



16th BILETA Annual Conference

April 9th - 10th, 2001.
University of Edinburgh, Scotland.

Legal Security of Web Sites : Proposal for a Legal Audit Methodology and a Legal Risks Profile Classification.

JEAN-PAUL CAILLOUX AND CHRISTOPHE ROQUILLY
(EDHEC School of Management, France)

Presented by CHRISTOPHE ROQUILLY

- [SESSION 1](#)
- [Section 1 : Identifying the web site and its legal risks](#)
- [Section 2 : Evaluating identified legal risks and Developing secured procedures](#)
 - [Part 2 : The Legal Risks Cartography](#)
- [Section 1 : Classifying the legal risks](#)
- [Section 2 : Setting up the Legal Risk Graph](#)
 - [Part 3. Typology of web sites](#)
- [Section 1. The « 5C » profiles](#)
 - [Section 2. « A priori » risks profiles](#)
 - [« Citizen » profile : a priori risks graph.](#)
 - [« Competitor » profile : a priori risks graph.](#)
 - [« Creative » profile : a priori risks graph.](#)
 - [« Contractant » profile : a priori risks graph.](#)
 - [Section 3. Principles of solutions](#)

Ebusiness (and more considerably internet law) has many particular characteristics. Two of them are of a great interest : its relationship with time and its relationship with space.

Ten years ago, when a law professor was speaking about a judgment of five years old, he used the expression : « recent » or « new » judgement. Today, with internet law, a judgement of two years old is an « historic » judgement and a new judicial decision is known (and may be copied fully) by everybody, everywhere in the world, with a delay of one or two days. One consequence among others : a great intensity of commentaries, exchanges, discussions ... with (in some cases) confusion between opinions and reality ... and not always with enough hindsight.

This speeding-up must be connected with a very high level (quantity and quality) of « legal production » (by judges and legislators). Thus, after the time of emptiness, after the time of « doubt » ... it's now the time of legal demand. Web is no more something strange, a « techwonder » which frighten the judge, the legislator or the lawyer ... « Astonished eyes » have been replaced by demanding eyes !

This familiarisation with internet and this new demand about internet law change very quickly the sense of some legal questions : for instance, a French judge has recognized for the first time the quality of « master piece » (protected by intellectual property law) to a web site only two years

ago [1]... and yet, the question is now to know if all the web sites have enough originality to benefit from this legal protection.

In the same time that internet law becomes time free, it becomes space free. The question is not for us to note that internet has no frontiers. We want only to underline the internationalisation of legal questions. A basic example : in the majority of cases, legal articles or papers refer only to national law or judgements ; but with internet law, references become international and are shared buy all lawyers. Consequence : if differences remain, the most frequent problems are similar everywhere and, more and more, similar solutions are given everywhere ... These similarities have another consequence with a fundamental harmonization of law (waited for by companies working, by definition with the internet, all over the world)[2].

It's clear that internet is not out of law but completely « under the law » ... but a law which changes constantly. A law for which technology is a real limit but also the only one able to give it a real effectiveness. A law which is also submitted to many influences and, for instance, to the influence of internauts community who plays a role of check and balances to judicial decisions[3].

Law « in revolution », new and inventive practices of web site owners, evolution of technology are serious reasons to think internet law in term of legal risks. But in the same time, web sites owners, consumers, public powers ... (for different reasons) want more legal security because legal security is essential for ebusiness development.

The demand of legal security is also formulated in a very amazing context. New tech law infringement (or law infringement with new tech) is not always related with moral disapproval. Hackers are often heroes ![4] Young people who copy music or DVD in violation of IP law has surely not conviction to infringe law.

It is in this global context and to answer to the demand of legal security that we decided to develop a web sites audit methodology. The target is to detect (on line first, then working with the site owner) all the legal risks related to a web site, and to give solutions to reduce the « most important » (Part 1). This methodology rests on an inventory of legal risks related to web sites (Part 2). It opens, rationally, on a typology of web sites (Part 3).

Part 1 : The Legal Audit Methodology: Detecting, Evaluating and Treating Legal Risks of Web Sites.

Several legal academics and practitioners refer to the notion of « legal risk ». Many lawyers say that « legal risks must be covered » or that « this project (or action) is too risky from a legal point of view ». As Law and its constraints are more and more associated to the management decision making, the « Legal Risk Approach » proves its usefulness. The increase of legal rules, the inflation of trials, show that the need for legal security is growing. Considering the deep nature of electronic commerce or, more generally, of the Internet, the level of legal insecurity linked to a web site development has not to be neglected. Meanwhile, it seems that the quickness of web sites creation does not really take into account the legal risk treatment. In the better case, just few legal risks seem to have been identified, very often for a competitive argument (« *The web site which respects your privacy !* »).

But a real treatment of legal risks linked to the development of a web site, requires a rational methodology which goes beyond the traditional empiricism. In a first section we develop the first and second step of the methodology, to identify the web site and its legal risks. In a second section, we study the three next steps, dedicated to the evaluation of legal risks and to procedures and actions which could be enhance to treat these risks.

Section 1 : Identifying the web site and its legal risks

Our methodology contains five different steps. For each of them, standard documents are used. Indeed, a methodology does exist only if it can be systematized to all web sites. The first and second steps are dedicated to the « identification ».

* Step 1 : Identifying the web site

An identity card of the web site is created (Web Site Identity Card - WebSitIc). The WebSitIc contains the following information :

- URL address
- Domain name
- Editor (name, address, email...)
- Lodger (name, address, email...)
- Nature of the Web site (for example, on line distribution of softwares)
- Profit or non profit activity

* Step 2 : Identifying legal risks of the Web site

It is a first level of identification, which is entirely done on line. The aim of this first level of legal risks identification is to determine a « *a priori* » legal risk level. This « *a priori* » legal risk level will sometimes have to be confirmed by a deeper analysis (see infra Step 5), which will be develop off line. To enable this identification, some clues must be found out, from a key-questions list. For each category of potential legal risks (see infra Part 2), we use a key- questions list. The auditor fills in a « Key Questions Board », as shown below

Key Questions Board			
Risks related to advertising on the web site			
Questions	Yes	No	To Be Verified
Q.1 : is there any banner on the web site	X		
Q.2 : does this banner often change	X		
Q.3 : is there any content promoting products or services	X		
Q.4 : is this content regularly updated			X
Q.5 : is there any pop-up when entering or leaving the web site	X		
Q.6 : is there any hypertext link to commercial websites	X		
Q.7 : is there any advertisement that could be considered as deceptive			X
Q.8 : could this advertisement be considered as « hyperbolic »		X	
Q.9 : is there any comparative advertisement		X	
Q.10 : is there any advertisement for regulated products		X	

This research of legal risks clues is repeated for each category of legal risks (see Part 2).

After these steps of identification, we have to evaluate the legal risks level and to propose suited procedures with the aim to eliminate, to restrict or to cover these legal risks.

Section 2 : Evaluating identified legal risks and Developing secured procedures

First of all, it is clearly important to evaluate the legal risks previously detected.

* Step 3 : Evaluating the tolerance level of identified legal risks

This third step shall enable to rationalize the legal risk treatment. Two postulates have guided the elaboration of our methodology. The first one consists in the material impossibility and the practical uselessness to try to cover all legal risks related to a web site development. It is clear that some legal risks can sometimes be considered as derisive regarding their economic consequences for the web site editor, or with a probability of appearance closed to zero. Therefore, it is necessary to determine the legal risks which have to be treated and covered. The second postulate is that risk analysis, whatever its nature, is always submitted to the limited rationality of actors. There is necessarily a difference between the « perceived » risk and the « real » risk. When measuring the legal risk related to a web site development, we must refer to criteria increasing our objectivity.

We measure the legal risks related to a web site development according to two criteria : a first one which represents the degree of arising, and a second one which represents the gravity of consequences.

By « degree of arising », we point out the expectation that the risks becomes reality. On this first criterion, the risk is classified as described below :

- Level 1 : very low expectation - closed to 0
- Level 2 : low expectation
- Level 3 : medium expectation
- Level 4 : High expectation
- Level 5 : Very high expectation - closed to certainty

Obviously, the question is to know what kind of key-points may be used to classify the legal risk on this criterion. Some key-points are clearly useful : the web site notoriety, the number of hits on the web site, the repetition of the risk. For instance, we think that the absence of any credits for celebrities pictures appearing on the web site, with a small number of pictures, and a slightly known web site, create a very low probability. If the pictures are particularly rare, the probability increases. If the web site is well-known, the probability could be very high.

The second criterion is related to the gravity of consequences for the web site owner. This gravity is appreciated considering the economic consequences born from the legal sanction : for instance the amount of damages, the possible penalty, the activity or trouble cessation, the web site closing...The measure of this gravity requires an expertise in the field of law, with the appropriate skill to understand legal texts and precedent cases. On this second criterion, the risk is classified as described below :

- Level 1 : very slight consequences - closed to 0
- Level 2 : slight consequences

- Level 3 : medium consequences
- Level 4 : high consequences
- Level 5 : very high consequences

When the legal risk is evaluated on both criteria, a « Legal Risk Graph » (LRG) can be set up. We show an example of a complete LRG in Part 2.

Thus the web site owner can now decide if the legal risk is tolerable or not for him. The degree of tolerance depends on the intersection between the degree of expectation and the degree of gravity. For instance, a legal risk with slight consequences and with a low expectation, could be considered by the web site owner as highly tolerable. It could mean that this specific legal risk does not have to be immediately treated. This approach clearly shows two important issues : there is no « absolute legal risk", it depends on both degrees ; the lawyer does not have to take the decision instead of the web site owner, his mission is to identify and evaluate both degrees of legal risks, and then check with the web site owner where could be the level of tolerance. Five level of tolerance appear, as described below :

- Level 1 : absolutely tolerable
- Level 2 : tolerable
- Level 3 : slowly tolerable
- Level 4 : very slowly tolerable
- Level 5 : non tolerable

* Step 4 : Completing the on line evaluation

As we have seen before, some key-questions cannot be resolved by a simple « legal risks on line identification ». In this case, the auditor has to use the most appropriate way to complete his « Key Questions Board » (for instance, questions to the web site redactor in chief, questions to the marketing director, questions to the webmaster, and so forth). Another standard-document can be used to complete the on line evaluation, as shown below :

Questions To Be Verified Board			
Risks related to advertising on the web site			
Questions	People concerned	Answers	
		Yes	No
Q.4 : is this content regularly updated	- Webmaster - Delayed on line verification		X
Q.7 : is there any advertisement that could be considered as deceptive	- Marketing Service - Auditor verification if		X

	necessary			
--	-----------	--	--	--

After this verification, the Key Questions Board is updated. Therefore, the « *a priori* » Legal Risk Graph (LRG) may be confirmed or modified. This final version of the LRG is the one which will be taken into account for Step 5.

* Step 5 : Developing procedures and actions to treat the legal risk

When the Legal Risk Graph is updated, it is advisable to determine if the legal risk must be treated or not, and how.

If we use again the specific case of « Risks related to advertising on the Web site », let's assume that the « Key Questions Board » and the « Questions to Be Verified Board » show some legal risks. For instance, hypertext links and their comments take to web sites whose content does not correspond to these comments. Moreover, some banners appearing on the web site concern regulated products. The French (for instance) law makes provision for some specific rules regarding the advertising for these kind of products.

Considering the number of hits on the web site and the economic consequences of possible penalties ordered by the court, the risk related to advertising on the web site has been rated as slightly tolerable. Therefore, some procedures to treat this risk have to be set up, using a « Risk Treatment Board » as shown below :

Risk Treatment Board						
Type of Risks	Nature of the Risk	Treatment Procedure - Level 1	Treatment Procedure - Level 2	Treatment Procedure - Level 3	Persons in charge of the treatment	Persons who have to be informed
Risks related to the promotional banners	- Deceitful advertising - Regulated products	- Identify the risk source - Check the products/services nature concerned by the banner	- If regulated products, consult the legal requirements - If Deceitful advertising, ask the advertiser to modify the banner	- Adapt the banner to legal requirements or cancel the banner if impossible - If no modification, delete the banner	- Level 1 : webmaster - Level 2 : webmaster (and lawyer) - Level 3 : webmaster	- Marketing service - Lawyer
Risks related to hypertext links	- Deceitful - Public order	- Identify the risk source - Check the conformity between comments and the linked web site contents	- If deceitful comment, adapt it - If non accordance with the public order, delete the link	None	- Level 1 : webmaster - Level 2 : webmaster (and lawyer) - Level 3 : none	- Lawyer

This Risk Treatment Board and procedures its contents must be shared within the company. In fact, the better way to anticipate and to treat legal risks is the sharing of information and knowledge between all staff members.

Part 2 : The Legal Risks Cartography

In this second Part, we explain how we organize the legal risks related to the development of a web site (Section 1) and we show how all these risks can be set on a Legal Risk Graph.

Section 1 : Classifying the legal risks

As we have explained it in Part 1, the legal audit of web sites use a rigorous methodology. This methodology must be applied to all legal risks which could appear in the case of a web site development. It is advisable to determine what kind of legal risks have to be detected and, if necessary, treated. The question is whether to know how legal risks can be classified, organized, with their rational treatment in mind.

A first approach may consist in a classification of legal risks by domains of law (for instance, intellectual property law, consumer law, competition law, privacy...). A second one may consist in a classification by legal risks cause : for instance, no check of advertising contents, of pictures and videos origin...

The first approach shows the advantage to be closer to lawyer's sensibility and traditional reasoning. But it shows the inconvenient to be less closed to the reality of a web site "life" and to the chronology of its creation and operation. The second approach shows the inverse advantage and inconvenient.

We consider that the most interesting approach consists in mixing both approaches. In other words, we adopt a legal risks classification which has two entries : on the one hand, an entry based on the web site "life cycle" : creation, development of contents, address, housing...; and on the other hand an entry based on legal domains : intellectual property law, contract law, consumer law...

The following Legal Risks Classification Board shows how we organize legal risks related to a web site creation and operation.

Legal Risks Classification Board							
Risks related to the web site creation R1	Risks related to the web site address R2	Risks related to the web site housing R3	Risks related to the web site access R4	Risks related to the advertising R5	Risks related to the competitive environment R6	Risks related to the online agreement process R7	Risks related to the dispute resolution R8
<i>Risks related to intellectual property rights</i> <i>R1-1</i>	See R1-1	Risks related to the "housing contract"	Cookies R4-1	Adverstising on the web site R5-1	Risks linked to antitrust law R6-1	Consumers information R7-1	Risks linked to a trial R8-1

		R3-1					
Copyrights R1-1-1	See R1-2	Risks of closing R3-1-1	Personal data catching R4-2	Banners R5-1-1	Risks of unfair competition	Sales (or services) general conditions R7-2	Risks linked to the to the court of competent jurisdiction R8-2
Trademarks R1-1-2	Risks related to domain name R2-1	Risks of contract cancellation R3-1-2	Viral attack R4-3	Contents R5-1-2		Agreement exchange R7-3	
Patents R1-1-3		Risks of breakdown R3-1-3		Hypertext links - Frames- Pop-up- Metatags[5]			

R5-1-3

On line payment

R7-4

Patterns

Advertising for the web site Transaction proof[6]

R1-1-4

R5-2

R7-5

Dilution

Referencing Contract execution

R1-1-5

R5-2-1

R7-6

Risks related to rights of personality

Search engines

R1-2

R5-2-2

Name

R1-2-1

Image

R1-2-2

Reputation

R1-2-3

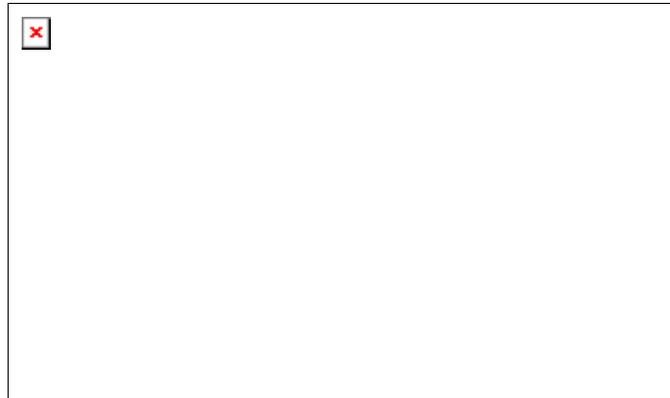
Risks related to hypertext links, frames and metatags

R1-3

Public order R1-4

See R1-1 and R5

For each Legal Risks Category, a Legal Risk Graph is set up, taking into account all sub-categories. For instance, for "Risks related to the web site creation" (R1), the LRG could be the following :



Section 2 : Setting up the Legal Risk Graph

When each legal risk category has been specifically treated, the final Legal Risk Graph (for the whole web site, taking into account each category) can be set up, as shown below :



In fact, the level of tolerance for each category corresponds to the previous analysis, specific to each category. For instance, if we have a look at the Risk 1 LRG, we can see that the level of tolerance may be different for each sub-category. To set up the final Legal Risk Graph, we take into account the more risky level of tolerance (in this case, Level 4). It probably means that the risk has to be treated, with the appropriate Treatment Board. But the sub-categories of legal risks with a "good" level of tolerance (for Risk 1, the sub-category n°3 - means R-1-3) won't be treated. Therefore, when the final Legal Risk Graph is elaborated, the auditor must return to the specific category Graph, check the sub-categories concerned, and then use the Risk Treatment Board.

Part 3. Typology of web sites

The inventory of legal risks related to web sites and the definition of their cartography is an attempt to give a definition of webs sites profiles and « a priori risk profiles » with, for each one, a series of preventive solutions.

Section 1. The « 5C » profiles

These typology of web sites is defined on the basis of « centers of gravity » of legal risks for each web site category. Five major categories may be given off with risks mainly related to the scope of the notion of « Creative », of « Competitor », of « Contractant », of « Consumer » and of « Citizen ». It's the reason why we have chosen to speak of the « 5C » profiles or typology.

- **Creative**[7]. This first category combines web sites which risks are mainly « creativity » risks. It contains three large web sites types : web sites with a very strong graphic added value (attractive and aesthetic sites or sites promoting arts), sites stocking creative elements (like pictures, for instance) and « public places » sites linked to texts or master pieces (like, for instance, sites with links to documents or press articles[8]).

Important to note[9] : the risks may be passive (for instance, the web site is counterfeited by another one) or active (the web site counterfeits another one).

- **Competitor**. This category combines web sites which are particularly in the scope of competition law (« commercial networks » law or unfair competition law).

It is the case with commercial web sites owned by producers developing a « closed distribution network » and/or with web sites of distributors and retailers of the same network[10].

In another point of view, are also in the scope of this category web sites which activity concerns directly a large number of companies. For instance, « prices comparison » sites : to forgot products of a company ... to be « mysterious » about commercial relationships between the site and some companies ... to compare products which have a really different level of quality ... are examples of risks related to unfair competition.

- **Contractant**. For this category, the principal risks are directly connected to the « heart » of the commercial relationship, in other terms to the commercial contracts which bind the site and clients or partners.

Two exemples give a good overview of this category :

Sites which sell services or advices on line, particularly in a Business to Business relationship (for instance, a web site which allows meeting between start-up creators and investors).

Sites offering to consumers hypertext links to other web sites (market places, portals ...) with contracts like affiliate contrats.

- **Consumer**. This category is the most « classic ». It is the category of the majority of « Business to Consumers » web sites. In this case, the « center of gravity » of the risks is related to information of consumers, to sales conditions (content and access), to evidence of order, to expression and validity of consent, to home delivery ...

The legal background of these obligations is particularly interesting with the question of the choice of applicable law and the different levels of consumers's protections.

- **Citizen**. This last category combines web sites for wich legal risks are distributed around two major fields :

Privacy law and personnal data protection ... especially for web sites which model is to sell informations directly (with, for instance, marketing studies on line) or behind an interface (some games sites for instance).

Public order restrictions which concern, particularly, « marginal » web sites but also very large

communities sites or very large portal (to see the Yahoo case in France, for instance).

Section 2. « A priori » risks profiles

For each of these five « generic » profiles of web sites, specific risks profiles may be defined. These risks profiles are only « a priori » profiles : they may be completed, nuanced, modified--and , in some cases, overthrown--by the audit of each web site.

But they allow to have a preventive overview of the major risks which have to be avoided.

Using the same codes that in our « Legal risks classification board », we may obtain , for each profile, a graph of « a priori risks » which combines « degree of arising » and « gravity of consequences ».

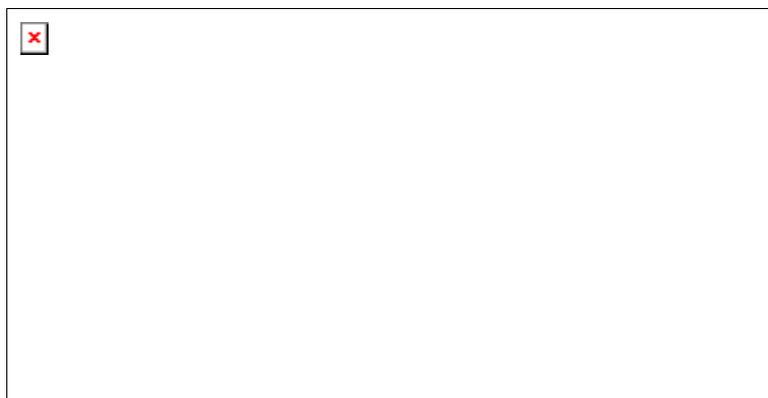
Two examples give a good overview of these graphs.



« Citizen » profile : a priori risks graph.

- The high level R1 is explained by the sub risk R1-4 (public order). The very high level of risk R4 (risks related to personal data) is an evidence. Middle level also for R5 and R6 is explained by the large number of links of these web sites and by the liability which may result of these links.

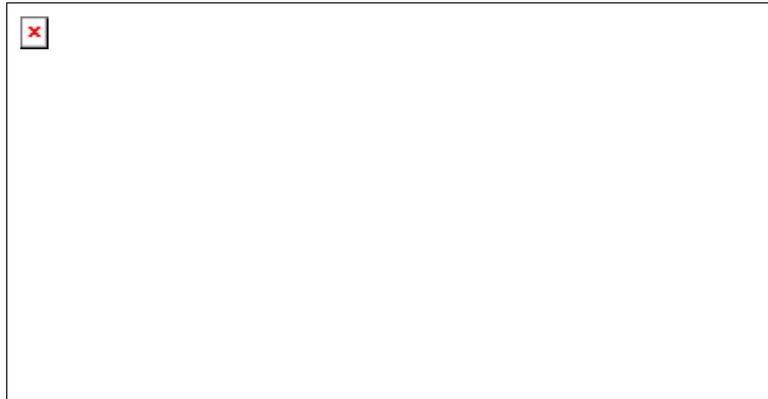
« Competitor » profile : a priori risks graph.



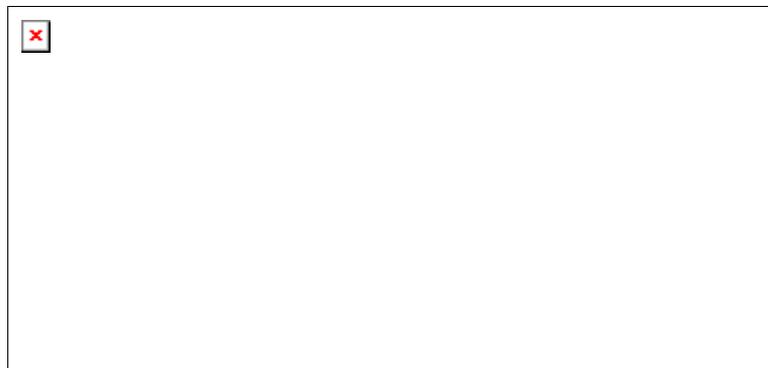
* The very high level of R5 end R6 is an evidence. The high level of R2 is explained by potential conflicts between domain names and trade marks or companies names.

A visual comparison between two profiles shows what we mean by « center of gravity » of legal risks.

« Creative » profile : a priori risks graph.



« Contractant » profile : a priori risks graph.



Section 3. Principles of solutions

For each risks profile, preventive legal security solutions « packages » may be used. It's important to recall that these solutions are only an instruction which may be changed or completed by the results of the audit of one web site and by the analysis of its specific characteristics. In this goal, we have seen in Part 1 the principles of treatment of legal risks with « custom made » procedures.

An example of these preventive packages may be given with the profil « Creative ». In that case, we suggest--it is one procedure between many other ones--to create a base which contains all the elements of the web site by type and by element.

This tool may be presented in the table shown below :

	Name	Description	Origin	Use limits	Rights obtained	Author
Pictures						
(.../...) each picture ...						
Graphism						
Painting						
Drawing						
(.../...)						

With this table, it is easy to control the risk of active counterfeiting which is one of the major risks of the "Creative" profile.

This example is really interesting because the table is only a managing tool, which becomes a legal tool when connected, by specific procedures, with legal risks. It's clearly typical of our methodology which search legal risk behind the practices and which search to obtain legal security with other practices.

[1] To see the case Cybion v/Qualistream (on <http://www.Juriscom.net>).

[2] M O'Rourke : Progressing toward an uniform code for electronic commerce or racing toward non uniformity (The Berkeley technology Law Journal, Vol. 14-2, Spring 1999).

[3] To see, for instance, the saga Etoy-Etoys" in which, finally, the toys web site, winner in front of the judge, abandons its victory (and give money) because the pressure of internautes.

[4] On this question and on the question of technology : M. Lee, J. Pak, T. Kim, A. Shapiro, Electronic commerce, Hackers and the search for : a regulatory proposal (The Berkeley Technology Law Journal, Vol 14;2, Spring 1999).

[5] For the background, T. W. Mills : "Metatags : seeking to evade user detection and the Lanham Act" (The Richmond Journal of Law &Technology, Volume 6, Issue 5, Spring 2000).

[6] For the background, Eric Caprioli : "Le juge et la preuve électronique" (Juriscom.net, Janvier 2000).

[7] In background, for instance : P-E. Moyses : "Internet, droit des obligations et droit d'auteur" (<http://www.Juriscom.net>, mars 1999) and A. Lewis : "Playing around with Barbie : expanding fair use for cultural icons" (The Journal of Intellectual Property, Chicago Kent School of Law, n° 61).

[8] A good example of this category is given by the site "Total News" well known for its past judicial problems.

[9] And it is true for the others profiles.

[10] In background ... M. J. Lockerby : "A world wide web of potential franchise law violations" (Richmond Journal of Law and Technology, Volume VI, Issue 1, Symposium 1999) or C. Roquilly and C. Collard : "Electronic commerce and closed distribution networks : proposals for solving legal problems (JILT, Issue 2, 2000).