

COPYRIGHT IMPLICATIONS OF HYPERLINKING AND FRAMING ON THE NET

Introduction

As Internet usage increases rapidly, users may be unwittingly exposing themselves to infringement of intellectual property rights through linking and framing.

It is generally believed that, although viewing a site does involve copying material on the site to the cache (or temporary internet files folder) on a user's hard drive in order to view it, the user has an implied licence to do this. However, there is no specific legal authority on this yet, and there are different possible copyright issues arising from linking to, and framing of, websites.

The Simple Link

The simple link is one in which the user is taken from the site which the user is currently viewing to the homepage of another site, and the link is identified clearly as the web address of another with a statement such as: "for more information on ABC, visit the site at <http://www.abc.com>".

As this type of link merely facilitates the navigation between the two sites, there is no copyright infringement because there is no copying involved. Moral rights are not infringed because the user is clearly being directed to another's site.

However, if the link is used for defamatory or trade mark infringement purposes, an action could arise. In the US case of *Playboy Enterprises, Inc. v. Universal Tel-a-Talk, Inc.* (1998), Universal Tel-a-Talk operated an x-rated website and used the Playboy name and logo to indicate the location of the link to the Playboy site. Playboy sued on the basis that users were likely to be confused into thinking that Playboy endorsed and/or sponsored the Tel-a-Talk site. Playboy also managed to prove that its trade marks would be tarnished by association with an x-rated site.

A German Court has decided that a content provider that included a link on its site was liable for the contents of the third party linked site, finding that the third party content was effectively adopted by the link. The importance of this case is that it means that any Internet content accessible from a computer in Germany will be subject to the German Teleservices Act.

The further away we move from the simple link to deep linking, the more legal issues arise, as the following demonstrates.

Deep Linking

A deep link is a link to a page on a site other than the homepage. It therefore bypasses many of the main details of the business of the site, and often will bypass the site owner's terms and conditions, privacy policy and copyright and trade mark notice and, most importantly for the site owner, any advertising on its homepage (which is often the main source of revenue for many site owners).

There have been a number of US cases dealing with deep linking issues on the Internet (there being presently no UK case dealing with deep-linking where the page linked-to did not contain copyright protected material), including *Ticket Master Corp. v. Tickets.com Inc.* Ticket Master operated a site which allowed customers to purchase tickets online to various events. Tickets.com also sells tickets to various events on-line, but in addition to that service they provide information on how to purchase tickets that it does not sell itself, and provide links other sites. In this case, Tickets.com granted the link which takes the user to an interior page of Ticket Master's site displaying the Ticket Master logo, bypassing their homepage.

The judge stated that “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. There is no deception in what is happening.”

The judge also stated that “deep linking by itself” (i.e. without confusion of source) “does not necessarily involve unfair competition”. It would therefore appear that where the user has linked, albeit deeply, to the site of another, and the link is clear and unambiguous, there can be no traditional passing off although there may possibly remain issues of implying association and dilution of a trade mark.

The judge further held that as it was possible to move on from the home page without having to agree to the terms and conditions or even read them, then it cannot be said that this creates a binding contract with anyone using the site. Whilst US cases are not binding in the UK, they often have persuasive authority in the UK courts.

In another case, StepStone, an on-line recruitment firm, which operates in 16 European countries, was awarded an injunction in the German Courts in December 2000 against Ofir, a Danish media group to stop the use of links between the two companies’ sites. It became the first company to successfully use the EU Copyright and Database Directive (“Directive”) to prevent another company linking directly to the content of its site. Both companies offer on-line recruitment site portals in the UK, Germany, Denmark and France. StepStone argued that Ofir was using StepStone’s job adverts to inflate the number of jobs offered through its site.

StepStone argued that Ofir was also deep-linking to the StepStone site, meaning that visitors were taken to job adverts and bypassing StepStone’s home page and banner advertisements. The Court in Germany found that Ofir was using StepStone’s job advertisements as its own and this meant there was a threat that Ofir could take business from StepStone.

This case illustrates an effective method of protecting deep-linking to another site’s database. The Directive was implemented in the UK under the Copyright and Rights in Databases Regulations 1997. Under general copyright laws it would have been difficult to show there had been an infringement of copyright. As a general rule, under English law, if it is possible to show confusion as to the source of the deep-linked page and injury to the goodwill of the claimant’s website business, a claimant might consider bringing an action in passing off.

Framing

Framing involves calling up a new web-page from a link within a website, which is then framed in a particular manner to give the impression that it forms part of the initial site. In other words, the URL remains unchanged, and the advertising, icons, logos and writing surrounding the frame remain unaltered.

For example, in the US case of Washington Post Co v. Total NewsInc 1997, the effect was that a viewer could read a news story from the Washington Post, but would continue to see the Total News logo and advertising.

Copyright infringement issues become far clearer when considering framing. There is little difference between a piece of text from one site that has been framed and the person cutting an article from a newspaper and publishing it as part of his own newspaper. The implied licence granted to users by site owners no more extends to utilising the text or graphics from their site as part of another’s site, than it permits the other party to copy text or graphics and paste them into his or her site. This would constitute copyright infringement.

In the UK, framing also raises issues of moral rights. The rights include the right to be identified as the author of the work and not to have the work falsely attributed to another. In both cases,

there is strong argument that the moral rights of the author would be breached if the site owner has framed works from another's site owner.

It is also not difficult to see the circumstances in which a framed link could be used to pass one's goods off as those of another or some sort of association between the two sites.

There are similar issues relating to potential database infringement under the EU Database Directive, where a deep link effectively contains a substantial part of the contents of the accessed database. Likewise, the use of spiders to trawl and create useful information from a competitor's website may constitute trespass where there is damage to a computer system from their use (e.g. it slows down access to the website). The law in this area is more advanced in the US and it remains to be seen whether a UK court would take the same view.

Executive Summary

- A link is a useful means of moving from one site to another.
- As the type of link moves away from the simple link to deep linking and framing, the legal issues become more involved.
- If you are going to provide a link to another's site, the safest legal means of achieving this is by adopting a simple link and not using framing.

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