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LEGAL ASPECTS OF LINKING

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Abstract

The thesis presents an overview of the legal aspects of using a tool that underlies the existence of the World Wide Web – that is, of a hyperlink. Firstly, the research begins with a general analysis of hyperlinking technology, stressing the aspects that are causing violations of other people's right. The attempts to protect hyperlinks as such, under patent or copyright laws, are highlighted. Secondly, the study shows different approaches that exist between practitioners, judges and legislators, especially if they come from different jurisdiction, in relation to the possibility and legality of free linking. This requires special attention, as all hyperlinks are functionally equal, though their exact use causes different consequences. Special consideration is given to the issue of linking to the illegal content, because it triggers liability even in cases were the relation of the linking person to the illegal content is not direct. After showing the shortcomings of the linking, though the technological measures to solve at least some problems are outlined. The research shows that linking is a complex sphere which has implications in the domains of copyright, trademark, defamation and other laws, thus its legal aspects are numerous.

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Introduction

From the moment of coming into existence of the World Wide Web we can easily trace a dramatic growth of it, and numerous important changes that it brought. Internet, initially just a passive environment used for email, newsgroups and mailing lists (used mainly by the researchers and educators[1]), has evolved to be an interactive, user- enabled universe filled with vast amounts of information.[2] This development was triggered by the growth in commercial usage of the new medium (which new notions like e-commerce and cyber-law appearing), as it is now possible to reach the wider audience than ever. These developments caused growing litigation, and the courts were faced with a demanding task of addressing traditional intellectual property and business law issues in the new digital sphere.

The expectations that were raised by the new medium ranged from the idea of total freedom and absence of regulation to the necessity of complete regulation of the digital sphere. The idea which is most often voiced in recent years is that there's no need to adopt a specific legislation to regulate Internet, nor its reasonable to leave the it without any regulations. Thus, the approach taken by courts, governments and commentators was that of adaptation of the existing legal norms to the new digital reality.

Internet, in essence being a huge conglomerate of interlinked data and information, created by various authors, raises many intellectual property issues. The most obvious aspects of it were addressed by many prominent commentators in their researches on intellectual property, with domain names being a favorite topic for analysis. So far none of these studies had addressed all the issues, the possibility of this being limited by the fact that Internet, being a relatively young medium, is still evolving, changing, and creating new problems that need to be solved.

These new problems are sometimes created by the new uses of the traditional Internet

[1] Ignacio Garrote Fernández-Díez, *The linking law of the World Wide Web*, Universidad Autónoma de Madrid, *at* http://www.uam.es/centros/derecho/publicaciones/pe/english.html (last modified March 22, 2000)

[2] Jeffrey R. Kuester, Peter A. Nieves Hyperlinks, frames and meta-tags: an intellectual property analysis, IDEA: The Journal of Law and Technology 1998 (38 IDEA: J.L. & Tech. 243), © 1998 PTC Research Foundation of the Franklin Pierce Law Center, at http://www.patentperfect.com/idea.htm (last visited: Feb. 23, 2007)

technologies, for example, links, frames[3] and meta-tags[4], - so-called associational tools[5], which were created specifically to aid the interconnection of the information available. Links are widely used even now, frames and meta-tags are not really important anymore, but at certain stage of their development they contributed to the creation of the extensive case-law on, trademark infringement, trademark dilution, unfair competition and copyright infringement.

Linking is said to lose its importance due to the modern architecture of the pages, which allows having not-permanent, not-visible links, or prohibiting linking. Nevertheless, so far it cannot exclude completely all the problems. Millions of pages exist that were built under the traditional architecture, and they are not being all renovated. Moreover, in some situations linking to front page is still a reality, and when this page presents illegal content, or violates someone's rights in any other way, the solutions are to be discovered. Thus, we can see that linking still poses many problems, and thus it seems necessary to put emphasis on some important issues.

After a brief historical perspective and explanation of terms, this thesis provides an overview of the most controversial areas, focusing on the analysis of cases. The methods used will be in essence comparative ones, as links, operating in an international sphere, and being exposed to many jurisdictions, have different standing in various countries.

The analysis will be based on the works of different authors and researches. However, so far there has been no research conducted that would deal specifically with the issue of hyperlinking. The works existing only touch upon the subject in the broader perspective of

[3] **Frame** - is an associational tool that provides a means for dividing a Web site into separate windows, with optional scroll bars and borders. Each window is displayed in a separate portion of the Web browser screen and functions independently to display an individual Web page.

[4] **Meta-tag "keywords" -** consists of text coding which is hidden from normal view and located within a specially designated portion of the HTML code which generates the Web page. Web page designers use this hidden HTML code to designate keywords which are communicated to search engine software.

[5] Heather A Harrison Dinniss, *Tools of the trade: intellectual property issues in electronic commerce tools*, Victoria University of Wellington Law Review, at http://www.austlii.edu.au/nz/journals/VUWLRev/2001/7.html (last visited: Apr. 18, 2007)

intellectual property, unfair competition, defamation, etc. laws. Separate articles dealing with various aspects of special kinds of hyperlinks by different authors were also used in this research.

Internet is its essence an international medium, thus, whatever is posted there affects every country in the world. Thus, the case-law available comes from many jurisdictions, though due to limitations on the size of this thesis it is impossible to address the legislation of each country underlying the outcome of the case. Nevertheless, the regulation in many spheres is very similar, e.g. in intellectual property law the results are mainly the same due to the harmonization stemming from the adoption of Berne and Paris convention more that a century ago. However, when case-law that reflects all peculiarities and differences between the countries, they are specifically highlighted, otherwise, only the legislation of the country of dispute is analyzed.

So, in first chapter of my thesis I will deal with the history of hyperlinks, which is necessary to understand their main characteristics and substance. Technical description will be given so as to give broader understanding on how the web linking system operates, followed by the discussion on the possibility of protection of links patent and copyright law. Second chapter will clarify the circumstances in which linking may create any copyright and trademark infringement situations. Special attention will be given to the certain problems created by deep and direct linking, together with the new issues raised by activities of search engines and databases. Third part will deal with the problems posed by the linking to the illegal and defamatory content.

Chapter I – General characteristics of hyperlinks

1.1 Definition of hyperlinks and their historical development

1.1.1 Brief explanation of terminology and linking technology

This chapter will start with technical description, as understanding of the context of hyperlinking and of the work of the system it needed to see more deeply the problems which are posed by the links.

Links underlie the existence of the Internet, and make Internet what it really is. The links are functionally all very similar – they identify sources on the Internet. However, depending on the source they identify, the mode of access to it, and the possibilities to prevent it, links appear to perform different functions, and to have different goals. Thus, for the reasons of clarity and convenience they are divided into different categories.

A Web page is constructed using "Hypertext Markup Language" (HTML), which provides display instructions to a Web browser program viewing the file which generates the particular Web page. Without HTML, a Web browser would display plain text in a continuous block without organization.[6]

The *HREF link* instructs a browser to stop viewing content transmitted from one location, and begin viewing that of another. The link can bring the viewer to a different point on the same page (for example, to the top of it), or to a different page in the same site (for example, to visit front-page), or to a site that is not on the local web site at all (external, or outbound links).[7] This "jump" is the essence of the Web.[8] HREF links is often represented by a web browser in some distinguishing way (different color, font or style[9], highlighted, underlined or otherwise

[6] Jeffrey R. Kuester, Peter A. Nieves Hyperlinks, frames and meta-tags: an intellectual property analysis, IDEA: The Journal of Law and Technology 1998 (38 IDEA: J.L. & Tech. 243), © 1998 PTC Research Foundation of the Franklin Pierce Law Center, at http://www.patentperfect.com/idea.htm (last visited: Feb. 23, 2007)

[7] *External linking*, Eflaunt, *at* http://www.eflaunt.com/seo-glossary/external-linking.htm (last visited Feb. 9, 2007)

[8] Jeffrey R. Kuester, Peter A. Nieves (1998) Hyperlinks, frames and meta-tags: an intellectual property analysis

[9] *Hyperlink*, Answers Corporation: Online Encyclopedia, Thesaurus, Dictionary definitions and more, *at* http://www.answers.com/topic/hyperlink (last visited Feb. 9, 2007)

prominent text[10]), though generally it is a blue underlined text.

A central feature of Web architecture is the notion of a “Uniform Resource Identifier” (URI), often called a “Uniform Resource Locator” (URL), or in everyday speech a "Web address", which is in fact a simple hyperlink.[11] Every object on the Web must have a URL, which is simply a string of characters, which identify a resource.[12] A single web-page may contain numerous of links to other web-pages, and that same page may itself be the "destination" of other links on other pages.[13]

Deep linking is a type of HREF link, thus, it is built into the Web technology of HTTP and URLs by default. It is in essence a hyperlink from a page on one site to a page "inside" another site, which bypasses the so called “home”, “front” or “portal” pages.[14] Thus, as the technology of the Hypertext Transfer Protocol (HTTP) does not make any distinction between "deep" links and any other links — all links are functionally equal – the restrictions on it are “alien” to the nature of Internet, and doing so requires extra efforts. This link: <http://www.example.com/page/page1.html> is an example of a deep link. The URL contains all the information needed to point to a particular item, instead of the home page <http://www.example.com>.

Direct linking is the nomination of the problematic act of using material (usually an image, which is than called “image linking”, but can as well be video, etc) from another website directly within one's own website. The content then appears to be originating from the site that posted a link, when in reality it belongs to another one, and is served by that other web-site. These actions are also a part of HTML, which makes is possible to inline in their page

[10] Daniel A. Tysver, *Linking and Liability*, BitLaw – a resource on technology law, *at* http://www.bitlaw.com/internet/linking.html (last visited Feb.12, 2007)

[11] *Intellectual Property on the Internet: A Survey of Issues*, 94 (Dec. 2002) World Intellectual Property Organization *at* http://www.wipo.int/copyright/ecommerce/en/ip_survey/chap3.html#3a (last visited: April 18, 2007)

[12] Bray Tim, *"Deep Linking" in the World Wide Web*, the World Wide Web Consortium (W3C) http://www.w3.org/2001/tag/doc/deeplinking.html (last modified Sept. 11, 2003)

[13] Daniel A. Tysver (2007), *Linking and Liability*

[14] Bray Tim (2003), *"Deep Linking" in the World Wide Web*

(and not in separate frame) materials regardless of the location of the web-page from which they were taken. Direct linking is also known as hotlinking, leeching, inline linking, embedding, web-clipping or bandwidth theft.[15] Same technology that made possible the emergence of these problems, now makes it possible to control the situation. Thus, after checking whether direct links are possible to a certain object on the web-page[16], the owner of can prevent it by the variety of ways: using of dynamic web-pages that have periodically changing URLs[17], instructing the server to deny all requests for images from other web-sites, redirect off-site traffic to an alternate image, etc.[18] Another option is the use of passwords and registration procedures to stop access to any particular Web page, with all data contained in it.

A better understanding of deep linking can be received from this explanation of IMG links, which instruct browser to supplement the text on the page with an image contained in a separate image file:

> "When a web site is visited, the browser first downloads the textual content in the form of an HTML document. The downloaded HTML document may call for other HTML and/or stylesheet files to be processed. These files may contain <img> tags which supply the URLs that allow images to display on the page. Normally, these are "relative" URLs that refer to images on the same server: <img src="pic.jpg">. HTML also permits absolute URLs that refer to images hosted on other servers: <img src="http://www.example.com/pic.jpg">. When a browser downloads an HTML page containing such an image, the browser will contact the remote server to request the image content."[19]

The difference of IMG link from and HREF link is that the reference of IMG link is not obvious for the user, who generally has no idea on the origin of the document. A user following an HREF link is usually aware that he been transferred to another page, either from

[15] *Inline Linking*, Wikipedia, the free encyclopedia, *at* http://en.wikipedia.org/wiki/Inline_linking (last modified March 4, 2007)
[16] *So You Have Decided to Hotlink and Steal Bandwidth*, ATlab, *at* http://altlab.com/hotlinking.html (last visited May 10, 2007)
[17] Jeffrey R. Kuester, Peter A. Nieves (1998) Hyperlinks, frames and meta-tags: an intellectual property analysis
[18] Thomas Scott, *Smarter Image Hotlinking Prevention*, A list apart: for people who make websites, at http://alistapart.com/articles/hotlinking (last visited May 10, 2007)
[19] *Inline Linking* (2007), Wikipedia, the free encyclopedia

the different appearance of the newly accessed page, or from the change in the URL address display in the web browser.

Search engines function to organize information on the Web and help users locate information. Web users utilize search engines to locate Web sites that match their particular interest. Like any typical computerized searching mechanism, a user types a keyword query into the search engine, and the program searches its database and returns a list of results. The results returned by search engine programs are a list of hyperlinks to related Web pages. The design of each of these immense databases is unique to the particular search engine. Each search engine does, however, use a specific kind of software, usually called a spider or crawler, to gather the addresses of Web pages available on the Internet. These programs, in turn, index text on the Web pages, thereby enabling the search engines to associate a user's keyword query with the indexed Web pages.[20]

1.1.2 History of hyperlinks

In the early 1960's Ted Nelson began the original hypertext project known as Xanadu, a hypertext and interactive multimedia system. According to the project history Nelson formulated the idea of hypertext in 1960, the word hypertext was chosen in 1963, and first published 1965.[21] Ted Nelson used the term "hypertext" to describe the "connected literature" of the world that could make up a web of information that could be accessed from anywhere.[22]

Ted Nelson had as his source of inspiration Vannevar Bush's essay, "As We May Think," were a microfilm-based machine with automated cross-referencing was depicted, which

[20] Jeffrey R. Kuester, Peter A. Nieves (1998) Hyperlinks, frames and meta-tags: an intellectual property analysis
[21] Heather A Harrison Dinniss (2001) *Tools of the trade: intellectual property issues in electronic commerce tools*
[22] David Post, Bradford C. Brown, *On The Horizon: Thorny Issues Surround Hyperlink Ownership*, InformationWeek *at* http://www.informationweek.com/shared/printableArticle.jhtml?articleID=6502009 (April 22, 2002)

enabled to link pages into a "trail" of related information, and then scroll back and forth among pages as if they were on a single microfilm reel. Nelson transposed Bush's concept into the computer context, made it applicable to specific text strings rather than whole pages, generalized it from a local desk-sized machine to a theoretical worldwide computer network, and advocated the creation of such a network.[23]

Meanwhile, working independently, a team of 17 researchers from Stanford Research Institute led by Douglas C. Engelbart (with Jeff Rulifson as chief programmer) was the first to implement the hyperlink concept for scrolling within a single document (1966), and soon after for connecting between paragraphs within separate documents (1968).[24] Although the main feature of their presentation in 1968 was the demonstration of the computer mouse, many other innovations were displayed including hypertext, object addressing and dynamic file linking.[25]

The World Wide Web boomed after Tim Berners-Lee invented in 1989 as an easy, user-friendly, and dynamic way of connecting documents, so that to enable researches to reach documents in complex networks more easily and efficiently.[26]

Hyperlinking enables users to connect to other Web pages and retrieve information within seconds and without having to perform new searches or other complex tasks. The extensive use of these interconnections between Web pages is why the medium is termed a "web." A Web page can contain as many or as few hyperlinks as the creator wishes. These branching mechanisms may reference Web pages both within and outside of the Web site, though it is primarily the linking to outside Web pages which raises intellectual property questions.[27]

[23] *Hyperlink*, Wikipedia, the free encyclopedia, *at* http://en.wikipedia.org/wiki/Hyperlink (last modified Feb. 5, 2007).
[24] *Ibid.*
[25] Heather A Harrison Dinniss (2001), *Tools of the trade: intellectual property issues in electronic commerce tools*
[26] Ignacio Garrote Fernández-Díez, *The linking law of the World Wide Web*, Universidad Autónoma de Madrid, *at* http://www.uam.es/centros/derecho/publicaciones/pe/english.html (last modified March 22, 2000)
[27] Jeffrey R. Kuester, Peter A. Nieves (1998) Hyperlinks, frames and meta-tags: an intellectual property analysis

1.2 Introduction into problem: can we link to other web-sites at all?

Hyperlink is a technology underlying the existence of the Web. But the important question to be answer – is there a right to link to other web-sites, and if yes – when?

The intuitive solution can be formulated this way. Any person who posted anything on the internet is interested in sharing this data with others, and wants to achieve the widest possible dissemination of his data. This is especially true with regard to the commercial companies, which are especially interested in the dissemination of information about their goods and services. Public and private organizations, which want their voices to be heard by the possible supporters, do generally look for a way to achieve a bigger publicity. Simple logic suggests that in case someone wants anything to be hidden, posting it in pubic space is not a very good way to achieve the result intended. If someone wants not to hide information, but to control it and restrict access to it, he has different tools available – for example, password protection, or express notification. The proponents also point at some other positive features of free linking, saying that it increases traffic, advertising rates, and, by inference, revenue.[28]

This intuitive approach is reflected in the dominant position of web-culture, which states that the web page creators can freely link their web-sites with the web-sites of others without requesting permission to do so from the owner of the linked site. This is either because the website owner has given an implied license to link by posting his material on the Web, or by characterizing such linking as fair use.[29]

The doctrine of implied license means that the owner of the web site is giving an implied license to link to his web site in the moment when he puts the document on the Web. He is aware of the fact that the Web is navigated by links and, indeed linking is the most usual way

[28] Maureen A. O'Rourke, *Legal Issues on the Internet Hyperlinking and Framing* (abstracted from Maureen A. O'Rourke, Fencing Cyberspace: Drawing Borders in a Virtual World, 82 Minn. L. Rev. 609 (1998)), *at* http://www.dlib.org/dlib/april98/04orourke.html (last visited: March 15, 2007)

[29] *Intellectual Property on the Internet: A Survey of Issues*, 94 (Dec. 2002) World Intellectual Property Organization *at* http://www.wipo.int/copyright/ecommerce/en/ip_survey/chap3.html#3a (last visited: April 18, 2007)

to access a document posted on the Web. Yet, the web page owner can escape this by using web-linking agreements that expressly stare that permission to link is required.[30]

Fair use doctrine is the most common defense in cases where implied license doctrine is inapplicable. If user is simply browsing a site acceded via normal hyperlink, this use is not commercial, and the user is in good faith. Fair use is also a defense for a claim that any link creates a copy of the web-site viewed.

However, many argue that only a web-site creator, who contributed to organizing it, and placed copyrighted material in it, has and should have the complete, absolute and unqualified right to decide as to how this web-site should be viewed by the users. It is especially true with regard to a special category of web-site: presentation web-site, which main purpose is to influence users, creating some emotional effect. When this is impossible due to the authorized linking of its part, or just an object from it, it is very likely to constitute a violation of web-site owner's rights. Prior consent and approval of the website owner or his express license is a must in those situations for the linking to be legal.[31]

Moreover, the owners of web-site are also concerned with the idea of not being falsely associated with the web-sites that link to them. The courts in the US maintain the idea, that mere appearance on a website of a hyperlink to another site will not lead a web-user to conclude that the owner of the site he is visiting is associated with the owner of the linked site[32], as such activity does not rise to sufficient levels of copying and/or confusion to be prohibited under trademark or copyright laws.[33] However, the difference between "mere" and

[30] Ignacio Garrote Fernández-Díez (2000), *The linking law of the World Wide Web*

[31] Shri Pavan Duggal, *To Link or Not to Link-The Judicial View*, Cyberlaw India, *at* http://www.cyberlaws.net/cyberindia/linking.html (last visited Feb. 10, 2007)

[32] *Knight-McConnell v. Cummins, Civ.* No. 03-5035, WL 1713824 (S.D.N.Y. July 29, 2004), Links & Law - Information about legal aspects of search engines, linking and framing, at http://www.linksandlaw.com/decisions-142-knight-mcconnell-cummins.htm (last visited April 18, 2007)

[33] Gregory M. Poehler, *Be Careful What You Link For*, Baker Botts L.L.P, Intellectual property report, vol. 4, issue 43, December 2004 *at* http://www.bakerbotts.com/file_upload/PoehlerArticle.htm (last visited April 16, 2007)

"not mere" appearance is sometimes very subtle, as opposing parties can have different view on it. Thus, disclaimers are appropriate and necessary, especially from the linking side.

The position of absolute freedom to link, and the requirement to ask for permission to any link are both very extreme. The truth is somewhere in between. The analysis of the case law below suggests that linking can be freely allowed, when it is clear for user, that the data retrieved is provided by another web-site.

Thus, there should also be a notification of copyright and patent rights. It's also important not to take advantage of another person's facilities, like using other web-site's bandwidth (this is important, as web hosts mostly charge based on the amount of data transferred). For this action the permission is necessary.

In any case, it is absolutely clear now that links can be used in a way that may violate copyright, defamation, or unfair competition laws. The "immateriality" of this sphere is not an obstacle to litigation and prosecution. For this reason, website owners are cautioned to think before they link.[34]

1.3 Legal protection of hyperlinks under copyright and patent laws

Hyperlink is merely an associational tool that makes it easier to connect various objects with each other. However, before dealing with legality of such connection, we first need to see whether it is possible to protect links as such. Two main claims arise here: hyperlinks being subject to copyright and to patent protection.

It can be claimed that link, being a sequence of letters, numbers and other symbols, can have a copyright protection. The position, however, differs with this regard in different countries.

The prevailing view in the US is that links are very similar to addresses. Especially a simple link, being web-site's URL, is just the electronic equivalent of the addresses. According to the

[34] Ibid.

U.S. case-law (***Feist v. Rural***[35]), addresses are not protected by copyright law. Similarly, links cannot be individually copyrighted. To put it differently, creating a link does not constitute a creation of copyrightable object. And similarly, it is perceived in the US a list of links is not a subject to copyright protection, and no violation of copyright protection is possible in the case of its publication.

The situation is absolutely different in EU, where listing of links can receive protection, as they can be considered as database, especially if an effort was made to organize them. European Commission took a view that just a copyright was not the optimal instrument in protecting databases. So, EU database directive was adopted to tackle this problem, which will be discussed more in detail below.

Subsequent case-law affirms this position. For example, collection of links was considered to be as a database in Germany[36] in 2001. The case dealt with the copying of a website containing a collection of links which were, in court's view, sufficiently organized by category and individually accessible to constitute a database. The court elaborated on the substantial investment criterion. An investment was held to be substantial if it has substantial weight ("substantielles Gewicht"). Explicit reference was made to the English rule of thumb "What is worth copying is worth protecting". Although defendant's database was not 100% copied, a substantial part had indeed been copied. Even before that, in 2000, the District Court of Cologne also held that a collection of links can qualify as a "database".[37]

Second situation that provoked much debate is a possibility to ***patent hyperlinks***. Although hyperlinks are the basis of the World Wide Web, and it's impossible to imagine Internet

[35] *Feist Publications, Inc. v. Rural Telephone Service Co. 449 U.S. 340, 347, (1991) Case No. 89-1909.* FindLaw for legal professionals, *at* http://laws.findlaw.com/us/499/340.html (last visited Feb. 25, 2007)

[36] Datenbankeigenschaft von Hyperlinksammlungen, AG Rostock, Germany 20.02.2001, 49 C 429/99, JurPC Web-Dok. 82/2002 at http://www.jurpc.de/rechtspr/20020082.htm (last visited: April 17, 2007)

[37] Linksammlung als Datenbank, Landgericht Köln, 12 May 2000 (Beschluß vom 12. Mai 1998 - 28 O 216/98, Akademie.de at http://www.online-recht.de/vorent.html?LGKoeln980512+ref=Urheberrecht (last visited: April 17, 2007)

without them, in some countries the hyperlink technology or parts and applications thereof were patented and used to assert ownership over hyperlink technology. For example, in the U.S. different patents exist on general hyperlinking aspects.[38] AltaVista claims to own 38 patents in the search area, so that "virtually everyone out there who indexes the Web is in violation of at least several of those key patents."[39]

Some patent holders have already tried filing suits against those violating their patents on hyperlinks. For example, in ***ACTV v. Disney***[40] case ACTV asserted patent infringement because of the use of hyperlinking technology. ACTV's assertions were narrow, based on technology for incorporating web links into interactive TV programming for different programs.

The U.S. District Court granted a summary judgment in favor of he defendant, without addressing the validity or enforceability of the 3 patents asserted by ACTV.[41] ACTV appealed successfully that decision (***ACTV, Inc. v. Walt Disney***[42]**)**, and the Court of Appeals has then remanded the suit to the District Court for further proceedings on infringement.

In another case, ***British Telecommunications*** (BT) claimed it owns a patent to hyperlinks,

[38] U.S. Patent 4,873,662 BT; U.S. Patent 6,195,707 IBM's "Bookmark Alias"; U.S. Patent 6,154,752 Lockheed Martin's "Colored Hyperlink"; U.S. Patent 5,924,104 IBM's "Intradocument Link Display"; U.S. Patents 5,778,181,5774,664 and 6,018,768 ACTV; U.S. Patent 5,794,207 Priceline.com's "name your price" auction; U.S. Patent 4,558,302 Unisys "Gif"; U.S. Patent 5,960,411 Amazon "I click"; U.S. Patent 6,157,946 NetZero on pop-up ads on Free Internet services; U.S. Patent 6,073,241 CNET Inc.'s "Apparatus and method for tracking world wide web browser" on the operation of banner advertisements; U.S. Patent 5,855,008 Cybergold's "Attention Brokerage"; U.S. patent 5,105,184 the "Energizer Bunny Patent" on methods for displaying and integrating commercial advertisements with computer software.

[39] Bruno De Vuyst, Katia Bodard and Gunther Meyer, *Deep Linking, Framing, Inlining and Extension of Copyrights: Recent Cases in Common Law Jurisdictions*, Murdoch University Electronic Journal of Law , Volume 11, Number 1 (March 2004) http://www.murdoch.edu.au/elaw/issues/v11n1/meyer111_text.html (last modified March 2004)

[40] *ACTV, INC. and HYPERTV NETWORKS, INC., v. The Walt Disney Co., ABC, INC. and ESPN, INC., U.S.D.C., S.D.N.Y., Case No. 00-CIV-9622. Filed: December 20, 2000, decided: May 24, 2002.* Tech Law Journal, *available at* http://www.techlawjournal.com/courts2000/actv_disney/20001220com.asp (last modified – Dec. 20, 2000)

[41] Bruno De Vuyst, Katia Bodard and Gunther Meyer (2004), *Deep Linking, Framing, Inlining and Extension of Copyrights: Recent Cases in Common Law Jurisdictions*

[42] *ACTV, Inc, et al. v. The Walt Disney Company, American Broadcasting Companies, Inc., and ESPN, Inc Docket No. 02-1491, Decided: October 8, 2003*, Georgetown Law Library, Opinions of the U.S.Courts of Appeals – Federal Circuit – Oct. 2003, *available at* http://www.ll.georgetown.edu/Federal/judicial/fed/opinions/02opinions/02-1491.html

which it filed back in 1976 and was granted in 1989.[43] BT had contacted 17 ISPs, asking them to get a hyperlink license. When they refused, BT pursued Prodigy, the oldest online access service, as a test case.[44] BT claimed that Internet as such infringed its Sargent patent (U.S. Patent 4,873,662[45], which describes a system in which multiple users, located at remote terminals, can access data stored at a central computer.) on web hyperlinks[46], and that Prodigy facilitates infringement by its subscribers by providing them with access to the Internet.[47]

However, BT's arguments were found to contain several flaws. The Internet has no "central computer" as described in the Sargent patent. Thus, as the Internet itself does not infringe the Sargent patent, "Prodigy cannot be liable for contributory infringement or active inducement for providing its users with access to the Internet." [48] BT's argument that Prodigy's Web servers directly infringe the Sargent patent also fails "because Web pages stored on Prodigy's Web servers do not contain 'blocks of information' or 'complete addresses' as claimed in the Sargent patent." [49] Thus, the decision let the patent stand but found no infringement of said patent[50], as it in fact did not cover web hyperlinks.[51]

As Bruno De Vuyst, Katia Bodard and Gunther Meyer have noted, if this or other patent claims are found valid, they may lead to severe adjustments in the use of an essential tool of

[43] Stephan Ott, Linking Cases Worldwide – A Comprehensive Overview, Version 2.1. (October 2004), *at* www.linksandlaw.com/Version2.1.pdf (last visited: May 15, 2007)
[44] Matt Loney, *Hyperlink patent case fails to click*, CNET News.com *at* http://news.com.com/2100-1033-955001.html (Aug 23, 2002).
[45] Information handling system and terminal apparatus therefor, United States Patent 4,873,662, Sargent, October 10, 1989, USPTO Patent Full-text and Image Database, *at* http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO2&Sect2=HITOFF&p=1&u=%2Fnetahtml%2FPTO%2Fsearch-bool.html&r=19&f=G&l=50&co1=AND&d=PTXT&s1=4873662&OS=4873662 (last visited May 11, 2007)
[46] *Hyperlink*, Wikipedia, the free encyclopedia, *at* http://en.wikipedia.org/wiki/Hyperlink (last modified Feb. 5, 2007).
[47] Matt Loney, *Hyperlink patent case fails to click*, CNET News.com *at* http://news.com.com/2100-1033-955001.html (Aug 23, 2002).
[48] *British Telecommunications PLC v. Prodigy Communications corporation (00 Civ. 9451 (CM), Aug 22, 2002)* United States District Court, Southern District of New York, *at* http://www.nysd.uscourts.gov/courtweb/pdf/D02NYSC/02-07733.PDF (last visited March 15, 2007)
[49] *Ibid.*
[50] Bruno De Vuyst, Katia Bodard and Gunther Meyer (2004), *Deep Linking, Framing, Inlining and Extension of Copyrights: Recent Cases in Common Law Jurisdictions*
[51] *Hyperlink*, (2007) Wikipedia, the free encyclopedia

the Internet.[52] Of course, an absolutely free linking is not allowed even now. However, the restrictions possibly created by these monopolies, with the necessity to pay for each usage of the links, would undermine the ideas of the inventors of the World Wide Web, restricting the freedom and development of the digital sphere.

[52] Bruno De Vuyst, Katia Bodard and Gunther Meyer, (2007) *Deep Linking, Framing, Inlining and Extension of Copyrights: Recent Cases in Common Law Jurisdictions*

Chapter 2 – Legal and practical problems stemming from simple, deep and direct linking

2.1 Copyright violation

2.1.1 Introduction into problem. Simple linking

All situations which involve links, either deep or direct, to web-pages or digital objects, can be violating copyright laws. However, there are means to decrease the possibility of accusations and lawsuits, which stem from the big number of questions which are still posing doubts. For example, taking someone's content and embedding or otherwise including in it one's web-site is intuitively perceived by many as not proper and illegal. And this is really so, unless prior authorization is obtained. However, the illegality of linking to the web-page is not as easily accepted. And even less – the illegality of linking to the front page via simple link (URL). Practice and case law have elaborated certain requirements which specify the conditions needed for that and similar actions to be legal.

The very first linking case (***Shetland Times case***[53]) arose out of the prospect of loss of advertising because of the bypassing of the Shetland Times front page.[54] Thus, though it can be claimed that this case cannot be used as a precedent prohibiting deep linking, it certainly confirms that providing a link to front page is legal in most cases. At first sight from a copyright point of view, none of the rights of the copyright owner are involved when someone creates a link.[55] Employing a simple link, the user merely views the material from the linked site, and is aware that it originates from a different website.[56] Linking doesn't transmit the

[53] *Shetland Times Limited against Dr Jonathan Wills and Zetnews Limited*, (1997 S.C. 316), Nov. 11, 1997, Juristische Fakultät der Universität Tübingen, *available at* http://www.jura.uni-tuebingen.de/bechtold/text/shetland_settlement.htm (last modified - Mar. 30, 2006)

[54] Bruno De Vuyst, Katia Bodard and Gunther Meyer (2004) *Deep Linking, Framing, Inlining and Extension of Copyrights: Recent Cases in Common Law Jurisdictions*

[55] Ignacio Garrote Fernández-Díez, *The linking law of the World Wide Web*, Universidad Autónoma de Madrid, *at* http://www.uam.es/centros/derecho/publicaciones/pe/english.html (last modified March 22, 2000)

[56] *Hyperlink*, Wikipedia, the free encyclopedia, *at* http://en.wikipedia.org/wiki/Hyperlink (last modified Feb. 5, 2007).

material to user's computer. Only a technically needed RAM (random access memory) copy is created, which is necessary to display the material.[57]

In the majority of cases a simple link from one website to the home page of another website does not raise concerns, as the use of such links may be equated to the use of footnotes to refer to other sites, similar to or a street name helping the online user to find more information about a subject he or she is interested into:

> "Like a footnote, it does not imply approval of the other's work. A footnote does not represent that the writer has read the other work in its entirety. A footnote certainly is not an attempt to pass the other writer's work off as one's own." [58]

However, some websites have claimed that linking to them is not allowed without permission, putting different arguments pro their theory, even some moral issues. For example, in Japan, it is considered rude to link to a personal website - especially that of an artist - without getting permission beforehand. Some sites use the phrase "Link Free" on their websites to indicate that they will not be upset by unauthorized linking.[59] t was also argued that hyperlinks could infringe the "making available right" provided in the WIPO Internet treatises.[60] However, at least in Europe, it is not so, according to the decision of the Norwegian Supreme Court in ***The Napster.no*** case[61], which rejected the idea that mere linking is automatically "making available."[62]

[57] *Intellectual Property on the Internet: A Survey of Issues*, 94 (Dec. 2002) World Intellectual Property Organization *at* http://www.wipo.int/copyright/ecommerce/en/ip_survey/chap3.html#3a (last visited: April 18, 2007)

[58] *Reno v. American Civil Liberties Union*, 117 S.Ct. 2329 (1997), August 20, 2001, Cornell University Law School *at* http://www.law.cornell.edu/supct/html/96-511.ZO.html (last visited: April 17, 2007)

[59] *Hyperlink*, Wikipedia, the free encyclopedia, *at* http://en.wikipedia.org/wiki/Hyperlink (last modified Feb. 5, 2007).

[60] *Ibid.*

[61] *TONO, NCB Nordisk Copyright Bureau, EMI Norsk AS, BMG Norway AS, Sony Music Entertainment Norway AS, Universal Music AS, IFPI Norge v Frank Allan Bruvik* , Norwegian Supreme Court, decision: 27 January 2005, Case number: 2004/882, Summary by Georg Philip Krog, Stanford Law School
Lawrence Lessig *at* http://www.lessig.org/blog/archives/Napster-case.pdf (last visited: May 18, 2007)

[62] Matthew Skala, *Norwegian Supreme Court: Linking not necessarily "making available"*, Mskala's home page *at* http://ansuz.sooke.bc.ca/lawpoli/cases/napster-no.php (last visited May 18, 2007)

2.1.2 Illegal and legitimate uses of deep linking

Deep linking to a web-page

The definition and basic introduction to the issue of deep linking was given in the beginning of this thesis. So far it's enough to say, that deep linking is considered by many as natural and legal, while others strongly oppose the idea of deep linking. In this subdivision we will look in detail on claims of both sides.

World Wide Web Consortium proposed a number of analogies to illuminate the question of deep linking through parallels in the real world. One is about a library, where each book on the shelf has an identifier, composed of its title, author, call number, shelf location, and so on. The library certainly will exercise access control to the individual books; but it would be counterproductive to do so by forbidding the publication of their identities[63].

Similarly, Web technologies, alongside with providing broad possibilities to refer to any resource, have well-developed mechanisms of controlling access. Everyone can make use these means them to protect its resources and control access to them, but it is unreasonable to suppress information about the existence of the resource itself by limiting the usage, transmission and publication of URLs. Restrictions on deep linking might endanger the existence of the Web as such, or at least impair its future development, as the free linking namely made it possible for "web" appear. Bray Tim further notices, that there is a clear distinction between identifying a resource on the Web and accessing it; suppressing the use of identifiers is not logically consistent.[64]

However, these ideas seem to have little influence on the minds of people who commercially use Internet. They call for the possibility of limiting and restricting free links, though they agree that the restrictions are less strict to those who use internet for non-commercial purpose.

As Bradley J. Hillis said:

[63] Bray Tim, *"Deep Linking" in the World Wide Web*, the World Wide Web Consortium (W3C) http://www.w3.org/2001/tag/doc/deeplinking.html (last modified Sept. 11, 2003)
[64] Ibid.

> "If you are running a personal site, with no commercial motive, you can engage in a limited amount of deep linking, and even framing. However, if a noncommercial site proves successful and has a lot of visitors, it is deemed to have become commercial regardless of intent, and the restrictions rules apply."[65]

The main subject of criticism of deep linking is that it diverts visitors from a site's front page, and thus diminishes the site's ability to expose visitors to advertising, disclaimers or navigation appearing on the gateway page.[66] Moreover, deep linking amounts to an infringement of copyright in the secondary material[67], alongside with "stealing" traffic and disrupting the intended flow of their websites[68].

The earliest legal case arising out of deep-linking is the abovementioned ***Shetland Times case***.[69] The headlines of Shetland News web-site were linked by deep links to articles on the Shetland Times site. Thus, the readers had access to the entire article, bypassing web-site's front page, which consisted of news headlines with embedded links to corresponding articles, and of space where paid advertisements appeared. Deep links were claimed to mislead the users into thinking that the articles were part of the Shetland News web site. So, the claimant asked for a court order temporarily preventing the Shetland News from maintaining the links, arguing that such links constitute copyright infringement, as it had copyright on the headlines.[70]

The court asserted infringement of copyright while referring to the prospect of loss of

[65] Bradley J. Hillis, *Thinking About Linking. Part I. Can Law Accommodate the Power of the Internet to Share Information?* Law Library Resource Xchange, LLC, *at* http://www.llrx.com/features/weblink1.htm#b2 (last modified: May 15, 1998)
[66] Ibid.
[67] *Intellectual Property on the Internet: A Survey of Issues*, 94 (Dec. 2002) World Intellectual Property Organization *at* http://www.wipo.int/copyright/ecommerce/en/ip_survey/chap3.html#3a (last visited: April 18, 2007)
[68] *Frequently Asked Questions (and Answers) about Linking*, (Chilling Effects Clearinghouse - a collaboration among law school clinics) *at* http://www.chillingeffects.org/linking/faq.cgi (last visited Feb.12, 2007)
[69] ***Shetland Times Limited against Dr Jonathan Wills and Zetnews Limited,*** (1997 S.C. 316), Nov. 11, 1997, Juristische Fakultät der Universität Tübingen, *available at* http://www.jura.uni-tuebingen.de/bechtold/text/shetland_settlement.htm (last modified - Mar. 30, 2006)
[70] Daniel A. Tysver, *Linking and Liability*, BitLaw – a resource on technology law, *at* http://www.bitlaw.com/internet/linking.html (last visited Feb.12, 2007)

advertising *because of the bypassing* of the Shetland Times *front page*[71], which diminished greatly the value its advertising space. The court based its decision on the United Kingdom's law governing cable television program providers.

The case was finally and ultimately settled out of court allowing linkage as if under a linking license.[72] Deep links were not allowed. Simple links to the Shetland Times' front page could be used, provided that the headlines that appeared on the Shetland News web site had to appear on a page which included the legend "A Shetland Times Story" in the same size or larger than the News' corresponding legend.[73]

In ***Ticketmaster v. Microsoft***[74], Ticketmaster alleged that a deep link implied a false association that constituted a dilution of its trademarks, *in addition to copyright infringement*, trespass and false advertising. Microsoft's <seattlesidewalk.com> site allowed visitors to deep link into the Ticketmaster site from which users could purchase tickets, *bypassing Ticketmaster's home page, and therefore its revenue-producing*. The District Court did not address these issues as the case was settled out of court. Microsoft agreed to stop deep-linking, unless under license agreement.[75]

The impetus for the suit was also probably primarily economic, as Microsoft bypassed Ticketmaster's home page with advertising. Also, some firms agreed to pay to link to the Ticketmaster site, and free linking by Microsoft could ruin this. Finally, Ticketmaster had agreed to give MasterCard prominence at the Ticketmaster site. Microsoft's bypassing of the home page threatened the ability of Ticketmaster to comply with that agreement. The free link of Microsoft then seems facially to be invidious; allowing such a free link undercuts

[71] Bruno De Vuyst, Katia Bodard and Gunther Meyer (2004), *Deep Linking, Framing, Inlining and Extension of Copyrights: Recent Cases in Common Law Jurisdictions*

[72] Ibid.

[73] *Shetland Times, Ltd. v. Jonathan Wills and Another (Summary)*, Netlitigation (Internet law: news, suits and decisions), *at* http://www.netlitigation.com/netlitigation/cases/shetland.htm (last modified Nov. 9, 2006)

[74] *Ticketmaster Corp. v. Microsoft Corp (CV 97-3055 RAP,C.D. Cal., filed April 28, 1997)* , AOL legal department: decisions and litigation *at* http://legal.web.aol.com/decisions/dlip/tickcomp.html (last visited Feb. 20, 2007)

[75] Drew Cullen, *Deep links are legal in Germany. Official*, The Register, at http://www.theregister.co.uk/2003/07/20/deep_links_are_legal/ (July 20, 2003)

Ticketmaster's flexibility both in designing its site and in its marketing efforts with other sites.[76]

Important consideration is a possible liability of user, who uses such a deep link. This question was addressed by M. A. O'Rourke, which clarified, that:

> "under the copyright law, the user's act of linking is unlikely to constitute infringement because it is probably protected either by an implied license or under the copyright doctrine of fair use. Because the user's act would not be infringing, the party - here, Microsoft - who enables the user to link, could not be guilty of contributory infringement. This result may seem incongruous in light of the objections detailed above. However, countervailing policy considerations including netiquette, the site owner's ability to combat unwanted linking technologically, and the First Amendment interest in maintaining the free flow of ideas and information on the Internet support this result." [77]

Ticketmaster later filed a similar case against ***Tickets.com***[78], which sold tickets to some events and gave users deep link to the interior page of Ticketmaster were they could purchase them. That interior location did contain the Ticketmaster logo so that customers knew they were dealing with Ticketmaster, not defendant.[79] They were unlikely to be mislead, so the court found no violation. The court left the question open whether a contract - and the breach thereof - could prohibit hyperlinking.

The Tickets.com case is considered to be the definitive case, establishing the legality of deep linking in the US[80] so long as it was clear who is responsible for the material The issue of deep linking seemed to belong to the past, and it was thought to be the seminal case over deep linking,

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[76] Maureen A. O'Rourke, *Legal Issues on the Internet Hyperlinking and Framing* (abstracted from Maureen A. O'Rourke, Fencing Cyberspace: Drawing Borders in a Virtual World, 82 Minn. L. Rev. 609 (1998)), *at* http://www.dlib.org/dlib/april98/04orourke.html (last visited: March 15, 2007)

[77] Ibid.

[78] *Ticketmaster Corp., et al. v. Tickets.com, Inc. (CV 99-7654, HLH(BQRX), 2000 U.S. Dist. Lexis 4553 (C.D. Cal. Mar. 27, 2000))* AOL legal department: decisions and litigation *at* http://legal.web.aol.com/decisions/dlip/ticketmaster.html (last visited Feb. 25, 2007)

[79] David M. Kelly and Christina J. Hieber, *Is Liability Just a Click Away?*, Originally published in Internet Law & Business, March 2001, Copyright © Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, *available at* http://www.finnegan.com/publications/news-popup.cfm?id=629&type=article (last visited March 10. 2007)

[80] Drew Cullen, *Deep links are legal in Germany. Official*, The Register, at http://www.theregister.co.uk/2003/07/20/deep_links_are_legal/ (July 20, 2003)

However, the issue was raised again in the U.S. in 2002, were the objection again concerned the by-passing of the front page. Belo, the parent corporation of the Dallas Morning News, sent a letter to the Website, BarkingDogs.org, demanding it stop deep linking to specific news articles from the paper's site, rather than its home page,[81] as it was specified in the site's terms of use. Drawing analogies to the real world, the commentators stated that readers of the newspaper are perfectly free to skip the front page and head straight for, say, the obituaries, but someone trying to do the same thing on the paper's Web site might be sued.[82]

Deep linking: search engines and news aggregator web-sites

As it was said before, search engines function to organize information on the Web and help users locate information. Deep linking is necessary for that, and without it the Internet as we know it would collapse, as the benefit of the prompt finding of the necessary information with the help of search engines (the amount of which is now astonishing) would be gone.[83]

However, there are some grey areas in this field, and solutions there are to be found. For example, following the policy changes of the issuer, free content might be turned into restricted (requiring registration and login system, with possibility of fee payment) or archived one. Thus, permanent deep links that led to that content might not work anymore, or might be blocked by the owner of web-site.

The issue that causes problem here is that search engines are often caching on their servers copies of the articles, thus, the thing that web-site might try to delete can still be available online. For example, Google and some other search engine have an option of viewing the cached copy of the web-site. Google introduced cache feature in 1997, aiming at providing users with access to a web-site that could be malfunctioning or offline, and at aiding search by

[81] Stephan Ott (2004), Linking Cases Worldwide – A Comprehensive Overview

[82] David F. Gallagher, *Compressed Data; Paper Sues a Web Site Over the Way It Links, The New York Times at* http://query.nytimes.com/gst/fullpage.html?sec=technology&res=9D0CE0D71F31F935A35756C0A9649C8B63 (May 6, 2002)

[83] Drew Cullen, *Deep links are legal in Germany. Official*, The Register, at http://www.theregister.co.uk/2003/07/20/deep_links_are_legal/ (July 20, 2003)

highlighting search terms. From that time on people can have access to a copy of almost any Web page in the form last indexed by Google.

This clearly causes concerns for the legal owners of the data. In 2003, for example, The New York Times negotiated with Google over removing copies of articles cached on the search engine's servers.[84] Fred Lohman, an attorney at the Electronic Frontier Foundation, reacted this way: "Google is making copies of all the Web sites they index and they're not asking permission … From a strict copyright standpoint, it violates copyright."[85]

In practice, web-sites have an option of "opting out" from caching, for example, by including a special code in their pages to prevent caching (so-called Robots Exclusion Standard (/robots.txt file). The very existence of this option minimizes the possibility of suits against Google. Some feel that content owners who fail to provide a /robots.txt file are implying that they do not object to deep linking, either by search engines or others who might link to their content.[86] Others believe that content owners may be unaware of the Robots Exclusion Standard, or may not use robots.txt for other reasons.[87] For example, web-site owner might decide not to use this opportunity, as it might fear that without it web-site will not get high ranking in search results.

In the US many Internet search engines have been getting "takedown" requests under the *Digital Millennium Copyright Act, Section 512*[88], which provides a safe harbor to in formation location tools that comply with takedown notices, but it is not settled whether they would be liable for copyright infringement if they did not use the safe harbor. Arguably, computer-generated pages of links do not materially facilitate infringing activity or put their hosts on notice of copyright infringements.

[84] Stefanie Olsen, *Google cache raises copyright concerns*, CNET News.com, at http://news.com.com/2100-1038_3-1024234.html (July 9, 2003)
[85] *Ibid.*
[86] *Deep Linking*, Wikipedia, the free encyclopedia, *at* http://en.wikipedia.org/wiki/Deep_linking (last modified March 18, 2007)
[87] *Ibid.*
[88] 17 U.S.C.A. Sec. 512 (Thompson West 2005)

European *E-commerce directive 2000/31/EC*[89] did not cover hyperlinks and search engines. However, in the First Report on the application of E-commerce Directive it was admitted that "recent case-law in the Member States recognizes the importance of linking and search engines to the functioning of the internet. In general, this case-law appears to be in line with the Internal Market objective to ensure the provision of basic intermediary services, which promotes the development of the internet and e-commerce."[90]

For example, under German law, the setting of deep links is neither subject to copyright nor does it amount to unfair competition. Moreover, the service of news search engine and it's extraction of fragments from the linked articles it operated are not in conflict with a normal exploitation of the online newspaper.[91]

The ***Paperboy***[92] case in Germany dealt with a search engine which specialized in searching news articles published online. Although the complaint of the plaintiff was dismissed by the Federal Supreme Court because it was formulated too imprecisely, the Court ruled that the service of Paperboy does not violate any rights of the plaintiff, at least as long as no technical measures are circumvented. The German court also thought the plaintiff's demand that users must start with the home page was unreasonable.[93] Saying that neither copyright nor competition law was violated, "The court stressed the importance of deep links for the internet and held that it is up to the plaintiffs to prevent deep links with technical measures, if they

[89] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178, 17.7.2000, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:HTML (last visited March 12, 2007)

[90] First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce); Brussels, 21.11.2003; COM(2003) 702 final, page 13, *available at* http://europa.eu.int/eur-lex/en/com/rpt/2003/com2003_0702en01.pdf (last visited Feb. 14, 2007)

[91] Georg Nolte, *abstract on 'Paperboy' Federal Supreme Court (Bundesgerichtshof), 17 July 2003*, in P.Bernt Hugenholtz, The Database Right File, Institute for Information Law, University of Amsterdam, *at* http://www.ivir.nl/files/database/index.html (last visited: April 15, 2007)

[92] *Verlagsgruppe Handeslblatt v. Paperboy, aus dem Bundesgerichtshof (BGH), Urteil vom 17. Juli 2003 √ I ZR 259/00.* Bundesgerichtshof, Mitteilung der Pressestelle *at* http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2003&Sort=3&anz=96&pos=0&nr=27035&linked=urt&Blank=1&file=dokument.pdf (last visited Feb. 23, 2007)

[93] Drew Cullen, *Deep links are legal in Germany. Official*, The Register, at http://www.theregister.co.uk/2003/07/20/deep_links_are_legal/ (July 20, 2003)

don't like them. The court did not answer the question if the circumvention of these measures would be illegal."[94]

In ***OFiR vs. HOME***[95] case, the Danish court stated that search engines are desirable for the functioning of the Internet of today[96], so that anyone while publishing information on the Internet, must assume - and accept - that search engines deep link to individual pages of one's website.

In 1997 the owner of online news search engine ***News Index*** had received a legal notice from The Times (and its owner - News International Newspapers) telling him to stop featuring its stories, as it was an infringement of copyright and not permitted by English fair dealing rules. The Times representative said that the main issue was that:

> "links from News Index bypass our registration process […] We want to ensure that users enter our site via the main front page so that the presentation of our material is the one we have constructed, not the one someone else's search engine has constructed."[97]

Though New Index could not be sued for reproducing headlines or even parts of the article, it could be found guilty of a "misappropriation of hot news." As it was noted, "If I get everything I need to know from the summary of the news article they are providing, then News Index could be free-riding on the effort of the originator of the story".[98]

In a case under Danish copyright law, ***Newsbooster.com***[99] was *prohibited from offering deep-linking search services, from reproducing and publishing headlines from the sites and from distributing e-newsletters with deep links*. The case stemmed from a complaint by the Danish Newspaper Publishers' Association ("DNPA"). Newsbooster.com worked much like a search

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[94] Ibid.

[95] OFiR vs. HOME, Danish Maritime and Commercial Court (Copenhagen), Feb. 2006, *at* http://www.domstol.dk/media/-300011/files/v010899.pdf (last visited May 10, 2007)

[96] Jon Lund, *Danish court approves of "deep-linking"*, New Media Trends, *at* http://newmediatrends.fdim.dk/2006/02/danish-court-approves-of-deep-linking.html (Feb. 28, 2006)

[97] Courtney Macavinta, *Linking a copyright violation?* CNET News.com *at* http://news.com.com/2100-1023-206228.html (December 11, 1997)

[98] Courtney Macavinta, *Linking a copyright violation?* CNET News.com *at* http://news.com.com/2100-1023-206228.html (December 11, 1997)

[99] *DNPA v. Newsbooster.com, District Court (Byret) Copenhagen, 16 July 2002*, in P.Bernt Hugenholtz,*The Database Right File*, Institute for Information Law, University of Amsterdam,, at http://www.ivir.nl/files/database/index.html (last visited May 17, 2007)

engine, offering "deep links" to specific news stories found on a variety of web sites. Users were able to choose keywords, and Newsbooster would return links to articles matching the request. In its decision, the Danish court concluded that Newsbooster was in direct competition with the newspapers, and that the links provided to the articles within the paper damaged the value of the newspapers' advertisements.[100] The reasoning of the Judge does not mean that all deep links are illegal in Denmark. That case looked at a system that was systematically trawling and linking to third party content – which is not the same as manually creating occasional links to third party sites.[101]

Deep linking: databases

In the European Union, linking is viewed as an act potentially giving rise to a claim for database right infringement pursuant to the EU Database Directive.[102] This Directive requires Member States to *"provide for a right for the maker of a database … to prevent extraction and/or re-utilization of the whole or a substantial part, …, of the contents of the database."* Even if parts of contents are **insubstantial**, protection can be invokes against acts which conflict with a normal exploitation of that database." This Directive has been invoked to prevent a news aggregator's website from deep-linking to articles on commercial newspapers' sites.

"Database rights" are not strictly speaking a species of copyright, though a database can still acquire copyright protection (and although database protection issues have typically been handled under copyright law in the United States). Rather, "database rights" as understood in the EU represent a new and discrete kind of intellectual property right that exists only when

[100] Gregory M. Poehler (2004), *Be Careful What You Link For*

[101] *Deep linking violates EU database law, German court rules*, OUT-LAW News, *at* http://www.out-law.com/page-2799 (July 26, 2002)

[102] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, 1996 O.J. (L. 77), Gateway to European Union, http://europa.eu.int/ISPO/infosoc/legreg/docs/969ec.html (last visited: April 25, 2007)

there has been investment in obtaining, verifying, or presenting the contents of a database.[103] Many European courts have considered the new database protection right in the Internet context, with inconsistent results.[104] This is mostly coming of difference in implementation of EU database directive, which was especially loosely implemented in Germany.

In ***PCM v. Kranten.com*** [105] the court found deep linking legally permissible and thus held that there is nothing to stop businesses from placing advertisements on web pages within their sites. In the ***StepStone***[106] case injunction was granted against deep linker, as the court concludes that the collection of jobs constitutes a database. However, in ***Wegener et al v. Hunter Select***[107] it was held that a newspaper's job listing section does not constitute a database under Dutch law (because data in database should be arranged in a systematic or methodical way to enable people to consult it quickly and efficiently), and cannot therefore be protected from being excerpted on a job search website. An index was added to this listing, which qualified it for protection, and thus violation of the database right of *Wegener et al* under Article 2 Database Act by was found.[108] In ***Cadremploi v. Keljob***[109], were injunction was granted against search engine that deep linked to other sites. The court in ***William Hill Org.***[110] was discussing database rights but not in the context of hypertext links.

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[103] Gregory M. Poehler (2004) *Be Careful What You Link For*

[104] Ibid.

[105] *PCM v. Eureka Internetdiensten (Kranten.com), Rb*. Rotterdam 22 augustus 2000, Zaak/Rolnummer: 139609/KG ZA 00-846, Links & Law - Information about legal aspects of search engines, linking and framing (Court decisions) *at* http://www.linksandlaw.com/decisions-89.htm (last visited April 16, 2007)

[106] *StepStone GmbH & Co. KG v. Ofir Deutschland GmbH* (LG Köln, Germany), 28.02.2001, 28 O 692/00, JurPC Web-Dok. 138/2001 *at* http://www.jurpc.de/rechtspr/20010138.htm (last visited: April 16, 2007)

[107] *Wegener et al v. Hunter Select*, President District Court (Arrondissementsrechtbank) Groningen, 18 July 2002, Reg.nr.: 59233 KG ZA 02-226, De Rechtspraak *at* http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=AE5512&u_ljn=AE5512 (last visited: April 16, 2007)

[108] *Wegener et al v. Hunter Select*, Court of Appeal (Gerechtshof) Leeuwarden, 27 november 2002, Rolnummer 0200328, De Rechtspraak, *at* http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=AF1109&u_ljn=AF1109 (last visited: April 16, 2007)

[109] *Cadremploi v. Keljob*, Court of Appeals, Civ. Ct. Paris (France), May 25, 2001, Jnet, la jurisprudence relative a Internet, *at* http://www.legalis.net/cgi-iddn/french/affiche-jnet.cgi?droite=decisions/dt_auteur/arret_ca-paris_250501.htm (last visited April 16, 2007)

[110] *The British Horseracing Board Ltd and Others v. William Hill Organization Ltd.* ECJ, nr. C-203/02, 9 November 2004, http://eur-lex.europa.eu/LexUriServ/site/nl/oj/2005/c_006/c_00620050108nl00040004.pdf (last visited: April 16, 2007)

In Germany, Mainpost, a publishing subsidiary of German group Verlagsruppe Holtzbrinck sued the search engine, ***Newsclub*** for deep-linking to the plaintiff's news articles. NewsClub won an interim injunction at Berlin court in 2001 (the court saw no difference between a normal search engine and the service offered by defendant, and no database infringement was found, nor did the defendant's actions constitute unfair competition)[111], but lost in the main lawsuit at Munich regional court (LG München)[112], and was found to have violated the copyright protection in Mainpost's news database by searching and linking directly to it. The decision was appealed at first but the appeal was withdrawn at the end of March 2003.

By agreeing to comply with the cease and desist agreement, the Plaintiff accommodated the Defendant by abandoning its claims of demanding compensation and further information that had been determined by Munich Regional Court

So the decisive question of the legality of search engines in general will probably be answered by higher German courts in parallel cases against the search engines

In ***Newsbooster.com*** the Danish court ruled that "the text collections of headlines and articles, which make up some internet media, are… found to constitute databases enjoying copyright protection."[113] At this point, it is still unclear what effect the *Newsbooster* decision has had (or will have). In fact, in an effort to take advantage of European inconsistency with respect to this issue, Newsbooster has recently moved its operations to the U.K.

In the abovementioned ***Paperboy***[114] case the court held that web pages containing publicly accessible news articles may be linked directly while bypassing the front page of the relevant

[111] *Newspaper Search Engine*, District Court (Landgericht) Berlin 30 January 2001, LG Berlin, 30.01.2001, 16 O 792/00, JurPC Web-Dok. 185/2001 *at* http://www.jurpc.de/rechtspr/20010185.htm (last visited April 16, 2007)

[112] Stephan Ott (2004), *Linking Cases Worldwide – A Comprehensive Overview*

[113] *Deep linking violates EU database law, German court rules*, OUT-LAW News, http://www.out-law.com/page-2799 (July 26, 2002)

[114] *Verlagsgruppe Handeslblatt v. Paperboy, aus dem Bundesgerichtshof (BGH), Urteil vom 17. Juli 2003 √ I ZR 259/00.* Bundesgerichtshof, Mitteilung der Pressestelle *at* http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2003&Sort=3&anz=96&pos=0&nr=27035&linked=urt&Blank=1&file=dokument.pdf (last visited Feb. 23, 2007)

web-site, and this will not constitute the violation of the Database Directive. [115] This case was said to show a remarkable victory of efficiency and usability of the internet over copyright and unfair competition claims.[116]

In another German case (with undisclosed parties) it was stressed, that in order to achieve the aims of the Directive, a low standard of substantiality should be applied, and small databases should be protected as well. A line should be drawn only at very simple databases. [117]

In ***eBay International AG v. [X]***[118] the defendants copied and used the data from two web-site databases of the eBay, which were both available to public. This was considered to be a violation of the German database law (§§ 87b UrhG). Several consideration were considered by the court as important. First, eBay made significant investment in creation, maintenance and organization of his databases. No restrictions on public access was held to be non-relevant, as German law has no protection of secrecy interests (only investment interests), and no protection of the arrangement of data. Thus, when data is obtained and then simply differently arranged – it can still form a substantial part of the database.

Similar position was taken by another German court in ***HIT BILANZ***[119] case, were it was held that the exclusive right of the producer of a database to reproduction can be infringed by obtaining data from the database and putting them together again in a different way.

In a very recent ***OFiR vs. HOME***[120] case the Court found systematic crawling, indexing and

[115] Bundesgerichtshof: Mitteilung der Pressestelle Nr. 96/2003, *Internet-Suchdienst für Presseartikel nicht rechtswidrig*. Bundesgerichtshof *at* http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Sort=3&Datum=2003&Art=pm&Blank=1&nr=26553&id=1058560384.14 (last visited: April 16, 2007)

[116] *Deep-Linking Legal After German Supreme Court Ruling*, German American Law Journal, http://galj.info/2003/07/18#z718paperboy.txt (Jul. 18, 2003)

[117] Datenbankeigenschaft von Hyperlinksammlungen, AG Rostock, Germany 20.02.2001, 49 C 429/99, JurPC Web-Dok. 82/2002 at http://www.jurpc.de/rechtspr/20020082.htm (last visited: April 17, 2007)

[118] *eBay International AG v. [X]*, LG Berlin, Beschluss vom 27.10.2005, Az.: 16 O 743/05, Aufrecht.de *at* http://www.aufrecht.de/index.php?id=4330 (last visited: April 17, 2007)

[119] HIT BILANZ, Federal Supreme Court (Bundesgerichtshof), 21 July 2005, I ZR 290/02 , Bundesgerichtshof *at* http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=1e4bf938b9f4bcc4ad2064183135ec6e&client=3&nr=33566&pos=0&anz=6 (last visited: April 17, 2007)

[120] OFiR vs. HOME, Danish Maritime and Commercial Court (Copenhagen), Feb. 24, 2006, *at* http://www.domstol.dk/media/-300011/files/v010899.pdf (last visited Jan 10, 2007)

deeplinking by portal site Bolig.ofir.dk of real estate site Home.dk not to conflict with Danish law or the database directive of the European Union.[121] The reason for that was that the site's real estate database was found not to be a database at all, and thus deep-linking to it was okay. The Court posed some very important and interesting considerations in justification of its position. It noted the difference between the technological point of view on databases (which is a set of information organized in a certain was) from a judicial perception of it. Legal idea of databases is expressed in the EU database directive (which protects the database as such, and not its content, which has copyright protection). The directive requires that the data that is to be put in the database to be a collected, already existing material, otherwise it will not be a database.[122] If this data is enriched, then it becomes not a database, but a container of data. Thus, as it was ironically noted, the database was too good, and because of its quality it could not be protected.[123] This seems to imply that among others also the databases of news-sites are not databases in the directive-sense, and therefore might not be protected from deep-links. Another important aspect that the Court took into account was that portal OFiR (based on revenues from banner ads) does not compete with real estate site HOME (funded by fees from houses actually sold).[124]

In the United States, where no *sui generis* database law currently exists, copyright owners have found protection against deep-linking by relying upon laws related to copyright, trespass, breach of contract, and common law misappropriation.

In the case of ***EBay Inc. v. Bidder's Edge Inc.***, it was found **that use of Web bots** to extract data about auctions from an auction site **amounted to trespass**. It claimed that unauthorized use of servers, such as unsolicited email or robot-generated hits to websites, is a "trespass" to

[121] *Deep Linking*, Wikipedia, the free encyclopedia, *at* http://en.wikipedia.org/wiki/Deep_linking (last modified March 18, 2007)
[122] *Bolig.ofir.dk v. Home.dk*, in P.Bernt Hugenholtz,*The Database Right File*, Institute for Information Law, University of Amsterdam, *at* http://www.ivir.nl/files/database/index.html (last visited: April 15, 2007)
[123] Jon Lund, *This is not a database! Says court about online real estate-database in deep-linking case of OFiR vs. HOME*, New Media Trends, at http://newmediatrends.fdim.dk/2006/03/this-is-not-a-database-says-court-about-online-real-estate-database-in-deep-linking-case-of-ofir-vs-home.html (March 3, 2006)
[124] Ibid.

those servers by **depriving the owners of the full use of their machines**. Significantly, eBay did not base its complaint on intellectual property law. The court granted an injunction Bidder's Edge from automatically spidering the eBay site to generate auction comparison listings, **because the robotic crawler used eBay system resources**.

Thus, the analysis of the situation with deep links shows that most web-sites have nothing against deep-linking to them, as it promotes their efforts, and increases traffic. The complaints that exist are mostly based on some special policy considerations – for example, the disruption of the intended flow of their websites. So far, the courts have found that deep links to web pages are neither copyright infringement nor trespass. No court has enforced a website's terms of use that bar deep linking.[125]

2.1.3 Legal consequences of direct linking

Direct linking to an object: legal problems

Direct linking causes browsers to request the image directly from the original web server. The legal status of inlining images without permission has not been yet settled.[126] As the Brad Templeton, the Chairman of the Board of the Electronic Frontier Foundation, noticed:

> "The doctrine of contributory infringement might apply more strongly here because you've now set up an automatic mechanism to cause users to copy the picture in a way not approved by the copyright holder. They don't even know it's happening, it's so automatic. It might be akin to you placing a photocopier on the street with a copyrighted photo in it, and a sign saying "press this button for a free picture." And sending the bill for the copying to the copyright holder of the picture to boot. You don't make any copies yourself, but it certainly seems to be even worse, from the copyright holder's viewpoint, than if you had done so."[127]

Thus, it is clear that direct linking makes violation of author's rights very easy. For the

[125] *Bloggers' FAQ - Intellectual Property*, Electronic Frontier Foundation, *at* http://www.eff.org/bloggers/lg/faq-ip.php (last visited: May 28, 2007)
[126] *Frequently Asked Questions (and Answers) about Linking*, (Chilling Effects Clearinghouse)
[127] Brad Templeton, *Linking rights*, Brad Templeton's Home Page at http://www.templetons.com/brad/linkright.html (last visited May 20, 2007)

violation to be established it is not even necessary to copy the linked material by the creator of the link.

One of the most obvious rights which can be violated is a right to display or communicate their work to the public.[128] Furthermore, derivative work can presumably be created by linking images from other web-sited, because they get combined with the current web-site In this case, the creator of the web site may be guilty of contributory copyright infringement for creating a derivative work, unless he obtain a prior permission.[129]

One can also utilize a link to pass off another's work as one's own. For instance, one could tell the reader to click on certain object within web-page to see certain object (image) of certain author. The link will then lead to an image created by another person, and thus it is falsely claimed to be originating from the author whose works user wanted to see.

Consequently, the HREF link also is a reverse passing off. Reverse passing off by using a link to pass-off another's work as one's own most likely violates laws governing competitive business practices. [130]

Direct linking also uses the creator's network bandwidth without any benefit to them[131]., and of course without his authorization. This is considered by many as **bandwidth** stealing, which is both costly and unpleasant for the creator, as his site is not being viewed in its intended form. Since bandwidth is a commodity, unauthorized use can increase the maintenance costs of the website hosting the image, hence the term bandwidth theft. As a result, some servers are programmed to use the HTTP referer to detect hot-linking, and return a condemnatory message (usually in the same format) in place of the expected image or media clip. [132]

[128] Ignacio Garrote Fernández-Díez, *The linking law of the World Wide Web,* Universidad Autónoma de Madrid, *at* http://www.uam.es/centros/derecho/publicaciones/pe/english.html (last modified March 22, 2000)
[129] Daniel A. Tysver, Brad Bolin, *Linking and framing concerns: Web Site Legal Issues,* Bitlaw – a resource on technology law, *at* http://www.bitlaw.com/internet/webpage.html#linking (last visited: Feb. 23, 2007)
[130] Ibid.
[131] *Deep Linking*, Wikipedia, the free encyclopedia, *at* http://en.wikipedia.org/wiki/Deep_linking (last modified March 18, 2007)
[132] *Inline Linking*, Wikipedia, the free encyclopedia, *at* http://en.wikipedia.org/wiki/Inline_linking (last modified March 4, 2007)

However, direct linking is and can be used in a variety of legitimate ways.

First, when the creator of web-site deliberately host all images on a separate server(s), so as to divide the bandwidth. For example, the front page then will be <example.com>, amusement part of web-site - <games.example.com>, and images will be served from <images.example.com>. Then, banner ads are hosted by a middlemen company, that takes ads from advertisers and places them on the web-site. More than that, direct links to copyrighted materials by search engine and their display is legitimate, but only when they are used as thumbnails. Case-law exists that supports this idea. For example, in *Kelly v. Arriba case* (see below), the **display of copyrighted images as "thumbnails" by a search engine constitutes fair use** under the Copyright Act.

Direct links and webcasting

A new issue of copyright protection of live Internet webcasts has recently been addressed in the US.[133] U.S. District Judge Sam Lindsay granted a preliminary injunction against Robert Davis (***FX Motor Sports, Inc. v. Davis***[134]), who provided direct links to the live audiocasts of motorcycle racing events (SFX's copyrighted live races in realtime) through his site <supercrosslive.com>. SFX argued irreparable harm because this unauthorized usage limits SFX right to sell sponsorships and endorsements on its own website as the exclusive source of the footage via webcast.[135] The Court analogized Davis's unauthorized website link for audio webcasts to the unauthorized satellite transmission of live television broadcasts in

[133] *Providing Unauthorized Link to Live Audio Webcast Likely Constitutes Copyright Infringement*, Stanford Law School, The Center for Internet and Society, *at* http://cyberlaw.stanford.edu/packets/200702/providing-unauthorized-link-to-live-audio-webcast-likely-constitutes-c (posted Feb. 22, 2007)

[134] *Live Nation Motor Sports, Inc. f/k/a SFX Motor Sports, Inc. v. Robert Davis, d/b/a Tripleclamps and www.supercrosslive.com (FX Motor Sports, Inc. v. Davis)* 2006 WL 361983 (N.D. Tex. Dec. 12, 2006): Memorandum opinion and order, Steptoe&Johnson LLP, *at* http://www.steptoe.com/assets/attachments/2770.pdf (last visited Feb. 14, 2007)

[135] Tamera H. Bennett, *Compare and Contrast Copyright Linking rulings in mp3s4free and SFX*, Current Trends in Copyright, Trademark & Entertainment Law *available at* http://ipandentertainmentlaw.wordpress.com/2007/01/19/compare-and-contrast-copyright-linking-rulings-in-mp3s4free-and-sfx/ (Jan. 19, 2007)

PrimeTime 24.[136] As a step in the process by which copyrighted works made their way to an unintended audience, either unauthorized act should be considered a public display or performance for the purposes of a copyright claim.

The Court found that SFX showed a substantially likelihood of succeeding on the merits of a copyright infringement claim.[137] The unauthorized link to the SFX webcast would likely qualify as a copied display or performance of plaintiff's copyrightable material (the judge was already critisized for failing to understand the internet). " The court agreed that if Davis is not enjoined from providing unauthorized Webcast links on his Web site, SFX will lose its ability to sell sponsorships or advertisement on the basis that it is the exclusive source of the Webcasts, and such loss will cause irreparable harm."[138] The Judge ruled "the link Davis provides on his Web site is not a 'fair use' of copyright material" and ordered him to cease linking directly to streaming audio files.[139]

Several conditions are usually needed to link to audio content from content providers is possible if several conditions are observed. These conditions are usually spelled out in the Term of Use of the web-site of content provider. For example, *National Public Radio (NRP)* allows linking to its Podcasts from Web sites, weblogs or similar applications, as long as:

> "(a) the links redirect the user to the NPR Web sites when the user clicks on them, (b) you do not insert any intermediate page, splash page or other content between the links and the applicable NPR web page, (c) the linking does not suggest that NPR promotes or endorses any third party's causes, ideas, Web sites, products or services, or (d) you do not use NPR content for inappropriate commercial purposes, and (e) you provide attribution to NPR

[136] *National Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10 (2d Cir. 2000), FindLaw for legal professionals, *at* http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=2nd&navby=case&no=999244 (last visited May 20, 2007)

[137] Tamera H. Bennett (2007), *Compare and Contrast Copyright Linking rulings in mp3s4free and SFX*

[138] *Texas court bans deep linking*, The Register, *at* http://www.theregister.co.uk/2007/01/23/texas_court_bans_deep_linking/ (Jan 27, 2007)

[139] Tamera H. Bennett, *Hyperlink to Webcast Not "Fair Use"*, Current Trends in Copyright, Trademark & Entertainment Law *available at* **http://ipandentertainmentlaw.wordpress.com/2007/01/05/hyperlink-to-webcast-not-fair-use/** (Jan. 5, 2007)

adjacent to the link."[140]

NPR specifically states that it reserves the right to discontinue providing NPR Podcasts at any time for any reason.

Direct linking: search engines

Search engines allow to provide search, and show in search result not simply the web-pages with the content requested, but also, especially if search criteria are given this way, images and similar content, with a direct link to it. This causes objections of the owners of such content. The arguments of the parties with regard to search engines mainly deal with interpretation of fair use doctrine.

In the US the provisions on fair use are in 17 U.S.C. §107[141], which lays down four factors to be considered by the courts in determining fair use of a copyright work: (i) the nature of the use of the work; (ii) the nature of the copyrighted work itself; (iii) the amount and substantiality of the portion used; and (iv) the effect of the use upon the potential market for the copyrighted work.

In the case ***Kelly v. Arriba***[142] (commonly known as the ***Ditto.com case,*** as Arriba has changed its name to Ditto.com), defendant operated a visual search engine, which displays its results as small pictures - "thumbnails" - rather than as text. After clicking on a "thumbnail", the larger version of the picture appears within the context of defendant's web-site, inlined by it. Similarly, the copyrighted material of Leslie Kelly, a photographer, was inlined.

The Ninth Circuit Court of Appeals held that there was no violation of the Copyright Act in displaying of copyrighted thumbnail images by a search engine, because it constitutes *fair use* (because the images themselves were poor resolution and they enhanced Kelly's market if

[140] *NRP: Terms of Use*, National Public Radio, *at* http://www.npr.org/about/termsofuse.html (last modified: August 18, 2006)

[141] 17 U.S.C.A. § 107

[142] *Leslie A. Kelly v. Arriba Soft Corporation*, February 6, 2002, 280 F.3d 934 (9th Cir. 2002), CV-99-00560-GLT, FindLaw for legal professionals, http://caselaw.findlaw.com/data2/circs/9th/0055521p.pdf (last visited May 20, 2007)

anything). These images were shown without their copyright management information, but the court decided that it was not in violation of the Digital Millennium Copyright Act.

The use of embedded links to frame the full scale photograph *did infringe* the photographer's copyright, violating his right to display the works publicly and diverting users from his site.

Thus, the *use of "thumbnails" was held to be fair use, inlining was not.* This judgment was welcome, because it allows search engines to continue to assist web searchers by the use of thumbnails. Moreover, it permits linking to an entire web page of another's website in the form of a new window (as opposed to an image or a frame). Both these aspects take into account the important role that search engines play in making the Web what it is.[143]

However, the courts reach different conclusions while deciding cases on thumbnails in other countries. For example, under the *German Copyright Law of 1965* there is no general limitation of fair use, but a closed set of `limitations' on a copyright owners rights (e.g. the reproduction for private or scientific use is permitted). [144]

Basing its decision on this norm, the court of Hamburg said in German-language Google News case that all limitations don't apply to the conversion of internet photos to "thumbnails". Google has developed an automated grouping process for Google News that pulls together related headlines and photos. The legal issue raised was that often thumbnail images from other news sources are used to illustrate links, and this could be in contradiction to copyright law. This means that Google can no longer use thumbnail images without the permission of the copyright owner.[145] Another case in the US seems to follow the approach taken by the German court. According to ***Perfect 10 v. Google***[146] case, Google's image search service

[143] Maitland Kalton, *Recent US Case Law*, Internet Newsletter for Lawyers. May/June 2002, by Delia Venables, *at* http://www.venables.co.uk/n0205uscaselaw.htm (last visited: March 20, 2007)

[144] *Framing/ Inline-Linking: Copyright and trademark law infringement?* Links and Law: Information about legal aspects of search engines, linking and framing, *at* http://www.linksandlaw.com/linkingcases-framing.htm (last visited - May 21, 2007)

[145] Stephan Ott (2004), Linking Cases Worldwide – A Comprehensive Overview

[146] Perfect 10 v. Google, INC., et al, case No. CV 04-9484 AHM (SXM) C.D. Cal. Feb. 21, 2006, Order granting in part and denying in part Perfect 10's motion for preliminary injunction against Google. US District Court, Central District of California, *at*

violates the copyrights of Perfect 10, an adult magazine and web publisher, by *displaying thumbnail-sized photographs.* The court did not follow Google's argument that its creation and display of thumbnails is fair use. The court noted that the presentation of images through frames is not an exercise of display right. It added that thumbnail copying for search purposes not fair use, notwithstanding *Kelly v. Arriba*.

The facts of the case show that in early 2005 Perfect 10 entered into a licensing agreement with Fonestarz Media Limited for the sale and distribution of Perfect 10 reduced-size images for download to and use on cell phones. Google's use of thumbnails does supersede this use of Perfect 10's images, because mobile users can download and save the thumbnails displayed by Google Image Search onto their phones.[147]

However, Google's picture search as such is not a violation. Google is also not secondarily liable under the doctrines of contributory or vicarious infringement for linking to infringing content. No contributory liability was established because search capacity and mere bringing visitors to the linked web-sited does not "materially contribute" to infringements. Google was not responsible if surfers clicked on thumbnails that directed them to full size porno images hosted on third party websites, taken without permission from the official Perfect 10 site. No vicarious liability was found as Google does not control infringement – ability to remove link is not ability to control the infringement[148]. The outcome of the decision means that Google no longer depends on the safe harbor provision.[149]

http://www.cacd.uscourts.gov/CACD/RecentPubOp.nsf/bb61c530eab0911c882567cf005ac6f9/3fdcaed8913a22018825711c005055a5/$FILE/CV04-9484AHM.pdf (last visited: May 15, 2007)

[147] *Creation of Thumbnails can be a copyright infringement in the USA*, Links and Law, at http://www.linksandlaw.com/news-update38-thumbnail-perfect-10-case.htm (last visited Feb. 14, 2007)

[148] Mitchell Zimmerman, *Perfect 10 v. Google, Analysis of the Preliminary Injunction Decision (February 23, 2006)*, Fenwick & West LLP, http://www.fenwick.com/docstore/Publications/GroksterDecison/perfect10_google.pdf *at* (last visited March 15, 2007)

[149] *Creation of Thumbnails can be a copyright infringement in the USA*, Links and Law, at http://www.linksandlaw.com/news-update38-thumbnail-perfect-10-case.htm (last visited Feb. 14, 2007)

2.2 Trademark violation

The Internet has opened new frontiers. The new technologies have created means of enforcing commercial rights and preventing criminal behavior. Alongside with that, application of these technologies has caused web masters and content providers significant grief - and that is in the sphere of the unauthorized use of trademarked material. [150]

A trademark is a word, image, slogan, or other device designed to identify the goods or services of a particular party.[151] Trademark law limits the manner in which the link may be displayed.[152] The use of trademark for the identification of the other party on the Internet has nothing inherently wrong in it. Some trademark owners tend to go to court every time they see their trademark on another party's page. However, this is not always a violation of the trademark right. Several circumstances are to be taken into account, for example, the possibility of consumer's confusion as to the source of data or sponsorship of the web page.[153]

2.2.1 Trademark infringement

Trademark infringement occurs when one party utilizes the mark of another in such a way as to *create a likelihood of confusion, mistake and/or deception* with the consuming public.[154] The most usual way of linking when the trademark is used is linking to another page through that party's logo, name or trademark.

An example would be IMG link that places a trademark of another on the web page as to create such a false conclusion. The confusion created can be that the web page author's

[150] *Trademarks*, NJSBDC (New Jersey small business development centers), *at* http://www.njsbdc.com/ebusiness/trademarks.php (last visited May 02, 2007)
[151] Daniel A. Tysver, *Web Site Legal Issues*, BitLaw - a resource on technology law, *at* http://www.bitlaw.com/internet/webpage.html (last visited Feb.12, 2007)
[152] Maureen A. O'Rourke, *Legal Issues on the Internet Hyperlinking and Framing* (abstracted from Maureen A. O'Rourke, Fencing Cyberspace: Drawing Borders in a Virtual World, 82 Minn. L. Rev. 609 (1998)), *at* http://www.dlib.org/dlib/april98/04orourke.html (last visited: March 15, 2007)
[153] Daniel A. Tysver, Brad Bolin, *Trademark: Web Site Legal Issues*, Bitlaw – a resource on technology law, *at* http://www.bitlaw.com/internet/webpage.html#trademark (last visited: Feb. 23, 2007)
[154] Daniel A. Tysver, *Web Site Legal Issues*, BitLaw - a resource on technology law, *at* http://www.bitlaw.com/internet/webpage.html (last visited Feb.12, 2007)

products or services are the same as that of the trademark owner, or that the web page author is somehow associated, affiliated, connected, approved, authorized or sponsored by trademark owner[155], which could lead to a claim of trademark infringement. Violation can be found, when it is stated that, e.g., "This page sponsored by “Example.com”, click here <example.com> for more details".

Graphics attract more attention and create a stronger impression of affiliation than mere text. Thus, use of them as links is very likely to create confusion. Many web-site do contain discussions of products or services, with company’s trademarks linked to official web-sites. Web-site owners should be aware of the potential trademark issues.[156] Practical solution that can help to evade problems with using another’s trademarks or trade names (even if done in a permitted way,) is to minimize their use, make it clear that those owners are not endorsing web-site, and be sure to use **disclaimers**. Disclaimer here means a statement naming the proper owners of trademarks, and claiming absence of affiliation with companies and that the web-site is not endorsed by them.[157]

Violation can occur if information is not truthful; and thus can mislead the consumer either by act or omission; or when competitor’s trademark is altered or defaced in any manner. It should also be clear who the owners of trademark are, and that they are not affiliated with the provider of information. It’s not allowed to connote in any way that the owner of the trademark endorses or sponsors web-site.

So far neither case-law nor legislators nor commentators addresses the question of the violation of trademark when it is viewed in search results. The case-law deals with a broad

[155] Daniel A. Tysver, *Trademark Infringement*, BitLaw - a resource on technology law, *at* http://www.bitlaw.com/trademark/infringe.html (last visited Feb.12, 2007)

[156] Daniel A. Tysver, Brad Bolin, *Trademark: Web Site Legal Issues*, Bitlaw – a resource on technology law, *at* http://www.bitlaw.com/internet/webpage.html#trademark (last visited: Feb. 23, 2007)

[157] Bruce E. Methven, *Keeping out of trouble with websites!* Methven & Associates, *at* http://www.methvenlaw.com/Handout_Keeping_Out_of_Trouble_With_Web_Sites.html (June 25, 2003)

category of images. In ***Kelly v. Arriba***[158] the use of thumbnails by the search engines was legal. In ***Perfect 10 v. Google*** case it was held illegal to demonstrate thumbnails, as Google gained profit because of it[159].

Alongside with search results, search engine provide advertisements which are connected with the results. Clicking an the ad (which in fact is a link) transfers the user to the web site of advertiser, who can be any person, so often he is not the owner of trademark. Thus, trademark owners voice concerns and objections, as their websites get less "hits" and less visitors.

These ads usually take one of two forms: text or image ads that are placed within search results, or banner ads that are linked to search terms. Advertisers pay search engines to list their links before other search results or to have their banner ad displayed when certain keywords are searched for.

Pop-up advertisements have two main forms: site-generated and adware generated. Site-generated ads are controlled by the host site, and advertise the site or a third party. They have not generated any notable litigation. Adware generated pop-up ads are more controversial, as an adware program resides on the user's computer, monitors the user's web activity and generates targeted pop-up ads when the user visits a specific site. Trademark owners have challenged adware's use of trademarks to trigger competitive pop-up ads. [160]

Search result ads triggered by trademarks have been found non-infringing if they do not confuse consumers and do not use the triggering mark in their content. The courts have not yet evaluated the use of a triggering mark in search result ad content. Adware's use of trademarks to generate pop-up ads has been found to be either non-infringing non-use or an

[158] *Leslie A. Kelly v. Arriba Soft Corporation*, February 6, 2002, 280 F.3d 934 (9th Cir. 2002) CV-99-00560-GLT, FindLaw for legal professionals, http://caselaw.findlaw.com/data2/circs/9th/0055521p.pdf (last visited May 20, 2007) .

[159] Perfect 10 v. Google (CV 04-9484 AHM (SHx), United States District Court: Central District of California, at http://www.cacd.uscourts.gov/CACD/RecentPubOp.nsf/bb61c530eab0911c882567cf005ac6f9/3fdcaed8913a22018825711c005055a5/$FILE/CV04-9484AHM.pdf (last visited: Feb. 20, 2007)

[160] Kendall Bodden, *Pop Goes The Trademark? Competitive Advertising on the Internet*, 1 Shidler J. L. Com. & Tech. 12 (Aug. 2, 2005), *at* http://www.lctjournal.washington.edu/vol1/a012Bodden.html (last visited May 20, 2007)

infringing use-in-commerce. Thus, the case law on these online ad delivery methods is unsettled. [161]

Absent new legislative remedies, trademark triggered pop-up ads or search result ads that are properly identified (so that he source of ads is clear) and not misleading (so that no user can be deceived) should be allowed under current advertising law.[162]

2.2.2 Trademark dilution

It is important to draw a clear distinction between trademark infringement and trademark dilution cases. The legal developments in the US show the difference between the two, so US anti-dilution statute will be taken as an example.

In 1995 Congress introduced and amendment, known as the Federal Trademark Dilution Act (FTDA), to§43 of the Trademark Act of 1946 (Lanham act), to provide a remedy for the "dilution of famous marks." It describes the factors that determine whether a mark is "distinctive and famous," and defines the term "dilution" as "the lessening of the capacity of a famous mark to identify and distinguish goods or services."[163] Trademark infringement is a case were there's the injury is the likelihood of confusion among consumers, and dilution is a potential injury to a trademark where there is no such confusion or competition, perhaps because the products are dissimilar or the circumstances make a traditional claim untenable.[164]

In 2006 a new U.S. trademark anti-dilution statute came into effect.[165] The first important

[161] Kendall Bodden, *Pop Goes The Trademark? Competitive Advertising on the Internet*, 1 Shidler J. L. Com. & Tech. 12 (Aug. 2, 2005), *at* http://www.lctjournal.washington.edu/vol1/a012Bodden.html (last visited May 20, 2007)

[162] Ibid.

[163] *Victor Moseley* **and** *Cathy Moseley*, **dba** *Victor's Little Secret, petitioners* **v.** *V Secret Catalogue, Inc.*, **et al.** on writ of certiorari to the united states court of appeals for the sixth circuit [March 4, 2003], FindLaw for legal professionals, *at* http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=01-1015#FNopinion1.* (last visited: May 23, 2007)

[164] William McGeveran, *Trademark Dilution Revision Act Becomes Law*, Info/Law, *at* http://blogs.law.harvard.edu/infolaw/2006/10/09/trademark-dilution-revision-act-becomes-law/ (Oct. 9, 2006)

[165] Trademark Dilution Revision Act of 2006 (Enrolled as Agreed to or Passed by Both House and Senate), H.R.683, The International Trademark Association, *at* http://www.inta.org/images/stories/downloads/trademarkdilutionrevisionact2006.pdf (last visited: Apr. 23, 2007)

change brought by it is a definition of a famous mark as being "widely recognized by the general consuming public of the United States." This should eliminate niche fame, where a mark is famous only within a narrow subcommunity, with a consequence that many marks will not qualify for dilution protection.[166]

The main reason to introduce the new law is to overturn a 2003 Supreme Court decision in ***Moseley case***[167], involving a little store selling "adult novelties" in a Kentucky strip mall called "Victor's Little Secret." A certain large retailer sued for trademark dilution. The Court held that the plaintiff needed to prove not merely likelihood of dilution, but *actual* dilution, which was so hard to do, that many considered that it would be impossible to win a lawsuit on this ground anymore.. The new law revises the statute to make it clear that plaintiff need only show defendant's mark is *likely* to cause dilution of plaintiff's mark.[168] The standard to measure "likelihood" is still to be developed.[169]

Another important change is limitation of the cases of fair use defenses to many trademark cases. The 1996 dilution statute listed such defenses (such as comparative advertising, news reporting, and noncommercial use) as applicable to actions brought under "this section," which might be read to apply not just to dilution claims but to many other cases under §43 of the Trademark Act. The new law retains those fair use defenses but limits them to cases under "this subsection" — that is, to dilution cases.[170]

Another thing added to FTDA is a "dilution by tarnishment" as a cause of action, defined as "association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark." This language will probably not be misused

[166] Eric Goldman, *Trademark Dilution Revision Act of 2006***,** Technology & Marketing Law Blog, *at* http://blog.ericgoldman.org/archives/2006/10/trademark_dilut_3.htm (Oct. 10, 2006)
[167] *Moseley et al., dba Victor's Little Secret v. V Secret Catalogue, Inc., et al.* certiorari to the united states court of appeals for the sixth circuit No. 01-1015. Argued November 12, 2002--Decided March 4, 2003, FindLaw for legal professionals, *at* http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=01-1015 (last visited: May 23, 2007)
[168] William McGeveran, *Trademark Dilution Revision Act Becomes Law*, Info/Law, *at* http://blogs.law.harvard.edu/infolaw/2006/10/09/trademark-dilution-revision-act-becomes-law/ (Oct. 9, 2006)
[169] Eric Goldman (2006), *Trademark Dilution Revision Act of 2006*
[170] William McGeveran (2006), *Trademark Dilution Revision Act Becomes Law*

against legitimate criticism or comparisons. [171] Still, a law that outlaws speech on the basis that it "harms the reputation" of something "famous" arises many legitimate concerns, though it is yet to be seen how it is going to work in practice, especially in the digital sphere.

In settled out of court case ***Ticketmaster Corp. v. Microsoft Corp***.[172] Ticketmaster alleged trademark dilution and other unfair competition, claiming that a link implies an association between the linking and linked sites, and such association was lacking in reality. Microsoft's <seattlesidewalk.com> site allowed visitors to deep link into the Ticketmaster site from which users could purchase tickets, *bypassing Ticketmaster's home page, and therefore its revenue-producing*. As noted by Maureen A. O'Rourke, "Interestingly, the complaint was based primarily on trademark law rather than copyright, as the copyright infringement claim appeared almost as an afterthought".[173]

User's expectations are important here, because most of them will not assume any affiliation between the two sites, particularly when he is transferred to clearly another web location. The manner in which trademark is used is important too, because if the linking site uses the linked site's fanciful logo as its pointer, consumers are more likely to believe that there is an association than if the linking site uses the address or name of the linked site as its pointer. The manner might imply expressly or implicitly an association, and violation can be found.[174]

2.2.3 Fair (non-infringing) use of trademarks

Although a minority of jurisdictions have adopted the fair use defense in conventional trademark claims, the defense is readily adaptable to and is gaining recognition in Internet

[171] Ibid.
[172] *Ticketmaster Corp. v. Microsoft Corp (CV 97-3055 RAP,C.D. Cal., filed April 28, 1997)* , AOL legal department: decisions and litigation *at* http://legal.web.aol.com/decisions/dlip/tickcomp.html (last visited Feb. 20, 2007)
[173] Maureen A. O'Rourke, *Legal Issues on the Internet Hyperlinking and Framing* (abstracted from Maureen A. O'Rourke, Fencing Cyberspace: Drawing Borders in a Virtual World, 82 Minn. L. Rev. 609 (1998)), *at* http://www.dlib.org/dlib/april98/04orourke.html (last visited: March 15, 2007)
[174] Ibid.

related cases. [175] The so-called "descriptive", "narrative" or "nominative" fair use of trademarks is generally allowed. The distinctions between these categories come from well-established doctrine that applies to traditional trademark legislation, and thus further investigation is unnecessary. In the digital sphere the situation of using someone's trademark most often occurs when it's needed to identify the goods, services, or company discussed (or complained about). A website *merely linking to someone's web page***,** even if that page and its URL include a trademark (e.g., "We disagree with "Example", click here <example.com> to visit their homepage"), is unlikely to be trademark infringement. [176] Even the use of trademark in domain name is allowed, so long as it's clear that the user not claiming to be or speak for the company, no suggestion that .the company endorses the user is allowed. [177]

In a famous case ***Bally v. Faber***[178] a former Bally Fitness customer was allowed to maintain web-site called "Bally sucks" (URL <www.compupix.com/ballysucks>) because he was using it to criticize Bally, and thus there was no likelihood of confusion. The court classified Faber's site as a consumer commentary rather than commercial use.[179]

Similarly, in ***Ford Motor Company v. 2600 Enterprises***[180] Ford applied for a preliminary injunction to stop the defendants from automatically redirecting users from their website <www.f--kgeneralmotors.com> to the claimant's official website <www.ford.com>. The defendants had done this by embedding a link in the programme code of their website using the claimant's commercial trademark. The sole purpose of the website was to re-direct users who type in the URL of the defendants' website (the domain name of which they owned) to

[175] *Trademarks*, NJSBDC (New Jersey small business development centers), *at* http://www.njsbdc.com/ebusiness/trademarks.php (last visited May 02, 2007)
[176] *Frequently Asked Questions (and Answers) about Linking*, (Chilling Effects Clearinghouse)
[177] Bruce E. Methven (2003), *Keeping out of trouble with websites!*
[178] *Bally Total Fitness Holding Corp. v. Faber* **,** 29 F. Supp. 2d 1161 (C.D. Cal. 1998), The University of Akron, *at* http://gozips.uakron.edu/~dratler/2003cyberlaw/materials/bally.htm (last visited: May 20, 2007)
[179] *Summaries of infringement cases.* The Beckham Center for Internet & Society at Harvard Law School, at http://cyber.law.harvard.edu/property00/domain/CaseLinks.html (last visited: May 20, 2007)
[180] Ford Motor Company v. 2600 Enterprises, et al. 177 F. Supp. 2d 661, 2001 U.S. Dist. Lexis 21302 (E.D. Michigan, December 20, 2001), Internet Library of Law and Court decisions, *available at* http://www.phillipsnizer.com/library/cases/lib_case31.cfm

the claimant's official website.[181] The Court *denied the claims for alleged unfair competition and trademark dilution* as a result of linking to the front page, because the defendants had neither used the plaintiff's mark in commerce, nor in connection with the sale, or advertising for sale, of any goods or services.

No violation can be established if usage is allowed, for example, under linking license. The example of this situation is the consequence of the *Shetland times* case[182]. It was finally and ultimately settled out of court providing for the linking license.[183] The link was to the Times' front page and the headlines that appeared on the News web site had to appear on a page which included the legend "A Shetland Times Story" in the same size or larger than the News' corresponding legend, moreover, "adjacent to any such headline or headlines there shall appear a button showing legibly the Shetland Times masthead logo."[184]

However, though many principles are the same, sometimes the exact uses that trigger no liability or possibility of suits differ from country to country. In some jurisdictions (e.g. the U.S.)[185] comparative advertising which names a competitor in a non-confusing and *truthful comparison* does not constitute infringement.[186] However, other jurisdictions have a different approach. For example, comparative advertising is not permitted by German domestic unfair competition law. This has legal consequences in the digital sphere too, which is shown by a dispute before the Frankfurt court on a comparative advertisement of two software products. The web-site was hosted in a US Web site of American subsidiary of a Japanese software

[181] Maitland Kalton, *Recent US Case Law,* Internet Newsletter for Lawyers. May/June 2002, by Delia Venables, *at* http://www.venables.co.uk/n0205uscaselaw.htm (last visited: March 20, 2007)

[182] *Shetland Times Limited against Dr Jonathan Wills and Zetnews Limited,* (*1997* S.C. 316), Nov. 11, 1997, Juristische Fakultät der Universität Tübingen, *available at* http://www.jura.uni-tuebingen.de/bechtold/text/shetland_settlement.htm (last modified - Mar. 30, 2006)

[183] Bruno De Vuyst, Katia Bodard and Gunther Meyer, *Deep Linking, Framing, Inlining and Extension of Copyrights: Recent Cases in Common Law Jurisdictions,* Murdoch University Electronic Journal of Law, Volume 11, Number 1 (March 2004) http://www.murdoch.edu.au/elaw/issues/v11n1/meyer111_text.html (last modified March 2004).

[184] *Shetland Times Limited against Dr Jonathan Wills and Zetnews Limited,* (1997 S.C. 316), Nov. 11, 1997, Juristische Fakultät der Universität Tübingen, *available at* http://www.jura.uni-tuebingen.de/bechtold/text/shetland_settlement.htm (last modified - Mar. 30, 2006)

[185] Bruce E. Methven (2003), *Keeping out of trouble with websites!*

[186] *Ibid.*

manufacturer. The advertisement was accessible from Germany via an Internet link, which was placed on the home page of the German subsidiary of the same Japanese mother company. The Frankfurt court ruled that the German company providing the link was in fact liable for unfair commercial practices and breach of national competition law. Therefore, the defendant was ordered to cease providing this link and pay the damages caused to the plaintiff.[187]

To sum it all, many claims against hyperlinks that include trademark infringement and trademark dilution are often weak. U.S. case-law shows that many hyperlinks can be exempted, in case they don't use actual trademarks, the uses are not "commercial," the trademarks are not "famous" (as required by the dilution statute), or an implied license arguably exists in light of URL advertisement.[188]

[187] *Germany - Court rules comparative advertising through Internet link provided by German software supplier to USA Web site infringes domestic unfair competition law*, News: Gateway to European Union, *at* http://europa.eu.int/ISPO/legal/en/news/9712/chapter2.html (Nov 05, 1999)

[188] Jeffrey R. Kuester, Peter A. Nieves Hyperlinks, frames and meta-tags: an intellectual property analysis, IDEA: The Journal of Law and Technology 1998 (38 IDEA: J.L. & Tech. 243), © 1998 PTC Research Foundation of the Franklin Pierce Law Center, at http://www.patentperfect.com/idea.htm (last visited: Feb. 23, 2007)

Chapter 3 – Content-related legal aspects of linking

3.1 Piracy and other copyright concerns

The World Wide Web is a network built upon links. So a legal rule that unnecessarily inhibits linking could stifle the development of the Web. On the other hand, a rule that tolerates overly permissive linking to infringing material could encourage and support mass piracy. [189]

In some jurisdictions, such as the United States of America, some courts find copyright infringement as a result of the simple linking, if such links f**acilitate** copyright infringement (for example, linking to the material which is itself infringing copyrighted content) or piracy. This is even more the case when it goes about not mere facilitation, but about the connection to illegal material with a view to disseminate it.

Many deliberate on the issue whether linking is protected by the First Amendment[190], which states that "Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble..."[191] The government (and states, under the Fourteenth Amendment) must meet a high level of scrutiny before restricting speech. [192]

The law of linking liability is considered a grey area. There are examples where ***sites have been proven liable*** such as *Intellectual Reserve vs Utah Lighthouse Ministry, Universal City Studios, Inc. v. Reimerdes,* and *Comcast vs. Hightech Electronics Inc* and there are examples where ***sites have not been proven liable for linking***, for example *Perfect 10 v. Google Inc.* The cases of websites are proved liable outweigh those where websites were not liable. [193].

In ***Intellectual Reserve Inc. v Utah Lighthouse Ministry Inc.***[194] (also known as ***Intellectual***

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[189] Carl S. Kaplan, *Cyber Law Journal: Assessing Linking Liability*, The New York Times: Technology, *at* http://www.nytimes.com/2000/09/08/technology/08CYBERLAW.html?ex=1181707200&en=adf4508666f150e0&ei=5070 (September 8, 2000)

[190] *Frequently Asked Questions (and Answers) about Linking*, (Chilling Effects Clearinghouse)

[191] *US Constitution. Bill of Rights*. The Legal Information Institute, Cornell University Law School, *at* http://www.law.cornell.edu/constitution/constitution.billofrights.html (last visited: May 25, 2007)

[192] *Frequently Asked Questions (and Answers) about Linking*, (Chilling Effects Clearinghouse)

[193] *Hyperlink*, Wikipedia, the free encyclopedia, *at* http://en.wikipedia.org/wiki/Hyperlink (last modified Feb. 5, 2007).

[194] ***Intellectual Reserve Inc. v. Utah Lighthouse Ministry Inc.***, United States District Court (C.D. Utah) 75 F. Supp. 2d 1290, University of Houston Law Center (supplement to Joyce, Patry, Leaffer & Jaszi, Copyright law:

Reserve v Tanners case), the ministry was prohibited from posting a portion of copyrighted Handbook of Instructions of the Mormons Church (on which Intellectual Reserve had copyright) on its web-site. After that, the ministry posted addresses (URL's) to websites that contained materials alleged to infringe copyright. International Reserve Inc., successfully asked a court to expand the restraining order. [195] In view of the court posting of the URL leading to unauthorized copies of a text amounted to contributory copyright infringement,[196] as it supplied users with the means to commit primary infringement. The court did not consider if the fair use doctrine could have excused a prima facie primary infringement.

In ***Universal v. Reimerdes*** case[197], known as ***the DeCSS case***, a computer program called DeCSS was developed that circumvented a DVD's encryption protection (Content Scramble System, or "CSS") and allowed copying and unauthorized viewing of movies. DeCSS was posted on a website, which was considered by the Court as being equivalent to trafficking in circumvention devices in contravention of the Digital Millennium Copyright Act (DMCA).

The preliminary injunction did not prohibit linking to other websites with DeCSS, differing in this respect with the Utah Lighthouse case.[198] S after it was issued, defendants removed DeCSS from the 2600.com web site, continued to support links to other web sites (a list which had grown to nearly five hundred by July 2000), purporting to offer DeCSS for download (calling it an act of "electronic civil disobedience").[199] A permanent injunction followed, which barred posting of DeCSS code or linking to sites containing DeCSS code .

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fifth edition (Lexis Publishing 2000).), *available at* http://www.law.uh.edu/faculty/cjoyce/copyright/release10/IntRes.html (Dec. 6, 1999)

[195] Stephan Ott (2004), Linking Cases Worldwide – A Comprehensive Overview

[196] *Frequently Asked Questions (and Answers) about Linking*, (Chilling Effects Clearinghouse)

[197] ***Universal City Studios, Inc. V. Shawn C. Reimerdes,*** 111 F. Supp. 2d 294 (S.D.N.Y. 2000), aff'd, 273 F.3d 429 (2d Cir. 2001), FindLaw for legal professionals *at* http://laws.findlaw.com/2nd/009185.html (last visited May 12, 2007)

[198] Bruno De Vuyst, Katia Bodard and Gunther Meyer, *Deep Linking, Framing, Inlining and Extension of Copyrights: Recent Cases in Common Law Jurisdictions*, Murdoch University Electronic Journal of Law , Volume 11, Number 1 (March 2004) http://www.murdoch.edu.au/elaw/issues/v11n1/meyer111_text.html (last modified March 2004).

[199] *Universal v. Reimerdes*, Wikipedia, the free encyclopedia, *at* http://en.wikipedia.org/wiki/Universal_v._Reimerdes (last modified: June 3, 2007)

The court ruled that it could regulate the link because of its "function," even if the link was also speech.[200] The Second Circuit upheld the restrictions[201] on the grounds that DeCSS code is only partially protected speech, and that such speech can be restricted on the Internet. The court acknowledged that there is a trade off between allowing unfettered speech and preventing the misuse of copyrighted material.[202]

According to Judge Lewis A. Kaplan of the U.S. District Court for the Southern District of New York (who decided the DeCSS case) a link can be bad or good, and it mainly turns on whether the linker's intent is laudable or not.[203] Judge Kaplan created a simple test, establishing liability if there was clear and convincing evidence that those responsible for the link (A) knew at the relevant time that the offending material was on the linked-to site; (B) knew that the offending material may not be legally offered, and (C) created or maintained the link "for the purpose" of disseminating that illegal technology.[204]

However, this test was criticized by many, as "it's easy for a plaintiff to say that a defendant intended some consequence […] Maybe the defendant did intend something and maybe he didn't. It's up to a jury to decide, and who knows what they'll do. So this leads to a classic chilling effect and potentially a very serious one." [205]

In the Netherlands ***Karin Spaink*** linked to the documents from the Church of Scientology about its doctrines, so the Church sued her in 1995 to prevent the disputed material from being published, basing its claim on copyright infringement arguments.[206] In 2003, the Court of Appeal rejected all of the Church of Scientology's claims against Spaink, Dutch ISP Xs4all,

[200] *Frequently Asked Questions (and Answers) about Linking*, (Chilling Effects Clearinghouse)
[201] Stephan Ott (2004), Linking Cases Worldwide – A Comprehensive Overview,
[202] *Free Speech*, Electronic Privacy Information Center, at http://www.epic.org/free_speech/ (last visited: May 15, 2007)
[203] Carl S. Kaplan (2000), *Cyber Law Journal: Assessing Linking Liability*
[204] William Reilly, *Lessons of 2600: Linking Rules for "Hacking" and Other Alternative Websites*, Packet Storm *at* http://packetstormsecurity.org/papers/legal/2600-lessons.htm (last visited: May 15, 2007)
[205] Carl S. Kaplan (2000), *Cyber Law Journal: Assessing Linking Liability*
[206] *Les scientologues perdent un important procès*, Anti-scientologie. *at* http://www.anti-scientologie.ch/karin-spaink.htm#perdent (Dec. 16, 2005)

and ten internet providers, who had permitted subscribers posting the documents,[207] overturning 1996 and 1999 rulings, which stated that if a provider is aware of hyperlinks to copyrighted material, he must take action against these hyperlinks.[208] The court stressed that in a democracy, free speech trumps copyrights.

The Church appealed to the High Court, but then dropped the case. Both Spaink and the Advocate General wanted the High Court give a ruling regardless of the dropping, but in 2005 it decided not to, leaving the 2003 decision intact and definitive. [209] This case didn't proclaim that hyperlinks cannot be unlawful, but it narrowed the ability of copyright claims against ISP's in the Netherlands based on "illegal" hyperlinks. [210]

In 2003 the <***DonkeyMania.com***> web-site was ordered by the court to be shut down, because of the links it contained.[211] The site did not contain any downloadable files itself, only links to peer-to-peer file sharing networks. The links allowed users to download copyright protected files, and provide further commentaries and links. The defendants claimed that they simply organized the information, and were never contacted prior the downloading, so didn't know that some of the connected pages or files were illicit. However, the site was closed, though the files and linked pages have not been declared illegal.

3.2 Linking to illegal material

It seems necessary to define a specific category of illegal content to which links can be provided, that differs from piracy and copyright-infringing content. Web-pages with illegal content differ significantly from the pages which have posted materials that violate copyright law and promote piracy. The examples of such pages are web-sites which promote

[207] Libbenga Jan, *Scientologists drop copyright case* (Dutch website can link to material), The Register, *at* http://www.theregister.co.uk/2005/07/08/scientology_copyright_case/ (July 8, 2005)
[208] Libbenga, Jan, *Scientologists loses copyright case*, The Register, *at* http://www.theregister.co.uk/2003/09/08/scientologists_loses_copyright_case/ (Sept. 8, 2003)
[209] *Les scientologues perdent un important procès*, Anti-scientologie. *at* http://www.anti-scientologie.ch/karin-spaink.htm#perdent (Dec. 16, 2005)
[210] Stephan Ott (2004), Linking Cases Worldwide – A Comprehensive Overview
[211] Ibid.

pornography, hatred, and similar grave actions. Thus, the governments put a special pressure on the providers of such pages, and on those linking to them. The problems mainly arise of the fact that some things prohibited in one country are perfectly legal in another.

In Germany the governmental policy is aimed at banning sites which provide links to web pages that contain some form of hate speech. This kind of content (e.g. anti-Semitic messages, revisionist propoganda about the Holocaust by Neo-Nazi groups, etc) benefit from constitutional protection in more liberal countries such as the USA and Canada. According to the US courts this kind of speech may only be forbidden where such advocacy is directed to inciting or producing 'imminent' lawless action and is likely to produce such action. In Germany, however, it is an offence to disseminate this kind of material. [212]

Attempts to regulate or restrain speech on the Internet have generally failed in the last few years. The US attempts to regulate indecency on the Internet or the German attempts to limit access to hate speech material or to limit access to *Radikal*, and the famous Canadian gag order about the *Homolka* case proved ineffective on the Internet. [213]

In 2002, the court in the Netherlands has decided that ***Indymedia***, a collective of anti-corporate media organisations, broke the law by linking to web sites that contained illegal material that was the subject of a lawsuit of Deutsche Bahn, Germany's national rail operator, against Google earlier that year. Google included in its search results links to web pages of Radikal that provided instructions on how to sabotage railway systems. Google removed the links immediately and deleted cached copies of the offending pages. Deutsche Bahn subsequently won a court order against a Dutch ISP that hosted the articles.[214] The Dutch arm of Indymedia received notice from Deutsche Bahn to remove links to mirror sites which linked to the offensive material (note that the company didn't link directly to illegal data). It

[212] Akdeniz, Yaman, *"To Link or Not to Link: Problems with World Wide Web Links on the Internet,"* (1997) International Review of Law, Computers and Technology 11 (2), pp 281-298.
[213] Ibid.
[214] *Dutch court stops indirect links to banned material* OUT-LAW News, 03/07/2002, *at* http://www.out-law.com/page-2730 (July 03, 2002)

refused to comply and the case went to the Dutch court, which decided that Indymedia's practices broke the law, even if it took several clicks to reach the illegal articles.

In Japan, on March 30, 2000 a very stringent position was taken by Osaka District Judge.[215] A web-site owner ***Kiuchi*** was providing on it FL software (which enabled removing of the photomask, employed to cover the most explicit parts of pornographic images), and links to other sites displaying pornographic materials(which are illegal in Japan). The main issue before the court was whether Kiuchi could also be found guilty of abetting and aiding crimes covered under the Japanese Penal Code.[216] The Judge decided that once a link is created to web-site that violated the law, the creator can be charged with aiding and abetting the crime committed, regardless of the awareness of the person creating the link of the illegality of the web site linked to.[217] The decision reiterated the proposition that ignorance of the law is no excuse. It also stated that the fact of punishing offenders by the judiciary did not amount to an infringement of the people's freedom to put and post information on the web. [218]

These developments and lawsuits had lead to a fact that some search engine prefer not to fight for a free speech, but rather to delete the controversial links. In the US it is also due to the safe harbor in the DMCA (section 512[219]), which protects online service providers e.g. search engines from liability for information posted or transmitted by subscribers if they quickly remove or disable access to material identified in the copyright holder's complaint. According to the research held in 2002 by Harvard University's Berkman Center, more than 100 web sites were excluded from French and German search results, each after a specific complaint of the government. Those are mainly anti-Semitic, pro-Nazi, or related to white supremacy. Also

[215] Bruno De Vuyst, Katia Bodard and Gunther Meyer, *Deep Linking, Framing, Inlining and Extension of Copyrights: Recent Cases in Common Law Jurisdictions*, Murdoch University Electronic Journal of Law , Volume 11, Number 1 (March 2004) http://www.murdoch.edu.au/elaw/issues/v11n1/meyer111_text.html (last modified March 2004).

[216] Shri Pavan Duggal, *To Link or Not to Link-The Judicial View*, Cyberlaw India, *at* http://www.cyberlaws.net/cyberindia/linking.html (last visited Feb. 10, 2007)

[217] Stephan Ott (2004), Linking Cases Worldwide – A Comprehensive Overview

[218] Shri Pavan Duggal, *To Link or Not to Link-The Judicial View*, Cyberlaw India, *at* http://www.cyberlaws.net/cyberindia/linking.html (last visited Feb. 10, 2007)

[219] 17 U.S.C.A. Sec. 512 (Thompson West 2005)

banned is <Jesus-is-lord.com>, a fundamentalist Christian site that is adamantly opposed to abortion.[220] The removed sites, unavailable from Google.de and Google.fr, still appear after a search on the Google.com site

In September 2002 news appeared that the University of California at San Diego has ordered a student organization to delete hyperlinks to an alleged terrorist Web site (which the U.S. government has designated as a terrorist group), citing the USA Patriot Act.[221] However, this order was soon removed, due to the public pressure, which persuaded university authorities that "links are a First Amendment right"[222].

3.3 Defamation

Generally, defamation is a false and unprivileged statement of fact that is harmful to someone's reputation, and published "with fault," meaning as a result of negligence or malice. State laws often define defamation in specific ways. Libel is a written defamation; slander is a spoken defamation.

For a statement to be defamatory, the statement must be published to a third party, and the person publishing the statement must have known or should have known that the statement was false. The law of defamation is complex, as it has been determined by numerous court decisions rather than one national statute. In addition, a claim of defamation is subject to a variety of defenses, such as the First Amendment and the defense that the statement was true. Because of the complexity of defamation law, a full explanation of this area will not be set forth here.[223]

Internet provides a new context in which a defaming statement can be made and published. A

[220] Declan McCullagh, *Google excludes controversial sites*, CNET News.com, *at* http://news.zdnet.co.uk/internet/0,1000000097,2124386,00.htm (Oct. 24, 2002)
[221] Declan McCullagh, *University bans controversial links*, CNET News.com, *at* http://news.com.com/2100-1023-959544.html?tag=fd_top (September 25, 2002)
[222] Declan McCullagh, *University backs down on link ban*, CNET News.com, *at* http://news.com.com/2100-1023-961297.html?tag=mainstry (October 8, 2002)
[223] Daniel A. Tysver, Brad Bolin, *Defamation: Web Site Legal Issues*, Bitlaw – a resource on technology law, *at* http://www.bitlaw.com/internet/webpage.html#defamation (last visited: Feb. 23, 2007)

context in which hyperlink to another's page or image can be problematic, as it can be might *misrepresent* something about the website, for example, affiliation or sponsorship, and/or be defamatory, and hence can make creator to be subject someone to legal liability.[224]

The link to another's page or image can be directly defamatory, that is, clearly identifying the party be it private person or legal entity), predominantly using its name (the example of this would be"Mr. X <http://www.example.com/~bad_man.htm> is doing bad things"). Moreover, the link itself might not directly identify the party, but the context of its usage might turn the statement into defamation (e.g., "Someone <http://www.example.com/~bad_man.htm> is doing bad things").

However, there is little new law relating to Internet defamation other than liability for service providers. Nonetheless, web page developers must be careful to avoid defaming someone in their pages. If a statement is being made that may damage the reputation of a person or organization, care should be taken to make sure that the statement is not defaming.[225]

In most of countries statutes of limitations on libel claims exist, after which point the plaintiff cannot sue over the statement. Most courts have rejected claims that publishing online amounts to "continuous" publication, and start the statute of limitations ticking when the claimed defamation was first published.[226]

In the ***CompuServe*** case[227] (first major published case on Internet libel), the plaintiff claimed damages due to one of CompuServe's hundreds of independent, self operated forums were a defamatory comment about Cubby, Inc. was posted. As CompuServe does not review the contents of publications prior to postings, court found that CompuServe acted merely as a distributor of information in its discussion groups, and therefore was not liable.

[224] *Frequently Asked Questions (and Answers) about Linking*, (Chilling Effects Clearinghouse)
[225] Daniel A. Tysver, Brad Bolin, *Defamation: Web Site Legal Issues*, Bitlaw – a resource on technology law, *at* http://www.bitlaw.com/internet/webpage.html#defamation (last visited: Feb. 23, 2007)
[226] *Bloggers' FAQ - Online Defamation Law*, Electronic Frontier Foundation, *at* http://www.eff.org/bloggers/lg/faq-defamation.php (last visited: May 17, 2007)
[227] *Cubby Inc v Compuserve Inc*, 776 F Supp 135 (1991), Electronic Privacy Information Center, at http://www.epic.org/free_speech/cubby_v_compuserve.html (last visited: May 10, 2007)

This finding in this case was based on ***Smith v. California*** case[228], where it was held that a distributor must have demonstrable knowledge of the erroneous (and defamatory) content of a publication prior to dissemination in order to be held liable for releasing that content.

It is important to note that CompuServe avoided liability because it did not know about the defaming statement, nor did it have any reason to know about the statement. If a distributor knows about a defaming statement and continues to distribute the information, liability is not so easily avoided. [229]

In the ***Prodigy*** case[230] the situation was similar in fact, but different in the outcome. Prodigy was sued for defamation based upon the statements made by one of its customers in a Prodigy discussion group (or bulletin board). In determining whether Prodigy was liable for the defaming statements of its customer in this case, the court had to find out whether Prodigy was a mere "distributor" of information (like bookstore or library, and thus not liable), or whether Prodigy was a "publisher" of information (with greater control over the information's content, such as a newspaper,).

Due to Prodigy's editorial control over content it likened itself to a "responsible newspaper"[231], and was thus considered to be in the publisher's category. Prodigy then had to change its practices, introducing a computerized keyword search solely to weed out messages containing obscene language, but without scanning messages for defamatory speech. [232]

In analyzing these cases, most commentators noted the irony that Prodigy was more likely to be liable for defamation because of the additional steps it took to control the content of its

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[228] *Smith v. California* 361 U.S. 147 (1959), FindLaw for legal professionals, at http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=361&invol=147 (last visited: May 15, 2007)

[229] Daniel A. Tysver, Brad Bolin, *Defamation: ISP Liability*, Bitlaw – a resource on technology law, *at* http://www.bitlaw.com/internet/isp.html#defamation (last visited: Feb. 23, 2007)

[230] *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), Electronic Frontier Foundation (EFF), *at* https://www.eff.org/legal/cases/Stratton_Oakmont_Porush_v_Prodigy/stratton-oakmont_porush_v_prodigy_et-al.decision (last visited: May 16, 2007)

[231] Marie D'Amico, The Web is Not a Legal Quagmire, FindLaw: Internet legal resources, Vol. 6, No. 2, July 1996. *at* http://lawcrawler.findlaw.com/MAD/webisnot.htm (last visited: May 25, 2007)

[232] David A. Potts. *Liability for libel on the Internet* (from "Defamation on Internet"), Legal Issues on the Internet, *at* http://www.cyberlibel.com./liabilit.html (last visited: May 16, 2007)

discussion groups. CompuServe did not attempt to monitor and control its discussion groups to the extent done by Prodigy, which made it easier for the CompuServe judge to find that CompuServe was merely a distributor of information. [233]

The web-site owners had then faced a difficult choice: either to filter messages and thus accepting legal liability for things they didn't do themselves; or to avoid censoring even of grossly inappropriate conduct so that the act of moderating in some situations will not trigger defamation liability. Such a hands-off approach can only increase the likelihood that defamatory statements will be made in the future. [234]

The solutions proposed by commentators were numerous, from making a "click through" **user agreement** where users consent not to post pornographic, defamatory or infringing materials or links to sites conducting illegal activities, to registration by service provider or hoster under the Digital Millennium Copyright Act.[235] Interesting possibility for online publishers was insurance to cover defamation claims, which is offered by many insurance companies, if insured agree to introduce certain standards and qualifications (i.e. procedures to screen inflammatory/offensive content, procedures to "take down" content after complaint)[236].

3.4 Free speech

In a landmark 1997 decision, the Supreme Court ruled that the Internet is a unique medium entitled to the highest protection under the free speech protections of the First Amendment to the US Constitution. This gives the Internet same free speech protection as print. The Internet

[233] Daniel A. Tysver, Brad Bolin, *Defamation: ISP Liability*, Bitlaw – a resource on technology law, *at* http://www.bitlaw.com/internet/isp.html#defamation (last visited: Feb. 23, 2007)
[234] Ibid.
[235] *Online Service Providers: Service Provider Designation of Agent to Receive Notification of Claims of Infringement*, US Copyright Office *at* http://www.copyright.gov/onlinesp/ (last visited: April 25, 2007)
[236] Michael Rothberg, Rick Fenstermacher, *Online Publishing Risks Create Need for Libel Insurance*, Online Journalism Review, at http://www.ojr.org/ojr/law/1077150111.php (Feb. 20, 2004)

is the first electronic media to achieve this because of low barriers to access, abundance, many speakers, no gatekeepers.[237]

Thus, the courts uphold the idea that even in World Wide Web people should be responsible for their own words. To put is simply, whenever anything is entered on a message board, chat room or blog, the creator becomes a worldwide publisher, similar to international journalist. So the risk of potential liability is very high, as any defamatory statement can be a basis for a lawsuit, just the same as handling out leaflets. [238]

There are, of course, two classic defenses here: **truth** and **opinion**, but it should be clear and obvious for the reader. Thus, it is not enough to preface a libel with "in my opinion" (i.e. IMHO, is doing bad things to make statement not defamatory.

Courts look at the context of statement, so as to see whether a reasonable reader or listener could understand the statement as asserting a statement of verifiable fact (one capable of being proven true or false.) or opinion or hyperbole. The difference is made between a a true, even if controversial, opinion ("I really hate George Lucas' new movie") and an assertion of fact dressed up as an opinion ("It's my opinion that Trinity is the hacker who broke into the IRS database.[239]

This Californian case ***Vogel et al. v. Felice***[240] the court rejected a claim that the defendant linked the plaintiffs' names to certain web addresses with objectionable addresses (i.e. <www.satan.com>), noting "merely linking a plaintiff's name to the word "satan" conveys nothing more than the author's opinion that there is something devilish or evil about the plaintiff

It is accepted in the U.S. that in digital sphere there are still limits to the First Amendment.

[237] *Communications Decency Act (CDA) – Free expression*, Center for Democracy and Technology, *at* http://www.cdt.org/speech/cda/ (last visited: March 20, 2007)
[238] Bruce E. Methven (2003), *Keeping out of trouble with websites!*
[239] *Bloggers' FAQ - Online Defamation Law*, Electronic Frontier Foundation, *at* http://www.eff.org/bloggers/lg/faq-defamation.php (last visited: May 17, 2007)
[240] *Vogel et al. v. Felice*, 127 Cal.App.4th 1006, 26 Cal.Rptr.3d 350, California Anti-SLAPP Project, *at* http://www.casp.net/felice.html (last visited: May 10, 2007)

The old adage “free speech doesn’t mean that you can shout “fire” in a crowded theater” applies here. The most common defense in a false light action is to claim First Amendment freedom of speech, but the courts are quite clear about offering no protection for false speech: *"false speech, even political speech, does not merit constitutional protection if the speaker* ***knows*** *of the falsehood or recklessly disregards the truth."*[241]

The Communications Decency Act of 1996 (CDA)[242] was a first attempt to censor speech online, as it severely restricted the first amendment rights by prohibiting posting "indecent" or "patently offensive" materials in a public forum on the Internet -- including web pages, newsgroups, chat rooms, or online discussion list. However, the Supreme Court held in ***Reno v Aclu***[243] that two anti-obscenity provisions of the CDA aimed at the protection of minors violate the freedom of speech provisions of the First Amendment. This was the first major Supreme Court ruling regarding the regulation of materials distributed via Internet.

The rest of the CDA, including the "safe harbor" provision protecting ISPs from being liable for the words of others, was not affected by this decision and remains law. This was confirmed in three main cases - *Zeran v. AOL, Gentry v. eBay* and *Schneider v. Amazon* – were immunity was granted to commercial online service providers.

The protection of ISP’s and users was once again affirmed in the recent case of ***Barrett v. Rosenthal***[244]**,** were a woman republished a defamatory statement about two doctors on the Internet, and was sued for that. An appellate court decided that she was liable. The Supreme Court said in its ruling that "the volume and range of Internet communications make the

[241] Don Burleson, *The Internet Journalist: Courts hold web publishers accountable for their acts*, Burleson Consulting, *at* http://www.dba-oracle.com/internet_defamation_privacy_libel_laws.htm (last visited: April 20, 2007)
[242] 47 U.S.C.A. Sec. 223 (Thompson West 2005)
[243] *Reno v. American Civil Liberties Union,* 117 S.Ct. 2329 (1997), August 20, 2001, Cornell University Law School *at* http://www.law.cornell.edu/supct/html/96-511.ZO.html (last visited: April 17, 2007)
[244] *Barrett et al. v. Rosenthal*, 40 Cal.App.4th 33 (2006), California Courts: the judicial branch of California, *at* http://www.courtinfo.ca.gov/opinions/archive/S122953.DOC (last visited: May 15, 2007)

'heckler's veto' a real threat under the Court of Appeal's holding."[245] Some commentators still proclaim that it is possible to be accused not only for creating defamation, but also for re-publishing a defamatory work and inciting defamation (for example, by posting a non-verified link).[246] However, this is not in line with case-law. ***Barrett v. Rosenthal*** clearly states that ISP's and users cannot be held liable for publishing the defamatory material of another author, and liability for defamation rests with the original author.

The California Supreme Court said Congress granted Internet providers immunity in the hope the industry would self-regulate and purge the Internet of at least some offensive material.[247]

In 2003 it was held that Web loggers, website operators and e-mail list editors can't be held responsible for libel for information they republish, thus, crucial First Amendment protections were extended to do-it-yourself online publishers.[248]

Liability may also occur upon disclosure of **private facts** about someone else or casting them in a **false light**, even if not in a defamatory fashion (for example, deliberately stating that a life-long Democrat is a neo-conservative Republican). [249]

[245] Mark Hefflinger, *Calif. Supreme Court Extends Web Libel Protections to Individual Users*, Digital Media Wire, Inc. *at* http://www.dmwmedia.com/news/2006/11/21/calif-supreme-court-extends-web-libel-protections-to-individual-users (Nov. 21, 2006)

[246] Don Burleson, *The Internet Journalist: Courts hold web publishers accountable for their acts*, Burleson Consulting, *at* http://www.dba-oracle.com/internet_defamation_privacy_libel_laws.htm (last visited: April 20, 2007)

[247] *Hosting or posting does not support libel claim*, The Reporters Committee for Freedom of the Press *at* http://www.rcfp.org/news/2006/1121-lib-hostin.html (Nov. 11, 2006)

[248] Xeni Jardin, *Bloggers Gain Libel Protection*, CondéNet, Inc. at http://www.wired.com/politics/law/news/2003/06/59424 (June 30, 2003)

[249] Bruce E. Methven (2003), *Keeping out of trouble with websites!*

Conclusion

The World Wide Web not only provided a new medium in the search, creation and development for information, it has also opened a closet filled with new questions relating to traditional areas of intellectual property.[250] The guidance on how to deal with them has been given both in many court decisions all over the world, and in different works of legal practitioners and experts.

They all admit that providing a link to another's website is an extremely common practice among website owners. The practice of linking is so widespread that many companies don't even consider requesting permission from the owner of a site to which a link is provided.

This position is best expressed by the words of Avi Adelman, who said that if the Web's creators hadn't wanted linking, "they would have called it the World Wide Straight Line."[251]

Nevertheless, there are examples of many cases worldwide were legal liability for linking was found under various causes of action, with no regard given to the fact that linking is enormously wide-spread. In general, anyone who posts links to web-pages with obscenity, libelous remarks, material taken without permission, and to sites that allow illegal free downloads of commercial software, etc. can be sued.

The main issue was the problem of misidentification, when the offending website linked in such a way that the viewer didn't realize who really owns the target site. More commercial issues, like circumventing advertising, or bandwidth stealing, were also among those important in finding the violation.

The problem is further complicated by the differences in the regulation in various countries of the world. Even in EU, were a databases directive was implemented, the differences in its

[250] Jeffrey R. Kuester, Peter A. Nieves Hyperlinks, frames and meta-tags: an intellectual property analysis, IDEA: The Journal of Law and Technology 1998 (38 IDEA: J.L. & Tech. 243), © 1998 PTC Research Foundation of the Franklin Pierce Law Center, at http://www.patentperfect.com/idea.htm (last visited: Feb. 23, 2007)

[251] Anick Jesdanun, *Linking, a fundamental premise of the Web, is challenged, AP*, SiliconValley.com *at* http://www.siliconvalley.com/mld/siliconvalley/news/editorial/3435606.htm (June 9, 2002)

implication show that there's so far a road to go to reach uniformity. The approach adopted in the EU with regard to the digital sphere is characterized as being a bit stricter than in the US. This is apparent when you look at the situation with hatred speech and the consequences of it in both countries. Having in mind that Asian courts, for example, Japanese, tend to be even stricter, the position of a person linking to another web-site becomes even more uncertain and confused.

Search engines are indexing web-site, and using links as a usual part of their activity. This made the situation with them especially dubious, as they are very likely to infringe author's rights. The main difference lies in fact that though linking to web-pages by the search engines is generally permitted, similar linking to images can raise concerns, if the search results are not depicted as thumbnail.

Nevertheless, the case law shows that the outcome of the cases is anyway predictable, as it is based on the general legal principles.

The results of the study demonstrate hat it is advisable to avoid linking without the site owner's consent for every link (though this can be clearly burdensome), or to link only to web-site which clearly permit (using special notification, or linking policy posted).

Another way to diminish the exposure to the probable liability is to identify (correctly) the owner and name of the target page when inserting links, and post a disclaimer (in an easily visible place) that waives any association, sponsorship or affiliation. This is especially important while using someone's trademarks. From the side of web-page owner, technical means to prevent linking are available.

However, even with consent of the owner of the web-site, linking can still be illegal, as the content of the web-page that links is created to can be illegal as such.

Therefore, the results of research show that linking is still a developing sphere which poses new questions to the legal practitioners and users, as new technological advancements appear.

Employing a hyperlink involves taking into account many legal issues and aspects, ans thus this problem can be called multidimensional. However, it is clear now that the existing legislation is capable of solving those issues with a help of interpretation and application of old theories to new circumstances.

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