

The Laws of 'Linking'

Q: Can we prohibit third parties from linking to, or otherwise using, educational materials that we make available on our website?

A: Yes. However, the law of “linking” has been developing since the Internet was first launched, and what is permissible — or at least customary — has evolved over time and is continuing to evolve. While it’s not always clear what is acceptable under a given set of facts, the basic principles of copyright and trademark law apply.

As to copyright law, assuming the association owns all rights in and to the educational materials (because it has created or obtained the rights to them), the association can prevent others from copying and distributing its materials, reproducing or posting copies on a website, and creating new works based on existing works (derivative works). A third party’s copying or creating derivative works from the association’s materials without permission constitutes copyright infringement, and the association has the right to stop it.

Note that a link directly to published material on a website would not, under traditional copyright law principles, give rise to a copyright claim because no “copying” per se is involved. Nevertheless, some courts have given protection to copyright owners that explicitly post notices warning others not to link to their copyrighted material.

As to trademark law, trademark owners may prevent others from using trademarks, tradenames and other marks that are confusingly similar to the owner’s marks and thereby may mislead consumers as to the source or origin of the goods or services sold under the marks. Federal law also prohibits “deceptive trade practices.”

As a result, linking (including other practices such as “framing” — where the third party frames another’s website — or “inlining” — whereby the HTML code for



a website is written in a way to “fetch” an image or document from another’s website) is not permissible when the linked-to material misleadingly appears to belong to the third party. For example, a link from a third-party website directly to a document on an association’s website that bypasses the association’s homepage is considered a “deep link.” Some courts have held that “deep linking” constitutes trademark infringement or deceptive trade practices. In other words, users may be misled into believing that the linked material belongs to the third party — since the association’s name and trademark may not be evident on the linked page — or that the association has some connection with the third party, which it does not, in fact, have. In any situation, whether such linking is allowed will depend on the specific facts and circumstances.

In practice, some companies allow third parties to link to their homepages without requiring explicit permission. Because linking to a homepage allows the user to see that the source of the educational material is the association, potential confusion is minimized. Some associations welcome outside organizations linking to the association’s materials — even without permission — as a way to promote their use and raise the association’s profile. Nevertheless, it is a good idea to consider establishing rules or formal linking agreements, and/or posting explicit prohibitions on linking, to control others’ links to association

websites.

In addition to linking, third parties sometimes refer to association publications or materials as resources for their own programs. As long as copyright and trademark law principles are followed, other organizations are allowed to recommend, rely on or refer to the association’s publications as a resource, such as curriculum materials for an accreditation or certification program sponsored by the third party.

Moreover, code bodies or government agencies sometimes adopt association-published standards and/or reference those standards in building codes, licensing requirements or other government regulations. While the association’s work product may not be copied without consent, others may reference those materials and make limited excerpts to the degree those excerpts constitute a “fair use.” Determining what constitutes “fair use” is based on several factors: whether the material is used for commercial vs. nonprofit purposes, how much of the material is used in relation to the whole, the nature of the material (creative vs. factual) and the effect of the use on the market for the work. Linking or license agreements also may be useful in this context. **■**

The answers provided here should not be construed as legal advice or a legal opinion. Consult a lawyer concerning your specific situation or legal questions.