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Copyright Implications of "Unconventional Linking" on the World Wide Web: Framing, Deep Linking and Inlining

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NOTE

COPYRIGHT IMPLICATIONS OF “UNCONVENTIONAL LINKING” ON THE WORLD WIDE WEB: FRAMING, DEEP LINKING AND INLINING[†]

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INTRODUCTION

Watershed decisions of first impression applying copyright law to advanced online technologies are imminent.¹ It is incumbent on Congress and the legal community to improve the chances that courts will decide them correctly. Some of the most interesting and important of these controversies will involve the rapidly maturing "linking" technologies of the World Wide Web ("WWW" or "Web"). The application of copyright principles in these contexts is the subject of much debate, but as the technologies grow in commercial importance, answers to these questions will be of increasing significance. Absent focused efforts by the legal community, resolution of these issues is far from certain. Most high-profile cases to date involving the Internet have not centered on copyright issues;² of those that have, many threaten to set sweeping and counterproductive precedents. Already, some courts have held that even basic Internet functions such as viewing a Web page can constitute "copying" for purposes of the copyright laws.³ In the absence of legal certainty, moreover, companies are beginning to promulgate documents such as "linking licenses,"⁴ purporting to authorize activities that copyright law should explicitly deem permissible. Judicial inaction or misconception of the underlying technology, however, could allow such contracts to gain undeserved legitimacy as the *de facto* standard. Continued procrastination in resolving these dilemmas is inadvisable as exponential growth in the commercial and recreational use of the Web⁵ spawns novel copyright questions almost daily. Guidance from Congress and those knowledgeable in the technology is paramount to prevent copyright principles from being misapplied to these novel questions, thus

¹ Indeed, just as this Note was nearing completion, a federal district court filed an order that appears to be the first to touch on the copyright ramification of framing, a main subject of this Note. See *Futuredontics, Inc., v. Applied Anagramics, Inc.*, No. CV 97-6991, 1998 U.S. Dist. LEXIS 2265 (C.D. Cal. Jan. 30, 1998) (denying a motion to dismiss a copyright infringement suit against the owner of a framing Web site). The fact that these cases are now beginning to be heard makes the prompt resolution of the questions posed in this Note all the more urgent.

² See, e.g., *Reno v. ACLU*, 117 S. Ct. 2329 (1997) (striking down portions of the Communications Decency Act of 1996). Despite its lag behind the technology, however, U.S. Internet case law is the most developed in the world. See Meg Carter, *Network: Copyright Cases from Washington to Shetland*, THE INDEP. (London), August 26, 1997, at N1.

³ See *MAI Systems, Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993) (defining "copying" so broadly as to include the loading of a file into a computer's temporary RAM memory).

⁴ See Ellen Poler, *Frames and License Agreements* (Oct. 20, 1997) <<http://collegehill.com/ilp-news/poler1.html>> ("[A] 'workaround' for the problem has been the use of linking agreements by many major commercial Web sites (whether or not they are 'meta-sites').").

⁵ See *Reno*, 117 S. Ct. at 2334 (detailing the rapid growth of the Web).

severely threatening the expansion and very existence of many online commercial ventures.

Currently, there is no consensus among commentators as to the proper paradigm for online copyright law. Some believe that applying established principles of intellectual property protection is sufficient.⁶ Others suggest that current notions of copyright and trademark protection must be fundamentally reassessed or even abolished relative to this new publishing forum.⁷ Certainly, translating copyright law to the Web will require more than mechanical application of existing statutes; the exact definition of the word "copy," for example, is not at all obvious in the online context. But while technological change may well lead people to question many of the assumptions upon which our current intellectual property jurisprudence is based, an abrupt overhaul of the jurisprudence, which has been shaped and tested far too extensively over the years, would be neither realistic nor productive.

In many of the most contentious areas, the courts have yet to apply current laws. Many otherwise ideal test cases have been resolved too early due to a variety of factors, including lopsided resources between disputants,⁸ business expediencies of settlement and judicial

⁶ For examples of this "minimalist" approach, see generally Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure* (1995), reprinted at *Intellectual Property and the National Information Infrastructure* (last modified Nov. 15, 1995) <<http://www.uspto.gov/web/offices/com/doc/ipnii/>> [hereinafter "White Paper"]; Charles R. Merrill & Robert J. Burger, *Keeping the Chain Unbroken* (visited Oct. 15, 1997) <<http://www.ipmag.com/merrill.html>>.

⁷ See, e.g., Terje Norderhaug & Juliet M. Oberding, *Designing a Web of Intellectual Property* (visited Oct. 15, 1997) <<http://www.nlc-bnc.ca/ifla/documents/infopol/copyright/nort1.htm>> ("Based on the finding that web technology undermines the protection of intellectual property law, we encouraged increased activism on the part of web technology designers with respect to taking over the role of legislation in shaping the framework for creative work."); Letter from Georgia Harper, Office of the General Counsel, University of Texas System, to author (Sept. 9, 1997) (on file with author) ("Imagine that it's 20 years in the future and things are pretty much all-digital If it's true that most of that content will be provided either free (no cost) to the consumer, either directly (access/use fees) or indirectly (licensed to 'libraries' that provide access to the end users), what would be the role of fair use, and even of copyright law itself, in such a world? I've always felt that to be really forward-thinking . . . , we have to get beyond arguments about the scope of fair use. It's just an impractical mechanism in this day and age").

⁸ See Jenifer Joyce, *Framing, Linking, Suing: When Conflicts Arise over Web Relationships, Suits Follow*, A.B.A. J., Oct. 1997, at 18 ("In framing or linking suits, the defendant is typically a small company with limited assets Recovering damages in such cases may not be feasible."); Letter from Roman Godzich, President, TotalNEWS Inc., to author (April 15, 1998) (on file with author) ("The only reason TotalNEWS settled was that we didn't have the funds to fight 6 of the worlds [sic] major publishers banded together. In fact, we found that it alos [sic] damaged our ability to sell advertising [sic] with those agencies who had our plaintiffs [sic] as major business partners [sic] (about half the agencies out there)."); Courtney Macavinta, *Linking a Copyright Violation?* (last modified Dec. 11, 1997) <<http://www.news.com/News/Item/0,4,17233,00.html>> ("So far the potential test cases have been settled out of court, or have involved small online start-ups that bowed to the pressure of big-time copyright holders.").

inexperience,⁹ to have any precedential value. The funds and time required to bring these issues to court may make litigation a poor means to modernize online copyright law.¹⁰ For this reason, and because the Internet is indeed unique in many respects, charting the boundaries of intellectual property protection online will be a far more challenging task than many commentators believe. Internet cognoscenti should guide the courts in creating the vital precedents that will continue to guide copyright law on the Internet for many years.¹¹

The first and most critical issue arising from application of copyright law to the Web is how to handle the "link" (also "hyperlink" or "hotlink"). Though actual case law is sparse, most courts and commentators generally agree that in its most simplistic form, a "link" that takes a Web user from one page to another lacks the creativity necessary to conflict with copyright protections.¹² This understanding, if it holds, guarantees that the Web will continue to exist in at least a basic form, for the ability to freely link between pages is central to the Web's appeal and utility.¹³

⁹ See Wendy R. Leibowitz, *The 'Net's Electronic Crystal Ball Reveals the Future as Litigious*, NAT'L L.J., April 21, 1997, at B7 (recognizing that judges "are not always the most wired members of society.").

¹⁰ See David G. Post, *The Link to Liability*, AM. LAW., July-Aug. 1997, at 99 (predicting a "technological arms race" evolving from courts' inability to deal quickly with developing Internet advancements); Norderhaug & Oberding, *supra* note 7 ("[L]itigation will do nothing but slow the pace of any technological developments. Currently, the cry of *copyright infringement* on the web prevents individual developers from pursuing some interesting work."); SHETLAND NEWS, *Times Puts Expansion Plans on Ice and Blames the News* (last modified July 29, 1997) <<http://www.shetland-news.co.uk/appeal.html>> ("The Shetland Times today . . . froze plans for new printing presses and blamed the move on the escalating costs of a legal action against its former editor . . .").

¹¹ See Norderhaug & Oberding, *supra* note 7 ("Technologists should take action now to prevent improper precedent.").

¹² See, e.g., Matt Jackson, *Linking Copyright to Home Pages*, 49 FED. COMM. L.J. 731, 734 (1997) (analogizing the linking of documents to "placing references to other works in printed text."); Richard Raysman & Peter Brown, *Dangerous Liaisons: The Legal Risks of Linking Web Sites*, N.Y.L.J., April 8, 1997, at 3 ("Absent a violation of rights in the way the link is structured . . . a link in itself is not viewed as violating any rights."); Jeffrey R. Kuester & Peter A. Nieves, *What's All the Hype About Hyperlinking?* (visited Oct. 15, 1997) <<http://www.tkhr.com/articles/hyper.html>>; Poler, *supra* note 4 ("No copyright liability is seen for a hypertext link that recites a URL . . ."); Letter from David H. Rothman, author of NETWORLD!: WHAT PEOPLE ARE REALLY DOING ON THE INTERNET, AND WHAT IT MEANS TO YOU, to author (April 2, 1998) (on file with author) ("Your distinction between linking and copying is absolutely correct."); Russell McVeagh McKenzie Bartleet & Co., *Hypertext Links: Are They Legal?* (last modified Dec. 1996) <<http://www.rmmb.co.nz/updates/ipdec96.html>> ("It is difficult to see how a hyperlink to another Web site can involve copying any material on that site . . ."); *There's A Storm A Brewing!*, 36 AARDVARK WEEKLY 1, ¶ 11 (Nov. 25, 1996) <<http://www.aardvark.co.nz/av1125.htm>> ("US [sic] copyright lawyers . . . [u]niversally . . . agreed that . . . linking to another site's publicly accessible content almost certainly does not constitute any breach of copyright.").

¹³ See *ACLU v. Reno*, 929 F. Supp. 824, 837 (E.D. Pa. 1996), *aff'd* 117 S. Ct. 2329 (1997) ("The power of the Web stems from the ability of a link . . ."); Brad Bolin, *Linking and Liability* (visited Oct. 15, 1997) <<http://www.bitlaw.com/internet/linking.html>> ("[I]f linking were disallowed or made illegal in the abstract, the Web would no longer exist."); Letter from

Unlike the law, however, Web technology has matured beyond the simple "link." Users can now implement newer, more ingenious methods to integrate others' information into their own pages. "Established"¹⁴ online content providers, however, have thus far had some success in frustrating these innovations by way of intellectual property protection.¹⁵ The extent to which such monopolies are granted will determine whether the Web as an informational medium will remain free to evolve.¹⁶

This Note evaluates online copyright law as it applies to three of the more "unconventional links": "framing,"¹⁷ "deep linking"¹⁸ and "inlining."¹⁹ Each method has been recently employed by a variety of companies and individuals to provide new, innovative Web services and each has raised significant issues of copyright protection. Without thoughtful consideration of how the underlying technology is applied in these cases, courts are likely to make grave missteps. Part I provides a brief background look at the technology behind the Web, and a summary of how these "unconventional links" function. Part I will also briefly review the five "exclusive rights" protected by the 1976 Copyright Act. Part II will examine each of the three linking technologies specifically. The arguments raised by these test cases will be examined against the five exclusive rights and the idea of "moral rights" that has crept into a line of copyright decisions. This section will address the differing conceptions of the meaning and extent of copyright protection on which these decisions are based. The plausibility of a fair use defense will also be considered in each case, though a full exposition of that doctrine is beyond the scope of this Note. Finally, Part III proposes a synthesis of these differences in copyright doctrine which will both protect the valid rights of creators and promote further innovation and interconnectivity by commercial Web services.

David H. Rothman to author, *supra* note 12 ("The links are among the medium's main attractions. Make it harder to link without permission and in the end you'll actually lessen the Net's usefulness for news, advertising and other business activity.").

¹⁴ Certainly a relative term, since the Web has existed in its current form for less than a decade.

¹⁵ See, e.g., *infra* notes 116-35 and accompanying text (discussing *TotalNEWS* suit).

¹⁶ See M.A. Stapleton, *Playboy Settles Internet 'Framing' Trademark Case*, CHI. DAILY L. BULL., May 21, 1997, at 1 (discussing a defendant's decision to settle a case brought against it by Playboy on the same day it was served).

¹⁷ For a description, see *infra* text accompanying notes 51-61.

¹⁸ For a description, see *infra* text accompanying notes 62-65.

¹⁹ For a description, see *infra* text accompanying notes 66-72.

I. TECHNICAL AND LEGAL BACKGROUND

A. *How the Technology Works*

In order to grasp and dissect the legal issues raised by various functions of the Internet, one must have a working knowledge of the underlying technology.²⁰

1. *The Internet*²¹

The "Internet" is one of the most ill-understood buzzwords of the past decade. The Internet is not a single, omnipotent computer that users around the world can "hook into," nor is it a location in an ethereal plane called "cyberspace."²² Strictly speaking, the Internet is not a "thing" at all. Rather, it is best understood as a collective term for all of the individual machines that combine to form it.²³ It is a network of networks,²⁴ a method of sharing information.

What has come to be called the Internet originated in the 1960s as a network of government and industry computers permanently interlinked by communication lines.²⁵ Its purpose was to facilitate easier communication between governmental agencies, defense research labs and scientists, with connections that would remain secure in the event of a war.²⁶ It remained mired in obscurity until the late 1980s,²⁷ when it first became accessible to the public. Like previous inventions allowing an order of magnitude increase in clarity, ease, speed and breadth of communication—the telephone, telegraph and fax ma-

²⁰ Some of this overview may be intuitive. The reader is assumed to have at least a minimum familiarity with most of the technologies discussed herein. Nonetheless, most will probably benefit from a brief explanation of technology.

²¹ It is an exercise in understatement to say that there are several reference books to choose from on the workings and uses of the Internet. One helpful source is ELIZABETH L. LAWLEY & CRAIG SUMMERHILL, *INTERNET PRIMER FOR INFORMATION PROFESSIONALS* 36-39 (1993). Internet books just a handful of years old are notoriously susceptible to becoming outdated, but they nonetheless can provide useful background information.

²² See White Paper, *supra* note 6, at 13 ("[T]his argument relies on the fantasy that users of the Internet, for instance, are somehow transported to 'chat rooms' and other locations, such as virtual libraries. While such conceptualization helps to put in material terms what is considered rather abstract, activity on the Internet takes place neither in outer space nor in parallel, virtual locations. Satellite, broadcast, fax and telephone transmissions have not been thought to be outside the jurisdiction of the nations from which or to which they are sent. Computer network transmissions have no distinguishing characteristics warranting such other-world treatment.")

²³ See Jackson, *supra* note 12, at 735 ("The Internet is both the hardware which connects thousands of computer networks worldwide, and the protocols which allow these networks to communicate with each other.") (citations omitted).

²⁴ The term "internet" was first coined in 1982 to describe a collection of connected networks using the TCP/IP protocol. See *History of the Internet* (visited Mar. 9, 1998) <<http://www.cs.rochester.edu/u/leblanc/internet-course/history.html>>.

²⁵ See *Reno v. ACLU*, 117 S. Ct. 2329, 2334 (1997).

²⁶ See *id.*

²⁷ See *id.*

chine, for example—it quickly expanded into business and popular applications. Its exponential expansion continues today.

When a computer user (“user”) “gets on” the Internet, she has not actually “gotten” anywhere, but instead has established a connection with another computer that will allow her to receive information from that and other computers that have made themselves available via the Internet network. A typical home or office user begins this process by using her “terminal,” or individual computer, to connect to another computer, known as a “server.”²⁸ This connection is made by dialing over a phone line to a server computer operated by an Internet Service Provider (“ISP”) company or, as is often the case in business and educational settings, by direct cable connection to that institution’s own server. Once that connection is established, the user can send requests for information located on any server in the Internet network. That request is transmitted from the terminal to the user’s host server, then from that server to the server where the information is located. The target server then transmits a copy of the requested information back along the same path to the terminal computer, where it is stored in the terminal’s “cache” memory²⁹ and converted into viewable form. Thus, the user is never operating anywhere other than his own computer. Any information viewed is actually a copy of a file stored on a remote server, though the near-instantaneous transmission of commands and information between two distant machines creates the illusion that the user is “at” the remote site.

This powerful networking system has spawned “a wide variety of communication and information retrieval methods.”³⁰ Electronic mail (“e-mail”), the most popular feature,³¹ allows users to transmit textual messages to the servers of other users, which are then retrieved by the recipient. File Transfer Protocol (FTP) allows users to download³² files or programs that are listed by name and organized in directories and subdirectories on a particular server.³³ USENET is a collection of thousands of “newsgroups,” individualized forums where readers can post and respond to messages on any of a nearly

²⁸ Also known as a “node.” See Timothy Hughes, *Intellectual Property and Browsing the Web* (visited Oct. 15, 1997) <<http://www.gtlaw.com.au/gt/pubs/browsingweb.html>>.

²⁹ See JIM CARROLL & RICK BROADHEAD, 1996 CANADIAN INTERNET HANDBOOK 273 (1996); Alan Hartnick, *Copyright & Trademark on the Internet* (visited Oct. 15, 1997) <<http://www.ljextra.com/practice/intellectualproperty/0207intip1.html>>.

³⁰ *Reno*, 117 S. Ct. at 2334.

³¹ See LAWLEY & SUMMERHILL, *supra* note 21, at 77.

³² The term “download” and its antonym, “upload” (which, as used here, is synonymous with “post”), are two popular examples of computer-inspired language which often confuse the uninitiated. For the purposes of this Note, and as the author takes them to be properly understood, “download” means to retrieve information from another computer (e.g., a server) onto the computer one is using while “upload” means to send information from the user’s computer elsewhere.

³³ See LAWLEY & SUMMERHILL, *supra* note 21, at 98-105.

infinite variety of subjects.³⁴ This Note, however, focuses on the much more widely used and promising application of the Internet: the World Wide Web.

2. The World Wide Web

The Web is the most well-known³⁵ and, with the exception of e-mail, heavily used³⁶ feature of the Internet. Unlike FTP and USENET, the Web can display pictures, animation and sound as well as simple text,³⁷ allowing a much broader range of creative expression.

Users have developed unique jargon to describe different aspects of the Web. An individual person's or business' collection of files on the Web is known as his "Web site."³⁸ This term is also sometimes used to describe the server on which the files are stored.³⁹ Information on these sites is arranged in individual "pages,"⁴⁰ so named because they operate much like a page from a book, displaying a certain amount of textual and graphical information on the screen, and often leading into more information stored in other pages. Each "Web page" has a distinctive "address,"⁴¹ or Uniform Resource Locator (URL), to distinguish its location from other pages. A Web page is actually a file written in the Hypertext Markup Language (HTML) computer language. The elements of these files can be separated into

³⁴ See PAUL GILSTER, *THE INTERNET NAVIGATOR* 291-331 (1994). Subjects for USENET newsgroups are truly limitless, since one can rather easily create a new group if there is not one on a particular topic. Current groups range from "misc.legal.computing" to "rec.arts.startrek.info" to "alt.barney.die.die.die."

³⁵ See *Reno*, 117 S. Ct. 2335 (1997). It is so well-known that many mistakenly believe the Web and the Internet to be coextensive. See Jeffrey R. Kuester & Peter A. Nieves, *Hyperlinks, Frames and Meta-tags: An Intellectual Property Analysis*, 38 IDEA 243, 244 (1998).

³⁶ According to a study done by RelevantKnowledge, over 10 million people ages 12 and older used the Web between August 1997 and January 1998. See Paul Festa, *Studies: Net Use, Classifieds Up* (visited Feb. 2, 1998) <<http://www.news.com/News/Item/0%2C4%2C18705%2C00.html?nd>>. Another recent analysis conservatively estimated that there were roughly 3,809,400 Web pages in August 1997. See Kuester & Nieves, *supra* note 35, at 245.

³⁷ This was not originally the case. Web document contents were limited to text until "web browsers," programs used to view material on the Web, became publicly available. See ED KROL, *THE WHOLE INTERNET USER'S GUIDE & CATALOG—ACADEMIC EDITION* 325 (1996). The National Center for Supercomputing Applications (NCSA) released the first browser, called Mosaic, in 1993. See RICHARD W. WIGGINS, *THE INTERNET FOR EVERYONE* 245 (1995). The initial version of Mosaic was soon followed by its now-dominant descendants, the Netscape Navigator and Microsoft Internet Explorer browsers, which display an increasingly broad range of file types. It is no surprise that the release of these later browsers coincided with the Web's phenomenal rise in popularity.

³⁸ See *Lockheed Martin Corp. v. Network Solutions, Inc.*, 985 F. Supp. 949, 951 (C.D. Cal. 1997) (holding that Network Solutions did not violate Lockheed Martin's trademark by registering Internet domain names identical to a trademark held by Lockheed Martin).

³⁹ See *Reno*, 117 S. Ct. at 2335.

⁴⁰ See KROL, *supra* note 37, at 331. The term "Web site" and "Web page" are sometimes used inaccurately as synonyms.

⁴¹ See *id.*

four categories:⁴² (1) the text of the Web page, (2) commands or “tags”⁴³ that format the text and control the page’s appearance, (3) tags that insert other files into the page display, such as graphics, applets⁴⁴ and Java programs⁴⁵ and (4) tags that create hypertext links (as defined below). The browser then converts those commands into the visual display typically referred to as a Web page.

The hypertext link makes the Web appealing to users but raises copyright law concerns. Each page on the Web can be accessed directly by typing its URL into one’s browser,⁴⁶ or via a “link” (a.k.a. a hyperlink or hotlink) that takes the user directly to another particular page.⁴⁷ This attribute, allowing Web pages to be embedded with commands that direct the user to other pages, has become known as “hypertext.”⁴⁸ A typical link is attached to a portion of text or picture file in a page. Selecting (or “clicking on”) the link will cause the browser to display the targeted page. In the HTML language, the text or picture that serves as the link is surrounded by a “hyper-reference” (“href”) tag, which simply lists the URL of the target in a format that the browser understands as a link.⁴⁹ The browser will usually highlight or underline the text or file attached to the link.⁵⁰

⁴² See NCSA—*A Beginner’s Guide to HTML* (last modified Mar. 12, 1998) <<http://www.ncsa.uiuc.edu/General/Internet/WWW/HTMLPrimerAll.html>> (explaining the basic elements of a Web page).

⁴³ Commands in the HTML language are often referred to as “tags” because they are relatively short, single-function commands typed within brackets (<...>). They also usually come in pairs, with the first tag instructing the browser to start performing a function (such as creating a link or formatting the text in a certain way) and the second tag instructing the browser to cease performing the function. See *id.* The command within this second “end” tag is usually identical to the first but is preceded with a “/.” Thus, the command for creating italicized text appears as: <I> text </I>. See Kuester & Nieves, *supra* note 35, at 278.

⁴⁴ Applets are mini-applications, or programs within the Web page that perform a single function, such as playing a sound file or viewing a particular type of file. See *CNET Glossary – Applet* (visited Mar. 24, 1998) <<http://www.cnet.com/Resources/Info/Glossary/Terms/applet.html>>.

⁴⁵ Java is an advanced programming language that provides graphics and animation, and is used in several Web-related applications. See *id.*

⁴⁶ With the obvious exception of pages that are password-protected or that require some other type of prerequisite to retrieval.

⁴⁷ See KROL, *supra* note 37, at 326. Recall that “going to a page” involves a computer code (here, an HTML “tag”) that instructs the browser to retrieve a new HTML file and load it into the display.

⁴⁸ See *id.* The term “hypertext” was coined in 1965, though the concept can be traced as far back as 1945. See *id.* “Hypertext” has also been used more recently, though before the popularization of the Web, to describe a similar but more advanced system that would universally allow users to attach their own comments to a page, or a portion of text within a page, and to view background information and comments of other users attached to that particular text. See K. ERIC DREXLER, *ENGINES OF CREATION: THE COMING ERA OF NANOTECHNOLOGY* 217-30 (1986). Although the Web can not yet provide that level of interactivity, some are working to advance it toward that goal. See Foresight Institute, *CritSuite* (visited Mar. 22, 1998) <<http://crit.org/index.html>>; Foresight Institute, *Foresight Institute* (visited Feb. 1, 1998) <<http://www.foresight.org/homepage.html>>.

⁴⁹ This tag has the literal form “ [text or file that will serve as the link] .” See NCSA—*A Beginner’s Guide to HTML—Linking* (last modified

3. The Unconventional Links

a. Frames

A Web page author can write his code so as to divide a single browser window into multiple regions for simultaneous viewing of different Web pages.⁵¹ This technique is known as “framing” and was first introduced by Netscape Communications Corporation in 1996 as a proprietary feature of its “Navigator 3.0” browser.⁵² Microsoft Corporation has since emulated this feature in its browser, “Internet Explorer.”⁵³

A basic browser displays only one page at a time.⁵⁴ A frames-capable browser follows this basic design premise, except that it multiplies the number of pages that are visible by segmenting the display screen.⁵⁵ Each page still exists and functions independently and the user can still only interact with one at a time, although pages that are intended to be viewed in frames will often be designed to interact with each other.⁵⁶

HTML tags instruct the browser to display certain pages within frames.⁵⁷ The Web page that contains these tags is known as the “frameset document.”⁵⁸ This page contains only instructions that specify how the frames will be laid out on the screen and instructions that tell the browser which pages to display in those frames. The frameset document does not contain any viewable content of its own.⁵⁹ Any other non-frameset document, or “body document,”⁶⁰ may appear in the frames.

Jan. 16, 1998) <<http://www.ncsa.uiuc.edu/General/Internet/WWW/HTMLPrimerAll.html#LI2>>. When discussing the application of copyright to HTML documents, it is always important to recall the creative content—or lack thereof—in the specified tags.

⁵⁰ See KROL, *supra* note 37, at 347-48.

⁵¹ See Charlton D. Rose, *Sharky's Netscape Frames Tutorial Lesson 1: Laying Out Frames* (visited Feb. 1, 1998) <<http://www.newbie.net/sharky/frames/1/2.html>>.

⁵² See Raysman & Brown, *supra* note 12, at 3.

⁵³ See Poler, *supra* note 4. Every major browser now available has the frames capability. *See id.*

⁵⁴ For example, the “Back” and “Forward” buttons take the user from one page to the next. The “Refresh/Reload,” “Print” and “Stop” buttons all affect the one page currently being viewed. URLs of individual pages can also be stored in a “bookmark” file for easier retrieval. *See* Essential Communications, *Internet Glossary* (visited Mar. 24, 1998) <<http://www.cfoinc.com/glossary.htm>>. Current browsers are only capable of “bookmarking” a page if it is the sole page on display. When a browser displays a framed document, it can only bookmark the frameset document. *See infra* text accompanying notes 58-60 for a discussion of frameset documents.

⁵⁵ *See* Rose, *supra* note 51.

⁵⁶ *See id.*

⁵⁷ *See* Poler, *supra* note 4.

⁵⁸ *See* Rose, *supra* note 51. These have also been referred to as “layout documents.” *See* Poler, *supra* note 4.

⁵⁹ *See* Poler, *supra* note 4.

Web sites with frames are more dynamic and interactive than standard one-page displays. Frames are often used to create a relatively narrow vertical frame on one side of the screen that contains links to each feature of the site. Clicking on one of the links will display that page in the larger frame, while the navigational links remain visible in the narrow frame. Frames also allow for side-by-side comparison of text documents or artwork. In addition, frames allow the insertion of commercial advertisements that remain visible in one portion of the screen while the user browses in another. As discussed below, framed commercial advertisements have sparked much legal controversy.⁶¹

b. Deep Links

“Deep links” are links that defeat a Web site’s intended method of navigation.⁶² Most sites contain a “home page”—a page intended to be the “front door” to the site—that welcomes users, explains the nature of the site and offers links that allow the user to navigate through the site.⁶³ The owner of such a site may prefer that other sites link to his home page, rather than to another page within the site. Instead of linking to the home page of a site, however, deep links go “beyond”⁶⁴ it to link to another page within the site. For example, site A, which contains many pages describing various products, may have a separate page containing the order form with which to purchase the products. Site B might contain a link that takes the user directly to site A’s order form, bypassing site A’s navigational structure.⁶⁵

Despite having some negative connotations, deep links are not necessarily invasive or even objectionable. Many sites have no “home page” *per se*, nor would their owners object to links made to their site’s component pages. Nonetheless, important questions exist

⁶⁰ See *id.* Before the inception of frameset documents, all Web pages could have been categorized as “body documents.” See *id.*

⁶¹ See *infra* text accompanying note 116, *et. seq.*

⁶² See Barry D. Weiss, *Metasites Linked to IP Violations*, NAT’L L.J., July 21, 1997, at B9. This terminology appears to be common in Internet circles, but at least some use the phrase “deep links” to mean “when someone links to a document that belongs to someone else, but doesn’t make it very evident that they are doing so.” Letter from Ralph Slate, Owner, *Internet Hockey Database* at <<http://slater.alabanza.com/ihdb>>, to author (April 3, 1998) (on file with author). That definition is distinct from the one used here, to wit, a link that refers to a page within a Web site other than the “home” page.

⁶³ See Emily Madoff, *Freedom to Link Under Attack* (last modified June 23, 1997) <<http://www.ljx.com/internet/0623link.html>>.

⁶⁴ The term “beyond” is imprecise. In actuality, each Web page is an individual HTML file unto itself, with no order or ranking other than the arbitrary URL assigned to it. There is no cyber-spatial plane on which one page can come “before,” “after,” “above” or “below” another. See *supra* note 22 and accompanying text (defining “cyberspace”).

⁶⁵ For a similar, real-life example involving deep links to Ticketmaster’s on-line order form, see *infra* notes 243-47 and accompanying text.

regarding the extent to which deep links should be legally permissible.

c. Inlining

Perhaps the most legally questionable practice that this Note will address is "inlining."⁶⁶ Inlining is a technique by which the creator of a Web page incorporates graphic files⁶⁷ located on another server into his own Web page. As discussed above,⁶⁸ one of the four main types of HTML tags are those instructing the browser to display a certain graphic file at a specific location in a page. The primary example of this type of tag is the image source⁶⁹ ("image") tag. Normally, this tag will display a graphic file stored in the same server as the page itself. However, the image command can just as easily display a graphic file stored on any Internet-connected server.⁷⁰ Thus, when a browser copies the page from its server, it will read the image command, retrieve a copy of the specified graphic file from the remote server and incorporate (or "inline") the graphic into the page display as it would any other file.⁷¹

The outcome of this process is the same whether the file is stored locally or on another server. The user will be unaware of the source of the individual graphics in the page, unless they deconstruct the HTML coding of the page or the inlining page's creator chooses to inform the user, neither of which typically occurs. This, of course, is precisely what upsets owners of inlined files.⁷²

⁶⁶ Some literature also refers to this process as "mirroring." See Jackson, *supra* note 12, at 752. The term "mirroring" is more commonly used, however, to refer to the distinct but analogous process of completely duplicating every file (HTML, graphic, or otherwise) in one Web site and placing them in another site. Sites are usually mirrored on servers in different locations to facilitate quicker access for local users. See *CNET Glossary—Mirror Site* (visited Mar. 25, 1998) <<http://www.cnet.com/Resources/Info/Glossary/Terms/mirrorsite.html>>.

⁶⁷ "Graphic file," as used here, is shorthand for any file containing a visual display. These often contain graphic art designed on a computer, icons, pictures and other visual forms "scanned" into a computer-displayable format. The names of these files will usually end with a ".jpg" or ".gif" suffix. See *CNET Glossary—GIF* (visited Mar. 25, 1998) <<http://www.cnet.com/Resources/Info/Glossary/Terms/gif.html>>.

⁶⁸ See *supra* notes 42-45 and accompanying text.

⁶⁹ This tag has the form . See *NCSA—A Beginner's Guide to HTML, Part 3* (last modified Jan. 16, 1998) <<http://www.ncsa.uiuc.edu/General/Internet/WWW/HTMLPrimerP3.html>>. Other commands may be included within the brackets of this tag, such as those specifying the height and width of the file and how it should be aligned within the page. See *id.* This is a "stand-alone" tag, as it does not have an accompanying "end tag." See *id.* For an explanation of "end tags," see *supra* note 43.

⁷⁰ See Norderhaug & Oberding, *supra* note 7.

⁷¹ See *id.*

⁷² Not all inlining is unauthorized. Many services offering free space for Web sites, such as Geocities, require users to incorporate their corporate logo on their home pages in return. See Geocities, *Guidelines—Page Content Requirements* (visited Sept. 4, 1998) <<http://www.geocities.com/members/guidelines/requirements.html#required>>. This file can be inlined into users' pages using the image tag. Other sites may agree to inline each others' images, perhaps to increase their exposure.

B. A Brief Overview of Modern Copyright Law

I. Fundamentals of U.S. Copyright Law

United States copyright law exists “not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’”⁷³ Since the time of the framers of the Constitution, this goal has been promoted by allowing authors to “secur[e] for limited Times . . . the exclusive Right to their respective Writings.”⁷⁴ Thus, creators have a legally protected economic incentive to create.

Nonetheless, copyright protection has always presented a difficult balancing act between the desire to provide for open societal access to creative works and the creator’s right to control and profit from her work.⁷⁵ As societal attitudes on these issues have fluctuated and technological and economic realities have changed, the laws have varied. Prior to 1971, for example, sound recordings were unprotected by copyright.⁷⁶ Before 1976 there was no right to control the public display of one’s work⁷⁷ and federal copyright protection did not attach to a creation until it was published.⁷⁸

The current system of copyright protection was established by the Copyright Act of 1976.⁷⁹ It enumerates five⁸⁰ “exclusive rights” of the copyright holder: to (1) reproduce the work,⁸¹ (2) create derivative works,⁸² (3) distribute copies,⁸³ (4) perform the work publicly,⁸⁴ and (5) display it publicly.⁸⁵ This cumulative “bundle of

⁷³ *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (quoting U.S. CONST., art. I, § 8, cl. 8).

⁷⁴ U.S. CONST., art. I, § 8, cl. 8.

⁷⁵ *See* Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381, 1395 (6th Cir. 1996) (Merritt, J., dissenting), *cert. denied*, 117 S. Ct. 1336 (1997) (“Rights of copyright owners are tempered by the rights of the public. The copyright owner has never been accorded complete control over all possible uses of a work.”).

⁷⁶ *See* PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES 552 (4th ed. 1997).

⁷⁷ *See* COPYRIGHT LAW REVISION, H.R. REP. NO. 94-1476, at 63 (1976).

⁷⁸ *See* GOLDSTEIN, *supra* note 76, at 566 (“As a rule, federal statutory copyright protected the work from the moment of publication through . . . a fixed twenty-eight year term . . .”).

⁷⁹ Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.).

⁸⁰ A “sixth” exclusive right was created by the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 2, 109 Stat. 336 (codified in 17 U.S.C. § 106(6)). This new paragraph, however, is more a clarification of the existing performance right than a new protection, and for the purposes of this Note will be treated as synonymous with the performance right.

⁸¹ *See* 17 U.S.C. § 106(1) (1994 & Supp. 1998).

⁸² *See id.* § 106(2).

⁸³ *See id.* § 106(3).

⁸⁴ *See id.* § 106(4).

⁸⁵ *See id.* § 106(5).

rights” often overlaps and can be infinitely subdivided.⁸⁶ As with any property right, these rights and subdivisions thereof may be licensed (impliedly or explicitly, exclusively or non-exclusively), sold, given away or otherwise alienated,⁸⁷ thus providing incentive to acquire the right.

To establish direct infringement, the complainant must show: (1) a valid copyright and (2) copying.⁸⁸ “Copying” is shorthand for anything that violates one or more of the five exclusive rights.⁸⁹ Infringement need not be willful.⁹⁰ To qualify for copyright protection, a work must be an “original work of authorship” and fixed in a “tangible medium of expression.”⁹¹

Liability for infringement can, in some circumstances, extend to parties beyond the direct infringer. Although Title 17 does not specifically hold anyone accountable for the infringing acts of another, “contributory infringement is merely a species of the broader problem”⁹² of delineating when it is just to punish one party for the acts of another. As described recently by the Ninth Circuit, this concept has taken root in two lines of copyright cases: vicarious and contributory infringement.⁹³

Vicarious liability is a product of agency law and is itself subdivided into two genera: the so-called “landlord-tenant” cases and the “dance hall” cases.⁹⁴ The first category describes a relationship where the principal “who lacked knowledge of the infringing acts of its tenant and who exercised no control over the leased premises was not liable for” the acts.⁹⁵ The dance hall line of cases, however, find liability in operators of entertainment venues “when the operator (1) could control the premises and (2) obtained a direct financial benefit from the audience” paying for the infringing performance.⁹⁶

⁸⁶ See COPYRIGHT LAW REVISION, H.R. REP. NO. 94-1476, at 61 (1976) (“These exclusive rights, which comprise the so-called ‘bundle of rights’ that is a copyright are cumulative and may overlap in some cases. Each of the five enumerated rights may be subdivided indefinitely and . . . each subdivision of an exclusive right may be owned and enforced separately.”).

⁸⁷ See 17 U.S.C. § 201(d) (1994).

⁸⁸ See *Mitek Holdings, Inc. v. Arce Eng’g Co.*, 89 F.3d 1548, 1553 (11th Cir. 1996).

⁸⁹ See *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1085 n.3 (9th Cir. 1989).

⁹⁰ See 17 U.S.C. § 501(a) (1994). If willfulness is shown, however, statutory damages may be awarded. See *id.* § 504(c)(2). Criminal penalties may be assessed for commercially motivated infringement. See *id.* § 506(a); see also No Electronic Theft (NET) Act of 1997, Pub. L. No. 105-147, 111 Stat. 2678 (extending felony criminal liability beyond commercial contexts).

⁹¹ 17 U.S.C. § 102 (1994).

⁹² *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984).

⁹³ See *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996). For a detailed and comprehensive consideration of vicarious liability in copyright law, see *Polygram Int’l Publ’g, Inc. v. Nevada/TIG, Inc.*, 855 F. Supp. 1314 (D. Mass. 1994).

⁹⁴ See *Fonovisa*, 76 F.3d at 261-65.

⁹⁵ *Id.* at 262.

⁹⁶ *Id.*

Contributory infringement, on the other hand, proceeds from tort law and imposes liability on those who directly contribute to another's infringement.⁹⁷ A contributory infringer is best described as "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another."⁹⁸

2. *Application of Copyright Law to the Internet*

It is well-settled that copyright protection can vest in online works. Title 17 lists eight broad, non-exclusive categories of protectable works, including literary, pictorial, graphic and audiovisual works,⁹⁹ under which nearly all Web-based expression certainly falls. Moreover, as long as the work in question was created by the author's own efforts, it is an "original work[] of authorship."¹⁰⁰

Copyright vests in the authorship of the work, not the copy that embodies it.¹⁰¹ Thus, "a 'book' is not a work of authorship, but is a particular kind of 'copy.' Instead, the author may write a 'literary work,' which in turn can be embodied in a wide range of 'copies' . . . including books, periodicals, computer punch cards, microfilm, tape recordings"¹⁰² and, logically, Web pages.

Information stored in an Internet server is in a "tangible medium of expression."¹⁰³ The House Report accompanying the 1976 Copyright Act makes clear that the medium of fixation is irrelevant so long as the work is "embodied in a physical object in written, . . . magnetic, or any other stable form"¹⁰⁴ and is "capable of perception directly or by means of any machine or device 'now known or later developed.'"¹⁰⁵ Therefore, the computer files that are the subject of this discussion are protectable by copyright law. The central inquiry, then, is whether the use to which the computer files are put violates one of the five exclusive rights of copyright.

Although the courts remain slow to adjust to online technology, some precedents applying copyright law to the Web do exist. Posting copyrighted material on the Web has been held to violate the rights of distribution and public display.¹⁰⁶ Several courts have shown a will-

⁹⁷ See *id.* at 264.

⁹⁸ *Gershwin Publ'g Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (citation omitted).

⁹⁹ See 17 U.S.C. § 102(a) (1994).

¹⁰⁰ COPYRIGHT LAW REVISION, H.R. REP. NO. 94-1476, at 51 (1976).

¹⁰¹ See *id.* at 53.

¹⁰² *Id.*

¹⁰³ *Id.* at 52.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ See, e.g., *Marobie-FL, Inc. v. National Assoc. of Fire Equip. Distribs.*, 983 F. Supp. 1167 (N.D. Ill. 1997) (holding that posting copyrighted "clipart" graphic files on Web without permission constitutes direct copyright infringement); *Playboy Enters., Inc. v. Frena*, 839 F.

ingness, moreover, to apply copyright principles to other online services, especially Bulletin Board Services ("BBS").¹⁰⁷ As illustrated above, however, such cases rarely go to trial and, when they do, courts are often ill-prepared to adjudicate them.¹⁰⁸

Although case law involving many of the new technologies may be sparse, the Supreme Court has laid down a guiding principle for approaching them: "When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of [its] basic purpose."¹⁰⁹ In other words, protecting an author's exclusivity is subordinate to the goal of advancing the educational and cultural enrichment of society at large.¹¹⁰ This principle merits special attention in today's political climate, where many are wary of (and sometimes outright hostile towards) the Web's openness.¹¹¹

The concepts of vicarious and contributory infringement are especially germane to the Web. Even the Supreme Court has recognized that information on the Web does not simply fall into consumers' laps.¹¹² Unlike television, which delivers copyrighted broadcasts to a passive viewer, users of the Web must seek out and access the Web page they wish to view.¹¹³ In many cases, a user's actions, such as retrieving a copy of a Web page to view in a browser, will be implicitly licensed by the content provider. Since there can be no contributory infringement without a direct infringement to "contribute" to, the user's ISP can not be liable.

This is not to say that Web site owners and ISPs can never be held liable for infringement. Even where an activity is covered by an implied license, a site operator's conduct might be contributory infringement where it causes the user to exceed the license.¹¹⁴ Indeed,

Supp. 1552 (M.D. Fla. 1993) (finding operator of BBS that included files containing digitized copies of Plaintiff's copyrighted photographs liable for unauthorized public distribution).

¹⁰⁷ See *Frena*, 839 F. Supp. 1552; *Sega Enters. Ltd. v. Maphia*, 948 F. Supp. 923 (N.D. Cal. 1997) (uploading and downloading of computer program files from BBS held to violate federal copyright and trademark law).

¹⁰⁸ See *supra* note 9 and accompanying text.

¹⁰⁹ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

¹¹⁰ See *Princeton Univ. Press v. Michigan Document Servs.*, 99 F.3d 1381, 1395 (6th Cir. 1996) (Merritt, J., dissenting), *cert. denied*, 117 S. Ct. 1336 (1997).

¹¹¹ See, e.g., No Electronic Theft (NET) Act of 1997, Pub. L. No. 105-147, 111 Stat. 2678 (extending criminal penalties to non-commercial copyright infringement); James Podgers, *Internet Regulation, Round Three*, A.B.A. J., March 1998, at 99 (describing the Communications Decency Act of 1996 as "a strong, deeply held, visceral desire to protect children from offensive sexual material on the Internet.") (internal quotations omitted); Jackson, *supra* note 12, at 733 ("Copyright owners, with the backing of the Clinton administration, claim that unless copyright law is strengthened, content will not be made available on the Internet and the network will fail.").

¹¹² See *Reno v. ACLU*, 117 S. Ct. 2329, 2336 (1997) (noting that a user must take affirmative steps in order to receive information via the Internet).

¹¹³ See *id.*

¹¹⁴ See Alan Gahtan, *Inappropriate Use of Frames May Constitute Infringement*, CYBERSPACE LAW., April 1997, at 4.

one BBS operator that encouraged its users to upload files that the operator knew to be infringing and that had the capacity to screen the files before making them publicly available was held liable for direct infringement.¹¹⁵ Nonetheless, in order to affix liability to the several parties involved in the online transactions examined below, it is especially important to keep in mind precisely who is doing what.

II. THE UNCONVENTIONAL LINKS

A. Frames

The dispute in *Washington Post v. TotalNEWS*¹¹⁶ centered on the propriety of frames. TotalNEWS is a small Arizona company that created a relatively simple Web site¹¹⁷ set up in three frames. A narrow vertical frame with links to assorted Web sites run by different news-reporting organizations appear on the right side of the screen (the "navigational frame"). Across the bottom of the screen is a narrow horizontal frame that carries the TotalNEWS logo and advertisements by corporate sponsors (the "ad frame"). The remainder of the screen (the "browsing frame")¹¹⁸ is devoted to browsing and contains, at least initially, the TotalNEWS home page. From that page or the navigational frame, users can click on one of hundreds of news-related links organized under 11 different subject categories. More prominent news sources, such as CNN and the television networks, are identified separately. The target page is then displayed in the browsing frame, while the other two frames remain visible. The site is designed to benefit users by organizing links to "all the News on the Net, all the Time"¹¹⁹ in one convenient location. By guaranteeing its sponsors continuous exposure regardless of which news service the user is reading, TotalNEWS is able to attract advertisers.¹²⁰

In what was the first case to address the technology, a group of media companies¹²¹ whose sites were being "framed" by TotalNEWS filed suit against the company in February 1997.¹²² The Plaintiffs

¹¹⁵ See *Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 512 (N.D. Ohio 1997) (granting publisher's motion for summary judgment in contributory copyright infringement suit against bulletin board owner who displayed copyrighted material).

¹¹⁶ Complaint, 97 Civ. 1190 (S.D.N.Y., Feb. 20, 1997), reprinted in *Frames Technology: The Internet Equivalent of Pirating?* (visited Oct. 15, 1997) <<http://www.ljx.com/internet/complain.html>> [hereinafter *Complaint*].

¹¹⁷ See TotalNEWS <<http://www.totalnews.com/>>.

¹¹⁸ This frame occupies roughly 80% of the browser's display area. See *id.*

¹¹⁹ *Id.*

¹²⁰ See *Complaint*, *supra* note 116, ¶ 35.

¹²¹ These included CNN Inc., Dow Jones & Co., Inc., Reuters New Media Inc., Time, Inc. and its subsidiary, Entertainment Weekly, Inc., Times Mirror Co., The Washington Post Co. and its subsidiary, Digital Ink Co. See *id.* ¶¶ 14-27.

¹²² See Meeka Jun, *Been 'Framed'? Imposters Beware!*, N.Y.L.J., June 20, 1997, at 5.

accused TotalNEWS of "pirating copyrighted material"¹²³ and republishing it for its own profit, while providing "little or no content of their own."¹²⁴ Specifically, they pointed to (1) the "altered" appearance of their pages when viewed as frames, as opposed to the larger amount of screen space they would otherwise occupy,¹²⁵ (2) the use of Plaintiffs' trademarks as links to their pages,¹²⁶ (3) free-riding off of the Plaintiffs' name values to promote "continuous, prolonged exposure to the logo, URL and advertising" of TotalNEWS,¹²⁷ (4) diminishment in the value of Plaintiffs' advertising by reducing its screen space and juxtaposing it with TotalNEWS' ads,¹²⁸ and (5) the "masking" of their URLs,¹²⁹ which prevents users from bookmarking the framed page,¹³⁰ possibly hindering their return to the site and confusing them as to the relationship between TotalNEWS and the target page.¹³¹

The case settled in June of 1997 before TotalNEWS filed an answer.¹³² By the terms of the settlement, TotalNEWS agreed to substitute the "framed" links to the seven Web sites run by the Plaintiffs¹³³ with "regular" links which open in an entirely separate browser window. TotalNEWS also signed "linking licenses" with the Plaintiffs authorizing the new links.¹³⁴ The early settlement of this first case involving frames leaves no firm precedent on the issue.¹³⁵

TotalNEWS is perhaps the most infamous of a growing number of frames-based sites. Called "meta-sites"¹³⁶ (or, more derisively,

¹²³ Complaint, *supra* note 116, ¶ 10.

¹²⁴ *Id.* ¶ 8.

¹²⁵ *See id.* ¶ 30.

¹²⁶ *See id.* ¶ 32.

¹²⁷ *Id.* ¶ 35.

¹²⁸ *See id.* ¶ 36.

¹²⁹ *See id.* ¶ 30.

¹³⁰ *See supra* note 54 and accompanying text (discussing the limits of "bookmarking" technology).

¹³¹ *See* Complaint, *supra* note 116, ¶ 57.

¹³² *See Jun, supra* note 122, at 5.

¹³³ But TotalNEWS only agreed to substitute "regular" links to the Plaintiffs' sites. The remainder of the links still open within a frame. *See TotalNEWS Settles; Will Stop Framing With Ads, Only Link*, MEDIA DAILY, June 6, 1997, available in NEXIS, News library, Curnws File. After the settlement, however, USA Today announced that it would seek the same arrangement with TotalNEWS. *See David Noack, USA Today Demands End to Framed Link*, EDITOR & PUBLISHER MAG., June 21, 1997, at 102.

¹³⁴ *See* Stipulation and Order of Settlement and Dismissal, 97 Civ. 1190, ¶ 4 (S.D.N.Y. Feb. 20, 1997), reprinted at *Law of the Internet* (visited Oct. 15, 1997) <<http://www.ljx.com/internet/totalse.html>> [hereinafter TotalNEWS Settlement]. By the terms of the settlement, the licenses are revocable. *See id.* ¶ 4(d). However, it is questionable whether a court would enjoin a Web site owner from simply linking to another site. *See supra* note 12 and accompanying text.

¹³⁵ *See* Matt Richtel, *Web Suit Fails to Provide Precedent*, AUSTIN AMERICAN-STATESMAN, June 9, 1997, at A6.

¹³⁶ Weiss, *supra* note 62, at B9.

“para-sites”¹³⁷), their appeal lies not in their own creative content but in their use of frames technology to simplify browsing for users of an increasingly complex Web. The service is often free to the user because advertisers pay a premium for the opportunity to frame their messages around any page the user may choose to view. These meta-sites can be viewed alternatively as an ingenious effort to capitalize on an unclaimed market,¹³⁸ or a shameless attempt to profit from the work of others.¹³⁹ Pundits on both sides have not been shy in vocalizing their initial reactions,¹⁴⁰ but relatively little in the way of reasoned legal analysis is available. Such an analysis is possible, however, within the framework of copyright law and its five exclusive protections.

1. Reproduction

A copyright owner has an exclusive right to “reproduce the copyrighted work in copies.”¹⁴¹ While the term “reproduce” is fairly self-defining, the term “copy” is not. The Copyright Act’s definition parallels the language used to describe the term “fixed”: “A work is ‘fixed’ in a tangible medium of expression when its embodiment . . . is sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated”¹⁴² directly or through a machine. “Copying,” then, is equivalent in copyright terminology to “fixating”; the fact that the thing being copied is a “copyrighted work” necessarily means it is an original work of authorship. Then to “reproduce . . . in copies” is to create something that would vest copyright privileges in the copier if they were not already held by the owner of the thing copied.

¹³⁷ Stuart D. Levi & Rita A. Rodin, *Para-Sites: Eating Away at Web Profitability?*, CYBERSPACE LAW., February 1997, at 2.

¹³⁸ See *id.* (“Most para-sites offer what are, arguably, value-added services.”).

¹³⁹ See *id.* (“Like their namesakes, para-sites thrive mostly at the expense of other Web sites . . .”).

¹⁴⁰ For the most vociferous reaction, see John C. Dvorak, *Lawsuit Threatens Future of the Web* (visited Sept. 10, 1997) <<http://www8.zdnet.com/pcmag/insites/dvorak/jd970303.htm>> “The stupidity and danger of such a suit seems beyond the comprehension of these media companies If this case goes to a judge who cannot understand the Web, then . . . [t]he Web dies I mean, how dumb are these people?” *Id.* See also Coe F. Miles, *The TotalNEWS Lawsuit* (visited Oct. 15, 1997) <<http://collegehill.com/ilp-news/miles.html>> (arguing that TotalNEWS did not commit copyright infringement); M. Sean Fosmire, *The Total News Lawsuit* (visited Oct. 15, 1997) <<http://www.collegehill.com/ilp-news/fosmire2.html>> (identifying the TotalNEWS suit as dangerous to the future of the Web, though distinguishing his argument from Dvorak’s); Seth Finkelstein, *The TotalNews Case—Confusion in Comprehension, Not Display* (visited Oct. 15, 1997) <<http://www.collegehill.com/ilp-news/finkelstein1.html>> (rejecting the Plaintiffs’ claims of “piracy”).

¹⁴¹ 17 U.S.C. § 106 (1) (1994 & Supp. 1998).

¹⁴² 17 U.S.C. § 101 (1994) (prior to 1998 amendment).

This is hardly what TotalNEWS and other meta-sites do.¹⁴³ If TotalNEWS could claim copyright protection in whatever creative work is viewed through its frames, one would expect them to provide links to more than just news stories! Recall what occurs when the user's browser fetches the TotalNEWS site. It sends a request to the appropriate server for the document at location /www.totalnews.com/. It receives a frameset document instructing the browser to segment its display into three frames and to display in those frames three Web pages stored on the TotalNEWS server (the home, navigational and ad pages). From there, users are expected to click on selected navigational links and view the targets of those links in the browsing frame.¹⁴⁴

The meta-site does not copy the page in the browsing frame. At the user's request, the server on which the target page is located makes a copy of the page and sends it to the user's terminal, which then downloads the copy (a fixation). The meta-site is not involved in the transfer and therefore does not reproduce anything. While the image of the target page that appears inside the frame is in fact a copy, the fact that it is framed is irrelevant to the right of reproduction.

There is no direct or contributory infringement, because the conduct is authorized by an implied license. Most commentators agree that by posting material on Web-connected servers, content providers implicitly license Web users to make the temporary copy necessary to view the file in a browser.¹⁴⁵ Indeed, given the public knowledge of

¹⁴³ See, e.g., Richard Colbey, *Whose News is it Anyway?*, THE GUARDIAN (London), Mar. 27, 1997, at 16 (analogizing TotalNEWS' actions with "someone who compiles an index of newspaper stories"); Finkelstein, *supra* note 139 (dismissing allegations that TotalNEWS had pirated copyrighted material as "simply not true"); Russell McVeagh McKenzie Bartleet & Co., *supra* note 12 ("It is difficult to see how the display of a URL or domain name could give rise to copyright or trademark infringement.").

¹⁴⁴ The URL in the location window also remains static, whereas it would normally register the address of the target page. But in this case, the URL shown is not that of the linking or target page, but of the frameset document. This example of one aspect of browser technology lagging behind another, however, will probably be rectified by future browsers. Indeed, some browsers available as this Note is being published are capable of bookmarking a framed page. This ability is still limited, however. For example, with Netscape Navigator 4.0.5 a user can "right-click" on a framed page to add it to the bookmark file. It can not be "filed" in bookmark subfolders, however, as bookmarks added by the standard "pull-down menu" or "drag-and-drop" procedures can be.

¹⁴⁵ See, e.g., Maureen A. O'Rourke, *Fencing Cyberspace: Drawing Borders in a Virtual World*, 82 MINN. L. REV. 609, 658 (1998) ("[M]ost commentators have focused on the doctrine holding that a copyright license may be implied by conduct . . . [T]he web page owner's act of placing the information on the web, knowing that the web is navigated by links, implies a license in favor of users that link to it."); Gahtan, *supra* note 114, at 4 ("[An] implied or express license [is] granted by the plaintiff to Web users who visit their websites directly to download and view such content."); Letter from David Post, Professor of Law, Temple University School of Law, to author (April 5, 1998) (on file with author) ("I don't think that hyperlinks are infringing in most circumstances, because I don't see the section 106 violation and/or because the ordinary hyperlink must be covered by some form of implied consent.")

the Web's interactivity and the impossibility of viewing a Web file without making a copy of it, it seems difficult to reach any other conclusion.

2. Derivative Works

The right "to prepare derivative works based upon the copyrighted work"¹⁴⁶ is not encumbered by the "copy" language. It is therefore broader than the reproduction right, because it does not require fixation.¹⁴⁷ A derivative "recast[s], transform[s], or adapt[s]"¹⁴⁸ the original in a new form "which, as a whole, represent[s] an original work of authorship."¹⁴⁹ In other words, a derivative is something that could, if fixed in a tangible medium,¹⁵⁰ receive copyright protection despite the existence of, and copyright in, the first work.

Whether meta-sites like TotalNEWS "recast" original works depends on the manner in which "work" is defined. Consider, for example, two computers with monitors *A* and *B*. Both machines are running identical browser programs. The browser on Monitor *A* is displaying the Cable News Network ("CNN") home page and Monitor *B* is displaying the TotalNEWS site with the CNN page in its browsing window. The two displays reveal two significantly different appearances. The CNN page fills Monitor *A*'s entire browser display and has the words "cnn.com" in the "Location Window."¹⁵¹ The same page occupies a slightly smaller window on Monitor *B* and is bordered by two other narrow Web pages (the TotalNEWS ad and navigational frames), and displays a different URL ("www.totalnews.com"). If the "work" is what appears on the screen, then one could conclude that the original CNN display has been transformed by making it a component of a new creation and TotalNEWS has violated CNN's copyright.

The objection to this "what you see is what you copyright" approach to meta-sites is that the authorship of the target page has not in fact been altered. Monitor *B*'s browser is displaying three works, not one. The screen is neatly trifurcated to allow viewing of multiple Web pages, each of which can be properly thought of as containing an "original work of authorship." Two of the pages are created by TotalNEWS, and the third and largest by CNN. Despite the interactivity

¹⁴⁶ 17 U.S.C. § 106(2) (1994 & Supp. 1998).

¹⁴⁷ See COPYRIGHT LAW REVISION, H.R. REP. NO. 94-1476, at 62 (1976).

¹⁴⁸ 17 U.S.C. § 101 (1994) (prior to 1998 amendment).

¹⁴⁹ *Id.*

¹⁵⁰ Because a derivative work does not need to be a "copy" fixed in a tangible medium, it need not meet the "fixation" requirement in order to infringe a copyright. See *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 968 (9th Cir. 1992) ("A derivative work must be fixed to be *protected* under the Act, but not to *infringe*." (citation omitted)).

¹⁵¹ The Location Window is the area of the browser that contains the URL of the page on display.

of the navigational and browsing frames, there is no suggestion that they form one document. Two of the frames are stationary, while the third can be substituted at will, and all three are physically divided by the borders of the frames.¹⁵²

The URL discrepancy, though, presents a possible flaw in this technical argument. As the Location Window displays, what the browser displays is initially and ultimately determined by the frameset document which lays out the frames and is composed by the meta-site's owners. The frameset document determines how the content of the frames will be "cast" by determining the size and position of each frame.¹⁵³ In that way, each frame can be seen as one component of a larger work, ultimately constructed by the frameset document.

From a technical standpoint, however, this "flaw" is unpersuasive. Although the frameset document contains the lines of computer coding directly responsible for the size and position of the frames in which each document will be viewed, a frameset document can not contain text that will appear to a user. The frameset document is a "dummy" page that consists solely of HTML tags, and tags should not merit copyright protection. Copyright can not protect "mere words" or ideas, only the unique ways in which authors use those words to express their ideas.¹⁵⁴ Framesets contain the "words" of the HTML language, but they embody no ideas or expression.

Might the arrangement of the frames itself be creative expression? This seems doubtful, though Congress has been silent on the issue.¹⁵⁵ To "recast" means more than to simply "arrange"; in the literary context, it means to "remodel or reconstruct."¹⁵⁶ To "modify"¹⁵⁷ is to "adapt," "transform" or "change in form, appearance, or structure."¹⁵⁸ Were one to form a collage of her favorite cat postcards and frame them on a wall in her home, she would not have "recast" them as her own work, nor would she be claiming authorship of them.¹⁵⁹ TotalNEWS can not claim a copyright in the unique way

¹⁵² It should be noted, however, that this will not necessarily be true of every meta-site. Frames can have borders with widths of zero. In that case, it may not be immediately apparent that two adjoining frames are really separate frames at all—at least until the content in one frame changes while the other remains constant.

¹⁵³ See Rose, *supra* note 51.

¹⁵⁴ See 17 U.S.C. § 102(b).

¹⁵⁵ See Jackson, *supra* note 12, at 752-53.

¹⁵⁶ RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 1124 (1991).

¹⁵⁷ *Id.* at 15.

¹⁵⁸ *Id.* at 1416.

¹⁵⁹ Thanks to Susan Kornfield for sharing this example. Telephone Interview with Susan Kornfield, Attorney, Bodman, Longley and Dahling, L.L.P., Ann Arbor, Michigan and Visiting Professor of Copyright Law, University of Michigan School of Law (Nov. 9, 1997). See also *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997) ("[D]e *minimis* in the copyright context can mean what it means in most legal contexts: a technical violation of a right so trivial that the law will not impose legal consequences [Judge Leval] offers the example of a *New Yorker* cartoon put up on a refrigerator.").

CNN's home page appears within its screen. The Supreme Court, moreover, has defined a "transformative" work as something that does more than supplant the original.¹⁶⁰ The form and structure of the cat postcards in the hypothetical have not been changed or modified in any way. The same can be said for the CNN page displayed through TotalNEWS.

If the form and structure have not been altered, then the last remaining avenue for establishing a "transformation" is to argue that frames impermissibly modify the appearance of their target page. Case law offers some support for this argument. In *Midway Manufacturing Co. v. Artic International, Inc.*,¹⁶¹ the Seventh Circuit held that a computer device created to speed up a particular video game was an infringing derivative.¹⁶² The device included circuit boards that substantially copied the programming in the original game.¹⁶³ Altering this programming to create the acceleration effect required "some creative effort," and made the end result a "more exciting" product.¹⁶⁴ Moreover, the court found it significant that a market existed for accelerated play video games.¹⁶⁵

In *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*,¹⁶⁶ however, the Ninth Circuit held that a product whose sole function was to adjust various properties of Nintendo games was not a derivative work.¹⁶⁷ This product, the "Game Genie," was inserted between the Nintendo machine and the game cartridge and functioned by interrupting individual lines of code coming from the cartridge and replacing them with different values.¹⁶⁸ Distinguishing its decision from *Midway*, the court noted that the device did not make a direct copy of the original program's elements.¹⁶⁹ The court also explained that works whose sole function is to enhance the original, like kaleidoscopes or spell checking programs for word processors,¹⁷⁰ should not be considered derivative works. Devices used in conjunction with, or to view, the original work "can only enhance, and cannot duplicate or recast" it.¹⁷¹ These secondary devices make the original work the object of their abilities but do not become a substitute or product of it.

¹⁶⁰ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (holding music group's parody of popular song did not necessarily copy excessively from original version).

¹⁶¹ 704 F.2d 1009 (7th Cir. 1983).

¹⁶² See *id.* at 1011.

¹⁶³ See *id.* at 1010-11.

¹⁶⁴ *Id.* at 1014.

¹⁶⁵ See *id.*

¹⁶⁶ 964 F.2d 965 (9th Cir. 1992).

¹⁶⁷ See *id.* at 967.

¹⁶⁸ See *id.*

¹⁶⁹ See *id.* at 969.

¹⁷⁰ See *id.*

¹⁷¹ *Id.*

This reasoning is particularly suited to the case of meta-sites. A site divided into frames is useless by itself—it needs content from another source to fill those frames. Just as the Nintendo game cartridge, and not the Game Genie, was the source of all of the creative content necessary to display the game,¹⁷² CNN, and not TotalNEWS, is the source of the display that fills the frame. *Galoob's* reasoning suggests that a “transformed” or “recast” derivative work is one that can at least partially serve as a stand-alone replacement for, or improvement to, the original—that a derivative work “duplicate[s]” the function of the original.¹⁷³ Mere accessories, then, do not reach the threshold of infringement. In the *TotalNEWS* example, the meta-site is attempting to “enhance” the content of pages like CNN’s by making it accessible through the site’s comprehensive directory of news providers. This meta-site enhances the original by adding a means to access it—the TotalNEWS navigational bar—but can not serve any meaningful function without CNN’s content. The *TotalNEWS* Plaintiffs’ assertion that the service “provide[s] little or no content of [its] own,”¹⁷⁴ serves to defeat their copyright infringement argument, at least as to the derivation right.

The *Galoob* court also distinguished *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*,¹⁷⁵ in which an art gallery mounted and sold individual pieces of art from a compilation onto separate tiles.¹⁷⁶ The court held that the tiles constituted an infringing derivative work.¹⁷⁷ The *Galoob* court noted that the *Mirage Editions* decision would have come out much differently if the gallery had merely sold a lens that allowed patrons to view multiple works of art simultaneously.¹⁷⁸ This distinction describes precisely what TotalNEWS and other meta-sites do: they allow simultaneous viewing of multiple Web pages, and the pages viewed within the frames can be adjusted as easily as a lens can be pointed at a different painting.¹⁷⁹

¹⁷² See *id.* at 968.

¹⁷³ *Id.* at 969.

¹⁷⁴ Complaint, *supra* note 116, ¶ 8.

¹⁷⁵ 856 F.2d 1341 (9th Cir. 1988).

¹⁷⁶ See *Galoob*, 964 F.2d at 968 (discussing the fact that physical incorporation of originals in works can infringe copyright).

¹⁷⁷ See *id.*

¹⁷⁸ See *id.*

¹⁷⁹ Moreover, the holding of *Mirage Editions* has recently been rejected by the Seventh Circuit in *Lee v. A.R.T. Co.*, 125 F.3d 580 (7th Cir. 1997). Under nearly identical facts, the A.R.T. court reasoned that mounting notecards depicting copyrighted artwork on ceramic tiles did not constitute the creation of a derivative work, because it did not recast, transform or adapt the artworks. *Id.* at 581. The court even went so far as to say that in order to infringe a copyright under the *Mirage Editions* analysis, one would have to change a painting’s frame or a photo’s mat. See *id.* at 582. This reasoning is analogous to the *TotalNEWS* scenario. See, e.g., Ronald Cooley, *Recent Developments in Intellectual Property Law*, A.B.A. SEC. INTEL. PROP. L. NEWSL., Winter 1998, at 30 (describing the A.R.T. court’s analysis).

Even as an "enhancement," moreover, meta-sites are less of a threat to the right of derivation than the Game Genie. That device caused a copyrighted Nintendo program to create different output than it would alone by substituting lines of code, albeit temporarily.¹⁸⁰ It is questionable whether a meta-site like TotalNEWS adds anything at all to its target pages.¹⁸¹ In *Mitek Holdings, Inc. v. Arce Engineering Co.*,¹⁸² the Eleventh Circuit was called upon to determine which elements of a computer program were eligible for copyright protection. The court drew a distinction between "literal" elements (the actual computer language that could be read in a print-out of the program itself) and "nonliteral elements" (that which appears on the screen).¹⁸³ Determining that copyright was concerned with only the literal computer language, the court held that the on-screen "look" of the final product was irrelevant.¹⁸⁴ This holding is "now well settled" law nationwide.¹⁸⁵ Similarly, in *People v. Enskat*,¹⁸⁶ the court relied on the best evidence rule to vacate a theater owner's conviction for performing obscene movies because the prosecution had introduced photographs of the movie being projected onto the screen and not the film itself.¹⁸⁷ Of the four elements of a Web page,¹⁸⁸ only text and

¹⁸⁰ See *Galoob*, 964 F.2d at 967.

¹⁸¹ The first court order to address the issue of whether meta-sites create derivative works may, however, indicate otherwise. See *Futuredotics, Inc., v. Applied Anagramics, Inc.*, No. CV 97-6991, 1998 U.S. Dist. LEXIS 2265, at *10 (C.D. Cal. Jan. 30, 1998) ("Galoob does not foreclose Plaintiff from establishing that AAI's web page, incorporates Futuredotic's web page in some 'concrete or permanent form' or that AAI's framed link duplicates or recasts Plaintiff's web page." (quoting *Galoob*, 964 F.2d at 968)). This order, while not resolving the derivative question, certainly indicates that the time to resolve these questions is at hand. Advocates of framing can take some comfort, at least, in the disclaimer by the *Futuredotics* court that "[t]he parties should not read too much into the Court's Order At the preliminary injunction stage, the Court determined that Plaintiff failed to establish a probability of success. On a motion to dismiss, however, the Court must accept as true the allegations contained in Plaintiff's FAC." *Id.* at n.2.

¹⁸² 89 F.3d 1548 (11th Cir. 1996).

¹⁸³ See *id.* at 1548, 1555 n.15.

¹⁸⁴ See *id.* at 1550 (affirming district court's holding that the nonliteral elements were unprotectable). Note that this discussion is limited to the digital display of a (relatively) static work of *authorship*, and not the "user interface" of a computer *program*, which aids the user in inputting data into a program and modifying its output. The federal courts of appeals have split on the issue of whether and to what extent such intangible interface displays can be granted copyright protection. See Fred Meeker & Peter McDermott, *Copyright Protection of User Interfaces for Computer Programs*, BLAST: THE BULL. A.B.A. SEC. SCI. AND TECH., March 1998, at 7.

¹⁸⁵ *Computer Assocs. Int'l. Inc. v. Altai*, 982 F.2d 693, 702 (2d Cir. 1992). The First Circuit has recently suggested that a computer command may be an uncopyrightable "method of operation" even if it contains original expression. See *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807, 815 (1st Cir. 1995), *aff'd by an evenly divided court*, 516 U.S. 233 (1996). The Tenth Circuit has since refused to follow that conclusion. See *Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d 1366 (10th Cir. 1997). Both courts agree, however, that the commands are uncopyrightable if they contain no original expression upon application of the "abstraction-filtration-comparison" test. See *Coolley*, *supra* note 179, at 30.

¹⁸⁶ 20 Cal. App. 3d Supp. 1 (Cal. App. Dep't Super. Ct. 1971).

¹⁸⁷ See *id.* at 3.

inserts such as graphics constitute works of authorship. The text of the article is fairly straightforward. Graphics are inserted into the display via an image tag, which does not itself contain creative content but rather points to a visual work (the graphic file). These are the works which merit protection. No meta-site, through the simple act of displaying a Web page in a frame, can possibly alter these elements. Indeed, in an example even more analogous to *TotalNEWS* than *Galoob* or *Midway*, the addition of commercials to the blank space at the beginning of rented videotapes was held not to affect the authorship of the movies on the tape.¹⁸⁹

Nor should the existence of a market for the alleged infringer's service be taken as evidence that a derivative work has been made. Disputing the reasoning of *Midway*, the *Galoob* court noted that a demand for a service is hardly evidence that the legal test of incorporation into a new work of authorship has been met.¹⁹⁰ A market exists for kaleidoscopes, for example, but this hardly proves that the toys create a derivative every time they are used to view a copyrighted work.¹⁹¹

3. Distribution

The right to distribute allows the holder to control the distribution of copies of the work "to the public by sale or other transfer of ownership, or by rental, lease, or lending."¹⁹² Thus defined, the right is fairly narrow.¹⁹³ A legally acquired copy can be used as the owner chooses.¹⁹⁴ As previously discussed, frames do not create any copies additional to those that a browser would make when displaying a page in an ordinary screen. For copyright purposes, the copy of the protected work stored on its owner's server can be considered the "original." When a user's browser asks to view that file, the owner's server automatically transmits, or distributes, a copy of the file to the user's terminal. This is the only copy made and distributed. Whether the user came upon that page via a link or by directly entering its URL and whether the file is ultimately viewed alone or in a frame is wholly irrelevant to the question of its distribution.

¹⁸⁸ See *supra* notes 42-45 and accompanying text.

¹⁸⁹ See *Paramount Pictures Corp. v. Video Broad. Sys., Inc.*, 724 F. Supp. 808, 817-22 (D. Kan. 1989).

¹⁹⁰ See *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 969 (9th Cir. 1992).

¹⁹¹ See *id.*

¹⁹² 17 U.S.C. § 106(3) (1994 & Supp. 1998).

¹⁹³ Since it is difficult to determine who "owns" the copy of a Web page viewed in a browser, the "transfer of ownership" language is also somewhat ambiguous here, although Congress' expansive interpretation of the phrase presumably covers whatever type of ownership applies to this situation. See COPYRIGHT LAW REVISION, H.R. REP. NO. 94-1476, at 62 (1976).

¹⁹⁴ See 17 U.S.C. § 109.

The last two exclusive rights in section 106 are stated in deceptively simple fashion: "to perform . . . [and] to display the copyrighted work publicly."¹⁹⁵ It can hardly be argued that something posted on a network as vast and widely used as the Web is not available "publicly." But what precisely does it mean to "display" something online,¹⁹⁶ and how far does that right extend?

4. Public Display and Performance, and the Moral Right to Prevent Distortion

a. Statutory and Moral Rights

A meta-site could, arguably, infringe on a copyright holder's right to public display. Unlike the reproduction right, the display right extends to any copy of the work, including the original one.¹⁹⁷ Even though the copy being viewed by the user is one made and transmitted by the copyright holder, the relevant question is not which copy is being displayed, but how.

If display of a page in a frame is a direct infringement, the meta-site could conceivably be contributorily or even directly liable. A display is "any act by which the initial performance or display is transmitted, repeated, or made to recur."¹⁹⁸ Although the meta-site does not store a copy of any of its target pages nor directly transmit such copies, the instructions contained in their frameset documents do directly cause the page to be displayed within a frame. One could reasonably argue that TotalNEWS does not fit this description because, when initially accessed, the TotalNEWS browsing window displays the TotalNEWS home page. It does not display anything located on any other server. The user, not TotalNEWS, makes the decision to display another page within the browsing window. But it is also reasonable to assume that a significant percentage of meta-sites

¹⁹⁵ 17 U.S.C. §§ 106(4), 106(5). Section 106(6) contains an analogous provision for sound recordings.

¹⁹⁶ For the purposes of this discussion, "display" and "perform" will be used synonymously. Although some Web pages contain elements that can be "performed," such as audio and video clips, the typical Web page contains mostly literary and graphic components that can not be "performed" in any way relevant to the Web. In any event, except for the semantic distinction, the two rights are in fact identical for all purposes relevant here. See Jackson, *supra* note 12, at 751 ("[A] Web site may include text and pictures which are displayed on a monitor, and moving images and audio which are performed.").

¹⁹⁷ See H.R. REP. NO. 94-1476, at 64 (1976).

¹⁹⁸ *Id.* at 63.

do in fact initially display content from other servers.¹⁹⁹ Thus, although the user requests the copies, such a meta-site contains by itself the code necessary to display the foreign content in a questionable manner. Given its editorial decision to structure its content in that manner, if this display is indeed infringement, the meta-site has at least "caused" or "induced" it. In addition, if the user was ignorant as to what he was viewing, a court could well hold the meta-site directly responsible.

It is questionable, however, whether the display right can and should extend so far. The actual breadth of the display right is less certain and more "subject to challenge" than the others because it did not exist until the 1976 Act.²⁰⁰ Courts have held that material additions, omissions and distortions of the original work can infringe copyright,²⁰¹ though it is unclear on which exclusive right these opinions were based. Indeed, the most significant cases in this area rely on a judicially crafted "right to check distortion or truncation of a copyrighted work."²⁰² Because such protections rely not on statutes but on what a leading commentator terms "moral rights,"²⁰³ courts have been slow to apply them.²⁰⁴ This fuzzy moral right against distortion dovetails somewhat with the spirit of the statutory display right. In addition, courts will often cite both sources of authority interchangeably when applying the display right. Therefore, this Note analyzes both rights as one body of law.

In the landmark case *Gilliam v. American Broadcasting Cos.*,²⁰⁵ ABC edited out certain scenes from a Monty Python movie it was authorized to air in order to meet time constraints.²⁰⁶ The Second Circuit held that this unauthorized editing threatened the integrity of the film and violated the troupe's "paramount" right to control how its work was performed.²⁰⁷ In *National Bank of Commerce v. Shaklee Corp.*,²⁰⁸ a distributor infringed upon an author's copyright by adding advertisements to the cover of her book that insinuated that the author endorsed the distributor's products.²⁰⁹ The author, who had established a reputation as one who would not endorse particular brands,

¹⁹⁹ This distinction may be irrelevant. But certainly those sites that do display foreign content to unaware users, when initially loaded, directly cause users to view foreign material.

²⁰⁰ H.R. REP. NO. 94-1476, at 63 (1976).

²⁰¹ See *National Bank of Commerce v. Shaklee Corp.*, 503 F. Supp. 533, 543 (W.D. Tex. 1980) (holding that a book distributor infringed an author's copyright by adding advertisements to book covers).

²⁰² *Paramount Pictures Corp. v. Video Broad. Sys., Inc.*, 724 F. Supp. 808, 821 (D. Kan. 1989).

²⁰³ *Id.* at 819 (citing 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.21(C)(1) (1989)).

²⁰⁴ See *id.*

²⁰⁵ 538 F.2d 14 (2d Cir. 1976).

²⁰⁶ See *id.* at 18.

²⁰⁷ See *id.* at 21.

²⁰⁸ 503 F. Supp. 533 (W.D. Tex. 1980)

²⁰⁹ See *id.* at 536-38.

objected to the placement of the advertisements.²¹⁰ Although the court explained that the issue was one of first impression,²¹¹ it relied on *Gilliam* to conclude that "an author should have control over the context and manner in which his or her work is presented."²¹² The Seventh Circuit has also stated in dicta that under the rule of *Shaklee*, material may not be added to spaces left blank by the work's creator,²¹³ although other courts have questioned the basis for this assertion.²¹⁴

For some commentators, the "distorted" display of a page through a frame is by itself enough to offend copyright law.²¹⁵ This argument is necessarily subjective, since the individual frames viewed objectively are clearly separate computer documents. Whether displaying a page in a frame violates an author's right to control the "context and manner" of the presentation of his work under a *Gilliam* and *Shaklee* analysis is uncertain.

Juxtaposing one's own advertisements next to another's, as TotalNEWS does, is not necessarily enough to create an impermissible appearance. In *Paramount Pictures Corp. v. Video Broadcatsing Systems, Inc.*,²¹⁶ the court found that a video rental store that added its own commercials to Paramount's tapes did not violate the producer's copyright.²¹⁷ The court specifically refused to extend *Gilliam* and *Shaklee*'s moral right against distortion beyond the facts of those cases, especially "since the Supreme Court has stated that a person does not infringe upon a copyright when he makes an unauthorized use of the protected work but in a manner outside the scope of any of the copyright holder's exclusive rights."²¹⁸

The renter of a Paramount videotape was unaware of which commercials, if any, would be on the tape.²¹⁹ "[A]n ordinary viewer, exercising due care in the circumstances"²²⁰ was also unlikely to confuse

²¹⁰ See *id.* at 545.

²¹¹ See *id.* at 544.

²¹² *Id.*

²¹³ See *WGN Continental Broad. Co. v. United Video, Inc.*, 693 F.2d 622, 626 (7th Cir. 1982) ("United Video may not use it for that purpose without WGN's permission, any more than if the publisher of a book leaves the inside covers blank the book seller . . . may inscribe the Lord's Prayer on them in order to broaden the book's appeal.").

²¹⁴ See *Paramount Pictures Corp. v. Video Broad. Sys., Inc.*, 724 F. Supp. 808, 820 (D. Kan. 1989) ("The Seventh Circuit offered no reasoning for this statement . . .").

²¹⁵ See *Levi & Rodin, supra* note 136, at 4; see also Letter from Anthony Campbell, Attorney, Locke Purnell Rain Harrell in Dallas, Texas, to the USENET newsgroups misc.int-property and misc.legal.computing (April 7, 1998) (on file with author) ("[F]raming or inlining a web page may destroy its integrity . . . [A]nalyze both what is happening to the code (which may not be infringed) and to the visual work (which is being edited, by adding or subtracting from the overall presentation).").

²¹⁶ 724 F. Supp. 808 (D. Kan. 1989).

²¹⁷ See *id.* at 812-21.

²¹⁸ *Id.* at 819 (citing *Twentieth Century Corp. v. Aiken*, 422 U.S. 151, 155 (1975)).

²¹⁹ See *id.* at 815-16.

²²⁰ *Id.* at 816.

ads made by local businesses for the professionally produced commercials of Hollywood studios and their multi-national corporate sponsors.²²¹ The court was also “frankly skeptical that viewers actually care whether Paramount is the source or sponsor of the advertisement, since it is equally likely that consumers would attach no more significance or association to the advertisement than those that inundate them daily on television and other advertising mediums.”²²² Likewise, ordinarily informed and cautious TotalNEWS users should be able to easily discern that the advertisements along the bottom of their screen, which appear when the TotalNEWS site is first accessed and remain visible regardless of the news page the user is browsing,²²³ are provided by TotalNEWS and not the target page.²²⁴ Moreover, though some users may become confused as to the ownership of the site,²²⁵ just as in *Paramount*, the fact “that the law also protects the gullible and ignorant consumers is only a general proposition and takes little away from the force of defendants’ argument.”²²⁶

It is highly questionable whether advertisements like those used by TotalNEWS threaten the integrity of the target’s authorship. In both *Gilliam* and *Shaklee*, the infringer edited the original material, threatening the integrity of the material and its authors. Moreover, the cases are founded on uncertain moral rights instead of Title 17. In *Paramount*, on the other hand, the movies on Paramount’s tapes were “not altered, mutilated, edited, or changed in any manner by defendants’ advertisements.”²²⁷ Likewise, TotalNEWS’ advertisements do not and can not alter or otherwise affect the content of its target pages. The most objectionable side effect of the framed browsing is to create some hint of confusion as to the relationship between the framed advertisements and the target page. Although relevant to sev-

²²¹ See *id.* at 816-17.

²²² *Id.* at 817; see also Board of Governors of the Univ. of N.C. v. Helpingstine, 714 F. Supp. 167, 173 (M.D.N.C. 1989) (“[T]he court is skeptical that those individuals who purchase unlicensed tee-shirts bearing UNC-CH’s marks care one way or the other whether the University sponsors or endorses such products or whether the products are officially licensed. Instead . . . it is equally likely that individuals buy the shirts to show their support for the University.”).

²²³ Regardless of the material displayed in the browsing frame, advertisements, which are rotated every 60 seconds, remain on the screen. See TotalNEWS, <<http://www.totalnews.com/>>.

²²⁴ Several commentators agree that most Web users can discern the difference between material provided by the meta-site and material provided by the target page. See Tim Berners-Lee, *Links and Law* (visited Oct. 15, 1997) <<http://www.w3.org/DesignIssues/LinkLaw.html>>; Finkelstein, *supra* note 140; Oppedahl & Larson L.L.P., *May I Use Images from the Web Sites of Others?* (visited Oct. 15, 1997) <<http://www.patents.com/weblaw.sht#ui>>.

²²⁵ See Complaint, *supra* note 116, ¶ 57.

²²⁶ *Paramount Pictures Corp. v. Video Broad. Sys., Inc.*, 724 F. Supp. 808, 817 (D. Kan. 1989).

²²⁷ *Id.* at 819.

eral causes of action under the Lanham Act,²²⁸ such association and its effect on advertising revenue is irrelevant to copyright.²²⁹

b. Section 106A

Section 106A of the Visual Artists Rights Act of 1990 sheds light on the right to prevent distortion. At first glance, it seems to codify the rule of *Gilliam* and *Shaklee*; it gives the creators of visual art the right "to prevent any intentional distortion, mutilation, or other modification . . . which would be prejudicial to his or her honor or reputation"²³⁰ and the right to "prevent the use of his or her name as the author . . . in the event of a distortion."²³¹

Two facts clearly bar the application of this provision to authors of online graphics. First, the section explicitly does not apply to copies of artwork.²³² Since nothing can be viewed online unless a browser makes a copy for display, section 106A is inapplicable to the Web. Second, section 106A defines "visual art" narrowly as a painting, drawing, print, sculpture, etc., available in less than 200 copies and explicitly excludes a host of works, including audio-visual works, data bases, electronic publications and electronic information services.²³³

c. License

Both the right against distortion and the display question can be evaluated as a matter of license between the copyright holder and the user. License, both explicit and implied, plays a large role in copyright law.²³⁴ In *Gilliam*, for instance, the network's editing ultimately violated Monty Python's copyright because it exceeded the network's license to air the program as it was.²³⁵ As illustrated above, a Web content provider must give users an implied license since a user's browser must make a copy of the content provider's files in order to display the page. Because the owner of an authorized copy may do as they wish with the copy, one could convincingly argue that the user is justified in viewing that copy within a frame.

On the other hand, one could argue that Web pages are inherently meant to be viewed as an unrestricted whole and any implied

²²⁸ Although relevant, the association is not necessarily dispositive. Such claims were rejected by the *Paramount* court. *See id.* at 816.

²²⁹ *See Colbey, supra* note 143, at 16.

²³⁰ 17 U.S.C. § 106A(a)(3)(A) (1994 & Supp. 1998).

²³¹ *Id.* § 106A(a)(2).

²³² *See id.* § 106A(c)(3).

²³³ *See id.* § 101.

²³⁴ *See Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990) (finding that although no explicit license agreement existed, an implied license existed and limited the Plaintiff's right to sue for copyright infringement).

²³⁵ *See Gilliam v. American Broad. Cos.*, 538 F.2d 14, 21 (2d Cir. 1976).

license extends only that far.²³⁶ As licenses are a matter of contract law,²³⁷ however, conditions precedent (such as viewing in a non-framed browser) will not be implied in them.²³⁸ Moreover, one must keep the goals of copyright law in mind when interpreting licenses for the use of copyrighted material.²³⁹ Certainly, permitting viewing of a Web page in any type of display furthers one of these goals by encouraging greater dissemination of information.

Suppose, however, that Web site owners include explicit notices on their pages that purportedly prohibit users from viewing their pages in frames. Such explicit statements can strengthen the site owner's case for infringement.²⁴⁰ But there are serious practical and policy concerns involved with enforcing such restrictions. Of course, the notices are meaningless if users are legally entitled to view Web documents in frames if they so choose. Site owners could include "boilerplate" contract language that conveys the right to read the copyrighted material in exchange for the user's promise not to do so in frames, but the applicability of such contracts in this context raises serious public policy concerns.²⁴¹ Users would have no idea that the warning against framing existed until they downloaded the page and viewed it through a frame. If warnings against frames are enforceable on the basis of copyright, there seems to be no reason why a site owner with a grudge against Microsoft can not sue to prohibit anyone using Microsoft's Internet Explorer from viewing his site or why America Online can not prevent CompuServe users from accessing the home pages of any of its members simply by including boilerplate language to that effect on its pages. Certainly, content publishers in other fields have never had such power to restrict their readership. Implying such a right into the online realm certainly goes against the intent of copyright law. Technological means of restricting access to online information, such as documents that are only readable by a particular browser program or countermeasures that prevent a site from being viewed in frames, are available to Web authors and are a much less intrusive alternative.²⁴²

²³⁶ See Brad Templeton, *Linking Rights* (visited Oct. 15, 1997) <<http://www.clari.net/brad/link-right.html>> ("[T]here is a fair argument that the authors of webpages welcome links to them and give implicit permission for this to happen.")

²³⁷ See *Effects Assocs.*, 908 F.2d at 559 n.7 ("[A]n implied license . . . seems to us to be a creature of law, much like any other implied-in-fact contract.")

²³⁸ See *id.* ("Conditions precedent are disfavored and will not be read into a contract unless required by plain, unambiguous language.")

²³⁹ See *Cohen v. Paramount Pictures Corp.*, 845 F.2d 851, 854 (9th Cir. 1988); *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1088 (9th Cir. 1989).

²⁴⁰ See Gahtan, *supra* note 114, at 4.

²⁴¹ See generally O'Rourke, *supra* note 145 (arguing that a variety of concerns, including the First Amendment rights of owners of framing sites, outweigh the nominal property interests of site owners who do not wish to be framed).

²⁴² Indeed, this already occurs to some extent. Microsoft, having obtained the exclusive right to create an official Web site for the popular *Star Trek* television series, for a time made

There is more to the controversy surrounding frames and copy-right than is apparent at first glance. Frames can superficially appear to be a blatant cut-and-paste job, pirating the targeted content and molding it into a new form. On closer examination, however, they are more fairly seen as an expedient way to view multiple pages simultaneously while maintaining the integrity of each document. So long as frame designers adhere to this model, a targeted site's owner has no basis to claim actual copying of the framed material. The owner must instead base such a claim on a more vague assertion that the framed display indirectly impinges on the creator's authorship. Even if a Web author could successfully make such a claim, the framer will have persuasive fair use defenses as discussed in Part II (D).

B. Deep Links

The most recent and well-publicized controversy over deep linking in a commercial context is the current *Ticketmaster Corp. v. Microsoft Corp.*²⁴³ suit. Microsoft recently launched a series of "Sidewalk" Web sites, each featuring a particular American city.²⁴⁴ The Sidewalk sites are designed to be a comprehensive tool for learning about events and attractions in the city. Following that theme, Microsoft would provide, wherever possible, along with a description of an event, a link to the page on the Ticketmaster Web site from which the user could order tickets to the event.²⁴⁵ Although the Sidewalk sites did not alter the Ticketmaster page in any way and the company still benefited from the order, Ticketmaster claimed that it was injured when users bypassed its home page.²⁴⁶ Users who arrive at Ticketmaster's order form via Ticketmaster's home page are exposed to advertising along the way. Ticketmaster would like to ensure that users of their service are exposed to these ads.²⁴⁷

Whether Ticketmaster can use the exclusive protections of the copyright law to achieve this goal is questionable, though one can

the site accessible only to visitors using Microsoft's Internet Explorer ("IE") browser. That policy has since been modified, but the site still contains features accessible only by IE users. See *Star Trek: Continuum* (visited Mar. 24, 1998) <<http://www.startrek.com/alt/startrek.asp>>. It would be quite a different situation, however, if Viacom, owner of the *Star Trek* trademark, simply posted a warning on an otherwise-freely accessible site warning away all Netscape users, then sought to use its right of public display to enjoin such use. Such an application of copyright law would restrict, rather than expand, the ability to disperse information. For further discussion of technological means of preventing undesired forms of viewing, see *infra* notes 418-20 and accompanying text.

²⁴³ Complaint, 97 Civ. 3055 (C.D. Cal. April 28, 1997), reprinted in *Ticketmaster v. Microsoft* (visited Sept. 5, 1998) <<http://www.jmls.edu/cyber/cases/ticket1.html>>.

²⁴⁴ See Weiss, *supra* note 62, at B9.

²⁴⁵ See *id.*

²⁴⁶ See *id.*

²⁴⁷ See *id.*

reasonably argue that the entire site represents one copyrighted "work." Notably, Ticketmaster did not include a copyright claim in its complaint. Indeed, because copyright protects only expression and not processes,²⁴⁸ Ticketmaster's order form page may not contain copyrightable material. But many owners of copyrighted material online may find themselves in similar situations. The issue has arisen under Scottish law in the "global watershed case"²⁴⁹ of *Shetland Times Ltd. v. Wills*,²⁵⁰ in which one online newspaper created links to individual articles on a rival newspaper's site.²⁵¹ Because online newspapers must, as a matter of practical necessity, locate individual stories in separate Web pages, virtually any online newspaper could fall victim to this practice. Similarly, many papers, reports and other copyrighted works posted online are too lengthy to reasonably fit in a single Web page. Authors of such works find it more practical to store individual chapters or sections in different pages and then create a table of contents page with links to each section. These authors, however, assert copyright protection over the entire document and may well wish to prevent other sites from linking to individual sections.

Recall that a "deep link" is distinguished from a "hyper-reference link" only by its target page, not by its form or function. This Note has assumed that hyper-reference links do not infringe upon copyright *per se*, because they contain only the target page's URL and no expressive content. Therefore, hyper-reference links can only be involved in copyright infringement if they are a component of a broader action, such as deep linking, and that action amounts to infringement.

1. *Reproduction and Distribution*

As in the context of frames, accessing a page through a deep link does not implicate the rights of reproduction and distribution any

²⁴⁸ See 17 U.S.C. § 102(b) (1994). Also relevant to on-line order forms like Ticketmaster's is the Copyright Office's clarification that it will not issue certifications of registration to "order forms and the like, which are designed for recording information and do not in themselves convey information." 37 C.F.R. § 202.1(c) (1997).

²⁴⁹ *Journalists' Union Confirms Backing for Wills*, SHETLAND NEWS (last modified July 27, 1997) <<http://www.shetland-news.co.uk/appeal.html>>. As with the *TotalNEWS* suit, however, it appears that this case was deemed a "watershed" prematurely. The case was recently settled out of court. For details of the settlement, see John Wills, *Shetland News Internet Case Settled Out of Court*, SHETLAND NEWS (visited Mar. 21, 1998) <<http://www.shetlandnews.co.uk/headline/97nov/settled/settled.html>>.

²⁵⁰ *Shetland Times v. Wills* (visited Mar. 24, 1998) <<http://www.jmls.edu/cyber/cases/shetld1.html>>. The only order issued in the case before it was settled was an "interim interdict," or temporary injunction, against the linking site. The interdict was issued on Oct. 24, 1996, by the Court of Sessions in Edinburgh, Scotland.

²⁵¹ See David H. Rothman, *Internet Links Could Take a Hit in Scottish Feud*, CHRISTIAN SCI. MONITOR, Dec. 3, 1996, at 19.

more than other means of Web browsing. The transaction that creates a new copy of the file and distributes it occurs between the owner's server and the user's terminal. The site containing the link is merely a catalyst and is not directly involved. Although the copyright holder may object to the way the copy is used or the manner in which it came to be viewed, these issues are properly addressed under the display right.

2. *Derivative Works*

Even if a lengthy essay or report stored over multiple Web pages is considered one copyrighted work, it would be difficult to conclude that a link to one component page creates a derivative work. Each individual page contains an original work of authorship, regardless of whether it also combines to form a larger work, and therefore, each is individually protected by copyright. In order to create a derivative work, the deep link would have to create something that could be independently copyrighted despite the copyright protection of the original work.²⁵² But what is displayed by following the deep link is the original work itself; nothing is added, subtracted or shown in conjunction with the original. Therefore, a deep link does not create a derivative work.²⁵³

3. *Public Display and Performance, and Moral Rights*

As with the derivation right, if the "work" in question is the individual Web page that is linked to, then the copyright holder can hardly object to the "context" or "manner" in which the page is displayed. The user views the page exactly as it would have appeared had the user arrived there via the table of contents rather than through the deep link. The target page is not "distorted" in any sense, let alone in the sense of the "material editing" performed by the *Gilliam* and *Shaklee* defendants.

Whether viewing the individual pages out of the sequence intended by the author violates the copyright in the work as a whole depends on the chosen analogy. Certainly reading the last chapter of a book first, while perhaps against the author's preference, in no way

²⁵² See COPYRIGHT LAW REVISION, H.R. REP. NO. 94-1476, at 57 (1976) ("Read together, [Sections 102 and 103] make plain that the criteria of copyrightable subject matter . . . apply with full force to works that are entirely original and to those containing preexisting material.").

²⁵³ But see Letter from Anthony Campbell to author, *supra* note 215 ("[D]eep links arguably create a derivative work by editing the main work, which often consists of multiple pages (if the site routes the user to Page [home], then B, then C, allowing someone who has not seen pages [home] and B to access page C not only alters the work, but may destroy its overall value)."). This argument, however, misuses the word "edit," since deep links function only as reference tools and can not edit or otherwise alter the document to which they refer.

infringes the authorship of the literary work embodied in the book.²⁵⁴ This analogy seems particularly applicable to online adaptations of literary works. If the Web pages were printed and read out of order, the author certainly could not object that they were read in that form.

The objecting copyright holder, however, may instead liken his situation to that in *WGN Continental Broadcasting Co. v. United Video Inc.*²⁵⁵ WGN, a Chicago "superstation," broadcasts an additional signal along with its evening news program.²⁵⁶ This "teletext" signal contains textual information such as the local news and upcoming WGN programs. By pressing a button on the remote control, a WGN viewer is able to switch back and forth between the broadcast and the teletext.²⁵⁷ WGN successfully enjoined a cable television operator from rebroadcasting the news program without the teletext signal.²⁵⁸ Judge Posner, writing for the majority, noted that WGN had chosen to copyright both signals as one audiovisual work.²⁵⁹ Relying on the public display/performance right and the right to prevent "truncation," as set forth in *Gilliam*, Judge Posner held that the cable operator had violated WGN's copyright.²⁶⁰ He did not find the difference between a one- and two-signal program "much more profound than that between a silent movie and a talkie,"²⁶¹ or a program with subtitles.²⁶² The fact that the broadcast and the teletext could not be viewed simultaneously did not disqualify the two signals from copyright protection any more than did the same attribute of pages of a book or entries in a dictionary.²⁶³

The *WGN* analogy breaks down, however, when applied to deep linking. Unlike the *WGN* cable operator, the creator of a deep link does not prevent the user from viewing the additional material in its

²⁵⁴ See *WGN Continental Broad. Co. v. United Video, Inc.*, 693 F.2d 622, 626-27 (7th Cir. 1982) ("The pages of books are also usually read sequentially, but this has never been thought a condition of copyright protection.").

²⁵⁵ See *id.*

²⁵⁶ See *id.* at 624.

²⁵⁷ See *id.* at 627.

²⁵⁸ See *id.* at 628.

²⁵⁹ See *id.* at 626-27.

²⁶⁰ Judge Posner also cited *Gilliam* and *Shaklee* for the proposition, based on moral rights, that if WGN had left the interval carrying the signal blank, the cable operator could not insert another signal into it. He drew an analogy to a publisher inserting the Lord's Prayer into the inside cover of a book to increase sales. See *id.* at 626. For a criticism of this dicta, see *Paramount Pictures Corp. v. Video Broad. Sys., Inc.*, 724 F. Supp. 808, 820 (D. Kan. 1989).

²⁶¹ *WGN*, 693 F.2d at 627.

²⁶² See *id.* at 626.

²⁶³ See *id.* at 626-27 ("The pages of books are also usually read sequentially, but this has never been thought a condition of copyright protection. A dictionary can be copyrighted although its pages, and the entries on each page, are not intended to be read in sequence. And if the publisher of a history book includes a fold-out map as an endpaper for the reader to consult from time to time while reading the text, the copyright on the book includes the map although the map is not intended to be read either simultaneously with the text or in some prescribed sequence with it.").

entirety. Individual Web pages, whether intended to be viewed sequentially or not, are separate computer files. They are not different "signals" and do not form a single audiovisual work. Even if a page is part of a larger, copyrighted work, the component page is equally protected by copyright, assuming it contains part of the original literary expression. The deep link simply gives the user an option to go directly to one component over another. It does not prevent the user from accessing the target site's home page. Indeed, if the deep link connects to a chapter or section of a longer literary work, the user often may proceed to the table of contents via a link in order to access the rest of the work. Users who access the work through the home page will be unaware of the deep link. A deep link simply expands the material's audience to users who access it via the deep link.

What, then, is to stop a site owner from creating his own substitute table of contents page containing deep links to every chapter or section of a work on another site? An attempt to pass off another's copyrighted work as one's own in another medium would usually involve copying, thus implicating copyright law. Here, however, no copy is made. If the author of the imposter table of contents intends to "pass off" the work as his own, then he has infringed upon the creator's right to control the "context and manner" in which her work is displayed.

Another issue is whether the implied license conferred on a user restricts him from viewing pages out of order. This approach, while difficult to enforce in individual cases, would provide a legal basis for challenging deep links as contributory infringement. It also seems antithetical to the purposes of copyright law.²⁶⁴ Certainly, allowing any Web page author to include a link to virtually any other page promotes a greater exchange of information. Even if online content providers would explicitly authorize deep links to their site, the hassle involved in ascertaining the "linkability" of a site and the inevitable chilling effect on the creation of links would far outweigh any nega-

²⁶⁴ Although a site owner should not be able to use copyright law to force his readers to view his site in a particular order or fashion, he should not be prohibited from taking advantage of technologies that will allow him to achieve these goals. An author could not utilize copyright law to force readers to read the pages of his book in any particular order, but, by the same token, an author is not prohibited from arranging his book in an atypical fashion (say, as a "Choose Your Own Adventure" book, which instructs the reader to jump to one of several different pages). Similarly, nothing in the copyright law would prevent a site owner from building a set of links that lead a user through the site in some prearranged order. The site owner could create a "gateway" page through which a user must pass in order to access the rest of the site. Indeed, many sites employ such gateway pages, requiring the user to assent to a set of guidelines before accessing the site.

tive influence that open linking might have on the willingness of authors to post their creations on the Web.²⁶⁵

Deep links by themselves, then, pose little threat of copyright infringement. This point is deceptively simple, but vitally important. Because such links do not appropriate, alter or influence the documents they reference anymore than a reference in a library card catalog misappropriates the content of a book, these links are benign in terms of copyright law. But quite like a library index, they are essential to maintaining the accessibility and utility of the Web itself. A regulatory scheme that attempted to require Web authors to obtain permission before linking to other pages in the name of protecting copyrights would be doomed to backfire disastrously.

C. Inlining

Inlining, which is more technically complex than deep linking, creates legal complications that deep linking does not. This is best illustrated by the "Dilbert Hacking Controversy."²⁶⁶ United Media made its famous "Dilbert" cartoon strip available each day²⁶⁷ on its Web site.²⁶⁸ Until sometime in 1995, United Media gave the file containing the actual strip the same name.²⁶⁹ This made it relatively easy for self-described "hackers" to inline the graphic into their own pages.²⁷⁰ Thereafter, in order to make it more difficult for hackers to inline the cartoon, United Media began to assign the graphic file a random name and adjusted the dimensions of the file slightly each day.²⁷¹ In an effort to circumvent United Media's anti-inlining measures, a hacker named Dan Wallach created a program that would load the United Media page each day, ascertain the name and dimensions of the day's *Dilbert* strip, and adjust the image tag on Wallach's page accordingly.²⁷² This prompted United Media to obtain a series of cease and desist orders, and created a vocal yet abortive "move-

²⁶⁵ This burden would be especially onerous on search engines. See Rothman, *supra* note 251, at 19 ("[S]ites like the popular Yahoo index might be virtually useless if links typically needed permission.").

²⁶⁶ Dan Wallach, *Dilbert Hack Page Archives* (last modified Sept. 28, 1997) <<http://www.cs.princeton.edu/~dwallach/dilbert/>>.

²⁶⁷ The actual strip posted on the Web site, however, lagged about two weeks behind the newest editions available in the daily newspapers because the papers objected to the competition.

²⁶⁸ See *Dilbert Zone* (modified daily) <<http://www.unitedmedia.com/comics/dilbert/>>.

²⁶⁹ The graphic file was named "todays_dilbert.gif". See Dan Wallach, *Dilbert Hack Page—Technical Details* (last modified Aug. 4, 1996) <<http://www.cs.princeton.edu/~dwallach/dilbert/tech-details.html>>.

²⁷⁰ See *id.*

²⁷¹ See *id.*

²⁷² See *id.*

ment”²⁷³ of Wallach supporters that faded after Wallach acceded to United Media’s demands.

As a starting point to the legal implications of inlining, most commentators condemn the practice.²⁷⁴ Despite these criticisms, the question of whether inlining can be objectively distinguished from any other facet of the Web’s interconnectivity remains.

1. Reproduction and Distribution

As with the above examples, inlining does not create a fixed copy beyond the one needed to view the image. By placing the graphic file on a Web server, the owner has consented to its being viewed. The server on which a Web file is stored makes a copy of the file and “distributes” it to the viewer. The owner may object to the manner in which the inlined file appears in the linking page, but this is a matter of the public display right.

2. Derivative Works, Public Display and Moral Rights

These rights appear to be threatened more by inlining than by framing or deep linking. As in the frames discussion, inlining does not modify, alter or transform the structure or form of the copyrighted graphic file. Even though graphics and other elements appear to form a single “page” on a computer screen, they are separate computer files that are each subject to independent copyright protection.

Whether the “appearance” of the file is modified in such a way as to create a derivative work is another question. An inlined image will often appear in a substantially different context on the linking page than it does on the original page. But copyright law only applies to literal elements of computer code, not evanescent screen images.²⁷⁵ Even the computer code, however, can be read to significantly “re-cast” the image. If one were to read the HTML coding of a Web page for only copyrightable elements, one would see text and image tags, arranged not too differently from how they may appear on screen. The actual graphic files can then be substituted for the image tags, since those commands are mere placeholders for the files themselves.²⁷⁶ Thus analyzed, even in print, the image could conceivably

²⁷³ See *id.*

²⁷⁴ See Raysman & Brown, *supra* note 12, at 3 (describing the “prevalent view” among Internet companies).

²⁷⁵ See *supra* note 184 and accompanying text.

²⁷⁶ The clever reader may at this point argue that the same “placeholder” analysis could be applied to frameset documents. One could say that the commands within these documents that instruct the browser to display certain pages within frames can be replaced with the pages themselves, thus making the frameset document a derivative work. The difficulty with this argument is that image tags point to a single graphic file which constitutes a single copyrighted work, whereas framesets include hyper-reference tags that contain only the URL of a target Web page—a Web page that contains both copyrightable and non-copyrightable material. The argu-

take on a new meaning by being inlined and thus be "recast" as a derivative work.

Concrete examples should elucidate the analysis. Users who view the Dilbert comic strip on Wallach's page are unlikely to see the cartoon in a different light than they would if they viewed it on United Media's page. This is so because a comic strip is self-contained and does not rely on its physical context for meaning. On the other hand, suppose a page displaying a graphic of a nude body were to inline the graphic of a celebrity's face, so that the two images appeared to be one body.²⁷⁷ Or suppose a web page inlined the graphic file containing the "Pepsi" logo on the PepsiCo Web site and placed it under the banner "Coke is Better Than."²⁷⁸ Even when analyzed as computer code rather than as an on-screen image, the graphic communicates the same message. Clearly, the inlined image has been "recast."²⁷⁹

This analysis suggests that the physical "context and manner" in which the inlined image is displayed can infringe upon the derivation right. The same analysis leads to the conclusion that inlining also can infringe upon the public display right. The public display right is infringed upon when the image is displayed in a context different than that intended by the owner.²⁸⁰ The frames discussion above dismissed the likelihood that displaying a page next to an advertisement frame "altered" the display for the purposes of copyright law because all copyrighted material in the page was displayed in exactly the same

ment, moreover, proves too much. If a URL could be thought of as synonymous with all of the copyrightable material on the page assigned to that URL, then all hyper-reference links would in fact copy and incorporate copyrighted material, and thereby infringe upon owners' copyrights. The entire Web could not legally exist in such a situation. This is why the non-infringing nature of hyper-reference links was set forth at the beginning of this Note.

²⁷⁷ The image tag can be used to alter the height and width of the inlined image.

²⁷⁸ This may well be fair use, however. See *infra* Part II(D)(3).

²⁷⁹ Again, the clever reader may apply this analysis to frames and argue that a web page author could achieve the same result by displaying the Pepsi home page in one frame and the banner in a frame above it. Such a display could possibly infringe upon the owner's copyright, specifically the owner's display right. See *supra* note 194 and accompanying text. For a number of reasons, however, such a result is not likely. First, frames display whole Web pages, not individual graphic files. It presumably would be much more difficult to achieve the same effect by juxtaposing the entire Pepsi home page with the pro-Coke banner than it would be to use only the Pepsi logo. While the logo could be inlined into the frame, this would then be an example of inlining, not framing. Second, when examined for elements of copyrightable, literal code, one would find that the pages displayed in the different frames are entirely separate documents, making a derivation claim highly difficult. Third, the user can change the page displayed in the frame by following a link, whereas the position of an inlined graphic within a page can not be altered by the user. Finally, the frames discussion in this Note centers on the growing phenomenon of meta-sites, whose purpose is to organize information scattered across the Web in an easily accessible fashion, not to mock corporate logos.

²⁸⁰ See Jonathan I. Ezor, *OPINION: Avoiding Trademark, Copyright Infringement* (visited Oct. 15, 1997) <<http://adage.com/interactive/articles/19961209/article8.html>> ("There might be some argument for copyright infringement [by a framing site] . . . by creating a visual work which incorporates elements from another's work . . .").

manner as the author intended. With inlining, the copyrighted material is excised from its original context and placed into another, with no guarantee that the two contexts will be remotely similar. This is functionally equiv-alent to the inliner making a physical copy of the file and redisplaying it in an entirely different medium. Such inlining unquestionably offends an owner's right to control the public display of his work.

Inlining also offends the moral right against distortion. In *Shaklee*, the entire text of the book, containing all of author's original authorship, remained the same. Yet tacking an advertisement onto the book's cover infringed on this right because it insinuated that the author endorsed the advertiser. Inlining can also alter the public's perception of the author.

One could argue that by posting files on a Web server, an owner implicitly licenses inlining. Just as graphic files are viewed independently for copyright purposes, so they must be for determining license. An owner of a graphic file can display the file in numerous different pages and in many different contexts. Therefore, it could be said that, without notice to the contrary, the owner authorizes others to do the same.

This argument, however, ignores the actual utilization of Web pages and graphic. Although Web browsers can display individual graphic files as easily as Web page files, browsers are not primarily used for this purpose. Nor are graphic files routinely displayed or advertised individually by owners who prefer to add such accessories as headlines, bylines, explanatory text, links, a page title, etc. Even when single graphics are featured individually—for example, a single photo in an image gallery—they are typically in a page that contains the name of the site and a link back to the referring page. This reality belies the suggestion that Web page owners implicitly license individual images for viewing and manipulation.

Finally, owners of inlining pages are directly liable for any infringement. They design the page and know the specific context in which the inlined image will be displayed. Furthermore, they create the rest of the page, which will serve as the image's new surroundings. The user only loads the page. In all likelihood, a user will not know that the page he is viewing contains an inlined image. Unlike a framed page, once a user loads a page that contains inlined files, he is powerless to choose whether or not to view another site's files.

D. What About Fair Use?

The "fair use" doctrine bends the literal application of copyright law when such enforcement would stifle creativity rather than pro-

mote it.²⁸¹ Fair use is the judicially crafted play in the joints of an otherwise rigid and unforgiving copyright apparatus. Because fair use is intended to be a subjective check on the overzealous application of objective copyright rules, it is quite impossible to divine a straightforward, abstract definition of this “most troublesome [doctrine] in the whole law of copyright.”²⁸² The Supreme Court has endorsed a helpful paraphrase of the Golden Rule for fair use questions: “Take not from others to such an extent and in such a manner that you would be resentful if they so took from you.”²⁸³ Nevertheless, some have opined that two attorneys could reach opposite conclusions on any given fair use issue, often while citing to the same cases.²⁸⁴

Most commentators appear to agree that fair use will continue to be relevant on the Web, just as fair use has adapted to other new mediums of expression.²⁸⁵ Opinions regarding the application of the fair use defense in the modern age are sharply divided, however, as exemplified by several recent judicial opinions.²⁸⁶ Decreased “transaction costs” of obtaining permission to use a copyrighted work have been one reason given to narrow the application of fair use;²⁸⁷ the Copyright Clearance Center’s online service handles copyright searches and use requests, for a fee. Nonetheless, the service is incomplete and time-consuming and has no effect on the often daunting asking prices of copyright holders. Since users will often need to make spontaneous and limited uses of certain copyrighted material on

²⁸¹ See *Princeton Univ. Press v. Michigan Document Servs.*, 99 F.3d 1381, 1385 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 1336 (1997) (“The fair use doctrine, which creates an exception to the copyright monopoly, permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”) (internal quotations omitted).

²⁸² *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939).

²⁸³ Joseph A. McDonald, *Non-infringing Uses*, 9 BULL. COPYRIGHT SOC’Y 466, 467 (1962), *cited with approval in Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550 n.3 (1985).

²⁸⁴ See Georgia Harper, *Will We Need Fair Use in the Twenty-First Century?* (last modified Mar. 4, 1997) <http://www.utsystem.edu/OGC/IntellectualProperty/FAIR_USE.HTM>.

²⁸⁵ See, e.g., Educom Review Staff, *Royalties, Fair Use & Copyright in the Electronic Age (Or Why We Could Call This Article Forrest Gump and Not Get in Trouble)* (last modified Dec. 1995) <<http://www.educom.edu/web/pubs/review/reviewArticles/30630.html>> (quoting Bruce A. Lehman, Chairman of the Working Group on Intellectual Property Rights within the Information Policy Committee on the Information Infrastructure Task Force: “I think there is a certain degree of paranoia in the world that new technology will be used to restrict fair use We have really rejected that point, and we’re trying to make our position clearer in our final report. There will be as much fair use in the digital age as there has been in photocopying”).

²⁸⁶ See *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1994) (rejecting a fair use defense in the context of intra-company photocopying of magazine articles, over a strongly worded dissent); *Princeton Univ. Press v. Michigan Document Servs.*, 99 F.3d 1381, 1385 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 1336 (1997) (same, in the context of commercial photocopying of texts for college courses).

²⁸⁷ See Harper, *supra* note 284.

the Web, the fair use doctrine seems destined to survive the information revolution in some form.

Fair use claims are judged according to the four factors listed in 17 U.S.C. § 107:²⁸⁸ 1) the nature of the use, 2) the nature of the work used, 3) the amount and substantiality of the portion used and 4) the economic effect of the use on the market value of the original. These factors are not exhaustive, but they provide a useful outline for courts. The Supreme Court has made clear that they are to be applied on a case-by-case basis²⁸⁹ and are not to be simplified into bright-line rules.²⁹⁰ Since Congress used the word "shall" in section 107, courts must consider all four factors.²⁹¹ Courts have historically focused their attention on the fourth factor, which is concerned with the economic effects of fair use, although recent decisions have questioned this practice.²⁹² The first factor, dealing with the character and purpose to which the copyrighted material is put, also tends to receive much attention.²⁹³ In turn, most judicial opinions tend to treat the remaining two factors as congressionally-mandated window dressing.

Notably, the fair use doctrine only applies if the courts determine that an infringement has occurred.²⁹⁴ Thus, the fair use doctrine will not be an issue in instances where, as described above, infringement is not possible.

²⁸⁸ Because this section is the sum of fair use law, it bears reprinting in full:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

- (1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

²⁸⁹ See *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 145 (S.D.N.Y. 1968).

²⁹⁰ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

²⁹¹ See *White Paper*, *supra* note 6, at 70.

²⁹² See *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70, 78 n.8 (2d Cir. 1997) ("[T]he erstwhile primacy of the fourth factor has been considerably modulated by the requirement announced by the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.* that 'all [four factors] are to be explored, and the results weighed together, in light of the purposes of copyright.'" (internal citations omitted)).

²⁹³ See *id.* at 78-80 (applying first factor and stating that the first factor should be applied whether or not the use falls neatly into an already-articulated category of use).

²⁹⁴ See Letter from Georgia Harper, Office of the General Counsel, University of Texas System, to author (June 23, 1997) (on file with author) ("[A]ny limitations involved with exercising fair use would not be necessary for those items unprotected in the first place.").

1. Frames

The foregoing discussion found that the most likely infringement of meta-sites like TotalNEWS is the display right. By juxtaposing a target page with the meta-site's links and advertisements, the meta-site arguably changes the "context" in which the page is displayed. The following fair use discussion assumes that frames infringe upon the display right.

a. Nature of the Use

Judicial treatment of the first factor is informed not so much by a checklist of rules as a set of presumptions. In an insightful dissent in the recent *Princeton University Press v. Michigan Document Services*²⁹⁵ case, Judge Ryan divided the first factor inquiry into two parts: "(1) the degree to which the challenged use has transformed the original, and (2) the profit or nonprofit character of the use."²⁹⁶

The Supreme Court's analysis under the first fair use factor focuses on whether the use is "transformative."²⁹⁷ According to the Court, transformative use "alter[s] the [original] with new expression, meaning, or message."²⁹⁸ A use that is deemed to transform the original will usually be protected under the fair use doctrine. The courts use several labels to distinguish the different varieties of transformative works: news reporting, educational, scholarship, research, comment and criticism.²⁹⁹ There is, however, no bright line to distinguish uses.³⁰⁰

Whether the activity of TotalNEWS can be labeled "news reporting" is questionable. Although it offers access to Web pages that fit that category, the act of directing users to the pages seems distinct from the function performed by the target page. In this way, TotalNEWS seems more analogous to a "news clipping" service that cuts out newsworthy articles and pastes them into a new publication, rather than reporting the news.³⁰¹

²⁹⁵ 99 F.3d 1381 (6th Cir. 1996) (Ryan, J., dissenting), *cert. denied*, 117 S. Ct. 1336 (1997).

²⁹⁶ *Id.* at 1400 (Ryan, J., dissenting).

²⁹⁷ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-79 (1994).

²⁹⁸ *Id.* at 579.

²⁹⁹ See 17 U.S.C. § 107 (1994).

³⁰⁰ See COPYRIGHT LAW REVISION, H.R. REP. NO. 94-1476, at 66 (1976) ("[T]he endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute.").

³⁰¹ See *Los Angeles News Serv. v. Reuters Television Int'l, Ltd.*, 942 F. Supp. 1265, 1272 (C.D. Cal. 1996).

The fact that a meta-site uses the target material for a different purpose, however, may well work in the meta-sites' favor. One "transforms" a work when she uses it for a different purpose.³⁰² Upon such a showing, the first factor in the fair use test will weigh in favor of the defendant in an infringement suit.³⁰³ As discussed above, although meta-sites are incapable of altering the physical content of a target page, they may very well "transform" the purpose of the target page.

TotalNEWS has a somewhat persuasive argument that it is "reporting" the location of their target pages. In *Los Angeles News Service v. KCAL-TV Channel 9*,³⁰⁴ a Los Angeles television station broadcast Los Angeles News Service's (LANS) copyrighted videotape footage of the Reginald Denny beating after LANS denied the station's request for a license to air the tape.³⁰⁵ After arguing in vain that it was reporting the news of the beating, KCAL argued that it was reporting on the newsworthiness of the tape itself.³⁰⁶ The Ninth Circuit found this argument "forceful,"³⁰⁷ but ultimately rejected it because KCAL did not use the footage in that fashion. Rather, KCAL used the footage as documentation of the beating and did not attribute the tape to its source.³⁰⁸ TotalNEWS, on the other hand, necessarily attributes the content it targets to its source because the frame displays the entire page, including, presumably, its creator's logo, masthead or other identifying marks. The function of the meta-site, moreover, is to allow users to find sites they might otherwise have trouble locating. Whether this convenience can accurately be labeled "news" in the copyright context is not certain.³⁰⁹

A work which transforms an original document for research purposes can also qualify as a transformative use under section 107. Indeed, the Second Circuit has remarked that "[i]f a book falls into one of these categories [i.e., criticism, scholarship or research], assess-

³⁰² See *Campbell*, 510 U.S. at 578-79.

³⁰³ See *id.*

³⁰⁴ 108 F.3d 1119 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 81 (1997).

³⁰⁵ See *id.* at 1120.

³⁰⁶ See *id.*

³⁰⁷ See *id.* at 1121.

³⁰⁸ See *id.* at 1121-22.

³⁰⁹ In the increasingly vast world of the Web, collecting the location of hundreds of sites along a similar theme is not a trivial task. Indeed, the commercial success of meta-sites is powerful evidence of the usefulness of the service. Although the "location" of information may not carry equal significance in other contexts, copyright law must be reinterpreted when applied to new technologies in a way that best increases the harvest of knowledge. See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("[T]he ultimate aim is . . . to stimulate artistic creativity for the general public good When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.").

ment of the first fair use factor should be at an end.”³¹⁰ TotalNEWS can easily be described as a research tool. Indeed, the most popular research services for legal professionals—LEXIS-NEXIS and Westlaw—perform an analogous function by allowing the user to retrieve a wide range of documents originally published in the print medium. Moreover, by creating links to other news sources and collecting them in one location, TotalNEWS makes a unique contribution that benefits researchers. This original research function should weigh heavily in favor of TotalNEWS.

Meta-sites would not be likely to fare as well if classified as “anthologies.” At least one court has found that simple anthologies that compile written works into a single volume are not transformative³¹¹ and congressional guidelines specifically prohibit them even for educational classroom use.³¹² Anthologies do not “transform” original works. Rather, they “catalog” them. At first blush, meta-sites seem analogous to catalogs in that they basically function as an index of Web sites. Meta-sites do not, however, create copies, as an infringing written anthology must.

Courts are most receptive to applying the fair use exemption in cases where the infringing material has educational uses. A meta-site is unlikely to receive the “educational” stamp, however, and such a label does not guarantee approval.³¹³ For example, copy stores such as Kinko’s have been fined for compiling portions of copyrighted books and articles into “course packs” for college professors, despite the educational purpose that the course packs serve.³¹⁴ These “copy shop” cases, one of the most litigated areas in fair use law, are analogous to meta-sites in that copy shops perform an activity that is barely transformative and only superficially educational. These stores profit from providing the copying service, regardless of whether the copies they make are used for educational purposes or otherwise. Likewise, even a meta-site geared towards students and consisting solely of links to educational sites still contains no original, creative input of an educational nature. If such a site were non-profit, it might arguably be termed educational. When supported by advertising like TotalNEWS, however, the commercial factor would probably pre-

³¹⁰ *New Era Publications Int’l v. Carol Publ’g Group*, 904 F.2d 152, 156 (2d Cir. 1990) (quoting *New Era Publications Int’l v. Holt*, 884 F.2d 659, 661 (2d Cir. 1989)) (Miner, J., concurring).

³¹¹ See *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1530 (S.D.N.Y. 1991).

³¹² See *id.* at 1535.

³¹³ See *Marcus v. Rowley*, 695 F.2d 1171, 1175 (9th Cir. 1983) (rejecting a photocopying business’ claim of fair use in reproducing copyrighted texts in “course packs” for college professors, on the grounds that the service was performed for commercial, not educational reasons).

³¹⁴ See *Kinko’s*, 758 F. Supp. 1522.

clude the owners from arguing that the site was subject to an educational exemption.

While the distinction between commercial and noncommercial uses still has weight, it is not as dispositive as it once was. Courts today are more likely to find a copyright violation where the material is used for commercial, rather than non-profit, purposes. However, "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."³¹⁵

The commercial element of the fair use test may weigh against ad-supported sites like TotalNEWS. The *KCAL-TV* decision noted that news broadcasts, although not "for-profit" enterprises in the traditional sense, still "sell the news" in the sense that the television stations that air them profit from the advertisements played during the broadcasts.³¹⁶ The stations thus compete for advertiser dollars presumably by creating more interesting broadcasts. As in the *KCAL-TV* case, the fact that TotalNEWS displayed the target pages next to its own advertising indicates that TotalNEWS had a profit motive in creating its meta-site. This motive weighs "against a finding of fair use, though by no means conclusively."³¹⁷

The significance of the profit motive in this instance, however, may be negligible. Fair use law is equitable in nature as it seeks to prevent a party from gaining a benefit without paying the proper price for it.³¹⁸ Any meta-site that links a user to another page on the Web does not, by definition, deprive the owner of the target page of a rightfully owed fee because users are carried to a display "which [they] had been invited to witness in its entirety free of charge."³¹⁹ In *Sony Corp. of America v. Universal City Studios, Inc.*,³²⁰ the Supreme Court held that using VCRs to tape TV programs could be fair use.³²¹ Likewise, TotalNEWS users are simply overcoming the barriers posed by the Web's vastness to what would otherwise be a freely accessible Web page. Additionally, it may not be entirely accurate to label ad-supported sites like TotalNEWS as "commercial" in the fair use sense. In his dissent in *Michigan Document Services*, Judge Ryan differentiated use for-profit from "commercial exploitation."³²²

³¹⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

³¹⁶ *See Los Angeles News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1121 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 81 (1997).

³¹⁷ *Princeton Univ. Press v. Michigan Document Servs.*, 99 F.3d 1381, 1400 (6th Cir. 1996) (Ryan, J., dissenting), *cert. denied*, 117 S. Ct. 1336 (1997).

³¹⁸ *See id.* at 1402.

³¹⁹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1984).

³²⁰ 464 U.S. 417 (1984).

³²¹ *See id.* at 417.

³²² *Michigan Document Servs.*, 99 F.3d at 1402.

An assessment of the distinction between for-profit activity and exploitation is critical because the Supreme Court has commanded that we examine “the nature and *objects* of the *selections* made” in view of “the examples given in the preamble to § 107” and the purposes of copyright protection, that is, to promote science and the arts.³²³

If, under the first factor, any activity engaged in by individuals via a for-profit entity were to be labeled commercial, “this one characteristic ‘would swallow nearly all of the illustrative uses listed in the preamble paragraph of section 107, including news reporting, comment, criticism, teaching, scholarship, and research,’”³²⁴ all of which “are generally conducted for profit in this century.”³²⁵ To be a commercial use, then, a use must be a “commercial exploitation” of a copyrighted work.³²⁶

The *Michigan Document Services* Defendant, by Judge Ryan’s analysis, did not commit such exploitation.³²⁷ “Profiting from exploiting copyrighted material requires more than profit obtained from a mechanical service . . . [It] involves an active role in assessing the value of, selecting, and marketing copied material based on its substance.”³²⁸ The Defendant in *Michigan Document Services* did not make such value-based assessments of the works copied. Rather, it mechanically reproduced materials selected by professors and students for educational purposes.³²⁹ The copyshop’s use “is more properly viewed as the commercial exploitation of professional copying technologies and of the inability of academic parties to reproduce printed materials efficiently, not the exploitation of copyrighted, creative materials.”³³⁰ Thus, the actions of the students and professors rather than the copiers should be at issue. If the students and professors used the material for “educational” purposes, any copyright infringement is excused by the fair use doctrine. It follows that the copyshop can not be contributorily liable where no actionable infringement has occurred.

By the same token, TotalNEWS does not choose which news source its users will view. Granted, TotalNEWS provides a finite

³²³ *Id.* at 1403 (Ryan, J., dissenting) (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (CCD Mass. 1841) (No. 4901)) (emphasis added by Judge Ryan).

³²⁴ *Id.* (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994)).

³²⁵ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 592 (1985).

³²⁶ The *Michigan Document Servs.* majority challenged Judge Ryan’s “exploitation” distinction on a textual basis, explaining that the statute only used the word “commercial.” See *Michigan Document Servs.*, 99 F.3d at 1386 n.3. Given the alternative to his formulation—that otherwise-acceptable use assisted by a for-profit institution is “commercial”—Judge Ryan’s analysis seems to be a reasonable interpretation of the statute.

³²⁷ See *id.* at 1402 (Ryan, J., dissenting).

³²⁸ *Id.*

³²⁹ See *id.* at 1402-03.

³³⁰ *Id.* at 1402.

number of links from which the user may choose, but with hundreds of selections, one can not, for the most part, argue that the meta-site is influencing its users to choose one over another. Regardless, TotalNEWS profits only from the fixed fee it charges advertisers and that fee is wholly unrelated to the specific content viewed by any particular user. TotalNEWS profits by exploiting the inability of its users to arrange hyper-reference links as efficiently as TotalNEWS does. The profits are not a product of any value judgment or editorial decision regarding the content viewed by the users. Moreover, most TotalNEWS users are no doubt using the service for private, non-profit purposes. Such viewing may qualify as fair use because it falls under the educational, research, or scholarship exceptions. In addition, unlike the copyshop cases, owners of the framed target pages probably implicitly license users to view the material in question. The "use" of target pages by TotalNEWS and other such meta-sites should not be considered "commercial" in the fair use sense at all. Since most meta-sites transform the purpose of their targets in some way, and since meta-sites do not commercially exploit copyrighted work, the first factor of the fair use analysis should weigh in a meta-site's favor.

b. Effect on Market Value of Original Work

When analyzing a fair use claim, the courts will examine whether the allegedly infringing material substitutes for the original or impairs the market value of the original.³³¹ Commercial gain does not create an automatic presumption of market substitution so long as it is "something beyond mere duplication for commercial purposes."³³² The court analyzes the effects of the allegedly infringing use on the potential market for derivative works of the original.³³³ The court also applies a "cumulative effects" test, which examines what would happen if the questioned use became widespread.³³⁴ Several challenged uses have emerged unscathed from this rather daunting scrutiny.

The *TotalNEWS* Plaintiffs argued that TotalNEWS negatively impacted the market value of their sites. The Plaintiffs argued that the advertisements on their pages would receive less screen space than they normally would, that the juxtaposition of TotalNEWS' ads would diminish the effectiveness of the Plaintiff's ads and that fewer

³³¹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587 (1994) (holding that under 17 U.S.C. § 107, commercial parody may be a fair use).

³³² *Id.* at 570.

³³³ See *id.* at 571.

³³⁴ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) ("A challenge . . . requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work.").

people would view their sites because visitors through frames would be unable to bookmark the framed page.³³⁵

These claims are hardly insurmountable. Although ads may receive less screen space in a frame than they would have otherwise, it is questionable whether content providers can guarantee advertisers a certain number of pixels on any given monitor. Screen space will vary depending on the size of the monitor. For instance, a seventeen-inch screen will display an advertisement more prominently than a fourteen-inch monitor. Of course, only the individual user controls this factor.

In addition, advertisers have no grounds for complaining about the possible juxtaposition of their ads with those of their competitors. Users have always been free to simultaneously open as many individual browser windows or other programs on their screen as they wish.³³⁶ These screens may well display competing ads. Nor can content providers control the advertising that is often displayed by a user's browser or ISP software.³³⁷ The claim is even less persuasive when one realizes that most advertisers on the Web do not even know where their ads will be displayed. Most advertisers submit their ads to intermediary agents who find pages on which to display ads.³³⁸ Furthermore, the target page's ads are all *still there*.³³⁹ The early settlement of the *TotalNEWS* suit obviated the need for discovery and the formal presentation of evidence, but common sense observations also contradict the Plaintiff's claims. After all, each of the target sites continue to exist and expand. Moreover, a sizeable percentage of Web sites utilize frames³⁴⁰ which no doubt encapsulate a wide range

³³⁵ See *supra* notes 120-30 and accompanying text (describing the Plaintiffs' allegations against TotalNEWS).

³³⁶ See KROL, *supra* note 37, at 370.

³³⁷ For example, browsers provided by America Online and Juno both display advertisements, as does America Online's "Instant Messenger" communications software. See *Advertising on Juno* (visited Mar. 21, 1998) <<http://www.juno.com/ads.html>>; *America Online Media Space* (visited Mar. 21, 1998) <<http://media.aol.com/>>.

³³⁸ See Levi & Rodin, *supra* note 137, at 3.

³³⁹ Indeed, one commentator posited that oral arguments in the *TotalNEWS* case, had it gone to trial, might [have gone] something like this:

Plaintiff: "Your Honor, they're leading visitors to my site!"

Judge: "What's your cause of action?"

Plaintiff: "They're misappropriating my content! They're being dishonest!"

Judge: "But you just said that they're sending people to you, right?"

Plaintiff: "Right."

Judge: "So you still benefit from the visit?"

Plaintiff: "Yes."

Judge: "So what's the problem?"

Richard P. Klau, *Online: The State of the Internet is Not as Bad as Some Would Have Us Believe*, STUDENT LAW., Sept. 1997, at 15.

³⁴⁰ See Weiss, *supra* note 62, at B9 ("[Meta-sites are] one of the most popular recent trends on the Internet. . . . [N]umerous other metasites continue to employ framing . . .").

of advertising-supported sites. Yet the Web continues to grow at exponential rates. Certainly, if frames were causing such grief, more than just these seven Plaintiffs would make their woes known.

Courts have often stated that whether an allegedly infringing use creates an actual profit or loss is irrelevant to a determination of market impact.³⁴¹ Courts have, however, recognized that some uses can only have a *positive* effect on sales of the original work. For example, the artist in *Haberman v. Hustler Magazine, Inc.*³⁴² had minimal profit from the public display of his work before its unauthorized reproduction in a magazine.³⁴³ After the reproduction, however, sales and exhibitions increased.³⁴⁴ In *Time Inc. v. Bernard Geis Associates*,³⁴⁵ the Defendant's chalk-drawn reproduction of frames from the Zapruder film that appeared in his scholarly book on the Kennedy assassination had no discernible effect on the market for the original and could, indeed, only increase market value.³⁴⁶ In *New Era Publications International v. Carol Publishing Group*,³⁴⁷ the court held that the unauthorized yet favorable biography of Scientology founder L. Ron Hubbard could only increase interest in its subject.³⁴⁸ In perhaps the most extreme example of this line of analysis, the Sixth Circuit even speculated that a gun-control group that reproduced an NRA mailer, listing representatives and their voting records, would not be liable for infringement because the NRA, which would be able to rally its members in response to the gun-control advertisement, would benefit from the ad.³⁴⁹

Framing likewise seems to benefit target pages. Framing can dramatically increase a target page's total number of "hits."³⁵⁰ The TotalNEWS site has been accessed thousands of times. This benefit may be less pronounced for industry leaders such as CNN or the Wall

³⁴¹ See, e.g., *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70, 81 n.16 (2d Cir. 1997) (holding that summary judgment was inappropriate where the use was not *de minimis* and the district court erroneously applied the fair use defense); *DC Comics Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 28 (2d Cir. 1982) (holding that summary judgment was inappropriate where questions of fact existed surrounding trademark infringement and fair use defense).

³⁴² 626 F. Supp. 201 (D. Mass. 1986) (stating fair use was reasonable where magazine published work for purposes of commentary without diminishing marketability of original).

³⁴³ See *id.* at 205.

³⁴⁴ See *id.* at 205-06.

³⁴⁵ 293 F. Supp. 130 (S.D.N.Y. 1968).

³⁴⁶ *Id.* at 146.

³⁴⁷ 904 F.2d 152 (2d Cir. 1990).

³⁴⁸ See *id.* at 159-60.

³⁴⁹ See *National Rifle Ass'n of Am. v. Handgun Control Fed'n*, 15 F.3d 559, 562 (6th Cir. 1994).

³⁵⁰ See Dvorak, *supra* note 140; Weiss, *supra* note 62, at B9; Fosmire, *supra* note 140; Dan Mitchell, *Wired News: TotalNews Settles with Media Giants over Links* (visited Oct. 15, 1997) <<http://www.wired.com/news/business/story/4286.html>>; Oppedahl & Larson L.L.P., *supra* note 224.

Street Journal, but local and niche operations may enjoy substantial increases in exposure.

In addition, the bookmarking argument is not persuasive. The sites visited are easily accessible through the TotalNEWS navigation frame. Moreover, the TotalNEWS site itself acts as a form of "bookmark." Additionally, most browsers are capable of opening a framed site in a separate browser window that the user can then bookmark. It seems probable that browsers may soon be able to bookmark framed sites. If users find a site they particularly enjoy through the meta-site, they are free to record that site's URL for later retrieval. Owners of targeted sites, then, have little practical basis on which to challenge framing.

Nor is it clear that the two sites operate in the same "market" at all. Presumably, users who access a particular site frequently or are induced to do so by other means, such as advertising, will have no desire to access it through a meta-site when they can view it in a whole screen. Visitors to the same site through TotalNEWS, then, are presumably all people who would not have found the site otherwise. The only way TotalNEWS could draw users away from a site is if, after viewing a site, a user found an even better news source while browsing TotalNEWS' links. In other words, sites like CNN fear the exposure that TotalNEWS will bestow on CNN's competitors. In this vein, CNN has no more cause of action against TotalNEWS than a local business does against the Yellow Pages.

The authors of the target pages are similarly not displaced from the market for derivative works. What possible incentive could CNN have to create a site that links to its own pages plus those of its competitors? The appeal of TotalNEWS lies in the use to which it puts the frames—collecting links to *different* sites in one place—rather than the frames themselves, which are merely a useful means to that end. Similarly, the *Galoob* court recognized that Nintendo had no realistic market for re-releasing accelerated play versions of its previous games because its customers expected new products from it, not rehashes.³⁵¹

Target sites might be able to argue that, by losing the ability to license the right to frame their content, they are displaced from the "licensing market." Although one well-recognized benefit of copyright ownership is the ability to license use of the exclusive rights it generates,³⁵² every extension of the fair use doctrine necessarily conflicts with the right to license out the sanctioned activity. Circuit

³⁵¹ See *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 971-72 (9th Cir. 1992).

³⁵² See *DC Comics Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 28 (2d. Cir. 1982) ("[O]ne of the benefits of ownership of copyrighted material is the right to license its use for a fee . . .").

courts in recent years have addressed this "circularity"³⁵³ by limiting their analysis to existing, reasonable or likely licensing markets.³⁵⁴ Even though TotalNEWS has obtained explicit permission from a number of sites in the wake of its legal battle, there is no existing market for licensing the right to frame a Web page.

While some commentators advocate such a permission-based system,³⁵⁵ others decry the move as a threat to the very free-linking nature of the Web.³⁵⁶ Frames, like simple links, are not likely to infringe upon any of the exclusive rights of copyright, and can be a useful tool in organizing the Web's vast array of information. Moreover, the fair use doctrine is designed to promote learning, not to enrich publishers.³⁵⁷ It is highly questionable whether these permission fees would serve as a net incentive to create new creative material,³⁵⁸ and they are almost certain to inhibit the further organization and accessibility of information already available. Thus, even if a market for permission fees is by some forecasts "likely," it is not "reasonable."

c. Nature of the Work

The nature of the pages targeted by TotalNEWS weighs in the meta-site's favor. Even though the *KCAL-TV* court eventually ruled that airing the Reginald Denny tape was not fair use, the informational and factual nature of the tape tipped this factor in the station's favor.³⁵⁹ This was so despite the fact that the work clearly qualified for copyright protection.³⁶⁰ Similarly, news is worded and conveyed by any given content provider in such a fashion as to qualify for copyright protection. A court, however, is more likely to extend the protections of the fair use doctrine to an author who allegedly infringed upon a news story's copyright than it would to an author who allegedly infringed upon a purely fictitious work.³⁶¹ As other meta-sites may well target pages containing fiction, however, the "nature of the work" analysis depends completely on the facts of the particular case.

³⁵³ See *Princeton Univ. Press v. Michigan Document Servs.*, 99 F.3d 1381, 1387 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 1336 (1997).

³⁵⁴ See *id.*; see also *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70, 81 (2d Cir. 1997).

³⁵⁵ See *Poler*, *supra* note 4; *Kuester & Nieves*, *supra* note 35, at 278-79.

³⁵⁶ See *supra* discussion in note 140.

³⁵⁷ See *Michigan Document Servs.*, 99 F.3d at 1395 (Merritt, J., dissenting).

³⁵⁸ See *id.* at 1409 (Ryan, J., dissenting).

³⁵⁹ See *Los Angeles News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1122 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 81 (1997).

³⁶⁰ See *id.*

³⁶¹ See *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1557 (M.D. Fla. 1993) (holding that manipulating images, deleting attributions to original author and falsely using logo was trademark infringement).

d. Amount and Substantiality of the Portion Used

Despite the substantiality of the display involved, this factor may not be prohibitive to a finding of fair use. Because frames display entire pages, there can be no argument that this factor does not on its face weigh against the meta-site. The fact that a target page is shown in its entirety, however, supports the argument that the framing site did not infringe upon the target's copyright in the first place, thus obviating the need to conduct a fair use inquiry. This factor may also help establish the good faith necessary for a fair use defense.³⁶²

2. Deep Links

Deep linking could, in theory, infringe copyright if used so pervasively and intentionally as to pass off another's copyrighted work as one's own. For example, a "table of contents" page, with deep links into the individual chapters of a work by someone else, along with text suggesting that the work was written by the linking page owner, might conceivably fall into this category. Such behavior would infringe on the public display right or its associated moral rights to prevent distortion. Certainly, if a high degree of bad faith were evident, courts would go out of their way to deny a fair use claim. If deep linking were held to implicate a Web page creator's display right in the absence of such a wanton disregard of original authorship, though, how would a fair use claim fare?

a. Nature of the Use

In order to envision a situation in which deep links can infringe on copyright, one must assume so many infringing acts that a fair use defense is out of the question. Here again, as with simple links, a deep link is merely the recitation of a page's URL, containing none of the page's creative content. Once followed, the link does not alter the content or display of the target page. It could not by itself be an infringing use, but could only be so judged in a situation where the numerous deep links strongly question the creator's authorship. The copyright holder would, therefore, properly challenge the contextual text of the linking page, but not the essence of the link itself.³⁶³

³⁶² See *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (holding that magazine's use of frames from a film constituted fair use).

³⁶³ One commentator has drawn an analogy to illustrate how a link and the text to which it is attached may, in combination, give rise to liability for defamation: "An example of a defamatory link would be: This man [with a link attached to the word "man"] killed my cat, stole my invention, and threatened to destroy the Internet. The statement itself does not identify the party. The link . . . provides the context that turns the statement into defamation." Bolin, *supra*

Section 107 may sanction many possible uses of deep links. One can design deep links to display visual or literary works for purposes of scholarship, comment and criticism. An in-depth commentary of an online work may include deep links to portions of the work at various intervals so that the user can compare the original to the review. The courts seem to allow authors to quote extensive passages of published works in order to criticize or analyze them.³⁶⁴ In *Haberman*, *Hustler* magazine reproduced two of an artist's surrealist postcards in a column in order to comment on them.³⁶⁵ The court held that the magazine's use did not infringe upon the artist's copyright interests because the court believed that, in order to effectively comment on the pieces of art, *Hustler* had to reproduce the entire piece of art.³⁶⁶ This is especially true if the commentary is biographical in nature, since the subject is unlikely to approve a critical biography.³⁶⁷ In *New Era Publications v. Carol Publishing Group*,³⁶⁸ an author who wrote an unauthorized biography of Scientology founder L. Ron Hubbard reproduced a wide array of Hubbard's writings.³⁶⁹ Each chapter of the book was prefaced by quotes from Hubbard, which were often juxtaposed with other Hubbard quotes.³⁷⁰ The Second Circuit held that this qualified as fair use.³⁷¹ Certainly, critical commentary of a writing already posted online followed by a deep link to a specific portion of the work would pose little threat to the right of public display.

A commentator may attempt to represent another's material as his own. Neither the *Haberman* nor the *New Era* defendant did so. A commentator who attributes the material he is reviewing to its creator establishes the "good faith" that the fair use doctrine presumes.³⁷²

note 13. However, this statement would have to impinge the authorship of the target page's creator in order to constitute copyright infringement.

³⁶⁴ See *Haberman v. Hustler Magazine, Inc.*, 626 F. Supp. 201, 207 (D. Mass. 1986) (holding that reproducing artwork for purposes of commentary is fair use) (citations omitted).

³⁶⁵ See *id.* at 205.

³⁶⁶ See *id.* at 212 ("Thus, to the extent that *Hustler's* purpose was to comment on *Haberman's* works, full reproduction of them was appropriate.").

³⁶⁷ See *New Era Publications v. Carol Publ'g Group*, 904 F.2d 152, 156 (2d Cir. 1990) (classifying biographies as a preferred use under the first fair use factor).

³⁶⁸ *Id.*

³⁶⁹ See *id.* at 154.

³⁷⁰ See *id.* at 156.

³⁷¹ See *id.* at 161.

³⁷² See *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1176 (5th Cir. 1980) ("[T]here was no attempt to palm off *Triangle's* product as that of the *Herald's*. Rather, the advertisement was a comparative advertisement done in a manner which is generally accepted in the advertising industry.") (citations omitted); see also *Marcus v. Rowley*, 695 F.2d 1171, 1175 (9th Cir. 1983) (holding that the photocopying of a copyrighted instructional manual for use in a "learning activity package" does not constitute fair use); *Haberman*, 626 F. Supp. at 207; *Fair Use Guidelines for Electronic Reserve Systems* (visited June 1, 1997) <<http://www.utsystem.edu/OGC/IntellectualProperty/rsvguid.tm>> (including attribution in a list of guidelines that operators of electronic reserves should follow to maintain a fair use defense).

Providing a notice of copyright when linking to protected materials is a simple and effective way to demonstrate good faith,³⁷³ though attribution and notice hardly seems necessary since the user, upon following the link, will view the original work in its entirety. In addition, Hustler did not use the Haberman art to enhance sales of its magazine. Indeed, a reader was unlikely to notice the art until after purchasing a copy.³⁷⁴ Even if the appeal of a Web page is increased by its deep links into other sites, one could hardly base a claim on that fact alone. The user, like the purchaser of *Hustler* magazine, would be unaware of the deep links until after he visited the Web site.

It would be difficult to characterize any use of a deep link as commercial in nature. Much like the passive copyshop activity in *Michigan Document Services*, the individual user ultimately “uses” any hyper-reference link, whether it is deep or not. A potential plaintiff will be hard-pressed to prove that an individual “used” a link for unfair commercial purposes, especially since the plaintiff originally made the document available to those who wished to link to it. Moreover, even if the linking site is “for-profit” in the sense of being supported by advertising, the advertisements are displayed regardless of whether the user follows the deep link. In fact, the sooner a user leaves the linking page to follow any link, the less exposure he will have to the page’s advertisements.

b. Effect on Original Work’s Market Value

Deep linking can only benefit the target page. Taken alone, the process of deep linking is not a substitution for the original Web page, but rather a promotion of it. A user who follows a deep link views the target page in exactly the same form and forum as the author intended. In addition, “market value” on the Web is usually synonymous with “advertising revenue.” It can not be said that the advertisements on the target page are any less effective simply because the previous page viewed by the user was on a different server. Indeed, Web site owners should plan for this possibility, given the easy-linking nature of the medium.

This analysis is buttressed by current practices on the Web. CNN, for example, explicitly encourages deep links to any of its component pages because it includes its logo and navigational links on each of its pages.³⁷⁵ Therefore, no matter which page in the site is viewed first, the user will have easy access to the rest of the site. Un-

³⁷³ Although intent is not necessary for infringement liability, it is relevant in determining the nature of the use, and is central to the “good faith defense.”

³⁷⁴ See *Haberman*, 626 F. Supp. at 211.

³⁷⁵ See *There’s A Storm A Brewing!*, 36 AARDVARK WEEKLY 1, ¶ 11 (last modified Nov. 25, 1996) <<http://www.aardvark.co.nz/av1125.htm>>.

der the cumulative effects test, the benefit to the site is that much greater.

Even if the entire site is thought of as a singular “work,” deep links still have a net-positive effect on the target site. A user who accesses a piece of an overall work is likely to explore the rest of the site, especially if the component page is clearly labeled as part of a greater whole and provides links back to a “table of contents” or home page. Linking to a component page does not decrease the market value of advertising on other pages in the site, just as reading a particular page in the magazine instead of flipping through the entire issue does not reduce the magazine’s advertising revenue. Furthermore, the reader is much more likely to skim the rest of the magazine after reading one of its articles than if he had never picked it up off the shelf in the first place.

Creating a “table of contents” page to disguise the authorship of a page may arguably diminish the “market value” of that authorship. But again, this scenario is beyond the scope of a simple deep link. Misleading a user as to the source of a commercial product on a Web page is, as in the *Ticketmaster* case, properly addressed under the Lanham Act, not under the copyright laws.

c. Nature of the Work

This factor will tend to favor the linking site as well. The nature of the specific work linked to in any particular case is fact-dependent. The fact that the work is located on an individual Web page that is freely accessible by a simple hyperlink, however, strongly suggests that the author has granted an implied license to view the page. Given that license, one who creates a link to another page does not infringe on the original owner’s copyright, since all a deep or normal hyperlink does is provide the user with the URL of the target page. A deep link merely facilitates doing what any Web page invites—reading the page.

d. Amount and Substantiality of the Portion Used

As with framing, the fact that a deep link displays an entire page actually benefits the link creator. It suggests that the link creator is merely referring a user to the page, rather than incorporating it and promoting it as his own. Since a link is not a “use” of a page but a reference to it, this factor is a non-issue.

3. Inlining

a. Nature of the Use

Much more than the other two technologies, inlining facilitates both physical “transformation” of the original graphic file (by omitting portions of it) and purpose “transformation” (by recasting it in a different context). Since, as discussed above, inlining may be more likely to infringe upon an author’s copyright, the question of fair use takes on greater significance. To the Supreme Court, an essential change in the character or purpose of the original “lie[s] at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright,”³⁷⁶ because it facilitates the copyright law’s goal of spurring the “harvest of knowledge.”³⁷⁷ Thus, even though a parody rap song by the group “2 Live Crew” duplicated substantial musical and lyrical components of Roy Orbison’s “Oh Pretty Woman,” the Court held that the components were used for a different purpose and context than the originals and, therefore, the song did not infringe upon the copyright.³⁷⁸

As mentioned above, the more transformative a work is, the less relevant its commercial nature is to a fair use determination. This was so in *Campbell v. Acuff-Rose Music, Inc.* despite the clear commercial nature of the transformed song.³⁷⁹ Indeed, the court will look for evidence of transformation in any challenged use, including educational.³⁸⁰

Because there are no predominate or widely publicized uses of inlining one can only speculate as to how the courts will apply the fair use analysis to inlining. An inlined image could be transformed for the purposes of news reporting, comment, criticism, scholarship, etc. Indeed, a Web-based “e-zine”³⁸¹ could inline a piece of graphic artwork into a commentary on that work in much the same manner as the magazine defendant in *Haberman*. Even the “Coke is Better Than” example above, which so clearly violates the image creator’s copyright, is equally likely to be labeled “criticism.” Precedent also suggests that republishing a copyrighted work that one alleges to be defamatory, in order to raise the ire and financial support of one’s supporters, can be fair use.³⁸² Similarly, a plaintiff who inlines a de-

³⁷⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

³⁷⁷ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545 (1985).

³⁷⁸ *See Campbell*, 510 U.S. at 579-80.

³⁷⁹ *See id.* at 579 (“[T]he more transformative the new work, the less will be the significance of the other factors, like commercialism, that may weigh against a finding of fair use.”).

³⁸⁰ *See White Paper*, *supra* note 6, at 71.

³⁸¹ An “e-zine” is an electronic magazine, available only on-line.

³⁸² *See Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1158 (9th Cir. 1986) (upholding Jerry Falwell’s fair use defense to Hustler’s infringement suit after Falwell

defendant's allegedly defamatory graphic into a Web page explaining the nature of the plaintiff's suit could be fair use. There are, of course, many examples of non-transformative duplication. Such uses are likely to be enjoined because they infringe upon an author's display right and, therefore, courts will never reach the fair use question. Nevertheless, fair use cases are so fact-dependent courts will be forced to make ad hoc decisions based on the facts before them

b. Effect on Original's Market Value

A different measure of market value is necessary in the inlining analysis. A single image is not accompanied by advertising.³⁸³ The effect that inlining has on value must then be determined by the facts and evidence of a particular case. Loss of a licensing market is one factor that is more germane in the context of inlining. There is a much more established and reasonable market for the display of copyrighted images than there is for the listing of a page's URL. For example, in *Ringgold v. Black Entertainment Television, Inc.*,³⁸⁴ a television show displayed an artist's copyrighted work as a background prop in one of its episodes.³⁸⁵ The court rejected the Defendant's fair use argument because the Defendant had received the "benefit" of displaying the work without paying a license fee.³⁸⁶ The loss of licensing fees was also a factor in *Marobie-FL, Inc. v. National Ass'n of Fire Equipment Distributors*,³⁸⁷ in which the infringing Defendant posted the Plaintiff's "clip art" on the Web without paying to use the images.³⁸⁸

Inlining can also threaten the market value of the page on which the images were originally displayed. In the *Dilbert* example, for instance, there would be no reason for a fan of the comic to view the United Media site and its associated advertising if the comic strip were displayed in its entirety on another page. Jonathan Shapiro, a United Media representative, advanced this argument.³⁸⁹ In a caustic

photocopied a page from *Hustler* magazine that was at the heart of his defamation suit against the magazine and sent the copies out to his supporters to generate support).

³⁸³ Unless, of course, the image is the advertisement, in which case the author has little incentive to complain, unless he objects to the context or manner in which the ad is displayed.

³⁸⁴ 126 F.3d 70, 72-73 (2d Cir. 1997).

³⁸⁵ See *id.* at 72-73.

³⁸⁶ See *id.* at 81.

³⁸⁷ 983 F. Supp. 1167 (N.D. Ill. 1997).

³⁸⁸ See *id.* at 1171.

³⁸⁹ See *Leisering's Letter and Response from UM* (visited Oct. 15, 1997) <<http://www.cs.princeton.edu/~dwallach/dilbert/leisering.html>> (quoting an e-mail message from Jonathon Shapiro of United Media responding to a supporter of Dan Wallach).

letter denouncing the company's attempt to stop Wallach from inlining the strip, one of the hacker's supporters suggested that inlining was no different than informing a friend who wanted to watch the Olympics that they were being broadcast by NBC—something for which the television network would be grateful. “By [l]inking people directly to your page Mr. Wallach is doing you the same favor.”³⁹⁰ If Wallach were in fact using a deep link to link users to the Dilbert page, this analogy would be valid. A more accurate analogy would be if that person enabled his friend to watch NBC's Olympic coverage but filtered out NBC's advertisements or other programming. NBC, who can only offer the Olympic broadcast by selling advertising, would certainly not appreciate this “favor.” “United Media is in a similar position,” Shapiro responded. Shapiro continued, “By linking to just our comics, Mr. Wallach . . . impairs our ability to generate the revenues necessary to keep our comics coming for free.”³⁹¹ Any site whose primary attractions are image files that can be easily inlined may find themselves in a similar situation.

The cumulative effects test magnifies further the dangers of this practice. Wallach's inlining was damaging enough to United Media, but one can reasonably assume that the average user would be unaware of his efforts and first check the United Media site if they wanted to read the Dilbert cartoon. If there were hundreds of sites across the Web inlining the same image, Dilbert fans would no doubt know to get their fix at any one of the sites. Such a result would be especially likely if the inlining sites offered other appealing features that United Media could not provide, such as an online “funnies page” that offered inlined strips from a variety of publishers. United Media would then lack the exclusive right to display the strip, and the appeal of its site to advertisers would diminish, perhaps substantially.

The same analysis is possible regarding works originally published in other mediums, whose text and images are considered one copyrighted work. The *Frena* Defendant, the operator of a subscription-based BBS, archived pictures scanned from magazines for his users to download.³⁹² Likewise, the Defendant in *Sega Enterprises Ltd. v. Maphia*³⁹³ made available pirated copies of video games on his BBS for a price.³⁹⁴ Claims of fair use were rejected in both cases because the activity at issue negatively impacted the market for the original product.³⁹⁵ As the *Frena* court explained, somewhat tongue-

³⁹⁰ *Id.*

³⁹¹ *Id.*

³⁹² See *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1554 (M.D. Fla. 1993).

³⁹³ 857 F. Supp. 679 (N.D. Cal. 1994).

³⁹⁴ See *id.* at 683.

³⁹⁵ See *id.* at 688 (“Consideration of the effect on the market for Sega's copyrighted works weighs heavily against a finding of fair use.”); *Frena*, 839 F. Supp. at 1559 (“Obviously, if this type of conduct became widespread, it would adversely affect the potential market for the

in-cheek, the *Playboy* court's reasoning rested on the proposition that consumers buy the magazine primarily for the articles.³⁹⁶ Moreover, the *Sega* court found that the company's market was significantly impacted since the pirated games directly reduced the need to buy the original, expensive game software.³⁹⁷ In both instances, had the defendant merely copied images such as small icons and buttons, the market value of the original work would have been unaffected. Further, individual photographs and images, though hardly integral to the overall work in which they were published, may be individually copy-righted and, therefore, subject to licensing fees.

Potential impact on market value has not automatically disqualified otherwise fair uses. Thus, in *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*,³⁹⁸ the court held that a newspaper's use of the cover of "TV Guide" in ads for its new TV supplement qualified as a fair use because any market harm was due to the nature of the clearly permissible comparative ad itself, and widespread use of such ads would not change that conclusion.³⁹⁹ Similarly, a Web page promoting a certain product may be permitted to inline, or even copy an image of a competitor's logo for the purposes of comparison.

c. Nature of the Work

Since an inlined image can depict anything, this factor is also difficult to generalize. As the preceding discussion makes clear, the nature of the inlined image is critical to an assessment of the nature of both the image's use and its market value.

Nonetheless, use of particular types of images may qualify for the fair use exception more often than others. Photographs, for example, are just as copyrightable as prose,⁴⁰⁰ but are comparatively expensive to license. Therefore, the need for fair use of these sources is somewhat greater. Historical photos, however, are often more freely reproducible as their use is more likely to be among the permitted categories under the first factor of the fair use test. Even if protected by copyright, moreover, online archives are likely to allow inlining pages to use photos provided they are attributed to the owner,

copyrighted work. Such conduct would deny PEI considerable revenue to which it is entitled for the service it provides.").

³⁹⁶ See *Frena*, 839 F. Supp. at 1558 ("The Court is not implying that people do not read the articles in PEI's magazine. However, a major factor to PEI's success is the photographs in its magazine.").

³⁹⁷ See *Sega*, 857 F. Supp. at 688 (stating that the combined effect of thousands of pirated games would negatively impact Sega).

³⁹⁸ 626 F.2d 1171 (5th Cir. 1980).

³⁹⁹ See *id.* at 1177.

⁴⁰⁰ See White Paper, *supra* note 6, at 33.

because such use can only increase interest in the services provided by the archives.⁴⁰¹

d. Amount and Substantiality of the Portion Used

Generally the least important factor, the amount and substantiality of the portion used, could potentially weigh heavily against an inliner. The Court has long treated this factor qualitatively. One who copies the "heart" of a much larger work incurs just as much liability as one who reproduces it in its entirety.⁴⁰² Reproducing 55 seconds of a 1.5-hour-long film has been deemed too substantial a portion,⁴⁰³ whereas a full reproduction of the art in *Haberman* was permissible for commentary purposes.⁴⁰⁴ Courts often cite the admonishment that "[n]o plagiarist can excuse the wrong by showing how much of his work he did not pirate."⁴⁰⁵ As the *Dilbert* example demonstrates, one comic strip or one photograph may be the main attraction of a Web page or even an entire site. If the image were not significantly valuable on its own, moreover, there would be little incentive to inline it in the first place. Therefore this factor is likely to weigh against the inliner.

III. TOWARDS A SYNTHESIS

In the preceding two Parts, this Note analyzed copyright law in its current form and its application to unconventional linking techniques. The Note has also explicitly and implicitly suggested potential pitfalls in applying long-standing copyright principles to these issues of first impression that may ensnare courts unfamiliar with the technology. Part III encapsulates those suggestions and formulate principles that can aid courts in ensuring that copyright law is applied to the Web in a manner that encourages the Web's continued growth and development as a forum for disseminating ideas.

⁴⁰¹ See Letter from Brad Hillis, Legal Analyst, Office of the Administrator for the Courts, State of Washington, to author (June 20, 1997) (explaining the motivation of archives that do not enforce copyright protections) (on file with author).

⁴⁰² See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564-66, 568 (1985) (agreeing with trial court's holding that a 300-word excerpt from President Ford's memoirs was "the heart of the book," the part most likely to be newsworthy and important in licensing serialization).

⁴⁰³ See *Roy Export Co. v. Columbia Broad. Sys., Inc.*, 503 F. Supp. 1137, 1145 (S.D.N.Y. 1980) (holding that a jury could reasonably have found that short portions of a film were quantitatively substantial).

⁴⁰⁴ See *Haberman v. Hustler Magazine, Inc.*, 626 F. Supp. 201, 212 (D. Mass. 1986) ("[I]t has long been recognized that a commentator may fairly reproduce as much of the original, copyrighted work as is necessary to his proper purpose.").

⁴⁰⁵ *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936).

A. Recognize that Copyright Law Still Applies on the Web

Copyright law has an important role to play on the Web. Some intellectual property authors have envisioned a society in which technology inherently places all ideas in the public domain.⁴⁰⁶ In this system, all works would be published and accessible online, and the fair use doctrine would no longer be necessary.⁴⁰⁷ Governmental regulation would only retard the growth of ideas in such a system. The World Wide Web as it currently exists, however, is not such a system.

Web sites generally fall into one of four categories: (1) sites that are dedicated purely to the public domain, such as personal and non-profit sites, (2) purely commercial sites that are available only for a fee, such as many newspaper and adult sites, (3) sites that advertise information available in other mediums, such as movie previews, order forms and magazine sites that offer synopses of the print-version's content and (4) content-driven sites supported by advertising revenue. Many works of original authorship in category (1) are posted by writers struggling to make a name for themselves in the hopes that their work will someday be published in print. Some authors and educators publish their works online, free of charge. Most authors and commercial content providers, however, still choose to receive monetary compensation for their efforts. At present, an author can receive compensation by either selling his information in print form on a per-copy basis or by contracting with advertisers.

The law must protect those sources of revenue in order to encourage the spread of information.⁴⁰⁸ In that regard, the Web is not

⁴⁰⁶ See, e.g., HENRY GUTMAN, *THE HARVARD CONFERENCE ON THE INTERNET AND SOCIETY* 357 (O'Reilly & Assoc. ed., 1997) ("Bill Gates mentioned the romantic vision where there are no lawsuits and everything is free for the taking. But we still need to ask, who will create the content, and why? We need an incentive and reward system."); John Perry Barlow, *Selling Wine Without Bottles: the Economy of Mind on the Global Net*, WIRE, Mar. 1994, at 85 ("Intellectual property law can not be patched, retrofitted, or expanded to contain digitized expression any more than real estate law might be revised to cover the allocation of broadcasting spectrum . . ."); Esther Dyson, *Intellectual Value*, WIRE, July 1995, at 136 ("In a new environment, such as the gravity field of the moon, laws of physics play out differently. On the Net, there is an equivalent change in 'gravity' brought about by the ease of information transfer. We are entering a new economic environment, as different as the moon is from the earth, where a new set of physical rules will govern what intellectual property means, how opportunities are created from it, who prospers, and who loses. Chief among the new rules is that 'content is free.'"); Letter from Georgia Harper, Office of the General Counsel, University of Texas System, to author (Sept. 9, 1997) (on file with author) ("Imagine that it's 20 years in the future and things are pretty much all-digital . . . [T]o be really forward-thinking about the balance between the rights of owners and the rights of users, we have to get beyond arguments about the scope of fair use. It's just an impractical mechanism in this day and age . . .").

⁴⁰⁷ See *supra* note 406.

⁴⁰⁸ See GUTMAN, *supra* note 406, at 358 ("Most of the things we appreciate on the Internet, someone spent time and money to create with the expectation of profit.") (internal quotation omitted).

materially different from any other publishing medium. If copyright law did not apply to the Web, the Web would revert to a non-commercial state. Some personal and non-profit sites would remain, but commercially-funded sites would have no incentive to operate on the Web if the material they created could not be safeguarded. Without the private investment that currently fuels the Web's expansion, moreover, there would be less incentive to continue advancing the computer technologies and products that facilitate such growth. As technological developments stagnated, the public would lose interest in the Web and the progress of useful arts and sciences online would decelerate.

B. Recognize the Web's Unique Potential

The judiciary must recognize the magnitude of the online medium in order to comprehend the wide range of interests that can be affected by each court decision. Surely, involving the Internet cases are not unique in the sense that they affect many people. The Internet is unique, however, in the sense that few technologies simultaneously affect so many individuals and yet have so little history of governmental interference.⁴⁰⁹ In the absence of precedent, each decision regarding the Internet will have an unusually powerful impact on this broad medium. Therefore, the judiciary should be especially cautious.⁴¹⁰

The Web is perhaps the most democratic forum for the exchange of ideas ever created.⁴¹¹ It allows each individual to be a publisher and a consumer, to browse and purchase from the entire spectrum of commercially available goods and to share ideas with unparalleled immediacy and global reach—all without leaving her home. The Supreme Court has already recognized that information on the Web is “as diverse as human thought” itself.⁴¹² The global reach of the Web ensures that any decision even minutely affecting the flow of ideas online is guaranteed to impact on the “harvest of knowledge.”

⁴⁰⁹ See *Reno v. ACLU*, 117 S. Ct. 2329, 2342-43 (1997) (“[T]he Commission’s order applied to a medium which as a matter of history had ‘received the most limited First Amendment protection,’ in large part because warnings could not adequately protect the listener from unexpected program content. The Internet, however, has no comparable history. . . . Neither before nor after the enactment of the CDA have the vast democratic fora of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry.”) (citation omitted).

⁴¹⁰ The Clinton administration has also taken a cautionary approach. See Margie Wylie, *Public Urged to Help Domain Mess* (last modified June 30, 1997) <<http://www.news.com/News/Item/0,4,12042,00.html>> (“The White House will release guidelines tomorrow that say Internet regulation could devastate the commercial potential of the nascent network.”).

⁴¹¹ See *Reno*, 117 S. Ct. at 2334-35, 2343 (describing the Web’s origins, reach, simplicity and freedom from regulation).

⁴¹² *Id.* at 2335.

The Web is also one of the most unregulated forums in modern society.⁴¹³ This can be attributed to its phenomenal rate of growth since its inception less than a decade ago. Government simply reacts too slowly to developments that occur so quickly. While the law certainly extends to the Web, courts must be careful not to overextend its reach. An incorrect decision will not be blunted by countervailing authority. A subsequent overruling of bad law may come too late to prevent the loss of billions of dollars of informational and technological investment. Legal rules too rooted in the facts of a particular case can quickly become obsolete along with the technology they address. Judges should be mindful of these facts, molding their reasoning as much as possible to provide insight relevant to later controversies.

In its first decision involving the Web, the Supreme Court struck down an ill-conceived regulation of on-line pornography whose breadth seriously implicated fundamental rights of free speech.⁴¹⁴ In balancing the interests involved, the Court observed that the prevalence of pornography on the Web has not impeded the forum's growth.⁴¹⁵ This reasoning is analogous to copyright protection. Despite the ease of duplicating protected materials and lack of effective legal regulation, the Web continues to expand. Judges should enforce copyright protection in online disputes only when doing so would promote further expansion of the Web.

C. Recognize that Legal Certainty is Key to the Web's Growth

Despite the Web's surging popularity and potential, lawsuits like *TotalNEWS* are a sign that some companies are hesitant to invest further in providing online content without some certainty of their legal rights. Certainty of legal rights and duties is a fundamental aspiration in all areas of our law, motivating such principles as *stare decisis* and the prohibition of *ex post facto* laws. Certainty is especially valuable to businesses which must assess the likelihood of success of an online venture before committing substantial assets to it.⁴¹⁶

The rights enjoyed by online content providers with respect to their copyrighted material are anything but certain. Since even basic

⁴¹³ See *id.* at 2342-43 (describing the unrestricted nature of access to Web pages).

⁴¹⁴ See *Reno*, 117 S. Ct. 2329 (striking down portions of the Communications Decency Act of 1996).

⁴¹⁵ See *id.* at 2351 ("The Government apparently assumes that the unregulated availability of 'indecent' and 'patently offensive' material on the Internet is driving countless citizens away from the medium because of the risk of exposing themselves or their children to harmful material. We find this argument singularly unpersuasive. The dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention.").

⁴¹⁶ See Kenneth Freeling & Joseph E. Levi, *Frame Liability Clouds the Internet's Future*, N.Y.L.J., May 19, 1997, at S5 ("[T]hese are important questions that will have to be answered if the commercial development of the Web is ever to live up to its potential."); see also Richtel, *supra* note 135, at A6 ("Internet businesses had to feel that their intellectual property was protected online or they would have no incentive to post valuable content.").

aspects of Web technology such as hyperlinking lack a clear, definitive legal sanction, commercial site operators are unable to speculate as to how courts will treat the use of the unconventional technologies discussed above. Up to this point, experiments such as providing portions of content online in order to spur interest in printed publications have been successful. Businesses will think twice about further expanding their online content, though, if the financial returns seem likely to diminish as such investments increase. News providers, for example, will not be encouraged to offer a wider range of online information and may even scale back current efforts if they believe that meta-sites discourage advertisers from investing in their Web sites. Online pursuits of the arts and imagery will be substantially curtailed if inliners are permitted to display another's work while hiding the creator's identity.

Thus, courts can spur advancement of the Web by clarifying how the most basic principles of copyright law will be applied. These decisions do not need to be sweeping in scope or exceedingly perceptive in their rhetoric to have a profound effect. A simple proclamation that URLs are mere facts and outside the reach of copyright law would end uncertainty and legitimize a number of Web applications, including, perhaps, deep linking and framing. Start-up businesses that might otherwise have been deterred from launching a profitable online venture would be freed from the threat of litigation. Moreover, content providers who can not seek protection in copyright law will be encouraged to develop better content with the resources previously allotted to litigation. For example, if a court were to hold that news providers were not harmed by the use of frames, the news providers might shy away from litigation and refocus their efforts on improving the quality of their content so that users would find it unnecessary to go elsewhere for their news.

Judges should also be mindful that questionable conduct outside the reach of copyright law can nonetheless spur the "useful arts" by encouraging content providers to develop non-legal, technological solutions. Online pornography serves as a relevant example. A strong market for the material has provided software innovators with an incentive to develop age-verification software, secure servers, on-line-purchasing technology and an ever-increasing array of formats in which to present data.⁴¹⁷ On the flip side of these developments, the

⁴¹⁷ See, e.g., *Adult Check* (visited Mar. 22, 1998) <<http://www.adultcheck.com>> (billing itself as "the Internet's premier adult verification system," at last count, this site was used by 17,059 adult-oriented sites); Courtney Macavinta, *Playboy Pins Hopes on Net* (visited Mar. 22, 1998) <<http://www.news.com/SpecialFeatures/0,5,20234,00.html>> (describing widening array of multimedia adult offerings on-line). Indeed, pornography may be among the largest factors driving the development and acceptance of Internet technology. See Frank Rose, *Sex Sells*, *WIRED*, Dec. 1997, at 220-21 ("The sex industry has been a critical factor in past media revolutions [such as home video and cable TV]. The pattern on the Web is no different.").

same issue has promoted the development of advanced filtering software, reviews of site content and heightened awareness of the Web's impact on society.⁴¹⁸ Likewise, the emergence of all three of the unconventional links discussed above have spurred companies to develop counteracting technologies.⁴¹⁹

This is not to say that society should rely upon technology alone to protect intellectual property online. Indeed, many of the technological measures and countermeasures developed to safeguard site content fly in the face of the free-linking atmosphere of the Web, frustrate the efforts of legitimate customers and may never be effective enough to adequately guarantee protection.⁴²⁰ After all, "the whole purpose of copyright law is to provide legal protection for documents when technological protection is hard."⁴²¹

The courts can also promote certainty by disavowing reliance on moral rights to determine copyright protections. As the above discussion has demonstrated, courts should instead rely upon the relatively new statutory right to control public display. This approach will both clarify the extent of this element of the Copyright Act and curtail the emergence of new "moral rights" that judges may discover in an effort to reach a desired result.

⁴¹⁸ See, e.g., David Hatch, *Industry to Shield Children, Avoid Fight*, ELECTRONIC MEDIA, Dec. 8, 1997, at 16-20 (describing a variety of voluntary measures against child pornography taken by the on-line industry in response to growing political and social pressure).

⁴¹⁹ See Kristi Coale, *Intellicast Smartens Up to a Banner Bypass* (visited Sept. 11, 1997) <<http://www.wired.com/news/technology/story/2844.html>> (describing Intellicast's efforts to prevent inlined links to its weather forecast graphics); Web Design Group, *Frames FAQ: Avoiding Getting 'Framed'* (visited Sept. 11, 1997) <<http://www.htmlhelp.com/design/frames/faq/framed.html>> (suggesting ways that Javascript can be used to thwart frames). Other commentators who have addressed the intellectual property aspects of framing and hyperlinking have advocated technological solutions such as Siteshield and "dynamic" Web pages, which periodically alter their own URLs, thus making it difficult to maintain a deep link to those pages. See Kuester & Nieves, *supra* note 35, at 278 (describing the development of protective software by Netscape).

⁴²⁰ See Complaint, *supra* note 116, ¶ 37 ("Plaintiffs have no assurance that in the fast-changing world of the Internet that any technological steps they take to avoid framing will succeed in ensuring that Plaintiff's sites remain consistently visible in the way they intended."); Gahtan, *supra* note 114, at 4 ("CNN employs special code [to prevent unauthorized framing.] However, this solution is far from perfect. It can take up to a minute or more to take effect, and even then, a pop-up window inviting users to return to the TotalNEWS site may still appear superimposed on the CNN website."); Mitch Wagner, *Web Firm Eyes Suit on Link Policies*, COMPUTERWORLD, May 12, 1997, at 61 ("[E]ach time they launch a site they'll put in the same deep links to our site, and then we'll have to find them and block them. That's not a solution."); Coale, *supra* note 419 ("It's violating one of the fundamental assumptions about how the Web works . . . the 'commonwealth' of the Web is being Balkanized by conflicting commercial factions.")

⁴²¹ Templeton, *supra* note 236 (emphasis omitted).

D. Create Institutions and Procedures to Guide Courts in Applying Copyright Law to Web Technologies

Because courts are limited in their ability to quickly and effectively develop principles of Web copyright law, it is reasonable to look to other institutions to help fill the gaps. Litigation, after all, is a slow and expensive means of applying the law to the rapidly changing online world, and the mere threat of a suit often chills online innovation.⁴²² Legislation may be a more effective way to determine Web rights,⁴²³ but the effort involved in legislative measures is daunting.

A congressionally-created, semi-permanent body whose task is to promulgate guidelines for Web copyright law and fair use might be the best solution. Such groups are not new innovations. The President has commissioned a Working Group on Intellectual Property Rights to address legal questions raised by the "National Information Infrastructure."⁴²⁴ Similarly, Congress has listed a set of guidelines for fair use in the classroom⁴²⁵ that many courts have found helpful as persuasive authority.⁴²⁶ The Conference on Fair Use (CONFU),⁴²⁷ moreover, consists of representatives from all interested parties, including publishers, authors and educators, and has already begun deliberating on a set of "Fair Use Guidelines for Electronic Reserve Systems."⁴²⁸

A new body dedicated to establishing Web copyright guidelines would serve many policy goals. The guidelines would provide a starting point for courts facing technological questions of first impression on which there might otherwise be no persuasive authority. Both a congressional sanction and participation by representatives of all interested members of the Web community, including content providers, ISPs, software and hardware manufacturers and legal experts would add to the legitimacy of the guidelines. Such broad-based participation, moreover, might foster a consensus on many issues and

⁴²² See Norderhaug & Oberding, *supra* note 7 ("[L]itigation will do nothing but slow the pace of any technological development. Currently, the cry of *copyright infringement* on the web prevents individual developers from pursuing some interesting work.").

⁴²³ See Joyce, *supra* note 8, at 18 (identifying two experts who opine legislation is the better means for resolving legal issues involving the Internet).

⁴²⁴ See White Paper, *supra* note 6, at 1.

⁴²⁵ See COPYRIGHT LAW REVISION, H.R. REP. NO. 94-1476, at 68-72 (1976).

⁴²⁶ See Princeton Univ. Press v. Michigan Document Servs., 99 F.3d 1381, 1390 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 1336 (1997) (citing numerous cases where courts have applied the "classroom guidelines").

⁴²⁷ CONFU was convened by the President's Working Group. See White Paper, *supra* note 6, at 4. Another salient model is the National Commission on New Technological Uses of Copyright (CONTU), which drafted a set of guidelines on library photocopying. See GOLDSTEIN, *supra* note 76, at 683.

⁴²⁸ Georgia Harper, *Electronic Reserve Guidelines* (last modified Mar. 5, 1996) <<http://www.utsystem.edu/OGC/IntellectualProperty/rsrvguid.htm>>. Notably, however, these guidelines did not receive endorsement by a majority of the group, and thus are not considered official CONFU guidelines. See *id.*

would preclude the necessity for litigation. Neutral guidelines can ensure that courts understand the basic features of the technology underlying a dispute free from the partisan mischaracterizations of litigants.

Such a body could ensure that the guidelines remain current by reconvening at regular intervals to issue updates and clarifications based on technological advancements since the previous meeting. This body could also assist judges facilitating the selection of a special master in especially complex technological disputes. Courts are authorized by Federal Rule of Civil Procedure 53 to appoint such individuals in exceptional circumstances and when authorized by the parties. They can be particularly helpful "when some special expertise is desired" in ascertaining certain facts.⁴²⁹ The congressional body could facilitate this procedure by preparing a list of suitably experienced and available experts. Like similar officers appointed in complex commercial litigation, such special masters would bring a level of expertise and familiarity with the issues that parallels that of the parties. This would add to the likelihood of a just and informed decision.

These suggestions are in line with current trends in judicial thinking. Recently, Associate Justice Steven Breyer called upon judges to rely more heavily on neutral experts, special masters and trained law clerks when facing tough scientific issues.⁴³⁰ As seen in *Daubert v. Merrell Dow Pharmaceuticals*⁴³¹ and recent breast cancer litigation,⁴³² federal and state judges are beginning to take a more active role in weeding "junk science" out of their courtrooms. Realizing their own lack of training in these complex areas, courts have been less hesitant to call upon a neutral scientific expert "the way they would call on tech services to load in some new software."⁴³³ Complex Internet copyright issues are analogous. The courts should apply the lessons learned from the previously lax approach to scientific credibility when Web copyright cases make their way into court.

⁴²⁹ FED. R. CIV. P. 53 advisory committee note subdivision (a) (describing situations in which the use of special masters is appropriate).

⁴³⁰ See Ellen Goodman, *Learning How to Judge What's Not Scientific*, BALTIMORE SUN, Feb. 24, 1998, at 19A. Breyer added, "[c]ourts must avoid that kind of serious scientific mistake which once led one court, for example, to hold that dropping an orange juice can caused breast cancer . . . [T]hey must aim for decisions that, roughly speaking, approximately reflect the scientific 'state of the art.'" *Id.*

⁴³¹ 509 U.S. 579 (1993).

⁴³² See Goodman, *supra* note 430, at 19A ("Since [*Daubert*], notably in the controversy over breast implants, one judge asked four neutral experts to sit beside him through a trial. Another called on a panel to review the scientific literature and prepare a report for use as evidence.").

⁴³³ *Id.*

E. Explicitly Recognize a Right to Make a Viewable Copy

The decision in *MAI Systems, Corp. v. Peak Computer, Inc.*⁴³⁴ is an example of how a court can apply copyright law to further legal confusion and discourage innovation on the Web. The case held that merely loading a file into the RAM of a computer for viewing constitutes making a copy⁴³⁵ without developing the idea of implied license. Roundly criticized,⁴³⁶ *MAI Systems* provides a method for challenging just about every Web-related activity, since viewing a Web file necessarily involves downloading a copy into the computer's temporary "cache" memory, which is slightly more permanent than RAM.

Either the courts or Web copyright guidelines should explicitly develop a user's right to make the copy necessary to view a Web page. The Web is designed to disseminate information. No one is under compulsion to make such information available on the Web. A site owner who chooses to put files on a Web site understands that the files will, thereby, be freely accessible. Certain options do exist for limiting accessibility to online documents. For example, the content provider can store the documents on a password-protected site or otherwise limited server,⁴³⁷ or he can assign random designations to individual files to prevent inlining, as in the *Dilbert* example. Technological means exist for discouraging techniques like framing and deep linking, although they are by no means foolproof.⁴³⁸ In addition, a creator of a work of original authorship can expect copyright law, by means of its five exclusive rights, to protect that authorship on the Web just as it would in any fixed medium. But beyond these protections, the author can not reasonably expect to prevent others from viewing the work as they please, nor should he. His decision to make the work available online creates an implied license to view the file.⁴³⁹

This principle will not diminish any of the author's exclusive copyright protections, and will serve to promote the harvest of knowledge. Reading a work has never been held to infringe upon copyright, despite the fact that a physical copy of the work is made on the reader's retinas. It is merely a step necessary to underline the valid purpose of reading the work and, as such, copyright law will ignore it.

⁴³⁴ 991 F.2d 511 (9th Cir. 1993).

⁴³⁵ See *id.* at 519 ("[W]e hold that the loading of software into the RAM creates a copy under the Copyright Act.").

⁴³⁶ See Jackson, *supra* note 12, at 744 (citing criticisms by two scholars and describing the decision as contradicting the legislative history of the Copyright Act).

⁴³⁷ Some copyright experts recommend using password-protected servers to preserve a fair use defense, especially if one plans to describe a Web site as a educational fair use. See Letter from Georgia Harper to author, *supra* note 294.

⁴³⁸ See *supra* note 419 and accompanying text.

⁴³⁹ See *supra* note 144; Part II(A)(4)(c).

Congress followed this same line of reasoning by exempting "purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, or captured momentarily in the 'memory' of a computer"⁴⁴⁰ from its definition of fixation. Such physical copies replicate a copyrighted work, but are necessary steps to viewing and thus ignored by copyright law. In addition, the last clause of this passage would seem to compel a result contrary to that reached in *MAI Systems*.

Documents stored in "cache" memory may not qualify as excusable viewing if the copy is stored beyond a reasonable period of time or if the copy is misused. A browser's cache memory stores files for a longer period of time than simple RAM memory,⁴⁴¹ which resets when the computer is shut off. A browser can be programmed to store files in cache up to a certain capacity limit.⁴⁴² The larger the limit, the easier it will be to return to previously viewed pages without downloading them again from the server. When the browser reaches its capacity limit it deletes some of the stored documents. Hypothetically, the user could employ a computer with enough storage capacity that the browser would never have to erase the cache.⁴⁴³ Again, the nature of the medium, a medium on which the author has willingly made his work available, requires a browser to make such copies. It is also common practice for browsers to store copies for a short time to allow a user to browse several pages and return again to the previously cached page without downloading it again.⁴⁴⁴ This storage is analogous to the "time shifting" in *Sony*. The *Sony* court refused to define the amount of time that a VCR user could keep a copy of a program before his continued possession became unreasonable.⁴⁴⁵ The court, however, seemed to presume that, at some point, continued ownership would constitute infringement.⁴⁴⁶ This same reasonableness standard should be used to define the amount of time a file may be stored in cache memory.

A user should not be prohibited from making a copy for legitimate viewing just because there is a chance that a cached copy can be misused. As with any other technology that can be put to rightful or

⁴⁴⁰ COPYRIGHT LAW REVISION, H.R. REP. NO. 94-1476, at 53 (1976).

⁴⁴¹ See *KROL*, *supra* note 37, at 386.

⁴⁴² See *id.*

⁴⁴³ See Interview with Sean T. Moorhead, Intellectual Property Attorney, Calfee, Halter & Griswold, Cleveland, Ohio (Feb. 1, 1998).

⁴⁴⁴ See *KROL*, *supra* note 37, at 386 (describing how a user may repeatedly visit a popular site during one session).

⁴⁴⁵ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 453 n.39 (1984) ("By definition, time-shift recording entails viewing and erasing,' so the recorded program would not displace the market for a later theatrical showing because 'the program will no longer be on tape when the later theater run begins.'") (quoting *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 467 (C.D. Cal. 1979)).

⁴⁴⁶ See *id.* at 455 n.40.

wrongful use, *abusus non tollit usus*—the abuse does not annul the proper use. In order for one to “misuse” a properly-made copy he must violate one of the five exclusive rights of reproduction, derivation, distribution, public performance or public display. It is certainly possible to put a cached copy to such use but it would take considerable, affirmative efforts by the user. Because cache files are not intended to be used in this manner,⁴⁴⁷ a certain degree of sophistication is required to put them to an infringing use. Files in cache memory are assigned names that bear no resemblance to their original designations.⁴⁴⁸ Finding a specific file would require sifting through a morass of virtually incomprehensible file names. It is this misuse that is the actionable infringement, not the mere existence of the cached file.⁴⁴⁹ Courts should exempt cached copies from the copyright analysis. Such a decision will help foreclose a line of specious infringement claims.

F. Explicitly Recognize a License to Link

The courts should recognize the right to create a simple hyperlink. The failure of the courts to explicitly recognize such a right has festered uncertainty regarding the legitimacy of the basic functions of the Web. Erasing this doubt will substantially encourage expansion of online enterprise.

A link is merely a statement of fact, outside the scope of copyright protection. Since hypertext links contain only the URL of the target page and the HTML coding necessary to take the user to it, they can not infringe upon a content provider’s copyright on their own.

Although this conclusion seems obvious, it takes on added importance in light of the fact that TotalNEWS agreed to sign “linking licenses” purporting to give TotalNEWS the “right” to create simple, non-framed links to the plaintiff’s sites.⁴⁵⁰ Such licenses have now become “common between publishers of web sites [in order to] retain control over limitations of liability.”⁴⁵¹ If the right to establish such

⁴⁴⁷ See *KROL*, *supra* note 37, at 386.

⁴⁴⁸ See *id.*

⁴⁴⁹ A litigious reader may point out that actually proving such use would be quite difficult. Consider, however, that in order to negatively affect the copyright owner’s interests, the use would have to be public, or at least done for a profit. Such uses can be detected by a reasonably targeted search through an Internet search engine. Otherwise, the use may well be a fair one and, therefore, non-infringing.

⁴⁵⁰ See TotalNEWS Settlement, *supra* note 134, ¶ 2 (stating terms for operation of links).

⁴⁵¹ Poler, *supra* note 4. *But see* Letter from Ellen Poler to author (April 2, 1998) (on file with author) (“While some large sites are requiring linking licenses, and some lawyers are recommending it, most of my clients with web sites don’t have linking agreements, and don’t want to bother. It’s a whole new cost of legal services for most companies, even pretty large ones. It may be that as a practical matter, a NY Times or Chicago Tribune should go to the trouble of linking licenses, but that the average web site need not do so.”). This reluctance on the part of

links is found only in these contracts, then that right can be revoked by terminating the licenses.⁴⁵²

This development threatens the viability of any fair use defense. Under the fourth fair use factor, a court will likely find that one who causes a copyright holder to lose the opportunity to license the work has infringed the creator's copyright. The loss of the opportunity to license, however, is only cognizable where an existing, reasonable or likely market for the license exists. Until recently, a page owner who claimed that he had lost his right to license a link to a Web page was unlikely to succeed since no such market existed or even seemed likely to arise. Should linking licenses between private parties catch on, the courts may be willing to recognize their validity and the existence of a market for them.

Enforcing such licenses would be disastrous for the future of the Web. This Note has repeatedly reinforced the importance of sanctioning basic Web functions such as links if the Web as we know it is to continue to exist. There is no logical argument for why such a link should be invalid without the target's approval. The courts should void "linking licenses" for lack of mutuality on the grounds that all parties are free to create hyperlinks to any page on the Web without fear of copyright infringement.⁴⁵³

G. Recognize a General Rule Permitting Display of Whole Web Pages

Once the courts recognize a right to create hyperlinks they should validate the result of following those links, namely the display of a Web page in its entirety. This principle should by itself establish a nearly irrebuttable presumption that deep links are valid, as they are simply hyperlinks by another name. The same principle applies to frames. The frameset documents that allow the display of pages within frames, after all, simply contain URLs and HTML coding. The target page is displayed within the frame exactly as it would appear if the user followed any other link, except that other frames appear on the screen. Since, as discussed in Part II, displaying some

most Web site operators may indicate that it is not too late to prevent such a market from gaining undeserved legitimacy.

⁴⁵² This is exactly what is purported in the TotalNEWS Settlement. See TotalNEWS Settlement, *supra* note 134, ¶ 4(d).

⁴⁵³ *But see* Kuester & Nieves, *supra* note 35, at 278-79 (advocating linking licenses as a means of preventing unintentional trademark, copyright infringement or unfair competition). My concerns about the basis for such contracts in copyright law do not implicate the use of similar agreements to prevent trademark infringement, dilution or unfair competition, if there were a reasonable basis for such liability in a given instance.

pages within frames could violate the author's right of public display, the use of frames should create only a presumption of validity.

One should note, however, the difficulty of establishing such a violation. The multi-frame display, in order to infringe on copyright, must alter the authorship of the document in some way and would require substantial effort on the part of the creator of the framing page.

This rule would practically prohibit authors from citing reduction in "ad revenue" as a means of establishing copyright infringement. Such considerations, after all, are properly considered under the fair use doctrine, which does not apply unless a copyright owner can first show that his copyright was infringed. This result is equitable for several reasons. First, ads usually are not part of the authorship of a page. Secondly, frames do not significantly impact the ads. Although framed ads occupy less space in a display and may be juxtaposed with ads displayed in other frames, the advertiser has no control over these factors regardless of whether or not frames are used. Actual screen size is determined by the size of the user's monitor and the size at which the user chooses to set his browser. Moreover, the user is free to open multiple browser windows⁴⁵⁴ or other programs in which competing ads may be displayed.⁴⁵⁵ Additionally, an assortment of other software on the user's screen, such as the user's browser itself, may also display advertisements. A Web content provider's advertising should not take precedence over all other advertising.

H. Recognize a Presumption Against Inlining, and Clarify Applicable Fair Use Standards

When a linking page causes a user's browser to display a target Web page in its entirety, the authorship of the work remains intact. Inlining, on the other hand, can be used to remove elements of the Web page from their surroundings. Therefore, Web copyright guidelines should establish a presumption that such actions infringe on the right of display and derivation.

This presumption should be rebuttable, however, and the high likelihood that such use is transformative should make fair use a particularly important consideration when analyzing inlining. When performing a fair use analysis, one should pay particular attention to the

⁴⁵⁴ See KROL, *supra* note 37, at 370 (describing benefits of working with multiple browser windows).

⁴⁵⁵ See *Chips: Cirrus Logic Launches VGA-to-TV Encoders for Sub-\$ 1000 PC and Consumer Entertainment Appliance Market*, EDGE: WORK-GROUP COMPUTING REPORT, November 24, 1997, available in NEXIS, News library, Cumws File ("Picture-in-Picture . . . allows multiple windows to be viewed simultaneously on the same display. . . . For example, a user can easily view a DVD movie in the upper-right-hand corner of the TV display while simultaneously working on an Excel spreadsheet in the main window.").

commercial or noncommercial nature of the inlined image, both in its original and inlined form. If the original page is supported by advertising, and the image plays a significant role in the page's appeal, the presumption against such use should be strong because the target page is likely to depend on that image to maintain its advertising and even its existence, as in the *Dilbert* scenario. The courts should also presume that an inlining page of a commercial nature is using the image for profit without paying an equitable price for that right.

Understanding the equities of inlining will become increasingly important as technology matures. As television continues to merge with computers and the Internet, hackers may develop methods to inline the interesting portions of a digital television broadcast while excluding the commercials. Indeed, with applets such as real-time, "streaming" video and audio broadcasts⁴⁵⁶ already a reality on the Web, this situation may already be occurring.

CONCLUSION

This Note has identified the numerous shortcomings and ambiguities in copyright law as applied to the World Wide Web. Framing, deep linking and inlining provide concrete examples of how the copyright laws have lagged behind current technology. This Note also suggests how copyright law can and should be adapted to the Web. In addition, this Note provides a model by which a congressionally established body might begin to formulate guidelines that would greatly assist our courts in conforming copyright law to the Web in way that promotes expansion of both knowledge and technology.

However Congress ultimately chooses to address copyrights on the Web, one thing is clear: the current state of affairs can not stand. Copyright law, as it currently exists, is woefully unprepared to handle the dilemmas created by new Web technologies. Leaving the development of online copyright law to slow, publisher-dominated litigation only ensures haphazard results, which, if allowed to form precedents, could significantly hamper the potential contributions of cutting-edge information technologies to society. Those who understand the technology and the law must lead both into the digital age.

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⁴⁵⁶ See Stephanie Miles, *Start-Up Takes on Streaming Video* (last modified Mar. 20, 1998) <<http://www.news.com/News/Item/0,4,20317,00.html>>.

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