

# MINIMIZING POTENTIAL LIABILITY ASSOCIATED WITH LINKING AND FRAMING ON THE WORLD WIDE WEB

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The internet has quickly become a medium of mass communication, a commercial marketplace, and a tremendous resource for information and data. But the rapid development and widespread acceptance of the internet may not have occurred without the techniques of "linking" and "framing,"<sup>1</sup> which provide users flexible and easy access to other websites. These techniques have enabled internet users to navigate the internet efficiently and sort through the dense and vast thicket of products, services and information available on the internet.

Recently, linking and framing have come under intense legal scrutiny, as the law in this area struggles to keep pace with the rapidly evolving technology and practices of the internet. Although few cases have directly addressed the issues of linking and framing and there is very little settled law, analysis of the existing cases and commentary in this area suggests steps to take and practices to avoid to minimize a website operator's potential liability.

This article explores the potential liability under current trademark and copyright law that website operators face when they link to and frame other websites.<sup>2</sup> It then proposes that state unfair competition laws pose the greatest possibil-

ity of creating liability for the website operator. Finally, the article offers guidelines for website creators and operators to follow to minimize legal liability while exploiting the full power of the internet's capabilities.

## I. INTERNET BASICS AND THE IMPORTANCE OF LINKING AND FRAMING

### A. The Basics of Linking and Framing

Although use of the internet has become part of the everyday experience of many Americans, a brief description of the concepts and terms used throughout this discussion will be helpful to the reader that is not versed in internet jargon.

Hypertext linking and framing are two techniques websites utilize to provide access to other sites. Hypertext links (often referred to simply as "links") are the highlighted text, pictures or logos (including banner advertisements) on the *linking* website that, when selected, access the *linked-to* web page.<sup>3</sup> Technically, after a user selects a site by clicking on the text, picture or logo, the user's web browser<sup>4</sup> reads the software code, finds the location on the internet that matches the address

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<sup>1</sup> See *infra* Part I.A. for definitions of linking and framing.

<sup>2</sup> The author also recommends WILLKIE FARR & GALLAGHER, *EMERGING ISSUES IN INTERNET LAW* (1999) for a more comprehensive discussion of the potential liabilities of a web-

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site operator or an on-line service provider.

<sup>3</sup> A web page is a document located on the world wide web, identified by a unique address. See "Web page," *Webopedia Online Dictionary and Search Engine* (visited Feb. 14, 1999) <www.webopedia.com>. A website is a compilation of related web pages and additional files located on the same server, compiled under a single domain name and owned by an individual, company or organization. See "Web site," *Webopedia Online Dictionary and Search Engine* (visited Feb. 14, 1999) <www.webopedia.com>.

<sup>4</sup> A browser, shorthand for web browser, is a software application used to locate and display web pages. See "Browser," *Webopedia Online Dictionary and Search Engine* (visited Nov. 19, 1999) <www.webopedia.com>. The software "translates digital bits into pictures and text so you can look at them . . . It lets us move easily from one website to another." HARRY NEWTON,

and requests a copy of the web page. The computer hosting the linked web page sends the copy back to the user's browser.<sup>5</sup> The browser on the user's computer reads the code of the copied web page and constructs the page according to the transmitted code so that the page appears on the user's computer screen.<sup>6</sup> Access to the content of the linked-to website is confirmed by the display of its Universal Resource Locator ("URL"),<sup>7</sup> which replaces the URL of the previous website on the top portion of the user's browser.

Deep linking refers to linking to an internal or subsidiary page of a website located at a lower level or several levels down from the home page.<sup>8</sup> Where ordinarily a user would follow several links to get to a particular web page, a deep link takes the user directly to that particular web page, thereby circumventing the home page and any other intervening pages.

Framing, on the other hand, allows a user to view the content of other linked sites without leaving the site originally visited<sup>9</sup> by enabling the first website, the *framing* website, to bring up the content of another website, the *framed* website, within the borders of its own web page.<sup>10</sup> In a technique similar to that of linking, the framing computer directs the user's browser to request a link to the computer that stores another website.<sup>11</sup> After a link is established between the two computers, a copy of the web page on the host computer is made and sent back to the user's browser.<sup>12</sup> The

linking website then directs the user's browser to display the linked content in a frame within the linking site, rather than displaying only the linked content.<sup>13</sup> The content of the framed website is brought up while some of the framing website's content remains displayed, appearing next to or surrounding the framed web page.<sup>14</sup> The user remains at the framing website, viewing one or more framed websites through a window.<sup>15</sup>

The frames, which function similarly to the "windows" used in the Microsoft Windows operating system, have the "look and feel" of the framing website but the content of the framed website, and may include banner advertisements or other links placed by the linking website.<sup>16</sup> The contents of the linked-to website displayed in the frame remain unchanged. However, since the entire screen cannot be used to display the linked-to-website, scroll bars must be used to view the entire page.<sup>17</sup>

## B. The Importance of Linking and Framing— From the Internet to the World Wide Web

The practice of linking has transformed the internet—previously a haphazard connection of servers and networks containing a mass of data and information—into today's World Wide Web ("web"), a more organized, structured system with a graphical, intuitive means of navigation and

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NEWTON'S TELECOM DICTIONARY (15th ed. 1999). Most are graphical browsers, which means they can display graphics and text, as well as handle a variety of multimedia information through the use of plug-in software applications. See *Webopedia*, *supra*.

<sup>5</sup> A host is "a computer with full two-way access to other computers on the internet. A host can use virtually any [i]nternet tool, such as WAIS, Mosaic and Netscape." HARRY NEWTON, NEWTON'S TELECOM DICTIONARY (15th ed. 1999). Typically, the term is used when there are two computer systems connected by modems and telephone lines; this system can be accessed by a user working at a remote location. The system that contains the data is called the host, while the computer at which the user sits is called the remote terminal. See "Host," *Webopedia Online Dictionary and Search Engine* (visited Nov. 10, 1999) <www.webopedia.com>.

<sup>6</sup> See Rebecca Quick, *How a Link Works*, WALL ST. J., July 2, 1997 at B6.

<sup>7</sup> A URL maps to an internet address. The standard format is <method of protocol://host name/folder or directory/file or document>. Hypertext transport protocol ("HTTP") is the default internet protocol used to search for addresses. The "www" in a URL denotes World Wide Web and is followed by the name of the physical computer directory that contains or hosts the files that make up the web

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page (e.g., <www.willkie.com>). The folder is a location on the computer drive containing files or documents. The file is the actual document stored on the computer drive. When a URL is entered, it is mapped to a unique number in the internet address directory that references a physical computer and its location on the network, as well as the particular file on that computer. See HARRY NEWTON, NEWTON'S TELECOM DICTIONARY (15th ed. 1999).

<sup>8</sup> A home page is the top-level web page or main page of a website, such as <www.yahoo.com> or <www.bloomberg.com>. Much like a table of contents, home pages usually indicates what is on the other pages of that website and provide internal links to those other pages. See HARRY NEWTON, NEWTON'S TELECOM DICTIONARY (15th ed. 1999).

<sup>9</sup> See Maureen A. O'Rourke, *Fencing Cyberspace: Drawing Borders in a Virtual World*, 82 MINN. L. REV. 609, 633 (1998).

<sup>10</sup> See Matt Jackson, *Linking Copyright to Homepages*, 49 FED. COMM. L.J. 731, 739 (1997).

<sup>11</sup> See O'Rourke, *supra* note 9, at 633.

<sup>12</sup> See *id.*

<sup>13</sup> See *id.*

<sup>14</sup> See *id.*

<sup>15</sup> See *id.*

<sup>16</sup> See *id.*

<sup>17</sup> See O'Rourke, *supra* note 9, at 633.

document retrieval.<sup>18</sup> The power of the web lies in the ability of users to quickly link to related documents, web pages or websites.<sup>19</sup>

Until recently, it was generally accepted that access to a website and its contents by linking was implicitly authorized by the website owner's placement of such content on the web. After all, why would anyone place any content on the web if such content was not intended to be viewed by others? As discussed below, however, the techniques and practices of linking and framing have recently come into question under state unfair competition and misappropriation laws, trademark law and copyright law.

## II. THE LEGAL IMPLICATIONS OF LINKING AND DEEP LINKING

Although there is little settled law on linking and deep linking, early cases and commentary on existing statutory and common law suggest that linking to the home page of websites is legally permissible. However, deep linking without permission to a commercial website raises numerous legal questions and should be avoided.

Linking to a website's home page rarely sparks disputes or presents legal issues, in part because links to home pages have been widely accepted as an integral part of the web since its inception. It can be argued that the mere presence of a site on the web implicitly grants others permission to link to the home page of that website. Stated another way, linking to home pages has become an intended consequence of—and fundamental to—the nature and operation of the web.<sup>20</sup>

On the other hand, deep linking is problematic because it allows the linking website to bypass the home page of the linked-to website and “cherry-

pick” the best content and features of the linked-to website. This practice results in the user spending less time on the linked-to website, generating fewer “hits”<sup>21</sup> on the linked-to site and ultimately reducing the value of the banner advertisements that the linked-to site can sell to advertisers.<sup>22</sup> Because the linking website capitalizes on the efforts of the linked-to website without proper attribution, deep linking without permission from the operator of the linked-to site is a risky undertaking that may lead to litigation.

An incident between Universal Pictures and Movie-List, an online movie preview and trailer aggregator, illustrates the lack of guidelines and general confusion surrounding deep linking and the potential danger of deep linking without permission. Universal recently wrote to Movie-List operator Jean-Pierre Bazinet demanding that he stop linking (and deep linking) to Universal's movie previews and trailers.<sup>23</sup> Universal noted that the display, reproduction or sale of Universal Pictures' trailers violated state and federal laws on copyright, unfair competition and trademark dilution. Although Bazinet replied that he had removed all Universal trailers from the <www.movie-list.com> server and that any trailers still on the site were through links to other servers, Universal insisted that linking to other sites that contain Universal's copyrighted material without its permission violated intellectual property rights. It requested that he remove all Universal images and links to sites with Universal trailers.

SimpleNet, Bazinet's internet service provider (“ISP”), became concerned about contributory liability and ordered him to comply with Universal's request. SimpleNet informed him that if Universal filed a formal complaint with the ISP, it would suspend his account. An incredulous

<sup>18</sup> The World Wide Web has been defined as “a collection of protocols and standards for accessing information on the [i]nternet, . . . [which is] the physical medium used to transport the data.” DEVRA HALL & NET.GENESIS, BUILD A WEB SITE: THE PROGRAMMER'S GUIDE TO CREATING, BUILDING AND MAINTAINING A WEB PRESENCE 5 (1995). It consists of “a series of documents stored in different computers all over the [i]nternet” whose interlinking has made it “currently the most advanced information system developed on the [i]nternet.” *ACLU v. Reno*, 929 F. Supp. 824, 836 (E.D. Pa. 1996), *affd*, 521 U.S. 844 (1997).

<sup>19</sup> See *Reno*, 929 F. Supp. at 836–37 (observing that “[t]hese links from one computer to another, from one document to another across the [i]nternet, are what unify the web into a single body of knowledge, and what makes the web unique”).

<sup>20</sup> See *Ticketmaster Corp. v. Microsoft Corp.*, No. 97-3055 RAP (Answer), at para. 41 (C.D. Cal. filed May 28, 1997).

<sup>21</sup> A hit (or page view), the accessing of a Web page, is often used by websites to give advertisers a sense of traffic and set rates. See “Page View,” *Webopedia Online Dictionary and Search Engine* (visited Nov. 19, 1999) <www.webopedia.com>.

<sup>22</sup> It also causes the user to bypass any disclaimers or terms of service that may be contained only on the home page of the linked-to website.

<sup>23</sup> See Jean-Pierre Bazinet, *Movie-List—Universal Troubles* (visited Nov. 9, 1999) <www.movie-list.com/universal.html>. See also Scott Rosenberg, *Don't Link or I'll Sue!*, SALON MAGAZINE (Aug. 12, 1999) <www.salon.com/tech/col/rose/1999/08/deep\_links/index.html> (discussing the *Movie-List/Universal* exchange in context of the resolution of the *Ticketmaster v. Microsoft* lawsuit).

Bazinet eventually took down all controversial material, including links, and in its place posted the exchange of letters and related materials. He then moved his movie-list material to a site under a different ISP, expressing his amazement and disbelief that Universal Pictures forced him to cease an activity that, in his opinion, actually benefited Universal Pictures.<sup>24</sup>

#### A. Linking and Deep Linking Case Law

So far, no case has directly challenged the process of linking to another party's home page. However, there is some support for the proposition that deep linking is objectionable and should be avoided. In *Ticketmaster Corp. v. Microsoft Corp.*,<sup>25</sup> Ticketmaster objected to deep links from Microsoft's Seattle Sidewalk website that linked directly to ticket purchasing screens, several layers within the Ticketmaster website. The contested pages on the Sidewalk website contained descriptions of events in certain cities, such as concerts and plays, and deep links that took users directly to web pages on Ticketmaster's website. Once on Ticketmaster's website, users could purchase tickets for those events.

Ticketmaster filed a complaint, bringing claims of trademark dilution and unfair competition.<sup>26</sup> Ticketmaster objected to, among other things, the fact that the deep links bypassed its home page—the page with the most potential for advertising revenue. In addition to filing a complaint, Ticketmaster responded by using technology that blocked links originating from the Sidewalk website.<sup>27</sup> Unfortunately, this case did not provide any binding legal precedent; the lawsuit was eventually settled when Microsoft agreed to link to Ticketmaster's home page rather than deep link to in-

dividual events.<sup>28</sup> However, this case clearly demonstrates the potential pitfalls and liability associated with linking and deep linking without the prior permission from the operator of the linked-to website.

A similar result was reached in *Shetland Times Ltd. v. Wills*.<sup>29</sup> In this Scottish case, the defendants ran the Shetland News, a news service containing headlines with deep links to articles on the plaintiff's website. Once again, the plaintiff objected to the bypass of its home page, which it planned to use as a source of advertising revenue. This case also settled, but only after the judge issued an interim interdict (similar to a preliminary injunction) enjoining the defendants from deep linking. This case has little precedential value in the United States, especially because the judge's decision was based on aspects of British copyright law that differ from the American system. However, scholars have referenced it as an indication of how a factfinder may analyze deep linking.<sup>30</sup>

Some defenders of deep linking suggest that this practice is almost as widely accepted as linking to home pages and that it allows users to fully harness the power of the web by instantly finding the information they seek. Deep linking advocates argue that web search engines<sup>31</sup>—which undoubtedly play a vital role in the development and usefulness of the web—deep link as a matter of course.

However, there are significant differences between deep linking by a search engine and deep linking by a commercial website that may justify divergent legal analyses. First, the linked-to website operators generally have several techniques at their disposal to control deep linking by a search engine. In fact, website operators often pay to be placed in a search engine's database or purchase

<sup>24</sup> See *id.*

<sup>25</sup> No. 97-3055 DDP (C.D. Cal. filed Apr. 28, 1997) (Complaint), available at <www.jmls.edu/cyber/cases/ticket1.html>.

<sup>26</sup> Ticketmaster's claim of unfair competition was unsurprising: Microsoft established a deep link to Ticketmaster's website after the parties had unsuccessfully attempted to negotiate a mutually beneficial agreement. See *id.* at para. 15.

<sup>27</sup> The use of technology by Ticketmaster illustrates that website operators have the option of resorting to technological solutions rather than legal proceedings to resolve disputes.

<sup>28</sup> See Bob Tedeschi, *Ticketmaster and Microsoft Settle Suit on Internet Linking*, N.Y. TIMES, Feb. 15, 1999, at C3.

<sup>29</sup> 1997 Sess. Cas. 604 (Scot. Outer House Oct. 24, 1996). For discussion of this case, see Walter A. Effross, *Withdrawal of*

*the Reference: Rights, Rules, and Remedies for Unwelcome Web-Linking*, 49 S.C. L. REV. 651, 655-56 (1998).

<sup>30</sup> See *id.*

<sup>31</sup> See "Search Engine," *Webopedia Online Dictionary and Search Engine* (visited Nov. 19, 1999) <www.webopedia.com>. A search engine is used to search the web for documents containing keywords specified by the user and compile a list of the documents in which the keywords are found. See *id.* A search engine works by sending out a specialized program, called a "spider," that "crawls" the web searching for relevant documents. See *id.* The documents are then "indexed" based on the keywords contained in each document. See *id.* Each search engine operates in a different way, using its own specialized algorithm to ideally return only meaningful results for each query. See *id.*

premier placement in a search engine's results. Operators can decide whether search engines can locate their sites and can dictate the actual keywords that will result in such location, with the inclusion of "meta tags" in the code of their web pages.<sup>32</sup> Operators can also encode their websites to (1) have their web servers check the "referrer" headers on incoming users and screen out certain domain names entirely; (2) use "cookies"<sup>33</sup> to ensure that visitors to deep pages have first checked in at the site's home page; or (3) include a "page wrapper" that reroutes traffic in various ways.<sup>34</sup>

Second, a search engine's deep link is established only after the user conducts a search, instead of provided by another commercial and perhaps competing website. The linked-to website is thus unlikely (or unable) to object to being deep linked by a search engine, since it will benefit from being found by a user who was specifically looking for it, and since it probably invited such deep linking by paying the search engine or by using meta tags.<sup>35</sup> Finally, websites can use advanced technology to block links from certain websites, and thus block search engines from "finding" web pages located deep in their websites.<sup>36</sup>

In short, deep linking by a search engine is more similar to a user bookmarking a particular web page in his or her browser.<sup>37</sup> In such situa-

tions, a user has not engaged in unfair competition with a commercial website, whereas another website that competes for advertising dollars most likely has. As further explained below, liability for deep linking is most likely to arise under state unfair competition or misappropriation laws where deep linking by a commercial website is shown to adversely impact the revenue and value of the linked-to website.

## B. Linking and Deep Linking is Not Prohibited by Copyright Law

Copyright law as currently interpreted does not seem to prohibit linking or deep linking. Of the exclusive rights granted to copyright owners,<sup>38</sup> linking seems to implicate only the right to reproduce.<sup>39</sup> Technically, the user may be susceptible to a claim of direct infringement because it is the user that makes a copy of the copyrighted material when he clicks on a link and downloads a web page.<sup>40</sup> However, the user is not likely to be found liable for copyright infringement because placing material on the internet implies a license to link and "copy."<sup>41</sup> While this outcome would require a broader interpretation of implied license law,<sup>42</sup> the user is still likely to be excused from copyright infringement liability under a fair use rationale.<sup>43</sup> A website operator could not be liable

<sup>32</sup> See "Meta Tags," *Webopedia Online Dictionary and Search Engine* (visited Nov. 19, 1999) <www.webopedia.com>. Meta tags are key words or phrases embedded in websites programmed using hypertext markup language ("HTML") that do not affect how the page is displayed. *See id.* Although meta tags provide such useful information as the page's designer, last update and content, their most useful function is to allow search engines to recognize and retrieve sites by encoding keywords representing the page's content. *See id.*

<sup>33</sup> See "Cookie," *Webopedia Online Dictionary and Search Engine* (visited Nov. 19, 1999) <www.webopedia.com>. A cookie is a file stored on a web user's computer drive allowing websites to identify the user and prepare customized webpages. *See id.* The file is placed on the drive during the user's first visit, during which the user may enter personal information, and is then sent back to the server each time the user requests a page from the server. *See id.*

<sup>34</sup> These techniques are also available to prevent deep linking. See Scott Rosenberg, *More on "Deep Links," Journalists and IPOs—Why You Don't Need Lawyers to Block Links—and Hot Reactions to the Chris Nolan Story*, SALON MAGAZINE, Aug. 18, 1999 <www.salon.com/tech/col/rose/1999/>.

<sup>35</sup> *See id.* "Meta tags can be very useful for [w]eb developers. They can be used to identify the creator of the page, what HTML specs the page follows, the keywords and descriptions of the page, and the refresh parameter[.]" *Meta Tag Tutorial*, Web Developer.com (visited Feb. 14, 2000) <www.webdeveloper.com>.

<sup>36</sup> *See id.*

<sup>37</sup> Bookmarking is a tool used by most current web browsers to save the URL of a website for later retrieval. *See* "Bookmark," *Webopedia Online Dictionary and Search Engine* (visited Feb. 16, 2000) <www.webopedia.com>.

<sup>38</sup> See 17 U.S.C. § 106 (1994 & Supp. III 1997).

<sup>39</sup> *See id.*

<sup>40</sup> *See id.*

<sup>41</sup> *See id.*

<sup>42</sup> Most cases of implied copyright license involve situations where there is some relationship (often that of employer and employee) between the parties. Such a relationship does not ordinarily exist between the website operator and the user.

<sup>43</sup> Courts weigh four statutory factors in assessing a defense of fair use:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit 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. 17 U.S.C. § 107(1)–(4) (1994). A user who links to a website typically does so for noncommercial purposes, and the effect of linking clearly expands the potential market for the copyrighted work, which few would find if linking were prohibited. Thus, a user's linking to a copyrighted web page would

for contributory infringement if there is no direct infringement by the user.<sup>44</sup>

A website operator's liability for linking to a website containing copyright infringing materials is further limited by the Digital Millennium Copyright Act ("DMCA").<sup>45</sup> Title II of the DMCA creates four limitations on liability for copyright infringement by website operators that entail a complete bar on monetary damages for direct, contributory and vicarious infringement, and restrict the availability of injunctive relief.<sup>46</sup> The DMCA establishes a safe harbor for a website operator referring or linking users to a website containing infringing materials.<sup>47</sup> This safe harbor includes all forms of referrals and links, ranging from referrals originating from search engines to links on web pages.<sup>48</sup>

A website operator is entitled to the protection of this safe harbor if the website operator lacks actual knowledge of the material's infringing nature and is not aware of facts or circumstances from which infringing activity is apparent.<sup>49</sup> Once aware of infringement, the website operator must act expeditiously to remove the links providing access to such material in accordance with the no-

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almost certainly be excused under fair use. After all, finding otherwise (*i.e.*, that users were liable for copyright infringement each time they clicked on a link) would signal the end of the internet. See 17 U.S.C. § 107 (1994).

<sup>44</sup> See *id.*

<sup>45</sup> Online Copyright Infringement Liability Limitation Act, Title II of the Digital Millennium Copyright Act ("DMCA"), Pub. L. No. 105-304, 112 Stat. 2860, 2877 (1998) (codified at 17 U.S.C. § 512 (1994 & Supp. IV 1998)). The DMCA was enacted in an effort to encourage the continued rapid development of the internet by limiting potential copyright liability for website operators and other online service providers for third-party content. See 144 CONG. REC. S11889 (daily ed. Oct. 8, 1998) (statement of Sen. Hatch); see generally Jennifer E. Markiewicz, *Seeking Shelter From the MP3 Storm: How Far Does the Digital Millennium Copyright Act Online Service Provider Liability Limitation Reach?*, 7 COMMLAW CONSPECTUS 423 (1999).

<sup>46</sup> See 17 U.S.C. § 512 (1994 & Supp. IV 1998). The first limitation of liability applies to a website operator storing material on his website at the request of a user (such as material posted on a message board, chat room, or personal webpage). See *id.* at § 512(c). The second limitation applies to circumstances where a website operator refers users to material at another website by means of linking. See *id.* at § 512(d). The third limitation of liability applies to a website operator or online service provider caching online materials from other websites. See *id.* at § 512(b). Finally, the fourth limitation covers cases where an online service provider provides conduit services to users such as e-mail messages without content modifications. See *id.* at § 512(a). The DMCA defines a "service provider" as a "provider of online services or network access, or the operator of facilities therefor[.]" 17

U.S.C. §§ 101 & 512 (1994 & Supp. IV. 1998). While this definition most probably includes online service providers as well as website operators, the precise coverage and scope of the DMCA has yet to be adjudicated.

### C. Linking and Deep Linking Does Not Implicate Trademark Law

Linking and deep linking are not likely to implicate existing trademark law, as long as (1) the linking website does not suggest any nonexistent affiliation with the linked-to website, and (2) the linking website does not tarnish the reputation of the linked-to website in any way.

Under trademark dilution law, famous marks are protected from dilution caused by unauthorized commercial use of the mark.<sup>51</sup> Linking or deep linking could constitute trademark dilution by tarnishment if, for example, the linked-to website was portrayed negatively or the linking website was irreputable. Further, a site operator could be liable for the infringing activities of a linked-to site under the theory of vicarious liability as discussed in Section IV, below.

It is preferable to obtain the trademark owner's

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U.S.C. §§ 101 & 512 (1994 & Supp. IV. 1998). While this definition most probably includes online service providers as well as website operators, the precise coverage and scope of the DMCA has yet to be adjudicated.

<sup>47</sup> See 17 U.S.C. § 512(d).

<sup>48</sup> See *id.*

<sup>49</sup> A website operator is not required to monitor the websites to which it links or affirmatively seeks facts indicating infringing activity in order to claim the protections of these safe harbors. Conversely, a website operator's monitoring of its site and the websites to which it links will not disqualify it from such safe harbor protection. See H.R. CONF. REP. NO. 105-796, at 73 (1998), reprinted in 1998 U.S.C.C.A.N. 639, 649.

<sup>50</sup> See H.R. CONF. REP. NO. 105-796, at 54. A "financial benefit" would arise where the value of the service or website lies in providing access to infringing materials. See *id.*

<sup>51</sup> Dilution is defined as "the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of: (1) competition between the owner of the famous mark and other parties, or (2) likelihood of confusion, mistake, or deception." See 15 U.S.C. § 1127 (1994 & Supp. IV 1998). The three main types of dilution are: (1) blurring, which "occurs when the ability of a mark to identify a product is weakened by others' use of the mark on different, non-competing goods" (*e.g.*, Nike cookies), (2) tarnishment, which occurs when a trademark "is associated with [an] inferior product or portrayed in an unfavorable light," and (3) diminishment, which is when others' use of a trademark diminishes the ability of the owner to use the trademark in advertising. See *id.*; see also Maureen A. O'Rourke, *supra* note 9, at 672-75 (1998).

prior approval when linking to a particular website and when using the website's trademarks on the link. However, nominative fair use of a trademark is acceptable under some circumstances. Fair use of a trademark in a link would be permissible if (1) the product or service in question is not readily identifiable without the use of the trademark; (2) only so much of the mark is used as is reasonably necessary to identify the product or service, and (3) the user does nothing that would suggest sponsorship or endorsement by the trademark holder.<sup>52</sup>

#### D. Linking Bans

Federal and state governments have recently enacted legislation to ban links in an effort to prevent undesired activities. In 1996, the Georgia legislature passed the Criminal Linking Act,<sup>53</sup> intending to prevent fraud on the internet by prohibiting the use of trade names and trademarks without the permission of the owner.<sup>54</sup> Because many website addresses consist of trade names, the statute had the effect of prohibiting the creation of any link containing a third party's trade name or trademark without the express permission of the trade name or trademark owner. The Criminal Linking Act would have created a chilling effect on the internet, bringing the practice of linking to a grinding halt. For that reason, the internet community vehemently opposed the Criminal Linking Act.<sup>55</sup>

The American Civil Liberties Union stepped in, challenging the constitutionality of the statute.<sup>56</sup> It argued that the Act was a content-based restric-

tion on the right to communicate and the right to use trade names, logos and other graphics in a manner held to be constitutional in other contexts, and should be analyzed under the strict scrutiny test for validity under the First Amendment.<sup>57</sup> The Court agreed, and permanently enjoined enforcement of the Criminal Linking Act, finding that the statute imposed content-based restrictions that were not narrowly tailored to achieve the purported compelling state interest of preventing fraud.<sup>58</sup> The court also found for the ACLU when it noted that the Criminal Linking Act's restriction on trade names and logos would frustrate the currently prevalent practice of linking on the web.<sup>59</sup>

Some courts have exhibited a more sophisticated approach to the linking ban issue, preferring to enjoin the posting of infringing internet content rather than prohibit links to such content. An example of this approach can be seen in the ongoing battle between the entertainment industry and programmers who reverse-engineered the encryption code for the DVD movie format and posted it on the internet.<sup>60</sup> In a suit against these programmers by the Motion Picture Association and the DVD Copy Control Association, the court refused to issue an injunction against links to other websites that contain the protected materials, finding that such an order is "overbroad and extremely burdensome."<sup>61</sup> The court reasoned that "links to other websites are the mainstay of the [i]nternet and indispensable to its convenient access to the vast world of information. A website owner cannot be held responsible for all the content of the sites to which it provides

<sup>52</sup> See *New Kids on the Block v. News America Publ'g, Inc.*, 971 F.2d 302, 308 (9th Cir. 1992).

<sup>53</sup> See Criminal Linking Act, GA. CODE ANN. §16-9-93.1 (1996).

<sup>54</sup> See *id.* The Criminal Linking Act makes it unlawful for any person . . . knowingly to transmit any data through a computer network . . . for the purpose of setting up, maintaining, operating, or exchanging data with an electronic mailbox, home page, or any other electronic information storage bank or point of access to electronic information if such data uses any individual name . . . to falsely identify the person . . . or for any person . . . knowingly to transmit any data through a computer network . . . if such data uses any . . . trade name, registered trademark, logo, legal or official seal or copyrighted symbol . . . which would falsely state or imply that such person . . . has permission or is legally authorized to use [it] for such purpose when such permission or authorization has not been obtained.

*Id.*

<sup>55</sup> See Robert D. McFadden, *Internet Law Overturned in Two States*, N.Y. TIMES, June 21, 1997 at 23 (noting that online services, ISPs, users and online publishers objected to the Georgia Law); see also ACLU, *Others Challenge Ga. Law Banning Anonymity, Trademark Use on 'Net*, COMPUTER INDUS. LIT. REPORTER, Oct. 1, 1997, at 23037.

<sup>56</sup> See *American Civil Liberties Union of Georgia v. Miller*, 977 F. Supp. 1228, 1230 (1997)

<sup>57</sup> See *id.* To avoid a finding of invalidity under the First Amendment, a state must demonstrate that its regulation is narrowly tailored to meet a compelling state interest. See *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989).

<sup>58</sup> See *id.* at 1233.

<sup>59</sup> See *id.* at 1230-31, 1234.

<sup>60</sup> See *DVD Copy Control Association, Inc. v. Andrew Thomas McLaughlin*, CV-786804 (Sup. Ct. CA Jan. 20, 2000), available at <[www.eff.org/ip/Video/DVDCCA\\_case/20000120-pi-order.html](http://www.eff.org/ip/Video/DVDCCA_case/20000120-pi-order.html)>.

<sup>61</sup> *Id.*

links.”<sup>62</sup> The court further found that an order prohibiting links to the information was unnecessary because it had already enjoined the posting of the information itself.<sup>63</sup>

Another example can be found in a bill introduced in the Senate on July 22, 1999. The Methamphetamine Anti-Proliferation Act (“Meth Act”) prohibits posting information about the manufacture, sale or use of illegal methamphetamines or linking to websites that include such content.<sup>64</sup> The Meth Act would make publishing or linking to drug information on the internet a felony punishable by up to ten years in federal prison.<sup>65</sup> The ACLU and the Electronic Frontier Foundation are preparing for a challenge to the Meth Act.<sup>66</sup> As Shari Steele, director of legal services for the Electronic Frontier Foundation, stated, “You can’t hold a third party responsible for content on a site that they do not control.”<sup>67</sup>

Linking bans have had a short life in the United States, and First Amendment and internet advocates will most probably continue to vehemently oppose them. As the web becomes a more pervasive medium, however, a link ban may seek to address the deep linking issues outlined in this section. Consequently, it is advisable that website operators follow the precautions set forth in Section VI when deep linking.

### III. THE LEGAL IMPLICATIONS OF FRAMING

The practice of framing and its significant legal issues has led to more legal disputes than linking or deep linking. But as with linking and deep linking, no case law has yet been established for framing. Based on the cases that have been brought and subsequently settled, framing could run afoul of state unfair competition laws and may violate trademark law.

#### A. Framing Case Law

The first case challenging the practice of framing, *Washington Post Co. v. Total News*,<sup>68</sup> involved a news directory that framed the content of more than 1,000 online news services worldwide. Washington Post Co., Time, CNN and Reuters, among others, objected to Total News’s practice of accessing their websites within a frame rather than in the entire browser window, because this process concealed the originator or source of the content. A frame allowed the defendant to display the plaintiffs’ content without any attribution to the plaintiffs. It also allowed the defendant to display its own advertising at all times, while the framed websites’ advertisements were often obscured. The plaintiffs brought claims of, *inter alia*, misappropriation, trademark dilution and unfair trade practices.

Total News agreed not to frame the plaintiffs’ content or to otherwise “directly or indirectly cause any plaintiff’s website to appear on a user’s computer screen with any material (*e.g.*, URL, text, graphics, pop-up window, audio or other) supplied by or associated with defendants or any third-party, such as an advertiser . . .”<sup>69</sup> While this case provides a useful backdrop for any discussion involving the legal implications of framing, it fails to provide a binding legal precedent because it was settled by the parties.

Nevertheless, there is some indication that framing is less acceptable than linking. In *Hard Rock Cafe Int’l Inc. v. Morton*,<sup>70</sup> for example, the court found it to be more objectionable. The court indicated that the framed website and the framing website were combined into a “single visual presentation.” It noted that a user could be unaware that she or he had left the framing website because the browser displayed the framing website’s URL.<sup>71</sup> However, the court qualified its finding by indicating that framing was a “flexible

<sup>62</sup> *Id.*

<sup>63</sup> *See id.*

<sup>64</sup> *See* Methamphetamine Anti-Proliferation Act of 1999, H.R. 2987, 106th Cong. (1999) [hereinafter the Meth Act].

<sup>65</sup> *See id.* at § 421(a)(2).

<sup>66</sup> *See What’s the Senate Snorting?*, BUSINESS 2.0, Nov. 1999 at 26.

<sup>67</sup> *Id.*

<sup>68</sup> No. 97 Civ. 1190 (PKL) (S.D.N.Y. Feb. 28, 1997). A

copy of the complaint is available online at <[www.jmls.edu/cyber/cases/total1.html](http://www.jmls.edu/cyber/cases/total1.html)>.

<sup>69</sup> *Washington Post Co. v. Total News*, No. 97 Civ. 1190, para. 3 (PKL) (S.D.N.Y.) (stipulation and order of settlement and dismissal).

<sup>70</sup> No. 97 CIV. 9483RPP, 1999 WL 717995, at \*25 (S.D.N.Y. Sep. 9, 1999).

<sup>71</sup> *See id.*



device” and that there may be instances in which the user would easily be able to distinguish the framed website from the framing website.<sup>72</sup> Also, it is important to note that the court interpreted a license agreement between the parties and found that the defendant’s framing violated the terms of the agreement.<sup>73</sup> Thus, the court’s conclusions may be of limited value where no agreement exists or where the dispute is premised on intellectual property or other statutory or common laws.

Other disputes involving framing include a lawsuit filed by the *Fort Wayne Journal Gazette* against the owners of <ft-wayne.com><sup>74</sup> and additional lawsuits involving Total News; these indicate that framing without permission is objectionable.<sup>75</sup> However, none of these cases has resulted in a judicial opinion examining the legal issues at stake.

## B. Copyright Law Does Not Prohibit Framing

The Copyright Act provides to the copyright holder a number of exclusive rights in his or her creation, including the right to distribute or reproduce the work and to prepare derivative works.<sup>76</sup> In the framing context, the exclusive right most likely to be infringed is the right to prepare derivative works;<sup>77</sup> however, the leading cases conflict on the issue of whether a framed object constitutes a derivative work.<sup>78</sup> Some case law suggests that a frame is simply a method of display that creates no derivative work.<sup>79</sup> However, as with linking, it is technically the user who creates the arguably derivative work; this is likely to be ex-

cused as fair use.<sup>80</sup> Furthermore, a website operator could not be liable for contributory infringement if there is no direct infringement by the user.<sup>81</sup>

While the practice of framing was examined under copyright law in *Futuredontics Inc. v. Applied Anagramics Inc.*,<sup>82</sup> this case provides little guidance on the treatment of framing under copyright law. The defendants in *Futuredontics*<sup>83</sup> reproduced a copy of the plaintiff’s website in a frame. The court denied the plaintiff’s motion for a preliminary injunction, indicating that it had not provided sufficient evidence to establish that the defendant’s framed link constituted a derivative work.<sup>84</sup> However, the court refused to dismiss the case, stating that the plaintiff was not foreclosed from establishing that the defendant’s page constituted a derivative work and that the plaintiff’s complaint sufficiently alleged a claim for copyright infringement.<sup>85</sup> Essentially, the court held that the plaintiff’s claims were neither unreasonable nor obviously valid, leaving the legality of framing unclear.<sup>86</sup>

## C. Trademark Law as Applied to Framing

Framing often causes confusion as to the source of the content displayed in the browser, leading to possible liability under trademark law. Section 43(a) of the Lanham Act, which deals with trademark infringement, prohibits the use of “any word, term, name, symbol, or device . . . or any false designation of origin, false or misleading de-

<sup>72</sup> See *id.*

<sup>73</sup> See *id.*

<sup>74</sup> See Carl S. Kaplan, *Lawsuit May Determine Whether Framing is Thieving*, CYBERTIMES (N.Y. TIMES) (May 29, 1998) <www.nytimes.com/library/tech/98/05/cyber/cyberlaw/29law.html>. A lawyer representing the *Fort Wayne Journal Gazette* in its dispute with the ft-wayne.com website was quoted as saying, “The defendants have modified their website and are now providing what appear to be direct links without any framing, which is what we wanted them to do from the very start.” David Noack, *Two Papers File ‘Frames’ Lawsuit*, EDITOR & PUBLISHER INTERACTIVE (May 15, 1998) <www.mediainfo.com/ephome/news/newshtm/stories/051598n7.htm>. See also *Digital Equip. Corp. v. Altavista Tech., Inc.*, 960 F. Supp. 456 (D. Mass. 1997) (outlining differences between linking and framing).

<sup>75</sup> See Martha L. Stone, *News Sites Go After Framers*, ZDNET NEWS CHANNEL (Dec. 20, 1997) <www.zdnet.com/zdnn/content/zdnn/1220/265686.html>.

<sup>76</sup> See 17 U.S.C. § 106 (1994) (explaining the exclusive rights enumerated for copyright owners).

<sup>77</sup> See 17 U.S.C. § 106(2) (listing the creation of derivative works as one of the exclusive rights of copyright owners).

<sup>78</sup> See *Lee v. A.R.T. Co.*, 125 F.3d 580, 583 (7th Cir. 1997) (note cards mounted on ceramic tiles are not infringing derivative works); *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, 964 F.2d 965 (9th Cir. 1992) (derivative work was not formed when work did not incorporate a portion of a copyrighted work in some concrete or permanent form); *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988) (copyrighted prints from a book mounted on ceramic tiles constitute infringing derivative work).

<sup>79</sup> See O’Rourke, *supra* note 9, at 666.

<sup>80</sup> See *id.* at 669–70. While the analysis is somewhat confusing, the first and fourth factors of the fair use analysis are likely to be sufficient when determining fair use since use is normally noncommercial and the market for the copyrighted work is expanded.

<sup>81</sup> See 3 NIMMER ON COPYRIGHT §12.04[A][3][a] (1999); 17 U.S.C. § 106(2) (1994).

<sup>82</sup> 45 U.S.P.Q.2d 2005 (C.D. Cal.), *aff’d* 152 F.3d 925 (9th Cir. 1998).

<sup>83</sup> See *id.* at 2005.

<sup>84</sup> See *id.* at 2006.

<sup>85</sup> See *id.* at 2010.

<sup>86</sup> See *id.* at 2011 n.2.

scription of fact, . . . which . . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection or association . . .”<sup>87</sup>

The two leading trademark cases in this area, involving facts similar to the framing in *Total News*, present conflicting views,<sup>88</sup> making it unclear whether framing would constitute trademark infringement. In *Paramount Pictures*, Paramount Home Video (“PHV”) distributed videotapes with commercials at the beginning of the tape.<sup>89</sup> Video Broadcasting Systems (“VBS”) sold advertising at the beginning of tapes sold by or rented from retail stores, some of which overlapped the pre-recorded advertisements.<sup>90</sup> PHV claimed that the advertisements placed at the beginning of the tapes distributed by VBS would confuse viewers into thinking that these advertisements were associated with PHV.<sup>91</sup> The court asked whether an ordinary viewer could believe that the defendants’ advertisements were produced or sponsored by PHV.<sup>92</sup> It found the standard for confusion was not met, in part because of the “relatively recent technological phenomenon of ‘VCRs’ in the home,”<sup>93</sup> and in part because it was “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.”<sup>94</sup>

However, *BellSouth Advertising* reached the opposite conclusion on similar facts.<sup>95</sup> That court enjoined Real Color Pages from inserting its tourist guide, which contained advertising of interest to tourists, into BellSouth’s yellow pages.<sup>96</sup> In issuing a preliminary injunction, the court found that BellSouth was likely to prevail on its claim for trademark infringement.<sup>97</sup> It distinguished *Paramount Pictures* by noting that, unlike PHV and VBS, BellSouth and Real Color Pages marketed similar products, leading to a greater likelihood

that consumers would be confused.<sup>98</sup>

Because internet framing disputes often involve websites that are in at least partial competition with each other and that market similar products, *BellSouth Advertising* suggests that such framing as in *Total News* may constitute trademark infringement if the viewer is confused about the source of any advertisements on the framing website.<sup>99</sup> But because section 43(a) involves the likelihood of confusion on the part of consumers, any trademark infringement analysis is likely to be fact-specific. Some framing websites may make it clearer than others that the user is viewing a different website, which would eliminate any confusion as to source.

Finally, framing could run afoul of trademark dilution law if the surrounding frame portrays the framed content or trademarks in an unfavorable light (tarnishment) or blurs the distinctive quality of the framed content or trademark (dilution).<sup>100</sup> For example, Ticketmaster sought to invoke such protection by alleging that Microsoft’s commercial use and appropriation of Ticketmaster’s name, marks and website enhanced Microsoft’s website and business while diminishing and diluting the value of Ticketmaster’s website and business.<sup>101</sup>

#### IV. CONTRIBUTORY AND VICARIOUS LIABILITY FOR LINKED OR FRAMED MATERIAL

Website operators who do not meet the safe harbor requirements of the DMCA may be held liable for linking or framing a website containing copyrighted materials. Such liability is not limited to direct infringement and may include contributory or vicarious infringement.

Direct copyright infringement may occur when

<sup>87</sup> 15 U.S.C. § 1125(a) (1999).

<sup>88</sup> Compare *BellSouth Adver. & Publ’g Corp. v. Real Color Pages, Inc.*, 792 F. Supp. 775, 785–86 (M.D. Fla. 1991) (granting a preliminary injunction against defendant who inserted a tourist guide into BellSouth’s yellow pages because users would be confused as to the source of the advertisement), with *Paramount Pictures Corp. v. Video Broad. Sys., Inc.*, 724 F. Supp. 808, 817 (D. Kan. 1989) (advertisements before movie on video tape did not result in viewer confusion as to the source or affiliation of the advertisements).

<sup>89</sup> See *Paramount Pictures*, 724 F. Supp. at 811–12.

<sup>90</sup> See *id.* at 812.

<sup>91</sup> See *id.* at 813–14.

<sup>92</sup> See *id.* at 814–15.

<sup>93</sup> *Id.* at 816.

<sup>94</sup> *Id.* at 817.

<sup>95</sup> See *BellSouth Adver.*, 792 F. Supp. 775.

<sup>96</sup> See *BellSouth Adver.*, 792 F. Supp. at 786.

<sup>97</sup> See *id.* at 784.

<sup>98</sup> See *id.* at 783.

<sup>99</sup> See *id.*

<sup>100</sup> The Federal Dilution Act defines dilution as the “lessening of the capacity of a famous mark to identify and distinguish goods or services regardless of the presence or absence . . .” of competition or confusion between the two parties. 15 U.S.C. § 1127 (1994 & Supp. IV 1998).

<sup>101</sup> See *Ticketmaster Corp. v. Microsoft Corp.*, No. 97–3055 DDP, at para. 19 (C.D. Cal. May 8, 1997) (amended complaint) available at <www.ljx.com/LJXfiles/ticketmaster/complaint.html> [hereinafter *Complaint*].

a website operator violates any of the copyright holder's exclusive rights.<sup>102</sup> Neither intent nor knowledge on the part of the infringer are required for direct copyright infringement liability.<sup>103</sup> For example, direct infringement liability may be found if a website operator uses content (text or graphics) without permission from a third party on its own website.<sup>104</sup> In *Playboy Enterprises v. Chuckleberry Publishing*, a website operator who personally provided infringing content was found liable for direct infringement.<sup>105</sup>

Contributory infringement occurs when the website operator knows the infringement is taking place and substantially participates in the infringing conduct.<sup>106</sup> In *Playboy Enterprises, Inc. v. Hardenburgh*,<sup>107</sup> for example, a Bulletin Board System ("BBS")<sup>108</sup> operator was held directly and contributorily liable for copyright infringement where images from *Playboy* magazine were knowingly posted for access by its paying subscribers.<sup>109</sup> In *Sega Enters. Ltd. v. MAPHIA*,<sup>110</sup> a BBS operator was found contributorily liable when customers uploaded Sega video game software that was sold or traded on the BBS for copies of other video games.<sup>111</sup> More recently, in *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*,<sup>112</sup> the court issued a preliminary injunction, based on the theory of contributory infringement, that prohibited the defendants, long-time critics of the Mormon Church, from including links to and posting the addresses of pirate websites that contained illegal copies of the Church Handbook of Instructions ("Handbook"). In issuing the injunction, the court stated that it was likely that the defendants had engaged in contributory copyright infringement when they posted the addresses of three

websites that they knew or should have known contained the pirated copies.<sup>113</sup>

Vicarious infringement may occur if a website operator controls or supervises the acts of the direct infringer and derives financial benefit from the infringing acts.<sup>114</sup> Neither knowledge of—nor participation in—the infringing activity is a required element of vicarious infringement.<sup>115</sup> In *Fonovisa, Inc. v. Cherry Auction, Inc.*,<sup>116</sup> the defendant, who operated a swap meet where counterfeit music recordings were frequently sold, was held liable for vicarious and contributory copyright infringement.<sup>117</sup> The court came to two conclusions: First, Cherry Auction had the right and ability to supervise the infringing activities because it set the swap meet rules, patrolled the premises and controlled the access of customers to the swap meet area, and second it derived a direct financial benefit from the infringing activities by collecting admissions fees, concession stand sales and parking fees.<sup>118</sup>

## V. STATE UNFAIR COMPETITION LAWS POSE THE GREATEST POTENTIAL FOR LIABILITY

### A. Liability Under State Unfair Competition Laws for Linking

Unless Congress enacts specific laws to address linking and deep linking, or copyright and trademark law evolves to specifically address linking and deep linking, such disputes are likely to continue to be based on state unfair competition laws. Typically, state unfair competition laws have been broadly applied to a wide variety of circum-

<sup>102</sup> See 17 U.S.C. § 501 (1994).

<sup>103</sup> See *Playboy Enters. Inc. v. Frena*, 839 F. Supp. 1552, 1559 (M.D. Fla. 1993).

<sup>104</sup> Direct liability infringement has been weakened by the strict evidentiary standards set under *Religious Technology Center v. Netcom On-Line Communications Services, Inc.*, in which the court held that internet access providers and BBS operators were not directly liable for copyright infringement if they merely served as conduits for unaltered information, regardless of any infringing materials stored on their computers. See 907 F. Supp. 1361, 1372–73. (N.D. Cal. 1995).

<sup>105</sup> See 939 F. Supp. 1032, 1034–39 (S.D.N.Y. 1996).

<sup>106</sup> See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 487 (1984).

<sup>107</sup> 982 F. Supp. 503 (N.D. Ohio 1997).

<sup>108</sup> A BBS is an electronic message center that users can dial into with a modem. Once connected, they can review messages left by others and leave their own messages. Most

BBSs serve specific interest groups. See "BBS," *Webopedia Online Dictionary and Search Engine* (visited Nov. 19, 1999) <[www.webopedia.com](http://www.webopedia.com)>.

<sup>109</sup> See *Playboy v. Hardenburgh*, 982 F. Supp. 503.

<sup>110</sup> 948 F. Supp. 923 (N.D. Cal. 1996).

<sup>111</sup> See *Sega v. MAPHIA*, 948 F. Supp. 923, 933 (N.D. Cal. 1996).

<sup>112</sup> 75 F. Supp. 2d 1290 (D. Utah 1999).

<sup>113</sup> See *id.*

<sup>114</sup> See *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304 (2d Cir. 1963).

<sup>115</sup> See *id.* at 307.

<sup>116</sup> 76 F.3d 259 (9th Cir. 1996).

<sup>117</sup> See *id.* Although *Fonovisa* did not involve a website operator or an internet-related business, several courts have cited it when considering indirect online service provider liability.

<sup>118</sup> See *id.* at 262.

stances and unfair business practices and are the most appropriate to analyze linking and deep linking disputes.<sup>119</sup> While state laws vary enough to make any general discussion of them difficult,<sup>120</sup> the common law claim of misappropriation, which is a type of unfair competition, most likely applies to online and other services such as deep linking.<sup>121</sup>

For a typical misappropriation claim, the plaintiff must show: (1) that the "plaintiff has made a substantial investment of time, effort, and money in creating the thing misappropriated," (2) the defendant has "appropriated the thing at little or no cost, reaping where it has not sown," and (3) the defendant's acts have injured the plaintiff, such as by direct diversion of profits from the plaintiff to the defendant or a loss of royalties that the plaintiff charges to others to use the misappropriated thing.<sup>122</sup> Of course, any analysis of misappropriation by the courts is likely to depend on the specific facts of a particular case and the nature of the links involved.<sup>123</sup> It is foreseeable however, that a plaintiff would bring a suit based on a misappropriation claim in an effort to stop a defendant from deep linking to its website.<sup>124</sup> The plaintiff would argue that the value of its website, which represents a substantial investment of plaintiff's money and time, has been reduced by a defendant's act of deep linking.<sup>125</sup> In this instance, arguably the deep links enable the defendant to appropriate plaintiff's content and work at little or no cost to defendant.

In *Ticketmaster*, the most compelling claims of

the complaint were based on unfair competition and unfair business practices under California statutory and common law.<sup>126</sup> Ticketmaster argued that Microsoft benefited at its expense by "creating advertiser supported pages on its website consisting solely of Ticketmaster's live event information and services without Ticketmaster's approval, and by prominently offering it as a service[.]"<sup>127</sup> Ticketmaster's complaint targeted Microsoft's deep links, by claiming that these links "circumvented the beginning pages of Ticketmaster's website, which display advertisements, products and services of entities with which Ticketmaster contracts[.]"<sup>128</sup> Ticketmaster alleged that Microsoft's deep links to internal pages on its website allowed Microsoft to essentially offer Ticketmaster's wide range of services at little or no cost to itself, while depriving Ticketmaster of advertising money generated from "hits" to its home page.<sup>129</sup>

Recently, Ticketmaster filed a similar suit based on unfair competition against a competitor, Tickets.com Inc.<sup>130</sup> Just as in *Ticketmaster*, Ticketmaster alleges that Tickets.com deep links to its website thus diluting its value.<sup>131</sup> Ticketmaster is once again relying on unfair competition and misappropriation to make an argument against deep linking without permission of the linked-to website.<sup>132</sup>

Similarly, eBay, the premier internet auctioneer, has refused to allow AuctionWatch and Bidder's Edge, specialized search services, to link to the eBay website.<sup>133</sup> AuctionWatch and Bidder's

<sup>119</sup> See Bruce P. Keller, *Condemned to Repeat the Past: The Reemergence of Misappropriation and Other Common Law Theories of Protection for Intellectual Property*, 11 HARV. J.L. & TECH. 401, 405-06. (1998).

<sup>120</sup> See generally *id.* (explaining that there is no "consensus" on claims of misappropriation because of state specific laws). In addition, the analysis of preemption and jurisdiction is typically fact-specific.

<sup>121</sup> See *id.* at 422. It is important to note, however, that the law of misappropriation is more developed in some states (e.g., New York) than in others, and may also be preempted by federal laws, depending on the circumstances.

<sup>122</sup> See J.T. MCCARTHY, 2 TRADEMARKS AND UNFAIR COMPETITION § 10.51 (4th ed. 1996 rev.).

<sup>123</sup> See generally *id.* (describing a situation where a plaintiff may have standing to sue). The law of misappropriation illustrates why deep linking is more likely to be actionable than linking. While the analyses of deep linking and linking are not appreciably different under copyright and trademark law, the facts surrounding deep linking claims (e.g., bypassing the home page, the main source of another website's advertising revenue) are more likely to implicate the third misappropriation factor and be viewed as "reaping where one has

not sown." *Id.*

<sup>124</sup> See e.g. Jean Pierre Bazinet, *Movie-List—Universal Troubles*, (visited Nov. 3, 1999) <www.movie-list.com> (explaining that Universal's problem with Bazinet's website is that it allows linking into Universal's website).

<sup>125</sup> See *id.* (discussing the problems of deep linking involved with Bazinet's website).

<sup>126</sup> See *Ticketmaster Corp. v. Microsoft Corp.* *supra* note 18, at paras. 29, 33.

<sup>127</sup> *Id.* at para. 17.

<sup>128</sup> *Id.* at para. 16.

<sup>129</sup> See *id.* at para. 17.

<sup>130</sup> See Jonathan Gaw, *Ticketmaster Sues Internet Rival*, LOS ANGELES TIMES, Aug. 12, 1999 at C6; Laura Rich, *Ticketmaster: Think Before You Link*, NETWORK WORLD, Oct. 15, 1999; Joel Salkowski, *Ticket Giant Engages in Foolish War Over Links*, CHICAGO TRIBUNE, Aug. 23, 1999 at C4.

<sup>131</sup> See *id.*

<sup>132</sup> See *id.*

<sup>133</sup> See Khani T.L. Tran, *EBay Moves to Block AuctionWatch.com After Failure of Talks on Licensing Pact*, WASH. POST, Nov. 8, 1999.

Edge have developed indexing search services that allow consumers to search from their website for items listed on multiple auction sites, such as eBay. EBay has taken technical steps to block access to its website from such sites, arguing that such access amounts to unfair trade practices and trespassing.<sup>134</sup> EBay actually filed a suit against Bidder's Edge in December 1999 alleging unfair trade practices and trespassing.<sup>135</sup> The U.S. Justice Department is now examining whether eBay's efforts to limit access from such websites constitutes an anti-competitive practice.<sup>136</sup> The search services argue that actions such as eBay's impede the growth of the internet, and e-commerce, and adversely impact consumers.

#### B. Liability Under State Unfair Competition Laws for Framing

Framing is more likely to implicate state unfair competition laws. The common law claim of misappropriation, as set forth in the previous linking Section of this Article, could be applied to framing to develop a compelling argument against framing. In *Total News*, for example, the plaintiffs alleged unfair competition and misappropriation under New York common law, claiming that the defendants took "the entire commercial value of the news reported at each of the Plaintiffs' respective websites and literally [sold] it to others for Defendant's own profit."<sup>137</sup> Total News' actions were particularly egregious in that not only did Total News misappropriate the Plaintiffs' content, it also covered and replaced the Plaintiffs' revenue-generating devices (banner advertisements) with its own. Misappropriation is a broad cause of action and can often be tailored to new types of unfair business practices.<sup>138</sup> Thus, in any framing dispute, unfair competition, and more specifically misappropriation, are the claims most likely to be used, and the claims most likely to meet with success.

<sup>134</sup> See *id.* EBay also objects to such linking because its items are displayed next to items of its competitors. See *id.* EBay further contends that such search engines reduce the speed and performance of its website. See *id.*

<sup>135</sup> John Schwartz, *Territorial Disputes on Web—Probe of EBay Hinges on Rights Data*, WASH. POST, Feb. 5, 2000, at E1 (suit still pending).

<sup>136</sup> See *id.*; *Justice Department Examines eBay Practice*, WALL

#### VI. CONCLUSION AND RECOMMENDATIONS

Very few cases have tackled the issues of linking and framing; consequently, there is very little settled law in this area. Until the courts provide guidance, the following are some recommendations designed to limit the potential liability of website operators that link to and/or frame other websites:

(1) In all instances, the linking or framing website should seek permission from, or enter into an agreement with, the linked-to or framed website.

(2) Many websites have "Terms and Conditions of Service" which indicate, among other things, whether they approve being linked to or framed, and what the process is for getting approval for such linking or framing.<sup>139</sup> A website operator should follow any such instructions and conditions in the site's Terms and Conditions of Service when linking to or framing such site.

(3) Linking to the home page of a website is generally acceptable. However, the linking website should be careful not to imply any affiliation with the linked-to website that does not in fact exist. In addition, the linking website should avoid portraying the linked-to website in an unfavorable light.

(4) Deep linking by a *commercial* website without the permission of the linked-to website should be avoided.

(5) Deep linking by a commercial website to a *noncommercial* website, such as a federal agency or state government, without permission is probably acceptable.

(6) Framing other websites without their permission should be avoided. If a website is framed without the framed website's permissions, the framing website should ensure that: (1) it is clear to the user which website is framed, (2) proper attribution is given to all the content on the framed website, and (3) the banner advertise-

ST. J., Feb. 4, 2000.

<sup>137</sup> See *Complaint*, *supra* note 101, at para. 42.

<sup>138</sup> See Keller, *supra* note 119, at 401 (discussing, *inter alia*, the use of misappropriation doctrine in *Total News*).

<sup>139</sup> See, e.g., CNBC linking policy (visited Nov. 1, 1999) <[www.cnbc.com/misc/linking\\_policy.asp](http://www.cnbc.com/misc/linking_policy.asp)> (accessible only through the CNBC home page).

ments and links of the framed website are not disabled.

(7) If a website operator deep links or frames without following the above recommendations, the website operator should be prepared, when

faced with such an informal or formal complaint from the linked or framed website, to disable the linking or framing immediately (or negotiate an agreement to maintain the links or frames) or risk facing significant potential liability.