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### Reference tools

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# Reference Tools : The Treasure Maps of the Internet

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## 1. Introduction

Every world has its own geography. The Internet, purely virtual world though it is, does not escape this rule. However, as is the fashion with worlds relatively unexplored, the geographical tools available to us are, for the most part, similar to the treasure maps of pirates, they indicate where to find useful resources, without giving any real or exact sense of the territory<sup>1</sup>. The maps remain patchy and are content, at first, just to localize different information sources and to relate them to one another. Domain names, hyper-links, search engines are the best known of these tools which I choose to call "reference tools". They are otherwise known under the generic names of 'hypermedia', 'associated tools', 'location information tools' or 'information tagging'.

From the conception of such treasure maps, to their allocation and commercialization, is but a short step, one that some operators have been quick to take. In this way commercialising references and other information location tools has developed whose economic and strategic importance cannot fail to grow. As with every new market, commercial codes and ethics remain to be defined. These

references, at first sight seemingly neutral, give rise to more and more conflicts, both for the distinctive signs they use, and for the relations they establish between particular sections of the web. These are the brand new legal questions which I propose to deal with in this article.

## 2. Categories of reference tools

Reference tools are already numerous, and by their very nature bound to go on increasing. As a result, we can only define them, in a non-exhaustive manner, by the essential functions they pursue. The following functions principally characterize the reference tools upon which this article is based:

- a reference tool has first and foremost a locating function. A certain resource must be found and localized on the Internet.
- a reference tool equally tends to attribute a distinct power to certain resources, both in the way it lists them and in its evaluation of them. The objective is to render *visible* a previously invisible resource.
- finally, the reference tool enhances the resources it presents with an air of seduction and attraction by leading the user to them, sometimes without his knowledge.

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<sup>1</sup> Studies show that search engines do not list more than 16% of the web's resources.

Certain mechanisms or technologies may themselves be considered as references in electronic networks, others are tools which use and index these. All the same, this distinction, however typologically valid, is not relevant here. We shall make no distinction between reference standards as such and reference tools in the following list:

- domain names: these are the commonly accepted form for an Internet resource's IP addresses, such as [www.fundp.ac.be](http://www.fundp.ac.be), or [www.microsoft.com](http://www.microsoft.com). They constitute the first type of localization and reference used on the Internet. I will not deal here with the legal problems raised by domain names in recent years<sup>2</sup>, unless with regard to similar questions posed by the second generation of references. It is nonetheless interesting to note that these contentious aspects are the forerunners of the principle issue dealt with in this article, which is the appropriation of Internet references.

- hyperlinks: these are the "interactive indication of the coordinates of a web page"<sup>3</sup>. They constitute the threads of the Web, inasmuch as these links establish connections between different Web resources. Different kinds of hyperlink may be encountered on the Internet:

- outlink: this records the electronic address of the target site, clicking on this link sends the address to the navigator which then directs the user to

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<sup>2</sup> WIPO, *The management of Internet addresses: Questions of intellectual property*, Final Report on the consultative process of the WIPO on Internet domain names, 30 April 1999, available at <http://wipo2.wipo.int>.

the site. These are the most used and best known type of link. They appear on websites as underlined text in another colour.

- in-line link: this is a pointer to a document, image, sound sequence or any other type of media, situated somewhere else on the Web, but called up on the linking site in such a way that the media thus linked appears on it. In other words, the visitor to a site sees a text or image on that page which in fact comes from another. For example, the logo of the University Faculties of Namur which appears on the CRID pages, in reality comes from another web page and has not actually been reproduced and installed on the CRIDs own specific page.
- framing: framing occurs when the material from an in-line link appears in the page border of the linking site. The page is thus divided into various spaces or "frames". The linking site is sometimes referred to as the "parasite", a clearly pejorative title<sup>4</sup>.
- meta-information and other HTML web page configurations: All information concerning machine-readable web resources can be considered as meta information. Its best known component is the meta-tag which is incorporated into web page composition to give it key-words or pertinent descriptions. As an example, the welcoming page of the Namur Law Faculty site includes in its

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<sup>3</sup> Definition given by the CIPertexte site, <http://www.droit.umontreal.ca/-farassef/cipertexte/index.html>

<sup>4</sup> HAYES D, 'Advanced copyright issues on the Internet', note 250, available at [http://www.fenwick.com/pub/coyright\\_internet.htm](http://www.fenwick.com/pub/coyright_internet.htm).

source-code the description of the page content as "Presentation of the faculty of law and the research centres", as well as the following key-words: law, candidacy, computing, privacy, contract, tort, audio-visual, copyright, expert systems, legal data bases, teaching, management, technology, information. These do not constitute references or localisations on the Internet in the strict sense of those terms, but are principally used by tools such as search engines to reference web pages. Search engines explore the source codes of sites they visit in search of titles, meta-tags and even words in the text. As a result, many web designers see to it that certain words appear in meta-tags or in the first lines of the text in order that search engines pay them attention and, particularly, index them in one category, even if a more precise analysis of the site content would index it in another one.

- search engines, directories, index and metasites: these reference tools have information provision and material research on the Internet as their objective. These services use electronic agents known as crawlers or spiders to prospect the network, make temporary copies of the information retrieved and draw up indexes. Search engines draw on these indexes for resources corresponding to the term entered by the user. Some also offer consultation of the index itself, which most often consists of a tree of links organized by country and sector of activities and services. Some sites have specialized in the creation of indexes and the collection of links related to a precise subject, such as legal resources on the net, MP3 music files, cinema or fly-fishing. Some programs also offer research through automatic surfing of the Net, according to preferences determined by the

user, collecting the pages of interesting sites and storing them on the user's hard disc. Such tasks are often carried out at night to take advantage of lower connection charges, which gives the internaut the chance to consult pages off-line, thus benefiting from higher consultation speeds, greater time and flexibility.

- portals: these openings onto the Internet offer the user a point of entry where a series of services and a preliminary directory of other resources can immediately be found. They can best be described as one-stop-shops giving access to either generalized<sup>5</sup> or specialized subjects or types of activity of interest to the user<sup>6</sup>. These portals enjoy a growing economic and strategic importance and aim to offer users "ready to wear" access to the network, containing all the primary services the user requires, such as e-mail, search engine, electronic payment system, agenda, weather reports, fax service etc.

- publicity banners: these are hoardings that appear on web pages extolling the virtues of a certain product or service. Clicking on such a banner sends you to the commercial site responsible for the advertisement. It seems pertinent to include banners in the list of Internet reference tools, inasmuch as these guide the internaut to specific selected commercial sites. The aim is therefore not to advertize vendors or service suppliers in a more or less haphazard blanket manner, but rather to guide potential clients to the source of information they are looking for.

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<sup>5</sup>This is notably the case with Yahoo's or Netscape Centre's welcome pages.

We have already said that this list does not pretend to be exhaustive. One might also consider labels used by PICS systems<sup>7</sup> as reference tools, insofar as they permit a discriminative selection of Internet content and guide the user towards certain sites which correspond to the values scale he or she has determined, to the detriment of other sites which the system excludes.

### 3. Liability for the reference

#### 3.1 Issue at stake

The essential question here is to know whether it is always legitimate to establish a reference to another Internet resource. Can anything be linked to anything in any circumstances? Can someone refer to my site, or use my distinctive signs, without my knowledge, when classifying a search for a third party? What sort of relationship does a reference tool establish between two resources? Alain Strowel speaks of hyperlinks in terms of "dangerous liaisons"<sup>8</sup>. Links have indeed given rise to the first cases of litigation in this area<sup>9</sup>, to the general outrage of the Internet community at

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<sup>6</sup> One also speaks of vortals, or vertical trade communities, which offer specific information or services to a particular economic sector.

<sup>7</sup> LIVORY A, 'CEE, contrôle du contenu circulant sur Internet : une approche particulière, le contrôle par l'utilisateur et le système PICS', *DIT*, 1997 6, 52-54.

<sup>8</sup> STROWEL A, 'Liaisons dangereuses et bonnes relations sur l'Internet. A propos des hyperliens', *A&M*, 1998 4, 296.

<sup>9</sup> For a very complete list of litigation in this field, see KUESTER J & NIEVES P, 'Hyperlinks, frames and meta-tags, an intellectual property analysis', *38 IDEA: J.L. & Tech.* 243, 1998, p. 24 seq.

large who insist, quite reasonably, that the very nature of the Web is its links, and that it would be ridiculous to even think of prohibiting them.

Nonetheless, we would be falling into a state of innocent naivety if we were to think that anything could be connected to anything, should be linked to everywhere and that this skeletal structure, this primary referential grid, is entirely unbiased and only serves to hold up the house. Far from being neutral, each type of reference listed above has a particular value of itself. Often it is less a question of linking two resources, but of making a statement on the alliance thus joined.

Though this does not imply that the site referred should always be able to control the company it finds itself in, yet at least it means that in the event of a prejudicial link being formed, certain legal avenues, which we shall deal with in a moment, will be open to it.

### 3.2. Copyright

Copyright has frequently served as the first line of attack in hyperlink litigation.<sup>10</sup> Apart from conflicts concerning a specific hyperlink towards a particular protected content, certain copyright holders of protected works are beginning to call for a remuneration for any link that is made to their work. Thus, in the USA, ASCAP (American Society of Composers, Authors and Publishers), the copyright collection

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<sup>10</sup> The Shetland News Case, Court of Session: Outer House Cases (1996), Oct. 24, 1996, for an analysis of copyright means, see Strowel, *op.cit.* p. 302 et seq.

agency for musical works, recently sent a series of letters to webmasters demanding a payment for any link to on-line music.<sup>11</sup> Even if the copyright society only intends to press charges where it is proven that the link referred genuinely has music on the same server, simply sending the letter has had the effect of scaring a lot of webmasters who are thereby pressured to deactivate the litigious link, most often in a state of high rage at that which they consider to be a typical case of might being right.

It seems to me, however, that the argument according to which the establishment of a link constitutes an act of exploitation of a work which is subject to the author's approval, is one that is rarely proven. Indeed, inserting a link does not constitute a reproduction of the work, inasmuch as the link itself in no way fixes the work, but only goes as far as to show where it can be found. This is sometimes less clear in the case of in-line links, or frames for which the linked resource has been called into the linking site in which it now appears, without there being any indication given to the visitor as to whether the elements originate from that site or not. Although, even in this case, it is only when the user consults the site that the computer will call-up the linked image or text from another location and install it on the page. Reproduction only takes place at the behest of the internaut and on the active memory of his machine.

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<sup>11</sup> SPRENGER, 'Music licensor shakes down web', *Wired News*, 1 July 1999, available at <http://www.wired.com/news/>

It is sometimes confusing. For example, Alta Vista has developed a search engine capable of finding images on the Internet. Once the engine is apprized of the search theme, it will show the results on-screen in the form of vignettes containing the retrieved images. Is this reproduction? No, not if the user decides against it, even though the page appears, at first view, to "reproduce" each image.

If reproduction has indeed taken place, then it will be found on the terrain of adaptation rights or intellectual reproduction of works.<sup>12</sup> Could not one realistically argue that a web page constructed on the basis of calling up other works via links, in fact constitutes a derived work? Even if the effective realization of the page takes place only when someone actually visits it, the derived work which constitutes the page has been conceived by its site designer as a whole incorporating linked works. A web site is anyway, when all is said and done, a "virtual collective" work comprising all the images and texts legible and visible to the user. Links necessitate an incorporation, at least in the virtual sense, of linked material in this collective work, thereby creating a new derived or adapted work. One argument for this point of view is that the linked material accentuates the value of the linking site. The moral right of a work's integrity would evidently play an important role within this framework.

The right of adaptation argument is clearly less strong in that which concerns out-links, or the results of searches rendered by machine in a fully automatic manner.

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<sup>12</sup> This argument is often advanced by American jurists who refer to "derivative work", see HAYES, *op.cit.*

Recourse to other aspects of author's rights is equally difficult.<sup>13</sup> It does not seem justifiable to me to pretend that drawing attention to a work by means of a link can be considered as putting it at someone's disposition<sup>14</sup> or communicating it to the public. A simple reference to a work does not, in my opinion, constitute a new act of making it available.

On the other hand, we have been witnessing for a while now a new offensive by copyright holders on the issue of hyperlinks, on the basis of responsibility for, or complicity in, a violation of copyright by third parties. IFPI, the international federation of phonographic producers, is taking a program designer to court for a program that searches for MP3 files on the Internet, files of which the most notable feature is that the majority of them are placed at the disposal of the public without the least authorization from the copyright holder. In this framework, a knowledge of the litigious nature of the material being communicated should be a key element in determining the responsibility of the linking site. For example, indicating illicit MP3 sites knowingly or when drawing a substantial promotional fee seems to me to involve liability for the copyright violation which then follows.

A similar approach was taken by a German court ruling, which considered that to establish a link to an American site with the sole purpose of making the kind of

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<sup>13</sup> see also the arguments on the side of the defense, notably the recourse to an implicit license, in STROWEL, *op.cit.*, p. 301-302.

<sup>14</sup> According to the terminology and definition of this right in the WIPO Treaties of December 1996 and in the draft European Directive on copyright harmonization in the information society.

comparitive publicity which is forbidden in Germany, constituted a violation of the relevant German law<sup>15</sup>.

### 3.3. Civil responsibility, unfair competition and brand law

Civil liability and commercial practice are the most used tools for the pursuit and sanction of indelicate liasons in the field of references. We have seen metatags are used like beacons to signal the content of a site to be visited to a search engine. This is, however, a reference tool that can be used to good or evil ends. The majority of sites incorporate into the writing of their pages key words which genuinely reflect their content. Others use metatags either to attract visitors who are actually looking for a more reputable or well-known site, or to trick monitoring and filtering technology. This last is notably the intended aim of pedophile websites who incorporate far more innocent key-words into their metatags, such as "bambi" for example. This multiplies the difficulties of police services in identifying illicit sites and may even enable such sites to pass through the fine mesh of nets that have been woven by filtration systems designed to block access to certain sites according to a preselected value scale laid down by the user. It is equally a cunning move that is known to amateurs of this type of site who then know just where to find the destination they seek.

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<sup>15</sup> Landgericht Frankfurt, 27 May 1998, available at <http://www.netlaw.de/urteile/lgf-6.htm>

Another type of practice has given rise to some recent litigation, when a site incorporates metatags into its page carrying its competitor's brandname, with the intention of attracting potential customers away from the latter to their own site. Recently, an American judge found in an appeals case of the sort that opposes two competitors of which one has incorporated the other's brandname in his metatags<sup>16</sup>. The judge considered that such behaviour was equivalent to using the trademark in a commercial insignium and constituted a dilution practice.

In another case, *Playboy Enterprises Inc. v. Calvin Designer Label*<sup>17</sup>, an Internet service provider had seeded his site and its source code with references to Playboy, which is a frequently used search word. He had also registered the domain names *playboyxx.com* and *playmatelive.com*. The bench formally forbade usage of the Playboy trademark in whichever way, including metatags. On the other hand, in another case involving the firm Playboy, the bench considered that the insertion of the terms *playboy* and *playmate* in the metatags of the personal webpage of a former playmate did not constitute illicit use, inasmuch as these terms belonged to the personality of the young woman and that their purpose in this context was to characterize her<sup>18</sup>.

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<sup>16</sup> *Brookfield Communications Inc. v. West Coast Entertainment*, US Court of Appeal, 9th Circuit, 22 April 1999, n° 98-56918, available at <http://www.vcilp.org/Fed-Ct/Circuit/9th/opinions/9856918.htm>; see also cited cases in KUESTER J & NEVES P, op.cit.

<sup>17</sup> <http://www.jmls.edu/cyber/cases/calvin1.html> .

<sup>18</sup> *Playboy vs. Terri Welles*, 9th district California, 20th October 1998, see WERY E, 'Marques protégées et métatags : Playboy débouté', *D&NT*, January 1999, <http://www.droit-technologie.org>

Under Belgian law, the creation of confusion between products or services of two companies, or between their respective reputations, constitutes an act contrary to fair trade practice, on the basis of article 93 and 94 of the commercial practice law. More specifically, the fact of drawing undeserved profit from the fame<sup>19</sup>, or creative and financial efforts of a competitor<sup>20</sup>, or of a sales trend in favour of articles commercialized by him, could be sanctioned on the same basis.

Exploiting the reputation of another, for example by creating an association between his product and that of a competitor or by causing one to believe in the existence of favourable contractual relations would be equally condemnable. Under French law, once a company attempts to promote or describe its own offer by making reference to a competitor through the use of his distinctive sign, in such a way as to make one believe that his service is of the same quality as that of the latter, the bench condemns this as "indiscreet re-appropriation" of clientele<sup>21</sup>. The application of such a theory to metatags would be most interesting.

If the association is made using a registered trademark<sup>22</sup>, article 13A, 1, d.) of the Uniform Benelux Law on trademarks allows the bearer of a registered trademark to oppose *"any usage of that trade mark or of a sign resembling it, in business and without just motive, for any purpose other than identification with those products,*

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<sup>19</sup> DE CALUWÉ, DELCORDE & LEURQUIN, *Les Pratiques de commerce*, Brussels, 1973 (edition on looseleaf sheets, 1991), n° 623, p. 705.

<sup>20</sup> BUYDENS M, *La protection de la quasi-cr ation*, Bruylant 1993, p. 711 et seq.

<sup>21</sup> BUYDENS, *op.cit.*, p. 734

<sup>22</sup> Case SAFIC/Distrimart, TGI Paris, Ref, 4 August, Au Fil du Net n° 14, *Gaz. Pal.*, 15/3/98, p. 25

*when such usage makes undue profit out of the distinctive character or reputation of that trademark and could be prejudicial to it*<sup>23</sup>. Use in business life has been defined by the Benelux Court of Justice<sup>24</sup> as the use of a trademark or sign by someone in connection with their own goods or services, with the intention of favouring their own offer or to denote their own company. Thus, secreting the brand name or trade mark of a competitor in the source code of one's web page, with the purpose of attracting visitors, would amount to illicit use. The fact that the use of the trademark is furtive does not seem to me to present a barrier to the application of the Uniform Law, inasmuch as this invisibility forms a part, paradoxically, of the very nature of the mechanism of visibility used on the Internet, and therefore part of the designation of the firm and its activities.

As regards prejudicial use, it must consist of a diminishing of the power to incite custom<sup>25</sup>, which might consist in a reduction of the distinctive power of the trademark by dilution, or an attack on its advertizing power through degrading use. This last point would certainly be the case in the use of the Disney brand or the name Bambi in a metatag on a pornographic site. Here the attack on the brand concerns the function of the symbol and the emotional associations which accompany certain trademarks, even to the point of detaching them from the actual product.

As regards the dilution of the trademark, one may easily imagine that the indexing of a site, by means of forged metatags, in certain categories of products or services of

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<sup>23</sup> Unofficial translation

<sup>24</sup> CJB verdict hagens Transporter, case 81/5, 29 June 1982, Rec. 1981-1982, p. 40

good repute is capable of diminishing the incitement to buy of these reputed products, whose distinctive character is diluted by proximity to the products, whether they be similar or not, of its less reputable rivals.

The Uniform Benelux Law on trademarks explicitly envisages that the misuse could take the form of the offer or launching onto the market of products under this sign or the use of the sign in business documents or advertizing. Does not the construction of a web page proposing products constitute a form of launching onto or making available on the market? If one maintains that visibility is an essential prerequisite for e-commerce, the insertion of such meta-information in html pages cannot be considered as other than a usage intended to place one's products under a protected brandname on the electronic market.

European regulations pertaining to trademarks establish a similar protection<sup>26</sup>, although limited to famous trademarks.

#### 4. A particular case: advertizing banners and key-words on the Internet

The insertion of advertizing banners on a web page has become a substantial source of revenue for the majority of services offered free of charge to the web user, such as search engines, services concentrated at portals or free information sites. The portal

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<sup>25</sup> CJB 1 March, 1975, *Ing, Cons.* 1975, p. 73

<sup>26</sup> Case 40/94/CE of the Council on the community brand of 20 December 1993, JO L11/1, 14 January 1994

set up by Netscape recently exceeded the 10 million member mark, which indicates why the advertizing space created by the Internet is a dream target for commercial and publicity firms. All the more so since the web permits a far more targeted kind of advertizing. Indeed, web advertizing usually follows this pattern: the main search engines and other portals draw up advertizing contracts with their commercial partners in order that the latter's banners appear as soon as certain key words are typed into the search box by the user. Thus, if you are looking for information on a car, simply typing in the word "car" will certainly make a banner appear from the car maker who has just concluded a contract with that search engine. In reality, these contracts are negotiated with a cybermarketing or cybertizing company, which buys up publicity space on the net and sells it to its clients. The big advantage of these spaces, in contrast to passive TV or billboard advertizing, is its ability to reach a very precisely targeted public. The key words which the internaut enters, as well as his previous commercial behaviour on and journeys across the web, are automatically transmitted to the cybermarketing firm, by virtue of the contract of space acquisition. This enables the latter to draw up a very accurate profile of the internaut who will then be targeted by advertizing. Such profiling is further accentuated by the use of "cookies"<sup>27</sup> which enable the tracking of an internaut from one connection to another.

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<sup>27</sup> GAUTHRONET & NATHAN, 'On-line services and data protection and the protection of privacy', Study realised for the European Commission. DG XV, p. 31

The criteria adopted by cybermarketers when profiling in this way<sup>28</sup>, which, in the majority, are sent automatically by the search engine, are the user's country of residence, the domain he belongs to (.com, .edu, .org, .be), the sector in which his employer operates, if he goes on-line from his place of work, the company's name, the size of its turnover, the type of browser he uses and his computer's running system, as well as the name of his access provider.

To give an example, Double Click, a pioneer in this field, claims a listing of 10 million users per year and adds 100,000 new ones each day! This poses serious problems of data protection and privacy, which we cannot go into here<sup>29</sup>.

Such a mechanism cannot pass without raising certain unprecedented legal questions. The essential feature of such questions is the use of key words. It seems that cybermarketers, or even the search engines themselves, sell certain key words to their clients or rather arrange that the typing in of a certain word will call up their client's banner. These key words are, in certain cases, protected brand names. Litigation is starting in this field in the USA. The cosmetic company Estée Lauder is pursuing the search engine Excite for having "sold" the key words "Estée Lauder", a brand name of which the company is the holder, to its competitor Fragrance Counter. Whenever an internet user enters these words in the search box, the banner which appears is that of Fragrance Counter, an on-line perfume store.

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<sup>28</sup> *ibidem*

<sup>29</sup> DINANT JM, 'Les Traitements invisibles sur Internet', available at <http://www.droit.fundp.ac.be/crid/eclip/luxembourg.html>

This case unmasks currently little known mechanisms and practices. However, one Internet site has developed a way of throwing some light onto this little game<sup>30</sup>: all you have to do is enter the name of your company, brand or any other word, to see onscreen the advertizing banners that word calls up from all the major search engines. Thus one may easily verify whether someone is hitching a ride on one's brand to pitch their own products. I tested the system with the word Disney. The majority of banners called up were indeed those of the famous cartoon company. However, certain engines displayed publicity for the on-line sale of video cassettes or toys.

We should not, however, be too quick to assume a violation of trademark rights. Disney has doubtless not concluded an advertizing contract covering every search engine. As a result, the advertizing company functioning on the other engines endeavours to deliver advertizing to the internaut that is close to the subject sought, without that client being necessarily a direct competitor of Disney.

In the Estée Lauder case, it is probable that the contract drawn up between the the cybertizer and its client does not address specific key words, but rather engages the advertizer to link their client's promotion to any relevant key word or pertinent user profile. Double Click doubtless introduced the names of different perfume and cosmetics companies in the "perfume" section of its data base. As soon as it receives a key word belonging to that section, the system automatically selects a current client from that sector.

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<sup>30</sup> <http://bannerstake.thomson-thomson.com>

However, would not an action based on trademark rights find its foundation in various precise cases? As with metatags, the issue is clearly one of usage in business, via advertizing, which closely approaches one of the definitions given, as much in the Benelux law as by European Community trademark regulations.

As regards prejudice, we recall that this must consist of a diminishing of the brand's power to incite buyers, whether through a dilution of the brands distinctive power, or by a degrading attack on its advertizing power. One may easily admit, in my opinion, that in the Estée Lauder case, the fact of sending a potentially interested user to a competitor's site is susceptible of diminishing the incitement to buy Estée Lauder products, to the advantage of those of the competition. In this case, the brand has indeed lost its distinctive power, for when used as a key word, the brand melts into a more generic context within its market segment.

The use of advertising to twist or deflect the distinctive function of a trademark seems crucial to me. Indeed, apart from its function as identifier for products and services, the brand also plays a large part in the communication and promotion of products<sup>31</sup>. Therefore, the promotion of a competitor's service or product after the customer has made a clear demand for the brand is a violation of the trademark law. In consequence, negotiation on the key-word which may take place between a search engine or an advertizing firm and a commercial web site may not concern a

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<sup>31</sup> GIELEN C, 'De beschermingsomvang van merkenrecht', in *Algemene problemen van merkenrecht*, F. Gotzen (ed). Bruylant 1994, p. 139.

particular brand name. In riposte, the case of brand names inserted into a category of words referring to a precise economic sector seems a more delicate matter to me, inasmuch as it is a question, not of using the brand name to indicate the activities of a particular competitor, but rather of establishing a data base generally accessible to several advertizing requirements. In this case, the firm is not using the brand of a third party with the intention of profiting from his reputation. On the contrary, the mechanisms upon which the selection and showing of his publicity banner are based, often take place without the knowledge of the competing company.

On the other hand, a recent American judgement dismissed the suit of the company Playboy in its case against the search engine Excite and the navigator Netscape for illicit use of its brand. Indeed, Excite seemed to have sold the keyword "Playboy" to a whole series of pornographic sites whose publicity banners would then appear whenever that term was researched. In vain did Playboy plead the dilution of its trademark. The judge deemed that the words Playboy and Playmate had so far entered common parlance as to be useable as key-words and references for this type of content or service<sup>32</sup>. The justification behind this debateable solution seems to have been that of not authorizing a monopoly of Internet key-words. This judge in a certain way anticipated the flood tide of litigation which threatens to emerge from the increased use of key-words as references on the Internet, which we shall take up under the next point.

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<sup>32</sup> MARINACCIO W, 'Playboy loses trademark suit', *New York Times*, 20 July 1999, available at [http://www.nytimes.com/cent/CENT\\_0\\_4\\_39496\\_00.html](http://www.nytimes.com/cent/CENT_0_4_39496_00.html)

## 5. The use of key-words by browsers

Recent navigators such as Netscape Communicator 4.5 or Microsoft Explorer 5.0 incorporate a technical tool which allows a key-word to be typed in the space normally reserved for the domain name of the site one wishes to reach. The navigator then takes you to the site which best seems to match the typed-in word. Thus we may imagine that to reach the site of the University of Namur, which is <http://www.fundp.ac.be>, it would be enough to type in the words "university namur" in the appropriate space. The result of this is that the user need no longer be so dependent on the use of domain names to reach particular sites but may make use of key-words to localise the services sought. A program, called RealName<sup>33</sup>, developed by the US company Centraal, is also incorporated into certain search engines with the same objective. This system has the particularity of determining the sites most likely sought by users according to the language they have chosen to configure their navigator. Thus the insertion of the same key-word is likely to send Belgian, Italian or American users to different sites.

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<sup>33</sup> X., 'The game of the name', *The Economist*, 31 July 1999, p. 72. This system is notably used by Alta Vista. <http://www.realname.com>

If such a practise becomes generalized, the domain name issue and the conflicts it has given rise to will be nothing compared to the battle<sup>34</sup> which will be fought by Internet merchants eager to obtain certain key-words. The World Intellectual Property Organization (see later WIPO) has already presaged the storm which is rising in this area. In its report on domain names from April 1999, we may read "*the same landrush mentality that applied to domain names may take hold in this area as well, as commercial and other interests seek to arrogate valuable keywords for themselves. The practices and procedures on the basis of which persons or organizations obtain keywords and the manner in which keyword systems operate may well cause difficulties similar to those now encountered in relation to domain names.*"<sup>35</sup>

Currently, key-words seem to have been attributed purely on the system operator's initiative. But everything leads us to believe that the medium-term goal of navigation systems is the attribution of key-words under contract to Internet service providers, doubtless for a fee. This is already the admitted policy of RealName which has more than 20,000 clients who subscribe for the use of a key-word against an annual fee of 100 dollars.

Certain systems already permit the sharing of words between several companies and screen a list of hyperlinks to the different sites linked to the key-word introduced, while others grant exclusive use of the word in question. As a result, key-words

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<sup>34</sup> 10 million internauts use RealName every month, a figure which will probably multiply by 10 in 6 months, which gives us a reasonable idea of what is at stake.

which constitute different protected brands perhaps in different territories cannot be materially used as substitutes for domain names by more than one title holder. This problem of unicity was already present in the case of domain names, there however, the mere addition of a suffix, or first level domain name or geographic distinction, such as .com, .edu, .fr, .be, permitted a diversification of usage for the same brand, for example, with regard to different territories. Such will not be the case for key-words. The following example is given in the WIPO report: several telecommunications companies, localized in different parts of the world, have registered domain names containing the word "telecom", such as Symmetricom (www.telecom.com), Telecom UK (www.telecom.co.uk), TWX Telecom (www.telecom.de), Telecom srl (www.telecom.it). However, enter the key-word "telecom" in the space reserved for domain names, and the user will only be led to the first site, an American company, to whom belongs the domain that owns the .com.

A supplementary difficulty is that navigators may, contractually or of their own initiative, attribute key words protected by a Brand to a person other than the brand holder. The Estée Lauder case risks spawning offspring.

On the other hand, what can one think of the attribution of key words consisting of very common terms such as "car", "computer", "movie"? The word "book" is thus linked to the site of Barnes & Noble, a competitor of Amazon.com in the sale of books on line. In such cases, words which are normally totally denuded of the power

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<sup>35</sup> WIPO Report, op. cit. chapter 5.

of distinctive association with a particular site, possess indubitable commercial value, particularly when they are that kind of word a rank beginner, the dream target of all web sites, would be likely to type into the navigator, thus using them as a simplified search engine.

So, just as the debate on domain names is beginning to calm down, we are witnessing a new emergent field of litigation, on the one side over the issue of the distribution of the distinctive signs that key words represent, and on the other, between these latter and the competing brands. However, unlike the case of domain names, the essential elements of the debate will be concentrated in the hands of the market, inasmuch as there is no question here of the attribution of key words by a company or authority designated to this effect by the government, but rather of attribution being arranged between private parties on the basis of the laws of supply and demand.

Nonetheless, the intervention of the authorities seems justified to us, essentially because attribution is currently taking place under the control of a few companies, such as Netscape, Microsoft, Excite or Yahoo, who enjoy a dominant position on the Internet search and navigation market. Further, if such tools for localization and reference become common on the web, the danger is that the visible and accessible part of that tapestry will become considerably reduced, to the marked detriment, even suffocation, of the genuine richness of the network and to the clear advantage of a handful of major commercial players left pulling the strings, the majority of whom will probably be American.

This intervention could take the form of legal depositions, or at least a monitoring of the contractual practices currently holding sway in the sector, notably with regard to the principles of unfettered competition and the abuse of dominant market positions.

The following principles should constitute the skeleton of any legislation in this field:

- key-word licensing agreements should be submitted to rules of transparency;
- the rights of trademarks should be respected and prevail in the attribution of key words. In the case of competing trademarks legally held by different title holders, navigation tools should screen a list of the sites of these various trademarks holders;
- clear and accessible information concerning the key word technology and its consequences should be provided to users;
- the choice of key word or domain name system should remain open to users;
- the non-commercial Internet must be assured equal benefit from these new technologies.

These principles could equally be translated into action via codes of conduct or other self-regulatory initiatives.

## **Conclusion**

*"When you are born, you live in an expanding world. First you get used to your mother. Then you get used to your father. Then you get used to your brothers and sisters. You go to school and get used to the school. You live in an expanding world. But as you get older, your world starts to narrow and the whole world is difficult to handle, you want it to decrease. As the years go by, you want your world to be smaller and smaller, because you don't have the strength to handle a whole world"*

Extract from the film "Home Free", Anne Smolar, 1997.

If, during the infancy of the Web, we were able to progressively get used to this constantly expanding universe, we now find ourselves unable to comprehend more than an infinitesimal part of it. This is where the interest in reference tools comes from, those virtual white canes which guide us through a world grown too big for us to handle.

But these tools, while hacking tracks through the tangled undergrowth of the web and charting its impossible geography, simultaneously diminish its very immensity. They select, make visible, promote and situate certain information and resources to the detriment of thousands of others which they neglect, reject or keep invisible. The risk is that the worldwide web pumps up these few ever more powerful and greedy

limbs, leaving only a very small portion of the whole available to our markedly reduced powers of comprehension.

It would be naive to pretend that this destruction is merely an inherent aspect of Internet nature and the price of its irreversible progress. This virtual extinction of a large part of its resources is in fact thought out and programmed, at least by default, by the new visibility merchants, some of whose practices we have shown here. At the same time, these reference technologies are contributing to the gradual transition of the Internet, interactive environment par excellence, away from the active logic of a "pull medium"<sup>36</sup> towards the passive logic of a "push medium". The internaut is no longer really free to surf at will, but instead is taken in charge and guided, sometimes without his own knowledge, towards other places and other spaces, frequently commercial ones.

As a consequence, the progress and use of new technologies such as search engines, localization by key word and cybermarketing are matched by the waves they are likely to occasion. We have seen to what degree these waves are already tossing up all sorts of litigation.

If the current legal instruments are sufficiently sharp to deal with the majority of these, legislative intervention will nonetheless be welcome in certain cases, notably in that which concerns the appropriation and commerce in particularly desirable references. Only in a legislative framework, even a self-regulatory one, marked by

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<sup>36</sup> SCHILLER D, 'Bataille mondiale pour la contrôle des réseaux', in *La révolution de la communication*, Manière de Voir, n° 46, Monde Diplomatique, July-August 1999, p. 12.

clarity and respect for the rights of intellectual property and healthy competition, will the confiscation of the internet landscape to the profit of a few operators be avoided.

Geography is never neutral. The schoolbooks in Nazi Germany placed their nation in the centre of the world, while the Mercator flat projection for world maps reduced the apparent surface area of third world countries to the advantage of the industrialized nations. By nature virtual and mobile, the geography of the Internet has, though yet in its infancy, already suffered its share of manipulation. Being aware of this is one step, turning it to the profit of all participants is another.

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