

**LAW SCHOOL
THE UNIVERSITY OF QUEENSLAND**

**LAWS7825: SUPERVISED RESEARCH PROJECT A
Professor Kamal Puri**

**Linking, framing and meta-tagging, new ways of copyright
and trademarks infringement**

**By Javier Felipe Sanchez Iregui
Student number 38056895**

INTRODUCTION

One of the reason to select this topic as my research project was the necessity of exploring the technical concepts on internet in relation with the traditional law fields of intellectual property.

There are several basic concepts which are well known by the technicians and those who uses to work in the internet or computer business. Terms such as linking, framing and meta tags are elemental concepts in the computer science.

Lawyers around the world know the rules of the copyright issues, trade marks and their application under the traditional ways of property. Nevertheless, as a twenty century lawyer one can not be indifferent in front of the internet legal challenges. In addition, there is no doubt that the traditional ways of property are perfectly admissible in the internet field and the best proof of it, it is the worldwide new legislation such us the Uncitral model for electronic commerce laws and the recommendations of the WIPO, among others.

The aim of this essay is to explore the internet concepts such as linking, framing and meta tags and establishing its point links with the legal terms of trade marks and copyrights. For instance, no one could nowadays deny the existence of copyright matter in the text published in any web page, nor even the trade marks right involved in those pages in front the any element that can gather the requirements of these kind of distinctive elements.

Well, at this point is essential to be clear about the fact that, although the most of the lawsuits about linking, framing and meta tagging have had place in the American forum, this essay is not going to discuss a particular local law, nor an international treaty. Nevertheless it is going to include some brief references to the American and the Australian laws just in order to put the concepts of linking, framing and meta tagging within a legal context.

The aim of this essay is to reveal how this internet tools can became in new ways of intellectual property infringement in general speaking. In that sense the goal of this essay is to provide the general elements to anyone for studying the figures of linking, framing and meta tagging under the scope of powerful internet tools that can harm the intellectual property of anyone in most the legislations of the world.

“A "link" is a set of commands in Hypertext Markup Language (HTML) that when actuated by right-clicking a mouse directs your browser to another page. The new page could be in the website you're viewing or it could be a page in another website.”⁵

By definition, a Hypertext Mark-up Language, is defined as “ HTML is not really a programming language, but a way to format text by placing marks around the text. For example HTML allows you to make a word bold or underline it. Early word processing programs used to work this way. HTML is the foundation for most web pages.”⁶

Mrs. Tania Rose has explained clearly the structure of a namely linking process through this words:

“Given the vastness of the World Wide Web, there is a need for efficient methods of grouping Web pages with one another.

- The linking function is the standard method used. Web pages are created using Hypertext Markup Language (HTML).
- Each Web page has an address or Uniform Resource Locator (URL) that identifies its whereabouts to users.
- A “link” is an “embedded electronic address that points to another Web location.
- One type of link, referred to as an “out link,” enables a user to jump instantaneously from one site to another simply by clicking on a word or phrase with the mouse.
- The out link stores the electronic address of the destination site, and clicking on the link sends that data to the browser, which then moves the user to the destination site”⁷

⁵ Law Offices of Douglas Clark Hollmann, <http://www.copyrights-attorney.com>

⁶ BASIC INTERNET TERMS <http://www.jworkman.com>

⁷ Unlawful Linking and Framing, by Tanya Rose

Regarding with the sort of linking process that exists, there is not consent among webmasters in the way of setting up the classification. Nevertheless, it is common to hear the expressions “link and “deep-link”. Generally speaking a link is the process that has been defined above, meanwhile: “a "deep link" is a link to an internal portion of another site instead of connecting your browser to the other website's home page. In other words, you don't enter the site through the front door, you suddenly appear somewhere deep inside the other website.”⁸

There are other authors that have talked about three different types of links as follow: “intra-page, intra-system, and inter-system. Intra-page links connect different parts of the same document. For example, a long document may have a link at the end which takes the user back to the beginning. Intra-system links connect different documents on the same server. An intra-system link on a university's server might connect the home pages of two different departments. An inter-system link connects documents on different servers. Thus, a document concerning intellectual property law on a university's server might be connected to the home page of the United States Patent Office”⁹

There are other authors who have included the inlining process as one of the kind of linking likewise. In general speaking is “When the creator of a Web site incorporates graphic files from another site's Web page onto the pages of his or her site.”¹⁰

Perhaps the best way to illustrate the readers in the form in which a linking process works in a real web page is providing some samplers. In the cases of single and deep links, the reader can check the page <http://www.Tickets.com>, which gathers information and services offered on a variety of other sites and linking Web surfers to those offerings.

⁸ Law Offices of Douglas Clark Hollmann, <http://www.copyrights-attorney.com>

⁹ Linking Copyright to Homepages by Matt Jackson.
<http://eon.law.harvard.edu/property/metatags/link1.html>

¹⁰ LINKING “In Search of Safe Linking”, Published: Sept. 29, 2000 By Christi Frum , Staff Writer of
<http://www.workz.com>

Another useful sampler of deep linking can be founded in <http://www.movie-list.com/>, where people who want to be updated with the latest movies, can search in to Movie-List. <http://www.movie-list.com/> filters out the corporate stuff, (Warner, universal studios etc) and just shows the user the namely product

Regarding with inlining, one of the most famous cases and sampler, it can be founded in Dilbert controversy¹¹

Is Linking Legal ?

At this point the reader have already the basic knowledge about the concept of linking and its subspecies (linking, deep linking and inlining).

Now one could ask oneself, which commercial and legal relevance all these concepts do have?

Well there are as many answers as lawyers and interested parties are.

The first thing which deserves to be mentioned here is the fact that Internet was developed by its own nature to link computer among them in order to share de information stored in. In that order of ideas, there exists an intrinsic principle of publicity regarding with the access to any web page.

There is other relevant issue that can not be ignored by the readers and is the fact that if someone has developed a web page to promote his or her products or services it has

¹¹ IMG links -- a special type of programming HTML link -- can be used to display graphic files one site that are stored on another. In one case, Dan Wallach, a fan of the Dilbert comic strip, did not like the design of the official Dilbert site owned by United Media and designed his own, The Dilbert Hack Page. He used IMG links to display the cartoon images from the United Media site so that a visitor to the Dilbert Hack Page viewed Dilbert cartoons (inlined from the United Media Page) within Wallach's "improved" page design. United Media demanded that Wallach 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). The parties avoided a lawsuit when Wallach agreed to drop the IMG links, and used traditional hypertext links to the United Media home page. Linking, Framing and Inlining, <http://www.nolo.com/lawcenter>

been with the aim of allowing others to access to it. In that sense it can be said which the content of any web page in general speaking is public.¹²

Nevertheless, there exist laws that outlaw links to certain types of information, such as drug-related content. One of those examples is the case of The Methamphetamine Anti-Proliferation Act¹³, under which it would be a criminal act to link to a broad range of drug-related information — regardless of the publisher's identity or intent.

On the other hand there exist the position of the owners of web pages to whom the linking practice can harm their commercial interests through moving the surfers from one page into the another one which own to a competitor.

In addition it deserves to be mentioned the fact of that the legal arguments can move even through unforeseen paths. Recently, one injunction was granted under the argument of trespassing by linking instead of the traditional argument of copyright infringement.

“Auction giant eBay recently won an injunction against Bidder's Edge, a competitor that gathers auction information from multiple Web sites. Instead of relying on standard copyright arguments, eBay used a novel argument: it claimed that the Bidder's Edge search system was "trespassing" on its Web servers.

¹² “ Linking itself is vital to the structure of the Internet. It is a rare web site indeed that contains no links to other sites or is not linked to by other sites. Links make the web manageable to surfers, enabling users to easily find useful information on topics of interest. So-called deep links are links to an interior page of a web site. By deep-linking into a site, the linking site allows the user to bypass the home page of the linked site, a page that often contains advertising, terms and conditions and proprietary information relevant to the use of the linked site. Linkers argue that deep linking is simply in line with the free nature of the web, that anyone who creates a web page in effect grants the entire cyber community an implied license to link to that page. Besides, the linkers contend, they are actually doing the linked sites a favor by driving users to the linked site.” Emerging Legal Guidance on 'Deep Linking' By Margaret Smith Kubiszyn, <http://www.gigalaw.com/articles>

¹³“ The Methamphetamine Anti-Proliferation Act also remains in circulation as a stand-alone bill. H.R. 2987. Some of the provisions H.R. 833 Title XVII/H.R. 2987 that EFF objects to: Makes it illegal to share information about harm reduction and growing hemp even for industrial purposes. Not only does it criminalize speech, it makes it illegal to even LINK TO sites with these types of articles and gives the government power to order Web sites censored and shut down without due process of law. It gives the DEA and the FBI the right to order ISPs to close down a site without notice to the owner on a police judgement call without an order from a court. This provision violates the First, Fourth and Fifth Amendments (free speech, freedom from unreasonable search and seizure, due process). “Drug Speech Censorship Bill Nearing Passage. <http://www.eff.org/>

Strictly speaking, eBay wasn't worried about Bidder's Edge linking to its site; it was more concerned about Bidder's Edge grabbing auction data and hauling it back to its own site. But I suspect that eBay's court victory will inspire other corporate sites to claim that unwanted hyperlinks are the virtual equivalent of trespassing. And again, far more sites will simply cave in and agree to demands that they not link to a site rather than risk the trouble and expense of a lawsuit.”¹⁴

As it could be evidenced by the readers, this a real controversial issue. For instance, Tim Berners-Lee, inventor of the World Wide Web, have made several times comments about the freedom to link. From his point of view, it is clear that the act of linking is not per nature an infringement.

In his article Links and Law, Tim Berners-Lee, has addressed this subject discussion the general myth about it

“Myth one: "A normal link is an incitement to copy the linked document in a way which infringes copyright".

This is a serious misunderstanding. The ability to refer to a document (or a person or any thing else) is in general a fundamental right of free speech to the same extent that speech is free. Making the reference with a hypertext link is more efficient but changes nothing else”

Myth two: Making a link to a document makes your document more valuable and therefore is a right you should pay".

This is another dangerous one. It is of course true that your document is made more valuable by links to high quality relevant other documents. A review in a consumer magazine has added value because of the quality of the products to which it refers the reader. I may be more valuable to you as a person if I refer you to other people by name, phone number or URL. This doesn't mean I owe those people something”

Myth three: Making a link to someone's publicly readable document is an infringement of privacy.

¹⁴ Create a Hyperlink: Go to Jail, By *Matt McKenzie*, VP Content, Seybold Seminars. <http://www.zdnet.com>

The "security by obscurity" method of hiding things behind secret URLs has the property that anyone knowing the URL (like a password) can pass it on. This is only a breach of confidentiality if there is some confidentiality agreement which has been made."¹⁵

In general speaking, it is possible to take a position in relation with the lawfulness of linking or not

“Emily Madoff, an intellectual property lawyer at Wolff Popper in New York, takes the alternative view. She said property owners who create content should have a right to determine how surfers experience their Web sites. In particular, she said, if an owner's home page or another page laden with ads is bypassed by a deep link, then the linked-to Web site owner will soon be out of business.”¹⁶

Nevertheless, today the most wide disseminated conception is giving the reason to the first one.¹⁷

"I don't think an intellectual property owner should be able to stop" most deep links, said Carl Oppedahl, a cyber law expert at Oppedahl & Larson, a law firm in Frisco, Colo. "The eventual goal of the Web is for everything to be linked to everything else. If someone says, 'You can't link to my page,' well, they are missing the point of the Web."¹⁸

¹⁵ Links and Law: Myths, by Tim Berners-Lee, <http://www.w3.org/DesignIssues/LinkMyths.html>

¹⁶ Is Linking Always Legal? The Experts Aren't Sure, by Karl S Kaplan, Cyberlaw journal, The New York times, August 6 1999

¹⁷ Why link? Linking is the *sine qua non* of the Internet's most popular information access tool, the World Wide Web, and there are millions of links in place today. Links allow quick access to information that otherwise could take days or even years to find. Linking also permits the user to determine how deeply to explore a particular topic. As an example, Bitlaw contains an overview of U.S. patent law, with links to the actual text of relevant federal statutes. A particular link may or may not be followed, depending upon the subjective importance of the information to the user. In most cases, the operator of a web-page will desire her page to be the destination of as many links as possible: More links means more hits, and more hits means wider dissemination of whatever information the page is designed to get across. Since most links do not (or cannot) conceal from the end-user the source from which information is being provided, there is little danger that the source of the content on a web-page will be misrepresented. Linking and Liability, <http://www.bitlaw.com/internet/linking.html>

¹⁸ Is Linking Always Legal? The Experts Aren't Sure, by Karl S Kaplan, Cyberlaw journal, The New York times, August 6 1999

At this point is clear for the readers that there is not common position in relation with the lawfulness or unlawfulness of linking. Now it is crucial to examine some of the judicial precedents in order of finding out the common factor if there is one in the way the judges have addressed the trouble of undesired links.

It is viable to find cases where the owner of a web page or site has decided to ban any chance of linking. In those cases is clear that the proprietor is resigning to the advantage of increasing his or her options of being visited. However, the owner's trend nowadays is to set up a union of rules for those who wants to link their pages.

From the point of view of the author, it is clear that in general speaking linking is not banned as a general rule. Nevertheless, anyone who decides to link web pages is under the scope of the law in relation with eventual infractions.

From a legal perspective linking can produce suits for defamation, trespassing, invasion of privacy, copyright infringement, trademark infringement and dilution, false advertising, unfair competition, breach of contract and disparagement. In the article Linking, Framing and Inlining, published in <http://www.nolo.com>, it viable to find some examples of these issues.¹⁹

¹⁹ “Defamation. A link may defame if its effect is to create an untrue statement that injures the reputation of a person or business. EXAMPLE: A student creates a hyperlink titled "Alcoholics on the Net" and links it to a picture of the school principal at another site. The hyperlink is defamatory because it serves as an untrue statement that injures the reputation of the principal within the community.

Invasion of Privacy. A link may violate a person's reasonable expectation of privacy. EXAMPLE: A disgruntled employee of Company A creates a hyperlink titled "Washed Up" that links to a hidden camera in Company A's executive washroom.

Copyright Infringement. Although it is not a violation of copyright law to create a hyperlink, it is a violation of the law to create a link that contributes to unauthorized copying of a copyrighted work if the linking party knew or had reason to know of the unauthorized copying and encouraged it. EXAMPLE: A website posted infringing copies of a church's copyrighted handbook at its site. The website was ordered to remove the handbook, but subsequently provided links to other sites that contained infringing copies of the handbook. These links were different from traditional hyperlinks because the website knew and encouraged the use of the links to obtain unauthorized copies. The linking activity constituted contributory copyright infringement. Intellectual Reserve, Inc. V. Utah Lighthouse Ministry, Inc. 75 F. Supp. 2d 1290 (D. Utah 1999).

Trademark Infringement and Dilution. A trademark is any name or graphic image that identifies and distinguishes products or services. It can be a word such as "Kodak," a graphic image such as the "Ask Jeeves" butler, or it can be a combination of elements such as the colors, lettering and special graphics used to distinguish Ebay.com from other online auctions. Here the broad legal rule is that the first user of a mark generally acquires trademark rights. Infringement occurs when a second user of the trademark, or a substantially similar mark, is likely to confuse consumers. In addition, if a trademark is famous, such as Amazon.com or America Online, the owner can stop others from using it in a way that tarnishes the

It is possible to say in advance that there are not common points in the judicial decisions solved until now which can serve anyone as a guidance for linking. However, this essay is going to discuss some relevant cases in order to provide a general perspective for the readers.

Shetland Times, Ltd. v. Jonathan Wills and Another, 1997 F.S.R. (Ct. Sess. O.H.), 24 October 1996 is Considered the first "linking" case. "the issue presented in *Shetland Times* was whether the Shetland News's ("News") "deep link" to embedded pages of the Shetland Times's("Times")web site, through the use of Times' web site's news headlines, was an act of copyright infringement under British law. The matter settled on the day of trial, shortly after the court had issued a preliminary injunction precluding the deep link. Although much discussed, this opinion has proved to be of little legal significance, in part because of the extremely low evidentiary standard applied by the court."²⁰

In *Gwatkin, (Nottinghamshire County Council v. Gwatkin*, (High Court of Justice, Chancery Division, June 3, 1997) "the Nottingham shire County Council filed suit against three British journalists and a web site operator claiming that their Internet posting of a long suppressed government report critical of Nottingham's Social Services Department's investigation into allegations of Satanism and child abuse in the late 1980s infringed on the Council's copyright to the report."²¹

mark's reputation. The use of a graphic trademark -- for example the Playboy bunny logo -- when linked to the trademark owner's site is sometimes a risky proposition. Unlike the use of a simple word link, a consumer is more likely to be confused into believing that the linked site is associated with or endorses the site that owns the graphical trademark. EXAMPLE: An X-rated website used the Playboy name and bunny logo to link to the Playboy website. Playboy sued and proved that users of the site may be confused as to whether Playboy sponsored or endorsed the adult site. Playboy also proved that its trademarks would be blurred or tarnished by the association with the adult site. *Playboy Enterprises, Inc. v. Universal Tel-A-Talk Inc.*, 1998 U.S. Dist. LEXIS 17282 (E.D. Pa. 1998).

In addition to these legal theories, other legal attacks on linking practices have been based upon false advertising, unfair competition, breach of contract and disparagement. False advertising occurs when a misleading statement about a product or service deceives the public. Unfair competition refers to a group of a state and federal laws that prohibit unethical behavior by businesses. A breach of contract may occur if users agree to contractual limitations when using a website, and then create links in violation of those terms. Disparagement occurs when a link creates a false statement that interferes with a company's business relations

²⁰ Linking, Framing, and Metatags, <http://www.netlitigation.com>

²¹ Supra

One of the most well known cases it was Ticket master v. Microsoft

“The first major case involving the practice of deep linking involved Microsoft's use of deep links from its "Sidewalk" web guides. These web guides spotlighted, among other things, upcoming events in a particular area, and would provide deep links to information on specific events on interior pages of the Ticket master web site. At that time, Ticket master had recently signed an agreement to provide event information and ticket-ordering links to a competing web guide service, City Search. Through this agreement, City Search was paying Ticketmaster for what Microsoft was taking for free. Ticketmaster filed suit against Microsoft on April 28, 1997, arguing that Microsoft's practices devalued Ticketmaster's site by bypassing its home page.

In the settlement, Microsoft agreed not to provide deep links to Ticketmaster's site, agreeing instead to link only to the Ticketmaster home page. Following this settlement, Ticketmaster allowed deep linking by sites such as Yahoo and Knight-Ridder, but only after the parties had entered into a linking agreement²²”

For space reason is impossible to discuss all the cases in this essay. Nevertheless, in order of being as more comprehensive as possible, it will provide below a list of the most significant cases in law about linking.

Dilbert Hack Page (inline image)	Shetland Times Ltd. v. Wills ("deep" hyperlink)
New Zealand TV v. 7am (hyperlink)	IRN v. 7am ("deep" hyperlink)
Washington Post ("deep" hyperlink)	Microsoft v. Ticketmaster ("deep" hyperlink)
Nottinghamshire County / JET (hyperlink)	The Times v. News Index ("deep" hyperlink)

²² Emerging Legal Guidance on 'Deep Linking' By Margaret Smith Kubiszyn
<http://www.gigalaw.com/articles>.

Speedlink v. Symicron (hyperlink)	Nando.Net v. 7am News ("deep" hyperlink)
Steinhöfel v. Best (hyperlink)	Bernstein v. J.C. Penny, Inc. (hyperlink)
Landgericht Frankfurt Az.: 3/12 O 173/97 (hyperlink)	RIAA v. Lycos (hyperlink)
weyhe-aktuell.de v. weyhe-online.de (hyperlink)	dpa v. Deutsche Telekom (hyperlink)
Symicron v. spartips.com - Telco Explorer (hyperlink)	Symicron II - FTP-Explorer (hyperlink)
Scientology Church vs. Spaink, XS4All et al. (Netherlands) (hyperlink)	Universal Studios v. Movie-List ("deep" hyperlink)
IFPI v. Olsson (hyperlink, MP3)	IFPI v. FAST Search & Transfer ASA (hyperlink, MP3)
Ticketmaster v. Tickets.com ("deep" hyperlink)	ASCAP v. Travelfinder.com (hyperlink, MP3)
eBay v. Auctionwatch ("deep" hyperlink, auction site)	IFPI Belgium/Polygram Records v. Belgacom Skynet (hyperlink, MP3)
IFPI Belgium v. Beckers RG 99/238320 (hyperlink, MP3)	Landgericht Munich I 9 HK O 6873/99 (hyperlink)
Landgericht Lübeck (hyperlink)	Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc. (hyperlink)
DVD Copy Control Association v. McLaughlin et al. (hyperlink, DeCSS)	MPAA v. NetSphere IT (Austria) (hyperlink, DeCSS)
DoubleClick v. Slashdot	NARM v. Sony

(hyperlink)	(hyperlink)
Kelly v. Arriba Soft Corp. (hyperlink)	Mattel, Inc. v. McCullagh (hyperlink)
IFPI China v. MyWeb Inc.com (hyperlink , MP3)	Microsoft v. Slashdot (hyperlink)
Universal City Studios, Inc. v. Reimerdes (hyperlink , DeCSS)	MP3board v. RIAA (in California) and RIAA v. MP3board (in New York) (hyperlink , MP3)
eBay v. Bidder's Edge NO. C-99-21200 RMW ("deep" hyperlink , auction site)	PCM v. kranten.com ("deep" hyperlink)
Landgericht Munich I court decision 4 HKO 18839/98 (hyperlink)	wwj.de ("deep" hyperlink , search engine)
BMG Australia Ltd. v. S11 (hyperlink)	Münz v. Symicron (FTP-Explorer) (hyperlink)
Symicron v. Dino-Online (FTP-Explorer) 7 HKO 12081/00 (hyperlink , search engine)	Symicron v. Fachhochschule Oldenburg (FTP-Explorer) (hyperlink)
Kelly v. Arriba Soft Corp. (inline image, search engine)	LucasFilms v. AlderaNet/NaboOnline (hyperlink)
Symicron (FTP-Explorer) 4 HKO 6543/00 (hyperlink)	Austrian Supreme Court in Civil Matters 4 Ob15/00k (deep linking)
Oberlandesgericht Schleswig-Holstein 6 U 51/00 (hyperlink)	Landgericht Frankenthal 6 O 293/00 (hyperlink)
Landgericht Cologne: Stepstone v. Ofir 28 O 692/00 (deep link, database directive)	Landgericht Hamburg: Bundesliga-Manager 312 0 606/00

	(hyperlink)
Austrian Supreme Court in Civil Matters 4 Ob 225/00t (hyperlink)	Austrian Supreme Court in Civil Matters/Jobmonitor v. Austropersonal 4 Ob 274/00y (hyperlink)
Better Business Bureau (hyperlink)	Danish High Court ("deep" hyperlink)
Keljob Tribunal de Commerce de Paris (hyperlink)	Faktuell.de (hyperlink)

Resource, The Link Controversy Page by Stefan Bechtold last update: September 12, 2001 ²³

The first question that can arise from all this cases into the reader's mind is why the linking process can be considered a copyright infringement?

Well, at this point is essential to be clear about the fact that this essay is not going to discuss a particular local law, not an Australian, nor an American neither an international treaty.

Perhaps one of the most representative cases of inlining, which it can be considered as a way of linking , it was that one known as the Dilbert Hack Page. The case has been represented by Edward A. Cavazos and Coe F. Miles in outstanding way in their article Copyright on the WWW: Linking and Liability

“The popular Dilbert comic strip chronicles the experiences of Dilbert, a corporate drone who is faced with the bureaucracy and mediocrity of the modern workplace. United Feature Syndicate, Inc. (UM), copyright owners of the Dilbert comic strip, maintain an Internet website where users can view recent Dilbert cartoons, purchase Dilbert related products, and contact either UM or the comic's author, Scott Adams. In January 1996, a Princeton University graduate student created a WWW site he called

²³ Resource, The Link Controversy Page by Stefan Bechtold last update: September 12, 2001

the Dilbert Hack Page (DHP) which allowed users to view recent Dilbert comics in a context different from that provided by UM.

The DHP used the names of Dilbert comic image files, obtained from the UM Dilbert site each day, to generate a remote auto-load link that was written into the DHP's HTML document (as ASCII text). When visitors to the DHP subsequently downloaded (browsed) the DHP's HTML document to their computer, the remote auto-load link HTML instructions were interpreted by the user's browser which, in turn, contacted UM's Dilbert site, downloaded the links' identified image files, and displayed the targeted image files. See Figure 1.

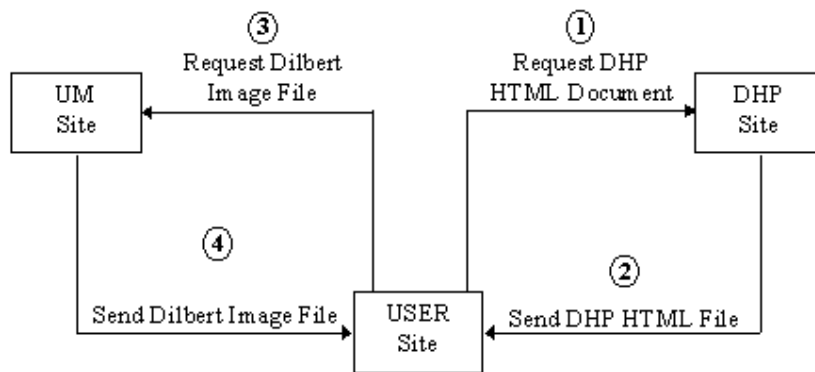


Figure 1

For analytical purposes, it is important to note that the DHP HTML page did not contain the subsequently displayed Dilbert image files. The DHP's author never duplicated the Dilbert cartoons at all. What the DHP HTML page did, however, is identify the precise location (computer site and file name) of the targeted Dilbert image files and, based on this information, the image files were obtained directly from UM's Dilbert site by the user's browser for incorporation into the DHP as displayed on the user's computer. In July 1996, UM contacted the DHP's author informing him that Dilbert comic strips were the intellectual property of UM and could not be used without their express written consent. A subsequent letter by UM's legal counsel alleged the DHP was a clear copyright violation and threatened legal action. In the face of an uncertain liability, the DHP was removed from active service in August 1996.”²⁴

²⁴ Copyright on the WWW: Linking and Liability Edward A. Cavazos and Coe F. Miles

Under the provisions of all copyright legislations or at least most of them, the author of a work has copyright over his or her creation in order to avoid the use or modification of his work by others without his authorization.

The originality of any work is the basic concept that grants the author with the legal protection of his or her work. Nowadays, around the world legislations recognize the necessity of that the works are fixed in any medium-even in electronic means- in order to permit it to be perceived or reproduced.

In general speaking the legislations have granted the authors with some basic rights, among others the right of reproduction, preparation of derivative works, public distribution and public performance or display. In addition most of copyright laws are clear about the fact of qualifying as infringer to anyone who breaks up or violates any of the right that the law has protected as the consequence of the authorship.

Facing the facts, there is not a unique position about if all linking process involve a copyright infringement. For instance, In the case of Dilbert cartoons, Edward A. Cavazos and Coe F. Miles have held that there was not a direct infringing under the American copyright act²⁵

From a strict legal point of view, is true that the party who is making the link is not responsible for direct copyright infringements. Is the same legal argument of the

²⁵ A quick review of the scenarios discussed in Section II seems to indicate that, at least in circumstances similar to the one posed by the Dilbert Hack Page, the only possible direct infringer would be the end user. That is because the linking party is not doing anything that seems to involve a direct manipulation of the copyrighted materials at all. As one set of commentators note, "they [the linking party] do not perform an act of copying - the essential element for copyright infringement liability." Because of the nature of the underlying technology, all of the acts that appear to be infringements (reproductions, distributions, and displays) are performed by the end user who is accessing the content directly. The linking party's only role in the process is the provision of information about how such access can be accomplished. This information takes the form of a Uniform Resource Locator (URL) with which the user effectuates (via their browser program) the retrieval and manipulation of the copyrighted material

lawyers in the case of Napster. Nevertheless this argument can not be applied under the general rules of contributory infringement

As a general rule, legislations today are looking for protecting the right of the authors of other way of infringement, such as the called contributory one. The second circuit in USA has established for instance that anyone “who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer.”²⁶

Nevertheless, it is important to remark here that not anyone who produce a device that can be used to perform an infringement can be considered as a contributory infringer. In that sense is necessary to recall some cases in law as *Sony Corp. of America v. Universal City Studios, Inc.* Where the test was if the device had some legal use.

In this sense the opinion of Edward A. Cavazos and Coe F. Miles in the case of Dilbert cartoons is “ If the link in question is an auto-load link, however, it may be the case that the link looks and functions more like a "means to infringe" or that the linking party so substantially participates in the user's acts that the linking party can be deemed a participatory infringer. The end user need not act at all here - his or her browser is directed to act by the HTML coding implemented by the linking party. This HTML code could very well be deemed a means-to-infringe. Also, the provision of this code approaches substantial participation in a way that providing an invoke-to-load link does not.”²⁷

²⁶ Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971).

²⁷ Copyright on the WWW: Linking and Liability Edward A. Cavazos and Coe F. Miles

One of the question that one can formulate oneself talking about linking is in which case linking is really illegal? . From my point of view the owner of a web page or a site has the right to ban any one who tries to link his or her web page. The reason is simple. All web pages or at least great number of them are original creations in terms of designs, content or in the way in which the information is presented as well as other particular factors.

When someone has decided to disclose or reveal his or her web page work through his diffusion in Internet, as author is exercising one of the mayor rights that legislation around the world have recognized in his favor. This right that is namely called the right of publication is inherent to the author. Nevertheless, this right is intimately linked with the right of reproduction. This last right can be restricted by the author.

Some people has expressed that in talking about linking there is not such thing like a copyright infringement due to the fact that a link is just a pointer -- and address, and the owner is who serves the article, not the linker. From my point of view this a simplistic solution for a real trouble.

Nowadays, there is a trend in the new web pages that are being launched, in the sense of establishing a series of restrictive disclaimers in relation with linking process by third parties. At least in general terms people around the world is taking conscience about how valuable are copyrights.

It is worth to point out that, authors have approached this hard matter through from a perspective of contributory negligence. This term has been explained clearly by Brad Templeton as follow:

“The first is the doctrine of "contributory copyright infringement." If you make something whose **sole** purpose is to facilitate others in violating a copyright, and/or you encourage people to do it, and you know you are doing this, you can be liable for contributory infringement even though you didn't do the copying yourself.

So if you **know** that the owners of a site don't want you linking inside, and you do it anyway just so people can get around their rules, then I think that if their rules are upheld as valid (unknown) then you could be held liable for contributory infringement. You aren't doing any copying, but you are taking actions solely to cause other people to make allegedly illicit copies for themselves. (This, by the way, is part of what Napster was sued for.) Generally this "deep linking" would need to be costing them money to make a case out of it.

A link might also be considered as actually the online implementation of a "device" -- a "button" that people push which causes their browser to request a document from another server. You didn't just tell them where the page was, you actually built them a virtual button that, if they push it, causes it to be delivered”²⁸ See the DeCSS case.²⁹

It is worth to conclude that from an strict point of view, an URL is just a public address in Internet. In that way if in a web page instead of establishing links, URL are listed, there will not be a copyright infringement.

²⁸ Linking Rights, Brad Templeton, <http://www.templetons.com/brad/linkright.html>.

²⁹ In the DeCSS case, the judge ruled that 2600 magazine, by linking, wasn't providing DeCSS software, but it was "trafficking" in it. What the judge said was that linking wasn't just telling people where something was, which remains legal. Linking, the judge felt, was an action as well as expressing information. He picked the bizarrely extreme analogy of political assassination, which is both expressive and murderous at the same time, to explain that some forms of expression which do other things can be regulated. The owners of the 2600 web site replaced their links with text URLs, and so far are unpersecuted. This would be in line with the theory that a link is not just a piece of text but also code in a computer language (HTML) that builds a virtual "button" that people push to cause not just speech, but actions to take place. Linking Rights, Brad Templeton, <http://www.templetons.com/brad/linkright.html>.

“While the Software Publishers Association claims that mere linking may violate copyright, an URL itself is not copyrightable. Since an URL is not subject to copyright, there is no violation if it is included in another page. Thus, linking between websites, even without express permission, is allowed.”³⁰

Finally, it could be useful to transcript some basic recommendation about link that have been mentioned by By David A. Gurwin

“- Consider negotiating a written agreement before framing or linking to the contents of a third party’s site;

-When linking to a third party’s site, link to the home page;

- Avoid using a third party’s logo or trademark as a link;

- Make sure that linking to another site does not create confusion or imply that the linked material is owned or endorse by, or otherwise associated with, the referring site; and

- Be flexible. As legal precedent develops in this area, parties may need to modify their linking and framing practices.”³¹

³⁰ Legal Elements of Design: Linking, Framing, and Meta Tags By Timothy J. Walton

³¹

Linking and Framing on the Internet: Unfair Competition?
By David A. Gurwin. <http://www.siliconindia.com/magazine/Apr99legal.html>

FRAMING

What are frames?

“Framing is a method of splitting one window into two or more screens. A web page can be inserted into a frame, and that portion of the screen will remain static as a user moves through other web pages. This method is called "framing," because it allows a webmaster to send an individual through numerous web pages while retaining the appearance and the utility of the frame inserted. Most of the "Intellectual Property in Cyberspace" pages utilize frames. The pages in this technical primer have been set to open outside of the frames.”³²

The difference between framing and linking can be explained clearly by following words:

“Unlike linking, framing is a relatively recent phenomenon, introduced by Netscape in Version 2 of its Navigator product. A framing site, by virtue of certain commands in its HTML code, links to another site, displaying that site within a window or frame. The frame itself is comprised of content from the framing site. In contrast to generic hyper linking, in the case of framing, the user remains at the framing site and views content from both sites. The address that the user's browser displays may continue to be that of the framing site. The user may be unaware that the content in the frame comes from another site.”³³

Technically explained, a framing process works as follow:

“The frames may contain either highlighted URL addresses of other Web pages that are intended to be "selected" by the framing page user or other pages within the same Web site. When the framing page user clicks on a framed URL address the user's browser immediately transmits the content of the selected URL so that the content of each frame appears on the user's screen not as if the user had accessed a new URL page directly,

³² Creating Web Pages, <http://eon.law.harvard.edu/property/introtech/construct.html>

³³ Legal Issues on the Internet Hyperlinking and Framing By Maureen A. O'Rourke Associate Professor of Law Boston University School of Law Boston, Massachusetts

but instead the content appears within the portion of the screen designated as its frame. Each frame functions independently, therefore the information that is downloaded into one frame will fill up only that frame, and it will not overwrite or affect the contents of the other frames on the computer screen.”³⁴

One sampler of framing techniques can be found in <http://www.totalnews.com/>

In the web site of the school of Harvard, called <http://eon.law.harvard.edu/>, it is possible to find a small legal approach to the problem of framing under the following words:

“The programmer of the Web page can dictate what goes into each frame. Commonly, a Web site designer creates a page that at all times displays one frame containing the name of the Web site and other identifying information. The other frames are then controlled by the user. For example, a Web site employing frames might always show the original Web site's graphic logo on the top of the page while allowing the user to view the NPR Web site in a different frame. (To see this example in use, click [here](#), then click "NPR" to see the NPR Web site "framed.") The legal implications of this are complex. In the example just given, a Web surfer might easily be confused concerning the relationship between NPR and the framing site. Moreover, the framing site might be unfairly deriving traffic from NPR's legally protected work.”³⁵

The school of Harvard even has illustrated the issue of framing with an hypothetical case as follow:

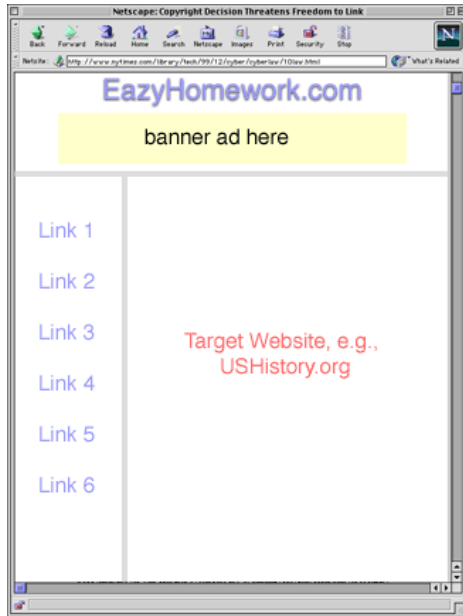
“Dan has created a commercial Web site dedicated to providing assistance to students with homework assignments. Called "Eazyhomework.com," the site contains little content, but rather provides users a guide to a wide array of other Web sites containing information about mathematics, science, history, etc.

Eazyhomework.com is a "frame-based" Web site, meaning that it is composed of several different "frames" whose content Dan can control with the appropriate programming. Dan has arranged the frames so that at all times, the user sees at the top

³⁴ Internet Legal Issues: Framing by Lloyd L. Rich 1999. <http://www.publaw.com/framing.html>

³⁵ Linking, Framing, Meta Tags, and Caching, <http://eon.law.harvard.edu/>

of his or her browser window the Eazyhomework.com logo and a banner advertisement, from which Dan derives income. To activate most of the links on the site, a user clicks on a word or icon located in one frame, which causes the target site to appear within another frame. When designing his site, Dan drew a diagram of this system, which you will find below (See Fig. 1). “



“The first complaint comes from Independence Hall Association (IHA), a non-profit organization dedicated to preserving information about the historic district of Philadelphia and educating the public about American Revolutionary history. IHA owns and operates a Web site with the domain name USHistory.org. EazyHomework.com has "framed" the USHistory.org site ³⁶ .

It is important to assert here that in Internet matters there is not a legal frame that can be used in front of a particular dispute. On the contrary the customary rules are the trend. The net-etiquette is a word that is being coining by the most of the authors in internet matters for representing that internet has to develop its own behavior rules.

³⁶ Supra

General speaking the trend is considering the framing practice something that is parasitic of the work of others and the main complaint is the confusion that can produce in the mind of the surfers.

In terms of the most remarkable case of framing it can be cited the Total News case, where a group of plaintiffs (The Washington Post and other news organizations) acted against Total News, Inc. The objection for the plaintiffs side was that the Total News site's framing of their content. Total News used to use in its site ads that had sold itself but would surround the content of the plaintiffs' sites. Plaintiffs claimed that Total News had infringed their copyrights and trademarks, diluted their trademarks and engaged in unfair competition.

The legal arguments used by the plaintiffs can be condensed using the words of Lloyd L. Rich :

“The new organizations asserted the following claims against TotalNews:

1. Misappropriation. The news organizations claimed that the TotalNews site "unfairly misappropriated valuable commercial property" by "[taking] the entire commercial value of the news reported at each site and literally selling it to others for TotalNews' own profit."

2. Federal trademark infringement and dilution. The news organizations under both federal and state laws claimed that the TotalNews site "dilute[d] and detract[ed] from the distinctiveness of [the news organizations'] famous trademarks." They also alleged that the TotalNews site was "likely to cause confusion and mistake and to deceive customers as to the source or origin of the content and advertising depicted at [TotalNews'] Web site."

3. Copyright infringement. The news organizations claimed that the TotalNews site violated "several . . . exclusive rights . . . belonging to the [news organizations] as owners of the copyrights in their respective content and Web sites,"

There are a many ways by which framing could constitute copyright infringement of a linked site's copyrightable material. The reproduction right may be infringed when a

linked page is locally cached for the purpose of framing without the copyright owner's permission. The adaptation right could be infringed if the framed work is an unauthorized derivative work of the linked page. The public distribution, display and performance rights could also be infringed because the linking site in an unauthorized manner has altered the distribution, display or performance of the linked site's content by framing that content.

TotalNews may have been most at risk with regard to potential copyright infringement liability for its creation of a derivative work that distorted and altered the way in which users viewed the news organizations' content in the following manner: (1) The TotalNews frame did not display the entire news organizations' computer screen as would have been the case if that screen had been accessed directly and not through the TotalNews Web page by the user, (2) the TotalNews frame surrounded the news organizations' content with TotalNews' own advertising and logo and (3) the Total News URL and not the news organizations was retained in the browser address field when the news organizations content was displayed on the TotalNews page.

4. Violation of advertising laws; deceptive practices; and unfair competition. The news organizations claimed that the TotalNews 's site was "likely to cause and [had] caused consumers mistakenly to believe that ... [TotalNews had] an affiliation with [the news organizations], or [was] sponsored or approved of by [the news organizations], or [was] otherwise associated with or [had] obtained permission from [the news organizations]."

5. Tortious interference with business relationships. The news organizations claimed that the [TotalNews'] site "made [the news organizations] performance of their advertising contracts more burdensome and . . . interfered with the benefits that [the news organizations'] advertisers bargained for when they purchased space on [the news organizations'] sites." ³⁷

If the reader can make a closer approach, there are another cases of framing such as:

Haymarket v. Burmah Castrol	Roche Lexikon
Journal Gazette v. Midwest Internet	Amnesty International v. amnesty-

³⁷ Internet Legal Issues: Framing by Lloyd L. Rich 1999. <http://www.publaw.com/framing.html>

Exchange	tunesia.org
Hotmail	Bau-markt.de v. baumarkt.de
Fort Wayne Newspapers v. Ft-Wayne.com	Futuredontics v. Applied Anagramic
L.A. Times / Washington Post v. Free Republic	TotalNews II
Playboy v. Web21	Yahoo.de v. Austro.NET

Source: The Link Controversy Page by Stefan Bechtold.

Is framing Legal ?

There is a useful question that can arise from framing matters and its is until what point is legal to frame someone else's site?

Again this is not an easy question to answer, specially because as it was mentioned above, in Internet issues, there are a series of customary rules instead of specific applicable laws.

Nevertheless the most accepted legal concept is that framing can cause consumer confusion and thereby violating trademarks laws and under particular laws can be unfair competition.

There are as many legal arguments as lawyers and point of view of course. For instance, Professor P. Eve Athanasekou of The School of Law University of Glasgow has held:

“Despite the fact that, at first, the assumption of copyright infringement may seem justified, there are several issues that contest its accuracy. It is true that many users could be misled to believe that all material on screen originates from the same source, especially since the URL address displayed remains that of the framing site. However, no copying of files takes place on the intermediary web site and the material presented within the frame is still accessed through a link, which is no more than a hypertext reference. But, whereas in the case of simple links, we can argue that there is an implied license for linking, that does not seem as easy to do in the case of frames, due to this confusion created by the URL display.

Unfortunately, and despite numerous lawsuits involving frames, there are no fixed rules. All cases so far have ended in out-of-court settlements, whose terms have been dictated by the balance of powers between the parties rather than facts, or technology.”³⁸

META TAGS

According to Oxford's Concise Dictionary the expression "meta" stands for something "*of a higher or second-order kind (ex. metalanguage)*".

Nevertheless, there exist several different approaches to the concept, For instance, from the view of an Web Analyst like Larisa Thomason, from NetMechanic, Inc., the term has a very specific application, as follows

“The term META is from metadata, which means data about other data. Search engines use META tags to help determine the content and value of your Web page content.

A META tag is an optional line of HTML code in the HEAD section of your document. The tag's actual content provides descriptive information about your site, but isn't displayed by the browser.

HTML specifications don't define the function of META tags, only their format. Consequently, there are a number of different META tags that describe everything from site content to the site author to a page rating. Different browsers recognize different META tags.”³⁹

For the purposes of this essay, the concept of meta tags is going to be associated with its application into the Internet world.

Generally speaking, it can be said that search engines look at three major Meta tags

1. Title Tag
2. Description Tag

³⁸ Internet and Copyright: An Introduction to Caching, Linking and Framing by P. Eve Athanasekou The School of Law University of Glasgow. <http://elj.warwick.ac.uk/>

³⁹ Put META Tags To Work On Your Site by Larisa Thomason, Senior Web Analyst, NetMechanic, Inc

3. Keyword Tag

A good example of the use of these meta tags it can be found it in <http://www.geocities.com/SiliconValley/3981/meta.htm>, as follows:

```
<<HEAD>
<TITLE>
META TAG - Information Page
<META HTTP-EQUIV="Description" NAME="Description" CONTENT:
"The HTML META tag, and how to use it.">
<META HTTP-EQUIV="Keywords" NAME="Keywords" CONTENT:
"META TAG Meta Tag meta tag search engines please guide me fdz oh kind
one".
```

The 'search engine result' for this web page will now appear on AltaVista like

[META TAG - Information Page](#) The HTML META tag, and how to use it.

Use [AltaVista](#) for this test. Enter the search word, META, you should get a result showing this page, probably along with a load of other stuff though, so you may not see it. If you enter the search **string**, "META TAG" then you will get a better result with fewer irrelevant pages. If you now enter the search **string** "please guide me fdz oh kind one", then you will get this page, and any other pages that have also used this exact same string of keywords in their Meta Tag."⁴⁰

Although the most important meta tag are title, key word and description, there are other useful meta tags like:

“Refresh: Use this attribute to refresh the page and/or to redirect the user after a certain period of time.

Copyright: The copyright date of the page.

Author: The author's name and any other information (email address,

⁴⁰ The <META> Tag . By ©Andrew Smith, 1999<http://www.geocities.com/SiliconValley/3981/meta.htm>

state, etc)

Expires: Tells search engines when the page will be out of date. For instance, if you have a page describing a conference set for April 2001, you might set the page expiration date to May 2001.

Rating: Use this META tag to rate your page much like movies and TV shows are rated. As more parents use filtering software, many may block access to "unrated" sites. In the future, a rating META tag may be necessary to increase your site's visibility."⁴¹

At this point the reader can be asking himself what kind of relationship can exist between meta tags and intellectual property?. Well, recently in UK a high court decided to protect the trademarks of a Uk company called Road Tech.

The case can be put in brief as follows: Mandata a competitor of the plaintiff road Tech had put the trademark "Roadrunner" which belong to the plaintiff in its website's meta-tags. The court ruled that Mandata had to remove the trademarked meta-tags from its web site and condemned it to pay damages and legal costs for about 80,000 pounds.

The main point here is that a company had used a trademark in its meta tags in order to lure the customers of a competitor, due to many search engines use meta-tags to produce results for keyword searches.

The former example is just a sampler of the main trouble in terms of the illegal use of meta tags in order to obtain an unfair advantage over others competitors.

Some of the most remarkable cases are:

Oppedahl Larson Advanced Concepts Civ. No. 97-Z-1592 (D.C. Colo., July 23,	& v. Inc. v. West Coast Entertainment	Brookfield Communications Inc. v. West Coast Entertainment	Terri Welles vs. Playboy (US District Court, San Diego, Jan. 4, 1999)	Playboy vs. Terri Welles Civ. No. C-97-3204 (N.D. Cal., Sept. 8, 1997)
---	---	--	--	--

⁴¹ Put META Tags To Work On Your Site by Larisa Thomason, Senior Web Analyst, NetMechanic, Inc.

1997)	Corp No. 98-56918 US Court of Appeals for Ninth Circuit.		
Insituform Technologies Inc. v. National Envirotech Group, L.L.C. Civ. No. 97-2064 (E.D. La., final consent judgment entered Aug. 27, 1997)	Playboy Enterprises Inc. v. Calvin Designer Label Civ. No. C-97-3204 (N.D. Cal., Sept. 8, 1997)	Playboy vs. AsiaFocus and Internet PromotionsI Civ. No. C-97-3204 (N.D. Cal., Sept. 8, 1997)	Trans Union LLC v. Credit Research, Inc., 2001 U.S. Dist. LEXIS 3526 (N.D. Ill. Mar. 26, 2001).

Resource: Meta Tag Lawsuits, by *By* Danny Sullivan
Editor, SearchEngineWatch.com

Other cases cited by Joseph weeden & luane yuriceck in their article “legal issues regarding metatagging”⁴², are also:

[Bihari v. Gross, 119 F. Supp. 2d 309 \(S.D. N.Y 2000\)](#)

[Prime Publishers, Inc. v. American-Republican, Inc., 2001 U.S. Dist. LEXIS 14361 \(D. Conn. Aug 7, 2001\)](#)

[Eli Lilly & Company v. Natural Answers, Inc., 233 F.3d 456 \(7th Cir. 2000\)](#)

[Playboy Enterprises, Inc. v. Asia Focus International, Inc., 1998 U.S. Dist. LEXIS 10359 \(E.D. Va. Feb. 2, 1998\).](#)

All of the cases have their particular relevant point, but for space reason it is not possible to discuss them in detail. Nevertheless this essay is going to put in brief the key concepts involved in most of them.

In the case *Eli Lilly & Company v. Natural Answers, Inc.*, 233 F.3d 456 (7th Cir. 2000), “Natural Answers markets its Herbscriptions line exclusively through its Internet Web site but plans to expand its channels of distribution to include retail outlets like health food and convenience stores. Natural Answers' Web site contains a column labeled "Think Herbs – not drugs!", under which it reads "Don't get your prescriptions filled with drugs . . . Get your Herbscriptions filled with Nature!" The Web site also features a

⁴² Joseph weeden & luane yuriceck “legal issues regarding metatagging”
http://www.unc.edu/courses/law357c/cyberprojects/fall01/Metatagging/sources.htm#Cases_Cited

table labeled "Herbs v. Drugs" which contrasts Natural Answers' products with a generic "Drug Alternative." In addition, until December 1999, Natural Answers' Web site contained a source code which included the term "Prozac" as a metatag,³ and described HERBROZAC as "a powerful, and effective all-natural and herbal formula alternative to the prescription drug Prozac." Internet search engines read source codes, which are not immediately visible to an Internet user, in response to search queries. Natural Answers' use of "Prozac" as a metatag was an attempt to guide Internet users searching for information on PROZAC[®] to Natural Answers' Web site. This effort apparently was unsuccessful, however, because searchers entering the keyword "Prozac" were swamped with Web sites containing a greater number of references to PROZAC[®]. Natural Answers removed the term "Prozac" from its source codes in response to this lawsuit.⁴³

In the case of *Oppedahl & Larson v. Advanced Concepts*, the main point object of discussion between the parties was the issue of misleading meta tags, based on the fact that the Advanced Concepts, -the defendants- apparently was trying to detour prospective clients for Oppedahl & Larson, through the use of the name of the plaintiff in its meta tags. The court granted a permanent injunction against the defendant from using the name without authorization.

As it can be evidenced by the reader, the trouble with meta tags is the fact that they can not be seen by the surfer. In that way the surfer who is using a search engine for looking for a particular site, can be easily misled towards a different site. In cases like this trademarks or copyright infringements are not so evident.

Other troubles that the use of meta tag can bring with their illegal or deceptive use are unfair competition and dilution. By the first legal figure, it can be understood the general prohibition that one company claims a false endorsement or connection with another one. For instance if some one uses in his meta tags the expression "Quantas" it can be assumed by a regular surfer which that particular site is endorsed by Quantas enterprise.

⁴³ <http://laws.lp.findlaw.com>

The concept of dilution is generally associated with the use someone else's a famous trademark in relation with something that can harm it. The concept of dilution even can be claimed by blurring a trademark.

In the first legal ruling case involving meta tags. -Insituform Technologies Inc. v. National Envirotech Group, L.L.C.- Insituform, the plaintiff, filed a lawsuit against National Envirotech for the using its name and a product name Insituform in its meta tags. The words only appeared in the meta tags, not in page copy at all.

"As told to me, the judge was most interested in the meta tag issue. The judge clearly did not like what National Envirotech had done with the meta tags," said Mark Pruner, who was involved in the case on behalf of the plaintiff. "The sole plausible reason for these registered trademarks to be in the meta tags was to misdirect people to the National Envirotech website," he said.

National Envirotech removed the disputed material but did not agree that it was suggesting an affiliation with Insituform or trying to deceive people.

Both parties reached a settlement agreement, but the judge also issued a permanent injunction.⁴⁴

In Playboy Enterprise Inc. v. Calvin Designer Label a preliminarily injunction was granted against the defendants form using "playboyxxx.com" or "playmatelive.com", as Defendants' domain name, directory name, or other such computer address, as in buried code or metatags on their home page or Web pages.

In PLAYBOY ENTERPRISES, INC., Plaintiff, v. ASIAFOCUS INTERNATIONAL, INC., Internet Promotions, Inc., Graham Daley, and Alan SMITH, The defendants have purposefully employed deceptive tactics to attract consumers to their Web site under the guise that their sites are sponsored by or somehow affiliated with PEI. Specifically, the defendants embedded PEI's trademarks "playboy" and "playmate" within the Web sites' computer source code which is visible to "search engines" that look for Web sites containing specific words or phrases specified by computer users. (Carr Decl. Decl., 13; Ex. K). Thus, a consumer conducting a search for PEI's Web site by typing in the

⁴⁴ Meta Tag Lawsuits By Danny Sullivan Editor, *SearchEngineWatch.com Updated: Feb. 19, 2002.*

trademark "Playboy" or "Playmate" would receive a search engine-generated list which included the asian-playmates Web site. (Carr Decl. 13-14; Exs. K, L). Through the defendants' willful deception, consumers have been misled into believing the asian-playmates Web site is connected with, or somehow sponsored by, PEI."⁴⁵

"In *Trans Union LLC v. Credit Research, Inc.*, 2001 U.S. Dist. LEXIS 3526 (N.D. Ill. Mar. 26, 2001). Plaintiff Trans Union, a leading credit-reporting agency, sought a preliminary injunction against two local credit bureaus for misusing plaintiff's trademarks on the Internet. The suit resulted from a longstanding service agreement under which defendant provided local credit information to plaintiff in exchange for access to plaintiff's nationwide credit database. Plaintiff objected to defendants' use of: (1) the Trans Union logo on their Internet sites, (2) use of the Trans Union name in meta-tags, and (3) use of the Trans Union name in the domain names"⁴⁶

One of question that can come into the reader's mind is if all the cases that someone is using someone else's trademarks in his or her meta tags can be considered as one infringement case.

Well, as a general rule, most of the legislation about trademarks around the world have established legal exceptions to use someone else's trademarks. Those case are known as fair uses. In that respect it can be cited the example that can be found it in the article "Meta Tags and Customer Confusion" from <http://www.nolo.com/lawcenter/ency/article.cfm>:

"Not every meta tag use of another company's trademark is illegal. When the trademark is used only to describe the goods or services of a company, or their geographic origin, this is permitted under trademark law as a "fair use."

For example, if a site called tropicalarts.com distributes literature and music from the Amazon region, it may use the word "amazon" in its meta tags. This use would not

⁴⁵ PLAYBOY ENTERPRISES, INC., Plaintiff, v. ASIAFOCUS INTERNATIONAL, INC., Internet Promotions, Inc., Graham Daley, and Alan SMITH, Defendants No. Civ.A. 97-734-A. United States District Court, E.D. Virginia.

⁴⁶ <http://www.ipworldonline.com/IPW/Free/transunion.htm>

infringe the Amazon.com trademark because the term "amazon" is being accurately used to describe the goods offered at Tropicalarts.

In one actual case, former Playmate Terri Welles established www.terriwelles.com and used Playboy and Playmate in her site's meta tags. This use of Playboy's trademarks was permitted because Ms. Welles was using the terms to describe herself and to properly index the pages. In addition, the court in this case was influenced by the fact that most of the free Web pages at the site included a disclaimer at the bottom: "This site is neither endorsed, nor sponsored by, nor affiliated with Playboy Enterprises, Inc. PLAYBOY, PLAYMATE OF THE YEAR and PLAYMATE OF THE MONTH are registered trademarks of Playboy Enterprises, Inc." (Playboy Enterprises, Inc. v. Welles, 7 F. Supp. 2d 1098 (Cal. S.D. 1998)).⁴⁷

⁴⁷ Meta Tags and Customer Confusion” from <http://www.nolo.com/lawcenter/ency/article.cfm>

LEGAL LIABILITY FOR LINKING, FRAMING AND METATAGGING

As it has been said as long this essay is, not all the cases of linking, framing and meta tagging are per nature illegal or harming the intellectual property and others rights.

Nevertheless as a constant, most of the linking, framing and meta tagging cases where the trade marks or copyright of others are being use them, do not account with the permission of their owners. In fact, most of the right holders have no conscience about that their trademarks and works are used them by third parties.

This research project is going to explore briefly some of the legal aspects involved in any linking, framing and meta-tagging process under the American and the Australian laws.

The main legal points that are involved by the use of the tools that it have been studied here, are related with copyright infringement, trade mark infringement and dilution.

In terms of copyright infringement, under the American and Australian legislation the principles are quite similar in the sense of both of them recognize by the only fact of the creation, some exclusive right to the authors that can infringe when someone reproduce, publish, adapt or perform the work without the authorization of his author.

Linking and framing can be used like tools that in some events constitute copyright infringement.

From a strict legal point of view, is true that the party who is making the link is not responsible for a direct copyright infringements due to the fact that a link is just a pointer -- and address, and the owner is who serves the article, not the linker. Nevertheless, it is possible that through linking process someone can be sued by contributory copyright infringement. See note pages number 28 to 30.

In the case of framing, it is possible to talk about direct as well as about indirect copyright infringement, due to the fact that in the case of framing the infringer is reproducing a protected work without authorization of his author. In relation with

declaring an indirect copyright infringement by framing, the reason for linking are perfectly applicable.

In the case of meta-tagging the copyright infringement is quite difficult because the search engines work using words as descriptors, not images or graphics. It could be possible that someone use a complete description that can be considered susceptible of copyright protection. Nevertheless is important to mention that domain names, phrases, or slogan are susceptible of being copyrightable and in that sense if someone use as meta tags, slogans or phrases that belong to someone else, therefore it could be an infringement case.

In the case on trademark infringement the trouble is to frame the case into the particular legislation. As it was mentioned before framing, linking and meta tagging are Internet tools that can result in a trademark infringement under the American legislation.

Generally speaking there is trademark infringement when someone that is not the owner uses a trademark in such way that consumer can be confused about it. In addition, since 1995 there is under the American legislation a legal figure called dilution.

“The Federal Trademark Dilution Act of 1995 expanded the scope of rights granted to famous and distinctive trademarks under the Lanham Act. Dilution differs from normal trademark infringement in that there is no need to prove a likelihood of confusion to protect a mark. Instead, all that is required is that use of a "famous" mark by a third party causes the dilution of the "distinctive quality" of the mark.”⁴⁸

In the case of Australian legislation, under the *Trade Marks Act 1995 (Cth)* is possible to talk about trademark infringement when the consumer are confused in relation with owner of the mark, or by the use of someone else's trademark in respect of the same goods or services as the original mark. In addition, under the section 120(3) it is also possible to infringe a trade mark in Australia where the mark is 'well known', and someone else uses it as indicating a connection between the unlawful user's goods or services and the trade mark owner. This figure is quite similar to the dilution concept that exists under the American legislation.

⁴⁸ Trademark dilution. <http://www.bitlaw.com>

It is clear that linking, framing and meta tagging can cause trade mark infringement as well as dilution as it can be inferred by the lawsuits that were commented as long this essay.

CONCLUSIONS

As it was mentioned before, this essay it was searching to make clarity about the concepts of linking, framing and meta tagging as three new ways of jeopardizing the traditional intellectual property right through the use of Internet tools.

In that way this essay it was not making an analysis of the figures mentioned under the light of a particular legislation. Nevertheless, it deserves to be mentioned at this point that there are general principles about intellectual property that can be use them without regarding a local law.

The goal of this essay it was to try to provide the general elements to anyone for studying the figures of linking, framing and meta tagging under the scope of powerful internet tools that can harm the intellectual property of anyone in most the legislations of the world. In that sense the objective has been achieved.

To conclude, it is essential put in brief the main topic and concepts that were treated here.

1. The term LINK “is used on internet for a click able address or word that will send you to another place or area of the site you are at, or to a different internet site”⁴⁹. As it can be inferred by the readers, the concept of link is intimately joined with the one itself of internet.
2. The Internet was developed by its own nature to link computer among them in order to share de information stored in. In that order of ideas, there exist an intrinsic principle of publicity regarding with the access to any web page. Nevertheless, there exist the position of the owners of web pages to whom the linking practice can harm their commercial interests through moving the surfers from one page into the another one which own to a competitor.

⁴⁹ <http://familyinternet.about.com>

3. There is not common position in relation with the lawfulness or unlawfulness of linking. It is viable to find cases where the owner of a web page or site has decided to ban any chance of linking. From a legal perspective linking can produce suits for defamation, trespassing, invasion of privacy, copyright infringement, trademark infringement and dilution, false advertising, unfair competition, breach of contract and disparagement.
4. From the point of view of the author, it is clear that in general speaking linking is not banned as a general rule. Nevertheless, anyone who decides to link web pages is under the scope of the law in relation with eventual infractions.
5. Some people has expressed that in talking about linking there is not such thing like a copyright infringement due to the fact that a link is just a pointer -- and address, and the owner is who serves the article, not the linker. It is worth to conclude that from an strict point of view, an URL is just a public address in Internet. In that way if in a web page instead of establishing links, URL are listed, there will not be a copyright infringement.
6. It is worth to point out that, authors have better approached the trouble of linking from a perspective of contributory negligence. Making something whose purpose is to facilitate others in violating a copyright, and/or encourage them to do it, can be considered as contributory infringement.
7. The difference between framing and linking can be explained clearly by following words: "Unlike linking, framing is a relatively recent phenomenon, introduced by Netscape in Version 2 of its Navigator product. A framing site, by virtue of certain commands in its HTML code, links to another site, displaying that site within a window or frame. The frame itself is comprised of content

from the framing site. In contrast to generic hyperlinking, in the case of framing, the user remains at the framing site and views content from both sites. The address that the user's browser displays may continue to be that of the framing site. The user may be unaware that the content in the frame comes from another site.”⁵⁰

8. General speaking the trend is considering the framing practice something that is parasitic of the work of others. Nevertheless the most accepted legal concept is that framing can cause consumer confusion and thereby violating trademarks laws and under particular laws can be unfair competition.

9. “The term META is from metadata, which means data about other data. Search engines use META tags to help determine the content and value of your Web page content. A META tag is an optional line of HTML code in the HEAD section of your document. The tag's actual content provides descriptive information about your site, but isn't displayed by the browser. HTML specifications don't define the function of META tags, only their format. Consequently, there are a number of different META tags that describe everything from site content to the site author to a page rating. Different browsers recognize different META tags.”⁵¹

10. The main point of meta tags is that a company can use someone else's trademarks as meta tags in order to lure the customers of a competitor, due to many search engines use meta-tags to produce results for keyword searches. Other troubles that the use of meta tag can bring with their illegal or deceptive use are unfair competition and dilution.

⁵⁰ Legal Issues on the Internet Hyperlinking and Framing By Maureen A. O'Rourke Associate Professor of Law Boston University School of Law Boston, Massachusetts

⁵¹ Put META Tags To Work On Your Site by Larisa Thomason, Senior Web Analyst, NetMechanic, Inc

11. As a general rule, most of the legislation about trademarks around the world have established legal exceptions to use someone else's trademarks. It is possible to find cases where someone has used someone else's trademarks as his meta tags and in some events those cases can be considered as a fair use.

12. In terms of copyright infringement, under the American and Australian legislation the principles are quite similar in the sense of both of them recognize by the only fact of the creation, some exclusive right to the authors that can infringe when someone reproduce, publish, adapt or perform the work without the authorization of his author.

13. Linking and framing can be used like tools that in some events constitute copyright infringement. In the case of framing, it is possible to talk about direct as well as about indirect copyright infringement, due to the fact that in the case of framing the infringer is reproducing a protected work without authorization of his author.