1-1-1998

Para-Sites: The Case for Hyperlinking as Copyright Infringement

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PARA-SITES: THE CASE FOR HYPERLINKING AS COPYRIGHT INFRINGEMENT

I. INTRODUCTION

The Internet enables society to share information and ideas more effectively than ever before. The dissemination of information on the Internet, unlike the use of books, magazines, or other traditional print media, is not constrained by the costs and delay of printing. Once an author makes his or her work available on the Internet, it is immediately accessible by millions of people around the world. The ease with which the Internet is accessed dramatically changes the way that copyrighted works are reproduced and distributed. However, that accessibility can also facilitate the infringement of those copyrights.[1] In attempting to maintain the balance between the benefits offered by the Internet and the rights of authors, courts have realized that traditional copyright concepts are strained when applied to the technology of the Internet.[2]

One particularly difficult application of copyright law to the Internet involves the practice of "linking" different Web sites with the use of hyperlinks."[3] This issue involves not only the hyperlink contained on a Web site but the act of hyperlinking itself. Because hyperlinking allows the connection of one Web site to another,[4] the question arises: if an individual creates a hyperlink to a Web site, has that individual violated the copyright of that site's author? The answer to this question is particularly meaningful for authors publishing on the Internet. Recently, some of the major news organizations sued a Web news service that

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1. *Cyberspace: The Legal Frontier*, LAW., May 6, 1997, at 10.

2. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A], at 1-66.8 (1997).

3. Hyperlinking is also referred to as linking, links, or hypertext links; such terms are used interchangeably in this Comment. *See* discussion *infra* note 23 and accompanying text. Although hyperlinking is actually a characteristic of the World Wide Web (the "Web"), Internet and Web concepts are used synonymously because both use the same "language" in transmitting files and documents. For further discussion on the language of the Internet and the Web, see discussion *infra* note 11 and accompanying text.

4. WEB-LINKING AGREEMENTS 1 (ABA ed., 1997). A "Web site" is a group of documents located on a computer network connected to the Internet. It may contain text, graphics, or both, and some sites may include sound and video. Although a Web site may consist of only one document (or "page"), a Web site usually consists of many individual Web documents or pages.

established links to the organizations' Web sites,[5] claiming that the Web news service misappropriated material from the Web sites through the use of hyperlinks.[6] Even though the parties reached an out-of-court settlement, the case revealed the potential for copyright infringement claims arising from the use of hyperlinks.[7]

This Comment argues that hyperlinking, the principal means by which computer users browse through Web sites and access information on the Internet,[8] constitutes a copyright infringement. Unfortunately, the current Copyright Act inadequately protects the rights of authors on the Internet. Although increased protection may impede the progress of the Internet, inasmuch as prohibiting or limiting hyperlinking decreases its overall efficiency, offering better copyright protection to authors will increase the use of the Internet as a medium of expression. This process will both further the goals of the Copyright Act and promoting the Internet itself.[9]

Part II briefly discusses the history and use of the Internet and the World Wide Web. Part III explains the principles of copyright law applicable to the Internet and Web site publishing. Part IV applies copyright law to hyperlinking and argues that unauthorized hyperlinking constitutes copyright infringement. Part V concludes that the Copyright Act of 1976[10] is inadequate to protect the rights of Internet authors against unlawful linking, and recommends that the Act must be amended to deal effectively with this recent copyright challenge on the Internet.

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5. *See* Washington Post Co. v. TotalNEWS, Inc., No. 97 Civ. 1190 (S.D.N.Y. filed Feb. 7, 1997); *see also* discussion *infra* Part IV.B.2.

6. *See* Washington Post Complaint ¶ 10, *available in Frames Technology: The Internet Equivalent of Pirating?*, L.J. EXTRA ON-LINE (visited Aug. 7, 1997) <http://www.ljx.com/internet.complain.html> (on file with the *Loyola of Los Angeles Entertainment Law Journal*) [hereinafter Washington Post Complaint]; *see also* discussion *infra* Part IV.B.2.

7. *See* discussion *infra* Part IV.B.2.

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

> The ubiquitous hyperlink has become essential to the success of the Web as both an information resource and a financially profitable medium. Indeed, some of the most popular and successful Web sites . . . provide directories of links to Web pages organized by topic . . . . For sites that hope to generate advertising revenues, the more visitors, the greater the potential payoff.

Id.

"Browsing" involves the act of visiting various Web sites through hyperlinks. *Id.* It is colloquially referred to as "surfing the Net." *See* Martin H. Samson, *Hyperlink at Your Own Risk*, N.Y.L.J., June 24, 1997, at 1.

9. Kurt Kleiner, *Surfing Prohibited*, NEW SCIENTIST, Jan. 25, 1997, at 28.

10. Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in 17 U.S.C. §§ 101–1010 (1994)).

Whereas the Internet is associated with the interconnection of various computer networks, the World Wide Web (the "Web") is regarded as *the* system of information within the Internet.[13] The Web's simplicity and interactive format have facilitated the use of the Internet in our society. Both individuals and organizations have established themselves on the Internet by creating Web sites. While most Internet service providers ("ISPs") charge a fee for such service,[14] commercial sites can defray such costs by selling advertisements on their site.[15]

B. Accessing a Web Site

The location of every Web site is designated by a specific sequence of alphanumeric characters known as a Uniform Resource Locator ("URL").[16] Although a Web site can be accessed by manually inputting its URL, hyperlinking remains the most common way to access a site.[17] Hyperlinking involves the placement of an icon on a Web site that when "clicked" calls up the URL of the destination site, causing that Web page to appear on the user's screen.[18]

However, a Web site cannot be accessed without the use of a Web client or browser.[19] A Web browser is a program that retrieves documents

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13. *Id.* at 832. Because the Web recognizes more than one protocol, different computers operate as one large web of information. *See* discussion *supra* note 11 and accompanying text.

Tim Berners-Lee at CERN, the European Particle Physics Laboratory, began the Web project in 1989. Kleiner, *supra* note 9, at 28. Berners-Lee attempted to find a way for researchers to share information and ideas world-wide. HESLOP & BUDNICK, *supra* note 11, at 28. The project was referred to as the Hypertext Project. *Id.* "Hypertext" refers to the text containing links to other documents contained on the Internet. *Id.*; Freeling & Levi, *supra* note 8, at S5. A person may "click" on a hypertext link to obtain more information on a subject. HESLOP & BUDNICK, *supra* note 11, at 4; Kleiner, *supra* note 9, at 28.

14. HESLOP & BUDNICK, *supra* note 11, at 21.

15. Linda Himelstein, *Web Ads Start to Click*, BUS. WK., Oct. 6, 1997, at 130.

16. A URL usually consists of (1) the type of transfer protocol used, (2) the server, and (3) the document's name or file name. One of the most common protocols is HTTP. *See* discussion *supra* note 11 and accompanying text. For example, a typical URL for a Web site may appear as *http://www.internet.com/basics.html*. The "http" indicates the type of protocol used to retrieve and send the document. The "internet.com" is the server on which the document is located, and "basics.html" is the name of the document or file. In addition, a URL may also include the directory containing the Web document. In the URL, *http://www.internet.com/intro/basics.html*, "intro" is the directory location for the document (or page) "basics.html."

17. Richard Raysman & Peter Brown, *Dangerous Liaisons: The Legal Risks of Linking Web Sites*, N.Y.L.J., Apr. 8, 1997, at 3.

18. Before the introduction of hyperlinks, Internet users relied on file indexes and keyword searches to locate information. Today, hyperlinks have simplified this process to the "click" of a button. *See* Kleiner, *supra* note 9, at 28.

19. HESLOP & BUDNICK, *supra* note 11, at 7. In 1992, the National Center for Supercomputing Applications ("NCSA") introduced the first Web browser, Mosaic. The

II. BACKGROUND

Before considering the legal issues raised by hyperlinks, it is necessary to understand the development of the Internet as a communications medium. Such a review reveals how the Internet raises a problem for courts in balancing the interests of the public and the rights of authors.

A. The Internet and the World Wide Web

The Internet is not easily defined. Technically, it is not a single network but "a network of networks," connecting local area networks ("LANs") and wide area networks ("WANs") together.[11] This connection of various systems has transformed the Internet into a global communications medium. Over the past few years, corporations, universities, non-profit organizations, and government agencies have each contributed to the Internet's development by making it more accessible to the public.[12]

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11. *See* DOUGLAS E. COMER, THE INTERNET BOOK 54 (1995) (footnotes omitted). A LAN is a group of computers connected over a short distance; whereas, a WAN is a group of computers connected over a long distance. *Id.* For example, a corporation may have a LAN to facilitate the exchange of information within a single office, but it may also have a WAN to allow communications with its foreign branches. A "network" is a "system of computers, terminals, and databases connected by communication lines." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 794 (9th ed. 1991) [hereinafter WEBSTER'S].

Since the networks connected to the Internet may not be compatible, networks communicate by way of protocols. BRENT HESLOP & LARRY BUDNICK, HTML PUBLISHING ON THE INTERNET FOR WINDOWS 4 (1995). A protocol is the language and rules by which computers communicate with each other. *Id.* The underlying protocol for the Internet is known as Transmission Control Protocol and Internet Protocol ("TCP/IP"). The Web includes various protocols: File Transfer Protocol ("FTP"), Telnet, Gopher, Wide-Area Information Servers ("WAIS"), and more. *Id.* The protocol used for accessing Web documents is Hypertext Transfer Protocol ("HTTP"). *Id.* at 10.

12. *See* ACLU v. Reno, 929 F. Supp. 824, 832 (E.D. Pa. 1996) (discussing the accessibility of the Internet in the context of reviewing the Communications Decency Act of 1996). Universities often provide connections to the Internet through computer centers and campus libraries, where the Internet has become an invaluable educational resource. *Id.* Corporations may allow access to the Internet for research purposes or to facilitate the exchange of information. *Id.* at 833. If individuals do not otherwise have access at school or at work, they can sign up with an Internet service provider ("ISP"), a company that charges a fee for access to the Internet. *Id.* at 832–33. Commercial on-line providers, such as America Online, CompuServe, the Microsoft Network, and Prodigy, have also included Internet access as an additional service. Some communities have created "free-nets" or local networks that provide Internet access for their citizens. *Id.* at 833. Additionally, some coffee houses offer customers access to the Internet. *Id.*

or files from a Web server or host computer.[20] A Web server is a program that sends the file or Web document after it has been requested by a browser.[21]

Using hypertext markup language ("HTML"),[22] three types of links can be created: (1) intra-page links; (2) intra-system links; and (3) inter-system links.[23] Such links are created by simply using a HTML linking command and the URL for a destination site.[24] Furthermore, when hyperlinking to another Web site, the author of a linking site often creates a "direct link" to that site.[25] Once activated, a direct link transfers an Internet user to the destination site.[26] This method of hyperlinking allows the viewing of only one site at a time.[27]

A second method of linking Web sites is framing. Framing allows a person to link to another Web site while maintaining the original site on the user's screen.[28] A framing site appears as multiple windows with each

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beginning of the Web's popularity is attributed to Mosaic. *Id.* at 5.

20. *Id.* at 7. A server or host computer is connected to the Internet. *See generally* RICHARD K. SWADLEY, THE INTERNET UNLEASHED 43 (1995) (discussing how computers and networks are connected to the Internet).

21. *Id.* at 6. A Web server is contained on a server or host computer.

22. HESLOP & BUDNICK, *supra* note 11, at 7. "HTML" is the formatting language for creating a Web document. *Id.*

23. *Id.* at 139. Intra-page links connect to other parts of the same Web site. *Id.* Intra-system links connect to other Web sites on the same server. *Id.* Inter-system links connect to a Web site on another server. *Id.* In a Web site's HTML code, a link is written as either a hypertext reference ("HREF") link or image ("IMG") link. Raysman & Brown, *supra* note 17, at 3.

In a Web site's HTML code, for example, a HREF link appears as <A HREF="http://www.internet.com/basics.html">Internet Basics</A>. ELIZABETH CASTRO, HTML FOR THE WORLD WIDE WEB 93 (2d ed. 1997). Similarly an IMG link appears as <A HREF="http://www.internet.com/basics.html"><IMG SRC="basics.gif"></A>. *Id.* at 102. On a Web page, however, a hyperlink appears as a highlighted word or phrase. It may also be embedded in an image attributable to the destination site.

24. The linking command or HTML command is contained in the source code or HTML code of the linking site. The "source code" or "HTML code" refers to the formatting for a Web document. In fact, a person can view the source code for a Web site with a browser. With the Web browser *Netscape Navigator*, a person simply clicks on "Document Source" under the View Menu. CASTRO, *supra* note 23, at 208.

25. This method of hyperlinking will be referred to as a direct link. It differs from other methods of linking that are discussed later.

26. Raysman & Brown, *supra* note 17, at 3.

27. *Id.*

28. Freeling & Levi, *supra* note 8, at S5; *see also Use of Frames to Incorporate Third-Party Content in Web Site Sparks Controversy*, COMPUTER L. STRATEGIST, Mar. 1997, at 8 [hereinafter *Use of Frames*] ("Framing allows web authors to divide web pages into multiple, scrollable regions and windows that may operate independently of each other. Using this technique, web authors . . . allow viewers to look 'through' one site to another, without ever terminating the connection to the linking site.").

window containing the contents of a destination site. With framing, a site owner can incorporate parts of or entire Web sites produced by others, as well as include its own advertising, logos, or promotions.[29] The parasitic nature of a framing site allows users to rely on one site for accessing another related site. Moreover, considering the market for advertising on the Internet, framing sites allow users to avoid visiting the destination site directly, costing advertisers on that site potential customers.

C. Are You Linking to Me?

In 1997, commercial publishers brought to the forefront the issue of copyright infringement through the use of hyperlinks.[30] Recognizing the Web's increasing popularity, many publishers have established Web sites containing articles from their print publications.[31] These companies are now challenging the unauthorized practice of hyperlinking to their sites by other Web sites, particularly other commercial sites. The destination sites object to the linking sites or link providers profiting from hyperlinking to the destination sites. More specifically, framing sites allow Internet users to circumvent the advertising on the framed sites. Because material on the framing sites typically occupy most of the user's screen, any advertisements on the framed destination sites are either obscured or hidden. Thus, advertisements on the destination sites are functionally replaced by those on the linking site. Consequently, framing sites attract advertising revenue away from the destination sites.

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29. *Use of Frames*, *supra* note 28, at 8.

30. In the United States, there have been only two cases to date involving claims against unauthorized hyperlinks. *See* Ticketmaster Corp. v. Microsoft Corp., No. 97 Civ. 3055 (C.D. Cal. filed Apr. 28, 1997); Washington Post Co. v. TotalNEWS, Inc., No. 97 Civ. 1190 (S.D.N.Y. filed Feb. 7, 1997). The *Ticketmaster* case is not discussed in this Comment because it involves the issue of linking as a matter of trademark infringement. Ticketmaster charged Microsoft with wrongfully misappropriating and misusing Ticketmaster's name and trademarks, diluting the value of Ticketmaster's name, trademarks, and business. *See* Ticketmaster Complaint ¶ 3, *available in Web Suit*, L.J. EXTRA ON-LINE (visited Aug. 7, 1997) <http://www.ljx.com/ljxfiles/ticketmaster/complaint.html> (on file with the *Loyola of Los Angeles Entertainment Law Journal*). Nonetheless, the mere existence of this case further supports the significance of the hyperlinking controversy. *See* discussion *infra* Part IV.B.2 for an analysis of *TotalNEWS*.

31. SWADLEY, *supra* note 20, at 35.

III. COPYRIGHT LAW

A. Overview of Copyright Law

Although the history of copyright law can be characterized as a continuous response to technological advancements,[32] the Constitutional Convention did not adopt the copyright clause in the Constitution as a response to technology.[33] The Framers of the Constitution recognized that authors would be motivated to create works if given an economic incentive, such as the exclusive right to reproduce their works.[34] Thus, Congress has enacted various copyright statutes granting authors exclusive rights in their work. However, even though a work is afforded copyright protection, Congress has provided many statutory limitations and exceptions for the public's use of such work.[35]

B. Requirements for Copyright Protection

The requirements for copyright protection are minimal. For works created after January 1, 1978, an author of a work receives copyright protection even though he or she has not registered the work with the

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32. INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 1, 7 (Sept. 1995) [hereinafter the WHITE PAPER].

> Changes in technology generate new industries and new methods for reproduction and dissemination of works of authorship, which may present new opportunities for authors, but also create additional challenges. Copyright has had to respond to those challenges, from Gutenberg's moveable type printing press to digital audio recorders and everything in between—photocopiers, radio, television, videocassette recorders, cable television and satellites.

Id.

33. 1 NIMMER & NIMMER, *supra* note 2, § 1.03[A], at 1-66.7.

34. *Id.* In *Mazer v. Stein*, 347 U.S. 201 (1954), the Supreme Court declared: "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance the public welfare through the talents of authors and inventors in 'Science and the useful Arts.'" *Id.* at 219. Later, in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), the Court stated:

> Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability to literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.

Id. at 156.

35. *See also* 17 U.S.C. §§ 107–21 (1994); *see* discussion *infra* Part III.E.

Copyright Office.[36] Under section 102(a) of the Copyright Act, "[c]opyright protection [applies to] . . . original works of authorship fixed in any tangible medium of expression . . . ."[37] Hence, copyright protection requires: (1) work of authorship; (2) fixation; and (3) originality.

1. Work of Authorship

The Copyright Act delineates works of authorship into eight broad categories: (1) literary works; (2) musical works; (3) dramatic works; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.[38] Although the work of authorship requirement is merely a classification of a work, how a work is categorized affects the rights granted to a copyright owner.[39]

2. Fixation

Perhaps the easiest requirement to satisfy is the requirement that a work be fixed in a tangible medium of expression—the "writings" requirement.[40] The Supreme Court has interpreted the "writings" requirement to mean "any physical rendering" of an author's work.[41]

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36. 2 NIMMER & NIMMER, *supra* note 2, § 7.16[A][1], at 7-148. While the mere registration of a work in the Copyright Office does not create a copyright, it confers on an author certain advantages: (1) it establishes a public record of the ownership of a copyright; (2) it establishes prima facie validity of the copyright; (3) it allows a copyright owner a broader range of remedies; and, most importantly, (4) it secures the right to file an infringement suit. *Id.* § 12.08, at 12-125. After the Berne Convention Amendments, registration is not required to bring an infringement suit. The Berne Convention prohibits imposition of formalities as a prerequisite for copyright protection. *Id.* § 7.16[B][1][b], at 7-161.

37. 17 U.S.C. § 102(a) (1994).

38. *Id.* For purposes of this Comment, it is not necessary to discuss all the works of authorship. For further discussion on the other types of "works of authorship," see 1 NIMMER & NIMMER, *supra* note 2, §§ 2.04-2.11, at 2-44 to 2-172.15.

39. *See* discussion *infra* Part III.C.

40. 1 NIMMER & NIMMER, *supra* note 2, § 1.08[B], at 1-66.25. The "writings" requirement is derived from the copyright clause in the Constitution. The United States Constitution provides: "Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their Writings and Discoveries . . . ." U.S. CONST. art. I, § 8, cl. 8.

41. Goldstein v. California, 412 U.S. 546, 561 (1973) ("'Writings' . . . [are not] construed in their narrow literal sense but, rather, with the reach necessary to reflect the broad scope of constitutional principles."). In *Reiss v. National Quotation Bureau*, 276 F. 717 (S.D.N.Y. 1921), Judge Learned Hand provided the standard for the constitutional interpretation of the "writings" requirement:

> [The Copyright Clause's] grants of power to Congress compromise, not only what was then known, but what the ingenuity of men should devise thereafter. Of course, the new subject-matter must have some relation to the grant; but we

Thus, the fixation requirement is met when an author embodies his or her work on a material object, such as a piece of paper, a canvas, or a computer's hard drive.

3. Originality

Originality is not defined in the Copyright Act, and thus, it is necessary to look to the case law for guidance. In *Feist Publications, Inc. v. Rural Telephone Service Co.*,[42] the Supreme Court held that originality consists of (1) minimal creativity and (2) independent creation.[43] In *Feist*, Rural Telephone provided telephone service to several communities in northwest Kansas and published white pages containing an alphabetical listing of subscribers' names, towns, and telephone numbers.[44] Feist also published telephone books and tried unsuccessfully to license Rural Telephone's list of names.[45] Without Rural Telephone's consent, Feist copied approximately 1300 names and numbers from Rural Telephone's white pages, including four fictitious listings that Rural Telephone inserted to detect copying by competitors.[46]

The Supreme Court found that Rural Telephone's copyright in its telephone directory did not protect the names and numbers copied by Feist.[47] In delivering the majority opinion, Justice O'Connor relied on the constitutional principle that a protected work must be original.[48] O'Connor stated that "original" means a work has a minimal level of creativity.[49] The Court further recognized that facts in and of themselves are *not* copyrightable, and thus, the facts underlying a work can be freely copied.[50] On the other hand, the Court held that factual compilations may possess the requisite originality.[51] It held that Rural Telephone's alphabetical listing of telephone subscribers and their numbers was not

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> interpret it by the general practices of civilized peoples in similar fields, for it is not a strait-jacket, but a charter for a living people.

Id. at 719.

42. 499 U.S. 340 (1990).

43. *Id.* at 345 ("Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.").

44. *Id.* at 342.

45. *Id.* at 343.

46. *Id.* at 342–43.

47. *Id.* at 361.

48. 499 U.S. at 345.

49. *Id.* at 346.

50. *Id.* at 348.

51. *Id.* at 345.

copyrightable as a compilation because it did not possess the minimum creativity to constitute an original work of authorship.[52]

This decision is significant not only for its clarification of the originality requirement, but also for its implications for the copyright protection afforded to lesser works of authorship, such as factual compilations. The Court concluded that factual compilations receive "thin" copyright protection.[53] Nonetheless, any distinguishable and meaningful variation from an underlying work should satisfy the Court's originality requirement.

The *Feist* Court also required that a work be independently created to satisfy the originality requirement.[54] Judge Learned Hand best expressed this concept: "[I]f by some magic a man who had never known it were to compose anew Keats's *Ode on a Grecian Urn*, he would be an 'author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's [public domain poem]."[55] In short, an author must not have copied another work.

C. Exclusive Rights Under Copyright Law

The copyright law grants certain exclusive rights to the owner of a copyright. Section 106 provides the owner of a copyright the exclusive right to: (1) reproduce the work; (2) prepare derivative works; (3) distribute copies of the work; (4) perform the work publicly; and (5) publicly display the work.[56] However, the owner of a copyright is not necessarily entitled to all of the exclusive rights[57] because certain works of authorship may not involve a performance or display right.[58]

1. Reproduction Right

The right to reproduce a copyrighted work may be the most fundamental right granted by copyright law.[59] The reproduction right

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52. *Id.* at 362.

53. *Id.* at 359.

54. *Feist*, 499 U.S. at 346.

55. Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936).

56. 17 U.S.C. § 106 (1994).

57. 2 NIMMER & NIMMER, *supra* note 2, § 8.01[A], at 8-14.1 ("[T]he nature of rights available to a copyright owner will often vary considerably depending upon the type of work that has been copyrighted.").

58. *Id.* § 8.14[A], at 8-181. For instance, the copyright owner of a sculptural work is not entitled to a performance right, because a sculpture cannot be "performed." *Id.*

59. *Id.* § 8.02[A], at 8-28.

involves the ability to reproduce a work in "copies or phonorecords."[60] This right should not be confused, however, with the concept of "copying."[61] While reproduction occurs when an author fixes a work onto a material object, copying may take place without fixation,[62] such as the unauthorized performance of a play.

2. Adaptation Right

The right to prepare derivative works[63] enables a copyright owner to exploit markets other than the one in which the work was first published. For example, the motion picture rights to a best-selling novel may be a more profitable derivative market. Accordingly, the adaptation right is infringed when a third party makes an unauthorized derivative work in which a pre-existing work is "recast, transformed, or adapted."[64] While it is unclear whether fixation is required for an infringement of the adaptation right, *Nimmer on Copyright*, a leading treatise on copyright law, argues that fixation should be required to infringe the adaptation right.[65]

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60. *Id.* Section 101 of the 1976 Act provides that "'[c]opies' are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 101. "Phonorecords," on the other hand, are defined as "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." *Id.*

61. 2 NIMMER & NIMMER, *supra* note 2, § 8.02[A], at 8-28; *see* discussion *infra* Part III.D. concerning copyright infringement.

62. 2 NIMMER & NIMMER, *supra* note 2, § 8.02[A], at 8-28; *see* discussion *supra* Part III.B.2.

63. Section 101 of the 1976 Act defines a derivative work as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." 17 U.S.C. § 101 (1994).

64. *Id.*

65. 2 NIMMER & NIMMER, *supra* note 2, § 8.09[B], at 8-128.4. In *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965 (9th Cir. 1992), the Ninth Circuit held that "[a] derivative work must be fixed to be protected under the Act, but not to *infringe*." *Id.* at 968 (citation omitted). Although this pronouncement constituted dictum, it nonetheless raised the issue of whether a derivative work must be fixed in order to violate a copyright author's adaptation right. *See* Freeling & Levi, *supra* note 8, at S5.

3. Distribution Right

The distribution right gives the copyright owner the right to control the first public distribution of his or her work.[66] The infringement of this right requires an "actual dissemination of either copies or phonorecords" of the copyrighted work.[67] Currently, the distribution right does not include the transmission of copyrighted works, as discussed under the performance and display rights.

4. Performance Right

The performance right is only available to certain works, such as musical and dramatic works.[68] As defined in section 101, "[t]o 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process . . . ."[69] Thus, a performance includes not only the initial rendition, but any further rendition that is distributed to the public.[70] For example, a person performs a work by reciting a poem, singing a song, or playing a tape on a VCR. Similarly, a broadcaster performs when he or she transmits a live performance or one contained on a phonorecord.

A copyright owner's performance right is restricted, however, to *public* performances.[71] Clearly, the drafters of the Copyright Act did not intend to prohibit individuals from private performances in their own homes.[72] As defined, a public performance is one that takes place in a

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66. The public distribution of a work may be by sale, rental, lease, or lending. H.R. REP. NO. 94-1476, at 62 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5675.

67. 2 NIMMER & NIMMER, *supra* note 2, § 8.11[A], at 8-137.

68. *Id.* § 8.14[A], at 8-181.

69. 17 U.S.C. § 101.

70. H.R. REP. NO. 94-1476, at 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5675–76.

71. 2 NIMMER & NIMMER, *supra* note 2, § 8.14[C], at 8-185.

72. Section 101 provides:

> "[P]ublicly" means—
>
> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

17 U.S.C. § 101.

public setting or before a public group.[73] More importantly, a public performance includes the transmission of a work.[74]

5. Display Right

As with the performance right, the right to display a work is limited to public displays.[75] Section 101 of the Copyright Act defines "display" as "to show a copy of [a copyrighted work], either directly or by means of a film, slide, television image, or any other device or process . . . ."[76] Thus, while a series of still photographs of a film would not infringe the performance right of the film's copyright owner, they would likely violate the display right. Accordingly, since a Web site is more analogous to a display of a copyrighted work, an Internet author may be entitled to a display right rather than a performance right.[77]

D. Copyright Infringement

For a copyright owner to maintain a suit for copyright infringement, he or she must prove: (1) ownership of a valid copyright in the work; (2) copying by the defendant; and (3) improper appropriation.[78] To prove ownership, a plaintiff's work must not have entered the public domain, or failed to satisfy the formalities for copyright protection.[79] Often, copying by the defendant cannot be shown by direct evidence, and thus, a plaintiff must offer circumstantial evidence of a defendant's copying, such as a defendant's access to a plaintiff's work or similarity between the works.[80] Because a person cannot infringe a copyright if that person independently created a copy of a plaintiff's work,[81] as in Judge Learned Hand's

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73. *Id.*

74. *Id.*

75. *Id.* § 106.

76. *Id.* § 101.

77. The legislative history of 1976 Act broadly defines the display right to cover "the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube, or similar viewing apparatus connected with any sort of information storage and retrieval system." H.R. REP. NO. 94-1476, at 64 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5677.

78. 4 NIMMER & NIMMER, *supra* note 2, § 13.01, at 13-5, § 13.01[B], at 13-9.

79. The formalities for copyright protection include fixation and originality. *See* discussion *supra* note 36 and accompanying text. Registration of a work is prima facie evidence of copyright ownership. *Id.*

80. *Id.* § 13.01[B], at 13-10 to 13-11.

81. *See* discussion *supra* Part III.B.3.

example, proof of a defendant's access reduces the chance of finding independent creation by a defendant.[82]

In addition, a plaintiff could establish copying by proving a "striking similarity" between the alleged copy and the original work.[83] If a defendant's work is overwhelmingly similar to a plaintiff's work, a trier of fact can infer that the defendant could not have independently created the infringing work.[84] Similarities between works that tend to prove actual "copying" are called probative similarities.[85]

After satisfying the copying element, a plaintiff must prove improper appropriation by showing that the infringing copy is "substantially similar" to the copyrighted work.[86] Although courts have applied various tests in determining substantial similarity,[87] most courts agree that trivial similarities are non-infringing.[88] Some courts have held, however, that even a negligible yet qualitatively important taking of a copyrighted work may constitute a substantial similarity.[89] Therefore, while a defendant need not copy the entire work to violate a copyright, a defendant must copy enough to raise an actionable claim for infringement.[90]

A defendant may be liable under any one of three types of infringement: (1) direct infringement; (2) vicarious infringement; or (3)

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82. 4 NIMMER & NIMMER, *supra* note 2, § 13.01[B], at 13-15.

83. *Id.* § 13.02[B], at 13-22. A striking similarity means that "the similarities must be so striking as to preclude the possibility that the defendant independently arrived at the same result." *Id.* at 13-22 to 13-23.

84. *Id.*

85. 4 NIMMER & NIMMER, *supra* note 2, § 13.01[B], at 13-11. *See generally* Alan Latman, *"Probative Similarity" As Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement*, 90 COLUM. L. REV. 1187, 1204 (1990) (suggesting that probative similarity be attributed to copying as a factual matter and retaining substantial similarity to describe copying as a legal proposition).

86. 4 NIMMER & NIMMER, *supra* note 2, § 13.03[A], at 13-27. Whereas a striking similarity merely proves actual copying by a defendant, a finding of substantial similarity indicates that such copying was improper.

87. *Id.* § 13.03[A][1][a]–[d], at 13-31 to 13-45.

88. *Id.* § 13.03[A], at 13-27.

89. *See* Burroughs v. Metro-Goldwyn-Mayer, Inc., 683 F.2d 610, 624 n.14 (2d Cir. 1982) ("[A] copyright infringement may occur by reason of a substantial similarity that involves only a small portion of each work . . . ."); Elsmere Music, Inc. v. NBC, 482 F. Supp. 741, 744 (S.D.N.Y. 1980) (holding that the defendant's copying, although slight, constituted a significant part of the copyrighted work).

90. 4 NIMMER & NIMMER, *supra* note 2, § 13.03[A], at 13-28 ("[T]he test for infringement of a copyright is of necessity vague . . . .") (quoting Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960)). *Nimmer on Copyright* notes that the necessary quantum of substantial similarity is unclear. *Id.* at 13-47. Inevitably, courts must engage in line-drawing when analyzing the substantial similarity element.

contributory infringement.[91] Direct infringement occurs when a person violates any one of the exclusive rights of a copyright holder.[92] A court does not look at whether the defendant had knowledge of the infringement or that he or she intended to violate the rights of the copyright owner.[93] This standard of strict liability ensures the utmost protection of a copyright owner's rights.

Vicarious infringement occurs when a third party is able to control or supervise the acts of the direct infringer and derives a financial benefit from the infringing acts.[94] The third party need not participate in the infringing act nor have knowledge of it to be liable for infringement.[95] For instance, in *Shapiro, Bernstein & Co. v. H.L. Green Co.*,[96] the defendant lessor was held liable for the infringing acts of his lessee, who sold pirated records in the leased space.[97]

Lastly, contributory infringement occurs when the third party knows the infringement is taking place, and the third party participates substantially in the infringing conduct.[98] In *Elektra Records Co. v. Gem Electronic Distributors, Inc.*,[99] for example, the court held the defendant liable for contributory infringement for loaning customers tapes containing copyrighted musical works and providing them with the means to make

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91. James A. Kirkland, *Emerging Internet Copyright Issues*, *in* FIRST ANNUAL INTERNET LAW INSTITUTE 531, 536 (PLI ed., 1997).

92. 17 U.S.C. § 501 (1994).

93. Playboy Enters. v. Frena, 839 F. Supp. 1552, 1559 (M.D. Fla. 1993) ("Intent or knowledge [to infringe] is not an element of infringement, and thus even an innocent infringer is liable for infringement . . . ."); *see also* Kirkland, *supra* note 91, at 536.

94. Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304 (2d Cir. 1963). The court stated in *Shapiro*:

> When the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials—even in the absence of actual knowledge that the copyright monopoly is being impaired—the purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation.

Id. at 307 (citations omitted).

95. *Id.* at 307.

96. 316 F.2d 304 (2d Cir. 1963).

97. *Id.* at 306.

98. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 486 (1984); *see also* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 397 (1968) ("[The] mere quantitative contribution cannot be the proper test to determine copyright liability . . . . Rather, resolution of the issue . . . depends upon a determination of the function that [the alleged infringer] plays in the total [reproduction] process . . . ."); Gershwin Publ'g Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) (holding that "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer") (footnote omitted).

99. 360 F. Supp. 821 (E.D.N.Y. 1973).

copies.[100] In contrast, the Supreme Court, in *Sony Corp. of America v. Universal City Studios, Inc.*,[101] found the manufacturer of a Betamax machine not liable as a contributory infringer for the taping of television programs by the VCR owner.[102] The Supreme Court concluded that the manufacturers of "staple articles of commerce" having substantial non-infringing uses cannot be held liable as contributory infringers.[103]

E. Fair Use Defense to Copyright Infringement

Even after a plaintiff proves a prima facie case of copyright infringement, a defendant may not be liable if the copy qualifies as a "fair use" of the original work.[104] Under section 107 of the Copyright Act, a court must balance four nonexclusive factors in determining fair use: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality copied of the work; and (4) the effect on the potential market for the copyrighted work.[105] While there is no bright-line rule for determining fair use, section 107 also considers certain uses as inherently fair, specifically reproduction of a copyrighted work for the purposes of "criticism, comment, news reporting, teaching . . . scholarship, or research . . . ."[106] However, because the fair use analysis looks to the facts and circumstances of each case,[107] it does not lend itself to predictable results.

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100. *Id.*

101. *See* 464 U.S. 417 (1984).

102. *Id.* at 456.

103. *Id.* at 442.

104. 4 NIMMER & NIMMER, *supra* note 2, § 13.05, at 13-149.

105. *Sony*, 464 U.S. at 448.

106. 17 U.S.C. § 107 (1994).

107. 4 NIMMER & NIMMER, *supra* note 2, § 13.05[A][1][c], at 13-154. The court in *Meredith Corp. v. Harper & Row, Publishers, Inc.*, 378 F. Supp. 686 (S.D.N.Y. 1974), summarized this concept:

> Fair use is to be determined by a consideration of all of the evidence, and among other elements entering into the determination of the issue, are the extent and relative value of copyrighted material, and the effect upon the distribution of objects of the original work . . . . Whether a particular use of a copyrighted article, without permission of the owner, is a fair use, depends upon the circumstances of the particular case, and the court must look to the nature and objects of the selections made, the quantity and value of material used, and the degree in which the use may prejudice the sale, diminish the profits, or supersede the objects of the original work . . . .

Id. at 689 (S.D.N.Y. 1974).

1. Purpose and Character of Use

Courts typically focus on the commercial nature of the defendant's usage in determining fair use.[108] If a defendant's copying is for economic gain, a presumption against fair use arises.[109] While a finding of commerciality is not dispositive of the fair use issue, a court is less likely to find a fair use privilege when a defendant profits from the copyrighted author's efforts.[110] Some courts also look at purposes other than a defendant's profit motive, particularly bad faith.[111] Intuitively, a use made in bad faith is inconsistent with this privilege because an assumption of good faith and fair dealing underlies a fair use.[112]

2. Nature of Copyrighted Work

The inquiry into the nature of the work presumes that the public should have more access to certain works than others.[113] If a work is factual in nature, as opposed to a work that is creative, courts are more willing to find a fair use.[114] In addition, a work that is unavailable or out-of-print is more susceptible to a fair use privilege.[115] The public has a greater interest in a work that is not widely disseminated. In contrast, an unpublished work does not receive the full extent of the fair use privilege.[116] An author's right to control the initial distribution of his or her work may outweigh a defense of fair use.[117] Accordingly, a court must reconcile such interests when examining this factor.

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108. 4 NIMMER & NIMMER, *supra* note 2, § 13.05[A][1][c], at 13-160.

109. *Sony*, 464 U.S. at 451 ("[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright . . . .").

110. *Harper & Row*, 471 U.S. at 562; 4 NIMMER & NIMMER, *supra* note 2, § 13.05[A][1][c], at 13-161; *cf.* Los Angeles News Serv. v. Tullo, 973 F.2d 791, 797 (9th Cir. 1992); Pacific & S. Co. v. Duncan, 744 F.2d 1490, 1496 (11th Cir. 1984) (holding defendant engaged in commercial use of copyrighted material even though customers used material for personal purposes).

111. *Harper & Row*, 471 U.S. at 562; Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 146 (S.D.N.Y. 1968); 4 NIMMER & NIMMER, *supra* note 2, § 13.05[A], at 13-72.

112. *Time*, 293 F. Supp. at 146.

113. 4 NIMMER & NIMMER, *supra* note 2, § 13.05[A][2][a], at 13-168.

114. *Id.*

115. *Id.* § 13.05[A][2][b], at 13-172.

116. *Harper & Row*, 471 U.S. at 554.

117. *Id.*

3. Amount and Substantiality of Use

Additionally, a court must analyze whether a defendant has excessively copied a plaintiff's work.[118] While a verbatim copy may qualify as excessive per se, this factor also depends on the purpose and character of a defendant's use.[119] For instance, in reviewing a book, a literary critic would be inclined to quote substantially from its passages.[120] Although a fair use would likely apply to such copying, a person must be mindful to not fulfill the market demand for a plaintiff's work with his or her copy. Moreover, courts analyze this factor from both a quantitative as well as qualitative perspective.[121] Thus, although a defendant may copy an insignificant amount of a plaintiff's work, he or she could still be liable for infringement if the amount copied represented the work's substance.[122]

4. Effect of Use on Market for Work

Finally, courts frequently cite the market effect factor as the most important in determining fair use.[123] If the market for a copyrighted work is eliminated, the author has no economic incentive to create other works. For that reason, a court's analysis may be strongly motivated by this factor. Furthermore, in examining the impact on the market, courts focus on the potential, rather than the actual, harm.[124] Accordingly, a court will also look at the effect on the derivative markets for a plaintiff's work.[125]

F. Implied License Defense to Copyright Infringement

If an alleged infringer lacks a fair use defense, a defendant could assert that he or she holds a nonexclusive license, or more specifically an implied license to use the work. Typically, a transfer of copyright

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118. This factor should not be confused with substantial similarity under copyright infringement. Since a defendant only asserts a fair use defense after a finding of copyright infringement, this factor is not analyzed until a plaintiff proves substantial similarities between the defendant's infringing work and plaintiff's copyrighted work.

119. 4 NIMMER & NIMMER, *supra* note 2, § 13.05[A][3], at 13-178.

120. This factor is closely related to the market effect factor discussed below. 4 NIMMER & NIMMER, *supra* note 2, § 13.05[A][3], at 13-178; *see* Fisher v. Dees, 794 F.2d 432, 437 (9th Cir. 1986).

121. 4 NIMMER & NIMMER, *supra* note 2, § 13.05[A][3], at 13-178.

122. *Harper & Row*, 471 U.S. at 569.

123. *Id.* at 566 ("This last factor is undoubtedly the single most important element of fair use."); 4 NIMMER & NIMMER, *supra* note 2, § 13.05[A][4], at 13-180.

124. 4 NIMMER & NIMMER, *supra* note 2, § 13.05[A][4], at 13-181.

125. *Harper & Row*, 471 U.S. at 568 ("[Fair use analysis] must take account not only of harm to the original but also of harm to the market for derivative works.").

ownership requires a writing by the copyright owner and the licensee.[126] However, the Copyright Act does not recognize a nonexclusive license as a transfer of copyright ownership.[127] Thus, by negative inference, a nonexclusive license may be granted orally or implied by conduct.[128] In *Effects Associates, Inc. v. Cohen*,[129] for instance, the Ninth Circuit held that because Effects had delivered a copy of its work to the defendant for distribution, the defendant had received a nonexclusive implied license.[130]

However, an implied license may be qualified in its terms. Just as an implied license may arise by a party's conduct, the terms of the license are determined by the facts and circumstances of each situation.[131] Thus, even though a person has implicit authority to use the copyrighted work, that person can still violate a copyright by exceeding the terms of the license.[132] Accordingly, the question arises of what license, if any, can be inferred from the existence of a Web site on the Internet. If a license does exist, its precise terms and scope must be determined as well.

IV. HYPERLINKS INFRINGE THE COPYRIGHT OF WEB SITES

Within the context of the Internet, two possible copyright infringements exist. First, the hyperlink itself, inasmuch as it represents the specific and unique URL of a destination site, may violate the copyright of that destination site. For example, assuming a business can copyright the URL for its Web site, a person placing that URL into a directory without permission would infringe the business' copyright in its URL.

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126. 2 NIMMER & NIMMER, *supra* note 2, § 10.03[A][7], at 10-43.

127. 17 U.S.C. § 101 (1994). The 1976 Act defines a "transfer of copyright ownership" as "an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license." *Id.*

128. 2 NIMMER & NIMMER, *supra* note 2, § 10.03[A][7], at 10-44; Effects Assocs., Inc. v. Cohen, 908 F.2d 555, 558 (9th Cir. 1990); *see* Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1167 n.35 (1st Cir. 1994); MacLean Assocs., Inc. v. Wm. M. Mercer-Meidinger-Hansen, Inc., 952 F.2d 769, 778–79 (3d Cir. 1991); Ladas v. Potpourri Press, Inc., 846 F. Supp. 221, 225 (E.D.N.Y. 1994); Apple Computer, Inc. v. Microsoft Corp., 821 F. Supp. 616, 627 (N.D. Cal. 1993); Pamfiloff v. Giant Records, Inc., 794 F. Supp. 933, 939 (N.D. Cal. 1992); Love v. Kwitny, 706 F. Supp. 1123, 1131 (S.D.N.Y. 1989); Silva v. MacLaine, 697 F. Supp. 1423, 1430 (E.D. Mich. 1988); Library Publications, Inc. v. Medical Econs. Co., 548 F. Supp. 1231 (E.D. Pa. 1982).

129. 908 F.2d 555 (9th Cir. 1990).

130. *Id.* at 559.

131. Allen R. Grogan, *Implied Licensing Issues in the Online World*, 8 COMPUTER LAW. 1, 2 (1997).

132. *Id.* at 3.

Second, the act of hyperlinking, inasmuch as it reproduces the entire destination site on the user's screen, may constitute an infringement. For example, if an author incorporates another author's short story within his or her novel and without that author's consent, such use would infringe the copyright in that short story.

A. What Is Copyrightable?

Before considering whether an infringement has occurred, one must first determine what copyright, if any, is being infringed. If the hyperlink itself raises the infringement claim, the issue becomes whether the destination site's URL is copyrightable. However, if the act of hyperlinking causes the infringement, a court must determine whether the contents of the destination site are copyrightable.

1. The Hyperlink and the URL

a. Work of Authorship

Because a URL consists of alphanumeric characters, it qualifies as a "literary work." Section 101 of the Copyright Act defines "literary works" as those "other than audiovisual works, *expressed in words, numbers, or other verbal or numerical symbols or indicia*, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, *disks*, or cards, in which they are embodied."[133] Such a broad definition encompasses URLs as a literary work of authorship.[134]

b. Fixation

For the destination site's URL to be copyrightable, it must satisfy both the fixation and originality requirements.[135] The first inquiry is whether a URL is fixed on a tangible medium of expression. Since a URL is physically located on a server's hard drive, a URL satisfies the fixation requirement.[136] The second inquiry is whether a URL has the requisite

133. 17 U.S.C. § 101 (emphasis added).

134. Raysman & Brown, *supra* note 17, at 3.

135. *See* discussion *supra* Part III.B.1 regarding a URL as a literary work.

136. Russell Shaw, *Copyright Law: It Applies to the Web, Too*, INVESTOR'S BUS. DAILY, Apr. 11, 1997, at A1.

"modicum of creativity" for originality. This question is not as clearly answered as the fixation requirement.

c. Fact or Original?

A URL does not have the requisite originality under copyright law[137] because it would likely be construed as a fact under the holding in *Feist Publications, Inc. v. Rural Telephone Service Co.*[138] The *Feist* Court provided that a fact is not copyrightable because "facts do not owe their origin to an act of authorship."[139] While a person may copyright the particular expression of a fact, the fact itself is *not* copyrightable.[140]

A URL is the Internet equivalent of the addresses in *Feist*.[141] It designates the location for a Web site on the Internet, and thus, it consists of no meaningful or creative component protectable by copyright law.[142] Moreover, a URL does not owe its origin to an act of authorship. Because a hyperlink itself "copies" only a Web site's URL,[143] it does not infringe that site's copyright.[144] For an infringement claim, a defendant must copy "[the] constituent elements of the work that are original."[145] Consequently, a link provider is not liable for infringement by creating a hyperlink.[146]

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137. *Home Sweet Home: An On-line Discussion of Copyright Issues Raised by the Creation of 'Home Pages,'* LEGAL TIMES, May 15, 1995, at 39 [hereinafter *Home Sweet Home*]; Raysman & Brown, *supra* note 17, at 3.

138. Charles R. Merrill & Robert J. Burger, *Keeping the Chain Unbroken* (visited Aug. 7, 1997) <http://www.ipmag.com/merrill.html>.

139. Feist Publications, Inc. v. Rural Tel. Serv. Co., 449 U.S. 340, 347 (1991).

140. *Id.* at 349.

141. *Home Sweet Home*, *supra* note 137, at 39; Raysman & Brown, *supra* note 17, at 3.

142. *Id.*

143. *See* discussion *supra* Part II.C.; *see also* discussion *supra* note 16 and accompanying text.

144. *Home Sweet Home*, *supra* note 137, at 39.

145. *Feist*, 499 U.S. at 361.

146. Interestingly, although the URLs themselves are not copyrightable, if one applies the Court's reasoning in *Feist*, an arrangement of hyperlinks may be copyrightable as a compilation of facts. *See* Matt Jackson, *Linking Copyright to Home Pages*, 49 FED. COMM. L.J. 731, 742 (1997); Raysman & Brown, *supra* note 17, at 3; *Home Sweet Home*, *supra* note 137, at 39; *see generally* 17 U.S.C. § 101. For example, if a Web site selected and organized a group of hyperlinks that satisfied copyright requirements, another Web site may not copy such compilation, but it could use the underlying URLs. Thus, while the compilation does not change the copyright status of the URLs, copyright protects the list of hyperlinks, which is essentially an arrangement of URLs. *See Feist*, 499 U.S. at 350–51.

2. The Act of Hyperlinking

Even though copyright does not extend to a destination site's URL, it can protect the contents of such site as a "literary work." For example, if the link provider simply placed copies of the publishers' printed articles on the Internet rather than linked to their Web sites, the publishers could easily assert their proprietary rights under copyright law.[147] In other words, a Web site does not differ significantly from a print publication other than the type of medium.[148] Assuming the contents of a destination site are sufficiently original, fixation is satisfied by a Web site's storage on a server's hard drive.[149] The *Los Angeles Times*, for instance, could claim copyright protection in the stories appearing on its Web site just as it could for its newspaper articles. Thus, because the act of hyperlinking reproduces the contents of a destination site on a user's computer, the copyright owner could bring a claim for copyright infringement.[150]

B. The Act of Hyperlinking Infringes the Copyright of Web Sites

1. Direct Links

A direct link infringes the copyright of a Web site if the act of hyperlinking actually copies the destination site's contents, resulting in an improper appropriation.[151] A direct link satisfies the copying element, because a hyperlink places a copy of the destination site on a user's computer.[152] More specifically, once an Internet user clicks on a hyperlink icon, the browser connects to the server specified in the URL of the

147. *See* Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993). While courts may have settled the issue of unauthorized copies on the Internet, it remains unclear what liability ISPs and commercial on-line services should bear for a subscriber's infringing activity. Currently, Congress is contemplating legislation that would alter the traditional standards for vicarious and contributory liability to apply more appropriately to ISPs. *See* On-Line Copyright Liability Limitation Act, H.R. 2180, 105th Cong. (1997); Digital Copyright Clarification & Technology Education Act of 1997, S. 1146, 105th Cong. (1997). This issue is outside the scope of this Comment.

148. Lance Rose, *World Wide Web Can Ensnare Unwary Users; Potential Copyright Problems Abound*, N.Y.L.J., Feb. 27, 1995, at S3; Daniel W. McDonald et al., *Intellectual Property and the Internet*, 12 COMPUTER LAW. 8 (1996).

149. McDonald, *supra* note 148, at 8.

150. Paul Gibbons & Lauren Gibbons, *It's the World's Biggest Copy Machine*, PC WK., Jan. 27, 1997, at 109.

151. *See* discussion *supra* Part III.E.

152. *Id.*

destination site.[153] The Web server then transmits a copy of the destination site to the user's computer, downloading the Web document into the computer's RAM.[154] In addition, the function of a hyperlink conveniently resolves the issue of improper appropriation.[155] The RAM copy is substantially similar to, if not an exact duplicate of, the destination site. The analysis becomes complicated when one considers whether the RAM copy is "fixed" on the user's computer.

Clearly, the fixation requirement for copyright protection must apply to a defendant's infringing copy, otherwise there has been no infringement of the original work.[156] Section 101 of the Copyright Act defines a work as fixed "when its embodiment in a copy or phonorecord . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[157] In addition, a "copy" is a "material object[], other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[158] While a RAM copy is contained on a material object, it is removed from the user's RAM when the computer is turned off.[159] Thus, the question arises as to whether a RAM copy is sufficiently permanent or stable.

Considering that most users merely browse on the Internet, a RAM copy may not be adequately "fixed" for purposes of infringement.[160] Rather, one could argue that the copy resides on the user's computer for only a transitory duration. This issue undoubtedly turns on how a court interprets the fixation requirement for copyright infringement.[161]

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153. *Id.* at 9.

154. Freeling & Levi, *supra* note 8, at S5 ("When a user clicks on the link, Web browser software automatically retrieves the corresponding document and creates a copy which is then displayed on the user's screen."). "RAM" refers to random-access memory: the computer memory that provides the main internal storage for programs and data. WEBSTER'S, *supra* note 11, at 974.

155. Gibbons & Gibbons, *supra* note 150, at 109.

156. 2 NIMMER & NIMMER, *supra* note 2, § 8.02[B][3], at 8-30.

157. *Id.*

158. 17 U.S.C. § 101 (1994).

159. Jackson, *supra* note 146, at 742.

160. Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 907 F. Supp. 1361, 1378 n.25 (N.D. Cal. 1995). Although the *Netcom* court provided that browsing is the functional equivalent of reading, it indicated that an Internet user could infringe a copyright by saving the RAM copy. *Id.*

161. One should not confuse this fixation requirement with the requirement of fixation for copyright protection. The former concerns whether a copy has been made, while the latter involves the creation of the original work. *See* discussion *supra* Part III.B.2.

Based on the Ninth Circuit's holding in *MAI Systems Corp. v. Peak Computer, Inc.*,[162] a copy created by a hyperlink is sufficiently "fixed" for an infringement claim.[163] MAI Systems Corp. ("MAI") manufactured computers and designed software to run those computers,[164] servicing both the computers and the software necessary to operate them.[165] Its software included the operating system required to run any other program on the computer.

The defendant, Peak Computer, Inc. ("Peak"), also maintained computer systems, including MAI computers, for its clients. Peak's service of MAI computers entailed routine maintenance and emergency repairs.[166] At times, the Peak technician operated the computer and its software in order to service the machine.[167] MAI claimed that this process infringed the copyrights in its software by loading a copy into the computer's RAM.[168] While Peak conceded that fact, it asserted that the RAM copy was not sufficiently fixed to constitute an infringement.[169]

Although the court failed to find a case specifically holding that the copying of software into RAM created an infringing copy,[170] it found some authority for the proposition that the act of loading a program from a storage medium to a computer's memory generally resulted in a copy of that program.[171] Furthermore, such authority did not expressly provide that a copy is produced irrespective of whether the software is loaded into RAM or on the computer's hard drive. Relying on the definition of "fixed" in the Copyright Act, however, the court held that an unauthorized copy created in RAM constituted infringement because such copy can be "perceived, reproduced, or otherwise communicated."[172] Consequently, the *MAI* court held that a copy residing in RAM is "fixed" for purposes of copyright infringement.[173]

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162. 991 F.2d 511 (9th Cir. 1993).

163. *Id.*

164. *Id.* at 513.

165. *Id.*

166. *Id.* at 519.

167. *Id.* at 518.

168. *MAI*, 991 F.2d at 518.

169. *Id.*

170. *Id.* at 519.

171. *Id.* (citing Vault Corp. v. Quaid Software, Ltd., 847 F.2d 255, 260 (5th Cir. 1988)); *see also* 2 NIMMER & NIMMER, *supra* note 2, § 8.08, at 8-105 ("Inputting a computer program entails the preparation of a copy.").

172. *MAI*, 991 F.2d at 519 (quoting 17 U.S.C. § 101).

173. *Id.*

Accordingly, under the Ninth Circuit's holding in *MAI*, the unauthorized copy resulting from the act of hyperlinking is an infringement of the destination site's copyright.[174] In *MAI*, a copy of the plaintiff's operating system software was loaded into RAM when the computer was turned on.[175] Similarly, a RAM copy of a destination site's contents is created when an Internet user activates a hyperlink.[176] In addition, the RAM copy can be perceived on a user's screen as well as copied onto the user's hard drive.[177] Because no court has applied the *MAI* decision to Internet copying, a question remains as to whether an Internet user must "fix" a copy of the Web site to a more tangible medium than RAM.[178]

a. What Exclusive Rights Are Involved?

The next inquiry is what exclusive rights are involved and which rights are infringed by a direct link. Consistent with the holding in *MAI*, a RAM copy infringes a destination site's reproduction right.[179] Furthermore, in *Playboy Enterprises, Inc. v. Frena*,[180] the court found that placing unauthorized copies of a work on the Internet implicated the copyright owner's distribution right.[181] Whether hyperlinking also involves an infringement of the distribution right is unclear, however, because the linking site merely provides a connection to the copyright owner's Web site. The copyright owner placed the contents of the destination site on the Web.

Moreover, there has been no infringement of the adaptation right. A direct link does not recast or alter the plaintiff's Web site in any way; instead, it is an exact duplicate of the destination site.[182] Finally, based on the holding in *Playboy Enterprises*, the act of hyperlinking implicates the display right rather than the performance right, and because the definition

174. Other courts have followed the holding in *MAI*. *See, e.g.*, Triad Sys. Corp. v. Southeastern Express Co., 64 F.3d 1330 (9th Cir. 1995); *Vault Corp.*, 847 F.2d at 255; Advanced Computer Serv. v. MAI Sys. Corp., 845 F. Supp. 356 (E.D. Va. 1994).

175. *MAI*, 991 F.2d at 518.

176. Gibbons & Gibbons, *supra* note 150, at 109; Ed Cavazos & Mike Godwin, *Intellectual Property and the Internet*, TEX. LAW., Sept. 9, 1996, at 10.

177. Grogan, *supra* note 131, at 1.

178. Mitchell Zimmerman, *Copyright in the Digital Electronic Environment*, *in* UNDERSTANDING BASIC COPYRIGHT LAW 409, 462 (PLI ed., 1997).

179. Gibbons & Gibbons, *supra* note 150, at 109.

180. 839 F. Supp. 1552 (M.D. Fla. 1993).

181. *Id.* at 1556.

182. *See* discussion *supra* Part IV.B.

of "public" applies to displays of copyrighted works, the transmission of a destination site would constitute an infringement.[183]

b. Who Is Liable?

The analysis of hyperlinking does not end with the conclusion that it constitutes a copyright infringement. An issue remains as to who should be liable for such infringement. The possible defendants are the link provider and the Internet user. A defendant's liability and the type of infringement at issue depends on a defendant's involvement in the infringing activity.[184] Because a copy of the destination site is not created until a link is activated, the link provider would not be liable for direct infringement.[185] However, because a copy is reproduced on a user's computer, a user would be liable for directly infringing the destination site's copyright.[186] While placing liability on the user seems harsh, the law does not consider a direct infringer's intent or knowledge.[187]

In addition to holding an Internet user liable, the link provider may still be accountable under the principles of contributory infringement. Applying the doctrine of contributory infringement, the link provider would be liable if it had knowledge of the infringement, and it substantially participated in the infringing act.[188] In providing the link to a destination site, a defendant expected that Internet users would utilize the link, and therefore, it would have the requisite knowledge. However, a defendant could assert that it lacked the required knowledge. Because a contributory infringer must know of the infringing act, and the law regarding hyperlinking is undeveloped, a link provider could take advantage of the vagueness in the law by arguing that it did not know whether a RAM copy constituted an infringement. Assuming, however, that a defendant knows of the user's infringement, a defendant has facilitated such infringement by providing the link to the destination site.[189]

Lastly, vicarious infringement would apply if the link provider can control or supervise the direct infringer's conduct and receive a financial benefit from the infringing act. This type of liability presumes a

183. *See* discussion *supra* Part III.C.5 and discussion *supra* note 72.
184. Freeling & Levi, *supra* note 8, at S5.
185. *Id.*
186. *Id.*
187. *Playboy*, 839 F. Supp. at 1559.
188. *See* discussion *supra* Part III.D.
189. Freeling & Levi, *supra* note 8, at S5.

commercial relationship between the link provider and the Internet user.[190] Hypothetically, this relationship can arise if a link provider charges users for access to its Web site. By controlling what links are available on its linking site, a link provider has the requisite control and supervision for vicarious liability. Furthermore, because a link provider benefits financially from a link to the destination site, it would be vicariously liable.

c. Fair Use?

The final inquiry is whether an Internet user would have an affirmative defense. If users are simply browsing on the Internet, they could successfully claim a fair use privilege.[191] First, the purpose and character of the use is non-commercial because the RAM copy is merely the result of browsing.[192] Furthermore, the use of the copy is not in bad faith because an Internet user is only viewing the destination site. Second, the nature of the copyrighted work supports a finding of fair use. By placing a site on the Internet, the author anticipates that users will access it. However, although the amount and substantiality of the use by the RAM copy is inconsistent with a fair use, the RAM copy does not negatively impact the market for the destination site.[193] As a practical matter, direct links actually benefit the destination site by increasing the number of visitors, that, in turn, attract businesses to advertise on the destination site.

Thus, while the copy in RAM constitutes an infringement of the destination site's copyright, the private use of the RAM copy should entitle a user to a fair use privilege. However, by providing Internet users with a fair use privilege, a link provider is absolved from any contributory or vicarious liability because no underlying infringement has occurred.

d. Implied License

The strongest argument offered in favor of hyperlinking is that Internet users and link providers receive an implied license from the destination site's owner.[194] By having a Web site on the Internet, the

190. *See* discussion *supra* Part III.D regarding vicarious infringement.

191. Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 907 F. Supp. 1361, 1378 n.25 (N.D. Cal. 1995).

192. *Id.*

193. *Id.*

194. Rose, *supra* note 148, at S3; Mark Eckenwiler, *Copyright on the Web Enhanced*, LEGAL TIMES, Aug. 19, 1996, at S29; Merrill & Berger, *supra* note 138.

copyright owner tacitly consents to anyone accessing the site.[195] Therefore, a link provider can hyperlink to the site, and a user can download the destination site onto his or her computer.[196]

However, this defense should not be interpreted as a blanket exemption for the act of hyperlinking. To use an analogy, if an author distributed copies of his or her book to the public, the author would nonetheless retain a copyright in the book. A purchaser of the book could not reproduce the author's work and then sell unauthorized copies. Thus, even though an author publishes on the Internet, the author does not relinquish his or her copyright in the site's contents.[197]

In addition, a Web site operator can negate an implied license by placing a notice or legend on its Web site providing an express license for hyperlinking. For instance, a site operator could require a link provider to only connect to the destination site's home page.[198] If a hyperlink connects to a Web page other than the home page, the link provider has exceeded the license.[199]

2. Framing

Framing provides a plaintiff with a stronger case for infringement against the link provider. Because the linking site remains on the user's screen together with the framed destination site, this method of linking appears more suspect. If one considers framing outside the Internet context, it is essentially the pirating of copyrighted material.[200] Framing

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195. *Home Sweet Home*, *supra* note 137, at 109.

196. *Id.*

197. Grogan, *supra* note 131, at 3.

198. A "home page" is the introductory Web page to a site. RICK STOUT, THE WORLD WIDE WEB COMPLETE REFERENCE 7 (1995).

199. In fact, many sites contain a Web page providing the terms and conditions for use of the Web site. For example, *ABCNEWS.com* provides in its terms of use:

> Ownership; Restrictions
>
> All materials contained in this site are the copyrighted property of ABC News/Starwave Partners (the "ABC Venture"), its parent, subsidiaries and affiliated companies (the "Related Parties") and/or licensors (the "Licensors"). "ABC" and all titles, characters, names and graphics are trademarks of ABC, Inc., the ABC Venture, and/or their licensors. *To reproduce, republish, upload, post, transmit, modify, distribute or publicly perform or display material from this site, you must first obtain written permission from the ABC Venture.* You may view and download material from this site for your personal, non-commercial home use only.

Terms of Use, ABCNEWS.COM (visited April 2, 1998) <http://www.abcnews.com/service/terms.html> (on file with the *Loyola of Los Angeles Entertainment Law Journal*) (emphasis added).

200. *Washington Post Complaint*, *supra* note 6, ¶ 10.

has recently come under attack in *Washington Post Co. v. TotalNEWS, Inc.*[201]

In February 1997, the *Washington Post* and other media companies[202] filed a lawsuit against a news Web site, TotalNEWS, for infringing the copyright in their Web sites. The plaintiffs were various news organizations that either published newspapers and magazines, operated a news wire service, or broadcasted television news, as well as maintained on-line versions on the Web. Each of the publishers had a registered copyright in the contents of their Web sites. TotalNEWS was the operator of a news Web site with hyperlinks to approximately 1350 news sites on the Internet.[203] TotalNEWS linked to the plaintiffs' Web sites by displaying their contents within frames on its site.[204] While the defendant did not add any substantive material of its own to the plaintiffs' work, it sold advertisements on its Web site by capitalizing on the public's attraction to the destination site's contents.[205]

The plaintiffs claimed that TotalNEWS "engaged in the Internet equivalent of pirating copyrighted material from a variety of famous newspapers, magazines, or television news programs."[206] Accordingly, the defendant was able to attract users to its site through its unauthorized use of the plaintiffs' news stories. As a result, the defendant allegedly profited from the advertising through its site and at the cost of advertisements on the destination sites.[207] The plaintiffs further objected to the use of frames because it altered the form and appearance of their sites.[208] Although this case did not proceed to trial, it provided an insight into the use of frames and hyperlinks in general.

Under the settlement order, the defendant agreed to permanently cease the practice of framing.[209] While the defendant can directly link to the plaintiffs' Web sites, such links prohibit the defendant from

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201. No. 97 Civ. 1190 (S.D.N.Y. filed Feb. 7, 1997).

202. The other plaintiffs in the suit included Time, Inc., Entertainment Weekly, Inc., CNN, Los Angeles Times, Dow Jones & Company, Inc., and Reuters New Media, Inc. Washington Post Complaint, *supra* note 6, ¶¶ 14–21.

203. Matt Richtel, *Legal Situation Is Confused on Web Content Protections*, N.Y. TIMES, June 9, 1997, at D5.

204. Washington Post Complaint, *supra* note 6, ¶ 8.

205. *Id.*

206. *Id.* ¶ 10.

207. *Id.* ¶ 10.

208. *Id.* ¶ 30.

209. Washington Post Order of Settlement ¶ 3, *available in Frames Technology: The Internet Equivalent of Pirating?*, L.J. EXTRA ON-LINE (visited Aug. 7, 1997) <http://www.ljx.com/internet.complain.html> (on file with the *Loyola of Los Angeles Entertainment Law Journal*) [hereinafter Washington Post Order of Settlement].

circumventing any advertisements appearing on the plaintiffs' sites.[210] In addition, TotalNEWS must only use hyperlinks that display the names of the destination sites in plain text.[211] However, the order does not restrict TotalNEWS from hyperlinking to pages other than the plaintiffs' home pages. Accordingly, the issue arises as to whether direct links to pages other than the home page may implicate the same concerns under framing, specifically altering the form of a Web site.[212]

a. Is a Framed Web Site a Derivative Work?

By incorporating the contents of a framed destination site, a link provider has violated the copyright owner's adaptation right, effectively creating a derivative work of the destination site.[213] This conclusion is supported by the holding in *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*[214] In *Mirage Editions*, the plaintiff owned the copyrights to various artwork by Patrick Nagel.[215] The plaintiff licensed the artwork for publication in a book commemorating Nagel's achievements.[216] The defendant, Albuquerque A.R.T. Co. ("A.R.T."), engaged in the business of mounting artwork on ceramic tiles and then selling them to the public.[217] After obtaining a copy of the plaintiff's book, A.R.T. mounted some of the pages onto tiles.[218] The plaintiff subsequently brought suit for infringement of its adaptation right. The court, finding in favor of the plaintiff, stated that A.R.T. had made "another version of [plaintiff's] art works . . . amount[ing] to preparation of a derivative work."[219]

The framing of a destination site's contents is analogous to the infringing activity in *Mirage Editions*. From the Internet authors' perspective, a framing site "mounts" the contents of other Web sites onto its pages. Conceivably, because an infringement of the adaptation right only requires a recasting of the underlying work in some form, a plaintiff

210. *See* discussion *supra* Part II.C.

211. Washington Post Order of Settlement ¶ 3, *supra* note 209.

212. Taken as a whole, a Web site may also be recognized as a copyrightable compilation. Rose, *supra* note 148, at S3. Arguably, if a link provider connects to a Web page other than the home page, one could assert that the link provider is modifying or transforming the work.

213. Freeling & Levi, *supra* note 8, at S5.

214. 856 F.2d 1341 (9th Cir. 1988). *But see* Annie Lee v. Deck the Walls, Inc., 925 F. Supp. 576 (N.D. Ill. 1996) (holding the mounting of notecards on ceramic tiles did not constitute an infringing derivative work).

215. *Mirage Editions*, 856 F.2d at 1342.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 1343 (citation omitted).

could argue that the framing site alters the way in which the plaintiff intended its Web site to appear.[220] The *Mirage Editions* court, citing the legislative history of section 106 of the Copyright Act, stated that the adaptation right is violated when "the infringing work . . . incorporate[s] a portion of the copyrighted work in *some form*."[221]

Additionally, in *Gilliam v. ABC*,[222] the Second Circuit held that an author has a right to prohibit the public presentation of his or her work in a distorted form.[223] The court noted that one who "makes an unauthorized use of the underlying work by publishing it in a truncated version" is an infringer.[224] Another court held that the unauthorized addition of advertisements in a book constituted an infringement of the adaptation right.[225] Finally, in *WGN Continental Broadcasting Co. v. United Video*,[226] the Seventh Circuit stated that even though a copyright owner does not make use of its adaptation right, it nonetheless retains the option to use the right later, and thus, a licensee cannot alter the copyrighted work.[227] Applying this line of reasoning to the act of hyperlinking, the operator of the framing site should be *directly* liable for infringing a destination site's adaptation right.

b. Is the Link Provider Liable?

Technically, the infringing derivative work is not created until a user clicks on the hyperlink. Because a hyperlink itself does not infringe a copyright, the operator of a framing site has not altered any part of the destination site.[228] Accordingly, the Internet user would remain directly liable, but that person would likely receive a fair use privilege.[229] In short, framing enables a link provider to copy a Web site's contents without actually copying it, precluding the copying element from ever being satisfied.

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220. Freeling & Levi, *supra* note 8, at S5.

221. 856 F.2d at 1344 (quoting 1976 U.S.C.C.A.N. at 5675). As *Nimmer on Copyright* argues, however, the fixation requirement applies intuitively to the adaptation right. Accordingly, the infringement claim against framing is also clouded by the fixation issue discussed under the direct link analysis.

222. 538 F.2d 14 (2d Cir. 1976).

223. *Id.* at 24.

224. *Id.* at 21.

225. National Bank of Commerce v. Shaklee Corp., 503 F. Supp. 533, 544 (W.D. Tex. 1980).

226. 693 F.2d 622 (7th Cir. 1983).

227. *Id.* at 625–26.

228. *See* discussion *supra* Part IV.A.1.b.

229. *See* discussion *supra* Part IV.B.1.c.

c. Fair Use?

Assuming, however, that the proper defendant is the link provider, it may be entitled to claim a fair use privilege. First, the purpose of the use may be either commercial or non-commercial.[230] As in *TotalNEWS*, a link provider can sell advertisements on its site by marketing its arrangement of hyperlinks to various Web sites.[231] Continuing with this hypothetical, the use is in bad faith because a link provider merely exploits the contents of the framed destination sites. Second, if a plaintiff is also attempting to profit from the contents of its Web site, the nature of the copyrighted work does not support a fair use privilege. Third, as with a direct link, a framing site reproduces the destination site in its entirety. Lastly, a copyright owner has a strong argument under the fourth factor. The framing of a destination site has a harmful effect on its market because the framing site directly competes with the plaintiff for advertising revenue as well as the attention of Internet users.[232] Clearly, if courts analyze framing outside of the Internet context, the linker has no fair use defense.

d. Implied License

As in the case of direct links, an owner of a framing site could assert an implied license to hyperlink to a plaintiff's Web site.[233] However, a framing site could still violate a destination site's adaptation right. As noted by the court in *WGN*, if not expressly authorized by the copyright owner, a licensee does not have the right to make derivative works.[234] With respect to the act of hyperlinking, even though a framing site may receive an implied license to hyperlink directly to various sites, it has no right to modify another Web site's contents.

V. RECOMMENDATIONS

A. The Copyright Act Inadequately Protects the Rights of Internet Authors

Because the technology of the Internet raises many questions about applying traditional copyright concepts to this medium,[235] the current

230. Freeling & Levi, *supra* note 8, at S5.

231. *Id.*

232. *Id.*

233. *See* discussion *supra* Parts III.F., IV.B.1.d.

234. *WGN*, 693 F.2d at 625.

235. Courts have had to analogize to past cases in order to handle issues raised by the Internet. *See, e.g.*, Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 907 F.

copyright law must be amended to take account of such issues. Without such amendments, the lack of guidance in this area would inevitably result in disparate court decisions.[236]

Congress has consistently recognized that the Copyright Act must be adjusted to protect the rights of authors against technological innovations.[237] Although the current law provides Internet users a fair use privilege, it fails to place liability on the operators of framing sites for apparent acts of copyright infringement. Because an infringement initially turns on when an infringing copy is made, a person can frame another Web site's contents without risk of liability. With a print medium, the same person would not be held contributorily liable, but directly liable. Consequently, the current copyright law must be amended to incorporate the traditional rules of copyright infringement into the Internet medium.

In February 1993, the Clinton administration responded to the challenges raised by the Internet by forming the Information Infrastructure Task Force ("IITF").[238] The IITF was commissioned to study and recommend an effective use for the National Information Infrastructure ("NII").[239] The report, entitled *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights* (hereinafter the *White Paper*), represents the IITF's efforts on the subject. Although the *White Paper* examines all of the major areas of intellectual property law, its recommendations under copyright law offer a possible solution to the issues raised by hyperlinking.

Supp. 1361 (N.D. Cal. 1995) (holding an Internet service provider is not vicariously liable unless the infringer's activity enhances the provider's services or attracts new subscribers); Sega Enters. Ltd. v. MAPHIA, 857 F. Supp. 679 (N.D. Cal. 1994) (holding an on-line service provider vicariously liable for allowing the uploading and downloading of copyrighted video games); Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993) (holding the operator of a bulletin board service ("BBS") directly liable for its subscriber's placement of copyrighted photographs on the BBS).

236. This occurrence is already evidenced by the court decisions concerning fixation for copyright infringement. *Compare* Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 907 F. Supp. 1361 (N.D. Cal. 1995) *with* MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993).

237. *See* Maureen A. O'Rourke, *Copyright Preemption After the ProCD Case: A Market-Based Approach*, 12 BERKELEY TECH. L.J. 53, 90 (1997); Jeffrey M. Gott, Note, *Lotus Development Corporation v. Borland International: The United States Court of Appeals for the First Circuit Takes A Step Backward for the Copyright Protection of Computer Programs*, 30 CREIGHTON L. REV. 1349, 1355 (1997).

238. The IITF is a group of representatives from federal agencies involved in the development of information and telecommunications technologies. WHITE PAPER, *supra* note 32, at 1. Recently, the IITF collaborated with private sector organizations, public interest groups, and state and local governments to develop a policy on intellectual property and the NII. *Id.*

239. The NII is the emerging U.S. information infrastructure, which includes the Internet. *Id.* at 2 n.5.

B. Congress Must Clarify the Current Copyright Law

Specifically, the *White Paper* provides that the "placement of copyrighted material into a computer's memory is a reproduction of that material."[240] Because a plaintiff's claim for copyright infringement depends on how a court interprets when a copy is "fixed," the White Paper's assumption that a RAM copy is fixed provides a Web site author the necessary protection against unauthorized linking to its site. While this aggressive interpretation of *MAI* has been criticized,[241] it reassures copyright-intensive businesses and institutions on the Internet that their rights will be protected. Without such a change, the law on this subject will remain unsettled. Congress should therefore incorporate into the Copyright Act the *MAI* holding regarding the copyright implications of a copy embodied in RAM.

VI. CONCLUSION

The Internet offers unprecedented benefits for authors and for society, in general, but if authors are to be encouraged to publish on the Internet, they must be assured that their proprietary rights in their copyrighted works will be protected.[242] Because the contents of Web sites will ultimately drive the development of the Internet, the development of that material depends on the protections afforded by copyright law. If the law fails to protect these proprietary concerns, however, the very fabric of the Internet may unravel.

Jonathan B. Ko[*]

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240. *Id.* at 64.

241. *See* Pamela Samuelson, *The Copyright Grab* (visited Aug. 28, 1997) <http://wwww.wired.com/wired/4.01/features/whitepaper.html> (on file with the *Loyola of Los Angeles Entertainment Law Journal*).

242. A plaintiff in the *TotalNEWS* case stated that "Internet businesses had to feel that their intellectual property was protected on line or they would have no incentive to post valuable content." Richtel, *supra* note 203, at D5.

* This Article is dedicated to my parents for their endless love and support, to Warren & Mee-Lee Szeto for their wisdom and guidance, to my friends for always encouraging me to be my best, and to Nancy Szeto, for allowing me to be part of her life. I would like to thank Scott McPhee and the editors and staff of the *Loyola of Los Angeles Entertainment Law Journal* for their advice and patience. Finally, special thanks to Professor Jay Dougherty for his insightful suggestions and review of this Comment, and to Danny Walanka for his encouragement and commitment.