

LINKING, FRAMING and CACHING

Internet Law and status re same:

Linking permits Web users to click their way from one Web site to another.

Framing permits a Web site user to view material from another Web site within a “frame” on the original site.

Caching is the creation of a copy of a Web site by storing data on a computer.

LINKING

Currently, linking can take three forms:

1. Hypertext Reference (HREF) Links: A simple text hyperlink to the home page of the linked site, implemented through Hypertext Markup Language (HTML), in which a hypertext link is marked as a highlighted word or different colored word on the linking site.
2. Graphic hyperlink: A link in which a graphic (logo, button, etc.) on the linking site alerts the user of the linking site to the existence of a link.
3. Deep linking: A text hyperlink to an internal page of the linked site.

TEXT HYPERLINKS

Copyright Infringement

When a Web site user clicks on a link to the home page of another site, the user is transferred to the linked site. Because the user is actually transferred to the linked site, the linking function does not appear to involve reproduction or public display of the linked site. Linking to the home page of another site also does not appear to be an exercise of the copyright owner’s modification, distribution or public performance rights. Accordingly, copyright law does not require that permission be obtained for linking.

Other Rights

If a Web page says, “ask permission before linking,” it is possible that linking to the site without the owner’s permission may be trespass. *Ebay, Inc. v. Bidder’s Edge, Inc.*, 2000 U.S. Dist LEXIS 7287 (ND Cal 2000).

GRAPHIC HYPERLINKS

If you own or have the right to use the graphic, copyright law does not require you to get permission for a link to the home page of the linked site, but it is considered good practice to ask

permission. If you use a copyrighted graphic image from the linked site as the graphic hyperlink, you will be reproducing and displaying copyrighted material you do not own (the graphic). You need the copyright owner's permission to use the graphic image, unless your use of the graphic is fair use.

DEEP LINKING

Whether deep linking (linking to an internal page of the linked site) requires permission is unclear.

Copyright Infringement

Whether deep linking is copyright infringement is unclear. An argument can be made that deep linking changes the way a Web user who follows a deep link to a linked site experiences the linked site. This could be viewed as an exercise of the linked site owner's modification right.

Other Rights

Even if deep linking is not copyright infringement, linking without permission could violate other rights of the linked site's owner, e.g., trespass, if permission is required.

In the case of *Ticketmaster Corp. v. Ticket.com, Inc.*, 54 USPQ2d 1344 (CD Cal 2000), the Court held that defendant's linking to plaintiff's Web site did not involve a violation of the Copyright Act because no copying is involved. However, the Court did not distinguish between linking to a site's home page and deep linking, nor did it address the question of whether deep linking is an exercise of the linked site owner's modification right. The Court did dismiss the plaintiff's cause of action for trespass and unfair competition. As to the trespass claim, the Court indicated that it was hard to see how entering a publicly available Web site could be called a trespass since all are invited to enter. As to the unfair competition claim, the Court said that deep linking by itself, without confusion of source, did not necessarily involve unfair competition.

However, the Court did not dismiss three other causes of action leaving same to go to trial:

1. Copyright infringement: Ticketmaster's claim that defendant reproduced numerous copies of interior Ticketmaster pages in order to extract data from them.
2. Passing off, false association, and false advertising claims: Ticketmaster claimed defendant's site falsely suggested an association with Ticketmaster and gave misleading information.
3. Tortious interference with prospective business advantage: Ticketmaster claimed defendant's link diverted Web users from plaintiff's home page, depriving plaintiff of ad revenue which is based upon the number of "hits."

REQUIRING PERMISSION

For all three types of linking, if a site to which you want to link states that you should get permission before linking to the site, it's best to obtain permission. Otherwise, one could be liable for breach of contract.

LINKS TO YOUR WEB SITE

If you want others to get permission before linking to your site, post a “request permission” notice prominently on your home page. If you prefer to include this notice in your Terms of Use document, then

1. indicate that permission is required for linking to the site
2. state that if one does not accept the terms stated here, they cannot use the site
3. make sure that the Terms of Use document must be read before one can proceed past the home page
4. require users to show agreement to the terms by clicking “I agree” before going on.

LIABILITY ISSUES

Linking may expose you to liability for wrongs done by the owner of the linked site under several legal theories, three of which are as follows:

Affiliation with Other Sites

Web viewers may get the impression that you are affiliated with the owners of sites to which your site links or is linked, with shared responsibility for the other site’s product and marketing claims. Accordingly, if your site contains links, you should provide a statement in your Terms of Use or on your home page that:

1. your site provides links to sites not under your control
2. links should not be interpreted as endorsements of the linked sites or the linked sites’ products.

Graphic Hyperlink Copyright Infringement

If you use a graphic from the linked site as a graphic hyperlink, you may be liable for copyright infringement if the linked site’s owner does not own the copyright in the graphic.

Linked Site’s Infringing Content

It is possible that a Web site owner who links to a site containing infringing material may be liable for contributory copyright infringement. Contributory copyright infringement is established when a defendant, with knowledge of another party’s infringing activity, causes or materially contributes to the infringing conduct. See *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 FSupp2d 1290 (D Utah 1999).

FRAMING

Framing permits viewers from one Web site to view material from another Web site within a frame without leaving the “framing” site. Framing changes the way the viewer experiences the framed site because the frame on the framing site covers up part of the framed site. Thus, framing may be an exercise of the linked site owner’s modification right.

In *Futuredontics, Inc. v. Applied Anagramics, Inc.*, 45 USP2d 2005 (CD Cal 1998), the Court refused to dismiss plaintiff’s copyright infringement suit, holding that the framed site may

constitute a derivative work, i.e., a work created by modifying a copyrighted work. This case is still pending.

CACHING

Caching is the creation of a copy of a Web site by storing data on a computer.

Server-level Caching

Caching at the server level is done to facilitate quick linking to a popular site, to maximize site “uptime,” and for security reasons (as part of a firewall). This type of caching is also called proxy caching. In copyright terms, caching a Web site is an exercise of the Web site copyright owner’s reproduction and display rights.

Temporary Caching

Temporary caching occurs within the computer’s random access memory (RAM) when one views a Web site, i.e., your browser caches each Web page you visit in your computer’s RAM. Presumably, by posting material, Web site owners grant Web viewers implied licenses for the RAM copy without which viewers cannot access material on the Web.

Linking vs. Caching

To a Web site user there does not appear to be any difference between clicking on an icon that takes the user to a linked site and clicking on an icon that brings up a cached site. One may ask why copyright law requires permission for caching and not for linking. The reason is that caching involves the creation of a copy of the cached site whereas linking does not.

INTERNET TECHNOLOGY

Every location on the Internet has an address composed of four groups of digits separated by decimal points, for example, 207.68.137.43. This address is referred to as an Internet Protocol (IP) address. However, because it is easier for Internet users to remember an address composed of words, each numeric IP address also has an alphanumeric counterpart. When an Internet user types into a computer the Internet address for the Web site located at <http://www.acme.com>, a top level domain server will match the alphanumeric address with its numeric IP address and direct the user’s computer to the computer hosting that Web site.

The alphanumeric address www.acme.com is read by a computer from right to left and is composed of three distinct parts. First, the [.com](http://www.acme.com) portion is the top level domain name and indicates the purpose of the organization or individual registering the site. Second, the [acme](http://www.acme.com) portion is the second level domain name and identifies who owns the Internet address. This portion of the domain name is the subject of most Internet domain name trademark disputes. Third, the [www](http://www.acme.com) portion is the host name of the specific computer at the [acme.com](http://www.acme.com) site. The [www](http://www.acme.com) indicates that the server is referred to as the “World Wide Web” server.

HTML Code – HTML coding provides display instructions to the Web browser, such as “Internet Explorer” or “Netscape Navigator,” viewing the file that generates a particular Web page. Through these HTML codes, a Web browser is instructed where to implement line breaks, new paragraphs and other display attributes that determine the appearance of the documents to the Internet user. Although this HTML coding is hidden from the normal view of a Web page, it can be viewed with the “View Source” function.

Metatags – One particular type of HTML text coding is the “metatag.” Metatags contain information about the document, such as the author, its expiration date, a description of the content of the Web page, and relevant keywords. It is these keywords which are embedded into a Web site’s computer code that allow search engines to identify the subject matter of that site. Internet search engines operate by identifying metatags and then compiling a list of Uniform Resource Locator (URL) addresses of Web pages whose metatags match the chosen search terms. Cases have proliferated in which defendants are enjoined or damages are imposed for using another’s trademark or trade name as a metatag.

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