

# Site hyperlink doesn't imply endorsement



By Bart  
A. Lazar

Despite the maturity of the Internet as a medium, amazingly, many Internet marketing-related legal issues are still unresolved. One issue that continues to perplex is whether one Web site may legally hyperlink to another without receiving permission from the "linked" site.

A number of legal issues arise from linking. First is whether linking two sites could create a "likelihood of confusion" among Internet users. Likelihood of confusion is the legal test used to determine if trademark infringement occurs in this context. If a judge or jury believes that a "relevant consumer" is likely to be confused into believing that the two sites linked together are somehow affiliated, the link would be illegal. Another legal theory (or variation of the same theory under the U.S. Lanham Trademark Act) is known as a "false implied endorsement" suggesting that the linked site somehow approves of the linking site. The argument would be that a consumer would expect the linked site to have approved the linking of the sites.

Recently, a federal court in New York determined that the mere appearance of a hyperlink to another site is not enough to cause users to think that the two sites are associated. The case involved the Web site [www.investortoinvestor.com](http://www.investortoinvestor.com) (which no longer appears to be active, but you can look at the site at [www.archive.org](http://www.archive.org)). Once there, search for [investortoinvestor.com](http://investortoinvestor.com) and click on the Aug. 8, 2003, link). [Investortoinvestor.com](http://investortoinvestor.com) appeared to be a forum for investor discussions. The proprietor of the site also published a newsletter on various stocks.

The defendant was a day trader who believed that the proprietor of [investortoinvestor.com](http://investortoinvestor.com) was a fraud. She spent a large amount of time and energy writing about the proprietor of [investortoinvestor.com](http://investortoinvestor.com) on the Internet. The criticism appears to still be available at [www.mary.cc/kathy-knight-mcconnell](http://www.mary.cc/kathy-knight-mcconnell).

## MARKETING AND THE LAW

In the messages, the defendant posted numerous messages describing the proprietor of [investortoinvestor.com](http://investortoinvestor.com) as a securities fraud "criminal," "insane," "paid to lie to investors," a cheat, a thief and "obese." Not surprisingly, in light of the content of the defendant's site, the link to [investortoinvestor.com](http://investortoinvestor.com) was not authorized.

The proprietor of [investortoinvestor.com](http://investortoinvestor.com) claimed that it was illegal for the defendant to link her criticism site to the plaintiff's Web site without permission or authorization, using the plaintiff's name in the post-domain path of the URLs for seven of her Web pages (and submitting these URLs to search engines) and posting links on Internet chat forums and discussion boards directing users to visit these Web pages.

**'If a judge or jury believes that a 'relevant consumer' is likely to be confused into believing that two sites are somehow affiliated, the link would be illegal.'**

The court found that the mere appearance on a Web site of a hyperlink to another site will not lead a Web user to conclude that the owner of the site he is visiting is associated with the owner of the linked site. The court noted specifically that the parties did not appear to be competitors. The defendant's Web site advertised Web design services, not investment services, and the defendant clearly disassociated herself from the plaintiff by criticizing the proprietor of [investortoinvestor.com](http://investortoinvestor.com).

The court also looked into the defendant's use of the plaintiff's name in the post-domain path of a URL and placement of URLs using the plaintiff's name in the post-domain paths on chat forums, discussion boards and search engines, and found that these did not give rise to any source of confusion, either. The court noted that the post-domain path of a URL merely shows how the Web site's data is organized within the host computer's files and does not suggest an association between items, even if various search engines link the plaintiff's product and defendant's Web page.

It seems that the court found two factors particularly important in deciding against liability for linking. First, the court found that the sites advertised different services. Since there was no competition, the court found that viewers were not likely to be confused between the two. While this makes some practical sense, stressing that the plaintiff in this case did not have a strong mark is important. Companies that own valuable marks can take action for what is called dilution of a trademark. This could apply if the link to a Web site associated with a famous brand name could act in a way that would weaken the trademark.

Second, the court focused on the criticism aspect of the content to show users that the linked sites could not be affiliated. While the court found that the Web site's "dissociation" from [investortoinvestor.com](http://investortoinvestor.com) to be sufficient to avoid confusion, such finding would not necessarily apply to all situations. In many instances, marketers try to avoid an association with another company by putting a disclaimer on the site, such as "This site is not affiliated with Company X." However, there are cases where courts have found disclaimers to be insufficient to avoid a claim of trademark infringement or improper association.

One final fact to mention is that the parties in this case were not represented by lawyers. While this does not necessarily mean that the case will be of limited value, it is possible that some important factual or legal issues were not brought to the court's attention. Overall, I would not say that this case establishes hard and fast lines that permit linking without obtain-

ing the permission of the linked party. However, the case demonstrates that judges may take a realistic look at how a link on the Internet appears to a Web viewer in order to determine whether or not an unauthorized link is illegal. As a practical matter, it may still be best to ask permission to link, however, the court's reasoning seems to have some application to situations where a marketer is linking to a competitor's site in order to engage in comparative advertising. The consumer knows that the parties are competitors, therefore, the link will not be understood by the consumer as an association between them. ■

*Bart A. Lazar is a partner who specializes in counseling, business transactions and litigation in intellectual property, advertising and promotions, privacy, Internet and related matters for Chicago-based Seyfarth Shaw LLP. He can be reached by e-mail at [BLazar@seyfarth.com](mailto:BLazar@seyfarth.com) or [news@ama.org](mailto:news@ama.org).*



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