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Permission to hyperlink?

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by Jay Forder, Consultant Editor

Linking etiquette

As we enter the new millennium, it is interesting to note the recent growth of another internet issue. The problem concerns hyperlinking - the ability to make text or images act like buttons with links to other objects. Hyperlinking is the basis of the hypertext transfer protocol (http). It brings clickable ease-of-use to the World Wide Web.

Information providers on the web are generally delighted when others create links to their information. The more links the merrier. In a sense, they prove the usefulness and popularity of the information.

The number of links grew exponentially as the web expanded. People were free to publish and post at will. Web etiquette did not require permission before creating a link to someone else's information, and it is easy to understand why this was so.

Does this mean one can always link to other pages without worrying about legal consequences? If not, in what circumstances could someone complain about the links you create? Will etiquette have to change? Recent disputes continue to raise these interesting questions.

The “deep linking” problem

“Deep linking” refers to the practice of creating a link directly to an “internal” page on another web site, rather than the other site’s home page. There have been a number of disputes involving deep linking over the years. One of the better-known was when Microsoft created links from their Seattle Sidewalk web site directly to internal Ticketmaster pages that allowed users to buy tickets for upcoming events. Bypassing Ticketmaster's home page meant users did not see Ticketmaster's policies, service information and major advertisements. Visits weren’t recorded as “hits”, and this was likely to have an effect on advertising revenue. Ticketmaster brought a suit alleging dilution of trademark, misrepresentation, misleading statements, unfair competition and unfair business practices. The parties settled out of court in 1999. Details of the settlement have not been made public, but Microsoft stopped linking to internal Ticketmaster pages.

This wasn't the first time deep linking had been the subject of a dispute. As early as 1996 a judge in the Shetland News case in the UK issued a preliminary injunction against the maintenance of deep links. That case also settled and the injunction was never tested. There have been several disputes in the interim, but none have resulted in a final legal ruling.

More recent disputes continue to raise the issue, but none look as though they will require a judicial ruling. For example:
Auction company, eBay Inc, has been trying to stop other auction sites from collecting ‘for sale’ information from their site and then linking directly to those items. The other sites appear to be willing to co-operate.

Several players in the movie industry, such as Universal Pictures and Hollywood.com, are trying to prevent a 20-year-old film enthusiast from linking directly to individual movie trailers on their sites. The film enthusiast doesn’t have the money or inclination to take the dispute to court.

It appears deep linking will be the subject of many more disputes before the legal picture becomes clearer.

**Linking to objectionable material**

Do creators of web sites need to be concerned about the legality of material to which they provide links? A preliminary injunction in a recent US case suggests they do. In fact they may need to worry about any provision of information that helps others access the material.

The injunction was granted in a case about copyright infringement. A second case, due to be heard soon, raises the same issue concerning defamatory material. It could also arise in the case of links to pornography.

The recent copyright case was brought by Intellectual Reserve, Inc. They hold all intellectual property rights for the Church of Jesus Christ of Latter Day Saints (the Mormon Church). They sought a preliminary injunction against Utah Lighthouse Ministry, Inc, a corporation run by ex-Mormons and long-time critics of the Church, Jerald and Sandra Tanner. The Tanners had published a chapter of the Mormon's *Church Handbook of Instruction* on their web site in support of their advice on terminating Church membership. The *Handbook* was meant for the guidance of Mormon priests, and was not meant to be freely available. When served with a notice to desist, the Tanners complied immediately.

Some time later, the Tanners published supportive email messages which made the point that the whole handbook was already available elsewhere on the web. Some of the published messages gave details (URLs) of other such sites. The Church claimed that publication of these details contributed to infringement of their copyright by inducing others to infringe. They sought an extension of the injunction.

There was no evidence that the Tanners had previously communicated with the other infringing sites. US District Court Judge, Tena Campbell, thus rejected the argument that the Tanners had contributed to the direct infringement by the other sites. However, she ruled that browsers who accessed the infringing sites were themselves infringing copyright, because a temporary copy is loaded into RAM and displayed on the screen. This was not authorised by the copyright owner. The Tanners had *prima facie* contributed to these infringements by publicising the URLs. She therefore granted the extension. The Tanners have noted an appeal.

Some commentators have expressed strong concern. Examples include:
“This case opens up a can of worms many in the communications arena ardently hoped would remain tightly sealed.”

“The case is a fantastic example of how traditional intellectual property (IP) law can fail to make sense in cyberspace.”

and

“... the decision could be one signal of an increasingly closed Web of the future, far different from the freewheeling forum that users know today.”

They argue that if you have to worry about the legality of the information to which you link, the exchange of information will not be as free, and a primary advantage of the web will be lost. They suggest it should not be illegal, and liken it to directing someone to a library in which there is an infringing book, or telling someone they can fly to Taiwan and buy pirated software.

Others are less concerned. They accept that the decision might be warranted. They point out the Tanners were trying to avoid the scope of the judge’s ruling, and were aiding and abetting illegal activity.

In the meantime the Church is calling for voluntary compliance with copyright law, and hope it will not be necessary to act against the other publishers of the *Handbook* (one of whom is Australian). The difficulties involved in removing controversial material from the web are notorious.

It is interesting to note that an international law firm recently reported an opposite conclusion in Russia:

“[A] Moscow inter-municipal court ruled that a web link to a pirate copy of a literary work does not constitute a violation of copyright.”

The defamation case raising the same issue is being brought by Law Professor, Daniel Curzon Brown. His action is against the owners of a web site that publishes student reviews of teachers. For present purposes, the more interesting part of the action is the allegation that a student group that links to the review site is equally guilty of defamation. The trial is set down for March, 2000.

**Conclusions**

Concerns about deep linking only arise because commercial interests are at stake. This is a good example of how growing commercialisation is demanding a rethink about how the internet operates. The issue has been around for a while, but unfortunately a legal solution is proving to be elusive. It is quite possible a technical solution preventing deep linking might arrive before the legal position is clarified.

As for linking to controversial or objectionable material, the jury is still out. As with most internet issues, international co-operation is desirable, both in arriving at a uniform approach and in enforcement.
1 I know it is the last year of the old millennium, but I wouldn't want to be provocatively accurate in the face of overwhelming popular opinion.


3 For information and links on the Shetland News case and several other deep link disputes, see Stefan Bechtold’s Link Controversy Page at <http://www.jura.uni-tuebingen.de/~s-bes1/lcp.html>.


6 The history of the dispute, including the judgment, is available at the Tanner’s web site: <http://www.utlm.org/>.


10 Thomas Lipscomb, founder of the Institute for the Digital Future, quoted by Stephen Lawson in the CNN article noted above.


12 For example, see the summary of Nottinghamshire County Council v Gwatkin, (UK Chancery Division, 3 July 1997) available at <http://www.netlitigation.com/cases/gwatkin.htm>.
