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Framing Technology and Link Liability*

Peter Jakob**

I am going to propose an analogy and I would like everyone to think about it. Imagine that the Internet wires and cyber materials are analogous to our streets and sidewalks. I would like everybody to think about that. I am curious to hear your thoughts. Hopefully, if we have time, I will be able to hear them. I also enjoyed hearing Mr. Betensky's views about Internet jurisdiction.¹ I was envious when he came here with statutes for 50 states and a fist full of opinions because over here in the linking-and-framing-liability part of the Internet law school there are no statutes, reported cases, or unreported cases. There is one unfortunate footnote that I will get to later in the program, but for the most part we are writing on a clean slate.² There is not much precedent to look at. You would be surprised at how many people cite seminars and seminar materials that people like myself put into booklets like these. People call me to say that my client has to change his website to satisfy the caller's client. They always say something marginally plausible such as an implied license was created by putting the site on the Internet, but that the caller's client has now revoked the implied license and my client cannot link to the site anymore. And I say to them, "Where did you get that, in one of those stupid Internet conferences?" And there is a long pause. That is all there is to cite to. So conferences like this are good but they are also dangerous.

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** Peter Jakob, Esq. is a partner in New York's Fein & Jakob. Prior to founding Fein & Jakob, Mr. Jakob was a director at Howard, Rice, Nemerovski, Canady, Falk & Rabkin, P.C. in San Francisco. A graduate of Fordham University School of Law where he edited the *Fordham Law Review*, Mr. Jakob also is lead co-author of *Handling Federal Discovery* (James Publishing 1996), a practice guide.

1. See Steven Betensky, *Jurisdiction and the Internet*, 19 PACE L. REV. 1 (1998).

2. See *infra* note 33 and accompanying text.

Instead of looking at old legal advocates when there is no law, we should look first to the principles of the Internet and what is important about it as a starting point to what the law ought to be. I have heard it said that having the Internet is like having a television set in the 1940s. It is not in every household yet and no one is quite sure how they will make money with it. But it is growing and getting there. It will only be a few years before a "Marshall McLuhen"-type person comes along and tells us that the media is the message with the Internet. As for the Internet, that means that linking is the message, it is what sets the Internet apart from other things that have existed for a long time in our world. Without linking, for example, I have heard that the Internet would be nothing but a slow moving dialogue television. Without linking websites, you could hardly even say that it is a web. It would only be a complex video answering machine. The world wide web would be the world wide grid of isolated sites. Linking has to be zealously guarded as we decide what restrictions and reasonable rules we will allow to develop in order to address what might be some legitimate, genuine abuses of linking. Watch for the slippery slopes and watch for the over broad prohibitions because linking is everything.

There is no law, but there have been some celebrated disputes about linking. Perhaps the most famous one was the one between two industry titans, TicketMaster and Microsoft.³ I am going to click through the essence of this dispute.⁴ It is about a year old dispute, but you can still see its effects on-line today. Microsoft runs a site called "*Seattlesidewalk.com*".⁵ There are analogous sites in other states.⁶ It is a "what's going on around town" kind of site. You go there to find concerts, operas, movies, where you can get tickets, and what ever else is available. For example, one thing it did before this dispute began was to provide a link from a *Seattlesidewalk.com* page to a TicketMaster page concerning the Dave Matthews concert coming to Seattle. This link was deep within the TicketMaster site where you

3. See *TicketMaster v. Microsoft Corp.*, No 97 3055 DDP (C.D. Cal.).

4. Mr. Jakab prepared an actual Internet presentation in which he was able to show his audience exactly what he was speaking of.

5. See *TicketMaster*, No 97 3055 DDP at 4.

6. See *id.* (TicketMaster also provides a website in Los Angeles and plans guides in other cities including New York, Boston and Denver). See *id.* at 4.

could purchase a ticket to the Seattle concert. This had TicketMaster up in arms. It did not want this to happen for reasons we may never know. It had ongoing negotiations with Microsoft. TicketMaster said Microsoft should get a license from them for doing it but Microsoft refused and sued TicketMaster in federal court in Los Angeles.⁷

Now, let us look through this for a second: we will first go to the *Seattlesidewalk.com* site. If you were to click on 'arts and music' for example, it would give you a page with relevant arts and music events. Right there is the Dave Matthews concert we have all been waiting to see. You click right on Dave's face over there, and it will give you the page about the concert, and as you can see in the upper left hand corner there is a link to TicketMaster. You click on it and it takes you to a page which still says *Seattlesidewalk.com*. That is what you do to order tickets through TicketMaster. But if you click on the *TicketMaster.com* link you see the vestiges of this dispute; that an unauthorized link can come here from Seattlesidewalk. TicketMaster does not want people coming here from Seattlesidewalk. Boggles the mind, correct? Why not? We may never know, but we can look at the Complaint, which you can find at *www.ljx.com*, the law journal websites. The Complaint alleges trademark dilution, which we just heard about, and confusion as to source, sponsorship or affiliation.⁸ It also alleges various state unfair competition and commercial misappropriation claims.⁹ If you look at paragraph 13 of the Complaint, there is a statement of what TicketMaster thinks Microsoft is taking from it.¹⁰ It might be useful to see what the alternative is by going indirectly from Seattlesidewalk over to the page at TicketMaster where you buy the ticket. You would essentially type in *www.TicketMaster.com* and with about five or six clicks you get to the Dave Matthews page and the tickets which everyone wants.

The Answer in the *TicketMaster* lawsuit is interesting for its affirmative defenses, which include First Amendment de-

7. See *id.* at 2.

8. See *id.* at 5-6.

9. See *TicketMaster*, No. 97 3055 DDP (C.D. Cal.) at 5.

10. See *id.* at 4.

fenses.¹¹ And in the Reply to the Answer, the entire case was narrowed to be a complaint about one single thing and that is deep linking, which is linking some place other than the very top level of *www.TicketMaster.com*. I doubt that this is really at the heart of the dispute because you can get to the page even if you try to get to the top level. But that is what the dispute is about now, and the question is, "Is there anything wrong with that?" Anybody, or the user of course, can type in a deep link URL. Getting there does not require a code being cracked or a code encryption. Anybody can do it. Is there anything wrong with that if the third party helps the user to do it? That is the question.

The other celebrated dispute, which we have talked about some, is the *TotalNEWS* case.¹² In this case, six media giants: The Wall Street Journal, CNN, Reuters, The Washington Post, The LA Times, and one other, sued a little website called TotalNEWS in Arizona.¹³ Bring up the TotalNEWS home page.¹⁴ TotalNEWS presents its page in frames which allow different parts of the screen to act independently of each other. TotalNEWS has a big frame where it is currently showing a copy of the front page of the MSNBC site and reserves about an inch on the bottom where it sells advertising. Up along the right are a bunch of hot buttons to some of the major news organizations that have good and interesting websites. Many people like this arrangement and many do not. Some say they like the navigation bar along the top and along the right side. This allows them to quickly check between the different spins or the different ways that major organizations report the same stories, allowing them to look at the political bent from each organization. They can look at who has the best coverage. There are a lot of benefits to be gained by quickly flipping between the same stories from different organizations that show up on the big frame. Others do not really like it, and of course anybody could disable the frames by clicking on the right mouse button. A new browser would then come up. The people who did not like it are

11. *See id.* at 9.

12. *See* Washington Post Co. v. TotalNEWS, Inc., 97 Civ. 1190 (S.D.N.Y. Feb. 20, 1997).

13. *See id.* at 1.

14. *www.TotalNews.com*.

the people who do not want to be framed and do not want to be associated with TotalNEWS. They do not want TotalNEWS to derive revenue from their context being shown on the big frame next to TotalNEWS advertising. So that is the dispute. The *TotalNEWS* Complaint is also available at *www.ljx.com*. Some of the major claims in that Complaint are called “hotnews” misappropriation.¹⁵ Trademark dissolution seems to have no bounds: confusion of sponsorship, affiliation or source, unfair competition, copyright infringement, or interference with business advantage. The *TotalNEWS* case was settled by agreement. You could look at that. It was a very, very interesting document at *www.ljx.com*. I will disclose that I represented TotalNEWS in that case, so that is my bias.

I now want to say a word or two about the *Shetland News* case.¹⁶ They are overseas and there is actually an opinion in the laws of Scotland.¹⁷ One website was linking to a news website of its competitor, who is off on Shetland Island.¹⁸ That website was using the headlines of the linked site or the hyperlink, and also deep linking a couple of pages into the website. The court in Scotland actually enjoined the website and addressed the potential copyright liability of the headlines.¹⁹ That has since been settled. A lot of people refer to that as “interdict,” which is the Scottish equivalent of an injunction.

Let me, without taking too much time, say a word or two about the different, established legal principles that appear in this Complaint and see how they may fit into linking infringement issues. Copyright, which we talked about all day, raises hundreds of interesting issues. It is not to be the weakest of all claims. Just to step through it quickly, the copyright statutes set forth enumerated rights for the copyright holder. There is a right to reproduction, which is an exclusive right given to the copyright holder.²⁰ The right of reproduction ordinarily is not implicated in the linking or framing situation because no one is really copying anything. Everyone is simply directing the user

15. *See id.* at 10.

16. *See* *Shetland Times v. Jonathon Wills and Zetnews*, Scotland Court of Sessions, Oct. 24, 1996.

17. *See id.*

18. *See id.*

19. *See id.*

20. *See id.*

to link to a particular place. In *Shetland News*, however, people were claiming a copyright in headlines.²¹ They did not want the headlines to be used as a hypertext to link to their news story.²² Are headlines copyrightable? It depends on the headline. You have to run it through the originality and creativity test of the copyright statute. But ordinarily, the typical headline is not copyrightable. The second right that is implicated or potentially implicated by the infringement is the right to make derivative works from your copyrighted work. This is thought to be implicated by framing, and a kind of technique that is similar to stealth framing, called "in-lining." This is when you can not tell you are in a frame but you are getting contents from others into your page even though it is transparent to the user. There are some non-cyberspace older framing cases that are instructive, such as people purchasing art, putting it up with a specialized frame, and then selling it like that. Is that a derivative work of the art? There is one Ninth Circuit case which said it was a derivative work.²³ It was much criticized. People interested in some of the criticism can look at the case where videocassette leader tapes were filled with commercials by someone other than the copyright holder of the video and subsequently sold like that.²⁴ That was held not to be a derivative work.²⁵

It is probably best to look at derivative rights from the point of view of the person making the derivative work. In the case of *TotalNEWS*, you have the user, who is the only one who can see it over the TotalNEWS server. Nobody is actually doing this mixing except the user. And then the question becomes, does the user have the defense of fair use? The distribution right is another exclusive right within the copyright laws. This is becoming more and more popular in cease and desist letters. It is moving towards the vanguard of copyright rights which people believe might be implicated in framing or linking. Although linking is pretty much distribution, it seems nevertheless to fit in a broad sense. There are interesting defenses

21. See *Shetland Times*, Scotland Court of Sessions.

22. See *id.*

23. See *Mirage Editions v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988).

24. See *Paramount Pictures Corp. v. Video Broadcasting Systems, Inc.*, 724 F.Supp. 808 (D. Kan. 1989).

25. See *id.* at 821.

beginning with the first sale doctrine, which I do not think we will be able to get to, in order to query whether the linker site is actually doing any distributing that the original content site was not doing. There are some who say that it is merely a referral and not an actual distribution. I think there is going to be a lot of this confusion. There is the display right, but ultimately it comes to the same issue as the derivative work right, where it is only on the user's machine that the image is being displayed. Certainly not on the linker's site, which is typically part of the newsletter. If the user has a defense, then the linker's site has a defense to claims of contribution. Speaking of defenses, fair use is widely thought to be a strong defense for the user, and thus for the contributory infringer.²⁶ If anybody thinks that what the user does at home, without profit, runs afoul or exceeds the fair use defense, there are two relevant factors in the statute, and more in the cases, that determine the ability of the use of this defense. One of those factors is market use.²⁷ It seems that linking can only increase the number of visits to the linked-to site and that one seems to come out very positively, and against a copyright plaintiff. The purpose of its use, whether or not for profit or to do the kind of linking that is typical on the web, is sending people to see related information.

There is a defense of implied license that is very controversial.²⁸ One way of analyzing it is by saying that when you place pages on the web there is an implied license to link to them, and as soon as a cease and desist letter is sent this implied license is revoked. Now people need a license for permission to link to my site. There are many critics of this kind of view. They say that if there is an implied license it ought to be irrevocable, otherwise it can wreak havoc on the very essence of the web. This is a slippery slope over broad prohibition. There are others who say that there is a First Amendment basis or other right to link that is not dependent on anybody's license, express or implied. There is the news reporting privilege which is very specific to news gathering organizations. Certainly that is another task to a copyright infringement plan. Most people conclude that there is no copyright violation in linking either because there is no

26. See 17 U.S.C. § 107.

27. See *id.*

28. See *id.*

copying or because it is the user that is doing the infringing activity. Therefore, there is probably a fair use defense. Of course there is no precedent. And really, in the end, it is an economic analysis under the fair use analysis that is necessary if one wants to prevail.

Let us move on to trademark infringement and unfair competition because these are really big weapons wielded in the linking liability area. The touchstone of trademark infringement is consumer confusion. My clients who have run these websites are very Internet savvy, they say confusion is the norm, confusion is everywhere, everyone is confused about everything. We do not know who is linking to whom for what reason and we are not sure we care. There are many reasons for the confusion. One, which is really at the heart of computers and the Internet, is juxtaposition in time and in space. Windows is all about juxtaposition, being able to see two things right next to each other so that one can quickly compare them. You can look at the TotalNEWS page.²⁹ The part at the top is from Netscape but when you click the news provider link, news content appears in the middle. You can see that MSNBC is on the page, but it says Intel and Texas Instruments inside. There is juxtaposition of these companies and these content providers. And of course, there is juxtaposition in time, quick moving from page to page, document to document. All of these things give rise to some level of confusion, particularly to people who are not familiar with them, even some federal judges. The confusion is easy to establish for the trademark plaintiff. Does this mean that linking or framing is an easy mark for a trademark plaintiff? You bet it does, because trademark infringement and unfair competition are wielded as the biggest sledgehammer by linking plaintiffs against the smaller websites. There is very little that can be done about this in the absence of some good law. Giving some protection, and perhaps heightening the level of confusion, for these purposes has to be established before there is a legitimate trademark infringement case.

Just to give you an example of this, the footnote that I alluded to earlier comes from *ACLU v. Miller*.³⁰ That is the case

29. See *supra* note 14.

30. See *American Civil Liberties Union of Georgia v. Miller*, 977 F.Supp. 1228 (N.D. Ga.1977).

invalidating the Georgia law which made it illegal to link anonymously or in some confusing manner.³¹ The judge did a good job in striking down the law except for his comments in footnote 5.³² He said:

The linking function requires publishers of web pages to include symbols designating other web pages which may be of interest to a user. This means that an entity or a person's seal may appear on hundreds or thousands of other web pages, just for the purpose of enabling the linking system. The appearance of the seal, although completely innocuous, would definitely 'imply' to many users that permission for use had been obtained.³³

Is it anybody's understanding that permission had been obtained anytime you saw a hyperlink on a page on the Internet? It is not my understanding, or the understanding of anyone that I have ever talked with. But this is the only real statement in the law books about linking. Confusing? Absolutely. Anything to do about it? I suspect we are going to have to live with it in this time period, when the profile of the average Internet user and the profile of the average federal judge do not have a lot of overlap. Ultimately, confusion is an empirical question. If anyone knows of any empirical studies on this I would be very interested in them. Trademark infringement has a fair use defense, which is First Amendment based. It is not as well developed as copyrights' fair use defense, but nonetheless it may become so with time.

I do not want to say too much about dilution since we were exposed to a lot of it in the last presentation. I will only talk about the theory which we had touched on last time. Its application to linking and framing seems to be that the presence of a trademark, logo, or a trade name on the hundreds or thousands of sites somehow diminishes the value of that trademark and the logo owners' rights. It is difficult to see why. They are there to be linked to a site. But nonetheless, dilution does conjure up this idea of "Oh my God, there are thousands of millions of McDonalds all over the place and they are not all McDonalds' hamburgers." McDonalds, which has built this distinctive mark will somehow lose out. We have thousands and millions of com-

31. *See id.* at 1235.

32. *See id.* at 1233.

33. *See id.* at 1233.

ponents which are linking and framing, and then attempting to assert dilution. Ultimately though, is there any detriment? Is there any dilution when all you are doing is sending people right where the owner of the mark presumably wants you to go? It is difficult to contradict the owner coming to court by arguing that this does, in fact, diminish the value of the trademark. Presumably, he would know best, and it is a cruel excuse to intimidate linkers.

Commercial misappropriation, another popular established legal principle, differs from state to state. Generally speaking, it is about unfair free-riding on another's work. Recently, there was the *NBA v. Motorola* case in the Second Circuit.³⁴ In that case, there were no linking or Internet issues, but there were copyright preemption issues.³⁵ It was held that commercial misappropriation is largely preempted by the copyright laws with a significant exception for what is called "hotnews" misappropriation.³⁶ Hotnews misappropriation originates from old cases around World War I, for example, *INS v. The Associated Press*,³⁷ where you had wire services sending people out into the battlefield. They would come back dead, maimed, or having put out a lot of effort to gather news from the front.³⁸ It was thought that maybe they ought to get some window or credit for this. You can not have a situation where the minute the media reports news, their competitors take it and sell it to their subscribers as if they had gathered it themselves. There should be some fairness by giving a window of time, whatever is reasonable under the circumstances, to somebody who has gone and either spent a lot of resources or put their lives on the line to gather news. This hotnews exception, I will not say was revived, but was recently brought back into the vanguard by the *Motorola* case.³⁹ There are five elements as to whether or not hotnews misappropriation applies: whether the information was gathered at a significant cost,⁴⁰ whether the information is

34. See *National Basketball Ass'n. v. Motorola, Inc.*, 105 F.3d. 841 (2nd Cir. 1997).

35. See *id.* at 849.

36. See *id.* at 852.

37. 248 U.S. 215 (1918).

38. See *id.* at 237.

39. See *Motorola*, 105 F.3d. 841.

40. See *International News Service*, 248 U.S. at 231.

time sensitive,⁴¹ whether there is free-riding by the defendant,⁴² whether the defendant and the plaintiff are in direct competition⁴³ (a difficult one to parse out in the linking context), and whether the conduct of the defendant reduces the incentive for the plaintiff to gather the news.⁴⁴

Recently, there was the *ALA v. Pataki*⁴⁵ decision that invalidated New York's Internet obscenity statute. The case was a District Court case concerning dormant commerce clause pre-emption.⁴⁶ I do not know whether the hotnews misappropriation exception would survive the dormant commerce clause and so, query, whether there was anything left in the commercial misappropriation theory.

I want to say a word about the "technological fix" because that is what it would seem to be. What goes through someone's mind when they see the situation such as the one we saw in the *TicketMaster* dispute? Why not just block the link they do not like? There are a number of things they could do. They could redirect the link to the top of their page and require the user to navigate the way they want. They could cut the link off altogether or show a new message. Like I said, there are a number of things they could do. They should be required to do them before they run to court. I would personally like a technology fix exhaustion requirement or at least a reasonable temper added before one could go to court. If there are countermeasures and they are difficult to surmount, the exhaustion requirement will be met. If there are no countermeasures and a technological fix works, you save legal fees, time, and bad will. Others have suggested that there should be no such requirement. Some people analogize to some ancient trespass laws, where the landowner does not have to put up a fence in order to get the benefit of the trespass laws. I do not know about that analogy. Measures and countermeasures are mitigated in the linking context by the amount of time they add to the user's floating. If you have blocks and get around them and then re-block, it is

41. See *Motorola*, 105 F.3d. 841.

42. See *id.*

43. See *International News Service*, 248 U.S. at 235.

44. See *Motorola*, 105 F.3d. at 853.

45. 969 F.Supp. 160 (S.D.N.Y. 1997).

46. See *id.*

going to be a long time before the user is able to see the information and people will be deterred by the unnecessarily burdensome measures and countermeasures.

I would now like to say a word about linking licenses. They are different than linking agreements, which are simply back scratching arrangements between two websites: "I'll link to you if you'll link to me." This is going to be mutually beneficial. It is called a linking agreement, but there is more and more talk about a linking license as though such a thing was needed. It is as though the widely regarded father of the world wide web is excellent at policing this. If anyone asks him for permission to use a website, he denies it on the grounds that none is needed. The *TotalNEWS* settlement agreement is very instructive on this. Those people in *TotalNEWS* whose complaints were filed and publicized by the media companies and those who said that this case has very far reaching, potentially dangerous implications to the web, were met with responses from the media companies.⁴⁷ Framing and advertising is not all that they want. I can tell you that somewhere in the *TotalNEWS* case, you can see that they really want much more. You see the remnants of a demand for a linking license. The parties ultimately had to work out a clause which granted TotalNEWS permission to link, but said that if any of the defendants tried to enforce its rights pursuant to the clause (denying permission to link) and TotalNEWS kept linking, it would be an affirmative defense for TotalNEWS that no permission was needed at all.⁴⁸ So it is not much of a license. But you would not believe how the company's lawyers went out on a limb to ask for a license, hoping that nobody would take a close look at it.

There might be a reason why there is such little law on linking and framing, whereas there is plenty of law on Internet jurisdiction. I know from my cases that there is a fear of bad precedent and not being able to get the decision-makers to understand what is going on and preserve the things that are primary to the web. "No harm to the Internet" is often my clients' first or second goal. The first is usually survival. The courts, the jurors, in fact most of us, have too little experience to be

47. See *Washington Post Co. v. TotalNEWS, Inc.*, 97 Civ. 1190, Exhibit B at 1.

48. See *Washington Post Co. v. TotalNEWS, Inc.*, 97 Civ. 1190, Stipulation and Order of Settlement and Dismissal at 4.

able to confidently put down some sensible precedent that we are sure will be useful into next year, much less five years down the road. I recommend that everybody stay out of court whenever they can. I very much agree with the sentiment that there should be some alternative to rushing to the federal courthouse. One alternative that I have seen implemented is a form of web ADR, where two companies that have Internet components create agreements, regardless of whether they are web design agreements, linking agreements, or a more garden variety commercial agreement. They arbitrate or mediate any disputes and sometimes designate a neutral third party who is familiar with the industry, or an ADR associated entity, in hopes of finding a decision-maker who is better able to understand. This, of course, eliminates the danger of a bad suit.

Let me get back very briefly to the streets and sidewalks analogy. Just like you go down the streets and sidewalks, you go down the wires and cyber materials on the Internet. You are really doing pretty much the same thing, you are going to see what is there and can deliver things at places along the way and see things at your own pace. Is linking, framing, or making money directly from advertising from framing any different from making money from house tours where one is taken along the street and shown an estate? Certainly they could put those things there and provide the content, but they are reaping the benefits from it. Where does that analogy break down? Well that is all too deep for me, thank you very much.