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LEGAL ISSUES

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One of the most important functions of the World Wide Web is the ability to link to other Websites. Indeed, the three characteristics that separate the World Wide Web from what went before (Telnet, Gopher, etc.) are the ability to deliver multimedia, the use of a graphical interface, and the ability to link seamlessly and easily to other sites. Without these three factors, the Web would not have obtained the popularity it currently has.

Yet the idea of linking and framing is troubling to some specialists in intellectual property. There are both copyright issues and trademark issues involved in linking and framing. In addition, there are some other concerns, such as libel, that need to be brought up.

Does this mean that linking is dead? Is the Web destined to go away? Of course not! But there are definitely some things that you can do, and some things that you shouldn’t do. The point of this column is to help show the difference between what is permissible and what isn’t.

Issues with Copying, Displaying, and Transmitting Files

One concern with copyright law and the World Wide Web is the issue of making copies. Section 106 of the copyright act provides that the copyright owner has the exclusive rights:

• to reproduce the copyrighted work in copies;
• to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
• 5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly;
• 6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

According to the copyright act, “Copies” are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."

The issue in the case of Websites involves the fact that each time you access a Webpage you are making a copy of the page on your computer. Of course, the creator of the Website knows that this is the case, and under normal circumstances this is no problem. After all, by placing an unencrypted page on the Web without password protection, the owner is in effect giving the public an implied license to view their page, even if it means making an incidental copy along the way.

Multimedia, sound, and graphics, on the other hand, are a bit more difficult. With multimedia, you are not only making an incidental copy, but are also displaying the work, which is also subject to copyright law. According to Title 17, “To ‘display’ a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsuccinctly [sic].”

Once again, however, if the copyright owner has placed the items on the Web without encryption or password protection, there is an implied license to use. The problem that crops up from time to time involves the downloading or display of multimedia involves works that are posted without the consent of the copyright holder. Since the Website operator can’t grant more rights than they have themselves, if the item is posted illegally an innocent user can’t obtain legal rights to display the material.

This particular scenario frequently occurs with regard to music. A Website operator will sometimes place a digital audio file on their Website, despite not having permission from the copyright holder. If this file is then subsequently downloaded, the person who is listening to the file doesn’t have legal rights. In effect, this was the basis for the finding in the Napster case, which involved a file transfer system whereby users could communicate with one another to exchange musical files.

According to the opinion, “Through a process commonly called ‘peer-to-peer’ file sharing, Napster allows its users to: (1) make MP3 music files stored on individual computer hard drives available for copying by other Napster users; (2) search for MP3 music files stored on other users’ computers; and (3) transfer exact copies of the contents of other users’ MP3 files from one computer to another via the Internet. These functions are made possible by Napster’s MusicShare software, available free of charge from Napster’s Internet site, and Napster’s network servers and server-side software. Napster provides technical support for the indexing and searching of MP3 files, as well as for its other functions, including a ‘chat room,’ where users can meet to discuss music, and a directory where participating artists can provide information about their music.”

In the case of Napster, the 9th Circuit found that there was sufficient reason to enjoin the continued operation of the company on the grounds that Napster could be found to have contributed vicariously and materially to copyright infringement through their control of the service. In other words, even if Napster didn’t know that their users were violating copyright, the control that they held was enough to give Napster the duty to ascertain whether their clients were violating copyright law, and to take affirmative steps to prevent these violations."

On the other hand, the Napster case stands for the proposition that cyberspace is subject to the same copyright restrictions as real space. On the other hand, however, a large part of the case rests on the fact that copies were digitally transmitted and on the control that Napster held over the entire system. According to Title 17, “A ‘digital transmission’ is a transmission in whole or in part in a digital or other non-analog format.” If the Website operator puts in a link, he or she is not creating a digital transmission; rather, the operator is re-directing the user’s browser to another site. It is that other site that

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is performing the digital transmission. In terms of linking, a simple link on a Website does not rise to the level of copyright infringement. Nonetheless, Web developers should be advised to avoid linking to digital files unless they are sure there are no copyright problems.

Issues with Deep Linking and Framing

Although a simple link doesn't generally rise to the level of a copyright violation, there are significant problems with the inclusion of deep links and with frames. A deep link is a link to a page inside another Website without first going to the homepage. According to attorney Randel S. Springer, “Framing is a hybrid of linking which allows a Website to display on a single screen content from its own site with content from another Website simultaneously. In the usual case, the framing site’s content appears in a “frame” which surrounds the content of another site. . . . In most instances, the “framing” site’s Web address is listed at the top of the browser.”

The reason that some copyright experts are troubled by deep linking is because it may appear to the user as if the material comes from the original Website. This is a much larger problem with frames than with deep linking, but is still an issue. As a result, some Websites don’t allow interior pages to be linked. If you are at all in doubt, check the terms and conditions for Website use, and don’t use more than the terms allow.

The main case discussing deep linking is Ticketmaster v. Tickets.com. In this case, a start-up company called Tickets.com employed a spider (a program that visits Websites and indexes them automatically—also called a “crawler” or a “bot”) to locate information about local events. Among other things, the spider indexed interior pages within the Ticketmaster Website. These interior pages were then linked from Tickets.com.

In the Ticketmaster case, the District Court identified three copyright issues. The first involved the incidental copy in computer memory; the court found that this was within fair use and was not a violation of copyright. The second issue was whether the URLs are subject to copyright such that a linking site can’t copy them; the court found that they are not subject to copyright. The third issue, however, is much more relevant for this article, i.e., whether deep linking is a violation of copyright. The District Court found that:

[Tickets.com] did not try to disguise a sale by use of frames occurring on the Tickets.com Website. [Tickets.com] further states that when users were linked to [TicketMaster] Web pages, the [TicketMaster] event pages were clearly identified as belonging to [TicketMaster]. . . .

In this case, a user on the [Tickets.com] site was taken directly to the originating [TicketMaster] site, containing all the elements of that particular [TicketMaster] event page. Each [TicketMaster] event page clearly identified itself as belonging to [TicketMaster]. Moreover, the link on the [Tickets.com] site to the [TicketMaster] event page contained the following notice: “Buy this ticket from another online ticketing company. Click here to buy tickets. These tickets are sold by another ticketing company. Although we can’t sell them to you, the link above will take you directly to the other company’s Website where you can purchase them.” (emphasis in original)

Even if the [TicketMaster] site may have been displayed as a smaller window that was literally “framed” by the larger [Tickets.com] window, it is not clear that, as a matter of law, the linking to [Tickets.com] event pages would constitute a showing or public display in violation of 17 U.S.C. § 106(5). Accordingly, summary judgment is granted on the copyright claims of [TicketMaster] and it is eliminated from this action.

In effect, the District Court found that, since Tickets.com was careful to let users know that they were going to another Website, there was no copyright infringement. Tickets.com didn’t provide pages from Ticketmaster as if they were theirs. This is the only real decision in the area of deep linking, and it appears to indicate that, as long as proper attribution is given, there are no copyright problems with deep linking.

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Framing, on the other hand, is almost by definition an issue both in terms of copyright and trademark. For copyright purposes, frames are problematic in that they appear to be passing off the work of another as if it were your own. According to Randal S. Springer, “Although there is little direct guidance on whether framing is legal, the practice certainly has the potential for causing consumer confusion, and thereby violating trademark laws and unfair competition laws.” Since the point of trademark protection is to protect the goodwill and investment of businesses while protecting consumers against misrepresentation and confusion as to the origin of goods and services, it makes sense that frames would resolve trademark issues.

In trademark law, claiming the product of another as your own is called “palming off.” The Lawyer’s Edition highlights the Dastar case contains an excellent description of palming off and reverse palming off. “Passing off” or “palming off” as the practice is sometimes called occurs when a producer misrepresents the producer’s own goods or services as someone else’s. “Reverse passing off” occurs when the producer misrepresents someone else’s goods or services as the producer’s own. The language of § 43(a) of the Lanham Act (15 USC § 1125(a)—which is amply inclusive of reverse passing off—forbids, for example, the Coca-Cola Company’s (1) passing off Coca-Cola’s product as Pepsi-Cola, or (2) reverse passing off Pepsi-Cola as Coca-Cola’s product.

The problem is that when frames are employed, it is difficult to tell the origin of the Website material. The most famous framing case involved a Website called TotalNews that framed stories from the Washington Post and other newspapers. Although this case never came to trial, the parties settled out of court.

According to the settlement document: Defendants agree permanently not to directly or indirectly cause any Plaintiff’s Website to appear on a user’s computer screen with any material (e.g. Universal Resource Locator (URL), text, graphics, pop-up window, audio, video or other) supplied by or Associated with Defendants or any third party, such as an advertiser, acting in privity [sic] with Defendants are under Defendants’ direct or indirect control; in particular, Defendants agree permanently to cease the practice of “framing” Plaintiffs’ Websites as that practice is described in the complaint in this case. Plaintiffs agree that Defendants may link from the TotalNews.com Website or any other Website to any Plaintiff’s Website, provided that:

1. Defendants may link to Plaintiffs’ Websites only via hyperlinks consisting of the names of the linked sites in plain text, which may be highlighted;
2. Defendants may not use on any Website, as hyperlinks or in any other way, any of Plaintiff’s proprietary logos or other distinctive graphics, video or audio material, nor may Defendants otherwise link in any manner reasonably likely to:
   i. imply affiliation with, endorsement or sponsorship by any Plaintiff;
   ii. cause confusion, mistake or deception;
   iii. dilute Plaintiffs’ marks; or
   iv. otherwise violate state or federal law.

The TotalNews case is one of the few bits of legal guidance available on the legality of framing. As a result of the settlement, most authorities suggest that the way to stay legal is to follow the guidelines that were laid down in the TotalNews case. In other words, make sure that when you are framing that it is very clear where the content came from, no trademarks are used without permission, and it is clear that there is no implication of sponsorship. When you are using a frame, it is generally best if you record the framed site’s terms and conditions, and if you obtain permission before creating the frame.

Other Legal Issues with Linking and Framing

In addition to copyright and trademark, there are other ways in which linking and framing can get a Website operator in trouble. Linking to a site that contains illegal material is a good way to attract law enforcement attention and wind up in court. For example, a Webmaster who created a “directory of child pornography Websites” would be sure to have a visit with the FBI. (Whether or not the charges finally stick depends on what the charges are and on the courts; however, I can think of a pretty good argument for charging the Webmaster as an Accessory After the Act.)

2600 Magazine found this out a few years ago when they tried to write a story about code that broke encryption on DVDs. Under the Digital Millennium Copyright Act, it is a criminal offense to remove or disable an encryption device. A developer in Norway (where the DMCA could not be enforced) had created code that would disable en- cryptions, and had placed it on a Website. In their story about encryption, 2600 Magazine attempted to place a link to the developer’s Website. After being sued by the Motion Picture Association of America, 2600 was barred from placing a link on their Website that would send users to the code.

Another potential problem with linking and framing involves the law of defamation. According to American Jurisprudence, the courts have defined defamation as being:

- A false publication causing injury to a person's reputation, or exposing him (her) to public hatred, contempt, ridicule, shame, or disgrace, or affecting him (her) adversely in . . . trade or business.
- The publication of anything injurious to the good name or reputation of another or which tends to bring him or her into disrepute.
- That which tends to injure reputation or to diminish the esteem, respect, good will, or confidence in the plaintiff or to excite derogatory feelings or opinions about the plaintiff.
- Communications made by a defendant to a third party that cause some injury to the plaintiff's reputation by exciting derogatory, adverse, or unpleasant feelings against the plaintiff or by diminishing the esteem or respect in which he (she) is held.
- Repeating the false statements of others.

In order to constitute defamation, the statement must be false. However, it cannot be something that is a matter of opinion. For example, “authors' description of plaintiff as 'drab and grey' and implication that she was 'unpleasant' were mere statements of opinion, not actionable as defamatory.

In the case of linking and framing, the problem stems from the issue of “Repeating the false statements of others.” Articles and books can be the subject of scrutiny; for example, newspapers are often sued for reporting the defamation of others. Even book reviewers are not exempt: "Assertions that would otherwise be actionable in defamation do not become nonactionable [sic] if they appear in (the) context of (a) book review." By the same token, linking to a Website that contains libelous information may constitute publishing the material for the purposes of defamation law. As a result, Website creators need to examine all the links they provide to determine if there are potential problems.

Conclusion

There are many issues to consider when determining the legality of linking and framing. Digital transmission, display, and copying of Websites and multimedia content can get a Website operator in trouble. Deep linking and framing also have the potential to be problematic. In addition, linking to illegal Websites or to sites that contain defamatory material could be an issue.

The basic things to remember are 1) check out the site you are linking to, in order to make sure it doesn’t have any overly illegal or defamatory material; 2) don’t copy anything, simply link; 3) never copy any trademarks from the other site; 4) make sure it is clear that you are not the author; and that it is clear where the material comes from; and 5) make sure that it doesn’t appear as if you have an association or sponsorship from the site you have linked. If you take all of these steps, you should be able to keep yourself out of court. Although digital transmission, display, linking, and framing have the potential to create problems, observing just a few simple rules can help reduce this problem, and keep the World Wide Web available for the general public.

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