

Up Link, Down Load, Tag —You're Sued

by Roy Gordet

Linking web sites is great promotion and can certainly increase web site activity, but it is fraught with legal perils. Trademark or copyright owners are not always happy about the use of their trademarks or copyrighted material without their authorization.

As reported in the press in June, several of the world's biggest media companies settled their lawsuit against TotalNews, Inc. The media companies objected to the manner in which TotalNews created links to web sites in which TotalNews would force web users to see the "linked-to" web site wrapped in a frame containing advertising sold by TotalNews and other TotalNews material. Under the settlement terms, TotalNews can still make the links to the web sites of the big media companies, but the TotalNews ads and framing must go. The links must be "direct".

As most of you know, there is a whole lot of linking going on. Just about every web site makes it possible to jump to another's web page merely by clicking on an icon. A web site owner adds value to its own web site by making it easier for users to so easily jump to another web site that may also be of interest to the user. However, many difficult legal issues come into play from the perspective of both the web site owner providing the link (the "linker") and the owner of the web site which, without its permission, gets linked up (the "linkee") to the linker's web site.

False Impressions of Sponsorship

The linker has to worry that it does not violate the trademark rights of the linkee. The general rule is that only a trademark owner can use its trademark to identify the source or origin of goods or services. It must be very clear when in using the linkee's trademark that users are not given the impression that the linkee is somehow endorsing the linker's products or services or web site. If such a false impression is given, then arguably the linker would be successful in a trademark infringement or unfair competition suit. The easiest way for the linker to avoid this problem is to not use the linkee's trademark, which may be impossible if the link will have any meaning, in which case it would be prudent to obtain the linkee's authorization to use the trademark in creating the link to the linkee's web site.

The linker has other trademark issues to worry about. By sending the user to the

linkee's site, will users believe that the linker has endorsed or sponsored the linkee's site? Thus, if a user purchases something off of the linkee's site, and it doesn't work properly, or it causes some terrible bodily injury, will the user be able to sue not only the linkee but also the linker on the ground that the user believed there was a sponsorship by the linker? One (limited) solution would be for the linker to expressly state that there is no implied or express sponsorship by the linker of the linkee's products or services. Typically an indemnity would be called for, but there may not even be an agreement between the linker and the linkee, and, in any case it is unlikely that the linkee would provide an indemnity unless the linkee is receiving some tangible benefit. Arguably this problem could go in both directions. A user who is dissatisfied with the linker's product or service may also sue the linkee on the ground that the user believed that the linkee was endorsing the linker's product or service. Much depends on the language used and the impressions conveyed by the web sites.

Copyright Liability

Similarly, suppose you are the linker, and you send a user to a linkee's web site where the linkee is posting material that infringes someone else's copyright. Arguably the linker has "contributed" to this copyright infringement by directing users to an infringing display.

In this regard, it is important to verify that materials provided by third parties as content on a web page are indeed owned by the person providing the materials, preferably with an express affirmation of copyright ownership and with an indemnity in the event that there are future claims by others that they are the true owners. Many content providers are not careful in their practice of employing developers, and it is possible that a commissioned programmer/developer has certain proprietary rights because the commissioning person has not put into place the proper written agreements concerning copyright ownership.

Next column we will discuss some case reports of the National Advertising Division of the Council of Better Business Bureaus concerning false claims in advertising.

Roy S. Gordet, a San Francisco attorney, welcomes your comments at rsgordet@ccnet.com.

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