



# World Library and Information Congress: 69th IFLA General Conference and Council

1-9 August 2003, Berlin

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**Code Number:** 034-F  
**Meeting:** 147. Copyright and Other Legal Matters (CLM)  
**Simultaneous Interpretation:** -

## «To Link Or Not To Link» <sup>(1)</sup>. Hyperlinks, liabilities and responsibilities

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### **SYNOPSIS**

*Hyperlinks are an essential part of the web. They give additional information and added value to a website. But various court actions indicate that hyperlinks could also imply additional liabilities. At first, hyperlinks allowed the addition of cross-references. Today they also raise several legal issues. Other possible misappropriations arise from the non-observance of ethical guidelines or netiquette.*

*The purpose of this paper is to present the various types of hyperlinks, then the liabilities which some of them could incur in order to avoid them, while keeping in mind the basic principle of freedom of information.*

### **TYPES OF HYPERLINKS**

Since hyperlinks can infringe in various ways on different rights, it is helpful to categorise the different types of links. There are basically four types of hyperlinks :

- a simple hyperlink to the home page of a targeted site ;
- a deep link which accesses a secondary page of another website ;
- framing <sup>2</sup> which allows one to put a page from another site into one's own site through a window, giving the impression that one is still in the original website ;
- in-line linking <sup>2</sup> which allows the automatic insertion of extracted parts of another site.

Very broadly speaking, as the following paragraph will prove, the more a link is automatic and deep, the more it integrates parts from another site, the more commercial the nature of the latter, the greater the risks become in terms of liability.

## **TYPES OF LIABILITIES**

In principle, freedom to create a hyperlink should be assumed. Actually, the web was developed with this assumption. If Netiquette<sup>3</sup>, the code of ethics of the Internet, recommended obtaining the permission of the linked site's webmaster, this recommendation turned out to be unrealistic and it is rarely respected. Therefore, creating an hyperlink is not a neutral act. If in most cases it is received positively, in others it could be inappropriate, even illegal as some court decisions indicate.

### **The legal framework**

Few laws actually address the issue of liability of the hyperlink.

- The Digital Millennium Copyright Act (USA, 1998). This law includes rules, which apply to hyperlink providers, but their liability is limited to uses that infringe copyright. Nevertheless providers are not liable if they are unaware of the copyright infringement, when they delete the link as soon as they are aware of its illegality and as long as they have not received remuneration as a consequence of an illegal link.
- The Additional Protocol to the Convention on Cybercrime, concerning the Criminalisation of Acts of a racist and xenophobic nature committed through Computer Systems (European Council, 2003)<sup>4</sup>. This convention sanctions the intentional dissemination of racist or xenophobic material. It specifies that an on-line dissemination also includes the creation or the compiling of hyperlinks in order to facilitate the access to such documents.
- The Directives of the European Institutions don't specifically mention hyperlinks. There is no provision about them in the E-Commerce Directive that applies to fifteen countries (and soon more). But the European Commission announced that a report on this topic would be published in July 2003. Besides, in its Preamble, the Copyright Directive indicates that a court would condemn a broker that disseminates on the Internet a copy of a protected work. Thus, even if the hyperlink provider is not mentioned, illegal actions could be condemned, as is provided for in the US Act, the DMCA .

In the absence of specific rules, judges refer to other laws such as those that sanctions unfair competition, copyright infringement, privacy infringement in order to condemn any illegal use or misuse of hyperlinks.

### **Types of infringements**

The choice has been made to emphasize five types of liabilities, illustrated by lawsuits from various parts of the world.

1. Intellectual property infringement.
2. Unfair competition.

3. Privacy infringement.
4. Dissemination of illegal information.
5. Moral rights infringement.

## 1. Intellectual property infringement

### • The copy of a logo

While the copy of a web site's URL seems tolerated, the copy of certain symbols appropriated by a company such as its trademark, logo or a slogan could involve some problems. The use of a trademark for the sole purpose of information, in a non-profit context, is not an infringement of the brand owner's rights. To be condemned as such, it would need to be used by a competitor for the sole purpose of a direct or indirect economic advantage.

In France, the radio station Europe 2 has been sentenced for a link that deliberately gave access to a website denigrating a rival station, NRJ. The link was a copy of the rival's logo, provided in order to make fun of it. The right of parody, although recognised in France was not accepted in this case (*NRJ SA v/ Europe 2 Communication, 2001*)<sup>5</sup>

In the United States, Total News had hidden the URLs and logos of rival linked sites. In the arbitration that put an end to this dispute, Total News was asked to use simple links and to mention the names of the companies that participated in this lawsuit, but it was not allowed to copy their logos (*Washington Post v/ Total News, 1997*)<sup>6</sup>.

The use of a brand in a metatag in order to attract customers to one's own website is forbidden and can be condemned as in the case of an American law firm (*Oppendahl & Larson v/ Advanced Concepts, 1997*)<sup>7</sup>.

On the other hand, still in the United States, a court has admitted the use on the Internet of a brand, a seal and an acronym protected by copyright when used for a non-commercial purpose (*American Civil Liberties Union v/ Miller, 1999*)<sup>8</sup>.

### • The copy of a protected work

In some cases, the link itself is sanctioned because it may be protected by copyright.

In the United Kingdom, the reproduction on a newspaper's website of titles of articles published by a rival paper through deep hyperlinks has been condemned. These deep links also prevented browsers from seeing the advertising by-line on the home page of the linked site (*Shetland Times v/ Shetland News, 1999*)<sup>9</sup>.

In the United States, a search engine has been condemned because it used as a pointers the reduced image corresponding to the word entered. In this case, it was not possible to claim « fair use » of these images provided through the use of framing (*Kelly v/ Arriba, 2002*)<sup>10</sup>.

But a link can also be forbidden if it gives illegal access to protected content:

In Belgium, a student who created hyperlinks to websites that proposed illegal musical recordings has been condemned. The intention to promote this illegal use had been retained (*IFPI v/ Beckers*, 1999)<sup>11</sup>.

In the United States, a non-profit association was asked by a court to stop putting on its website e-mails with addresses of websites containing illegal reproductions of a book protected by copyright. The association was accused of collusion for disseminating that information (*Mormon Church v/ Utah Lighthouse Ministry*, 1999)<sup>12</sup>.

On the other hand, still in the United States, contradictory decisions have been made in lawsuits concerning websites which offer hyperlinks to source codes used to break DVD encryption. In January 2000, the California Supreme Court refused to forbid the dissemination of this information (*DVD CCA v/ Mc Laughlin*, 2000)<sup>13</sup> but the South District of New York did condemn it in August 2000.

In Spain, a judge rejected a complaint against a website that linked to pages that intercepted television signals. But this decision is doubtful because the refusal could be explained by the fact that the illegal character of the hyperlinks could not be proven (*several Spanish TV channels v/ website owner ajoderse.com website*, 2003)<sup>14</sup>.

It is thus the intention to cheat, the presumption of ill-intent that are condemned, but only when the latter can be proven.

- **Copying parts of a database**

A website can be a database and the producer of a database is protected in Europe by a specific right when he can prove "significant" investment went into its creation. Then he has the right to oppose any "substantial" use of the database.

Thus, in France, the company Cadremploi accused the company Keljob of creating deep hyperlinks to its section on job announcements. Cadremploi succeeded not because Keljob used deep hyperlinks but because it had thus extracted substantial parts of its database (*Keljob v/ Cadremploi*, 2001)<sup>15</sup>.

In the Netherlands, a company used the telephone directory of KPN, the national telecommunications company. It was condemned for having used in a repetitive and systematic way small parts of this database and because this activity caused a loss in KPN's advertising space rental income. (*KPN v/ XSO*, 2000)<sup>16</sup>.

## **2. Unfair competition**

Unfair competition allows the sanctioning of the appropriation of a website's content through hyperlinks giving the web surfer the illusion that he/she is still in the original website. This misappropriation of another's work represents freeloading.

In France, again with the *Keljob v/ Cadremploi* lawsuit, deep-linking was considered unfair competition because the address of the targeted website was hidden by "framing" (*Keljob v/Cadremploi 2001*)<sup>15</sup>.

On the other hand, still in France, a company that used deep links but didn't hide the address and mentioned the source in a banner, was not sentenced. The judge decided that it didn't infringe any intellectual property right, that it was not considered unfair competition and that it didn't give a negative image of the targeted website (*Stepstone France v/ Ofir France, 2000*)<sup>17</sup>.

In Denmark, a company was condemned for Copyright and Trade Law infringement for having created and profited from automatic deep links to many articles from several on-line newspapers. Besides, they refused to negotiate a compromise (*Danish Newspaper Publisher's Association v/ Newbooster, 2002*)<sup>18</sup>.

The mere indication of a URL could lead to a lawsuit as in the United States in a case opposing Sony CD retailers to Sony; the latter was condemned because their CD's indicated the URLs of the various Sony websites from which customers could buy the same products on-line (*Nat. Association of Recording Merchandiser v/ Sony Music Entertainment, 2000*)<sup>19</sup>.

But unfair competition can be based on other grounds.

For instance, when it interferes with the normal functioning of the targeted website.

Thus, in the United States, a company that created a system to merge the contents of several websites was condemned because it reduced the loading speed of the targeted website. Besides, technical protection measures had been infringed (*American Airlines v/ Farechase, 2003*)<sup>20</sup>.

Or usage drops.

This occurred when Microsoft put deep links to the Ticketmaster website in order to book seats for several shows with negative consequences for the advertisers on Ticketmaster's website. Microsoft finally agreed to put one single hyperlink to the home page of Ticketmaster's website (*Ticketmaster v/ Microsoft, 1997*)<sup>21</sup>.

The discredit of a product or a service proposed by a rival is also condemned.

A French broadcaster has also been condemned for unfair competition for the intentional use of a hyperlink to denigrating content (*Europe 2 v/ NRJ, 2001*)<sup>5</sup>.

### **3. Privacy infringement**

Hyperlinks can be used to disseminate slanderous words about one person. In the United States, the first amendment allows claims of infringement to the freedom of expression but slander, obscenity and the threat to national security are forbidden. In other countries, several laws have been adopted in order to deal with these types of issues.

As regards attacks on one's honour, slander and denigration, a website in Germany was condemned because it hyperlinked to several slanderous articles. The judge called for a balance to be maintained between freedom of expression and the protection of a person. He also underlined that it is important that a certain neutrality be kept between the content to be linked and the person/institution creating the link (*Steinhöfel v/ Best, 1998*)<sup>22</sup>.

Hyperlinks to forbidden images can also be condemned, even if it is more difficult to determine the fault, as indicated by the example presented below, although it was contested.

In France, an artist was condemned because of a hyperlink to morbid images in spammed e-mails. Besides the very subjective analysis of the danger the images represented, the judge was reproached for confusing an open website with an e-mail which is a personal correspondence. One of the arguments presented by the judge was that the images could have been seen by children under 18, something that is punishable under French law. The sender was sentenced, even though the hyperlink was only a reference to, rather than an apology of the incriminating website. (*B. Richard v/ X. , 2003*)<sup>23</sup>. What was also condemned was the unsolicited nature of the e-mail and refusal of the accused to withdraw it.

But the infringement to a person's rights can be established merely through an ill-meaning association. Such as in the example of a website created by a mother in memory of her deceased child that was linked to a website called « Babes on the Net » on a very different subject<sup>24</sup>.

These cases have been mentioned to underline the fact that the mere reference to a slanderous article is not enough to be condemned. This would be out of proportion to the targeted goal. But, it is important to keep in mind that hyperlinks should be created in an appropriate context and be as neutral as possible.

#### **4. Dissemination of illegal information**

The nature of banned material varies according to country.

Thus, in the Netherlands, a link to the home page of a site that explained how to block a convoy transporting radioactive waste was condemned (2002).

In France, the dissemination of poll results during pre-election periods is forbidden. But the newspaper "Libération" was not sentenced for their link to a California website containing this kind of information. The judge stated that providing a link was different from including information on its own website (*Libération 1998*)<sup>25</sup>.

We note that comparative advertising is forbidden in France but hyperlinks make this sort of comparison easy.

In the United States, a Court refused to forbid hyperlinks to some protected works, i.e. the source code giving the key that allows over-riding DVD

protection. It considered that a webmaster was not responsible for the content of websites to which hyperlinks were made.

## **5. Moral rights infringement**

Framing and in-line linking go against the "paternity right", i.e. the right for the author to be cited, and the right to preserve the integrity of his (or her) work when, for instance, some components are isolated and used in a very different context. Even a single link to a home page could, depending upon the way it is introduced, be qualified as false advertising. For instance, when a website indicates that there is a connection between one company and another when there is none.

We will mention only one example: that of a Belgian company, United Media, copyright holder of a comic strip, who noticed that an automatic link placed an image from their book on the Ku Klux Klan's website (*United Media v/ Ku Klux Klan*).

### **Summary**

It is important to keep in mind the principle of freedom when creating a hyperlink. But we must admit that it is a probationary liberty because the liability of a hyperlink provider could be invoked when :

- there is abuse;
- the links are created to illegal websites.

The court cases that have been presented lead to the following remarks :

- links that allow inserting a page or some of its element (framing and in-line linking) correspond to a misappropriation when permission has not been obtained and should be avoided ;
- as soon as there is a commercial purpose, a use that corresponds to an advertisement, or when links are created to sites that engender illegal acts (such as downloading music for which rights have not been paid), some precautions are essential. It is important to determine, when possible, the illegal nature of the targeted website. Indeed, some sites propose works, for which rights have been paid and the use of the MP3 format does not always mean that every download is illegal.
- When the site is a database, the extraction of large portions and the systematic use of small parts should be avoided. This could be considered unfair competition because one's website can be enhanced without any compensation. This is the case, for instance, when links bring value-added content (like daily updated news), when they bypass the owner's banner (now less often the case) or, more generally, information about the website and its publisher. It would also be the case if the links allowed a web surfer to go directly to a protected work without following the path that requires payment of a fee.
- This obviously concerns primarily profit-making companies but hyperlinks to their sites are established and a balanced relationship should be maintained.

One should also keep in mind that these links, when properly clearly labelled, do more towards promoting a site rather than misappropriating it. It's an important issue to bring to the attention of commercial sites.

- It is important to avoid linking to websites containing denigrating or slanderous information, as well as to websites that violate the laws of one's country. In France, this would include links with false or comparative advertising (a cross-reference to a product or a brand from a rival company with comparisons), links to pedophilic or racist sites.

However, a link to every controversial site should not be condemned. Links, even to illegal contents, could sometimes present an interest, even a social utility. Thus, for instance, a link to an anti-Semitic site, created by an association engaged in a struggle against racism, could in theory be authorised. In fact, it is the absence of criminal intent that should be evaluated.

In Civil Law countries (see note), it is the intention, the dishonesty that will be evaluated. In Common Law countries, it would rather be the fair use infringement, which concerns the Netiquette or an exception to the Copyright. In order to benefit from « fair use », a judge will examine several criteria : the purpose of the link, its nature, the importance of the links that have been reproduced and the consequence of the reproduction.

In a lawsuit, no matter what the country, a judge will examine the body of evidence before making a decision. Thus, in a recent case involving an American content provider who downloaded data to create a database for comparing information, the aggravating points were the resale, the bypassing of the technical protection and the downloading engine that slowed the site down. (*American Air Lines v/ Farechase, 2003*)<sup>20</sup>.

We observe that compromises have often been reached in case of dispute. Arbitration and negotiation play a significant role.

## **TYPES OF TOOLS FOR RISK MANAGEMENT**

It is possible to assume that permission is implicit for a simple link. According to us, this presumption should be extended to deep linking. But any presumption can be reversed by proof of the existence of

- explicit prohibitions, like technical measures or conditions of use mentioned on the site ;
- implicit prohibition to use hyperlinks which represent an unfair use.

Some tools are recommended to limit the risks:

- **Netiquette**

It s a code of ethics on the web that promotes fair use and describes some basic rules :

- to obtain a clear permission to use framing or in-line linking, even for deep-linking if it is likely to be a problem ;
- to respect a deliberate prohibition, even for a single link, when it is mentioned on a website (or ask for permission) ;
- to respect the copyright of the various rightholders of the targeted website ;



- to present clearly the content of each website in order to avoid any confusion ;
- to be sure that the targeted website is not illegal.

- **Specifications about hyperlink policies**

Webmasters could express that they don't want to be linked, or only after having given their permission. But only links that might infringe a right should be forbidden. Single links or deep links created without framing shouldn't, in principle, be forbidden.

But in Common Law countries, this information would have no legal value, only an ethical value. One should be able to prove, in the event of a dispute, that somebody had read the usage conditions and that he had accepted them. So, in the United States, in the case *Tickets.com*, it was not possible to prove that this company had accepted the site's conditions of use (by clicking, for instance, on the clause « I accept ») (*Ticketmaster Corp v/ Ticket.com, 2000*)<sup>26</sup>.

In Civil Law countries, the indications on a site don't create any obligation. They only represent an element useful to determine the responsibility of a person who created a link that caused significant damage (like a fall in advertisement revenue). This information could only facilitate obtaining compensation in case of harmful hyperlinks.

- **Disclaimers**

They limit the liability with regards to the contents of the targeted website. They have no value under criminal law where one cannot refuse responsibility for illegal acts or complicity in an illegal act. Their only interest is to alert web surfers of the potential risks of some links.

- **Appoint one responsible person**

The moderator of a discussion list or the webmaster of a website could assume this responsibility. These persons should have technical and legal competencies, in order to avoid sentences as a main or secondary person responsible for a harmful or illegal act.

- **Written procedures**

If several individuals are contributing to a website or a discussion list, it would be useful to record the procedures to follow when creating a hyperlink in order to avoid those that infringe regulations in force in a country.

- **Technical measures**

Some technical measures could be used in order to prevent the creation of a link or to control it. One of them consists in introducing in the html code of web pages a specific JavaScript in the metatag BODY. Thanks to this additional word, a site will always appear as a whole in the window of a navigator, even if the site that had created the link intended to use framing. In the future, we can imagine that it could be presumed that the webmaster that has not used this technical possibility agrees with the creation of those links.

- **The contract**

It is the safest solution but also the most complicated. A contract can be used in case of global strategies of partnership. New contracts have therefore appeared with the development of in lining, framing or deep-linking. Sometimes they include plans for remuneration according to the number of visitors resulting from one link. Different types of contracts could be established : 1) an agreement in which every partner allows the creation of mutual and free of charge hyperlinks ; 2) an agreement with another site in which a remuneration is given to the partner according to the number of visitors or purchases realised thanks to this hyperlink (amazon.com, fnac.com ...), ....

## **CONCLUSION**

Link or not to link ? It seems that it's better to think carefully before linking. But hyperlinks should be allowed as long as they respect copyright or the rights of the persons that are mentioned, when they don't violate a contract or a technical measure of protection set by a webmaster.

To request permission every time we intend to link would represent an obstacle for the free circulation of information. It also represents a regression if we refer to practises followed in the past : the citation and the scientific methods founded upon citations. The web is not only a place for e-commerce.

It's important, and we would like to stress this, to be free to create links, to be free to quote. But we recommend a responsible use and one that respects certain rules. We know these rules. The main ones forbid appropriating information produced and disseminated by others, hiding sources and recommend placing the information in an appropriate context.

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### **Main sources**

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### **To know more**

- The Link Controversy Page < [www.jura.uni-tuebingen.de/~s-bes1/lcp.html](http://www.jura.uni-tuebingen.de/~s-bes1/lcp.html) >
  - Links & Law < [www.linksandlaw.com](http://www.linksandlaw.com) >
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## Note

### Civil Law and Common Law

Civil Law can be found in Latin countries like France, Italy and Spain. The German Law that applies in Germany and Austria, is founded on the same basis. In this system the legal framework is given by the law itself. The judges have only to interpret and to apply it. In theory, they are not linked to previous judgements.

Common Law is practised in the United Kingdom, the United States, Ireland, and various Commonwealth countries. In this system, the main legal sources are customs and precedents created by the case law. If there is no legal text available, previous decisions will define the positive right. So, previous decisions are imposed on judges as soon as they are pronounced by a court situated on the same or a higher level.

In other countries, like Canada or South-Africa, a mixed system has been adopted.

To know more <[www.droitcivil.uottawa.ca/world-legal-systems/fra-commonwealthmembers.html](http://www.droitcivil.uottawa.ca/world-legal-systems/fra-commonwealthmembers.html)>

1. Expression used in the article by Alain Strowel et Nicolas Ide, « Responsabilité des intermédiaires le problème des hyperliens »
2. Technical explanations can be found here <[www.foruminternet.org/telechargement/documents/reco-hyli-20030303.htm#\\_Toc34442522](http://www.foruminternet.org/telechargement/documents/reco-hyli-20030303.htm#_Toc34442522)>
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