes anti-circumvention of technological measures so as to protect copyright). "So long as linking liability requires clear and convincing evidence of a forbidden purpose," the court wrote, "it will not impermissibly chill speech on the Internet (EFF, 2005).

4. In-line Linking

"In- lining" is the process of displaying a graphic file on one website that originates at another. It enables creators of web pages to embed content (e.g. text, or images) by including a reference to the URL location of the material. In such cases, the linking web site owner is essentially using and displaying copyrighted material belonging to another person or entity on their website without permission of the rightful copyright owner even though no cache copy of the in lined material is made on the host server.

The case, *Kelly v Arriba Soft Corp.* [No.0055521 DC No.CV-99-00560GLI] involves a "visual search engine" located at www.ditto.com. Ditto (formerly known as *Arriba*) operates a search engine, which displays its results as small pictures - "thumbnails" images of millions of photographs - rather than as text trawls- including those of Les Kelly, a photographer of the American West, who sued them for reproducing miniatures of his images without his permission, and using them to link to his

original photos (Gigilaw, 2005).A three-judge panel of the appeals court held that the display of copyrighted images by a search engine constitutes fair use under the Copyright Act. The court also held that displaying such images without their copyright management information did not constitute a violation of the Digital Millennium Copyright Act .But in a much more far-reaching ruling, the court said that while the use of "thumbnails" was fair, inlining was not. It was the first time an appellate court had ruled on the issue of "in-line linking" or "framing", the practice followed by many search engines of providing a link that opens a browser window displaying material from another website (EEF, 2005a).The court recognized that Kelly's photographs were not actually being copied, but were being displayed without permission. The court, relying on the language of the Copyright Act, its legislative history, and the foregoing *Playboy* cases, concluded that even though a copy had not been created, *Arriba*, by linking and framing Kelly's images, violated the copyright owner's exclusive right of display and was not fair use.

Another dispute arose from inlining and involved the comic strip "Dilbert." In this case Dan Wallach a fan of the Dilbert comic strip did not like the design of the official Dilbert site and therefore created his own site using IMG links to display the cartoon images from the official Dilbert site (<http://web.archive.org/web/>, 2005).The Dilbert fan's use of inlined links to the comic strip led to a cease-and-desist demand from United Media for Wallach to stop because the display violated copyright law and the process could destroy the integrity of the comic strip (if, for example, the strip were displayed at an adult or racist site). Wallach removed the IMG links.

5. Framing

Framing is an associational tool whereby a webpage is divided into two or more sections with each frame displaying live content from other non-affiliated Web pages, but ostensibly appearing to the Internet user as single webpage. Each window is displayed in a separate portion of the Web browser screen and functions independently to display an individual Web page. In most instances, each web page is interlinked by the use of hyperlinks within the framed site, allowing for user interaction without leaving the original framed site or opening a new screen. Controversy arises when both the source and target sites use frames. Framing the content of another website within ones own website template may confuse consumers as to the source of the content. If it is used to "pass off" another person's work as one's own - referred to as "reverse passing", it may also violate trademark and unfair competition laws. Framing may trigger a dispute under copyright and trademark law theories because a framed site arguably alters the appearance of the content and creates the impression that its owner endorses or voluntarily chooses to associate with the framer. The source site may use its own frames to obscure or cover up the target site's frames. Thus, as with

deep linking, the target site's sponsors are being deprived of the exposure for which they paid. It is generally agreed that the strongest case for copyright infringement in "framing" cases is a derivative works claim. The copyright owner's exclusive right to prepare derivative works is violated if a legally-owned copy of the copyrighted work is altered, modified or presented to the public in a distorted form.

In *Futuredontics Inc. v. Applied Anagramic Inc.* (AAI), [No. 97-56711, 1998 U.S. App. LEXIS 17012 (9th Cir. 07/23/98)], a dental services website, framed the content of a competing site. The frames included information about *Applied Anagramic* as well as its trademark and links to all of its Web pages. It was sued under the theory that framing creates a derivative work subject to copyright infringement. Injunctive relief was denied, and the denial was affirmed by the 9th Circuit on July 23. The court found that *Futuredontics* had not demonstrated either the possibility of irreparable injury or that the balance of hardships tipped sharply in its favour. *Futuredontics'* claims, that the AAI framed link "falsely implies that AAI - not *Futuredontics* - is responsible for the success of *Futuredontics'* dental referral service," even if true, is not tied to any tangible loss of business or customer goodwill (Computer Lawyer, 1998). However, the defendant's motion to dismiss was also denied. The court reasoned that the addition of the frame modified the appearance of the linked site and such modifications could, without authorization, amount to infringement. The case was finally settled.

One of the first major cases to challenge framing on intellectual property theories was *Washington Post Co. v. Total News, Inc.*, [No. 97 Civ. 1190 (PKL) (S.D.N.Y. June 6, 1997)]. *Total News* had put up a website using frames, with links to many other web-based news services, identified by their trademarks, in a narrow column to the left, an advertising banner across the bottom right of the screen, and a content window in the upper right of the screen. When a user clicked on a news service, that news service's content appeared within the window on the *Total News'* site. However, when the news service's content first loaded, the advertising banner on the *Total News* Web site obscured its advertisements. Some of the framed sites responded by setting their pages to refresh when loaded, so that the pages appeared in their own window without the *Total News* frame. The plaintiffs, who include CNN, The Washington Post, Dow Jones, Times Mirror and Reuters, were upset that advertisements sold by *Total News* are displayed in the advertisement frame at the same time that the linked-to news service was displayed in the news frame, thereby depriving plaintiffs of revenue from their own banner ads, and also that the *Total News* URL, and not the URL of the actual news source, appeared in the address portion of the user's Web browser. The complaint in this case involved accusations of "blatant acts of misappropriation, trademark dilution and infringement, false advertising, unfair competition wilful copyright violations, and other related tortuous acts."). The case was settled and under the settlement, *Total News* may continue

to provide links to the plaintiffs' Web sites, but only in such a way that internet users are taken directly to the plaintiffs' sites without *Total News'* frames. The settlement also required that any linking should not 1) cause confusion, mistake or deception; 2) imply endorsement or sponsorship by or association with the publishers without prior authorization; and 3) dilute the publishers' trademarks.

If the case has gone into trial, direct copyright infringement may have been difficult to prove by the plaintiffs given the fact that *Total News* did not copy the copyrighted information contained in plaintiffs' news services, but rather the user downloads a copy of the information by browsing. In its defence, *Total News* could have also argued an implied license, that is, that by posting copyrighted information on the Web without including any express-use limitations, plaintiffs should anticipate that others will use established programming techniques, such as hyperlinks and frames, to access the material. Plaintiffs may have needed to offer proof that the defendants adversely impacted plaintiffs' advertising market.

The use of framing brings forth a host of issues similar to those of linking. Unfortunately, they remain wide open to debate and have not yet been fully addressed by any court.

6. Meta-tags

Meta-tags are areas of text that are hidden from the viewer of a page but accessible to browsers and robots. They are located in the head section of the html code. Robots use Meta-tags to find out more about a web page, so they can affect the search ranking. Meta-tags are employed for the sole purpose of attracting potential customers to a site. Trademark issues can arise if the website owner uses a logo, design, or other trademarked symbol or mark as a "hot" button to activate a link, to insert as a meta-tag, or as part of its domain name. Placing the names of competitors and other competitor trademarks in meta-tags will often steer a search engine toward these individuals rather than to the website of the competitor. Courts have ruled that placing another's trademark in the user's meta-tag is trademark infringement.

In *Brookfield Communications, Inc. v. West Coast Entertainment Corp.* [No. 98-56918 (9th Cir. Apr. 22, 1999)], the Ninth Circuit Court of Appeals Ninth Circuit, reversing the district court, enjoined defendant from using plaintiff's "movie buff" trademark in either a domain name or meta-tags found on defendant's web site. The court rejected defendant's contention that it had superior rights to the mark by virtue of the fact that it commenced use of the mark before plaintiff. While defendant had used the mark in a domain name registered with NSI before plaintiff commenced its use of the mark on the Internet, defendant did not commence operation of a site at that domain name until well after plaintiff commenced use of the mark. Defendant's only use of the mark that arguably predated plaintiffs was in "limited e-mail correspondence (Samson, 2004)." According to the Court, Brookfield held

a valid trademark in *moviebuff.com* and West Coast's use of it in the meta-tags caused initial confusion of consumers by pulling them away from Brookfield's site. In reaching this conclusion, the court relied on the fact that the marks at issue were identical, and were both using the Internet to market related products.

The case illustrates that the improper use of another's trademarks in a site's metatag amounts to a purposeful action to misdirect customers and generate pre-sale confusion. Because bad intentions suggest intent to mislead and benefit from the goodwill associated with another's trademark, cases involving suspicious or deceitful conduct often appear to present the clearest cases of infringement. For this reason, several courts reacted quickly with strong injunctive orders for the plaintiffs in hidden metatag situations. But some other early meta-tag cases also demonstrated that even the use of another's trademark in a hidden meta-tag can, under some circumstances, constitute allowable descriptive use as was decided by the court in *Playboy v. Calvin Designer Label*[44 U.S.P.Q. 2d 1157 (N.D. Cal. Sept. 8, 1997)].

In this case, the defendant had developed an adult entertainment site and had used Playboy's famous marks, "playboy" and "playmate" in its meta-tag. U.S. District Judge Charles Legge of the Northern District of California held that this use of Playboy's trademarks constituted infringement and dilution that justified an injunction. The court found that *Playboy Enterprises Inc.* (PEI) had demonstrated a likelihood of success on its trademark and unfair competition claims. Under the injunction, the defendant was enjoined from using PEI's marks in any manner, including as Internet domain names and in metatags on its home page or web site. The court also ordered the defendant to cease using the domain names, and to request that Network Solutions Inc. cancel the domain name registrations and delegate control over the domain names to the court (Wilson, 1998).

In the summary proceedings in the case of *Road Tech Computer Systems Ltd v Mandata Limited*, (IPLegal, 2005) the use of a competitor's UK registered trademark both in the meta-tags for the Defendant's rival website and in hidden text on its website, was admitted by the Defendant to amount to trademark infringement and the court held that the use of unregistered mark in the same way connected with the claimants and therefore amounted to civil wrong of passing off. The traditional requirements of passing off are threefold: That the claimant has established goodwill among the public in relation to its goods and services, such that its mark is distinctive of the goods and services. Misrepresentation by the defendant would likely lead persons wishing to buy the goods and services and to be misled into buying the goods or services of the defendant. No actual damage had to be proven in order for the court to award monetary compensation to the claimant. Since in this case the keyword in the meta-tag was identical with the registered trade mark of the Claimant and was used to promote services which were the same as those specified in the registration, it was not necessary for the claimant to prove confusion: hence, the

Defendants admission.

On the 19th of December 2000, the Austrian Supreme Court (OGH) for the first time delivered a decision in the context of Meta-tagging (www.internet4jurists.at, 2005). In line with existing US and German case law, the Austrian Supreme Court held that as a general rule, use of a protected business sign by a third party as a meta-tag violates the Austrian Unfair Competition Act. According to the Court, however, this principle does not apply if use of the business sign as a meta-tag is objectively justified and does not mislead the public. In this particular case, the defendant company could prove that it had previously licensed a number of patents to the plaintiff company (as the owner of the infringed trademark used as meta-tag). The Court held that it was in the objective interest of the defendant company to inform the public on the products (including the related trademarks) the plaintiff company produced under the licensed patent rights. Consequently, in the Court's opinion, the defendant company was also entitled to use such trademark as a meta-tag on its Web site. By use of a meta-tag in the case at issue, the average Internet user would not consider the trademark concerned as belonging to the defendant company.

7. Spidering

A search engine robot is called a "spider": the reason being that when the robot/spider goes to a page, it follows all the links on that page. In the imagination this action resembles a many legged spider. The robot follows the links to see if the pages go where they say they go. To know what these pages are the spider reads their meta-tags. Robots normally always follow down at least one level when they index a page, and many spiders return later to do a "deep crawl" and index every page they find (Rukavina, 2004).

Search engines like Google or basically any web application that needs to grab a snapshot of the *entire* Internet so that it can be searched, indexed or otherwise sliced and diced – generally develop this snapshot using automated web browsing computer programs that start at one web page, collect all the links on that page and visit each of them in turn, collect all the links on *those* pages, and so on and so on and so on. This process, because it is conceptually like "walking through the web" is called *spidering* or *crawling* (Wagner, 2001).

On Dec. 10, 1999, eBay, the world's largest Internet auction service, filed a complaint against *Bidder's Edge* in the US District Court (56 USPQ2d 1856), alleging trespass to personal property, unfair business practices, copyright infringement, misappropriation, false advertising, trademark dilution, injury to business reputation, interference with prospective economic advantage, and unjust enrichment. The defendant in this case lists prices from dozens of Internet auction sites, including *eBay*, thus allowing the viewer to shop for items from many different sites at once. *Bidder's Edge* had used the robots to retrieve vast amounts of eBay auction data for display on its own site. The data was then combined with auction listings from other sites so that online buyers could easily

comparison shop for items--an antique watch, for instance--from multiple auctions sites on Biddersedge.com.

On May 24, 2000, U.S. District Court Judge Ronald M. Whyte issued a preliminary injunction ordering *Bidder's Edge* to stop spidering auction data from eBay and posting it on its site. The judge ruled that the spidering deprived *eBay* of the use of its personal property, likening the activity to unlawful trespass and expressing concern about potential harm to eBay's computer resources and said that even if its searches use only a small amount of eBay's computer system capacity, *Bidder's Edge* has nonetheless deprived *eBay* of the ability to use that portion of its personal property for its own purposes. *Bidder's Edge* settled the case. The settlement prohibits *Bidder's Edge* from using any automated software programs from accessing or copying material from *eBay's* database (Wingfield, 2001).

8. Solutions

Linking to and framing of content contained on an unrelated web site is controversial. It has not only grown with the expansion of the Internet, but has also resulted in numerous disputes regarding its legality. In order to avoid legal tussles, every website developer should know when using others' graphics, deep links and frames to get to other sites is allowed, and when it can lead to trouble. The simplest method of avoiding linking problems is to seek permission. As a general rule, one does not need permission for a hyperlink that uses highlighted text. But when in doubt, it is best to ask permission to link and sign what's called a "linking agreement". Another solution would be the use of a prominently placed disclaimer. This may lessen the possibility of litigation. A disclaimer is a statement denying an endorsement for or from another site or waiving liability for a potentially unauthorized activity. By attributing the deep-linked content to its source, linking parties would avoid consumer confusion. Hyper linking may be a good strategy for business, but until the law is made clear as to deep linking's legal validity, it would be wise not to deep link.

9. Conclusions

Deep-linking goes to the very heart and soul of the Internet. If the simple process of posting a link to another site becomes mired in regulation, the usefulness of the Internet as an effective communication of information could disintegrate. The common factor in the court cases that have been discussed in this study is that the use of linking, framing and meta-tags were perceived by the respective plaintiffs as threat to their advertising revenue as well as image or reputation. The arguments raised indicate that there are three grounds on which a website proprietor might be able to resist linking: trespass, breach of copyright and trademark, and unfair competition. Decisions of the court have mostly been on a case-by-case basis, under theories of trademark, copyright, defamation, invasion of privacy, unfair competition, trespass, and the

infringer's lack of good faith and other laws. The legal answer is by no means clear and commentators hold widely diverging opinions. Different courts have arrived at different and often, conflicting results. At present, there is no law prohibiting linking, and other associational tools. In Europe and in the United States, there is developing a line of conflicting court cases.

Many businesses who don't want their valuable content associated with or connected to certain sites have challenged some linking practices and are currently lobbying to regulate their use. Some commercial site owners believe it is within their prerogative to restrict deep-linking. This reflects the frustration certain people have with a loss of control once they post something. For instance, in an *amicus brief*, R.A. Epstein of the University of Chicago written on behalf of Reed-Elsevier plc, the National Association of Realtors and several e-commerce companies who are lobbying the U.S. Congress for increased protection of online databases argued that a web site is real property and not a personnel property and therefore any electronic intruder may be kicked off without the need to show harm (De Vuyst, 2004) .This theory would induce Website owners to bargain over access rights.

Linking is so fundamental to the functioning of the World Wide Web that many users feel that any legal restriction on their use of links is a violation of the right to travel and speak freely in cyberspace. Requiring permission before linking could jeopardize online journals, search engines and other sites that link – which is to say, just about every site on the Internet. The integrity and freedom of the Internet could be compromised and endangered. If the Web's creators had not wanted linking, "they would have called it the World Wide Straight Line" (Jesdanun, 2002).

Under current copyright law, almost any artistic or linguistic composition which may be posted on a web site is likely to be copyrighted, but by posting materials on an open computer network, a publisher is granting web viewers at least the implied right to view its postings. It seems the jury's still out when it comes to deep linking. In general, the courts seem reluctant to outlaw deep linking and have employed several lines of reasoning to avoid issuing injunctions to the defendants. Some of the early cases imposing such restrictions may have been driven by a fundamental misunderstanding of the Web and users' needs by the courts. Legal limitations should rarely be imposed on linking. If it does, it should only be in some kinds of situations.

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