Linking, Framing, Metatagging and Cyberstuffing: Challenges for Trademark Owners

Linking and Framing

As Internet usage increases, so do the difficulties and responsibilities of trademark owners and their attorneys. Two technological applications in particular have become problematic for trademark owners: linking and framing.

What puts the “Web” in World Wide Web are virtual transportation systems called “links,” “hyperlinks” or “hotlinks.” Links consist of highlighted words, underlined text or icons. In fact, you accessed this article by a link in the title represented by both underlined and highlighted text.

Links allow seamless movement over the World Wide Web by simple clicks of the mouse. The Internet user could literally spend hours traveling through hyperlinks that began with a single link.

Framing is a variant of linking which often raises significant trademark issues. A typical Internet screen may be comprised of several subframes appearing within the larger frame of the screen. The technique of framing is a method by which content from one site is linked into another site and presented within a border. For example, a page in a Web-based business magazine may frame in running stock quotes from NASDAQ®.

What is most interesting and most problematic about framing is that the owner of Web site “A” may retrieve information from Web site “B,” and put it into a frame on Web site “A” without permission from “A.” Depending upon the manner in which this is done, the Internet user who is on Web site “A” may, or may not, know that some of the information presented originates or, in Web parlance, is “retrieved” from Web site “B,” and may assume that “B” approves of, endorses, or is involved in developing the content at site “A.”

Trademark and copyright infringement may occur when source indicators and advertising are omitted from the “retrieved” site. Where trademarks and/or advertisements are omitted from a retrieved site, the retrieved information may appear to come from the site onto which the user is logged, when in reality it comes from a completely different site. Not only can this lead to confusion as to source, it can also have a significant impact on the advertising revenue of the “retrieved” party’s site.

Advertising revenue is often measured by the number of “hits” a particular Web site receives. Stated simply, Web sites that receive more hits can demand a higher price for the placement of advertisements on their sites. Linking and framing each raise distinct problems in this context. For instance, if an individual arrives directly at an internal page of a Web site through a link, a “hit” may not be recorded. Thus, the Web page operator may not accurately record the number of visitors accessing the Web site, the result of which may be a significant loss in advertising revenue. Framing presents an almost reciprocal problem. The advertiser who has paid a premium to appear on a site may have its advertising stripped out by a Webpage operator who imports certain page content but not the surrounding advertising. Worse yet, the operator importing content in this fashion may sell advertising separately for its own site.
A survey of the cases decided on this issue to date reveals that links or framing are not per se violative of the law. There are, however, uses of linking or framing which may constitute trademark or copyright infringement, trademark dilution, or unfair competition. As the law emerges, trademark owners and Web site designers should work closely with counsel when structuring links or frames to outsidersites in order to avoid a possible infringing or diluting use of another’s intellectual property. Similarly, should a trademark owner see an objectionable use of a link or frame involving their own trademarks or proprietary information, they should contact counsel immediately to explore the possible legal remedies available to them.

Metatags and Cyberstuffing

"Metatags" are computer codes used to index or catalogue Web sites. They are invisible to users, but detectable by search engines. The creator of a Web site may use metatags to assist search engines in cataloguing the content of the site. In most cases, a metatag specifies key words to be matched during an internet user's search. While this is obviously a useful manner of indexing information, it can also become a means for trademark infringement and unfair competition.

As noted above, advertising revenues are often directly related to the number of hits a Web site receives. Web sites which appear as search results at the top of the list can be expected to receive more hits than those appearing at the bottom. One manner of ensuring that a Web site will appear at the top of a list is to have the most key words that are sought after as its metatags. Oftentimes Web site designers will use the names or trademarks of well-known businesses (frequently direct competitors) in their own metatags. In that way, people searching for a competitor’s Web site will be led to the Web site of the crafty metatag user.

In attempting to exploit the manner in which certain search engines may catalogue and index sites, a number of companies and web designers will engage in a more nefarious trick for indexing information: "cyberstuffing." The term "cyberstuffing" refers to the practice of placing multiple entries of the key word on the face of a Web page. The wording is often invisible to the user. For example, black lettering might be placed against a black background. The wording may or may not be relevant to the contents of the Web page. One court analogized the use of a competitor’s trademark in a metatag to the placing of a competitor’s road sign on the highway. When a driver exits at the designated spot, he finds there is no location for the store on the sign, but sees the competitor’s store and decides to shop there. Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1064 (9th Cir. 1999). A later court rejected that particular analogy as applied to the case before it. Instead, the court said that the defendant’s use presented a scenario more akin to a driver pulling off the freeway in response to a sign that reads “Fast Food Burgers,” to find a well-known fast food restaurant, next to which stands a billboard that reads: “Better Burgers: 1 Block Further.” The driver, previously enticed by the prospect of a meal from the well-known restaurant, as a result of what he sees once off the road, decides he wants to explore other burger options. Playboy Enterprises, Inc. v. Netscape Communications Corp., 55 F.Supp.2d 1070, 1075 (CD. Ca. 1999).

The small body of case law which has developed thus far indicates that the courts are loath to completely ban the use of metatags containing or consisting of a third-party’s trademark as long as it can be shown that there is a legitimate reason for such use. Much depends on the metatag itself and whether it is merely a trademark or is also an ordinary word which a person would use in attempting to find information on the Internet, again emphasizing the relative benefits which owners of arbitrary trademarks in particular may enjoy. In addition, courts will consider whether the adoption of the metatag in question is done for the purpose of misleading and, even if that is
the purpose, whether there is still a legitimate rationale for the use of the term as a metatag. The cases are fact-driven and each possible scenario creates different issues of liability.

For trademark owners who believe that their mark is being infringed by the third-party use of metatags and/or cyberstuffing, it is critical to consult counsel for an analysis of the particulars of the case as well as any new relevant case law on the issue. Similarly, those wishing to use metatags as an indexing tool should consult counsel to determine whether such use comports with what courts consider to be legitimate, non-infringing business practices.

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