

## Internet, Intellectual Property and all that jazz: Hyper-linking, Framing and Meta-tagging

### 1. Introduction

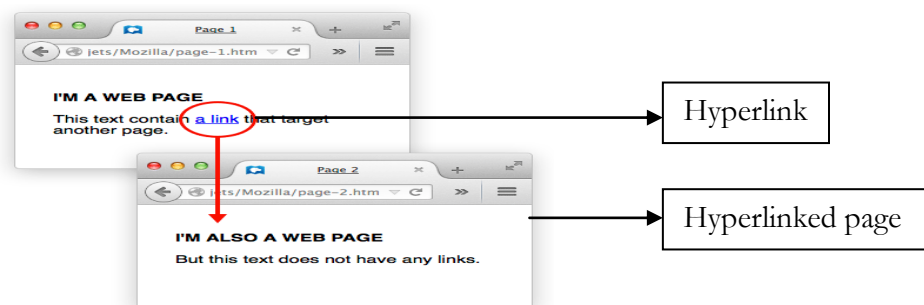
With increased access and connectivity, the internet has become almost ubiquitous. This has led to a plethora of complicated legal issues, rapidly evolving and demanding constant attention. Hyper-linking, framing and meta-tagging are three of the most frequently used features by websites to ensure interconnectivity. The internet is a repository of interlinked information and these features play a huge part in the way internet is used and viewed. In this context, the interim order passed by the Delhi High Court in *PVR Limited v. Just Dial Limited* on April 10, 2019<sup>1</sup> (“**PVR Case**”) could have far reaching implications.

This newsletter analyzes the PVR Case in light of international jurisprudence on hyper-linking, framing and meta-tagging, and makes recommendations on how to use these tools without being on the wrong side of the law.

### 2. Hyper-linking, Framing and Meta-tagging

Internet is home to innumerable websites that comprise various kinds of information. These websites are constructed using the Hypertext Markup Language (“**HTML**”), which instructs a web browser to display content in a particular form as a webpage. In order to associate websites with one another, various tools such as hyper-links, frames and meta-tags (“**Tools**”) are used. Let us start by examining each of them:

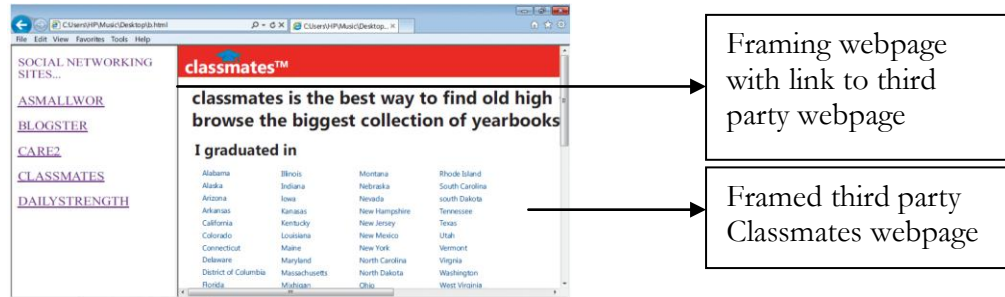
Hyper-linking: Hyper-links are often present in the form of an image, underlined or italicized text on a webpage. By clicking on this hyper-link, the user is directed to the referenced webpage. Hyper-linking can be in the form of “surface-linking” i.e., hyper-linking the home page of the referenced website, or in the form of “deep-linking”, which directly hyper-links a specific webpage from a website. This process enables users to easily access and retrieve related information from a different page.



Framing: This is the process by which a website makes the contents of another website visible on the former’s page but in a separate frame. Framing allows a user to view contents of the

<sup>1</sup> CS(COMM) 187/2019

third party webpage on the framing website that he/she is browsing. It retains certain characteristics of the framing website by incorporating its border and navigation tools.



**Meta-tagging:** Meta-tagging is the process by which a HTML coding statement which describes certain aspects of a website’s content is inserted. Meta-tags primarily serve the purpose of indexing a website or webpage so that someone searching for information similar to information contained on the website is directed to it when keywords matching the meta-tags are entered in a search engine. For example, a website offering AC repair and maintenance services might utilize the brand name of major AC manufacturers (Voltas, Blue Star etc.) as meta-tags in order to optimize search results.

### 3. The PVR Case

This case involved two parties – PVR Limited and Just Dial Limited. Just Dial Limited, through its website Justdial.com (“**Justdial**”), is an online content aggregator that provides listing details of several vendors and facilitates purchase of goods and services by utilizing deep-linking, meta-tagging and framing. PVR Limited is a cinema operator, which operates its own website PVR.com (“**PVR**”), through which it offers information about its movie theaters, shows, timings and a ticket booking facility.

On May 31, 2016, PVR had entered into an agreement with Justdial to allow users to book PVR movie tickets through PVR’s ticketing interface on Justdial. Despite termination of this agreement on August 15, 2018, Justdial continued to list PVR’s movie schedule and offer the option of booking tickets by deep-linking its website with Paytm and BookMyShow, two platforms authorized by PVR for this purpose. PVR initiated legal proceedings against Justdial for infringement of trademark, copyright and claimed passing off arising from:

- unauthorized use of PVR’s trademarks, movie schedule, and pictures of PVR movie theaters which resulted in Justdial exploiting PVR’s goodwill by leading a user to believe that there is a nexus between Justdial and PVR;
- utilizing deep-linking and framing to enable users to by-pass PVR’s website, thereby resulting in increased traffic on Justdial;
- utilizing PVR’s trademarks as meta-tags.

The Delhi High Court was of the view that a prima facie case existed, and accordingly, on April 10, 2019, passed an interim injunction against Justdial, directing it to refrain from using PVR’s registered marks or any deceptive variant thereof in the form of meta-tags. The final judgment is likely to delve into the use and legality of Tools and their use to interconnect

proprietary marks and content with websites that are not specifically authorized to use or display them. This judgment is likely to have a big impact on online content aggregators, who consistently use Tools to operate their business.

In order to understand how Tools are treated in other jurisdictions, we have examined a few case laws below.

#### 4. International Jurisprudence

##### 4.1 United Kingdom

(i) *Shetland Times Ltd v Dr Jonathan Wills and Zet News Ltd*<sup>2</sup>: In what is considered to be the first case of deep-linking amounting to copyright infringement, Zet News placed deep-links from Shetland Times on its website pertaining to various news articles. When a user clicked on one of these links, he/she was directed to that relevant webpage on Shetland Times, comprising the news article. While the parties settled on the final day of the trial, the Court prima facie held that this is tantamount to copyright infringement.

##### 4.2 Canada

(i) *Imax Corp v. Showmax Inc*<sup>3</sup>: Imax Corp sued Showmax for deep-linking and framing of its webpages to create an impression that Imax Corp was associated to Showmax, for the purposes of its proposed large-format movie theatres. The Court agreed with Imax and granted an injunction against Showmax. The Court held that the confusion that would arise from such arrangement was in itself irrefutable evidence of Imax being exposed to serious and irreparable harm.

##### 4.3 United States of America

(i) *Ticketmaster v. Microsoft*<sup>4</sup>: Ticketmaster sued Microsoft for alleged trademark infringement due to placement of deep-links to Ticketmaster's website on Microsoft's sidewalk.com. Ticketmaster claimed that the deep-links caused its homepage to be circumvented, leading to lesser views of the third party advertisements placed on it thereby causing loss of advertising revenue. It also asserted that it had entered into contracts with other vendors to place deep-links to its website, which was subverted by Microsoft's unauthorized actions. While this suit was finally settled outside court, it sheds light upon why deep-linking claims are entertained by courts even if it profits the aggrieved party, albeit unintentionally. Ticketmaster chose to sue Microsoft despite profiting from the increased traffic to its website and consequent rise in ticket sales due to Microsoft's unauthorized deep-linking.

(ii) *Washington Post v. Total News*<sup>5</sup>: The Washington Post and other newspapers sued Total News for copyright and trademark infringement due to unauthorized deep-linking and framing of news articles from their respective websites, while retaining the look and feel of the Total News website. When users followed these links, they could view the linked site within the Total News

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<sup>2</sup> 1997 SLT 669

<sup>3</sup> (2000), 5 CPR (4th) 81 (FCTD)

<sup>4</sup> No. 97-3055 DDP (C.D. Cal. Apr. 12, 1997)

<sup>5</sup> 97 Cv. 1990 (PKL) (S.D.N.Y.)

frame, which obscured the trademarks and advertisements in the linked websites. The plaintiff newspapers also claimed that as Total News was effectively placing its name on the newspapers' works by framing, this would tantamount to copyright infringement through creation of unauthorized derivative works. This suit was ultimately settled when Total News agreed to meet most of the plaintiff newspapers' demands.

(iii) *Bijur Lubricating Corp. v. Devco Corporation*<sup>6</sup>: Bijur manufactured and sold lubricating systems whereas Devco sold replacement parts for Bijur lubricating systems. Bijur sued Devco for utilization of its trademarks, including in meta-tags, for selling spare parts with the intention of misleading customers into believing that there was a nexus between Bijur and Devco. The Court held that this does not constitute infringement as the Bijur trademarks being used on Devco's website and meta-tags were nominative, as they were used to describe Devco's parts. Further, the Court held that:

*"Just as the Lanham Act permits Devco to inform customers through its website that it sells replacements for Bijur parts, it allows Devco to provide the same information in its metatags.....although some uses of metatags can cause initial interest confusion, metatags in which a competitor's mark is used "truthfully to identify the competitor's goods" are permissible under the Lanham Act.....When potential customers would run Internet searches using variations on the keyword "Bijur", the result lists would include a link to the Devco webpage under the title metatag "bijur replacement lubrication parts by Devco." At that point, the customers could choose whether or not to visit Devco site. Nothing in this description of the site was misleading; it informed potential customers that the replacement parts were "by Devco" implying that they were not manufactured by Bijur. It cannot be inferred that Defendants intended to use Devco's metatags to confuse the public or appropriate Bijur's goodwill. This factor weighs in favor of Defendants."*

In view of the above, most jurisdictions view the use of Tools to access third party proprietary trademarks and content, or to suggest a nexus between the websites, as trademark and copyright violations. However, in certain circumstances, utilization of trademarks in meta-tags has been held to be "nominative use", and not infringement.

## 5. Recommendations on use of Hyper-links, Frames and Meta-tags

Going forward, online vendors who rely heavily on the use of these Tools, may have to be careful about how they connect with third party content. As a general rule, we recommend that whenever hyper-linking or framing is done, the linking website should display a "disclaimer" stating that the linked website, its contents, and all protected trademarks, links and material contained therein do not belong to them. While this disclaimer does not absolve the linking website of liability for trademark or copyright violations, it can be a mitigating factor that shows that the intended use was not to exploit the linked website or to wrongfully establish a nexus between both websites. Some additional recommendations are as follows:

### 5.1 Hyper-linking

- Linking websites can opt to use surface-linking instead of deep-linking as, based on our research; linked websites do not seem to object to users being directed to their homepage.

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<sup>6</sup> 332 F.Supp.2d 722, Civ. No. 00-5157 (WHW) (D.N.J., August 26, 2004)

- Some linked websites may consider using dynamic webpages<sup>7</sup> that periodically change URLs and content based on the proprietor's preferences. This will require websites who hyper-link these pages to persistently update the hyper-link in order to ensure that it leads to the correct web-page content, making hyper-linking fairly difficult.

## 5.2 Framing

- Limiting the frame size can help ensure that none of the content of the linked webpage is obscured.
- Framing websites should actively avoid inserting advertisements on the frame itself. If advertisements can't be avoided, they should ensure that advertisements conflicting with those on the framed webpage are avoided.

## 5.3 Meta-tagging

- Utilizing trademarks in meta-tags should be limited to permitted nominative use of such trademarks under the Trade Marks Act, 1999. A trademarked term can be used as a meta-tag where certain goods or services cannot be identified without its use. For example, if a company manufactures protective cases for a Nokia mobile-phone, it can utilize Nokia as a meta-tag on its website.
- The meta-tagging website must ensure that this use is not suggestive of any nexus with the proprietor of the trademark.
- Meta-tags should not cause drawing of traffic from another website to one's own, especially that of a competing vendor, or that has potential of confusing the customers. Stating the exact purpose of such use on the website in a clear and legible manner can help achieve this.

## 6. Conclusion

While no final orders have been passed in the PVR case, it will have significant implications for content aggregators. The interim order is accurate in its assessment, and the final order will define the contours for such use of Tools. In so far as meta-tags are concerned, Indian courts have accurately held that use of trademarks as meta-tags to divert internet traffic from the proprietor's website, or mislead users to believe that there is a nexus with the proprietor, would constitute infringement. The judgments in *Mattel, Inc. and Others vs. Jayant Agarwala and Others*<sup>8</sup> and more recently in *Christian Louboutin Sas vs. Nakul Bajaj*<sup>9</sup> settle this issue. With regard to deep-linking and framing, we hope that the Delhi High Court balances interest of proprietors against the "fair use"<sup>10</sup> and "nominative use"<sup>11</sup> exceptions.

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<sup>7</sup> Among other things, dynamic webpages display different content each time based on pre-set preferences, such as time periods, user access and user interaction

<sup>8</sup> 2008(38) PTC 416 (Del)

<sup>9</sup> 2018(76)PTC508(Del)

<sup>10</sup> Section 52 of the Copyright Act, 1957 lays down fair use exceptions

<sup>11</sup> Section 30(2)(d) of the Trade Marks Act, 1999 lays down nominative use exceptions