LINK LIABILITY: THE ARGUMENT FOR INLINE LINKS AND FRAMES AS INFRINGEMENTS OF THE COPYRIGHT DISPLAY RIGHT

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INTRODUCTION

As the Internet continues to expand exponentially, so do the corresponding legal issues. While this vast network was intended to be used to share information, the influx of companies using the Internet, and particularly the World Wide Web ("Web"), for marketing or commerce have blurred the lines between shared information and protected information. Today many commercial site owners pursue advertisers in order to make a profit. To these owners, Web site content is extremely valuable because it is the primary attraction for advertisers. Problems arise, however, when the technology that serves as a basis for the Web—hypertext linking—causes users to bypass Web site advertising, thus reducing advertising exposure and the amount of money the site can charge for advertising.

There are three primary ways that linking sites can evade the advertising content of the linked site: by circumventing the home page through deep links; by linking only to a specific image on a server through inline links; or by obstructing the site with frames. Due to reduced advertising exposure, all three of these linking methods decrease the value of the linked site’s content. Because copyright law aims to encourage the dissemination of quality works by compensating authors, it is applicable in the online medium to protect Web site owners from lost revenue due to the decrease in value of the site content. While other commentators have addressed the viability of copyright law as it applies to linking and framing, this Note takes the perspective that both copyright law and the law of misappropriation currently offer redress against these technologies. Moreover, in its appropriate context, copyright law in particular should be vigorously invoked to protect creative works in cyberspace.

Part I of this Note provides background on the Internet, the Web, and the technologies involved in deep linking, inline linking, and

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framing. Part II presents an overview of the relevant areas of current copyright protection for literary, pictorial, and graphic works, including online works, and discusses the applicability of the law of misappropriation to theft of time-sensitive material. Part III more specifically examines deep linking, inline linking, and framing and the cases or disputes that have grappled with these technologies. Part IV argues that inline linking is an infringement of the copyright display right, and that framing is an infringement of the display and derivative work rights. It also argues that a cause of action for misappropriation is appropriate for all three linking technologies when time-sensitive material is co-opted. This Note asserts that, contrary to conclusions reached by other commentators, in the case of unwanted links, infringement of the display right is the most applicable cause of action for owners of linked-to sites because it achieves the intent of copyright law in the online realm. Both copyright law and the law of misappropriation thus offer immediate solutions to unhappy owners of linked-to sites.

I. THE INTERNET

This part will describe the structure and evolution of the Internet, and specifically of the Web. It will also furnish an overview of the technologies involved in deep linking, inline linking, and framing.

A. Structure and Evolution

The Internet is the world's largest computer network. It was spawned in the 1960s when researchers funded by the United States Defense Department's Advanced Research Projects Agency ("ARPA") began to connect computers. The Internet was designed not to feature a main control point, but rather to have a decentralized structure, formed by a "complex web of smaller regional networks." The purpose of the decentralized structure was to enable the surviving points to continue to communicate should a nuclear strike damage part of the system. The Internet is composed of a main backbone of computers. The "node" computers on the backbone are enormous file servers that store and transmit data. Connected to these nodes are smaller
networks that service specific geographical regions.\(^7\) Thousands of these computer file servers act as "hosts" for Web sites and other digital files.\(^8\) In the 1970s, ARPA played a key role in the development of rules or "protocols" for transferring data between different types of computer networks.\(^9\) Each of the interconnected computers, or servers, that composes the Internet has its own Internet Protocol address.\(^10\) Every document contained on the servers has its own Uniform Resource Locator ("URL"), or Internet address.\(^11\)

In its early stages, the Internet was almost exclusively a research network, and unrestricted use of the information contained on it was standard.\(^12\) This custom was supported by the National Science Foundation's ("NSF") "acceptable use policy," which restricted the network to noncommercial purposes.\(^13\) Because this policy applied only to the NSF Network backbone,\(^14\) service providers formed the Commercial Internet Exchange ("CIX") to bypass the acceptable-use policy.\(^15\) The CIX network became available for use in 1992.\(^16\)

Today commerce has consumed the online world, and the sharing philosophy that spawned the Internet has come into conflict with business and competition.\(^17\)

B. The World Wide Web

In 1989, Tim Berners-Lee invented the Web, "an abstract (imaginary) space of information"\(^18\) containing documents, sound files, and video files. While the Internet exists wholly apart from the Web, the Web could not exist without the Internet. As the Supreme Court has emphasized, "[n]o single organization controls any membership in the Web, nor is there any single centralized point from

\(^{7}\) See Siskind & Moses, supra note 2, at 16-17.
\(^{8}\) See Zimmerman, supra note 6, at 591.
\(^{9}\) Gelman, supra note 3, at 2.
\(^{13}\) Id.
\(^{14}\) The NSF backbone supports a sizable amount of Internet traffic. However, networks can still communicate with one another through the use of other network systems. See Jill H. Ellsworth & Matthew V. Ellsworth, Marketing on the Internet: Multimedia Strategies for the World Wide Web 13 (1995).
\(^{15}\) See Ellsworth & Ellsworth, supra note 14, at 256; O'Rourke, supra note 12, at 624.
\(^{16}\) See O'Rourke, supra note 12, at 624.
\(^{18}\) Tim Berners-Lee, Frequently asked questions by the Press-Tim BL (visited Oct. 16, 1999) <http-//wwwv.w3.org/People/Berners-Lee-Bio.html/FAQ.html>.\)
which individual Web sites or services can be blocked from the Web."\(^{19}\)

The Web is based on a technology called "hypertext," which enables users to link directly from one source of information to another, regardless of the type of computer being used or where the computer is located.\(^{20}\) Accordingly, one court has noted that "[t]he power of the Web stems from the ability of a link to point to any document, regardless of its status or physical location."\(^{21}\) Web pages are created using the programming language known as HyperText Markup Language ("HTML").\(^{22}\) A Web site may be one page or a collection of associated Web pages connected via hypertext links.\(^{23}\) The initial entry to a Web site is called a home page.\(^{24}\)

A user may access a Web site in several ways: by typing in the Web site address when using a browser;\(^{25}\) by running a search using a commercial search engine such as Yahoo, which produces a list of sites conforming to the user’s search criteria;\(^{26}\) or through hypertext links from one site to another.\(^{27}\) Links are selected words or graphics in a Web page that are typically highlighted and can be "expanded" to provide additional information about the topic.\(^{28}\) Links connect to other documents or graphics, either within the same Web site or in others.\(^{29}\) Consequently, the user does not have to move through a document sequentially, but can choose to follow the links that interest her.\(^{30}\) The use of links obviates the need to memorize long and complicated URL addresses.\(^{31}\)

Browsers such as Netscape Navigator are interfaces required to view HTML documents on the Web.\(^{32}\) These browsers connect via the Internet to remote computers, request documents, and then format

\(^{20}\) See Gelman, supra note 3, at 6; Krol, supra note 4, at 287.
\(^{22}\) See Siskind & Moses, supra note 2, at 82; infra text accompanying note 54.
\(^{23}\) See Krol, supra note 4, at 289; Echerou, supra note 10, at 2.
\(^{24}\) See Krol, supra note 4, at 289; Echerou, supra note 10, at 2.
\(^{26}\) See Reno, 521 U.S. at 852.
\(^{27}\) See id.; Kopp & Suter, supra note 25, at 305.
\(^{29}\) See Reno, 521 U.S. at 852.
\(^{30}\) See Paul Gilster, Finding It on the Internet 140 (1994).
\(^{31}\) See Freeling & Levi, supra note 28, at S5.
\(^{32}\) See Ellsworth & Ellsworth, supra note 14, at 40.
the resulting documents for viewing on the user's computer. The remote computers run Hypertext Transfer Protocol ("HTTP") servers that retrieve the documents when requested.

The HTTP process comprises four steps. When a user wishes to connect to a Web site, her browser software contacts the Web server where the Web site resides and establishes a connection to that computer. The Web site computer then sends the requested information to the user's computer. Her browser software retrieves the data and displays it. The user's computer and the Web server where the Web site resides then disconnect from one another. Hence, while one user is viewing the contents of a Web page or selecting a link to click on, other users are able to access and view that same Web site. When a user decides to click on a link, her browser reconnects to the appropriate Web server, obtains and displays the information she requests, and again disconnects. As a result of the HTTP process, more than seven intermediate copies of the site's content may be made during the course of browsing a Web site.

C. Web Business

The Web is now a commercial marketplace. Today, advertising on Web sites is a billion-dollar business. A prevalent business model for Internet businesses relies on advertising revenue, which in turn depends on proving the size of one's audience through a measure of hits (or visits) of the Web site, and ensuring particular advertising placement. A significant number of commercial sites are completely advertiser-supported, and Web users can visit them free of charge.

33. See Spainhour & Quercia, supra note 11, at 2.
34. See id.
36. See id.
37. See id.
38. See id.
39. See id.
40. See id.
41. See id.
42. See Zimmerman, supra note 6, at 593 (quoting David L. Hayes, The Coming Tidal Wave of Copyright Issues on the Internet 3-4, 34 (1997)).
45. See O'Rourke, supra note 12, at 626; Zimmerman, supra note 6, at 608; Wendy R. Leibowitz, E-Litigation: Linking to lawsuits, Nat'l LJ., Aug. 16, 1999, at B24 (discussing advertising placement as the specific placement of the advertising on the Web site, such as a banner on the home page).
Web site owners utilize links to increase traffic to their sites.47 For owners intent on generating advertising revenues, the more visitors to the site, the greater the potential reward.48 Thus, for these Web sites, the content is valuable and its protection vital.

D. Linking

In Internet culture, or according to standard “netiquette,”49 authors may add links to other Web sites without obtaining permission from the linked-to site.50 Many commentators have suggested that an implied license to link exists because Web site owners know that the Web is navigated through links and understand that by having a Web site, one assumes other sites will link to it.51 In addition, at least one court has arguably created a First Amendment “right to hyperlink.”52 Linked-to sites typically do not object to linking because it benefits the linked-to site by bringing additional viewers and site hits.53

51. See Jonathan Rosenoer, CyberLaw: The Law of the Internet 10 (1997); Kara Beal, The Potential Liability of Linking on the Internet: An Examination of Possible Legal Solutions, 1998 B.Y.U. L. Rev. 703, 725-26 (arguing that “by publishing a site, the owner is impliedly licensing all hypertext links,” but not in all circumstances); O’Rourke, supra note 12, at 658-59 (noting that many commentators “assert simply that the web page owner’s act of placing the information on the web, knowing that the web is navigated by links, implies a license in favor of users that link to it”); Freeling & Levi, supra note 28; Hartnick, supra note 47. But see Walter A. Effross, Withdrawal of the Reference: Rights, Rules, and Remedies for Unwelcomed Web-Linking, 49 S.C. L. Rev. 651, 677 (1998) (arguing that three factors weigh against an implied license to link: (1) the fact that the linked-to site did not prepare its material for the linking site; (2) the lack of a “meeting of minds” between the linked-to and linking site; and (3) the lack of payment by the linking site to the linked-to site).
52. See ACLU v. Miller, 43 U.S.P.Q.2d 1356, 1358, 1360 n.5, 1361 (N.D. Ga. 1997) (striking down a state statute criminalizing the use of any “trade name, registered trademark, logo . . . or copyrighted symbol . . . which would falsely state or imply that such person . . . has permission or is legally authorized to use such trade name, registered trademark, logo . . . or copyrighted symbol” because the act “chilled[ed] protected expression” without any “compelling state interest that would be furthered by restricting the linking function in this way”); see also Jeffrey R. Kuester & Peter A. Nieves, Hyperlinks: A Form of Protected Expression?, Nat’l L.J., Jan. 26, 1998, at C10 (“[T]he court clearly attached First Amendment importance to hyperlinking, arguably creating a right to link.”).
53. See O’Rourke, supra note 12, at 626.
HTML tags are used to create a hypertext link from one Web site to another. HTML is a "system of tags used to describe and create World Wide Web documents and display them using browser programs. HTML consists of text and tags which assign text special meanings, formatting instructions, and hypertext links." There are basically two types of links: out links and in links. A hypertext reference ("HREF") link is an out link that instructs the browser to go to a different point on the same page, to a different page within the same site, or to a site other than the local Web site (out linking). Thus, when the user clicks on an out link, a connection is made to a new site or page and the new document replaces the current document on the user's screen. Out linking is the most common method of navigating the Web. HREF links are used to create a deep link, or a link to an underlying page of a Web site. HREF links are usually established through text or symbols, also called icons. The text or icon is typically highlighted by special formatting, color, or other features to make it easy to detect. To create the link using HTML, one must anchor the Web site and specify the document to link.

An IMG link is an in link (or inline link) that brings an image contained in a separate file into the text and onto the page being viewed. The separate file may be contained on the Web author's file server, on the same Web site, or on an entirely different site. Unlike when accessing an HREF link, the user need not take any action to activate an IMG link—it is automatically activated upon loading the Web page. The image or text that is linked to is then brought into and displayed on the linking Web page as though it is part of that Web page. IMG links are not apparent to the viewer, but exist within the HTML code of a Web page. Hence, "[t]he user typically will not realize that the image or text called up by the IMG link is resident on another Web site." In addition, while the image linked to by the

55. See Echerou, supra note 10, at 2.
57. See Echerou, supra note 10, at 2.
58. See Saidman, supra note 57.
60. See Echerou, supra note 10, at 3.
62. See Echerou, supra note 10, at 3.
63. See id.
64. See Saidman, supra note 57.
65. Echerou, supra note 10, at 3.
E. Framing

Netscape's release of Netscape Navigator 2.0 introduced a new way of presenting information on the Web—via frames. Framing is analogous to an IMG link in that it occurs "when one Web site brings content from another Web site into a window that appears on the original framing site." Framing allows two or more Web sites to appear on the user's screen simultaneously.

Frames thus enable a site to be broken up into component boxes. By creating links in each frame, the contents of the frames can change independently of the contents of the other frames. Framing can be a useful navigation tool for the user. One frame can remain static while the user navigates through content within another frame. The ability to create frames for advertising content has made them most popular on commercial sites.

Although the secondary site is viewed within the frame, the first site's URL is displayed on the user's browser. It is possible to obtain the URL of the framed site by looking in the dropdown View menu for Frame Info, but that is not intuitive to most users. In addition, the standard attempt to "bookmark" a framed site (i.e., add an entry for that site in a directory of sites stored in the browser program for easy return) results in a bookmark of the framing site. While it is possible to bookmark a framed site, it requires additional effort.

66. See id.
69. See Notess, supra note 67.
70. See id. The ability to view frames comes from the browser; Netscape supports framing, but some browsers are non-frame-enabled. See id. at 68. Some framed sites display a message alerting the user that a frames-enabled browser is necessary to view the site. See id.
71. See id. at 66.
72. See Saidman, supra note 57.
73. See Notess, supra note 67, at 68.
74. See id.
75. See Gahtan, supra note 48, at 2.
76. Usually, when the user bookmarks a page, she is bookmarking the URL. In the case of frames, the URL remains that of the framing site. In version 3 of Netscape, the user may bookmark an individual frame by using the right mouse button and choosing "Add Bookmark" from the menu. See Notess, supra note 67, at 68. But see Weiss, supra note 50 (noting that framing "prevents users from creating bookmarks for the framed pages").
The unique technological innovations of linking and framing on the Web raise challenging issues of ownership rights in the online world. To this end, Part II will discuss the goals of copyright law and the law of misappropriation, and the protections they currently provide to more traditional works.

II. COPYRIGHT LAW AND THE LAW OF MISAPPROPRIATION

Deep linking, inline linking, and framing implicate several copyright protections as well as the common law doctrine of misappropriation. In order to properly analyze these implications, Part II examines the basic premises of copyright law and the rights it affords to the copyright holder, along with the purpose and utility of the law of misappropriation.

A. Copyright Purposes and Subject Matter

Federal copyright law finds its basis in the Constitution. The Copyright Clause provides that: “The 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 respective Writings and Discoveries.” Copyright law as developed in the United States encourages and rewards creative expression.87 Copyright protection provides compensation to authors in exchange for creative endeavors.78 However, the ultimate goal of copyright law is to provide access to quality works in order to enrich the general public.89 By providing protection, copyright law therefore induces authors to create works that benefit the public.81

Congress outlined the scope of copyright protection in the Copyright Act of 197682 (“Act”): “(a) Copyright protection

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77. U.S. Const. art. I, § 8, cl. 8.
78. See Quality King Distrib., Inc. v. L'Anza Research Int'l, Inc., 523 U.S. 135, 151 (1998) (noting that the “principal purpose [of the Copyright Act] was to promote the progress of the 'useful Arts,' by rewarding creativity” (citations omitted)).
79. See Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).
80. See Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994); Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) (“The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.'”); Aiken, 422 U.S. at 156 (“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.”).
81. See Fogerty, 510 U.S. at 524 (“The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public.”); see also Craig Joyce et al., Copyright Law 3 (4th ed. 1998) (noting that while “the focus of American copyright law is primarily on the benefits derived by the public from the labors of authors . . . [i]n fact, there exist, in the legal materials both of the United States and of other countries with a developed jurisprudence on the subject, many theories about how and why copyright works”).
subsists... in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”

According to the Act, “[a] work is ‘fixed’ in a tangible medium of expression when its embodiment is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”

Ownership of a valid copyright requires both originality and copyrightability of the subject matter. The standard for originality does not require novelty or uniqueness, but rather that the work originated with the author. Copyrightable subject matter includes in relevant part: “(1) literary works; (2) musical works...; (3) dramatic works... (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; [and] (7) sound recordings...”

The written content of Web pages that meets the originality standard has been treated as a literary work, because under the Copyright Act literary works include those that are digitally rendered. A Web page may also contain pictorial or graphic works, musical works, audiovisual works, and sound recordings. All of these are protected by copyright law, even though they are stored in digital form on the Web.

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84. Id. § 101.
86. See, e.g., Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 103 (2d Cir. 1951) (concluding that “[n]o matter how poor artistically the ‘author’s’ addition, it is enough if it be his own”). For example, facts are not copyrightable because they “do not owe their origin to an act of authorship.” Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 347 (1991). But a compilation that contains no protectible written expression may meet the constitutional standard for copyright protection if it contains an original selection or arrangement. See, e.g., Feist, 499 U.S. at 356-60.
88. See United States Copyright Office, Copyright Registration for Online Works, Circular 66, at 1 (1998) (“For works transmitted online, the copyrightable authorship may consist of text, artwork, music, audiovisual material... sound recordings, etc.”). See also Digital Communications Assocs. v. Softklone Distrib. Corp., 659 F. Supp. 449, 454 (N.D. Ga. 1987) (“It is now well-established under the amended 1976 Act that a computer program is a ‘work of authorship’ and is subject to copyright protection. Under the Act, computer programs are classified as ‘literary works’...” (citing Whelan, Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1234 (3d Cir. 1986)); Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1249 (3d Cir. 1983).
90. See id.
B. Exclusive Rights

The Copyright Act grants copyright owners certain exclusive rights. A copyright is infringed when a person other than the owner violates any of those rights. The exclusive rights relevant to linking technology are the right "to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies . . . ; (2) to prepare derivative works based upon the copyrighted work; . . . (5) . . . to display the copyrighted work publicly." The current case law interpreting these exclusive rights, as well as the case law on misappropriation, provide some guidance in regard to the issues implicated by the deep linking, inline linking, and framing technologies examined in this Note.

1. Reproduction Right

A copyright owner has the exclusive right to reproduce the work or to create copies. The Copyright Act defines a copy as a fixed object from which the work can be "perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." In the online context, reproduction is the creation of a copy of the online site content, whether a pictorial or graphic work, a musical work, an audiovisual work, a sound recording, or the Web page itself. Exactly how such a copy is effected via linking and framing raises interesting questions. Theoretically, because an individual's server makes copies of the original Web site, that user is infringing the site's copyright. This possibility will be discussed in Part IV.

A plaintiff must prove two elements to sustain a claim of direct infringement of the reproduction right: "(1) ownership of a valid copyright; and (2) copying of constituent elements of the work that are original." Infringement of the reproduction right is the most common cause of action invoked when protected content is copied.

2. Derivative Work Right

The derivative work right protects authors against unauthorized uses and transformations of their original works. According to the Copyright Act, "[a] 'derivative work' is a work based upon one or more preexisting works," which includes "editorial revisions, annotations, elaborations, or other modifications which, as a whole,

92. Id. § 106.
93. See id.
94. Id. § 101.
represent an original work of authorship . . . ."96 Parties seeking to transform a work in one of these ways must first gain permission from the copyright holder. Infringement of the derivative work right requires not only transformation of the original work, but the creation of a minimally original new work.

Several cases have discussed derivative works in the context of mounting or framing works of art. These cases are analytically analogous to the scenario of framing Web sites. In Lee v. A.R.T. Co.,97 the Seventh Circuit found that a copyrighted lithograph that was mounted on a ceramic tile and sold was not a derivative work.98 Writing for the court, Judge Easterbrook examined the language of the Copyright Act and concluded that the original work was not recast, transformed, or adapted.99 Judge Easterbrook explained that a museum does not violate section 106(2)100 of the Copyright Act each time it changes the frame of a copyrighted painting, even though the selection of a frame does affect the impression the work communicates, and often artists stipulate specific frames.101 The court concluded that "[i]f the framing process does not create a derivative work, then mounting art on a tile, which serves as a flush frame, does not create a derivative work."102

The lower court in Lee v. Deck the Walls, Inc.103 used similar reasoning as that of Judge Easterbrook. In Deck the Walls, the defendant mounted the plaintiff's notecards on ceramic tiles and sold them.104 Finding "the proffered distinctions between framed art and 'tiled art' unconvincing and without support,"105 the court opined that a work's copyright is not infringed by employing the work in an unauthorized manner beyond the scope of the copyright holder's exclusive rights.106 The court cited the Second Circuit for the notion

96. 17 U.S.C. § 101. Examples include "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." Id.
97. 125 F.3d 580 (7th Cir. 1997).
98. See id. at 583.
99. See id. at 582.
100. Section 106(2) provides for the exclusive right to prepare derivative works. See 17 U.S.C. § 106(2).
101. See Lee, 125 F.3d at 581.
102. Id. at 581. In addition, the court concluded that if courts adopted the approach of Lee and the Ninth Circuit about what constitutes a derivative work, then the United States would in effect be adopting an expansive version of authors' moral rights, under which artists may prevent any alteration of their works of which they disapprove. See id. at 582.
104. See id. at 577.
105. Id. at 579 (citation omitted).
106. See id. at 580 (citing Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 155 (1975)).
that an unauthorized derivative work must contain the requisite creativity and originality in order to constitute copyright infringement. The court also pointed out that the originality requirement for a derivative work demands only that "the author make the selection or arrangement independently... and that it display some minimum level of creativity." Because the work did not exhibit the necessary originality, it was not an unauthorized derivative work.

On the other hand, *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.* held that mounting art tiles was sufficiently transformative to create an unauthorized derivative work. In *Mirage*, the plaintiff brought suit against a store that removed prints from a commemorative book, mounted them on tiles, and then sold them. The Ninth Circuit noted that by removing the works from the book and adhering them to the tiles, the store did not reproduce the works. Rather, the store "recast or transformed" the works by including them in the preparation of the tiles. Thus, the Ninth Circuit found the appellant liable for copyright infringement.

These art-framing cases are useful to the analysis of unwanted links and the derivative-work right in Part IV.

3. Display Right

Copyright owners are afforded protection against unauthorized displays of their works. To display a work is "to show a copy of it" directly or through "a film, slide, television image, or any other device or process...." An unauthorized display will not amount to an infringement unless it is made "publicly." The Copyright Act defines displaying a work "publicly" as follows:

(1) to perform or display [a work] 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.

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107. See id. (citing Woods v. Bourne Co., 60 F.3d 978, 993 (2d Cir. 1995)).
109. 856 F.2d 1341 (9th Cir. 1988).
110. See id. at 1342.
111. See id. at 1344.
114. See 2 Nimmer, supra note 86, § 8.20[A].
and at the same time or at different times.115

The display right encompasses the direct showing of a copy, as well as display by projection of an image onto a screen or other surface “by any method” and “the transmission of an image by electronic or other means.”116 Because the definition of copies “includes the material object . . . in which the work is first fixed,”117 the right of display includes the original work. The owner of a lawfully made copy of a copyrighted work, however, does not need the copyright owner’s authorization to display the copy to an audience present where the copy is situated.118 For example, the owner of a work of fine art may display the work publicly in a gallery without obtaining the copyright owner’s permission.119

One of the first cases to explore the display right and digital images is Playboy Enterprises, Inc. v. Webbworld, Inc.120 There the court wrestled with appropriate definitions of “display” and “public” in the online realm. The court in Webbworld found direct infringement of Playboy’s reproduction, distribution, and display rights by an adult Web site that stored several of Playboy’s copyrighted images on its Web server and displayed them to its subscribers.121 In finding that the display right was infringed by allowing subscribers to view the images, the court noted that “[t]he concept of display is broad”122 and covers display of images on a Web server in order to prevent indirect public displays that would affect the copyright owner’s market for reproduction and distribution.123

Playboy Enterprises, Inc. v. Frena124 further defined public display in the online context and serves as an analogy to unauthorized Web site display. In Frena, in which the defendant displayed copyrighted images on his Bulletin Board Service (“BBS”),125 the court noted that

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118. See id. § 109(c).
119. See id. § 109(c).
120. 991 F. Supp. 543 (N.D. Tex. 1997), aff’d, 168 F.3d 486 (5th Cir. 1999).
121. See id. at 551-52.
122. Id. at 552 (citing Playboy Enters. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993)). The display right is broad to protect the copyright owner against unauthorized displays regardless of the medium. See H.R. Rep. No. 94-1476, at 64 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5678 (noting that the display right is “broad enough to include all conceivable forms and combinations of wired or wireless communications media”).
125. A bulletin board service is a system one accesses by modem in order to post and download messages or electronic files. See Robin Williams, Jargon: An Informal Dictionary of Computer Terms 58 (1993).
under the Act a public display is a display at a location accessible to
the public or where a significant number of persons beyond the typical
circle of family and its social acquaintances is congregated. Thus, even
though the BBS was available to only those users with a password, Frena's unauthorized display of copyrighted images on his
BBS was a public display.

These cases establish that showing copyrighted images on the Web
is a violation of the copyright owner's display right. As such, showing
Web site content or a Web page itself should similarly invoke the
display-right protection, assuming each has met the originality
threshold.

C. Infringement and Defenses

A copyright is infringed when someone other than the owner
violates any of the exclusive rights granted by the Copyright Act.
Knowledge or intent is not an element of direct infringement. Direct
infringement requires only that the infringer violate an
exclusive right, whether knowingly or not. The next two sections
discuss liability for contributory infringement and the fair use defense
to a claim of infringement, both relevant to the application of
copyright law to online works.

1. Contributory Infringement

Though not liable as a direct copyright infringer, one can
nonetheless be liable for contributory infringement. Contributory
liability is relevant to a discussion of liability for linking because
courts have identified at least two types of activities that may lead to
contributory liability: "(i) personal conduct that encourages or assists
the infringement; and (ii) provision of machinery or goods that
facilitate the infringement." While no clear definition of a
contributory infringement exists, the Supreme Court evaluates
liability "depend[ing] upon a determination of the function that [the
alleged infringer] plays in the total [reproduction] process." In one
scenario, the Court defined a contributory infringer as one who

126. See Frena, 839 F. Supp. at 1557.
127. See id. at 1557; see also Playboy Enters. v. Russ Hardenburgh, Inc., 982 F.
Supp. 503, 513 (N.D. Ohio 1997) (finding that "[d]efendants displayed copies of PEI
photographs to the public by adopting a policy which allowed their employees to
place those photographs in files available to subscribers").
129. See id.; supra note 4, at 212.
130. See 17 U.S.C. § 501(a); see also id. § 106.
131. Matthew Bender & Co. v. West Pub'l'g Co., 158 F.3d 693, 706 (2d Cir. 1998)
giving "TIst TV. Prods., Inc. v. California Auth. of Racing Fairs, 785 F. Supp. 854, 861
n.13 (E.D. Cal. 1992)).
controls the copyrighted works and allows use without permission from the copyright owner. In another situation, the Second Circuit defined a contributory infringer as "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another." As a rule, contributory infringement follows only after a finding of direct infringement by another party.

In the linking context, individual users are theoretically liable as direct infringers when their computer technology makes copies of Web site content for display on their screens. Providers of linking and framing technology could thus be liable for contributory infringement by making this ability to download other sites possible. The viability of such claims will be discussed in Part IV.

2. Fair Use

Fair use is a defense to copyright infringement relevant to an analysis of infringing conduct for the three types of unwanted links. The defense limits the exclusive rights of the copyright owner by recognizing that certain acts of copying are defensible as fair uses. It is an equitable doctrine that weighs the infringing use against the harm to the copyright holder. Courts consider four factors in determining whether an infringement is a fair use:

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

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135. See Cable/Home Communication Corp. v. Network Prods., Inc., 902 F.2d 829, 845 (11th Cir. 1990) (citing 3 Nimmer on Copyright § 12.04[A], at 12-42 to 12-42.1).
136. See 4 Nimmer, supra note 86, § 13.05.
137. See Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 144-45 (S.D.N.Y. 1968). But see William F. Patry, The Fair Use Privilege in Copyright Law 4 (2d ed. 1995). Fair use may date back to at least Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901) (Story, J.) ("[W]e must often, in deciding questions of infringement, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."). See Patry, supra, at 3.
(1) The purpose and character of the use

In weighing this factor, non-commercial, educational uses are favored over commercial, exploitative uses. According to the Supreme Court, "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." The Supreme Court has also reasoned that the primary purpose of this factor is to determine whether the new work supersedes the original work or adds something new, or is otherwise transformative. The more transformative the use, the less the elements such as commercialism will weigh.

(2) The nature of the copyrighted work.

The second factor focuses on two aspects of the copyrighted work: whether it is published or unpublished, and whether it is informational or creative. The scope of the fair use defense is generally narrower when the work is unpublished because the author's right to control the first appearance of her work weighs against a finding of fair use. The second aspect "looks to broaden the protection of those works that are creative, fictional, or highly original and lessen the protection for those works that are factual, informational, or functional." Copyright law recognizes the need to disseminate factual works, making these works more susceptible to fair use. Thus, the fair use defense is more likely to succeed when a work is factual rather than fictional.

139. Id.
142. See id.
146. See Religious Tech. Ctr., 923 F. Supp. at 1246 (citing Campbell, 510 U.S. at 586); see also Harper & Row, 471 U.S. at 563 (noting that the "law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy"); 4 Nimmer, supra note 86, § 13.05[A][2][a] (stating that "the more creative a work, the more protection it should be accorded from copying").
(3) [T]he amount and substantiality of the portion used in relation to the copyrighted work as a whole.\textsuperscript{149}

The copying of an entire work generally weighs against a finding of fair use.\textsuperscript{150} The amount of permissible copying varies according to the purpose and character of the use (the first factor).\textsuperscript{151} Thus, even if a substantial portion of the work was copied, but the purpose and character of the use was productive and non-commercial, it may weigh toward a finding of fair use.

(4) [T]he effect of the use upon the potential market for or value of the copyrighted work.\textsuperscript{152}

This factor concerns the impairment to the market caused by the conduct of the alleged infringer and ""whether unrestricted and widespread conduct ... would result in a substantially adverse impact on the potential market" for the copyrighted work.\textsuperscript{153} The fourth factor is the most important in determining fair use\textsuperscript{154} because the fair use doctrine will not allow a use that supersedes the use of the original work.\textsuperscript{155}

Because copyright law seeks to provide incentives to create and disseminate quality works, where a use competes with or supplants the copyrighted work, that use will not be considered fair.\textsuperscript{156}

D. Misappropriation

Misappropriation is a state law cause of action that draws on

\textsuperscript{149} 17 U.S.C. § 107 (1994).
\textsuperscript{150} See Sony, 464 U.S. at 449-50; 4 Nimmer, supra note 86, § 13.05[A][3].
\textsuperscript{152} 17 U.S.C. § 107.
\textsuperscript{153} Campbell, 510 U.S. at 590 (quoting 3 Nimmer on Copyright § 13.05[A][4](1993)); see also Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 568 (1985) (noting that fair use is negated if challenged widespread use would adversely affect the potential market for the copyrighted work); 4 Nimmer, supra note 86, § 13.05[A][4] (same).
\textsuperscript{155} See, e.g., United Tel. Co. of Mo. v. Johnson Publ'g Co., 855 F.2d 604, 610 (8th Cir. 1988). The Supreme Court has returned to Folsom v. Marsh to determine the definition of a superseding use. See Harper & Row, 471 U.S. at 549 (noting that a reviewer may cite from the original work "for the purposes of fair and reasonable criticism," however, "if he thus cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy") (quoting Folsom v. Marsh, 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841) (No. 4901) (Story, J.)).
\textsuperscript{156} See Ringgold v. Black Entertainment Television, Inc., 126 F.3d 70, 80-81 (2d Cir. 1997); Salinger v. Random House, Inc., 811 F.2d 90, 99 (2d Cir. 1987); Epstein, supra note 143, § 4.02[C].
notions of fairness. It is invoked as a remedy against one who
profits from the intellectual labor of another. Misappropriation is a
relevant cause of action in deep linking, inline linking, and framing
cases when news is the subject matter. Because copyright law does
not protect facts, the copying or taking of news stories has a
disputatious history. According to the Supreme Court in
International News Service v. Associated Press ("INS"), "news is not
within the operation of the copyright act." However, the taking of
news is within the doctrine of misappropriation, which is "not
necessarily synonymous with copyright infringement." The term
misappropriation originated in INS, in which INS was accused of
pirating the substance of AP's news stories and shipping them to INS's
west coast affiliates. The affiliates then rewrote the news stories
and published them in west coast newspapers. The affiliates,
therefore, took the facts, which are not copyrightable, but not the
expression, which is copyrightable.

Nonetheless, the Court found that the acquisition of news requires
organization, "a large expenditure of money, skill, and effort," and
"an exchange value... dependent chiefly upon its novelty and
freshness." The Court also noted that the misappropriation of news
by a competing news agency constitutes unfair competition because it
is contrary to acts of good conscience.

Because misappropriation cases typically involve a valuable
intangible not protected by patent, trademark, or copyright law, a
misappropriation claim may be preempted by federal law. A state
law claim is preempted when that claim seeks to vindicate "legal or
equitable rights that are equivalent to any of the exclusive rights"

157. See Joyce et al., supra note 81, at 58; 2 J. Thomas McCarthy, McCarthy on
158. See Joyce et al., supra note 81, at 58.
159. See supra note 85.
(1918) (holding that while the expression created by an author is copyrightable, the
facts underlying an article are not); Financial Info., Inc. v. Moody's Investors Serv.,
Inc., 808 F.2d 204, 207-08 (2d Cir. 1986) (holding that financial reporting service's
reporting of financial information is not original enough to be eligible for copyright
protection); Gannett Satellite Info. Network, Inc. v. Rock Valley Community Press,
existence of an ownership right in several news articles).
161. INS, 248 U.S. at 233.
162. National Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 850 (2d Cir. 1997)
(citing H.R. Rep. No. 94-1476 (1976)); 1 Nimmer, supra note 86, § 1.01[B][1][f][i].
163. See INS, 248 U.S. at 238; Joyce et al., supra note 81, at 13.
164. See INS, 248 U.S. at 231.
165. Id. at 238.
166. See id. at 240.
167. See Joyce et al., supra note 81, at 13; 1 Nimmer, supra note 86, § 1.01[B]-
[B][1].
168. See 1 Nimmer, supra note 86, § 1.01[B]-[B][1].
granted by copyright, and the particular work falls "within the subject matter of copyright." However, if an "extra element," in addition to the elements of a copyright claim, exists, then the state cause of action is not within the general scope of copyright protection and thus survives preemption. The legislative history of the Copyright Act indicates, and most courts agree, that there is no preemption when a plaintiff makes out a "hot news" claim. Thus far, this is the only misappropriation cause of action that has survived preemption when the claim concerns rights that are equivalent to those conferred by copyright and features subject matter within the scope of copyright.

The elements of a hot news claim were laid out by the Second Circuit in *NBA v. Motorola, Inc.*:

(i) [The plaintiff generates or collects information at some cost or expense, (ii) the value of the information is highly time-sensitive, (iii) the defendant's use of the information constitutes free-riding on the plaintiff's costly efforts to generate or collect it, (iv) the defendant's use of the information is in direct competition with a product or service offered by the plaintiff, (v) the ability of other parties to free-ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.

Under this test, Web sites featuring up-to-the-moment news may be eligible for protection from misappropriation under a hot news theory.

This framework of copyright and misappropriation law serves as a springboard to a discussion of the relevance of current law to the three linking scenarios. Against this background, Part III will

169. 17 U.S.C. § 301(a) (1994); see also 1 Nimmer, supra note 86, § 1.01[B] (stating that "Congress has acted in explicit terms to pre-empt various state laws through Section 301 of the Copyright Act of 1976").

170. See, e.g., National Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 850 (2d Cir. 1997) ("[If] an 'extra element' is 'required instead of or in addition to the acts of reproduction, [for example], in order to constitute a state-created cause of action, then the right does not lie 'within the general scope of copyright,' and there is no preemption.'" (quoting Computer Assocs., Int'l v. Altai, Inc., 982 F.2d 693, 716 (2d Cir. 1992))).

171. See H.R. Rep. No. 94-1476, at 132 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5748 ("[S]tate law should have the flexibility to afford a remedy... against a consistent pattern of unauthorized appropriation by a competitor of the facts (i.e., not the literary expression) constituting 'hot' news...").

172. See 1 Nimmer, supra note 86, § 3.04[B][3][b].

173. *Motorola*, 105 F.3d at 852 (citations omitted) (finding that recorded broadcasts of NBA games—as opposed to the games themselves—are entitled to copyright protection, but the reproduction of facts from the copyrighted broadcast for use on hand-held pagers was neither an infringement nor a misappropriation under a hot news claim). The court in *Motorola* found that the extra elements in addition to those of copyright infringement "that allow a 'hot-news' claim to survive preemption are: (i) the time-sensitive value of factual information, (ii) the free-riding by a defendant, and (iii) the threat to the very existence of the product or service provided by the plaintiff." Id. at 853.
describe the relatively few cases and claims that have been brought by linked-to sites based on unwanted links.

III. COPYRIGHT LIABILITY AND MISAPPROPRIATION IN LINKING CASES

This part presents the current case law on the copyright and misappropriation implications of the three different types of linking: deep linking, inline linking, and framing. This part discusses in detail the facts of these cases and claims, which will then serve as models for the analysis of liability presented in Part IV.

A. Deep Linking

Deep linking occurs when the linking site creates a link to an underlying page (as opposed to the home page) of the linked-to site.\(^\text{174}\) There is no United States case law that specifically addresses the copyright implications of deep linking.\(^\text{175}\) Most claims have settled. The case of *Shetland Times Ltd. v. Wills*,\(^\text{176}\) decided by the Court of Session in Edinburgh, Scotland, is therefore important even in a discussion of United States copyright law because its examination of deep linking provides the only case law on the subject. Because *Shetland Times* involved a grant of an interim interdict, akin to a preliminary injunction, and is based on United Kingdom law, its applicability in the United States is limited. In addition, it contains little discussion of the technologies involved,\(^\text{177}\) rests its holding on a

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174. See supra notes 55-59 and accompanying text for a discussion of deep linking technology.
175. The most recent case involving deep linking was filed in July 1999, when Ticketmaster filed suit against Tickets.com in the Central District of California alleging “copyright infringement, breach of contract, false advertising, misappropriation, unfair business practices, trespass, unjust enrichment and tortious interference with prospective economic advantages.” Linda Deckard, *Internet Ticket Sales Subject of Lawsuit*, Amusement Bus., Aug. 2, 1999, at 9. Ticketmaster, a national provider of automated ticketing services, claimed among other things that the deep links that Tickets.com created were an unfair business practice and implied a partnership between the two sites. See id.; Joe Salkowski, *Ticket Giant Engages in Foolish War Over Links*, Chi. Trib., Aug. 23, 1999, at 4. Tickets.com argued that it was merely referring business to Ticketmaster that it could not fulfill. The theory of liability for the copyright claim made by Ticketmaster seems to be based on the reproduction right. See Deckard, supra.
177. “No detailed technical information was put before me in relation to the electronic mechanisms involved,” and “[t]he resolution of the above issues may in the
theory of liability unrecognized in United States copyright law, and has since settled.

The plaintiff, *The Shetland Times*, is a Scottish newspaper that carries local, national, and international news. The defendants were the managing director of Zetnews Ltd. and Zetnews Ltd. itself, a news reporting service operating under the name *The Shetland News*. Each newspaper had a Web site. The plaintiff's Web site contained many of the stories that had appeared in the plaintiff's print publication. The defendant's Web site included also verbatim headlines that had appeared in the plaintiff's newspaper and on the plaintiff's Web site. A user who accessed the defendant's Web site could click on the headlines on the defendant's home page and gain access to the plaintiff's text articles as published on the plaintiff's Web site. This was accomplished by a deep link to the plaintiff's Web site, enabling users to bypass the plaintiff's home page and go directly to the underlying page containing the corresponding article.

In granting the interim interdict, Lord Hamilton concluded that the plaintiff had made "a prima facie case that the incorporation by the [defendants] in their web site of the headlines provided at the [plaintiff's] web site constitutes an infringement of [section] 20" of the Copyright, Designs and Patents Act of 1988 by "the inclusion in a cable programme service of protected cable programmes." While the decision rested on the possible infringement of the headlines, Lord Hamilton also stressed that "[i]t was fundamental to the setting up by the [plaintiffs] of their web site that access to their material should be gained only by accessing their web site directly. While there has been no loss to date, there is a clear prospect of loss of potential advertising revenue in the foreseeable future." In disposing of the argument that the plaintiff benefited from the links, the Court found that "[t]here was . . . no substance . . . in the suggestion that the [plaintiffs] were gaining an advantage by their newspaper items being made

end turn on technical material not available to me at the hearing on interim interdict." 

Id. at 671.

178. The copyrightability of headlines is beyond the scope of this Note.


180. See id.

181. See id.


183. Id.


available more readily through the [defendant’s] web site.”186

The parties settled out of court by agreeing that each link to an individual story must include the notice, “A Shetland Times Story”; that the Shetland Times masthead logo must appear on the button next to each headline; and that the legend on the button be hypertext-linked to the Shetland Times Online headline page.187

B. Inline Linking

Inline links cause a file or image from another Web site to automatically appear on the linking site.188 There has been no published case law concerning inline links. The Dilbert dispute, a dispute that did not involve the filing of a complaint or any judicial determinations, is one of the few inline links controversies and thus will serve as a point of discussion for these links.

Dan Wallach created “The Dilbert Hack Page,” a site that presented the Dilbert comic strip via inline links to the United Media Web site, where the comic strips are located.189 When an end user browsed Wallach’s Dilbert Hack Page, she did not need to click on any links to view the Dilbert comic strip. Rather, the images appeared on Wallach’s Web site via IMG, or inline links.190 United Media, speaking for United Feature Syndicate, Inc., owner of the copyright in the comic strip, requested by letter that Wallach discontinue the link.191 United Media contended that “the names or likenesses of the Dilbert comic strips and all other United Media intellectual property cannot be used—on the World Wide Web or elsewhere—without the express, written consent of UFS.”192

In defense of his site, Wallach argued that he was not infringing because his Web page did not contain a copy of the Dilbert strip. Rather, his page instructed the user’s browser to go to the Dilbert site to retrieve the strip and display it on Wallach’s page.193 However, in a second letter, United Media asserted that Wallach’s inline links to copyrighted material constituted an unauthorized display of a

186. Id.
188. See supra notes 60-66 and accompanying text for a discussion of inline linking technology.
190. See id.; see also supra notes 60-66 and accompanying text (discussing IMG links).
192. Id.
copyrighted work, a violation of the Copyright Act. To avoid litigation, Wallach removed the page. The Dilbert dispute is significant because it serves as the only publicized scenario in which inline links were in dispute, and indicates that infringement of the display and reproduction rights are likely theories in future inline links litigation.

C. Framing

Framing cases have been somewhat more prevalent than other types of linking cases. Framing occurs when one site brings content from another Web site into a window that appears on the original framing site. The two most well-known cases dealing with copyright and misappropriation theories respectively are Futuredontics, Inc. v. Applied Anagramics, Inc. and Washington Post Co. v. Total News, Inc. The facts of each will be discussed in turn.

Futuredontics is one of the few framing cases that has not settled. Because there was a judicial ruling denying a motion to dismiss for failure to state a claim upon which relief can be granted, it is relatively instructive on the issue of framing and liability for an unauthorized derivative work.

Futuredontics operates a dental referral business using the telephone number 1-800-DENTIST. Futuredontics also maintains a Web site to advertise its dental referral business. The site consists of graphics and text, which are copyright-registered subject matter. Applied Anagramics, Inc. ("AAI") established its own Web site that included a link through which the user could view Web pages from the Futuredontics site within a frame. The frame included AAI's logo, information on AAI, and links to AAI's other Web pages. Futuredontics alleged that AAI infringed its copyright by creating an unauthorized derivative work. AAI, however, contended that Futuredontics' copyright claim should be dismissed because rather than creating a derivative work, the site provided a "lens" through which users could view the information Futuredontics provided.


198. See Kopp & Suter, supra note 25, at 309.


201. See id. at 2010; Kopp & Suter, supra note 25, at 309.
The court concluded that Futuredontics’ claim for relief sufficiently alleged copyright infringement based on an unauthorized derivative work, thus surviving a Rule 12(b)(6) motion to dismiss.203

As this Note goes to press, the AAI Web page no longer has a link to the Futuredontics page. The Patients and Dentists link connects directly to an underlying page on the AAI Web site that contains information about dentists.204 The court’s ruling in Futuredontics allows for the possibility that an unauthorized derivative work may be produced through the use of framing technology.

Another highly publicized framing case was Washington Post Co. v. Total News, Inc.,205 which has also settled. The case is significant because it involved one site benefiting from the time-sensitive content of another, thus raising a potential misappropriation claim. Plaintiffs in the case were several news corporations that published in an electronic format on the Web.206 The plaintiffs included The Washington Post Co., Time, Inc., Cable News Network, Inc. (“CNN”), Times Mirror Co., Dow Jones & Co., Reuters New Media, Inc., and Entertainment Weekly, Inc.

The defendant was Total News, a Web site that served as an index to these news sites. The site featured a menu of trademarks of the publications mentioned, as well as the Total News trademark and URL, some content from the framed site, and an advertisement from AT&T, with the opportunity to click on the ad for more advertising content.207

With the use of frames, the Total News Web site was divided into four independent windows.208 A vertical frame on the left side contained the names of the different news services. Each name acted as a hyperlink to the corresponding news service. In the bottom left portion was a small, rectangular frame that contained the Total News logo, and a frame along the bottom of the screen was used for advertisement space that Total News sold to generate revenue.209 The fourth and largest frame, located in the right-center part of the screen, was the news window. Thus, there were four separate windows on the screen. When a user selected a particular news service by clicking on

202. See Fed. R. Civ. P. 12(b)(6). The Rule provides that an action may be dismissed for “failure to state a claim upon which relief can be granted.” Id.
206. See id. paras. 14-21.
209. See id.
In February 1997, several newspapers and periodicals filed suit against Total News, Inc., challenging its practice of framing. The plaintiffs claimed both misappropriation based on a hot news claim and copyright infringement on the theory that defendants infringed the plaintiffs' material by "republishing" or "otherwise making it available without [p]laintiffs' consent." The plaintiffs' theory for their hot news claim was that they had "expend[ed] substantial resources to gather and display the news and information found on their websites," that the "news and information [was] time-sensitive" and frequently updated, and that the defendant's Web site "[was free riding] on plaintiffs' efforts" and misappropriated its content. In addition, they claimed that Total News's free riding substantially reduced the incentive for the plaintiffs to maintain their own Web sites.

The case has settled, with Total News agreeing to refrain from any direct or indirect framing of the plaintiffs' Web sites, and the plaintiffs agreeing to allow Total News to link to the sites, but only with a text-based no-frames hypertext link. Liability for framing, along with other linking scenarios, thus remains an open question.

Using the cases discussed in Part III as model scenarios for linking and framing activities, Part IV will examine the applicability of copyright and misappropriation causes of action to each linking scenario.

IV. COPYRIGHT LAW IS APPLICABLE TO THE INTERNET

This part applies copyright law and the law of misappropriation to Web linking and analyzes the potential causes of action created by deep links, inline links, and frames. For each of the three linking scenarios, this part uses a model case from Part III to analyze potential liability. This part argues that the reproduction right is inapplicable in these linking scenarios, and that the viability of

210. See id.
211. See supra Part II.D for a discussion of "hot news" misappropriation claims.
213. Id. para. 39.
214. See id.
infringement of the derivative work right turns on the particular facts of each case. Linked-to sites, however, have a cause of action against the linking site for infringement of the display right in cases of inline linking and framing, but not in the case of deep linking. In addition, this part argues that misappropriation is applicable when a Web site’s subject matter is hot news.

A. Deep Linking

Based on current case law and theories underpinning copyright law, linked-to sites containing time-sensitive content may have a cause of action for deep linking under the common law doctrine of misappropriation, but do not have a claim in copyright law.

1. Deep Linking and the Reproduction Right

In cases of deep linking, in which one site links to the underlying page of another site, analysis of copyright protection begins by asking whether deep links actually create copies of the work. Recall the facts of Shetland Times, in which the Shetland News linked to the underlying pages containing the news articles of the Shetland Times. Under United States law, defendant Shetland News does not infringe the reproduction right of the copyright holder because Shetland News does not make copies of the Web page articles. Rather, it provides links or references to the Shetland Times pages. Technically, it is the user who is making the copy by browsing the page through the link because the page will be stored in the RAM of the user’s computer. A copy stored in RAM has been held to meet the fixation requirement of the Copyright Act. In sum, The Shetland

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216. See supra notes 55-59 and accompanying text for a discussion of deep linking technology.
217. See supra Part II.B.1 for a discussion of the reproduction right.
219. For a discussion of Shetland Times, see supra Part III.A. While the decision does not discuss the reproduction right, this Note uses the facts of the case as a basis of discussion to determine whether deep linking infringes the reproduction right.
220. See also Brian D. Wassom, Note, Copyright Implications of “Unconventional Linking” on the World Wide Web: Framing, Deep Linking and Inlining, 49 Case W. Res. L. Rev. 181, 215-16 (1998) (“The transaction that creates a new copy of the file and distributes it occurs between the owner’s server and the user’s terminal.”).
221. Computers and file servers use two types of memory: temporary memory, or Random Access Memory (RAM), and permanent memory, which includes hard drives and floppy disks. See Zimmerman, supra note 6, at 595-96. When the computer is turned on and used, documents, programs, and other information must be loaded into RAM in order for the computer to work with or display the document or information. See id. But when the user closes a document, the document disappears entirely from RAM. See id. In addition, when the computer is turned off, everything that was in RAM disappears completely. See id. at 462.
222. See Triad Sys. Corp. v. Southeastern Express Co., 64 F.3d 1330, 1335 (9th Cir. 1995); MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518-19 (9th Cir. 1993) (upholding a finding of copyright infringement where a repair person who was not
News itself likely is not liable for direct infringement of the reproduction right. Most commentators who have addressed the issue agree.223

Were Shetland Times224 brought under United States law, in order to hold Shetland News liable for infringement of plaintiff's reproduction right the court would instead have had to find it liable for contributory infringement. Because contributory liability is dependent upon a finding of direct liability,225 one must identify a direct infringer. In a deep linking scenario, exactly who is making copies of the copyrighted work? In Shetland Times, the direct infringer is the end user because the end user is the only party making a copy.

However, it is unlikely that any court would find direct infringement on the part of the end user. This legal issue is not settled, but because the online world facilitates and even requires the infinite creation of copies,226 courts likely would find that the fair use exception applies to end users browsing the Web.227 Indeed, one court has indicated in dicta that browsing would be afforded the fair use exception.228 In addition, at least one commentator has interpreted

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223. See, e.g., Beal, supra note 51, at 724 ("[N]o copying of copyrighted work is involved in the creation or use of a link itself . . . ."); Wassom, supra note 220, at 215-16 ("The transaction that creates a new copy of the file and distributes it occurs between the owner's server and the user's terminal.").

224. While the decision does not discuss contributory liability, this Note utilizes the facts of the case as a basis of discussion to determine contributory liability for deep linking.

225. See supra Part II.C.1 for a discussion of contributory liability.

226. See Baumgarten et al., supra note 4, at 204-05; Hayes, supra note 89, at 77-78; see also Zimmerman, supra note 6, at 588 ("[C]opying' . . . is simply a ubiquitous activity on the web . . . [O]rdinary accessing of web sites itself involves the repeated reproduction of material placed on and intended to be accessed over the web."); supra notes 35-42 and accompanying text.

227. See supra Part II.C.2 for a discussion of the fair use defense to copyright infringement.

the Digital Millennium Copyright Act\textsuperscript{229} to "confirm[] that a temporary copy of a copyrighted work made automatically by a computer when browsing [the Web] is not considered an infringing copy."\textsuperscript{230} Some commentators have argued that the end user is not liable for either direct or contributory infringement because the copies that are made while browsing are authorized by an implied license.\textsuperscript{231}

To determine whether there is contributory liability in the deep linking that occurred in the \textit{Shetland Times} scenario, it is necessary to examine the fair use exception. The fair use defense is typically unsuccessful when an entire work has been copied.\textsuperscript{232} Nonetheless, applying the facts of \textit{Shetland Times}\textsuperscript{233} to the four fair use factors
required by the Copyright Act\(^{234}\) reveals that the end user likely would have a fair use defense.

(1) The purpose and character of the use.\(^{235}\)

In the case of *Shetland Times*, presumably an end user reading a newspaper article is using the material productively—the purpose of her use is to obtain information. In addition, the end user is not using the information commercially, because presumably she is not sharing the information, storing it, or printing it out. According to the Supreme Court’s profit/nonprofit approach to fair use, the importance of this factor is not whether the purpose of the use is monetary gain, but whether the user profits from the copyrighted material without compensating the copyright owner.\(^{236}\) Under the facts of *Shetland Times*, the user does not stand to profit from the use at all.

The Supreme Court has also explained that the goal of the purpose/character factor is to ascertain whether the new work supersedes the original work, adds something new, or is otherwise transformative.\(^{237}\) The more transformative the use, the less the other factors, such as commercialism, will weigh.\(^{238}\) In *Shetland Times*, the use is not transformative, nor does it add anything new at all. Nonetheless, on balance it seems that the first factor weighs in favor of the user reading the *Shetland Times*. Even the typical browser surfing the Web for recreational purposes other than reading news would likely have a fair use defense. Most browsers search for information and do not derive a profit from what they find.

(2) The nature of the copyrighted work.\(^{239}\)

The two issues relating to the nature of the copyrighted work are whether the original work was published or unpublished and whether it is informational or creative.\(^{240}\) In *Shetland Times*, the articles are published because they are already available on the Internet. This does not affect a finding of fair use because the purpose of the inquiry is to provide more protection to unpublished works in order to allow

\(^{234}\) See *supra* Part II.C.2.

\(^{235}\) This factor includes an examination of whether the purpose is of a commercial nature or for nonprofit educational purposes. 17 U.S.C. § 107(1) (1994). See *supra* notes 139-42 and accompanying text for a discussion of the first fair use factor.


\(^{238}\) See *id*.

\(^{239}\) See 17 U.S.C. § 107(2); *supra* notes 143-48 and accompanying text for a discussion of the second fair use factor.

the author control over her own work.\textsuperscript{241} The copyrighted work is informational because it is news. This weighs toward a finding of fair use because this aspect of the analysis expands protection for creative or fictional works and decreases protection for factual or informational works so that the latter are more easily disseminated.\textsuperscript{242} Thus, a determination of fair use is more probable when the work is factual rather than fictional.\textsuperscript{243} Here, because the \textit{Shetland Times} articles are factual, the balance weighs in favor of the end user.

(3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole.\textsuperscript{244}

If browsing the Web site is "using" the material, then a substantial amount of the Web site content is used because the entire article is copied in RAM when the user calls up the corresponding Web page—regardless of whether she actually reads it.\textsuperscript{245} The copying of an entire work weighs against a finding of fair use.\textsuperscript{246}

The amount of permissible copying varies according to the purpose and character of the use (the first factor).\textsuperscript{247} Thus, even though the entire work was copied in RAM, the purpose and character of the use remains productive and non-commercial, thus weighing toward a finding of fair use.

(4) The effect of the use upon the potential market for or value of the copyrighted work.\textsuperscript{248}

In these cases, there may be an effect on the potential market for the copyrighted work. When users bypass the home page of the \textit{Shetland Times}, the site owner is deprived of exposure to potential advertisers. This may result in decreased advertising revenue and a consequent decrease in the value of the copyrighted work to site owners. However, it is unclear whether the advertising is viewed less frequently because of the deep linking, or whether exposure to the advertising is unaffected because the links may be providing the site with additional traffic and exposure. Nonetheless, those accessing the

\textsuperscript{241} See supra note 145 and accompanying text.
\textsuperscript{242} See supra notes 146-47 and accompanying text.
\textsuperscript{244} See 17 U.S.C. § 107(3); supra notes 149-51 and accompanying text for a discussion of the third fair use factor.
\textsuperscript{245} See supra notes 221-22 and accompanying text for a discussion of copies in RAM.
\textsuperscript{248} See 17 U.S.C. § 107(4); supra notes 152-56 and accompanying text for a discussion of the fourth fair use factor.
site via deep links do not view the advertising at all. The value of the work is harmed. But because this harm results from the links, and only indirectly from the acts of the end user, arguably the end user should be provided a fair use defense. In addition, for policy reasons, it seems unlikely that courts would hold millions of web browsers liable for copyright infringement merely for surfing the Internet.

In sum, under current copyright law, a linked-to site would have difficulty arguing that linking makes unauthorized copies of Web site content. They would have equal difficulty trying to pin contributory liability on linking sites, as end users would likely be provided a fair use defense.

2. Deep Linking and Unauthorized Derivative Works

Construed in the context of the case law concerning derivative works, deep linking does not create a derivative work because there is no transformation of the underlying work. For example, in the Shetland Times case, the Shetland News has in effect taken a page from the Shetland Times Web site and made it part of the Shetland News site. It has not made editorial revisions by choosing that page from the Shetland Times site and adding it to its own site. Instead, it has merely linked to the entire article. Deep linking, therefore, does not meet the standard of originality required by copyright in order to constitute a derivative work. Hence, the Shetland Times would not be entitled to relief based on an infringement of the derivative work right.

249. See supra Part II.B.2 for a discussion of derivative works.
250. The Shetland Times case does not discuss derivative works. However, this Note refers to the facts of the case in order to determine whether deep linking creates a derivative work. See supra notes 176-87 and accompanying text for the facts of Shetland Times.
251. See Wassom, supra note 220, at 216 ("[W]hat is displayed by following the deep link is the original work itself; nothing is added, subtracted or shown in conjunction with the original."); supra note 96 and accompanying text.
Shetland News may have created a "compilation" or "collective work" in the sense that it has selected and arranged the works of Shetland Times on the Shetland News Web site. "A ‘compilation’ is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship," 17 U.S.C. § 101; see Feist Publications Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991) ("The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers."). "A ‘collective work’ is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." 17 U.S.C. § 101. However, because the works are not literally a part of the Shetland News Web site, this is likely an unsuccessful argument.
252. While most commentators agree that deep linking does not create a derivative work, see, e.g., Wassom, supra note 220, at 216, one commentator has suggested that Web sites are audiovisual works, and that changing the sequence in which the works are viewed infringes the copyright owner's right to prepare derivative works. See
3. Deep Linking and the Display Right

Similarly, deep linking does not infringe the copyright owner's display right under current case law.\textsuperscript{253} The display right protects the author against unauthorized public displays of a copyrighted work. In \textit{Shetland Times}, the \textit{Shetland News} does not display the copyrighted work on its Web site. Rather, it links to the \textit{Shetland Times} site, in effect routing the user to the original work. The end user is, however, unaware that she has left the \textit{Shetland News} site (the linking site) behind and that the \textit{Shetland Times}'s material is not that of the linking site. In other words, the end user believes she is still on the \textit{Shetland News} site. Such a scenario implicates trademark issues, such as reverse passing off,\textsuperscript{254} but it does not implicate copyright law. Thus, under the Copyright Act's definition of display, which calls for an unauthorized public showing, the \textit{Shetland Times} does not have a claim for infringement of the display right.\textsuperscript{255}

4. Deep Linking and Misappropriation for Hot News Claims

Under United States law, the facts of the \textit{Shetland Times} case raise the potential for liability for misappropriation,\textsuperscript{256} even though the news articles in question are copyrighted content. A misappropriation

\textsuperscript{253} See Wassom, \textit{supra} note 220, at 216 ("[T]he copyright holder can hardly object to the 'context' or 'manner' in which the page is displayed."); \textit{supra} Part II.B.3 for a discussion of the display right.

\textsuperscript{254} In order to succeed on a claim for reverse passing off under the Lanham Act, a plaintiff must prove: "(1) that the work at issue originated with plaintiff; (2) that [the] origin of the work was falsely designated by the defendant; (3) that the false designation of origin was likely to cause consumer confusion; and (4) that the plaintiff was harmed by the defendant's false designation of origin." Banff Ltd. v. Express, Inc., 921 F. Supp. 1065, 1071 (S.D.N.Y. 1995) (quoting Lipion v. The Nature Co., 71 F.3d 464, 472 (2d Cir. 1995)).

\textsuperscript{255} At least one commentator agrees, though based on different reasoning. See Wassom, \textit{supra} note 220, at 216 (stating that in the deep linking scenario, "[t]he copyright holder can hardly object to the 'context' or 'manner' in which the page is displayed."). On the contrary, in the \textit{Shetland Times} case, the copyright holders are objecting to the manner in which their works are displayed through the deep links. However, because the plaintiff's articles are not displayed on the defendant's Web site, there is no infringement of the display right.

\textsuperscript{256} \textit{supra} Part II.D for a discussion of misappropriation.
claim may be preempted when that claim seeks to defend rights commensurate with those provided by copyright law, and when the subject matter of the work itself is copyrightable. However, if in addition to the elements of a copyright claim, an "extra" element exists, then the misappropriation claim is not within the general scope of copyright protection and thus survives preemption. As a result, the legislative history of the Copyright Act indicates, and most courts agree, that a plaintiff is not preempted from making a hot news claim. A hot news claim has been the only type of misappropriation claim to survive preemption when the work is copyrightable and the claim is equivalent to the rights afforded by copyright.

Applying the criteria set forth by the court in NBA v. Motorola to the facts of Shetland Times, the plaintiff can make out a hot news claim for misappropriation:

(i) as a newspaper, The Shetland Times generates or collects information at some cost or expense; (ii) because it is a daily newspaper, the value of the information is highly time-sensitive; (iii) the defendant’s use of the information constitutes free-riding on the plaintiff’s costly efforts to generate or collect the information because the defendant does nothing but link to the content already existing on the plaintiff’s Web site; (iv) the defendant is a directly competing newspaper who competes with the plaintiff for advertising; (v) the ability of other parties to free-ride on the efforts of The Shetland Times would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened. In a competitive situation such as in the Shetland Times scenario, misappropriation is an appropriate cause of action for the deep-linked site.

In short, in deep linking cases, a linked-to site may state a cause of action for misappropriation when the site features time-sensitive

257. See 17 U.S.C. § 301 (1994); supra notes 167-72 and accompanying text.

258. See, e.g., NBA v. Motorola, Inc., 105 F.3d 841, 850 (2d Cir. 1997) ("[I]f an ‘extra element’ is ‘required instead of or in addition to the acts of reproduction, [for example], in order to constitute a state-created cause of action, then the right does not lie ‘within the general scope of copyright,’ and there is no preemption.’” (quoting Computer Assocs., Int’l v. Altai, Inc., 982 F.2d 693, 716 (2d Cir. 1992))).

259. See Copyrights Act, H.R. Rep. No. 94-1476, at 132 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5748 ("[S]tate law should have the flexibility to afford a remedy . . . against a consistent pattern of unauthorized appropriation by a competitor of the facts (i.e., not the literary expression) constituting ‘hot’ news . . .”); supra notes 171-73.

260. 105 F.3d 841, 850 (2d Cir. 1997). See supra note 173 and accompanying text.

261. One commentator has agreed that misappropriation may be applicable in linking scenarios. However, she suggests that such a claim is more likely when framing is involved. See Beal, supra note 51, at 731-32 (arguing that misappropriation is more likely in framing scenarios because “framed sites typically contain time-sensitive information gathered at a cost . . . the framing site free rid[es] on those efforts [and] the framed site is in direct competition with framing sites for advertising revenue”).
content.\textsuperscript{262} However, based on copyright theory and current case law interpreting the protections afforded by copyright law, there is no copyright liability for deep linking.

**B. Inline Linking**

An inline link automatically imports an image contained in a separate file onto the Web page being viewed.\textsuperscript{263} Based on current case law construing the Copyright Act and its theoretical underpinnings, inline linked-to sites have a cause of action for unwanted links under the display right. In addition, if the inline-linked content is time-sensitive, the linked-to site may have a cause of action under misappropriation.

1. **Inline Linking and the Reproduction Right**

The analysis of inline linking and the reproduction right is similar to the deep linking discussion above.\textsuperscript{264} It begins with whether the linking site infringes the linked-to site's right to make copies of its work.\textsuperscript{265} In analyzing the facts of the Dilbert dispute,\textsuperscript{266} the first issue concerns who makes the copy. Wallach, the owner of the inline linking site, does not make a copy of the Dilbert cartoon image. Rather, his code instructs the user's browser to retrieve the image to be displayed on the linking site's Web page. Thus, the linking site does not directly infringe the reproduction right.\textsuperscript{267} In order for a court to find Wallach liable for infringement of the reproduction right, the court would have to find contributory infringement.

As with all contributory infringement claims, in the Dilbert dispute the linking site would be held liable for contributory infringement only if there were a finding of direct infringement on the part of the end user.\textsuperscript{268} As argued in Part IV.A, courts likely would find that end users merit a fair use defense.\textsuperscript{269} Applying the Copyright Act's four fair use factors to the facts of the Dilbert dispute, the user likely would qualify for a fair use defense for the following reasons:

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\textsuperscript{262} While deep linking cases may state a cause of action under misappropriation, they may also merit relief under trademark law.
\textsuperscript{263} See supra notes 60-66 and accompanying text for discussion of the technology of inline linking.
\textsuperscript{264} See supra notes 217-30 and accompanying text.
\textsuperscript{265} See supra Part II.B.1 for a discussion of the reproduction right.
\textsuperscript{266} See supra Part III.B for the facts of the Dilbert dispute.
\textsuperscript{267} Most commentators agree. See, e.g., Wassom, supra note 220, at 220 ("[I]nlining does not create a fixed copy beyond the one needed to view the image.").
\textsuperscript{268} See supra Part II.C.1 for a discussion of contributory infringement.
\textsuperscript{269} See supra Part II.C.2 for a discussion of the fair use defense.
(1) The purpose and character of the use.270

In the scenario of the Dilbert dispute, an end user reading a cartoon is using the material productively because the purpose of her use is entertainment. The end user who is merely browsing is not using the information commercially, because she is not distributing the information, saving it, or printing it out. In scenarios such as the Dilbert dispute, the user does not stand to profit from the use at all, thus weighing in favor of a finding of fair use.

The first factor also looks to whether the use of the Web site in such a scenario is transformative.271 In the Dilbert dispute, the use does not add anything new to the work. The entire image is linked to Wallach's page. Still, the first factor overall weighs in favor of the user browsing Wallach's Web page.

(2) The nature of the copyrighted work.272

The second factor focuses on whether the Dilbert cartoons were published or unpublished and whether they are informational or creative.273 Because the cartoons are already available on the Internet, they have been published. This fact is neutral in the fair use determination because the purpose of the distinction is to allow authors to control the first appearance of their works.274 In terms of the second component of this factor, the Dilbert cartoons are creative, resulting in a finding against fair use because fair use is expanded for factual works in order to disseminate them to the public, rather than for fictional works such as cartoons.275 Thus, this fair use factor weighs against the end user.

(3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole.276

The end user "uses" the entire cartoon when she browses Wallach's Web site because she copies the cartoon into her computer's RAM when she browses the page. In general, use of a whole work weighs against a finding of fair use.277 However, the amount of noninfringing

270. This includes whether such use is of a commercial nature or is for nonprofit educational purposes. See 17 U.S.C. § 107 (1994); supra notes 139-42 and accompanying text for a discussion of the first fair use factor.
271. See supra notes 141-42 and accompanying text.
273. See supra note 144 and accompanying text.
274. See supra note 145 and accompanying text.
275. See supra notes 146-48 and accompanying text.
277. See supra note 150 and accompanying text.
copying depends on the purpose and character of the use (the first factor).\textsuperscript{278} Hence, regardless of whether the entire work was copied into RAM, the end user had a productive purpose from which she did not stand to profit.

(4) The effect of the use upon the potential market for or value of the copyrighted work.\textsuperscript{279}

The fourth factor examines whether the use has harmed the copyright owner's ability to profit from the work and whether such conduct would adversely affect the potential market for the copyrighted work in the future.\textsuperscript{280} The fourth factor is the most significant in determining fair use.\textsuperscript{281}

Wallach's Web site affects the potential market for the copyrighted work. The inline links cause the end user to evade the United Media home page, depriving the advertiser of possible exposure. This may result in a decrease in advertising revenue. Much like in deep linking cases, the advertising on the United Media site may be seen less frequently because of the inline linking, or its exposure may actually be unaffected because Wallach's links provide the site with additional traffic. Nonetheless, those viewing the work via inline links on Wallach's site do not view the advertising on the United Media site at all. The value of the work is therefore harmed.

But because this harm results from the links, and only indirectly from the end user, in a case such as the Dilbert dispute the end user likely would prevail on a fair use defense. A plaintiff, therefore, would face difficulty in holding a linking site contributorily liable under current constructions of copyright law. In addition, as in the deep linking situation, for policy reasons a court would likely not find direct infringement on the part of the end user as that would require holding millions of Web users who unknowingly view an inlined image liable for copyright infringement.

2. Inline Linking and Derivative Works

The Copyright Act requires a transformative use and a resultant original work in order to maintain a derivative-work-right claim. In light of current case law interpreting the Act, an unauthorized

\textsuperscript{278} See supra note 151 and accompanying text.

\textsuperscript{279} 17 U.S.C. § 107. See supra notes 152-56 and accompanying text for a discussion of the fourth fair use factor.


derivative work\textsuperscript{282} was not produced in the Dilbert dispute. Wallach did not make any editorial revision of the Dilbert cartoon—he merely linked to the United Media Web site that contained that day’s edition of the cartoon. Whichever cartoon appeared on the United Media Web site then appeared on Wallach’s Web site. An unauthorized derivative work requires originality in order to constitute infringement.\textsuperscript{283} As in the discussion of deep linking and derivative works,\textsuperscript{284} the requisite originality was not present because no editorial revisions or modifications were made. Wallach therefore did not somehow alter the original work in order to create a new work. He merely routed the user to the original work, which appeared on his own site.\textsuperscript{285}

3. Inline Linking and the Display Right

Current case law does, however, indicate that the defendant in the Dilbert dispute infringed the plaintiff’s display right. The display right protects the copyright owner against illegal public display of an original work. In the Dilbert dispute, Wallach showed the Dilbert strip on his Web site through the use of a process—inline links.\textsuperscript{286} Because the definition of display under the Copyright Act includes showing a copy of a work by any process, Wallach infringed United Media’s display right. The House Report concerning the Copyright Act of 1976 states that “[e]ach and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a ‘transmission,’” and “[t]he definition of ‘transmit’... is broad enough to include all conceivable forms and combinations of wired or wireless communications media.”\textsuperscript{287} Therefore, when an end user browses a Web site, a transmission has been made and the Web site content is displayed. There is no requirement that Wallach create a copy in order to infringe United Media’s display right.\textsuperscript{288} He directly infringed by displaying the original work on his own site.

\textsuperscript{282} See supra Part II.B.2 for a discussion of derivative works.
\textsuperscript{283} See supra note 96 and accompanying text.
\textsuperscript{284} See supra Part IV.A.2.
\textsuperscript{285} At least one commentator agrees, but relies on a different analysis. See Wassom, supra note 220, at 221 (“Users who view the Dilbert comic strip on Wallach’s page are unlikely to see the cartoon in a different light than they would if they viewed it on United Media’s page.”). Regardless of whether the cartoon is seen in a different light, the requisite originality must be present in order to constitute a derivative work.
\textsuperscript{286} See supra notes 60-66 and accompanying text for a discussion of the technology of inline linking.
\textsuperscript{288} The Copyright Act specifies that one may infringe the display right by displaying the original work. See 17 U.S.C. § 101 (1994) (The Act notes that “[t]o ‘display’ a work means to show a copy of it” and “[t]he term ‘copies’ includes the material object... in which the work is first fixed.”).
The facts of the Dilbert dispute are analogous to those of the Webbworld case discussed above.289 Much as Webbworld displayed images illegally on its adult Web site by allowing its subscribers to view Playboy's images, when Wallach allowed end users who browsed his Web site to view a copyrighted Dilbert cartoon, he in effect displayed the image of the cartoon.

To constitute infringement, the display must also be public.290 Playboy Enterprises, Inc. v. Frena,291 a case in which the defendant displayed copyrighted images on his BBS, provides guidance on this issue. The court in Frena looked to the Copyright Act to explain that a public display is "a display 'at a place open to the public or...where a substantial number of persons outside of a normal circle of family and its social acquaintances is gathered.'"292 Even though the BBS was available only to those users with a password, Frena's unauthorized display of copyrighted images on his BBS was a public display.293 Wallach's display of the Dilbert comic strip on his Web page was a public display of even greater import, as it was available to all Web browsers.294

A linked-to site desirous of fending off unwanted inline linking is most likely to succeed under a display right cause of action.295 Inline linking has the clear effect of reproducing the work in a public forum without the author's consent, thus depriving the author of the opportunity to gain revenue by controlling the work's display.

289. See supra notes 120-23 and accompanying text for a discussion of the Webbworld case.

290. See supra Part II.B.3 for a discussion of the display right.


292. Frena, 839 F. Supp. at 1551 (citation omitted).

293. See id. at 1557; see also Playboy Enters. v. Russ Hardenburgh, Inc., 982 F. Supp. 503, 513 (N.D. Ohio 1997) (finding "[d]efendants displayed copies of PEI photographs to the public by adopting a policy which allowed their employees to place those photographs in files available to subscribers").

294. At least one author agrees, but bases the analysis on different reasoning. See Wassom, supra note 220, at 221-22. The author focuses on the fact that Wallach displayed the image in a "context" different from that intended by the copyright owner. The author indicates that the problem is that there is "no guarantee that the two contexts will be remotely similar." Id. at 222. However, it is the fact that Wallach displayed the image publicly without authorization that makes the use infringing. If Wallach displayed the image on his Web site in a similar context to that of United Media, his use would still be an infringement of the display right.

295. The common exception to the display right does not apply to the facts of the Dilbert dispute. The exception provides that the owner of a lawfully made copy of a copyrighted work does not need permission to display the work to an audience present where the work is situated. See 17 U.S.C. § 109(c) (1994). For example, the owner of a sculpture may display the work publicly in a gallery without obtaining the copyright owner's permission. See Dratler, supra note 119, § 6.01[4][c]. Wallach was not the owner of the copyrighted work. In addition, the viewers are not present at the place where the copy is located.
4. Inline Linking and Misappropriation in Hot News Cases

The facts in the Dilbert dispute\(^\text{296}\) do not trigger a cause of action for misappropriation.\(^\text{297}\) The online cartoons are within the subject matter of copyright,\(^\text{298}\) and the plaintiff seeks to claim a right equivalent to those provided by copyright law.\(^\text{299}\) In such a situation, a state-law misappropriation claim would be preempted by federal copyright law.\(^\text{300}\) In order to avoid preemption, one must state a misappropriation claim that features an extra element, putting the claim outside the scope of copyright. The only successful misappropriation claim meeting this requirement has been a hot news claim.\(^\text{301}\) However, in the Dilbert scenario, there is no extra element\(^\text{302}\) that puts the claim outside the general scope of copyright law, as the cartoons are not informational or highly time-sensitive. If, however, the inline linked-to files or images were time-sensitive, a plaintiff may be able to make out a hot news misappropriation claim.

C. Framing

Framing creates several windows on the end user's screen, often displaying another Web site (the framed site) on the home site (the framing site).\(^\text{303}\) The act of framing typically obstructs the advertising content of the framed site. In contrast to other types of linked-to sites, framed sites likely have causes of action for infringement of both the display and derivative work rights, as well as for misappropriation of hot news. This Note uses Total News as a model framing case in order to analyze liability under the applicable legal theories.\(^\text{304}\)

1. Framing and the Reproduction Right

In framing cases, as in deep linking and inline linking cases, the question of exactly who makes a copy of the copyrighted work determines whether the reproduction right is infringed.\(^\text{305}\) Because a framing site provides code that tells the user's browser to retrieve the framed site's page, the framing site is not itself making a copy of the

\(^{296}\) See supra Part III.B.
\(^{297}\) See supra Part II.D for a discussion of misappropriation.
\(^{298}\) The cartoons would likely fall under pictorial works under 17 U.S.C. § 102, even in digital form.
\(^{299}\) See supra note 167 and accompanying text.
\(^{300}\) See supra note 169 and accompanying text.
\(^{301}\) See supra notes 170-71 and accompanying text.
\(^{302}\) See supra notes 171-73 and accompanying text for a discussion of a "hot news" misappropriation claim and the requisite extra element.
\(^{303}\) See supra notes 67-76 and accompanying text for a discussion of framing technology.
\(^{304}\) See supra notes 205-15 and accompanying text.
\(^{305}\) See supra Part II.B.1 for a discussion of the reproduction right.
As mentioned in the analysis of deep linking and inline linking, only the user technically makes a copy. Therefore, in a Total News situation, the framing site does not directly infringe the reproduction right under current constructions of copyright law.

The framing site could be held liable for contributory infringement only if a court were to find direct infringement on the part of another party. This would again require that the end user be held liable for direct infringement. Courts, however, would likely find that browsing the Total News Web site is a noninfringing use and afford the end user a fair use defense.

The Copyright Act requires that four fair use factors be weighed in order to determine whether the use is noninfringing. Upon applying the factors to the facts of Total News, the user would likely have a fair use defense to a claim of direct infringement.

(1) The purpose and character of the use.

The first factor looks to whether the end user profits from the use of the news content provided through Total News and whether the use is transformative. In the Total News scenario, the end user is using the material productively because she is obtaining information. The end user is not sharing the information, storing it, or printing it out. Under the facts of Total News, the user does not stand to profit from the use at all. On the other hand, the use is not transformative—it does not add anything new at all. It merely frames the site and obstructs the advertising. Nonetheless, it seems that the first factor weighs in favor of the user in Total News.

(2) The nature of the copyrighted work.

The second factor turns on whether the copyrighted work is published or unpublished, and whether it is creative or informational. The articles on the Total News site are published in

306. See supra Part IV.A.1.
307. See supra Part IV.B.1.
308. See also Wassom, supra note 220, at 201 ("At the user's request, the server on which the target page is located makes a copy of the page and sends it to the user's terminal, which then downloads the copy. . . . The [framing site] is not involved in the transfer and therefore does not reproduce anything.").
309. See supra Part II.C.1 for a discussion of contributory liability.
310. See supra Part II.C.2 for a discussion of the fair use defense to copyright infringement.
311. This includes whether such use is of a commercial nature or is for nonprofit educational purposes. 17 U.S.C. § 107 (1994). See supra notes 139-42 and accompanying text for discussion of the first fair use factor.
312. See supra notes 141-42 and accompanying text.
314. See supra note 144 and accompanying text.
that they are already available on the Internet. The fair use analysis is unaffected by this differentiation because the purpose of the factor is to protect unpublished works so that the author can exert control over their initial appearance.\footnote{See supra note 145 and accompanying text.} Because the copyrighted work is news, and thus informational, a finding of fair use is more likely. Copyright law seeks to distribute information, thus allowing for fair use when the work is factual. The balance weighs in favor of the end user reading the news on the Total News site.

(3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole.\footnote{See 17 U.S.C. § 107. See supra notes 149-51 and accompanying text for discussion of the third fair use factor.}

The end user browsing the Total News site used a substantial amount of the copyrighted work because the entire article was copied into RAM when the user brought up the page\footnote{See supra notes 221-22 and accompanying text for a discussion of copies in RAM.}—whether or not she actually read it. The copying of an entire work normally weighs toward a finding of infringing use.\footnote{But see Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 449-50 (1984) (commenting that “the nature of a televised copyrighted audiovisual work... is the fact that the entire work... does not have its ordinary effect of militating against a finding of fair use” (citations omitted)).} However, the purpose and character of the use (the first factor) affects the degree of permissible copying.\footnote{See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586-87 (1994).} Thus, even though the entire article was copied into the end user’s RAM, the purpose and character of the use was productive and non-commercial, tilting toward a finding of fair use.

(4) The effect of the use upon the potential market for or value of the copyrighted work.\footnote{See 17 U.S.C. § 107. See supra notes 152-56 and accompanying text for a discussion of the fourth fair use factor.}

When Total News used frames to show content from another site on its own site, there was a possible effect on the potential market for the copyrighted work. When the linking site obstructs the linked-to site with a frame, the advertiser is deprived of exposure to potential customers. This may result in decreased advertising revenue. As with deep linking\footnote{See supra Part IV.A.1.(4).} and inline linking\footnote{See supra Part IV.B.1.(4).} it is not clear whether the advertising is viewed less often because of the framing, or whether exposure to the advertising remains unaffected because the link may provide the site with additional traffic and exposure that the site would not otherwise have received. Nonetheless, as in deep linking
and inline linking scenarios, those viewing the site via frames do not view the advertising at all. The value of each article is thus facially harmed.

Because the resultant harm derives from framing, and only indirectly from the end user's action in copying the content, the end user should arguably be provided a fair use defense. Therefore, a plaintiff would have difficulty in holding a framing site contributorily liable under current interpretation of copyright law. In addition, as in the deep linking and inline linking situations, a court would likely not find direct infringement on the part of the end user for policy reasons because such would require holding millions of Web users who unknowingly view a framed Web page liable for copyright infringement.

2. Framing and Unauthorized Derivative Works

Based on current case law, including the court's ruling in Futuredontics,\textsuperscript{323} framing may create an unauthorized derivative work. Creation of an unlawful derivative work requires transformative use of another work and resulting originality. Framing scenarios are most analogous to derivative-work-right cases. The frame can be viewed either as a lens through which a user may view the Web site, or as an actual alteration of the site. The answer turns on whether there is any obstruction of the site. If there is obstruction, and thus alteration, the inquiry turns to whether the framing site has the required modicum of originality to constitute a derivative work.\textsuperscript{324}

In the Futuredontics case, for example, simply placing a frame around the Futuredontics Web pages does not create a derivative work because it is not a transformation of the work. In Lee v. A.R.T. Co.,\textsuperscript{325} Judge Easterbrook challenged the notion that changing a painting's frame "transformed" the painting. If a changed frame is a transformation, then any alteration of a work, however slight, creates a derivative work. This is not the intent of the Copyright Act,\textsuperscript{326} under which a modicum of originality is required in order for a derivative work to exist.\textsuperscript{327} Therefore, when a frame is placed around a site, a derivative work is arguably not produced.

However, when a frame is placed around a site and the site is partially obstructed, a derivative work may be produced. This depends on whether the decision to obstruct the advertising is of an editorial or business nature.\textsuperscript{328} The requisite originality is present

\textsuperscript{323} See supra notes 196-204 and accompanying text.
\textsuperscript{324} See supra note 96 and accompanying text.
\textsuperscript{325} 125 F.3d 580 (7th Cir. 1997).
\textsuperscript{326} See supra Part II.A.
\textsuperscript{327} See supra Part II.B.2.
\textsuperscript{328} See supra Part II.C.
when the framing site makes an editorial revision. If the infringing site has partially obstructed parts of the Web page or the advertising content of the Web page in order to present the most aesthetically pleasing page, then it has made an editorial revision. The Copyright Act specifies that an editorial revision creates a derivative work. If, however, a business decision is made to block all advertising, then this is arguably not an editorial revision, nor any type of modification that falls under the Copyright Act. Such a use does not contain the requisite originality to constitute a derivative work. Rather, it is a uniform decision that contains no originality. Whether a framing site creates an unauthorized derivative work should therefore turn on the facts of each case. If, for example, in Futuredontics, AAI had chosen to block all advertising on framed sites as a policy decision, a derivative work was probably not created because AAI had not made an editorial revision, but had merely chosen to block the advertising as a business decision.

Another commentator has argued that frames do not create a derivative work because they merely focus or enhance the original site. While recognizing that the court in Midway Manufacturing Co. v. Arctic International, Inc. held that a computer device created to speed up a particular video game was an infringing derivative work, the author found that the analogy to a kaleidoscope in Lewis Galoob Toys, Inc. v. Nintendo of America, Inc. was better suited to framing scenarios. There the Ninth Circuit held that the “Game Genie,” whose function was to adjust properties of Nintendo games, was not a derivative work. The court noted that it enhanced the original work without making a copy of the original program’s elements. Under this view, framing another site’s content acts as a lens, as argued by the defendant in Futuredontics.

This reasoning does not take into account instances where the Web site is obstructed. In addition, cases dealing with framed works of art are more immediately relevant because they deal literally with frames. In framing cases such as Total News, the user linking to each news page via the Total News site has no choice but to view the pages within a frame. This is different from the situation in Midway, where

330. See Wassom, supra note 220, at 204-05. But see Effross, supra note 51, at 679-80. (“[I]f framing is involved, the argument for infringement under this [derivative work] standard grows much stronger because the linking site has transplanted information from the framing site into the context of the linking site.”). The author also raises the possibility that the framing site may be able to raise a fair use defense. See id. at 680.
332. 964 F.2d 965 (9th Cir. 1992), aff’d, 16 F.3d 1032 (9th Cir. 1994).
333. See Wassom, supra note 220, at 204-05.
334. See id. at 205.
the user may view the original work if she so chooses. The Total News user does not have the option to view the work without the frame or "lens." Because it is not necessary to make a copy of the original work in order to create a derivative work, by framing the Web site with the requisite originality, an unauthorized derivative work is created.

3. Framing and the Display Right

In situations such as Total News, where the framing site links to the framed site and obstructs its advertising, the framing site infringes the owner's display right. Because the definition of "display" under the Copyright Act includes showing a copy of a work by any process, Total News infringed the news sites' display right by showing their articles on the Total News Web site through the process of framing. Through the use of an in link, the framed site is displayed on the framing site's Web site. Even the URL that appears remains that of the framing site. Total News need not create a copy in order to infringe the news sites' display right. Under the Copyright Act, one may infringe the display right by displaying the original work. Total News therefore infringed merely by displaying the original news articles.

The Webbworld case discussed above is useful in the Total News analysis. Similar to the situation in which Webbworld displayed images on its adult Web site by allowing its subscribers to view Playboy's images, when Total News allowed end users who browsed its Web site to view the copyrighted works of the plaintiffs, it in effect displayed the works.

In addition, a display must be public in order to be infringing. Playboy Enterprises, Inc. v. Frena, a case in which the defendant displayed copyrighted images on his BBS, expounded on the definition of public display in the online world. The Frena court cited the definition of display in the Copyright Act to explain that a public display is "a display 'at a place open to the public or... where a substantial number of persons outside of a normal circle of family and its social acquaintances is gathered.'" In Frena, where the BBS was

336. See supra note 113 and accompanying text.
337. See Saidman, supra note 57.
339. See supra notes 120-23 and accompanying text for a discussion of the Webbworld case.
340. See supra notes 114-15 and accompanying text.
342. Frena, 839 F. Supp. at 1557 (citation omitted).
available only to users with a password, Frena’s unauthorized display of copyrighted images on his BBS constituted a public display.343 Similarly, Total News's display of the copyrighted news articles on its Web page constituted a public display.344

Other commentators have expressed skepticism about whether the display right applies in the framing scenario.345 These commentators rely on moral rights and contractual arguments. However, it is not necessary to look to moral rights or contractual claims to redress framing injuries. The broad definition of display and copyright's fundamental goal of rewarding authors for their creative works in order to disseminate good works to the public renders violation of the display right an applicable cause of action in unwanted framing cases.

4. Framing and Misappropriation

To determine whether the plaintiffs in Total News346 have a claim for misappropriation, it is necessary to determine whether framing creates a hot news claim that will survive preemption.347 The five-factor analysis here is similar to that involving deep linking.348 In the Total News scenario, the plaintiff can likely make out a hot news claim for misappropriation.349 Using the structured analysis in NBA v. Motorola, Inc.:350 (i) all of the plaintiffs (The Washington Post Co.,

343. See id. at 1557; see also Playboy Enters. v. Russ Hardenburgh, Inc., 982 F. Supp. 503, 513 (N.D. Ohio 1997) (finding “[d]efendants displayed copies of PEI photographs to the public by adopting a policy which allowed their employees to place those photographs in files available to subscribers”).

344. See supra notes 205-15 and accompanying text for a discussion of Total News. The exception to the display right does not apply to the facts of Total News. The exception provides that the owner of a lawfully made copy of a copyrighted work does not need permission to display the work to an audience present where the work is situated. See 17 U.S.C. § 109(c) (1994). For example, the owner of a sculpture may display the work publicly in a gallery without obtaining the copyright owner's permission. See Dratler, supra note 119, § 6.01[4][c]. In Total News, the framing site was not the owner of the copyrighted works. In addition, the viewers are not present at the place where the copy is located.

345. See, e.g., Wassom, supra note 220, at 209 (“It is questionable, however, whether the display right can and should extend so far.”). The author relies on moral rights and contractual arguments in his discussion of the display right. See id. at 208-14 (stating that in the framing scenario it is uncertain whether the framing site “violates an author's right to control the 'context and manner' of the presentation of his work” and arguing that it is highly unlikely that frames violate the integrity of the author's work).

346. See supra notes 205-15 and accompanying text for a discussion of the facts of Total News.

347. See supra Part II.D and accompanying text for a discussion of misappropriation.

348. See supra notes 256-62 and accompanying text.

349. See also Beal, supra note 51, at 731-32 (arguing that framed sites likely have a misappropriation claim because they "typically contain time-sensitive information gathered at a cost, and the framing site is free riding on those efforts").

350. 105 F.3d 841 (2d Cir. 1997). See supra note 173 and accompanying text for a discussion of Motorola and a “hot news” misappropriation claim.
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Time Inc., Cable News Network, Inc. (CNN), Times Mirror Co., Dow Jones & Co., Reuters New Media Inc. and Entertainment Weekly, Inc.) generate or collect information at cost or expense; (ii) as news, the value of the information is highly time-sensitive. In fact, Total News billed itself as a source of breaking news, Total News free rides on the plaintiffs' efforts by merely putting a frame around the plaintiffs' works. In addition, it promotes its Web site to advertisers on the basis of its ability to feature plaintiffs' content next to commercial messages, therefore making a profit on the plaintiffs' efforts; (iv) Total News's use of the plaintiffs' work directly competes with the plaintiffs because they target the same advertising audience; (v) the free-riding of Total News reduces the plaintiffs' incentive to produce a news content Web site.

In sum, framed sites have a cause of action against framing sites for infringement of the display right. Depending on the facts of the particular case, they may also have a cause of action for creation of an unauthorized derivative work and for misappropriation of time-sensitive material.

CONCLUSION

Several commentators offer technological remedies to halt unwanted links. These include tracking methods, passwords, periodically changing the URL, dynamic paging, using blocking code, and dissolving the link with code. There are several reasons why technological solutions should not be relied upon to remedy unwanted links. First, technological remedies soon become obsolete. Second, regardless of the existence of technological remedies, copyright law should be able to protect copyrightable expression, no matter the medium. Copyright law is intended to provide authors with an incentive to create works that benefit the public. Unwanted

351. See Keller, supra note 215, at 422.
353. Tracking methods allow site owners to find out which Web sites are linking to them. See Madoff, supra note 17.
354. Prompting the end user for a password circumvents the link. See id.; O'Rourke, supra note 12, at 645; Madoff, supra note 17; Web's Fabric, supra note 193, at 8.
355. By periodically changing the URL of the Web site, the link is rendered ineffective. See O'Rourke, supra note 12, at 645.
356. Dynamic paging is a complex structure in which the reference point of the Web pages changes, depriving the linking site of a fixed point to which to link. See id.
357. There are several types of blocking code that the linked-to site can incorporate into its HTML that fail to recognize the linking site. See id. at 646.
358. The linked-to site can use technology that dissolves the frame after a certain amount of time elapses. See id. at 646-47; Gahtan, supra note 48, at 4.
links lessen the value of online content. Lack of protection for online works saps authors' incentive and may result in fewer online works that benefit the public.

While infringement of the reproduction right is not applicable in linking and framing cases, in which liability under current copyright law would require finding that the end user is a direct infringer, other protections should be available. Deep-linked sites are relegated to a theory of misappropriation when time-sensitive material is involved, and inline linked-to and framed sites can also take advantage of this cause of action for hot news thefts. Infringement of the derivative work right in framing cases turns on the facts of each case because the requisite originality must be present.

The strongest case for copyright infringement brought by inline-linked and framed sites rests in the display right. Commentators have noted that the definition of public display under the Copyright Act "readily accommodates the online context." \(^{359}\) Inline linking and framing sites display the content from another site publicly through the use of HTML code. According to the legislative intent, the purpose of including a display right under copyright law was to prevent indirect public displays of a tangible copy that would affect the copyright owner's market for reproduction and distribution.\(^{360}\) By invoking the display right in cases of inline links and framing, this intention is achieved. In many inline linking and framing cases, the copyright owner's market is affected because its advertising revenue may decrease when end users evade the copyright owner's advertising. Because these unwanted links may be a disincentive to create online works, the display right affords a strong measure of protection and thus fulfills the goals of copyright law.

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359. See, e.g., Hayes, supra note 89, at 134.