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HYPERLINKS, FRAMES AND META-TAGS: AN INTELLECTUAL PROPERTY ANALYSIS

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The introduction of the World Wide Web in 1990 has dramatically fueled the rising popularity of the Internet, and courts have increasingly been called upon to address traditional intellectual property causes of action in this new medium. While courts and commentators

[*244] have thoroughly addressed the intellectual property issues surrounding the use of Internet domain names, n2 few have focused on the intellectual property issues implicated by other basic features of the Internet.

In particular, associational tools such as hyperlinks, n3 framing and meta-tags can have a significant impact on intellectual property rights. After a brief historical perspective and explanation of terms, this article provides an overview of the areas of intellectual property law implicated by these associational tools, an analysis of cases and controversies in these areas, and practical recommendations for avoiding similar conflicts in the future.

I. Historical Perspective and Explanation of Terms

The Web has experienced dramatic growth in recent years, and has transformed the Internet from a primarily passive environment used for email, newsgroups and mailing lists, to an interactive, user-enabled universe filled with vast amounts of information. The effect of the Web on the Internet has become so overwhelming that, to many, the Web and the Internet are mistakenly considered to be coextensive. The individual bearers of the extensive amounts of information on the Web are called Web sites. A Web site may consist of several individual Web pages, each containing text, graphics, and hyperlinks connecting the pages together. The number of Web sites has grown at a phenomenal rate, as shown by the following chart: n4

[*245]

[SEE FIGURE IN ORIGINAL]

This Web site "boom" can be attributed, in part, to a relatively new appreciation for the potential commercial value of the Web and a widespread desire to reach the ever-growing audience of this new medium. Accompanying the growth of the Web, however, is a growing problem of locating desired resources. The magnitude of this problem becomes clearer upon reflecting that each of the 1,269,800 Web sites tallied in August of 1997 may have several associated Web pages of information. Assuming a conservative average of three Web pages per Web site, there are at least 3,809,400 Web pages from which to select information.

Given the vast amount of available information, there is a great need for efficient methods of associating Web pages with each other. Hyperlinks, frames, and meta-tags are just a few of the associational tools currently available. Unfortunately, in addition to their usefulness, these tools are able to adversely affect intellectual property rights through, for example, trademark infringement, trademark dilution, unfair competition and copyright infringement. However, before engaging in legal analysis, it is important to have a basic understanding of how these tools work.

A Web page is constructed using Hypertext Markup Language (HTML), a basic text coding technique which provides display instructions to a Web browser program viewing the file which generates the particular Web page. Through these codes or "tags," a Web browser is instructed where to implement new paragraphs, line breaks, bolded letters, and other display attributes which determine the way a document is presented to the viewer. Without HTML, a Web browser would display plain text in a continuous block without organization. Although HTML tags are hidden from normal view, most Web browsers enable users to

[*246] select a viewing option which allows them to see the HTML coding used to generate a given Web page.

One particular type of HTML tag is the hyperlink, often represented as bolded or underlined text, or as an image. By "clicking" a mouse or other pointing device on a hyperlink, the contents of another Web page referenced by the hyperlink are then displayed by the Web browser. This "jump" to another Web page is the essence of the Web. Hyperlinking enables a Web surfer to connect to other Web pages and retrieve information within seconds and without having to perform new searches or other complex tasks. The extensive use of these interconnections between Web pages is why the medium is termed a "web." A Web page can contain as many or as few hyperlinks as the creator wishes. These branching mechanisms may reference Web pages both within and outside of the Web site, though it is primarily the linking to outside Web pages which raises intellectual property questions.

Related to hyperlinking, "framing" is an associational tool that provides a means for dividing a Web site into separate windows, with optional scroll bars and borders. Each window is displayed in a separate portion of the Web browser screen and functions independently to display an individual Web page. In most instances, each Web page is interlinked by the use of hyperlinks within the framed site, allowing for user interaction without leaving the original framed site or opening a new screen. A user can choose from different topics within one of the individual framed pages within the site by clicking on a hyperlink on one of the framed pages which, in turn, opens a linked Web page within one of the framed portions of the Web site. When used properly, frames can make a viewer's time on a Web page significantly more productive.

Search engines also function to organize information on the Web and help users locate information. Web users utilize search engines such as Yahoo!, n5 Webcrawler, n6 HotBot, n7 Alta Vista, n8 Infoseek, n9 and Lycos, n10 to locate Web sites that match their particular interest. Like any typical computerized searching mechanism, a user types a keyword query into the search engine, and the program searches its database and returns a list of results. The results returned by search engine programs are a list of hyperlinks to related Web pages. The design of each of these immense

[*247] databases is unique to the particular search engine. Each search engine does, however, use a specific kind of software, usually called a spider or crawler, to gather the addresses of Web pages available on the Internet. These programs, in turn, index text on the Web pages, thereby enabling the search engines to associate a user's keyword query with the indexed Web pages.

In addition to analyzing the displayed text, the titles and the addresses of Web pages, search engines make particular use of meta-tag keywords. Meta-tag keywords consist of text coding which is hidden from normal view and located within a specially designated portion of the HTML code which generates the Web page. Web page designers use this hidden HTML code to designate keywords which are communicated to search engine software. This is an important associational tool for the Web page designer since search engines are often unable to properly index a particular Web page based on the text of the page. In its cooperation with a search engine, a meta-tag keyword may be thought of as a "pre- hyperlink" since a hyperlink is often created by a search engine in a search results phase when a user performs a search using that keyword. Unfortunately, uses of trademarks in ways which cause search engines to improperly associate Web pages with those trademarks have created allegations of intellectual property violations.

The development of these associational tools has made the Web an even more valuable and efficient resource by logically associating related information. However, as with any new technology, new rules and regulations are never far behind, and the developing law must carefully balance the power and efficiency of these new tools with their potential impact upon intellectual property rights.

II. Overview of Applicable Law

The following is an overview of the basic areas of intellectual property law that are relevant to any analysis of associational Internet mechanisms, such as hyperlinks, frames and meta-tags.

A. Federal Trademark Infringement and Unfair Competition

To prove trademark infringement under federal law, n11 a plaintiff must show that the defendant's use of his or her federally registered mark is likely to cause an appreciable number of customers to be confused as to

[*248] the source or sponsorship of the defendant's goods or services. n12 Courts have considered a number of different factors in determining whether the defendant's use is likely to cause confusion with the plaintiff's mark. Each of the United States Courts of Appeals has devised its own variation of a list of factors to be considered in determining whether there is the requisite likelihood of confusion for trademark infringement. n13 In comparing two marks to evaluate likelihood of confusion, commonly examined factors include strength of the conflicting marks, degree of similarity between the marks, proximity of the goods or services, the junior user's good faith in choosing its marks and the sophistication of the purchasers. n14

When considering the likelihood of confusion requirement it should be noted that, in addition to "point-of-sale" confusion, "pre-sale" confusion, n15 and "post-sale" confusion n16 are actionable. Point-of-sale confusion can be described as confusion of the purchaser as to the services or goods at the time of purchase. Pre-sale confusion occurs when an infringing use is likely to attract potential customers based on the reputation of the owner of the mark. Post-sale confusion occurs when the public, viewing the purchased goods or services, associates a defendant's goods or services with the plaintiff, regardless of whether the purchaser was confused. n17 Hyperlinking and meta-tag cases illustrate the importance of recognizing confusion that may occur at times other than at the point of sale. For example, when using trademarks as keywords with a search engine, a consumer may be initially confused by the results returned by the search engine; however the confusion may be quickly dispelled by clicking on a returned hyperlink and arriving at the "wrong" Web page, or by simply scanning descriptions of the returned results. In this example, it is not clear that the consumer was confused at the "point of sale," and the recognition of confusion at other times is therefore important.

Regarding pre-sale confusion, in Blockbuster Entertainment v. Laylco the court stated "[t]he fact that a customer would recognize that

[*249] Video Busters is not connected to Blockbuster after entry into a Video Buster store is unimportant. The critical issue is the degree to which Video Busters might attract potential customers based on the similarity to the Blockbuster name." n18 The case of Jeff Foxworthy v. Custom Tees, Inc. specifically addresses the distinction in types of confusion, stating "the fact that [the customer] was not 'actually' confused at the point of sale does not change the likelihood that others would associate defendant's [goods] with plaintiff, whether at the point of sale or in the public after sale." n19 The eleventh circuit has also commented on this matter in the case of United States v. Torkington, n20 where it stated that the question is whether the public, not the purchaser alone, would be confused by the use of the mark. n21 These cases suggest that courts may look to post-sale confusion in considering a likelihood of confusion as well as point-of-sale confusion.

B. Federal Unfair Competition

A federal cause of action for unfair competition derives from 15 U.S.C.

1125(a), commonly known as section 43(a) of the Lanham Act. Different categories of federal unfair competition exist under the Lanham Act including passing off n22 and false advertising. n23 The Lanham Act's prohibition against passing off specifically prohibits a person from using a "false or misleading description of fact, or false or misleading representation of fact" in commerce, which "is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person" n24 This provision provides a cause of action for unfair competition even though the plaintiff's goods are not the subject of federal registrations. n25 This is particularly important where

[*250] a plaintiff attempts to use a generic term as a source identifier. Since a generic term is not eligible for trademark protection, a plaintiff using a generic term will not be protected by trademark law; n26 however, the court may enjoin an infringer from passing itself off as the plaintiff or from passing its product off as the plaintiff's. n27

The requirements for a passing off claim for federal unfair competition are: (1) an association of origin by the consumer between the mark and the first user, and (2) a likelihood of consumer confusion when the mark is applied to the second user's good. n28 Unlike a common law cause of action for passing off which requires either fraud or a distinctive mark or tradename, a federal claim for passing off encompasses a broader area of unfair competition which may be generally described as a misappropriation of the skill, expenditures, and labor of another. n29 Therefore, when most courts speak of "passing off" as a species of federal unfair competition they are referring to passing off without the element of fraud. n30

Also relevant to Internet-based intellectual property analysis is the Lanham Act's prohibition against false advertising. n31 This section specifically prohibits a person from using a "false or misleading description of fact, or false or misleading representation of fact [in] commercial advertising or promotion [which] misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services or commercial activities . . ." n32

To establish a cause of action for false advertising under the Lanham Act, the plaintiff must show that the challenged statement is literally false or, even though the statement is not literally false, that it is likely to deceive or confuse customers. n33 In addition to this first showing, the plaintiff must also show that the defendant's false or misleading representation was material in the sense that it would have some effect

[*251] on the consumers who are making the purchasing decision. n34 This requirement helps prevent frivolous claims by ensuring that the plaintiff's cause of action for federal false advertising is properly based on a likelihood of being damaged by the defendant's representations.

The types of unfair competition encompassed by the Lanham Act are related and often have overlapping requirements; however a finding that the use of a phrase or word does not constitute passing off does not absolve the users of the phrase or word from other forms of unfair competition such as false advertising. n35 In fact, as has been demonstrated, the two are separate causes of action. n36 Therefore, failing to succeed on a cause of action under section 1125(a)(1)(A), which requires a likelihood of confusion, will not defeat a cause of action under section 1125(a)(1)(B), which has no such requirement.

C. Federal Dilution

On January 16, 1996, the Lanham Act was amended to provide for a trademark dilution claim. n37 15 U.S.C.

1127 defines dilution as

the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of (1) competition between the owner of the famous mark and other parties, or (2) likelihood of confusion, mistake, or deception. In a federal dilution action, a plaintiff bears the burden of proving (1) that it owns a famous mark, and (2) that defendant's mark dilutes the famous mark.

Though directed at preventing the erosion of a famous mark's capacity to distinguish goods and services, the Lanham Act does not specify how dilution occurs or how it may be detected and measured. State dilution statutes do, however, shed some light on this unsettled area of the law. Courts applying state dilution statutes recognize that dilution occurs in two ways: (1) when a junior mark causes "tarnishment" of the famous mark and (2) when the use of the junior mark causes "blurring" of the famous mark's power to identify and distinguish goods and services. n38

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Dilution through tarnishment may occur when an accused junior mark is used on unwholesome or inferior goods or services that may create a negative association with the goods or services covered by the famous mark. n39 An example of tarnishment might be a sign saying "Just smoke it," underscored by a marijuana cigarette in the shape of a "swoosh," the well known sign and slogan of Nike's "Just do it" campaign.

In contrast to tarnishment, the blurring theory of dilution focuses on the activities of a junior user which diminish the distinguishing and identifying power of a famous mark. The case of Panavision Intern., L.P. v. Toeppen states that blurring "involves a whittling away' of the selling power and value of a trademark by unauthorized use of the mark." n40 In this way, the use of the junior mark diminishes the power of the famous mark to quickly call to mind and distinguish the goods or services associated with that mark.

Although confusion is specifically excluded from the dilution inquiry by

1127 of the Act, the concept of confusion is related to the definition of blurring. The case of Ringling Bros. v. Utah Division of Travel n41 sheds some light on the relationship of confusion to blurring and the reason for its exclusion from the dilution inquiry. The court stated that the Lanham Act is concerned with protecting customers from "source confusion." n42 The Lanham Act seeks to prevent consumers who see the junior mark from believing that the goods or services bearing the mark are in some way affiliated with the owner of the senior mark. n43 This type of source confusion is not a consideration when performing a dilution inquiry. n44 Rather, the focus of dilution is upon protecting the property interest vested in the owner of the famous mark. n45 The protection of famous marks against blurring prevents individuals who see the junior mark and the famous senior mark from associating the two, thereby diluting the power of the famous mark to "identify and distinguish" its goods or services. n46 This association, which may be

[*253] thought of as a type of confusion, occurs when the similarities between the two marks are so great that a link between the marks is formed which makes the famous mark call to mind the junior mark, or the goods or services of the junior mark. n47 A finding that this type of injury has occurred does not, in a strict logical sense, depend upon the presence of the source confusion which is a primary focus of the Lanham Act.

The Federal Trademark Dilution Act also provides an effective means of defense against a dilution claim. First, the Act has addressed the commercial use issue by stating in section 1125(c)(4)(B) that the non-commercial use of a mark shall not be actionable under the anti-dilution provision of the Act. Second, the Act also states in section 1125(c)(3) that the Federal Dilution Act preempts any state dilution action if a defendant has a federal trademark registration.

D. Copyright Infringement

Copyright law confers five exclusive rights upon the owner of a copyrighted work: (1) the right to reproduce the copyrighted work; (2) the right to prepare derivative works based on the copyrighted work; (3) the right to distribute copies or phonorecords of the copyrighted work to the public; (4) the right to perform the work publicly; and (5) the right to display the copyrighted work publicly. n48 The violation of any of these rights may constitute an actionable infringement. To prove copyright infringement, a plaintiff must establish the ownership of a valid copyright and that one of the previously mentioned rights has been infringed. n49

To infringe upon the owner's exclusive right to reproduce, it is not a necessary requirement that the defendant have made an exact copy of the copyrighted work. Courts have used the phrase "substantial similarity" to define the level of similarity that is necessary, along with a valid copyright, to establish copyright infringement. n50 Copyright law does not protect ideas alone, but rather the expression of ideas, and the accused work must therefore be substantially similar both in idea and in expression to the copyrighted work. n51 The means used to reproduce a

[*254] copyrighted work is also important to the issue of infringement. The accused work must have been copied from the original copyrighted work and not have been the product of independent coincidental effort, or there is no infringement of the exclusive rights conferred by law upon the owner. n52

In addition to the right to reproduce the copyrighted work, the copyright owner has the exclusive right to prepare derivative works based on the copyrighted work. n53 A derivative work is defined in 17 U.S.C.

101 as:

a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work." n54

For a work to be considered a derivative work the work must first contain originality and second, be made lawfully as described under 17 U.S.C.

103(a). n55 The term "lawfully" refers to permission granted by the true copyright owner. Therefore, one who is found to have derived a work from a copyrighted work would be liable for infringement if the derivation was made without the owner's permission. The standard which courts have used in determining the amount of originality needed for a work to be considered a derivative work has been that the derivative work must make a variation on an underlying work that is considered more than "merely trivial." n56 If the level of originality is considered more than "merely trivial" and the person seeking a copyright has lawfully received permission to create the derivative work, the author of the adaptation will be entitled to his or her own derivative copyright which will be separate from the copyright contained in the underlying work. n57 The level of originality required does vary among the United States Courts of

[*255] Appeals, leading to uncertainty as to how the law will apply to the new medium of the Web.

E. State Unfair Competition

Unfair competition on the state level is a term that encompasses many different theories of immoral behavior in the marketplace. State laws of unfair competition are intended to prevent improper behavior which injures the reputation and good will of another business. Like many other areas of the law, the law of unfair competition continues to grow, providing solutions for practically any new form of marketplace misconduct. Of the many areas covered by this body of law, the state law doctrines of misappropriation, passing off and dilution are the three most relevant to the regulation of the Web.

1. Misappropriation

Misappropriation is a common law form of unfair competition created by courts. In a misappropriation claim, a defendant is accused of copying or appropriating a plaintiff's creation that is not protected by trademark, copyright or patent law. For a typical misappropriation claim to be successful, a plaintiff must prove three different factors: (1) that the plaintiff has made a substantial investment of time, effort, and money in creating the thing misappropriated, such that the court can characterize that "thing" as a kind of property right; (2) the defendant has appropriated the "thing" at little or no cost, such that the court can characterize the defendant's actions as "reaping where it has not sown;" and (3) the defendant's acts have injured the plaintiff, such as by a direct diversion of profits from the plaintiff to the defendant or a loss of royalties that the plaintiff charges to others to use the thing misappropriated. n58

Since the misappropriation cause of action is broadly tailored, plaintiffs commonly incorporate this cause of action into their infringement claims. This is particularly due to the fact that misappropriation claims are not restrictive in nature, unlike trademark infringement claims wherein courts are continuously adding restrictions. However, certain applications of a misappropriation cause of action fail in light of federal preemption challenges. n59

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2. Passing Off

Passing off is the oldest of all the unfair competition theories. n60 Basically, passing off occurs when a defendant is making a form of false representation that causes consumers to believe that the defendant's goods or services come from the plaintiff. n61 To prove passing off a plaintiff must first show that a defendant is duplicating or simulating the plaintiff's distinctive mark. n62 This mark must be inherently distinctive or have acquired secondary meaning for this cause of action to be supported. n63 Secondly, the plaintiff must demonstrate that the duplication or simulation which is performed by the defendant's goods or services caused a likelihood of consumer confusion about the source of the goods or services of the plaintiff. n64

Additionally, in an action for unfair competition due to passing off, wrongful intent to confuse is not required. In fact, the only time wrongful intent may be required is if the plaintiff cannot prove that he or she has an inherently distinctive mark or that the mark has acquired secondary meaning. n65

3. State Dilution

Dilution provides a cause of action in areas of unfair competition not covered by the passing off doctrine. n66 The dilution doctrine has now been codified in the statutes of a majority of states. n67 Each of these states has adopted a version of the Model State Trademark Act, which states in

12:

Likelihood of injury to business reputation or of dilution of the distinctive quality of a mark registered under this Act, or a mark valid at common law, or a

[*257] trade name valid at common law, shall be a ground for injunctive relief notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods or services. n68

In 1992 a revision was made to the state Model Bill which provided that a mark must be famous. The Bill also provided for a seven-part list of factors to be used in determining whether a mark is famous. n69 Furthermore, the 1992 version of the Model State Trademark Bill also defined dilution as "the lessening of the capacity of a mark to identify and distinguish goods or services, regardless of the presence or absence of (a) competition between the parties, or (b) likelihood of confusion, mistake or deception." n70

While many states have adopted their own form of trademark dilution law, state dilution generally requires that a mark be distinctive and that the defendant's mark is likely to dilute the plaintiff's mark. This dilution occurs in either of two ways: (1) when a junior mark causes "tarnishment" of the famous mark and (2) when the use of the junior mark causes "blurring" of the famous mark's power to identify and distinguish goods and services. n71

While the Federal Trademark Dilution Act is derived from state causes of action for dilution, there are differences between the two. First, the Federal Trademark Dilution Act specifies that the mark in question must be a famous mark. In fact, the Act specifically states that in determining whether a mark is distinctive and famous a court may consider any of the factors mentioned in section 1125(c). n72 In comparison, a state cause of action for dilution requires that a mark be distinctive. n73 Second, while a state cause of action requires that a plaintiff prove a likelihood of dilution of its trademark, as specified above in the Model State Trademark Act, the Federal Trademark Dilution Act requires that the plaintiff prove that the defendant's use caused dilution of its mark. n74 These differences show that a tougher burden of proof is faced by a plaintiff bringing a federal trademark dilution cause of action as opposed to a state claim.

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It should be noted that the First Amendment may provide an effective means of defense against a dilution claim. In *L.L. Bean v. Drake Publishers*, ⁿ⁷⁵ the First Circuit held that First Amendment considerations provide a limitation to a cause of action for dilution in a case in which the defendant has made a non-commercial use of the plaintiff's mark. ⁿ⁷⁶ The reasoning for this limitation is that if the owner of a mark is given the power to restrict the usage of its mark in a non-commercial atmosphere, this will directly conflict with the free speech and communication of ideas. ⁿ⁷⁷ However, commercial use or speech has been shown to be less important than other types of usage, thereby justifying more stringent regulation. ⁿ⁷⁸

F. Fair Use

Fair use is a defense to a cause of action for trademark or copyright infringement. Different criteria are used in each of these intellectual property fields for finding a defense of fair use.

1. Trademark Fair Use

While a trademark will protect a word which is used by a manufacturer or merchant to identify goods and distinguish them from others, ⁿ⁷⁹ trademark law will not prevent the use of such a word in good faith with a primary purpose of describing a product or service, and not to infringe the trademark resembled by it. ⁿ⁸⁰ Several different factors are

[*259] considered in determining whether a court will determine that a use is an infringing use or a fair use.

The first factor to be considered is the manner in which the word or mark is being used by the defendant. n81 The only use of a word which will qualify as a fair use will be a use that is not promoted in a trademark sense. n82 To determine whether such a use is being promoted in a trademark sense, factors such as the visual placement, font size, and prominence of the word are considered. n83 Since visual placement in a non-prominent area is not characteristic of trademark usage, such a finding would be considered fair use. n84

The second factor to consider in deciding whether a use is a fair use is whether the defendant is using the word or mark in good faith. n85 A showing of intentionally using another's word or mark for the purpose of feeding upon the good will of that individual will prompt a court toward finding a defendant's bad faith and therefore, lack of fair use. n86

The final factor to consider in determining whether a trademark use is a fair use is whether the use of the word or mark is likely to confuse consumers. n87 A finding by the courts that a defendant's use of a word or mark is likely to cause confusion will most likely hinder the court from also considering the use a fair use and lead to a finding of infringement. n88

2. Copyright Fair Use

A fair use defense also exists in copyright law, creating limitations on the exclusive rights enjoyed by owners of protected works. In considering whether a fair use defense exists, Congress supplied the courts with four factors to consider: the purpose and character of the accused use; the nature of the copyrighted work; the importance of the portion

[*260] used in relation to the copyrighted work as a whole; and the effect of the accused use on the potential market for or value of the copyrighted work. n89 These factors of any use are in no way definitive, but instead act as factors that are to be balanced in equity by a court. n90 The Supreme Court hinted as to the strength of individual factors in Harper & Row Publishers v. Nation Enterprises, observing that the fourth factor, the effect of the accused use on the potential market or value of the copyrighted work, was "undoubtedly the single most important element of fair use." n91

In reference to the second factor, the nature of the copyrighted work, Congress added a final sentence to 17 U.S.C.

107 in 1992 stating that "[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." This addition shows Congress' concern as to the importance of published vs. unpublished works. This importance can be seen, once again, by the Harper & Row case where the court took into consideration whether the plaintiff's work was published or unpublished. There the court stated, "[u]nder ordinary circumstances, the author's right to control the first public appearance of his undissemated expression will outweigh a claim of fair use." n92 The logic behind this statement is that prepublication use is usually not seen as a fair use since it contradicts the copyright author's vital right to be the first to publish his or her work.

The third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, takes into consideration exactly what portion of the copyrighted work was used by the defendant and the value of this portion. For this factor a court will usually consider whether the defendant's work copied a larger portion of the plaintiff's work than is necessary to project the defendant's purpose. n93 If the amount copied is substantially larger, a court will lean toward not finding fair use as a defense to copyright infringement. n94

The final factor, the effect of the use upon the potential market for or value of the copyrighted work, was determined to be the most important by the Harper & Row court. n95 This factor takes into account

[*261] that merely copying a plaintiff's copyrighted work may not negatively affect the market for her copyrighted work. One commonly known means for testing whether there is in fact an effect on the plaintiff's market is whether both the plaintiff's and defendant's works perform the same function. n96 When both works perform the same function a court might find that a defendant's work may substitute for the plaintiff's work, thereby affecting the plaintiff's market. Therefore, a finding that the defendant's work potentially affects the plaintiff's market will weigh against a finding of fair use.

III. Judicial Review of Internet Activities

A. Hyperlinks

1. Ticketmaster

The currently pending case of Ticketmaster v. Microsoft addresses the implications of hyperlinking without permission. n97 Ticketmaster filed suit against Microsoft for improperly using Ticketmaster's name and logo on a Microsoft Web site, "Seattle Sidewalk." n98 The use of "deep" hyperlinks to specific pages within the Ticketmaster Web site would allow a user of the Seattle Sidewalk Web site to bypass all policies, service information and ads provided on the Ticketmaster homepage and go directly to Ticketmaster's event listing to purchase tickets. This would not have happened if the hyperlinks from Seattle Sidewalk had been "surface" hyperlinks directed to the Ticketmaster homepage instead of to one of the subsidiary pages within the Web site. Ticketmaster alleged that due to this direct linking which also used Ticketmaster trademarks, Microsoft benefited from Ticketmaster's trademarks and name. n99

One interesting note in the history of this case is that before the suit began, the companies were in negotiations for having hyperlinks from the Sidewalk Web site to the Ticketmaster site, perhaps suggesting Microsoft was concerned about the legal bases for their intentions. After the negotiations failed, Microsoft established the links anyway. n100 In

[*262] addition, after the initial Complaint was filed, Ticketmaster filed an Amended Complaint to more specifically reference deep linking, creating an inference that Ticketmaster suspects that merely linking to a homepage may not be actionable. Specifically, the new language in the First Amended Complaint stated, "Some of Seattle Sidewalk's links have circumvented the beginning pages of Ticketmaster's Web site, which display advertisements, products and services of entities with which Ticketmaster contracts, and have linked directly to subsidiary pages of the Web site." n101 The specific language affirms the theory stated above.

Specifically, Ticketmaster alleged numerous claims against Microsoft including the following substantive claims for relief: dilution of Ticketmaster's trademarks under 15 U.S.C.

1125(c); falsely, deceptively and misleadingly representing its association, connection or affiliation with Ticketmaster in violation of 15 U.S.C.

1125(a); unfair competition under the California Business & Professions Code

17200 et. seq.; false and misleading statements under California Business & Professions Code

17500 et. seq.; and unfair competition and unfair business practices under California common law. n102

In its Answer to Ticketmaster's complaint Microsoft admitted that Ticketmaster requested it to alter the Seattle Sidewalk Web site to delete certain references to Ticketmaster. n103 Microsoft's Answer further acknowledges that the two parties have a dispute concerning Microsoft's right to publish facts that are publicly available and that make it convenient for consumers to contact Ticketmaster's Web site. n104 However, Microsoft denies, among other things, that they have wrongfully appropriated or misused Ticketmaster's name or trademarks or engaged in unfair competition; that they have used Ticketmaster's property or goodwill to sell any goods or services; or that they have deprived Ticketmaster of favorable advertising business or opportunities. n105

In response to Ticketmaster's complaint, Microsoft raised eleven affirmative defenses: (1) Assumption of the risk; (2) Estoppel; (3) Fair use; (4) Nominative fair use; (5) Non-commercial use; (6) News

[*263] reporting; (7) Failure to mitigate damages; (8) Failure to state a claim. (9) Preemption; (10) Unclean hands; and (11) First Amendment. n106

Microsoft also filed a counterclaim for declaratory judgment pendant upon the legality of hyperlinking. In the counterclaim Microsoft stated that a judicial determination that it legally used Ticketmaster's URLs is needed in order to "remove any chill from the free workings of the Internet." n107 This counterclaim seems to place a large and realistic burden on the court since, according to the counterclaim, failing to recognize Microsoft's use of hyperlinks as lawful would tend to place a stigma on hyperlinks in general and on their legality. n108

Ticketmaster addressed Microsoft's counterclaim in a Reply, stating that their pending action does not attack the use of hyperlinks in general, but instead, attacks Microsoft's unauthorized use of "deep" hyperlinks to particular pages on Ticketmaster's Web site. n109 Further, Ticketmaster states that this use is an unlawful use and misappropriation of Ticketmaster's property for the commercial use and gain of Microsoft. n110 Additionally, Ticketmaster replies that this unlawful use has unfairly diluted, and is still diluting, its marks and name, as well as diminishing the advertising revenue available to Ticketmaster in return for an increase in Microsoft's advertising revenue. n111

2. Shetland Times

Since the Internet is, after all, a world-wide network, hyperlinking has not been an issue addressed solely in the United States. The United Kingdom has dealt with this matter in *Shetland Times Ltd. v. Dr. Jonathan Wills and Zetnews Ltd.* n112 In that case, Lord Hamilton recently granted an interim interdict, similar to a U.S. preliminary injunction, to stop the Shetland News from making free links to the Shetland Times

[*264] Web site. The plaintiffs own and publish The Shetland Times, a newspaper that carries local, national and international news, while the defendants provide a news reporting service called The Shetland News. n113 Both parties created Web sites based on their news reports.

The Shetland News Web site, however, contained a number of headlines which served as hyperlinks to articles on the Shetland Times Web site. These hyperlinks provided direct access (i.e., "deep" hyperlinks) to the corresponding text that was published on the plaintiff's Web site without the user having to go through the plaintiff's homepage. n114 The plaintiffs also planned to use advertising on their homepage as a source of revenue, but due to the defendants' deep hyperlinks, such advertisements would never be seen by visitors arriving through the defendants' site, leading to a potential loss of revenue. In granting the interim interdict, Lord Hamilton apparently found that it was crucial that all access to the substantive material on the plaintiff's Web site should be obtained exclusively by accessing its Web site through the homepage (i.e., no "deep" hyperlinking), and that there was no materiality to the defendants' defense that the plaintiff was benefiting from its newspaper items being made more available to the public by being disclosed on the defendants' Web site. n115

On November 11, 1997, both plaintiff and defendants agreed to an out-of-court settlement. n116 The terms of the agreement stated that Shetland News would still be able to link to stories that are on the Web site of Shetland Times by the use of headlines, but they must make sure that: (1) each hyperlink that goes to one of Shetland Times' stories uses the legend, "A Shetland Times Story," which must appear under the headline and in the same size; (2) next to each headline there must be a button showing, "legibly," the Shetland Times' masterhead logo; and (3) these legends and buttons are to be hyperlinks to the Shetland Times online headline page. n117

While both parties have agreed to the terms of the settlement, one can argue that Lord Hamilton's granting of the interim interdict suggests that "deep" hyperlinking will not be permitted. On the other hand, it is important to note that the basis for the decision was a peculiar

[*265] interpretation of the copyright cable programming law in Scotland, n118 a concern that has not been expressed in the United States. In addition, identical headlines from Shetland Times articles were copied, to which the U.K. court attached copyright protection. n119 Courts in the United States have been reluctant to extend copyright protection to such types of short expressions.

3. ACLU

A much more important recent decision is American Civil Liberties Union of Georgia v. Miller. n120 In that case, the plaintiffs brought an action for declaratory and injunctive relief challenging the constitutionality of Georgia's "Internet Police" Law. n121 On June 23, 1997, the district court enjoined enforcement of this state statute, a new provision of Georgia's Computer Systems Protection Act that had taken effect on July 1, 1996. n122 While one state legislator criticized those who

[*266] passed the law as "not knowing a gigabyte from a chiggerbite," n123 the state law did provide Georgia citizens additional protection for their trademarks, trade names, seals, logos, and copyrighted symbols. Unfortunately, the statute was ultimately found to have been worded too broadly to survive constitutional scrutiny. n124 More importantly, however, in addition to the statute having been the first of its kind in the country, this recent federal court decision may have a profound impact on the future of intellectual property protection on the Internet.

The "Internet Police" law criminalized n125 the use of any trademark or similar designation on the Internet in a manner that falsely implied that permission for such use had been granted when such permission had not been obtained. Because of the vague wording of the statute, it is unclear whether the statute covered the use of trademarks as hyperlinks on the Web. Mere use of a trademark on a Web page may not imply permission, but that implication arguably is strengthened when the trademark is presented as a hyperlink to the trademark owner's Web page. If mere use of a trademark without a disclaimer in some commercial contexts could be construed to create a likelihood of confusion as to sponsorship, n126 the opportunity to "click" on the trademark and instantly view the trademark owner's Web page may very well do the same, or even imply permission. In addition, because of the broad wording of the statute, it appears to criminalize the use of an e-mail address that fails to include the name of the owner of the e-mail address.

The reasons surrounding the passage of the law are also vague. Representative Don Parsons introduced the law as HB 1630 to prevent fraud and misleading information on the Internet, especially with respect to trademarks and similar designations. n127 However, some wondered whether the statute was passed in the wake of growing popularity for a conservative Web page maintained by Representative Mitchell Kaye n128 that used the address "www.gahouse.com" and included the Georgia Seal and a picture of the Capitol. Others suggested that the legislation was an attempt by BellSouth to affect the outcome of a domain name dispute with the owner of an Internet directory service at

[*267] "www.realpages.com," n129 a suggestion that BellSouth strongly denied.
n130

Regardless of the reasons behind the legislation, there was a perceived negative impact on the state's image as a leader in technology because of an apparent lack of understanding of the Internet. The president of one high-tech Atlanta firm was prompted to comment that "[t]he law is so poorly written it's obvious the author didn't understand the Internet. I'm afraid Georgia will be viewed as a technological backwater." n131 In response to the legislation, a diverse coalition of fourteen plaintiffs, including the ACLU, the Electronic Frontier Foundation, State Representative Mitchell Kaye, and others, filed suit in the United States District Court. n132 In this suit the plaintiffs argued that enforcement should be enjoined because the statute violates constitutional protections of free expression, association, access to information, and privacy, as well as being substantially overbroad and unconstitutionally vague. In addition, because the statute attempted to regulate interstate commerce occurring wholly outside the borders of the State of Georgia, the plaintiffs argued that the statute was a violation of the Dormant Commerce Clause of the United States Constitution. n133

According to the plaintiffs' brief in support of their motion for preliminary injunction, the plaintiffs conceded that while the State may have an interest in laws that legitimately secure intellectual property rights, "the State may not suppress protected expression under the thin guise of protecting intellectual property." n134 Quoting one court, "It offends the Constitution . . . to invoke [a state intellectual property statute] as a basis for enjoining the noncommercial use of a trademark by

[*268] a defendant engaged in a protected form of expression." n135 The plaintiffs also noted that there were already numerous other less restrictive civil and criminal remedies to protect intellectual property. n136 Thus, it was argued that the Act's broad restrictions were not narrowly tailored to serve any compelling state interest and were simply content-based restrictions upon protected expression. n137

The plaintiffs also argued that the Act attempted to directly regulate commerce occurring wholly outside the borders of the state of Georgia, and was thus per se invalid. n138 According to the Dormant Commerce Clause of United States Constitution, n139 state authority is severely limited in areas which affect commerce occurring entirely outside the state. n140 Apparently, if a prohibited message merely passed "through" Georgia, the parties to the communication would have violated the law. n141 For example, if a Web page maintained by one party in California were accessed by a second party in New York, both parties are criminals under the Georgia statute if the data happened to pass through Georgia. n142

The district court agreed that the statute was unconstitutional under the First Amendment. n143 The court found that the statute was not narrowly tailored to achieve fraud prevention because it "instead sweeps innocent, protected speech within its scope" and "applies regardless of whether a speaker has any intent to deceive or whether deception

[*269] actually occurs." n144 In essence, the court stated that "the statute was not drafted with the precision necessary for laws regulating speech." n145

More importantly from a national perspective, however, is the court's treatment of the hyperlinking issue. According to the court, a fair reading of the law, as written, is that it prohibits the current use of Web page links. n146

The linking function requires publishers of Web pages to include symbols designating other Web pages which may be of interest to a user. This means that 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. n147

The court went on to state that the defendants had not articulated a compelling state interest that would be furthered by restricting the linking function to avoid this appearance of permission. n148

Thus, on one hand, the court clearly attached First Amendment importance to hyperlinking, arguably creating a "right to link." On the other hand, however, the court noted that hyperlinking would "imply" to many users that permission for a hyperlink had been obtained. n149 Because such an "implication of permission" ordinarily would result in a finding of infringement outside of the Internet context, n150 the Miller court's opinion arguably suggests that the usual rules governing trademark infringement and unfair competition actions may not apply with equal force where hyperlinks are concerned.

Moreover, as the court correctly noted, protection against the infringement of trademarks and service marks is available through a variety of causes of action under both state and federal law other than those provided by the Georgia Act. Consequently, if the "right" to link recognized by the Miller court is, in fact, grounded in the First Amendment, the consequences of its recognition may extend far beyond the legislation actually at issue in that case. Specifically, the First Amendment presumably would restrict applications of those causes of

[*270] action as well, n151 leaving the ability of trademark owners to prevent use of their marks in the hyperlinking context subject to question.

This decision also affects the use of graphical images as hyperlinks, a practice many may have considered wrong despite approving of plain text hyperlinks. While the likelihood of confusion may be considered to be greater, many graphical images also carry copyright protection. However, as noted above, the legislation also referred to "copyrighted symbols," and the court discussed the widespread use of "symbols" and "seals" in the Web's linking system. n152 Thus, this decision arguably includes graphical image hyperlinks within this newly created "right to link." Furthermore, since frames and search engine manipulation are logical extensions of the right to link, this decision raises the implication that the First Amendment may also reach these particular useful methods which are available to the Web page creator.

The Miller decision stands parallel to the recent U.S. Supreme Court decision in *Reno v. ACLU*, n153 which generally focused on the importance of free speech on the Internet. In this decision, portions of the federal Communications Decency Act (CDA) were declared unconstitutional restrictions of free speech. n154 In a 7-2 decision written by Justice Stevens, a thorough analysis illustrated how free speech would have been adversely affected by the CDA. The Court opined that although the state had a compelling interest in the protection of minors from pornographic and indecent material, the CDA was overly vague. n155 Particularly of interest was the Court's distinction between commercial and non-commercial speech, wherein non-commercial speech is deserving of a higher level of protection. n156 This would seem to suggest that standard hyperlinking for non-commercial use will fall within the domain of this case while hyperlinking for commercial use may not. In any case, the importance of First Amendment issues is affirmatively portrayed by both the *Reno v. ACLU* case and the *ACLU v. Miller* case.

[*271]

B. Frames: Total News

One recent dispute, *Washington Post v. Total News*,¹⁵⁷ caught the attention of many Internet users. In *Total News*, the plaintiffs, *Washington Post Co.*, *Time Inc.*, *Cable News Network Inc.*, and *Reuters New Media Inc.*, among others, brought multiple causes of action against the defendants, *Total News Inc.* and other related parties. Included in these causes of action were misappropriation, federal trademark dilution, trademark infringement, false designation of origin, false representations and false advertising, trademark infringement and unfair competition under state law, dilution under state law, deceptive acts and practices, copyright infringement, and tortious interference. The plaintiffs alleged that the defendants designed a parasitic Web site which, instead of having its own material, simply republished the news and editorial content of Web sites that already existed so as to unfairly attract advertisers and users.¹⁵⁸

The plaintiff's cause of action for misappropriation alleged that *Total News* had unfairly misappropriated valuable commercial property that belonged to the plaintiffs by causing the plaintiffs' Web sites to appear "within" one of the frames belonging to *Total News*.¹⁵⁹ The plaintiffs also alleged that the defendants' conduct constituted misappropriation and unfair competition under the common law of the State of New York since the defendants' site took the entire commercial value of the material located on the plaintiffs' site and sold it to others for the defendants' own profit.¹⁶⁰

In the federal trademark dilution cause of action the plaintiffs claimed they were in possession of some of the "most famous trademarks used in interstate commerce in the United States."¹⁶¹ Plaintiffs alleged that the actions of the defendants diluted and detracted from the distinctiveness of the plaintiffs' trademarks, causing damage to the plaintiffs and the "business and goodwill" inherent in their trademarks. Therefore, the plaintiffs alleged that the defendants were in violation of 15 U.S.C.

1125(c).¹⁶²

[*272]

Addressing the trademark infringement cause of action, the plaintiffs alleged that the defendants' unauthorized use of their famous trademarks in connection with unauthorized advertisements was likely to cause confusion and to deceive consumers as to the source of origin of the advertisement which was in violation of

32 of the Lanham Act. n163

In another cause of action against the defendants for false designation of origin, false representation and false advertising, the plaintiffs alleged that, by the defendants' using the plaintiff's marks, they caused consumers to believe that the defendants were in some way affiliated with the plaintiffs and therefore the defendants were making "false, deceptive, and misleading statements." n164 These statements, in turn, constituted a "false representation and false advertising" which was performed in connection with services that were distributed in interstate commerce, therefore in violation of

43(a) of the Lanham Act. n165

In a separate cause of action, the plaintiffs alleged that the defendants' actions regarding their Web site constituted trademark infringement and unfair competition in violation of their rights under the common law of the State of New York and N.Y. Gen. Bus. Law

368-e. n166 The cause of action for dilution under state law alleged that the defendants' actions were likely to "dilute and detract" from the characteristic distinctiveness of the plaintiffs' trademarks, which would lead to damage upon the plaintiffs and the business and goodwill of the plaintiffs' trademarks. n167 Therefore, it was also alleged that the defendants were in violation of the New York Anti-dilution Statute, N.Y. Gen. Bus. Law

368-d.

The plaintiffs further claimed that the acts of the defendants constituted deceptive acts and practices in violation of N.Y. Gen. Bus. Law

349-350. n168

In the plaintiffs' cause of action for copyright infringement the plaintiffs alleged that the defendants infringed the plaintiffs' copyrighted material by republishing the material or by making it available to the public without first receiving permission to do so. By doing this the plaintiffs claimed that the defendants were in violation of several of the

[*273] exclusive rights belonging to the plaintiffs, which are enumerated in 17 U.S.C.

106. n169

In the final cause of action for tortious interference, the plaintiffs alleged that the defendants intentionally created a Web site to display third-party advertising material at the same time "and in competition" with the advertising material located on the plaintiffs' sites. n170 The plaintiffs alleged that the defendants made the plaintiffs' performance of advertisement contracts they already possessed more burdensome. The plaintiffs also alleged that this newly applied burden from the defendants interfered with previously bargained for advertising space which was negotiated for between the plaintiffs and their clients. n171

On the Total News Web site, activation of a hyperlink to an external site opened the associated external page within one of the framed portions of the Total News homepage while leaving the Total News logo, commercial advertisements and URL on the screen surrounding the activated page. The plaintiffs claimed that this method of advertising was the "Internet equivalent of pirating copyrighted material from famous newspapers, magazines or television news programs," and that the defendants' page simply took parts of competitive publications and used them for their own financial benefit. n172

While many observers were anxious for a court to address the various legal issues presented by this conflict, Total News and the other defendants settled this controversy n173 by agreeing to stop the framing of plaintiffs' Web sites. While being far from conclusive, this settlement could suggest that hyperlinking in a framed arrangement could be actionable under at least one of the legal claims asserted in the Total News complaint. Interestingly, framing on the Total News Web site continued after the settlement. This framing, however, is limited to sites belonging to those who were not a party in the above-mentioned settlement, implying Total News believes it is doing nothing wrong. The settlement also allows Total News to continue linking without framing, which they currently are doing.

[*274]

C. Meta-tags

1. Playboy

In the first meta-tag case, *Playboy Enterprises, Inc. v. Calvin Designer Label*, n174 the district court issued a preliminary injunction ordering the defendants to cease all use of the plaintiff's registered trademarks in any fashion. In this case the defendant was using the registered trademarks PLAYMATE and PLAYBOY as meta-tag keywords as well as domain names on the Internet and on different Web pages within their sites at Internet addresses "www.playboyxxx.com" and "www.playmatelive.com." n175

In response to Calvin's use of the Playboy trademarks, Playboy filed a motion seeking a preliminary injunction for trademark infringement, unfair competition and dilution. In granting Playboy's preliminary injunction, the court ruled that Playboy demonstrated a sufficient (1) likelihood of success on the merits of its trademark infringement, unfair competition and dilution claims, (2) showing of irreparable harm if they are not granted a temporary restraining order pending hearing on their motion for a preliminary injunction, (3) balance of hardships tipping in their favor, (4) and the absence of any public interest factors that stand against the issuing of the relief sought by the motion. n176

In the court's order Calvin was preliminarily enjoined from, among other things: using the Playboy and Playmate trademarks, any terms similar to these trademarks, or any terms likely to cause confusion within meta-tags, domain names, or Web sites; using the trademarks on their goods or services in a manner which is likely to create an erroneous belief that the goods or services are authorized by Playboy; and engaging in any activities which may cause a consumer to believe that the defendant's goods or services are sponsored, authorized, licensed or authorized by the plaintiff. n177

Although this case seems to shed some light on the potential causes of action concerned with search engines, the plaintiff's infringed marks were also being used as domain names of the defendant's Web site; thus, this decision may not have been decided solely because of meta-tags,

[*275] but instead on the basis of domain name usage, an area presently being litigated as an issue of trademark infringement.

2. Insituform

In another recent case, *Insituform Technologies, Inc. v. National EnviroTech Group*,ⁿ¹⁷⁸ the issue of infringing meta-tag usage was once again addressed. Insituform filed a motion for preliminary injunction on July 31, 1997, claiming trademark infringement and unfair competition. In this case, National EnviroTech, a competitor of Insituform, placed meta-tags within the HTML code for its Web site referencing Insituform's registered trademarks INSITUFORM and INSITUPIPE. This designation would lead keyword searches on search engines to return National's Web site as well as Insituform's, thereby potentially showing an association between the Insituform and National Web sites.

On August 26, 1997, the court signed a final judgment on consent against the defendant National Envirotech.ⁿ¹⁷⁹ This final judgment was based on a settlement agreement calling for National to delete Insituform's federally registered trademarks and service marks INSITUFORM and/or INSITUPIPE from the meta-tag section of the National Liner Web site, to submit or resubmit the National Liner Web site to different Internet search engine companies, and in addition, to send a letter to each of these search engine companies with a copy of the final judgment on consent and the plaintiff's complaint.

Since this recent case was settled by consent agreement, it lacks the judicial direction many Internet users presently seek regarding meta-tag usage. The defendants did, however, agree to the removal of all meta-tag references which may signify either that they feel there may in fact be a cause of action against this kind of meta-tag usage, or that they simply did not wish to commence litigation in an area containing practically no guidance from the courts.

[*276]

3. Oppedahl & Larson

In the most recent case addressing the use of meta-tags, *Oppedahl & Larson v. Advanced Concepts*,¹⁸⁰ the plaintiff brought an action for federal unfair competition, federal dilution, common law unfair competition, and common law trademark infringement for the defendant's use of the plaintiff's trademark *OPPEDAHL & LARSON*.¹⁸¹ In filing the complaint Oppedahl stated that the defendant's Web sites contained their trademark numerous times within meta-tags and that when a search report was performed using the Altavista search engine, the defendant's Web pages were returned as well as their own.¹⁸² In fact, in the complaint, Oppedahl specifically states that after viewing the returned URLs from the search engine, they noticed no reference to their trademarks and instead were required to look at the "underlying source document" to find the references to their mark.¹⁸³

Although the defendants have removed all references to Oppedahl & Larson on its Web sites, since the civil action still proceeded, those seeking an answer to the relevance of meta-tags in an infringement action may have some judicial guidance in the near future.

IV. Defenses

Federal claims against hyperlinking, framing and meta-tagging including trademark infringement, trademark dilution, and copyright infringement are often weak since many hyperlinks do not use actual trademarks, the uses are not "commercial," the trademarks are not "famous" (as required by the dilution statute), or an implied license arguably exists in light of URL advertisement. Thus, state claims, which often involve less defined areas of law, may have been more problematic for Total News and Microsoft.

While federal copyright preemption is certainly a defense to consider against state law claims,¹⁸⁴ the recent case, *American Libraries Association v. Pataki*¹⁸⁵ directly addressed state regulation of the Internet.

[*277] In Pataki, the plaintiffs alleged that New York Penal Law 235.21(3) (New York Act), a state Internet obscenity law, was unconstitutional because it unduly burdened interstate commerce in violation of the Commerce Clause of the U.S. Constitution. n186 The court stated that the New York Act represented an unconstitutional intrusion by one state into interstate commerce (i.e., a "dormant commerce clause" violation) and granted the plaintiffs a preliminary injunction enjoining enforcement of the Act. n187 The decision specifically states that regulation of the Internet by separate states needs to be cohesive, or users of the Internet will be lost in an array of differing state imposed laws. With different state laws regulating the same Internet, a user would be forced to use the Internet according to the state with the most restrictive regulations, a "lowest common denominator" approach. n188 Therefore, the need for uniformity in this "unique sphere of commerce" required that the New York law be stricken. n189 Thus, the federal copyright preemption doctrine and the dormant commerce clause may offer fertile ground for defending against state law claims.

Of particular interest in the Pataki decision was reference to regulation of interstate commerce from *BMW of North America, Inc. v. Gore*. n190 "[W]hile Congress could enact a law requiring full disclosure of every presale repair to an automobile, no single state could impose such a policy nationwide by imposing economic sanctions aimed at changing the conduct of a tortfeasor in other states." n191 This decision seems to imply that a state law may be declared unconstitutional in its application under the dormant commerce clause without requiring that the state law itself be declared unconstitutional.

V. Recommendations

With little concrete direction supplied by the courts and many new issues becoming relevant in the use of associational tools on the Internet, one preventative measure against a trademark or copyright claim is a common disclaimer. The disclaimer should state that the Web site and owner of the Web site are not sponsored or affiliated with any

[*278] owners of the specific trademarks used on the Web site, including those constituting hyperlinks. Such a disclaimer can go far toward reducing the likelihood of confusion. A statement expressing the hyperlink owner's willingness to remove a hyperlink immediately upon request by the trademark owner may also be an effective provision. This method may prevent an upset Web page owner from immediately filing an infringement suit, instead requesting the removal of a hyperlink or meta-tag if they find its use inappropriate. As well, disclaimers should be placed in an easily accessible area and not hidden within the mass of information on a Web site.

Fortunately, with advancements in technology, one newly available means of preventing an infringement suit from occurring is for the Web page owner to implement Web page protecting software. One example of this useful software is Netscape Server's software tools. These tools can be used to design a Web page to accept only those universal resource locator requests originating at a specific address. All other URLs which are referred to the Web page return only the "404 - file not found" message. n192 This mechanism greatly increases the Web page owner's control over his or her page. Of course, this software is just the beginning and with time new software will become available. One new system which has become available is SiteShield, which is a new concept in Web content protection. SiteShield enables content providers to place copyright-protected images on Web pages, while reducing the fear that they can easily be stolen and re-used. Employing proprietary server-based technology, SiteShield allows Webmasters to simply indicate which images or other content need protection. n193

Technology also poses other solutions by making it possible for a Web site owner to implement the use of passwords and registration to stop access to any particular Web page they choose. Another technological control is the use of dynamic Web pages that have periodically changing URLs. Ticketmaster, for example, employs this method of periodically changing URLs to ensure that Web users can only link to certain of their Web pages.

Another potential solution to problems concerning hyperlinking may be to construct a web-linking agreement. This recent solution has been vigorously opposed by many who point out that one of the central purposes of the Web is to promote effortless linking to different resources. A problem arises however, where, as previously described, a hyperlink falsely suggests association with the host of a linked page, or incorporates copyrighted or trademarked materials from the linked page

[*279] without a license. n194 This situation is a prime example of where a web-link agreement that specifically addresses the terms of the hyperlink would be valuable.

Potential defendants can also take some steps to avoid infringement suits and other intellectual property disputes. A Web site owner can ask the individual who created their Web site whether they have implemented any trademarks in designing the site. Specifically, the owner should inquire as to whether any competitor marks have been used as meta-tags, or have been invisibly embedded within any of the site's pages. Other issues to consider are whether the site's framing techniques make improper use of any competitive marks; and of course, whether competitor trademarks are visibly used on the Web site.

VI. Conclusion

With the Web providing a new medium in the search for information it has also opened a closet filled with new questions relating to traditional areas of intellectual property. Recent case law has been slow in providing guidance to those unfamiliar, as well as familiar, with these areas of intellectual property. Although Web users will have to await better guidance from the courts, there are methods available to minimize liability and the risk of being brought into court to defend an infringement suit.

n1 Recent domain name cases include: *Hasbro, Inc. v. Internet Entertainment Group*, 40 *U.S.P.Q.2d* (BNA) 1479 (*W.D. Wash.* 1996); *BellSouth Corp. v. Internet Classifieds*, No. 1-96-CV-769-CC (N.D. Ga. Apr. 5, 1996); *Roadrunner Computer Sys. v. Network Solutions, Inc.*, No. 96-413-A (E.D. Va. Apr. 25, 1996); *Empress Travel, L.P. v. Network Solutions, Inc.*, No. 96-CV-4503 (E.D.N.Y. filed Sept. 12, 1996) <<http://www.patents.com/empress/empress.sht>>; *Pike v. Network Solutions, Inc.*, No. 96-CV-4256 (N.D. Cal. filed Nov. 25, 1996) <<http://www.patents.com/pike/pike.sht>>; *Hasbro, Inc. v. Clue Computing, Inc.*, No. 97-10065-DPW (D. Mass. Sept. 31, 1997); *Panavision Int'l, L.P. v. Toeppen*, 945 *F. Supp.* 1296, 40 *U.S.P.Q.2d* (BNA) 1908 (*C.D. Cal.* 1996); *Juno Online Services, L.P. v. Juno Lighting, Inc.*, No. 97-C-791 (N.D. Ill. Sept. 29, 1997) <<http://www.Loundy.com/CASES/Juno v Juno.html>>. Recent domain name articles include: Michael B. Landau, Problems Arising Out of the Use of "WWW.TRADEMARK.COM": The Application of Principles of Trademark Law to Internet Domain Name Disputes, 13 *Ga. St. U. L. Rev.* 455 (1997); Carl Oppedahl, How is a Domain Name Like a Cow?, 15 *J. Marshall J. of Computer and Info. Law* 437 (1997); David Hakala & Jack Rickard, A Domain By Any Other Name! (visited Dec. 9, 1997) <<http://www.boardwatch.com/mag/96/oct/bwm9.htm>>; Jack Rickard, Telebits - May 1996: Domain Name Policies Challenged In Court (visited Dec. 14, 1997) <<http://www.boardwatch.com/mag/96/may/bwm5.htm>>; Ira S. Nathenson, Showdown at the Domain Name Corral: Property Rights and Personal Jurisdiction over Squatters, Poachers and other Parasites, 58 *U. Pitt. L. Rev.* 911 (1997); Jonathan Rosenoer, Famous Trademarks (visited Dec. 14, 1997) <<http://www.cyberlaw.com/cylw0296.html>>.

n2 Domain names are labels used to uniquely identify the numerical addresses which are associated with computers connected to the Internet. Domain names consist of words or recognizable combinations of characters, and offer an alternative way of identifying these long and difficult to remember numerical addresses. Domain names usually end with an extension such as ".com", and often they will provide an indication of who owns or is using the domain name, for example, "nike.com".

n3 A hyperlink includes text or graphical images, capable of "transporting" a user to a pre- defined destination on the Web with the click of a mouse.

n4 Robert H. Zakon, Hobbes' Internet Timeline (visited Dec. 14, 1997)
<<http://info.isoc.org/guest/zakon/Internet/History/HIT.html>>.

n5 <<http://www.yahoo.com>>.

n6 <<http://www.webcrawler.com>>.

n7 <<http://www.hotbot.com>>.

n8 <<http://www.altavista.com>>.

n9 <<http://www.infoseek.com>>.

n10 <<http://www.lycos.com>>.

n11 See *15 U.S.C. 1114* (1994).

n12 See, e.g., *Quality Inns Int'l, Inc. v. McDonald's Corp.*, 695 F. Supp. 198, 8 U.S.P.Q.2d (BNA) 1633 (D. Md. 1988).

n13 3 J.T. McCarthy, Trademarks and Unfair Competition 24.06[4] (3d ed. 1995 rev.).

n14 Id.

n15 *Blockbuster Entertainment v. Laylco*, 869 F. Supp. 505, 33 U.S.P.Q.2d (BNA) 1581, 1586-87 (E.D. Mich. 1994).

n16 *United States v. Torkington*, 812 F.2d 1347, 2 U.S.P.Q.2d (BNA) 1292 (11th Cir. 1987).

n17 *Foxworthy v. Custom Tees, Inc.*, 879 F. Supp. 1200, 1216 (N.D. Ga. 1995).

n18 869 F. Supp. 505, 33 U.S.P.Q.2d (BNA) 1581, 1586-87.

n19 879 F. Supp. 1200, 1216.

n20 *United States v. Torkington*, 812 F.2d 1347, 2 U.S.P.Q.2d (BNA) 1166 (11th Cir. 1987).

n21 *Id.* at 1352-53, 2 U.S.P.Q.2d (BNA) at 1170.

n22 *15 U.S.C. 1125(a)(1)(A)* (1996).

n23 *1125(a)(1)(B)*.

n24 *1125(a)(1)(A)*.

- n25 *Coach Leatherware Co. v. AnnTaylor, Inc.*, 933 F.2d 162, 168, 18 U.S.P.Q.2d (BNA) 1907, 1912 (2d Cir. 1991).
- n26 *Blinded Veterans Ass'n v. Blinded Am. Veterans Found.*, 872 F.2d 1035, 1039, 10 U.S.P.Q.2d (BNA) 1432, 1435 (D.C. Cir. 1989).
- n27 *Id.* at 1042-43, 10 U.S.P.Q.2d (BNA) at 1438.
- n28 *Forschner Group, Inc. v. Arrow Trading Co.*, 904 F. Supp. 1409, 1417 (S.D.N.Y. 1995), *aff'd*, 124 F.3d 402, 43 U.S.P.Q.2d (BNA) 1942 (2d Cir. 1997).
- n29 *Am. Footwear Corp. v. Gen. Footwear Co.*, 609 F.2d 655, 662, 204 U.S.P.Q. (BNA) 609, 614 (2d Cir. 1979).
- n30 *Blinded Veterans*, 872 F.2d at 1045, 10 U.S.P.Q.2d (BNA) at 1440.
- n31 15 U.S.C. 1125(a)(1) (1996).
- n32 *Id.*
- n33 *Nat'l Basketball Ass'n v. Motorola Inc.*, 105 F.3d 841, 855, 41 U.S.P.Q.2d (BNA) 1585, 1597 (2d Cir. 1997).
- n34 *Taquino v. Teledyne Monarch Rubber*, 893 F.2d 1488, 1500 (5th Cir. 1990).
- n35 *Forschner Group, Inc. v. Arrow Trading Co.*, 30 F.3d 348, 357, 31 U.S.P.Q.2d (BNA) 1614, 1621 (2d Cir. 1994).
- n36 *Supra* notes 23-25, and accompanying text.
- n37 15 U.S.C. 1125(c) (1996).
- n38 See, e.g., *Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 875 F.2d 1026, 1031, 10 U.S.P.Q.2d (BNA) 1961, 1965 (2d Cir. 1989).
- n39 *Deere & Co. v. MTD Productions, Inc.*, 41 F.3d 39, 44, 32 U.S.P.Q.2d (BNA) 1936, 1939 (2d Cir. 1994).
- n40 *Panavision Int'l, L.P. v. Toeppen*, 945 F. Supp. 1296, 1304, 40 U.S.P.Q.2d (BNA) 1908, 1914 (C.D. Cal. 1996).
- n41 *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev.*, 955 F. Supp 605, 42 U.S.P.Q.2d (BNA) 1161 (E.D. Va. 1997).
- n42 *Id.* at 615, 42 U.S.P.Q.2d (BNA) at 1167.
- n43 *Id.*
- n44 *Id.*
- n45 *Id.*
- n46 *Id.*
- n47 *Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 875 F.2d 1026, 1031, 10 U.S.P.Q.2d (BNA) 1961, 1966 (2d Cir. 1989).
- n48 17 U.S.C. 106 (1996).

n49 *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 18 U.S.P.Q.2d (BNA) 1275, 1296 (1991).

n50 *Id.*

n51 *Passillas v. McDonald's Corp.*, 927 F.2d 440, 442, 17 U.S.P.Q.2d (BNA) 1874, 1875 (9th Cir. 1991).

n52 *Granite Music Corp. v. United Artists Corp.*, 532 F.2d 718, 720, 189 U.S.P.Q. (BNA) 406, 408 (9th Cir. 1976).

n53 17 U.S.C. 106 (1996).

n54 17 U.S.C. 101 (1996).

n55 Section 103(a) states that "[t]he subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully." 17 U.S.C. 103(a) (1996).

n56 McCarthy, *supra* note 12, at 115.

n57 17 U.S.C. 103(b) (1996).

n58 McCarthy, *supra* note 13, 10.51.

n59 17 U.S.C. 301 (1996).

n60 W. P. Keeton, Prosser and Keeton on Torts 130, at 1015 (5th ed. 1984).

n61 *Id.*

n62 *Id.*

n63 *Id.*

n64 *Id.*

n65 *Id.*

n66 *Allied Maintenance Corp. v. Allied Mechanical Trades, Inc.*, 369 N.E.2d 1162, 1166, 198 U.S.P.Q. (BNA) 418, 420 (N.Y. 1977).

n67 Milton W. Handler, Are the State Antidilution Laws Compatible with the National Protection of Trademarks?, 75 *Trademark Rep.* 269 (1985). See also, David S. Welkowitz, Oh Deere, What's to Become of Dilution? A Commentary on the New Federal Trademark Dilution Act, 4 *UCLA Ent. L. Rev.* 1 (Fall 1996).

n68 Model State Trademark Act 12 (1992).

n69 Model State Trademark Act 13.

n70 Model State Trademark Act 1(K).

n71 *Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A.*, 875 F.2d 1026, 1031, 10 U.S.P.Q.2d (BNA) 1961, 1965 (2d Cir. 1989) (applying New York anti-dilution statute). See notes 38-49, *supra*, and accompanying text.

n72 15 U.S.C. 1125(c) (1996).

n73 Model State Trademark Act 12.

n74 15 U.S.C. 1125(c).

n75 *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 1 U.S.P.Q.2d (BNA) 1753 (1st Cir. 1987).

n76 A commercial use is a use that concerns only the commercial or economic interests of a defendant and its audience. *Id.* at 30, 1 U.S.P.Q.2d (BNA) at 1757.

n77 *Id.*

n78 Cases supporting this theory are abundant. See, e.g., *Central Hudson Gas & Elec. v. Public Serv. Comm. of N.Y.*, 447 U.S. 557 (1980); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); *Reno v. ACLU*, 117 S.Ct. 2329 (1997).

n79 Jane C. Ginsburg et al., *Trademark and Unfair Competition Law*, 44 (2nd ed. 1996).

n80 Section 33(b)(4) of the Lanham Act states: That the use of the name, term, or device charged to be an infringement is a use, otherwise than as a mark, of the party's individual name in his own business, or of the individual name of anyone in privity with such party, or of a term or device which is descriptive of and used fairly and in good faith only to describe the goods or services of such party, or their geographic origin. 15 U.S.C. 1115(b)(4) (1996).

n81 *Id.*

n82 *Id.*

n83 *Engineered Mechanical Services v. Applied Mechanical Technology*, 584 F. Supp. 1149, 1158, 223 U.S.P.Q. (BNA) 324, 330 (M.D. La. 1984).

n84 *Id.*

n85 *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Celozzi-Ettelson Chevrolet, Inc.*, 855 F.2d 480, 488, 8 U.S.P.Q.2d (BNA) 1072, 1075 (7th Cir. 1988).

n86 *Id.*

n87 *Lindy Pen Co. v. Bic Pen Corp.*, 725 F.2d 1240, 226 U.S.P.Q. (BNA) 17 (9th Cir. 1984).

n88 *Id.*

n89 17 U.S.C. 107 (1996).

n90 3 M. Nimmer & D. Nimmer, *Nimmer on Copyrights* 13.05(A) (1992).

n91 *Harper & Row Publishers v. Nation Enter.*, 471 U.S. 539, 566, 225 U.S.P.Q. (BNA) 1073, 1083 (1985).

n92 *Id.* at 555, 225 U.S.P.Q. (BNA) at 1079.

n93 *Id.* at 564-65, 225 U.S.P.Q. (BNA) at 1082-83.

n94 *Id.* at 565, 225 U.S.P.Q. (BNA) at 1083.

n95 *Id.* at 566-67, 225 U.S.P.Q. (BNA) at 1083-84.

n96 *Id. at 568, 225 U.S.P.Q. (BNA) at 1084.*

n97 First Amended Complaint, Ticketmaster Corp. v. Microsoft Corp., CV 97-3055 RAP (C.D. Cal. filed Apr. 28, 1997) <<http://www.ljx.com/LJXfiles/ticketmaster/complaint.html>>.

n98 *Id.*

n99 *Id.*

n100 *Id.*

n101 *Id.*

n102 *Id.*

n103 Answer to First Amended Complaint, Affirmative Defenses and Counterclaims, Ticketmaster Corp. v. Microsoft Corp., CV 97-3055 RAP (C.D. Cal. filed May 28, 1997) <<http://www.ljx.com/LJXfiles/ticketmaster/answer.html>>.

n104 *Id.*

n105 *Id.*

n106 *Id.*

n107 *Id.*

n108 *Id.*

n109 Plaintiff Ticketmaster Corporation's Reply to Microsoft Corporation's Counterclaim, Ticketmaster Corp. v. Microsoft Corp., CV 97-3055 RAP (C.D. Cal. filed Jun. 23, 1997) <<http://www.ljx.com/LJXfiles/ticketmaster/reply.html>>.

n110 *Id.*

n111 *Id.*

n112 *Shetland Times, Ltd. v. Dr. Jonathan Wills and Zetnews, Ltd., (Sess. Cas. Oct. 24, 1996) (order granting interim interdict) <<http://www.shetland-news.co.uk/opinion.html>>.*

n113 *Id.*

n114 *Id.*

n115 *Id.*

n116 Jonathan Wills, Shetland Times Internet case settled out of court, The Shetland News (Nov. 11, 1997) <<http://www.shetlandnews.co.uk/headline/97nov/settled/settled.htm> l>.

n117 *Id.*

n118 *Shetland Times v. Shetland News - The Decision (visited Jan. 29, 1998) <<http://www.carltons-dundee.co.uk/features/shetland.htm>>.*

n119 *Id.*

n120 *977 F. Supp. 1228 (N.D. Ga. 1997).*

n121 Ga. Code Ann. 16 9 93.1 (1997).

n122 The new section states: (a) It shall be unlawful for any person, any organization, or any representative of any organization knowingly to transmit any data through a computer network or over the transmission facilities or through the network facilities of a local telephone network for the purpose of setting up, maintaining, operating, or exchanging data with an electronic mailbox, home page, or any other electronic information storage bank or point of access to electronic information if such data uses any individual name, trade name, registered trademark, logo, legal or official seal, or copyrighted symbol to falsely identify the person, organization, or representative transmitting such data or which would falsely state or imply that such person, organization, or representative has permission or is legally authorized to use such trade name, registered trademark, logo, legal or official seal, or copyrighted symbol for such purpose when such permission or authorization has not been obtained; provided, however, that no telecommunications company or Internet access provider shall violate this Code section solely as a result of carrying or transmitting such data for its customers. (b) Any person violating subsection (a) of this Code section shall be guilty of a misdemeanor. (c) Nothing in this Code section shall be construed to limit an aggrieved party's right to pursue a civil action for equitable or monetary relief, or both for actions which violate this code section. Ga. Code Ann. 16 9 93.1 (1997).

n123 Jeffrey R. Kuester, *Cyber-Sheriff's in Town*, Nat'l L. J., July 1, 1996, at C1.

n124 *ACLU, 977 F. Supp. at 1233-34.*

n125 Ga. Code Ann. 16 9 93.1 (1997). The Act also created civil remedies for any violation of the Act. Ga. Code Ann. 16 9 93(g)(1) (1997).

n126 *ACLU, 977 F. Supp. at 1233.*

n127 Letter from Rep. Don Parsons, Georgia State Representative, District 40, to Jeff Kuester, Partner, Thomas, Kayden, Horstemeyer, & Risley, L.L.P. (Apr. 18, 1996) (on file at <<http://www.kuesterlaw.com/parsons.htm>>).

n128 <<http://www.gahouse.com>>.

n129 Because Rep. Don Parsons, the sponsor of the legislation, was an employee of BellSouth, the Electronic Frontier Foundation reportedly accused BellSouth of masterminding the legislation to help their legal battle. <<http://www.news.com/News/Item/0,4,1144,00.html>>.

n130 BellSouth denied sponsorship of the legislation in a letter dated April 25, 1996, stating that "[t]o suggest that BellSouth would sponsor HB 1630 in a desperate attempt to find an alternative remedy to a weak cause of action is absolutely ludicrous." <<http://www.kuesterlaw.com/bell.htm>>. >

n131 *Grass-roots Groups Slow in Responding to New Legal Curbs*, Atlanta Const., May 6, 1996, at C6.

n132 Other plaintiffs include Electronic Frontiers of Georgia, AIDS Survival Project, Atlanta Freethought Society, Atlanta Veterans Alliance, Community ConneXion, Kenneth Leebow, Bruce Mirken, Bonnie Nadri, Josh Riley, John Troyer, and Jonathan Wallace.

n133 Plaintiff's Brief in Support of Motion for Preliminary Injunction, I(D)
<<http://www.efga.org/hb1630/brief01.html>>. >

n134 Plaintiff's Brief in Support of Motion for Preliminary Injunction, I(A)(4)
<<http://www.efga.org/hb1630/brief01.html>>.

n135 *L.L. Bean, Inc. v. Drake Publishing, Inc.*, 811 F.2d 26, 32, 1 U.S.P.Q.2d (BNA) 1753, 1758 (1st Cir.), cert. denied, 483 U.S. 1013 (1987) (refusing to apply Maine trademark anti-dilution statute to enjoin parody using defendant's trademark).

n136 See, e.g., 15 U.S.C. 1125 (1997) (federal remedy for trademark infringement); Ga. Code Ann. 10 1 450 et seq. (1997) (Georgia remedy for trademark and trade name infringement); Ga. Code Ann. 10 1 453 (1997) (unauthorized and deceitful use of name or seal); Ga. Code Ann. 10 1 393 (1997) (unfair and deceptive consumer trade practices); Ga. Code Ann. 10 1 372 (1997) (deceptive trade practices); *Jellibeans, Inc. v. Skating Clubs of Georgia, Inc.*, 716 F.2d 833, 837, n. 6 (11th Cir. 1983) (common law action for unfair competition).

n137 Plaintiff's Brief in Support of Motion for Preliminary Injunction, I(A)
<<http://www.efga.org/hb1630/brief01.html>>. >

n138 Plaintiff's Brief in Support of Motion for Preliminary Injunction, I(D)(2)
<<http://www.efga.org/hb1630/brief01.html>>.

n139 U.S. Const. art. I, 8, cl. 3.

n140 *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989).

n141 Plaintiff's Brief in Support of Motion for Preliminary Injunction, I(D)(1)
<<http://www.efga.org/hb1630/brief01.html>>.

n142 Ga. Code Ann. 16 9 94(4) (1997).

n143 *American Civil Liberties Union of Ga. v. Miller*, 977 F. Supp. 1228, 1232 (N.D. Ga. 1997).

n144 Id.

n145 *Id. at 1233*.

n146 Id.

n147 Id.

n148 Id.

n149 Id.

n150 See, e.g., *University of Ga. Athletic Ass'n v. Laite*, 756 F.2d 1535, 1546, 225 U.S.P.Q. (BNA) 1122, 1130 (11th Cir. 1985).

n151 In other contexts, the use of the First Amendment to restrict the applicability of unfair competition causes of action is well-established. See, e.g., *Cliffs Notes v. Bantam Doubleday Dell Publishing Group*, 886 F.2d 490, 493-97, 12 U.S.P.Q.2d (BNA) 1289, 1291-94 (2d Cir. 1989) (holding trademark "parody" subject to First Amendment protection); *Rogers v. Grimaldi*, 875 F.2d 994, 997-1002, 10 U.S.P.Q.2d (BNA) 1825,

1826-32 (2d Cir. 1989) (holding movie title protected by First Amendment against liability under Lanham Act).

n152 *ACLU*, 977 F. Supp. at 1233.

n153 *Reno v. American Civil Liberties Union*, 117 S.Ct. 2329 (1997).

n154 *Id.*

n155 *Id.* at 2345.

n156 *Id.* at 2349.

n157 *Washington Post Co. v. Total News, Inc.*, No. 97 Civ. 1190 (PKL) (S.D.N.Y. filed Feb. 20, 1997) <<http://www.ljx.com/internet/complain.html>>.

n158 *Id.*

n159 *Id.*

n160 *Id.*

n161 *Id.*

n162 *Id.*

n163 *Id.*

n164 *Id.*

n165 *Id.*

n166 *Id.*

n167 *Id.*

n168 *Id.*

n169 *Id.*

n170 *Id.*

n171 *Id.*

n172 *Id.*

n173 *Washington Post Co. v. Total News, Inc.*, No. 97 Civ. 1190 (PKL), Stipulation and Order of Settlement and Dismissal (S.D.N.Y. Jun. 6, 1997) <<http://www.ljx.com/internet/totalse.htm>>. >

n174 *Playboy Enter., Inc. v. Calvin Designer Label*, 44 U.S.P.Q.2d (BNA) 1156 (N.D. Cal. 1997).

n175 *Id.*

n176 *Id.* at 1157.

n177 *Id.* at 1157-58.

n178 *Insituform Tech., Inc. v. National EnviroTech Group*, No. C-97-2064 EDL (E.D. La., final consent judgment entered Aug. 26, 1997)

<<http://www.cll.com/case1.htm>>; Ann Davis, Web Leaves a Tangled Trademark Issue, Wall St. J., Sept. 15, 1997, at B10.

n179 *Insituform Tech., Inc. v. National EnviroTech Group*, No. C-97-2064 EDL (E.D. La., final consent judgment entered Aug. 26, 1997) <<http://www.cll.com/case1.htm>>. >

n180 *Oppedahl & Larson v. Advanced Concepts*, No. C-97-Z-1592 (D. Colo. filed July 23, 1997) <<http://www.patents.com/ac/complain.sht>>.

n181 *Id.*

n182 *Id.*

n183 *Id.*

n184 *National Basketball Ass'n v. Sports Team Analysis and Tracking Systems*, 939 F. Supp. 1071, 1094, 41 U.S.P.Q.2d (BNA) 1549, 1568 (S.D.N.Y. 1996).

n185 *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997).

n186 *Id. at 161.*

n187 *Id. at 174.*

n188 *Id. at 183.*

n189 *Id.*

n190 *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 566 (1996).

n191 *Pataki*, 969 F. Supp. at 175.

n192 <<http://www.wired.com/news/technology/story/2844.html>>.

n193 <<http://www.maximized.com>>. >

n194 Subcommittee on Interactive Services, Committee on the Law of Commerce in Cyberspace, Web Linking Agreements, Contracting Strategies and Model Provisions, 1997 A.B.A. Sec. Bus. L.