COMMENT

MISSING LINK(S): PROTECTING PUBLIC IMAGE AND CORPORATE PROFITS IN CYBERSPACE*

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I. INTRODUCTION

The primary benefit of the interactive and participatory information network known as the World Wide Web (the “Web”) is the implicit license granted every owner of a site to link to another’s site. It is this ability to blur the lines of demarcation between unrelated sites, rather than simply the ability of individuals and organizations to create their own Web sites containing hyperlinked pages of information, that confers value on the Internet as an information conduit. However, the technological ease with which these links may be created has triggered a complex debate: On what basis may a Web site proprietor defend itself from an unwanted link? This controversy is compounded by the view of many users that the Internet is a “new frontier” wherein ‘ideas and information should flow freely.”

This Comment examines the practice of linking Internet sites and the status of domestic law in this emerging area. The discussion revolves around the extent to which an international extension of copyright to protect proprietary Web sites needs to be adopted domestically. Part II details the development of the Internet and discusses the issues raised by linking practices. Part III analyzes the development of both domestic and international case law and commercial practices as well as the limitations of each holding. Finally, Parts IV and V consider copyright, trademark, and non-legal suggestions for shaping the future boundaries of unauthorized linking. This Comment concludes that, although current copyright protections ensure the continued commercial viability of proprietary Web sites, they do so at the expense of the “right to link”—the free exchange of information that is at the very core of the Web—and threaten the usefulness of this medium.

II. LINKING TO THE “NETWORK OF NETWORKS”

A. Introducing the Internet

The Internet, which is the world’s largest computer network, developed as a government-sponsored experimental project aimed at linking computers together so that research facilities could pool their resources. As the number of network users rapidly increased, the Web was created to make the Internet more accessible. The newly devised Web created a “decentralized, global system of interrelated links that allow

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5. Gasparek, supra note 3, at 790.
6. ACLU, 929 F. Supp. at 831 (stating that the Internet was developed by the Advanced Research Project Agency as an experimental project to create a “redundant system of linked computers” called ARPANET that allowed the United States military, defense contractors, and universities conducting defense-related research to communicate with one another). As it grew to include “universities, corporations, and people around the world,” ARPANET was renamed the “DARPA Internet,” and finally, the “Internet.” Id.
7. Id. at 831 (noting that, in 1981, fewer than 300 computers were connected to the Internet, but by 1996, the estimated number of host computers had increased to over 9,400,000 worldwide).
users to ‘link’ to or access information across the network.”

Today, the Internet connects approximately 400 million users worldwide, of which an estimated 33%, or 134 million, reside in the United States. No single “academic, corporate, governmental or non-profit” entity manages the Internet. The network exists solely because countless independent computer operators elected “to use common data transfer protocols to exchange communications and information” with other users. Users connect to the Internet by connecting their personal computers to “host computer[s]”—which may themselves be “Web servers that support web sites.” Users are thereafter able to access information on host computers through hypertext, a computer code that allows information stored on individual computers to be shared between users through links.

B. Using the Internet—Linking Between Web Pages

A user can “access, exchange, or communicate information on the Internet” by many means. Of these, the Web is the most extensively employed and has become the foundation for the development of an “Internet commercial marketplace.” The Web uses a formatting language termed hypertext markup language (HTML), that, when combined with interpretive programs, “allow[s] users to ‘browse’ or ‘surf’ the Web in order to access HTML documents known as ‘web pages.’”

9. Id.
10. COMPUTER INDUSTRY ALMANAC, INC., U.S. HAS 33% OF INTERNET USERS WORLDWIDE YEAR-END 2000 ACCORDING TO THE COMPUTER INDUSTRY ALMANAC, at http://www.c-i-a.com/200103iu.htm (Mar. 5, 2001). The number of Internet users worldwide is predicted to reach approximately 673 million by the end of 2002 “and over 1 billion users by year-end 2005.” Id.
11. ACLU, 929 F. Supp. at 832.
12. Id.
13. Gasparek, supra note 3, at 790 (noting that each Web server “can host literally hundreds of different Web sites”).
14. Id.
15. BILL EAGER, USING THE WORLD WIDE WEB 42 (Kelli M. Brooks et al. eds., 1994) (stating that the term “hypertext . . . refers specifically to computer-based documents in which readers move from one place in a document to another or between documents in a nonlinear or nonsequential manner”). The ability of users to move between documents (to “jump”) via links is the core of the Web—“[t]he extensive use of these interconnections between Web pages is why the medium is termed a ‘web.’” Jeffrey R. Kuester & Peter A. Nieves, Hyperlinks, Frames and Meta-tags: An Intellectual Property Analysis, 38 IDEA 243, 246 (1998).
16. Morris, supra note 8, at 248.
18. Morris, supra note 8, at 248–49.
Web sites may be comprised of any number of such pages, each of which typically includes “hyperlinks” (also called “pointers” or “links”). A hyperlink—“shown on the screen as either highlighted text, underlined text or a graphical icon”—allows users to access a new document or a different part of the current document. There are thus two kinds of hyperlinks: internal hyperlinks, which link one Web page to another page within the same Web site or one portion of a Web page to another part of the same page, and external hyperlinks, which link one Web page to the Web page of another Web site.

Today, innumerable organizations maintain Web sites with a “home page” from which they intend visitors to start their explorations. Once inside the home page, visitors can link to both internal and external pages connected to the home page through one link or a series of links. “Providing a link from one Web site to another Web site is a consumer service that attracts users to the Web.” Thus, to increase the value of their Web site, owners of commercial Web pages generally encourage others to hyperlink to their pages. When the hyperlink connects only to the home page of the Web site, few site owners would argue that this “front door” link constitutes an impermissible use, even when it is established without permission. However, when the

19. O'Rourke, supra note 17, at 621. In addition, each page has an address or Universal Resource Locator (URL) that identifies its Web location for users. Id. at 622 (noting that “[i]n the first few years of the web’s existence, a user had to know the URL of a site in order to obtain access). Id. at 622

20. Morris, supra note 8, at 249. When a site owner designates a graphic image or icon as the link to be selected, and the user clicks on the icon, the user's browser reads the code, connects to the Internet, finds the Web page that matches the address, and requests a copy of that Web page. Effross, supra note 2, at 654. Almost immediately thereafter, “[t]he computer running the linked web page sends the requested copy back to the user's browser,” where the browser decodes and assembles the page on the user's computer screen. Id.

21. Morris, supra note 8, at 249 & n.10.

22. Id. at 249 n.10.

23. O'Rourke, supra note 17, at 622 (noting further that “[i]f one thinks of a web site as a book, the home page is like the table of contents and introduction, and the other pages are like chapters that may be accessed by clicking on their entry in the table of contents”); see also Effross, supra note 2, at 653 (“The home page of a site corresponds to the front door of a house or the front window of a store.”).

24. Effross, supra note 2, at 653. (“Many visitors start their explorations at the home page, proceeding to internal pages connected to the home page through one link or a series of links.”).

25. Gasparek, supra note 3, at 794.

26. See Morris, supra note 8, at 249 n.11 (explaining that commercial Web sites are valued by the number of times a user accesses or “hits” a site, and that the greater the number of hits, the greater the ability of the Web page owner to sell advertising space on his site).

27. Gasparek, supra note 3, at 794 (pointing out that the problem arises not when a
link circumvents the home page and attaches to an internal page of the Web site (“deep links”) without authorization, users may be exposed to fewer advertisements on the site.28 This Comment explores the means by which commercial Web site owners may protect their investment.

C. Selling on the Web

In order to detail the impact of unauthorized linking, it is necessary to understand the business models that drive the Web. Despite its “obvious attractiveness . . . as a commercial marketplace,” the Web has not proven easy to exploit.29 Web-based revenue models may be broadly classified into four categories: (1) “cybershopping”; (2) advertising-based models; (3) subscription-based models; and (4) “traffic-based” models.30

1. Cybershopping. In cybershopping, the Web is used as a “marketing tool.”31 The Web site owner creates revenue by selling its products on-line with the Web itself acting as a distribution mechanism.32 This model has not fully realized its potential because consumers continue to be reluctant to complete their orders by transmitting their credit card numbers and other personal information into the ethereal maw of the Web.33 Thus, the future of this revenue model depends upon both the

28. See Kuester & Nieves, supra note 15, at 261 (providing an example of how deeplinks allow a user “to bypass all policies, service information, and ads provided on the [target] homepage”). One way in which Web site owners may trace the number of unauthorized links—although frequently dated or incomplete—is through a search engine, which can display a list of pages that link to any other page on the Web. See Effross, supra note 2, at 654.

29. O'Rourke, supra note 17, at 625 (“B]usinesses have struggled to find a way to make money from web-based activities.”).

30. See id. at 625–26; see also Eric Schlachter, The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could Be Unimportant on the Internet, 12 BERKELEY TECH. L.J. 15, 24–30 (1997) (detailing business methods by which content providers support free access and distribution of information available at their sites, including the sale of goods and services, advertising, and sponsorships); Michael J. Schmeizer, Note, Protecting the Sweat of the Spider's Brow: Current Vulnerabilities of Internet Search Engines, 3 B.U. J. SCI. & TECH. L. 12, para. 13 (1997), (noting that Web revenue models include “subscriptions, advertising, and enabling the purchase of goods and services”). It must be recognized, however, that Web sites may not be discretely divided into each category. Rather, they often incorporate elements of each method. Nonetheless, for the purposes of clarity, each method will be considered separately here.
development of sufficiently secure links and assurances to potential customers of integrity and confidentiality.\textsuperscript{34}

2. Advertising-Based Models. This widely used revenue model allows Web sites to “generate revenue by charging companies to advertise at their site,” with the rate charged varying on the number of “hits” the page containing the advertisement receives.\textsuperscript{35} For the advertiser, the advertisement’s worth is typically determined by the number of viewers who link “from the web site displaying the advertisement to the web site of the advertiser itself.”\textsuperscript{36} The profitability and potential of this revenue model is undoubted.\textsuperscript{37} Its commercial efficacy, however, depends upon the control a Web site owner and an advertiser maintain over a link—as well as the context in which an advertisement is displayed.\textsuperscript{38}

\begin{itemize}
\item[31.] O’Rourke, \textit{supra} note 17, at 627.
\item[32.] See, e.g., \textit{Welcome to ticketmaster.com!}, at http://www.ticketmaster.com (last visited Mar. 13, 2001) (providing schedules of musical, sporting, and artistic events and allowing visitors to order tickets online). These “cybershops” may supplement the pre-existing distribution mechanisms of the Web site owner. \textit{See also, e.g., L.L. Bean}, at http://www.llbean.com (last visited Mar. 13, 2001) (allowing visitors to the site to order products from L.L. Bean, a direct-mail company).
\item[33.] O’Rourke, \textit{supra} note 17, at 628 & n.85 (pointing out consumers’ hesitance to purchase items online, and noting that for the marketplace to prosper, those shopping on the Web will need a method to “authenticate the identity of the person with whom they [are interacting]).
\item[34.] Brian W. Smith & Kimberly B. Kiefer, \textit{Recent Developments in Electronic Authentication: The Evolving Role of the Certification Authority}, 116 BANKING L.J. 341, 341 (1999) (asserting that the “[s]ecurity and integrity of data transmission and identification are of critical concern to the advancement and growth of electronic commerce”). To address these concerns, “trustworthy means for transmitting data across an open network (i.e., the Internet[,] and for entering into electronic contracts by which parties to the contract can determine that each is truly who they claim to be” are necessary. \textit{Id.}
\item[35.] \textit{See O’Rourke, supra} note 17, at 626.
\item[36.] \textit{Id.} at 626 & n.73; \textit{see also} Catherine P. Taylor, \textit{Banner Year}, WIRED (Mar. 1997), http://www.wired.com:80/wired/archive/5.03/es_webad_pr.html (“Advertising is conventionally priced on an impression basis according to cost per thousand, or CPM, meaning that marketers pay when computer users see an advertising banner, even if they don’t click through to the [advertiser’s] Web site.”).
\item[37.] \textit{See, e.g., Internet Advert. Bureau, IAB Internet Advertising Revenue Report: Executive Summary 1999 Third-Quarter Results} (1999), available at http://www.iab.net/adrevenue/adreindex.html (Apr. 27, 1999) (relating that revenue from such advertising totaled $1.2 billion for the third quarter of 1999, compared to the $491 million that was recorded in the same period in 1998, and noting that the pace with which these revenues are increasing compares favorably to the development of “other advertiser-supported industries” such as radio and television broadcasting).
\item[38.] For example, some companies have already abandoned plans to charge an annual fee for access to online publications because of public reluctance to pay for content. \textit{See, e.g., O’Rourke, supra} note 17, at 627 & n.82 (relaying the concerns of an on-line magazine editor, following the abandonment of plans to charge an annual fee for access to his on-line publication, that many people “are too damned cheap . . . [or] too engaged by
3. **Subscription-Based Models.** Unlike advertiser-supported sites, which users may typically access without charge, a subscription-based site relies upon users paying a fee for admittance. However, the popularity of the other revenue models, with their focus on providing content free of charge, has meant that subscription-based sites are rarely successful.

4. **Traffic-Based Models.** Finally, the traffic-based (or commission-based) model consists of sites that link users to other commercial sites purveying a variety of services. Under this model, revenue is generated through advertising and transaction fees. Specifically, the Web site acts “as the gateway that connects users to the appropriate supplier,” with the suppliers paying a commission for business sent their direction.

Each revenue model thus depends on hyperlinks for its continued commercial viability. The issue is whether, and in what fashion, a party must seek permission before establishing a link to another page.

**D. The Digital Millennium Copyright Act**

The Digital Millennium Copyright Act (DMCA or “Act”) sets out the liability of Internet service providers (ISPs) for infringement committed through use of their facilities. The Act

the novelty of the medium to pay extra for content").

39. Id. at 627 & n.78 (pointing out that “users may not pay for accessing or using” such Web sites).

40. Schmelzer, supra note 30, at para. 14. Users may also pay only for specific usage under what may be termed as the “pay-per-view model.” See id. at para. 15.

41. See, e.g., Lisa Goldbaum, Teams Look for Ways to Score on the Net, FORBES.COM, (Oct. 11, 1999), at http://www.forbes.com/tool/html/99/oct/1011/feat.htm (revealing that the Web site for the Cleveland Indians professional baseball team has attracted only 1300 premium subscribers despite the team’s large and highly loyal fan base and the relatively modest fee charged for its Web site’s premium content); see also O’Rourke, supra note 17, at 627 (reporting that the number of subscribers to the on-line version of the Wall Street Journal dwindled from 600,000 to 50,000 following the introduction of a subscription charge).

42. See O’Rourke, supra note 17, at 629–30.

43. See, e.g., David Bank, Microsoft Moves to Rule On-Line Sales, WALLST.J., June 5, 1997, at B1 (explaining that Microsoft is setting up sites for many cities to serve as entry ports, and noting that Microsoft plans to make money from these sites through advertising and sales and distribution charges).

44. O’Rourke, supra note 17, at 630 (describing Microsoft’s version of a commission-based revenue model).


46. See id. § 512(a). The Act defines ISPs as “entities offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.” Id. § 512(k).
offers expansive protections for ISPs, but also requires them to take particular actions in order to qualify for those protections.

In general, the DMCA provides that ISPs are not liable for copyright infringement when they merely transmit, route, connect, or provide “intermediate and transient storage” for information that was provided either by their customers or by other persons.\textsuperscript{47} In addition, liability under the DMCA does not attach to ISPs for storing “infringing materials on their networks, provid[ing] hypertext links to infringing materials or stor[ing] infringing materials at a user’s request.”\textsuperscript{48}

When a hypertext link leads to infringing material, an ISP is not liable for the infringement so long as the ISP:

1. (A) does not have actual knowledge that the material or activity is infringing [a copyright];
   (B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
   (C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

2. does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

3. upon notification of claimed infringement . . . responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity . . . .\textsuperscript{49}

The Act thus immunizes ISPs and gives Web site owners some recourse by authorizing them to remove an unwanted hyperlink.\textsuperscript{50} The DMCA does not, however, provide any guidance as to the rights of Web site owners whose reputation or e-commerce operations have been disrupted by an infringing link. This Comment addresses the lack of such guidance.

\textsuperscript{47} Id. § 512(a).
\textsuperscript{49} 17 U.S.C. § 512(d)(1)–(3) (Supps. IV & V 1994); see also Nicos L. Tsilas, Minimizing Potential Liability Associated with Linking and Framing on the World Wide Web, 8 COMM.LAW CONSPECTUS 85, 90 (2000) (“A website operator is not required to monitor the websites to which it links or affirmatively seek facts indicating infringing activity in order to claim the protections of these safe harbors.”).
\textsuperscript{50} 17 U.S.C. § 512(d)(3) (allowing a service provider to remove hyperlinks to infringing material with no further legal liability).
A. Domestic Linking—The Beginning

Within the burgeoning body of Internet law, framing and linking concerns have only recently become prevalent. As the Web continues to grow in both popularity and profitability, however, parties concerned with harm to their Internet presence resulting from unauthorized links have increasingly sought refuge in court.

1. Ticketmaster Corp. v. Microsoft Corp. In early 1997, Ticketmaster, an online ticket-seller, filed suit against Microsoft in a California federal district court. Ticketmaster alleged that after “[n]egotiations with Microsoft for an agreement allowing Microsoft to profit from linkage to and association with Ticketmaster’s name, marks and web site [had] failed,” Microsoft continued to make use of such “linkage and association as a freerider and in express contravention of Ticketmaster’s request.”

The linkage in dispute concerned Microsoft’s use of hyperlinks to Ticketmaster’s site on its city guide to Seattle. Although the companies had previously negotiated for a mutually beneficial marketing deal connecting their respective sites, no agreement could be reached. As a result, Ticketmaster finally entered into an agreement with CitySearch, Inc., a Microsoft city guide competitor. Despite the lack of agreement, Microsoft

51. See Tsilas, supra note 49, at 85 (stating that linking and framing have both recently come under “intense legal scrutiny”); 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, 183–85 (1998) (recognizing that, in 1998, the “critical issue” of the application of copyright law to linking had yet to be fully developed).


54. Id. at para. 16.

55. See Seth Schiesel, In Ticketmaster vs. Microsoft, It’s Tough to Know Whom to Root For, N.Y. TIMES, May 5, 1997, at D4 (reporting that Microsoft’s site included “dozens of links to Ticketmaster’s home page” and “direct links to pages deep inside the Ticketmaster site”).

56. Id. (reporting that the companies negotiated unsuccessfully from forty-five days to a year, depending on whom one believes, on how to accomplish referrals from Sidewalk to Ticketmaster’s Web site); see also Ticketmaster Suit Targets Microsoft, HOUS. CHRON, Apr. 30, 1997, at 1C (stating that Microsoft claimed it negotiated with Ticketmaster for four to five months “seeking to promote each other’s sites and jointly sponsor events”).

57. Ticketmaster First Amended Complaint, supra note 53, at para. 12; O’Rourke, supra note 17, at 635. Interestingly, CitySearch subsequently purchased Microsoft’s city
included a number of deep links from their Seattle Sidewalk site to Ticketmaster.\footnote{58}

Ticketmaster objected to three of Microsoft’s practices.\footnote{59} Ticketmaster alleged the following: (1) that Microsoft’s practice of deep linking took Ticketmaster’s content out of context and diverted advertising dollars to Microsoft;\footnote{60} (2) that the use of their trademark and trade names on the Microsoft site allowed the latter to attract advertising dollars;\footnote{61} and (3) that Microsoft’s actions diluted the value of Ticketmaster’s agreement with a credit card company to give the card prominence on their site.\footnote{62}

Unfortunately, the “valid questions of dilution and unfair competition” raised by Ticketmaster’s allegations were never answered because the parties subsequently reached a settlement.\footnote{63}

2. Framing the News: Washington Post Co. v. Total News, Inc.\footnote{64} On February 20, 1997, a group of online news site operators, led by the Washington Post, filed suit against Total News and others for the “parasitic” operation of a Web site that “framed” the pages of the target site.\footnote{65}
At the time of suit, the Total News Web site consisted of a collection of links that, when accessed, placed the plaintiffs’ content in a window (or “frame”) surrounded by the contents (including the advertising) of the Total News site. The primary basis of the Washington Post’s claim was that Total News obscured the Post’s advertisers with its own advertisers and used the Post’s logo as a hyperlink icon. Thus, the source of contention was the ability of Total News to republish and profit—in the form of increased advertising revenue—from copyrighted material that it had not created.

As with Ticketmaster Corp. v. Microsoft Corp., the parties in Washington Post Co. settled the litigation. Under the settlement, Total News specifically agreed to neither frame any of the plaintiffs’ Web sites, nor link to any page of any Web site that encourages users to link to any of the The Washington Post’s Web sites. The implications and applications of this type of settlement, and the propriety of unauthorized linking itself, have yet to be fully explored.


Among other claims, Futuredontics sued Applied Anagramics for copyright infringement, alleging that the framed
link created a derivative work in violation of Futuredontics’ exclusive right to create such works under the Copyright Act.\footnote{Id. at 2008–10.} Applied Anagramics argued that their “window or frame” merely provided a “lens” that enabled Internet users to view the information that Futuredontics itself placed on the Internet.\footnote{Id. at 2010.} In November 1997, the court denied Futuredontics’ motion for a preliminary injunction prohibiting the link because there was insufficient evidence that the framed link created an infringing derivative work.\footnote{Id. at 2008.}

Encouraged by the court’s denial of the preliminary injunction, Applied Anagramics moved to dismiss the complaint on the grounds that the framed link did not create a derivative work.\footnote{Id.} The motion was denied, however, because the court found Futuredontics had sufficiently alleged that the framed site constituted a derivative work for the purposes of copyright infringement.\footnote{Id. at 2010.} According to the court, its decision would not foreclose Futuredontics from establishing that Applied Anagramics’ Web page incorporated Futuredontics’ Web page in “some ‘concrete or permanent form,’” or that Applied Anagramics’ framed link duplicated or recast the plaintiff’s Web page, thereby creating an infringing derivative work.\footnote{Id. at 2010 (holding that neither party produced sufficient evidence to allow the court to conclusively determine whether defendants’ frame page constituted a derivative work, thus making dismissal inappropriate).}

The Ninth Circuit affirmed the district court’s denial of a preliminary injunction restraining Applied Anagramics from using a framed link to Futuredontics’ Internet Web site.\footnote{Id. at 2010 (citing Louis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 968 (9th Cir. 1992)).} In a brief unpublished opinion, the Ninth Circuit held that Futuredontics had failed to demonstrate “either the possibility of irreparable injury or that the balance of hardships tipped sharply in its favor.”\footnote{Futuredontics, Inc. v. Applied Anagramics, Inc., 152 F.3d 925, 925 (9th Cir. 1998) (mem.).} Specifically, the court noted that any implication that Applied Anagramics was responsible for the success of Futuredontics’ dental referral service was not “tied to any tangible loss of business or customer goodwill.”\footnote{Futuredontics, Inc. v. Applied Anagramics, Inc., No. 97-56711, 1998 WL 417413, at *1 (9th Cir. July 23, 1998) (mem.).}
4. ACLU v. Miller. Despite the uncertain state of the law regarding unauthorized linking, “one state’s legislative attempt to resolve” these issues “has already been struck down as overbroad.” In *ACLU v. Miller*, a collection of non-profit organizations, individuals, and ISPs filed a constitutional challenge to a Georgia statute (the Criminal Linking Act) that prohibited the unauthorized use of trade names and trademarks.

The Criminal Linking Act “had the effect of prohibiting the creation of any link containing a third party’s trade name or trademark without the express permission of the trade name or trademark owner.” If upheld, the Act would likely “have created a chilling effect on the [I]nternet, bringing the practice of linking to a grinding halt.”

On June 20, 1997, a preliminary injunction was granted enjoining the enforcement of the Criminal Linking Act, because the court found that the content-based restrictions of the statute were insufficiently precise in their terms to achieve the purported compelling state interest of preventing fraud.

The court further noted that the pertinent part of the Criminal Linking Act “prohibit[ed] the current use of web page links.” Linking “requires publishers of web pages to include symbols designating other web pages which may be of interest to a user.” Such symbols, the court found, “although completely innocuous, would definitely ‘imply’ to many users that permission

86. Effross, *supra* note 2, at 660–65 (detailing the briefs and procedural history of *ACLU v. Miller*).
88. *Id.*
89. GA. CODE ANN. § 16-9-93.1(a) (1996 & Supp. 1998). The Criminal Linking Act made it unlawful for any person, any organization, or any representative of any organization knowingly to transmit any data through a computer network . . . for the purpose of setting up, maintaining, operating, or exchanging data with an electronic mailbox, home page, or any other electronic information storage bank or point of access to electronic information if such data uses any individual name, trade name, registered trademark, logo, legal or official seal, or copyrighted symbol to falsely identify the person, organization, or representative transmitting such data or which would falsely state or imply that such person, organization, or representative has permission or is legally authorized to use such trade name, registered trademark, logo, legal or official seal, or copyrighted symbol for such purpose when such permission or authorization has not been obtained. . . .

*Id.*
91. *Id.*
93. *Id.* at 1233 n.5.
94. *Id.*
for use had been obtained.” 95 No compelling state interest was elucidated that would be furthered by restricting the linking function in the manner mandated by the Criminal Linking Act. 96 Thus, the court issued an order permanently enjoining the State from enforcing the Criminal Linking Act. 97

It seems, therefore, that any legislation designed to protect Web site owners from unauthorized links will meet strident challenges, 98 and must be exceptionally well-drafted to pass constitutional muster. 99 Commercial Web sites would likely be well-advised to seek their own protections, and it is to this end that international resolutions of such linking issues must be examined.

B. International Linking

1. Shetland Times, Ltd. v. Wills. 100 In October 1995, the Shetland News (“News”), a newspaper reporting on topics of interest in the Scottish Islands, added to its Web site links that reproduced verbatim the headlines of articles available on the Web site of a competing newspaper, the Shetland Times (“Times”). 101 Visitors who followed these links from the News site would view articles on the Times site and return to the News site through another link “without passing through the Times’s home page or viewing any advertisements placed on the Times’s web site.” 102

In granting the interim interdict, Lord Hamilton of the Court of Sessions (Outer House) concluded that the News’s actions constituted prima facie infringement under the statute at issue. 103 While the decision rested on the possible infringement of headlines, the court concluded that “[i]t was fundamental” to the

95. Id.
96. Id.
97. Effross, supra note 2, at 665 (noting that the order was entered August 7, 1997).
98. See, e.g., Tsilas, supra note 49, at 92 (detailing intended challenges by the ACLU and the Electronic Frontier Foundation to a federal law which “would make publishing or linking to drug information on the [I]nternet a felony punishable by up to ten years in federal prison”).
99. Effross, supra note 2, at 665.
101. See id.; see also Effross, supra note 2, at 655 (summarizing the background and judicial resolution of Shetland Times, Ltd. v. Wills).
102. Effross, supra note 2, at 655 (describing the direct linking practices at issue in the Shetland Times case).
Times that access to the posted articles “should be gained only by accessing their web site directly.”

Thus, while the infringing site had yet to impact the Times, there existed “a clear prospect of loss of potential advertising revenue in the foreseeable future,” and “no substance” to the suggestion that the News site’s parasitic activity had benefited the Times.

The parties thereafter reached a settlement, “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.”

While this settlement agreement provides valuable guidance as to the possible resolution of linking issues where commercial advantage is not the primary goal, it provides little aid to those who seek revenue from advertising on their Web sites.

2. Church of Spiritual Technology v. Spaink. On June 9, 1999, the district court of the Hague “held a Web site owner liable for contributory copyright infringement for linking to another Web site containing infringing material.” The Church of Spiritual Technology (“Scientology”), “known to be vigilant in defending the copyrights to materials written by Scientology founder L. Ron Hubbard,” sued a number of ISPs and individuals for “not removing a link to an allegedly infringing Web site.” The ISPs had been informed that they were providing access to an infringing site.

The Church of Spiritual Technology decision is notable because it is perhaps the first time a court has deemed a link itself, absent further duplication of protected material, subject to an action for copyright infringement.
The Scientology court declared

“that by having a link on their computer systems which, when activated brings about a reproduction [of copyrighted works], . . . the Service Providers are acting unlawfully if and insofar . . . they have been notified of this, and moreover the correctness of the notification of this fact cannot be reasonably doubted, and the Service Providers have then not proceeded to remove this link from their computer system at the earliest opportunity.”¹¹³

Although the court took great care to explain that notification of the ISP is required for liability to accrue, it also mandated that ISPs exercise “[a] certain degree of care” with regard to the occurrence of further infringements.¹¹⁴ The vague boundaries of the notification requirement thus give cause for concern. The consequences of this decision and its potential for application in the United States have yet to be fully explored.

C. The Future of Linking Litigation

1. Bernstein v. J.C. Penney Inc.¹¹⁵ On September 29, 1998, in a decision that may shape the limits of linking litigation, a federal district court in California dismissed with prejudice claims of copyright infringement based on multiple linking against Elizabeth Arden Co. and Parfums International Ltd. (collectively “Arden”).¹¹⁶ The court summarily rejected the plaintiff’s argument that Arden was liable for infringement after an Arden perfume product “was promoted on a J.C. Penney website that was ‘hyperlinked’ to a website operated by the Internet Movie Database (IMDB) that in turn linked to several other websites, one of which—the Swedish University Network (SUNET)—contained infringing copies of plaintiff’s photographs of actress Elizabeth Taylor, the spokesperson for Arden’s perfume.”¹¹⁷

Regrettably, the court failed to elucidate which argument, among the multitude of defenses asserted by Arden, it found most persuasive.¹¹⁸ Nonetheless, it is possible to surmise from

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¹¹⁴. *Spiritual Technology*, *supra* note 107 at para. 16; *see also Leibowitz*, *supra* note 108.
¹¹⁶. *Id.* at 1063–64. Arden’s parent company, Conopco, successfully moved to dismiss Plaintiff’s complaint under Federal Rule of Civil Procedure 12(b)(6) on the ground that it failed to state a claim upon which relief could be granted. *Id.*
¹¹⁷. *Id.* at 1063.
¹¹⁸. *See id.* Arden contended the action should be dismissed for the following
the decision that, given their potentially “devastating impact on
the Internet,” multiple linking claims should be permitted only
where the linking Web site is both aware of the infringing
material and in some manner facilitates access.119

2. Intellectual Reserve, Inc. v. Utah Lighthouse Ministry,
Inc.120 In December 1999, a Utah federal district court issued a
preliminary injunction temporarily barring the defendants from
posting the Internet addresses of other sites that displayed
unauthorized reproductions of a Mormon text on their Web
site.121 As with Church of Spiritual Technology, the Intellectual
Reserves court determined that the defendants had likely
“engaged in contributory copyright infringement when they
posted the addresses of three [w]eb sites that they knew, or
should have known, contained” pirated copies of the copyrighted
material.122 If this decision stands, it will almost certainly alter
and inhibit linking, and may threaten the popularity and
commercial viability of the Web itself.123 Given its importance, a
full explication of Intellectual Reserve is required.

reasons:

(1) a company whose product is merely displayed on another entity's Web site
cannot be held liable for any infringement by the author of that website; (2)
linking cannot constitute direct infringement because the computer server of the
linking website does not copy or otherwise process the content of the linked-to
site; and (3) multiple linking cannot constitute contributory infringement
because (a) Internet user's viewing of the material at issue is not infringing and
thus there was no direct infringement in the United States to which Arden could
contribute; (b) linking ‘is capable of substantial noninfringing uses’ and thus
cannot support a claim for contributory infringement; and (c) the [c]ourt cannot
infer from the facts alleged that Arden knew the photos had been posted to
SUNET and multiple linking does not constitute substantial participation in any
infringement where the linking website does not mention the fact that Internet
users could, by following the links, find infringing material on another website.

Id. at 1063–64 (citations omitted).

119. See id.
120. 75 F. Supp. 2d 1290 (D. Utah 1999).
121. Id. at 1295. The defendants were two critics of the Mormon church (the
“Church”); the plaintiff, Intellectual Reserve, Inc., was the corporation that held the
Church's intellectual property assets. Carl S. Kaplan, Copyright Decision Threatens
Freedom to Link, N.Y. TIMES ON THE WEB, Dec. 10, 1999,
http://www.nytimes.com/library/tech/99/12/cyber/cyberlaw10law.html (on file with the
Houston Law Review) (discussing the potential implications of the Intellectual Reserve
decision).
122. Kaplan, supra note 121. The copyrighted material consisted of selections from
the text of the Church Handbook of Instructions, a “limited-distribution book that enables
lay clergy to administer the affairs of the Church of Jesus Christ of Latter-Day Saints.”
Id.
123. See id. (quoting a copyright lawyer as stating that, if the Intellectual Reserve
decision stands and an address cannot be posted without infringing a copyright, “then
linking is definitely dead”).
In July 1999, the defendants, “long-time critics of the Mormon Church,” posted excerpts of the Church Handbook of Instructions (“Handbook”) on their Web site.\textsuperscript{124} Subsequently, the Church, through the corporation charged with holding its intellectual property assets, claimed that the posting amounted to a copyright infringement and an initial, temporary restraining order was issued barring the “direct posting” of the material.\textsuperscript{125} Undeterred, the defendants placed a notice on their Web site that the copyrighted material was online, and provided three Internet addresses at which copies of the entire handbook or portions thereof could be acquired.\textsuperscript{126} Moreover, the defendants “posted e-mails on their website that encouraged browsing those websites, printing copies of the Handbook and sending the Handbook to others.”\textsuperscript{127} The preliminary injunction issued on December 6, therefore, prohibited the defendants from either directly posting the copyrighted material or posting on their site “addresses to websites that defendants [knew], or [had] reason to know, contain[ed] the material alleged to infringe plaintiff’s copyright.”\textsuperscript{128}

In making this decision, the court reached two conclusions that threaten both the future viability of linking and, as a consequence, the Web itself.\textsuperscript{129} First, the court found that those who had browsed any of the three sites posting the copyrighted material were not simply viewing the material, but were engaging in direct copyright infringement by making a copy of the Handbook.\textsuperscript{130}

\textsuperscript{124}. Id. The defendants posted a total of 17 pages of the 160-page handbook, which they claimed to have received in electronic form from an anonymous source. Id.

\textsuperscript{125}. Id.

\textsuperscript{126}. Intellectual Reserve, 75 F. Supp. 2d at 1292; Kaplan, supra note 121.

\textsuperscript{127}. Intellectual Reserve, 75 F. Supp. 2d at 1292 (footnote omitted).

\textsuperscript{128}. Id. at 1295.

\textsuperscript{129}. See Kaplan, supra note 121 (noting a copyright lawyer’s conclusion that “[t]he Web is all about links . . . [w]ithout linking, there is no Web”).

\textsuperscript{130}. Intellectual Reserve, 75 F. Supp. 2d at 1294. The court reasoned, “When a person browses a website, and by so doing displays the Handbook, a copy of the Handbook is made in the computer’s random access memory (RAM), to permit viewing of the material. And in making a copy, even a temporary one, the person who browses infringes the copyright.” Id. The court sought to mitigate the “harsh” and sweeping nature of its position—wherein any person who accesses an infringing Web site, no matter how briefly, may be liable for copyright infringement—by allowing innocent infringers a possible exemption from damages for their infringement. Id. at 1294 n.5 (noting that, where an infringer “[is] not aware and [has] no reason to believe that his or her acts constitute an infringement of copyright, the court in its discretion may reduce the award of statutory damages”). The court failed to address, however, the likely detrimental impact that its decision would have on Internet usage and scores of innocent infringers. See Kaplan, supra note 121 (relating one law professor’s concern that the court’s decision “could discourage people from giving addresses of Web sites or linking to them out of concern for
Second, the court held that by posting the addresses to the pirate sites after they were ordered to remove extracts from the copyrighted materials from their own Web site, and by otherwise assisting people who wished to locate these sites, the defendants likely were liable under a theory of contributory copyright infringement because they had “actively encouraged” browsers to directly infringe the plaintiff’s copyright.

The Intellectual Reserve decision thus raises two primary concerns of hyperlinking litigation. First, as there can be no contributory infringement without direct infringement, when third parties use unauthorized links are any copies made by their browsers permissible? Second, can the mere provision of a Web address or hyperlink to infringing material amount to actively encouraging a third party’s infringement?

131. Intellectual Reserve, 75 F. Supp. 2d at 1294–95. It must be noted that Intellectual Reserve concerns only the unauthorized posting of Internet addresses (URLs), and not the provision of unauthorized inclusion of hyperlinks. See id. (noting that defendants “listed” the three Web site addresses, but omitting any reference to a link being created); Kaplan, supra note 121 (commenting on the similarity for copyright infringement purposes between the posting of Internet addresses as was alleged in Intellectual Reserve and actual linking to Web sites). Nevertheless, the copyright issues are undoubtedly similar.

132. Aside from listing the addresses of the three infringing sites themselves, the defendants posted on their Web site the notice: “Church Handbook of Instructions is back online!” Intellectual Reserve, 75 F. Supp. 2d at 1294–95.

133. See id.

134. Id. at 1294. Interestingly, the defendants in Intellectual Reserve failed to raise the fair use defense against either the direct or contributory infringement claims, although several factors of such a defense may have worked in their favor. Stephen Lesavich, Case Adds More Uncertainty to Web Copyright Laws: Utah Court Finds Contributory Infringement for Encouraging Use of Links to Infringing Sites, Nat’l L.J., Jan. 31, 2000, at C9, C10. The information made available was, for example, arguably factual in nature, constituted only about five percent of the copyrighted material, and was posted for nonprofit, educational purposes. Additionally, the material was “unpublished and closely guarded,” thus rendering problematic any estimation of either its potential market value or actual value. Id.

135. Subafilms, Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088, 1092 (9th Cir. 1994) (finding that, to prevail on a claim of contributory infringement, a plaintiff must first establish that the conduct a defendant authorized or encouraged could itself amount to infringement).

136. Refer to note 130 supra and accompanying text (noting that the court foreclosed any possibility that browsing would amount to nothing more than mere viewing of the copyrighted material by holding that browsing under the facts of the case amounted to copyright infringement).

137. See Intellectual Reserve, Inc., 75 F. Supp. 2d at 1295 (determining that a plaintiff can “suffer additional immediate and real irreparable harm if [a defendant is] permitted to post the copyrighted material or to knowingly induce, cause or materially contribute to the infringement of [a] plaintiff’s copyright by others”).
3. Universal City Studios, Inc. v. Reimerdes.\textsuperscript{138} In a recent decision, the Southern District of New York moved toward a resolution of the linking questions raised by \textit{Intellectual Reserve}.\textsuperscript{139} Although primarily concerned with the dissemination of technology that allowed the circumvention of the copyright protection measures provided by the DMCA,\textsuperscript{140} the court’s reasoning may be applied in the future even where the actions of the infringer are less egregious. As such, a detailed analysis of \textit{Reimerdes} is required.

The plaintiffs, eight major United States motion picture studios, distributed digital versatile disks (DVDs) protected from copying by an encryption system called Content Scramble System (CSS).\textsuperscript{141} In September of 1999, Jon Johansen, a fifteen-year old Norwegian youth, and two unnamed individuals he met over the Internet, “reverse-engineered a licensed DVD player . . . discovered the CSS encryption algorithm and keys,” and used them to create DeCSS, a program capable of decrypting and allowing the playback and copying of DVDs.\textsuperscript{142} Shortly thereafter, Johansen began offering DeCSS on his personal Web site and informing others of the posting.\textsuperscript{143}

Shortly after being posted by Johansen, DeCSS became widely available on the Internet, with hundreds of sites offering

\textsuperscript{138} 111 F. Supp. 2d 294, 303–04 (S.D.N.Y. 2000).
\textsuperscript{139} \textit{Id.} at 294.
\textsuperscript{140} \textit{Id.} at 303–05. The DMCA contains two principal anti-circumvention provisions. The first, 17 U.S.C. § 1201(a)(1)(A) (1998), prohibits the act of circumventing “a technological measure” put in place by a copyright owner to control access to a copyrighted work. \textit{Id.} The second, 17 U.S.C. § 1201(a)(2)(A)-(C) (1998), on which the \textit{Reimerdes} decision focused, provide that:

\begin{itemize}
  \item No person shall . . . offer to the public, provide or otherwise traffic in any technology . . . that—
  \begin{itemize}
    \item (A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under [the Copyright Act];
    \item (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under [the Copyright Act]; or
    \item (C) is marketed by that person or another acting in concert with that person with that person’s knowledge for use in circumventing a technological measure that effectively controls access to a work protected under [the Copyright Act].
  \end{itemize}
\end{itemize}

\textsuperscript{141} \textit{Reimerdes}, 111 F. Supp. 2d at 303 (noting that “CSS-protected motion pictures on DVDs may be viewed only on players and computer drives equipped with licensed technology that permits the devices to decrypt and play—but not to copy—the films”). DVDs, which are five-inch wide disks, are capable of holding full-length motion pictures in digital form. \textit{Id.} at 307. In excess of 4000 motion pictures had been released in DVD format in the United States at the time of the court’s decision. \textit{Id.} at 310.
\textsuperscript{142} \textit{Id.} at 311.
\textsuperscript{143} \textit{Id.}
The defendants, publishers of a copyrighted magazine and Web site dedicated to computer hacking, began offering DeCSS for download in November 1999. In addition, defendants “established . . . a list of links to several web sites that purportedly ‘mirrored’ or offered DeCSS for download.”

Litigation understandably ensued, and in reasonably short order a preliminary injunction was entered preventing the defendants from posting DeCSS on their Web site. Their response, like that of the defendants in Intellectual Reserve, was to comply, but to couple their compliance with “what they termed an act of ‘electronic civil disobedience’”—increasing their efforts to link their Web site to a large number of other Web sites that continued to make DeCSS available. The studios continued seeking an injunction against such linking and ultimately were successful.

The comprehensive nature of the Reimerdes opinion, and the limited focus of this Comment, preclude consideration of all the issues raised therein. Thus, it is necessary to distill those linking subjects that may apply beyond the anti-circumvention provisions of the DMCA.

Perhaps cognizant of the fact that it was authoring the first extensive treatment of the proper balance to be struck between linking and copyright protection, the Reimerdes court considered carefully, albeit relatively briefly, the “possible chilling effect of a rule permitting liability for or injunctions against Internet hyperlinks.” In so doing, it found guidance in the law of defamation, as “[t]he threat of defamation suits creates the same risk of self-censorship, the same chilling effect, for the traditional press as a prohibition of linking . . . poses for web site operators.” Thus, as the traditional press is not entirely

144. Id.
145. Id. at 308–09 (stating that defendants operated both The Hacker Quarterly, a magazine that was “something of a bible in the hacker community,” and a Web site that provided information on hacking).
146. Id. at 312.
147. Id.
148. Id. at 312 & n.92 (relating that suit was filed in January 2000, and a preliminary injunction was issued on January 20, 2000).
149. Id. at 312–13 (noting that the defendants’ list of links to other Web sites where DeCSS was available had grown to nearly 500 by July 2000, and that “defendants obviously hoped to frustrate plaintiffs’ recourse to the judicial system by making effective relief difficult or impossible”).
150. Id. at 346–47.
151. Id. at 340 (recognizing that “[a]nything that would impose strict liability on a web site operator for the entire contents of any web site to which the operator linked . . . would raise grave constitutional concerns”).
152. Id.
immunized from all defamation actions, the court did not exempt Web site operators from all liability under the DMCA.\textsuperscript{153}

Drawing on the “two-tiered constitutional standard” of defamation law,\textsuperscript{154} the court fashioned the following rule for the imposition of injunctive relief or monetary liability on a Web site operator for linking to another site that offers information violative of the DMCA:

[T]here may be no injunction against, nor liability for, linking to a site containing circumvention technology, the offering of which is unlawful under the DMCA, absent clear and convincing evidence that those responsible for the link (a) know at the relevant time that the offending material is on the linked-to site, (b) know that it is circumvention technology that may not lawfully be offered, and (c) create or maintain the link for the purpose of disseminating that technology.\textsuperscript{155}

Whether this rule offers succor to those whose claim for infringement lies beyond the scope of the DMCA is certainly a matter for future debate. Nonetheless, by recognizing that long-established defamation theories may be readily adapted for use against some forms of linking, the Reimerdes decision, at a minimum, suggests that traditional intellectual property laws need to be reconsidered for application in cyberspace.

As Part III illustrates, linking disputes are likely to become increasingly prevalent as the Web expands exponentially as both a public forum and a commercial marketplace. Indeed, the full impact of setting limits on the freedom to link, such as those espoused by the Church of Spiritual Technology, Intellectual Reserve, and Reimerdes decisions, is still unknown. Part IV of this Comment surveys the means by which a Web site proprietor may bring an action against an unauthorized linker under existing copyright or trademark law.

\textsuperscript{153} Id. The court further noted that “the solution to the problem is the same: the adoption of a standard of culpability sufficiently high to immunize the activity, whether it is publishing a newspaper or linking, except in cases in which the conduct in question has little or no redeeming constitutional value.” Id.

\textsuperscript{154} Id. at 340–41 (distinguishing between the “clear and convincing evidence” of publication with “knowledge of . . . falsity or with serious doubt as to . . . truth” that is required to impose liability for defamation of a public figure, and the negligence standard imposed for defamation of a private figure).

\textsuperscript{155} Id. at 341. In evaluating the latter category, the purpose for which the link is created or maintained, courts are to “look at all relevant circumstances.” Id. at 341 n.257.
IV. COPYRIGHT AND TRADEMARK MODELS FOR DEALING WITH UNAUTHORIZED WEB LINKS

A. Linking and Copyright

1. Overview. Under the Copyright Act, copyright protection is granted “in original works of authorship fixed in any tangible medium of expression.” A copyright bestows upon its holder an exclusive bundle of rights that includes the right to reproduce, distribute, perform, and display the copyrighted works publicly, as well as prepare derivative works based upon the copyrighted work. These rights undoubtedly apply to the “unauthorized reproduction through the Internet of [copyrighted] material that originally appeared in another medium.”

Irrespective of which exclusive right is at issue, the direct infringer is the party who makes the copy or creates the derivative work. In the case of both links and frames, the user, not the author of the linking Web page, is thus the direct infringer. As in Intellectual Reserve, the Web page author may be a contributory infringer if the author, “with knowledge of the

157. Id. § 102(a).
158. Id. § 106(1) (defining the reproduction right as the right to “reproduce the copyrighted work in copies or phonorecords”).
159. Id. § 106(3) (allowing the copyright owner the right to “distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending”).
160. Id. § 106(4) (granting the copyright owner of “literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, the right to perform the copyrighted work publicly”); id. § 106(5) (granting a right of public display in “literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work”).

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

Id. § 101.
161. Id. § 106(2). Derivative works are those “based upon one or more preexisting works,” where the work has been “recast, transformed, or adapted.” Id. § 101.
162. Effross, supra note 2, at 667 (positing that copyright law applies to the Internet).
163. O’Rourke, supra note 17, at 658 (pointing out that there is an important “legal distinction between direct and contributory infringement”).
164. Id. (stating that the user, not the author, may be the direct infringer).
infringing activity, induces, causes or materially contributes to the infringing conduct” of the user.165

2. Licensed to Link? Many commentators have looked to “the doctrine holding that a copyright license may be implied by conduct” in assessing the copyright implications of a link.166 They reason that an implied license in favor of users who link to a site is created when an owner places information on the Web.167 Others, however, have noted that three factors weigh against such a finding:

(1) [t]he target site owner's not preparing the site’s material specifically for the owner of the linking site; (2) the absence of a “meeting of the minds” between the owners of the linking and target sites; and (3) the absence of payment offered to the target site’s owner by the owner of the linking site.168

Thus, although an author’s decision to make his or her work available over the Internet may prove influential in this implied license analysis as to the linking site, it is unlikely to prove determinative.

Notwithstanding the possible unavailability of an implied license defense, the ordinary user should be protected under the doctrine of fair use. Generally, fair use is an affirmative defense that excuses otherwise infringing conduct where the following non-exclusive statutory factors weigh in favor of exemption:169

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

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

165. Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc. 75 F. Supp. 2d 1290, 1293 (D. Utah 1999) (quoting Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971)).

166. O’Rourke, supra note 17, at 658 & n.216 (listing authors who argue that a Web site user has an implied license to view Web information and that the act of posting information to an unrestricted Web site is the basis for implying that license).

167. Id.

168. Effross, supra note 2, at 677.

169. See 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 1305 (2000) (quoting Iowa State Univ. Research Foundation, Inc. v. ABC, 621 F.2d 57 (2d Cir. 1980) for the proposition that “the affirmative defense of fair use ‘permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster’”(footnote omitted)).
(4) the effect of the use upon the potential market for or value of the copyrighted work.\textsuperscript{170}

When ordinary users access a Web page, they typically do so for reasons other than profit.\textsuperscript{171} Moreover, such access “generally expands the market for the copyrighted work.”\textsuperscript{172} Although a copy of the whole work is made when a site is entered,\textsuperscript{173} this fact, in isolation, should not negate the fair use defense absent a mercantile aspect to the linkage.\textsuperscript{174}

Application of the doctrine of fair use, therefore, could prove efficacious in facilitating “innovative uses of content in cyberspace.”\textsuperscript{175} The malleable and imprecise scope of the doctrine may serve to “maximiz[e] efficiencies in the allocation of the most important resource of the global economy, namely, information.”\textsuperscript{176}

B. Linking and Trademark\textsuperscript{177}

A trademark acts as a “signal that conveys product information to [an] observer.”\textsuperscript{178} As such, “any word, symbol, device, or combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others,” constitutes a trademark.\textsuperscript{179}

\textsuperscript{170} 17 U.S.C. § 107(1)–(4) (1994). Although the U. S. Supreme Court has noted that the factors are not to be treated in isolation, in current practice, courts typically examine these factors in sequence, emphasizing the fourth factor, market effect. See MARSHALL LEAFER, UNDERSTANDING COPYRIGHT LAW 434 (3d ed. 1999).

\textsuperscript{171} O’Rourke, supra note 17, at 661 (explaining that ordinary linkers “should be protected under fair use,” as the character of their access typically lacks a profit motive).

\textsuperscript{172} \textit{Id}.

\textsuperscript{173} Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc. 75 F. Supp. 2d 1290, 1294 (D. Utah 1999) (explaining that copying occurs when material is transferred to a computer’s memory and that, absent ownership of the copyright or express permission by license, such an act constitutes copyright infringement).

\textsuperscript{174} See Effross, supra note 2, at 681 (pointing out that “the phrase ‘potential market for’ will principally apply to undercut a plaintiff’s ability to profit from his site in the “commercial-link context”).

\textsuperscript{175} Ruth Okediji, Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace, 53 Fla. L. Rev. 107, 146 (2001). Okediji argues that the fair use right should co-exist with a new statutory exemption for “uses that are dependent on, or the result of, how the Internet functions.” \textit{Id}.

\textsuperscript{176} \textit{Id} at 182.

\textsuperscript{177} Because Web sites transcend both state and national boundaries, a plaintiff may bring related copyright claims governed exclusively by federal statute. This Comment’s scope, however, discusses trademark law in the context of federal trademark law.

\textsuperscript{178} Morris, supra note 8, at 253–54 (stating that a trademark helps to re-assure the observer that a product will be what the producer warrants and helps to show the quality of the product).

\textsuperscript{179} \textit{Id}.
Under the Lanham Act,\(^{180}\) a registrant of a trademark may obtain injunctive relief\(^{181}\) against any party who, without the consent of the trademark registrant,

use[s] in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.\(^{182}\)

In addition, a separate unfair competition cause of action for civil damages lies against:

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic of his or her or another person's goods, services, or commercial activities.\(^{183}\)

"By protecting marks against confusing uses, trademark law helps consumers identify the manufacturer that is the source of a particular product."\(^{184}\) In turn, trademark law protects the investment or property rights of a business in a particular mark.\(^{185}\)

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181. Id. § 1114(2)(A).
182. Id. § 1114(1)(a).
183. Id. § 1125(a)(1)(A)–(B).
184. O'Rourke, supra note 17, at 671 (stating that protecting marks against confusing uses "saves consumer search costs because consumers can rely on the level of quality associated with a particular mark"); see also 1 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 2:3 (4th ed. 1996) (noting that "trademarks perform at least two important market functions: (1) they encourage the production of quality products; and (2) they reduce the customer's costs of shopping and making purchasing decisions").
185. McCarthy, supra note 184, § 2:4 (declaring that trademark law protects "the trademark owner's investment in the quality of the mark and the quality of the goods or services the mark identifies").
In the context of linking litigation, trademark infringement concerns may arise where the owner of a Web site puts the mark or logo of a company on his or her own site as a link.\(^{186}\) When a hyperlink is used, “the text setting forth the link is usually in the form of the domain name of the site to be linked, or the trade name or logo of the company owning the linked site.”\(^{187}\) Despite concern over infringement caused by this type of logo link, the linking party is typically aware that the linking site owes no fealty to the linked site, such that the latter bears no responsibility for the value or content of the former.\(^{188}\) Nevertheless, the linking site may still “capitalize on the popularity of the linked site.”\(^{189}\)

While a lack of confusion would seem to take any claim out of the Lanham Act’s provisions, a linker may still be liable for infringement if a plaintiff were to produce “any credible evidence of likelihood of confusion,”\(^{190}\) given a demonstrated willingness to interpret the statute broadly.\(^{191}\) As the \textit{Intellectual Reserve} court noted, albeit in a copyright context, evidence of such confusion need not be established directly, but may be inferred through an increase in the number of hits on the infringing sites.\(^{192}\) If this reasoning stands, trademark infringement actions for unauthorized linking or posting are likely to prove both increasingly popular and successful.

Such claims, however, are likely to frustrate the value of the Web as a commercial and information exchange. As a result, a trademark model that encompasses and addresses these concerns must be constructed. In this context, the fair use defense,
adopted by the Ninth Circuit in the commercial user context.\textsuperscript{193} has been advocated as the most effective method of ensuring the continued viability of hyperlinking.\textsuperscript{194} For the defense to be available, however, three requirements must be satisfied:

First, the product or service in question must be one not readily identifiable without use of the trademark; second, only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and third, the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.\textsuperscript{195}

Using this method, the domain name of a linked site may continue to be used as a link so long as there is no suggestion of affiliation with the linked site.\textsuperscript{196} In addition, as long as the linking site does not affirmatively represent itself as an affiliate of the destination site, the linking site could not be held liable for trademark infringement by way of implied association.\textsuperscript{197}

As the Reimerdes decision impliedly recognizes in its application of defamation principles to linking,\textsuperscript{198} the special context of Internet communication will likely mandate that these copyright and trademark models be applied neither uniformly nor in isolation. Fortunately, their fair-use defenses appear sufficiently flexible to meet the challenges of a digital age.

V. THE EFFICACY OF NON-LEGAL SOLUTIONS TO UNAUTHORIZED WEB LINKS

To forestall the difficulty of obtaining redress for unwelcome linking through the judicial system, and to maintain the

\textsuperscript{193} See New Kids on the Block v. News Am. Pub'g, Inc., 971 F.2d 302, 306 (9th Cir. 1992) (noting that the fair use defense precludes a trademark registrant from making a descriptive term exclusively his own so that others are forbidden from using that same term to describe their products).

\textsuperscript{194} O'Rourke, supra note 17, at 680.

\textsuperscript{195} New Kids on the Block, 971 F.2d at 308 (footnote omitted). Under this formulation, then, "a soft drink competitor would be entitled to compare its product to Coca-Cola or Coke, but would not be entitled to use Coca-Cola’s distinctive lettering." Id. at 308 n.7; see also O'Rourke, supra note 17, at 680 (arguing that the New Kids test suggests that a linking site should be allowed to use a linked site as long as they do not insinuate that they are affiliated with that site).

\textsuperscript{196} O'Rourke, supra note 17, at 680. It is understandably “difficult to identify a site without using at least its URL or address.” Id. Moreover, attempting to do so would seem to frustrate the ease of use upon which the Internet’s popularity and usefulness relies. However, “[u]sing an address as a hyperlink intrudes less on the linked site’s trademark rights than would use of a fanciful logo.” Id.

\textsuperscript{197} Id. at 680–81.

\textsuperscript{198} Refer to notes 154–55 supra and accompanying text (detailing the manner in which the “two-tiered” standard of defamation was applied to linking).
essential value of the Web as a communication exchange, owners may turn to technology to control their presence on the Web. Several remedies have been proposed and are in various stages of use, including “tracking methods, passwords, periodically changing the [site address], dynamic paging, using blocking code, and dissolving the link with code.” Many owners, for example, have incorporated computer coding to block users from either linking to other sites or framing internal pages. Where technology fails, commentators have suggested a “pay for access” approach, or the use of a link license or agreement.

Perhaps the most original suggestion for preventing unauthorized access comes from Walter A. Effross, the Chair of the American Bar Association’s Subcommittee on Electronic Commerce. Effross proposes creating an icon that indicates whether and to what extent an owner permits linking to their site. In so doing, the icon would serve as a reminder to all visitors that Web site owners have little control over linking sites, and would rebut any argument as to whether an implied license to link had been granted, without deterring use of the site.

Notwithstanding their ingenuity, the effectiveness of these safeguards is doubtful. Although they may dissuade unauthorized access by most casual linkers or commercial organizations, such methods are unlikely to discourage all illicit hyperlinks. Given the pace of technological change, any

199. Roarty, supra note 106, at 1057 (footnotes omitted). “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.” Id. at 1057 n.356.
200. Morris, supra note 8, at 286; see also Effross, supra note 2, at 692 n.236.
201. Morris, supra note 8, at 286.
202. See Effross, supra note 2, at 692.
203. Id. Effross suggests the icon resemble a traffic light, so that:

If the lamp lit on the depicted traffic light were red, the indication would be that the owner of the web page had not granted permission to link to or frame that page. A yellow light would indicate that the owner had granted some sites permission to link to or frame that page. . . . A green light would show that the page's owner has granted everyone on the Web a license to link to or frame that page.

Id.

204. Id. at 692–93. Effross evinces the hope that his idea of a “virtual signpost” will become a default feature of site construction software, enhancing the ability of owners to counterattack intruders and protect both their reputations and intellectual property interests. Id. at 693.

205. Unauthorized hyperlinks are likely to persist where, for example, their target is an establishment that is frequently criticized, such as the Church of Scientology or the Mormon Church.
“moats, drawbridges, and walls around . . . digital domains”\textsuperscript{206} are unlikely to remain impregnable for long.

VI. CONCLUSION

The “explosive growth of the Internet and its evolution from a medium for information exchange to its new role as a forum for conducting business”\textsuperscript{207} depends upon the continued ability of parties to link their sites. If Intellectual Reserve stands, the “right to link” will be placed in jeopardy. By extending liability to a party who had done no more than encourage others to access a site and had not even provided a link for their convenience, the court left all Internet communications suspect. Yet, the “right to link” must be tempered by the right of corporations and individuals to control unauthorized access to their Web sites. In this regard, perhaps only an amalgam of common-law theories such as defamation, and the fair use defense, whose application has always depended on the circumstances of the individual case, can adequately balance these competing desires.

\textit{Cameron Pope}

\textsuperscript{206} Effross, \textit{supra} note 2, at 693.
\textsuperscript{207} Morris, \textit{supra} note 8, at 287.