

5-1-1998

The Potential Liability of Linking on the Internet: An Examination of Possible Legal Solutions

Kara Beal

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Internet Law Commons](#)

Recommended Citation

Kara Beal, *The Potential Liability of Linking on the Internet: An Examination of Possible Legal Solutions*, 1998 BYU L. Rev. 703 (1998).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1998/iss2/14>

This Comment is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

The Potential Liability of Linking on the Internet: An Examination of Possible Legal Solutions

I. INTRODUCTION

At the end of 1997, 40 million people were using the Internet;¹ by 1999 that number is expected to grow to 200 million.² With this increasing popularity of the Internet, and the World Wide Web in particular, users are encountering old legal issues in entirely new contexts. Formerly established legal rules must be reconsidered in light of the new technological opportunities available to computer users.³ One issue that is just being raised is the protection of intellectual property on the Internet. Because Congress is not prescient, its past attempts at statutorily protecting intellectual property did not anticipate the technological possibilities of the Internet. It was therefore impossible to sufficiently guard against misappropriation of the proprietary work of others in an entirely new medium.

One of the basic functions of the World Wide Web is the linking function which allows a user to instantaneously “jump” from one site to another with the click of a button. Web site owners have many concerns about posting information on the Internet and having it “linked to” by other sites. One set of concerns involves any association between the two linked sites that may be created in the minds of the viewers. If the viewer associates the two sites, the concern is that the passively linked site may become liable for factual misstatements or defamatory

1. See Chris Allbritton, *'97 Will Be Remembered as Year We Really Went Digital*, SEATTLE POST-INTELLIGENCER, Dec. 27, 1997, at E2.

2. See *ACLU v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996), *aff'd*, 117 S.Ct. 2329 (1997).

3. Personal jurisdiction on the Internet is an example of one issue that has been developing. See generally Sean M. Flower, Note, *When Does Internet Activity Establish the Minimum Contact Necessary to Confer Personal Jurisdiction?*, 62 MO. L. REV. 845 (1997); Jeffrey B. Sklaroff, *Personal Jurisdiction, the Internet and Electronic Communication: Where Does the Internet Defendant do Business?*, in LITIGATING COPYRIGHT, TRADEMARK AND UNFAIR COMPETITION CASES FOR THE EXPERIENCED PRACTITIONER 1997, at 463, 466 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G4-4025, 1997).

704 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

statements made by the linking site. Moreover, when a viewer assumes two sites are associated, that association may damage the reputation of the linked-to site. For example, if a site displaying pornography contains links to sites of merchandisers and organizations (with which it is unassociated), the reputations of the linked sites may suffer because of the implied association. Site owners may have no knowledge of, and have no control over the sites that link to their sites.⁴

Additionally, web site owners have a strong interest in preserving their own advertising. Framed links that obscure the original advertising on a linked page and deep hyperlinks that bypass a site's advertising may infringe on this ownership interest and cause a loss of advertising revenue. One commentator has stated that control over how visitors enter and move through a site is critical to a company's ability to maximize sales and profits because of the power to ensure that all visitors view its advertising.⁵

A final concern is raised by the possible misuse of proprietary information that is posted on the Internet. If publishers feel that copyrighted and trademarked material is not adequately protected from misuse, they will be reluctant to post such information on the Web. This could result in an overall decrease in useful information on the Web and would be detrimental to the vitality of the Internet.

This Comment will discuss legal actions that are threatening the use of links on the Web. Part II will give a history and explain the workings of the Internet. Part III will outline the technological workings of the three possible types of links and explain how they may infringe on proprietary rights, using real conflicts as examples. Part IV will then discuss the primary causes of action as they may apply to these cases, along with some benefits and drawbacks of these theories of liability. Part V will emphasize the policy considerations of applying law to the Internet and note technical as well as

4. See *infra* note 32 and accompanying text. Even if a site owner knows which other sites are linked to hers, she has no technological power to remove those links (short of hacking), but can only request that the owner of the linking site remove the links.

5. See Barry D. Weiss, *Metasites Linked to IP Violations: Web Sites Framed or Linked to Other Sites May Enjoy Greater Exposure, but Some Are Suing the Framing Sites for Infringement*, NAT'L L.J., July 21, 1997, at B9.

statutory solutions to linking conflicts on the Web. Finally, Part VI concludes that the Internet itself should generally define the scope of Internet law, and that its development should not be restricted by premature legal constraints.

II. HISTORY OF THE INTERNET & WORLD WIDE WEB

A. *The Origin of the Internet*

The Internet originated in 1969 as an experimental tool to link government and industrial computers in the defense field.⁶ It enables computers separated by great distances to communicate by receiving and transmitting data over telephone lines. The Internet has now grown to the point that it connects thousands of local computer servers and can access the data stored in each server's memory.⁷ Individual computer users dial into a local server and are instantly connected to the near-infinite expanse of the Internet.

In 1989, Tim Berners-Lee invented the hyperlink by which one can instantaneously move from one location in the Internet to another.⁸ Shortly thereafter, a graphical user interface (GUI)⁹ was developed which enabled users to point and click with a mouse to negotiate through the Internet; this marked the beginning of the World Wide Web (Web).¹⁰ Technically, the Web is a separate, uniform set of computer commands or protocols that overlays the Internet and allows navigation

6. See Emily Madoff, *Freedom to Link Under Attack: Web Community up in Arms over Lawsuits*, N.Y. L.J., June 23, 1997, at S1.

7. When a personal computer user wants to establish Internet access, she does so through a local Internet Service Provider (ISP). Each server is maintained as a point of connection to the Internet, and when an individual user is interested in using her Internet access, her computer establishes a connection with the server through a telephone line. Once a user's computer is linked to the server, she can access all the other servers in the world which are linked together to form the Internet.

8. See *How the Web's Fabric Could Be Torn Apart*, S. CHINA MORNING POST, Feb. 20, 1997, at 8 [hereinafter *Web's Fabric*].

9. A GUI is a visual format that allows the computer user to point and click with a mouse to access different commands, rather than having to type the commands from the keyboard. A GUI is the difference between the convenience of Windows and the tedium of DOS.

10. See Kenneth Freeling & Joseph E. Levi, *Frame Liability Clouds the Internet's Future: Lawsuit Protests Web Programming Trick*, N.Y. L.J., May 19, 1997, at S5.

through the Internet by a GUI, delivering a "rich multimedia experience."¹¹

B. Primary Uses of the World Wide Web

The information contained on the Web is simply the information of the individual sites, and thus is infinitely varied. A great deal of practical information is accessible on the Web, as well as entertainment, special interest, and consumer information. News is instantly accessible,¹² the scores of sports games are updated immediately,¹³ and the price of a specific stock can be pinpointed at any particular time.¹⁴

The World Wide Web is composed of two main types of sites: information providers and metasites or compilers. An information provider typically displays meaningful, original content which may be occasionally updated. Examples include the sites for USA Today,¹⁵ Delta Airlines,¹⁶ Barnes and Noble,¹⁷ and the Library of Congress.¹⁸ A metasite compiles data on information provider sites and points, or links, to those sites.¹⁹ Metasites include web search engines,²⁰ and catalogs of sites of a particular, narrow interest.

Because of the insular, self-sufficient nature of information providers, they rarely link to sites of other organizations. Metasites are often used to locate information provider sites of interest, and are a growing trend in web page development²¹ because they are cheaply and easily made. Metasites, however,

11. David Phillips & Elizabeth deGrazia Blumenfeld, *Seams in a Seamless Web*, in *ADVERTISING LAW IN THE NEW MEDIA AGE* 631, 634 (PLI Corporate Law and Practice Course Handbook Series No. B4-7202, 1997).

12. See, e.g., *TotalNEWS* (visited Feb. 3, 1998) <<http://www.totalnews.com>>; *All News Channel* (visited Feb. 3, 1998) <<http://www.allnews.com>>; *CNN Interactive* (visited Feb. 3, 1998) <<http://cnn.com>>.

13. See, e.g., *ESPN Sportszone* (visited Feb. 3, 1998) <<http://espn.sportszone.com>>.

14. See, e.g., *Salomon Smith Barney Access* (visited Feb. 3, 1998) <<http://www.smithbarney.com>>.

15. See *USA TODAY* (visited Feb. 3, 1998) <<http://www.usatoday.com>>.

16. See *Delta Air Lines Sky Links* (visited Feb. 3, 1998) <<http://www.delta-air.com>>.

17. See *Barnes and Noble.com* (visited Feb. 3, 1998) <<http://www.barnesandnoble.com>>.

18. See *The Library of Congress* (visited Feb. 3, 1998) <<http://lcweb.loc.gov/>>.

19. See Weiss, *supra* note 5, at B9.

20. See, e.g., *Yahoo!* (visited Feb. 3, 1998) <<http://www.yahoo.com/>>.

21. See Weiss, *supra* note 5, at B9.

are more frequently meeting legal opposition as they try to help users locate and utilize the information provider sites.

The main tool visitors use to find a new site on the Web is a search engine.²² Search engines are gigantic databases that catalog all the sites on the Web and are frequently visited by Web users to find a site that they have not visited before. After a user has described to the search engine what type of site she is looking for, the search engine will display a list of possible choices from which the user chooses the site she would like to visit. The user can visit a site on the list by clicking on it, and traveling to the site via a link.

C. The Basic Components of a Web Site

Each location on the Web is termed a “site” and may consist of one page or multiple pages arranged together. Each page contains the text and graphics that have been chosen and developed by the publisher. Sites are simple enough to create that private individuals have as much opportunity to produce them as large organizations.

The main components of a web page are: (1) the address, by which the user locates the page, (2) the content which the user views or listens to, and (3) the links the site may contain to other sites which enable the user to find additional material of interest. First, the Uniform Resource Locator (URL), or address, enables a user to locate the site. The URL functions like a phone number; if a user knows the URL of a site she would like to visit, she can easily type it in and access the site directly.

The content of each site is varied, as are all works of authorship. Sites mainly contain text and graphic images, but may also contain audio and video clips. If a site includes multiple pages, the introductory page, or home page, functions as a welcome and guide to the further content of the site, allowing the user to access specific information within the site.²³ Further pages within the site are typically accessed through links from the home page; however, these pages also

22. See, e.g., *Yahoo!*, *supra* note 20.

23. See Madoff, *supra* note 6, at S1.

708 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

have distinctive URLs and can be accessed directly by entering the URL into a user's Web browser software.

Finally, web sites typically contain links to other sites. Once a visitor locates a particular site that interests her, links from that site enable the person to quickly and easily locate additional information on other sites that will also interest her. These links are fundamental to the functioning of the Web, as they allow users to access sites without knowing the specific URL of that site—access through linking is termed “surfing.”

When viewing a web page, the user's computer accesses the data detailing the page from the Internet and the image of the page is stored in the random access memory (RAM) of the computer. This image remains in the computer's RAM for the time that the user is viewing the page and then is replaced by other data. Web browser software also saves a copy of the site on the hard drive of the computer in a process called caching.²⁴ If the user requests to visit that site again, it can be retrieved from RAM more quickly than it could be reloaded from the Internet.²⁵ The cache size is limited, so when the cache is full, and the user visits another sites, the cache will delete the oldest images to save the most recent.

D. *The Culture of the Internet*

The culture of the Web is defined more by free accessibility than by any other single characteristic. When the Web was in its infancy, web sites were created largely for fun and information. Only very recently, as the popularity of the Internet has grown, have commercial transactions comprised a large portion of web traffic. The early web sites were designed and visited by people who were already highly technical, and there was a sense of camaraderie between the publisher and the viewer because of this common technical interest—each party *wanted* to share web sites with the other.

Because the Web has evolved within a free culture, the majority of web sites are free to visit,²⁶ and there is prestige in be

24. See *Copyright Law on the Internet: The Special Problem of Caching and Copyright Protection*, CYBERSPACE L. INST., app. (visited Sept. 1, 1995) <<http://www.cli.org/caching.html>>.

25. See *id.*

26. One of the few highly popular sites that charges a fee for access to some

ing a frequently-visited site.²⁷ If the site publisher requires or desires funding to maintain his or her site, the publisher typically seeks advertising revenue rather than charging the visitor.²⁸ The site author wants to encourage all the visits or “hits” he can because the most popular way to charge advertisers is a per-hit fee. This competition for advertising revenue, in addition to the natural competition for popularity, spurs the desire to have his site visited. The pursuit of these coveted hits relies both on advertising in traditional media (print, TV, radio), and a complex, uniquely Internet system of advertising links that appear on one site, and with the click of a button can convey a viewer to the advertiser’s site.

Based on this competitive and free culture, the prevalent attitude on the Web thus far has generally been that no permission is necessary to link to another site—the publication of a web site makes the site available for linking.²⁹ Publication is tantamount to creating an implied license to link for all other sites in cyberspace. Indeed, Mr. Berners-Lee, the originator of the hyperlink, has emphasized that “[t]here is no reason to have to ask before making a link to another site.”³⁰ Echoing this, another web page creator has stated that “[t]he whole point of the Internet is to be able to link to other sites.”³¹

information is *ESPN Sportszone*, *supra* note 13. ESPN is able to make a profit this way and still attract a great number of viewers. Visitors to the ESPN site can view the site for free, but must pay for premium programs and columns.

27. The top five most frequently visited sites by males for December 1997 were (1) ESPN Sportszone, (2) Dejanews, (3) FlashNet, (4) NY Times, and (5) University of Michigan. The five frequently visited sites by females for December 1997 were (1) Barnes and Noble, (2) Warner Brothers, (3) Switchboard, (4) Blue Mountain Arts, and (5) GTE. See *RelevantKnowledge First to Release Top Twenty-Five Web Site Lists for the Month of December (Jan. 12, 1998)* <http://www.relevantknowledge.com/Press/release/1_12_98_1.html>.

28. By 2001 an estimated eleven percent of global ad revenues (or \$59 billion) will be Web advertising, up from one percent in 1997. See Sebastian Rupley, *Web Ads Hit Their Stride*, *Z D N E T* (Apr. 12, 1998) <<http://www.zdnet.com/products/content/articles/199803/ads.stride/index.html>>.

29. See Charlotte Dunlap, *Groups Express Shock at Ticketmaster Move* (May 1, 1997) <<http://192.215.107.71/wire/news/apr/0501ticket.html>>; Tim Berners-Lee, *Links and Law: Myths*, ¶ 5 (Apr. 1997) <<http://www.w3.org/DesignIssues/LinkMyths.html>>.

30. Berners-Lee, *supra* note 29, ¶ 4. According to Mr. Berners-Lee: “I received a mail message asking for ‘permission’ to link to our site. I refused as I insisted that permission was not needed.” *Id.*

31. Rebecca Quick, *Framing’ Muddies Issue of Content Ownership: Technology*

III. HOW TO GET FROM HERE TO THERE: LINKS

Because of the value to web sites of being visited frequently, linking, often done without the knowledge or consent of the linked-to site,³² has largely been an unquestioned practice, and has even been considered an advantage to the linked-to site. However, the increased use of the Internet by commercial organizations has heightened legal anxiety about links and has led to legal challenges to this previously assumed right to link. Different types of links can raise different liability issues which will be discussed below.

A. Hypertext Links

1. *The technology and uses of hypertext links*

Hypertext links are the fundamental and original links that form the basis of the Web.³³ These links are also referred to as "HREF links" (Hypertext Reference links), or if they transfer the viewer to a new site, as "out-links."³⁴ Such links are instructions from the page being visited to the user's computer that tell the computer to reach into the Internet and access a new site. The new site will appear on the screen of the user's computer, and the previous site will disappear. Hypertext links are designated on a page either by specially formatted text (typically differentiated by color and underlining) or by an image.³⁵ When the user clicks on this text or image, the new site is retrieved. When a viewer moves from one site to another via a hyperlink, the URL displayed on the screen changes to the URL of the linked page currently being viewed.

Lets Sites Alter Presentation of Others' Web Pages, WALL ST. J., Jan. 30, 1997, at B8 (quoting Roman Godzich, the creator of the TotalNEWS site); see also *Web's Fabric*, *supra* note 8, at 8.

32. No action is required by a site owner to have a link to *her* site. Typically, the link is made without ever informing the site owner that such a link has been established. A site owner who wants to find out which sites link to hers cannot tell simply by looking at her site, but she can find the links by visiting *Alta Vista* (visited Mar. 31, 1998) <<http://altavista.digital.com>> and typing "LINK:[web address]." This command will tell the site owner where all links to her site are coming from. Interview with Trevor Higbee, President of Wilde Computer Services (Dec. 2, 1997).

33. See *supra* note 8 and accompanying text.

34. See Madoff, *supra* note 6, at S1.

35. See Richard Raysman & Peter Brown, *Dangerous Liaisons: The Legal Risks of Linking Web Sites*, N.Y. L.J., Apr. 8, 1997, at 2.

A hypertext link to the home page of another site will be easily identifiable by the viewer, as all home pages identify their topic and source.³⁶ However, links to deeper pages within a site may be more difficult to detect because the internal page may not indicate the origin or ownership of the site.³⁷ In either case, the user will be aware that the link is taking place, but in the latter she may be unaware that the computer is linking to a site owned by another author. Instead she may assume that the new page is simply an internal page of the site she was originally viewing.

2. *Two cases challenging the use of hypertext links*

There are two views of the function of hyperlinks. A hyperlink can be compared to a library card catalogue that simply directs the user to a new site, or it can be viewed as a way of enhancing the value of one site by incorporating someone else's work into it without permission.³⁸ The prevailing opinion is that a hypertext link to a home page is probably not a basis of trademark infringement liability unless that link is indicated by a logo or other proprietary image.³⁹ However, a link to a page deep within a site may create liability under unfair trade practice laws if the viewer could be confused or misled about the origins of that page.⁴⁰ Additionally, a link to an internal page may take the user past the page on which the site's advertising is posted—depriving the site owner and its advertisers of coveted "hits" to the home page.⁴¹

a. *The Shetland Times case.* The first suit to charge that Internet links violated proprietary rights was brought in

36. See Phillips & Blumenfeld, *supra* note 11, at 638. This practice of identifying the ownership of a site is dictated only by practicality, which encourages all site publishers to take credit for their own sites. The identification further allows the viewer to quickly and easily discern whether this site is one of interest to her.

37. See *id.*; Martin J. Elgison & James M. Jordan III, *Trademark Cases Arise from Meta-Tags, Frames: Disputes Involve Search-Engine Indexes, Web Sites Within Web Sites, As Well As Hyperlinking*, NAT'L L.J., Oct. 20, 1997, at C6; Mitch Wagner, *Web Firms Eye Suit on Link Policies*, COMPUTERWORLD, May 12, 1997, at 61R.

38. See *Web's Fabric*, *supra* note 8, at 8.

39. See Madoff, *supra* note 6, at S1; Raysman & Brown, *supra* note 35, at 3. This situation would clearly cause trademark infringement because of the unauthorized use of a proprietary mark. See Madoff, *supra* note 6, at S1.

40. See discussion of Lanham Act § 43(a) claims, *infra* Part IV.C.

41. *But see* discussion *infra* Part III.A.2.b (describing Ticketmaster's solution to this problem).

712 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

Scotland.⁴² On the Shetland Islands are two local newspapers that compete against each other, and both papers post their stories on the Internet.⁴³ The site of the Shetland News (the defendant in the case) displayed headlines on its home page that allowed a visitor to link to the actual newspaper articles.⁴⁴ Although some of the headlines displayed on the home page represent articles written by the Shetland News, other headlines belonged to articles written by the Shetland Times (the plaintiff). The hyperlinks associated with these headlines transported the viewer to the Shetland Times page on which the article appeared.⁴⁵ There was no indication on the Shetland News home page that any of the articles listed there belonged to anyone but the Shetland News. Additionally, the links to the Shetland Times site bypassed the Shetland Times home page (which displayed Shetland Times' third-party advertising) and linked directly to an internal page. The page on which the article appeared, however, did display the Shetland Times URL and masthead at the top. The Shetland Times filed suit against the Shetland News in the Edinburgh Court of Sessions on a claim of copyright infringement.⁴⁶

The judge before whom the case was presented granted the Shetland Times an interim interdict (akin to a preliminary injunction) barring Shetland News from linking to any internal page of the Shetland Times site through the use of headlines copied from Shetland Times articles.⁴⁷ In deciding to grant the interim interdict, the judge considered the balance of convenience of the two parties and decided they weighed in favor of the plaintiff.⁴⁸ The judge determined that it is essential

42. See *What the Judge Said in "The Shetland Times" Case*, SHETLAND NEWS (Oct. 24, 1996) <<http://www.shetland-news.co.uk/opinion.html>> (opinion granting interim interdict) [hereinafter *Shetland Times Case*].

43. See *id.* ¶¶ 5-9.

44. See *id.* ¶ 11.

45. A live demonstration of how the linking was performed and how it looked is available at *Simulation of Shetland News Pages* (visited Feb. 3, 1998) <<http://www.shetland-times.co.uk/st/newsdemo/>>.

46. See *Web's Fabric*, *supra* note 8, at 8. The copyright law of the United Kingdom does not exactly parallel ours (in fact, headlines may be copyrightable under UK law). However, American commentators have suggested that the claim is parallel to a claim of unfair competition for reverse passing off in the United States. See Elgison & Jordan, *supra* note 37, at C6; Madoff, *supra* note 6, at S1.

47. See *Shetland Times Case*, *supra* note 42 (opinion granting interim interdict).

48. See *id.* ¶ 27.

to the plaintiff that visitors visit the home page of the site, and that bypassing the home page would lead to loss of revenue that would be difficult to quantify.⁴⁹ Finally, he concluded that there was no merit in the argument of the Shetland News that the Shetland Times benefitted by the exposure it received because of increased hits.⁵⁰

During their trial, the two parties decided to settle. Under the terms of the settlement agreement, the Shetland News can hyperlink to articles on the Shetland Times web site through headings as it had done, but all headings of Shetland Times articles must have the words "A Shetland Times Story" printed underneath in type at least as large as the headline.⁵¹ Additionally, a button displaying the Shetland Times masthead must be displayed adjacent to the headline that will link, along with the headline itself, to the Shetland Times page on which the article appears.⁵² In return for these accommodations, the Shetland Times dismissed its suit.⁵³

b. The Ticketmaster case. In the second suit disputing the use of hypertext links, Microsoft established a web site, titled Seattle Sidewalk, as an Internet guide to local entertainment in the Seattle area.⁵⁴ Where an entertainment event requires a ticket that can be purchased through Ticketmaster, Microsoft has included a hyperlink to Ticketmaster's web site. The link transfers the viewer directly to the internal Ticketmaster page, on which the viewer enters a credit card number and actually purchases the ticket for that particular event.⁵⁵ This link bypassed Ticketmaster's home page which displayed

49. *See id.*

50. *See id.*

51. *See* Johnathan Wills, *Shetland Times Internet Case Settled out of Court*, SHETLAND NEWS, ¶¶ 8-9 (Nov. 11, 1997) <<http://www.shetland-news.co.uk/headline/97nov/settled/settled.html>>.

52. *See id.* ¶ 11.

53. *See id.* ¶ 12.

54. This site can be found at *Seattle Sidewalk* (visited Mar. 31, 1998) <<http://seattle.sidewalk.com>>. Microsoft also has additional "Sidewalk" sites for cities such as Washington, D.C., Boston, San Francisco and Sydney, Australia. *See Sidewalk.com* (visited Mar. 31, 1998) <<http://sidewalk.com>>.

55. *See Ticketmaster v. Microsoft: First Amended Complaint*, ¶ 16 (visited Feb. 3, 1998) <<http://www.ljx.com/LJXfiles/ticketmaster/complaint.html>> [hereinafter *Ticketmaster Complaint*].

714 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

Ticketmaster's name and third-party advertising.⁵⁶ When the user arrived at Ticketmaster's page through the link from Seattle Sidewalk, the Ticketmaster URL was displayed, and the look and feel of the site were different from Seattle Sidewalk.

Ticketmaster objected to these links, especially because Microsoft originally sought Ticketmaster's permission to link to its site for a fee. When negotiations broke down, Microsoft installed the link anyway—without paying Ticketmaster at all.⁵⁷ Ticketmaster claimed that Microsoft has created this link in bad faith and is “feathering its own nest.”⁵⁸ From Ticketmaster's perspective, the Ticketmaster name enhances the value of any on-line city entertainment guide that is able to link to it.⁵⁹ Ticketmaster has rejected the idea that it also benefits from exposure on the Seattle Sidewalk site.⁶⁰ “Does this do anything other than to promote the greater wealth of Microsoft?” asked the president of Ticketmaster. “No.”⁶¹

Due to these objections Ticketmaster has taken affirmative actions. First, it filed suit against Microsoft in April 1997 in federal district court in California.⁶² Second, Ticketmaster has intercepted the link between Seattle Sidewalk and its own internal page, and has erected an intercept page that states “[t]his is an *unauthorized* link and a dead end for Sidewalk.”⁶³

56. Ticketmaster's home page is located at *Ticketmaster Online* (visited Feb. 3, 1998) <http://www.ticketmaster.com>.

57. See Madoff, *supra* note 6, at S1.

58. *Ticketmaster Complaint*, *supra* note 55, ¶ 17.

59. See *id.* ¶ 19.

60. Although, undeniably, the Seattle Sidewalk site sends potential ticket buyers to Ticketmaster, Ticketmaster claims that the people who actually use the link are few and most buyers will find Ticketmaster on their own. In the first three weeks of April 1997, Ticketmaster claims that only 12 ticket purchasers came to the Ticketmaster site from Seattle Sidewalk. See Rebecca Quick, *Can't Get There From Here May be Web's New Motto: Companies Start to Curb Links to Their Sites*, WALL ST. J., July 2, 1997, at B6.

61. Jim Zarroli & Bob Edwards, *Morning Edition: Web Links Challenged* (NPR radio broadcast, June 3, 1997), available in 1997 WL 12821854.

62. See *Ticketmaster Complaint*, *supra* note 55.

63. *Dead End Page* (visited Feb. 3, 1998) <http://www.ticketmaster.com/restricted/index.html>. The site further instructs, “You cannot connect to Ticketmaster Online directly through Microsoft Sidewalk,” and has a link to Ticketmaster's home page. *Id.*

Ticketmaster's suit seeks declaratory and injunctive relief as well as damages for violation of trademark dilution laws.⁶⁴ Allegedly, due to the association with Seattle Sidewalk, the value of Ticketmaster's name, trademarks and web site are diluted and the value of Seattle Sidewalk is unfairly enhanced.⁶⁵ Additionally, Ticketmaster claims violations of state and federal unfair trade practices laws on the theory that Ticketmaster has the sole right to control how users approach and use the Ticketmaster web site.⁶⁶ Because visitors from Seattle Sidewalk do not visit Ticketmaster's home page, they miss Ticketmaster's greeting, customer service announcements, and advertising. This may imply to visitors a false association or sponsorship between the two companies. Further, Ticketmaster claims that its presence on the Seattle Sidewalk page enhances Microsoft's advertising appeal and is an act of false advertising.⁶⁷

Microsoft replies that Ticketmaster's complaint "is based on a fundamental fiction. Ticketmaster creates an illusion that Microsoft, not the Internet user, is accessing Ticketmaster's Web Pages."⁶⁸ Furthermore, Microsoft asserts that although it links to Ticketmaster's site, it is not "party to the communication between the viewer and Ticketmaster" and all it does is "provide viewers of its own Web Pages with the URLs for other Web Page [sic] on the Internet . . . that the viewer may find of interest."⁶⁹

This case is currently awaiting trial and has a high likelihood of completing the trial process without a settlement due to the large resources of the parties, and thus is likely be the first case to rule on the legality of the link.

64. See *Ticketmaster Complaint*, *supra* note 55, ¶¶ 24-25.

65. See *id.* ¶ 19.

66. Although Ticketmaster objects to the link from Seattle Sidewalk, any visitor can set a bookmark to or enter the URL of an internal page of the Ticketmaster site and purposefully bypass the home page.

67. See *Ticketmaster Complaint*, *supra* note 55, ¶¶ 20, 27.

68. *Ticketmaster v. Microsoft: Answer to First Amended Complaint, Affirmative Defenses and Counterclaims*, ¶ 46 (visited Feb. 3, 1998) <<http://www.jlx.com/LJXfiles/ticketmaster/answer.html>>.

69. *Id.* ¶ 45.

B. In-Line Links

1. The technology and uses of in-line links

A link on the Internet does not necessarily transfer the viewer to another page, but can also use an image from a separate page and import it to the site being viewed. These links are called in-line or IMG (image) links.⁷⁰ Through these links, images appear seamlessly on a site like photographs appear in a newspaper or magazine—the viewer cannot distinguish that the image has originated at and been imported from a separate site.⁷¹

2. The legal ramifications of in-line links

An IMG link does not clearly violate copyright protections because copyright law requires a copying, and an IMG link involves no copying per se. The programming code in the linking site instructs the user's computer to visit the site on which the image appears originally and to display that image on the site currently being viewed; an original image is being displayed to the viewer. These links can, however, create liability because the viewer cannot distinguish that the image belongs to another site and the viewer can easily be confused as to the origin and ownership of that image.

While no suits have been filed alleging that an in-line link violates proprietary rights, there is record of one threatened suit. A graduate student at Princeton established an in-line link that imported the daily Dilbert comic strip to his own web page.⁷² United Media Syndicate, who controls the strip, threatened to sue for violation of copyright.⁷³ Of course, the student objected that technically he was not making a copy of the strip,⁷⁴ but eventually he agreed to remove the link from his page.⁷⁵

70. See Madoff, *supra* note 6, at S1.

71. See Raysman & Brown, *supra* note 35, at 3.

72. See *Web's Fabric*, *supra* note 8, at 8.

73. See *id.* A copy of the cease and desist letter is available online at *United Media's Second Letter* (visited Feb. 3, 1998) <<http://www.cs.princeton.edu/~dwallach/dilbert>>. United Media threatened to sue under the copyright theory of infringement of public display or performance rights. See *id.*

74. See *Web's Fabric*, *supra* note 8, at 8.

75. See Raysman & Brown, *supra* note 35, at 3.

C. Framed Links

1. The technology and uses of framed links

Framed links are a further development of hypertext links. Frame technology was developed by Netscape and was introduced with Netscape 2.0 in January 1996.⁷⁶ Framing allows the publisher of a site to divide her web page into multiple separate windows on the user's screen that can be operated independently of each other. Frames are easy to create⁷⁷ and allow a site to display an on-screen border that remains constant while various other sites are projected within the border.⁷⁸ Frames may display text and graphics as well as other elements such as hypertext links, and further internal frames.⁷⁹

The practice of framing allows an original site, through a link, to incorporate entire pages of other sites into its screen while still retaining the advertising and logo of the original site as well as retaining control of the viewer. The framed site is viewable in its entirety but is often reduced in size or partially obscured by the frame, forcing the viewer to scroll through that window to view the periphery of the framed site.⁸⁰ The origin of the framed site can be entirely unclear to the viewer, especially because the displayed URL belongs to the framing site, not the framed site.⁸¹ Because of this, bookmarks to the framed sites are impossible to create.⁸²

76. See Quick, *supra* note 31, at B8.

77. See *id.*

78. See Raysman & Brown, *supra* note 35, at 3.

79. See *id.*

80. See Quick, *supra* note 31, at B8. The framing site can control whether the framed site is shrunk to fit the window within the frame or whether the framed site is partially obscured by the frame. See Matt Jackson, *Linking Copyright to Homepages*, 49 FED. COMM. L.J. 732, 739 (1997), available at <<http://www.law.indiana.edu/fclj/pubs/v49/no3/jackson.html>>.

81. The viewer can discern the origin of the framed site by positioning her arrow over the window, clicking with her right mouse button, and choosing "properties." This will display the URL of the window.

82. See Weiss, *supra* note 5, at B9. Bookmarks are a function of browser software that allow the user to mark a page and be able to revisit it quickly and easily.

718 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

Frames are beneficial to many sites because they increase the number of functional options displayed to the viewer. Metasites that use frames can increase the likelihood that the viewer will stay with the meta site while visiting the other sites listed, rather than wandering off into cyberspace. This benefits the framing site by ensuring that its advertising and logo will be continuously displayed while the viewer is accessing the framed sites.⁸³ Certainly, advertisers love the continual exposure they receive while in a frame, but the advertisers of the framed sites are unhappy because their ads are upstaged or obscured.⁸⁴ However, on the Internet exposure is everything, and framing does arguably increase the exposure of the framed site.

Framing technology can also be beneficial to the viewer who is able to quickly and easily access a great deal of information with little sophistication and effort.⁸⁵ Many framing sites have a frame that allows for greater navigability through the selection of sites the viewer can visit—increasing the utility and appeal of framing sites to web users.

2. *The legal problems of framing technology*

Frames, however, can create great confusion over the ownership of a site. The framed site may appear to be “presented” by the original site,⁸⁶ or it may appear that the original site is an authorized user of the framed site, or that the original site has some affiliation with the framed site.⁸⁷ This confusion can lead to lawsuits for reverse passing off and misappropriation.⁸⁸ There is also arguably liability under copyright law, but as with IMG links, the framing site does not technically make a copy of the framed site; the framing site tells the user’s computer from where to retrieve an original copy of the framed site, and the site appears within the frame on the user’s screen without any reproduction.

83. See Quick, *supra* note 31, at B8.

84. See *id.*

85. See Weiss, *supra* note 5, at B9.

86. See Quick, *supra* note 31, at B8.

87. See Madoff, *supra* note 6, at S1.

88. See *infra* Part IV.C-D.

On October 17, 1996 Roman Godzich launched the TotalNEWS Internet site⁸⁹ to enable people to find current news easily.⁹⁰ TotalNEWS provides links to the sites of more than 1,000 news organizations, creating a huge database of articles for the convenience of visitors.⁹¹ Because TotalNEWS used framing technology,⁹² the content of the news organizations' sites was shown in only one window on the screen and was surrounded by TotalNEWS framing which included the TotalNEWS logo and third-party promotional advertising.⁹³

Although one might think that the news publishers would be grateful for the exposure they received from TotalNEWS, some were unhappy about the framed links for a number of reasons.⁹⁴ One reason was that the publishers wanted to protect the advertising on their own sites. When those sites were linked to from TotalNEWS, the advertisers on the TotalNEWS frame at the bottom of the page were more noticeable, typically larger, and generally overshadowed advertising on the publishers' own pages.⁹⁵ Additionally, TotalNEWS' actions raised concerns about intellectual property protection and possible misuse of copyrighted and trademarked material.

89. The TotalNEWS site is located at *TotalNEWS*, *supra* note 12.

90. See *TotalNEWS Settles Suit With Media Companies*, *NEWSDAY*, June 8, 1997, at A47; Quick, *supra* note 31, at B8. Mr. Godzich realized the need for a site to allow easy access to current news at the time of the TWA 800 crash when his wife and son were scheduled to be making a transatlantic flight at that approximate time. He could not find one site at which he could get all the information he was looking for. See Quick, *supra* note 31, at B8.

91. See Quick, *supra* note 31, at B8.

92. A vertical frame on the right side of the screen provides buttons with links to major news providers such as CNN and the Wall Street Journal. A small frame in the bottom right corner displays the TotalNEWS logo. A large frame along the bottom of the screen displays advertising for supporters of TotalNEWS. See *TotalNEWS*, *supra* note 12.

93. See *id.*

94. But, according to Mr. Godzich, many web sites (including Forbes and MSNBC) "either thanked us or requested we add links to their sites." *Content Wins—But Sets No Precedent: TotalNEWS Suit Settled*, *NEWSINC*, June 23, 1997, available in 1997 WL 9049311 [hereinafter *Content Wins*].

95. See *Washington Post Co. v. Total News, Inc.*, 97 Civ. 190 (PKL) (S.D.N.Y., complaint filed Feb. 20, 1997) complaint ¶¶ 7-10, available at <<http://www.jlx.com/inter.net/complaint.html>> [hereinafter *TotalNEWS Complaint*]; Debra Aho Williamson & Kim Cleland, *Big Media Fights Back, and the Web Could Lose: TotalNews Suit Opens Door to Scrutiny of Links*, *ADVERTISING AGE*, Mar. 3, 1997, at 24.

720 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

Consequently, in February 1997, The Washington Post and five other publishers⁹⁶ filed suit against TotalNEWS claiming that the “[d]efendants are engaged in the Internet equivalent of pirating copyrighted material.”⁹⁷ According to the plaintiffs’ attorney, TotalNEWS is a “parasitic website”⁹⁸ whose use of frames is equivalent to cutting a news story out of a printed newspaper, pasting it on a new sheet of paper, and selling advertising around the margins.⁹⁹

The suit against TotalNEWS charged a myriad of violations of the law and sought a declaration of the plaintiffs’ rights, a permanent injunction, and damages.¹⁰⁰ First, the plaintiffs charged that their copyrights on all framed pages had been infringed because TotalNEWS “republishes” this material and makes it available on its web site.¹⁰¹ TotalNEWS, of course, responded that it does not “republish” anything but simply directs the user’s computer to the location where it can retrieve the information.¹⁰² However, it is possible that the image of the TotalNEWS site, taken as a whole, may be considered an unauthorized derivative work. If so, TotalNEWS may have violated copyright law.¹⁰³

The plaintiffs also sought relief under federal and state trademark dilution and infringement statutes. According to the plaintiffs, their own marks “are among the most famous trademarks used in interstate commerce in the United States”¹⁰⁴ and are diluted by being shown within the TotalNEWS frame.¹⁰⁵

Additionally, the plaintiffs asserted violations of state deceptive practices and unfair competition laws, as well as violation of the federal Lanham Act § 43(a).¹⁰⁶ These claims are

96. Plaintiffs are The Washington Post, Time, CNN, The Los Angeles Times, Dow Jones & Company, and Reuters. See *TotalNEWS Complaint*, *supra* note 95.

97. *Id.* ¶ 10.

98. *Id.* ¶ 8.

99. See David Hoyer, *Small Valley Firm’s Big Fight Could Decide Future of Web*, ARIZ. REPUBLIC, Mar. 7, 1997, at E 1.

100. See *TotalNEWS Complaint*, *supra* note 95, ¶¶ B-C. Plaintiffs also sought costs and attorney’s fees. See *id.* ¶ E.

101. See *id.* ¶ 70.

102. See Freeling & Levi, *supra* note 10, at S5.

103. See *id.*; see also discussion *infra* Part IV.A.

104. *TotalNEWS Complaint*, *supra* note 95, ¶ 45.

105. See *id.* ¶ 46.

106. See 15 U.S.C. 1125(a); *TotalNEWS Complaint*, *supra* note 95, ¶¶ 56-60; see

based on the likelihood of viewers' confusion regarding the origin and affiliation of the news reports,¹⁰⁷ and the likelihood of misconception that the plaintiffs sponsor, approve of, or are affiliated with the TotalNEWS site. TotalNEWS' frames that display the advertising and TotalNEWS logo are the main sources of potential confusion for viewers.¹⁰⁸ However, the fact that the URL displayed at the top of all viewer's screens is the URL of TotalNEWS and not that of the Washington Post, for example, is an additional source of confusion.¹⁰⁹ This function of framing may lead to the greatest confusion over the origin of the material. TotalNEWS responded that viewers will not be confused about the origin of the displayed material because TotalNEWS posts a disclaimer, stating that it is not affiliated with the organizations to whose material it links, along with instructions on how to view the linked sites without the frames.¹¹⁰ Additionally, plaintiffs asserted that TotalNEWS misappropriated the plaintiffs' "valuable commercial

also discussion of Lanham Act claims, *infra* Part IV.C.

107. See *TotalNEWS Complaint*, *supra* note 95, ¶ 52.

108. See *id.* ¶¶ 35-36. However, at least one visitor was not confused. "[T]he simple layout of the formatting seen in TotalNews . . . leaves no impression that they claim the content as their own, or have any connection at all." Seth Finkelstein, *The TotalNews Case—Confusion in Comprehension, Not Display*, INTERNET LEGAL PRAC. NEWSL., May 19, 1997, ¶ 9 (May 19, 1997) <<http://www.collegehill.com/ilp-news/finkelstein1.html>>.

109. See *TotalNEWS Complaint*, *supra* note 95, ¶¶ 34-35 (objecting to viewer's prolonged exposure to TotalNEWS' URL while viewing the plaintiffs' sites).

110. See *Web's Fabric*, *supra* note 8, at 8. The disclaimer, which must be linked to from the home page, states in part:

[E]ven though the TotalNEWS URL might be displayed as the current URL, users are actually directly accessing the third-party web sites. . . . All data is sent from the corresponding web site directly to the user's browser without any intervention from TotalNEWS.

[The site here instructs the viewer how to remove unwanted frames from linked sites.]

. . . .

All trademarks and copyrights are owned and controlled exclusively by the third-party web sites accessed, unless otherwise stated in their terms of services.

Furthermore, no inference or assumption should be made and no representation may be implied that either TotalNEWS, its parent or subsidiary companies or their affiliates, edit, operate or control in any respect any information, products or services on these third-party sites.

TotalNEWS Disclaimer (visited Feb. 3, 1998) <<http://www.totalnews.com/disclaimer.html>>.

722 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

property”¹¹¹ under state common law. This claim would typically be preempted by a federal copyright claim, but due to a recent Second Circuit definition of the exceptions to preemption, the misappropriation claim may be viable.¹¹² Assuming a misappropriation claim were allowed against TotalNEWS, the plaintiffs could succeed upon showing an unauthorized use of plaintiffs’ material for commercial gain.¹¹³

Finally, plaintiffs claimed that TotalNEWS tortiously interfered in the contracts between the plaintiffs and their advertisers by displaying its own third-party advertising in the most prominent positions of the screen.¹¹⁴ Plaintiffs claimed that this act burdens their contracts with their own advertisers because the advertisers on plaintiffs’ sites do not receive the benefit they anticipated when they purchased the advertising.¹¹⁵ TotalNEWS responded that the benefits to the plaintiffs because of the added hits they receive from the TotalNEWS site have a *positive* impact on plaintiffs’ contracts with their advertisers.¹¹⁶ In fact, TotalNEWS used this theory to support the fact that the plaintiffs can prove no damages, because of the additional exposure they are providing these sites.

This case against TotalNEWS was settled.¹¹⁷ According to the settlement agreement, TotalNEWS may not frame the plaintiffs’ sites, but it does have an express license to link to them.¹¹⁸ This license may be revoked at any time upon 15 days notice,¹¹⁹ and if that occurs, TotalNEWS retains the right to litigate.¹²⁰

111. See *TotalNEWS Complaint*, *supra* note 95, ¶ 40.

112. See *NBA v. Motorola, Inc.*, 105 F.3d 841, 843 (2d Cir. 1997) (holding that common law misappropriation actions regarding “time-sensitive” information survive federal copyright preemption in some circumstances).

113. See *TotalNEWS Complaint*, *supra* note 95, ¶ 42.

114. See *id.* ¶ 75.

115. See *id.*

116. See *Zarr oli & Edwards*, *supra* note 61.

117. See *Content Wins*, *supra* note 94. TotalNEWS settled because it did not have the money to fight a lengthy battle against the wealthy publishers. See *id.*

118. See Matt Richtel, *Web Suit Fails to Provide Precedent*, AUSTIN AM.-STATESMAN, June 9, 1997, at A6.

119. See *id.*

120. See Martin H. Samson, *Hyperlink at Your Own Risk*, N.Y. L.J., June 24, 1997, at 1. Incidentally, five daily Japanese newspapers have threatened to sue TotalNEWS for framing their sites. See Max Jarman, *Five Japanese Papers Warn*

IV. CAUSES OF ACTION

A. *Copyright Infringement*

Copyright infringement has been asserted in the TotalNEWS and Dilbert cases.¹²¹ There is no direct precedent for the copyright issues that arise in these contexts, and no mention in the copyright statutes of how to apply copyright law to the Internet. The last major revision of copyright law was the Copyright Act of 1976,¹²² well before the sophistication of computers made it possible for the Internet to grow to its current size and popularity.

Under the Copyright Act of 1976, the owner of a copyright can prohibit others from reproducing, preparing derivative works of, distributing copies of, and publicly performing or displaying the copyrighted work.¹²³ To implicate a copyright holder's rights, the copies that are made must be "material objects . . . in which a work is fixed by any method . . . from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."¹²⁴ "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."¹²⁵

1. *Viewing a site as infringing on copyright*

While the action that is disputed in these cases is linking, an examination of the application of copyright law to the basic function of viewing a web site is instructive. The legislative history of the Copyright Act implies that copies of work in a computer's RAM are not fixed for copyright purposes: "[T]he

Total News: Scottsdale 'Metasite' Accused of Poaching, ARIZ. REPUBLIC, Dec. 24, 1997, at E1.

121. See *TotalNEWS Complaint*, *supra* note 95, ¶¶ 67-73; *United Media's Second Letter* (visited Feb. 3, 1998) <<http://www.cs.princeton.edu/~dwallach/dilbert>>. Copyright infringement was also asserted in the *Shetland Times* case, but that specific copyright law claim does not exist in American law. See *Shetland Times Case*, *supra* note 42 (opinion granting interim interdict).

122. 17 U.S.C. §§ 101-803 (1994).

123. See *id.* § 106.

124. *Id.* § 101.

125. *Id.*

724 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

definition of 'fixation' would exclude from the concept purely evanescent or transient reproductions such as those . . . captured momentarily in the 'memory' of a computer."¹²⁶ While this interpretation would exclude typical web browsing from infringing on the rights of the copyright holder, it allows copies of sites retained in the cache to be considered copies for infringement purposes.

Notwithstanding the legislative history of the Copyright Act, in *MAI Systems Corp. v. Peak Computer, Inc.*,¹²⁷ the Ninth Circuit held that loading software from a permanent storage device (such as a hard disk, floppy disk or CD-ROM) into the RAM of a computer is sufficient to constitute a copying of the software.¹²⁸ The court stated that "since we find that the copy created in the RAM can be 'perceived, reproduced, or otherwise communicated,' we hold that the loading of software into the RAM creates a copy under the Copyright Act."¹²⁹ This broad definition of "copying" could certainly include the accessing of web sites as they are downloaded from the Web into the computer's RAM for viewing in the same manner the software in *MAI* was loaded into RAM.¹³⁰

According to the *MAI* interpretation of copyright law, *all* viewers of web sites are infringing on the copyright holder's exclusive rights because the viewing of a site necessitates that the site be loaded into the RAM of the viewer's computer. But given the voluntary act of constructing a web page, and the assumption that that page was constructed to be viewed, it would be absurd to hold a viewer liable. Therefore, the viewer can assert a defense of implied license. Logically, the existence of any web site implies to the viewer a license to take all action that is incidental to viewing that site. Alternatively, the user could claim that her viewing of the site is a fair use of the material. An analysis of the fair use defense considers whether the use is for a commercial purpose, that the site by its nature encourages visitors, and the effect of the use upon the market

126. H.R. REP. No. 94-1476, at 53 (1976).

127. 991 F.2d 511 (9th Cir. 1993), *cert. dismissed*, 510 U.S. 1033 (1994).

128. *See id.* at 518-19.

129. *Id.* at 519 (citing 17 U.S.C. § 101).

130. *See Jackson, supra* note 80, at 744-46.

value of the copyrighted work.¹³¹ The balance of these factors would likely exonerate the viewer from any copyright liability.

2. *Linking and framing as infringing on copyright*

But linking, not viewing, is the act that is causing lawsuits; in a linking context it is less clear whether unauthorized copying has occurred. The act of creating a hypertext link requires only the reproduction of the URL of the site, not any content of the site. The URL itself lacks unique or characteristic elements, and is therefore not copyrightable.¹³² Technically, no copying of copyrighted work is involved in the creation or use of a link itself—the link simply directs the user's computer to where it can access the linked site. Inserting in one's page a link to another site can be considered no different than listing a phone number or address for the user to call or visit.¹³³ Similarly, a sentence in print telling a user where to find a specific article violates no copyright even if the article itself is copyrighted because the information on where the article is located is not the article itself, nor a public display, nor performance of it.¹³⁴ Another commentator, however, has argued that the link is not as simple as a statement, but rather is a *device* that delivers the linked page to the viewer, and thereby infringes on protected rights of the copyright holder.¹³⁵

Additionally, if the law were interpreted to hold viewers responsible for copyright infringement for viewing sites, then a link could encourage copyright violation, and the site creating the link could be responsible for contributory infringement of

131. See 17 U.S.C. § 107. There is also a fourth factor, which is the amount and substantiality of the portion used as related to the whole, but it seems irrelevant to this analysis. See *id.*

132. URLs are functional and contain no expressive or original component that would subject it to copyright protection. See Raysman & Brown, *supra* note 35, at 3; Jackson, *supra* note 80, at 742.

133. See Raysman & Brown, *supra* note 35, at 3 (stating that functionally a URL is no different than a street address).

134. See Finkelstein, *supra* note 108, ¶ 3.

135. See Brad Templeton, *Linking Rights*, ¶ 11 (visited Feb. 3, 1998) <<http://www.clari.net/brad/linkright.html>> (suggesting that a link is an online "physical" button that causes the browser software to move to a new site and therefore is more infringing than simply displaying a phone number to call).

726 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

the copyright. Contributory infringement occurs when a party “with knowledge of the infringing activity [in this case the viewing], induces, causes or materially contributes to the infringing conduct of another.”¹³⁶

A framed link may be considered a copyright infringement as a derivative work. Any “work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’”¹³⁷ The existence of the frames, themselves, could indicate the creation of a derivative work.¹³⁸ The derivative nature of the work would be further indicated by any distortion of the original view of the site (shrunken or partially obscured).¹³⁹ This theory is very favorable to plaintiffs in framing cases because no copying is necessary to support a finding of a derivative work.

According to another theory, the copyright holder’s right to distribute her work could be infringed by a link, either hypertext or framed. This could apply because the linking site has “taken a step toward distributing the content of the linked site beyond the confines of the cyberspace where its owner placed it.”¹⁴⁰ However, this theory rests on the notion that the linking site is retrieving the linked site for the user. On the contrary, the link simply instructs the user’s computer to access the linked site in its original position in cyberspace.

If a link is considered to create a copy under copyright law, traditional defenses could be used by linkers to immunize their actions. First, the implied license defense may apply. Because linking is so fundamental to the functioning of the Web, it could easily be considered incidental to viewing; therefore by publishing a site, the owner is impliedly licensing all hypertext

136. *Gershwin Publishing Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (citations and footnote omitted).

137. 17 U.S.C. § 101 (1994).

138. *See* *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988) (holding that copyrighted artwork mounted onto ceramic tiles constituted a derivative work for copyright purposes), *cert. denied*, 489 U.S. 1018 (1989). *But see* *Lee v. A.R.T. Co.*, 125 F.3d 580 (7th Cir. 1997) (holding that copyrighted artwork mounted onto ceramic tiles *did not* constitute a derivative work for copyright purposes).

139. *See* *Gilliam v. American Broad. Cos.*, 538 F.2d 14, 24 (2d Cir. 1976).

140. Charles R. Merrill & Robert J. Burger, *Keeping the Chain Unbroken*, INTELL. PROP. MAG., ¶ 31 (Feb. 1997) <<http://www.ipmag.com/merrill.html>>.

links.¹⁴¹ This license, however, may be subject to any stated prohibition of linking to a site that desires to remain link free.¹⁴² Alternatively, a license to link may be implied as long as the link does not bypass advertising used as a revenue generator.¹⁴³ However, an implied license to view or link to a site may not be deemed to extend to either a competitor, or a derivative work and therefore may not extend to framing sites.¹⁴⁴

Additionally, the defense of fair use could apply to a hyperlinker, although not as universally as to a viewer. The linker is more likely to have established the link for commercial purposes, and may detract from the value of the site depending on the originating site of the link and whether the destination of the link bypasses advertising on the linked site. Unfortunately for framing sites such as TotalNEWS, the fair use defense is unlikely to apply to their use of the framed information because they are more clearly using the copyrighted material for commercial purposes, as particularly evidenced by the surrounding advertising. However, an additional requirement for fair use defense—the impact on the market demand for the information—may work for the benefit of either the framing site or the framed site. A framing site may actually increase the demand for the framed site because the framing site gives simple and direct access to the framed site.

The use of an IMG link may also constitute a creation of a derivative work or a public display depending on its use. Further, an IMG link is less likely to be defensible through the implied license and fair use doctrines due to the deceptive presentation of the link.

Because there is no direct copying involved in hyperlinking, these links should not be restricted by copyright law, notwithstanding the decision in *MAI*. IMG and framed links

141. *See id.*

142. *See* Mark Sableman, *Business on the Internet, Part II: Liability Issues*, 53 J. MO. BAR 223, 225-26 (1997) (noting that prohibitions against linking which are stated on the site could undercut the viability of generally implied licenses).

143. *See* Templeton, *supra* note 135, ¶¶ 21-22 (stating that it is reasonable to imply a license to link to any site if the link neither bypasses a security system nor advertising and there is no stated prohibition against linking on the site).

144. *See* Freeling & Levi, *supra* note 10, at S5 (suggesting that an implied license may not extend to a competitor).

728 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

could be controlled by copyright if they are considered derivative works or public displays. The drawback of applying copyright law to the Internet is that the law does not consider the specific characteristics of the Internet; it protects copyright privileges on the Internet in exactly the same manner as copyright privileges in print media are protected, and yet the uses of the information on the Internet are different.

B. Trademark Infringement

Trademark law is easier to apply to the Internet than copyright law because it is not as media specific, and its application does not restrict the flow of information on the Internet more than it restricts information in print. Trademark claims include claims of infringement and dilution.

1. Linking as infringing on trademark

Claims of trademark infringement can arise if a hyperlink is designated on the linking page with a proprietary name, image, or logo. All links contain the URL of the passively linked site, and many URLs contain the trade name of the owner of the linked site which may be protected. However, the use of the trade name in the URL of a link may be excused as a fair and descriptive use of the mark. In contrast, an in-line link that incorporates a distinctive image or mark into another page could be found to violate trademark restrictions.

However, many trademark claims associated with linking would likely be considered trademark dilution claims, wherein the linked-to page claims that the value of its trademark(s) has been diminished by the link.¹⁴⁵ A trademark dilution claim recognizes that trademark holders need to impose quality restrictions on the use of their marks in order to preserve the value of those marks. One argument that owners of linked pages make is that the association between the two sites tarnishes or devalues the image associated with the mark. Another situation in which a dilution claim may arise is that of a hypertext link pointing to a page internal within a site. This link bypasses the customary channels the viewer would

145. See 15 U.S.C. § 1127(c) (1994).

otherwise travel through to reach the internal page, and may therefore distort the image the viewer has of the site.

An example of the two types of dilution infringement is claimed in *Ticketmaster v. Microsoft*,¹⁴⁶ in which Ticketmaster alleges that Microsoft is diluting the Ticketmaster trademark by incorporating a link from Seattle Sidewalk to the Ticketmaster site.¹⁴⁷ Ticketmaster claims that through this link to the Ticketmaster site Microsoft “has enhanced the value of Microsoft’s web site and business and diluted and diminished the value of Ticketmaster’s web site and business.”¹⁴⁸ Presumably, this is due to the use of the Ticketmaster name on the Microsoft web site and the structure of the link that transmits the viewer to an internal page within the Ticketmaster site bypassing Ticketmaster’s third-party advertising.

2. *Framing as infringing on trademark*

The owner of a framed web site can also assert trademark infringement and dilution claims.¹⁴⁹ Infringement would result from the unauthorized use of proprietary marks for commercial purposes as they appear within the frame. Dilution can be asserted due to the display of the trademarks within a frame that includes a logo and URL of another organization.

A federal district court in *Playboy Enterprises, Inc. v. Frena*¹⁵⁰ ruled that when a dial-up computer bulletin board (similar to a web site) uploaded computer images that displayed the registered trademark of Playboy, then removed the trademarks and added the name of the bulletin board to the photographs, the bulletin board service infringed Playboy’s trademarks.¹⁵¹ This can be analogized to a framing situation. A frame surrounding a linked site that displays the logo of the framing site can be considered an obscuring of the trademark of the framed site, and therefore an infringement. However framing which adds advertising or a logo to the framed site is

146. See *supra* Part III.A.2.b.

147. See *Ticketmaster Complaint*, *supra* note 55, ¶ 10.

148. *Id.* ¶ 19.

149. Both of these claims were asserted against TotalNEWS. See *TotalNEWS Complaint*, *supra* note 95, ¶¶ 44-55.

150. 839 F. Supp. 1552 (M.D. Fla. 1993).

151. See *id.* at 1561.

730 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

not as egregious as removing the original trademark and replacing it with the trademark of the framing site.

C. Lanham Act §43(a) for Unfair Competition

The Lanham Act § 43(a) was written to encompass all types of actions that would not be included in other proprietary right prohibitions. A claim under the Lanham Act § 43(a)¹⁵² for unfair competition is designed to protect property interests against a broader range of unfair trade practices than trademark law protects against.¹⁵³ Under § 43(a), any act that would cause consumers confusion as to origin or association of the product is actionable. For example, in *Playboy*, the court found that falsely describing the origin of the photographs created liability for the defendant for “reverse passing off” (or putting Frena’s name on Playboy’s product).¹⁵⁴ In addition, the court found that the defendant denied Playboy the right to public credit for its goods.¹⁵⁵

In a linking scenario, a viewer could easily be confused as to the ownership and origin of an internal page to which she linked from a home page she was viewing. Such was the harm alleged by the plaintiffs in *Shetland Times*.¹⁵⁶ Visitors who utilize such a link may believe that the linked-to page was created by the linking page—especially if the look and feel of the two pages are similar. The only true way to distinguish

152. 15 U.S.C. § 1125 (1994). The statute reads:

(a) Civil action

(1) Any person who, on or in connection with any goods or services, . . . uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, false or misleading representation of fact, which--

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

Id.

153. *See Playboy*, 839 F. Supp. at 1562.

154. *See id.*

155. *See id.*

156. *See supra* Part III.A.2.a.

whether one has been transported to an entirely new site is to compare the URLs of the linking and the linked sites.

In a framing case, such as *TotalNEWS*, the imposition of the framed link with the framing site's logo in a frame can cause even more confusion than a hypertext link due to substantial and false implications that an affiliation, association, or sponsorship exists between the two sites.¹⁵⁷ Additionally, the reverse passing off claim can be sustained because the URL displayed is the URL of the framing site, there is no discernable move from the original site to a new one (even if the look and feel change, some elements of the screen remain the same), and the origin of the linked material is not easily distinguished from the framing site. Such a claim can also be asserted for in-line links that are sure to cause confusion as to the origin of the imported item.

A further claim can be raised under the Lanham Act for infringement of "trade dress." Trade dress is the distinctive overall image and impact of a combination of elements that are source-identifying.¹⁵⁸ On a web site the distinguishing factors could include colors, typefaces, and graphics used on the site, and the arrangement of them. If a site containing links to pages of another site mimics the style of the linked-to site, particularly if there seems to be an attempt to confuse the viewer as to which site she is viewing, the owner of the linked site may be able to prevail on such a claim.

D. Misappropriation

Common law misappropriation, like the Lanham Act §43(a), is intended to bar infringing conduct that is not covered by copyright law. Misappropriation can be claimed in linking cases to protect "material that has been acquired . . . as the result of organization and the expenditure of labor, skill, and money."¹⁵⁹ The Supreme Court first recognized misappropriation as a cause of action during World War I, before copyright protection was extended to news dispatches, to give some equitable

157. See *TotalNEWS Complaint*, *supra* note 95, ¶ 52; Raysman & Brown, *supra* note 35, at 3.

158. See *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992); *M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421 (4th Cir. 1986).

159. *International News Serv. v. Associated Press*, 248 U.S. 215, 239 (1918).

732 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

protection to the owner of the news dispatch who technically had no intellectual property right in the news dispatches.¹⁶⁰ This theory was subsequently used to protect network television and radio broadcasting, and phonographic records before they were otherwise protected under federal intellectual property laws.¹⁶¹ The courts recognized the need to prevent unfair use of the property rights of another, even if those property rights were not yet technically recognized by statutory law.

The main hurdle in asserting a misappropriation claim is that it is usually preempted by copyright law. However:

“Misappropriation” is not necessarily synonymous with

copyright infringement, and thus a cause of action labeled as “misappropriation” is not preempted if it is in fact based neither on a right within the general scope of copyright as specified by section 106 nor on a right equivalent thereto. For example, state law should have the flexibility to afford a remedy (under traditional principles of equity) against a consistent pattern of unauthorized appropriation by a competitor of the facts . . . constituting “hot” news, whether in the traditional mold of *International News Service v. Associated Press*, 248 U.S. 215 (1918), or in the newer form of data updates from scientific, business, or financial databases.¹⁶²

In January 1997, the Second Circuit in *NBA v. Motorola, Inc.*,¹⁶³ redefined the misappropriation exemption to copyright law. Misappropriation can now be applied to cases where the plaintiff generates or gathers time-sensitive information at some cost, the defendant is a competitor of the plaintiff and his use of the information constitutes free riding on the plaintiff’s efforts. The ability of parties to free ride on the efforts of the plaintiff “would so reduce the incentive to produce the product

160. See Bruce P. Keller, *Condemned to Repeat the Past: The Reemergence of Misappropriation and Other Common Law Theories of Protection in Intellectual Property*, in LITIGATING COPYRIGHT, TRADEMARK AND UNFAIR COMPETITION CASES FOR THE EXPERIENCED PRACTITIONER 1997, at 185, 189-90 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G4-4025, 1997).

161. See *id.* at 193-95.

162. H.R. REP. No. 94-1476, at 132 (1976).

163. 105 F.3d 841 (2d Cir. 1997).

or service that its existence or quality would be substantially threatened.”¹⁶⁴

In an Internet context, misappropriation claims may also be used to prevent hypertext linking, but a competitive relationship between the parties may be more difficult to prove. However, such a claim could more likely be used by owners of framed sites who are trying to prevent further framing. The framed sites typically contain time-sensitive information gathered at a cost, and the framing site is free riding on those efforts.¹⁶⁵ Because the framed site is in direct competition with framing sites for advertising revenues, the market value of the framed site could be threatened.

V. OTHER PROPOSED SOLUTIONS

A. Technical Solutions

Although legal enforcement mechanisms may be sufficient to preserve a page owner's rights on the World Wide Web, frequent users of the Web are disinclined to have non-technical judges and juries define their property rights.¹⁶⁶ They worry that if the judge or jury is insufficiently cyber-sophisticated, they will rule in ways that will materially hamper or destroy the utility of the Web.¹⁶⁷

164. *Id.* at 845.

165. The Washington Post calls TotalNEWS a “parasitic website that republishes the news and editorial content of others’ websites in order to attract both advertisers and users.” *TotalNEWS Complaint*, *supra* note 95, ¶ 8. Similarly, Ticketmaster alleges that “Microsoft is feathering its own nest at Ticketmaster’s expense.” *Ticketmaster Complaint*, *supra* note 55, ¶ 17.

166. Virginia Hick observed, “The stakes are so high for many of these issues, neither side wants to lose. . . . So they put it off to another day and work out an accommodation. At this point, that’s good for everyone.” Virginia Baldwin Hick, *Companies Strive to Define Law of the Net: Firm’s Name Steered Surfers to a Competitor, Framing Causes a Fuss on the Internet*, ST. LOUIS POST-DISPATCH, Dec. 21, 1997, at E1; *see also* David R. Johnson & David G. Post, *And How Shall the Net Be Governed? A Meditation on the Relative Virtues of Decentralized, Emergent Law*, (Sept. 5, 1996) <<http://www.cli.org/emdraft.html>> (arguing for no governmental involvement in Internet regulation).

167. The judge in *Shetland Times Inc. v. Wills* illustrates how many judges could feel in the situation of having to decide Internet issues with little technological experience. “No detailed technical information was put before me in relation to the electronic mechanisms involved. It was simply submitted that there was not a ‘sending’ in an ordinary sense and that a contrast could be [sic] made with cable television.” *Shetland Times Case*, *supra* note 42 (opinion granting interim interdict).

734 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

In lieu of legal imbroglios, there are technical battles to fight and cyberspace solutions to be found. One technical solution to prevent a link to an internal page is to require a password or registration for every visitor to the site, forcing the visitor to enter through the home page.¹⁶⁸ A similar approach was taken by Ticketmaster to prevent Seattle Sidewalk from linking directly to an internal page on the Ticketmaster site. The Ticketmaster intercept page effectively states Ticketmaster's objection to the link and shepherds all linkers through the home page. But there are other steps Ticketmaster could take including putting its name and advertising on the top of *each* page of its site.

Another way to prevent links to internal pages that bypass the home page is to periodically shift the addresses of the internal pages.¹⁶⁹ This would make unwanted hyperlinks obsolete, and while they could be reestablished, it gains the linked page a reprieve. However, this method of protection may interfere with links from search engines, which would be disadvantageous for the site. Further, there are technical methods that allow tracing of where a web site's visitors come from.¹⁷⁰ Using this tracing technique, site owners can monitor links and act quickly to stop any linking they feel is inappropriate. Additional computer coding can even prevent frames from being displayed around a site.¹⁷¹

Unavoidably, for every technical prophylactic, there will be a corresponding technical advance to avoid or overcome the remedy. This will be a continuing circular battle, and it emphasizes the need to protect proprietary rights on the Internet. In contrast, however, intellectual property laws are only necessary to protect proprietary rights when technology is incapable of doing so. If the members of the Internet community are able to solve these problems without legal involvement, the Internet will retain its technologically-governed environment.

168. See *Web's Fabric*, *supra* note 8, at 8.

169. See Raysman & Brown, *supra* note 35, at 3.

170. See *supra* note 32.

171. The Wall Street Journal used this technology to prevent the framing of their sites before the TotalNEWS settlement. See Quick, *supra* note 31, at B8. When this technology is used the link still works, but it functions as a hypertext link.

B. Legal Solutions

Realistically, legal solutions will eventually have to be developed to regulate these issues, either through new interpretations of current laws or by passing new laws. These legal solutions should, however, be approached with caution. Although some results of linking should be prohibited to protect proprietary rights, some functions should be preserved to protect the Internet environment.

1. Policy goals

The culture and history of the Internet and the World Wide Web indicate the importance of the ability to be able to freely share information.¹⁷² Links are the main tool used to facilitate the sharing because they are the primary means of transportation on the Web. They are essential to the usefulness of the Web and should be preserved to the greatest extent possible when in conflict with proprietary rights. All Internet users who post information on the Web are sophisticated enough to know that links to their sites are essential and therefore inevitable. If it were impossible to use links, the only way to access a site would be to know and type in the URL of the site—this would force us back to the Internet as it existed before the advent of the Web, when each site had to be individually accessed with an address already known to the user.

The scope of intellectual property rights should not necessarily grow with the advent of a new medium in which to display creative work. The traditional rights of a copyright or trademark holder can be preserved with the continued use of links. This co-existence may impose a few restraints on linking and may require web site publishers to take more self-protective steps than they are accustomed to in other media, but will eventually foster an Internet environment that allows for the greatest access to information.

When proprietary rights are balanced against the need for linking on the Internet, some restrictions on linking are essential. However, neither hyperlinks to home pages nor to internal pages should be generally restricted by copyright or

172. *See supra* Part II.D.

736 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

any other laws. The balance of the threats imposed by hyperlinking and the benefits of their function weigh in favor of the preserved use of links. Web site publishers are aware of the ubiquity and functionality of links, and must be willing to accept the legality of linking and take reasonable steps to preserve their proprietary interests in light of the medium in which they have chosen to participate. For example, clearly identifying the ownership of a site at the top of each page would prevent a great deal of confusion as to site ownership and would prevent one site from passing off the material on another site as its own.

Although links in general should not be prohibited by law, if such a link (to an internal page, for example) falsely implies a common ownership between pages by an implied association, or by the design of one page to match the other to confuse the viewer, such practices could be actionable under state unfair trade practices laws, the Lanham Act § 43(a), and trademark dilution and misappropriation. These causes of action protect legitimate and useful links and prohibits those which are designed to profit from viewer confusion.

In-line links can be a useful tool for web site publishers, but should only be used by the owner of the image; they will inevitably cause the viewer to assume that the image is associated with the site it is in. Any use of an in-line link that imports a copyrighted image into an unassociated page without the copyright owner's express consent should be a violation of the copyright holder's exclusive right to control derivative works or public displays.

Frames are useful to viewers and therefore merit tolerance, but not unrestrained use. Framing sites should be required, initially, to notify the viewer of a method to view the linked site without the frame, at the viewer's discretion. If the frame is imposed, it should display the framed site with minimal distortion, and clearly give attribution to the owner of the framed site (including a display of the URL of the framed site). These measures are suggested by the common sense, broad theories associated with unfair trade practices laws, trademark dilution and misappropriation, and allow for the use of frames, but not their abuse.

On the whole, narrow solutions to these legal problems on the Internet are difficult to codify, since they will likely be

obsolete or incomplete at the moment of their passage. With the continued technological development that defines the Web, new types of links and new linking methods may soon be developed that specific proscriptions will be inadequate to control. Therefore, while the Internet is still in such a dynamic and developing state, any law that governs its use must be loose enough to allow for creative growth. Legislatures should aid the courts in sorting out practical solutions to these issues, but the legislative solutions should be based on the particular needs and uses of the Internet and consider the users and their purposes as well.

2. *Proposed legislative solutions*

In an effort to find a practical solution to these Internet problems, the Clinton Administration commissioned a report (White Paper) on how the copyright act should be amended to protect intellectual property rights on the Internet.¹⁷³ The White Paper acknowledges and supports the *MAI* approach to finding a copy anytime a web site is loaded into the RAM of a computer.¹⁷⁴ This interpretation of copying, as discussed earlier, could be the basis for finding that links violate copyright protection. Further, the committee recommended that a right of transmission be added to the bundle of proprietary rights.¹⁷⁵ This additional right of transmission could also prevent hyperlinking depending on exactly how transmission is defined. If adopted, these interpretations of copyrights on the Internet could be crippling to the further development of the Web as a tool for broad communication and information exchange.

The Georgia legislature also addressed some of these issues by passing a statute in 1996 intended to prevent fraud on the Internet by prohibiting the use of tradenames without

173. See INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995); see also *NII Copyright Protection Act of 1995: Hearing on H.R. 2441 and S. 1284 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary and the Senate Comm. on the Judiciary*, 104th Cong. 30-39 (1995) (statement of Bruce A. Lehman, Assistant Secretary of Commerce).

174. See INFORMATION INFRASTRUCTURE TASK FORCE, *supra* note 173, at 65.

175. See *id.* at 213-17.

738 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

the permission of the owner of the name or mark.¹⁷⁶ In effect, this statute prohibited all hypertext links created without the express permission of the site owner; because many URLs contain tradenames, the use of the URL itself in a link would be infringement.¹⁷⁷ The outrage in the Internet community over this statute was immediate and strong. The ACLU challenged the constitutionality of the statute and was granted a preliminary injunction barring enforcement of the statute pending trial.¹⁷⁸ The judge hearing the preliminary injunction motion conceded:

A fair reading of the clause . . . prohibits the current use of web page links. The linking function requires publishers of web pages to include symbols designating other web pages which may be of interest to a user. . . . The appearance of the seal, although completely innocuous, would definitely "imply" to many users that permission for use had been obtained.¹⁷⁹

Such a law, because of its inartful drafting, would inadvertently destroy the usefulness of the Web while innocently trying to prevent fraud on the Internet.

As shown by these two examples, any legislative action that relates to the Internet must consider what ramifications that action will have on the vitality of the Internet. Policy goals of encouraging continued growth of the Internet must be considered when drafting any legislation that would impact the Internet to ensure that its important aspects, such as linking, are not significantly limited.

VI. CONCLUSION

176. See GA. CODE ANN. § 16-9-93.1 (1996).

177. The statute makes it a crime for

any person . . . knowingly to transmit any data through a computer network . . . if such data uses any . . . trade name, registered trademark, logo, legal or official seal, or copyrighted symbol . . . which would falsely state or imply that such person . . . has permission or is legally authorized to use [it] . . . for such purpose when such permission or authorization has not been obtained.

Id. at § 16-9-93.1(a).

178. See *ACLU of Ga. v. Miller*, 977 F. Supp. 1228, 1230 (N.D. Ga. 1997).

179. See *id.* at 1223 n.5.

With the advent and increasing use of the Internet, it is inevitable that legal disputes will arise and that legal issues, which in the past have been considered settled, will have to be applied in an entirely new environment. The intellectual property and unfair competition laws we have depended on up to this point were not drafted in consideration of all the possibilities available through the Internet, but they are still sufficient to protect ownership rights when combined with simple self-help remedies such as clear identification of ownership.

We must preserve intellectual property rights on the Internet to foster the free exchange of ideas in that medium and to prevent stifling the growth and expansion of this new tool. Flexible laws, such as state and federal unfair competition laws and misappropriation laws, can and should be applied until the technology is more mature, the uses are more defined, and legislation has been enacted that specifically considers the unique capabilities of the Internet. When strict copyright and trademark law would be applied in opposition to a policy of growth of the Web, laws prohibiting unfair trade practices and misappropriation are strong enough to protect the proprietary rights of Internet publishers, relying as they do on equitable principles. At the same time, these laws lack media-specific definitions and restrictions and therefore can easily be applied in the cyber-environment.

These laws allow the flexibility necessary for judges and juries to consider the uniqueness of the Internet and to protect that medium for further development until it has matured sufficiently to allow for comprehensive statutory regulation. Historically, one court noted, "the doctrine [of unfair competition has been] a broad and flexible one. It has allowed the courts to keep pace with constantly changing technological and economic aspects so as to reach just and realistic results."¹⁸⁰ The analogous claims of unfair trade practices and misappropriation will allow us to control activities on the Internet and still encourage its development and growth.

The plaintiffs in linking cases assume that if a site establishes a link to their page, and the linking site benefits,

180. Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp., 101 N.Y.S.2d 483, 495 (N.Y. Sup. Ct. 1950).

740 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

then there must some harm done to the linked page. This is not true in print media when one source references another, and it is not true on the Internet. There simply are no damages in many linking situations because the linked page receives more benefits from the increased traffic. When true intellectual property issues are at stake, traditional intellectual property law can be applied, but linking does not infringe on the rights of the creator until the linking site tries to take credit for the work of the linked site.

When considering the bounds of the law in this field, we must consider that “[r]egulation should be imposed only as a necessary means to achieve an important goal on which there is a broad consensus. Existing laws and regulations that may hinder electronic commerce should be reviewed and revisited or eliminated to reflect the needs of the new electronic age.”¹⁸¹ The freedom to link on the Internet leads to the greatest possible access to information. In order to provide for this result, we must be sensitive to the purpose and culture of the Internet as we develop ways to protect what is useful about the Internet and control what is not.

Kara Beal

181. THE WHITE HOUSE, A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE 5 (1997).