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Hyperlinks, frames and metatags: some legal problems

Rhonda Breit

Abstract

This article maps some of the legal problems facing on-line publishers who use publication tools such as hyperlinks, frames and metatags. It will identify potential legal problems arising from the use of these on-line publication tools and then analyse international case law to predict how Australian courts may approach their regulation. Finally it identifies some practical guidelines which may be followed to avoid legal problems arising from their use.

Introduction

Hypertext links, which are tools that help users navigate the Internet, are frequently used by on-line publishers, including journalists and academics, to connect to other sites. Hyperlinks or links, as they are commonly known, make it possible for users to navigate the Internet with ease, inviting web surfers to inspect on-line material deeper within a site or from another Internet site. They are an integral part of the World Wide Web. However, their use raises important legal questions, which should be considered by publishers when configuring links to other sites. Metatags are used to attract web traffic to a site, while frames are used to maximise exposure of Internet sites, thereby increasing the revenue raising potential of the Internet. The use of metatags and frames also presents some legal problems for on-line publishers. This article will outline the legal tensions arising from use of these publication tools and, by considering international precedents, outline a protocol for their use in Australia.

The tools: what are they?

Hyperlinking is "a particular type of Hypertext Markup Language (HTML) tag...often represented as bolded or underlined text or as an image" (Kuester & Nieves 1998, 2). Links are achieved by inserting a web address in the HTML code, "which when pointed to and clicked by a site user, causes the user's browser to instruct a web-server to find the URL" (Chalet & Smith 1999, 10). Users can connect to other Web pages and retrieve information within seconds without having to perform new searches or other complex tasks" (Kuester & Nieves 1998, 2). Hyperlinks have a display and an address element. The address element, which stores the address that the end user's browser will look up if the end user clicks or otherwise engages the hyperlink, determines the level of penetration into the connecting site (Leonard & Leong 1998, 44). The display element "acts as a placegetter and allows a different string of text to be displayed" (Leonard & Leong 1998, 44). The display element may take various forms including underlined text, usually in a different colour, but it may take the form of a label, 'click here' button or graphic on which the user clicks to invoke the link. Links can be made directly to another site's homepage or to pages within a site, which is known as deep-linking.

Commercial pressures have dictated on-line publishers use other tools to maximise Internet exposure and increase its revenue raising potential. These tools include frames and metatags.

Frames are used to maximise exposure on the Internet, thereby increasing its potential to sell advertising. The Web site is divided into separate windows that have "optional scroll bars and borders" (Kuester & Nieves 1998, 2). Essentially, a user can link to another site from within the original site but the material to which they have linked is 'framed' by the original web site. This can give rise to the impression that the material originated from that site.

Each window is displayed in a separate portion of the Web browser screen and functions independently to display an individual web page. In most instances, each web page is interlinked by the use of hyperlinks within the framed site, allowing for user interaction without leaving the original framed site or opening a new screen. A user can choose from different topics within one of the individual framed pages within the site by clicking on a hyperlink on one of the framed pages, which in turn, opens a linked Web page within one of the framed portions of the Web site. (Kuester & Nieves 1998, 2).

A metatag is an invisible search tool, which uses key words to identify the site and attract web traffic. Kuester and Nieves explain that metatags are hidden text coding, "located within a specially designed portion of the HTML code which generates the Web page" (1998: 2-3).

Web page designers use this hidden HTML code to designate keywords which are communicated to search engine software. This is an important tool for the web page designer since search engines are often unable to properly index a particular Web page based in the text of the page. In its cooperation with the search engine, a metatag keyword may be thought of as a pre-hyperlink, since a hyperlink is often created by a search engine in a search results phase when a user performs a search using that keyword (Kuester & Nieves 1998: 2-3).

The correct use of hyperlinks, frames and metatags should not be problematic for journalists or journalism educators. However, the incorrect use of these tools can give rise to various legal problems including:

- facilitating a person to access copyright material of a third party
- infringing a third party's trade mark
- implying some association between the linked and the linking site
- reducing the revenue raising ability of a third party's site.

This paper attempts to extract some general rules for journalists, newspaper Web designers and journalism educators to follow when considering whether the use of tools gives rise to legal problems. To do this, it will consider some international cases, which address the legal problems applying to the use of these tools, and analyse how the principles enunciated in them may apply in Australia.

Is there a right to link?

Links are an integral part of navigating the World Wide Web and any attempt to limit their use would limit freedom of speech on the Internet. In the United States, such constraints on hyperlinking may be an unconstitutional censorship of Internet speech. This issue was considered by the United States Federal District Court when the American Civil Liberties Union challenged the constitutionality of Georgia's 'Internet Police' Law (ACLU v Miller 1997; Kuester & Nieves 1998: 12). The Act criminalised the use, without consent, of trademarks and logos on the Internet that falsely implied that permission for their use had been granted (Kuester & Nieves 1998: 12). The ACLU argued that

the "trade and logo restriction frustrates one of the Internet's unique features — the links that connect web pages on the World Wide Web and enable users to browse easily from topic to topic through the computer network system" (ACLU v Miller 1997: 2). The court noted that for the state to justify the Internet Police Law and overcome the presumption of invalidity, it had to demonstrate "that the statute furthers a compelling state interest and is narrowly tailored to achieve it". The court accepted that the compelling state interest was fraud prevention, but found that the act was not narrowly tailored to achieve fraud prevention. It found that the uncertainty arising from the Act resulted in self-censorship, which was "particularly harmful because it chills protected expression".

Kuester and Nieves claim the First Amendment importance attached to hyperlinking "arguably creates a right to link" (Kuester & Nieves 1998: 14). While acknowledging the potential harm that could be caused by links that falsely imply consent for their use had been given, the court found that the existing laws of fraud, trademarks, copyright, passing off and fair trading provisions protected the commercial interests of the linked site. Kuester and Nieves argue the application of these laws on the Internet could be limited because restricting the use of hyperlinks essentially limits use of the World Wide Web which, in turn, illegally chills freedom of expression on the Internet. The decision is important because it confirms domestic laws, such as copyright, trademarks, passing off, consumer protection legislation and fraud do regulate the Internet. It also suggests, however, that the Internet's dependence on linking (and other publication tools) may affect the way in which domestic laws are applied to these practices.

It is unlikely Australian courts will recognise a right to link. Australia's only constitutional guarantee of freedom of speech is a negative right that state, territory or federal law will not restrict political and government communication (Lange 1997). The implied freedom of political communication may affect the way in which courts interpret the application of domestic laws to Internet publications. But Australian courts must also take account of global issues when applying existing law to the Internet. This occurred in *Macquarie Bank v Berg* (1999), when Simpson J rejected an application to restrain publication of defamatory material on the Internet. In handing down his decision, Simpson J noted the international consequences of granting interlocutory injunctive relief against potentially defamatory material

published on the Internet (*Macquarie Bank v Berg* 1999, 3). The court considered the fact that a defamatory publication in Australia may not be in breach the defamation laws of other countries. By ordering a publication be removed from the Internet by granting an injunction, the Australian courts could be censoring protected speech overseas. This does not mean that Australian defamation law must fall in line with overseas laws. The variations in international speech laws can be accommodated in the type of remedy provided. Instead of granting injunctions, which restrict Internet speech by removing a publication, the court can increase damages for the increased harm suffered because the publication remains on the Internet. This approach acknowledges the publication contravenes Australian law but accommodates more liberal defamation laws that may apply elsewhere. Thus Australian courts can internationalise their approach to legal problems arising from Internet publications while upholding their domestic laws. So what is the international approach to hyperlinks, frames and the use of metatags?

Case studies

Hyperlinks

Shetland Times Case

One of the first cases to arise from hyperlinking involved two newspapers, both with on-line publications, based in the Shetland Islands off Scotland. The *Shetland News* created hyperlinks using *Shetland Times'* headlines, to *Shetland Times'* stories. The hyperlinks by-passed the *Times'* home-page, where the bulk of its advertising material was located. The link created the impression the stories were part of the *News'* web-site. The *Times'* sought an injunction restraining the *News* from using the hyperlinks claiming the links infringed copyright on two grounds:

- First, the web-site constituted a cable program within the terms of the British Copyright legislation and the link to *Times* stories constituted a copyright infringement, and
- It also argued the headlines used to link to the stories constituted literary works owned by the *Times* and the storage of them in electronic form constituted copying within the terms of the act.

Effectively the court was being asked to determine whether the act of deep linking (using the headlines of the newspaper to which the link is created) to pages within the web address presented a prima facie breach of copyright. The court granted a preliminary injunction, but the matter settled before the issues of copyright infringement could be heard.

The court could not rule out the copyright protection in web-sites as a cable program service (*Shetland Times v Wills* 1997, 608). It also could not rule out the possibility that copyright could subsist in headlines and noted:

While literary merit is not a necessary element of a literary work, there may be a question whether headlines, which are essentially brief indicators of the subject matter of the items to which they relate, are protected by copyright. However, in light of the concession that a headline could be a literary work and since the headlines at issue (or at least some of them) involve eight or so words designedly put together for the purpose of imparting information, it appeared to me to be arguable that there was a (copyright) infringement. (*Shetland Times v Wills* 1997, 609).

Given this case settled on the eve of the hearing, it is important to consider the terms of settlement when extracting practical principles to apply in the establishment of a hyperlink policy in Australia. "As part of the settlement, the *News* agreed to link only through the *Times*' web site's front page and agreed to include a legend identifying the headlines as from the *Shetland Times* wherever such headlines were posted on the *News*' website." (Netlitigation 1999b, 1).

Ticketmaster Case

Another case dealing with hyperlinks is *Ticketmaster Corp v Microsoft Corp*, where Ticketmaster sued Microsoft for linking to its site without permission. Negotiations for a linking agreement between the two organisations had fallen down, but Microsoft linked to the site without any agreement. The link avoided Ticketmaster's home page and linked deep into the site. Ticketmaster profited from the link because surfers from the Microsoft link booked tickets, but it claimed the Microsoft link avoided advertising placed on its homepage, thereby effectively devaluing Ticketmaster's home page and the linking agreements held with other corporations. Ticketmaster sought injunctive relief against Microsoft on the ground of trademark and copyright infringement and unfair

competition. The two organisations reached a confidential settlement in February this year, but Microsoft did remove its deeplink and is now routing its traffic through Ticketmaster's home page.

The *Shetland Times* and *Ticketmaster* cases suggest:

- copyright may subsist in headlines
- use of someone else's headlines as hyperlinks could infringe copyright
- a linking site may authorise a copyright infringement by leading an Internet user to copyright material
- confusion arising from the relationship between the linked and the linking site may give rise to legal liability.

Issues not canvassed in these cases include:

1. By placing material on the Internet, does the copyright owner grant an implied licence to use, copy for personal use?
2. Would such an implied licence extend to a right to link?
3. Does a hyperlink (particularly by a newspaper) constitute a fair use of copyright material?

Framing

Washington Post et als v TotalNews, Inc

Washington Post and other news services sought to restrain TotalNews from framing their website and website content. The TotalNews site relied on links to selected news web sites including that of the *Washington Post*. The applicants argued that the TotalNews frames — which included a logo, links, advertising and new frame — infringed both copyrights and trade marks; diluted the content of their web sites and deprived them of advertising revenue (Netlitigation 1999f, 1). This action was settled before being heard but the terms of settlement provide some guidelines for on-line publishers seeking to draw up a protocol for web design. "As part of the settlement,... TotalNews agreed to enter into a linking agreement with the plaintiffs which allowed TotalNews to link the plaintiffs' websites but prohibited the use of frames, graphics, video or audio materials, or plaintiffs' proprietary logos any or all of which might imply an affiliation with or endorsement of TotalNews by, the plaintiffs." (Netlitigation 1999f, 2).

The TotalNews case indicates that the use of frames can give rise to complaints of passing off or misleading and deceptive conduct in breach of the Trade Practices Act.

Metatags

Playboy Enterprises (PEI) v Terri Welles

Problems arise in the pre- and post-linking phase, where trademarks of competitors are used. Several cases have been instigated in the United States claiming a competitor's metatags have infringed their trademark. One interesting case is *Playboy Enterprises Inc (PEI) v Terri Welles*, where PEI sought a preliminary injunction against model Terri Welles to restrain her from using the term Play Mate of the Year 1981 and its abbreviation PMOY 81. Ms Welles has a Website, which displays the term Play Mate of the Year as a sub heading on the front page. The sub heading is burned in the header "Terri Welles" which appears at the top of the front page of her website. The abbreviation "PMOY 81" appears as a watermark that forms the background to the pages of her website. However, at the bottom of her front page Welles included a disclaimer, in 8pt type, which states: "This site is neither sponsored by, nor affiliated with Playboy Enterprises Inc" and she lists the registered trademarks of Playboy Enterprises. Welles also used the term Playboy and Playmate as metatags.

The court rejected PEI's application for an injunction claiming the terms Playmate of the Year 81, PMOY 81 and Playboy and Playmate were merely descriptive of Ms Welles. She was in fact a Playmate of the Year 1981 and a Playboy and a Playmate. The court placed great weight on the disclaimer, which it claimed reduced the likelihood of confusion arising from the use of the descriptive terms. The court held that the use of the description constituted a "fair use" of a term usually associated with PEI.

The PEI and Terri Welles saga is continuing but the court's views provide some lessons for Australian Web designers. Although the use of metatags is unlikely to give rise to copyright issues, they can infringe a person's trademark or suggest some unauthorised connection with another trader, giving rise to problems of passing off or an action for misleading and deceptive conduct under the Trade Practices Act. This case is helpful also because it illustrates that use of descriptive words will not constitute a trademark infringement and the use of disclaimers can negate confusion arising from the use of these descriptive words. Caution should be exercised when drawing general rules from this case because of PEI's tactics. Originally PEI wanted Ms Welles to join their site and when she refused, they sought legal redress.

These are a selection of the international cases involving the legal problems arising from the use of Internet tools. This paper will now attempt to analyse how these cases may be influence Australia courts, which must apply the law of copyright, trademarks, passing off, and Trade Practices Act.

Application to Australian situation

Copyright

The Copyright Act 1968 (Cth) protects the commercial interests of a person who transforms an original idea into material form as a literary, artistic, dramatic or musical work or film, sound recording, broadcast signal or published editions of works. The Act attempts to balance the rights of creators to profit from their endeavour against the public interest in accessing information, thereby ensuring "fair play" (Walker 2000: 902). Section 35 of the Copyright Act provides that the author or person who transforms the idea into a material form owns the copyright, which means they have the exclusive rights to deal with the original work in the manner the Act prescribes. The Copyright Act (1968) does not recognise separate copyright in Web pages, but the general rules of copyright apply to the various original works which go to make up the Web page, including literary, artistic and musical works, broadcast signals, sound recordings and the like. There is no copyright in "news, facts or information" but copyright can subsist in the original expression of news, facts or information (Walker 2000: 913). Copyrights are infringed if a person, without permission of the copyright owner, does or *authorises* the doing of any act comprised in the copyright (Copyright Act 1968, section 36).

Although the protection offered to copyright owners is very strong, it is not absolute. The rights of the creator to profit from his/her creative endeavour must be balanced against the cultural interests of the public in accessing original material (see Macmillan 1998). The rights of the creator must be balanced against the public interest in freedom of speech and the freedom to access information. This is achieved by permitting certain uses of copyright material and limiting the duration of the protection. Sections 40-42 of the Copyright Act enable the use of copyright works for research, study and criticism or review and for reporting news in a newspaper, magazine, film or broadcast (see Gibson 1998: 68). To rely on the fair dealing defences a newspaper should acknowledge

the fact "that the story originates with another newspaper" (*Express Newspapers v News Ltd* 1990: 208).

A copyright owner may expressly or by implication authorise a person to use copyright material. The 'custom' of picking up news stories appearing in other newspapers and reproducing them might "found a defence that in publishing a newspaper each paper accepts and impliedly consents to the others picking up the story and using it in a way which is proper" (*Express Newspapers v News Ltd* 1990: 209; Walker 2000: 939). There is no ruling on what constitutes a "proper use" of another newspaper's articles, but given that copyright law aims to promote "fair play", it is arguable that a proper use would require some form of acknowledgement of the original story, similar to the fair dealing defence. This argument raises at least three issues:

- Do these 'well-known practices', which arguably give rise to an implied licence, translate into the electronic world?
- What is a proper use of another newspaper's story on the Internet?
- Does an implied licence permit deep-linking?

Based on the *Shetland Times* case it would seem that the practice of deep linking may be problematic because copyright can be asserted in:

- the words that comprise the link (Leonard & Leong 1998: 45)
- the words and letters in the domain name (Leonard and Leong 1998: 45)
- the content of the site at the end of the link (Leonard & Leong 1998: 45)
- words comprising the link and letter in domain name.

The *Shetland Times* case suggests that a 'thin' copyright protection may subsist in the headlines, if sufficient skill and labour is expended in them. However, the American courts have been reluctant to recognise copyright in headlines. Any copyright protection, which would subsist in them, could be avoided by a person changing the headline slightly or by acknowledgement. If the Australian courts accepted the argument that copyright can subsist in headlines, it is possible the link and the domain name could give rise to a technical infringement of copyright. The invisible metatags, that attract browsers to the site, may also infringe copyright if they incorporate a slogan, which has taken a level of skill and labour to create. However, given that metatags are tags and not structured like headlines, the use of metatags is more likely to give rise to trademark issues.

This discussion reveals that metatags and the address and display elements of hyperlinks could give rise to a technical breach of copyright. However, any copyright protection in headlines or slogans could be avoided by acknowledgement or the exercise of some independent skill and labour to vary the headline/slogan. The act of leading someone to the original works of another site presents the greatest copyright problems for people configuring hyperlinks.

Contents at end of link

The act of authorising a person to copy another person's original works is outlawed by the Copyright Act (1968, section 36). Does the act of linking to a site constitute authorising a copyright infringement? It could be argued that the act of placing material on the Internet gives rise to an implied licence. For news publications, the implied licence would arise out of the well-known practice of news organisations picking up a competitor's news stories and using them in a manner which is proper (*Express Newspapers v News Ltd* 1990: 209; Walker 2000: 939). Given the integral nature of links to the Internet, it also could be argued that the 'well known practice' of people picking up material from the Internet gives rise to an implied licence to use this materially properly.

Leonard and Leong argue that the act of placing copyright material on the Internet must give rise to an implied licence for users to read and copy the material for personal use, otherwise everyone would have to seek copyright permission before entering a web site (Leonard & Leong 1999: 46). If the world at large has an implied licence to access web sites, then it is difficult to see how a link, which routes a person to a site, would constitute authorising a copyright infringement in breach of section 36, Copyright Act 1968. Leonard and Leong state that "if the end user already has an implied licence from the target site to reproduce the contents, it is difficult to see how the rogue site can permit them to do something they already have permission to do" (Leonard & Leong 1999: 44). However, the implied licence is limited to a proper use.

What is a proper use of on-line copyright material? Here it is necessary to go back to the aim of copyright law, which seeks to ensure fair play. For on-line material to be used properly it must be accessed in the order and manner expected by the copyright owner. To ensure the copyright owner maintains

control over his/her works, the implied licence must be limited to users accessing the copyright material via the home page. The copyright owner would then maintain control over the order in which material is presented to the public and there is no confusion about its origins. Deep-links into the heart of a site would transfer this 'control' from the copyright owner to the linking site. For example, if a person publishes a book, they have control over the sequence in which material is presented to the public. If a person wants to read a section of a book (or make a copy of a section of a book) they are exposed to the sequence of logic of the person who converted the original idea into material form and there are strict limitations on the amount of original material that may be copied. The act of deep-linking on the Internet undermines this control, thus limiting the creator's rights to exclusively deal with his/her original work. This does not sit well with the aim of copyright law.

This discussion suggests that a shallow-link to a homepage could not authorise a copyright infringement, because the user is introduced to the site in the order it is intended to be presented to the public and it is acknowledged (provided the site is not framed in such a way as to be misleading). However the implied licence is unlikely to extend to deep links, which it intrude on the copyright owner's ability to control the sequence in which his/her material is presented to the public. Thus an implied licence would not extend to a deep link unless it acknowledged the source of the material and allowed the user to access the linked site's home page.

It must always be remembered that the copyright owner has the right to revoke the licence at any stage. Where a deep-link is made to original works for research, study and criticism and review or for reporting the news, it could be argued this constitutes a fair or permitted use. To rely on this defence, however, material should be attributed to the author. Where confusion arises as to the source of the original works (e.g. it is framed by the linking site), it is unlikely to fall within the permitted use defences.

Trademarks

The use of Internet tools also may infringe a competitor's trademark. The Trade Mark Act 1995 protects the words, phrases, letters, numbers, sounds,

scents, shapes, logos, pictures and packaging, which are used to distinguish the goods and services of one trader from another (Trade Marks Act 1995, section 6; Commonwealth of Australia 1999: 1). The Trade Marks Act 1995 provides a system where distinguishing marks or 'signs' can be registered, giving the owner "exclusive use, and/or control of the use of the trade mark throughout Australia for the goods and services for which it is registered" (Trade Marks Act 1995, section 20; Commonwealth of Australia 1999: 8). The owners may sue anyone who uses their trademark, or similar trademark, on the same or similar goods or services. A trade mark infringement occurs where the sign used is "substantially identical or deceptively similar" to the registered trademark (Trade Mark Act 1995, section 120; Commonwealth of Australia 1999: 8). When deciding whether there has been an infringement of a registered trademark the court will take into account:

- the physical similarities of the 'signs';
- the aural similarities of the 'signs';
- the type of customer and the level of confusion caused to them by similarities between the signs;
- the way in which the goods or services are offered for sale and its effect on potential customers;
- the lasting impression of the sign (Commonwealth of Australia 1999: 8).

Section 122 Trade Marks Act outlines when a trade mark will not be infringed, incorporating a fair use defence, similar to that considered by the court in the *Terri Welles* case.

The law of trademarks is probably more important than copyright when configuring metatags and hyperlinks. In the US, several cases have arisen from the use of trademarks in hyperlinks and metatags. It has already been noted in *PEI v Welles* that the use of a competitor's trademark to attract Web traffic is a trademark infringement unless it is a fair use. The use of descriptive words constitutes a fair use, therefore if *The Age* used 'news' as a metatag or hyperlink, it is unlikely that News Limited would be able to restrain this use as a breach of trade mark or associated term. Various courts in the US have granted injunctions against competitors using trademarks as links and metatags, and it is likely the Australian courts will also restrain such activity. Based on US cases terms are unlikely to infringe a competitor's trade mark if they are:

- merely descriptive of the product or service (*PEI v Terri Welles* 1999);
- a disclaimer is used to reduce the likelihood of confusion (*PEI v Terri Welles* 1999);
- used for criticism or review and no confusion arises from the use of the trade mark (*Bally Total Fitness v Andrew Faber* 1998);
- used for editorial or non-commercial expression, which does not devalue the mark (*Bally Total Fitness v Andrew Faber* 1998).

A fair use defence will lie where a person has acted in good faith and has not attempted to profit from the reputation of another. But how can the courts measure the effect of Internet tools on a trade mark or organisation's reputation? In *Brookfield Communications Inc v West Coast Entertainment Corp*, the plaintiff, which operated a site called moviebuffonline.com, filed a complaint to halt the launch of a site with the domain name moviebuff.com. The moviebuff.com domain name had been registered since 1996 but it had been trading as the Movie Buff's Movie Store since 1986. Brookfield had been trading under the trademark MovieBuff since 1993. The court ruled that West Coast was not the first user of the trade mark moviebuff...because the Movie Buff's Movie Store was substantially different to moviebuff. The Ninth Circuit court stated:

West Coast's first use [of the moviebuff.com mark] was neither February 1996 when it was registered, nor April 1996 when it was first used, but rather November 1998 when it first made a widespread and public announcement about the imminent launch of its website. (Sandburg 1999: 2).

Sandburg claims that "trademark law takes precedence over Internet customs and practices" (1999: 2). The court found that the use of the moviebuff trademark as a metatag constituted an infringement because the trader "improperly benefits from the goodwill that Brookfield developed in its mark...Using another's trademark in one's metatag is much like posting a sign in front of one's store." (Sandburg 1999: 2)

The court's findings in *Brookfield* suggest that when considering whether a trademark has been infringed, the court will look behind the actions:

- When the court considers the issue of prior use of a trademark, it will not look at the date of registration to measure the level of public identification with a particular mark, instead the court will consider the date of actual widespread use.
- Reputation can be measured by the amount of time a person has operated a website.

When measuring the likelihood of public confusion the court will look at three things:

- the virtual identify of the marks which includes "similarity of appearance, sound and meaning of the trade marks";
- relatedness of the parties' goods, and in this case the fact that the two companies offered services related to the entertainment industries and provided searchable databases meant they were quite similar; and
- the simultaneous use of the Web as a marketing tool also exacerbated the level of public confusion.

Passing off

If a person has not registered their trademark an action may lie at common law. The tort of passing off provides an action where a trader, who has developed goodwill in particular goods or a business, is harmed by a competitor who represents his goods to be those of the first trader. The tort provides that a trader cannot exploit the reputation of a competitor. The tort of passing off prohibits "a person using names, marks, letters or other signs to induce consumers to believe that the goods or services the person is supplying are, in fact, those of another trader" (Armstrong et al 1995: 58). David Lindsay identifies three essential elements to bring an action in passing off, they are:

- the plaintiff has established a reputation or goodwill deserving of protection;
- there has been a misrepresentation likely to confuse or mislead consumers;
- the plaintiff has suffered some damage or is likely to suffer damage (Armstrong et al 1995: 58).

Proving a reputation and goodwill worthy of protection on-line and damage to a reputation as a result of hyperlinks and metatags is problematic. How do you measure a person's reputation online where no personal interaction takes place and, unless offering an e-mail or chat service, there is very little to measure satisfaction. In fact, many sites would be unable to identify who has accessed their site (and if they could there would be serious privacy implications). So there is no real way of measuring the level of satisfaction consumers have from the product, except by measuring the number of hits registered on the site. Obviously with existing newspapers that go on-line, their reputation as newspapers will go some way to proving their online reputation, but the other way to measure reputation is the number of hits made on a site. If a hyperlink

takes a surfer deep into the on-line pages, the hit (which is registered by entering the homepage) is avoided. This undermines the aggrieved 'trader's' ability to prove reputation and subsequent damage. It may be possible to draw some comparison on the number of hits before the link and the number of hits after the link, but this evidence is not conclusive of damage.

The *Brookfield case* provides some guidelines on how the United States' courts will measure reputation on the Internet. If it is clear that there is no association between the linked and linking site (or framed and framing site), obviously no action in passing off will arise, which emphasises the importance of attribution — a basic rule of journalism (see Leonard & Leong 1998: 45).

Trade Practices Act

The Trade Practices Act (1974), and the state equivalent Fair Trading legislation, also could apply to use of hyperlinks, metatags and frames if Internet users are misled by the false, misleading or deceptive conduct of another². Section 52 provides that "a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive" (Trade Practices Act 1974) and equivalent provisions also apply in all states and territories in Australia.³ Walker notes that misleading and deceptive conduct is not defined in either the TPA or the state legislation, but cases have shed some light on its meaning. The term 'mislead' has been held to mean "to lead astray in action or conduct; to lead into error; to cause to err", whereas 'deceive' has been held to mean to "cause to believe what is false" (Walker 2000, 375)⁴.

Any hyperlink that would lead users to conclude that the linking organisation is authorised to link to the linked site or has some other endorsement, could constitute misleading and deceptive conduct under the terms of the act. The same argument could apply to metatags and frames, which give rise to the same impression. A breach of the act can only occur if some confusion arises about the relationship between the linked and the linking site (framed or framing site). This again reinforces the need to attribute or in some way acknowledge the source of the material. If it is impossible to configure the site to remove this confusion, then permission will need to be sought by way of a linking agreement.

Conclusion and practical guidelines

Existing laws do regulate the use of hyperlinks, frames and metatags. Use of each of these tools can give rise to legal problems including breach of copyright, trade mark infringement, an action in passing off or it may constitute misleading and deceptive conduct in breach of the Trade Practices Act or the Fair Trading legislation.

These tools make it easier to navigate the Internet. Any restriction on their use will indirectly affect freedom of speech on the Internet. However, the international implications of any restriction on speech also must be balanced against the need to protect commercial interests of Internet businesses. The international cases cited and the legal doctrines which regulate these practices in Australia suggest that anyone engaging in fair play will be able to use these tools freely. Problems will occur where:

- Deep links are used and there is no attribution or access to the linked site's home page.
- Hyperlinks use headlines or some other creative work owned by someone else without attribution.
- A site uses the distinguishing mark of a competitor as a hyperlink or metatag, which does not constitute a fair use in that it is merely descriptive, or being used for criticism or review. (Obviously the question of fair use is complex, justifying a separate article in itself. Legal advice should be sought before using a competitor's name, trademark or other identifying mark, symbol, slogan etc.)
- Metatags are used to attract a competitor's customers by misrepresenting some association with that trader.
- Frames are used which give rise to a wrongful impression that there is some relationship between the framing and the framed site.

Some simple practical steps can overcome the legal ambiguity arising from the use of these tools:

1. Sites should protect copyright material by specifying that material may only be linked to with the consent of the copyright owner. This can be done by a linking agreement, which will maximise the value of linking rights and advertising and can also clarify legal ambiguities arising from the use of material.
2. Any limitation on access rights should be repeated throughout the site and not just set out on the site's home-page.

3. Licence agreements should exclude licensees from entering into linking agreements with other sites.
4. Licence agreements should specify where the linking site should enter the linked site, for example the home-page.
5. Licence agreements should specify the nature of any acknowledgement.
6. If there is no linking agreement, always link through the linked site's home page.
7. Use disclaimers to limit possible confusion about the relationship between the linked and the linking site.
8. Deep links to another site should clearly indicate the source of the information, who owns copyright and provide the user with direct access to the linked site's home page.
9. Site checks should be made to discover whether people are linking to a site without consent and attribution.
10. Organisations should check regularly to see if competitors are using their trademark in a metatag.
11. Conditions of use of material available through a site should be set out on the home-page.
12. Advertising should be incorporated throughout the site at relevant launch sites.

While the Internet and the World Wide Web have reduced the barriers to global communication, legal regimes are still limited by geographical borders. As new technologies emerge and Internet communication tools improve, it can be unclear how the domestic laws regulate these practices. Individuals and corporations can redress some of these ambiguities by being aware of the legal pitfalls in embracing global communication tools and taking some practical steps to minimise the confusion arising from the application of various domestic laws to international communication practices. The ease of using some of these tools disguises the complex legal problems that can arise from their use. Before embracing new navigational and communication tools, journalists, journalism educators, publishers and Internet users generally should take steps to minimise the legal risks associated with their use.

Notes

¹ The issues raised here are also relevant to the tort of passing off and the Trade Practices Act.

² This article will focus on the Trade Practices Act.

³ Fair Trading Act 1987 (NSW), Fair Trading Act 1989 (QLD), Fair Trading Act 1987 (SA), Fair Trading Act 1990 (Tas), Fair Trading Act 1985 (Vic), Fair Trading Act WA, Fair Trading Act 1992 (ACT), Consumer Affairs and Fair Trading Act 1990 (NT).

⁴ Sections 53 c and or (d) may also apply to the use of these tools, however, this paper will focus on section 52.

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