

*Edition* May 2008

*p1* Hyperlinking policy

*p2* Going green – Do your ICT credentials make the grade?

## Further information

**Cameron Abbott**  
Partner

telephone | +61 3 9640 4261  
facsimile | +61 3 9205 2055  
email | [cameron.abbott@middletons.com](mailto:cameron.abbott@middletons.com)

**Mark Feetham**  
Partner

telephone | +61 2 9513 2540  
facsimile | +61 2 9513 2399  
email | [mark.feetham@middletons.com](mailto:mark.feetham@middletons.com)

## Hyperlinking policy

Hyperlinks are an integral part of the World Wide Web. They allow users to navigate the internet using just a mouse or to source files located on remote servers. The use of hyperlinks is so prevalent few people stop to consider the legal implications of how they create or use them.

### Types of hyperlinks

The most controversial types of hyperlinks are:

- deep links
- framing
- inline image links.

#### Deep links

Deep links are hyperlinks to pages which are not the website's homepage. For example, a hyperlink to <http://www.middletons.com/publications/default.asp> would be classified as a deep link because it bypasses Middletons' homepage.

#### Framing

Framing allows a web page to be divided into multiple sections or frames. The use of frames can be contentious where they display files located on remote websites without the viewer knowing that this is occurring.

#### Inline image links

Inline image links or 'IMG links' are used to display images and graphics contained on a third party's server, within your own webpage.

### Factors to consider

Website operators wanting to post hyperlinks to third party websites should consider the following factors.

#### Implied licence

Hyperlinking netiquette (customs or behaviours expected on the internet) does not usually require the website owner's prior consent. In most instances hyperlinks are encouraged as a means of free publicity and increasing web traffic.

However, before using hyperlinks you should first check:

- whether the website has a hyperlinking policy within its terms and conditions
- if the terms and conditions allow your proposed method of hyperlinking.

Hyperlinking policies often allow standard hyperlinks but prohibit deep links. This is because homepages will frequently contain important notifications, advertising and visitor statistics from which the website's owner derives revenue. In *Shetland Times Ltd v Wills 1997*, while the case was ultimately settled out of court, the Scottish court granted an interim injunction recognising the detriment that could be caused by deep linking. Further, in the US case of *eBay Inc v Bidder's Edge Inc*, spider software that scanned the eBay system and created deep links to specific sale items was found to cause damage to eBay. The damage was caused by reducing the value of eBay's service and consuming bandwidth and server capacity.

#### Intellectual property

The main intellectual property (IP) considerations in this field relate to copyright and trade mark law. A simple hypertext reference will not usually cause any infringement of a third party's IP. Where you may find trouble is when:

- inline links are used, or
- the content of the referred website is an unauthorised use of another's copyright works or a registered trade mark.

Where inline links use images in a manner that was not intended or authorised by the copyright owner, there may be a claim for copyright infringement. Further, if that image is a registered trade mark (ie a company logo) the exclusive rights in the mark may be infringed.

Some sites allow inline linking, so check their terms of use. Youtube is a good example. Youtube's 'Embedded Player' allows website designers to use Youtube videos on their own website. You should always be aware that while Youtube may authorise the inline linking, if the video content has been loaded onto the Youtube server without the copyright owner's consent, linking to that material may still constitute an infringement of copyright by way of authorisation infringement.

In *Universal Music Australia Pty Ltd v Cooper*, the operators of the website mp3s4free.net maintained hyperlinks to remote websites containing pirated music. By facilitating the downloading of mp3 files, the operators of the website were consciously aiding users to infringe the copyright owned by the record companies. This resulted in a finding of *authorisation infringement* against them even though the website operators didn't copy anything themselves.

**Passing off and similar statutory claims**

Passing off is an action under tort law against a person pretending to supply the goods of another. Essentially, one party deceptively benefits from another's goodwill and reputation. Discussion on passing off claims from hyperlinking typically arises in the context of framing, but could be made out from any form of hyperlink that is likely to confuse users. Where frames source their content from remote websites, this can create the impression that they belong to the website operator, confusing the viewer as to their origin.

These same facts raise issues under the *Trade Practices Act* or the various State Fair Trading Acts for:

- misleading and deceptive conduct, or
- the making of false representations of sponsorship or approval.

Inline image links which display company logos alluding to a non-existent alliance or affiliation between the two sites may also constitute misleading and deceptive conduct or a false representation of sponsorship.

**Practical considerations**

From a practical perspective, it is important to consider the reputation of the websites that you hyperlink to. No matter which method of hyperlinking you use, it is rare that you will have any control over the content of those sites or have the time to verify its accuracy. This can cause legal implications (such as where a

remote site contains defamatory or illegal material) and commercial concerns where third party content is of such a poor quality that it damages your own reputation and goodwill.

**Recommendations**

If you are a website operator, we recommend you take the following step to minimise your risks of a hyperlinking dispute:

- determine whether the websites you link have hyperlinking policies. If they do, comply with the terms
- if you operate a website without a hyperlinking policy it would be advisable to have one prepared in case another website links inappropriately to yours
- if a website does not have a hyperlinking policy, always link to the homepage
- do not create hyperlinks to content that you suspect is an infringement of another party's intellectual property rights
- it is best to only use framing, deep links or inline links where these are expressly permitted. Ensure that visitors to your website are aware that you are not the owner of that content and that there is no affiliation between yourself and the linked website
- only link to sites that are reputable and try to monitor their content and their hyperlinking policies as these may change.

## Going green – Do your ICT credentials make the grade?

For many businesses information communication technology (ICT) infrastructure is now one of the largest contributors to their carbon footprint. Driven by investor and consumer environmental concerns, organisations are implementing environmental policies across their operations and making green considerations an important factor in ICT purchasing decisions.

Up until very recently the 'green' spotlight has generally focussed most on heavy industries including mining, petrochemicals and utilities. These industries have made attempts to develop robust environmental management policies and have been concerned to establish their green credentials. While not always seen as shining beacons for the environment they have made significant efforts to address environmental concerns raised by their business practices.

That spotlight has altered and it is the IT industry which is under increased scrutiny. Now more than ever before the green credentials of ICT providers are under the microscope and are seen as critical to their standing in the marketplace. As climate change, carbon emissions and energy consumption have become issues of

mainstream concern, customers are now assessing providers on the environmental impact of their technology offerings rather than focussing only on more traditional criteria such as performance and value for money.

**Impact of ICT industry on the environment**

Businesses in Australia generate more carbon dioxide emissions from their use of ICT than the entire civil aviation sector. In the United States, servers alone account for 1.5% of all energy consumption (a figure expected to double in the next few years). Organisations are beginning to factor carbon emission costs into their pricing

structures, as they recognise that use of environmentally friendly ICT is a market necessity.

Rising energy costs too provide a further financial incentive to pursue green ICT solutions. Electricity used for operations and cooling accounts for 60% of the day-to-day running costs of a typical data centre and due to decreasing server prices. It is estimated that it will soon cost more to power and cool servers over their lifespan than to purchase them.

## Businesses and industry response

So what response have we seen from industry? Both consumer businesses and the ICT industry have reacted to global environmental concerns, and have introduced strategies to reduce their carbon footprints and power bills.

The Australia and New Zealand Banking Group estimates that 40-50% of its power consumption is directly related to its ICT infrastructure. By simply banning the use of screensavers in the office, ANZ was able to reduce its energy consumption by 4% and save A\$500,000 in electricity costs.

Macquarie Telecom recently awarded a major ICT contract to Sun Microsystems, passing over its incumbent supplier on the basis that Sun had better environmental credentials and would therefore help Macquarie to reduce its carbon emissions and power usage.

Many ICT providers have become involved in consortiums such as 'Green Grid' and the 'Climate Savers Computer Initiative' which aim to develop energy efficiency standards and metrics for the industry. At an operational level, a number of ICT vendors including Dell, HP, IBM and Sun Microsystems have all developed more energy efficient ICT products and services, and are branding their organisations as environmentally friendly. These vendors are focussing on enhancements to their product offerings in relation to cooling techniques, energy efficiency, recycling and green manufacturing.

New eco friendly technologies are diverse, and include:

- server virtualisation and thin client technologies
- power management applications
- more efficient server configurations and hardware
- improved cooling systems for servers (especially in data centres)
- the replacement of traditional telephone systems with IP phones.

The Australian Federal Government, one of Australia's largest ICT consumers, has indicated that it may introduce government grants of up to A\$1 million for secondary schools to invest in thin client technology. Thin clients were singled out as the preferred technology for their reduced cost and improved energy consumption when compared to the usual desktop environment. As the government rolls out its National Secondary School Computer Fund, providing computers to every student in years 9-12, ICT vendors with strong green technologies appear likely to be well placed to profit from this A\$1 billion initiative.

## Environmentally friendly ICT purchasing and procurement

The shift in the ICT market towards environmentally friendly products and services is already having a significant impact on customer ICT procurement behaviour. Vendors who can demonstrate eco-friendly ICT solutions that respond to customer environmental concerns will win the business.

Middletons has extensive experience advising both suppliers and customers on ICT procurement transactions. We are seeing more and more tenders requiring vendors to demonstrate their 'green' credentials in both their technology offerings and approach to the market. The requirement to demonstrate compliance with robust corporate social responsibility policies and dedicated environment policies is becoming commonplace in larger transactions. Customers too need to be aware of which suppliers offer green ICT products and services.

There is no avoiding the green spotlight. As eco-friendly contracting becomes the norm, customers will vote with their feet. Are you confident that you have the expertise to maximise your organisation's ability to take advantage of an environmentally aware ICT market? Make sure you are not left behind!