

COMMENT

META-TAGS AND HYPERTEXT DEEP LINKING: HOW THE ESSENTIAL COMPONENTS OF WEB- AUTHORING AND INTERNET GUIDANCE ARE STRENGTHENING INTELLECTUAL PROPERTY RIGHTS ON THE WORLD WIDE WEB*

Mark Everett Chancey**

An ever-growing population is using the World Wide Web, which permits instant access to an unprecedented aggregate of information. Such user population numbers have been and continue to be well-documented.¹ Along with this exponential Web growth, however, came the probability that newer technologies would eventually raise novel legal issues. Perhaps the most prominent of these issues are domain name disputes,² cybersquatters holding choice

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** B.A., Pepperdine University, 1995; J.D., Stetson University College of Law, 1998.

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1. For a sample of this documentation, with Internet population figures, including methodological information and statistics, see <<http://www.commerce.net/research/stats/wwwpop.html>>. Furthermore, projected figures are available for the years 1999 and 2000, including updated information from the Fall 1997 Commerce Net & Nielsen Internet Demographic Survey. See CommerceNet, *Internet Population* (visited Apr. 20, 1999) <<http://www.commerce.net/research/stats/wwwpop.html#WWWPOP>>.

2. See, e.g., André Brunnel & May Liang, *Trademark Troubles with Internet Domain Names and Commercial Online Service Screen Names: Roadrunning Right into the Frying Pan*, 5 INT'L J.L. & INFO. TECH. 1 (1997); Kenneth S. Dueker, *Trademark Law*

domain names for ransom,³ and obtaining jurisdiction in cyberspace.⁴

By the same token, other issues have surfaced.⁵ Two recent issues, which implicate copyright and trademark law, stem from the legal ramifications involved in a Web site's creation or design. Such complicated issues deserve priority⁶ from among a long list of Internet topics currently attracting legal attention. Why should these "design" issues be accorded paramount status? Web site design is being dictated by technologies that evolve according to user demand and the corresponding capabilities to meet that demand. As a result of this technological evolution, it is the function of the law to respond by ensuring that the same protections provided by copyright and trademark law are afforded now as they were in the past. If any legal controls are going to be imposed in an effort to realize some modicum of regulation in cyberspace,⁷ then they will likely lie within the realm of Intellectual Property (IP).⁸

Lost in Cyberspace: Trademark Protection for Internet Addresses, 9 HARV. J.L. & TECH. 483 (1996).

3. See *infra* text accompanying notes 75–79 for a case involving a "cybersquatter" who reserved roughly 240 domain names consisting of some choice Web addresses, including <www.deltaairlines.com>, <www.britishairways.com>, and <www.crateandbarrel.com>. See also *infra* note 105 and accompanying text for evidence that the anti-dilution statute discussed in this paper was intended to thwart such illegal practices as cybersquatters who buy choice domain names.

4. See generally HENRY H. PERRITT, JR., LAW AND THE INFORMATION SUPERHIGHWAY 197–200 (1996); Brian Covotta, Note, *Personal Jurisdiction and the Internet: An Introduction*, 13 BERKELEY TECH. L.J. 625 (1998). "[T]oday, cyberspace is the conceptual 'location' of the electronic interactivity available using one's computer." William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 198 n.5 (1995) (citation omitted).

5. In addition to the technologies discussed in this Comment, caching and framing are examples of some newer Internet issues attracting legal attention. See Eric Schlachter, *Caching on the Internet*, CYBERSPACE LAW., Oct. 1996, at 2; see also Law Journal Extra, *Law of the Internet* (visited Mar. 1, 1999) <<http://www.ljx.com/internet/complain.html>> (addressing the legalities of framing wherein the defendant-host site opted to show the viewer news stories written and gathered by other Web sites, such as the *Washington Post's* Web site, within the frames of its own Web site, thereby devaluing the content of the sites from which the news was taken).

6. The Author is merely suggesting that the technologies discussed in this Comment — those technologies that actually create a Web site — deserve senior status among a list of many Internet issues warranting legal attention, including: framing, caching, domain name disputes, difficulties of obtaining jurisdiction in cyberspace, digital piracy, and a host of security issues.

7. See *supra* note 4 for a definition of "cyberspace."

8. See John Goldring, *Netting the Cybershark: Consumer Protection, Cyberspace*,

Accordingly, the focal point of this Comment is the use of meta-tags⁹ and hypertext linking, two enormously popular technologies employed in Web site design. This Comment will address and expose the legal parameters surrounding these technologies. After a brief introduction to meta-tag technology, this Comment will argue that dilution is the proper remedy for meta-tag issues, and that an infringement action should be reserved for domain name disputes and other related matters. After a discussion on meta-tags, this Comment will address “deep” linking, a form of hypertext linking. Whereas dilution proves the remedy best-suited for meta-tag issues, an action arising under unfair competition law may be the most successful remedy in hypertext linking cases. In stark contrast to meta-tag usage, and as distinguished from *surface* hypertext linking, users who engage in *deep* hypertext linking may find stiffer penalties and brighter lines of regulation.

I. META-TAGS

A. Meta-Tags as a Web Authoring Tool

When designing a Web site, the designer will utilize a computer language known as HTML. Within the HTML code, there are different “tags” the designer uses to label groups of information.¹⁰ These tags are written in the HTML computer language and are merely a means of conveying “information about information.”¹¹

A meta-tag¹² allows the designer to label his Web site, by choos-

the Nation-State, and Democracy, in BORDERS IN CYBERSPACE 322, 348 (Brian Kahin & Charles Nesson eds., 1997).

9. The practice of embedding keywords in meta-tags is also commonly referred to as “cyber-stuffing,” “hidden code,” “buried code,” or “machine readable code.”

10. See Danny Sullivan, *The New Meta Tags Are Coming — Or Are They?* (visited Mar. 10, 1999) <<http://searchenginewatch.com/sereport/9712-metatags.html>>. Danny Sullivan works as a consultant and manages the Search Engine Watch.com Web site. See *id.*

11. See Excite, Inc., *Excite Info* (visited Mar. 14, 1999) <<http://www.excite.com/info/listing.html>>. These meta-tags will not be visible to anyone who views the Web site; for that matter, no HTML language is readily readable, but most Internet browsers do incorporate some means of viewing the underlying source code (which usually involves clicking on Source/Source Code under the View menu). See e.g., Scott Clark, *Back to Basics: META Tags* (visited Mar. 10, 1999) <http://www.webdeveloper.com/categories/html/html_metatags.html>.

12. There are many different types of HTML tags and meta, meaning information about information, used here to signify that the content within the meta-tag is describ-

ing the descriptors or keywords that identify and describe the subject matter of the Web site, and imbedding such information within this tag.¹³ This is the most common use and the original purpose for which the tags were designed.¹⁴ However, another popular tag, the meta-refresh tag,¹⁵ can be used to tell an Internet browser to reload a different or the same page within a few seconds.¹⁶ A typical meta-tag will look similar to this:

```
<HEAD>
<TITLE>META examples</TITLE>
<META name="keywords" content="keyword1,keyword2">
</HEAD>17
```

The third line of this example is the line on which the user fills in the name of the meta-tag (the most common is generally "keyword"). The user will place the word "keyword" in the quotes following "name." Next, the quotes located to the right of the word "content" are the list of keywords and key phrases the user wants to use to describe his page.

Web site designers use meta-tags to label a Web site's content to ensure that the majority of search engines¹⁸ will index their Web site.¹⁹ Once a Web site has been indexed by a search engine, that Web site will then be matched against user queries and returned as a possible search result.²⁰ Although not all search engines incorporate meta-tag support, the clear majority do and others offer partial support for the technology.²¹

One of the exceptions, the Excite²² search engine, does not sup-

ing the content of the Web site. See ELIZABETH CASTRO, *HTML 4 FOR THE WORLD WIDE WEB* 128-31 (1998).

13. See Sullivan, *supra* note 10.

14. See CASTRO, *supra* note 12, at 120.

15. See *id.* at 132.

16. Such as in the case of time sensitive information (e.g., stock quotes).

17. John Pollock, *Using META Tags for Search Engines* (visited Mar. 10, 1999) <<http://www.pageresource.com/html/meta.htm>>.

18. The most popular search engines are Yahoo!, Altavista, Excite, Hotbot, and Metacrawler. Yahoo!, by far the most popular, is the invention of two Stanford University students. See Yahoo!, *YAHOO!* (visited Mar. 10, 1999) <<http://join.yahoo.com/overview.html>>.

19. See Danny Sullivan, *How Search Engines Work* (visited Mar. 10, 1999) <<http://www.searchenginewatch.com/webmasters/work.html>>.

20. See *id.*

21. See *id.*

22. Excite can be found at <<http://www.excite.com>>.

port meta-tags and instead programs its “spider [robot-like searching mechanism] . . . to grab as much information as it can from . . . [a] site by taking the exact words on the page. If the user can't see or use it, we [Excite] don't bother to index it or search on it.”²³

Nonetheless, when a Web site designer labels the content of a Web site, he will use descriptors or keywords reflecting that Web site's content.²⁴ Then, as discussed above, the search engines will index that site based on the keywords and descriptors used.²⁵ Consequently, a designer will likely attempt to choose those descriptors and keywords that most closely match the greatest number of user queries performed on any given search engine.

The meta-tagging of a Web site, however, becomes complicated by the need for increased exposure of one's Web site. Due to the vast and potentially limitless size of the World Wide Web, a strong correlation exists between Web site exposure and success. Success is twofold. The commercial context measures success by increased traffic to the Web site because increased traffic and exposure ensure a greater likelihood that the Web site's owner can attract advertisers to his Web site. And more advertisers equals more money. The other type of success is more personal, and typically relates to the motive of the one who commissioned the design of the Web site. Often, motive reflects a political agenda or campaign to raise awareness over an issue.²⁶ Nonetheless, success here is still increased awareness. Thus, be it commercial or personal, exposure is the key.

Thinking in terms of exposure, the Web site designer faces a dilemma. Because the majority of Internet search engines utilize meta-tags and index Web sites according to that meta-data, and having one's Web site indexed by search engines increases that Web site's exposure, some Web site designers imbed whatever descriptors or keywords they choose into their meta-tags, and do so irrespective

23. Excite, Inc., *Getting Listed Help* (visited Mar. 10, 1999) <<http://www.excite.com/Info/listing.html>>. This information is provided along with details on how a Web site can get listed with Excite. In this regard, Excite works as many search directories do, in that a Web site must send in a short description of the Web site and this description begins the indexing process. *See id.*

24. *See* Clark, *supra* note 11.

25. *See* Sullivan, *supra* note 10.

26. For example, a local religious group opposing Disney's personnel policies might litter its meta-tags with the word “Disney” some 2000 times to re-direct the consumer traffic searching for Walt Disney World's Web site. *See* 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25:69 (4th ed. 1998).

of their Web site's content.²⁷ The natural progression here is that meta-tagging those keywords or descriptors most frequently searched by consumers will give a particular Web site the greatest likelihood of being noticed.

The industry promotes the practice of using choice descriptors and keywords within one's meta-tags as being an aggressive tactic to "get your Web site noticed."²⁸ At first, some designers imbedded words such as "sex" or "nudity," and still other designers imbedded descriptors and keywords completely unrelated to the content on their site.²⁹ These words would be imbedded in the meta-tags and, at times, would even be hidden in a typeface and color that matched the exact color of the page, thus making it more difficult to pinpoint such uses.³⁰

Moreover, Web designers also learned the trade of "spamming,"³¹ whereby one would gratuitously repeat the same word over and over in an attempt to achieve a higher rank within a particular search engine's indexing.³² The various search engines, however, responded by enacting strict rules that prohibited spamming.³³ Still other search engines refused to index any Web site that practiced this spamming technique.³⁴

Additionally, some designers and industry experts began to

27. For a sample case in which a Web designer imbedded such keywords and descriptors, see *infra* note 128, and accompanying text.

28. See *infra* text accompanying note 29 for reference to an instructional manual promoting such tactics.

29. See Ann Davis, *Web Weaves a Tangled Trademark Issue*, WALL ST. J., Sept. 15, 1997, at B10.

30. See *id.*

31. If the various search engines spot a spamming technique, such as "stacking" or "stuffing" (where a word is repeated many times in a row to improve its position within a search engine's indexing), that search engine may decide to downgrade a page's ranking or may decide to exclude it altogether. See Danny Sullivan, *Search Engine Features Chart* (visited Mar. 10, 1999) <<http://searchenginewatch.internet.com/webmasters/features.html>>. Users and various Web authoring professionals are encouraged to engage in "spam narking," that is, to complain about various Web pages using these spamming techniques. See *id.*

32. It is desirous for one to have his Web site ranked as high as possible on any given search engine. The higher a site is ranked, the more likelihood it has of being returned (showing up in the search results) in response to a user's query.

33. See Sullivan, *supra* note 31 and accompanying text for an explanation of search engine penalties.

34. See *id.* The penalties have become stricter as these spamming techniques have increased in frequency. See *id.*

imbed the name of competitors within their meta-tags.³⁵ This practice began because some designers realized that imbedding words such as “sex” or “nudity” had the effect of attracting the wrong clientele.³⁶ This new custom of littering one's meta-tags with competitor names was also motivated by fear that one's Web site would be buried by the sheer number of competitors coming online; it was again touted as being another method of gaining increased exposure of one's site.³⁷ This practice was somewhat common in the trade and was listed in several Internet manuals.³⁸ In particular, an Internet manual published by the firm Did-it.com suggested, “You can be blatantly ruthless here and just list a well-known competitor's name as one of your keywords.”³⁹

In fact, to further illustrate the point, recently an online telephone and business directory, Infospace, Inc., agreed to withdraw the use of their competitor's name from their meta-tags.⁴⁰ WorldPages, Inc., the competitor, discovered the use of its name in the meta-tags and subsequently demanded that Infospace delete its name.⁴¹ This case also highlights another complicating factor occurring in most meta-tag cases: the competitor's name was inserted by a third party — an independent contractor specializing in Web design.⁴² This practice of hiring outside the firm to commission the design of a Web site is known as “outsourcing,” and it emphasizes the ever-increasing need for Web designers to be legally astute regarding their selection and implementation of descriptors and keywords within meta-tags.⁴³

35. See Davis, *supra* note 29.

36. See Barry D. Weiss, *Metasites Linked to IP Violations*, NAT'L L.J., at B9 (July 21, 1997) <<http://www.ljx.com/internet/0721metasites.html>>.

37. See *id.* (noting that one may imbed a competitor's name or any name simply to increase the number of “hits” his Web site receives at any given time). A greater quantity of “hits” translates into increases in advertising revenue. See *id.*

38. See Davis, *supra* note 29.

39. *Id.* In light of recent lawsuits, however, the firm, Did-it.com, deleted the advice. See *id.*

40. See *id.*

41. See *id.*

42. See *id.*

43. See Louis K. Ebling & Karen E. Kreider, *Dilution Is Remedy for Internet Mark Misuse*, NAT'L L.J., May 18, 1998, available in <<http://www.ljx.com/internet/D518dilution.html>> (indicating that the more reputable and experienced Web authors and designers should be knowledgeable regarding these legal matters and that there are certain societies to educate Web authors and designers to such legalities).

Such uses of another competitor's name were, at times, unauthorized and were used to deliberately capitalize on the goodwill of another's mark, as was the case previously mentioned.⁴⁴ The practice was obviously intended to divert consumer attention that was meant to go elsewhere.⁴⁵ What Web site designers were not aware of, however, was that these competitors had some proprietary interest in their names. Below is the typical routine of how this unauthorized meta-tagging occurs:

Example: Company X and Company Y both make the same product. Company X is a popular product and has been on the market for years. Company X spends millions of dollars advertising its product and consequently, Company X's product is well-known and well-liked. Along comes Company Y, a newcomer to the game. In an attempt to garner more clients, Company Y utilizes meta-tags in designing its Web site. Company Y puts Company X's famous mark into the meta-tags of the HTML language of its Web site. Consequently, when a consumer searches for Company X's product, the search engine will "grab" Company Y's site also. Now, Company Y has come up in the search results of someone searching for Company X's product, and could very well be returned with a higher rank⁴⁶ than the exact brand the consumer was attempting to locate. Company Y gains exposure and may even realize an increase in sales and/or popularity on account of this maneuver.⁴⁷

In summary, the practices of (a) spamming, (b) littering one's meta-tags with words connoting sexual innuendo, and (c) imbedding words totally unrelated to the subject matter of that particular Web site, merely constitute grievances to be proscribed and punished by the various search engine utilities, as none of these practices have been heavily litigated in a court of law. Conversely, the offense of imbedding a competitor's⁴⁸ trademarked name into the meta-tags on

44. See Weiss, *supra* note 36.

45. See *id.*

46. See *supra* note 32 for an explanation of why it is generally regarded as desirable that one's Web site obtain the highest ranking possible.

47. See Martin J. Elgison & James M. Jordan III, *Trademark Cases Arise from Meta-Tags*, NAT'L L.J., Oct. 20, 1997, at C6 (containing a similar, yet more scaled-down, example).

48. For the precise offense highlighted in this Comment — where one party uses another party's trademarked name in an attempt to capitalize on the reputation and goodwill of that mark — the association between the parties is essentially irrelevant for purposes of defining the illegality on which this part of the Comment is based.

his own Web site, which is the subject of this Comment, is also the subject matter of a rapidly growing body of litigation.

B. Trademark Law: The Big Picture

Before discussing how meta-tags violate IP rights, a brief overview of trademark law is warranted. A trademark (the use of the word trademark here includes trademarks, service marks, collective marks, certification marks, and trade names) is typically understood as the embodiment of a brand name of a good or service.⁴⁹ A trademark's chief purpose is to allow for customer identification of the manufacturer or sponsor of a good or the provider of a service.⁵⁰ In addition, a trademark conveys more than the mere identity of the owner/manufacturer of the trademark and in fact "is a shorthand means of conveying commercial information."⁵¹ The trademark can also communicate the nature and quality of the goods and services and can symbolize the reputation of that which it represents.⁵²

When the unauthorized use of a trademark occurs, the Trademark Act of 1946,⁵³ otherwise known as the Lanham Act, prescribes a cause of action for trademark infringement.⁵⁴ To sustain an action for infringement, the plaintiff must show that a likelihood of confusion exists about the source, sponsorship, affiliation, or approval of the offending mark.⁵⁵ Proof of actual confusion is not required for infringement.⁵⁶

Section 1125(a) of the Lanham Act also provides for protection against unfair competition.⁵⁷ This provision allows a suit regardless of whether the goods have been federally registered or are receiving federal protection from any other statute.⁵⁸ Several different types of

49. See 3 MCCARTHY, *supra* note 26, § 24:68.

50. See *id.*; *New Kids on the Block v. New Am. Publ'g, Inc.*, 971 F.2d 302, 305 (9th Cir. 1992).

51. RAYMOND A. KURZ ET AL., *INTERNET AND THE LAW: LEGAL FUNDAMENTALS FOR THE INTERNET USER* 49 (1996).

52. See *id.* at 49–53.

53. 15 U.S.C. §§ 1051–1127 (1994).

54. See *id.* § 1114(1).

55. See 3 MCCARTHY, *supra* note 26, § 23:1; see also 15 U.S.C. § 1125(a)(1)(A).

56. See 3 MCCARTHY, *supra* note 26, § 23:3.

57. See 15 U.S.C. § 1125(a)(1)(A). Each state has its own common law regarding unfair competition, and state statutory legislation proscribes unfair competition, as well.

58. See *Coach Leatherware Co. v. AnnTaylor, Inc.*, 933 F.2d 162, 168 (2d Cir. 1991).

unfair competition are derived from the Lanham Act, the most notable being "passing off"⁵⁹ and "false advertising."⁶⁰ Other actions arising under the guise of unfair competition include an action for "false designation of origin" and "false descriptions forbidden."⁶¹

In sum, the aggrieved plaintiff confronted with a dilutive or infringing use of his trademark had a choice of a *federal* remedy under the Lanham Act of either trademark infringement, unfair trade practice, or unfair competition.⁶² In addition, there was also a valid choice under state law, as approximately one-half of the states⁶³ had state dilution laws, and still others had unfair trade practice and unfair competition causes of action arising under each state's common law.⁶⁴

59. Although the statute does not use the term "passing off," courts have recognized passing off as a claim under the Lanham Act since 1953. *See generally* American Tel. & Tel. Co. v. Winback & Conserve Program, Inc., 42 F.3d 1421, 1424 (3d Cir. 1994) (linking passing off to the language of 15 U.S.C. § 1125(a)(1)(A)). Passing off prohibits a party from partaking in any act that is false or misleading relative to the description or representation of some fact that "is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person." 15 U.S.C. § 1125(a)(1)(A).

60. *See* § 1125(a)(1). The false advertising provision at issue, § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), provides in pertinent part:

Any person who, on or in connection with any goods or services . . . uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any . . . false or misleading description of fact, or false or misleading representation of fact, which . . . (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1), *quoted in* C.B. Fleet Co. v. SmithKline Beecham Consumer Healthcare, L.P., 131 F.3d 430, 434 (4th Cir. 1997).

61. *See* 15 U.S.C. § 1125. These two causes of action may be asserted by an individual using an unregistered trademark. *See supra* text accompanying note 58.

62. *See* 3 MCCARTHY, *supra* note 26, § 24:82.

63. This is known as the "patch-quilt" system of protection, that is, approximately one-half of the states have some form of a dilution action, thus demonstrating the need for a uniform federal act. *See* H.R. REP. NO. 104-374, at 4 (1995), *reprinted in* 1996 U.S.C.C.A.N. 1029. Twenty-six states have anti-dilution statutes: Alabama, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, and Washington. *See* 3 MCCARTHY, *supra* note 26, § 24:80, at n.2 (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 25 statutory note (1995)).

64. *See* 3 MCCARTHY, *supra* note 26, § 24:80 at n.2.

C. 1995 Federal Trademark Dilution Act: Narrowing the Focus

In 1995, Congress drafted a new anti-dilution statute giving holders of famous registered and unregistered marks a federal cause of action.⁶⁵ This new anti-dilution statute has rapidly become the preferred remedy for violations of trademark rights occurring through the use of meta-tags.⁶⁶ The reasons for its popularity will be discussed in detail in a later section of this Comment.⁶⁷

Enacted on January 16, 1996, and appearing under the short title, the Federal Trademark Dilution Act of 1995 (FTDA),⁶⁸ the entire statute is only two pages long.⁶⁹ In its simplest terms, the statute prescribes a cause of action for the rightful owner of a famous⁷⁰ mark, provided the owner can prove that another's use of that mark dilutes the mark's distinctiveness or the mark's ability to denote the one true source of the goods.⁷¹ To prove a dilutive use, the plaintiff must show that:

1. The plaintiff owns a mark that qualifies as a "famous" mark as measured by the eight factors listed

65. *See id.* § 24.67(II)(A). Dilution law was codified in the form of a federal statute in 1996. *See id.* All earlier attempts to introduce federal legislation on dilution failed. *See id.* at n.3.

66. *See* Ethan Horwitz & Eric Prager, *What Is Dilution and How Is It Proved?*, N.Y. L.J., Dec. 2, 1996, at 3. Notably, before the enactment of the federal anti-dilution statute, a cause of action for dilution was actionable under state law in about half of the states. *See id.*

67. *See infra* Part I.F.

68. Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (codified at 15 U.S.C. § 1125(c) (Supp. III 1997)).

69. *See id.*

70. The anti-dilution statute protects only "famous" marks. *See id.* § 1125(c)(1). Although the threshold question of whether a mark is "famous" is likely to be disputed in the courts, the Act lists eight non-exclusive criteria for determining if a mark is "famous":

(A) the degree of inherent or acquired distinctiveness of the mark, (B) the duration/extent of use of the mark, (C) the duration/extent of advertising and publicity of the mark, (D) the geographical extent of the trading area in which the mark is used, (E) the channels of trade for the goods or services with which the mark is used, (F) the degree or recognition of the mark in the trading areas and channels of trade used by the mark's owner, (G) the nature and extent of use of the same or similar marks by third parties, and (H) whether the mark is federally registered.

Id.

71. *See* 3 MCCARTHY, *supra* note 26, §§ 24.67–71. The traditional examples of dilutive uses of another's marks include BUICK aspirin, KODAK pianos, and DUPONT shoes. *See* Horwitz & Prager, *supra* note 66, at 8 n.3.

in § 1125(c)(1).

2. The defendant is making commercial use in interstate commerce of a mark or trade name.
3. The defendant's use of the mark began after the plaintiff's mark became famous.
4. The defendant's use causes dilution by lessening the capacity of the plaintiff's mark to identify and distinguish goods and services.⁷²

Congress designed the FTDA to protect against two main types of dilution: blurring and tarnishment.⁷³ Blurring the distinctiveness of a famous mark was the first concern of the Act,⁷⁴ and was successfully invoked in *Intermatic v. Toeppen*.⁷⁵ There, Toeppen, the defendant, registered the domain name *www.intermatic.com*.⁷⁶ Toeppen was allowed to register the domain name of Intermatic even though he held no proprietary interest in the name; the plaintiff, however, had a registered trademark for the name Intermatic and alleged that Toeppen's use of that name as a Web address constituted dilution.⁷⁷ The district court ruled that the defendant's use of the plaintiff's brand name and trademark lessened the capacity to identify and distinguish the plaintiff's goods (blurring).⁷⁸ Specifically, if Toeppen continued using *intermatic.com*, Intermatic's name, reputation, and goodwill "would be at Toeppen's mercy and could be associated with an unimaginable amount of messages on Toeppen's Web pages."⁷⁹

72. 3 MCCARTHY, *supra* note 26, § 24.89.

73. See Horwitz & Prager, *supra* note 66, at 2. The Restatement (Third) of Unfair Competition also uses this two-part analysis of actions constituting dilution. See 3 MCCARTHY, *supra* note 26, § 24:70 n.3 (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 25 (1995)).

74. Blurring is the more traditional of the two types and is the type of injury under the dilution theory that was "envisioned by its original proponents." 3 MCCARTHY, *supra* note 26, § 24.68.

75. 947 F. Supp. 1227 (N.D. Ill. 1996). The term "registered" means that the defendant, Toeppen, applied to a Network Information Center (NIC), which reserves domain names, to register the right to use the name *www.intermatic.com*. See *id.* at 1229. In the United States, Network Solutions, Inc. is the organization responsible for distributing Web addresses. See *id.* This is the organization to which Toeppen applied. See 3 MCCARTHY, *supra* note 26, § 25:73.

76. See *Intermatic*, 947 F. Supp. at 1229.

77. See *id.*

78. See *id.* at 1236.

79. *Id.* at 1240.

Tarnishment, the other form of dilution, was the subject of *Hasbro, Inc. v. Internet Entertainment Group*.⁸⁰ Here, the court addressed a defendant's unauthorized use of the name CANDYLAND, a federally-registered trademark of Hasbro since 1951.⁸¹ Hasbro, Inc., sued to enjoin Internet Entertainment Group from using the CANDYLAND name in connection with its adult pornographic Web site.⁸² The Internet site tarnished the family-oriented CANDYLAND board game by association with a pornographic Web site (unwholesome goods).⁸³ The court found that the probable harm to Hasbro and its CANDYLAND name outweighed any inconvenience that defendants would experience by ceasing to use the CANDYLAND name and re-registering under a different Web address.⁸⁴

Other notable features within the anti-dilution statute are remedies and defenses.⁸⁵ Upon proving the elements of a prima facie case, the plaintiff will likely be awarded injunctive relief.⁸⁶ Typically, this involves directing the defendant to withdraw the plaintiff's trademarks from its meta-tags, and in the case of domain names, to cease and desist from using the troublesome domain name.⁸⁷ Interestingly, the anti-dilution statute allows for other, more stringent and punitive remedies, provided the aggrieved party can prove that the "person against whom the injunction is sought willfully intended to trade on the owner's reputation or to cause dilution of the famous mark."⁸⁸ Proving "willful intent" in dilution cases may be a very real possibility and thus, the aggrieved party also may be entitled to monetary relief.⁸⁹

80. 40 U.S.P.Q.2d (BNA) 1479 (W.D. Wash. Feb 9, 1996).

81. *See id.* at 1480.

82. *See id.* The defendant registered the domain name www.candyland.com, thus using the trademarked name as the entrance into its adult Web site. *See id.*

83. *See id.* The term "unwholesome" originated as a form of tarnishment to a trademark, "when its likeness is placed in the context of sexual activity, obscenity, or illegal activity." *Hormel Foods Corp. v. Jim Henson Prod.*, 73 F.3d 1470, 1497 (9th Cir. 1996). The use of the CANDYLAND name with a pornographic Web site is quite a far cry from using it to describe a child's board game.

84. *See Hasbro*, 40 U.S.P.Q.2d at 1480. The court failed to give further reasoning, such as whether the name CANDYLAND can ever be used by a party other than Hasbro and in a manner other than in reference to Hasbro's board game. *See id.*

85. *See* 15 U.S.C. §§ 1125(c)(1), (2), (4).

86. *See supra* text accompanying note 72 for the elements of a prima facie case.

87. *See, e.g., Hasbro*, 40 U.S.P.Q.2d at 1480.

88. 15 U.S.C. § 1125(c)(2).

89. *See id.*

The statute ends by noting that a defendant charged with trademark dilution may assert a fair use defense.⁹⁰ Here, a defendant may allege use of the trademark “in comparative commercial advertising or promotion to identify the competing goods or services of the owner of the famous mark.”⁹¹ The fair use defense was successfully employed in *Playboy Enterprises, Inc. v. Welles*.⁹² The defendant was a Playboy cover-model in May 1980, and PLAYMATE OF THE YEAR[®] in June 1981.⁹³ Playboy Enterprises, Inc. (PEI) hosts two popular Web sites on the World Wide Web in addition to its normal publishing activities.⁹⁴ PEI owns federally-registered trademarks for the terms PLAYBOY[®], PLAYMATE[®], PLAYMATE OF THE MONTH[®], and PLAYMATE OF THE YEAR[®].⁹⁵ PEI sued, maintaining that Welles' use of these trademarks erroneously led websurfing consumers to believe her site was affiliated or sponsored by PEI.⁹⁶ PEI admitted that Welles was not contractually restricted from using the trademarked terms, but argued that trading on Playboy's marks, so as to compete with Playboy Enterprises, and attracting customers in a prominent manner constituted an infringement and trademark dilution.⁹⁷

The court responded to PEI's arguments by comparing the PLAYMATE[®] designation to the prestige and notoriety associated with winning an Academy Award or a Heisman Trophy.⁹⁸ Since Welles was designated PLAYMATE OF THE YEAR[®], she could assert a “fair use” defense, and PEI must carry the burden to sur-

90. *See id.* § 1125(c)(4)(A). The fair use defense is also a defense to trademark infringement and copyright infringement. *See* JANE C. GINSBURG ET AL., TRADEMARK AND UNFAIR COMPETITION LAW 44 (2d ed. 1996). In addition to the fair use defense, noncommercial use of a trademark and all forms of news reporting and commentary are defenses. *See id.*

91. 15 U.S.C. § 1125(c)(4)(A).

92. 7 F. Supp. 2d 1098 (S.D. Cal. 1998).

93. *See id.* at 1100.

94. *See id.*

95. *See id.*

96. *See id.* at 1101. PEI was likely suing Welles in an attempt to dissuade her and other former playmates from venturing out on their own. PEI maintains its own Web site termed a “CyberClub,” where \$60 allows access to real-time chats with former PLAYMATE[®] models and includes the privilege of viewing photographs of respective models. *See id.*

97. *See id.* at 1102–03.

98. *See Welles*, 7 F. Supp. 2d at 1102.

mount the defense.⁹⁹ The court denied PEI's injunction after analyzing a long list of factors weighing in Welles' favor, such as her use of prominent disclaimers, and ultimately concluded that PEI failed to show a likelihood of success on its infringement claim and dilution claims against Welles' fair use argument.¹⁰⁰

D. Legislative Intent of FTDA: Application to Internet?

Before analyzing the case law applying the anti-dilution statute to meta-tags, a brief digression into a review of legislative history provides some evidence that Congress contemplated extending protection to the World Wide Web through the anti-dilution statute.¹⁰¹ The legislative intent underlying the FTDA appears to be motivated by an adherence to a more global policy of protection.¹⁰² Comments made by the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary¹⁰³ provide support for this basis, including comments made in the context of expanding this new dilution protection to all famous marks, registered or unregistered.¹⁰⁴ Such comments included Senator Patrick Leahy's (D.-Vt.) statement that "it is my hope that this anti-dilution statute can help stem the use of deceptive internet addresses taken by those who are choosing marks that are associated with the products and reputation of others."¹⁰⁵ Although the remark was likely referencing an-

99. *See id.* at 1103–04. The court recognized that "PLAYMATE OF THE YEAR[®], 1981," fairly and in good faith described Welles, and therefore, was a fair use of the trademark. *See id.* at 1104.

100. *See id.* at 1104–05.

101. *See, e.g., infra* note 105 and accompanying text.

102. *See* 3 MCCARTHY, *supra* note 26, § 24:90 (discussing Congresswoman Patricia Schroeder's (D.-Colo.) feeling that limiting federal remedies would be adverse to the United States' position as a leader in protection of IP).

103. The Subcommittee referenced here is the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary, to whom the bill requesting the amendment of the Trademark Act of 1946 was sent. *See* Malla Pollack, *Time to Dilute the Dilution Statute and What Not to Do When Opposing Legislation*, 78 J. PAT. & TRADEMARK OFF. SOC'Y 518, 519 n.2 (1996). Official hearings were conducted on July 19, 1995, and were chaired by Congressman Carlos J. Moorhead (R.-Cal.). *See id.* at 522 n.12.

104. Congresswoman Patricia Schroeder offered an amendment to include *all* famous marks, registered and unregistered; the Subcommittee ultimately adopted this amendment. *See id.* at 522.

105. 141 CONG. REC. S191312 (daily ed. Dec. 29, 1995). Senator Leahy's quote, although made in reference to cybersquatters who buy choice domain names to later ransom off at steep prices, has also been used to support the assertion that the anti-dilution

other Internet-related legal issue — cybersquatters holding domain names for ransom — the clear language of Senator Leahy's statement supported the premise that the FTDA envisioned application to the World Wide Web.

Additionally, testimony from the Patent and Trademark Office further supports this premise by noting that limiting the protection of this new anti-dilution statute to registered marks alone was “not within the spirit of the United States' position as a leader in setting the standards for strong worldwide protection of intellectual property.”¹⁰⁶ Indeed, the House even finished the Report by accepting the expansion of all famous marks to protect the United States' position with its trading partners that famous marks should always be protected, regardless of whether they are registered in the country under which they seek protection.¹⁰⁷

Thus, legislative history demonstrates that this new anti-dilution statute was designed to extend to something as seemingly expansive and limitless as the World Wide Web. The statute, in its attempt to remain purposefully broad, also reflects this concept. Nonetheless, the courts, through their interpretive powers, decide the statute's range of application and final definition.

E. The Case of the Invisible Infringer: A Look at Case Law

The first case to include a cause of action for unauthorized meta-tagging of trademarks was *Playboy Enterprises, Inc. v. Calvin Designer Label*.¹⁰⁸ PEI sued, alleging a host of offenses, including dilution, against the defendant's use of the registered trademarks PLAYBOY® and PLAYMATE® as meta-tag keywords within its site and domain names.¹⁰⁹ The United States District Court for the Northern District of California held that PEI demonstrated a likelihood of success on its infringement and dilution claims, and therefore, ordered injunctive relief.¹¹⁰ However, in terms of meta-tagging, because the defendant used PEI's registered trademarks within its

statute was designed for other Internet-related legal issues. *See id.*

106. H.R. REP. NO. 104-374, at 4 (1995), reprinted in 1995 U.S.C.C.A.N. at 1029, 1031.

107. *See id.* at 4-5, reprinted in 1995 U.S.C.C.A.N. at 1031-32.

108. 985 F. Supp. 1220 (N.D. Cal. 1997).

109. *See id.* at 1221.

110. *See id.*

domain names, it is difficult to say that the injunction was based solely on the unlawful use of the registered trademarks within its meta-tags.¹¹¹

In *Insituform Technologies, Inc. v. National EnviroTech Group*,¹¹² the defendant, National EnviroTech, placed the plaintiff's registered trademarks within its HTML code the meta-tags that comprised two of its Web sites.¹¹³ When a viewer searched for Insituform, the search engine would also return National EnviroTech's page.¹¹⁴ The plaintiff alleged that it suggested to the viewer that there might be an association between the two parties, and it blurred the distinctiveness represented by the name Insituform.¹¹⁵ The plaintiff noted that National EnviroTech failed to mention Insituform in any way on the actual Web site, such as comparison advertising or fair use to compare products and services.¹¹⁶ The defendant readily admitted to using the plaintiff's federally protected trademarks in its HTML code, meta-tags, and eventually entered into a settlement agreement,¹¹⁷ under which the defendant agreed to remove the marks from its meta-tags.¹¹⁸

The most remarkable case to date, however, where once again PEI was the plaintiff, is *Playboy Enterprises, Inc. v. AsiaFocus International, Inc.*¹¹⁹ This was a landmark case because it involved the first monetary damage award given for dilution of trademarks in the meta-tagging of a Web site and also involved a finding of infringement due to the additional use of Playboy's trademarks within

111. The court did, however, partially base its holding on the dilutive use of the trademarks within the defendant's meta-tags. *See id.*

112. The *Insituform* case is unreported, but can be found on the Internet. *See* West Group, *Cowan, Liebowitz & Latman, P.C.* (visited Mar. 15, 1999) <<http://www.cll.com/case1.htm>> [hereinafter *Insituform*]. This case was settled on August 27, 1997. *See id.*

113. *See* Will Roger, *Meta Tags Raise Trademark Issues*, INTER@CTIVE WEEK (Oct. 6, 1997) <<http://jupiter.cs.wayne.edu/~grosky/CSC691/Articles/MetaTagsTrademark.htm>>.

114. *See id.* (discussing the basics of searching on the Internet and also including a brief and limited instruction on how the search engines work).

115. *See id.*

116. *See id.*

117. Interestingly, INTER@CTIVE WEEK reported that, although Insituform's attorney, Joshua Paul, claimed that National Envirotech's actions did violate existing trademark law, National Envirotech's attorney, Marguerite Kingsmill, denied any wrongdoing in the settlement and proclaimed, "There is no law covering trademarks and meta tags," and further espoused, "I think it's going to be difficult to analyze the system under current laws." *Id.*

118. *See id.*

119. No. CIV.A.97-734-A, 1998 U.S. Dist. LEXIS 10359 (E.D. Va. Feb. 2, 1998).

the defendant's domain name.¹²⁰ The court entered a default judgment of \$3 million against the defendants, two Hong Kong based agencies hosting an Internet site at www.asian-playmates.com.¹²¹

These two Hong Kong agencies, AsiaFocus and Internet Promotions, used both the PLAYMATE® and PLAYBOY® trademarks and placed them both in their meta-tags and in the domain names.¹²² The court analyzed this case in terms of the traditional infringement standard of confusion and noted that to prevail under this section of the Lanham Act, a plaintiff must show that the “defendant's use of a colorable imitation of the trademark is likely to cause confusion among consumers.”¹²³ To determine consumer confusion regarding the identity of the goods, the “distinctiveness or strength of the mark” was the most important factor.¹²⁴ From that starting point, the court concluded that PEI's marks were widely known and associated with PEI and that the marks acquired substantial distinctiveness among consumers.¹²⁵ Because the defendant's site similarly portrayed nude pictures of women, a consumer could become confused about the source or identity of the mark's holder.¹²⁶ Therefore, a browser would not truly know if PEI funded or supported the defendant's operation. Strictly speaking in terms of a dilution remedy, the court noted the willfulness of the defendant's actions, holding that such behavior “epitomizes the ‘blurring’ of PEI's trademarks.”¹²⁷

Oppedahl & Larson v. Advanced Concepts, Inc.,¹²⁸ although still pending, has far-reaching and widespread legal implications for the

120. *See id.* at **21–25.

121. *See id.* The court's award of \$3 million might be purposefully exaggerated, so to attract attention, given the likelihood of enforcing such a judgment against a foreign company. *See id.*

122. *See id.* at **6–9.

123. *Id.* at *15 (citing *Lone Star Steakhouse & Saloon v. Alpha of Va.*, 43 F.3d 922, 930 (4th Cir. 1995)).

124. *AsiaFocus*, 1998 U.S. Dist. LEXIS 10359, at *16.

125. *See id.* at *20.

126. *See id.*

127. *Id.* at *21 (concluding that a search conducted on PEI's trademarks would likely lead consumers to an AsiaFocus Web site, which would likely cause consumers to think that AsiaFocus Web sites were somehow affiliated or sponsored by PEI).

128. This case was filed July 23, 1997. To date, the action is still pending. As of March 17, 1999, it is not available on LEXIS or Westlaw, but the complaint can be located on the Internet. *See Oppedahl & Larson LLP, Patent Law Web Server* (last modified Jan. 3, 1999) <<http://www.patents.com/ac/complain.sht>> [hereinafter *Oppedahl*].

use of meta-tags. This case concerns the unauthorized use of the firm name of Oppedahl & Larson within the meta-tags of the defendant's Web site.¹²⁹ Oppedahl & Larson, a New York partnership, hosts a Web site at <http://www.patents.com>, which provides information to the public regarding intellectual property law.¹³⁰

Carl Oppedahl, a managing partner at Oppedahl & Larson, routinely ran checks on its name through an Internet search engine, specifically the Altavista engine.¹³¹ During one of these routine checks in July 1997, he was astonished to find nine URL addresses returned under some variation of the domain-name www. advanced-concepts.com.¹³² These sites were not affiliated with the Oppedahl & Larson firm.¹³³ After carefully searching the text of the Web sites and finding no mention of the firm's name, Carl Oppedahl searched the meta-tags.¹³⁴ The search resulted in the discovery of the names "Oppedahl" and "Larson" imbedded in the meta-tags at least eight times in each of the respective nine URL addresses.¹³⁵ Oppedahl & Larson sued alleging, *inter alia*, federal unfair competition and federal dilution.¹³⁶

Shortly after Oppedahl & Larson sued, the *Wall Street Journal* reported that Robert Welch, the president of the defendant company, said that he added the name to the meta-tags because his Web site mentioned an article that was written by Oppedahl & Larson.¹³⁷ He further stated that "[i]t was one of those four o'clock in the morning mistakes, when you're not careful about what you're putting in."¹³⁸

Advanced Concepts admitted to the "mistake," but declared it did not know the mistake was illegal.¹³⁹ Carl Oppedahl suggested

129. *See id.* ¶¶ 23–41.

130. *See id.* ¶ 2.

131. *See id.* ¶ 23.

132. *See id.* ¶¶ 23–24. This case also involved two other defendants, but for purposes of brevity and ease, these two defendants are not discussed in the text. *See id.* These two defendants, as contrasted from the defendant Advanced Concepts, meta-tagged the Oppedahl & Larson site only one time. *See id.*

133. *See Oppedahl, supra* note 128.

134. *See id.* ¶ 24.

135. *See id.* ¶¶ 25–35.

136. *See id.* ¶¶ 15–47.

137. *See Davis, supra* note 29, at B10.

138. *Id.*

139. *See id.*

that Advanced Concepts probably imbedded its name in an effort to garner more clients.¹⁴⁰ Oppedahl's assertion especially rang true because Advanced Concepts offered domain-name registration services, and Oppedahl & Larson provided a wide variety of legal services related to domain-name challenges as well.¹⁴¹

The *Oppedahl* case is an outstanding example of the meta-tag controversy. While other suits may be clouded by the occurrence of domain-name disputes, the subject matter of this suit centered squarely on the use of meta-tags.¹⁴²

One final case is worth highlighting. Although the case contained allegations of an illegal use of a protected trademark in both the domain name and meta-tags again, the case is instructive as it provides a glimpse into where some courts might be headed with respect to trademark law and meta-tags. In *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*,¹⁴³ the Ninth Circuit reversed the trial court's denial of a temporary injunction after concluding that the unauthorized use of another's protected mark in one's meta-tags is actionable under the Lanham Act.¹⁴⁴ The case involved an entertainment industry news provider who sued the owner of a video store rental chain for using its trademarked name "MovieBuff" in its domain name and its meta-tags.¹⁴⁵

Although the facts are similar to most of the other meta-tags cases, the *Brookfield* decision is notable in that the Court expressly couched a cause of action for the unauthorized use of a protected mark within the defendant's meta-tag in the traditional trademark infringement framework.¹⁴⁶ Specifically, the *Brookfield* court found that a consumer, upon perusing a listing of search results containing both the legitimate and unauthorized websites, is likely to sustain some degree of initial confusion.¹⁴⁷ Although it remains arguable whether *any* confusion occurs in the mind of the consumer, and re-

140. *See id.*

141. *See id.*

142. Incidentally, as a rather humorous and sarcastic prank, an anonymous person created a Web site devoted solely to disclaim any use, association, or knowledge of Oppedahl & Larson, Carl Oppedahl, Larson, or Carl. This site is located at <<http://www.geocities.com/CapitalHill/lobby/6620/index.htm>>.

143. 174 F.3d 1036 (9th Cir. 1999).

144. *See id.* at 1066.

145. *See id.* at 1041-43.

146. *See id.* at 1061-66.

147. *See id.* at 1062-63.

regardless of the quality or duration of the confusion, the Ninth Circuit found the possible “initial” confusion to be sufficient to allege such meta-tag violations under the traditional trademark infringement framework.¹⁴⁸ This case will be discussed below in further detail.¹⁴⁹

F. Lessons Learned: What Is All the Confusion About, Anyway?

Since the enactment of the anti-dilution statute three years ago, most of the cases pertaining to meta-tags have ended in verdicts or injunctive relief favoring the plaintiffs.¹⁵⁰ However, those cases always included the use of the plaintiff's trademark within the infringer's domain name. What happens when the trademarked terms appear only in the meta-tags? Can a plaintiff succeed under a claim for infringement, or is dilution the more suitable remedy for meta-tags?

Nonetheless, to deduce the exact reasons why a dilution remedy is more suitable, the differences between proving infringement and proving dilution must first be examined. As evidenced by the previously discussed case law, dilution was the most common cause of action involved in the meta-tag cases. This popularity is likely attributable to the fact that the anti-dilution statute does not require proof of likelihood of confusion, a standard of proof required under an infringement cause of action.¹⁵¹ As one court duly noted, in distinguishing between infringement and dilution:

Dilution is an injury that differs materially from that arising out of the orthodox confusion [required under infringement]. Even in the absence of confusion, the potency of a mark may be debili-

148. See *id.* at 1066 (“Using a competitor's trademark in the metatags of such web site is likely to cause what we have described as initial interest confusion. These forms of confusion are exactly what the trademark laws are designed to prevent.”).

149. See *infra* notes 175–82 and accompanying text.

150. See *Calvin Designer Label*, 985 F. Supp. at 1219 (holding in favor of the plaintiff); *Asiafocus*, 1998 U.S. Dist. LEXIS 10359, at *25 (holding in favor of the plaintiff); *Insituform*, *supra* note 112; *Oppedahl*, *supra* note 128.

151. See 3 MCCARTHY, *supra* note 26, § 23:1. Likelihood of confusion for federally-registered marks is determined by examining whether a person's use is “likely to cause confusion, or to cause mistake, or to deceive.” *Id.* For unregistered marks, likelihood of confusion is demonstrated when a use “is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association” of the defendant with the plaintiff. *Id.*

tated by another's use. This is the essence of dilution. Confusion leads to immediate injury, while dilution is an infection which, if allowed to spread, will inevitably destroy the advertising value of the mark.¹⁵²

As previously stated, a dilution claim may exist irrespective of any real or potential consumer confusion, and independent of any requirement that the plaintiff satisfy the common trademark standard of likelihood of confusion.¹⁵³ A dilution claim also exists without regard to competition between the parties.¹⁵⁴ The difference between infringement and dilution is worth restating:

For dilution to occur, the relevant public must make some connection between the mark and both parties. But that connection is not the kind of mental link between the parties that triggers the classic likelihood of confusion test. Rather, the assumption is that the relevant public sees the junior user's use, and intuitively knows, because of the context of the junior's use, that there is no connection between the owners of the respective marks. However, even with those who perceive distinct sources and affiliation, the ability of the senior user's mark to serve as a unique identifier of the plaintiff's goods or services is now weakened because the relevant public now also associates that designation with a new and different source.¹⁵⁵

Under a trademark infringement action, likelihood of confusion is the basic test to determine if infringement has occurred.¹⁵⁶ In contrast, for dilution, the examination focuses on the distinctiveness and embodiment that a particular mark has acquired over time and the subsequent whittling away of that value through some unauthorized use.¹⁵⁷

Examining the specific actions of a dilutor reveals that one who dilutes another's trademarks is not aiming to defraud and fool the consumer; rather, the principal evil of a dilutor is directed at the search engines and the ability of those engines to read information. The dilutor wishes to fool a search engine. The end result of this

152. *Mortellito v. Nina of Cal., Inc.*, 335 F. Supp. 1288, 1296 (S.D.N.Y. 1972).

153. *See* 3 MCCARTHY, *supra* note 26, § 24.70.

154. *See id.* § 24.71.

155. *Id.* § 24:70.

156. *See id.*

157. *See id.*; GINSBURG ET AL., *supra* note 90.

deception, then, confronts the consumer with the slight *possibility* of confusion. However, in an infringement action, possibility of confusion is not sufficient; the confusion must be probable, not possible. Thus, the problem with trying to remedy the unauthorized use of a trademark in a meta-tag with a traditional infringement claim is attempting to satisfy the requisite confusion requirement.¹⁵⁸

This confusion analysis leads further into the realization that with the act of meta-tag diluting, there will most likely not be *any* confusion recognized. A typical scenario is where the diluting site is returned by a search engine as a high ranked Universal Resource Locator (URL), next to the legitimate competitor's URL.¹⁵⁹ Chances are the consumer will not even think that the products are associated. This is because the consumer will merely see the competitor's name and will have a choice between them.

If confusion does arise through the use of meta-tags, the confusion is initial. Confusion occurs when the consumer, faced with the search results, contemplates why a search for product *X* also produced a result for product *Y*. However, the confusion ends soon thereafter. Consumers, through scanning the results, will determine which product or service they so desire. The consumer will not, however, pause and contemplate, "Hey, Company *X* must be affiliated with Company *Y*." This thought process, required under traditional infringement action,¹⁶⁰ is not a result of the meta-tag diluting nor is it the reason why meta-tag dilutors use another's protected marks. The dilutor's goal is to gain increased exposure through increased traffic; it is not to cause customer confusion, nor is customer confusion a by-product or an unintended consequence.

A dilution remedy to the meta-tagging issue is further supported by an inquiry into the intent of the dilutor. The intent of a meta-tag dilutor is usually deliberate and purposeful and is aimed at diverting customers to a Web site who otherwise would have ended up at the plaintiff's Web site.¹⁶¹ This is best illustrated in the *Oppedahl* case. Recall that in *Oppedahl* an IP firm's managing partner discovered the unauthorized use of its firm name within another's meta-

158. See Ebling & Kreider, *supra* note 43 (pointing out this obstacle with the traditional infringement claim).

159. See *GTE New Media Servs., Inc. v. Ameritech Corp.*, 21 F. Supp. 2d 27, 33 n.4 (D.D.C. 1998) (recognizing that Web site addresses are commonly referred to as URLs).

160. See 3 MCCARTHY, *supra* note 26, § 24:70.

161. See Ebling & Kreider, *supra* note 43.

tags.¹⁶² Here, the intent seems clear. Although one might argue that Advanced Concepts's meta-tags contained the Oppedahl & Larson name because its Web site mentioned an article written by them,¹⁶³ this hardly necessitates or permits the use of the Oppedahl & Larson name to be repeated eight separate times on each separate page of the diluting Web site.

The dilutor, Advanced Concepts, willfully intended to use the Oppedahl & Larson name, but such action increased traffic directed toward its Web site. This was not done to trick customers into thinking that Advanced Concepts and Oppedahl & Larson were affiliated. Nonetheless, a finding that a defendant intentionally attempted to infringe upon the goodwill and reputation of another's trademark will permit a plaintiff to choose damages other than injunctive relief, such as the defendant's profits, by way of an accounting, treble damages, and even attorney's fees.¹⁶⁴

Absent a legitimate use, the unauthorized use of another's trademark in a meta-tag will always dilute the distinctiveness of the mark. However, this will more than likely never cause the requisite consumer confusion needed to prove a traditional infringement claim. Dilution recognizes an injury from any activity that lessens a mark's capacity to denote one source of a particular good or service.¹⁶⁵ Thus, dilution is the more legally sound argument for the unauthorized use of one's trademark within another Web page's meta-tags.¹⁶⁶ However, in the aforementioned cases, the plaintiffs sued under infringement theory and pleaded dilution in the alternative.¹⁶⁷ Since dilution and infringement are separate legal theories, courts should determine "whether or not, assuming that there is *no* likelihood of confusion, there is illegal dilution."¹⁶⁸

162. See *supra* notes 128–36.

163. See Davis, *supra* note 29, at B10.

164. See 15 U.S.C. § 1117(a) (1994).

165. See GINSBURG ET AL., *supra* note 90, at 129.

166. It is important to note that trademark infringement and trademark dilution can be pleaded alternatively as they look to "separate and distinct harms to a trademark." 3 MCCARTHY, *supra* note 26, § 24:70. On the other hand, infringement and dilution can coexist if a court finds that a significant consumer population is likely to be confused and "that among a significant number of consumers who are not confused, the defendant's use will illegally dilute by blurring or tarnishment." *Id.* § 24:70.

167. See *Calvin Designer Label*, 985 F. Supp. at 1219; *AsiaFocus*, 1998 U.S. Dist. LEXIS 10359, at *25.

168. 3 MCCARTHY, *supra* note 26, § 24:70 (emphasis added); see also 15 U.S.C. § 1114(1)(a).

Although many courts have found that dilution flows from a finding of traditional “likelihood of confusion,”¹⁶⁹ this may not be true. A person might or might not think that there is any affiliation or connection between the two products once a search engine utility has returned both sites.¹⁷⁰ If he does think there is some connection, albeit mistakenly, then traditional trademark infringement is a likely finding.¹⁷¹ However, if he does not think there is a connection or affiliation, then a separate analysis to determine dilution is necessary.¹⁷² The dilution theory of wrongdoing rests on the premise that the defendant's use of the mark in the meta-tags does not amount to the strong mental connection, where confusion is likely required under infringement.¹⁷³

In an almost anticlimactic fashion, however, the *Brookfield*¹⁷⁴ case presented the Ninth Circuit with the opportunity to find a cause of action under the Lanham Act *without* any mention of the anti-dilution act.¹⁷⁵ Dubbed as “initial interest confusion,” the Ninth Circuit reversed the trial court and concluded that the unauthorized use of another's protected mark within one's meta-tags is, in fact, actionable under the Lanham Act — that is, under the traditional framework utilized in proving infringement.¹⁷⁶ Again, the *Brookfield* case involved the unauthorized use of another's mark within the meta-tags as well as within the domain names; nonetheless, the Ninth Circuit opened the door for aggrieved trademark holders to allege a cause of action solely under the traditional infringement provisions of the Lanham Act.¹⁷⁷

169. See, e.g., *Academy of Motion Picture Arts & Sciences v. Creative House Promotions, Inc.*, 944 F.2d 1446, 1454 (9th Cir. 1991) (recognizing that “likelihood of confusion” is the ultimate test); see also 3 MCCARTHY, *supra* note 26, § 24:70 (“[I]f the mental connection between plaintiff's and defendant's goods and services is so strong as to create likely confusion as to source, sponsorship, affiliation, or connection, then there must be a mental connection sufficient for dilution by blurring to occur.”).

170. See 3 MCCARTHY, *supra* note 26, § 24:70.

171. See *id.*

172. See *id.*

173. See *id.*

174. See *supra* notes 143–60 and accompanying text.

175. See *Brookfield*, 174 F.3d 1036 (9th Cir. 1999).

176. See *id.* at 1062 (citing *Dr. Seuss Enters. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1405 (9th Cir. 1997)). The court noted, however, that the associational confusion present in the domain name issue was completely different than the meta-tags issue and thus proceeded to utilize a different analysis for the meta-tags issue. See *id.*

177. See *id.*

Without discussing the remedial dilution action, the Ninth Circuit stated that the unauthorized use of another's marks in one's meta-tags triggers a certain degree of confusion, however minimal, and concluded that any confusion, initial or otherwise, is sufficient to be actionable under the Lanham Act.¹⁷⁸ The critical and deciding factor for the *Brookfield* court was the misappropriation of the goodwill of the legitimate and protected mark.¹⁷⁹ Regardless of the confusion element, the court reasoned, the fact still remained that the defendant improperly benefitted from the goodwill that the plaintiff was able to acquire in its trademark. In essence, the deliberate re-directing of a consumer by the use of another's mark was sufficient to plead trademark infringement.¹⁸⁰

Significantly, the court not only conceded the difficulty of finding the requisite confusion needed for trademark infringement,¹⁸¹ but also noted that the traditional eight-factor test commonly applied to infringement cases was not particularly helpful as applied to a meta-tag context.¹⁸² Thus, without so much as a mention of a possible dilution remedy, or even a brief recitation of the developing caselaw with regard to meta-tags and dilution, the Ninth Circuit expanded the avenues of relief for aggrieved trademark holders everywhere by allowing a suit under the traditional infringement action.¹⁸³

One should resort to technology if he wishes to avoid all the trappings of pursuing a legal remedy. Danny Sullivan, a Web consultant who operates Search Engine Watch,¹⁸⁴ suggests it is easy to

178. *See id.* at 1062–63 (noting that both the *Dr. Seuss* case and the Second Circuit have held that initial interest confusion is actionable under the Lanham Act).

179. *See id.* at 1064.

180. *See id.* at 1066.

181. *See Brookfield*, 74 F.3d at 1062 (exclaiming that “it is difficult to say that a consumer is likely to be confused about whose site he has reached or to think that [the plaintiff] Brookfield somehow sponsors West Coast's [the defendant] web site”).

182. *See id.* at 1062 n.24.

183. The Ninth Circuit more than likely chose not to discuss the dilution act because it was not pleaded by either party, and the pleadings frame the issues. Nonetheless, the opinion was comprehensive and lengthy, and thus it seemed appropriate, if not necessary, to at least mention the dilution remedy that many other courts have predicated injunctive relief upon in other meta-tag cases.

184. Search Engine Watch, located at <www.searchenginewatch.com>, is a “respected guide to the practices of various search engines.” Elizabeth Gardner, *Trademark Battles Simmer Behind Sites* (visited Mar. 1, 1999) <<http://www.internetworld.com/print/1997/08/25/news/19970825-battles.html>>.

prevent competitors from hijacking your consumer traffic.¹⁸⁵ First, he recommends using one's trademark repeatedly throughout the different pages of the site.¹⁸⁶ The trademark should also be written in HTML language, not merely in some "pretty graphic."¹⁸⁷ This repetition — coupled with other terms describing the site — will likely rank the legitimate page higher than an infringing site.¹⁸⁸ The sites that "spam" over and over will likely be discarded as search engines tighten the rules and attempt to level the playing field.¹⁸⁹

As a result of case law and subsequent commentary, Web site designers, and persons who refer the outsourcing of these projects, will discern the following as a guidance template: (1) the use of another's mark turns on intent because fair use is an exception under the *Welles* case;¹⁹⁰ (2) one's chances of avoiding injunctive or monetary relief are as good as one's argument (for example, in the *Oppedahl & Larson* case, if Advanced Concepts can successfully argue that it meta-tagged the Oppedahl & Larson name because its Web site contained an article written by Oppedahl & Larson, it might constitute a justifiable use);¹⁹¹ (3) from a technological standpoint, a repetitive use of one's own mark on every page still stands a greater likelihood of being ranked higher in a given search result than the dilutor meta-tagging the same mark;¹⁹² (4) given the premise in (3) above, the relegation of the dilutor's site to the back of the search result is as good as exclusion, given the ever-increasing number of URLs returned on any given search result;¹⁹³ and (5) above all else, any independent Web designer or any firm hiring such a designer needs to understand the legal ramifications of meta-tagging another's trademark.

II. HYPERTEXT DEEP LINKING

185. *See id.*

186. *See id.*

187. *See id.*

188. *See id.*

189. *See id.*

190. *See supra* notes 92–100.

191. *See supra* notes 128–37.

192. *See* Gardner, *supra* note 184 (quoting Danny Sullivan's tips to combat this unlawful meta-tagging).

193. *See id.*

Hypertext linking, now considered the “backbone” of the Web, is so integral to the Web experience that to remove it would be to remove the “Web” from the World Wide Web. Its expediency is unmatched in terms of transporting the user from site to site. Hypertext linking allows a user to merely click on the underscored link and that user will be transported to the linked site almost instantly.¹⁹⁴ It is convenient and efficient.

A. Hypertext Linking: Expedient Internet Guidance

For purposes of this Comment, hypertext linking is classified into two types: surface and deep links.¹⁹⁵ A surface link is one in which the linking site lists the outermost page of another's Web site.¹⁹⁶ Surface linking, as opposed to deep linking, has been well received for the obvious reason that it increases exposure and awareness of the linked sites.¹⁹⁷

Deep linking has recently become the subject matter of a lawsuit, with many more likely to follow.¹⁹⁸ Deep linking occurs when a referring site offers a link to a page deep within another site.¹⁹⁹ For example, compare a surface link, www.apple.com, to a deep link, www.apple.com/products/imac/order.html.

The use of deep linking triggers many legal concerns, including whether the referring site is liable if it contains a link to illegal materials,²⁰⁰ such as Web sites offering pirated versions of software. Or, as is the issue in this section of the Comment, what the legal ramifications are if a Web site, such as one owned and operated by Microsoft, refers a consumer to a link deep within the Ticketmaster site, wherein the consumer bypasses the outer pages of the Ticketmaster site.

B. *Ticketmaster v. Microsoft*: A Prime Example

194. See CASTRO, *supra* note 12, at 18.

195. See Elgison & Jordan, *supra* note 47.

196. See *id.*

197. See *id.*

198. See *id.*

199. See *id.*

200. See Mark Grossman, *Net Framing and Linking: Borrowers Beware*, MIAAMI DAILY BUS. REV., Jan. 23, 1998, at B1.

Ticketmaster, Inc. v. Microsoft Corp.,²⁰¹ was recently filed in a California district court. Ticketmaster sued Microsoft because Microsoft, on its <www.seattle.sidewalk.com> site, imbedded links to Ticketmaster's ordering pages.²⁰² Although Ticketmaster alleged multiple causes of action, including deceptive trade practice and unfair competition, Ticketmaster also added a dilution claim based solely upon hypertext linking.²⁰³

In theory, Ticketmaster would only stand to gain exposure and increased sales through Microsoft's link. However, this was a deep link because it transported the viewer to a page deep within Ticketmaster's site. This deep linking to Ticketmaster's direct ordering page transports the viewer past Ticketmaster's home page.²⁰⁴ Because the viewer bypasses the home page, the viewer never sees, *inter alia*, advertisements, disclaimers, policy information, and any other promotional messages.²⁰⁵ Thus, the viewer ordering tickets for an event first discovered on the www.seattle. sidewalk.com site never has the opportunity to view any advertisements and never sees Ticketmaster's homepage, thereby reducing Ticketmaster's opportunity to advertise its own events and increase sales through this method.

The *Ticketmaster* case raises several issues. First, many parties have asserted, including Microsoft,²⁰⁶ if one ventures out onto the Web, linking is an inherent part of the venture, and hosting a Web page invites others to link to such a page. Second, Microsoft asserted that because linking is so fundamental to the Web, using a link to Ticketmaster's ordering page is lawful and fundamental to the Web experience, and that a declaratory judgment²⁰⁷ supporting

201. This case is unreported, but the first amended complaint can be found on the Internet. See Law Journal Extra, *The LJX Files* (visited Mar. 10, 1999) <<http://www.ljx.com/LJXfiles/ticketmaster/complaint.html>> [hereinafter *Ticketmaster*].

202. See *id.* ¶ 2.

203. See Elgison & Jordan, *supra* note 47, at C6.

204. See *Ticketmaster*, *supra* note 201, ¶¶ 14–19.

205. See *id.*

206. This was just one of the propositions asserted by Microsoft. In all, Microsoft raised 11 affirmative defenses, including the following: (1) assumption of risk, (2) estoppel, (3) fair use, (4) nominative fair use, (5) non-commercial use, (6) news reporting, (7) failure to mitigate damages, (8) failure to state a claim, (9) preemption, (10) unclean hands, and (11) First Amendment. See *id.*

207. Microsoft filed a counterclaim asking for a declaratory judgment on the legality of hypertext linking, claiming that failure to recognize and permit free use of hypertext linking would create a stigma on hyperlinks in general. See Law Journal Extra, *LJX*

Microsoft's use is fundamentally necessary to "remove any chill from the free workings of the Internet."²⁰⁸ Unfortunately, in February 1999, Ticketmaster and Microsoft settled, so observers are left without a judicial ruling on the legality of unauthorized deep linking on the Web.²⁰⁹

Another case that deserves attention for its role in setting precedent on the hypertext deep linking issue is *Washington Post Co. v. TotalNews, Inc.*²¹⁰ Multiple plaintiffs, including the *Washington Post*, *Time* magazine, *Sports Illustrated*, and CNN, sued the defendant which specialized in collecting news stories from reputable newspapers and journals and providing the user with one-click links to such news stories.²¹¹ The defendant, TotalNews Web site, displayed the stories within the largest frame²¹² on its Web page, but continued to run its own advertisements in the bottom frame of the page.²¹³ Instead of transporting the viewer to the plaintiffs' actual Web sites, the defendant's site actually incorporated the copyrighted material of the plaintiffs' sites into its own page.²¹⁴ Thus, the defendant's own advertisements were always visible, while none of the advertisements or disclaimers on the plaintiffs' sites were visible.²¹⁵

The plaintiffs maintained that such activity constituted misap-

Files (visited Mar. 10, 1999) <<http://www.ljx.com/LJXfiles/ticketmaster/answer.html>>, ¶¶ 29-32.

208. *Id.* ¶ 29.

209. See David Buchbinder, *21 Months Later, Ticketmaster & Microsoft Settle Linking Suit*, 15 COMPUTER L. STRATEGIST, Feb. 1999, at 2. For a recent, controversial judicial opinion on the hypertext linking issue, see *ACLU v. Miller*, 43 U.S.P.Q.2d 1356 (N.D. Ga. 1997) (arguably creating a First Amendment right to link); see also Jeffrey Kuester & Peter A. Nieves, *Hyperlinks: A Form of Protected Expression?*, NAT'L L.J., Jan. 26, 1998, at C10.

210. This case is unreported, but a copy of the complaint can be found on the Internet. See Law Journal Extra, *Law of the Internet* (visited Mar. 1, 1999) <<http://www.ljx.com/internet/complain.html>> [hereinafter *Washington Post*].

211. See *id.*

212. Framing, a technology in and of itself, is the name used when a single Web page contains multiple sections, called frames, each of which display separate information. Generally, a user utilizes three-frame technology where there is a small frame on the bottom of the Web page which usually contains the site's advertisements. See Grossman, *supra* note 200, at B1. Another frame usually appears on the left side and this frame typically displays the Web site's table of contents or any links to which it is referring the user. See *id.* The third and largest frame appears in the center of the Web page and displays the main content of the site or of the sites to which it links. See *id.*

213. See *id.*

214. See *id.*

215. See *id.*

propriation, unfair competition, trademark infringement, and false designation of origin.²¹⁶ The parties involved agreed to a settlement wherein the defendant agreed to stop linking to the plaintiffs' sites in a manner that would display the plaintiffs' copyrighted stories within the defendant's own frames.²¹⁷

C. *Shetland Times*: An International Perspective²¹⁸

In stark contrast to Microsoft's position in the *Ticketmaster* case,²¹⁹ the *Shetland Times*, a newspaper in the United Kingdom (U.K.), sued another local U.K. paper, the *Shetland News*, when the *Shetland News* Web site began offering links to stories published in the *Shetland Times*.²²⁰ Once again, as in *Ticketmaster*, the links offered by the referring site, *Shetland News*, were deep links taking the viewer deep into the articles section of the *Shetland Times*.²²¹ The *Shetland Times*'s position on this activity allies with Ticketmaster's theory that such linking constitutes "parasitic activity."²²² The *Shetland Times* won an interim edict, similar to a preliminary injunction, and before a decision on permanent injunctive relief could be granted, the parties settled.²²³

The result was that *Shetland News*, the defendant, was allowed to link to stories on the plaintiff's Web site provided the *Shetland News* site abided by the following terms:

- (a) each link to any individual story shall be acknowledged by the legend "A *Shetland Times* Story" appearing underneath each headline and of the same or similar size as the headline; (b) adjacent to

216. *See id.*

217. *See* Martin H. Sampson, *Hyperlink at Your Own Risk*, N.Y. L.J., June 24, 1997, at 29.

218. The reader might be interested to know that several other United Kingdom cases involving domain name disputes and hypertext linking have recently received attention for their role in strengthening IP rights on the Web. *See* Bina Cunningham, *UK Courts Address Domain Name Issues*, IP WORLDWIDE, (Jan.-Feb. 1998) <<http://www.ipwww.com/jan98/p27uk.html>>; *Marks & Spencer v. One in a Million* (visited Mar. 1, 1999) <<http://www.nic.uk/news/oiam-judgment.html>> (final judgment entered Nov. 28, 1997).

219. *See supra* notes 201-09 and accompanying text.

220. *See* New York Law School, *Communications Media Center at New York Law School* (visited Mar. 15, 1999) <<http://www.cmcnyls.edu/Misc/ShTDTTRO.HTM>>; *see also* Elgison & Jordan, *supra* note 47, at C6.

221. *See* Elgison & Jordan, *supra* note 47.

222. *Id.* at C6.

223. *See id.*

any such headline or headlines there shall appear legibly a button showing the *Shetland Times* masthead logo; and (c) the legend and the button shall each be hypertext links to the *Shetland Times* online headline page.²²⁴

At first thought, it seems Ticketmaster and Microsoft could have stipulated to an agreement similar to that in the *Shetland Times* case. However, the reader should note that before Ticketmaster filed suit, Ticketmaster and Microsoft were in “negotiations” to allow Microsoft to use these “deep” links to the Ticketmaster Web sites.²²⁵ The negotiations failed, however, and Microsoft imbedded the links despite the failed attempt at negotiations.²²⁶ Perhaps Microsoft felt it needed permission to incorporate such “deep” links to Ticketmaster's site; thus, the reason for the negotiations. Or, perhaps Ticketmaster was retaliating due to Microsoft's insistence on using the link despite the failed negotiations. Nonetheless, Ticketmaster's position that its accessibility through the link on Microsoft's site increased the value of such site is seemingly a sound argument, one in which many parties have a vested interest.

The *Ticketmaster* and *Shetland Times* cases are representative of the types of actions arising from the use of deep links. While an argument can be made that surface linking is essential to the Web and that such linking is assumed when one consents to business on the Web, deep linking seems to be perceived as more parasitic and as being a violation of the fundamental doctrines underlying unfair competition law.

D. Should Hypertext Deep Linking Be Prohibited?

Many policy arguments abound with respect to hypertext linking. Without the consent of the referred site, deep links should be prohibited. When one watches television, for example, there are certain “nuisances,” such as having to tolerate the commercials, advertisements, and end credits. Similarly, a magazine reader must

224. *Id.* The detailed terms of the agreement can be found on the Internet. See *Shetland News* (visited Mar. 15, 1999) <<http://www.shetlandnews.co.uk/headline/97nov/-settled/settled.html>>.

225. See Elgison & Jordan, *supra* note 47.

226. See *id.*

filter through pages of advertisements and a multitude of straying subscription cards before he or she finds the table of contents, or better yet, an actual article. In the same fashion, then, when one surfs the Internet, part of the experience entails entering through the front door. Why should a consumer be privileged to information without having to read any disclaimers asserted by the very party offering that information or without being bombarded by advertisements or legal disclaimers?

It seems then, absent consent, hypertext deep linking should be prohibited not necessarily upon a copyright basis, but on the basis of unfair competition. As nebulous as the law of unfair competition can seem, at least in terms of a precise definition,²²⁷ its wide reach provides a necessary foundation and a starting point from which to prescribe parameters and afford remedies that are needed to guide the technology of hypertext deep linking. The Fifth Circuit stated that “[t]he law of unfair competition is the umbrella for all statutory and nonstatutory causes of action arising out of business conduct which is contrary to honest practice in industrial or commercial matters.”²²⁸ Commercial matters such as revenues associated with advertising on permanent Web sites seem the proper subject matter for unfair competition law.²²⁹

The simple fact is that Microsoft chose the link to a “deep” or-

227. McCarthy states that “[t]he term ‘unfair competition’ . . . is too abstract and subjective when divorced from concrete examples.” 1 MCCARTHY, *supra* note 26, § 1:8. Furthermore, a Minnesota appellate court has maintained that “unfair competition is not a tort with specific elements; it describes a general category of torts which courts recognize for the protection of commercial interests.” *Rehabilitation Specialists, Inc. v. Koering*, 404 N.W.2d 301, 305 (Minn. Ct. App. 1987).

228. *American Heritage Life Ins. Co. v. Heritage Life Ins. Co.*, 494 F.2d 3, 4 (5th Cir. 1974).

229. This seems fitting after examining other examples of court-adjudged types of unfair competition, including the use of confusingly similar corporate and business names. *See International News Serv. v. Associated Press*, 248 U.S. 215 (1918) (regarding misappropriation of business values); *Electrolux Corp. v. Val-Worth, Inc.*, 161 N.E.2d 197 (N.Y. 1959) (regarding false representations, false advertising, and the use of “bait and switch” selling tactics); 3 MCCARTHY, *supra* note 26, §§ 9:1–9:4.

Unfair competition law has also been recently utilized to decide a meta-tags case wherein a district court granted injunctive relief for the unauthorized use of another’s protected mark within the defendant’s meta-tags. *See SNA, Inc. v. Array*, Civ.A. 97-7158, 1999 WL 376044, *12 (E.D. Pa. June 9, 1999) (enjoining the defendant’s use of the plaintiff’s trademarked name in its meta-tags after the plaintiff alleged the use constituted an unfair trade practice and noted that the defendant’s use of the trademarked name was a “bad faith effort to confuse internet users that is likely to succeed”).

dering page because it provided the user with one-link away convenience. Similarly, Ticketmaster is on the receiving end of some percentage of increased consumer attention because of the link. Nonetheless, in terms of competing fairly and equitably, all links, absent consent or agreement otherwise, should be limited to the outer-most page, or what is commonly referred to as the home page (e.g., www.ticketmaster.com).

CONCLUSION

Unlike the technology underlying the use of meta-tags, which could one day be superseded by technologies found in successor languages to HTML, such as XML and its RDF tags,²³⁰ hypertext linking needs boundaries. It needs some basic controlling guidelines to which Web designers can turn, absent some private or contractual agreement.

As it stands now, the party that incurs the most risk in Web site design is the party that outsources the design of a Web site to some independent third party, or in other terms, the majority of persons venturing into business on the Web. Where it once might have been a task of finding the best qualified, the task now becomes finding a professional with keen insight into the technologies as well as the legal intricacies involved in such matters. Though most Web design professionals should be astute in such matters, the independent contractor hired by Infospace “slipped in the keywords” without the CEO's knowledge.²³¹ Fortunately, that case ended amicably and Infospace was first presented with a demand.²³² We should all be so lucky. Nonetheless, Web site designers and those individuals “outsourcing” such projects must be appraised of the meta-tag and linking technologies so to minimize one's chances of unknowingly engaging in such unlawful activities.

In terms of “deep” linking, the user who chooses to imbed such deep links must hesitantly assume all risks involved. Surface linking is assumed and fundamental to one's presence on the Web; “deep” linking has proven to be more treacherous. If one does imbed a deep link, the use of formatting techniques to credit the material

230. See Sullivan, *supra* note 10.

231. See *supra* notes 40–43 and accompanying text.

232. See *supra* notes 40–43 and accompanying text.

should steadfastly be employed. In time, courts will have to provide answers to these questions, but until that time, disputes and unauthorized uses will likely be governed by the intent of the user. Such intent governs the remedies afforded by the previously discussed anti-dilution statute, and such intent will likely control deep linking issues as well.