

Jurisdiction, Choice of Law, Copyright, and the Internet: Protection Against Framing in an International Setting

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INTRODUCTION

With the Internet playing an increasingly dominant role in the way people communicate and the World Wide Web becoming a major medium by which ideas are exchanged and business conducted, more disputes over intellectual property rights in cyberspace are making their way towards the courts. Moreover, in a medium in which geographical boundaries are almost meaningless, questions of where these disputes can be resolved are often difficult.

This Article intends to contribute to the present discussion concerning how to properly address the pertinent legal questions arising from the utilization of the Internet as a means of communication. To understand the Internet's development allows us to gain a better understanding of its particular significance today as well as in the near future. This leads to the insight of how important it is to find appropriate answers to the pertinent legal questions deterring copyright holders from posting their works on the Internet.¹

1. See the Senate's Judicial Committee, with regard to the Digital Millennium Act, S. REP. NO. 105-190, at 8 (1998), stating that "copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy". After the Senate also Congress on Oct. 13, 1998 voted for the Digital Millennium Act, Subsequently the President signed the Digital Mil-

This Article provides an overview of copyright infringement on the Internet and the international jurisdictional dilemmas that arise in protecting intellectual property rights of Internet content providers. Part I briefly examines the Internet. Part II reviews international jurisdiction and choice of law implications in intellectual property disputes concerning the Internet. Part III analyzes the issue of whether framing is copyright infringement under United States law. This Article concludes that individuals from foreign nations who use American copyrights without authorization on foreign Internet service providers are subject to liability under the United States Copyright Act of 1976, through the exercise of personal jurisdiction over the international infringer.

I. THE INTERNET

A. *The Significance of the Internet and the Scope of the Analysis*

The Internet² is the term describing the world of electronic communications by the means of computer networks. The idea to connect single computers within a network to enable users to exchange ideas and data came into existence in the beginning of the 1960's when Internet pioneers were envisioning the so called "Galactic Network."³ Shortly after that, in 1965, the first data processing connection between two remote computers via a telephone line had been established, although the circuit switched telephone line limited the "network's" useful application. Nevertheless, the first

lennium Act on Oct. 28, 1998 into law, see the 'Statement by the President', (visited Nov. 4, 1998) <<http://www.dfc.org/issues/wipo/presidn.html>>.

2. The Internet sometimes is more colorfully referred to as 'Cyberspace'. Legal commentators also call the Internet 'Global Information Infrastructure' ("GII"), see Jane C. Ginsburg, *Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure*, 42 J. COPYRIGHT SOC'Y U.S.A. 318, 319 (1995) [hereinafter Ginsburg, *Global Use*]; Andreas P. Reindl, *Choosing Law in Cyberspace: Copyright Conflicts on Global Networks*, 19 MICH. J. INT'L L. 799, 800 (1998); Stephen Fraser, *The Copyright Battle: Emerging International Rules and Roadblocks on the Global Information Infrastructure*, 15 J. MARSHALL J. COMPUTER & INFO. L. 159, 760 (1997).

3. The envisioned network looked very much alike the Internet we have today, see Barry M. Leiner, *A Brief History of the Internet*, (visited July 26, 1998) <<http://www.isoc.org/Internet-history/#fricc>>.

wide-area network had been built in 1965.⁴ Departing from the point of the first two-computer-network in the 1960's and the subsequent creation of the ARPANET, a military communication network with three-hundred computers linked in 1981⁵ a much more sophisticated technical standard gave rise to the Internet as it is known today.⁶ According to pertinent Internet growth-surveys, more than two million Web sites are available on the Internet. The development of this number is depicted in the first graph in the Appendix, beginning in June 1993:⁷ The number of Internet hosts, starting with four in 1969, and domains, starting with 3.900 in 1989, have also tremendously grown. Following those numbers, the second and third graphs in the Appendix also provide a strong visual impression about the evolving significance of the Internet as well as they give an idea about the Internet's importance in the near future.⁸

4. *See id.*

5. *See* Kevin M. Fitzmaurice and Renu N. Mody, *International Shoe Meets the World Wide Web: Whither Personal Jurisdiction in Florida in the Age of the Internet?*, 71- FLA. B.J. 22 (1997).

6. Currently, American companies and universities envision the high speed "Internet 2". The idea is to build it parallel to the existing Internet so that data of any amount can be securely transferred avoiding the pitfalls of the existing Internet like clogged electronic paths, *see* Robyn Meredith, *The New York Times*, Monday, February 2, 1998. For a detailed historic outline with regard to the development of the Internet technology *see* Robert H'obbes' Zakon, *Hobbes' Internet Timeline* v.3.3 (visited July 26, 1998) <<http://info.isoc.org/guest/zakon/Internet/History/HIT.html>>.

7. *See* Appendix, *infra* p. 723 for an illustrative diagram. *See also* H'obbes' Zakon, at <<http://info.isoc.org/guest/zakon/Internet/History/HIT.html#Growth>> (visited July 26, 1998). Robert H'obbes' Zakon retains his information from various other sources such as the 'Zone program reports' maintained by Mark Lottor at <<ftp://ftp.nw.com/pub/zone/>> (visited July 26, 1998); the 'Connectivity table' maintained by Larry Landweber at <ftp://ftp.cs.wisc.edu/connectivity_table/> (visited July 26, 1998); the 'Web growth summary page' by Matthew Gray of MIT at <<http://www.mit.edu/people/mkgray/net/web-growth-summary.html>> (visited July 26, 1998); and Netcraft at <<http://www.netcraft.com/survey/>> (visited July 26, 1998). All sources can be verified through hyperlinks provided on Robert H'obbes' Zakon's Web site.

8. *See* Appendix, *infra* p. 723 for an illustrative diagram. *See also* H'obbes' Zakon, at <[http://info.isoc.org/guest/zakon/Internet/History/HIT.html # Growth](http://info.isoc.org/guest/zakon/Internet/History/HIT.html#Growth)> (visited July 26, 1998). More recent figures are even more dramatic: Following the newest survey by 'Matrix Information and Directory Services' (MIDS), restated in the German newspaper report, *Massenauflauf im Cyberspace*, SÜDDEUTSCHE ZEITUNG, July 28, 1998, there were 102 million users connected to the Internet in January 1998. Based on the fact that the number of Internet users double each year there will be, say MIDS, an estimated number

This booming quality of the Internet, expressed by the startling increase of the number of Web sites available and end users connected to the Internet, is usually explained with the Internet's potential commercial value as well as with people's general desire to disseminate information they consider worthwhile to disseminate.⁹

Since contemporary technical standard makes it so easy to digitize works of authorship in the first place making them accessible for everyone by posting and distributing them on the Internet, it goes without saying that the Internet challenges the existing patterns of established law. Contract law¹⁰ as well as criminal liability¹¹ and privacy issues¹² are at stake. However, the emerging law of the Internet particularly invokes the challenge of copyright law.¹³ Copyright protected works once digitized are much easier to copy than conventionally accessible works.¹⁴ Moreover, copies from a digitized work appear generally in the same quality as the original.¹⁵

of 233 million user by the year 2000 and more than 700 million by 2001. MIDS has a Web site at <<http://www.mids.org>> (visited July 28, 1998), however, the survey results were not (yet) available.

9. See, e.g., Jeffrey R. Kuester & Peter A. Nieves, *Hyperlinks, Frames and Meta-Tags: An Intellectual Property Analysis*, 38 IDEA: J.L. & TECH. 243, 245 (1998). The most current and perhaps not only for the time being the most sensational information available on the Internet is the Ken Starr Report covering the intimate affair between the President Bill Clinton and a young White House intern consisting of more than 400 pages of thoroughly worked out details meant as a preparation to impeachment procedures aimed at the President, (visited Sept. 12, 1998) <<http://starrreport.excite.com/6narrit.htm#L28>>.

10. See JONATHAN ROSENOER, *CYBERLAW: THE LAW OF THE INTERNET* 237-41 (London 1997) (dealing with the enforceability of electronic agreements); Mark A. Lemley, *Intellectual Property and Shrink-wrap Licenses*, S. CAL. L. REV. 1239 (1995) [hereinafter Lemley, *Shrink-wrap Licenses*] (examining shrink-wrap licenses in Cyberspace).

11. For an overview see ROSENOER, *supra* note 10, at 167-192.

12. See *id.* at 129-141.

13. Mike Godwin, *Link Law on the Internet: A Panel Discussion*, 38 IDEA: J.L. & TECH. 197 (1998).

14. Particularly the Senate's Judicial Committee, with regard to the Digital Millennium Act, S. REP. NO. 105-190, at 8 (1998), explicitly points out that "due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy."

15. However, copyright law is not the only part of intellectual property law that faces Internet related challenges. Trademark law is also affected, particularly concerning

A person who edits and provides digitized information and uploads it to the Internet might incorporate unauthorized copies of other individual's work or infringe other rights exclusively assigned to the author of a copyright protected work. Along the same line, Internet Service Providers ("ISPs") may be held liable for copyright infringement just by virtue of providing active and passive access to the Internet, thereby disseminating infringing work provided by third parties.¹⁶ Moreover, copyright infringement may occur just by transmitting a work through the Internet. Particularly the use of the World Wide Web, which is the most popular segment of the Internet,¹⁷ makes it easy to download and copy information desired by users who are interested in the information provided. Apart from the substantial copyright law, jurisdiction and choice of law issues have to be taken into consideration since the Internet works through a world wide network which does not stop at the border of one's home country.

This Article focuses on copyright infringement and liability from the point of view of an Internet content provider, whose Web page is being framed. In order to invoke jurisdictional and choice of law issues, it is assumed that a German citizen living in Germany using a German Internet service provider ("ISP") frames a Web site provided by a United States citizen living in the United States. The consumer, respectively the end user, of the framed Web site will be a United States citizen as well accessing the Web site from the United States.

domain name disputes and the use of trademark-protected logos, signs and names used by third parties on their Web sites. For a current comprehensive overview as to trademark protection, including federal and state dilution, see Jeffrey R. Kuester and Peter A. Nieves, *Hyperlinks, Frames and Meta-Tags: An Intellectual Property Analysis*, 38 IDEA J. L. & TECH. 243, 247-53 (1998).

16. See *Religious Technology Center, v. Netcom On-Line Communication Service, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995). For a closer discussion of the ISP's liability see *infra* at 713.

17. Other applications of the Internet are e-mail, bulletin boards, file transfer protocol, and telnet, see NABARRO NATHANSON, *THE LAWS OF THE INTERNET* 4-8 (1997), for a concise description of those features.

B. *What Exactly is Framing?*

In order to understand the significance of the term ‘framing’ one must understand how the World Wide Web functions. The World Wide Web consists of countless Web pages providing information. Those Web pages have, to make each Web page individually accessible, a particular URL-address assigned to it. A Web page is usually written in ‘Hypertext Mark-up Language’ (“HTML”) allowing it to incorporate Hypertext References (“HREF”), the ‘links’ which are designed to direct the attention of the user to other Web page which are usually related to the content of the Web page being visited. An anchor that is electronically incorporated in the document being viewed represents such a link. The anchor may consist of particular words, sentences, or paragraphs, marked as anchor by usually underlining them. By clicking the computer’s pointing device, a mouse, on the anchor the web browser immediately loads the URL-address of the linked Web pages and transfers to it enabling the user to view the linked Web page.¹⁸

Whereas linking just provides a reference point to the document being viewed without really incorporating it into one’s own Web page,¹⁹ framing goes farther. It is based on the modern Internet browser technology with its ability to open a number of frames on the screen for direct viewing of different Web pages containing

18. For a concise description of hypertext reference technology see Richard S. Vermut, *File Caching on the Internet: Technical Infringement or Safeguard for efficient Network operation*, 4 J. INTELL. PROP. L. 273, 287 (1997); Richard Raysman & Peter Brown, *Dangerous Liasons: The Legal Risks of Linking Web Sites*, N.Y.L.J., Apr. 8, 1997, at 3.

19. Simply linking does not seem to constitute copyright infringement since a hypertext linked Web site seems to be just an instruction to connect to an other work rather than actually use of it. Moreover those who upload information on the World Wide Web implicitly intend to have their documents viewed, therefore uploading documents perhaps grants an implied license to link, see Eric Schlachter, *The Intellectual Property Renaissance in Cyberspace: Why Copyright Law could be Unimportant on the Internet*, 12 BERKELEY TECH. L.J. 15, 46 (1997); see also Maureen A. O’Rourke, *Fencing Cyberspace: Drawing Borders in a Virtual World*, 82 MIN L. R. 610, 658-662 (1998); German legal commentators share this interpretation with regard to linking, see Frank A. Koch, *Grundlagen des Urheberrechtschutz im Internet und in On-line-Diensten*, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT (GRUR) 1997, 417, 430.

text, graphics or other HTML elements.²⁰ This technique gives the end user the advantage to browse different Web sites with related information at the same time.²¹ Moreover, framing enables a Web site operator to incorporate remote Web sites completely into the Web site the end user actually called upon without terminating the connection to this Web site.²² Thus, when a framed Web site is called upon by clicking on the link's anchor, the linked Web page may appear in part on screen surrounded by a frame that is provided by the "framing" Web page, which is the Web page the end user actually called upon.²³ The frame often depicts logos, advertisement, or promotions placed by the author of the framing Web site. The logos, advertisement, or promotions of the framed Web site are sometimes covered by the frame and invisible to the end user. The frame then may generate the impression that the viewer is actually viewing information coming from the originating framing metasite, instead of from the linked site.²⁴ But not only does the frame generate this impression, the URL does as well, because the URL displayed in the browser is the framing site's address and not the site's address actually being framed.²⁵

In a case recently before the court of the Southern District of New York²⁶ the plaintiffs, among them the Washington Post, complained that the defendant, Total News, Inc., an Internet content provider, hosted a Web site consisting of framing links to the Washington Post's and other news provider's Web sites. According to the complaint,²⁷ viewers of the defendant's Web site were

20. See Raysman & Brown, *supra* note 18, at 3. This feature is comparable with window's multitasking feature making it possible to run a number of applications on the computer and to display them at the same time.

21. See Ellen Poler, *Frames and License Agreements*, (visited July 26, 1998) <<http://www.collegehill.com/ilp-news/poler1.html>>.

22. See *id.*; see also Raysman & Brown, *supra* note 18, at 3.

23. For future reference this Web page will be called the 'framing' Web page.

24. See David Phillips & Elizabeth Blumenfeld, *Seams in a Seamless Web*, 482 PLI/PAT 65, 72 (1997).

25. See *Use of Frames to Incorporate Third-Party Content in Web Site Sparks Controversy*, 13 COMPUTER L. STRATEGIST 8, n. 13 (1997).

26. *Washington Post v. Total News, Inc.*, No. 97-1190 (S.D.N.Y. filed Feb. 20, 1997).

27. See Complaint, *Washington Post v. Total News, Inc.* (No. 97-1190) (visited May 10, 1999) <<http://www.ljx.com/internet/complain.html>>; see also James A. Kirkland, *Emerging Internet Copyright Issues*, 482 PLI/PAT 531, 544 (1997), who restates and

able to choose the plaintiff's anchor transferring them to a corresponding Web site showing the news provided by the plaintiff and framed by the defendant depicting its own advertisement and logo.²⁸ The parties settled the case.²⁹ As for the settlement, the defendants agreed to permanently refrain from causing plaintiffs Web site to appear and to cease the practice of framing. However, the parties stipulated that defendants may link to plaintiff's Web sites via hyperlinks consisting of the linked sites in plain text.³⁰ This case demonstrates the significance of the question of whether framing infringes the author's exclusive rights granted by the Copyright Act of 1976 ["Copyright Act"].³¹ Moreover, it shows that framing represents, since no precedent is available,³² an unsettled area of law.³³

cites the complaint.

28. See Complaint, *Washington Post v. Total News, Inc.* (No. 97-1190) (visited May 10, 1999) <<http://www.ljx.com/internet/complain.html>>; see also Kenneth Freeling & Joseph E. Levi, *Frame Liability Clouds the Internet's Future*, N.Y.L.J., May 19, 1997, at S5.

29. See *Washington Post v. Total News, Inc.*, No. 97-1190 (S.D.N.Y. June 5, 1997) (stipulation and order of settlement and dismissal). The stipulation and order is available on the Internet at <<http://www.ljx.com/internet/total.html>> (visited May 10, 1999).

30. See *id.*

31. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C.A. §§ 101-1010 (West Supp. 1999)). Apart from copyright issues, the causes of action in *Total News* were misappropriation, federal trademark dilution, federal trademark infringement, false designation of origin, false representation and false advertising, as well as trademark infringement, dilution and unfair competition under state law, deceptive acts and practices, and tortious interference. For a concise analysis of the case see Jeffrey R. Kuester & Peter A. Nieves, *Hyperlinks, Frames and Meta-Tags: An Intellectual Property Analysis*, 38 IDEA J. L. & TECH. 243, 271 (1998).

32. In *Futuredontics Inc. v. Applied Anagramic Inc.*, the defendant Applied Anagramic Inc. allegedly framed the plaintiff Futuredontics' Web site. See No. 97-6691 (C.D. Cal. Jan. 30, 1998) (reported in 55 PATENT, TRADEMARK & COPYRIGHT JOURNAL, 315 (1998)). The district court rejected the plaintiff's motion for preliminary injunction as well as the defendant's subsequent motion to dismiss finding that plaintiff has sufficiently alleged a claim for copyright infringement. See *id.* The United States Court of Appeals, Ninth Circuit affirmed. See *Futuredontics Inc. v. Applied Anagramic Inc.*, 152 F.3d 925 (9th Cir. 1998) (unpublished table decision).

33. There is, nevertheless, some technical relief against framing available. The following java script will automatically remove any existing frames:

```
<SCRIPT LANGUAGE=JAVASCRIPT>  
<!--  
if (top.frames.length!=0)  
top.location=self.document.location;
```

II. INTERNATIONAL JURISDICTION AND CHOICE OF LAW

Recalling the hypothetical,³⁴ it is reasonable to assume that the German content provider and his or her ISP might be responsible for the allegedly infringing use of the framed Web site and that they should be held liable for the damage they allegedly caused. Since a suit should be brought against them in the United States, two things are necessarily required. First, it has to be determined whether United States courts can exercise international personal jurisdiction over the German defendants and second, in case it can, what the applicable law is.

A. *International Personal Jurisdiction*

First, the general principles regarding international personal jurisdiction will be extracted from the pertinent law before those principles will be applied to the conduct of framing following the

```
// —>
</SCRIPT>
An alternative to the foregoing javascript is:
<SCRIPT LANGUAGE=JAVASCRIPT>
<!--
function breakOut () {
    if (self != top)
        window.open (“my URL”, “_top”, “”);
}
// —>
</SCRIPT>
</HEAD>
<BODY onLoad=“breakOut ()”>
```

Web Design Group, *HTML Help by The Web Design Group* (last modified Jan. 23, 1999) <<http://www.htmlhelp.com/design/frames/faq/framed.html>>. For technical relief see also Chuck Muscanio, *The Best Way to FRAME-Proof your Pages, boost table speed, & more*, (visited May 10, 1999) <<http://www.netscapeworld.com/netscapeworld/nw-05-1997/nw-05-html.html>>; *Still more Tricks to FRAME-Proofing your pages, plus . . .* (visited May 10, 1999) <<http://www.netscapeworld.com/netscapeworld/nw-07-1997/nw-07-html.html>>. However, there is, as David G. Post points out, no ultimate technical relief against framing since antiframeing technology will soon be fought with anti-antiframeing technology leading to “a kind of technological arms race”, see David G. Post, *Plugging In: Has Cyberspace Law Come of Age*, AM. LAW., April 1998, at 8.

34. The hypothetical is of a German citizen living in Germany using a German ISP frames a Web site provided by a United States citizen living in the United States. The end user, of the framed Web site will be a United States citizen as well who accesses the Web site from the United States.

hypothetical.³⁵

1. General Principles

Any given State's authority to affect its legal interests is accepted as a general principle. This principle is commonly described by the term "jurisdiction." Traditionally, three kinds of jurisdictions are distinguished: legislative, judicial, and enforcement jurisdiction.³⁶

a. Jurisdiction to Legislate

The settled principle that countries have authority to affect their legal interests particularly to persons and circumstances does not mean that countries are free to legislate whatever they want. It is generally accepted as a basic rule that a country's authority to legislate ends where legitimate interests of other countries are affected. Within this framework of diverse interests states generally recognize that whatever happens on the territory of a country is of that country's primary concern. This principle is called the territoriality principle. It is also recognized that a country has a significant interest in exercising jurisdiction over persons or things that possess its nationality, the nationality principle, as well as the interest in protecting its nationals from conduct outside its territory, the passive nationality principle. In addition, countries have the right to protect themselves against hostile acts (protective principle) and finally there are certain activities universally condemned (universal principle).³⁷

In accordance with these general principles just pointed out, the section 402 of the *Restatement (Third) of Foreign Relations* further summarizes the legitimate interest countries have to exercise jurisdiction. It provides that a state has jurisdiction to prescribe law with respect to:

35. See *supra* note 5 and accompanying text.

36. See LOUIS HENKIN ET AL., *INTERNATIONAL LAW* 1046 (3d ed. 1993). The jurisdiction to enforce will not be discussed since it is not relevant in the context of the purpose of this Article.

37. *Id.* at 1049; the protective and the universal principles will not be discussed since they are not relevant in the context of the purpose of this Article as well, for a discussion of those aspects see *id.* at 1081-3.

- (1)(a) conduct that, wholly or in substantial part, takes place within its territory;
 - (b) the status of persons, or interests in things, present within its territory;
 - (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
- (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
- (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.³⁸

The principle of territoriality is well established and free from controversy. As early as 1812 the courts had recognized that “[t]he jurisdiction [to legislate] of the nation within its own territory is necessarily exclusive and absolute” and that a restriction upon it would diminish a country’s sovereignty.³⁹ Thus, no foreign country has the right to legislate another country’s laws. Along the same line it is basically noncontroversial that a country has the right to regulate the conduct of its citizens or nationals anywhere in the world.⁴⁰ The passive nationality principle might be invoked when an act committed in one state causes injury in the territory of another state. Even though the act did not take place in the territory of one state, jurisdiction can be established there on the fact that the injurious effect took place in the territory.⁴¹

b. Jurisdiction to Adjudicate

Jurisdiction to adjudicate is defined as a country’s authority to subject persons or things to the process of its courts or administrative tribunals.⁴² The exercise of jurisdiction to adjudicate does not

38. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 (1986).

39. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

40. *See Blackmer v. United States*, 284 U.S. 421 (1932).

41. *See United States v. Aluminum Co. of America*, 148 F.2d 416, 444 (2d Cir. 1945); BERNHARD H. OXMAN, *JURISDICTION OF STATES, AN ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 277 (Rudolf Bernhard ed., Installment 10, 1987).

42. *See* RESTATEMENT OF THE LAW (THIRD) OF FOREIGN RELATIONS §§ 1-488

apply to any person. Countries are rather somewhat restricted by reasonableness. With regard to this reasonableness, section 421 of the *Restatement (Third) of Foreign Relations* points out that “[a] state may exercise jurisdiction through its courts to adjudicate with respect to a person or thing if the relationship of the state to the person or thing is such as to make the exercise of jurisdiction reasonable.”⁴³ In other words, the relationship of a person to a country determines whether the exercise of jurisdiction over this person is reasonable. This idea of a relationship test in United States law differs quite substantially from the principle ‘actor sequitur forum rei’⁴⁴ which is the starting point of any personal jurisdiction analysis in most of the country’s international civil procedure laws.⁴⁵ Applying the ‘actor sequitur forum rei’ standard to the framer located in Germany would lead to the conclusion that an action against the alleged infringer would have to be brought before German courts. In the United States, however, plaintiffs, considering the home forum as the most favorable, seek to show that a defendant has minimum contacts with the plaintiff’s forum.⁴⁶

2. Jurisdiction to Adjudicate in the United States

When dealing with the United States’ jurisdiction to adjudicate, one has to distinguish between the United States’ subject matter jurisdiction and the United States’ territorial Jurisdiction.

a. Subject Matter Jurisdiction

The subject matter jurisdiction in the United States is highly determined by the existence of two independent court systems, commonly regarded as the systems of the federal courts and the states courts. As a basic rule, subject matter jurisdiction is gener-

(1986).

43. *Id.* § 421(1)

44. The plaintiff follows the defendant to the latter’s forum.

45. See Reinhold Geimer, *INTERNATIONALS ZIVILPROZESSRECHT*, 2. Aufl. 1993, Margin No. 298; Stephan Wilske & Teresa Schiller, *International Jurisdiction in Cyberspace: Which States may Regulate the Internet*, 50 *FED. COMM. L.J.* 117, 146 (1996).

46. See MARYLIN J. RAISCH & ROBERTA I. SHAFFER, *INTRODUCTION TO TRANSNATIONAL LEGAL TRANSACTIONS* 42 (New York 1995), (considering, from the United States point of view, the choice of the plaintiff’s forum in international litigation simply as a matter of practicability).

ally granted to the state courts. However, Article III, section 2 of the United States Constitution allows the legislator to designate specific subject matter to the exclusive or concurrent federal jurisdiction.⁴⁷ In diversity cases Congress has chosen a nonexclusive federal jurisdiction. The diversity statute prescribes in that respect that “[t]he [federal] district courts have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of value of \$ 75,000.00 exclusive of interest and cost and is between . . . citizens of a state and citizens or subjects of a foreign state.”⁴⁸ More specifically with regard to the hypothetical, the patent jurisdiction statute prescribes exclusive jurisdiction of federal courts in copyright cases.⁴⁹ Since the hypothetical is clearly a copyright case, which is, in addition, characterized by diverse nationality, federal courts have exclusive jurisdiction regardless of the value of the case and no state court in the United States is permitted to hear the case.

b. Territorial Jurisdiction

Traditionally, a prerequisite to exercise jurisdiction over a person was the physical presence of this person in the forum.⁵⁰ However, modern business life, particularly the increased mobility granted by modern means of transportation and communication and commercial transactions involving parties located in the whole country, challenged the standard of the physical forum presence.⁵¹ As a consequence, courts began exercising jurisdiction over individuals who were not present in the court’s forum. This practice lead to the development of the minimum contact standard.

47. U.S. CONST. art. III, § 2.

48. 28 U.S.C. § 1332 (a)(2) (1994).

49. 28 U.S.C. § 1338 (a) (1994)

50. *See International Shoe Co. v. State of Washington, Office of Unemployment Compensation and Placement*, 326 U.S. 310, 315 (1945).

51. *See World Wide Volkswagen Corp. v. Charles S. Woodson*, 444 U.S. 286, 293 (1980).

(1) Minimum Contacts Standard

On the assumption that individuals can be present in a forum without constantly being physically there, the Supreme Court, based on the Constitution's Due Process clause,⁵² prevents state courts from exercising personal jurisdiction over defendants who lack sufficient contacts with the forum state.⁵³ Hence, state courts have personal jurisdiction over an individual not present in the forum if the individual has established minimum contacts with the forum.

Although the Supreme Court ruled with regard to a conflict between two parties located in the United States, the minimum contacts rule applies as well to a foreign defendant.⁵⁴ The underlying concept of the minimum contact test deriving from the due process clause is to preserve the sovereignty of the states in the federal system and to grant the right to a defendant to affiliate himself with one or another of those sovereigns.⁵⁵ Countries are obviously sovereign too so the same reasoning applies with respect to personal jurisdiction of a foreign defendant.

The Supreme Court in *International Shoe*⁵⁶ distinguished between the two classes of jurisdictional situations with regard to the defendant's contacts. The Supreme Court specifically distinguished between "general jurisdiction" and "specific jurisdiction".⁵⁷ The former invokes the permission of general jurisdiction over an individual if her contacts with the forum are systematic and continuous enough that the defendant might anticipate defend-

52. See U.S. CONST. amend. V for Federal Government action and U.S. CONST. amend. XIV Section 1 for State action.

53. See *International Shoe*, 326 U.S. at 315.

54. See *Asahi Metal Industry Co., Ltd., v. Superior Court of California, Solano County*, 480 U.S. 102, 109 (1987) (holding that the minimum contact doctrine applies where the defendant is a Japanese national).

55. See Dan L. Burk, *Jurisdiction in a World without Borders*, 1 VA. J. L. & TECH. 3, 26 (1997) (citing *Hanson v. Denckla*, 357 U.S. 253, 251; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293(1980); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-3 n. 10 (1982)).

56. See *International Shoe*, 326 U.S. at 315.

57. See Burk, *supra* note 55, at 26.

ing any type of claim there.⁵⁸ The latter comes into play when the defendant has minimum contacts with the forum in such a way that she might anticipate defending that particular type of claim there.⁵⁹ It is needless to say that the German defendants in the hypothetical lack any systematic and continuous contacts with the United States and that they do not anticipate defending any type of claim there.

The lack of general jurisdiction leads to the more difficult question of whether the German defendants from the hypothetical are subject to specific jurisdiction. Here it needs to be analyzed whether the German defendants from the hypothetical might anticipate defending a copyright claim in the United States based on the conduct of framing. When analyzing the specific jurisdiction the Supreme Court considers the foreseeability that a defendant will become subject to suit in a particular forum and, in addition, certain other 'fairness factors'.

(a) Foreseeability

In *World Wide Volkswagen* the Supreme Court held that foreseeability does not just imply "the mere likelihood that a product will find its way into the forum state."⁶⁰ Rather, "it is that the defendant's conduct and connection with the forum State are such that she should reasonably anticipate being hauled into court there."⁶¹ The Supreme Court pointed out that a defendant has clear notice that she is subject to suit when she "purposefully avails" herself of the privileges and the advantage of conducting activities within the forum state.⁶² It is clear that doing business with the aim of direct pecuniary gain in the forum state enhances the possibility of becoming involved in suit and renders it foreseeable for the defendant to become subject of a law suit.⁶³ The contact inquiry in a case involving a foreign defendant may consider minimum contacts with the United States as a whole, rather than with any par-

58. See *International Shoe Co. v. State of Washington, Office of Unemployment Compensation and Placement*, 326 U.S. 310, 315 (1945).

59. See *id.*

60. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293(1980).

61. *Id.* at 297.

62. *Id.*

63. See *Burk*, *supra* note 55, at 26.

ticular state.⁶⁴ Where there is an express contract forming the basis for the party's business in the forum, state foreseeability is easily to be inferred.⁶⁵

(b) Fairness Factors

Relying on its ruling in *International Shoe*, where the court held that once minimum contacts between the defendant and the forum state have been established, it has to be determined whether the assertion of personal jurisdiction comports with the "traditional conception of fair play and substantial justice",⁶⁶ the Supreme Court enunciated five jurisdictional fairness factors to be considered in a separate assessment. In appropriate cases courts "may evaluate [1] the burden on the defendant, [2] the forum State's interest in adjudicating the dispute, [3] the plaintiff's interest in obtaining convenient and effective relief, [4] the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and [5] the shared interest of the several States in furthering fundamental substantive social policies".⁶⁷ To render jurisdiction unreasonable the fairness factors need to be compelling to outweigh the fact that an individual has purposefully availed himself of the forum.⁶⁸ Apart from the five fairness factors, when the defendant is a foreign national, the procedural and substantive policies of the other nation whose interests are affected by the assertion of jurisdiction have to be considered as well on a case by case basis.⁶⁹

64. See *Asahi Metal Industry Co., Ltd., v. Superior Court of California, Solano County*, 480 U.S. 102, 115 (indicating, however, that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into international field."); see also *Burk*, *supra* note 55, at 26.

65. See *Burger King Corp. v. John Rudzewicz*, 471 U.S. 462, 480 (1985).

66. See *International Shoe Co. v. State of Washington, Office of Unemployment Compensation and Placement*, 326 U.S. 310, 315 (1945).

67. See *Burger King*, 471 U.S. at 477; however, factors number 4 and 5 do not seem to be of much relevance in an international setting.

68. *Id.*

69. See *Asahi Metal Industry Co., Ltd., v. Superior Court of California, Solano County*, 480 U.S. 102, 115 (1987).

(2) Jurisdiction in the Internet

With regard to the hypothetical, the specific jurisdiction analysis leads to the question of whether the German ISP or the German framer or both could reasonably foresee being sued in a United States court by having purposefully availed themselves of the privileges and the advantage of conducting activities within the United States. More specifically, the question arises of what kind of Internet related conduct justifies the assumption of a purposeful availment.

A number of cases in the United States have already dealt with jurisdiction issues in the context of the Internet. In *Compuserve v. Patterson*,⁷⁰ for example, the court found that the defendant had purposefully availed herself of the plaintiff's headquarters forum because the latter was posting the defendant's software and transmitting the fees for downloaded software the defendant had written. In *Bensusan Restaurant Corp. v. King*⁷¹, to the contrary, jurisdiction could not be established due to the lack of purposeful availment. The defendant had created a Web site containing information about its jazz club in Columbia, Missouri, whose name ("The Blue Note") was identical with the name of a jazz club in New York. The plaintiff sued for trademark infringement in New York and the court ruled that a passive Web page just posting information cannot be the basis for purposeful availment.⁷² The court pointed out that the argument that the defendant "should have foreseen that users could access the site in New York and be confused as to the relationship of the two Blue Note clubs is insufficient to satisfy due process."⁷³ In a later case, the Ninth Circuit developed a solution which seems to be mediating between the two opposite approaches the courts in *Compuserve* and in *Bensusan* advanced. This solution could be called the 'Interactivity approach'.

70. 89 F.3d 1257 (6th Cir. 1996).

71. *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd* 126 F.3d 25 (2d Cir. 1997).

72. *See id.* at 301.

73. *Id.*

(a) The Interactivity Approach

In *Cybersell v. Cybersell*,⁷⁴ where the plaintiff claimed that the defendant infringed the former's trademark by setting up a Web page under the plaintiff's name "Cybersell,"⁷⁵ the Ninth Circuit distinguished between passive and interactive Web pages. A passive Web site, the court held, does nothing more than permitting anyone to access it and to view the information. This can be compared to the placement of a product into the stream of commerce that may be felt everywhere but is not an act purposefully directed toward the forum state.⁷⁶ An interactive Web site, on the other side, allows users to exchange information and encourages to communicate.⁷⁷ The opportunity to exchange and communicate information indicates that the content provider directed her activity in a substantial way to the forum.⁷⁸ Along the same line in other cases district courts also considered that the "notion of transacting business over the Internet involves examining the level of Interactivity."⁷⁹

With regard to the hypothetical the user can do more than just accessing and viewing the Web site. He can also actively choose to click on the anchor that provides the link to the framed Web site. Instantly after activating the link the framed Web page will be downloaded⁸⁰ into the end user's computer and can be viewed on the computer screen. The framing Web site, therefore, can be considered as interactive.⁸¹

74. *Cybersell, Inc. v. Cybersell, Inc.* 130 F.3d 414 (9th Cir. 1997).

75. *Id.* at 415.

76. *See id.* at 418.

77. *See id.*

78. *Id.*

79. *See, e.g., Resuscitation Technologies, Inc. v. Continental Health Care Corp.*, No. IP 96-1457-C-M/S, 1997 WL 148567 at **1, 4 (S.D. Ind. 1997); *see also SF Hotel Company, L.P. v. Energy Investments, Inc.*, 985 F. Supp. 1032, 1034 (D. Kan. 1997); *Zippo Manufacturing Co., v. Zippo Dot Com, Inc.* 952 F. Supp 1119, 1124 (W.D. Pa. 1997).

80. For the purpose of simplification in the context of this Article, the term "downloading" refers to the storage of information derived from the Internet into the computer's RAM unless otherwise indicated.

81. *See Jane C. Ginsburg, Copyright without Borders? Choice of Forum and Choice of Law for Copyright Infringement*, 15 CARDOZO ARTS & ENT. L.J. 153, 160 (1997) [hereinafter Ginsburg, *Copyright without Borders*]. Prof. Ginsburg argues along

However, those courts distinguishing interactive Web pages from passive ones, and favoring interactive Web pages with regard to the determination of personal jurisdiction, also emphasize that there must be something in addition to plain interactivity to establish purposeful availment. This additional element is the commercial nature of the exchange of information that occurs on the web site.⁸² Usually, courts infer the commercial nature of the exchange from either the sales they have generated through the Web page or from e-mail communication directed at the making of a sale. The defendants in those cases allegedly either transacted business over the Internet or solicited business over the Internet.⁸³ Obviously, none of those activities occur with regard to the hypothetical because it is generally not the framing Web page operator's intent to enter into a contract of any kind with an end user who downloads the framing Web page.⁸⁴ But, nevertheless, the operator wants the

the same line using the following hypothetical: Former French President Francois Mitterand died in January 1996. Shortly after his death, his physician published a memoir ("Le Grand Secret") describing that the late President was not able to exercise his office towards the end of his second presidency. *See id.* at 153-54. The late President's family invoked France's post mortem privacy right and stopped further dissemination of the memoirs. *See id.* A French Web page operator, however, had the book already scanned and posted it on the Internet with the opportunity to download. *See id.* (citing Michel Alberganti & Herve Morin, *Internet contourne la censure du livre du docteur Gubler*, LE MONDE, Jan. 25, 1996.). In her hypothetical, Prof. Ginsburg assumed that the Web site operator had uploaded her files to a United States Web site, and that the French copyright owners had sought to prevent dissemination of the work in the United States. *See Ginsburg, Copyright without Borders, supra* at 166 (concluding that "the out of state Web site that offers Le Grand Secret is 'interactive': it does not simply inform users that they can buy the book elsewhere (or through other media); it enables to acquire it directly from the site.").

82. *See Cybersell* 130 F.3d at 418; *Resuscitation*, 1997 WL 148567 at * 4; *SF Hotel Company*, 985 F. Supp. 1032 at 1034.

83. Examples for cases where business was transacted are: *CompuServe v. Patterson*, 89 F.3d 1257 (6th Cir. 1996); *Digital Equipment Corp. v. Altavista Technology, Inc.*, 960 F. Supp 456 (D. Mass. 1997); *Hall v. Laronde*, 56 Cal. App. 4th 1342 (Cal. Dist. Ct. App. 2d, Div. 6 1997); *Resuscitation*, 1997 WL 148567 at *1. Examples for cases where business was solicited are: *Hasbro, Inc. v. Clue Computing, Inc.* 45 U.S.P.Q.2d 1170 (D. Ma. 1997); *Zippo v. Zippo Dot Com, Inc.*, 952 F. Supp 1119 (W.D. Penn. 1997); *EDIAS Software international, L.L.C., v. Basis International Ltd.*, 947 F. Supp. 413 (D. Ariz. 1996); *Hereos Inc. v. Hereos Foundation*, 958 F. Supp 1 (D.D.C. 1996); *Maritz, Inc., v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996).

84. However, it might be theoretically possible that it is the framing Web page operator's intent to enter into a contract with the end user depending on what kind of busi-

end user to access a particular site through her own framing Web site to ensure that her advertisement will be visible on the end users computer screen. For that reason, the framing Web page does not just simply inform the end user that there is the particular site out there, which can be accessed under its particular URL. It also does not offer a plain link to the particular site as a shortcut. The Web page enables the end user to download, or to acquire, the particular Web site directly within the framing Web site.⁸⁵ A process, which, if not authorized by the framed Web page's copyright owner, would amount to copyright infringement. Moreover, seeing the end user's click on the link as a request to get access to the framed Web site and the fact that access is actually granted as the immediate positive response to the request allows to infer that the end user and the Web site operator actually communicate with each other, even though, admittedly, in a very limited technical fashion. Nevertheless, the opportunity to request a download and then to actually acquire the copyright protected information by initializing the communication seems to be sufficiently equivalent to the exchange of information recognized by the courts to establish purposeful availment. Following this conclusion the question remains, however, whether the exchange of information is also commercial in nature. One surely could argue that the Web site operator just as the framer derives her revenue from selling advertisement space to third parties. The more hits her Web page receives the more revenue she will derive. Communication with the end user leads to the receipt of a hit and thus increases the Web page operator's revenue. That in turn renders the communication at least in some sense indirectly of commercial nature. However, the relevant cases indicate the necessity of a direct commercial relationship between the Web site operator and the end user. Therefore, it would certainly be too overbroad to acknowledge calling on a framing Web page as communication of commercial nature. But it appears to be equivalent to communication of commercial nature when, as it is the case in the context of framing, the communication has some sort of an impact on the copyrights of an United

ness the operator pursues.

85. See *supra* notes 18-19 and accompanying text.

States citizen.⁸⁶

However, when recognizing the communication in the context of framing as having an impact on the copyright owner's rights and, at the same time, as an equivalent to communication of commercial nature, then the question arises whether the Web site needs to have received a sufficiently large number of hits or whether the Web site's potential accessibility by virtue of being posted on the Internet would be sufficient. In order to counterbalance the lack of the commercial nature of the communication, a sufficiently large number of hits might be required to recognize purposeful availment in the context of framing in an international setting. However, unlike in the real world with respect to real goods, an Internet user does not need to specifically order from a particular provider the information she wants. Moreover, the ordered information does not need to be actively shipped to the customer. Thus, in the context of the Internet, there is no specific interaction necessary between the providing and the consuming parties since the Internet's content is in fact permanently and ubiquitously available to be downloaded. Furthermore, somebody calling on a Web page usually has no knowledge as to the Web page operator's or the ISP's geographic location.⁸⁷ In the context of pertinent minimum contacts standard, this permanent availability and the lack of knowledge about the party's location as unique features to the Internet, may invoke the argument that it is unnecessary for the user in the forum to interact with the Web site. As well, the potential for interaction with the Web site by virtue of it being posted on the Internet is sufficient to find purposeful availment.

The following, however, will show that the law requires that a framing Web page actually was accessed and that it actually must have been accessed by a number of visitors in order find purposeful availment.

86. The impact approach excludes plain linking and caching of Web pages from purposeful availment scrutiny since both conducts are clearly covered by an implied license granted by the Web page's copyright owner. Plain linking and caching, therefore, has no impact on copyright owner's rights. For a more detailed analysis of the implied license doctrine in the context of the Internet, *see infra* Part II.B.2.a.(1).(b).

87. The URL is not a reliable indicator since its extensions like '.de' which stands for Germany or ".uk" which points to the United Kingdom might be operated and maintained from anywhere in the world.

(b) Access

In *Maritz v. Cybergold* the district court in eastern district of Missouri implicitly addressed the problem and recognized jurisdiction over the defendant.⁸⁸ The court found that “[b]y simply setting up, and posting information at, a Web site in the form of an advertisement or solicitation, one has done everything necessary to reach the global Internet audience.”⁸⁹ The court then concluded that “while modern technology has made nationwide commercial transactions simpler and more feasible, even for small businesses, it must broaden correspondingly the permissible scope of jurisdiction exercisable by the courts.”⁹⁰ By contrast a district court in Arizona also seemed to rely on mere accessibility as such without paying attention to the question whether the Web site actually had visitors or not.⁹¹ The court simply concluded that “[the defendant] should not be permitted to take advantage of modern technology through an Internet web page and forum and simultaneously escape traditional notions of jurisdiction.”⁹²

Both foregoing court decisions indicate that an interactive Web site by virtue of being accessible or, from the content provider’s perspective, by the mere invitation to visit a Web site by making it available on the Internet, is sufficient to find purposeful availment to the United States. Following this approach, it is reasonably foreseeable for the German content provider from the hypothetical to be sued in the United States. Since the German content provider’s ISP made it possible for the framer to avail himself of the United States forum, the ISP, by virtue of contributing to the availment, also established minimum contacts in that respect.⁹³

However, considering the applicable Federal Rule of Civil Procedure, it appears to be doubtful whether federal courts can exercise international personal jurisdiction just by virtue of having a framing Web site being accessible through the Internet.

88. 947 F. Supp. 1328 (E.D. Mo. 1996).

89. *Id.* at 1332.

90. *Id.* at 1334.

91. *EDIAS Software international, L.L.C., v. Basis International Ltd.*, 947 F. Supp. 413 (D. Arizona 1996).

92. *Id.* at 420.

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

(c) Rule 4 (k) of the Federal Rules of Civil Procedure

Rule 4 (k) of the Federal Rules of Civil Procedure deals with the territorial limits of state court jurisdiction and with the federal court jurisdiction as well, the latter following the former consequently. Particularly, Rule 4 (k)(1)(A) of the Federal Rules of Civil Procedure states the very principle that “[s]ervice of summons or filing a waiver of service is effective to establish [federal] jurisdiction over the person of a defendant who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located.”⁹⁴ This provision indicates that, as a general rule, the district court situated in that state that would have jurisdiction over the particular defendant, is the appropriate one.⁹⁵ For that reason, it is appropriate to assess whether and if necessary under which circumstances state jurisdiction can be established against the German defendants. Considering that the framing Web site is ubiquitously available, any state may be affected by the defendant’s conduct.

Generally, the state court’s jurisdiction is limited to the citizens of the particular state where the state court is situated. Exercising personal jurisdiction in an international context therefore depends on the states so called long-arm statutes that provide rules for the state’s right to exercise personal jurisdiction over a foreign defendant. The provisions of those long arm statutes must be satisfied to establish the consequential federal court jurisdiction as well,⁹⁶ unless the defendant is amenable to the federal court’s exercise of the jurisdiction.⁹⁷

For example the New York long-arm statute, section 302 of New York Civil Practice Law and Rules, provides two possible

94. FED. R. CIV. P. 4 (k)(1)(A).

95. See STEVAN BAICKER-MCKEE ET AL., FEDERAL RULES OF CIVIL PROCEDURE § 1.5 (1997).

96. See *Wenz v. Memery Crystal*, 55 F 3d 1503, 1506-7 (10th Cir. 1995). The court denied federal jurisdiction over a nonresident defendant because the state’s long arm statute did not apply. See *id.* at 1508.

97. See, e.g., *Maritz, Inc., v. Cybergold, Inc.*, 947 F. Supp. 1328, 1331 (E.D. Mo. 1996) (where the court raised the federal jurisdiction question but has not made a decision since the defendant consented to the exercise of the court’s jurisdiction).

bases for asserting personal jurisdiction over a foreign defendant.⁹⁸ The first possibility makes jurisdiction depend on “commit[ing] a tortious act within the state.”⁹⁹ The second possibility is based on tortious acts committed outside the state but causes injury within the state and which demands the defendant’s reasonable expectation that its acts have in-state consequences. Furthermore, the defendant must have “derive[d] substantial revenue from interstate or international commerce.”¹⁰⁰

Applying the second alternative with regard to the hypothetical the German framer puts up her link without deriving any revenue from international commerce at all and neither does the ISP. The framer might only, if at all, gain revenue from selling space for advertisement on her Web page and the ISP makes her living only by selling its service in Germany primarily to German customers. There is no revenue from international commerce to be found and both, neither the framer nor her ISP aim for revenue from international commerce.¹⁰¹ It is, therefore, impossible to apply the New York’s long-arm statute in this respect. Furthermore, long-arm jurisdiction cannot be established by applying the first alternative as well because no tortious act will be committed in New York just by virtue of the potential accessibility of the Web site. Moreover, downloading might actually not create a copy in the computer’s RAM as legal commentators and European authorities are currently proposing,¹⁰² thereby suggesting that framing does not lead to a tort at all. The lack of state court jurisdiction¹⁰³ necessarily

98. See N.Y. C.P.L.R. 302 (McKinney 1998). It appears to be reasonable to choose New York as an example for a long arm statute scrutiny since New York City is the United States’ and perhaps the world’s most important international business metropolis.

99. See *id.*

100. See *id.*

101. The sale of advertisement space to New York companies by the German Web site operator is conceivably what could then actually constitute international commerce.

102. Many legal commentators have criticized the proposition taken by the Ninth Circuit in *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993); see also David Post, *New Wine, Old Bottles: The Evanescent Copy*, AM. LAW, May 1995, at 103. In Europe the Council of the European Community’s proposal for a directive seem to suggest that a copy in the RAM is merely transitory and not constituting copyright infringement, see Proposal for a European Parliament and Council Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, COM (97) 628 Final (Oct. 12, 1997), art. 2, cmt. 3.

103. This is true for New York. Other states, such as California, might have

leads to the conclusion that it is impossible to establish federal jurisdiction as well since, applying Rule 4 (k)(1)(A) of the federal Rules of Civil Procedure, state court long-arm jurisdiction is a precondition to establish federal jurisdiction in that particular state. As a consequence, the German framer and her ISP seem to be off the hook.

However, Rule 4 (k)(2) of the Federal Rules of Civil Procedure does provide relief.¹⁰⁴ Rule 4 (k)(2) of the Federal Rules of Civil Procedure provides: “[i]f the exercise of [federal] jurisdiction is consistent with the Constitution and laws of the United States serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.”¹⁰⁵ Rule 4 (k) (2) particularly exposes foreign defendants to federal jurisdiction under two conditions. First, the claim needs to arise under federal law and second, foreign defendants need to have sufficient contacts with the United States as a whole but lack sufficient contacts with any state to support personal jurisdiction under the states long-arm statute.¹⁰⁶ Both requirements are easily met since all state or common copyright law is preempted by the Federal Copyright Act,¹⁰⁷ and state’s long-arm statutes do not provide general jurisdiction as provided in Rule 4 (k) (2). Applying the plain language of Rule 4 (k)(2) of the Federal Rule of Civil Procedure it could be sufficient just to analyze the nature of the claim as a

broader long-arm statutes.

104. See FED. R. CIV. P. 4 (k)(2) (adopted in 1993).

105. See *id.*

106. See STEVAN BAICKER-MCKEE ET AL., FEDERAL RULES OF CIVIL PROCEDURE, (1997), 105, quoting *Omni Capital International v. Rudolf Wolff & Co.*, 484 U.S. 97, 111, where the defendant had sufficient contacts to satisfy due process concerns, but insufficient contacts to fall within any State long-arm statute; see also *Eskofot A/S v. E.I. Du Pont De Nemours & Co.*, 872 F. Supp. 81, 87 (S.D.N.Y. 1995), where the court also held that sufficient contacts with the United States as a whole establishes federal jurisdiction.

107. 17 U.S.C.A. § 301 (a) (West Supp. 1999) Section 301 provides that “all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified in section 106 . . . are governed exclusively by this title. Thereafter [January 1, 1978], no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any state.” *Id.*

copyright claim and the lacking application of state's long-arm statutes. Consequently, it would be easy to verify minimum contacts and fairness factors based on the pure invitation to access a Web site in the United States. Its potential accessibility in the United States then would rationalize the finding of "sufficient contacts with the United States as a whole".¹⁰⁸

However, case law seems to point in a different direction. In *Eskofot A/S v. E.I. Du Pont De Nemours & Co.*¹⁰⁹ a New York district court applied Rule 4 (k)(2) of the Federal Rule of Civil Procedure and held that "personal jurisdiction may be asserted by courts where a foreign corporation, through an act performed elsewhere, causes an effect in the United States."¹¹⁰ It is needless to say that the mere act of providing the link between the two Web sites and storing this link in Germany on a German ISP does not cause an effect in the United States at all as long as no end user in the United States calls on the link. Consequently it appears to be impossible to establish international personal jurisdiction in the context of framing activities just by virtue of the framing Web site being accessible over the Internet. For that reason it is clear that the framing Web site actually needs to be hit by American end users. Apparently, without a hit there would be no effect at all.

Hitting the Web site causes an effect in the sense that it creates copies in the end user's RAM, the Web site becomes visible on the end user's computer screen, and the Web site is also potentially subject for a long term storage in the computer's hard drive. At a first glance, however, it seems to be inappropriate to take just one hit in the United States to establish minimum contacts by virtue of having "an effect" in the United States. Even though it is very much likely that it is foreseeable for the German content provider and her ISP that the link will be, once it is posted on the Internet, accessed anywhere in the world,¹¹¹ fairness factors, derived from

108. See *International Shoe Co. v. State of Washington, Office of Unemployment Compensation and Placement*, 326 U.S. 310, 315 (1945).

109. *Eskofot A/S v. E.I. Du Pont De Nemours & Co.*, 872 F. Supp. 81 (S.D.N.Y. 1995). The plaintiff, a Danish corporation, claimed anticompetitive acts in Europe conducted by an United States corporation barring entry into the United States market. See *id.*; see also *United States v. Int'l. Bhd. of Teamsters*, 945 F. Supp. 609 (S.D.N.Y. 1996).

110. See *Eskofot*, 872 F. Supp. at 87.

111. See *Ginsburg, Copyright without Borders*, *supra* note 81, at 160 (making that

the due process clause, appear as to render personal international jurisdiction for “just one hit” unconstitutional.¹¹² On the one side, the public interest in the United States to prosecute a “one hit” claim seems to be invisibly small because, at the first glance, only minimal impact can be found. Moreover, it seems to be too much of a burden for a defendant to come to the United States to defend a case just because the defendant’s Web site has been hit there once.

However, there is different impact to be found depending on what the end user actually does with the information she downloaded. Obviously, the impact will be heavy in case the end user not only downloads the information into the computer’s RAM but makes copies of it by saving the downloaded information on her hard drive. The copy from the hard drive might be easily disseminated to third parties thereby threatening the author’s rights extensively. Under this circumstances, public interest to prosecute a one

argument with respect to foreseeability.)

112. However, Germany’s procedural and substantive policies would not necessarily contradict the prosecution of a “one hit” claim. Germany was very strict in its demand to shut down a Web site hosted by CompuServe and which was communicating third party’s child pornography materials. CompuServe, in order to comply with German law, had to take the Web sites off the Internet entirely thereby denying access to not only German subscribers but American subscribers as well. With respect to German law, section 184 (3) of the German Penal Code (Strafgesetzbuch, StGB) renders dissemination, performance and production of pornographic material depicting violence, sexual abuse of children and sexual conduct with animals as a crime. This provision is, pursuant to section 6 (6) of the German Penal Code, also applicable to international crimes of non-nationals committed abroad. This ‘long-arm’ provision, however, might extend the scope of a country’s jurisdiction to adjudicate, *see* German Federal Supreme Court, BGH StR 1976, 298. Nevertheless, as Stephan Wilske and Teresa Schiller point out, Germany is in accordance with international law when it makes its nationals even abroad subject to its prohibition of dissemination of child pornography. *See* Wilske & Schiller, *supra* note 45, at 132. Consequently, Munich’s lower district court, AG München, Urt. vom 28.5.1998, CR 1998, 500 convicted CompuServe Germany’s CEO for CompuServe USA hosting pornographic content provided by third parties. However, there is a strong indication that the court disregarded section 5 of the German Teleservice Act providing the conditions under which an ISP is exempted from liability for hosting third party content. The trial court particularly neglected to take into consideration that CompuServe USA offers its service to approximately five million customers in 185 countries and that it was, at least during the relevant time, technically impossible for CompuServe USA to block German customers from access to the content only, *see* Hans-Werner Moritz, CompuServe Germany’s trial lawyer, in his annotation to the verdict, in: *COMPUTER UND RECHT* 505, 508 (1998). The case is on appeal. A decision is expected later in 1999.

a one hit claim is certainly substantial. Given that the defendants know about information on the Internet being ubiquitously available and the possibility that downloaded information can be saved on the hard disk, it does not seem to be too much of a burden for the German defendants to come the United States to defend a claim. In this respect it is relevant what the court in *Maritz* held namely that “[b]y simply setting up, and posting information at, a Web site in the form of an advertisement or solicitation, one has done everything necessary to reach the global Internet audience.”¹¹³ But the outcome of the analysis changes when the end user does nothing more than just downloads the information into the computer’s RAM without intent to permanently save it. The impact on the copyright owner’s reproduction right is comparatively small and the threat to violate the author’s reproduction right is consequently smaller too. To counterbalance the small impact the download into the computer’s RAM has, it is reasonable to demand a sufficiently large number of hits. A sufficiently large number¹¹⁴ of hits makes up the lack of a heavily weighing impact on the author’s reproduction right due to permanent storage in the computer’s hard drive.¹¹⁵

Consequently, after all, purposeful availment in the context of framing can be established as follows: First, when the information was downloaded into the computer’s RAM for a sufficiently large number of times in the United States as a whole. Second, when the information was downloaded into the computer’s RAM and stored on the computer’s hard drive once.

With regard to the hypothetical it is assumed that the German framer’s Web site was visited in the United States by a sufficient large number of end users.¹¹⁶ As a consequence, the framer and her

113. *Maritz, Inc., v. Cybergold, Inc.*, 947 F. Supp. 1328, 1332 (E.D. Mo. 1996).

114. This number has yet to be determined. 50 hits seem to be sufficient to make up the threat to author’s rights imposed by saving downloaded content on the computer’s hard drive.

115. See Ginsburg, *Copyright without Borders*, *supra* note 81, at 161 (focusing on a sufficiently large number of hits to satisfy minimum contacts.) However, Prof. Ginsburg does not explicitly distinguish between information downloaded into the computer’s RAM and information stored in the computer’s hard drive. See *id.*

116. It appears to be more difficult to prove that an end user actually saved downloaded content to her hard disk than establishing a sufficiently large number of hits.

ISP purposefully availed themselves of the privileges of the United States as a whole. Therefore, international personal jurisdiction over the German defendants has been established.

(d) Forum Non Conveniens

The German defendants still could invoke the forum of non convenience doctrine. The term “forum non conveniens” refers to court’s discretionary power to decline jurisdiction when convenience of parties and ends of justice would be better served if the suit would be brought in a different forum.¹¹⁷ In determining whether the doctrine of non convenience ought to be applied, the court should consider a number of relevant factors: (1) the relative ease of access to sources of proof, (2) availability of compulsory process for attendance of unwilling witnesses, (3) cost of obtaining attendance of willing witnesses, (4) possibility of view of premises, and (5) all other practical problems that make a trial easy, expeditious and inexpensive.¹¹⁸

It does not seem to be the case that framing a Web page opens court’s discretionary power to decline jurisdiction. The sources of proof are accessible over the Internet and witnesses are most likely not needed, a fact that renders the availability of compulsory process for attendance of unwilling witnesses and cost of obtaining attendance of willing witnesses irrelevant. There are also no premises to be viewed, except, perhaps, the framing Web site at issue which can be accessed through the Internet anywhere. The fact that the defendants have to travel from Germany to the United States forum and the fact as such that they have to defend themselves before a foreign court might cause some remaining inconvenience. However, considering the world wide accessibility of the Internet, about which the defendants presumably were aware of and which they most likely appreciated, it is reasonable not to permit them the right to invoke the doctrine of the forum of non conveniens.

117. See *Johnson v. Spider Staging Corp.*, 555 P.2d 997, 1000 (Wash. 1976) en banc; see also 28 U.S.C. § 1404 (1994).

118. See *Di Lella v. Lehigh Valley Railroad Co.*, 7 F.R.D. 192, 193 (S.D.N.Y. 1947).

3. Intermediate Result

As an intermediate result it can be concluded that federal courts can exercise international personal jurisdiction in the context of framing when the framing Web site is sufficiently interactive and two alternative conditions are met: First, the Web site has been hit once in case the downloaded information was permanently saved on the computer's hard disk; or second, the Web site has been hit sufficiently often in case the downloaded information was only temporary stored in the computer's RAM. Furthermore, defendants are not able to invoke the doctrine of forum of non conveniens.

B. *Choice of Law*

After international personal jurisdiction over the German defendants has been established by virtue of finding sufficient Web site hits in the whole United States the question arises whether it is German or United States copyright law that governs the case.

The Copyright Act of 1976 provides no guidelines as to the conflicts of law and neither does the national treatment principle of the Berne Convention.¹¹⁹ The latter basically provides that a foreign author seeking copyright protection abroad has to be treated like a national.¹²⁰ The fact pattern here is different since it is a domestic author seeking protection in his home jurisdiction against a foreign infringer. For that reason determining the applicable law invokes the general principle of territoriality which traditionally governs the conflicts of law within internationally situated copyright cases.¹²¹

119. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on Nov. 13, 1908, completed at Berne on Mar. 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971, 1161 U.N.T.S. 3. [hereinafter Berne Convention]. The United States joined in 1989 with the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

120. See Berne Convention art. 5 (1), which provides: "Authors shall enjoy . . . in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals . . .".

121. See Andreas P. Reindl, *Choosing Law in Cyberspace: Copyright Conflicts on Global Networks*, 19 MICH. J. INT'L L. 799, 803 (1998).

1. The Shortcomings of the Territoriality Principle in the Digital Arena

In the context of copyright cases within an international setting the principle of territoriality is traditionally of some importance. It describes the fact that national copyright law is applicable only within the country; that it does not reach across its borders.¹²² The mirror like counterpart to the principle of territoriality is the principle of the country of protection (*lex loci protectionis*) stating that the origination and the scope of copyright protection is determined by the law of the country in which copyright protection is actually being sought. This principle is set forth in Article 5 (2) of the Berne Convention.¹²³ Following the principle of territoriality and its mirror-like counterpart the applicable law in copyright cases within an international context is generally the law of that country in which the infringing acts occurred.¹²⁴ Applying those principles, for example, in a case where somebody legally acquires an original work of authorship in Germany, brings it to the United States, copies it and sells it publicly in the United States, it is without any doubt that United States copyright law applies to solve the case.

However, the Internet's digital environment generally imposes a problem on the traditional territorial choice of law regime, be-

122. See *id.* at 804; also Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 548 (1997). However, Berne, at least, does provide minimum protection for member state authors seeking copyright protection abroad in a country which is a member of Berne. Minimum protection is granted for any kind of works of literature and art (Art. 2 of the Berne Convention). The scope of the minimum protection is set forth in Art. 6^{bis} of the Berne Convention and covers, inter alia, the rights to prepare translations, adaptations, reproductions, and the right to broadcast.

123. Article 5 (2) of the Berne Convention provides that copyright protection "shall be governed exclusively by the laws of the country where protection is claimed". Berne Convention, *supra* note 119, art. 5 (2).

124. See, e.g., *Murray, v. British Broadcasting Corp.*, 81 F.3d 287, 290 (2d Cir. 1996) (holding that national treatment is "a choice of law rule mandating that the applicable law be the copyright law of the country in which the infringement occurred"). See also PAUL E. GELLER, *INTERNATIONAL COPYRIGHT: AN INTRODUCTION IN INTERNATIONAL COPYRIGHT LAW AND PRACTICE* § 3 [1][a] (1997); MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT*, § 17.05 (1998) [hereinafter *NIMMER ON COPYRIGHT*]. A minority of other legal commentators, however, interpret the language of Art 5 (2) of the Berne Convention "protection is claimed" literally and maintain the argument that the copyright law of that country applies in which the actual litigation takes place (*lex fori* rule), see, e.g. Ginsburg, *Global Use*, *supra* note 2, at 336-37.

cause a single use of a copyrighted work might lead to effects in a number of different countries. A content provider might upload a work on the Internet in one country which is then accessed by an end user who downloads it into her RAM of her computer in a different country. Applying a strictly territorial choice of law regime, one is unable to define which copyright laws exclusive rights may have been infringed because neither the content provider can control who in fact accesses the work she uploaded nor is the end user able to identify the location of the source of the work she browsed and then downloaded.¹²⁵

A plausible approach to decide whether it is the broadcasting or the receiving country's law that ought to govern the conflict could be the determination as to whether it is the receiving or the broadcasting activity which in fact weighs heavier as a cause to the infringing act. With regard to framing, where the infringing act allegedly is the creation of a copy in the end users RAM of her computer, neither of the two conducts - sending and receiving—seem to outweigh the other in terms of importance. Both are logically necessary for the creation of the copy in the computer's RAM; without one of the two causes no infringement would occur. Moreover and generally in the context of the Internet, both alternatives come along with disadvantages which are surely not wanted. Applying the receiving country's law a content provider would expose herself to as many foreign copyright laws as there are countries with Internet access.¹²⁶ Assuming the content provider is eager to avoid becoming subject to suit in one of the Internet countries, she would be forced to consider all the country's copyright laws and to curtail her content to bring it in accordance with those laws. Proceedings like this would take too much trouble and would be insecure too. The other alternative, applying the law of the broadcasting country, has been initially proposed by the Com-

125. See Reindl, *supra* note 121, at 807-8; Ginsburg, *Copyright without Borders*, *supra* 81, at 318-20; David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1371. (1996) (“[t]he system is indifferent to the *physical* location of [machines between which messages and information are routed], and there is no necessary connection between an Internet address and a physical jurisdiction”).

126. See Johnson & Post, *supra* note 125, at 1374; Ginsburg, *Global Use*, *supra* note 2, at 334; Fraser, *supra* note 2, at 765.

mission of the European Union.¹²⁷ Its proposal was based on the approach chosen by the EU's Satellite Broadcasting Council Directive¹²⁸ which applies the broadcasting country theory. Particularly Article 1 (2)(b) of the directive provides in that respect that the authoritative country for acquiring broadcasting rights is the country from where the broadcast is being conducted. Without questioning the plausibility of the broadcasting country theory in the context of satellite broadcasting,¹²⁹ in the context of the Internet serious problems would come along with it. Content providers could avoid liability by using ISP from a country which affords its nationals a comparatively lesser standard in copyright protection than the content provider's home country does.¹³⁰ The current system of international copyright protection would be rendered useless with regard to digital communication and exchange of information over the Internet.¹³¹

However, it is necessary to find an approach that reasonably enables the legal system to properly solve the choice of law question and to reach justifiable solutions in the context of the Internet.

127. See Commission of the European Communities, Copyright and Related Rights in the Information Society: Green Paper presented by the Commission, COM (95) 382 Final (July 1995) [hereinafter Green Paper].

128. See Official Gazette of the EU No. L 248/15 (Oct. 6, 1993).

129. Interestingly, the Ninth Circuit in *Allarcom Pay Television, Ltd. v. General Instrument Corp.*, 69 F.3d 381 (9th Cir. 1995) ruled the opposite way holding that the transmission of a copyrighted work from the United States into Canada was not copyright infringement even though the broadcasts originated in the United States.

130. See Reindl, *supra* note 121, at 836. In June 1997, for example, the pacific island Tonga advertised its ISP to potential customers by emphasizing that the country does not have a trademark law, thus trademark infringement would be impossible, see German commentator Stefan Bechtold, *Multimedia und Urheberrecht - einige grundsätzliche Anmerkungen*, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT (GRUR), 18, 23 n.60 (1998).

131. This has been recognized also by the European Union's Commission which, after hefty criticism abandoned the idea in its 'Follow up' to the Greenpaper on Copyright, COM (96) 568 Final. See German commentators Axel Nordemann /Heinz Goddar/Marion Tönhard/Christian Czychowski, *Gewerblicher Rechtsschutz und Urheberrecht im Internet*, COMPUTER UND RECHT (CR), 645, 652 (1996); see also Reindl, *supra* note 121, at 831-36 (identifying arguments in favor of the application of the law of the country of origin but concluding that the "arguments against applying such a choice of law rule are more persuasive").

2. Alternative Approaches in the Digital Arena

Available alternative approaches can be divided into two categories. The first category relies heavily on a traditionally known method usually employed in tort cases within an international setting. The second approach reflects on a new and distinctive cyber-law.

a. The Victim Approach as a Solution

It is impossible to make a preference in favor of either the receiving country or the broadcasting country.¹³² Therefore, it may be useful to redirect one's focus from the perpetration of the infringement to the infringement itself, particularly to the author of the infringed original work. Thus, the focus is directed to the place where the victim of the infringing conduct is situated. This approach seems to be well established in the context of torts committed in an international setting.

A tort is defined as "a violation of a duty imposed by general law or otherwise upon all persons occupying the relation to each other that is involved in a transaction".¹³³ Copyright law as such imposes a duty on third parties, namely not to violate the author's exclusive rights set forth in the Copyright Act. As a consequence, copyright infringement certainly constitutes a tort.¹³⁴ It should be, therefore, legitimate to analyze the law concerning international torts and to apply an analogous approach to copyright infringement on the Internet.

There are two underlying theories leading to a determination

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

133. *Coleman v. California Yearly Meeting of Friends Church*, 27 Cal. App. 2d. 579, 581 (1938); see also RESTATEMENT (SECOND) OF TORTS § 6 (1965). Section 6 defines tortious conduct as conduct that "denote[s] the fact that conduct whether of act or omission is of such a character as to subject the actor to liability under the principles of the law of Torts". *Id.*

134. Section 823 (1) of the German Civil Code (Bürgerliches Gesetzbuch, BGB) creates the equivalent tort provision in German law providing liability in case of an unlawful conduct causing damage. Section 823 (2) of the German Civil Code imposes the same liability on those who violate specific protective law ('Schutzgesetz'). The German copyright act doubtlessly qualifies as such a protective law, see Palandt, Bürgerliches Gesetzbuch, Kommentar, 58th ed., § 823 margin number 151.

which law should apply when a tort is committed in an international setting. The first theory with respect to international torts is the traditional one that is based on the “lex loci delicti” approach. According to the lex loci delicti rule the applicable law is the law of the place where the tort has been committed. Thus, decisive is the place where the last event occurred which was necessary to make an actor liable.¹³⁵ However, while this rule seems to be an adequate one in the real world it is not in cyberspace. In cyberspace it is difficult to identify where on the Internet events actually occur. The location might be any country that is on-line. Therefore, the lex loci delicti approach turns out to be inappropriate to serve as a sound choice of law regime in cyberspace.¹³⁶ The second theory determines the applicable law by finding out the most significant relationship the participating parties have to a particular country.¹³⁷ It deserves further inquiry as to the question whether it provides a feasible basis for the choice of law decision.

(1) *The Restatement (Second) of Conflicts of Laws*

To determine the most significant relationship the *Restatement (Second) of Conflicts of Laws* provides in section 6 (2) that in case there is no statutory directive concerning the choice of law the factors relevant to the choice of the applicable rule of law include:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and

135. See RESTATEMENT (FIRST) OF CONFLICTS OF LAW § 377 (1937).

136. See Matthew R. Burnstein, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, VAND. J. TRANSNAT'L L. 75, 93 (1996).

137. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (1971).

(g) ease in the determination and application of the law to be applied.¹³⁸

Section 145 (2) of the *Restatement (Second) of Conflicts of Laws* furthermore provides what kind of contacts are to be taken into account when applying the principles of section 6.¹³⁹ Those contacts include:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.¹⁴⁰

Section 145 (2) (a) and (b) of the *Restatement (Second) of Conflicts of Law* basically resemble the traditional rule of the *lex loci delicti*: when the place where the injury occurred and the place where the conduct causing the injury occurred is identical it follows naturally that the law of this particular place ought to be applicable.¹⁴¹ But it becomes more difficult to determine the applicable law when the place of injury and the place of cause are different from each other.

(2) Place of Injury v. Place of Cause

The difficulty in determining the applicable when the place of cause and place of injury are different can be illustrated by the following example: an American tourist buys a poisoned apple in Rome, carries it back home to Texas,¹⁴² eats it and becomes sick. The injury clearly occurs in Texas whereas the cause was set in Rome invoking the question whether Texas law ought to apply or

138. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6

139. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145.

140. Section 145 of the Restatement of Law has been criticized for not providing a rule in its true sense since it lacks a definition of the word "significant", see Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202, 212 (1969).

141. See *id.*

142. Leaving the fact aside that United States law prohibits the importation of agricultural products of any kind.

Italian law. Logically, there are two approaches leading to a solution of this conflict. The judge might either choose between the place of injury and the place of cause or she might combine both places, choosing the law alternatively. In fact there seems to be no greater justification for choosing either the place of injury or the place of the cause to determine the applicable law. The former protects the valid confidence of the victim in her particular environment and the latter protects the actor who might have acted in accordance with the law applicable at her environment. Section 145 (2) (a) and (b) of the *Restatement (Second) of Torts* actually does not provide any help in that respect since both place of injury and place of cause seem to weigh equally without favoring one or the other as being the decisive contact.

However, considering section 6 (2) of the *Restatement (Second) of Conflicts of Law*, it appears to be the fact that all the factors relevant to the choice of the applicable rule of law point to one direction which is to always protect the victim of a tortious act, respectively to apply the law which favors the victim's claim in general. It is without any doubt that, as a matter of policy, justified expectations, and predictability, it is usually the victim who should be protected. The victim usually has no means to protect itself or to avoid the harmful event whereas the actor at least to a certain extent is able to control her actions and to consider future effects caused by her anticipated conduct. That makes it reasonable to apply the law of the victim's forum and to put the burden on the actor even though her conduct might be legal at her home country.¹⁴³

Considering fairness standards toward the defendant it seems to be necessary to employ a foreseeability test with regard to the question whether a content provider could reasonably foresee that

143. See Reindl, *supra* note 121, at 836-53 (presenting a slightly different solution). He essentially relies on the economic effects a transmission might have at a given territory. See *id.* at 837. However, following Reindl's approach, a number of online transmissions will have economic effects in a number of receiving countries leading, consequently, to the potential application of a number of different copyright laws. Therefore, Reindl's suggestion does not seem to sufficiently solve the main concern emerging from the principle of territoriality in the context of the Internet that is the unlimited number of different applicable copyright laws. The victim approach on the other hand necessarily leads to the application of the country's copyright law where the defendant is situated.

her work will be accessed in a particular country.¹⁴⁴ In the context of the Internet, however, the use of the medium as such strongly implies foreseeability in this respect. A content provider is certainly aware of the fact that a work, once uploaded, is ubiquitously available in every country that has access to the Internet. Given this awareness, it must be concluded that it is the content provider's intent to actually make her work ubiquitously available. As a consequence, she can, respectively does, reasonably foresee that her work will be accessed anywhere. Particularly in case the content provider derives her revenue from operating a Web site either by granting access to it for a fee or by publishing third party advertising for a fee the content provider foresees the accessibility. In both cases the content provider depends on as much access as possible regardless from which country the access originates.¹⁴⁵

However plausible an approach based on traditional rules with regard to the shortcoming of the principle of territoriality is, applying those rules for resolving conflicts of law problems in cyberspace is subject to fundamental criticism. This fundamental criticism finds its expression particularly in the proposal of a distinctive cyberlaw.

144. *Id.* at 844-45. It is suggested, thereby pointing to case law stating "that an element of potential knowledge or perhaps even intent must exist before foreign copyright laws are applied to ensure fairness toward the defendant." *Id.* at 844. The foreseeability test is applicable in international product liability cases limiting a defendant's risk to become subject to foreign product liability claims, see Russel Weintraub, *Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation*, 1989 U. ILL. L. REV. 129, 148 (1989); Hague Conference on Private International Law: Convention on the Law Applicable to Products Liability, Oct. 12, 1972, art. 7, 11 I.L.M. 1283 (providing that the place of injury or the plaintiff's residence is inapplicable if the manufacturer could not reasonably foresee that the injury causing product would be available in those places through ordinary commerce).

145. See Reindl, *supra* note 121, at 849, who suggests that the foreseeability test will be easily met where a content provider receives revenues from online customers. However, the test, he seem to suggest, is not necessarily met in cases where content providers provide free and uncontrolled access to their Web sites deriving revenues, for example, from third party advertising. *Id.* at 850.

b. Distinctive Cyberlaw

David R. Johnson and David Post have proposed a new dimension with regard to the applicable law in cyberspace. Their proposal is meant to overcome the traditional approaches for determining jurisdiction and choice of law.¹⁴⁶ They analyze that the traditional methods have their justifying basis in the real physical world where control over physical space, and people and things located there is a defining attribute of sovereignty and statehood. There is a correspondence between physical boundaries and jurisdictional boundaries which reflects a strong relationship between physical proximity and the effects of any particular behavior.¹⁴⁷ Cyberspace, say Johnson and Post, has no territorially based boundaries anymore and physical locations almost entirely lack the power to control activity in Cyberspace.¹⁴⁸ Moreover, the effects of on-line activity in cyberspace are not tied to geographically proximate locations either.¹⁴⁹ Thus, traditional principles are not able to function as proper guidelines in the virtual world because cyberspace without any doubt “undermines the relationship between legally significant (on-line) phenomena and physical location.”¹⁵⁰

The proposed alternative would be to recognize cyberspace as a distinct place with its own (electronic) boundaries.¹⁵¹ When taking cyberspace as its own distinct place one could overcome the difficulties determined by a regime of inconsistent copyright laws

146. See Johnson & David, *supra* note 125, at 1374.

147. See *id.* at 1369.

148. See *id.* at 1370-71.

149. See *id.* at 1375; see also German commentator Stefan Bechtold, *Multimedia und Urheberrecht - einige grundsätzliche Anmerkungen*, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT (GRUR) 1998, 18, 23.

150. Johnson & Post, *supra* note 125, at 1370; see also Burnstein *supra* note 136, at 93-4; Axel Nordemann /Heinz Goddar/Marion Tönhard/Christian Czychowski, *Gewerblicher Rechtsschutz und Urheberrecht im Internet*, COMPUTER UND RECHT (CR) 645, 651 (1996).

151. This idea also finds proponents among German legal commentators, who explicitly recognizes that copyright infringement is not connected to a particular country anymore but occurs within a communication network. See Stefan Bechtold, *Multimedia und Urheberrecht - einige grundsätzliche Anmerkungen*, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT (GRUR) 18, 23 (1998).

following the principle of territoriality.¹⁵² Inconsistent copyright laws could be replaced by new doctrines particularly tailored to cyberspace.¹⁵³ Already in the real world much creative expression is entirely independent of an incentive structure and has more to do with building up recognition in the community and the accumulation of reputational capital.¹⁵⁴ Moreover, seeing cyberspace as a place with its own boundaries would facilitate the development of new doctrines of implied license and fair use with regard to the transmissions and creations of copies incidentally caused when browsing and caching the Internet. Based on its own cross-boundary “spaceness” cyberspace could also provide means to resolve disputes which might occur within its boundaries based on the countries willingness to delegate authority and sovereignty to a self governing cyberspace body.¹⁵⁵

3. Determining the Applicable Law

It is obvious that distinctive cyberlaw does not yet exist. There might be some efforts around like the adoption of netiquette¹⁵⁶ providing core rules with respect to the style people on the Internet communicate with each other.¹⁵⁷ Moreover, an on-line mediation and arbitration center for domain name disputes under the roof of the WIPO can be found as well.¹⁵⁸ But it is needless to say that those efforts, even though they might point into the right direction,

152. See Johnson & Post *supra* note 125, at 1383.

153. See *id.* at 1384.

154. This may be even more true in cyberspace where it is already happening that copyright holders, like Netscape and Microsoft with respect to their Internet browser software, first give away their work for free in order to create a reputational capital which can be financially exploited later.

155. See Johnson & Post, *supra* note 125, at 1391.

156. “Netiquette” describes a voluntarily administered set of rules about how to behave when connected to the Internet: “[T]he informal rules and customs that have developed on the Internet.” Religious Technology Center v. Netcom On-Line Communication Service, Inc., 907 F. Supp. 1361, 1375 (N.D. Cal. 1995). Despite its character as purely voluntary, litigators try to use netiquette rules to argue their cases, see *id.* at 1375. An introduction to the rules is available on *Netiquette Homepage*, (visited July 26, 1998) <<http://www.etiquette.net/index.html>>.

157. See Johnson & Post, *supra* note 125, at 1389.

158. Initiated by the International Ad Hoc Committee, see Annette Kur, *Der Bericht des International Ad Hoc Committee*, COMPUTER UND RECHT (CR) 325, 327 (1997); see also Johnson & Post, *supra* note 125, at 1388.

do not make up a distinctive cyberlaw solving actual problems in determining “real” jurisdiction and choice of law issues in Internet related copyright cases with international participation. It seems to be very likely that the only promising way to create a truly effective cyberlaw will be the administration of multilateral treaties such as TRIPs or the WIPO administered Berne Convention and the Copyright Treaty from December 20, 1996.¹⁵⁹ The latter at least partially deals with Internet related aspects of technology, although not as to jurisdiction and choice of law issues,¹⁶⁰ and TRIPs which brings Berne’s minimum standards of IP protection into the WTO regime of trade liberalization and, for the first time in the history of multilateral IP treaties, provides an enforcement procedure to its provisions.¹⁶¹ The multilateral copyright treaties could serve as a basis for coordination of the multitude of interests of the parties connected to the net, thereby considering the different cultures, legal standards and values of the participating parties.¹⁶² Even though it will be extremely difficult to internationalize copyright with regard to distinct cyberlaw,¹⁶³ maintaining the idea of a distinctive cyberplace with its own boundaries will, at the same

159. See Stefan Bechtold, *Multimedia und Urheberrecht - einige grundsätzliche Anmerkungen*, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT (GRUR) 18, 23 (1998). This German commentator particularly points out this fact.

160. World Intellectual Property Organization Copyright Treaty, *adopted by Diplomatic Conference at Geneva, Dec. 20, 1996*, 36 I.L.M. 65 (1997) [hereinafter WIPO Copyright Treaty]. Article 8 provides: “[a]uthors of literary and artistic work shall enjoy the exclusive right of authorization any communication to the public of their works, by wire, or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.” See *id.* As of 1998, the treaty has been signed by fifty-one states and is ratified by three, namely Belarus, Indonesia and the Republic of Moldova, see World Intellectual Property Organization, (visited July 26, 1998) <<http://www.wipo.org/eng/ratific/s-copy.htm>>.

161. See Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 VA. J. INT’L LAW 275 (1997) (analyzing the enforcement mechanism provided by TRIPs).

162. See Johnson & Post, *supra* note 125, at 1395 (categorizing this variety of concerns as “internal diversity”). The commentators propose that this internal diversity becomes exercised and secured by contractual provision which are imposed by different local sysops on the cyberlaw citizens. See *id.* at 1397.

163. See Stefan Bechtold, *Multimedia und Urheberrecht-einige grundsätzliche Anmerkungen*, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT (GRUR) 1998, 18, 23 (articulating this concern).

time, also facilitate the necessary process of identification and addressing pertinent problems to eventually create a smoothly working system.

The lack of distinctive cyberlaw on the one side and the necessity to provide “justice” in a truly existing conflict between parties with conflicting interests consequently leads to the conclusion that traditional choice of law concepts ought to be applied. Following the analogy of tort principles in an international copyright dispute, discussed earlier, it appears to be quite easy to determine the applicability of United States copyright law. The victim, the author of the framed Web site, resides in the United States and the victim in an international tort case deserves protection. Because distinctive cyberlaw is lacking and the principle of territoriality looking for the place where the conduct causing the infringement took place does not provide a decisive help either, the traditional victim approach should be analogously applied in international copyright cases in the context of the Internet. Since, with regard to the hypothetical, the victim is a United States resident the United States Copyright Act of 1976 ought to be ruling the case.¹⁶⁴

C. *Intermediate Result*

As an intermediate result it can be concluded, with regard to the hypothetical, that United States federal courts can exercise personal international jurisdiction over the German defendants because minimum contacts to the United States as a whole can be established. Furthermore, United States copyright law governs the case because the victim of the allegedly infringing act is a United States resident. The traditionally in international copyright cases used choice of law rules, which are based on the principle of territoriality, do not apply.

164. The victim approach is consistent with German international private law concerning tort cases which applies the law of the place of injury and the law of the place of cause alternatively in favor of the victim of a tortious act. See GERHARD KEGEL, *INTERNATIONALS PRIVATRECHT* 533-37 (7th ed. 1995). The commentator explicitly argues that ‘the sympathy with the victim is generally greater than the sympathy with the actor’. See *id.* However, it needs to be emphasized that German conflict of law doctrine, in case there are two places of perpetration, favors the law which is more favorable for the defendant, that might very well be the victim’s or the delinquent’s law. See *id.* at 541.

III. IS FRAMING COPYRIGHT INFRINGEMENT UNDER UNITED STATES LAW?

The determination whether framing is copyright infringement particularly points to the question whether the work of authorship being framed is protected by copyright law. In case it does not, no copyright infringement occurs and a framer cannot be held liable in the first place. Analyzing whether a work being framed is copyright protected invokes the question as to the requirements of copyright protection in general. These questions entail what the subject matter of copyright protection is and in case the framed work falls within subject matter of copyright law, whether the act of framing infringes one of the author's exclusive rights.

A. *The Subject Matter of Copyright*

The subject matter of copyright is defined by section 102 of the Copyright Act of 1976.¹⁶⁵ According to section 102 (a) works of authorship include in particular literary, musical, pictorial, and audiovisual works as well as sound recordings.¹⁶⁶ Section 102 (a) furthermore prescribes that copyright protection subsist only “in original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine.”¹⁶⁷

The language of the statute invokes two questions. The first question refers to the standard of “originality” a work of authorship needs to have to qualify for copyright protection. The second question emerges from the significant characteristics of the Internet and refers to the problem whether original works of authorship transferred over the Internet are fixed in a tangible medium pursuant to the language of the statute.

165. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C.A. §§ 101-1010 (West Supp.1999)) [hereinafter Copyright Act].

166. 17 U.S.C.A. § 102 (a) (West Supp. 1999). Dramatic, choreographic and architectural works are protected as well but play apparently a little role in the context of the Internet and the conduct of framing.

167. 17 U.S.C.A. § 102 (a).

1. The Standard of Originality

The term originality refers basically to the fact that an original work of authorship does not have to be novel but rather independently created and not copied from other works.¹⁶⁸ But it is not just the independent creation of a work in itself that confers copyrightability. Copyrightability can be claimed only in the expression of the work of authorship and not in its underlying ideas.¹⁶⁹ This aspect of the standard of originality is usually referred to as the idea/expression dichotomy. Furthermore, the work has to reflect a minimum degree of creativity.

a. The Idea/Expression Dichotomy

The idea/expression dichotomy points out that underlying ideas of a work can not be copyright protected at all. Following the copyright clause of the constitution,¹⁷⁰ which provides that copyrights might be granted to promote the progress of science and the useful arts, it is impossible to grant a copyright for an idea since it would confer a monopoly to the author and thereby inhibiting the promotion of science and the useful arts.

168. See NIMMER ON COPYRIGHT *supra* note 124, § 2.01 [A].

169. See *Whelan Assocs. v. Jaslow Dental Lab.*, 797 F.2d 1222, 1234 (3d Cir. 1986), *cert. denied* 479 U.S. 1031 (1987).

170. See U.S. CONST. art. I, § 8, Cl. 8 “The Congress shall have the power . . . To promote the Progress of Science and Useful Arts, By Securing for Limited Times to Authors and Inventors the Exclusive Right to their Respective Writings and Discoveries.” *Id.* The constitutional copyright clause reveals in particular that American copyright protection is not, unlike copyright protection in European countries such as Germany and France, based upon any natural rights an author retains in his works. Rather that copyright is a purely statutory right serving the welfare of the public by giving authors an incentive to produce original works of authorship which in turn enhances the promotion of science and useful arts. See H.R. NO. 2222, 60th Cong. (1908). For a critical and concise discussion of the concept of romantic authorships opposed to the economic analysis prevailing in anglo-american copyright law see Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873 (1997) [hereinafter Lemley, *Romantic Authorship*] (reviewing JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY). Professor Lemley argues that the idea of romantic authorship suffers from three deficiencies. First, it is unable to explain the legal rules that make up intellectual property law, second, a number of intellectual property areas are inconsistent with the idea of romantic authorship and third, the idea of romantic authorship cannot explain the changes taking place in intellectual property law today. See Lemley, *Romantic Authorship*, *supra* at 879.

The idea/expression dichotomy found early application in *Baker v. Selden*.¹⁷¹ There, Selden was the author of a book that described a new way of accounting. He developed an account book ledger design that incorporated his new idea. Baker copied the account book ledger and Selden sued him for copyright infringement.¹⁷² The court held that Selden's book was subject of copyright protection but not the account book ledger because the latter itself just represents the idea which then found its expression in the detailed descriptions of the book.¹⁷³ In other words, *Selden* teaches that the written expression is copyrightable, the idea - the account book ledger as such - has to remain unprotected to ensure that it cannot be monopolized by the person who "invented" the idea, thereby inhibiting the promotion of science and the useful arts. However, in cases where the idea and its expression is inseparable, "copying the expression will not be barred, since protecting the expression in such circumstances would confer a monopoly of the idea upon the copyright owner".¹⁷⁴ The non-copyrightability of ideas and expressions being inseparable is commonly referred to as the merger doctrine.

The idea/expression dichotomy was explicitly recognized in section 102 (b) which provides that "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."¹⁷⁵ Denying copyright protection to any idea or process does not mean that a written description of the idea or process cannot enjoy copyright protection,¹⁷⁶ unless, invoking the merger doctrine set forth in *Baker v. Selden*, the number of possible expression of the idea is

171. *Baker v. Selden*, 101 U.S. 99 (1879).

172. *See id.* at 100.

173. *See id.* at 104 (holding that "[t]he use of the art is a totally different thing from a publication of the book explaining it. The copyright of a book on book-keeping cannot secure the exclusive right to make, sell, and use account-books prepared upon the plan set forth in such book.")

174. *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971).

175. 17 U.S.C.A. § 102 (b) (West Supp. 1999).

176. *See* NIMMER ON COPYRIGHT, *supra* note 124, § 2.03 [D].

limited.

b. The Creativity Requirement

Traditionally, American courts granted copyright protection according to the “sweat of the brow” doctrine.¹⁷⁷ Courts particularly relied on section 5 (a) of the Copyright Act of 1909,¹⁷⁸ provided categories under which a work might be copyrighted. One of these categories was “[b]ooks, including composite and cyclopaedic works, directories, gazetteers, and other compilations.” Section 5 (a) of the Copyright Act of 1909 was seen as a specification as to the works “in which copyright can be claimed.”¹⁷⁹ Applying the “sweat of the brow” doctrine courts conferred copyright protection already when plaintiff had expended some deal of labor regardless whether the work does contain some sense of creativity at all:

The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are in *publici juris*, or whether such material shows literary skill or originality The man who goes through the streets of a town and puts down the names of each of the inhabitants, which their occupations and their street number, acquires material of which he is the author.¹⁸⁰

The Supreme Court overruled the “sweat of the brow” doctrine in 1991 in the *Feist* case.¹⁸¹ Rural, the plaintiff in *Feist*, was a telephone company which distributed the yellow and the white pages listing of Rural’s subscribers in an alphabetical order together with

177. See, e.g., *Jeweler’s Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83, (2d Cir. 1922) (holding that a compilation of trademarks of various firms is a directory and as such copyrightable). See also *Leon v. Pacific Telephone & Telegraph Co.*, 91 F.2d 484 (9th Cir.) (holding that a telephone directory containing names, addresses, and phone numbers was copyrightable).

178. Act of Mar. 4, 1909, ch. 320, 9-12, 35 Stat. 1075 (current version at 17 U.S.C.A. §§ 101-1010).

179. See *Jeweler’s Circular Publishing Co.*, 281 F. at 85.

180. *Id.* at 88.

181. *Feist Publications, Inc. v. Rural Telephone Service*, 499 U.S. 340 (1991)

gether with their towns and telephone numbers. Feist, the defendant, was a publishing company that specialized in areawide telephone directories and its yellow pages covered also Rural's service area. Both parties competed vigorously with each other for advertisement. To compile the white pages Feist asked Rural to license its white page listing what Rural refused to do.¹⁸² As a result, Feist used the listings without Rural's consent and incorporated them into its white pages.¹⁸³ Rural sued for copyright infringement and the District Court, relying on caselaw, held that telephone directories are copyrightable.¹⁸⁴

The court acknowledges the copyrightability of compilations in general and refers to the idea/expression dichotomy and states that in absence of original written expression only the compiler's selection and the arrangement may be protected and that raw facts may be freely copied.¹⁸⁵ Holding facts as non-copyrightable, the court states, is in accordance with the Copyright Act of 1976, which provides in section 102 (b) that "copyright protection for an original work of authorship [does not] extend to any idea."¹⁸⁶ Even though a compiler may use the selections and arrangements others have used as a starting point, thereby indicating, that novelty is not required, the court points out that the selection and arrangement of the facts has to be done independently and that the selection and arrangement needs to display some level of creativity. As a result the court explicitly dismissed the sweat of the brow doctrine.¹⁸⁷ The opinion does not clearly define the threshold of creativity. However, the court ruled that names, addresses, and telephone numbers are merely non protectible facts and that Rural's typical and obvious telephone listing—name, town, and telephone number—as well as the arrangement of the listings in alphabetical order does not meet the minimum creativity requirement necessary to

182. *See id.* at 343.

183. *See id.*

184. *Id.* at 344.

185. *See id.* at 359 (holding "the facts contained in existing works may be freely copied because copyright protects only the elements that owe their origin to the compiler—the selection, coordination, and arrangement of facts").

186. 17 U.S.C.A. § 102 (b) (West Supp. 1999).

187. *See id.* at 359-60.

confer copyright protection.¹⁸⁸

Consequently, framing a Web page does not constitute copyright infringement when the Web page lacks a minimum of creativity as required by the Feist case. The determination of the originality of a work of authorship, however, has to be made on a case by case basis. Since it is just a spark of creativity which is needed to make a work eligible for copyrightability, it would be good advice to treat a doubtful case as copyrightable matter rather than non-copyrightable.

2. Fixation in a Tangible Medium

The way that the Internet works and information is communicated through the Internet heavily depends on storing information in the Computer's memory devices, particularly the ISP's and cache providers hard disk.¹⁸⁹ Following the definition of the term 'fixation' provided in section 101, the storage of the information in those memory devices does qualify as fixation pursuant section 102 (a).¹⁹⁰ Section 101 states: "a work is fixed in a tangible medium of expression when its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than a transitory duration".¹⁹¹ It appears to be rather settled law that original works of authorship, stored in the hard disk of a computer, are fixed pursuant section 106 (a), because it goes without saying that an original work of authorship, stored in the hard disk of a computer, is a stable copy of the original work which can, with the aid of a machine, be perceived for a period of more than a transitory duration.¹⁹² Courts have long recognized that a ROM¹⁹³ is a

188. *See id.* at 362-3 ("Rural expended sufficient effort to make the white pages directory useful, but insufficient creativity to make it original.").

189. For the discussion whether RAM storage constitutes fixation *see infra* Part III.B.2.a.

190. 17 U.S.C.A. § 102 (a) (West Supp. 1999). Section 102 (a) of the Copyright Act requires an original work of authorship containing a minimum of creativity needs to be "fixed in a tangible medium of expression from which it can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine, to enjoy copyright protection." *Id.*

191. 17 U.S.C.A. § 101 (West Supp. 1999).

192. *See* James A. Kirkland, *Emerging Internet Copyright Issues*, 482 PLI/PAT 531,

tangible means of expression and that a computer program imprinted in a ROM is fixed in a tangible medium.¹⁹⁴

B. *Infringement of Author's Exclusive Rights*

The owner of the copyright of the work stored on the Internet server's hard disk may invoke his exclusive rights granted by the Copyright Act when his work is being framed. Author's exclusive rights might be infringed either directly by the content provider, the framer, and/or the end user, or indirectly by the Internet service provider who has contributed to an alleged copyright infringement. Author's exclusive rights are expressed in section 106.¹⁹⁵ An author has the exclusive right to do and to authorize: the reproduction of the copyrighted work in copies; the preparation of derivative works based upon the copyrighted work; the distribution of copies of the copyrighted works to the public by sale or other transfer of ownership, or by rental, lease, or lending; and the display of the copyrighted work publicly.¹⁹⁶

1. *Framer's Direct Infringement*

Direct Infringement is based on the notion that somebody's conduct directly infringes authors exclusive rights. With respect to the hypothetical, the framer being the person setting up the framing link in the first place is naturally the focus of the analysis.

542 (1997).

193. Read Only Memory.

194. *See* Apple Computer Inc. v. Formula International, Inc. 562 F. Supp. 775, 779 (C.D. Cal. 1983), *aff'd* 725 F.2d 521 (9th Cir. 1984) (the court does not problematize the lower courts finding in terms of the fixation in a tangible medium); *see also* Stern Electronics, Inc. v. Kaufman, 669 F.2d 852, 855 (2d Cir. 1982) (not recognizing the copy of a work as fixed when putting it in memory devices of a computer). This view is shared by the United States-government, *see* INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 26 (1995) [hereinafter NII White Paper]; and is also consistent with the German Copyright Act, *see, e.g.*, German commentator KAI VINCK, URHEBERRECHT § 16 (Wilhelm Nordemann et al., 8th ed. 1994).

195. 17 U.S.C.A. § 106 (West Supp. 1999).

196. *See id.*

a. The Right to Reproduce

The right to reproduce an original work of authorship is considered to be the most fundamental right of all the author's exclusive rights provided in section 106.¹⁹⁷ Since section 106 (1) refers to "reproduction of copies," the section has to be read in conjunction with section 101. The latter provides that "[c]opies are material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."¹⁹⁸ The significance of this provision in the context of framing is obvious. The conduct of framing must constitute a material object in which the framed work is fixed and from which it can be perceived, either directly or with the aid of a machine. Since the framed Web site will finally appear on a computer screen it seems to be, at a first glance, an easy task to qualify framing as a violation of author's reproduction right. But this turns out to be different when taking a closer look.

It has already been stated that digitized works stored in a web-server's hard disk fulfill the fixation requirement and generally constitutes a copy in a tangible medium.¹⁹⁹ However, the conduct of framing in itself may not create a copy at all. It is rather arguable that the framer merely creates a link between his Web site to the Web site that is going to be framed in purely technical fashion. However, linking does not create the fixation of the framed Web site on the server's hard disks and, therefore it does not create a copy. One might argue that a copy of the framed Web site occurs when an end user calls on the framing link. But this copy at most comes into existence in a place related to the user, most likely in his computer, and not in a place which is related to the framer.²⁰⁰

However, the technical prerequisite of "framing" is "linking", namely to establish a link from the framer's Web site to the framed

197. See Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 DAYTON L. REV. 547, 550, (1997) [hereinafter Lemley, *Overlapping Copyrights*].

198. 17 U.S.C.A. § 101 (West Supp. 1999).

199. See Nimmer on Copyright, *supra* note 124, § 2.03 [D].

200. See *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993) (ruling that loading software into the RAM of a computer creates a copy).

one. When “linking” would constitute copyright infringement, the framer could be directly held responsible.²⁰¹ But even when analyzing the technical aspects of linking no creation of a copy can be found. The hypertext link employed by the framer contains only the URL address of the linked Web site technically implemented in the Web site’s HTML code. The URL address merely serves as a locator indicating where on the Internet the desired information is available. As such the URL address does not contain a copyrightable expression.²⁰² Considering the functional aspect of the URL address, it appears likely to be a system or method of operation which, when activated, causes the browser software to jump from one Web site to another. Nevertheless, a fact or a method of operation is not copyrightable.²⁰³ Moreover, it is widely assumed that by uploading a Web site the content provider grants an implied license to link.²⁰⁴ Consequently, the hypertext link itself never constitutes a copy or otherwise processes any of the data from the linked Web site and the author’s exclusive right to reproduce is not implicated.²⁰⁵ Consequently, the framer does not infringe the author’s reproduction right by the mere act of “linking” the latter’s Web page to his framing Web site.

201. Caching appears to be another questionable activity under copyright scrutiny. However, it is not an issue in the context of framing. Caching means to make a copy of digitized information somewhere between the original medium on which it is stored (hard drive, server, or disk) and the end user. Caching generally provides faster access to Web sites by taking it away from a server which might be frequently visited thereby causing delay for the end user, see Jerry S. Birenz, *Caching World Wide Web Sites*, 480 PLI/PAT 275, 277 (1997).

202. See Raysman & Brown, *supra* note 18, at 3.

203. See 17 U.S.C.A. § 102 (b) (West Supp. 1999). Section 102 provides that “[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” *Id.*

204. See Raysman & Brown, *supra* note 18, at 3; see also Mark B. Harrison, *Link Law on the Internet: A Panel Discussion*, 38 IDEA: J.L. & TECH. 197, 227.

205. See Eric Schlachter, *The Intellectual Property Renaissance in Cyberspace: Why Copyright Law could be Unimportant on the Internet*, 12 BERKELEY TECH. L.J. 15, 45 (1997); see also Matt Jackson, *Linking Copyright to Homepages*, 49 FED. COMM. L.J. 731, 742 (1997); O’Rourke, *supra* note 19, at 658-63 (addressing pure linking merely on an implied license theory without further inquiry as to whether linking has an effect on author’s reproduction right in the first place).

b. The Right to Adapt

Section 106 (2) grants to the copyright owner the exclusive right “to prepare derivative works based upon the copyrighted work.”²⁰⁶ The definition in section 101 provides that a derivative work is a work “based upon one or more preexisting works . . . in which a work may be recast, transformed, or adapted.”²⁰⁷ Courts are split with regard to the question whether an adaptation needs to contain new copyrightable expression to qualify as a derivative work.²⁰⁸ In the case of framing, however, it is not necessary to choose sides since the outcome of the analysis is not determined by the question whether the framed Web site does add originality or not.

The purpose of the adaptation right is to put the copyright owner in the position to control more than simply verbatim forms of copying.²⁰⁹ Framing does produce more than simply a verbatim copy of the framed work. It incorporates the framed work, embodied in the Web site, into the framer’s Web site and makes both Web sites appear as one entity, using the underlying work as it has been framed. Furthermore, a derivative work does not need to be fixed to cause a copyright infringement.²¹⁰ That a derivative work does not need to be fixed might lead to the conclusion that the link

206. 17 U.S.C.A. § 106 (2) (West Supp. 1999).

207. 17 U.S.C.A. § 101 (West Supp. 1999).

208. The Ninth Circuit in *Mirage Editions Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1343 (1988) held that the act of mounting copyrighted photographs on tiles infringes the author’s adaptation right even though there was no new copyrightable expression added. To the contrary, the Seventh Circuit decided in *Anni Lee v. Albuquerque A.R.T. Co.*, 125 F.3d 580, 582 (1997), the very same facts differently holding that mounting photographs on tiles does not create a derivative work. The Seventh Circuit’s opinion indicates that new originality is indeed required, *see also* Lemley, *Overlapping Copyrights*, *supra* note 197, at 563.

209. *See* MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW § 1.2 (1995). Another definition has been provided by Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOCIETY 209, 217 (1983). The commentator states that derivative works are directed at a different market than the original work. *See id.* It seems to be reasonable to claim that the Internet is a new and therefore a different market for the distribution of copyrighted works. Consequently, just posting a work on the Internet would already be creating a derivative work instead of a copy. *See* Lemley, *Overlapping Copyrights*, *supra* note 197, at 563.

210. To become a copyrighted work, however, a derivative work needs fixation. *See* NIMMER ON COPYRIGHT, *supra* note 124, § 8.09.

itself, the URL address, represents the derivative work.

The allegedly infringing frame is apparently not fixed as long as it is not activated and has no immediate impact on author's exclusive right. However, the framing link represents a dormant, potential copyright infringement that becomes real once the link is activated. This situation of a dormant copyright infringement is analogous to the situation the plaintiff was in *Midway*.²¹¹ In *Midway* the plaintiff manufactured video game machines with data for the game stored on printed circuit boards. The defendant sold printed circuit boards for video games that sped up the plaintiff's video game when properly inserted in replacement of one of the plaintiff's circuit boards. The court ruled that the circuit board sold by the defendant was a derivative work.²¹² Analyzing the courts ruling concerning the defendant's speed up version it has to be pointed out that it did not work by itself but rather in conjunction with the plaintiff's video machine. Obviously, the derivative work was not fixed within the device the defendant sold. It was merely dormant and became active only when it was inserted in the plaintiff's video machine. The situation with regard to the framing link is similar. Once it is uploaded it merely needs to be activated to cause a copyright infringement assuming that activating the link creates a copy of the framed Web site surrounded and therefore adapted by the framing Web site somewhere in cyberspace.²¹³ As a consequence, the framing link constitutes a dormant adaptation analogous to the adaptation the defendant's device caused in *Midway*.

However, considering the legislative history, a work being just dormant of infringing quality does not qualify as an adaptation. Legislators were intending that "the infringing work must incorporate a portion of the copyrighted work in some form."²¹⁴ Courts followed this incorporation requirement. In the *Lewis Galoob*

211. *Midway MFG. Co. v. Artic International, Inc.*, 704 F.2d 1009 (7th Cir. 1983).

212. *See id.* at 1013.

213. Most likely in the end user's RAM, for a detailed discussion whether downloading a work in the end user's RAM leads to copyright infringement. *See infra* Part III.B.2.a.

214. *See* H.R. REP. NO. 94-1476, at 62 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5675.

Toys, Inc. v. Nintendo of America, Inc.,²¹⁵ the defendant, Galoob, manufactured an add-on device to alter features of one of plaintiff Nintendo's copyrighted video games.²¹⁶ The add-on device was to be inserted between a game cartridge and the Nintendo Entertainment System and did not alter the data that were stored in the game cartridge. The defendant argued that the alterations only occurred in the computer processor and therefore necessarily had to remain unfixed. The court concluded that a derivative work must be fixed to be copyright protected, but a derivative work does not have to be fixed to infringe the copyright of the underlying work.²¹⁷ On this basis, the court held that Galoob's device could only work in conjunction with Nintendo's video game and therefore did not supplant, duplicate, or recast Nintendo's work.²¹⁸ Another court's holding in the *Vault Corp. v. Quaid Software Ltd.*²¹⁹ is similar. There the plaintiff Vault developed software to protect other software from becoming copied. Quaid, the defendant, developed a program disabling Vault's protection software by loading a computer program into the computer's memory. Quaid's program also shared a thirty-character sequence with Vault's sequence. The court held that the infringing work must incorporate a portion of the copyrighted work in some form.²²⁰ It particularly saw the thirty-character sequence as an incorporation of the copyrighted work.²²¹

Applying the applicable case law it has to be concluded that the mere conduct of framing—creating a link by connecting two URL addresses to each other—does not incorporate the framed Web site into the framing one. Furthermore, the dormant copyright infringement, which is represented by the framing link, constitutes no impact on the author's exclusive rights. The framer's conduct

215. 964 F.2d 965, 967 (9th Cir. 1992), *cert. denied*, 507 U.S. 985 (1993)

216. *See Galoob*, 964 F.2d at 967.

217. *See id.* at 968.

218. *See id.* at 969.

219. 847 F.2d 255 (5th Cir. 1988).

220. *See id.* at 267; *see also* *Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir.), *cert. denied* 470 U.S. 1052 (1984).

221. *See Vault*, 847 F.2d at 267. The court, however, dismissed Vault's claim on the basis of lacking substantial similarity holding that the copying of 30 characters was not sufficient to prove that the copying was substantially similar. *See id.* at 268.

can be better described as a conduct which grants the ability to download the framed Web page,²²² but as such framing in sense of technically providing the link does not yet incorporate the framed Web site into the framing one. For that reason, the conduct of framing does not infringe the author's exclusive right to prepare derivative works.

c. The Right to Distribute

Pursuant to section 106 (3), the copyright owner has the exclusive right "to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending."²²³ Thus, the statute grants the copyright owner the exclusive right publicly to sell, give away, rent, or lend any material embodiment of his work.²²⁴ However, the mere link between two URL addresses connecting the framed and the framing Web sites does not create the necessary material embodiment of the framed Web site containing the protected work.²²⁵ The lack of material embodiment of the work in the connecting URL addresses leaves no room for the presumption that framing infringes author's exclusive distribution right because distribution actually does not take place at all.

d. The Right to Perform and Display Publicly

Section 106 (4) grants an author the exclusive right to perform a copyrighted work publicly.²²⁶ Section 106 (5) confers the exclusive right to publicly display a copyrighted work.²²⁷ In both cases the copyrighted work must be either a literary, musical, dramatic, or choreographic work, or a pantomime, a motion picture, or another audiovisual work.²²⁸ To "display" a work is "to show a copy of it, either directly or by means of a film, slide, television image,

222. See O'Rourke, *supra* note 19, at 668 (suggesting this approach as a possible way of analyzing the problem).

223. 17 U.S.C.A. § 106 (3) (West Supp. 1999).

224. See *National Car Rental Sys. Inc. v. Computer Association International, Inc.*, 991 F.2d 426, 430 (8th Cir. 1993), *cert. denied*, 510 U.S. 861 (1993).

225. See *supra* note 224 for the embodiment requirement.

226. See 17 U.S.C.A. § 106 (4) (West Supp. 1999)

227. See *id.*

228. See 17 U.S.C.A. § 106 (4), (5) (West Supp. 1999).

or any other device or process or, in a case of a motion picture or other audiovisual work, to show individual images nonsequentially.”²²⁹ To “perform” a work is “to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.”²³⁰

In terms of a motion picture the language of both definitions clearly indicates that the “performance” of a motion picture or other audiovisual work requires “show[ing] its images in any sequence” and that the display of a motion picture or other audiovisual work requires only the showing of “individual images nonsequentially.”²³¹ Regarding motion pictures and other audiovisual works, “display” is limited to individual pictures of an audiovisual work (stills) whereas “performance” covers the audiovisual work as a whole or any sequence of it.²³² In terms of nonaudiovisual works like literary, musical, and dramatic works the exclusive display right will be infringed when a manuscript or printed version of the work is being transmitted.²³³ The impact on framing on the exclusive display and performance rights is the same, so that the following analysis applies to both the exclusive right to display and the exclusive right to perform.

As it has already been pointed out, the display of a copyrighted work as well as its performance needs to be done “in public” to qualify as infringing conduct. Section 101 provides the definition of “to perform or display a work publicly.”²³⁴ One might argue

229. See 17 U.S.C.A. § 101 (West Supp. 1999) (defining “display”).

230. See *id.* (defining “perform”).

231. *Id.*

232. See NIMMER ON COPYRIGHT, *supra* note 124, § 8.20 [A.]

233. See *id.*

234. See 17 U.S.C.A. § 101 (West Supp. 1999). “To perform or display publicly” is: (1) to perform or display [the work] at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public are capable of receiving the performance or display it in the same place or in separate places and at the same time or at different times.

Id.

that the Internet is not a place according to the meaning of the statutory language since the Internet is not a place open to the public where people are gathered. However, case law indicates that audio transmission to hotel rooms for the benefit of the guests qualify as transmission to the public²³⁵ as well as video transmissions to four people inside a closed room.²³⁶ Therefore, the transmission of a work via the Internet clearly encompasses the transmission to the public pursuant to section 101.²³⁷

235. See *Buck v. Jewell LaSalle Realty Co.*, 283 U.S. 191 (1931).

236. See *Columbia Pictures v. Redd Horne Inc.*, 749 F.2d 154, 159 (3d Cir. 1984); *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1020 (7th Cir. 1991).

237. See Lemley, *Overlapping Copyrights*, *supra* note 197, at 561; Matt Jackson, *Linking Copyright to Homepages*, 49 FED. COMM. L.J. 731, 751 (1997). The German copyright act is being interpreted differently with regard to the exclusive right to broadcast set forth in section 20 of the German Copyright Act (UrhG). Section 20 UrhG grants the right "to make a work accessible to the public." According to the traditional interpretation of "making a work accessible to the public" shared by the vast majority of German legal scholars and the Federal Supreme Court (BGH) "making accessible to the public" requires that people have to simultaneously receive a broadcast at a given time without being able to choose at what time they want to receive the broadcast, see Ulrich Loewenheim, *Urheberrechtliche Probleme bei Multimedienwendungen*, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT (GRUR) 830, 835 (1996); Federal Supreme Court, BGH LM § 20 UrhG - Verteileranlagen. The traditional concept of one broadcast, which can be received just at the time when the broadcast actually takes place, is challenged in the context of the Internet. In the Internet, the consumer decides at what time she is going to receive the broadcasted work and perhaps when to look at it again. To create a transmission right that goes beyond the simple broadcast right, legal scholars suggest either to interpret the language of the statute extensively thereby acknowledging a "successive public," which basically means to get rid of the simultaneous requirement thereby sticking to the language of the statute, see Ferdinand Melichar, *Virtuelle Bibliotheken und Urheberrecht*, COMPUTER UND RECHT (CR) 756, 758 (1995). Or to apply section 15 (2) UrhG analogously which would provide that an author has the "exclusive right to communicate his work to the public in non-material form." MANFRED REHBINDER, URHEBERRECHT § 25 IV. 2 (9th ed. 1996).

The new European Commission's proposal for a European Parliament and council directive will provide a solution to the broadcast problem as briefly outlined before. See Proposal for a European Parliament and Council Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, COM (97) 628 Final. Article 3 of the proposal provides that:

Member states shall provide authors with the exclusive right to authorize or prohibit any communication to the public of originals and copies of their works, by wire or wireless means, including making available to the public their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

Id. Art. 3. The commission's comment on this proposal points out that it has been drafted particularly to fit within modern "on-demand transmissions." See *id.* art. 2, cmt. 2, at 20.

However, following the language of the definition of ‘digital transmission’ in section 101 linking a Web site by creating a connection between two URL addresses does not constitute a transmission. Section 101 defines a “digital transmission” as a transmission . . . in a digital or other non-analog format. Assuming that the definition of a digital transmission applies not only with regard to section 106 (6), it nevertheless indicates that a (digital) transmission is characterized by a transfer of some information.²³⁸ Establishing the framing link as a conduct lacks such a transfer. It merely provides the technical link between two Web sites without actively transferring or communicating information as long as the link is not activated.

e. Intermediate Result

As an intermediate result it has to be stated that the conduct of framing does not infringe any of the author’s exclusive rights set forth in section 106. Neither does the conduct of framing lead to the creation of a copy or to a derivative work, nor to a display, performance, or distribution of a copyright protected work. Consequently, a person, who is engaged in framing a third party’s Web site, can not be held directly liable for his conduct under copyright law.

2. End Users Direct Infringement

The end user of a framed Web site is the person who actually calls on the site and views it on his computer screen. In the context of the Internet it is worth discussing whether the end user by virtue of using the Internet interferes with the author’s exclusive rights.

238. 17 U.S.C.A. § 106 (6) (West Supp. 1999). Section 106 explicitly granting copyright owners of sound recordings the right to control public performance “by means of a digital audio transmission.” *Id.*

a. Author's Reproduction Rights

The reason that the end user's conduct—calling upon a particular Web site—triggers the question whether this conduct interferes with the author's exclusive reproduction right is based on computer technology. The use of any modern computer application necessarily involves the creation of a copy in the computer's RAM.²³⁹ In the context of the Internet the browser software "loads" the Web page from the server's host computer into its RAM. Once the information is uploaded it becomes available for the computer's processor and is finally visible on the user's screen. The significance of a RAM is its lack of capability to store information permanently. Once the computer is turned off the information disappears from the RAM and remains unrecoverable. The information is likewise lost when new information is loaded into the RAM going along with the user's particular application requiring the RAM space formerly occupied. The RAM, therefore and in contrast to a hard disk or a ROM, is a temporary storage device.

(1) Copy in User's RAM

It has already been pointed out that section 106 (1) provides the right to reproduce an original work of authorship, speaks of "reproduction of copies," and is to be read in conjunction with section 101, which defines the term "copy."²⁴⁰ The definition provides that "[c]opies are material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."²⁴¹ The definition of "copy" indicates the requirement of "fixation," which is defined also in section 101. Section 101 provides in that respect that "a work is 'fixed' in a tangible medium of expression when its embodiment in a copy . . . by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than a

239. Random Access Memory.

240. See *supra* notes 189 and accompanying text.

241. 17 U.S.C.A. § 101 (West Supp. 1999).

transitory duration.”²⁴² Unlike a hard disk, which allows permanent and stable storage of information, the RAM is arguably not as permanent and stable to allow the information to be perceived for a period of more than transitory duration. Therefore, as it has already been pointed out, the Computer’s RAM is a temporary storing device.

(2) *MAI Systems Corp. v. Peak Computer, Inc.*

The Ninth Circuit in *MAI Systems v. Peak Computer, Inc.*²⁴³ was the first court to address the question whether the storage of information in the RAM is sufficiently permanent and stable to permit it to be perceived for a period of more than transitory duration.²⁴⁴ The plaintiff MAI, manufactured computers and designed software to run those computers, which it licensed to its customers. The software license allowed MAI customers to use the software for their own purposes including the loading of the software into the computer’s RAM. The license prohibits the use or copying of MAI software by third parties and the software includes operating system software. The defendant Peak, maintained and repaired computer systems for its clients. The process of maintaining and repairing necessarily involves turning on the computer, consequently running MAI’s operating software by storing it into the computer’s RAM, thereby checking whether computer and software are functional. Running the operating software also allowed Peak’s technician to view the systems error log that enables him to diagnose a problem. MAI claimed that Peak, by virtue of loading the software into the computers RAM, created a copy that allegedly infringed MAI’s exclusive reproduction right.²⁴⁵ Peak argued that “this loading of copyrighted software does not constitute a copyright violation because the copy created in RAM was not fixed.”²⁴⁶ The court, without really discussing the issue and without weighing different positions, basically “find[s] that the copy created in the RAM can be ‘perceived, reproduced, or otherwise

242. *Id.*

243. 991 F. 2d 511 (9th Cir. 1993).

244. *See id.* at 513.

245. *See id.* at 513, 517-518.

246. *Id.* at 518.

communicated,' [and] hold[s] that the loading of software into RAM creates a copy under the Copyright Act."²⁴⁷

This decision has sparked fundamental criticism among legal commentators. They pointed out the legislative history to the Copyright Act which indicates that "[t]he definition of 'fixation' would exclude from the concept purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, or captured momentarily in the 'memory' of a computer."²⁴⁸ The language easily supports the finding that Congress did not consider RAM copies to be fixed.²⁴⁹ In connection with the language in the legislative history, a further argument was made dealing with the fact that Congress enacted section 117 (1) and (2), which exempts from liability the copying of a computer program "created as an essential step in the utilization of the computer program . . . for archival purposes."²⁵⁰ Apparently, Congress did not intend every digital copy to be an infringement of author's reproduction right.²⁵¹ Apart from that, the court in MAI became criticized for not discussing the "transitory duration" prong of the fixation test²⁵² and not analyzing preexisting cases that have suggested that RAM copies are not fixed. For example, in *Apple Computer v. Formula International*²⁵³ the court stated that "RAM can be simply defined as a computer component in which data and computer programs can be temporarily recorded."²⁵⁴ This utilizing programs in a computer "would be only a temporary fixation. It is a property of RAM that when the computer is turned off, the copy of the programs re-

247. *Id.* at 519.

248. H.R. REP. NO. 94-1476, 53 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5666.

249. See Lemley, *Overlapping Copyrights*, *supra* note 197, at 551; Karen S. Frank, *Potential Liability on the Internet*, 437 PLI/PAT 417, 427 (1996).

250. 17 U.S.C.A. § 117(1)(2) (West Supp. 1999).

251. See Frank, *supra* note 149, at 427; see also Katrin Levine, *MAI v. Peak: Should Loading Operating System Software into RAM Constitute Copyright Infringement?*, 24 GOLDEN GATE U.L. REV. 649, 669-77, (1994) (pointing out that loading the software by a maintenance provider into the RAM is an 'essential step' pursuant section 117 (1)).

252. See Lemley, *Overlapping Copyrights*, *supra* note 197, at 551.

253. *Apple Computer, Inc. v. Formula International, Inc.*, 594 F. Supp. 617 (C.D. Cal. 1984).

254. *Id.* at 622.

corded in RAM is lost.”²⁵⁵ However, there are a number of rulings which are consistent with the court’s approach in *MAI*²⁵⁶ as well as there is scholarly authority and the United States government suggesting that RAM copies are fixed.²⁵⁷

Transferring the ruling in *MAI* into the context of the Internet one might argue that browsing the Internet necessarily involves the making of copies in the RAM thereby creating a copy in the RAM that in turn violates the copyright law. The argument was made that the *MAI* ruling precludes people’s right to read or grants the copyright owner an unknown exclusive reading right.²⁵⁸ This argument seems to assume that the simple act of reading information in the real world is actually free. But this is not the case. In the ‘real world’ consumers have to pay for any kind of information retrieval, regardless of whether it is for books, newspaper, magazines and so forth. Access to those sources always was and still is connected with a detriment. Even borrowing books from libraries is impossible when the user does not pay either directly by submitting a fee for every single use or indirectly by paying a membership fee, tuition, or by paying taxes, so that libraries actually have

255. *Id.* at 622.

256. *See* Triad Systems Corp. v. Southeastern Express Co., 64 F.3d 1330 (9th Cir. 1995); *In re Independent Serv. Org. Antitrust Litigation*, 910 F. Supp. 1537, 1541 (D.Kan. 1995); *ISC-Bunker Ramo, Inc. v. Altech*, 765 F. Supp. 1310, 1322 (N.D. Ill. 1990); *Advanced Computer Services v. MAI SYS.*, 845 F. Supp. 356, 363 (E.D. Va 1994) (pointing out that a copy only comes into existence when it lasts several minutes in the RAM).

257. *See* NIMMER ON COPYRIGHT, *supra* note 124, § 8.08 [A][1]; *see also* NII White Paper, *supra* note 194, at 64-66. Moreover, the WIPO, represented by its Assistant Director General, Mihaly Ficsor, also seems to maintain that it has been WIPO’s position since 1982, that storage of works in digital systems in an electronic medium, regardless whether of permanent or temporary nature was considered a reproduction pursuant to Article 9 of the Berne Convention. *See* Berne Convention, *supra* note 119, art. 9. (“Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form”); *see also* Seth Greenstein, *News from WIPO: The Final Day—Two Treaties for WIPO, and One More for the Road*, (visited July 26, 1998) <http://www.hrrc.org/wr_12-20.html> (the unofficial report); Fraser, *supra* note 2, at 778 (stating “[i]n fact, under Mr. Ficsor’s interpretation of the Berne Convention, browsing may already be forbidden”).

258. *See* Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 40 (1994); *see also* Barbara Cohen, *A Proposed Regime for Copyright Protection on the Internet*, 22 BROOK. J. INT’L L. 401, 412 (1996); *see also* Fraser, *supra* note 2, at 780.

to acquire the books on the market in exchange for money. One might say that I could get a book from my friend and read it for free without any copyright law interference. But even in this case the same reasoning applies: it is at least the friend who had to pay for the book in the first place thereby securing the author's deserved remuneration.²⁵⁹ Obtaining a copy from the Internet does not involve any monetary transfer at all and potentially deprives the copyright owner of the revenue. Comparing the act of browsing the Internet with the conduct of free browsing a magazine or a book to facilitate the decision whether the book or the magazine is to be bought also misses the point. The hard copy might be subject to browsing but it cannot be taken away without paying. This is different with a virtual copy from the Internet. Once a copy is downloaded it can be easily stored on the hard disk and then distributed in an unlimited number either as a virtual copy or printed out as a hard copy in exactly the same quality as the original copy. Therefore, the free reading argument has to be rejected in favor of the court's ruling in MAI and its subsequent court decisions.²⁶⁰

259. See Fred H. Cate, *Law in Cyberspace*, 39 *How. L.J.* 565, 577 (1996), who does not consider this argument when he points out that newspapers can be read without copying it. Neither does Steven Fraser. See Fraser, *supra* note 2, at 811. Fraser assumes that analog copies of copyrighted works were always free. In fact they never were. The first copy received from the publisher was always paid for. See *id.* There is no apparent justification for a change of this mechanism with regard to copyrightable works published on the Internet as Steven Fraser seems to suggest. See *id.*

260. See David Nimmer, *Brains and other Paraphernalia of the Digital Age*, SC47 ALI-ABA 29, 41-42 (1996). David Nimmer points out that copyright owners were always able to restrict access to their work permitting, for example, Disney to charge for multiple admittance for one movie every time one reenters the movie theater. See *id.* "In this instance, the right to control reading . . . is not a revolutionary addition to the copyright owner's exclusive right." *Id.* at 47. Remarkable is the approach expressed by Richard Stallman. See Richard Stallman, *Address at the Eight Annual Computer, Freedom, and Privacy Conference* (Feb. 18, 1998). Richard Stallman not only defends a reading right in context of the Internet, he radically questioned the legitimacy of copyright in general, since no such things as moral rights or natural rights exist. See *id.* He also suggested a copyright duration of two years for all kinds of works. See *id.* Acknowledging, after all, that Richard Stallman's proposal is intuitively appealing, particularly with regard to software development inhibited by long lasting intellectual property rights, authors nevertheless need an incentive to produce creative work on a high quality level. His proposal to establish a system of voluntary payments to authors seems to be wishful thinking. Apart from the implications imposed by the current international copyright treaty regime and without even being an adherent of the natural rights theory, it is needless to say that a voluntary payment system and a two year copyright duration cannot be the

The outcome of the analysis is that the end user, by loading the framing Web site into his RAM, creates a copy of this Web site and at the same time, incidentally creates a copy of the framed Web site as well. This leads to the conclusion that the end user infringed the reproduction right attached to the framed Web site.

(3) A User's RAM Copy Pursuant to the Digital Millennium Copyright Act

Following the Digital Millennium Copyright Act,²⁶¹ Congress made clear that a hardware maintenance service does not violate the reproduction right when it runs a computer program for the sole purpose of repair and maintenance.²⁶² Therefore, *MAI v. Peak* became irrelevant leaving room for a new evaluation of the question whether the creation of a copy in a computer's RAM leads to a copyright infringement or not. Considering the narrow exemption created by Congress and the generally prevailing fear about the violation of copyrights in the digital context, however, it is not unlikely that courts will consider RAM copies as a violation of the copyright holder's reproduction right remaining in the tradition of *Mai v. Peak*.

basis to give authors a lasting incentive to produce creative work. People, I suppose, just simply would not pay money on a voluntarily basis.

261. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (codified in scattered section of 17 U.S.C.).

262. See 17 U.S.C.A. § 117 (West Supp. 1999). Section 117 provides that it is: [N]ot an infringement for an owner or lessee of a machine to make or authorize the making of a copy of a computer program if such copy is made solely by virtue of the activation of a machine that lawfully contains an authorized copy of the computer program, for purposes only of maintenance or repair of that machine, if (1) such new copy is used in no other manner and is destroyed immediately after the maintenance or repair is completed; and "(2) with respect to any computer program or part thereof that is not necessary for that machine to be activated, such program or part thereof is not accessed or used other than to make such new copy by virtue of the activation of the machine. *Id.*; S. REP. NO. 94-105, at 56 (1998).

b. Author's Remaining Exclusive Rights

Since in the context of the Internet one usually has to deal with overlapping copyrights,²⁶³ it might be the case that the end user of a framed Web site does not only violate the reproduction right. However, concerning the distribution right it is obvious that clicking on a framing Web site does not constitute the distribution of the framed Web site to the public. It is just the end user who views the site; the public does not take part. The same reasoning applies in connection with the public performance and display right; clicking on and viewing the framing Web site is not done publicly.

However, it might be the case that the end user creates a derivative work since she actually transforms or recasts the framed Web site by activating the framing site and letting the framed Web site appear on the screen. This question naturally invokes the discussion of two issues. First, whether a derivative work needs to add new copyrightable expression to the underlying work and second, whether it is sufficient as to the creation of a derivative work that the end user does nothing else than clicking on the provided link without actively participating in the conduct of recasting and/or transforming the underlying work. In this respect it is probably appropriate to say that courts demand that the creator of a derivative work participates in the creation of that work at least to some extent. After all, in *Mirage*²⁶⁴ the creator of the derivative work had to mount the photographs on the tiles, thereby showing that the creator is somehow substantially involved in creating the derivative work. It is, however, questionable whether this sort of active participation in the creation of a derivative work can be shown when an end user does nothing more than clicking on a link incorporated in the framing Web site. Perhaps, clicking on the link is not sufficient to determine the creation of a derivative work.²⁶⁵

263. See Lemley, *Overlapping Copyrights*, *supra* note 197, at 547 (analyzing of overlapping copyrights in the context of the Internet).

264. See *Mirage Editions Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1343 (1988).

265. See Jeffrey Kuester, *Link Law on the Internet: A Panel Discussion*, 38 IDEA: J.L. & TECH. 197, 226 (1998) (suggesting, however, that clicking on a framing link in fact constitutes sufficient participation to create a derivative work: "hyperlinking into a

However, this problem does not need to be fully discussed and resolved since the standard for infringement is the same for both the infringement of the reproduction right and the infringement of the adaptation right. It, therefore, does not matter which of the rights is actually infringed.²⁶⁶ Since it has already been analyzed that the end user infringes the reproduction right, no further investigation with regard to the adaptation right is necessary.

c. Defenses

The end user is not helpless after having established that downloading a framing Web site infringes the author's reproduction right. As a defense she might appoint the first sale doctrine or that the provider of the framed Web site in fact granted an implied license to view the content of the Web site by virtue of posting it on the Internet. A third argument could be that the end user's calling on the framing Web site is a fair use.

(1) First Sale Doctrine

The first sale doctrine is codified in section 109 (a) of the Copyright Act and allows the owner of a particular copy of a work to dispose of possession of that copy in any way, for example by selling, leasing, loaning or giving it away without violating the copyright owner's exclusive right of distribution.²⁶⁷

It could be argued that the end user, by virtue of downloading the framed Web site, creates a copy of the framed Web site that was lawfully made by its author. Once the author posts his content on the Internet it seems to be reasonable to say she disposed of the possession of this copy that was received by the end user. How-

frame in a certain way that changes the intended appearance is sort of like the ceramic tile idea. You are taking the original content and putting it in a new arrangement.")

266. See Lemley, *Overlapping Copyrights*, *supra* note 197, at 550.

267. 17 U.S.C.A. § 109 (a) (West Supp. 1999). Section 109 provides in its relevant parts that "the owner of a particular copy . . . lawfully made under this title, or any other person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy." *Id.* There are exceptions to the first sale doctrine with respect to a particular copy of a computer program or a particular phonorecord of a sound recording which can not be rented, leased or lend for the purpose of direct or indirect commercial advantage. See Lemley, *Overlapping Copyrights*, *supra* note 197, at 575.

ever, it is undisputed that the first sale doctrine is applicable only to those situations where the owner disposes of physical possession of a particular copy.²⁶⁸ A transmission through the Internet does not create a physical embodiment of the work and no physical embodiment of the copy stored on the host server. The lack of disposal of a physical embodiment certainly leaves no room for the assumption that downloading information from the Internet is protected by the first sale doctrine. But legal commentators have, concerning Internet transmissions, argued that only technically the first sale doctrine does not apply.²⁶⁹ According to this view it is a fact that copyrights overlap and that transmissions over the Internet not only touch on an author's exclusive distribution right but also on his reproduction right.²⁷⁰ Following this point of view, the argument could be made that the first sale doctrine should apply when the transmission is followed by the deletion of the particular file which contained the transferred information on the host server so that the number of copies do not increase after a digital transmission.²⁷¹ As a consequence, the usual effect of a reproduction would be taken away and author's right to control the number of copies made from his work would not be harmed.²⁷² This argument has been rejected by the United States government stating that the application of the first sale doctrine would nevertheless weaken the author's exclusive reproduction right and that the reproduction

268. See, e.g., *Columbia Pictures Industry v. Redd Horne, Inc.* 749 F.2d 154, 159 (3d Cir. 1984) (pointing out that the "first sale doctrine prevents the copyright owner from controlling the future transfer of a particular copy once its *material* ownership has been transferred") (emphasis added).

269. See Lemley, *Overlapping Copyrights*, *supra* note 197, at 575.

270. See *id.*

271. See James V. Mahon, *A Commentary on Proposals For Copyright Protection on the National Information Infrastructure an Analysis of Proposed Copyright Changes and their Impact on Copyright's Public Benefits*, 22 RUTGERS COMPUTER & TECH. L.J. 233, 262, n.133 (1996) (suggesting that a work could be deleted once it was downloaded from the content providers hosts). The commentator offers, "by embedding copyright information within the computer file, the originating computer could automatically detect the transmission of copyrighted material and delete the original copy upon successful transmission to the destination computer." *Id.*

272. See *id.* at 263 (suggesting that there would be no infringement if the conveyance of a computer file had been done by "deleting other copies") see also Neel Chatterjee, *Imperishable Intellectual Creations: The Limits of the First sale Doctrine*, 5 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 383, 387 (1995), (criticizing that the overlapping copyrights limit the freedom of alienation within on-line transmissions).

right is simply not within the scope of the first sale doctrine.²⁷³

It is certainly not a common practice that ISP's delete files automatically after they were downloaded for the first time, so, with regard to the hypothetical, it can be reasonably assumed that the file containing the framed Web page was not deleted after the end user's download. It goes without saying that the framer has no intent and particularly no opportunity to delete the file(s) containing the framed Web site. As a consequence, the first sale doctrine is not a valid defense for the end user who downloads a framed Web site even under the assumption that the first sale doctrine does not apply only in a technical sense.

(2) Implied License

The question, whether an implied license can be found, refers to the law of the transference of exclusive rights. The Copyright Act provides in section 204 (a) in this respect that “[a] transfer of ownership . . . is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.” Section 101 of the Copyright Act furthermore provides the definition of the term ‘transfer of copyright ownership’. Following the language of the definition given by section 101 “[a] ‘transfer of copyright ownership’ is an . . . exclusive license, or any other conveyance . . . whether or not it is limited in time or place of effect, but not including a nonexclusive license.” The language clearly indicates that nonexclusive licenses can be granted but are excepted from the ‘in writing requirement’ of section 204 (a) of the Copyright Act.²⁷⁴ Consequently, nonexclusive licenses can be conveyed by oral agreement or can be implied from the conduct of the parties.²⁷⁵

The case law indicates the grant of an implied license in two situations. In *Effects Associates, Inc v. Cohen*²⁷⁶ the latter hired

273. See NII White Paper, *supra* 194, at 94.

274. See *Maclean Assocs., Inc. v. Wm. M. Mercer-Meidinger-Hansen, Inc.* 952 F.2d 769, 778 (3d Cir. 1991).

275. See *id.* at 779 (quoting NIMMER ON COPYRIGHT § 10.03 [A], who states that “[a] nonexclusive license may be granted orally, or may be even implied from conduct.”).

276. 908 F.2d 555 (9th Cir. 1990).

Effects, the plaintiff, to improve a film Cohen made. The parties agreed orally that Effects would be compensated for that work.²⁷⁷ After finishing the work and handing it over, Cohen only paid half of the amount she promised to pay.²⁷⁸ However, Cohen used the work by incorporating it into another work to be distributed by a third-party.²⁷⁹ The court found that Effects was the copyright holder but it did not find copyright infringement. The court noted that “Effects created the work at defendants request and handed it over, intending that defendant copy and distributes it.”²⁸⁰ The court concluded that Effects “impliedly granted nonexclusive licenses to Cohen . . . to incorporate the special effects [and] to distribute the film.”²⁸¹ The general rule behind the court’s ruling is clear: “when an individual creates a work at a request of another, hands it over, and intends for that recipient to copy and distribute it, an implied license for the recipient is created.”²⁸² In another case the United States Court of Federal Claims held that an implied license is created when a person hands over his work to another with no pecuniary expectations and with the anticipation that the work will be copied and published.²⁸³

With regard to the situation in the Internet and the applicable law in mind it cannot be doubted that a person posting his work on the Internet grants an implied license to download and to view it or, in other words, to browse it.²⁸⁴ Authors know in advance that a work, once posted on the Internet, will be available for the millions of users connected to the Internet. Posting a work on the Internet even indicates that the author wants his work to be viewed by as many people as possible unless she disclaims the implied license in terms clearly visible on the homepage or she cancels an implied license in force by putting up an advanced notice on his Web site.²⁸⁵

277. *Id.* at 556

278. *Id.*

279. *Id.*

280. *Id.* at 558.

281. *Id.* at 559.

282. Richard S. Vermut, *File Caching on the Internet: Technical Infringement or Safeguard for Efficient Network Operation?*, 4 J. INTELL. PROP. L. 273, 347 (1997).

283. *See* *Herbert v. United States*, 36 Fed. Cl. 299, 310 (Fed Cl. 1996).

284. *See* *Nimmer*, *supra* note 260, at 51.

285. *See* *Jerry S. Birenz, Caching World Wide Web Sites*, 480 PLI/PAT 275, 286 (1997) (stating, with regard to caching, states that a proper copyright notice put up on the

It seems to be a precondition for the assumption of an implied license in the Internet, however, that the Web site is accessed or visited in the same manner as it has been originally posted on the Internet. The author most likely wants to have her work viewed and consumed the way she created it, not in an altered version whatsoever or in connection with a different work. This precondition is arguably not fulfilled when a Web site containing an original work of authorship is framed. The framed work appears on the user's screen somehow altered and surrounded by a frame showing the content of the framing Web site. Moreover, it seems to be implausible to assume that a copyright holder, without further written notice visible on his Web page, intends to permit framing. Framing implies alteration of the copyrighted work as opposed to pure linking where the only purpose is to transfer the end user to the linked site which then will be seen without any alterations at all.

However, if there was a common practice among Web site operators to impliedly license framing one could make the argument that any Web site posted on the Internet can be framed. Insofar it is not the Web page operator's intent which is decisive but rather what appears to be common practice with regard to Web page operator's. However, cases dealing with framing currently litigated in the United States point to the fact that there is no common practice among Web site operators to grant implied licenses for framing.²⁸⁶ As a consequence, the idea of an implied license is not applicable in the context of a framed Web site; there is no basis to assume that a copyright owner has impliedly given his consent to view his framed Web site.²⁸⁷

homepage would exclude the implied license assumption).

286. See *Washington Post v. Total News, Inc.* 97 Civ. 1190 (PKL) (S.D.N.Y. filed Feb. 20, 1997); *Futuredontics, Inc. v. Applied Anagramic Inc.* 152 F.3d 925 (9th Cir. 1998) (unpublished table decision) (both cases initiated by plaintiffs whose Web sites were framed by the defendants).

287. See O'Rourke, *supra* note 19, at 669 (arguing along the same line).

(3) Fair Use

“The doctrine of fair use allows a holder of the privilege to use copyrighted material in a reasonable manner without the consent of the copyright owner.”²⁸⁸ The underlying principle of fair use was first addressed in 1841 in *Folsom v. Marsh*²⁸⁹ where the court sought to distinguish between an excusable unauthorized use of a work and an infringing use. The court stated “if so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy pro tanto.”²⁹⁰ In modern days, the fair use argument became an affirmative defense and the last resort against a claim for copyright infringement. As an affirmative defense, the burden of proof shifts from the plaintiff to the defendant who wants to avoid liability. It is his obligation to prove the fairness of the use rather than the copyright owner needs to prove an accused use not being fair.

The common law doctrine of fair use found its modern expression in section 107 providing that “the fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright.”²⁹¹ In determining whether the use made of a work in any particular case is a fair use, the language of the statute employs four factors to be considered.²⁹² First, “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”²⁹³ Second, the nature of the copyrighted work.²⁹⁴ Third, “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”²⁹⁵ And last, “the

288. See *Narall v. Freemann*, 872 F.2d 907, 913 (9th Cir. 1989).

289. 9 F. Cas. 342 (C.C.D. Mass. 1841).

290. *Id.* at 348.

291. See 17 U.S.C.A. § 107 (West. Supp. 1999).

292. See *id.*

293. *Id.*

294. See *id.*

295. *Id.*

effect of the use upon the potential market for or value of the copyrighted work.”²⁹⁶ The uses listed in the statute do not exclude other uses not listed from being recognized as fair use and do not create a presumption that a listed use is fair.²⁹⁷ It is clear that courts have to evaluate all four factors set forth in section 107 in any case to determine whether a particular use is fair or not.

(a) Purpose and Character of the Use

The purpose and the character of the use contrasts commercial uses with nonprofit educational uses. The Supreme Court in *Sony Corp. v. Universal City Studios, Inc.*,²⁹⁸ stated with regard to this contrast that all commercial uses were to be presumed unfair.²⁹⁹ The Supreme Court’s subsequent *Harper & Row, Publishers, Inc. v. Nation Enterp.* decision does not appoint its former presumption but ruled more lenient that a use for commercial purposes usually weighs against a finding of fair use.³⁰⁰ The *Campbell v. Acuff-Rose Music, Inc.* decision finally overturned the *Sony* presumption and differentiated the actual character of the use by distinguishing transformative use of the work from a mere duplication.³⁰¹ In case a user duplicates the work and uses the reproductions commercially the use weighs heavier against a finding of fair use, whereas in case a user makes a transformative use and creates a derivative work the use weighs more in favor of fair use.³⁰² Concerning the mere reproduction feature courts held in a commercial context, for example, that off-campus copy shops that manufacture and distribute photocopies on teachers specification and order are not covered by the fair use doctrine.³⁰³ Concerning the hypothetical the end user certainly does not make a transformative use of the work she

296. *Id.*

297. *See Harper & Row, Publishers, Inc. v. Nation Enterp.*, 471 U.S. 539, 561 (1985).

298. 464 U.S. 417 (1984).

299. *See id.* at 451.

300. *See Harper & Row*, 471 U.S. at 562.

301. *See Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569 (1994).

302. *See id.* at 584.

303. *See Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1542 (S.D.N.Y. 1991) (granting an injunction against the defendant’s conduct of ‘Professor Publishing’ which was not covered by the fair use defense.)

downloads. She rather creates a reproduction.³⁰⁴ Following *Campbell*, the first factor in the fair use analysis would weigh against a finding of fair use if the end user's use of the reproduction would be commercial.

In *American Geophysical Union v. Texaco Inc.*,³⁰⁵ the Second Circuit suggested, in order to discern the 'purpose and character of the use,' that the nature and the objectives of the user needs to be considered.³⁰⁶ Concerning a user's objectives, a fair use defense will not prevail when the use of the reproduction appears as a form of commercial exploitation.³⁰⁷ The court then concludes that "[t]he greater the private economic rewards reaped by the secondary user (to the exclusion of broader public benefits), the more likely the first factor will favor the copyright holder and the less likely the use will be considered fair."³⁰⁸ With regard to the hypothetical there is hardly an economic reward for the end user to be found. She just gains free information through the framed Web site she could have gained for free by accessing the framed Web site directly anyway. On the other hand, the end user's creation of a copy is also incidental because technically induced in the computer's RAM. The copy will be most likely deleted as soon as the end user calls on another Web page or as soon as she turns the computer off.

However, browsing the Internet could have some commercial impact, for example, when a company checks out its competitor's Web site to compare and improve its own professional performance. But even in this case, the use seems to be more like an "intermediate use" which does not weigh against a finding of fair use. With regard to intermediate use in *Sega* the defendant copied computer code to study the idea contained within that program for the subsequent development of a competing computer program.³⁰⁹ Using a copy for such a purpose, the court held, was intermediate use

304. See Lemley, *Overlapping Copyrights*, *supra* note 197, at 555.

305. 60 F.3d 913, 922 (2d Cir. 1994).

306. See *id.* at 922.

307. See *id.*

308. *Id.*

309. See *Sega Enterprises Ltd., v. Accolade, Inc.*, 977 F.2d 1510, 1514-15 (9th Cir. 1992)

“only and thus any commercial exploitation was indirect or derivative.”³¹⁰ As a result, the defendant copied the computer program for a “legitimate [and] essentially non-exploitative purpose.”³¹¹ Whereas the copy is not literally an intermediate one, the same reasoning may apply to the use with commercial impact in the context of framing. Just analyzing a Web site downloaded into the computer’s RAM to compare professional performance is arguably an indirect or derivative commercial exploitation and, therefore, essentially non-exploitative.

The end users use with regard to the hypothetical is non-commercial. Therefore, the first factor in the fair use analysis weighs in favor of a finding of fair use.

(b) The Nature of the Copyrighted Work

Courts have held that the nature of the copyrighted work weighs in the copyright owner’s favor when works of fiction³¹² and unpublished works³¹³ were copied. In turn they have held in defendant’s favor when factual works³¹⁴ and published works³¹⁵ were copied. In the context of framing it might be necessary to distinguish between different kinds of works being framed. Those works might be either factual or fiction, weighing either for or against fair use.

Applying the factual/fiction distinction in *Total News*,³¹⁶ the framed works were news sites that by nature present factual works weighing more in favor of a fair use. Applying the published/unpublished distinction in the context of the Internet is more difficult. Perhaps, a work put on the Internet is not published fol-

310. *See id.* at 1522.

311. *See id.* at 1523.

312. *See* *Twin Peaks Prods., Inc. v. Publications Int’l, Ltd.*, 996 F.2d 1366, 1376 (2d Cir. 1993).

313. *See* *New Era Publications Int’l, Aps v. Henry Holt & Co.*, 873 F.2d 576, 583 (2d Cir. 1989), *cert. denied*, 493 U.S. 1094(1990).

314. *See* *National Rifle Ass’n v. Handgun Control Fed’n*, 15 F.3d 559, 562 (6th Cir. 1994).

315. *See* *New Era Publications Int’l, ApS v. Carol Publ’g Group*, 904 F.2d 152, 157 (2d Cir. 1990).

316. *See* *Washington Post v. Total News*, 97 Civ. 1190 (S.D.N.Y. filed Feb. 20, 1997).

lowing the definition of “publication” in section 101.³¹⁷ The conduct of uploading and downloading a work does not constitute a transfer of ownership as to the work being downloaded into the computer’s RAM and the posting does not constitute an offering for further distribution of copies neither. The posting seems more likely to be a public display pursuant to the definition of “public display” provided in section 101³¹⁸ which does not in itself constitute “publication.” The lack of publication clearly weighs against the end user calling on a framed Web site.

However, in the NII paper the United States government suggests that, in the context of the Internet, “it is quite possible that a court might evaluate whether a work in digital form should be treated differently from a work in a conventional print or other analog form for the purpose of evaluating” the nature of the copyrighted work.”³¹⁹ This statement indicates that a work posted on the Internet perhaps ought to be regarded as published. The actual availability of the work leaves no room to consider a work put on the Internet as not being published. Consequently, a work posted on the Internet has to be regarded as published pursuant to the definition provided in section 101. Therefore, the use of a work posted on the Internet weighs more in favor of a finding of fair use.

(c) The Amount and Substantiality of the Portion Used

The third factor in the fair use analysis takes the amount of the protected work taken by the infringer into account, measuring the quantity as well as the quality. Concerning the quantity of the portion which was used it seems to be the prevailing view that “[it] generally may not constitute a fair use if the entire work is repro-

317. 17 U.S.C.A. § 101 (West Supp. 1999) Section 101 provides: Publication is the distribution of copies . . . of a work to the public by sale or other transfer of the ownership, or by rental, lease, or lending. The offering to distribute copies . . . to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance of a work does not of itself constitute publication.

Id.

318. For a more detailed discussion of “public display” See Lemley, *Overlapping Copyrights*, *supra* note 197, at 561.

319. See NII White Paper, *supra* 194, at 78.

duced.”³²⁰ On the other hand, with respect to the quality of the portion being used, even a relatively small portion can cause copyright infringement.³²¹ Consequently, the judge is obliged to decide on a case to case basis how much of the framed Web site has been incorporated into to the framing Web site. For that reason, it is, in the context of the Internet, difficult to state whether the factor ‘amount and substantiality of the portion used’ generally works more in favor of the defendant or against him. It is, nevertheless, most likely that the framing Web page entirely displays the copyrightable expression embodied in the framed Web page.³²² And, furthermore, it seems to be impossible to find a similar justification as to the time shifting purpose in *Sony*³²³ acknowledged as a valid justification for the entire reproduction of a copyright protected work. As a result, the third factor in the fair use analysis weighs more against the finding of fair use.

(d) The Economic Effect of the Use

The last factor is the ‘economic effect of the use’ which is the most important and central factor in the fair use scrutiny.³²⁴ This part aims at the commercial impact of the use on the copyright holder.³²⁵ The case law dealing with regard to the fourth fair use factor seems to indicate that, once the plaintiff is able to establish that she would have had significantly higher revenues from the work when it had not been copied, this factor weighs heavily in favor of the plaintiff. Thus, a use of a work must not “impair materi-

320. See NIMMER ON COPYRIGHT, *supra* note 124, § 13.05 [A]; however, in *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 448 (1984), the court ruled that video taping a TV show completely for time shifting purposes constitutes fair use even though the entire work was reproduced.

321. See *Harper & Row, Publishers, Inc. v. Nation Enters.* 471 U.S. 539, 569 (1985).

322. Technically, it is certainly possible to reduce the framed Web page’s size in terms of how it would appear unframed, so that it could fit in the center of the framing Web page and surrounded by a frame.

323. See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984).

324. See *Lewis Galoob Toys, Inc. v. Nintendo of Am.*, 964 F.2d 965, 971 (9th Cir. 1992), *cert. denied*, 507 U.S. 985 (1993).

325. See Richard S. Vermut, *File Caching on the Internet: Technical Infringement or Safeguard for efficient Network operation*, 4 J. INTELL. PROP. L. 273, 333 (1997).

ally the marketability of the copied work”³²⁶ and therefore requires the analysis whether, “if [the challenged use] should become widespread, it would adversely affect the potential market for the copyrighted work.”³²⁷ With regard to the hypothetical, the conduct of framing has two negative effects on the potential market. One is more indirect and the other is more direct.

i. Indirect Effect

Internet content providers usually gain revenue from placing advertisements from third parties on their Web pages.³²⁸ The amount of money a content provider can demand for his service is determined by the number of visitors his Web site gets. The number of visitors can be figured out by counting the number of ‘hits’ a Web site receives.³²⁹ The higher the number of visitors of a particular Web site is the more valuable the Web site becomes in terms of gaining revenues from advertisement. Since the framing Web site usually also provides third party’s advertisement, the conduct of framing adds to the number of content providers competing with each other to do business with third parties willing to place advertisements on the Internet.³³⁰ It is a basic economic principle that increased competition in a given market for a given

326. See *Playboy Enters., Inc., v. Frena*, 839 F. Supp. 1552, 1558 (M.D. Fla. 1993).

327. See *Sega Enterprises Ltd., v. Accolade, Inc.*, 977 F.2d 1510, 1523 (9th Cir. 1992), see also *Sony*, 464 U.S. at 451 .

328. See Ellen Poler, *Frames and License Agreements*, (visited May 10, 1999) <<http://www.collegehill.com/ilp-news/poler1.html>>. Another way to gain revenue from a Web site is to charge a fee for access using the end users credit card number. Access fees are commonly due for playing online games, e.g. Magic Online at <<http://www.imageonline.com/start.shtml>> (visited July 26, 1998), and online gambling (placing the bets), e.g. <<https://secure.commerce-sights.com/freeplay>> (visited July 26, 1998), or require at least a membership providing personal information usually including credit card numbers, to be seen e.g. at adult Web sites at <<http://www.sex.com>> (visited July 26, 1998). However, Web sites which charge an access fee or require a membership are regularly password protected to restrict access. This mechanism also prevent the Web site from becoming framed by a framing Web site.

329. It is technically not a problem to count the numbers of hits a Web site receives. See the ISP Coastline, offering Web site service including “hit counter” at <<http://www.coastline.com>>.

330. See Ellen Poler, *Frames and License Agreements*, (visited July 26, 1998) <<http://www.collegehill.com/ilp-news/poler1.html>> (stating that “[frames] also enable the sponsor of the meta site, or content aggregator, to compete against the individual web site for advertising revenue”).

product is likely to bring prices down because the competing parties tend to undercut their competitor's prices. Thus, once a content provider has lowered his prices to meet the increased competition, the competing content provider is forced to match the lower price to retain its customers and to stay in business. Unless the competing content provider is unable to attract more visitors to his Web page, thereby increasing the commercial value of the Web site, the consequence of competition for advertisement, induced by framing a Web site, is a lower price. Consequently, in the future a framed content provider will gain less revenue for the same number of web banner advertising she was able to place before.³³¹ Less revenue for web banner placement clearly indicates a negative impact on this particular market pointing to the conclusion that the fourth factor in the fair use analysis 'economic effect of the use' weighs against a finding of fair use.

However, one could argue that current case law applying a fair use analysis indicates that the use of a copy and the dissemination of a copy to third parties must be direct and that it is the direct use which is generally regarded as having a negative impact on the copyright holder's commercial interests. In *Sega Enterprises Ltd., v. Accolade, Inc.*³³² the plaintiff Sega was a copyright owner of a computer video system operating with cartridges.³³³ The defendant Accolade reverse engineered Sega's video game programs by producing a "copy" to be able to decompile the information stored in Sega's game cartridges. Accolade then loaded the decompiled code in its computer and experimented with it to discover Sega's interface specifications. Accolade recorded the information it found and used it in the second stage to create its own games for Sega's computer video system without copying the Sega's program. The court saw the intermediate copying as such and considered the fact that the decompilation of Sega's software affected the market for its video game system. However the court stated that the market was merely indirectly affected and that consumers are

331. Web banner ads seem to be usually placed on a short term basis. *See id.* (stating that a common web banner continues for 90 days).

332. 977 F.2d 1510(9th Cir. 1992).

333. *See id.*

very likely to buy more than one video game.³³⁴ To foreclose a competitor from this market would be an attempt to monopolize the market that can not be a justification for resisting the invocation of the fair use doctrine.³³⁵ In *Sony, Corp. v. Universal City Studios* the Plaintiff, Universal Studios brought suit against the defendant Sony for providing consumers with VCRs granting the opportunity to tape record copyright protected television shows.³³⁶ The court held that the shows were recorded just for time shifting purposes without further dissemination of the copies to third parties. Considering these facts copyright holders would suffer no economic harm.³³⁷

Sega and *Sony* seem to apply, when discussing a negative commercial impact weighing against fair use, as an underlying principle that only direct use of the copy and the making it available to third parties will be regarded as a negative economic effect of the use. This analysis finds confirmation in *Sega Enterprises Ltd. v. MAPHIA*,³³⁸ which indicated that the direct use of a copy and its dissemination to third parties is generally regarded as providing a negative impact on the copyright holders commercial interests.³³⁹

Comparing the facts in *Sega*, *Sony* and *MAPHIA*, it is clear that the commercial impact of framing is quite indirect concerning the use of the copyrighted work. But courts also seem to start from the general assumption that, as already pointed out, a use is unfair if “it adversely affects the potential market for the copyrighted work.”³⁴⁰ In the context of the Internet it is a given fact that providing space for advertisement on a Web page basically is the only way to

334. *Id.* at 1523

335. *Id.* at 1524.

336. *See Sony, Corp. v. Universal City Studios*, 464 U.S. 417, 438 (1984).

337. *See id.*

338. 857 F. Supp. 679 (N.D. Cal. 1994).

339. *See id.* The defendant MAPHIA operated a bulletin board system where literal copies of Sega’s copyrighted video games were uploaded, downloaded and permanently stored. *See id.* at 688. The court considered those facts and found that their economic impact weighs against the assumption of a fair use. *See id.* at 688.

340. *See Sega Enterprises Ltd., v. Accolade, Inc.*, 977 F.2d 1510, 1523 (1993) (citing *Sony, Corp. v. Universal City Studios*, 464 U.S. 417, 451 (1984)).

commercially exploit a Web page.³⁴¹ Thus, the only potential market for the Web page respectively for the copyrighted work is not, as it happens to be the case in the real world, to sell copies of it but to sell space for third parties' advertisement. It does not seem to be reasonable to distinguish between direct exploitation through selling copies of a work at the one hand and indirect exploitation through selling advertisement space "on" virtually existing copies at the other when this is literally the only way to retain revenue from a copyrighted work. Therefore, selling space for advertisement on a Web page is exploitation of a potential market in the same way as selling copies of a given work in the real world. This potential market for selling advertisement space on a Web page would be adversely affected when framing would become widespread.

The assumption of the foregoing analysis—indirect effects can be relevant with regard to negative economic effects of the use—is consistent with the Ninth Circuit decision in *Princeton Univ. Press, v. Michigan Document Serv., Inc.*³⁴² The defendant Michigan Document was a close-to-the-campus copyshop which, without the copyright owner's permission, copied, bound and sold coursepacks to students for use in fulfilling reading assignments given by professors.³⁴³ The court was not inquiring as to the sale of books the plaintiff might have lost due to the copyshop's conduct.³⁴⁴ Rather, the court was concerned about the licensing fees

341. Charging a fee for accessing a Web site also generates revenue. However, there are much less Web sites on the Internet which charge accessfees than Web sites which do not. This fact allows to draw the conclusion that it depends on the content's strength and its appealing power to the end user whether an accessfee is charged. Since the majority of Web sites apparently do not have this strength the only possibility to retain revenue is web banner advertising. See Fraser, *supra* note 2, at 810 (citing Claudia Dreifus, *The Cyber-Maxims of Esther Dyson*, NEW YORK TIMES MAGAZINE, July 7, 1996, at 16, 18) (pointing out that oversupply of content will outpace demand, therefore authors will not receive most of their revenue from access fees but from advertising third party's services)). Following Chris Charron, an analyst of Forrester Research, quoted by Robert Fixmer, *Technology*, THE NEW YORK TIMES, Monday, July 27, 1998, at C4 ("[t]he pie is advertising, and the pie that's available, we think, will be \$ 8 billion in five years, with 30 percent of that going to [companies like AOL, Yahoo and Exite]—about 2,4 billion.").

342. 99 F 3d 1381 (6th Cir. 1996), *cert. denied*, 520 U.S. 1156 (1997).

343. See *id.* at 1383.

344. The sale of books was lost anyway since copying conducted by the students

which plaintiff generates by usually licensing copyshops to prepare course packs for students.³⁴⁵ The court recognized the licensing for copyshops as a potential use of, respectively as a potential market for, copyrighted works³⁴⁶ and found, after considering the other three factors, against fair use.³⁴⁷ The impact of the potential market argument is even stronger in the context of framing. There, selling advertisement is, as opposed as to *Princeton*, the only market in which a Web page operator is able to compete.³⁴⁸

ii. Direct Effect

The direct economic effect of the use appears also in the context of the sale of space for advertisement. A Web site, which already contains ads, might be regularly framed. One effect of the frame might be that those ads are blocked out when visited through the framing Web site.³⁴⁹ It seems to be reasonable to assume that the framed Web page's advertisers most likely will reduce payment or stop paying at all. This effect without any doubt adversely affects the market for the copyrighted work, respectively for the framed Web page.

After analyzing the direct and indirect effect downloading a framing Web site has on the market for web banner advertisement, the fourth factor in the fair use analysis 'economic effect of the use' weighs against a finding of fair use.³⁵⁰

would have been covered by the fair use doctrine. *See id.* at 1386.

345. *See id.* at 1387.

346. *See id.* at 1388.

347. *See id.* at 1388. (Ryan, J., dissenting) (considering the courts argument with respect to the loss of license fees as "circular"). Judge Ryan states that "[i]t is circular to argue that a use is unfair, and a fee therefore required, on the basis that a publisher is otherwise deprived of a fee." *Id.* at 1407. *See also* Basic Books, Inc. v. Kinko's Graphics Corp. 758 F. Supp. 1522, (S.D.N.Y. 1991) (acknowledging that copying course packs for students without authorization has "unfavorably impacts upon plaintiff's sales of their books and collection of permission fees").

348. Notwithstanding the possibility to charge a fee for access or require personal information. *See supra* note 341 and accompanying text.

349. *See* Ellen Poler, *Frames and License Agreements* (visited July 26, 1998) <<http://www.collegehill.com/ilp-news/poler1.html>>.

350. The outcome of this analysis might change when the framing Web site does not replace the framed Web site's commercials but puts other non commercial related information in its frame. In a case like this the commercial value perhaps even increases.

(e) Balancing the Four Factors

The fair use analysis' last step requires the balancing of the four factors of the fair use analysis. Generally, the purpose and character of the use as well as the nature of the copyrighted work weigh more in favor a finding of fair use whereas the amount of the portion used as well as the economic effect of the use weigh against a fair use finding.

The published nature of the work on the one side and the likely display of the framed Web site as a whole on the other seem to be equally less strong in their impact on the author's exclusive rights. They are, therefore, nondeterminative with regard to the fair use analysis. The noncommercial character of the use strongly suggests to find the end user's calling on a framed Web site as fair. However, the first factor of the fair use analysis can not outweigh the negative effect the use has on the framed Web site's market because the fair use analysis' fourth factor is given the most importance in the fair use scrutiny. The end user downloading a framed Web site directly impairs the commercial exploitation of the framed Web site leaving the content provider no other way to make up for the impairment in another potential market.³⁵¹

It has to be concluded that the end user calling on a framed Web site has no defense against a copyright infringement claim. Neither can she rely on an implied license nor can she claim that his use is fair use pursuant to section 107.

C. Liability

Section 501 (b) entitles the copyright owner to administer remedies against the copyright infringement by granting the right "to institute an action for any infringement . . . while he or she is the owner of it," thereby establishing a strict liability standard for copyright infringement.³⁵²

351. See O'Rourke, *supra* note 19, at 669-70. Professor O'Rourke comes to a different conclusion suggesting that "[copyright law] . . . seem to support a fair use right to employ frames." *Id.* However, Professor O'Rourke reaches her conclusion without considering the Web page's advertisement market and both the direct and the indirect negative economic effects the conduct of framing creates. See *id.*

352. 17 U.S.C.A. § 501 (b) (West Supp. 1999).

The remedies for infringement essentially consist of injunctions and damages. Particularly section 502 (a) gives the right for injunctive relief “on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.”³⁵³ Section 504 gives the aggrieved party the choice to collect either actual damages and profits resulting from, respectively attributable to, the infringement.³⁵⁴ The alternative would be statutory damages that range, at the courts discretion, between \$500 and \$20,000.³⁵⁵ In the case the copyright owner proofs and the court finds that the infringement was committed willfully, the award of statutory damage may increase up to \$100,000. On the other hand, in case where the court finds that an infringer was not aware and had no reason to believe that his acts constituted copyright infringement, the court has the discretionary power to reduce the award of statutory damages to a sum not less than \$200.³⁵⁶

1. Direct Infringement

Section 501 (a) provides that “[a]nyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright.”³⁵⁷ Needless to say that “anyone” includes the end user, who has been found responsible for copyright infringement by virtue of browsing a framed Web site, and that an action could be brought for holding her liable.

However, it is also obvious that the end user is not the person who should be held responsible. First, it is uncertain whether the end user does have the money to satisfy an actual or statutory damage award. And second it appears to be ethically or as a matter of policy not right to hold the end user liable. The end user in case of doubt, has no intention to gain a commercial advantage out of his or her conduct. The end user was just visiting a Web site that ac-

353. 17 U.S.C.A. § 502 (a) (West Supp. 1999).

354. 17 U.S.C.A. § 504 (b) (West Supp. 1999).

355. 17 U.S.C.A. § 504 (c)(1) (West Supp. 1999).

356. 17 U.S.C.A. § 504 (c)(2) (West Supp. 1999). Section 503 of the Copyright Act furthermore grants the right for impounding and disposition of infringing articles; and section 505 of the Copyright Act allows, in the court’s discretion, the recovery of the prevailing party’s costs and attorney’s fee.

357. 17 U.S.C.A. § 501 (a) (West Supp. 1999).

tually appeared to be a site he or she initially did not want to call on but which he or she could have called on directly without infringing a copyright. Assuming that the end user was granted an implied license to visit that Web site. Furthermore, as a matter of practicability, it is surely impossible to track an end user down who downloaded a framed Web site.³⁵⁸ It is, therefore, not only a matter of practice, but also just and economically advised to refrain from suing the end user for copyright infringement. In this context an aggrieved copyright holder might abstain from holding the end user liable in case she has a true alternative. This alternative could be the liability of the German framer and his German ISP.³⁵⁹

2. Indirect Infringement

While liability for direct infringement is expressly addressed in the Copyright Act, the statutory provision does not include liability based on the conduct committed by a third party. However, despite the absence of express language in the statute it is a common law principle to impose liability for copyright infringement on third parties who were not themselves active in the infringing conduct but where somehow participating in the infringing activity.³⁶⁰ Moreover, one of the copyright statute's rights granted to a copyright owner is the right "to authorize" others to exercise the different exclusive rights an author may have.³⁶¹ Congress' use of the phrase "to authorize" establishes liability for those who simply cause or permit others to engage in an infringing act.³⁶² To cause or permit someone to engage in an infringing act is indirect in-

358. See Nimmer, *supra* note 260, at 65.

359. See *id.* (noting that "without even looking to deep pockets, the only pocket amenable to suit is the ISP").

360. See *Sony, Corp. v. Universal City Studios*, 464 U.S. 417, 435 (1984) (holding that "[t]he absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringement on certain parties who have not themselves engaged in the infringing activity.").

361. See 17 U.S.C.A. § 106 (West Supp. 1999) (providing that "the owner of copyright under this title has the exclusive right to do and to authorize any of the following" exclusive rights).

362. See H.R. REP. NO. 94-1476, at 61 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5674; see also *ITSI T.V. Productions, Inc., v. California Authority of Racing Fairs*, 785 F. Supp. 854, 860 (E.D. California 1992), *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 800 F.2d 59, 62 (3d Cir. 1986), NIMMER ON COPYRIGHT, *supra* note 124, § 12.04 [A].

fringement, which might be either qualified as vicarious conduct or contributory conduct, committed, in case of framing, either by content provider who created the link or her Internet service provider.

a. Vicarious Infringement

To establish vicarious infringement two elements are required to be independently present. First, the defendant must have the right and the ability to supervise the infringing conduct and second the defendant must have an obvious and direct financial interest in the exploitation of the copyrighted materials.³⁶³

Since vicarious liability generally applies to the ownership of the physical premises where the infringement occurs,³⁶⁴ this form of indirect liability is not applicable in the context of framing. The ISP might have such a financial interest since she usually operates her service commercially. However, the ISP clearly has no right to supervise the end user preventing her from liability for vicarious infringement. The same reasoning can be applied with respect to the framer. She might have a financial interest in the copyrighted material since she is probably eager to draw attention to her Web site. Yet the framer obviously has no opportunity to supervise the end user neither. The end user decides for herself whether she calls on the framed Web site or not. Vicarious liability cannot, therefore, be established, neither concerning the ISP nor to the framer.

b. Contributory Infringement

A person might be held liable for contributory infringement when she “with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of an-

363. See *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963); *Playboy Enters., Inc. v. Straware Pub. Corp.*, 900 F. Supp. 438, 440-1 (S.D. Fla. 1995); *Pinkham v. Sara Lee Corp.*, 983 F.2d 824, 834 (8th Cir. 1992); NIMMER ON COPYRIGHT, *supra* note 124, § 12.04 [A] [1]

364. Most likely in “master and servant” relationships like employer-employee, *see, e.g.*, *Dreamland Ballroom v. Shapiro, Bernstein & Co.*, 36 F.2d 354 (7th Cir. 1929); or landlord-tenant relationships, *see, e.g.*, *Shapiro, Bernstein & Co. v. H. L. Green Co.* 316 F.2d 304 (2d Cir. 1963).

other.”³⁶⁵ The applicable case law particularly emphasis the knowledge and participation element to held somebody liable as a contributory infringer.³⁶⁶ Thus, the defendant objectively needs to know or have reason to know that the work in question is copyrighted and that its use violates the copyright law.³⁶⁷ Moreover, the potential contributory infringer must undertake more than just contributing to the primary infringement in order to be liable as a contributory infringer.³⁶⁸ Her participation must be substantial in the sense that it “must bear some direct relationship to the infringing acts.”³⁶⁹

(1) Internet Service Provider

The ISP’s contributory liability for third party contend was never really questioned since policy reasons strongly suggest to put the burden on the ISPs to prevent infringement.³⁷⁰ ISP responsibility has been extensively discussed. Legal commentators have suggested the full range of possible solutions as to and to what extend ISPs should be held liable for third party content. The main issue is whether an ISP should monitor the content provided by its customers. One end of the scale represents strict liability by expressing the view that “[t]he copyright Act dictates that the party who is

365. See *Gershwin Publishing Corp. v. Columbia Artist Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

366. See *Demetriades v. Kaufmann*, 690 F. Supp. 289, 293 (S.D.N.Y. 1988) (holding that “just as benefit and control are the signposts of vicarious liability, so are knowledge and participation the touchstones of contributory infringement”).

367. See *ITSI T.V. Prod., Inc., v. California Auth. of Racing Fairs*, 785 F. Supp. 854, 861 (E.D. Cal. 1992); *Cable/Home Communication v. Network Productions*, 902 F.2d 829, 845-46 (11th Cir. 1990).

368. See *ITSI T.V. Prod.*, 785 F. Supp. at 861; *Gershwin Publishing Corp.*, 443 F.2d 1154, 1162 (2d Cir. 1971).

369. NIMMER ON COPYRIGHT, *supra* 124, § 12.04 [A][2][a]. See *Demetriades* 690 F. Supp. at 294 (holding that, with regard to third party liability, “[s]omething more—deriving from one’s substantial involvement—is needed”); see also *Apple Computer, Inc. v. Microsoft Corp.* 821 F. Supp 616, 625 (N.D. Cal. 1993), *aff’d* 35 F.3d 1435 (9th Cir. 1994) (citing *Demetriades*, 690 F. Supp. at 294, and stating that “[t]he participation of the alleged contributory infringer must be ‘substantial’”).

370. See NII White Paper, *supra* 194, at 117; see also Fraser, *supra* note 2, at 797 (pointing out that ISPs are not common carriers like telephone companies which must open their networks to all users without discrimination). However, access on a non-discriminatory basis is the condition for an exemption from applying certain laws including copyright law. See *id.*

responsible for the storage facility is responsible for the contents contained therein. . . . The sysop must take responsibility for any works resident on the BBS that are accessible to the public for browsing or downloading.”³⁷¹ The other end of the scale lobbies for no liability at all unless the infringing material is the ISP’s own content.³⁷² An intermediate solution stresses that “[l]iability should be found if the provider has actual knowledge that a work that is being posted or has been transmitted onto, or stored on, its system is infringing, and has the ability and authority to stop the transmission, and has, after a reasonable amount of time, allowed the infringing activity to continue.”³⁷³ This approach appears to be consistent with the United States government’s approach as to ISP liability.³⁷⁴ The government maintains that “[s]ervice providers should have an incentive to make their subscribers more aware of copyright law and to react promptly and appropriately to notice by copyright owner that infringing material is available on their systems.”³⁷⁵ Courts seem to move in the direction of the intermediate position.³⁷⁶ Particularly the court in *Netcom* excluded strict liabil-

371. See Joseph V. Myers III, *Speaking Frankly about Copyright Infringement on Computer Bulletin Boards: Lessons to be Learned from Frank Music, Netcom, and the White Paper*, 49 VAND. L. REV. 439, 474 (1996).

372. See Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case against Copyright Liability of Bulletin Board Operators*, 13 CARDOZO ARTS & ENT. L.J. 345, 409-10 (1995). The commentator has strong arguments for her position that ISP liability would induce a centralized mechanism of creation and dissemination of information, would furthermore impose a high degree of monitoring users. See *id.* As a consequence, cost of monitoring reduce the incentive to provide on-line services, and increased cost will be born by users what reduces the number of potential users. See *id.* at 405-7.

373. See Kevin M. Cox, *Online Service Providers and Copyright Law: The Need for Change*, 1 SYRACUSE J. LEGIS & POL’Y 197, 202 (1995).

374. See NII White Paper, *supra* 194, at 124.

375. *Id.*

376. The On-Line Copyright Liability Limitation Act (“OCLLA”) was introduced to the House of Representatives also in September 1997 and also precludes ISP from liability provided that the ISP has no knowledge of the copyright infringement. See H.R. NO. 105-2180 (1997). The On-Line Copyright Infringement Liability Limitation Act (“OCILLA”) was introduced to the House of Representatives precluding ISP liability for intermediate storage “if (A) the transmission was initiated by another person, (B) the storage and transmission is carried out through an automatic technological process, without any selection of that material by the provider; and (C) any copy made of the material is not retained longer than necessary for the purpose of carrying out that transmission.” H.R. REP. NO. 105-3209 (1998); see also Daniel Cahoy, Comment, *New Legislation Re-*

ity as well as non liability at all and asked as to whether the ISP had reason to know about infringing material on his servers and as to whether the ISP might have substantially participated in the infringing activity.³⁷⁷

(a) Knowledge

ISPs usually do not know about the activity of their clients. To determine when constructive knowledge should be imputed, the legal standard has to be applied in accordance with the applicable holdings of the courts.

In *Sony Corp. v. Universal City Studios, Inc.*, the Supreme Court adopted a relatively lenient standard with regard to manufacturers of equipment capable of infringing uses.³⁷⁸ The court applied the “staple article of commerce” doctrine holding that if equipment used for infringing copyrights was “capable of substantial non-infringing uses” then liability for the manufacturer of the equipment is not an option.³⁷⁹ However, courts have developed a higher standard of care for persons who maintain control over equipment that has both infringing uses and substantial non-infringing uses. In *RCA Records*³⁸⁰ a copy service provided access

garding on-Line Service Provider Liability for Copyright Infringement: A Solution in Search of a Problem?, 38 IDEA: J.L. & TECH. 335, 353-359 (1998) (providing a more detailed analysis of the proposed legislation and concludes that legislation with regard to ISP liability is unnecessary and detrimental at this time). The current system limits the liability of ISPs reasonably while it also maintains “the incentive to curb truly egregious infringement.” *Id.* at 360.

377. *See Religious Technology Center v. Netcom On-Line Communication Service, Inc.* 907 F. Supp 1361 (N.D. Cal. 1995). *But see Playboy Enterprises, Inc., v. Frena* 839 F. Supp. 1552 (M.D. Fla. 1993). In *Playboy*, the defendant operated a computer bulletin board for subscribers who uploaded copyright protected photographs. *Id.* at 1554. The defendant argued that he himself did not copy any of the photographs, and was not aware of the copies posted on the BBS. The court nevertheless found the defendant directly liable for infringing the plaintiff’s distribution right by supplying a product containing unauthorized copies of the copyrighted photographs. *Id.* at 1559. In another case with similar facts the court based its decision both on direct infringement as well as on contributory infringement, *see Sega Enterprises, Ltd. v. MAPHIA* 857 F. Supp. 679 (N.D. Cal. 1994).

378. *See Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

379. *See id.* at 442.

380. *RCA Records, Inc. v. All-Fast Systems, Inc.* 594 F. Supp. 335 (S.D.N.Y. 1984).

to a machine capable of making copies of cassette tapes at fast speed. The actual copying was performed by the store's employees.³⁸¹ The plaintiff sought an injunction against the defendant's conduct and the court found direct liability but took also the possibility into account that allowing customers to have access to the machines to make their own copies could cause liability on the basis of contributory infringement.³⁸² The court concluded that the shop owner was in a better position to control the use of his potentially infringing device than the manufacturer and ordered, consequently, that the copy shop could not allow customers to use the fast copying machines if the owner has "reasonable cause to believe [a customer] intend[ed] to use the machine to copy plaintiff's copyrighted recordings."³⁸³

It can be assumed that the host server of an ISP is a potentially infringing device that can only be controlled by the ISP itself. Applying *RCA*, therefore, the ISP has to stop copyright infringement when it has reasonable cause to believe that a particular posting infringes copyright. But it seems to be difficult to establish, under which circumstances an ISP is obliged to exercise its duty. Considering the mass of data an ISP has to handle in a given time period, it would seem to impose too much of a burden on ISP's to screen out infringing postings before they are made. Therefore, in *Religious Technology Center v. Netcom On-Line Communication Service, Inc.*,³⁸⁴ the court allows an ISP to post content without the initial inquiry whether the content to be posted is of infringing quality or not.³⁸⁵ However, it established a standard of reasonable verification an ISP has to administer, allowing an ISP to continue the posting of the Web page in question, once it has received notice about an alleged infringement. The court found in that respect that the BBS operator's lack of knowledge will be found reasonable where the operator cannot reasonably verify a claim of in-

381. *See id.* at 337

382. *Id.* at 339.

383. *Id.* However, plaintiffs request for seizure of the copy machine was denied because plaintiff could not prove that the copy machine was exclusively used to copy its copyrighted recordings. *See id.* at 340.

384. 907 F. Supp 1361 (N.D. Cal. 1995).

385. *See id.* at 1373-74

fringement.³⁸⁶

Such lack of ability to verify must either be due to a possible fair use defense, the lack of copyright notices on the copies, or the copyright holder's failure to provide the necessary documentation to show that there is a likely infringement.³⁸⁷ Under such circumstances, there will be no liability for contributory infringement for allowing the continued distribution of the works on its system.³⁸⁸

Since the defendant in *Netcom* actually did not pay attention to the notice being given about an alleged copyright infringement the court found that "[t]hese facts are sufficient to raise a question as to Netcom's knowledge once it received a letter from the plaintiffs."³⁸⁹

The *Netcom* decision appears to be applicable also in the context of framing with regard to the knowledge requirement. In this context, therefore, an ISP has knowledge once it has received notice about the allegedly infringing activity and when it either ignores the notice without further investigation or, upon investigation, unreasonably concludes that there is no claim of infringement.

(b) Substantial Participation

Once the element of knowledge has been established, liability will be imposed only if the ISP participates in the infringing activity by inducing, causing, or materially contributing to the infringing

386. *See id.* at 1374

387. *See id.*

388. *See id.*

389. *Id.* at 1375. Germany's standard with regard to ISP liability is somewhat similar. Section 5(2) of the Teleservice Act, adopted in the course of the legislation of the Information and Communication Services Act (IuKDG), in force as of August 1, 1997, provides explicitly that "[p]roviders shall not be responsible for any third-party content which they make available for use unless they have knowledge of such content and are technically able and can reasonably be expected to block the use of such content". Teleservice Act § 5 (2). The reasonableness standard employed by the act is defined by up to date state of technical art, *see* Ulrich Sieber, *Kontrollmöglichkeiten zur Verhinderung rechtswidriger Inhalte in Computernetzen (I)*, COMPUTER UND RECHT (CR) 581, 588 (1997). The IuKDG is available in English translation at <<http://www.iid.de/rahmen/iukdgbt.html>>.

ing conduct of the primary infringer.³⁹⁰ Such participation needs to have a certain degree, thus it must be substantial.³⁹¹

Courts seem to find substantial participation in cases where the defendant's contractual relationship to the primary infringer directly or actively induces or causes the infringement. In *Netcom* the defendant was the primary infringer's Internet service provider who had a contractual relationship with another defendant's bulletin board service (BBS), who in turn made it possible for the primary infringer to upload the allegedly infringing material for further distribution.³⁹² In *Gershwin Publishing Corp. v. Columbia Artist Management, Inc.*,³⁹³ a promoter organizing and directing a concert in which musicians performed copyrighted music without the copyright owner's permission substantially participated in the infringing activity.³⁹⁴ In *Fonovisa, Inc. v. Cherry Auction*,³⁹⁵ the defendant's and the primary infringer's contractual relation was based on a space rental agreement and the defendant actively sought to provide the environment for the infringing conduct.³⁹⁶ On the other hand courts seem to deny substantial participation in cases where the contractual relationship between the defendant and the primary infringer provides to the infringing conduct passively. In *Demetriades v. Kaufmann*,³⁹⁷ the defendant, who, as a real estate broker, sold land to individuals who were conducting copyright infringement on the premises sold, did not actively contribute to the copyright infringement.³⁹⁸ In *Varon v. Santa Fe Reporter, Inc.*,³⁹⁹ where an employee gave an art magazine to her employer who copied pictures from this magazine and published them in a newspaper, the defendant was not liable because she "took no active part" in the infringing conduct.⁴⁰⁰ The court in *Fonovisa* also distin-

390. See *supra* note 365 and accompanying text.

391. See *supra* notes 368-369 and accompanying text.

392. See *Religious Technology Center v. Netcom On-Line Communication Service, Inc.*, 907 F. Supp. 1361, 1367 (N.D. Cal. 1995).

393. 443 F.2d 1154 (2d Cir. 1971).

394. See *id.* at 1162-63.

395. 76 F.3d 259 (9th Cir. 1995).

396. See *id.* at 264.

397. 690 F. Supp. 289 (S.D.N.Y. 1988).

398. See *id.* at 294.

399. 218 U.S.P.Q. (BNA) 716 (D.N.M. 1982).

400. *Id.* at 718.

guishes expressly between active participation and passive participation.⁴⁰¹

In the context of framing the ISP certainly has no contractual relationship with the primary infringer, the end user, and she does not actively cause or induce the copyright infringement conducted by the primary infringer. The ISP merely provides the access to the posting without being at all able to control who is accessing the server or who is downloading information provided by individuals with contractual relationships to the ISP. The primary infringer on the other hand is mainly interested in getting the information regardless of the ISP providing the service. He, when retaining information from a Web site, most likely does not even know who the content providers ISP is. As a consequence, the ISP, in the context of framing, does not substantially participate in the infringing activity and she should not be held liable.

(c) The Internet Service Provider's Liability pursuant to the Digital Millennium Act

Following the Digital Millennium Act Congress has explicitly provided a provision dealing with the ISP's direct liability. Pursuant to section 512(c) of the Copyright Act, an ISP is exempted from liability under three conditions.⁴⁰² First, an ISP must not know that she is hosting infringing material. Second, An ISP must not have gained a financial benefit attributable to the infringing activity. Finally, after notification, an ISP is obliged to remove or disable access to the allegedly infringing material.⁴⁰³ The new law

401. See *Fonovisa*, 76 F.3d 259 at 264.

402. 17 U.S.C.A. § 512 (c) (West Supp. 1999).

403. See *id.* Section 512 provides:

A service provider shall not be liable for monetary relief, or except as provided in subsection (i) for injunctive or other equitable relief, for infringement for the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider (A)(i) does not have actual knowledge that the material or activity is infringing, (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent, or (iii) if upon obtaining such knowledge or awareness, the service provider acts expeditiously to remove or disable access to, the material; (B) does not receive a financial benefit directly attributable to the infringing activity, where the service provider has the right and ability to control such activity; and (C) in the instance of a notifi-

indicates that there will be no difference between it and the law established by Netcom. Knowledge as to the infringing activity is a condition for ISP liability as is the duty to remove infringing material after notification. The element of a financial benefit corresponds to contributory infringement because contributory infringement generally requires a contractual relationship between the infringer and the ISP.

It is, however, likely that section 512(c) is not applicable in the context of framing. Section 512(c) explicitly provides that “a service provider shall not be liable for monetary relief . . . for infringement for the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider.”⁴⁰⁴ This section indicates that an ISP is exempted from liability when she hosts no infringing material at all. This is the case with framing. The ISP only hosts the technical link which in itself contains no infringing material. Therefore, it is likely that the ISP’s liability for framing conducted by another content provider remains to be determined by the relevant case law which indicates that an ISP can not be held liable for framing conducted by a third party.

(2) Framer

The framer’s conduct also requires analysis as to his knowledge and his substantial participation.

(a) Knowledge

With regard to the knowledge requirement within the contributory infringement analysis,⁴⁰⁵ the framer certainly does not positively know about a particular end user violating a copyright since the framer just provides the link between his and the copyright holder’s Web sites. However, it is clearly the framer’s intention to have users calling on his Web site and executing the link that she

cation of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

Id.

404. 17 U.S.C.A. § 512 (c) (West Supp. 1999).

405. See *supra* note 376 and accompanying text.

has provided. Moreover, the framer is most likely aware of the fact the use of current computer technology inevitably induces a copy of the framed Web site in the end user's RAM. It is, therefore, obvious that the framer has at least reason to infer about the end user's copyright infringement.

(b) Substantial Participation

With regard to the substantial participation requirement within the contributory infringement analysis,⁴⁰⁶ it is clearly the case that the end user has no contractual relationship with the framer. The lack of a contractual relationship suggests, of course, that the framer has no duty to provide the link and that the end user has no duty to call on the framer's Web site. The lack of mutual duties might lead to an inference that the framer does not substantially participate in the end user's infringing activity, however, the framer materially contributes to the infringing quality by providing the link. Even though the link as such is not material in the sense the applicable case law seems to suggest it should be; particularly, that the link does not represent a physical space like a ballroom or the ISP server's hard drive. Nevertheless the link exist in virtual reality and, as it is with physical space, it facilitates and enables the generation of the infringing copy of the framed Web site in the end user's RAM. The link or the provision of the link, consequently, should be treated analogous to a material contribution to an infringing activity, leading to the conclusion that the framer substantially participates in the infringing conduct of the end user.

3. Intermediate Result

Refraining from holding the end user liable for practical and economical reasons, only the framer should be held liable for indirect copyright infringement. However, vicarious liability cannot be established, neither with regard to the ISP nor with regard to the framer because both are unable to supervise the end user while browsing the Internet. Contributory liability cannot be established with regard to the ISP. Even though one assumes she was on notice with regard to infringing activity conducted on her server the

406. See *supra* notes 392-393 and accompanying text.

ISP does not substantially participate in the infringing activity. The ISP merely provides access to her server and has no active relationship with the end user downloading information stored on the ISP's server. To the contrary, the framer at least has reason to infer about the end user's infringing activity and does substantially participate in the infringing conduct. By creating the framing link she materially provides the means to create a copy in the end user's RAM the infringing activity.

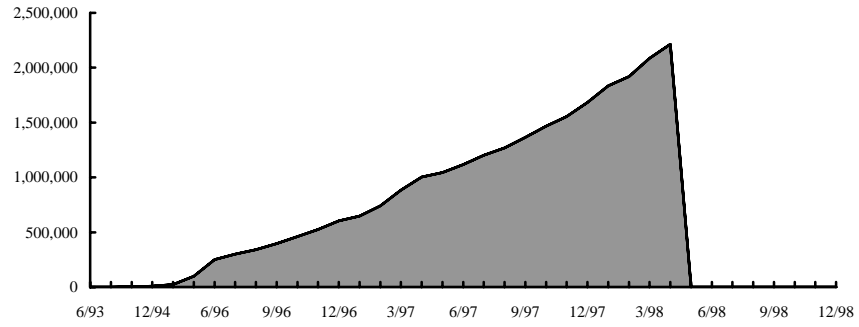
CONCLUSION

Recalling the hypothetical, where a German person created a link between his Web site and Web site provided by a United States citizen, posted it on a German ISP and an end user from the United States called on the framing Web site, the German framer can be held liable for copyright infringement under the United States Copyright Act of 1976.

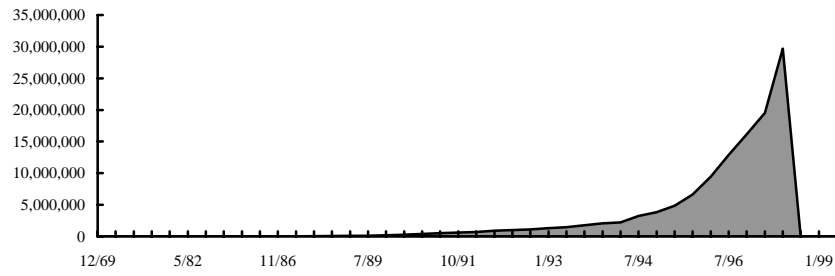
United States courts can exercise personal international jurisdiction over both, the framer and the ISP, by virtue of the minimum contacts the defendants established to the United States as a whole. United States law is applicable following the traditional *lex loci commissi* approach that is analogously to be applied due to the shortcomings of the traditional territoriality principle. The framer significantly contributes to the copyright infringement conducted by the end user, who violated the copyright laws by downloading the framed Web page in his computer's RAM. The ISP is exempt from liability since, even though she might know about the infringement, she did not substantially participate in the end user's infringing conduct.

APPENDIX

1. Websites



2. Hosts



3. Domains

