

2001

## Surfing the Web For Copyright Law: Why Infringement Claims are All Wet

Jessica Richardson

Follow this and additional works at: <https://scholarship.law.umn.edu/mjlst>

---

### Recommended Citation

Jessica Richardson, *Surfing the Web For Copyright Law: Why Infringement Claims are All Wet*, 2 MINN. INTELL. PROP. REV. 73 (2001).

Available at: <https://scholarship.law.umn.edu/mjlst/vol2/iss2/3>

## Surfing the Web For Copyright Law: Why Infringement Claims are All Wet

*Jessica Richardson*

### INTRODUCTION

Imagine you are about to go on a trip to Seattle, a city you have never visited. You will have a lot of free time in Seattle, so you turn to the fastest, easiest, most convenient way to receive current and accurate information: the Internet. You settle down at your personal computer in the den at home and dial up your local Internet Service Provider. Unsure of where to find the information you need, you type in the address for Yahoo!<sup>1</sup> and begin your search. You enter the name of the city, and within seconds a list of possible Web pages that may be of interest to you appears. With one point and click of the mouse, you instruct your computer to display the Seattle Sidewalk site,<sup>2</sup> so that you may “virtually” explore the city.<sup>3</sup> You browse restaurant reviews, hotel availability, museum exhibits, and theater events. You are thrilled to find that your favorite band will be playing while you are visiting Seattle. Conveniently, the Seattle Sidewalk Web page provides a hyperlink to

---

1. See Yahoo! (visited April 10, 2001) <<http://www.yahoo.com>>.

2. See Seattle Sidewalk (visited April 10, 2001) <<http://www.seattle.sidewalk.com>>.

3. Typing in <[www.seattle.sidewalk.com](http://www.seattle.sidewalk.com)> will no longer take users to that specific location, but rather to <[www.msn.citysearch.com/?brand=sidewalk](http://www.msn.citysearch.com/?brand=sidewalk)>, a similar guide to Seattle’s entertainment and events. In the fall of 2000, Microsoft sold the Sidewalk series to Ticketmaster Online-Citysearch. Microsoft retained rights to buying guides and business directories, which now appear through the MSN network. See Bob Tedeschi, *Microsoft Selling City Guides to Ticketmaster for \$240 Million*, N.Y. TIMES (July 20, 1999) <<http://nytimes.qpass.com/qpass-archives>>. This Note describes the relationship of the companies and the functioning of their Web sites as they existed prior to Ticketmaster’s acquisition of the Sidewalk series. Although Microsoft has renamed its site, and Ticketmaster now owns the Sidewalk series, the formerly adversarial relationship between the two companies nonetheless provides an ideal framework for the analysis of copyright issues arising from unauthorized deep linking on the Internet.

Ticketmaster,<sup>4</sup> where you can purchase your ticket. One more click and a ticket order page appears, the Ticketmaster logo at the top and the convenient credit card entry at the bottom. You agree to pay the ticket price and the hefty Ticketmaster charges, order your tickets, and log off the Internet, content to have stumbled upon the concert information and excited to have purchased tickets.

Little do you know that Ticketmaster would argue you have been breaking the law by simply clicking on links and browsing the Web.<sup>5</sup> This note argues that “normal” hyperlinks, Hypertext Reference links, do not create a viable cause of action for copyright infringement. Part I describes the history and the function of the Internet and specifically details how hyperlinks work as the primary means of connecting and retrieving electronic documents viewed on the Web. Part II describes principles of copyright law and how they currently apply to the Internet. Part III applies copyright law to a situation involving hyperlinks that Microsoft created which allowed users to access the ticket order page of Ticketmaster Online directly. Through analysis of a common situation occurring on the Internet, this note proposes that neither the Internet Service Provider, in facilitating access to the Web and allowing the creation of hyperlinks, nor the link creator, in designing hyperlinks that connect Web sites, nor the individual user, in locating and viewing Web sites via hyperlink connections, should be held liable for copyright infringement.

## I. TECHNOLOGY OF HYPERTEXT LINKS ON THE INTERNET

The U.S. government created the Internet in 1965 in order to connect the Defense Department with radio and satellite networks.<sup>6</sup> Widespread public use has since transformed the Internet into a medium for global communication.<sup>7</sup> During the

---

4. See Ticketmaster (visited April 10, 2001) <<http://www.ticketmaster.com>>.

5. See First Amended Complaint, Ticketmaster Corp. v. Microsoft Corp., CV 97-3055 RAP (C.D. Cal. filed Apr. 28, 1997) <<http://www.ljx.com/LJXfiles/ticketmaster/complaint.html>> [hereinafter Ticketmaster Complaint].

6. See KIERSTEN CONNER-SAX & ED KROL, *THE WHOLE INTERNET: THE NEXT GENERATION* 4 (1999).

7. See *id.* at 107. “The World Wide Web, or WWW, is the most popular, powerful, and easily navigable portion of the Internet.” *Id.*

1980s, the U.S. National Science Foundation extended Internet access to researchers at universities and colleges throughout the country.<sup>8</sup> Until the late eighties, Internet use consisted only of communication through e-mail messages or newsgroups.<sup>9</sup> Tim Berners-Lee then revolutionized the Internet by inventing the hyperlink,<sup>10</sup> and the World Wide Web was born.<sup>11</sup>

Hyperlinks connect documents on the Internet by providing users viewing one Web page direct access to other Web pages. A hyperlink usually appears on an electronic document as underlined line of colored text or graphic image. When a user clicks on the hyperlink with a mouse pointer another electronic document, the "Web page," opens. Host computers store Web pages and users explore the Internet using hyperlinks to link Web page to Web page.<sup>12</sup>

Users often use "search engines" such as Yahoo!,<sup>13</sup> Google,<sup>14</sup> Infoseek<sup>15</sup> and Ask Jeeves<sup>16</sup> to locate Web sites containing specific information. Search engines act as databases for information contained on Web sites.<sup>17</sup> When user types in keywords regarding the information or specific type of Web site she is looking for, the search engine provides a list of possible links, or "addresses," which normally appear as a hypertext links. By clicking on the particular address, the user's computer displays the contents of the chosen site.

Each Web page has an address, or Universal Resource

---

8. *See id.* at 5.

9. *See id.*

10. *See id.* at 6.

11. *See* Kara Beal, Comment, *The Potential Liability of Linking on the Internet: An Examination of Possible Legal Solutions*, 1998 B.Y.U. L. REV. 703, 705 (1998). Public servers became available in 1993, and open specifications allow the general public to create Web pages. Ever since the public acquired unlimited access to the Internet, the number of Web sites has been increasing dramatically. Approximately 500 Web sites existed in October of 1993. Six years later over two million sites had been created. *See* CONNER-SAX & KROL, *supra* note 6, at 107.

12. *See* CONNER-SAX & KROL, *supra* note 6, at 107. Individuals connect to the Internet by connecting to a local Internet Service Provider (ISP). *See id.* Using the telephone line, personal computers link to the server, which allows access to information stored on all the computers joined together on the Web. *See id.*

13. *See supra* note 1.

14. *See* Google (visited April 10, 2001) <<http://www.google.com>>.

15. *See* Infoseek (visited April 10, 2001) <<http://www.infoseek.com>>.

16. *See* Ask Jeeves (visited April 10, 2001) <<http://www.askjeeves.com>>.

17. *See* CONNER-SAX & KROL, *supra* note 6, at 414.

Locator code ("URL"), normally beginning with "http://www."<sup>18</sup> The address appears across the top of the screen in the "location" bar. By looking at the location bar, a user can identify the source of the site she is viewing. If a user knows the address of the site she wishes to view, she can type it in the location bar directly and avoid using a search engine.

Web pages, each one an individual work of authorship, contain mainly text and graphics, but may also contain audio and video elements. Owners construct Web sites using Hypertext Markup Language ("HTML").<sup>19</sup> Some sites contain multiple pages<sup>20</sup> and the introductory page, or "home page," acts as a welcome page and a guide to the information contained on pages "deeper" in the site.<sup>21</sup> Generally, a user who clicks on links on the home page can connect to other pages within the site; however, each new page has its own Internet address, and can be accessed without first entering the site's home page by directly typing the "internal" address.<sup>22</sup> Web pages also often contain links to other related sites. By entering one site of interest, the user may then continue to "surf the Web" and enter an infinite number of other sites

---

18. See Shelby Clark, Note, *What a Tangled Web We Weave, When First We Practice to Deceive: Frames, Hyperlinks, Metatags and Unfair Competition on the World Wide Web*, 50 HASTINGS L.J. 1333, 1335 (1999).

19. See CONNER-SAX & KROL, *supra* note 6, at 298. The instructions for the Web page design do not appear on the computer screen, but direct the browser how to display text, images, and other media aspects of the page. See *id.* Using HTML, a designer can make her Web page interactive through links to other HTML documents. See *id.*

20. See Clark, *supra* note 18, at 1358 n.11. Commercial Web sites often contain multiple pages. See *id.* In a commercial site, the home page acts not only as a guide for the rest of the site, but also may contain disclaimer and legal information as well as advertising. See *id.* Users view this advertising when entering the Web site through the home page, creating revenue. See *id.*

21. See Beal, *supra* note 11, at 707.

22. See *id.* Pages other than the home page of a Web site are often described as "internal" pages, located "beyond" the primary page. See *id.* However, each page is located at its own URL, stored and organized in a non-linear fashion. See CONNER-SAX & KROL, *supra* note 6, at 107 ("The web does not imply a hierarchical tree, which is the structure of most books, nor a simple ordered list. In essence, it allows many possible relations between any individual document and others . . . regardless of where the document is located."). See also Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure 13 (1995), reprinted at Intellectual Property and the National Information Infrastructure (last modified Nov. 15, 1995) <[http:// www.upsto.gov/Web/offices/com/doc/ipnii/](http://www.upsto.gov/Web/offices/com/doc/ipnii/)> [hereinafter "White Paper"] ("While conceptualization helps to put in material terms what is considered rather abstract, activity on the Internet takes place neither in outerspace nor in parallel, virtual locations.").

through the hyperlinks provided, without knowing or searching for the addresses.<sup>23</sup>

A user may link functions in one of three ways.<sup>24</sup> Hypertext Reference links (“HREF”) direct the browser to display the content of another Web site by retrieving the new address, which then replaces the address of the first site in the location box.<sup>25</sup> “IMG” links instruct a browser to display images or text from another Web site without leaving the original site.<sup>26</sup> IMG linking can be accomplished by “framing”<sup>27</sup> or “inlining.”<sup>28</sup> Proxy server links display contents of a Web site to which the user has already linked,<sup>29</sup> by storing or “caching” the contents of the site on the user’s computer, making it available

---

23. See Beal, *supra* note 11, at 739 n.32. Linking usually occurs without the knowledge of the owner of the linked to site. If a site owner wants to find out what other sites contain a link to hers, she can visit <<http://altavista.digital.com>>. See *id.* Typing “LINK: [owner’s URL address]” generates a list describing where all the links to her site come from. See *id.*

24. See Peggy Miller, *Advertising Law in the New Media Age*, 775 PLI Commercial Law and Practice Course Handbook Series No. A0-002M 505, 507 (1997).

25. See *id.*

26. See *id.*

27. See Charlton D. Rose, *Sharky’s Netscape Frames Tutorial Lesson 1: Laying Out Frames* (visited April 10, 2001) <<http://www.sharkysoft.com/tutorials/frames/1.htm>>. While HREF links display only one Web page at a time, framing allows the user to view multiple pages on the same screen. See *id.* A narrow vertical frame containing a list of links to the Web site’s internal pages often appears on one side of a Web site’s home page. See *id.* If a user clicks on a link, the internal page is retrieved in the main frame and the link list remains displayed in the vertical side bar. See *id.* Frames can also be used to display information simultaneously for comparison. See *id.* The user can interact with only one frame at a time, as each still exists as an independent document. See *id.* Furthermore, displaying linked to information in a frame allows the original site to continue to display bordering advertising information. See *id.*

28. See Brian Wassom, *Copyright Implications of “Unconventional Linking” on the World Wide Web: Framing, Deep Linking and Inlining*, 49 CASE W. RES. L. REV. 181, 193 (1998). Inlining occurs when a Web page designer incorporates a graphic file from another site into her own page. See *id.* When a user retrieves the page, specific HTML language instructs the browser to copy an image from another page on the server and incorporate the image onto the displayed page. See *id.* The graphic image usually appears in a small box outlined in bold color. See *id.* Unlike in the case of HREF links, nothing identifies the source of the inlined graphic. See *id.* Unless the user deconstructs the HTML coding of the page or the creator alerts the user, the user does not know where the individual graphic came from. See *id.* See also *supra* note 19.

29. See Miller, *supra* note 24, at 507.

for rapid retrieval.<sup>30</sup> In each case, the content of the Web site to be viewed must be loaded into the random access memory (RAM) of the user's computer before it can be displayed on the screen.<sup>31</sup>

According to the court in *ACLU v. Reno*, “[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.”<sup>32</sup> The practice of linking developed within the culture of free accessibility to the Web<sup>33</sup> and, until recently, remained largely unquestioned.<sup>34</sup> While hyperlinks between Web sites create limitless accessibility integral to the functioning of the Web and augment the ease with which a user may locate information, competition for popularity and advertising revenue<sup>35</sup> has increased Web site owner concern about when and how other sites link to theirs.<sup>36</sup> Myriad legal issues arise when challenging the use of hypertext links. To date, copyright claims on the Internet remain an unsettled and widely disputed area of law.<sup>37</sup>

---

30. See Beal, *supra* note 11, at 708. The image of the Web page remains in the user's computer's RAM while the user views the page. See *id.* Web browser software also stores a copy of the site, or caches it, on the computer's hard drive for a limited time. See *id.* The cache can store only a limited number of sites; as the user visits additional sites, the cache deletes the oldest sites and saves the more recently visited. See *id.* If the user revisits a site while it is stored in the cache, the browser retrieves the information much more quickly from the hard drive than it would by reloading the site from the Internet. See *id.*

31. See Miller, *supra* note 24, at 507.

32. *ACLU v. Reno*, 929 F. Supp. 824, 837 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997).

33. See *supra* note 11.

34. See *supra* note 5.

35. See Beal, *supra* note 11, at 708-09. Owners of Web sites requiring financial support usually charge advertisers, rather than site users, to generate funding. See *id.* at 709. The site owner places the advertiser's logo on a Web page, and every time a user visits the page the advertiser must pay the owner a set amount, or per-hit fee. See *id.*

36. See Robert A. Bourque & Kelly L. Konrad, *The Tangled Web: First Wave of Internet Cases Provides More Questions Than Answers*, 8 No. 11 J. PROPRIETARY RTS. 2, (publication page numbers not available) (1996) (“While hyperlinks exist most obviously to provide the Internet user with handy, efficient cross-references to relevant topics of interest, they also have great commercial potential.”).

37. Upon hearing of the settlement ending Ticketmaster's case against Microsoft, described below at Part II.E., Jeffrey Kuester, Internet law specialist and partner at Thomas, Kayden, Horstemeyer & Risley, responded, “[i]’m sure it’s the best interest of the parties, but for the purpose of providing meaningful guidance to the Internet community, this is the worst news I’ve

## II. COPYRIGHT LAW ONLINE

In recent years, the scope of basic copyright law in the United States has been expanding through regulation and judicial interpretation to encompass unforeseen developments in communication technology.<sup>38</sup> Current jurisprudence employs the fundamentals of copyright law and the exclusive rights it confers, the elements of an infringing action, and the elements of the fair use defense in the Internet context.<sup>39</sup>

### A. FUNDAMENTALS OF COPYRIGHT LAW

Article I of the U.S. Constitution contemplates the existence of a body of law “to promote the Progress of Science and useful Arts.”<sup>40</sup> The Copyright Act of 1976 (“Act”) establishes a system of copyright protection in the United States. Protection exists for all “original works of authorship fixed in any tangible medium of expression,”<sup>41</sup> in an effort to encourage creation of literary, artistic and technological works, and to reward authors for their work. However, copyright law acts as a balance between individual protections and the public interest in use and dissemination of creative works.<sup>42</sup>

The Act has been amended several times, often in response to the developments of advancing technology.<sup>43</sup> As technology continues to develop, new and unforeseen situations demand that courts interpret and apply copyright laws in an equitable

---

heard all day. . . . We were hoping to hear some good, broad, general language from the court. . . . Now, do we know if deep linking is bad? Is linking to a main home page O.K.? Is it just not O.K. to link? We don't know.” See Bob Tedeschi, *Ticketmaster and Microsoft Settle Suit on Internet Linking*, N.Y. Times (Feb. 15, 1999) <<http://nytimes.qpass.com/qpass-archives>>.

38. See ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 911 (2d ed. 2000).

39. See *id.* at 911- 1007 (applying copyright law to computer technology).

40. U.S. CONST. art. I, § 8, cl. 8.

41. 17 U.S.C. § 102(a).

42. See MERGES ET AL., *supra* note 38, at 352.

43. See *id.* at 345-48 (describing the history of copyright law from its origin in 1556 to the present). Congress modified the Act in 1980 to incorporate computer programs, in 1992 to address digital audio recordings, and in 1998 to clarify application in online contexts. See *id.* See also *Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417, 430 (1984) (“From its beginning, the law of copyright has developed in response to significant changes in technology.”).



manner; they must continue to protect the author's rights and provide incentives for creation, and at the same time protect the public's interest in the dissemination of information as communication technology explodes.<sup>44</sup> Recently, Congress enacted the Digital Millennium Copyright Act ("DMCA"), addressing the application of copyright law to online technology.<sup>45</sup>

## B. EXCLUSIVE RIGHTS UNDER COPYRIGHT LAW

Current copyright law expressly confers six rights to a copyright owner.<sup>46</sup> Section 106 conveys exclusive rights to reproduce the work,<sup>47</sup> create derivative works,<sup>48</sup> distribute copies of the work,<sup>49</sup> perform the work publicly,<sup>50</sup> display the work publicly,<sup>51</sup> and perform sound recordings by means of digital audio transmission.<sup>52</sup> Like other property rights, copyright owners may divide their bundle of rights through licensing, sale, and other means of alienation.<sup>53</sup> While violation of any of these rights may constitute infringement, hyperlinks are most likely to implicate the right to reproduce work, the right to create derivative works, the right to distribute copies of the work, and the right to display the work publicly.

---

44. See *MERGES ET AL.*, *supra* note 38, at 911.

45. See The Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998), codified at 17 U.S.C. § 512. The DMCA "implements two important international treaties of the World Intellectual Property Organization," modifies the application of copyright law to the Internet, and "outlaws manufacture of devices or software designed to circumvent protective security measures created for the Internet and other electronic environments." Carolyn Andrepont, *Digital Millennium Copyright Act*, 9 No. 11 DEPAUL-LCA J. ART & ENT. L. 397, 398-399 (1999).

46. 2 MELVIN B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 8.01[A] at 8-14 (1963).

47. See 17 U.S.C. § 106(1) (2001).

48. See *id.* § 106(2) (2001).

49. See *id.* § 106(3) (2001).

50. See *id.* § 106(4) (2001).

51. See *id.* § 106(5) (2001).

52. See *id.* § 106(6) (2001).

53. See Wassom, *supra* note 28, at 194-95.

## 1. The Right to Reproduce the Work

The right to reproduce a work is the most fundamental right granted by copyright law.<sup>54</sup> Section 106(1) grants a broad right that prevents others from making both exact copies and “substantially similar” reproductions.<sup>55</sup> Section 101 defines “copies” as “material objects . . . in which work is fixed . . .”<sup>56</sup> Although the law prohibits copying, it does not prohibit independent creation. A copyright owner possesses rights to the original expression, not the facts, which are considered public domain.<sup>57</sup> According to the legislative history of §106, reproducing the entire work or any substantial part, exactly or by imitation, constitutes infringement “as long as the author’s ‘expression’ rather [than] merely the author’s ‘ideas’ are taken.”<sup>58</sup>

In the online context, the reproduction right is arguably implicated every time an image is reproduced either in a central server or in a user’s computer. Very little case law exists concerning “the exclusive right of reproduction of works in the context of computer memory” and most of them concern computer software.<sup>59</sup> In 1993, the Court of Appeals for the Ninth Circuit held that “since . . . the copy created in the RAM can be ‘perceived, reproduced, or otherwise communicated’, . . . the loading of software into the RAM creates a copy under the Copyright Act.”<sup>60</sup> However, when browsing the Internet, a “copy” exists on the computer screen only as long as the user views the page, and on the computer’s hard drive only until the cache fills and the earliest viewed sites are erased.<sup>61</sup> Since the image usually does not even remain in the computer’s memory until the computer is turned off, as in *MAI Sys. v. Peak*,<sup>62</sup> such

---

54. See *MERGES ET AL.*, *supra* note 38, at 432.

55. See *id.* at 433.

56. 17 U.S.C § 101 (2001).

57. See *MERGES ET AL.*, *supra* note 38, at 433.

58. See *id.* (quoting H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., at 61 (1976)).

59. See Bruce Keller, *Internet and Online Law: Copyright*, 610 PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G0-00D6 169, 212 (2000).

60. *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993), cert. dismissed 510 U.S. 1033 (1994).

61. See *supra* note 30 and accompanying text.

62. See *supra* note 60 and accompanying text; *MAI Sys. Corp.*, 991 F.2d at 519.

use is arguably not “fixed” as required by the statutory definition.<sup>63</sup> Although a number of courts agreed with the *MAI Sys.* holding,<sup>64</sup> prior case law,<sup>65</sup> Congressional intent,<sup>66</sup> most commentators,<sup>67</sup> and intuition<sup>68</sup> reject this decision. Furthermore, Section 117 of the Act, enacted in 1980, permits users of computer programs to make certain copies without implicating the copyright holder’s reproduction rights.<sup>69</sup>

---

63. See 17 U.S.C. § 101 (2001). The statute states that “a work is ‘fixed’ in a tangible medium of expression when its embodiment is a copy or phonorecord . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than a transitory duration.” *Id.*

64. See, e.g., *Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1335 (9th Cir. 1995) (holding that loading operating system software into a computer’s RAM is copying for the purposes of the Act); *Stenograph L.L.C. v. Bossard Associates, Inc.*, 144 F.3d 96, 101 (D.C. Cir. 1998) (holding that loading software from a permanent storage medium to a computer’s RAM by “booting up” causes a copy to be made); *Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc.*, 55 F. Supp.2d 1113, 1119 (D. Nev. 1999) (holding that scanning a photograph into a computer’s RAM violates the reproduction right).

65. See *Apple Computer v. Formula Int’l. Inc.*, 594 F. Supp. 617, 621-22 (C.D. Cal. 1984) (indicating that copies stored in RAM, unlike those loaded in ROM, were only “temporary”).

66. The House Report on the 1976 Act states that “the definition of ‘fixation’ would exclude from the concept purely evanescent or transient reproductions such as those captured momentarily in the ‘memory’ of a computer.” H.R. Rep. No. 1476, 94th Cong., 2d Sess. 53 (1976).

67. See, e.g., MERGES ET AL., *supra* note 42, at 968; Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Internet Providers*, 13 CARDOZO ARTS & ENT. L.J. 345, 381-382 (1995); Michael E. Johnson, Note, *The Uncertain Future of Computer Software Users’ Rights in the Aftermath of MAI Systems*, 44 DUKE L.J. 327 (1994); Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1280 n.184 (1995); Katrine Levin, Note, *MAI v. Peak: Should Loading Operating System Software into RAM Constitute Copyright Infringement?*, 24 GOLDEN GATE U.L. REV. 649 (1994); Jessica Litmas, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 41-42 (1994); Carol G. Stovsky, Note, *MAI Systems Corp. v. Peak Computer, Inc.: Using Copyright Law to Prevent Unauthorized Use of Computer Software*, 56 OHIO ST. L.J. 593 (1995).

68. Under *MAI*, every use of a computer involves making copies. See MERGES ET AL., *supra* note 38, at 968. It would be impossible for a computer to read and implement a program without making a copy; such application of copyright law, while protecting a copyright owner’s interest, obliterates the public’s interest in dissemination and use of the work. See *id.* (“While you can ‘use’ a book without making a copy, under *MAI* any use of a computer program— even turning the computer on— necessarily implicates the copyright laws.”).

69. See 17 U.S.C. § 117 (2001). Section 117 states that “it is not an infringement for the owner of a copy of a computer program to make . . . another copy. . . provided: (1) that such a new copy or adaptation is created as

## 2. The Right to Create Derivative Works

A copyright owner also has the exclusive right to prepare derivative works.<sup>70</sup> In order to be considered a derivative work, the new work must contain an element of originality and be made by, or with the permission of, the true copyright owner.<sup>71</sup> Furthermore, a derivative work must add a new expressive element to the original work and serve markets that differ from the market in which the original work was introduced.<sup>72</sup> The level of originality required in the new work for the courts to consider it a derivative work is more than “merely trivial.”<sup>73</sup> Infringement occurs when a third party “recast[s], transform[s] or adapt[s]”<sup>74</sup> a work without the authorization of the copyright owner.

According to the Fourth Annual Internet Law Institute, simply digitizing a work does not create a derivative work, as “such techniques are essentially techniques of copying.”<sup>75</sup> The courts have addressed the question, however, of whether modification of an existing digital work by simply adding a new

---

an essential step in the utilization of the computer program. . . or (2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.” *Id.* The Congressional intention in enacting § 117 “seems to be to allow copies such as those made in *MAI v. Peak*.” *MERGERS ET AL.*, *supra* note 38, at 969. Title III of the DMCA altered this provision to expressly exempt from liability the owner or lessee of a computer to make a copy of a computer program for purposes of maintaining or repairing computer hardware only. *See Keller*, *supra* note 59, at 213.

70. *See* 17 U.S.C. § 106(2) (2001). Section 101 of the Act defines a “derivative work” as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaboration, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’” 17 U.S.C. §101 (2001).

71. *See* 17 U.S.C. § 103 (2001).

72. *See* *Midway Mfg. Co. v. Artic Int’l, Inc.* 704 F.2d 1009, 1013-14 (7th Cir. 1983), cert. denied, 464 U.S. 923 (1983).

73. Jeffrey R. Kuester & Peter A. Nieves, *Hyperlinks, Frames and Meta-Tags: An Intellectual Property Analysis*, 38 *IDEA* 243, 254 (1998) (“The level of originality required does vary among the United States Courts of Appeals, leading to uncertainty as to how the law will apply to the new medium of the Web.”).

74. *Id.*

75. *Keller*, *supra* note 59, at 214.

component to that work creates a derivative work.<sup>76</sup> The court in *Midway Mfg. Co. v. Artic Int'l, Inc.*, determined that adding a Artic-manufactured computer chip, which was used to speed up an arcade video game manufactured by Midway, infringed on Midway's copyright by creating a derivative work.<sup>77</sup> On the contrary, the court in *Lewis Galoob Toys, Inc. v. Nintendo of Am.*,<sup>78</sup> ruled that the Game Genie, a computer game add-on that altered characteristics of games played on a home video game unit, does not infringe, as it does not incorporate any part of the original work.<sup>79</sup> The *Galoob* court distinguished the Game Genie from Artic's chip; noting that Game Genie involved no direct copying from a computer's ROM and that it is used in a private, non-commercial setting.<sup>80</sup> In dicta, the *Galoob* court stated that "derivative works should not encompass works whose sole purpose is to enhance the underlying work."<sup>81</sup>

### 3. The Right to Distribute Copies of the Work

Another right that may arise in the Internet context is the right of distribution. Section 106(3) grants the copyright owner the right to distribute, through sale or other means, original and subsequent copies of the copyrighted work.<sup>82</sup> Infringement of the distribution right requires that a third party actually disseminate copies of the original work.<sup>83</sup> A distributor of unauthorized copies may be liable for copyright infringement even if she did not make the copies herself.<sup>84</sup>

In the Internet context, disseminating a document on the Web may implicate the distribution right. Link creators have been held liable for infringement if the link is used to retrieve a

---

76. See MERGERS ET AL., *supra* note 38, at 976-1007 (discussing fair use and derivative works as applied to computer software.)

77. See *Midway Mfg. Co.*, 704 F.2d at 1013.

78. See *Lewis Galoob Toys, Inc. v. Nintendo of Am.*, 964 F.2d 965 (9th Cir. 1992).

79. See *id.* at 968 .

80. See *id.* at 969.

81. Matt Jackson, *Linking Copyright to Homepages*, 49 FED. COMM. L.J. 731, 748 (1997). See also *Lewis Galoob Toys, Inc.*, 964 F.2d at 659 ("The Game Genie is useless by itself, it can only enhance, and cannot duplicate or recast, a Nintendo game's output.").

82. See 17 U.S.C. § 106(3) (2001).

83. See 2 NIMMER & NIMMER, *supra* note 46, § 8.11[A], at 8-149.

84. See MERGER ET AL., *supra* note 38, at 470.

Web site that distributes infringing copies of works.<sup>85</sup> The distribution right, however, has been interpreted to apply to “material objects, which are arguably distinct from the signals sent in transmissions.”<sup>86</sup> Courts have been inconsistent in the application of the statutory right to public distribution with regard to electronic transmissions.<sup>87</sup> The Working Group on Intellectual Property Rights of the United States addressed this uncertainty and proposed that works distributed electronically should be treated no differently from work distributed physically.<sup>88</sup> Despite these recommendations, the DMCA did not “change the law with respect to many transmissions that implicate the exclusive distribution rights of copyright owners,”<sup>89</sup> as it mandates a licensing scheme relating specifically to online transmissions of sound recordings only.<sup>90</sup>

#### 4. The Right to Display the Work Publicly

The fourth right that hyperlinks may arguably implicate is the exclusive right of public display. Section 101 defines “display” as “to show a copy of it, either directly or by means of film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.”<sup>91</sup> Such display must occur:

at a place open to the public or at any place where a substantial number of persons outside of a normal circle of family and its social acquaintances is

---

85. See *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F.Supp. 2d 1290 (D. Utah 2000) (holding that providing links to a Web site that contains infringing copies of the Mormon Church handbook constitutes contributory infringement).

86. Keller, *supra* note 59, at 227 n.12.

87. See *Agee v. Paramount Comm. Inc.*, 59 F.3d 317, 324-25 (2d Cir. 1995) (holding that a satellite transmission of sound recordings does not constitute distribution) and *Sega Enterprises Ltd. v. MAPHIA*, 948 F. Supp. 923, 932-33 (N.D. Cal. 1996) (holding that the uploading and downloading of software infringes reproduction right, with no finding made with respect to public distribution rights). *But see* *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552, 1556 (M.D. Fla. 1993) (holding that operators of an Internet bulletin board service from which copyrighted pictures were viewed and downloaded constitutes infringement of public distribution rights).

88. See White Paper, *supra* note 22, at 213-17.

89. Keller, *supra* note 59, at 217.

90. See 17 U.S.C. §§ 112, 114 (2001).

91. 17 U.S.C. § 101 (2001).

gathered; or (2) to transmit or otherwise communicate. . . to a place specified by clause (1) or to the public, by means of any device or process.<sup>92</sup>

Clause (2) covers all broadcasts or transmissions, even if all possible recipients do not view the work, or do so individually, in the privacy of their own home.<sup>93</sup>

Like infringement of the right to distribution, infringement of the right to public display may occur in the absence of copying the work.<sup>94</sup> Posting and viewing documents on the Internet may involve copyright liability for violation of an owner's exclusive display right. Like many aspects of potentially infringing situations on the Web, the "significance of the right of public display . . . to the online environment has not been addressed in detail in the decisional law to date."<sup>95</sup> The "White Paper" declares that browsing the Web and viewing works online constitutes a public display, but offers no explanation for its decision.<sup>96</sup> According to the Fourth Annual Internet Law Institute, the assumption underlying the White Paper's determination "is that all browsing requires copying in RAM, which fixation, it concludes, is a reproduction under current case law."<sup>97</sup>

### C. COPYRIGHT INFRINGEMENT

A claim of copyright infringement can be brought under 17 U.S.C. § 501.<sup>98</sup> To establish direct infringement, a plaintiff must prove ownership of a valid copyright, copying by the defendant, and improper misappropriation.<sup>99</sup> A plaintiff can

---

92. *Id.*

93. *Id.* The transmission of a work constitutes public display "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.*

94. See MERGER ET AL., *supra* note 38, at 478.

95. Keller, *supra* note 59, at 226.

96. See White Paper, *supra* note 22, at 71.

97. Keller, *supra* note 59, at 227 n.52. See also *supra* Part I.B.1 (discussing the viability of claims that loading information into a computer's RAM creates a copy within the meaning of the Act) and Part II.B.1 (discussing fixation requirement as an element of "copying").

98. See 17 U.S.C. § 501(a) (2001). The section states in part, "[a]nyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 121 . . . is an infringer of the copyright or right of the author." *Id.*

99. See *Arnstein v. Porter*, 154 F.2d 464, 468 (2d. Cir. 1946).

establish the copying element through showings of defendant's access to the original work,<sup>100</sup> or that the "two works are so strikingly similar as to preclude the possibility of independent creation."<sup>101</sup> A plaintiff can establish improper appropriation by showing "substantial similarities" in the two works.<sup>102</sup> The defendant must have interfered with one of the plaintiff's rights granted by §106 in order for the plaintiff to succeed on an infringement claim.<sup>103</sup> Remedies for infringement liability include "an injunction, the impounding and disposal of infringing articles, damages and profits, court costs and attorney's fees, and even criminal sanctions against the infringer."<sup>104</sup>

In order to find contributory infringement damaging, the court first must find that the copyright owner's rights have been directly infringed.<sup>105</sup> Personal conduct that furthers, or is part of, a copyright infringement constitutes contributory infringement, as does supplying machinery or good that provide the means for infringement.<sup>106</sup> Such infringement occurs when "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another."<sup>107</sup>

#### D. FAIR USE DEFENSE TO COPYRIGHT INFRINGEMENT

Limitations exist on the exclusive rights afforded to copyright owners in 17 U.S.C. § 106.

Under § 107, "the fair use of a copyrighted work . . . is not infringement of copyright."<sup>108</sup> The Copyright Act describes certain purposes for which reproducing copies does not

---

100. See 4 NIMMER & NIMMER, *supra* note 46, § 13.01[B], at 13-10.

101. *Ferguson v. Nat'l Board. Co., Inc.*, 584 F.2d 111, 113 (5th Cir. 1978).

102. See 4 NIMMER & NIMMER, *supra* note 46, § 13.03[A], at 13-27. Copying that is negligible in quantity but substantial in quality may nonetheless constitute substantial similarity. *Id.*

103. See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

104. Rosaleen P. Morris, Note, *Be Careful to Whom You Link: How the Internet Practices of Hyperlinking and Framing Pose New Challenges to Established Trademark and Copyright Law*, 30 RUTGERS L.J. 247, 277 (1998).

105. See 3 NIMMER & NIMMER, *supra* note 46, § 12.04[A][3][a], at 12-82 to 12-84.

106. See *id.*

107. *Gershwin Publ'g Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

108. 17 U.S.C. § 107 (2001).



constitute infringement<sup>109</sup> and enumerates four factors the court should consider in determining fair use: the purpose and character of the use,<sup>110</sup> the nature of the copyrighted work,<sup>111</sup> the amount and substantiality of the portion used in relation to the copyrighted work as a whole,<sup>112</sup> and the effect of the use upon the potential market for or value of the copyrighted work.<sup>113</sup> The Copyright Acts also lists potential fair uses and the factors to be considered in determining fair use are “illustrative rather than exhaustive.”<sup>114</sup> The Copyright Act also provides that no one factor should be considered definitive; rather, the court should balance all four in equity.<sup>115</sup>

### 1. The Purpose and Character of Use

The first factor to consider in determining the validity of a fair use defense to copyright infringement examines the purpose of the use of the copied work.<sup>116</sup> A court must consider not only whether the defendant used the work for a commercial or nonprofit purpose,<sup>117</sup> but also whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.<sup>118</sup> The propriety of the defendant’s conduct also merits consideration,<sup>119</sup> as does whether implied

---

109. *See id.* The statute contemplates “purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not infringement of copyright.” *Id.*

110. *See id.* § 107(1).

111. *See id.* § 107(2).

112. *See id.* § 107(3).

113. *See id.* § 107(4).

114. MERGES ET AL., *supra* note 42, at 490. According to the House Report, both lists serve to “offer some guidance” in judicial determination of a fair use defense. *See id.* (quoting H.R. No. 9401476, at 66 (1976)).

115. *See* 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A], at 13-152 to 13-155.

116. *See* 17 U.S.C § 107(1) (2001).

117. *See id.* Section 107 states that the character of the use includes “whether such use is of a commercial nature or is for nonprofit educational purposes.” *Id.*

118. *See* Harper & Row Publishers v. Nation Enter., 471 U.S. 539, 566-68 (1985).

119. *See id.* at 562. *See also* 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A][1][d], at 13-167 to 13-170, and Jonathan B. Ko, *Para-Sites: The Case for Hyperlinking as Copyright Infringement*, 18 LOY. L.A. ENT. L.J. 361, 377 (“Intuitively, a use made in bad faith is inconsistent with this privilege because an assumption of good faith and fair dealing underlies fair use.”).

consent justifies the use.<sup>120</sup>

## 2. The Nature of the Copyrighted Work

The nature of the copyrighted work is the second consideration. The necessity for an informed society, dictates that the public should have greater access to certain public works than others.<sup>121</sup> Thus, courts recognize a greater need to disseminate factual works than fiction.<sup>122</sup> Whether the author has published the work is a critical component of the consideration, since the author's right to decide when and where her work becomes public may outweigh the defense.<sup>123</sup> Courts will also consider the copyright holder's interest in confidentiality and creative control of the work.<sup>124</sup>

## 3. The Amount and Substantiality of the Work Used

The third factor listed for consideration in U.S.C. §107 is the amount of the work copied. Courts will consider not only the portion of the original work copied in relation to the original work as a whole constitutes an important consideration, but also the proportion of allegedly infringing work the copied material comprises.<sup>125</sup> If the portion copied is substantially larger than the portion necessary to complete the purpose of the defendant's work, the amount copied will weigh against a finding of fair use.<sup>126</sup> The factor contemplates not only how much of the original work was copied but also the import of that aspect of the work.<sup>127</sup>

## 4. The Effect on Market Value

The fourth factor for consideration is the effect of the use upon the market for or value of the copyrighted work.<sup>128</sup> The

---

120. See *Harper & Row*, 471 U.S. at 551.

121. See 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A][2][a], at 13-170 to 13-171.

122. See *Harper & Row*, 471 U.S. at 547-48.

123. See *id.* at 555.

124. See *id.* at 564.

125. See *id.* at 565-66.

126. See *id.* at 564-65.

127. See 4 NIMMER & NIMMER, *supra* note 46, § 13.05 [A][3], at 13-180.

128. See 17 U.S.C. § 107(4) (2001).

Supreme Court has indicated that this factor serves as “undoubtedly the single most important element of fair use.”<sup>129</sup> The fair use defense is limited to copying by others that which does not materially impair the marketability of the allegedly copied work.<sup>130</sup> A plaintiff may negate the fair use defense by showing that should the challenged use become widespread, “it would adversely affect the potential market for the copyrighted work.”<sup>131</sup> Furthermore, the court may consider not only the harm incurred in the market for the original work but also harm to the market for derivative works.<sup>132</sup>

The fair use defense, in all contexts, “is a highly contentious area of law”<sup>133</sup> and the balancing of the four factors in each case-by-case analysis remains extremely fact-specific.<sup>134</sup>

#### E. TICKETMASTER V. MICROSOFT: A CASE FOR ONLINE COPYRIGHT LIABILITY?

Recently, Ticketmaster objected to “deep links”<sup>135</sup> connecting to the ticket purchase order page of its Web site. The first legal dispute arose in April of 1997,<sup>136</sup> after Microsoft created a series of Web sites as online travel guides to certain cities throughout the world.<sup>137</sup> One site, called Seattle

---

129. *Harper & Row*, 471 U.S. at 556.

130. *See id.* at 568.

131. *See id.* (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451, 104 S.Ct. 774, 793 (1984)).

132. *See id.* at 568 (stating that fair use analysis “must take account not only of harm to the original but also harm to the market for derivative works”).

133. Keller, *supra* note 59, at 203.

134. *See id.* at 231. Depending on the combination and strength of arguments for each factor, a fair use defense may apply to hyperlinking Web pages on the Internet. *See id.* For example, “when the reproduction, performance or display is made only of a fragment of a work, for a transitory period, for noncommercial use and when no downloading occurs, the argument that browsing is a fair use would seem particularly strong.” *Id.*

135. Deep linking occurs when a hypertext link connects to an internal page of another Web site, rather than to the site’s home page. *See Beal, supra* note 11, at 711. Although the user is aware the link is taking place, she may be unaware that she is linking to an entirely new site rather than an internal page of the original site. *See id.* Some Web site owners, especially owners of commercial sites, feel that deep links “defeat a Web site’s intended method of navigation.” Wassom, *supra* note 28, at 192.

136. *See supra* note 5.

137. *See id.* Other cities include Washington, D.C., Boston, and San Francisco.

Sidewalk,<sup>138</sup> included descriptions of various entertainment events in Seattle and provided a hypertext link to the Ticketmaster Web page. Instead of linking to Ticketmaster's home page,<sup>139</sup> clicking on the hypertext link transferred the user directly to the page on which the user enters a credit card number to actually purchase tickets for the particular event.<sup>140</sup> In this manner, a visitor to the Seattle Sidewalk page could purchase tickets from Ticketmaster without visiting Ticketmaster's home page and thus avoid exposure to third-party advertising.<sup>141</sup>

As a first attempt to prevent Seattle Sidewalk's link, Ticketmaster's claim alleged unfair competition and trademark infringement; it did not include copyright infringement claims and did not mention deep linking.<sup>142</sup> After Microsoft filed a counterclaim seeking declaratory judgment as to the legality of hyperlinking<sup>143</sup> Ticketmaster amended its complaint to specifically address deep linking as the infringing activity.<sup>144</sup> Unfortunately, rather than force the court to determine whether hyperlinks may be created without fear of liability in order to "remove any chill from the free workings of the Internet,"<sup>145</sup> the first Ticketmaster case settled.<sup>146</sup>

---

138. See *supra* note 2.

139. See *Ticketmaster* (visited April 10, 2001) <<http://www.ticketmaster.com>>.

140. See *Ticketmaster Complaint*, *supra* note 5. See also Beal, *supra* note 11, at 713 ("When the user arrived at Ticketmaster's page through the link from Seattle Sidewalk, the Ticketmaster [page's] URL was displayed, and the look and feel of the site were different from Seattle Sidewalk.")

141. See *id.*

142. See *Ticketmaster Complaint*, *supra* note 5.

143. See *Kuester & Nieves*, *supra* note 73, at 263. See also Answer to First Amended Complaint, *Ticketmaster Corp. v. Microsoft Corp.*, CV 97-3055 RAP (C.D. Cal. Filed Apr. 28, 1997) (visited April 16, 2001) <<http://www.ljx.com/LJXfiles/ticketmaster/answer.html>> [hereinafter *Microsoft Answer*].

144. See *Ticketmaster Complaint*, *supra* note 5 ("Some of Seattle Sidewalk's links have circumvented the beginning pages of Ticketmaster's Web site, which display advertisements, products and services of entities with which Ticketmaster contracts, and have linked directly to subsidiary pages of the Web site."). By narrowing the claim to infringement by use of deep links, Ticketmaster acknowledges hyperlinks to its home page may not create a cause of action. See *id.*

145. *Kuester & Nieves*, *supra* note 73, at 263 (quoting *Microsoft Answer*, *supra* note 143).

146. See *Tedeschi*, *supra* note 37. Although the parties did not disclose the settlement terms, the Seattle Sidewalk site changed its link to connect to Ticketmaster's home page. See *id.* It appears from the agreement that

In a subsequent claim against Tickets.com filed in July of 1999,<sup>147</sup> Ticketmaster chose to include claims of copyright infringement based on the reproduction right.<sup>148</sup> In conjunction with other cases that have recently arisen claiming copyright infringement,<sup>149</sup> Ticketmaster's addition of copyright infringement to its legal complaint represents the belief that hypertext linking, especially deep linking, constitutes a viable claim of copyright infringement.

Ticketmaster's suit against Microsoft pertained to a deep link to an order form page.<sup>150</sup> Since copyright protects ideas and expression, not facts and forms,<sup>151</sup> the specific page in question may not even contain copyrightable material.<sup>152</sup> Many, indeed most, Web pages do contain copyrightable material, including other pages in Ticketmaster's site. Unfortunately, "the on-line industry remains without legal guidelines on the practice of so-called deep linking, of which Microsoft was by no means the only practitioner."<sup>153</sup>

---

Ticketmaster was satisfied as long as no deep linking occurred, although no precedent-setting decision was reached by the court. *See id.*

147. *See* Plaintiff's Motion for Preliminary Injunction, Ticketmaster Corp. v. Tickets.com, WL 1887522 at \* 1 (C.D. Cal. Aug. 10, 2000). Although the California Central District Court found that hypertext linking by itself does not create copies, and does not constitute copyright infringement, *see id.*, the Utah District Court found contributory infringement for creating links to site containing a church document. *See supra* note 86 and accompanying text.

148. *See* Defendant's Motion to Dismiss the First Amended Complaint, Ticketmaster Corp. v. Tickets.com, WL 525390 at \*2 (C.D. Cal. March 27, 2000) ("The motion to dismiss the first claim (copyright infringement) is denied because the complaint alleges actual copying.").

149. *See, e.g., What the Judge said in the Shetland Times Case*, SHETLAND NEWS (Oct. 24, 1996) <<http://www.shetland-news.co.uk/opinion.html>> (opinion granting interim interdict); Washington Post Co. v. Total News, Inc., 97 Civ. 190 (PLK) (S.D.N.Y., complaint, filed Feb. 20, 1997); and United Media's Second Letter (Feb. 3, 1998) (visited April 10, 2001) <<http://www.cs.princeton.edu/~dwallach/dilbert>>.

150. *See supra* note 144 and accompanying text.

151. *See supra* note 58 and accompanying text.

152. *See* Wassom, *supra* note 28, at 215.

153. Tedeschi, *supra* note 37. All of the cases mentioned in note 149 also settled without reaching a decision on the merits. *See generally* Beal, *supra* note 11. "There is no direct precedent for the copyright issues that arise in these contexts, and no mention in the copyright statutes of how to apply copyright law to the Internet." *Id.* at 722.

### III. HYPERLINKS DO NOT CREATE A CASE FOR COPYRIGHT INFRINGEMENT

If Ticketmaster had decided to raise a copyright claim in the Microsoft suit (assuming that the linked-to page was copyrightable), as the owner of the linked-to Web site (“owner”) it would have had to first decide who was liable for such infringement: the Internet Service Provider (“ISP”), the creator of the Web site containing the contested link (“link creator”), or the individual user browsing the Web (“user”). Although the claims described above were actually brought against the link creator, careful consideration of each of the actors who are potentially liable for infringement demonstrates that the ISP, the link creator, and the user all may likely use HREF links, including deep links, without violating current copyright law.<sup>154</sup>

#### A. A VALID COPYRIGHT CLAIM DOES NOT EXIST AGAINST THE INTERNET SERVICE PROVIDER

A local Internet Service Provider (“ISP”) connects individuals to the Internet.<sup>155</sup> While it is possible that a plaintiff such as Ticketmaster may identify an ISP as an infringer, it is unlikely since Title II of the DMAC, entitled the Online Copyright Infringement Liability Limitation, “contains several ‘safe harbor’ provisions for ISPs.”<sup>156</sup> Limitations on liability exist in four areas: “1) transitory communication, 2) system caching, 3) storage of information on either systems or networks as the direction of users, and 4) information location tools.”<sup>157</sup> As long as the ISP falls into the categorical definition,<sup>158</sup> the server may not be liable if it implements a

---

154. This note addresses whether or not HREF hypertext links create a viable action for copyright infringement. It does not apply to IMG links involving inlining or framing. See *supra* notes 24-28 and accompanying text.

155. See *supra* note 12 and accompanying text.

156. Andrepont, *supra* note 45, at 412.

157. *Id.*

158. In order to qualify as a “service provider,” with regard to the limitation on “transitory communications,” the provider must be “an entity offering the transmission, routing, or providing of connection for the digital online communications, . . . without modification to the content of the material as sent or received.” Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 § 512 (1998). Qualifications with regard to the other limitations define a provider as “a provider of online services or network access, or the operator of facilities therefor.” *Id.*

policy for terminating accounts of subscribers who repeatedly infringe copyrights and supports technological measures used to protect copyrights.<sup>159</sup> Section 512(d) specifically addresses “hyperlinks, online directories, and search engines.”<sup>160</sup> The ISP will not be held liable, regardless of actual knowledge that the material or activity is infringing, as long as it does not directly receive a financial benefit from infringing activity, and, if when alerted to the infringing material, it removes or disables the material that is claimed to be infringing.<sup>161</sup> The Act “provides that a service provider will not be liable for any monetary, injunctive or other equitable relief, as long as the listed conditions are met.”<sup>162</sup> Because of safeguards specifically created by the DMCA for ISPs, the owner would be unable to prevail on a claim of infringement.

## B. A VALID COPYRIGHT CLAIM DOES NOT EXIST AGAINST THE LINK CREATOR

When suing for copyright infringement, the copyright owner would most likely name the link creator as the infringing party. The owner could file a complaint based on direct infringement and could also assert contributory infringement, claiming that the link created provides the means for infringement by the user.

### 1. The Link Creator Does Not Directly Infringe Any Copyrights

In order to establish direct infringement, the court must find copying by the defendant and improper misappropriation of the work.<sup>163</sup> By providing an HREF, the link creator must interfere with one of the owner’s statutory rights, which include the right to reproduce the work, the right to create derivative copies of the work, the right to distribute copies of the work, or the right to distribute the work.<sup>164</sup>

---

159. See Andrepont, *supra* note 45, at 413.

160. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 § 512 (1998).

161. See Andrepont, *supra* note 45, at 417.

162. *Id.* at 415.

163. See *supra* Part II.C (discussing direct and contributory copyright infringement).

164. See *supra* notes 46-52 and accompanying text.

a. The Link Creator Does Not Directly Infringe the Right to Reproduce the Work

The most fundamental right created by copyright law is the exclusive right to reproduce one's work.<sup>165</sup> The fundamental question is: Who is actually reproducing the work?<sup>166</sup> Microsoft asserted that Ticketmaster's complaint "is based on a fundamental fiction. Ticketmaster creates an illusion that Microsoft, not the Internet user, is accessing Ticketmaster's Web pages."<sup>167</sup> Microsoft has only placed the URL of Ticketmaster's purchasing page on the Seattle Sidewalk Web site as a hyperlink.<sup>168</sup> By clicking on the HREF link, the user directed her computer to leave Seattle Sidewalk, connect to the Ticketmaster site, and retrieve the purchase order page.<sup>169</sup> The link creator does not reproduce any part of the owner's work, it merely provides an interested user the Internet address of another useful site. Moreover, the URL itself does not contain expression, but only fact, which is not copyrightable material.<sup>170</sup> Therefore, the link creator's page does not create copy of the owner's site and does not directly infringe on the owner's reproduction right.

b. The Link Creator Does Not Directly Infringe the Right to Create Derivative Works

The owner might claim that the link creator is modifying the original work by creating a hypertext link to an internal Web page, and in doing so, creating a derivative work.<sup>171</sup> Since the link creator is not creating a copy of the owner's Web page as stated above,<sup>172</sup> the link creator is doing nothing more than

---

165. See *supra* notes 54-55 and accompanying text.

166. The law prohibits making both copies and substantially similar reproductions. See *supra* note 55 and accompanying text.

167. Microsoft Answer, *supra* note 139, at 46.

168. See *supra* note 18 and accompanying text. The URL appeared in the location bar as: <http://www.ticketmaster.com>.

169. See *supra* note 25 and accompanying text.

170. See *supra* notes 57-58. Even if the URL contains the name of the Web page, names and titles are not generally copyrightable. See *id.*

171. See *supra* notes 70-81 and accompanying text.

172. See *supra* Part III.B.1.a (explaining that the link creator does not directly infringe copyrights because the link creator does not reproduce the original work).



adding a method for the user to access the owner's Web page. Hyperlinks may be analogized to the Game Genie created by Galoob, which the court held did not create a derivative work.<sup>173</sup> Just as the Game Genie is physically attached to a Nintendo video game, the link creator's hypertext link "attaches," superficially through HTML, to the owner's page. Both the Game Genie and hypertext links are useless by themselves; neither functions in the absence of the original work.<sup>174</sup> Furthermore, hyperlinks entail no direct copying and are used in a private setting, two factors which were considered to be important in the *Galoob* decision.<sup>175</sup> By creating a hypertext link to the owner's Web page, the link creator does not create a derivative work.

c. The Link Creator Does Not Directly Infringe the Right to Distribute Copies of the Work

Copyright owners retain the right to distribute both the original work and subsequent copies of the work.<sup>176</sup> The link creator's hyperlink does not create a copy of the owner's work<sup>177</sup> and therefore possesses nothing to distribute. However, infringement of the distribution right does not require that the distributor make the unauthorized copies.<sup>178</sup> The owner may argue that though the user creates the copies, the link creator's site does the distributing. The theory that the link creator distributes anything contains two flaws. First, it operates on the assumption that distribution can occur before copying, which is logically unsound; second, it confuses providing directions with providing the actual web page contents, since the link on the link creator's site does nothing more than provide the user with the address of the owner's Web page.

The information provided by Internet hyperlinks can be compared to information provided by telephone information services. Using the Ticketmaster hypothetical, suppose the user wants to purchase concert tickets by phone. She calls

---

173. See *supra* note 79 and accompanying text.

174. See *supra* note 81 and accompanying text.

175. See *supra* note 80 and accompanying text.

176. See *supra* note 82 and accompanying text.

177. See *supra* Part III.B.1.a (explaining that the link creator does not directly infringe copyrights because the link creator does not reproduce the original work).

178. See *supra* note 84 and accompanying text.

Information and requests Ticketmaster's phone number. The operator will provide it, as long as it is listed in the city's directory. The user may then reach Ticketmaster either by hanging up the phone and dialing the number or requesting that the operator connect her directly. Here, Ticketmaster chose to post its Web page on the Internet, just as it chose to list its phone number in the directory. Microsoft, akin to the Information operator, provides the URL address that the user is looking for, then the user makes the decision whether to click on the address directly, type it into the location bar, or ignore it altogether. The link creator does not control whether, or by what means, the user reaches the owner's Web page. If the owner would like to stop distributing its Web page, it may remove the document from the server or otherwise protect it. In creating the hyperlink, the link creator does not directly infringe the owner's right to distribute either the original work or copies thereof.<sup>179</sup>

d. The Link Creator Does Not Directly Infringe the Right to Display the Work Publicly

Suppose that while browsing the Internet, the user visits the link creator's Web site. With one click on the HREF link, she suddenly finds her computer displaying a page of the owner's Web site. The URL of the specific page appears in the location bar and the user is no longer "at" the link creator's site.<sup>180</sup> Thus, the computer displays the owner's Web page itself, not the owner's Web page on the link creator's site. The link creator is not directly infringing by displaying the copyrighted work in a public place, which is the definition of public display under § 101, clause (1).<sup>181</sup>

Clause (2) of the definition, however, includes transmission of the work.<sup>182</sup> Even assuming that the Information Infrastructure Task Force's White Paper is correct in asserting

---

179. See *supra* note 85 and accompanying text. It is worth noting, however, that if the link creator created a link to a Web page that distributed infringing copies of copyrighted works, a case of contributory infringement may exist. In that case the owner of the linked to site, would be the actor liable for direct infringement, so it is unlikely that she would bring a suit against anyone else. See *id.*

180. See *supra* Part I (describing the technical process of hyperlinking).

181. See *supra* note 91 and accompanying text.

182. See *supra* notes 92-93 and accompanying text.

that works viewed online constitute public displays,<sup>183</sup> the Ticketmaster Web site transmits its Web pages to the user's computer at the user's request. Ticketmaster, not Microsoft, displays the document by placing it on the server,<sup>184</sup> so Microsoft cannot be liable for direct infringement of Ticketmaster's public display right.

## 2. The Link Creator Does Not Contributorily Infringe Copyrights

While the link on the creator's site does not directly infringe the owner's copyright, the owner may claim that the link creator is liable for contributory infringement for providing the means for others to infringe.<sup>185</sup> In order to find contributory infringement, the owner would have to prove that the link creator knew of the infringement, the users in fact used the link to connect to the owner's Web page, the user was committing direct infringement due to the hyperlink, and the link substantially contributed to the direct infringement.<sup>186</sup>

Returning to the Ticketmaster hypothetical, Microsoft created the link so users could connect to Ticketmaster and purchase tickets, so the court might assume that Microsoft knows that users are clicking on the hyperlink, satisfying the second requirement. Although a user may view the same Web page by directly typing in the URL, Ticketmaster could possibly substantially contribute to infringement, by claiming that the link substantially contributed to the direct infringement; since Microsoft enables at least some users to enter the Ticketmaster site, the court might conclude that it contributes substantially to the conduct of the linking user, albeit a difficult assertion to prove. Ticketmaster would have to prove, however, that the user directly infringes its rights in order to satisfy elements one and three to prevail on a contributory infringement claim.

---

183. See *supra* notes 96-97 and accompanying text.

184. See *supra* Part III.B.1.c (explaining that the link creator does not directly infringe because the link creator does not distribute copies of the work).

185. See *supra* note 106 and accompanying text.

186. See Keller, *supra* note 59, at 236. See also *supra* notes 105-107 and accompanying text.

### C. A VALID COPYRIGHT CLAIM DOES NOT EXIST AGAINST THE INTERNET USER

If linking from the link creator's Web site to the owner's page constitutes direct infringement by the Internet user, the owner would have a cause of action every time her Web page gets a "hit" without the user normally typing the owner's URL. Ticketmaster, however, does not want to discourage users from purchasing tickets online, only from purchasing tickets from the order page via deep link, bypassing third party advertising on the rest of the Ticketmaster site. Thus, Ticketmaster would not have brought an action if the link had been to the home page rather than the order page. Bringing a cause of action of contributory infringement against the link creator, rather than the user, Ticketmaster not only avoids alienating its target market but also has a much better chance of confronting a defendant with deep pockets, such as Microsoft. In order to prevail on contributory claims, however, the owner must still prove that the users directly infringe its copyright.<sup>187</sup>

#### 1. The Internet User Does Not Directly Infringe Copyrights

The owner of a linked-to Web page is unlikely to be able to prove that Internet users directly infringe copyrights. Even if the court determines that the user's computer does reproduce the work, a user is still likely to prevail on either an implied license or a fair use defense.

##### a. The Internet User Does Not Directly Infringe the Right to Reproduce the Work

When clicking on the HREF link on the link creator's Web site, the user's computer contacts the ISP, which retrieves the data for the owner's URL from the user's server and displays it on the user's screen. In order to display the owner's page, it must be stored in the user computer's RAM.<sup>188</sup> If the court considers that the RAM storage of the Web page constitutes copying, it necessarily has determined that such storage meets the "fixation" requirement of the Copyright Act,<sup>189</sup> though the

---

187. See *supra* note 105 and accompanying text.

188. See *supra* note 31 and accompanying text.

189. See *supra* notes 59-69.

information is normally erased from the RAM when the user shuts down the computer, if not before.<sup>190</sup> The DMCA has been interpreted 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.”<sup>191</sup> Any other interpretation would lead to the absurd result that every user surfing the Internet directly infringes copyright law every time she views a Web page. Thereby making every link creator liable for contributory infringement. Without hyperlinks, the Internet would cease to be a seamless Web of interconnected documents,<sup>192</sup> but rather would be reduced to a complicated array of isolated works, accessible only to those who know the specific URL of the site they would like to view.

b. The Internet User Does Not Directly Infringe the Right to Create Derivative Works

By linking to the owner’s Web page, an Internet user does not create a derivative work. She views the owner’s page on her computer screen, as the owner has displayed it on the Web, without adding any original expressive element.<sup>193</sup> Just as the link creator does not directly infringe the right to create a derivative work,<sup>194</sup> the user does not violate the owner’s exclusive right to create derivative works simply because she reaches the site through a hyperlink.

c. The Internet User Does Not Directly Infringe the Right to Distribute Copies of the Work

The only way the user could violate the right to distribute copies of the owner’s work is by printing the Web page and distributing it physically.<sup>195</sup> The same reasoning applies as used above with regard to the link creator, that viewing the Web page does not create the copy, but rather subsequent

---

190. *See id.*

191. Roarty, *supra* note 148, at 1039 (quoting Karen S. Frank, *Cable Online Liability in Cable Television Law 1999*, 245, 265 [PLI]).

192. *See supra* Part I (describing how the Internet functions).

193. *See supra* notes 71-72 and accompanying text.

194. *See supra* Part III.B.1.a (explaining that the link creator does not directly infringe copyrights because the link creator does not reproduce the original work).

195. *See supra* notes 86-90 and accompanying text.

actions of the user that are unforeseeable and unrelated to Internet hyperlinking.<sup>196</sup> The Internet user does not directly infringe the owner's distribution right through use of a hyperlink.

d. The Internet User Does Not Directly Infringe the Right to Display the Work Publicly

The right to display one's work publicly protects a copyright owner from unauthorized display of her work. Ticketmaster Online provides a Web page from which event-goers may purchase tickets. Ticketmaster displays the document on the Web, and the user views it, and possibly interacts with it, fulfilling Ticketmaster's goal. The user neither places the page on display nor transmits the document to anyone else; by linking to the owner's page, the user does not implicate the owner's right to display its work.

2. Fair Use Defense Protects Internet User from Copyright Infringement

Although the legal issues concerning whether the user directly infringes the owner's right to reproduce the work remain unsettled,<sup>197</sup> a court would likely find that the fair use exception applies to the user viewing copyrighted Web sites retrieved by hyperlinks. Even if a court holds that copies are made in the user's RAM,<sup>198</sup> "the online world facilitates and even requires the infinite creation of [such] copies."<sup>199</sup> Consideration of the four factors used to determine the validity of a fair use defense demonstrate that the user would likely be found not liable for direct infringement.

---

196. *See supra* Part III.B.1.c (explaining that the link creator does not directly infringe because the link creator does not distribute copies of the work).

197. *See supra* Part III.B.1.a (explaining that the link creator does not directly infringe copyrights because the link creator does not reproduce the original work).

198. *See id.*

199. Roarty, *supra* note 148, at 1038.

a. The Purpose and Character of the Use

The first factor a court considers in determining fair use is the purpose of the use of the copyrighted work.<sup>200</sup> The Internet is commonly characterized as harboring unbridled potential for disseminating information. The Internet's unprecedented growth since its inception demonstrates that it not only exists as an effective, cost efficient, accessible method for conveying information, but that users do actually engage in cyberactivities frequently and with vigor. The Internet serves a host of functions, ranging from personal, academic, and educational to enjoyable, informative, and commercial. The court must consider copyright claims in the context in which they appear. When dealing with on-line activities concerning publicly displayed documents, society's First Amendment interest in obtaining and disseminating information trumps individuals' interests in copyright.

In a more fact-specific context, the Ticketmaster example, the user visiting the Seattle Sidewalk Web site presumably searches for information useful in planning her trip or learning more about the city. Although the user may purchase tickets by visiting the Ticketmaster page and completing a commercial transaction, she is not using the information for a commercial purpose; that is, the user does not profit from the copyrighted material without paying the customary price.<sup>201</sup> The user's purpose for allegedly copying the work is viewing Internet Web pages, which has been called "the functional equivalent of reading, which does not implicate copyright laws and may be done by anyone in a library without the permission of the copyright owner."<sup>202</sup>

Ticketmaster bases its objections to deep linking on the argument that by entering its site directly at the order page, rather than through the home page, the user avoids viewing paid advertising throughout the site. If the link creator purposely misleads the user, or intentionally diverts the user from the owner's home page for her own financial gain, courts will consider a high degree of bad faith as weighing against a finding of fair use, as the defense is consonant with moral

---

200. See *supra* note 116 and accompanying text.

201. See *supra* notes 117-118 and accompanying text.

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

rights and fair dealing.<sup>203</sup> If the link creator does not attempt to conceal the origin of the owner's page, nor claim the page as its own, a finding of bad faith would be unwarranted considering the benefits of the hyperlink. In the situation where URL of the owner's page appears in the location bar, or even in the more extreme situation where the link creator actually attempts to pass off the owner's page as its own, the propriety of the link creator's actions is not at issue. The merit of *user's* conduct is to be considered, and the purpose of browsing the Internet using links is to obtain information easily and expeditiously. The nature of the use of the copied work weighs in favor of the user, as does the implied consent of the owner, since "ordinary accessing of web sites itself involves the repeated reproduction of material placed on and intended to be accessed over the web."<sup>204</sup>

#### b. The Nature of the Copyrighted Work

The court considers the nature of the copied work as the second factor of a fair use defense.<sup>205</sup> Although the Court has determined that the public interest is greater in receiving factual information than fictional,<sup>206</sup> the nature of the medium itself indicates that all Web sites should be equally accessible. The Web thrives on user interaction; its sole function is to act as a forum for public works, voluntarily published for widespread public access and dissemination,<sup>207</sup> like a pile of fliers left in a park for the public to pick up and read. The owner obviously created its Web site in anticipation that Internet users will view it and possibly interact with it. By publishing information on the Web and making it freely accessible by hyperlinks, the owner cannot claim violation of its right to control an unpublished work,<sup>208</sup> nor can it claim an interest in confidentiality.<sup>209</sup> Furthermore, a deep link does not change the nature of the work, but, like any link, "facilitates

---

203. See *supra* note 119 and accompanying text.

204. Michael Zimmerman, *Copyright in the Digital Electronic Environment*, in 1998 UNDERSTANDING BASIC COPYRIGHT LAW 543, 588 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No G0-001K, 1998).

205. See *supra* note 121 and accompanying text.

206. See *supra* note 122 and accompanying text.

207. See *supra* Part I.

208. See *supra* note 123 and accompanying text.

209. See *supra* note 124 and accompanying text.



doing what any Web page invites—reading the page.”<sup>210</sup> Moreover, Ticketmaster itself has developed technology that directs the user’s computer to open Ticketmaster’s homepage open in a new window anytime a deep link occurs.<sup>211</sup> The second factor clearly weighs in favor of a finding of the fair use defense.

c. The Amount and Substantiality of the Work Used

When the user links to the ticket order page, the page specified by the URL is copied in the computer’s RAM. While all of the pages of a Web site may be considered the work as a whole, in which case the page copied comprises only a small proportion of the work copied, it may also be considered an individual work, in which case the computer displays it in its entirety.<sup>212</sup> While the amount and substantiality of the copied work appears to weigh in favor of the owner, the factors are to be balanced in equity,<sup>213</sup> and the other three factors weigh toward a finding of fair use.

d. The Effect on Market Value

The final factor the courts consider is the effect of the use on the market for or value of the copyrighted work.<sup>214</sup> In the Ticketmaster case, which involves a commercial transaction, the question may be whether the user’s copying of the purchase order page has an effect on the value of the on-line purchasing page. The question may also be whether the user’s copying of that particular page has an effect on the value of the Web site as a whole. For purposes of the amount and substantiality of the work factor, the owner would argue that the order page constitutes a work as a whole, in which case the user’s copying

---

210. See Wassom, *supra* note 28, at 238.

211. See Plaintiff’s Motion for Preliminary Injunction, *supra* note 147, at \*1. When deciding the Motion for Preliminary Injunction, the District Court found that there had been significant changes in the circumstances of the case since deciding the Motion to Dismiss. See *id.* The Court found that “[Ticketmaster] devised technical methods of blocking direct access by “deep linking” to [Ticketmaster] interior event pages.” *Id.* The Court also noted that Ticketmaster may no longer be able to employ these defensive techniques. See *id.*

212. See *supra* notes 125-126 and accompanying text.

213. See *supra* note 115 and accompanying text.

214. See *supra* note 128 and accompanying text.

has no effect on its market. That is, whether a user reaches the page through a deep link directly to it or through a series of links through Ticketmaster's home page, the user will still purchase tickets and Ticketmaster will still receive the same profit in either situation.

Deep linking may have an effect on the market, however, if the court considers the whole Web site as the work. Ticketmaster claims that in bypassing the advertisements located on its home page and throughout the site, the user deprives it of advertising revenue.<sup>215</sup> While it is true that a user retrieving the page through a deep link will not view the advertisements, Ticketmaster would have a difficult time proving that deep linking users would have otherwise seen the advertisements or even solicited its Internet purchasing services at all. Ticketmaster's claim is based on the assumption that had the user not linked to the order page through the Seattle Sidewalk site, she would have linked to the order page by visiting the Ticketmaster home page directly. It is quite possible that she would not have, and only by visiting the Seattle Sidewalk site did she happen to arrive at the Ticketmaster site. In this light, hyperlinks, including deep links, actually increase the value of the work in two ways. First, the link promotes the specific page and leads the user to it; second, once a user links to one page of a site, she may explore the rest of the site via links provided on the new page.<sup>216</sup> Despite the fact the user will not initially view the advertising on Ticketmaster's home page by first linking directly to the order page, the copying that occurs arguably "can only benefit the target page."<sup>217</sup>

Based on the analysis above, the user, searching for information on the Web, cannot be held liable for copyright infringement. Even if a court finds that browsing the Internet encroaches one of the owner's statutory rights, it is extremely likely that a user would be protected by the fair use defense, largely due to the interactive nature of the Internet itself. Thus if the user cannot be held liable for direct copyright infringement, the link provider cannot be held liable for contributory infringement.

---

215. See Complaint, *supra* note 5 and accompanying text.

216. See Wassom, *supra* note 28, at 235-38.

217. *Id.* at 237.

## IV. CONCLUSION

Ticketmaster's hypothetical copyright claim against Microsoft for deep linking to its site provides an poignant example of how current copyright laws must be interpreted, manipulated, and revised when applying it to the mercurial medium of Internet communication. While one of the goals of copyright law is to protect the unique expression of authors and to encourage creation of literary, artistic and technological works, the other is to disseminate information and creative works. Creative and informative Web pages make up the seamless Web of the Internet, and hyperlinks facilitate a user's ability to locate and access information. While Hypertext Reference links between Web pages on the Internet may give rise to a cause of action in another area of the law, copyright claims should be avoided. In the balance of copyright law, the author's interest in limiting access to unprotected, publicized works, is far outweighed by hyperlinks' contributions to the "infinite possibilities and opportunities for the sharing of information on a global level."<sup>218</sup>

---

218. Andrepont, *supra* note 45, at 419-20.