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Linking and keywords revisited
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In the last issue we discussed the deep linking problem.¹ In September 1999 we talked about keywords being used to control banner ads.² No sooner had these issues gone to print when interesting new cases were reported. This note covers these cases.

Ticketmaster and deep linking (again)

Our prediction in the previous issue that deep linking would not provoke a legal decision for a while turned out to be quite wrong. A Californian federal district court judge has made a ruling on the topic.

The case involved Ticketmaster again – you might recall they settled out of court with Microsoft last year. The latest dispute was with Tickets.com,³ a recent “start-up” company in the same business of selling entertainment, sports and travel tickets over the Web. Whenever Tickets.com was unable to provide tickets themselves, they linked directly to relevant pages on other providers’ (including Ticketmaster’s) sites with the message “Buy this ticket from another on-line ticketing company”. This link was generally accompanied by an explanation that “These tickets are sold by another ticketing company. Although we can’t sell them to you, the link above will take you directly to the other company’s web site where you can purchase them.”

Ticketmaster alleged 10 different grounds for their action. Some involved specific interpretations of US legislation, but there were several other relevant arguments.

A copyright infringement?

One allegation was that deep linking was a copyright infringement. In dealing with Ticket.com’s motion to dismiss the claim, Judge Hupp ruled:

“hyperlinking does not itself involve a violation of the Copyright Act … since no copying is involved. The customer is automatically transferred to the particular genuine web page of the original author. There is no deception in what is happening. This is analogous to using a library’s card index to get reference to particular items, albeit faster and more efficiently.”⁴

The judge did not, however, dismiss the copyright infringement claim altogether, because Ticketmaster had also alleged actual copying of thousands of their “events pages”. Although the judge cast doubt on whether extracting factual information from these pages was a breach of copyright, he felt there was still a case to answer.

Breach of conditions of use?

Ticketmaster alleged a breach of contract. Conditions of use posted on their home page prohibit deep linking and specify the information is not to be used for commercial purposes. They argued these conditions were enforceable in the same way as a shrink-wrap or click-wrap licence. Judge Hupp made the point that the terms on Ticketmaster’s home page were not as obvious as licence agreements because users
had to scroll down to the bottom of the page to read them, and could quite easily navigate to an “events page” without even looking at them. He therefore dismissed this claim, with leave to amend the pleadings to allege knowledge and implied agreement to these terms.

Passing off, trespass, unfair competition or tortious interference?

Judge Hupp allowed the claim of passing off to remain, on the basis that it alleged that Tickets.com were falsely implying an association with Ticketmaster. However, it is difficult to see how this claim will be justified on the evidence. The judge dismissed a claim of trespass, saying it was hard to see how entering a publicly available web site could be a trespass. On the unfair competition claim he said:

“The complaint also alleges deep linking as an example of unfair competition, but the court concludes that deep linking by itself (ie, without confusion of source) does not necessarily involve unfair competition.”

It should be noted that the Australian High Court has rejected a general common law action for “unfair competition”. In the absence of legislation, Australian courts would be restricted to an action for passing off.

From the US perspective, perhaps the most promising of the Ticketmaster causes of action was a tort of interfering with a prospective business advantage:

“[The claim] is that advertisers who pay on the basis of the number of “hits” on the home page will not pay for deep linked reference to the interior event pages. This is alleged to be purposely done to disrupt Ticketmaster’s income from those advertisers. Further, the allegation is made that bypassing the home page enables the customer to avoid the terms and conditions, which are not available to him on the event page. … [T]he court is not ready to definitively rule on this in the context of an interference claim and the motion to dismiss is denied …”.

Conclusions

It seems that deep links per se are acceptable. However, to avoid actions for passing off or unfair competition, it is imperative to ensure there is no confusion in the minds of consumers. One needs to make it clear the link is to another site, and there is no association between the businesses.

Where deep links cause a loss of revenue to a web site owner, there might yet be remedies in tort, at least in US law. There is considerable doubt as to whether Australian tort law would be flexible enough to provide a remedy. In Allen v Flood [1898] AC 1, the House of Lords held that, where harm was intentionally caused to another’s business, liability would only arise if there was an independent unlawful act. If deep linking is lawful, cases dealing with interference by unlawful means would not be applicable, no matter how broadly courts define the notion of “unlawful” in this context. An action for deliberate or malevolent interference carried out by lawful means is precluded (unless there is a conspiracy, which is a separate tort). Because of this anomaly, Australian courts have been critical of the decision in Allen v Flood, but have not been prepared to overrule it. Until it is overruled, or changed by legislation, it is unlikely there will be liability, even for malevolent deep linking.
Keywords and banner ads revisited

In our September 1999 issue we noted Playboy’s complaint that Excite, the well-known web index and search facility, was selling advertising rights to competitors when the words “playboy” or “playmate” were used in a search. They alleged this was an infringement or dilution of their trademark, but the judge ruled the terms “playboy” and “playmate” were sufficiently generic to deny Playboy any monopoly over them.

We mentioned that Estee Lauder had started a similar action, and a German court has now made a ruling. The facts were that Excite had “sold” certain keywords to iBeauty, a perfume and cosmetics business on the web. The keywords included “Estee Lauder”, “Clinique”, and “Origins”. When Excite users typed these terms into a search, a banner ad for iBeauty appeared on the results page. iBeauty is not an authorised reseller of Estee Lauder products. Estee Lauder’s brought an action in the German regional court in Hamburg, alleging a breach of their trademark rights. The judge held it was an illegal infringement of Estee Lauder’s trademark rights.

The principle is an important one in the scheme of things on the web. It might well be that trademark owners would normally have some control over the way their mark is used in commercial life. On the other hand there is a strong counter-argument that the mark is not being used to deceive. Disallowing the practice of selling keywords might have a stifling effect on the viability or usefulness of important web search facilities. Excite plans to appeal against the decision. It will be interesting to note the final outcome.

1 “Permission to hyperlink?”, Law & Technology Newsletter, Issue 19 (March 2000). Deep linking is the practice of linking directly to an internal web page on someone else’s site, thus bypassing their home page.
2 “Disputes about names”, Law & Technology Newsletter, Issue 16 (September 1999).
5 Victoria Park Racing v Taylor (1938) 58 CLR 479; Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2) (1984) 156 CLR 414.
6 See the general discussion of intentional and unjustifiable interference with trade or business in Balkin and Davis, Law of Torts, 2 ed (1996), Butterworths, Chapter 21.
7 Details in English are difficult to find, but see Baker & McKenzie, Global IT/C Law Alert, 4 April 2000, available at <http://www.bakernet.com/itc/default.htm> (must register).