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Introduction

The explosive expansion of the Internet during the recent years has provoked many lawsuits that left lawyers struggling with the application of traditional, "analogue" law to the new, digital technology. Yet, another pattern of disputes emerges that involves unauthorised Web linking in various forms. Technology meanwhile provides for the possibility to either incorporate images originating from another source on the Web into the own Web site or to frame content from other providers into the own material published on the Web simply by using hypertext links. These activities, along with more traditional kinds of links, have lead to disputes between content providers on the Internet about linking in general and specific kinds of links in particular. Four celebrated linking disputes, one in the Great Britain and three in the United States, gained interest in the cyber world because of their potential impact on the main feature of the Web, the possibility of linking documents. Thus far, only one court decision was issued in the Scotland, the other lawsuits were either settled or they are still pending. Notwithstanding this uncertainty in law, similar situations have evolved and the demand for a solution is growing. Commentators around the world have tried to deal with the issue and it appears that in many jurisdictions traditional intellectual property law is difficult to apply to the new technology.

With regard to these problems some authors mentioned the idea that technical barricades, rather than reliance on legal principles, should be the primary means of exercising site control[1]. Indeed, it appears that there are a variety of devices capable to avoid being linked without consent[2]. However, technical barricades are only viable until some clever developer figures out how to circumvent them. In the long run, a sound society should be able to offer effective legal protection for those who publish their intellectual property on the Internet. It has to be remembered that intellectual property law had to stand many challenges by technological developments in the past. The transition from the analogue world into a digital one may arguably constitute the biggest

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1 Barry D.Weiss, *"Metasites Linked To IP Violations"*, p.4; Bradley J. Hillis, *"Thinking about Linking"*, p.1; Edward A. Cavazos and Coe F. Miles, *"Copyright on the WWW: Linking and Liability"*, p. 17

2 For a survey see Bradley J. Hillis (n.1)

task. Still, traditional intellectual property law has not proved to be completely unsatisfactory.

Considering the rapid growth of Web content providers and users in South Africa, it is likely that similar disputes will evolve here soon. In the course of this dissertation I will try to establish whether South African intellectual property law is able to cope with the present linking problems and whether it leads to reasonable results. After providing a brief survey on the technical background of linking (Chapter 1) and the facts of some celebrated linking disputes (Chapter 2) I will continue to analyse the disputes under South African intellectual property law (Chapter 3). In conclusion I will argue that the law in South Africa indeed provides the means to deal with unauthorised Web linking and that the application of the traditional law leads to reasonable results.

Chapter 1: Technical Background

To understand the legal problems linking provokes, a basic knowledge of the technical aspects of the Internet and the World Wide Web is essential. Although most of its users are meanwhile familiar with at least some of these aspects, for the present discussion it is essential to remember certain facts.

I. The Internet

The United States District Court for the Eastern District of Pennsylvania in its well known decision in *American Civil Liberties Union v. Janet Reno*[3] characterised the Internet as not being "a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks. Thus it is a network of networks."[4]

It has its origins in 1969 as an experimental project of the Advanced Research Project Agency ("ARPA") and was called ARPANET[5]. This network linked computer and computer networks owned by the military, defence contractors, and university laboratories conducting defence related research. At the same time that ARPANET was maturing, similar networks developed to link universities, research facilities, businesses and individuals around the world. These networks included, for example, BITNET, CSNET, FIDONET and USENET[6]. Eventually, each of these networks were themselves linked together, allowing users of any computers linked to any one of the networks to transmit communications to users of computers of other networks. This series of linked networks finally became what is today commonly known as the Internet[7].

What was born as an experiment out of cold war paranoia soon became a worldwide communications medium with extraordinary growth. Whereas in 1981 only 300 computers were linked to the Internet, in 1989 the number had increased to 90 000. In 1996 already over 9 400 000 host computers worldwide were estimated to be linked

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3 929 F. Supp. 824 (1996) II paragraph 1
4 *ibid*, II. paragraph 1
5 *ibid*, II. paragraph 5
6 *ibid*, II. paragraph 0

together. This count, however, did not include personal computers people use more frequently to access the Internet. In all, it is expected that by the year 1999 the number of Internet users will grow to 200 million people[8].

From its inception, the network was designed to be a decentralised, self-maintaining series of redundant links between computers and computer networks, capable of rapidly transmitting communications without direct human involvement or control[9]. In order to assure the functionality of the network in spite of wars or other attacks, it has been designed with an automatic ability to re-route communications if one or more individual links were damaged or otherwise unavailable[10]. In addition, one of the key technologies of the Internet is the use of so called "packet-switching" communication protocols.[11] This technology allows individual messages to be subdivided into smaller "packets" that are then send independently to their destination. In the course of this journey they do not necessarily all travel the same path, in case computers along the route become overloaded or damaged, packets may be re-routed to less loaded computers[12]. Because the Internet does not have a single information channel but rather uses any number of routes like telephone lines, satellite links or mobile phone signals, different packets with information may even travel along different routes, one via satellite, the other via a telephone line[13]. Once all packets arrive at their destination, they are automatically reassembled by the receiving computer[14].

There are various methods to communicate over the Internet, such as one-to-one messaging, or real time communication[15]. The most commonly known, however, is the

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7 *ibid,* II paragraph 10
8 *ibid,* II. paragraph 3
9 *ibid,* II. paragraph 6
10 *ibid,* II. paragraph 6
11 L. Edwards & C. Waelde, *"Law & the Internet"*, p.15
12 *ACLU v. Reno* (n.3) at II paragraph 9
13 James P. Conolly, *"Fair Dealing in Webbed Links of Shetland Yarns"*, p.4
14 *ACLU v. Reno* (n.3) at II paragraph 9
15 To explain all methods in detail would extend the scope of this dissertation. For an exhaustive overview please see the courts findings in *ACLU v. Reno* (n.3) at II. paragraphs 22-32

"remote information retrieval", i.e. the search for and retrieval of information located on remote computers via the World Wide Web[16].

II. The World Wide Web

The World Wide Web (WWW), often simply referred to as "the Web, was created in 1991 as a graphical interface designed to make the Internet more user friendly and to simplify the sharing of information[17]. Though information on the Web is contained in individual computers, the fact that each of these computers is connected to the Internet through WWW protocols allows all of the information to become part of a single body of knowledge[18].

The WWW is structured as a vast collection of interconnected digital documents, called Web sites[19]. A Web site consists of a number of interconnected pages, each of which again consists of a separate computer display of textual information, graphic information or sounds. Because the computer allows viewers to "scroll through" a long document or image that extends beyond the border of the screen, a single Web page can contain much more than one screenful of information[20]. Web sites are most commonly divided into one "home page" and various sub pages. The home page is the "front door" or table of contents page of a Web site. Usually, a user starts navigating from the home page and from there he is guided to certain sub pages of his interest.

Web sites are encoded pursuant to a set of standards called HyperText Markup Language (HTML). This computer language is used to create hypertext documents that are portable from one computer platform to another[21]. HTML documents are text files containing text that is displayed onscreen, and HTML instructions that are not visible to the user. In order to read the HTML files, i.e. to display the content of the document and

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[16] *ACLU v. Reno* (n.3) at II. paragraph 30
[17] Kenneth Freeling and Joseph E. Levi, *"Frame Liability Clouds the Internet's Future"*, p.1
[18] *ACLU v. Reno* (n.3) at II. paragraph 34
[19] Kenneth Freeling and Joseph E. Levi, (n.17) p.1
[20] Walter A. Effros, *"Withdrawal of the Reference: Rights, Rules and Remedies for Unwelcomed Web-Linking"*, p.2
[21] Edward A. Cavazos and Coe F.Miles (n.1) p.2

to interpret the HTML instructions, programs called "browsers"[22] are essential. Browsers are applications to interpret the HTML instructions in a marked-up document[23]. When ordered to display a certain Web site, the browser sequentially steps through the document's text and, when he finds an HTML instruction, translates it. Finally, he executes these instructions and displays the content of the document on the user's screen[24].

Each Web page, whether a home page or an internal page, has a unique address, known as the "Uniform Resource Locator" (URL)[25]. The URL is generated in part by choices made by the destination organisation and in part by established protocols. The one part a destination organisation may choose is the so called "domain name" of the address[26]. Most Web page providers choose their company's name as domain in order to facilitate remembrance. Thus, for instance, Microsoft has the domain www.microsoft, CNN chose the domain www.cnn.

Furthermore, several "top level domains" (TLDs) are used to identify the provider of the Web page. These top level domains are added to the domain name and include ".co" used by commercial entities[27], ".gov" for governmental organisations, ".ac" for certain educational establishments[28], ".org" for other non profit organisations who do not fall easily within these categories, ".net" for network providers and ".int" for organisations established by international treaties[29].

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22 The most popular Web browsers at present include Netscape Navigator, Microsoft Internet Explorer and NCSA Mosaic

23 Edward A. Cavazos and Coe F. Miles (n.1)p.2

24 *ibid,* p.18, Fn 7

25 L. Edwards & C. Waelde, (n.11) p.45

26 Every computer that is Internet enabled has both a Domain Name and an Internet Protocol (IP) address, similar to a telephone number. IP addresses consist of four sets of numbers, each between 1 and 255. An example for an IP address might be 130.132.59.234. However, because IP addresses are hard to remember and easy to type incorrectly, the Domain Name System was established. See L. Edwards & C. Waelde (n.11) p.16

27 In most other countries besides South Africa and the United Kingdom the top level domain for commercial entities is ".com"

28 In most other countries besides South Africa and the United Kingdom the top level domain for educational establishments is ".edu"

29 L. Edwards & C. Waelde (n.11) p.46

Though, when the Domain Name System was established in the United States, little regard was given to the potential of an international naming convention and no geographical domains were used.[30] This might have resulted out of the assumption that all domains would be located in the United States. Meanwhile, however, nearly every country in the world has a geographical domain[31].

To "browse" or "surf" the Web simply requires the user to type the URL of the destination whose Web page he wants to visit in the location display of his browser. The browser then sends a request from its client's computer over the Internet to the destination computer. The destination computer replies by sending the document or information contained to the client's computer, which is then displayed by the browser.

One very important technical note in this context is that for a user to view a document on his screen, a "copy" of that document must be loaded into the Random Access Memory (RAM) of his computer[32]. Otherwise, no image will appear on the user's monitor. Whether this temporary copy in RAM should be considered a reproduction under Copyright Law is subject of a heated debate and will be discussed in the Legal Analysis (Chapter III).

III. Hyperlinks

An alternative possibility to browse the Web is the use of hypertextlinks, more commonly known as hyperlinks, or simply links. Hyperlinks are points in Web documents through which connections to other Web pages are established so that the user may "branch" outward to other documents of his interest. When a hyperlink is activated, the content of the linked-to Web site is displayed on the user's computer screen.

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[30] L. Edwards & C. Waelde (n.11) p.16

[31] A complete listing of countries and their Domain Name Code can be found under ftp://ftp.nw.com/zone/iso-country-codes. Though, most Web page providers in the U.S. still do not use the ".us" ending

[32] Matt Jackson, *"Linking Copyright to Homepages"*, p.5

Web pages may contain any number of hyperlinks, each of which may point to files or documents on different machines in different locations. Hyperlinks exist since the invention of the World Wide Web and are often said to be a central Web feature, because they enable users to access different pages and different sites anywhere in the world instantly, without the need to use complicated Internet addresses[33]. Furthermore they allow the linking of sites of related interest in an efficient, decentralised manner. Thus, the user who follows the links may obtain as much information related to a subject as available[34].

Virtually, it is possible incorporate links to any other Web page on the Internet, unless the owner of the page provides technical means to prevent this. Moreover, it is not only possible to establish a link to the home page of a Web site one can rather incorporate a link to any internal page. These links, that do not guide the user to the home page of a Web site but to any internal page, are commonly called "deep links".

For the purpose of this dissertation it has to be distinguished between two generic classes of links, local and remote. Local links point to other pages or elements within the same Web site. The user who follows these links thus always stays within the same document. Remote links, however, point to a document or element stored at a different Web site. A user following these links will leave the linking site entirely and enter a new one, the linked-to site. Local and remote links might be compared with scholarly footnotes: some of them refer to pages within the same text, others refer to completely different writings.

This paper is concerned with remote links only, since local links do not appear to cause any legal problems, particularly not regarding intellectual property law.

Remote links, again, can be distinguished as follows:

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[33] Emily Madoff, *"Freedom to Link Under Attack -- Web Community in Arms Over Lawsuits"*, p.5
[34] Peter Jakab, *"Facts and Law of Web Linking"*, p.2

1. HREF links

Hypertext Reference (HREF) links are the most fundamental hyperlinks. They are incorporated directly into a Web site, typically in form of a highlighted phrase or image. Most often, the user's cursor arrow transforms into a "hand" when scrolling over a hypertext link, thus making the link easily recognisable. When a user selects a link by "clicking" it with the left mouse button, Web browser software automatically retrieves the corresponding document and creates a copy that is then displayed on the user's screen.

The HTML code used to create the basic hypertext link is itself comprised of two parts. The first is not visible onscreen and provides a browsing computer with the Internet location, or URL, of the document to which the hyperlink is made. The other component of the HREF link is the actual hypertext visible to users onscreen[35].

As soon as the link is activated by a click on the left mouse button, the linked-to Web site appears on the user's screen and the URL in the browser's display changes into the new address. In fact, the user leaves the linking document entirely and enters the new, linked-to, document. HREF links thus allow the viewing of content only from one site at a time.

2. IMG Links

HTML furthermore provides the means for linking documents through their graphical elements by using "inlined" images. IMG, which stands for "image", is an example of an HTML code used to insert inlined images into HTML documents. Inlined images are graphics that are visible onscreen as part of a Web document's main body, but which originate at a different source than the document's HTML code[36]. The inlined images therefore may originate either on the same Web site of the inlining host, or at any point on the Internet, including Web sites owned or maintained by parties unrelated to the site inlining the image.

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[35] Richard Raysman and Peter Brown, *"Dangerous Liaisons: The Legal Risks of Linking Web Sites"*, p.2

[36] *ibid*

An IMG link is automatically activated when the Web page is first loaded[37]. A browser initially accessing a Web document containing an HTML command to inline will automatically retrieve the images from their original sources and incorporate them into the Web site's onscreen display[38]. This is accomplished when the browsing computer establishes a temporary connection with the URL containing the image, copies the image to the browser's cache[39] and inserts the image onscreen at the point specified by the original document's HTML command[40].

As a technical matter, Web browsers treat inlined images onscreen as if they were text elements. HTML permits the author of the "inlining" site to define the onscreen characteristics or "attributes" of inlined images, such as size and alignment, with the Web page's text.

IMG links therefore enable Web site providers to use and alter images created by other authors. When the inlining Web page is loaded, however, the browser only displays the Internet address of the linking site. Hence, the user is unaware that the image he sees may originate from a completely different source.

3. Frames

Another possibility of linking Web sites is the relatively recent phenomenon of framing[41]. This new technique enables Web site designers to divide Web pages into multiple, scrollable regions and windows that may operate independently of each other. Frames may contain text, graphics or other HTML elements such as HREF or IMG links[42].

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37 Matt Jackson (n.32) p.4

38 Richard Raysman and Peter Brown (n.35) p.2

39 The cache is a file created for temporary storage incidental to use of a program on a computer. No cache copy of the image is made on the host server.

40 Richard Raysman and Peter Brown (n.35) p.2

41 The frame technology was introduced by Netscape for their Navigator product in 1996. Today it is widely used and compatible with most commercial browsers. See Richard Raysman and Peter Brown (n.35) p.2

Because each frame functions independently, information downloaded into one frame fills up only that frame, and does not overwrite the contents of the other windows[43]. Thus, when an HREF link incorporated into the text of one frame is activated, the content of the linked-to site is displayed only in that frame.

Contrary to generic hyperlinking, therefore, in the case of framing the user remains at the framing site and views content from both sites[44]. The address displayed by the browser continues to be that of the framing site. Hence, the user may be unaware that the content in the frame originated at another site. Furthermore, framing prevents users from creating bookmarks for the framed pages[45].

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[42] *ibid*
[43] Kenneth Freeling and Joseph E. Levi (n.17) p.1
[44] Maureen O'Rourke, *"Legal Issues on the Internet – Hyperlinking and Framing"*, p.3
[45] Barry D. Weiss (n.1) p.2

Chapter 2: Some Celebrated Linking Disputes

The use of these various types of hyperlinks has raised some legal disputes recently. A brief survey of the facts of some celebrated disputes and the findings of the courts, as far as such decisions have been reached, shall help to illustrate the legal implications of linking.

I. *Shetland Times Ltd. v. Dr. Jonathan Wills and Zetnews Ltd*[46]

The first and only court decision at present to address a linking issue was rendered by the Court of Session in Edinburgh, Scotland. The plaintiff in this case owns and publishes *The Shetland Times* newspaper. Versions of the paper appear both in print and on a Web site operated by the plaintiff. The defenders own and operate a Web site on which they publish a news reporting service entitled *The Shetland News*. On their Web site the defenders reproduced verbatim a number of headlines appearing in *The Shetland Times*. These headlines were hyperlinked to the plaintiff's Web site, such as clicking on the headline took the user directly to the internal pages on the plaintiff's site on which the related story was found. Furthermore, the defendants set up these links so that users had no choice to stay on the plaintiff's Web site but had to return with the browser's "back" button to the defendant's site after reading the article issued by the plaintiffs.

The plaintiffs claimed that this activity constitutes copyright infringement on two grounds. First, they maintained that the headlines made available on their Web site are cable programs within the meaning of section 7(1) of the British Copyright, Designs and Patents Act 1988[47]. The facility made available by the defendants on their Web site was

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[46] *Shetland Times Ltd. v. Dr. Jonathan Wills and Another*, (1996) S.C.L.R. 160. The opinion of Lord Hamilton is also available on the Internet under http://www.jmls.edu/cyber/cases/shetld1.html

[47] Section 7 of the British Copyright, Designs and Patents Act 1988 provides:

(1) In this part
- "cable programme" means any item included in a cable programme service; and
- "cable programme service" means a service which consists wholly or mainly in sending visual images, sounds or other information by means of a telecommunications system, otherwise than by wireless telegraphy for reception

(a) at two or more places (whether for simultaneous reception or at different times in response to requests by different users), or

(b) for presentation to members of the public, and which is not, or so far as it is not, excepted by or under the following provisions of this selection.

(2) The following are excepted from the definition of a "cable programme service"

alleged to be a cable programme service within the meaning of section 7(1) and the inclusion of those items in that service constitutes an infringement of copyright under section 20 of the CDPA. Furthermore, the plaintiffs maintained that the headlines are literary works owned by them and that the defendant's activities constitute infringement by copying them under section 17 of the CDPA.

The defence argued that they never made or kept copies of the plaintiff's on-line edition and therefore did not infringe copyright. The only action taken by the defendants was directing their readers to the plaintiff's on-line edition. In detail, they claimed that the facility made available by them is not a cable programme service since it does not include "sending" of the information as required by the legal definition in section 7(1) of the Act. Provided that the court would find that the information is "send' within the meaning of the Act, they argued that the sending is done only by the defendants and not by the plaintiffs. Finally they maintained that in any case the service was an "interactive service" excepted by section 7(2)(a).

The court followed both arguments raised by the plaintiffs and issued an interim interdict restraining the defenders to establish deep links to the Web pages of the plaintiff. Lord Hamilton repeatedly stated that no detailed technical information in relation to the electronic mechanisms involved was put before him but according to the information that was available the plaintiff's arguments appeared to be well founded[48].

Because of its uniqueness in the cyber world, this dispute raised the interest of both lawyers and Internet freaks all around the world. Comments have been issued not only in the United Kingdom[49]. Some claimed that this decision might be able to destroy the

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(a) a service or part of a service of which it is an essential feature that while visual images, sounds or other information are being conveyed by the person providing the service there will or may be sent from each place or reception, by means of the same system or (as the case may be) the same part of it, information (other than signals sent for the operation or control of the service) for reception by the person providing the service or other persons receiving it ...

[48] Opinion of Lord Hamilton, http://www.jmls.edu/cyber/cases/shetld1.html, p.3

[49] see, for example, Charles Oppenheim, *"The Internet Copyright Case and its Implications for Users of the WWW"*, p.1-5; James P. Conolly et al, *"Fair Dealing in Webbed Links of Shetland Yarns"*, p.1-13; Dan L. Burk, *"Prorietary Rights in Hypertext Linkages"*, p.2; Timothy Hughes, *"Intellectual Property and Browsing the Web"*, p.5; Walter A. Effross (n.20) p.3-4; Peter Jakab (n.34) p.4

nature of the Internet and that the prevention of links would deprive it of its character. In the United States, therefore, most commentators kept their distance to Lord Hamilton's decision and repeatedly assured that under U.S. law a different result would have come out.

On 11th November 1997 the Shetland Times issued a publisher's statement that their interim interdict dispute with the Shetland News has settled without going to proof. The settlement now allows the defendants to link to the plaintiff's Web site by using their own headlines, provided that (1) an acknowledgement is given for each headline as being "A Shetland Times Story", (2) the Shetland Times masthead logo appears adjacent to any such headline and (3) that each hyperlinks established only guides to the Shetland Times online headline page.[50].

II. *TicketMaster v Microsoft*[51]

Another linking dispute involving "deep links" arouse between TicketMaster, a familiar distributor of tickets to recreational, sporting and cultural events in the United States, and software giant Microsoft. TicketMaster is the proprietor of a Web site that allows users to learn information about events and their ticket availability as well as to order tickets directly over the Internet. Microsoft runs a Web site called "Seattle Sidewalk" that features information about Seattle, including information concerning upcoming entertainment events. As part of its service Microsoft provided links from its Seattle Sidewalk site pages directly to the respective pages of TicketMaster's site that facilitates purchase from TicketMaster of tickets to the respective events included among Seattle Sidewalk's listings. For example, a user browsing Seattle Sidewalk could come upon information about an upcoming rock concert at a Seattle venue and be presented not only with the information but with a hypertext link directly to TicketMaster's sale Web page for that event. The user could click on that link, be transported directly to TicketMaster's sales page, purchase tickets from TicketMaster and return to Seattle

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[50] James P. Conolly (n.13) p.1

[51] *Ticketmaster Corp. v. Microsoft Corp.* (1997) No 97-3055 DDP.

Sidewlk with a click of his browser's "back" button. In this way, the user employs the TicketMaster service without entering and navigating its site from its homepage.

On April 28, 1997 TicketMaster filed suit in the U.S. District Court for the Central District of California, alleging several claims including federal trademark infringement, federal trademark dilution, and California statutory and common law unfair competition[52]. Unlike in the *Shetland Times* case, however, they did not claim copyright infringement. At present, the trial is still pending and its outcome is awaited eagerly by both lawyers and Internet freaks around the world.

III. *The Dilbert Hack Page*

A dispute concerning IMG links is the Dilbert Hack Page case. The popular Dilbert comic strip chronicles the experiences of Dilbert, a corporate drone who is faced with the bureaucracy and mediocrity of the modern workplace. United Feature Syndicate Inc. (UM), the copyright owners of the Dilbert comic strip, maintain a Web site where users can view recent Dilbert cartoons, purchase Dilbert related products, and contact either UM or the comic's author, Scott Adams[53]. In January 1996, Daniel Wallach, a Princeton University graduate student created a Web site he called "Dilbert Hack Page" (DHP) which allowed users to view recent Dilbert comics in a context different from that provided by UM[54]. The DHP used the names of Dilbert comic image files, obtained from the UM Dilbert site each day, to generate a remote auto-load link that was written into the DHP's HTML document. When visitors entered the DHP, their browsers automatically contacted UM's Dilbert site, downloaded the links' identified image files and displayed the targeted image files.

In July 1996, UM contacted the DHP's author informing him that Dilbert comic strips were intellectual property of UM and could not be used without their express written

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[52] The complaint is available on the Internet under http://www.ljx.com/ljxfiles/ticketmaster.html

[53] United Feature Syndicate, Inc., *The Dilbert Zone*, http://www.unitedmedia.com/comics/dilbert

[54] The Dilbert Hack Page has been disabled meanwhile. Mr. Wallach maintains an archive that chronicles copies of all correspondence received and sent to UM regarding the Dilbert Hack Page at http://www.cs.princeton.edu/~dwallach/dilbert.

consent[55]. A subsequent letter by UM's legal counsel alleged the DHP was clear copyright violation and threatened legal action[56]. In face of uncertain liability the DHP finally was removed from active service in August 1996[57].

IV. *Washington Post v TotalNews*[58]

Finally it remains to mention one legal dispute concerned with frames between six media companies, The Washington Post, Time, CNN, Times Mirror, Dow Jones & Co and Reuters, and a news company called TotalNews. TotalNews operates a Web site that provides links to a variety of news sources, including those operated by the plaintiffs[59]. Using frames, TotalNews has divided its Web page into four independent windows. A vertical frame on the right-hand side includes the names of eight different news services. Each name acts as a hyperlink to the corresponding news service. In the lower right-hand corner is a small, rectangular frame that contains the TotalNews logo, while a frame along the bottom of the screen is set aside as advertisment space that TotalNews sells to generate revenues. The fourth and largest frame, located in the left-center part of the screen, is the news window. When a user selects a particular news service by clicking on its hyperlink, the contents of that site are displayed here. Because the frame does not fill the entire computer screen, the linked-to news service does not take up the whole screen, as it would have had frames not be used.

While the linked-to news is displayed in the news frame, advertisements sold by TotalNews are simultaneously displayed in the advertisement frame. Furthermore, the TotalNews URL, and not the URL of the actual news source, appears in the location display of the user's Web browser.

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55 Daniel Wallach, *United Media's First Letter* (dated July 19, 1996), http://www.cs.princeton.edu/~dwallach/dilbert/letter1.html

56 Daniel Wallach, *United Media's Second Letter* (dated July 26, 1996), http://www.cs.princeton.edu/~dwallach/dilbert/letter2.html

57 Daniel Wallach, *The Dilbert Hack Page is Gone*, (dated August 4, 1996), http://www.cs.princeton.edu/~dwallach/dilbert/page-gone.html

58 *Washington Post Co. v. Total News Inc.*, 97Civ. 1190 (S.D.N.Y., Feb.20, 1997)

59 http://www.totalnews.com.

The plaintiffs filed a lawsuit on February 20, 11997 in a U.S. District court accusing TotalNews for trademark infringement, trademark dilution, unfair competition, copyright infringement and tortious interference with third-party relations[60]. TotalNews claimed to be unable to raise the funds to defend themselves and settled the lawsuit by agreeing to provide links to the plaintiff's sites without frames[61]. When a user now selects a link to one of the plaintiff's Web pages, these pages are displayed on the entire screen and the URL address in the browser's display changes to the source of the information.

[60] The complaint is also available on the Internet at http://www.ljx.com/internet/complain.html
[61] The proposal for the settlement is available on the Internet at http://www.ljx.com/internet/totalse.html

Chapter 3: Legal Analysis

Because the problems related to Web linking are relatively new, South African courts and its legislature did not have time yet to react on these developments. Thus, there are no particular laws or precedents to rely upon. At certain stages of the examination it is therefore interesting to compare the legal evolution in foreign countries that have already had the opportunity to deal with some issues. Among these are the Unites States as being the country with the most comprehensive case law on Internet related disputes, and Great Britain.

During the analysis a special focus is set upon copyright law because, considering its function and purpose, this is in my opinion the closer and more suitable law than that of trademarks. In short terms one may say that copyright law ensures the author's to control the use of his work in all the manners in which it can be exploited for personal gain or profit [62]. Trademark law, on the other hand, serves the purpose of ensuring the identification of a person's goods or services and to distinguish them form the goods and services of others[63].

The plaintiffs in the linking disputes illustrated above are just precisely concerned with the exploitation of their works. Economical exploitation in times of the Internet is not the sale as it used to be in times of printed press. Revenues on and around the Internet are primarily gained by advertisements. This may change in some time when Web site providers will establish more access controls for their sites and will demand

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[62] O.H. Dean, *Handbook of South African Copyright Law"*, p.1-1 and 1-37. Although the common law systems take a different approach to copyright than the civil law systems, this final result can be attributed to both of them. The analog of copyright in the civil law world is known as *droit d'auteur* (France), *derecho de autor* (Spain) or *Urheberrecht* (Germany) and translated as *author's rights.* This difference in terminology between the common law *copyright* and the civil law *author's right* reveals a fundamental difference in attitude about works of authorship between the two legal traditions. The term *copyright* is an impersonal one, removed from the author. It connotes a negative right, the right of the owner to prevent copying of his work. The general philosophy of copyright in the common law world is to provide material support to one who invests in producing the work. Thus it is heavily economical orientated. By comparison, the civil law tradition views the author's work as an extension of his personality which springs into existence by a personal act of creation. This view reflects a more sympathetic attitude towards the author. In the civil law world an author is deemed to have a moral entitlement to control and exploit the product of his intellect. See Marshall A. Leaffer, *"Understanding Copyright Law"*, p.1-2 and Phillips,Durie and Karet, *"Whale on Copyright"*, p.14-15

[63] Harry G. Henn, *"Copyright Law- A Practitioner's Guide"*, p.3

remuneration. At present, however, the main source of revenues is the advertising material. Typically, one Web site contracts with another Web site or company to display an advertisement. Much like a billboard, the cost of renting this space directly relates to the "landlord's" Internet location. Web sites that are often viewed, or, as it is commonly known, "hit", are considered prime real estate and are relatively costly sites at which to advertise. Since the home page usually is the page where most viewers enter, it is on this page that the majority of advertising occurs[64].

When these home pages are circumvented by the linking party, as happened in the cases concerning "deep links", such links result in the advertisements of the sponsor Web site not being viewed and the value inherent to that Web site to advertisers is therefore reduced. In essence, the Web site that has established the link benefits because viewers find its value enhanced (i.e. additional relevant access), but this is done at the expense of the linked-to site.

Framing, on the other hand, may have a distorting effect on the advertisements displayed on Web pages. An advertisement on a framed page is often forced to coexist with the ads displayed on the borders of the original "metasite", as the framing Web page is commonly known. Thus, the visual impact and the value of each ad is minimised by the clutter created by the framing[65]. Similarly, framing may distort the spatial goal of the advertisers. The physical location of advertisements may be compromised when pages are framed within a larger site. What was initially envisioned as an ad running horizontally across the top of the Web page becomes, through framing, a smaller ad running across the middle of the screen[66]. If advertisers begin to view these distortions as devaluing their ads, site owners also may face the possibility of losing advertising revenues.

The complaints about linking are therefore not linking per se. Usually, Web site providers do not mind having their sites linked-to since this means, after all, an

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[64] Robert C. Scheinfeld and Parker H. Bagley, *"Emerging Issues on the Internet"*, p.2
[65] Barry D. Weiss (n.1) p.2
[66] *ibid*

increased use of their site. The plaintiffs in the linking disputes are, at least in most of the cases, rather concerned about their advertising revenue, in other words, with the exploitation of their works. To protect the rights of authors to gain personal profit from their works lies, after all, within the responsibility of copyright law.

I. Copyright Law

Copyright Law in South Africa is governed by the Copyright Act 98 of 1978[67] that provides no copyright or right in the nature of copyright shall subsist otherwise than by virtue of its provisions or some other enactment in that specific regard[68]. In general terms, the Copyright Act vests several exclusive rights to the author of a work concerning the reproduction and exploitation of his work. The content and scope of these rights depend on the category the work belongs to[69]. Any interference with these rights usually constitutes copyright infringement[70] unless the user might claim a valid exception[71].

1. Categorisation of a Web site and its Content

In order to establish whether linking infringes on copyright, it is first necessary to determine the nature of material published on the Web. As mentioned above, the law of copyright currently protects certain categories of works, including literary, musical and artistic works, sound recordings, cinematographic films, broadcasts, programme-carrying signals, published editions and computer programs, provided they are original and reduced to a material form[72]. The content of the rights conferred to the owner of the copyrighted work depends on the category of works that is concerned. The list of protected works is exhaustive, i.e. copyright protection is only granted as far as a work can be accommodated within these categories[73].

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[67] All further references to the "Copyright Act" or "the Act" are, unless otherwise stated, references to the Copyright Act 98 of 1978.
[68] Section 41(4) of the Copyright Act
[69] Sections 6 – 11B of the Copyright Act
[70] Section 23 of the Copyright Act
[71] Sections 12 – 19B of the Copyright Act
[72] Section 2(1) and (2) of the Copyright Act
[73] O. H.Dean, (n.62) p.1-14

With regard to material published on the Web one has to distinguish between a Web site in general and its content in particular. Web sites contain, at least in most of the cases, accumulations of texts, graphics, images and, sometimes, sounds. All these contents are individually eligible for copyright as literary, musical or artistic works under section 2(1)(a), (b) or (c) of the Copyright Act.

Furthermore, Web sites as a whole are carefully created products concerning the arrangement of the elements contained. Like business cards they are used and designed to represent their owner. Hence, they are products of intellectual activity and should be eligible for copyright. The question is, however, under which category of work a Web site may be classified. Lord Hamilton in the *Shetland Times* case assumed it to be a cable programme service under section 7 of the British Copyright, Designs and Patents Act 1988[74]. Notwithstanding that this finding received lots of well founded criticism[75], the South African Copyright Act does not provide a similar category of works.

A Web site could be considered a "literary work" under section 2(1)(a) of the Copyright Act. This applies particularly to those cases in which written works like newspapers or books are published on the Web. However, Web sites usually contain more than just written works. Nearly all include graphics, images and some even sounds. Since the written content of a site is protected individually, as explained above, for the purpose of categorising a Web site it appears to be more important to find a category that comprises all sites offered on the Web, not only those that consist mainly of literary works.

Furthermore, it could be taken into account that a Web site constitutes a "broadcast" under section 2(1)(f) of the Copyright Act. A "broadcast", "when used as a noun, means a telecommunication service of transmissions consisting of sounds, images, signs or signals which (a) takes place by means of electromagnetic waves of frequencies lower than 3 000 GHz transmitted in space without an artificial conductor; and (b) is intended

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[74] *Shetland Times Ltd. v. Dr. Jonathan Wills and Another*, (n.46)

[75] see, for example, James P. Conolly (n.13) p.3-5

for reception by the public or sections of the public, and includes the emitting of programme-carrying signals to a satellite, ..."[76]. However, as mentioned above, the Internet has no single information channel, it rather uses various routes to transmit the information including telephone lines, satellite links or mobile phone signals[77]. Because a "broadcast" requires the emitting of signals to a satellite, i.e. the information has to travel a designated path, a Web site does not fit into this category of works.

Another category of works that might be considered is that of a "published edition" under section 2(1)(h) of the Copyright Act. It is defined as "the first print by whatever process of a particular typographical arrangement of a literary or musical work"[78]. In essence this category of works amounts to the typographical arrangements featured on the page of a book or on other material[79]. Indeed, a Web site might be considered as the cover of a book or a CD in those cases where it contains written works or sounds. However, as I have explained above, there are Web sites that neither embody literary nor musical works. Since the definition of a published edition requires the inclusion of only these categories of works, this would not apply to all sites on the Web. As in the case of literary works, categorising a Web site as a "published edition" would not be satisfactory because it does not comprise all sites offered on the Web.

The category of works that is applicable in the present case is rather the one of "computer programs" under section 2(1)(i) of the Copyright Act. A "computer program means a set of instructions fixed or stored in any manner and which, when used directly or indirectly in a computer, directs its operation to bring about a result"[80]. This would in general be the source code, but with modern generation computers, much of the source code for a computer can itself be computer-generated[81].

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[76] Section 1(1) of the Copyright Act
[77] See above, p.4
[78] Section 1(1) of the Copyright Act
[79] O.H. Dean (n.62) p.1-12
[80] Section 1(1) of the Copyright Act
[81] Alan Smith, *"Copyright Companion"*, p.82

As described above, a Web site is a software program written in a high level computer language, the HTML code[82]. This code, also known as the source code, is read and interpreted by another software program, the browser's software, that is loaded onto the user's computer. When the browser contacts an URL address and receives the requested document, the HTML file contains certain instructions for the browser's software concerning the arrangement of texts, graphics, etc. Without these instructions the browser would not be able to display the page accordingly. Hence, when the HTML file, which is a set of fixed and stored instructions, is used in a computer, it directs its operation to bring about a certain result.

The same classification is made in other countries. In Great Britain, for instance, as well as in many other member states of the Berne Convention, computer programs are protected as literary works under section 1(1)(a) of the CDPA. The Act does not provide an express definition for the term "computer program" because this allows for the necessary amount of flexibility in a fast developing area, where technological evolutions outdate definitions rapidly[83]. In general terms it is said, however, to be a series of coded instructions which are intended to bring about a particular result when used in a computer[84]. According to this definition, which is indeed quite similar to the South African legal definition, authors agreed upon that a Web site is best to categorise as a computer program[85].

In the United States the question of categorisation did not receive lots of attention because the U.S. Copyright Act does not exhaustively protect certain kinds of works[86] but rather offers protection for every product of intellectual activity provided it is original and fixed in a tangible medium of expression[87]. A categorisation of works is therefore not necessary in the United States. However, regarding the definition of a "computer program" as "a set of statements or instructions to be used directly or

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[82] See above, p.5
[83] Jon Holyoak and Paul Torremans, *"Intellectual Property Law"*, p. 414
[84] *ibid*, p.414
[85] See, for instance, James P. Conolly (n.13) p.7; C. Edwards and L. Waelde (n.11); Graham J.H. Smith, *"Internet Law and Regulation"*, p.22
[86] Gregory, Saber & Grossman, *"Introduction to Intellectual Property Law"*, p.169

indirectly in a computer in order to bring about a certain result"[88] most authors also argue in favour of a categorisation of material published on the Internet thereunder[89].

In addition, material published on the Web fulfils all further requirements provided by the Copyright Act. In particular, it is "written down, recorded, represented in digital data or signals or otherwise reduced to a material form"[90]. Although the Copyright Act does not provide any definition for the term "represented in digital data", it can well be assumed that material published on the Internet does comply with this provision. The purpose for this provision is the maxim in copyright law that there is no copyright in ideas[91]. It is rather the material form of expression of the idea that is the subject of copyright[92]. On the one hand, the underlying HTML files of each Web site can be reduced to a binary series of 0's and 1's, which is one of the most significant characteristics of digitalisation. Moreover, the main purpose for the incorporation of the term "digital data" was to confer copyright protection to computer and underlying software programs although they are not written down in a traditional context. Since Web sites are software programs and in reduced to a material form as such that the owner can proof their existence, this should satisfy the requirements of section 2(2) of the Act.

2. Exceptions

Before I embark on the examination whether the linking party infringes on copyright, I would like to introduce some special defences always mentioned in the context of Web linking. As I will discuss below, the liability of the linking party depends strongly on that of the end user. The end user is, however, in most of the cases excused by certain exemptions provided for in the Copyright Act. Whether these exceptions apply to the linking party also is subject of examination below. However, it requires a basic

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87 17 U.S.C. $102 (a)
88 17 U.S.C. $101
89 David J. Loundy, *"Revising the Copyright Law for Electronic Publishing"*, p.7
90 Section 2(2) of the Copyright Act
91 O.H. Dean (n.62) p.1-18
92 *Galago Publishers (Pty) Ltd & another v. Erasmus,* 1989 (1) SA 276 (A) at 293G, and at 283-4

knowledge of the structure and purpose of the exceptions to establish their scope of application.

During the course of usual Web browsing it is almost certainly the case that copyrights of authors will be infringed. One of the most important examples in this context is the copy loaded into the RAM of the user's computer when he calls up a Web document[93]. As I will discuss in detail below, this copy constitutes an infringing reproduction for copyright purposes[94]. However, authors of Web sites generally intend their work to be publicly accessible and called up by users. In case they do not, they will provide means to select the number of visitors to their page, for instance by demanding remuneration. It would therefore be unrealistic to accuse the user to have infringed copyrights every time he loads a Web site that does not have an access control device. Hence, it is necessary to consider whether copyright law provides exceptions for these cases.

On the one hand, the Copyright Act includes a wide range of exemptions from copyright protection that differ considerably from work to work[95]. Still the exceptions have in common that they are all instances in which it is considered to be in the public interest that the copyright owner should not have a monopoly in the performance of particular acts in relation to his work[96]. On the other hand, the copyright owner may grant licenses to another and therefore transfer his rights[97]. The two exceptions that are of particular interest in the context of Web browsing are the "fair dealing" clause and an implied license granted by the author.

2.1. Fair Dealing

The Copyright Act contains fair dealing exceptions for a number of works[98]. The intention of these provisions is to find a balance between the rights of the author on the one hand and to provide a fair and equitable way of allowing others to refer to

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93 As explained above, p.7, to view a document on the screen a copy of the Web document has to be loaded into the RAM of the user's computer.
94 See below, p.27-29
95 Sections 12-19B of the Copyright Act
96 O.H. Dean (n.62) p.1-51
97 Section 22 of the Copyright Act

copyrighted works on the other hand[99]. Fair dealing means roughly that there will be no copyright infringement if the use of the work is "fair"[100]. The fair dealing exception is predicated on the assumption that in principle an act of infringement has been committed and this act is then excused by the exemption[101].

The most important fair dealing provision in this context provides that copyright shall not be infringed when the use of the work is made for "purposes of research or private study by, or the personal or private use of, the person using the work"[102]. This will apply to many users browsing privately. However, there is no similar provision with regard to computer programs[103]. This is a result of the assumption that so called "home copying" of computer programs is not permitted[104]. The only private use of a computer program that is allowed under certain circumstances is mentioned in section 19B(2) of the Copyright Act. According to this the copyright in a computer program is not infringed by a person who is in lawful possession of a computer program or an authorised copy thereof if he makes copies to the extent reasonably necessary for back-up purposes, provided such a copy is intended exclusively for personal or purposes and is destroyed when the possession of the computer program in question, or the authorised copy, ceases to be lawful. In essence this exception allows a licensed user of a computer program to make and retain back-up copies of that program for as long as he remains a licensed user[105].

The fair dealing provision concerning private use is therefore not applicable to the use of Web sites, because these are computer programs. This limits the scope of application to contents of a Web site. The defence that will gain even more importance with regard to Web linking will therefore be the one of an implied license.

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[98] See, for example, sections 12(1), 15(4) and 19B(1) of the Copyright Act
[99] Alan Smith (n.81) p.52
[100] J. Holyoak and P. Torremans (n.83) p.206
[101] O.H. Dean (n.62) p.1-51
[102] Sections 12(1)(a) and 15(4) of the Copyright Act
[103] See section 19B(1) of the Act according to which only the fair dealing provisions under section 12(1)(b) and (c) shall *mutatis mutandi* apply.
[104] O.H. Dean (n.62) p.1-53

2.2. Implied License

The exception of an implied license is founded on the assumption that anyone who places material on the Web consents to its use in foreseeable manners[106]. Most commentators therefore agree upon the idea that by posting material on the Internet, authors of Web sites implicitly license users to make the temporary RAM copy necessary to view the file in a browser[107].

Whether this idea of an implied license can be applied on Web linking also, will be subject of discussion below[108]. At this stage it is only important to note that South African copyright law allows the granting of an implied license. Section 22(4) of the Copyright Act provides that a "non-exclusive license to do an act which is subject to copyright may be written or oral, or may be 'inferred from conduct'...". Thus, courts have not spent much time to establish whether such license is provided for in the Act but rather supposed it to exist[109].

3. Copyright Infringement

South African copyright law provides for two types of copyright infringement, direct or primary infringement[110] and indirect or secondary infringement[111]. Linking only implicates on the first alternative. Direct or primary infringement of the copyright in a work takes place when a person, without the authority of the copyright owner, does or causes someone else to do any of the acts which are in respect of that work designated as restricted acts and therefore are in the monopoly of the copyright owner[112].

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[105] O.H. Dean (n.62) p.1-60
[106] Peter Jakab (n.34) p.7
[107] see, for instance, Edward A. Cavazos and Coe F. Miles, (n.1) p.9, Walter A. Effross (n. 20) p.15-16, Peter Jakab (n.34) p.7
[108] see below, p.42
[109] see, for instance, *Frank &Hirsch (Pty) Ltd v. Roopanand Brothers (Pty) Ltd,* 1993 (4) SA 279 (A) at 292 B
[110] Section 23(1) of the Copyright Act
[111] Section 23(2) of the Copyright Act
[112] O.H. Dean (n.62) p.1-37

3.1. Hyperlinks in General

The first links I will examine for the purposes of copyright infringement are hyperlinks in general. Although there are, at least not so far, no legal disputes evolved concerning usual hyperlinks, linking in general imposes some problems I would like to discuss on a general basis before I embark on the particular problems more specific kinds of links raise.

3.1.1. Infringement of Reproduction Right

Linking may infringe the Web site author's exclusive right to reproduce his work. A reproduction can be assumed when the work is copied, whereas it is not necessary for the reproduction to be in a tangible form, nor does it have to be in exactly the same form as the original[113].

The main problem with Web linking in a copyright context is the fact that the underlying technology of the Internet does not require the linking party to "copy" the linked-to site in the traditional way. In order to establish a link the linking party only incorporates the HTML command into its file. When the user activates the link his browser's software retrieves the corresponding document and displays it on his screen. There is, however, no copy or whatsoever passing the linking party's server. Defendants in linking disputes therefore always maintain that the only role they are playing is to provide means to guide users to the linked-to sites.

Still, there are some copies involved in the linking process that may be relevant for copyright purposes.

3.1.1.1. RAM copy

As explained above, one copy that is created during the process of Web browsing is the one that is stored into the RAM of the user's computer when he calls up the linked-to

[113] A. Smith (n.81) p.49

document[114]. The question is, whether the linking party can be accused of helping the user to create this copy.

This depends, in the first place, on whether this RAM copy constitutes an infringing copy for copyright purposes. Computer RAM is generally of two types, Dynamic Random-Access Memory ("DRAM"), or Static Random-Access Memory ("SRAM")[115]. The first type of memory must be continually "refreshed" or the contents of the memory are lost, while the second type does not need refreshing[116]. However, in either case, the storage in RAM is only a temporary one that is lost as soon as the Computer is switched off. Because of this reason courts and authors all over the world struggle to subsume whether this is a copy sufficient for infringement purposes.

In the United States, for instance, some courts have suggested that copies of a program loaded into RAM may be relevant for copyright purposes[117]. In the popular *MAI* case the court relied on a report of the National Commission on New Technological Uses of Copyrighted Works (CONTU) which stated that "the placement of a work into a computer is the preparation of a copy ..."[118]. Furthermore they found that "the copy created in RAM can be "perceived, reproduced, or otherwise communicated" and thus held that the loading of software into the RAM creates a copy under the Copyright Act[119]. This decision was criticised heavily by a number of leading copyright scholars[120], albeit this criticism only concerned the requirement under U.S. Copyright Law that a copy has to be "fixed in a tangible medium"[121]. It is argued that it appears to be at odds

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[114] see above, p.7
[115] David J.Loundy (n.89) 11
[116] *ibid*
[117] see, for isntance, *Mai Systems Corp. v. Peak Computer Inc.*, 991 F.2d 511 (9th Cir. 1993); *Religious Technology Center v. Netcom On-Line Communication Services Inc.*, 907 F.Supp 1361 (N.D. Cal. 1995)
[118] Final Report of the Nat. Commission on New Technological Uses of Copyrighted Works 13 1979)
[119] *May Systems Corp. v. Peak Computer Inc.* (n.117) p.519
[120] for a survey see Matt Jackson (n.32) p.7
[121] Section 101 of the U.S. Copyright Act defines a fixation as follows:
A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than a transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

with the legislative history of the 1976 U.S. Copyright Act[122]. Referring to a House Report accompanying the enactment of the Copyright Act[123] it has been concluded that the RAM copies are too transitory or ephemeral to be infringing[124].

In Great Britain a reproduction is required to exist in any material form, albeit this also includes storing the work in any medium by electronic means[125]. Furthermore, copying for the purpose of the CDPA includes the making of copies that are transient or incidental to some other use of the work[126]. With regard to these provisions it is argued that under the 1988 CDPA copies of software programs loaded into the RAM of a computer should be considered to be copies for the purpose of copyright law[127]. The same should then be valid for browsing the Web. The fact that the copy is transient in that it will only remain while the machine is switched on is immaterial.

With regard to South African law, I would suggest that the copy created in the RAM of the user's computer should also be considered as a reproduction for infringement purposes. First, compared to the above mentioned legislatures South Africa appears to be the one with the least requirements concerning a "reproduction". Since the other countries came to the conclusion that a copy exists, despite of their restricting definitions, this should all the more be assumed where restrictions do not exist. Secondly, there is no point why the copy created in the RAM should not be regarded as a usual reproduction. The only difference is the fact that it is only transient and lost as soon as the computer switched off. However, useful representations of the program's information can be displayed on a video screen or printed out on a printer[128]. And this can be done virtually instantaneously once loading of the software into RAM is

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[122] Matt Jackson (n.32) p.7

[123] H.R. Rep. No. 94-1476, at 53 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5666: "(T)he definition of fixation would exclude form the concept purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, or captured momentarily in the 'memory' of a computer".

[124] Dan L. Burk (n.49) p.4

[125] Section 17(2) of the CDPA

[126] Section 17(6) of the CDPA

[127] H. Carr and A. Arnold, *"Computer Software – Legal Protection in the United Kingdom"*, p.91

[128] David J. Loundy (n. 89) p.6

completed[129]. What is important is not the length of time that the work is available in a computer's RAM, but rather what can be done with the work once it is in there.

Having established that the RAM copy indeed constitutes a reproduction sufficient for infringement purposes, the next question to examine is whether the linking party does infringe on copyright by causing the user to create this copy. Section 23(1) of the Copyright Act provides that copyright is infringed by any person who "does or causes any other person to do" a restricted act without the authority of the copyright owner. This provision makes clear that copyright is infringed when an infringing act is committed not only by the actual perpetrator of that act but also by someone who instigates or instructs the doing of that act[130]. The instigator of the infringing act commits contributory copyright infringement[131].

However, as discussed above, it has to be assumed that the author of the Web site granted an implied license to the user to browse and create the copy stored in his RAM[132]. The user can thus not be held liable for copyright infringement. Therefore it is to establish whether the linking party can be accused of copyright infringement although the user has a license to copy the Web sites.

An interpretation of the text of section 23(1) leads to the conclusion that, at least in the present cases, this is not the case. According to this provision infringement only occurs when somebody interferes with the "exclusive rights" of the copyright owner. In case the user has an implied license to load the Web documents into his computer's RAM, the copyright owner does not have an "exclusive right" any more. He rather shares his right with the user. The linking party therefore cannot "cause" the user to do any act that the owner has the exclusive rights to do. Thus, it can not be accused of contributory infringement.

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[129] *ibid*

[130] O.H. Dean (n.62) p.1-50

[131] *ibid*

[132] See above, p. 25. As explained above, the fair dealing exception will not be applicable here because in the case of hyperlinks in general only Web sites as a whole are concerned. These constitute computer programs. The application of the fair dealing clause on computer programs is, however, very restricted.

3.1.1.2. References

As discussed above, in order to identify the area of the screen that will effect the link when clicked, linking parties use any texts or graphics displayed on their pages. A common identifier is, for example, the URL address of the linked-to page. Thus it is interesting to determine whether the display of a foreign URL address does infringe on copyright.

This depends, in the first place, on whether a URL address is protected as a "work" under the Copyright Act. One may argue that it is constitutes a literary work according to section 2(1)(a) of the Act. Literary works include a wide range of written works, irrespective of literary quality and in whatever mode or form expressed[133]. With regard to this definition the term "literary work" was criticised as something of a misnomer and it has been suggested to use a description as "written works", because this would convey a more accurate impression[134]. In fact, the term "literary works" comprises any combination of letters and/or numerals[135] whereby the main consideration has to be the amount of skill and effort that went into its creation rather than the literary merit thereof[136].

Whether this definition implies that URL addresses are eligible for copyright is questionable. On the one hand, they are mere indicators of location such as street names and telephone numbers[137]. On the other hand, contrary to these conventional references, Web site providers may choose their domain names[138]. Many companies indeed invest skill and effort to create domain names as such they are easy to remember and creative, too. However, in my opinion it is questionable whether this is true for the majority of domain name owners because most of them simply use their company or organisation names. In these cases, South African courts have decided that there is no copyright

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[133] Section 1(1) of the Copyright Act
[134] O.H. Dean, (n.62) p.1-6
[135] *ibid*
[136] *Kalamazoo Division (Pty) Ltd v. Gay*, (1978) 2 SA 184 (C)
[137] Dan L. Burk (n.49) p.6-7
[138] See above, p.6

protection for invested names that do not contain any literary content[139]. I would therefore suggest to abstain from attributing URL addresses literary qualities.

3.1.1.3. Titles or Short Phrases

The same question arises in cases where the linking party uses titles or short phrases as hyperlinks. This happened in the *Shetland Times* case where the defendants displayed the headlines of the plaintiff's paper. With regard to the definition of literary works mentioned above, it is arguable that headlines are protected as literary works because usually the author invests a certain amount of skill and effort to embrace the article and gain the interest of the reader. If this is true for other titles or short phrases also depends on the circumstances in the particular case.

3.1.2. Infringement of Publication Right

It may be argued that the linked-to Web site is published when the link is established, or, alternatively, when the user activates the link, and that linking therefore infringes the exclusive right of the author to publish his site. "Publication" takes place when copies of the work are issued to the public[140]. The number of copies that have been issued is irrelevant[141]. It has to be stressed, however, that publication of a computer program will only constitute infringement if it was previously unpublished[142].

If linking is considered to be a publication of a Web site this must be founded on the idea that the linking party provides access to the site as such it is displayed on the user's screen. First, it is questionable whether this constitutes issuing "copies" of the site to the public. Considering the technical facts, the linking site merely provides access to the material the author has previously posted on the Web. This is usually no copy but rather the original program. What is made available to the public by establishing a link is therefore not a copy in the traditional sense but rather the possibility to create own

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[139] *Kinnor (Pty) Ltd v. Finkel*, 352 JOC at 361 with reference to *Exxon Corporation v. Exxon Insurance Consultants Ltd*, 1982 RPC 69

[140] Section 1(5)(a) of the Copyright Act

[141] Alan Smith (n.81) p.83

copies. If this is nevertheless considered to be a "publication" of a Web site then it has to be argued that the site was previously published by the author of the material who posted it on the Web. In any case, the linking party does not infringe on the right to publish a work[143].

3.1.3. Infringement of Public Performance Right

Furthermore one may consider the linking party to infringe the exclusive right of the author to perform his work in public. A "performance" includes any mode of visual or acoustic presentation of a work, including any such presentation by the operation of a loudspeaker, a radio, television or diffusion receiver or by the use of a record or by any other means[144]. The term "in public" is not defined in the Act. In order to determine whether a work is performed in public, it is necessary to consider the nature of the audience[145]. Only if members of the general public have reasonable freedom of access the performance may be seen as in public[146].

The display of a Web site on the Internet may therefore indeed be considered a public performance. However, similar to the publication above, a technical evaluation leads to the conclusion that it is not the linking party that performs the site but rather the author of the Web site himself. This is comparable with an answering machine system[147]. One can program a number into speed dial and then call the number to reach a company's answering machine and listen to the outgoing message. The server of the linked-to site is like an answering machine. When the author of the linked-to site places his work on the server, it is akin to placing an outgoing message on the answering machine. The URL that designates the location of the linked-to site is the "phone number" used to reach the answering machine. When the linking party creates the link this is comparable to putting a phone number on the speed dial memory. When the user selects the link, the user's Web browser "calls" the linked-to site's server. The answering machine (i.e. the server)

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[142] *ibid*

[143] Section 1(5)(d)(iii) of the Copyright Act is not applicable in the present case because, as I will discuss in detail below, the Internet does not constitute a "diffusion service". See below, p.34

[144] Section 1(1) of the Copyright Act

[145] *Southern African Music Rights Organisation Ltd v. Svenmill Fabrics (Pty) Ltd,* 1983 (1) SA 608 at 611

[146] Alan Smith (n.81) p.50

then transmits the outgoing message (i.e. the linked-to site) to the user's Web browser for the user to view. Listening to the transmission of an answering machine's outgoing message over a telephone line would also be considered a public performance. If someone lets another use his phone and dials the answering machine for him, they have not violated the performance right. By the same token, the linking party is not infringing on the performance right.

3.1.4. Infringement of Broadcasting Right

As I have discussed above, the display of a Web site does not constitute a broadcast, because according to its definition this requires the work to be transmitted to a satellite[148]. This is, however, not always the case in the course of Internet telecommunication. Thus, no infringement of the broadcasting right takes place during the course of Web linking.

3.1.5. Infringement of Transmission Right

Whether linking infringes on the exclusive right of a Web site owner to transmit his work in a diffusion service depends on whether the Internet can be regarded such a medium. A "diffusion service" is defined as a "telecommunication service of transmissions consisting of sounds, images, signs or signals, which takes place over wires or other paths provided by material substance and intended for reception by specific members of the public ..."[149].

It is questionable whether the Internet constitutes a diffusion service. First, it is arguable that transmission on the Internet does not exclusively take place over wires or other paths of "material substance". As I have explained above, information on the Internet uses various routes to travel among which are satellites and, since recently, mobile phone signals also[150]. These paths are not, or at least not completely, made of material substance. Furthermore, a "diffusion service" has been described by a South African

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[147] Matt Jackson (n.32) p.10
[148] See above, p.20
[149] Section 1(1) of the Copyright Act
[150] See above, p. 4

court as "something of an amenity such as is provided to a hotel guest or to a hospital patient in his room; he presses one of a series of buttons or turns one of a series of knobs and thereby selects the programme of one or another of the services provided by the South African Broadcasting Corporation, or that of an in-house service, i.e. a series of musical items being played on the record-player of the hotel or hospital"[151]. This is certainly not comparable to the Internet.

3.1.6. Infringement of Adaptation Right

The purpose of conferring the adaptation right is to allow the copyright owner to control more than simply verbatim forms of copying[152]. The Copyright Act expressly provides examples of adaptations of certain categories of works[153] but it has to be remembered that this list is not exclusive but rather a specification as the term "includes" suggests[154]. Infringement of the adaptation right may therefore occur in any case where a derivative work is created. In the case of simple hyperlinking, however, there is no reason for the assumption the linking party might create adaptations of the linked-to Web site. As explained above, the linking party only provides access to the linked-to site but never creates an own copy of it, nor does it provide alterations.

3.1.7. Infringement of Right to Let

Some Web sites offer collection of links that are accessible only against payment of a fee. This may be considered as exploitation of the linked-to Web sites by way of letting or offering for hire by way of trade and thus infringement of the author's exclusive right. However, the fee does not refer to the use of a particular linked-to Web site but rather to the use of the compilation of links as a whole. Thus, it is not the linked-to Web site that is exploited but the linking site. An infringement of the right to let a computer program does therefore not exist.

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[151] *Southern African Music Rights Organisation Ltd v. Svenmill Fabrics (Pty) Ltd,* 1983 (1) SA 608 (C) at 610 G, H

[152] Marshall A. Leaffer (n. 62)

[153] Section 1(1) of the Copyright Act

[154] The British CDPA, for example, contains similar definitions of an "adaption" as the South African Copyright Act (see section 21 of the CDPA). However, instead of providing "Adaption ... includes" the CDPA provides "Adaption ... means". This difference in terminology has the consequence that the

3.2. "Deep Links"

As in the case of hyperlinks in general, "deep linking" does not involve copying of the linked-to site by the linking party. Thus there is no implication on the reproduction right. The only right that may considered be infringed in the cases of "deep links" is the right to adapt a work because the linking party guides the user to the site from a different perspective[155]. In the *TicketMaster* case, for example, TicketMaster alleged that Microsoft has usurped the navigational control of its Web site. Because the Microsoft link bypasses TicketMaster's home page by going deep into the site, customer service announcements and advertising displayed on the home page are ignored by the users. The ability to guide customers strategically through an organisation's place of business is, however, a cornerstone of effective marketing[156]. The placement of high-margin products at the supermarket check-out line or the geographical location of merchandise in a department store is analogous to the page layout of a Web site[157]

An adaptation in relation to a Web site, i.e. a computer program, includes, inter alia, a version of the program in a programming language, code or notation different from that of the program or, a fixation of the program in or on a medium different from the medium of fixation of the program[158]. Furthermore any alteration of the work may be considered an adaptation[159]. However, in my opinion during the course of deep linking no adaptation of the Web site takes place. Influencing the navigational control of a Web site owner does not infringe his exclusive right to adapt it. The linking party has no direct contact with the linked-to site at all. Thus it does not change the site nor does it create a new product. Even though the link is established the Web site stays the same concerning its composition of HTML codes

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British definition is exclusive (see Phillips, Durie & Karet (n.62) p.45) whereas the South African Copyright Act allows further examples

[155] Matt Jackson (n.32) p.9

[156] Barry D. Weiss (n. 1) p.4

[157] *ibid*

[158] Section 1(1) of the Copyright Act

3.3. IMG Links

IMG links do, contrary to the above mentioned kinds of links, not concern Web sites as a whole but rather images and graphics contained on the sites. These graphics are generally protected as "artistic works" under section 2(1)(c) of the Copyright Act, provided they meet all further requirements.

3.3.1. Reproduction Right

Through IMG links the linking party transports an image contained in another Web file to its own document so that this is displayed automatically when a user loads the site. This may infringe the reproduction right of the copyright owner of the image.

Again, the technical characteristics of linking do not require the linking party to copy the images in the traditional way. In the case of IMG links one only needs to locate the URL of the Web site where the image originates from and to use the appropriate HTML code. A browser initially accessing a Web document containing an HTML command to inline will automatically retrieve the images from their original sources and incorporate them into the Web site's onscreen display[160]. The inlined image never appears on the linking party's screen nor does it pass through its server. Thus, the linking party does not actually copy the inlined image and therefore it does not directly infringe on copyrights.

Still, it may be considered that the linking party commits contributory copyright infringement by causing the user to create a reproduction of the image in his computer's RAM. As discussed above, this would not be the case when the copy created by the user would be comprised by the implied license granted by the author of the original site. I would argue, however, that the implied license alleged to have been granted by the author only includes usual browsing activities and that inlining images is none of these usual activities[161]. First of all, an implied license is a contractual agreement, although not written or formally negotiated, but inferred from conduct. Usually, contracting

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[159] See above, p.34-35
[160] See above, p.9
[161] Stefan Bechtold, *"Der Schutz des Anbieters von Information"*, p.9

parties know each other and have been involved in commercial transactions[162]. Though it seems possible to allege the existence of a contractual agreement despite the parties not knowing each other, this implies also that the scope of this tacit agreement is to establish very carefully. With regard to the implied licenses in the present cases this means that the scope of the agreements can only reach so far as it is necessary for users to do what the author intended them to do with his site when he posted them on the Web. Generally, this only includes visiting the site, not inlining images thereof into another site. I would therefore conclude that an implied license for the user to create a copy of the inlined image does not exist.

However, the user may be excused by the fair dealing clause[163]. In most of the cases he will browse privately and thus create the RAM copy of the inlined image for personal or private use.

If this is the case the question arises whether the linking party can be accused of committing contributory copyright infringement by causing the user to copy the inlined images, although the user is excused by the fair dealing clause.

This case is different to that of an implied license because the fair dealing exception generally requires the existence of an infringement by the user and just excuses it afterwards[164]. The wording of section 23(1) of the Copyright Act does not imply an answer to this question. In the United States the situation appears to be quite clear. Contributory copyright infringement by the linking party always requires direct infringement by the user[165]. It is this principle that causes the main difficulty of applying copyright law to linking disputes. However, no arguments are found in these decisions to support this view. In my opinion, there is no reason why contributory infringement should be excluded when the primarily infringing party is excused by the fair dealing exception. Basically, both parties commit infringement and it is only because of special circumstances that the fair dealing exception is applicable to the user. It would be an

[162] This was case in *Frank & Hirsch (Pty) Ltd v. Roopanand Brothers (Pty) Ltd,* (n.109)
[163] Section 15(4) and 12(1) of the Copyright Act
[164] O.H. Dean (n.62) p.1-51

unfair advantage for the linking party if it could profit by this also. Moreover, the fair dealing clause will not be applicable to every user but only to those that browse privately. If the linking party would constitute contributory infringement only in those cases where the fair dealing exception does not apply to the user, the liability of the linking party would completely depend on circumstances that it has no influence upon. The results would be rather incidentally and would lead to different and thus unfair results.

I would therefore argue that in cases of IMG links the linking party indeed commits contributory infringement by causing the user to copy the inlined images. Whether the user, too, can be held liable for copyright infringement or whether he is excused by the fair dealing exception, is irrelevant concerning the liability of the linking party.

3.3.2. Adaptation Right

The images and graphics transported into the linking Web site are shown in a completely different context than intended by their author. This may infringe his exclusive right to adapt his work. "Adaptation" in relation to an artistic work includes a transformation of the work in such a manner that the original or substantial features thereof remain recognisable[166]. However, as explained above, this is only a specification, in addition every alteration of the work may constitute an adaptation.

Whether inlining of images constitutes an adaptation under these requirements depends on the use in the certain circumstances. If a main feature of the image is the context in which it is shown, than inlining it into a different context should infringe on the adaptation right. However, this is always to be determined by considering the circumstances in every case.

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[165] See, for instance, *Lewis Galoob Toys Inc. v. Nintendo of America Inc.*, 780 F.Supp. 1283 at 1298 (N.D. Cal. 1991) ("absent direct infringement, there is no contributory infringement")

[166] Section 1(1) of the Copyright Act

3.4. Frames

Concerning frames, the exclusive right that might considered be infringed by the framing party is the adaptation right. On one level, it may be said that combining the content of the framed page with that of the own page may create a derivative work. Further, most browser programs have the effect that the framed content is compressed or concatenated. This may be considered a derivative work, even without reference to the surrounding frames. Third, the framing practice has the effect to leave the URL of the linking site in the browser's location indicator, what may constitute another adaptation of the original work.

In case that framing indeed constitutes adaptations of the material published on the Web, the framing party can not be held liable for direct copyright infringement because it does not created the adaptation itself. As in all cases concerning linking, technically, there is no copy of the framed site passing the computer or the server of the linking party. It is rather the user that creates the framed screen by loading the site of the linking party. As in the case of IMG links, I would argue that the implied license granted by the author of the framed material concerning the use of this material in foreseeable manners does not comprise framing[167]. In order to visit a site it is not necessary to frame it. The technique of framing is useful for the some Web sites to offer a more structured and easier to survey page. Most often framing is used to guide through the internal pages of a Web site such as the left side of the screen displays a table of contents whereas the main frame shows the content of the different sub-pages[168]. Framing thus makes it more convenient for users to navigate through documents published on the Web. If frames are used to display contents of different Web sites, however, this constitutes a disadvantage for the author of the framed site because his work is displayed in a different context, with different graphics, texts and advertisements surrounding it. Furthermore, because the URL of the linking site continues to be displayed in the browser's location indicator, the user not familiar with the Web could easily get the impression that the content he

[167] See also, Timothy Hughes (n.49) p.7

[168] See, for instance, the Web site of the WIPO under http://www.wipo.org/cng/main/htm. Commercial entities usually have an additional frame containing advertising that is displayed above or below the main frame.

views originates from the linking site. Typically, the author of a Web document would therefore not agree on having his page framed. Hence, because the scope of the license has to be established very carefully since it is only a tacit agreement[169], it is not arguable that the implied license to browse does include the consent of the copyright owner to frame.

With regard to the first argument mentioned above, there are two contradictory precedents in the United States with considerable argumentation. Although these cases do not involve Web framing in particular they have a similar context. In *Mirage Editions Inc. v. Albuquerque A.R.T. Co*[170] the defendant removed artwork from purchased books, affixed the artwork to a tile, and resold the tile for commercial gain. Without analysis, the Ninth Circuit found him liable for violating the copyright owner's right to make and authorise the creation of derivative works. In *Lee v. Albuquerque A.R.T. Co.*[171], a case having virtually the same facts as *Mirage*, the Seventh Circuit concluded that the copyright owner's derivative right was not violated. The *Lee* court reasoned that merely bonding artwork to a tile was analogous to framing a picture, an act that does not change, recast, adapt or transform the original artwork[172]. The court noted that to hold otherwise would be to make "criminals out of art collectors and tourists" and anyone else who frames purchased artwork[173].

Furthermore it is argued that the acceptance of framing as an adaptation of the original work would have highly disturbing implications for the routine use of hypermedia and computer displays generally[174]. Considering most of the shelf applications software, Web browsers and other software applications routinely "frame" displayed content in order to make menus, tool bars, and other locally generated aspects of interfaces readily available[175]. However, in my opinion this typical use of frames can be distinguished from those used by meta-sites like the TotalNews site by considering the scope of the

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[169] See above, p.25
[170] *Mirage Editions Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988)
[171] *Lee v. Albuquerque A.R.T. Co.*, 125 F.3d 580 (7th Cir. 1997)
[172] *ibid* at 582
[173] *ibid*
[174] Dan L. Burk, (n.49) p.8

implied license granted by the author. If the license includes any use in foreseeable manners, then the frames typically used by browsers or other software applications are, contrary to the ones used by meta-sites, comprised by the license.

Interim Conclusion

In conclusion it may be said that hyperlinks in general do not infringe on copyright, mainly because the underlying technology provides the possibility to establish links without copying protected material in a traditional way. An evaluating consideration implies that this result is reasonable. Generally, linking does not interfere with the right of a copyright owner to exploit his work. The linking party only provides facilitated access to different sites without profiting from this at the expense of the linked-to parties. Moreover, hyperlinks are vital to the infrastructure of the Web because they allow an effective and quick retrieval of information that would otherwise be shattered around connected computers all over the world. A prohibition or restriction of the use of hyperlinks would certainly destroy a main feature of the Web.

The same argumentation applies to "deep links". There is no basis for copyright infringement by establishing links that circumvent the home page of a Web site. The interest of Web site providers to maintain navigational control over their sites and guide visitors from their home page through the sub pages is remarkable. On the other hand, however, most Internet sites of bigger organisations or academic institutions consist of several hundred sub pages[176]. Quick and effective retrieval of information would not be gained by establishing links only to the home pages only because then the user still would have to navigate through a vast collection of information until he finds his point of interest.

It is even arguable to assume that anyone publishing material on the Web tacitly agrees to links established to either his home page or to the sub pages. As mentioned above,

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[175] *ibid*

[176] See, for instance, the Web sites of the WIPO under http://www.wipo.org or that of the UCT under http://www.uct.ac.za

with publishing material on the Web the copyright owner of these documents implicitly agree on the use of it in foreseeable manners, even though this might otherwise infringe on his copyright. Simple hyperlinking has to be regarded as such a foreseeable use. Today, nearly every page contains links to different documents. It is even argued that the *raison d'etre* of the Web is linking[177]. Therefore I would conclude that with posting material on the Web anyone consents to simple links set up to his document.

By contrast, IMG links and frames are not that easily handled. According to the opinion of the author a Web site provider establishing IMG links or frame infringes copyright. Considering the impact of inline links or frames on the author's material this result appears to be justified. With IMG links and frames the user has no possibility to learn from the origins of the material displayed. With common knowledge of the Web he may even have the false impression that the content was created by the linking site. In sum, balancing the interest of the author of the material copied or adapted and that of the linking party leads to the conclusion that there is no valuable interest on the side of the latter that may outweigh the necessity to protect intellectual property.

II. Trademark Law

Plaintiffs in the aforementioned cases relied upon multiple intellectual property theories including claims of trademark infringement that may be present entirely apart from copyright infringement.

1. Statutory Trademark Law

Statutory trademark law may be implicated in hypertext linking if a word, logo or other insignia which is associated by the public with a particular business is used as the graphic designating the link to that businesses online material. For example, in the *TotalNews* situation, a button or highlighted link marked "CNN" or "Washington Post" used to access those companies sites might constitute unauthorised use of those companies' marks. Additionally, in most countries domain names and other resource

[177] Graham J.H. Smith (n.85) p.28

locators can be trademarks[178]. Hypertext links that incorporate such identifiers may therefore also be making unauthorised use of a trademark. Whether domain names can be regarded as trademarks in South Africa also has not been established by courts thus far. However, considering the fact that South Africa ranks fourteenth in the world for number of registered domain names[179] legal disputes are likely to arise soon. Writers have already submitted that the use of an Internet domain name can infringe another party's rights to a trademark[180].

The use of a trademark in order to designate a link may infringe on trademark law under section 34(1) of the Trademarks Act. At bottom, this provision deals with consumer confusion. In general, linking, frames, inlining and even windows and computers generally have as one central purpose the juxtaposition of information[181]. Juxtaposition of elements is usually a factor that enhances confusion[182]. Cyberspace also labours under a blurring of the fundamental conceptual borders between things on which it is relied upon in the "real world". In cyberspace, for example, it is difficult to know where one site or page ends and another begins and even the concept of a free-standing document is problematic. There are links to lower in the page, to other pages and to other sites that are not as readily distinguishable from one another as are reading down a book page, turning the page and picking up another book. Considering that furthermore most users of the new medium are not familiar with this new technology, the Internet itself can create enough confusion.

In the context of linking, display of a business' mark in order to signal a link to its online material might incorrectly signal a business relationship with the entity whose page displays the mark[183]. Alternatively, the seamless transition between display of linked materials may be confusing to users who have difficulty keeping track of their logical

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[178] For a detailed survey of foreign jurisdictions see Graham J.H. Smith (n.85) Chapter 3
[179] M. van der Merwe and L. Erasmus, *"Internet Domain Names - The misuse of trade marks, company names and trading styles"*, p.54
[180] *ibid*, p.54-55
[181] Peter Jakab (n.34) p.7
[182] *ibid*
[183] Maureen A. O'Rourke(n.44) p.3

location within a web of hypertext links[184]. Unsophisticated link users may believe that linked materials all originate from the same source, or may be unaware that use of a hypertext link can call materials up from a different server[185]. This problem even exacerbates where frames are used, because the URL displayed by a Web browser continues to be that of the initial linking page.

In my opinion, the question of whether the use of logos or other identifiers infringes on trademark law can not be established in general but depends on the circumstances in every case. However, generally it may be said that users of the WWW will become more and more familiar with it. Simple links as well as deep links will therefore not be likely to cause any confusion, even if the linking party uses trademarks to designate the link. It has to be considered that, ironically, the best way to make clear that linked material stems from a different source is to clearly label the link with the mark of the entity whose material will be retrieved[186]. The Trademarks Act also provides for the possibility of the use of a trademark if this is *bona fide*[187]. In addition it may be argued that there is no room for confusion as long as the URL shown in the browser's location display is the one where the content displayed originates. For the common user of the Internet the URL is the only device to learn about his location on the Web. Because this is different with frames, consumer confusion and thus trademark infringement appears more likely in these cases. If the sites framing however indicate exactly what they are doing, there may be no reason for confusion. Thus, it is always the context that will govern.

2. Common Law - Passing Off

Roman-Dutch law contains a general principle that a person may not, by imitating the name, marks or device of another who has acquired a reputation for his goods, filch the latter's trade[188]. According to the generally accepted definition[189] "the wrong known as passing off consists in a representation by one person that his business is that of another,

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[184] Dan L. Burk (n.49) p.10
[185] *ibid*
[186] *ibid* at 11
[187] Section 34(2) of the Trademarks Act
[188] *Policansky Bros Ltd v. L & H Policansky,* 1935 AD 89 at 97
[189] Butterwoths, *"The Law of South Africa-Vol2"*, p. 399

or that it is associated with that of another, and, in order to determine whether a representation amounts to a passing-off, one enquires whether there is a reasonable likelihood that members of the public may be confused into believing that the business of the one is, or is connected with, that of another."[190].

Similarly to trademark law, the principle of passing-off may be implicated in hypertext linking if the trademark, logo or other insignia of another 's business is used as the graphic designating the link to that businesses online material. It is arguable that this activity is likely to provoke the impression that there is an association between the linking and the linked-to site and this may lead to confusion in the public. In essence, whether or not the principle of passing-off applies again depends on the circumstances of every case. Therefore, the same argumentation as in the case of trademark law applies.

[190] *Capital Estate and General Agencies (Pty) Ltd v. Holiday Inns Inc,* 1977 (2) SA 916 (A) at 929; see also *Hollywood Curl (Pty) Ltd v. Twins Products (Pty) Ltd,* 1989 (1) SA 236 (A) at 249

Chapter 4: A Constitutional Right to Link?

In conclusion I would like to mention one interesting aspect of Web linking that is discussed in the United States, following a decision by the district court for the Northern District of Georgia. The court had to deal with a legislative initiative concerning the protection of computer systems enacted by the U.S. State Georgia in July 1996[191]. Section 1 of the Act provided that it shall be unlawful to knowingly

> "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 ... which would falsely state or imply that such person ... has permission or is legally authorised to use such trade name, registered trademark, logo, legal or official seal, or copyrighted symbol for such purpose when such permission or authorisation has not been obtained ...".

This section has been interpreted to prohibit the establishment of hyperlinks in general, or, at least, the incorporation of trademarks or names in clickable items[192]. Thus it has caused a huge outcry of all those who feared for the free exchange of information on the Internet, calling it an "Internet Police" law[193]. A state legislator even criticised colleagues who passed the law as "not knowing a gigabyte from a chigger byte"[194]. In September 1996, a diverse coalition of 14 plaintiff's, including the American Civil Liberties Union and the Electronic Frontier Foundation, filed a constitutional challenge in the district court for the Northern District of Georgia[195]. Emphasising that the critical

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[191] Act No. 1029 Ga. Law 1996, p.1505, codified at O.C.G.A. s.16-9-39.1. The Act is also available on the Internet under http://www.efga.org/hb1630/hb1630.txt

[192] Jeffrey R. Kuester, *Cyber Sheriff's in Town"*, p.1

[193] *ibid*

[194] The Associated Press, "Internet Bill Stirs Trouble in Cyberspace," Marietta Daily Journal, April 29, 1996, at 4B. Rep. Grindley's other views regarding this law are available at http://www.kuesterlaw.com/grind.htm

[195] *American Civil Liberties Union v. Miller*, 43 U.S.P.Q. 2d 1356 (N.D. Ga. 1997). The complaint is also available on the Internet under http://www.aclu.org/issues/cyber/censor/GACOMPLT.html

linking feature is the defining characteristic of the Web they argued that the statute violated constitutional protections of free expression, free association, access to information and privacy, and that it was overbroad and unconstitutionally vague[196]. The plaintiff's conceded that the state may have a legitimate interest in protecting certain intellectual property rights but argued nevertheless that the state could not constitutionally suppress protected expression under the guise of protecting such right[197].

The state responded that the Act "did not address, and was not intended to address, the links between Web sites ... but only to prevent people from misidentifying themselves or misrepresenting that their home page is the home page of another person or organisation when it is not"[198]. Arguing that the legislative history of the Act indicates clearly that it was only intended to prevent the owner of a Web site from falsely identifying himself or his affiliations on his own site[199] the state goes on respond that "hypertext links commonly used on the World Wide Web are, without the injection of fraud or misrepresentation, merely references to the computer site and computer address of another person or entity on the Internet or Web. Without the injection of the knowing and intentional misappropriation of another's identity or identifying mark into such (a) situation, the statute poses no obstacle to innocent links"[200].

On June 20, 1997 the court granted a preliminary injunction enjoining the enforcement of the Act[201]. Agreeing with the plaintiffs that the statute as written was unconstitutionally overbroad and vague and that the State's effort to rehabilitate were tangled, the court found that

> "(a) fair reading of the clause, as written, is that it prohibits the current use of Web page links. The linking function requires publishers of Web pages to

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[196] *ibid*
[197] *ibid*
[198] Brief in Opposition to Plaintiff's Motion for Preliminary Injunction, at I.A.2., available on the Internet under http://www.inteliview.com /fraudlaw.htm
[199] *ibid*, at I.B.4
[200] *ibid*, at II.C.2
[201] *ACLU v. Miller* (n.196) 114. The decision is also available on the Internet under http://www.aclu.org/courts/aclugamiller.html

include symbols designating other Web pages which may be of interest to a user. This means tht an entity or person's seal may appear on hundreds or thousands of other Web pages, just for the purpose of enabling the linking system. The appearance of the seal, although completely innocuous, would definitely "imply" to many users that permission for use had been obtained. Defendants have articulated no compelling state interest that would be furthered by restricting the linking function in this way"[202].

This argumentation has been interpreted by some authors to imply that the court clearly attached First Amendment importance to hyperlinking, arguably "creating a right to link"[203]. However, from an American perspective to me this interpretation appears to be too easy. First of all, the decision in question is a preliminary injunction that only requires a substantial likelihood of success on the merits[204] and no thorough examination of the case. In addition, the court never examined whether linking may be a form of protected expression under the First Amendment. It rather supposed that it would be and continued to establish whether the limitation of this right by the Georgia State Act happened constitutionally. Thus it only examined whether the Act was too vague, overbroad, or not narrowly tailored to promote a compelling state interest. With regard to this I would not assume that the Northern District Court of Georgia created a constitutional "right to link".

Nevertheless, the idea seems to be worth another thought and since legislators around the world will undoubtedly continue to attempt to regulate the Internet, other legal challenges will follow and with them, probably, a more distinctive discussion of this issue. From a South African perspective I would argue that it appears unlikely that Web linking itself is regarded as a form of protected expression. An expression is defined as "every act by which a person attempts to express some emotion, belief or grievance"[205]. However, it might be considered that the free flow of information on the Internet is

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[202] *ibid*
[203] Jeffrey R. Kuester and Peter A. Nieves, *"Hyperlinks: A Form Of Protected Expression?"*, p.2
[204] *ACLU v. Miller* (n.197) 114
[205] J. De Waal, I. Currie & G. Erasmus, *"The Bill of Rights Handbook-1998"*, p.235

constitutionally protected. The WWW is not solely used by commercial entities with the purpose to increase profits. It rather was intended to serve as the platform for a global, online store of knowledge, containing information from a diversity of sources and accessible to Internet users around the world[206]. Currently, it is the most advanced information system developed on the Internet and embraces within its data model most information in previous networked information systems such as ftp, gopher, wais and Usenet[207]. With this vast collection of information it is the possibility of linking that unifies the Web into a single body of knowledge and that makes the Web unique[208]. Thus, restriction of Web linking may indeed constitute the limitation of constitutional rights like freedom of expression. With regard to the retrieval of information it is even arguable that the right of education may be implicated.

However, it has to be stressed that even constitutional rights are not absolute, their boundaries are set by the rights of others and by the legitimate rights of society[209]. Considering that, at least in the cases of frames and IMG links, intellectual property rights of others are involved, it appears unlikely that linking will be considered to prevail.

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[206] *ACLU v. Reno,* (n.3) 836
[207] *ibid*
[208] *ibid* at 837
[209] J. De Waal, I. Curie & G. Erasmus (n.206) p.113

Conclusion

There may be various aspects regarding the features of the new media that make it difficult to apply traditional law on the new technologies. Concerning Web linking, however, it appears that South African intellectual property law provides quite a good basis to reach reasonable results. Copyright as well as trademark law provide the means to ensure a fair balance between the interests of content providers and users of the Internet. The "implied license" principle in copyright law and the *bona fide* uses accepted under trademark law allow a flexible treatment of possible infringing activities. This applies not only to the kinds of links that are known today, but even to those that are likely to be developed in the future.

Still, there are many aspects why even intellectual property law is not completely satisfactory when applied to issues concerning the Internet. For instance, the Copyright Act does not confer protection to all material published on the Web but only to Web sites that are made by a South African or first published in the Republic[210]. Furthermore, as mentioned above, under U.S. American law there is no basis for copyright infringement by the linking party. A South African content provider will therefore not enjoy the same protection in the U.S. as he does here in the Republic. However, problems resulting out of the global nature of the Internet are common with regard to the new media and solutions are currently discussed and will be found. Particularly with an activity as fundamental as linking it is difficult to imagine that it is left clouded in legal uncertainty for too long.

[210] Sections 3 and 4 of the Copyright Act. The geographical scope of application is furthermore extended to members of the Berne Convention. See Regulation 2 of GN 136/1989.

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