

§ 6.09 Copyright Implications of Online Activities

Numerous distinct electronic activities take place in an online environment, including uploading and downloading of files, browsing and sending e-mail. Each of these implicates one or more exclusive rights of the copyright owner. After discussing the exclusive rights implicated by several of the most common online activities, subsequent sections of this chapter address the standard of infringement liability for these activities and any applicable defenses.¹

[1]—User Uploads

Uploading of copyrighted works may be accomplished in various ways. Most commonly, the information is uploaded in an uninterrupted transmission of a copy (or phonorecord) of the information from the user's computer to the service provider's computer or complex of computers. Before the uploading occurs, however, the user must possess a computer-readable version of the work to be uploaded. When the computer-readable copy (or phonorecord) is created by the user, the reproduction right is usually implicated.² Of course, if the user is the author of the work, such a reproduction is authorized. Conversely, uploads may be from copies (or phonorecords) not created by the user but purchased from retailers, obtained from an online transmission, or otherwise.

In the course of uploading the information, a copy (or phonorecord) of the work is made on the service provider's computer. In addition, ephemeral or other transitory copies may be made in the user's computer or at intermediate stages in the process of posting. The making of each of these copies may implicate the reproduction right of the copyright owner depending on the extent to which the work has been fixed as a copy in computer memory or otherwise.³

Neither the right to make derivative works nor the public distribution right is affected by such uploading. The adaptation right is not implicated because no derivative work is created by

¹ Accordingly, in this section, when certain uses of copyrighted works are described as implicating or triggering exclusive rights of the copyright owner, other facts must be considered before determining whether such use is authorized and, if unauthorized, other factual and legal considerations (such as defenses) should be taken into account before concluding that the use is infringing and, if so, who bears liability.

² See § 6.08[1] *supra*. If the user-made copy is a backup copy of software or an installed version of software, the reproduction right may not be triggered. 17 U.S.C. § 117.

³ See § 6.08[1] *supra*.

mere transmission. Furthermore, the transmission should not constitute distribution because, *inter alia*, transmission to a server alone, when there is no immediate access by others, is not "to the public."⁴ At the most, such an act is a limited publication.⁵ When distribution to the public is intended, however, and actually occurs, uploading appears to be the critical, infringing act enabling such unauthorized distribution.⁶

An uploading transmission of an audiovisual work or sound recording would not be a transmission of a performance except in the unusual circumstance that the transmission was isochronous and the provider's equipment was capable of concurrent receipt or display of only that performance.⁷ Furthermore, without concurrent isochronous retransmission by the provider's server, uploading could not be a transmission "to the public" that implicates the public performance right. Finally, following the reasoning applicable to public performance, the public display right would not be implicated by uploading.

[2]—Granting Public Access to a Work

In some online contexts, the uploading of information by a user is only the first step in making the information available to users of the service. Often a specific act (such as revising file attributes, or moving the file to another directory or physical device) is necessary to afford public access. A service provider's decision to grant the public access to a work may not only occur in connection with user-uploaded material but also with respect to provider-supplied content (or content supplied by third parties).

⁴ Postings to Usenet news groups, it is worth noting, are not to one server alone; such postings are mirrored on thousands of servers within a matter of hours or less. *Religious Technology Center v. Netcom On-Line Communications Services, Inc.*, 907 F. Supp. 1361, 1367-1368 (N.D. Cal. 1995) (*Netcom II*). If the law is changed such that distribution can be by transmission without any physical copies changing hands (see § 6.08[3] *supra*), postings to news groups by users are likely to constitute distributions to the public.

⁵ See § 6.03[3] N. 11 *supra*. But see, *Getaped.com, Inc. v. Cangemi*, 188 F. Supp.2d 398, 400-402 and n.2 (S.D.N.Y. 2002) (holding that "Section 106(3) . . . gives copyright holders the exclusive right of publication" and that a Web page is "published" when it goes live on the Internet).

⁶ *Accord*, Information Infrastructure Task Force, Working Group on Intellectual Property Rights (Bruce A. Lehman, Chair), *Intellectual Property and the National Information Infrastructure* (White Paper), at 215 n.541 (Sept. 1995).

⁷ § 6.08[4][b] *supra*. Inasmuch as the service provider would not have any interest in or need to view or listen to a performance concurrent with its transmission, it is extremely unlikely that an isochronous transmission would be used for uploading.

The rights of reproduction or adaptation may be implicated in the course of preparing the copy of the work to reside on the provider's computer system for the purpose of providing user access, depending on the precise operating details of service. The act of granting public access prior to actual user access, however, does not implicate any of the exclusive rights of the copyright holder. Transmission to users must occur for the display or performance rights to be implicated.

[3]—Browsing

Among the most common online activities is "browsing," by which the user is able to read, view, or hear works as they are transmitted by the service provider, in some cases under the user's interactive control.⁸ Such features may utilize buffering features that temporarily copy some or all of the work being browsed in the user's computer. For purposes of the discussion in this section, when the user does not permanently copy the work such use is "browsing." (Permanent copying would more properly be considered downloading, the subject of the next section.)

Browsing is a term that encompasses a variety of activities, including viewing the contents of World Wide Web sites. Arguably, browsing does not trigger the reproduction right unless a substantial portion of the work is copied in the buffer at one time (and for more than a transitory period).⁹ The extent to which the work must be transmitted and a substantial portion fixed in order to implicate the reproduction right is uncertain. A copyright owner could argue that the browsing of an entire work may constitute reproduction, albeit in small pieces.

Browsing may also implicate the public performance and display rights of the copyright owner, depending on the work browsed; the recipient's use of the work, and whether the transmission is isochronous or asynchronous. For example, in the case of a sound recording of a musical work that is heard by the user in strict synchrony with its transmission from the service provider (or an audiovisual work that is similarly viewed), the performance right in the underlying musical composition (or in the audiovisual work) is

⁸ LEXIS/NEXIS is one example of a service currently available that allows a user interactively to browse a variety of textual (literary) works. RealAudio is an example of a service that permits substantially concurrent transmission and audible replay of sound recordings.

⁹ But see, White Paper, N. 6 *supra*, at 72 n.226 (discussed at § 6.08[5] N. 87 *supra*). The Register of Copyrights has noted that if browsing "involves the browser receiving a transmission of all or a substantial portion of a work in order to view it on his or her computer screen, without the consent of the copyright owners, the conduct is likely to involve a *prima facie* case of infringement." Letter from Marybeth Peters, § 6.08[3][b] N. 25 *supra*.

likely to be implicated, assuming that sufficient numbers of users access the work in this fashion over time to constitute "public" performance.¹⁰ In addition, the public digital performance right in the sound recording may be implicated, if none of the exemptions to that right pertain. Similarly, the display right may be implicated in the case of literary, graphical and other works that are susceptible of display and that are, in fact, displayed to the user during the browsing process. The triggering of the display right, of course, is dependent upon whether the time, places and recipients of the displays are such that the display is "to the public."¹¹

These rights, depending on the type of use, may not be infringing because they would constitute fair uses. Particularly when the reproduction, performance or display is made of only a fragment of a work, for a transitory period, for noncommercial use and when no downloading occurs, the argument that browsing is a fair use would seem particularly strong.

In *Netcom II*, for example, the court discussed browsing at some length: it concluded that browsing of textual works was probably protected by fair use or that, at most, such browsing constituted innocent infringement.¹² As that court pragmatically observed, the "temporary copying involved in browsing is only necessary because humans cannot otherwise perceive digital information. It is the functional equivalent of reading, which does not implicate the copyright laws and may be done by anyone in a library without the permission of the copyright owner."¹³

¹⁰ See § 6.08[4][c] *supra*.

¹¹ The Ninth Circuit has held that the display of copyrighted photographs on a search engine implicated the public display right, even absent proof that anyone ever viewed the images. *Kelly v. Arriba Soft Corp.*, 280 F.3d 934, 946 (9th Cir. 2002).

¹² "Absent a commercial or profit-depriving use, digital browsing is probably a fair use; there could hardly be a market for licensing the temporary copying of digital works onto computer screens to allow browsing. Unless such a use is commercial, such as where someone reads a copyrighted work online and therefore decides not to purchase a copy from the copyright owner, fair use is likely. Until reading a work online becomes as easy and convenient as reading a paperback, copyright owners do not have much to fear from digital browsing and there will not likely be much market effect.

"Additionally, unless a user has reason to know, such as from the title of a message, that the message contains copyrighted materials, the browser will be protected by the innocent infringer doctrine, which allows the court to award no damages in appropriate circumstances. In any event, users should hardly worry about a finding of direct infringement; it seems highly unlikely from a practical matter that a copyright owner could prove such infringement or would want to sue such an individual."

Netcom II, N. 4 *supra*, 907 F. Supp. at 1378 n.25.

¹³ *Id.*

[4]—Downloading

Downloading a copy (or phonorecord) of a copyrighted work from a Web site, a bulletin board or an online service consists of an electronic transmission from the service to the user's computer, which results after its completion in the creation of a copy of the work on the user's computer (whether in RAM or on hard or floppy disk).¹⁴ Downloading itself implicates the reproduction right because a copy is made by or at the request or action of the user. The rights of public performance and display are not implicated by downloading.¹⁵ The right of public distribution, however, may be implicated by such electronic transmission.¹⁶

[5]—E-Mail and List Servers

In the simplest e-mail application, the user sends the work to one other person, resulting in a copy of the file remaining in the sender's possession and a new copy being created on and residing in the memory of the recipient's computer. In addition, in order to transmit the e-mail and hold it for receipt by the addressee, ephemeral, short-term or even permanent copies of the e-mail may be made by the service provider's computers and on intermediate nodes through which the e-mail passes.

Thus, e-mail transmissions implicate the reproduction right.¹⁷ The right of public distribution, however, is not implicated.¹⁸ To the extent that electronic transmissions are now considered distributions, a private, one-to-one e-mail transmission is not sent "to the public."¹⁹ The performance and display rights are not implicated by e-mail, which is an asynchronous transmission. Moreover, viewing (or hearing) subsequent to receipt by one recipient would not constitute "public" performance or display.

If the e-mail were sent to several recipients, the analysis would change in only one respect: the "public" element might be present. Use of a list server, which generates e-mail addressed to each of the members of an established list, would similarly only affect the

¹⁴ The case in which the transmitted work may be viewed, heard or otherwise experienced *during* downloading is discussed in § 6.09[3] *supra*, regarding browsing.

¹⁵ See § 6.08[4] through [5] *supra*.

¹⁶ See § 6.08[3][a] *supra*.

¹⁷ To the extent that many e-mail transmissions only contain content authored by the sender, the consequences, under copyright law, of such transmissions are not significant. Further retransmission, however, without the author's express authorization may constitute infringement of the reproduction right.

¹⁸ For a discussion of this right, see § 6.08[3] *supra*.

¹⁹ *Accord*, White Paper, N. 6 *supra*, at 215.

"public" element.²⁰ E-mail and list server applications deliver copies of files to users that, as used in current applications, must be fully downloaded before being viewed, heard or otherwise accessed.

[6]—Caching, Mirroring and Ephemeral Copies

As private (i.e., non-Internet, private network) service providers have opened gateways to the Internet, and especially as they have introduced World Wide Web browsers, the demands of their millions of subscribers for rapid access to information has overwhelmed popular Internet servers. Caching and mirroring are techniques that such providers use in connection with particularly popular remote files or busy Internet servers or Web sites to enhance the availability of Internet resources. A service provider may copy a file from a remote server (i.e., "cache" the file), or "mirror" substantially all of the contents of a server to meet its subscribers' requests for information on a timely basis and to conserve scarce technological resources. The necessity of these practices is manifest.²¹

In some cases, mirroring or caching a file may implicate the reproduction rights of the copyright owner, in that such works are copied by the service provider onto its own system. In the case of mirroring, the compilation copyright, if any, of the server operator also may be implicated through the reproduction of the entire group of mirrored files. Depending upon how (or whether) the cached and mirrored works are delivered to the service provider's users, the reproduction, public performance and public display rights also may be implicated.

When the caching or mirroring occurs automatically, however, one court has held, in the context of Usenet news groups, that the service provider does not directly infringe the reproduction, distribution, or display rights.²² Such a result seems wise, both in the context of Usenet news groups and in the context of the automatic caching of Web sites by a service provider, for several reasons. The ubiquity of caching and mirroring online may be said to create an implied consent to have one's posting or one's Web site automatically cached by a service provider to facilitate online communication. Moreover, in such instances, no volitional activity by the service provider has taken place.

In addition to these possible defenses, the Digital Millennium Copyright Act (the DMCA) limits the potential copyright

²⁰ The "public" element is relevant, of course, in addition to treating an electronic transmission as a "distribution."

²¹ Indeed, mirroring is essential for the operation of the Usenet news group system. See *Netcom II*, N. 4 *supra*, 907 F. Supp. at 1367-1368, 1372-1373.

²² *Netcom II*, N. 4 *supra*, 907 F. Supp. at 1368-1369, 1371-1373. See § 6.10[1][a] *infra*.

infringement liability of service providers who engage in caching through "an automatic technical process for the purpose of making the material available to users of the system or network. . . ." ²³ In order to take advantage of this limitation on liability, the service provider must not be the originator of the infringing material, must not modify the material, must update the cache regularly, must pass on to the copyright owner any user information that is collected (such as the number of hits), and must be careful not to permit unauthorized access to material that is restricted to the copyright owner's subscribers or to those who have been issued a password by the copyright owner. ²⁴ Although some caching clearly falls outside the scope of the DMCA's limitation on liability, some of the more traditional defenses to copyright infringement may still be applicable, such as fair use or an implied license or consent by the owner of the copyright in the cached material.

In addition to the caching of materials by a service provider, most Web browsers automatically save a copy of all Web pages being viewed to the user's local disk drive, a process commonly termed "local caching." One of the purposes of local caching is to enable a user to return to the last page or last several pages viewed without requiring the remote server to retransmit a copy of the page; instead the cached copy is loaded into the browser. Not only is this a standard feature of browsers, and, therefore, an inevitable consequence of the way the Web operates today, it also is so well-known that Web site operators, in willingly transmitting pages to users, would be deemed to be consenting to such caching—at least for the narrow purposes described above. It seems doubtful, however, that the copyright owner's license or consent for other types of uses could similarly be implied (e.g., e-mailing the Web page to others, using the locally cached page as a model or starting point for preparing a derivative Web page, or reproducing the cached page on the end user's own Web site).

[7]—Hyperlinking

Another well-known and inevitable consequence of the way the Web operates is the use of hyperlinks—one of the basic mechanisms of the World Wide Web. A hyperlink is an "active" or "hot" area on a Web page that links to either another Web page or another location within the same page. The presence of a hyperlink may be signified either by text or images. Hyperlinks are used to allow a viewer of one Web page (the "Linking Page") on a site (the "Linking Site") to point and click in order to gain access to the contents of another page (the "Linked Page"), contained on the same site or a different Web site (the "Linked Site"). Hyperlinks obviate the need to access the Linked Page by typing in its full

²³ 17 U.S.C. § 512.

²⁴ 17 U.S.C. § 512.

address. The underlying code for the hyperlink, which is invisible to the user, is a reference to the address (the uniform resource locator, or URL) of the Linked Page.

When the user activates the hyperlink, the user's Web browser accesses the Linked Page referenced by the hyperlink and displays the page to the user. Accordingly, hyperlinking is a powerful and (when the response is quick) satisfying way of shifting from one content source to another.²⁵

There are a number of ways that hyperlinking can be performed that may implicate copyright or other intellectual property rights.²⁶ For example, hyperlinking may be accompanied by use of framing;²⁷ may be carried out so pervasively that questions of commercial misappropriation or copyright infringement of the content on the Linked Site or its arrangement and organization are

²⁵ Ticketmaster Corp. v. Tickets.com, 54 U.S.P.Q.2d (BNA) 1344 (C.D. Cal. 2000) (“[H]yperlinking does not itself involve a violation of the Copyright Act (whatever it may do for other claims) since no copying is involved. . . . [It] is analogous to using a library’s card index to get reference to particular items, albeit faster and more efficiently.”). The court subsequently denied Ticketmaster’s motion for a preliminary injunction on copyright, trademark, and state law theories. Ticketmaster Corp. v. Tickets.com, No. CV 99-7654 HLH (BQRx), 2000 U.S. Dist. LEXIS 12987 (C.D. Cal. Aug. 10, 2000), *aff’d* 248 F.3d 1173 (9th Cir. 2001). Despite an absence of case law holding that typical hyperlinking implicates any copyright in the linked-to site, at least one firm, iCopyright.com, reportedly has provided the owners of several sites with the technological means to charge fees for the ability to link to their content.

²⁶ Non-copyright concepts, such as trespass and breach of contract claims, may protect subject matter that is not copyrightable. *Compare:*

Second Circuit: Register.com, Inc. v. Verio, Inc., 126 F. Supp.2d 238 (S.D.N.Y. 2000) (relying on trespass and breach of contract claims to enjoin Verio from “spidering” WHOIS data from Register.com and using the information for unsolicited commercial e-mail and telephone calls).

Ninth Circuit: eBay v. Bidder’s Edge, Inc., 100 F. Supp.2d 1058 (N.D. Cal. 2000) (relying on trespass tort to issue a preliminary injunction ordering Bidder’s Edge to stop “spidering” auction data from eBay and posting the information on its own site).

With:

Ninth Circuit: Ticketmaster Corp. v. Tickets.com, 54 U.S.P.Q.2d (BNA) 1344 (C.D. Cal. 2000) (dismissing trespass claim based on unauthorized aggregation of information as preempted by federal copyright); Ticketmaster Corp. v. Tickets.com, No. CV 99-7654 HLH (BQRx), 2000 U.S. Dist. LEXIS 12987 (C.D. Cal. Aug. 10, 2000), *aff’d* 248 F.3d 1173 (9th Cir. 2001) (rejecting renewed trespass claim and distinguishing eBay decision on the ground that Ticketmaster had not shown that the “spiders” sent to its site by Tickets.com obstructed the function of its site).

See also, § 6.12 *infra* on copyright preemption.

²⁷ See § 6.09[8] *infra* for a discussion of framing.

implicated;²⁸ or may be used to link to Web sites that distribute infringing copies of copyrighted works.²⁹ Where hyperlinking results in a framing of the Linked Site, the Ninth Circuit has held that the public display right may be infringed directly by the Linking Site.³⁰ In *Kelly v. Arriba Soft Corp.*, the court concluded that the defendant's active participation in the display of the plaintiff's images, including by having its program "inline link and frame" those images, demonstrated it was more than a "passive conduit" and that, therefore, direct liability was warranted.

With respect to whether the Linking Site may be liable for copyright infringement when the Linked Site contains infringing material, the Software Publishers Association (SPA) publicly has taken the position that hyperlinking to a site involving infringing activities itself constitutes copyright infringement.³¹ In an effort to counter allegedly widespread, unauthorized online distribution of commercial software, in 1996 the SPA contacted various Internet service providers, Web site operators and others, arguing that it constitutes infringing activity to provide a hyperlink to a Web site or other Internet resource that offers "warez"—i.e., pirated copies of commercial software—or that offers tools that help users to activate pirated software, such as serial numbers and passwords.³²

²⁸ See *Ticketmaster Corp. v. Microsoft Corp.*, No. 97-3055 (C.D. Cal. complaint filed April 28, 1997) (common law claim). The plaintiff, Ticketmaster, objected, *inter alia*, to Microsoft's linking to Web pages deep within the Ticketmaster site, thereby bypassing the Ticketmaster home page and the commercially valuable advertising displayed on the home page. The parties announced a settlement in January 1999, which reportedly allows Microsoft to maintain a hyperlink to Ticketmaster's home page, but not to engage in "deep linking" to pages within the Ticketmaster site.

Outside the United States, "deep linking" may give rise to other causes of action. See *Danish Newspaper Publishers' Ass'n v. Newsbooster.com ApS*, 2002 IRL Web (P&F) 1703 (Denmark 2002) (holding that news clipping service violated newspapers' rights under Danish law passed pursuant to European Union's Database Protection Directive by "deep linking" to individual articles on newspapers' Web sites).

²⁹ *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp.2d 1290 (D. Utah 1999) (providing links to sites containing infringing copies of Mormon Church handbook constitutes contributory infringement). See also, *MP3Board, Inc. v. Recording Industry Ass'n of America*, No. CV 00-20606 (RMW) 2001 WL 804502 (N.D. Cal. Feb. 27, 2001) (noting that plaintiff service initially made, and subsequently dropped, request that court rule on whether providing hyperlinks to a Web site containing material infringing copyright constitutes copyright infringement).

³⁰ *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002).

³¹ "Didn't You Notice? The Software Publishers' Internet Strategy Is Off to a Rocky Start," *Info. L. Alert* (Nov. 8, 1996).

³² *Cf.*, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 455-458 (2d Cir.

The DMCA provides a limitation on liability for service providers (including some Web site operators that fall under the statutory definition of "service provider") who have linked to a site containing infringing material.³³ To take advantage of this limitation on liability, a service provider must not have actual knowledge of infringing material on the Linked Site, must not be aware of facts or circumstances from which infringing activity is apparent, and cannot receive any financial benefit directly from the infringing activity in situations in which the service provider has control over such activity. Also, when the service provider is given a detailed notice of a claimed infringement in the form dictated by the DMCA, or when it obtains actual knowledge of a claimed infringement, it must act expeditiously to terminate the link.³⁴

In situations where the DMCA's limitations on liability are unavailable, there are still a number of possible defenses to a claim of copyright infringement. To begin, hyperlinking, other than when the linked site is framed, does not appear to constitute direct copyright infringement on the part of the owner of the Linking Site. When a hyperlink is executed, the user's Web browser ceases communicating with the Linking Site and initiates a request to the Linked Site for transmission of the Linked Page. Thus, the Linking Site transmits none of the content of the Linked Page or the Linked Site to the user. Nor does the Linking Site store any of the content of the Linked Site.³⁵ Under these circumstances, it is difficult to identify which, if any, of the exclusive rights of a copyright owner would be infringed directly by the Linking Site.

Whether claims of contributory or vicarious liability might be asserted, however, is a highly fact-dependent matter, and one which raises some novel issues of proof. For example, contributory infringement claims would require proof of knowledge and

2001), *petition for rehearing en banc filed* No. 00-9185 (2d Cir. Jan. 14, 2002) (knowingly and purposefully linking to sites that offer decryption software violates provision of DMCA that prohibits trafficking in decryption technology).

³³ 17 U.S.C. § 512.

³⁴ See: *Hendrickson v. eBay, Inc.*, 165 F. Supp.2d 1082 (C.D. Cal., Sept. 4, 2001) (eBay and an online "service provider" held not liable for alleged infringement on the basis that plaintiff failed to meet the notice requirements under the DMCA by not sufficiently (1) identifying the allegedly infringing materials (2) under oath with (3) representation of authority to act on behalf of the copyright owner); Bunk, "Validity, Construction and Application of Digital Millennium Copyright Act," 2001 A.L.R. Fed. 2 (2001). See also, Yen, "Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment," 88 Georgetown L.J. 1833 (2000).

³⁵ Technically, the URL of the Linked Page must be stored on the Linking Site, but the URL, as a title, is not copyrightable. See: 37 C.F.R. § 202.1(a); *Arthur Retlaw & Associates, Inc. v. Travenol Laboratories, Inc.*, 582 F. Supp. 1010, 1014 (N.D. Ill. 1984).

substantial assistance by the Linking Site to direct infringement by some other person—either the owner of the Linked Site or a user who is infringing copyright through use of the Linked Site. Thus, the plaintiff copyright owner would need to show: (1) that the owner of the Linking Site knew of the infringement; (2) that users were in fact using the hyperlink to jump from the Linking Site to the Linked Page; (3) that direct copyright infringement was occurring due to the hyperlink; and (4) that the assistance provided by the hyperlink was substantial.³⁶ These matters, however, pose serious evidentiary obstacles.

First, the Linking Site cannot determine what interaction the user is having with the Linked Site, and may not even be able to distinguish between the situation in which a user clicks on a hyperlink, and the situation in which a user is departing the Linking Page for some other reason. Thus, establishing knowledge of copyright infringement is not straightforward—even after a copyright owner gives notice to the Linking Site that the content to which the hyperlink points is infringing.³⁷

Second, as noted, proof of use of the hyperlink may not be available directly from the Linking Site and might have to be inferred by other means—or, indeed, may not be ascertainable.

Third, where the Linked Page displays infringing content as soon as the hyperlink is executed, it may be relatively easy to establish direct infringement immediately following execution of the hyperlink, but alternatively, where the Linked Page itself does not consist of infringing content but rather offers the opportunity to view or download infringing works, proof of direct infringement may be elusive.

Finally, demonstrating that the assistance provided by the Linking Site was "substantial" also may be difficult, particularly in the instance where the Linked Page is not infringing, but must be accessed as only one step out of several necessary for direct violation of a copyright owner's rights.³⁸

Vicarious liability for hyperlinking to an infringing site may be found where it is established that provision of the hyperlink constituted sufficient "control" over the infringement and when the Linking Site received a direct financial benefit from such hyperlinking.³⁹

³⁶ See § 6.07[1] *supra*.

³⁷ *Cf.*, *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp.2d 1290 (D. Utah 1999) (granting preliminary injunction on contributory infringement claim when defendants' Web sites actively encouraged users to link to and copy from sites where the infringing material was available).

³⁸ See Jackson, "Linking Copyright to Homepages," 49 Fed. Communications L. J. 731 (1997).

³⁹ See § 6.07[1] *supra*.

[8]—Framing

Framing is a technique that is used to assemble a composite Web page from separately addressed constituent elements. The "framing" Web page's frame specification identifies various "frames" or areas in that page, and also identifies the URL of other pages that it intends to capture and place within the designated frames. When the user's browser receives the frame specification, it immediately requests transmission of the content of the various captured URLs. In this manner, the content of each framed page appears on the user's screen not as if the user had accessed that page directly, but within the portion of the screen designated as its frame.

For example, frames offer a Web site a way to keep advertising fixed in a frame in one part of the screen, to display a fixed index or table of contents in another frame, and to have the principal contents of the page in another scrollable frame. Such layouts have proven popular due to the commercial value of keeping advertising in sight of the user, the convenience of having a navigation bar always in view, and the efficiency of having the contents of a long page accessible via the scrolling window. Moreover, a framed page can offer advantages in terms of initial design and maintenance. Rather than designing one page made up of a variety of elements, the Web site operator will design three separate parts, each containing one constituent piece of framed content, save them as separate files, and identify those files in the frame specification.

The use of framing technology has been the central issue in several cases. In one case, the plaintiff news publishers alleged, *inter alia*, that the defendants' Web site used a frame structure and hyperlinks to the plaintiffs' own Web sites to alter users' perusal of the plaintiffs' sites in a variety of ways, including the imposition of the defendants' border containing the paid advertising of the defendants' advertisers.⁴⁰ The complaint alleged commercial misappropriation of the plaintiffs' content under the "hot news" doctrine, trademark dilution and infringement, copyright infringement, and tortious interference with the plaintiffs' own advertising contracts, among other causes of action. The action was settled before the merits were reached by the district court. The terms of the court-ordered settlement provided, among other things, that defendants would cease framing of plaintiffs' Web sites, and that defendants would link to plaintiffs' sites only with permission

⁴⁰ *The Washington Post v. Total News, Inc.*, 97 Civ. 1190 (PKL) (S.D.N.Y. complaint filed Feb. 20, 1997). Bruce P. Keller represented the plaintiffs in this action. See also, *National Football League v. TVRadioNow*, 53 U.S.P.Q.2d (BNA) 1831 (W.D. Pa. 2000) (enjoining Web site from transmitting television programming surrounded by advertising sold by the Web site). Bruce P. Keller was co-counsel for the National Football League and the National Basketball League in this action.

(a "link license"), with such permission revocable upon fifteen days' notice by plaintiffs.

In another case,⁴¹ AAI, the owner of the registered service mark 1-800-DENTIST, granted an exclusive license to Futuredontics to use the mark in connection with its dental referral business. Futuredontics established a corporate Web site, which it registered with the United States Copyright Office. Without seeking Futuredontics' permission, AAI subsequently linked its own Web site to certain Futuredontics Web pages, which were surrounded by a frame featuring the AAI logo, information on AAI, and "links to all of AAI's other web pages." Futuredontics sued AAI, claiming both copyright and trademark infringement. AAI moved to dismiss the copyright infringement claim, arguing that the framed version of the Futuredontics Web page did not constitute an unauthorized derivative work and that Futuredontics had not stated an infringement claim. The district court disagreed, ruling that AAI had not been able to show as a matter of law that the framed Futuredontics Web page did not qualify as a derivative work.⁴²

There are a variety of ways in which framing could constitute infringement of the Linked Site's copyrights. The reproduction right may be infringed in that, when the Linked Page is locally cached, the reproduction occurs for the purpose of framing rather than displaying directly, without the copyright owner's permission. The adaptation right may be infringed if the framed work is an unauthorized derivative work of the Linked Page.⁴³ Finally, the public distribution, display and performance rights may be infringed on the grounds that the Linking Site is participating in the Linked Site's distribution, display or performance of its content, but in an unauthorized way because the Linking Site is altering the intended manner of that distribution, display or performance by framing the content.⁴⁴

⁴¹ Futuredontics, Inc. v. Applied Anagramics, Inc., No. CV 97-6991 ABC (MANx), 45 U.S.P.Q.2d 2005 (BNA) (C.D. Cal. 1998) (denying defendant's motion to dismiss). The district court's denial of the plaintiff's preliminary injunction motion, reported at 1997 U.S. Dist. LEXIS 22249, was affirmed by the Ninth Circuit on appeal. Futuredontics, Inc. v. Applied Anagramics, Inc., 152 F.3d 925 (9th Cir. 1998).

⁴² See also, *Journal Gazette Co. v. Midwest Internet Exchange*, 98-CV-130 (N.D. Ind. complaint filed May 4, 1998) (alleging that defendant's ft-wayne.com Web site improperly frames articles from plaintiffs' newspapers).

⁴³ *Compare, Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988) (mounting on tiles of individual photographs taken from plaintiff's published book of photographs constitutes infringement of adaptation right), *with Lee v. A.R.T. Co.*, 125 F.3d 580 (7th Cir. 1997) (mounting of art postcard on ceramic tile does not constitute derivative work).

⁴⁴ See *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002) (holding public display infringed by inline linking of linked site).