

WIPO-ESCWA/EC/BEY/ 03/Doc. 4b

ORIGINAL: English

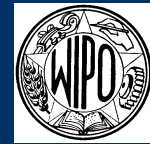
DATE: April 2003



LEBANESEREPUBLIC



UNITEDNATIONSECONOMIC  
ANDSOCIALCOMMISSIONFOR  
WESTERNASIA(ESCWA)



WORLDINTELLECTUAL  
PROPERTYORGANIZATION

**WIPO-ESCWAARABREGI ONALCONFERENCEON  
INTELLECTUALPROPERT YANDELECTRONICCOM MERCE**

organizedby  
theWorldIntellectualPropertyOrganization(WIPO)  
and  
theUnitedNationsEconomicandSocialCommissionforWesternAsia  
(ESCWA)

incooperationwith  
theMi nistryofEconomyandTrade

**Beirut, May 7 and 8, 2003**

**INTELLECTUALPROPERTYONTHEINTERNET :  
COPYRIGHTANDRELATEDRIGHTS**

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# Liability for Linking on the Internet

## *Analysis of Case Law*

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## The Web and the Links

- No web, without hyperlinks between web pages: the links are the glue with which the web is woven
- What is a hyperlink? (pointer - HTML code)
- Which are the different linking techniques ?
  - user activated links
    - surface linking : to homepage
    - deep linking : to subpage (or interior page)
    - framing : no reference to linked page
  - automatic links (also “embedded” or “dynamic” links, or “inlining”)

## Overview of Cases

- First anglo-american cases (96-98): settlements *Shetland Times*, *TotalNews*, *Ticketmaster (I)*
- Second generation of cases (99-today): decisions
  - US : *DeCSS*, *Ticketmaster (II)*, *Bernstein/Penney*, *eBay/BE*, *LA Times/Free Republic*, *Mormon Church*, *DVD/McLaughlin*, *Kelly/Arriba...*
  - FRG : *Steinhöfel*, *Telco- and FTP-Explorer*, *Bau-markt*, *StepStone/OfiR...*
  - NL : *XS4all*, *KPN/XSO*, “*Kranten.com*”
  - Fr : *Sacem/Roche*, *Groupe Industrie/Ornis*
  - Sw : *IFPI/Olsson*
  - B : *IFPI/Skynet*, *IFPI/Beckers*
  - UK : *Haymarket/Burmah Castrol (no decision)*

## Overview of Cases

- **News sites:** *Shetland Times, TotalNews, LA Times/Free Republic, “Kranten.com”, Groupe Industrie/Ornis*
- **Databases online:** *Ticketmaster, KPN/XSO, Bau-markt, eBay/BE, StepStone/OfiR*
- **Music online (and contributory infringement):** *IFPI/Olsson, IFPI/Skynet, IFPI/Beckers*
- **Other contributory infringement cases in relation to IP rights:** *DeCSS-Reimerdes, Mormon Church, DVD/Mc Laughlin, Scientology/XS4all, Bernstein/Penney, etc.*

# I. Liability for the Provider of the Link

- **A. Infringement due to the pointer**  
(for ex. titles as pointers)
- **B. Infringement related to the linking technique**  
(for ex. deep links, framing)
- **C. Contributory infringement for further distribution of the illicit content linked-to**  
(for ex. illicit MP3s, computer code, substantial part of databases)

Shetland's  
FIRST daily  
newspaper



Read in  
55 count  
worldw

## Main Headline Page

Please check daily for new updates



*The Shetland Smokehouse*

LATEST NEWS - *Read about it Here !!*

Click on any headline below for the full story

**Cheaper job on school budget savings**

**Bid to save centre after council funding 'cock up'**

**Forum to monitor west oil effect on fishing**

## A. Pointers

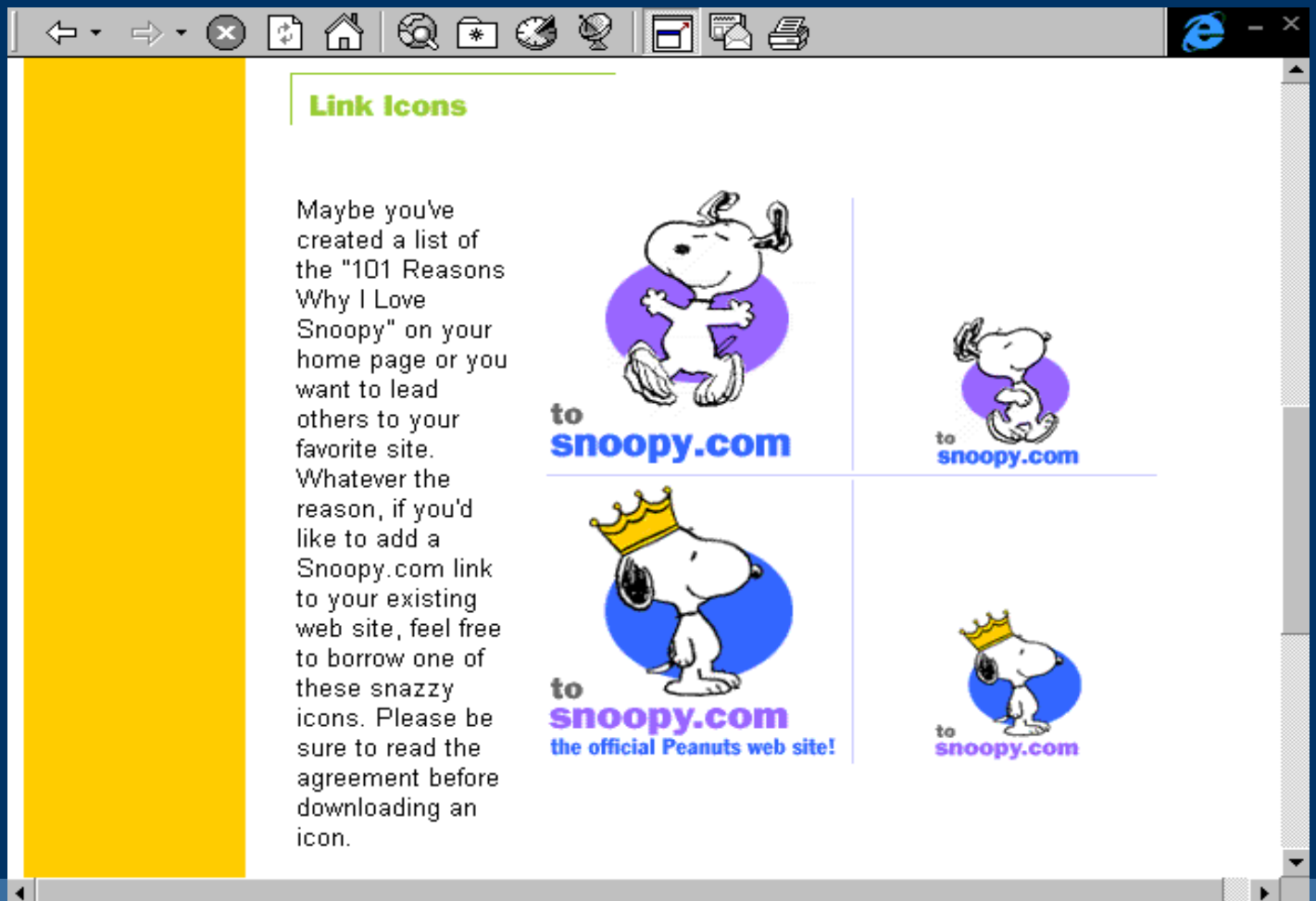
### *Shetland Times v. Shetland News*

(UK - Oct. 96, settlement Nov. 97)

- **Facts** : The *Shetland News*' site used the titles of the *Shetland Times*' articles, as pointers to deep-link to the corresponding articles on the *Shetland Times*' site
- **Legal basis** : pointers infringe copyright on titles
- **Preliminary injunction** : granted
- **Settlement** : titles, plus "A *Shetland Times* story", plus the *Shetland Times*' logo, as pointers to the *Shetland Times*' homepage







## Advice: Agreement on a Link Icon



**Link Icons**

Maybe you've created a list of the "101 Reasons Why I Love Snoopy" on your home page or you want to lead others to your favorite site. Whatever the reason, if you'd like to add a Snoopy.com link to your existing web site, feel free to borrow one of these snazzy icons. Please be sure to read the agreement before downloading an icon.

 to <b>snoopy.com</b>	 to <b>snoopy.com</b>
 to <b>snoopy.com</b> the official Peanuts web site!	 to <b>snoopy.com</b>

The screenshot shows a Microsoft Internet Explorer browser window. The title bar reads "Fun & Games - Microsoft Internet Explorer". The address bar contains the URL "http://www.unitedmedia.com/comics/peanuts/c\_fun/#icons". The main content area displays the following text:

"SNOOPY.COM"  
OFFICIAL ICON LINK LICENSE AGREEMENT  
**License.** United Feature Syndicate grants to anyone using one of its PEANUTS icons (License) the non-exclusive right, until UFS gives notice to the contrary, to place the Icon in Licensee's web site, subject to the following conditions:

- (a) the Icon may be used only for the purpose of hyperlinking to UFS's sites at "http://www.unitedmedia.com/peanuts/" and/or "http://www.snoopy.com/";
- (b) Licensee will not alter the appearance of the Icon in any manner; and
- (c) Licensee will make no use of any intellectual property of UFS, other than the Icon, without UFS's express written permission.

[Fun & Games](#)

The browser's taskbar at the bottom shows the Start button, several open application windows (including Internet Explorer), and the system tray with the date and time "15:06".

# B. Linking Technique

## *Kranten.com* (NL - Aug. 00)

**Kranten.com - hét online krantenoverzicht - Microsoft Internet Explorer**

File Edit View Favorites Tools Help

Back Forward Stop Refresh Home Search Favorites History Mail Print Edit

Address <http://www.kranten.com/> Go Links >>

**KRANTEN.COM**  
HET ONLINE KRANTENOVERZICHT

Gratis  
Gratis dingen  
Gratis!!  
Gratis...  
**MY WEB**

De kranten per e-mail WAP BE ->

vrijdag 12 januari 2001, 15:03 uur

Zoek naar  Vind  
Powered by **ixquick**

**Column Zoeken**

**Column**  
**Typisch Brits** (Jeroen de Groot)  
"Een paar vette bierkoppen die een pijltje werpen. Het is maar wat je leuk vindt. En toch zitten er 2 miljoen Nederlanders aan de buis gekluisterd."  
Lees de volledige column ->

**Weer**

Het Nederlandse weer - wijzigen  
za zo ma di wo  
  
4 4 2 2 2 Meer weer...

Business & Finance Sport Internet & IT Weer & Verkeer  
Landelijke kranten Regionale kranten Belgische kranten

**Algemeen Dagblad** +

- Ouders heroveren Honki Ponk
- Nieuwe tegenslag voor internetsector
- Brit mag weer bloot de straat op
- Schaatstwist waart boven EK
- Buitendijk valt weer uit naar Krajicek
- Interactieve schaatstabel
- Negende BSE-koe in Nederland
- Zeevisproducten met keurmerk
- Lego verkoopt 3 miljoen steentjes per dag
- Beleid gehandicapte niet overal 'adequaat'

Start Pegasus... Krante... Microsoft... Microsoft... Internet 15:01

Algemeen Dagblad - Economie - Microsoft Internet Explorer

File Edit View Favorites Tools Help

Back Forward Stop Refresh Home Search Favorites History Mail Print Edit

Address <http://www.ad.nl/economie/ZZZSEPX3VHC.html> Go Links

Algemeen Dagblad > Economie > Lego verkoopt 3 miljoen steentjes per dag

**Lego verkoopt 3 miljoen steentjes per dag**  
'In 2005 wereldwijd sterkste merk'

*Door Jeroen Schutijser*

Rotterdam - "Hoeveel Lego-steentjes er in Nederland in omloop moeten zijn?" Marketing-coördinator Koen Vroman van Lego-Benelux begint hardop te rekenen: "Sinds de introductie in 1957 hebben we er in ieder geval zo'n 5,5 miljard (!) verkocht; omgerekend ruim 3 miljoen per dag." Als je ze in de lengte achter elkaar legt, praat je over een slordige 176.000 kilometer steentjes (ruim vier keer de aarde rond).

Afgezien van de plastic Lego-steentjes die per ongeluk in de stofzuiger of de wasmachine belanden, doet zich het merkwaardige feit voor dat bijna niemand het kleurige constructiespeelgoed weggooit: "Hebben de eigen kinderen er geen lol meer in, dan verdwijnen de steentjes meestal naar zolder", zegt Vroman te weten. "Voor later, voor de kleinkinderen."

**AD's Handige 100**

**Top 5 Economie links**

1. AD-Dossier Spelen met Vuur
2. Aanmelden voor AD Economie nieuwsbrief
3. AEX
4. Wall Street Journal online
5. Finance Television

Naslagwerken... OK

**LEZERSAANBIEDING**

De leukste Hotels

Op vakantie met baby's, peuters en kleuters.

Uit eten met de Dames

Start | Pegasus... | Kranten... | Microsoft... | Microsoft... | Algem... | 15:03

## Deep Links and Pointers

*Kranten.com* (NL - Aug. 00)

- **Deep links using headlines of articles as pointers:**
  - action for copyright and database right infringement + unfair competition
- **Decision:**
  - no copyright infringement (no copy by creating a link or sending a list of links by e-mail; yes in case of copying the list of titles, but quotations allowed for a media company)
  - no database right infringement: no substantial investment in the content and selection of the headlines (>< text of the articles)

## Deep Links and Pointers

### *Kranten.com* (NL - Aug. 00)

- **Decision:**
  - even if the whole site must be considered as a database: no substantial taking (and no conflict with normal exploitation and no unreasonable prejudice for the legitimate interests of owners)
  - no unfair competition (choice, but no necessity, to put ads *on the homepage*)
- **Dismissed**

## Deep Links

*Ticketmaster v. Tickets.com* (US - 03 + 08.00)

- **Facts:** deep links to interior pages (35.000 pages changed per day). Revenues: selling tickets and ads
- **Decisions:**
  - No copyright infringement even for the temporary copies (10-15 s.) on defendant system in order to extract the information and reformat it
  - Deep linking as such is not a form of unfair competition
  - No breach of contract (online terms and conditions) because no “I agree” box (>< *eBay*)

Thank you for visiting ticketmaster.com. Use of this site is subject to the express terms and conditions. By continuing past this page, you expressly agree to be bound by those terms and conditions which prohibit commercial use of this site.

ticketmaster.com

Privacy | My Account | Help | Check Your Order

SEARCH FOR EVENT:

IN

Choose State

GO

VENUES • METROS • STATES • TICKET ALERT • STORE • TIPS

we prefer American Express Cards

MUSIC

- Country/Folk
Jazz/Blues
Oldies
Rock/Popular
Urban
World Music

SPORTS

- Baseball
Basketball
Football
Golf
Hockey
Motorsports
Soccer
Tennis
Wrestling

ARTS

- Ballet/Dance
Classical/Opera
Museums
Theatre

FAMILY

- Circus
Family Destinations
Ice Shows
Rodeo
Touring Family Events

popular MUSIC events

- Britney Spears
Dave Matthews Band
AC/DC
Tim McGraw
Pearl Jam
more...

popular SPORTS events

- World Wrestling Federation
Atlanta Braves
New York Yankees
Chicago Cubs
Seattle Mariners
more...

popular ARTS events

- Disney Presents: The Lion King (CA)
Riverdance
Elton John and Tim Rice's AIDA
Disneys Beauty and the Beast
Les Miserables
more...

in the SPOTLIGHT



Get inside EMP. Experience Music Project.

Win a trip to Seattle and experience the wildest thing to rock the music world. Plus, check out the amazing lineup of EMP Grand Opening concerts.



Big deals? We've got them!

Click here to find out what the deal is in your city. Check back each week as deals are updated every Tuesday.



Register to win

a flyaway package in our Big Ticket Summer Fun Sweepstakes. Get merchandise discounts with a Peppridge Farm UPC symbol.

in the STORE



Vivitar 4x30 Mini Compact Binoculars

See all of the action up



## *Ticketmaster site:*

### **Notice:**

*«By continuing past this page, you expressly agree to be bound by those terms and conditions which prohibit commercial use of this site.»*

### **Terms and conditions:**

*«You must obtain our prior written consent to make commercial offers of any kind, whether by advertising, solicitations, links, or any other form of communication. (...) you may not resell or link to other sites for the purpose of selling tickets of any kind. »*

## Framing

### *Washington Post v. Total News* (US - Settlement, 97)

- **Facts** : *Total News*' site represents a collection of 1.200 links to news sites. Upon activation of the link, the content of the linked sites was presented within the frame of *Total News*' site.
- **Legal basis** : copyright, trademark infringement, and misappropriation of content

## Framing

*Washington Post v. Total News* (US - Settlement, 97)

- **Settlement :**
  - no more framing
  - linking allowed, submitted to news sites' right to revoke their permission upon 2 weeks notice
  - only use full names of linked web sites as pointers

# Framing

*Bau-markt.de v. baumarkt.de (FRG - June 99)*

KRAUTOL Online-Service - Microsoft Internet Explorer

fileXpress integrator

File Edit View Go Favorites Help

Address <http://www.krautol.de/> Search Links

**KRAUTOL**

**KRAUTOL WERKE** Pfungstadt, Germany

Ihr kompetenter Partner in Sachen Farbe

Wählen Sie Ihre Sprache

Choose your language

Herzlich willkommen bei Krautol. Vorab schon einmal vielen Dank für Ihr Interesse, dem wir gerne gerecht werden wollen. Wir haben versucht, eine Menge Informationen für Sie zu verarbeiten, was bei den vielen

Start | Internet zone | 16:54

# Framing

## *Bau-markt.de v. baumarkt.de (FRG - June 99)*

Test - Microsoft Internet Explorer

fileXpress integrator

File Edit View Go Favorites Help

Address <http://www.baumarkt.de/cgi-bin/click.pl/http://www.krautol.de>

Homepage Hersteller/Produkte Handel Info-Center Produktsuche

**baumarkt.de** die digitale Fachzeitschrift für Bauherren und Heimwerker sowie Suchmaschine der (gesamten) Baubranche, verlinkt Sie zu:

**KRAUTOL**

**KRAUTOL WERKE** Pfungstadt, Germany

Ihr kompetenter Partner in Sachen Farbe

Wählen Sie Ihre Sprache

Choose your language





Herzlich willkommen bei Krautol. Vorab schon einmal vielen Dank für Ihr Interesse, dem wir gerne gerecht

Start | Internet zone | 16:53

## Framing

*Bau-markt.de v. baumarkt.de* (FRG - June 99)

- **Facts:** plaintiff offers a site with advertising “homepages” for various companies; defendant’s site provides a search function with links to the “homepages” of plaintiff’s site, but within its frame
- **Legal basis:** copyright, database protection and unfair competition (+ civil right to be named)
- **Decision:**
  - no protection by copyright; no database right in favor of plaintiff (does not bear the risk; works under commission)
  - dismissed

## C. Contributory Infringement

MP3 : *Olsson* case (SW- Sept. 99, Dec. 99 and 00)

- **Procedure** : criminal procedure against a student (complaint by IFPI) for providing links to illicit MP3 files
- **Legal basis** : copyright infringement and contributory infringement
- **Decision** : dismissed
- **Conclusion**: avoid *Goliath v. David* cases and criminal procedure

## MP3 : *Olsson case*

- **Direct infringement :**
  - no distribution, because no physical copy
  - no making available to the public
- **Contributory infringement :**
  - no proof that the person who placed the copies online was guilty of an offence and that the action took place in Sweden
  - no proof that the sound files were copied by visitors for purposes other than their private use



## MP3 : *IFPI v. Beckers* (B - Dec. 99)

- **Facts** : Student sued by IFPI for providing links to MP3-files (civil action)
- **Legal basis** ( “référé” or “preliminary injunction” ) :
  - no claim for copyright infringement
  - tort liability (1382 Civil Code) for inducing copyright infringements
- **Decision** : granted

## *DeCSS case (US - Aug. 00)*

- **Facts** : defendants sued for posting DeCSS (source code for descrambling the DVD protection system) + for linking to sites
- **Legal basis** : linking is a form of trafficking in technological measures covered by DMCA (if knowledge)
- **Decision** : prohibited by DMCA if linking to
  - sites that automatically commence the process of downloading DeCSS
  - sites that display nothing more than DeCSS

## *DeCSS case (US - Aug. 00)*

- **Decision** : issue of first amendment compatibility (for ex. when linked-to sites contain other, non infringing materials) and “chilling effect” on linking
- No liability if offer of illicit technology but no evidence that the persons responsible for linking:
  - know that the material is on the linked-to site
  - know that it is unlawful circumvention technology
  - create and maintain the link for the purpose of disseminating the technology

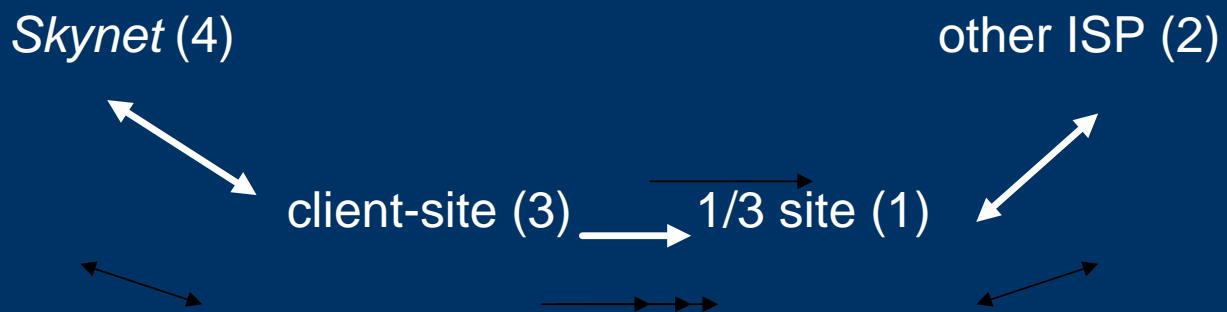
## II. Liability of Intermediaries

- **A. Liability for hosting links to illicit content**
- **B. Liability for spidering licit information**

## A. Liability of Hosting Provider

### *IFPI v. Skynet* (B – Febr. 01)

- **Facts** : No hosting of MP3's but presence on client' sites (3) hosted by Skynet (4), of links to 1/3 party sites (1) hosted by other ISPs (2)



## *IFPI v. Skynet* (B - Febr. 01)

- **Decision :**
  - rules on participation to an infringement can apply to the hosting provider for its client's hyperlinks to illicit material
  - invitation to follow a notice and take down procedure with three days delay for taking down the material (procedure actually applied in Napster type file sharing as well)

## B. Liability for Spidering

### *eBay v. Bidder's Edge* (US -May 00)

- **Facts:** defendant (BE) offers an auction aggregation site including information regarding *eBay's* auctions. BE recursively crawls the *eBay* system to compile its database
- **Legal Base:** civil trespass (property right on the computer system)
- **Outcome:** injunction from accessing *eBay's* computer systems by use of any automated querying program (robot, spider, etc.)

## Spidering in Europe: Divergence with US *KPN v. XSO* (NL - Jan. 00)

- **Legal context:** database directive (1996)
  - condition of the *sui generis* protection for non-copyrighted content: substantial investment made by the maker of the (auction, phone, etc.) listings
  - effect: prohibition of extraction and reutilization
- **Decision :**
  - no extraction but some form of prohibited reutilization of data on phone subscribers through framing (phone directory)



## Conclusion

Think before you link  
(content provider)

Take down if you know  
(intermediary)

Thank you for your attention

Alain Strowel

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