Content providers: “I was framed”

Content providers (owners of copyright in literary material) have challenged the practice of making hyperlinks to their Internet Web sites. Some contend that any unauthorized provision of a link to their Web pages is copyright infringement. It is doubtful, however, that anyone in the US takes such claims seriously.

**Total News suit**

Framing, a new variation on linking, has led to a massive lawsuit by six prominent content providers against a Web entrepreneur whom they accuse of pirating their content. The Washington Post as lead plaintiff, seconded by the Los Angeles Times, the Wall Street Journal (Dow Jones), CNN, Reuters, and Time Warner, have sued Total News of Phoenix, Arizona, and its principals. They claim copyright infringement, trademark infringement, misappropriation, and various other wrongs.

The plaintiffs complain that Total News untastefully framed their Web page content, and they demand that the “piratical” practice stop. (The easiest way to understand how this system operates is to access www.totalnews.com and see it for yourself. To read the complaint filed in this case, see www.ljx.com/internet/complain.html.)

**Netizen reactions**

Netizens are outraged; they see the complaint as yet another attack against the Net from content providers. John Dvorak (PC Magazine, Mar. 3, 1997, and totalnews.com’s link) sees the suit by the “Gang of Six” as “the greatest threat to the Web” yet. Dvorak continues, “The stupidity and danger of such a suit seems beyond comprehension...unless they know exactly what they are doing and are out to destroy the Web.”

His explanation is that this Gang of Six is “worried sick that the Web will fundamentally change the nature of their business, and they want to put a stop to it.” That is, the Gang is “hatching a sinister plot to kill the Web” to preserve the dominance of print-on-paper media. “If the case goes to a judge who cannot understand the Web, then all linking could be challenged. The Web dies. The old media continue.” Dvorak therefore calls on Netizens to “put pressure on the Gang of Six to back off immediately,” possibly by starting a boycott against the publishers.

The Electronic Frontier Foundation’s newsletter, EFFector, (www.eff.org) also frets. However, it dithers (or rather aliases), finding it “not at all clear” whether framing is copyright infringement. EFFector perceives “essentially a conflict” between two theories of copyright law. One legal theory says that claims of copyright infringement “should be interpreted based on what functionally is occurring (that is, on whether it functions just like a traditional infringement).” A competing legal theory says “the issue of infringement turns on what is technically true about the facts.” EFFector maintains that both theories are “consistent with most prior cases.” It therefore concludes:

As with many other areas of the law, now probably is just not the time to settle these issues governmentally, as the technology is moving too rapidly for any branch of government to keep up. EFF calls on the participants in this dispute to please keep the interests of the public in mind.

...Disputes of this nature are best settled by carefully considered arbitration or bilateral compromise, in private, rather than in the judicial system, where decisions can have long-lasting precedence and disastrous fallout.

...Perhaps frames are simply too troublesome and should be abandoned.

...It may be that such extensions [as fram-
ing), like unstable software, should be tested and reviewed in more private, controlled circumstances. It may be a good idea to include in this process review by attorneys and policy analysts with an eye to ferreting out and fixing legal difficulties that may arise, before public release and implementation cause crises of this sort.

...It is incumbent upon the participants in this medium to create industry practices and new forms of netiquette that allow one to make full responsible use of new technologies while still respecting copyright and trademark holders. Courts cannot do this for us.

EFFector is well-meaning but naive—and in several respects, uninformed. There is no respectable "functionality" theory of copyright law. The only legal theory that courts accept is that copyright infringement "turns on what is technically true about the facts." Moreover, it would be impossible for both of EFFector's legal theories to be "consistent with most prior cases." Since they are mutually contradictory, only one of them could be consistent with most precedent. In fact, everything in copyright law, intellectual property law, and perhaps all law as well, turns on what is technically true about the facts. (What is "non-technical" truth about facts? Is it a New Age concept, perhaps "spiritual" truth?)

Copyright law is entirely a creature of federal statute. If the statute does not explicitly call some conduct copyright infringement, it is not copyright infringement.

Thus, Supreme Court Justice Stewart observed that singing a copyrighted song in the shower is not copyright infringement because the statute makes only "public performance" of a work copyright infringement. He then went on to hold for the Court that playing a radio in a fast-food restaurant does not infringe the copyright in a song broadcast over the radio. That is true regardless of the copyright owner's arguments about functional equivalency:

Copyright law does not give a copyright holder control over all uses of his copyrighted work.

Instead, (it) enumerates several rights that are made exclusive to the holder of the copyright. If a person puts a copyrighted work to a use within the scope of one of those exclusive rights, he infringes the copyright. If he puts the work to a use not enumerated, he does not infringe.

Furthermore, the US system of government does not operate the way EFFector states. If any plaintiff sues any defendant, the court cannot say that it will abstain from ruling in the matter because now is just not the time to settle these issues governmentally. Courts must rule for the plaintiff or defendant when a statute says that the plaintiff can sue the defendant. Courts cannot require them to settle the matter in private or have a conference to establish new rules of netiquette. Unless one side decides to cave in, and the Gang of Six surely has no plan to do that, the court cannot duck deciding whether copyright infringement occurred here.

That's just wishful thinking. EFFector, as Jim Glidewell pointed out in an amusing and penetrating critique of EFFector's indecisiveness (www.halcyon.com/jimg/eff_post.txt). Doubtless, Glidewell is too harsh when he condemns EFFector for "impotently bleating," and accuses it of considering its role "to make the net safer" for content providers. However, he makes a telling point when he says that it is unrealistic to expect that revenue-hungry entrepreneurs will wait on the sidelines before exploiting new technology. They won't wait until standards organizations (IEEE?), aided in the review process by lawyers (known well as objective arbiters of the public interest) and policy analysts (academics?), ferret out and repair any difficulties that might arise to cause crises.

Sorting it all out

The linking/framing issue has several aspects, only one of which I propose to address here: whether it is unlawful to link or frame. Another aspect of the issue (suggested by others) is whether the practices are good or bad, beneficial to the public or tasteless and deserving of suppression, supportive of free discussion or destructive of incentives to create literature.

Though I invite reader comment to IEEE Micro or e-mail to me on the latter aspect, at the moment I propose to discuss only the legalities. In a nutshell, there is no legal support for the contention that linking, without additional objectionable conduct, is a wrong. Framing, though it can be more iffy in some circumstances, is generally completely legal.

Linking

Linking, without more, is nothing but the Internet equivalent of providing users with speed dialing or with what they could give themselves by making a bookmark. Only two provisions of copyright law could possibly be relevant to linking. They are sections 106(1) and (3) of the US Copyright Act, which give copyright owners the exclusive rights to reproduce copies of copyrighted works and to distribute copies publicly.

An infringer can violate these provisions of law either by reproducing or distributing a copy (direct infringement), or by causing someone else to do so while knowing that such infringement will occur (contributory infringement). In this case, Total News' infringement by reproduction could only be contributory, for Total News does not itself make any copy. If anything, it causes users and perhaps those caching in servers to make copies. If any distribution to the public occurs, it would be direct, for there is no reason to believe that end users distribute anything publicly.

No copyright infringement by reproduction occurs, because clicking on a link does not result in the user's reproduction of a copy of the copyrighted material. To be sure, the material appears on the user's screen display and is cached in RAM (for some users, on disk, on a FIFO basis like a shift register). Both are transitory and not the kind of copies whose reproduction section 106(1) addresses. (Some Internet service providers cache frequently accessed material, but for how long?) For purposes of US copyright law, a copy must be in a tangible medium, such as paper, magnetic
Getting around a Web site

A link or hyperlink can be a phrase, graphic, or button that you find on the screen of a page when you are Net surfing. (Often it is underlined and in another color.) When you place the cursor over the link, in some browsers a hand icon appears in place of the mouse cursor arrow. When you click, your browser requests the Web page or file that is associated with the URL (Uniform Resource Locator). Conventionally, a link will show in one color (such as blue) if you have not clicked on it, and in another color (such as maroon), if you have previously clicked on it.

An on-site link links you to a different place on the same Web page or to a different page of the same group of associated pages, for example, a single document at a given Web site. Say you are browsing the current issue of IEEE Micro at the Computer Society’s Web site (www.computer.org/pubs/micro/micro.htm). An article shows colored reference numbers or endnote numbers in the text. You click on the number, and the screen changes to the designated endnote. Click on the colored number at the beginning of the endnote, and you return to the body of the page.

An off-site link links you to another Web site. Say you are browsing a Total News site page listing national newspapers. You click on the underlined phrase “Washington Post.” Your net access provider connects you to the Internet, and your browser requests a connection with the Washington Post server (www.washingtontpost.com). Similarly, when you use search engines such as Yahoo or AltaVista, clicking on the link for a document connects you to the Web site where the document is located.

Each page at a Web site has a unique URL. The links shown on the screen are associated in a memory with an appropriate URL to facilitate linking. Without linking, if you wanted to look up cross-referenced material, you would have to write down the URL and then key it in.

A bookmark is a special kind of link used in the Netscape browser. Clicking on the “add bookmark” item at the top of the screen puts the Web page you are viewing into your list of bookmarks. When you want to go back to that Web page, you select it from this list. Links and bookmarks are Internet counterparts of macros or aliases in ordinary programs, and of speed-dialing buttons for telephone systems. A link invokes the character string needed for a URL, obviating the need to enter the character string by keying it in.

The invention of hyperlinking is attributed to Vannevar Bush. (See his article, “As We May Think,” in The Atlantic Monthly, July 1945.) You can learn more about linking in The Netscape Handbook: Learn Netscape, which you can access at http://home.netscape.com/eng/mozilla/3.0/handbook/docs/learn.html. (Trying to key that in will make you appreciate links.)

The 12th century scholar Rashi used something akin to linking. He placed Torah passages at the center of pages, surrounded the passages by commentaries on them, and in some cases placed commentaries on the commentaries around the latter. Later editors then placed Rashi’s commentaries on the last-named commentaries around the latter. For examples, see www.cjs.upenn.edu/Exhibt/lmg0021.jpeg and /lmg0046.jpeg. (Trying to key that in will make you appreciate links.)

A frame, or portion of a page, allows Web site designers to section the screen into different areas so they can structure information and control it more easily. Each area can contain separate information or Web pages. A simple example is when a Web designer sections the screen into two areas: a narrow column on the left and a wide column on the right. The designer places a control panel in the narrow left column, and the information to be presented on the right. The control panel controls what is presented in the right panel. This is a very common use of frames.

For more on framing, see http://developer.netscape.com/library/documentation/htmlguid/frames.htm.
**Micro Law**
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place. Simply by entering the appropriate URL, A has placed copyrighted material where anyone can access it, and indeed download it. My link on my page is scarcely distinguishable from my placing on my page the following statement: “You can access A’s copyrighted material which it has placed on its Web page by going to www.a-page.com.” (Or, as stated earlier, how to find Jim Glidewell’s critique of EFfector.) That is a truthful statement of fact, protected under the First Amendment, and it is no copyright infringement. If A didn’t want people accessing its material, it shouldn’t have posted it on its Web page. A has nothing more to complain about than if I led someone to the public library and pointed out where on the shelf that person could find A’s copyrighted book. A is distributing the material; I’m not.

(A third problem with this charge is that it is unclear that my hypothetical conduct results in public, rather than private, distribution. The law is unsettled on when distribution is public. In some courts—for example, Pennsylvania—transmitting videotaped movies to hotel guests’ rooms is public distribution. In other courts—for example, California—it is not. Unless the distribution is public, it is not copyright infringement. If you view a computer screen display in your house, is it like your viewing a videotaped movie in your hotel room? Is it thus no more private than the latter? (Whether a court holds the distribution of the screen display is public or private may depend on the caprice of what precedent the court follows in a given part of the country.)

To be sure, A might complain that my link uses A’s name (say, the site is designated kodak.com or intel.com or wsj.com or washingtonpost.com, and my link shows that). Is that trademark infringement? No, not every use of a trademark is an infringing “trademark use.” Some uses are just descriptions.

Thus, the Supreme Court has held that it is not trademark infringement to advertise that you are selling reconditioned Champion spark plugs, if that is the truth. Similarly, courts have held that it is permissible to sell products that “fit” or are replacement parts for a trademarked product. An example is “Buy my Cheapo brand toner cartridges that fit HP LaserPrinter 4 machines—at half the price; they last twice as long as HP’s do.” That is not trademark infringement and is perfectly legal, if it is the truth. Calling a Web site by its name is not trademark infringement. (However, I could overdo it and therefore infringe if I use a logo on my screen to designate the link. I infringe, for example, by using a button with Coca-Cola in script letters or Intel with the e dropped down. Linkers must not do that.) See the Update box.

**Framing**

Framing might be more troublesome, but the better legal view is that it too is no infringement. In the Gang of Six’s suit against Total News, the complaint terms the alleged copyright infringement “unauthorized republication” of copyrighted material. That is all. It is unclear why the complaint calls the defendant’s conduct republication since the statute does not mention (let alone forbid) republication. It refers only to publication, and even publication is not what the statute defines as copyright infringement.

The statute says that unauthorized public distribution is infringement. Presumably, there is some subtle legal reason for charging Total News with republication instead of public distribution, but it escapes me. (Maybe they’re worried about the hotel room videotape cases.) In any case, unauthorized republication must involve public distribution of a copy of the copyrighted work for it to be held copyright infringement. For the reasons previously given, it does not.

Curiously, the Gang of Six failed to charge Total News with a legally more plausible (although still untenable) theory of copyright infringement: unauthorized preparation of a derivative work. Unlike copyright law’s prohibition of reproduction and distribution in sections 106(1) and (3), section 106(2)’s prohibition of unauthorized preparation of a derivative work does not require preparation of a copy for copyright infringement to occur. (This is a result of a congressional misstep in trying to protect pantomimes and choreographic performances. Congress felt someone could pirate them in modified form without a physical copy ever being made. In the course of protecting them against mere preparation of a derivative work, regardless of tangible copies, Congress made the same provision applicable to poems, telephone directories, and computer programs, among other things.)

Is combining Microsoft’s Web page story about Bill Gates with uncomplimentary remarks about him in an adjacent frame on the same screen a preparation of a derivative work? Or, let’s get closer to the facts. Does combining a story from the Washington Post with an advertisement from DEC in an adjacent frame, as Total News does, result in an unauthorized derivative work?

There is a conflict of precedent. The Ninth Circuit has held that cutting pictures out of a book and placing them in passe-partout plastic frames is
preparation of a derivative work and thus copyright infringement. However, another Ninth Circuit decision says that using software to change a video game to give a character more “lives” or stronger weapons is not the preparation of a derivative work.

Meanwhile, other courts have held that sewing together towels having copyrighted artwork on them, to form a handbag, is not copyright infringement. Neither is painting a wooden hobby horse a different color or gluing greeting cards to ceramic plaques for resale copyright infringement. Another court held that splicing advertising trailers into videotapes is not preparation of derivative works. Still another court, however, speculated that imprinting the Lord's Prayer onto the flyleaf of a copyrighted book and reselling the book would involve a derivative work and thus copyright infringement.

Despite the confusion, the sounder and probably more well accepted view is that some transformation of the original must occur for there to be any derivative work. Moreover, juxtaposing two works (as in splicing advertisements to the beginning of a videotape) must involve some interaction between the two works before you can say that any derivative work, and therefore copyright infringement, exists. Applying that test to framing suggests that no preparation of a derivative work occurs. The DEC advertisement that Total News placed under the Washington Post story does not interact with the story; it just sits there. In any case, the Gang of Six has not chosen to complain about derivative works. So the issue will have to wait for a future attack against framers by content providers.

Surprisingly, no one has yet tried to patent framing and threaten to sue all framers for patent infringement unless they pay royalties. This is a curious oversight.

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